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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before The Commission

In the Matter of)

PRIVATE FUEL STORAGE, L.L.C.)

(Private Fuel Storage Facility))

Docket No. 72-22

ASLBP No. 97-732-02-ISFSI

**APPLICANT'S BRIEF SEEKING REVERSAL OF LBP-02-08 AND
REQUESTING SUMMARY DISPOSITION OF CONTENTION OGD O**

Jay E. Silberg
Ernest L. Blake, Jr.
Paul A. Gaukler
Michael G. Lepre
Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037
202-663-8000

Counsel for Private Fuel Storage, L.L.C.

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**APPLICANT’S BRIEF SEEKING REVERSAL OF LBP-02-08 AND
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Pursuant to the Nuclear Regulatory Commission’s (“NRC” or “Commission”) March 7, 2002 Memorandum and Order,¹ Applicant Private Fuel Storage, L.L.C. (“Applicant” or “PFS”) hereby submits this brief requesting that the Commission: (1) reverse the Atomic Safety and Licensing Board’s (“Board”) February 22, 2002 Memorandum and Order (“OGD O Order”)² to the extent that the Order set contention OGD O for hearing; and (2) grant Applicant’s May 25, 2001 Motion for Summary Disposition of OGD O.

As set forth fully below, the Commission should reverse the OGD O Order and grant summary disposition on all of contention OGD O because that portion of the Board’s decision denying Applicant’s summary disposition motion: (1) exceeds the scope of the NRC’s authority under Executive Order 12898 and the National Environmental Policy Act (“NEPA”); (2)

¹ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-08, 55 NRC ___, slip op., Memorandum and Order (March 7, 2002).

² Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-08, 55 NRC ___, slip op., Memorandum and Order (Ruling on Applicant’s Motion for Summary Disposition of “Contention OGD O” Environmental Justice) (February 22, 2002).

improperly focuses its environmental justice analysis on a “subgroup” of a population; (3) misinterprets environmental justice requirements by analyzing the alleged disparate benefits of the project rather than the project’s environmental impacts; (4) adopts as the basis for the hearing environmental effects that were raised not in OGD O, but in another, already rejected, contention; (5) ignores the fact that the environmental effects underlying its decision to conduct an environmental justice hearing already have been addressed and identified in the Final Environmental Impact Statement (“FEIS”); (6) requires, in direct contravention of controlling precedent, that the proposed project satisfy substantive requirements ostensibly mandated by NEPA; and (7) intrudes upon a sovereign Indian tribe contrary to federal law.

I. BACKGROUND

In June 1997, PFS filed an application with the NRC for a license to possess and store spent nuclear fuel at an independent spent fuel storage installation (“ISFSI”) to be located on the Skull Valley Goshute Indian Reservation in Skull Valley, Utah. The ISFSI, known as the Private Fuel Storage Facility (“PFSF”), would be located on tribal land leased by PFS from the Skull Valley Band (“Band”) – a federally-recognized Indian tribe – under a lease agreement which was entered into between PFS and the Band on May 20, 1997. The Band intervened in the licensing proceeding in support of PFS’s application. Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 159 (1998).

Among the other groups seeking to intervene in the licensing proceeding was Ohngo Gaudadeh Devia (“OGD”). OGD is an organization which described itself as being formed specifically to oppose the PFSF, and most of whose members were members of the Band.³ On

³ Ohngo Gaudadeh Devia’s Request For Hearing And Petition To Intervene (September 12, 1997) at 3 (“OGD’s Hearing Request”).

November 24, 1997, OGD submitted a number of contentions challenging PFS's application.⁴

The contention at issue here, labeled "OGD O," stated as follows:

The license application poses undue risk to public health and safety because it fails to address environmental justice issues. In Executive Order 12898, 3 C.F.R. 859 (1995) issued February 11, 1994, President Clinton directed that each Federal agency "shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States." It is not just and fair that this community be made to suffer more environmental degradation at the hands of the NRC. Presently, the area is surrounded by a ring of environmentally harmful companies and facilities. Within a radius of thirty-five (35) miles the members of OGD and the Goshute reservation are inundated with hazardous waste from: Dugway Proving Ground, Utah Test and Training Range South, Deseret Chemical Depot, Tooele Army Depot, Envirocare Mixed Waste storage facility, APTUS Hazardous Waste Incinerator, Grassy Mountain Hazardous Waste Landfill and Utah Test and Training Range North.⁵

OGD O contained six bases purporting to support OGD's claim that PFS's license application failed to address issues regarding "environmental justice." As set forth in the contention itself, OGD O relied upon Executive Order 12898, which states in pertinent part: "[t]o the greatest extent practicable and permitted by law, . . . each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States"⁶

⁴ Ohngo Gaudadeh Devia's Contentions Regarding The Materials License Application Of Private Fuel Storage In An Independent Spent Fuel Storage Installation (November 24, 1997) ("Contentions").

⁵ *Id.* at 27-28.

⁶ Executive Order 12898 of February 11, 1994 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), 59 Fed. Reg. 7,629 (1994) at Section 1-101.

On April 22, 1998, the Board admitted OGD O, but limited it to “the disparate impact matters outlined in bases one, five, and six.” Private Fuel Storage, LBP-98-7, 47 NRC at 233.⁷ Although the text of the contention itself was limited to “undue risk to public health and safety,” OGD O Basis 1 focused entirely on environmental issues, claiming that the proposed plant would have “negative economic and sociological impacts on the Native Community of Goshute Indians who live very close to the proposed site” and that the Applicant’s Environmental Report (“ER”) “does not reflect consideration of the fact that the plant is to be placed in the dead center of an Indian Reservation.”⁸ OGD O Basis 1 added that PFS’s license application does not demonstrate any attempts to avoid or mitigate the disparate impact of the proposed plant on a minority community.⁹ It also argued that “it has been a longstanding policy of the federal government to actively recruit and site waste facilities on tribal lands throughout the United States.”¹⁰ OGD O Basis 5 claimed that “if any type of Environmental assessment is done,” it must consider “the cumulative impacts and disproportionate impacts that the OGD community has been made to suffer” from certain hazardous facilities near the Goshute Reservation.¹¹ OGD O Basis 5 added: “the ER does not reflect consideration of the fact that the ISFSI site is to be placed in the dead center of a rural Native American community.”¹² OGD O Basis 6 claimed that the ER failed to

⁷ The Board excluded OGD O bases two, three and four “because the facility cost-benefit issues they seek to raise are not relevant to this contention.” Id. at 233.

⁸ Contentions at 28.

⁹ Id. at 29.

¹⁰ Id.

¹¹ Id. at 32-34. In response to a motion for reconsideration, the Board subsequently excluded some of these facilities from the scope of Basis 5. Private Fuel Storage, (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 298-9 (1998).

¹² Contentions at 32-34.

address the effect that the PFSF would have on property values of tribal members, members of OGD, or people living in and around the area of the proposed PFSF.¹³

Following discovery and issuance of the Draft Environmental Impact Statement (“DEIS”),¹⁴ PFS on May 25, 2001 moved for summary disposition of the three admitted bases of OGD O.¹⁵ As to Basis 1, PFS relied upon the extensive discussion of sociological and economic impacts set forth in the DEIS.¹⁶ PFS also pointed out that OGD had failed to identify any specific disproportionate economic or sociological impacts that were not inadequately discussed in the DEIS, but rather focused on alleged racial motivation for the siting of the PFSF, which is outside the scope of the Commission’s purview under NEPA.¹⁷ PFS also pointed out that OGD did not allege any specific environmental impacts not discussed in the DEIS,¹⁸ and that “[t]o the extent OGD has asserted in discovery impacts not covered in the DEIS, . . . those impacts arise from fear and other intangible, psychological effects, which the DEIS need not discuss, as those impacts lie outside the scope of OGD O and NEPA.”¹⁹ The NRC Staff supported PFS’s Motion.²⁰

¹³ Id. at 34-36.

¹⁴ Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facilities in Tooele County, Utah, NUREG 1714 (June 2000).

¹⁵ Applicant’s Motion For Summary Disposition Of OGD Contention O – Environmental Justice (May 25, 2001) (“PFS Motion”).

¹⁶ Id. at 6-7; See also Statement of Material Facts accompanying PFS Motion at 2-3.

¹⁷ PFS Motion at 5.

¹⁸ Id. at 5-6.

