

UNITED STATES OF AMERICA

February 18, 2004 (10:49AM)

NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before the Commission

In the Matter of)

PRIVATE FUEL STORAGE L.L.C.)

Docket No. 72-22-ISFSI

(Private Fuel Storage Facility))

**INTERVENOR SKULL VALLEY BAND'S RESPONSE
TO OGD'S MOTION
TO REOPEN THE RECORD ON OGD CONTENTION O
(ENVIRONMENTAL JUSTICE)**

Intervenor Skull Valley Band of Goshute Indians opposes the recent Motion submitted by Intervenor Ohngo Gaudadeh Devia (OGD) to Reopen the Record on OGD Contention O (environmental justice), which was rejected by the Commission in its decision of October 1, 2002 (CLI-02-20). This latest effort to persuade the Commission to become involved in the financial business of the Skull Valley Band completely fails to meet the criteria for reopening a closed record in 10 CFR § 2.734.

BACKGROUND

The Independent Spent Fuel Storage Installation (ISFSI), which is the subject of the license application of Private Fuel Storage LLC (PFS), would be constructed and operated on the Skull Valley Indian Reservation under an amended lease entered into between the Skull Valley Band of Goshute Indians and PFS, and approved by the Bureau of Indian Affairs (BIA) on May 23, 1997, subject to certain conditions, including the

issuance of a license by the NRC. The site is owned by the Skull Valley Band, and held in trust by the United States for the benefit of the Band.

OGD Contention O ("Environmental Issues are not addressed."), as admitted by the Atomic Safety and Licensing Board, alleged that the environmental impacts of the proposed Independent Spent Fuel Storage Installation (ISFSI) would have a cumulative adverse effect on the members of the Skull Valley Band, and that the license application failed to mitigate these impacts. The Contention stated, "The license application poses undue risk to public health and safety because it fails to address environmental justice issues." OGD Contentions, at page 27 (November 24, 1997). The reference to "environmental justice" comes from Executive Order 12898, in which President Clinton directed federal agencies to "identify[] and address[], 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" 59 F.R. 7629 (1994). The Board ultimately rejected all of the bases for this contention, except Basis 1, which stated: "The proposed plant will have negative economic and sociological impacts on the Native community of Goshute Indians who live very close to the proposed site." *Id.*, at 28.

OGD was confronted in this Contention with the fact that in 1996 a clear majority of the General Council of the Skull Valley Band authorized this project to be built on their lands. Thus, it became awkward for OGD to contend that the NRC's consideration of this project for construction on Indian lands denied environmental justice when the majority Goshute owners of that land were welcoming the project, and looked forward to the jobs, infrastructure and revenues which would accompany the construction and

operation of the project. As OGD's assertion of Contention O evolved, it focused on the alleged effect of the project on a dissident minority, namely those members of OGD who were also members of the Band who opposed the project. Specifically, in its June 28, 2001, Response to PFS' Motion for Summary Disposition, OGD offered a Declaration by Sammy Blackbear, alleging corruption in the Skull Valley Band's leadership ranks, and mismanagement of the PFS lease revenues.

The Board appeared to accept that characterization of Contention O, when it considered Applicant's Motion for Summary Disposition of that contention. On February 22, 2002, it ordered a hearing on the Band's expenditure and distribution of PFS lease revenues to determine whether a minority "subgroup" of the Band was suffering a disproportionate environmental harm from the project, and also ordered the Band to provide by March 22, 2002, an accounting of the expenditure, distribution, allocation and use of those lease revenues. LBP-02-08. The Skull Valley Band immediately sought a stay of that Memorandum and Order, which was granted by the NRC on March 7, 2002. CLI-02-08.

On October 1, 2002, the Commission reversed the Board's Memorandum and Order, and directed the Board to grant summary disposition for PFS on OGD O. CLI-02-20. OGD now moves to reopen the record on OGD O "based on new and additional evidence" purportedly in accordance with the requirements of 10 CFR § 2.734.

DISCUSSION

The regulatory criteria for reopening a closed record are strict. The motion to reopen (1) must be timely, (2) must address a significant safety or environmental issue, and (3) must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially. The motion must be accompanied by one or more affidavits setting forth the factual and/or technical bases for the movant's claim that the above criteria have been satisfied. Such affidavits must be given by competent individuals with knowledge of the facts alleged, or by qualified expert. The movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases to support its claim that the above criteria have been met.

