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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 RESPONSE TO THE "PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIM"** Civil No. 2:01CV00270C Judge Tena Campbell

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UTAH'S REPLY TO THE "PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM"

The plaintiffs (collectively "PFS") have built their "Motion to Dismiss Counterclaim" ("the Motion") on a number of erroneous bases. Most seriously, the Motion mischaracterizes the nature and purpose of Utah's Counterclaim, but the Motion's errors do not end there. The following sections of this Response demonstrate those errors one by one.

I.
BECAUSE PFS PREVIOUSLY FILED A REPLY TO UTAH'S COUNTERCLAIM, PFS IS PRECLUDED FROM FILING NOW ITS RULE 12(b) MOTION TO DISMISS.

Rule 12(b), Federal Rules of Civil Procedure, requires that a Rule 12(b) motion to dismiss a counterclaim be filed before the plaintiff files a reply to the counterclaim:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses **shall be made before pleading** if a further pleading is permitted. (Emphasis added.)

PFS filed its Reply to Utah's Counterclaim on 28 August 2001; that Reply was a further "permitted" pleading pursuant to Rule 7(a), Federal Rules of Civil Procedure. Thus, PFS filed its 12 December 2001 Motion to Dismiss – which it expressly characterizes as one brought pursuant to Rule 12(b)[1] – months **after** filing PFS's Reply to Utah's Counterclaim. Accordingly, the

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[1] *E.g.*, Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Dismiss Counterclaim, at p. 2 (hereafter "Memorandum").

Federal Rules of Civil Procedure prohibit PFS's Rule 12(b) Motion to Dismiss Utah's Counterclaim. This Court can and should deny the Motion on that ground.

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It appears that most of the Motion is a challenge to this Court's Article III and statutory jurisdiction over the Counterclaim. That being so, this Court may elect to treat the Motion as a Rule 12(h)(3) suggestion of lack of jurisdiction or, perhaps, as a Rule 12(c) motion for judgment on the pleadings. (Such a suggestion and such a motion may properly be filed after the filing of a reply to a counterclaim.)

Without supporting anything other than a denial of PFS's improper Rule 12(b) Motion to Dismiss, but out of regard for economy in the proceedings, Utah will proceed on in this Response to address all aspects of PFS's Motion and to establish thereby that the Motion is both baseless in itself and nothing more than one part of PFS's on-going but wrong-headed efforts to have this Court ignore or avoid Utah's five challenges to PFS's standing.

II.
PFS's MOTION MISCHARACTERIZES THE NATURE AND PURPOSE OF UTAH'S COUNTERCLAIM.

The fastest way for this Court to grasp what is going on here is to have already read three of Utah's previously filed papers: first, Utah's Rule 12(c) Motion for Judgment on the Pleadings; second, Utah's Reply re Utah's Motion for Judgment on the Pleadings; and, third, Utah's Rule 12(h)(3) Suggestion of Lack of Jurisdiction. Those three papers point out PFS's lack of basis (jurisdictional and otherwise) for the claims PFS asserts in its Complaint.

Like those three Utah filings, Utah's Answer and Counterclaim also had as its primary burden (1) identifying the jurisdictional defects inhering in PFS's Complaint and (2) assuring that, without fail, those defects get adjudicated. Here is a quick summary of PFS's jurisdictional defects:

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. A group of big nuclear utilities had created a Delaware limited liability company (Private Fuel Storage, hereafter "the L.L.C.") to promote 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 the L.L.C. 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. the L.L.C. 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 the L.L.C. 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 and Counterclaim to PFS's Complaint, Utah alleged that:

1. Governing federal law, the Nuclear Waste Policy Act, prohibits and renders unauthorized the proposed Skull Valley facility, and the NRC has no authority to issue a license for such a facility;

2. 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");

3. The lease was not valid because entered into by means and persons not authorized by the Band's governing law;

4. The Bureau of Indian Affair's superintendent's conditional approval of the lease was not valid because given in violation of governing federal law; and,

5. DOI cannot give final, unconditional approval to the lease because, in the circumstances, approval would breach DOI's trust obligations to the Band.

In this fashion, Utah put at issue and challenged the justiciability of PFS's Complaint,[2] with the Counterclaim being merely the flip side of PFS's own justiciability allegations (direct and implicit) in its Complaint. That "flip side" concept is important and explains why, in making its required justiciability allegations in support of its Counterclaim, Utah said only this: "This Counterclaim is justiciable on the same basis and to the same extent as is the Complaint." Answer, at ¶ 76.

