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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before the 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 REPLY BRIEF
SEEKING REVERSAL OF FEBRUARY 22, 2002,
MEMORANDUM AND ORDER (LBP-02-08)
OF THE ATOMIC SAFETY AND LICENSING BOARD**

INTRODUCTION

On May 3, 2002, counsel for Ohngo Gaudadeh Devia (OGD) filed their answering 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). Notwithstanding that four briefs had been filed seeking reversal of LBP-02-08,¹ OGD's answering brief contains not one citation to any of those briefs, and is almost wholly unresponsive to the arguments made therein. Instead, OGD largely repeats, in a conclusory fashion, the rationale of the Board's Memorandum and Order which OGD asks the Commission to affirm. Consequently, the Skull Valley Band's Reply Brief will first briefly summarize the issues which OGD has failed to address, and

¹ Intervenor Skull Valley Band's Opening Brief, NRC Staff's Brief on Appeal, and Applicant's Brief Seeking Reversal, all dated April 5, 2002, and Brief of *Amicus Curiae* Bureau of Indian Affairs, dated April 15, 2002. The Commission's Scheduling Order of March 27, 2002, referred to the first three briefs as "opening briefs", and to briefs seeking affirmance of LBP-02-08 as "answering briefs."

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then respond to any additional citations of authority upon which OGD relies in its effort to prop up the Board's erroneous Memorandum and Order.

DISCUSSION

The Board's Memorandum and Order— requiring an accounting of tribal lease revenues and ordering a trial on whether these revenues have been equitably expended, allocated, used, and distributed— is an extraordinary intrusion into matters of tribal self-government for which there is no precedent. See Skull Valley Band's Opening Brief, at Part I. Neither the Order nor OGD's answering brief offers any support for that proposition. Certainly, the Nuclear Regulatory Commission has been delegated no authority in this regard. Matters involving business leases of tribal lands are subject to the rules and regulations of the Secretary of the Interior promulgated pursuant to 25 U.S.C. § 415. Neither that statute, nor Interior Department regulations, make any provision for agency oversight of the expenditure or distribution of tribal lease revenues by tribal officials.

Executive Order 12898, on Environmental Justice, by its terms imposes no new substantive legal requirements on federal agencies, contrary to repeated assertions in OGD's answering brief, which characterizes the "pure question of environmental justice" (Ans. Brief, at p. 13) as one of "the legality of issuing the license" (*id.*, at pp. 6, 14). Indeed, the Executive Order merely underscores the National Environmental Policy Act, which itself is only a procedural statute. See NRC Staff's Brief, at Part III. The Executive Order certainly gives no agency of the federal government the authority to interfere in the management of internal tribal affairs, or in internal tribal financial operations. See Brief of *Amicus Curiae* Bureau of Indian Affairs.

Apart from these egregious defects, the Board's Order is simply outside the scope of OGD Contention O. See NRC Staff's Brief, at Part V; Applicant's Brief, at Part II.B. Contrary to OGD's repetition of the assertions made in the Board's Order regarding disputes purportedly put in issue by the June 28, 2001, Declaration of Sammy Blackbear, there is no genuine disputed material fact which would require a trial of OGD Contention O. Skull Valley Band's Opening Brief, at Part III; Applicant's Brief, at Parts II.C and II.F.

In Part II.A. of its brief OGD invokes the federal trust responsibility to Indian tribes as a general basis of authority in support of the Board's Order. The Skull Valley Band does not argue with the existence of the federal trust obligation, but that trust cannot be an all-purpose rationale for interfering in matters of tribal governance, or otherwise to provide federal officials with paternalistic authority to insinuate themselves into tribal affairs. Without supporting authority, OGD creates out of whole cloth a "balancing" test for determining whether intrusion into matters of tribal self-governance may be justified (Ans. Brief, at p. 12), and asserts that "[t]he trust responsibility of the federal government outweighs the policy of non-interference in tribal affairs in certain situations." Ans. Brief at p. 10.

OGD cites the Supreme Court opinion in Seminole Nation v. United States, 316 U.S. 286 (1942), in support of its argument. This decision was rendered over three decades before passage of the Indian Self-Determination Act, 25 U.S.C. §§ 450, *et seq.*, enacting the modern federal policy of tribal self-determination, and it is not on point. Seminole Nation involved interpretation of a special jurisdictional act of Congress, authorizing the Court of Claims to entertain certain tribal damage claims against the U.S.

Among the Seminole claims was a breach of a government promise, in a specific provision of an 1856 treaty, to distribute interest on a \$500,000 trust fund to members of the Tribe on a *per capita* basis. The federal Indian agent annually paid the interest to tribal officials for many years with full knowledge that those officials were expropriating the money, and not making the payments required by the treaty. 316 U.S. at 294-96. OGD's fragmented quotations from that opinion (Ans. Brief, at p. 11) do not make it applicable here— for a number of significant reasons.

