

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE, L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent	)	
Fuel Storage Installation)	)	

NRC STAFF’S RESPONSE TO APPLICANT’S MOTION FOR SUMMARY  
DISPOSITION OF UTAH CONTENTION DD-- ECOLOGY AND SPECIES

INTRODUCTION

Pursuant to 10 C.F.R. § 2.749, the NRC Staff (“Staff”) hereby responds to the “Applicant’s Motion For Summary Disposition of Utah Contention DD-- Ecology and Species” (“Motion”) filed by Private Fuel Storage, L.L.C. (“PFS” or “Applicant”) on June 29, 2001. For the reasons set forth below and in the attached affidavit,<sup>1</sup> the Staff submits that the issues pertaining to Contention Utah DD have been resolved and there does not exist a genuine dispute of material fact with respect to these matters. Accordingly, the Staff submits that the Applicant is entitled to a decision in its favor as a matter of law, and its Motion should be granted.

BACKGROUND

In June 1997, the Applicant filed a license application for its proposed independent spent fuel storage installation (“ISFSI”), to be located on the Reservation of the Skull Valley Band of Goshute Indians (“Skull Valley Band”). The application consisted of several documents including,

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<sup>1</sup> See “Joint Affidavit of Martha S. Salk and Clay E. Easterly Concerning Utah Contention DD” (hereinafter “Joint Affidavit”).

as pertinent here, an Environmental Report (“ER”), which addressed the environmental impacts of the Applicant’s proposed facility.

In November, 1997, the State of Utah (“Utah”) filed a number of safety and environmental contentions relating to the PFS application. Included among these was Contention Utah DD, in which Utah challenged the sufficiency of the Applicant’s assessment of the “potential impacts and effects from the construction, operation, and decommissioning of the ISFSI and the transportation of spent fuel on the ecology and species in the region.”<sup>2</sup> On April 22, 1998, the Atomic Safety and Licensing Board ruled on Utah’s standing to intervene and the admissibility of its contentions, in LBP-98-7.<sup>3</sup> Contention Utah DD, as admitted in LBP-98-7, asserts as follows:

**Utah DD -- Ecology and Species**

CONTENTION: The Applicant has failed to adequately assess the potential impacts and effects from the construction, operation and decommissioning of the ISFSI and the transportation of spent fuel on the ecology and species in the region as required by 10 C.F.R. §§ 72.100(b) and 72.108 and NEPA in that:

1. The License Application fails to address all possible impacts on federally endangered or threatened species, specifically peregrine falcons nesting on the Timpie Springs Waterfowl Management Area.
2. The License Application fails to include information on pocket gopher mounds which may be impacted by the proposal.
3. The License Application has not adequately identified plant species that are adversely impacted or adequately assessed the impact on those identified, specifically the impact on two “high interest” plants, Pohl’s milkvetch and small spring parsley.
4. The License Application does not identify, nor assess the adverse impacts on, the private domestic animal (livestock) or the domestic plant (farm produce) species in the area.

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<sup>2</sup> “State of Utah Contentions Regarding the Materials License Application Of Private Fuel Storage In An Independent Spent Fuel Storage Installation,” dated November 23, 1997 (“Utah Contentions”).

<sup>3</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 204-06, 256-57 (1998).

LBP-98-7, 47 NRC at 256-57. The Licensing Board subsequently clarified the scope of the admitted contention, by confirming that paragraphs one and three of the contention are limited to the specific species identified in those paragraphs.<sup>4</sup>

In June 2000, the Staff published its “Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah,” NUREG-1714 (“DEIS”). Therein, the Staff, *inter alia*, addressed the potential ecological impacts of the construction, operation, and decommissioning of the proposed PFS facility (“PFSF”) and related transportation facilities, including, specifically, the effects on vegetation and wildlife. See DEIS §§ 3.4 (“Potentially Affected Environment - Ecological Resources”), 4.4 (“Environmental Consequences- Ecological Resources”), and 5.4 (“Transportation Impacts - Ecological Resources”).

