UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

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

CLI-02-20

MEMORANDUM AND ORDER

On February 22, 2002, the Atomic Safety and Licensing Board in this proceeding issued a decision that set for hearing some aspects of an "environmental justice" contention filed by intervenor Ohngo Gaudadeh Devia (OGD).[1] At the urging of another intervenor, the Skull Valley Band of Goshute Indians, we granted interlocutory Commission review of the Board ruling and a stay of all proceedings related to environmental justice.[2] Our order also invited the United States Bureau of Indian Affairs to submit an *amicus curiae* brief.

The Board ordered an environmental justice hearing to resolve the question whether the individual members of OGD, which includes Band members who oppose the PFS project, might suffer the environmental impacts of the project without enjoying its financial benefits. The

[1] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-08, 55 NRC 171 (2002) (summary disposition ruling on OGD Contention O).

[2] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-08, 55 NRC 222 (2002).

Board found that the accuracy of the NRC's Environmental Impact Statement ("EIS") had been called into question by allegations that funds paid on the PFS lease had been misappropriated, thereby raising a question whether the project's adverse environmental consequences would in fact be offset by economic benefits. The Board directed the litigants to prepare for a hearing on payments made by PFS to date and on the manner in which the Band has handled, spent, and distributed the payments.

Before us, on interlocutory appeal, the Band, PFS, and the NRC staff argue that NRC hearing boards lack legal authority, under the National Environmental Policy Act ("NEPA") or otherwise, to adjudicate claims requiring an inquiry into internal financial and governance matters of a federally recognized sovereign Indian tribe such as the Skull Valley Band. The Bureau of Indian Affairs, in response to our request for an *amicus* brief, also opposes the Board decision. OGD, on the other hand, fully supports it.

Without for a moment discounting the seriousness of OGD's claims of financial impropriety, we do not agree with the Board that such claims fall within NEPA or justify an NRC hearing on the issue. OGD's allegations show, at most, a disparity in the financial benefits that the PFS project may bring to different members of the Skull Valley Band. But OGD's financial allegations do not display a disparity in the project's *environmental* impacts -- the focus of a NEPA-environmental justice inquiry at the NRC.[3] Moreover, OGD's original environmental justice contention, as admitted, contained no hint of its financial claims. It is neither fair nor consistent with our usual practice to allow a last-second infusion of new elements into a previously admitted contention.[4] Finally, even were we inclined to overlook these flaws in

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[3] *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 100-110 (1998).

[4] *See id*. at 104-06. *See also* Statement of Policy on Conduct of Adjudicatory Proceedings, 48 NRC 18, 22 (1998).

OGD's claims, we are not nearly as convinced as the Board that an NRC hearing into a tribal Chairman's alleged mishandling of tribal funds could go forward without infringing tribal sovereignty, a concern pressed forcefully in the *amicus curiae* brief of our sister federal agency, the Bureau of Indian Affairs.

The Board was well aware that OGD's environmental justice claims might require excessive NRC probing into internal tribal affairs. It attempted conscientiously to avoid the problem by postponing definitive decisions until further facts emerged at a hearing.[5] But, as we see the environmental justice issue, no hearing should take place. Claims of financial and political corruption inside the Skull Valley tribe do not belong in our hearing process under the rubric of environmental justice or NEPA. Our mission is to protect the public health and safety and the environment. We lack the expertise, the resources, and the statutory mandate to get to the bottom of tribal corruption charges. Other government bodies, including the Federal Bureau of Investigation and the Bureau of Indian Affairs, are far better positioned to consider OGD's complaint.

I. Background

OGD is a group of individuals, some of whom are Skull Valley Band members and some of whom are not, some of whom live on the Skull Valley reservation and some of whom do not, all of whom are opposed to the PFS project.

In the Board's original ruling on intervenors' proposed contentions it rejected all of OGD's proposed contentions except OGD O, which relates to environmental justice.[6] That contention claimed that the license application "poses undue risk to public health and safety because it fails to address environmental justice issues." "It is not just and fair," the contention

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[5] *See* LBP-02-8, 55 NRC at 184-85.

