

Appeal No. 02-4149

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

THE SKULL VALLEY BAND OF GOSHUTE INDIANS, et al.
Plaintiffs-Appellees,

v.

**MICHAEL O. LEAVITT, in his official capacity as
Governor of the State of Utah, et al.**

Defendants-Appellants.

On Appeal from the United States District Court for the
District of Utah, No. 2:01 CV 00270CV
Honorable Tena Campbell

APPELLANTS' OPENING BRIEF

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

<i>TABLE OF CONTENTS</i>	i
<i>TABLE OF AUTHORITIES</i>	v
<i>STATEMENT REGARDING PRIOR OR RELATED APPEALS</i>	x
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES	1
1. Did Plaintiffs carry their burden to show standing where they presented no evidence that they have suffered a redressable injury to a legally protected interest?	1
2. Did Plaintiffs carry their burden to show ripeness where various federal agency approvals necessary for commencement of Plaintiffs' proposed nuclear waste storage facility have not yet been given and may never be given?	1
3. Did Plaintiffs carry their burden to show that there was no genuine issue of material fact and that they were entitled to judgment as a matter of law regarding their claim that the federal Atomic Energy Act preempted the challenged Utah statutes where:	
(a) governing federal law already prohibits Plaintiffs' proposed nuclear waste storage facility, and	1
(b) many of the challenged Utah statutes both concern areas traditionally left to state regulation and have, at most, an indirect and insignificant effect on radiological safety decisions.	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	7
1. The federal government and high-level nuclear waste	8
2. The federal Nuclear Waste Policy Act of 1982 and amendments	12
3. Initial efforts towards a private, away-from-reactor, SNF waste	

facility	15
4. The Consortium, the Band, and the Lease	17
5. Utah’s legislation relative to high-level nuclear waste	18
6. Activities in the NRC licensing proceeding	20
SUMMARY OF THE ARGUMENT	21
ARGUMENT	23
STANDARD OF REVIEW	23
I. PFS LACKS STANDING BECAUSE IT HAS PRESENTED NO EVIDENCE THAT IT HAS SUFFERED A REDRESSABLE INJURY TO A LEGALLY PROTECTED INTEREST	24
A. The Supposed Interference With PFS’s NRC License Application is Not a Cognizable Injury Traceable to the Utah Statutes	26
B. PFS’s Purported Injuries are Self-Inflicted and Not Traceable to the Utah Statutes	28
C. There is No Evidence in the Summary Judgment Record to Establish Any Actual Adverse Impact on the PFS Licensing Proceeding	32
D. PFS Has No Legally Protected Interest in Building and Operating a Private, Off-Site Storage Facility Because Such a Facility is Prohibited by Statute	36
1. This Court must determine whether Congress prohibited PFS’s proposed facility in order to determine the threshold jurisdictional question of standing	36
2. In the NWPA, Congress prohibited what PFS is promoting, a privately owned, away-from-reactor, SNF storage facility	40

a.	<u>With the language of section 10155(h) of the NWPA, Congress excluded storage of SNF at privately owned, away-from-reactor facilities</u>	41
b.	<u>The design, object, and policy of the NWPA make clear that Congress intended to preclude SNF storage at privately owned, away-from-reactor facilities</u>	48
c.	<u>The NWPA’s legislative history demonstrates Congress’s intent to exclude a private, away-from-reactor, SNF storage facility</u>	53
d.	<u>The NWPA alters the implications that can plausibly be drawn from the AEA about authorization for private, away-from-reactor storage facilities</u>	61
II.	PFS’S CLAIMS ARE UNRIPE	66
A.	PFS’s Claims Are Not Fit for Judicial Resolution at this Stage	69
B.	The Supposed Hardship that the District Court Attributed to PFS Cannot Support a Premature Constitutional Overhaul of the Utah Statutory Scheme	73
III.	THE CHALLENGED UTAH STATUTES ARE NOT PREEMPTED	76
A.	The Challenged Statutes Cannot Be Preempted Because They Merely Confirm the NWPA’s Prohibition of a Private, Away-From-Reactor Facility	77
B.	Even Assuming that Congress Did Not Prohibit a PFS-type Facility, Most of Utah’s Challenged Statutes Are Not Preempted	80
1.	The AEA does not preempt the “municipal contract” provisions	84
2.	The “unfunded potential liability” provisions are not preempted	89

3.	The AEA does not preempt U.C.A. § 19-3-318 (financial responsibility of equity interest holders)	95
4.	The “roads” provisions are not preempted	98
5.	The “licensing” provisions are not preempted	102
CONCLUSION		106
REASONS FOR ORAL ARGUMENT		107
CERTIFICATE OF COMPLIANCE		108

ADDENDUM

1. COURT ORDER ENTERED 30 JULY 2002
2. CHAPTER 4, OTA REPORT, OTA-0-171
3. ATOMIC ENERGY ACT REFERENCES TO NUCLEAR
WASTE STORAGE AND DISPOSAL
4. THE NUCLEAR WASTE POLICY ACT, AS AMENDED
5. EXCERPTS FROM *THE CONGRESSIONAL RECORD*
6. THE CHALLENGED UTAH STATUTES

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Adickes v. S.H. Kress & Co.</i> , 398 U.S. 144 (1970)	23
<i>Albee Tomato, Inc. v. A.B. Shalom Produce Corp.</i> , 155 F.3d 612 (2nd Cir. 1998.)	23, 34, 97
<i>American Target Advertising, Inc. v. Giani</i> , 199 F.3d 1241 (10th Cir. 2000)	105
<i>Andriiu v. Ashcroft</i> , 253 F.3d 477 (9th Cir. 2001)	44
<i>Arjay Associates, Inc. v. Bush</i> , 891 F.2d 894 (Fed. Cir. 1989)	38
<i>Armstrong World Industrial, Inc. v. Adams</i> , 961 F.2d 405 (3d Cir. 1992)	66
<i>Batterton v. Francis</i> , 432 U.S. 416 (1977)	46
<i>Blue Circle Cement, Inc. v. Board of County Commissioners</i> , 27 F.3d 1499 (10th Cir. 1994)	99
<i>California Coastal Commission v. Granite Rock Co.</i> , 480 U.S. 572 (1987) .	102, 103, 105
<i>Claybrook v. Slater</i> , 111 F.3d 904, 907 (D.C. Cir. 1997)	36
<i>Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk</i> , 604 F. Supp. 1084 (E.D.N.Y. 1985)	86, 87
<i>Coalition for Sustainable Resources, Inc. v. United States Forest Service</i> , 259 F.3d 1244 (10th Cir. 2001)	74
<i>Crandon v. United States</i> , 494 U.S. 152 (1990)	48
<i>Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Const.</i> , 485 U.S. 568 (1988)	76
<i>English v. General Elec. Co.</i> , 496 U.S. 72 (1990)	<i>passim</i>

<i>Ernst & Young v. Depositors Economic Protection Corp.</i> , 45 F.3d 530 (1st Cir. 1995)	73
<i>Essence, Inc. v. City of Federal Heights</i> , 285 F.3d 1272 (10th Cir. 2002)	32, 33, 35, 36
<i>United States ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc.</i> , 190 F.3d 1156 (10th Cir. 1999)	32
<i>Florida Power & Light Co. v. Westinghouse Elect. Corp.</i> , 826 F.2d 239 (4 th Cir. 1987)	8, 9, 11
<i>Food and Drug Administration. v. Brown & Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000)	62, 64
<i>Fuller v. Norton</i> , 86 F.3d 1016 (10th Cir. 1996)	29, 30
<i>Gade v. National Solid Wastes Management Association</i> , 505 U.S. 88 (1992)	99
<i>Gilberg v. Stepan Co.</i> , 24 F. Supp. 2d 325 (D.N.J. 1998)	90, 94
<i>Hastings v. Judicial Conference of the United States</i> , 770 F.2d 1093 (D.C. Cir. 1985)	66, 67, 69
<i>Hysten v. Burlington Northern and Santa Fe Railway Co.</i> , 296 F.3d 1177 (10th Cir. 2002)	23
<i>Illinois v. General Electric Co.</i> , 683 F.2d 206 (7th Cir. 1982)	18
<i>In the Matter of Private Fuel Storage, L.L.C. (ISFSI)</i> , ____ N.R.C. ____ (15 October 2002)	5
<i>In the Matter of Private Fuel Storage, LLC (ISFSI)</i> , 47 N.R.C. 142 (1998)	20
<i>In re Integra Realty Resources, Inc. v. Fidelity Capital Appreciation Fund</i> , 262 F.3d 1089 (10th Cir. 2001)	26, 27
<i>International Union v. Johnson</i> , 674 F.2d 1195 (7th Cir. 1982)	31
<i>Kerr-McGee Corp. v. Farley</i> , 115 F.3d 1498 (10th Cir. 1997)	89, 90, 96
<i>Lewis v. Casey</i> , 518 U.S. 343 (1996)	35

<i>Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1),</i> 21 N.R.C. 644 (1985)	86
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	26, 27, 32
<i>Lujan v. G & G Fire Sprinklers, Inc.</i> , 532 U.S. 189 (2001)	75, 97
<i>Matsushita Electric Industrial Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	34, 85
<i>Matthiesen v. Banc One Mortg. Corp.</i> , 173 F.3d 1242 (10th Cir. 1999)	40
<i>New Mexicans for Bill Richardson v. Gonzalez</i> , 64 F.3d 1495 (10th Cir. 1995)	69
<i>Ohio Forestry Association v. Sierra Club</i> , 523 U.S. 726 (1998)	72
<i>Pacific Gas & Electric Co. v. State Energy Resources Conservation</i> <i>and Development Commission</i> , 461 U.S. 190 (1983)	75, 80, 81, 82, 87
<i>Printz v. United States</i> , 521 U.S. 898 (1997)	88
<i>Seamons v. Snow</i> , 206 F.3d 1021 (10th Cir. 2000)	23
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984)	75, 81, 82, 85, 91, 92, 93
<i>Steel Co. v. Citizens for a Better Environment</i> , 523 U.S. 83 (1998)	32
<i>Table Bluff Reservation v. Phillip Morris, Inc.</i> , 256 F.3d 872 (9th Cir. 2001)	32
<i>Tennessee v. Herrington</i> , 806 F.2d 642 (6th Cir. 1986)	13
<i>United States v. Fausto</i> , 484 U.S. 439 (1988)	60, 61, 62
<i>United States v. Power Engineering Co.</i> , 303 F.3d 1232 (10th Cir. 2002)	40
<i>Utah v. Babbitt</i> , 137 F.3d 1193 (10th Cir. 1998)	38
<i>Utah v. United States Depart. of the Interior</i> , 210 F.3d 1193 (10th Cir. 2000) ("Utah II")	18, 65, 68
<i>In re Western Pacific Airlines, Inc.</i> , 273 F.3d 1288 (10th Cir. 2001)	23

<i>Wilson v. Glenwood Intermountain Properties, Inc.</i> , 98 F.3d 590 (10th Cir. 1996)	24, 28, 29, 30, 31
<i>Yellowfish v. City of Stillwater</i> , 691 F.2d 926 (10th Cir. 1982)	65

STATE CASES

<i>Great Neck Plaza, L.P. v. Le Peep Restaurants, LLC</i> , 37 P.3d 485 (Colo. App. 2001)	96
<i>Messick v. PHD Trucking Services, Inc.</i> , 678 P.2d 791 (Ut. 1984)	95
<i>S.T. Hudson Engineers, Inc. v. Camden Hotel Development Associates</i> , 747 A.2d 931 (Pa. Super. 2000)	95
<i>Stewart v. Utah Public Service Commission</i> , 885 P.2d 759 (Utah 1994)	105

FEDERAL STATUTES

The Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 <i>et seq.</i>	<i>passim</i>
The Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101 <i>et seq.</i> ...	<i>passim</i>
Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301 <i>et seq.</i>	62, 63, 64

STATE STATUTES

State, Utah Const. Art. XI, § 1	87
The challenged Utah statutes	<i>passim</i>
Minn. Stat. § 116C.771 (1994)	16

LEGISLATIVE HISTORY

Price-Anderson Reauthorization Act of 2001, H.R. Rep. No. 107-299, pt. 1 (2001)	89
--	----

128 Cong. Rec. 28,033 <i>et seq.</i> (1982)	<i>passim</i>
146 Cong. Rec. S574 (2000)	64
Report on H.R. 6598, H.R. Rep. No. 97-785, pt. 1 (1982)	57, 58

REGULATIONS

45 Fed. Reg. 74,693,* 74,693 (12 November 1980)	11
10 C.F.R. 2.786 (b)	21
10 C.F.R. pt. 72	11, 46

MISCELLANEOUS

13A Wright & Miller, <i>Federal Practice and Procedure</i> § 3532.1, at 120	66
13A Wright & Miller, <i>Federal Practice and Procedure</i> § 3532.3, at 149	70
Dan Guttman, Price-Anderson Act Reauthorization: Due Diligence Is in Order, 32 <i>Envtl. L. Rep.</i> 10594 (2002)	90
Noah Sachs, <i>The Mescalero Apache Indians and Monitored Retrievable Storage of Spent Nuclear Fuel: A Study in Environmental Ethics</i> , 36 <i>Nat. Resources J.</i> 881, 883 n.4 (1996)	13, 14, 15, 16
Office of Technology Assessment, <i>Managing the Nation's High-Level Nuclear Waste</i> , OTA-0-171 (March 1985)	8
John Helland and Mike Bull, <i>Nuclear Waste Dry Cask Storage, Information Brief</i> , Minnesota House of Representatives (2001)	16

STATEMENT REGARDING PRIOR OR RELATED APPEALS

Utah v. United States Dept. of the Interior, 210 F.3d 1193, 1198 (10th Cir. 2000)

(“*Utah II*”) is a related appeal. Tribal members opposed to the waste dump and the State of Utah pursued judicial and administrative challenges to the Lease’s conditional approval. When Utah sought to intervene in the lease review process, Utah’s federal district court (Judge Kimball) held that Utah did not have the requisite standing; this Court then affirmed that dismissal but on the alternative ground that the matter was not ripe because the requisite NRC and Department of Interior approvals for the Lease and the waste facility had not yet been given and might never be.

STATEMENT OF JURISDICTION

Plaintiffs premised the District Court's subject-matter jurisdiction on 28 U.S.C. §§ 1331, 1343(a)(3), and 1362 and on 42 U.S.C. § 1983. Defendants, however, asserted that Plaintiffs could not satisfy Article III's standing and ripeness requirements and that therefore the District Court lacked subject-matter jurisdiction.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 inasmuch as the District Court by 13 August 2002 entered Orders disposing of all parties' claims and the District Court Clerk on 14 August 2002 entered Judgment in a Civil Case, with the Defendants-Appellants filing their Notice of Appeal on 15 August 2002.

STATEMENT OF THE ISSUES

1. DID PLAINTIFFS CARRY THEIR BURDEN TO SHOW STANDING WHERE THEY PRESENTED NO EVIDENCE THAT THEY HAVE SUFFERED A REDRESSABLE INJURY TO A LEGALLY PROTECTED INTEREST?

2. DID PLAINTIFFS CARRY THEIR BURDEN TO SHOW RIPENESS WHERE VARIOUS FEDERAL AGENCY APPROVALS NECESSARY FOR COMMENCEMENT OF PLAINTIFFS' PROPOSED NUCLEAR WASTE STORAGE FACILITY HAVE NOT YET BEEN GIVEN AND MAY NEVER BE GIVEN?

3. DID PLAINTIFFS CARRY THEIR BURDEN TO SHOW THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AND THAT THEY WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW REGARDING THEIR CLAIM THAT THE FEDERAL ATOMIC ENERGY ACT PREEMPTED THE CHALLENGED UTAH STATUTES WHERE:

(a) GOVERNING FEDERAL LAW ALREADY PROHIBITS PLAINTIFFS' PROPOSED NUCLEAR WASTE STORAGE FACILITY, AND

(b) MANY OF THE CHALLENGED UTAH STATUTES BOTH CONCERN AREAS TRADITIONALLY LEFT TO STATE REGULATION AND HAVE, AT MOST, AN INDIRECT AND INSIGNIFICANT EFFECT ON RADIOLOGICAL SAFETY DECISIONS?

STATEMENT OF THE CASE

Plaintiff Private Fuel Storage, L.L.C., a consortium of eight nuclear utilities (“the Consortium”), entered into a lease (conditionally approved by the Indian Superintendent but not yet finally approved by the Secretary of the Interior) with Plaintiff Skull Valley Band of Goshute Indians (“the Band”) to create and operate an open-air waste dump for the Nation’s entire present inventory of commercially generated spent nuclear fuel (approximately 40,000 metric tons uranium). Because the Consortium and the Band (collectively “PFS”) deemed a variety of Utah statutes a hindrance to their project, they initiated this action against a number of Utah officials (collectively “Utah”), seeking declaratory and injunctive relief on a theory of federal preemption by the Atomic Energy Act of 1954 (“AEA”).¹

PFS’s Complaint begins with the assertion that the Consortium “seeks to construct and operate a temporary spent nuclear fuel storage facility on lands leased from” the Band but that the “State of Utah has enacted several pieces of legislation in an effort to stop the project.” App. I, 2, at 16. (Citations to the Appendix appear in the following format: volume, tab, and page number. Counsel for the parties agreed on the Appendix’s content; it comprises five volumes.) The Complaint describes how the Consortium had initiated the then- and still-ongoing Nuclear Regulatory Commission (“NRC”) licensing

¹ 42 U.S.C. §§ 2011 *et seq.* PFS advanced a number of theories other than AEA preemption, but the district court did not reach those other theories in any way that matters for this appeal.

proceeding relative to the proposed facility, notes Utah's active involvement in that proceeding, and predicts that the proceeding will lead to an NRC licensing decision in 2002. *E.g., id.* at 20-21, 25, 27-28. Although the Complaint alleges in detail how the challenged statutes will interfere with PFS's efforts "to construct and operate" the proposed facility, *e.g., id.* at 17, 21, 30, 32-38,² the Complaint never alleges that those statutes are adversely impacting in any way the NRC licensing proceeding. Nor did PFS, by way of subsequently presented evidence, ever establish such an impact.

In a number of memoranda, Utah asserted that PFS lacked standing because governing federal law prohibits a waste dump of the kind PFS is promoting ("the 'lawfulness' issue");³ that the action was not ripe because agency action (by the NRC and the Department of the Interior) essential to the waste dump scheme had not yet occurred and might not occur;⁴ and that the challenged Utah statutes withstand all the federal constitutional attacks leveled at them, both because federal law prohibits a PFS-type

² For example, the Complaint asserts that "Governor Leavitt commenced an all-out war designed to prevent **construction** of the PFS" facility, App. I, 2, at 30, and that the challenged Utah statutes were "designed to prevent **construction** of the PFS" facility. *Id.* at 31 (emphasis added.)

³ The Defendants' Memorandum in Support of Their Motion for Judgment on the Pleadings, App. I, 7, at 165; Utah's Reply re Utah's Motion for Judgment on the Pleadings, App. III, 17, at 882; Utah's Rule 12(h)(3) Suggestion of Lack of Jurisdiction, App. III, 18, at 928; Utah's Reply re Utah's Suggestion of Lack of Jurisdiction, App. IV, 27, at 1160.

