WESTERN SHOSHONE DEFENSE PROJECT

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EIS001965

February 28th, 2000

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Ms. Wendy Dixon
EIS Project Manager, M/S 010
U.S. Department of Energy
Yucca Mountain Site Characterization Office
P.O. Box 30307
North Las Vegas, Nevada 89036

Dear Ms Dixon,

Here are our comments on the Yucca Mountain project. They are hereby submitted by email within the February 28th deadline, and an identical hard copy will be mailed February 29th, 2000.

The Western Shoshone Defense Project is a Western Shoshone directed non-profit organization whose mission is to promote and preserve Western Shoshone rights and lands for present and future generations based upon cultural and spiritual traditions. The WSDP was created by the Western Shoshone National Council, a traditional government of the Western Shoshone Nation, and is not affiliated with any particular Federally recognized tribal government. Our boards represent
1 Western Shoshone from communities across Newe Sogobia (Western Shoshone homelands). With our current understanding of this project, it is our opinion that the Yucca Mountain project will have a profoundly negative impact on the cultural, spiritual, political, and economic survival of the Western Shoshone Nation. We do not want this dump on our lands and we will do everything in our power to stop a project which violates our rights as Indian people and human beings.

2 **Request for Extension**

Western Shoshone spiritual person Corbin Harney has requested an extension for Native communities to comment on this project. We add our voice to this request for an extension of the comment period. Western Shoshone communities are faced with a multitude of projects impacting their lands; mining, military training and various other development projects are proposed on a continual basis. For each of these projects the federal government seeks Native American input, yet the resources available to the Western Shoshone are very limited in both time and expertise. A four to six week extension to this comment period would allow us to better comment on this project and also allow other Western Shoshone entities to add their voices.

Introduction

3... We oppose this project based upon the traditional cultural and spiritual teachings of our people, as well as the fact that this particular piece of land lies within our ancestral lands as recognized in the 1863 Treaty of Ruby Valley. Indian people have used this area since time immemorial.

...3 Indian nations pre-date the United States and will likely survive the existence of United States. While presently unoccupied by Indian people, this area may be reinhabited in future thus it is a responsibility and necessity to protect this area, its waters, its wildlife and its cultural areas. Because Indian people are the permanent occupants of these lands they will suffer the greatest long term risk and exposure. Indian people have already suffered greatly as a result of the U.S. nuclear program. The Navajo uranium miners, the people of Laguna Pueblo, and the downwind Shoshone and Paiute communities are just some of the examples of Indian people who have suffered for this misguided policy. We should not be put at any more risk. If this project is as safe as you claim, there would be no need to build it here far from the sources of the nuclear waste. But because you recognize the extreme danger and risk involved in the storage of this waste you choose to ship it far from yourselves, burdening our land and our future generations with it. This is not surprising considering the history of contempt and disregard with which you have treated our lands and people. This is an issue of environmental justice. The executive orders concerning sacred sites and environmental justice are applicable here. While DOE concern about cultural sites is important as is the work of the "Consolidated Group of Tribes and Organizations" to protect and document these areas, in no way does this make development of the dump acceptable to Indian people.

4... **Treaty of Ruby Valley, International Law, Natural Law**

Your discussion of the Treaty of Ruby Valley is insufficient and innaccurate. With the signing of the Treaty the U.S. government had entered into a nation to nation agreement with the Western Shoshone nation. As an agreement between nations, it was recognized within the U.S. Constitution as the "supreme law of the land." Despite the many concessions granted to the U.S. by the Western Shoshone , the Treaty of Ruby Valley is significant because it ceded no land. And like all Treaties it did not grant rights to Indian people, it granted certain privileges and rights to the U.S., reserving all the sovereign rights and responsibilities possessed by the Nation unless specifically waived. It is also important to note that the Supreme Court's 'canons of treaty interpretation' require that Treaties be interpreted as the Indian people understood them at the time of signing, and that any ambiguities be interpreted in favor of the Indian people. The Federal government has chosen to hide behind the fraudulent proceeds of the Indian Claims Commission in denying the continuing validity of our Treaty. By what Constitutional authority do the "findings" of a commission permit the violation of Treaties? The Supreme Court case U.S. v. Dann is also mentioned in reference to the Treaty. Title to our land was never litigated by this court. Federal District court has declared the Treaty of Ruby Valley as being in "full force and effect." and this has yet to be refuted by any U.S. court.