[6] *See Private Fuel Storage*, LBP-98-7, 47 NRC 142, 233 (1998).

stated, "that this community be made to suffer more environmental degradation at the hands of the NRC."[7] OGD's contention pointed to "a ring of environmentally harmful companies and facilities" that surround the site of the proposed PFS facility, including the Dugway Proving Ground, the Deseret Chemical Depot, the Envirocare mixed waste storage facility, the APTUS Hazardous Waste Incinerator, and the Grassy Mountain Hazardous Waste Landfill.[8] The Board admitted OGD's environmental justice contention, "with the caveat that the contention is limited to . . . disparate impact matters," including cumulative impacts from the nearby facilities and effects on property values. [9]

PFS moved for summary disposition on OGD's environmental justice contention. In opposing PFS's motion, OGD filed a lengthy affidavit by a member, Sammy Blackbear, that made a number of allegations against tribal Chairman Leon Bear. Among other things, Blackbear claimed that Chairman Bear had misappropriated funds paid by PFS under the lease it entered into with the Band in 1997.[10] Blackbear alleged that Chairman Bear had used these funds both for personal gain and to bribe other tribe members to support his administration.

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[7] *Id.*

[8] *Id*.

[9] *Id.*

[10] The lease provided for the immediate payment of certain fees to keep the lease option open until construction can begin. Because the land is held in trust by the United States for the Band, the Secretary of the Interior, through the Bureau of Indian Affairs, must approve the lease. *See* 25 U.S.C. § 415(a). The BIA gave conditional approval in May 1997. It conditioned final approval on a finding that the lease is in the Band's best interest. *See* Brief of *Amicus Curiae* Bureau of Indian Affairs in the Commission's Interlocutory Review of the Licensing Board's Decision in LBP-02-08 Concerning Contention OGD O (Environmental Justice), at 3 (Apr. 15, 2002).

Blackbear also stated that tribe members who opposed the PFS project or Chairman Bear's chairmanship of the tribe were wrongfully denied any share in the proceeds of the lease.[11]

The Board granted the motion for summary disposition in part and denied it in part.[12] It found that there was no remaining issue of fact as to cumulative impacts from the surrounding facilities or effects on property values.[13] The Board found, however, that the claim that the PFS proceeds had not been used to benefit all members of the tribe raised a litigable question whether there was a minority "subgroup" of the tribe that would suffer a disproportionate environmental impact from the project.[14]

The Board reasoned that because of "unchallenged" environmental effects -- operational noise, visual impact, and interference with the Goshutes' traditional lifestyle (a "cultural insult") -- OGD's claim that some Goshutes are not enjoying the financial benefits of the lease constitutes a claim of disproportionate environmental burden "from a NEPA balancing standpoint."[15] According to the Board, OGD's claim of cumulative environmental impacts and impacts on property values were not substantiated and could not proceed to hearing, "[b]ut the same cannot be said" for the claimed disproportionate impact on OGD's members from the

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[11] The Skull Valley Band has not refuted the allegation that some members have received distributions of the PFS lease payments while others have not, arguing instead that this allegation is irrelevant. For the purposes of this order, we will assume the truth of the facts alleged by the party opposing summary disposition -- *i.e.,* OGD. *See Advanced Medical Systems, Inc.,* CLI-93-22, 38 NRC 98, 102 (1993).

[12] *See* LBP-02-08, 55 NRC at 203.

[13] *See id.* at 193-97.

[14] *See id.* at 189-91.

[15] *Id.* at 197.

uneven sharing of the project's lease income.[16] This issue, the Board ruled, "can be resolved only at a hearing."[17]

To resolve the lease income issue, the Board ordered PFS and the Skull Valley Band to produce records showing how much money had been paid under the lease and how it had been distributed.[18] The Board also suggested that the NRC staff or the Skull Valley Band might provide evidence from a representative of the Bureau of Indian Affairs "detailing his response to the relevant allegations in the Blackbear affidavit and setting out his understanding of the BIA's authority and responsibility to bring about change in the situation."[19] Finally, the Board strongly urged the possibility of settlement.[20]

In directing a hearing on OGD's environmental justice claim, the Board rejected two threshold arguments: (1) that OGD's financial misconduct claim, if litigated, would interfere in internal tribal governance; and (2) that OGD's financial claim fell outside the scope of its original environmental justice contention.[21] On tribal governance, the Board found the doctrine against outside scrutiny "not absolute," but dependent upon a "fact-driven" inquiry into whether this particular case represents a "special situation" allowing an NRC environmental justice review, notwithstanding the usual policy against "interfering in intratribal disputes."[22] As for the argument that OGD's environmental justice contention, as originally framed, did not cover

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[16] *Id.* 193.