¹⁹ Id. With respect to Basis 5, PFS – supported by declarations from two expert witnesses – showed that the surrounding facilities would cause no significant impacts that could be cumulative with any impacts of the PFSF. Id. at 12-17. Regarding Basis 6, PFS showed that the DEIS addressed property value impacts and that, as demonstrated in a supporting expert declaration, property value impacts would be positive. Id. at 18-20.

²⁰ NRC Staff’s Response To Applicant’s Motion For Summary Disposition Of OGD Contention O – Environmental Justice (June 28, 2001).

On June 28, 2001, OGD submitted its response opposing PFS's summary disposition motion.²¹ OGD generally claimed that the Board had broad discretion to address OGD's claims of racial discrimination.²² With respect to "Economic and Sociological Impacts" (i.e., OGD O Basis 1), OGD stated that "PFS is Not Dealing with the Legitimate Tribal Government," and that PFS has "dealt exclusively with Mr. Leon Bear," who "is not and has never been the Tribal leader he claims to be."²³ OGD claims that "Leon Bear does not provide reliable information," and that PFS "[p]roject funds are not reaching the Tribe."²⁴ OGD added that the DEIS "inadequately deals with other economic impacts such as: No other industries or use of the land is being pursued because of the PFS facility, including a lucrative rocket test facility; Traditional use of the land will be significantly adversely impacted, especially agriculture and livestock."²⁵ OGD also claimed that the DEIS does not address "sociological impacts peculiar to constructing and operating nuclear waste facilities on Indian reservations," including "damages due to blatant and facially evident discriminatory effects caused by disparate treatment along racial lines, damages to offenses against Native American morality, and damages due to disruption of Native American social and cultural traditions."²⁶

OGD's response largely relied upon a declaration from Mr. Sammy Blackbear ("Blackbear Declaration"), a member of the Band opposed to the PFSF.²⁷ Nearly all of the Blackbear

²¹ Ohngo Gaudadeh Devia's (OGD) Response To Private Fuel Storage's (PFS) Motion For Summary Disposition Of OGD Contention "O" (June 28, 2001).

²² Id. at 1-8.

²³ Id. at 8-9.

²⁴ Id. at 9-11.

²⁵ Id. at 11.

²⁶ Id.

²⁷ Id., Blackbear Declaration at ¶ 261. There is no indication in OGD's pleadings that Mr. Blackbear is a member of OGD.

Declaration is an attack on matters relating to governance of the Band and management of its financial matters. Only two of the 400 paragraphs contained in the Blackbear Declaration even approach raising environmental issues,²⁸ and those two paragraphs do not specifically cite the environmental impacts that underlie the Board's decision to conduct an environmental justice hearing in this case.

In December 2001, the NRC -- in cooperation with the U.S. Bureau of Indian Affairs, the U.S. Bureau of Land Management, and the U.S. Surface Transportation Board -- issued a Final Environmental Impact Statement ("FEIS") for the construction of the PFSF.²⁹ As with the DEIS, the FEIS contained an extensive discussion of economic and sociological impacts.

In the February 22, 2002 OGD O Order, a newly-reconstituted Board denied summary disposition of OGD O Basis 1 and set that part of OGD O for hearing. *Id.* at 34-36.³⁰ In doing so, the reconstituted Board's focus "primarily rests on only two of [OGD's] claims . . . , that (1) the project's environmental impacts are unacceptable and that (2) the [Band's] leadership has deprived [OGD] of any share of the significant benefits that should accrue to them from the project, namely, the income from the lease." *Id.* at 7.

According to the Board, the evidence at trial must focus upon the payments made by PFS and the Band's internal use of those funds. For example, the OGD O Order states that evidence

²⁸ *Id.*, Blackbear Declaration at ¶¶ 398-399.

²⁹ Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, NUREG-1714 (December 2001).

³⁰ The OGD O Order granted PFS's motion for summary disposition of OGD Bases 5 and 6. With respect to Basis 5, the Board found that an entire section of the DEIS was devoted to the "cumulative impacts" issue. OGD O Order at 31. The Board also found persuasive the uncontroverted declarations of Applicant's expert witnesses, which the Board concluded demonstrated that potential cumulative impacts were "not feasible" or "insignificant." *Id.* at 31-33. Regarding Basis 6, the Board found: "the DEIS specifically recognizes the Tribe's use of the land for cultural and spiritual activities and discusses the impacts that the facility will have upon this use of the land." *Id.* at 33. The Board added that the Band voluntarily entered into the lease agreement and "any decrease in land value should be offset by the lease and tax payments and the improvements generated by both." *Id.* at 34.

required at trial, “at a minimum” would include “a PFS (1) tabulation of all the payments it made at any point thus far to the Skull Valley Band or to any of its members, showing at a minimum the amount, form, timing and recipient of each payment; and (2) schedule of future payments to be made if the facility is approved.” Id. at 36-37. The OGD O Order also required that, by March 22, the Band shall make available:

a Band accounting 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 37.³¹

On March 4, 2002, the Band filed a motion for directed certification for Commission review of the OGD O Order and asked the Commission to stay the Board’s proceedings on environmental justice pending that review.³² Also on March 4, the NRC Staff requested that the Commission stay the effect of the OGD O Order, pending the Commission’s consideration of any requests for interlocutory review or motions for directed certification that may be filed by the Staff and/or other parties.³³ On March 7, 2002, the Commission – finding that there was an

³¹ The OGD O Order also contains a separate section entitled “The Wisdom of Settlement,” in which the Board strongly urges the Band and OGD to settle the intra-tribal dispute. OGD O Order at 40-43 (“we think there has rarely been an issue so amenable to settlement as that presented here”). PFS recognizes the benefits of settling disputes, but is concerned that the reconstituted Board’s desire to see this issue settled may have influenced its application of environmental justice and NEPA principles and precedent.

³² Intervenor Skull Valley Band’s Motion For Directed Certification For Review Of Memorandum And Order (LBP-02-08) Of The Atomic Safety And Licensing Board (March 4, 2002).

³³ NRC Staff’s Request For A Stay Pending The Commission’s Consideration Of Any Requests For Interlocutory Review Of The Licensing Board’s Decision In LBP-02-08 Concerning Contention OGD O (Environmental Justice) (March 4, 2002).

“exceptional situation that warrants immediate Commission attention” – stayed the OGD O Order and set for briefing the Board’s environmental justice ruling.³⁴

For the reasons set forth below, PFS requests that the Commission: (1) reverse the reconstituted Board’s ruling setting OGD O for hearing; and (2) grant PFS’s motion for summary disposition of OGD O.

II. ARGUMENT

A. The Board’s Decision To Hold A Hearing Regarding OGD O Basis 1 Exceeds The Scope Of Executive Order 12898 And NEPA.

1. Allegations Of The Band’s Alleged Mismanagement Of Funds Are Outside The Scope Of Executive Order 12898 And NEPA.

The Board found that an environmental justice hearing was necessary, *inter alia*, to determine whether, as alleged in OGD’s response to PFS’s motion for summary disposition and in the accompanying Blackbear Declaration, Applicant’s lease payments were appropriated by the Band’s leader exclusively for his, and his allies, personal use, while such funds were withheld from other tribal members such as those who are members of OGD. OGD O Order at 10; see also id. at 34-36. While PFS believes such allegations to be baseless, such an inquiry is wholly outside the scope of the Commission’s authority under Executive Order 12898 and NEPA.

Executive Order 12898 “established no new rights or remedies.” Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 102 (1998) (“LES”). Rather, the purpose of the Executive Order was to “help ensure that all communities and persons across this Nation live in a safe and healthful environment.” Id. Moreover, Executive Order 12898 “merely . . . underscore[s] certain provision[s] of existing law” Id. (emphasis added). In the case of NRC, that “existing law” is NEPA. As the Commission pointed out in LES,

³⁴ CLI-02-08, slip op. at 2-3.

NEPA's "core interest" is "the physical environment -- the world around us, so to speak." Id., quoting Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983).

Nothing in NEPA authorizes the NRC to conduct a hearing into the internal financial management of an Indian tribe.³⁵

Applying these principles in LES, the Commission refused to permit an environmental justice inquiry into an applicant's alleged racially discriminatory motives in selecting a facility's site. According to the Commission, such a "free-ranging" inquiry would be far beyond the scope of the environmental inquiry contemplated by Executive Order 12838 and NEPA. LES, CLI-98-3, 47 NRC 101-103. Although the Board here was not proposing to investigate racial discrimination, an inquiry into allegations of misappropriation of tribal funds is just as far removed from the purposes of Executive Order 12898 and NEPA as is racial discrimination. A hearing into OGD's and Mr. Blackbear's allegations would focus "on an issue well outside NEPA's principal concern, the 'physical environment.'" Id. at 103. Indeed, Mr. Blackbear himself characterizes his claims as "civil violations of my Constitutional rights and the Indian Civil Rights Act, as well as serious criminal violations of the Skull Valley Band of Goshute Indians, Tribal Code, Title 1, Tribal Offenses"³⁶ As the Commission held in LES, "NEPA is not a civil rights law." Id. at 106.

