RAS 4926 UNITED STATES OF AMERICA LBP-02-20
NUCLEAR REGULATORY COMMISSION **DOCKETED 10/15/02**
SERVED 10/15/02

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, L.L.C.	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel Storage Installation)	October 15, 2002

MEMORANDUM AND ORDER
(Granting Motion for Summary Disposition
Regarding Contention Security-J)

Pending before the Licensing Board in this proceeding concerning the June 1997 application of Private Fuel Storage, L.L.C., (PFS) for authorization to construct and operate a 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) in Skull Valley, Utah, is a PFS motion for summary disposition regarding contention Security-J, Law Enforcement. As admitted, contention Security-J, which is sponsored by intervenor State of Utah (State), challenges the sufficiency of the PFS physical security plan (PSP) on the ground that PFS does not meet the requirements of 10 C.F.R. Parts 72 and 73 regarding the involvement of a local law enforcement agency (LLEA). According to PFS, summary disposition should be entered in its favor on contention Security-J because the Utah laws that the State alleges preclude compliance with Parts 72 and 73 have been declared unconstitutional by the United States District Court for the District of Utah (District Court) such that no genuine dispute of material law or fact remains with respect to the sufficiency of the PFS PSP.

For the reasons set forth below, we grant the PFS request for summary disposition in its favor on contention Security-J.

I. BACKGROUND

A. Procedural History of Contention Security-J

The Commission's regulations regarding physical protection at ISFSIs are set forth in 10 C.F.R. Parts 72 and 73. According to 10 C.F.R. §§ 72.180, 72.184, an applicant must "establish, maintain, and follow a detailed plan for physical protection as described in § 73.51" and have a "safeguards contingency plan for responding to threats and radiological sabotage." Further, section 73.51(b)(1), which details the requirements for physical protection at an ISFSI, states that an applicant must "establish and maintain a physical protection system with the objective of providing high assurance that activities involving spent nuclear fuel and high-level radioactive waste do not constitute an unreasonable risk to public health and safety." To fulfill this requirement, the ISFSI must be capable of meeting performance capabilities that include "timely communication to a designated response force whenever necessary." 10 C.F.R. § 73.51(b)(2). One of the ways that this performance capability can be met is by having a "[d]ocumented liaison with a designated response force or local law enforcement agency . . . ." 10 C.F.R. § 73.51(d)(6). In addition, under section 3.d of 10 C.F.R. Part 73, Appendix C, "Contents of the Plan," a PSP must have the following:

> Law Enforcement Assistance – A listing of available local law enforcement agencies and a description of their response capabilities and their criteria for response; and a discussion of working agreements for communicating with these agencies.

As part of the PFS June 1997 application for a license to store spent nuclear fuel (SNF) at an ISFSI, which is to be constructed on the reservation of intervenor Skull Valley Band of Goshute Indians (Skull Valley Band) located within Tooele County, Utah, PFS included a PSP

purported to meet the various requirements of Parts 72 and 73. In this regard, based on a cooperative law enforcement agreement (CLEA) between Tooele County, the United States Department of the Interior's Bureau of Indian Affairs (BIA), and the Skull Valley Band that gives the Tooele County sheriff's office the authority and responsibility to provide law enforcement services on the Skull Valley Band reservation, the Tooele County sheriff's office has been identified as the designated local law enforcement agency (LLEA) for the Skull Valley ISFSI that would respond in the event of an incident at the facility.[1]

In March 2001, however, the Utah legislature passed and the Governor signed Senate Bill 81 (S.B. 81), which is part of a comprehensive legislative scheme regarding the storage of high-level nuclear waste in the state. Among other items, S.B. 81 includes municipal services contract provisions that prohibit counties from entering into agreements with nuclear waste disposal sites to provide "municipal services," which are defined in the statute to include law enforcement services. See Utah Code Ann. §§ 19-3-301(6)(b), 19-3-303(6)(j). Thereafter, in an April 13, 2001 request, the State asked the Board for late-filed admission of contention Security-J. In this issue statement, the State asserts that with the passage of S.B. 81 and its provisions banning county municipal services agreements with ISFSIs, PFS is not in compliance with the requirements of 10 C.F.R. Part 73 because, among other things, it no longer can claim to have a documented liaison with an LLEA.

