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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

THE SKULL VALLEY BAND OF
GOSHUTE INDIANS, et al.,

Plaintiffs,

vs.

MICHAEL O. LEAVITT, et al.,

Defendants.

Counterclaim

**UTAH'S RULE 12 (h)(3)
SUGGESTION OF LACK OF
JURISDICTION**

Civil No. 2:01CV00270C

Judge Tena Campbell

Pursuant to Rule 12(h)(3), Federal Rules of Civil Procedure, the defendants ("Utah") suggests that this Court lacks subject-matter jurisdiction relative to the plaintiffs' ("PFS") Complaint. Specifically,

- It is virtually certain that PFS does not have standing to raise the claims asserted in its Complaint; and
- It is probable that PFS's claims are not ripe for adjudication.

In Section I, we demonstrate that PFS does not have the standing required by Article III to raise its claims. We do this in large measure by incorporating the material set forth in the opening and reply memoranda in support of Utah's Motion for Judgment on the Pleadings,

where we demonstrate in detail PFS's lack of standing. We repeat that material here (as noted, largely by incorporation) for two reasons. First, it is helpful to consider both of PFS's jurisdictional problems (standing and ripeness) in the same context; that consideration aids in understanding in which order this Court ought to address those two problems. Second, even though the propriety of using a Rule 12(c) motion to raise a standing problem seems fairly well settled¹, we use a Rule 12(h)(3) suggestion relative to that problem out of an abundance of procedural caution; all authorities agree that a Rule 12(h)(3) suggestion is a proper procedure for that purpose.

In Section II, we set forth the problems with the ripeness of PFS's claims.

In Section III, we demonstrate that this Court is free to address first either PFS's standing problem or its ripeness problem but that, for powerful reasons, this Court ought to address and resolve first the standing issue.

I.
PFS LACKS THE STANDING REQUIRED BY ARTICLE III TO RAISE
THE CLAIMS ASSERTED IN PFS's COMPLAINT.

We incorporate by reference the material set forth in the opening and reply memoranda supporting Utah's Rule 12(c) motion. We also summarize that material in the following paragraphs.

¹ A number of authorities agree that Utah's Rule 12(c) motion for judgment on the pleadings is a proper procedure for raising the issue of PFS's standing. *E.g.*, 5A Wright & Miller, Federal Practice and Procedure § 1350, at p. 200 (2nd ed. 1984) (hereafter "W&M"); *Alonzo v. Chase Manhattan Bank*, 25 F.Supp.2d 455 (S.D.N.Y. 1998).

Article III limits a federal court's subject-matter jurisdiction to an actual "case" or "controversy." To satisfy that constitutional requirement, the plaintiff must have standing to raise his claims. Relative to standing, Article III requires, as "the first element," that the plaintiff has "suffered an 'injury in fact'--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual and imminent, not 'conjectural' or 'hypothetical.'" *Table Bluff Reservation v. Phillip Morris, Inc.*, 256 F.3d 872, 882 (9th Cir. 2001).

A federal court will not presume that the plaintiff has standing. Rather, the plaintiff bears the burden of first alleging the legal and factual bases of his standing and then both establishing the essential points of law and proving the relevant facts.

A plaintiff does not have standing to challenge a statute that allegedly hinders the plaintiff in accomplishing an **unlawful** purpose or objective. In such a case, the plaintiff is not suffering "an invasion of a legally protected interest." *Id.*

A federal court cannot proceed to the merits of the plaintiff's action until the court has first fully adjudicated its own subject-matter jurisdiction, including the plaintiff's standing.

PFS's objective – allegedly being hindered by the challenged Utah statutes – is to create in Skull Valley, Utah, a privately owned, away-from-reactor, spent nuclear fuel ("SNF") storage facility, yet governing federal law renders such a facility **unlawful**. Governing federal law, the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101, *et seq.* ("NWPA"), provides that only the federal government is authorized to site, construct, and operate any new away-from-reactor, SNF storage facilities (whether interim or permanent) and prohibits all private initiatives in that direction. A contrary construction of the NWPA renders nonsensical

the carefully crafted and comprehensive solution specified by Congress in that legislation for the problem of interim, away-from-reactor, SNF storage; indeed, a contrary construction renders ludicrous both the language and express provisions of the NWPA.

Accordingly, PFS has no legally protected interest in accomplishing its Skull Valley nuclear waste dump scheme; as a pure matter of federal statutory law, that scheme is unlawful. Thus, PFS does not have standing to raise its claims in federal court.

