
ORAL ARGUMENT SCHEDULED FOR APRIL 24, 2007
(Before: Circuit Judges Rogers, Tatel and Garland.)

In The
United States Court of Appeals
For The District of Columbia Circuit

OHNGO GAUDADEH DEVIA; STATE OF UTAH,

Petitioners,

v.

**NUCLEAR REGULATORY COMMISSION;
UNITED STATES OF AMERICA,**

Respondents,

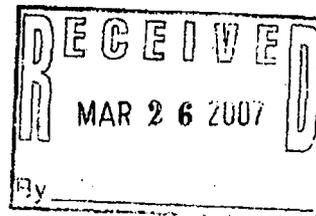
**PRIVATE FUEL STORAGE, L.L.C., and
SKULL VALLEY BAND OF GOSHUTE INDIANS,**

Intervenors.

**ON PETITION FOR REVIEW OF AN ORDER OF THE
UNITED STATES NUCLEAR REGULATORY COMMISSION**

SUPPLEMENTAL BRIEF FOR PETITIONER OGD

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**Authorities upon which we chiefly rely are marked with asterisks.*

SUMMARY OF ARGUMENT

The Court has requested the parties to address the issue of whether the revocation of the conditional lease approval, the disapproval of the right of way application, or passage of the National Defense Authorization Act for FYU 2006, together or individually, call into question either ripeness of this case or the standing of Petitioners to bring the case. The above-referenced administrative decisions by the Bureau of Indian Affairs ("BIA") and the Bureau of Land Management ("BLM") impact the ripeness of this case. The BIA decision revoked the conditional lease approval tentatively given to the PFS lease of tribal lands because the conditional approval was outside the scope of the BIA Superintendent of the Uintah and Ouray Agency's authority. The conditional approval was also in direct violation of BIA policy prohibiting conditional approval of leases for waste facilities on Indian Reservations. *See* Addendum to Petitioner OGD's Opening Brief at pp. 20-50. A decision by the BLM also made construction of the SNF storage facility impossible. The BLM disapproved PFS's application for a right of way for the construction of a necessary rail spur to transport the SNF to the proposed facility. The BLM had no choice but to disapprove the application due to the passage of the National Defense Authorization Act for Fiscal year 2006, section 384 of Public Law 109-163, in which Congress withdrew that Cedar Mountain Wilderness Area from "all forms of entry, appropriation, or disposal under the public lands laws." The BLM was precluded from approving PFS's application for right of way because of this legislation. *See* Addendum pp. 1-19.

The BIA and BLM decisions have made the proposed PFS project a practical impossibility and the license application by the PFS from NRC moot. Petitioners, OGD have standing to bring this case because there is injury in fact, causation, and redressability of the

NRC decisions appealed from. This case is also ripe for decision because it is fit for judicial decision and it would be an undo hardship on OGD if the court dismissed this case on ripeness grounds without reviewing the issues presented by OGD. Holding the case in abeyance pending the outcome of potential appeals of the BIA/BLM decisions would be the better course of action under the circumstances.

ARGUMENT

A. OGD HAS STANDING BECAUSE THEY HAVE SUFFERED AN INJURY IN FACT THAT IS TRACEABLE TO CONDUCT OF THE NRC AND THAT INJURY CAN BE REDRESSED BY A FAVORABLE DECISION.

The three elements of constitutional standing are: first, there must be an injury in fact which is concrete and particularized and actual or imminent, not conjectural or hypothetical; second, the injury has to be fairly traceable to the challenged action; and third, it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Injury can be actual or imminent and can be suffered by an individual or an organization as long as that organization has members who are or will be inured. *See Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