⁴ Utah's Rule 12(h)(3) Suggestion of Lack of Jurisdiction, App. III, 18, at 928; Utah's Reply re Utah's Suggestion of Lack of Jurisdiction, App. IV, 27, at 1160.

waste dump and because most of the challenged statutes do not address radiological safety but rather regulate the economic, environmental, and land-use issues left to state regulation.⁵

Thus, in Utah's view, the "lawfulness" issue – that governing federal law prohibits the kind of nuclear waste storage facility proposed by PFS – was of crucial significance to two fundamental issues in the case. First, because the invasion of a legally protected interest is a threshold requirement of standing, Utah asserted that PFS lacked standing to challenge statutes allegedly hindering the creation of a facility prohibited by federal law. Second, Utah also explained that the "lawfulness" issue was relevant to the merits – in that federal law cannot be deemed to preempt state laws that merely confirm what federal law already prohibits.⁶

For its part, PFS moved for a summary judgment ratifying PFS's attacks on the constitutionality of the challenged Utah statutes.⁷ In doing so, PFS adamantly insisted that the district court could not and should not resolve the "lawfulness" issue in any

⁵ (1) Utah's Response to Plaintiffs' Joint Motion for Summary Judgment; and (2) Affidavits and Appendix, App. IV, 28, at 1190.

⁶ The "lawfulness" issue arose in two contexts for purposes of this appeal – standing and AEA preemption. The issue arose in additional contexts at the district court, specifically, in the context of each of PFS's attacks (other than AEA preemption) on the constitutionality of the challenged Utah statutes, see App. IV, 28, at 1198-1203, but the district court did not address those other attacks nor premise its dispositive Order on them. Order, App. V, 40, at 1551.

⁷ App. II, 10, at 303.

context. Specifically, PFS insisted that the federal Hobbs Act precluded district court review of the validity of the NRC licensing proceeding (which validity turns on resolution of the underlying “lawfulness” issue, a pure issue of law).⁸ On the standing issue, PFS asserted that – regardless of the lawfulness of its proposed waste dump – PFS had a “legally protected interest” in seeking an NRC license for the dump and the challenged statutes invaded that “interest.”⁹ On the AEA preemption issue, PFS suggested that all the challenged Utah statutes were in some way relevant to “radiological safety” and thus

⁸ See App. I, 8, at 258-67.

⁹ E.g., App. IV, 23, at 1034-36. But PFS presented no evidence that the challenged statutes were in fact hindering the licensing proceeding and showed that only a small part of all the challenged statutes – those setting forth Utah’s “non-participation” decision – had any role at all in that proceeding. The only evidence PFS presented in support of its summary judgment motion – two declarations, one by the Consortium’s Mr. Parkyn and one by the Band’s Mr. Bear – studiously avoided any reference to any impacts on PFS’s licensing proceeding or its pre-construction “business decisions.” Declaration of John Parkyn, App. III, 15, at 874 ; Declaration of Leon Bear, App. III, 16, at 878.

PFS, however, did ask the district court to take “judicial notice” of one narrow point – that Utah in the NRC proceeding had questioned the adequacy of PFS’s security plan because a small portion of all the Utah statutes challenged in this action set forth Utah’s “non-participation” decision, that is, Utah’s decision that its police resources would not be used to provide security for the waste dump and because PFS’s security plan relied on a public response force rather than a private one. App. IV, 23, at 1028-30. Immediately prior to the submission of this Opening Brief, the first tier of NRC review – an Atomic Safety and Licensing Board – ruled in favor of the Consortium on the Consortium’s motion for a summary disposition of Utah’s point, set forth in its “Contention Security J – Law Enforcement.” The Licensing Board did so on the basis of the collateral estoppel effects of the district court’s intervening 30 July 2002 Order in this action. *In the Matter of Private Fuel Storage, L.L.C. (ISFSI)*, LBP-02-20, ____ NRC ____ (15 October 2002) and thus did not address the other issues previously presented by PFS and Utah.

that those statutes were somehow preempted even if they merely confirmed what Congress had prohibited.¹⁰

In its 30 July 2002 Order resolving most of the motions before it, the district court held that it need not resolve the “lawfulness” issue in any context.¹¹ App. V, 40, at 1555-56 ; also attached as Addendum 1. Regarding standing, the court presumed that all the challenged Utah statutes in fact were hindering the NRC licensing proceeding, that PFS “clearly” had a right to prosecute that proceeding, and that therefore PFS had standing to challenge the constitutionality of the Utah statutes. *Id.* at 1555-57. Regarding ripeness, the district court presumed that all the challenged Utah statutes in fact were hindering PFS’s pre-construction business operations and PFS’s NRC licensing proceeding and that this “present injury” rendered the action ripe for adjudication, *id.* at 1558-61, even though the NRC and the Department of the Interior (because of the “lawfulness” issue or a number of other issues) might not give final approvals required for the project to proceed. In the district court’s view, the constitutionality of the challenged statutes was “fit” for judicial review because the question of preemption presented a pure issue of law. *Id.* at 1561.

¹⁰ App. V, 34, at 1454-57.

¹¹ In the district court’s 11 April 2002 hearing on most of the pending motions, Utah’s counsel advised the court that Utah had just succeeded – over PFS’s opposition – in getting the NRC (specifically, the Commission itself) to accept the “lawfulness” issue for analysis and resolution. (As of the submission of this Opening Brief, the Commission has not yet issued a decision.) App. V, 39, at 1508.

As to the merits, that is, AEA preemption, the district court again concluded that it could resolve that issue without resolving the “lawfulness” issue. The district court so concluded on the basis of its premise that “the federal government has occupied the field of nuclear safety,” so that “any state law on the same subject” is preempted “even if harmonious with federal law,” *id.* at 1563. From this premise, the district court concluded that the “lawfulness” issue was “irrelevant,” *id.* at n. 6, deemed all the challenged statutes to address matters of “safety,” *id.* at 1564-72, and thus held all the challenged statutes preempted. *Id.* at 1572-73.¹²

On 14 August 2002, with all parties’ claims now adjudicated, the Clerk entered the Judgment in a Civil Case. App. V, 43, at 1587. On 15 August 2002, Utah filed its Notice of Appeal. App. V, 44, at 1590.

STATEMENT OF THE FACTS

The legal issues presented on this appeal lie at the intersection of three complex regulatory schemes – the AEA; the federal Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101 *et seq.* (“the NWPA”); and the Utah statutes challenged in

¹² Although this is not entirely clear from the 30 July 2002 Order, that Order appears to declare the Utah statutes unconstitutional not just to the extent they interfere with the NRC licensing proceeding or PFS’s pre-construction business activities but also to the extent they interfere with construction and operation of the waste facility. It does seem clear that the Order invalidates even those challenged statutes that do not go into operation unless and until the “lawfulness” issue is judicially resolved adverse to Utah’s position.

this action ("the challenged statutes"). Because an understanding of these statutes is crucial to a correct resolution of the issues raised by this appeal, we begin with a history of the federal statutes, followed by a statement of PFS's activities and Utah's legislative scheme.¹³

* * * * *

1. The federal government and high-level nuclear waste.

With its 1954 enactment of the AEA, Congress opened the way for the private, commercial use of nuclear power to generate electricity. The AEA created and granted licensing authority to the Atomic Energy Commission ("AEC"), the predecessor to the NRC, and the AEC used that authority by the late 1950's to license the first commercial, nuclear powered, electrical generating plants. Addendum 2, at 83.

But the use of nuclear materials in power generation had to include more than the solution of the fissionable process and the design and operation of practical and efficient nuclear power reactors; a safe, effective method of disposing of the irradiated fuel at the end of the processing stage was equally necessary because of the severe danger such fuel posed for public health and safety. This spent or irradiated fuel, which includes plutonium with "a half-life of 25,000 years," admittedly posed a "severe potential health hazard" and its disposal presented "complex technical problems."

¹³ The review that follows in the text is drawn, unless noted otherwise, from the 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." OTA-0-171. Chapter 4 of the OTA Report entitled "The History of Waste Management" is attached as Addendum 2. Other portions of the review are drawn from PFS's Complaint or other sources, as noted.

Florida Power & Light Co. v. Westinghouse Elec. Corp., 826 F.2d 239, 244 (4th Cir. 1987) (citations omitted).

As the reactors began to generate spent nuclear fuel (“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.” Addendum 2, at 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. *Id.*

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 pt. 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. *Id.* All costs of “disposal and perpetual surveillance” by the federal government were to be borne by the owners of the nuclear reactors. *Id.*

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. Addendum 2, at 85.

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.” *Id.* 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.” *Id.*

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).” *Id.* at 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.” *Id.* at 86. Because of political opposition, ERDA’s initial plans were scaled back. By 1980, repository sites in only six states were being evaluated. *Id.* at 87.

In 1976, the NRC “sought to renew [the AEC’s] earlier checkmated 1971 [Kansas] effort by planning an experimental storage depository in Michigan, but a ‘political uproar quickly brought the program to defeat again, this time even before enough drilling could be accomplished to determine whether technical flaws in the site existed.’” *Florida Power, supra*, 826 F.2d at 245.

In 1977, President Carter announced a federal spent fuel policy, “partly to ease the utilities’ growing burden of spent fuel storage.” Addendum 2, at 87. 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.” *Id.* President Carter also suspended indefinitely the “reprocessing of commercial spent fuel in the United States.” *Id.* 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. *Id.* (Although in 1981 President Reagan reversed President Carter’s policy on reprocessing, no one stepped forward to invest in new reprocessing facilities. *Id.* at 88.)¹⁴

¹⁴ In 1980, two years before enactment of the NWPA, the NRC adopted the Part 72 regulation pursuant to which PFS applied for its NRC license. This regulation was entitled “Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation (ISFSI).” 10 CFR pt. 72. According to the NRC, the ISFSI regulation was adopted because “following [President Carter’s] deferral of reprocessing of spent fuel in April 1977 came the general recognition that, regardless of future

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.

2. The federal Nuclear Waste Policy Act of 1982 and amendments.

Congress deemed the NWPA its first comprehensive treatment of the Nation's nuclear waste problem. (The AEA did not even mention nuclear waste storage or disposal in 1954 and even now, after fifty years of amendments, the AEA's references to high-level nuclear waste storage or disposal are sporadic and of minimal substance. See

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 [as an alternative to storage in water-filled basins] would be a likely additional new step in the nuclear fuel cycle," pending the SNF's ultimate disposal in a permanent repository. 45 Fed. Reg. 74,693, *74,693 (12 November 1980). Part 72 did not expressly authorize away-from-reactor ISFSIs, but the NRC, before enactment of the NWPA, interpreted that authorization into the regulation. *Id.* at 74,698. Utah has petitioned the NRC for amendment of Part 72 to bring it in harmony with the NWPA by excluding PFS-type facilities from the regulation's scope. That petition awaits the NRC's pending resolution of the "lawfulness" issue.

Addendum 3 for a listing of the those AEA references.) The original NWPA called for the creation of multiple deep geologic repositories for permanent SNF disposal and specified the processes leading to that end. The Act also encouraged expansion of at-reactor SNF storage, provided on an “emergency” basis for federal acceptance of a limited amount of commercial SNF for temporary storage at a federal facility, and called for the study of federally owned and operated monitored retrievable storage facilities (a new name for the RSSF program).

In 1982, Congress was so confident about its program for a permanent repository that NWPA directed the Department of Energy (“DOE”) to enter virtually immediately into contracts with the nuclear utilities obligating DOE to begin taking the utilities’ SNF by January 1998. (The contracts also provided, through a ratepayer surcharge, for the funding of federal SNF nuclear waste management efforts.)¹⁵

No nuclear utility ever sought the benefits of the federal “emergency” storage program. Regarding the monitored retrievable storage (“MRS”) concept, the Department of Energy recommended sites in Tennessee, touching off intense political opposition led by that state’s then-Governor LaMar Alexander.¹⁶

¹⁵ See Complaint, App. I, 2, at 8-9; *see also* 42 U.S.C. § 10222(a), (c), (d), and (e).

¹⁶ See *Tennessee v. Herrington*, 806 F.2d 642 (6th Cir. 1986); Noah Sachs, *The Mescalero Apache Indians and Monitored Retrievable Storage of Spent Nuclear Fuel: A Study in Environmental Ethics*, 36 Nat. Resources J. 881, 883 n.4 (1996) (hereafter “Sachs-Mescalero”).

Congress revisited the NWPA in 1987. It limited investigation of permanent repository sites to Yucca Mountain, Nevada.¹⁷ Tennessee had sufficient political muscle in Congress to take itself out of the MRS bull's-eye; Congress conditionally called for the creation of an MRS but specified that selection of a site would start from scratch, with Tennessee being on the same footing as all other states.¹⁸ In this context, Congress also created the office of Nuclear Waste Negotiator, whose job it was to find a state or Indian reservation willing to take SNF on an interim or temporary basis pending completion of the permanent repository.¹⁹

The Nuclear Waste Negotiator appeared to be making some progress with the Mescalero Apache tribe, but again local political opposition arose. New Mexico Senator Bingaman succeeded in 1993 in pushing through federal legislation requiring the approval of surrounding off-reservation communities for any on-reservation DOE nuclear waste storage facility.²⁰ Because New Mexico opposed the contemplated DOE facility, this legislation effectively killed the Nuclear Waste Negotiator's Mescalero initiative.

¹⁷ 42 U.S.C. § 10172.

¹⁸ 42 U.S.C. § 10162(a).

¹⁹ Complaint, App. I, 2, at 5; 42 U.S.C. §§ 10242 and 10243; Sachs-Mescalero, at 883.

²⁰ Sachs-Mescalero, at 885 n.18.

Indeed, because all states opposed the presence of an MRS, the Office of Nuclear Waste Negotiator failed to achieve its objective, and in 1995 Congress terminated that Office.²¹

3. Initial efforts towards a private, away-from-reactor, SNF waste facility.

After DOE's failure in New Mexico, however, and with the excruciatingly slow pace of progress towards a permanent repository, most of the Nation's nuclear utilities banded together to form a consortium, the stated purpose of which was to negotiate a deal with the Mescalero whereby the consortium would create a private waste dump on that reservation.²² The consortium had the support of the Mescalero's powerful tribal chairman, Wendell Chino, but the proposal caused conflict and deep divisions between tribal members.²³ (This same pattern was to repeat itself with the Band in Utah a few years later.²⁴) After three and one-half years of effort, negotiations broke down, with the Mescalero electing not to pursue the matter further.²⁵

²¹ 42 U.S.C. § 10250.

²² Sachs-Mescalero, at 885.

²³ *Id.* at 887-890.

²⁴ Judy Fahys, *Family Feud: Goshutes Split Over Nuclear Waste Site*, Salt Lake Tribune, 18 August 2002, available at <http://www.sltrib.com/2002/aug/08182002/utah/762819.htm>; Dan Egan, *A Tribe Divided Over Waste: Plan to Store Nuclear Materials on Reservation Sows Rift*, Milwaukee Journal Sentinel, 28 September 2002, available at <http://www.jsonline.com/news/nat/sep02/83761.asp>.

²⁵ Sachs-Mescalero, at 886.

At the beginning, the Mescalero consortium had thirty-three members; by the time negotiations ended in April 1996, only eleven members.²⁶ After the New Mexico failure, however, a few members insisted on pursuing the idea of a private nuclear waste dump on an Indian reservation. Chief among those was Northern States Power (now Xcel), owner/operator of three reactors in Minnesota. Minnesota is one of 33 states that at one time or another chose the nuclear option for the generation of electricity. (Both New Mexico and Utah always declined that option.) But like the other 32 SNF-producing states,²⁷ Minnesota strongly preferred (and prefers) out-of-state storage over in-state storage. Indeed, Minnesota became so uncomfortable with in-state storage of the increasing amounts of its own SNF that the state legislature in 1994 enacted a statute limiting any in-state storage of the kind proposed for Utah to just seventeen casks.²⁸ (PFS's Utah waste facility is designed and hopes for 4,000 casks.) Northern States Power has cited this Minnesota statute as a primary reason for its vigorous support of the Consortium.²⁹

²⁶ *Id.* at 885, 886 n.26.

²⁷ From this point forward in the brief, all references to SNF are to commercially generated SNF, unless expressly noted otherwise. SNF is usually measured in metric tons uranium ("MTUs").

²⁸ Minn. Stat. § 116C.771 (1994); John Helland and Mike Bull, *Nuclear Waste Dry Cask Storage, Information Brief*, Minnesota House of Representatives, at 3 (2001).

²⁹ Sachs-Mescalero, at 885 n.19.

4. The Consortium, the Band, and the Lease.

The nuclear utilities, including Northern States Power, pursued their private waste dump idea by forming the Consortium (with eight utility members) and pursuing a lease deal with the Band. The Band has approximately 124 members, of whom approximately 75 are adults and therefore members of the Band's General Council.³⁰ The Band's reservation sits about 50 miles west of the center of Salt Lake City, but only a small number of tribal members (less than 25, including children) reside on the reservation.³¹

Three tribal officers executed the PFS lease ("the Lease") on 20 May 1997 (with two of the three having since repudiated the waste dump³²). Although the Lease calls for creation of an above-ground SNF storage facility for all of the Nation's present inventory of SNF (40,000 metric tons uranium) and thus for a facility more than half as large as the Nation's proposed deep geologic repository at Yucca Mountain, the Indian Superintendent in Ft. Duchesne affixed his approval to the Lease three days after the Consortium and the Band signed it.³³ That approval is conditional, being subject to final Secretary of Interior approval or disapproval (slated for after the NRC issues a license for the PFS facility, if it ever does).

³⁰ App., I, 3, at 116.

³¹ *Id.*

³² Fahys, *supra*, n. 24.

³³ App. I, 3, at 116.

Tribal members opposed to the waste dump and Utah pursued judicial and administrative challenges to the Lease's conditional approval. When Utah sought to intervene in the lease review process, Utah's federal district court (Judge Kimball) held that Utah did not have the requisite standing; this Court then affirmed that dismissal but on the alternative ground that the matter was not ripe because the requisite NRC and Department of Interior approvals for the Lease and the waste facility had not yet been given and might never be. *Utah v. United States Dept. of the Interior*, 210 F.3d 1193, 1198 (10th Cir. 2000) ("*Utah II*"). Tribal members' administrative challenges continue and are presently before the Interior Board of Indian Appeals.³⁴

5. Utah's legislation relative to high-level nuclear waste.

Utah has consistently opposed an away-from-reactor, SNF storage facility. In that respect, Utah is like every other state – as evidenced by: (1) the efforts of all other states targeted for an "interim" facility: Kansas in 1970, Michigan in 1976, Tennessee in the mid-1980s, New Mexico in the late 1980s and early 1990s³⁵; (2) the Nuclear Waste Negotiator's failed efforts to entice any state to accept such a facility; and the efforts of

³⁴ *Bullcreek et. al v. Western Regional Director, Interior Board of Indian Appeals*, Docket No. IBIA 02-8-A.