A specific act of Congress authorized the Court of Claims to make findings of fact on the Seminole claim for monetary damages. The basis for liability was an explicit treaty provision imposing an express obligation on federal agents, which they failed to fulfill. There was a trust *res*, a trust fund, established by the treaty, and the subject of Congressional appropriations. In contrast, the PFS lease revenues which are the subject of the Board's Order are never handled by federal officials, least of all NRC employees. They are paid by PFS directly to the Skull Valley Band. There is no provision in the lease, or anywhere in federal law, for *per capita* payments to members of the Band. That is a decision for the Band itself to make.

Any reliance on the Seminole Nation decision in this proceeding must fail upon examination of the Bureau of Indian Affairs' response to the unsupported accusations of corruption in the Sammy Blackbear Declaration, as discussed in detail in the Band's Opening Brief. These allegations were considered in the BIA Regional Director's decision of August 20, 2001, on the appeal by Sammy Blackbear and OGD challenging the Superintendent's 1997 approval of the PFS lease. The decision states: "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” Exhibit BB to the Band’s Opening Brief, at p. 7. The decision then faults Mr. Blackbear and OGD for failing to follow the Band’s law and order code and exhausting tribal judicial remedies. Finally, the decision notes that on two occasions the Secretary of the Interior had conveyed the allegations “to proper federal law enforcement agencies”, and states that they “are under active investigation by those agencies.” *Id.* The transmittal of that information to those agencies was said to be “in furtherance of [the Secretary’s] fiduciary duties toward the trust asset which was the subject of the business lease.”² *Id.* As stated in the Band’s Opening Brief (at page 14), this is a matter within the jurisdiction of the FBI and the Inspector General, under the authority of 18 U.S.C. § 1163. The NRC should not cloak its Licensing Board with the power to interfere in such matters. No statute gives the NRC that authority.³ Nor does the Executive Order on Environmental Justice.

² The “trust asset” referenced in the Regional Director’s decision is the tribal land which is the subject of the leasehold. He was not referring to the lease revenues, which, as pointed out by the *amicus* brief of the Bureau of Indian Affairs, “are not funds held in trust by the United States for the Band ...” BIA Brief, at p. 1.

³ OGD misleadingly cites several statutes for the proposition that Congress has authorized disclosure of tribal financial matters. *Ans. Brief*, at pp. 12-13, 15. The Indian Long-Term Leasing Act, 25 U.S.C. § 415, is cited, but nothing in that statute says anything about internal tribal financial matters; nor do the BIA implementing regulations authorized by the statute. Rather, this statute stands for the proposition that it is the Secretary of the Interior, not the NRC, which has delegated authority over tribal commercial leases. *Supra*, at p. 2.

OGD’s brief also contains references to federal statutes regarding Indian allotted lands and federal criminal jurisdiction over Indian country, neither of which have anything to do with the subject matter of this proceeding. That Congress has plenary power over Indian affairs is not disputed. However, there is no evidence that Congress has passed any statute authorizing the NRC, or any other agency, to require an accounting of tribal lease revenues. OGD cites 25 U.S.C. § 81 for the proposition that a tribe must submit “detailed information” (at p. 15). In fact, that statute stands for the opposite proposition. Congress enacted the modern version of Section 81 in the Indian Tribal Economic Development and Contract Encouragement Act of 2000, 114 Stat. 46, which requires only one disclosure by a contracting tribe: whether it has waived its sovereign immunity to allow for enforcement of certain contracts. A purpose of this contemporary statute was to eliminate unnecessary and antiquated bureaucratic control over tribal commercial contracts. S. Rep. 106-150 (Sept. 8, 1999).

It is interesting to note that the Supreme Court entertained another tribal claim in the Seminole Nation case which is more closely analogous to the unsupported OGD claims made here. The Tribe contended that a provision of the Curtis Act of 1898 prohibited the government from making payments to the tribal treasurer, who allegedly failed to re-distribute the sums. The Supreme Court held that the payments in question had not been earmarked by Congress for *per capita* distribution, and that the statute did not impose a duty on the Secretary of the Interior to oversee tribal expenditure of those payments:

The deletion of this clause [directing the Secretary of the Interior to supervise “all expenses incurred in transacting their [tribal] business”] is persuasive that Congress intended that tribal officers should retain the right to disburse their funds for the expenses of their respective tribal governments. For these reasons we think Section 19 prohibits payment by the Government to the tribal treasurer only when such payments are to be distributed by him to members of the tribe. It has no application to money earmarked for educational or tribal purposes, and money intended for any purpose the tribe may designate.

316 U.S. at 302-03. In this case, there is no colorable authority for NRC supervision of Skull Valley Band expenditure and allocation of PFS lease revenues— certainly not in the Executive Order on Environmental Justice.

