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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	Docket No. 72-22-ISFSI
PRIVATE FUELS STORAGE, L.L.C.	)	
	)	ASLBP No. 97-732-02-ISFI
(Independent Spent Fuel Storage Installation)	)	
	)	

OHNGO GAUDADEH DEVIA ("OGD") BRIEF SEEKING AFFIRMANCE OF THE FEBRUARY 22, 2002 MEMORANDUM AND ORDER (LBP-02-08) OF THE ATOMIC SAFETY AND LICENSING BOARD CONCERNING OGD CONTENTION O (ENVIRONMENTAL JUSTICE)

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I. INTRODUCTION

In the Atomic Safety Licensing Board's February 22, 2002 Memorandum and Order (LBP-02-08), the Board correctly recognized that Ohngo Gaudadeh Devia's ("OGD") Contention O (Environmental Justice) necessarily presented the Board, and now the Commission, with serious disputes among members of the Skull Valley Band of the Goshute Indians over this proposed NRC licensing action and over certain land lease income, and the application of two important federal doctrines that, at first glance, threaten to conflict with each other. On the one hand, courts have embraced the general rule that matters of internal tribal governance are largely beyond inquiry by federal and state authorities,

which must defer to a tribal government's creation of its own substantive laws to assist in tribal governance and its enforcement of those laws in tribal forums. On the other hand, an Executive Order issued by President Clinton in 1994, and endorsed by the Nuclear Regulatory Commission, reminds each federal agency to ensure that its actions -- including awarding licenses for private projects -- are consistent with norms of "environmental justice" that protect disadvantaged populations.

The Board's Order correctly determined that the disclosure of certain financial information relative to the lease by the Applicant and the Band is absolutely necessary in order to resolve OGD Contention O. Without such disclosures, the issue of environmental justice cannot be resolved by summary disposition or otherwise. The Applicant and the Band, both voluntarily approaching and submitting to the jurisdiction of the Board and the Commission, cannot pursue a license for the proposed facility while simultaneously refusing to provide information necessary to resolve what is in OGD's estimation the most important contention at issue in this proceeding.

II. BACKGROUND

In 1997, a consortium of electric utility operators of nuclear power reactors known as Private Fuel Storage, LLC ("PFS" or the "Applicant"), applied to the Nuclear Regulatory Commission for a license for an off-site, away from reactor, facility for spent fuel storage. The proposed storage facility would include 4,000 concrete-encased casks, each nearly twenty (20) feet high

and eleven (11) feet in diameter that would potentially hold 40,000 metric tons of spent nuclear reactor fuel. In pursuing its goal of finding a "temporary" storage site for a substantial portion of the country's nuclear waste, PFS entered into a business lease with the executive committee of the Skull Valley Band of Goshute Indians[1] to construct and operate the storage facility on the Band's Reservation, which is approximately fifty (50) miles from Salt Lake City, Utah. The general members of the Band, including members of OGD, have never been allowed to see the terms of the lease and they remain a secret.

Because leases of tribal lands held in trust by the United States require approval of the United States, through the Bureau of Indian Affairs ("BIA"), the lease was, after a remarkably short review, approved by the BIA conditioned on the NRC licensing the proposed facility and appropriate environmental impact review. Following PFS's application to NRC for a license, members of OGD petitioned to intervene in this proceeding to oppose the licensing of the proposed PFS facility. On November 24, 1997, OGD filed a number of specific challenges in the form of "contentions" called for by NRC rules. OGD's sixteen (16) contentions, lettered A through P, have been disposed of with the sole exception of OGD Contention O (Environmental Justice). See LBP-98-7, 47 NRC 142, reconsideration granted in part and

[1] It is noted that a tribal leadership dispute among Band members persists and the legitimacy of the executive committee that signed the PFS lease remains in question.

denied in part, LBP-98-10, 47 NRC 288, 298-99, aff'd on other grounds, CLI-98-13, 49 NRC 26 (1998).

Members of the Band, including members of OGD, have opposed the lease on a variety of grounds, including those set forth in OGD Contention O, (Environmental Justice). As originally filed, OGD Contention O presented six specific grounds that it said provided a basis for its claim. The Board rejected three of those bases, leaving for further litigation the three "disparate impact matters outlined in bases one, five, and six." See LPB-98-7, 47 NRC at 233. The remaining three bases involve: the disparate economic and sociological impacts of minority and low-income populations compared to the overall population (basis 1); the cumulative impacts of the PFS facility coupled with the impacts from other hazardous waste facilities surrounding the Reservation (basis 5); and the adverse effects on property values stemming from the proposed facility (basis 6).

