THE ROLE OF INDIAN TRIBES IN AMERICA'S NUCLEAR FUTURE

prepared for

The Blue Ribbon Commission on America's Nuclear Future

by

Peter C. Chestnut
Ann Berkley Rodgers
Joe M. Tenorio
Janis E. Hawk

Chestnut Law Offices
121 Tijeras NE, Suite 2001
Albuquerque, New Mexico 87102
Phone: (505) 842-5864

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EXECUTIVE SUMMARY

Indian tribes have voiced their tribal issues in the United States' nuclear effort since its inception, with the siting of what would become Los Alamos National Laboratory adjacent to the San Ildefonso Pueblo Reservation and the Hanford plutonium production works along waterways shared with the Yakama Nation and other Indian tribes. The siting of a proposed repository at Yucca Mountain, Nevada along with other activities conducted on the Nevada National Security Site (NNSS) (formerly the Nevada Test Site), increased the need for the United States Department of Energy (DOE) to address previously unidentified tribal concerns. Initially there was little attention given to these indigenous nations except when these federal installations needed some resource that a tribe possessed, such as a domestic water supply or construction materials. Today, these Indian tribes are partners with the states that host DOE facilities in working groups that assist the DOE in making nuclear policy. This White Paper focuses on the modern role of Indian tribes in national policy-making concerning America's nuclear future and its potential to affect Indian tribes, tribal resources or people.

Our national constitution is very specific about the powers of the federal government, and leaves other powers to state governments. Relations with Indian tribes are specifically designated as a federal area in the U.S. Constitution. As a result, the general view of most observers is that Indian tribes have whatever powers the federal government acknowledges or gives to them. This view is incorrect on many levels. Indian tribes are a separate and distinct type of sovereign entity. Tribes have sovereign governmental powers that pre-date the arrival of Columbus and the creation of the United States and as a result, they retain all those powers that have not been taken from them by the federal government. The federal government has acknowledged a fiduciary duty to recognize each Indian tribe's right to make its own laws and be governed by them. The federal government has also delegated some additional powers to tribes. This paper examines the powers of Indian tribes, the responsibilities of the federal government to those tribes, and the mechanisms presently used by the United States and Indian tribes to incorporate tribal views in the creation of federal laws, regulations, and policies as well as decision-making by federal agencies.

The Blue Ribbon Commission on America's Nuclear Future (BRC) is tasked with providing recommendations for developing a safe, long-term solution to managing the Nation's used nuclear fuel and high level waste. This White Paper describes the role of Indian tribes in America's Nuclear Future and the intergovernmental issues that may arise with any proposed solutions. **Section 1** introduces the rest of the paper.

Section 2 addresses the powers of Indian tribes, where these powers come from and how Indian tribes exercise those powers. When this issue first came before the United States' Supreme Court in 1823, that Court looked to the principles of international law to define the relationship of the United States and Indian tribes. International law is still important today in defining that relationship as demonstrated by President Obama's announcement of his endorsement of the United Nations' Declaration on the Rights of Indigenous Peoples at a White House conference of tribal government leaders in 2010.[1] The Declaration is pertinent to the work of the BRC because it addresses the fundamental duties of a national government to indigenous societies when it comes to actions such as the siting of facilities for or the transporting of hazardous wastes across tribal lands.

Section 3 examines how the United States recognizes tribal authority, and diminishes it or expands it. It begins with a discussion of the extent of the exclusive powers of the federal government over Indian tribes and the concomitant federal duties owed to Indian tribes. Several federal statutes that are relevant to transportation and siting issues are specifically discussed. Of key importance are the Nuclear Waste Policy Act of 1982 and its 1987 amendments (NWPA) which presently apply to any siting decision for interim or long-term storage or permanent disposal of nuclear waste,[2] and the Hazardous Materials Transportation Act (HMTA) which limits the powers of tribes to prohibit transportation of hazardous or radioactive wastes across tribal lands.[3]

The more limited authority of states over Indian affairs is discussed in **Section 4.** Generally, states do not have authority over Indian tribes because the United States Constitution reserves that authority for Congress. States have authority only to the extent such authority is granted to them by the federal government. Absent explicit Congressional permission for a state 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, states would be barred from any role in such decisions. A state may have an indirect effect on the decision of an Indian tribe to host an interim or permanent disposal facility as discussed in Section 4.2.

Section 5 addresses the evolution of federal policy toward Indian governments over time and the important role today of meaningful consultation and informed consent as a means of incorporating Indian tribes into federal actions leading to the creation of federal laws, regulations and policies that have the potential to affect Indian tribes, their lands, cultural resources or members. The failure of any entity acting pursuant to federal law to engage in meaningful consultation with Indian tribes can stop a project at least temporarily, so it is essential that the concept of meaningful consultation be incorporated into the recommendations of the Commission.

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[1] United Nations General Assembly Resolution 61/295 (September 13, 2007). The full Declaration is set out in **Appendix A** to this Paper.

[2] Excerpts of the Nuclear Waste Policy Act pertaining to Indian tribes are set out in **Appendix B** to this Paper.

[3] Excerpts of the Hazardous Materials Transportation Act that apply to Indian tribes are set out in **Appendix C** to this Paper.

We conclude the paper in **Section 6** with a summary of how tribal governmental authority can be used to thwart projects or promote them. This final section discusses several ways in which tribes can affect a proposed federal action. One of the most effective means available to a tribe is to demand meaningful consultation where there is any proposed federal action that has the potential to affect the tribe, its resources or its people. This is not limited to potential action on federal Indian reservations, nor does it matter what type of entity is acting on behalf of the federal government. Any entity acting pursuant to a federal authorization must comply with this duty. The importance of meaningful consultation with regard to nuclear issues is explicit in the Nuclear Waste Policy Act. While federal agencies are also subject to tribal consultation through executive orders that require development of a consultation policy, a federal entity that is not governed by such executive orders still would have the duty to consult where, as here, Congress explicitly recognized and provided for consultation. Absence of adequate, meaningful consultation may delay a project and the delay can prove fatal.

Finally, based on the analysis presented in this paper, we make a recommendation to the Blue Ribbon Commission that it request the Secretary of the DOE to assist the BRC by assigning appropriate personnel to arrange for meaningful consultation with Indian tribes, to be initiated with the release of the BRC's Interim Report.

1. INTRODUCTION

President Obama established the Blue Ribbon Commission on America's Nuclear Future to provide recommendations for developing a safe, long-term solution to managing the Nation's used nuclear fuel and high level nuclear waste. This necessarily includes finding safe solutions for interim storage and permanent disposal of spent nuclear fuel and high-level radioactive waste, and transportation of such wastes and fuel from their source to the storage site. Specifically, the Commission will provide advice, evaluate alternatives, and make recommendations for a new strategy to solve the growing problem of what to do with America's nuclear waste.

The purpose of this White Paper is to identify the issues that arise concerning Indian tribes and their powers of self-determination for their people and their resources when the federal government seeks solutions to a national problem which could affect them. Federal law recognizes that a tribe has a role in such choices, whether it is to provide land for storage or disposal of nuclear waste or to oppose such use of their lands. Federal law can limit a tribe's choice as well, for example, by prohibiting an Indian tribe from blocking all transportation of nuclear waste through its lands.[4]

[4] See the Hazardous Materials Transportation Act, 49 U.S.C. §§1801 *et seq* (**Appendix C**). See also *Public Service Company of Colorado v. Shoshone-Bannock Tribes,* 30 F.3d 1203 (9th Cir. 1994) (tribe is subject to suit for unlawful attempt to stop shipments of spent nuclear fuel across tribal reservation); see also *Northern States Power Company v. Prairie Island Mdewakanton Sioux Indian Community,* 781 F.Supp. 612 (D. Minn. 1991) (tribe can be enjoined from preventing continued interference with shipment and receipt of materials necessary to maintain operation of plant in light of preemption under Hazardous Materials Transportation Act and Atomic Energy Act)..

These issues cannot be fully explained without an understanding of the unique relationship of Indian tribes to federal and also state governments. This Paper will address the following areas of policy and law:

(1) The powers of Indian tribes as they evolved over time: tribal self-determination includes the right of tribal governments to make their own laws and be governed by them, limited only by their status as domestic dependent nations.

(2) The relationship of the federal government to Indian tribes: the power of Congress alone to regulate and modify the status of tribes (Plenary Power) derived from the United States Constitution and the responsibility of the federal government toward the tribes as a result of that power (Trust Responsibility).

(3) The limited role of the states in Indian affairs: States do not have the inherent power to regulate Indian tribes unless such power is specifically delegated to them by the federal government.

The modern focus of tribal self-determination is on meaningful consultation and informed consent. International law focuses on meaningful consultation to achieve the informed consent of indigenous people. In the United States today, meaningful consultation to achieve informed consent has replaced treaty-making as the primary tool in Indian affairs. The current policy of the federal government is to involve tribal governments in the development of federal policies and practices that have tribal implications in order to safeguard tribal rights as part of the government's Trust Responsibility to the tribes.

2. THE POWERS OF INDIAN TRIBES

2.1 Tribal Involvement with Nuclear Issues

When the decision was made during World War II to site part of the Manhattan Project on the Pajarito Plateau west of Santa Fe, New Mexico, and another part in Hanford, Washington on the Columbia River, Indian tribes became involved in the national nuclear effort. The Pueblo de San Ildefonso, with its lands bordering the Los Alamos site in New Mexico, provided workers, water and building materials for Los Alamos, and shares a boundary with the Los Alamos National Laboratory to this day. The Yakama Nation, downstream from the Hanford complex where the first full-scale nuclear reactor for plutonium production in the world was built, is one of the first communities to be affected by the nuclear materials produced at Hanford and buried next to the Columbia River. Because of its early involvement with nuclear issues, the Yakama Nation contributed to the legislation that became the Nuclear Waste Policy Act. The ancient wintering ground of the Yakama was chosen for the Manhattan Project, now known as Hanford. The Yakama Nation is still affected by the nuclear materials at the Hanford complex.

The Hanford site is located within areas used by several tribes, as recognized by treaties with the Confederated Tribes of the Umatilla Indian Reservation in Oregon, and the Nez Perce Tribe in Idaho as well as the Yakama Nation. The Idaho Department of Energy's activities directly affect the Shoshone-Bannock Tribes of Ft. Hall, Idaho, and the tribes attempted to block shipments of commercial spent nuclear fuel across the Fort Hall reservation. Indian tribes in New Mexico are directly affected when shipments to the DOE Waste Isolation Pilot Plant (WIPP) in Carlsbad, New Mexico, cross their lands. There is even greater concern with rail shipments because railroads often are located in river valleys, thus implicating a tribe's water supply.

In 1989, the DOE placed human health and the environment as its top priority (above weapons production). It then created the State and Tribal Government Working Group (STGWG)[5]. 16 states and 10 tribes have participated in STGWG[6] with a focus on environmental management (EM) activities. Not all tribes with cultural affiliation to DOE facilities in Nevada where EM activities are conducted are included in STGWG.

Several branches of DOE have been working with Indian tribes since the 1990s. These include: the Environmental Management Program, the National Nuclear Security Administration (NNSA, formerly Defense Programs), the Office of Science and the Office of Congressional and Intergovernmental Affairs. Of particular importance, Environmental Management created an Office of Long Term Stewardship in 1996 at the urging of the tribes and states through STGWG. The Stewardship Committee of STGWG produced a report entitled "Closure for the Seventh Generation" in 1999.[7] Its recommendations focused on long-term stewardship goals, planning and implementation as well as public awareness and education. The DOE Branch of Legacy Management today exists in significant part because of the insistence of the tribes and states involved in STGWG that long-term stewardship remains a fundamental obligation of the federal government, even after a site has been "cleaned up" and closed.

Because Indian tribes recognize their responsibility of stewardship over their lands, environmental surveillance and monitoring remain areas where tribes are uniquely situated to assist that mission long into the future.[8] Indian tribes are uniquely tied to their existing land base

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[5] STGWG was created in response to a letter from ten state Governors to the Secretary of Energy in 1989 regarding their concerns for management, cleanup, and disposal of radioactive and hazardous chemical wastes at DOE facilities within or adjacent to their states. The Secretary asked each Governor to appoint a representative to participate in the planning process through membership in a State and Tribal Government Working Group (STGWG). The Secretary also invited representatives from the Yakama Indian Nation, the Shoshone-Bannock Tribes, the National Governors' Association, the National Conference of State Legislatures, and the National Association of Attorneys General to participate. STGWG first met in June 1989.

[6] STGWG Tribal members include: The Confederated Tribes of the Umatilla Indian Reservation, Nez Perce Tribe, Pueblo of Jemez, Pueblo de San Ildefonso, Santa Clara Pueblo, Seneca Nation of Indians, Shoshone-Bannock Tribes, and the Yakama Nation as active members. The Pueblo of Isleta and the Navajo Nation have participated in the past. The 16 states include: California, Georgia, Idaho, Kentucky, Missouri, Nevada, New Mexico, New York, Ohio, Oregon, South Carolina, Tennessee, Texas, and Washington as active members currently. Colorado and Illinois have also actively participated in the past.

[7] Published by the National Conference of State Legislatures.

[8] STGWG, "Long-Term Stewardship and the Federal Trust Responsibility: Incorporating the Duties Owed To And the Obligations of American Indian Tribes into a Long-Term Stewardship Plan, 2002"

because of the permanent nature of their location and their deep-rooted cultural connections to it. In many instances Indian tribes do not have alternative sources for vital land and water. Tribal people cannot just move away from contaminated groundwater and still retain all their rights as tribal people on their own lands. Therefore, Indian tribes have compelling interests in making a stewardship program succeed on lands connected to their tribal cultures.

