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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SKULL VALLEY BAND OF GOSHUTE INDIANS, et al., Plaintiffs, vs. MICHAEL O. LEAVITT, et al., Defendants.	**(1) UTAH'S MOTION FOR ORDER DEFERRING RESPONSE TO SUMMARY JUDGMENT MOTIONS PENDING DETERMINATION OF THIS COURT'S JURISDICTION;** **(2) REQUEST FOR ORAL ARGUMENT ON EXPEDITED BASIS;** **(3) SUPPORTING POINTS AND AUTHORITIES; AND** **(4) EXHIBITS**
Counterclaim	Civil No. 2:01CV00270C Judge Tena Campbell

MOTION

The defendants ("Utah") move for an order deferring its response to the plaintiffs' pending motions for summary judgment pending this Court's determination of its jurisdiction over this action. (Utah also requests oral argument on its Motion, on an expedited basis.)

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The plaintiffs ("PFS") do not have standing to raise in this Court their Complaint's claims. Nor are those claims ripe. Utah has so demonstrated in three papers already filed with this Court.[1]

These issues of standing and ripeness go to the core of this Court's Article III subject-matter jurisdiction over PFS's Complaint. Settled law mandates that this Court fully and finally adjudicate all of PFS's standing and ripeness problems **first**, before addressing any aspect of the merits of PFS's Complaint. Because standing and ripeness are jurisdictional, any adjudication of those issues adverse to PFS requires dismissal of the Complaint and precludes federal court consideration of the merits of the Complaint's claims.

Accordingly, it makes sense – common sense – for this Court and the parties to devote their time and other resources first to a resolution of the standing and ripeness issues. It makes sense – common sense – for this Court and the parties to **not** expend their time and resources wading through the merits of PFS's claims unless and until this Court has determined that it has subject-matter jurisdiction over those claims.

Yet PFS is insisting that the parties brief **now** – and that this Court **now** read and otherwise prepare for a resolution of – PFS's claims, before any resolution of PFS's right to even be in this Court. PFS's insistence takes the form of two motions for summary judgment of about 400 pages of filed material; takes the further form of an express refusal to agree that this Court

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[1] Those three papers are: The Defendants' Memorandum in Support of Their Motion for Judgment on the Pleadings, filed 20 September 2001; Utah's Reply re Utah's Motion for Judgment on the Pleadings, filed 10 January 2002; and Utah's Rule 12(h)(3) Suggestion of Lack of Jurisdiction, filed 14 January 2002.

and Utah need not wade through those 400 pages until the necessity to do so is established; and takes the further form of refusing to give any reason for its insistence.

Because PFS's insistence does not make sense and will waste a big portion of this Court's and Utah's time and other resources, we make this Motion, asking that this Court order a deferral of its own and Utah's work on PFS's motions for summary judgment until this Court has ruled that it has jurisdiction to even address those PFS motions.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION

I.
BACKGROUND

The two plaintiffs (collectively "PFS") are Private Fuel Storage, L.L.C., a Delaware limited liability company, and one of two groups of Goshute Indians claiming to be the legitimate leadership of the Skull Valley Band of Goshute Indians ("the Band"). The group wedded to the L.L.C. is referred to as "the Leon Bear faction."[2]

Eight big nuclear utilities formed the L.L.C. in about 1997. The L.L.C. then entered into a lease with the Leon Bear faction allowing the L.L.C. to build and operate a nuclear waste dump on 99 acres of the Band's reservation. That reservation sits 45 miles west of Salt Lake City. In industry jargon, the proposed nuclear waste dump is a privately owned, away-from-reactor, spent nuclear fuel ("SNF") storage facility. SNF is a highly lethal, highly toxic waste that remains

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[2] The executive branch of the federal government is in the process of resolving, for its purposes, which of the two groups claiming tribal leadership – if either – the executive branch will recognize and deal with. The first step in that process will be an initial ruling by the Indian superintendent at Ft. Duchesne, expected any week now. We understand that the next step will be a final ruling by the Secretary of the Interior.

deadly for many thousands of years. PFS has big plans for its Skull Valley facility; it proposes to store there, on open concrete slabs, the nation's entire present inventory of SNF, 40,000 metric tons. (No one location now has, in such a storage mode, more than about 500 tons of the stuff.)

