

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT  
No. 02-4119

SKULL VALLEY BAND OF GOSHUTE INDIANS, et al.,  
Plaintiff-Appellees,

v.

MICHAEL O. LEAVITT, et al.,  
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF UTAH

**BRIEF OF THE UNITED STATES AS AMICUS CURIAE**

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## **INTEREST OF THE UNITED STATES**

Congress vested the Nuclear Regulatory Commission (NRC) with the authority to license, supervise, and regulate nuclear facilities. *See* Atomic Energy Act (AEA), 42 U.S.C. § 2201, *et seq.* Pursuant to that statutory mandate, the NRC has developed expertise, extending over several decades and numerous licensing proceedings, regarding the lawful and safe operation of facilities that handle nuclear materials. The NRC has a strong interest in the proceedings before this Court because the State of Utah has challenged the NRC's authority to license the appellees' proposed facility. The briefs filed by the parties have not fully addressed the exclusive jurisdictional scheme established by Congress in the Hobbs Act for review of NRC decisions. Under that scheme this Court lacks jurisdiction to adjudicate Utah's argument regarding the relationship between the AEA and the Nuclear Waste Policy Act (NWPA).

### **BACKGROUND**

#### **A. Procedural History**

This action arises from a dispute between the State of Utah (Appellant here) and the Private Fuel Storage (PFS), a consortium of nuclear power plant operators, and the Skull Valley Band of Goshutes

Indians (together Appellees here) regarding the State's authority to regulate the operation of a private, interim, spent nuclear fuel, storage facility within its borders. In 1997, PFS filed an application with the NRC for a license to build and operate such a facility on tribal land located in Utah. While the NRC has been conducting a proceeding, including agency hearings, to determine whether the license should be granted, Utah enacted legislation aimed at regulating the transportation and storage of nuclear waste. PFS and the Skull Valley Band challenged these statutes in federal district court, claiming they were preempted by the AEA, which vests licensing authority for spent nuclear fuel storage facilities with the NRC. On July 20, 2002, the District Court found for the plaintiffs<sup>1</sup> and Utah appealed to this Court.

Throughout the litigation, Utah has argued that the NRC has no statutory authority to issue the license sought by PFS. According to Utah, the NWPA, which authorizes the Department of Energy (DOE) to provide certain types of federal interim storage facilities, supersedes the NRC's authority to license interim storage facilities under the AEA. Utah first raised this argument as a counterclaim in the district court proceeding,

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<sup>1</sup>*The Skull Valley Band of Goshute Indians and PFC v. Leavitt*, 215 F. Supp. 1232 (D. Utah 2002).

challenging the NRC's jurisdiction to license the proposed facility. The United States filed an amicus brief arguing for dismissal of the counterclaim based on three jurisdictional arguments: 1) that all challenges to NRC licensing decisions must be brought in the appropriate court of appeals under the Hobbs Act, *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985); 2) that the State had failed to exhaust its administrative remedies due to the on-going licensing process; and 3) that under the doctrine of primary jurisdiction, the District Court should await resolution of the interplay question by the NRC and the appropriate court of appeals. The District Court agreed with the United States and dismissed the counterclaim. However, Utah continues to argue that this Court must resolve the interplay between the two federal statutes in order to resolve this dispute.

**B. The Federal Statutes That Govern Spent Nuclear Fuel Waste Storage and Disposal**

In the AEA, Congress granted the NRC exclusive authority to regulate the health and safety aspects of "radiation hazards," including the licensing, transfer, delivery, receipt, acquisition, possession and use of nuclear materials. 42 U.S.C. § 2021(k); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S.

190, 206 (1983). The NRC, under the AEA, and the U.S. Department of Transportation, under the Hazardous Materials Transportation Uniform Safety Act (HMTUSA), have dual authority over safety in the transportation of radioactive materials. In carrying out its statutory mandate, the NRC has promulgated regulations providing a comprehensive procedure for the licensing of temporary Independent Spent Fuel Storage Installations (ISFSIs). *See* 10 C.F.R. pt. 72.<sup>2</sup> Congress addressed the permanent storage of spent nuclear fuel and spoke to certain types of interim storage facilities to be provided by DOE in the Nuclear Waste Policy Act (NWPA). *See* 42 U.S.C. § 10101 *et seq.* The NWPA does not contain an express revocation of the NRC's authority to provide for and regulate the interim storage of spent nuclear fuel.

