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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.	)	Docket No. 72-22
	)	
(Private Fuel Storage Facility)	)	ASLBP No. 97-732-02-ISFSI

**BRIEF OF THE SKULL VALLEY BAND  
ON NRC JURISDICTION (CLI-02-11)**

By Memorandum and Order, dated April 3, 2002 (CLI-02-11), the Commission invited interested persons to submit *amicus curiae* briefs on the subject of the State of Utah's "Suggestion of Lack of Jurisdiction", dated February 11, 2002 (hereinafter "Suggestion".) The Skull Valley Band of Goshute Indians is an intervenor in this proceeding in support of the Private Fuel Storage's (PFS) application for license herein, and thus is an interested party on the subject of Utah's Suggestion. If the license is granted, the Skull Valley Band will reap substantial benefits from the Private Fuel Storage Facility (PFSF) on the Skull Valley Reservation under the terms of a lease with PFS.

Utah's Suggestion presents the argument that the Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101, *et seq.* (NWPA), deprives the Commission of jurisdiction over PFS' license application "by prohibiting any privately owned, away-from-reactor, spent nuclear fuel ("SNF") storage facility." Suggestion at p. 2. As noted in the April 3<sup>rd</sup> Memorandum and Order, PFS has argued that nothing in the NWPA undermines the

licensing authority found in the Atomic Energy Act (AEA) and the regulations in 10 CFR Part 72. CLI-02-11, at pp. 2-3. The Skull Valley Band agrees with PFS' view of the Commission's statutory authority. See Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion for Judgment on the Pleadings in Skull Valley Band and Private Fuel Storage, L.L.C. v. Leavitt, et al., Case No. 2:01CV00270C, U.S. Dist Ct., D. Utah, at pp. 15-37 (Enclosure 1 to Applicant's Response to Utah's Suggestion of Lack of Jurisdiction, dated February 21, 2002.) In further support of that view, the Skull Valley Band contends that the Commission should consider the canon of statutory construction that federal statutes passed for the benefit of Indians should be construed liberally in their favor. Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985). The NWPA is such a statute. This argument is discussed below.

#### ARGUMENT

It is Utah's view that the NWPA "expressly prohibits away-from-reactor storage of SNF at privately owned and operated storage facilities." Petition to Institute Rulemaking, at p. 5, attached as an exhibit to Utah's Suggestion (hereafter "Rulemaking Petition"). However, no express prohibition, in so many words, appears in the NWPA. Rather, Utah's position is centered on the argument that the NWPA established a comprehensive national nuclear waste management system, making no provision for the licensing of privately-owned, away-from-reactor facilities. Rulemaking Petition, at pp. 8-32. This argument is dependent on Utah's recitation of the legislative history of the NWPA, contemporary and subsequent events, and the construction of subsequent

enactments by Congress. The argument does not purport to rely on the plain language of the NWPA, except (as noted by the Commission) for Section 135(h), which states:

Notwithstanding any other provision of law, nothing in this act shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease, or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on the date of the enactment of the Act.

42 U.S.C. § 10155(h); CLI-02-08, at p. 2; Rulemaking Petition, at pp. 8-10. This language, of course, is not an express prohibition directed to the NRC, but only a limitation on the authorization found in the NWPA. Utah argues that the asserted prohibition “is made plain by the legislative history of the NWPA ....” Rulemaking Petition, at p. 10. In other words, the prohibition is not plain from the language of the Act, and reliance on legislative history is required.

The Skull Valley Band agrees with PFS’ view that the fact that Congress did not expressly prohibit licensing of private storage projects, like this one on the Skull Valley Indian Reservation, provides a simple, straightforward answer to Utah’s Suggestion: the plain language of the NWPA does not prohibit such projects. However, if the Commission is of the view that the NWPA is unclear in this regard (a view not shared by the Skull Valley Band), it is the position of the Band that the Commission should apply an oft-invoked canon of statutory construction:

[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit ....

Montana v. Blackfeet Tribe, *supra*; United States v. Idaho, 210 F.3d 1067, 1073 (9th Cir. 2000), *affirmed* 533 U.S. \_\_\_, 150 L.Ed.2d 326 (2001); Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001). See also National Labor Relations Board v. Pueblo of San Juan, 276 F.3d 1187 (10th Cir. 2002): “The canons of construction applicable in Indian law

are rooted in the unique trust relationship between the United States and the Indians.” 276 F.3d at 1194, *quoting from County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). This canon is sometimes stated as applying to “uncertain statutory provisions in laws intended to benefit Native Americans”, *Pueblo of Santa Ana v. United States*, 214 F.3d 1338, 1342 (Fed. Cir. 2000), and in practice that is how it is generally applied by federal courts.

The NWPA is such a law. Indian tribes figure prominently in the scheme of the NWPA. The NWPA guarantees the participation of Indian tribes in any planning or decision involving the siting of a permanent repository for nuclear waste on an Indian reservation, and provides for payments to Indian tribes for their expenses in connection with the evaluation of facilities. 42 U.S.C. §§ 10137-38. The Act likewise provides for tribal participation in the siting of the proposed federal interim storage facility and the Monitored Retrievable Storage Facility. *Id.*, §§ 10155(d), 10161(h). If, in consultation with tribes, Indian reservations are selected to be the hosts of nuclear waste storage under the NWPA, the tribes would receive substantial compensation for providing a storage site. *Id.*, §§ 10167, 10173-73a.

