

May 13, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before The Commission

May 16, 2002 (3:37PM)

In the Matter of)
)
PRIVATE FUEL STORAGE, L.L.C.)
)
(Private Fuel Storage Facility))

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Docket No. 72-22

ASLBP No. 97-732-02-ISFSI

APPLICANT'S RESPONSE TO INITIAL BRIEF OF OHNGO GAUDADEH DEVIA

Pursuant to the Nuclear Regulatory Commission's ("NRC" or "Commission") March 7, 2002 Memorandum and Order,¹ as revised,² Applicant Private Fuel Storage, L.L.C. ("Applicant" or "PFS") replies to Ohngo Gaudadeh Devia's ("OGD") Brief³ seeking affirmance of the Atomic Safety and Licensing Board's ("Board") February 22, 2002 Memorandum and Order ("OGD O Order").⁴

I. ARGUMENT

A. OGD Has Not Demonstrated A Basis For A Hearing On Environmental Justice Issues.

OGD's Brief fails to address virtually any of the environmental justice arguments set

¹ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-08, 55 NRC ____, slip op., Memorandum and Order (March 7, 2002).

² Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), Order, Docket No. 72-22-ISFSI (March 27, 2002).

³ Ohngo Gaudadeh Devia ("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) (May 3, 2002) ("OGD Brief").

⁴ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-08, 55 NRC ____, slip op.; Memorandum and Order (Ruling on Applicant's Motion for Summary Disposition of "Contention OGD O" -- Environmental Justice) (February 22, 2002).

forth in PFS's April 5, 2002 Brief,⁵ any one of which mandates the reversal of the OGD O Order and the granting of summary disposition on all of contention OGD O. For example, OGD claims that members of the Skull Valley Band ("Band") have not received equal financial benefits under the lease entered into between PFS and the Band. OGD Brief at 19. OGD has not, however, explained how this is an appropriate subject for an environmental justice inquiry. Executive Order 12898 requires a Federal agency to identify and address "disproportionately high and adverse human health or environmental effects . . ." on a minority or low-income population.⁶ The Executive Order does not create substantive rights, Louisiana Energy Services, L.P. (Claiborne Enrichment Center, CLI-98-3, 47 NRC 77, 102 (1998) ("LES"), but merely underscores existing law, which in the case of the NRC is the National Environmental Policy Act ("NEPA"). Id. NEPA, however, is an environmental statute, id., citing Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983), and not a civil rights law. LES, CLI-98-3, 47 NRC at 106. Accordingly, an investigation by the NRC into the Band's internal distribution of funds would be far afield from the NRC's expertise and the purpose of Executive Order 12898. PFS Brief at 9-11.

In addition, despite the fact that Executive Order 12898 expressly applies to minority or low-income "populations" as a whole,⁷ the Board made the unprecedented decision to focus an environmental justice review on OGD as a "subgroup of the larger community." OGD O Order at 23. OGD fails to even address this issue. Considering a few individuals to be a "population" for environmental justice purposes would create an unworkable standard wholly inconsistent

⁵ Applicant's Brief Seeking Reversal Of LBP-02-08 And Requesting Summary Disposition Of Contention OGD O (April 5, 2002) ("PFS Brief").

⁶ Executive Order 12898 of February 11, 1994 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), 59 Fed. Reg. 7629 (1994).

⁷ Executive Order 12898 at Section 1-101.

with the express language and the purpose of Executive Order 12898. PFS Brief at 11-16. In fact, OGD's members are not even all members of the Band, nor do its members all live near the site of the proposed Private Fuel Storage Facility ("PFSF"). PFS Brief at 12 n. 38. OGD's Brief does not dispute these facts, nor does OGD present any argument or explanation as to why OGD (or some of its members) should be recognized as a "population" under Executive Order 12898.

PFS also has pointed out that, contrary to the Commission's rules requiring specificity in contentions,⁸ the three adverse impacts cited by the Board as underlying the proposed environmental justice inquiry -- namely operational noise, visual intrusion and cultural insult -- were never raised in contention OGD O. PFS Brief at 17-21. OGD's Brief does not, nor could it, argue that these alleged impacts were properly raised. In fact, although on numerous occasions OGD states that the PFSF will have "negative environmental impacts," see, e.g., OGD Brief at 5, 7, 18, nowhere does OGD's Brief so much as identify the environmental impacts that OGD's members allegedly will suffer.