The AEA and the Hobbs Act, 28 U.S.C. §§ 2341-2351, govern civil actions that challenge licensing and rulemaking decisions of the NRC.<sup>3</sup>

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<sup>2</sup>The NRC initially promulgated regulations governing the licensing of facilities for the storage and disposal of nuclear waste away from the reactor in 1980, two years prior to the passage of the NWPA. *See* "Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation," 45 Fed. Reg. 74,693 (1980). The NRC amended the regulations in 1988 to add additional provisions for its licensing of federally-owned storage and disposal facilities for spent nuclear fuel and high-level radioactive waste as required under the NWPA. *See* 53 Fed. Reg. 31,651 (1988) (codified at 10 C.F.R. pt. 72).

<sup>3</sup>The Hobbs Act also governs review of certain decisions by the Federal Communications Commission, the Department of Agriculture, the Department of Transportation, the Federal Maritime Commission and the Interstate Commerce Commission. 28 U.S.C. § 2341.

The Hobbs Act specifies that judicial review of a final order issued by the NRC shall only be pursued in a petition for review filed in the U.S. courts of appeals. The Hobbs Act grants to the courts of appeals “exclusive jurisdiction to enjoin, set aside, suspend ... all final orders of the [Nuclear Regulatory Commission] made reviewable by section 2239 of title 42 [the AEA].” 28 U.S.C. § 2342(4) (emphasis added). In turn, the AEA provides that the Hobbs Act governs review of “[a]ny final order entered in any proceeding of the kind specified in subsection (a) [of § 2239].” “The granting, suspending, revoking, or amending of any license ... and [] any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees” qualify as subsection (a) proceedings. 42 U.S.C. § 2239(a)(1)(A).

C. PFS’s Licensing Adjudication and the NRC’s Ruling on Utah’s Contention and Petition for Rulemaking

The NRC’s licensing process includes both a technical review by the NRC staff and an opportunity for a formal adjudicatory hearing before the Atomic Safety and Licensing Board (the “Licensing Board”). *See* 10 C.F.R. pt. 2 (G). Under the NRC’s regulations on hearings, any interested party may seek intervention into the licensing process and obtain a full adjudicatory hearing on its contentions about the license. *See* 10 C.F.R. §§

2.105, 72.46. The Licensing Board presides over such a hearing.<sup>4</sup> After a full adjudicatory hearing, the Licensing Board issues an “initial decision” on the licensing application. 10 C.F.R. § 2.760(a). An initial decision approving issuance of a license is appealable to the Commission, and in the case of ISFSIs becomes effective only upon an order of the Commission. 10 C.F.R. §§ 2.764(c); 2.786(b). The Commission’s final order is subject to a petition for reconsideration, 10 C.F.R. § 2.771, and, in accordance with the Hobbs Act, to judicial review in the appropriate court of appeals.

The State of Utah sought to intervene in the PFS licensing process in 1997 and submitted contentions. *See generally In the Matter of Private Fuel Storage, LLC*, 47 NRC 142 (April 22, 1998). These included a claim that the NWPA eliminated the NRC’s authority under the AEA to issue a license approving the construction and operation of an away-from-the reactor ISFSI. *Id.* at 183-84. In rejecting this contention, the Licensing Board held that the NRC has promulgated regulations that govern the licensing of ISFSIs (10 C.F.R. pt 72) and that Utah’s contention “impermissibly challenge[d] the agency’s existing regulatory provisions or rulemaking-associated generic determinations” within the context of a licensing adjudication. *Id.* at 183-

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<sup>4</sup>A Licensing Board is generally composed of a lawyer as a chair and two technically-trained hearing examiners. 42 U.S.C. § 2241; 10 C.F.R. § 1.15.

