May 14, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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-ISFSI** |
| | ) | |
| **(Private Fuel Storage Facility)** | ) | |

# SKULL VALLEY BAND OF GOSHUTE INDIANS' BRIEF IN SUPPORT OF APPLICANT'S APPEAL OF ORDER GRANTING THE CONFEDERATED TRIBES' PETITION FOR INTERVENTION

## INTRODUCTION

Pursuant to 10 C.F.R. § 2.714a, the Skull Valley Band of Goshute Indians submits this brief in support of the Appeal of Order Granting the Confederated Tribes' Petition for Intervention filed by the Applicant Private Fuel Storage L.L.C. The Skull Valley Band strongly opposes the granting of intervention to the Confederated Tribes of the Goshute Reservation of the Goshute Reservation's (**Confederated Tribes**) by the Memorandum and Order (Rulings on Standing, Contentions, Rule Waiver Petition, and Procedural/Administrative Matters), LBP-98-7, (Memorandum and Order) slip op. at 28-32.

Pursuant to the most elementary principles of federal Indian law, and as noted by the Atomic Safety and Licensing Board (**Board**) in its Memorandum and Order[1], the Skull Valley Band and the Confederated Tribes are two totally separate and distinct tribes, and neither tribe has

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[1] In its Memorandum and Order, the Board stated 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. Standing must, therefore, be established based on contacts of individual Confederated Tribes members with the Skull Valley Band reservation and the PFS facility located there." (Memorandum and Order) slip op. at 30.

any legal authority or interest with respect to the reservation of the other. The Confederated Tribes recognizes this separate status of the two tribes at pages 1 and 2 of its "Brief of the Confederated Tribes of the Goshute Reservation in Response to the Appeal of Applicant Regarding Standing" (**Response**), but then ignores this basic principle and the clear finding of the Board for the majority of its Response by raising issues which are either entirely irrelevant or too attenuated to the "representational" status of the Confederated Tribes at issue in this appeal. The Confederated Tribes further presents an incomplete history of the two tribes which is superseded by the current tribal organizational documents and federal law governing the relationship of the two tribes.

Moreover, the Confederated Tribes cannot establish, contrary to the determination in LBP-98-7, representational standing based on the contacts of Chrissandra Reed and her granddaughter, Michaela, with the Skull Valley Reservation. Neither Chrissandra nor her granddaughter has been to the Skull Valley Reservation for over six months. Such minimal contacts are insufficient under NRC legal precedent to establish standing as of right.

Accordingly, the Skull Valley Band respectfully requests the Commission to reverse the determination that the Confederated Tribes has established standing to intervene as of right in this proceeding and to deny the Confederated Tribes' petition for lack of standing.

## THE FACTS

The facts stated by the Applicant in its brief are correct and are hereby adopted by the Skull Valley Band.[2] However, the Skull Valley Band, based upon its direct knowledge of the facts and

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[2] "Applicant's Brief on Appeal of Order Granting the Confederated Tribes' Petition for Intervention" at 2-7 (May 4, 1998) ("Applicant's Brief").

circumstances surrounding this matter, desires to supplement the last point made in Applicant's brief (at p. 7 n. 10) regarding conflicting claims made at the January 1998 prehearing conference concerning the continued visits by Chrissandra Reed's granddaughter, Michaela, to the Skull Valley Reservation. The Confederated Tribes' attorney acknowledged that Michaela had not visited the Skull Valley Reservation since October of 1997, but claimed that the Skull Valley Band had "cut-off" the visits. Tr. at 20, 26. At the same prehearing conference, however, Counsel for the Skull Valley Band made it clear that such allegation was "blatantly not true." Tr. at 23-25.

The Board correctly reflected in its Memorandum and Order (at 31) the clear representations that Michaela's visits "have not been terminated by the Skull Valley Band or any Band member." Although the Confederated Tribes' attorney represented that the "intent" of the grandmother "would be to continue those" visits as in the past (Tr. at 26), the facts belie this supposed intention. Chrissandra Reed has not brought her granddaughter, Michaela, to the Skull Valley Reservation since late October of 1997; therefore, it has been more than six months since either Chrissandra Reed or her granddaughter, Michaela, have had any contact with the Skull Valley Reservation.

## THE LAW

The Commission should reverse the ruling that the Confederated Tribes has standing to intervene in this proceeding in a representational capacity for Chrissandra Reed and her granddaughter, Michaela. The Confederated Tribes has not established representational standing in order to intervene in this licensing proceeding because (1) the contacts by Chrissandra Reed and her granddaughter, Michaela, with the Skull Valley Reservation are not imminent and, alternatively, are too infrequent, to justify granting them standing in their own right, and (2) the

interests the Confederated Tribes ostensibly seeks to protect are not germane to its organizational purpose. Each of these grounds for reversal is addressed in turn below.