In short, the purpose of Utah's Counterclaim is to assure adjudication of the very matters that determine whether PFS has any right to even be in this Court. Moreover, events have proven that Utah, with its Answer and Counterclaim, was wise in emphasizing those matters and in insisting on their adjudication. At every turn and in every way since the close of the pleadings, PFS has tried to keep this Court from adjudicating those matters, has tried to keep this Court from determining for itself whether PFS has any right to even be in this Court. Thus, PFS has asserted in both its Rule 12(b) Motion and in its Opposition to Utah's Rule 12(c) Motion for Judgment on the Pleadings that this Court cannot and must not:

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[2] Utah's position raises five standing issues and at least two ripeness issues. The first standing issue is a pure question of law, has already been raised by Utah's Rule 12(c) motion for judgment on the pleadings, and has already been fully briefed. 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. Since filing its Answer and Counterclaim, Utah has raised the ripeness issues with its Rule 12(h)(3) suggestion of lack of jurisdiction.

1. answer the pure question of law whether PFS's proposed nuclear waste dump is unlawful as prohibited by federal law (even though the lawfulness of that facility is essential to PFS's standing to raise its Complaint's claims and PFS has the burden of establishing its standing);

2. adjudicate whether NEPA renders PFS's process for obtaining a license invalid (even though the validity under federal law of that license is essential to PFS's standing to raise its Complaint's claims and PFS has the burden of establishing its standing);

3. resolve whether the lease is invalid because entered into by means and persons not authorized by the Band's governing law (even though the validity of that lease is essential to PFS's standing to raise its Complaint's claims and PFS has the burden of establishing its standing);

4. determine whether the Bureau of Indian Affair's superintendent's conditional approval of the lease was invalid because given in violation of governing federal law (even though the validity of that conditional approval of the lease is essential to PFS's standing to raise its Complaint's claims and PFS has the burden of establishing its standing); and,

5. determine whether DOI can or cannot give final, unconditional approval to the lease (even though the validity of any unconditional approval of the lease is essential to PFS's standing to raise its Complaint's claims and PFS has the burden of establishing its standing).

PFS is insisting that this Court cannot and must not resolve these five items even though each goes to this Court's Article III jurisdiction over PFS's Complaint, even though this Court always has jurisdiction to determine its own jurisdiction, and even though this Court will **never**

presume the plaintiff's standing or the ripeness of his claims but rather will **presume an absence of jurisdiction** until the plaintiff carries his burden to establish affirmatively the existence of federal court jurisdiction.

Utah was wise with its Answer and Counterclaim both to emphasize these five matters determinative of PFS's standing and to insist on the full adjudication of those matters. And in the light of this correct view of the nature and purpose of Utah's Counterclaim, PFS's Motion – with its mischaracterization of the Counterclaim's nature and purpose – is rightly seen as nothing more than a continuation of PFS's efforts to stay in this Court while allowing no one, not even this Court, the means to question PFS's right to invoke this Court's jurisdiction. PFS's efforts will not wash; as our prior papers have already demonstrated, governing law dooms those efforts to failure.

III.
BECAUSE UTAH's COUNTERCLAIM SEEKS ADJUDICATION OF PFS's ARTICLE III STANDING AND BECAUSE THIS COURT ALWAYS HAS JURISDICTION TO DETERMINE ITS OWN ARTICLE III JURISDICTION, THE ISSUES RAISED BY THE COUNTERCLAIM ARE PROPERLY BEFORE THIS COURT FOR RESOLUTION; INDEED, THIS COURT CAN PROCEED TO NONE OF PFS's CLAIMS ON THE MERITS UNLESS AND UNTIL THIS COURT ADJUDICATES (IN FAVOR OF PFS) THE STANDING ISSUES RAISED.

Two settled principles of law provide the basis of the conclusion that this Court not only can but must proceed to adjudicate the PFS standing issues raised in Utah's Counterclaim. The first principle is that this Court must resolve first – before proceeding to any other issues in this case – PFS's standing and hence this Court's Article III jurisdiction over this case.