Although the staff declared admission of this issue statement was appropriate, PFS opposed admitting late-filed contention Security-J on the ground that a case brought in federal district court in Utah by PFS and the Skull Valley Band challenging the constitutional efficacy of this and other parts of the Utah legislative scheme to address in-state HLW storage would

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[1] Previously, the Board had granted summary disposition in favor of PFS regarding State contentions challenging the efficacy of the approval process used for the CLEA between Tooele County, the BIA, and the Skull Valley Band. See LBP-99-31, 50 NRC 147 (1999).

control whether the Utah statute was effective. Alternatively, PFS contested the contention's admissibility based on the Commission's "realism doctrine," under which it is presumed that emergency service providers will perform in accordance with an existing reactor facility emergency response plan when events call upon them to do so.

Agreeing that the outcome of the District Court suit could control, the Board deferred ruling on the admissibility of contention Security-J. See LBP-01-20, 53 NRC 565, 570-72 (2001). After receiving from the parties six periodic status reports regarding the litigation, citing the continuing uncertainty about the timing of the District Court's resolution of the case, the Board admitted contention Security-J in a February 22, 2002 decision. See LBP-02-7, 55 NRC 167, 169 (2002). That issue statement provides:

> "The Applicant's Physical Security Plan does not comply with 10 CFR Part 73 because the Applicant does not have valid documented liaison with a designated [LLEA], and redundant communications between onsite security force members and the LLEA, to provide timely response to unauthorized penetrations at the PFS facility. See 10 CFR §§ 72.180; 73.51(d)(6), (8) and (12); and Part 73, Appendix C."

LBP-01-20, 53 NRC at 568.

On April 30, 2002, the Applicant filed a motion requesting summary disposition in its favor regarding contention Security-J. See [PFS] Motion for Summary Disposition of Utah Contention Security J -- Law Enforcement (April 30, 2002) [hereinafter PFS Motion]. The State filed a response opposing the motion. See [State] Opposition to PFS's Motion for Summary Disposition of Utah Contention Security J-Law Enforcement (May 31, 2002) [hereinafter State Response]. The staff filed a response as well, albeit supporting the motion, to which the State subsequently filed a reply. See NRC Staff's Response to [PFS] Motion for Summary Disposition of Contention Utah Security-J (July 22, 2002) [hereinafter Staff Response]; [State]

Reply to Staff's Response to PFS's Motion for Summary Disposition of Utah Contention Security J -- Law Enforcement (Aug. 9, 2002) [hereinafter State Reply].

During the latter portion of the briefing process on the PFS motion, however, the District Court ruled on the pending federal litigation. In doing so, the District Court granted a PFS/Skull Valley Band motion for summary judgment and motion to dismiss the State's counterclaims while denying the State's motion for judgment on the pleadings and assertion of lack of jurisdiction, thus deciding the case against the State. See Skull Valley Band of Goshute Indians v. Leavitt, 215 F. Supp. 2d 1232 (D. Utah 2002). The day after this July 30, 2002 ruling, the State notified the Licensing Board of the District Court's decision and indicated it was contemplating seeking reconsideration so as to warrant deferral of any Board ruling based on the District Court decision. See [State] Notification of Actions Relative to Contention Utah Security J (July 31, 2002). Although the Board indicated in an August 1, 2002 issuance that it would await a District Court ruling on such a reconsideration request before seeking further information from the parties regarding the impact of that decision on the pending PFS motion, see Licensing Board Memorandum and Order (Summary Disposition Supplemental Filings Regarding Contention Security-J) (Aug. 1, 2002) at 2-3 (unpublished), the State ultimately did not make such a filing. Thus, in accordance with the Board's August 1, 2002 order, on August 19, 2002, PFS filed a supplement to its dispositive motion seeking a ruling in its favor based on the District Court's decision, to which the State and staff filed respective responses opposing and supporting the PFS motion, making this matter ripe for decision. See [PFS] Motion Supplement to Motion for Summary Disposition of Utah Contention Security J -- Law Enforcement (Aug. 19, 2002) [hereinafter PFS Supplement]; [State] Response to PFS's Supplement to PFS's Motion for Summary Disposition of Utah Contention Security J -- Law Enforcement (Aug. 27, 2002) [hereinafter State Response to PFS Supplement]; [Staff]

