

TIM VOLLMANN
3301-R Coors Road N.W., # 302
Albuquerque, NM 87120
Telephone: (505) 792-9168
Facsimile: (505) 792-9251
Attorney for Plaintiff Skull Valley
Band of Goshute Indians

JAMES A. HOLTKAMP (1533)
LEBOEUF, LAMB, GREENE & MAC RAE
136 S. Main Street, Suite 1000
Salt Lake City, UT 84111
Telephone: (801) 320-6700
Facsimile: (801) 359-8256
Attorneys for Plaintiff Skull Valley
Band of Goshute Indians

VAL R. ANTCZAK (0120)
J. MICHAEL BAILEY (4395)
H. DOUGLAS OWENS (7762)
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, Utah 84145-0898
Telephone: (801) 532-1234
Facsimile (801) 536-6111
Attorneys for Plaintiff Private Fuel Storage, L.L.C.

JAY E. SILBERG
ERNEST L. BLAKE, Jr.
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
Telephone: (202) 663-8000
Facsimile: (202) 663-8007
Attorneys for Plaintiff Private Fuel Storage, L.L.C.

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

* * * * *

THE SKULL VALLEY BAND OF
GOSHUTE INDIANS and PRIVATE FUEL
STORAGE, L.L.C.

Plaintiffs,

vs.

MICHAEL O. LEAVITT, in his official
capacity as Governor of the State of Utah, et
al.,

Defendants.

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION TO DISMISS
COUNTERCLAIM**

Case No. 2:01CV00270C

Judge Tena Campbell

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STATEMENT OF ISSUES { TC VL "1" }

1. Does the Administrative Orders Review Act (commonly called the Hobbs Act) divest the Court of jurisdiction to hear Defendants' claim that the Nuclear Regulatory Commission lacks authority to license the spent fuel storage facility proposed by Plaintiff Private Fuel Storage?

2. Does the Nuclear Regulatory Commission have authority to license the facility proposed by Plaintiff Private Fuel Storage?

3. Does the Hobbs Act divest the Court of jurisdiction to hear Defendants' claim that the environmental impact statement being prepared for the proposed storage facility will necessarily be defective?

4. Is Defendants' claim concerning the adequacy of the environmental impact statement barred because the study has not yet been finished and no licensure decision has been made?

5. Defendants claim that the Bureau of Indian Affairs' review of the lease of the land for the proposed storage facility is legally inadequate. Is this claim barred by the doctrines of res judicata and collateral estoppel, a lack of ripeness, and a lack of standing?

6. Defendants claim that Plaintiff Skull Valley Band of Goshute Indians did not validly approve the lease. Is this claim barred by tribal sovereign immunity, a lack of jurisdiction over challenges to internal tribal decisions, and a lack of standing?

BACKGROUND{ TC \L "1" }

Plaintiffs filed this action to establish the unconstitutionality of legislation enacted by the State of Utah to block construction and operation of a facility proposed by Plaintiff Private Fuel Storage, L.L.C. (“PFS”) to temporarily store spent nuclear fuel on the reservation lands of Plaintiff Skull Valley Band of Goshute Indians (“Skull Valley Band,” “the Band,” or “the Tribe”). All of Plaintiffs’ claims concern the constitutionality of the Utah statutes.

Defendants Michael Leavitt and Mark Shurtleff have filed a single Counterclaim asking the Court to prohibit the spent fuel storage project. The Counterclaim lists five sub-claims that allegedly should prevent the project:

[T]his Court should enter a judgment in favor of Utah and against PFS and the Band, declaring that: First, the NRC [Nuclear Regulatory Commission] . . . has no authority or jurisdiction to license [Plaintiffs’ proposed facility] . . . Second, an NRC license for the [facility] will necessarily violate NEPA [National Environmental Policy Act] and therefore be invalid. . . . Third, the Band has not validly . . . approved the lease [between PFS and the Band]. Fourth, the BIA’s [Bureau of Indian Affairs] conditional approval of the lease occurred in violation of governing laws and rules. Fifth, any BIA approval of the lease will be invalid as a breach of the Government’s trust obligation to the Band. . . .

Amended Counterclaim ¶ 34 (hereafter “Counterclaim”). These five claims fail to state a claim, are not properly brought in this court for jurisdictional reasons, or are otherwise not justiciable, as established below, and should be dismissed pursuant to Fed. R. Civ. P. 12(b).

SUMMARY OF ARGUMENT{ TC \L "1" }

Defendants’ first claim is that the Nuclear Regulatory Commission (“NRC”) lacks authority to license the temporary storage facility for spent nuclear fuel that has been proposed

by PFS. This claim was the subject of Defendants' earlier Motion for Judgment on the Pleadings. The same arguments Plaintiffs raised in opposition to that Motion are applicable here: the Court lacks jurisdiction to hear the claim under the Hobbs Act (which provides for jurisdiction over NRC orders and regulations only in the courts of appeals) and, in fact, the NRC does have authority to license the facility.

Defendants claim that the NRC's environmental impact statement ("EIS") for the proposed facility is inadequate. Jurisdiction over this claim is also barred by the Hobbs Act, and the claim is premature because there has been no final agency action in the form of a final EIS and licensing decision based thereon.

The Band and PFS have entered into a lease for land on which the proposed facility will be built if it is licensed. Defendants claim that the Bureau of Indian Affairs ("BIA") has improperly conducted the review process applicable to the lease and will do so again when the lease is submitted for final review. This issue is barred by the doctrines of res judicata and collateral estoppel; the State of Utah raised the issue in proceedings culminating recently in a decision by the Tenth Circuit. Even assuming, ad arguendo, that this decision has no preclusive effect, the claim would be barred because it is not ripe and Defendants lack standing to bring it.

Finally, Defendants claim that the Band improperly approved the lease to PFS. This claim, concerning internal tribal matters, is barred by the doctrine of Indian tribal sovereign immunity. Moreover, the Court lacks jurisdiction to hear a challenge to an internal tribal decision, and Defendants again lack standing to assert the claim.

ARGUMENT\ TC \L "1"

Each of Defendants' five claims for declaratory relief is invalid, as set forth below.

Consequently Defendants' Counterclaim should be dismissed.

I. THE COURT SHOULD DISMISS DEFENDANTS' CLAIM THAT THE NRC LACKS AUTHORITY TO LICENSE PFS' PROPOSED STORAGE FACILITY BECAUSE 1) DEFENDANTS BRING THIS CLAIM IN THE WRONG COURT, AND 2) THE NRC HAS THE REQUISITE AUTHORITY.

