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UNITED STATES OF AMERICA

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NUCLEAR REGULATORY COMMISSION

April 15, 2002 (3:40PM)

BEFORE THE COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of )

PRIVATE FUEL STORAGE, L.L.C. )

Docket No. 72-22-ISFSI

(Independent Spent  
Fuel Storage Installation) )

**BRIEF OF *AMICUS CURIAE* BUREAU OF INDIAN AFFAIRS  
IN THE COMMISSION'S INTERLOCUTORY REVIEW OF  
THE LICENSING BOARD'S DECISION IN LBP-02-08 CONCERNING  
CONTENTION OGD O (ENVIRONMENTAL JUSTICE)**

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April 15, 2002

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**CONTENTION OGD O (ENVIRONMENTAL JUSTICE)**

INTRODUCTION

The Bureau of Indian Affairs (BIA) submits this *amicus curiae* brief at the invitation of the Nuclear Regulatory Commission to address a ruling of the Atomic Safety and Licensing Board. The Board ruled that it would hold a hearing concerning allegations that Skull Valley Band of Goshute Indians officials have deprived certain members of the Band of their share of certain payments under a proposed lease of land on the Skull Valley Indian Reservation. Although these payments are not funds held by the United States in trust for the Band, the Board ruled that it could investigate these allegations under the auspices of Executive Order 12898 on environmental justice, issued by President Clinton in 1994 and endorsed by the Commission. Under well-established principles of Indian law, however, the Board has no jurisdiction to investigate the Band's internal financial affairs concerning these non-trust payments, and the Executive Order does not confer such jurisdiction.

## BACKGROUND

The Band and Private Fuel Storage, L.L.C., (PFS) have entered into a proposed lease for an Independent Spent Fuel Storage Installation (Installation) on the Skull Valley Indian Reservation in Utah. Because the proposed lease is for the use of land held by the United States in trust for the Band, the Secretary of the Interior (or her designee) must approve it under 25 U.S.C. § 415. The BIA (under delegated authority from the Secretary) conditionally approved the proposed lease by its terms in May 1997. Final approval of the proposed lease, if any, cannot occur until the fulfillment of the conditions in the lease and a BIA finding, under its regulations at 25 C.F.R. Part 162, that the proposed lease is in the best interest of the Band. *State of Utah v. United States Department of the Interior*, 210 F.3d 1193 (10<sup>th</sup> Cir. 2000). The proposed lease is, therefore, at most an option on the land and does not purport to convey any interest in the trust land that could be construed as alienation.

The execution of the proposed lease triggered the payment by PFS to the Band of a Pre-Operational Exclusivity Fee and a Pre-Operational Administrative Fee (in return for the agreement of the Band that no other lease would be made for the site of the proposed Installation). Despite the payment of these fees, however, PFS cannot begin construction of the proposed Installation, if at all, until the Secretary gives final approval to the proposed lease.

As part of the Commission's review of the proposed license application, a group known as Ohno Gaudedah Devia ("OGD") that includes both non-Band members and

dissident Band members has filed a contention (“Contention O”) concerning environmental justice. PFS filed a summary disposition motion on Contention O, supported by the NRC staff (and with the tacit approval of the Band). In response to that motion, OGD alleged, based on an affidavit of one of its leaders, that the leadership of the Band had misappropriated the pre-operational fees from PFS for its own personal use. On February 22, 2002, the Board granted most of PFS’s motion for summary disposition. It denied the motion, however, with respect to the allegation of misappropriation of funds and some other issues not relevant here, and set that issue for hearing in April.

The Board’s opinion, LBP-02-08, is based on Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” (1994). The Board notes the strong policy of the United States, as expressed in Supreme Court case law and elsewhere, not to get involved in intratribal disputes or in matters of tribal government. Nevertheless, the Board went on to rule that OGD may constitute a “low-income population” within the meaning of the Executive Order because they “are suffering a disparate burden, bearing the adverse environmental consequences of the PFS project while remaining impoverished as others have their situation improve.” LBP-02-08 at 23. The Board then orders the Band to submit an “accounting showing, at a minimum, (1) the amount of the payments received from [PFS] by the Band (or 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.” LBP-02-08, at 37.