[17] *Id.* at 198.

[18] *See id.* at 199-200.

[19] *Id.*

[20] *See id.* at 201-03.

[21] *See id.* at 184-89.

[22] *See id.* at 184-85.

financial misconduct, the Board said that the "argument has something to commend it, but not enough."[23] The Board noted that the original contention had complained of "negative . . . sociological impacts," that "later developments" concerning uneven distribution of the lease income shed "new light" on the contention, and that claims made in discovery gave other parties in the case sufficient advance notice of OGD's concerns.[24]

Subsequently, the Commission granted interlocutory appellate review of the Board decision on the environmental justice contention, and stayed all hearing activity on the contention pending the Commission's decision.[25]

II. Discussion

In 1994, President Clinton issued Executive Order 12898, which instructed federal agencies to consider "environmental justice" in their decisions -- that is, whether a proposed government action will have a disproportionately high and adverse environmental impact on minorities and low-income populations.[26] In 1998, we analyzed the executive order, and its meaning for the NRC, in *Claiborne Enrichment Center*.[27] We pointed out that "the executive order, by its own terms, established no new rights or remedies," but was intended "merely to *underscore* certain provision[s] of *existing* law that can help ensure that all communities and persons across this Nation live in a safe and healthful environment."[28] At the NRC, we said, the "only 'existing law' conceivably pertinent . . . is NEPA, a statute that centers on environmental

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[23] *Id.* at 186.

[24] *See id.* at 186-89.

[25] *See* CLI-02-8, 55 NRC at 226.

[26] 59 Fed. Reg. 7629 (Feb. 11, 1994).

[27] CLI-98-3, 47 NRC at 100-02.

[28] *Id.* at 102 (emphasis in original).

impacts."[29] At the outset of the current proceeding we reminded all parties of our *Claiborne Enrichment Services* guidance.[30]

With this background in mind, we turn now to how NEPA and the executive order on environmental justice affect this case. Several considerations, separately and together, persuade us to set aside the Board order requiring a hearing on OGD's "environmental justice" claim of financial mismanagement or chicanery.

A. There is No Disproportionate Environmental Impact.

Environmental harm is NEPA's "core interest."[31] The essence of an environmental justice claim, in NRC practice, is disparate environmental harm.[32] The executive order on environmental justice, on which the Board bases its decision, calls on agencies to determine whether a proposed action would have "disproportionately high and adverse *human health or environmental* effects."[33]

Here, though, OGD and the Board have focused on disparate economic benefits, not on disparate environmental effects. The Board's reasoning starts to go awry when it conflates economic benefits and environmental effects. In actuality OGD makes no claim that its members will suffer a disproportionate environmental injury when compared to other members of the tribe, and there is no evidence that they will. The Board acknowledged that the environmental impacts are the same for all living on the reservation:

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[29] *Id.*, *quoting* Memorandum for the Heads of All Departments and Agencies, 30 Weekly Comp. Pres. Doc. 279 (Feb. 14, 1994).

[30] *See* CLI-98-13, 48 NRC 26, 35-36 (1998).

[31] *Claiborne Enrichment Center*, CLI-98-3, 47 NRC at 102.

[32] *See id.* at 106-110.

[33] *See* LBP-02-8, 55 NRC at 181, quoting E.O. 12898, § 1-101 (emphasis added).

