

The SHOSHONE-BANNOCK TRIBES



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RECEIVED

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Ms. Wendy Dixon, EIS Project Manager
 M/S 010
 U.S. Department of Energy
 Office of Civilian Radioactive Waste Management
 Yucca Mountain Site Characterization Office
 P.O. Box 30307
 North Las Vegas, NV 89036-0307

Re: Comments on the Draft EIS for the Yucca Mountain Repository

Dear Ms. Dixon:

The Shoshone-Bannock Tribes appreciates the opportunity to provide comments on the Department of Energy's ("DOE") draft Environmental Impact Statement ("DEIS") for the proposed national geologic repository for spent fuel and nuclear waste at Yucca Mountain.

Shoshone-Bannock Tribes' Interest. In 1867, President Andrew Johnson by Executive Order designated the Fort Hall Reservation ("Reservation") for various Shoshone and Bannock bands who occupied the area from time immemorial. On July 3, 1868, the Shoshone-Bannock Tribes concluded the Second Treaty of Fort Bridger, which was ratified by the United States Senate on February 24, 1869. 15 Stat. 673. Article 4 of the Treaty reserved the Reservation as a "permanent home" for the signatory Tribes. The Treaty in addition to the reserving the Reservation, reserved off-reservation hunting, fishing, and gathering rights on federal lands. The Tribes, today, continue to exercise these treaty guaranteed subsistence rights in and near the Idaho National Engineering and Environmental Laboratory ("INEEL") located approximately 40 miles northwest of the Reservation. The INEEL is located on the aboriginal area of the Tribes.

The Reservation consists of about 544,000 acres of land, and it forms a sizeable geographic area for the exercise of Tribal jurisdiction, supports a residing population, is the basis for the Tribal economy, and provides an irreplaceable forum for cultural vitality based on religious practices and cultural traditions premised on the sacredness of land. The

current Tribal enrollment is approximately 4,300 members, and the Reservation population is about 6,000.

The Shoshone-Bannock Tribes ("Tribes") are a federally recognized Indian Tribe organized under the provisions of the Indian Reorganization Act, 25 U.S.C. § 476 and is governed by a Constitution and Bylaws adopted by Tribal members in 1936. Pursuant to the Constitution and Bylaws the Tribes exercise a full range of governmental powers including regulatory, police, judicial, legislative, and maintains a well-established infrastructure. In 1937, the Tribes established a federally chartered corporation under Section 17 of the Indian Reorganization Act, 25 U.S. C. § 476. The federal corporation permits the Tribes to engage in economic and business matters. Currently, the corporation maintains several successful enterprises located throughout the Reservation, including, two gas stations, restaurant, buffalo enterprise, two grocery stores, museum, agricultural farm, clothes and beadwork store, and gaming enterprise.

The Tribes' interest in spent fuel and nuclear waste issues including its transportation and storage, arises from the impacts of the storage at the INEEL on aboriginal lands of the Tribes, and the exercise of treaty rights on and near the lands. In addition, the storage of waste may impact the Reservation lands, and health and welfare of the Tribal members. The Reservation is a major corridor for transportation route of all the waste shipped into and out of the INEEL by rail or highway. The railroad and Interstate 15 bisect the Reservation from north to south for approximately 15 miles.

General Comments. [There is no question that the United States DOE has a trust responsibility to the Tribes. This trust relationship was established in the Fort Bridger Treaty of 1868, 15 Stat. 673, and the United States Supreme Court has held the goals in setting aside the Reservation were "to protect . . . [the Tribes'] rights and to preserve for . . . [them] a home where . . . [their] tribal relations might be enjoyed under shelter of the authority of the United States." *Ward v. Racehorse*, 163 U.S. 504, 509 (1896). In addition, the DOE Indian Policy recognizes this trust responsibility and recognizes that "some Tribes [such as the Shoshone-Bannock] have treaty-protected interests in resources outside the reservation boundaries."

Accordingly, in exercising its trust responsibilities to the Tribes, it must exercise the highest degree of care and all the skill at its disposal to protect treaty rights, and trust property from loss or damage. See *Duncan v. United States*, 667 F.2d 36, 45 (Ct. Cl. 1981). These fiduciary duties require far more than a 'judgment call,' subordinating tribes' trust resources to competing federal interests. *Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252, 256 (D.D.C. 1973). Additionally, a tribe should not be required to prove to the trustee the particular measures which are necessary. A tribe is 'entitled' to rely on the United States, its guardian for needed protection of its interests." *United States v. Creek Nation*, 295 U.S. 103, 110 (1935). This trust responsibility means that DOE must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary. *Morton v. Ruiz*, 415 U.S. 199, 232-38 (1974); *Cheyenne Arapahoe Tribes of Oklahoma v. United States*, 966 F.2d 583 (10th Cir.), *cert. denied*, 113 S.Ct. 1642 (1992).

