

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

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Private Fuel Storage, a Limited Liability Company;

(Independent Spent Fuel Storage Installation).

Docket No. 72-22
ASLBP No. 97-732-02-ISFSI
May 24, 2001

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**OHNGO GAUDADEH DEVIA'S (OGD) RESPONSE TO PRIVATE FUEL
STORAGE'S (PFS) MOTION FOR PROTECTIVE ORDER
RESTRICTING SCOPE OF DEPOSITION**

Response to PFS' Motion for Protective Order Restricting Scope of Deposition:

OGD hereby provides a response to PFS's May 17, 2001 Motion for Protective Order Restricting Scope of Deposition. The May 17th Motion asks the Board for a protective order, to apply to the continued deposition of Leon D. Bear (and other deponents).

The requested protective order should be denied because it is unnecessary and inappropriate, because PFS' objections to OGD's lines of deposition questions are without merit, and because PFS' objections are interposed to obscure facts relevant to OGD Contention O for an improper purpose.

OGD must be allowed to depose Mr. Bear on the material he drafted which PFS has submitted to the NRC thus far, and on the areas and topics associated with Mr. Bear's future testimony.

PFS' Protective Order Motion is Unnecessary and Inappropriate: In its May 17th Motion, PFS asks the Board for a protective order restricting the scope of the deposition of Mr. Bear (and other deponents) by OGD to matters "within the scope of OGD O," as that scope is defined by PFS. PFS' protective order motion is unnecessary and inappropriate because even assuming the restrictions to the scope of OGD's Contention O, as that scope is defined by PFS

(which restrictions, scope, and definition OGD does not concede), the lines of questions which OGD intends to ask at the deposition, are still appropriate and relevant with respect to the subject deposition.

PFS' Statement of Scope: In its May 17th Motion, PFS states that OGD Contention O is limited to: The assertion that “the license application poses undue risk to public health and safety because it fails to address environmental justice issues” which PFS indicates includes only:

1. The assertion that the PFSF will have negative economic and sociological impacts on the native community of Goshute Indians who live near the site.

2. The assertion that the PFS Environmental Report (ER) fails to consider cumulative impacts from enumerated facilities in Tooele County that may be suffered by members of the Skull Valley Goshutes.

3. The assertion that the ER fails to address the disparate impacts that the facility will have on property values in and around the Skull Valley Goshute community.

PFS goes on to further state:

OGD O is limited to analysis of disparate high and adverse environmental effects on minority and low-income communities. The NRC's goal with respect to the environmental justice “disparate impact” analysis is to assess adverse environmental effects “on low-income and minority communities that become apparent only by considering factors peculiar to those communities.”

(May 17th Motion, section II B, starting at second paragraph (both paragraphs and pages are unnumbered)).

PFS does not, in its May 17th Motion, dispute OGD's right to question Mr. Bear on his *bona fides*, both as a witness for PFS on OGD Contention O, and as the author or co-author of documents submitted to the NRC by PFS and stated by PFS to be relevant to OGD Contention

O, although PFS states that some of the questions relative to these issues have already been asked and answered, and PFS objects to “extensive” or “lengthy” inquiry into these matters. (May 17th Motion, section III B).

PFS also does not, in its May 17th Motion, dispute OGD’s right to question Mr. Bear on the content of the documents for which he is listed as co-author, submitted to the NRC by PFS and stated by PFS to be relevant to OGD Contention O.

PFS additionally does not, in its May 17th Motion, dispute OGD’s right to question Mr. Bear on areas (including scope) of his future testimony.

OGD’s Intended Lines of Questions fall within PFS’ Stated Scope: The deposition is in major part intended to explore Mr. Bear’s “expertise” and other *bona fides* in the areas he plans to testify as a witness and with respect to the information he has supplied to the NRC as a writer and source of information relied upon by the NRC. PFS lists Mr. Bear as a person who “supplied information to PFS concerning environmental justice issues relevant to Contention OGD O”. (*Applicant’s Objections and Responses to OGD’s Second Requests for Discovery*, March 7, 2001, p. 15).

OGD intends to focus in large part on the content of the letter, signed by Mr. Bear, dated February 16, 1999, and the eleven pages of material appended to that letter, all of which PFS submitted to the NRC on February 18, 1999, and which PFS has subsequently admitted comprise “documents that address impacts falling within the scope of OGD O”. (For admission see *Applicant’s Objections and Responses to OGD’s Second Requests for Discovery*, March 7, 2001, p. 6 and documents listed at pp. 8 & 10).

