

May 4, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

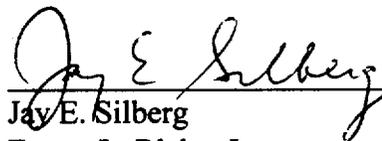
Before the Commission

In the Matter of)
)
PRIVATE FUEL STORAGE L.L.C.) Docket No. 72-22
)
(Private Fuel Storage Facility))

**APPLICANT'S NOTICE OF APPEAL OF ORDER GRANTING THE
CONFEDERATED TRIBES' PETITION FOR INTERVENTION**

Applicant Private Fuel Storage L.L.C., pursuant to 10 C.F.R. § 2.714a, files a notice of appeal of the Memorandum and Order (Rulings on Standing, Contentions, Rule Waiver Petition, and Procedural/Administrative Matters), LBP-98-7, issued on April 22, 1998 granting the Petition to Intervene of the Confederated Tribes of the Goshute Reservation. Applicant appeals the Memorandum and Order's determination that Confederated Tribes has standing to intervene in this licensing proceeding.

Respectfully submitted,



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Before the Commission

In the Matter of)
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PRIVATE FUEL STORAGE L.L.C.) Docket No. 72-22
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**APPLICANT'S BRIEF ON APPEAL OF ORDER GRANTING THE
CONFEDERATED TRIBES' PETITION FOR INTERVENTION**

I. INTRODUCTION

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") respectfully submits this brief in support of its appeal pursuant to 10 C.F.R. § 2.714a of the granting of intervention status to the Confederated Tribes of the Goshute Reservation ("Confederated Tribes") by the Memorandum and Order (Rulings on Standing, Contentions, Rule Waiver Petition, and Procedural/Administrative Matters), LBP-98-7, issued on April 22, 1998. See Memorandum and Order at 28-32. The Applicant respectfully requests the Commission to reverse the determination that the Confederated Tribes has established standing to intervene as of right and to deny its petition for lack of standing. The Memorandum and Order failed to place the burden of proof on the Confederated Tribes as required under judicial concepts of standing utilized by the Commission in determining

intervention as of right in its licensing proceedings. Nor did the Confederated Tribes establish representational standing in order to intervene in this licensing proceeding.

II. STATEMENT OF THE CASE

PFS submitted a license application, dated June 20, 1997, to the Nuclear Regulatory Commission ("NRC") to construct and operate an Independent Spent Fuel Storage Installation ("ISFSI") pursuant to 10 C.F.R. Part 72 on the reservation of the Skull Valley Band of the Goshutes (the "Skull Valley Band"). The proposed ISFSI is intended to provide interim storage for spent fuel from domestic commercial nuclear power plants.¹

On July 21, 1997, the NRC formally accepted the application as complete for review and docketed the application under 10 C.F.R. Part 72 as Docket No. 72-22. On July 31, 1997, the NRC published a Notice of Opportunity for Hearing with respect to the application. The Notice informed all parties interested in intervening in the proceeding of the need to submit petitions to intervene. On August 29, 1997, the Confederated Tribes and David Pete (its chairman) filed a Request for Hearing and Petition to Intervene of the Confederated Tribes of the Goshute Reservation and David Pete ("Confederated Tribes Petition").

¹ The map at Figure 1-1 to the License Application shows the location of the Skull Valley reservation and the proposed facility.

The Confederated Tribes' reservation is geographically separate and distinct from that of the Skull Valley Band.² The Confederated Tribes' reservation straddles the Nevada-Utah border approximately 75 miles west of the Skull Valley reservation and the proposed ISFSI facility. Memorandum and Order at 28.³ Three mountain ranges and two U.S. military reservations (off limits to the public) lie between the Confederated Tribes and the Skull Valley reservations.⁴

The Confederated Tribes and the Skull Valley Band are two completely separate and independent political, economic, and legal entities.⁵ The two reservations have separate and independent governments and neither tribe has any legal authority or

² Each reservation is in a separate geographic administrative unit of the Bureau of Indian Affairs. The Skull Valley Indian Reservation is administered by the Uintah and Ouray Agency in Fort Duchesne, Utah. The Confederated Tribes' Reservation is administered by the Eastern Nevada Agency in Elko, Nevada.

