

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 7498

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COMMISSIONERS

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Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of)
)
)

PRIVATE FUEL STORAGE, L.L.C.)

Docket No. 72-22-ISFSI

(Independent Spent Fuel
Storage Installation))
_____))

CLI-04-09

MEMORANDUM AND ORDER

I. Introduction

Now before the Commission is intervenor Ohngo Gaudadeh Devia's (OGD) motion to reopen the case record on Contention O, an "environmental justice" contention. The NRC staff, the applicant Private Fuel Storage (PFS), and intervenor Skull Valley Band of Goshute Indians oppose the motion. For the reasons cited below, we deny the motion.

II. Background

In CLI-02-20, 56 NRC 147 (2002), the Commission directed the Atomic Safety and Licensing Board to grant PFS's motion for summary disposition of Contention O, an "environmental justice" contention submitted by intervenor OGD. Our decision explained at some length why the intratribal dispute¹ OGD sought to litigate in Contention O -- over how

¹ OGD members oppose the PFS project. The group includes individuals who are members of the Skull Valley Band. Some OGD members live on the Skull Valley reservation and some do not. In opposing the PFS motion for summary disposition of its environmental justice contention, OGD alleged that Skull Valley Band tribal Chairman Leon Bear

(continued...)

particular Skull Valley band leaders have utilized or distributed lease payments made by PFS -- fell beyond the scope of the National Environmental Policy Act ("NEPA") and beyond the Licensing Board's jurisdiction. As we stated, "unless Congress has specifically acted to abrogate a tribe's sovereign immunity, a wholly intratribal dispute must be resolved within the tribe."² The Licensing Board therefore lacked jurisdiction "to provide declaratory or injunctive-type relief to OGD on its complaint that the tribal leadership is mishandling PFS lease payments,"³ and denying OGD members a share in the financial benefits of the PFS lease.

Our decision further stressed that both NEPA and President Clinton's Executive Order on "environmental justice" are, at bottom, concerned with *environmental* impacts.⁴ The executive order, for example, calls upon agencies to determine whether a proposed action would have "disproportionately high and adverse *human health or environmental effects*," not disproportionate financial effects among different "subgroups" of a minority population.⁵ OGD has not claimed that its members will suffer a disproportionate or greater environmental injury from the proposed action, but that the Band leadership has used PFS lease payments "for personal gain and to bribe other Band members," and has accused OGD of "treason" and

¹(...continued)
misappropriated funds paid by PFS under the lease PFS entered into with the Band in 1997, and used these funds for his own personal use or to bribe other tribe members into supporting his administration. OGD alleged that Chairman Bear wrongfully had denied to share money obtained from the PFS lease with tribe members that either opposed the PFS project or his chairmanship of the tribe. See CLI-02-20, 56 NRC 147, 150-51 (2002).

² *Id.* at 159.

³ *Id.*

⁴ *Id.* at 153-59. In 1994, President Clinton issued Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," directing federal agencies to consider "environmental justice" in their decisions. See 59 Fed. Reg. 7629 (Feb. 11, 1994).

⁵ CLI-02-20, 56 NRC at 153 (quoting E.O. 12898, § 1-101)(emphasis added).

sought to terminate their tribal membership.⁶ These are political and criminal issues, not environmental. Indeed, as we noted in CLI-02-20, the Environmental Impact Statement (EIS) for PFS found the overall impact on residents of the reservation “small to moderate.”⁷ None of the listed adverse impacts were found to pose a disproportionately high impact to the Skull Valley Band or to any other minority population living near the Skull Valley Band reservation.⁸

Moreover, as we earlier explained, the executive order is intended only to underscore existing law. In this case, the relevant existing law is found under NEPA, which similarly is focused on a need to take a “hard look” at *environmental* impacts of proposed actions.⁹ In CLI-02-20, the Commission acknowledged that the NRC staff’s NEPA review does consider a project’s anticipated socioeconomic benefits along with its costs, but we stressed that such a “broad and informal balancing of costs and benefits does not call for an investigation into perceived financial misdeeds going well beyond the natural or anticipated effects of a proposed project.”¹⁰ In short, we declined in CLI-02-20 “to use NEPA as authority for (in effect) a corruption investigation, a major undertaking far afield from the NRC’s experience and expertise”¹¹:

Claims of financial and political corruption inside the Skull Valley tribe do not belong in our hearing process under the rubric of environmental justice or NEPA. Our mission is to protect the

⁶ OGD’s Motion to Reopen the Record on OGD Contention O (Jan. 29, 2004)(“OGD Motion”) at 2, 4.

⁷ CLI-02-20, 56 NRC at 154 (citing NUREG-1714, Vol. 1, Final Environmental Impact Statement (Dec. 2001)(“FEIS”) at 6-21 to 6-33).

⁸ *Id.* at 154 n.37. See also FEIS at 6-28.

