UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

In the Matter of:	)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC (Independent Spent Fuel Storage Installation)	)	May 14, 1998

STATE OF UTAH'S BRIEF IN RESPONSE TO APPLICANT'S APPEAL OF ORDER LBP-98-7 GRANTING THE CONFEDERATED TRIBES' PETITION FOR INTERVENTION

INTRODUCTION

The State hereby responds to the Applicant's Appeal of the Board's order of April 22, 1998, LBP 98-7, granting the Confederated Tribes of the Goshutes intervention as of right to participate as a full party in this proceeding. The State supports the Confederated Tribes' petition and submits that the Board correctly determined that the Confederated Tribes of the Goshute Reservation has established standing to intervene.

BACKGROUND

On July 31, 1997, the Nuclear Regulatory Commission published a notice of opportunity to request a hearing and petition to intervene in this proceeding, in which Private Fuel Storage, LLC has applied for a license to build a high-level nuclear waste storage facility on the Skull Valley Reservation, located in Tooele County, Utah. 62

Fed. Reg. 41,099. Petitions to intervene in the proceeding were timely filed by a number of petitioners, including the State of Utah and the Confederated Tribes of the Goshute Reservation.[1] All petitioners who timely filed for intervention have been admitted as parties by the Licensing Board, which found they have standing and have presented at least one admissible contention. LBP-98-7 at 157.

On May 4, 1998, the Applicant, Private Fuel Storage, LLC, appealed to the Nuclear Regulatory Commission the Board's granting intervention to the Confederated Tribes of the Goshute Reservation.

ARGUMENT

A. Standard of Review for Rulings on Intervention

A Licensing Board's decision to admit a petitioner as an intervenor is entitled to "substantial deference," absent a clear misapplication of the facts or law. Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995). Furthermore, a Licensing Board's conclusion regarding the adequacy of a petitioner's affected interest will not be disturbed unless it appears to be "irrational." Id.; *see also* Duquesne Light Co. (Beaver Valley Power Station, Unit No. 1), ALAB-109, 6 AEC 243, 244 (1973).

---

[1] The other petitioners timely filing are Castle Rock Land and Livestock, L.C., Skull Valley Co., LTD., and Ensign Ranches of Utah, L.C.; Ohngo Gaudadeh Devia; and Skull Valley Band of Goshute Indians. LBP-98-7 at 1. An additional petitioner, Scientists for Secure Waste Storage, filed late and was denied intervention by the Licensing Board. *See* id. at 44-45.

B. Legal Standard for Granting Intervention

Persons requesting leave to intervene in NRC proceedings must show that they have standing to intervene pursuant to 42 USC § 2239(a) and 10 CFR § 2.714(d)(1). The petitioner must show:

(i) The nature of the petitioner's right under the Act to be made a party to the proceeding.
(ii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
(iii) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.

10 CFR § 2.714(d)(1). In addition, the petition must set forth with particularity the petitioner's interest in the proceeding and the aspects of the proceeding in which the petitioner wishes to intervene. 10 CFR § 2.714(a)(2).

The Commission looks to judicial concepts of standing in determining whether a petitioner's interest may be affected by a licensing proceeding. Thus, a petitioner must show that a proposed action will cause injury-in-fact to the petitioner's interest; that injury must arguably fall within the zone of interests sought to be protected by the Atomic Energy Act (AEA) and the National Environmental Policy Act (NEPA). Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993); Public Service Co. of Indiana (Marble Hill Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 439 (1980); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-614 (1976)). Additionally, the injury must be fairly traceable to the proposed action, and the injury

must be redressable by the Commission. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

Organizations as well as individuals may petition to intervene in NRC proceedings, and they must identify any organizational interest or interests of identified members that are harmed or threatened with injury by the license application at issue. Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995), *referring to* Warth v. Seldin, 422 US 490, 511 (1975); Northeast Nuclear Energy Co. (Millstone Nuclear Power Plant, Unit No. 1), LBP-9601, 43 NRC 19, 21-23 (1996). To obtain standing, an organization must either demonstrate immediate or threatened injury to its organizational interests or derive representational standing from an individual member who has standing to participate and that member has authorized the organization to represent his or her interests. Millstone, 43 NRC at 21-22.