Yucca Mountain is within the boundaries of the Western Shoshone Nation as defined by the Treaty. We have included the text of this Treaty of Peace and Friendship. As you will see the Treaty does not permit creation of waste dumps, nor cede title to Western Shoshone lands. The Treaty is the "supreme law of the land." The U.S. government has already seized enormous amounts of Western Shoshone land (Nellis and NTS), rendering large portions uninhabitable (NTS). Even now the Air Force has requested permanent withdrawal of Nellis lands, Yucca Mountain will be repeating and increasing this injustice to the Western Shoshone.

Treaty of Peace and Friendship made at Ruby Valley, in the Territory of Nevada, this first day of October, A.D. one thousand eight hundred and sixty-three, between the United States of America, represented by the undersigned commissioners, and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs and Principle Men and Warriors, as follows:

4...

Article I.

Peace and Friendship shall be hereafter established and maintained between the Western Bands of the Shoshonee nation and the people and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon citizens of the United States within their country, shall cease.

Article II.

The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all emigrants and travelers under its authority and protection, without molestation or injury from them. And if depredations are at any time committed by bad men of their nation, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travellers passing peaceably over either said routes is hereby guarantied by said bands.

Military posts may be established by the President of the United States along said routes or elsewhere in their country; and station houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travellers or for the mail or telegraph companies.

Article III.

The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through a part of Shoshonee country, it is expressly agreed that the same may be continued without hinderance, molestation, or injury from the people of said bands, and that their property and the lives and property of passengers in the stages and of the employees of the respective companies, shall be protected by them. And further, it being understood that provision has been made by the government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by siad bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of country claimed or occupied by them.

Article IV.

It is further agreed by the parties hereto, that the Shoshonee country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be acquired. Mills may be erected and timber taken for their use, as also for building or other purposes in any part of the country claimed by said bands.

Article V.

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:

On the north by Wong-goga-da Mountains and Shoshonee River Valley; on the west by Su-non-to-yah Mountains or Smith Creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and the Great Salt Lake Valley.

Article VI.

The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as

...4 *he may indicate, and to reside and remain therein.*

Article VII.

The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same, therefore, and in consideration of the proceeding stipulations, and of their faithful observance by the said bands, the United States promise and agree to pay to the said bands of the Shoshonee nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded.

Article VIII.

The said bands hereby acknowledge that they have received from said commissioners provisions and clothing amounting to [five] thousand dollars as presents at the conclusion of this treaty

The Western Shoshone have clearly expressed their opposition to this project. Western Shoshone National Council has passed a resolution declaring Newe Sogobia a nuclear free zone. The Wells band of the Te-Moak Tribe of Western Shoshone has passed a resolution against nuclear waste transport through their community. My family is opposed to Yucca Mountain and efforts to build a nuclear waste train through our traditional use area in Crescent Valley.

Because of the unwillingness of the U.S. to recognize our rights as indigenous people and U.S. citizens, we have sought international forums to assist us in protecting our lands and interests. You should be aware that the Inter-American Commission on Human Rights is currently investigating the case brought by myself and sister Mary concerning the United States continuing violation of our human rights. Both the Yomba Shoshone Tribe and the Ely Shoshone Tribe have intervened in support of our assertion that the continuing actions of the U.S. government including the pursuit of the Yucca Mountain dump violates our rights. Both Yomba and Ely have also filed similar petitions before the United Nations Committee to Eliminate Racial Discrimination. The unwillingness of the United States and the DOE to respect Western Shoshone concerns is also a clear violation of rights identifiede in the United nations Draft Declaration on the Rights of Indigenous Peoples. We are putting you on notice that you will held accountable internationally for your actions on our lands.

