

September 26, 2001

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

DOCKETED
USNRC

October 2, 2001 (12:07PM)

In the Matter of)
)
PRIVATE FUEL STORAGE L.L.C.)
)
(Private Fuel Storage Facility))

Docket No. 72-22

ASLBP No. 97-732-02-ISFSI

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**INTERVENOR SKULL VALLEY BAND'S MOTION FOR PROTECTIVE
ORDER AS TO CERTAIN EXHIBITS**

Intervenor Skull Valley Band of Goshute Indians moves for a Protective Order pursuant to 10 CFR 2.740(c)(6) with respect to certain exhibits to a Declaration of a Band member filed by Intervenor Ohngo Gaudadeh Devia (OGD) with its Response filed on June 28, 2001, to the Motion for Summary Disposition of OGD Contention O filed by Applicant Private Fuel Storage (PFS). As discussed below, these exhibits contain confidential and proprietary information of the Band which has been made available to members of the Band's General Council but which should not be made public. This motion seeks a Protective Order tailored to allow disposition of the Contention without causing unnecessary harm to the Band. The substance of this motion has been discussed with counsel for the two other parties litigating the merits of OGD Contention O, namely OGD and PFS, and as discussed below, they are willing to enter into the confidentiality agreement proposed as part of the relief sought by this motion.

BACKGROUND

OGD's Response to Applicant's Motion for Summary Disposition of OGD Contention O was accompanied by a Statement of Material Facts at Issue which, along with the Response, made reference to a 75-page Declaration of Sammy Blackbear, dated June 28, 2001, containing numerous allegations of improprieties in the conduct of the governmental affairs of the Band since 1994. That Declaration also accompanied the filing of OGD's Response, but, although it contained a Table of Exhibits referenced in the Declaration, no exhibits were filed with the Office of the Secretary or served on other parties, as counsel for OGD had sent a cover letter to the Licensing Board explaining why the exhibits should be afforded confidential treatment. See July 24, 2001, Memorandum and Order (Status of "Confidential" Documents). That letter also stated that the exhibits were not being served "subject to claims of confidentiality, safety and sovereignty." Ostensibly, the sovereignty of the Band was invoked by OGD, a non-tribal group, due to Mr. Blackbear's contention that he is the true chairman of the Band.

There has since been a substitution of counsel for OGD, and also for the Skull Valley Band. Counsel for OGD, the Band, and PFS have, consistent with orders of the Board, been discussing appropriate treatment of these exhibits. The Band has expressed concern to counsel for OGD and PFS that some, though not all, of the exhibits may indeed be records of the Band's internal governmental affairs not previously made public, and should be treated as confidential notwithstanding their availability to Mr. Blackbear as a member of the Band's General Council, which includes all adult members of the Band. These exhibits were first made available to the Band, through counsel, on August 22. The Band's need for confidential treatment of some of the exhibits was discussed between

counsel for the OGD and the Band the following week. On August 31 OGD withdrew its request for confidential treatment of the exhibits, acknowledging that the Band retains a claim for confidentiality for some of the exhibits, and withheld service of the exhibits pending resolution of the issue of their confidential treatment. On September 5 the Board ordered that the Band file its motion for a protective order by September 10, 2001. This was later extended to September 26, 2001.

It is important to note that this motion should not be read as conceding the relevancy or accuracy of any of the assertions in OGD's Response to the PFS Motion for Summary Disposition of Contention O, its Statement of Material Facts at Issue, or the Declaration of Sammy Blackbear. The Band supports the PFS motion, and most importantly, contends that the NRC, like federal courts, lacks jurisdiction to address the issues of tribal governance raised in OGD's filings. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59-61 (1978), where the Court was reluctant to construe the Indian Civil Rights Act as a wholesale "interference with tribal autonomy and self-government". Id., at 59. This motion merely addresses confidential treatment for some of the exhibits put in evidence by OGD.

DISCUSSION

Many of the exhibits referenced in the Sammy Blackbear Declaration are Band records containing detailed budgetary and financial information of the Band. It appears that some of these records have necessarily been provided to the Bureau of Indian Affairs (BIA) due to the Bureau's special responsibilities to the Band and its programs designed to support tribal governments. But this does not detract from the confidential and proprietary nature of these tribal records; the BIA's own treatment of these records as

confidential is supported by Exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b)(4). See State of Utah v. Department of the Interior, ___ F.3d ___ (Docket No. 00418, 10th Cir. decided July 10, 2001), which upheld the BIA refusal to disclose redacted portions of the Band's lease with PFS. Similarly, NRC's own rules on the public inspection of records and documents includes an exception for "Trade secrets and commercial or financial information obtained from a person and privileged or confidential." 10 CFR 2.790(a)(4). This, of course, is based on the same FOIA exemption applied in State of Utah.

A compelling reason for nondisclosure is the prejudicial effect that the release of this information would have on the Band. These budget and financial documents contain detailed information on the Band's expenditure of its limited funds, revenues earned by the Band, and the distribution of those revenues to Band members, all matters of sole concern to Band members and a prerogative of the Band's sovereignty. See Declaration of Leon D. Bear (attached). These documents are of a sensitive, financial nature, and their release to the public may cause competitive harm to the Band, as explained in the attached Declaration.