> *The disparity comes about, then, not in the direct environmental burden, but from the net impact as measured by the NEPA-sanctioned balance of environmental burdens and economic benefits* – some obtain an economic benefit from the project to offset its environmental burdens, while others do not, experiencing only the burdens. *We hold that this type of net disparity can be as much a matter for environmental justice review under NEPA – a statute which sets up a process in which the classic burden/benefit balance has always been central – as is the more usual disparate environmental burden viewed alone.*[34]

In our view, the executive order, and NEPA generally, do not call for an investigation into disparate economic benefits as a matter of environmental justice. Even though money (or social services) from the PFS lease payments might make it easier for some to tolerate noise, cultural insult, and unsightliness near the facility, the payments don't "mitigate" environmental harms in the sense of eliminating or minimizing them.[35] We see nothing in the executive order or in NEPA to suggest that a failure to receive an economic benefit should be considered tantamount to a disproportionate environmental impact.

Notably, the executive order asks agencies to consider environmental justice implications only when disparate environmental effects are "high and adverse."[36] Here, the EIS found the overall environmental impacts on reservation residents small or "small to moderate,"[37] a finding not now in dispute before the Board. There is no reason, therefore, to conclude that persons who fail to receive their desired share of the PFS lease money are suffering a "high

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[34] *Id.* at 192 (emphasis in original).

[35] It is also noteworthy that we are not even focused on the applicant's direct payments related to this project, but rather on a secondary distribution of those payments. It would raise some troubling questions indeed if NEPA or Environmental Justice were to be seen as requiring a potentially endless trek following the flow of contract payments from major construction projects.

[36] E.O. 12898, § 1-101.

[37] The EIS considered all the adverse impacts that the Board found significant -- noise, visual impact, and cultural insult -- and concluded that none of these would have a disproportionately high impact on the Skull Valley Band, or other low income or minority populations residing near the reservation. *See* EIS, pp. 6-21 - 6-33.

and adverse" environmental impact. Such persons may well have a grievance against their tribal leadership, but that grievance cannot fairly be considered "environmental." None of this is to say that under NEPA our staff and hearing boards do not consider socioeconomic costs and benefits at all. They do, "to a limited extent."[38] But NEPA has limits. The desirability of a "broad and informal balancing" of costs and benefits[39] does not call for an investigation into perceived financial misdeeds going well beyond the natural or anticipated environmental effects of a proposed project.[40]

In *Claiborne Enrichment Center,* we held that the executive order on environmental justice does not transform NEPA into a general "civil rights law," and thus we declined to authorize a NEPA hearing on claims of intentional race discrimination.[41] Similarly, we decline today to use NEPA as authority for (in effect) a corruption investigation, a major undertaking "far afield from the NRC's experience and expertise."[42] What we said in *Claiborne Enrichment Center* pertains here as well: "Were NEPA construed broadly to require a full examination of every conceivable aspect of federally licensed projects, 'available resources may be spread so

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[38] *Claiborne Enrichment Center*, CLI-98-3, 47 NRC at 89.

[39] *See id.*

[40] We add, however, a point of clarification on the Licensing Board's role in this case. The Board commented that because PFS has "no right to use [tribal lands for its own purpose . . . the *only* justification for imposing . . . adverse impact on an impoverished population is the offsetting benefits that will accrue to the Band's members from payment for use of tribal lands." *See* LBP-02-08, 55 NRC at 192 (emphasis added). In balancing costs and benefits under NEPA the Board should also consider the other benefits of the project, such as (for example) the benefit of allowing shutdown reactors to be decommissioned sooner and any tax revenues accruing to the state and local governments. *See* EIS, Sec. 8.2, pp 8-11 - 8-12.

[41] *See id.* at 106.

[42] *Id.* at 103.

thin that agencies [would be] unable adequately to pursue protection of the physical environment and natural resources.'"[43]

B. The Board's Order Improperly Looks at a "Subgroup" of a Minority Population.

Even if an uneven distribution of financial benefits could be viewed as some form of environmental harm, we would not uphold the Board decision to begin a NEPA inquiry into the matter because it depends upon splitting the pertinent environmental justice population, the Skull Valley Band, into competing "subgroups."[44] The dispute between OGD and others in the Band is not ours to ameliorate or mediate, certainly not under NEPA.