Executive Order 12898, issued by President Clinton in 1994, directed all agencies in the executive branch to examine and conduct their activities in a manner that guards against environmental injustice. See 3 C.F.R. 859 (1995). The Order directs every federal agency to "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 . . . ." Executive Order 12898 at § 1-101. This

Commission has adopted the Order's principles and has agreed to abide by them. See Letter from NRC Chairman to President Clinton, March 31, 1994. The NRC has a duty to identify, weigh, and mitigate "disparate environmental impacts" upon disadvantaged groups. See Louisiana Energy Services, CLI-98-3, 47 NRC 77 (1998) (LES).

In June of 2000 in this licensing proceeding, the Staff issued a draft environmental impact statement (DEIS) for the proposed PFS facility. The Staff concluded therein that the proposed facility passed environmental impact review because the negative environmental impacts of the proposed facility on the Reservation (such as noise or visual impact) would be more than offset by the environmental benefits that would flow to Band members as a result of lease payments to Band members and the consequent increase in Band members' standard of living. See DEIS §§ 4.5.2.8 (at 4-36) and 6.2.1.2 (at 6-31).

On May 25, 2001, PFS moved for summary disposition of OGD Contention O, arguing that the undisputed facts justified rejecting OGD's environmental justice contention without giving OGD the opportunity to present its case at a hearing. On June 28, 2001, OGD responded in opposition to PFS's motion for summary disposition. With the response, ODG filed a sworn declaration of Sammy Blackbear, wherein Mr. Blackbear identified himself as the Band's Chairman, based on a dispute election Mr. Blackbear claims unseated Mr. Bear.

As the Board recognized:

> Throughout the declaration were detailed allegations of a years-long course of conduct by Mr. Bear "and his cohorts" that Mr. Blackbear characterized (Decl. at 5) as a "systematic, longstanding, blatant pattern of corruption, oppression and abuse." Whatever the legitimacy of that characterization, or of Mr. Blackbear's claim to be the Tribe's legitimate leader, from our perspective the key feature of the allegations is the claim that the Applicant's lease payments, intended for the Band, have been appropriated by Mr. Bear exclusively for his personal use and that of his allies, and withheld from any Tribal members who opposed the project.

(Board Order at 10 (citing Blackbear Decl. at 10-11) (emphasis in original).

III. ARGUMENT

While OGD acknowledges, as did the Board, that matters of tribal governance are internal matters and beyond the authority and control of state authority and, in most cases federal authority, the Board's Order does not improperly infringe on the Band's sovereignty for two principle reasons. First, in this case the Band voluntarily intervened in this proceeding to support the issuance of a PFS license and voluntarily submitted itself to the jurisdiction of the Atomic Safety Licensing Board and the Nuclear Regulatory Commission. In other words, the Band joined PFS's effort to obtain an NRC license for a tribal business venture with PFS, and therefore submitted to the authority of the Board and the Commission. Second, the usual rule against state and federal involvement does not override the Board's order for the production of certain Band and PFS financial information because the information is critically necessary to determine the legality of issuing a license to the proposed PFS

facility. Without disclosure of the evidence needed by the Board to resolve OGD Contention O, the Board is unable to resolve critical issues of fact in dispute and accordingly cannot summarily resolve OGD Contention O.

At the heart of OGD Contention O is the assertion that the negative environmental impacts on the Band members and the Reservation are not outweighed by the financial benefits to the Band members. The record exposes the stark factual dispute concerning the lack of financial benefits to many members of the Band because of corruption and political differences. PFS and the Band ask the Commission to dismiss OGD Contention O in the face of disputed issues of fact, the resolution of which require the production of certain information at a hearing. The Board, which has carefully examined the motion to summarily dispose of OGD Contention O, has correctly decided that the contention simply cannot be summarily decided without the production of certain financial information.