OGD also intends to explore areas (including scope) associated with Mr. Bear’s future testimony.

OGD reserves the right to further question Mr. Bear on the topics of authorship, bases, accuracy, authority, bias, competence, compensation, and veracity, especially if an issue arises out of the inquiry concerning the document material or areas and scope of future testimony by Mr. Bear. OGD does not expect, and does not intend, that such questioning will be “extensive” or “lengthy” but rather that it will primarily be responsive to the issues driven by the inquiry concerning the document material, and areas concerned with Mr. Bear’s future testimony.

All of the lines of questions OGD intends to ask as part of the deposition of Mr. Bear clearly fall within the compass of, and therefore are justified as proper deposition questions by, PFS’ stated position on scope, as given in its May 17th Motion.

PFS’ Objections are Without Merit: The lines of questions which PFS objects to, and requests protection from, also fall within the compass of, and therefore are justified as proper deposition questions by, PFS’ stated position on scope, as given in its May 17th Motion. In addition, PFS’ stated reasons for objection are without foundation.

Lines of Deposition Questions from which PFS Requests Protection: In its May 17th Motion, PFS identifies only the following specific lines of questions as being objectionable:

1. Questions concerning the authority by which Mr. Bear purports to act on behalf of the Skull Valley Tribe.

2. Questions concerning purported Tribal resolutions, provided to the Bureau of Indian Affairs (BIA) by Mr. Bear in an attempt to show purported support on the part of Tribal members for the PFS project, and subsequently made public by the BIA. This includes questions concerning how such resolutions are produced and authorized.

3. Questions concerning PFS dealing with and providing project funds to persons not

representing the Tribe, thus addressing the issue of project funds purportedly going to the Tribe but not being received by the Tribe.

4. Questions concerning Mr. Bear's personal feelings about OGD and bias towards members of OGD.

PFS' Stated Objections: PFS objects to these lines of questions because:

1. PFS claims all four of these lines of questions are outside the scope of proper deposition questions concerning OGD O;
2. PFS claims all four of these lines of questions impermissibly entangle the license proceedings in internal tribal matters;
3. PFS claims all four of these lines of questions are inappropriately being used by OGD to support a legal action in federal court; and finally,
4. PFS claims all four of these lines of questions are being used by OGD to harass and antagonize "chairman" Bear "in its campaign to oust Mr. Bear as Band Chairman".

Within the Scope: The NRC discovery rules are broad and discovery is to be liberally granted. (*Public Service Company of New Hampshire, et al.*(Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC at 490 (1983)). The test of whether a matter is discoverable is one of "general relevance" which is easily satisfied unless it is clear that the evidence sought can have no possible bearing on the issues of the Contention. (*Commonwealth Edison Co.* (Zion Station, Units 1 & 2), ALAB-185, 7 AEC 240 (1974). "Parties are entitled to discover all matters not privileged that tend to support or negate the allegations in the pleadings, or which are reasonably calculated to reveal such matters." (*Pennsylvania Power and Light Company and Allegheny Electric Cooperative, inc.* (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC at 319 (1980)). Discovering the bias of expert witnesses is very important

to the discovery process. (21 NRC 644). “Various steps in the analysis and thinking processes of expert witnesses in arriving at their conclusions are discoverable, as bearing upon the bases for their opinions as well as their credibility as witnesses. ... all factors which could condition or affect [expert] opinions are properly the subject of ... discovery in advance of trial. ...expert witnesses are not immunized from discovery by the form of their studies or proposed testimony. ... If an expert is going to testify, all factors which could reasonably [relate] to bias as well as competence are discoverable.” (*Houston Lighting and Power Company, et al.* (South Texas Project Units 1 and 2), LBP-79-30, 10 NRC 594, 595 (1979)).

Taken one at a time, it is clear that each of the objected to lines of questions are within the scope of proper deposition questions concerning OGD O.