³⁵ Illinois is an SNF-producing state, with eleven commercial reactors. An Illinois reprocessing plant known as GE Morris, adjacent to a commercial reactor known as Dresden 2 & 3, accepted some SNF in preparation for reprocessing, which never occurred, and accepted some for interim storage. Illinois supported storage at GE Morris for in-state SNF but tried to prohibit storage there of out-of-state SNF. *See Illinois v. General Elec. Co.*, 683 F.2d 206, 208-09 (7th Cir. 1982).

all states targeted for the permanent repository, most notably Nevada for the past two decades.

Utah's responded with "two step" legislation. The "Step One" provisions prohibit – consistent with governing federal law's prohibition of private, away-from-reactor, SNF storage facilities – placement of such a facility in Utah. The "Step Two" provisions – if and only if such a prohibition were construed out of federal law – go into effect to regulate impacts on the State's and its citizens' economic, environmental, and land-use interests implicated by such a facility. That two-step approach is important to understand. (The challenged Utah statutes are reproduced in Addendum 6.)

For Step One, the Utah Legislature took the well-founded position that federal law prohibits a privately owned, away-from-reactor, SNF storage facility, U.C.A. § 19-3-302 (2), and, on that basis, prohibited such a facility in Utah, U.C.A. § 19-3-301(1), and prohibited various activities designed to accomplish such an unlawful enterprise. U.C.A. §§ 19-301(9) and 17-34-1(3).

But the Legislature also recognized that the "authority to grant a license [for a privately owned, away-from-reactor, SNF storage facility might be] upheld by a final judgment of a court of competent jurisdiction." U.C.A. § 19-3-301(2)(a)(ii). In that case, the rules of the game in Utah change, and Step Two kicks in. In Step Two, Utah does not prohibit such an SNF storage facility but rather exercises its authority to protect local economic, environmental, and land-use interests. The Step Two provisions are of *no* force

or effect until a judicial ruling adverse to Utah's position on the "lawfulness" issue.

(After such a ruling, the Step One provisions are of *no* force or effect.)

The resulting "fall-back" or Step Two regulatory scheme requires the promoter of a private nuclear waste dump, affected local government entities, and various state agencies to comply with certain requirements. For example, a county hosting such a nuclear facility has to first amend its general plan to "include specific provisions related to" such a facility, in conformity with various specific guidelines. U.C.A. § 17-27-301(3). Another example is what the parties refer to as the "municipal contract" provisions. As long as the NRC's licensing authority has not been "upheld by a final judgment of a court of competent jurisdiction," U.C.A. § 19-3-301(2)(a)(ii), and therefore the flat prohibition remains in effect, local government cannot contract to provide municipal services to the prohibited facility. But, in the event that flat prohibition and its basis go by the wayside through due process, then local government can contract to provide such services (most important here, law enforcement services) upon compliance with the fall-back regulatory scheme. *E.g.*, U.C.A. § 17-27-102(2) (upon compliance "with the mandatory provisions of this part," a county's "agreement or contract to provide goods, services, or municipal-type services to any storage facility . . . may be executed [and] implemented.")

6. Activities in the NRC licensing proceeding.

During the same period of this legislative activity, the Consortium was prosecuting its NRC licensing proceeding – and continues to do so. Utah's first act, after its

intervention, was to raise federal law's prohibition of a PFS-type facility. The Licensing Board deemed itself unauthorized to resolve such an issue, and Utah had no appeal of right to the Commission. *In the Matter of Private Fuel Storage, LLC (ISFSI)*, LBP-98-7, 47 NRC 142, 183-84 (1998). As noted above, Utah just recently persuaded the Commission – over PFS's objections – to address the "lawfulness" issue.

The Licensing Board is now slated (this date keeps getting bumped back) to issue its final licensing decision by 5 December 2002. The inevitable appeal to the Commission must then be filed within fifteen days. 10 CFR 2.786(b). There is no schedule for the Commission's resolution of the appeal (which, in turn, is subject to review either by this Court or by the Court of Appeals for the District of Columbia). Nor is there any schedule for the Department of the Interior's final approval/disapproval decisions.

SUMMARY OF THE ARGUMENT

At PFS's insistence, the district court undertook an extensive constitutional overhaul of a broad range of Utah statutes. It did so despite the fact that the Utah statutes may never have any impact on PFS's ability to operate its proposed SNF facility – because PFS has not received the agency approvals it needs and because federal law already prohibits a PFS-type facility. The district court also did its overhaul on the basis of a series of factual speculations or presumptions that find no basis in the summary judgment record below. The district court's decision should be reversed on three separate grounds.

First, PFS failed to carry its burden of establishing standing. If federal law independently prohibits a PFS-type facility (and the district court refused to conclude otherwise), then PFS has not identified a cognizable legal injury that is causally connected to the Utah statutes. Controlling precedent holds that the mere procedural interference with an application for a government license or other benefit is not a cognizable injury in the abstract, and that is all that PFS has asserted here. Moreover, any such injuries to PFS are fairly traceable to federal law's broader prohibition of private, away-from-reactor facilities, not to the Utah statutes. And in any event, there simply is no evidence in the record to support a finding that PFS has suffered any such injuries – even if they were cognizable and traceable to the Utah statutes. Finally, PFS cannot establish any concrete injury to its interest in constructing and operating the proposed waste facility itself – because that facility is legally barred by the NWPA.

Second, PFS failed to carry its burden of establishing ripeness. The court below erred in ignoring the crucial fact that PFS is asking the courts to invalidate a comprehensive state statutory scheme whose constitutionality need not be decided unless and until the pending government approvals are resolved in PFS's favor. Ripeness doctrine clearly counsels against the premature resolution of constitutional issues, particularly where (as here) those issues are inseparably bound up with questions presented in an ongoing administrative proceeding whose resolution may moot the need to resolve such issues. Under the circumstances, PFS is in no position to raise its supposed "hardship" as a ground for a premature decision: the unproven, amorphous

“hardship” that the district court ascribed to PFS had no support in the record and is not enough to support a premature constitutional overhaul of the Utah statutory scheme.

Finally, the AEA does not preempt the challenged statutes. Because the NWPA prohibits a PFS-type waste dump, it is nonsensical to assert that federal law operates to preempt state laws prohibiting just what federal law prohibits. And even assuming federal authorization for (rather than prohibition of) the waste dump, federal law does not preempt substantial portions of the challenged statutes – such as those regulating the economic, environmental, and land-use impacts of the dump.

ARGUMENT

STANDARD OF REVIEW.

On appeal from a district court order granting a motion for summary judgment, this Court reviews the entire record *de novo* in the light most favorable to the appellant, drawing all inferences favorable to the appellant and according no deference to the district court’s decision. *Hysten v. Burlington Northern and Santa Fe Ry. Co.*, 296 F.3d 1177, 1180 (10th Cir. 2002); *In re Western Pacific Airlines, Inc.*, 273 F.3d 1288, 1291 (10th Cir. 2001); *Seamons v. Snow*, 206 F.3d 1021, 1026 (10th Cir. 2000). When the moving party bears the burden of proof on any material fact, summary judgment is properly sustained only when that party has presented evidence meeting that burden; otherwise, summary judgment must be reversed. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Albee Tomato, Inc. v. A.B. Shalom Produce Corp.*, 155 F.3d 612, 617-18 (2nd Cir. 1998.)

I.

PFS LACKS STANDING BECAUSE IT HAS PRESENTED NO EVIDENCE THAT IT HAS SUFFERED A REDRESSABLE INJURY TO A LEGALLY PROTECTED INTEREST.

As the district court acknowledged, PFS has standing to challenge the Utah statutes at issue here only if it carries the burden of establishing (1) a concrete injury to a legally protected interest; (2) a causal relationship between the injury and the Utah statutes; and (3) a likelihood that the injury will be redressed by a favorable decision. Order, App. V, 40, at 1554-55; *see also Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590, 593 (10th Cir. 1996). In the proceedings below, PFS initially claimed that the challenged statutes injured its interest in constructing and operating the proposed waste facility.³⁶ Utah responded, however, by demonstrating that the private, off-site facility proposed by PFS was prohibited by federal law under the NWPA – so that any interference with PFS’s construction and operation of such a facility was not an injury to a legally protected interest and could not be redressed by any decision of the court.³⁷ PFS then shifted grounds and identified a very different injury—the challenged statutes’ *procedural* interference with PFS’s prosecution of the NRC licensing proceeding (instead of any *substantive* interference with the construction or operation of the facility).³⁸

³⁶ Complaint, App. I, 2, at 17, 21, 30-38.

³⁷ See n. 3, *supra*.

³⁸ E.g., Plaintiffs’ Response to Defendants’ Suggestion of Lack of Jurisdiction, App. IV, 23, at 1034-36.

The district court accepted this argument. It concluded that the procedural interference with PFS' "licensing efforts before the NRC" was a sufficient injury in and of itself to establish standing. Order, App. V, 40, at 1555. It did so without any attempt to evaluate Utah's legal argument that PFS's proposed facility is legally barred by the NWPA, and without identifying any evidence in the record of PFS's supposed procedural injury.

The district court erred in four respects. First, controlling precedent holds that the mere procedural interference with an application for a government license or other benefit is not a cognizable injury in the abstract; under these cases, the district court erred in holding that PFS's standing could be established without any inquiry into whether PFS's proposed facility was legally barred by federal statute. Second, even if PFS's alleged procedural injuries were legally cognizable, PFS's standing would fail because any such injuries are fairly traceable to the NWPA's broader prohibition of private, away-from-reactor facilities, not to the Utah statutes. Third, there simply is no evidence in the record to support a finding that PFS has suffered any such injuries – even if they were cognizable and traceable to the Utah statutes. Finally, PFS cannot establish any concrete injury to its interest in constructing and operating the proposed waste facility itself – because that facility is legally barred by the NWPA.

A. The Supposed Interference With PFS's NRC License Application is Not a Cognizable Injury Traceable to the Utah Statutes.

The district court found standing only by embracing the expansive conception of *procedural* injury offered by PFS. It concluded that PFS had a “right recognized in law to seek a license from the NRC free from alleged state interference,” even if PFS has no “right to own and operate a SNF facility.” Order, App. V, 40, at 1556. In other words, the district court held that the question “whether the Plaintiffs will be successful in their effort to have the NRC grant them a license does not affect their *legal right to make that effort.*” *Id.* (emphasis added).

The district court's treatment of PFS's purported procedural injury runs afoul of controlling precedent. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 (1992), the Supreme Court held that a party cannot establish standing based only on an injury to a “procedural right” – that there is no “abstract, self-contained, noninstrumental ‘right’ to have the Executive observe the procedures required by law.” Under *Lujan*, a party has standing to “enforce procedural rights” only if it can show that the procedures in question “protect some threatened *concrete interest* of his *that is the ultimate basis of his standing.*” *Id.* at 573, n. 8 (emphasis added). Put differently, a plaintiff has standing to challenge a “procedural requirement” only if the “disregard” of that requirement “could impair a concrete interest” of the plaintiff. *Id.* at 572.

Thus, the *Lujan* decision makes clear that standing may be based on interference with a procedural interest only where the procedures in question are a means to an

ultimate, substantive end. But where the party asserting a procedural interest is ultimately ineligible for the substantive benefit at issue, there is no concrete, redressable injury and accordingly no standing.

This Court's decision in *In re Integra Realty Resources, Inc. v. Fidelity Capital Appreciation Fund*, 262 F.3d 1089 (10th Cir. 2001), is to the same effect. In that case, certain defendants opted out of a settlement with the bankruptcy trustee. Thereafter, the district court entered an order allowing certain settlement payments to be released immediately to the trustee. The defendants saw this order as inflicting an actual injury upon them; the defendants contended – and no one disagreed with them – that as a matter of fact “this order enables the Trustee to generate a war chest of funds which will inevitably make it more difficult for [the defendants] to defend their cases.” *Id.* at 1102. When the defendants challenged the order, the trustee objected to their standing, arguing that defendants “lack any legally protected interest that could support the ‘injury in fact’ element necessary to demonstrate standing.” *Id.*

This Court acknowledged the actuality of the injury suffered by the defendants – noting that they had shown “the loss of some practical or strategic advantage in litigating their case.” *Id.* Yet the Court held that such “tactical disadvantage” did not amount to “legal prejudice” or injury to a legally protected interest, and thus that the defendants “who opted out of the settlement lack standing to appeal.” *Id.* at 1103.

The district court's finding of standing falls flat under *Lujan* and *In re Integra Realty*. PFS clearly cannot assert an abstract procedural “right recognized in law to seek

a license from the NRC free from alleged state interference.” Order, App. V, 40, at 1556.

As in *In re Integra*, PFS has shown at most “merely the loss of some practical or strategic advantage in litigating their case” before the NRC. Such “injury” is not legally protectable. PFS’s standing must be based on a showing that any injury to its NRC application affects a “concrete interest” in building and operating the proposed SNF storage facility.³⁹ Because (as shown below) PFS’s “right” to build and operate such a facility fails as a matter of law, PFS cannot establish that it has a “concrete interest” that could be impaired by the Utah statutes, and its standing fails as a matter of law.

B. PFS’s Purported Injuries are Self-Inflicted and Not Traceable to the Utah Statutes.

A plaintiff’s standing under Article III requires a showing not only of a legally cognizable injury but also that such injury is fairly traceable to the defendant’s challenged conduct. In other words, as this Court has indicated, standing is established only if there is “a causal relationship between the injury and the challenged conduct.” *Wilson, supra*, 98 F.3d at 593.

PFS’s standing also fails under this element. Even if PFS’s procedural injuries were legally cognizable, they nevertheless would not be sufficient to establish standing because they are traceable not to the Utah statutes in question but to the NWPA’s broader

³⁹ Indeed, if a mere procedural interest were enough, any citizen with a philosophical objection to the Utah statutes could challenge them in court. Standing doctrine precludes the federal courts from becoming embroiled in such philosophical debates.

prohibition of private, away-from-reactor facilities. Put differently, any causal chain linking PFS's supposed injuries to the Utah statutes is broken by the intervening prohibition of the NWPA.

Consider the district court's characterization of the injuries suffered by PFS: the district court held that the Utah statutes harmed PFS by their purported "interference" with PFS's application for a license from the NRC. Order, App. V, 40, at 1555-56. Any such injury, however, is not properly attributable to the Utah statutes but to the NWPA. If (as demonstrated below) the NWPA independently (and flatly) prohibits the private, away-from-reactor facility proposed by PFS, then the real "interference" with PFS's application is traceable to the broad prohibition of the NWPA, not to the narrower limitations of the Utah statutes. The Utah statutes may make PFS's application for a nuclear waste facility **more difficult**, but the NWPA makes such a facility **impossible**, and that effect breaks the causal connection to Utah law.

Indeed, this Court has found standing lacking in closely analogous circumstances. In two important cases, this Court rejected a plaintiff's standing to challenge one provision of a statutory scheme where the injuries suffered by the plaintiff would have been incurred under another, broader provision. *See Wilson, supra*, 98 F.3d at 593; *Fuller v. Norton*, 86 F.3d 1016, 1027 (10th Cir. 1996). In *Fuller*, the trustee of an employee welfare benefit plan sponsored by a multiple employer welfare arrangement (MEWA) filed a declaratory judgment action seeking to challenge a Colorado law exempting MEWAs established in or before 1982 (but not after) from Colorado insurance

regulations. Although the plaintiff MEWA was established after 1982 and thus was injured in the sense of being subject to Colorado insurance regulations, this Court found that such injuries were not causally connected to the “before 1982/after 1982” provision but to another provision of the statute. 86 F.3d at 1027. Specifically, this Court noted that the plaintiff MEWA would not have been exempt from Colorado insurance regulations under a broader provision limiting the exemption to entities “‘sponsored and maintained by an association which ... [h]as been in existence for a period of at least ten years.’” *Id.* Because the plaintiff did not satisfy this condition for an exemption, this Court held that plaintiff lacked standing to challenge the statute’s distinction between pre- and post-1982 entities. The necessary causation was lacking – as the plaintiff “still would not fulfill the remaining requirements of the Colorado statute” even if the challenged provisions were struck down. *Id.*

The Court’s analysis in *Wilson* is to the same effect. In that case, plaintiffs sought to challenge under the Fair Housing Act (FHA) the Brigham Young University (BYU) housing requirement of gender-segregated apartments, alleging that they had been denied the right to access defendants’ apartments on the basis of their gender. (One plaintiff was a male who had been denied a room in one of defendants’ all-female apartments; another was a female who had been denied a room in one of defendants’ all-male apartments.) 98 F.3d at 592.

There was no dispute that this injury was in some sense related to BYU’s requirement of gender-segregated apartments, but this Court nevertheless found the

causation element of standing to be lacking. It held that plaintiffs lacked standing to challenge the BYU regulation under the FHA's non-discrimination provisions because there was a supervening, independent cause of plaintiffs' injury – the plaintiffs' failure to qualify for the apartments in question under a broader provision that permits landlords "to give preference to college students over non-students." *Id.* at 594. Specifically, the Court explained that this broader prohibition severed the causal chain of plaintiffs' injury:

Because plaintiffs were not BYU students, the ownership and/or operation of gender-segregated apartments reserved solely for BYU students could not have caused plaintiffs to lose the opportunity to rent the apartments. As non-students, plaintiffs lack standing to bring their gender-discrimination claims because even in the absence of the challenged gender discrimination they would not have qualified to rent the student apartments.

Id.

The same analysis defeats PFS's standing here. Because the NWPA flatly prohibits PFS's private, away-from-reactor facility, the Utah statutes could not have interfered with PFS's application for a license to operate such a facility. As a private party seeking to operate an away-from-reactor facility, PFS lacks standing to challenge the Utah statutes because, even in the absence of the Utah statutes, PFS may not build and operate the proposed SNF facility. *See also International Union v. Johnson*, 674 F.2d 1195, 1199 (7th Cir. 1982) (holding that plaintiffs lacked standing to challenge pregnancy leave limitations on unemployment compensation where plaintiffs were "independently ineligible for benefits because they were not actively seeking work during their pregnancy leave," as required under the statute; explaining that under such circumstances plaintiffs

“have failed to carry their burden of showing that their failure to secure unemployment benefits results from the enforcement of the pregnancy-leave provisions”).

C. There is No Evidence in the Summary Judgment Record to Establish Any Actual Adverse Impact on the PFS Licensing Proceeding.

The district court’s finding of standing also fails on the alternative ground that there is no evidence in the summary judgment record below to support the conclusion that PFS actually suffered any such procedural injury. The court *presumed* that PFS had suffered such injury in the form of “interference” with its NRC application.⁴⁰ Order, App. V, 40, at 1555-56. But PFS failed to present any actual evidence to support such presumed injuries, and accordingly the district court’s finding of standing fails even assuming *arguendo* that procedural injuries might be enough to establish standing.

Because the elements of standing are “an indispensable part of the plaintiff’s case,” a plaintiff who moves for summary judgment bears the burden of “set[ting] forth’

⁴⁰ In so presuming, the district court went counter to settled law that a federal court will not presume any aspect of subject-matter jurisdiction; just the contrary, the court will presume no jurisdiction until the plaintiff establishes otherwise.

Since federal courts are courts of limited jurisdiction, we **presume no jurisdiction exists absent an adequate showing by the party invoking federal jurisdiction**. If jurisdiction is challenged, the burden is on the party claiming jurisdiction to show it by a preponderance of the evidence. Thus, [plaintiffs] bear the burden of alleging “the facts essential to show jurisdiction” and supporting those facts with competent proof.