The former Indian superintendent at Ft. Duchesne, who has since left Bureau of Indian Affairs employ, upon his receipt of the lease gave it an immediate "conditional" approval. The L.L.C. then initiated a proceeding before the Nuclear Regulatory Commission ("the NRC") to get a license to build and operate the proposed Skull Valley facility. The L.L.C. did so despite the fact that governing federal law – the Nuclear Waste Policy Act ("the NWPA") – prohibits a new privately owned, away-from-reactor, SNF storage facility such as PFS is promoting.[3] Utah entered the NRC licensing proceeding and raised the NWPA's prohibition. But the NRC's byzantine procedures have so far precluded both the Licensing Board conducting the proceeding and the Commission itself from ruling on the merits of Utah's objection, so the proceeding has gone forward.

Faced with these developments, Utah's legislature enacted a number of statutes designed to protect Utahns against the risks of harm posed by PFS's proposed project, a project that Utah – with good reason – sees as a legal and an environmental farce. PFS – despite the fact that it had not yet received (and probably will never receive) a final, unconditional approval of the lease by the Secretary of the Interior and had not yet received (and probably will never receive) an

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[3] The unlawful nature of PFS's proposed nuclear waste dump is at the heart of one of two of PFS's standing problems. The other standing problem arises from the fact that the Department of the Interior cannot validly approve the lease, with such approval being a statutory requirement for the lease's effectiveness.

NRC license, upheld by the reviewing courts, to build and operate the proposed Skull Valley facility – despite all this, PFS invoked this Court's jurisdiction in April 2001, asking that this Court declare the Utah statutes unconstitutional and enjoin their operation. Today, nine months later, PFS is not much closer to receiving the NRC license and is probably further away from receiving Department of Interior ("DOI") approval of the lease – because of the leadership dispute that has arisen in the Band.

In its Answer to the Complaint, Utah pointed out the insurmountable legal and factual barriers to PFS ever getting a valid NRC license and a valid lease with the Band, validly approved by DOI. Those barriers, of course, defeat PFS's standing to raise its challenges to the Utah statutes. Likewise, the fact that PFS has not yet got a valid license and a valid lease validly approved and the further fact that uncertainty reigns as to whether PFS will ever get those in the future render PFS's claims premature, that is, not ripe. And here, both the standing and the ripeness problems defeat this Court's Article III subject-matter jurisdiction. Accordingly, Utah has raised the jurisdictional issues in both its Rule 12(c) motion for judgment on the pleadings[4] and its Rule 12(h)(3) suggestion of lack of jurisdiction.[5]

In the midst of all this activity resulting from PFS's standing and ripeness problems, PFS filed two motions for summary judgment, which total about 400 pages of filed material.[6] Utah's response was for its counsel (Mr. Stewart) to propose to PFS's counsel (four law firms) "a

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[4] Filed 20 September 2001.

[5] Filed 14 January 2002.

[6] Filed 12 December 2001.

sensible schedule that we can take to Judge Campbell for the briefing and resolution of both the threshold and the state-statute issues."

> By threshold issues, I mean all the issues of justiciability that have been or soon will be raised by motion. Here is a rundown of those justiciability issues:
>
> Utah's motion for judgment on the pleadings raises plaintiffs' *standing* to pursue their claims given that (in our view) as a matter of law PFS cannot get a valid license to operate the proposed Skull Valley nuclear waste dump. . . .
>
> . . . .
>
> Utah's soon-to-be filed [Rule 12(h)(3) suggestion] will raise the *ripeness* of the plaintiffs' claims, while urging that, as between plaintiffs' *standing* and the *ripeness* of plaintiffs' claims, the District Court should address and resolve first the *standing* issue. . . .
>
> By state-statute issues, I mean the constitutionality of the challenged state statutes. The pending motion or motions for summary judgment raise the state-statute issues. . . .
>
> You elected, in the midst of the uncertainty regarding the District Court's final decisions on the justiciability issues, to create a motion for summary judgment on the state-statute issues – a motion almost two inches thick and comprised of (by my guess) 400 pages of material. Notions of judicial economy point to an approach where the Court first resolves the threshold issues, after which – but only if the case is still alive – the Court and the parties address the state-statute issues. What contrary notions led to the creation of the motion for summary judgment, I do not know. If there are defensible reasons, I trust you will share those with me in our dialogue over my proposal . . . .

