Consent-Based Siting and Indian Tribes

Submitted to the Department of Energy, Office of Nuclear Energy

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The Nuclear Energy Tribal Working Group (NETWG) was chartered to connect Tribal government leaders and representatives with the Department of Energy Office of Nuclear Energy (hereby referred to as "DOE" or "Department"). NETWG works closely with DOE to ensure tribal concerns are recognized. This paper highlights the key concerns NETWG shares pertaining to tribal involvement throughout DOE's consent-based siting process. These concerns should not be taken to be representative of tribes as a whole.

An overarching theme of concern for NETWG is the lack of consistency and integrity in DOE's approach to incorporating tribal views and concerns throughout its efforts. The majority of the information in this paper has previously been brought to the Department's attention, and, in some instances, is language DOE adopted on its own. Generally, because of the Department's inconsistent consideration to the laws, policies, and inherent sovereign rights of tribal governments, there tends to be disconnect and a lack of trust and confidence in the Department's decisions. It is NETWG's intention to bring these discrepancies to light, and to assure American Indian tribes are provided the mindful consideration and legal standing they deserve throughout the federal government's processes.

The following paper outlines some primary concerns pertaining to tribal participation and acknowledgement throughout the Blue Ribbon Commission on America's Nuclear Future (BRC) and DOE's consent-based siting process. With increased integrity and consideration, NETWG is hopeful American Indian Tribes and the Department can continue working together to solve the country's nuclear waste challenges, amongst other important political issues.

I. Background

Following the recommendations of President Obama and the BRC, DOE initiated a national dialogue on a consent-based siting process as a basis for the development of an interim storage facility and/or a repository for disposal of spent nuclear fuel and high-level waste. DOE's consent-based approach to siting will be built upon collaboration with the public, industry, NGO's, tribal, state, and local governments, as well as other stakeholders.

The BRC was formed in 2010 after President Obama declared the process to license Yucca Mountain was "unworkable." Two years later, the BRC advanced eight recommendations in its "2012 Report to the Secretary of Energy." The recommendations identified implementing a "new, consent-based approach to siting future nuclear waste management facilities." This acknowledges the Yucca Mountain project, as a top-down, federally-mandated approach, was unsuccessful due to objections of the state and local governments. **From the BRC's report, it is clear consideration should be given to potential tribal host communities when responding to the question of what to do with the United States' nuclear waste.**

The report explains successful siting decisions are the result of complex and sustained negotiations between project proponents and potentially affected tribal, state, and local governments. The report suggests host states and/or tribes should retain direct authority over aspects of project regulation, permitting, and operations.

In January of 2013, DOE released the Administration's "Strategy for the Management and Disposal of Used Nuclear Fuel and High Level Radioactive Waste" *(*hereby referred to as "Strategy"). The Strategy, an implementation plan for the BRC Report, outlines the Obama Administration's policy regarding the disposition of used nuclear fuel and high level radioactive waste. Among other things, the Strategy recommends a comprehensive waste management and disposal system including a pilot interim storage facility, a full-scale storage facility, and a geologic repository. These facilities are sited using a phased, adaptive, and consent-based process recommended by the BRC.

Earlier this year, DOE initiated the consent-based siting process, providing notice in the Federal Register (80 FRN 79872) and a kick-off meeting in Washington, DC. The agency hosted a number of public meetings designed to engage Americans in the discussion of how best to develop a siting process that is "fair and reflective of public input."[1]

Ultimately, these efforts will result in a report seeking to inform DOE on what the public views to be a fair and consent-based approach to siting the nuclear waste.

II. DOE Must Amend its Recommendations to Acknowledge Tribal Support is Vital to Ensuring Success of the Nuclear Siting Program.

When discussing DOE's past efforts to site a repository and strong opposition from the elected leaders of potentially affected parties, the BRC report mentions "the cooperation of affected state governments will be vital to the success of the nuclear waste program going forward." [2] The report also mentions tribal and local support is not "sufficient to

[1] "Consent-Based Siting." *Department of Energy*. N.p., 2016. Web. 29 July 2016. Available at: <http://www.energy.gov/ne/consent-based-siting>.
[2] Blue Ribbon Commission on America's Nuclear Future. *Report to the Secretary of Energy*. Rep. January, 2012. P. 22.

overcome state-level opposition." [3] The Department's actions are consistent with this language, highlighting the importance of state consent and participation. These statements, however, overlook the intent of the Commission and the overarching idea that governments (federal, tribal, and state) must work equally together to solve our country's nuclear energy challenges.