While in the past, collaboration between DOE and some Indian tribes has been challenging, in recent years, such collaborative activities have been more successful. DOE investment in building tribal capacity in the environmental monitoring and analysis areas is an important factor in helping this happen. Today, tribes have taken the lead as co-trustees in the area of Natural Resource Damages and Restoration (NRDAR) at DOE's sites in Los Alamos and Hanford. Sixteen Tribes have developed a positive working relationship with the NNSS, and also with the Department of Defense's Nellis Air Force Base which includes the Nevada Test and Training Range.[9]

Transportation of nuclear materials across the country has been an area of concern and focus for tribes at least as long as the DOE has been trying to create one or more national repositories. WIPP in New Mexico and the NNSS each gave rise to a multiyear collaboration between Indian tribes and DOE and is seen as beneficial by both participating tribes and DOE. For transportation to both WIPP and Yucca Mountain, tribes insisted that emergency preparedness programs needed to be funded by DOE, with proper training, equipment, and staff, in the event that a shipment of nuclear materials might require these services during passage through tribal lands by either road, rail, or river. Funding from WIPP for such programs continues to this day.[10] However, it is important to note that no funding was ever provided to the Yucca Mountain tribes for such undertakings.

The Office of Civilian Radioactive Waste Management (OCRWM) worked with over 40 tribes through the Transportation External Coordination Working Group (TECWG) for tribes along potential routes to Yucca Mountain. While OCRWM no longer exists, a National Transportation Stakeholders Forum (NTSF) now has a tribal working group involved in addressing prospective shipment report improvements. The tribes involved in this activity are primarily those directly affected by DOE nuclear cleanup activities, including many of the STGWG tribes.

The OCRWM Yucca Mountain Project Site Characterization Office began its relationship with tribes in 1987, followed by the NNSS in 1991, when a model of consultation was introduced to the Consolidated Group of Tribes and Organizations (CGTO), which includes 16 tribes. CGTO works with NNSS proactively on site monitoring and co-management regarding environmental issues and actively participates as co-authors for National Environmental Protection Act (NEPA) documents including Environmental Impact Statements and Resource

[9] Personal communication with tribal member, Pahrump Paiute Tribe.

[10] The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 *et seq.* (CERCLA) provides funding for training under section 9660a.

Management Plans. The success of this undertaking arises from early tribal involvement in proposed actions that could affect cultural resources at the NNSS.[11]

DOE has signed Accords with four Pueblos surrounding the Los Alamos National Laboratory in New Mexico (LANL), and has agreements-in-principle with the other STGWG tribes.[12] These commitments to provide information and funding for independent monitoring and evaluation of information have been in place for over 15 years and have produced a high level of technical capability in the STGWG tribes. The U.S. Navy has an agreement with the Shoshone-Bannock Tribes because of the shipment of naval spent fuel to the Idaho National Laboratory (INL) facility through tribal lands. WIPP has a separate agreement with that tribal government regarding shipment of transuranic waste from this Idaho facility to WIPP. These documents were created at the instigation of the Indian tribes after initial discussion concerning potential contamination of the environment affecting tribal lands and other resources.

The Nuclear Waste Policy Act of 1982, as amended in 1987[13], (discussed more fully in Section 3.7) addresses tribal issues regarding transportation, storage and disposal of nuclear waste on their lands. Several tribes expressed an interest in interim storage of nuclear waste during the time when the 1987 amendments created the Office of the Nuclear Waste Negotiator[14]. The Office of the Negotiator expired by statute in 1994.[15] The fact that several tribes expressed an interest in hosting nuclear waste storage on an interim basis may be of interest to the Blue Ribbon Commission.[16] When grants were made available by the Negotiator in 1991, sixteen Indian tribes applied for the initial Phase I study grants.[17] Eight tribes applied for the Phase II-A funding of $200,000.[18] Even after the Office of the Negotiator expired, one Indian tribe continued to work with private companies to site a monitored retrieval storage facility on its lands, without success.[19] Actually implementing long-term interim nuclear waste storage or permanent disposal on tribal lands would likely require statutory changes. For example, the Indian Leasing Act generally limits leasing of tribal lands to 50 years, or 99 years at most.[20]

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[11] Personal communication with tribal member, Pahrump Paiute Tribe.

[12] As an example, the Accord between the U.S. Department of Energy and the Pueblo de San Ildefonso is set out in **Appendix D** to this Paper.

[13] 42 U.S.C. §10101 *et seq.*

[14] 42 U.S.C. §10242

[15] 42 U.S.C. §10250

[16] See "Environmental Justice and the Skull Valley Goshute Indian's Proposal to Store Nuclear Waste", Journal of Land, Resources and Environmental Law, Sierra M. Jeffries, 2007.

[17] See The Mescalero Apache Indians and "Monitored Retrievable Storage of Spent Nuclear Fuel: a Study in Environmental Ethics", Noah Sachs, 1996, Fall – Natural Resources Journal. (Tribes included the Mescalero Apache Tribe (NM), Chickasaw Indian Nation (OK), Prairie Island Indian Community (MN), the Sac and Fox Nation (OK), Yakama Indian Nation (WA), Skull Valley Band of Goshute Indians (UT), Alabama/Quassarte Tribe (OK), Eastern Shawnee Tribe (OK), Lower Brule Sioux Tribe (SD), Ponca Tribe (OK), , Ft. McDermitt Paiute Shoshone Tribe (NV and OR), Tetlin Village Council (AK), Akhiok-Kaguyak Inc./Akhiok Traditional Council (AK), Apache Development Authority (OK), Absentee Shawnee (OK), and Caddo Tribe (OK).)

[18] *Id.*

[19] See, infra, at Section 4.2.

[20] 25 U.S.C. §415. Indians tribes can lease or exchange land, but that requires federal approval. But see *Skull Valley Band of Goshute Indians v. Davis*, 728 F.Supp.2d 1287, 1292 (D. Utah 2010) (noting that tribe entered into a 25

A more thorough review of consultation requirements, treaty rights, and statutes applicable to nuclear issues on Indian lands follows.

2.2 Tribes as Independent Governments

The creation of direct relationships with Indian tribes will only be effective where there is an understanding of what tribal power is and what defines it. Indian tribes are not states or political subdivisions of states, and Indian tribes are not federal instrumentalities – they are independent sovereign governments with their own relationship with the federal government. For example, DOE has entered into Accords directly with the Pueblo de San Ildefonso and some of its neighboring Pueblos to address Los Alamos issues (**Appendix D**). Likewise, DOE has entered into agreements with the Yakama Nation on salmon management and restoration in the Columbia River. **It is critical to remember that any entity created by the federal government, without regard to the type of entity, that is responsible for interim storage or permanent disposal, as well as the transportation of waste for storage or disposal, must have a formal working relationship directly with all potentially affected Indian tribes.** An example of a formal working relationship with Indian tribes is the Memorandum of Agreement between the Tennessee Valley Authority and the Tennessee State Historic Preservation Officer of Knox County, Tennessee. This Agreement calls for consultation with federally recognized Indian tribes that are participants or invited signatories to the Agreement[21].

2.3 Indian Tribes and International Law

The Doctrine of Discovery derived from 18th Century international law is the foundation of federal Indian law in the United States. As stated in *Tee-Hit-Ton Indians v. United States,*[22]

> "[D]iscovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained. ... The great case of *Johnson v. McIntosh,* 8 Wheat. 543, 5 L.Ed. 681, denied the power of an Indian tribe to pass their right of occupancy to another. It confirmed the practice of two hundred years of American history 'that discovery gave [the federal government] an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."

The modern international statement of the rights of indigenous people of the world is contained in the United Nations Declaration on the Rights of Indigenous Peoples (U.N. Declaration)[23] which was endorsed by President Barack Obama for the United States in December, 2010.[24] While it is not clear that an Indian tribe could bring a lawsuit in a U.S. court

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year lease with an irrevocable option for an additional 25 year term for the construction and operation of a spent nuclear fuel storage facility on tribal land).

[21] The full text of the Agreement can be found in Appendix E.

[22] 348 U.S. 272 (1955)

[23] Issued on September 18, 2007 (**Appendix A**).

[24] Washington Times, December 16, 2010

to enforce rights set out in this Declaration, the U.N. Declaration has significant moral force, and petitions for violations can be taken to the United Nations.[25]

The U.N. Declaration takes a consent-based approach to issues that impact indigenous peoples. The rights of Indian tribes under international law relating to decisions made by the federal government for the siting of storage and disposal facilities for any type of hazardous materials are addressed in the U.N. Declaration. **Article 29** is explicitly applicable to the issue of siting nuclear waste disposal and storage facilities: indigenous populations "have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources". It requires national governments to "take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent".

Other more general Articles are also relevant.

Article 39 provides that "Indigenous peoples have the right to have access to financial and other technical assistance from States[26] and through international cooperation, for the enjoyment of the rights contained in this Declaration." The Declaration designates consultation and cooperation as the means to establish informed consent.

Article 18 states that "Indigenous people have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions".

Article 19 requires national governments to "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them".

The right to meaningful consultation, discussed in Section 5, is now recognized and practiced by the United States government under executive orders, federal policies and federal statutes. Many federal statutes that apply to Indian tribes contain provisions for consultation, informed consent and federal financial assistance. These include the NWPA[27] and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[28], discussed in Section 3.7. In addition, as noted earlier, Indian tribes in the U.S. have the right to

[25] See "Chickaloon Tribe tests U.N. Declaration of Indigenous Rights over Coal Mine", Alaska News, Monday, 28 February 2011 03:40 reporting on a report filed with the United Nations by the tribe to protest a coal mine which will interfere with traditional activities. The Chickaloon Tribe is a federally recognized Alaskan Native Village government. See 74 Fed. Register 40218, August 11, 2009.

[26] For purposes of the U.N. Declaration, "States" mean nation-states or nations, not the individual states of the United States.

[27] 42 U.S.C. §10101 *et seq.*

[28] 42 U.S.C. §9601 *et seq.*

make their own laws and be governed by them.[29] This includes establishing regulations and policies. Indian tribes are governed by tribal legislative bodies, executive branches and tribal courts. Thus, in policy and in practice, the United States generally complies with the U.N. Declaration, with some exceptions. (See discussion of statutes that take away Indian rights in section 3.7.5.)

2.4 Indian Tribes under United States Law

Tribes retain, on lands they occupy, all powers except those inconsistent with domestic dependent sovereign status. These are called "inherent powers" because they are retained by the tribes, not granted to them. Examples of inherent powers are the right to hold elections, determine membership, and enact laws needed for self-governance.[30] Indian tribes also have delegated powers under federal statutes, as discussed in section 3.7. These are powers that the federal government has given to tribes in recognition of the current federal policy to encourage tribal self-determination, thereby strengthening self-governance of tribal lands, people and resources.

The federal government recognizes that Indian tribes have sovereign immunity and cannot be sued without their consent unless that immunity has been expressly waived by the tribe or taken away by the federal government.[31] "Sovereign Immunity" is a government's immunity from being sued without its consent.[32] For example, the 9th Circuit Court of Appeals determined that the HMTA (**Appendix C**)[33] abolished tribal sovereign immunity from suit in federal court to determine whether a tribal law is preempted by the HMTA because that Act provides for an appeal to federal court of administrative decisions regarding preemption.[34]

Indian tribes have been categorized as "domestic dependent nations" by the U.S. Supreme Court in *Cherokee v. Georgia*.[35] The court determined that Indian tribes are not foreign nations and also that the relationship between tribes and the U.S. is unlike any other relationship. Chief Justice Marshall explained:

> "The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge

[29] *Williams v. Lee*, 358 U.S. 217 (1959)
[30] See e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978).
[31] *Id.*
[32] Definition from *Black's Law Dictionary,* 8th Ed.
[33] 49 U.S.C. §5101 *et seq.*
[34] *Public Service Co. of Colorado v. Shoshone-Bannock Tribe*, 30 F.3d 1203 (9th Cir. 1994)
[35] 30 U.S. 1, 1831 WL 3974 (1831)

themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper[.]"

When a tribe's assertion of its governmental authority clashes with federal authority, there are two rationales to support a court finding that the tribe cannot assert that authority because of its status as a domestic dependent nation. First, Indian tribes do not have any legal authority where a specific power is exclusively held by the federal government under the United States Constitution. For example, the federal government holds the exclusive power to make treaties with foreign governments.[36] Second, a tribe cannot look to federal courts to enforce its power where the court would have to allow a violation of a right held by an individual protected by the U.S. Constitution. This is because federal courts are bound by the Constitution and the Bill of Rights while Indian tribes are not. Therefore, if an Indian tribe asserts a tribal power over a non-Indian that is a violation of the non-Indian's civil rights under the U.S. Constitution, a federal court cannot enforce that power and can prohibit the tribe from enforcing the power it asserted. For example, in *Oliphant v. Suquamish Indian Tribe,*[37] the U.S. Supreme Court held that an Indian tribe has no criminal jurisdiction over a person who is not an Indian. In *Montana v. U.S.,*[38] the Court held that an Indian tribe does not have civil jurisdiction over a non-Indian on non-Indian lands within the exterior boundaries of a reservation, with two specific exceptions: (1) where a non-Indian has entered into an agreement with the tribe; or (2) where the non-Indian's action threatens or has a direct affect on the political integrity, economic security or health or welfare of the tribe or its members.[39]

Tribal Powers, whether inherent or delegated, can be modified in several ways:

(1) Treaties between the federal government and Indian tribes can set limits on a tribe's inherent powers. For example, many treaties take away inherent rights to use and occupy land ceded by a tribe in a treaty. Another typical provision required tribes to deliver non-Indian law breakers to the U.S. government for prosecution.

