

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

MAR 28 2007

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 REPLY BRIEF FOR PETITIONER OGD

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

SUMMARY OF ARGUMENT

Petitioner OGD has standing to bring this case because there is injury in fact, causation, and redressability of the NRC decisions. This case is also ripe because it is fit for judicial decision. The NRC administrative decisions Petitioners ask the Court to review are final and ripe for review. 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. Holding the case in abeyance pending the outcome of potential appeals of the BIA and BLM decisions would be a better course of action under the circumstances.

ARGUMENT

A. OGD MEETS THE REQUIREMENTS OF CONSTITUTIONAL, REPRESENTATIONAL, AND PRUDENTIAL STANDING.

The three elements of constitutional standing are: 1) injury in fact which is concrete and particularized and actual or imminent, not conjectural or hypothetical; 2) second, the injury has to be fairly traceable to the challenged action; and 3) 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).

Because all three elements of injury in fact, causation, and redressability are met for reasons previously provided to the Court, OGD has constitutional standing. The facts also meet the requirements of representational standing. OGD's purposes 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 redress from the financial harm 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 redress. Thus, 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. THE CASE IS RIPE FOR REVIEW.

This case is procedurally ripe because the agency decisions which Petitioner seeks review of 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. 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 case on ripeness grounds, there would be no opportunity 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 NRC has already granted the license and no other review of the issues presented in this appeal is practicable. 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 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 courts would benefit from further development of the issues presented. The only 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. The finality of those actions has no bearing on the Court's 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 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. At a minimum, the Court should hold this case in abeyance pending the outcome of possible appeals of the BIA and BLM decisions.

C. BECAUSE DISMISSING THIS CASE WOULD DENY OGD A FAIR OPPORTUNITY TO HAVE THE MERITS OF THE CASE HEARD, THE COURT SHOULD HOLD THE CASE IN ABEYANCE PENDING THE OUTCOME OF POTENTIAL APPEALS OF THE BIA AND BLM DECISIONS.

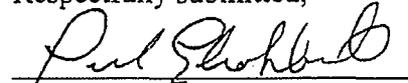
Alternatively, the Court should hold this case in abeyance pending the outcome of potential appeals of The BIA and BLM decisions. In the case of *Town of Stratford, Connecticut v. Federal Aviation Administration*, the petitioner sought review of a Federal Aviation Administration ("FAA") decision involving 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 possible 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. The preferable alternative to dismissal would be holding the case in abeyance until the appeals of the BIA and BLM decision have been determined.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 28th 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 Reply 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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