Exhibit 1 (Monte Stewart letter to PFS's counsel, 20 December 2001). Utah's proposal was essentially what this Motion seeks now in the form of an Order from this Court: The parties will complete briefing of the justiciability issues, and this Court will then rule on those issues; work on PFS's summary judgment motions will be deferred pending a decision by this Court that it indeed has jurisdiction over PFS's Complaint.

PFS's counsel responded with a statement that "we do not agree with your proposal . . . . Our position is that briefing should be concluded and the issues decided together." Exhibit 2

(Val R. Antczak letter to Monte Stewart, 4 January 2002). Despite Mr. Stewart's earlier request for a statement of any "defensible reasons" for PFS's insistence on working on the merits before jurisdiction was established, PFS's counsel provided no statement, other than the bald assertion that PFS's position was "contemplated by the Rules of Civil Procedure and the Rules of Practice of the District Court." *Id.*

Consequently, Utah files this Motion to get a briefing schedule that does not waste this Court's and Utah's time and other resources.[7]

II.
SETTLED LAW REQUIRES THIS COURT TO ADDRESS AND ADJUDICATE FIRST ALL THE SUBSTANTIAL CHALLENGES NOW RAISED TO PFS's STANDING AND THE RIPENESS OF PFS's CLAIMS; UNTIL THIS COURT DOES SO AND RESOLVES THESE ISSUES IN FAVOR OF JURISDICTION, THIS COURT CANNOT PROCEED TO ADDRESS ANY ASPECT OF THE MERITS OF PFS's COMPLAINT.

Until four years ago, a number of circuit courts allowed their district courts to avoid resolving difficult standing and other Article III requirements in order to reach an easy resolution on the merits adverse to the plaintiff. The doctrine was known as "hypothetical jurisdiction." But in *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83 (1998), the United States Supreme Court slammed the door shut on hypothetical standing, "declin[ing] to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action," *id.* at 94, and thereby reaffirming "the rule that Article III jurisdiction is **always** an antecedent question," *id.* at 101 (emphasis added).

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[7] We received on 10 January 2002 a scheduling order from this Court adding all pending motions, including the summary judgment motions, to the 11 April 2002 hearing already scheduled on Utah's Rule (c) motion regarding the lack of PFS's standing.

The Tenth Circuit is in accord.

> Our review requires that we determine the appropriate sequence for addressing the issues presented by this case. We rely on two recent Supreme Court opinions, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999), and *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). With possible exceptions not applicable here, these cases hold that "jurisdiction generally must precede merits in dispositional order." *Ruhrgas*, 526 U.S. at 577, 119 S.Ct. 1563; see *Steel Co.*, 523 U.S. at 101-02, 118 S.Ct. 1003. "Jurisdiction to resolve cases on the merits requires both authority over the category of claim in suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court's decision will bind them." *Ruhrgas*, 526 U.S. at 577, 119 S.Ct. 1563. While "there is no unyielding jurisdictional hierarchy" requiring federal courts to sequence one jurisdictional issue before the other, *id.* at 578, 119 S.Ct. 1563, "in most instances subject-matter jurisdiction will involve no arduous inquiry" and "both expedition and sensitivity to state courts' coequal stature should impel the federal court to dispose of that issue first."

Gadlin v. Sybron Intern. Corp., 222 F.3d 797, 799 (10th cir. 2000).