Until four years ago, a number of circuit courts allowed their district courts to avoid resolving difficult standing questions in order to reach an easy resolution on the merits adverse to the plaintiff. The doctrine was known as "hypothetical jurisdiction." But in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), the United States Supreme Court slammed the door shut on hypothetical standing, "declin[ing] to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action," *id.* at 94, and thereby reaffirming "the rule that Article III jurisdiction is **always** an antecedent question," *id.* at 101 (emphasis added).

Thus the law is certain now that a district court must resolve its own subject-matter (including Article III) jurisdiction first, before proceeding to address any other issue in the case.

Here, that certainty means that this Court must first resolve whether federal law authorizes PFS's proposed nuclear waste dump, as PFS contends, or whether federal law prohibits that dump, as Utah contends, with a resulting lack of standing in PFS. That certain principle of law has the same meaning for each of the other four defects in PFS's standing; this Court must adjudicate those other four issues in favor of PFS before proceeding to any of PFS's claims. And this Court has jurisdiction to adjudicate all five defects in PFS's standing because this Court always retains its inherent, essential jurisdiction to determine its own Article III jurisdiction over an action. That is the second settled principle of law sustaining Utah's position.

It is settled law that an Article III court always has the jurisdiction, the power, to determine its own subject-matter jurisdiction, especially its Article III jurisdiction. The federal courts deem this "jurisdiction to determine jurisdiction" both "inherent" and "essential," a power

flowing from the constitutional mandate limiting federal court jurisdiction to an actual "case" or "controversy."

"It is a fundamental principle that a court created under Article III of the United States Constitution **always** has the necessary jurisdiction to determine whether it has jurisdiction over . . . the subject matter of a case or controversy." *In re Department of Energy Stripper Well Exemption Litigation,* 945 F.2d 1575, 1579 (T.E.C.A. 1991) (emphasis added). And as the Second Circuit very recently explained, a federal court's authority to determine its own jurisdiction, including the power to resolve "jurisdictional facts" and essential points of law, "stems not from [Congressional action], but rather from the inherent jurisdiction of Article III federal courts to determine their jurisdiction." *Kuhali v. Reno,* 266 F.3d 93, 100 (2nd Cir. 2001).

The Tenth Circuit is in accord. "Undoubtedly the district court had jurisdiction to determine its jurisdiction." *Dennis Garberg & Associates, Inc. v. Pack-Tech Intern. Corp.*, 115 F.3d 767, 773 (10th Cir. 1997). Or, as the Tenth Circuit held in even more powerful language:

> This initial holding recognizes that when [a party invoked the district court's jurisdiction], the federal district court instantly acquired the threshold jurisdiction to decide whether it had the power to exercise jurisdiction over the action. This "jurisdiction to determine jurisdiction" is an essential power, subject to review of any court, particularly the federal courts of limited jurisdiction.

State ex rel. Oklahoma Tax Com'n v. Graham, 822 F.2d 951, 955 (10th Cir. 1987), *vacated on other grounds,* 484 U.S. 973 (1987).

In sum, this Court has the jurisdiction, the power, to determine whether PFS has standing to pursue its claim in this Court, and that power derives not from any Congressional action or inaction but directly from Article III of the Constitution.

The clear implication of this conclusion is that a defendant has the right to raise to the Court's attention and insist on an adjudication of challenges to and defects in the plaintiff's standing – in other words, to do just what Utah has done with its Answer and Counterclaim.[3] The very moment a plaintiff invokes a federal court's jurisdiction, he puts in issue the legal and factual underpinnings of his required allegations of standing. At that very moment, the plaintiff confers on the defendant the right to raise, to challenge, and to push to final adjudication the defects in plaintiff's standing. If the plaintiff cannot tolerate an airing and a resolution of those defects, he ought not invoke the jurisdiction of the federal court in the first place. But once he does invoke that jurisdiction, he has no basis for preventing the adjudication of the legal and factual underpinnings of his standing allegations.

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The certain and settled principles of law just reviewed – when applied to a correct characterization of Utah's Counterclaim's nature and purpose – defeat all the misguided arguments comprising PFS's improper Rule 12(b) motion to dismiss. We so demonstrate in the following sections.

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[3] Even if none of the parties raises the issue of the plaintiffs' standing, the district court must and will do so on its own motion. The court of appeals or the Supreme Court will do the same, even if the standing issue was never considered below. *E.g., In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1101 (10th Cir. 2001) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.' "); *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th cir. 1974) ("If the parties do not raise the question of lack of jurisdiction, it is the duty of the federal court to determine the matter sua sponte.")