If the hearing proposed by the Board were to go forward, the Board would be required to engage in a detailed, time and resource-consuming, fact-finding investigation regarding the Band's accounting and banking practices. For the same reasons that the Commission in LES refused to authorize a racial bias hearing, holding a hearing in this proceeding regarding OGD's and Mr.

³⁵ Moreover, because funds from the lease payments are distributed by the Band rather than PFS, the asserted impacts are not caused by the proposed federal action, but by a third party. See Metropolitan Edison Co., 460 U.S. at 774 & n. 7.

³⁶ Contentions, Blackbear Declaration at ¶ 29; see also id. at ¶ 30(d) ("... Leon Bear and his co-conspirators have violated our Civil rights by taking away our money, our right to self-government, peaceful assembly, free speech, due process, and equal treatment.")

Blackbear's claims would be "far afield from the NRC's experience and expertise," "would come with no guaranty of an accurate or useful result," and "would consume enormous NRC Staff resources." Id. at 103. In fact, by attempting to divine the motivations of intervenors to the proceeding (i.e., the Band and OGD), the Board seeks to go even farther afield from the NRC's expertise than did the Licensing Board in LES. Accordingly, the Commission should find such an investigation outside of the Commission's jurisdiction under Executive Order 12898 and NEPA.

2. There Is No Legal Basis For Applying An Environmental Justice Analysis To A "Subgroup" Of A Population.

As the OGD O Order acknowledges, under Executive Order 12898, the environmental justice doctrine "is supposed to focus an agency on protecting minority or low-income populations." OGD O Order at 22 (emphasis added). Given that the PFSF will be located on the Band's reservation, the members of the Band obviously would be the relevant "population" of concern. The Board recognizes this, stating that the Band, as the host of the project, was "the large community" to be evaluated under environmental justice "when the project was first being considered" Id. at 23. The Board recognized that the Band "has welcomed the project" and "is not now complaining of any environmental injustice." Id.

Although the Board acknowledged that the Band supports the PFSF, it nevertheless chose to "reframe[]" the environmental justice inquiry. Id. The Board proposed to focus its environmental justice review not on the Band as a whole, but rather on a "subgroup of the larger community." Id. The Board defines this subgroup as individuals who allegedly are not receiving an equal share of the project's funds. Id. at 23-24. With circular logic, the Board justifies recognizing a subgroup as the population of concern under Executive Order 12898 by claiming that "the nature of the problem defines the scope of the population." Id. at 25 (emphasis in original). The Board's *ad hoc* creation of a population subgroup for environmental justice

purposes, and its announcement of a substantive test justifying that decision, are unprecedented and impermissible departures from the clear language and intent of Executive Order 12898.

Executive Order 12898 requires the relevant Federal agency to identify and address disproportionately high and adverse environmental effects on “minority populations” and “low-income populations.” It does not state, nor even imply, that an environmental justice analysis should apply to subgroups of individuals within such populations. Nor does the Executive Order or NEPA allow an agency the discretion to define a population to fit a particular problem. In identifying “low-income populations,” an agency “may consider as a community either a group of individuals living in geographic proximity to one another, or a set of individuals (such as . . . Native Americans), where either type of group experiences common conditions of environmental exposure or effect.”³⁷ The low-income group of individuals experiencing common conditions of “environmental exposure or effect” in this case is comprised of all those members of the Band living near the proposed PFSF, not only OGD.³⁸

If the term “populations” were to be read as applying to only a few individuals within the affected community, it would be virtually impossible for any Federal agency to satisfy the Executive Order. Taken to its natural conclusion, the Board’s “the nature of the problem defines the scope of the population” test could be applied to mean that every individual in every low-income population (or even one low-income individual living in an affluent population) must receive equal benefits from a proposed project. That test would create an unworkable standard that would require endless analysis and could be used to derail nearly any proposed project that

³⁷ Environmental Justice Guidance Under the National Environmental Policy Act, Council on Environmental Quality (December 10, 1996) (“CEQ Guidance”) at Appendix A -- Guidance On Key Terms In Executive Order 12898, p. 25.

³⁸ In fact, some unidentified portion of OGD’s members are not even part of the affected community, given that all of its members are not members of the Band, nor do all of its members live near the site of the proposed PFSF. See OGD’s Hearing Request at 3.

impacts a low-income individual. It also would be wholly inconsistent with Executive Order 12898, which created “no new rights or remedies.” LES, CLI-98-3, 47 NRC at 102.

The Board attempts to justify recognizing OGD as a protected subgroup by claiming that the environmental justice inquiry in LES similarly focused on a disadvantaged subgroup of a population, namely “pedestrians.” OGD O Order at 23. In LES, however, the NRC did not identify a subgroup of a population, nor did it examine the impact of the project’s benefits on such a subgroup. The Commission recognized that the environmental justice inquiry in LES should focus on the environmental impacts on the “African-American . . . communities of Center Springs and Forest Grove.” LES, CLI-98-3, 47 NRC at 106 (emphasis added).

The proposed project in that case would have increased the length of a frequently-used road between the two communities by 0.38 mile. Id. at 107. The Board found that “many residents of the two impoverished communities have no choice but to travel on foot,” and that the project would have made travelling between the two communities more difficult. Id. The Commission added that increasing the length of the road could impact families who use the road for “numerous joint community activities including ‘sports-related activities that involve children living in both communities, and church services that are divided between the two communities.’” Id. (quoting the intervenor’s contentions).

The LES decision found that travel between the communities was an important characteristic of the population as a whole in LES. Accordingly, the Licensing Board found that the final environmental impact statement in that proceeding should not only consider the impact of the project on car traffic, but also on pedestrians. Id. at 108. The Commission did not focus on pedestrians as an environmental justice “subgroup,” but rather examined the effect of the project on an activity (travel between the communities) that was widespread among the relevant

population. This is a far cry from examining how a project's economic benefits are distributed among a few individuals within a population.

The Board cites no other decision under Executive Order 12898 or NEPA to support its creation of a protected subgroup within a population for environmental justice purposes. Attempting to justify its departure from the express language of Executive Order 12898, the Board relies on two pre-NEPA (and obviously pre-Executive Order 12898) court decisions involving the United States Department of Housing and Urban Development's ("HUD") treatment of low-income housing. OGD O Order at 24. Those two cases are completely irrelevant and inapplicable to an NRC environmental justice analysis.

In the first case cited by the Board, Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971), the plaintiffs (African-American tenants or applicants for public housing in Chicago) sought a declaration, on their behalf and on behalf of all other similarly situated African-Americans, that the HUD Secretary implemented a racially discriminatory public housing system within Chicago. Plaintiffs also sought to enjoin the Secretary from making available to the Chicago Housing Authority any federal financial assets to be used to support the alleged racially discriminatory aspects of the Chicago public housing system. Gautreaux, 448 F.2d at 732. The court held that the entry of a decree in a companion case did not render this case moot since a controversy between the parties still existed, id. at 735-737, and that HUD's participation in a discriminatory housing program violated the Fifth Amendment and the Civil Rights Act of 1964. Id. at 737-740.

The second case, Shannon v. United States Dep't of Housing & Urban Dev., 436 F.2d 809 (3rd Cir. 1970), involved a suit by white and black residents (some homeowners and some tenants), businessmen, and representatives of private civic organizations in an urban renewal area. On their own behalf, and on the behalf of others similarly situated, the plaintiffs sought an injunction

against HUD's issuance of a contract of insurance or guaranty, and against its execution or performance of a contract for rent supplement payments. Shannon, 436 F.2d at 811. Their "substantive complaint" was that "the location of this type of project on the site chosen will have the effect of increasing the already high concentration of low-income black residents," in violation of the Housing Act of 1949 and various civil rights acts. Id. at 812. The court reversed an earlier dismissal of the complaint, agreeing with the plaintiffs that the appellee did not follow the relevant rules for determining the proper location for public housing. Id. at 822.