Defendants claim that the NRC lacks authority to license PFS's proposed storage facility. See Counterclaim ¶ 31 (first claim). This claim was the subject of Defendants' earlier Motion for Judgment on the Pleadings. Plaintiffs hereby adopt and incorporate by reference the arguments made in their November 8, 2001, Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings. A copy of the Memorandum is submitted herewith as Attachment 1. Plaintiffs there demonstrate that Defendants have brought their claim in the wrong court. Pursuant to the Administrative Orders Review Act (commonly called the Hobbs Act), 28 U.S.C. §§ 2342-51, the proper forum for the review of issues concerning the NRC's authority to license the proposed PFS facility is the federal courts of appeals. Plaintiffs also demonstrate that the NRC has the requisite authority to license the PFS facility. For the same reasons set forth in Plaintiffs' earlier Memorandum, Defendants' claim that the NRC lacks authority to license the PFS facility should be dismissed.

II. THE COURT SHOULD DISMISS DEFENDANTS' CLAIM THAT A LICENSE FOR THE FACILITY WILL VIOLATE NEPA BECAUSE 1) DEFENDANTS BRING THE CLAIM IN THE WRONG COURT, AND 2) THERE IS NO FINAL AGENCY ACTION FOR THE COURT TO CONSIDER.

The National Environmental Policy Act (“NEPA”), requires that any federal agency proposing a “major Federal action[] significantly affecting the quality of the human environment,” prepare an EIS. 42 U.S.C. § 4332(2)(C). The NRC is currently preparing its final EIS concerning the proposed PFS facility prior to its licensing decision. Defendants claim that if the NRC grants a license to PFS for a spent fuel storage facility on Plaintiff Skull Valley Band’s reservation, the license will necessarily violate NEPA due to the NRC’s use of its waste confidence rule¹ in its EIS and because the storage facility will not be temporary but will remain in use much longer than planned. See Counterclaim ¶ 31 (second claim). This claim should be dismissed because the Court lacks jurisdiction to hear it under Hobbs Act, and because there has been no final agency action.

¹ The NRC initially issued its waste confidence rule in 1984. See 49 Fed. Reg. 34658 (Aug. 31, 1984). The Commission initiated the rulemaking proceeding that resulted in the waste confidence rule in 1979 on remand from the U.S. Court of Appeals for the D.C. Circuit. See 44 Fed. Reg. 61372, 61373 (1979); 49 Fed. Reg. 34658 (1984); Minnesota v. Nuclear Regulatory Commission, 602 F.2d 412, 416-417 (D.C. Cir. 1979) (“[the Commission] could properly consider the complex issue of nuclear waste disposal in a ‘generic’ proceeding such as a rulemaking, and then apply its determinations in subsequent adjudicatory proceedings”). In the course of the rulemaking proceeding the Commission received both written and oral presentations from designated participants, including environmental groups such as the Sierra Club and the Natural Resources Defense Council, as well as public comments. See 49 Fed. Reg. 34,658. “The purpose of the . . . Waste Confidence Decision was ‘to assess the degree of assurance now available that radioactive waste can be safely disposed of, to determine when such disposal or offsite storage will be available and to determine whether radioactive waste can be safely stored on site past the expiration of existing facility licenses until offsite disposal or storage is available.’” 64 Fed. Reg. 68005, 68005 (Dec. 6, 1999) (quoting 49 Fed. Reg. 34658, 34658 (Aug. 31, 1984) (original waste confidence decision)); see also 55 Fed. Reg. 38474 (Sept. 18, 1990) (affirming waste confidence decision). The NRC concluded that safe disposal of spent fuel at a geologic repository was technically feasible and would occur before 2025. See 55 Fed. Reg. at 38474, 38477-79; 64 Fed. Reg. at 68005-07 (affirming 1990 waste confidence decision). As a result of the waste confidence decision, the environmental impact study for the issuance of a spent fuel storage facility license only considers the impacts of spent fuel storage for the term of the license or amendment. See 10 C.F.R. § 51.23(b).

A. The Hobbs Act Divests This Court of the Jurisdiction to Hear Defendants' Claim.

Defendants bring their assertion of the inadequacy of the EIS in the wrong court. Pursuant to the Hobbs Act, the district courts lack jurisdiction to consider an EIS prepared by the NRC and its associated decisions. As explained in greater detail in Plaintiffs' Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings (Attachment 1), the Hobbs Act vests exclusive jurisdiction in the courts of appeals for review of matters committed to the NRC. The draft EIS identified by Defendants as faulty was prepared by the NRC, and the final agency action will be the licensing decision of the NRC. Consequently, the EIS and its associated decisions may only be reviewed in a court of appeals, and not by this Court. See New Jersey Dep't of Env'tl. Prot. and Energy v. Long Island Power Authority, 30 F.3d 403, 412-13 (3d Cir. 1994) (claim properly dismissed from district court where NEPA challenge concerning two agencies would effectively challenge NRC final order); City of West Chicago v. United States Nuclear Regulatory Comm'n, 542 F. Supp. 13, 15 (N.D. Ill. 1982) (plaintiffs' claims concerning issuance of EIS dismissed because license amendment had not yet been issued and court noted that once issued, "review is proper before the court of appeals"); Citizens Awareness Network v. Nuclear Regulatory Comm'n, 854 F. Supp. 16, 18 (D. Mass. 1994) (court of appeals had sole jurisdiction to hear challenge to NRC's decision to allow facility to perform early removal of nuclear waste without requiring formal environmental review); Concerned Citizens of R.I. v. Nuclear Regulatory Comm'n, 430 F. Supp. 627, 632 & n.8 (D. R.I. 1977) (plaintiffs' claims to block permit process for construction of nuclear reactors dismissed due to lack of subject matter

jurisdiction because pursuant to 28 U.S.C. § 2342, judicial review of NRC's final decision on EIS is only reviewable by court of appeals).

B. There Is No Final Agency Action.

Defendants' claim that the EIS will be inadequate should be dismissed for the additional reason that there is no final agency action. The EIS relating to PFS' proposed project is currently in a draft state. The final EIS is scheduled to be issued shortly and will be the subject of public hearings before the NRC's Atomic Safety Licensing Board ("ASLB") on contentions raised by the State. Until the final EIS is issued, the subsequent ASLB hearings completed, an initial decision issued by the ASLB and a license issued by the Commission, there is no final agency action. Judicial review of the adequacy of an EIS and associated agency decisions, must await completion of the decision-making process that follows issuance of the final EIS. Such "final agency action" is required by statute and interpretive case law. The statutory requirement stems from the Administrative Procedure Act ("APA"), which applies because NEPA does not provide a private cause of action. See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 882 (1990). Judicial review of alleged NEPA violations is only available pursuant to the general review provisions of the APA, which require that the action under review be a final agency action. As the Supreme Court held:

When, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the "agency action" in question must be "final agency action." See 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no adequate remedy in a court are subject to judicial review.") (emphasis added [by the Court]).

Lujan, 497 U.S. at 882. The requirement of finality protects the “agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” Utah v. United States Dep’t of the Interior, 210 F.3d 1193, 1196 (10th Cir. 2000).