1. Questions concerning the purported authority of Mr. Bear to act in behalf of the Band are within the scope of proper deposition questions concerning OGD O because:

a. PFS lists Mr. Bear as a witness against Contention OGD O specifically because he is the purported tribal leader, and he will testify as such. If he is not the tribal leader his testimony will be materially affected, for example as to basis, authority, accuracy, and believability.

b. PFS lists Mr. Bear as an expert source of information concerning issues relevant to Contention OGD O, including a signed letter and eleven pages of material, specifically because he is the purported tribal leader, and the letter is signed as such. The content of the information is such that if he is not the tribal leader the usability of the information, some of which is critical to PFS’s submission and relied upon by NRC staff, will be materially affected, for example as to basis, authority, accuracy, and believability.

c. If Mr. Bear does not have authority to act on behalf of the tribe then both PFS

and the NRC are not dealing with the legitimate tribal government and critical issues such as questions of willing jurisdiction, public acceptability, representation on the facility safety board, waiver of tribal sovereignty, receipt and distribution of project funds, and other socioeconomic factors, along with a host of other issues, are not being addressed, which materially increases the likelihood and probable harm of adverse disparate impacts, and makes their mitigation more difficult.

d. Despite PFS' arguments to the contrary, the need to deal with the legitimate tribal government in order to construct and operate a nuclear facility on the tribe's reservation is sufficiently coupled to the physical aspects of the project to satisfy *People Against Nuclear Energy v. Metropolitan Edison Co.*, 460 U.S. 766 (1983).

2. The above referenced purported tribal resolutions are being used by PFS and Mr. Bear to show purported support for Mr. Bear and purported support for the PFS project by the tribe. Questions concerning these documents are within the scope of deposition questions for the same reasons, as provided in 1 above, for other questions relating to the purported representation of the tribe. Additionally, the question of support for the PFS project is separately important for OGD O issues such as willing jurisdiction, public acceptability, demographics (for example movement to and from the reservation), and property values. OGD has a right to discover information relevant to these issues.

3. Socioeconomic effects associated with project funds are sufficiently coupled to the physical aspects of the project to satisfy *Metropolitan Edison*, despite PFS' arguments to the contrary. Such socioeconomic effects are also within the scope of Contention OGD O. For example, if project funds are not reaching the tribe but are being diverted, because there is a lack of project controls to assure project funds will reach the tribe, this could cause disparate

socioeconomic impacts, and OGD has a right to discover information relevant to this.

4. Mr. Bear's bias against OGD and OGD's members must be understood in order to assess his testimony as a witness against OGD's Contention, and his information as submitted to the NRC by PFS, and is therefore within the scope of the deposition. OGD has a right to discover information relevant to this.

No Impermissible Entanglements: PFS claims that apart from being outside the scope of OGD O, questions touching on "internal tribal matters" such as (it claims) the authority of Mr. Bear to act on behalf of the tribe, ought not to be allowed. PFS states that as a matter of policy "federal courts have repeatedly refused to be drawn into inter-tribal disputes" and "inquiry into the Band's internal tribal affairs is particularly offensive" and "they clearly have no place" in these proceedings. But this is not a fair statement of the policy on this issue. PFS would exert purported authority to assert tribal sovereignty as a bar to verification of legitimate authority to assert tribal sovereignty.

When an Indian tribe purportedly, through a purported representative, enters the larger world to engage in activities with non Indians, especially those involving any assertion, waiver, or restriction of sovereign rights, both courts and federal agencies are more than permitted, they have an affirmative positive duty, and are compelled to verify that persons purporting to represent Indian tribes have proper authority to do so, and to verify additional authority from the tribe's legitimate legislative body for any assertion, waiver, or restriction of sovereign rights (a tribal leader has no independent power to assert or compromise sovereign powers, only the tribe's legislative body may do so, see citations, below).

Preservation of sovereign rights is particularly important in federal agencies' dealings with Indian tribes. A court (or federal agency) must consider all relevant factors, including

necessarily applicable tribal government matters, involved in determining sovereignty issues, especially with respect to the purported exercise of authority to enter into agreements or regulatory activities involving Indian lands, especially where the agreements or activities waive or restrict sovereign powers. Federal courts (and agencies) are to address the assertion, waiver, or restriction of sovereign power “because such power is circumvented and defined by federal law [and] a federal question is raised necessarily by the attempt to exercise it.” *Tenneco Oil v. Sac & Fox Tribe of Indians of Okl.*, 725 F.2d 572, 575 (10th Cir. 1984).

