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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S BRIEF ON APPEAL FROM THE LICENSING BOARD'S DECISION IN LBP-02-08, CONCERNING CONTENTION OGD O (ENVIRONMENTAL JUSTICE)

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April 5, 2002

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IN LBP-02-08, CONCERNING CONTENTION
OGD O (ENVIRONMENTAL JUSTICE)

INTRODUCTION

On February 22, 2002, the Atomic Safety and Licensing Board in this proceeding issued a Memorandum and Order (LBP-02-08), in which it granted in part, and denied in part, the "Applicant's Motion For Summary Disposition of OGD Contention O - Environmental Justice" ("Motion"), filed by Private Fuel Storage, L.L.C. ("PFS" or "Applicant").[1] Shortly thereafter, the Commission issued its Memorandum and Order in CLI-02-08,[2] in which it (a) granted a motion for directed certification of the Licensing Board's decision, filed by Intervenor Skull Valley Band of Goshute Indians ("Skull Valley Band");[3] (b) granted requests to stay the effect of the Board's

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[1] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-08, 55 NRC ___ (Feb. 22, 2002) ("Memorandum and Order (Ruling on Applicant's Motion for Summary Disposition of 'Contention OGD O' - - Environmental Justice)") (slip op.).

[2] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-08, 55 NRC ___ (March 7, 2002) (slip op.). Subsequently, by Order dated March 27, 2002, the Commission extended the dates for filing briefs in this matter by two days, in response to the Staff's unopposed request for a modification of the briefing schedule.

[3] *See* "Intervenor Skull Valley Band's Motion for Directed Certification for Review of Memorandum and Order (LBP-02-08) of the Atomic Safety and Licensing Board," dated March 4, 2002 ("Band Motion").

decision, filed by the Skull Valley Band and the NRC Staff ("Staff");[4] and (c) established a schedule for filing briefs on appeal. In accordance with the Commission's Order in CLI-02-08, the Staff hereby files its brief on appeal from the Licensing Board's decision.

For the reasons set forth below, the Staff respectfully submits that the Licensing Board's decision (a) threatens to improperly intrude into the internal affairs of a Federally recognized sovereign Indian tribe (the Skull Valley Band of Goshute Indians); (b) disregards the Commission's government-to-government relationship with that Indian tribe; (c) is incorrect as a matter of law, in that it would improperly establish a cause of action for litigants in NRC adjudicatory proceedings, under the National Environmental Policy Act of 1969 ("NEPA") and Executive Order No. 12,898 (Environmental Justice); (d) is incorrect as a matter of law, in its construction of the "environmental justice" doctrine to apply to subgroups within a larger Indian tribe or minority population; and (e) is incorrect as a matter of law, in that it requires the litigation of issues that are outside the scope of any admitted contention in this proceeding.

Moreover, the Staff respectfully submits that the Licensing Board's decision improperly establishes the Board (and the Commission) as a judicial tribunal with a mandate to adjudicate (or mediate) a wholly intra-tribal dispute. The Board's decision would require the litigation and adjudication of numerous allegations that are wholly unrelated to the Commission's statutory responsibilities -- notwithstanding the Board's belief that this issue is fairly raised within the rubric of "environmental justice." Accordingly, the Staff respectfully submits that the Licensing Board's decision in LBP-02-08, denying the Applicant's motion for summary disposition of Basis 1 of Contention OGD O, should be reversed, and Basis 1 of Contention OGD O should be dismissed.

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[4] *See* (1) "Intervenor Skull Valley Band's Motion Pursuant to 10 CFR § 2.788 for Stay of Memorandum and Order (LBP-02-08) of the Atomic Safety and Licensing Board," dated March 4, 2002 ("Band's Stay Request"); and (2) "NRC Staff's Request for A Stay Pending the Commission's Consideration of Any Requests for Interlocutory Review of the Licensing Board's Decision in LBP-02-08 Concerning Contention OGD O (Environmental Justice)," dated March 4, 2002 ("Staff's Stay Request").

BACKGROUND

On April 22, 1998, the Licensing Board admitted Ohngo Gaudadeh Devia ("OGD"), a group consisting of members of the Skull Valley Band or other Native Americans who oppose the PFS license application, as a party to this proceeding. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 169 (1998). In that decision, the Licensing Board admitted one of OGD's contentions for litigation -- Contention OGD O (Environmental Justice), which it "limited to the disparate impact matters outlined in bases one, five and six," as further narrowed in the Board's decision. *Id.*, 47 NRC at 233.[5]

Within a few months after the Licensing Board had issued its ruling in LBP-98-7, the Commission provided explicit guidance to the Board with respect to the adjudication of Contention OGD O. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 35-36 (1998). Specifically, the Commission approved the Licensing Board's rejection of a separate environmental justice contention (filed by the State of Utah) involving a "discriminatory siting" claim, and observed that the discriminatory siting claims contained in Contention OGD O similarly failed to state a cognizable issue.[6] Further, the Commission reiterated that Executive Order No. 12,898 (Environmental Justice), upon which the "disparate impacts" issue in Contention OGD O was based, does <u>not</u> establish a legal right or remedy for OGD, but only underscores the requirements in NEPA. *Id.* at 35-36.

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[5] Bases one, five and six, respectively, raised the following issues: (a) "negative economic and sociological impacts on the Native community of Goshute Indians and OGD members" who live near the proposed site" (as well as claims of discriminatory siting); (b) "disproportionate adverse health or environmental effects on a minority population," due to the presence and emissions of numerous other hazardous waste sites within 35 miles of the Skull Valley Band Reservation and OGD members' homes; and (c) the effect on "property values of the surrounding lands." *See* "[OGD's] Contentions Regarding the Materials License Application of [PFS] in an [ISFSI]," filed November 24, 1997 ("OGD Contentions"), at 27-29 and 32-36.