Here, no final agency action will occur with respect to the EIS for the PFS Facility until a final agency order has been issued in the ongoing NRC licensing proceeding for the facility. The NRC regulations expressly provide that “[w]hen a hearing is held on a proposed action,” such as for the PFS Facility, the initial decision of the presiding officer, or ASLB, or the final decision of the Commission “will constitute the record of decision” for NEPA purposes. 10 C.F.R. § 51.102; see also 10 C.F.R. § 51.103(c); New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 93-94 (1st Cir. 1978); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 705-07 (1985). Until that “record of decision” has been made, after completion of the final EIS, any challenge by Defendants to the EIS would be premature. It is well established in NEPA law that it is the agency’s decision, not the final EIS on which the decision is based, that is the final, judicially-reviewable agency action. See Jersey Heights Neighborhood Ass’n v. Glendening, 174 F.3d 180, 186 (4th Cir. 1999) (holding that the record of decision issued following EIS was the final agency action); Grand Canyon Air Tour Coalition v. Federal Aviation Admin., 154 F.3d 455, 472-72 (D.C. Cir. 1998) (dismissing NEPA claim challenging FAA’s environmental assessment because agency had not made final decision regarding which air routes and corridors to authorize); Montana Snowmobile Ass’n v. Wildes,

103 F. Supp. 2d 1239, 1241-42 (D. Mont. 2000) (holding that adoption of a forest plan by the record of decision following the EIS constituted the final agency action).

Consequently, until the EIS is final and the NRC subsequently makes a licensing decision subject to review under the Hobbs Act, Defendants' allegations of NEPA violations are necessarily premature.

III. THE COURT SHOULD DISMISS THE DEFENDANTS' CLAIMS CONCERNING THE BIA'S APPROVAL OF THE PFS LEASE.

The Counterclaim asserts that the Court should enter judgment preventing the proposed PFS facility because BIA's approval of the Skull Valley Band's lease to PFS was legally deficient. Defendants claim, without specificity, that "the BIA's conditional approval of the lease occurred in violation of governing laws and rules," and "any BIA approval of the lease (conditional or otherwise) will be invalid as a breach of the Government's trust obligation to the Band inasmuch as the Skull Valley SNF dump will be a de facto permanent repository and thereby destroy the trust purposes of the land." Counterclaim ¶¶ 1, 34 (claims 4 and 5). The Court should dismiss these claims for three reasons. First, the claims are barred by the doctrines of res judicata and collateral estoppel; second, the claims are not ripe; and third, Defendants lack standing to assert the claims. Each of these issues is considered below, after a discussion of the prior proceeding from which res judicata and collateral estoppel arise.

A. Defendants' Previous Attempts to Raise the Lease Approval Issues Have Been Rejected.

Defendants' repeated and unsuccessful efforts to raise lease approval issues in prior proceedings are summarized in Utah v. United States Department of the Interior, 210 F.3d 1193

(10th Cir. 2000). That Tenth Circuit decision now gives rise in this case to the defenses of res judicata and collateral estoppel.

On May 20, 1997, the Skull Valley Band and PFS signed an agreement for the lease of lands within the Skull Valley Reservation on which PFS proposes to construct and operate a temporary storage facility for spent fuel. Id. at 1195. The United States holds the lands in trust for the Skull Valley Band, and pursuant to 25 U.S.C. § 415(a), the Secretary of the Interior must approve any lease of Indian trust lands. Id. As required by § 415(a), the Band submitted the lease to the BIA, as designee of the Secretary of Interior, for approval. Id.

The BIA Superintendent of the Uintah and Ouray Reservation, acting under the authority delegated to him by the Secretary of the Interior, conditionally approved the lease. Id. The Superintendent conditioned the approval upon (1) the successful completion of an environmental impact statement (“EIS”) evaluating the environmental impacts of the lease in accordance with the National Environmental Policy Act (“NEPA”), and (2) the issuance of a license by the NRC. Id.

The State of Utah sought to intervene in the lease approval process before the Superintendent of the Uintah and Ouray Reservation, who denied intervention because the State lacked standing to raise issues relating to the lease approval process. The decision was affirmed by the BIA’s Area Director, and then again affirmed by the Interior Board of Indian Appeals, which held:

The State seeks to assert its position with respect to environmental and safety concerns about a proposed use of tribal land in the context of a BIA lease approval proceeding under 25 U.S.C.

§ 415(a). The Board has determined that, in that context, the State does not have a right to intervene because it is a stranger to the lease and is not within the zone of interests sought to be protected by section 415. This holding does not preclude the State from asserting its position with respect to environmental and safety concerns in a proper context, i.e., the NEPA and NRC review proceedings.

State of Utah v. Acting Phoenix Area Director, Bureau of Indian Affairs, 32 IBIA 169, 176 (1998), submitted herewith as Attachment 2.

The State then sued in this court seeking to reverse the IBIA's determination that the State lacked standing to intervene. Utah v. United States Dep't of the Interior, 45 F. Supp. 2d 1279, 1281 (D. Utah 1999) ("the district court decision" or "Utah I"). The primary focus of the lawsuit was "whether the state has standing either to intervene as a party in the [25 U.S.C.] § 415 (a) lease approval proceedings or to appeal the Superintendent's decision approving the Lease." Id. at 1282. Judge Kimball concluded that the State had no "legally enforceable rights" to intervene in the agency's lease approval process, and dismissed the case for lack of standing. Id. at 1283-84.

The State then appealed to the Tenth Circuit, again seeking "to intervene in the lease approval process to ensure the Superintendent considers environmental factors as required by § 415(a)." Utah v. United States Dep't of the Interior, 210 F.3d 1193 (10th Cir. 2000) ("the Tenth Circuit decision" or "Utah II"). The Court observed that the Superintendent's approval of the lease was conditional, subject to the successful completion of an EIS and the issuance of an NRC license, and that "NEPA's scope of review significantly exceeds that required by [25 U.S.C.] § 415(a)." Id. at 1195-96. Without reaching the standing question on which the case

had been dismissed below, the court held that the State's action was not ripe for adjudication because the "State's claimed harms are contingent, not certain or immediate." Id. at 1197-98. The court reasoned: "We cannot be certain whether the EIS will show that the project presents unacceptable risks, whether the NRC will issue a license to PFS, or . . . the precise activities which may be permitted on the leased lands." Id. at 1197.

Since the decisions in Utah I and Utah II were rendered, nothing has occurred that would confer standing on Defendants or make the lease approval issues ripe.

B. Defendants' Challenge to the BIA's Lease Approval Process Is Barred by Res Judicata and Collateral Estoppel.

Defendants' current claim that the BIA failed to follow governing laws in conditionally approving the lease or will fail to follow governing law in the future is but another attempt to raise claims that the Tenth Circuit rejected on ripeness grounds. Without question, the doctrines of res judicata and collateral estoppel bar Defendants' attempt to resurrect those issues in this forum. "Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Montana v. United States, 440 U.S. 147, 153 (1979). "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Id.

