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(Application for Admission pending)

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MARGENE BULLCREEK, *et al.*,  
Petitioners,

v.

No. 03-1018

UNITED STATES NUCLEAR REGULATORY  
COMMISSION, and the

UNITED STATES OF AMERICA,  
Respondents,

SKULL VALLEY BAND  
OF GOSHUTE INDIANS,  
Movant-Intervenor.

**SKULL VALLEY BAND OF GOSHUTE INDIANS'  
MOTION TO DISMISS**

The Skull Valley Band of Goshute Indians respectfully moves, pursuant to Rule 27 of the Federal Rules of Appellate Procedure, to dismiss the Petition for Review filed in this matter, on the ground that Petitioners are not "part[ies] aggrieved" within the meaning of 28 U.S.C. § 2344, and that Petitioners therefore do not have standing to pursue the aforesaid petition. The Skull Valley Band filed a Motion to Intervene in this proceeding on March 3, 2003, and that motion is pending.

## BACKGROUND

Petitioners have commenced this action to seek review of a December 18, 2002, order issued by the NRC denying a February 11, 2002, petition of the State of Utah to initiate rulemaking on the subject of spent nuclear fuel storage installations. This order also rejected the State of Utah's "Suggestion of Lack of Jurisdiction" in a proceeding to consider an application by Private Fuel Storage, L.L.C. (PFS), for a license to construct and operate an Independent Spent Fuel Storage Facility (ISFSI) on the Skull Valley Indian Reservation in Utah. Private Fuel Storage, L.L.C. (ISFSI), CLI-02-29, 56 NRC \_\_ (Dec. 18, 2002). That licensing proceeding is still pending before the NRC. The Petition for Review noted that Petitioners "do not petition for review of the [December 18, 2002] order to the extent it resolves Utah's Suggestion for Lack of Jurisdiction ...." Petition at p. 2, note 1. Thus, the pending licensing proceeding is not a subject of this Petition for Review.

In December 1996 PFS entered into a business lease with the Skull Valley Band, a federally-recognized Indian Tribe, pursuant to 25 U.S.C. § 415, which requires the approval of the Secretary of the Interior for leases of tribal lands. That lease was later amended, and then approved by the Bureau of Indian Affairs on May 23, 1997, subject to certain conditions, including the issuance of an NRC license for the ISFSI. See Utah v. U.S. Department of the Interior, 201 F.3d 1193 (10th Cir. 2000). When the NRC license is issued, and deliveries of spent nuclear fuel commence to the Skull Valley Reservation, the Band will receive substantial benefits under the lease. A related case is Skull Valley Band v. Leavitt, 215 F.Supp.2d 1232 (D. Utah 2002), *appeal pending* (10th Cir., Case No. 02-4149), in which the Band and PFS have successfully challenged the constitutionality of Utah state legislation designed both to prohibit and to impose burdensome regulations on the ISFSI.

Petitioners include nine members of the Skull Valley Band of Goshute Indians. They also represent themselves to be “members of the Band’s General Council”, which indeed they are, as all adult members of the Band are members of the General Council. A tenth petitioner is an unincorporated association known as Ohngo Gaudadeh Devia (OGD), which is made up of both members and non-members of the Band who are opposed to the ISFSI which is the subject of the licensing proceeding. See Private Fuel Storage, L.L.C., CLI-02-20, 56 NRC 147 (October 1, 2002), slip op. at p. 3.

OGD is an intervenor in the licensing proceeding in opposition to the license. However, its participation in the February 11, 2002, Petition to Initiate Rulemaking was limited to a “Joinder of Utah’s Petition to Institute Rulemaking and to Stay Licensing Proceeding”, belatedly filed on October 18, 2002. This 2-page filing is attached hereto as Exhibit A. It “adopts and incorporates by this reference the entirety of the State of Utah’s petition to institute rulemaking and to stay this proceeding and all documents filed in support thereof.” There is no further substance to this “Joinder”.

The nine individual petitioners are not parties to the licensing proceeding. Neither did any of them file any comments on the State of Utah’s Petition to Institute Rulemaking. They are, however, sometime political opponents of the current leadership of the Skull Valley Band.