OGD's motion fails on all counts. This is best demonstrated by focusing on the single affidavit attached to the Motion, that of OGD leader Margene Bullcreek. It is two pages long, but attaches four exhibits, one inch thick. Paragraph 2 states that the Affidavit is based upon her "own personal knowledge", and that she is "competent to testify to the matters contained herein." However, the balance of the Affidavit merely refers to the "true and correct" copies of the four exhibits. These four exhibits consist of a press release of the Utah U.S. Attorney's office, documents filed by the U.S. Attorney in the U.S. District Court, a newspaper article, and lastly, a self-serving 2-page letter from Ms. Bullcreek's attorney.

With the exception of her attorney's letter, Ms. Bullcreek is not mentioned in any of the exhibits, and played no role in the creation of those exhibits, which are all public documents. She is ostensibly no more than a bystander in the development of the

events which are the subject of these exhibits. Her affidavit, on its face, thus does not meet the standards of 10 CFR § 2.734(b), which require that it be given “by competent individuals with knowledge of the facts alleged” OGD’s Motion merely states conclusorily that “She is a competent individual with knowledge of the facts alleged in the motion.” Motion at page 9. This does not comply with the regulation on reopening a closed record. Nor does OGD’s Motion meet any of the criteria set out in paragraph (a) of the subject regulation.

A. The Motion is not timely.

The Motion states that it is timely because the U.S. District Court documents, which constitute Exhibits 1 and 2, were filed in December 2003, approximately six weeks before the Motion was filed. Motion at page 6. However, the only exhibit of which the affiant has any evident personal knowledge is Exhibit 4, a June 2, 2003, letter from Ms. Bullcreek’s attorney, addressed to Skull Valley Band Chairman Leon D. Bear and to attorney Scott H. York, the Band’s local attorney.¹ This letter accuses the addressees of “threaten[ing] to strip our clients and other individuals of their Band membership because of their opposition to the proposed PFS nuclear waste storage facility” The letter concludes with a demand that if the addressees do not provide requested information on a Skull Valley Band Tribal Court within 10 days, “we will assume that a Tribal Court does not presently exist” The third page of Exhibit 4 is a U.S. Postal Service return receipt card to show that attorney Scott York received the letter. OGD’s proffer of this exhibit as new and additional evidence fails to meet the timeliness requirement of the regulation.

¹ The date of the letter, June 2, 2003, is the same day that the U.S. Court of Appeals for the Tenth Circuit denied OGD’s Petition for Review. See Motion at page 4.

The Motion mentions Exhibit 4 twice, on pages 2 and 8; and OGD appears to proffer the letter for the evidentiary propositions that Margene Bullcreek and others are being persecuted by the leadership of the Band in retaliation for their opposition to the PFS project, and for the proposition that no Tribal Court exists. Aside from the fact that these propositions do not add anything to the record already considered by the Commission (see *infra*), this “evidence” can hardly be considered timely, as it was self-generated eight months ago. Not mentioned anywhere in the OGD Motion is that Ms. Bullcreek, represented by OGD counsel, filed a *habeas corpus* petition in the U.S. District Court on July 25, 2003, against all three members of the Skull Valley Band’s Executive Committee. Bullcreek v. Bear, Docket No. 2:03cv00605 (D.Utah). Thus, Ms. Bullcreek has pursued a remedy to redress her alleged deprivation of rights. This case has been pending for six months, and we understand that the record has been sealed by order of the court. This demonstrates that counsel’s self-serving letter, proffered at this late date as “new and additional evidence”, is neither new nor timely.

B. The Motion does not address a significant safety and environmental issue.

Neither the Bullcreek Affidavit, nor any of the exhibits mention “safety” or the “environment”. Exhibit A, according to the Motion (at page 5) and the Affidavit (at paragraph 3), is made up of a U.S. Department of Justice press release and a criminal indictment of Leon D. Bear. Neither the press release nor the indictment even mention the PFS project or the NRC licensing project, and have no evident relationship to either. There is nothing in these documents which appears to have anything to do with safety or the environment. This fact did not prevent OGD from asserting in its Motion to Reopen

that the motion “confirms what is clearly a significant safety and environmental issue” Motion at page 7. It states that “[t]his new and additional evidence of criminal wrongdoing by Leon Bear and his administration relates to OGD’s contention that individual Band members who do not support the proposed PFS facility and Leon Bear’s leadership continue to suffer a disproportionate environmental impact in that they will suffer negative environmental impacts of the proposed project without enjoying the financial benefits of the lease.” Respectfully, the “new and additional evidence” does nothing of the kind.