The BRC report highlights tribes and local governments as being generally supportive of siting facilities (for job creation and economic development), whereas states are not. The BRC recommends that to be successful, "the new waste management organization must find ways to address *state* concerns, while at the same time capitalizing on local support for proposed facilities" (emphasis added).[4] These statements imply that decisions made at the state level are valued more than those made at the local or tribal level.

DOE made several efforts throughout designing the consent-based siting process to ensure tribal input is received. These efforts are not unnoticed; however, conversations with DOE staff imply state priority over tribal rights is a prevalent issue. Our view, which was mentioned throughout these meetings, is the Department believes state opposition (or support) will take priority over the tribal perspective, whatever it may be. In other words, if a tribe wanted to host a facility (or opposed a state's desire to host), but the adjacent state did not agree, the state's position would prevail.

As they stand, both the BRC report and DOE's current consent-based siting strategy minimizes or mischaracterizes tribal sovereign rights. These efforts incorrectly imply states and counties are stakeholders in tribal affairs, rather than recognizing tribal nations as domestic dependent nations with inherent sovereign rights. Without the appropriate recognition of the importance of tribal support, the Administration's efforts will never be sufficient to meet the standards of "consent-based."

It is imperative the Department understands the rights of federally recognized tribes, and accurately describe the vital role that tribes play in contributing to the success of the nuclear program as the agency moves forward.

III. The Department Must Recognize the Inherent Sovereign Rights of Tribal Nations.

Before engaging in any conversation based on consent, particularly in reference to American Indian tribes, the Department must clearly understand the dynamics of tribal sovereignty. The relationship of the United States to American Indians is "unlike that of any other two people in existence."[5]

[3] Blue Ribbon Commission on America's Nuclear Future, p. 56.
[4] Blue Ribbon Commission on America's Nuclear Future, p. 56.
[5] Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831).

According to the BRC report, "a good gauge of consent would be the willingness of affected units of government—the host states, tribes, and local community—to enter into legally binding agreements with the facility operator, where these agreements enable states, tribes, and communities to have confidence that they can protect the interests of their citizens."[6]

This language emphasizes consent must be sought from all affected governmental units (tribal, state, and local) before a project may proceed. Consent from all affected government units is ideal, but the right of federally recognized Indian tribes to develop or site a facility on tribal land, without state objection or oversight, is a sovereign right. This recognition of the tribes' legal standing is notably absent in the BRC report.

Indian reservations are considered to be "domestic, dependent nations."[7] As such, Indian tribes possess inherent governmental power over all internal affairs and states, as well as other adjacent tribes, are prevented from interfering with the tribes in their self-government.[8]

Indian tribes may face similar issues as states regarding siting considerations. That is, an individual tribe may find itself with competing interests (e.g., weighing potential environmental and cultural impacts from hosting a site with economic benefits from hosting). However, determination of these issues is reconciled by the tribe itself, rather than through federal government oversight.

Tribal lands are typically located within the geographic boundaries of a state or states, but they are not political sub-jurisdictions of the state. Rather, they should be thought of as adjacent jurisdictions. The BRC appropriately recognizes states do not have regulatory authority over Indian tribes. However, the report also quotes **"it would be unrealistic to attempt to locate a facility on tribal land in the face of determined state-level opposition"** (emphasis added). [9]

Without explicit Congressional permission, a state or adjacent tribe, regardless of location, has no authority "to regulate tribal activity or conduct concerning locating facilities on Indian lands for interim (or long-term) storage for and permanent disposal of used/spent nuclear fuel and high-level radioactive wastes." [10] This language was submitted to the BRC in 2011 as a White Paper prior to the development of the final

[6] Blue Ribbon Commission on America's Nuclear Future, Ex. Summary, page ix.
[7] Worcester v. Georgia, 31 U.S. 515 (1832).
[8] Some exceptions exist with regard to civil and criminal authority.
[9] *Report to the Secretary of Energy,* p. 58.
[10] Chestnut, Peter C., Ann B. Rodgers, Joe M. Tenorio, and Janis E. Hawk. *The Role of Indian Tribes in America's Nuclear Future Prepared for The Blue Ribbon Commission on America's Nuclear Future*. Rep. 2011. Print.

report. Inexplicably, this language was dismissed from the final report and replaced by language highlighting the importance of state approval.