IV.
PFS's CHALLENGES TO THE "RIPENESS" OF UTAH's CHALLENGES TO PFS's STANDING PROVIDE NO BASIS FOR IGNORING THOSE STANDING ISSUES RAISED BY UTAH – ALTHOUGH PFS's CHALLENGES DO EFFECTIVELY DEMONSTRATE THAT PFS's OWN CLAIMS ARE NOT RIPE AND HENCE NOT JUSTICIABLE.

Throughout its improper Rule 12(b) motion to dismiss, PFS argues, in effect, that Utah's challenges to the not-yet-issued NRC license and to the not-yet-granted DOI final, unconditional approval of the lease are premature, that is, not yet ripe and, hence, not yet justiciable. In making that argument, PFS does nothing valid to deflect this Court from considering Utah's challenges, while doing much to demonstrate that PFS's own substantive claims on the merits are premature, that is, not yet ripe and, hence, not yet justiciable.

PFS's argument does nothing valid to deflect this Court from considering Utah's claims. That is because Utah's claims are challenges to PFS's standing to bring its action. And, as already demonstrated, this Court always has jurisdiction to determine its own jurisdiction (meaning the plaintiff's standing); the plaintiff has the burden of establishing his own standing; and this Court must and will adjudicate the plaintiff's standing before moving on to the merits. Under those settled principles of law, it is simply nonsensical to say that there are "ripeness" problems with a defendant's challenges to the plaintiff's standing. If there are any ripeness problems in such a context, those problems must be – as they are here – inherent in the plaintiff's own claims.

The nonsensical nature of PFS's "ripeness" argument can be illuminated in this way. If this Court were to accept PFS's "ripeness" challenges to Utah's challenges to PFS's standing,

this Court would be saying that it cannot hold that PFS has standing but that it (the Court), faced with that difficulty, will presume that PFS has standing and, on that basis, proceed to adjudicate PFS's claims on the merits. But, of course, a federal court will not presume that the plaintiff has standing; just the contrary, the court will presume that the plaintiff does not have standing until the plaintiff establishes otherwise. So rather than presume standing in such circumstances, the Court will dismiss the Complaint.

This last illustration also demonstrates that what PFS is really doing when it challenges the "ripeness" of Utah's challenges to PFS's standing is establishing the ripeness problems with PFS's own claims. A quick review of ripeness doctrine clarifies this point.[4]

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 Wright & Miller, Federal Practice and Procedure, §§ 3531.12, 3532.1, 3533.1 (2nd ed. 1984).

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

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[4] A more detailed review of the doctrine appears in Utah's Rule 12(h)(3) Suggestion of Lack of Jurisdiction.

> 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).

In light of PFS's justiciability allegations (direct and implicit) in its Complaint, PFS faces two serious ripeness challenges to that Complaint: (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 challenge to PFS's Complaint, the uncertainty of a final, unassailable 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 and Counterclaim 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.[5] Yet PFS, which

[5] 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.

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 pointed out to this Court the **uncertainty** in that prospect.

> 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 (hereafter "Memorandum"). *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:

> 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. And the constitutional principle remains: If Utah's challenges to PFS's standing cannot be resolved now because of uncertain future events, that uncertainty inheres in PFS's own standing allegations and is so grievous that PFS cannot establish its standing. This Court must, therefore, dismiss PFS's Complaint.

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In the following sections, we apply the general principles of justiciability already established and do so in the context, each in turn, of Utah's specific challenges to PFS's standing.

V.
IN RESOLVING PFS's STANDING, THIS COURT WILL ANSWER THE LEGAL QUESTION WHETHER PFS's PROPOSED SKULL VALLEY FACILITY IS UNLAWFUL.

Utah's Counterclaim's first challenge to PFS's standing is that "the NRC ... has no authority or jurisdiction to license a private, for-profit, off-site dump of the kind contemplated by the foreign utilities' scheme." Answer and Counterclaim, ¶ 81. This is the same issue presented

by Utah in its Rule 12(c) Motion and in its Rule 12(h)(3) Suggestion. The issue was first raised, not in Utah's Counterclaim, but by PFS itself when it alleged in its Complaint that it is required to obtain, and is seeking, a license from the NRC to build and operate the proposed storage facility. Complaint, ¶¶ 16 and 17. PFS's allegations about the need for a license from the NRC are an essential element of PFS's Complaint. If the NRC lacks authority to issue such a license, then PFS cannot build and operate its proposed nuclear waste dump. If PFS cannot build and operate its proposed storage facility, then the Utah statutes that PFS attacks will have no application to PFS, and PFS will lack standing to pursue its attack. Thus, the issue of NRC's licensing authority presents an important threshold issue of standing that must be resolved before this case can proceed.

