

No. 05-1419

Consolidated with 05-1420, 06-1087

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

OHNGO GAUDADEH DEVIA and
STATE OF UTAH,
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

PRIVATE FUEL STORAGE, L.L.C. and
SKULL VALLEY BAND OF GOSHUTE INDIANS,
Intervenors.

On Petitions for Review of Orders and a License of the
Nuclear Regulatory Commission

MOTION OF PETITIONER STATE OF UTAH TO VACATE
FINAL AGENCY ACTION AS MOOT

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A quarter-century after Respondent-Intervenor Private Fuel Storage, L.L.C. (PFS), sought a license from Respondent Nuclear Regulatory Commission (NRC), 16 years after the NRC granted the requested license, and some 15 years after this Court held in abeyance petitions for review of the requested license because “petitioners’ challenge . . . has all the earmarks of a decision that ‘we may never need to’ make,”¹ it is time to conclude that this Court *does* never need to resolve the petitions for review. This matter is moot.

When a matter has become moot through no fault of the parties seeking appellate review, the proper course is to vacate the decision below. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). That course is just as appropriate in cases arising from administrative agencies as in cases appealed from lower courts. “[T]he principle enunciated in *Munsingwear* [is] at least equally applicable to unreviewed administrative orders.” *A.L. Mechling*

¹ *Ohngo Gaudadeh Devia v. Nuclear Regulatory Commission*, 492 F.3d 421, 425 (D.C. Cir. 2007) (quoting *National Treasury Employees Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996)).

Barge Lines, Inc. v. United States, 368 U.S. 324, 329 (1961); *see also Board of Governors v. Security Bancorp*, 454 U.S. 1118 (1991); *Northern California Power Agency v. NRC*, 393 F.3d 223, 225 (D.C. Cir. 2004).

This Court therefore should vacate as moot the final agency action below and all the contested decisions leading to issuance of the license and denial of rehearing.

STATEMENT

1. As this Court noted in 2007, in 1997 PFS, “a consortium of eight nuclear utilities, applied to the” NRC “for a license to build and operate an Independent Spent Fuel Storage Installation (ISFSI).” 492 F.3d at 422. The facility was to be built “on land in Utah belonging to the Skull Valley Band of Goshute Indians,” “pursuant to a lease between the Band and PFS.” *Id.*

“On September 8, 2005, following a lengthy administrative proceeding in which the petitioners participated, the NRC issued a memorandum and order authorizing its staff to issue a license to

PFS to build and operate the ISFSI. On February 21, 2006, . . .

NRC granted the license.” 492 F.3d at 423.

However, other federal agencies denied approvals – of rights-of-way and of the lease – necessary for PFS to build the facility. *Id.* This Court therefore “f[ou]nd the petitions for review unripe, and [held] this case in abeyance in accordance with the terms set forth in the accompanying order.” *Id.* at 428. The accompanying order required the parties to file periodic status reports and in particular sought information about any judicial review of the agency decisions that precluded PFS from proceeding. *See* Order, No. 05-1419 (D.C. Cir. June 26, 2007), Document No. 1049256.

On July 26, 2010, the United States District Court for the District of Utah vacated both denials and remanded the right-of-way application and the lease to the Department of the Interior for further consideration consistent with the court’s decision. *Skull Valley Band of Goshute Indians v. Davis*, 728 F. Supp. 2d 1287 (D. Utah 2010).

On November 15, 2010, this Court in response to the parties' joint motion entered an Order holding this case in abeyance pending further order of the Court and directing the parties, including the Intervenors, to file periodic status reports on the remanded right-of-way application and lease approval. Order, No. 05-1419 (D.C. Cir. Nov. 15, 2010), Document No. 1277356.

The parties continued to file status reports through March 20, 2018. Shortly thereafter, this Court administratively terminated the case. *See* Order, No. 05-1419 (D.C. Cir. Apr. 24, 2018), Document No. 1727939.

2. PFS at one point formally abandoned its license application. *See* Seventeenth Status Report at 4, No. 05-1419 (D.C. Cir. Apr. 15, 2013), Document No. 1430785. PFS, however, later rescinded its abandonment. *See* Twenty-Second Status Report at 3, No. 05-1419 (D.C. Cir. Dec. 4, 2014), Document No. 1525486.