**Chrissandra Reed and her Granddaughter Lack Individual Standing**

The Commission has held that it "generally defers to the Presiding Officer's determinations regarding standing, absent an error of law or an abuse of discretion." International Uranium (USA) Corporation (White Mesa Uranium Mill; Alternate Feed Material), CLI-98-6, issued on April 30, 1998, Memorandum and Order at 2 (citing Georgia 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. The Skull Valley Band agrees with the Applicant that the Board's Memorandum and Order finding that the Confederated Tribes have standing failed to allocate the burden of proof to the Confederated Tribes and should be reversed on that ground. See Utah v. Babbitt, 137 F.3d 1193, 1202 (10th Cir. 1998) ("The party invoking federal jurisdiction bears the burden of establishing [the] elements [of standing]"). Further, in view of the absence of any visits over the past six months by Ms. Reed and her granddaughter, it is clear that this burden of proof has not been met.

The elements of Article III judicial standing, 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 v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

Here, Ms. Reed's and her granddaughter's contact with the Skull Valley Reservation, which last occurred more than six months ago, is not sufficiently imminent or, alternatively, has become too infrequent, under the standards applied by the Supreme Court and the NRC, for either of them as individuals to obtain standing. There is no injury to these two individuals because they have not been on the Skull Valley Reservation. Therefore, it follows that the Confederated Tribes should not be given representational standing on behalf of these two ineligible individuals.

The Supreme Court has held that to have standing, a party's "injury in fact" must be "actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560 (citations and quotations omitted). In that case, the respondents filed affidavits asserting that they intended to return to a distant location they had visited before and at which they would allegedly suffer harm. Id. at 564. The Court denied them standing because such was not enough to show that harm was imminent.

> That the women "had visited" the areas of the projects before the projects commenced proves nothing. As we have said in a related context, [p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects. And the affiants' profession of an "intent" to return to the places they had visited before -- where they will presumably [be harmed] -- is simply not enough.

Id. (citations omitted). Therefore, because Ms. Reed and Michaela have not visited the Skull Valley Reservation in more than six months—even assuming an intent to return to the Reservation at some time in the future—any harm that would allegedly come to them from the building of the ISFSI is not "imminent." Hence, they lack standing.

Moreover, under NRC practice, while frequently engaging in substantial activities in the vicinity of a facility may establish standing, Maine Yankee Atomic Power Company (Maine Yankee Atomic Power Station), LBP-82-4, 15 NRC 199, 204 n.7 (1982), "occasional trips" to communities near the site are not sufficient. Houston Lighting and Power Company (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 456-57 (1979) (citing Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-397, 5 NRC 1143, 1150 (1977)). For example, in South Texas, "contact resulting from [the petitioner's] presence about once a month" was "de minimis and insufficient to confer standing." LBP-79-10, 9 NRC at 457. Therefore, even if the Commission could view Ms. Reed's and Michaela's contact with the Skull Valley Reservation as recurring, rather than having occurred in the past (as supported by the facts), the contact does not occur frequently enough for them to have standing.

Accordingly, the Commission should find that the Confederated Tribes lacks standing to intervene in this proceeding, because the Confederated Tribes' contact with the ISFSI site, which, based on the Confederated Tribes' claim to representational status, assertedly stems from visits to the Skull Valley Reservation more than six months ago by Ms. Reed and her granddaughter, is not sufficiently imminent or, alternatively, has become too infrequent, to meet the standards established by the Supreme Court and the Commission.

**Lack of Representational Standing Even Assuming Individual Standing**

Even if one were to assume arguendo that Chrissandra Reed and her granddaughter had demonstrated sufficient contacts to warrant their individual standing, the Skull Valley Band submits that the Confederated Tribes would still have failed to justify representational standing in

this case.[3] Confederated Tribes would still fail to meet the second prong of the test for representational standing because the interests that Confederated Tribes seeks to protect are not germane to the organization's purpose.

To meet the second prong of the requirement for representational standing, there must be "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). The Confederated Tribes describes its functions and objectives as related to the health, safety, social, educational and commercial services and opportunities at the Tribes' reservation. See Confederated Tribes Petition at 4. The Skull Valley Reservation, for which the Confederated Tribes has neither legal responsibility nor jurisdiction, is 70 miles distant from its reservation.[4] The Skull Valley Band has the responsibility to ensure the safety of its members -- and their visitors -- on its Reservation. The Confederated Tribes does not.[5]

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[3] 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).

[4] The Confederated Tribes report to a different Bureau of Indian Affairs Office. The Confederated Tribes not only have completely separate governments and enrollment processes, but a member in one Tribe cannot and does not vote in the elections of the other.

[5] Additionally, if Indian tribes are allowed to intervene in the economic affairs of other separate federally recognized Indian tribes based upon historical or anthropological claims, then there would be constant interference by Indian tribes in each others' internal affairs. Such a result is not supported by federal Indian law and in fact would undermine the federal government's goal of tribal economic development and self-sufficiency. See 25 U.S.C. § 450a(b) ("The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy. . ..") (Emphasis added.)