(2) Executive Orders were used in place of treaties or federal statutes to create Indian reservations from 1871 until 1919, when Congress limited this Executive power.[40] For example, President William McKinley set apart land in Montana for the Northern Cheyenne Tribe by executive order on March 19, 1900.

(3) Statutes can modify tribal power by specifically delegating powers to tribes, recognizing inherent powers or by taking away tribal powers. Important examples for the BRC

[36] *Johnson v. M'Intosh,* 21 U.S. 543, 8 Wheat. 543, 5 L.Ed. 681 (1823)
[37] 435 U.S. 191 (1978)
[38] 450 U.S. 544 (1981)
[39] *Montana v. U.S.*, 450 U.S. 544 (1981).
[40] 45 U.S.C. §150 "No public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation except by act of Congress."

are: (a) the NWPA[41] which specifies roles and responsibilities for tribes affected by nuclear repository siting and (b) the HMTA[42] which limits tribal inherent power by preempting tribal laws prohibiting any transportation of hazardous materials across tribal lands.[43] Congress can also confirm or expand tribal power by lifting or relaxing limits imposed by the Courts or the Executive branch.[44] For example, in *Duro v. Reina,*[45] the Supreme Court held that Indian tribes did not retain the inherent power of criminal jurisdiction over non-member Indians on their reservations. In response, Congress overruled the court by enacting a law recognizing the inherent power of Indian tribes to exercise criminal jurisdiction over all Indians on their reservations, including those not members of their tribe.[46] Federal environmental laws recognize tribal self-determination by delegating authority to Indian tribal governments to issue permits under the Clean Water Act,[47] Safe Drinking Water Act[48] and the Clean Air Act.[49] (See Section 3.7.2)

(4) Regulations enacted pursuant to federal statutes can define aspects of the Trust Responsibility. For example, regulations under the Indian Long-term Leasing Act[50] protect tribal lands by providing time limits for leases, identifying terms that must be part of a lease, and describing policies and procedures for entering into a lease for tribal land.[51]

(5) Action Pursuant to Regulations. A federal agency may issue a decision based on requirements in federal regulations that can limit tribal powers. The Bureau of Indian Affairs (BIA) issued a Record of Decision regarding a proposed Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians in Tooele County, Utah.[52] The BIA's duty regarding the proposed Fuel Storage Installation was to approve or disapprove a long-term lease under regulations enacted pursuant to the Indian Long-term Leasing Act.[53] The BIA initially gave the lease a conditional approval, depending on approval of the project by other federal agencies.[54] The Bureau of Land Management rejected a companion

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[41] 42 U.S.C. §10101 *et seq.*

[42] 49 U.S.C. §5101 *et seq.*,

[43] 49 U.S.C. §5125; See also *Public Service Company of Colorado v. Shoshone-Bannock Tribes,* 30 F.3d 1203 (9th Cir. 1994) (tribe is subject to suit for unlawful attempt to stop shipments of spent nuclear fuel across tribal reservation); see also *Northern States Power Company v. Prairie Island Mdewakanton Sioux Indian Community,* 781 F.Supp. 612 (D. Minn. 1991) (tribe can be enjoined from preventing continued interference with shipment and receipt of materials necessary to maintain operation of plant in light of preemption under Hazardous Materials Transportation Act and Atomic Energy Act)..

[44] *United States v. Lara,* 541 U.S. 193 (2004).

[45] 495 U.S. 676 (1990)

[46] See 25 U.S.C. §1301(2)

[47] 33 U.S.C. §1251 *et seq*

[48] 42 U.S.C. §300f *et seq.*

[49] 42 U.S.C. §7401 *et seq.*

[50] 25 U.S.C. §415

[51] 25 C.F.R. Part 162

[52] http://www.deq.utah.gov/Issues/no_high_level_waste/documents/rdocs/ROD%20PFS%2009072006.pdf, (last visited March 25, 2011)

[53] 25 C.F.R. Part 162

[54] Jeffries, Sierra M., "Environmental Justice and the Skull Valley Goshute Indians' Proposal to Store Nuclear Waste," 27 J.Land, Resources & Envtl.Law, 409-429 at p. 416 (2007).

request for a right-of-way associated with the project. This led the BIA to retract its conditional approval, citing, among other reasons that "it is not consistent with the conduct expected of a prudent trustee to approve a proposed lease that promotes storing [spent nuclear fuel] on the reservation."[55] The history of the attempt to locate a spent nuclear fuel repository on the lands of the Skull Valley Goshutes is a prime example of how a State can and does influence or thwart federal action regarding Indian tribes. It is discussed in further detail in Section 4 concerning state authority over Indian Lands.

2.5 Inherent Power of Indian Tribes

The inherent power of Indian tribes to enact laws is recognized in federal law as one of the inherent rights of self-determination.[56] The federal government recognizes the power, or authority, of Indian tribes to enact legislation addressing tribal concerns, including those identified as state concerns in Chapter 8 of the Office of Technology Assessment's "Managing the Nation's Commercial High-Level Radioactive Waste".[57]

This inherent authority extends over tribal lands and resources including real and transitory property[58] rights under U.S. law and under International Law. The U.N. Declaration states that Indigenous Peoples "have the right to the lands, territories and resources which they have traditionally owned, occupied, or otherwise used or acquired."[59] They have the right "to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use".[60]

Under U.S. laws, the concept of Aboriginal Title is the inherent right to use the lands historically occupied by an Indian tribe that can only be extinguished by the federal government. In *Oneida Indian Nation of N.Y. v. County of Oneida*,[61] the U.S. Supreme Court stated:

> "Unquestionably it has been the policy of the federal government from the beginning to respect the Indian right of occupancy, which could only be interfered

[55] Id. at 417, citing to Bureau of Indian Affairs, Record of Decision for an Independent Spent Fuel Storage Installation (ISFSI) on the Reservation of the Skull Valley Band of Goshute Indians (Band) in Tooele County, Utah, 6-7 (2006).

[56] This right is recognized in International Law in Article 18 of the U.N. Declaration on the Rights of Indigenous Peoples (**Appendix A**). See also, e.g. *United States v. Lara*, 541 U.S. 93 (2004) recognizing inherent tribal authority over all Indians. Also see *Williams v. Lee,* 358 U.S. 217, 220 (1959), ("absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and ruled by them.")

[57] NTIS Order #PB 86-116852, March 1985. Such concerns include, but are not limited to, dangers to physical health and safety from exposure to radiation, increased demands on governmental services, losses to land, loss of tax revenues, increased demand on scarce resources such as water, loss of the ability to exploit mineral and other resources from lands surrounding the facility, and non-radioactive water and land pollution.

[58] "Transitory Property" is the right to natural resources that continuously cross boundaries such as water, fish, wildlife and, in some instances, plants.

[59] U.N. Declaration, Article 26

[60] *Id.*

[61] 414 U.S. 661 (1974)

with or determined by the United States.' *Cramer v. United States*, 261 U.S. 219, 227, 43 S.Ct. 342, (344,) 67 L.Ed. 622. This policy was first recognized in *Johnson v. M'Intosh*, 8 Wheat. 543, 5 L.Ed. 681 [1823], and has been repeatedly reaffirmed."

The land to which Indian tribes have aboriginal title are the lands they occupied when the Europeans "discovered" or invaded the continent and which the tribes continued to occupy after that time. The conquering sovereign obtained rights to the land by virtue of its conquest and imposition of authority over the land and with it, the right to take the land from the natives.[62] Although Indian tribes did not have actual written title to the land, as that term was understood by the Europeans, "aboriginal title" is used to describe their occupation of the land and their right to use the land. To Indian tribes, aboriginal title is as sacred to them as fee simple title is to non-Indians.[63]

In order to extinguish aboriginal title, there must be a federal action that is not consistent with continued occupation and use of the land by the tribe. Actions that have been found to be sufficient to extinguish aboriginal title include designations of land as part of National Forests, National Parks and Military Reservations.[64] In addition, a final judgment entered into by the Indian Claims Commission and payment of the judgment by Congress can also be found to extinguish aboriginal title.[65] (See section 3.7.4.) The inclusion of Indian aboriginal title lands in a public lands grazing unit has been held not sufficient to extinguish the aboriginal title.[66]

3. THE RELATIONSHIP OF THE FEDERAL GOVERNMENT WITH INDIAN TRIBES

3.1 Federal Recognition of Indian Tribes and Tribal Lands

An informal definition of an Indian tribe is "simply a group of Indians that is recognized as constituting a distinct and historically continuous political entity for at least some governmental purposes."[67] The federal government defined an Indian tribe more formally in one federal law as "any Indian tribe, band, nation, or other organized group or community, including

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[62] *Johnson v. M'Intosh,* 21 U.S. 543, 1823 WL 2465 (U.S.Ill.1823); See also, Miller, Robert J., "Native American, Discovered and Conquered", Greenwood Press, 2006.

[63] *U.S. v. Shoshone Tribe,* 304 U.S. 111, 117 (1938). See also, *Mitchel v. U.S.,* 34 U.S. 711 (1835) (exclusive tribal possessory right recognized based on tribal use including hunting.)

[64] *United States v. Pueblo of San Ildefonso,* 513 F.2d 1383, 1386, 1391-92, 206 Ct.Cl. 649 (1975) (reservation of lands for forest purposes effectively extinguishes Indian title); *U.S. v. Gemmill,* 535 F.2d 1145 (9th Cir.) (same), cert denied, 429 US 982 (1976).

[65] See e.g., *U.S. v. Dann*, 470 U.S. 39 (1985); *Havasupai Tribe v. U.S.*, 752 F.Supp. 1471, 1478 (D. Az. 1990), aff'd by *Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991).

[66] *U.S. v. Dann,* 706 F.2d 919 (9th Cir. 1983), reversed on other grounds, 470 U.S. 39 (1985)

[67] Canby, "American Indian Law", 2nd Ed., p. 4. See, also, *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981) cert. denied 454 U.S. 1143 (1982) ("failure of the federal government to recognize a particular group of Indians as a tribe cannot deprive that group of vested treaty rights.").

any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians".[68] This paper only discusses such federally recognized tribes.[69] "Federal recognition of an Indian tribe may arise from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity." [70]

Tribal land currently recognized by the federal government is commonly referred to as an Indian Reservation. Depending on the tribe, some or all of the land within the reservation is a small part of that tribe's aboriginal land. Here, the United States generally holds title to the land, but it is held solely and exclusively for the benefit of the Indian tribe. The United States is, in effect, the Trustee of the reservation for the exclusive benefit of the tribe. This type of title exists where the U.S. has formally recognized Indian land holdings, either by treaty, statute or executive order.[71] In many cases the United States entered into treaties with Indian tribes to extinguish aboriginal title to some lands, but recognize tribal authority over other lands. Well known examples of this were the treaties in the 1800's with the Indian tribes in the southeastern United States referred to as the "Five Civilized Tribes."[72] These tribes entered into treaties with the United States giving up their lands in the eastern United States for reservation lands in what would eventually become the western state of Oklahoma.[73] The Pueblo Indians of New Mexico are unique in that their lands were recognized under Spanish rule as land grants held in fee simple title. When New Mexico was acquired by the United States under the Treaty of Guadalupe Hidalgo,[74] the U.S. guaranteed the Pueblos' property rights acquired under Spanish and Mexican rule. Under the Indian Reorganization Act of 1934,[75] Indian tribes can acquire land and request the federal government to take title to the newly acquired land in trust for the benefit of the tribe. There is generally no difference in the type of authority that an Indian tribe has over lands it controls, whether the lands are considered as reservations, trust land or land owned by the tribe and subject to federal restrictions against alienation (the conveyance or transfer of property to another).

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[68] 25 U.S.C. 450b (the *Indian Self-determination Act of 1975)*

[69] In some areas, particularly in the thirteen original colonies, there are Indian tribes that are recognized by state law, but not federal law. An example is the Mattaponi Tribe of Virginia.

[70] *Canby*, supra. See *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866). There is also a federal regulatory process for granting federal recognition to Indian tribes that have not been otherwise recognized; see 25 C.F.R. § 83.

[71] In the past, absent a governing statute mandating compensation for taking aboriginal title lands, Indian tribes had no constitutional right to be paid for a taking of occupied lands where title was not recognized by the United States. There is some question as to whether this is still good law. It is certainly contrary to present International Law which provides that States shall give legal recognition and protection to lands, territories and resources traditionally owned, occupied or otherwise used or acquired by Indigenous peoples. Article 26 (3).

[72] The Five Civilized Tribes are the Seminole, Cherokee, Chickasaw, Creek and Choctaw.

[73] For example, see: Treaty with the Cherokee, 1836; Treaty with the Choctaw, 1830; Treaty with the Creeks, 1832; Treaty with the Chickasaw, 1830; and Treaty with the Seminole, 1832. http://digital.library.okstate.edu/kappler/Vol2/Toc.htm, last visited April 25, 2011.