[6] The Commission observed that the two contentions' discriminatory siting claims were barred in light of the Commission's recent decision in *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 101-06 (1998).

On May 25, 2001, the Applicant filed its motion for summary disposition of Contention OGD O. Therein, PFS requested that the Board dismiss the contention on the grounds that there remained no genuine issue as to any material fact relevant to the contention. A response in support of that motion was filed on June 28, 2001, by the Staff;[7] and OGD simultaneously filed its response in opposition to the motion, to which it attached a 75-page declaration by Skull Valley Band member Sammy Blackbear.[8] In his Declaration, in addition to presenting a few brief claims that the PFS Facility would have adverse impacts on the members of the Skull Valley Band (Blackbear Dec. ¶¶ 398-99), Mr. Blackbear presented extensive claims that the Tribal leadership had deprived him and other Band members of their civil rights; had engaged in unfair election practices, embezzlement and other unlawful conduct; and had withheld from him and other Band members who oppose the PFS Facility any share of the money received from PFS (*Id.,* ¶¶ 23-24, 28 [*sic*]-285, and 298-397).[9]

On February 22, 2002, the Licensing Board issued its decision in LBP-02-08, ruling on the Applicant's motion for summary disposition. The Board granted the Applicant's Motion with respect

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[7] *See* "NRC Staff's Response to Applicant's Motion for Summary Disposition of OGD Contention O -- Environmental Justice," dated June 28, 2001 ("Staff Response"), and the Affidavits attached thereto (addressing, respectively, Bases 1, 5, and 6 of the contention).

[8] *See* "[OGD's] Response to [PFS'] Motion for Summary Disposition of OGD Contention 'O,'" dated June 28, 2001 ("OGD Response"), and "Declaration" of Sammy Blackbear" ("Blackbear Dec."), attached thereto.

[9] Included in Mr. Blackbear's Declaration is an assertion that he is the rightful Chairman of the Band, based on his election as Vice Chairman in 1994 -- which, he asserts, the U.S. Bureau of Indian Affairs ("BIA") has improperly failed to recognize. Blackbear Dec. ¶¶ 6, 171-99. In addition, he stated that he and/or his attorneys referred certain of his claims to BIA, the U.S. Department of the Interior, and/or the U.S. Attorney's office, to no apparent avail; that BIA conspired, "connived" or acquiesced in the deprivation of his rights; and that BIA improperly failed to take action on his complaints -- although it referred certain matters to the U.S. Attorney for investigation. *See id.,* ¶¶ 33-37, 135-68, 198-206, 391. He further expressed his hope "that the NRC deals more fairly with our Tribe" than had BIA and PFS, *Id.,* ¶ 208, and "that the NRC will investigate these issues and will work with me and the Tribal General Council to find mitigative measures." *Id.,* ¶ 400.

to Bases 5 (cumulative impacts) and 6 (impacts on property values), finding that there did not exist a genuine dispute of material fact as to those issues. *Id.*, slip op. at 29-34. However, the Licensing Board denied the Applicant's Motion with respect to Basis 1 (disparate impacts) -- insofar as it raised the issues of operational noise, visual impact, and "cultural insult." *Id.* at 34. In addition, the Board found that these potential impacts might be borne disproportionately by members of the Band who oppose the PFS project, in that they might suffer these adverse impacts without receiving the financial benefits of the project. *Id.* at 34-36. The Board set this issue for hearing and, in particular, directed the parties to submit evidence concerning the payments that have been made by PFS under the lease to date, the payments it expects to make in the future, and the manner in which the Band had handled all payments received from PFS to date, including how those payments have been distributed, spent on goods or services, or deposited to the Band's accounts. *Id.* at 36-37.[10]

On March 7, 2002, the Commission issued its Memorandum and Order in CLI-02-08, in which it directed certification, and stayed the effect, of the Licensing Board's decision in LBP-02-08, and directed the filing of briefs on appeal.

ARGUMENT

I. The Licensing Board's Decision in LBP-02-08 Would Cause the Commission Improperly to Intrude into the Internal Affairs of a Federally Recognized Sovereign Indian Tribe.

In its decision, the Licensing Board demonstrated deep concern over the extensive allegations made by Sammy Blackbear in his Declaration opposing the Applicant's motion for

[10] The Licensing Board set these issues for hearing during the week of April 22, 2002. LBP-02-08, slip op. at 37-38. Those hearings have been stayed by the Commission's Order in CLI-02-08.

summary disposition.[11] These included allegations that the Applicant's lease payments to the Band were appropriated by Mr. Bear exclusively for personal use by him and his allies, and were withheld from any Tribal members who oppose the project. *Id.* Numerous other allegations were made by Mr. Blackbear, involving a myriad of grievances against Mr. Bear's purported conduct as Chairman of the Tribe including, as noted by the Board, "the disputes over elections, the violation of Tribal norms, the relative standing of the protagonists, the perception of threats and other matters." LBP-02-08, slip op. at 36. The Board declined, however, to identify precisely which of these issues it deemed to be within the scope of the matters set for hearing, stating as follows:

> Having found that a hearing is required, we need not delineate these matters. As the parties see fit and to the extent we concur, some of them <u>may</u> 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.

