

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

PRIVATE FUEL STORAGE, L.L.C.

(Independent Spent  
Fuel Storage Installation)

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Docket No. 72-22-ISFSI

NRC STAFF'S REPLY TO OHNGO GAUDADEH DEVIA'S ("OGD")  
BRIEF SEEKING AFFIRMANCE OF LBP-02-8

Robert M. Weisman  
Counsel for NRC Staff

May 13, 2002

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INTRODUCTION

Pursuant to the Commission's "Memorandum and Order" in *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-08, 55 NRC \_\_\_\_ (March 7, 2002) (slip op.), and its scheduling Order dated March 27, 2002, the NRC staff ("Staff") hereby replies to the "[OGD] Brief Seeking Affirmance of the February 22, 2002 Memorandum and Order (LBP-02-08) of the Atomic Safety and Licensing Board Concerning OGD Contention O (Environmental Justice)," dated May 3, 2002 ("OGD Answer"). As explained below, OGD (a) erroneously attributes to the NRC a fiduciary duty ("trust responsibility") toward the Skull Valley Band of Goshute Indians ("Skull Valley Band" or "Band"); (b) incorrectly asserts that the Band, by intervening in this proceeding, consented to the NRC's exercising jurisdiction over the Band's distribution of funds to Band members; and (c) does not otherwise present any reason why LBP-02-8 should be affirmed. For the reasons set forth below and in the Staff's brief of April 5, 2002,<sup>1</sup> the Commission should reverse LBP-02-8.

BACKGROUND

On February 22, 2002, the Atomic Safety and Licensing Board in this proceeding issued its decision in LBP-02-8, in which it granted in part, and denied in part, the "Applicant's Motion For

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<sup>1</sup> "NRC Staff's Brief on Appeal From the Licensing Board's Decision in LBP-02-08, Concerning Contention OGD O (Environmental Justice)" (Apr. 5, 2002) ("Staff Opening Brief").

Summary Disposition of OGD Contention O - Environmental Justice,” dated May 25, 2001, filed by Private Fuel Storage, L.L.C. (“PFS” or “Applicant”). *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-8, 55 NRC 171 (2002). On March 7, 2002, the Commission issued CLI-02-08, in which it granted a motion for directed certification of the Board’s decision, granted requests to stay the effect of that decision, and established a schedule for filing briefs on appeal. See CLI-02-08, *supra*. On April 5, 2002, in accordance with the Commission’s Order in CLI-02-08 and its March 27 scheduling Order, the Applicant, Intervenor Skull Valley Band, and the Staff filed their opening briefs on appeal from the Board’s decision.<sup>2</sup> In addition, *amicus curiae* Bureau of Indian Affairs (“BIA”) of the Department of Interior filed its brief urging reversal of LBP-02-8 on April 15, 2002.<sup>3</sup> The Staff described the background of the proceeding in the Staff’s Opening Brief (at 1-5), and that background need not be reiterated here.

#### ARGUMENT

I. OGD Incorrectly Claims That the Federal Interest in Not Interfering With the Skull Valley Band’s Self-Governance May be Balanced Against Other Governmental Interests Here.

OGD claims that “the federal government’s interest in non-interference with matters of tribal self-government” must be balanced against its “interest in ensuring that its actions are consistent with norms of environmental justice[,]” its “trust responsibility to Indian tribes, and [its] general interest in regulating away from reactor storage of nuclear waste[.]” OGD Answer at 8-9. OGD also asserts that the Federal government has a distinct “obligation of trust in its dealings with ‘dependent and sometimes exploited’ Tribes.” *Id.* at 9. Attributing such obligations to the NRC,

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<sup>2</sup> See “Applicant’s Brief Seeking Reversal of LBP-02-8 and Requesting Summary Disposition of Contention OGD O” (Apr. 5, 2002); “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” (Apr. 5, 2002).

<sup>3</sup> See “Brief of [BIA] in the Commission’s Interlocutory Review of the Licensing Board’s Decision in LBP-02-08 Concerning Contention OGD O (Environmental Justice)” (Apr. 15, 2002).