U.S. ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc., 190 F.3d 1156, 1160 (10th Cir. 1999) (emphasis added). See also *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103-104 (1998); *Table Bluff Reservation v. Phillip Morris, Inc.*, 256 F.3d 872, 882 (9th Cir. 2001) (“Federal courts are presumed to lack jurisdiction, unless the contrary appears affirmatively from the record. . . . The plaintiff has the burden of establishing standing . . .”).

by affidavit or other evidence ‘specific facts’” sufficient to establish those elements. *Lujan v. Defenders of Wildlife, supra*, 504 U.S. at 561. At the summary judgment stage, in other words, the plaintiff may not rest on “‘mere allegations’ of injury, causation, and redressability,” but must support those elements with affirmative evidence. *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1280 (10th Cir. 2002).

PFS made no attempt to carry that burden. It failed to present a single affidavit to establish any hindrance to its NRC application caused by the Utah statutes. It did so, moreover, in the face of a record showing that the NRC licensing proceeding is proceeding apace. PFS’s own Complaint says that the NRC proceeding is moving ahead to a licensing decision in 2002, and Utah’s Answer agrees: “[The NRC] licensing proceeding . . . has been rolling inexorably forward ever since [its inception] toward a foreordained destination no observer can fail to see, issuance of a license.”⁴¹ Complaint, App. I, 2, at 6; Utah’s Answer, App. I, 3, at 114 .

In the proceedings below, PFS offered two grounds for excusing its failure to present any affidavits establishing injury: (1) that the mere allegations of harm in its Complaint were sufficient; and (2) that the court could take “judicial notice” of the effect

⁴¹ That result is foreordained not because of the merits of PFS’s application but because of the fact that “the NRC has long since become (like the AEC before it became) a compliant tool of the industry.” Utah’s Answer, App. I, 3, at 114.

In this light, Utah anticipates that – despite the strength of the “lawfulness” issue in favor of Utah – the NRC (the Commission) will rule on that issue in favor of PFS and may even do so after Utah files its Opening Brief and before PFS files its Brief in response.

of one provision of the challenged Utah statutes on the NRC proceeding. *See* Plaintiffs' Response to Defendants' Suggestion of Lack of Jurisdiction, App. IV, 23, at 1028-30. Both arguments are misguided.

On the first point, PFS argued that although PFS had filed a motion for summary judgment, Utah's challenge to PFS's standing should be taken as a motion to dismiss – and that the Complaint's allegations should be accepted as true, making unnecessary any affirmative evidence of a redressable injury. *See id.* at 1028, n. 4 (asserting that “a plaintiff can rest on the allegations of the Complaint where, as here, *Defendants* have not moved for summary judgment”) (emphasis added). This argument, of course, is fundamentally misguided. The litigation was at the summary judgment stage precisely because PFS had taken it there. Because PFS's standing was an integral part of its alleged right to prevail on its summary judgment motion, PFS could not credibly argue that the standing issue was somehow back at the pleading stage and only the merits of PFS's claims were at the summary judgment stage. As the plaintiff and the summary judgment movant, PFS bore the burden of proof on the key standing question of whether it had suffered redressable injury; thus, PFS was not entitled to summary judgment when it failed to present evidence meeting that burden. *See Albee Tomato, Inc., supra*, 155 F.3d at 617-18. The district court clearly erred in drawing an inference of injury in the absence of any evidence; if there was any inference to be drawn, it should have been in favor of Utah as the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

On the “judicial notice” point, PFS suggested that the court should “take judicial notice of the fact that in the NRC licensing proceeding” Utah argued that “one of the provisions of the challenged Utah legislation prohibits the provision of law enforcement services to the proposed facility site” and that “PFS should be denied a license because it cannot demonstrate adequate security for the facility.” Plaintiffs’ Response to Defendants’ Suggestion of Lack of Jurisdiction, App. IV, 23, at 1030. *See* note 9, *supra*, and note 42, *infra*. This argument is equally unavailing. First, the mere fact that Utah raised the “municipal contract” provisions to the NRC says nothing about whether the provision itself produced any actual, cognizable injury to PFS. Again, there is absolutely no evidence in the record of such injury, and it cannot be presumed from a cold record merely indicating that Utah raised the argument.⁴²

Second, even assuming that the “municipal contract” provisions could be shown to have produced some injury to PFS’s NRC application, such injury at most would give PFS standing to challenge just those provisions – not the Utah statutory scheme in its entirety. Standing to challenge one statutory provision does not operate to confer standing to challenge a different statutory provision. That is because “standing is not dispensed in gross,” *Lewis v. Casey*, 518 U.S. 343, 358 n. 6 (1996), as this Court recently

⁴² *See* n. 9, *supra*. The Licensing Board was moving ahead to resolve the contention surrounding the “municipal contract” provisions when, because of the district court’s intervening 30 July 2002 Order, the Licensing Board concluded that collateral estoppel provided an adequate and independent ground for ruling in the Consortium’s favor.

demonstrated in *Essence, Inc. v. City of Federal Heights, supra*, 285 F.3d at 1280-91 (holding that plaintiffs challenging city code regulating nude dancing lacked standing to challenge the “disability” provisions and the “revocation” provisions of the Code but that they did have standing to challenge other provisions). Thus, even assuming that the “municipal contract” provisions are in fact hindering the NRC proceeding, that assumption provides PFS with no basis for attacking all the numerous other challenged Utah statutes – none of which has played any demonstrated role before the NRC.

D. PFS Has No Legally Protected Interest in Building and Operating a Private, Off-Site Storage Facility Because Such a Facility is Prohibited by Statute.

Because PFS’s purely procedural injuries are neither legally cognizable nor adequately supported by the record, PFS’s standing turns on whether PFS has the interest that it identified initially in the proceedings below – an interest in constructing and operating the proposed SNF facility. For these reasons, this Court ultimately must decide whether such an interest is a legally protected one. If federal law prohibits the facility proposed by PFS, then PFS has no cognizable injuries and thus no standing.

1. This Court must determine whether Congress prohibited PFS’s proposed facility in order to determine the threshold jurisdictional question of standing.

The pivotal “lawfulness” issue must be decided in order to determine the threshold jurisdictional question of standing, and that issue cannot be avoided by the district court’s facile assertion that standing ordinarily does not require a showing that the plaintiff “will succeed on the merits.” Order, App. V, 40, at 1556. First, it should be noted that the lawfulness of the proposed PFS facility is not the ultimate question on the merits

presented in this case. Instead, the ultimate merits question here is whether the challenged Utah statutes are preempted. The district court was simply mistaken in suggesting that Utah was arguing that PFS's standing "depend[s] on whether [PFS] can demonstrate that [it] will succeed on the merits." *Id.* (quoting *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997)).

It is true that the lawfulness of the proposed PFS facility is related to the preemption issue presented on the merits of this case, just as it is true that the lawfulness question is also relevant to PFS's licensing proceeding before the NRC. But it is hardly surprising that the purely legal issue of Congress's intent regarding a PFS-type facility overlaps with PFS's standing.⁴³ Nor does such overlap excuse the court of its obligation

⁴³ In the district court, PFS persisted in refusing to acknowledge that the answer to a pure legal question can be applied to resolve a number of different practical issues, in a number of different fora. Thus, PFS refused to speak of the "lawfulness" issue as a pure question of law about Congress's intent regarding a PFS-type facility but always spoke as if the issue were solely a question of the scope of the NRC's jurisdiction and licensing authority. To correct PFS's refusal and the resulting confusion, we note these simple points:

The "lawfulness" issue constitutes a pure legal question – did Congress prohibit a private, away-from-reactor, SNF storage facility? To answer that question "yes" or "no" is to resolve **no** practical issue; it is simply to answer a pure legal question. The answer, of course, may then be **applied** in the process of resolving any number of practical issues – and that application may occur in any number of different fora. Here are three such practical issues (there are more):

1. As a result of the challenged Utah statutes, has PFS suffered an actual injury to a legally protected interest so as to give PFS standing to attack those statutes?
2. Are the challenged Utah statutes in harmony with the federal law governing the storage and disposal of spent nuclear fuel (so as to be immune to any preemption attack)?
3. Will a license that the NRC may issue in the future for the Skull Valley facility be an invalid license because issued for a facility prohibited by Congress?

This Court has before it now the first of those three practical issues – whether PFS

to decide a legal question that is of crucial importance to plaintiffs' standing. As the district court itself acknowledged, the courts have long recognized that there are instances in which a standing question may depend on the resolution of an issue that is connected to "the merits of the underlying claim." Order at 6. Indeed, this Court so recognized in *Utah v. Babbitt*, 137 F.3d 1193, 1207 n.20 (10th Cir. 1998), and held that it was "appropriate to resolve the [key] legal question" for standing purposes even though "the standing inquiry overlaps with the merits of the plaintiff's claim."

This is just such a case, and the court below erred in suggesting that it could avoid its obligation to determine whether PFS's interest in operating an off-site SNF facility is "legally protected." See Order, App. V, 40, at 1556 ("The question of whether Plaintiffs have a right to own and operate a SNF facility will be resolved by the NRC (with the right of appeal to the appropriate Court of Appeals) and not by this court.") Federal courts are duty bound to determine their own subject-matter jurisdiction, including the plaintiff's standing. When the plaintiff's standing turns on a pure question of law, the federal court must resolve that question.

has a legally protected interest and thus standing. The Court can rule on that practical issue only by answering the "lawfulness" issue. If this Court resolves the first practical issue, the standing issue, (and also the ripeness issue) in favor of PFS, then this Court will have before it the second of the three practical issues – whether the challenged Utah statutes are in harmony or in conflict with the relevant federal law – and this Court's prior resolution of the "lawfulness" issue will come into service again.

Importantly, this Court has no need to resolve the third practical issue – the scope of the NRC's jurisdiction and licensing authority. Nothing before this Court in this appeal requires resolution of that third practical issue.

That point is made well both in this Court's decision in *Utah v. Babbitt, supra*, 137 F.3d 1193, and in the Federal Circuit's decision in *Arjay Associates, Inc. v. Bush*, 891 F.2d 894 (Fed. Cir. 1989). In *Utah v. Babbitt*, the plaintiffs contended that they had standing to challenge Interior's denial of their "right" to participate in a wilderness inventory process under FLPMA. 137 F.3d at 1206-07. Interior said that FLPMA accorded no such right. Although recognizing that to do so overlapped with a resolution of the plaintiffs' claims on the merits, *id.* at 1207 n.20, this Court squarely addressed for standing purposes the legal question arising under FLPMA regarding the alleged participation "right."

We first look to the relevant provisions of FLPMA to determine whether Plaintiffs have a right to participate in the inventory process. If we conclude that Plaintiffs do not have such a right, then Plaintiffs' claimed injury based on the denial of this right is without merit and they consequently lack standing to challenge the 1996 inventory on these grounds.

Id. at 1207. In so ruling, this Court cited both the *Claybrook* case purportedly relied on by the district court below and the *Arjay Associates* case. *Id.*

In *Arjay Associates*, certain manufacturers had violated a federal statute prohibiting the export of certain high-tech machines to the Soviet Union. Congress had responded by enacting a law naming those manufacturers and barring their goods from importation into the United States. The manufacturers' sales representatives then filed an action in federal court, alleging that the import ban inflicted serious economic injury on them; on this basis, the sales representatives challenged the constitutionality of the federal

legislation. Both the district court and the court of appeals dismissed the action, holding that the sales representatives lacked standing. Without in any way disputing or minimizing the reality of the sales representatives' actual economic injury, the circuit court held that such injury in and of itself was insufficient, given that they had no legal "right to the continued importation of the excluded . . . products." *Id.* at 898.

The *Arjay Associates* court's ultimate holding is instructive: that plaintiffs "lack standing because the injury they assert is to a nonexistent right to continued importation of a Congressionally excluded product and is thus nonredressable. Because [plaintiffs] have no right to conduct foreign commerce in products excluded by Congress, they have in this case no right capable of judicial enforcement . . ." *Id.* at 898. That holding, slightly paraphrased, applies with full force here: that PFS lacks standing "because the injury it asserts is to a nonexistent right to creation and operation of a Congressionally prohibited nuclear waste dump and is thus nonredressable. Because PFS has no right to conduct the business of a nuclear waste dump prohibited by Congress, it has in this case no right capable of judicial enforcement."

2. In the NWPA, Congress prohibited what PFS is promoting: a privately owned, away-from-reactor, SNF storage facility.

The language, structure, and legislative history of the NWPA uniformly demonstrate Congress's intent to exclude a PFS-type facility. (The entire NWPA, as amended, is reproduced in Addendum 4.)

a. With the language of section 10155(h) of the NWRPA, Congress excluded storage of SNF at privately owned, away-from-reactor facilities.

“The starting point of every statutory construction problem is with the language of the statute itself.” *Matthiesen v. Banc One Mortg. Corp.*, 173 F.3d 1242, 1244 (10th Cir. 1999). In construing that language, the court will give meaning to all portions of the language and avoid an interpretation that renders some portions meaningless or nonsensical. *United States v. Power Engineering Co.*, 303 F.3d 1232, 1238 (10th Cir. 2002) (“we cannot construe a statute in a way the renders ‘words or phrases meaningless, redundant, or superfluous.’”); *Matthiesen v. Banc One Mortg. Corp.*, *supra*, 173 F.3d at 1244.

When these rules are applied to the language of the NWRPA’s section 10155, and particularly to that of subsection (h), that language is seen as manifesting Congress’s decision both to exclude a PFS-type facility and to prevent any previously enacted law from being used to counter that Congressional decision.

With section 10155 of the NWRPA’s Subtitle B, Congress in 1982 provided a carefully controlled, limited, and federal program for temporary, away-from-reactor storage, a program some Members referred to as an “emergency” program. Section 10155 provided that up to 1900 metric tons of SNF could 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 NWRPA and then only if reactor owners could first show that they had done, and were doing,**

everything possible to expand their on-site storage capacities and then only if away-from-reactor storage was absolutely necessary to prevent reactor shutdowns.⁴⁴

The presence of the section 10155, or emergency, program in the 1982 bill, however, concerned Members of Congress. Specifically, Members worried that the acknowledgment in section 10155 that SNF could be stored away-from-reactor (or “offsite”) might lead the federal government or private parties, in order to avoid reactor shutdowns, to use for interim SNF storage either the already existing and privately owned reprocessing facilities or some new facility. The House authors of section 10155 therefore added subsection (h) to make clear their intent to limit away-from-reactor storage facilities to those owned by the federal government at the time of the adoption of the NWPA – and thus to preclude private creation of such a facility.

Congress wrote subsection (h) in these words:

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.

For our purposes, the key language is this: “Notwithstanding any other provision of law, nothing in this Act shall be construed to . . . authorize . . . the private . . . use . . .

⁴⁴ In addition, in Subtitle C, Congress in 1982 authorized the study – but not the implementation of – another type of possible interim, away-from-reactor, storage program known as “monitored retrievable storage” (“MRS”).

of any storage facility located away from the site of any civilian nuclear power reactor . . .
.”

The only sensible reading of this language – the only reading that does not ignore language in subsection (h) – is that Congress excluded a PFS-type facility from the Nation’s nuclear waste management system. First, “this Act” was, and was understood by the Congress that enacted it to be, not just Congress’s first excursion into the management of high-level nuclear waste but a comprehensive treatment of that subject.⁴⁵

⁴⁵ Congress viewed its handiwork in the NWPA as comprehensively addressing SNF storage and disposal. 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.

128 Cong. Rec. 32,556 (1982). 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

(When enacted in 1954, the AEA said nothing regarding nuclear waste management, and even now, nearly fifty years later, any references in the AEA to high-level nuclear waste storage or disposal are *de minimis* in number and substance. See Addendum 3.) Thus, in the field of the management of nuclear waste, particularly SNF from civilian nuclear power reactors, what “this Act” expressly does not “authorize” is not Congressionally authorized.

This conclusion is reinforced by the other key language: “Notwithstanding any other provision of law.” That language has no meaning unless it means that no other previously enacted provision of law can counter the Congressional decision not to authorize a PFS-type facility. Indeed, this “notwithstanding” language is nonsensical if the only purpose of subsection (h) is to say that the NWPA itself does not authorize a

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.

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.

PFS-type facility, with no intent to affect law outside the NWPA. The “notwithstanding” language’s purpose must be to affect law outside the NWPA; that is what such clauses do. *See Andreiu v. Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001) (“the phrase [“notwithstanding any other provision of law”] means that [the statute containing it] . . . trumps any contrary provision elsewhere in the law”) (emphasis added). Or, stated slightly differently, the “notwithstanding” language is exactly contrary to an intent not to affect law outside the NWPA.

That realization – that the intent of the “notwithstanding” language must be to affect law outside the NWPA⁴⁶ – brings us back to this question: Affect how? The only plausible answer is, to prevent any previously enacted law from countering the Congressional decision not to authorize a PFS-type facility. That must be the answer because withholding that Congressional authorization is the point of the language following the “notwithstanding” clause.

The meaning and import of the “notwithstanding” clause can be clarified by considering the meaning of subsection (h) in the absence of this introductory clause. In the absence of the “notwithstanding” clause, one could plausibly argue either of two different interpretations of the subsection, the *action* interpretation and the *no-decision* interpretation. The *action* interpretation posits that the NWPA is a comprehensive

⁴⁶ In this context, it bears emphasis that the “notwithstanding” clause refers not to “any other provision of this Act” but to “any other provision of law.” Congress certainly knew how to use the phrase “this Act” if that phrase suited its purposes; Congress used that phrase later in subsection (h) itself.

regulation of away-from-reactor SNF and thus that anything not authorized in “this Act” is not Congressionally authorized, period. The *no-decision* interpretation is that Congress simply wanted to make clear that it was not deciding, in enacting the NWPA, whether federal law precluded “the private or Federal use” of away-from-reactor SNF facilities not expressly addressed in the NWPA.

Of these two interpretations, only the *action* interpretation makes any sense once the “notwithstanding” clause is restored to subsection (h). If Congress had simply wanted to make clear that it was not deciding the fate of away-from-reactor SNF facilities not expressly addressed in the NWPA, Congress would have had no reason to begin by saying “notwithstanding any other provision of law.” Indeed, the use of that phrase is contrary to an intent to simply limit the scope and effect of the NWPA; in drafting the NWPA, one limits the scope and effect of that Act by what one says in the Act about the Act – not by limiting the scope and effect of some non-NWPA law. Yet the “notwithstanding” clause is wonderfully consistent with the *action* interpretation. If Congress wanted its refusal to authorize facilities not expressly authorized by the NWPA to preclude such facilities across the board, the exactly logical words for Congress to use would be “notwithstanding any other provision of law.”

