UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-02-08

ATOMIC SAFETY AND LICENSING BOARD

RAS 3940 **DOCKETED 02/22/02**

Before Administrative Judges:

SERVED 02/22/02

Michael C. Farrar, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel Storage Installation)	February 22, 2002

MEMORANDUM AND ORDER
(Ruling on Applicant's Motion for Summary Disposition of "Contention OGD O" -- Environmental Justice)

Introduction and Summary. Presented with serious disputes among members of the Skull Valley Band of the Goshute Indians over this proposed NRC licensing action and over certain landlease income, we are called upon here to apply two important federal doctrines that, at first glance, threaten to conflict with each other. On the one hand, the United States Supreme Court has long made it clear that matters of Tribal governance are largely beyond inquiry by federal (and State) instrumentalities, which must defer to a Tribal government's creation of its own substantive laws to assist in Tribal governance and its enforcement of those laws in Tribal forums. On the other hand, an Executive Order issued by President Clinton in 1994, and endorsed by the Nuclear Regulatory Commission, reminds each federal agency to ensure that its actions -- including awarding licenses for private projects -- are consistent with norms of "environmental justice" that protect disadvantaged populations.

This matter had its genesis when the Skull Valley Band, acting through its identified leadership, entered into a business arrangement to lease its Reservation lands, located within

the borders of the State of Utah, to a consortium of electric utility companies called Private Fuel Storage, LLC (PFS, or the Applicant). That organization has applied for an NRC license to construct and operate a facility that -- in a manner emanating from earlier federal policy -- would provide for the temporary above-ground storage on the Skull Valley Reservation of spent fuel from nuclear reactors.

That project could eventually result in the presence on the Reservation of 4,000 concrete-encased casks, each nearly 20 feet high and 11 feet in diameter. The Skull Valley Band, having invited the lease arrangement, intervened in this licensing proceeding to support the project, known formally as an "independent spent fuel storage installation" (ISFSI). On the other hand, a group known as Ohngo Gaudedah Devia (OGD), comprised primarily of Band members opposed to usage of the Tribal Reservation for that purpose, intervened to oppose that endeavor on a number of counts, only one of which remains pending.[1]

That OGD challenge to the proposed federal license, denominated "Contention OGD O," raises environmental justice issues, pointing to the provisions of the Executive Order previously mentioned and the National Environmental Policy Act (NEPA). As OGD sees it, the proposed project is inconsistent with the Band's cultural heritage and the sacredness of its Reservation lands and, for those reasons and others involving more tangible sociological matters, thereby imposes environmental injustice upon OGD members in a manner not permitted by NEPA.

While our proceeding has been running its course, a controversy has been building among the various Band members on both sides, and their allies, concerning the legitimacy of the Tribal leadership and the control of Tribal finances. In that regard, and crucial to our

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[1] The State of Utah, the principal opponent of the PFS proposal, also intervened here to present various challenges to the project. For a recent rundown of the overall history and status of the proceeding, see LBP-01-39, 54 NRC ___ (Dec. 26, 2001). At this juncture, OGD's environmental justice contention is the only one, of those that might be the subject of the hearing beginning in April, that has a dispositive motion still pending. Compare id. at ___ (slip op. at 37), note 36.

decision today, allegations have been made that members opposing the project are being deprived, by the Tribal leadership overseeing the business arrangement, of any share in the lease payments coming to the Band from PFS. An OGD leader has filed an affidavit with us expressing his view of the facts related to those allegations.

Our current involvement was triggered when the Applicant asked us, under our rules of practice, to reject OGD's environmental justice claim summarily, as legally and factually deficient. Insofar as the crucial issue is concerned, the Applicant -- essentially seeing this part of the controversy as involving an aspect of Tribal governance -- requests that we therefore defer to, and base our action on, the formal position taken by the Tribal leadership in favor of the project, rather than set the matter for hearing.

The NRC Staff -- whose role in the system is to review the PFS application from an internal regulatory standpoint before it comes to us to adjudicate any outside challenges[2] -- supports the PFS motion for summary disposition. The motion has the Skull Valley Band's tacit approval. Of course, OGD opposes the motion, based in part on the above-mentioned affidavit.

Although we grant the Applicant's motion in part, we also, for reasons that do not ensnare us in the apparent controversy about Tribal governance, deny the Applicant's motion in part, thereby sending an aspect of the environmental justice claim to an April trial on the merits. We set out in Part I of this opinion our reasoning for that decision.

As we there explain, the Supreme Court's Tribal governance doctrines mentioned above do not preclude us from entertaining claims of deprivation of environmental justice that, in the situation here presented, may belong to a subgroup of the overall Tribal community. Under our rules, those claims here must go to hearing, for they cannot now be resolved on the competing assertions of Band members holding very different beliefs about the impact of the project on

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[2] The Staff's work here began with PFS's filing its application in 1997 and has continued through PFS's submission of some twenty-three amendments. The Staff review led it recently to issue a Supplemental Safety Evaluation Report and the Final Environmental Impact Statement.

their individual situations, including the impact of the concomitant lease income that was anticipated would be applied -- but may not be being used -- to relieve their poverty.

But the Supreme Court doctrines on Tribal governance, and similar lessons drawn from other sources, convince us that there are other, far better, ways than a hearing to resolve this controversy. To point the parties in that direction, we focus in Part II on why resolution of the matters underlying the environmental justice dispute may best be driven by those with a greater stake in, and understanding of, the conflict than we possess. We believe that a hearing before us should be a last resort. Accordingly, we strongly encourage the protagonists to settle this matter -- achieving an outcome shaped by, and satisfactory to, themselves -- rather than to turn it over to us for a trial, and an outcome, that may disappoint them all.[3]

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[3] To guide the reader, we provide here a partial outline of our opinion:

I. The Need for a Hearing
  A. The Setting of the Controversy
    1. The Nature of the Facility, the Lease and the Disputes
    2. The Filings of the Parties
    3. The Concept of Environmental Justice
    4. The Standards for Summary Disposition
  B. The Interpretation of the Law
    1. The Deference Owed to Tribal Governance
    2. The Definition of "Low Income Populations"
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    3. The Balancing of Environmental Impacts
  C. The Facts in Dispute and the Facts Needed
    1. The Impacts on the Environment
      a. Cumulative Impacts
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II. The Wisdom of a Settlement
  A. The Policy of the Commission
  B. The Path to a Settlement

I. THE NEED FOR A HEARING

A. The Setting of the Controversy

In early 1983, President Reagan signed the Nuclear Waste Policy Act of 1982 into law. As amended, that law acknowledges the potential for siting nuclear waste disposal facilities of one kind or another on Indian Reservations.[4] The response of Indian Nations to overtures from the Nuclear Waste Negotiator (established as a federal officer by Title IV of that Act) and from others was overwhelming. Although Indian Tribes control only some 3% of the Nation's land, Tribes were responsible for some 3/4 of the 20-odd initial nuclear waste disposal applications and all of the Phase II applications.[5] Eventually, the somewhat different proposal now before us emerged.

1. The Nature of the Facility, the Lease, and the Disputes. As is well-known, the absence of a repository for the permanent storage of spent nuclear fuel that has been and will be generated by the Nation's 100-odd power reactors[6] prompted a consortium of electric utility operators of nuclear power reactors to form the Private Fuel Storage, LLC, organization to seek an NRC license for an off-site facility for spent fuel storage, known in Commission argot as an ISFSI (see p. 2, above). In pursuing its goal, PFS entered into a business arrangement with the Skull Valley Band of the Goshute Indians (which acted through its ostensible leadership representatives) to construct and operate an ISFSI on the Band's Reservation some 50 miles southwest of Salt Lake City. The proposed ISFSI license would permit, among other things, the

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[4] See 42 USC § 10242.

[5] These figures were reflected in various commentaries said to draw upon the records of the now-defunct Office of Nuclear Waste Negotiator.

[6] As of December 2000, a total of 104 power reactors remained licensed to operate. See NUREG-1350, Vol. 13, p. 28 (June, 2001). A number of others had earlier been decommissioned.

storage of 40,000 metric tons of spent nuclear reactor fuel in concrete-encased storage casks (see p. 2, above) to be arrayed on specially-designed concrete pads.[7]

The storage of the casks is intended to be temporary (pending development of a permanent repository such as the one being considered for Yucca Mountain). To that end, PFS's contracts are to require its customers to retain title to the spent fuel they send to the facility, so that it could be sent back to them at the end of the facility's life if a permanent repository is not ready by then.[8]

Under the unique relationship that exists between the United States and sovereign Indian Nations, Tribal contracts are not valid without the approval of the Department of the Interior's Bureau of Indian Affairs (BIA). That agency gave the proposed lease between PFS and the Band preliminary approval in 1997. That lease had been negotiated and signed on behalf of the Band by Leon Bear, exercising the authority he claimed by virtue of having previously been elected the Band's President in a process that, while apparently controversial, earned BIA's approval. Joining him were the Band's Vice Chairperson and Secretary, at that time Mary Allen and Rex Allen, respectively.

Not all Tribal members, however, shared these putative officers' view of the benefits to the Band of the lease arrangement, and a group of project opponents took issue with the leadership's actions. According to the documents before us (as also reflected in contemporary

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[7] The State has put forward various safety issues about the proposed facility, including the potential risks from (1) accidents caused by U.S. military operations to the West and (2) earthquakes and other geotechnical phenomena. We will be considering those issues, along with others, at the upcoming trial. See note 1, above.