In any event, the arguments that cite principles of federal nonintervention into matters of tribal governance do not apply to PFS disclosures ordered by the Board. Moreover, even if the Commission determines that the financial disclosures ordered by the Board are unnecessary, a hearing is still required to resolve undisputed and disputed issues of fact regarding OGD Contention O. The Commission should affirm the Board's order and allow OGD to present its case at a hearing.

A. The Board May Lawfully Inquire Into Internal Financial Matters of the Skull Valley Band Because The Federal Government's Trust Responsibility To Indian Tribes Combined With The Federal Government's Interest In Regulating The Storage Of Spent Nuclear Fuel Outweighs The General Policy Of Noninterference In Matters Of Internal Tribal Self-Government.

In its Memorandum and Order, the Board correctly observed that the controversy over the application for an Independent Spent Fuel Storage Installation presented it with the task of balancing apparently conflicting federal doctrines. It framed the issue as balancing the federal government's interest in non-interference with matters of tribal self-government, against the federal government's interest in ensuring that its actions are consistent with norms of environmental justice. Thus framed, the issue is incomplete. The weight of additional principles of law must be added to the scales before the Commission assumes the task of balancing the apparently conflicting federal interests.

The Board correctly set one side of the scales by considering the weight of the well-established principle of deference to a Tribal government's ability to make its own laws and be ruled by them. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Williams v. Lee, 358 U.S. 217 (1959). The weight of this principle is not absolute, however. The sovereignty that Indian tribes retain is of a unique and limited character; it exists only at the sufferance of Congress and is subject to complete defeasance. *See* United States v.

Wheeler,1079, 55 L.Ed.2d 303 (1978); *see, e.g.*, Nero v. Cherokee Nation of Oklahoma, 892 F.2d 1457, 1465 (10th Cir. 1989).

On the other side of the scales is the weight of three important principles. As the Board pointed out, the federal government has an interest in ensuring that the actions of its agencies comport with norms of environmental justice. *See* Exec. Order 12898 (1994). There are at least two other federal interests that must also be considered. The federal government's trust responsibility to Indian tribes, and the federal government's general interest in regulating away from reactor storage of nuclear waste must be included in the balancing analysis. Each of these federal interests exists independent of the Executive Order in question and gives rise to certain obligations, along with the authority to carry out appurtenant duties.

It is undisputed that the federal government has a distinctive obligation of trust in its dealings with "dependent and sometimes exploited" Tribes. *See* Cherokee Nation v. State of Georgia, 5 Pet. 1, 8 L.Ed. 25; United States v. Kagama, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228; Choctaw Nation v. United States, 119 U.S. 1, 7 S.Ct. 75, 30 L.Ed. 306; United States v. Pelican, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676; United States v. Creek Nation, 295 U.S. 103, 55 S.Ct. 681, 79 L.Ed. 1331. It is well-settled that "the standard of duty for the United States as trustee for Indians is not mere 'reasonableness,' but the highest fiduciary standards. See, e. g., United States v. Mason, 412 U.S. 391, 398, 93

S.Ct. 2202, 2207, 37 L.Ed.2d 22 (1973)." (other citations omitted); *see also* Coast Indian Community v. United States, 550 F.2d 639, 652-53, 213 Ct.Cl. 129, 153 (1977).[2]

The trust responsibility of the federal government outweighs the policy of non-interference with tribal self-governance in certain situations. In Seminole Nation v. U.S., 316 U.S. 286, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942), the United States was obligated by treaty to pay annuities to members of the Seminole Nation. Instead, the Government transferred the money to the Seminole General Council. Members of the Tribe argued that because the Seminole General Council had misappropriated the money, the Government had not satisfied its obligation to pay the individual members of the Tribe. The Government took the position that it complied with the will of the General Council, and by doing so it discharged its obligation to the Tribe. "The

[2] In cases where the federal government, or an agency thereof, stands to benefit from a particular decision or outcome, the nature of its trust obligations changes. In Ottawa Tribe v. United States, 166 Ct. Cl. 373, 380, cert. denied, 379 U.S. 929, 85 S.Ct. 324, 13 L.Ed.2d 341 (1964), the court discussed the standards applicable to a self-dealing trustee (a corrupt Indian agent committed a breach of trust against the Tribe), pointing out that: "The law requires what is called uberrima fides, the highest good faith, in matters of this kind. There can be no shading. This is not a sudden turn in the law. It is based upon centuries of human experience. The principle has been a gradual growth. It recognizes the frailties of human nature and curtains off any possibility of personal profit from such a confidential relationship. There is thus a basic reason for applying this principle of law. It has been found, through these years of revealing experience and continuing effort to perfect the law, that the only practical way to assure proper operation is to foreclose any possibility of the trusted representative's making a personal profit out of transactions that are linked directly or indirectly to such a relationship."

