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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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

INTERVENOR SKULL VALLEY BAND'S OPENING BRIEF SEEKING REVERSAL OF FEBRUARY 22, 2002, MEMORANDUM AND ORDER (LBP-02-08) OF THE ATOMIC SAFETY AND LICENSING BOARD

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INTRODUCTION

In a Memorandum and Order, dated March 7, 2002, the Commission stayed the February 22, 2002, decision (LBP-02-08) of the Atomic Safety and Licensing Board (ASLB), which granted in part and denied in part Applicant's Motion for Summary Disposition of Contention O filed in this matter by Intervenor Ohngo Devia Gaudadeh (OGD). That contention is based on Executive Order 12898 of February 11, 1994, 3 CFR 859 (1995), Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations. The ASLB had ordered Intervenor Skull Valley Band of Goshute Indians to provide by March 22, 2002, an accounting of the expenditure, distribution, allocation and use of lease revenues received from Applicant Private Fuel Storage L.L.C., a lessee of Skull Valley Band reservation lands,[1] and set for trial in April

[1] The lease was conditionally approved by the Bureau of Indian Affairs (BIA) in 1997. Final approval is conditioned on issuance of a license by the NRC. The BIA is a cooperating agency with the NRC in the preparation of the Environmental Impact Statement. See Final Environmental Impact Statement for the construction and operation of an Independent Spent Fuel Storage Facility on the Reservation of the Skull Valley Band of Goshute Indians (FEIS) at 1.5.2.

the issue of whether OGD would suffer the environmental impacts of the Project without receiving the financial benefits. OGD includes both members and non-members of the Skull Valley Band who oppose the Project. The Commission's Order granted the Band's Motion for Directed Certification seeking review of the ASLB decision, and set a briefing schedule, later extended. The Skull Valley Band seeks reversal of the ASLB decision.

SUMMARY OF ARGUMENT

It is the position of the Skull Valley Band that the ASLB decision— to the extent that it denied Applicant's Motion for Summary Disposition, ordered the Band to provide an accounting of lease revenues, and set for trial matters concerning the expenditure, distribution, allocation, and use of the Band's revenues— (1) violates important principles of federal Indian law, and infringes on the sovereign tribal authority of the Band, by interfering in internal tribal governmental matters; (2) misapplies Executive Order 12898 on Environmental Justice, and is inconsistent with the National Environmental Policy Act (NEPA); and (3) is not supported by the record in this proceeding.

BACKGROUND

Intervenor Skull Valley Band is a federally recognized Indian tribe exercising governmental powers over both its members and over the Skull Valley Indian Reservation, which was set aside by Executive Orders in fulfillment of Article 6 of the 1863 Treaty with the Shoshoni-Goship, 13 Stat. 681. The Band supports the issuance of the storage facility license to Applicant Private Fuel Storage, L.L.C. (PFS), as the Band will receive substantial benefits from the Project, including lease revenues, jobs,

programs to benefit Band members, and an expanded opportunity to exercise sovereign authority over its lands. FEIS at 4.5.2.8.

For over a decade the Band has been considering the possibility of utilizing its lands for the storage of spent nuclear fuel. It was the recipient of grants from the Department of Energy in the early 1990s to study such an undertaking. Currently, no significant income is generated for the Band from its reservation lands. The Band has been awaiting this opportunity for a long time.

The Skull Valley Band is governed by a General Council consisting of all adult members of the Band. Many of the governmental responsibilities for the Band are delegated by the General Council to the Band's Executive Committee, which is made up a Chairman, Vice-Chair, and Secretary. In December 1996 the General Council enacted a resolution authorizing the Executive Committee to enter into a lease and related agreements for the purpose of allowing a spent nuclear fuel storage site on the Skull Valley Reservation. (A copy of this Resolution is attached hereto as Exhibit AA.) The initial lease was executed on December 27, 1996, and submitted to the Bureau of Indian Affairs (BIA) in January 1997 for review and approval in accordance with 25 U.S.C. § 415 and applicable BIA regulations. The BIA reviewed the proposed lease for several months, and submitted proposed revisions to the parties. This culminated in the execution of a new Amended and Restated Lease on May 20, 1997, which was approved by the BIA Superintendent on May 23, 1997. By the terms of the lease, construction of the Project is conditioned on the issuance of an NRC license, completion of the NEPA process, and any necessary mitigation.

Litigation Over The BIA Lease Approval

The Band's and the BIA's approvals of the PFS lease have been the subject of unrelenting litigation challenges. None has been successful. In 1998 the State of Utah filed suit against the Department of the Interior seeking to overturn the conditional BIA approval of the PFS lease. Utah v. U.S. Dept. of the Interior, No. 2:98CV380K, U.S.D.C., D. Utah. The Department had denied the State's administrative appeal of that approval. State of Utah v. Acting Phoenix Area Director, 32 IBIA 169 (1998). In 1999 tribal dissidents, including Margene Bullcreek, the leader of OGD, and Sammy Blackbear, filed a similar challenge in the same court, challenging BIA reliance on the Band's approval of the lease. U.S. ex rel. Blackbear v. Babbitt, 2:99CV156K. The two lawsuits were consolidated. The State's suit was dismissed for lack of standing. 45 F.Supp.2d 1279 (D.Utah 1999). The dissidents' suit was dismissed on February 14, 2000, for lack of ripeness and for failure to exhaust administrative remedies. The State appealed the dismissal of its suit, and the Tenth Circuit affirmed, ruling that, because there has been no final approval of the PFS lease by the BIA, the lawsuit was not ripe. 210 F.3d 1193 (10th Cir. 2000).

In the same lawsuit the State of Utah pursued a Freedom of Information Act (FOIA) claim against the Department of the Interior, seeking disclosure of an unredacted copy of the PFS lease. The Department had disclosed the lease document, but had redacted several provisions, including the Section specifying the amount of compensation to the Skull Valley Band. That information was withheld as confidential proprietary information under exemption (4) of FOIA. 5 U.S.C. § 552(b)(4). The U.S. District Court

upheld the Department's withholding of that information, and last summer the Tenth Circuit affirmed. 256 F.3d 967 (10th Cir. 2001).

Meanwhile, having been admonished by the federal court for failing to exhaust their administrative remedies, the dissidents renewed their pursuit of an administrative appeal of the BIA Superintendent's conditional approval of the lease. Among the appellants were OGD, Margene Bullcreek, and Sammy Blackbear.[2] On August 20, 2001, the Western Regional Director of the BIA denied their appeal. See Exhibit BB to this brief. A further administrative appeal, to the Interior Board of Indian Appeals, has been filed by four members of the Band, including Margene Bullcreek, but not including Sammy Blackbear. That appeal is pending. Also, on May 2, 2001, before the issuance of the BIA Regional Director's decision, 18 dissident members of the Band, led by Sammy Blackbear, filed another suit in the U.S. District Court challenging the BIA action, including the agency's reliance on evidence of the Band's approval of the PFS lease. Blackbear v. Norton, No. 2:01CV00317C.[3] Four of those plaintiffs, including Margene Bullcreek, have withdrawn from that lawsuit. The U.S. Attorney has filed a Motion to Dismiss.

Finally, as recounted in periodic Joint Status Reports made to the Board, the Skull Valley Band and PFS filed suit in federal court against Utah state officials in April 2001, challenging state legislation purporting to prohibit and regulate the Project. Defendants filed a Counterclaim against the Skull Valley Band in August 2001, which contains three

[2] In support of the appeal Sammy Blackbear filed a Declaration very similar to the one filed with the Atomic Safety and Licensing Board in support of the June 28, 2001, OGD Opposition to the Applicant's Motion for Summary Disposition of OGD Contention O. See Exhibit BB at pp. 6-7.

[3] See LBP-02-08 at p.35, footnote 53. The complaint in this lawsuit also contains most of the allegations found in the Sammy Blackbear Declaration filed on behalf of OGD in this proceeding.

causes of action challenging the PFS lease, including one claim that it was not lawfully approved by the General Council of the Band. The Counterclaim also realleges many of the allegations found in Blackbear v. Norton regarding the conduct of the government of the Skull Valley Band. Plaintiffs filed a Motion to Dismiss the Counterclaim in December 2001, and oral argument will be heard in the U.S. District Court on this and other motions on April 11, 2002. The significance of the pendency of some of these cases, and also the various rulings by the U.S. District Court and the Department of the Interior, will be discussed below.

Proceedings Pertaining To OGD Contention O

The only remaining contention of OGD is that the license application fails to address environmental justice issues. The bases for this Contention which were admitted by the Licensing Board were (1) allegedly disparate economic and sociological impacts on the native community of Goshute Indians living near the project site, (2) alleged disproportionate cumulative impacts to be suffered by members of the Skull Valley Band, and (3) adverse effect on property values.

PFS moved for Summary Disposition of Contention OGD O on May 25, 2001, and OGD responded with its Opposition on June 28, 2001, alleging that Chairman Leon Bear is not a legitimate leader of the Skull Valley Band, and contending that "there is a lack of project controls to assure project funds will reach the Tribe," referring to "OGD's allegations that PFS' improper dealings have diverted project funds into criminal activities . . .." Opposition at page 10. These allegations may be found in the 400-paragraph Declaration of Sammy Blackbear, who signed as Tribal Chairman, claiming that his election dates back to a 1994 recall effort. It is this Declaration, with

unsupported accusations of corruption, which is the primary basis for the Board's determination that there are issues of fact which prevent summary disposition of Contention OGD O. LBP-02-08 at page 35.

In its February 22, 2002, Memorandum and Order the Board granted PFS' Motion for Summary Disposition in part and denied it in part. The Board held "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 the[] adverse impacts" of the PFS Facility. LBP-02-08 at page 34. Because the Blackbear Declaration contains allegations that Band members' requests for an allocation of the lease payments were turned down, and because there are also allegations that Chairman Leon Bear made extraordinary purchases for his own use, the Board held that these issues of alleged disparate impacts of the Facility must be resolved at a hearing. Id. at page 36.

The Board acknowledged at the outset of its Memorandum and Order "that matters of Tribal governance are largely beyond inquiry by federal (and State) instrumentalities . . .." LBP-02-08 at page 1. However, the Board invoked its right "to determine our own jurisdiction to proceed, taking the proverbial 'peek at the merits' to the extent necessary to resolve jurisdictional issues." Id. at page 17. This "peek" would be a full-scale examination of the Band's allocation, expenditure, distribution, and use of its own lease revenues for the purpose of determining whether the members of OGD, as a subgroup of the Band, constitute a discrete "low income population" within the meaning of the Executive Order on Environmental Justice. Id. at page 18.

The Board's Order set for trial in April the matter of the allocation, expenditure, distribution, and use of lease revenues, and ordered the Skull Valley Band to provide an accounting to the Board and to other affected parties by March 22nd of (1) the amount of the PFS lease payments received by the Band or any member, (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) the manner in which funds deposited in those accounts were later distributed or put to other uses. LBP-02-08 at page 37.

ARGUMENT

I. The Board's Decision Violates Important Principles of Federal Indian Law, and Infringes on the Sovereign Tribal Authority of the Skull Valley Band, by Interfering in Internal Tribal Governmental Matters.

A. General Principles of Federal Indian Law Prohibit Federal Agencies from Interfering in Internal Tribal Matters, Including the Use and Distribution of Tribal Funds.

The principle that matters of tribal self-governance are immune from inquiry outside of tribal institutions has been firmly established in federal law. In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the Supreme Court ruled that federal courts could not hear tribal members' complaint of a violation of federal law by the tribal government, namely the equal protection and due process provisions of the Indian Bill of Rights applicable to tribal governments in 25 U.S.C. § 1302(8).[4] The Court held that the claim against tribal officers "constitutes an interference with tribal autonomy and self-government." 436 U.S. at 59. The Court added: "Resolution in a federal forum of

[4] The Tenth Circuit had ruled that a tribal ordinance had indeed violated plaintiffs' rights. Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976). Counsel for the Skull Valley Band represented the Martinez plaintiffs in the District Court and in the 10th Circuit.

intratribal disputes . . . cannot help but unsettle a tribal government's ability to maintain authority." Id. at 60.