[8] See FEIS (note 2, above) at xxxii. Although the initial license period would be for 20 years, the possibility of an extension exists. A controversy about how the expected facility life is treated in the FEIS has just given rise to a new, late-filed contention, submitted by the State on February 11, 2002, which we need not pause to detail here.

newspaper accounts),[9] the years since have been filled with challenges to the officers' authority, status and actions; calls for, conduct of, and disputes over new elections; demands for information about the lease terms; battles for control of the Band's offices and bank accounts;[10] and even attempts to replace the Band's legal counsel involuntarily (see note 20, below).

We touch herein on a number of these disputes. As will be seen, however, our eventual focus (see pp. 28-36, below) primarily rests on only two of the opponents' claims (which turn out to be related), namely, that (1) the project's environmental impacts are unacceptable and that (2) the leadership has deprived them of any share of the significant benefits that should accrue to them from the project, namely, the income from the lease.

2. The Filings of the Parties. In response to the Commission's providing an opportunity for hearing on the PFS application, a number of the Skull Valley Band members, and other individuals, calling themselves Ohngo Gaudedah Devia, petitioned to intervene in this proceeding to oppose the project. (The Band itself is participating in support of the Applicant's position.) On November 24, 1997, OGD filed a number of specific challenges in the form of the "contentions" called for by NRC rules;[11] for a variety of reasons, this Board determined that, with one exception, those contentions could not go forward. LBP-98-7, 47 NRC 142,

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[9] Of course, we mention these accounts not to arrive at any factual determinations but only to highlight the intensity of the underlying controversy.

[10] See Skull Valley Band Goshutes v. Zion's Bank, No. 2:01CV00813C (D. Utah, filed Oct. 18, 2001); see also Brent Israelsen, "Nation" Inserts Itself into Tribal Fray, Salt Lake Tribune, Nov. 13, 2001 (referring to the Native American Tribal Organization, also known as the NATO Indian Nation).

[11] OGD presented 16 contentions, lettered A through P. The last of those (to which we refer later), dealt with the impacts of the facility's "routine operations" and "associated transportation activities," and complained of, among other things, "obvious impacts resulting from the physical presence of the facility," including "visual intrusion, noise, worker and visitor traffic." Contentions at 36.

reconsideration granted in part and denied in part, LBP-98-10, 47 NRC 288, 298-99, aff'd on other grounds, CLI-98-13, 49 NRC 26 (1998).

The one remaining is "Contention OGD O," presenting an environmental justice claim. As framed, that contention invoked the Executive Order in urging that the community not be "made to suffer more environmental degradation at the hands of the NRC." After making reference to the Reservation's being surrounded by a "ring of environmentally harmful companies and facilities" that create or process hazardous waste, OGD presented six specific grounds that it said provided a basis for its claim.

This Board rejected three of those bases, leaving standing the three "disparate impact matters outlined in bases one, five and six." See LBP-98-7, 47 NRC at 233. Basis # 1 involves the disparate economic and sociological impacts on minority and low-income populations compared to the overall population. Basis # 5 addresses the cumulative impacts of the PFS facility coupled with the impacts from other nearby hazardous waste facilities. And Basis # 6 highlights the adverse effects on property values stemming from the proposed facility.[12]

After we admitted that contention into the proceeding, the Commission early on took the opportunity -- afforded by its review of another aspect of this case -- to provide further guidance on the environmental justice concept. CLI-98-13, 48 NRC 26, 35-36 (1998). The Commission there reminded us of its prior teachings, particularly those dealing with the limitations that inhere both in the Executive Order (whose "purpose was merely to underscore" certain already-existing provisions of NEPA) and in the "disparate impact" doctrine (which does not admit of a "broad NRC inquiry into questions of motivation and social equity in siting"). See Louisiana

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[12] See OGD Contentions at 27-36. The rejected bases (numbered 2, 3 and 4) questioned the environmental, sociological and psychological costs to Band members stemming from increased traffic, population, and impacted lifestyles; the lack of a cost-benefit analysis that considers the alternative of leaving spent fuel at reactor sites; and the need for the proposed PFS facility.

Energy Services [LES] (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998). As will be seen, our decision today observes those limitations.

In due course, in June 2000, the Staff issued its draft environmental impact statement (DEIS) for the PFS facility.[13] In there discussing environmental justice matters, the Staff based its conclusions (that the project passed muster) in large measure on information supplied by the Tribal leadership. See, e.g., DEIS at 4-38. In the DEIS, the Staff took the position that any negative environmental impacts attributable to the project's presence on the Reservation -- such as noise or visual impact (p. 6-27) -- would be more than offset by the environmental benefits that would flow to Band members from putting the lease payments to good use in improving their basic living conditions. See DEIS §§ 4.5.2.8 (at 4-36); 6.2.1.2 (at 6-31).

After the parties conducted discovery of each other's evidence, the Applicant moved on May 25, 2001, for summary disposition of Contention OGD O, urging that the undisputed facts render a hearing unnecessary and justify a ruling in its favor. In thus filing the motion that is presently before us for resolution, PFS supplied, along with a supporting statement of material facts not in dispute,[14] supporting information from three experts: George H.C. Liang, Senior Principal Environmental Engineer at Stone & Webster; Roger Bezdek, President of Management Information Services; and George Carruth, an independent consultant experienced in the area of radioactive waste.[15] Their declarations addressed whether the project would have impacts cumulative with other facilities in the area, and included analysis of

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[13] See Draft Environmental Impact Statement for the Construction and Operation of an [ISFSI] on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, NUREG-1714 (June, 2000) [hereinafter DEIS].

[14] See [PFS] Motion for Summary Disposition of OGD Contention O - Environmental Justice (May 25, 2001) [hereinafter PFS Dispositive Motion]; see also id. Statement of Material Facts On Which No Genuine Dispute Exists [hereinafter PFS Undisputed Facts].

[15] See Declaration of George H.C. Liang [hereinafter Liang Decl.]; Declaration of Roger Bezdek [hereinafter Bezdek Decl.]; Declaration of George Carruth [hereinafter Carruth Decl.].

potential groundwater contamination; the impact the proposed facility would have upon Tribal property values; and the cumulative air quality hazards to the Skull Valley Reservation posed by the proposed facility and surrounding hazardous facilities.

On June 28, 2001, OGD filed a response opposing the PFS dispositive motion. OGD's response included a statement of disputed and relevant material facts and the passionate 75-page sworn declaration of a leading OGD member, Sammy Blackbear. In that declaration, Mr. Blackbear identified himself as the Tribal Chairman, based on a disputed election that he claimed had unseated Leon Bear.[16]

Throughout the declaration were detailed allegations of a years-long course of conduct by Mr. Bear "and his cohorts" that Mr. Blackbear characterized (Decl. at 5) as a "systematic, longstanding, blatant pattern of corruption, oppression and abuse." Whatever the legitimacy of that characterization, or of Mr. Blackbear's claim to be the Tribe's legitimate leader, from our perspective the key feature of the allegations is the claim that the Applicant's lease payments, intended for the Band, have been appropriated by Mr. Bear exclusively for his personal use and that of his allies, and withheld from any Tribal members who opposed the project. Blackbear Decl. at 10-11. We discuss that claim at greater length below (pp. 34-36).

On the same date, the NRC Staff filed a response in support of the PFS motion, including various affidavits pertaining to several of the bases of OGD's contention.[17] That a

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[16] See [OGD]'s Response to [PFS]'s Motion for Summary Disposition of OGD Contention "O" (June 28, 2001)[hereinafter OGD Response]; see also id. Statement of Material Facts at Issue in Support of [OGD]'s Response to [PFS]'s Motion for Summary Disposition of OGD Contention O [hereinafter OGD Disputed Facts]; id. Declaration of Sammy Blackbear [hereinafter Blackbear Decl.].

[17] See NRC Staff's Response to Applicant's Motion for Summary Disposition of OGD Contention O -- Environmental Justice [hereinafter Staff Response]; see also id. Joint Affidavit of Sam A. Carnes, Paul R. Nickens and Michael J. Scott Concerning OGD Contention O, Basis 1 [hereinafter Basis One Affidavit]; id. Joint Affidavit of Terence J. Blasing, Richard H. Ketelle, and Michael J. Scott Concerning OGD Contention O, Basis 5 [hereinafter Basis Five Affidavit]; id. Joint Affidavit of David L. Allison, Sam A. Carnes, and Michael J. Scott Concerning OGD Contention O, Basis 6 [hereinafter Basis Six Affidavit].

portion of one affidavit was prepared by David L. Allison -- BIA's Uintah and Ouray Superintendent, who is responsible for the federal government's relationship with the Skull Valley Band -- is of particular interest (see note 57, below). That Staff pleading engendered a July 9, 2001 OGD reply taking issue with a number of points the Staff had presented.[18]

Our rules of practice do not afford moving parties an automatic opportunity to reply to the filings of the other parties. 10 C.F.R. § 2.749(a). The Applicant, not having sought leave to reply, accordingly filed no rejoinder to the Blackbear declaration, which means that in most respects we have before us only one side of the story about the matters presented so forcefully in that declaration. The Band itself, going through a change of counsel around that time,[19] filed no papers in connection with the motion.[20]

3. The Concept of Environmental Justice. Executive Order 12898 (see p. 1, above) directed all agencies in the executive branch to examine, and if necessary to adjust, their activities to guard against inconsistency with norms of environmental justice.[21] Although that

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[18] See [OGD]'s Response to NRC Staff's Response to [PFS]'s Motion for Summary Disposition of OGD Contention "O" (July 9, 2001)[hereinafter OGD Reply].

[19] See Notice of Appearance and Substitution of Counsel (Aug. 8, 2001).