³ About two-thirds of the Confederated Tribes' Reservation is in Nevada. See U.S. Department of Commerce, Federal and State Indian Reservations and Indian Trust Areas, 515 (1974).

⁴ See United States Geological Survey map showing the locations of the two reservations. Attachment A to Applicant's Answer to Request for Hearing and Petition to Intervene of the Confederated Tribes of the Goshute Reservation and David Pete, dated September 15, 1997 ("Applicant's Answer to the Petition to Intervene"). The map shows that the Confederated Tribes' reservation is separated from the proposed ISFSI by the Cedar Mountains (elevation over 5000 feet with a peak at 6922 feet), the Dugway Range (elevation over 5000 feet with a peak at 7068 feet), and the Deep Creek Range (elevation over 10,000 feet with a peak at 12,087 feet). Most of the land separating the two reservations is part of the Utah Test and Training Range (south area) and the Dugway Proving Ground, two military reservations off limits to the public. See License Application, Figure 1-1.

⁵ See Bureau of Indian Affairs, "Indian Entities Recognized and Eligible to Receive Services from the U.S. Bureau of Indian Affairs", 62 Fed. Reg. 55,270, 55,271, 55,273 (1997). The two reservations were created at different times by different Executive Orders. The Confederated Tribes' Reservation was created by an Executive Order in 1914 (IV Kappler 1049, March 23, 1914) and the Skull Valley Indian Reservation was created by separate Executive Orders in 1917 and 1918 (IV Kappler 1048, Sept. 7, 1917 and Feb. 15, 1918).

influence over, or property interest in, the other's reservation. The Confederated Tribes readily acknowledges that the Skull Valley Band "is a separate federally recognized Indian tribe." Confederated Tribes Petition at 3, 16.

In their petition to intervene, the Confederated Tribes and Chairman Pete claimed an interest in the original Goshute aboriginal land in the vast pre-statehood area that is now generally Utah. The Atomic Safety and Licensing Board ("Board") correctly determined, however, that "any assertion of standing based on the general interests of Confederated Tribes or its members in Goshute aboriginal lands is inconsistent with the congressionally recognized status of the Confederated Tribes and the Skull Valley Band as distinct entities with separate reservations." Memorandum and Order at 30.⁶ Moreover, the Board found Chairman Pete's assertion (in his affidavit filed in support of the petition) that he engaged in activities in the Goshute aboriginal lands in the vicinity of the Skull Valley Reservation to be "too general to provide him with standing as of right individually or in a representational capacity." Id.⁷

⁶ Additionally, as set forth in Applicant's Answer to the Petition to Intervene at 6-7, the Indian Claims Commission concluded in 1973 that Goshute title in the aboriginal lands had "extinguished" by January 1, 1875, except for the two small areas which correlate to the current Confederated Tribes and the Skull Valley reservations. Further, any claims of the Confederated Tribes in the aboriginal lands outside of their reservation were formally extinguished in a 1975 settlement before the Indian Claims Commission. Id. Thus, as recognized by the Board, the Confederated Tribes has no legally cognizable rights or claims in the aboriginal lands outside the boundaries of their reservation, and no rights or claims to the Skull Valley Indian Reservation.

⁷ The Applicant in its Answer to the Petition to Intervene and the NRC Staff, in a response dated September 18, 1998, both argued, for largely the same reasons as articulated by the Board, that neither the Confederated Tribes nor Chairman Pete had demonstrated standing in their August 29, 1997 Intervention Petition.