On June 29, 2001, PFS filed the instant Motion, on the grounds that there does not exist a genuine dispute of material fact with respect to the matters raised in Contention Utah DD. With respect to each basis of the contention, PFS contends that the subject has been adequately addressed in the Applicant’s ER and/or in the Staff’s DEIS. Additionally, PFS maintains that the State has offered little, if any, evidence in support of Contention Utah DD, and, in fact, only provided speculative witness testimony regarding Basis 1, leaving Bases 2, 3 and 4, entirely undefended. PFS thus concludes that, due to this lack of evidentiary support, coupled with the coverage of these alleged deficiencies in the Staff’s DEIS, summary disposition of Contention Utah DD is warranted.

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<sup>4</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 296 (1998). The Licensing Board declined to adopt a request for clarification filed by the State, which would have revised paragraph one of the contention to indicate that it “is not limited to only one peregrine falcon with a nest or nests on the Timpie Springs Wildlife Management Area.” *Id.* at 297 n.3.

As set forth below and in the attached affidavit, the Staff has reviewed the Applicant's Motion and the Statement of Material Facts attached thereto, and is satisfied that the statements of fact contained therein are correct, subject to the modifications contained in the attached affidavit (none of which affect the Staff's determination that there does not exist any genuine dispute of material fact with respect to Contention Utah DD). Accordingly, the Staff submits that summary disposition of Contention Utah DD is appropriate at this time.

#### DISCUSSION

A. Legal Standards Governing Motions for Summary Disposition.

Pursuant to 10 C.F.R. § 2.749(a), "[a]ny party to a proceeding may move, with or without supporting affidavits, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding. The moving party shall annex to the motion a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard." In accordance with 10 C.F.R. § 2.749(b), when a properly supported motion for summary disposition is made, "a party opposing the motion may not rest upon the mere allegations or denials of his answer; his answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact." In addition, an opposing party must annex to its answer a short and concise statement of material facts as to which it contends there exists a genuine issue to be heard. 10 C.F.R. § 2.749(a).<sup>5</sup> All material facts set forth in the moving party's statement will be deemed to be admitted unless controverted

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<sup>5</sup> *Accord, Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 93 (1986). General denials and bare assertions are not sufficient to preclude summary disposition when the proponent of the motion has met its burden. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993) ("AMS"). Although the opposing party does not need to demonstrate that it will succeed on the issues, it must at least demonstrate that a genuine issue of fact exists to be tried. *Id.*; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-92-8, 35 NRC 145, 154 (1992) (to avoid summary disposition, the opposing party had to present contrary evidence that was so significantly probative as to create a material issue of fact).

in the opposing party's statement. *Id.* Pursuant to 10 C.F.R. § 2.749(d), "[t]he presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavit, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law."<sup>6</sup>

The Licensing Board has previously ruled upon various motions for summary disposition filed by PFS, in accordance with these principles. In doing so, the Board succinctly summarized the standards for granting summary disposition, as follows:

Under 10 C.F.R. § 2.749(a), (d), summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and

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<sup>6</sup> The Commission's summary disposition procedures have been analogized to Rule 56 of the Federal Rules of Civil Procedure. See, e.g., *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) LBP-99-32, 50 NRC 155, 158 (1999). Indeed, the Commission, when considering motions for summary disposition filed pursuant to 10 C.F.R. § 2.749, generally applies the same standards that the Federal courts use in determining motions for summary judgment under Rule 56 of the Federal Rules. *AMS*, CLI-93-22, 38 NRC at 102. Decisions arising under Rule 56 of the Federal Rules may thus serve as guidelines to the Commission's adjudicatory boards in applying 10 C.F.R. § 2.749. *Perry*, ALAB-443, 6 NRC at 754. Under Rule 56, the party seeking summary judgment has the burden of proving the absence of genuine issues of material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *AMS*, 38 NRC at 102. In addition, the record is viewed in the light most favorable to the party opposing the motion. *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962); *Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility)*, ALAB-944, 33 NRC 81, 144 (1991). If the moving party makes a proper showing for summary disposition and the opposing party fails to show that there is a genuine issue of material fact, the court (or Licensing Board) may summarily dispose of all of the matters before it on the basis of the filings in the proceeding, the statements of the parties, and affidavits. See Rule 56(e), Fed. R. Civ. P.; 10 C.F.R. § 2.749(d); *AMS*, 38 NRC at 102.