[20] At a later point, certain assertedly "recently elected Tribal executive officers," including Mr. Blackbear, sought to have us "deal exclusively" with them as the Band's representatives. See letter of Oct. 3, 2001. In response to that letter and our Oct. 11, 2001 Memorandum and Order (unpublished), the Band (as represented by its counsel who had newly appeared in August) filed affidavits of the Band's Mr. Bear and the BIA's Mr. Allison, that dealt primarily with the governance issues raised by the letter, not with the lease payment issues before us now. Report to the Board on the Status of Counsel (Oct. 24, 2001). The matter later ended without us having been presented any basis to allow involuntary replacement of counsel (see unpublished Memorandum and Order, Dec. 10, 2001).

[21] That Order, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" and found at 3 C.F.R. 859 (1995), began by directing every agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations . . . ." § 1-101.

Order may not by its terms have been applicable to independent agencies, the Nuclear Regulatory Commission promptly endorsed its principles and agreed to abide by it.[22]

The Executive Order also indicated that it was not intended to add rights beyond those that already existed, but was simply intended to focus agency attention on protecting those rights. The Commission endorsed that limitation in adopting the Order's mandates. See LES, CLI-98-3, 47 NRC at 102.

The Executive Order has two key components. As already noted, one stresses that agencies should make achieving environmental justice part of their overall mission by "identifying and addressing . . . disproportionately high and adverse human health or environmental effects" of agency programs on minority and "low-income populations." § 1-101 (emphasis added). The other reminds an affected agency to conduct agency actions "that substantially affect human health or the environment" in a manner that does not deny benefits from, exclude participation in, or discriminate under agency programs because of an individual's "race, color, or national origin." § 2-2.

As interpreted by the Commission in LES, the NRC's role is to identify and to weigh, or to mitigate, "disparate environmental impacts" upon disadvantaged groups but does not embrace the resolution of claims of "racial discrimination." CLI-98-3, 47 NRC at 100-10. In so denominating the Executive Order's reach, the Commission there pointed out that NRC expertise does not extend to such areas and that ordinarily the agency's resources -- needed to protect the public health and safety and the environment and thus focused on those purposes -- should not be misallocated to matters in which they were unlikely to make a difference.[23]

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[22] See March 31, 1994 letter from the then-Chairman of the NRC to the President.

[23] Id. at 103. See also § 1-101 of the Executive Order, which provides that "[to] the greatest extent practicable and permitted by law . . . each Federal agency shall make achieving environmental justice part of its mission . . . ." (emphasis added).

In the course of deciding the LES proceeding, the Commission devoted considerable attention to explaining how the environmental justice concept was to be applied to the work of the NRC. As noted above, the Commission there instructed Licensing Boards to focus on disparate environmental impacts that a proposed facility might create on disadvantaged groups, not on any purported racial discrimination, deliberate or coincidental, that might have been involved in the facility's siting. In doing so, the Commission noted that its purpose was not to diminish the agency's commitment to President Clinton's Executive Order. Because the NRC's environmental role was, however, limited to its authority under the National Environmental Policy Act of 1969 (42 USC § 4321), which the Commission pointed out is not a civil rights law, the agency was not to become involved in "full-scale racial discrimination litigation" in its licensing proceedings. CLI-98-3, 47 NRC at 106. Instead, the focus was to be on an issue that "lies close to the heart of NEPA," namely, the disparate adverse environmental impacts of agency action on "minority and impoverished citizens." Ibid.

4. The Standards for Summary Disposition. The Commission's rules, like those of federal courts, allow judges to resolve summarily -- that is, without an evidentiary hearing -- matters which, although initially contested, turn out not to involve any material factual disputes. We have on many occasions in this proceeding recited and applied the general standards which govern the grant or denial of summary disposition:

> In an NRC proceeding, a party is entitled to summary disposition if the presiding officer determines that there exists "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." 10 C.F.R. § 2.749(d). When reviewing a motion for summary disposition, the Commission has used standards similar to those used by the federal courts when ruling on motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).
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> Consistent with Rule 56, the moving party bears the initial burden of showing that no genuine issue as to any material fact exists, which the party must do by a required statement of material facts and any supporting documentation submitted with the requisite motion. See Private Fuel Storage L.L.C.

> (Independent Spent Fuel Storage Installation) LBP-99-32,50 NRC 155, 158 (1999). The opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting documentation, or the facts will be deemed admitted. See CLI-93-22, 38 NRC at 102-03. When responding, the opposing party may not rely upon mere allegations or denials but must submit "specific facts showing that there is a genuine issue of fact." [footnote omitted] 10 C.F.R. §2.749(b).

LBP-01-30, 54 NRC 231, 235 (2001).

On some occasions, we have had to look also to more specific standards instructing us how to proceed when faced with opinions from competing experts.[24] Although some experts are involved here, the central dispute is not over experts' technical opinions but about laypersons' factual observations. In this situation, when what is at stake is whether a trial must be held to ascertain the truth, the specific standards are quite clear, and are easily understood and applied: "since the burden of proof is on the proponent of the motion, the evidence submitted must be construed in favor of the party in opposition thereto, who receives the benefit of any favorable inferences that can be drawn."[25]

In this instance, the Applicant (supported by the Staff) is the moving party, and OGD is the party opposing summary action. Therefore, we must -- at this stage of the proceeding but for present purposes only -- give credence to the fact-related material OGD has put forward,[26]

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[24] For example, we referred earlier in this proceeding to "the corollary tenets that, among other things, instruct us at the summary disposition stage not to try to decide 'which experts are more correct'." LBP-01-39, 54 NRC ___, ___ (slip op. at 16-17)(Dec. 26, 2001). See also LBP-02-01, 55 NRC __, __ (slip op. at 3)(Jan. 9, 2002).

[25] Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361 (1994)(citing 10A Charles A. Wright, et al., Federal Practice and Procedure § 2727 (2d ed. 1983)).

[26] As we observed above, the Applicant did not seek to reply to the fact-based material submitted with OGD's response. In two respects, then, we have no alternative but to accept OGD's version as correct for purposes of ruling on the Applicant's motion. The Applicant will, of course, have an opportunity at the trial to put forward its, and Mr. Bear's, version of the facts.

including specifically the sworn declaration of Sammy Blackbear, and we do so in the next Subpart of this opinion.[27]

B. The Interpretation of the Law

With the stage thus set, we need to consider -- and, if necessary, to reconcile -- a number of legal doctrines and the manner in which they apply to the situation presented. Specifically, we must first determine whether, and if so to what extent, we are permitted to look into (or are foreclosed from inquiring about) matters of Tribal governance. Second, we must ascertain what are the nature of the "low-income populations" or "impoverished citizens" (as described by the Executive Order and the Commission, respectively) that the environmental justice concept is intended to protect from disparate impact. Third, we must focus upon how a NEPA balance is struck between a project's potential adverse environmental impacts and any offsetting economic or other benefits that may be anticipated.

Once those doctrines are clarified and their applicability here settled, we can turn to the task of evaluating the parties' assertions about the facts. Once again, the principles that guide procedure at this stage call on us to determine whether there are material facts in dispute that preclude a summary resolution on the documentary record; if so, a trial, at which live testimony will be heard, is mandated.

1. The Deference Owed to Tribal Governance. When presented disputes involving Tribal members, the Supreme Court has long recognized and deferred to a Tribal government's ability to create its own substantive laws to assist in Tribal governance and its ability to enforce those laws in Tribal forums. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Williams

[27] In contrast to the limited role allowed us at the summary disposition stage, where we simply determine whether factual issues exist, it is our task at a live evidentiary hearing to resolve those factual disputes. For example, for non-expert witnesses, we do so by such means as evaluating their credibility, which can be ascertained not only by detecting any inconsistencies in their testimony but also by observing their demeanor.

v. Lee, 358 U.S. 217 (1959). This policy has led lower federal courts to encourage Tribal self-governance and to refrain from interfering in intratribal disputes. Wheeler v. U.S. Dept. of Interior, 811 F.2d 549, 551 (10th Cir. 1987). In furtherance of this policy, the Supreme Court has recognized Tribal courts, if established,[28] as "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." Santa Clara Pueblo, 436 U.S. at 65 (emphasis added).

This policy of deferring to Tribal governance is, however, not absolute. The courts have also recognized that in some "special situations" the need for agency action may prevail over the desirability of allowing Tribal self governance. Wheeler, 811 F.2d at 551-52. There is some suggestion in that regard that circumstances might permit intrusion into the realm of Tribal governance where no Tribal forum for interpreting Tribal law exists. Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457, 1465 (10th Cir. 1989). And one court has directed the Bureau of Indian Affairs, on an interim basis, to choose between rival Tribal factions in order to allow the agency to interact successfully with the Tribe pending action by the Tribal court. Goodface v. Grassrope, 708 F.2d 335 (8th Cir. 1983).[29]

The situation before us might be one of the special situations envisioned in Wheeler and Nero, for it differs in a material respect from many of the leading Tribal governance deference cases. Typically, those cases involved suits brought against the Tribe by disgruntled Tribal

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[28] We are told that the Skull Valley Band has no established Tribal courts, although the Tribe is said to contract from time to time for judicial services, predominantly for tax issues. Blackbear Decl. at 3.

[29] Recognizing the agency's obligation to interact with the Tribal government, the Court insisted that BIA make this interim choice pending action by an existing Sioux court system that was capable of successfully resolving the dispute. 708 F.2d at 339. The Court stressed, however, that BIA's decision was intended to be only an interim one, which would be supplanted by the Tribal Court's eventual ruling. Ibid.

members complaining of Tribal action. In other words, there the Tribe did not initiate the process leading to the requested involvement of a non-Tribal government adjudicator.

