

**RAS 3701**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

LBP-01-40

**DOCKETED 12/28/01**

**SERVED 12/28/01**

Before Administrative Judges:

Michael C. Farrar, Chairman  
Dr. Jerry R. Kline  
Dr. Peter S. Lam

In the Matter of

PRIVATE FUEL STORAGE, L.L.C.

(Independent Spent Fuel Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

December 28, 2001

MEMORANDUM AND ORDER  
(Granting in Part and Denying in Part  
Summary Disposition Regarding  
Contention Utah O, Hydrology)

Pursuant to 10 C.F.R. § 2.749, applicant Private Fuel Storage, L.L.C., (PFS) has requested that summary disposition be entered in its favor regarding intervenor State of Utah's Contention Utah O, Hydrology. By that contention, the State asserts that PFS, in its application under 10 C.F.R. Part 72 for an NRC license for its proposed Skull Valley, Utah independent spent fuel storage installation (ISFSI), has failed adequately to assess the effects on the hydrological resources of the surrounding area from the construction, operation, and decommissioning of the ISFSI.

The NRC staff supports the PFS summary disposition request, while the State opposes it. For the reasons and to the extent set forth below, the Board grants in part and denies in part the PFS request for summary disposition on Contention Utah O.

## I. BACKGROUND

In June 1997, PFS filed a license application for its proposed ISFSI, which included a safety analysis report (SAR) and an environmental report (ER) addressing, respectively, the safety aspects of the proposed facility and its projected environmental impacts. In response, the State and a number of other petitioners, including farming/ranching/land investment companies Castle Rock Land and Livestock, L.C., Skull Valley Co., Ltd., and Ensign Ranches of Utah, L.C., (collectively Castle Rock) filed a number of contentions opposing the PFS application. In particular, three contentions -- Utah O, Castle Rock 8, and Castle Rock 10 -- dealing with the potential effects of the ISFSI on surrounding hydrological resources were admitted and combined by the Board in LBP-98-7, 47 NRC 142, 192-193, 216, 217 reconsideration granted in part and denied in part on other grounds, LBP-98-10, 47 NRC 288, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998). As admitted and subsequently revised, Contention Utah O now reads as follows:

The Applicant has failed to adequately assess the health, safety, and environmental effects from the construction, operation, and decommissioning of the ISFSI as required by 10 C.F.R. §§ 72.24(d), 72.100(b), and 72.108, with respect to the following containment sources, pathways, and impacts:

1. Containment pathways from the [A]pplicant's sewer/wastewater system; routine facility operations; and construction activities.
2. Containment pathways from the [A]pplicant's retention pond in that:
  - a. The ER fails to discuss potential for overflow and therefore fails to comply with 10 C.F.R. Part 51.
  - b. ER is deficient because it contains no information concerning effluent characteristics and environmental impacts associated with seepage from the pond in

violation of 10 C.F.R. § 51.45(b) and §72.126(c) & (d).

3. Potential for groundwater and surface water contamination.
4. The effects of [A]pplicant's water usage on other well users and on the aquifer.
5. Impact of potential groundwater contamination on downgradient hydrological resources.

LBP-99-39, 50 NRC 232, 236, 240 (1999) (dismissing portion of contention related to the Rowley Junction intermodal transfer point) (revising LBP-99-6, 49 NRC 114, 121 (1999) (upon withdrawal of Castle Rock, dismissing portion of contention related to firefighting) (revising LBP-98-7, 47 NRC at 254)).

In June 2000, the staff published its draft environmental impact statement (DEIS) regarding the proposed PFS ISFSI. See Draft Environmental Impact Statement for the Construction and Operation of an [ISFSI] on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, NUREG-1714 (June 2000) [hereinafter DEIS]. As relevant to this motion, the DEIS contains discussions assessing the hydrological resources in and around the proposed site. See DEIS at 3-6 to -14, 4-4 to -13, 6-4 to -6, 6-33, 6-39.