The Confederated Tribes continue to raise untenable arguments, rejected by the Board, that it has interests in the Skull Valley Reservation germane to its organizational purpose such that it should be considered more than an entity having only representational status.[6] In the Confederated Tribes' own words: it claims to be "not merely 'an interested Tribe.'" Response at p. 6. For example, the renewed reference to the aboriginal interest in the land and the aboriginal affiliation of the two tribes is not relevant to the current, independent governmental and territorial status of the two tribes. The Confederated Tribes' persistent restatement of this history is misleading. The assertion of continuing ties between the tribes based on the Confederated Tribes' constitution is also misleading because the constitutional provision providing for "affiliation" of the Skull Valley members with the Confederated Tribes was removed from the Confederated Tribes' constitution ten years ago (See Response at p. 6). In any event, the fact that the Confederated Tribes once made itself amenable to affiliation cannot be used to bootstrap the Confederated Tribes interest in the Skull Valley reservation.[7]

The Confederated Tribes' reference to the Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq. (**ICWA**), as support for its standing is also inappropriate; ICWA does not increase the Confederated Tribes' interest or responsibility with respect to the Skull Valley Reservation or members of the Skull Valley Band or visitors thereto. The intent of ICWA is to preserve Indian culture from the wrongful taking of Indian children by non-Indians. ICWA does not create

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[6] Throughout its Response, the Confederated Tribes have again raised numerous issues such as the welding shop and grave sites which are wholly unrelated to its representational status of Chrissandra Reed and her granddaughter, Michaela. The Skull Valley Band believes these matters are irrelevant to the current appeal and has determined it is unnecessary to respond in greater specificity to each allegation.

[7] Significantly, the term "affiliate" is not defined in the constitution, but appears as a proviso in the constitution's membership section which suggests that affiliation is not equivalent to membership.

standing in an NRC licensing application as proposed here. Rather, ICWA is an extraordinary and specific act passed by the Congress to allow Indian Tribes and families to maintain custody of Indian children. No legal proceeding involving the custody of Indian children is being decided by the NRC and none is proposed by the Confederated Tribes.

ICWA is a specific delegation of authority to Indian tribes because such jurisdiction did not exist without a federal grant. As reflected in ICWA and its legislative history, ICWA has a narrow focus, is directed primarily at the states, and cannot be read so broadly to affect the sovereignty of other tribal jurisdictions, such as the Skull Valley Band.[8] Moreover, the interest of the Confederated Tribes pursuant to the ICWA is by the admission of the Confederated Tribes itself fully satisfied. The Confederated Tribes has not raised any concern about the custody of Michaela or the integrity of her relationship to her tribe and culture. In fact, during her infrequent visits to the Skull Valley Reservation, she is with relatives.

As a result, the individual interests which the Confederated Tribes allegedly would protect in this licensing proceeding have no reasonable connection to the functions provided by the Confederated Tribes to its members. The Confederated Tribes has no more right to standing based on activities which are planned to occur on the Skull Valley Reservation than the Skull Valley Band would have as to activities which occur on the Confederated Tribes Reservation.

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[8] The ICWA by its terms does not operate to deprive tribal courts of jurisdiction over custody proceedings "involving an Indian child who resides or is domiciled with the reservation of such tribe." 25 U.S.C. § 1911(a). Thus not only can the ICWA not be used to establish standing in the NRC for the Confederated Tribes, it tends to support the opposite conclusion; that is, as far as the health and welfare of any Indian child on a reservation is concerned, the Congress has confidence in the tribal court of the jurisdiction in which the child is located to provide for the interest of the child.

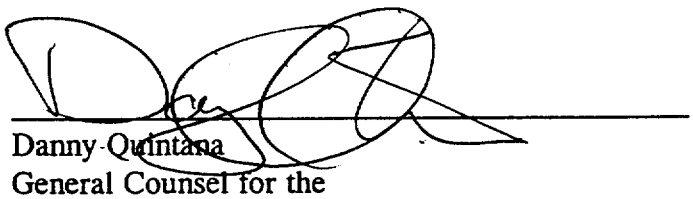
## CONCLUSION

The Confederated Tribes should not be entitled to intervene in this proceeding because it has failed to establish standing to intervene. The Commission should therefore deny the Confederated Tribes' petition to intervene for lack of standing.

Dated this 14th day of May, 1998.

Respectfully submitted,

DANNY QUINTANA & ASSOCIATES, P.C.



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**UNITED STATES OF AMERICA**

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| PRIVATE FUEL STORAGE L.L.C. | ) | Docket No. 72-22 |
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| (Private Fuel Storage Facility) | ) | |

## CERTIFICATE OF SERVICE

I hereby certify that copies of the Skull Valley Band of Goshute Indians' Brief in Support of Applicant's Appeal of Order Granting the Confederated Tribes' Petition for Intervention dated May 14, 1998, were served on the persons listed below (unless otherwise noted) by U.S. mail, first class, postage prepaid, this 14th day of May 1998.

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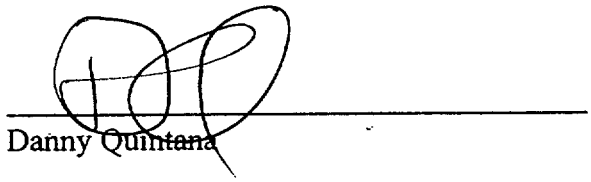

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