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The SHOSHONE-BANNOCK TRIBES

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The Secretary
Attention: Rulemakings and Adjudication Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dear Secretary:

On behalf of the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation in southeastern Idaho, I submit the attached Comments of the Shoshone-Bannocks Tribes on the Nuclear Regulatory Commission's advanced notice of rulemaking on a rule that would require licensees to notify Indian tribes prior to the shipment of high level radioactive waste across tribal lands. We appreciate the opportunity to participate in this advance notice of rulemaking and support the Nuclear Regulatory Commission's efforts and proposal.

Sincerely,

Claudeo M. Broncho

Duane Thompson, Chairman
Fort Hall Business Council

W/enclosure
Cc: Jeanette Wolfley, Attorney
Candy Jackson, Attorney
Robert Bobo, Tribal DOE Project Manager

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Comments of the
Shoshone-Bannock Tribes of the Fort Hall Indian Reservation
On Advance Notice of Rulemaking
By the Nuclear Regulatory Commission

I. Introduction

On December 21, 1999, the Nuclear Regulatory Commission issued an advanced notice of a proposed rulemaking that would require licensees to notify Indian tribes prior to the shipment of high level radioactive waste across their tribal lands. 64 Fed. Reg. 71331. The Shoshone-Bannock Tribes appreciate the opportunity to submit the following comments on the proposed rulemaking, and commend the Nuclear Regulatory Commission in considering this rulemaking that will affect many tribal governments throughout the United States.

II. Background on Shoshone-Bannock Tribes and the Fort Hall Indian Reservation

The Shoshone and Bannock Tribes, collectively comprise a single federally recognized sovereign tribal government, organized under the a Constitution and Bylaws adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq. The current Tribal enrollment is approximately 4,500 members and the approximate Fort Hall Reservation population is about 6,000 with the resident Tribal membership about 3,600.

In 1867, President Andrew Johnson by Executive Order designated the Fort Hall Indian Reservation ("Reservation") for various Shoshone and Bannock bands of Indians who occupied the area of southeastern Idaho for time immemorial. On July 3, 1868, the Shoshone and Bannock Tribes ("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 Fort Bridger Treaty reserved the Reservation as a "permanent home" for the signatory Tribes. Although the Fort Bridger Treaty called for the Reservation to be approximately 1.8 million acres, "surveying errors" in 1873 reduced the actual size to 1.2 million acres. Swim v. Bergland, 696 F.2d 712, 714 (9th Cir. 1983).

The goals of the United States 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 authority of the United States." Ward v. Racehorse, 163 U.S. 504, 509 (1896). Subsequent cession agreement with the United States to provide lands for white settlers reduced the present day Reservation to approximately 544,000 acres or 870 square acres. FMC v. Shoshone-Bannock Tribes et al., 905 F.2d 1311, 1312 (9th Cir.), *cert. denied,* 499 U.S. 943 (1991). Of the 544,000 acres, 96% of the land it Tribal land or held in trust by the United States for the benefit of the Tribes or its individual members. Id. The remaining 4% of land is held in fee by individual Indians, the Tribes and non-Indians, and the fee land is sprinkled throughout the Reservation. Id. The Reservation forms a sizeable geographic area for the exercise of Tribal jurisdiction, supports a residing population, is the basis of the Tribal economy, and provides an irreplaceable forum for cultural vitality based on religious practices and cultural traditions premised on the sacredness of land.

III. Advance Notification of Shipments Through the Reservation

The Reservation is about 40 miles southeast of the Idaho National Engineering and Environmental Laboratory (INEEL), and thus is within the region of influence. The Reservation is a major corridor for hazardous and radioactive waste shipments to and from the INEEL, including transuranic, low level radioactive waste, tritium, and spent fuel shipments to the Naval Reactor Facility. Shipments of the waste are transported across the Reservation either on Interstate 15 or via the railroad to the INEEL. The Tribes are an " affected Indian tribe" within the meaning of the Nuclear Waste Policy Act, 42 U.S.C. § 10101(2)(B), which means that the Department of Energy must consult with, and the Tribes participate in matters at the INEEL that impact their interests.