Insufficient Comment Period. [Despite the DOE extending the comment period an additional 30 days, the total time allowed to comment is insufficient given the large

2 cont. volume of complex, technical information, documents, references, etc, to review for this critical draft EIS. The DOE has undertaken this particular EIS for many years, with highly qualified experts to study and understand the Yucca Mountain area. It is unrealistic to expect the EIS to be adequately reviewed by Indian tribes who have limited financial resources and technical staff, and to prepare technical comments that address the myriad of issues raised in the EIS in such a short period of time. The Nevada Indian tribes are particularly hampered in their ability to comment on this EIS in a manner that is protective of their interests. Therefore, it is even more important that the DOE carefully and thoughtfully consider and protect the Nevada tribal interests, including treaty rights, health and risk related matters based on their trust responsibility.

3 **The "No Action Alternative".** While we recognize that the Nuclear Waste Policy Act prevents the DOE from considering the need for the repository or alternatives to geologic disposal, and the no action alternative was considered to provide a baseline for comparison with the proposed action, we believe that it is necessary to point out that the No-Action alternative has serious ramifications for our Tribal community. The Tribes have consistently taken the position that the waste has remained too long in the aboriginal area of the Tribes. To even suggest that the spent fuel will remain on site at INEEL, either with institutional controls or unimaginably, without controls, is not acceptable to our people.

As discussed in the draft EIS, if the spent fuel is left on-site in dry storage, eventually the radioactive material would escape to the environment, contaminating the atmosphere, soil, surface water and groundwater. Although there is no mention of what would happen to the people living near these sites, we assume that they would either be removed or face contamination. Such federal action as the Supreme Court succinctly stated in *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919), "would not be an exercise of guardianship, but an act of confiscation" or "spoliation" as Justice Cardozo tartly stated in *Shoshone Tribe v. United States*, 299 U.S. 476, 498 (1937).

The DOE must recognize that tribal lands play a different role than in the non-Indian context. And, any federal action affecting such tribal lands must evaluate using the trust doctrine. First, the Tribal land base is the sine quo non of tribal sovereignty. Surrounded by a majority non-Indian society of a vastly different orientation, a distinct tribal territory remains essential to fulfilling the federal promise of native separatism envisioned in the treaty making era. The vast cessions of land by tribal peoples through the treaty process were premised on federal promises that naïve people could continue their way of life on homelands of smaller size, free from intrusions of the majority society. The dominant tenet which emerges from these origins is that the Indians best interests lie in preserving the tribes' sovereign nation status, resisting assimilation forces, and preserving homelands. Today, most fundamentally, the modern form of the trust obligation is the federal government's duty to protect his separatism by protecting tribal lands, resources and way of life, and shielding Indian lands from environmental threats. See e.g., *United States v. Creek Nation*, 295 U.S. 103, 110 (1935); *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 750 (10th Cir. 1987)(finding trust responsibility to protect tribe's wildlife resources); *Joint Passamaquoddy Tribal Council v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975) (noting that federal government's fiduciary duty to protect tribal lands is "beyond question"); *Nothern Cheyenne Tribe v. Hodel*, 12 Indian L. Rep. 3065, 3070 9D.Mont, May 28, 1985) (mem.) (noting trust duty extends to off-reservation federal activities that impact tribe).

3 cont.

Second, intergenerational habitation is unquestionably a dominant feature of tribal land tenure. We have no intention of leaving our permanent homeland, land that was reserved by Treaty for present and future generations. The Tribe have justifiable expectations of a perpetual and stable land base. This stands in marked contrast to non-Indian owned lands, which is typically held by individuals for transitory habitation or business for investment.

Third, Indian land is essentially irreplaceable. This is due in part to the unavailability of alternate consolidated tracts of land, but also these lands form the basis for cultural and economic survival of the Tribes. Loss of a tribal land base because of contamination would be devastating to tribes and leads to would lead to irreversible cultural extinction for some tribes. Moreover, if tribal lands are contaminated and damaged, habitation is restricted or eliminated which will result in the tribe losing its political powers to control and regulate the activities occurring on its homelands. Finally, the tribe may be unable to adequately preserve or protect its members' general health, welfare and safety through the loss of contaminated lands.

