

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Commission

December 30, 2003 (9:49AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)
)
PRIVATE FUEL STORAGE L.L.C.) Docket No. 72-22
)
(Private Fuel Storage Facility)) ASLBP No. 97-732-02-ISESI

**SKULL VALLEY BAND RESPONSE TO OGD PETITION FOR REVIEW
OF INTERLOCUTORY BOARD ORDERS**

On December 4, 2003, Intervenor Ohnge Gaudadeh Devia (OGD) submitted a Petition for Review of various Interlocutory Board Orders entered on April 22, 1998 in this licensing proceeding. The Board ruled in those orders that certain contentions raised by OGD were inadmissible. The Skull Valley Band of Goshute Indians, an Intervenor in support of the Application for license, opposes this Petition for Review on the ground that OGD has failed to demonstrate any basis for the review of those orders. Applicant Private Fuel Storage L.L.C., as lead party opposing contentions, is responding to all arguments raised in OGD's Petition for Review. The Skull Valley Band's Response is limited to OGD Contention J.

STANDARDS OF REVIEW

A. Standard for Granting a Petition for Review

A petition for review of the decisions of a licensing board is granted only at the discretion of the Commission, "giving due weight to the existence of a substantial question with respect to the following relevant considerations:

“(1) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

“(2) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

“(3) A substantial and important question of law, policy, or discretion has been raised;

“(4) The conduct of the proceeding involved a prejudicial procedural error; or
Any other considerations which the Commission may deem to be in the public interest.”

10 C.F.R. § 2.786(b)(4) (emphasis added); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-03-17, ___ NRC ___, slip op. at 4 (2003). Since OGD raises no substantial questions of fact, law or policy, there is no reason why the Commission should exercise its discretionary power to review the Board’s decision.

B. Standards for Admitting Contentions

Since OGD Contention J was rejected by the Board at the filing stage, the standards for admitting contentions are stated here. Contentions must meet the standards set forth in 10 C.F.R. § 2.714(b)(2), which provide “[e]ach contention must consist of”

- “a specific statement of the issue of law or fact to be raised or controverted”, accompanied by
- (i) a “brief explanation of the bases of the contention”;
- (ii) a “concise statement of the alleged facts or expert opinion” supporting the contention together with references to “specific sources and documents . . . on which the petitioner intends to rely to establish those facts or expert opinion”; and
- (iii) “[s]ufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact,” which showing must include “references to the specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute”

10 C.F.R. § 2.714(b)(2). The failure of a contention to comply with any one of these requirements is grounds for dismissing the contention. 10 C.F.R. § 2.714(d)(2)(i). The Board discussed the standards for admitting contentions in detail when it rejected the contentions in question here when the State first sought to intervene. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 178-83, aff'd in part on other grounds, CLI-98-__ (1998).

OGD Contention J – The License Application Fails to Address the Status of Compliance with All Permits, Licenses, and Approvals for the Facility.

Intervenor Skull Valley Band will reap substantial benefits from the Private Fuel Storage Facility on the Skull Valley Reservation under the terms of a lease with the Applicant, if the license is granted. OGD is an organization whose members are both members of the Band and non-members who oppose the license. Among the arguments made in support of OGD's Petition for Review is that the Board's summary disposition of Contention J "fails to fulfill [the NRC's] trust obligations to the Skull Valley Band membership" (OGD Petition at p. 7), and that "[T]he Board erred in failing to evaluate OGD Contention J and the PFS application in accordance with the heightened scrutiny required by the federal government's trust responsibility." OGD Petition at p. 8. OGD alleges that it has been "denied the opportunity to litigate tribal members' concerns about the inadequate protections of Tribal land, water, and air contained in the PFS application." Id.

OGD misconstrues and misapplies the law with respect to the federal government's trust responsibility for Indian tribal lands, and its arguments on behalf of individual members and non-members of the Skull Valley Band would undermine the actual beneficiary of that trust responsibility, the Skull Valley Band itself.

ARGUMENT

The Petition for Review misconstrues the federal government's trust responsibility.

The Skull Valley Indian Reservation is held in trust by the United States for the benefit of the Skull Valley Band. The Band has made clear its desire to host the PFS project, consistent with federal public health and safety requirements, because the project will bring jobs, revenue and infrastructure to an Indian Reservation where there is no current viable economic development. The trust status of Skull Valley tribal land prevents it from being alienated, and guarantees that the Tribe, as beneficial owner, is immune from state taxation. See United States v. White Mountain Apache Tribe, 123 S.Ct. 1126, 1132-33 (2003). That trust status alone does not endow the federal government, or the Nuclear Regulatory Commission, with any overarching trust responsibility which would override tribal desires and decisions for the development of that land.

OGD has cited the recent decision of the U.S. Supreme Court in the White Mountain Apache Tribe case, cited above, for the proposition that the NRC is bound by "exacting fiduciary standards" (which are not identified) to evaluate the PFS application "with heightened scrutiny", which requires that OGD be given "the opportunity to litigate tribal members' concerns." OGD Pet. at 8, quoted above. That is not what the Supreme Court said; quite to the contrary. The case was brought by the Tribe in the Court of Federal Claims, seeking damages from the United States for allowing government buildings, over which a federal agency had complete control, located on the Fort Apache Reservation in Arizona, to fall into dramatic disrepair. The Court held that any actionable trust responsibility on the part of the United States must be the subject of a

specific statute imposing a “substantive obligation” (123 S.Ct. at 1133); and the Court found that a 1960 statute, which set aside these buildings and land in trust for the Tribe, “subject to the right of the Secretary of the Interior to use the land and improvements for administrative or school purposes” (*id.*, at 1134), was the specific source of a “full responsibility to manage Indian resources and land for the benefit of the Indians.” *Id.*, at 1133.¹

