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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

INTERVENOR SKULL VALLEY BAND'S MOTION
PURSUANT TO 10 CFR § 2.788 FOR STAY
OF MEMORANDUM AND ORDER (LBP-02-08)
OF THE ATOMIC SAFETY AND LICENSING BOARD

Intervenor Skull Valley Band of Goshute Indians (Skull Valley Band) hereby moves the Commission pursuant to 10 CFR § 2.788 for a stay of the February 22, 2002, Memorandum and Order of the Atomic Safety and Licensing Board (LBP-02-08), regarding Contention OGD O, insofar as (1) it sets for trial during the Board hearing in Salt Lake City in April the issue of how the Skull Valley Band has allocated and expended lease revenues received from Applicant Private Fuel Storage, L.L.C. (PFS); and (2) it orders the Skull Valley Band to account to the Board and other affected parties by March 22, 2002, for the expenditure, distribution, or use of such revenues, and to pre-file testimony by that date. The need for the stay arises from the pendency of the Skull Valley Band's Motion for Directed Certification for review of the Board's Memorandum and Order pursuant to 10 CFR §2.786(g), which has also been filed today. See Georgia

Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193-94 (1994).

There are only 18 days left before the Band (and other parties) would be required to meet the Board's first deadline of March 22. A stay is necessary to prevent irreparable harm to the sovereignty of the Skull Valley Band. A stay is also necessary to insure that the parties are not required to meet short Board deadlines leading up to a hearing next month, if the Commission finds the Skull Valley Band's motion seeking review of the Board's Memorandum and Order has merit.

SUMMARY OF THE BOARD'S ACTION

The Memorandum and Order was issued in response to the Applicant's May 25, 2001, Motion for Summary Disposition of Contention OGD O, the only remaining contention filed by Intervenor Ohngo Gaudadeh Devia (OGD), a group made up of both members and non-members of the Skull Valley Band who are opposed to the lease of tribal land and issuance of the necessary license by the NRC. The central principle of that contention, as understood by the Board, is that issuance of the license would perpetrate environmental injustice on the Goshute Indian people, notwithstanding that the Skull Valley Band has entered into a lease of tribal land for this purpose.¹

The Board granted the PFS Motion for Summary Disposition in part, and denied it in part. It has set for trial the issue of whether OGD is a low-income population within the meaning of Executive Order 12898, 3 CFR 859 (1995), the Executive Order on

¹ As discussed in more detail in the Motion for Directed Certification, a number of the members of the Band, including at least a few members of OGD, have pursued litigation against the Department of the Interior challenging the conditional approval of the lease in 1997. An administrative appeal within the Department has also been pursued, and the Western Regional Director of the Bureau of Indian Affairs (BIA) denied that appeal on August 20, 2001. A copy of that decision is attached to the Motion for Directed Certification. Four members of the Band are pursuing a further administrative appeal to the Interior Board of Indian Appeals.

Environmental Justice, and if so, whether the issuance of the project license will have a disparate impact on that population. The Board held that it was necessary to make findings of fact in order to determine whether it had jurisdiction to consider the OGD claim of environmental injustice. LBP-02-08 at page 17. It held that a Declaration filed by one Sammy Blackbear, in conjunction with the June 28, 2001, OGD response to the PFS motion, had put in issue whether the leadership of the Band has allocated the proceeds of the lease only to favorites of the tribal chairman, and had left the opponents of the lease in "impoverished". Id. at pp. 14-15, 23. What the Board envisions for this trial is the submission and consideration of evidence on how the Skull Valley Band has allocated, expended, distributed, and used the lease revenues (id. at page 36), and it has ordered the Band to submit an accounting by March 22, 2002, to the Board and the affected parties, "showing, at a minimum, (1) the amount of the payments received from the Applicant by the Band (or by any member thereof); (2) the manner in which those funds were distributed to individuals in the Band, expended on goods or services, or deposited to the Band's accounts; and (3) to the extent the funds went into those accounts, the manner in which those funds were later distributed or put to other uses." Id. at page 37.