supporting materials, or the movant's facts will be deemed admitted. See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-19, 53 NRC 416, 421-22 (2001) (summary disposition of Contention Utah K), *citing PFS*, LBP-99-23, 49 NRC 485, 491 (1999) (Contention Utah C).<sup>7</sup>

The Commission has encouraged the use of summary disposition procedures "on issues where there is no genuine issue of material fact so that evidentiary hearing time is not unnecessarily devoted to such issues." *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 457 (1981).<sup>8</sup> Likewise, the Appeal Board has recognized that summary disposition provides "an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues." *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980).<sup>9</sup>

Finally, if a contention challenges an applicant's environmental report, the contention may be viewed as a challenge to the Staff's EIS. See, e.g., *Louisiana Energy Services, L.P.* (Claiborne

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<sup>7</sup> *Accord, Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) LBP-99-31, 50 NRC 147, 152 (1999) (Security-A, B, and C); LBP-99-32, 50 NRC 155, 158 (1999) (Utah G); LBP-99-33, 50 NRC 161, 164-65 (1999) (Utah M); LBP-99-34, 50 NRC 168, 173-74 (1999) (Utah B); LBP-99-35, 50 NRC 180, 184 (1999) (Utah K); LBP-99-36, 50 NRC 202, 207 (1999) (Utah R); LBP-99-42, 50 NRC 295, 301 (1999) (Utah H); LBP-00-06, 51 NRC 101, 112 (2000) (Utah E).

<sup>8</sup> The Commission recently endorsed this policy statement, but indicated that "Boards should forego the use of motions for summary disposition except upon a written finding that such a motion will likely substantially reduce the number of issues to be decided, or otherwise expedite the proceeding." *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 20-21 (1998). The Staff submits that summary disposition of this contention will reduce the number of issues to be decided and will serve to expedite the proceeding.

<sup>9</sup> It is well settled that an agency may ordinarily dispense with an evidentiary hearing where no genuine issue of material fact exists. *Veg-Mix, Inc. v. U.S. Dep't of Agriculture*, 832 F.2d 601, 607-08 (D.C. Cir. 1987).

Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998). Accordingly, where a contention asserts that the ER failed to consider some matter or did not explain clearly how that matter was treated, those assertions may be deemed to apply to the Staff's EIS as well, and may be resolved by a showing that the EIS resolved the alleged deficiency.

As more fully set forth below, the Staff submits that summary disposition of Contention Utah DD is appropriate in accordance with these established standards, in that a genuine dispute of material fact no longer exists with respect to any of the specific matters alleged in the contention.

B. Summary Disposition of Contention Utah DD, Basis 1 Is Appropriate.<sup>10</sup>

1. Deficiencies Asserted in Basis 1 (Peregrine Falcons).

In Basis 1 of Contention Utah DD, Utah asserts that the Applicant "failed to address all possible impacts on federally endangered or threatened species, specifically the peregrine falcon nest in the Timpie Springs Waterfowl Management Area." LBP-98-7, 47 NRC at 256. As mentioned above, the Board subsequently clarified the scope of the contention by confirming that this Basis was limited to the specific species identified - the peregrine falcon. The State detailed its allegations during discovery, wherein it argued that the Applicant did not adequately address or evaluate the impact of increased rail and vehicle traffic on the peregrine falcon or on the peregrine falcon's prey species.<sup>11</sup> Additionally, the State contended that the Applicant failed to

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<sup>10</sup> The Staff notes that the Applicant's Motion and supporting documents contain certain information that was not available to the Staff when the DEIS was prepared (e.g., Intermountain Ecosystems, L.L.C., "Private Fuel Storage Facility, Proposed Alternate Rail Route, Plant Species of Special Concern Inventory, Skull Valley Utah", May 12, 1999; and correspondence from Clyde Pritchett to PFS in May 2001, concerning recent pocket gopher surveys.) The Staff has reviewed this additional information and has determined that it does not affect the Staff's conclusion that summary disposition of Contention Utah DD is appropriate. See Joint Affidavit, §§ 4, and 24-25.

<sup>11</sup> See "State of Utah's Objections and Response to Applicant's Second Set of Discovery Requests With Respect to Groups II and III Contentions", June 28, 1999, at 116-18.

address both the potential loss of prey habitat through damage to wetlands caused by rail construction and other project activities, and the impacts of prey species exposed to radiation.<sup>12</sup>

2. The DEIS Addresses the Issues Raised in Basis 1 of Contention Utah DD, and There Does Not Exist A Genuine Dispute of Material Fact Concerning Basis 1.