Relying principally on the evaluation in the DEIS, PFS filed the instant motion, supported by a statement of material facts not in dispute, claiming that there no longer exists a genuine issue of material fact regarding Contention Utah O. See [PFS] Motion for Summary Disposition of Utah Contention O -- Hydrology (June 29, 2001) [hereinafter PFS Motion]; id. Statement of Material Facts on Which No Genuine Dispute Exists [hereinafter PFS Undisputed Material Facts]. In addressing the first three parts and the fifth part of the State's contention, PFS asserts that the State's concerns over radiological and nonradiological contamination of

hydrological resources are based upon subjective belief and unsupported speculation; in support, it provides the affidavits of Stone and Webster, Inc., (S&W) Senior Principal Environmental Engineer Dr. H.C. "George" Liang and S&W Lead PFS Project Mechanical Engineer Donald Lewis to demonstrate that proposed operational procedures at the PFS facility will eliminate the potential for groundwater and surface water contamination. See PFS Motion at 5-14; id. exh. A at 13-26 (Declaration of H.C. "George" Liang and Donald Wayne Lewis) [hereinafter Liang/Lewis Declaration].

In addition, relying on its experts' opinion and the DEIS, PFS contends that the potential impact of any contaminants on the surrounding groundwater and surface water will be insignificant given the arid climate, the lack of surface water, the depth of groundwater, and the soil characteristics between the surface and the groundwater, all of which it is said effectively prohibit water at the PFS site from reaching groundwater or surface water. See PFS Motion at 7-8, 15; Liang/Lewis Declaration at 8-10, 25, 28-29. Further, with respect to paragraph four of the contention, PFS asserts -- based on its groundwater use estimates and a prior State study of Skull Valley aquifer use -- that its groundwater withdrawal for facility construction and operation would not adversely impact other users or the aquifer. See PFS Motion at 14, Liang/Lewis Declaration at 26-28.

On July 19, 2001, the staff filed a response supporting the PFS motion and, with asserted "minor modifications," the PFS statement of undisputed material facts. See NRC Staff's Response to [PFS]'s Motion for Summary Disposition of Utah Contention O -- Hydrology (July 19, 2001) at 12 [hereinafter Staff Response]. In its response, which was supported by the affidavit of Bechtel-Jacobs Corp. Subsurface Contaminant Specialist Richard H. Ketelle, the staff contends that because the State's "broad allegations" have been adequately addressed in the DEIS, there no longer exists a genuine issue of material fact with respect to Contention

Utah O. Id. at 7-8; see also id. unnumbered exhibit at 2-5 (Affidavit of Richard H. Ketelle Concerning Utah Contention O -- Hydrology) [hereinafter Ketelle Affidavit].

Also on July 19, 2001, the State filed its response opposing the PFS request for summary disposition, along with a statement of disputed material facts and the supporting affidavit of State Department of Environmental Quality Division of Water Quality Director Donald A. Ostler. See [State] Response and Opposition to PFS's Motion for Summary Disposition of Contention Utah O -- Hydrology (July 19, 2001) [hereinafter State Response]; id. [State] Statement of Disputed and Relevant Material Facts (July 19, 2001) [hereinafter State Disputed Material Facts]; id. exh. 1 (Declaration of Don A. Ostler, P.E., in Support of Utah's Response to Summary Disposition of Contention Utah O) [hereinafter Ostler Declaration]. In its response, the State asserts that the PFS experts, albeit qualified civil engineers, are not sufficiently qualified in hydrology to assess the facility's environmental impacts on surface and groundwater. See id. at 5-6. In addition, the State contends there remain in dispute numerous material facts about the data used and assumptions made by PFS and staff experts in evaluating the possible impacts of the proposed facility upon hydrological resources in the surrounding area. See id. at 10-14.

The State later filed a reply to the staff's July 19, 2001 response to the PFS dispositive motion. See [State] Reply to NRC Staff's Response to [PFS] Motion for Summary Disposition of Utah Contention O -- Hydrology (July 30, 2001) [hereinafter State Reply]. In this reply, the State asserts that the staff failed to describe and apply the appropriate legal tests for such a proceeding. In addition, the State contends that the staff failed to address the key factual issues surrounding Contention Utah O, relying instead on "a description of the history of Utah O followed by a boiler plate description of the law surrounding summary disposition." Id. at 2 n.2. In particular, the State challenges the staff's asserted failure to address the absence of site soil

permeability and aquifer data, declares that the staff's modifications to the PFS undisputed material factual statement have raised material factual disputes, and urges that the expertise of the staff's supporting witness does not extend to all the areas in which he expressed opinions. See id. at 3-10.