Thus the law is certain now that a district court must resolve its own subject-matter (including Article III) jurisdiction first, before proceeding to address any issue on the merits of the case. Here, that certainty means that this Court must first resolve the substantial challenges to PFS's standing and to the ripeness of PFS's claims. Only when the Court has done so – and ruled in favor of PFS on both standing and ripeness – can this Court address the merits of PFS's challenges to the Utah statutes.

III.
NOTIONS OF JUDICIAL ECONOMY, COMMON SENSE, AND THE WEAKNESS OF PFS's POSITION ON STANDING AND RIPENESS ALL SUPPORT AN ORDER DEFERRING WORK ON THE SUMMARY JUDGMENT MOTIONS UNTIL THIS COURT DETERMINES THAT IT HAS JURISDICTION OVER PFS's COMPLAINT.

We still do not know why PFS's four law firms, faced with substantial challenges to PFS's standing and the ripeness of its claims, elected to devote the time needed to create 400

pages of summary judgment motions. Be that as it may, the question is now whether this Court and Utah (which has fewer lawyers on this case than PFS has law firms) must expend very substantial amounts of time and other scarce resources to work through those 400 pages – when the probability is very high that this Court will rule against PFS on standing and ripeness. Notions of judicial economy and simple common sense point to the same answer: defer that work until it becomes (if ever) necessary to do it.

The weakness of PFS's position on standing and ripeness lends further support to this answer. We will not repeat here the material appearing in our other papers[8] and demonstrating that PFS is going to lose on standing and ripeness, but the Court has those papers and may refer to them.

Finally, no plausible, defensible reason appears (nor can we think of any) for requiring this Court and Utah to engage in substantial work relative to PFS's summary judgment motions before this Court finally adjudicates its subject-matter jurisdiction.

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[8] Those papers are: The Defendants' Memorandum in Support of Their Motion for Judgment on the Pleadings, filed 20 September 2001; Utah's Reply re Utah's Motion for Judgment on the Pleadings, filed 10 January 2002; and Utah's Rule 12(h)(3) Suggestion of Lack of Jurisdiction, filed 14 January 2002.

IV.
CONCLUSION

For all the foregoing reasons, Utah respectfully requests that this Court enter an order deferring further briefing and other work on PFS's summary judgment motions pending a resolution by this Court of its subject-matter jurisdiction.

Dated: 14 January 2002

Counsel for the defendants

By: Monte Stewart
MONTE N. STEWART

By: Lawrence J. Jensen
LAWRENCE J. JENSEN

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Re: *Private Fuel Storage, et al. v. Leavitt, et al.*
Scheduling of briefing on and resolution of threshold and state-statute issues

Good afternoon:

I write to propose a sensible schedule that we can take to Judge Campbell for the briefing and resolution of both the threshold and the state-statute issues.

By threshold issues, I mean all the issues of justiciability that have been or soon will be raised by motion. Here is a rundown of those justiciability issues:

Utah's motion for judgment on the pleadings raises plaintiffs' *standing* to pursue their claims given that (in our view) as a matter of law PFS cannot get a valid license to operate the proposed Skull Valley nuclear waste dump. (We understand your position to be that the District Court does not have jurisdiction to determine plaintiffs' standing but that the District Court nevertheless should go on to resolve the plaintiffs' claims.)

Plaintiffs' motion to dismiss raises a number of justiciability issues. Plaintiffs' motion raises the issue of the *District Court's jurisdiction* to resolve two of the five threshold issues necessarily raised by plaintiffs' Complaint: (1) the NRC-licensing-authority question with all it means for plaintiffs' *standing* and (2) the *de facto* permanent repository/NEPA problem. Plaintiffs' motion to dismiss also raises the *ripeness* of Utah's counterclaim for declaratory

judgment, this time on three of the five threshold issues necessarily raised by plaintiffs' Complaint: (1) *de facto* permanent repository and, hence, NEPA violations; (2) validity of BIA conditional approval of the waste dump lease; and (3) validity of BIA unconditional approval of the lease. Plaintiffs' motion to dismiss also raises, with a tribal sovereignty slant, Utah's *standing* to address the fifth threshold issue raised by plaintiffs' Complaint, the validity of tribal approval of the lease.