The Skull Valley Band contends in its Motion for Directed Certification that the Board's Memorandum and Order is completely contrary to a large body of federal law barring federal agency intrusion into internal tribal governmental affairs, and that the Board (and the Nuclear Regulatory Commission, for that matter) has no authority to engage in this inquiry, or to order the Band to account for its allocation, expenditure, distribution, or use of its own tribal revenues.

The Skull Valley Band moves for stay pursuant to 10 CFR § 2.788. The criteria for a stay are set forth in Section 2.788(e), and are discussed serially below. If the accounting, ordered to be made available to the Board and other affected parties by March 22, is stayed, the hearing date of April 22 (or earlier) on this particular contention must also be stayed. Otherwise, and until the Commission acts on the request to review the Board's Memorandum and Order, the Skull Valley Band and the other parties will not have a clear picture of what issues the hearing on Contention OGD O, if any, will address.

GROUND FOR A STAY

I. The Skull Valley Band Has Made a Strong Showing that It Will Prevail on its Motion for Directed Certification and Will Succeed in Persuading the Commission to Overrule the Board's Memorandum and Order.

The Band has demonstrated in its Motion for Directed Certification that the Board's Order lacks any support in federal law governing federal review of tribal decision-making. The Band's Motion also provides persuasive authority for the proposition that the Board's inquiry is beyond the reach of the Nuclear Regulatory Commission. Even the Department of the Interior and the Bureau of Indian Affairs, agencies with much broader authority in Indian affairs than the NRC, are unwilling to engage in the kind of inquiry into internal tribal affairs that the Board has directed. In a decision addressing nearly identical allegations by OGD and Mr. Blackbear, the BIA Western Regional Director refused to overturn the Superintendent's 1997 approval of the PFS lease. Letter from BIA Western Regional Director Wayne C. Nordwall to Duncan

Steadman (attached as Exhibit 2 to the Skull Valley Band's Motion for Directed Certification.) His consideration of those broad and unfounded allegations-- and his deference to tribal decision-making-- is markedly different from the Board's.

II. The Band and its Members Will Suffer Irreparable Harm if the Board's Decision Is Not Stayed.

The question of irreparable injury is the most important factor to be considered in the granting of a stay. E.g., Alabama Power Co. (Joseph M. Farley Power Plant, Units 1 and 2), CLI-81-27, 14 NRC 795 (1981). The Board's Order that the Skull Valley Band account for the revenues it has received from the PFS lease constitutes an unlawful intrusion into the sovereign affairs of the Band that will cause irreparable injury to the Band's governance.

As discussed in detail in the Band's Motion for Directed Certification, the Board's decision to review matters which involve internal tribal decision-making is destructive of tribal autonomy and self-government. This is not a mere philosophical concept. The Supreme Court said in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), that "Resolution in a federal forum of intratribal disputes . . . cannot help but unsettle a tribal government's ability to maintain authority." Id. at 60. One successful foray into a federal agency by opponents of tribal leadership will encourage other tribal members to take their grievances to other federal agencies, rather than seek to resolve them within the tribe. The Board's Order that the Band provide an accounting of its revenues for Board review is particularly intrusive. The early deadline for meeting this Order makes this issue a very urgent one for the Band.

Further, as shown by the Declaration of Chairman Leon Bear and the documents attached thereto (Exhibit 1 to the Motion for Directed Certification), the Board's order to account for PFS lease revenues necessarily implicates the Band's receipt, deposit, and distribution of tribal revenues other than PFS lease revenues. Those revenues are even more clearly outside the purview of any federal agency oversight than the subject lease revenues. Thus, the accounting ordered by the Board will expose the Band to competitive harm, and the revelation of these other revenues will be even more destructive of internal tribal governance. Moreover, as also indicated in the Motion for Directed Certification, Band transactions with its own members will be exposed to outside scrutiny, and will have to be defended, if the Board's Order is not overruled.