Congress’s choice of the word “law” in the “notwithstanding” clause sustains Utah’s position in another important way. The word “law,” when given its common meaning, encompasses not just statutes enacted by Congress but also substantive regulations promulgated by agencies. *See Batterton v. Francis*, 432 U.S. 416, 425 n. 9

(1977) (“Legislative, or substantive, regulations are ‘issued by an agency pursuant to statutory authority and . . . implement the statute Such rules have the force and effect of law.’”) Consistent with this common meaning, PFS apparently contends that the NRC’s Part 72 regulation – pursuant to which PFS is now seeking its NRC license – is such a substantive regulation and hence “law.” Moreover, Congress, when drafting section 10155(h) in 1982, was generally aware of the existence of an earlier promulgated NRC regulation (Part 72) providing for private, away-from-reactor, SNF storage facilities. (On this last point, PFS and Utah are in agreement.⁴⁷) Thus, the sensible conclusion is that Congress, when crafting the “notwithstanding” clause into section 10155(h), did so to prevent not only any previously enacted statute but also any previously promulgated regulation from countering the Congressional decision not to authorize a PFS-type facility.

* * * * *

PFS has suggested that subsection (h) merely reflects Congressional intent that the three then-existing but not operational reprocessing plants – GE Morris in Illinois, Savannah River in South Carolina, and West Valley in New York – not be federalized and used for SNF storage. But this suggestion ignores Congress’s use of the word “private” in the phrase “the private or Federal use.” If Congress had meant only to prohibit the federalization of existing private facilities for SNF storage, it would have had

⁴⁷ See, e.g., App. I, 8, at 281-83.

no reason to add the words “private or Federal facilities.” Moreover, PFS’s suggested reading offers no explanation or possible meaning for the phrase “notwithstanding any other provision of law.” Under PFS’s interpretation, Congress would have said “notwithstanding any other provision of this Act,” so as to assure that no other part of the Act defeated Congress’s purported intent regarding the three reprocessing plants. But Congress, knowing how to use the phrase “this Act,” chose instead the vastly more inclusive word “law.” In 1982, Congress did not want any other previously enacted “law” (including the AEA and Part 72) to interfere with Congress’s decision to withhold authorization for any away-from-reactor, SNF storage facility other than what Congress carefully authorized in Subtitle B, the federal “emergency” program.

Thus, the language of subsection (h) defeats PFS’s and sustains Utah’s position on the “lawfulness” issue.

b. The design, object, and policy of the NWPA make clear that Congress intended to preclude SNF storage at privately owned, away-from-reactor facilities.

The NWPA’s prohibition of a PFS-type facility is clear not only from the language of subsection (h) but also from the “design of the [NWPA] as a whole and [from] its object and policy.” *See Crandon v. United States*, 494 U.S. 152, 158 (1990).

As noted above, Congress saw the NWPA as establishing a comprehensive nuclear waste management system – setting forth Congress’s decisions on the hows and wheres and whats of away-from-reactor SNF storage. These decisions render wholly implausible a Congressional intent to that a PFS-type storage facility should be allowed as part of the

Nation's nuclear waste management system. In other words, those decisions are exactly consistent with Congressional intent as expressed in subsection (h)'s language.

In the NWPA, Congress has dealt with away-from-reactor SNF in three contexts: (1) permanent SNF disposal at a deep geologic repository (Subtitle A); (2) temporary, "emergency" SNF storage at an already existing federal facility to avoid commercial reactor shut-down (Subtitle B); and (3) interim SNF storage at a federal Monitored Retrievable Storage facility ("MRS") (Subtitle C). In all three contexts, Congress insisted on substantial procedural and financial protections for affected local governments and communities. Thus, every time Congress authorized away-from-reactor SNF storage or disposal:

1. Affected local governments and communities received detailed *participation rights*. These participation rights include such things as prescribed notices, participation in siting decisions, involvement in receiving and providing information on a wide-range of impacts, and consultation on those matters.

2. Affected local governments and communities received extraordinary *procedural rights*. These procedural rights include the right to disapprove the away-from-reactor SNF facility, with that disapproval operating to kill the facility unless and until both Houses of Congress, by majority vote, override the disapproval.

3. Affected local governments and communities also received *rights to substantial financial assistance*.⁴⁸

Further, every time Congress authorized away-from-reactor SNF, Congress placed limits on the quantity allowed. Thus, for the Subtitle B “emergency” program, the limit was 1,900 metric tons uranium (“MTU”) in the aggregate at all involved federal sites;⁴⁹ for Subtitle C’s MRS program, 10,000 MTU before opening of the permanent repository and 15,000 MTU after;⁵⁰ and for Subtitle A’s permanent repository, 70,000 MTU.⁵¹ Further, every time Congress authorized away-from-reactor SNF, Congress insisted on a careful, statutorily guided site selection process.⁵²

⁴⁸ 42 U.S.C. §§ 10135 through 10138 (Subtitle A, permanent repository); 10155(d) and 10156(e) (Subtitle B, temporary, or “emergency,” storage); 10161(f) and (h) and 10166 (Subtitle C, MRS).

⁴⁹ 42 U.S.C. § 10155(a).

⁵⁰ 42 U.S.C. § 10168(d)(3)-(4).

⁵¹ 42 U.S.C. § 10134(d) (applies until a second repository is in operation, but Congress has prohibited for now development of a second repository, 42 U.S.C. § 10172a(a).)

⁵² For example, with an MRS, the NWPA at 42 U.S.C. § 10164 requires consideration of:

the extent to which siting a monitored retrievable storage facility at each site surveyed would--

- (1) enhance the reliability and flexibility of the system for the disposal of spent nuclear fuel and high-level radioactive waste established under this chapter;
- (2) minimize the impacts of transportation and handling of such fuel and waste;
- (3) provide for public confidence in the ability of such system to safely

Further, when Congress authorized temporary, away-from-reactor SNF placement, Congress imposed a strict time limit: any SNF stored under Subtitle B 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.” 42 U.S.C. § 10155(e). Moreover, Congress took steps to assure that the existence of a temporary storage facility or an MRS did not operate to interfere with progress towards creation of the repository. *E.g.*, 42 U.S.C. § 10168(d).

Against that careful statutory design for the management of away-from-reactor SNF, PFS asserts that Congress somehow intended to allow PFS’s proposed facility –

1. even though Utah and its local communities are not allowed the participation rights, the procedural rights, and the rights to substantial financial assistance that Congress provided for states and local communities facing a much smaller facility;

dispose of the fuel and waste;

(4) impose minimal adverse effects on the local community and the local environment;

(5) provide a high probability that the facility will meet applicable environmental, health, and safety requirements in a timely fashion;

(6) provide such other benefits to the system for the disposal of spent nuclear fuel and high-level radioactive waste as the Secretary deems appropriate; and

(7) unduly burden a State in which significant volumes of high-level radioactive waste resulting from atomic energy defense activities are stored.

2. even though PFS's proposed facility will take about twenty times more SNF than what Congress allowed for temporary storage and three to four times more SNF than what Congress allowed at an MRS;

3. even though PFS's proposed facility will retain SNF twenty to thirty years longer than what Congress allowed for temporary storage; and

4. even though Congress's careful site selection guidelines did not operate in the selection of the Skull Valley site.

The very incongruity, the very absurdity, of PFS's position we refer to as "the big anomaly." In most concise terms, the big anomaly is the position that Congress, in specifying its various solutions for away-from-reactor SNF, intended that the federal government (the owner/operator of all those solutions) could proceed only upon compliance with a host of protective, limiting provisions but that a private entity could proceed to devise a "private" solution completely unfettered by Congress's protective judgments. The underlying premise of the big anomaly then is that Congress saw a reason to carefully limit and guide federal handling of away-from-reactor SNF but a reason that does not extend to private handling of such. Moreover, this premise underlying the big anomaly requires a reason that counters the intuitive notion that, if Congress saw a need to limit anyone, it would be a private entity (such as a shell Delaware limited liability company) and not the federal government (with its vast resources and experience in things nuclear). But PFS has not provided such a reason.

PFS has provided **no** plausible explanation for Congress's supposed highly disparate treatment, relative to the handling of away-from-reactor SNF, between the federal government and a private entity.

The solution to the statutory interpretation problem posed by the big anomaly is simple. Congress created no big anomaly. That is, Congress did not call for highly disparate treatment, relative to the handling of away-from-reactor SNF, between the federal government and a private entity. As both the language of subsection (h) and the design, object, and policy of the NWPA make clear, Congress limited ownership of away-from-reactor SNF solutions to the federal government and excluded private involvement.

c. The NWPA's legislative history demonstrates Congress's intent to exclude a private, away-from-reactor, SNF storage facility.

The legislative history also supports Utah's reading of subsection (h) and Utah's view of the meaning of the design, object, and policy of the entire NWPA. Indeed, as is made plain by the NWPA's legislative history, a privately owned, away-from-reactor, SNF storage facility (just what PFS is now proposing) was one of Congress's worst nightmares, and Congress added the language in subsection (h) precisely to prevent that nightmare from becoming a reality.

The House debate on section 10155(h). The House extensively discussed in 1982 the reasons for adopting section 10155(h) as part of the NWPA. Because of the importance of this debate to this Court's task, we recount the debate in some detail. (The relevant portions of the Congressional Record are also attached as Addendum 5.)

On the floor of the House, Rep. Lundine proposed that section 10155 providing for emergency offsite storage of SNF (then referred to as section 135) be deleted from the bill in its entirety. 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. 128 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 in the absence of the language in subsection (h), the reprocessing plant in his district would be used to store SNF "under emergency circumstances" so as to "preclude the shutdown of a power plant" 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 (Lundine's) 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.” *Id.*

The Senate Debate on Section 10155(h). After section 10155, with its subsection (h), got to the Senate in December 1982, Sen. Percy shared the same concern as Rep. Lundine, namely, that, in order to avoid reactor shutdowns, 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) for 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 32,560. 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.

* * * * *

Regarding the NWPAs legislative history, PFS's practice has been to rely on statements made before subsection (h) even made its appearance in the Congressional deliberations and, further, to ignore the post-subsection (h) statements showing Congress's intent that PFS-type facilities not be a part of the Nation's nuclear waste management system.

The timing, of course, is crucial. The bills before the Senate prior to December 1982 never contained subsection (h) or an equivalent. Accordingly, during that time, Senate bills, as a pre-condition for utility access to federal emergency storage, required utility efforts not just with on-site storage but also with private off-site storage, and the Senators deliberated as if private off-site storage was an acceptable component of the national nuclear waste management system they were then laboring to fashion. Likewise, in the early going (before the end of July 1982), the House bills did not contain subsection (h) or an equivalent, with the same consequences seen in the Senate. Then, during the last week of July 1982, the House Energy and Commerce Committee created

as an amendment and adopted by a 23-19 vote section 135 (what became 42 U.S.C. § 10155), including subsection (h) in essentially the form of its final passage. House Energy and Commerce Committee's Report on H.R. 6598, H.R. Rep. No. 97-785, pt. 1, at 23-25, 50, 96 (1982). From the moment that subsection (h) made its appearance, all deliberations in the House – with one ambiguous exception we address below – proceeded on the basis that private off-site storage was not an option in the Nation's nuclear waste management system. In like fashion, when the House bill – with subsection (h) – became the bill before the Senate for its Members' deliberations, all the discussion proceeded on the assumption that private off-site storage was not an option.

Thus, on 30 November 1982, Rep. Broyhill stated:

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.

128 Cong. Rec. 28,040 (1982)(emphasis added).

Pre-subsection (h) statements are simply of no value for purposes of determining Congress's intent with respect to subsection (h).⁵³

⁵³ Utah readily acknowledges that before subsection (h) made its appearance in the Congressional deliberations, a number of Members shared the view that private off-site storage both could be and should be a component of the Nation's nuclear waste management system. But any fair observer will acknowledge just as readily that, after the appearance of subsection (h), such talk ceased and all talk on the matter was to the contrary.

The one House statement after July 1982 relied on by PFS is too ambiguous to be helpful to either side, or, stated another way, is just as helpful to Utah's position as to PFS's. That statement – consisting of three sentences – comes from the House Energy and Commerce Committee's Report on H.R. 6598, H.R. Rep. No. 97-785, pt. 1, *supra*, dated 20 August 1982. At that time, what became subsection (h) said: "Notwithstanding any other provision of law, nothing in this Act shall be construed to . . . authorize . . . the private or Federal use . . . of any non-Federal storage facility located away from the site of any nuclear powerplant."⁵⁴ In discussing the entirety of section 135 (of which subsection (h) is a part), the House Report at page 41 said:

Another alternative for additional storage capacity is the utilization of a large capacity centralized storage facility, sometimes referred to as an away-from-reactor (AFR) facility, because it would not be located at the site of any of the reactors using it.

This sentence does not specify whether the contemplated facility is federally owned,⁵⁵ privately owned, or either. But the very next sentence makes plain that the Report is referring to a federally owned facility, not a private one. That sentence reads:

Such facilities are required to be licensed by the NRC under Section 202(3) of the Energy Reorganization Act of 1974.

⁵⁴ In final codified form, subsection (h) speaks of "this chapter" rather than "this Act" and "the private or Federal use . . . of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal government on January 7, 1983."

⁵⁵ Such as an MRS facility slated for study under the bill's Subtitle C.

Section 202(3) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5842(3), unambiguously speaks of, and only of, NRC “licensing and related regulatory authority” over “the following facilities of the Administration: . . .” A subsection (3) Administration (meaning federally owned) facility is one “used primarily for the receipt and storage of high-level radioactive wastes from activities licensed under” the AEA. The House Report’s careful use of subsection (3) thus clarifies the federal ownership of the facility referenced in the previous sentence.

In the next sentence, however, the Report’s drafter inserted one word that PFS would urge resurrected the ambiguity of the first sentence. That word is “private.”

The Committee bill does not require that storage capacity at a private AFR be exhausted or unavailable before a utility would be eligible for storage capacity provided by the Secretary.

Contrary to PFS’s arguments, this sentence is hardly “conclusive.”⁵⁶ It merely makes the factually unobjectionable point that, in the post-subsection (h) world, efforts to use private off-site storage is no longer a pre-condition for access to federal emergency storage. This factually accurate statement cannot possibly be read as an implicit repudiation of the entirety of the relevant legislative history, much less of the plain language of the statute and its design, object, and policies.

⁵⁶ Applicant’s Brief in Opposition to Utah’s Suggestion of Lack of Jurisdiction filed 15 May 2002 before the NRC, *In the Matter of Private Fuel Storage L.L.C. (ISFSI)*, Docket No. 72-22, ASLBP No. 97-732-02-ISFSI, at 6.

d. The NWPA alters the implications that can plausibly be drawn from the AEA about authorization for private, away-from-reactor, SNF storage facilities.

PFS has argued that Utah's reading of the NWPA amounts to an implicit repeal of the AEA's general grant of licensing authority and then argues that, because repeals by implication are not favored by the courts, the NWPA should not be read as Utah urges. Utah, however, is **not** asking that this Court find that the AEA's grant of general licensing authority has been implicitly repealed. Rather, Utah asks only that the Court recognize this: the **implications** that can properly be drawn from the AEA's general grant of authority have been altered by the more specific and later-enacted NWPA.

As the Supreme Court explained in the *Fausto* case: “[R]epeal by implication of an express statutory text is one thing; But repeal by implication of a legal disposition implied by a statutory text is something else.” *United States v. Fausto*, 484 U.S. 439, 453 (1988) (emphasis added). Where repeal of an express statutory text is involved, “it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change.” *Id.* But where the repeal of an **implication** drawn from the statutory language is involved, as is the case here, a different standard applies. In such a situation,

courts frequently find Congress to have [repealed an implication drawn from a statute] – whenever, in fact, they interpret a statutory text in the light of surrounding texts that happen to have been subsequently enacted. This 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.

Id.

Utah is not asking the Court to find that the NWPA implicitly repeals either any express language of the AEA or the general licensing authority granted to the NRC by the AEA. That general authority is an integral part of the framework established by the NWPA and its continued existence is essential to implementation of the NWPA. Instead, Utah is simply asserting that the AEA (which only insubstantially and sporadically addresses the issue of nuclear waste storage), when read in combination with the later-enacted, more specific NWPA (which comprehensively addresses the issue of nuclear waste storage), may not be used to authorize something the NWPA excludes – private, away-from-reactor, SNF storage facilities.

Upholding Utah’s position will not have the effect of deleting from the statute books either NRC’s general licensing authority or any express language in the AEA. The NRC will still have the authority to issue licenses to “transfer, deliver, acquire, possess, own, receive possession of or title to, import, or export ... special nuclear material,” 42 U.S.C. §§ 2073(a) and 2077, and there will still be a myriad of ways in which that authority may properly be exercised. The only thing that will have changed is that an implication drawn from that general grant of authority by the NRC in promulgating a regulation – at a time when there was no Congressionally enacted storage policy – will have been “altered by the implications of a later statute,” that is, the NWPA. Just as in *Fausto*, after Utah’s position is upheld, the AEA’s grant of licensing authority will “not stand repealed, but [will remain] an operative part of the integrated statutory scheme set

up by Congress” to govern the important and highly controversial issue of the storage of nuclear waste. 484 U.S. at 453. Even after Utah’s position is upheld, storage of nuclear waste in the manner prescribed by the NWPA will still take place only pursuant to a license issued by the NRC under its general grant of licensing authority. 42 U.S.C. § 10168(c).

This approach to statutory construction is illustrated by the Supreme Court’s recent decision in *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). There 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 to an interpretation – in light of the later-enacted NWPA – of the scope of any authority granted by the AEA for a PFS-type facility. 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 Court

found that 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, later-enacted 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. As with tobacco, Congress has created a “distinct regulatory scheme” for SNF storage – through twenty years of work on the NWPA. The implications of that later, SNF storage-specific legislation must control the construction of, and the proper implications to be drawn from, the earlier general language in the AEA. Further, just as the Court observed in *Brown & Williamson*, 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. To state the obvious: away-from-reactor, SNF storage is both a highly controversial and a highly important issue. Because of that importance and controversy, Congress has visited the issue on three occasions, in 1982, 1987 and 2000.⁵⁷ Each time, Congress showed great sensitivity to the political implications of the siting of such a facility and to the need to make such a facility an integral part of the national system. It defies common sense and established canons of statutory construction to conclude, in light of Congress’ comprehensive and detailed legislation on the issue, that Congress left private parties free to build and operate away-from-reactor storage facilities of whatever size, duration, and

⁵⁷ Congress’s 2000 legislative activity is not discussed above because Pres. Clinton vetoed the resulting bill. That bill was the Nuclear Waste Policy Amendments Act of 2000, S. 1287, 106th Cong. (2000), and is found at 146 Cong. Rec. S574 (2000).

location, subject only to the regulation promulgated by the NRC before Congress enacted the NWPA.⁵⁸

II.