184.

Not long after the start of this lawsuit (but several years after the Licensing Board had ruled on the admissibility of Utah's "lawfulness" contention), Utah filed a petition for rulemaking seeking to have the ISFSI regulations rescinded based on its view that the NRC lacks jurisdiction to license interim spent nuclear fuel storage facilities. Utah's petition argued that the NWPA had revoked the Commission's authority to license such facilities. Utah advanced the same argument in a "Suggestion of Lack of Jurisdiction" that it filed with the Commission in the context of the licensing adjudication.

On December 20, 2002, the NRC issued an administrative order ("December Order") denying the rulemaking petition and resolving Utah's "Suggestion of Lack of Jurisdiction." 56 NRC 390 (2002). The Commission's 29-page opinion found that the NWPA did not supersede NRC's ISFSI regulations, and that the Commission continued to have authority under the AEA to consider issuance of a license for the proposed PFS facility. On January 30, 2003, the Ohngo Gaudadeh Devia (OGD) (a group of dissident Skull Valley Goshutes), intervenors in the licensing adjudication, petitioned for review of the December Order under the Hobbs

Act in the District of Columbia Circuit. Utah has also filed its own challenge to the NRC's order in the District of Columbia Circuit.<sup>5</sup> The two cases have been consolidated under the caption *Bullcreek v. NRC*, Nos. 03-1018 & 03-1022 (D.C. Cir.).

The Licensing Board recently issued a decision holding that a license for the PFS facility "cannot be granted at this juncture." *In the Matter of Private Fuel Storage*, LBP-03-04, -NRC-- (March 10, 2003). The Board gave PFS the opportunity to make additional showings to remedy the defects the Board found in the application. *Id.*

## DISCUSSION

- A. This Court can determine the plaintiffs' standing without addressing the interplay between the NWPA and the AEA.

As in the district court proceeding, Utah continues to argue that the court must resolve the NRC's authority under the AEA to determine the plaintiffs' standing "[b]ecause [if] PFS has no right to conduct the business of a nuclear waste dump prohibited by Congress, it has in this case no right capable of judicial enforcement." Utah's Brief at 40. In other words,

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<sup>5</sup>Challenges to the December Order could have been filed in either this Court or the District of Columbia Circuit as the Hobbs Act allows for a choice of venue for review of orders of Federal agencies "in the judicial circuit in which the petitioner resides, or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit." *See* 28 U.S.C. § 2343.

according to Utah, since the NWPA revoked NRC's jurisdiction under the AEA to license the proposed facility, the plaintiffs cannot lawfully obtain a license from the NRC and hence, are not concretely injured by the State's statutes.<sup>6</sup>

As the district court correctly recognized, resolution of the interplay between the NWPA and the AEA is not necessary in determining the plaintiffs' standing in this case.<sup>7</sup> Court's Order at 5-6. ("The question of whether Plaintiffs have a right to own and operate a SNF facility will be resolved by the NRC (with the right of appeal to the appropriate Court of Appeals) and not by this Court.") Further the District Court correctly held

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<sup>6</sup>The analysis proposed by Utah closely resembles the "legal interest" standing analysis formerly applied by the Supreme Court. Under that test, a plaintiff was required to show the invasion of a "legal right," established under statutory or common law, in order to establish standing. See, e.g., *Association of Data Processing Organizations, Inc., v. Camp*, 397 U.S. 150, 153-54 (1970) (explaining and rejecting this test). The Supreme Court discarded this approach for the familiar inquiry of injury-in-fact, traceability, redressability, and the zone-of-interests test. Insisting on the resolution of a merits issue as an element of the standing issue, as Utah does, effectively revives this now-abandoned doctrine.