⁹ CLI-02-20, 56 NRC at 153, 159; see also, e.g., *Robertson v. Methow Valley Citizens Council* 490 U.S. 332, 349-50.

¹⁰ CLI-02-20, 56 NRC at 154-55 (internal quotations and citation omitted).

¹¹ *Id.* at 155.

public health and safety and the environment. We lack the expertise, the resources, and the statutory mandate to get to the bottom of tribal corruption charges. Other government bodies, including the Federal Bureau of Investigation and the Bureau of Indian Affairs, are far better positioned to consider OGD's complaint.¹²

III. Analysis

Under our rules, a motion to reopen a record to consider additional evidence will "not be granted" unless it satisfies three requirements.¹³ The motion must (1) address a significant safety or environmental issue; (2) demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially; and (3) be timely.¹⁴ OGD's motion fails to meet our standard for reopening.

OGD's basis for reopening the record is a recent criminal indictment.¹⁵ In December 2003, a federal grand jury indicted tribal Chairman Leon Bear on two counts of theft from Indian Tribal Organizations, one count of theft concerning programs receiving federal funds, and three counts of filing false tax returns. The indictment charges Mr. Bear with embezzlement, misapplication, and conversion to his own use of funds belonging to the Skull Valley Band. It also charges Mr. Bear with knowingly filing false tax returns in the years 2000-2002.

By filing a motion to reopen the record, OGD suggests that had there been an "actual criminal indictment" of Leon Bear when we last considered OGD's environmental justice

¹² *Id.* at 150.

¹³ 10 C.F.R. § 2.734 (2003).

¹⁴ *Id.*

¹⁵ See OGD's Motion at 1, 6-9.

contention, we likely would have reached a different result.¹⁶ On the contrary, however, in CLI-02-20 the Commission “*assume[d] the truth of the facts alleged*” by OGD for purposes of legal analysis.¹⁷ Moreover, the existence of an indictment has no bearing on the reasons we gave for rejecting OGD’s environmental justice claims. The indictment in no way changes the fact that OGD’s claims center upon allegations of an illegal diversion and misallocation of tribal money, and of problems with the leadership of the Skull Valley Band -- financial and political matters that the NRC is neither equipped nor authorized to investigate, sort out, or in any fashion resolve.

The Commission has always recognized and acknowledged the seriousness of OGD’s charges. But the indictment itself serves only to reinforce our view that other, more legitimate and effective avenues exist for OGD to seek redress of its concerns. As we stated previously, “OGD’s charges of corruption *may prove salient* -- but for criminal investigators, for civil lawsuits, or for voters in future tribal elections, not for NEPA reviewers.”¹⁸

OGD seeks to portray the alleged “financial misdeeds and corruption of Leon Bear” as a significant safety and environmental issue warranting the reopening of the record.¹⁹ But neither Mr. Bear nor the Skull Valley Band will own or operate the PFS facility. OGD does not suggest how the alleged theft of tribal monies or the filing of false tax returns -- even if true -- would have any bearing on facility operations. Despite OGD’s unsupported claim, Leon Bear and members of his administration will have no role in “overseeing” operations.²⁰

¹⁶ *Id.* at 8-9.

¹⁷ CLI-02-20, 56 NRC at 151 n.11 (emphasis added).

¹⁸ *Id.* at 157 (emphasis added).

¹⁹ See OGD Motion at 7.

²⁰ See *id.*

OGD's real complaint is that because of the Bear administration's actions, OGD is not "enjoying the financial benefits of the [PFS] lease."²¹ Yet as we noted previously, "[s]ubject to criminal and tribal law, the Band ultimately gets to decide how to handle its own revenues."²² The Bureau of Indian Affairs recognizes Mr. Bear "as the duly elected Chairman of the Skull Valley Band."²³ The Skull Valley Band leadership chose to enter into a land lease with PFS, and the Bureau of Indian Affairs conditionally approved the proposed lease in 1997.²⁴ For the NRC to intervene in an attempt to protect a "disaffected 'subgroup' of the Band, namely OGD's members, ... would place [our agency] uncomfortably and unlawfully, right in the middle of an internal tribal dispute."²⁵ Our position is consistent with that of the Bureau of Indian Affairs, which has stressed that the NRC has "no jurisdiction to investigate the [Skull Valley] Band's internal financial affairs concerning these [PFS] payments."²⁶

²¹ See *id.*

²² CLI-02-20, 56 NRC at 160.