[74] 9 Stat. 922 (1848)

[75] 25 U.S.C. §461 *et seq.*

3.2 Expansive Federal Power and Heightened Responsibility

As mentioned in Section 2.3, the relationship of Indian tribes and the United States has its genesis in the Doctrine of Discovery, which grants to the conqueror title to the land, subject to the right of an Indian tribe to exist, and absent other action by the conqueror, to continue to occupy and use lands, territories and resources that they have used in the past. Since the United States is the successor to the various conquerors, it holds the exclusive right to interfere with the Indian right of occupancy. For example, only the federal government can eliminate the political rights of a tribe or acquire land or other resource rights from Indian tribes. Due to the expansive nature of this asserted federal right, known today as the "Plenary Power" over Indian affairs, the United States has the duty or obligation to act towards Indian tribes in the manner of a fiduciary or trustee.[76] This obligation is referred to as the Federal Trust Responsibility. So, while the federal government has full authority to extinguish various tribal rights,[77] the federal trust responsibility effectively limits what it can do and how it can exercise that authority. In 1976, the U.S. Supreme Court defined the limit: federal actions are limited to those that can be tied rationally to the fulfillment of the Trust Responsibility, referred to as "Congress' unique obligation toward the Indians."[78] While Congress' power is absolute, United States actions pursuant to that power are subject to the highest fiduciary standard.

The status of Indian tribes was recognized and defined in several Supreme Court cases beginning in the early 1800s. In *Johnson v. M'Intosh,*[79] the U.S. Supreme Court held that Indian tribes have the legal right to occupy their lands subject only to the sovereignty of the United States. In *Cherokee Nation v. Georgia,*[80] the Court first described Indian tribes as "domestic dependent nations," stating that Indian tribes are distinct political societies capable of managing their own affairs and governing themselves. The Supreme Court in *U.S. v. Kagama*[81] further clarified the status of tribes as dependent on the federal government, owing no allegiance to the states, and also that due to the federal government's history of dealing with the tribes and treaties in which promises were made, there arose a duty of protection by the federal government. In this particular case, the federal government protected the tribe from the imposition of state authority.

3.3 Federal Plenary Power

In *Worcester v. Georgia,*[82] the Supreme Court held that the Cherokee nation is a distinct community over which the laws of the state of Georgia could have no force, and clearly established that the federal government has exclusive power over tribes. This power is derived from Article I, Section 8, clause 3 of the U.S. Constitution which vests power in the U.S.

[76] *Seminole Nation v. U.S.*, 316 U.S. 286, 297 (1942)("the most exacting fiduciary standards" apply to federal government, based on private trust and principles).
[77] In *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) the U.S. Supreme Court upheld a federal statute that took away treaty rights as within the plenary powers of Congress over Indian affairs.
[78] *Delaware v. Weeks*, 430 U.S. 73 (1976).
[79] 21 U.S. 543, 1823 WL 2465 (U.S.Ill.1823)
[80] 30 U.S. 1, 1831 WL 3974 (U.S.Ga.1831)
[81] 118 U.S. 375 (1886)
[82] 31 U.S. (6 Pet) 515 (1832)

Congress "To regulate Commerce ... with the Indian Tribes". The modern analysis of federal plenary power is set out in *Williams v. Lee,*[83] where the U.S. Supreme Court held that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be governed by them." Congress has acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.[84]

We briefly noted earlier that the Plenary Power of the federal government permits Congress to unilaterally extinguish treaty rights held by Indians. This federal power was upheld in *Lone Wolf v. Hitchcock,*[85] where the Supreme Court held that a statute passed by Congress that took away treaty rights of a tribe was within the plenary power of Congress. The plenary power is so great that Congress can terminate an Indian tribe's independent political existence. This was done in the 1950s to numerous Indian tribes. The effects were disastrous, and the policy was disavowed by the United States less than 20 years later.[86] A modern example of plenary power is found in CERCLA.[87] The federal government can actually relocate a tribe if it determines that the only proper remedial action for a contaminated site is the relocation of the tribe because it is cost effective and necessary to protect the health and welfare of the tribe.[88] However, a finding that the proper remedial action is relocation must be concurred in by the affected tribal government. Indians who are on aboriginal lands generally consider relocation as an impossible action due to their cultural attachment to these lands.

3.4 The Trust Responsibility

The Trust Responsibility does not hinge on the existence of treaties; the United States owes a fiduciary duty to all tribes that it recognizes.[89] Further, where congressional acts create the basis of a Trust Responsibility, neither the statutes nor the implementing federal regulations need to use the word "trust" or "fiduciary" to give rise to a trust duty.[90] "The trustee has a duty to protect the trust property against damage or destruction. He is obligated to the beneficiary to do all acts necessary for the preservation of the trust [property] which would be performed by a reasonably prudent man employing his own property for purposes similar to those of the trust."[91]

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[83] 358 U.S. 217 (1959)
[84] *Id.*
[85] 187 U.S. 553 (1903)
[86] See discussion of Federal Policy Section 5.1
[87] 42 U.S.C. §9601 *et seq.*
[88] 42 U.S.C. §9626
[89] *United States v. Santa Fe Pacific Railroad,* 314 U.S. 339 (1942)
[90] *United States v. Mitchell,* 463 U.S. 206, 224 (1983) (Mitchell II) (The applicable statutes and their regulations established a fiduciary relationship and define the contours of the federal fiduciary responsibilities).
[91] *Fort Mojave Indian Tribe et. al., v. United States,* 23 Cl.Ct. 417, 426 (1991) (citing G. Bogert, "The Law of Trusts and Trustees", Section 582 (2d ed. revised 1980)).

3.4.1 The Trustee.

The federal government is the trustee for the Indian tribes. As a practical matter, all federal entities are bound by the Trust Responsibility.[92] The majority of cases involving the Trust Responsibility involve enforcing the Executive's trust duties towards Indian Tribes. **All federal entities, whether an agency or a semi-autonomous federally chartered entity, have trustee status under the Federal Trust Responsibility to Indian Tribes.[93]** For example, in 2009, a federally chartered entity (the Tennessee Valley Authority), the Tennessee State Historic Preservation Officer, and the Eastern Band of Cherokee Indians, the United Keetoowah Band of Cherokee Indians, and the Alabama-Coushatta Tribe of Texas, entered into a Memorandum of Agreement in accordance with federal regulations on the protection of historic sites,[94] to protect tribal cultural property through consultation.[95]

3.4.2 Beneficiaries and their rights.

Indian Tribes or Tribal Members are the beneficiaries of the Trust Responsibility. Beneficiaries may bring actions against the Executive Branch for breach of fiduciary duty. For an executive act or statute that applies to Indians to be lawful, it must be "tied rationally to the fulfillment" of the United States' "unique obligation towards the Indians."[96] Suits may be brought in federal district courts pursuant to the federal Administrative Procedure Act[97] (APA) for equitable, declaratory, or mandamus relief.[98] The APA waives (that is, eliminates) the normal federal sovereign immunity for actions taken by federal agencies, and allows the agencies to be sued. Federal actions that are considered "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" may be set aside as unlawful.[99] Suits may also be brought in the U.S. Court of Federal Claims for monetary damages.[100]

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[92] See e.g., *Nance v. Environmental Protection Agency*, 645 F.2d 701 (9th Cir. 1981), cert. denied, 454 U.S. 1081 (1981); see also, Department of Interior, Government-to-Government Consultation Policy (Dec. 13, 2000).; U. S. Department of Agriculture, Policies on American Indians and Alaska Natives, March 14, 2008; Environmental Protection Agency, Memorandum to all EPA Employees Reaffirming Indian Policy (July 11, 2001; U.S. Department of Energy American Indian and Alaska Native Policy, 2006; Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes, 61 Fed. Reg. 29424, 29426 (June 10, 1996).

[93] *Parravanno v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995).

[94] 36 C.F.R. Part 800

[95] Cultural Resources Memorandum of Agreement, November 25, 2009, **Attachment E.**

[96] *Morton v. Mancari*, 417 U.S. 535, 555 (1974)

[97] 5 U.S.C. §551 *et seq.*

[98] 5 U.S.C. §702. Equitable relief is the recourse to principles of justice to correct or supplement the law, for example, a non-monetary remedy such as an injunction; declaratory relief is a judgment that establishes the rights and other legal relations of the parties; a writ of mandamus is a ruling issued by a superior court to compel a lower court or government officer to perform a mandatory or ministerial duty correctly. Definitions from *Black's Law Dictionary*, 8th Ed.

[99] *Id.*

[100] 28 U.S.C. 1505; see *United States v. Mitchell*, 463 U.S. 206 (1983).

3.4.3 Trust responsibility applies to on-reservation and off-reservation trust property.

The Trust Responsibility protects tribal property whether it is held as a treaty right, a federally designated reservation or restricted fee ownership. Wherever the Trust Property is located, the federal government has a duty to protect that resource, even if it is located outside Indian lands.[101] Certain tribes who reserved certain rights off their reservation have a right to demand that the federal government protect those rights, including water, fishing, hunting, and gathering rights. (See discussion of treaty rights in Section 3.5.)

The Trust Responsibility has been used to protect different types of trust property including the following: (1) tribal trust funds,[102] (2) tribal water rights,[103] (3) pollution of Indian lands,[104] (4) trespass on Indian lands,[105] (5) distribution of income and proceeds to individuals,[106] (6) conveyance of Indian lands,[107] and (7) resource mismanagement.[108] Failure to enforce federal regulations benefitting Indian tribes or failure to enforce leases/rights of way may be another category.

3.4.4 Federal agency obligation to protect trust property in light of competing interests.

In carrying out statutory programs, federal agencies must act consistently with the Trust Responsibility, especially when such programs may affect Indian tribes. Federal agencies have an affirmative duty to take action when necessary to protect Indian property. Unlike Congress, federal agencies cannot eliminate (in legal terms, "abrogate" or "extinguish) the Trust Responsibility.[109]

Because federal agencies must act consistently with the Trust Responsibility, courts require agencies to protect tribal property against competing federal or state interests.[110] The

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[101] *Pyramid Lake Paiute Tribe of Indians v. United States Dep't of the Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990).

[102] *Cobell v. Salazar, Case* No. 1:96CV01285 (D.D.C.)*;* See also, *Manchester Band of Pomo Indians, Inv. v. US,* 363 F.Supp. 1238, 1245-48 (N.D. Cal. 1973).

[103] *Pyramid Lake Paiute Tribe of Indians v. Morton,* 354 F.Supp. 252, 256-57 (D. D.C); modified in part on other grounds, 360 F. Supp. 669 (D. D.C. 1973), rev'd in part on other grounds, 499 F.2d 1095 (D.C. Cir.)

[104] *Blue Legs v. U.S. Bureau of Indian Affairs,* 867 F.2d at 1095 (1989) (ordering the executive agencies (Bureau of Indian Affairs and Indian Health Service) to clean up open dumps on Pine Ridge reservation).

[105] *Northern Cheyenne Tribe v. Hodel,* 12 Indian L. Rep. 3065, 3067-71 (D. Mont. 1985) (requiring Executive to consider effect of coal leasing program on nearby reservation); *Edwardsen v. Morton,* 369 F.Supp. 1359, 1371 (D. D.C. 1973) (finding Executive had a duty to prevent trespass).

[106] *Seminole Nation v. United States,* 316 U.S. 286, 296-98 (1942).

[107] *Lane v. Pueblo of Santa Rosa,* 249 U.S. 110, 113 (1919) (disposal of lands to which Indians have complete and perfect title would not be an exercise of guardianship, but an act of confiscation); see also, *Cramer v. United States,* 261 U.S. 219, 232-33 (1923) (voiding patent that conveyed Indian lands to Railroad).

[108] *White Mountain Apache Tribe v. United States,* 11 Cl. Ct. 614, 681 (1987), *aff'd,* 5 F.3d 1506 (D.C. Cir.), *cert. denied,* 114 S. Ct. 1538 (1993) (government liable for damages from mismanagement of tribal range and timberland); see also, *Northern Arapahoe Tribe v. Hodel,* 808 F.2d 741 (10th Cir. 1987) (government has trust obligation to protect tribal wildlife resources).

[109] *United States v. Dion,* 476 U.S. 734, 740 (1986).

[110] See e.g., *Pyramid Lake Paiute Tribe of Indians v. Morton,* 354 F.Supp. 252, 256-57 (D. D.C); modified in part on other grounds, 360 F. Supp. 669 (D. D.C. 1973), rev'd in part on other grounds, 499 F.2d 1095 (D.C. Cir. 1974), *cert* denied, 420 U.S. 962 (1975); see also *Kerr McGee Corp. v. Farley,* 915 F.Supp. 273 (D. N.M. 1995) (Once

legislation authorizing action by a federal agency provides the process for the application of trust responsibility in a particular situation.[111] If a federal agency attempts to accommodate competing interests between tribal stakeholders and other non-tribal stakeholders in an unbalanced way, a court could find such accommodation to constitute a breach of the trust obligation.[112] If an irreconcilable conflict exists between tribal property rights and other interests, including national interests, a federal agency lacks authority to extinguish tribal rights; only Congress can to that.