Petitioners filed their Petition for Review of the NRC’s denial of Utah’s Petition to Institute Rulemaking on January 30, 2003. Case No. 03-1018. The State of Utah filed its own Petition for Review of that decision on February 11, 2003. Case No. 03-1022. This Court, on its own motion, consolidated the two proceedings on February 12, 2003. This Motion to Dismiss pertains only to Case No. 03-1018.

## ARGUMENT

PETITIONERS ARE NOT “PARTIES AGGRIEVED” WITHIN THE MEANING OF 28 U.S.C. § 2344, AND MAY NOT SEEK THIS COURT’S REVIEW PURSUANT TO 28 U.S.C. § 2342.

The jurisdiction of this Court has been invoked pursuant to the Administrative Orders Review Act, generally known as the Hobbs Act, 28 U.S.C. §§ 2341, *et seq.* The Act gives this Court jurisdiction to review final NRC rules dealing with the activities of licensees. Reyblatt v. NRC, 105 F.3d 715 (D.C. Cir. 1997). However, 28 U.S.C. § 2342 provides that “Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.” Section 2344 in turn provides in pertinent part:

Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.

The “party aggrieved” requirement is an important statutory prerequisite to the invocation of the jurisdiction of a Court of Appeals. Gage v. Atomic Energy Comm’n, 479 F.2d 1214, 1218 (D.C. Cir. 1973).

### A. THE NINE INDIVIDUAL PETITIONERS ARE NOT PARTIES AGGRIEVED.

This Court has often ruled that, to be a “party aggrieved” within the meaning of 28 U.S.C. § 2344, a petitioner must have participated in the agency proceedings below. Professional Reactor Operator Society v. NRC, 939 F.2d 1047, 1049, n. 1 (D.C. Cir. 1991); Simmons v. ICC, 716 F.2d 40, 42-43 (D.C. Cir. 1983). In other words, it is not enough for a petitioner to show that it is a “person aggrieved” by an agency order; participation in the

agency proceedings as a “party” is mandatory. Southern Pacific Transportation Co. v. ICC, 69 F.3d 583, 587 (D.C. Cir. 1995). Contemporary precedent admits of no exceptions to this requirement. See Erie-Niagara Rail Steering Committee v. Surface Transportation Board, 167 F.3d 111 (2nd Cir. 1999).

The nine individual petitioners clearly do not meet this test. They offered no comments on Utah’s Petition for Rulemaking in the agency proceedings below. The Skull Valley Band submits that the participation of these nine Band members in this case is merely political orchestration to embarrass the leadership of the Skull Valley Band. This is clear from the fact that the Petition for Review was filed to coincide with the next-day filing of the State’s Reply Brief in the 10<sup>th</sup> Circuit in Skull Valley Band v. Leavitt, 215 F.Supp.2d 1232, *supra*, where the State seeks to overturn a U.S. District Court decision invalidating state legislation designed to block the storage project. The filing of the Petition for Review in this case was highlighted on page 2 of that Reply Brief as part of the Appellants’ “Supplemental Statement of the Case.” See Exhibit B, attached. These nine petitioners are no more than intermeddlers in this review process, and their petition should be dismissed.

B. OGD IS NOT A PARTY AGGRIEVED.

Neither does OGD qualify as a “party aggrieved.” Its “participation” in the agency rulemaking proceeding was an untimely, “me-too” filing, which followed— by over eight months— Utah’s Petition for Rulemaking. See Exhibit A. No substantive comment was submitted to the agency by OGD. Indeed, its “Joinder” with Utah’s request for a stay of the ISFSI licensing proceeding was particularly pointless, as the Commission entered a Memorandum and Order on April 3, 2002— over six months before the filing of the

“Joinder”— denying the State’s request for stay. Private Fuel Storage, L.L.C., CLI-02-11, 55 NRC 260 (2002). Moreover, there is nothing in NRC’s rules which recognizes or contemplates the filing of such a “Joinder”.

