

September 29, 1997

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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

**APPLICANT'S ANSWER TO PETITION TO INTERVENE
OF THE SKULL VALLEY BAND OF GOSHUTE INDIANS**

I. INTRODUCTION

Applicant Private Fuel Storage L.L.C. ("PFS") submits this answer supporting the Petition to Intervene ("Skull Valley Band Pet.") filed on September 12, 1997, by the Skull Valley Band of Goshute Indians ("the Band" or "the Petitioner"). The Petitioner requests to intervene in support of the license application filed by PFS for the construction and operation of the Private Fuel Storage Facility ("the Facility"), which is to be located with the support and consent of the Petitioner on its reservation in Utah. PFS supports the Petitioner's participation in this proceeding.

The Petitioner has demonstrated standing pursuant to 10 C.F.R. § 2.714. In addition, the Petitioner also qualifies to participate as an interested governmental entity pursuant to 10 C.F.R. § 2.715(c). The Petitioner is a sovereign, Federally-recognized tribal government having a government-to-government relationship with the executive departments and agencies of the United States Government. As the host jurisdiction and

property owner of the site for the proposed Facility, the Petitioner has a unique interest in this proceeding.

II. BACKGROUND

On June 20, 1997, PFS submitted a license application to the NRC to construct and operate an Independent Spent Fuel Storage Installation ("ISFSI") pursuant to 10 C.F.R. Part 72. The Petitioner is the host jurisdiction and property owner for the site of the proposed Facility. See Skull Valley Band Pet. at 2, 3. The proposed Facility will be located entirely within the property boundaries of the Petitioner's reservation. See PFS Facility Safety Analysis Report at 1.1-1, 1.1-2, Figure 1.1-1 ("PFSF SAR").

There is appropriate authorization to request participation of the Band as an intervenor pursuant to 10 C.F.R. § 2.714, or alternatively, as an interested governmental entity pursuant 10 C.F.R. § 2.715(c). The Petition to Intervene is signed by Leon D. Bear, Mary J. Allen, and Rex A. Allen, the Executive Committee of the Skull Valley Band of Goshute Indians, which is the governing body of the Band. Skull Valley Band Pet. at 2, 4. Furthermore, Leon D. Bear, the Chairman of the Skull Valley Band has been authorized by resolution of the General Council, which is comprised of the eligible voting membership of the Band, to take any actions necessary in connection with the development of the independent spent fuel storage installation proposed by Private Fuel Storage L.L.C.

The Petitioner is a Federally-recognized Indian Tribe that is sovereign under Federal Law. Skull Valley Band Pet. at 1; see Bureau of Indian Affairs, "Indian Entities Recognized and Eligible to Receive Services from the U.S. Bureau of Indian Affairs", 61 Fed. Reg. 58,211, 58,212, 58,214 (1996). The Petitioner's reservation was established by Executive Orders in 1917 and 1918 (IV Kappler 1048, Sept. 7, 1917 and Feb. 15, 1918). As a sovereign, Federally-recognized tribal government, the Petitioner operates on a government-to-government relationship with the United States Government and its executive departments and agencies pursuant to the Constitution of the United States, treaties, statutes, and court decisions. See Executive Memorandum of April 29, 1994, 59 Fed. Reg. 22,951 (1994) (Memorandum from President Clinton to Heads of Executive Departments and Agencies on "Government-to-Government Relations with Native American Tribal Governments") ("Executive Memorandum") (copies of both the Federal Register notice and the original memorandum are included in Attachment A).

The Petitioner entered into an agreement with PFS to lease certain lands within its reservation on which the Facility is to be sited. Skull Valley Band Pet. at 2. The lease between the Petitioner and PFS was approved by the Bureau of Indian Affairs on May 23, 1997.¹ The Petitioner "is an interested government with sovereignty over the lands on which the project is to be sited." Skull Valley Band Pet. at 3. The Petitioner's reservation has approximately 30 tribal members, most of whom reside in the reservation's tribal

¹ Bureau of Indian Affairs' approval is conditioned on completion of the NRC's National Environmental Policy Act review and issuance of a license to operate the Facility.

village located about 3.5 miles east-southeast of the proposed Facility. PFSF SAR at 1.1-2.

In addition to its obvious property and proximity interest, the Petitioner also stands to receive considerable benefits from the construction and operation of the Facility. The direct benefits are "a steady revenue stream for the Tribal Government and Band members, a diverse set of meaningful jobs for tribal members and training/development opportunities for other Band members." PFS Facility Environmental Report at 7.2-2 ("PFSF ER"). The indirect benefits include "increased traffic and business at their convenience store during construction and operation, and an increased profile for the Band in the Utah business economy, potentially bringing new economic development initiatives to the Band." PFSF ER at 7.2-3. Other indirect benefits include upgrades to transportation infrastructure on the reservation. Id.

