

May 08, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE NUCLEAR REGULATORY COMMISSION

In the Matter of)

PRIVATE FUEL STORAGE, I.L.C.)

Docket No. 72-22

(Independent Spent
Fuel Storage Installation))

ASLBP No. 97-732-02 ISFSI

**BRIEF OF THE CONFEDERATED TRIBES OF THE GOSHUTE RESERVATION
IN RESPONSE TO THE APPEAL OF APPLICANT REGARDING STANDING**

In response to the Appeal filed by the Applicant Private Fuel Storage (herein, "Applicant") to the decision of the Atomic Safety and Licensing Board (April 22, 1998), the Confederated Tribes of the Goshute Reservation (herein, "the Tribe") submits the following: The Tribe respectfully requests the Commission to deny Applicant's appeal and to sustain the Board's determination that the Tribe has established standing to intervene in this matter.

Statement of the Case and Factual Background

Applicant seeks to place high-level radio-active waste on the reservation of the Skull Valley Band of Goshutes, located in western Utah. The Tribe is a separate, federally-recognized Indian tribe which is located on the west side of Tooele County,

- 2 -

along the western border of Utah, just south of Ibapah and approximately 60 air-miles from the proposed site. Tooele County is geographically large, but is sparsely inhabited. Most of the area is a part of the "Western High Desert Region" and is characterized by wide vistas, beautiful mountains, and salt flats.

The Tribe timely filed a petition to intervene in this matter, and the Board below ruled in exercising its discretion under the standards of *Pebble Springs*, CLI-76-27, 4 NRC at 616, that the Tribe should be granted intervention status.

Approximately 450 individuals comprise the current membership of the Tribe, about half of whom reside on the Reservation. By contrast, the Skull Valley Band has approximately 130 members, only 30 of whom actually reside on the Skull Valley Reservation.

The Skull Valley Band of Goshutes is also a separate federally-recognized Indian tribe, consisting of persons who are literal cousins to the Tribal members at Ibapah. When the Goshute Indian claim was filed against the United States, both Goshute groups participated in the same case and ultimately jointly shared in the final judgment. The claim was based upon the aboriginal Goshute area which included all of Tooele County and much of the lands surrounding.¹ From time immemorial, the Goshutes have hunted, fished, gathered, and lived, died and were buried within their aboriginal area.

¹ The Goshute aboriginal area consisted of about 7.2 million acres and extended approximately from Salt Lake City on the east to the Ruby Mountains in Nevada on the west, and from the town of Delta, Utah, on the south to the Great Salt Lake on the north. See Indian Claims Commission Docket 326 B and J.

- 3 -

The proposed location of the ISFSI is entirely within the adjudicated aboriginal area of the Goshute Indians.

The Tribe and its members regard burial sites located within the aboriginal area (including Skull Valley) as sacred places, and from time to time, visit such sites to honor deceased ancestors and relatives.

The Tribe's headquarters is located in Tooele County. The headquarters facility contains the Tribe's administrative, education, health, law enforcement, elderly, day care, and social work offices. Approximately 25 Tribal members are employed at the headquarters. In addition, the Tribe owns a welding fabrication shop located nearby at which 15 to 20 Tribal members have been employed in the past.² The Tribal children attend school at Ibapah and also Wendover, both within Tooele County.

The Tribe and its members depend heavily upon ranching for employment and income. Declarations were filed with the Board below showing with particularity the nature and frequency of the contacts of the Goshute Tribal members with their cousins at Skull Valley. As shown in the declarations, members of the Goshute Tribe actually reside and work on a neighboring ranch only a few miles north of the Skull Valley Reservation. Also, members of the Goshute Tribe based in Ibapah, Tooele County, Utah, visit the Skull Valley Reservation on a regular and frequent basis for a wide variety of family, cultural, religious, and social reasons. Given the relatively small number of

² Currently, the shop is closed, but the Tribe is actively negotiating with regard to re-opening the facility.

- 4 -

permanent. Skull Valley residents who are located on the Skull Valley Reservation, the contacts and the interaction of the members of the Goshute Tribe with their literal cousins must be deemed to be a significant factor in the Skull Valley community.

Moreover, as noted in the declarations, the burial ground located on the Skull Valley Reservation is the final resting place for a number of Goshute Tribal members as well as the relatives of many Goshute Tribal members.