In its Memorandum, PFS argues that the Court "lacks jurisdiction to hear [Utah's first counterclaim relative to NRC's licensing authority] under the Hobbs Act." Utah has fully refuted this argument in Utah's Reply re Utah's Motion for Judgment on the Pleadings; Utah incorporates that Reply by reference here. Utah has every right to challenge PFS's standing based on the unlawful, prohibited nature of PFS's proposed Skull Valley facility.

VI.
UTAH'S CHALLENGE TO PFS's STANDING, BASED ON NEPA, IS AT LEAST AS JUSTICIABLE AS PFS'S COMPLAINT.

Utah's Counterclaim's second challenge to PFS's standing is that any NRC license for PFS's' proposed facility would necessarily violate NEPA. Answer and Counterclaim, ¶ 81. This is because NRC arbitrarily assumed, during the NEPA process, that no spent nuclear fuel will be stored at PFS's proposed facility beyond the 40-year life of its license; consequently, the NRC

precluded any analysis in the environmental impact statement of the potential long-term environmental impacts of the Skull Valley facility. The NRC took this course (with PFS concurrence) in spite of the fact that Congress has failed to approve a site for a permanent repository that could receive the waste from PFS's proposed facility at the end of 40 years, and in spite of the further fact that, if a permanent repository were built, the statutory limits on its capacity would assure that substantial nuclear waste will remain in Skull Valley indefinitely.

PFS argues that Utah's NEPA claims are "premature" – that is, not ripe – because "no final agency action will occur with respect to the EIS for the PFS Facility until a final agency order has been issued in the ongoing NRC licensing proceeding for the facility." Memorandum, at p. 8. Utah freely acknowledges the validity of this argument but then hastens to point out that the argument applies with equal force to PFS's claims against Utah's statutes. If Utah's NEPA claims are not ripe because the licensing processing is not complete, then PFS's claims against Utah's statutes are similarly not ripe. Unless and until PFS obtains a valid license from NRC, there will be no project for Utah's statutes to "stop or interfere with." And, as already noted, in its own Memorandum, PFS takes the position that claims dependent on the outcome of the licensing proceeding are not ripe for judicial review:

> Defendants' Counterclaim remains contingent on the outcome of the NEPA process and the licensing process. .... Judicial review undertaken now may well prove in the future to have been unnecessary based on faulty factual premises. Under these circumstances, judicial review is premature.

Memorandum, at p. 21.

In short, Utah's NEPA challenge to PFS's possible NRC license goes to an essential element of PFS's standing and is thus a challenge this Court has the jurisdiction to resolve. In any event, PFS's Complaint is certainly no more ripe for review than our Counterclaim's NEPA challenge to PFS's standing.

VII.
THE COURT HAS BOTH THE JURISDICTION AND THE OBLIGATION TO DETERMINE PFS'S STANDING BY DETERMINING THE VALIDITY OF THE LEASE.

Utah's Counterclaim's third challenge to PFS's standing is that "the Band has not validly, properly, and lawfully approved the lease." Amended Answer and Counterclaim,¶ 81. The issue of the validity of the lease was first raised, not in Utah's Counterclaim, but by PFS itself when it alleged that "the Skull Valley Band and PFS entered into a 25 year lease ... for the purpose of the development, construction, and operation of the" proposed storage facility. Complaint, ¶ 47. The issue of the validity of the lease, like the issue of NRC's licensing authority, presents a threshold issue of standing that must be resolved before PFS's claims about the constitutionality of Utah's statutes may be considered.[6]

In moving dismissal of Utah's third challenge, PFS again makes the untenable argument that the Court lacks jurisdiction to determine PFS's standing, only this time the reason is tribal

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[6] It is important to note here that Utah's concerns about the validity of the lease are not mere allegations, but are based on the fact that "at least 18 members of the Band's General Council have challenged the validity of the lease" and "have filed an administrative appeal with BIA and two federal lawsuits" raising this issue. Answer and Counterclaim, ¶ 23. Moreover, Utah has developed substantial evidence in the form of affidavits and tribal documents, evidence defeating PFS's jurisdictional allegation that the lease is valid.

sovereign immunity, rather than the Hobbs Act. PFS asserts that "suits against Indian tribes are barred by sovereign immunity absent either an unequivocal waiver by the tribe or congressional abrogation." Memorandum, at p. 28. This assertion is of a general principle with which Utah fully agrees. The problem for PFS is that the principle does not apply here to bar Utah's third challenge, and it certainly has no bearing on the Court's jurisdiction to determine PFS's standing.