<sup>7</sup>The plaintiffs in this case can establish the three prong standing test without the Court addressing the interplay between the NWPA and the AEA. See *Pacific Legal Foundation v. State Energy Resources Conservation*, 659 F.2d 903 (9th Cir. 1982). (holding that "[b]ecause the challenged statutes stand as an absolute barrier to construction of the proposed plants, and because that barrier will be removed if the utilities secure the injunctive relief they seek .... . It is sufficient that the utilities intend to proceed if the statutes are invalidated.") (internal citations omitted). Plaintiffs presented evidence of a current interference with their ability to meet NRC's licensing requirements regarding funding, which should suffice for injury. For causation and redressability, plaintiffs argue that the challenged statutes, if left in place, will obstruct their efforts to construct the proposed storage facility.

that a determination of standing does not usually involve looking at the plaintiffs' likelihood of success on the merits. *Id.* at 6. The District Court acknowledged that there are certain situations in which a court would need to examine the merits of the underlying claim to determine standing, but distinguished those cases on the basis that, in those cases, the plaintiffs claimed injury based on processes that the court determined were not provided under the statute. *Id.* at 7.

In urging this Court to resolve the interplay between the NWPA and the AEA, Utah cites to *Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998). See Utah's Brief at 36-40. In *Utah*, before engaging in the three-part standing analysis, this Court looked first to the Federal Lands Policy Management Act (FLPMA) and held that the plaintiffs lacked standing because they had no rights under that statute to challenge the lack of public participation in a land inventory conducted by the BLM. *Utah*, 137 F.3d at 1207-8.

*Utah* is easily distinguished based on the nature of plaintiffs' claimed injury. In *Utah*, the plaintiffs were claiming a right of public participation where neither the agency regulations nor the underlying statute recognized one. Here in contrast, there is an existing NRC

licensing process and the standing “injury” claimed by PFS and Skull Valley is interference with that process. The District Court here held that the injury is “the plaintiffs’ constitutional right to seek a government benefit, a license from the NRC, free from allegedly preempted state laws.” Court’s Order at 7. PFS can lawfully seek a federal license from the NRC, regardless of whether or not the license can or will ultimately be granted. In short, this Court can determine standing without reaching the interplay between the NWPA and the AEA.

- B. The interplay between the NWPA and the AEA is not properly before this Court as the Hobbs Act dictates an exclusive jurisdiction scheme for review of challenges to NRC’s jurisdiction.

The Hobbs Act dictates that neither the interplay question nor the NRC’s December Order is properly at issue in this appeal. In the Hobbs Act, Congress vested exclusive jurisdiction in the courts of appeals to review controversies regarding NRC licensing or rulemaking proceedings. *See* 28 U.S.C. § 2239(a)(1)(A); *see Concerned Citizens of Nebraska v. NRC*, 970 F.2d 421, 424 (8th Cir. 1992). Even though this case is now before the Tenth Circuit, Utah’s argument arose in the district court and bypasses the carefully prescribed statutory review scheme envisioned by

the Hobbs Act. Actions encompassed within the Hobbs Act's exclusive courts of appeals review clearly include challenges to NRC's decisions regarding its own licensing jurisdiction. *General Atomics v. NRC*, 75 F.3d 536, 539 (9th Cir. 1996) ("courts of appeals have exclusive jurisdiction to review NRC decisions regarding jurisdiction"); *NRDC v. NRC*, 606 F.2d 1261, 1265 (D.C. Cir. 1979) ("NRC's decision concerning jurisdiction ... is well within the class of final orders reviewable under [the Hobbs Act]").

Utah cannot create jurisdiction in this Court by simply recasting their interplay argument, which questions the NRC's authority over a licensing adjudication, in terms of standing. Utah's attempt to bolster its arguments by inappropriately attaching a copy of the NRC's December Order to its reply brief in this appeal likewise must fail. Utah's Reply at 22-35. Such collateral attacks on NRC decisions undermine the prescribed scheme for obtaining review of agency orders dictated by the Hobbs Act.