Most importantly to the Band, any hearing on these internal tribal issues will do irreparable harm to the sovereignty of the Band. Skull Valley Band is a small Tribe whose recent history bespeaks of few opportunities to exercise its sovereign powers over its reservations lands. Intrusion into the internal affairs of a sovereign entity is likely to be damaging to tribal institutions. The spectacle of tribal officers being forced to open their books to outside scrutiny will jeopardize the authority of future tribal officials. In an era when federal courts and agencies have been directed to defer to tribal decision-making, the Board's paternalistic Order will be particularly denigrating to the Skull Valley Band.

The Board suggested in a footnote (LBP-02-08 at page 37, note 56) that a hearing might be closed if proprietary information is revealed. Certainly, the Band would insist on a closed hearing, as a minimum protection. But this will not be sufficient to prevent damage to the Band, as there is a risk that tribal members attending the hearing,

unconstrained by tribal traditions in a non-tribal forum, may reveal proprietary information to others. Furthermore, a closed hearing could not mitigate the harm caused by the Board's inquiry into sovereign tribal matters. In short, the Band cannot participate in a federal agency adversarial hearing on internal tribal governmental matters. Whether or not it does so, it will be prejudiced by the conduct of such a hearing.

Finally, the accounting for tribal revenues ordered by the Board is exceedingly burdensome, and is due very shortly. Given the unprecedented and surprising nature of the Board's Memorandum and Order, the Band was wholly unprepared to assemble the information necessary to comply with the Board's accounting order.

III. A Stay Would Not Harm Other Parties.

First, since OGD opposes the granting of a license to PFS, a stay would not be harmful to it. Second, a stay of any trial on the merits of Contention OGD O would not interfere with the hearing of all the other remaining contentions, and the schedule that the Board has set for April, and likely May, in Salt Lake City can remain in place. Parties' schedules for the appearance of expert witnesses on those contentions will be unaffected. There is no evident overlap in the witnesses required for OGD O and the witnesses needed to dispose of other contentions. Moreover, the Board acknowledged in its Memorandum and Order that any hearing on this contention "will be a short one." LBP-02-08 at page 38, note 58. Of course, if the Commission agrees with the Skull Valley Band that the Board's inquiry is beyond its authority and in violation of federal law governing tribal sovereignty, then no hearing may be held on Contention OGD O. In any event, there is no reason to believe that a stay of the proceedings in OGD O will delay a final decision on the license application.

IV. A Stay Would Be in the Public Interest.

Federal policy has long favored the independence, self-determination, and sovereignty of Indian tribes. See 25 U.S.C. § 450, et seq., the Indian Self-Determination Act of 1975, as amended. See also Executive Order 13175 (November 6, 2000), quoted on pages 11-12 of the Band's Motion for Directed Certification. This policy would not be served by the forced accounting of tribal revenues and the trial required by the Board's Memorandum and Order. It is important that the Commission give consideration to the Skull Valley Band's strong arguments that this inquiry lies beyond the authority of the Board. Indeed, the NRC's reach outside its jurisdiction to intrude into matters reserved to the tribal government will harm the respectful relationship between the Federal Government and Indian Tribes which the Congress and the Executive have sought to build. To require a precipitous accounting, and a premature trial, on a new and contentious issue such as the distribution of tribal lease revenues will likely increase the possibility of litigation challenging the Commission's authority. It is in the public interest that the Commission first take a hard look at what the Board has concocted before requiring the parties to expend their resources on a pointless adversarial proceeding.

Respectfully submitted,



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NUCLEAR REGULATORY COMMISSION**

Before The Commission

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Intervenor Skull Valley Band's Motion for Directed Certification (except for two one-page exhibits, which are the subject of a new Motion for a Protective Order), the Band's Motion for Stay, and the Band's new Motion for Protective Order were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 4th day of March, 2002.¹

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¹ The postmark on the envelopes shows the date March 5, 2002, but the postage was in fact placed on the envelopes on March 4, 2002.

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