With its Counterclaim, Utah seeks merely an affirmative declaration on an issue that PFS must prove anyway as part of its case-in-chief. Put another way, Utah is merely asking the Court to affirmatively state that PFS was wrong in alleging that the lease is valid (just as PFS is asking this Court to declare, expressly or implicitly, that the lease is valid). Utah is not asserting a new and different cause of action and for that reason is not bringing a new suit against the Band that would require a waiver of sovereign immunity.[7] As the Supreme Court noted in *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 891 & fn.* (1986), a counterclaim may properly be asserted against an Indian tribe to "defeat" the tribe's own claim, as for example a counterclaim asserting an offset. Here Utah is merely seeking to defeat PFS's own claims by challenging in the form of a Counterclaim the all-important jurisdictional allegations of PFS's Complaint. Moreover, even if Utah's third challenge in the Counterclaim

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[7] The case on which Plaintiffs rely, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), involved a new and different cause of action being asserted against an Indian tribe as a counterclaim. The Potawatomis had sued the state to have the application of a particular state tax to them declared invalid. The State responded by counterclaiming for the amount of back taxes that it claimed the Potawatomis owed. That was a new and different issue than the one on which the Potawatomis had sued. For that reason, the case is not relevant here.

were dismissed because of tribal sovereign immunity, the issue of the validity of the lease would not go away. It would remain part of the litigation as a threshold question of standing necessarily raised by the allegations of PFS's Complaint and would need to be adjudicated to determine PFS's standing.

A few further thoughts on tribal sovereign immunity are perhaps merited here. While the act of filing suit may not automatically waive the immunity of a tribe to counterclaims, the act of filing does signal a tribe's assent to the jurisdiction of the court for purposes of resolving the very claims on which the tribe is suing. It could not be otherwise. As the Supreme Court has approvingly noted, "even petitioner [Indian tribe] concedes that its tribal immunity does not extend to protection from the normal process of the .. court in which it has filed suit." *Id.* at 890. Accordingly, the Band is not immune from a determination of its standing to bring its claim against Utah's statutes, even if that determination necessarily requires review of the Band's internal decision-making.[8] The doctrine of tribal sovereign immunity does not trump the Court's authority and obligation under Article III to determine its own jurisdiction. Not even an Indian tribe can properly say to a federal court what PFS is here asserting – you may use your jurisdiction to grant us relief, but you may not use your jurisdiction to determine if we have standing to seek that relief if that determination would require a review of internal tribal

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[8] PFS notes that "the federal judiciary has repeatedly rebuffed attempts to seek federal court review of internal tribal decision-making." Memorandum, at p. 31. The cases it cites in support of this proposition are not relevant here. Unlike the litigants in PFS's cases, Utah is not coming into federal court as a plaintiff seeking judicial review of "internal tribal decision-making" to vindicate its own claims. It is defending itself in a lawsuit brought by an Indian tribe by challenging the tribe's standing, which Utah is fully entitled to do.

decision-making. Put another way, the doctrine of tribal sovereign immunity does not require Utah or the Court to accept as true any and all allegations of PFS's Complaint that involve internal tribal decision-making. In defending itself, Utah is entitled to challenge those allegations and to put PFS to its proof. If PFS is not prepared to shoulder the burden of proving its own case, if it wants at all costs to shield the Band's decision-making from the Court's view, then its course of action is clear – it should dismiss its Complaint.[9]

VIII.
THIS COURT HAS THE JURISDICTION AND THE OBLIGATION TO DETERMINE PFS'S STANDING BY DECIDING WHETHER THE BUREAU OF INDIAN AFFAIR'S APPROVAL OF THE LEASE WAS OR WILL BE UNLAWFUL.

