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State of Wyoming: NRC Staff Assessment of a Proposed Agreement Between the Nuclear Regulatory Commission and the State of Wyoming

Comment On: NRC-2018-0104-0005

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General Comment

See attached file(s) for Comment Letter from Shoshone-Bannock Tribes Fort Hall Business Council

Attachments

07262018_SBT_Comment_Letter_NRC-2018-0104

The SHOSHONE-BANNOCK TRIBES

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FORT HALL BUSINESS COUNCIL
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July 26, 2018

Nuclear Regulatory Commission
Washington, DC 20555-0001

RE: SHOSHONE-BANNOCK TRIBES' COMMENTS ON THE PROPOSED NRC-WY STATE AGREEMENT APPLICATION (Docket ID # NRC-2018-0104)

The Shoshone-Bannock Tribes (Tribes) have reviewed the proposed State Agreement between the Nuclear Regulatory Commission (NRC) and the State of Wyoming (WY). We appreciate the opportunity to provide comments on this matter. The Tribes expect to establish a government-to-government relationship between the Tribes and the NRC in accordance with the federal trust responsibility. While the Fort Hall Reservation is located in southeast Idaho, the Tribes have an interest in the proposed Agreement because the Tribes have a vested interest in WY which is within our aboriginal territory.¹

The Tribes have several significant concerns on this proposed delegation. We are concerned that the proposed Agreement continues an improper precedent of the NRC omitting federal-tribal consultation. *We do not support any delegation of any federal agency or commission of their permitting or any other federal decision-making authority to a state.* The Tribes prefer to establish a direct government-to-government relationship with the NRC. Recognizing the long-term environmental impacts of the natural resources in Wyoming, the Tribes have significant concerns on groundwater management by the State of Wyoming.

NRC PROPOSED CHANGES IN TRIBAL CONSULTATION. The NRC stated, in a March 21, 2018 letter to the Tribes,² that once WY assumes regulatory authority pursuant

¹ The Tribes have an interest in the environmental quality and tribal health and safety within the political boundaries of WY. Some areas in WY are part of our aboriginal territory and part of our treaty lands. In 1868, the Tribes and the United States signed the Fort Bridger Treaty, and Article 4 preserved our "right to hunt on unoccupied lands of the United States." These lands include those on which our Tribes may exercise our inherent and treaty rights, and lands and resources that may be affected by the regulatory activities in the proposed NRC-WY State Agreement (Agreement). *See Treaty with the Eastern Band of Shoshoni and Bannock, July 3, 1868, 15 Stat. 673.*

² The letter to the Tribes is located in the NRC Adams database under Accession Number: ML18033A970.

to the Agreement “the NRC would no longer consult on activities related to uranium and thorium milling in Wyoming.” In the subsequent paragraph of the letter, NRC added:

NRC cannot require a State to include tribal consultation as part of its licensing reviews. However, the State can provide additional environmental and historic and cultural review requirements. The Wyoming Department of Environmental Quality has also indicated that tribal consultation is important, and the Department is currently deliberating on how that process would work most efficiently within existing Wyoming law.

We have serious concerns about an Agreement that effectively withdraws the federal agency’s tribal consultation process. It is well-established that the United States has a trust responsibility to Indian tribes, which has been repeatedly recognized and upheld by the federal courts. Executive Order 13175 reaffirmed the federal trust responsibility to tribes, calling on Federal agencies “to establish regular and meaningful consultation and collaboration with Tribal officials in the development of Federal policies that have Tribal implications...” These Federal policies were defined as regulations, proposed legislation, policy statements, or other actions that may affect a Tribe’s relationship with the United States or its distribution of power and responsibilities. *This federal trust responsibility requires federal agencies to consult with tribal governments regarding matters affecting important tribal interests.*

NO TRIBAL-STATE CONSULTATION IN WYOMING. State governments and agencies do not have the same trust responsibility to tribes in considering how their actions and decisions affect tribal interests. Historically, state governments have not been friendly to tribal interests.³ And under this Agreement, there would be no requirement for WY to consult with Tribes. *The Tribes reiterate that consultation must be carried out between decision-makers of the federal agency and affected tribes.*

NRC TRIBAL CONSULTATION POLICY. In 2017, the NRC issued a Tribal Policy Statement (TPS),⁴ which was a step toward a better government-to-government relationship between tribes and the NRC. Section I of the TPS mentions that “[o]ther statutory provisions such as the National Historic Preservation Act (NHPA) (54 U.S.C. 300101 et seq.) can require Tribal consultation as part of the NRC’s evaluation of agency activities during licensing actions, rulemaking, or policy development.” The NHPA regulations at 36 CFR 800 identify that NRC or WY may have a statutory obligation to fulfill tribal consultation (Section 106) requirements as it relates to the Agreement. The regulations at 36 CFR 800.1 state:

The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal *undertakings* through consultation among the *agency official* and other parties [including Indian tribes] with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning.

³ As the United States Supreme Court has observed: “[Tribes] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies.” United States v. Kagama, 118 U.S. 375, 384, 6 S. Ct. 1109, 1114, 30 L. Ed. 228 (1886).

⁴ The Tribal Policy Statement was published under NUREG-2173, NRC Accession No. ML17193A424.

[Emphasis added]. We emphasize “undertakings” and “agency official” because they point to the fact that NRC needs to reexamine the consultation requirement signing the Agreement. An “undertaking” is defined under 36 CFR 800.16(y) as follows:

Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

An “agency official” is defined under 36 CFR 800.2(a) as follows:

Agency official. It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

The plain language of these above paragraphs, coupled with the fact that the NRC will oversee the implementation of the WY Agreement through the Integrated Materials Performance Evaluation Program, suggests that tribal consultation must be made a part of the licensing and regulatory process under the NRC-WY State Agreement.