PFS'S CLAIMS ARE UNRIPE

As this Court has explained, “[t]he ‘basic rationale’ of the ripeness doctrine ‘is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.’” *Utah II, supra*, 210 F.3d at 1196 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967)). These concerns are at their apex when the issues raised by the plaintiff question the constitutionality of a state statutory scheme. See 13A Wright & Miller, *Federal Practice and Procedure* § 3532.1, at 120 (“The values of avoiding unnecessary constitutional determinations and establishing proper relationships between the judiciary and other branches of the federal government lie at the core of ripeness policies”). In such cases,

⁵⁸ Even if the rule disfavoring repeals by implication did somehow apply here (it does not), this would nonetheless be an appropriate situation in which to find such a repeal. Repeals by implication may be found “where provisions in the two acts are in irreconcilable conflict.” In such a situation, “the later act to the extent of the conflict constitutes an implied repeal of the earlier one.” *Yellowfish v. City of Stillwater*, 691 F.2d 926, 928 (10th Cir. 1982)). As demonstrated above, the NWPA clearly excludes a PFS-type facility. If the AEA is read to authorize such a facility, the two Acts are in “irreconcilable conflict” on that point and the older of the two, the AEA, must give way to that extent.

the courts' interest in avoidance of premature litigation is twofold – in respecting the sovereignty of the states under the doctrine of federalism and in avoiding constitutional adjudications that may prove unnecessary. *See Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 411 (3d Cir. 1992) (explaining that the fitness of a case for judicial resolution must consider the rule of “avoidance of ruling on federal constitutional matters in advance of the necessity of deciding them”); *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093, 1100 (D.C. Cir. 1985) (indicating that “[i]t is an established and salutary principle of the law of federal courts that constitutional issues affecting legislation will not be determined ‘in advance of the necessity of deciding them’”).

PFS's claims present these heightened concerns of prematurity and entanglement. PFS asks the federal courts to strike down a broad range of Utah statutes under the Supremacy Clause of the U.S. Constitution, yet these issues need not be decided at this early stage and will never arise unless (1) the NRC grants PFS the necessary license and that license is upheld against Utah's challenge in the circuit court to its lawfulness and (2) the Department of the Interior gives its approvals and those approvals withstand the inevitable judicial review. In deference to the principle of federalism and the policy of avoidance of constitutional adjudications, this Court should dismiss PFS's claims as unripe unless and until each of the NRC's and Interior's “administrative decision has been formalized and its effects felt in a concrete way” by PFS.

The district court ignored the heightened concerns presented by the circumstances of this case, asserting that the ripeness determination turns only on “the fitness of the issue for judicial resolution and the hardship to the parties of withholding judicial consideration.” Order, App. V, 40, at 1557. In the district court’s view, PFS’s claims were fit for judicial resolution because “[t]he issues presented . . . 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.” *Id.* at 1558. Moreover, the court concluded that resolution of these constitutional issues was merited at this stage because PFS would somehow suffer “hardship” in the absence of a judicial decision. *Id.*

The district court’s finding of ripeness falters on two grounds. On the issue of the “fitness” of this case for judicial resolution, the court below erred in giving controlling weight to the nature of the issues presented for review and in ignoring entirely the fundamental concern highlighted above – that PFS is asking the courts to invalidate a comprehensive state statutory scheme whose constitutionality need not be decided unless and until the pending NRC proceeding and issues before the Department of the Interior (and subsequent appeals) are resolved in PFS’s favor. Ripeness doctrine clearly counsels against the premature resolution of constitutional issues, particularly where (as here) those issues are inseparably bound up with questions presented in an ongoing administrative proceeding whose resolution may moot the need to resolve such issues. Under the circumstances, PFS is in no position to raise its supposed “hardship” as a

ground for a premature decision: the unproven, amorphous “hardship” that the district court ascribed to PFS (on the basis of *no* evidence in the record) is simply not enough to support a premature constitutional overhaul of the Utah statutory scheme.

A. PFS’s Claims Are Not Fit for Judicial Resolution at this Stage.

The ripeness doctrine counsels against the premature resolution of issues that may never arise and that are inextricably connected with ongoing administrative proceedings. Indeed, this court said as much in its decision in *Utah II* – a case in which Utah had initiated a federal district court action seeking to intervene in Interior’s approval process relative to PFS’s lease for the facility in question here. In *Utah II*, this Court held that disputes relative to PFS’s proposed project were not ripe for adjudication – exactly because of the uncertainty regarding future agency approvals or disapprovals:

We cannot be certain whether the EIS will show that the project presents unacceptable risks, whether the NRC will issue a license to PFS or, if ultimately authorized [by Interior] following the environmental considerations, the precise activities which may be permitted on the leased lands. Accordingly, we conclude the State’s suit is not ripe for review.

210 F.3d at 1198.

That same uncertainty inheres in PFS’s claims, all of which will go by the wayside if even one of the required and multiple agency approvals is not granted. PFS’s claims are unripe because it is uncertain “whether the NRC will issue a license to PFS” or whether such license will hold up on appeal in the face of any number of challenges (including the challenge to the lawfulness of such a facility) or whether Interior will

decide for or against PFS or whether a pro-PFS decision by Interior will survive judicial review.⁵⁹ Indeed, the inadvisability of premature judicial involvement is particularly clear in this case in light of the constitutional nature of the issues involved; the “established” rule counsels against a constitutional overhaul of state statutes “in advance of the necessity” of doing so. *Hastings, supra*, 770 F.2d at 1100.

Thus, although (as the district court noted) the constitutionality of the Utah statutes is primarily a legal question, Order, App., V, 40, at 1558, that assertion alone is insufficient to sustain the conclusion that the issues presented are fit for judicial resolution. As noted above, a constitutional review of state statutes is classically premature and unfit for judicial decision if such review may ultimately prove unnecessary. *See also New Mexicans for Bill Richardson v. Gonzalez*, 64 F.3d 1495, 1499 (10th Cir. 1995) (in determining fitness, central focus is whether case involves uncertain or contingent events). Moreover, the courts consistently have acknowledged that the “fitness” of a question may also turn on the need for further development of the meaning and implications of state law. *See* 13A Wright & Miller, *Federal Practice and*

⁵⁹ Tellingly, PFS made this same point of uncertainty in challenging the ripeness of Utah’s counterclaim, which asked for a declaration on the lawfulness of PFS’s proposed facility under the NWPA. *See* Memorandum of Points and Authorities in Support of Plaintiffs’ Motion to Dismiss Counterclaim, App. III, 14, at 658, 662 (asserting that “the ripeness doctrine bars the claims because NEPA review and NRC licensing proceedings are still ongoing, and their outcomes unknown,” and that “[j]udicial review undertaken now may well prove in the future to have been unnecessary”).

Procedure § 3532.3, at 149 (“The need for more precise development to frame constitutional issues may arise with respect to state law as well as to facts.”).

Such development is necessary here – both as to the meaning of state law and as to factual questions relevant to the question whether the Utah statutes are preempted. As explained in Section III below, a crucial shortcoming of the district court’s review of the Utah statutes was its presumption that certain provisions of the Utah statutes would be likely to have certain effects on radiological safety. As also explained in Section III below, another shortcoming was the district court’s assumption that certain Utah provisions might be interpreted in a particularly problematic fashion. To the extent the constitutionality of the Utah statutes turn on predictions of their likely effects or possible interpretations, the statutes are unfit for constitutional review at this early stage.⁶⁰

Ironically, the district court purported to ground its decision in this case on a desire to *defer* to the pending NRC proceeding, asserting that “[t]he question of whether Plaintiffs have a right to own and operate a SNF facility will be resolved by the NRC (with the right of appeal to the appropriate Court of Appeals) and not by this court.”

⁶⁰ As explained in detail in Section III below, the extent to which the Utah provisions (if any) may be preempted may require further factual development. The viability of the “municipal contract” provisions, for example, may turn on the costs imposed on PFS by these provisions and on whether and to what extent such costs result in a “direct and substantial” effect on nuclear safety decisions. Similarly, the viability of the “unfunded potential liability” and equity holder liability provisions may turn on the future determinations of the DEQ as to what “unfunded liability” may be or what “cash equivalents” might include, or on whether and to what extent PFS’s activities fall outside the scope of the Price-Anderson Act.

Order, App. V, 40, at 1556. The district court's premise – of the desirability of deferring to the NRC proceeding – may or may not have been appropriate. But that premise leads necessarily to the dismissal of this case as unripe – not to activist intervention in Utah's statutory scheme. After all, this case simply cannot be resolved without a decision on the “lawfulness” issue. The lawfulness of PFS's proposed facility is inextricably connected to the issue of PFS's standing, as explained above. Moreover, the lawfulness issue must also be resolved in order to decide the merits of PFS's claim that the Utah statutes are preempted. *See* Section III, *infra* (explaining that if the NWPA flatly prohibits private, away-from-reactor SNF facilities, the Step One, or “prohibition,” provisions can hardly be said to be preempted and the Step Two provisions are of no force or effect).

Thus, if this Court determines that it should not decide the “lawfulness” issue until the NRC's not-yet-announced ruling is finally reviewed on appeal, such a determination clearly requires dismissal of this suit on ripeness grounds. PFS cannot have it both ways; it cannot insist on the necessity of deferring to the NRC while at the same time demanding a decision on the merits of a case that necessarily implicates issues also presented in the NRC proceeding.

B. The Supposed Hardship that the District Court Attributed to PFS Cannot Support a Premature Constitutional Overhaul of the Utah Statutory Scheme.

The district court held that a ruling was necessary at this juncture to avoid “hardships” that PFS presumably would suffer in the absence of a premature decision on the viability of the Utah statutory scheme. Order, App. V, 40, at 1558-61. Specifically, the court concluded that resolution of the uncertainty as to the viability of the Utah statutory scheme was necessary to enable PFS to more economically pursue its “licensing efforts with the NRC,” *id.* at 1558-59, and to make more informed planning decisions during the “pre-construction” phase of the project, *id.* at 1560-61.

These “hardships,” however, are hardly a cognizable ground for pressing forward with a complex judicial evaluation of the Utah statutes at this early stage – an evaluation that may be unnecessary if any of the NRC and Interior decisions is adverse to PFS or, if favorable to PFS, is reversed on appeal. First, PFS’s supposed difficulty in pursuing its licensing efforts with the NRC are insufficient as a matter of law to justify the courts’ intervention at this early stage. See *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 734-35 (1998). As the Supreme Court indicated in *Ohio Forestry*, the notion that “it will be easier, and certainly cheaper” to proceed with an early judicial challenge is not “sufficient by itself to justify review in a case that would otherwise be unripe.” *Id.*

Second, any difficulty that PFS has suffered in pursuing its licensing efforts with the NRC or in making planning decisions during the pre-construction phase of the project are not causally connected to the Utah statutes. Such hardships (if any) logically are

attributable to the NWPA (which flatly prohibits private, away-from-reactor, SNF storage facilities), not to the Utah statutes. In other words, a decision on the constitutionality of the Utah statutes will hardly resolve PFS's purported uncertainty if the broader question of lawfulness under the NWPA is left unresolved. As the First Circuit has indicated, "The usefulness that may satisfy the hardship prong ... is not met by a party showing that it has the opportunity to move from a position of utter confusion to one of mere befuddlement." *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d 530, 540 (1st Cir. 1995).⁶¹

⁶¹ In *Ernst & Young*, the First Circuit dismissed as unripe Ernst & Young's ("E&Y") constitutional challenge to Rhode Island legislation governing contribution following settlement by one of two or more joint tortfeasors. E&Y contended that the legislation was calculated to coerce it to settle pending litigation with the state, leaving it unable to appraise intelligently the extent of its potential exposure. It attacked the legislation on its face, so there was no need for further factual development. E&Y also argued hardship in the form of uncertainty: in that it would have difficulty framing a position in settlement negotiations if it could not know whether the statute was constitutional.

The First Circuit nevertheless dismissed the case as unripe, emphasizing that the constitutionality of the statute was "speculative, premature, and lacking in practical value." 45 F.3d at 539. Specifically, the court noted that E&Y would not be affected by the Rhode Island statute unless other parties settled on terms that gave effect to the legislation and unless E&Y were held liable. In light of these contingencies, the court held that the case was unripe despite the purely legal nature of the issues and despite plaintiff's purported hardship in the form of uncertainty—particularly where E&Y would still face some uncertainty even if the statute's constitutionality were resolved. The same conclusion is proper here: the constitutionality of the Utah statutes is speculative, premature, and lacking in practical value, and PFS's uncertainty will remain even if in this action the constitutionality of the Utah statutes is prematurely resolved favorably to PFS.

It is no answer to assert (as PFS has) that any resolution of the broader lawfulness question is premature and thus that PFS has suffered interim uncertainties flowing from the Utah statutes. Such uncertainty is entirely self-inflicted and thus irrelevant. PFS cannot decline to pursue (indeed, oppose) an early resolution of the “lawfulness” issue, while at the same time complaining that this strategic decision causes it significant hardship.

Finally, the district court’s finding of hardship fails in the absence of any record support for it. As with standing, PFS bears the burden of “providing evidence to establish that the issues are ripe,” *Coalition for Sustainable Resources, Inc. v. United States Forest Service*, 259 F.3d 1244, 1249 (10th Cir. 2001), and it failed to carry that burden here. PFS presented not one affidavit to establish the “fact” of adverse impact. Indeed, in the only PFS declarations filed (those of the Consortium’s Parkyn and the Band’s Bear), there is a studied effort to make no statement regarding the impact – adverse or otherwise – on PFS’s business activities. See App. III, 15, at 874, and 16, at 878. Moreover, PFS elected to file no other affidavits despite Utah’s heated refutation of PFS’s allegations (in its Complaint,⁶² never supported thereafter) that somehow the mere existence of the challenged Utah statutes is crimping PFS’s business planning. Thus, as simple matters of proof of fact and settled law, PFS’s and the district court’s “business uncertainty” theory fails to sustain a holding that PFS’s claims are ripe for review.

⁶² Complaint, App. I, 2, at 38-39.

III.

THE CHALLENGED UTAH STATUTES ARE NOT PREEMPTED.

The district court also erred in its analysis of the merits of this case. In striking down a vast array of Utah statutes under the Supremacy Clause, the district court paid lip service to the Supreme Court decisions that define the preemptive scope of the AEA, *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190 (1983), *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), and *English v. General Elec. Co.*, 496 U.S. 72 (1990), but the district court failed to give effect to the clear import of these three decisions. In light of these three decisions, the district court's principal missteps were two: (a) its assertion that the lawfulness of PFS's proposed facility under the NWPA was "irrelevant"; and (b) its assumption that preemption is appropriate as to any provision that could be presumed to have any conceivable effect on nuclear safety – no matter how indirect and insubstantial the effect, and even in the absence of any record proof of such effects. If the district court had properly applied these three Supreme Court precedents, it would have concluded that the challenged Utah statutes escape preemption either because the NWPA already prohibits PFS's proposed facility or because the Utah statutes (for the most part) have at most indirect, insubstantial effects on decisions regarding nuclear safety.⁶³

⁶³ In turning now to the merits of PFS's constitutional attack on the challenged Utah statutes, two fundamental principles merit noting: (1) State statutes come before a federal court with a presumption of constitutionality. See *Lujan v. G & G Fire*

A. The Challenged Statutes Cannot Be Preempted Because They Merely Confirm the NWPA's Prohibition of a Private, Away-From-Reactor Facility.

The opinion below never expressly addressed the question whether the AEA preempts the Utah statutes' broad Step One prohibition of SNF facilities.⁶⁴ It focused instead on the indirect Step Two provisions that – if they ever take effect – place a series of limitations and conditions on SNF facilities.⁶⁵ See Order, App. V, 40, at 1565-73. Thus, the court's apparent conclusion that the Step One prohibition is preempted was implicit – suggested by its sweeping conclusion that all state laws on the “subject” of nuclear safety are preempted “even if harmonious with federal law.” *Id.* at 1563. From this premise, the district court drew an important (if misguided) conclusion, asserting in a

Sprinklers, Inc., 532 U.S. 189, 198 (2001). (2) A statute will be construed – to the fullest extent reasonably possible – so as to avoid raising constitutional defects and preserve the statute against a charge of unconstitutionality. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const.*, 485 U.S. 568, 575 (1988).

PFS repeatedly ignores its burden arising from the first principle and repeatedly violates the second principle. Regarding the second principle, PFS's readings consistently “horribilize” the challenged statutes. Thus, although the Utah Legislature clearly limited the challenged statutes so they do not interfere with First Amendment (petitioning and associational) rights, U.C.A. § 19-3-301(12), PFS insists on reading the statutes as violative of those rights. E.g., App. II, 10, at 367-74.

⁶⁴ See Utah Code Ann. § 19-3-301 (“The 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.”); see also §§ 19-3-301(1) and (9) and 17-34-1(3).

⁶⁵ As already noted repeatedly, on a final judicial resolution of the “lawfulness” issue adverse to Utah's position, the Step One provisions are no longer operative and the Step Two provisions then go into effect. U.C.A. § 19-3-301(2).

footnote that “[t]his renders Defendants’ lawfulness argument irrelevant.” *Id.* at 1563 n.

6.

The district court’s studied refusal to address the “lawfulness” issue is perhaps understandable; for all the reasons noted in Section II above, sound ripeness doctrine may be good reason to defer decision on the “lawfulness” issue until it is resolved conclusively in the direct appeal from the NRC proceeding. But the impulse for deference to the NRC proceeding requires dismissal on ripeness grounds. If this Court is to address the merits of PFS’s preemption challenge to the Utah statutes, it *must* decide whether Congress has already prohibited the private, away-from-reactor facility proposed by PFS.

After all, as the Supreme Court has explained, the preemption question ultimately is one of “congressional intent.” *English, supra*, 496 U.S. at 79. The Court has recognized “three circumstances” under which state law may be deemed preempted by federal statutes: (1) express preemption, in which “Congress has made its intent known through explicit statutory language”; (2) field preemption, in which Congress’s intent may be “inferred from a ‘scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it’”; and (3) conflict preemption, in which Congress is deemed to have intended to preempt state law “to the extent it actually conflicts with federal law,” in that it is impossible to comply with both federal and state law, or state law impedes “the full purposes and objectives of Congress.” *Id.* In all three circumstances, Congressional intent is paramount. Indeed,

field preemption requires a showing that “Congressional intent to superseded state laws [is] ‘clear and manifest,’” and conflict preemption looks at the “purposes and objectives of Congress.” *Id.*

Accordingly, the question whether Congress **intended** to prohibit the sort of private, away-from-reactor facility proposed by PFS can hardly be dismissed as “irrelevant.” If Congress intended (in the NWPA) to prohibit such facilities, it can hardly be deemed to have intended to preempt a state law that merely confirms this prohibition. Utah’s Step One prohibition simply states that the Utah legislature agrees with the prohibition already enacted by Congress in the NWPA, and that simple agreement cannot be set aside as stepping into a field occupied by federal law, much less as impeding Congressional objectives.

If Congress did *not* intend to prohibit a PFS-type facility, preemption analysis of the Step One provisions is equally straightforward. On such a holding of Congressional intent, Utah’s Step One provisions have no force or effect. A statute with no force or effect cannot conflict with, frustrate, impede, or thwart *any* federal program – or anything else – and thus cannot be deemed preempted.

A similar analysis applies to the Step Two provisions – those that place conditions or limitations on the operation of a nuclear waste facility in Utah. If Congress intended a flat prohibition on PFS-type facilities, the Step Two provisions have *no* force or effect; those provisions go into effect *only* on a judicial holding that Congress did *not* so

intend.⁶⁶ This is another reason the district court's evasion of its responsibility – upon reaching the merits – to resolve the “lawfulness” issue is so wrong. The district court reached out to strike down a large number of state statutes not now – and maybe never – of *any* force or effect.