III. THE PETITIONER HAS DEMONSTRATED STANDING UNDER NRC CASE LAW AND 10 C.F.R. § 2.714(a)

Under the Atomic Energy Act and NRC regulations, a petitioner to intervene must demonstrate a sufficient interest that might be affected by the outcome of the proceeding (i.e., demonstrate standing). See 42 U.S.C. § 2239(a); 10 C.F.R. § 2.714(a). The standing test seeks to ensure that permission to intervene is granted to participants who have a "real stake" in the outcome of the proceeding. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 N.R.C. 439, 447-48 (1979) ("real stake" . . . must mean 'genuine,' 'actual' or 'direct stake'), citing Sierra Club v. Morton, 405

U.S. 727, 740 (1972) (standing test attempts to ensure review is sought by "those who have a direct stake in the outcome").

NRC case law establishes that a petitioner supporting a license application can demonstrate standing to intervene under 10 C.F.R. § 2.714. Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 N.R.C. 737, 743 (1978).² The Licensing Board and the Commission have cited the Sheffield doctrine approvingly in a recent enforcement order proceeding. Sequoyah Fuels Corp. (Gore, Oklahoma Site) LBP-94-5, 39 N.R.C. 54, 65-66, affirmed, CLI-94-12, 40 N.R.C. 64, 68 (1994). The Petitioner supports granting of the PFS license application in this proceeding. Skull Valley Band Pet. at 1, 3. The Petitioner requests to intervene specifically "to protect the Band's legal interests by making the Band a full and equal party [to the NRC] proceedings." Skull Valley Band Pet. at 3. Standing to intervene does not hinge on the litigating posture the petitioner would assume if allowed to participate. Sheffield, ALAB-473, supra, 7 N.R.C. at 743, citing Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970). The Appeals Board in Sheffield established that intervention did not depend on whether the petitioner supported or opposed the license application, but

[r]ather, the test is whether a cognizable interest of the petitioner might be adversely affected if the proceeding has one outcome rather than another. And, to repeat, no such interest is to be presumed. There must be a concrete demonstration that harm to the petitioner (or those it represents) will or could flow from a result unfavorable to it - whatever that result might be.

² The Commission has granted intervention to petitioners supporting a license application in several cases. See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station) LBP-73-13, 6 A.E.C. 271, 274 (1973) (petitioner Suffolk Scientists for Cleaner Power and Safer Environment granted intervention in support of license application); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-72-34, 5 A.E.C. 214, 215 (1972) (petitioners Dow Chemical Company and Midland Nuclear Power Committee granted intervention in support of license application).

Sheffield, ALAB-473, supra, 7 N.R.C. at 743.

As a petitioner supporting the license application, the Band's standing stems from the possibility for the Board to deny the license application or impose license conditions. See id. The Petitioner stands to suffer injury-in-fact that is concrete, actual, and imminent if the Facility is not approved. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The Petitioner would be substantially injured by an adverse decision in this proceeding which would deny it the considerable benefits and other interests that would flow to the Band from construction and operation of the proposed Facility. See PFSF ER at 7.2-2, 7.2-3. As the host jurisdiction and property owner for the site of the proposed Facility, the Petitioner has a unique interest that will be directly affected by the outcome of the proceeding. As discussed above, the Petitioner owns the property the Facility will be built on, has tribal members residing near the Facility, has its tribal village about 3.5 miles east-southeast of the Facility, and stands to receive considerable direct and indirect benefits from the construction and operation of the Facility.

The Petitioner's interest in receiving these benefits is directly linked to the outcome of this proceeding. The Petitioner demonstrates the importance of the outcome of the proceeding to its interest, in stating

[g]iven the nature of this facility and the materials which are proposed for storage, and the Band's property interests in the leased land and other reservation lands, the NRC determinations of whether to issue a license, and if so, on what terms, will have a substantial health, safety, cultural, and financial impact on the Skull Valley Goshute Reservation.

Skull Valley Band Pet. at 2.

The Petitioner has complied with the requirement to provide a statement of aspects on which it wishes to intervene pursuant to 10 C.F.R. § 2.714. The Petitioner has stated that it wishes to intervene in "all aspects ... affecting the health, safety, or cultural or financial resources of the Band, and any others which are material to the outcome or the financial viability of the Applicant's proposal." Skull Valley Band Pet. at 3.

IV. ALTERNATIVELY, PETITIONER SHOULD BE GRANTED PARTICIPATION AS AN INTERESTED GOVERNMENTAL ENTITY PURSUANT TO 10 C.F.R. § 2.715

Alternatively, as a sovereign, Federally-recognized Indian Tribe that is the host jurisdiction of the proposed Facility, the Petitioner should be permitted to participate in any hearing on this proceeding as an interested governmental entity pursuant to 10 C.F.R. § 2.715(c). The Board may grant an "interested" governmental entity such as a "State, county, municipality, and/or agencies thereof," the opportunity to participate in a hearing. 10 C.F.R. § 2.715(c). When § 2.715(c) was amended to broaden its coverage from "an interested State" to include "county, municipality and/or agencies thereof," the Commission stated that its intent was to extend the cooperation provided in that regulation "to other units of government which also have an interest in the licensing proceeding." 43 Fed. Reg. 17,798, 17,800 (1978).

