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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SKULL VALLEY BAND OF
GOSHUTE INDIANS, et al.,

Plaintiffs,

vs.

MICHAEL O. LEAVITT, et al.,
Defendants.

**THE DEFENDANTS'
MEMORANDUM IN SUPPORT
OF THEIR MOTION FOR
JUDGMENT ON THE PLEADINGS**

Civil No. 2:01CV00270C
Judge Tena Campbell

COUNTERCLAIMS

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INTRODUCTION

The pleadings in this action, when measured against the federal law governing storage of nuclear waste, establish that Utah is entitled to a judgment on the pleadings. That is because the governing federal law renders unauthorized and unlicenseable the plaintiffs' proposed nuclear waste dump in Skull Valley, Utah. That conclusion of law is not a close issue; the statutory language and history overwhelmingly support the conclusion.

Moreover, that dispositive legal issue – whether federal law prohibits the plaintiffs' proposed waste dump – is properly before this Court for resolution now. It is so because of the plaintiffs' own actions. The plaintiffs came into this Court alleging that they were on the verge of getting valid approval¹ from the Nuclear Regulatory Commission (“NRC”) to build and operate the proposed waste dump, were being frustrated by the disliked State statutes in their efforts to achieve their goals, and were therefore entitled to a judgment striking down those statutes. The plaintiffs' allegation that they were on the verge of a valid NRC license was not a mere gratuitous or off-hand comment; that allegation was an absolutely essential basis for their entire ability to pursue their claims in this Court. In other words, the plaintiffs themselves necessarily raised – for resolution by this Court – the question whether federal law prohibits the proposed waste dump.

One other aspect of that legal question also demonstrates that the question is ready for adjudication here and now. The question is a pure question of law, a pure question of statutory construction, one that requires no technical expertise; rather, that legal issue is quintessentially of the kind meant for resolution by an Article III judge.

¹ In the form of a license to be issued to one of the plaintiffs, Private Fuel Storage LLC.

STATEMENT OF THE ISSUE

Should this Court grant the defendants' Rule 12(c) motion for judgment on the pleadings where:

1. the essential basis of the plaintiffs' claims is this allegation: that federal law authorizes (and, therefore, the NRC is on the verge of issuing a valid license for) the proposed Skull Valley nuclear waste storage facility;
2. all the pleadings admit the one material fact: that the proposed Skull Valley facility is a privately owned, away-from-reactor, spent nuclear fuel storage facility; and
3. that undisputed fact gives rise to a dispositive question of law (specifically, of statutory construction): Does governing federal law – the Nuclear Waste Policy Act of 1982, as amended – prohibit and preclude such a private facility?

STATEMENT OF THE FACTS

The dispositive fact (there is only one material, dispositive fact) is not in dispute. The one dispositive fact² can be stated in one sentence: The spent nuclear fuel storage facility proposed for Skull Valley is a private (not a federal) facility built not at the site of any existing reactor but well away from all nuclear reactors. Or, in the jargon of the industry, the Skull Valley waste facility is a private, away-from-reactor, spent nuclear fuel storage facility. That facility is not an "onsite" storage facility, meaning, it is not part of a nuclear reactor complex.

Other background facts, also undisputed by the parties, help in placing in context the legal issue arising from the one dispositive fact. Those background facts appear uncontradicted both in

² For purposes of this motion, this Court may accept as true all the factual allegations of the plaintiffs' Complaint; to do so will have no effect on the outcome of this motion because those other factual allegations are not material given the dispositive legal issue now before this Court.

the pleadings of all the parties and in the Congressional documents relating to the history of the nuclear waste storage issue and of Congressional action relative to that issue.

**Undisputed Background Facts in the Pleadings:
The Private, Away-from-Reactor, Nuclear Waste Dump Proposed for Skull Valley**

Plaintiff Private Fuel Storage L.L.C. ("PFS") is a limited liability company organized and existing under the laws of Delaware. Complaint, para. 4; Answer, para. 31. PFS is owned by eight utilities, each of which owns at least one nuclear reactor in states other than Utah and at which spent nuclear fuel ("SNF")³ is currently stored. Complaint, para. 29; Answer, para. 46.

Since June 20, 1997, PFS has been seeking a license from the NRC to construct and operate a storage facility for SNF on a portion of the reservation of the Skull Valley Band of Goshute Indians in Utah. Complaint, para. 32; Answer, para. 49. PFS will use the waste facility to store SNF now stored throughout the country at the sites of the reactors that generated the SNF.

There are approximately 38,500 metric tons of SNF in storage at commercial nuclear reactor sites in the United States. This amount is increasing at the rate of about 2,000 metric tons per year as a result of the continuing operation of commercial nuclear reactors. Complaint, para.

³ Nuclear reactors are fueled with enriched uranium in the form of small ceramic-like pellets contained in zirconium tubes or rods. Groups of these rods are bound into assemblies about 12 feet long. Complaint, para. 25; Answer, para. 44. These assemblies are placed in the core of a nuclear reactor. Through the process of nuclear fission, the uranium atoms in the rods split, releasing energy and producing heat. The heat is used to generate steam that is then used to produce electricity. When the assemblies are no longer efficient in generating the amount of heat needed, the fuel is considered "spent" and is removed from the core of the reactor. PFS Draft Environmental Impact Statement, p 1-5. This "spent" fuel is far more radioactive and lethal than new fuel.

Also, since the close of pleadings, one fact mentioned above but not material to this motion has changed. One PFS member – Consolidated Edison – has divested or is divesting itself of its nuclear reactors.

26; Answer, para. 45. PFS proposes that its nuclear waste facility store an amount of SNF equal to the entire current inventory of SNF from commercial nuclear reactors in the United States.

**Undisputed Background Facts from Congressional Documents:
The History of Nuclear Waste Storage and Congressional Action**

The governing law is the Nuclear Waste Policy Act of 1982, as amended. 42 U.S.C. §§ 10101, *et seq.* (“the NWPA”). In the comprehensive and detailed NWPA, Congress has created (in its own words) “the Nation’s nuclear waste management system,” 42 U.S.C. §§ 10163(a)(1)(B), and “an integrated nuclear waste management system.” *Id.* at 10168(b). To correctly understand that Congressional action, it is necessary to understand the long and somewhat involved history of the federal government’s efforts, prior to the passage of the NWPA, to determine how the nation was to store and dispose of its nuclear waste and, more specifically, whether and under what circumstances SNF could or should be stored in an interim (or temporary) away-from-reactor storage facility.

The history of these efforts has been extensively researched at the direction of Congress. The review that follows is drawn from a March 1985 report prepared by the Office of Technology Assessment (“OTA”) at the request of Congress and entitled “Managing the Nation’s Commercial High-Level Radioactive Waste.” Chapter 4 of the OTA Report entitled “The History of Waste Management” is attached as Appendix 1.

The first privately-owned nuclear reactors were licensed in the late 1950s by the Atomic Energy Commission (“AEC”), the predecessor to the NRC, pursuant to the licensing authority granted it by the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.* (“the AEA”). As the reactors began to generate SNF, the universal assumption was that the SNF would be reprocessed and that the fuel produced thereby would be used to generate more electricity. Permanent

disposal of the relatively small volume of high-level liquid radioactive waste that remained after reprocessing would be the responsibility of the federal government. Accordingly, the owners of nuclear reactors began storing their SNF in “water-filled basins at reactor sites, pending development of a commercial reprocessing facility.” Appendix 1, at p. 83.

The AEC authorized the construction of the first commercial reprocessing plant in 1963. Located in New York, that plant operated for six years before closing in 1972. Two other reprocessing plants were authorized, one in Illinois and one in South Carolina, but neither of them ever became operational.

In 1970, the AEC published the first federal policy with respect to the disposal of the high-level liquid radioactive wastes that result from the reprocessing of SNF. 10 CFR Part 50, Appendix F. Under the policy, the liquid wastes were to be converted by the reprocessing facility to a dry solid and placed in sealed containers. The containers were then to “be transferred to a Federal repository” which would assume permanent custody of them. All costs of “disposal and perpetual surveillance” by the federal government were to be borne by the owners of the nuclear reactors.

In 1970, the AEC also announced that an abandoned salt mine in Lyons, Kansas, had been selected as the site for the first full-scale federal nuclear waste repository. Two years later, the AEC abandoned its plans for a repository in Lyons, due both to intense political opposition at the state and local level and to technical problems at the site.