argument for the Government, however sound it might otherwise be, fail[ed] to recognize the impact of certain equitable considerations and the effect of the fiduciary duty of the Government to its Indian wards." *Id.* at 295. In that case the government had "indications" and "warnings" that the chiefs were in the habit of taking out whatever amount they chose from the annuities for the purpose of perpetuating their government. *See id.* at 300. Such information was sufficient to require further investigation and specific findings on the issue, in spite of respect for tribal governance matters. Speaking of the indications, the Court was of the opinion that "they were sufficient to justify remanding this branch of the case to the Court of Claims for further findings, in the light of such evidence as may be brought to its attention." *See id.* at 307.

The record before the Board and the Commission clearly evinces "warnings" and "indications" of corruption, financial misdealing, etc., similar to those in Seminole Nation. The federal government's interest in not encroaching on matters of self-governance does not excuse it from its trust responsibility to investigate or permit proof on such warnings in the process of approving a license for a nation's largest away from reactor waste storage facility. The fact that the government may have competing interests does not excuse it from prudently exercising its trust obligations. *See* Navajo Nation v. United States, 263 F.3d 1325, 1332 (Fed. Cir. 2001).

The federal government's interest in respecting tribal governance matters is not absolute. It must also be weighed against the federal government's

interest in regulating other matters. For example, respect for a tribe's ability to exercise its treaty rights gives even to a state's interest in conserving fish species. In Puyallup Tribe, Inc., Dep't of Game of State of Washington, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977), the Court observed that fishing rights do not persist down to the very last steelhead in the river. "Rights can be controlled by the need to conserve a species." *Id.* at 433 U.S. 176. Rights of a tribe, based on a treaty or a federal policy favoring tribal self-governance, can give way to certain conflicting interests.

In this case, the federal government has an interest in regulating the storage of spent nuclear fuel, arising independent of Executive Order 12898, as demonstrated by the very existence of the Commission and federal statute. Such an interest must be balanced against the government's interest in encouraging tribal self-governance, especially in light of the specific Executive branch directive to avoid environmental injustice. Certainly, in the many cases like *Puyallup*, where a tribe's right to exercise self-government is found to be subordinate to a contrary interest, the federal government considered, then subordinated its interest in not interfering with tribal self-government.

Additionally, the federal government has manifested its willingness to intrude upon tribal self-governance matters in many areas where Congress has issued legislation requiring disclosure of tribal financial matters. *See, e.g.*, Commercial Leasing Program, 25 U.S.C. § 415 *et seq.*; Leasing of Allotted Lands, 25 U.S.C. § 391 *et seq.* In fact, in many areas Congress has issued

legislation on matters which are at the heart of tribal self-governance, *see, e.g.*, Major Crimes Act, thus, demonstrating that the policy of tribal self-governance is not absolute.

The cases cited by those parties seeking reversal of the Board's decision certainly do not stand for the proposition that under no circumstance is a foray into matters of self-governance permitted. The main case relied upon by such parties, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), deals with a matter of true tribal self-governance, not a matter similar to the case at hand. Changing tribal laws governing membership in the tribe is not akin to inquiring into financial aspects of a proposed lease for a nuclear waste facility on a tribe's Reservation where the tribe voluntarily placed the issue before the federal government.

A straw-man which has been attacked by the parties seeking reversal of the Board decision is that this contention is merely an issue of warring factions of the tribe. Though members of OGD may disagree with the presently recognized Executive Committee, they stand before the Commission on the pure question of environmental justice, presenting evidence that the negative effects of the proposed facility are not outweighed by economic benefits. As the Board determined, additional information and a hearing is necessary to resolve this contention.

The federal government's trust responsibility to investigate and permit proof of indications of financial misdealing in light of the nature of the

proposed facility, and the federal government's independent interest in regulating the storage of nuclear waste, along with the specific Executive Order to avoid environmental injustice, outweighs the federal policy favoring tribal self-governance. Therefore, the Board's decision must be affirmed.