OGD claims that this “trust responsibility . . . outweighs the policy of non-interference with tribal self-governance in certain situations.” *Id.* at 10. Although OGD acknowledges the rule against interfering with tribal self-governance laid down by the Supreme Court<sup>4</sup> (see *id.* at 8), as explained below, OGD incorrectly attributes a “trust responsibility” to the NRC, and no other federal interest warrants the NRC’s interference in the Band’s self-governance here.

A. OGD Incorrectly Attributes to the NRC a Fiduciary Duty to the Skull Valley Band.

OGD argues that the NRC should interfere in the Skull Valley Band’s internal affairs based on the Federal government’s “trust responsibility” to the Band. *Id.* at 8-14. The cases on which OGD relies to ascribe a “trust responsibility” to the NRC involved lands, money, or other property held in trust for Tribes by the Federal government, pursuant to treaty or statute, or specific Federal statutes defining the relationship between the United States and the Tribes with respect to criminal conduct.<sup>5</sup> The NRC, however, is not holding property in trust for the Skull Valley Band, nor does any statute, including the Atomic Energy Act of 1954, as amended (“Act”), from which the NRC derives its authority, require the NRC to act as a fiduciary with respect to an Indian Tribe. Therefore, these cases do not apply to the NRC.

The Act, in particular, does not impose any fiduciary duty on the Commission toward an Indian Tribe, in exercising its licensing responsibilities or otherwise. Indeed, to the extent that OGD

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<sup>4</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

<sup>5</sup> See *United States v. Mason*, 412 U.S. 391, 391-94 (1973) (payment of estate tax on trust corpus); *Seminole Nation v. United States*, 316 U.S. 286 (1942) (claims against United States for funds pledged under treaties, or granted by Congress in statutes); *United States v. Pelican*, 232 U.S. 442, 444-49 (1913) (murder of Indian on Indian lands held in trust by United States); *Choctaw Nation v. United States*, 119 U.S. 1, 2-5 (1886) (claims against United States based on treaties); *United States v. Kagama*, 118 U.S. 375 (1886) (murder of Indian on reservation); *Cherokee Nation v. Georgia*, 30 U.S. 1, 15-16 (1831) (request for injunction to prevent Georgia’s seizure of Indian lands denied because Cherokee Nation was not a “foreign nation” for jurisdictional purposes); *Navajo Nation v. United States*, 263 F.3d 1325, 1327-28 (Fed. Cir. 2001) (claim regarding royalty rates for coal on Indian lands); *Coast Indian Community v. United States*, 550 F.2d 639, 641-42 (Ct. Cl. 1977) (claim for value of right-of-way across Indian lands); and *Ottawa Tribe v. United States*, 166 Ct. Cl. 373, 375-77 (1964) (claim with respect to lands subject to treaty provisions).

seeks to impose conditions in a license or order that might be issued to PFS to control disbursement of PFS payments to the Band or any individual, such conditions are beyond the NRC's authority. See *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-96-7, 43 NRC 235, 268-69 (1996) (denial of request for order directing licensee to establish fund to benefit those assertedly suffering from cancer). Similarly, the National Environmental Policy Act of 1969, as amended ("NEPA"), imposes procedural requirements on the Commission for considering the environmental impacts of proposed actions, and does not impose any fiduciary duty on the Commission. Therefore, OGD's argument that "[t]he record before the Board and the Commission clearly evinces 'warnings' and 'indications' of corruption, financial misdealing, etc." and that the "federal government's interest in not encroaching on matters of self-governance does not excuse it from its trust responsibility to investigate or permit proof on such warnings" (OGD Answer at 11) is without merit. Rather, these claims must be reviewed through Tribal processes, or, to the extent allegations of criminal conduct have been made, by referral of those allegations to the appropriate law enforcement authorities.

B. OGD Incorrectly Asserts that Other Governmental Interests Outweigh the Federal Interest in Not Interfering With the Skull Valley Band's Self-Governance.