The AEC then began to search for other possible repository sites. It also “proposed [for the first time] building a series of aboveground structures, called retrievable surface storage facilities (RSSFs), to store commercial high-level wastes for a period of decades while geologic

repositories were developed.” However, “the environmental impact statement issued by AEC in support of the RSSF concept drew intense criticism by the public and by the Environmental Protection Agency because of concerns that the RSSFs would become low-budget permanent repository sites. As a result, AEC abandoned the RSSF concept in 1975.” Appendix 1, at p. 85

In 1974, Congress abolished the AEC and “distributed its developmental functions to the new Energy Research and Development Agency (ERDA), later changed to the Department of Energy (DOE), and its regulatory functions to the new Nuclear Regulatory Commission (NRC).” Appendix 1, at p. 86.

In 1975, ERDA developed the National Waste Terminal Storage program. “The program involved a multiple-site survey of underground geologic formations in 36 states and was designed to lead to the development of six pilot-scale repositories by the year 2000.” Appendix 1, at p. 86. Because of political opposition, ERDA’s initial plans were scaled back. By 1980, repository sites in only six states were being evaluated.

In 1977, President Carter announced a federal spent fuel policy, “partly to ease the utilities’ growing burden of spent fuel storage.” The policy provided that “title to spent fuel would be transferred to the Government and that the spent fuel would be transported at utility expense to a Government-approved away-from-reactor facility for storage until a repository became available.” President Carter also suspended indefinitely the “reprocessing of commercial spent fuel in the United States.” Appendix 1, at p. 87. The President was concerned, in part, that the uranium-enriched fuel that was a byproduct of reprocessing would lead to a further proliferation of nuclear weapons. (Although in 1981 President Reagan reversed President Carter’s policy on reprocessing, no one stepped forward to invest in new reprocessing facilities.)

Thus, at the time Congress considered and passed the NWPA in 1982, it faced the following realities: 1) increasing amounts of SNF were accumulating at reactor sites in water-filled basins that had not been designed for long-term storage; 2) the future of reprocessing, the long-assumed solution to SNF, was in doubt; 3) a federal repository for the **permanent** disposal of SNF was still approximately 20 years in the future; and 4) efforts to develop an **interim**, away-from-reactor SNF storage facility pending completion of a permanent repository had generated fierce political opposition and had been stymied by concerns, among others, that any such facility would itself become a *de facto* permanent repository.

* * * * *

We will show in the “Argument” section that when Congress enacted the NWPA in 1982 (and amended it in subsequent years), Congress created, with comprehensive and detailed legislation, a national nuclear waste management system. We will further show that both express language in the legislation creating that system and the entire legislative scheme itself prohibits a private, away-from-reactor SNF facility (such as PFS is attempting). Finally, we will show that PFS’s effort to evade these legislative realities are contrary to governing law.

SUMMARY OF ARGUMENT

The material and dispositive fact is undisputed in the parties’ pleadings. The dispositive fact is that PFS is attempting to create a private, away-from-reactor SNF storage facility. That dispositive fact gives rise to a pure and dispositive question of law, a pure question of statutory construction: Has Congress allowed or prohibited a private, away-from-reactor SNF storage facility? Consequently, the matter is ready to be and should be resolved now with a judgment on the pleadings, pursuant to Rule 12(c), Federal Rules of Civil Procedure.

That judgment should be in favor of Utah and against the plaintiffs because Congressional language and Congressional intent are wonderfully clear: express statutory language disallows a PFS-type facility, and the entire legislative scheme for the Nation's nuclear waste management system likewise precludes the notion of a lawful facility of that kind. PFS's effort to evade Congressional directives is without a valid legal basis.

ARGUMENT

BECAUSE THE MATERIAL FACTS ARE NOT IN DISPUTE AND PRESENT A PURE AND DISPOSITIVE QUESTION OF LAW, THIS COURT SHOULD GRANT UTAH'S RULE 12 (c) MOTION INASMUCH AS CONGRESS HAS BOTH EXPRESSLY PROHIBITED A PFS-TYPE FACILITY AND CREATED WITH A COMPREHENSIVE AND DETAILED LEGISLATIVE SCHEME A NATIONAL NUCLEAR WASTE MANAGEMENT SYSTEM THAT PRECLUDES SUCH A FACILITY.

In Part A, we set out the law demonstrating the propriety, here and now, of this Court adjudicating the dispositive legal issue and thereby granting our motion for a judgment on the pleadings pursuant to Rule 12(c). In Part B, we demonstrate how Congress expressed itself when addressing the question of a PFS-type facility and thereby prohibited such a facility. In Part C, we demonstrate that the legislative scheme governing the national nuclear waste management system precludes SNF storage at a private, away-from-reactor storage facility. Finally, in Part D, we show that Congress, to prohibit and preclude a PFS-type facility, was not required to constrict expressly the NRC's licensing authority arising from the venerable AEA.

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I.

A. WHERE (AS HERE) THE MATERIAL AND DISPOSITIVE FACTS ARE NOT DISPUTED IN THE PARTIES' PLEADINGS, AND WHERE (AS HERE) THE FACTS GIVE RISE TO A PURE QUESTION OF LAW, ESPECIALLY A QUESTION OF STATUTORY CONSTRUCTION, THE COURT SHOULD RESOLVE THE QUESTION PURSUANT TO A RULE 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS.

An order granting a Rule 12(c) motion for judgment on the pleadings is right when the pleadings reveal no genuine dispute on the material and dispositive facts, when those facts give rise to a dispositive question of law, and when analysis of that legal question discloses that the moving party is entitled to a judgment as a matter of law. Rule 12(c), Federal Rules of Civil Procedure. *E.g.*, *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998). This rule has particular applicability when the question of law is one of statutory construction. *E.g.*, Wright & Miller, Federal Practice and Procedure § 1367, at p. 509 (“A rule 12(c) motion is designed to provide a means of disposing of cases when the material facts are not in dispute and a judgment on the merits can be achieved by focusing on the content of the pleadings and any facts of which the court will take judicial notice. The motion for a judgment on the pleadings only has utility when all material allegations of fact are admitted in the pleadings and only questions of law remain. This may occur, for example, in . . . litigation in which the sole question is . . . interpretation of a statutory provision.”); *see Cecilia Packing Corp. v. U.S. Dept. of Agriculture*, 10 F.3d 616 (9th Cir. 1993).

These Rule 12(c) concepts apply fully here. No genuine dispute exists or can exist regarding the dispositive fact that PFS is proposing a private, away-from-reactor, SNF storage

facility.⁴ That undisputed fact gives rise to a dispositive question of law, more specifically, a question of statutory construction: Has Congress allowed or disallowed such a facility? As we show in the following Parts, the answer is: disallowed. Consequently, an order granting our Rule 12(c) motion is right in these circumstances.

B. THE NWPA DIRECTLY ADDRESSES THE ISSUE OF INTERIM, AWAY-FROM-REACTOR SNF STORAGE AND UNAMBIGUOUSLY PRECLUDES SNF STORAGE AT A PFS-TYPE FACILITY.

1. In Response to Member Concerns, Congress Enacted § 10155(h) And Thereby Expressly Disallowed SNF Storage At Away-from-Reactor Facilities Such As The One PFS Is Proposing For Skull Valley.

Where Congress has directly spoken to the precise question at issue, a court must give effect to Congress' unambiguously expressed intent, *Food and Drug Administration. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000), and, when looking at the legislative history, a court will give great weight to a floor manager's explanations to her Congressional colleagues regarding that intent. *E.g., Edward J. Bartolo Corp. v. Florida Gulf Coast Building*, 485 U.S. 568, 585 (1988).

In the NWPA, Congress has spoken directly to the precise issue now before this Court; Congress expressly disallowed a private, away-from-reactor, SNF waste facility of the kind PFS seeks to put in Skull Valley. The voice of Congress on this issue is unambiguous, powerful, and consistent. The following paragraphs so show.

⁴ As we noted in footnote 2 above, for purposes of this motion, this Court may accept as true all the factual allegations of the plaintiffs' Complaint; to do so will have no effect on the outcome of this motion because those other factual allegations are not material given the dispositive legal issue now before this Court.

When enacting the NWPA, Congress established a comprehensive program for the interim storage of SNF pending completion of a permanent repository. With Subtitle B,⁵ entitled “Interim Storage Program,” 42 U.S.C. §§ 10151 to 10157, Congress mandated that the reactor owners store their SNF onsite (that is, at the reactors) and expand their onsite storage capacity to that end. But Congress also provided a carefully controlled and limited program for temporary, away-from-reactor storage, a program some Members referred to as an “emergency” program. Section 10155 of Subtitle B provides that (and **only** that) SNF may be stored at an away-from-reactor nuclear facility **owned by the federal government** and then **only** if the federal government owned the facility at the date of the enactment of the NWPA and then **only** if reactor owners can first show that they have done, and are doing, everything possible to expand their onsite storage capacities and then **only** if away-from-reactor storage is absolutely necessary to prevent reactor shutdowns. And then, if all those requirements are met, total storage at all such federally owned facilities cannot exceed 1900 metric tons of SNF. In Subtitle C of the 1982 Act, Congress authorized the study (but not the implementation of) another type of possible federal interim storage program known as “monitored retrievable storage” (“MRS”).