3.5 Federal Treaties

Treaties are contracts or agreements between the United States and Indian tribes that limit the powers of both entities.[113] Generally, while ceding large parts of their homelands, many Indian tribes reserved certain rights to use the ceded lands through treaty-making. The "treaty was usually **not a grant of rights to the Indians, but a grant of rights from them** – a reservation of those not granted."[114] (Emphasis added.) The exception, as discussed earlier, was where Indian tribes were moved away from their aboriginal lands entirely.[115]

In determining the scope of the treaties and the rights retained or granted in treaties by the tribes, courts generally apply special "canons of construction" to interpret the documents. These special canons of construction are derived from common law rules meant to equalize the bargaining power between parties to a contract. Some cases assume that the canons are needed because of the unlettered state of many Indian tribes when they entered into treaties,[116] but that is not accurate. Due to the expansive plenary power of the United States, there is invariably a highly unequal bargaining position between the federal government and Indian tribes. In a real sense, these special canons of construction are the judiciary's means of implementing the Trust Responsibility. Today, the canons are also applied by a court to determine what Congress intended when enacting any statute that can affect Indian tribes.[117] For example, one canon requires courts to interpret ("construe") treaties liberally to favor the Indian tribes.[118] A second canon directs courts to construe treaties "not according to the technical meaning of its

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powers of tribal self-government or other Indian rights are shown to exist, subsequent federal action which might arguably abridge them is construed narrowly in favor of retaining Indian rights).

[111] *Nevada v. Unites States,* 463 U.S. 110 (1983).

[112] *Id*. (In order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power, that all water not obligated by a court decree or contract with the District goes to Pyramid Lake [for the benefit of the Tribe]. The U.S. has charged itself with moral obligations of the highest responsibility and trust. Its conduct should be judged by the most exacting standards); see also, *Northern Cheyenne Tribe v. Hodel,* 12 Indian L. Rep. 3065 (D. Mont. 1985) (Secretary of Interior's argument that the trust duty was overshadowed by the "national interest" in developing coal must give way to protection of the trust responsibility).

[113] *Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n,* 443 U.S. 658 (1979).

[114] *United States v. Winans,* 198 U.S. 371, 381 (1905).

[115] See discussion of the Five Civilized Tribes in Section 3.1

[116] *Tulee v. Washington,* 315 U.S. 681, 684-5 (1942). .

[117] *Bryan v. Itasca County, Minnesota,* 426 U.S. 373 (1976).

[118] *Tulee, supra.*

words…but in the sense in which they would naturally be understood by the Indians."[119] Finally, ambiguity is to be construed in favor of the tribes.[120]

Whatever rights are reserved by a tribe under a treaty, those rights usually include property rights, which necessarily include the use of the property. Treaties may protect property located on reservation land, off reservation land, or both. For example, the Stevens Treaties reserved to signatory tribes "[t]he right of taking fish at all usual and accustomed places in common with citizens of the Territory."[121] Those same treaties reserved to signatory tribes "the exclusive right of taking fish in all the streams where running through or bordering said reservation…" which includes the Columbia River.[122] In locating sites for interim storage facilities and permanent disposal repositories for used/spent nuclear fuel and high-level radioactive wastes, treaty rights may be impacted when the locations of such storage facilities or repositories interfere with the Indian tribe's use of land or exercise of other rights reserved by treaty.

There are at least two ways that federal government action can interfere with treaty rights. First, as mentioned above, Congress may enact a law that unilaterally extinguishes Indian treaty rights. It is settled federal law that Congress has the power to abrogate treaty rights:[123]

> "[w]hen circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so…that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians."[124]

This congressional power is limited because Congress must act in good faith with Indian tribes, especially when proposed legislation has the potential to interfere with an Indian tribe's use or exercise of its rights. Good faith requires Congress to provide "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[125] While an express intent to abrogate treaty rights, on the face of the statute, is preferable, it is not required. A court may find "sufficiently compelling" evidence for Congress to abrogate treaties on the face of the statute, in the legislative history of the enacted legislative bill, and/or in the surrounding circumstances. When Congress abrogates such treaty rights, it must compensate the affected Indian tribe.[126] As noted above, treaty rights are property rights, and when such rights are taken away by the federal government for public use, this loss of property rights requires compensation

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[119] *Jones v. Meehan,* 175 U.S. 1, 11 (1899); *Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n,* 443 U.S. 658 (1979).
[120] *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973).
[121] *See e.g., Treaty with the Nez Perce,* June 11, 1855, U.S.-Nez Perce Indians, art. III, para.2, 12 Stat. 957, 958.
[122] *Id.*
[123] *See e.g., Muckleshoot Indian Tribe v. Hall,* 698 F.Supp.1504, 1512 (W.D. Wash. 1988).
[124] *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903); See discussion of CERCLA provision in Section 3.3.
[125] *U.S. v. Dion,* 476 U.S. 734, 739-40 (1986).
[126] *Menominee Tribe of Indians v. United States,* 391 U.S. 404, 412-413 (1968).

under the Fifth Amendment.[127] When the contemplated federal action is the location of nuclear storage facilities or repositories, Congress, in the Nuclear Waste Policy Act, specifically chose an approach that uses consultation and informed consent for decision-making rather than abrogation of treaty rights.[128]

Second, federal governmental action may, either through licensing, regulation, construction, or other executive branch activities, threaten to interfere with an Indian tribe's treaty rights. Problems can arise when Congress does not clearly abrogate treaty rights, but the subsequent action of governmental agencies interferes with treaty rights. Federal agencies do not have authority to abrogate treaty rights, but may violate treaty rights if the agency interferes with a treaty right that was not clearly abrogated by Congress. Absent clear evidence that Congress considered Indian treaty rights and chose to limit or take away the rights, federal projects may stall in protracted litigation brought by the affected tribes, and if such governmental action is not actually stopped, may require the government to provide just compensation.[129]

3.6 Executive Branch Action

Executive agencies are often empowered by legislation to enact regulations to implement the statute. These regulations govern how the agency applies the statute in carrying out its duties. The Executive Branch of the federal government can also take action on its own through executive orders. Several executive orders have been issued to require executive agencies to develop policies guiding their interactions with Indian tribes. Many of these executive orders and policies are discussed throughout this paper. Currently, Executive Order 13175 issued by President Clinton, requiring all executive branch agencies to consult with tribes about potential actions that may affect them, has been embraced and expanded by President Obama in a Memorandum issued on November 5, 2009,[130] discussed in greater detail in Section 5.

3.7 Federal Statutes

As with Treaties, federal statutes and regulations can limit or expand federally recognized tribal authority or give shape and focus to the federal trust responsibility. As domestic dependent nations, Indian tribes look to the federal government to protect them and act in their best interests. As noted earlier in the section on Federal Treaties, statutory interpretation is needed when there is some ambiguity or vagueness that must be resolved by a judge. The same canons of construction used to interpret treaties are used to interpret statutory language, resolving any ambiguities in favor of Indian tribes.

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[127] *See e.g., Whitefoot v. U.S.*, 155 Ct. Cl. 127, 150-151 (1961), *cert. denied*, 369 U.S. 818 (1979) (Northwest tribes received compensation when the construction of The Dalles Dam destroyed their usual and accustomed fishing places at Celilo Falls, Oregon).

[128] See Section 3.7.1, infra.

[129] *Puyallup Tribe v. Dep't of Game,* 391 U.S. 392, 398-99 (*Puyallup I)*; *Dep't of Game v. Puyallup Tribe,* 414 U.S. 44, 49 (1973) (*Puyallup II); Puyallup Tribe v. Dep't of Game,* 433 U.S. 165, 173-74 (1977) (*Puyallup III). See also, U.S. v. Oregon*, 913 F.2d 576, 584 (9th Cir. 1990); *U.S. v. Eberhardt*, 789 F.2d 1354, 1357 (9th Cir. 1986).

[130] These Executive documents are in **Appendices F and G** to this Paper.

3.7.1 Federal statutes can recognize and give effect to other tribal rights.

The **Nuclear Waste Policy Act,** 42 U.S.C. §10101 *et seq.* (NWPA) (**Appendix B**), was enacted in 1983 to establish a schedule for the siting, construction, and operation of interim and permanent repositories for high-level radioactive waste and spent nuclear fuel. The NWPA contains many provisions that protect the rights of Indian tribes 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. The NWPA requires a consent-based approach to working with tribal governments, basically on an equal basis with state governments, for choosing any sites for storage or disposal of nuclear waste; this requirement specifically and directly affects any decision by the federal government to consider locating as well as to locate nuclear waste sites on or near tribal land.

Following the pattern of prior federal law on other matters, the NWPA defines "Indian Tribe" as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village".[131] This definition is substantially similar but not identical to other definitions of Indian tribes found in federal statutes. In addition, because of the specific focus of this particular law, it further defines "affected Indian Tribe" as "any Indian tribe (A) within whose reservation boundaries a monitored retrievable storage facility, test and evaluation facility, or a repository for high-level radioactive waste or spent fuel is proposed to be located;" and "(B) whose federally defined possessory or usage rights[132] to other lands outside of the reservation's boundaries arising out of congressionally ratified treaties may be substantially and adversely affected by the locating of such a facility."[133] (Emphasis added.) Thus, the NWPA recognizes not only tribal possession and ownership rights attached to their lands but also usage rights protected in treaties, such as the right to fish in the usual and customary places, even if outside of the reservation land now occupied by the tribe.

The NWPA requires the Secretary of Energy (Secretary) or the President to notify a tribal government, at the same time as it notifies a state, if a decision is made to locate a disposal site on tribal or state land before proceeding with any site specific investigations and to permit the tribal or state government to participate and to be consulted on the project.[134] First the Secretary or President must notify the Tribal Council of any affected Indian tribe, the Governor of the state, and the State legislature, in any State of the potentially acceptable sites within the State.[135] Then, the governing body of the tribe and the governor of the State can submit a notice of disapproval to the federal government if they object to siting the repository within the State. However, the authority of the Governor or legislature of the State to submit a notice of

[131] 42 U.S.C. §10101(15)

[132] Indian tribes may have two kinds of property rights; the right to possess and occupy their reservation and lands they own, and the right to use land they do not occupy but they can use for hunting or fishing or other purposes.

[133] 42 U.S.C. §10101(2)

[134] 42 U.S.C. §10121

[135] 42 U.S.C. §10136 (b)(1)

disapproval is not applicable with respect to any site located on an Indian reservation.[136] This means that a state does not have the right under the NWPA to object to a tribe's decision to accept a facility on their lands. However, state governments can find other ways to stop a facility on tribal lands. (See "The Role of States on Tribal Land" discussion in Section 4.)

Even though federal policy now requires it anyway, the NWPA specifically recognizes the tribal right of consultation. (See "Meaningful Consultation" discussion in Section 5.) The federal government must consult with an affected tribe when it first decides to study an area for suitability and throughout the process that follows.[137] The Act requires the President or the Nuclear Regulatory Commission (NRC) to provide timely and complete information regarding determinations or plans made with respect to siting, development, design, licensing, construction, operation, regulation, or decommissioning of a facility, within 30 days of a tribe's (or state's) request for information .[138] If the Secretary fails to provide that information within 30 days, the tribal (or state) government can send a formal written objection to the President of the United States. If the President or the Secretary fails to provide the information within 30 days of the President's receipt of the formal objection, the Secretary shall immediately suspend all activity until the information is provided.[139]

42 U.S.C. §10138 contains requirements for the participation of Indian tribes in repository siting decisions. Upon the submission by the President to the Congress of a recommendation of a site for a repository located on the reservation of an affected Indian tribe, the governing body of such Indian tribe may disapprove the site designation and submit a notice of disapproval to Congress not later than 60 days after the date that the President recommends the site to Congress. The notice of disapproval shall be accompanied by a statement of reasons explaining why the governing body of the Indian tribe disapproved the recommended repository site.

After Congress receives a notice of disapproval of a siting decision from a tribe or state, the site shall be disapproved unless, during the first 90 calendar days of continuous session of Congress after the date of the receipt by the Congress of the notice of disapproval, Congress passes a resolution of repository siting approval and such resolution then becomes law.[140] This section of the Act contains very specific instructions limiting what the Senate and House of Representatives can do with the resolution. For example, a motion to approve the resolution shall not be subject to amendments.[141]

The NWPA provides for financial assistance to an affected tribe, mitigation of effects resulting from the use of tribal land for storage or disposal, and technical assistance to the tribe. Any affected Indian tribe wanting assistance must prepare and submit to the Secretary a report

[136] 42 U.S.C. 10136(b)(3)
[137] See **Appendix I** for a letter from the Nez Perce Tribe requesting negotiations on an agreement for consultation.
[138] 42 U.S.C. §10137(a)(1)
[139] 42 U.S.C. §10137(a)(2)
[140] 42 U.S.C. §10135
[141] 42 U.S.C. §10135 (d)(4) and (e)(4)

on any economic, social, public health, safety, and environmental impacts that are likely as a result of the development of a storage facility or repository at a site on the reservation of the tribe.[142] "Reservation" is defined in the Act as "(A) any Indian reservation or dependent Indian community referred to in clause (a) or (b) of section 1151 of title 18; or (B) any land selected by an Alaska Native village or regional corporation under the provisions of the Alaska Native Claims Settlement Act,"[143] i.e. lands owned or controlled by the federally recognized tribal government. The Secretary must provide grants to each affected tribe for the cost of participating in activities required under the NWPA. The grant can be used for participation, monitoring, and mitigation purposes. It can also be used to provide information to tribal residents about the activities associated with the site.[144] Some tribes applied for grants under the NWPA when the office of the Negotiator was in existence; see footnote 18 for a list of tribes that applied for and received grants. In addition, the United States will provide annual payments to a tribe that has a facility located on its land until all activities, development, and operations are terminated at the site.[145] The amount of the annual payment will be equal to the amount the tribe would receive if it was authorized to tax activities at the site and the development and operation of the repository, as the tribe taxes other commercial activities occurring on its reservation.[146] There are no facilities located on tribal land at this time, so no annual payments have been made.