5 In our ways there are four sacred elements, the Earth, the water, fire(the sun) and air. When we look at the Yucca Mountain project with these elements in mind, we see the absurdity of your proposal to store high level nuclear waste at Yucca Mountain. It is a violation of the natural laws as set forth by our Creator.

Earth: Mother Earth is sacred, she should not have poisons injected into her. The earth is alive-earthquakes are a reality and Yucca Mountain is a very geologically active area, it is laced with faults. It is foolish to think that the mountain can contain this waste for thousands of years, water and air both flow through the mountain. The mountain breaths. That is why the DOE now says it will engineer a facility to contain the waste inside the mountain for thousands of years, because they know the mountain cannot contain the waste itself. This is even more foolish, we haven't even been able to write for the amount of time this stuff will be toxic. To suggest we can build a facility that will contain it for that long is ridiculous.

6 **Water:** DOE has admitted that dump will leak over course of time. It is unacceptable to contaminate water. Water is source of life. It has significance culturally, spiritually, biologically, and economically. This is the most arid state in the union, water is more precious than gold. It is irresponsible and bad policy to allow its permanent contamination. Water is already contaminated at the Nevada Test Site, Hot Creek Valley and near Fallon from nuclear tests. Enough is enough.

7 **Sun:** There are renewable alternatives to nuclear power, yet the United States has made no commitment to close nuclear power plants and develop other forms of power. Here in the southwest solar energy provides a practical alternative. In combination with wind power this type of power production is sustainable and not environmentally harmful, producing little if any waste. Construction of the Yucca Mountain dump will permit the continuing operation of dangerous nuclear power plants, and the continuing production of nuclear waste. This is foolish. If there is not an adequate solution to deal with nuclear waste the first step to take is to stop producing it! The U.S. has made no effort to do this and is in fact promoting nuclear power overseas. If Yucca Mountain was constructed on schedule (which it isn't or won't be) by the time it was built there would be more waste awaiting storage then its capacity, thus requiring an expansion or another dump.

8 **Air:** As mentioned above, U.S. government has not pursued a policy of attempting to replace nuclear power with sustainable alternatives like wind power. Permitting the Yucca Mountain is allowing the Federal government and the nuclear industry to continue with their life threatening and ill conceived energy policy. Two wrongs don't make a right. Nuclear industry wants this dump so they can continue to produce power through nuclear plants, and thus continue to make money. Money is the white man's god.

9... **Transportation Issues**

Transport of dangerous nuclear waste exposes large segments of the U.S. population to the potential of accidents and radiation exposure, this includes Indian populations. Current transport options pass through or adjacent to the following Indian communities in Nevada (Wells, Elko, Battle Mountain, Crescent Valley, Winnemucca, Lovelock, Pyramid Lake, Reno-Sparks, Ely, and Moapa) The nuclear industry is hypocritical. People living near nuclear power plants have always been told that it is perfectly safe and contained on site, yet now they say it needs to be moved out west for safety reasons. Moving such large volumes of waste around the country increases dramatically the chance for accidents. Construction of new rail routes can open up possibility of increased development in remote areas, with additional impacts to Western Shoshone interests (land, water, cultural sites, hunting and gathering).

The DOE has stated that they will use the Yucca Mountain EIS to make their decision on the mode of transport for the waste, however all the specific details of how the waste would be transported are still up in the air, the casks have not even been built yet, they don't know the details of how it would be transported by train, whether private entities would be contracted for the shipping etc. All of these issues are dealt with in a cursory fashion with many assumptions being made. Risk of transport depends on details of cask and rail line construction, operation and route design, yet these details are being put off to a later date. With all these assumptions it is impossible to conduct a reliable analysis of the impacts of this project, yet they intend to make a decision based on this info. Madness! The failure to fully address transportation issues in this document results in segmentation which is forbidden in NEPA. Transport is directly related to the Yucca Mountain project, there is no way to get it their without transportation, and transportation to Yucca Mountain would not occur if

...9 the dump were not built.