* * * * *

We note here yet another standing issue. Relative to its proposed nuclear waste dump, PFS needs **two** things in order to have standing to challenge Utah statutes: one, a *valid* license from the NRC **and**, two, a *valid* lease with the Skull Valley Band, *validly* approved by the Secretary of the Interior. In its Answer, Utah refutes in detail PFS's standing under both points. We are limiting, however, our present challenge to PFS's standing to the first point because that first point presents a pure question of law that this Court can readily resolve (given the governing law) in favor of Utah. The second standing point – a *valid* lease *validly* approved – will require resolution of some contested factual issues, and the plaintiffs have refused to be forthcoming with discovery. If this Court does not resolve the first standing point (or a ripeness issue) against PFS, this Court, before proceeding to the merits, must hold PFS to its burden of establishing its standing in the face of Utah's challenge on the second point. Settled law so requires.

II. PFS's CLAIMS ARE NOT RIPE.

Ripeness, like mootness, is most helpfully understood as a temporal limitation on the concept of standing. Standing requires an actual injury to a legally protected interest. Ripeness

accepts the concept of injury but requires that *future* events not make too doubtful the realization of that injury. (Ripeness analysis further balances that doubtfulness – or uncertainty – against the seriousness of harm to the plaintiff resulting from a deferral of present judicial action.) Mootness accepts the concept of injury but requires that *past* events not have ended the reality of the plaintiff's injury. *See generally* 13A W&M, §§ 3531.12, 3532.1, 3533.1.

Ripeness is an Article III requirement, just as much as is standing.

Under Article III of the Constitution, federal courts have subject matter jurisdiction only over "cases and controversies." Whether a claim is ripe for adjudication, and therefore presents a case or controversy, bears directly on this jurisdiction. . . . The ripeness doctrine is "intended 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.' " . . . "In short, the doctrine of ripeness is intended to forestall judicial determinations of disputes until the controversy is presented in clean-cut and concrete form." . . . In determining whether a claim is ripe, two issues must be evaluated: (1) the fitness of the issue for judicial resolution and (2) the hardship to the parties of withholding judicial consideration.

United States v. Wilson, 244 F.3d 1208, 1213 (10th Cir. 2001) (citations omitted).

Because ripeness, like standing, is an Article III requirement, the same procedural principles apply to ripeness as apply to standing.

To fall within our subject-matter jurisdiction, a case must raise issues that are ripe for review. . . . The plaintiff bears the burden of providing evidence to establish that the issues are ripe. . . . Where, as here, a party has attacked the factual basis for subject-matter jurisdiction, we do not presume the truthfulness of the complaint's factual allegations; rather, we may consider evidence not contained in the pleadings.

Coalition for Sustainable Resources, Inc. v. United States Forest Service, 259 F.3d 1244, 1249 (10th Cir. 2001) (citations omitted). When facts bearing on ripeness are disputed, they may be the subject of discovery and then an evidentiary hearing. *See, e.g., Federal Deposit Ins. Corp. v.*

Oaklawn Apartments, 959 F.2d 170, 174 (10th Cir. 1992) (“Facts regarding jurisdictional questions may be determined by reference to affidavits, . . . by a pretrial evidentiary hearing, . . . or at trial when the jurisdictional issue is dependent upon a decision on the merits.”)

PFS’s Complaint necessarily raised a number of threshold, or justiciability, issues. Faced with the burden to adequately plead the basis for Article III jurisdiction over its action, PFS alleged (directly or by necessary implication) that:

1. PFS was promoting the creation and operation of a privately owned, away-from-reactor, SNF storage facility on a portion of the reservation of the Skull Valley Band of Goshute Indians (“the Band”);
2. The Band had granted PFS a valid lease for the waste dump site;
3. That lease will not be valid until finally and unconditionally approved by the Department of the Interior (“DOI”);
4. DOI’s Bureau of Indian Affairs had already validly, conditionally approved that lease;
4. DOI in the future will validly, unconditionally approve that lease;
5. PFS was prosecuting a licensing proceeding before the Nuclear Regulatory Commission (“NRC”) to receive a license inasmuch as federal law requires a license for the handling of SNF;
6. The NRC in the future will issue to PFS a valid license for the Skull Valley facility, which agency action will be upheld when subjected to inevitable judicial review; and
7. PFS is suffering big hardship because Utah’s challenged statutes are hindering PFS in the implementation of its scheme for the Skull Valley facility.