The NWPA includes provisions for agreements between Indian tribes and the Secretary to set forth the procedures to be followed when a site is developed on a Reservation or lands outside of the reservation's boundaries where possessory or usage rights arise out of Congressionally ratified treaties.[147] However, no provision in an agreement can affect the authority of the NRC.[148]

The NWPA also briefly touches on the transportation of nuclear material over tribal land. The Secretary must notify an affected tribe when nuclear waste will be transported through tribal lands.[149] The Secretary must also provide technical assistance and funds to Indian tribes for training for public safety officials of Indian tribes through whose jurisdiction the Secretary plans to transport spent nuclear fuel or high-level radioactive waste. Training must cover procedures required for safe routine transportation of these materials, as well as procedures for dealing with emergency response situations.[150]

While Indian tribes are entitled to information and to meaningful consultation throughout the process, the federal government's Plenary Power gives them the right to override a tribe's

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[142] 42 U.S.C. §10138(b)(3)(B)

[143] 42 U.S.C. §10101. This definition includes land not designated as a reservation described as "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state" in 18 U.S.C. §1151B.

[144] 42 U.S.C. §10138(b)(1)

[145] 42 U.S.C. §10138(b)(4)

[146] *Id.*

[147] See 42 U.S.C. §10137(c) and 42 U.S.C. §10167

[148] 42 U.S.C. §10137

[149] 42 U.S.C. §10175

[150] *Id.*

objections. However, the burden is on Congress to affirmatively designate a site that an Indian tribe has objected to, in spite of the tribe's objection, through the resolution process and the 90 day time limit. If Congress does not pass the resolution, the site is automatically disapproved. The NWPA also provides for judicial review in the U.S. Court of Appeals of any final decision or action of the Secretary, the President, or the NRC, constitutional issues, or any failure to comply with the provisions of the Act.[151]

The NWPA originally intended that the DOE would make any siting decisions. That did not happen, so in the 1987 amendments to the Act, Congress itself selected a site, Yucca Mountain. This site is still in litigation. Tribal and other efforts to site nuclear waste facilities on lands of one tribe were thwarted by political efforts.[152] This suggests the importance of clear federal requirements for, and equally clear limits on, tribal (and state) actions, and Congressional commitment to respect the process it specifies, if any process for siting decisions is going to succeed.

3.7.2 Federal statutes can explicitly expand tribal rights.

The **Resource, Conservation and Recovery Act** ("RCRA"), 42 U.S.C. §6901 *et seq.*, gives the Environmental Protection Agency (EPA) the authority to control hazardous waste including the generation, transportation, treatment, storage, and disposal of hazardous waste. RCRA treats Indian tribes as municipalities for purposes of the Act.[153] This status makes a tribe eligible for a grant under 42 U.S.C. §6977 for the purpose of developing, expanding, or carrying out a program for training persons for occupations involving the management, supervision, design, operation, or maintenance of solid waste management and resource recovery equipment and facilities; or to train instructors and supervisory personnel to train or supervise persons in occupations involving the design, operation, and maintenance of solid waste management and resource recovery equipment and facilities. The EPA Administrator is authorized in 42 U.S.C. §6908(a) to enter into assistance agreements with federally recognized Indian tribes for the development and implementation of programs to manage hazardous waste. The Waste Isolation Pilot Plant (WIPP) and Los Alamos National Laboratory (LANL) both operate under RCRA permits issued by the state of New Mexico. Tribes do not have such authority under this law.

Environmental and other laws enacted by Congress delegate specific federal enforcement and regulatory authority to Indian tribes, thereby expanding tribal rights. The **Clean Water Act**, 33 U.S.C. §1251 *et seq.*, treats Indian tribes as states for purposes of the Act.[154] An Indian tribe will be granted the power to exercise federal authority under the Act if: (1) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (2) the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe; and (3) the Indian tribe is reasonably expected to be capable, in the

[151] 42 U.S.C. §10139
[152] See, infra, at Section 4.2 where the State of Utah through Congressional action successfully blocked the siting of a storage facility on the Skull Valley Goshute's reservation.
[153] 42 U.S.C. §6903(13)
[154] 33 U.S.C. §1377(e)

EPA Administrator's judgment, of carrying out the functions to be exercised under this chapter and all applicable regulations.[155] Specifically, the Clean Water Act delegates authority to Indian tribes to grant permits for dredging and filling,[156] and to set water quality standards.[157] This delegated power was upheld by the 10th Circuit Court of Appeals in *City of Albuquerque v. Browner,*[158] which held that a tribe can establish water quality standards more stringent than federal standards and that the EPA has authority and the responsibility to require upstream National Pollution Discharge Elimination System (NPDES)[159] dischargers to comply with downstream tribal standards. Regulations applying to the Clean Water Act delegate power to Indian tribes to grant discharge permits under NPDES on tribal land.[160]

The **Clean Air Act**, 42 U.S.C. §7401 *et seq.,* was enacted to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare. It gave the EPA power to delegate considerable authority over air quality matters to federally recognized tribes on Indian lands, including permit issuance.[161] Courts have held that because a power is delegated federal power, tribes with this status have jurisdiction over non-Indian lands inside tribal lands.[162] An Indian tribe can receive the right to carry out and enforce federal requirements authorized under this Act under the same three requirements described for the Clean Water Act.[163]

The **Safe Drinking Water Act**[164] authorizes the EPA to treat Indian tribes in the same manner as it does states for the purposes of implementing the Act on tribal lands.[165] Indian tribes are eligible for grant and contract assistance to carry out the functions delegated to them under the Act.

The **Comprehensive Environmental Response, Compensation, and Liability Act,** (CERCLA), 42 U.S.C. §9601 *et seq.*, was enacted to address unauthorized releases of hazardous substances. CERCLA treats the governing body of an Indian tribe substantially the same as a state with respect to the provisions of the Act regarding notification of releases (§9603(a)), consultation on remedial actions (§9604(c)(2)), access to information (§9604(e)), health authorities (§9604(i)), and roles and responsibilities under the National Contingency Plan and submittal of priorities for remedial action (§9605). Section 9604 provides for cooperative agreements between Indian tribes and the President to carry out provisions of the Act. CERCLA gives tribal authorities Natural Resource Trustee status for tribal lands.[166] Tribal trustees are

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[155] *Id.*
[156] 33 U.S.C. §1344(g)
[157] 33 U.S.C. §1313
[158] 97 F.3d 415 (1996)
[159] 40 C.F.R. §122
[160] 40 C.F.R. §123.1(d)(2)
[161] 42 U.S.C. §7601 (D)(2)
[162] *Arizona Public Service Co. v. Environmental Protection Agency*, 211 F.3d 1280 (C.A.D.C. 2000).
[163] 40 C.F.R. §7601(d)(2)
[164] 42 U.S.C. §300f *et. seq.*
[165] 42 U.S.C. §300j-11
[166] 42 U.S.C. §9607(f) and 40 C.F.R. §300.610

authorized to act when there is injury to, destruction of, loss of, or threat to natural resources, including their supporting ecosystems, as a result of a release of a hazardous substance. Trustees can act to restore natural resource injustice even while a facility is being cleaned up and still operating.

The **Native American Graves Protection and Repatriation Act** (NAGPRA), 25 U.S.C. §3001 *et seq.*, is another federal law that expressly expands tribal rights. NAGPRA protects Native American human remains, associated funerary (i.e., burial-related) objects, sacred objects and cultural patrimony[167] that are found on federal land or tribal land or are in museums that receive federal funds.[168] NAGPRA requires a federal land agency or museum receiving federal funds that has possession of human remains, funerary objects, sacred objects or cultural patrimony to notify the appropriate Indian tribe and return the objects upon request by the tribe.[169] This expands tribal authority over its cultural patrimony beyond the boundaries of the tribe's land. NAGPRA declares that the Act establishes a unique relationship between the federal government and Indian tribes that should not be construed to establish a precedent with respect to any other individual, organization or foreign government.[170] The Memorandum of Agreement regarding the Tennessee Valley Authority (TVA) (**Appendix E**) cites to the possibility of finding human remains, funerary objects, sacred objects and objects of cultural patrimony at a construction site as a reason requiring the Agreement.

3.7.3 Federal statutes can implicitly expand tribal rights.

The **National Historic Preservation Act** (NHPA), 16 U.S.C. §470-470w-8, implicitly expands tribal rights by protecting property of historic and cultural importance to Indian tribes even if the property is not located on tribal land. The NHPA in Section 106 requires the head of any federal agency having direct or indirect jurisdiction over a proposed federal or federally assisted undertaking, and the head of any federal department or independent agency having authority to license any such undertaking, to take into account the effect of the undertaking on any historic property that is included in, or eligible for inclusion in, the National Register prior to the approval of the expenditure of any federal funds on the undertaking or prior to the issuance of any license.[171] The Section 106 consultation process requires the federal agency to consult with other parties including Indian tribes with an interest in the potential effects of the undertaking on historic properties. For example, as recently as March 31, 2011, the Nuclear Regulatory Commission (NRC) notified the Piscataway Indian Nation of an application for renewal of a license for a spent fuel storage installation at the Calvert Cliffs Nuclear Power Plant, and the initiation of a section 106 consultation process. (While indicating the scope of this duty to consult, this tribe is not federally recognized, yet the federal government provided notice to the tribe). The NHPA authorized the Secretary of the Interior to enact regulations to assist

[167] Cultural patrimony is defined as objects having ongoing historical, traditional, or cultural importance central to a Native American group.
[168] 25 U.S.C. §3001
[169] 25 U.S.C. §3005
[170] 25 U.S.C. §3010
[171] 16 U.S.C. §470f

Indian tribes in preserving tribal historic and cultural properties.[172] The NHPA will have a direct affect on any decision by the federal government to locate a site for nuclear waste storage if the site includes any protected historic or cultural property of a tribe.

3.7.4 Federal statutes can take away tribal rights.

The **Hazardous Materials Transportation Act**, 49 U.S.C. §5101 *et seq.* (HMTA) **(Appendix C)** is a federal statute that explicitly extinguishes some tribal rights relevant to the Blue Ribbon Commission's responsibilities. Indian tribes are required to permit transportation of hazardous materials, including radioactive materials,[173] over tribal land, and HMTA allows a tribe to be sued in federal court for enforcement purposes.[174] However, the statute does not take away all tribal authority regarding the transportation of hazardous materials across tribal land. HMTA allows tribes to establish and enforce designations of specific highway routes over which hazardous material may and may not be transported by motor vehicle.[175] Tribes can also impose permit requirements, limits and other requirements related to highway routing.[176] The HMTA authorizes the Secretary of Transportation to enact regulations for an Indian tribe to use in carrying out the provisions of the Act.[177]

The HMTA does not prohibit regulations enacted by an Indian tribe, but does limit a tribe's power in specific ways. It states that any requirement of a state, political subdivision of a state or Indian tribe is preempted by the Act if: (1) complying with the requirement conflicts with the requirements under the federal statutes relating to the transportation of hazardous materials or a directive of the Department of Homeland Security, or (2) the requirement is an obstacle to carrying out the requirements of the HMTA for hazardous materials transportation or a directive issued by the Secretary of Homeland Security.[178]

Notably, the HMTA does not explicitly provide for any type of consultation with Indian tribes. The Secretary must only consult with states in developing the standards to use in designation of routes that shall not be used.[179] However, the duty to consult exists independently

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[172] 36 C.F.R. §61.1(4) The Act was amended in 1992 to explicitly provide protection to the traditional cultural properties of tribes.

[173] The Act describes hazardous materials by stating that "The Secretary shall designate material (including an explosive, radioactive material, infectious substance, flammable or combustible liquid, solid, or gas, toxic, oxidizing, or corrosive material, and compressed gas) or a group or class of material as hazardous when the Secretary determines that transporting the material in commerce in a particular amount and form may pose an unreasonable risk to health and safety or property. 49 U.S.C. §5103a.

[174] 49 U.S.C. §5112(b)(D)

[175] 49 U.S.C. §5112(a)(2)

[176] *Id.*

[177] 49 U.S.C. §5112(b)

[178] 49 U.S.C. §5125

[179] *Id.*

of this or any other federal law because Executive Order 13175 requires every federal agency to have a policy for consultation with Indian tribes that may be affected by agency action.[180]

In 1991, the Shoshone-Bannock Tribes stopped a Public Service Company of Colorado (PSC) shipment of spent nuclear fuel at the reservation border. PSC sued the tribes and certain individual tribal officers, alleging that the tribes' attempts to stop PSC's shipments of spent nuclear fuel across the Shoshone-Bannock reservation were preempted by the HMTA. In *Public Service Co. of Colorado v. Shoshone-Bannock Tribes,* the United States Court of Appeals for the 9th Circuit considered whether Indian tribes have sovereign immunity for matters regulated by the HMTA.[181] The HMTA expressly provides that persons directly affected by any requirement of an Indian tribe may seek either an administrative or a judicial determination that the requirement is preempted.[182] The court held that by permitting tribal regulations to be challenged in federal court, Congress effectively eliminated any tribal immunity from such suits under the HMTA. While the HMTA permits Indian tribes to enact regulations for such shipments, the Act requires that tribes must provide a route through their lands.[183]

If an Indian tribe wanted to bring a legal action in court against the United States for a taking of land, or other injuries suffered as a result of federal action (or inaction) an act of Congress is required allowing the Indian tribe to file the lawsuit. Several Tribes tried but failed to get Congress to pass a law that would eliminate this requirement. In 1946 Congress enacted the **Indian Claims Commission Act**, 25 U.S.C. §§70-70v to hear claims by tribes against the United States arising before August 13, 1946.[184] That commission was established to hear certain types of claims: (a) claims based on violations of the U.S. Constitution, treaties or laws; (b) claims based on the taking of lands owned or occupied by Indian tribes without payment of compensation (or inadequate compensation); and (c) claims based upon the lack of fair and honorable dealings that might have been explicitly recognized by law or equity as of August 13, 1946.[185] With that act, Congress sought to "settle once and for all the claims arising from the government's historical dealings with the Indians."[186] This law is no longer in effect since the Indian Claims Commission ended its work in 1978.