These cases have nothing to do with a consideration of the environmental impacts of a proposed project under Executive Order 12898 or NEPA, nor do they discuss the rights of a subgroup of a disadvantaged population in an administrative licensing proceeding.³⁹ The plaintiffs in these cases were groups of individuals exercising their civil rights in federal court. The OGD O Order's tortured attempt to rely on irrelevant cases in which individuals filed racial discrimination lawsuits under substantive federal laws demonstrates how far the Board departed from the only issue at hand: identifying for NRC licensing purposes whether a proposed project has disproportionately high and adverse environmental impacts on a disadvantaged population as a whole.

In fact, with respect to the racial discrimination theory used in these pre-NEPA HUD cases, the Board itself stated that "no such theory is permissible before this Board." OGD O Order at 24 n.38. Nevertheless, the Board finds those cases "instructive" to its holding here. Id. The Board even claims that, had one of those cases been brought after NEPA and Executive Order 12898, "it could, we think, have fit quite well within the 'environmental justice' rubric." Id. at 24.

³⁹ The plaintiffs in these cases were not a subgroup of the disadvantaged population, but represented the disadvantaged population as a whole.

To the contrary, it is difficult to imagine how cases regarding Constitutional and civil rights challenges to low-income housing decisions could be applicable to an Executive Order and a statute which are designed to ensure that the environmental impacts of a proposed project are identified and addressed. In any event, the Board's speculation about the impact that previous cases could have on the interpretation of subsequent, unrelated laws turns legal analysis on its head, and hardly forms a sufficient basis for the Board's departure from NEPA and the express language of Executive Order 12898.

3. The Board's Decision Improperly Focuses The Environmental Justice Review On Alleged Disparate Economic Benefits.

According to the Board, and without any supporting authority, the potential disparate distribution of benefits to OGD's members (presumably only those who are Band members) is a matter for environmental justice review by the NRC. *Id.* at 25-28. Executive Order 12898, however, focuses exclusively on an agency's obligation to assess the adverse environmental effects of proposed actions on low-income and minority populations; it does not authorize an investigation into allegations concerning whether the economic benefits of a project are being equally distributed within that population.

Specifically, Executive Order 12898 directs Federal agencies to identify and address "disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States." 59 Fed. Reg. at 7,629 (emphasis added). And NEPA – the existing law that Executive Order 12898 is intended to underscore – is a statute that similarly "centers on environmental impacts." LES, CLI-98-3, 47 NRC at 102 (emphasis added). The CEQ Guidance regarding application of environmental justice principles also focuses "exclusively on identifying and adequately assessing the impacts of the proposed actions on minority populations, low-income populations, and Indian

Tribes.” Id. (emphasis in original). The Guidance does not mention investigating how a proposed project’s benefits are distributed within a population or an Indian tribe, much less an examination of the population’s or the tribe’s internal financial matters.

The Board, therefore, improperly defined the issue to be examined at hearing in terms of whether there would be disparate economic benefits from the project rather than if the project would result in disparate environmental effects. In the Board’s view, its inquiry would focus on “those who are suffering a disparate burden,” namely, OGD members allegedly “remaining impoverished as others have their situation improve.” OGD O Order at 23 (emphasis omitted). Executive Order 12898, however, requires Federal agencies to address disproportionately high and adverse environmental “effects.” It does not state, nor even imply that the agency may examine whether the economic benefits received by some portion of the population are disparate. Accordingly, conducting a hearing regarding alleged disparate distribution of benefits from a proposed project is beyond the scope of an environmental justice review under Executive Order 12898 and NEPA.

B. The Alleged Adverse Impacts Underlying The Board’s Decision To Conduct An Environmental Justice Review Are Outside The Scope Of The Admitted Contention.

The Board’s decision to hold a hearing regarding OGD O Basis 1 also is inconsistent with the NRC’s “longstanding practice” that “requires adjudicatory boards to adhere to the terms of admitted contentions.” LES, CLI-98-3, 47 NRC at 105. None of the alleged adverse impacts cited in the OGD O Order were raised in OGD O Basis 1. Accordingly, the Board has no authority to now use those impacts to deny summary disposition and justify holding an environmental justice hearing.

According to the Board, “the operational noise, the visual intrusion, and the cultural insult” of the PFS project “furnish[] the underpinning for [OGD’s] environmental justice claim.” OGD O

Order at 18; see also id. at 34. OGD O Basis 1, the only OGD contention that is still at issue, mentions none of these allegedly adverse impacts. OGD O Basis 1 states that “[t]he proposed plant will have negative economic and sociological impacts on the Native community of Goshute Indians who live very close to the proposed site.”⁴⁰ That contention also argues:

The ER does not reflect consideration of the fact that the plant is to be placed in the dead center of an Indian Reservation. The proposed siting of the ISFSI in a minority community follows a pattern noted in a 1987 study by the United Church of Christ The License Application does not demonstrate any attempts to avoid or mitigate the disparate impact of the proposed plant on this minority community. Further it has been a long standing policy of the federal government to actively recruit and site waste facilities on tribal lands throughout the United States.⁴¹

Nowhere, however, does that contention even mention “operational noise, visual intrusion and cultural insult.” Nor does OGD’s lengthy response to PFS’s motion for summary disposition of OGD O specifically identify noise, visual intrusion, or cultural insult as adverse environmental impacts that should be set for hearing.

The Commission’s regulations require that contentions include a “specific statement” of the issue of law or fact raised in the contention, a brief explanation of the basis of the contention, a concise statement of the alleged facts or expert opinion which support the contention and on which the intervenor intends to rely in proving the contention at hearing, and sufficient information to show that a genuine issue of material law or fact exists. 10 C.F.R. §2.714(b)(2). Moreover, the litigable scope of a contention is limited to its terms combined with its stated bases. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988). It is well-settled that “an intervenor is bound by the literal terms of its own

⁴⁰ Contentions at 28.

⁴¹ Id. at 28-29.

contention.” Id., n. 11, quoting Philadelphia Electric Co., (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 709 (1985). In accordance with these principles, a contention cannot be interpreted to raise issues other than those specifically set forth therein.

The OGD O Order improperly brushes aside these arguments. The Board did not – nor could it – claim that “operational noise, visual intrusion, or cultural insult” were specified in OGD O Basis 1.⁴² Rather, ignoring clear Commission precedent, the Board applied a new standard that allows it to put words into the mouths of intervenors. According to the Board: “[g]iven the nature and location of this proposed facility, we read the reference in Basis 1 . . . to ‘negative . . . sociological impacts’ as embracing a number of such impacts.” OGD O Order at 19. The Board adds: “[f]or this contention, the nature of the various impacts is not difficult to comprehend” Id.

Although the Board feels it is easy to comprehend that OGD’s claimed “sociological” impacts embraced operational noise, visual intrusion and cultural insult, a review of OGD’s own contentions demonstrates otherwise. OGD raised those very impacts in a separate contention, OGD P (“Members of OGD Will Be Adversely Impacted by Routine Operations of the Proposed Storage Facility and its Associated Transportation Activities”). In relevant part, OGD P states: “The ability of OGD members to pursue the traditional Goshute life style will be adversely impacted by the routine operations at the storage facility. Obvious impacts from the physical presence of the facility are[:] visual intrusion, noise The ability of OGD members to pursue a traditional Goshute life style will be adversely affected by routine transportation operations . . .

⁴² In an effort to submit as complete a response as possible to OGD’s vague contention, in responding to the claimed sociological impacts raised in OGD O Basis 1 the PFS Motion noted that the DEIS addressed these three topics and included them in the Statement of Material Facts. PFS’s reference to these issues, however, did not relieve OGD of its obligation in the first instance, as described herein, to raise those specific impacts in OGD O.

.”⁴³ OGD, therefore, was capable of specifically identifying these concerns, and chose to do so as part of OGD P. The fact that they were not referenced in OGD O demonstrates that, contrary to the Board’s conclusion, OGD itself believed these impacts were something other than “economic” or “sociological.”

The Board properly rejected OGD P at the outset. Private Fuel Storage, L.L.C., LBP-98-7, 47 NRC at 233-4.⁴⁴ Now, however, the reconstituted Board not only finds this dismissal irrelevant, but even claims that, because operational noise, visual intrusion and cultural insult were “mentioned” in the rejected contention, the Applicant was on notice of these claims. OGD O Order at 18-19, 21 n. 33. PFS, however, was on notice of nothing other than that these claims were no longer part of this proceeding. It is illogical and inconsistent with the Commission’s pleading requirements for the Board to set for hearing a contention based not on issues specified therein, but on issues specifically raised in another, rejected contention. The Board’s ruling turns the contentions process on its head. Establishing such a precedent would render meaningless the Commission’s “very stringent threshold screening standards” regarding contentions, *id.* at 19, thereby forcing applicants to be prepared at some later date to revisit any issue “mentioned” in a rejected contention.