In its Answer to PFS's Complaint, Utah alleged that:

1. The lease was not valid because entered into by means and persons not authorized by the Band's governing law;
2. The Bureau of Indian Affairs's superintendent's conditional approval of the lease was not valid because given in violation of governing federal law;
3. DOI cannot (and therefore will not, it is hoped) give final, unconditional approval to the lease, both because (as a mixed question of law and fact) the lease is invalid under the Band's form of government and because (as a matter of fact) the Skull Valley facility will become an incurable *de facto* permanent repository, approval of which would breach DOI's trust obligations to the Band;
4. Governing federal law, the NWPA, prohibits and renders unauthorized the proposed Skull Valley facility, and the NRC has no authority to issue a license for such a facility; and
5. Because the Skull Valley facility will become an incurable *de facto* permanent repository, PFS's process for its creation violates the National Environmental Policy Act ("NEPA").

In this fashion, Utah put at issue and challenged the justiciability of PFS's Complaint. Utah's position raises two standing issues and at least two ripeness issues. As already noted, the first standing issue is a pure question of law and has already been fully briefed; Utah raised that issue with its Rule 12(c) motion for judgment on the pleadings. The two ripeness issues are these: (1) Agency action (and inevitable judicial review thereof) has not yet given PFS a valid, lawful license; whether PFS will ever get such in the future is far from certain. (2) Agency

action (and inevitable judicial review thereof) has not yet given PFS a valid, lawful lease; whether PFS will ever get such in the future is far from certain.

Regarding the first ripeness issue, the uncertainty of a final, unassailable NRC license, the respective positions of PFS and Utah can only be characterized as bizarrely reversed. After suffering through the first four years of NRC's licensing "proceeding," Utah alleged in its Answer that "the NRC . . . thus began a licensing proceeding that has been rolling inexorably forward ever since [1997] toward a foreordained destination no observer can fail to see, issuance of a license." Answer, at ¶ 15.² Yet PFS, which has the burden of establishing ripeness for its Complaint and thus the burden of showing a high level of certainty that the license will issue, has filed a paper in this Court pointing out the **uncertainty** in that prospect. PFS made that bizarre move in this context: To assure that the threshold issues were fully adjudicated and not in any way overlooked, Utah added a Counterclaim to its Answer, asking this Court to declare the law on each threshold issue. In other words, Utah's Counterclaim is just the flip side of the justiciability allegations (direct and implicit) in PFS's Complaint. Utah noted as much when, in making the required justiciability allegations to support its Counterclaim, Utah said only the following: "This Counterclaim is justiciable on the same basis and to the same extent as is the Complaint." Answer, at ¶ 76. Apparently believing its own claims, but not Utah's, to be exempt from justiciability requirements, PFS filed a "Motion to Dismiss" alleging that Utah's Counterclaim was **not ripe** because of **uncertainty** regarding the NRC licensing process:

² Utah, of course, strongly asserts that, in the inevitable judicial review of any NRC license issued to PFS, the courts will reverse the agency action. The NRC's lack of authority to license a private, away-from-reactor, SNF facility will, in itself, require reversal.

Defendants' Counterclaim remains contingent on the outcome of . . . the [NRC] licensing process. Any focus on the precise activities that may be permitted is presently impossible. Judicial review undertaken now may well prove in the future to have been unnecessary

Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Dismiss

Counterclaim, at p. 21.³ *See also id.* at 17 ("the ripeness doctrine bars the claims because NEPA review and NRC licensing proceedings are still ongoing, and their outcomes unknown.")

PFS and Utah, however, are in agreement regarding the second ripeness issue, the uncertainty of a final, unassailable lease with the Band, although, again, given PFS's burden to establish the ripeness of its Complaint's claims, PFS's efforts to show considerable uncertainty, rather than certainty, seems odd. As with the uncertainty of the NRC license, so with the uncertainty of a final, valid lease: PFS talks about how uncertain it all is:

[T]he ripeness doctrine bars the claims because NEPA review and NRC licensing proceedings are still ongoing, and their outcomes unknown. It is too early to know if final lease approval will be forthcoming under the lease approval [process in DOI].

Id. at 17. But PFS does not stop there in emphasizing uncertainty. It puts into the equation the Tenth Circuit decision denominated *Utah II*, *Utah v. United States Dept. of Interior*, 210 F.3d 1193 (10th Cir. 2000), and quotes (at page 17 of its memorandum) from that decision this language about the uncertainty of both the very same NRC licensing process and the very same DOI lease-approval process at issue here:

³ Because PFS previously filed a Reply to Utah's Counterclaim, PFS's "Motion to Dismiss" (expressly brought "pursuant to Rule 12(b)") is misnamed; it should be denominated either a Rule 12(c) motion or a Rule 12(h)(3) suggestion.