Likewise, the Tribe submits that it is not just "an interested Tribe." When the United States first dealt with the Goshute Indians, it treated all Goshutes as one group. See Treaty with the Shoshoni-Goship (1863) (13 Stat. 681). The lands described in that treaty and regarded as belonging to all Goshutes consisted of: "On the north by the middle of the Great Desert; on the west by Steptoe Valley; on the South by Tooedoe or Green Mountains; and on the east by Great Salt Lake, Tuilla, and Rush Valleys." Id. at Art. 6. A copy of the map approved by the Indian Claims Commission as the Goshute aboriginal area is attached as Ex. 1. The Indian Claims Commission found that "some of the Goshute Indians were engaged in farming at Skull Valley, Deep Creek, Salt Marsh, and Warm Springs, and that other Goshutes still were roaming upon the entire Goshute tract in search of game and pine nuts for food." 31 Ind. Cl. Comm. 225, 261 (1973).

Illustrative of the continuing close ties between the Goshute Tribe and the Skull Valley Band is a provision contained in the Goshute Tribe's initial Tribal Constitution. Article III, Section 1 (Membership) provided as follows (Constitution and By-laws of the

- 5 -

Confederated Tribes of the Goshute Reservation, approved by the Department of the Interior on November 25, 1940):

The membership of the Confederated Tribes of the Goshute Reservation shall consist as follows:

a) All persons of Indian blood whose names appear on the official census rolls of the Confederated Tribes of the Goshute Reservation as of April 1, 1939: *Provided*, That within one year after approval of this Constitution and By-laws, such roll may be corrected by the Goshute Business Council of the Confederated Tribes subject to the approval of the Secretary of the Interior.

b) All children born to any member of the Confederated Tribes who is a resident of the reservation at the time of the birth of said children.

c) All persons of Indian blood whose names appear on the official census rolls of the Skull Valley Reservation; *Provided*, That the Skull Valley Indians may affiliate hereafter with Confederated Tribes of the Goshute Indians. [Emphasis added.]

- 6 -

The Goshute Tribe's Constitution was not modified to delete the Skull Valley reference until 1988, after the Skull Valley Band confirmed its own separate governmental identity.³ The Indian Claims award for the Goshute claims case was divided between the two groups, in recognition that together they were "culturally and politically representative" of the aboriginal Goshute Indians and "also representative in terms of territorial continuity of the Goshute Indians of 1875." Results of Research Report on Goshute Judgment in Dockets 326-B and J before the Indian Claims Commission, Bureau of Indian Affairs, Phoenix Area (by Jose Zuni), March 5, 1976.

Hence, the Goshute Tribe is not merely "an interested Tribe." Until relatively recently, the Goshute Tribe included the Skull Valley people. The close relationship of these people with the members of the Goshute Tribe is an historical fact and continues to the present.

To demonstrate the close affiliation of the two groups, Chrissandra Reed, a member of the Goshute Tribal Council submitted her declaration to the Board below, noting that she is the legal guardian of her three-year old granddaughter, Michaela who resides with her on a full-time basis except for times when she is under the care of Ms. Reed's cousins on the Skull Valley Reservation. Michaela is also an enrolled member of the Goshute Tribe. The duration of Michaela's stays on the Skull Valley Reservation are from one night to periods of up to two weeks. During her stays on the Skull Valley

³ The Skull Valley Band adopted its first enrollment ordinance in 1956. The Skull Valley Band did not formally organize until the 1980's.

- 7 -

Reservation, Michaela resides in the home of her cousins and plays with her cousins and has gone horse-back riding there on the Skull Valley Reservation. Also, during such stays, she drinks local water and eats the food prepared and served by her cousins, which food includes natural foods gathered in the Skull Valley area. Ms. Reed usually drops off her granddaughter at the I-80 truck stop (Rowley Junction) through which junction Applicant proposes to tranship nuclear waste on its way to the Skull Valley Reservation. Ms. Reed picks up her grandchild either at Salt Lake City or at the Skull Valley Reservation. About one-fourth of the pick-ups are on the Skull Valley Reservation. Occasionally, Ms. Reed also picks up her grandchild at the truck stop. On the average, Ms. Reed visits the Skull Valley Reservation about 8-10 times each year.⁴