The Board sought to apply environmental justice on the theory that losing out on the PFS lease payments makes OGD a "low-income" subgroup of the larger tribal community. But this approach potentially would create an artificial "environmental justice" concern at virtually all proposed federal projects, for almost any project yields more benefits for some than others. For example, when a project brings jobs to the community, those persons who are hired benefit disproportionately over those who are not. But this does not mean that those not obtaining jobs have a legitimate "environmental justice" complaint. If they did, agencies' NEPA reviews would be endless, because the potential universe of aggrieved individuals and groups is, as the NRC staff's brief stated, "virtually infinite, limited only by one's imagination."[45]

Environmental justice, as applied at the NRC, does not take us down that road. Instead, it means that the agency will make an effort under NEPA to become aware of the demographic and economic circumstances of local communities where nuclear facilities are to be sited, and take care to mitigate or avoid special impacts attributable to the special character of the

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[43] *Id.* at 102-03, quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983).

[44] *See* LBP-02-8, 55 NRC at 189-91.

[45] NRC Staff's Brief on Appeal (Apr. 5, 2002), at 20-21.

community.[46] Thus, an NRC EIS looks at the pertinent minority community in general, not at vaguely defined, shifting "subgroups" within that community. Otherwise, "environmental justice" becomes simply a device for ventilating intramural disputes within communities -- which is not a function Congress has assigned to the NRC and is not a function in which we have skill or expertise.

The Board in this case recognized that the Skull Valley Band as a whole "has welcomed the project," is benefitting from it, and is not complaining of environmental injustice.[47] The Board proposed to "reframe" the environmental justice inquiry, so that instead of looking at the tribe as a whole to determine if its members would suffer a disproportionate impact vis à vis the larger population of Utah or the nation, the Board would consider the OGD members[48] vis à vis the rest of their own tribe:

> As reframed, our inquiry now focuses, at OGD's urging, on a subgroup of the larger community, a smaller but distinct and well-defined population: those who are suffering a *disparate burden, bearing the adverse environmental consequences of the PFS project while remaining impoverished as others have their situation improve*.[49]

But we see no basis for launching an "environmental justice" inquiry into whether some members of a minority community are impoverished when compared to others in the same community or (as is alleged in this case) whether one tribal subgroup is siphoning money or benefits from another. President Clinton's executive order asked agencies to consider whether a disadvantaged community is suffering from disproportionate harmful environmental effects,

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[46] *See Claiborne Enrichment Center*, CLI-98-3, 47 NRC at 106.

[47] LBP-02-08, 55 NRC at 189.

[48] OGD's members include persons who do not reside on the reservation. Obviously, only those members who do reside there are the subject of the environmental justice analysis because only they are subjected to the anticipated environmental harms. For purposes of this discussion, we will use "OGD" as shorthand for those members on the reservation.

[49] LBP-02-08, 55 NRC at 189-90 (emphasis in original).

such as when a number of pollution-emitting neighboring facilities have a cumulative adverse effect on a predominantly poor or minority neighborhood. Nothing in the executive order or in NEPA suggests that agencies also must investigate which subgroups within a minority community may obtain special benefits as compared to others.

Our agency's environmental decision-making under NEPA does not require us to intervene in what is, at bottom, a political dispute inside the Skull Valley Band. It is apparent from OGD's allegations that OGD represents a political faction opposed to the current tribal leadership. OGD's charges of corruption may prove salient -- but for criminal investigators, for civil lawsuits, or for voters in future tribal elections, not for NEPA reviewers. Our NEPA record already contains ample information on the likely effects and the local and national benefits of the PFS facility, including the infusion of financial resources into the local community. To complete our NEPA review, we do not need to know precisely how those resources are shared.[50]

C. Disparate Financial Benefit is Outside the Scope of Admitted Contentions.

A further reason for denying a hearing on the environmental justice issue is that the factual dispute over where the lease income is going lies outside the scope of the admitted contentions.

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[50] The benefits discussion in the EIS does not state that everyone in the community will benefit equally, or even that everyone will benefit to any degree. The EIS speaks in terms of increased revenues and enhanced job opportunities for the "Skull Valley Band." *See, e.g.,* EIS, pp. 4-39, 6-32, 8-11.