NEPA Analysis

10 Before addressing our particular concerns with respect to this "environmental impact analysis," we wish first to comment on the selection process in general. According to the DEIS, the Nuclear Waste Policy Act acknowledged the "Federal Government's responsibility" to provide for permanent disposal of our nation's spent nuclear fuel and high-level radioactive waste. (DEIS at 1-9). This Act, set in motion a process whereby three "repository site candidates" were identified and approved. The DEIS goes on to note, that in 1987, Congress "significantly amended" the Act to single out only one of the sites for study. (Id.). Provisions in the Nuclear Waste Policy Act as amended in 1987 allows the DOE to prepare an environmental impact statement which doesn't consider the need for a repository, alternative locations or alternatives to geological disposal. This amendment was attached at the last minute at the urging of the nuclear industry, it was not subject to wide debate or public discussion, hardly the actions of a DOE concerned about the future generations. By not including a needs statement or any alternatives the EIS process is completely subverted. The evaluation of alternatives is the heart of the NEPA process. The DOE was asked to include alternatives during the scoping process in 1995, yet has ignored the public's requests. The DEIS fails to provide an adequate description of the process by which Yucca Mountain was singled out for exclusive study.

The process, as outlined in the DEIS, fails to provide the reader with any insight whatsoever into the decision-making process that resulted in the need for and purpose of the document. From what one is presented with in the DEIS, it appears simply that Nevada lacks the political strength to defend itself. Without any discussion of the reasoning behind the singling out Yucca Mountain, the Act appears undemocratic at best and fraudulent at worst. With ever increasing skepticism directed towards our Congress and political system, the need for truly open and honest democratic discourse cannot be debated. The DEIS needs to assure the reader that the purpose and need for the project are well reasoned and accurately reflect the reality of the situation.

Native American Consultation

11 The DOE has failed to properly conduct Native American consultation with affected Native American s. Consultation must occurr on a government to government basis with the various Tribal Councils. This is set forth in various Federal laws and regulations. The work of the "Consolidated Group of Tribes and Organizations" while important, does not constitute "consultation." It is our understanding that the members of this group have consistently expressed their opposition to the Yucca Mountain project. Yucca Mountain lies within the territory of the Western Shoshone Nation, yet the northern communities of the Nation have been left out and ignored by the DOE in its evaluation of impacts and cultural concerns. Failure to properly consult with all of the affected tribal interests undermines the NEPA process, and violates Federal law.

Lack of Meaningful Alternatives

A. Alternatives

12... The selection and evaluation of alternatives to the proposed action are, without a doubt, the most critical aspects of the environmental review process codified by Congress in the National Environ-

...12 mental Policy Act. (NEPA). The CEQ Guidelines state quite unequivocally, that this "section is the heart of the environmental impact statement." (40 CFR 1502.14). In order to live up to NEPA's mandate the decision-maker, as well as the public, must be presented with "the environmental impacts of the proposal and the alternatives in comparative form", thus "sharply defining the issues and providing a clear basis for choice". (Id.). Under NEPA, agencies are directed to, inter alia :

(a) Rigorously explore and objectively evaluate *all reasonable alternatives*, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
(b) Devote substantial treatment to *each alternative* considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
(c) Include *reasonable* alternatives not within the jurisdiction of the lead agency....

(Id.). Agencies are mandated under NEPA to follow these procedures in order to sharply define the issues and provide a sound basis for the decision-maker to choose among the available options. Without strict adherence to the duties mandated, the environmental review process is left impotent and emasculated. A far cry indeed, from the laudable goal of "assur(ing) for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings...." (NEPA , 101).

It appears that for the purposes of Yucca Mountain, DOE has seen fit to cut out the very heart of NEPA. This is especially alarming in that this project has, perhaps more than any other, the potential for the most devastating environmental impacts ever conceived. How can DOE claim to be working in the best interests of the nation, while simultaneously failing to abide by the "will of the people" as expressed in NEPA. Note that the 1987 amendments do not **prevent** the DOE from evaluating alternatives, they merely exempt them from fulfilling these aspects of NEPA. It is DOE's choice to not address these issues. DOE now hopes to erect the facade of NEPA compliance in order to complete the deception first begun at the dawn of the Nuclear Age.

13...