NRC CAN REQUIRE TRIBAL CONSULTATION. The NRC is relinquishing the tribal consultation requirements prematurely and without due consideration of the terms of the NRC-WY Agreement—by which it may ensure that consultation and NHPA are carried out to the fullest extent. Under Article II.B.2 of the Agreement, the NRC “reserves the authority to establish minimum standards governing reclamation, long-term surveillance or maintenance, and ownership of such byproduct material and of land used as a disposal site for such material [materials defined under Section 11e.(2) of the AEA].” Under Article II.B.2.a, the NRC also reserves “[t]he authority to establish terms and conditions as the Commission determines necessary to assure that, prior to termination of any license for such byproduct material, or for any activity that results in the production of such material, the licensee shall comply with decontamination, decommissioning, and reclamation standards prescribed by the Commission and with ownership requirements for such materials and its disposal site.” And under Article II.B.2.e., the NRC reserves “[t]he authority to require the Secretary of the United States Department of Energy, other Federal agency, or State, whichever has custody of such byproduct material and its disposal site, to undertake such monitoring, maintenance, and emergency measures as are necessary to protect public health and safety, and other actions as the Commission deems necessary.” *By these provisions under Article II.B.2, NRC can exercise its authority to require tribal consultation and the Tribes recommend that NRC require this process.*

UNCERTAINTY ON THE STATE OF WYOMING’S INTENTION ON TRIBAL CONSULTATION. According to NRC’s March 21, 2018 letter to the Tribes, WY

considers tribal consultation to be important, but Wyoming's intentions regarding consultation are not clear and we have found no reference in the Agreement (nor in WY rules and regulations) that WY intends to implement or follow through with any tribal consultation activities. In fact, WY's Uranium Recovery Program Rules under Chapter 11, Article I, Section 35-11-109 "Powers and duties of the director," seems to exclude Tribes from its list of governments or agencies to consult. The Rules state that the director of the DEQ shall "[a]dvise, consult and cooperate with other agencies of the state, the federal government, other states, interstate agencies, and other persons in furtherance of the purposes of this act." *We recommend that WY include tribes under this requirement on consultation and cooperation.*

POTENTIAL OPPORTUNITIES FOR TRIBAL CONSULTATION. Currently, there is no specific process for tribal consultation as it relates to licensing and procedures that are part of the Agreement and relevant WY rules and regulations. However, the Tribes suggest to examine future opportunities to promulgate policy and regulations to ensure a new process is developed to address tribal consultation. The NRC's March 21, 2018 letter to the Tribes suggested that WY was looking into how tribal consultation fits into existing WY laws and regulations. The WY Environmental Quality Act under 35-11-109 (viii) could include consultation with Indian tribes, as it instructs the director to "Represent Wyoming in any matters pertaining to plans, procedures or negotiations for interstate compacts or other intergovernmental arrangements relating to environmental enhancement and protection." Tribal consultation could also be made part of Uranium Recovery Program Rules at Chapter 4, Section 9, Specific Requirements for Issuance of Specific Licenses. For example, consultation could be a part of Section 9 subpart (b), which details the license application requirements. The Tribes also suggest that an opportunity for Tribal government review of license applications should be incorporated into the Uranium Recovery Program Rules at Chapter 4, Section 9, subpart (i). *The Tribes encourage NRC to oversee and ensure the State of Wyoming develops a robust procedural process of consultation with tribes.*

TRIBAL EXPERTISE ON TRIBAL RESOURCES. The Tribes have subject matter experts in Cultural Resources and Historic Preservation, Air and Water Quality, Fish and Wildlife, Environmental Waste Management, Emergency Response and Preparedness, Environmental Impact Assessments, and other subject matters. *Therefore, we recommend that WY include the Tribes in this Section 9 (i) review and comment process, and that NRC not approve the Agreement until then.*

RADIATION SURVEYS ON TRADITIONAL PLANTS. Tribal members use native plants for traditional foods, medicines and ceremonies, so we recommend that the reports—required under Section 10. Operational Requirements at subpart (c) of WY's Uranium Recovery Rules—include radiation surveys (including for water, wildlife, and plants) at varying distance from the uranium mining/milling sites to identify at-risk areas and resources and to ensure the protection of Tribal health and safety are at risk. *We recommend that these radiation surveys on the native plant locations are not made public on the WY DEQ website, and that those reports are provided directly to affected tribes.*

Providing a tribal review process is of great importance, especially since our cultural

properties, traditional use areas, and other resources can only be fully assessed by our expert staff. Such reviews also ensure that we fully avoid and/or minimize destruction of history properties and cultural resources, or the degradation of cultural use areas, aboriginal territory, and treaty lands. *We emphasize that any future reviews by our Tribe, or consultation with the Fort Hall Business Council, would depend on the location of the license activity. We also note that a Hazard Assessment is needed for our Tribes to fully determine potential risks to our tribal members regarding life and health concerns.*

In closing, we hope these comments will improve our relationship with the NRC and WY. The Tribes reiterate that the gravity of federal consultation, permitting and regulation of uranium or related mining or processing activities and must remain with the federal agency/commissions. The Fort Hall Business Council requests NRC staff to attend a government to government meeting in Fort Hall, ID regarding this matter and to build upon this relationship. We appreciate that the NRC will provide a webinar to the Tribes on this Agreement matter. Based on that webinar, and subsequent internal discussions among the Tribal Council, directors, and staff, we may provide additional comments to the NRC after the 30-day comment period. In the meantime, if you have any questions please contact Talia Martin, Director of the Tribal Department of Energy, at (208) 236-1079.

Sincerely,

A handwritten signature in cursive script that reads "Nathan Small".

Nathan Small,
Chairman