On March 7, 2002, this Commission stayed the Board’s decision, granted the Band’s Motion for Directed Consideration, and invited “the Bureau of Indian Affairs to file an *amicus curiae* brief in this case no later than April 15, 2002.” CLI-02-08. This brief is respectfully submitted in response to that invitation.

## ARGUMENT

### **1. The Executive Order on Environmental Justice Cannot Grant the Federal Government Authority to Interfere in a Tribal Government’s Management of its Own Internal Affairs.**

The crux of the Board’s decision is that, in spite of the federal government’s lack of authority to interfere in internal tribal operations, the Executive Order on environmental justice somehow trumps longstanding Supreme Court case law, Congressional authority, and more recent Executive Orders,<sup>1</sup> and allows the Commission to micro-manage the distribution by a sovereign government of its funds to its members. The Executive Order cannot allow such interference as a matter of law, nor would such interference be consistent with its purpose.

Under Article I, Section 8, of the Constitution, Congress has sole authority to “regulate Commerce . . . with the Indian tribes.” Thus, Congress has plenary power over

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<sup>1</sup>For example, Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”, §§ 2(b) and (c) (November 6, 2000). *See also*, Memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments”, 59 Fed. Reg. 22951 (1994).



the relationship between the federal government and Indian tribes, and can limit, modify, or eliminate tribal self-government. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), and cases cited therein. The Executive Order on environmental justice, like many executive orders, is not founded specifically on an Act of Congress, nor, of course, is it an Act of Congress. Therefore, it cannot have the effect wished by the Board, of modifying tribal self-government to allow the Board to intrude into internal tribal financial affairs. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (use of Executive Order to regulate interstate commerce by seizing steel mills unconstitutional).

In fact, the Executive Order is not intended, by its terms, to alter the relationship between the federal government and sovereign tribal governments. The Commission reminded the Board earlier in this case that “President Clinton’s executive order stated expressly that it created no new legal rights or remedies; accordingly, it imposed no legal requirements on the Commission. Its purpose was merely to underscore certain provisions of existing law.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 35-36 (1998), *citing Louisiana Energy Services* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 102 (1998) (quotation marks omitted). The Commission stated at that time that “the only ‘existing law’ applicable to the environmental justice issues in this proceeding is the National Environmental Policy Act (NEPA).” CLI-98-13, 48 NRC at 36. Because the allegations of misappropriation of funds were not before the Board (or the Commission) at that time, that was a reasonable statement. The same principle, however, applies to the “existing law” concerning the

relationship of the federal government to Indian tribal governments. The Executive Order cannot (and does not) grant a remedy, i.e., interference by a federal agency with internal tribal financial matters, that is not otherwise available under existing law.

Furthermore, the Executive Order is not meant to abrogate the existing government-to-government relationship between the federal government and Indian tribes (in part because, as noted above, it cannot do so). Under Section 6-606 of the Executive Order, “[e]ach Federal agency responsibility set forth under this order shall apply equally to Native American programs.” The Council on Environmental Quality’s *Environmental Justice Guidance under the National Environmental Policy Act* (1997) (“*CEQ Guidance*”) (cited with approval by the Commission in both CLI-98-3 and CLI-98-13, *supra*), defines “Native American Programs” as including “those Federal programs designed to serve Indian Tribes or individual Indians, recognizing that such programs are to be guided, as appropriate, by the government-to-government relationship, the Federal trust responsibility, and the role of tribes as governments within the Federal system.” *CEQ Guidance*, at 34 (emphasis added). The action that the Board proposes to take under the guise of the Executive Order is not “guided . . . by the government-to-government relationship [or] the role of tribes as governments within the Federal system;” it is directly contrary to that relationship. The Board’s effort in this case to investigate the internal financial operations of a sovereign tribal government is “misplaced,” *Louisiana Energy Services*, CLI-98-3, 47 NRC at 102, and contrary to the Executive Order it is meant to enforce.