In contrast, here the Tribe itself initiated the involvement with the non-Tribal adjudicator, first by entering into a business relationship with an organization seeking an NRC license (albeit for a Reservation-centered facility), and then by intervening in this licensing proceeding. For purposes of applying the deference doctrine, these affirmative extra-Tribal steps may invoke an exception by placing the Band in a position distinct from that of a Tribe which is unwillingly forced to defend its purely intratribal action, or on-reservation activity, in an outside forum.

For reasons that shall appear, we need not now resolve the "exception" question. Nor need we now determine the precise boundary between (1) a legitimate look into the factual disputes surrounding the environmental justice issue (see pp. 22-25, below) and (2) a forbidden foray into matters of Tribal governance. In the circumstances of this case, the location of that boundary is likely to prove very much fact-driven -- and at this point we do not have the facts.

What we do have -- even if the Tribal governance deference doctrine admitted of no exceptions -- is a right to examine the facts related to environmental justice at least sufficiently closely to determine our own jurisdiction to proceed, taking the proverbial "peek at the merits" to the extent necessary to resolve jurisdictional issues.[30] In the course of performing that exercise at trial, we are also likely to become more informed about whether any exceptions to the Tribal governance deference doctrine should come into play here. In short, it remains to be seen whether we are dealing with an issue of Tribal governance, or a matter of some other nature.

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[30] See Hardy v. Wigginton, 922 F.2d 294, 297 (6th Cir. 1990) (in the context of a habeas corpus issue, citing International Association of Machinists v. Trans World Airlines, 839 F.2d 809, 812 (D.C. Cir. 1988), to draw upon the time-honored "peek at the merits" practice that courts may follow when deciding jurisdictional issues). See also Nestor v. Hershey, 425 F.2d 504, 511 (D.C. Cir. 1969), explaining that courts always have jurisdiction to determine their own jurisdiction, so that when the "issue of jurisdiction is inextricably intertwined with the merits of the controversy," courts may examine the merits to the extent necessary to determine if they have jurisdiction to hear the issue.

2. The Definition of "Low Income Populations". The environmental justice Executive Order is intended not to create new enforceable rights in individuals, but simply to focus agencies on their existing environmental responsibility to see to it that their actions -- here the licensing of the proposed PFS project -- do not have a disparate environmental impact on minority or impoverished populations.[31] OGD claims that the PFS project will have such an impact on its members, and details a number of such impacts.

a. *Preliminary Matters*. The Applicant and Staff have a two-fold initial response. The first is that some of the impacts OGD now cites are outside the scope of its admitted contention. The other is that the information provided by their experts and by the Band indicates that the OGD-averred adverse impacts simply do not exist. We address both of those preliminary arguments now.

(i). OGD must overcome the assertion that it has not properly pleaded the adverse impacts -- the operational noise, the visual intrusion, and the cultural insult -- which we recognize (see p. 34, below) as furnishing the underpinning for its environmental justice claim. As the Applicant and Staff would read Contention OGD O, these items were not embraced within the contention as first written and as later limited by our order admitting it.

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[31] OGD's papers go beyond the disparate impact issue to allege racially-discriminatory siting. Even if OGD is correct that, notwithstanding its holding in LES (see pp. 12-13, above), the Commission seemingly left some leeway for us to consider such a claim in another case if it were well-pleaded, that leeway seems to have been removed by the Commission's further teachings in this very proceeding. See CLI-98-13, 48 NRC at 36, indicating quite clearly that "the focus of the Board's environmental justice inquiry" here is to be on "disparate impacts," not "questions of motivation and social equity in siting." Even if that limitation were not in place, we are not prepared to agree that targeting of a group as the possible beneficiary of current government-related action can, in a manner that is cognizable before us, have a racially discriminatory effect upon that group if it is currently free (despite the history that led to its situation) to choose to pass up the opportunity so provided.

Of course, OGD would argue that the Band was deprived of the freedom to make that choice because, in seizing the PFS opportunity, its purported "leadership" did not speak for the entire Tribe. That argument, however, simply presents in a different fashion the underlying issue on which this case turns, which receives our full consideration elsewhere herein.

As we said not so long ago on another question in this case, that argument has something to commend it, but not enough. LBP-01-39, 54 NRC at ___ (slip op. at 30). Given the nature and location of this proposed facility, we read the reference in Basis 1 (of what is, after all, an "environmental justice" contention) to "negative . . . sociological impacts" as embracing a number of such impacts. What is important is that the Applicant and Staff had notice of the nature of those impacts as they prepared for trial (and, in the Staff's case, as it conducted the environmental analysis leading to the preparation of the Environmental Impact Statements).

For this contention, the nature of the various impacts is not difficult to comprehend, and to the extent specificity is needed it was provided by the discovery process. That some of the impacts might also have provided a basis for other contentions, or other bases, that were excluded from consideration, does not limit their relevance here. Indeed, that they were mentioned elsewhere indicates the Applicant and Staff could hardly have been unaware of them; the Staff's discussion of them in the DEIS is further evidence that they were not hidden from view -- to the contrary, they are fairly obvious.

We need add only this. We also said in LBP-01-39 that once a contention is deemed sufficiently serious to be admitted into the proceeding (by passing the very stringent threshold screening standards that keep many from being litigated at all), "any number of later developments will also guide and control just how that contention does or does not move into the actual hearing process." Id. at ___ (slip op. at 15) (emphasis added).

To be sure, we said that in the context of an extremely complicated technical issue, one which had led the Applicant to amend its application on more than one occasion. Those circumstances are not present here. But other telling circumstances are.

In the first place, the contentions were drafted, and the late January, 1998 oral argument on them was held,[32] before the Commission issued its April 3, 1998 LES decision defining the contours of environmental justice claims. Second, we had not anticipated, before we ruled on the admissibility and scope of the various contentions, that there would arise a question as to the distribution -- or lack thereof -- of the lease income to OGD's members. In the circumstances of these "later developments" (see above), there is occasion to look at the admitted contention in the new light cast by those events.

We are told by the Staff that when the Applicant conducted discovery, OGD indicated clearly that certain material that had initially been presented as part of a rejected contention (see note 11, above) (as well as in a rejected basis for the pending contention (see note 12, above)) was at that later juncture being relied upon to support the accepted contention. Staff Response at 13-14. In this fashion, the Applicant was put on greater notice of the nature of the allegations it might have to defend against. The Staff as well learned which areas of its DEIS might therefore need to be upgraded in producing the FEIS.

In addition, it could not have come as a surprise that residents of the Reservation complaining of "negative sociological impact" would be objecting to the fundamental, obvious intrusions the project's physical presence would impose on them and on their interaction with each other and with the land -- the noise of operations, the visual blight on the landscape, and the invasion of Reservation sanctity. As we see it, the impacts now in question were contained

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[32] When oral argument was held on admitting the contention, and until two months ago, this Board was under the chairmanship of Judge G. Paul Bollwerk, III. We pointed out in LBP-01-39, issued late last year, that Judge Bollwerk, acting on December 19, 2001 in his capacity as Chief Administrative Judge of the Licensing Board Panel, had appointed another Board, chaired by Judge Farrar, to take over many of the matters remaining in this proceeding, with the original Board retaining jurisdiction over specified matters. 54 NRC at ___ (slip op. at 2), note 3. As we there noted, there is no lack of continuity in the work of the two Boards, and indeed references to "our" past actions, or those of "this Board," are not intended, unless specifically noted, to distinguish between the Board chaired by Judge Bollwerk and the Board chaired by Judge Farrar (both of which have the same technical members).

in the original OGD papers,[33] referenced later during the discovery process, and always conceded to exist. We therefore think it permissible to consider them here.[34]

Taking this approach to the contention is, we think, consistent with an action the Commission took in dealing with an analogous situation in its LES decision on environmental justice. The Commission there commented unfavorably on the Licensing Board's decision to require the submission of certain evidence at the hearing after earlier rejecting for consideration the subject about which the evidence was to deal. CLI-98-3, 47 NRC at 109. Even though the

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[33] To repeat, those impacts were mentioned not only in a rejected contention (lettered "P", see note 11, above) but also in a rejected basis for the admitted and pending environmental justice contention (see note 12, above).

[34] We focus here on the disturbance to OGD members caused by the direct, physical impact of the project on the Reservation. The Applicant and Staff rely, however, on the Supreme Court's having upheld the Commission's view that a matter too remote to be cognizable in our proceedings was the psychological fear (of radiation exposure and the like) induced by the presence of a neighboring, unwanted facility that met applicable licensing standards. Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 776-78 (1983), affirming Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-80-39, 12 NRC 607 (1980) and CLI-81-20, 14 NRC 593 (1981).

We think the concerns before us here to be of a different nature -- less ephemeral and less speculative -- than those raised by the Three Mile Island plaintiffs. As we see it, a facility put directly on one's homelands -- resulting in physical invasion and effects that are direct and palpable, not indirect and evanescent -- will have cognizable adverse impacts (more substantive than those described in Metropolitan Edison) on the peaceable enjoyment of the benefits that otherwise would be derived from that property.

The Commission recognized as much in LES, when it distinguished non-cognizable "psychological effects" stemming from such things as "a fear of nuclear power" from cognizable environmental impacts which "will flow directly" from the physical presence of a "heavy industrial facility nearby." CLI-98-3, 47 NRC at 109, note 26. Cf. RESTATEMENT SECOND OF TORTS (1965) §§ 46, 312, 436, 436A, indicating that to recover for emotional distress, a tort claim based on negligence must involve some physical injury (which a claim based on deliberate conduct need not show) and that recovery by plaintiff for emotional distress in suit based on intentional or reckless conduct directed at a third party in the plaintiff's presence requires showing of physical harm.

