ORAL ARGUMENT SCHEDULED FOR APRIL 24, 2007

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

Nos. 05-1419, 05-1420, and 06-1087

OHNGO GAUDADEH DEVIA, and
STATE OF UTAH,
Petitioners,
v.

U.S. NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
Respondents.

ON PETITION TO REVIEW ORDERS OF AND LICENSE ISSUED BY
THE U.S. NUCLEAR REGULATORY COMMISSION

SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

JUDICIAL DECISIONS:

AGENCY DECISIONS:

STATUTES:

*Authorities chiefly relied on are marked with an asterisk.

INTRODUCTION

This case is fully briefed and awaiting oral argument on April 24. This supplemental brief responds to the Court's order, dated March 16, 2007, requesting the parties' views on ripeness and standing in light of recent administrative and statutory developments.

As is often the case with major private sector projects, the process that Private Fuel Storage, L.L.C. (PFS) must go through before actually building and operating its proposed spent fuel storage facility involves separate approvals from separate governmental entities.[1] Specifically, the NRC must license the facility, the Bureau of Indian Affairs (BIA) must approve the lease of the land chosen for the facility, and the last portion of PFS's current proposed route for transporting spent fuel to the site requires Bureau of Land Management (BLM) approval.

NRC has already granted a license to PFS. The validity of this license is the subject of the instant (consolidated) lawsuits. After NRC's license grant, however, the BIA refused to approve the PFS land lease, and the BLM rejected PFS's right-of-way application. The latter decision was based, in part, on the FY 2006 National Defense Authorization Act's creation of the Cedar Mountain Wilderness Area (Pub. L. 109-163, § 384), which the BLM viewed as prohibiting one – but only one – of PFS's two proposed right-of-way options. *See* Brief for the Federal Respondents at 119 n.42. The BLM's rejection of PFS's other right-of-way was based on NEPA concerns and had nothing to do with the new Wilderness Area designation. *See id.*

PFS and the Skull Valley Band of Goshute Indians have indicated that they

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[1] Such scenarios commonly arise in NRC practice. *See, e.g., Power Authority of the State of New York*, 52 NRC 266, 288-90 (2000); *see also Pacific Gas & Electric Co.*, 55 NRC 317, 333-34 (2002) (referring to the NRC's "usual practice of completing [its] license transfer reviews promptly despite the pendency of related matters elsewhere").

"are contemplating seeking judicial review" of the BIA and BLM decisions. *See* Brief for Intervenors PFS and Skull Valley Band at 29. Thus, the ultimate outcome of the land lease and right-of-way issues remains uncertain. Nonetheless, one of the petitioners, Ohngo Gaudadeh Devia (OGD), contended in its opening brief (at pp.8-10) that the BIA and BLM decisions render the instant litigation moot and require vacating the NRC license. The other petitioner, the State of Utah, seemingly agrees with us that the NRC licensing litigation is not now moot and would become so only if PFS fails to overcome the BLM and BIA disapprovals. *See* Brief for Petitioner State of Utah at 14. We explained our disagreement with OGD's mootness-*vacatur* argument in our main brief (at pp.117-120).

This Court has now ordered the parties to address ripeness or standing concerns that may have arisen on account of the BIA and BLM decisions and the Cedar Mountain Wilderness Area designation, and to address three cases.[2]

ARGUMENT

Ripeness and standing principles do not bar this Court from adjudicating the petitions for review. Thus, the case ought not be dismissed. This Court has discretion, though, to hold it in abeyance to await further developments.

A. The Petitions for Review Should Not Be Dismissed for Lack of Ripeness.

1. Ripeness principles do not prevent this court from reviewing this case. In considering ripeness, a court looks to (1) whether the issues are "fit" for review and (2) whether "hardship" to the parties would result from delaying review. *See Abbott*

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[2] The three cases are: *Worth v. Jackson*, 451 F.3d 854 (D.C. Cir. 2006); *Town of Stratford, Conn. v. FAA*, 292 F.3d 251 (D.C. Cir. 2002) (opinion denying rehearing); and *City of Orrville, Ohio v. FERC*, 147 F.3d 979 (D.C. Cir. 1998). We address each case below.

Laboratories v. Gardner, 387 U.S. 136, 149 (1967). *Accord General Electric Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002).