²³ Indictment, *United States of America v. Leon Bear* (C.D. Utah filed Dec. 17, 2003) at 2, attached as Exhibit "A" to Affidavit of Margene Bullcreek in Support of OGD's Motion (Jan. 29, 2004). Before the Licensing Board, OGD claimed that Leon Bear is not the legitimate tribal leader and that instead Mr. Blackbear is the legitimate leader of the Skull Valley Band. See, e.g., OGD's Response to PFS Motion for Summary Disposition (June 28, 2001) at 9. OGD's motion to reopen the record references and includes a copy of a recent federal indictment of Mr. Blackbear, on 1 count of theft from an Indian tribal organization and 5 counts of bank fraud. Mr. Blackbear's indictment states that the Bureau of Indian Affairs recognizes Leon Bear as the chairman of Skull Valley Band, and that Mr. Blackbear has no authority to act on behalf of the tribe. See Indictment, *United States of America v. Malinda Moon, Sammy Blackbear, Miranda Wash, and Duncan Steadman* (C.D. Utah filed Dec. 17, 2003) at 2-3, Exhibit "A" to Affidavit of Margene Bullcreek, *supra*.

²⁴ Final lease approval by BIA is conditioned on a finding that the lease will be in the best interest of the Band. PFS cannot begin construction of the facility until final approval has been granted.

²⁵ CLI-02-20, 56 NRC at 159-60.

²⁶ Brief of *Amicus Curiae* (April 15, 2002) at 1. Prior to our decision in CLI-02-20, the Commission invited BIA to set forth its position.

The FEIS cites the Skull Valley Band leadership's declared intention to use PFS lease payments "for a number of beneficial purposes, including on-Reservation improvements to housing, development of schools, day-care, medical facilities, higher education opportunities, and commercial improvements to the Pony Express Convenience Store."²⁷ NEPA, however, does not require the NRC to investigate or enforce whether the Band leadership in fact fulfills its promises -- whether PFS payments indeed are spent prudently, legally, or otherwise to the satisfaction of the entire tribe. To be sure, OGD's concerns are very serious, but they belong in another forum, not an NRC licensing proceeding. There would be no end to the NRC's environmental review if the agency had to follow and scrutinize ongoing contract payments and the actions of tribal leaders.

Lastly, OGD's motion claims that the Commission in CLI-02-20 "assumed the existence of an adequate tribal forum for resolution of internal tribal disputes" and that "it is now clear that no tribal court exists for the Skull Valley Band."²⁸ OGD argues that had the Commission "had an opportunity to consider the evidence of criminal activity and financial corruption of Leon Bear ... together with the lack of any tribal court to resolve matters of internal tribal disputes, a materially different result would have been likely."²⁹

But CLI-01-20 nowhere rested on the existence of a tribal court. It does not even mention a tribal court. Clearly, the decision emphasizes that the issues raised by OGD constitute an intratribal dispute, subject to tribal *and* criminal or civil law, but not NEPA. The decision describes OGD's charges as matters "for criminal investigators, for civil lawsuits, or for

²⁷ See FEIS at 4-39. Other stated socioeconomic benefits include possible jobs for tribal members, a potential for increased business at the Pony Express Convenience Store, and significant payments to Tooele County.

²⁸ OGD's Motion at 8.

²⁹ *Id.* at 9.

voters in future tribal elections.”³⁰ And it acknowledges that tribal dissidents have filed administrative appeals with the Bureau of Indian Affairs, have sued in federal district court to challenge BIA’s approval of the PFS lease, and further, that criminal claims have been referred to the Federal Bureau of Investigation -- all “more appropriate, avenues of redress ... open to OGD.”³¹ Yet whether or not the Skull Valley Band specifically has a tribal court -- the Band affirms that it *does* utilize a tribal court “from time to time”³² -- makes no difference to the reasoning or result in CLI-02-20.³³

³⁰ CLI-02-20, 56 NRC at 157.

³¹ *Id.* at 160. For example, dissident members of the Skull Valley Band have sued in federal court challenging the PFS lease and the legitimacy of the currently recognized Band leadership. A recent decision in the United States Court of Appeals Tenth Circuit found these challenges premature, given that: (1) a challenge to the PFS lease is still pending before the Interior Board of Indian Appeals, and (2) the proper method for challenging tribal election results is first to file a complaint with the Secretary of the Interior, a remedy the plaintiffs have yet to exhaust. See *Blackbear v. Norton*, No. 02-4230 (10th Cir.)(Mar. 5, 2004).

³² Intervenor Skull Valley Band's Response to OGD's Motion (02/09/04) at 8.

³³ We need not address whether OGD’s motion is timely, for it is clear that the motion does not meet 10 C.F.R. § 2.734’s other requirements: the motion does not raise a significant safety or environmental issue, and it does not demonstrate that a materially different result would have been likely had the Leon Bear indictment been considered initially.

IV. Conclusion

The Commission denies OGD's motion to reopen the record on Contention "O."

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 24th day of March, 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22-ISFSI
)	
(Independent Spent Fuel Storage)	
Installation))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-04-09) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution with copies by electronic mail or facsimile as indicated.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 24th day of March 2004