Response to "[PFS] Supplement to Motion for Summary Disposition of Contention Utah Security J -- Law Enforcement" (Aug. 28, 2002) [hereinafter Staff Response to PFS Supplement].

B. Utah SNF Legislation

As was noted in section I.A above, contention Security-J is rooted in the premise that certain of the provisions of S.B. 81 abrogate the existing CLEA to the degree that pact is the vehicle under which Tooele County would, by reason of the facility's proposed location on the Skull Valley Band reservation, provide law enforcement services relative to the PFS ISFSI. As noted by the State in its response to the PFS dispositive motion, see State Response at 5, S.B. 81 is part of a comprehensive statutory scheme to control, and seemingly prohibit, the storage of high-level SNF within Utah, see Utah Code Ann. § 19-3-301(1) ("[t]he placement, including transfer, storage, decay in storage, treatment, or disposal, within the exterior boundaries of Utah of high-level nuclear waste or greater than class C radioactive waste is prohibited"), based initially on the supposition that federal law does not sanction a privately owned ISFSI, see id. § 19-3-302(2).

Nonetheless, as is noted in the State's response, recognizing that NRC authority to grant a license for a privately-owned, away-from-reactor SNF storage facility might be upheld by a court, the Utah legislature included "fall-back" provisions. See State Response at 5 (citing Utah Code Ann. § 19-3-301(2)(a)(ii)). If the NRC's licensing authority is upheld, the State declares, these would come into play to control SNF storage within the State through a state permitting process, allegedly designed to protect vital local economic, environmental, and land-use interests, all pursuant to the State's police power. See id. at 5-6 (citing Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 211-12 (1983)). In its response, the State further asserts that under these fall-back provisions, a

county choosing to host an ISFSI must conform with certain specific guidelines that allegedly are intended to regulate an SNF facility, including amending the county's existing general development plan to address specific aspects of the proposed site's health and general welfare effects upon its citizens, thereby essentially becoming a part of the State licensing scheme. See id. at 6-7 (citing Utah Code Ann. § 17-27-301(3)).

Even under these fall-back provisions, however, the degree to which the existing CLEA would survive relative to the PFS PSP is in significant doubt. Utah Code section 19-3-301(6)(a) does allow state agencies to contract to provide municipal services, including law enforcement services, to an ISFSI after meeting certain requirements in accordance with the fall-back scheme. The practical effect of this provision relative to the CLEA is problematic, however, given section 17-34-1(3), which declares that a county may not "provide, contract to provide, or agree in any manner to provide municipal-type services . . . to any area under consideration for" an SNF storage facility; section 19-3-301(6)(b), which prohibits a state political subdivision from entering into a contract with an ISFSI to provide "municipal-type services"; and section 19-3-301(9)(a)(i), (ii), which voids any contract formed with an ISFSI facility to provide "municipal-type services" as being against public policy.[2]

[2] Pointing to Utah Code section 17-27-102(2), which provides that "[a] county shall comply with the mandatory provisions of this part [(i.e., Part 1 of Title 17, Chapter 27)] before any agreement or contract to provide . . . municipal-type services to any storage facility . . . for high-level nuclear waste . . . may be executed or implemented," the State declares that the fall-back provisions would be operative to permit counties to enter into contracts to provide municipal services if the general regulatory scheme -- the outright ban on any nuclear storage in the State -- were to be declared void. See State Response at 6-7. In relevant part, however, there is no distinction drawn elsewhere in S.B. 81 that would indicate that the provisions nullifying municipal services contracts with ISFSIs do not operate when the general scheme is voided.