## **2. Absent an Act of Congress, the United States Government must Deal with Indian Tribes on a Government-to-Government Basis**

The leading case on the role of the federal government in matters of internal tribal government affairs is *Martinez, supra*. *Martinez* was brought by female members of the Pueblo to challenge membership criteria of the Pueblo that allegedly discriminated on the basis of both sex and ancestry in violation of the equal protection provision of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. § 1302(8). The Supreme Court was therefore faced with the situation where some people were allegedly being deprived of the benefits of tribal membership, similar to the allegations made by OGD in this case. The Court first reviewed the sovereign nature of tribal governments, and the rule that “Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.” 436 U.S. at 56. The Court noted that:

Although Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief in [another section of ICRA], a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.

436 U.S. at 60 (citations omitted). The Court did not find such an indication of legislative intent, and, instead, ruled that, “[g]iven the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.” 436 U.S. at 72 n.32. The Supreme Court therefore found that, while Congress had

required in the ICRA that tribal governments protect the rights of individuals, it had deliberately not provided federal courts or administrative agencies with jurisdiction to intervene in internal tribal governmental matters, even to investigate allegations of discrimination. Similarly, in this case, there is no statute that would grant the federal government the authority to undertake the kind of review in which the Board wishes to engage, and the Commission should refrain from intervening in internal financial matters of the Band's government.

While the Board recognized the applicability of *Martinez*, it suggested that two Tenth Circuit decisions “recognized that in some ‘special situations’ the need for agency action may prevail over the desirability of allowing tribal self-governance.” LBP-02-08 at 16. No such “special situation” is applicable to this case. The two cases cited by the Board are *Wheeler v. United States Department of the Interior*, 811 F.2d 549 (10<sup>th</sup> Cir. 1987), and *Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457 (10<sup>th</sup> Cir. 1989), both involving election disputes. The “special situations” mentioned by the Tenth Circuit in those cases concern areas where (1) the BIA, in order to provide services or to approve a transaction, needs to know what tribal government to deal with, or (2) the tribe has specifically invited the BIA by its constitution or statutes to take a role in its governance. The “special situations” mentioned by the Board only occur in dictum in the *Wheeler* and

*Nero* decisions and are inapplicable to this case, and therefore should be afforded no weight by the Commission.<sup>2</sup>

At bottom, OGD's allegations are against the Band's government itself. This is not a case where an action of an applicant for a license would have an impact on a group of people. These allegations are, rather, part of a continuing dispute between factions in the Band for control, a dispute that has resulted so far in three federal court cases and an administrative appeal. *See*, Intervenor Skull Valley Band's Opening Brief, at 4-5 and 15-17. As such, the OGD allegations and dispute present a non-justiciable political question over which the Board has no jurisdiction. *Potts v. Bruce*, 533 F.2d 527, 529-530 (10<sup>th</sup> Cir. 1976).

### **3. The Commission Has No Authority to Investigate the Band's Internal Financial Operations**

In *Vizenor v. Babbitt*, 927 F. Supp. 1193 (D. Minn. 1996), the plaintiffs asked the BIA to appoint an independent trustee to oversee the operations of the White Earth and Leech Lake Bands of Chippewa Indians, with the authority to recapture all monies

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<sup>2</sup>The Board cited *Nero* for a holding that intervention may be permissible if no tribal forum for resolution of disputes exists. LBP-02-08 at 16. To the contrary, the holding of *Nero* specifically follows *Wheeler*, which states that "without deciding whether the Department should become involved when a tribal forum is not available, we hold that when a tribal forum exists for resolving a tribal election dispute, the Department must respect the tribe's right to self-government and, thus, has no authority to interfere." 811 F.2d at 553 (emphasis added). To the extent that a tribal forum is required, moreover, it does not have to be a tribal court. The Supreme Court in *Martinez* referred to the Pueblo's Tribal Council and noted that "[n]onjudicial tribal institutions have also been recognized as competent law-applying bodies." 436 U.S. at 66 (citation and footnote omitted). The General Council of the Band could likewise be such a forum.