Id.; emphasis in original. In the "next subsection" of its opinion, the Board proceeded to describe the evidence which it expected, "<u>at a minimum</u>," to be "relevant to [its] determination" concerning Mr. Blackbear's financial ("flow of funds") allegations. *Id.*; emphasis added. In this regard, the Board directed PFS and the Band to produce evidence concerning the following matters:

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[11] The Licensing Board appears to have been deeply affected by Mr. Blackbear's allegations, stating at one point that his Declaration "recounts . . . 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[,] . . . the repeated unsuccessful efforts made to get BIA to intervene in an active capacity[,] . . . and the approaches made to other U.S. officials . . . that are said to have yielded promises but no results. . . . A reading of the full declaration makes it appear that OGD's members have explored every potential avenue of relief." LBP-02-08, slip op. at 35 n.53. Elsewhere, the Board addresses Mr. Blackbear's allegations that "<u>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</u> 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.' . . . [W]e are told that "some of the families have little or no utilities, going without adequate heat or any electricity for years." *Id.* at 27 n.43; emphasis in original.

> [A] 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.

Id. at 36-37.

However, while the Board indicated that evidence concerning the "flow of funds" (*i.e.,* how the Band has spent, banked, or distributed the funds received from PFS) must be presented at hearing, the Board also indicated that such evidence constitutes only the "minimum" of what it believed necessary. *Id.* at 36. Indeed, the Board identified numerous other issues which it appears to have set for hearing, involving a broad array of issues raised by Mr. Blackbear concerning tribal governance, allegations of corruption and embezzlement, the legitimacy of the current tribal leadership, and other intra-tribal matters. These issues were variously described as follows:

1. Whether "the 'purported 'leadership'" speaks for the Tribe -- which the Board described as "the underlying issue on which this case turns," *Id*. at 18 n.31;

2. Whether Chairman Bear "is Goshute only by adoption, not by blood, and has not taken interest in Goshute social and cultural traditions," *Id.* at 36 n.55;[12]

3. Whether "<u>the key feature</u>" of Mr. Blackbear's allegations is true, *i.e.*, that <u>"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</u>," LBP-02-08, slip op. at 10 (emphasis in original), and whether "the lease

[12] Chairman Bear rebutted these assertions in the "Declaration" he filed in support of the Skull Valley Band's Motion for Directed Certification, dated March 4, 2002 (¶¶ 1-2). While the Licensing Board did not explain why it cited this allegation by Mr. Blackbear, the Board may have done so in the belief that it is relevant to deciding which individual holds a superior claim to the title of Chairman; thus, the Board specifically contrasted Mr. Blackbear's assertion about Mr. Bear's parentage and concern for tribal affairs to Mr. Blackbear's claim that he (Blackbear) has lived on the Reservation with his three children since 1996. *See* LBP-02-08, slip op. at n.55.

payments, said to amount already to 'millions of dollars' . . . have been misappropriated by Mr. Bear and converted to his own use and that of his allies and favorites," *Id.* at 35;

4. Whether "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," while "Mr. Bear is . . . making extraordinary purchases for his own use" -- which allegations, the Board ruled, "can be resolved only at a hearing," *Id.* at 36;

5. The validity of Mr. Blackbear's claims that "Leon Bear and his cohorts have grown rich, while the majority of the Goshutes living on the Reservation remain in abject poverty," including "inadequate housing, without working plumbing or adequate sewage facilities or weatherization, without reliable motor vehicles, with restricted education, and without meaningful employment opportunities," and that some families "have little or no utilities, going without adequate heat or any electricity for years," *Id.* at 27 n.43, emphasis in original;[13]

6. Whether the allegations, if "proven," establish a "pattern of corruption," or "instead . . . portray a matter of Tribal governance legitimized by Goshute culture (for example, the maintenance of Tribal discipline)," *Id.* at 36 n.54;

7. Whether "any exceptions to the Tribal governance deference doctrine should come into play here . . . [and] whether we are dealing with an issue of Tribal governance, or a matter of some other nature," *Id.* at 17;

8. The "reach of Tribal governance," *Id.* at 38; and

9. Evidence from the Bureau of Indian Affairs or [former Superintendent] Allison, "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," *Id.* at 37.[14]

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[13] Apparently with this issue in mind, the Board invited the parties to submit "[e]xhibits (such as photographs of dwelling structures)," LBP-02-08, slip op. at 38.

[14] The Board also identified three adverse environmental impacts in Basis 1 of the contention -- although it is unclear if these issues were set for hearing. These were alternatively described as follows:

1. The "adverse impacts," *i.e.*, "the operational noise, the visual intrusion, and the cultural insult," that "the presence of the facility will bring to the Skull Valley Reservation," LBP-02-08, slip op. at 18, 34;

2. "Negative sociological impacts" involving "the fundamental, obvious intrusions the project's physical presence would impose on [Reservation residents] and on their

(continued...)

There can be little doubt that the Board's decision signaled its intention and readiness to launch into a broad inquiry into intra-tribal affairs. The Board recited numerous allegations by Mr. Blackbear concerning the tribal leadership and its handling of intra-tribal financial matters -- assuring the Applicant that it will be given an opportunity at hearing to put forward "its, and Mr. Bear's version of the facts." *Id.* at 14 n.26. Similarly, the Board stated that while some matters "involving matters of Tribal governance" might not be within its jurisdiction, "those complaints that prove within our reach will be addressed" -- and it committed to "'hear the other side'" before reaching a conclusion:

> 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." 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.

Id. at 39; footnote omitted. Similarly, the Board invited the Staff, the Band, or BIA itself, to submit testimony by BIA and/or former BIA Superintendent David Allison, "detailing his response to the relevant allegations in the Blackbear affidavit and setting out his understanding of the BIA's

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[14](...continued)

interaction with each other and with the land -- the noise of operations, the visual blight on the landscape, and the invasion of Reservation sanctity," *Id.*, at 20 (emphasis added); and

3. "[t]he disturbance to OGD members caused by the direct, physical impact of the project on the Reservation," due to "a facility put directly <u>on one's homelands</u> -- resulting in physical invasion and effects that are direct and palpable, not indirect and evanescent . . . on the peaceable enjoyment of the benefits that otherwise would be derived from that property." *Id.,* at 21, n.34 (emphasis in original).