Moreover, even if the Commission finds that OGD properly raised these adverse environmental impacts, the Final Environmental Impact Statement ("FEIS") and the Draft Environmental Impact Statement ("DEIS") prepared in this proceeding fulfill the Executive Order's requirement that such impacts (if any) be identified and addressed.⁹ OGD's Brief does not challenge the fact that the FEIS and the DEIS satisfy that requirement. OGD merely claims that the DEIS concluded that the PFSF "passed environmental impact review" because the environmental impacts would be "more than offset by the environmental benefits that would

⁸ 10 C.F.R. §2.714(b)(2); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988).

⁹ PFS Brief at 22-25; see also Applicant's Motion For Summary Disposition Of OGD O Environmental Justice (May 25, 2001).

flow to Band members as a result of lease payments.” OGD Brief at 18; see also id. at 5. This is not a correct reading of the DEIS (or the FEIS). The DEIS recognized the lease payments as only one benefit of the PFSF. The DEIS (and the FEIS) also pointed out that the proposed project would have many other positive economic and societal benefits, and that PFS would implement mitigation measures. See, e.g., DEIS at §§ 4.5.2.8, 4.8.2.8, 4.6.5, 6.2.1.2, 8.2.1, 8.3. In addition, OGD claims that the DEIS’s conclusion “presupposes that Band members have been and will continue to receive equal benefits because of the lease.” OGD Brief at 19. The DEIS, however, nowhere states that the benefits of the project must fall equally on each member of the Band.

In its Brief, OGD also claims: “[a]t the heart of OGD Contention O is the assertion that the negative environmental impacts on the Band members and the Reservation are not outweighed by the financial benefits to the Band members.” OGD Brief at 7. This, however, is not the relevant standard for an environmental justice review. There simply is no substantive requirement under Executive Order 12898 or NEPA that a proposed project’s financial benefits must exceed its costs. PFS Brief at 25-29. Not surprisingly, OGD again provides no citation to support its claim that the economic benefits of the PFSF must outweigh its costs.

OGD also cites to various paragraphs of a declaration from Mr. Sammy Blackbear which purportedly discuss facts submitted by OGD that remain undisputed. OGD Brief at 22-23. All of these paragraphs relate to matters regarding the Band’s internal governance and internal financial matters; none has anything to do with whether the PFSF will have disproportionately high adverse environmental effects on a disadvantaged population. Nor do those paragraphs even mention any of the three claimed adverse impacts which the Board found underlie OGD’s environmental justice claim.

For these reasons, there is no basis for the Commission to conduct a hearing regarding environmental justice matters in this proceeding, and the Commission should grant PFS's motion for summary judgment and dismiss all of contention OGD O.¹⁰

B. The Hearing Required By The Board Would Intrude On Sovereign Tribal Matters.

1. OGD's Brief Ignores Well-Established Principles Regarding Non-Interference In Tribal Matters.

In support of the Board's Order, OGD relies on Executive Order 12898 and ignores the applicable Executive Order which mandates respect for tribal sovereignty.¹¹ In addition, it is well-settled that only an act of Congress can limit such sovereignty.¹² Neither the Board nor OGD cites any treaty or other Congressional mandate which authorizes the Board's examination of the Band's financial matters. Indeed, although OGD argues that the federal government has demonstrated a willingness to intrude on tribal matters in other areas by issuing legislation purportedly allowing such intrusion, OGD points to no such statute in this case because no such statute exists. OGD Brief at 12-13.

In seeking to justify the Board's Order, OGD also turns federal Indian law on its head by arguing that the trust doctrine not only allows, but requires, the Board to delve into internal Band

¹⁰ OGD argues that, at a minimum, PFS should be required to make certain financial information available to affected parties. OGD Brief at 21-22. Since there is no basis to conduct an environmental justice hearing, the Commission should deny that request. Nor is there any suggestion as to how PFS's financial information could support OGD's allegation (even if relevant) as to unequal distribution of financial benefits to Band members.

¹¹ See Executive Order 13175 of November 6, 2000 (Consultation and Coordination with Indian Tribal Governments) 65 Fed. Reg. 67,249 (2000) as discussed in PFS's Brief at 9, 30. Notably, OGD does not attempt to respond to this Executive Order, perhaps because this Executive Order is directly on point in its requirement that federal agencies should interact with Indian tribes on a government-to-government basis and should not intrude into internal tribal affairs.

¹² "Congress possesses plenary power over Indian Affairs, including the power to modify or eliminate tribal rights. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 . . . (1978)." South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998).

matters. OGD creates an artificial balancing test that weighs the “trust responsibility,” “norms of environmental justice” (which OGD never defines), and the NRC’s need to regulate nuclear waste against “deference to a Tribal government’s ability to make its own laws” OGD Brief at 8-9. Congress and the courts, however, have authorized no such balancing test. In fact, rather than supporting OGD’s and the Board’s position, the trust responsibility and the cases cited by OGD actually support the principle of non-interference in tribal matters.