On October 15, 1997, the Confederated Tribes and David Pete filed a Supplemental Memorandum in Support of the Petition to Intervene⁸ together with two declarations, a Supplemental Declaration of Chrissandra M. Reed ("Reed Declaration") and a Supplemental Declaration of Genevieve P. Fields ("Fields Declaration"). Both declarations sought to show "with particularity the nature and frequency of the contacts" of members of the Confederated Tribes with the Skull Valley reservation. Confederated Tribes Supp. Mem. at 2. However, as found by the Board, the Fields Declaration, like Chairman Pete's affidavit, does not provide standing as of right individually or in a representational capacity "because it fails to describe any recent activities she personally engages in on the Skull Valley Reservation." Memorandum and Order at 31.⁹

Unlike the Fields Declaration, Chrissandra Reed in her declaration did claim some present-day contact by herself and her granddaughter with the Skull Valley Reservation. She claimed that she "takes her granddaughter, Michaela, to the Skull Valley Reservation every other week and leaves her there in the care" of her first cousins for "one night to periods of up to two weeks" and that she (Chrissandra Reed) "visits with her cousins at the Skull Valley Reservation on a regular basis" and "regularly visits" the cemetery on the Skull Valley Reservation where her aunt is buried. Reed Declaration at ¶¶ 4-5, 8. The

⁸ Supplemental Memorandum In Support Of The Petition Of The Confederated Tribes Of The Goshute Reservation And David Pete To Intervene And For A Hearing, dated October 15, 1997 ("Confederated Tribes Supp. Mem.").

⁹ See also Applicant's Answer to the Confederated Tribes and David Pete's Supplemental Memorandum in Support of Petition to Intervene and for a Hearing at 6-8, dated December 12, 1997 ("Applicant's Answer to Supp. Mem.").

declaration did not, however, define "regular," or identify Chrissandra Reed as the legal custodian of her granddaughter, or describe the manner in which she dropped off or picked up her granddaughter at the Skull Valley reservation.

Applicant included with its December 12, 1997 Answer to the Confederated Tribes Supplemental Memorandum, a declaration from Arlene Wash ("Wash Declaration"), the cousin of Chrissandra Reed with whom Michaela stays while visiting the Skull Valley reservation. See Exhibit 1 to Applicant's Answer to Supp. Mem. Arlene Wash states in her declaration that "Chrissandra does not come onto to the [Skull Valley] reservation to drop off or pick up Michaela" but that she (Arlene Wash) meets Chrissandra at a truck stop located at exit 77 on Interstate 80 -- "25 miles north of the Skull Valley Indian Reservation" -- or at West Valley (a city adjacent to Salt Lake City over 50 air miles east of the Skull Valley Reservation). Wash Declaration at ¶ 3. Arlene Wash further notes in her declaration that Michaela comes to stay at the Skull Valley Reservation only "about 3 or 4 times a year or more whenever Chrissandra needs a place for Michaela to stay" and that Chrissandra's visits to the Skull Valley Reservation "are random and usually are no more than once a year." Wash Declaration ¶¶ 3-4.

On December 29, 1997, Confederated Tribes and Chairman Pete filed a "Further Supplemental Memorandum" in support of their petition to intervene together with a second declaration of Chrissandra Reed ("Reed Second Declaration") contesting certain statements in the Wash Declaration. In her second declaration, Chrissandra Reed acknowledges that she "usually drops off her granddaughter at the I-80 truck stop," but

claims that “[a]bout one-fourth of the pick-ups are on the Skull Valley Reservation,” and that, “[o]n the average, [she] visits the Skull Valley Reservation about 8-10 times each year.” Reed Second Declaration at ¶¶ 5-7. She also states (although no documentation is provided) that she is the legal guardian of her granddaughter, Michaela. *Id.* at ¶ 2.¹⁰

Having rejected both Chairman Pete’s Affidavit and the Fields Declaration as lacking any basis for individual or representational standing, the Board determined that Confederated Tribes had standing to intervene in this proceeding based solely on the two Reed Declarations. In so determining, the Board did not resolve the conflicting claims set forth above, but concluded as follows:

After reviewing all this information in the light most favorable to the petitioner, we are unable to conclude that the pattern of familial association that brings Ms. Reed and her minor granddaughter onto the Skull Valley Band reservation to visit Ms. Reed’s cousins has become so attenuated as to provide an insufficient basis for standing for Ms. Reed or her minor granddaughter, whose legal interests Ms. Reed represents as guardian. Having been authorized to represent Ms. Reed’s interests, Confederated Tribes thus has standing to participate in this proceeding.