B. No-Action Alternatives

DOE deception is two-fold in this process; first, reasonable alternatives are completely ignored, and second, unreasonable alternatives are presented as the no-action alternatives. As to the latter, the DEIS states that "these two scenarios were chosen for analysis because they provide a baseline for comparison to the Proposed Action and they reflect a range of the impacts that could occur." (DEIS at 2-60). While the establishment of baselines is indeed necessary, if they are completely unrealistic they adversely impact the decision-making process. Instead of deciding between; the proposed action, a range of reasonable alternatives, and a realistic no-action alternative, the decision-maker is left with an either/or situation. An either/or situation compounded by the fact that the only alternative to the proposed action is presented in such a way as to make its choice impossible. Again, DOE appears to be actively engaged in a campaign of misinformation and deceit.

The two scenarios identified in the DEIS as the no-action alternatives are simply to far removed from reality to be of any use. Nobody in their right minds is suggesting leaving the waste on site indefinitely, unmonitored and unguarded. The nuclear industry, the anti-nuclear people, and government entities have never suggested this, yet this is what Yucca Mountain project is compared to in the EIS. This is the classic case of creating a straw man to knock down. The reader is left with the uneasy, not to mention false, impression that we either store this stuff at Yucca Mountain or we leave it where it is. The DEIS speaks of "effective institutional control" and "no effective institu-

...13 tional control," both of which represent extreme ends of a spectrum. By presenting the no-action alternative (i.e. the not at Yucca Mountain scenario) in such a way, the decision-maker is unable to make an informed decision. We would recommend that the DEIS evaluate realistic and meaningful scenarios, rather than continue to waste our time and energies on "straw alternatives" and eviscerated environmental reviews.

By only allowing the decision-maker to consider this project only in isolation, without consideration of reasonable alternatives, and without a realistic baseline from which to examine possible impacts, DOE has made a mockery out of the people's will. Further, by circumventing both the letter as well as the spirit of the law, DOE has effectively defrauded the entire country. Finally, by not allowing the decision-maker to make an informed decision, DOE may very well have doomed this country and all of its inhabitants to unimaginable impacts for many generations to come. Reasonable alternatives have been presented to the DOE, yet they have ignored these suggestions and moved forward with a plan that benefits the nuclear industry.

14

Cultural Impacts

According to the DEIS, approximately 826 archaeological sites have been discovered in the analyzed land withdrawal area. (DEIS at 3-66). While none of these sites have been nominated to the National Register, at least 150 are potentially eligible. (Id.). The DEIS goes on to state that "DOE (1988b, all) describes how the Department meets its responsibilities under Section 106 of the National Historic Preservation Act and the American Indian Religious Freedom Act...." (Id.). Now, is it safe to assume that DOE's responsibilities under current legislation remain unchanged, or have these too been abrogated? Given the bastardized version of NEPA currently being applied to this project, is it still safe to assume that other relevant legislation remains in tact?

15...

Cultural Resource Protection

We wish to remind the DOE of the three main federal statutes, and implementing regulations, that establish the framework for historic preservation and cultural resource management in Indian country and in areas currently outside of tribal jurisdiction where tribes have religious and cultural interests. The National Historic Preservation Act (NHPA), (16. U.S.C. 470-470w-6), the Archaeological Resources Protection Act (ARPA), (16 U.S.C. 470aa-470*ll*), and the Native American Graves Protection and Repatriation Act (NAGPRA), (25 U.S.C. 3001-3013) may all play a role in the decision-making process. Additionally, DOE must also keep in mind, the various Executive Orders and policy pronouncements concerning tribal-federal interactions.

From the information contained in the DEIS, we urge the DOE to immediately seek eligibility determinations for the 150 sites "potentially eligible for nomination". (DEIS at 3-66). We also urge the DOE to reanalyze the "826 archaeological sites" that have been discovered. (Id.). During this process, DOE must remain mindful of the guidance provided in Bulletin 38 published by the National Park Service in 1990. Additionally, DOE must strictly adhere to good faith compliance with section 106 of the NHPA by following the Advisory Council's regulations. These regulations set out the requirements for consultation with Indian tribes and Native Hawaiian organizations, inter alia, undertakings that would affect tribes by affecting traditional cultural properties that are not located within artificial reservation boundaries.