There is nothing in the press release or indictment even to suggest that the allegations therein have anything to do with the PFS project, much less safety or environmental issues.² For the record, Mr. Bear has pleaded not guilty, and of course, he is innocent until proven guilty. OGD’s Motion asserts that the indictment “call[s] into question the stability of the proposed PFS facility” and thereby reaches for the issues of safety and environmental protection. This perpetuates a common falsehood about the project: that the Skull Valley Band will play a role in the regulation of the facility. This is, of course, untrue, as the NRC plays that role, and the Band cannot interfere in such federal regulation.

Exhibit B is a copy of a civil action filed against Leon Bear and the Band to enforce an Internal Revenue Summons, and related attachments. Nothing in that exhibit

² Also inexplicably included in the documents under Exhibit A, although it is not discussed in the Motion or even mentioned in the Affidavit, is the criminal indictment of Sammy Blackbear, Marlinda Moon, Miranda Wash, and Duncan Steadman. Paragraphs 7 and 8 of this document do mention the PFS project, to note merely that defendants Blackbear, Moon, and Wash are opposed to it, as they are political opponents of Chairman Leon Bear. Of course, it was the Declaration of Mr. Blackbear which led the Board to order a hearing on the Band’s finances. Mr. Steadman previously appeared as counsel for OGD in this proceeding. These defendants are also innocent until proven guilty. Nothing in that indictment has been offered by OGD as any new evidence on safety or environmental issues.

mentions the PFS project or the NRC licensing proceedings; nor does it have anything to do with safety or the environment. The taxpayer at issue is Starlike Properties, Inc., not the Skull Valley Band nor Leon Bear. See Declaration of Denise Glaser in Exhibit B. OGD Motion's does not suggest, as it cannot, that Starlike has any role in the PFS project. Exhibit B has absolutely nothing to do with this proceeding.

Exhibit C is a newspaper article on the civil proceeding which is the subject of Exhibit B. This article is not credible evidence of anything relevant here. But the newspaper reporter makes a connection between the IRS summons and the PFS project as follows: "The issue of tribal finances has been a subject of bitter controversy among tribal members, especially since the leaders agreed to host the nuclear facility on 820 acres of reservation land across the road from the tumbledown tribal village in the shadow of Deseret Peak." On its face, this newspaper article is not material or reliable evidence of the safety or environmental issues.³

Exhibit D, as discussed above, merely contains self-serving allegations by OGD counsel that his clients are being persecuted by the leadership of the Skull Valley Band. It is offered for the additional proposition that the Skull Valley Band does not have a working Tribal Court. The Band does utilize a Tribal Court from time and time, but this is not at all relevant or material to reopening OGD Contention O. But the existence *vel non* of a Tribal Court has nothing to do with safety or environmental issues in connection with licensing the project. Further, in addressing tribal self-governance concerns in Part II.D of its October 1, 2002, decision, the Commission does not even mention the

³ If necessary, the Skull Valley Band would be prepared to impeach the neutrality and credibility of the reporter, who specializes in articles exalting Margene Bullcreek and demonizing Leon Bear and the PFS project.

possibility of OGD members seeking redress in a tribal court. This has nothing whatsoever to do with safety or environmental issues in this licensing proceeding.

C. The “new evidence”, were it to be considered, would not likely precipitate a materially different result in the NRC’s consideration of OGD Contention O.

OGD’s Motion ignores the bases on which the Commission rejected Contention O in 2002. The Commission held that OGD and Goshute opponents of the project, previously considered by the Board as a “subgroup”, did not constitute a “low-income population” within the meaning of Executive Order 12898. Part II.B of CLI-02-20. Nothing in the Motion to Reopen provides any basis for a new look at the Contention.