obtained unlawfully by tribal leaders and the power to supervise the Bands' business matters and upcoming tribal elections. The monies at issue in *Vizenor* were proceeds from the tribal casino that the tribal leaders had allegedly misappropriated. The United States District Court for the District of Minnesota noted that the plaintiffs did "not simply request a new election, which would by itself pose very serious sovereignty issues, but seek pervasive federal government oversight of the Bands' essential governmental functions. A more invasive action could hardly be imagined." 927 F. Supp. at 1203. The court then ruled that, since the funds at issue were not being held by the United States in trust for the tribes, there is no trust responsibility owed by the BIA to the tribes for management of those funds, and so the BIA had no authority to investigate the internal financial operations of the sovereign tribal government. *Id.* See also, *Smith v. Babbitt*, 100 F.3d 558 (8th Cir. 1996) (dispute over distribution of gaming proceeds is issue for tribe and its courts). In fact, the *Vizenor* court ruled that the ultimate remedy for the allegations of misappropriation of funds lay within the Tribes themselves, to recall the leaders in accordance with Tribal procedures or to "throw the rascals out", again in accordance with Tribal procedures. 927 F. Supp. at 1204-05.

The proper authority for any investigation into the misappropriation of funds by a tribal government is the Federal Bureau of Investigation. Such misappropriation can be a federal crime under 18 U.S.C. § 1163. The tribal leaders in *Vizenor* had actually been indicted by a federal grand jury for embezzlement. In this case, there are only the allegations that have been made by OGD for some time. According to newspaper reports,

the Federal Bureau of Investigation is investigating those allegations. Judy Fahys, *Feds Demand Goshutes Open Financial Books on N-Waste Deal*, Salt Lake Tribune (March 14, 2002) (copy attached). To the extent that the allegedly misappropriated funds are federal funds, the Interior Office of the Inspector General would also have jurisdiction to investigate under the Inspector General Act of 1978, 5 U.S.C. Appendix 3, *et seq.*

### CONCLUSION

For all of the above reasons, the BIA recommends that the Commission reverse the Board's decision in LBP-02-08, and rule that the Commission, and therefore the Board, has no jurisdiction, under the Executive Order or otherwise, to investigate the internal operations of a tribal government, including misappropriation of funds.

Dated 4/15/02

Respectfully submitted,



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## Feds Demand Goshutes Open Financial Books on N-Waste Deal

Thursday, March  
14, 2002

BY JUDY FAHYS  
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TRIBUNE

Federal prosecutors seeking evidence for a grand jury probe are demanding that Skull Valley Goshute leaders turn over financial records on their deal for a \$3.1 billion facility to store depleted nuclear fuel, including accounts of how project money has been spent.



Goshute Chairman Leon Bear says records on the N-waste deal should be out of the federal government's reach unless the tribal council decides otherwise.

(Tribune file photo)



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FBI agents handed the subpoenas to embattled tribal Chairman Leon Bear and disputed tribal Secretary Rex Allen on Sept. 12 as they left a Salt Lake City meeting. Investigators demanded documents "relating to Private Fuel Storage and the Skull Valley Band of Goshute Indians," including "contracts, correspondence, checks and copies thereof, bank records, deposit slips, records of receipt and disbursement of funds," according to one of the subpoenas.

Officials would not specify who is being investigated or what the crime might be. Said the FBI's Kevin R. Eaton: "We don't comment on pending investigations."

But the subpoenas were issued three months after Bear critics Sammy Blackbear and Margene Bullcreek aired allegations of corruption and abuse of authority in statements to federal regulators. The tribe has been fractured into three camps by the nuclear waste deal, with Bear leading supporters, Bullcreek the opponents and Allen representing those who want stronger oversight of the nuclear facility.

The Tribune confirmed this week the delivery of the subpoenas.

Allen, who is in a dispute with Bear over whether he continues to be tribal secretary, said he turned over papers in his possession within 24 hours. Bear said he did not, although he administers tribal



monies, including the \$1.4 million Private Fuel Storage reportedly had paid the 127-member band as of February 2001.