Utah's Counterclaim's fourth and fifth challenges to PFS's standing are that the "BIA's conditional approval of the lease occurred in violation of governing law," and that "any BIA approval of the lease (conditional or otherwise) will be invalid as a breach of the Government's trust obligation to the Band." Answer and Counterclaim, ¶ 81. The issue of the validity of BIA's approval of the lease was first raised, not in Utah's Counterclaim, but by PFS itself when it alleged in its Complaint that the lease "has been [conditionally] approved by the authorized representative of the Secretary of the Interior . . . as required by federal law." Complaint, ¶ 16.

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[9] PFS makes the further argument that "Defendants lack standing to assert a claim based on an alleged violation of internal tribal procedures." Memorandum, at p. 33. Utah is not asserting a claim for relief based on a "violation of internal tribal procedures." Utah is defending itself in a lawsuit brought by an Indian tribe by challenging the tribe's standing, which Utah is fully entitled to do. It is absurd to assert that Utah lacks "standing" to defend itself by challenging the factual allegations of PFS's Complaint. By suing Utah based on the allegation of a valid lease, PFS has conferred on Utah all the "standing" it needs to litigate the validity of the lease.

PFS's allegation about BIA's approval of the lease is an essential element of PFS's Complaint. If the lease was not validly approved by BIA, then PFS cannot build and operate its proposed storage facility on the Band's lands. If PFS cannot build and operate its proposed storage facility on the Band's lands, then the Utah statutes that PFS attacks will have no application to PFS, and PFS will lack standing to pursue its attack. Thus, the issues relating to BIA's approval of the lease present an important threshold issue of standing that must be resolved before this case can proceed.

PFS spends thirteen pages of its Memorandum arguing, in effect, that the lease approval issues are not ripe because whether Utah will be harmed by the allegedly unlawful lease approval "remains contingent on the outcome of the NEPA process and the licensing process," and therefore "judicial review undertaken now may well prove in the future to have been unnecessary or based on faulty factual premises."[10] Memorandum, at p. 21. Of course, the same can be said of PFS's claims against Utah's statutes. Those claims, too, "remain contingent on the outcome of the NEPA process and the licensing process." Accordingly, by PFS's own analysis, "judicial review [of PFS's claims] is premature" and its claims must be dismissed. On the other hand, if the Court somehow finds that PFS's claims are ripe, notwithstanding the uncertain outcome of

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[10] PFS bases its ripeness argument, in part, on the alleged res judicata effect of the decision in *Utah v. United States Dep't of the Interior*, 210 F.3d 1193 (10th Cir. 2000), claiming that since that decision "nothing has occurred that would ... make the lease approval issues ripe." Memorandum, at p. 12. PFS is, of course, wrong. Something quite significant has happened since that decision that affects the ripeness of the lease approval issues – PFS has filed a lawsuit attacking the constitutionality of Utah's statutes and has moved for summary judgment, and has thus both asserted that PFS has standing and asserted that the lease approval issues raised by its Complaint are ripe .

the licensing process, then there is no escaping the issue of PFS's standing implicated by the lease-approval process.[11] The Court may not consider the merits of PFS's claims without first deciding whether PFS has standing, in light of the status of the lease-approval process, to bring those claims.

IX.
CONCLUSION

For all the foregoing reasons, Utah respectfully submits that PFS's efforts to avoid adjudication of the five challenges to PFS's standing must fail. Those five challenges are constitutional challenges to PFS's standing and hence to this Court's subject-matter jurisdiction over PFS's Complaint. Those challenges are so important, so fundamental, to this action, including this Court's jurisdiction, that Utah raised the challenges in its Answer and Counterclaim and is renewing the challenges most suited to a quick, clean judicial resolution in Utah's pending Rule 12(c) motion for judgment on the pleadings and Utah's pending Rule 12(h)(3) suggestion of lack of jurisdiction. PFS has no basis for asserting, as it does in its

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[11] 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.")

improper Rule 12(b) motion to dismiss, that this Court must ignore, avoid, dismiss Utah's five challenges.

This Court should deny PFS's improper Rule 12(b) motion to dismiss.

Dated: 22 January 2002

Counsel for the defendants

By: _____
MONTE N. STEWART

By: _____
LAWRENCE J. JENSEN

CERTIFICATE OF MAILING

I certify that a true and correct copy of this document was served by mailing the same, first-class, postage prepaid, on 22 January 2002, to:

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