C. Parties' Positions Regarding Summary Disposition

1. PFS Dispositive Motion

Based on this statutory scheme, with contention Security-J the State challenged PFS compliance with 10 C.F.R. Parts 72 and 73. On April 30, 2002, PFS moved for summary disposition of contention Security-J. In that motion, PFS contends that no disputed genuine issues of material fact exist relative to contention Security-J in that the contention presents only purely legal questions. In support of this proposition, PFS puts forth three arguments, namely, (1) the enacted Utah legislation is preempted by the Atomic Energy Act of 1954 (AEA), 42 U.S.C. § 2011 et seq.;[3] (2) the Utah laws are violative of the federal Constitution's Commerce Clause, U.S. Const. art. I, § 8, cl. 3;[4] and (3) even if the Utah laws are not overturned on constitutional grounds, the Commission's "realism doctrine" prevents the State

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[3] Federal preemption of state laws is a product of federal Constitution's Supremacy Clause, which provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ." U.S. Const., art. VI, cl. 2. Federal preemption of state laws occurs in three ways. First, if Congress acts pursuant to its enumerated powers, it can expressly preempt state laws with federal laws. Second, "field preemption" can occur in instances when a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress has left no room to supplement it. Third, even if Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. See Pacific Gas & Elec. Corp. v. State Energy Res. Conservation and Dev. Comm'n, 461 U.S. 190, 204 (1983).

[4] Besides granting Congress the express authority to override conflicting state-adopted commercial regulations, the Commerce Clause has been recognized to abridge state authority through negative implication. This "dormant" Commerce Clause concept is based on the idea that, although the Commerce Clause is an affirmative grant of power to Congress to regulate interstate commerce, it also operates to preclude the states from burdening unduly or discriminating against interstate commerce. See Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Oregon, 511 U.S. 93, 98 (1994); Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res., 504 U.S. 353, 359 (1992). In this regard, if a state law discriminates against interstate commerce on its face, it is per se invalid under the dormant Commerce Clause. See Oregon Waste Sys., 511 U.S. at 99. If, however, a state law is even-handed or nondiscriminatory, but still burdens interstate commerce, the law is invalid only if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

from asserting successfully that PFS is not in compliance with Part 73 requirements because of the lack of a valid CLEA.[5] See PFS Motion at 5-18.

In its post-District Court ruling dispositive motion supplement, PFS asserts that July 30, 2002 decision, "clearly is dispositive of PFS' first ground for summary disposition" that the State legislation is preempted by the AEA. PFS Supplement at 4. Declaring the District Court's decision "explicitly invalidates the particular provisions underlying contention Security J," PFS asserts that the principles of collateral estoppel and res judicata apply to the State's challenge in the NRC proceeding, given that the issue resolved in the District Court's decision "is precisely the same as that presented in PFS's Motion for Summary Disposition, it is an issue [that was] actually litigated in the Federal District Court, the issue was determined by a valid and final judgment, and the ruling was essential to the Federal District Court's judgment." Id. at 4-5. PFS, however, urges the Board to rule on all the issues it has presented, including the validity of the Utah laws under the Commerce Clause and the Commission's realism doctrine "for the purposes of completing the record." Id. at 7-8.

2. State Position with Regard to the PFS Motion

The State's main argument in its initial and subsequent responses to the PFS motion and supplemental motion is that the issue of the constitutionality of the Utah legislation's municipal services contract provisions is secondary to the determination whether Congress in the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. § 10101 et seq., intended to permit a

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[5] As set forth in 10 C.F.R. § 50.47(c)(1)(iii), the realism doctrine "recognize[s] the reality that in an actual emergency, state and local government officials will exercise their best efforts to protect the health and safety of the public." Therefore, if as a result of a lack of state and/or local government participation a nuclear reactor applicant cannot demonstrate that an adequate emergency plan exists, the applicant can develop its own emergency plan and the NRC will evaluate that plan based upon the presumption that state and local officials generally will follow the applicant's plan in the event of an emergency.