¹⁰ As noted in the Board’s Memorandum and Order at 31, conflicting claims were also made at the prehearing conference (January 27-29, 1998) regarding continued visits by the granddaughter Michaela to the Skull Valley Reservation. Counsel for both Confederated Tribes and the Applicant agreed that Michaela had not visited the Skull Valley Reservation since late October 1997. Tr. at 11, 20. Counsel for Confederated Tribes claimed, however, that the Skull Valley Band had “cut-off” the visits. Tr. at 20, 26. Counsel for the Skull Valley Band stated that the allegation that visits had been cut off by the Band was “blatantly not true.” Tr. at 24. Counsel for the Applicant also represented his understanding that the “alleged cut-off of visits by the Skull Valley people” was a “false statement” and that it was Michaela’s grandmother, Chrissandra Reed, not the Skull Valley Band, who had halted the visits. Tr. at 23-25. Counsel for Applicant offered to present Arlene Wash (who was present) as a witness “to state that for the record,” but the Board declined, stating that presenting her as witness was unnecessary. Tr. at 24.

Memorandum and Order at 31-32.

III. LEGAL ARGUMENT

The Applicant requests the Commission to reverse the determination that the Confederated Tribes has standing to intervene as of right in this proceeding because (1) the Memorandum and Order failed to place the burden of proof on the Confederated Tribes, as required under judicial concepts of standing utilized by the Commission,¹¹ and (2) the Confederated Tribes has not established representational standing in order to intervene in this licensing proceeding even assuming that two of its members might have been found to have standing in their individual capacity. Each of these grounds for reversal is addressed in turn below.¹²

A. Failure to Allocate Burden of Proof to the Confederated Tribes

The Commission has held that, “[i]n the absence of a clear misapplication of the facts or misunderstanding of law,” a licensing board’s determination that an intervenor has established standing “is entitled to substantial deference.” Gulf States Utilities Company (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-48 (1994); accord Georgia

¹¹ It is well established that the Commission applies “contemporaneous judicial concepts’ of standing to determine whether a petitioner has a sufficient interest in a proceeding to be entitled to intervene as a matter of right.” Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (citations omitted).

¹² Because the contentions of Confederated Tribes that were admitted by the Board have been consolidated with essentially identical contentions of other petitioners that the Board also admitted (see Memorandum and Order at 62-63, 107-110, 141-42, 144 and Appendix A at 1-4), the issues raised by Confederated Tribes that were admitted by the Board will be litigated in the licensing proceeding regardless of whether Confederated Tribes is allowed to intervene.

Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995). Under this standard, the Commission reviews de novo questions of law underpinning a licensing board determination that a party has standing. See Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 57 n.5 (1979), cited in River Bend, CLI-94-10, 40 NRC at 48 n.3; Georgia Tech, CLI-95-12, 42 NRC at 116 n.11.

In this case, the PFS believes that the Memorandum and Order failed to allocate the burden of proof to the Confederated Tribes for establishing the elements of Article III judicial standing.¹³ As stated by the Supreme Court:

The party invoking federal jurisdiction bears the burden of establishing these elements. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (emphasis added) (citations omitted); accord Bennett v. Spear, ___ U.S. ___, 117 S. Ct. 1154, 1163-64 (1997).

¹³ These elements, as recognized in Commission precedent, require a petitioner to demonstrate that (1) it has suffered a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute; (2) that the injury can fairly be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision. See, e.g., Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). See also Lujan, *infra*, 504 U.S. at 560-61.