Utah's soon-to-be filed alternative motion to dismiss will raise the *ripeness* of the plaintiffs' claims, while urging that, as between plaintiffs' *standing* and the *ripeness* of plaintiffs' claims, the District Court should address and resolve first the *standing* issue. As helpful as it would have been for the Court to have one clear path to the *standing* issue, we have no choice now but to raise as an alternative the *ripeness* of plaintiffs' claims – in light of plaintiffs' jaw-dropping two-step position. Step one, Utah's counterclaim – which merely seeks complete resolution of the threshold issues inextricably inherent in plaintiffs' Complaint – is not ripe for adjudication. Step two, this Court does not have jurisdiction to determine the ripeness of those threshold issues but nevertheless should proceed as if they were ripe and as if they had been (although they have not been) resolved in favor of plaintiffs.

By state-statute issues, I mean the constitutionality of the challenged state statutes. The pending motion or motions for summary judgment raise the state-statute issues. (Interestingly, one of those issues is whether state statutes unduly hinder or contravene federal policy for SNF storage, which issue in turn necessarily raises this now all too familiar question: Does that federal policy authorize or prohibit a PFS-type waste dump? We are to suppose, I guess, that the District Court does not have jurisdiction to answer that question but must nevertheless move on to resolve the larger preemption issue.)

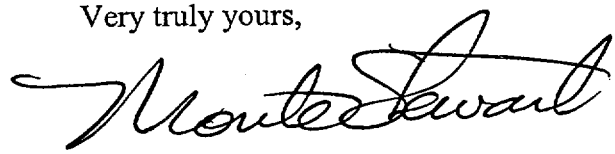
You elected, in the midst of the uncertainty regarding the District Court's final decisions on the justiciability issues, to create a motion for summary judgment on the state-statute issues – a motion almost two inches thick and comprised of (by my guess) 400 pages of material. Notions of judicial economy point to an approach where the Court first resolves the threshold issues, after which – but only if the case is still alive – the Court and the parties address the state-statute issues. What contrary notions led to the creation of the motion for summary judgment, I do not know. If there are defensible reasons, I trust you will share those with me in our dialogue over my proposal, which is:

We will (1) complete briefing of Utah's motion for judgment on the pleadings, plaintiffs' motion to dismiss, and Utah's soon-to-be-filed alternative motion to dismiss in time for all those motions to be heard by the Court at the April hearing now set on Utah's motion for judgment on the pleadings; (2) ask the Court to expand that hearing to encompass the two motions to dismiss; (3) set a schedule for completion of the briefing on the plaintiffs' motion for summary judgment,

a schedule triggered by a District Court decision on the justiciability issues that leaves this case still alive; and (4) ask the Court for a hearing date for the motion for summary judgment (subject to Utah's rights under Rule 56(f)).

I look forward to your response.

Very truly yours,



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January 4, 2002

VIA FACSIMILE

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Re: Skull Valley Band v. Leavitt-Civil Case No. 2:01 CV-00270

Dear Monte:

I am in receipt of your letter dated December 20, 2001 and have discussed the same with counsel for the Skull Valley Band. We do not agree with your proposal that Defendants' Motion for Summary Judgment should be held in abeyance pending a ruling on the Motions to Dismiss. Our position is that briefing should be concluded and the issues decided together.

As contemplated by the Rules of Civil Procedure and the Rules of Practice of the District Court, both sides should complete the briefing as currently scheduled. If you need an additional and reasonable extension of time to complete your briefing, we would grant such a request. Please contact Mike Bailey or me directly to discuss that matter, if necessary. Also, please inform us when you intend to file an opposition memorandum to our Motion to Dismiss. That opposition memorandum was due on December 27, 2001, and I hope that we can see a response in the near future.

I look forward to your response.

Sincerely,

Parsons Behle & Latimer

Val R. Antczak

ST

cc: Jay Silberg
Tim Vollmann
James Holtkamp
Larry Jensen

444947.2

CERTIFICATE OF SERVICE BY MAIL

I certify that a true and correct copy of this document was served by mail, on 14 January 2002, by mailing to:

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