## II. ANALYSIS

### A. Standard for Summary Disposition Review

The standard governing motions for summary disposition is well established and has been used repeatedly by the Licensing Board in ruling on previous PFS dispositive motions:

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 fact with its own statement of material facts in dispute and 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).

LBP-99-23, 49 NRC 485, 491 (1999).

The Board recently discussed the corollary tenets that, among other things, instruct us at the summary disposition stage not to try to decide "which experts are more correct." LBP-01-39, 54 NRC \_\_\_, \_\_\_ (slip op. at 16-17). With all these principles in mind, the Board addresses the PFS summary disposition motion regarding Contention Utah O.

B. Parties' Positions on Contention Utah O

1. PFS Position

In support of its motion for summary disposition, PFS submits sixty-six purported undisputed material facts to demonstrate there exists no genuine issue of material fact concerning Contention Utah O, thereby entitling it to a decision as a matter of law. See PFS Undisputed Material Facts at 1-13. As outlined in that statement, the thrust of the PFS position is that its proposed operating procedures will ensure no radiological or nonradiological contamination of surface or groundwater will occur and that the State's views to the contrary are based upon unsupported opinion and speculation. In that regard, PFS contends, the State has failed to support its "broad claims" regarding the impact of radiological contamination upon the surface and ground water relating to the proposed facility, including contamination associated with routine operations, the sewer/waste water system, and the detention pond as asserted in the first three paragraphs of the contention and the surface and groundwater claims of the fifth paragraph. PFS Motion at 5; see also PFS Undisputed Material Facts at 4-5, 7-8, 9-12.

According to PFS, the State's supporting expert's opinion about the occurrence of radiological contaminants is based upon "subjective belief and unsupported speculation" that is insufficient to forestall favorable action on the PFS dispositive motion. PFS Motion at 5. PFS also states that -- because the proposed site is "an arid location, with no perennial or intermittent surface waters" and is located where the groundwater is relatively deep and the intervening soil has low permeability -- contaminants would not reach surface or groundwater even if site contamination occurred. Id. at 7; see also PFS Undisputed Material Facts at 2, 3.

As PFS sees it, its proposed "Start Clean -- Stay Clean" operating procedures and designs -- which include pre-shipment/post-facility arrival/pre-storage area transfer contamination surveys of the seal-welded, never-to-be-opened spent nuclear fuel (SNF)

canisters and total isolation of the canister transfer building from the facility sewer/wastewater system -- will strictly limit actions that create the possibility of a radiological contaminant leak and will provide for a rapid response in the unlikely event such a leak occurs. Id. at 5-6; see also PFS Undisputed Material Facts at 4-5. In this regard, PFS challenges the State's claim that a mistake by someone at the reactor site where the SNF originates, followed by a similar mistake at the PFS facility, has the potential to cause a radiological contamination problem. PFS contends that speculation regarding such an improbable chain of events is not sufficient to defeat a motion for summary disposition. See PFS Motion at 8. Instead, PFS declares, the State is attempting to require PFS unnecessarily to justify the absence of certain State-desired facility design features. See id. at 9.

With respect to nonradiological contamination, in connection with the first of the five specific paragraphs of Contention Utah O, PFS asserts that summary disposition in its favor is appropriate because it has established that the potential for groundwater contamination from ISFSI construction activities, routine operations, and the sewer/wastewater system is so small that any environmental impact to the surrounding hydrology is not credible. See PFS Motion at 9-10. According to PFS, its proposed "best management practices" for storing and disposing of potential nonradiological contaminants will ensure that those substances do not have an impact on the surrounding hydrology. PFS Motion at 10-11; see also PFS Undisputed Material Facts at 2-4, 5-6, 8. In addition, PFS claims its wastewater system will not contaminate the underlying groundwater because there is no hydrological link between the surface water and the groundwater.<sup>1</sup> See PFS Motion at 11-12; see also PFS Undisputed Material Facts at 2, 11.