B. The General Rule Against Federal Agency Interference in Matters of Internal Tribal Governance Should Not Apply Where Information Within the Tribe's Control is Necessary to Resolving a Critical Issue of Concern Regarding the Legality of Issuing the License, and Where the Tribe Voluntarily Intervenes in the Proceeding Seeking the Licensing of a Private Spent Nuclear Fuel Storage Facility.

As discussed above and as the Board recognized, while there is a general policy against federal interference in matters of internal tribal governance, there may be situations where some level of federal intervention is justified by the federal government's trust responsibility to Indian tribes and important government interests that implicate matters of tribal governance. This licensing proceeding presents such a situation for two reasons. First, the Band voluntarily submitted itself to the jurisdiction of the Board and Commission by intervening in this proceeding in support of PFS obtaining a license for the proposed nuclear waste facility. Second, the federal government's strong interest in regulating the transportation and storage of spent nuclear fuel and need to obtain PFS and Band financial information to resolve disputed factual questions requires some intervention into Band financial dealings.

The law on matters of tribal governance does not preclude the Board from entertaining claims of deprivation of environmental justice where the tribal government voluntarily submits itself to the jurisdiction of the Nuclear Regulatory Commission and the Atomic Safety Licensing Board. The submission of lease information to the Board does not infringe unnecessarily on the ability of the Band to govern itself where the requested information is necessary to determine whether the sought-after license should be issued. In this case the Band was required to disclose to the BIA, and it is common practice for the BIA in considering whether to approve leases of tribal lands to require, the submission of detailed information in order to assure that approval is prudently given under the circumstances. See generally, 25 U.S.C. § 81.

While Indian tribes enjoy sovereign immunity from suit, such immunity can be abrogated by Congress or waived by the tribe. Both Supreme Court precedent and clear policy considerations "militate in favor of the tribe's power to consent to suit." United States v. Oregon, 657 F.2d 1009, 1014 (9th Cir. 1981) (citing Turner v. United States, 248 U.S. 354, 358 (1919); Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 173 (1977)). This right of an Indian tribe to consent to suit is consistent with the broad notion of Indian self-determination. A number of other courts have also accepted the premise that tribes may consent to suit. See Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 540 (10th Cir. 1980) (en banc), aff'd, 455 U.S. 130 (1982); Fontenelle v. Omaha Tribe of Nebraska, 430 F.2d 143, 147 (8th Cir. 1970); Maryland Cas.

Co. v. Citizens' Nat'l Bank, 361 F.2d 517, 520-21 (5th Cir.), cert. denied, 385 U.S. 918 (1966).

By voluntarily intervening in the NRC proceeding in support of the PFS license application, the Band subjected itself to the jurisdiction and fact-finding authority of the Board and the Commission. While it is true that participation in this administrative proceeding does not constitute a general waiver of tribal sovereign immunity, the Band has waived its immunity with respect to those issues necessary to determination of OGD Contention O. See, e.g., Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 773 (C.A.D.C. 1986) ("There can be no doubt that the [tribes'] voluntary intervention as party defendants was an express waiver of their right not to be joined in the . . . suit."); United States v. State of Oregon, 657 F.2d 1009, 1014 (9th Cir. 1981). "Unlike a situation where a tribe enters a suit as a plaintiff, anticipating that it can only improve or maintain its *status quo,* a tribe intervening as a defendant fully realizes that it might lose that which it already has--preserving its *status quo* is the whole point of the intervention. By so intervening, a party "renders itself 'vulnerable to complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party.'" Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 773 (C.A.D.C. 1986) (citing Schneider v. Dumbarton Developers, Inc., 767 F.2d 1007, 1017 (D.C. Cir. 1985) (quoting State of Oregon, 657 F.2d at 1014); see also District of Columbia v. MSPB, 762 F.2d 129, 132 (D.C. Cir. 1985); In re White, 139 F.3d