OGD’s participation in the PFS licensing proceeding itself should not be elevated to recognize OGD as a “party aggrieved” by the denial of Utah’s rulemaking petition. By the time OGD filed its “Joinder” on October 18, 2002, its only remaining contention in opposition to the PFS license application (the only one which had been accepted by the agency) had already been dismissed by the full Commission. 56 NRC 147 (October 1, 2002). This contention claimed that the PFS license application “poses an undue risk to public health and safety because it fails to address environmental justice issues.” Id., slip op. at p. 3. This has nothing to do with the rulemaking petition which is the supposed subject of OGD’s Petition for Review.

It is important to note that the Commission observed, in its decision on the OGD “environmental justice” contention: “It is apparent from OGD’s allegations that OGD represents a political faction opposed to the current tribal leadership.” Id., slip op. at pp. 12-13.<sup>1</sup> Thus, OGD’s lame and belated effort to somehow “participate” in the rulemaking proceeding is disingenuous, nothing more than a product of an internal tribal dispute. The Supreme Court has warned that federal court involvement in internal tribal matters “constitutes an interference with tribal autonomy and self-government.” Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978). The decision to lease tribal land of the Skull Valley Band was a tribal decision. Honoring the efforts of a group of tribal dissidents who oppose that lease undermines tribal decision-making.

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<sup>1</sup> OGD has already filed a Petition for Review in the 10<sup>th</sup> Circuit— albeit prematurely— challenging the Commission’s decision denying its environmental justice contention. Case No. 02-9583.

At best, OGD's effort to seek this Court's review of the Commission's denial of the Utah's rulemaking petition is a pointless political plug for the State's relentless opposition to the licensing of an ISFSI on the Skull Valley Reservation. OGD's latter-day "Joinder" of October 18, 2002, added nothing to the Commission's consideration of Utah's legal argument, and should not be viewed as elevating OGD to "party" status. Similarly, in Natural Resources Defense Council v. NRC, 666 F.2d 595 (D.C.Cir. 1981), the petitioner tried to invoke Hobbs Act review of agency rules by filing a latter-day petition to revoke those rules, and then sought review of the inevitable denial of its belated petition. Here, OGD has been far less clever. Its politically-motivated and untimely filing of a couple of pages of paper cannot transform it into a "party aggrieved".

#### CONCLUSION

For the foregoing reasons, the Petition for Review in No. 03-1018 should be dismissed.

Respectfully submitted,



Tim Vollmann  
Attorney at Law  
Attorney for Movant-Intervenor  
Skull Valley Band of Goshute Indians  
(Application for Admission pending)

Dated: March 19, 2003

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Skull Valley Band of Goshute Indians' Motion to Dismiss were served upon the following by United States mail, first class postage prepaid, on this 19<sup>th</sup> day of March 2003:

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A

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of: )  
 ) Docket No. 72-22-ISFSI  
PRIVATE FUELS STORAGE, L.L.C. )  
 ) ASLBP No. 97-732-02-ISFI  
(Independent Spent Fuel Storage )  
Installation) )  
\_\_\_\_\_ )

OHNGO GAUDADEH DEVIA ("OGD") JOINDER OF STATE OF  
UTAH'S PETITION TO INSTITUTE RULEMAKING AND TO STAY  
LICENSING PROCEEDING

On February 11, 2002, the State of Utah filed a petition to institute rulemaking pursuant to 10 CFR 2.802(a), and to stay this licensing proceeding until final resolution of Utah's petition to amend its regulations governing independent spent fuel storage installations ("ISFSIs"), 10 CFR Part 72, to the extent those regulations may be deemed to relate to a privately owned, away-from-reactor, spent nuclear fuel storage facility. Specifically, Utah petitioned that the Commission amend the ISFSI regulations to make clear that licensing is allowed only for federally owned and operated away-from-reactor, spent nuclear fuel ("SNF") storage facilities and not for an away-from-reactor storage facility when privately owned.

Having reviewed the State of Utah's petition to institute rulemaking and to stay this licensing proceeding and the attached appendices, OGD adopts and incorporates by this reference the entirety of the State of Utah's petition to institute rulemaking and to stay this licensing proceeding and all documents filed in support thereof.