Deference to tribal sovereign authority continues in the federal courts. In January an *en banc* panel of the Tenth Circuit held that the National Labor Relations Board's efforts to prevent an Indian tribe from enacting a right-to-work ordinance must fail. The tribal ordinance applies to non-tribal businesses on leased tribal lands. NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002). The court observed: "In addition to broad authority over intramural matters such as membership, tribes retain sovereign authority to regulate economic activity within their own territory." 276 F.3d at 1192-93.

The Board's Memorandum and Order paid lip service to these principles, and characterized its ruling as not intruding on tribal self-governance but seeking only to determine whether a subgroup of the Band is receiving benefits from the PFS lease sufficient to offset alleged adverse impacts. This inquiry necessarily insinuates the Board into the internal affairs of the Band.

The Board's decision appears to have been premised on the misconception that individual tribal members have a right to the distribution of a share of tribal revenues. There is no legal basis for such a proposition. Whether an Indian tribe decides to make *per capita* distributions of a portion of its revenues to its members is a tribal prerogative. Historically, the Bureau of Indian Affairs has played a role in the *per capita* distribution of limited categories of funds held in trust by the United States in the U.S. Treasury. But once revenues have been received by a tribe, they are no longer subject to BIA control—with one exception mentioned below.

The most common example of federally-supervised *per capita* distribution occurs when an Indian tribe is awarded a judgment against the United States under the Indian Claims Commission Act. There is a statutory process to be followed for the preparation of a judgment fund distribution plan, which must be approved by the Secretary of the Interior. 25 U.S.C. §§ 1401-08. But even that process allows, but does not require, *per capita* distributions to tribal members. Nevertheless, the judgment fund distribution process has led many to believe that tribal revenues are routinely subject to *per capita* allocations. This is incorrect. An exception which demonstrates the rule is a provision in the Maine Indian Claims Settlement Act of 1980, which provides for distribution of a portion of the income from a settlement trust fund to Passamaquoddy and Penobscot tribal members over the age of sixty. 25 U.S.C. § 1724(b). *Per capita* distribution of such trust funds held in the U.S. Treasury must be authorized by federal statute, or requested by the tribe. 25 U.S.C. § 117a.

But, in this day and age, many revenues from tribal enterprises are paid directly to the Indian tribes, and are not held in U.S. government trust accounts. The BIA makes no decisions on the expenditure or allocation of such tribal funds—with one exception. Under the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701, *et seq.*, a tribe may not make *per capita* distributions of its gaming revenues unless a plan for doing so has been approved by the Secretary of the Interior. 25 U.S.C. § 2710(b)(3). Even so, the decision to make *per capita* distributions to tribal members is, in the first instance, a tribal one; and federal courts do not become involved in tribal decision-making with regard to such revenues. See Smith v. Babbitt, 100 F.3d 556 (8th Cir. 1996).

In short, there is no federal statute of general applicability governing the distribution or expenditure of tribal lease revenues. Unless a tribal constitution, or a specific federal statute, requires the review or approval of the Bureau of Indian Affairs before tribal funds may be disbursed, the BIA is not involved. This is a matter within the discretion of the tribal government, and the tribal decision is not reviewable by a federal agency or court. Vizenor v. Babbitt, 927 F.Supp. 1193, 1203 (D.Minn. 1996). There is certainly no federal right on the part of a tribal member to demand a share of tribal lease revenues.

Whatever misconceptions the Board may have had regarding federal supervision over tribal funds, it struggled mightily to find some basis in federal law for intervening in Skull Valley Band internal tribal matters. The Board professed to have found an "exception" for "special situations" in dicta found in two Tenth Circuit decisions. LBP-02-08 at page 16. The Band submits that no exception, if any exist, is applicable here.

The two decisions are Wheeler v. Department of the Interior, 811 F.2d 549 (10th Cir. 1987), and Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457 (10th Cir. 1989). Both affirmed District Court decisions declining to entertain challenges to Cherokee Nation tribal governmental matters, namely a tribal election and a question of tribal membership eligibility, respectively. The Wheeler decision states: "The federal courts have also [in addition to Congress] encouraged [tribal] self-government. Specifically, they have stated that when a dispute is an intratribal matter, the Federal Government **should not interfere**." 811 F.2d at 551 (emphasis added.) The "special situations" suggested in the opinion have absolutely no applicability to Contention OGD O. They both involve the Department of the Interior: "If a Tribe's constitution or its statutes call

for the Department to take an active role in [tribal] lawmaking . . . [and where] certain federal statutes require Department involvement in tribal matters." Id. at 551-52. Neither "special situation" exists here.

The Nero opinion discusses a previous Tenth Circuit decision, Dry Creek Lodge v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), which was invoked by the plaintiff-appellants in Nero as a basis for federal court jurisdiction over an Indian Civil Rights Act complaint, notwithstanding the broad language of the Supreme Court decision in Santa Clara Pueblo v. Martinez. The Nero court characterized the narrow exception found in Dry Creek Lodge as involving three requirements: (1) that the plaintiff be a non-Indian; (2) that the complaint does not involve an internal tribal issue; and (3) that tribal remedies are unavailable. Contention OGD O clearly does not meet the first two tests; hence, even if this exception applied to an NRC proceeding—which it does not— it would be unavailing here. The Board's Memorandum and Order nevertheless cited Nero for "some suggestion . . . that circumstances might permit intrusion into the realm of Tribal governance where no tribal forum for interpreting Tribal law exists." LBP-02-08 at page 16. As shown above, this is not a correct reading of Tenth Circuit precedent in this area, including Nero. The fact that the Skull Valley Band does not have a full-time tribal court to adjudicate disputes among members of this small Tribe is certainly no basis for federal agency intrusion into internal tribal matters.[5] This has never been a basis for federal court jurisdiction since the decision in Santa Clara Pueblo v. Martinez, as Santa Clara Pueblo itself had no tribal court independent from its

[5] Indeed, Exhibit B to the Sammy Blackbear Declaration is Title 1 of the Band's Tribal Code. Section 3 recognizes the existence of a Skull Valley Band Tribal Court.

Tribal Council. See Martinez v. Santa Clara Pueblo, 402 F.Supp. 5, 10 (D.N.M. 1975). The Martinez Plaintiffs made that point to the Supreme Court, to no avail.

The Board then reached even further to justify its Order with an attempt to distinguish this licensing proceeding from much of the body of precedent admonishing federal courts and agencies not to intrude into tribal internal affairs. The Board suggested that the Skull Valley Band "itself initiated the involvement with the non-Tribal adjudicator, first by entering into a business relationship with an organization seeking an NRC license . . . and then by intervening in this licensing proceeding." LBP-02-08 at page 17. Needless to say, this is a rather rude surprise to the Skull Valley Band—that it must open its books to federal agency scrutiny in the name of environmental justice when it enters into a lease of its land and then expresses interest in a licensing process. If this is a valid distinction, many other Indian tribes will be similarly rudely surprised when they intervene in federal agency proceedings. Tribal intervention is common before a number of federal adjudicatory and regulatory agencies, *e.g.*, the Federal Energy Regulatory Commission. Moreover, all leases of tribal land require federal approval, a federal action which often implicates compliance with NEPA on the part of the approving agency, namely BIA. If the logic of the Board's suggestion is correct, then the BIA itself will have to delve into the issue of how the lessor Indian tribe allocates, distributes, and expends lease revenues before the agency can close the NEPA record and make a decision whether to approve the lease. This has most definitely not been the way BIA considers leases for approval. Nor does the applicable statute, 25 U.S.C. § 415, authorize that kind of BIA inquiry into the manner in which a tribe allocates, distributes, or

expends its lease revenues. It is not difficult to imagine how tribes will react if the BIA begins to engage in that kind of inquiry.[6]

There is one statute which invites federal inquiry into matters of tribal finances. That is 18 U.S.C. § 1163, which makes it a federal crime to steal or embezzle tribal funds. Sammy Blackbear's Declaration, submitted on behalf of OGD, alleges—with no supporting documentation whatsoever—that members of the Skull Valley Band have been deprived of hundreds of thousands "if not millions, of dollars" as a result of a "systematic, longstanding, blatant pattern of corruption, oppression and abuse", and that this has been reported to federal officials "but nothing is ever investigated or resolved." ¶¶ 31-37. In fact, these accusations were conveyed to the Federal Bureau of Investigation and the Department of the Interior's Inspector General in March 2000 and again in January 2001. See Exhibit BB, at p. 7. Very recently, Mr. Blackbear was quoted in the Salt Lake City media as saying that U.S. Senators Hatch and Bennett played a role in reinitiating such an investigation. "Did Hatch, Bennett Spur Goshute Probe?", Deseret News, March 14, 2002. Skull Valley Band leaders are currently cooperating with a pending federal law enforcement investigation. Misappropriation of tribal funds is certainly a concern of the Band. As the Board noted in its Memorandum and Order (LBP-02-08, footnote 10), there is pending litigation over the raiding of bank accounts of the Skull Valley Band. The FBI and the Inspector General are the agencies authorized to look into such matters, not the Atomic Safety and Licensing Board. The leaders of the

[6] Even assuming *arguendo* that the use and distribution of tribal lease revenues were an appropriate subject for federal agency review— which the Skull Valley Band does not concede— it is the Secretary of the Interior, not the Nuclear Regulatory Commission, to whom Congress has delegated matters involving tribal leases. 25 U.S.C. § 415; cf. Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir.) cert. denied 464 U.S. 1017 (1983). Neither an Executive Order nor NEPA can change that allocation of agency responsibilities.

Skull Valley Band should not be subjected to a hearing to defend themselves to the Board against these unspecific allegations of criminal conduct made by a political opponent.

B. The Board's Decision Violates the Sovereign Governmental Prerogatives of the Skull Valley Band Tribal Government.

Not only does the Board's February 22nd Memorandum and Order violate precepts of federal law which bar federal intrusion into internal tribal governmental matters; the Board's decision would in fact interfere with the Skull Valley Band's government, and is scornful of Band governmental processes. The Board's decision refers to the Band's leadership as the "putative officers" (LBP-02-08 at p.6), and questions the standing of Tribal Chair Leon Bear based on the absurd allegation by Mr. Blackbear that Mr. Bear "is Goshute only by adoption." LBP-02-08 at p. 36, footnote 55. Although the Board acknowledged the primacy of the BIA in matters involving governmental relationships with the Skull Valley Band, it gave little or no weight to Declarations submitted by the BIA Superintendent, instead proposing that he testify in response to the allegations in the Blackbear Declaration and "set[] out his understanding of the BIA's authority and responsibility to bring about change in the situation." Id. at p. 37.[7] The Board's approach clearly invites an inquiry into the question of who leads the Skull Valley Band. Notwithstanding that this is a matter wholly outside of the Board's purview, it is important to set the record straight.

As reported above, the question of whether the PFS lease was validly approved by the Band has been the subject of multiple lawsuits, none successful. During the pendency of these suits the BIA has continued to work with NRC staff and other agencies on the preparation of the Environmental Impact Statement, based on the assumption that

[7] BIA Superintendent David L. Allison retired from government service in January 2002.

the Skull Valley Band and PFS have entered into a valid lease, yet subject to final BIA approval. The BIA has examined the broad allegations made by Mr. Blackbear and his political allies, and has dismissed them. In a detailed August 20, 2001, decision, attached as Exhibit BB, the BIA Western Regional Director upheld the Superintendent's conditional approval of the lease. As mentioned, four members of the Band have pursued a further administrative appeal to the Interior Board of Indian Appeals (IBIA). They are represented by current counsel for OGD.

The Regional Director's decision is instructive. He addressed the general allegations of bribery, corruption, and misappropriation of tribal funds: "No names are provided, no places, and no specific acts are set forth by the appellants to corroborate or substantiate these allegations." Exhibit BB at p. 7. He noted that referrals had been made to appropriate law enforcement agencies, and that there could be no adequate response to such vague and general allegations. Id. He did not order a hearing to entertain these allegations, but held that the dissidents must take their grievances back to the Band for resolution in tribal forums. Id. at p. 5. He also invoked "the long-standing policy of the BIA ... to avoid interference into tribal politics and decision making, where the official government of a tribe resolves to undertake a certain action, and that action is challenged by another group or faction within that tribe ...." Id. He denied the dissidents' appeal on the grounds of ripeness, standing, and failure to exhaust tribal remedies. Id. at p. 11.