The presence of the section 10155, or emergency, program in the 1982 Act concerned Members. Specifically, Members worried that the existence of such a program might lead some to attempt an interim SNF storage facility not addressed by Congress in the NWPA and do so in a Member’s home district. The authors of the 1982 Act therefore added subsection (h) to section 10155 to prohibit such an un contemplated facility. What subsection (h) says and what the

⁵ Subtitles B and C of the original 1982 NWPA are now codified as Parts B and C of Subchapter I of that Act.

Members said about their intent for that subsection defeats and prohibits PFS's proposed Skull Valley facility.

Subsection (h) provides:

Notwithstanding any other provision of law, nothing in this Act shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on the date of the enactment of this Act.

This language acts as an express disallowance of any away-from-reactor storage other than that provided for in the NWPA and, therefore, an express disallowance of PFS's proposed facility. Indeed, as is made plain by the legislative history of the NWPA, a PFS-type storage facility was one of Congress' worst nightmares, and Congress added the language in subsection (h) precisely to prevent that nightmare from becoming a reality.

a. The House's Intent with Subsection (h) Was to Prevent a PFS-type Nuclear Waste Storage Facility.

The House extensively discussed the reasons for adopting 10155(h) in 1982 as part of the NWPA. That discussion leaves no doubt that the House intended 10155(h) to prohibit the type of storage facility that PFS is now proposing to build in Skull Valley. Because of the importance of this debate to the issue presented in this case, we recount the debate in some detail. (The relevant portions of the Congressional Record are also attached as Appendix 2.)

On the floor of the House, Rep. Lundine proposed that section 10155 (then referred to as section 135) be deleted from the bill in its entirety. As noted above, section 10155 is the part of Subtitle B that authorized, as a last resort, the storage of up to 1900 tons of SNF at nuclear facilities that were already owned by the federal government and then only after a series of other conditions were satisfied. Rep. Lundine believed that the "interim storage needs [of reactor

owners] will be and can be met at the sites of reactors, and with our research program," and that providing federal interim storage capacity (even with the onerous restrictions of section 10155) would relieve the pressure on the reactor owners to solve their problems onsite. 97 Cong. Rec. 28,034 (1982). In response to Rep. Lundine's proposal, Rep. Corcoran expressed concern that by deleting section 10155, Congress would also be deleting the language now found in subsection (h), the language specifically providing that the NWPA was not to be read as encouraging, authorizing, or requiring away-from-reactor storage at any site other than those nuclear facilities already owned by the federal government. Rep. Corcoran had in his district one of the three existing (but non-operational) high-level radioactive waste reprocessing plants, and he was concerned that unless Congress provided for some interim away-from-reactor storage capacity, the reprocessing plant in his district would be used to store SNF "under emergency circumstances" so as to "preclude the shutdown of a powerplant" that had run out of onsite storage. *Id.* at 28,033. He believed that section 10155 and, specifically, subsection (h) would prevent such an occurrence.

Rep. Lundine then tried to reassure Rep. Corcoran by pointing out that his proposed amendment, by eliminating NWPA's sole authorization of away-from-reactor storage, would eliminate "congressional intent to establish an [away-from-reactor] program at any site," whether federal or private, thus making the language in subsection (h) unnecessary. *Id.* "The purpose of this amendment," he said, "is to try to solve the problem on site, not at away-from-reactor sites." *Id.* at 28.039. Summing up, he framed the issue for his colleagues as follows:

Are you going to keep the spent fuel rods at the end of the nuclear generating process at the site of the reactor, or are you going to ship them all over the country to various away-from-reactor storage sites, thereby incurring possible danger?

Id. at 28,034.

To dispel that specter of shipments “all over the country” raised by Rep. Lundine, Rep. Lujan, a floor manager of the bill and one opposed to Rep. Lundine’s proposed amendment, reassured his colleagues that section 10155 provided only for a “last resort interim storage facility,” and that SNF would not be shipped all over the country. “We have been very careful,” he said, “to specify [in section 10155] that [away-from-reactor storage] would be *only* at existing Federal sites, **so that any Member does not have to worry about whether or not a new interim storage facility is going to come into his district.**” *Id.* (emphasis supplied).

At the conclusion of the debate, Rep. Broyhill, another floor manager, reinforced Rep. Lujan's point:

Mr. Chairman, I would point out to the Members that the last-resort interim storage program is limited to existing Federal facilities **And I would also say that we have special statutory language in [subsection (h)],** which [Rep. Lundine] now would have us strike, **that would exclude the use of private away-from-reactor facilities for the storage of spent fuel.** We specifically put this language in here to take care of the problem that he and others have talked about; that is, the concerns they have expressed as [to] the possible use of privately owned facilities in their particular districts.

Id. at 28,040 (emphasis supplied).

In short, the House powerfully, consistently, and unambiguously expressed its intent that subsection (h) “would exclude the use of private away-from-reactor facilities for the storage of spent fuel.”

b. The Senate’s Intent with Subsection (h) Was to Prevent a PFS-type Nuclear Waste Storage Facility.

On the Senate side, Sen. Percy shared the same concern as Rep. Lundine, namely, that SNF would be placed “temporarily” or otherwise at a privately owned, away-from-reactor

facility, especially one in his state. Senator Percy wanted assurance that, if the bill were to provide (as it did in section 10155, albeit under strict limitations) away-from-reactor storage of SNF, such storage would **not** take place in any of the existing privately-owned reprocessing plants. To get that assurance, he asked Sen. Simpson, one of the bill's floor managers, this "one question":

Is it the intent of the managers of this legislation under section 135 to prohibit the Secretary from providing capacity for the storage of spent nuclear fuel from civilian nuclear power reactors at the following facilities: First. The interim spent fuel storage facility owned and operated by General Electric in Morris, Ill.; Second. The former nuclear fuel reprocessing center in West Valley, N.Y.; and Third. The Allied General Nuclear Services facility near Barnwell, S.C.?

Id. at 32560. Sen. Simpson responded, "**Yes, that is the intent of the managers of this legislation.**" *Id.* (emphasis supplied).

In short, the Senate, like the House, unambiguously expressed its intent that subsection (h) would exclude the use of private away-from-reactor facilities for SNF storage.

c. PFS's Position Regarding Section 10155(h) Will Not Wash.

When PFS began its NRC licensing proceeding, Utah argued that section 10155 precluded licensing of PFS's proposed waste facility. Because PFS opposed Utah's argument, we know PFS's position, and it does not wash. (In response to Utah's argument, the first-tier in the NRC, the Licensing Board, only assumed that the ultimate authority in that agency, the Commission itself, believed that a PFS-type facility was allowable and therefore did not make an independent ruling. The Commission has never ruled on the issue, and Utah did not have an interlocutory appeal as of right to the Commission from Licensing Board action to continue on with the proceedings before the Licensing Board. The Licensing Board decision is attached as Appendix 3.)

PFS made two arguments to the Licensing Board. Despite the express language of section 10155 (especially subsection (h)), despite all the legislative history set forth above, and despite the fact that neither the NRC nor the Department of Energy (“DOE”) has ever expressly addressed and ruled on this issue, PFS asserted to the Licensing Board that “[t]here is no support for Utah’s [argument] in the NWPA, in its legislative history, or in the subsequent interpretation of the NWPA by [NRC or DOE].” Applicant’s Answer to Petitioners’ Contentions, filed December 24, 1997, in *In the Matter of Private Fuel Storage L.L.C.*, NRC Docket No. 72-22, at p. 4. PFS provided no support for its bald (and obviously highly erroneous) assertion, but the Licensing Board elected to proceed anyway.⁶ What we have set forth above regarding section 10155 and subsection (h) suffices to refute PFS’s bald assertion.⁷

PFS also argued that “the NWPA did not repeal the NRC’s existing authority under the Atomic Energy Act to license interim storage of spent nuclear fuel away from reactors at non-federal [read “private”] sites.” *Id.* This second PFS argument is as devoid of basis as is the first. The second PFS argument, however, is more logically addressed in Part B, 2 below.

* * * * *

In sum, with subsection (h) Congress clearly expressed its intent to prohibit PFS-type waste facilities. Any argument to the contrary must necessarily ignore Congress’ clear expressions.

* * * * *

⁶ In its Answer and Counterclaim in this action, Utah noted that “the NRC has long since become (like the AEC before it became) a compliant tool of the industry.” Page 9.

⁷ Part B, 2, a & b, below further refutes PFS’s bald assertion that nothing supports Utah’s position on the invalidity of a PFS-type facility.