Yet, the implication of Utah’s argument in its Suggestion is that the NWPA effectively prohibits Indian tribes from choosing to lease their lands to private entities for the storage of SNF. Indian tribes were given the opportunity to lease their lands to non-Indian entities “for public ... or business purposes” by the Indian Long-Term Leasing Act of 1955, 25 U.S.C. § 415(a). The legislative history of the bill, which became the 1955 Act, introduced by Rep. Stewart Udall of Arizona, makes clear that the economic development of Indian reservations through outside non-Indian investment was a central

objective of Congress. See Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072, 1074 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983). Nothing in this 1955 Act limited the “business purposes” for which tribal lands could be leased, though all leases were subject to the approval of the Secretary of the Interior.

However, in 1970 the Act was amended to provide for a list of factors the Secretary of the Interior must consider before approving any leases. P.L. 91-275, 84 Stat. 303. Among these factors are whether “adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands”, the “safety of structures or other facilities to be constructed on such lands ... and the effect on the environment of the uses to which the leased lands may be subject.” *Id.*; 25 U.S.C. § 415. Again, no express limitations were placed on the purposes for which tribal lands may be leased. Of course, if an Indian tribe seeks to lease its lands for SNF storage, not only is the approval of the Secretary of the Interior required, an NRC license of the facility is also required. That was certainly the case before the enactment of the NWPA.

But Utah’s argument— that the NWPA barred the NRC from licensing an SNF storage facility under the pre-existing authority of the AEA, and the regulations promulgated thereunder— effectively denies tribes the economic opportunity to lease tribal lands for these purposes. This is contrary to the above-stated canon of statutory construction that federal statutes are to be construed liberally for the benefit of Indians. Utah would have the NRC and the courts believe that, although Congress viewed Indian reservations as legitimate sites for SNF storage in 1982, when it enacted the NWPA, it was revoking the right that tribes possessed under the Indian Long-Term Leasing Act of 1955, to lease their lands to private entities for SNF storage. Such a view appears to

violate the general rule against implicit repeal of prior enactments. But even if the NWPA were ambiguous in this regard, the aforesaid canon states that, if the provisions of a statute are uncertain, the ambiguous expressions are to be resolved in the Indians' favor.

Application of this canon of statutory construction by the courts has not been limited to laws whose primary purpose is to address public policy issues on Indian lands, or generally to effectuate the federal trust responsibility to Indian people. The canon has also been applied to federal environmental statutes, not unlike the NWPA, which contain certain provisions specifically benefiting Indian tribes, but which have broader effect. For example, the canon was applied to the Clean Air Act, which contains no definition of Indian reservation, to allow Indian tribes to regulate air quality on non-Indian fee lands within a reservation. Arizona Public Service v. Environmental Protection Agency, 211 F.3d 1280, 1292-93 (D.C.Cir. 2000), *cert. denied sub nom Michigan v. EPA*, 121 S.Ct. 1600 (2001). The canon was also invoked to deny the State of New Mexico regulatory jurisdiction over groundwater at a proposed off-reservation uranium minesite, where the mineral estate was non-Indian-owned but the surface estate was held by the Navajo Nation. The court enlisted the aid of the canon to uphold an EPA rule which retained regulatory authority over such lands under the Safe Drinking Water Act. HRI v. Environmental Protection Agency, 198 F.3d 1224, 1244, n. 13 (10th Cir. 2000).<sup>1</sup>

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<sup>1</sup> These contemporary cases also demonstrate that the Indian canon is being actively applied by the courts today. We do note that the Supreme Court recently declined to apply the canon to a provision of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(d)(i), regarding federal taxation of gambling operations. Chickasaw Nation v. United States, \_\_\_ U.S. \_\_\_, 151 L.Ed.2d 474 (2001). This decision did not reject the canon, but held that it was not determinative in that case because the Court could "find no other reasonable reading of the statute" than the one which disfavored the tribe. 151 L.Ed.2d at 480. Justice O'Connor's dissent discusses at length the continued viability of the canon. Id., at 484.

## CONCLUSION

Utah's Suggestion of Lack of Jurisdiction should be rejected because nothing in the NHPA denies or prohibits NRC authority to license the PFSF on the Skull Valley Indian Reservation. If the Commission views Utah's Suggestion as identifying an ambiguity in the NHPA, it should apply the canon of statutory construction that statutes should be construed liberally to favor Indians, and ambiguous expressions are to be resolved to their benefit, rather than to deny the Skull Valley Band the economic opportunities which this lease of its reservation lands would provide.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tim Vollmann", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the Intervenor Skull Valley Band's Brief on NRC Jurisdiction (CLI-02-11) were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 15<sup>th</sup> day of May, 2002.

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