PFS-type ISFSI facility.[6] See State Response at 8, 11-13; State Response to PFS Supplement at 1-2. The State asserts that the PFS supplement concedes that the District Court decision did not settle this issue, and that the Commission's decision to address on the merits the State's February 11, 2002 suggestion of lack of jurisdiction, see CLI-02-11, 55 NRC 260, 264-66 (2002), constitutes an acknowledgment that the Commission must resolve the threshold issue before considering the constitutionality of the Utah statutes. See State Reply at 6; State Response to PFS Supplement at 3. The State also asserts PFS has ignored long-established Commission precedent that if there is a "special public interest factor" in a case, it will refuse to apply a different adjudicatory body's decision. See State Response to PFS Supplement at 2-3. According to the State, this case presents numerous reasons that qualify for invoking this exception, which PFS has failed to address other than to make the "bald assertion" that no such special interest exists. Id. at 2-3; see State Reply at 8-10 & n.4. In fact, the State declares the "nature and procedural posture" of the District Court's decision, including its "blanket analysis [of] the many varied provisions constituting Utah's general statutory scheme" and the pendency of a Utah appeal of that ruling with the United States Court of Appeals for the Tenth Circuit, make Licensing Board reliance on the decision in granting the PFS motion both unsafe and unwise. State Reply at 8; see State Response to PFS Supplement at 3.

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[6] As framed by the State, this issue concerns the regulatory jurisdiction of the Commission as defined under the NWPA. The State contends that the NWPA prohibits a privately-owned, away-from-reactor SNF storage facility, such as the Skull Valley facility. According to the State, the provisions of the NWPA describing ISFSIs and the "persons" who are authorized to apply for a license to construct and operate an ISFSI prohibit all privately-owned, away-from-reactor ISFSI facilities. As a result, the State argues, PFS is not eligible for a license to operate the Skull Valley facility. See State Response at 11; see also Utah's Suggestion of Lack of Jurisdiction (Feb. 11, 2002) at 2-3 (filed with the Commission).

3. Staff Response to PFS Motions

In its July 22, 2002 response to the initial PFS motion, the staff asserts that S.B. 81 is legally invalid under the doctrine of federal preemption as violative of the AEA and the Commerce Clause. See Staff Response at 9-20. Additionally, in its response to the PFS supplement to its motion, the staff supports the PFS assertion that summary disposition should be granted because res judicata requires the Board to give full and conclusive effect to the District Court's decision. In that filing, the staff asserts that even though it was not a party to the District Court litigation, the staff's non-participation in that cause was "of no consequence, in that neither the State nor PFS seeks to apply the doctrine of repose against the Staff," and that the District Court's decision should be given full effect in the absence of any other public policy concerns. Staff Response to PFS Supplement at 5. The staff also declares that the State's arguments about the "correctness" of the District Court's decision and the filing of an appeal do not negate the effect of res judicata. Id. at 6. Finally, the staff declares that it "does not oppose the Applicant's suggestion that the Licensing Board rule upon its other stated grounds for summary disposition," noting that the record would then be complete for Commission review. Id. In this regard, the staff suggests that " [t]o the extent that a ruling on the Applicant's other arguments may be viewed to be akin to an 'advisory opinion'. . . [they] are normally disfavored, but there is no bar to the issuance of such an opinion." Id. n.10.

II. ANALYSIS

A. Summary Disposition Standards

In an earlier ruling on a PFS motion for summary disposition, the Board summarized the governing standards as follows:

> Under 10 C.F.R. § 2.749(a), (d), summary disposition may be entered with respect to any matter (or all of the matters) in a

> proceeding if the motion, along with any appropriate supporting material, shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and 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). We once again use these standards in evaluating the PFS motion relative to contention Security-J.