The required elements for res judicata and collateral estoppel are similar. Res judicata "requires: (1) a judgment on the merits in the earlier action; (2) identity of the parties or their privies in both suits; and (3) identity of the cause of action in both suits." Yapp v. Excel Corp.,

186 F.3d 1222, 1226 (10th Cir. 1999). Collateral estoppel typically requires: (1) a valid final judgment on the issues; (2) identity of the party against whom the earlier decision is asserted; and (3) “an identity of issues raised in the successive proceedings.” SIL-FLO, Inc. v. SFHC, Inc., 917 F.2d 1507, 1520 (10th Cir. 1990). These factors are considered below.

1. This Case Satisfies the Final Judgment Test for Preclusion.

Generally, a final judgment on the merits is required to invoke res judicata or collateral estoppel, but this showing is not required where, as here, Defendants seek to relitigate a claim that was dismissed based on grounds of ripeness, standing, or like issues negating justiciability. In such cases, the decision dismissing the action has preclusive effect as to the issue that was the basis for the dismissal. “Dismissals for want of justiciability are controlled by the same principles as apply to want of subject matter jurisdiction. The decision should preclude relitigation of the very issue of justiciability actually determined.” Wright, Miller & Cooper, Federal Practice and Procedure § 4436 (1981). See also Althin CD Med., Inc. v. West Suburban Kidney Center S.C., 874 F. Supp. 837, 843-44 (N.D. Ill. 1994) (dismissal for lack of standing would be without prejudice to merits of case, but would preclude relitigation of standing issue); Solar v. Merit Systems Protection Bd., 600 F. Supp. 535, 536 (S.D. Fla. 1984) (collateral estoppel applies because, in a previous proceeding, “this Court ruled that plaintiff had failed to exhaust his administrative remedies. *That* conclusion is controlling in [this case]” absent a change in factual circumstances relating to the justiciability issue). Pursuant to these authorities, and given that there has been no change in any relevant circumstances, the Tenth Circuit’s

affirmance of the dismissal on grounds of a lack of ripeness has the effect of precluding any dispute as to whether the claims are ripe at this time.

2. This Case Satisfies the Identity of Parties Test for Preclusion.

For purposes of determining the preclusive effect of Utah II, Defendants in this case, the Governor and Attorney General of Utah, should be considered identical to the party in Utah II, which was the State itself. Many cases hold that government officers are bound by decisions affecting the government, and vice versa. *See, e.g., Headley v. Bacon*, 828 F.2d 1272, 1279 (8th Cir. 1987) (“Litigation involving the government is generally binding with respect to governmental officials who are sued in their official capacities in later actions.”) (citing Town of Seabrook v. New Hampshire, 738 F.2d 10, 10 & n. 1 (1st Cir. 1984)); Lee v. City of Peoria, 685 F.2d 196, 199 n. 4 (7th Cir. 1982) (holding that city and its employees were in privity for preclusion purposes); Mathix v. Laird, 457 F.2d 926, 927 (5th Cir. 1972) (“The fact that the defendant here is the Secretary of Defense, rather than the United States [as in prior litigation], is of no consequence” (for preclusion purposes). Consequently, Defendants here cannot assert that preclusive effect does not apply because they were not parties to Utah II.

3. This Case Satisfies the Identity of Claims/Issues Test for Preclusion.

The identity of issues is established by reviewing the record to determine if the same issues were raised in the prior proceedings. *See Montana v. United States*, 440 U.S. 147, 156 (1979). Such an examination of the record shows that Defendants’ current attempt to claim that BIA’s lease approval process does not comply with governing law, *see* Counterclaim ¶ 34 (fourth and fifth claims), is the same as one of the issues that was decided in Utah II. There, as

discussed, the Tenth Circuit held that the State's claim to participate in proceedings before the BIA was not ripe, but the issues that the State presented to the Tenth Circuit for decision went beyond the simple issue of intervention. The State expressly sought intervention for one purpose: to contest what the State asserted to be the BIA's failure to consider certain environmental and safety factors in the ongoing lease approval process. See Utah II, 210 F.3d at 1196 ("The State seeks to intervene in the lease approval process to ensure that the Superintendent considers environmental factors as required by § 415."). This is the same substantive claim Defendants make in this case.

Paragraph 24 of the Counterclaim contains the fullest explanation of Defendants' Counterclaim as it concerns the lease approval issues. There Defendants complain that the BIA's approval of the lease, in reliance on a faulty EIS to be prepared by the NRC, will be illegal and will breach the government's trust obligations to the Band. The EIS, Defendants allege, will be defective because it will rely on the waste confidence decision and the proposed storage facility will continue to store spent fuel much longer than contemplated by the EIS. Finally, Defendants allege that lease approval will violate the BIA's "statutory obligations to persons and the environment off the reservation." Counterclaim ¶ 24.

A review of the State's briefs in Utah II demonstrates that the foregoing issues are identical to those presented to the Tenth Circuit prior to its decision. In its opening brief on appeal, submitted herewith as Attachment 3, the State explained that it sought to intervene in the lease approval process to ensure that the BIA would not rely on an allegedly inadequate EIS:

[I]ssues which are of fundamental importance in the BIA proceeding have been determined to be outside the scope of the planned [NEPA] review. . . . What is before the Court is the adequacy of the BIA lease approval process. Without intervention . . . it is highly likely that [the process] will be inadequate. . . .

Attachment 3 at 44-45 (emphasis added). See also id. at 9 (complaining of BIA’s reliance on inadequate EIS to be prepared by the NRC); id. at 18 (intervention necessary to ensure BIA will fulfill its statutory duties); id. at 19 (intervention necessary to “challenge the failure of the BIA Superintendent to perform his statutory duty”); id. at 20 (“there has been a complete abdication of [the BIA’s] responsibilities and an unwarranted, wholesale deferral of [its] duties to another administrative agency”); id. at 21 (State wants to intervene to “challenge the failure of [the BIA] to do its duty”). The State’s reply brief before the Tenth Circuit, submitted herewith as Attachment 4, contains similar allegations at 7, 14 and 24.

Moreover, the specific inadequacies in the EIS alleged by the State in Utah II are the same as those identified in paragraph 24 of the Counterclaim. The State argued in Utah II that the spent nuclear fuel would remain on site longer than planned by the EIS, Attachment 3 at 40-43, Attachment 4 at 21, that the BIA could not rely on an EIS that in turn relied on the waste confidence rule, Attachment 4 at 21-22, and that the BIA had failed to discharge its duties to persons and the environment surrounding the reservation. Attachment 4 at 7, 15-16.

As demonstrated, all three tests for the application of res judicata and collateral estoppel have been met: the Tenth Circuit entered a final judgment on justiciability; the parties in the Tenth Circuit case are the same as are before this Court; and in both cases, the State party seeks

to participate in proceedings to challenge the BIA's lease approval process. Because the status of the lease approval has not changed, Defendants' lease approval claims are precluded. The issuance alone of the final EIS, which is scheduled shortly after the filing of the instant Motion, does not materially alter the status of the lease approval process. As the Tenth Circuit reasoned, the State's claim would not be ripe until the NRC issues a license and the "precise activities which may be permitted" are known. Utah II at 1197.