OGD did not, and could not, cite any statute which would provide the basis for the “comprehensive control” (*id.*) which the Court required to provide a basis for a trust responsibility claim. What OGD seeks is for the NRC to expand its inquiry in this proceeding to embrace a new and subjective standard for protection of Indian land, air and water, notwithstanding the desires of the Indian beneficiary of the trust. This runs against the modern federal Indian policy of tribal self-determination. OGD wants the NRC to impose a more severe standard (of unbridled scope), than the public health and safety standards set by the Atomic Energy Act and NRC regulations, for a licensed project on tribal land. This would be unfair to the Skull Valley Band.²

The inquiry and higher standards advocated by OGD are particularly inappropriate here. The land is held in trust for the Skull Valley Band, not the individual members of the Band, certainly not on behalf of the tribal dissidents and others represented by OGD. It is the beneficial owner of tribal land which may invoke and enforce the government’s trust responsibility for that land, not the constituent members,

¹ The White Mountain Apache Court distinguished the more “general trust relationship” between Indian landowners and the United States, which has been recognized by the Supreme Court for many years. 123 S.Ct. at 1133, note 3.

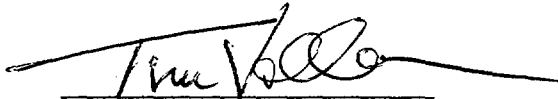
² OGD also cites Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001), for an expansive view of the federal trust responsibility. This case deals with agency management of Individual Indian Money (IIM) accounts, which are controlled by the Secretary of the Interior by statute and regulation, and has no applicability to an NRC licensing proceeding. The applicability of the trust responsibility in that case was not disputed.

divorced from the Tribe. As pointed out by PFS in its Answer to OGD's original assertion of this contention, the Interior Board of Indian Appeals has held that any trust duty of the Bureau of Indian Affairs for tribal land is owed to the tribal landowner, not to an individual Indian tribal member. Robert and Khrista Johnson v. Acting Phoenix Area Director, 25 IBIA 18 (1993). See also Fort Berthold Land & Livestock Assn. v. Great Plains Regional Director, 35 IBIA 266, 277 (2000). Significantly, other individual Indians purporting to make claims on behalf of the Skull Valley Band were recently shown the door by the U.S. Court of Appeals for the 10th Circuit, on the ground that they could not establish that they had tribal status. Nato Indian Nation v. Utah, No. 02-4062 (Aug. 8, 2003).

CONCLUSION

In sum, the Skull Valley Band takes the position that the Commission should not succumb to OGD's entreaties to conduct a new factual inquiry in this proceeding, to determine whether the PFS license application meets undefined, higher standards which OGD claims must be imposed on the Skull Valley Band's own lands. There is no legal basis for conducting such an inquiry. OGD's Petition for Review thus does not meet the standards for such petitions, as it raised no substantial issue of law or policy, or demonstrated any factual, legal, or procedural error below.

Respectfully submitted,



Tim Vollmann
Attorney for the Skull Valley Band
of Goshute Indians
3301-R Coors Rd. N.W. #302
Albuquerque, NM 87120
Telephone: (505) 792-9168

CERTIFICATE OF SERVICE

I hereby certify that copies of the Skull Valley Band Response to OGD Petition for Review of Interlocutory Orders 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 18th day of December 2003.

Emil L. Julian, Assistant for
Rulemakings and Adjudications
Rulemaking & Adjudication Staff
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: hearingdocket@nrc.gov
(original and two copies)

Jeffrey S. Merrifield, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrmerrifield@nrc.gov

Edward McGaffigan, Jr. Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, DC 20555-0001
e-mail: cmrmcgaffigan@nrc.gov

Michael C. Farrar, Esq., Chairman
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: MCF@nrc.gov

Nils J. Diaz, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 G15
Washington, DC 20555-0001
e-mail: cmrdiaz@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: JRK2@nrc.gov; kjerry@erols.com

G. Paul Bollwerk III, Esq., Administrative
Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: GPB@nrc.gov

Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop O-15 B18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: set@nrc.gov
e-mail: pfscase@nrc.gov

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: PSL@nrc.gov

Jay Silberg, Esq.
Paul Gaukler, Esq.
Sean Barnett, Esq.
Shaw Pittman, LLP
2300 N Street, N.W.
Washington, DC 20037-1128
e-mail: jay.silberg@shawpittman.com
paul.gaukler@shawpittman.com
sean.barnett@shawpittman.com

Diane Curran, Esq.
Harmon Curran Spielberg &
Eisenberg L.L.P.
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
e-mail: dcurran@harmoncurran.com

Joro Walker, Esq.
Land and Water Fund of the Rockies
1473 South 1100 East
Suite F
Salt Lake City, UT 84105
e-mail: utah@lawfund.org


*Office of the Commission Appellate
Adjudication
Mail Stop: 16-G-15 OWFN
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(United states mail only)

James M. Cutchin
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: jmc3@nrc.gov
(e-mail copy only)

Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, Utah 84114-0873
e-mail: dchancellor@utah.gov

John Paul Kennedy, Sr., Esq.
David W. Tufts, Esq.
Confederated Tribes of the Goshute
Reservation and David Pete
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84105
e-mail: dtufts@djplaw.com

Paul EchoHawk, Esq.
Larry EchoHawk, Esq.
Mark EchoHawk, Esq.
EchoHawk PLLC
P.O. Box 6119
Pocatello, ID 83205-6119
e-mail: paul@echohawk.com



Tim Vollmann