Nevertheless, publicly available and judicially noticeable sources demonstrate that PFS has abandoned the project *de facto* if not *de jure*.² The Court of Federal Claims has found that “the [PFS] project is defunct” based on testimony at a trial stating that it is defunct and “the entire investment in PFS is worthless.” *Southern California Edison Company v. United States*, 93 Fed. Cl. 337, 359 (2010). More recently, public records of the Bureau of Land Management have show that PFS’s applications for the necessary rights-of-way have lapsed and the agency’s records pertaining to those applications have been sent to the National Archives. *See Attachments A & B.*

ARGUMENT

The agency actions challenged by the petitions for review

² The State of Utah was not involved in any of the discussions PFS had with federal agencies following the remand from the Utah district court, nor has it had any other reason to know PFS’s intentions other than to the extent those intentions are made public. Certainly, Utah did nothing to *cause* this case to become moot (a factor often relevant to the propriety of an order of vacatur).

should be vacated as moot.

For there to be a justiciable “Case” or “Controversy,” U.S. Const. Art. III, “a live controversy must exist at all stages of judicial review.” *NTCH, Inc. v. FCC*, 841 F.3d 497, 504 (D.C. Cir. 2016) (citing *Friends of the Earth v. Laidlaw Env. Servs.*, 528 U.S. 167 (2000)). “If events outrun the controversy such that the court can grant no meaningful relief, the [claim] must be dismissed as moot.” *Id.* (quoting *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the U.S.*, 264 F.3d 52, 55 (D.C. Cir. 2001)).

There is nothing this Court could do to revive or shut down the PFS project. If the Court agreed with Utah’s challenges, the project (the ISFSI) would not be built. If the Court upheld all of the challenged NRC rulings in their entirety, the project would not be built. “[T]he [PFS] project is defunct.” *Southern California Edison Company v. United*

States, 93 Fed. Cl. at 359.

“[T]he appropriate disposition of moot administrative orders’ is vacatur of the administrative order [this Court is] without authority to review.” *Secretary of Labor, Mine Safety & Health Administration v. M-Class Mining, LLC*, 1 F.4th 16, 25 (D.C. Cir. 2021) (quoting *Tennessee Gas Pipeline Co. v. Federal Power Commission*, 606 F.2d 1373, 1382 (D.C. Cir. 1979), in turn citing *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. at 329); accord *Southern Services Co. v. FERC*, 416 F.3d 39, 44 (D.C. Cir. 2005); *American Family Life Insurance Co. (AFLAC) v. FCC*, 129 F.3d 625, 651 (D.C. Cir. 1997).

This Court has applied the normal rule in cases in which the NRC is the respondent. See *Northern California Power Agency v. NRC*, 393 F.3d 223, 225 (D.C. Cir. 2004). “[I]f the party who lost below did not cause the case to become moot, that is, if happenstance or the actions of the prevailing party

ended the controversy, vacatur remains the standard form of relief.” *Id.* That is undeniably the case here.

That vacatur should include all of the NRC’s decisions in this case. “A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.” 5 U.S.C. § 704. And this Court, too, has made clear that review of a final agency action can encompass review of preliminary, not-final agency actions as well. *See Yaman v. U.S. Dep’t of State*, 634 F.3d 610, 613 (D.C. Cir. 2011) (*per curiam*) (noting that an agency’s denial of a request for a document “will be subject to review as a part of the consolidated case, which includes a challenge to the [agency]’s final decision on the merits”).

It is only logical, then, that, a vacatur of a final agency action should also vacate any interim agency actions that a petitioner also challenged in its petition for review. Here, the State sought review of “all of the decisions of the [NRC] and

the Licensing Board leading up to and culminating with its final decision.” Pet. for Rev. at 2, No. 05-1419 (D.C. Cir. Nov. 8, 2005). All of those decisions should therefore be vacated.

Respectfully submitted,

Roy T. Englert, Jr.

/s/ Roy T. Englert, Jr.

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Utah

March 28, 2022

No. 05-1419

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**UNITED STATES COURT OF APPEALS FOR
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OHNGO GAUDADEH DEVIA, et, al.,)
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v.)
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UNITED STATES NUCLEAR)
REGULATORY COMMISSION, and)
the UNITED STATES OF AMERICA,)
Respondents.)

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27 and Cir. R. 27, I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,361 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type

style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

Dated: March 28, 2022

/s/ Roy T. Englert, Jr.

Roy T. Englert, Jr.