The BRC's position underscores the struggle by the Skull Valley Band of Goshute Indians in their attempt to develop an interim storage facility on their reservation in the 1990's. While the counties around the reservation were generally supportive of the project, the State of Utah strongly opposed having nuclear waste in its state. State opposition and transportation concerns helped to halt the tribe's efforts. [11] This situation is unjust and brings to light a difficult situation DOE must consider throughout its consent-based process.

For perspective, imagine Wisconsin chose to host a facility. There is question as to how much voice Minnesota, or any neighboring state, would have in Wisconsin's decision-making process. While communication and negotiation regarding transportation and other safety issues must occur for the siting to be successful, it is doubtful DOE would halt the project on Minnesota's objection alone.

In reality, siting of spent nuclear fuel and high-level waste is challenging with the expectation that some level of opposition will always exist. With this in mind, the Department must determine how it will balance varying perspectives while accounting for tribal sovereignty and individual state rights. Differing views between Indian country and a state should be given great consideration and, at minimum, the same treatment as state-to-state opposition. Before the Department adopts and implements a consent-based approach, it must appropriately recognize state approval is not necessary for decisions made on tribal land.

IV. The Federal Government has a Trust Responsibility to American Indian Tribes.

One of the foundational principles of Indian law is the federal government's trust responsibility to Indian tribes. Federal trust responsibility includes legal duties, moral obligations, and the fulfillment of understandings and expectations arising over the entire course of the relationship between the United States and federally recognized tribes.[12]

The United States holds legal title to Indian lands, but the lands must be managed in unison with the equitable title resting with Indians.[13] Therefore, it is the right of federally recognized Indian tribes to make development decisions in Indian country, without state objection or oversight.

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[11] For more details, please refer to the Appendix 2 attached to this paper.

[12] Cherokee Nation v. Georgia 30 U.S. 1 (1831); United States v. Mason, 412 U.S. 391 (1978); Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1288 (N.D. Cal. 1978).

[13] United States v. Mason, 412 U.S. 391 (1978); Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1288 (N.D. Cal. 1978).

Indian country is defined as "all land within the boundaries of an Indian reservation, regardless of ownership."[14] Therefore, land located within a reservation but owned by a non-Indian is still Indian country. Additionally, rights-of-way through reservation lands (e.g., state or federal highways) are a part of Indian country. Indian country extends outside of reservations, including "dependent Indian communities"[15] as well as "trust" and "restricted" allotments of land.

Because rights-of-way through reservations are considered Indian country, tribes have the authority to manage and maintain activity that happens in that area (recognizing a tribe may not violate certain constitutional prohibitions such as impairing interstate commerce).

V. The Department must be Consistent in its Implementation of Existing Laws and Policies Speaking to American Indian Tribes.

The Department already has several laws and policies in place recognizing the importance of both tribal sovereignty and trust responsibility. Disconnect between existing policies and current departmental implementation is a key area the Department can, and must, begin to improve. Several existing policies, namely: DOE's Indian Policy, Executive Order 13175 on consultation and cooperation, and the Nuclear Waste Policy Act, all may be used as background for the Department in engaging with tribes on developing a consent-based approach to siting.

a. DOE Indian Policy 144.1

The Department established an American Indian policy in 1992. The Indian Policy has been revised and reaffirmed a couple of times, with the most recent version released in 2006.[16] The purpose of the Department's Indian Policy is to convey the agency's guiding principles for consistent interactions with tribal governments. The Indian Policy is based on the United States Constitution, treaties, Supreme Court decisions, Executive Orders, statues, existing federal policies, tribal laws, and other political relationships between the tribes and the United States government.