Courts and federal agencies must consider such factors as those concerning the validity of purported Tribal resolutions and statutes; the legitimacy and limitations of authority of Tribal officers and the effectiveness of any consent to enter into agreements or other commitments and especially to assert, waive, or restrict sovereign powers, including whether the agreement or commitment was considered and proper authority granted by a duly constituted Tribal council; and further whether such authority exceeds that which the Tribe may properly grant. (See, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690-91 (1948); *Tenneco Oil v. Sac & Fox Tribe of Indians of Okl.*, 725 F.2d 572 (10th Cir. 1984); *Kelley v. U.S.*, 69 F.3d 1503, 1507 (10th Cir. 1995); *Rockbridge v. Lincoln*, 440 F.2d 567 (9th Cir. 1971); *Hotvela Traditional Elders v. Indian Health Serv.*, 1 F.Supp. 2d 1022 (D.Ariz. 1997); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 519 F.Supp. 418 (D.Ariz. 1981); *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 318, 320-21 (1926); *Coast Indian community v. United States*, 550 F.2d 639 (1977); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), affirmed, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Even a state court can consider the evidence and decide the issues in such cases, although a state court is somewhat more limited. See, *Granite Valley v. Jackpot Junction*, 559 N.W.2d 135 (Minn.App. 1997)).

When Leon D. Bear, purportedly acting with the authority of the tribe, entered the larger world to engage in activities with non Indians, and arrange for the construction and operation of a high level nuclear storage facility site on the Indian reservation, he voluntarily exposed himself and the tribe to a measure of public scrutiny and the vicissitudes of NRC licensing. That he understood this is obvious in the very letter that is the subject of this deposition, which states that the information concerned topics generally deemed sensitive by the Band but nonetheless was being provided (with no agreement of confidentiality) in order to address issues being considered in the licensing process. In fact Mr. Bear was relatively cooperative at the deposition and usually refused to answer questions concerning these documents only when prompted to so refuse by PFS' counsel.

The licensing process by which a high level nuclear waste storage facility is placed in the middle of an Indian reservation on Indian trust land necessarily involves commitments which affect the assertion, waiver, and placement of limitations on the tribe's sovereign powers, and the involved federal agencies, including the NRC, have a duty to verify proper authority is granted by the duly constituted tribal government.

Any remaining question on whether any assertion of the Tribe's sovereignty is at issue in these proceedings is dispelled by PFS in its instant May 17th Motion where it purportedly asserts such Tribal sovereignty as a basis for its Motion.

Concurrent Legal Action in other Forums Constitutes no Bar: The current or prior prosecution of legal action in other forums which involve the same or similar issues does not bar the proper and legitimate questioning of Mr. Bear in this deposition, even if OGD were a party to such action. But OGD is not and never was a party to any such action. OGD seeks to complete Mr. Bear's deposition in these proceedings, on topics relevant to OGD

O, for appropriate use in these proceedings, whether or not Mr. Bear's testimony has any relevance in other actions in other forums.

No Harassment or Antagonization: OGD has not and does not intend to harass, embarrass or antagonize Mr. Bear. All deposition questions have been asked in a civil and dispassionate manner and OGD intends to pursue its further deposition of Mr. Bear in a similar professional manner. There is no basis in fact for PFS's claims of harassment or antagonization.

No matter how often PFS touts Mr. Bear as the tribal chairman, Mr. Bear has never been and currently is not tribal chairman (thus there can be no "campaign to oust Mr. Bear as Band Chairman") and Mr. Bear has no authority to represent the tribe. Recognizing this issue could potentially be a point of contention during Mr. Bear's deposition, OGD and PFS, with Mr. Bear's consent, worked out an amenable method of dealing with this wide difference in position during the deposition, for example by dispensing with the need for using the word "purported" repeatedly. Tr. at 5. OGD reserved its rights, however, to question Mr. Bear on his credentials, including the basis for his purported authority to represent the tribe. OGD went out of its way, and will continue to do so, to avoid even the semblance of any harassment or antagonization.