More recently, Mr. Blackbear and other opponents of the Band's leadership claimed that Chairman Leon Bear had been recalled from office by tribal members, and that an election had been conducted for a new slate of officers. This was reflected in an

October 3, 2001, letter to the Board from Mr. Blackbear and two others claiming to be the new officers, with Mr. Blackbear as Vice-Chair. (The need for this latest recall effort is, of course, inconsistent with Mr. Blackbear's previous insistence that he was the true tribal chairman, dating back to a 1994 recall. Apparently, even his political allies never believed that singular claim.) In a December 10, 2001, Memorandum and Order the Board noted that the "purported new leadership group" had failed to respond to Board requests for either an entry of appearance or an information report. However, the Board's February 22 decision, relying in part on "contemporary newspaper reports", reflects some doubt whether Chairman Leon Bear leads the Band, "exercising the authority he claimed by virtue of having been previously elected ...." LBP-02-08 at p. 6.

BIA Superintendent David Allison was witness to the events of August through October 2001, and his Declaration of October 24, 2001 (noted in LBP-02-08, footnote 20, but also attached here as Exhibit CC), demonstrates that BIA continued to deal with Chairman Leon Bear and Vice-Chair Lori Skiby as the duly elected representatives of the Band "for purposes of the provision of federal programs and federal funds." Exhibit CC, ¶ 10. This has not changed. Attached as Exhibit DD is a March 25, 2002, letter from Acting Superintendent Allen Anspach advising Chairman Bear that the BIA continues to deal with him and Vice-Chair Skiby for purposes of contracting for federal programs and delivery of federal services to the Band.

The Board's apparent doubt about the Band's leadership may have underlain its justification for its intrusion into Band financial and governmental matters. That intrusion would be deep and unwarranted. The Board's order for a full accounting of the expenditure, distribution, and use of these funds would necessarily reach transactions

among members of the Band, and the interpretation of tribal traditions, laws and resolutions for which the Board has no expertise or authority. There is no basis for a federal agency inquiry into such matters, which are the sole province of tribal law.

As demonstrated in the attached Exhibit EE, the Declaration of Band Chairman Leon Bear, accompanied by Band financial documents,[8] PFS revenues are deposited by Band officials into bank accounts where other tribal revenues are also routinely deposited. Id. ¶ 8. Such an accounting would do competitive harm to the Band, revealing their investments and business transactions to persons who seek to obtain a competitive or political edge against the Band, and to undermine its financial planning for the future. Indeed, the General Council of the Band passed a resolution a few years ago, requiring confidentiality in the handling of internal Band documents— for the very reason that the State of Utah has sought to undermine the Band in the State's effort to block the PFS project. See Exhibit FF, General Resolution 99-04E. The Board's decision runs contrary to this tribal law.

Further, the distribution of funds to tribal members also involves personal transactions which are absolutely no business of the Board. Dividends are paid to tribal members when Band finances allow, and where Band resolutions authorize such dividends. Declaration of Leon D. Bear, Exhibit EE at ¶ 9. As shown by Exhibit B to the Leon Bear Declaration, a copy of a dividend check and stub with the name of the payee Band member redacted, the amount of a dividend payment may depend on debts

[8] This exhibit is the same Declaration filed as Exhibit 1 to the Band's March 4, 2002, Motion for Directed Certification (incorrectly marked Exhibit A. The two attachments to that Declaration are denoted Exhibits A and B.) The Band is today filing a new Motion for Protective Order to protect the two financial documents attached to the Declaration. Counsel for OGD and PFS have advised that they concur in this Motion.

owed to the Band by a particular Band member. Loans and dividend payment advances are often made to Band members to help them pay other debts. The criteria for such loans and advances, and the manner in which debts are incurred under tribal law, are matters reserved for the consideration of the tribal government.

The Board's decision involves an inquiry which will do irreparable and immediate damage to Band members and to the tribal government. Band members will no longer be secure in the knowledge that their transactions with the Band are confidential. Their employers, neighbors and family members will be able to discover information about them, which they had assumed would be kept in confidence. The revelation of personal transactions may also disrupt tribal governmental processes, injecting personal feuds into consideration of Band policy and budgetary matters. (A reading of the Blackbear Declaration makes clear that this is a motive underlying the claim of environmental injustice.)

With its February 22, 2002, Memorandum and Order, the Board has immersed itself into the waters of tribal finances and politics, personal relationships among Band members, business transactions between the Band and third parties, and issues of interpretation of tribal resolutions and ordinances. Much of this information has never been revealed outside of the Band. It is clear why the courts have admonished federal agencies not to delve into such matters. The modern policy of tribal self-determination is designed to give Indian tribes the opportunity to make their own decisions about matters tribal in nature— to make their own mistakes, if you will— without the pervasive oversight of the federal government which crushed tribal initiative for so many decades.

II. The Board's Decision Misapplies Executive Order 12898, and Is Inconsistent with the National Environmental Policy Act.

The Board's February 22nd decision to require an accounting and trial of the distribution, expenditure, allocation and use of the Skull Valley Band's lease revenues is premised on agency compliance with Executive Order 12898. The Board's reading and application of that Executive Order violates both its letter and spirit with an interpretation which undermines the sovereignty of Indian tribes. The Board's treatment of OGD as a potential "low-income population", namely as a subgroup of the Skull Valley Band, within the meaning of that term in the E.O. is also erroneous. And the application of the Executive Order to address alleged economic impacts of the Project is inconsistent with both the Order and NEPA.

Executive Order 12898 requires each federal agency to achieve environmental justice "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 ...." Section 1-101 (emphasis added.) Not surprisingly, the Executive Order contemplated coordination of its implementation with Indian tribal governments. See Sections 3-302(d) and 6-606.

The Executive Order on Environmental Justice was never intended to undermine federal respect for tribal institutions. Moreover, it must be read in the context of other recent Executive Orders calling for federal agencies to work closely with Indian tribes,

respecting their laws and institutions, and deferring to their decisions on matters tribal. Executive Order 13175 (November 6, 2000), Section 3, states:

> (a) Agencies shall respect tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.
>
> (b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.
>
> (c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:
>
> (1) encourage Indian tribes to develop their own policies to achieve program objectives;
>
> (2) where possible, defer to Indian tribes to establish standards; and
>
> (3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

The guidance on deference to tribal decision-making <u>on matters federal</u> shows that the Board's Memorandum and Order is wholly inconsistent with this government-wide policy. Most importantly, this statement of policy implicitly recognizes the principle of federal law that federal agencies have NO authority <u>in matters tribal</u> in nature. This directive requires agencies to give "maximum administrative discretion" to tribal governments with respect to federal statutes and regulations. Clearly, deference to **total** tribal administrative discretion is required for matters of tribal law and custom.

Indeed, since the lease agreement must be approved by the Indian tribe in the first place, the concept of environmental justice, that is, avoidance of disparate treatment of a low-income population, has no meaning here— where an Indian tribe with a low-income population has agreed to the use of its lands in return for various benefits paid by the

lessee or otherwise arising from the terms of the lease. What kind of environmental justice is it that would allow a minority within a Native American community to defeat the wishes of the majority population seeking economic development for their impoverished reservation?

Thus, the Board's Order has interpreted the Executive Order in a manner which cannot be justified. A "low-income population" should have a "geographical proximity" or "common conditions of environmental exposure or effect" with reference to Census data. See Appendix A of the Council on Environmental Quality's Guidance Under the National Environmental Policy Act. But the Board is treating OGD as a "subgroup" of the Band, which has a single reservation where, it is fair to say, both opponents and proponents of the project reside, sometimes within the same families. See attached Declaration of Tribal Chairman Leon Bear, Exhibit EE. Many Band members live off of the reservation, and would like to see job opportunities which will enable them to return to the reservation. OGD itself is made up of both members and non-members of the Band (LBP-02-08 at page 2), and thus cannot qualify as a subgroup of the Band—even if such a distinction were warranted under the Executive Order. There is nothing in the record which even suggests that OGD is a discrete low-income population. Rather, the Board has latched onto unsupported allegations made in Sammy Blackbear's Declaration of June 28, 2001, that the Band leadership has discriminated against political opponents and favored cronies in the distribution of lease revenues, to find a possible basis for contriving a low-income population out of those allegedly poverty-stricken political opponents. Even the OGD Contention does not assert that.

NEPA does not give the Board the power to do engage in such an inquiry under the rubric of environmental protection. "NEPA is meant to supplement federal agencies' other non-environmental objectives, not to transplant specific regulatory burdens from those expert agencies otherwise authorized to redress specific nonenvironmental problems and pointlessly to reimpose those objectives on other unqualified agencies." Glass Packaging Institute v. Regan, 737 F.2d 1083, 1092 (D.C. Cir. 1989). It is the Department of the Interior which has the delegated authority to decide whether the PFS lease should be finally approved, as being in the best interests of the Skull Valley Band. Neither NEPA nor the Executive Order on Environmental Justice shifts this duty to the NRC.

III. The Board's Decision To Hold a Trial on the Distribution, Allocation, Expenditure and Use of Tribal Lease Revenues Is Not Supported by the Record.

In the previous sections the Band has demonstrated that the Board's decision to conduct a hearing on the Skull Valley Band's distribution, allocation, expenditure, and use of tribal lease revenues violates federal law and is not an authorized function of the NRC. In addition, it must be pointed out that there is not a sufficient record to justify such a fact-finding exercise. The Board has relied entirely on the Declaration of Sammy Blackbear to provide a foundation for its determination that a trial is necessary. Apart from the fact that Declaration has little or nothing to do with OGD Contention O, it does not constitute probative evidence sufficient to establish a genuine disputed material fact, which would bar Applicant's Motion for Summary Disposition of that contention. The Declaration is, quite simply, a mud-slinging exercise by a political opponent of the Tribal

Chairman. The assertions of "fact" contained therein are transparent accusations, unsupported by the hundreds of pages of exhibits attached thereto.[9]

The Board's decision states: "Whatever the legitimacy of [the Declaration's] characterization [of "corruption, oppression and abuse"], or of Mr. Blackbear's claim to 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." LBP-02-08 at p.10 (emphasis in original.) Later in its Memorandum and Order the Board cites to specific paragraphs in the Declaration for "facts ... material to the issues we must decide." Id. at p. 35. These "facts" are no more than accusations that Leon Bear has absconded with the PFS lease money, and that Mr. Blackbear and Ms. Bullcreek and their families have been treated unfairly. Among the preposterous allegations made by Mr. Blackbear— and considered by the Board— is that Leon Bear is Goshute only by adoption and that he "has not taken an interest in Goshute social and cultural traditions." Id. at p. 36, footnote 55.

The Board insisted on absolutely no detail from Mr. Blackbear, and got none. For example, the Board relied (LBP-02-08 at p. 35) on the following allegation: "258. Leon Bear and some of his co-conspirators have announced that PFS has paid them and the Tribe millions of dollars as a result of this purported 'lease agreement' of Tribal trust lands." Mr. Blackbear provides no dates, no places, no context whatsoever for this incredible statement. Yet the Board held that this kind of allegation puts in issue for trial

[9] This statement, and the following discussion, should not be interpreted as suggesting that an evidentiary hearing is required to determine the accuracy or veracity of the Blackbear Declaration. This discussion is intended merely to show that the Declaration (with exhibits) is an inadequate basis for requiring a hearing on any question at issue in this proceeding.

a full accounting of all tribal lease revenues. This "evidence" falls far short of the kind of showing necessary to deny a Motion for Summary Disposition and require a trial.