The Board also emphasizes that concerns regarding operational noise, visual intrusion and cultural insult were discussed during discovery. According to the Board: “to the extent specificity [regarding contentions] is needed, it was provided by the discovery process.” *Id.* The Board

⁴³ Contentions at 36 (emphasis added).

⁴⁴ The Board found that OGD P was inadmissible because the contention and its bases failed to establish with specificity any genuine dispute, lacked adequate factual or expert opinion support, and/or failed to properly challenge PFS’s application. *Id.* at 234. In addition, the Board stated: “to the extent this contention seeks consideration of ‘psychological stress’ as an environmental impact under NEPA, it does not have a cognizable basis.” *Id.*, citing Metropolitan Edison, 460 U.S. at 772-779. Apparently, the Board felt that the same impacts rejected in OGD P as without basis, had enough basis for a hearing on OGD O, even though those impacts were never mentioned in OGD O.

added that the impacts “now in question” were “referenced later during the discovery process” Id. at 20-21. Here, as well, the Board’s approach to this issue is inconsistent with the Commission’s extensive jurisprudence. As set forth above, intervenors are bound by the terms of their contentions. An “intervenor is not free to change the focus of its admitted contentions, at will, as the litigation progresses.” Seabrook, 28 NRC at 97 n.11. Moreover, in upholding the Commission’s right to reject contentions that are unfocused, the Supreme Court found: “administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that ‘ought to be’ considered” Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553-554 (1978). Transforming OGD’s cryptic references to “sociological impacts” into specific impacts underlying an environmental justice review would improperly reward OGD for submitting contentions that lacked the requisite specificity.

Moreover, the Board’s ruling could prevent future applicants from obtaining discovery on a relevant issue. Under the Commission’s rules, discovery is limited to the scope of admitted contentions. 10 C.F.R. §2.740(b)(1); see Philadelphia Electric Co., (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 241 n. 24 (1986); Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489, 492 (1977). If the Board in the course of summary disposition can change the scope of an admitted contention to add as new issues arguments mentioned in a rejected contention, the applicant would have no opportunity to pursue discovery on the new issue.

For these reasons, the Board cannot rely upon operational noise, visual intrusion and cultural insult as the alleged adverse impacts underpinning an environmental justice review.

C. Operational Noise, Visual Intrusion And Cultural Insult Were Identified And Addressed In The FEIS.

Assuming *arguendo* that concerns regarding “operational noise, visual intrusion and cultural insult” were properly raised by OGD O Basis 1, the FEIS (and the DEIS before that) has identified and addressed these impacts (if any), and found them not to be adverse.⁴⁵ Thus, the requirements of Executive Order 12898 and NEPA have been met.

For example, the FEIS discusses the impact of “Noise During Construction” and “Noise During Operations.” FEIS at §§4.8.1.1, 4.8.1.2. The FEIS finds that noise from construction activity would not be expected to be “annoying” (as that term is used by the Environmental Protection Agency) for residents located inside the homes nearest to the PFSF. *Id.* at §4.8.1.1. Increase in noise associated with construction traffic would produce only moderate impacts in the vicinity of the project, and would be temporary. *Id.* In addition, the FEIS concludes that noise impacts from operation of the PFSF would be “small” and would not warrant mitigation measures. *Id.* at § 4.8.1.2.

The FEIS also discusses the potential visual impacts of the project. *Id.* at §4.8.2. The FEIS describes the detailed “Visual Analysis” that was performed. *Id.* at §4.8.2.2. It concludes that, although the visual landscape would change given the contrast of a large industrial facility with the surrounding landscape, those changes “would represent small to moderate impacts to recreational viewers, residents of Skull Valley, and motorists.” *Id.* §4.8.2. Furthermore, the FEIS discusses certain mitigation measures that would be used to make the facility less visible to potential viewers. These include the use of shielded light to minimize light diffusion at night. *Id.* at §4.8.2.8 The FEIS discusses other potential mitigation measures, such as planting vegetation or

⁴⁵ See e.g., PFS Motion at 5-11. OGD’s response to the PFS Motion did not challenge PFS’s claims that the ER and the DEIS addressed these issues.

constructing earthen berms to screen the facility, and using colors of paint that would blend facility structures with the surrounding landscape. Id.

The FEIS also identifies and addresses the types of impacts that could fall under the Board's so-called "cultural insult" category. In Section 3.6, "Cultural Resources," the FEIS discusses (among other things) the numerous surveys conducted in the project area for cultural, archaeological and historic resources, including those specifically for Native American resources. The FEIS states: "[w]ithin the proposed PFSF project area, no traditional cultural properties or usage of culturally important natural resources have been documented." Id. at §3.6.2.2. Moreover, "[t]raditional plants of value to the Skull Valley Band, such as sage and cedar, are sparse in the project area due to a lack of surface water, and are considered inferior to the same plants growing in the Stansbury Mountains east of the Reservation, and in the adjacent Tooele Valley." Id. Accordingly, the FEIS concludes that potential impacts on cultural resources from construction and operation of the proposed PFSF are small. Id. at §§4.6.1 and 4.6.2. Regarding mitigation, the FEIS provides that, if any buried cultural resources are discovered at the site, measures that comply with historic preservation laws and regulations will be put in place. Id. at §4.6.5.

In its more specific discussion of "Native American Cultural Resources," the FEIS recognizes that issues regarding broad cultural values have been raised by some members of the Band who live in close proximity to the proposed PFSF. Id. at §4.6.3. The FEIS points out, however, that a review of ethnographic and historical information supports the conclusion that "no traditional cultural properties or use of culturally important natural resources are known within the specific project areas." Id. Accordingly, the FEIS states:

Consequently, construction and operation of the storage facility on the Reservation is considered to have a small potential for affecting

Tribal cultural values or traditional cultural properties. Based on the known situation, no mitigation measures are required for potential impacts to Native American resources.

Id.

As this discussion shows, the operational noise, visual intrusion and cultural insult impacts cited by the Board are generally either non-existent or not adverse. Where impacts were identified, mitigation measures were also discussed. Accordingly, the FEIS has thoroughly identified and addressed the alleged impacts that the Board relies upon as the “underpinning” for OGD’s environmental justice claim. OGD O Order at 18. This fully and finally satisfies the requirements of Executive Order 12898 (“each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing disproportionately high and adverse human health and environmental effects . . .) and NEPA.

In addition, if the Board intended its so-called “cultural insult” impact to denote something other than the types of tangible effects on cultural resources identified and addressed in the FEIS,⁴⁶ such alleged effects still would not provide a basis for an environmental justice review. The Board previously had rejected contentions (i.e., OGD P) that relied on intangible effects, because they “fail[ed] to establish with specificity any genuine dispute; lack[ed] adequate factual or expert opinion support; and/or fail[ed] properly to challenge the PFS application.” Private Fuel Storage, LBP-98-7, 47 NRC at 234. The Board also found that “psychological stress” is not cognizable as an environmental impact under NEPA. Id., citing Metropolitan Edison, 460 U.S. at 772-9. In Metropolitan Edison, the U.S. Supreme Court found that the plaintiffs’ challenges to the proposed

⁴⁶ For example, in response to PFS discovery requests, OGD has asserted that the construction, operation and decommissioning of the PFSF would be “antithetical to [the Goshute] way of life and would alienate the Goshutes from their surroundings or affect their connection with ancestral lands.” OGD’s Responses to Applicant’s First Set of Discovery Requests (May 28, 1999) at 3-4. In those responses, OGD also stated that exposure to “the intrusion of high-tech culture” would have adverse impacts on the “mental and spiritual well being of Band members,” and that intrusion of the PFSF would “disrupt the sense of community” among them. Id. at 4.

action based on claims of “impaired ... sense of well-being,” “anxiety,” “tension,” “fear,” “a sense of helplessness,” and “harm to the stability, cohesiveness and well being of the communit[y]” were beyond NEPA’s reach. Metropolitan Edison, 460 U.S. at 769 n. 2, 776. As recognized by the Supreme Court, such types of impacts are “far[] removed from the physical environment,” are “more closely connected with the broader political process,” and thus are not cognizable under NEPA. Id. at 777 n.12.⁴⁷ The Court added:

If contentions of psychological health damage caused by risk were cognizable under NEPA, agencies would, at the very least, be obliged to expend considerable resources developing psychiatric expertise that is not otherwise relevant to their congressionally assigned functions. The available resources may be spread so thin that agencies are unable adequately to pursue protection of the physical environment and natural resources.