In any event, the Staff included discussion of the matters at issue here in the DEIS, while discussion of "psychological fear" matters is off-limits. This action confirms the inherent difference between the two types of alleged impacts.

Commission also found that the Board there had left its action "unexplained," the Commission allowed the Board's action to stand, given the circumstances there presented. Ibid.

Here, in contrast to the LES situation, this Board is, prior to the hearing, giving advance notice of, and providing an explanation for, our decision to allow further consideration of a subject some of the parties may have thought to have been previously excluded from consideration because it was also included in rejected assertions. In light of the reasons which underlie our explanation, we do not see that any ultimate rights of the parties have been invaded, even though their short-term expectations may not have been met.[35]

(ii). The Applicant's second threshold argument is that and its experts have established, in line with the Band's view, that many other environmental impacts of which OGD complains do not exist, or at least are nowhere near the offensive level that OGD claims. In large measure, we agree with the Applicant, as will be seen from our analysis of the facts in subsections I.C.1.a-b, below. But as we have pointed out above, and as the Applicant and Staff have conceded, this facility brings with it some adverse impacts, and they are not trivial.

How those impacts can be offset in a NEPA balance remains, therefore, an issue to be addressed. Indeed, as will be seen in Section I.B.3 below, it is a key point in the case. But first, having resolved the Applicant's preliminary arguments, we turn to the definitional aspects of the environmental justice issue.

b. *Environmental Justice Populations*. The environmental justice doctrine is supposed to focus an agency on protecting minority or low-income populations or, as the Commission put it, impoverished citizens. But neither the Executive Order nor any other readily available authority tells us how we are to go about defining or circumscribing such "populations" when the

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[35] This somewhat peculiar procedural setting may explain why the Applicant's motion did not deal factually with the lease payment and other grounds on which we now deny that motion (compare p. 11 and note 26, above, with pp. 34-35, below). The Applicant will, however, have full opportunity to present all its relevant evidence on all decisive matters at the hearing.

answer is not obvious. On that score, the Commission indicated in LES (47 NRC at 100) and repeated here (49 NRC at 36) that some of the answers may "become apparent only by considering factors peculiar to those communities."[36]

Here, the Band -- the large community that would have drawn attention as being impoverished when the project was first being considered (see p. 5, above) -- has welcomed the project, and is not now complaining of any environmental injustice. The Applicant's and the Staff's approach, although not framed precisely in terms of our definitional question, would have that be the end the inquiry.

We think not. The Band as a whole may well be benefitting as a result of, and not be complaining about, the project. That does not provide the answer; it only reframes the question.

As reframed, our inquiry now focuses, at OGD's urging, on a subgroup of the larger community, a smaller but distinct and well-defined population: those who are suffering a disparate burden, bearing the adverse environmental consequences of the PFS project while remaining impoverished as others have their situation improve. Just as in the LES proceeding the crucial disparate impact was felt by only a portion of the community at large -- and indeed eventually focused on a particularly disadvantaged subgroup, namely "pedestrians"[37] -- here we perceive no necessary bar to considering the impact of the project on less than the full complement of Band membership.

As we discuss at greater length below (pp. 25-28), an aspect of NEPA involves balancing environmental costs against economic (or other) benefits. A project's "disparate impact" can thus stem from either (1) a disparity in how the environmental burdens of the project are felt by different populations, or (2) a disparity in how the net impact of the project --

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[36] To be sure, the Commission was speaking there of defining the "effects," not the "populations." But we nonetheless are able to take guidance from its approach.

[37] See CLI-98-3, 47 NRC at 107.

as measured by the balance of environmental burdens and economic benefits -- is felt by different populations.

In that context, and under the view of the facts we must take at this stage, OGD's members are indeed "disadvantaged" in relation to Mr. Bear and his leadership allies -- the OGD group is receiving little or nothing in benefits from the project to offset its adverse environmental impacts, while Mr. Bear and his favorites (while bearing no more of the burdens) are receiving most, if not all, of the offsetting economic benefits. If that is true, it may be that only the OGD group remains an impoverished population within the meaning of the environmental justice rubric; the Bear group may no longer fit that mold.

Our manner of inquiring into whether OGD enjoys protected "population" status, or is simply caught up in a Tribal governance matter, is reinforced by the line of pre-NEPA federal court cases invalidating the Department of Housing and Urban Development's placement of low-income housing in a manner that had a disparate impact on a disadvantaged portion of a community. In those cases, it was not determinative that a city's duly-chosen overall leadership had fully concurred in the placement of the housing. What was determinative was the impact of that housing on the disadvantaged portion of the population. That group, voiceless in the city's deliberations, was entitled to be heard by the court and to be relieved of the undue burden upon it. See Gautreaux v. Romney, 448 F.2d 731, 737 (7th Cir. 1971)[Chicago]; see also Shannon v. U.S. Dep't of Housing & Urban Dev., 436 F.2d 809 (3rd Cir. 1970)[Philadelphia]. Had Gautreaux been brought after NEPA had been implemented and the Executive Order issued, it could, we think, have fit quite well within the "environmental justice" rubric.[38]

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[38] We perforce recognize that (1) the theory of these pre-NEPA cases, as presented by the plaintiffs at the time, was one of racially discriminatory siting, and that (2) no such theory is permissible before this Board. But what we see in the housing cases is the emergence of a different principle, one that is instructive here. That is, those cases teach that even though a governing body's overall leadership has given its blessing to a project and welcomes its presence, the negative impact of that project on a disparate subgroup of the [CONT'D]

So too here. If Mr. Blackbear's allegations are true, it may be that the Band as a whole now holds a privileged status vis-a-vis OGD, and that only OGD's members fit the description of "low-income populations" or "impoverished citizens." But we find ourselves unable to decide as a matter of law how the term "population" should be defined. As we see it, the nature of the problem defines the scope of the population. Or, as the Commission put it (see p. 23, above), the answer may "become apparent only by considering factors peculiar to" the situation at hand.

In other words, just as we found with respect to the jurisdictional issue about the reach of "Tribal governance," we have to "peek at the merits" to resolve this definitional matter about the application of the term "low-income population." Here too, then, we come to no conclusion other than that we must go to hearing.

3. The Balancing of Environmental Impacts. As seen in the foregoing section, it may prove appropriate for OGD to challenge the project for its disparate impact on OGD's members, even if the OGD view is not shared by the Tribal leadership. The next question concerns the nature and consequences of those impacts.

Under the practices that various agencies have developed under the National Environmental Policy Act (and at the risk of oversimplifying the subject), it is commonly understood that an agency has several basic options when, after the proverbial "hard look" is taken, a project it proposes to license is seen to have potential adverse environmental consequences.[39] At one extreme, a project might be disapproved entirely, on the grounds that its adverse impacts are too severe. More typically, aspects of all or part of a project might be

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[CONT'D] community at large may be considered by the tribunal before which a challenge to the project is brought. In those pre-NEPA housing cases, the court challenges happened to be based on racial discrimination; under current law, they could just as well, like the matter before this Board, have been based on a type of disparate impact.

[39] See, generally, the Council on Environmental Quality's regulations guiding executive branch agencies, 40 C.F.R. Chapter V, §§ 1500 et seq.

altered to reduce the adverse impacts to the point at which they, and the project, are acceptable.[40] Once those adverse impacts have been reduced to the extent practicable, an agency is free to proceed to license the project, if it determines that the project's overall benefits exceed its environmental and other costs and that no obviously superior alternatives are in sight.[41]

Here, it is a relatively simple matter to apply those precepts. Both the Applicant and the Staff concede there are some adverse environmental impacts associated with putting this project on the Skull Valley Reservation. Because the Applicant otherwise has no right to use those lands for its own purpose, the Applicant and Staff both recognize that when the NEPA-mandated environmental balance is struck with an eye on the Executive Order, the only justification for imposing those adverse impacts on an impoverished population is the offsetting benefits that will accrue to the Band's members from payments for use of Tribal lands.[42]

We would expect that, more typically, a standard NEPA environmental justice contest (if there is such a thing) would feature as the disparate impact the environmental burden being felt by all the disadvantaged neighbors of a proposed project, in contrast to the lack of burden imposed on the further-away, more-privileged, classes. Here, the situation is different: the

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[40] Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 82-83 (1977).

[41] We mean in the above analysis to describe generally the internal procedures an agency may go through when it wishes to incorporate environmental factors thoroughly into its decision-making process, not to imply that reviewing courts can to the same extent force an agency's hand on the substance of its determinations. After all, as judicial review has confirmed, NEPA is only a procedural statute that "merely prohibits uninformed -- rather than unwise -- agency action." See, for example, Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51 (1989).

[42] As the Applicant puts it, "[the DEIS] clearly shows that the economic impact of the [facility] on the Band is positive, in large part because of PFS lease payments to the Band." PFS Motion at 7. The Staff says the same thing in this fashion: "The proposed [facility] would provide substantial lease income to the Skull Valley band and would result in a large positive impact." DEIS at 6-31.

environmental burden on those most affected by the project -- the Tribal members living on the Reservation -- is, as far as we have been told, the same for all.

The disparity comes about, then, not in the direct environmental burden, but from the net impact as measured by the NEPA-sanctioned balance of environmental burdens and economic benefits -- some obtain an economic benefit from the project to offset its environmental burdens, while others do not, experiencing only the burdens. We hold that this type of net disparity can be as much a matter for environmental justice review under NEPA -- a statute which sets up a process in which the classic burden/benefit balance has always been central -- as is the more usual disparate environmental burden viewed alone.