Mere allegations do not suffice to contradict a movant's showing that there are no genuine issues of material fact which would bar summary disposition. An opponent of such a motion must put forward evidence in the form of specific facts to contradict the evidence offered by the movant or otherwise point to specific facts which would demonstrate a trialworthy issue. "[G]enuineness and materiality are not infinitely elastic euphemisms that may be stretched to fit whatever pererrations catch a litigant's fancy." Blackie v. State of Maine, 75 F.3d 716, 721 (1st Cir. 1996). "In the lexicon of Rule 56, 'genuine' connotes that the evidence on the point is such that a reasonable jury, drawing favorable inferences, could resolve the fact in the manner urged by the nonmoving party, and 'material' connotes that a contested fact has the potential to alter the outcome of the suit under the governing law . . ." Id. The standard for summary disposition of an issue before the ASLB is no less.

It is valuable to note that the Department of the Interior found it necessary to review Mr. Blackbear's similar allegations made in the context of the administrative appeal from the Superintendent's conditional approval of the PFS lease. The Western Regional Director gave the Declaration no weight because of the unsubstantiated nature of the allegations. See Exhibit BB at pp. 6-7. The Board should have done the same.

CONCLUSION

In sum, OGD offered no credible evidence to contradict the bases for Applicant's Motion for Summary Disposition, and the Board erred in not granting the motion in its entirety. It appears from the second part of the Memorandum and Order, "The Wisdom

of a Settlement", that the Board's decision to require a hearing on the equitable distribution of lease revenues may have been driven by a sincere desire to assist various Band political factions through a settlement process to resolve these internal tribal disputes. Notwithstanding the Board's laudatory motives, it had no authority to do so, and such agency intervention violates federal law.

Respectfully submitted,

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

Attorney for the Skull Valley Band
of Goshute Indians

SKULL VALLEY BAND

EXHIBIT -- AA _

General Council
Resolution No. 97-12A

Skull Valley Reservation
Uintah and Ouray Agency

Date: December 07, 1996

SKULL VALLEY BAND OF GOSHUTE INDIANS

WHEREAS, the Skull Valley Band of Goshute Indians of the Skull Valley Indian Reservation, hereinafter referred to as the "BAND," is recognized as an Indian Tribe by the Secretary of the Interior for Federal purposes, and

WHEREAS, the BAND conducts all Tribal business by means of a General Council comprised of the eligible membership of the BAND, and

WHEREAS, the Executive Committee is the governing body of the BAND elected by the General Council and has the powers delegated to it by the General Council, and

WHEREAS, the General Council passed General Council Resolution No. 94-02 dated February 19, 1994, which among other things, authorized the Executive Committee to enter into formal credible negotiations with utility companies and/or other private entities for the building of an interim storage facility for spent nuclear fuel on the Skull Valley Indian Reservation, in Tooele County, Utah (the "Reservation"), and

WHEREAS, the Executive Committee has entered into formal credible negotiations with the Private Fuel Storage L.L.C. (the "L.L.C.") for the building of such Interim Storage Facility, and has analyzed the feasibility of the development, construction, financing, ownership and operation of a private interim spent nuclear fuel storage facility (the "Facility"), such Facility to be located on the Reservation, and

WHEREAS, the Executive Committee has advised the General Council of the feasibility of the Facility and has recommended that it is in the best interest of the BAND to enter into a Business Lease, a draft of which is attached hereto, and other relevant contracts, agreements, leases, consents or other documents with the L.L.C. and/or Federal agencies of the United States for the purposes of the development, construction, financing, ownership and operation of the Facility, and

WHEREAS, the General Council has determined that it is feasible and in the best interest of the BAND to enter into agreements with the L.L.C. to have the Facility developed, constructed, financed, owned and operated, and therefore it is in the best interests of the BAND to execute the attached Business Lease and other relevant contracts, agreements, leases, consents or other documents.

NOW, THEREFORE, BE IT RESOLVED BY THE GENERAL COUNCIL OF THE BAND PURSUANT TO ITS SOVEREIGN AUTHORITY, AS FOLLOWS:

1. The General Council hereby adopts, approves, ratifies and confirms the terms and conditions of the attached Business Lease by and between the BAND and L.L.C., along with its attachments and exhibits, and urges its prompt approval by the Bureau of Indian Affairs, Nuclear Regulatory Commission and any other relevant federal agencies.

2. The General Council hereby authorizes the Executive Committee Chairman and/or his designee to execute the final Business Lease and amendments, modifications and restatements of the Business Lease, if any, as may be necessary to conform said agreements to revisions identified by the Bureau of Indian Affairs, Nuclear Regulatory Commission or other relevant federal agency to comply with law or regulation or to any, as may be necessary to modify said agreement to revisions negotiated by the Executive Committee Chairman and/or his designee and the L.L.C..

3. The General Council hereby authorizes the Executive Committee Chairman and/or his designees to execute any other relevant contracts, agreements, leases, consents or other documents with the L.L.C. and/or federal agencies of the United States and to take any and all other actions necessary and proper, for the purposes of the development, construction, financing, ownership and operation of the Facility.

4. The Executive Committee shall have the full authority and is hereby authorized to enter into waivers of the sovereign immunity of the BAND, the waiver of Tribal Court jurisdiction and the waiver of any requirement to exhaust Tribal Court remedies, solely with the L.L.C., whether within the Business Lease or any other relevant contracts, agreements, leases, consents or other documents with the L.L.C. and/or federal agencies of the United States for the purposes of the development, construction, financing, ownership and operation of the Facility; provided, however, that trust lands of the United States shall in no way be affected by said waiver of sovereign immunity of the BAND.

5. This Resolution supersedes and replaces all prior resolutions, or portions thereof, which are in conflict with the provisions herein.

Arlis Brown
Leslie Wash
Arlene B. West
Shawna V. Wach
Edwin Clover

Lori Bear

Certification

I, hereby certify that General Council Resolution No. 97-12A was adopted by the Skull Valley Band of Goshute Indians at a duly called meeting at Skull Valley, Utah on this 07 day of December, 1996, according to the customs practiced by the BAND for the conduct of its meetings. All adult members of the BAND having been duly notified of this meeting. The resolution was adopted by a vote of 21 members representing the majority of the voting members of the BAND present at this meeting: 21 voted FOR, 0 voted AGAINST.

Executive Committee Officer

RESOLUTION
ATTACHMENT NO 97-12A(1)
Skull Valley Reservation
Uintah and Ouray Agency
December 12, 1996

SKULL VALLEY BAND OF GOSHUTE INDIANS

WHEREAS, the Skull Valley Band of Goshute Indians (the "Band") is a federally recognized Indian Tribe by the Secretary of the Interior for federal purposes;

WHEREAS, the BAND conducts its Tribal business by means of a General Council comprised of the eligible membership of the BAND;

WHEREAS, the Executive Committee is the governing body of the BAND elected by the General Council and has the powers delegated to it by the General Council, and,

WHEREAS, the General Council (i) passed Resolution No. 97-12A on December 7, 1996 which adopts, approves, ratifies and confirms the terms and conditions of the draft Business Lease by and between the BAND and the Private Fuel Storage, L.L.C. (the "L.L.C."), along with its attachments and exhibits, all of which are attached to said Resolution (such Business Lease to be for the development, construction, financing, ownership and operation of a private interim spent nuclear fuel storage facility (the "Facility"), and (ii) urges its prompt approval by the Bureau of Indian Affairs, Nuclear Regulatory Commission and any other relevant federal agencies, and,

WHEREAS, General Council Resolution No. 97-12A authorizes the Executive Committee Chairman and/or his designee to execute the final Business Lease and Amendments, modifications and restatements of the Business Lease as may be necessary to conform said agreements to revisions identified by the Bureau of Indian Affairs, the Nuclear Regulatory Commission or other relevant Federal agencies to comply with law or regulation or as may be necessary to modify said agreement to revisions negotiated by the Executive Committee Chairman and/or his designee and the L.L.C., and,

WHEREAS, General Council Resolution No. 97-12A authorizes the Executive Committee Chairman and/or his designee to execute all other relevant contracts, agreements, leases and other documents for the purpose of development, construction, financing, ownership and operations of the Facility, and

WHEREAS, General Council Resolution No. 97-12A gives the Executive Committee the full authority and authorization to enter into waivers of the sovereign immunity of the BAND, the waiver of Tribal Court jurisdiction and the waiver of any requirement to exhaust Tribal Court remedies, solely with the L.L.C., as further provided in said Resolution.

RESOLUTION
ATTACHMENT NO. 97-12A(1)
DATE 12 Dec 96

NOW, THEREFORE, BE IT RESOLVED, that we the undersigned support and approve General Council Resolution No. 97-12A and support all authorizations given to the Executive Committee Chairman and/or his designee on this viable economic project for the Band.

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Lori Beal [illegible]	
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CERTIFICATION

I hereby certify that this Resolution Attachment No 97-12A(1) was adopted by the Skull Valley Band of Goshute Indians, on this 12 day of December, 1996 according to the customs practice by the Band. All adult members signing this Resolution are enrolled members of the Band.

Executive Officer
Skull Valley Goshutes

RESOLUTION
ATTACHMENT NO. 97-12A(1)
DATE 4/12/97

Diane Tom Eagle
Leslie C. Eagle
Clayton Aaron Eagle
Amy Moon Dick
Dan Dick
Pamela Brown

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WESTERN REGIONAL OFFICE
P.O. BOX 10
PHOENIX, ARIZONA 85001

TAKE PRIDE IN AMERICA

IN REPLY REFER TO:

SKULL VALLEY BAND
EXHIBIT -- BB

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

AUG 2 0 2001

Mr. Duncan F. Steadman, Esq.
Steadman, Fairbanks & Shepley, L.C.
550 South 300 West
Payson, Utah 84651-2808

Dear Mr. Steadman:

This Decision, made pursuant to the authority outlined in 25 C.F.R. §§2.4(a) and 2.19(a), decides an appeal regarding a proposed business lease entered into between Private Fuel Storage, L.L.C. ("PFS") and the Skull Valley Band of Goshute Indians ("Band") of Utah. The appeal was filed by you on behalf of twenty members of the Band[1] who oppose the business lease and its purpose. Though it is not clear that the lease in its present form is appealable under 25 C.F.R. Part 2, an issue that will be fully examined *infra*, we are still rendering a Decision in this matter, largely because of the obvious and fractious controversy surrounding this lease and its purpose, which is the temporary storage of nuclear waste on the Band's reservation in central Utah. This proposal is apparently supported by a majority of the Band's voting members but bitterly contested by not only the appellants herein, but by the State of Utah and several other entities.

Procedurally, the appeal was brought to you on behalf of Sammy Blackbear, Sr., and other members of the Band, through the filing of a "Notice of Appeal" dated September 22, 2000, containing the appellants' statement of reasons for the appeal. Thereafter, by letter through counsel dated September 29, 2000, the Confederated Tribes of the Goshute Reservation sought to "join and intervene" in this appeal. By letter dated October 6, 2000, the State of Utah, through the Office of Attorney General, declared that the State "hereby joins in and supports" the same appeal. By an "Answer of Interested Party"dated October 17, 2000, a group comprised mostly of Band members

[1]Although twenty names appear in the caption to the appeal filed with the Regional Director, records of the Bureau of Indian Affairs indicate that Kenneth W. Eagle died July 28, 2000; Marvin R. Wash died January 12, 1999; and Edwin Clover and Diane Eagle Tom both have stated in writing that they do not want to be listed with the appellants. Accordingly, it would appear that only sixteen rather than twenty members of the Band are willing and conscious participants, and notice of this decision is being provided to those individuals through this letter to you, as their counsel of record

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and called *Ohngo Gaudadeh Devia* Awareness ("OGDA"), whose principal is Margene Bullcreek, also a named appellant in the September 22, 2000, appeal, sought to join in and support the appeal. On October 25, 2000, PFS filed an "Answer of Interested Party" to the appeal. By letter of October 25, 2000, the Band itself filed an "Answer of Interested Party." On October 30, 2000, the Confederated Tribes of the Goshute Reservation filed a reply to the responses of PFS and the Band. Finally, on November 19, 2000, the original appellants filed a reply to the responses of PFS and the Band.[2] Many of the points raised in support or in opposition to the business lease and its purpose by the various parties involved are duplicative, and can be reduced to several basic categories or arguments. In what follows, these points will be addressed and examined under general headings descriptive of the categories or arguments in which they belong.