OGD asserts that "the federal government has an interest in regulating the storage of spent nuclear fuel" and that "[s]uch an interest must be balanced against the government's interest in encouraging tribal self-governance[.]" *Id.* at 12. The Skull Valley Band, however, has not applied for an NRC license; rather, the applicant here, PFS, would be responsible for meeting NRC requirements applicable to construction and operation of an independent spent fuel storage installation.<sup>6</sup> The Band is merely intervening in the proceeding in support of the Applicant. Thus, the Band need not demonstrate compliance with NRC licensing requirements, the NRC is not

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<sup>6</sup> Any challenge to the validity of the Tribe's lease with PFS must be resolved by the Tribe, BIA, or courts with jurisdiction over that issue.

otherwise asserting its authority over the Band, and the NRC's regulation of spent fuel storage does not require resolution of the Tribe's internal disputes. Accordingly, the NRC's licensing interests do not outweigh the Federal government's interests in encouraging tribal self-governance.

In arguing that other governmental interests must be weighed against the Federal government's interest in respecting Tribal sovereignty (*see id.* at 11-12), OGD cites the decision in *Puyallup Tribe, Inc. v. Dep't of Game of Washington*, 433 U.S. 165 (1977) as an example to be followed in the instant proceeding. *Id.* at 12. Based on the decision in *Puyallup*, OGD concludes that "where a tribe's right to exercise self-government is found to be subordinate to a contrary interest, the federal government considered, then subordinated its interest in not interfering with tribal self-government." *Id.* As set forth below, however, *Puyallup* does not support OGD's position.

OGD incorrectly characterizes the decision in *Puyallup*. There, the Supreme Court stated:

Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe. This Court and the commentators all concur. . . .

[T]he portions of the state-court order that involve relief against the Tribe itself must be vacated in order to honor the Tribe's valid claim of immunity.

*Puyallup*, 433 U.S. at 172-73 (citations omitted). While the Court in *Puyallup* permitted the state court to exercise its authority over individual Tribe members (*id.* at 173), that decision provides no basis here for disregarding the Skull Valley Band's sovereignty in managing its internal affairs.<sup>7</sup>

In addition, OGD provides no reason why the NRC cannot discharge its NEPA obligations to consider environmental justice matters and, at the same time, respect the Band's sovereignty

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<sup>7</sup> OGD also describes three Federal statutes, claiming that these enactments of Congress demonstrate that "the policy of tribal self-governance is not absolute." OGD Answer at 12-13. This argument ignores the fact that Congress has plenary authority to limit, modify or eliminate the powers of local self-government that the tribes otherwise possess. *See Santa Clara Pueblo*, 436 U.S. at 56. Congress, of course, can give whatever weight it sees fit to considerations of Tribal sovereignty in crafting statutory provisions governing a given subject.

with respect to the financial matters raised in the Board's decision in LBP-02-8. Specifically, OGD offers no support under NEPA for that portion of the Board's decision that identified a sub-group within the Band as "disadvantaged." See LBP-02-8, 55 NRC at 189-91. Indeed, identification of such a sub-group lacks a foundation under NEPA. See Staff Opening Brief at 19-22. OGD has not set forth any reason why this portion of the Board's decision should not be reversed.

In the last portion of this argument, OGD asserts, without support, that *Santa Clara Pueblo* "deals with a matter of true tribal self-governance, not a matter similar to the case at hand." OGD Answer at 13. This attempt to distinguish *Santa Clara Pueblo* is without merit. The issues under consideration in the instant proceeding include (a) a dispute regarding tribal leadership (*see id.* at 3, n.1), and (b) the manner in which the Band has handled payments received from PFS (*see id.* at 6). As explained in the Staff's Opening Brief, these precise matters have been found to be matters of true tribal self-governance. See Staff Opening Brief at 5-14. Specifically, the Court of Appeals for the Tenth Circuit ruled that certain Tribal leaders' "alleged failure to acknowledge their recall and misuse of tribal funds . . . were 'clearly intratribal disputes' for which [the plaintiff] would have to seek tribal remedies." *Tillett v. Lujan*, 931 F.2d 636, 642 (10<sup>th</sup> Cir. 1991); *see* Staff Opening Brief at 11-12. OGD's Answer is without merit in this regard.

II. The Skull Valley Band's Intervention in this Proceeding Does Not Amount to Its Consent to be Sued With Regard to Internal Distribution of PFS Payments Within the Band.

OGD states that the Licensing Board's decision in LBP-02-8 does not improperly infringe on the Band's sovereignty based on its claim that "the Band voluntarily intervened in this proceeding . . . and voluntarily submitted itself to the jurisdiction of the [ASLB] and the [Commission]." OGD Answer at 6, 14. As explained below, however, the decisions upon which OGD relies do not support its position, and intervention in a proceeding before the Licensing Board is not akin to intervention in a civil lawsuit under the Federal Rules of Civil Procedure.

