

- RAS 3964

February 11, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

2002 FEB 26 PM 3:47

OFFICE OF THE SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

**SIXTH JOINT REPORT ON THE STATUS OF
FEDERAL LAWSUIT SKULL VALLEY BAND v. LEAVITT**

Pursuant to the June 14, 2001 order of the Atomic Safety and Licensing Board (“Board”),¹ Applicant Private Fuel Storage, L.L.C. (“PFS”), the Skull Valley Band of Goshute Indians (“Skull Valley Band”), and the State of Utah (“State” or “Utah”) jointly submit this report on the status of the federal lawsuit, Skull Valley Band of Goshute Indians v. Leavitt, Case No. 2:01CV00270C (D. Utah, filed Apr. 19, 2001). On April 13, 2001, the State filed Contention Security-J, Law Enforcement (“Security-J”), which contended that PFS is unable to comply with the regulatory mandate that a “[d]ocumented liaison with a designated response force or local law enforcement agency (LLEA) must be established to permit timely response to unauthorized penetration or activities,” 10 C.F.R. § 73.51(d)(6), because recently-adopted Utah legislation prohibits any state or local government entity from entering into such an agreement relative to the PFS facility. Order at 1. The Board deferred any ruling on the State’s request to admit Security-J, pending resolution of the federal district court litigation in which the Skull Valley Band and PFS

¹ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-20, 53 NRC 565 (2001) (Deferring Admissibility Ruling on Late-Filed Contention Security-J) (“Order”).

Template = SECY-049

SECY-02

contest the constitutionality of the Utah legislation, or further order of the Board. Order at 2. In order to monitor that proceeding to determine whether any developments would warrant further Board action on the contention pending a court ruling, the Board requested PFS, the Skull Valley Band, and the State to file periodic joint reports on the status of the lawsuit. Id. at 9. The first report was due on June 29, 2001; subsequent reports are due every 45 days thereafter. Id.

On June 29, the parties filed their initial report on the status of the litigation as required by the Board's June 14, 2001 Order.² In that report, the parties noted that the Board had before it a copy of the federal complaint, which had been filed by PFS and the Skull Valley Band on April 19, 2001,³ and that by joint stipulation the parties to the federal litigation had agreed that the State defendants had until July 18, 2001 to file their answer to the complaint.

On August 13, 2001 the parties filed their second joint report on the status of the litigation.⁴ In that report, the parties noted that, on July 18, 2001, the State defendants filed their answer to the complaint as well as a counterclaim against PFS and a demand for a jury trial, and that on August 8, 2001 the State defendants filed an amended counterclaim adding the Skull Valley Band as a defendant to the counterclaim.

On September 28, 2001 the parties filed their third joint report on the status of the litigation.⁵ In that report, the parties noted that, on August 27, 2001, PFS and the Band had filed their reply to the Amended Counterclaim. The parties also reported that on

² Joint Report on the Status of Federal Lawsuit Skull Valley Band v. Leavitt (June 29, 2001).

³ PFS attached a copy of the Complaint to its response to Utah's request to admit Utah Security-J. See Applicant's Response to State of Utah's Request for Admission of Late-filed Contention Utah Security J—Law Enforcement, dated April 27, 2001.

⁴ Second Joint Report on the Status of Federal Lawsuit Skull Valley Band v. Leavitt (August 13, 2001).

⁵ Third Joint Report on the Status of Federal Lawsuit Skull Valley Band v. Leavitt (September 28, 2001).

September 20, 2001 the State Defendants had filed a Motion for Judgment on the Pleadings arguing that the Nuclear Regulatory Commission lacks statutory authority to license a private, away-from-reactor spent fuel storage facility, to which PFS's and the Band's response would be due October 9, 2001.

Upon request of the Board,⁶ on October 24, 2001 the parties, filed an interim joint report on the status of the litigation.⁷ In that report the parties reported that there had been no change concerning the status of the litigation from that previously reported except that (1) the parties had stipulated that PFS's and the Band's response to the State Defendants Motion for Judgment on the Pleadings would be due November 8, 2001, and (2) counsel for the State Defendants had requested by letter dated October 11, 2001 a Rule 26(f) meeting of the parties.

On November 13, 2001 the parties filed their Fourth joint report on the status of the litigation.⁸ In that report the parties noted that, (1) on November 8, 2001, PFS and the Band had filed their opposition to the State Defendants' Motion for Judgment on the Pleadings, arguing both that the District Court lacks jurisdiction under the Hobbs Act to entertain the Defendants' challenge to the NRC's jurisdiction and that the Commission has full authority under the Atomic Energy Act to license a private, away-from-reactor spent fuel storage facility; (2) the United States Department of Justice had filed an Unopposed Motion for Extension of Time to File a Brief as Amicus Curiae until January 8, 2002 in order "to allow the United States to determine whether to file a brief as amicus curiae" on behalf of the NRC with respect to the issues raised in the State Defendants'

⁶ Memorandum and Order (Schedule for Filings Relating to Representation for Intervenor Skull Valley Band of Goshute Indians) (October 11, 2001).

⁷ Interim Joint Report on the Status of Federal Lawsuit Skull Valley Band v. Leavitt (October 24, 2001).

⁸ Fourth Joint Report on the Status of Federal Lawsuit Skull Valley Band v. Leavitt (November 13, 2001).