These straightforward legal conclusions are confirmed by the obvious practical implications of a decision that PFS's proposed facility is barred by the NWPA. If Utah's construction of the NWPA prevails, PFS surely will abandon the entire waste dump project and discontinue any challenge to the Utah statutes. PFS cannot possibly have any interest in continuing the futile pursuit of a project that is barred by federal statute, much less in challenging Utah statutes that either confirm the federal prohibition or that have no force or effect relative to a project that is illegal in any event. Thus, the district court surely erred in concluding that Congressional intent to prohibit a PFS-type facility was “irrelevant,” and the NWPA's prohibition of such a facility easily defeats PFS's attempt to invalidate the Step One provisions under the doctrine of preemption.

B. Even Assuming that Congress Did Not Prohibit a PFS-type Facility, Most of Utah's Challenged Statutes Are Not Preempted.

Many of the Utah statutes escape preemption even assuming *arguendo* that Congress has not spoken to the lawfulness of a private, away-from-reactor, SNF storage facility. The district court proceeded as if preemption applied to any state statute that

⁶⁶ The next section analyzes preemption doctrine relative to the Step Two provisions in the event of such a judicial holding.

could be presumed to have any impact on nuclear safety – no matter how indirect that impact and even in the absence of any evidence in the record of the actuality or extent of an impact. This approach was fundamentally misguided, however, and clearly incompatible with Supreme Court precedent.

The Court's first landmark AEA preemption decision was *Pacific Gas, supra*, 461 U.S. 190 (1983). In that case, several nuclear utilities argued that the AEA preempted a California statute imposing a moratorium on new nuclear power plants until the federal government adequately resolved the SNF storage and disposal problem. As part of their argument, the utilities asserted that "the Act [i.e., the AEA] is intended to preserve the Federal Government as the sole regulator of all matters nuclear." 461 U.S. at 205. The Court rejected that broad view, however, stating that the exclusive federal role was in regulation of "the radiological safety aspects of" nuclear facilities and emphasizing that the AEA preserves state control over "police powers" and other "areas that have been characteristically governed by the States." *Id.* 205-06. In other words, the Court held that the AEA contemplates "dual regulation" of matters nuclear: federal regulation of the "safety ... aspects of energy generation" and state regulation of aspects that "States have traditionally occupied" such as "the type of generating facilities to be licensed, land use, ratemaking, and the like." *Id.* at 211-12.

Under these standards, the challenged California statute escaped preemption because the AEA preserved the states' traditional role in determining, on economic

grounds, whether an electric generating plant, nuclear or otherwise, should be built in the first place. *Id.* at 222-23. In response to the argument that the “true” motive for or purpose of the challenged California statute was fear of a nuclear accident and hence “radiological safety,” the Court held that a “nonsafety rationale” for the challenged state statute was sufficient to sustain that statute against a preemption claim. *Id.* at 213. The challenged statute, of course, had such a rationale: concern regarding the economic viability of a new nuclear power plant in an uncertain SNF storage/disposal world.

The Court underscored the narrow scope of the “radiological safety” field just one year later in a landmark case coming from this circuit, *Silkwood, supra*, 464 U.S. 238 (1984). In that case, the administrator of the estate of a deceased laboratory analyst at a federally licensed nuclear facility brought a state law tort action against the facility to recover for plutonium contamination injuries to the analyst’s person and property. The jury awarded compensatory and punitive damages, even though the facility’s safety features complied with NRC regulations. The facility raised an AEA preemption argument, relying on the *Pacific Gas* language that “the Federal Government has occupied the entire field of nuclear safety concerns,” 461 U.S. at 212, language implying that no state could impose its own more stringent safety regulations on nuclear power plants. The Supreme Court rejected this AEA preemption argument and upheld the award of both compensatory and punitive damages. In the process, the Supreme Court rejected

a “broad preemption analysis,” *id.* at 246, and further rejected the notion that field preemption analysis even applied:

But insofar as damages for radiation injuries are concerned, preemption should not be judged on the basis that the federal government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law.

Id. at 256. The Court went on to hold that the requisite conflict and frustration were absent in that case, *id.*, concluding, as Justice Blackmun put it in his opinion, that “[w]hatever compensation standard a state imposes . . . a [nuclear] licensee remains free to continue operating under federal [safety] standards and to pay for the injury that results.” 464 U.S. at 264 (Blackmun, J., dissenting as to punitive damages only).

Several years later in *English, supra*, 496 U.S. 72 (1990), a unanimous Supreme Court again reinforced the narrow scope of the “radiological safety” field and the high level of conflict and frustration required to sustain a preemption holding. In *English*, a nuclear facility technician had complained to the NRC and to her employer (the facility) of various safety violations. The facility fired her, and she sued for intentional infliction of emotional distress under state tort law. The facility argued AEA preemption, but the Court held that the tort claim was not preempted, holding that anything less than direct and substantial effects on safety decisions will not sustain a preemption claim:

[F]or a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those who build or

operate nuclear facilities concerning radiological safety levels. We recognize that the claim for intentional infliction of emotional distress at issue here may have some effect on these decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. As employers find retaliation more costly, they will be forced to deal with complaints by whistle-blowers by other means, including altering radiological safety policies. Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the pre-empted field.

Id. at 85.

The district court's preemption analysis is incompatible with *Pacific Gas*, *Silkwood*, and *English*. Most of the challenged Utah provisions survive preemption under a proper application of these cases – even if the NWPA were construed not to speak to the lawfulness of a private, away-from-reactor, SNF storage facility.

1. The AEA does not preempt the “municipal contract” provisions.

The “municipal contract” provisions divide between Step One and Step Two and operate as follows: As long as the lawfulness of a PFS-type facility has not been “upheld by a final judgment of a court of competent jurisdiction,” U.C.A. § 19-3-301(2)(a)(ii), and therefore the flat prohibition remains in effect, local government cannot contract to provide law enforcement and other municipal services to the prohibited facility. U.C.A. § 17-34-1(3). But, in the event that Utah's position on the “lawfulness” issue is upended, then local government can contract to provide such services upon compliance with the Step Two regulatory scheme. *E.g.*, U.C.A. § 17-27-102(2) (upon compliance “with the mandatory provisions of this part,” a county's “agreement or contract to provide goods,

services, or municipal-type services to any storage facility . . . may be executed [and implemented.]”⁶⁷

The “municipal contract” provisions are the focus of Utah’s Security J contention before the NRC’s Licensing Board, discussed in the standing section above and in notes 9 and 42. NRC staff has made it clear in those proceedings that PFS’s security plan can satisfy standards through use *either* of local law enforcement *or* of a private security force.⁶⁸ The district court struck down the “municipal contract” provisions, however, on the basis of its factual speculation that a “refusal to provide municipal services would drastically increase PFS’s cost of operation, because the SNF facility would have to provide its own emergency services.” Order, App. V, 40, at 1572. Contrary to the district court’s speculation, the record contains nothing relative to costs of emergency services. Accordingly, Utah, as the nonmoving party in the summary judgment context, is entitled to the inference that the cost to PFS of contracting for local law enforcement

⁶⁷ Moreover, the prohibition on municipal-type services is limited just to the “area under consideration for a storage facility.” U.C.A. § 17-34-1(3). As is commonly known, and as the Utah Legislature made clear during its deliberations on this provision, “area” means just that, the area devoted to the storage facility. In this case, that means the uninhabited 820 acres devoted to the dump site and does not mean any other portion of the Band’s reservation of some 18,000 acres. (Thus, Tooele County’s law enforcement agreement with the Band is in full force and effect for all but the 820 acres – where nobody lives.)

⁶⁸ See 10 CFR 72.120, cross-referencing 10 C.F.R. §73.51(d). Subsection (5) of the latter provides: “Documented liaison with a designated response force [private security force] or local law enforcement agency (LLEA) must be established to permit timely response to unauthorized penetrations or activities.”

services is equal to or more than the cost to PFS of providing the allowed alternative, a private security force. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp, supra*, 475 U.S. at 588.⁶⁹ In any event, the district court, on the basis of its “drastically increased costs” assertion, went on to assert, without further support or analysis, that “[t]his municipal service provision has a direct and substantial affect [sic] on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels and, thus, fall [sic] within the preempted field.” Order, App. V, 40, at 1572.

The district court’s analysis fails for at least four reasons. First, the “factual” basis for the district court’s analysis – “drastically increased costs” – has no support in the record. In the absence of any such evidence, Utah is entitled to the contrary inference – no increased costs. Second, even if the “municipal contract” provisions somehow increase PFS’s costs, certainly the increase would still be far below the costs at issue in *Silkwood* (\$10,000,000 in punitive damages) and in *English* (damages for intentional infliction of emotional distress) – costs that the Supreme Court held to have an insufficiently “direct and substantial effect” to result in preemption.

Third, the NRC and another district court have already held on the basis of thorough analysis, that a state’s “non-participation” decision, such as is reflected in the

⁶⁹ The district court went on to assert that the “municipal contract” provisions “threaten PFS’ application before the NRC.” Order, App. V, 40, at 1572. That assertion goes to the standing, not the preemption issue, and is false, as demonstrated in section I above.

“municipal contract” provisions, is not preempted by the AEA. In *Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, LPB-85-12, 21 NRC 644 (1985), the Licensing Board reviewed a case where the owner/operator (LILCO) of a proposed Long Island nuclear power plant intended under LILCO’s emergency response plan to use private persons to accomplish various police-type tasks but a New York statute and Suffolk County ordinance prohibited such. LILCO argued that the local laws “are preempted by the Atomic Energy Act of 1954, as amended, ‘because they invade the field of radiological health and safety regulation, a field exclusively occupied by the federal government . . .’ and further that ‘emergency planning . . . is inherently and exclusively a matter of radiological health and safety.’” *Id.* at 900. After a detailed and scholarly analysis, the Licensing Board rejected the argument. *Id.* at 900-909. The Board noted the absence of a “nexus” between the operation of traditional state police powers and “the regulation of radiological health and safety,” *id.* at 904, and held that the regulation of law enforcement and similar resources “raise questions that are a matter of local concern” and thus “Congress did not intend to preempt any of the State laws” at issue. *Id.* at 907.

A federal district court reached the same conclusion in *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk*, 604 F.Supp. 1084, 1093-96 (E.D.N.Y. 1985). In that case, the County of Suffolk had enacted resolutions “effectively establish[ing] the County’s policy to oppose nuclear power facilities within its borders and to refuse to cooperate in radiological emergency response planning.” *Id.* at 1094. “In order to

determine whether defendants' refusal to participate is in fact a preempted regulation of nuclear safety, the court looks to judicial precedent and the legislative history of the AEA for guidance." *Id.* That look (careful and detailed) led the court to hold that the County's non-participation decision was not preempted. *Id.* at 1096.

Fourth, *Pacific Gas* emphasizes that the AEA preserves state authority over "areas that characteristically have been governed by the States"—including the exercise of "historic police powers." 461 U.S. at 205-06. Traditional state police powers obviously encompass decisions regarding the allocation of law enforcement resources. Because in Utah a county is a subdivision of the State, Utah Const. Art. XI, § 1, county law enforcement constitutes a component of the State's total law enforcement resources. With the "municipal contract" provisions, Utah announced a decision regarding the allocation of its law enforcement and similar resources; Utah determined that those resources would not be used in connection with an SNF storage facility unless and until due process led to a holding that such a facility was lawful and, if such a holding materialized, that its resources would then be used in connection with such a facility only upon that facility's compliance with various state regulatory requirements. Importantly, the "municipal contract" provisions do not in any way prohibit or hinder the promoter of such a facility from engaging private security forces.

Thus, Utah's "municipal contract" provisions escape preemption because they cannot be shown to have any effect on radiological safety decisions and they fall within

an area traditionally reserved for state regulation. Whatever preemptive effect the AEA may have, the AEA certainly does not operate, under the guise of “preemption,” to dictate how and when and where and on whose behalf a state will use its law enforcement resources.⁷⁰

2. The “unfunded potential liability” provisions are not preempted.

The “unfunded potential liability” provisions are those portions of the challenged statutes designed to assure payment of at least a portion (75%) of any liability (i) resulting from operations connected to an SNF waste dump and (ii) falling outside the scope or coverage of the Price-Anderson Act, a component of the AEA, 42 U.S.C. § 2210. Specifically, section 19-3-301(5) of the Utah Code directs Utah’s Department of Environmental Quality (“DEQ”) to determine “the amount of unfunded potential liability in the event of a release of waste” connected to an SNF waste dump. (DEQ has not yet done that relative to any facility.) Section 19-3-316 then makes “any person in possession of waste . . . liable, consistent with the provisions of federal law, for any expense, damages, or injury incurred by . . . any person as a result of a release of the waste.” Finally, section 19-3-319(3) requires one seeking to create an SNF waste dump “to pay to [DEQ] not less than 75% of the unfunded potential liability . . . in the form of cash or cash

⁷⁰ PFS’s argument, if adopted, would raise serious constitutional questions. *Printz v. United States*, 521 U.S. 898, 933 (1997) (“The Federal Government may not compel the states to enact or administer a federal regulatory program.”)

equivalents” and to do so before beginning operations. (DEQ has not yet promulgated regulations specifying what qualifies as “cash equivalents.”)

The scope of Utah’s concept of “unfunded potential liability” is determined by the scope of the Price-Anderson Act (“PAA”). As this Court has explained, the PAA provides certain “protections from tort liability for the nuclear industry,” including

(1) an aggregate ceiling on the liability for nuclear tort claims; (2) a “channeling of liability” to protect private entities from liability for their indirect participation in atomic development; and (3) an indemnification program, through which the federal government would require private insurance coverage to a certain level, and pay public liability claims above that amount, up to the liability ceiling created by the PAA.

Kerr-McGee Corp. v. Farley, 115 F.3d 1498, 1503 (10th Cir. 1997). Thus, for claims within the scope of the PAA, claimants can recover from an assured fund – currently about \$9.5 billion for any one “nuclear incident,” 107th Cong., Price-Anderson Reauthorization Act of 2001, H.R. Rep. No. 107-299, pt. 1, at 6 (2001) – and covered nuclear entities have no liability above that “liability ceiling.”

Utah’s unfunded liability provisions are designed to fill in the gaps in the PAA’s coverage. Any damage claim falling *within* the scope of the Price-Anderson Act falls *without* the scope of the Utah provisions, exactly because such a claim is *funded* up to the “aggregate ceiling” and, above that ceiling, does not create *liability*. (That ceiling is, after all, “the liability ceiling.” *Kerr-McGee Corp. v. Farley*, *supra*, 115 F.3d at 1503.) Thus, the Utah statutes require a payment of 75% of unfunded liabilities *only* with respect to

activities not covered by the PAA; Utah enacted those provisions, in other words, in the face of uncertainty about the scope of the PAA's coverage and with the intent to assure payment of claims not eligible for the PAA fund.

The scope of the Price-Anderson Act – that is, just which entities and what kinds of nuclear events the Act covers – is the subject of hot debate and considerable uncertainty. Compare *Kerr-McGee Corp. v. Farley*, *supra*, 115 F.3d 1498, with *Gilberg v. Stepan Co.*, 24 F.Supp.2d 325 (D.N.J. 1998) (thorough, scholarly analysis of the issue, coupled with vigorous criticism of this Circuit's decision in *Farley*). See also Dan Guttman, Price-Anderson Act Reauthorization: Due Diligence Is in Order, 32 *Envtl. L. Rep.* 10594 (2002) (reviewing the conflicting cases on the scope of the Price-Anderson Act); John Karl Gross, Note, Nuclear Native America: Nuclear Waste and Liability on the Skull Valley Goshute Reservation, 7 *B.U. J. Sci. & Tech. L.* 140, 153-58, 162-66 (2001) (canvassing some of the uncertainties relative to Price-Anderson Act coverage for some activities connected to PFS's proposed waste dump). In Utah's view, this uncertainty inheres in transportation to the proposed PFS waste dump (with the issue perhaps turning on the nature of the license held by the source of the SNF), storage at the dump (with the issue perhaps turning on the presence or absence of an NRC/PFS indemnity agreement), and transportation from the proposed PFS waste dump to a site other than the federal permanent repository (with the issue perhaps turning on the nature of the license held by the original source of the SNF and/or the nature of the license held

by the destination). Faced with this uncertainty, Utah enacted the “unfunded liability provisions” to assure payment of at least a portion (75%) of any liability (i) resulting from operations connected to an SNF waste dump and (ii) falling outside the scope or coverage of the PAA.⁷¹

The “unfunded potential liability” provisions surely escape preemption. Unfortunately, the district court offered no analysis of those provisions other than to note their existence, Order, App. V, 40, at 1566, and then, apparently, to strike them down with its blanket conclusion that “Part 3 [of which the provisions are one section among many] attempts to regulate areas which are covered by the AEA and, therefore, is preempted.” *Id.* at 1567. But this facile conclusion is incompatible with the Supreme Court’s decisions in *Silkwood* and *English*, both of which uphold state rules dictating the financial consequences of nuclear accidents.

Silkwood and *English* clearly reject the notion that the federal government has so completely occupied the field of nuclear safety that the states are precluded from prescribing additional financial consequences to nuclear accidents. Instead, these two cases hold that such additional consequences are preempted only if they (1) “have some

⁷¹ As noted in section II above, it remains to be seen whether and to what extent PFS’s activities will be found to fall under the umbrella of the PAA. If all of PFS’s activities are covered by the PAA, the unfunded liability provisions will have no practical effect on PFS, and there will be no case or controversy before the court under these provisions. This is just one of the many uncertainties that counsels in favor of a dismissal of this case on ripeness grounds.

direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels,” *English, supra*, 496 U.S. at 85, or (2) are irreconcilable with the or frustrate the objectives of the federal law, *id.* at 87. The “unfunded potential liability” provisions easily escape preemption under these standards.

First, there is no evidence in the record to support the proposition that these provisions will have *any* effect on decisions regarding radiological safety levels – much less a “direct” and “substantial” effect. And even assuming for the sake of argument that the record could support a finding of any such effects, these effects would be indirect and insubstantial, as *Silkwood* and *English* make clear. In *Silkwood*, state awards of “compensatory and punitive damages for radiation-based injuries” were acknowledged to have some effect on “nuclear employers’ primary decisions about radiological safety in the construction and operation of nuclear power facilities,” but the Court nevertheless held that there was “no evidence of a ‘clear and manifest’ intent on the part of Congress” to preempt such claims. *English, supra*, 496 U.S. at 86 (summarizing the decision in *Silkwood*). In the Court’s view, the effects of such a damages award were “neither direct nor substantial enough to place petitioners’ claim in the preempted field,” *id.* at 85, despite the fact that “the tort claim in *Silkwood* attaches additional consequences to safety violations themselves,” *id.* at 86. Moreover, the *Silkwood* Court reached this conclusion despite the “tension between the conclusion that [radiological] safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless

award damages based on its own law of liability” governing unsafe working conditions. *Silkwood, supra*, 464 U.S. at 256.

After *Silkwood*, *English* was an easy (and unanimous) case. If state remedies imposing damages based on state standards of safe working conditions escaped preemption, then clearly the retaliatory discharge remedies in *English* also survived, since “the prospect of compensatory and punitive damages for radiation-based injuries will undoubtedly affect nuclear employers’ primary decisions about radiological safety in the construction and operation of nuclear power facilities far more substantially than will liability under [the retaliatory discharge provisions at issue in *English*].” 496 U.S. at 86. The same conclusion is appropriate here: the effects of the remedies in *English* obviously are more direct and more substantial than any supposed effects of the unfunded liability provisions, and thus those provisions escape preemption under *Silkwood* and *English*.