Timeliness: Given the unusually controversial and extraordinary nature of the issues upon which the appellants based their appeal, what would otherwise be incontrovertible grounds for summary dismissal under 25 C.F.R. §2.17 are not being invoked to dismiss this appeal summarily. The action or decision of the Bureau of Indian Affairs ("BIA") being appealed is the conditional approval of the "Amended and Restated Business Lease Between Skull Valley Band of Goshute Indians and Private Fuel Storage, L.L.C.," dated May 20, 1997. The business lease was approved on May 23, 1997 by the Superintendent of the Uintah and Ouray Agency, BIA, pursuant to the formal delegations of authority based upon applicable provisions of Part 10, Bureau of Indian Affairs Manual. The effective date of the approval of the lease was conditioned upon fulfillment of the following at future dates: (1) completion of the environmental analysis required under NEPA, (2) modification of the business lease to incorporate any mitigation measures identified in the Record of Decision, (3) issuance of an environmental impact statement, and (4) issuance of a license by the Nuclear Regulatory Commission.

Under 25 C.F.R. §2.9, appellants are required to file a Notice of Appeal "...within 30 days of receipt by the appellant of the notice of administrative action described in §2.7." In this case, because the action of the agency official was a conditional approval of a business lease, no Notice of Administrative Action was distributed to interested parties in May or June of 1997 pursuant to §2.7(a), and no "written decision" was issued as anticipated by §2.7(c), the effects of which were to leave in doubt both the appealability of the action and the time parameters for appeal. Due to this circumstance, the appellants did not file a Notice of Appeal within 30 days of any event. Instead, appellants waited until September 22, 2000, a period of over three (3) years, to file their Notice of Appeal. Owing to the lack of adherence to the applicable computations of time under the regulations, neither the appellants nor the BIA ought to be subject to the allegations of the other for failure to timely comply and submit pleadings under the regulations. It is therefore reasonable under the circumstances to leave the issue of timeliness on the margins of this controversy, excluding both its offensive and defensive capabilities, in order to focus on the more substantive merits of the appeal

[2] On October 20, 2000, an "Answer of Interested Party" was filed by an entity describing itself as the "NATO Indian Nation." This entity is not a federally recognized Indian tribe, has no interest that could be adversely affected by this Decision, and therefore has no standing to submit any filings in the 25 C.F.R. Part 2 appeals process. Accordingly, any positions taken by this entity will not be addressed in the context of this Decision.

and this Decision.

Ripeness: Inextricably related to the issue of timeliness discussed above is the issue of ripeness. To put the issue in the interrogative form, is the appeal of a decision to approve conditionally a business lease ripe at the time of such conditional approval, or must the appellants wait until the four enumerated conditions are fulfilled, including full analysis under the National Environmental Policy Act, 42 U.S.C. §4321 *et seq.*, and the Indian Long-Term Leasing Act, 25 U.S.C. §415, and the lease becomes final and effective so as to allow commencement of construction and operation of the proposed facility? A party is not "adversely affected" simply by being opposed to a certain issue and expending resources in furtherance of that opposition. Under the regulations, it is doubtful that the appellants here are likely to be "adversely affect[ed]" during the time the conditions to the lease are being completed, for the simple reason that the parties may in fact not succeed in the completion of the enumerated lease conditions and the business lease will ultimately never become effective. 25 C.F.R. §2.2 (definition of *Appeal*).

Conversely, upon successful completion of all the enumerated conditions, the appellants may then be in a position to be adversely affected, at which point their appeal would be ripe for consideration. Where, as here, appeals are filed prematurely in anticipation of the possibility of appellants being adversely affected, they are subject to denial. This is the position taken on more than one occasion by the Interior Board of Indian Appeals ("IBIA"). In *Pat Hayes v. Anadarko Area Director, BIA*, 25 IBIA 50 (1993), an appeal was dismissed by the Board as not ripe based upon appellant's denial of general assistance benefits where eligibility for such assistance had not yet been determined. In *Tule River Indian Reservation v. Area Director, Sacramento Area Office, BIA*, 17 IBIA 21 (1988), the Board dismissed an appeal as not ripe for lack of an appealable decision by the Area Director on the issue of whether appellant had implied agency under a self-determination contract to provide services to unenrolled Indians. Appellants in this matter cannot be adversely affected by the terms and provisions of a business lease that the BIA has not yet approved so that the parties cannot yet begin construction and operation of the facility. *State of Utah v. United States Department of the Interior*, 210 F.3d 1193 (10th Cir. 2000), and *State of Utah v. United States Department of the Interior*, Consolidated Case No. 2:98 CV 380 K (D. Utah, February 14, 2000). Accordingly, the appeal is premature.

Standing: The regulations at 25 C.F.R. Part 2 do not contain any prerequisite for standing to bring an appeal under this Part. Indeed, under the Definitions in §2.2, an "Appellant" is any interested party who files an appeal, "Appeal" is a request for review of an action or decision that is claimed to adversely affect the appellant, and an "Interested Party" is any person whose interests *could be* adversely affected by such an action or decision. In §2.3(a) appellants are persons who *may be* adversely affected by BIA actions or decisions. The judicial requirement of "standing" to bring a lawsuit in a court of law is typically narrower than the scope of the Part 2 regulations that pertain to an administrative appeal. Nonetheless, a reasonable and prudent standard along the lines of judicial standing needs to be applied to Part 2 appeals in order to eliminate from consideration prospective appellants with only the most tenuous and marginal connections to an agency action or decision–those who suffer virtually no adverse effects from these actions or decisions but who may disagree with

them purely on political or ideological grounds.

With regard to the judicial standards of standing, the Federal District Court for the District of Utah considered and discussed the standing of the appellants herein within the context of a case they filed in that court, *United States ex rel. Sammy Blackbear, Sr. v. Babbitt*, No. 2:99 CV 156K, subsequently consolidated with *State of Utah v. U.S. Dept. of the Interior, et al.* No. 2:98 CV 380K. In its Order of February 14, 2000, in which it dismissed the Complaint brought by Sammy Blackbear Sr., *et al.*, that Court found and stated under a subheading titled "Standing under the Administrative Procedures Act," that it was "arguable" that the Blackbear Plaintiffs would have standing under the APA. The Court did not decide the standing question, however, since it ultimately dismissed the case on ripeness grounds (as the same claim is being dismissed here).

Under the circumstances presented here, the concept of standing may be subject to elastic characteristics, depending upon who is making the analysis. Standing in a Federal court differs from standing before the IBIA (43 C.F.R. §4.331(a)), which in turn both differ from standing under 25 C.F.R. Part 2. While it may not be inappropriate to consider a legal standard of Federal court standing or IBIA standing to an appeal brought under 25 C.F.R. Part 2 where the issues arise from facts in common, so that one must show violation of a legally protected interest under 25 U.S.C. §415, for example, to be heard under Part 2, strictly speaking the Definitions in §2.2 and the Applicability provision in §2.3 circumscribe the standard of standing under Part 2. The difference between the standard of standing in IBIA proceedings and Part 2 was discussed by the IBIA in *Roland Redfield v. Acting Deputy Assistant Secretary–Indian Affairs*, 9 IBIA 174 (1982). There, the IBIA rejected the appellant's assertion that "[I]n order to have standing under this section [43 C.F.R. §4.331] he must show only that he is an 'interested party' as defined in 25 C.F.R. §2.1 and must merely show the decision will adversely affect him." *Id.* at 175. It is clear from this that not only is there a different standard for standing between IBIA appeals and 25 C.F.R. Part 2, but that the IBIA underscores the basic criterion under Part 2 appeals that the appellant need only show--as the language states--that the agency decision will adversely affect him. As noted above under Ripeness, there has been no agency action as yet that can adversely affect the appellants. Moreover, under well established law, tribal members lack standing to bring an administrative action for the tribe based on a personal assessment of what is or is not in the best interests of the tribe. *Frease v. Sacramento Area Director*, 17 IBIA 250 (1989).

Though the State of Utah is not the appellant in this appeal, but rather claims to be an "Interested Party" that seeks to join in and support the appellants, the State was already held to be without standing in an appeal before the IBIA regarding the same business lease in this matter. In *State of Utah v. Acting Phoenix Area Director*, 32 IBIA 169 (1998), citing the rule of standing governing administrative procedures, the IBIA dismissed the State of Utah's appeal on the basis that "a stranger to a lease of trust or restricted Indian lands is not within the zone of interests sought to be protected by 25 U.S.C. §415 (1994), and therefore has no right to intervene in, or appeal from, a Bureau of Indian Affairs proceeding under that section." 32 IBIA at 174. (The IBIA's decision was affirmed by the United States District Court for the District of Utah in *Utah v. United States Department of the Interior*, 45 F. Supp.2d 1279 (1999).) We conclude that this rule applies to all

those claiming to intervene in, join in, or support the appellants of record in this appeal who do so under color of 25 C.F.R. §2.2 as Interested Parties.

Exhaustion of Tribal Remedies: Owing to the fact that the appellants in this case are members of a minority or dissident faction of the Band, the question of the true or proper remedy for their grievances must be considered in light of their appeal under Part 2. Such a consideration may not be applicable in circumstances where the aggrieved party to an agency action or decision as set forth in 25 C.F.R. §2.2, §2.3(a), or §2.8 were other than enrolled members of the tribe or band whose interests the agency's action or decision affected. Due to the long-standing policy of the BIA (upheld by the IBIA, as noted below) to avoid interference into tribal politics and decision making, where the official government of a tribe resolves to undertake a certain action, and that action is challenged by another group or faction within that tribe, the BIA encourages any controversy or disagreement between them to be settled within the context of the tribal judiciary or council. Here, the appellants bypassed any attempt at formal resolution of the controversy within the tribal context, either through appointment of a judge or arbitrator or through a hearing before the General Tribal Council. It is clear that the General Tribal Council acting in an adjudicative capacity would have had the jurisdiction to consider such an appeal from the appellants, based on wording in Title 1, Chapter 1 of the Band's law and order code which speaks in Section 3(A) of persons "under the jurisdiction of the Skull Valley Goshute Tribal Court" and in Section 3(B) whose heading is "Duty of the Court," both of which anticipate judicial review. Moreover, it is probable under proposed Title 2, Chapter 10 of the Band's law and order code on "Written Rules of Court," which is expressly referred to in Title 1, that a judicial hearing by an appointed judge would have afforded another, similar opportunity to do the same, even though there is no existing tribal court within the Band's reservation at this time.

The principle of judicial exhaustion within tribal judicial forums is a creation of the Federal courts, and is often applied to litigants who seek the jurisdiction of Federal district courts because they seek to avoid tribal courts. The landmark decision in the Federal case law was *National Farmer's Union Insurance Companies v. Crow Tribe*, 471 U.S. 845 (1985). There, the insurance company sought to enjoin a default judgment against a state school district, arguing that the tribal court lacked jurisdiction over the district. The Supreme Court held that while Federal court jurisdiction did exist under applicable statutes, exercise of that jurisdiction must be deferred until the tribal court itself had ruled upon the company's jurisdictional challenge and its own inherent jurisdiction to hear the case. This case was followed two years later by *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), where the issue was whether diversity jurisdiction should be exercised over a request for declaratory relief by an insurer regarding its obligations under one of its auto policies. Again, the Supreme Court held that proper deference to the tribal court was warranted to determine its own jurisdiction, and remanded to the district court to dismiss or stay proceedings until such determination was made. In both instances, and in the cases that have followed since, the prevailing concept is that the tribal court is the first to be able to resolve issues over which it has primary jurisdiction, and another tribunal must defer to the tribal court to allow that court to make the initial determination as to whether it has the jurisdiction to resolve the issues.