Even if Congress had never enacted subsection (h), or even if a court were to ignore the meaning and intent of that statutory provision, the governing law still mandates a holding that the NWPA, in establishing a comprehensive, detailed, and national nuclear waste management system, disallows a PFS-type facility and any NRC licensing of such a facility. We so show in the following sections.

2. The NWPA Establishes A Comprehensive National Nuclear Waste Management System That Precludes SNF Storage At A PFS-Type Waste Facility.

When Congress comprehensively resolves a specific issue through unambiguous legislation, a court will give full effect to Congress' intent as revealed in that legislation.

The NWPA comprehensively establishes a national nuclear waste management system and in the process addresses and regulates the precise issue now before this Court: "interim" or "temporary" away-from-reactor storage of SNF. That system unambiguously reveals Congress' intent as to what interim, away-from-reactor SNF storage facilities will be allowed (and under what constraints) and what facilities will be excluded and disallowed. That system unambiguously reveals Congress' intent to exclude and disallow a PFS-type facility.

a. The NWPA is a comprehensive Congressional solution to the issue of interim, away-from-reactor SNF storage.

The NWPA comprehensively addresses SNF storage and disposal from commercial reactors. Recognizing that "a national problem has been created by the accumulation of ... spent nuclear fuel from nuclear reactors," Congress established for the first time in the Nuclear Waste Policy Act of 1982 a comprehensive national program for SNF storage and disposal.⁸ 42 U.S.C. §

⁸ The NWPA's comprehensive storage and disposal program applies to nuclear wastes from "atomic energy defense activity" conducted by the Federal Government and to nuclear wastes from "civilian nuclear activity", including wastes generated by civilian

10131(a)(2). Congress noted that “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.” *Id.* at § 10131(a)(7). Accordingly, the NWPA clearly identifies who is responsible for SNF at each stage of its life, in what type of facilities it may be stored⁹, how the sites for those facilities are to be selected, how the affected local communities are to participate in the site selection process, in what circumstances SNF may be stored in away-from-reactor sites, in what quantities SNF may be stored at away-from-reactor sites, and who is responsible for paying the costs of storage.

i. Even a brief overview of the NWPA reveals the comprehensive nature of Congress’ approach to SNF storage and disposal.

As originally enacted in 1982, the NWPA’s national system for SNF storage and disposal had four principal components.

1. DOE was made responsible (with Congressional approval) for siting, constructing, and operating one or more deep geologic repositories for the permanent disposal of the

nuclear reactors that generate electricity. 42 U.S.C. § 10101(3) and (5). Such wastes include “high-level radioactive waste,” which is defined as the “material resulting from the reprocessing of spent nuclear fuel,” spent nuclear fuel, and low-level radioactive waste. Unless otherwise noted, the discussion in this Memorandum deals with the storage and disposal of spent nuclear fuel from civilian nuclear reactors.

⁹“Storage” and “disposal” are defined terms in the NWPA. “Storage” means “retention of high-level radioactive waste, spent nuclear fuel, or transuranic waste with the intent to recover such waste or fuel for subsequent use, processing, or disposal.” 42 U.S.C. § 10101(25). “Disposal” means “the emplacement in a repository of high-level radioactive wastes, spent nuclear fuel, or other highly radioactive material with no foreseeable intent of recovery” *Id.* at § 10101(9). Unless otherwise noted, the terms “storage” and “disposal” in this Memorandum shall have their defined meanings.

nation's SNF. *Id.* at §§ 10131 to 10137. Such a repository was to be funded by the owners of the reactors that generated the SNF, through a rate-hike mechanism. *Id.* at § 10222.

2. Reactor owners were made responsible both for storing their own SNF onsite and for maximizing their capacity to do so, pending the completion of the deep geologic repository. *Id.* at §§ 10151 to 10154.

3. As a last resort, and only if necessary to prevent the shutdown of reactors, DOE was authorized to store up to a maximum of 1900 tons of SNF at away-from-reactor sites but only at federal facilities that were already in existence as of the date of the enactment of NWPA. *Id.* at § 10155.

4. DOE was directed to study the feasibility and wisdom of constructing, owning, and operating an away-from-reactor storage facility for SNF, referred to as a monitored retrievable storage ("MRS") facility, pending the completion of the federal repository, and to make a recommendation to Congress in that regard. *Id.* at § 10161.

In 1987, Congress made two basic changes to the national program. First, Congress identified Yucca Mountain, Nevada, as the only site that DOE should evaluate as a potential location of the permanent repository. *Id.* at § 10172. Second, Congress, in response to DOE's recommendation, specifically authorized DOE to site, construct, own, and operate an MRS facility, but only upon compliance with stringent restrictions and safeguards. *Id.* at § 10162(b).

(In 2000, Congress made one more change, but President Clinton vetoed it, and Congress could not override the veto. Congress provided for an interim SNF storage site adjacent to Yucca Mountain to be built, owned, and operated by DOE. See Section B, 2, c below.)

Even this brief overview reveals the comprehensive nature of Congressional action, through the NWPA, towards a solution to the storage and disposal of SNF. Certainly the Members of Congress and the courts have understood the NWPA's national nuclear waste management program to be comprehensive, as shown in the following paragraphs.

ii. The Members of Congress, the courts, and federal departments all view the NWPA's solution for SNF storage and disposal as comprehensive.

Congress has always understood its own program to be comprehensive. The principal Senate sponsor of the NWPA, Sen. McClure, stated in the 1982 debates:

[T]his bill is a truly comprehensive approach to the ultimate solution to disposition of the large and varied quantities of nuclear waste existing today in the United States and nuclear wastes which will be created in the years and decades ahead. [The bill] provides a firm national policy for spent-fuel storage, with clear guidelines for future utility planning.

97 Cong. Rec. 32,556.

In a similar vein, Sen. Simpson stated:

We are on the verge today of establishing the framework for this Nation's first comprehensive nuclear waste management and disposal program – a significant achievement for the Congress and the country.

Id. at 32,560.

Sen. Moynihan explained:

The passage of comprehensive Federal nuclear waste management legislation is long overdue. Many have worked diligently and thoroughly on the legislation before us today and it would be unfortunate indeed if another Congress adjourned without enacting a much needed system to deal with the long-term storage and permanent disposal of the high-level nuclear wastes being generated by this Nation's commercial nuclear power plants. There are 73 operating commercial powerplants in the United States ... Yet we have no comprehensive nuclear waste management program in place to deal with the tremendous volume of waste that will be generated by these plants. What we have before us today is a bill that will finally put us on the path to comprehensive nuclear waste management.

Id. at 32,562-63.

Sen. Mitchell stated:

The drive behind the efforts to bring up and pass nuclear waste legislation is based on one steadfast concern: that for too long, Congress has failed to act on a final, comprehensive solution to the problem of nuclear waste.

Id. at 32,571.

Senate recognition that Congress was finally achieving a "final, comprehensive solution to the problem of nuclear waste" was echoed in the House. Rep. Udall, a principal House sponsor of the NWPA, stated that "the passage of this bill will, for the first time, give us a national policy on high-level nuclear waste." *Id.* at 27,772. Rep. Lujan explained:

This Congress, by passing a high level nuclear waste act, will be mandating a major Federal program for the ultimate solution of this Nation's growing radioactive waste problem. The last resort, interim storage facilities provided for in this act are an integral part of a relatively small, but essential, subprogram which contributes to the comprehensive solution.

Id. at 27,779.

Mr. Roth stated: "I rise to urge this body to carefully consider legislation that will establish a national policy for disposal of nuclear waste." *Id.* at 27,776.

DOE, the agency charged with the primary responsibility for administering the NWPA, shares Congress' view of the statute's comprehensive nature. The DOE has referred to the NWPA as "a comprehensive framework for disposing of high level radioactive waste and spent nuclear fuel generated by civilian nuclear power reactors." 60 Fed. Reg. 21,793.

Making the same observation, the D.C. Circuit Court of Appeals has described the NWPA as "a comprehensive scheme for the interim storage and permanent disposal of high-level

radioactive waste generated by civilian nuclear power plants." *Indiana Michigan Power Co. v. Department of Energy*, 88 F.3d 1272, 1273 (D.C. Cir. 1996).

Finally, the legislation itself refers to the NWPA's comprehensive program as the "the Nation's national nuclear waste management system," 42 U.S.C. §§ 10163(a)(1)(B), and "an integrated nuclear waste management system." *Id.* at § 10168(b).

In short, the NWPA is comprehensive in its treatment of the SNF disposal issue.

b. In its comprehensive approach to interim, away-from-reactor SNF storage, Congress carefully selected what kinds of facilities would be allowed and, in the process, unambiguously revealed its intent to exclude the kind of privately owned, away-from-reactor facility PFS is proposing for Skull Valley.