Under the "fitness" prong, courts consider whether withholding judicial review would provide an opportunity for the agency's position to further crystallize or for the issues involved to become "more concrete" through emergence of additional facts. *See id.*; *Association of American Railroads v. ICC*, 846 F.2d 1465, 1469 (D.C. Cir. 1988). Here, the NRC's adjudicatory record is already fully developed, and the NRC decision is final, not subject to reconsideration. Nothing that occurs in the future regarding the BIA or BLM decisions would apply to any substantive question this Court has been asked to decide. Whether NRC acted reasonably on the issues petitioners raise - for example, aircraft crash probabilities or NEPA review of terrorism impacts – depends *solely* on the reasons NRC has *already* provided for its decisions. Future events are irrelevant to the analysis. Therefore, postponing review until later would not render the substantive issues in this case any more "fit" for judicial review than they are already.

Thus, our case is quite different from one of the cases listed in this Court's March 16th order, *Worth v. Jackson*, 451 F.3d 854, where this Court found a lack of ripeness. There, the plaintiff feared that the Department of Housing and Urban Development (HUD) *might* use an unwritten policy to take a discriminatory action against him *in the future*, even though it had not done so yet. Because of the highly speculative nature of this feared future agency action, the Court deemed the suit against HUD to be premature. Here, by contrast, NRC has already granted PFS its license, and in fact has already done all it can do to allow the PFS project to go forward. Petitioners' claims in this Court focus on an already-completed *past* NRC

licensing decision. Thus, the NRC license, unlike the HUD policy at issue in *Worth*, is "fit" for review now.

The second ripeness prong – "hardship" to the parties – also does not bar review here. Under the Hobbs Act, parties seeking to challenge final agency actions covered by the Act – such as the petitioners here – must appeal within 60 days after final agency action. 28 U.S.C. § 2344. As this Court has said, such a deadline shows that Congress has "emphatically declared a preference for immediate review." *Natural Resources Defense Council, Inc. v. EPA*, 22 F.3d 1125, 1133 (D.C. Cir. 1994); *Association of American Railroads*, 846 F.2d at 1469. Under such statutes, where Congress expects immediate review, "no purpose is served by proceeding to the second [or hardship] prong" of ripeness analysis. *Natural Resources Defense Council*, 22 F.3d at 1133. It is inapplicable. Consequently, once this Court has determined that the issues in this case are fit for judicial review, the ripeness inquiry should end.

2. Declaring "not ripe" cases like this, where NRC has issued a license but other approvals remain pending or in (potential) litigation, would cause large practical difficulties in administering judicial review under the Hobbs Act. The Hobbs Act's 60-day deadline for challenging final NRC decisions is jurisdictional and means that, if the current suit is dismissed as not yet ripe, petitioners could not simply wait until ripeness occurs and then re-file their petitions for review. It is already well over 60 days since NRC took its final action on the PFS license. Dismissing the current lawsuits on ripeness (or standing) grounds,[3] then, would effectively render the NRC licensing decision unreviewable, even if in the end PFS and the Skull Valley Band

[3] We discuss the possibility of holding this case in abeyance, rather than dismissing it, in Point C, *infra*.

were to succeed in overturning the still-unreviewed BIA and BLM decisions. The BLM and BIA decisions therefore cannot sensibly be understood as depriving the final NRC licensing decision of ripeness.[4]

To be sure, it is certainly possible that reversals of the BIA and BLM decisions "may not occur at all." *Worth v. Jackson*, 451 F.3d at 861 (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). Yet, because the BIA and BLM decisions are actions taken by *other governmental entities*, it would be problematic, from a practical standpoint, to hold that uncertainty regarding them renders the NRC's decision unripe. Such a rule could lead to judicial gridlock where, as here, multiple governmental entities must provide approvals for a project to proceed and each approval (or disapproval) may spawn its own legal action. Each court – or even each agency – might end up awaiting action somewhere else before moving forward. Unsurprisingly, then, this Court has held that uncertainty about necessary actions by other agencies does not make review of a challenged final agency action or decision unripe. *See Town of Stratford, Connecticut v. FAA*, 285 F.3d 84, 88 n.5 (D.C. Cir. 2002). *See also Sandell v. FAA*, 923 F.2d 661, 663-64 (9th Cir. 1990).