It is unclear whether the Licensing Board assigned these issues to be addressed at hearing. While the Board specifically requested evidence on the "flow of funds" and other intra-tribal matters, it did not call for evidence on the issues of operational noise, visual impacts, or cultural insult -- perhaps based on a conclusion that they constitute "fundamental, obvious intrusions" (*Id.* at 20).

authority and responsibility to bring about change in the situation." *Id.* at 37.[15] In sum, while the Licensing Board asserted that it did not intend to intrude into "the controversy over Tribal governance," *see, e.g., id.* at 3, its decision threatens to do so in a most significant manner.

The Licensing Board's stated determination to adjudicate these intra-tribal issues constitutes reversible error, in that it would cause the Commission improperly to intrude into matters of internal Tribal governance and sovereignty. In this regard, the Supreme Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978),[16] establishes that this proposed foray into intra-tribal affairs is wholly improper. There, the Court recognized the importance of preserving Indian self-government and self-determination, and the need to protect tribal sovereignty from undue interference. The Court recited the principle established long ago, that "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government." *Id.* at 55, *citing Worcester v. Georgia*, 6 Pet. 515, 559 (1832). In addition, the Court cited long-standing precedent in support of the principle that Indian tribes "have the power to make their own substantive law in internal matters" and "to enforce that law in their own forums." *Id.*; citations omitted. Further, the Court stated as follows:

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[15] The Board did not indicate specifically which issues it wished the BIA or Mr. Allison to address, requesting only that his testimony respond to "the relevant allegations in the Blackbear affidavit . . . . " LBP-02-08, slip op. at 37. It is therefore difficult to determine which of Mr. Blackbear's allegations are "relevant" and require a response by Mr. Allison or the BIA.

[16] In *Santa Clara Pueblo*, an action was brought for declaratory or injunctive relief, to declare invalid an Indian tribe's ordinance which denied membership (including voting, inheritance rights, and possessory interests in communal property) to the children of female tribal members who marry outside the tribe, while extending such membership to children born of male members who marry outside the tribe. The Court held that section 1302 of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301, *et seq.* (which provides that "[no] Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws"), did not specifically authorize actions in the federal courts for declaratory or injunctive relief under Title I of the Act against a tribe or tribal officers and, in the absence of a specific waiver of sovereign immunity, the federal courts lacked jurisdiction over civil actions seeking such injunctive or declaratory relief. *See* 436 U.S. at 51-53, 72.

> In addressing this inquiry, we must bear in mind that providing a federal forum . . . for issues arising under § 1302 constitutes an interference with tribal autonomy and self-government . . . . Even in matters involving commercial and domestic relations, we have recognized that "[subjecting] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves," *Fisher v. District Court,* 424 U.S. 382, 387-388 (1976), may "undermine the authority of the tribal [court] . . . and hence . . . infringe on the right of the Indians to govern themselves." *Williams v. Lee,* 358 U.S. [217] at 223 n9 [(1959)]. *A fortiori,* resolution in a foreign forum of intratribal disputes of a more "public" character, such as the one in this case, cannot help but unsettle a tribal government's ability to maintain authority. Although Congress clearly has power to authorize civil actions against tribal officers, . . . a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent. Cf. *Antoine v. Washington*, 420 U.S. 194, 99-200 (1975); *Choate v. Trapp,* 224 U.S. 665, 675 (1912).

Id. at 59-60; emphasis added.

Here, as in *Santa Clara Pueblo*, the fundamental sovereign right of the Skull Valley Band to govern itself has been placed in contest, with one group of antagonists (OGD and Mr. Blackbear), urgently seeking relief from the tribal government's policies and governance, by bringing such claims before a federal agency forum. In this situation, careful attention must be given to the Supreme Court's admonition that "providing a federal forum . . . constitutes an interference with tribal autonomy and self-government," and that "[subjecting] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves [could] infringe on the right of the Indians to govern themselves"; and that allowing such disputes to be adjudicated in a federal forum, particularly where intra-tribal disputes of a more "public" character are involved, "cannot help but unsettle a tribal government's ability to maintain authority."

Accordingly, under the Supreme Court's decision in *Santa Clara Pueblo*, proper respect for the sovereignty of the Skull Valley Band and its established right to govern itself requires that the Licensing Board and the Commission "tread lightly in the absence of clear indications of legislative intent." Moreover, the nature of the issues placed in dispute by Mr. Blackbear's Declaration are

precisely the types of issues that have been reserved for the Tribe under the doctrine of Tribal sovereignty, and an encroachment upon the Tribe's sovereign right to address these matters should not be countenanced lightly. *Cf. Tillett v. Lujan,* 931 F.2d 636, 642 (10th Cir. 1991) (attempt to invoke federal court jurisdiction to decide issues concerning tribal officials' alleged failure to recognize their election recall, and misuse of tribal funds, were "clearly intratribal disputes" for which the plaintiff "would have to seek tribal remedies").[17]

While the Licensing Board recognized that the Supreme Court's decision in *Santa Clara Pueblo*[18] upholds the principle that the federal government and judiciary should defer to Tribal self-governance in "disputes involving Tribal matters," it found that this "policy of deferring to Tribal governance is, however, not absolute." LBP-02-08, slip op. at 15-16. The Board then opined that its exploration of this matter might be justified, in that (a) here, there is no Tribal court, *Id.* at 18, *citing Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1465 (10th Cir. 1989), and (b) "in some 'special situations' the need for agency action may prevail over the desirability of allowing Tribal self governance." *Id., citing Wheeler v. U.S. Dept. of Interior*, 811 F.2d 549, 551-52 (10th Cir. 1987). The Licensing Board further stated as follows:

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[17] It has been held that Indian tribes retain such elements of sovereignty as the power to conduct elections and prosecute election offenses, *United States v. Wadena*, 152 F.3d 831, 858 (8th Cir. 1998); to protect tribal self-government and to control internal relations, *Montana v. United States*, 450 U.S. 544, 564 (1981); to regulate domestic relations among its members, prescribe rules of inheritance, and punish tribal offenders, *Id.*; and to determine the method of distributing money among tribal members, *Pembina Treaty Committee v. Lujan*, 980 F.2d 543, 545-46 (8th Cir. 1992) (ruling that an order "purporting to affect money already disbursed is an impermissible encroachment on tribal sovereignty," and allocations among various types of expenditures "is a political difficulty that must be redressed, if at all, through tribal political processes or the tribal courts"); *Cf. Native Village of Venetie v. Alaska*, 687 F. Supp. 1380, 1393 (D. Alaska 1988).

[18] The Board also cited *Williams v. Lee,* 358 U.S. 217 (1959), and *Wheeler v. U.S. Dept. of Interior*, 811 F.2d 549, 551 (10th Cir. 1987).

> 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 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.

Id. at 16-17.

This attempt to distinguish the prevailing doctrine of Indian self-governance is without merit. Here, the Tribe has its own method for resolving disputes such as those contained in Mr. Blackbear's Declaration: Such matters can be brought to the attention of the Tribe's General Council, which is made up of all adult members of the Tribe.[19] Thus, a "tribal forum" (albeit not a "tribal court") exists. Second, inasmuch as this dispute involves only members of the Tribe, it is appropriate that OGD and Mr. Blackbear pursue their claims before the Tribal General Council.[20] Further, in the event that they wish to pursue their belief that tribal funds have been misappropriated

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[19] *See* Declaration of Sammy Blackbear, ¶¶ 10-22. Mr. Blackbear states, *inter alia*, that "our Tribe has always had a traditional form of government . . . and conducted its business in a traditional manner in accordance with the rules of this official government" (¶ 10); "all tribal business has been and must be conducted by our General Council, which is comprised of all adult Tribal members eighteen years or older. There are about 120 members with just over half being adults" (¶ 12); "the General Council is our sole official governmental body" (¶ 13); "I am a voting member of the General Council [and] have attended General Council meetings most of my life (¶¶14-15); the Tribe has a three-person Executive Committee, elected to four-year terms (¶ 19); and the Tribe has "no judicial branch or court" but has "from time-to-time contracted for judicial services, predominantly or solely for tax issues" (¶ 20).

[20] *Cf. Bank of Oklahoma, N.A. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1170 (10th Cir. 1992), stating that the exception to the "exhaustion of tribal remedies" doctrine depends upon a finding that no tribal court forum existed, for a non-Indian party).

by a member of the Tribe, that claim is inappropriate for consideration here and should be pursued, if at all, before the Tribal General Council or in some other forum.[21]

Finally, the Staff notes that the Commission's responsibility under NEPA does not require it to delve into matters of tribal governance, tribal equity, or tribal distribution of income. Rather, in evaluating the impacts of a proposed action, the agency can and should consider the net costs and benefits of the proposed license -- without requiring consideration of how the Tribe chooses to distribute or share its income within the Tribe, or how the Tribe manages its internal affairs. Such an intrusion into Tribal affairs, accompanied by the Licensing Board's demand that the Tribe provide an accounting of how it handles its financial affairs, threatens a serious and irreparable injury to tribal sovereignty and self-governance. Accordingly, the Licensing Board's acceptance of these issues for hearing should be set aside.

II. The Decision in LBP-02-08 Disregards the Commission's Government-to-Government Relationship with a Federally Recognized Sovereign Indian Tribe.

The Skull Valley Band of Goshute Indians is a sovereign, Federally-recognized tribal government.[22] In this regard, President Clinton established a policy calling upon executive departments and agencies to establish a government-to-government relationship with any such recognized sovereign Indian Tribe. *See* Memorandum of April 29, 1994, "Government-to-

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[21] *Cf. United States v. McGrady*, 508 F.2d 13 (8th Cir. 1974), *cert. denied*, 420 U.S. 979 (1975) (criminal prosecution for embezzlement of Tribal funds). *See also Vizenor v. Babbitt*, 927 F. Supp. 1193 (D. Minn. 1996) (BIA is not required "to micro-manage the Bands' affairs" where the money was "tribal property" rather than property held in trust by the federal government; dissidents could convene an election to "throw the rascal out"; BIA has no "trust responsibility" to "run" a tribe or "to supervise tribal governments or elections"; and requiring a new election would pose "very serious sovereignty issues" and would involve "pervasive federal government oversight of the Bands' essential governmental functions. A more invasive action could hardly be imagined.")

[22] *See* Notice, "Indian Entities Recognized and Eligible to Receive Services From the U.S. Bureau of Indian Affairs," 65 Fed. Reg. 13,298, 13,301 (2000). The Band's Reservation was established long ago by Executive Order. *See* IV Kappler 1048 (Sept. 7, 1917 and Feb. 15, 1918).

Government Relations With Native American Tribal Governments," 59 Fed. Reg. 22,951 (1994). For example, the President therein directed executive departments and agencies to conduct their activities "in a knowledgeable, sensitive manner respectful of tribal sovereignty," in an effort to build a relationship "reflecting respect for the rights of self-government due the sovereign tribal governments." *Id.* The Commission has indicated its support for this policy. *See* Advance Notice of Proposed Rulemaking, "Advance Notification to Native American Tribes of Transportation of Certain Types of Nuclear Waste," 64 Fed. Reg. 71,331, 71,333 (1999).