When the NRC granted the license to PFS they created an imminent injury to OGD. OGD is an organization dedicated to preserving the Skull Valley Band of Goshute Indian culture and traditions and opposes the imminent negative environmental impacts of the proposed PFS project. Margene Bullcreek and other members of the Band residing on the Reservation will be directly impacted by the environmental harms that will be caused by the proposed PFS project. Not only is it imminent that OGD will suffer environmental harm resulting from adverse aesthetics and degradation of tribal land, they have already suffered financial harm because they do not support PFS. The NRC did not provide OGD with an opportunity to be heard concerning

the unequal financial benefits of the lease to PFS on individual tribal members. The NRC reversed an order from the ASLB that would have compelled discovery and required a hearing to address the question of disparate environmental impact due to unequal financial benefits of the PFS project on certain Band members, including those that are part of OGD. *See* LBP-02-08, 55 NRC 171, 203 (2002) and CLI-02-20, 56 NRC 147 (2002).

The environmental harm that will be suffered by OGD and the financial harm that has already occurred constitute a continuing injury in fact sufficient to satisfy the first element of constitutional standing. The injuries in this case differ from the injury in *Worth v. Jackson*, 451 F.3d 854 (D.C. Cir. 2006) in that OGD has suffered injuries in the past for which they are seeking relief and they will suffer injuries in the future for which relief is sought. *Id.* at 858. *Worth* sought “only forward-looking relief” that the Court found to be “just the kind of speculative intention normally insufficient for standing purposes.” *Id.* OGD seeks relief from both past injuries and imminent future injuries that are not speculative. The injury in *City of Orrville, Ohio v. FERC*, 147 F.3d 979 (D.C. Cir. 1998) was also found to be too speculative to satisfy the requirements of Art. III. *Id.* at 986. In that case the petitioner was denied standing because its interests were “too attenuated” and therefore “too speculative.” *Id.* The petitioner in that case did not show sufficient injury because it was simply a preliminary permit holder hoping to be awarded a license at a later date. *See id.* at 982-83. OGD has more than merely a commercial interest in a review of the NRC’s issuance of the license to PFS. OGD’s land, culture, and traditions are at stake. They are not a competitor for the license, as was the case in *City of Orrville*. OGD does not want the facility to be built for environmental and cultural reasons. Members of OGD live in close proximity to the proposed construction site and would be subject to the negative environmental impacts as well as the continuing negative economic

impacts that such a facility would create and perpetuate. For these reasons, it is certain that OGD has suffered and will suffer substantial injury in fact.

The second element requires the injury to be fairly traceable to the challenged action. The challenged action in this case is the NRC's grant of a license to PFS. When the NRC granted the license to PFS it had the effect of allowing PFS to proceed with the project that will cause the injury in fact. Also, when NRC reversed the ASLB order that would have compelled discovery and required a hearing, the action furthered and protected the economic harm suffered by OGD as a result of the lease with PFS. Without the action of the NRC, PFS would not be able to pursue the construction of the facility and therefore the injury in fact is fairly traceable to the challenged action of the NRC.

The final element is redressability. Here it must be shown that a favorable court decision would redress or avoid the injury. The relief asked for is for the Court to remand this matter to the NRC and direct the Commission to reconsider and deny the PFS license application in light of the BIA/BLM decisions mooted the PFS licensing proceeding or in the alternative to have the Court reverse the NRC's Memorandum and Order, CLI-05-19, directing summary disposition against OGD Contention O (Environmental Justice) to allow an opportunity to have a hearing on the Environmental Justice Contention. If the Court were to do that, the injury that will be caused by PFS's facility would be avoided because they would no longer have a license to construct the injury causing facility. If the Court were to allow OGD to be heard with regard to the Environmental Justice Contention the injury of disparate financial harm to OGD as a result of the lease to PFS would also be redressed.

Because all three elements of injury in fact, causation, and redressability are met, OGD has constitutional standing. The facts also meet the requirements of representational standing.