Id. at 776.

For these reasons, even if contrary to its literal terms OGD O Basis 1 is interpreted as alleging “operational noise, visual intrusion and cultural insult” as disproportionately high and adverse environmental effects, those allegations do not support the Board’s decision to hold an environmental justice hearing pursuant to Executive Order 12898 and NEPA.

D. The Board’s Decision Improperly Adopts A Substantive NEPA Standard That The Benefits Of The Proposed Project Must Exceed Its Environmental Effects.

In its environmental justice analysis, the Board claims that the benefits of the proposed project must exceed its alleged adverse environmental impacts. For example, the Board states: “an agency is free to proceed to license the project, if it determines that the project’s overall benefits exceed its environmental and other costs and that no obviously superior alternatives are in sight.” OGD O Order at 26 (emphasis added). According to the Board: “the only justification for

⁴⁷ See also Maryland-National Capital Park & Planning Comm’n v. United States Postal Serv., 487 F.2d 1029, 1038-
Footnote continued on next page

imposing those adverse impacts on an impoverished population is the offsetting benefits that will accrue to the Band's members from payments for use of Tribal lands." *Id.* at 26 (emphasis omitted). The Board adds that the disparate impact could come about, "not in the direct environmental burden, but from the net impact as measured by the NEPA-sanctioned balance of environmental burdens and economic benefits -- some obtain an economic benefit from the project to offset its environmental burdens, while others do not, experiencing only the burdens." *Id.* at 27 (emphasis omitted). Contrary to the Board's pronouncements, neither Executive Order 12898 or NEPA contain a substantive requirement that adverse environmental impacts must be "outweighed" or "offset" by economic, or any other, benefits.

NEPA directs Federal agencies considering a "major federal action significantly affecting the quality of the human environment" to prepare an environmental impact statement. It is well-established that the purpose of this requirement is two-fold: (1) it places an obligation on the agency to consider detailed information concerning every significant aspect of a proposed action's environmental impact; and (2) it ensures that the relevant information will be made available to the public. Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 90 n.1, 97 (1983); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). Thus, NEPA is "essentially procedural." Vermont Yankee, 435 U.S. at 558. Congress intended NEPA to "insure a fully informed and well-considered decision." *Id.* Accordingly, "NEPA itself does not mandate particular results, but simply prescribes the necessary process." Robertson, 490 U.S. at 350.⁴⁸ Thus, "[i]f the adverse environmental effects of the proposed action are adequately

Footnote continued from previous page

39 (D.C. Cir. 1973) (intangible psychological effects and individual preferences fall outside the scope of NEPA).

⁴⁸ See also Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-228 (1980); Vermont Yankee, 435 U.S. at 558.

identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.” Id. Applying these principles in Robertson, for example, the Supreme Court found that the Forest Service, after complying with NEPA’s procedural requirements, could have issued a permit for downhill skiing in the National Forest at issue even if 100 percent of the mule deer herd in that area would be lost. Id. at 351.

Robertson expressly distinguished NEPA from statutes that impose substantive requirements on Federal agencies. For example, the Court explained that the Endangered Species Act of 1973 requires Federal agencies to insure that actions subject to their jurisdiction do not jeopardize the continued existence of an endangered or threatened species. Id. at 351 n. 14. The Court also pointed out that the Department of Transportation Act of 1966 allows use of publicly owned land only if there is no alternative and the project includes all possible planning to minimize harm to the area at issue. Id. The Court found that NEPA differs from those types of statutes, because NEPA imposes no such substantive obligations. Id. Rather, “NEPA merely prohibits uninformed – rather than unwise – agency action.” Id. at 351. Despite this clear precedent to the contrary, the Board improperly has concluded that it cannot license the PFSF unless the economic benefits of that project outweigh the project’s environmental impacts.

It is true that, under NEPA, an EIS should discuss mitigation measures. As explained above, however, the FEIS prepared in this proceeding does just that. The FEIS satisfies the agency’s “primary duty” under NEPA, which is “to take a ‘hard look’ at environmental impacts.” LES, CLI-98-3, 47 NRC at 88-89, quoting Public Utilities Commission v. FERC, 900 F. 2d 269, 282 (D.C. Cir. 1990). NEPA, however, does not require an agency to mitigate environmental impacts:

There is a fundamental distinction ... between a requirement that mitigation be discussed in sufficient detail to ensure that

environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other.

Robertson, 490 U.S. at 352. In fact, “it would be inconsistent with NEPA’s reliance on procedural matters – as opposed to substantive, result-based standards – to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.” Id. at 353. “NEPA imposes no substantive requirement that mitigation measures actually be taken.” Id. n. 16. Nevertheless, this is exactly what the Board demands: before it will license the PFSF, the Applicant must demonstrate that the benefits derived by lease payments for use of the tribal lands exceed the alleged adverse impacts. In fact, the Board carries this substantive standard even one step further, requiring that the benefits to even a few individuals within an impacted population must outweigh the environmental impacts felt by that population as a whole.

The Commission itself has recognized that NEPA “does not require agencies to select the most environmentally benign option.” LES, CLI-98-3, 47 NRC at 88. As the Commission has found, an EIS need not include “a formal or mathematical cost-benefit analysis.” Id. “NEPA does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula.” Id., quoting Sierra Club v. Lynn, 502 F.2d 43, 61 (5th Cir, 1974), cert. denied, 422 U.S. 1049 (1975). By requiring that the “project’s overall benefits exceed its environmental and other costs” the Board is applying a formal, precise, and substantive test where none exists or is authorized under NEPA. For this reason, the Board is simply wrong in stating that the benefits of the PFSF must outweigh its costs.

Finally, to the extent that a cost-benefit analysis is conducted, the Board has failed to consider all relevant factors. The only mitigation or benefits that apparently carry any weight with the Board are PFS’s payments to the Band under the lease. As set forth in the FEIS, mitigation measures other than lease payments will be implemented to address the proposed project’s

potential environmental impacts. The project has many benefits in addition to the lease payments,⁴⁹ which the Board has chosen to ignore.

E. The Hearing Required By The Board Would Intrude On Sovereign Tribal Matters In Contravention Of Federal Law And Policy.

The Board also erroneously concluded that it has the authority to conduct a hearing regarding the methods used by the Band to distribute lease payments made by PFS. Such an inquiry would directly intrude on internal tribal matters and is an affront to the Band's tribal sovereignty.⁵⁰

The OGD O Order's decision requiring an environmental justice hearing is based on a misreading of federal law regarding non-interference with internal tribal affairs. Although it acknowledged Supreme Court holdings that federal instrumentalities may not interfere with tribal self-governance, the Board justified its intrusion in the internal affairs of the Band by stating that the federal courts have recognized certain "special situations" in which the need for agency action may prevail over the desirability of allowing tribal self-governance. OGD O Order at 16, citing Wheeler v. United States Dep't of Interior, 811 F.2d 549, 551-52 (10th Cir. 1987). Wheeler, however, does not support the Board's action.

The first "special situation" cited by Wheeler is one in which a tribal constitution or tribal statutes call for the Bureau of Indian Affairs ("BIA") to take an active role in the legislative affairs of an Indian tribe. Wheeler, 811 F.2d at 551. The Board cited no such provision, and we know of none contained in the Band's laws. This "special situation," therefore, is inapplicable.

⁴⁹ See FEIS at §§ 8.2.1 and 8.3.

⁵⁰ The Band, as a sovereign Indian tribe, possesses the power of regulating its internal and social relations. United States v. Kagama, 118 U.S. 375, 381-2 (1886).

The second “special situation” cited by Wheeler is one in which a federal statute requires the involvement of a federal agency in tribal matters. Id. at 551-552. We know of no federal statute, and none is cited by the Board, which requires the Board to delve into the Band’s internal financial matters. The Board’s only justification for its actions is its citation of Executive Order 12898. Under its own terms, however, that Executive Order does not create any substantive rights.⁵¹ In addition, the Board fails to acknowledge that its interpretation of Executive Order 12898 conflicts with a later executive order, Executive Order 13125, which promises federal consultation and coordination, not interference, with Indian tribal governments.⁵² Executive Order 13175 clearly enunciates federal principles respecting tribal self-government which can not be ignored by the Board.