Unlike the paternalistic practices of the past, which OGD would resurrect, in recent years the federal trust doctrine has been used to promote tribal self-governance. As noted by OGD, Congress has enacted various statutes, such as 25 U.S.C. § 81 and 25 U.S.C. § 415, which pertain to Indian Tribes and their agreements with third parties. OGD Brief at 12-13. Although the Bureau of Indian Affairs may, as provided by statute and regulation, review agreements to ensure that the tribes received, among other things, fair compensation, the primary purpose of these acts is to promote tribal self-government by encouraging tribal self-determination and economic development.¹³

The applicable statute governing the lease entered into by PFS and the Band is 25 U.S.C. § 415. This statute -- not Executive Order 12898 or the case law cited by OGD -- regulates and controls tribal dealings with third parties. In § 415, Congress directs the Secretary of the Interior, not the NRC, to review Business Leases.¹⁴ That statute, however, does not give the Secretary of the Interior, much less the NRC, the authority to direct the disposition of the lease payments received by the Tribe. See Webster v. United States, 823 F. Supp. 1544, 1550 (D. Mont. 1992), aff’d, 22 F.3d 221 (9th Cir. 1994) (the tribe, not the federal government, negotiates

¹³ For example, a primary purpose of the revised 25 U.S.C. § 81 adopted in 2000 is to encourage Indian economic development. H. Rep. No. 106-501 at 1, reprinted in 2000 U.S.C.C.A.N. Leg. Hist. 69-70.

¹⁴ 25 U.S.C. § 415 and implementing regulations at 25 C.F.R. Part 162.

its own lease). The NRC should respect the limits which Congress has placed on federal intervention into tribal self-governance.

Moreover, the two cases, Seminole and Puyallup, cited by OGD as justifying the OGD Order's unprecedented attempt to control tribal affairs, OGD Brief at 10-12, instead illustrate the limits on federal involvement in internal tribal affairs. In Seminole, unlike in PFS's case, a treaty between the tribe and the federal government required the federal government to make per capita payments to individual tribal members of the Seminole Nation, and created a specific fiduciary duty of the Government to those individuals. Seminole Nation v. United States, 316 U.S. 286 (1942). In PFS's case, however, there is no similar treaty language or other federal law creating a requirement that payments be made directly to the Band's members. Seminole, therefore, simply does not apply. Puyallup supports the principle that the federal government does not interfere with the manner in which a tribe uses its resources. Puyallup Tribe, Inc. v. Dep't of Game of Washington, 433 U.S. 165 (1977). As in Seminole, the Puyallup court was interpreting a treaty and found that both the Puyallup Tribe and the State of Washington held certain fishing rights. The court in that case made it clear that the State had no say in how the Tribe allocated the fishing rights among its members: "The respondent [the state of Washington] has no interest in how the catch is allocated among the Indians." 433 U.S. at 178. The NRC, like the court in Puyallup, should refrain from involving itself in the internal financial matters and governmental decisions of the Band.

2. The Band's Intervention In The NRC Licensing Process Is Not A Waiver Of Its Sovereign Immunity.

The Commission should reject OGD's argument that the Band, by voluntarily submitting to the jurisdiction of the NRC, has waived its sovereign immunity as to internal tribal matters.

OGD Brief at 16-17. Unlike in the Wichita and Oregon cases cited by OGD,¹⁵ the Band is not a defendant in this proceeding. But more importantly, the Band's mere intervention in an NRC licensing proceeding does not bestow upon the Board any authority to examine the Band's internal financial matters which, as described above, are not relevant to environmental justice. In any event, OGD fails to mention that waivers of sovereign immunity are to be narrowly construed, and that there must be an express waiver of sovereign immunity by either the Congress or the tribe.¹⁶ Neither Congress nor the Band has made any such express waivers relevant to this proceeding.

In addition, other cases cited by OGD as supporting its waiver argument are not applicable. District of Columbia v. Merit Systems Protection Board, 762 F.2d 129 (D.C. Cir. 1985), does not have anything to do with Indian tribes, let alone addressing a waiver of tribal sovereign immunity. The court in District of Columbia refused to review a lower court's conclusion that the District's suit against the Merit Systems Protection Board was barred by sovereign immunity. Id. at 132. And In re White, 139 F.3d 1268 (9th Cir. 1998), merely stands for the standard bankruptcy proposition that, when a governmental agency tries to collect a debt in bankruptcy, the sovereign is bound by the court's allowance or disallowance of the creditor's claim. In re White acknowledges that the initiation of a lawsuit establishes consent to the

¹⁵ Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765 (D.C. Cir. 1986); United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981).