Here, the Board stated that it was “unable to conclude that the pattern of familial association that brings Ms. Reed and her minor granddaughter onto the Skull Valley Band reservation to visit Ms. Reed’s cousins has become so attenuated as to provide an insufficient basis for standing.” Memorandum and Order at 31-32. This language reflects that the Board did not conclude that the Confederated Tribes had affirmatively shown sufficient contacts of Chrissandra Reed and her granddaughter to establish standing in their individual capacity. Rather, the Board was unable to conclude that the Confederated Tribes had not shown sufficient contacts. Thus, the Board did not place the burden on the Confederated Tribes to establish the elements of Article III standing, contrary to the above Supreme Court precedent, which would have required dismissal of the Confederated Tribes’ petition for lack of standing.

In determining whether standing had been established, the Board viewed the petition in “the light most favorable” to the Confederated Tribes. See Memorandum and Order at 24-25, citing Georgia Tech, CLI-95-12, 42 NRC at 115. The origin of this formulation is Warth v. Seldin, 422 U.S. 490, 501 (1975), a case where a plaintiff’s standing was challenged in a motion to dismiss the complaint. See Kelley v. Selin, 42 F.3d 1501, 1508 (6th Cir.), cert. denied, 515 U.S. 1159 (1995), cited in Georgia Tech. However, viewing the evidence in a light favorable to a petitioner is distinct from the petitioner’s burden of proof. Even when weighed in a light most favorable to a petitioner or plaintiff, the petitioner or plaintiff still carries the burden of proof with respect to the evidence so weighed. The evidence so weighed must establish -- as made clear by the

Supreme Court's decision in Lujan and Bennett -- the elements of Article III standing. The Board's determination does not reflect that the Confederated Tribes has met its burden of affirmatively showing sufficient contacts to establish standing.

Moreover, as reflected by the Supreme Court decisions in Lujan and Bennett, a plaintiff's evidentiary burden to establish the elements of standing increases at each successive stage of litigation, from motion to dismiss through to a final determination on the merits at trial. Here, the Board's determination of the sufficiency of the contacts of Chrissandra Reed and her granddaughter for standing is, as a practical matter, a final determination because this issue is wholly unrelated to the merits of the license application and will not be litigated further in this proceeding.¹⁴ Accordingly, it is appropriate to require the Confederated Tribes to meet the evidentiary burden of proof required of a plaintiff for a final determination on the merits with respect to this issue, which the Board's determination reflects clearly has not been met.

Accordingly, the Commission should find that the Confederated Tribes lacks standing to intervene as of right in this proceeding because the Board failed to allocate the burden of proof to the Confederated Tribes, as required under judicial concepts of standing utilized by the Commission. Had the Board properly allocated the burden of proof to the Confederated Tribes, standing would have been denied given the Board's

¹⁴The circumstances here are thus unlike those in cases where the factual standing issues are closely intertwined with factual issues concerning the ultimate merits of the proceeding. See, e.g., Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-77 (1994).

failure to find that Confederated Tribes had affirmatively shown sufficient contacts to establish standing.

B. Lack of Representational Standing Assuming Individual Standing

Even assuming that the Confederated Tribes had shown that Chrissandra Reed and her granddaughter had sufficient contacts to establish standing in their individual capacity, that showing would not be sufficient for the Confederated Tribes to invoke representational standing in the circumstances here. The requirements for an organization to invoke the representational standing of its members are, as set forth by the Supreme Court, three-fold. These are: (1) its members must have standing in their own right; (2) the interests the organization seeks to protect must be germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the individual members. Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). Here, even assuming that Chrissandra Reed and her granddaughter would have standing in their own right, Confederated Tribes would still fail to meet the second prong of the test for representational standing given that the interests that Confederated Tribes seeks to protect are not germane to the organization's purpose.