3. Finally, it is noteworthy that the BIA and BLM decisions came many months *after* the current lawsuits were filed – an additional reason why ripeness concerns do not call for dismissing this case. Except for mootness, which looks to whether a controversy that was live at the time the case was filed has been terminated by

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[4] The FY 2006 National Defense Authorization Act's creation of the Cedar Mountain Wilderness Area also does not raise ripeness concerns. The reason for this, quite simply, is that it does not actually block PFS from going forward with its project. All it does, as explained in our main brief (p. 119 n. 42), is to limit PFS's options for the final leg of spent fuel transportation to the site. Consequently, this Act does not create any ripeness difficulties whatsoever.

subsequent events, jurisdictional questions turn on facts existing when the case was filed. *Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991); *see also Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570-71 (2004).

Here, the petitions for review were filed on November 8, 2005 and on March 6, 2006. The BIA and BLM decisions rejecting the land lease and the right-of-way application did not issue until September 7, 2006. *See* Brief for Petitioner OGD at Add. 3, Add. 50. Therefore, these two agency actions cannot render this case unripe. In light of their timing, the only potential justiciability impact they could have is to render the case (potentially) moot. As we explained in our main brief (at 117-20), however, mootness doctrine would permit this case to be heard so long as a reasonable *possibility* remains that PFS could make future use of its NRC license. That is the case here, because the BIA and BLM decisions have not yet undergone judicial review. Moreover, the BLM explicitly stated that it would be open to considering a revised PFS right-of-way application. OGD's Opening Br. at Add. 19.

B. The Petitions for Review Should Not Be Dismissed for Lack of Standing.

As explained in one of the cases this Court has asked the parties to address, *City of Orrville, Ohio v. FERC*, 147 F.3d at 985, to show standing petitioners must show that they have suffered an injury-in-fact that is concrete and particularized, actual or imminent, fairly traceable to NRC's conduct, and likely to be redressable by a judicial decision in petitioners' favor. Alleged injuries that are "too speculative, generalized, and remote" will fail this test. *Id.* at 987.

Our main brief did not challenge the bases for standing asserted by petitioners OGD and Utah. Utah's ownership of property near the proposed site, *see* Utah's Opening Br. at 16, and OGD members' residence near the site, *see* OGD's Opening Br.

at 2, give these parties a particularized interest in the project and in the NRC license necessary for the project to proceed.[5] They claim they will be harmed by the PFS project, a harm not possible without the NRC license.

It is settled that determinations of standing, like jurisdictional determinations generally, are to be based upon the facts that exist at the time the case was filed. *See City of Orrville*, 147 F.3d at 985 n.5; *see also ACLU of Nevada v. Lomax*, 471 F.3d 1010, 1015 (9th Cir. 2006) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); *Cleveland Branch, NAACP v. City of Parma, Ohio*, 263 F.3d 513, 524-25 (6th Cir. 2001) (citing cases from numerous other circuits). In this case, the petitions for review were filed on November 8, 2005, and March 6, 2006. The BIA and BLM decisions rejecting the land lease and the right-of-way application, however, were not issued until months later, on September 7, 2006. *See* OGD's Opening Br. at Add. 3, Add. 50. Consequently, they should not impact the petitioners' standing in this case. As this Court held in *City of Orrville*, mootness – not standing – is implicated by post-lawsuit factual developments. *See City of Orrville*, 147 F.3d at 985 n.5. As we argued in our main brief and reiterated in this one, the fact that PFS could still conceivably obtain reversals of the BIA and BLM decisions means that this case is not moot.[6]

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[5] We do not agree, however, with Utah's additional claim to standing based on representing the health and safety interests of its citizens. *See* Utah's Opening Br. at 16. States may not sue federal agencies in a *parens patriae* capacity. *See, e.g., West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004).

[6] Although mootness is sometimes referred to as "standing set in a time frame," it is important to note that greater certainty of future injury must be shown to satisfy the standing requirement at the outset of a case than to defeat a claim of mootness later on in the litigation. *Friends of the Earth, Inc., v. Laidlaw Environmental Services*, 528 U.S. 167, 190 (2000). Merely showing a possibility of future injury will establish that a case is not moot.