Further, we demand the Department to conduct additional surveys of all lands within the proposed withdrawal. Given the evolving nature of NHPA compliance, we believe that many prior surveys may be tainted by the prejudices and past practices of various federal, state, and local enti-

...15 ties. In order to purge these past efforts, as well as to fully and in good faith comply with the requirements of the NHPA, we feel a great deal of work has yet to be done. We remind the DOE to vigilantly adhere to its obligations as articulated in the statutes, policy pronouncements, and case law of this nation. Anything less than full compliance will certainly result in violations of both legal and moral norms.

16...

The Trust Responsibility

We wish to caution the DOE to be mindful of their Trust responsibility to this nation's indigenous peoples in deciding where to place the repository. As should be evidently clear at this point, the placement of the repository at Yucca Mountain will impact native peoples in unique and disproportionate ways. Many of these effects have the potential to seriously impact traditional practices and beliefs: practices and beliefs that we now know to be critical to maintaining tribal integrity. Practices and beliefs which if completely destroyed, in essence equate to a spiritual genocide for this continent's indigenous inhabitants. We recognize that the "Trust Responsibility" has been used as a tool against the indigenous people, and is clearly in contradiction to the nation to nation relationship expressed through the Treaty. However, as the U.S. claims to have a legal trust responsibility over Indian people, which in its basic essence mandates the protection of the interests of the so called wards, we present the following comments.

While it may have been conceded in the past that the federal government's professed goal was to wipe out this country's original inhabitants, today this is clearly not the case. Congressional legislation and executive orders have made clear that today, the federal government is in the business of protecting the spiritual and cultural vitality of these communities. The creation of a repository at Yucca Mountain will undoubtedly have deleterious consequences for the area's indigenous peoples.

The trust doctrine was first articulated by Chief Justice Marshall in his opinions in the *Cherokee* cases: *Cherokee Nation v. Georgia* and *Worcester v. Georgia.* In *Cherokee Nation*, Marshall noted that the Indians relationship to the United States was marked by peculiar and cardinal distinctions which exist[ed] nowhere else. Indian tribes were independent in the sense of being autonomous, self-governing entities with an unquestioned right to occupy the lands reserved by them in treaties with the United States. Nevertheless, Marshall stated, when the tribes ceded their land to the United States, they relinquished their power to control their external relations and instead looked to the United States for protection. Indian tribes were thus domestic dependent nations whose relationship to the United States resembled that of a ward to his guardian.

While the *Worcester* opinion added no new principles to those set out in *Cherokee Nation*, Marshall did emphasize the Indians status as distinct, independent political communities with the right to govern themselves within their territorial borders. This emphasis suggests that the federal duty of protection extends not only to the protection of Indian land, but also to the protection of Indian internal governmental and cultural autonomy.

Marshall's guardianship theory was thus based in a general duty of the United States, as the more powerful sovereign, to protect tribal lands and the right of tribal self-government within tribal territories. Over the course of the nineteenth century, however, the theory evolved from the Marshallian ideal of protection to a justification for the exercise of federal power. During the judicial plenary power era, roughly coterminous with the legislative allotment policy, the Court authorized congressional expropriation of tribal governmental authority and tribal lands under the theory that the Indians needed the care and protection of the federal government. If, in the exercise of that protectorate power, Congress chose to subject Indians to federal criminal laws or to take tribal lands

16... for homesteaders in violation of express treaty provisions, the Court would not intervene. Instead, given the dependent status of the tribes, the Court would presume that Congress had a moral obligation ... to act in good faith in legislating over the tribes. Whether Congress in fact complied with its obligation was a political question.

Early in the twentieth century, tribes began to use the trust responsibility to assert their rights against federal executive agency officials. One of the earliest of these case is *Lane v. Pueblo of Santa Rosa.* In *Lane*, the Supreme Court enjoined the Secretary of the Interior from disposing of tribal lands under the general public land laws. The Court held that the plenary power of Congress described in *Lone Wolf* to regulate Indian lands for the benefit and protection of its wards certainly ... would not justify ... treating the lands of the Indians as public lands of the United States, and disposing of the same under the Public Land Laws. That, the Court observed, would not be an exercise of the guardianship, but an act of confiscation.