To fully communicate the compelling and unmistakable implications of the NWPA with respect to the issue of away-from-reactor storage of SNF, it is necessary to discuss in some detail the deliberate and considered manner in which Congress has addressed that issue in the NWPA, first in 1982, then in 1987, and, finally, in 2000.

i. In the original enactment of the NWPA in 1982, Congress allowed away-from-reactor SNF storage only at already established federal facilities.

As noted briefly earlier, in 1982 Congress addressed away-from-reactor storage of SNF in Subtitles B and C of Title I of the NWPA.

Subtitle B - Because a permanent repository would take some years to develop, Congress recognized that it needed to address the issue of what was to be done in the interim with the SNF that was accumulating in the onsite water-filled storage basins at nuclear reactors. When the NWPA was originally passed in 1982, Subtitle B, which is entitled "Interim Storage Program", was the sole provision of the Act specifying what was to be done with SNF during the interim

period prior to completion of a permanent repository. The specifications in Subtitle B do not include storing the SNF at a privately-owned, away-from-reactor facility.

In Subtitle B, Congress specifically found that “the persons owning and operating civilian nuclear power reactors have the primary responsibility for providing interim storage of spent nuclear fuel from such reactors.” This responsibility was to be fulfilled in only one way: “by maximizing, to the extent practical, the effective use of existing storage facilities **at the site** of each civilian nuclear power reactor, and by adding new **onsite** storage capacity in a timely manner where practical.” 42 U.S.C. § 10151(a)(1)(emphasis supplied). Significantly, although Congress was clearly determined to have reactor owners bear the primary responsibility for SNF storage, it did not direct them to fulfill that responsibility by using or developing privately-owned, away-from-reactor storage capacity. Instead, it focused exclusively on the owners’ onsite options. The obvious reason – away-from-reactor storage by private parties was not an option under the national nuclear waste management system.

Congress went on in a different subsection to state that the purpose of the “Interim Storage Program” was to “provide for the utilization of available spent nuclear fuel pools **at the site** of each civilian nuclear power reactor to the extent practical and the addition of new spent nuclear fuel storage capacity where practical **at the site** of such reactor.” *Id.* at § 10151(b)(1)(emphasis supplied). Significantly, although Congress again expressed in these words its intent to have reactor owners bear the primary responsibility for SNF storage, Congress did not direct them to use or develop privately-owned, away-from-reactor storage capacity. The obvious reason – such storage was not an option under the national nuclear waste management system.

To assist reactor owners in the accomplishment of their interim storage responsibilities, Congress directed the federal government to do three things. First, Congress directed the Secretary of DOE, the NRC, and “other authorized Federal officials” to “take such actions as such official considers necessary to encourage and expedite the effective use of available storage, and necessary additional storage, **at the site** of each civilian reactor” *Id.* at § 10152. Significantly, although Congress was clearly determined to have reactor owners bear the primary responsibility for SNF storage, Congress did not direct the federal officials to take actions to encourage and expedite the use or development of privately-owned away-from-reactor storage capacity. The obvious reason – such storage was not an option under the national waste management program. Second, Congress directed NRC to “establish procedures” for the licensing of new technology “for use **at the site** of any civilian nuclear power reactor.” *Id.* at § 10153. Significantly, although Congress was clearly determined to have reactor owners bear the primary responsibility for SNF storage, Congress did not direct NRC to establish procedures to facilitate the use of new technology at privately-owned, away-from-reactor storage facilities. The obvious reason – such storage was not an option under the national waste management system. Finally, Congress streamlined NRC procedures pertaining to “an application for a license, or for an amendment to an existing license, ... to expand the spent nuclear fuel storage capacity **at the site** of a civilian nuclear power reactor” *Id.* at § 10154. Significantly, although Congress was clearly determined to have reactor owners bear primary responsibility for SNF storage, Congress did not streamline NRC procedures pertaining to applications to use or develop privately-owned, away-from-reactor storage capacity. The obvious reason – such storage was not an option under the national waste management program.

Having made clear, as a matter of national policy, that reactor owners bear the primary responsibility for interim storage of SNF and that they are to accomplish such responsibility solely through the use and/or expansion of their onsite storage capacities, Congress then spelled out the severely limited circumstances under which SNF could be stored at away-from-reactor sites. A review of the restrictions on away-from-reactor storage makes clear that Congress viewed such storage in 1982 as truly a last resort, one that was to be employed only after reactor owners had exhausted their own onsite storage capabilities, and then only under the control of DOE.¹⁰

The first restriction is that away-from-reactor storage of SNF can only be provided in one way. Subtitle B authorizes DOE to use “available capacity at one or more facilities owned by the Federal government on the date of the enactment of this Act, including the modification and expansion of such facilities ...” for such storage. Moreover, Congress limited the total SNF at all qualifying federal facilities to an aggregate of 1,900 metric tons. *Id.* at § 10155(a)(1)(A). There is no authorization for the use of privately-owned, away-from-reactor storage capacity.

The second restriction is that away-from-reactor storage of SNF at already established federal facilities was to take place only if the NRC first determined that 1) the entity requesting such storage cannot reasonably provide in a timely manner “adequate storage capacity” at the reactor site “to ensure continued orderly operation” of the reactor; and 2) the entity “is diligently pursuing licensed alternatives to the use of Federal storage capacity for the storage of spent

¹⁰ It should be noted that the offer to provide federal interim storage space was limited in time. To take advantage of the federal offer, owners of nuclear reactors had to enter into a contract with DOE to do so prior to 1990. 42 U.S.C. § 10156(a)(1). No owner did. Thus, the authority to make this storage space available to reactor owners has expired.

nuclear fuel expected to be generated by such [entity] in the future.” *Id.* at § 10155(b)(1). The “licensed alternatives” that the entity was required to diligently pursue as a condition of using federal away-from-reactor storage capacity were: 1) expansion of existing storage facilities **at the reactor site**; 2) construction of new or additional storage facilities **at the reactor site**; 3) acquisition of modular or mobile storage equipment for use **at the reactor site**; and 4) transshipment to another reactor site owned by such entity. *Id.* Significantly, although Congress was clearly determined to have reactor owners bear the primary responsibility for storing their SNF, it did not require reactor owners to demonstrate, as a condition of using storage space at the federal facilities, that they were “diligently pursuing” development of away-from-reactor storage options as means of meeting their future storage needs. The obvious reason – such storage was not an option under the national waste management system.

The third restriction was that any SNF stored at already established federal facilities had to “be removed from the storage site or facility involved as soon as practicable, but in no event later than 3 years following the date on which a repository or monitored retrievable storage facility developed under this Act is available for disposal of such spent nuclear fuel.” *Id.* at § 10155(e). Significantly, although Congress was clearly determined to limit the amount of time that SNF could be stored at away-from-reactor facilities, it did not require the removal of SNF no later than 3 years following the date on which any privately-owned, away-from-reactor storage capacity, like the one PFS is proposing, became available. The obvious reason – development of such storage capacity was not an option under the national waste management system.

The fourth restriction was that affected States and Tribes had to be fully involved in any decision to use an already established federal facility to store SNF. Once DOE selected an

already established federal facility as an interim storage site for SNF, it was directed to enter into a cooperative agreement with the State or Tribe under which the State or Tribe would “have the right to participate in a process of consultation and cooperation, ... in all stages of the planning and development, modification, expansion, operation, and closure of storage capacity at a site or facility within such State for the interim storage of spent fuel from civilian nuclear power reactors.” *Id.* at § 10155(d). In addition, the State or Tribe was given a right to disapprove DOE’s selection of a site. Such disapproval would block use of the site unless Congress passed a resolution overriding the disapproval. *Id.* at § 10155(d)(6)(D). Significantly, no participation rights were guaranteed to States or Tribes with respect to a decision to use or develop private away-from-reactor storage facilities. It defies reason to believe, as PFS apparently does, that Congress would treat the decision to use an already established federal facility for short-term SNF storage with such political sensitivity and with such careful regard for the rights of the affected communities but would then completely ignore the political implications of private parties deciding to develop new storage facilities at any site of their choosing. The obvious reason why this sensitive issue was not addressed in the NWPA – because privately-owned, away-from-reactor storage facilities were not an option under the national waste management system.

The fifth restriction was that DOE was required to pay “impact assistance” to a “State or appropriate unit of local government” to “mitigate social or economic impacts occasioned” by the use of already established Federal facilities within their jurisdictional boundaries to store SNF on an interim basis. *Id.* at 10156(e). Significantly, no “impact assistance” was required to be paid to state and local governments to “mitigate social or economic impacts” caused by the storage of SNF at privately-owned away-from-reactor sites. The obvious reason why Congress did not

provide for such impact assistance – because such storage was not an option under the national waste management system.