C. The Board Correctly Applied the Requirements for Establishing Standing as of Right in Admitting the Confederated Tribes as Intervenors.

In ruling on the Confederated Tribes intervention petition the Board had before it evidence presented by the Confederated Tribes in the form of affidavits describing contacts of individual members of Confederated Tribes with the Skull Valley Reservation. The Board relied on two affidavits filed by Chrissandra Reed, a member of the Confederated Tribes, which described a pattern of visits onto the Skull Valley reservation by Ms. Reed and her granddaughter, for whom Ms. Reed

acts as legal guardian. The Board found the contacts by Ms. Reed and the child "bring one or both of them within distances of the facility we have found sufficient to provide standing for other participants." LBP-98-7 at 31. The Board reviewed conflicting claims alleged by the Applicant about the frequency and continued nature of the visits by Ms. Reed and her grandchild. After weighing the competing claims, the Board did not accept the Applicant's assertion that the pattern of contacts has become so attenuated as to provide an insufficient basis for granting standing to Ms. Reed and her grandchild. Id. at 32.

The Applicant argues that in determining that the Confederated Tribes has standing, the Board erroneously placed the burden of proof on the Applicant rather than on the Confederated Tribes, in violation of Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Applicant's Brief at 9. On this ground, the Applicant seeks reversal of the Board's decision to admit the Confederated Tribes as an intervenor.

The Applicant is in error. First, the allocation of the burden of proof is only relevant to the extent that there is conflicting evidence in the record. There is no dispute that Chrissandra Reed's granddaughter Michaela has visited the Skull Valley Reservation at least 3 or 4 times per year to visit her cousins. *See, e.g.* Applicant's Brief at 6, Wash Declaration[2] at ¶ 3. There is also no dispute that Chrissandra Reed and her

[2] Declaration of Arlene Wash, dated November 10, 1997, attached to Applicant's Answer to the Confederated Tribes and David Pete's Supplemental Memorandum in Support of Petition to Intervene and for a Hearing, dated December 12, 1997.

granddaughter have family ties with the Skull Valley Reservation. Although there are conflicting statements in the record as to whether Ms. Reed's and Michaela's visits have been cut off and by whom, the fact remains that there is a "pattern of familial association." It was within the sound discretion of the Licensing Board to determine that the frequency of Michaela's contacts with the Skull Valley Reservation was sufficient to confer standing, and that the contacts were likely to continue given the family ties. The Board's exercise of discretion should be not disturbed unless the record demonstrates that a different result is warranted, which it does not.

Even assuming for purposes of argument that the Board had insufficient evidence before it to conclusively determine the Confederated Tribes' standing, the Board acted properly in finding that the Confederated Tribes had sufficiently demonstrated its standing at this threshold stage of the proceeding. As recognized in Lujan, the "manner and degree of evidence" required to satisfy the burden of demonstrating standing differs at the successive stages of the litigation. Id. At the initial stage of a proceeding, the intervenor has not had an opportunity to test opposing affidavits or testimony through discovery, or cross-examine opposing witnesses; nor has the Licensing Board had an opportunity to evaluate the credibility of opposing witnesses on the stand. Thus, the level of proof required of a petitioner at the initial stage of a proceeding must necessarily be tempered by the degree to which the petitioner is able to defend itself against factual attacks on its assertions regarding

standing. The NRC has also recognized this principle. In Sequoyah Fuels Corporation (Gore, Oklahoma Site), LBP-94-5, 39 NRC 54, 71 (1994), the Licensing Board decision found "a sufficient demonstration of injury in fact" where, despite opposing affidavits claiming that the petitioner would not suffer injury, the potential for such injury could not be ruled out. There, the Board found that the issue of injury-in-fact was tied to the merits of the case, which had yet to be developed, and found that the merits should not be reached "prematurely." Id. at 68. The Commission affirmed the Board's decision in Sequoyah Fuels Corporation (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64 (1994), holding that for the petitioner to prove his standing would require "more technical studies" that are "unnecessary" at this "threshold stage." Gore, 40 NRC at 74. *See also* Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111 (1995) (at "threshold standing stage," Commission refused to disturb Licensing Board's presumption that some injury could occur within the half-mile zone where the petitioner worked).