The second prong of the requirement for representational standing serves the important function of ensuring that the injury of an organization's member or members has "some reasonable connection with the reason the members joined the organization and with the objectives of the organization." Medical Ass'n of Alabama v Schweiker, 554 F. Supp. 955, 965 (M.D. Ala.), affirmed, 714 F.2d 107 (11th Cir. 1983). Thus, for example,

the court in Schweiker held that a medical association was not the proper organization to represent its physician members as taxpayers because they had joined the association as physicians and not as taxpayers. Id. Similarly, in McKinney v. Dep't of the Treasury, 799 F.2d 1544, 1553 (Fed. Cir. 1986), the court held that the Washington Legal Foundation, a public interest law firm, could not sue to require the Customs Service to bar the importation of Soviet-made goods in an effort to protect the economic interests of Foundation members who were manufacturers or workers because such protection was not one of its purposes.¹⁵ As recently reaffirmed by the Supreme Court, the second prong of the Hunt test complements the first to ensure that Article III standing exists by assuring that the organization has a sufficient stake in the resolution of the dispute. United Food & Commercial Workers v. Brown Group, 517 U.S. 544, 116 S. Ct. 1529, 1535-36 (1996).¹⁶

The Confederated Tribes' functions and objectives as described in its intervention petition relate to providing health, safety, social, educational and commercial services and opportunities at the Tribes' reservation. See Confederated Tribes Petition at 4. Here, however, the health, safety and other interests of its members that the Confederated Tribes seeks to protect are some 70 miles distant from its reservation, far beyond the immediate

¹⁵ See also Local 186, Int'l. Bhd. of Teamsters v. Brock, 812 F.2d 1235, 1239 (9th. Cir. 1987) (“[t]he asserted right of a convicted felon to serve in union employment is not an interest germane to the union’s purpose”).

¹⁶ Although allowing representational standing of an organization under the three prong test of Hunt, the Commission has not previously had a need to focus on the requirements of the second prong of this test. See Georgia Tech, CLI-95-12, 42 NRC at 115, citing Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390-96 (1979); Consolidated Edison Company (Indian Point, Unit 2), CLI-82-15, 16 NRC 27, 32 (1982).

environs of Confederated Tribes reservation. A separate and distinct legal entity, the Skull Valley Band, is responsible for ensuring the safety of its members -- and their visitors -- on the Skull Valley Reservation. The Confederated Tribes has no jurisdiction, nor does it have any responsibility, for ensuring the health or safety of its members on the Skull Valley Reservation.

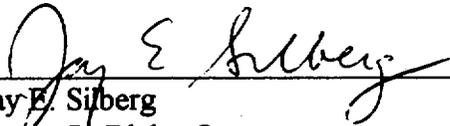
Thus, the individual interests sought to be protected by the Confederated Tribes in this licensing proceeding are not reasonably connected to the reservation-based health, safety or other functions provided by the Confederated Tribes to its members. The situation here can be easily distinguished from the case where an individual joins an environmental organization in order to further that person's interest in protecting the environment. When an environmental organization brings a proceeding related to protecting the environment, it is directly addressing the interests that its members are seeking to advance by joining the organization.

Thus, the Commission should deny the Confederated Tribes representational standing under the established three-part test set forth in Hunt even assuming that Chrissandra Reed and her granddaughter would have standing in their individual capacity. Indeed, if the Confederated Tribes could establish representational standing in the circumstances here, nothing would prevent an Indian tribe from the State of Alaska from intervening as of right in a proceeding for a proposed nuclear facility in the State of Florida, as long as one of its members alleged an occasional visit to cousins who happen to live somewhere near that facility.

IV. CONCLUSION

For the reasons stated above, the Commission should reverse the Board's determination that the Confederated Tribes has established standing to intervene as of right in this licensing proceeding and deny the Confederated Tribes' petition to intervene for lack of standing.

Respectfully submitted,



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Dated: May 4, 1998

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Notice of Appeal of Order Granting the Confederated Tribes' Petition for Intervention" and "Applicant's Brief on Appeal of Order Granting the Confederated Tribes' Petition for Intervention," dated May 4, 1998, were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 4th day of May 1998.

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