OGD is an organization whose individual members could bring the case themselves and alone would satisfy the requirements for constitutional standing. Also, the purposes of the organization are relevant to the issues in this case. OGD's intentions include preservation of the Band's culture and traditions and the opposition of PFS's project and the negative environmental impacts that it would have. OGD also seeks to address the continuing financial harm and disparate economic treatment of individual tribal members that has resulted from local corruption and the inability to correct that corruption due to the NRC's reversal of the ASLB's order that would have allowed discovery and redress. For these reasons OGD satisfies the requirements of representational standing.

A party must also establish prudential standing. *See City of Orrville, Ohio*, 147 F.3d at 987. The Hobbs act grants this Court and other courts of appeal jurisdiction where a "party aggrieved" by a reviewable final order files a petition for review within sixty (60) days after entry of the order by the agency. 28 U.S.C. § 2344. Petitioner OGD filed its petition for review on November 8, 2005, within sixty (60) days of the NRC's Memorandum Decision and Order, CLI-05-19, docketed September 9, 2005, in satisfaction of the requirements of 28 U.S.C. § 2344. Because it has been shown that OGD is a "party aggrieved," and they filed within the sixty (60) day time limit, there are no prudential standing limitations.

B. THIS CASE IS RIPE AND THE COURT SHOULD VACATE THE GRANT OF A LICENSE TO PFS, OR, IN THE ALTERNATIVE, THE CASE SHOULD BE HELD IN ABEYANCE PENDING THE OUTCOME OF POTENTIAL APPEALS OF THE BIA AND BLM DECISIONS.

The September 7, 2006 decisions of the BIA and the BLM had the effect of rendering construction and operation of the proposed PFS project impossible. This case is procedurally ripe because the agency decisions of which OGD seeks review are those of the NRC not those of the BIA or the BLM. The BIA and BLM decisions impact the Court's decision on whether to

vacate the NRC's granting of the license. In determining ripeness, the agency actions that should be evaluated are those of the NRC.

A court is to evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration" in determining ripeness. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). The Supreme Court has also added as considerations whether judicial intervention would inappropriately interfere with further administrative action, and whether the courts would benefit from further development of the issues presented. See *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998).

The first prong of the *Abbott Laboratories* test, fitness of the issues for judicial decision, is satisfied if "the issue tendered is a purely legal one." *Abbott Laboratories*, 387 U.S. at 149. Both the BIA and the BLM decisions make the construction of the PFS facility a legal impossibility. OGD is petitioning the Court to vacate the license granted to PFS by NRC. Both the BIA and the BLM decisions make the PFS project a legal impossibility. Judicial review of NRC's grant of the license to PFS in light of the BIA and BLM decisions is a purely legal issue and therefore passes the first prong of the *Abbott Laboratories* test. The second prong examines the hardship to the parties of withholding court consideration. OGD would suffer a great hardship if this Court were to dismiss the case. Petitioner OGD filed its petition for review within sixty (60) days of the NRC's Memorandum Decision and Order in satisfaction of the requirements of 28 U.S.C. § 2344. If the Court were to dismiss this appeal on ripeness grounds, there would be no opportunity for OGD to refile at a later date as the sixty (60) day requirement has long since passed. Even short of dismissal, OGD has suffered a hardship because the NRC has granted the license to PFS. The Supreme Court in *Ohio Forestry* discusses challenges that "do not create adverse effects of a strictly legal kind . . . that would have traditionally qualify as

harm” and include in the list the failure to grant a formal legal license. 523 U.S. at 733 paraphrasing *United States v. L.A. & Salt Lake R. Co.*, 273 U.S. 299, 309-10 (1927). Read in full context, the Court seems to say that the grant of a formal license can be considered a hardship and fulfill the second prong of the *Abbott Laboratories* test for ripeness. In that case the Court found that there was no hardship in delaying review of a U.S. Forest Service Plan even though it allowed for possible clear-cutting that may violate the National Forest Management Act. *Id.* at 734. The reason that no hardship was found is because the Forest Service had not yet made any actual timber sales. *Id.* This is unlike our case. The NRC has already granted the license and no other review or decision making need take place. While the Forest Service still had the opportunity to evaluate the impact of each individual timber sale, the NRC no longer has that oversight in granting the license. Because the NRC has granted the license to PFS and because dismissing the case would leave no opportunity to refile the case at a later date, OGD would suffer a hardship if the court withheld consideration by dismissing the case on ripeness grounds.