C. Defendants' Challenge to the BIA's Lease Approval Process Is Not Ripe.

Concepts of res judicata and collateral estoppel aside, Defendants' claims challenging the BIA's lease approval process should be dismissed because the claims are not ripe. As already decided by the Tenth Circuit in Utah II, the ripeness doctrine bars the claims because NEPA review and NRC licensing proceedings are still ongoing, and their outcomes unknown. It is too early to know if final lease approval will be forthcoming under the lease approval pursuant to 25 U.S.C. § 415 and significantly any decision by a court would inappropriately interfere with the administrative process, a process in which defendants may, and are, participating. In short, the outcome of the NEPA review and licensing process may render Defendants' current challenge unnecessary.

Whether a dispute is ripe for adjudication involves an inquiry into "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Labs. v. Gardner, 387 U.S. 158, 164 (1967); accord Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164 (1967). A "basic rationale" of the ripeness doctrine is to "protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt

in a concrete way by the challenging parties.” Abbott Labs., 387 U.S. at 148-49. In the recent case of Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726 (1998), the Supreme Court applied a three part test to determine whether a controversy was ripe for judicial decision. The factors that the Court considered relevant were:

- (1) whether delayed review would cause hardship to the plaintiff;
- (2) whether judicial intervention would inappropriately interfere with further administrative action; and
- (3) whether the courts would benefit from further factual development of the issues presented.

Id. at 733. See also Utah II, 210 F. 3d at 1196 (in dismissing the State’s appeal of these very issues, the Tenth Circuit followed the elements identified in Ohio Forestry). Defendants’ Counterclaim fails all three prongs of the ripeness test.

1. Delaying Judicial Review of Defendants’ Claims Will Cause No Harm.

The Tenth Circuit held, in Utah II, that the State would not suffer any significant hardship if court consideration of its participation in, and challenge to, the lease approval process was withheld. 210 F.3d at 1196. Similarly here, Defendants will suffer no harm if consideration of their challenge to the BIA’s lease approval process is withheld. In Utah II, the Tenth Circuit based its decision on the Ohio Forestry case. There, plaintiff Sierra Club sought to challenge a land resource management plan for a national forest because the plan would supposedly lead to logging inconsistent with federal statutes. The Supreme Court held that the case was not ripe, noting that “[a]lthough the [p]lan sets logging goals, selects the forests that are suited to timber production, and determines which ‘probable methods of timber harvest’ are appropriate, it does not itself authorize the cutting of any trees.” Ohio Forestry, 523 U.S. at 729 (citations omitted).

Before timber harvesting could occur, a number of additional events had to take place, including giving those affected by the proposed logging an opportunity to be heard, completion of review of environmental impacts under NEPA, and an opportunity for judicial review for anyone opposed to the agency’s determination concerning logging. *Id.* at 729-30. Accordingly, the Court found that the plan sought to be challenged by the Sierra Club did not inflict any “significant practical harm upon the interests the Sierra Club advances—an important consideration in light of this Court’s modern ripeness cases.” *Id.* at 733-34.

Similarly here, Utah cannot assert “any significant practical harm” until the results of the BIA’s lease review are known. Indeed, there may in fact be no future lease review at all if the project is not licensed, as the final lease review would only occur following completion of the NEPA process and the issuance of a license, just as the logging opposed by the Sierra Club in Ohio Forestry could take place only after additional administrative procedures and judicial review. As in Ohio Forestry, Defendants’ claims are contingent; they do not amount to “significant practical harm.” *Id.* at 733; see also Texas v. United States, 523 U.S. 296, 300 (1998) (claim resting on contingent future events that may not occur is not ripe); Norvell v. Sangre de Cristo Dev. Co., Inc., 519 F.2d 370, 376 (10th Cir. 1975) (holding that “[n]o significant hardship will accrue to the State” because any such hardship would first be contingent upon approval of the development project at issue).

2. Judicial Review Now Would Interfere With Further Administrative Action.

Defendants' Counterclaim alleges that the BIA violated applicable law by issuing its conditional approval of the lease and that any future BIA approval of the lease would be illegal. Judicial review now on these issues would clearly interfere with BIA action. In Ohio Forestry, the Supreme Court found an action not ripe because, among other things, immediate judicial review would hinder the agency's ability to refine its policies and it would be an interference with the system Congress specified for logging decisions. 523 U.S. at 735-36. Similarly here, judicial review now of the BIA's contingent approval of the lease and expected future review of the lease would hinder the agency's own decision-making responsibilities and interfere with Congressionally delegated power to approve Indian leases. See also FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 242 (1980) (premature review "denies the agency an opportunity to correct its own mistakes and to apply its expertise").²

3. Further Factual Development of the Issues Raised in the Counterclaim Is Necessary.

The Tenth Circuit held that Utah's claim was not ripe because further factual development was necessary: "The State's claimed harms are contingent, not certain or immediate. We cannot be certain whether the EIS will show that the project presents unacceptable risks, whether the NRC will issue a license to PFS or . . . the precise activities

² In Utah II, the court stated that "judicial intervention would probably not inappropriately interfere with further administrative action." 210 F.3d at 1197. The court did not elaborate on this statement, and it would seem to stand at odds with the Supreme Court's holding in Ohio Forestry. Nevertheless, the Tenth Circuit noted it would benefit from further factual development.

which may be permitted on the leased lands.” Utah II, 210 F.3d at 1197-98. The same conclusions apply here. Defendants’ Counterclaim remains contingent on the outcome of the NEPA process and the licensing process. Any focus on the precise activities that may be permitted is presently impossible. Judicial review undertaken now may well prove in the future to have been unnecessary or based on faulty factual premises. Under these circumstances, judicial review is premature just as it was in Utah II. See also Ohio Forestry, 523 U.S. at 736 (further factual development necessary because review at present would take place “without benefit of the focus that a particular logging proposal could provide” and, depending on agency’s future actions, “review now may turn out to have been unnecessary”); Norvell, 519 F.2d at 378 (“we hold that declaratory judgments are improper when, as here, ongoing activity [in accordance with NEPA] may radically change the factual situation”).

D. Defendants Lack Standing to Challenge the BIA’s Lease Approval Process.

Defendants’ claims concerning the lease approval process should be dismissed for the additional reason that Defendants lack standing. This was the basis of Judge Kimball’s dismissal. As noted, his decision was affirmed on the alternate ground of ripeness, but the Tenth Circuit offered no criticism of Judge Kimball’s decision.³ Because of the nature of the affirmance, Judge Kimball’s dismissal on standing grounds may lack the force of collateral estoppel,⁴ but his decision clearly articulates why Defendants lack standing.

³ The Tenth Circuit noted that the issue of ripeness had not been raised below, and declined to address standing where both standing and ripeness are challenged. Utah II, 210 F.3d at 196, nn.1, 2.