It is clear from these detailed restrictions that Congress gave careful and close consideration in adopting Subtitle B of the NWPA to the role that interim, away-from-reactor storage of SNF was to play in the national nuclear waste management system. It was concerned about where it would happen, how long it would last, how much could be stored, which reactor owners would qualify to have their SNF stored at an away-from-reactor site, and what the impacts would be on affected communities. It strains credulity to suggest, as PFS must to sustain its position, that the restrictions in Subtitle B only express national policy with respect to the provision of away-from-reactor storage at already established federal facilities but that reactor owners were left free by Congress to develop their own away-from-reactor storage facilities, at whatever sites they chose, and with whatever storage capacities they wanted, subject only to the regulations of the NRC. Why would Congress worry so much about the provision of a very limited amount of away-from-reactor storage at already established federal facilities for a strictly limited period of time but not worry at all about the provision of away-from-reactor storage capacity by private parties in new facilities that could be located anywhere the private parties wanted, be as big as they wanted, and operate for as many as 40 years, subject only to the ISFSI regulations of the NRC? The obvious reason – because such private, away-from-reactor storage was not an option under the national waste management system.

Subtitle C – Subtitle C of the NWPA, which is entitled “Monitored Retrievable Storage,” addressed the potential long-term (but not permanent) storage needs of reactor owners, pending completion of a permanent repository. Congress recognized that providing assistance to the

industry in the short-term, as outlined in Subtitle B, might not be sufficient to solve the SNF storage problems the owners could conceivably face while waiting for a permanent repository to be built. Accordingly, Congress initially authorized DOE in 1982 to study the possibility of the federal government – not reactor owners – building one or more “monitored retrievable storage” facilities. MRS facilities are storage facilities that would be capable of safely storing SNF for long periods of time but from which the SNF could eventually be retrieved for disposal in a permanent repository. The MRS concept is similar to, and a direct descendant of, the Retrievable Surface Storage Facility concept first proposed by the AEC in the early 1970s. (The proposed PFS waste facility is an illegitimate, outlaw version of an MRS facility.)

Under Subtitle C, DOE was to “complete a detailed study of the need for and feasibility of, and shall submit to the Congress a proposal for, the construction of one or more monitored retrievable storage facilities for high-level radioactive waste and spent nuclear fuel.” 42 U.S.C. § 10161(b)(1). Each such facility was to be designed to “safely store such spent fuel and waste as long as may be necessary” and “to provide for the ready retrieval of such spent fuel and waste for further processing or disposal.” *Id.* at § 10161(b)(1)(D). DOE’s proposal was to include recommendations for “the establishment of a Federal program for the siting, development, construction, and operation” of MRS facilities, “which facilities are to be licensed by” the NRC. *Id.* at § 10161(b)(2). Only if “Congress by law, after review of the proposal submitted by [DOE] specifically authorize[d] construction of a monitored retrievable storage facility” was any such facility to be built. *Id.* at § 10161(c)(2). Significantly, DOE was not directed to study the need for and feasibility of a privately-owned MRS, like the facility that PFS has proposed. The

obvious reason – such a facility was simply not an option under the national waste management system.

ii. In the 1987 amendments to the NWPA, Congress allowed away-from-reactor SNF storage only at an MRS facility owned and operated by the federal government.

DOE completed its MRS study and submitted its proposal to Congress in March 1987, recommending that an MRS be authorized. After carefully reviewing DOE's proposal, Congress amended the NWPA in 1987. Pub. L. Nos. 100-202, 100-203, codified at 42 U.S.C. §. The amendments authorized DOE to "site, construct, and operate one monitored retrievable storage facility" but only subject to a whole host of restrictions that Congress included in the amendments. 42 U.S.C. § 10162(b).

The amendments established a Monitored Retrievable Storage Review Commission, the members of which were to be appointed by Congress. 42 U.S.C. § 10163. The MRS Commission was to prepare yet another "report on the need for a monitored retrievable storage facility as a part of a national nuclear waste management system." *Id.* at § 10163(a)(1)(C). In preparing the report, the Commission was to review, among other things, "the status and adequacy" of the MRS work done by DOE and to "make a recommendation to Congress as to whether such a facility should be included in the national nuclear waste management system in order to achieve the purposes of this chapter, including ... providing temporary storage of spent nuclear fuel accepted for disposal." *Id.* The amendments also specifically required the MRS Commission, "in preparing the report and making its recommendation" to "compare such a [federally-owned and operated MRS facility] to the alternative of at-reactor storage of spent nuclear fuel prior to disposal of such fuel in a repository under this chapter." *Id.* at § 10163(a)(2).

Significantly, there is no direction to compare a federally-owned and operated MRS facility to a privately-owned and operated MRS facility, even though such a comparison would have been extremely valuable to Congress as it considered whether to authorize a federal MRS facility. The implication is clear – no such comparison was required by Congress because a privately-owned and operated MRS facility was not an option under the national nuclear waste management system.

The 1987 amendments authorized DOE, following submission of the MRS Commission Report to Congress, to select a site for an MRS facility but only if it determined “on the basis of available information” that the site was “the most suitable for a monitored retrievable storage facility that is an integral part of the system for the disposal of spent nuclear fuel and high-level radioactive waste established under this chapter.” *Id.* at § 10165(a). Moreover, DOE’s selection of a site is subject to disapproval by the affected State or Indian tribe, which disapproval can only be overridden by a resolution of Congress. Significantly, Congress did not require that any privately-owned, away-from-reactor storage facility be built only if it was first determined to be “an integral part” of the national nuclear waste management system, nor did it provide any special rights to communities directly affected the selection of a site for such a facility. The obvious reason – such a facility was not an option under the national nuclear waste management system.

Because Congress was concerned that the construction of an MRS facility might relieve the pressure to move ahead with the development of a permanent repository, it closely tied the development of such a facility to the development of a permanent repository. The 1987 amendments to the NWPA prohibit DOE from selecting an MRS site “until after [DOE] recommends to the President the approval of a site for development as a repository.” *Id.* at §

10165(b). The amendments also limit NRC's licensing authority with respect to an MRS facility. Under the 1987 amendments, NRC may not authorize construction of the MRS facility to begin until after it has issued a license for construction of the permanent repository. It may also not permit the storage of more than 10,000 metric tons of SNF at the MRS facility until the permanent repository "first accepts" SNF, and may not authorize the MRS facility to ever store more than 15,000 metric tons of SNF. *Id.* at § 10168(b). In short, Congress took deliberate steps to insure that the development of temporary storage capacity for SNF in an MRS facility run by DOE would not impede the ultimate goal of developing a permanent repository but rather would be an integral part of the system designed to achieve that goal. Significantly, the development of a storage facility like the one PFS is proposing might similarly relieve the pressure to move ahead with a permanent repository. Yet Congress did not tie the selection of a site for such a facility to DOE's recommendation of a site for a permanent repository, nor did it limit the amount of SNF that could be stored in such a facility. The obvious reason why Congress did not take steps to make such a facility an integral part of its effort to develop a permanent repository – because such a facility is not an option under the national waste management system. What PFS is proposing is an unlawful facility that has the potential of disrupting and frustrating Congress' effort to develop a permanent repository.

From the elaborate restrictions placed by the 1987 amendments on the siting, construction, and operation of an MRS facility, it is obvious that Congress intended to maintain strict control of the development and use of such a facility as an integral part of the national waste management system created in the NWPA. It strains credulity to suggest, as PFS must to sustain its position, that NWPA's MRS restrictions are an expression of national policy only with respect to the

construction and operation of an MRS facility by DOE and that reactor owners were left free by Congress to develop their own away-from-reactor MRS-like facilities, at whatever sites they chose and with whatever storage capacities they wanted, subject only to the regulations of the NRC.

It should be noted here that, following Congress' authorization of an MRS facility in 1987, DOE investigated a number of potential sites, including the reservation of the Skull Valley Band of Goshute Indians. However, due to intense political opposition, DOE's efforts ground to a halt in the mid-90s when Congress failed to renew the authority for the Nuclear Waste Negotiator, who had been tasked in 1987 to "attempt to find a State or Indian tribe willing to host a . . . monitored retrievable storage facility." 42 U.S.C. §§ 10242 and 10250. To our knowledge, DOE has no current plans to seek a license to construct and operate an MRS facility. Thus, the issue remains unresolved of what to do with SNF that truly cannot be stored at reactor sites¹¹ pending completion of a permanent repository. While Congress has provided a clear plan in the NWPA, the failure of the federal government to implement that plan has kept the issue a live one. It is the failure of the federal government to proceed with plans for an MRS facility that led PFS to seek a license from the NRC for its own proposed storage facility. Complaint, para. 16. What PFS fails to understand is that NRC may not exercise its authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law," *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988), no matter how important PFS or the NRC believes the issue to be.