We do not mean to imply by the above analysis that the deeply-held beliefs of OGD's members -- about the overall objectionable nature of this project's invasion of lands they view as sacred -- can be eradicated by a mere monetary payment. That is not how we perceive the purpose of the funds supposed to be provided under the lease -- they do not represent a "payoff" and should not be seen as a "sellout." To the contrary, those funds can represent, and create, something else entirely: a significant, indeed life-altering, sociological improvement for a people that is described by Mr. Blackbear (Decl., ¶ 396) as "in abject poverty"[43] -- better food, shelter, clothing, health care and education. All of these beneficial changes, it was seemingly envisioned by policy-makers and presumably intended by the Applicant, would flow their way from the lease income and would represent the offset for the "negative . . . sociological impacts" on which the environmental justice contention was founded.

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[43] The declaration there indicates that "Leon Bear and his cohorts have grown rich, while the majority of the Goshutes living on the Reservation remain in abject poverty." That poverty is movingly described as being "in inadequate housing, without working plumbing or adequate sewage facilities or weatherization, without reliable motor vehicles, with restricted education, and without meaningful employment opportunities." In that same vein, we are told that "some of the families have little or no utilities, going without adequate heat or any electricity for years."

To be sure, the underlying desire of OGD's members is that the project not invade their Reservation, but their strong objections have thus far not carried the day. So long as that remains so, it would seem vital -- both to the advancement of their welfare and to the success of the project which others in the Band welcome -- that the contemplated lease payments be distributed to all the affected Tribal members. For both the Applicant and Staff have in effect conceded that the project cannot go forward unless the NRC finds it provides some sort of benefits to overcome the environmental costs it imposes upon affected Tribal members.[44] To further disadvantage some among that population does not provide the solution -- it exacerbates the problem.

For OGD's members, the requisite benefits are not flowing, according to their description of the facts (which at this juncture, for the reasons stated earlier, must be taken as true for purposes of ruling on the Applicant's pending motion). We address the significance of what OGD says is happening in the next section.

C. The Facts in Dispute and The Facts Needed

Having reviewed the overarching legal principles that must come into play in resolving Contention OGD O, we now can turn to analysis of various fact-specific matters, so as to determine whether there are any genuine issues of material fact that require a hearing for their resolution. In making this determination, we find it useful to discuss the facts concerning environmental impacts in terms of the remaining three bases that fleshed out the environmental justice contention (see p. 8, above). That discussion is followed by consideration of the situation involving the lease payments.

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[44] Of course, the future of the project is also subject to the State's safety challenges and to the environmental contentions also awaiting trial. In other words, nothing we say here is intended to indicate any view whatsoever on the merits of those safety and environmental issues.

1. The Impacts on the Environment. As indicated below, we find that there are no factual disputes underlying Bases 5 and 6 that would require a hearing to resolve. That is because the types of environmental impacts there described have proven to be of themselves not material to an ultimate decision about the facility. But the same cannot be said about the matters covered by Basis 1, as we understand it.

a. *Cumulative Impacts*. In its Basis 5, Contention OGD O addresses the disproportionate impact the proposed facility will have -- alone and combined with the other hazardous waste facilities located within a thirty-five mile radius of the proposed site -- upon the local Tribal population. OGD asserts that the environmental assessments of the proposed facility, initially conducted by the Applicant and supplemented in the Staff's DEIS,[45] fail to address these important issues and therefore violate the environmental justice Executive Order's embodiment of NEPA.

As explained below, however, due to the Band's contracting with the Applicant for use of Reservation land, and the analysis conducted by the Applicant and Staff -- unchallenged here by OGD -- concerning the impacts this facility will have, the Board finds OGD's arguments to be unpersuasive when applied to the Band as a whole. Thus, the Board concludes that there no longer exists a dispute of material fact regarding this point and grants summary disposition to that extent.

OGD contends that the Executive Order requires the agency to identify and to address the "disproportionately high and adverse health or environmental effects" of the facility upon the surrounding minority, low income community. OGD Contentions at 32. Locating the facility on the Reservation, OGD argues, will limit the exposure of the facility's adverse impacts

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[45] The DEIS has recently been duly transformed into the FEIS (see note 2, above). Because the pending motion papers naturally refer only to the DEIS and no party has called our attention to anything in the FEIS that changes the nature of the matters we must address here, we limit our consideration to the DEIS except for one background matter (see p. 6, above).

exclusively to Indian Tribes and therefore they will be disproportionately subjected to increased risks of cancer and other related injuries. OGD Response at 15-16. Because, according to OGD, Tribal members will be the exclusive victims of these adversities, OGD urges that the Applicant, and subsequently the Staff, must address this disparate impact as part of their environmental assessment. Id.

OGD's argument fails to address a key component of this scenario -- namely, that the Skull Valley Band, as representative of those living on the Reservation, was a full partner in the Applicant's plan to construct the facility. Because it is being allowed to put the proposed facility upon the Reservation in return for the lease payments, the Applicant is insulated from accusations by the intended recipients that its facility will disproportionately affect their community at large, compared to those less disadvantaged who live in other, more distant, locations.[46]

OGD also uses Basis 5 to contend that the Applicant (and, by implication, the Staff in its subsequent DEIS) failed to analyze adequately the cumulative impacts created by adding this facility to an area that is already home to numerous other hazardous waste facilities. According to Contention OGD O:

> [w]ithin a radius of thirty-five (35) miles the members of OGD and the Goshute Reservation are inundated with hazardous waste from: Dugway Proving Ground, Utah Test and Training Range South, Desert Chemical Depot, Tooele Army Depot, Envirocare Mixed Waste storage facility, Aptus Hazardous Waste Incinerator, Grassy Mountain Hazardous Waste Landfill and Utah Test and Training Range North.

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[46] The Applicant's reliance upon the Band's agreement to counter the assertion about the facility's disparate impact, carries with it the implication that the entire host community affected by the facility will receive the "benefits" of the arrangement. This foretells our concern about the distribution of the rental income from the agreement and the net burden/benefit balance.

OGD Contentions at 28. Because these facilities are located within such proximity to the proposed facility, OGD contends that there must be a full analysis of the cumulative impacts of all these facilities.

That the area in question is home to numerous hazardous waste facilities is a given; but OGD's assertion that the Staff and the Applicant have failed to address the cumulative impacts of siting the facility in this area is unfounded. To the contrary, the Staff devotes an entire DEIS section -- Section 6.3, entitled "Cumulative Impacts" -- to the discussion of the potential cumulative impacts that will arise due to the construction and operation of the proposed facility. See DEIS at 6-32 to 6-38.

Going beyond the Staff's discussion in the DEIS, the Applicant, in support of its Motion for Summary Disposition, supplied two expert witnesses' lengthy declarations that discussed the potential cumulative impacts of siting the project on the Reservation. See Liang Decl.; Carruth Decl. In his discussion, Dr. Liang determined that the distance between the other hazardous sites and the Reservation, the geography of the area, and the arid climate makes cumulative impacts from surface or groundwater transmission "not feasible." Liang Decl. at 5. As to hazardous materials, after studying the other facilities, PFS expert Carruth determined that the only conceivable threat would be from air pathways, and the cumulative air quality analysis for each of those facilities indicated air pollutants would be "well below" any level of significance. Ibid., Carruth Decl. at 11, 33. Therefore, Dr. Carruth concluded that combining this low level of pollutants with the minimal emissions anticipated from the proposed facility would result in insignificant cumulative impacts upon the Reservation. Id. at 33.

In contrast to this detailed analysis presented by the Applicant, OGD did not supply any supporting documents to substantiate its claim that there will be adverse cumulative impacts. As has been stated in previous opinions here and elsewhere, the responding party cannot rely upon mere denials and unsupported allegations to answer a motion for summary disposition,

but must demonstrate in some positive fashion the existence of a genuine issue of material fact in dispute.[47] In other words, however sincere its beliefs, OGD cannot simply rely upon its own presumption that there will be such effects; without providing supporting evidence of possible cumulative effects from the surrounding hazardous facilities, OGD's position cannot withstand the contrary declarations offered by PFS and the Staff.

Rather than present supporting documents that disputed PFS's analysis, OGD argued that it was premature for us to rule in light of the number of outstanding contentions that remained to be resolved before the full effects of the proposed facility could be determined. OGD asserts that the outcome of any one of these other contentions may affect the cumulative impact analysis. Since the filing of OGD's brief in June 2001, however, the Board has addressed, at least preliminarily, all outstanding contentions relevant to this issue.[48]

In terms of the contentions that survived the preliminary stages and whose merits will thus be addressed at the April hearing, only Utah O, which involves the impacts of the proposed facility upon the underlying groundwater, can be considered relevant to this cumulative impacts discussion. Even if we were to assume that the proposed facility would have an adverse groundwater impact,[49] it remains that OGD has -- in the face of the Applicant's presentation ---

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[47] See, e.g., LBP-02-02, 55 NRC __, __ (slip op. at 13-14) (Jan. 14, 2002); see also Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 78 (1981).

[48] The Board has until today deferred ruling upon the admissibility of Contention Utah Security J (see LBP-01-39, 54 NRC at ___ (slip op. at 37) note 35), but the issues involved in that contention would not in any way be expected to affect the cumulative impact analysis.