1268, 1271 (9th Cir. 1998) (In bankruptcy cases, filing of a proof of claim generally constitutes a waiver of sovereign immunity); McClendon v. United States, 885 F.2d 627, 630 (9th Cir. 1989) ("Initiation of a lawsuit necessarily establishes consent to the court's adjudication of the merits of that particular controversy. By initiating the 1972 action, the Tribe accepted the risk that it would be bound by an adverse determination of ownership of the disputed land. However, the 'terms of [a sovereign's] consent to be sued in any court define that court's jurisdiction to entertain the suit.") (citing Jicarilla Apache Tribe v. Hodel, 821 F.2d 537, 539 (10th Cir. 1987) (quoting United States v. Testan, 424 U.S. 392, 399 (1976))). Thus, the Band has consented to the jurisdictional authority of the Board and Commission by intervening in this action, and must comply with disclosure orders of the Board with respect to those issues related to the Band's intervention—in this case, financial information relating to the PFS lease.

In an NRC proceeding, a party is entitled to summary disposition if the presiding officer determines that there exists "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." 10 C.F.R. § 2.749(d). When reviewing a motion for summary disposition, the Commission has used standards similar to those used by the federal courts when ruling on motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03

(1993). Consistent with Rule 56, the moving party bears the initial burden of showing that no genuine issue as to any material fact exists, which the party must do by a required statement of material facts and any supporting documentation submitted with the requisite motion. See Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation) LBP-99-32,50 NRC 155, 158 (1999). The opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting documentation, or the facts will be deemed admitted. See CLI-93-22, 38 NRC at 102-03. When responding, the opposing party may not rely upon mere allegations or denials but must submit "specific facts showing that there is a genuine issue of fact." [footnote omitted] 10 C.F.R. §2.749(b); see also LBP-01-30, 54 NRC 231, 235 (2001). In this case PFS is the moving party, and OGD is the non-moving party and OGD Contention O is the subject of the summary disposition motion.

In June of 2000, the Staff issued a draft environmental impact statement (DEIS) for the proposed PFS facility. The DEIS concluded that the proposed facility passed environmental impact review because the negative environmental impacts of the proposed facility on the Reservation (such as noise or visual impact) would be more than offset by the environmental benefits that would flow to Band members as a result of lease payments to Band members and the consequent increase in Band members' standard of living. See DEIS §§ 4.5.2.8 (at 4-36) and 6.2.1.2 (at 6-31).

The Staff's DEIS conclusion and finding that negative environmental impacts would be offset by financial benefits mistakenly presupposes that Band members have been and will continue to receive equal benefits because of the lease. As the Board recognized, OGD has presented facts that dispute the Staff's uninformed assumption that all Band members are receiving financial benefits of the PFS lease. These issues of fact will remain in dispute unless the Commission affirms the Board's order for production of the PFS and Band evidence outlined by the Board. (Board Order at 36-37).

In this case the Board correctly observed that "under [NRC] rules, [OGD's claims of deprivation of environmental justice] must go to hearing, for they cannot now be resolved on the competing assertions of Band members holding very different beliefs about the impact of the project on their individual situations, including the impact of the concomitant lease income that was anticipated would be applied—but may not be being used—to relieve their poverty." (Board Order at 3-4) (emphasis added). As the Board recognized, there are important issues of fact in dispute that require a hearing. [3]

The Board correctly recognized that "[a]t a minimum, and for obvious reasons, it seems certain evidence will be relevant to [the Board's determination of OGD Contention O]." (Board Order at 36). This information

[3] It is noteworthy that OGD's response to PFS's motion for summary disposition, namely Mr. Blackbear's declaration, asserts a number of undisputed facts that stand uncontroverted and foreclose summary disposition. (Board Order at 35).

includes: 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. Similarly relevant would be 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. (Board Order at 37).

Because there are competing claims of deprivation of environmental justice that cannot be resolved without a hearing, the Commission must either permit the Board to hold a hearing or decline to license the PFS facility. The financial information within the Band's control is absolutely necessary to resolve issues of fact in dispute with respect to OGD Contention O. Without such information, OGD's environmental justice contention cannot be fairly adjudicated, and the PFS license application must be denied. The resistance of PFS and the Band to turning over the information ordered by the Board is analogous to cases where an action must be dismissed because of the tribunal's inability to exercise jurisdiction over an Indian tribe because of sovereign immunity. See Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 776-77 (C.A.D.C. 1986) (stating that if the tribe is an indispensable party,