Policy Principle I states the "Department recognizes the Federal Trust relationship and will fulfill its trust responsibilities to American Indian and Alaska Native Nations." The

[14] 18 U.S.C. 1151 (2012).
[15] "All dependent Indian communities" within the United States. A dependent Indian community is any area of land which has been set aside by the federal government for the use, occupancy or benefit of Indians, even if it is not a reservation (e.g., Pueblos of New Mexico). 18 U.S.C. 1151 (2012).
[16] DOE Order 144.1, November 16, 2009.

Policy Principle further states the Department will "pursue actions that uphold treaty and other federally recognized and reserved rights of the Indian nations and peoples."

In Policy Principle II, the Department recognizes tribal governments as "sovereign entities with primary authority and responsibility for the protection of the health, safety and welfare of its citizens." The Policy Principles also recognizes tribal governments as separate and distinct authorities, independent of state governments.

Many agency offices have developed frameworks for implementing the Department's Indian Policy, including the Office of Nuclear Energy, to ensure consistent interpretation and application. With respect to Policy Principle I (*Trust Responsibility*), the framework states the offices endeavor to inform state and local governments, and other stakeholders, about the Department's role and responsibilities with respect to Indian tribes, including "its responsibility to treat tribes as sovereign governments."

The consent-based siting process must be revised to include and explain how these policy principles relate to the new siting process. Ultimately, the process must afford an opportunity for an interested tribal government to actively participate.

b. Executive Order 13175

According to Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments", each Federal agency is required to engage in government-to-government consultation with American Indian tribes. These government-to-government relationships recognize tribal sovereignty and allow an opportunity for tribal officials to give timely input in the development of regulatory policies affecting the Tribe. Furthermore, in a government-to-government relationship, a tribe has a recognized right to protect the health, safety, and welfare of its citizens.

The order requires each Federal agency to ensure meaningful and timely input by tribal officials in the development of regulatory policies that affect the tribe. The continual highlight of the need for state approval to result in a "workable" solution undermines the consultation and cooperation requirements established under this order.

c. Nuclear Waste Policy Act

The Nuclear Waste Policy Act (NWPA) of 1982, amended in 1987, was designed to assist in the siting, construction, and operation of interim and permanent repositories for spent nuclear fuel. The NWPA contains many provisions recognizing Indian rights, including: "(1) recognizing tribal authority over tribal lands; (2) mandating the tribal right of consultation; and (3) providing for financial and technical assistance to tribes."[17]

[17] 18 U.S.C. 1151 (2012).

The 1987 amendments to the NWPA created the Office of the United States Nuclear Waste Negotiator (NWN). The NWN is designed to work with states or Indian tribes to reach agreements on the potential voluntarily hosting of a Monitored Retrievable Storage (MRS) facility.[18] All states and federally recognized tribes were sent a letter from the NWN, explaining the need for the MRS and the availability of tiered-funding to study the feasibility of voluntarily hosting a facility. The fact that tribes were included in the search for an MRS site demonstrates their unique sovereign status; otherwise, the Office of the NWN would have only contacted states.[19]

Section 135 of the NWPA clearly specifies the state governor or legislature has no authority to disapprove siting decisions on Indian land.[20] The overarching concept woven throughout the NWPA, that tribal sovereignty requires tribes to be engaged with on an individual level, separate from state opinion, must be transmitted through the entirety of the Department's communications and decision-making process.

Elements of the NWPA are ideal example of an appropriate consent-based approach, holding tribal governments equal to state governments for siting considerations, while simultaneously recognizing tribal sovereignty.[21] Recognizing such, the federal government must be consistent in its implementation of this language.

VI. Conclusion

The right of American Indian tribes to exercise their sovereign powers, including but not limited to the right to make complex economic, environmental, and political decisions free from state oversight, is continually overlooked or discounted by both the BRC and DOE. Tribes are being denied the right of self-determination as promulgated in the federal regulations by requiring or encouraging state and local consent.

NETWG understands the Department's current effort is focused on creating a process to define consent, in terms of siting a facility for the storage of high-level spent nuclear fuel. It is vital for the Department to begin prioritizing integrity and thoughtful consideration in gathering input from tribal people throughout its efforts.