The IBIA has adopted the concept of tribal judicial exhaustion, and has applied it to appellants

who appeal agency actions under 25 C.F.R. §2.3. In *Ken Mosay and Mary Washington v. Minneapolis Area Director, Bureau of Indian Affairs*, 27 IBIA 126 (1995), the IBIA considered an appeal from a decision of the Minneapolis Area Director recognizing tribal election results where the appellants had failed first to seek redress in a tribal forum. The Board, in discussing the exhaustion principle, stated there that

> Appellants have not attempted to challenge the election in tribal court. Therefore, the tribal court has had no opportunity to rule on the extent of its jurisdiction. In National Farmer's Union Insurance Cos. v. Crow Tribe, 471 U.S. 845, 857 (1985), the Supreme Court cautioned that a Federal forum should stay its own hand in order to allow a tribal court a "full opportunity to determine its own jurisdiction." This requirement is a component of the broader rule requiring exhaustion of tribal remedies. *The Board follows this rule*, declining to consider issues which belong before a tribal forum, e.g., Flores v. Acting Anadarko Area Director, 25 IBIA 6 (1993) (tribal disenrollment), and sometimes abstaining from a case entirely where it finds that primary jurisdiction lies with a tribal court.
> At 130-131(emphasis added)

The IBIA has followed this rule consistently, as is evidenced by the frequency of its application in cases brought before the Board. See *inter alia*, *Displaced Elem Lineage Emancipated Members Alliance v. Sacramento Area Director, Bureau of Indian Affairs*, 34 IBIA 74 (1999); *Guy Madison and Clifford Jones v. Acting Portland Area Director, Bureau of Indian Affairs*, 33 IBIA 278 (1999); *Liane Johnson v. Billings Area Director, Bureau of Indian Affairs* 32 IBIA 90 (1998); and *Johannes Wanatee, Sr. v. Acting Minneapolis Area Director, Bureau of Indian Affairs*, 31 IBIA 93 (1997).

The case at issue, however, is neither before a Federal district court nor the IBIA, but rather before the consideration of the Western Regional Director of the Bureau of Indian Affairs as an appeal under 25 C.F.R. Part 2. Nonetheless, given that the exhaustion of tribal court remedies is a principle that will confront appellants in any further appeals as a threshold issue, the same analysis must apply at this level of appeal as well. In this matter, where one group of tribal members objects to actions taken by their tribal government, the appropriate initial remedy is not a Part 2 appeal but rather one within the context of the tribe, a remedy never sought here. We conclude that there must be a nexus of continuity between all levels of review of any issue, and to exclude any treatment or discussion of an issue at the Part 2 appeal level that will possibly be fatal upon further appeal would constitute a disservice to the IBIA and any Federal court, should the appeal survive to that level. We conclude, furthermore, that appellants have failed to seek and to exhaust their tribal forum remedies, which is sufficient grounds for denial and dismissal of this appeal, as are the ripeness and standing grounds noted above.

Allegations of Impropriety and Bribery: Paragraph 5 of appellants' Statement of Reasons submitted pursuant to 25 C.F.R. §2.10 makes allegations against the Secretary of the Interior of his failure to address "issues of impropriety" and "serious questions of irregularity concerning the entire negotiation and finalization process" of the business lease. These allegations in the Statement of

Reasons are not specific, but rather general. No names are provided, no dates, no places, and no specific acts are set forth by the appellants to corroborate or substantiate these allegations. It is further alleged that the Secretary had prior knowledge of such improprieties which are vaguely described as "unlawful acts," "uninvestigated and unresolved allegations of bribery and corruption with respect to the Purported Lease Agreement," and "uninvestigated and unresolved allegations of criminal and civil violations of tribal members' civil and property rights" in the Statement of Reasons, at Paragraph 5(a) and (b).

Given the vagueness and generality of these allegations and the Secretary's purported prior knowledge of them, there can be no adequate response to them on the merits, but only a commensurate general denial of such prior knowledge of the allegations. In addition to denying any prior knowledge of any such activity by the Band's officials, there are two further considerations that need to be addressed relating to this issue. First, the Band's law and order code contains a prohibition against bribery by its elected officials. Title 1, chapter 2, §5 of that code, titled "Bribery," makes it a criminal offense to give or offer money or "anything of value to another person with corrupt intent to influence another in the discharge of his duties." The appellants were arguably under an obligation to bring such charges as they believed were actionable against such Band officials as they believed were guilty pursuant to this code section within the context of the tribal judicial system. Moreover, the appellants' allegations against Band officials, if true, fall within the scope of criminal offenses, while appeals under 25 C.F.R. Part 2 are strictly within the area of civil law where criminal violations cannot properly be addressed. The proper redress for such criminal behavior is a court of competent jurisdiction. This was not done by appellants here, and these allegations are being raised now in the Part 2 appeal for the first time, thus violating not only the precept of bringing actions in the proper forum, but also the principle of exhaustion of tribal judicial remedies and providing additional rationale for dismissal of this appeal for failure to comply therewith.

Second, the Secretary has in fact twice conveyed to proper law enforcement agencies information and allegations that came to his attention during the course of his review of the business lease. The Secretary conveyed to the Federal Bureau of Investigation and to the Office of the Inspector General, Department of the Interior, in March of 2000 and again in January of 2001 certain documents and data related to allegations made by certain of the appellants and their supporters against tribal officials regarding bribery and official corruption. Those agencies then undertook to investigate the information so conveyed, and as of this time the allegations that bribery, corruption, and other actionable offenses had been committed by officials of the Band in connection with the business lease are under active investigation by those agencies. The Secretary, upon such conveyance of this information and these allegations, took no position on the accuracy or reliability thereof, but simply conveyed the information in furtherance of his fiduciary duties toward the trust asset which was the subject of the business lease. Accordingly, the introduction of these specific facts in light of the appellants' general allegations of the Secretary' failure to act impels the conclusion that the allegations made in Paragraph 5 of the Statement of Reasons are false and inaccurate.

Authority of the Tribe's General Council: The appellants raise an issue in their Statement of Reasons that concerns the authority of the Band, or alternatively the Executive Committee of the

General Council, to enter into the business lease in question. The principal issue concerns the election or grant of authority by the General Council for the Band to enter into the business lease with PFS for the storage of nuclear waste on the reservation. This issue necessarily involves voting procedures within the tribal context and the related matters of notice, what constitutes a majority of the General Council, and the true will of the people.

The reservation of the Skull Valley Band of Goshute Indians was established by two Executive Orders in the years 1917 and 1918, pursuant to an 1864 treaty between the United States and the "Shoshoni-Goship Indians." This reservation constitutes 17,444 acres, and the Band exercises inherent and delegated jurisdiction over the Band's members and over nonmembers who are within its exterior boundaries. The Band does this through a traditional form of government by the General Council which is comprised of all the members of the Band who are 18 years of age or older. There is in addition to the General Council an Executive Committee, elected by the members at a meeting of the General Council, that is responsible for the daily and routine business of the Band and whose authority is circumscribed by resolutions of the General Council. Major decisions that affect the health and welfare of the Band are made by the General Council in regular and special meetings.

The appellants have alleged in their Statement of Reasons two specific failures of the Secretary in Paragraphs 3 and 4(c), as follow:

> The Secretary has failed to ensure that the Purported Lease Agreement was the subject of deliberation by a meeting of the Tribal General Council and that Purported Lease Agreement was thereby properly approved, or that the purported Tribal representatives acted with proper authority, despite BIA knowledge that there have been problems in this area, especially with respect to resolutions being issued without a proper Tribal General Council meeting, without an informed consideration of issues, without a valid quorum or majority vote, and not in accordance with Tribal governmental methods and procedure. (Paragraph 3)
>
> A majority of the members of the Tribal General Council...have, in any case never been in attendance at any duly called, properly constituted Tribal General Council meeting, with a chance to properly deliberate, in accordance with tribal procedures, the authorization of such a lease of Tribal trust lands and waiver of tribal sovereign powers. (Paragraph 4(c))

The narrow question presented by the appellants here is whether the Secretary has an affirmative duty to oversee the internal decision-making processes of tribes. This is a duty considerably different from the Secretary's duty to review, and approve or deny leases of trust lands pursuant to 25 U.S.C. §415 and 25 C.F.R. Part 162.

Where a *prima facie* showing exists that a tribal governing body is acting legitimately under color of tribal law and its actions affect a trust asset, it is not clear absent actual knowledge by the

Secretary of malfeasance by that governing body that the Secretary has an affirmative duty to look beyond the actions of that body. *See, Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) ("Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation." (Emphasis added.)) As was stated in the section *supra* on exhaustion of tribal remedies, the "long-standing policy of the BIA [is] to avoid interference into tribal politics and decision making." Here, there has been no compelling showing of malfeasance, or even misfeasance, but rather only general allegations of a failure of the General Council to act with authority in entering the business lease, and a corresponding failure of the Secretary to oversee the actions of the General Council in this regard.

In this matter, the Regional Director relies on three basic documents to conclude that the business lease was entered into legitimately and pursuant to the authority of the General Council. The first of these documents is General Council Resolution #79-08, dated November 24, 1979, in which the General Council acknowledged "...the need to delegate some of its authority to the elected leaders (Executive Committee) in order to facilitate the transaction of Band business," and formally resolved in numbered paragraph two thereof "That the Executive Committee is authorized to negotiate contracts and agreements with Federal, State and local governments, and private companies and individuals." The second of these documents is General Council Resolution #89-12, dated November 18, 1989, which sets forth the procedures of all meetings of the General Council, requires a minimum of two such meetings each year, and significantly states by resolution that "Tribal Business conducted within the General Council can and will be carried out by the Tribal members present at these meetings, representing the majority of the eligible members of the Band." Accordingly, the Band has determined that a *majority of members present* at any General Council meeting, rather than a majority of voting members of the General Council, will be sufficient to authorize significant proposals that come to a vote during any General Council meeting. The third and last of these documents is General Council Resolution # 97-12A, dated December 7, 1996, in which a vote was taken by the General Council by which a majority of Band members authorized the entering into the business lease with PFS for construction of a facility for the storage of nuclear waste. Taken together, these three documents, in addition to the BIA's long-standing policy to avoid interference into internal tribal decision-making, necessarily compels the conclusion that the Secretary must accept the Band's decision to enter this business lease as a legitimate and proper exercise of tribal sovereignty and authority, and to do otherwise would constitute an unacceptable infringement on that sovereignty and authority.

Environmental Issues: In their Statement of Reasons, the appellants allege that the Secretary failed in his duty to ensure proper compliance with the applicable environmental laws governing the leasing of Indian trust lands. Specifically, in paragraphs 23, 26, 34, and 35, allegations were made of the Secretary's supposed failure to consider, *inter alia*, health and safety generally, environmental justice, the National Environmental Policy Act ("NEPA") process, and the feasibility of removing the spent nuclear fuel from the site.

The Nuclear Regulatory Commission, the BIA, the Bureau of Land Management, and the Surface Transportation Board are currently analyzing the potential impacts on the quality of the human environment of their proposed actions concerning this facility and alternatives in an environmental impact statement ("EIS"). The Draft EIS was issued in June of 2000, and addressed many of the issues raised by the appellants. The appellants, and many other parties, submitted comments on the Draft EIS as part of the mandatory NEPA process, including comments concerning many of the same issues raised in this appeal. These agencies are preparing the Final EIS, which addresses all of those comments. By law, any challenge to the adequacy of the EIS must await the issuance of the Final EIS and Record of Decision. *Kleppe v. Sierra Club*, 427 U.S. 390, 406 n. 15 (1976); *Committee against Railroad Relocation v. Adams*, 471 F. Supp. 142, 144-45 (E.D. Ark. 1979). Accordingly, it is for the same reasons set forth *supra* in the discussion of "Ripeness" that issues of environmental concern should not be discussed in this 25 C.F.R. Part 2 Decision.