[49] The outcome of that particular dispute seems more likely to be either a finding that no material impact is expected, or a determination that the Applicant must take steps to avoid any such impact, neither of which results would benefit OGD's position. (We make that general observation about Utah O without intending to prejudge the specific evidence that may be provided us at the hearing. But in light of our general view on that score and the Commission's admonition that we urge the parties to settle issues susceptible to such resolution (see Part II of this opinion), we suggested at the last prehearing conference call (Tr. 2913, Feb. 6, 2002) that the parties attempt to settle that issue.)

come forward with no showing that the surrounding hazardous waste facilities are contaminating the groundwater and that these contaminants are traveling to and causing contamination of the aquifer underlying the Reservation.[50] Because OGD has not presented any supporting documentation to substantiate its claims about the effects of other facilities, the Applicant is entitled to summary disposition of this matter.

b. *Property Values*. Basis 6 of Contention OGD O states that the Applicant's environmental report fails to address the impact of the proposed facility upon property values of surrounding Reservation lands. OGD believes construction of the facility on Tribal land will significantly decrease the value of its members' property. In particular, OGD's brief contends, the environmental analysis fails to address the unique cultural and spiritual values that members of all Indian Tribes assign to land. We note that all the Reservation land is held by the United States in trust for the Band as a whole; Tribe members own individually (in contrast to their common interest in the land) only the structures placed on the land. Allison Decl. at 3.

We fully acknowledge the special relationship of Tribe members to their land. But we find that this issue has been adequately addressed by the DEIS. The DEIS discusses (at 6-30 to 6-31) the Reservation's procedures for alienating land and the impact that the construction and operation of the facility will have upon housing demand. In addition, the DEIS specifically recognizes the Tribe's use of the land for cultural and spiritual activities and discusses the impacts that the facility will have upon this use of the land.

Again, an initial answer to OGD's argument is provided by the voluntary nature of the agreement into which the Band entered to bring the facility to the Reservation. In light of that

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[50] The only evidence offered concerning groundwater contamination was contained in the Liang Declaration. In there analyzing the hazardous waste facilities that surround the Skull Valley Reservation (pp. 5-7), Dr. Liang determined that contaminants released into the groundwater would be minimal even if they were able to reach the aquifer below the Reservation, but it is highly unlikely that could occur.

agreement, the main issue underlying this dispute becomes the distribution of the lease payments agreed to by PFS, which will allow the Band to improve its Tribal infrastructure by improving its educational and social service systems. Thus, as the Applicant's brief would have it, any decrease in land value should be offset by the lease and tax payments and the improvements generated by both.[51]

As indicated by the previous discussion, the Board concludes that there no longer remains any dispute of material facts regarding this matter. Thus, the Applicant is entitled to summary disposition on this point as well.

c. *Adverse Impacts*. What the Applicant is not entitled to, however, is a ruling that there are no adverse environmental impacts associated with the physical presence of the proposed facility; indeed, we do not understand either its or the Staff's arguments to embody such a claim. And, as we have seen above, there are a number of direct and simple -- but significant and potentially extremely burdensome -- adverse impacts that fit within the ambit of the sociological impacts referred to in the contention's Basis 1.

To repeat, these are the operational noise, the visual impact, and the cultural insult that the presence of the facility will bring to the Skull Valley Reservation, all now of relevance here (see pp. 19-22, above). We have seen that principles of environmental justice would preclude making OGD's members -- if they do in fact prove to be a protected "population" -- bear disproportionately (from a NEPA balancing standpoint) the net effect of these adverse impacts, whose degree might be contested but whose existence is unchallenged. That brings us to another part of the case that requires a hearing to resolve.

2. The Payments under the Lease. The matter of the allocation of the lease payments presents itself in unusual fashion. In most summary disposition proceedings, the moving party

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[51] PFS Dispositive Motion at 19-20. This assumes the appropriate distribution of the lease payments, the need for which we turn to shortly. See Section I.C.2, below.

presents asserted undisputed facts which it claims warrant a ruling in its favor. As we have seen (pp. 29-34, above), the Applicant was successful to the extent it employed that approach. But that success carried it only so far, for OGD's countering argument introduced a whole new set of asserted undisputed facts in the Blackbear declaration. Because, once again, those stand uncontroverted at this point, the moving party cannot hope to prevail at this stage if the asserted facts presented are relevant and material.[52]

We explained in Section I.B.3 why those facts are material to the issues we must decide. And even a cursory examination of them, as reflected in the Blackbear declaration, reveals their relevance to establishing the propositions for which they are presented. Thus, we need devote little discussion to them. We note merely that Mr. Blackbear claims -- and, again, those claims are not refuted at this point and must be taken as true for present purposes -- that the lease payments, said to amount already to "millions of dollars" (Decl. at ¶ 53.d, p 10; ¶ 258, p. 54), have been misappropriated by Mr. Bear and converted to his own use and that of his allies and favorites (Decl. at ¶ 283.c, p.58; ¶ 300, p. 61; ¶ 327, p. 64; ¶ 334, p. 65; ¶¶ 354-55, pp. 67-68).[53]

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[52] OGD did not cross-file for summary disposition. Thus, even to the extent the facts it has presented are as yet "undisputed," it is not entitled to any relief at this point, for in the procedural posture then presented, the opposition was under no obligation to respond to those "facts." The opportunity to do so will be presented at the hearing.

[53] The Blackbear declaration recounts throughout the numerous efforts he and other Band members have made to obtain an accounting of the PFS funds (and other income streams) flowing to the Tribe. It also recounts (e.g., at 7, 33) the repeated unsuccessful efforts made to get BIA to intervene in an active capacity (which included filing suit against it: Blackbear v. Norton, Case No. 2:01CV00317C (D. Utah, filed May 2, 2001)), and the approaches made to other U.S. officials -- the local U.S. Attorney, the FBI, and the Inspector General and the Solicitor of the Department of the Interior -- that are said to have yielded promises but no results (Decl. ¶ 26, pp. 3-4; p. 35). A reading of the full declaration makes it appear that OGD's members have explored every potential avenue of relief.

Going on, the Blackbear declaration cites examples of OGD members who sought the benefits of and an allocation from the lease payments and other funding sources to meet their most basic needs but who, having opposed the project, were turned down (Decl. at ¶ 53.g, p. 12; ¶¶ 275-76, p. 57; ¶¶ 340-47, pp. 66-67; ¶¶ 375-76, p. 70). On the other hand, Mr. Bear is said to be making extraordinary purchases for his own use (¶ 53.d, p. 11; ¶ 277, p. 57). At the risk of repetition, we point out again that we are not saying these allegations are true,[54] only that, uncontested as they are, the Applicant's motion cannot result in them being summarily denied -- they can be resolved only at a hearing.

The Blackbear declaration covers many other subjects, including the disputes over elections, the violation of Tribal norms, the relative standing of the protagonists,[55] the perception of threats, and other matters. Having found that a hearing is required, we need not delineate all these matters. As the parties see fit and to the extent we concur, some of them may be suitable for consideration at the hearing, but (unless shown otherwise) we do not expect to entertain matters that clearly involve only "Tribal governance," especially given BIA's primacy and action thereon. Some subjects do, however, seem clearly suitable for consideration there, and we list them briefly in the next subsection.

3. The Evidence for the Trial. At a minimum, and for obvious reasons, it seems certain evidence will be relevant to our determination. For instance, assuming Mr. Blackbear puts forth the same testimony about the flow of funds that is in his affidavit, of likely relevance would be a

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[54] Although these and other allegations are not yet proven, the Blackbear declaration says they point to a pattern of corruption (see p. 10, above). It remains to be seen whether, instead of demonstrating human frailty, they portray a matter of Tribal governance legitimized by Goshute culture (for example, the maintenance of Tribal discipline). On the other hand, it may be relevant that the PFS funds come from the leasing of Reservation land held for all Tribe members in common (see p. 33, above).

[55] According to the OGD brief (at 10), Mr. Bear is Goshute only by adoption, not by blood, and has not taken interest in Goshute social and cultural traditions. According to ¶ 8 of his declaration, Mr. Blackbear and his three children have lived on the Reservation since 1996.

PFS (1) tabulation of all the payments it made at any point thus far to the Skull Valley Band or to any of its members, showing at a minimum the amount, form, timing and recipient of each payment; and (2) schedule of future payments to be made if the facility is approved. Similarly relevant would be a Band accounting showing, at a minimum, (1) the amount of the payments received from the Applicant by the Band (or by any member thereof); (2) the manner in which those funds were distributed to individuals in the Band, expended on goods or services, or deposited to the Band's accounts; and (3) to the extent the funds went into those accounts, the manner in which those funds were later distributed or put to other uses.[56]

These documents and any other evidentiary materials shall be made available to the other affected parties and to the Board by Friday, March 22, 2002. If Mr. Bear intends to testify at the hearing to contest the Blackbear allegations, his written testimony shall be pre-filed at the same time by the Applicant and/or the Band, depending on which will be sponsoring him.

By the same token, the Staff or Band should consider providing the parties and the Board with pre-filed testimony from the BIA's Mr. Allison,[57] detailing his response to the relevant allegations in the Blackbear affidavit and setting out his understanding of the BIA's authority and responsibility to bring about change in the situation. Or a party may wish instead to invite the direct participation of the BIA -- the Staff's partner in the preparation of the DEIS, and now the FEIS -- in this proceeding, so that BIA could present these matters on its own behalf. Barring some objection of a nature we do not now envision, we would expect to approve BIA's participation for that purpose. Cf. 10 C.F.R. § 2.715(c).

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[56] The Board is issuing today, covering proprietary information previously submitted, the protective order whose terms the parties had previously agreed upon and have been informally observing. We are not now making any determination as to whether those terms, or similar ones, should apply to the evidence now to be adduced.

[57] As observed above (p. 11 and note 20), the Staff earlier presented an affidavit from Mr. Allison, albeit on a topic different from that now at issue, while the Band presented his affidavit on a related subject.

For its part, OGD will be expected to produce Mr. Blackbear as a witness. While his pre-filed testimony may draw from his declaration, it should focus on the matters now in issue.