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<sup>1</sup> PFS also cites the DEIS as support for its position that its sewer/wastewater system will not contaminate underlying groundwater, noting the DEIS finding that the soil at the site has a "relatively low infiltration capacity." PFS Motion at 11 (quoting DEIS at 4-12).

PFS maintains it is entitled to summary disposition as well in connection with State assertions about nonradiological contamination relating to part two of the contention, which proffers the need to analyze the impacts of detention pond contamination. Although noting that the pond is designed to hold the waters from a single, 100-year storm event, PFS declares that summary disposition is appropriate because no contamination is expected to enter the detention basin, so that there will be no resulting impact upon the groundwater quality. See PFS Motion at 12-13; see also PFS Undisputed Material Facts at 10. PFS also asserts that by demonstrating that its procedure will preclude nonradiological contamination, it has adequately addressed the State's concerns for part three of contention Utah O, which alleges the possibility of surface and groundwater contamination. PFS Motion at 13-14; see also PFS Undisputed Material Facts at 11-12. Moreover, PFS contends, even in the unlikely event contamination would occur, for the reasons previously set forth regarding surface water location, soil permeability, and groundwater depth, such contamination would not reach the surrounding surface or groundwater, so that summary disposition in its favor should be entered for this part of the contention as well. See PFS Motion at 13-14; see also PFS Undisputed Material Facts at 11-12.

In response to the concerns raised in the fourth portion of contention Utah O, regarding facility water usage impacts, PFS asserts that both the DEIS and a State study support its position that facility water usage of 2.3 acre-feet per year over the life of the facility is unlikely to impact adversely the Skull Valley aquifer or other water users, thus entitling it to summary disposition on this point as well. See PFS Motion at 14; see also PFS Undisputed Material Facts at 12-13. With regard to the latter point, PFS cites a 1987 State proposal for development of the Superconducting Super Collider that indicated up to 4,000 acre-feet of water could be removed annually from the Skull Valley aquifer without adversely impacting other users in the

area. Finally, in addressing the fifth part of contention Utah O, which alleges PFS needs to study the impact of potential groundwater contamination on downgradient hydrological resources, PFS declares that because the State has not raised any information in addition to that put forward in its unsuccessful attempts to support the other parts of this contention, PFS is entitled to summary disposition on this portion of the contention as well. See PFS Motion at 15; see also PFS Undisputed Material Facts at 13.

2. Staff Position

In responding to this PFS dispositive motion, the staff states that it has reviewed the PFS statement of undisputed material facts and has determined the statement to be correct, subject to a few minor changes, none of which undermines the staff's support for the PFS motion. See Staff Response at 7. The staff also asserts that while completing the DEIS, it evaluated the potential impacts from site construction, operation, and decommissioning and determined that any such impact upon the surrounding hydrology would be "small." Id. The staff thus contends that there no longer exists a genuine issue of material fact with regard to Contention Utah O and that PFS is entitled to a merits decision, in its favor, as a matter of law.

3. State Position

According to the State, the PFS dispositive motion should be denied as lacking adequate support, failing to comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4322, et seq., and 10 C.F.R. Part 72, and as leaving numerous material facts unresolved. In this regard, the State raises a number of specific objections to the motion.

First, the State questions the supporting expert testimony presented by Donald W. Lewis and Dr. H.C. “George” Liang,<sup>2</sup> asserting these PFS affiants do not exhibit sufficient relevant knowledge, skills, experience, training, or education to meet the standards necessary to be qualified as expert witnesses on the matters at hand. The State contends that these PFS witnesses have demonstrated unfamiliarity with terms and procedures relevant to the issues raised by contention Utah O and, therefore, their testimony should be limited to matters relating to their area of expertise, civil engineering. See State Response at 5-6.

The State also argues that NEPA and Part 72 require an ISFSI applicant to assume and discuss facility accidents, which are not uncommon, and the potential impacts those accidents may have upon the surrounding environment, which, according to the State, PFS has failed to do. See State Response at 7; see also Ostler Declaration at 4, 7. The State contends that NEPA requires an analysis of all reasonably foreseeable impacts that may occur as a result of the proposed project, which the State believes should include both radiological and nonradiological spills, releases, and accidents at an ISFSI. See State Response at 7-8. Thus, the State contends the burden falls upon applicant PFS to inform the public of possible accident scenarios and the potential environmental impacts these scenarios may produce. In any event, the State contends, the PFS claim that such accidents need not be considered -- based on the “unsupported speculation” premise that future employees will not have any accidents and will follow procedures -- is not in keeping with generally accepted principles of behavior or with the dictates of NEPA and Part 72. See id. at 9-10; see also State Disputed Material Facts at 8.