The Staff respectfully submits that the Licensing Board's determination to conduct a wide-ranging inquiry into how the Skull Valley Band conducts its affairs, including the management and distribution of funds, elections, and intra-tribal disputes, would effectively abrogate this policy favoring "government-to-government" relations with federally-recognized Native American tribal governments. Not only would this requirement disregard the sovereign status of a Federally-recognized Indian tribe (discussed above), by requiring Tribal government leaders to appear before the Board (and the Commission) to defend their management of tribal affairs, it would also render nugatory the government-to-government doctrine announced by President Clinton.

In this regard, it should be noted that the Commission routinely considers the costs and benefits of licensing actions, in which tax payments resulting from the construction and operation of a NRC-licensed facility may be received by a county or State government; in those cases, the Commission does not inquire or consider how that government distributes the economic benefits that may result from the licensing action. That same approach should be followed here, where such payments are received by a Tribal government, under the "government-to-government" relationship -- *i.e.*, no inquiry is required or should be made into how the Tribe spends or distributes the economic proceeds that may flow from the licensing action.

Accordingly, the Licensing Board's disregard of the government-to-government relationship that exists between the Skull Valley Band and the Commission should be set aside.

III. The Decision in LBP-02-08 Would Improperly Establish a Cause of Action Under NEPA and the Executive Order on Environmental Justice in NRC Adjudicatory Proceedings.

In its decision, the Licensing Board repeatedly indicated its view that an unfavorable balancing of costs and benefits under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* ("NEPA") -- including the "disparate impacts" alleged by Mr. Blackbear -- could result in its denial of the PFS application. For example, the Board stated:

> 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 altered to reduce the adverse impacts to the point at which they, and the project, are acceptable. 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.

Id. at 25-26; footnotes omitted.[23] Similarly, the Board mistakenly declared that "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 [environmental] impacts on an impoverished population is the offsetting benefits that will accrue to the Band's members from payments for use of Tribal lands." *Id.* at 26; emphasis in original.[24] Likewise, the Board again

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[23] In footnote 41 appended to this statement, the Board remarked: "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. . . . 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)." While the Staff agrees with the Board's citation to *Methow Valley*, it is difficult to reconcile this statement with the Board's statements cited in the text above, in which the Board clearly took an opposite tack -- asserting that a cost-benefit balance under NEPA must favor the proposed licensing action in order for that action to proceed.

[24] The only support offered by the Board for this interpretation of the Applicant's and Staff's positions is that the Applicant's motion for summary disposition and the Staff's DEIS had concluded that the facility would result in a large economic benefit to the Band. *See* LBP-02-08, slip op. at 26 n.42. The statements cited by the Board, however, do not establish any basis to believe that, in the Applicant's and Staff's view, the project could not proceed without a favorable economic

(continued...)

(erroneously) stated that "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" (*Id.*, at 28, emphasis added),[25] and it then brought the environmental justice doctrine into its view of this matter, stating: "To further disadvantage some among that population does not provide the solution -- it exacerbates the problem." *Id.*, emphasis in original.[26] Similarly, the Board stated 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. . . . *Id*. at 34; emphasis added. Finally, the Board urged the parties (including PFS, which is not involved in the intra-tribal dispute), to settle the environmental justice issue, in order to avert a decision that is potentially adverse to PFS and the Band. *See Id.,* at 4 and 39-43.[27]

The Licensing Board's interpretations of NEPA and of the environmental justice doctrine, recited above, are simply incorrect. Contrary to the Board's repeated assertion, NEPA does not provide a basis to conclude that a proposed licensing action may be rejected if the adverse impacts of a proposed licensing action are not outweighed by the benefits of that action. Rather, NEPA

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[24](...continued)
cost-benefit balance -- and, indeed, that would be inconsistent with the Staff's understanding of NEPA. In short, the Staff does not reach the conclusion attributed to it by the Board.

[25] Contrary to the Board's belief, the Staff has not "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." The Board did not provide a basis for its belief that the Staff and Applicant had "in effect conceded" this point, and the Staff is not aware of any basis for that belief. *See* n.24, *supra.*

[26] Further demonstrating its view that its consideration of this matter could result in denial of the PFS license application, the Board continued, "Of course, the future of the project is also subject to the State's safety challenges and to the environmental contentions also awaiting trial." LBP-02-08, slip op. at 28 n.44; emphasis added.

[27] In this regard, the Board encouraged the parties to settle this matter, "rather than to turn it over to us for a trial, and an outcome, that may disappoint them all." LBP-02-08, slip op. at 4.

requires the agency to consider the reasonably foreseeable impacts of the proposed action and alternatives thereto; it does not, however, require that any particular action be taken once those impacts have been considered. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (NEPA requires federal agencies to take a "hard look" at environmental consequences, but "does not mandate particular results"; as long as the adverse impacts "are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."). The Board's repeated suggestion that it could deny the proposed licensing action here if the adverse impacts to Mr. Blackbear or others in the Tribe are not outweighed by the benefits of the proposed action, is simply inconsistent with this well established principle.

Moreover, the Board erred in concluding that the "environmental justice" doctrine, established in Executive Order No. 12,898, provides a cause of action for persons who oppose an NRC licensing action, whereby they may readily block the agency from issuing a license as long as they show that the proposed action would cause them to experience adverse impacts that are not outweighed by the economic benefits of the action. *See* LBP-02-08, slip op. at 25-28. This interpretation of the environmental justice doctrine, like the Board's interpretation of NEPA, is simply incorrect -- as is clear from the Commission's explicit remarks early in this proceeding:

> We remind the Board and the parties of our ruling in *Claiborne* that President Clinton's executive order [on environmental justice] stated expressly that it created no new legal rights or remedies; accordingly, it imposed no legal requirements upon the Commission. *See* CLI-98-3, 47 NRC at 102. "Its purpose was merely to 'underscore certain provision[s] of *existing* law.'" *See id.* The only "existing law" applicable to the environmental justice issues in this proceeding is the National Environmental Policy Act (NEPA).