¹¹ Whether there is or will be a genuine shortage of onsite SNF storage capacity is very much a disputed issue, although not an issue relevant to this motion.

iii. In the 2000 amendments to the NWPA, Congress allowed away-from-reactor SNF storage only at a federally owned "receipt facility" adjacent to the permanent repository.

In March 2000, Congress passed the Nuclear Waste Policy Amendments Act of 2000. S. 1287, 106th Cong. (2000), found at 106 Cong. Rec. S574. Although the act was vetoed by President Clinton and therefore did not become law, it nevertheless provides the most recent Congressional statement on the role that away-from-reactor storage is to play in the national nuclear waste management system established by the NWPA.

The 2000 amendments were prompted, in part, by litigation brought by reactor owners to recover damages from the federal government for its failure to begin disposing of their SNF in accordance with the deadline imposed by the NWPA in 1982. When the NWPA was first passed, Congress believed that the permanent repository would be operational by the end of 1997. As a result, it obligated DOE to begin to dispose of SNF no later than January 31, 1998. 42 U.S.C. § 10222(a)(5)(B). The D.C. Circuit has held that DOE's disposal obligation is not dependent on the availability of the permanent repository. *Indiana Michigan Power Co. v. Department of Energy*, 88 F.3d 1272 (D.C. Cir. 1996). As a consequence, the federal government is now liable for potentially billions of dollars of damages for the temporary storage costs incurred by reactor owners after January 31, 1998. The damages will continue to mount until the SNF is disposed of at the permanent repository or until the federal government otherwise takes responsibility for the SNF now stored at reactor sites.

To stanch the bleeding, Congress passed the 2000 amendments. With DOE having failed to identify a suitable site for an MRS, Congress tried yet another approach to providing away-from-reactor storage pending the completion of the repository. This time Congress, in a section

entitled "Backup Storage Capacity," authorized DOE to take title to such SNF as the NRC "determines cannot be stored onsite" and to "transport such spent nuclear fuel to, and store such spent nuclear fuel at, the [permanent] repository site after the [NRC] has authorized construction of the repository." At the repository site, the SNF was to be handled, packaged and stored "prior to emplacement" in a "receipt facility" located "within the geologic repository operations area." 106 Cong. Rec. S574. The hope was that the availability of such a facility for interim storage purposes would reduce the federal government's damages bill by allowing the government to take responsibility for some SNF in advance of the opening of the permanent repository.

We see here again Congress' now familiar solution to the SNF interim storage problem – Congress authorizing a federally owned interim storage facility that is directly tied to the development of a permanent repository and that would only be made available after a determination by the NRC that the SNF destined for storage there could not be stored onsite. We also have a repeat of the 1982 colloquy in which members of Congress sought assurance that their authorization of an interim storage facility would not lead to the storage of SNF at privately owned, away-from-reactor, storage facilities in their home states and districts. In the debate on the 2000 amendments, Sen. Hollings asked for the same type of assurance sought for and received by Sen. Percy in 1982. "I would like to inquire of the manager," Sen. Hollings said, "whether it is possible for any spent nuclear fuel to go to South Carolina under the provisions of Section 102, 'Backup Storage Capacity,' of the manager's substitute amendment." The floor manager, Sen. Murkowski, responded, "Absolutely not. Spent nuclear fuel cannot go to South Carolina under the specific terms of the amendment's Backup Storage Capacity provisions, which state that the

government shall: ‘*** transport such spent fuel to, and store such spent fuel at, the repository site ***’” *Id.* at S573.

Significantly, some made an effort (which failed) to obtain Congressional acknowledgment in the 2000 amendments that the proposed PFS facility (or something like it) was part of the national nuclear waste management system. In an earlier version of the 2000 amendments, DOE was to be authorized to take title to such SNF as could not be stored onsite and to transport it for storage at either the “receipt facility” or at “a privately owned and operated independent spent fuel storage facility licensed by the Nuclear Regulatory Commission.” *Id.* at S494. This thinly veiled reference to the proposed PFS storage facility was not in the bill that passed, thus reaffirming that, in Congress’ view, such a facility is simply not part of the national nuclear waste management system.

* * * * *

In is fair to say in summary that Congress’ careful, comprehensive, and recurring action addressing the issue of interim, away-from-reactor SNF storage evidences unambiguously Congress’ intent to allow only those interim facilities expressly authorized by Congress and to exclude and outlaw all others, including PFS’s proposed facility in Skull Valley. Indeed, that evidence is so powerful and compelling as to render PFS’s contrary position simply implausible.

c. In precluding a PFS-type facility, Congress was not required to expressly limit the AEA’s grant of licensing authority to the NRC; the specific policy embodied in the later NWPA will control a court’s construction of the earlier AEA, even though the AEA has not been expressly amended.

As noted earlier, PFS has argued that “the NWPA did not repeal the NRC’s existing authority under the Atomic Energy Act to license interim storage of spent nuclear fuel away from reactors at non-federal [read “private”] sites.” Applicant’s Answer to Petitioners’ Contentions,

filed December 24, 1997, in *In the Matter of Private Fuel Storage L.L.C.*, NRC Docket No. 72-22, at p. 4. This argument, as demonstrated in the following paragraphs, is without merit.

Not only will a court give full effect to a detailed and comprehensive legislative scheme constructed to regulate the issue before the court, but the court will be reluctant to read an earlier statute broadly where the result is to circumvent the subsequent, detailed scheme. *Patterson v. McLean Credit Union*, 491 U.S. 168, 181 (1989); *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, *supra*, 529 U.S. 120. Indeed, a specific policy embodied in a later federal statute will control a court's construction of the earlier statute, even though that earlier statute has not been expressly amended. *Id.*

Food and Drug Administration. v. Brown & Williamson Tobacco Corp., *supra*, 529 U.S. 120, demonstrates the application of these fundamental principles of statutory construction. In that case, the tobacco industry challenged the FDA's assertion of jurisdiction under the venerable (enacted 1938) Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.* ("FDCA"), to regulate tobacco as a "drug" and cigarettes and smokeless tobacco as "devices" that deliver nicotine to the body. The Supreme Court held that, even if the FDCA definitions of the terms "drug" and "devices" were broad enough to be properly construed to include tobacco products, the "FDA's claim to jurisdiction contravenes the clear intent of Congress," as expressed in the "distinct regulatory scheme" that Congress had created to address the "problem of tobacco." *Id.* at 132, 144. Thus, the Court went on to hold that the FDA was precluded from regulating tobacco under the FDCA.

The Court based this holding on a number of key concepts, all relevant here. The Court noted that Congress had created a "distinct regulatory scheme" through (in very large part) six

pieces of “tobacco-specific legislation that Congress has enacted over the past 35 years.” *Id.* at 143-44. The implications of the latter, tobacco-specific legislation controlled the construction of, and the proper implications to be drawn from, the earlier general language in the FDCA.

At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The “classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.” This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. As we recognized recently . . . “a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.”

Id. at 143 (citations omitted).

Further, the Court observed that the more controversial and important the issue, the more likely, as a matter of common sense, that Congress intended its specific solution to the problem to prevail over any agency action premised on an earlier and general grant of authority. Thus, after repeating the idea quoted above – that a subsequent, specific statute governs – the Court noted: “[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.” *Id.* at 133. Against this background, the Court then held that “no matter how ‘important, conspicuous, and controversial’ the issue,” still “an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.” *Id.* at 161. On this basis, the Court refused to extend the scope of the FDCA “beyond the point where Congress indicated it would stop.” *Id.*

The application of these rules of law to this case is straightforward. In an attempt to validate its SNF waste facility scheme, PFS relies on the AEA of 1954, with its broad and general

grant of licensing authority to the AEC (subsequently, the NRC), even though that venerable statute never mentions SNF storage or disposal. At the same time, PFS ignores – indeed, its scheme directly opposes – Congress’ subsequent detailed and specific solution to the nuclear waste storage issue appearing in the NWPA. The governing law, however, will not tolerate PFS’s scheme. We so show in the following paragraphs, beginning with an overview of the older AEA and then of the NWPA’s detailed solution.

The AEA does not address the storage and disposal of SNF. Moreover, the licensing authority granted to the NRC by the AEA over activities involving the possession and use of nuclear materials by private parties is broad and general, making no reference to the licensing of storage facilities of any kind.

What the AEA does grant the NRC is this: the authority to license the private possession and use of three types of nuclear materials. With respect to “special nuclear material,” the AEA grants NRC authority to “issue licenses to transfer or receive in interstate commerce, transfer, deliver, acquire, possess, own, receive possession of or title to, import or export” 42 U.S.C. § 2073(a). With respect to source material, the AEA grants NRC authority to license any use “approved by the [NRC] as an aid to science or industry.” *Id.* at § 2093. With respect to byproduct material, the AEA grants NRC authority to license possession of the material “for research or development purposes, for medical therapy, industrial uses, agricultural uses, or such other useful applications as may be developed.” *Id.* at § 2111. The AEA also grants NRC authority to “establish by rule, regulation, or order such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the [NRC] may deem necessary to promote the common defense and security or to protect health or

to minimize danger to life or property” and to establish standards and restrictions governing the design, location and operation of facilities” used in the conduct of regulated activities. *Id.* at § 2201(b) and (i).