Moreover, it is appropriate for a Licensing Board to judge conflicting assertions in the standing affidavits in the light most favorable to the petitioner. As implicitly recognized by the Applicant, this standard is consistent with judicial precedents and longstanding NRC practice. Applicant's Brief at 10, *citing* Georgia Tech, 42 NRC at 115; Warth v. Selden, 422 U.S. 490, 501 (1975); Kelley v. Selin, 42 F.3d 1501, 1508 (6th Cir.), cert. denied, 515 U.S. 1159 (1995).

The consideration of affidavits opposing standing is also akin to a ruling on summary judgment, in which any conflicts in the assertions are resolved in favor of a full hearing on the disputed issues. Accordingly, if the Commission should find that the Confederated Tribes have not met its burden in demonstrating standing in this proceeding, the appropriate relief is to remand the issue for further proceedings, not to dismiss the Confederated Tribes from the case.

D. The Confederated Tribes Has Established Representational Standing

The Applicant, relying on Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977), argues that the interest that the Confederated Tribes seeks to protect must be germane to the organization's purpose and that the Tribe has not met that burden. At issue in Hunt was whether an organization that was essentially a state agency rather than a traditional voluntary membership organization, could assert more than an abstract concern for the well-being of the Washington-apple industry as the basis for standing. Hunt, 432 U.S. at 342. No such abstract concern is at issue in the Private Fuel Storage, LLC licensing proceeding.

The Confederated Tribes has raised health and safety concerns relating to tribal members who reside on the Confederated Tribes' reservation and who visit the Skull Valley Reservation and pass by the site of the Applicant's intermodal transfer point at Rowley Junction.[3] The Confederated Tribes is responsible for maintaining its

[3] Rowley Junction is at the Junction of Interstate 80 (exit 77) and Skull Valley Road and is sometimes the point at which Ms. Reed drops off her granddaughter for

member's health and safety and it administers its own health, educational, elderly and day care facilities. Affidavit of David Pete at 17, 19, dated August 28, 1997, attached to Petition for Leave to Intervene Submitted by the Confederated Tribes of the Goshute Reservation and David Pete, dated August 28, 1997. *See also* Applicant's brief at 13. The Applicant asserts, without a shred of evidence, that the Skull Valley Band of Goshutes is responsible for the health and safety of visitors to its reservation and that somehow the health, safety and welfare of the Confederated Tribes members are irrelevant when those members are off the member's reservation. Applicant's Brief at 13.

The Applicant is attempting to merge the two standards from which an organization may derive standing. Millstone states that an organization may base its standing on either an injury to its organizational interests or derive standing from an individual member and that member has authorized the organization to represent his or her interest. Millstone, 43 NRC at 21-22. Ms. Reed on her own behalf and as legal guardian to her granddaughter has individual standing and Ms. Reed has authorized the Confederated Tribes to represent her interest. LBP-98-7 at 32. Thus, the Board has correctly decided that the Confederated Tribes has organizational standing. Furthermore, the Confederated Tribes has met the additional burden the Applicant attempts to impose on this intervenor. In obtaining standing, Ms. Reed has established

---

her visits to the Skull Valley Reservation. Applicant's brief at 6; SAR at 4.5-3; State's Contentions, dated November 23, 1997, at 10-15.

a threat to the health and safety of herself and her granddaughter and the Confederated Tribes has also shown that it is responsible for the health and welfare of its tribal members.

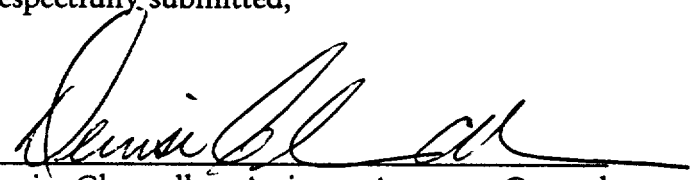
The Applicant's arguments are unpersuasive for the Commission to disturb the Licensing Board's conclusion regarding the adequacy of the Confederated Tribes' affected interest, and thus, the Commission should affirm the Board's decision.