⁴ Wright, Miller, & Cooper, Federal Practice & Procedure § 4421 at 205 (1981), suggests collateral estoppel does not apply; see also Stebbins v. Keystone Ins. Co., 481 F.2d 501, 507 n.13 (D.C. Cir. 1973) (“only those issues

5 U.S.C. § 702 was the primary mechanism by which Defendants sought standing in Utah. See 45 F. Supp. 2d at 1282. Section 702, part of the Administrative Procedures Act, can provide standing in the absence of an explicit standing provision in another applicable statute. Id. Defendants must satisfy two tests to demonstrate that they have the requisite standing pursuant to § 702. First, they must have suffered an “injury in fact—an invasion of a legally protected interest.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Second, they “must establish that the injury . . . falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.” Air Courier Conf. v. American Postal Workers Union, AFL-CIO, 498 U.S. 517, 523 (1990) (citations and internal quotation marks omitted); see also Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153-54 (1970) (same two elements). Defendants satisfy neither of these requirements.

1. Utah Has Not Suffered An Injury In Fact.

As described above, Defendants assert that the BIA failed to adhere to “governing laws” in conditionally approving the lease. Counterclaim ¶¶ 24, 34. This does not constitute an injury in fact. To establish an injury in fact, the claimant has the burden of demonstrating the “invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” Defenders of Wildlife, 504 U.S. at 560 (citations and internal quotation marks omitted).

expressly considered by the appellate court can be used[] as the basis for a plea of collateral estoppel”); Moran Towing & Transp. Co. v. Navigazione Libera Triestina, S.A., 92 F.2d 37, 40 (2d Cir. 1937) (rejecting argument that appellate court affirmance on other grounds “leaves the questions determined by the lower court res judicata in all respects”); The Hannahville Indian Cmty. v. United States, 1967 WL 8873 (Ct. Cl.) (holding that if “appellate court

An allegation such as Defendants' that injury may occur "some day" when the BIA approves the lease does "not support a finding of the 'actual or imminent injury' that our cases require" for standing. Defenders of Wildlife, 504 U.S. at 564; see also Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) ("[W]e have said many times before and reiterate today: Allegations of possible future injury do not satisfy the [injury in fact] requirements of Art. III."). Utah's claim that the BIA's reliance on the NRC's EIS, when it is completed, will not satisfy applicable law, is too speculative to satisfy the injury in fact requirement for standing. No activities have yet been licensed, the BIA has not issued a final approval of the lease, and it may never do so because the final approval is contingent upon satisfactory completion of the NEPA and NRC licensing processes.

Even if such activities are completed, Defendants will have no legally protected interest that can give rise to an injury in fact. Defendants cannot assert an "injury in fact" because the lease-review standards under which Defendants seek relief (25 U.S.C. § 415(a)) were not enacted for Defendants' benefit. Federal law governing the BIA's oversight of leasing exists for the benefit of Indians; non-Indians are not entitled to claim "injuries in fact" based on the agency's alleged noncompliance. Cf. Idrogo v. United States Army, 18 F. Supp. 2d 25, 27-28 (D. D.C. 1998) (non-Indians cannot suffer "injury in fact" from violations of Native American Graves Protection and Repatriation Act because the Act was passed to benefit only Native Americans).

does not pass upon [lower court's] finding of fact in reaching its decision, the lower court's finding is not conclusive against the appellant on a different cause of action").

2. Defendants Are Not Within the Zone of Interests Protected by 25 U.S.C. § 415.

To establish standing, Utah also “must establish that the injury [it] complains of . . . falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for [the] complaint.” Lujan v. National Wildlife Fed’n, 497 U.S. 871, 883 (1990). In asserting that the BIA has not followed “governing laws and rules,” Defendants have not specifically identified any federal law, but they appear to be referring to the law governing the BIA’s lease approval process, 25 U.S.C. § 415(a). Section 415(a) provides in part:

Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

25 U.S.C. § 415(a).

In the Utah litigation, both the IBIA and Judge Kimball held that Section 415 did not afford the State a basis for standing. The IBIA squarely held that the State “is not within the zone of interests sought to be protected by section 415. . . . [T]he State [may assert] its position with respect to environmental and safety concerns in a proper context, i.e., the NEPA and NRC review proceedings.” State of Utah v. Acting Phoenix Area Director, Bureau of Indian Affairs, 32 IBIA 169, 176 (1998), submitted herewith as Attachment 2. Judge Kimball similarly concluded that Utah is not within the zone of interest protected by § 415. He held that “[n]either

§ 415(a) nor its implementing regulations” provides the State with a basis for standing. Utah I, 45 F. Supp. 2d at 1282. The judge reasoned: “To read § 415(a) to give legally enforceable rights to parties having interests that compete with the tribes’ would be to impose a duty on the Secretary that is inconsistent with the statute’s purpose of protecting tribal interests and resources.” Id. at 1283. See also Webster v. United States, 823 F. Supp. 1544, 1550 (D. Mont. 1992), aff’d 22 F.3d 221 (9th Cir. 1994) (holding BIA’s discretionary lease approval authority under § 415 “is grounded in the federal policy of promoting the political and economic autonomy of the tribes” or, in other words, protecting Indian interests).

This conclusion is supported by decisions interpreting other statutes requiring government approval of Indian transactions with third parties. For example, 25 U.S.C. § 81 requires approval by the Secretary of certain contracts between Indian tribes and third parties. In Western Shoshone Business Council v. Babbitt, 1 F.3d 1052 (10th Cir. 1993), the court addressed the issue of standing where a law firm sought to overturn the BIA’s refusal to perform a Section 81 review of the law firm’s representation contract with a group of Indians. 1 F.3d at 1055-56. The court held that “[a]lthough the [law firm] has an interest that is arguably threatened by defendant’s refusal to review its contract with the Council,” and the firm’s relationship with Indians was effectively regulated by the statute, it was not within the protected zone of interest. Id. The court concluded:

Of course plaintiff [law firm] is “regulated” by § 81, but the undisputed purpose of the statute is to protect tribal lands, not to regulate lawyers specifically, or to create either an administrative right of review or a contract cause of action for non-Indian contractors. Given the overtly paternalistic cast of § 81, we

conclude that it cannot reasonably be assumed that Congress intended to permit the suit by non-Indian contractors.

Id. at 1056 (internal quotation marks and citation omitted). If even persons who have direct contractual relationships with a tribe and who are regulated by Section 81 are not within the statute’s zone of interest, “it cannot reasonably be assumed that Congress intended to permit” third parties, such as Defendants here, with even more unrelated interests, to bring suit under the similar provisions of Section 415. Other decisions reach similar conclusions.⁵

The courts have made clear that claimants such as Defendants are not within the “zone of interest” protected by Section 415 and the similar Section 81. There is no reason that this Court should depart from the holding in Utah I, where the court addressed identical claims and rejected them on the basis of standing.