We cannot be certain whether the EIS will show that the project presents unacceptable risks, whether the NRC will issue a license to PFS or, if ultimately authorized following the environmental considerations, the precise activities which may be permitted on the leased lands.

Id. at 1198.

In short, Utah and PFS agree about the substantial level of uncertainty that PFS's alleged injury will ever mature (or "ripen") into an actual, cognizable, legal injury.

Relative to the ripeness of its own Complaint's claims,⁴ PFS must be banking on its ability to show such horrible hardship to itself – if this Court refrained from adjudicating its claims – that this Court, in working the ripeness equation, will conclude that Article III ripeness is present despite that uncertainty PFS itself emphasizes. If that is PFS's thinking (and there is no other plausible explanation for its position), then this Court is now faced with two key issues. First, because PFS's alleged hardship is entirely a factual matter and hotly disputed, what procedures will this Court employ relative to discovery and an evidentiary hearing to enable the Court to accurately measure any actual hardship (as opposed to PFS's lawyer-scripted recitation of its "hardship")? Second, can and should this Court address first the purely legal standing issue of federal statutory prohibition of a PFS-type facility? These two questions interrelate.

Utah contests – rejects – PFS's assertions that, absent adjudication of its claims here, PFS will suffer serious, even unconscionable, hardship. Utah rejects those assertions because they are false as a matter of fact and reality.

⁴ That PFS believes its Complaint's claims are ripe is powerfully demonstrated by the fact that PFS has filed two summary judgment motions on the ultimate merits of those claims, the constitutionality of the challenged Utah statutes. Those two summary judgment motions and supporting documents total about 400 pages.

Regarding PFS's allegations that the mere existence of the challenged Utah statutes is crimping its business planning, Complaint, at ¶ 70 – that allegation has “lawyer script” written all over it. Certainly PFS's “hardship,” if any, results in large measure from the fact that federal law prohibits PFS's scheme and the further fact that Utah has now raised that prohibition in a substantial and serious challenge. By comparison, any crimping of PFS's business planning resulting from the Utah statutes must be small indeed. Moreover, until Utah can interrogate under oath the business executives who do PFS's business planning and thereby test the bases for the “crimping” allegation – and until this Court can hear those executives' testimony and judge first-hand of its credibility – that allegation can be given no weight in determining and measuring the fact, the reality, of supposed “hardship.”

Regarding the Leon Bear component of PFS, the hardship alleged is the need to endure an on-going “impermissible infringement upon the Skull Valley Band's inherent tribal sovereignty.” Complaint, at ¶ 73. Yet the facts are that the Leon Bear faction's right to speak for the Band is in serious question and the subject of a pending Bureau of Indian Affairs' proceeding; the “new leadership,” which may soon be recognized by the BIA as the legitimate tribal leadership, has not bought into the PFS party line; and substantial evidence points to PFS's dealings with the Band, including the method in which it got the lease, as the only genuine affront to notions of Indian tribal government.

Accordingly, the answer to the first question raised by PFS's claim of hardship – what procedures will this Court employ relative to discovery and an evidentiary hearing to enable the Court to accurately measure any actual hardship? – should be this: Utah will be given a

reasonable amount of time to discover from PFS documents potentially relevant to PFS's claim of hardship, followed by depositions of the PFS executives knowledgeable about the bases of the "hardship" allegation, followed by an evidentiary hearing before this Court.⁵ *E.g.*, 13A W&M § 3531.15, at p. 97-99; *Federal Deposit Ins. Corp. v. Oaklawn Apartments*, 959 F.2d 170, 174 (10th Cir. 1992) ("Facts regarding jurisdictional questions may be determined by reference to affidavits, . . . by a pretrial evidentiary hearing, . . . or at trial when the jurisdictional issue is dependent upon a decision on the merits."); *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981) (in deciding contested jurisdictional questions, the court will not "necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations.") (citing, among other cases, *Ogden River Water Users' Ass'n v. Weber Basin Water Conservancy*, 238 F.2d 936 (10th Cir. 1956).)

That answer to the first issue makes all the more important the answer to the second issue: Can and should this Court address first (that is, before resolving the ripeness issue) the purely legal issue of standing arising from the federal statutory prohibition of a PFS-type facility?