Of course, all affected parties may pre-file other written testimony upon which they intend to rely, such as might be related to the reach of Tribal governance (see, e.g., note 54, above). Any such pre-filings or Exhibits (such as photographs of dwelling structures) are likewise due by March 22, as are their briefs on any legal principles or theories bearing on the matters covered in this opinion which they would like to bring to our attention.

The matter will be heard during the week of April 22, assuming the other pending issues do not occupy all of that week. If no time is available then, and if to protect proprietary information the hearing is closed to the public (so that smaller facilities would suffice), then the Board will seek to obtain suitable space during the previous week, during which no hearings are otherwise contemplated. Otherwise, it will be heard after all the other issues. In the interim, the Board will be available, at the request of the affected parties, for prehearing conference calls to set any additional procedural guidelines or to resolve any anticipated procedural disputes.[58]

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[58] No Referral. In light of the potential importance of some of the issues with which this opinion deals -- namely, the potential "Tribal governance" jurisdictional ban and (2) the "protected population" definitional aspects of the environmental justice question -- we have considered whether to refer this matter to the Commission for its early review, as permitted by 10 C.F.R. § 2.730(f). We have decided against that course for several reasons.

Our first thought is that the time for hearing is fast approaching and we think it far better that the parties spend the intervening time preparing for that hearing, rather than preparing briefs for the Commission. Moreover, as it turned out, we have made no final rulings on either of the key points listed above; rather, we have merely said that the key questions -- of (1) our jurisdiction to proceed without intruding into matters of Tribal governance and (2) the proper definition of the protected populations -- are both inextricably bound up with the merits of the underlying disputes. To repeat, we have ruled only that we must go to hearing to obtain enough facts to resolve those threshold, fact-dependent matters; we have made no substantive or precedential rulings on either count.

Finally, we would expect that either the matter will be settled or the hearing on this contention will be a short one. Once it is concluded and we have made rulings on the points at issue, any review the Commission later deems warranted would thereby benefit from the presence of a full evidentiary record and properly developed legal arguments, as well as (if OGD prevails) our decision on a remedy.

One of the purposes of independent adjudicators in any society or culture is to assure that disputes are decided according to applicable law, not by wielding of unfettered power. The powerless or the frustrated who come before a tribunal are not entitled to demand victory, but they are entitled to receive justice.

Here, OGD is seeking environmental justice, as our laws entitle it to do. It may be that some of OGD's complaints will prove beyond our reach, involving matters of Tribal governance that would be reviewable only by Tribal courts, if any existed in the Skull Valley Band (or were imported for particular purposes).[59] But those complaints that prove within our reach will be addressed.

Because at this juncture we have heard essentially from only one side, it is important that we bear in mind the ancient axiom "audi alteram partem" -- "hear the other side."[60] That venerable principle has particular application to the matter before us, where the Blackbear declaration puts forward a stinging indictment of the Bear regime that is as yet unanswered. We can assure the Applicant and the Band that we will come to no conclusions before we hear from Mr. Bear.

There is an alternative course, and a far preferable one. We discuss it in Part II, to which we commend the parties' most serious attention.

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[59] See note 28, above.

[60] See United States v. Steel Tank Barge H 1651, 272 F.Supp. 658, 659 note 1 (E.D. La. 1967), citing John M. Kelley, Audi Alteram Partem, 9 Natural Law Forum 103 (1964). Together, those authorities trace the principle's flow from ancient Greek and Roman literature, through the common law, and into modern Supreme Court opinions on Constitutional law, and point out that the principle embodies elements of both providing due process to litigants and avoiding mistaken decision by judges.

II. THE WISDOM OF A SETTLEMENT

A. The Policy of the Commission

In promulgating the Rules of Practice which govern our proceedings, the Commission included a separate section promoting the value of settling disputes. Given the importance of that policy to the matter before us, it is worth reciting here much of the text of that provision:

> The Commission recognizes that the public interest may be served through settlement of particular issues in a proceeding or the entire proceeding. Therefore, . . . the fair and reasonable settlement of contested initial licensing proceedings is encouraged. It is expected that the presiding officer and all of the parties to those proceedings will take appropriate steps to carry out this purpose.

10 C.F.R. § 2.759. See also 10 C.F.R. § 2.718(h) (authorizing the presiding officer to hold settlement conferences).

The Commission did not leave it at that, but reemphasized the point in a decision in another type of licensing proceeding. Specifically, in Rockwell International Corp. (Rocketdyne Division), CLI-90-5, 31 NRC 337, 340 (1990), the Commission noted that "Commission policy strongly favors settlement of adjudicatory proceedings." See also Policy Statement on Alternative Means of Dispute Resolution (57 FR 36678, Aug. 14, 1992).[61]

Certainly, this Commission viewpoint is consistent with the universal notion that reaching consensus is a valuable endeavor. In this regard, we think there has rarely been an issue so amenable to settlement as that presented here. The interests of the parties would seemingly be well served by resolving their disputes -- which seem to be depriving both sides of peace of mind -- in a fashion which, if not exactly amicable, would free them to pursue more productive activities.

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[61] The Commission's two major policy statements on the conduct of hearings, although directed primarily to other subjects, both encourage attempts to reach settlements. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456 (1981), and Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 19 (1998).

B. The Path to a Settlement

Our opinion today points out that the doctrines that require deference to Tribal governance do not necessarily preclude us from examining the environmental justice dispute before us. But those doctrines certainly instruct us that otherwise it is far better that solutions to disputes among Tribal members come from those who understand their customs and practices -- so that any resolution incorporates conditions within which all can function well as time goes forward.

Accordingly, it is entirely clear to us that it would be a far wiser course for the affected litigants -- the Applicant Private Fuel Storage, the Skull Valley Band of the Goshute Indians, and Ohngo Gaudedah Devia -- and the apparent individual protagonists, Leon Bear and Sammy Blackbear, to settle this dispute rather than go to the hearing that we have ruled is otherwise required.

Moreover, as we see it, there are at least three organizations that might be able to help settle this dispute if the Band is unable to do so on its own. In the first place, we offer the services of a settlement judge from our own Licensing Board Panel. The Commission has encouraged the appointment of settlement judges, noting that to avoid any possible prejudgement problems, the Licensing Board presiding over the merits of the case can play only a limited role in looking at the merits in the course of promoting settlements.[62] In contrast, a settlement judge -- not being involved in a decision-making role, not able to impose a solution, and thus not being bound by the ex parte rule -- can employ a wide variety of potentially beneficial techniques, without compromising any rights of the parties.

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[62] See Rockwell International, CLI-90-5, 31 NRC at 340-41.

Any such appointment would be made by the Licensing Board Panel's Chief, Judge Bollwerk, who is prepared to start the process.[63] Because he is still involved with some aspects of the case and was involved in prior Board rulings involving the parties affected by the possible settlement, he would not appoint himself, but rather another full-time or part-time legal member of the Panel to serve as settlement judge.

An NRC settlement judge would not necessarily bring to the table any particular knowledge of Tribal culture. If that quality were deemed helpful or desirable, it would seem there would be a larger role for the Bureau of Indian Affairs to play than it appears to have been able or willing to play thus far. We do not pretend to understand the nuances of the relationship between BIA and Indian Nations generally, or with the Skull Valley Band in particular. But it still may be that the BIA's Mr. Allison could better serve the public interest, and fulfill his agency role, as a mediator charged to help settle the dispute, rather than as a witness expected to help explain it (see p. 37, above). He might do so on his own or, if the parties desired or the settlement judge wished, he might also participate in aid of the NRC settlement judge (if the parties seek that one be appointed), assuming that would not conflict with his role as a witness if settlement were not accomplished.

If NRC or BIA assistance is not desired, perhaps the Applicant, Private Fuel Storage, is in a good position to guide a settlement. After all, it is the PFS funding that is the source of the dispute, and it is the PFS project that is potentially at risk from Tribal instability. The Applicant needs no approval from us, or invitation from the parties, to press for an amicable settlement on its own. But its apparent inability to calm the controversy thus far hints that it might benefit from NRC and/or BIA involvement in a settlement process.

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[63] This process was implemented recently in the Hydro Resources case (Docket No. 40-8968-ML), in which Judge Farrar was appointed to act as a settlement judge.

We will be contacting the affected parties next week to obtain their thoughts about invoking a formal settlement process. As the two parts of our opinion lay out for them, the parties have a clear choice to make: reach a settlement or go to hearing. We are prepared to help with the former, or to conduct the latter.

Accordingly, for the reasons and to the extent set forth in Part I of this opinion, it is this 22nd day of February, 2002, ORDERED that:

(1) the Applicant's motion for summary disposition of Contention OGD O is GRANTED IN PART and DENIED IN PART; and

(2) the matter is SET FOR HEARING in Salt Lake City during the week beginning Monday, April 22, 2002 (unless otherwise ordered at the suggestion of the parties) under the SCHEDULE ESTABLISHED herein for prehearing filings.

The affected parties are ENCOURAGED to consider the suggestions regarding settlement set forth in Part II of this opinion, and to prepare to respond next week to the inquiry we will be making in that regard.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael C. Farrar
ADMINISTRATIVE JUDGE

/RA/

Jerry R. Kline
ADMINISTRATIVE JUDGE

/RA/

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 22, 2002

Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) intervenors Skull Valley Band of Goshute Indians, OGD, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State of Utah; and (3) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE, L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent Fuel Storage Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF "CONTENTION OGD O" -- ENVIRONMENTAL JUSTICE) (LBP-02-08) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket No. 72-22-ISFSI
LB MEMORANDUM AND ORDER
(RULING ON APPLICANT'S MOTION
FOR SUMMARY DISPOSITION OF
"CONTENTION OGD O" --
ENVIRONMENTAL JUSTICE) (LBP-02-08)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 22nd day of February 2002