Additionally, Defendants are not only strangers to the proposed lease which they claim is invalid, they are strangers to the trust relationship between the Skull Valley Band and the United States which they contend has been violated by the proposed lease. The trust obligation “has

⁵ See, e.g., Schmit v. International Fin. Mgmt. Co., 980 F.2d 498, 498 (8th Cir. 1992) (non-Indian lacked standing to bring action alleging that defendants violated federal law by contracting with Indian tribe to operate bingo halls on tribal land without first obtaining approval of Secretary of the Interior; non-Indian was not within the zone of interest protected by 25 U.S.C. § 81); Enterprise Mgmt. Consultants, Inc. v United States, 685 F. Supp. 221, 222-23 (W.D. Okla. 1988), aff’d, 883 F.2d 890 (party to bingo management contract with Indian tribe was not within the “zone of interest” to obtain judicial review of administrative determination denying approval of contract; statute governing agreements with Indian tribes was intended to protect the interests of Indians); Gray v. Johnson, 395 F.2d 533, 536 (10th Cir. 1968) cert. denied, 392 U.S. 906 (1968) (noting, in the context of lease approvals under 25 U.S.C. §§ 393 and 393a, that “[t]he supervisory power is for the benefit of the Indian. . . . [T]he United States has the duty to get the ‘best possible price’ for the Indian.”); Wallace v. Aberdeen Area Director, 29 IBIA 142 (1996) (in leasing trust property, BIA’s duty is owed to the owners of that property; appellant, who was only a potential lessee of trust property, lacked standing to allege a violation by the BIA); ITT Rayonier, Inc. v. Deputy Assistant Secretary – Indian Affairs (Operations), 13 IBIA 90 (1985) (standing to review BIA’s approval of Indian timber contract settlement denied where intervener was “not a party to the contract at issue and has no legal right to represent any real party-in-interest”).

been compared to . . . a common law trust, with the United States as trustee, the Indian trib[e] . . . as beneficiar[y], and the property and natural resources managed by the United States as the trust corpus.” Department of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 121 S. Ct. 1060, 1067 (2001). The problem with Defendants’ claim regarding that trust obligation is that they have utterly no interest in that legal relationship, and thus have no standing to enforce it—much less in a claim against the Skull Valley Band, the beneficiary of that trust.

IV. THE COURT SHOULD DISMISS THE DEFENDANTS’ CLAIM CONCERNING THE BAND’S APPROVAL OF THE LEASE.

Defendants’ claim that “the Band has not validly, properly, and lawfully approved the lease [to PFS],” Counterclaim ¶ 34 (third claim), should be dismissed because (1) adjudication of the claim would violate tribal sovereign immunity, (2) the Court lacks jurisdiction to hear it, and (3) Defendants lack standing to assert it.

A. This Court is Barred From Adjudicating the Claim by Tribal Sovereign Immunity.

Defendants’ original Counterclaim, filed with their Answer on July 17, 2001, named only PFS as a counter-defendant; it did not name the Skull Valley Band as a counter-defendant even though Defendants claimed that “the Indian tribe has not validly, properly, and lawfully approved the lease.” Utah’s Answer, Counterclaim, and Demand for Jury Trial, ¶ 1. In apparent recognition that the Band is an indispensable party to the Counterclaim, Defendants filed an Amended Counterclaim on August 8, 2001, naming the Band as a counter-defendant. It alleges that Band officials, including Chairman Leon Bear, have violated the Band’s traditions and rules,

Counterclaim ¶ 23(B), and that “[t]he Band has never approved the lease in a manner valid under the Band’s form of government.” Id. ¶ 25(A). This claim against the Band—and all other claims against the Band—are barred by the doctrine of tribal sovereign immunity.

Suits against Indian tribes are barred by sovereign immunity absent either an unequivocal waiver by the tribe or congressional abrogation. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Ute Distribution Corp. v. Ute Indian Tribe, 149 F.3d 1260 (10th Cir. 1998). There is no applicable congressional abrogation of immunity, nor has the Band consented to the assertions of Defendants’ Counterclaim.

The initiation of this suit by the Band against state officials to establish that certain Utah statutes are unconstitutional does not constitute a waiver of the Band’s sovereign immunity. In Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991), the Supreme Court held that a lawsuit by the Potawatomi Tribe seeking to enjoin a state cigarette sales tax assessment did not constitute a waiver of sovereign immunity to a counterclaim by which the Oklahoma Tax Commission sought to enforce its tax claim, and also to enjoin tribal cigarette sales to non-tribal members. 498 U.S. at 509-10. The Supreme Court rejected the Oklahoma Tax Commission’s argument that its counterclaim arose out of the same transaction and was therefore “compulsory” under Fed. R. Civ. P. 13(a). Similarly, Defendants here contend that Plaintiffs have “sought a declaration of their rights” and have thus “necessarily put the [validity of the PFS lease] in issue,” implying that the Skull Valley Band thereby consented to the counterclaim. See Counterclaim ¶ 27. However, the Band has not sought from this Court a declaration of its rights under its lease with PFS, so the Counterclaim does not even arise out of

the same transaction. The Band has certainly not consented to a suit seeking to declare the Band's actions in approving the lease unlawful as violative of tribal law and customs.

The breadth of the ruling in Oklahoma Tax Commission, *supra*, is telling. Acknowledging that the Court had previously ruled, in Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980), that a tribe may be required to assist in the collection of sales taxes imposed on nontribal members, 498 U.S. at 512, the Court nevertheless held that Oklahoma's counterclaim was barred. Subsequently, in Kiowa Tribe of Oklahoma v. Manufacturing Technology, 523 U.S. 751 (1998), the Supreme Court observed that its ruling in Oklahoma Tax Commission stands for the proposition that, even where a state has a right to demand tribal compliance with state laws, it does not follow that the State has the means available to enforce those laws. 523 U.S. at 755.

In upholding the doctrine of tribal sovereign immunity, the Supreme Court's opinion in Kiowa Tribe noted that an early rationale for the doctrine was "to protect nascent tribal governments from encroachment by States" – a concern clearly present in this case. 523 U.S. 758-59. Further, subsequent to Kiowa, Congress has reinforced the tribal sovereign immunity doctrine in the Indian Tribal Economic Development and Contract Encouragement Act of 2000, 114 Stat. 46, 25 U.S.C. § 81. That Act requires tribes to disclose their sovereign immunity defense when they enter into certain contracts or to waive it. The Act does not, however, waive tribal immunity from suits by States or give the States any standing to challenge tribal commercial contracts. Thus, this Court should also apply the doctrine to Defendants'

Counterclaim against the Band, and thereby protect the Band from this encroachment by Defendants.