The Tribes have a comprehensive infrastructure, which includes departments that specifically are charged with the responsibilities and duties to address Department of Energy issues, transportation of hazardous and radioactive waste shipments through the Reservation, monitoring of potential contaminated air emissions from the INEEL, safety and emergency response matters, and general public safety issues. The Tribes have an established Fire Department, Emergency Response Agency, Public Safety Department, and Law and Order Department.

The Tribes have negotiated agreements with the Department of Energy and the Department of Navy which address and require advance notification of shipments passing through the Reservation. These advance notices are also required of private, commercial shipments of high level radioactive waste across the Reservation by federal court order. These advance notices by agreement are similar to the Nuclear Regulatory Commission ("NRC") regulations. 10 C.F.R. 71.97. For example, under the Navy Agreement, the Chairman of the Tribes or his designee (the Tribal Police Department) receives three advance notifications: (1) on the day the shipment departs from its origin; (2) 24 hours prior to reaching the Reservation; and (3) 1 hour to arriving on the Reservation. The Naval shipments are spent fuel nuclear waste heading to the Naval Reactor Facility at the INEEL. This advance notice information is considered classified controlled nuclear information. Under the Department of Energy Agreement, the Tribal Public Safety Department receives four advance notices of shipments prior to entering the Reservation. The Tribes receive: (1) a 14 day advance notice; (2) a 7 day advance notice; (3) a 24 hour advance notice; and (4) a 1 hour advance notice. The shipments are also monitored on the Transcom system located in the Public Safety Department. There are established points of contact with telephone numbers, and fax machine numbers for current shipment information.

Initially, when the Tribes requested that advance notices of shipments and other information about the shipments be provided by the shippers to the Tribes there were many questions (similar to the NRC's proposed rulemaking questions) about the capabilities of the Tribes to participate in the advance notification process. Most of these fears were based upon ignorance of the Tribal government and lack of knowledge of the tribal government structure, etc. Over the years, communication and coordination between the Tribes and federal agencies has increased and is currently excellent. Additionally, implementation of the notifications, changes in schedules, changes in points of contacts,

etc. are running smoothly. We regularly participate in multi-jurisdictional emergency exercises with the federal, state and local jurisdictions to address and respond to emergency situations.

We, therefore, support the NRC's efforts in proposing this new rulemaking since many Indian tribes may not be in the same position as the Shoshone-Bannock Tribes to negotiate agreements with the necessary federal agencies or licensees which ship high level waste across their tribal lands. Moreover, nowhere is public health and welfare more at jeopardy than in the hazardous and nuclear waste fields. There are enormous risks inherent in transportation of such shipment of waste across tribal lands. Tribes and the public deserve to be protected, and tribes deserve to be notified of shipments across their lands.

IV. Comments and Advice on the Specific Considerations for the Rulemaking

A. Developing A List of Native American Tribe Contacts.

A.1: The Tribes agree that the appropriate approach in developing a list of Tribal contacts would be to first secure the list of federally recognized Indian tribes from the Bureau of Indian Affairs. Next, the NRC would have to identify all the Indian tribes who may be impacted or routes which will cross tribal lands, and then contact each tribe to determine if the tribe is interested in being notified of the shipments. Some tribes may not be interested in participating in the process, where others will wholeheartedly participate.

A.2: All tribes who determine that they would like advance notice of shipments should be provided the opportunity to update their points of contact on an annual basis. Pursuant to our agreements, the Tribes provide any contact changes to the federal agencies on an annual basis, but usually provide changes immediately to insure efficient communication and continuity in implementing the process of advance notification. Also, the Tribes have more than one point of contact. We would recommend updates of information annually similar to the states, but would include language which encourages tribes to update when points of contact change.