The third “special situation” cited by the Wheeler court is the need of the federal government to be able to recognize tribal governments. Wheeler, 811 F.2d at 552. The Board, however, has no role in this recognition. The appropriate federal agency, the BIA, already has recognized the current executive committee of the Band for federal purposes.⁵³

In fact, the Board neglects to cite language in Wheeler which directly contradicts its intrusion into the internal affairs of the Band. At the end of its discussion regarding “special situations,” the Wheeler court restates its position that the federal government should stay out of the internal affairs of Indian tribes:

Nevertheless, the Supreme Court has stated that ‘ambiguities in federal law have been construed generously in order to comport with

⁵¹ Executive Order 12898 at Section 6-609.

⁵² Executive Order 13175 of November 6, 2000 (Consultation and Coordination With Indian Tribal Governments), 65 Fed. Reg. 67,249 (2000).

⁵³ See Letter from BIA acting Superintendent Allen Anspach to Mr. Leon D. Bear advising Chairman Bear that the BIA continues to deal with him and Vice-Chair Skiby for purposes of federal contracting programs (March 25, 2002), Attachment A hereto.

... traditional notions of sovereignty and with the federal policy of encouraging tribal independence.' ... Thus, even these special situations should be resolved in favor of tribal self-determination and against Federal Government interference.

Wheeler, 811 F.2d at 552 (citation omitted).⁵⁴

The Board also takes the position that federal case law preventing federal interference in tribal internal affairs should not apply here because the Band, by entering into the lease with PFS, has "initiate[d] the process leading to the requested involvement of a non-Tribal government adjudicator." OGD O Order at 17. The involvement of the federal government has, however, not been "initiated" by the Band, but is instead required by federal law as a part of the BIA leasing and the NRC licensing processes. The BIA's lease review process is designed to allow the BIA to meet its trust responsibility to the Band. The NRC's licensing process is primarily designed to ensure the safety, and assess the environmental impact, of the project. Neither process requires the federal adjudicator's involvement in intra-tribal financial matters. The Board, rather than respecting the trust responsibility which all federal agencies share toward Indian tribes, has abused its trust responsibility by manipulating the NRC licensing process to interfere in the Band's internal affairs.

Federal law is clear that federal agencies are not to intrude in matters of tribal self-government.⁵⁵ Such intrusions have been thwarted by federal court decisions upholding the right

⁵⁴ The Board's citation of Nero v. Cherokee Nation, 892 F.2d 1457 (10th Cir. 1989) is similarly unavailing. Although the Board cites Nero for the proposition that "circumstances might permit intrusion into the realm of Tribal governance where no Tribal forum for interpreting Tribal law exists," OGD O Order at 17, there is no federal requirement that Indian tribes maintain full-time tribal courts. See Fletcher v. United States, 116 F.3d 1315, 1334 (10th Cir. 1997) (Court did not have jurisdiction to impose a form of government on the Osage Tribe); Round Valley Indian Hous. Auth. v. Hunter, 907 F. Supp. 1343, 1346 n. 3 (N.D. Cal. 1995) (Coyote Valley Tribe's constitution allows the creation of a judicial system but does not require it); See also Hunt v. Aberdeen Area Dir., BIA, 27 IBIA 173 (1995) (Interior Board of Indian Appeals affirmed a similar General Council's role as an appellate forum and did not establish any requirement to establish a "tribal court."); Webster Cusick v. Acting Eastern Area Dir., BIA, 31 IBIA 255 (1997); Little Six, Inc. v. Minneapolis Area Dir., BIA, 24 IBIA 50 (1993).

⁵⁵ Tribal self-governance includes the power to raise revenues and distribute services to its members without the interference of third parties. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) (the power to raise revenues for its essential services is derived "from the tribe's general authority, as sovereign, to control economic

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to tribal self-government and sovereignty. For example, in EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071 (9th Cir. 2001), the court would not permit the EEOC to pursue an age discrimination claim brought by a tribal member against the tribally-owned construction company, finding that this was a matter for internal tribal government:

The facts in this case reveal that this dispute involves a strictly internal matter. The dispute is between an Indian applicant and an Indian tribal employer. The Indian applicant is a member of the tribe, and the business is located on the reservation. Subjecting such an employment relationship between the tribal member and his tribe to federal control and supervision dilutes the sovereignty of the tribe. The consideration of a tribe member's age by a tribal employer should be allowed to be restricted (or not restricted) by the tribe in accordance with its culture and traditions. Likewise, disputes regarding this issue should be allowed to be resolved internally within the tribe. Federal regulation of the tribal employer's consideration of age in determining whether to hire the member of the tribe to work at the business located on the reservation interferes with an intramural matter that has traditionally been left to the tribe's self-government.

Karuk Tribe, 260 F.3d at 1079, quoting EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 249 (8th Cir. 1993).⁵⁶

Furthermore, disgruntled tribal members have no authority to challenge tribal agreements. For example, in Yazzie v. Morton, 59 F.R.D. 377, 384 (D. Ariz. 1973), the court noted that “[t]his attempt by the plaintiffs to force the intervenors and the Tribe to renegotiate the leases is clearly an attempt by five Navajos [the plaintiffs] to force their will on the whole Tribe.” The court refused to justify such interference. The Commission should likewise reject the Board’s attempted

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activity within its jurisdiction, and to defray the cost of providing governmental services.”); Bishop Paiute Tribe v. County of Inyo, 275 F.3d 893, 902-03 (9th Cir. 2002) (the release of tribal employment and payroll records was a matter of internal tribal policy with which the state and court could not interfere).

⁵⁶ See also NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1192 (10th Cir. 2002) (The Tribe as sovereign has the right to enact right to work law.)

interference on behalf of a similarly situated group of purported tribal members who do not represent the majority view of the Band.⁵⁷

Rather than following the clear mandate of Wheeler, Nero and other federal court decisions⁵⁸ that federal agencies should avoid entanglement in tribal internal affairs, the Board has impermissibly invoked a questionable interpretation of Executive Order 12898, ignored the direct conflict between that interpretation and the terms of Executive Order 13175 regarding Indian tribal sovereignty, and ignored voluminous federal case law denying federal intrusion into internal tribal matters.

F. The Commission Should Grant Summary Disposition Of OGD O Basis 1.

As described above, the Board erred in many respects when it denied PFS's summary disposition motion as to OGD O Basis 1 and set that contention for hearing. For the reasons set forth herein as well as those contained in the PFS Motion, PFS requests that the Commission not only reverse the Board's decision to hold a hearing (and correct its erroneous application of environmental justice principles, NEPA law and Commission precedent), but also summarily dismiss OGD O.

As demonstrated in this brief and in PFS's Motion, there exists no genuine issue as to any material fact relevant to OGD O Basis 1. Section II. C. above and pages 5 through 11 of the PFS Motion set forth in detail how the DEIS fully identified and addressed the "sociological" and

⁵⁷ See, e.g., Willis v. Fordice, 850 F. Supp. 523, 528 (S.D. Miss. 1994), aff'd without op., 55 F.3d 633 (5th Cir. 1995) (Plaintiff failed to show that he, a resident member of the Choctaw Tribe, had a legally protected right to be free from gaming on his homeland because the tribe has a right to conduct gaming on the Reservation); Tewa Tesuque v. Morton, 498 F.2d 240, 242-3 (10th Cir. 1974), cert. denied, 420 U.S. 962 (1975), (members of the Pueblo sought to cancel a 99-year lease between the Pueblo and a development company. The court affirmed the decision of the district court dismissing the action); see also McClendon v. United States, 885 F.2d 627, 633 (9th Cir. 1989).

⁵⁸ See Ordinance 59 Ass'n v. United States, 163 F.3d 1150, 1152 (10th Cir. 1998); Penobscot Nation v. Fellecer, 164 F.3d 706, 713 (1st Cir.) cert. denied, 527 U.S. 1022 (1999); Smith v. Babbitt, 100 F.3d 556 (8th Cir. 1996), cert. denied, 522 U.S. 807 (1997). See also Ware v. Richardson, 347 F. Supp. 344 (W.D. Okla. 1972), and cases

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“economic” impacts on the Band from the construction and operation of the PFSF as contemplated under Executive Order 12898 and NEPA.⁵⁹ OGD totally failed to address the DEIS’s consideration of these impacts in its response to the PFS Motion. The Board correctly found that there were no issues in dispute with respect to OGD O Bases 5 and 6,⁶⁰ and should have reached the same conclusion with respect to OGD O Basis 1. Even if the Commission agrees with the Board that “operational noise,” “visual intrusion,” and “cultural insult” fall within OGD O Basis 1, those effects have been identified and addressed in the DEIS and the FEIS, and OGD’s response to the PFS Motion failed to challenge the DEIS’s conclusions regarding those matters. Accordingly, since there are no material facts in dispute, the Commission should summarily dismiss contention OGD O Basis 1 as a matter of law.⁶¹ In addition, it is important that the Commission definitively resolve this contention now, given the imminent hearing schedule,⁶² and the Board’s projected date -- September 9, 2002 -- for its decision in this case.⁶³

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cited therein (Court did not have jurisdiction to hear housing construction dispute by Kiowa members against the Kiowa Housing Authority because it was an intra-tribal dispute).