The Commission also held that the Executive Order only directs agencies to determine whether a proposed action would have “disproportionately high and adverse human health or environmental effects.” Part II.A of CLI-02-20. It held that allegations of disparate economic impacts do not fall under the environmental justice rubric. Nothing in the Motion to Reopen departs from OGD’s assertion, which first emerged in 2001— long after Contention O was filed— that these alleged economic impacts can be addressed by the Executive Order.

Additionally, the Commission followed the position of the Bureau of Indian Affairs, in its *amicus* brief filed in opposition to OGD Contention O, that any review of tribal financial affairs by the NRC would be an unlawful intrusion into internal tribal matters. The Commission further observed that many of OGD’s allegations, found exclusively in the Blackbear Declaration, were of criminal wrongdoing, and that other

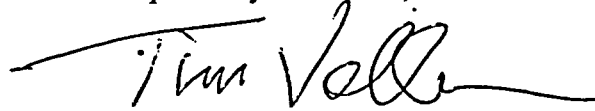
agencies of the federal government were better suited to address those allegations. Nothing has changed. Even assuming that the indictment of Leon Bear has anything to do with the allegations in the Blackbear Declaration, which is not at all evident, they are being addressed through the criminal justice system. NRC has no role here.

Finally, the Skull Valley Band would like to advise the Commission that OGD's ostensible concern about misallocation of the benefits of the PFS lease is not believable. OGD is not asking the Commission to direct PFS or the Skull Valley Band to allocate or distribute the revenues differently. OGD's and Margene Bullcreek's position, parroting that of the State of Utah, is that no license for the project should be issued. See Bullcreek v. NRC, No. 03-1018 in the U.S. Court of Appeals for the D.C. Circuit. OGD has not been able to find a single flaw in the licensing agency's environmental consideration of the PFS application, and thus is once again trying to elevate internal tribal strife into matters of "safety" and the "environment". As the Commission noted last week, in its Memorandum and Order, CLI-04-04, denying OGD's Petition for Review, "[W]e see no reason to foreclose Indian tribes from possible economic opportunities (such as the PFS facility, if built) under the guise of protecting Indian tribes from environmental harm, no matter how slight."

CONCLUSION

For the foregoing reasons, the Skull Valley Band respectfully requests that the Commission deny OGD's Motion to reopen the record concerning OGD Contention O.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tim Vollmann", with a long horizontal flourish extending to the right.

Tim Vollmann
3301-R Coors Road NW #302
Albuquerque, NM 87120
Telephone: (505) 792-9168

Attorney for the Skull Valley Band
of Goshute Indians

February 9, 2004

CERTIFICATE OF SERVICE

I hereby certify that copies of the Intervenor Skull Valley Band's Response to OGD's Motion to Reopen the Record on OGD Contention O (Environmental Justice) 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 9th day of February, 2004.

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)

Nils J. Diaz, Chairman
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, DC 20555-0001
e-mail: Chairman@nrc.gov

Edward McGaffigan, Jr. Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
Washington, DC 20555-0001
e-mail: cmrmcgaffigan@nrc.gov

Paul B. Abramson
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: PBA@nrc.gov

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: cmrmerrifield@nrc.gov

Michael C. Farrar, Esq., Chairman
Administrative Judge
Atomic Safety and Licensing Board Panel
Mail Stop – T3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: MCF@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

Stephen Simpson, Esq.
MS mib-6456
Division of Indian Affairs
Office of the Solicitor
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

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

G. Paul Bollwerk III, Esq.
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: GPB@nrc.gov

Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop O-15 D21
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

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

*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)

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)

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: dchancellor@utah.gov
jbraxton@utah.gov
attygen@xmission.com

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@djlplaw.com

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

Joseph R. Egan, Esq.
Martin G. Malsch, Esq.
Egan, Fitzpatrick & Malsch, PLLC
7918 Jones Branch Dr., Suite 600
McLean, VA 22102
e-mail: eganpc@aol.com
mmalsch@nuclearlawyer.com

Jay Silberg, Esq.
Paul Gaukler, Esq.
Sean Barnett, Esq.
Shaw Pittman, LLP
2300 N Street, N.W.
Washington, DC 20037-1128
e-mail: jay.silberg@shawpittman.com
paul.gaukler@shawpittman.com
sean.barnett@shawpittman.com

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

Tim Vollmann