Contrary to the assertion in Basis 1, the DEIS thoroughly evaluated impacts to the peregrine falcon and its prey species in a variety of contexts. In this regard, the Staff notes that regardless of whether the State was correct in asserting that the “License Application fails to address all possible impacts on . . . peregrine falcons nesting on the Timpie Springs Waterfowl Management Area,” as alleged in Basis 1 of this contention, the Staff’s DEIS contains a detailed assessment that addresses this issue -- thus rendering moot any alleged deficiency in PFS’s license application. See DEIS §§ 3.4.2.2; 4.4.1.2; 4.4.1.3; 4.4.2.2; 4.4.3.2; 4.4.5.2; 4.5.1.6; 4.5.2.6; 5.4.1.3; 5.4.1.5; 5.4.2.3; and 5.4.3.3. Additionally, as set forth in the Joint Affidavit attached hereto, the Staff has reviewed the Applicant’s Statement of Material Facts as they pertain to Basis 1, and has determined that they are correct, except to the extent modified in the Staff’s affidavit -- none of which modifications affects the Staff’s determination that summary disposition of these issues is appropriate. See Joint Affidavit, ¶¶ 8-16, and 24-25.

In sum, the Staff has adequately assessed in the DEIS all potential impacts to the peregrine falcon and their prey raised by Utah in Contention Utah DD. Accordingly, there is no genuine dispute of material fact in this regard, and the Applicant is entitled to summary disposition as to Contention Utah DD, Basis 1 as a matter of law.

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<sup>12</sup> Utah Contentions at 118-19.

C. Summary Disposition of Contention Utah DD, Basis 2, Is Appropriate.

1. Deficiencies Asserted in Basis 2 (Pocket Gophers).

In Contention Utah DD, Basis 2, as admitted, Utah asserts that “[t]he License Application fails to include information on pocket gopher mounds which may be impacted by the proposal.” LBP-98-7, 47 NRC at 256.

2. The DEIS Addresses the Issues Raised in Basis 2 of Contention Utah DD, and There Does Not Exist A Genuine Dispute of Material Fact Concerning Basis 2.

The potential impacts on the Skull Valley pocket gopher population of the proposed PFSF are considered throughout the DEIS. In this regard, the Staff notes that regardless of whether the State was correct in asserting that the “License Application fails to include information on pocket gopher mounds which may be impacted by the proposal,” as alleged in Basis 2 of this contention, the Staff’s DEIS contains a detailed assessment that addresses this issue -- thus rendering moot any alleged deficiency in PFS’s license application. See DEIS §§ 3.4.3.2, 4.4.1.2, 4.4.3.2, and 4.4.5.2. Moreover, as set forth in the Joint Affidavit attached hereto, the Staff has reviewed the Applicant’s Statement of Material Facts, and has determined that it is correct, except to the extent modified in the Staff’s affidavit -- none of which modifications affects the Staff’s determination that summary disposition of these issues is appropriate. See Joint Affidavit, ¶¶ 17-18, and 24-25.

In sum, the DEIS adequately considers the potential impacts of the proposed facility to the Skull Valley pocket gopher population. Consequently, there is no genuine dispute of material fact with respect to these matters, and the Applicant is entitled to summary disposition on Contention Utah DD, Basis 2, as a matter of law.

D. Summary Disposition of Contention Utah DD, Basis 3, Is Appropriate.

1. Deficiencies Asserted in Basis 3 (Pohl's Milkvetch and Small Spring Parsley).

In Contention Utah DD, Basis 3, as admitted, Utah claims that “[t]he License Application has not adequately identified plant species that are adversely impacted or adequately assessed the impact on those identified, specifically the impact on two ‘high interest’ plants, Pohl’s milkvetch and small spring parsley.” LBP-98-7, 47 NRC at 257. The Board later clarified that this issue was limited to the plant species specifically identified. LBP-98-10, 47 NRC at 296-97.

2. The DEIS Addresses the Issues Raised in Basis 3 of Contention Utah DD, and There Does Not Exist A Genuine Dispute of Material Fact Concerning Basis 3.