Additional Claims of Appellants: The foregoing has sought to categorize the basic elements of both the claims made by appellants in their Statement of Reasons under 25 C.F.R. §2.10, and our responses thereto, into the broad headings as they appear above. Most of the 36 numbered paragraphs of appellants' Statement fall into one or another of these headings, yet there are certain specific allegations and claims that need to be discussed that did not fall into such categories, in order to treat them all comprehensively. In addition to those that fall within one of the categories above, which are the majority, there are those that are too vague and general to warrant discussion, such as No. 27, which purports to describe a failure of the Secretary "... to consider, or properly document consideration of, any, let alone all, relevant factors with respect to these required issues." [3]

As to claim No. 4, alleging that copies of the business lease with PFS were never made available to members of the General Council, there is credible evidence to deny this and assert that such copies were made available. At the meeting where the PFS business lease was discussed, both BIA and tribal officials maintain that copies of the business lease were available next to the sign-in sheets on the table at the entrance to the meeting room, but that very few were picked up by those tribal members in attendance. At that meeting the lease terms were discussed, as well as the leasing process itself. No one present at the meeting indicated that he or she did not a copy of the lease, which is a matter of record. As to claim Nos. 6 and 7, pertaining to surety bonds and other protections, these are simply inaccurate. The business lease does in fact provide for the very things described by appellants as being absent from the lease. As to claim No. 10, regarding the Secretary's failure to protect the Tribe's sovereign power, waivers of sovereign immunity (as appear with limitations in the business lease) are within the Tribe's discretion, not the Secretary's. Moreover, sovereignty is an inherent principle, and not one that needs any affirmative defense by third parties; it is a tool to be exercised or not by the Tribe alone in furtherance of its best interests. As to claim

[3] In any event, whether the appellants' claims are those that fall within an existing category analyzed above, or whether they are treated as separate issues below, or whether they are too vague and general to fit into a category or be separately treated, we have considered each and every enumerated claim in the appeal in reaching his Decision. Further, given the disposition of this case on standing, ripeness, and exhaustion of tribal remedies grounds, it is unnecessary for each enumerated claim to be separately discussed in this section.

No. 13, pertaining to an alleged failure of the Secretary to ensure rental increases, this again is simply inaccurate. Rental adjustments in the lease are tied to the market for this facility, and will increase significantly over time.

Certain other claims and allegations, which comprise the bulk of the remainder, are predicated upon an absence of any affirmative duty of the Secretary to commit or omit some act or action, and therefore cannot be responded to in any meaningful way except to state that no such obligation exists for the Secretary. An example of this is claim No. 2, which assumes that the Secretary has an affirmative duty to be "involved in the negotiation process" of tribes and third parties entering leases of trust lands. There is no authority for this proposition, because there is no such affirmative duty or obligation. Secretarial involvement in the negotiation of tribal leases would, in fact, conflict with the literal language of 25 U.S.C. §415 which provides that Indian lands "...may be leased by the Indian owners." Although a lease requires Secretarial approval, the statute does not contemplate or require the Secretary to be a party to lease negotiations. *See, United States v. Algoma Lumber Company*, 305 U.S. 415 (1939) (approval does not make the United States a party to tribal contracts). Secretarial intrusion into the leasing process would also run afoul of both the authority given to tribes at 25 U.S.C. §476(c) which gives tribes absolute authority over the leasing of tribal lands, and of the policy enunciated in the Indian Self-Determination Act, 25 U.S.C. §450a. Similarly, the appellants allege in claim No. 14 that the Secretary failed "...to consider the need for competitive bidding." There is neither an affirmative duty or obligation of the Secretary to consider nor to require competitive bidding in the leasing of trust lands pursuant to statute, regulation, or any theory of fiduciary trustee responsibility.

Conclusion: Based upon the foregoing, the appellants' appeal under 25 C.F.R. Part 2 is hereby denied based on ripeness, standing, and failure to exhaust tribal remedies. Although these grounds are the sole and sufficient basis for this denial, appellants have also failed to establish - based on their general, broad, and alternatively vague allegations - that the Superintendent acted in any manner that was not within reason or the scope of his authority with respect to the subject business lease.

Please be advised that the appellants have a right to appeal this decision pursuant to 25 C.F.R. §2.19. A Notice of Appeal must be submitted within 30 days of receipt of this Decision. The signed appeal must be mailed to the Interior Board of Indian Appeals, 4105 Wilson Boulevard, Arlington, Virginia 22203, in accordance with the regulations set forth at 43 C.FR. §§4.310 - 4.340 (copy enclosed). If possible, a copy of this Decision should be enclosed with the Notice of Appeal. Appellants must send copies of the Notice of Appeal to: (1) the Assistant Secretary–Indian Affairs, MS 4140 MIB, Department of the Interior, 1849 C Street, N.W., Washington, D.C. 20240; (2) each Interested Party known to the appellants; and (3) this office. The Notice of Appeal sent to the Interior Board of Indian Appeals must certify that copies of the Notice of Appeal have been sent to these parties. Anyone not represented by an attorney may request assistance from this office in the preparation of further appeals. If the appellants file a Notice of Appeal, the Interior Board of Indian Appeals will notify them of all further appeal procedures.

If no appeal is timely filed, this Decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a Notice of Appeal.

Sincerely,

WAYNE C. NORDWALL

Regional Director

Enclosure

cc: See Attached Distribution List

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SKULL VALLEY BAND

EXHIBIT -- CC

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

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

DECLARATION OF DAVID L. ALLISON
PURSUANT TO 10 C.F.R. § 2.790

David L. Allison, being duly sworn, states as follows under penalty of perjury:

1. I am the Superintendent of the Uintah & Ouray Agency of the Bureau of Indian Affairs in Fort Duchesne, Utah. I have served in this position since April 1995. Among my responsibilities as Superintendent is the government-to-government relationship between the U.S. Department of the Interior and the Skull Valley Band of Goshute Indians. I am responsible for federal programs administered by the Bureau of Indian Affairs for the benefit of the Skull Valley Band, and federal funds to support these federal programs.

2. The governing body of the Skull Valley Band is the General Council, which is made up of all adult members of the Band. In my position as Superintendent I am often requested to attend General Council meetings of the Skull Valley Band on the Skull Valley Reservation in Utah. I attended General Council meetings held on August 25, 2001, and October 13, 2001.

3. At the General Council meeting held on August 25, 2001, there was a

recall petition circulated by Band Secretary Rex A. Allen among adult tribal members in an effort to remove Chairman Leon D. Bear and Vice-Chair Lori B. Skiby from their positions on the Skull Valley Band Executive Committee. The only copy of the recall petition, ostensibly circulated before, during, and after that meeting, which I have seen does not contain the signatures of a majority of the adult members of the Skull Valley Band.

4. At meetings, facilitated by an attorney in the Office of the Salt Lake City Field Solicitor's Office, held on September 4, 11, 12, and 13, 2001, attended by Chairman Bear, Vice-Chair Skiby, and Secretary Allen, and others representing those officers of the Band, the need to call another meeting of the General Council to address leadership, recall, and election issues was discussed.

At the meeting on September 13, 2001, it was agreed that a General Council meeting, previously scheduled by Rex Allen for September 22, 2001, be postponed until October 13, 2001. Upon presentation of the final Notice, to be sent to all adult members of the Tribe, typed on Tribal stationery, Mr. Allen refused to sign it, stating that he would wait until the following Monday (September 17, 2001) to sign or not sign. He wanted the weekend to discuss the matter with his associates. Chairman Bear stated that if Mr. Allen did not sign the agreed Notice of General Council Meeting scheduled for October 13, 2001, that he and the Vice-Chair would sign the Notice and mail it.

When Mr. Allen did not make contact with me on the following Monday, as he had agreed to do, the Chairman, Leon Bear, and the Vice-Chair signed the Notice and mailed it to all members of the General Council.

5. I understand that Rex Allen sent a Notice to some, but not all, General Council members calling a meeting for September 22, 2001. However, I was not invited to that meeting, and consequently was not present. I understand that the September 22, 2001, meeting was held, but I have not seen satisfactory evidence that the September 22, 2001 meeting was a duly-called meeting of the General Council.

6. I understand that an election of officers on the Executive Committee was conducted at the September 22nd meeting, but I have seen no satisfactory evidence that there were any vacancies to be filled for those positions, which are elective offices of the Band, and which had previously been filled in the course of regularly-scheduled elections of the Band.

7. After the meeting of September 22, 2001, and in response to much of the confusion generated by reports of an election held at that meeting, Chairman Bear and Vice-Chair Skiby mailed an additional Notice, dated October 2, 2001, again notifying all members of the General Council of the Special General Council meeting to be held on October 13, 2001.

8. I was invited to, and did attend, the October 13, 2001, General Council meeting. I counted 42 adults present, most of whom, I believe, were members of the Band. I believe that a majority of the adult members of the Band were present.

9. At the October 13, 2001, meeting there were discussions among members of the General Council on the appropriate procedures to be followed for recall of Band officers, on the events since the General Council meeting of August 25, 2001, and of the need to clarify the leadership of the Skull Valley Band. A resolution was introduced at that meeting to reaffirm the validity of the results of the election of Chairman Bear and Vice-Chair Skiby at the regularly scheduled election of November 2000. A majority of those present at the meeting were in favor of that resolution.

10. Based on my experience as a BIA Superintendent responsible for matters involving the government of the Skull Valley Band, and my observation of the relevant events since August 25, 2001, and for purposes of the provision of federal programs and federal funds, I see no basis at this time for dealing with anyone other than Chairman Leon Bear and Vice-Chair Lori Skiby as continuing as duly elected officers of the Executive Committee of the Skull Valley Band.

11. My understanding is that Secretary Rex Allen resigned his position as Secretary on September 22, 2001, but I have no documentation of that reported

resignation.

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

Executed on October 24, 2001.

David L. Allison

Superintendent

Uintah & Ouray Agency

Bureau of Indian Affairs

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SKULL VALLEY BAND
EXHIBIT -- DD

IN REPLY REFER TO:
Superintendent

MAR 25 2002

Mr. Leon D. Bear, Chairman
Skull Valley Band of Goshute Indians
Skull Valley Reservation, #808
3359 South Main Street
Salt Lake City, UT 84115

Re: Skull Valley Band of Goshute Indians Leadership

Dear Chairman Bear:

This responds to your March 22, 2002 request to draw-down the Band's FY 2002 P.L. 93-638 funds and to various inquiries from certain parties regarding the position of the Bureau of Indian Affairs (BIA) as to who are the duly elected officials of the Skull Valley Band of Goshute Indian Band (Band) in Central Utah. In the past year or two, the BIA has been subject to inquiries from numerous parties on this issue, most with a specific agenda in mind. Some wish to see a certain person or persons retain or continue in a leadership capacity of tribal government, others wish to see those same persons vanquished, while others still wish to create and exploit for various reasons, an on-going controversy concerning the Band leadership. All of these interests appear to have one thing in common, they have arisen due to strong positions taken for or against the Band's lease of land to Private Fuel Storage, LLC, (PFS), for the purpose of storing spent nuclear fuel on the Band's reservation.

The position of the BIA, with respect to internal tribal disputes and political factionalism, is to stay out of such disputes altogether. Indian tribes are sovereign entities under the law and must settle their leadership issues internally. There are effectively no Federal remedies available for the resolution of internal tribal politic disputes, as held in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). Accordingly, it is neither within the authority, nor the mission of the BIA to decide, arbitrate, select or acknowledge one political faction of a Federally recognized Indian Tribe over another. It is for the band itself to do so, however difficult that may be and however long that may take. The BIA's sole role in such an endeavor is to assist tribes where possible, but not to impose its decisions upon them.

In light of the layered controversies now swirling around the Band, and in response to the inquiries made, the BIA, with help of the Office of the Solicitor, has made an exhaustive study of the Band's governing documents and ordinances, including those provided by the legal counsel for the various factions, which purport to identify and confirm the existing tribal government, and the various allegations and accusations from diverse parties who both challenge the leadership and
make alternative claim to it. The outcome of this study is that the BIA has discovered no event since the Band entered the lease with PFS that conclusively alters the Band's choice of Leon Bear as the Chairman of the General Council and its Executive Committee. HOWEVER, as noted above, it is ultimately up to the Band to decide this issue.