The Supreme Court interprets the jurisdictional grant of authority under the AEA broadly, and has held that decisions "ancillary" or "preliminary" to a NRC licensing decision may be challenged only on direct review in the Courts of Appeals. *Lorion*, 470 U.S. at 743 (emphasis added). As noted above, PFS and Utah are currently in the midst of an ongoing

administrative hearing before the NRC, in which PFS seeks an NRC license to construct and operate an offsite spent nuclear fuel storage facility on lands located in Skull Valley, Utah, and leased from the Skull Valley Band of Goshute Indians. The question of whether the NRC has authority under the AEA to license the proposed facility under its existing regulations is properly considered ancillary to the licensing adjudication. At this point in the administrative proceeding, the NRC has issued several preliminary decisions including: (1) the December Order addressing its authority under the AEA and denying Utah's rulemaking petition,<sup>8</sup> and (2) the March Order identifying the current defects in PFS's application. However the fact remains that the Commission has not yet ruled on whether to issue a license to PFS. When the Commission issues a final decision in the licensing proceeding regarding the PFS facility, the appropriate court of appeals will have exclusive jurisdiction to review that decision.

The Hobbs Act leaves no room for review of NRC's licensing or rulemaking decisions as part of a district court case. Utah cannot bypass the exclusive jurisdictional scheme of review by deciding to "reply directly to

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<sup>8</sup>As mentioned above, both Utah and OGD have challenged the rulemaking portion of the December Order in the D.C. Circuit under the Hobbs Act. We take no position on the finality of the December Order or its ripeness for review under the circumstances here, where the petition for rulemaking was filed incident to an on-going licensing proceeding.

the NRC decision,” Utah’s Reply at 22, in a non-Hobbs Act case. The scope of exclusive jurisdiction under the Hobbs Act extends not only to challenges to final rulings in licensing proceedings but also to any preliminary suits that might affect the court of appeals’ jurisdiction over final agency actions. See *California Save Our Streams v. Yeutter*, 887 F. 2d 908 (9th Cir. 1989); *Public Utility Comr. V. Bonneville Power Administration*, 767 F. 2d 622 (9th Cir. 1985); accord *TRAC v. FCC*, 750 F. 2d 70, 75 & 78-79 (D.C. Cir. 1985) (“[w]e hold that where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court’s future jurisdiction is subject to the exclusive review of the Court of Appeals.”). See also *Ecology Action v. AEC*, 492 F. 2d 998 (2d Cir. 1974). It goes without saying that any decision regarding the NRC’s authority under the AEA and the NWPA as applied to the PFS license application would bear directly on issues in NRC’s December Order and might affect the ongoing Hobbs Act cases in the D.C. Circuit. Accordingly, by seeking to have this Court decide the issue of the Commission’s authority, Utah has sought relief that impermissibly impairs the exclusive jurisdiction of the courts of appeals pursuant to the *TRAC* line of cases.

In short, Congress has established a review structure under the Hobbs

Act and the AEA designed to vest the courts of appeals with exclusive subject-matter jurisdiction over any direct review of a Commission action related to licensing or rulemaking under the AEA. *See Lorion*, 470 U.S. at 740-41. This Court should not entertain Utah's collateral attack on the NRC's licensing authority, which threatens the integrity of the NRC's administrative process and of Congress's carefully prescribed judicial review scheme.

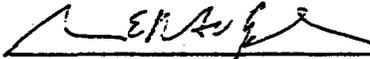
Additionally, allowing litigants to bypass the Hobbs Act has broader ramifications than just allowing a collateral attack on the NRC "licensing authority" decision in this particular case. There are many federal agencies whose decisions are subject to direct court of appeals review under the Hobbs Act. A decision here to resolve an NRC licensing dispute outside the Hobbs Act framework potentially will expose Hobbs Act agencies to federal district court review whenever private litigants have the wit or ingenuity to dress regulatory claims in "standing" or other similar garb. This result cannot be squared with Congress's decision in the Hobbs Act to assign such claims "exclusively" to the courts of appeals. *See* 28 U.S.C. § 2342.

## CONCLUSION

For the foregoing reasons, this Court should not rule on the interplay between the NWPA and the AEA in resolving this case.

Dated: March 25, 2003

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