The Board interpreted our *Claiborne Enrichment Center* decision as a precedent for dividing environmental justice populations into subgroups. *See* LBP-02-8, 55 NRC at 190. But in *Claiborne Enrichment Center*, we approved a Board decision requiring the NRC staff to consider whether a proposed road relocation would affect pedestrians in an impoverished and minority community where "many residents of the two impoverished communities have no choice but to travel by foot." CLI-98-3, 47 NRC at 107. We did not call for breaking up the community into "subgroups" of car-drivers and pedestrians. There was no controversy between motorists and pedestrians in *Claiborne Enrichment Center* remotely comparable to the financial dispute between rival tribal factions here.

The NRC's "longstanding practice requires adjudicatory boards to adhere to the terms of admitted contentions" in order to give opposing parties "advance notice of claims and a reasonable opportunity to rebut them."[51] OGD's environmental justice contention ("OGD O"), as admitted, alleged that the environmental impacts of the proposed ISFSI would have a cumulative adverse effect on tribe members and would adversely affect property values, and that the license application failed to mitigate these impacts.[52] OGD first raised the issue of uneven or corrupt distribution of lease payments when it submitted Sammy Blackbear's declaration in response to PFS's motion for summary disposition -- three years after OGD had filed its original environmental justice contention.

As the litigation went forward, OGD made no effort to amend its contention to add its financial grievance or to introduce the claim that a "subgroup" of the tribe would suffer disparate environmental harm. PFS and the other parties apparently had no reason to know about OGD's new, finance-driven, version of its environmental justice contention. Indeed, PFS's motion for summary disposition did not even address the subject. As the Board acknowledged, this meant "that in most respects we have before us only one side of the story about the matters presented so forcefully in [the Blackbear] declaration."[53]

Our rules of procedure require that contentions include a "specific statement of the issue of law or fact to be raised or controverted."[54] Here, however, the admitted contention included neither the law nor the facts that the Board later set for hearing. As admitted, OGD O did not give fair notice that the parties must litigate the alleged misappropriation of PFS lease money;

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[51] *Claiborne Enrichment Center*, 47 NRC at 105.

[52] *See* OGD Contentions at 27-36, *see also* LBP-98-7, 47 NRC at 233.

[53] LBP-02-8, 55 NRC at 181.

[54] 10 C.F.R. § 2.714(b)(2).

or that they must address the theory that disparate payments created a "subgroup" of the Skull Valley Band; or that they must produce accountings as evidence at the hearing. The issue set for hearing in the Board's February order nonetheless dealt entirely with those matters; *i.e.,* the new environmental justice theory introduced by the Blackbear declaration. The Board even instructed the parties to develop and produce new evidence for the hearing -- accountings of money PFS paid and how the tribe handled that money.[55]

In *Claiborne Enrichment Center* we rejected an untimely attempt to insert a claim of intentional race discrimination into a previously admitted environmental justice contention. So too, here, it would be unfair, and violative of our rules of procedure, to require the parties to go to hearing on a legal theory that departs dramatically from the admitted environmental justice contention.

D. NEPA Responsibilities Do Not Justify An NRC Inquiry Into Tribal Affairs.

All parties appear to share the common ground that, as a general rule, federal agencies and adjudicators lack power to oversee sovereign Indian tribal matters. OGD, though, says that the normal government reluctance to interfere with tribes does not apply here because, by intervening in our proceeding in support of the PFS project, the Skull Valley Band, in effect, has consented to an NRC inquiry into tribal financial affairs. OGD also maintains that a NEPA cost-benefit analysis requires the NRC to consider how the Band is handling the PFS lease income. PFS and the NRC staff, on the other hand, insist that in this case, as in most situations, federal Indian law prevents outside review of tribal financial affairs. The Band itself and the Bureau of Indian Affairs (in its *amicus curiae* brief) take the same position. So do we.

As we already have explained at length earlier in this opinion, OGD's grievance -- that the Skull Valley Band's leadership is allegedly misappropriating income from the PFS lease -- is not

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[55] LBP-02-8, 55 NRC at 199-200.

properly a NEPA claim at all. In *Metropolitan Edison Co. v. People Against Nuclear Energy*, the Supreme Court ruled that NEPA comes into play only when there is a "close[] relationship between the change in the physical environment and the 'effect' at issue."[56] Alleged mishandling of lease proceeds does not fall in this category. NEPA simply is not the vehicle, and NRC not the forum, to resolve the question whether the leadership of an Indian tribe is dealing unfairly with its members.