The BIA's more immediate concern is the impending draw-down of funds under one of the Band's existing P.L. 93-638 contracts. The BIA provides many services to tribes and its members. P.L. 93-638 allows tribes to contract to provide those services, in lieu of the BIA providing these services. Services provided by the Band under its P.L. 93-638 contract include; Scholarships, Jobs Placement Training, Social Services, Indian Child Welfare and Aid to Tribal Governments. Generally, when this occurs, the BIA no longer has staff to perform the contracted functions. The BIA also recognizes the overriding intent of P.L. 93-638 is to allow a tribe to make decisions affecting its interests and the interests of its members at the local level. In only the most egregious of situations will the BIA seek to terminate a P.L. 93-638 contract and reassume the responsibility to deliver the contracted services. Thus, frequently in circumstances where an internal tribal dispute arises, BIA will continue to fund P.L. 93-638 contracts as long as it appears the services are being delivered. This is based on the rule in *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983), that the BIA should not interfere in internal tribal disputes but may have to recognize someone in the tribe to deal with on an interim basis in order to conduct Federal business. Accordingly, unless and until the Band clearly and unequivocally provides the BIA with evidence as to changes in its leadership, the BIA will continue, for P.L. 93-638 contract and other limited governmental purposes, to conduct its routine business with and provide for the delivery of those services through Mr. Bear as the Chairman and Lori Skiby as Vice-Chairman.

Sincerely,

Allen J. Ruspah

Superintendent

cc: Western Regional Director
State of Utah

SKULL VALLEY BAND

EXHIBIT -- EE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

DECLARATION OF LEON D. BEAR

Leon D. Bear, being duly sworn, states as follows under penalty of perjury:

1. I have served as Chairman of the Executive Committee of the Skull Valley Band of Goshute Indians (the Band) since 1996. At a duly called meeting of the General Council of the Skull Valley Band on November 25, 2000, I was reelected to a four-year term as Chairman.

2. My family and I reside on the Skull Valley Reservation. I am the natural born son of the late Richard Bear, who also served as the Chairman of the Skull Valley Band. My uncle, Lawrence Bear, has also served as Chairman, and my family and I have held a variety of offices on behalf of the Skull Valley Band for many years, and I am experienced in dealing with a wide variety of transactions on behalf of the Skull Valley Band.

3. Also elected at the November 2000 General Council meeting was Lori Skiby as Vice-Chair. Rex Allen served as Secretary of the Executive Committee from his reelection in November 1998 until the fall of 2001. Shareen Wash was appointed, at a

duly called General Council meeting on October 13, 2001, to serve as Acting Secretary for the remainder of the 4-year term which expires in November 2002.

4. Shareen Wash resides on the reservation. She is the oldest daughter of the late Lester Wash, who signed an affidavit on September 11, 1997, with the Nuclear Regulatory Commission, stating that he was a member of Ohngo Gaudadeh Devia, an organization evidently created to oppose the siting of the Private Fuel Storage Facility on the Skull Valley Reservation. This project has been the subject of vigorous debate within the Skull Valley Band community for years. Both opponents and proponents of the project reside on the reservation. But the opponents of the project represent a minority of Band members. More than 40 adult members of the Band, a clear majority, signed a General Council Resolution, dated December 7, 1996, supporting the project and authorizing the Executive Committee to execute a lease with Private Fuel Storage, L.L.C. (PFS).

5. Pursuant to the authority of the December 7, 1996, Resolution and other tribal laws, the three members of the Executive Committee, including myself, executed the First Amended and Restated Lease with PFS on May 20, 1997. This amended lease superseded an earlier lease document which was provided to the Bureau of Indian Affairs (BIA) for its review, comments, and approval. After receipt of BIA comments, the amended lease was negotiated and executed by the parties.

6. The BIA Superintendent, David Allison, signed the approval of the PFS lease on May 23, 1997. The lease, by its terms, is conditioned on the issuance of an

appropriate license from the Nuclear Regulatory Commission (NRC), completion of the necessary environmental analysis by the NRC and BIA under the National Environmental Policy Act, the issuance of an Environmental Impact Statement, and modification of the lease to include mitigation measures identified in the record of decision.

7. The Executive Committee of the Skull Valley Band is responsible for receipt, deposit, and reinvestment of revenues received by the Skull Valley Band, including revenues received from PFS under the terms of the lease. The Executive Committee is also responsible for the distribution and expenditure of those revenues on behalf of the Skull Valley Band.

8. When revenues are received from PFS, they are deposited in bank accounts of the Skull Valley Band, into which other non-PFS revenues are also deposited.

(a) Attached as Exhibit A to this Declaration is a copy of the first page of a July 2001 Statement of an Account of the Skull Valley Band at Bank One. The Account Number has been redacted from this copy to protect against unauthorized withdrawals. In October 2001, an unauthorized withdrawal was made from another Skull Valley Band account at another bank by persons whose names were not on the signature cards for that account.

(b) Also redacted from Exhibit A is the line referring to checks and withdrawals from this account. Page 2 of the Statement details those checks and withdrawals, but it is not part of this Exhibit A because these are confidential transactions of the Skull Valley Band, disclosure of which is not permitted by resolution of the General Council of the Band.

(c) At the bottom of Exhibit A under "Deposits/Credits" there are four credits to the account listed. The deposits dated "06-15" and "07-03" are revenues received from PFS. The other entries represent revenues of the Skull Valley Band which were not received from PFS.

9. Periodic distributions of shares of Skull Valley Band revenues are made to members of the Band. These are known as dividends. These dividends are distributed, and the amounts of the dividends are determined, only after an annual budget has been prepared. Individual dividend payments can include revenues from various revenue sources, including PFS revenues.

(a) Members of the Skull Valley Band may borrow money from the Band to pay other debts, and for various other purposes. The amounts of these member loans, and other debts owed the Band by individual members, may be deducted from dividend checks paid to members of the Band.

(b) Attached as Exhibit B to this Declaration is a copy of a Skull Valley Band dividend check, dated October 18, 1999, and the attached check stub. The name of the payee has been redacted to protect privacy. The Bank Account umber has been redacted for the reasons stated in Paragraph 8(a), above. The check stub shows three sources of revenues from which the dividend payment has been made. It also shows a deduction for a loan made to the individual member of the Band.

10. By Resolution of the General Council of the Skull Valley Band confidentiality is required in the treatment of Band business. It is my opinion that disclosure of PFS revenues (and other revenues, for that matter) and the allocation, distribution, expenditure, and use of those revenues to a person not a member or representative of the Skull Valley Band, or to an outside entity, would violate tribal law and custom.

11. The limited disclosure of the redacted documents as exhibits to this Declaration is provided solely for the purpose of demonstrating to the Nuclear Regulatory Commission that an accounting of the receipt, allocation, distribution, expenditure and use of PFS revenues by the Skull Valley Band, as ordered by the Atomic Safety and Licensing Board, would intrude on internal tribal affairs and would necessarily involve disclosure of other revenues of the Band and numerous transactions of the Band involving non-PFS revenues, and would jeopardize the privacy and expectation of confidentiality of many members of the Skull Valley Band in their transactions with the

Band. By submission of this Declaration to the NRC, and the attached exhibits, I am not waiving any right of the Skull Valley Band to claim confidentiality of any other matter of tribal business.

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

Executed on March 4, 2002.

Leon D. Bear, Chairman, Executive Committee

Skull Valley Band of Goshute Indians

SKULL VALLEY BAND

EXHIBIT -- FF

GENERAL COUNCIL
RESOLUTION NO. 99-04E

SKULL VALLEY RESERVATION
UINTAH AND OURAY AGENCY

APRIL 24,1999

SKULL VALLEY BAND OF GOSHUTE INDIANS

WHEREAS, the Skull Valley Band of Goshutes of the Skull Valley Indian Reservation, hereafter referred to as the "Band" is recognized as an Indian Tribe by the Secretary of the Interior for federal purposes, and

WHEREAS, the Band conducts its Tribal business by means of the General Council comprised of the majority of the eligible membership of the Band in attendance at the General Council Meeting and recognizes the need to delegate its authority to the Executive Committee (the Governing Officials) in order that the day to day Tribal business can be conducted and carried out, and

WHEREAS, the General Council is responsible for making major decisions involving important changes in the Band's manner of conducting its business within the reservation, and

WHEREAS, historically the Executive Committee is the record keeper of the General Council meetings and any information or documents developed, and

WHEREAS, due to the types of economic activity and the State of Utah prying into Tribal Affairs, the Band has to protect themselves against the possibility of proprietary or confidential documents and information being produced to outside factions that can do harm to the Band or any economic activity within the reservation lands.

NOW, THEREFORE BE IT RESOLVED all Tribal documents produce for the Tribal Government, Meetings and or Information shall be considered CONFIDENTIAL AND OR PROPRIETARY and shall not be produce or represented to any outside entities and or factions, unless authorized to do so in writing by the Executive Committee or General Council.

COPY

BE IT FURTHER RESOLVED that any Tribal members or individual that produces documents, materials or information shall be considered an unlawful act and shall be dealt with by the offenses dictated on this resolution;

First Procedure	Knowledge to be brought before Executive Committee, to be determine and investigated
Second Procedure	Notify individual or individuals of offense
Third Procedure	Provide evidence and proof to General Council to make a determination and act upon the violation
Forth Procedure	Appeal, the defendant should provide the Council with evidence and proof to question the charges brought before the Council
Fifth Procedure	By order of the General Council, the Executive Committee is provide the resolution to incorporate the decision of the General Council

First Penalty Grounds	Community Service - Determined by the counts of violations and acts
Second Penalty	Monetary Payment - Determined by the cost of investigation and the loss of the economic value of the proprietary information or documents violations
Third Penalty	Minimal Tribal rights - Determined by the seriousness of the violation and on the evidence
Forth Penalty	Terminate Tribal rights - Determined on the evidence that must prove that the violation was committed beyond a doubt.

All Tribal Members are to conduct themselve accordingly and protect the Band from outsiders.

COPY

April 24,1999

Print Name	Signature
Leslie Wash	Leslie Wash
LAVEIDA M WASH	Laveida M Wash
Dwayne M Wash	Dwayne M Wash
Kristen Bear	KB
Tim Bear	
Theresa F Bear-Jim	Theresa F Bear-Jim
Garth J. Bear Jr	Garth J Bear Jr
Delano Moon	Delano Moon
Ronald Blackbear	Ronald Blackbear
Ronald Blackbear	Ronald Blackbear
Elaine V. Bear	Elaine V. Bear
MATT BEAR	
Miranda Wash	Miranda Wash
Charlotte Craig	Charlotte Craig
Jennifer Bear	Jennifer Bear
Megan J. Bear Hyen	
Edwin Clover	Edwin Clover
Gina Moon	Gina Moon
Shareen V. Wash	Shareen V. Wash
Laine Thom	Laine Thom

General Council Resolution
No. 99-04E
Page 4

April 24,1999

Print Name	Signature
Stephen Bear	[illegible]
Cecelia M. Ottogary	[illegible]
Diane Ottogary	[illegible]
Violet [illegible]	[illegible]
Tiffiny A Allen	[illegible]
[illegible] Bear	[illegible]
Lori B. Skibby	[illegible]
[illegible] Moon	[illegible]
Gary Bear	[illegible]
Adena Bunch	[illegible]
Rex A. Allen	[illegible]
[illegible]	Mary J Allen
Lloyd D Bear	[illegible]

CERTIFICATION

I, hereby certify that General Council Resolution No. 99-04E was adopted by the Skull Valley Band of Goshute Indians at a duly called General Council Meeting on the Skull Valley Indian Reservation, on this 24 day of April, 1999, in accordance to General Council Resolution No. 89-12 dated November 18,1990 for the conduct of its meetings, all adult members of the Band having been duly notified of this meeting. The resolution was adopted by 42 representing the majority of the adult members of the Band present at this meeting; 33 FOR, 9 AGAINST.

Official Seal
Attested

OFFICIAL SEAL
SKULL VALLEY BAND OF GOSHUTE

By: _____
Skull Valley Official or Officer

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before The Commission

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the Intervenor Skull Valley Band's Opening Brief Seeking Reversal of February 22, 2002, Memorandum and Order (LBP-02-08) of the Atomic Safety and Licensing Board (except for two one-page exhibits, which are the subject of an Amended Motion for a Protective Order) and the Band's Amended Motion for Protective Order 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 5th day of April, 2002.

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