The judicial decisions that OGD cites do not support its position because they involved facts significantly different from those at issue here, or rest on significantly differing legal foundations.<sup>8</sup> None of the cases involve intervention in an administrative proceeding; rather, all the cases involved civil proceedings in which the presiding court had the authority to impose obligations or grant relief to any of the opposing parties involved therein. In contrast, the NRC's only action in this proceeding is to either (1) grant the PFS application, with or without license conditions, or (2) deny the application. Inasmuch as the NRC lacks authority to direct the Applicant to disburse funds to particular organizations or individuals (see *Yankee*, CLI-96-7, *supra*), the Licensing Board similarly has no authority to interfere in the distribution of funds within the Skull Valley Band.

The decision in *McClendon v. United States*, 885 F.2d 627 (9<sup>th</sup> Cir. 1989), which OGD cites, is particularly instructive. As set forth in that decision:

[T]he "terms of [a sovereign's] consent to be sued in any court define that court's jurisdiction to entertain the suit." Thus, a tribe's waiver of sovereign immunity may be limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts.

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<sup>8</sup> See *Puyallup*, 433 U.S. at 172-73 (court lacked jurisdiction over Tribe); *In re White*, 139 F.3d 1268, 1271 (9<sup>th</sup> Cir. 1998) (participation in bankruptcy proceeding to collect debt acts as waiver of immunity); *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10<sup>th</sup> Cir. 1987) (Tribe's filing of action was not consent to subsequent action), quoting *United States v. Testan*, 424 U.S. 392 (1976) (Tucker Act case not involving Indians; no right under Classification Act or Back Pay Act on which to base Court of Claims' jurisdiction); *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 771-774 (D.C. Cir. 1986) (Caddos and Delawares consented to Wichitas' suit, but Wichitas did not consent to Caddos' and Delawares' counterclaim); *Schnieder v. Dumbarton Developers, Inc.*, 767 F.2d 1007 (D.C. Cir. 1986) (suit did not involve Indians); *District of Columbia v. MSPB*, 762 F.2d 129, 132 (D.C. Cir. 1985) (suit did not involve Indians); *United States v. Oregon*, 657 F.2d 1009, 1014-16 (9<sup>th</sup> Cir. 1981) (Tribe intervened under Fed. R. Civ. P. 24(a)(2), with the status of original parties fully bound by all future orders); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10<sup>th</sup> Cir. 1980) (en banc) (Tribe levied tax on gas produced on Tribal land; expressly waived immunity in tax ordinance); *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143, 147 (8<sup>th</sup> Cir. 1970) (explicit provision in Tribe's corporate charter permitted quiet title action); and *Maryland Cas. Co. v. Citizens' Nat'l Bank*, 361 F.2d 517, 520-21 (5<sup>th</sup> Cir. 1966) (express provision of Tribal incorporation allowed suit; Tribe immune to garnishment).

*Id.* at 630 (emphasis added; citation omitted). There, the Ninth Circuit emphasized that “tribal initiation of litigation alone does not establish waiver with respect to related matters,” citing *Jicarilla Tribe*. *Id.*

In *Jicarilla Tribe*, a Tribe was joined under Rule 24 of the Federal Rules of Civil Procedure, and was thus directly subject to substantive orders issued by the court. In this proceeding, however, the Skull Valley Band intervened in support of the Applicant, and is not directly affected by the ASLB’s substantive decisions (as PFS is). Rather, the Band intervened “anticipating that it can only improve or maintain its *status quo*” (see *Wichita*, 788 F.2d at 773; OGD Answer at 16); it did not waive its immunity with respect to matters relating to self-governance. Moreover, OGD’s assertion that the manner in which funds are distributed internally within the Band must be considered in resolving Contention OGD O (see OGD Answer at 19-20) is erroneous, because that issue is clearly outside the scope of the contention as admitted (see Staff Opening Brief at 22-25).