PFS' Objections are Improperly Interposed: The granting of a protective order is a remedy to be used to satisfy the requirements of justice. (10 CFR § 2.740(c)). PFS' objections are interposed, to obscure facts relevant to OGD Contention O, for an improper purpose. Environmental Justice issues, including issues in OGD Contention O, and especially issues in OGD Contention O involving PFS' dealings with Mr. Bear, and Mr. Bear's purported authority to represent the tribe, are related to current critical issues in an ongoing lawsuit PFS has recently filed against the State of Utah. OGD is not a party to this lawsuit (OGD is not a party to any

lawsuit), but PFS and Mr. Bear are. By keeping certain information relevant to OGD Contention O from being discovered PFS can keep this information from being immediately used against it in its lawsuit against the State of Utah. Whether or not information relevant to OGD O is also relevant to issues in other legal actions should not be a bar to OGD's right to conduct its proper deposition (see above).

OGD Must be Permitted to Continue Deposition of Mr. Bear: OGD had a specific deposition plan which if carried out without undue disruption would have reasonably been able to complete the deposition in a good solid day of deposition taking with a reasonably cooperative deponent. OGD's plan was badly disrupted for reasons beyond OGD's reasonable control. OGD planned to focus on the February 16, 1999 letter and associated eleven pages of documents and on the scope of Mr. Bear's future testimony. By the nature of the issues involved Mr. Bear's *bona fides* including background, bias, authority, competence, and veracity could be tested naturally as part of going through the documents systematically and by exploring the scope of his future testimony.

PFS refused at the start to allow questions concerning the scope of Mr. Bear's future testimony. PFS objected that it constitutes attorney work product, yet PFS surprisingly did not justify its objection in its current motion as it needed to. "An objecting party's mere assertion that the material it is withholding constitutes attorney work product is insufficient to meet its burden of establishing the existence of attorney work product privilege." (*Public Service Company of New Hampshire, et al.* (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 491 (1983)). Unless the Board grants a privilege which PFS has not properly justified in its motion, OGD should be permitted to continue deposing Mr. Bear concerning the scope of his future testimony. "Testifying expert witnesses are not immunized from discovery by the form of

... proposed testimony.” (*Houston Lighting and Power Company, et al.* (South Texas Project Units 1 and 2), LBP-79-30, 10 NRC 594, 595 (1979)).

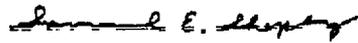
OGD did not progress very far in to the February 16, 1999 letter and eleven pages of material because PFS’ objections were such that Mr. Donnell and Mr. Bear could not be questioned in tandem as was promised by PFS. Mr Donnell had to make an early airplane and would not be available again and we were requested to concentrate on his necessarily separate deposition. We did so, believing that we would have Mr. Bear all day and later if necessary, up until the 11th of May. Throughout the deposition there were numerous off record conferences between Mr. Bear and the PFS attorney and numerous objections, all of which took up considerable time. The attorney for PFS often complained that OGD was asking questions on topics to which he had to object which he claimed took up too much time, and he had us jump around to other topics. All of this disrupted our systematic plan. Additionally, we had to contend with a confidentiality agreement with Mr. Bear, which we had never seen (we had seen a similar agreement with PFS) and which we did not know would be needed to conduct our deposition. This took up a considerable amount of the meager time remaining. The attorney for PFS left to take an early flight in the afternoon (the last he could get) and Mr. Bear abruptly left with him just after 3:30 p.m. when we had not gotten started until after 9:30 a.m.

If OGD is not able to complete a reasonable deposition concerning these documents and Mr. Bear’s future testimony, the use of the documents and the testimony by PFS would not be justified.

Conclusion: PFS’ requested protective order is unnecessary and inappropriate and PFS’ objections to OGD’s lines of deposition questions are without merit and are made in support of an improper purpose. PFS’ Motion should be denied. OGD should be permitted to continue and

complete its necessary and proper deposition of Mr. Bear.

Respectfully submitted,



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May 24, 2001

**UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION**

Private Fuel Storage, a Limited Liability Company;

(Independent Spent Fuel Storage Installation).

Docket No. 72-22
ASLBP No. 97-732-02-ISFSI
May 24, 2001

CERTIFICATE OF SERVICE

I hereby certify that copies of **OHNGO GAUDADEH DEVIA'S (OGD) RESPONSE TO PRIVATE FUEL STORAGE'S (PFS) MOTION FOR PROTECTIVE ORDER** were served on the persons listed below by e-mail (unless otherwise noted) with conforming copies by United States mail, first class, postage prepaid, this May 24, 2001.

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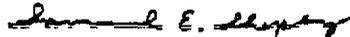
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