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<sup>2</sup> The State contends that Dr. Liang’s area of expertise lies specifically in “assembling data and information collected by various experts in other fields of hydrology and using that information as input to mathematical equations and programs to model the physical flow of surface and groundwaters.” State Response at 6. According to the State, with this background Dr. Liang should not be allowed to opine about matters outside the data collection and “groundwater dispersion” areas of hydrology. Id.

Also contested by the State are the conclusions drawn by the affiants supporting the PFS motion concerning the hydrological connection between the surface and the underlying aquifer and the permeability of the surface soils. See State Response at 10; see also State Disputed Material Facts at 1-9. According to the State, to determine whether a connection exists between the surface and an underlying aquifer requires defining the size and water quality of the underlying aquifer and determining the permeability of the surface soil at the PFS site, which the State claims PFS has failed to do. See State Response at 10-14; see also Ostler Declaration at 2-4, 8-10; State Reply at 3-5. The State asserts that because soil permeability varies among soil types and there are various types of soil present at the PFS site, the conclusions the staff and PFS draw about soil permeability in the DEIS and the ER based on region-wide data are inapposite. See State Response at 13; see also State Reply at 3-4. Moreover, the State maintains that contrary to the PFS position, there will exist at the PFS facility pathways -- such as spills and release to soil, migration of septic/wastewater discharges, improperly filled boreholes, and the retention pond -- that will allow migration from the surface to the groundwater. See id. at 13-14; see also Ostler Declaration at 5-8, State Reply at 5-6. The State thus believes that PFS and the staff have not gathered sufficient site-specific data to support the conclusions drawn about this hydrological connection. See State Response at 14-15.

The State further contends that the staff "minor" modifications to the PFS statement of undisputed material facts simply emphasize the existence of material factual disputes. For instance, the staff provides an unsupported declaration estimating PFS annual average water requirements at 4.4 acre-feet. See State Reply at 6-7. So too, the State asserts, staff changes to PFS statements regarding the existence of radiological and nonradiological contamination from "no credible sources or pathways" to "unlikely to occur" shows a reliance on the PFS Start

Clean -- Stay Clean program rather than a lack of possible migration pathways. See id. at 8-9. Finally, the State challenges the expertise of the staff's supporting witness Kettle by asserting that while he is qualified to opine about groundwater contamination, remediation, and contaminant pathways, he is not qualified to provide opinions about engineering design, construction, or industrial risk management relative to the adequacy of the PFS structures and procedures to preclude contaminant releases. See id. at 9-10.

C. Licensing Board Determination

1. Impacts Relating to Radiological and Nonradiological Contamination

We begin our analysis with the applicant's assessment of the potential impact the ISFSI's construction, operation, and sewer/wastewater system will have upon the surrounding surface water and groundwater, the subject of the first paragraph of Contention Utah O. With its Start Clean -- Stay Clean program, PFS commits to operating in a manner designed to eliminate any scenario whereby radiological contaminants might reach surface water and groundwater.

For its part, the State does not specifically question the adequacy of these radiological contamination prevention procedures or postulate a specific scenario under which such contamination could be released into surface or groundwater pathways.<sup>3</sup> Instead, it supports this aspect of its challenge to the PFS motion with the declaration of Don Ostler in which he states:

In my 27 years' experience in reviewing practices at industrial facilities, I am aware of numerous incidents where employees have accidentally or intentionally released pollutants or contaminants, or placed same into a septic system. Even

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<sup>3</sup> The Board notes that none of the State's submitted disputed material facts address the adequacy of the proposed PFS procedures for safeguarding against the possible release and spread of radiological contaminants. Compare PFS Undisputed Material Facts at 4-5 with State Disputed Material Facts at 1-9.

companies with best management practices cannot control accidents that occur onsite. Without adequate monitoring systems, PFS will be unaware if such accidents occur. Also PFS does not even have contingency plans or containment systems to address possible accidents. It is credible that a facility operator would assume that spills and releases as a result of human error and misconduct can and do occur at industrial and commercial facilities, such as the PFS facility.