Through the claims process created in the 1946 Act, the aboriginal title lands of Indian tribes who filed claims were judicially determined, and compensation was paid for the land that no longer was held by the Indian tribe or by the United States in trust for the tribe. Indian title

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[180] "Consultation and Coordination With Indian Tribal Governments", November 6, 2000

[181] 30 F.3d. 1203(1994)

[182] 49 U.S.C. §5125(c)(3)

[183] 49 U.S.C. §5112(b)(D)

[184] For claims arising after that date, see 28 U.S.C. 1505

[185] Canby, W.C., Op. cit. at 265-266.

[186] A good source of information concerning the claims filed with the Indian Claims Commission is "Irredeemable American, the Indians' Estate and Land Claims", Imre Sutton, ed. , University of New Mexico Press (1985). Claims had to be filed by 1951. Over 600 claims were docketed before the Commission. In 1978 any remaining cases were transferred to the Federal Court of Claims, and its successors. The final Indian Claims Commission case was *Pueblo de San Ildefonso v. United States,* U.S. Ct.Fed. Cl. Docket 354. The settlement was approved by Congress in 2006, P.L. 109-286, with the Court entering the final decree that same year.

was extinguished when compensation was paid for the lands taken.[187] Historians, anthropologists, archaeologists and ethnologists did significant work to establish aboriginal title areas in the decades following its enactment.[188] While this extinguished aboriginal title to vast amounts of land, the question of what other rights or resources on the land were given up depends on the exact wording either of the decree or settlement reached in each case or the appraisals used to determine compensation. In order to determine that a property right has been extinguished, courts require very explicit language describing the right, relying on the same level of specificity required to find an extinguishment of a treaty right.[189] As a result there are significant tribal rights to a variety of resources located on lands where aboriginal title to the land was extinguished through the Indian Claims Commission. A good example of rights that survived extinguishment through the Indian Claims Commission process is rights to cultural resources; these rights are now protected by other federal legislation such as the National Historic Preservation Act discussed in section 3.7.3.

Public Law 280 is another federal law that took away tribal rights for certain named tribes by subjecting those tribes to state jurisdiction for criminal offenses allegedly committed on tribal land by Indian people.[190] PL 280 authorized state jurisdiction over offenses committed by or against Indians in Indian country and declared that the criminal laws of the State shall have the same force and effect within Indian country as they have elsewhere within the State.[191] The statute applied only to certain states including Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin. PL 280 was later amended to require the consent of the tribe before a state could assume criminal or civil jurisdiction.[192] Tribes in Connecticut, Rhode Island and Texas are also subject to state jurisdiction as a result of statutes affecting specific tribes.

3.7.5 Federal statutes can implicitly take away tribal rights.

Congress has not passed legislation implicitly extinguishing any tribal rights relating to the mission of the Blue Ribbon Commission. As discussed *infra*, Congress explicitly eliminated certain tribal rights when it enacted the HMTA. An example showing how a law can implicitly eliminate a tribal right is the **Bald and Golden Eagle Protection Act of 1940.** The Act makes it a criminal offense to kill or take a bald or golden eagle.[193] The Act permits the taking or killing of eagles with the permission of the Secretary of the Interior. Permission will be granted for specified reasons including permitting Native Americans to kill or take eagles for religious

[187] *United States v. Dann*, 470 U.S. 39 (1985); *Navajo Tribe v. New Mexico*, 809 F.2d 1455 (10th Cir. 1987).
[188] Some of this rich body of work was republished by Garland Publishing, Inc. as the Garland Series of American Indian Ethnohistory in 1974.
[189] See, e.g. *Menominee Tribe v. United States,* 391 U.S. 404 (1968) An Indian tribe was held to retain federally protected hunting and fishing rights granted by a treaty even though Congress had terminated the federal trust relationship to the tribe where such rights were not explicitly mentioned in the termination act.
[190] Public Law 83-280, Act of Aug. 15, 1953, 67 Stat. 588 as amended in 1968 to require tribal consent. See 25 U.S.C. §1326.
[191] 18 U.S.C. §1162(a)
[192] 25 U.S.C. §1321, 1322
[193] 16 U.S.C. §668 – 668d

purposes.[194] In *United States v. Dion,*[195] the United States Supreme Court held that the Act abrogated any treaty rights of an Indian tribe relating to hunting bald and golden eagles. The Court stated that it is essential that there is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty right. Since the Act provides for permits under certain specified circumstances, including permitting Indian tribes and tribal members to take eagles for religious purposes and because of evidence in the legislative history of the Act, the Court determined that the Act extinguished treaty rights to hunt and kill eagles without a permit.

3.7.6 Federal statutes are often enacted to fulfill the trust responsibility.

The federal government has enacted statutes specifically designed to fulfill its trust responsibility to Indian tribes. These statutes include the NWPA discussed above, which provides Indian tribes with the right to fully participate in the process of designating sites for storage and disposal of nuclear waste. Other statutes enacted for this purpose include the **Indian Education and Self-Determination Act of 1975,**[196] which permits an orderly transition from the federal domination of programs and services for Indians to meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

The **Indian Reorganization Act of 1934**[197] recognized that Indian tribes should be permitted to remain domestic dependent nations and have the right to govern themselves and protect their land base, including reservation lands and lands owned by the tribes. It authorized Congress to acquire land and water rights for Indian tribes within or outside of existing tribal lands.

The **Indian Long-term Leasing Act**[198] limits the term of any lease of Indian land with an Indian tribe to 25 years except for certain tribes which can enter into a lease not to exceed 99 years. The Act includes other limitations on the length of leases with Indian tribes based on the use of the land. See discussion at Section 4.2 for how this law affected a tribe pursuing storage of nuclear materials on their land.

The **Pueblo Lands Acts of 1924**[199] **and 1933**[200] quieted title to Pueblo grant lands that were not taken away by the federal government pursuant to the 1924 Act. It also provided for compensation for lands taken from a Pueblo and water rights that would remain in non-Indian ownership as a result of the Act and the federal government's failure to protect the rights of the

[194] 16 U.S.C. §668a
[195] 476 U.S. 734 (1986)
[196] 25 U.S.C. §450 *et seq.*
[197] 25 U.S.C. §461 *et seq.*
[198] 25 U.S.C. §415
[199] 43 Stat. 636
[200] 48 Stat. 108

Pueblo Indians before 1924. Further, it required federal approval for any future transaction involving Pueblo grant lands.

The **Energy Policy Act of 2005**[201] includes special provisions for Indian tribes at section 503 to assist Indian tribes in the development of energy resources and further the goal of Indian self-determination. It allows a tribe to have greater control over leasing its lands for energy projects. It also directs the Secretary of Energy to establish an Office of Indian Energy Policy and to implement an Indian energy resource development program to assist consenting Indian tribes and tribal energy resource development organizations in achieving the purposes of this title.

The **American Indian Religious Freedom Act (**AIRFA) provides that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions ... including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."[202] In 1996 President Clinton issued Executive Order 13007, Indian Sacred Sites, to further establish the federal government's commitment to protecting Indian religious sites. The Order states that "In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites."[203]

4. THE ROLE OF STATES ON TRIBAL LAND

The Constitution's grant of power to Congress over commerce with Indian tribes was so extensive that it prevents any state from exercising authority over Indians or their lands, even if Congress has not asserted its authority in a specific matter.[204] This is known as federal preemption. In 1832, the U.S. Supreme Court recognized that Indian tribes retain the right of self-governance, ruling that state laws have no force on Indian lands.[205]

The federal government exercised its exclusive authority over Indian affairs when it required specific clauses regarding the state's treatment of Indian tribes in the constitutions of some newly admitted states. The federal Enabling Acts of many western states provided a vehicle that allowed the people of the state to form a constitution, a state government, and to be admitted into the Union on an equal footing with the original states.[206] The Enabling Acts

[201] Public Law 109-58
[202] 42 U.S.C. §1996
[203] Ex. Ord. No. 13007, May 24, 1996, 61 F.R. 26771
[204] Article I, Section 8, Clause 3
[205] *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (Chief Justice Marshall wrote that Indian land "is a distinct community, occupying its own territory, with boundaries accurately described, in which …[state laws] can have no force."
[206] See e.g., Enabling Act for New Mexico, 1910; ch. 310, 36 Stat. 557.

generally required the people of a state to incorporate certain provisions into their new state constitutions. One of these required provisions is known as the "Disclaimer Clause."

The "Disclaimer Clause" is a binding promise by each new state to the United States disclaiming (denying) "all right and title…to all lands…owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty…"[207] Since the Disclaimer Clause recognized that a state did not have any right or title to Indian lands, the Disclaimer Clause accordingly provided that the United States had "absolute jurisdiction and control" of the Indian lands.[208] The Disclaimer Clause bars state regulation and taxation of Indians and their lands, without regard to the state's interest.[209]

The Disclaimer Clause cannot be changed or amended without the consent of Congress.[210] Once Congress grants permission, then any changes or amendments to a state constitution containing that clause must be approved by a majority vote by both houses of the state's legislature and by a majority of the electorate.[211] When PL 280 was amended in 1968, the state could no longer assume jurisdiction over tribes without their consent even if its constitution was amended on this subject.[212]

In 1946, Congress initially took the same federal preemption approach for all matters concerning nuclear energy.[213] This does not mean that the individual states cannot influence the federal-tribal relationship regarding nuclear issues. States often view Indian tribes as competitors for economic development projects, or, in other instances, seek to prevent Indian tribes from allowing forms of economic activity that a state does not want within its borders.[214] The following sections address the law concerning direct state regulation of Indian tribal conduct or activity arising on tribal lands and what, in fact, a state did do to thwart an Indian tribe's goal to site an interim spent nuclear fuel storage facility on tribal land.

4.1 State Power to Regulate Tribal Conduct or Activity on Tribal Lands

Absent explicit Congressional permission for a state 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, states would be barred from any role in such decisions.

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[207] See e.g., N.M. Const., art. XXI, § 2.

[208] *Id.*

[209] See e.g., *three Affiliated Tribes of Fort Berthold v. Wold Engineering*, 467 U.S. 138 (1983); *cf.*, *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962).

[210] See e.g., Enabling Act for New Mexico, at §2 (Ninth Paragraph).

[211] See e.g., N.M. Const. art. XIX, §4.

[212] 25 U.S.C. §1321

[213] At that time it was referred to as atomic energy

[214] A good example of an industry that several states tried, unsuccessfully, to keep out of Indian Country was high-stakes, casino style gaming. Ultimately, Congress enacted legislation to set out a limited role for states in this industry on tribal lands. See the discussion in Section 4.1.2 concerning the Indian Gaming Regulatory Act.

Federal treaties and statutes have been consistently construed to reserve the right of tribal self-government, but U.S. Supreme Court case law in the 20th century established a "trend…away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption."[215] The U.S. Supreme Court established "two independent but related barriers to … state regulatory authority over tribal reservations and members. First, the exercise of such authority may be preempted by federal law ("federal preemption"). Second, "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" ("infringement").[216] Each barrier provides an independent basis for denying state jurisdiction over an activity undertaken on tribal lands or by Indian tribes.[217] However, if Congress delegates a power to a state, that delegation governs. (See section 4.1.3.)

4.1.1 Federal preemption

If a state's effort to regulate tribal activities is challenged in court, the court first looks to see if the state's action is preempted by federal law. Under federal preemption, the Court begins by assuming that state authority is preempted as a matter of federal law. Federal preemption is clearly defined in a 1973 case: "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply."[218] Federal preemption can only be overcome by a clear statement by Congress in an existing law that state law applies to a particular situation. If Congress has not delegated power to the states in a statute, the Court reviews applicable federal laws[219] to determine whether the federal statutes (or the regulations implementing them) effectively create a comprehensive scheme on the subject matter such that it leaves no room for state regulation on the matter. If federal law does create a comprehensive scheme, then state law does not apply to tribes and their lands.[220]

For example, in the context of a tribe's decision to accept a **federal** nuclear waste facility on tribal lands under the Nuclear Waste Policy Act, the Act preempts the state from enacting laws, policies, or decisions contrary to a tribe's exercise of such tribal self-determination.[221] (See "Federal Statutes" discussion at section 3.7.) In the context of a tribe's decision to construct and/or operate a **private** nuclear waste facility on tribal lands, the Atomic Energy Act may preempt a state from regulating the storage of spent nuclear fuel located on tribal land. The Atomic Energy Act preempts state laws when they are grounded on a nuclear safety rationale.[222] In other words, while Congress has preempted the entire field of nuclear safety, it has not

[215] *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 172 (1973).
[216] *Williams v. Lee*, 358 U.S. 217 (1959)
[217] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980).
[218] *McClanahan, supra.*, at 171.
[219] Including federal Enabling Acts or other statutes and regulations concerning the subject matter of the conduct or activity being regulated, and applying the statutory rules of construction discussed in section 3.5 and 3.7 of this paper.
[220] *U.S. v. Mitchell*, 463 U.S. 206 (1983) (Mitchell II)
[221] 42 U.S.C. § 10136(b)(3).
[222] *The Skull Valley Band of Goshute Indians v. Leavitt,* 215 F.Supp.2d 1232 (D. Utah 2002), affirmed by 376 F.3d 1223 (10th Cir. 2004).

preempted all areas which relate to nuclear power.[223] If neither the Nuclear Waste Policy Act nor the Atomic Energy Act can be used by a tribe as the basis to preempt state law completely, an Indian tribe may look to other sources of federal law for such preemption. See discussion in section 4.2 about the Goshute Tribes efforts to accept a nuclear waste facility on its land.