B. Application of Summary Disposition Standards to Contention Security-J

The PFS April 2002 motion for summary disposition sets forth several major legal theories in support of its argument that there is no genuine dispute of material fact relating to contention Security-J and that on this contention it is entitled to a ruling in its favor as a matter of law. As to one of these -- AEA preemption of the Utah law's municipal services contract provisions -- initially we are faced with the question whether, in ruling on contention Security-J, it is appropriate as a legal and policy matter for the Board to give full effect to the District Court's decision declaring unconstitutional as preempted by the AEA the Utah legislation at issue relative to this contention. In turn, pivotal to this analysis are the concepts of res judicata and collateral estoppel, also referred to as the doctrines of repose, that we consider in some detail below.

1. Res Judicata and Collateral Estoppel

A classic formulation of the doctrine of res judicata, also known as claim preclusion, was set forth by the United States Supreme Court in the case of Cromwell v. County of Sac, 94 U.S. 351, 352 (1876):

> [T]he judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

In applying the doctrine of claim preclusion,[7] modern courts look to three factors to determine whether or not a claim should be barred in connection with subsequent litigation: (1) whether there was a final judgment on the merits of the claim by a court of competent jurisdiction; (2) did the prior action involve the same parties or their privies; and (3) did the prior action involve the same claim. See 18 James Wm. Moore et al., Moore's Federal Practice § 131.01, at 131-12 (3d ed. 1999) [hereinafter Moore].

Similar to the doctrine of res judicata, the precept of collateral estoppel, also known as issue preclusion, prevents the re-litigation of issues that already have been adjudicated. Issue preclusion applies only if the issue in the prior adjudication is identical to that in the subsequent case. Moreover, to apply the doctrine of collateral estoppel: (1) the judgment in the case must be final and entered by a court of competent jurisdiction; (2) the issue must have been the same as that actually litigated and necessary to the outcome of the first action; and (3) the party

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[7] Central to the principle of claim preclusion are the concepts of merger and bar. The doctrine of merger states that when a plaintiff succeeds in litigation and recovers a valid and final judgment, the plaintiff's claim is merged into the judgment, as well as all the defenses to it, including any that have not, but could have been, brought. By the same token, if a plaintiff loses in litigation, the result is a bar on any further claims made by the plaintiff arising from that particular cause of action. See 18 James Wm. Moore et al., Moore's Federal Practice § 131.01, at 131-11 (3d ed. 1999).

to which the estoppel is to be applied must have been a party, or in privity with a party, that litigated the issue in the prior proceeding. See 18 Moore ¶ 132.01[1]-[2], at 132-10 to 132-11. If so, the issue cannot be re-litigated in a subsequent action with a different claim.

While, as a general rule, the doctrine of res judicata may be applied in NRC adjudicatory proceedings, an exception to this customary practice occurs when broad public policy considerations or special public interest factors are involved such that an agency's need for flexibility outweighs the reasons underlying this repose doctrine so as to favor re-litigation of a particular issue.[8] See United States Department of Energy, Project Management Corp., Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 420 (1982). For instance, a judicial decision need not be considered binding on an administrative agency if the legislature granted primary authority to decide the substantive issue in question to the administrative agency. See 2 Kenneth C. Davis, Administrative Law Treatise § 18.12, at 627-28 (1958) [hereinafter Davis]. Nor is a change in external circumstances required for an agency to exercise its basic right to change a policy decision and apply a new policy to parties to which an old policy applied. See Clinch River, CLI-82-23, 16 NRC at 420.

