



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

December 4, 2019

Chairman Ladd Edmo
Shoshone-Bannock Tribes
of the Fort Hall
Reservation of Idaho
P.O. Box 306
Fort Hall, ID 83203-0306

SUBJECT: RESPONSE TO COMMENTS ON THE PROPOSED WYOMING AGREEMENT
AND PREPARATION FOR FUTURE CONSULTATION

Dear Chairman Edmo:

This letter responds to the Shoshone Bannock Tribes' July 26, 2018, comment letter on the proposed Agreement between the State of Wyoming and the U.S. Nuclear Regulatory Commission (NRC) that was initially published in the *Federal Register* on June 26, 2018 (83 FR 29828).¹ The July 26, 2018, letter expressed an interest in establishing a government-to-government relationship with the NRC. The Shoshone-Bannock Tribes also expressed an interest in having further consultation with the NRC regarding the NRC's oversight of the Wyoming's Agreement State program, in a subsequent meeting on September 27, 2018 with Ms. Talia Martin, Director, Shoshone-Bannock Tribes' Department of Energy. As discussed at the September meeting, the NRC will continue to work with Ms. Martin to prepare for consultation with you on these matters. We have identified opportunities for tribal consultation during the processes of license termination and transfer to the U.S. Department of Energy (DOE) of former uranium mill sites in Wyoming. On December 2, 2019, the NRC staff discussed the contents of this letter during a conference call with Ms. Martin and other members of the Shoshone-Bannock Tribes to provide an opportunity for discussion and any needed clarity.

The NRC appreciates the time and effort the Shoshone-Bannock Tribes took to develop comments on the proposed Wyoming Agreement. The NRC staff's Commission paper on the proposed Wyoming Agreement (SECY-18-0082, "Section 274b. Agreement with the State of Wyoming" (August 27, 2018) included the Shoshone-Bannock Tribes' comments for the Commission's consideration (Agencywide Documents Access and Management System (ADAMS) Accession No. ML18192B111)(Enclosure 1). We provided a hard-copy of the staff's Commission paper to Ms. Martin during the September 27, 2018 meeting and are enclosing another copy in this letter. Enclosure 2 of the Commission paper provides a summary of the public comments and the staff's responses. Specifically, Comments 12 through 27 provides the staff's responses to the Shoshone-Bannock Tribes' comments.

We recognize that the Shoshone-Bannock Tribes would like to continue tribal consultation with the NRC on activities related to uranium and thorium milling in Wyoming. However, under the

¹ As required by Section 274e. of the Atomic Energy Act of 1954 (AEA), the NRC staff published the proposed Agreement and a summary of the draft staff assessment for public comment in the *Federal Register (FR)* on June 26, 2018 (83 FR 29828), July 3, 2018 (83 FR 31174), July 10, 2018 (83 FR 31981), and July 17, 2018 (83 FR 33257).

Wyoming Agreement that became effective on September 30, 2018, Wyoming assumed, and the NRC discontinued, regulatory authority over the activities related to uranium and thorium milling in the State. As a result, the NRC does not have regulatory authority to conduct tribal consultation for Wyoming's licensing actions. The State of Wyoming's regulatory actions under the Agreement are subject to the State's regulatory and procedural requirements that consider the impact on environmental, historical, and cultural resources.

The NRC also does not have authority to require Wyoming to have tribal consultation requirements. Section 274d. of the Atomic Energy Act, as amended, requires the NRC to enter into an agreement when the agency finds the Agreement State program is compatible with the NRC's regulatory program and is adequate to protect public health and safety from radiological hazards. The responsibilities that Wyoming assumed under the Agreement do not require Wyoming to have tribal consultation to be compatible with the NRC's statutory or regulatory provisions. The NRC's Integrated Materials Performance Evaluation Program (IMPEP), which the agency uses to meet its congressionally-mandated oversight of Agreement State programs, focuses on Wyoming's compatibility with the NRC's regulatory programs and adequacy with respect to the protection of public health and safety from radiological hazards. Because Agreement State radiological programs are not specifically required to include provisions for tribal consultation, the IMPEP review will not evaluate Wyoming's tribal consultation program.²

Many of the other comments in the July 26, 2018 letter related to specific Wyoming regulations regarding tribal consultation. On October 2, 2018, we sent the Shoshone Bannock Tribes' comments concerning the continuation of tribal consultation during Wyoming's licensing actions to the Wyoming Department of Environmental Quality for their consideration. A copy of the letter is enclosed in this letter (ADAMS Accession Number ML18269A074)(Enclosure 2).

Notwithstanding the Wyoming Agreement, the NRC will continue developing a direct government-to-government relationship with the Shoshone-Bannock Tribes. The NRC continues to have regulatory authority over all other radioactive materials not transferred to the State of Wyoming, which include radioactive materials used for medical, academic, and industrial purposes. These NRC regulatory activities will continue to be subject to relevant Treaties, federal statutes, and regulations in accordance with the NRC's Tribal Policy Statement.

In response to the Tribes' comment regarding Article II.B.2. of the Wyoming Agreement, we have identified additional opportunities for tribal consultation during the processes of uranium mill license termination and transfer to the U.S. Department of Energy (DOE). The NRC's review of the State's evaluation for the termination of a uranium mill license (Completion Review Report) and approval of the DOE's Long-Term Surveillance Plan (LTSP) would qualify as a federal undertaking under the National Historical Preservation Act (NHPA) and also trigger a review under the National Environmental Policy Act (NEPA). However, the NRC's review of the CRR to ensure the licensee complied with existing requirements prior to license termination is only administrative³ in nature. For each CRR, the NRC would have to make a determination whether the action has the potential to affect historical properties. The Section 106 process could end upon the NRC finding that the CRR review does not have the potential to affect

² Some federal agencies delegate implementation of their federal programs and require States to have tribal consultation requirements. These federal agencies continue to have regulatory authority over the State's activities and may have broader statutory authorities than the NRC to impose tribal consultation requirements on States implementing their federal programs.

³ An administrative action in the context of the CRR process means that the NRC is concurring on previously completed activities.

historic properties. Tribal consultation would not be triggered under the NHPA regulations in that situation. In comparison, the development of the LTSP by the DOE and its acceptance, after review, by the NRC is not administrative in nature and could have the potential to affect historical properties and impact the environment. Consequently, the LTSP could trigger consultation under the NHPA. Additionally, the NRC's Tribal Policy Statement allows the NRC to respond to a Tribe's request to consult on the license termination and transfer processes. We look forward to discussing this matter with you, and to follow up on additional actions we have taken in response to our discussion with Ms. Martin on September 2018, which include our evaluation of engaging tribes in the Agreement State application process.

As discussed during the December 2, 2019, conference call, the NRC looks forward to continue working with the Shoshone-Bannock Tribes to develop plans for future government-to-government meetings to discuss areas of tribal interest. If you have any questions about this matter, contact me at michael.layton@nrc.gov or David Alley of my staff at (301) 415-2178 or at his e-mail at david.alley@nrc.gov.

Sincerely,

/RA Kevin Williams for/

Michael C. Layton, Director
Division of Materials Safety, Security, State,
and Tribal Programs
Office of Nuclear Material Safety
and Safeguards

Enclosures:

1. SECY-18-0082, "Section 274b. Agreement with the State of Wyoming"
2. Letter dated October 2, 2018, to State of Wyoming Transmitting Public Comments Regarding Tribal Consultation Received on the Proposed Wyoming State Agreement.

cc: Talia Martin, Shoshone-Bannock Tribes
Department of Energy

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DATED: DECEMBER 4, 2019

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