⁵⁹ Applicant’s May 25, 2001 Motion relied on the DEIS to demonstrate that the alleged impacts have been identified and addressed. As discussed above, the FEIS was issued in December 2001.

⁶⁰ OGD O Order at 28-34.

⁶¹ See, e.g., Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993) (summary disposition is proper if the filings in the proceeding demonstrate “that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.”)

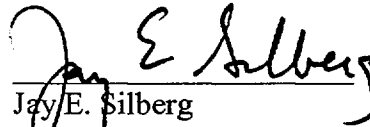
⁶² See NRC Press Release 02-035 (March 26, 2002).

⁶³ Private Fuel Storage Order (General Schedule Revisions) (September 20, 2001).

III. CONCLUSION

For the foregoing reasons, PFS respectfully requests that the Commission reverse the OGD O Order to the extent that the Order set for hearing contention OGD O Basis 1. In addition, PFS requests that the Commission grant summary disposition with respect to OGD O Basis 1 and dismiss the remaining aspect of this contention from the proceeding.

Respectfully submitted,



Jay E. Silberg
Ernest L. Blake, Jr.
Paul A. Gaukler
Michael G. Lepre
Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037
202-663-8000

Counsel for Private Fuel Storage, L.L.C.

Dated: April 5, 2002



United States Department of the Interior
BUREAU OF INDIAN AFFAIRS

Utah and Ouray Agency
P. O. Box 130
585 South 7500 East
Fort Duchesne, Utah 84026-0130
(435) 722-4300
FAX (435) 722-2323

IN REPLY REFER TO:
Superintendent

MAR 25 2002

Mr. Leon D. Bear, Chairman
Skull Valley Band of Goshute Indians
Skull Valley Reservation, #808
3359 South Main Street
Salt Lake City, UT 84115

Re: Skull Valley Band of Goshute Indians Leadership

Dear Chairman Bear:

This responds to your March 22, 2002 request to draw-down the Band's FY 2002 P.L. 93-638 funds and to various inquiries from certain parties regarding the position of the Bureau of Indian Affairs (BIA) as to who are the duly elected officials of the Skull Valley Band of Goshute Indian Band (Band) in Central Utah. In the past year or two, the BIA has been subject to inquiries from numerous parties on this issue, most with a specific agenda in mind. Some wish to see a certain person or persons retain or continue in a leadership capacity of tribal government, others wish to see those same persons vanquished, while others still wish to create and exploit for various reasons, an on-going controversy concerning the Band leadership. All of these interests appear to have one thing in common, they have arisen due to strong positions taken for or against the Band's lease of land to Private Fuel Storage, LLC, (PFS), for the purpose of storing spent nuclear fuel on the Band's reservation.

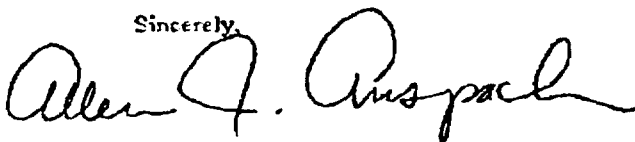
The position of the BIA, with respect to internal tribal disputes and political factionalism, is to stay out of such disputes altogether. Indian tribes are sovereign entities under the law and must settle their leadership issues internally. There are effectively no Federal remedies available for the resolution of internal tribal political disputes, as held in *Sania Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Accordingly, it is neither within the authority, nor the mission of the BIA to decide, arbitrate, select or acknowledge one political faction of a Federally recognized Indian Tribe over another. It is for the band itself to do so, however difficult that may be and however long that may take. The BIA's sole role in such an endeavor is to assist tribes where possible, but not to impose its decisions upon them.

In light of the layered controversies now swirling around the Band, and in response to the inquiries made, the BIA, with help of the Office of the Solicitor, has made an exhaustive study of the Band's governing documents and ordinances, including those provided by the legal counsel for the various factions, which purport to identify and confirm the existing tribal government, and the various allegations and accusations from diverse parties who both challenge the leadership and

make alternative claim to it. The outcome of this study is that the BIA has discovered no event since the Band entered the lease with FFS that conclusively alters the Band's choice of Leon Bear as the Chairman of the General Council and its Executive Committee. HOWEVER, as noted above, it is ultimately up to the Band to decide this issue.

The BIA's more immediate concern is the impending draw-down of funds under one of the Band's existing P.L. 93-638 contracts. The BIA provides many services to tribes and its members. P.L. 93-638 allows tribes to contract to provide those services, in lieu of the BIA providing these services. Services provided by the Band under its P.L. 93-638 contract include; Scholarships, Jobs Placement Training, Social Services, Indian Child Welfare and Aid to Tribal Governments. Generally, when this occurs, the BIA no longer has staff to perform the contracted functions. The BIA also recognizes the overriding intent of P.L. 93-638 is to allow a tribe to make decisions affecting its interests and the interests of its members at the local level. In only the most egregious of situations will the BIA seek to terminate a P.L. 93-638 contract and reassume the responsibility to deliver the contracted services. Thus, frequently in circumstances where an internal tribal dispute arises, BIA will continue to fund P.L. 93-638 contracts as long as it appears the services are being delivered. This is based on the rule in *Goodface v. Grassope*, 708 F.2d 335 (8th Cir. 1983), that the BIA should not interfere in internal tribal disputes but may have to recognize someone in the tribe to deal with on an interim basis in order to conduct Federal business. Accordingly, unless and until the Band clearly and unequivocally provides the BIA with evidence as to changes in its leadership, the BIA will continue, for P.L. 93-638 contract and other limited governmental purposes, to conduct its routine business with and provide for the delivery of those services through Mr. Bear as the Chairman and Lori Skiby as Vice-Chairman.

Sincerely,



Superintendent

cc: Western Regional Director
State of Utah

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Brief Seeking Reversal Of LBP-02-08 And Requesting Summary Disposition Of Contention OGD O was served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 5th day of April 2002.

Emil L. Julian, Assistant for
Rulemakings and Adjudications
Rulemaking & Adjudication Staff
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: hearingdocket@nrc.gov
(original and two copies)

Jeffrey S. Merrifield, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmmerrifield@nrc.gov

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

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

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

Michael C. Farrar, Esq., Chairman
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: MCF@nrc.gov

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: PSL@nrc.gov

Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop O-15 B18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: set@nrc.gov
e-mail: pfscase@nrc.gov

Diane Curran, Esq.
Harmon Curran Spielberg &
Eisenberg L.L.P.
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
e-mail: dcurran@harmoncurran.com

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

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: JRK2@nrc.gov; kjerry@erols.com

*Office of the Commission Appellate
Adjudication
Mail Stop: 16-G-15 OWFN
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(United states mail only)

Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, Utah 84114-0873
e-mail: dchancel@att.state.ut.us

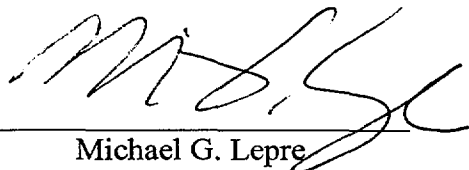
John Paul Kennedy, Sr., Esq.
David W. Tufts, Esq.
Confederated Tribes of the Goshute
Reservation and David Pete
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84105
e-mail: dtufts@djplaw.com

Joro Walker, Esq.
Land and Water Fund of the Rockies
1473 South 1100 East
Suite F
Salt Lake City, UT 84105
e-mail: utah@lawfund.org

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

Paul EchoHawk, Esq.
Larry EchoHawk, Esq.
Mark EchoHawk, Esq.
EchoHawk PLLC
P.O. Box 6119
Pocatello, ID 83205-6119
e-mail: paul@echohawk.com

Tim Vollmann, Esq.
Skull Valley Band of Goshute Indians
3301-R Coors Road, N.W.
Suite 302
Albuquerque, NM 87120
e-mail: tvollmann@hotmail.com



Michael G. Lepre