and cannot be joined due to its immunity, the claim may not proceed) (citing Lomayaktewa v. Hathaway, 520 F.2d 1324 (9th Cir. 1975) (dismissing suit because tribe was indispensable party); Tewa Tesuque v. Morton, 498 F.2d 240 (10th Cir. 1974)); see also Niagra Mohawk Power Corp. v. Tonawanda Band of Seneca Indians, 862 F.Supp. 995 (W.D.N.Y. 1994) (dismissing counterclaim due to inability to join tribe as indispensable party); In re Nat'l Cattle Congress, 247 B.R. 259, 268-69 (Bkrtcy. N.D. Iowa 2000) ("because continuing to maintain proof of claim in this case would contradict the tribe's assertion of immunity, tribe would be required to elect between withdrawing its proof of claim or asserting an unqualified claim by removing the attached waiver disclaimer.")

It follows that, because the information of the Band is indispensable and necessary to adjudicating OGD Contention O, and if the Commission determines that Band information must not be disclosed pursuant to the Board's Order, the licensing proceeding cannot continue and the license application should be rejected.

C. Even if the Commission Adopts the Position that the Board's Order Violates Principles of Federal Indian Law with Respect to Band Financial Disclosures, These Principles do not Apply to the Board's Order for PFS to Make Certain Financial Information Available to Other Affected Parties.

Should the Commission determine that principles of federal Indian law prohibit the Board from ordering the Band to produce tribal financial

information, the Commission should not extend the prohibition to the Board order for production of financial information by PFS. It would be a novel proposition indeed to determine that principles of tribal sovereignty apply to non-tribal limited liability corporations simply by virtue of business contacts. The Commission should affirm the Board's order commanding PFS to disclose: (1) a 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. (Board Order at 37).

D. Even if the Commission determines that particular financial information of the Band is not subject to disclosure, a hearing is necessary to resolve remaining issues of fact in dispute.

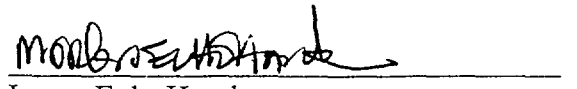
In the event the Commission determines that PFS and the Band are not obligated to produce financial information outlined by the Board and relevant to OGD Contention O, the facts put at issue by OGD's environmental contention, including Mr. Blackbear's Declaration, remain in dispute and must be resolved through a hearing process. (Board Order at 35-37). Even without the critical information necessary to resolve OGD's environmental justice contention, certain facts submitted by OGD remain undisputed, (Board Order at 35) (citing Blackbear Decl. at ¶ 53.d, p. 10; ¶ 258, p. 54; ¶ 283.c, p. 58; ¶ 300, p. 61; ¶ 327, p. 64; ¶ 334, p. 65; ¶¶ 354-55, pp. 6-68; ¶ 53.g, p. 12; ¶¶ 275-76, p. 57; ¶¶ 340-47, pp. 66-67; ¶¶ 375-76, p. 70), and, as the Board recognized,

there are other factual issues in dispute that require a hearing for resolution. (Board Order at 36) ("The Blackbear declaration covers many other subjects, including the disputes over elections, the violation of Tribal norms, the relative standing of the protagonists, the perception of threats, and other matters. Having found that a hearing is required, we need not delineate all these matters.").

IV. CONCLUSION

For the reasons outlined above, the Commission should affirm the Atomic Safety Licensing Board's February 22, 2002 Order, LBP-02-08. Reversing the Board's Order will permit the continuation of grossly disparate and unequal treatment of Skull Valley Band members, leaving many members impoverished while others enjoy the financial benefits of the PFS lease. As the Board has acknowledged, the years since the PFS lease was signed by the Leon Bear executive committee have been filled with challenges to the officers' authority, status, and actions; calls for, conduct of, and disputes over new elections; demands for information about the lease terms; battles for control of the Band's offices and bank accounts; and even attempts to replace the Band's legal counsel involuntarily. Unless the PFS lease financial information is disclosed by PFS and the Band in accordance with the Board's Order, these sharp disputes will persist and intensify as these proceedings march towards the licensing of what would be the nation's largest nuclear waste storage facility in history.

Respectfully submitted,



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I hereby certify that on this 30th day of May, 2002, I caused to be served a true and correct copy of the foregoing by United States Mail, First Class and conforming copies by electronic mail, unless otherwise noted, and addressed to the following:

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