Ostler Declaration at 7.

In this statement, Mr. Ostler paints with a broad brush, essentially asserting the industrial truism that when it comes to “contaminants,” accidents happen. From our review of Mr. Ostler’s credentials, however, it is apparent that while he has considerable expertise in hydrology, that expertise essentially relates to nonradiological, as opposed to radiological, contaminants. See id. at 1; see also PFS Motion exh. B, at 24-28 (Deposition of Don A. Ostler (Apr. 19, 2001)) [hereinafter Ostler Deposition]. As PFS correctly notes, he does not identify a specific deficiency in connection with the PFS Start Clean -- Stay Clean program that could result in radiological contamination being introduced from the PFS facility into the local surface water or groundwater system. See PFS Motion at 8 (citing Ostler Deposition at 50-51, 56-64).

As we have observed before, while a summary disposition opponent is entitled to all reasonable inferences that may be drawn from any evidence submitted, this does not relieve it of the responsibility, in the face of well-pled undisputed material facts, of providing something more than suspicions or bald assertions as the basis for a material factual dispute. See LBP-99-35, 50 NRC 180, 194 (1999). In this instance, in addressing the likelihood of radiological contamination, the State has failed to provide any showing that meets this standard so as to establish a material factual dispute about the reasonable foreseeability of such releases

that would engender the need for any additional NEPA analysis.<sup>4</sup> We thus grant the PFS motion in this regard.

On the other hand, given Mr. Ostler's experience, we have no difficulty in finding that, with respect to nonradiological contaminants, his representations regarding problems that have occurred at industrial facilities despite the use of "best management practices" in connection with such contaminants are sufficient to create such a material factual dispute relative to that type of contaminant. In this regard, PFS's own description indicates that, as far as non-radiological contaminants are concerned, its facility will be essentially no different from typical industrial facilities of its size (see PFS Motion at 3). But PFS has not indicated it has in mind for nonradiological contaminants any specially-designed cradle-to-grave program, like the Start Clean -- Stay Clean program provides for radiological ones, to obviate human error.

As to the fate of such contaminants, we believe that the State has raised, via Mr. Ostler's expertise, legitimate concerns about the PFS analysis of the permeability of the surface soils and the hydrological connection between the surface and the groundwater. PFS and the State have presented experts with opposing assessments of soil permeability and the ability of a nonradiological contaminant released into the soil to reach groundwater. The parties have also asserted differing expert opinions concerning the adequacy of PFS's proposed septic system. In particular, opinions differ about the ability of the septic system to treat the type of nonradiological waste that will be encountered and the degree to which septic wastes will

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<sup>4</sup> In this regard, we find the State's attempt to interpose a material factual dispute relative to the adequacy of the PFS program by challenging the qualifications of the staff's supporting witness is unavailing. Putting aside the fact that the State's characterization of the witness' expertise in this regard may not be entirely accurate, see Ketelle Affidavit, unnumbered attach. (resume of Richard H. Ketelle), it is apparent that the witness' conclusions are fully consistent with the staff analysis as presented in its DEIS. See DEIS at 4-10 (proposed PFS facility is designed and intended to be operated as a zero release facility, thus, no effluents are expected).

ultimately reach and contaminate the groundwater. Compare Utah Disputed Material Facts at 4-5 with PFS Undisputed Material Facts at 6, 8. And the same is true for the nonradiological aspects of paragraphs two and three of this contention. Given these disputes, and the standards that we must apply (see p. 5, above), summary disposition is inappropriate in these instances.<sup>5</sup> See also LBP-01-39, 54 NRC \_\_\_, \_\_\_ (slip op. at 16-17, 26) (Dec. 26, 2001).

2. Potential Impact on Other Well Users and Aquifers

With respect to part four of the contention, dealing with water supply, PFS contends that even under the facility's most conservative water-use assumptions (i.e., its estimates showing the highest water use), the other well users or the Skull Valley aquifer will not be adversely affected. In support of its claim, PFS declares that its projected water usage will remain well within limits established by the State in a 1987 development proposal created for the Superconducting Super Collider.<sup>6</sup> See PFS Motion at 14.