The principle of collateral estoppel, like that of res judicata, may also be applied in administrative adjudicatory proceedings. See Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 561, 562-63 (1977). As a general matter, a judicial decision is entitled to the same collateral estoppel effect in a later administrative proceeding as it would be accorded in a subsequent judicial proceeding. See id. at 561 (citing 2 Davis § 18.11, at 619). As with the concept of res judicata, and for the same reasons, the

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[8] Res judicata also does not apply when the foundation for a proposed action arises after the prior ruling advanced as the basis for res judicata or when the party seeking to employ the doctrine had the benefit, when it obtained the prior ruling, of a more favorable standard as to burden of proof than is now available to it. Public Serv. Co. of New Hampshire (Seabrook Station, Units 1 &2), ALAB-349, 4 NRC 235, 245-46 (1976).

existence of public policy considerations could outweigh the jurisprudential policy reasons for applying the doctrine of collateral estoppel. See Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 574-75 (1979). The correctness of the prior decision is not, however, a public policy factor upon which the application of the doctrine of collateral estoppel depends. See Safety Light Corp. (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 446-47 & n.158 (1995).

2. Application of the Doctrines of Repose to Contention Security-J

In its July 30, 2002 decision, the District Court found that the "issues presented in the motions are primarily legal ones, bearing on the questions of whether the Utah laws violate various Constitutional provisions and whether federal law has preempted the field," and that the factual issues as they related to the pending motions were not in controversy. Skull Valley Band, 215 F. Supp. 2d at 1241. The Court also found that PFS "would face significant hardship if the constitutionality of the Utah laws was not resolved at this point" and as a consequence determined that the challenged enactments were ripe for review in that proceeding. Id. at 1241, 1243.

The Utah statutes at issue in this proceeding, including Utah Code Ann. § 17-34-1(3), are those provisions regulating municipal services contracts that directly affect the viability of the CLEA in question relative to the PFS facility. The District Court, noting that "[a] refusal to provide municipal services would drastically increase PFS' cost of operation, because the SNF facility would have to provide its own emergency services," held these provisions unconstitutional under the AEA due to the "direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels and, thus, fall within the pre-empted field." Id. at 1249 (footnote omitted). As a result of this judicial holding, PFS and the staff ask this Board to apply principles of res judicata and/or collateral

estoppel to contention Security-J, thereby extinguishing this particular State claim that PFS should be denied a license because it has not complied with certain 10 C.F.R. Part 73 requirements. As explained below, regardless of which repose tenet attaches, we find the PFS dispositive motion regarding contention Security-J should be granted because there are no genuine issues of material fact in controversy and PFS is entitled to a ruling in its favor on the motion as a matter of law.

As noted earlier, as a general matter a judicial decision is entitled to the same collateral estoppel or res judicata effect in an administrative proceeding as in a later judicial proceeding, assuming that there are no overriding public policy issues. See Davis-Besse, ALAB-378, 5 NRC at 561. And certainly in this instance, whether on the basis of claim or issue preclusion,[9] the matters that were resolved by the District Court are dispositive of those before the Board in connection with contention Security-J. The State's basis for the contention is that PFS is not in compliance with the Commission's requirements relative to an LLEA because the enactment of the Utah legislation in question, in particular the municipal services contract provisions, eviscerates the underlying CLEA as it applies to the PFS facility. Because the District Court ruled that these statutory provisions have no effect because they are unconstitutional, and the State has made no other showing in connection with this contention indicating that PFS cannot

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[9] In this instance, the criteria necessary for res judicata to attach apparently are present, i.e., (1) there was a final judgment on the merits by the District Court; (2) the action involved the same parties as are present before the Board (except for the staff, which does not object to the use of doctrines of repose and, in any event, in this circumstance might be in privity with PFS); and (3) the prior action involved the same claim, at the heart of which is the question of the constitutionality of the Utah statutes. The same is true for the requirements for collateral estoppel, i.e., (1) the issue regarding the contention before the Board rests on the constitutionality of the Utah statues, which was also the issue before the District Court and was an essential component of its determination; (2) the constitutionality of those statutes was litigated by the State, the party against which estoppel is to be applied; and (3) the decision issued by the District Court was a valid and final judgment. We also note there are no significant differences in circumstances, such as burden of proof, that would prevent us from applying the doctrines in this administrative licensing proceeding.

comply with the LLEA-related requirements of Part 73, a determination granting the PFS dispositive motion seems wholly in order.