The concept of a secure usable tribal homeland for future generations must guide the trust analysis in the DOE's decisionmaking regarding the no-action alternative. Accordingly, relocating a tribe in a manner similar to the relocation of the non-Indian residents of Times Beach or Love Canal would be disastrous to the Tribe's well being, and inconsistent with the federal government's trust obligations to the tribe. See, e.g., *Continental Insurance Co. v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 811 F.2d 1180, 1182 n.1 (8th Cir. 1987)(noting high levels of the hazardous substance dioxin resulted in government purchasing the entire town of Times Beach, Missouri with its population of approximately 2,200 people for \$37 million); *Smith v. Reagan*, 842 F.2d 28 (2d Cir. 1988)(residents of Love Canal, New York received relocation assistance when 21,000 tons of chemical waste dumped by Hooker Chemical & Plastics Corp. in the Love Canal landfill leaked out and made many residences uninhabitable.)

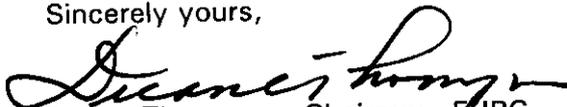
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The No-Action alternative means the federal government has not recognized its trust responsibility to the Tribes or its DOE Indian Policy. As stated in the DEIS, Congress has affirmed that the DOE is responsible for the permanent disposal of spent nuclear fuel and highly radioactive waste. The safe removal and disposal of this waste is a national responsibility and priority. The no-action alternative is unacceptable. The waste must be removed from INEEL.

In addition, any failure to dispose of the waste by 2035 would be a violation of the January 29, 1998 agreement between the United States Department of the Defense, Department of the Navy and the Shoshone-Bannock Tribes.

We have also attached specific comments from our technical staff which should be incorporated within this letter as if fully set forth herein. If you have any questions, please contact me at 208/478-3802.

Sincerely yours,


Duane Thompson, Chairman, FABC

Cc: FHBC
Attorneys Office
Robert Bobo

MEMO

TO: Duane Thompson, Chairman
Fort Hall Business Council

FROM: Robert Bobo, Tribal DOE Project Manager

DATE: February 22, 2000

RE: **COMMENTS TO THE DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR A GEOLOGIC REPOSITORY FOR THE DISPOSAL OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE AT YUCCA MOUNTAIN, NYE COUNTY, NEVADA**

5 [First, we would like to thank DOE for including summary documents, especially for voluminous EIS's. The summary document makes the EIS more reader-friendly and probably elicits more reader interest than the daunting, multi-volume EIS proper. However, one problem that might crop up in using a summary is that the reader might submit questions and comments that would have been clarified in the main document. But, if time constraints or other reasons preclude a thorough study of the EIS, then the reader will be left with the questions raised by issues presented in the summary document. Therefore the first suggestion I would like to make is that the authors crossreference material in the summary to the applicable sections and page numbers in the EIS. Granted, with only two volumes in the Yucca EIS, this is not as big of a problem, but for EIS's with 6-8 volumes and about as many appendices, a cross-reference system would be very valuable.]

Specific comments on the Yucca Mountain Draft EIS are given below:

6 [pg. S-2 - last sentence - add Tribes to "state and local government consultations". Tribes should stand alone and not be lumped into the category of "local government".]

7 [pg. S-20 -lower box - what criteria will be considered in determining whether the retrieval option will be 100 years or 300 years or somewhere in between?]

8 [pg. S-35 - 6th para., last sentence - "Releases would vary from 90 to 2600 curies annually depending on the packaging scenario." That is quite a range. Please explain how those values were determined and which packaging scenario will release the most activity.]

9 [pg. S-42 - 5th para. - It is stated that "...heat from the decay of radionuclides in the waste would cause temperatures in the rock near the disposal containers to rise above the boiling point of water." That statement simply gives the low end of the range. What is an estimated or calculated high end? It would seem that the temperature would have to be extremely high in order for heat to conduct through 660feet to 1440feet of rock such that the temperature of the surface soils rises by 3 ° C (following paragraph). Is there a possibility that the heat would be sufficient to melt rock in the vicinity of the drifts? What might be the consequences of rock expansion and pressure buildup?

9 cont.

Obviously, a temperature "above the boiling point of water" will convert water to steam, or, depending on pressure, to superheated water. Therefore, what will be the ramifications of "...0.3 percent of the estimated 23.4 million cubic meters..." of water infiltrating the repository on an annual basis (pg S-41)? Another Yellowstone, perhaps?