When funding is becomes available and the process moves forward for determining a suitable location for a storage facility, tribal communities must be consulted on a

[18] A MRS is designed to store a maximum of 10,000 MTU until a repository was open.
[19] Visit the Appendix to this paper for more information on the NWPA and the authority of the NWN to negotiate with Indian tribes.
[20] 42 U.S.C. 10136(b)(3).
[21] Title IV of the NWPA creates a "Nuclear Waste Negotiator" to coordinate the governing body of any tribe or state interested in hosting a potential site with the Federal government to reach a mutually beneficial agreement for siting the waste. 42 U.S.C. 10241, et seq.

government-to-government basis consistent with laws and regulations at the forefront of any siting effort that may have an impact on their community. Central to these recommendations is the principal foundation of trust and transparency in tandem with the importance of DOE implementing a consistent and effective approach to working with American Indian tribes in a good-faith manner.

Tribes are not equivalent to states. Sovereignty and trust responsibility aside, from an ethical standpoint, tribes should be treated at a minimum, in tandem with states. As the current policies and processes exist relating to the siting of nuclear waste, tribes are inappropriately afforded less deference than states. Regardless of where waste is sited, it is incumbent upon DOE to provide American Indian tribes with the legal distinction and respect they deserve.

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Appendix 2: Nuclear Waste Negotiator / Skull Valley Band of Goshute Indians Example

The Nuclear Waste Negotiator (NWN) was created under the Nuclear Waste Policy Act (NWPA) to reach agreements with states or Indian tribes to voluntarily host a Monitored Retrievable Storage (MRS) facility, which could store a maximum of 10,000 MTU until a repository was open. All states and federally recognized tribes were sent a letter from the NWN, explaining the need for the MRS and the availability of tiered-funding to study the feasibility of voluntarily hosting a facility.

After the NWN initiated communication with tribes and states regarding the MRS facility, twenty Phase I grant applications were submitted by sixteen tribes and four non-tribal applicants. Nine tribes were awarded Phase I funding of $100,000, with eight completing their feasibility studies. Nine tribes applied for Phase II funding ($200,000), of which four received funding and two returned their awards. The two tribes completing their Phase II projects included the Mescalero Apache Tribe in New Mexico and the Skull Valley Band of Goshute Indians in Utah. Phase II-B funding (up to $2.8 million to continue feasibility studies and educational outreach and entering into formal negotiations) was scheduled to be distributed, but Congress subsequently canceled the funding and the program. In discussing the MRS process and the number of potential host tribes, the BRC report concluded by stating, "in no case, however, was the host state supportive of having the process go forward." [22]

Because the MRS siting process was significantly delayed, Mescalero Apache began working on their own with a group of utilities to site a facility in December 1993. The tribal council and the utilities drafted a Letter of Intent in December 1994. However, in a January 31, 1995 referendum, the Mescalero voted 490 to 362 against further negotiations. The tribal leadership, which supported the venture, organized a petition drive for a revote, and on March 9, 1995, the Mescalero reversed the former decision and voted 593 to 372 in favor of the project. Negotiations over the design and financing of the facility continued through 1995 and early 1996, but these efforts ended in April 1996.[23]

The Skull Valley Band of Goshute Indians partnered with eight utilities that formed Private Fuel Storage (PFS), after the federal government abandoned efforts to site an MRS facility. PFS received a license from the Nuclear Regulatory Commission (NRC) for an Independent Spent Fuel Storage Installation (ISFSI). The PFS facility is not a NWPA authorized facility. The counties surrounding the PFS facility were generally supportive of the Tribe, while the State of Utah was not. The State of Utah conveyed its disapproval in a comment letter to the BRC based on the lack of a consent-based process (advocated by the BRC) and science-

[22] BRC report, page 23

[23] Richmond School of Law, *The Mescalero Apache Indians and Monitored Retrievable Storage of Spent Nuclear Fuel: A study of Environmental Ethics*, Noah M. Sachs 1996.

based approach.[24] There was no discussion in the BRC Report that Skull Valley has the right to site such a facility on its land as a sovereign nation. Nor was there mention that Skull Valley had received MRS funding to conduct technical studies on the proposed site.

This example is highlighted with the intent that the Department will consider it to be a lesson learned to continue moving forward the conversation of what to do with the nation's high-level spent nuclear fuel.

[24] Blue Ribbon Commission on America's Nuclear Future. *Report to the Secretary of Energy*. Rep. January, 2012. P. 24.