The next element of ripeness is whether judicial intervention would inappropriately interfere with further administrative action. As stated, the administrative action that is at issue here is the NRC’s granting of the license and the NRC’s reversal of the order from the ASLB that would have compelled discovery and required a hearing to address the question of disparate environmental impact due to unequal financial benefits of the PFS project on certain Band members, including those that are part of OGD. Judicial intervention would not interfere with the actions of the NRC because the actions of the NRC are final. The NRC has granted PFS’s application for the license, reversed the ASLB order, and directed summary dismissal of the environmental justice contention. The only further administrative actions that can occur in this

case are appeals of the decisions of the BIA and BLM. Judicial intervention regarding the NRC would not inappropriately interfere with possible appeals to the BIA or the BLM.

The final question on ripeness asks whether the courts would benefit from further development of the issues presented. Any further development that may occur is the PFS appeal of the BIA and/or BLM decisions. This possibility does not preclude this court from finding that this case is ripe and deciding on the issues presented. Administrative proceedings that have an impact on the issues in this appeal could occur at any time. The finality of those actions has no bearing on the Courts ability to review the actions of the NRC that are final.

Because the decisions of the BIA and the BLM, which occurred after the filing of OGD's petition for review, have rendered the PFS license application and proceeding moot, and because a review of NRC actions is ripe the Court should remand with orders to vacate the NRC's grant of the license to PFS.

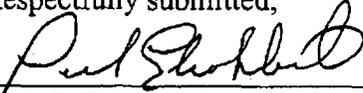
In the alternative the Court should hold this case in abeyance pending the outcome of potential appeals of those decisions. In the case of *Town of Stratford, Connecticut v. Federal Aviation Administration*, the petitioner sought review of a Federal Aviation Administration ("FAA") decision involving property that was still under the Army's control. 292 F.3d 251,252 (D.C. Cir. 2002). Upon discovery of this impairment the Court issued an order holding the case in abeyance "until the Army finally decided to release its portion of the property to be used for the airport improvement." *Id.* The Army issued a decision, presumably releasing the property and then withdrew the decision for reevaluation making construction, once again impossible. *Id.* The Justice Department attorney suggested that the case be again placed on hold or that the petition be dismissed without prejudice so that the petitioner could refile if and when the Army issued a new decision. *Id.* In this case dismissal without prejudice would not be an option due to

the time restraints mentioned above. If the case were dismissed, it would be impossible to refile because the sixty (60) day requirement of 28 U.S.C. § 2344 could not be satisfied. Holding the case in abeyance would be an option that would allow consideration of the matter pending the outcome of the BIA and BLM appeals.

CONCLUSION

Petitioners OGD have met the requirements for constitutional, representational, and prudential standing and should be allowed to bring this case. The case is ripe because the challenged action is that of the NRC which is final and reviewable. Dismissing OGD's Petition for Review on ripeness grounds would effectively deny OGD a fair opportunity to have the merits of its petition addressed by this Court. The preferable alternative would be for the Court to hold the case in abeyance pending a possible outcome from potential appeals of the BIA and BLM decisions.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 23rd day of March 2007, I filed with the Clerk's Office of the United States Court of Appeals for the district of Columbia Circuit, via hand-delivery, the required copies of the foregoing Supplemental Brief of Petitioner, and further certify that I served by first class U.S. mail copies of the same to the following:

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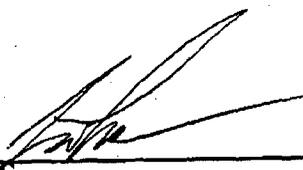
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