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 35-36 (1998), *citing Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 102 (1998).

The Licensing Board's decision in LBP-02-08 erroneously would afford OGD and Mr. Blackbear a "new legal right or remedy," whereby the Board would deny the PFS license application if the benefits to those persons do not outweigh the adverse environmental impacts which they claim to experience -- *i.e.,* if those persons do not share in the economic benefits of the proposed action, or if they are otherwise dissatisfied with that outcome. This result is contrary to the Commission's guidance in CLI-98-13, and should be set aside.

IV. The Decision in LBP-02-08 Incorrectly Construes the Environmental Justice Doctrine to Require Consideration of Adverse Impacts to a Potentially Infinite Array of Subgroups Within the Larger Minority or Disadvantaged Population.

In its decision, the Licensing Board reviewed the doctrine of environmental justice, observing that under all existing precedent and practice, that doctrine is applied by considering the adverse impacts that an action might have upon an overall low income or minority population. Nonetheless, the Board concluded that this doctrine could and should be expanded, to consider the impacts of the proposed action on smaller subgroups within the larger minority or low income population.

In this regard, the Board first redefined the minority or low income group, stating as follows:

> Here, the Band -- the large community that would have drawn attention as being impoverished when the project was first being considered . . . has welcomed the project, and is not now complaining of any environmental injustice. . . .
>
> . . . The Band as a whole may well be benefitting as a result of, and not be complaining about, the project. . . .
>
> . . . [O]ur 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 <u>disparate burden, bearing the adverse environmental consequences of the PFS project while remaining impoverished as others have their situation improve</u>. Just as in the <u>LES</u> 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" -- here we perceive no necessary bar to considering the impact of the project on less than the full complement of Band membership. . . .

LBP-02-08, slip op. at 23-24; footnote omitted. The Licensing Board then found that the OGD members constituted a disadvantaged subgroup to which the environmental justice doctrine might apply. The Board stated (*id*. at 24):

> 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. . . .

Finally, the Board established a new legal doctrine, holding as follows:

> We would expect that, more typically, a standard NEPA environmental justice contest . . . 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 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.
>
> <u>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</u> -- some obtain an economic benefit from the project to offset its environmental burdens, while others do not, experiencing only the burdens. <u>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</u>.

Id. at 26-27; emphasis in original.

These determinations are unprecedented -- and would result in a requirement that the Commission examine, with respect to each and every one of its licensing actions, whether its licensing action might have a net adverse effect on any subgroup -- however defined -- within the larger minority or low income population. Indeed, the number and types of such subgroups may be

virtually infinite, limited only by one's imagination.[28] This would create an absolutely unworkable precedent, and goes far beyond the purpose or mandate of the Executive Order on environmental justice.

Moreover, the Board's reference to *LES* is misplaced: There, the "pedestrians" were not a distinct subgroup within the minority population. Rather, each and every person within the larger minority group might have become a pedestrian at some time or another following the licensing of the Claiborne enrichment facility, such that the impact caused by realignment of the road in that case could have affected the larger minority group as a whole. Accordingly, the potential impact to "pedestrians" constituted a potential impact to the entire minority group. Here, a different result is obtained, in that the Board recognized that only the OGD subgroup might be affected differently than the larger minority or low income group. Accordingly, the Commission's decision in *LES* does not support the Board's action.

Finally, the Licensing Board's requirement that the agency consider how a proposed licensing action would affect individual members or subgroups within a larger minority group, rather than consideration of the overall impacts on the minority group itself, establishes a novel and unworkable precedent that would convert NRC licensing boards (and the Commission) into courts of sociological and psychological inquiry, focused on (a) addressing perceived impacts to individuals or small subgroups within the larger minority or low income community, or (b) attempting to resolve intra-community disputes rather than the issues which the Commission is statutorily required to decide. The Board's decision to examine such issues, and its suggestion that its consideration of these issues could affect the outcome of this proceeding, should be set aside.

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[28] For example, such subgroups could be defined as radish eaters, fish sellers, tent dwellers, different towns, or any conceivable subgroup that some one, some where, is able to define as an identifiable subset within the larger minority or low income population, whose members would allegedly be affected differently than other individuals within the larger disadvantaged group.

V. The Decision in LBP-02-08 Requires Litigation of Issues That Are Outside the Scope of Any Admitted Contention in This Proceeding.

Wholly apart from the substantial legal errors discussed above, involving the Board's treatment of a sovereign Indian Tribe, and its interpretation of NEPA and the environmental justice doctrine, the Licensing Board's decision in LBP-02-08 requires reversal on a single procedural ground: The decision adopts, as the central issue in Contention OGD O, an issue (disparate impacts on the OGD subgroup) that was never identified by OGD in Contention OGD O or any of its bases -- and indeed, that was never identified by OGD until over three years after the contention was filed. The Licensing Board's decision effectively embraces this issue as part of the contention -- thereby ignoring the well-established and oft-repeated maxim that contentions are necessarily limited to the issues stated in their bases. *See* 10 C.F.R. § 2.714(b)(2); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155 (1991).