10

pg. S-48 - 3rd and 4th para. - This section on health impacts is very confusing. In the 9,900-year analysis (3rd para) the maximally exposed individual (MEI) would be expected to receive only 1.3mr/yr. at a distance of three miles. Then, the million-year analysis (4th para.) predicts a MEI peak dose rate of 9,100 millirem at a three-mile distance occurring 320,000 years after closure. 1.3mr vs 9,100mr! Is the 9,100 value per year? Or spread out over the 320,000 years? If the latter is the case, then what is the relevance? A MEI will live only a tiny fraction of 320,000 years whether he contracts a radiation-induced cancer or not.

Furthermore, after 9,900 years (and even much sooner), all the relatively short-lived fission products will have decayed away. And in 320,000 years, even that widely-feared and misunderstood bugbear, plutonium, in its common guises of Pu 239, 240 and 241 will have disappeared.

So, really, what is one to make of this section on health impacts. What does it all mean in a practical sense?

11

pg. S-52 - 2nd para. - The last sentence of this paragraph seems very much contradictory. On the one hand DOE "...believes that there would be no disproportionately high and adverse impacts to minority or low-income populations...", then on the other hand acknowledges that Native Tribes in the area consider the proposed repository to be an adverse element in their lives and environment. If the Tribes, by DOE definition, are a minority, and if the Tribes feel the repository will have inverse impacts on them, then, ipso facto, there *are* adverse impacts to minorities.

12

pg. S-53 - 3rd para. - There is some confusion on what constitutes a rail shipment. It is stated that the "...mostly rail scenario would involve approximately 13,400 cask shipments (10,800 rail shipments and 2,600 legal-weight truck shipments)". If it takes 10,800 rail shipments to transport 10,800 casks, then obviously, the load is only one cask per train. Surely, rail transport will be more efficient than that. Please clarify.

13

pg. S-59 - sect. S.6.1. - It is unclear why the value, 70,000 MTHM, was chosen as the maximum amount of SNF/HLW allowed in the Yucca Mt. repository. Evidently, geographical constraints are not the driving issue inasmuch as the amount of real estate required will vary considerably depending on which thermal-load scenario is chosen. If the Yucca Mt. site can physically contain the complete inventory of SNF/HLW, and if all parameters point to Yucca Mt. as the most promising site, and, given the inevitable delays, litigation, expense and political ramifications of building a second repository somewhere else, would it not be better to ask Congress to designate Yucca as the repository for all SNF/HLW?

- 14 Also, [it is unclear what constitutes the total projected inventory of Inventory Module 1. Is the 105,000 MTHM quantity the amount of commercial SNF currently in the inventory, or the amount that is expected to accumulate over a certain time period? In a DOE news release dated February 7, 2000 entitled *A Mixture of Thorium and Uranium May Provide Cheaper, Cleaner, Safer Nuclear Power*, it is stated that "Most of the 104 nuclear power plants in the U.S. shut down at least once every 18 months to refuel". On the average, how much additional MTHM are created each year due to commercial refueling? DOE/Navy refueling? Should not a repository be constructed that will have the capacity to handle all existing and projected inventory?]
- 15 [In this same section, pg. S-59, last paragraph, please clarify the statement "The emplacement of Inventory Module 1 or 2 at Yucca Mountain would require legislative action by Congress unless a second repository were in operation". What that appears to say is that if a second repository is opened anywhere in the country Module 1 or 2 could then be placed in Yucca Mountain without Congressional approval. But what does one scenario have to do with the other?]
- 16 [DOE timelines are out of sync between the Yucca EIS and the court settlement with the State of Idaho. In the former, the proposed action would see Yucca closing by 2033, whereas in the latter, high-level waste only has to be *ready to move* by 2035. If Yucca has already closed by that time, where would Idaho's waste go? We suggest the addition of an alternative in the EIS which includes a schedule for accepting high-level waste shipments through the year 2060 in order to anticipate shipment acceptance and construction delays at the Yucca Mountain Site. The year 2060 would allow a more reasonable time frame at Yucca Mountain and would agree with DOE time frames for completing the treatment of DOE's high-level waste at INEEL.]
- 17 Finally, [we propose that the final EIS include an alternative where the waste acceptance criteria at Yucca Mountain provides for the acceptance of *all* the high-level waste from DOE's inventory at INEEL, including mixed waste if, for any reason, the high-level waste cannot be treated to remove the hazardous constituents.]

cc: FHBC (7)
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file