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REGULATORY COMMISSION, and)
the UNITED STATES OF AMERICA,)
Respondents.)

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c), that on March 28, 2022, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court’s CM/ECF system.

Dated: March 28, 2022

/s/ Roy T. Englert, Jr.
Roy T. Englert, Jr.

Attachment A

**DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
CASE RECORDATION
CR Customer Information Index**

Customer Name	Address	Address2	City	State/Prov	Zip	Cat	Interest Relationship	Case Type	Serial Number	Disposition
PRIVATE FUEL STORAGE LLC	PO BOX C4010		LA CROSSE	WI	54602-4010	C	APPLICANT	289001	UTU 076985	CLOSED
		C				APPLICANT	289001	UTU 076986	CLOSED	
		C				HOLDER/BILLEE	289001	UTU 077610	CLOSED	

Attachment B

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01 10-21-1976;090STAT2776;43USC1761

Total Acres:
776.000

Serial Number
UTU--- - 076985

Case Type 289001: ROW-OTHER-FLPMA

Commodity 970: OTHER ENERGY FACILITIES

Case Disposition: CLOSED Case File Juris:

Serial Number: UTU---- 076985

Name & Address		Int Rel	% Interest
PRIVATE FUEL STORAGE LLC	PO BOX C4010	LA CROSSE WI 54602-4010	APPLICANT 100.000000000

Serial Number: UTU--- - 076985

Mer Twp	Rng	Sec	SType	Nr	Suff	Subdivision	District/ Field Office	County	Mgmt Agency
26	0010N	0090W	018	ALIQ		ALL;	SALT LAKE FIELD OFFICE	TOOELE	BUREAU OF LAND MGMT

Serial Number: UTU--- - 076985

Relinquished / Withdrawn Lands

Serial Number: UTU--- - 076985

Act Date	Act Code	Action Txt	Action Remarks	Pending Office
08/31/1998	124	APLN RECD		
09/23/1998	844	CAT 5 COST RECOVERY-PROC		
12/14/1998	392	MONIES RECEIVED	\$58800.00;	
06/18/2001	392	MONIES RECEIVED	\$17940.00;1	
02/10/2006	971	COST RECOV (PROC) RECD	\$8000.00;1	
02/13/2006	065	COST RECOV (MON) RECD	\$12000.00;1	
09/07/2006	125	APLN REJ/DENIED		
07/18/2008	970	CASE CLOSED		

Serial Number: UTU--- - 076985

Line Number	Remark Text
0001	LOW CORRIDOR RR SPUR/SKULL VALLEY
0002	SEE UTU-076986 - PFS INTERMODAL TRANSFER POINT

Run Date/Time: 3/18/2022 10:23 AM

Page 1 Of 1

01 10-21-1976;090STAT2776;43USC1761

Total Acres:
21.000

Serial Number
UTU--- - 076986

Case Type 289001: ROW-OTHER-FLPMA

Commodity 970: OTHER ENERGY FACILITIES

Case Disposition: CLOSED Case File Juris:

Serial Number: UTU---- 076986

Name & Address		Int Rel	% Interest
PRIVATE FUEL STORAGE LLC	PO BOX C4010	LA CROSSE WI 54602-4010	APPLICANT 100.000000000

Serial Number: UTU--- - 076986

Mer Twp	Rng	Sec	SType	Nr	Suff	Subdivision	District/ Field Office	County	Mgmt Agency
26	0010S	0080W	012	ALIQ		NENE;	SALT LAKE FIELD OFFICE	TOOELE	BUREAU OF LAND MGMT

Serial Number: UTU--- - 076986

Relinquished / Withdrawn Lands

Serial Number: UTU--- - 076986

Act Date	Act Code	Action Txt	Action Remarks	Pending Office
11/23/1999	124	APLN RECD		
09/07/2006	125	APLN REJ/DENIED		
07/18/2008	970	CASE CLOSED		
03/10/2020	163	CASE SENT TO NARA	DEN/049-20-0167	

Serial Number: UTU--- - 076986

Line Number	Remark Text
0001	INTERMODAL TRANSFER POINT/SKULL VLY RD
0002	SEE UTU-076985 - PFS LOW CORRIDOR RAIL SPUR

Run Date/Time: 3/18/2022 10:25 AM

Page 1 Of 2

01 10-21-1976;090STAT2776;43USC1761

Case Type 289001: ROW-OTHER-FLPMA

Commodity 971: NON-ENERGY FACILITIES

Case Disposition: CLOSED

Case File Juris:

Total Acres:
1163.640

Serial Number
UTU--- - 077610

Serial Number: UTU---- 077610

Name & Address	Int Rel	% Interest
PRIVATE FUEL STORAGE LLC PO BOX C4010 LA CROSSE WI 54602-4010	HOLDER/BILLEE	100.000000000

Serial Number: UTU--- - 077610

Mer Twp	Rng	Sec	SType	Nr	Suff	Subdivision	District/ Field Office	County	Mgmt Agency
26	0010N	0090W	017	ALIQ		ALL;	SALT LAKE FIELD OFFICE	TOOELE	BUREAU OF LAND MGMT
26	0010N	0090W	018	ALIQ		ALL;	SALT LAKE FIELD OFFICE	TOOELE	BUREAU OF LAND MGMT
26	0010N	0090W	020	ALIQ		N2;	SALT LAKE FIELD OFFICE	TOOELE	BUREAU OF LAND MGMT
26	0010N	0090W	021	ALIQ		ALL;	SALT LAKE FIELD OFFICE	TOOELE	BUREAU OF LAND MGMT
26	0010N	0090W	022	ALIQ		SW;	SALT LAKE FIELD OFFICE	TOOELE	BUREAU OF LAND MGMT
26	0010N	0090W	027	ALIQ		E2;	SALT LAKE FIELD OFFICE	TOOELE	BUREAU OF LAND MGMT
26	0010N	0090W	034	ALIQ		E2;	SALT LAKE FIELD OFFICE	TOOELE	BUREAU OF LAND MGMT
26	0010S	0090W	003	ALIQ		E2;	SALT LAKE FIELD OFFICE	TOOELE	BUREAU OF LAND MGMT
26	0010S	0090W	010	ALIQ		E2;	SALT LAKE FIELD OFFICE	TOOELE	BUREAU OF LAND MGMT
26	0010S	0090W	015	ALIQ		E2;	SALT LAKE FIELD OFFICE	TOOELE	BUREAU OF LAND MGMT
26	0010S	0090W	022	ALIQ		E2;	SALT LAKE FIELD OFFICE	TOOELE	BUREAU OF LAND MGMT
26	0010S	0090W	027	ALIQ		E2;	SALT LAKE FIELD OFFICE	TOOELE	BUREAU OF LAND MGMT
26	0010S	0090W	034	ALIQ		E2;	SALT LAKE FIELD OFFICE	TOOELE	BUREAU OF LAND MGMT

Serial Number: UTU--- - 077610

Relinquished / Withdrawn Lands

Serial Number: UTU--- - 077610

Act Date	Act Code	Action Txt	Action Remarks	Pending Office
04/25/2000	124	APLN RECD		
05/09/2000	842	CAT 3 COST RECOVERY-PROC		
05/22/2000	065	COST RECOV (MON) RECD	\$100;	
05/22/2000	971	COST RECOV (PROC) RECD	\$550;	
12/01/2000	315	RENTAL RATE DET/ADJ	\$3677.10;	
12/08/2000	005	NEPA ANALYSIS APPROVED	EA	
12/20/2000	111	RENTAL RECEIVED	\$3677.10;	
12/21/2000	307	ROW GRANTED-ISSUED	6MOS	
12/21/2000	503	LENGTH IN MILES	32;	
12/21/2000	504	WIDTH IN FEET (TOTAL)	300;	
01/08/2001	303	NOTICE TO PROCEED ISSUED		
06/20/2001	234	EXPIRED		
06/21/2001	970	CASE CLOSED		
03/10/2020	163	CASE SENT TO NARA	DEN/049-20-0168	

NO WARRANTY IS MADE BY BLM FOR USE OF THE DATA FOR PURPOSES NOT INTENDED BY BLM

**BUREAU OF LAND MANAGEMENT
CASE RECORDATION
(LIVE) Serial Register Page**

Run Date/Time: 3/18/2022 10:25 AM

Page 2 Of 2

Serial Number: UTU--- - 077610

Line Number	Remark Text
0002	SOILS/BORINGS TESTS ALONG LOW CORRIDOR RAIL LINE

NO WARRANTY IS MADE BY BLM FOR USE OF THE DATA FOR PURPOSES NOT INTENDED BY BLM