Contrary to the assertion in Basis 3 of Contention Utah DD, the DEIS discusses the potential impacts on Pohl’s Milkvetch and Small Spring Parsley. In this regard, the Staff notes that regardless of whether the State was correct in asserting that the License Application “has not adequately identified plant species that are adversely impacted or adequately assessed the impact on those identified, specifically the impact on . . . Pohl’s milkvetch and small spring parsley,” as alleged in Basis 3 of this contention, the Staff’s DEIS contains a detailed assessment that addresses this issue -- thus rendering moot any alleged deficiency in PFS’s license application. See DEIS §§ 3.4.3.1 and 4.4.3.1. Furthermore, as set forth in the Staff’s affidavit attached hereto, the Staff has reviewed the Applicant’s Statement of Material Facts, and has determined that it is correct, except to the extent modified in the Staff’s affidavit -- none of which modifications affects the Staff’s determination that summary disposition of these issues is appropriate. See Joint Affidavit, ¶¶ 19, and 24-25.

In sum, the DEIS adequately considers the potential impacts of the proposed facility to Pohl’s Milkvetch and small spring parsley. Consequently, there is no genuine dispute of material fact with respect to these matters, and the Applicant is entitled to summary disposition on Contention Utah DD, Basis 3, as a matter of law.

E. Summary Disposition of Contention Utah DD, Basis 4 is appropriate.

1. Deficiencies Asserted in Basis 4 (Livestock and Agriculture).

In Contention Utah DD, Basis 4, as admitted, Utah claims that “[t]he License Application does not identify, nor assess the adverse impacts on, the private domestic animal (livestock) or the domestic plant (farm produce) species in the area.” LBP 98-7, 47 NRC at 257. In discovery, Utah additionally asserted that the effect on humans or animals from the potential increase in background radiation caused by cask storage has not been addressed, nor have the impacts on the beekeeping industry in the county or potential impacts from food chain alteration.

2. The DEIS Addresses the Issues Raised in Basis 4 of Contention Utah DD, and There Does Not Exist A Genuine Dispute of Material Fact Concerning Basis 4.

Potential impacts on the livestock and agriculture in the Skull Valley area from the proposed facility are discussed extensively in the DEIS. In this regard, the Staff notes that regardless of whether the State was correct in asserting that the License Application “does not identify, nor assess the adverse impacts on, the private domestic animal (livestock) or the domestic plant (farm produce) species in the area,” as alleged in Basis 4 of this contention, the Staff’s DEIS contains a detailed assessment that addresses this issue -- thus rendering moot any alleged deficiency in PFS’s license application. See DEIS §§ 3.5.2.1, 3.5.2.3, Table 3.11, 4.4.2.2, 4.4.5.2, and 4.7.2.1. Moreover, as set forth in the Joint Affidavit attached hereto, the Staff has reviewed the Applicant’s Statement of Material Facts, and has determined that it is correct, except to the extent modified in the Staff’s affidavit -- none of which modifications affects the Staff’s determination that summary disposition of these issues is appropriate. See Joint Affidavit, ¶¶ 20-25.

In sum, the DEIS has included a thorough analysis of the potential impacts of the proposed PFSF on the livestock and farm produce in the area. Consequently, there is no genuine dispute of material fact with respect to these matters, and the Applicant is entitled to summary disposition on Contention Utah DD, Basis 4, as a matter of law.

CONCLUSION

As set forth above and in the Joint Affidavit attached hereto, the Staff has reviewed the Applicant's Statement of Material Facts and has determined that it is correct, subject to certain minor modifications, none of which affects the Staff's determination that there does not exist any genuine dispute of material fact with respect to Contention Utah DD. Accordingly, the Staff submits that the Applicant is entitled to a decision in its favor on this contention as a matter of law.

Respectfully submitted,

**/RA/**

Angela Coggins  
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Counsel for NRC Staff

Dated at Rockville, Maryland  
this 19<sup>th</sup> day of July 2001

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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PRIVATE FUEL STORAGE L.L.C. ) Docket No. 72-22-ISFSI  
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(Independent Spent )  
Fuel Storage Installation) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION DD – ECOLOGY AND SPECIES" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 19th day of July, 2001:

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