Motion for Judgment on the Pleadings; and (3) counsel for the parties had agreed to hold a Rule 26(f) conference of the parties on November 15, 2001.

On December 28, 2001, the parties filed their Fifth joint report on the status of the litigation.⁹ In that report the parties noted that (1) the Rule 26(f) conference was held by counsel for the parties on November 15, 2001; (2) on December 12, 2001, PFS and the Band had filed a motion for summary judgment with respect to the claims in their complaint and a motion to dismiss the State Defendants' counterclaims; (3) counsel for PFS, the Band, and the State Defendants were working on developing an agreed upon schedule for the remaining litigation with respect to the two motions, and (4) the District Court had set April 11, 2002 for hearing the State Defendants' Motion for Judgment on the Pleadings.

The following has occurred since the parties' December 28, 2001 report. On January 9, 2002, the State Defendants filed their reply to PFS's and the Band's response to the State's Motion for Judgment on the Pleadings. On January 10, 2002, the District Court amended its Notice of Hearing for April 11, 2002 to include Plaintiffs' Motion for Summary Judgment and Plaintiffs' Motion to Dismiss the State Defendants' counterclaim. On January 22, 2002, the United States filed its Amicus Brief arguing that the Court must dismiss for lack of jurisdiction that portion of the State Defendants' counterclaim that contends that the Nuclear Regulatory Commission lacks authority to license an offsite interim spent fuel storage facility. On January 23, 2002, the State Defendants filed their response to PFS's and the Band's Motion to Dismiss the State Defendants' counterclaim and on February 6, 2002, PFS and the Band filed their reply brief on the Motion to Dismiss.

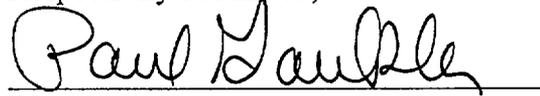
⁹ Fifth Joint Report on the Status of Federal Lawsuit Skull Valley Band v. Leavitt (December 28, 2001).

On January 14, 2002, the State Defendants filed a Rule 12(h)(3) Suggestion of Lack of Jurisdiction with respect to Plaintiffs' complaint, as well as a Motion and Request for Expedited Hearing to defer responses to the Plaintiffs' Motion for Summary Judgment pending a determination of the jurisdictional issues concerning the complaint. On January 28, 2002, PFS and the Band filed a combined motion opposing the State Defendants 12(h)(3) suggestion and motion to defer briefing on Summary Judgment, and seeking to strike portions of the State Defendants' reply to Plaintiffs' response to the Motion for Judgment on the Pleadings. A hearing was held on January 29, 2002. The Court denied the motion to defer briefing on the Summary Judgment and ordered that all briefing is to be completed by March 28, 2002, in anticipation of oral argument on all pending motions on April 11, 2002, as provided for by the Court's January 10, 2002 Notice of Hearing.

Although hearing has been set on Plaintiffs' Motion for Summary Judgment, it is not known when the Court will rule on the Motion. Therefore, as requested at the January 17, 2002 prehearing conference, Applicant requests the Board to rule on the admissibility of Contention Utah Security J. The State is of the opinion that, at this time, there is no need for Board action on Utah Security J and that the Board should continue to monitor the federal litigation.

PFS, the Skull Valley Band, and the State will submit their next joint status report to the Board on or before March 28, 2002.

Respectfully submitted,

A handwritten signature in black ink, reading "Paul Gaukler", written over a horizontal line.

Jay E. Silberg

Ernest L. Blake, Jr.

Paul A. Gaukler

D. Sean Barnett

SHAW PITTMAN

2300 N Street, N.W.

Washington, DC 20037

(202) 663-8000

Counsel for Private Fuel Storage L.L.C.

Dated: February 11, 2002

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

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the Sixth Joint Report on the Status of Federal Law-suit Skull Valley Band v. Leavitt were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 11th day of February 2002.

G. Paul Bollwerk III, Esq., Chairman Ad-
ministrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: GPB@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: JRK2@nrc.gov; kjerry@erols.com

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: PSL@nrc.gov

*Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications
Staff
e-mail: hearingdocket@nrc.gov
(Original and two copies)

Catherine L. Marco, Esq.
Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop O-15 B18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: pfscase@nrc.gov

John Paul Kennedy, Sr., Esq.
David W. Tufts, Esq.
Confederated Tribes of the Goshute
Reservation and David Pete
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84105
e-mail: dtufts@djplaw.com

Diane Curran, Esq.
Harmon, Curran, Spielberg &
Eisenberg, L.L.P.
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
e-mail: dcurran@harmoncurran.com

* Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, Utah 84114-0873
e-mail: dchancel@state.UT.US

Joro Walker, Esq.
Land and Water Fund of the Rockies
1473 South 1100 East
Suite F
Salt Lake City, UT 84105
e-mail: utah@lawfund.org

Tim Vollmann, Esq.
Skull Valley Band of Goshute Indians
3301-R Coors Road, N.W.
Suite 302
Albuquerque, NM 87120
e-mail: tvollmann@hotmail.com

Paul EchoHawk, Esq.
Larry EchoHawk, Esq.
Mark EchoHawk, Esq.
EchoHawk PLLC
P.O. Box 6119
Pocatello, ID 83205-6119
e-mail: paul@echohawk.com

* By U.S. mail only


Paul A. Gaukler