III. OGD’s Other Arguments Do Not Compel a Different Result.

A. OGD Incorrectly Characterizes the Draft Environmental Impact Statement (DEIS).

OGD incorrectly states that “[t]he Staff has concluded [in the DEIS] that the proposed facility passed environmental impact review because [its] negative environmental impacts . . . on the Reservation [of the Skull Valley Band] . . . would be more than offset by the environmental benefits that would flow to Band members as a result of lease payments to Band members and the consequent increase in Band members’ standard of living.” OGD Answer at 6, 7, 13, and 18. The Staff did not make such a statement in the DEIS. Further, the character of the distribution of PFS payments within the Band was not considered in the DEIS or FEIS. The Staff did not evaluate in the DEIS or FEIS how individual members of the Band would be affected by the PFS project—nor was the Staff required to do so under NEPA.<sup>9</sup> Rather, the Staff considered the economic benefits

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<sup>9</sup> Accordingly, OGD’s conclusion that the Staff “presupposes that Band members have  
(continued...)

that would accrue to the Band as a whole (as well as the environmental costs and benefits to the Band and the larger community).<sup>10</sup> The Staff concluded, *inter alia*, that “no disproportionately high and adverse impacts would occur to the Skull Valley Band or to minority and low income populations living near the proposed rail routes from the proposed action.” DEIS § 6.2, at 6-28.

B. OGD’s Claim That The Skull Valley Band Is an Indispensable Party Is Irrelevant.

OGD claims that the Band is indispensable with respect to Contention OGD O, and that if the Band is immune from suit, then the contention cannot be resolved and the application must be rejected. OGD Answer at 20-21. As set forth above, however, the contention does not properly encompass the issue of how funds might be distributed within the Band. Thus, there is no need to resolve Contention OGD O on the basis proposed by OGD, and OGD’s claim that the Skull Valley Band is an indispensable party is irrelevant. Moreover, under 10 C.F.R. § 2.701(b), only the Staff is required to be a party to proceedings under 10 C.F.R. Subpart G. Further, it is not necessary for a minority or low income population to be represented in a proceeding for the Staff to perform and document an environmental justice review. In view of the above, the NRC can resolve Contention OGD O whether the Band is a party or not.

C. PFS Need Not Provide The Requested Information.

OGD asserts that PFS should be required to disclose “all the payments it has made at any point thus far to the Skull Valley Band or to any of its members” and a “schedule of future payments to be made if the facility is approved.” *Id.* at 21-22. Contention OGD O, as admitted, does not require consideration of this information. Thus, there is no reason why PFS should provide it.

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<sup>9</sup>(...continued)

been and will continue to receive equal benefits from the lease” and “assum[ed] . . . that all Band members are receiving financial benefits of the PFS lease” (OGD Answer at 19) is entirely erroneous.

<sup>10</sup> In addition, the financial benefits to the Band were but one of the potential benefits of the proposed PFS facility (“PFSF”) considered by the Staff. See DEIS § 9.4.3, at 9-13.

D. OGD Does Not Raise Any Genuine Issues of Material Fact Requiring a Hearing.

Significantly, OGD itself admits that the issue raised in Basis 1 of Contention OGD O—which the Licensing Board retained in LBP-02-8—is the disparate impacts on “minority and low income populations compared to the overall population.” OGD Answer at 4. The issues raised by OGD, however, do not involve that comparison. Rather, OGD seeks to compare impacts solely with respect to separate subgroups within the Band.

OGD asserts that factual disputes remain that require hearings to resolve.<sup>11</sup> *Id.* at 22-23. OGD, however, has not identified a single issue of material fact that would remain for resolution if LBP-02-8 is reversed with respect to the distribution of funds within the Band. All of OGD’s assertions clearly relate to distribution of funds within the Band. Accordingly, these assertions would not be in issue should the Commission determine to reverse the Board with respect to this matter.

CONCLUSION

For the reasons set forth above, OGD’s Answer does not warrant the Commission’s affirming the Board’s decision in LBP-02-8, and the Staff submits that it should be reversed.