⁴ Ms. Reed also stated in her declarations that because of blood relationships and intermarriage, members of the Goshute Tribe attend family gatherings, parties, and other events on the Skull Valley Reservation. Enrolled members of the Skull Valley Band also live on and regularly visit the Reservation of the Goshute Tribe. It is the custom and practice during such visits to share food and local water with visitors. Thus, Goshute members eat the food of the Skull Valley members, which food includes natural foods gathered in the Skull Valley area. Persons buried at Skull Valley include Ms. Reed's father's sister, Stella Murphy Black Bear. Stella was married to an Indian who was a member of the Skull Valley Band. She is now deceased and is buried in the Tribal burial ground there on the Skull Valley Reservation. The cemetery is located about one-half mile from the homes of the Skull Valley Band's members. Ms. Murphy regularly visits that cemetery. Other Goshute Tribal members buried at Skull Valley include Ethelyn Murphy's children. Ethelyn is an elderly member of the Goshute Tribe and resides on the Goshute Reservation. Ethelyn is also the sister of Stella, referred to above. Ethelyn's former husband is Edgar Moon, who is an enrolled member of the Skull Valley Band. Ethelyn's son who is buried at Skull Valley passed away about three years ago. Another one of Ethelyn's sons still resides on the Skull Valley Reservation. Ethelyn regularly visits the graves of her children and also visits her living son on the Skull Valley Reservation. Ms. Reed further testified that when she was younger, she attended religious ceremonies on the Skull Valley Reservation on a regular basis, approximately monthly. Declarant frequently attended such ceremonies with her father (now deceased) who traveled with her and who was an active

(continued...)

- 8 -

Ms. Reed, as a member of the governing body of the Goshute Tribe further testified that the potential contamination of the Skull Valley Reservation area in the event of an accidental release of radioactive material would have a direct and substantial impact on numerous members of the Goshute Tribe. The Goshute Tribe has the responsibility to safeguard the health and safety of its members and to preserve and protect its culture.

Ms. Reed, as a Tribal leader and member, authorized the Goshute Tribe to represent her interests in this proceeding.

Discussion of Legal Issues

I. The Board Properly Exercised Its Discretion in Granting Intervention Status to the Goshute Tribe.

In granting the Goshute Tribe standing to participate in this matter, the Board properly exercised its discretion based upon the material contained in the record. The

⁴(...continued)

participant in such ceremonies. The ceremonies are held in an Indian tepee which is moved from place to place, but is typically located near the tribal residential area on the Skull Valley Reservation. Such ceremonies still take place and are attended by other enrolled members of the Goshute Tribe including Ethelyn Murphy, Mabel Salazar, and Bernice Steele. Dan Murphy (former Chairman of the Goshute Tribe) and Lee Moon (who is a member of the Goshute Business Council) also have attended those ceremonies held on the Skull Valley Reservation. Occasionally, some of the ceremonies are also held on the Goshute Reservation near Ibapah and are attended by Goshute Tribal members and Skull Valley Band members.

- 9 -

Commission should not overturn such an exercise of discretion, particularly upon the weak arguments advanced by the Applicant.⁵

The facts recited above clearly support a discretionary ruling that the Goshute Tribe should be allowed to intervene in this matter. See *Pebble Springs*, supra. The Board properly considered the Goshute petition in a light favorable to the petition. See *Georgia Institute of Technology*, CLI-95-12, 42 NRC 111, 115 (1995). The Applicant in its brief incorrectly asserts that the Board "failed to allocate the burden of proof" to the Goshute Tribe. To support its assertion, Applicant attempts to twist the wording of the Board's ruling. The Tribe made a showing that sufficient contacts existed to support standing. In the proceeding below, the Applicant challenged some of those contacts, saying in essence that they were too attenuated. After considering the nature of the challenge, the Board concluded that those contacts had not "become so attenuated as to provide an insufficient basis for standing". Implicit in that ruling is a finding that the Goshute Tribe had established sufficient contacts, and despite Applicant's challenge, those contacts were not so attenuated as to make them insufficient. See page 32 of Board's ruling.

⁵ Both the Goshute Tribe and the Skull Valley Band also maintained that as Indian Tribal Governments they are entitled in the alternative to participate as a matter of right as interested governmental entities. The Goshute Tribe continues to maintain that position, which was not addressed by the Board because of the fact that the Board granted intervention status on other grounds. See page 23 of the Board's ruling, fn. 3.

- 10 -

II. The Goshute Tribe Has An Interest.

The second argument raised by Applicant is that the Goshute Tribe lacks representative standing because the Goshute Tribe is separate from the Skull Valley Band and it lacks jurisdiction for "ensuring the health or safety of its members on the Skull Valley Reservation." The Applicant further argues without any factual basis that "the individual interests sought to be protected by the Confederated Tribes in this licensing proceeding are not reasonably connected to the reservation-based health, safety or other functions provided by the Confederated Tribes to its members."

This incorrect assumption ignores the facts. To illustrate this point, it is important to note that the health and safety of Goshute members is of great concern to the Tribe, regardless of whether or not the members actually reside on the Goshute Reservation. For example, a tribal member who suffers an injury or illness on the Skull Valley Reservation will be treated under medical arrangements coordinated by the Goshute Tribe. If the member can return to the Goshute Reservation, the community health representative employed by the Tribe will be responsible for following and coordinating the treatment. If the member is treated off the Reservation, the CHR remains involved. Incapacitated Tribal members who return to the Reservation remain a responsibility of the Tribe (and its other members).