Nor can the “unfunded potential liability” provisions be said to conflict with or frustrate federal law. PFS never made any attempt to demonstrate any conflict with or frustration of federal objectives in the record on summary judgment, and the notion of such a conflict is logically untenable. The “unfunded potential liability” provisions operate only in an area that Congress has left outside the scope of its regulatory scheme (the PAA). Nothing in the evolution of the PAA evidences any Congressional intent to alter state compensation schemes relative to nuclear events falling outside that Act’s

scope. The courts so recognize: in cases arising from such events, they deem state law to govern. *E.g., Gilberg v. Stepan Co., supra*, 24 F. Supp.2d at 346.

Indeed, a contrary conclusion would lead to perverse, nonsensical results. Congress could not have intended to provide a fund approaching \$10 billion to victims of nuclear activities covered by PAA, while at the same time completely foreclosing the states from taking any steps toward assuring recovery for victims of nuclear activities not covered by the Act. Preemption analysis is fundamentally an inquiry into congressional intent,⁷² and any court should be loathe to ascribe such a perverse result to Congress.

3. The AEA does not preempt U.C.A. § 19-3-318 (financial responsibility of equity interest holders).

Section 19-3-318 provides in essence that those who stand to profit from the existence of a nuclear waste dump in Utah must also bear the risks of harm that such an enterprise may impose on innocent people. The section does this by using the well-established concept of “piercing the corporate veil,” although here the concept is applied to any limited liability entity, not just corporations. Thus, the section allows liability for enterprise harms to flow to equity interest holders.

⁷² Laurence H. Tribe, *American Constitutional Law* 1177 (3rd ed. 2000) (“Perhaps the most fundamental point to remember is that preemption analysis is, or at least should be, a matter of precise statutory construction rather than an exercise in free-form judicial policymaking.”)

The reason for the section is immediately apparent. The Legislature was aware that a PFS-type enterprise would create risks of an almost unfathomable magnitude and that the scope of the PAA relative to a PFS-type facility was uncertain. Thus, the Legislature was aware that in plausible circumstances leakage from just one cask could result in in-state economic damages exceeding \$300 billion and that, even in the absence of an accident, enterprise activities plausibly could reduce in-state real property values by over \$5 billion. See Utah's Response to Plaintiffs' Joint Motion for Summary Judgment, Exhibit 1, Affidavit of Christopher J. Kyler, App. IV, 28, at 1230-31. With that awareness, the Utah Legislature had a responsibility to ask who should bear the risk of such harm to the extent that risk is not funded and capped by the PAA. Section 19-3-318 is the Legislature's answer: Those who stand to profit from the enterprise, the equity interest holders, should bear that risk rather than innocent bystanders.

In making this judgment, the Legislature stood on a rock-solid legal foundation. Settled law gives a state power, when considerations of justice or equity warrant, to remove a business entity's limited liability and thus eliminate that entity's equity holders' "shield." *Messick v. PHD Trucking Services, Inc.*, 678 P.2d 791, 794 (Ut. 1984) (disregard of equity holders' shield permitted when to do otherwise "would sanction a fraud, promote injustice, or an inequitable result would follow."). And states use this power properly and regularly, regardless of the business entity's state of creation. Compare *S.T. Hudson Engineers, Inc. v. Camden Hotel Development Assocs.*, 747 A.2d

931 (Pa. Super. 2000) (Pennsylvania court pierces the veil of a Pennsylvania corporation) with *Great Neck Plaza, L.P. v. Le Peep Restaurants, LLC*, 37 P.3d 485 (Colo. App. 2001) (Colorado court pierces the veil of a Nevada limited liability company).

The district court struck down section 19-3-318 on this analysis:

Such individual risk would more likely than not have the effect of preventing the construction and operation of a SNF storage facility. At the least, there would be an additional, substantial cost of insurance to officers, directors, and PFS, and a corresponding effect on the safety measures employed by the facility. Therefore, § 19-3-318 directly and substantially affects the decisions made by those who build or operate nuclear facilities concerning radiological safety levels. Under *English*, such a law falls within the preempted field.

Order, App. V, 40, at 1567. But that analysis fails for several closely related reasons.

First, PFS never demonstrated and the district court never determined what, if any, of PFS's proposed activities will fall outside the PAA's scope. (On a broad reading of the *dicta* in *Kerr-McGee v. Farley, supra*, 115 F.3d at 1503-04, it might be said that none will, meaning PFS's equity holders will face no liability.)⁷³ Second, PFS never demonstrated and the district court never determined any dollar amount for any liability possibly resulting from PFS activities (if any) falling outside the PAA's scope. Third, PFS never demonstrated and the district court never determined what the "additional . . .

⁷³ Indeed, on such a reading, PFS would have no standing to challenge section 19-3-318 because that section could have no practical effect on PFS or its equity holders. In this connection, we note that no equity holder is a party to this action and hence no equity holder is challenging section 19-3-318.

cost of insurance to officers, directors, and PFS” would be as a consequence of section 19-3-318.⁷⁴

Finally, the district court had no basis for asserting that the additional costs (if any) resulting from section 19-3-318 were more direct or more substantial than the costs resulting from the Colorado and North Carolina compensation schemes sustained by the Supreme Court against AEA preemption attacks in *Silkwood* and *English*. Thus, section 19-3-318 escapes preemption for the same reasons set forth above in support of the “unfunded potential liability” provisions: such provisions have no “direct and substantial effect” on radiological safety decisions and cannot be said to conflict with the objectives of federal law.

4. The “roads” provisions are not preempted.

The “roads” provisions, U.C.A. §§ 54-4-15, 74-3-301, 74-4-125, and 78-34-6, regulate such matters as state control over roads in Skull Valley, railroad crossings on those roads, and related eminent domain activities, and provide for oversight by the Governor and the Legislature of state agency decisions relative to those matters. The district court did not dispute Utah’s position that the roads provisions on their face are

⁷⁴ It bears repeating that PFS always bears the burden of establishing the unconstitutionality of the challenged statutes, which come to this Court with a presumption of constitutionality, *Lujan v. G & G Fire Sprinklers, Inc.*, *supra*, 532 U.S. at 198, and that, in the summary judgment context, the party with the burden of proof (here, PFS) cannot be granted a judgment without first presenting evidence adequate to sustain that judgment. *Albee Tomato, Inc. v. A.B. Shalom Produce Corp.*, *supra*, 155 F.3d at 617-18.

nothing “other than an obviously lawful exercise of Utah’s power to legislate with respect to the roads in the State,” a traditional state government function. Order, App. V, 40, at 1569. But the district court then asserted that “the relevant inquiry goes beyond the statute’s language.” *Id.* at 1570.

What the district court deemed relevant “beyond the statute’s language” was both the purported “true legislative motive” to create a “moat” around the proposed nuclear waste dump site and the prediction that Governor Leavitt and the Legislature, when the time came in the future, would use their statutory power to block transport of SNF on the State’s roads. *Id.* at 1570-71. On the basis of that divination of true motive and that prediction of future action, the district court asserted without further analysis that “the Road Provisions directly and substantially affect the decisions made by those who build or operate nuclear facilities concerning radiological safety levels and fall within the preempted field.” *Id.* at 1571. The district court did not specify what those assertedly affected “decisions” might be, nor does the record contain any clue on the matter.

Moreover, the district court did not come to grips with (but obviously went contrary to) Supreme Court and Tenth Circuit law demanding an objective evaluation of the text and effect of state laws subject to a preemption challenge and shunning a subjective hunt for “true legislative motive.” The Tenth Circuit is particularly strong in its insistence that, in preemption analysis, the focus be on the objective effects of a local law, not on any subjective assessment of the motivations prompting enactment of the law.

Blue Circle Cement, Inc. v. Board of County Comm'rs, 27 F.3d 1499 (10th Cir. 1994), is the leading case. There an Oklahoma county sought to use a local zoning ordinance to prevent a quarry and cement manufacturing plant from using hazardous waste fuels in its cement kilns. The plant owner argued preemption under the federal Resource Conservation and Recovery Act. In its preemption analysis, this Court said:

[I]t seems to us that the evaluation of the local ordinance should be conducted on an objective, rather than a subjective, basis. It is, after all, very difficult to determine the bona-fides of a collective legislative body where motivation may vary among the members of that body and where, in most cases, the motivations may be complex and easily disguised. Rather, we are on firmer footing if we utilize an objective approach, asking whether a legitimate local concern has been identified and whether the ordinance is a reasonable response to that concern. Of course, we must also examine the impact of the local ordinance on the objectives of the federal statute because there can be no implied *Hines* preemption unless the local ordinance thwarts the federal policy in a material way.

Id. at 1508-09. This Court then correctly noted that “[i]n adopting an objective, rather than a subjective, analysis for our preemption review, we are following the lead of the United States Supreme Court,” citing *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992).⁷⁵

This Court might also have cited *Pacific Gas, supra*, 461 U.S. 190, which refused the utilities’ invitation (similar to PFS’s here) to find that California’s true motive was concern for “radiological safety” and hence impermissible:

⁷⁵ *Blue Circle’s* rejection of a search for subjective legislative motives cuts against both the “improper motive” claims of a party attacking the statute and any statutory declaration of the Legislature’s “motives.” 27 F.3d at 1509.

Although these specific indicia of California's intent in enacting [the challenged statute] are subject to varying interpretation, there are two further reasons why we should not become embroiled in attempting to ascertain California's true motive. First, inquiry into legislative motive is often an unsatisfactory venture. . . . What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it. Second, it would be particularly pointless for us to engage in such inquiry here when it is clear that the states have been allowed to retain authority [to do what California did].

Id. at 216. *See also English, supra*, 496 U.S. at 84 n. 7 (1990) (declining to hold that "safety motivation is relevant").

The district court also erred by ignoring the fact that a proposed rail line (one not crossing state lands) is PFS's preferred method for transporting SNF to the dump site,⁷⁶ and that, therefore, the "roads" provisions probably will never affect PFS operations. Further, the district court provided no basis for its assumption that it would be Governor Leavitt who would exercise the gubernatorial power, if the occasion to do so ever arose in the future. (Governor Leavitt's third term ends January 2005, Utah has never had a four-term governor, and the record is devoid of evidence as to when any gubernatorial decisions under the "roads" provisions will need to be made. If PFS has its way with its proposed railroad route, the answer is never.)

⁷⁶ PFS's preference for the rail line is fundamental to its plan, as reflected in the EIS for the proposed facility. *See* Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, NUREG-1714, Docket No. 72-22, at 2-14 (December 2001).

In sum, on a legally and factually insubstantial basis, the district court held preempted state statutory provisions regulating matters at the core of any state's traditional powers, the power to regulate state roads. That holding is invalid exactly because of the traditional nature of a state's powers over its roads and because of PFS's failure to establish in this case the requisite irreconcilable conflict or frustration of federal objectives.

5. The "licensing" provisions are not preempted.

The "licensing" provisions, U.C.A. §§ 19-3-301(4) and (6), 19-3-304 through 19-304-311, and 19-3-315, are Step Two provisions, that is, they take effect only after judicial resolution of the lawfulness of an away-from-reactor storage facility. They contemplate that the owner-operator of such a facility must receive a state agency-issued license, and provide for the issuance of the license if the facility complies with a broad range of regulations in areas traditionally subject to local government regulation. These areas include groundwater impacts, social and economic impacts, and security plans for transportation and transfer operations.⁷⁷ They also include, to be sure, other areas that concern radiological safety.⁷⁸

⁷⁷ *E.g.*, U.C.A. §§ 19-3-305(1) (groundwater); 19-3-305(2) and 19-3-315 (transportation); 19-3-305(4) (economic and social impacts); and 19-3-307(2) (siting considerations such as nearby archeological sites or historic structures).

⁷⁸ *E.g.*, U.C.A. §§ 19-3-305(10)-(13) and 19-3-306(3)-(4).

PFS has consistently taken the position (reflected, for example, in its filings with the NRC) that it (PFS) is not subject to any state or local regulation relative to any aspect of its proposed project. Thus, in this action, PFS has taken the position that any state licensing requirement applicable to PFS, whatever its subject, is *per se* preempted by the AEA. Utah has consistently taken the position (reflected, for example, in the *Granite Rock* logic underlying Utah's adoption of the "licensing" provisions) that PFS is subject to state regulation in the "gap" areas, that is, those areas where federal regulation is not present.

In accepting PFS's broad and absolute preemption challenge to the "licensing" provisions, the district court identified the obvious: some portions of the "licensing" provisions purport to regulate in areas where federal regulation is present, indeed, exclusive – such as the "radiological safety" aspects of the proposed PFS facility. According to the district court, because "[t]his state licensing scheme duplicates the NRC's licensing procedure in significant ways . . . [it] is preempted." Order, App. V, 40, at 1566-67. In so ruling, however, the district court ignored the equally obvious facts (i) that portions of the "licensing" provisions regulate in areas where federal regulation is absent, that is, in the "gaps"; (ii) that *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987), held that, to defeat a broad, absolute, and facial preemption challenge, the defendant state agency "needed merely to identify a possible set of permit conditions not in conflict with federal law"; and (iii) that Utah's DEQ and Department of

Transportation do identify such “a possible set of permit conditions” in their administration of the “licensing” provisions.

In *Granite Rock*, a mining company was engaged in the business of mining limestone and held an unpatented mining claim on federal land in a national forest. A California statute required “any person undertaking any development, including mining, in the State’s coastal zone [to] secure a permit from the California Coastal Commission.” 480 U.S. at 576. The Commission directed the mining company to apply for a permit for any further mining. The company initiated a federal action, arguing that federal law preempted California’s state permit requirement. On virtually the same reasoning used by the district court here, the Ninth Circuit held for the mining company, stating that “an independent state permit system to enforce state environmental standards would undermine the Forest Service’s own permit authority and thus is preempted.” *Id.* at 577.

The Supreme Court reversed:

Granite Rock suggests that the Coastal Commission’s true purpose in enforcing a permit requirement is to prohibit *Granite Rock’s mining entirely*. *By choosing to seek injunctive and declaratory relief against the permit requirement before discovering what conditions the Coastal Commission would have placed on the permit, Granite Rock has lost the possibility of making this argument in this litigation.* Granite Rock’s case must stand or fall on the question whether any possible set of conditions attached to the Coastal Commission’s permit requirement would be pre-empted. . . . In the present posture of this litigation, the Coastal Commission’s identification of a possible set of permit conditions not pre-empted by federal law is sufficient to rebuff Granite Rock’s facial challenge to the permit requirement.

Id. at 588-89.

Utah's DEQ and Department of Transportation intend to apply the "licensing" provisions in the "gaps" and not in areas where exclusive federal regulation is in effect. Thus, DEQ intends to apply the "licensing" provisions to air quality effects, surface water and groundwater impacts, and other activities with off-reservation effects such as nonradiologic solid waste handling and disposal. The Department of Transportation's intent focuses on weight restrictions, highway requirements and restrictions, tracking systems, speed restrictions, transport times, and motor carrier and escort requirements. These two departments are presently uncertain regarding their role in security issues arising from off-reservation transportation, particularly security at PFS's proposed intermodal transfer site adjacent to Interstate 80 far north of the Band's reservation. That uncertainty results from the fact that the NRC has chosen not to address those issues in the PFS licensing proceeding.⁷⁹ Given NRC's apparent decision to limit its regulatory activities short of those transportation security issues, the two departments will probably pursue their regulatory mandates concerning those issues pending further clarification of federal regulatory intent.

⁷⁹ The NRC chose instead to rely on generic United States Department of Transportation and NRC regulations pertaining to SNF transportation, refusing thereby to view the unique activities at the intermodal transfer site as meriting tailored regulatory oversight.

In sum, in the procedural posture of this case, in light of the *Granite Rock* holding, and in the context of the Utah departments' intended use of their regulatory powers, the "licensing" provisions withstand PFS's preemption attack.⁸⁰

CONCLUSION

In light of all the foregoing, Utah respectfully requests that this Court:

1. hold that PFS lacks standing because PFS did not meet its burden to show standing where it presented no evidence that it had suffered a redressable injury to a legally protected interest; and/or

⁸⁰ U.C.A. § 19-3-312 addresses enforcement and penalties relative to violations of the challenged statutes in Part 3. The district court did not analyze this section separately but apparently struck it down as part of the court's blanket invalidation of all of Part 3. Relative to any portion of Part 3 ultimately held invalid, section 19-3-312 is not operative; relative to the rest of Part 3, the section is operative and presumptively valid. A state may enforce its valid laws.

Utah elects not to defend U.C.A. § 19-3-301(10), which imposes "an annual transaction fee of 75% of the gross value of [a contract] to the party providing goods, services, or municipal-type services to" an SNF storage or transportation facility. In pre-enactment discussions, Utah's executive branch favored the general idea of a reasonable tax on such contracts, especially since the statutory scheme provides that two-thirds of the tax collected goes to the Utah Division of Indian Affairs for the funding of a wide range of social and economic development activities for the benefits of Utah's tribes opposed to in-state SNF storage (all the tribes except the Band). But also in those pre-enactment discussions, Utah's executive branch opposed a 75% tax as grossly excessive. Nevertheless, the bill's sponsor insisted on the 75% figure. (Utah's governor does not have a line-item veto.) Continuing of the view that the 75% rate cannot be justified, Utah respectfully declines to defend that provision in this action.

The challenged statutes have a severability provision. U.C.A. § 19-3-317. In the context of PFS's attack on the Utah statutes, governing law gives full effect to that provision. E.g., *Stewart v. Utah Public Service Comm'n*, 885 P.2d 759, 779 (Utah 1994); *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1250 (10th Cir. 2000).

2. hold that PFS's claims are not ripe because requisite NRC and Department of Interior approvals for the proposed facility have not yet been granted and may never be and because PFS did not meet its burden of proof that the challenged Utah statutes were causing present "business uncertainty."

If this Court disagrees with Utah's position on justiciability and the "lawfulness" issue, Utah requests that this Court hold the challenged statutes not preempted.

REASONS FOR ORAL ARGUMENT

This Opening Brief demonstrates the bases for oral argument in the case: the breadth and complexity of the three statutory schemes necessarily requiring this Court's attention; the large number of issues (and their novelty and difficulty) necessarily requiring this Court's attention; and the public importance of this case.

Dated: 18 October 2002



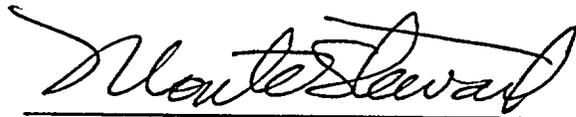
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), Federal Rules of Appellate Procedure, I certify that, by Order dated 15 October 2002, this Court granted leave for Appellants to file an Opening Brief consisting of no more than 2500 lines of text and that this Opening Brief (from the “Jurisdiction” section through the “Conclusion”) consists of 2397 lines of text.

A handwritten signature in black ink, appearing to read "Monte Stewart", written over a horizontal line.

MONTE N. STEWART
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