Shortly after *Lane*, in *Cramer v. United States*, the Court voided a federal land patent that 19 years earlier had conveyed lands occupied by Indians to a railway. The Indians occupancy of the lands was not protected by any treaty, executive order, or statute, but the Court placed heavy emphasis on the trust responsibility and national policy protecting Indian land occupancy as a basis for relief. The Court held that the trust responsibility limited the general statutory authority of these federal officials to issue land patents.

The typical issue before the courts concerned the conduct of federal executive officials in the management of tribal lands held in trust for the tribes by the United States. For example, in *United States v. Creek Nation*, the Creek Tribe sued the United States for money damages when it discovered that a federal executive agency had erroneously surveyed reservation boundaries and sold a portion of Creek land to non-Indians. On certiorari, the Supreme Court held that the Tribe was entitled to compensation for the erroneous taking of its reservation land. The Court noted that, even though as the Tribes guardian the federal government exercised complete control over tribal trust property, the governments power was nevertheless constrained by the limitations inhering in the trust responsibility.

The Supreme Court did not address the exact nature of the limitations inherent in the trust responsibility in the *Creek Nation* case, but in more recent money damages suits where federal executive agency management of tribal trust property has been at issue, courts have construed the trust responsibility as imposing strict fiduciary duties on federal executive officials. In *Navajo Tribe of Indians v. United States*, the Navajo Tribe claimed that the federal government breached its trust obligations to the Tribe when the Bureau of Mines, which was responsible for the supervision of oil and gas leases on the Navajo Reservation, failed to inform the Tribe that it had assumed an oil and gas lease from a private company that no longer wished to conduct drilling operations on tribal lands. The Tribe sought money damages on the grounds that the lease should have been assigned for the benefit of the Tribe, and not for the benefit of the federal government. The Court of Claims held in the Tribes favor, stating that [t]he case is somewhat analogous to that of a fiduciary who learns of an opportunity, prevents the beneficiary from getting it, and seizes it for himself. The Court thus cast the federal executive officials duty to the Tribe in terms of a private fiduciary's duty of loyalty to the beneficiary.

Analogizing the federal governments trust responsibility to that of a private fiduciary is less problematic in situations where federal management of tangible Indian property is at issue; the traditional trust elements of fiduciary, beneficiary, and trust corpus fit well in these situations. The analogy is more strained, however, when intangible Indian interests are at stake, such as culture and sovereignty. Judicial reluctance to invoke the trust responsibility in such instances could change as a result of the application of the trust responsibility in the off-reservation context, for in those in-

...16 stances damage to tangible trust property is not necessarily present.

The Supreme Court has recognized the undisputed existence of a general trust relationship between the United States and the Indian people. Northwest Sea Farms v. U. S. Army Corps of Engineers, 931 F.Supp. 1515 (W.D.Wash. 1996) (quoting United States v. Mitchell, (*Mitchell II*) 463 U.S. 206, 225, 103 S.Ct. 2961, 2972, 77 L.Ed.2d 580 (1983). This obligation has been interpreted to impose a fiduciary duty owed in conducting any Federal government action which relates to Indian Tribes. Nance v. Environmental Protection Agency, 645 F.2d 701, 711 (9th Cir.), cert. denied, 454 U.S. 1081, 102 S.Ct. 635, 70 L.Ed.2d 615 (1981). In a leading case, the United States Supreme Court stated: [U]nder a humane and self-imposed policy ... [the federal government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919), may also prove useful. There the Supreme Court enjoined the Secretary of the Interior from disposing of tribal lands under the general public land laws. The Court held that the plenary power of Congress to regulate Indian lands for the benefit and protection of its wards certainly ... would not justify ... treating the lands of the Indians as public lands of the United States, and disposing of the same under the Public Land Laws. That, the Court observed, would not be an exercise of the guardianship, but an act of confiscation. Id. at 113.