Moreover, it is also worthy of note that even the U.S. Congress recognized the extended concerns of Indian Tribes for their members when it adopted the Indian Child

- 11 -

Welfare Act, 25 U.S.C. §1901 et seq. That law allows Tribes to intervene in state court actions involving child custody proceedings without limiting the interests of Tribes to just their respective reservation areas. Federal law does not limit a tribe's interest only to members who are on the reservation of such tribe; in fact, federal law recognizes the responsibility and concern of tribes for members under circumstances present in this case. Thus, it is simply incorrect to maintain that the responsibility and concern of the Goshute Tribe stops at its Reservation borders.

The Applicant's reference to an Alaskan Indian who happens to occasionally visit a facility in Florida is not applicable here. In the present case, the history of affiliation, the proximity, the common aboriginal area, the frequency and variety of contacts present in the Goshute situation would clearly distinguish it from the hypothetical Alaska-Florida example.

The Board below was correct in determining that the Goshute Tribe could function as representative for its members in this case.

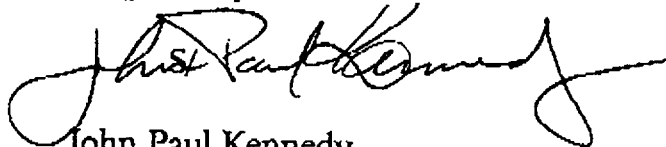
Conclusion

On the basis of the foregoing and on the basis of the record as a whole, it is respectfully submitted that the Board properly exercised its discretion in granting intervention status to the Goshute Tribe. The Board's ruling should be sustained.

- 12 -

Dated: May 8, 1998

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Paul Kennedy", written in a cursive style.

John Paul Kennedy
Attorney for the Confederated Tribes of the
Goshute Reservation

- 13 -

Certificate of Service

I hereby certify that copies of the above Statement of Contentions were served upon the persons indicated below in the manner stated on the date stated:

Attn: Docketing & Service Branch
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Mail Stop 016G15
11555 Rockville Pike One White Flint North
Rockville, MD 20852-2738
(original and two copies – Fed. Ex. Only)

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
email jrk2@nrc.gov

G. Paul Bollwerk, III, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
email gpb@nrc.gov

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
email psl@nrc.gov

Office of the Secretary
Attn: Rulemakings and Adjudication Staff
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(Fed. Ex. Only)

Sherwin E. Turk, Esq.
Catherine L. Marco, Esq.
Office of General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop: 0-15 B18
Washington, D.C. 20555
Fax: 301-415-3725
email SET@nrc.gov

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Office of the Comm'n Appellate Adjudication
Mail Stop 16-G-OWFN
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Jay E. Silberg, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street N.W.
Washington, D.C. 20037-8007
Fax: 202-663-8007
jay_silberg@shawpittman.com

Joro Walker, Esq.
Land and Water Fund of the Rockies
160 South Main Street, Suite 1
Salt Lake City, Utah 84111
Fax: 303-786-8054
joro61@inconnect.com

- 14 -

Danny Quintana, Esq.
50 W. Broadway, Fourth Floor
Salt Lake City, Utah 84101
Fax: 801-521-4625
quintana@Xmission.com

Denise Chancellor
Utah Attorney General's Office
P.O. Box 140873
Salt Lake City, Utah 84114-4810
Fax: 801-366-0292
dchancel@state.ut.us

Connie Nakahara, Esq.
Utah Dep. Of Environmental Quality
168 North 1950 West
P.O. Box 144810
Salt Lake City, Utah 84114-4810
Fax: 801-536-0061
cnakahar@state.UT.US

Clayton J. Parr, Esq.
Michael Later, Esq.
Parr, Waddoups, Brown, Gec & Loveless
185 S. State #1300
Salt Lake City, Utah 84147-0019
Fax: 801-532-7751
karenj@pwlaw.com

Diane Curran, Esq.
Harmon, Curran & Spielberg
2001 S Street, N.W., Suite 430
Washington, D.C. 20009
Fax: 202-328-6918
dicurran@aol.com

James M. Cutchin, V
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
email jmc3@nrc.gov

Prof. Richard Wilson
Department of Physics
Harvard University
Cambridge, Mass. 02138
wilson@huhepl.harvard.edu

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

Dated: May 8, 1998.



John Paul Kennedy