Specifically, nowhere in Contention OGD O did the Intervenor ever identify any claims concerning disparate impacts on certain subgroups within the Tribe, as compared to other tribal subgroups; improper tribal governance; or unequal distribution of lease payments .[29] The Licensing Board explicitly recognized this fact in its decision. Thus, in describing Basis 1 of the contention, the Board stated: "Basis # 1 involves the disparate economic and sociological impacts on minority and low-income populations compared to the overall population." LBP-02-08, slip op. at 8. In other words, basis one of the contention -- as framed by OGD and admitted by the Board -- involved only a claim that the overall minority group would suffer disparate impacts as compared to the non-

[29] Even in its initial responses to discovery, OGD asserted only that the Skull Valley Band would suffer disproportionate impacts as compared to other groups; and it nowhere asserted that tribal governance or any unequal distribution of tribal money was part of this contention. *See* "[OGD's] Responses to Applicant's First Set of Discovery Requests, dated May 28, 1999; and "[OGD's] Second Response to Applicant's First Set of Discovery Requests," dated July 7, 1999. Only in March 2001, three years after this contention was admitted, did OGD first assert that tribal governance and/or the distribution of benefits was part of this contention. *See* n. 30, *infra.*

minority community. Indeed, the Board's decision explicitly recognizes that the issue of disparate subgroup impacts had not been raised within the contention as filed. The Board stated:

> . . . [W]e 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.

Id. at 20. Similarly, the Board observed:

> The matter of the allocation of the lease payments presents itself in unusual fashion. In most summary disposition proceedings, the moving party presents asserted undisputed facts which it claims warrant a ruling in its favor. . . . [T]he Applicant was successful to the extent it employed that approach. But that success carried it only so far, for OGD's countering argument <u>introduced a whole new set of asserted undisputed facts in the [June 2001] Blackbear declaration</u>. 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.

Id. at 35; emphasis added.

In fact, OGD first raised the issue of unequal distribution of PFS lease payments, in its response to the Applicant's motion for summary disposition[30] -- three years after it had filed this contention. The Board observed that "[t]his somewhat peculiar procedural setting may explain why

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[30] OGD filed the Blackbear Declaration in this proceeding on June 28, 2001, in its response to the Applicant's motion for summary disposition. OGD had never mentioned the specific allegations in that Declaration previously; and the only prior, general reference to the Blackbear Declaration was made <u>in March 2001</u>, in OGD's supplemental responses to the Applicant's <u>February 1999</u> discovery requests. Thus, on March 8, 2001, OGD supplemented its discovery responses by asserting that a majority of the Skull Valley Band does not support the PFS project, and that the bases for this assertion were contained in (unidentified) "affidavits filed . . . in <u>State of Utah v. United States Department of Interior</u>" and "other evidence" in that case. *See* "[OGD's] Supplemental Responses to Applicant's First Set of Discovery . . . ," dated March 8, 2001, at 4. OGD then filed a further supplemental response, stating that it intends to rely on "all evidence submitted in that case by the 'Blackbear' Plaintiffs, as contained in affidavits, declarations and other supporting or evidentiary documents and records." *See* "[OGD's] Second Supplemental Responses to Applicant's First Set of Discovery . . .," dated March 26, 2001, at 2. PFS moved to compel OGD to provide more specific responses, but that motion was denied. *See* "Memorandum and Order (Ruling on Discovery Motions and Request to Extend Time to Complete Depositions),"dated May 29, 2001, at 4.

the Applicant's motion did not deal factually with the lease payment and other grounds on which we now deny that motion . . ." *Id.* at 22 n.35. However, the Board was not troubled by OGD's late identification of this issue, based on its view that "[t]he Applicant will, however, have full opportunity to present all its relevant evidence on all decisive matters at the hearing." *Id.*

The Licensing Board's explicit recognition that OGD had been three years late in raising the issue of "disparate impacts" among different subgroups within the overall minority community, should have led to the Board's dismissal of this claim. As the Commission previously noted in this proceeding, Contention OGD O had been admitted "with the useful caveat that litigation on the contention was 'limited to the disparate impact matters raised in its admitted bases.'" CLI-98-13, 48 NRC at 36, *citing* LBP-98-7, 47 NRC at 233. Here, a reading of this contention and its "admitted bases" makes clear that OGD did not raise the issues of tribal governance, unequal distribution of money, and disparate subgroup impacts within this contention -- yet, these very late-filed issues form the basis for the Board's decision, in LBP-02-08,[31] to deny the Applicant's motion for summary disposition of the contention.

The Board's late adoption of these issues contravenes the well-recognized principle that contentions are limited to their stated bases. *See* 10 C.F.R. § 2.714(b)(2); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155 (1991). Accordingly, the Licensing Board's incorporation of these issues into Contention OGD O should be

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[31] Further, in CLI-98-13, the Commission recited its decision in *LES*, in which it stated:

> The NRC's goal [with respect to analyzing disparate impacts] is to identify and adequately weigh, or mitigate, effects [of the proposed action] on low-income and minority communities that become apparent only by considering factors peculiar to those communities." CLI-98-3, 47 NRC at 100. . . . That should be the focus of the Board's environmental justice inquiry.

PFS, CLI-98-13, 48 NRC at 36. Nowhere in *LES* did the Commission state that impacts on subgroups within the larger low-income or minority community are to be weighed or mitigated.

set aside, and the Licensing Board's denial of the Applicant's motion for summary disposition of Basis 1 of the contention should be reversed.

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that the Licensing Board's decision in LBP-02-08 should be reversed.

Respectfully submitted,

/RA/
Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 5th day of April 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE 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 "NRC STAFF'S BRIEF ON APPEAL FROM THE LICENSING BOARD'S DECISION IN LBP-02-08, CONCERNING CONTENTION OGD O (ENVIRONMENTAL JUSTICE)," in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 5th day of April, 2002:

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