A.3: In addition to a telephone call under the agreements we have entered into with the federal agencies, we request that a facsimile confirmation be sent to the Chairman and/or Law and Order Department Chief. The concern set forth under this subsection can be addressed by telephone contact or facsimile contact. Any tribe who desires to participate in this advanced notification process will be aware that they must identify a contact that can be reached any time of the day. We do not believe that this should be a major concern or impediment to the notification process.

B. Minimizing the Licensees' Administrative Burden.

B.1: Currently, licensees who ship high level radioactive waste are required to give advance notice to all state governors and law enforcement. We do not believe that there will be an additional administrative burden that the licensee cannot meet. We do not believe that there will be an overwhelming number of tribal governments who will wish to participate in the advance notice.

B.2: This question is a real hypothetical. Shipments under normal conditions usually take a number of days to arrive at their destinations, and there should not be any situation where a tribal point of contact cannot be reached, particularly if there is advanced planning on the part of the licensee. If the shipment is on such a tight schedule and it is necessary for the waste to be delivered to a certain location, the shipment should proceed. The licensee however, runs the risk of tribal governments objecting to the shipment passing across their tribal lands.

C. Identifying the Location of Tribes Along Shipment Routes

C.1: The NRC could publish a list for licensees to rely upon to enable them to identify tribes located along their shipment routes. The Department of Energy and NRC should already have a compiled list of tribes who have been affected, or who have participated in shipment and transportation issues involving high level radioactive waste. This list could be provided on the internet which would be readily accessible to licensees.

C.2: Yes, a central data base of the location of tribal lands should be, and is, maintained by NRC and the Department of Energy.

C.3: The rule should apply equally to all lands, e.g. trust lands, tribal lands and fee lands. Indian tribes do not make a distinction among these types of lands when exerting tribal regulatory jurisdiction to protect and preserve the health and welfare of their residents. The NRC should apply the rule uniformly throughout Indian lands, and not undertake a piecemeal or checkerboard approach to recognizing tribal jurisdiction. For example, the Environmental Protection Agency has recognized and supported a tribal territorial approach for tribes seeking to exert environmental regulation throughout their entire reservation rather than singling out fee lands. The same should apply here.

D. Safeguards Information

D.1: Yes, as a matter of fulfilling the government-to-government policy, all affected tribes should be notified when spent fuel shipments are transported to or across tribal lands.

D.2: Yes, this rule should be broadened to include governmental entities such as Indian tribes.

D.3: The act of notifying Indian tribes about shipments does not increase the risk to safeguard the shipments. Tribal governments are responsible and competent governments with the ability to respond to emergencies and protect the health and welfare of all people. Any fear is unfounded. Our emergency response, public service and law enforcement units train regularly with local state and county agencies, and have a well coordinated emergency response protocol worked out which is a real benefit to the state and local residents.

D.4: The rule should be similar to what is established for the state governments.

D.5: Yes, there may be tribes that may not wish to receive such information, but one will not know the answer until the particular tribe is contacted. Tribal decision making on all the notification issues may vary from tribe to tribe, and that is why it is imperative that the NRC or licensee contact the individual tribe, and not assume all tribes are alike. Some tribes have very sophisticated systems in place, and other tribes may have only a one-person office to communicate and coordinate on the shipment matters.

D.6: Does the NRC review and inspect each state's action to control and protect safeguards information? We do not believe that the tribe's action to protect information needs to be reviewed by the NRC. Again, it is a matter of trust and treating Indian tribes as competent, able-bodied governments with the ability to implement the necessary programs.

D.7: The 10 C.F.R.73.21(a) establishes a presumption that State and local police forces procedures meet the requirements. This presumption should also be applied to tribal police force procedures for information protection.

D.8: No, there should not be an exemption. Given the many concerns set forth in the NRC's questions about protection of information it does not appear that there would be a situation when a tribe should be permitted to obtain secure information if it cannot be protected.

D.9: Is a licensee *permitted* rather than required to release information to a state government? If a tribal government has identified points of contact and meets the other requirements of the rule, then a licensee should be required to release the information to the tribe.