Respectfully submitted,

**/RA/**

Robert M. Weisman  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 13<sup>th</sup> day of May 2002

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<sup>11</sup> The factual disputes OGD would have the NRC resolve relate to (a) funds received from PFS (see “Declaration of Sammy Blackbear,” attached to “[OGD’s] Response to [PFS’] Motion for Summary Disposition of OGD Contention ‘O,’” dated June 28, 2001, ¶¶ 53.d, 258, 283.c, 327, and 334); (b) asserted purchases by Leon Bear (*id.*, ¶¶ 354-55); (c) distribution of funds to specified Band members (*id.*, ¶¶ 275-76 and 340-47); and (d) grants from “HUD” (*id.*, ¶¶ 53.g and 375-76).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S REPLY TO OHNGO GAUDADEH DEVIA'S ("OGD") BRIEF SEEKING AFFIRMANCE OF LBP-02-8" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 13<sup>th</sup> day of May, 2002:

Michael C. Farrar, Chairman\*  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555  
(E-mail copy to [MCF@NRC.GOV](mailto:MCF@NRC.GOV))

Office of the Secretary\*  
ATTN: Rulemakings and Adjudications  
Staff  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555  
(E-mail copies to [SECY@NRC.GOV](mailto:SECY@NRC.GOV)  
and [HEARINGDOCKET@NRC.GOV](mailto:HEARINGDOCKET@NRC.GOV))

Dr. Jerry R. Kline\*  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555  
(E-mail copy to [JRK2@NRC.GOV](mailto:JRK2@NRC.GOV))

Office of the Commission Appellate  
Adjudication  
Mail Stop: 16-C-1 OWFN  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Dr. Peter S. Lam\*  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555  
(E-mail copy to [PSL@NRC.GOV](mailto:PSL@NRC.GOV))

James M. Cutchin, V\*  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555  
(E-mail to [JMC3@NRC.GOV](mailto:JMC3@NRC.GOV))

Atomic Safety and Licensing Board  
Panel  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Jay E. Silberg, Esq.\*\*  
Ernest Blake, Esq.  
Paul A. Gaukler, Esq.  
Sean Barnett, Esq.  
Shaw Pittman  
2300 N Street, N.W.  
Washington, DC 20037-8007  
(E-mail copy to jay\_silberg,  
paul\_gaukler, sean\_barnett, and  
ernest\_blake@shawpittman.com)

Tim Vollmann, Esq.\*\*  
3301-R Coors Road N.W.  
Suite 302  
Albuquerque, NM 87120  
(E-mail copy to [tvollmann@hotmail.com](mailto:tvollmann@hotmail.com))

Leon Bear, Chairman  
Skull Valley Band of Goshute Indians  
3359 South Main  
Box 808  
Salt Lake City, Utah 84115

Denise Chancellor, Esq.\*\*  
Fred G. Nelson, Esq.  
Laura Lockhart, Esq.  
Utah Attorney General's Office  
160 East 300 South, 5th Floor  
P.O. Box 140873  
Salt Lake City, UT 84114-0873  
(E-mail copies to dchancel, fnelson,  
llockhar, and jbraxton@att.State.UT.US,  
adminag@xmission.com)

Connie Nakahara, Esq.\*\*  
Utah Dep't of Environmental Quality  
168 North 1950 West  
P. O. Box 144810  
Salt Lake City, UT 84114-4810  
(E-mail copy to  
cnakahar@att.state.UT.US)

Diane Curran, Esq.\*\*  
Harmon, Curran, Spielberg & Eisenberg  
1726 M Street, N.W., Suite 600  
Washington, D.C. 20036  
(E-mail copy to  
[dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com))

John Paul Kennedy, Sr., Esq.\*\*  
David W. Tufts, Esq.  
Durham, Jones & Pinegar  
111 East Broadway, Suite 900  
Salt Lake City, UT 84105  
(E-mail copy to [dtufts@djplaw.com](mailto:dtufts@djplaw.com))

Joro Walker, Esq.\*\*  
Land and Water Fund of the Rockies  
1473 South 1100 East, Suite F  
Salt Lake City, UT 84105  
(E-mail copy to [utah@lawfund.org](mailto:utah@lawfund.org))

Paul C. EchoHawk, Esq.  
EchoHawk Law Offices  
151 North 4th Avenue, Suite A  
P.O. Box 6119  
Pocatello, Idaho 83205-6119  
(E-Mail copies to: paul, larry and  
[mark@echohawk.com](mailto:mark@echohawk.com))

**/RA/**

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Robert M. Weisman  
Counsel for NRC Staff