Any review of the AEA reveals that the specific issue of the storage and disposal of nuclear wastes was simply not within the contemplation of Congress when it enacted the AEA.

Pursuant to its general licensing authority, NRC adopted a set of regulations in 1980, two years prior to the NWPA, entitled “Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation (ISFSI).” 10 CFR Part 72. The ISFSI regulations are the ones under which PFS is seeking a license for its Skull Valley waste facility. According to the NRC, the ISFSI regulations were adopted because “following [President Carter’s] deferral of reprocessing of spent fuel in April 1977 came the general recognition that, regardless of future developments, spent fuel would have to be stored for a number of years prior to its ultimate disposition, and that the storage of spent fuel in an ISFSI would be a likely additional new step in the nuclear fuel cycle.” 45 Fed. Reg. 74,693.

An ISFSI is defined as “a complex designed and constructed for the storage of spent fuel and other radioactive materials associated with spent fuel storage.” 10 CFR 72.3(m). An ISFSI is meant to be a temporary facility licensed initially to store SNF for 20 years. According to the NRC, an ISFSI may be located at the site of the reactor where the SNF was generated or at an away-from-reactor site. 45 Fed. Reg. 74,696 (1980). The ISFSI regulations define “spent fuel” as including “special nuclear material, byproduct material, source material, and other radioactive materials associated with fuel assemblies.” 10 C.F.R. 72.3(v).

At the time that the ISFSI regulations were promulgated in 1980, there was no Congressionally-approved national nuclear waste management policy. 45 Fed. Reg. 74,693 (1980). There was only the broad, general language of the AEC with respect to the licensing of the possession and use of nuclear materials. The NRC relied on that language to address, as best it could, the increasingly troublesome and controversial issue of nuclear waste storage and disposal. Two years after the ISFSI regulations were promulgated, however, Congress passed the NWPA, which established for the first time a Congressionally-approved waste management policy. Although NRC amended its ISFSI regulations in 1988 to take into account certain provisions of the NWPA, 53 Fed. Reg. 31,651 (1988), it has not, to our knowledge, ever publicly disclosed its analysis of the impact of the new national policy on its pre-NWPA interpretation of the AEA as authorizing the NRC to license away-from-reactor ISFSIs. The NRC should have updated its analysis because, when the NRC's general licensing authority is read in combination with the "nuclear waste management-specific legislation" of the NWPA that Congress enacted in 1982 and revisited thereafter, it is clear that Congress intended to preclude the NRC from exercising jurisdiction over private, away-from-reactor ISFSIs.

Initially, there is PFS's insurmountable problem with the express language of subsection (h), the provision Congress used to express its intent to "exclude the use of private away-from-reactor facilities for the storage of spent fuel." 97 Cong. Rec. 28,040. To give no effect to that intent is to make fools out of the Members of Congress quoted in section B, 1 above and to make nonsensical their clear words. As floor manager Rep. Broyhill explained, the language in 10155(h) was inserted into the NWPA to "exclude the use of private away-from-reactor facilities," *id.*; it is nonsensical to argue (as PFS must) that subsection (h) was

inserted to clarify that the NRC could still license (after enactment of the NWPA) such facilities. In section 10155(h), Congress was seeking to prevent the very thing that PFS is now proposing to do – storage of SNF at an away-from-reactor site other than one owned by the federal government at the time NWPA was enacted. Both Rep. Lundine, who believed that his amendment to delete section 10155 would eliminate any "congressional intent to establish an [away-from-reactor] program at any site" (thereby keeping the camel from getting his nose in the tent, so to speak) and thereby eliminate the need for subsection (h), and Rep. Lujan, who believed that he had been "very careful" in drafting section 10155 to limit away-from-reactor storage to existing federal sites, would be stunned by PFS's argument that, the day after enactment of section 10155, the NRC would be free to license new, private, and away-from-reactor storage facilities of whatever size and location, subject only to that agency's own regulations.

Indeed, PFS's position would leave NRC free to license as away-from-reactor SNF storage facilities the three existing reprocessing plants named by Sen. Percy (no doubt much to his chagrin) and in direct contradiction of the "intent of the managers of" the NWPA. If adopted, PFS's position would leave a gaping hole, big enough to drive 40,000 metric tons of SNF through, in the carefully crafted compromise that Congress adopted in the NWPA between those who wanted no away-from-reactor storage at all and those who were convinced, as Rep. Udall put it, that some federally owned, "small, modest size away-from-reactor storage program" was necessary to deal with "emergencies where we have rods that we need a place for and the company cannot do it on-site." 97 Cong. Rec. at 27,772.

Nor can PFS fare any better with the governing principles of law set forth at the beginning of this section B, 3, including the *Food and Drug Administration* case's demonstration of the

correct application of those principles. Those principles mandate giving full effect to the detailed and comprehensive legislative scheme (the NWPA) constructed to regulate the issue before this Court (interim storage of SNF); mandate refusing to read the earlier and general statute (the AEA) broadly where the result is to circumvent the subsequent, detailed scheme (of the NWPA), *Patterson v. McLean Credit Union*, *supra*, 491 U.S. 168, 181; *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, *supra*, 529 U.S. 120; and mandate giving controlling force to the specific policy embodied in the later federal statute (the NWPA) over (even an agency's) construction of the earlier statute, even though that earlier statute has not been expressly amended. *Id.*

Food and Drug Administration v. Brown & Williamson Tobacco Corp., *supra*, 529 U.S. 120, shows the way to a sensible treatment of Congress' efforts relative to our national nuclear waste management system. Just as the Supreme Court noted in that case, here Congress has created a "distinct regulatory scheme"; it has done so through twenty years of work on the NWPA. The implications of that latter, SNF storage-specific legislation must control the construction of, and the proper implications to be drawn from, the earlier general language in the AEA.

At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." This is particularly so where the scope of the earlier statute [the AEA] is broad but the subsequent statutes [the NWPA] more specifically address the topic at hand [interim SNF storage]. As we recognized recently . . . "a specific policy embodied in a later federal statute [the NWPA] should control our construction of the [earlier] statute [the AEA], even though it ha[s] not been expressly amended."

Id. at 143 (citations omitted).

Further, just as the Court observed there, so here: the more controversial and important the issue, the more likely, as a matter of common sense, that Congress intended its specific solution to the problem to prevail over any agency action premised on an earlier and general grant of authority. “[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.” *Id.* at 133. Against this background, the Court then held that “no matter how ‘important, conspicuous, and controversial’ the issue,” still “an administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.” *Id.* at 161. On this basis, just as the Court did there, so this Court should refuse to extend the scope of the FDCA “beyond the point where Congress indicated it would stop,” *id.*, so as to give full and sensible effect to Congress’ decisions regarding interim SNF storage.

The governing law and sensible analysis defeats PFS’s ploy to find shelter in the general licensing authority granted by the venerable AEA. Congressional intent is too clear: Congress has prohibited, disallowed, and outlawed PFS’s proposed SNF storage facility in Skull Valley.¹²

¹² The implications of this conclusion of law for the plaintiffs’ case extend beyond just the one dispositive issue we have focused on in this Memorandum. Here, we have made the simple and obvious observations that, unless PFS is on the verge of receiving a valid NRC license for the proposed Skull Valley facility, PFS has no basis (or standing, if you will) for challenging the disliked Utah statutes and that, as a matter of law, PFS cannot get a valid license for a facility Congress has clearly prohibited. But the dispositive conclusion of law also defeats the plaintiffs’ case in other ways meriting note here but not elaboration. For example, the Secretary of the Interior obviously cannot approve a final lease between PFS and the Skull Valley Band for operation of an unlawful nuclear waste dump. As a further example, Utah statutes allegedly “hindering” the proposed Skull Valley waste dump cannot contravene (or somehow be preempted by) federal law that renders such a dump unlawful.

CONCLUSION

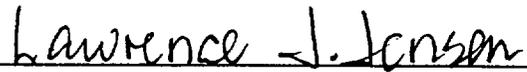
For all the foregoing reasons, we respectfully submit that this Court should hold that governing federal law excludes and disallows PFS's proposed Skull Valley waste facility, on that basis grant Utah's Rule 12(c) motion, and then enter a judgment on the pleadings in favor of Utah and against the plaintiffs, a judgment that will of necessity fully and finally terminate this action.

Dated: 20 September 2001

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