To be sure, the State has asserted there are overriding policy concerns that weigh against attaching doctrines of repose in this case. The Board finds these arguments meritless, however. First, the District Court did address the "threshold issue" of whether or not the NRC has jurisdiction to license a PFS-type facility, finding in the context of its standing determination that the question of whether PFS has the legal right to own and operate an ISFSI should be resolved by the Commission, and possibly through appeals of that determination to an appropriate federal appellate court, given that PFS in the district court litigation was seeking only to secure the right to proceed in the NRC licensing proceeding unhindered by the State.[10] See Skull Valley Band, 215 F. Supp. 2d at 1240, 1241. Second, we agree with the PFS observation that the District Court's preemption analysis was "more than adequate to strike down the statutory provisions," PFS Supplement at 7, and, contrary to what the State has asserted, see State Response to PFS Supplement at 3, in determining their constitutionality the District Court did address the pertinent statutory provisions distinctly and separately, see 215 F. Supp. 2d at 1243-52. Moreover, while any State qualms with the District Court's analyses and conclusions may be questions for a federal appellate court, they do not provide a basis for not applying the repose doctrines. See Davis-Besse, ALAB-378, 5 NRC at 562-63. The same is true with regard to the State's related argument that the Board should not grant the PFS motion based on the District Court's ruling because "some months from now upon reversal of the [District Court's] Order we will all be right back here going through this drill all over again."

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[10] In this regard, while (as we noted previously in section I.C.2) this issue is pending with the Commission currently, the Board has already addressed the question in ruling on the admissibility of contention Utah A, Statutory Authority. See LBP-98-7, 47 NRC 142, 183-84, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998).

State Reply at 9-10. It may well be that if the Tenth Circuit decides to reverse the District Court's ruling, the agency will be at the same point we are at right now -- litigating the merits of this State claim. But that is a risk PFS must bear relative to facility licensing. See Davis-Besse, ALAB-378, 5 NRC at 560-61, 563.

We do, however, disagree with PFS and the staff in one respect. We find it unnecessary to delve into the merits of the additional arguments made by PFS in support of its motion for summary disposition. Certainly, neither of these parties has suggested that the District Court's determination to strike down the contested statutory provisions as preempted on AEA grounds was not sufficient, in and of itself, to resolve the litigation, thereby alleviating the need for a ruling on the Commerce Clause viability of the Utah enactments. The same is true in the context of contention Security-J. In light of the District Court's AEA preemption ruling, the doctrines of repose fully support our determination regarding the pending PFS motion, so that we need not address the other challenges to the Utah legislation interposed in its filings.

III. CONCLUSION

Under the doctrines of repose, the July 30, 2002 District Court ruling upholding the PFS/Skull Valley Band assertion that the municipal services contract provisions enacted by the Utah State legislature in S.B. 81 are unconstitutional as pre-empted by the AEA is dispositive of the same issue presented by PFS in its summary disposition motion on contention Security-J.

Accordingly, there being no genuine issues of material law or fact in dispute, summary disposition in favor of PFS is appropriate relative to that contention.

For the foregoing reasons, it is this fifteenth day of October 2002, ORDERED, that the April 30, 2002 PFS motion for summary disposition regarding contention Security-J, as supplemented on August 19, 2002, is granted and, for the reasons given in this memorandum and order, a decision regarding that contention is rendered in favor of PFS.

THE ATOMIC SAFETY
AND LICENSING BOARD[11]

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

/RA/

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

October 15, 2002

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[11] 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, 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 (GRANTING MOTION FOR SUMMARY DISPOSITION REGARDING CONTENTION SECURITY-J) (LBP-02-20) 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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Docket No. 72-22-ISFSI
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REGARDING CONTENTION SECURITY-J)
(LBP-02-20)

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[Original signed by Evangeline S. Ngbea]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of October 2002