The question whether the leadership of an Indian tribe is dealing unfairly with its members relates fundamentally to tribal governance. The specter of quasi-judicial oversight by a federal agency, including the presentation of evidence and cross-examination on tribal financial decisions, undermines well-established principles governing the interaction of the federal government with Indian tribes. The first of these principles is that unless Congress has specifically acted to abrogate a tribe's sovereign immunity, a wholly intra-tribal dispute must be resolved within the tribe.[57] The Board thus lacks jurisdiction to provide declaratory or injunctive-type relief to OGD on its complaint that the tribal leadership is mishandling PFS lease payments.

OGD's argument that the Band has waived its sovereign immunity by intervening in the NRC licensing proceeding is unpersuasive. The Band is not applying for an NRC license, but has simply intervened in an existing proceeding to protect tribal interests. At the time of the Band's intervention, there was not the slightest suggestion that OGD or the Board planned to examine tribal financial records and governance. Waivers of sovereign immunity, in Indian cases and elsewhere, are not lightly implied or presumed.[58]

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[56] 460 U.S. at 774.

[57] *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (subjecting wholly intra-tribal dispute to a non-tribal forum would infringe on the Indians' right to govern themselves).

[58] *See id.* at 58.

It is the policy of the federal government to promote self-determination by Indian tribes.[59] This means that the Skull Valley Band is entitled to decide what is best for it as a whole, without second-guessing by the Board. The Band evidently determined that the lease was in its best interest when it entered into it. The Board cannot attempt to protect the interests of a disaffected "subgroup" of the Band, namely, OGD's members, for that would place the Board, uncomfortably and unlawfully, right in the middle of an internal tribal dispute.[60] Subject to criminal and tribal law, the Band ultimately gets to decide how to handle its own revenues, even if its distribution scheme appears unfair to outside observers.

The allegations contained in the Blackbear affidavit understandably caught the Board's attention. But they are not matters for NRC licensing hearings. Tribal dissidents, including Blackbear, have filed administrative appeals with the Bureau of Indian Affairs and also have sued in federal district court to challenge the BIA's approval of the lease.[61] In addition, claims that funds have been misappropriated have apparently been referred to the Federal Bureau of Investigation.[62]

In short, other, more appropriate, avenues of redress remain open to OGD in its dispute with the Band's leadership. Our hands-off position is buttressed by the federal agency with the

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[59] *See* Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq. See also* Executive Order 13175, Consultation and Coordination With Indian Tribal Governments (Nov. 6, 2000), 65 Fed. Reg. 67249, Sec. 2 (c) ("The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination").

[60] *See Santa Clara Pueblo v. Martinez,* 436 U.S. 49 and cases cited therein*; cf. Wheeler v. United States Dept. of the Interior,* 811 F.2d 549 (10th Cir. 1987) (Department of Interior had no jurisdiction to hear appeal of election challenge by unsuccessful candidate for tribal office, which must be determined internally).

[61] *See, e.g., U.S. ex rel. Blackbear v. Babbit*, 2:99CV156K (D. Utah); *Blackbear v. Norton*, No. 2:01CV00318C (D. Utah).

[62] *See* Fahys, "Feds Demand Goshutes Open Financial Books on N-Waste Deal," *Salt Lake City Tribune* (March 14, 2002).

most expertise in this area, the Bureau of Indian Affairs, which has filed an *amicus* brief insisting that the NRC stay out of the Goshutes' intra-tribal dispute.

III. Conclusion

For the foregoing reasons, the Board's partial denial of summary disposition on OGD's environmental justice contention, OGD O, is *reversed*, and the Board is *directed* to grant summary disposition for PFS on OGD O.

IT IS SO ORDERED.

For the Commission

/RA/

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Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 1st day of October, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-02-20) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution with copies by electronic mail or facsimile as indicated.

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[Original signed by Evangeline S. Ngbea]

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Dated at Rockville, Maryland,
this 1st day of October 2002