"They have got to realize the tribe is a sovereign nation, and they can't just come in and ask for documents," Bear said on Wednesday, adding that he needs the tribal council's permission to disclose the financial information.

Bear, Allen and Allen's sister, Mary Apadaca, signed the 1997 lease that allows the utilities, called Private Fuel Storage, to apply for a federal permit to store power-plant waste on a 125-acre concrete pad on the reservation, about 45 miles southwest of Salt Lake City. The proposed facility, big enough to hold storage casks containing all the spent fuel produced nationwide in four decades of commercial nuclear power, is opposed by the state of Utah and some tribal members.

Under fierce pressure to help utilities get rid of the waste now stored at more than 60 U.S. sites, the U.S. Nuclear Regulatory Commission (NRC) is scheduled to make a decision on the Goshute-Private Fuel Storage facility this fall.

Last week, the commission blocked a request for financial information by the Atomic Safety and Licensing Board, which reports to NRC. The licensing panel asked tribal leaders in February for an accounting of project money as part of an inquiry into allegations that the project's benefits have not been shared equally and that leaders have used it instead to reward their supporters and punish opponents.

The NRC agreed with its staff and Bear's attorneys, who said the agencies had no business delving into tribal affairs. The agency is not expected to decide for at least a month whether to uphold the licensing board's order for the disclosure of financial information.

Apadaca and Allen said they would welcome the scrutiny. Allen's questions about the handling of the Private Fuel Storage deal prompted Bear to oust him from his post as tribal council secretary last fall. Allen insists he is still secretary, while Bear recognizes another tribal member.

"We want the NRC to review all that," said Allen of the Private Fuel Storage money and the charges of self-dealing. "We want the finances accounted for."

Although Bear said tribal members have open access to the tribe's books, Allen said tribal members failed to get leaders to answer their questions. Tribal members passed a resolution last year demanding that Private Fuel Storage money be audited and that members receive equal benefits from the storage project.

"Under the Indian Civil Rights Act, we should be paid equally -- not one family \$7,000, one family getting \$5,000, one family getting \$2,000 and one family getting nothing," said Apadaca, who now uses the name Allen. "NRC should sit there and look at it."

Allegations that Bear and his current administration have enriched themselves and their supporters with Private Fuel Storage money have been rampant at least since last winter.

Scott Northard, a Private Fuel Storage project manager, sparked an uproar at a meeting with tribal members on Feb. 3 last year when he said it was not possible to scrap the waste facility contract, as one Goshute proposed, according to several participants. The consortium had already paid \$1.4 million for the lease, Northard reportedly said.

"It became very contentious," said Fred Payne, a veteran consultant who negotiates mining contracts for tribes.

Later, Payne talked with the members over lunch and he recalled, "They kept trying to get me to help them find out what happened to the money."

The money question also is a factor in a leadership dispute in federal court.

Bear has rejected an Aug. 25 vote that ousted his administration, and has refused to recognize the Sept. 22 election of Blackbear, Marlinda Moon and Miranda Wash, all of whom pushed for the licensing board's help in examining the corruption and mismanagement allegations.

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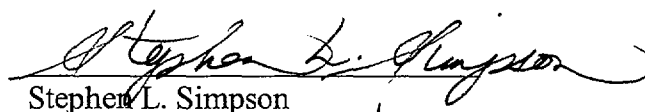
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**CERTIFICATE OF SERVICE**

I hereby certify that on April 15, 2002, I served a copy of the enclosed Notice of Appearance and Brief of *Amicus Curiae* Bureau of Indian Affairs in the Commission's Interlocutory Review of the Licensing Board's Decision in LBP-02-08 Concerning Contention OGD O (Environmental Justice) by mailing a copy, postage prepaid, certified mail, (unless otherwise noted) to the following:

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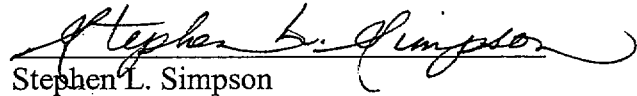
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