B. This Court Has No Jurisdiction To Entertain Defendants’ Challenge To An Internal Tribal Decision.

As noted above, Defendants claim that the Skull Valley Band “has not validly, properly, and lawfully approved the lease,” Counterclaim ¶ 1; that Chairman Leon Bear “[d]uring his tenure as a tribal officer ... has violated the Band’s traditions and rules,” *id.* ¶ 23(B); that the “Band has never approved the lease in a manner valid under the Band’s form of government,” *id.* ¶ 25(A); and that the “Band’s ‘approval’ of the lease resulted and continues to result from wrongful and unlawful use of tribal assets and from economic and other forms of coercion and duress.” *Id.* ¶ 25(B). However, no federal statute provides this Court with subject matter jurisdiction to consider this challenge to an internal tribal decision regarding the use of tribal lands. The Court certainly has no authority to review tribal actions alleged to have violated tribal law.

In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the Supreme Court held that the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301, et seq., provided no basis for federal court jurisdiction over a suit by a tribal member challenging her tribe’s actions as violating the Indian Bill of Rights found in 25 U.S.C. § 1302. The Court also held that the tribal member could not invoke federal court jurisdiction to challenge the actions of tribal officers, who are not protected by sovereign immunity, because a federal action “constitutes an interference with tribal autonomy and self-government. . . .” 436 U.S. at 59. “[R]esolution in a federal forum of

intratribal disputes . . . cannot help but unsettle a tribal government’s ability to maintain authority. . . .” Id. at 60.⁶

Similarly, Defendants’ claim challenging tribal approval of the PFS lease invites this Court to delve into the propriety and validity of internal tribal actions. The only basis of jurisdiction alleged by the Defendants is “the same basis and to the same extent as this Court has jurisdiction relative to the Complaint. . . .” Counterclaim ¶ 28. None of the statutes relied on by Plaintiffs in their Complaint provide any basis for Defendants’ attempt to seek review of tribal actions in their Counterclaim.

In the twenty-three years since the Supreme Court’s decision in Santa Clara Pueblo, the federal judiciary has repeatedly rebuffed attempts to seek federal court review of internal tribal decision-making. In Runs After v. United States, 766 F.2d 347 (8th Cir. 1985), the court of appeals held that “[r]esolution of . . . disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court.” 766 F.2d at 352. There plaintiffs contended that certain tribal council resolutions regarding the tribal electoral process were allegedly inconsistent with the tribal constitution, and that members of the council conspired to prevent plaintiffs from running for or holding tribal office. Indeed, the Field Solicitor for the Bureau of Indian Affairs (BIA) had previously advised the BIA that the

⁶ The Tenth Circuit had earlier ruled that the tribal ordinance challenged by plaintiffs violated the equal protection provision of the Indian Bill of Rights, 25 U.S.C. § 1302(8). Martinez v. Santa Clara Pueblo, 540 F.2d 1039, 1046-47 (10th Cir. 1976) rev’d 436 U.S. 49 (1978).

resolutions were contrary to the tribal constitution. Id. at 350. Nevertheless, the court of appeals affirmed the district court’s dismissal for want of jurisdiction.⁷

In Tillett v. Lujan, 931 F.2d 636 (10th Cir. 1991), plaintiff claimed that members of the Tribal Business Committee had embezzled tribal funds, and then retaliated against her for her efforts to have them recalled from tribal office. The Tenth Circuit held:

To the extent Tillett sought to invoke the jurisdiction of federal court to decide issues concerning [tribal leaders’] alleged failure to acknowledge this recall and the misuse of tribal funds, the district court properly concluded that such matters were “clearly ‘intratribal’ disputes” for which Tillett would have to seek tribal remedies.

931 F.2d at 642. The court cited Santa Clara Pueblo for the proposition that exclusive jurisdiction for the resolution of such disputes lies in tribal court. Id.; see also Wheeler v. Swimmer, 835 F.2d 259, 262 (10th Cir. 1987); Wheeler v. Dep’t of the Interior, 811 F.2d 549, 552-53 (10th Cir. 1987) (affirming grant of summary judgment against plaintiff in suit where plaintiff sought to compel the BIA to take action regarding “intratribal matter[]” of election dispute). The foregoing cases establish that there is no jurisdictional basis for this Court to entertain Defendants’ Counterclaim challenging tribal procedures employed to authorize a lease of tribal land.⁸

⁷ Plaintiffs in Runs After tried to evade the general rule barring federal court review of intra-tribal matters by naming the BIA as a defendant, but the court of appeals held that they had failed to exhaust agency administrative remedies. 766 F.2d at 352. Of course, Defendants here have not sought relief against the BIA.

⁸ A narrow exception, not applicable here, to the rule that tribal decisions are not reviewable in federal court without a Congressional authorization, was recognized in National Farmers Union Insurance Co. v. Crow Tribe, 471 U.S. 845 (1985). There the court held that federal question jurisdiction (28 U.S.C. § 1331) lies to determine whether an Indian tribe has the authority to exercise certain governmental powers, such as the exercise of tribal court jurisdiction over non-Indians. Federal question jurisdiction is not applicable here because Defendants have not

C. Defendants Lack Standing To Assert a Challenge Predicated on Tribal Procedures.

As a separate ground for dismissal, Defendants lack standing to assert a claim based on an alleged violation of internal tribal procedures. Since Defendants lack standing to challenge the BIA's approval of the lease, as discussed above, they also necessarily lack standing to challenge the Band's own internal approval of the lease. Defendants have not suffered an "injury in fact," Defenders of Wildlife, 504 U.S. at 560, because any harms are contingent on the outcome of the NEPA process and licensing proceedings. Nor can Defendants allege an injury that "falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for [the] complaint." Air Courier, 498 U.S. at 523. Defendants are not within the zone of interests protected by the internal procedures followed by the Band in approving the lease. Failing to satisfy either element of the standing test, Defendants lack standing to complain of a failure of the Band to adhere to its internal procedures.

CONCLUSION

For the foregoing reasons, Defendants' Amended Counterclaim should be dismissed in its entirety with prejudice, with costs awarded to Plaintiffs.

contended in their Counterclaim that the Skull Valley Band lacks authority to lease tribal land; they have alleged only that the tribal leaders have not followed tribal customs and rules, and have misused tribal assets.

DATED this 12th day of December, 2001.

/S/

James Holtkamp
Leboeuf, Lamb, Greene & MacRae
Attorneys for Plaintiff Skull Valley Band of
Goshute Indians

Tim Vollmann
Attorney for Plaintiff Skull Valley Band of
Goshute Indians

/S/

Val R. Antczak
J. Michael Bailey
H. Douglas Owens
Parsons Behle & Latimer
Attorneys for Plaintiff Private Fuel Storage,
L.L.C.

Jay E. Silberg
Ernest L. Blake, Jr.
Shaw Pittman LLP
Attorneys for Plaintiff Private Fuel Storage,
L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December, 2001, I caused to be hand delivered a true and correct copy of the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES**

IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIM to:

Monte N. Stewart, Esq.
Special Assistant Attorney General
Lawrence J. Jensen, Esq.
5110 State Office Building (behind Capitol Building)
Salt Lake City Utah 84114

James R. Soper, Esq.
State of Utah
Office of the Attorney General
160 East 300 South, 5th Floor
Salt Lake City, Utah 84114