The DOE has failed to fulfill the federal government's trust responsibility with respect to the Western Shoshone. The DOE has general trust responsibilities, in addition to any specific responsibility imposed by a statute, treaty, or executive order. See F. Cohen, Handbook of Federal Indian Law, Ch. 3, C2c (Michie, 1982 ed.); Pyramid Lake Paiute Tribe v. Morton, 354 F.Supp. 252, 256-57 (D.D.C. 1972). These obligations have been likened to the fiduciary obligations that exist between a trustee and a beneficiary. See, e.g., Seminole Nation v. United States, 316 U.S. 286 (1942). This relationship imposes strict fiduciary standards of conduct on federal executive agencies in their dealings with Indian tribes. Northern Cheyenne Tribe v. Hodel, 12 Indian L. Rep. (AM. INDIAN LAW. TRAINING PROGRAM) 3065, 3070 (D.Mont. May 28, 1985).

The existence of such a relationship between the Western Shoshone and the United States was first recognized in the 1863 *Treaty of Ruby Valley*. This was a treaty of peace intended to accommodate the western movement of citizens of the United States and to protect Western Shoshone rights. It was not a treaty of cession. From the time of its proclamation in 1869 to the present, the *Treaty of Ruby Valley* has been in full force and effect, part of the supreme law of this country under its constitution and laws. The United States has consistently violated the obligations inhering to such a relationship practically since its inception. The placement of the repository on Western Shoshone lands, despite the adverse cultural impacts certain to transpire, will violate the federal government's trust responsibility.

17... **Environmental Justice**

Initially, the DEIS seems to take what it characterizes as "Native American Viewpoints" and separate this out from its interpretation of what it means to address environmental injustice in minority communities. This appears to be the result of the DOE's misunderstanding of the significance of the cultural and environmental impacts occasioned by the decision to place a repository in Yucca Mountain. The Western Shoshone will be more profoundly impacted, both culturally and environmentally, by the decision to create a repository at Yucca Mountain, than perhaps any other minority group in the nation. In examining these impacts, the DOE has responsibilities not only under Executive Order 12898, but also, under the federal government's trust responsibility, as well

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...17 as the various policy pronouncements concerning sacred sites and government to government relations.

According to the DEIS, "no disproportionately high and adverse impacts would result from the Proposed Action." (DEIS at 4-84). This is perhaps the most outrageous statement contained in the draft document. It reflects either complete ignorance with respect to the concept of environmental justice, or a complete lack of respect for the cultural ties of the Western Shoshone. As stated earlier, these are Western Shoshone lands. Their destruction strikes at the very heart of the cultural integrity of the Western Shoshone Nation.

We emphatically implore the DOE to reevaluate issues of environmental injustice with respect to the Western Shoshone Nation. This reevaluation needs to be done with an attitude of respect for the cultural and environmental bonds of the Western Shoshone. As currently drafted, the DEIS fails to adequately take cultural and environmental impacts into account as related to the issue of environmental justice. We urge the DOE to perhaps seek further guidance as to its responsibilities to the Western Shoshone with respect to Yucca Mountain and the surrounding lands.

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Closing Comments

These comments are in addition to the public statements made by Western Shoshone individuals and representatives during the public hearings. During the public hearings in Crescent Valley, both Western Shoshone and local residents pointed out numerous factual flaws in the EIS, in particular concerning the transport routes through Crescent Valley. Based upon the inaccurate information presented, we find it quite likely that the remainder of the EIS is filled with similar inaccuracies. Considering the expense of this project, the DOE has done a very sloppy job of evaluating the impacts. We do not feel it is our job to point out the various on the ground mistakes made, mistakes that would not have been made had DOE staff actually visited the communities and routes proposed for the transport of the nuclear waste. The DEIS is fundamentally and fatally flawed.

We are also letting you know that we have been informed by Kevin Brady Jr., Chairman of the Yomba Tribe of Shoshone, that they support and sign on to these comments. We expect you will receive a letter to this effect from him.

Sincerely,

Carrie Dann

Carrie Dann
citizen, Western Shoshone Nation
director, Western Shoshone Defense Project

Christopher J Sewall

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