Whether release of this information to the outside public is advisable is a question within the exclusive province of the Band's government. The balancing of interests required by Section 2.790 of the NRC rules should favor nondisclosure, as the protective order sought by the Band, described below, will allow the NRC to address and dispose of OGD Contention O without subjecting the Band to the competitive harm and annoyance which will result from the public release of these internal documents.

Following is a list of those exhibits which are Band records claimed to be confidential and proprietary:

Exhibit C – Annual Report (FY 1987) of Available Cash.

Exhibit D – Budgets from 1984 to 1992.

Exhibit E – Year-End Financial Reports between 1980 and 1994.

Exhibit F – Budgets from 1980 to 1986, including a December 12, 1980 letter from a BIA official to the Band, and a November 21, 1986, internal BIA memorandum, both of which contain confidential budget information received from the Band.

Exhibit H – Two documents are exempt from disclosure: a November 25, 1989 Memorandum from the Band's Executive Committee to Tribal members, and an April 21, 1990, General Council Resolution on the Budget, including dividend payments to Band members.

Exhibit I – An August 13, 1984, Executive Resolution on the allocation of funds for a contract with an architectural firm.

Exhibit K – Three budget resolutions dated November 8, 1986, May 2, 1987, and June 7, 1987.

Exhibit M – Four Resolutions of the Band, one addressing the investment of funds held in trust for minors in 1981, and three containing Band budget figures in 1985, 1987, and 1988.

Exhibit O – A December 27, 1993, Memorandum from two members of the Executive Committee to the Tribal Secretary, discussing internal procedures of the Band.

Exhibit X – An October 23, 1994 Executive Committee Report addressed to Tribal Members and addressing a variety of budgetary issues. (This is Exhibit U on the Table of Exhibits.)¹

Exhibit AA – A June 8, 1994, letter from the Tribal Chairman to the BIA describing the tribal business plan and various tribal enterprises in an effort to obtain a federal loan guarantee. (This is Exhibit X on the Table of Exhibits.)

The above-described records of the Band, if disclosed, would present an undue burden on the Band and subject the Band to annoyance, embarrassment, and oppression, as the internal decision-making processes and financial decisions of the Band would be opened to outside scrutiny and threaten the independence and sovereignty of this small Indian tribe.

SCOPE OF PROTECTIVE ORDER

These records fall within the scope of 10 CFR 2.740(c) which authorizes protective orders for good cause shown, which may include protection of trade secrets and other confidential research, development or commercial information that may be disclosed only in a designated way. The protective order sought by the Band would allow these exhibits to be considered by the Board in conjunction with OGD's Response to the PFS Motion for Summary Disposition of Contention O, as long as they are held as nonpublic information by the Board and by the Office of the Secretary. The parties litigating Contention O, namely PFS, OGD, and the Band, are prepared to enter into a Confidentiality Agreement (now being drafted) which would allow use of these exhibits

¹ Beginning with Exhibit S among the documents provided by counsel for OGD, the letters designating the exhibits do not correspond to the designations on the Table of Exhibits or to the references in the Declaration of Sammy Blackbear.

only for purposes of the Board's and the Commission's ultimate disposition of this contention, and not for any other purpose. These exhibits would not be served on any other party. In the event that OGD Contention O is the subject of a hearing (which the Band and PFS oppose as unnecessary), the exhibits described above would continue to be treated as nonpublic information, and any discussion of the exhibits in testimony could, if necessary, be the subject of an *in camera* proceeding.

A proposed Protective Order is also attached to this motion.

Respectfully submitted this 26th day of September, 2001.

A handwritten signature in black ink, appearing to read "Tim Vollmann", with a horizontal line underneath it.

Tim Vollmann
3301-R Coors Road N.W. # 302
Albuquerque, NM 87120
Telephone: (505) 792-9168

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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

**DECLARATION OF LEON D. BEAR
PURSUANT TO 10 C.F.R. § 2.790**

Leon Bear, being duly sworn, states as follows under penalties of perjury:

1. I have served as Chairman of the Executive Committee of the Skull Valley Band of Goshute Indians {the Band} since 1996. In that capacity, I am responsible for the operational and managerial matters of the Band. Between 1986 and 1994, I served as the Secretary of the Executive Committee. In that capacity I was responsible, among other things, for the custody and safekeeping of the Band records. I am providing this declaration to identify the reasons why certain Band confidential information associated with the above captioned proceeding should be maintained as confidential information by the Nuclear Regulatory Commission pursuant to 10 C.F.R. §2.790(a)(4).

2, Private Fuel Storage, L.L.C. ("PFS"), has applied for a license permitting it to receive, transfer and possess power reactor spent nuclear fuel for temporary storage at the Facility. Ohngo Gaudadeh Devia {"OGD"} has intervened in this proceeding, and on June 28, 2001, it filed a Response in opposition to the PFS Motion for Summary Disposition of OGD Contention"O". Accompanying that Response was a Declaration of Sammy Blackbear, a member of the Band, which contained numerous allegations regarding the procedures and conduct of the

internal business and decision-making of the Band. Attached to that Declaration were numerous exhibits which were first provided to the Band, through counsel, on August 22, 2001. I first saw these exhibits on August 24, 2001.

