

ADJUDICATORY ISSUE INFORMATION

August 22, 2002

SECY-02-0158

FOR: The Commission

FROM: John F. Cordes, Jr. */RA/*
Solicitor

SUBJECT: LITIGATION REPORT - 2002 - 02

Parents Concerned About Indian Point v. NRC, No. 02-4243 (2d Cir., filed June 27, 2002)

This lawsuit challenges the Commission's refusal to reopen a 20-year old proceeding on emergency planning at the Indian Point nuclear power reactors. Petitioner says the proceeding should be reopened in light of the September 11 terrorist attacks. The Commission, in a letter sent by the Office of the Secretary, said that it would not reopen a case closed nearly twenty years ago, and pointed out that petitioner could seek relief, or demand a new proceeding, under 10 C.F.R. § 2.206. Petitioner, though, simply sought reconsideration, which the Commission denied.

Petitioner then filed a petition for judicial review in the United States Court of Appeals for the Second Circuit (in New York City). We have moved to dismiss the petition for review on justiciability grounds. If the court of appeals denies or defers our motion, an NRC brief will be due in October.

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Skull Valley Band of Goshute Indians v. Leavitt, No. 2:01-CV-270V (D. Utah, decided July 30, 2002)

This lawsuit in federal district court in Salt Lake City challenged the constitutionality of various laws enacted by the State of Utah to obstruct the proposed Private Fuel Storage facility on Indian tribal lands in Utah. The PFS facility would temporarily store spent fuel from nuclear power reactors. Among Utah's arguments in defending the suit was a claim that the Nuclear Waste Policy Act precluded the NRC from licensing the proposed facility. Utah thus maintained

that the facility could never obtain a license lawfully. Hence, according to Utah, the Goshutes and PFS lacked standing to challenge the state's anti-PFS legislation, and the lawsuit was not ripe.

We filed an *amicus curiae* brief disputing Utah's claim. We argued that only courts of appeals, not federal district courts, had authority to review questions bearing on NRC licensing authority. We stated that the district court ought to let the Commission decide, in the first instance, whether it had licensing authority. That determination, we said, had nothing to do with ripeness or standing in the Goshute-PFS challenge to Utah's statutes.

The court (Campbell, J.) agreed with our view, and declined to enter the licensing authority dispute. See Slip op. at pp. 4-11, 26-27. (That issue is currently pending before the Commission.) The court also struck down the Utah legislation nearly in its entirety as preempted by the federal government's exclusive power to regulate the safety of nuclear reactors and high-level waste storage.

Utah has already taken an appeal to the United States Court of Appeals for the Tenth Circuit (in Denver). We again may seek leave to participate as *amicus curiae*.

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Sweet v. United States, Nos. 00-274C, 00-292C, 01-434C (U.S. Court of Federal Claims, decided August 7, 2002)

This lawsuit seeks Price-Anderson indemnity from the NRC for legal defense costs and for damages liability arising out of an underlying tort suit in Massachusetts (*Heinrich v. Sweet*). The underlying case seeks damages for the alleged misuse of the MIT research reactor for medical treatment that the doctors (allegedly) knew was ineffective. We have argued throughout the case that Price-Anderson does not apply here because the underlying tort suit sounds in medical malpractice, not in a reactor malfunction.

The Claims Court (Firestone, J.) rejected our position. The court ruled, in essence, that injuries, deaths, and litigation costs resulting from an alleged medical misuse of MIT's research reactor fall within Price-Anderson even though the reactor operated normally and as expected. In consultation with Justice Department lawyers, we are considering our options for further review and further litigation. If the case proceeds to final judgment, potentially millions of dollars are at stake.

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