Moreover, this Court has already held expressly that Utah's claim of potential harm from the PFS facility suffices to show standing to bring PFS-related judicial challenges against NRC actions. *See Bullcreek v. NRC*, 359 F.3d 536, 540 (D.C. Cir. 2004). This Court decided *Bullcreek* in early 2004, well before NRC had completed the PFS licensing proceedings, meaning that it was still unclear whether PFS would even receive an NRC license, much less approvals from the BIA and BLM. Nonetheless, this Court found that Utah had standing to challenge denial of a rulemaking petition to prevent NRC from considering PFS's application. *Id.* at 539-540.

The National Defense Authorization Act for FY 2006 is a bit more complicated, because it was signed into law on January 6, 2006 – after OGD had filed its only petition for review in this Court but before Utah had filed its final review petition. Based on timing alone, then, this Act could theoretically impact Utah's standing while leaving OGD's standing untouched. Yet, as we have already explained (p.5 n.4, *supra*), the Act's creation of the Cedar Mountain Wilderness Area impacts (and prohibits) only one of the two alternate rights-of-way that PFS proposed. The Act bars the "rail-spur" option only, not the "trucking" option. Thus, it serves only to limit PFS's options for transporting spent fuel over the final leg of the trip to the proposed facility; it does not render the project an impossibility, nor does it render PFS's NRC license unusable. The Act does not, then, remove potential harm to petitioners or their standing.

C. Holding the Case in Abeyance is a Prudential, Discretionary Decision

While the recent BIA decision, the recent BLM decision, and the statutory "Wilderness" designation do not bar this Court from adjudicating the timely-filed petitions for review, there might be prudential reasons why this Court may see fit, for

docket management or judicial economy purposes, to hold this case in abeyance pending the outcome of challenges to the BIA and BLM decisions.

It is relatively uncommon for courts to overturn federal agency permitting and licensing decisions. In this case, there are two federal decisions that must be overturned before the PFS project, as currently envisioned, may proceed: the BIA land lease disapproval and the BLM denial of the right-of-way. Thus, this Court could reasonably find that holding the instant petitions for review in abeyance, pending the results of judicial review of the BLM and BIA decisions, makes sense.

On the other hand, if it were routine for courts to stay consideration of cases where one agency has granted a necessary permit but the outcome of other necessary permitting decisions remains in doubt, a serious "first-mover" problem could arise. This is because if each reviewing court refuses to conduct its review until all others have finished theirs, no reviews will occur at all. In general, then, it may make pragmatic sense to simply allow each parallel agency decision to be reviewed independently and on its own timetable.

One of the cases that this Court asked the parties to address, *Town of Stratford, Connecticut v. FAA*, 285 F.3d 84 (D.C. Cir. 2002), *on rehearing*, 292 F.3d 251 (D.C. Cir 2002), presented an analogous situation. It involved a challenge to a final FAA decision approving an airport sponsor's reconstruction project whose completion required an Army decision on land disposition. This Court originally held the case in abeyance, on prudential grounds, to await the Army decision. 292 F.3d at 252. But once the Army acted the Court proceeded to the merits decision despite other pending permit applications. The Court indicated, as noted above in our discussion of ripeness, that judicial review of an agency decision to issue an approval does not

necessarily need to await the fate of other necessary permits. This Court found the FAA's approval of the airport project "ripe for review even if the [city sponsoring the airport project] has yet to get all of the permits required for construction." 285 F.3d at 88 n.5.

In addition, the Hobbs Act's 60-day deadline, and the Congressional intent for quick judicial review that it embodies (*see* p.4, *supra*), arguably counsel against prudence-based delays in judicial review of final agency decisions. Given the clear Congressional intent favoring prompt review in Hobbs Act cases, it would seem that prudence factors supporting delay should be downplayed, just as hardship considerations are ignored in traditional ripeness analysis in Hobbs Act cases.

In the end, the decision whether to proceed with oral argument and a judicial decision now, or to hold the case in abeyance to await developments on the BLM and BIA decisions, is a discretionary one for this Court. We are prepared to move forward now – NRC has finished its work after an 8-year adjudication and the case is fully briefed – but we of course will abide by this Court's determination on when the case should be heard and decided.

CONCLUSION

The ripeness and standing doctrines do not require dismissal of the petitions for review. When to hear and decide the case resides in this Court's discretion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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