Although, as noted earlier, the State makes reference to a staff estimate of annual average water usage higher than the PFS estimate, see State Reply at 6-7, and also alludes to the staff's DEIS discussion indicating that a lack of available data made it difficult fully to refine a groundwater availability analysis, see Utah Disputed Material Facts at 6, any dispute here does not involve a material fact. Put another way, because the State does not contest the earlier State-generated water availability data (relied upon by PFS), then regardless of how the

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<sup>5</sup> In light of this finding regarding the nonradiological contaminant aspects of the contention, at this juncture we need not resolve the State challenge to the hydrology expertise of the PFS supporting witnesses.

<sup>6</sup> According to PFS, the State determined that up to 4,000 acre-feet of water could be removed from the Skull Valley aquifer without impacting other users in the area, while PFS asserts its proposed ISFSI will require only an average 2.3 acre-feet per year. See PFS Motion at 14.

dispute over the facility's annual average use estimates were to be resolved, the Skull Valley aquifer would provide significant margin -- in the range of a thousand-fold -- for that usage.

Because the State has not contested this PFS showing based on State data,<sup>7</sup> the Board concludes that there no longer remains a dispute of material fact concerning the impact water usage at the proposed facility will have upon the Skull Valley aquifer and surrounding well users, thereby entitling PFS to judgment in its favor regarding part four of this contention.

### 3. Impact on Downgradient Water Users

In concert with our determination in section II.C.1 above, with its showing regarding the means by which nonradiological contaminants could be released to reach the ground and surface water surrounding the proposed site, the State has created material factual disputes about the impact the ISFSI may have upon downgradient water users. Thus, the Board concludes that the State has demonstrated a genuine dispute with regard to this issue, thereby precluding the Board from entering summary disposition in favor of PFS with regard to part five of the contention.

## III. CONCLUSION

PFS having demonstrated there does not exist a dispute of material fact regarding (1) radiological contamination at the facility relative to parts one, two, three, and five of Contention Utah O, Hydrology; and (2) the potential impact of the facility's water usage on other well users and the aquifer as presented by part four of Contention Utah O, we grant these aspects of its

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<sup>7</sup> We also are not persuaded that there is a material factual dispute by reason of the State's passing suggestion that only the State Engineer has the authority to determine the legal adequacy of groundwater withdrawal, see State Reply at 7, which appears to hark back to a matter addressed in the context of a different, and already resolved, issue. See LBP-01-24, 54 NRC 174, 175-76 (2001) (dismissing with prejudice Contention Utah T, Inadequate Assessment of Required Permits and Other Entitlement.).

summary disposition request regarding this contention. With respect to facility nonradiological contamination as it is implicated in parts one, two, three, and five of this contention, we find that the State has demonstrated the existence of material factual disputes, including those involving competing expert opinions. Thus, PFS having failed to meet its burden in this regard, we deny its request for summary disposition on these aspects of Contention Utah O.

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For the foregoing reasons, it is this 28<sup>th</sup> day of December 2001, ORDERED, that the June 29, 2001 PFS motion for summary disposition is granted in part and denied in part as is described in section II.C of this decision.

THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>8</sup>

*/RA/*

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Michael C. Farrar  
ADMINISTRATIVE JUDGE

*/RA/*

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Peter S. Lam  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
December 28, 2001

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<sup>8</sup> Although Judge Kline participated in deliberations regarding this issuance and agrees with the result, he was unavailable to sign it.

Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant PFS; (2) intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (LBP-01-40) (GRANTING IN PART AND DENYING IN PART SUMMARY DISPOSITION REGARDING CONTENTION UTAH O, HYDROLOGY) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Administrative Judge  
Michael C. Farrar, Chairman  
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Docket No. 72-22-ISFSI

LB MEMORANDUM AND ORDER (LBP-01-40)  
(GRANTING IN PART AND DENYING IN PART  
SUMMARY DISPOSITION REGARDING  
CONTENTION UTAH O, HYDROLOGY)

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[Original signed by Emile L. Julian]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 28<sup>th</sup> day of December 2001