For the reasons set forth in Utah's petition to institute rulemaking and incorporated herein by reference, OGD hereby joins and adopts the State of Utah's petition to institute rulemaking and stay this licensing proceeding.

Respectfully submitted this 18<sup>th</sup> day of October, 2001.

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I hereby certify that on this \_\_\_\_\_ day of October, 2002, I caused to be served a true and correct copy of the foregoing by United States Mail, First Class and conforming copies by electronic mail, unless otherwise noted, and addressed to the following:

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B

Appeal No. 02-4149

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**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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**THE SKULL VALLEY BAND OF GOSHUTE INDIANS, et al.**  
Plaintiffs-Appellees,

v.

**MICHAEL O. LEAVITT, in his official capacity as  
Governor of the State of Utah, et al.**

Defendants-Appellants.

On Appeal from the United States District Court for the  
District of Utah, No. 2:01 CV 00270CV  
Honorable Tena Campbell

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**APPELLANTS' REPLY BRIEF**

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**ORAL ARGUMENT REQUESTED**



We use in this Reply Brief the same abbreviations and short-hand phrases used in our Opening Brief. Thus, all appellants are "Utah"; appellee Private Fuel Storage LLC is "the Consortium"; appellee Skull Valley Band of Goshute Indians is "the Band"; the appellees collectively are "PFS"; etc.

### SUPPLEMENTAL STATEMENT OF THE CASE

Since the filing of Utah's Opening Brief on 18 October 2002, the following events material to this appeal have occurred:

1. On 18 December 2002, the NRC's Commissioners entered an order resolving, in two different proceedings, challenges to the NRC's authority to license a private, away-from-reactor, SNF storage facility. In resolving those challenges, the Commissioners addressed the underlying legal question: With enactment of the Nuclear Waste Policy Act of 1982 ("NWPA"), did Congress intend to exclude from the Nation's nuclear waste management system the use of such a private facility? The Commissioners ruled in favor of PFS's position, as and when Utah's Opening Brief had predicted they would. Opening Brief, at 33 & n. 41.

Regarding the two proceedings, one is the Consortium's licensing proceeding. In that proceeding, the Commissioners denied Utah's "Suggestion of Lack of Jurisdiction," which various members of the Band's General Council had joined. (The Band's General Council consists of all adult members of the Band.)

The other proceeding is separate from and outside the Consortium's licensing proceeding; that other proceeding was initiated by Utah's "Petition to Initiate Rulemaking," which, again, various General Council members joined. Utah's Petition requested that the NRC amend its Part 72, or ISFSI, regulation to reflect that Congress had excluded private, away-from-reactor, SNF storage facilities from the Nation's nuclear

waste management system. The Commissioners' decision denying the Petition to Initiate Rulemaking constituted final agency action subject to an immediate appeal of right. 28 U.S.C. §§ 2342, 2344; 42 U.S.C. § 2239(a)(1)(A) and (b)(1); 5 U.S.C. §§ 703, 704.

For ease of reference, we attach the Commissioners' 18 December 2002 decision as Addendum 7 and hereafter refer to it as "the NRC Decision."

2. On 29 January 2003, nine of the Band's General Council – including two of the three signers of the 1996 lease between the Band and the Consortium – appealed the Commissioners' denial of the Petition to Initiate Rulemaking to the Court of Appeals for the District of Columbia. Addendum 8. Utah is still considering whether it will do the same.

3. On 23 December 2002, the United States Department of Justice asked this Court for an extension of time until 5 March 2003 in which to decide whether the United States would file an amicus brief in support of PFS. This Court granted the extension. If such a brief is filed, this Court has ordered that Utah will have ten days to file a supplemental Reply Brief.

4. On 23 January 2003, one of two Licensing Boards (the Farrar board) involved in the Consortium's NRC licensing proceeding announced that it hoped to file decisions by the end of February 2003 on the contentions still remaining before it: geotechnical, military aircraft crashes, and rail spur alignment. The other Licensing Board (the Bollwerk board) has informally advised that it will file its decisions on the contentions still remaining before it – financial assurance and decommissioning – at the time of the Farrar board's filings.