¹⁶ See, e.g., Maryland Cas. Co. v. Citizens' Nat'l Bank, 361 F.2d 517, 520 (5th Cir.), cert. denied, 385 U.S. 918 (1966) (congressional waiver is required); Fontenelle v. Omaha Tribe of Nebraska, 430 F.2d 143 (8th Cir. 1970) (express tribal waiver required). Recent Supreme Court precedent, ignored by OGD, further illustrates that waivers of tribal sovereign immunity are construed narrowly to protect tribal sovereignty. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509-10 (1991); Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc., 523 U.S. 751, 754 (1998).

adjudication of only that particular controversy, but does not stand for the proposition that the internal affairs of a sovereign entity would generally be open for adjudication.

In addition, contrary to OGD's claims, withholding of the Band's financial records would not affect the licensing process. The NRC rules do not mandate the involvement of the Band, which is the lessor of the land in this context. Although OGD claims that this financial information is critically important to resolving the alleged factual dispute concerning the Band's internal financial dealings, that argument is circular. See, e.g., OGD Brief at 6-7. OGD must demonstrate there are grounds for conducting an environmental justice hearing before it can claim that disclosure of any financial information is essential to that hearing.

Citing various "Rule 19"¹⁷ cases, OGD also claims, without explanation, that the Band's refusal to provide internal financial information is "analogous to cases where an action must be dismissed because of the tribunal's inability to exercise jurisdiction over an Indian tribe because of sovereign immunity." OGD Brief at 20. In Wichita, however, the Court was concerned with whether all of the tribes were actually parties and if so, whether they were indispensable. 788 F.2d at 772. There, the Court was resolving a dispute among three tribes over the allocation of funds among the tribes. Accordingly, the participation of all three tribes was essential. In addition, although the tribe in Tewa Tesuque v. Morton, 498 F.2d 240, 243 (10th Cir. 1974) was held to be an indispensable party because it was a party to the lease at issue, the court dismissed that action in part because the plaintiff class had an adequate remedy in that it could bring the

¹⁷ Fed. R. Civ. P. 19.

dispute before a tribal council and the court recognized that it should not interfere in internal tribal matters. Thus, the Rule 19 cases cited by OGD are inapplicable.¹⁸

II. CONCLUSION

For the foregoing reasons, PFS requests that the Commission reverse the Board's Memorandum and Order LBP-02-08 to the extent that Order set Contention OGD O for hearing. In addition, PFS requests that the Commission grant summary disposition with respect to Contention OGD O and dismiss the remaining aspect of that contention from this proceeding.

Respectfully submitted,



Jay E. Silberg
Ernest L. Blake, Jr.
Paul A. Gaukler
Michael G. Lepre
Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037
202-663-8000

Counsel for Private Fuel Storage, L.L.C.

May 13, 2002

¹⁸ The other cases relied upon by OGD did not turn on whether a tribe is an indispensable party: Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians, 94 F.3d 747, 749 (2d Cir. 1996) (affirming the district court's dismissal for "lack of a federal question.") and In re National Cattle Congress, 247 B.R. 259, 268-69 (Bankr. N.D. Iowa 2000) (court permitted the tribe to choose whether to pursue its Proof of Claim or alternatively to assert sovereign immunity in its Objection to the reorganization plan.)

**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))	ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Response To Initial Brief Of Ohngo Gaudadeh Devia was served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 13th day of May 2002.

Emil L. Julian, Assistant for
Rulemakings and Adjudications
Rulemaking & Adjudication Staff
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: hearingdocket@nrc.gov
(original and two copies)

Jeffrey S. Merrifield, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmmerrifield@nrc.gov

Richard A. Meserve, Chairman
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: Chairman@nrc.gov

Greta J. Dicus, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrdicus@nrc.gov

Edward McGaffigan, Jr. Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrmcgaffigan@nrc.gov

Nils J. Diaz, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrdiaz@nrc.gov

Michael C. Farrar, Esq., Chairman
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: MCF@nrc.gov

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

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

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

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

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

*Office of the Commission Appellate
Adjudication
Mail Stop: 16-G-15 OWFN
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(United states mail only)

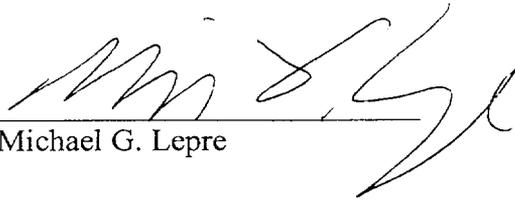
Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, Utah 84114-0873
e-mail: dchancel@att.state.ut.us

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

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

James M. Cutchin
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: jmc3@nrc.gov
(e-mail copy only)

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



Michael G. Lepre