CONCLUSION

For the reasons set forth above, the State requests the Commission uphold the Licensing Board's decision that the Confederated Tribes has standing in this proceeding.

DATED this 14th day of May, 1998.

Respectfully submitted,



Denise Chancellor, Assistant Attorney General
Fred G Nelson, Assistant Attorney General
Diane Curran, Special Assistant Attorney General
Connie Nakahara, Special Assistant Attorney General
Attorneys for State of Utah
Utah Attorney General's Office
160 East 300 South, 5th Floor, P.O. Box 140873
Salt Lake City, UT 84114-0873
Telephone: (801) 366-0286, Fax: (801) 366-0292

CERTIFICATE OF SERVICE

I hereby certify that copies of STATE OF UTAH'S BRIEF IN RESPONSE TO APPLICANT'S APPEAL OF ORDER LBP-98-7 GRANTING THE CONFEDERATED TRIBES' PETITION FOR INTERVENTION were served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 14th day of May, 1998:

Attn: Docketing & Services Branch
Secretary of the Commission
U. S. Nuclear Regulatory Commission
Mail Stop: O16G15
11555 Rockville Pike, One White Flint North
Rockville, MD 20852-2738
e-mail: secy@nrc.gov
(*original and two copies*)

Shirley A. Jackson, Chairman
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: chairman@nrc.gov

Edward McGaffigan, Jr., Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: sfc@nrc.gov

Greta J. Dicus, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrdicus@nrc.gov

Nils J. Diaz, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrdiaz@nrc.gov

G. Paul Bollwerk, III, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: gpb@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: jrk2@nrc.gov

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: psl@nrc.gov

Sherwin E. Turk, Esq.
Catherine L. Marco, Esq.
Office of the General Counsel
Mail Stop - 0-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: set@nrc.gov
E-Mail: clm@nrc.gov

Jay E. Silberg, Esq.
Ernest L. Blake, Jr.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N. W.
Washington, DC 20037-8007
E-Mail: Jay_Silberg@shawpittman.com

Clayton J. Parr, Esq.
Parr, Waddoups, Brown, Gee & Loveless
185 South State Street, Suite 1300
P. O. Box 11019
Salt Lake City, Utah 84147-0019
E-Mail: karenj@pwlaw.com

John Paul Kennedy, Sr., Esq.
1385 Yale Avenue
Salt Lake City, Utah 84105
E-Mail: john@kennedys.org

Joro Walker, Esq.
Land and Water Fund of the Rockies
165 South Main, Suite 1
Salt Lake City, Utah 84111
E-Mail: joro61@inconnect.com

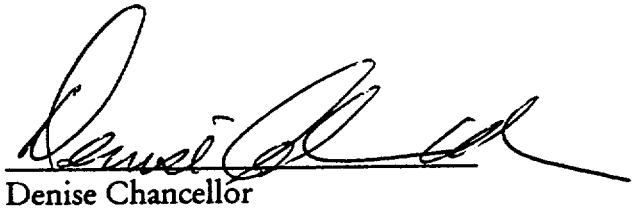
Danny Quintana, Esq.
Danny Quintana & Associates, P.C.
50 West Broadway, Fourth Floor
Salt Lake City, Utah 84101
E-Mail: quintana@xmission.com

Martin S. Kaufman, Esq.
Atlantic Legal Foundation
205 E. 42nd Street
New York, New York 10017
E-mail: mskaufman@yahoo.com

Richard Wilson
Department of Physics
Harvard University
Cambridge, Massachusetts 02138
E-mail: WILSON@HUHEPL.
HARVARD.EDU

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

Office of the Commission Appellate
Adjudication
Mail Stop: 16-G-15 OWFN
U. S. Nuclear Regulatory Commission
Washington, DC 20555
(*United States mail, first class only*)



Denise Chancellor
Assistant Attorney General
State of Utah