3. I am familiar with many of the specific exhibits which are internal Band documents pertaining to the budget, expenditures, financial status, and internal decision-making processes of the Band. Other exhibits, with which I had not been specifically familiar before copies of the exhibits were provided to me, are internal Band documents in a form familiar to me as a Band officer. These documents are normally not made available to anyone other than members of the Band, representatives of the Band, and officials of the Bureau of Indian Affairs. Public disclosure of these documents may cause harm to the Band because the processes and substance of financial decisions made by the Band would be revealed to non-members of the band, who either may seek to do business with the Band, or who have opposed the Band's efforts, or may later oppose the Band's efforts, to engage in commercial transactions.


4. I have examined the exhibits which are documents which the Band is contending are confidential and proprietary, and for which the Band is requesting a protective order from the Board, and to the best of my knowledge, these documents have not previously been made available to anyone other than members of the Band, representatives of the Band, representatives of individual members of the Band, or officials of the Bureau of Indian Affairs who review such documents in their official governmental capacity.

5. The reason for not disclosing this type of information is that the information is proprietary and commercially sensitive to the conduct of the Band's business, i.e., public disclosure of this information could cause great harm to the Band. The Band is in competition

with other businesses in and around Skull Valley. Band resources are limited compared to other nearby business entities. Therefore, alternatives of future economic development being considered by the Band, the resources available to exploit those alternatives, as well as the commercial terms of ongoing Band economic development projects are especially in need of protection. If such information became available to other entities, it could be used to the competitive disadvantage and economic harm to the Band, e.g., by exploiting the opportunities to the exclusion of the Band or obtaining an unfair advantage in negotiating future economic development projects on the Band's Reservation. Therefore, information about Band economics, such as contained in budget documents, planning of Band future economic developments, and commercial terms of proposed development projects, warrants protection.

I declare under penalties of perjury that the foregoing is true and correct.

Executed on September 26, 2001.


Leon D. Bear, Chairman
Executive Committee

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NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board

In the Matter of)	
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PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22
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(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

**PROTECTIVE ORDER AS TO CERTAIN EXHIBITS INTRODUCED
IN RESPONSE TO APPLICANT'S MOTION
FOR SUMMARY DISPOSITION OF OGD CONTENTION "O"**

Upon consideration of the September 26, 2001 Motion of intervenor Skull Valley Band of Goshute Indians (Skull Valley Band) for a Protective Order as to Certain Exhibits attached to the Declaration of Sammy Blackbear which was attached to intervenor Ohngo Gaudadeh Devia's (OGD) June 28, 2001 response to the May 25, 2001 motion of applicant Private Fuel Storage, L.L.C. (PFS), for summary disposition of contention OGD O, Environmental Justice Issues Not Addressed, and it appearing that OGD and PFS are prepared to enter into a Confidentiality Agreement with the Skull Valley Band to continue to treat those Exhibits as confidential, it is:

ORDERED

- (1) that the Office of the Secretary shall continue to treat the exhibits listed below as nonpublic documents;
- (2) that those exhibits need not be served by OGD on parties who are not litigating OGD Contention O; and

(3) that OGD, PFS, and the Skull Valley Band treat those exhibits as confidential as required by the Confidentiality Agreement to which they are parties.

The exhibits to which this protective Order shall pertain are as follows:

Exhibit C – Annual Report (FY 1987) of Available Cash.

Exhibit D – Budgets from 1984 to 1992.

Exhibit E – Year-End Financial Reports between 1980 and 1994.

Exhibit F – Budgets from 1980 to 1986, including a December 12, 1980 letter from a BIA official to the Band, and a November 21, 1986, internal BIA memorandum, both of which contain confidential budget information received from the Band.

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FOR THE ATOMIC SAFETY
AND LICENSING BOARD

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board

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(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the Skull Valley Band's Motion for Protective Order as to Certain Exhibits have been served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 26th day of September, 2001.

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e-mail: hearingdocket@nrc.gov
(Original and two copies)

* Adjudicatory File
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September 26, 2001

Office of the Secretary
U.S. Nuclear Regulatory Commission
Attention: Rulemakings and Adjudications Staff
Washington, D.C. 20555-0001

Re: In the Matter of Private Fuel Storage L.L.C., Docket No. 72-22

To Whom It May Concern:

Enclosed for filing are the original and two copies of the Declaration of Leon D. Bear, dated today, September 26, 2001, which is an attachment to the Intervenor Skull Valley Band's Motion for Protective Order as to Certain Exhibits, also being filed today *via* U.S. mail and facsimile. The separate filing is necessary because the enclosed original is being mailed from Salt Lake City, Utah, while the Motion is being mailed from Albuquerque, New Mexico.

Thank you for your cooperation.

Sincerely,



Tim Vollmann