Throughout its answering brief OGD recites the flawed rationale of the Board that the Band has somehow consented to this intrusion into its governmental and financial affairs by intervening in this proceeding. See the discussion at pp. 13-14 of the Band’s Opening Brief. OGD attempts to bolster the Board’s rationale with citations to cases which discuss tribal consent to suit, or waivers of tribal sovereign immunity (Ans. Brief, at pp. 15-17), which have no applicability here to the question of the scope of agency authority to intrude in matters reserved for tribal governments. But, even if this precedent had some remote applicability to the issue presented here, it is important to

understand that the Supreme Court has interpreted waivers of tribal sovereign immunity very narrowly, even to deny a defendant the opportunity to pursue a counterclaim against a litigating tribe, because the filing of the tribal suit did not serve as consent to a claim not arising out of the same transaction. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509-10 (1991). The record in this proceeding will not support the claim that the Band ever agreed to open up its internal financial records to scrutiny by the Atomic Safety and Licensing Board. The supposed issues of fact, which the Board would address in a hearing, all arise out of the Declaration of Sammy Blackbear, filed June 28, 2001, long after the Band intervened in this licensing proceeding. Not only are the politically-motivated and unsupported accusations in that Declaration outside the scope of OGD Contention O, they were never raised as an issue in this proceeding until OGD's Response to Applicant's May 25, 2001, Motion for Summary Disposition.⁴

Similarly untenable is OGD's argument that, if the Band declines to make its financial records available for the Board's review, the application must be dismissed for want of an indispensable party. Ans. Brief, at pp. 20-21. OGD cites various cases interpreting Rule 19 of the Federal Rules of Civil Procedure where an attempt has been made to litigate issues of intimate concern to an Indian tribe without joining that tribe as a party. There is no analogy here. The NRC's rules do not require the participation or intervention by a lessor of land that is the subject of an activity for which an NRC license

⁴ OGD cites Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765 (D.C.Cir. 1986), for the proposition that tribal intervention in a lawsuit as a defendant renders the tribe vulnerable to complete adjudication of the issues in the litigation. That case, which involved BIA distribution of income produced from land held in trust for three separate Indian tribes, bears no similarity to this proceeding. Like other cases cited by OGD, the court's decision interprets Rule 19, F.R.Civ.P., which does not apply to this proceeding. At any rate, the Skull Valley Band is not a party "defendant" here. It intervened in support of the PFS license application.

is sought. OGD's argument means that, if the Band had originally not chosen to intervene in this proceeding, the Board would have had no authority to adjudicate the contentions raised in opposition to the license.

Among OGD's last arguments is that, even if Band financial information is not subject to NRC scrutiny, the Commission should allow the Board to force disclosure of a detailed tabulation of all PFS payments heretofore made to the Band, and a schedule of future payments to be made if the facility is approved. As discussed in the Band's Opening Brief (at p. 14, note 6), recited earlier in this brief, and never answered by OGD, tribal commercial leases are the subject of the exclusive authority of the Secretary of the Interior, under her rules and regulations, pursuant to 25 U.S.C. § 415. Further, as explained in the BIA *Amicus* Brief, the Executive Order on Environmental Justice provides no basis for such an agency inquiry into tribal lease payments. The flimsy logic of the Board's Memorandum and Order fails completely when so dissected. Should the NRC then usurp the authority of the Secretary of the Interior, and determine (in the guise of ensuring environmental justice) that the lease payments are fair?

Finally, OGD argues that a hearing should be held on the allegations in Sammy Blackbear's Declaration, even without requiring disclosure of tribal financial information. OGD would have the Board review his "undisputed" allegations regarding tribal elections, violations of tribal norms, and other "factual issues in dispute." *Ans. Brief*, at pp. 22-23. These issues, of course, go to the heart of the admonition of the Supreme Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), for federal courts and federal agencies not to intrude in internal tribal governmental matters. See BIA *Amicus* Brief, at p. 7. Furthermore, Mr. Blackbear's transparent accusations do not give

rise to genuine issues of material fact which would bar summary disposition of OGD Contention O. See Skull Valley Band's Opening Brief, at pp. 23-25.

CONCLUSION

In sum, OGD's answering brief has offered no support for the proposition that the NRC has any authority to investigate or adjudicate the preposterous accusations made by Sammy Blackbear, or that the Executive Order on Environmental Justice provides any basis for inquiring into the expenditure, allocation, or distribution of tribal lease revenues. The Board's Memorandum and Order would sanction an unprecedented interference in tribal affairs, and usurp the authority of the Secretary of the Interior. It should be reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tim Vollmann", with a long horizontal flourish extending to the right.

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NUCLEAR REGULATORY COMMISSION**

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Intervenor Skull Valley Band's Reply Brief Seeking Reversal of February 22, 2002, Memorandum and Order (LBP-02-08) of the Atomic Safety and Licensing Board 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 13th day of May, 2002.

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A handwritten signature in black ink, appearing to read "Tim Vollmann", written over a horizontal line.

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