⁵ On 11 October 2001, Utah, although the defendant, sent a letter to PFS's lawyers to initiate a Rule 26(f) meeting where a discovery plan could be explored, including discovery of some of the very facts bearing on PFS's hardship allegations. At the resulting Rule 26(f) meeting, PFS refused to make any discovery, saying that this case could, would, and should be resolved without the need for any inquiry into any facts and therefore without the need for any discovery. That continues to be PFS's stated position. Apparently PFS is laboring under a misapprehension of the governing law, believing that this Court is bound to accept PFS's allegations without further investigation, that this Court will "presume" that PFS's Complaint is really justiciable.

III.
**THIS COURT SHOULD ADDRESS FIRST THE PURELY LEGAL ISSUE OF
STANDING ALREADY FULLY BRIEFED BY THE PARTIES.**

It is settled law that a federal court must adjudicate first any question regarding its Article III jurisdiction, including the plaintiff's standing and the ripeness of his claims, before proceeding to adjudicate any issue on the merits. *E.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). But it is likewise settled law that as between one Article III issue and another – such as standing and ripeness – a federal court can adjudicate either issue first and will choose which to adjudicate first on the basis of considerations of judicial economy. *E.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 66-67 (“We may resolve the question whether there remains a live case or controversy with respect to [one plaintiff’s] claim without first determining whether [either of two other parties] has standing to appeal because the former question [mootness], like the latter [standing], goes to the Article III jurisdiction of this Court and the courts below, not to the merits of the case.”)

Here, notions of judicial economy dictate that this Court adjudicate first the issue of the lawfulness of PFS’s proposed nuclear waste dump and, hence, of PFS’s standing. That issue presents a pure question of law, a question of statutory construction, a question of the kind that Article III courts are adept at answering. The question presents no disputed factual matters; the parties’ pleadings agree that PFS is proposing to build a privately owned, away-from-reactor, SNF storage facility in Skull Valley. The question calls for no expertise in any field except the law. Moreover, the parties have now fully briefed that dispositive question of law. All that remains is for this Court to rule, holding for one position or the other.

By contrast, the ripeness issue, with its hardship component, is going to require substantial discovery, both by way of document production and depositions, with no discovery having begun yet because of PFS's refusal to make discovery. The ripeness issue is going to require an evidentiary hearing before this Court, and that hearing may not be short given the different facets of PFS's hardship allegations. Further, adjudication of the ripeness issue is going to require an assessment of the level of certainty or uncertainty in the outcome of the NRC licensing proceeding (including the inevitable judicial review⁶) and the DOI lease-approval process. Finally, this Court will be required to engage in a difficult balancing between the level of uncertainty that a perceived injury will ever mature, on one hand, and, on the other hand, the level of hardship resulting from deferral of present judicial action. *See Coalition For Sustainable Resources, Inc. v. United States Forest Service, supra*, 259 F.3d at 1249 ("Application of the ripeness doctrine, however, 'remains a confused mix of principle and pragmatic judgment'").

Powerful considerations of judicial economy support this Court adjudicating first PFS's standing problem arising from the well-founded challenge to the unlawfulness of PFS's proposed Skull Valley facility.

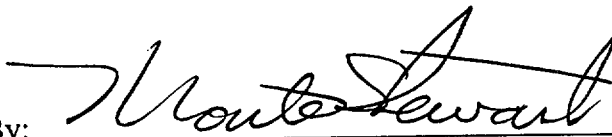
⁶ That inquiry, necessary to properly resolve the ripeness issue, will require this Court to assess the lawfulness of the proposed nuclear waste dump – without that assessment alone being dispositive (as that assessment will be with the standing issue).

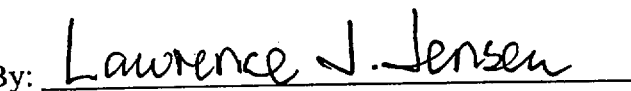
**IV.
CONCLUSION**

In light of all the foregoing, Utah respectfully requests that this Court first adjudicate the issue of PFS's standing arising from the legal contention that PFS's proposed nuclear waste dump is unlawful. If this Court holds, as a matter of law, that the proposed facility is unlawful, this Court will dismiss PFS's Complaint. If this Court holds otherwise, it will proceed to the ripeness issue, in which case Utah requests that this Court set a schedule for discovery on the relevant disputed issues of fact, followed by an evidentiary hearing.

Dated: 14 January 2002

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CERTIFICATE OF MAILING

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