The Petitioner meets both the "governmental entity" and "interest" requirements to participate in a hearing pursuant to 10 C.F.R. § 2.715(c). The Petitioner is a sovereign governmental entity recognized by the Federal government. Skull Valley Band Pet. at 1 (stating that the Petitioner is "a federally recognized Indian Tribe and sovereign under

Federal Law"). The Petitioner "fully supports this project and is interested in the success of the license application." Skull Valley Band Pet. at 3. As the host jurisdiction for the proposed Facility, the Petitioner has a demonstrated and unique interest in this proceeding (e.g., the Petitioner owns the property the Facility will be built on, the Facility will be near Tribal members' residences, and the Petitioner will receive employment, revenue, and other direct or indirect benefits from PFS). The Petitioner "is an interested government with sovereignty over the lands on which the project will be sited," id. (emphasis added), and should be granted the opportunity to participate in any hearing as an interested governmental entity pursuant to 10 C.F.R. § 2.715(c).

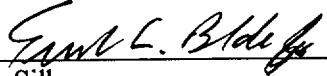
In addition, the United States Government has directed executive departments and agencies to take affirmative steps to assure that tribal governments are consulted on activities that affect the trust property and/or governmental rights of the tribe. See 59 Fed. Reg. at 22,951 (Executive Memorandum, Subpart (c)). The government-to-government relationship between the United States Government and Federally-recognized Indian Tribes, recognized in the Executive Memorandum, means that the Skull Valley Band of Goshute Indians should be provided the same rights to participate in this proceeding as 10 C.F.R. § 2.715(c) affords to "an interested State, county, municipality and/or agencies thereof." Because this proceeding is specifically about licensing a facility within the legal property boundaries of the Petitioner's reservation, this proceeding directly affects its "trust property and/or governmental rights." See 59 Fed. Reg. at 22,951 (Executive Memorandum, Subpart (d)). As the jurisdiction on whose lands the proposed

Facility is to be built and operated, the Petitioner must be given the same right to participate in any hearing on this proceeding as a State, county, municipality or agency thereof.

V. CONCLUSION

For the reasons stated above, PFS supports the Skull Valley Band of Goshute Indian's participation in any hearings in this proceeding. The Petitioner has a unique role in this proceeding and has complied with the requirements to intervene pursuant to 10 C.F.R. § 2.714. Alternatively, the Petitioner qualifies to participate in any hearings on this proceeding as an interested governmental entity pursuant to 10 C.F.R. § 2.715(c). Accordingly, the Petitioner's participation in any hearings on this proceeding should be granted.

Respectfully submitted,


Jay E. Silberg
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Counsel for Private Fuel Storage L.L.C.

Dated: September 29, 1997

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Answer to the Petition to Intervene of the Skull Valley Band of Goshute Indians," dated September 29, 1997 were served on the persons listed below (unless otherwise noted) by facsimile with conforming copies by U.S. mail, first class, postage prepaid, this 29th day of September, 1997.

G. Paul Bollwerk III, Esq., Chairman
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Thomas D. Murphy
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

* Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Catherine L. Marco, Esq.
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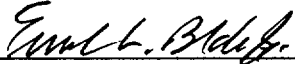
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* Charles J. Haughney
Acting Director, Spent Fuel Project Office
Office of Nuclear Material Safety and
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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications
Staff

(Original and two copies)

* By U.S. mail only



Ernest L. Blake, Jr.

Attachment A

Presidential Documents

Title 3—

The President

Memorandum of April 29, 1994

Government-to-Government Relations With Native American Tribal Governments

Memorandum for the Heads of Executive Departments and Agencies

The United States Government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. Today, as part of an historic meeting, I am outlining principles that executive departments and agencies, including every component bureau and office, are to follow in their interactions with Native American tribal governments. The purpose of these principles is to clarify our responsibility to ensure that the Federal Government operates within a government-to-government relationship with federally recognized Native American tribes. I am strongly committed to building a more effective day-to-day working relationship reflecting respect for the rights of self-government due the sovereign tribal governments.

In order to ensure that the rights of sovereign tribal governments are fully respected, executive branch activities shall be guided by the following:

- (a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government-to-government relationship with federally recognized tribal governments.
- (b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.
- (c) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities.
- (d) Each executive department and agency shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes.
- (e) Each executive department and agency shall work cooperatively with other Federal departments and agencies to enlist their interest and support in cooperative efforts, where appropriate, to accomplish the goals of this memorandum.
- (f) Each executive department and agency shall apply the requirements of Executive Orders Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review") to design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.

The head of each executive department and agency shall ensure that the department or agency's bureaus and components are fully aware of this memorandum, through publication or other means, and that they are in compliance with its requirements.

This memorandum is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

The Director of the Office of Management and Budget is authorized and directed to publish this memorandum in the Federal Register.

William D. Clinton

THE WHITE HOUSE,
Washington, April 29, 1994.

JFR Doc. 94-10877
Filed 5-2-94; 3:49 pm
Billing code 3110-07-M

Editorial note: For the President's remarks to American Indian and Native Alaska tribal leaders, see the Weekly Compilation of Presidential Documents (vol. 30, issue 18).

THE WHITE HOUSE
WASHINGTON

April 29, 1994

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Government-to-Government Relations with
Native American Tribal Governments

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(b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.

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