This same analysis is applied by courts when addressing the power of a state to regulate non-Indian activity on tribal lands. If a storage facility is proposed to be located on tribal land, and that facility will be operated by a non-Indian entity, then it is relevant to ask whether a state has any authority to regulate the conduct or activity of that non-Indian storage facility operator. The key to federal preemption eliminating a state's exercise of power in this situation is finding at least one federal law that will effectively stop a state from asserting its regulatory powers over the non-Indian entity.

In the field of nuclear safety concerns, the Supreme Court has found that state laws are preempted, even if they do not directly conflict with federal law.[224] When a state enacts laws regulating either a non-Indian's storage of spent nuclear fuel located on tribal land or the transportation of spent nuclear fuel to and from the storage facility, the Atomic Energy Act preempts such laws when they are grounded on a nuclear safety rationale.[225] In other words, while Congress has preempted the entire field of nuclear safety, it has not preempted all areas which relate to nuclear power. For example, the federal government has not preempted the economic decision by a state of whether or not to construct a nuclear facility. [226]

When neither the Atomic Energy Act nor the Nuclear Waste Policy Act can be used to preempt a state from regulating non-Indian conduct or activity on tribal lands, other federal laws may be used to prohibit a state from interfering in such conduct or activity. For example, if a non-Indian operator of a storage facility requires a long-term lease, then the federal leasing statutes and regulations may effectively occupy the field so as to preempt state regulation.[227] Depending on the subject that a state law regulates, the federal leasing statutes may be used to preempt such state regulation of the non-Indian activity.[228]

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[223] *Id.*, at 1245.

[224] *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n,* 461 U.S. 190, 212 (1983). This case recognized that Congress preempted nuclear safety matters, but did not oust traditional State authority over economic questions such as the need for additional generating capacity, the type of generating facilities to be licensed, land use, and rate-making. The Supreme Court accepted the State of California's asserted economic purpose for a state law limiting a nuclear power plant's interim storage capacity, and concluded that this particular state law was not preempted.

[225] *The Skull Valley Band of Goshute Indians v. Leavitt,* 215 F.Supp.2d 1232 (D. Utah 2002), aff'd 376 F.3d 1223 (10th Cir. 2004).

[226] *Id.*, at 1245.

[227] *Utah v. US Dep't of Interior,* 45 F.Supp.2d 1279 (D. Utah 1999) (finding that state does not have a right to intervene as party in lease approval proceedings, or to appeal decision regarding lease, may be used as argument that federal leasing regulations have preempted the field), affirmed by 210 F.3d 1193 (10th Cir. 2000).

[228] *Segundo v. City of Rancho Mirage,* 813 F.2d 1387, 1391 (9th Cir. 1987) (the federal leasing statutes and regulations create a comprehensive scheme to preempt application of city rent control laws on tribal lands); cf *Gila River Indian Community v. Waddell,* 91 F.3d 1232, 1237 (9th Cir. 1996) (federal leasing statutes and regulations did not create such a comprehensive scheme to preempt state taxation on a non-Indian vendor).

4.1.2 Infringement

If the federal government has not enacted laws or regulations in a matter affecting Indian tribes and a state attempts to assert authority over the tribe, the second barrier to state action arises. The court asks whether "the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[229] More specifically, it has stated that "when Congress has wished the States to exercise this power [of regulating activities on tribal lands] it has expressly granted them the jurisdiction."[230] In particular, the court has acknowledged that Congress gave states a mechanism to "assume jurisdiction over reservation Indians if the state legislature or the people vote affirmatively to accept such responsibility…"[231] and the tribe consents to state jurisdiction.[232] Federal Enabling Acts and disclaimer clauses (discussed at the beginning of this section) found in state constitutions generally create a bright line rule that state jurisdiction over tribal conduct or activity on tribal lands stops at the reservation boundaries. The infringement test arises mainly in cases involving civil, rather than criminal, jurisdiction.

As a cautionary note, the infringement test may not provide a complete barrier to all state regulatory jurisdiction. However, as long as a tribe can establish that it has inherent authority to regulate a subject matter on tribal land, state regulation may be found to infringe on the tribe's right to self-government, especially when an Indian tribe has adopted its own tribal laws and/or regulations governing that subject matter.

4.1.3 Balancing competing interests by the courts

In determining whether state laws are preempted by federal law, federal courts will sometimes examine "the language of relevant federal treaties and statute in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence."[233] This type of analysis acknowledges the tradition of Indian sovereignty over tribal lands and members and reflects the federal government's firm policy of promoting tribal self-sufficiency and economic development.[234] With this backdrop, the court does not require an express delegation of federal authority to the state but instead balances the competing interests of the state, the tribe and the federal government, making a particularized inquiry "whether, in the specific context, the exercise of state authority would violate federal law."[235]

There are four federal laws that are relevant to the issue of delegation of federal authority over tribes to states, and to the balancing of competing interests. None of the laws deal with the siting and operation of any type of energy facilities, but they do provide important insights on how courts have dealt with the "balancing test". The four laws are: 1) **P.L. 280**: Congress

[229] *Williams v. Lee*, 358 U.S. 217, 219 (1959).
[230] *Id.*
[231] *Id*., at 222.
[232] See Section 3.7.4, re Public Law 280, as amended in 1963.
[233] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)
[234] *Id.*
[235] *Id.*

originally allowed five states to assume civil and criminal jurisdiction over Indians;[236] 2) **Liquor Control Act**: Congress permits states to have concurrent jurisdiction with the federal government over sales of liquor;[237] 3) **Indian Gaming Regulatory Act:** Congress expressly authorized Indian tribes and states to enter into Compacts providing for the application of state laws "that are directly related to, and necessary for, the licensing and regulation" of gaming (gambling) and to allocate jurisdiction between the state and the tribe that is "necessary for the enforcement of such laws and regulations;"[238] and 4) **Adam Walsh Child Protection and Safety Act**: Congress provided an express consent for states to assert jurisdiction in Indian Country over sex offender registration, but only if tribes do not elect to participate in the national sex offender registration regime. [239]

In a case involving the tribal authority to regulate alcohol, the Court recognized the traditional role of states in regulating alcohol.[240] This case involved a suit for damages against a small tribe near San Diego that sold alcohol to a person that resulted in an off-reservation motor vehicle crash. The court found that there was no tradition of tribal regulation of alcohol by Indians and allowed the suit to proceed.[241] The state in this case was California, which was one of the states explicitly granted jurisdiction on tribal lands by Public Law 280. Because of these two factors, a preemption analysis could not be applied and the case was decided by analyzing and balancing competing interests instead.

The balancing test will be applied only if a court finds that:

1. The Indian tribe does not have an inherent right to regulate the subject matter; or

2. The case involves minimal state burdens on Indian tribes in their dealings with non-Indians coming from outside the reservation. The minimal burdens analysis only applies if the court finds that the state has the power to regulate the underlying activity.[242]

In *White Mountain Apache Tribe v. Bracker (1980)*, the U.S. Supreme Court stated that "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members."[243] In *California v. Cabezon Band of Indians* (1987) the Supreme Court stated that case law has "not established an inflexible *per se* rule[244] precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent."[245] That is, under certain circumstances a state may validly assert

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[236] Public Law 83-280, Act of August 15, 1953, 67 Stat. 588 as amended in 1968 to require tribal consent. See 25 U.S.C. §1326.

[237] 18 U.S.C. §1161*; See also, Rice v. Rehner,* 463 U.S. 713, 715 (1983)

[238] *See e.g., Doe v. Santa Clara Pueblo,* 154 P.3d 644, 652 (N.M. 2007).

[239] *See e.g., State v. Atcitty,* 2009-NMCA-086, ¶32; 2009 WL 2601310, p10 (N.M. Ct. App. 2009).

[240] See e.g., *Rice v. Rehner,* 463 U.S. 713 (1983)

[241] *Id*.

[242] *See e.g., Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation,* 425 U.S. 463 (1976); *See also, Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134 (1980).

[243] *Bracker, supra.,* at 142.

[244] A *per se* rule means a rule that stands alone without reference to additional facts or as a matter of law. Definition from *Black's Law Dictionary,* 8th Ed.

[245] *California v Cabezon Band of Mission Indians,* 480 U.S. 202 at 214-215

authority over the activities of nonmembers on a reservation, and in exceptional circumstances a state may assert jurisdiction over the on-reservation activities of tribal members, even without Congressional action.[246] Courts applying the balancing test seem to be saying that preemption may be outweighed not only by a clear statement of federal law, but also by a state presenting evidence of compelling state interests. In other words, federal preemption may be overcome and outweighed by state interests. However, tribal control of tribal lands is unlikely to be subject to a balancing of interest test.

The Supreme Court has provided some guidance for the balancing test by identifying the federal, tribal and state interests necessary to be considered in determining whether a particular exercise of state authority violates federal law.[247] "[F]ederal and tribal interests arise from the broad power of Congress to regulate tribal affairs under the Indian Commerce Clause, Article I, Section 8, Clause 3, and from the semi-autonomous status of Indian tribes."[248] The federal government recognizes and Indian tribes assert "[t]he tradition of Indian sovereignty over the reservation and tribal members."[249] This tradition of tribal sovereignty "is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting self-sufficiency and economic development."[250] State interests in regulating the matter must also be examined and be given the appropriate weight. The balancing test is not controlled by "mechanical or absolute conceptions of state or tribal sovereignty."[251] It requires a particularized examination of the relevant state, federal, and tribal interests.[252]

Once all of the governmental interests have been examined, a court must then determine whether the state's interests justify assertion of state regulatory power over tribal conduct or activity arising on tribal lands. Generally, the courts require the state to identify a regulatory function or service that would justify the regulation. The court may also be persuaded if the state could point to an off-reservation effect of the subject matter sought to be regulated. Loss of state revenue, however, is generally not a sufficient basis for justifying an assertion of state taxing power.[253] This analysis prevented state taxation of a non-Indian business operating within tribal lands where Congress has enacted a program or policy such as tribal self-determination that would be negatively affected by state action.[254]

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[246] *Id.*

[247] *Bracker, supra.*, at 141-145.

[248] *Ramah Navajo School Board v. Bureau of Revenue of New Mexico,* 458 U.S. 832, 837 (1982) (citing *Bracker, supra*., at 142).

[249] *Moe v. Salish & Kootenai Tribe,* 425 U.S. 463 (1976) (The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted or infringed by operation of federal law).

[250] *Bracker, supra*., at 143.

[251] *Bracker, supra*., at 145.

[252] *Id.*

[253] *Id., supra*., at 150.

[254] See, e.g. *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982)(federal Indian education goals prevent state taxation of non-Indian contractor building school for a tribal organization on tribal land.)

4.2 How States Can Affect the Federal-Tribal Relationship: A Cautionary Example[255]

The Skull Valley Band of Goshute Indians has a federal reservation within the exterior boundaries of Tooele County, Utah. The area surrounding the reservation is far from pristine. As described by one author:

> "South of the reservation are the Dugway Proving Grounds and Intermountain Power Plant. At the Dugway Proving Grounds, the federal government stores nerve agents and operates a weapons testing and training range for 'air to surface, surface to air and air to air weapons.' Intermountain Power Project operates a coal-powered electricity generating facility and creates a substantial amount of air pollution. East of the reservation is the Tooele Army Depot, the site of one of the world's largest nerve gas incinerators and weapons testing and storage facility. The Envirocare disposal site for low-level radioactive waste and two other waste facilities are located northwest of the reservation. North of the reservation is MagCorp, one of the nation's worst industrial polluters, a magnesium production plant which generates chlorine gas."[256]

The area is so compromised that the Band is limited in how it can implement economic development on its land. Seeing a rare opportunity, the Band became actively involved in efforts initiated by the Nuclear Waste Negotiator to site at least a temporary storage facility on the reservation. The Negotiator appeared to favor siting a facility on tribal lands.[257] In 1994, before a specific site could be selected, the Office of the Negotiator expired. Utility companies then formed a consortium to address their need for storage of spent nuclear fuel. The consortium, through a Wisconsin-based firm, started negotiating with the Skull Valley Band to lease reservation land for such a facility. In addition to income from the lease, the Band could expect 500 temporary and 40 permanent jobs.[258] The Band agreed to proceed.

A lease of Indian land must be approved by the Bureau of Indian Affairs (BIA). In order to go forward, the project needed the approval of the BIA and other federal agencies, including the Nuclear Regulatory Commission and the Surface Transportation Board. The approval of the Bureau of Land Management was also required because a right of way across, and a site for a

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[255] The facts set out in this section are taken from Jeffries, S.M., "Environmental Justice and the Skull Valley Goshute Indians' Proposal to Store Nuclear Waste". Vol. 27, No. 2 Journal of Land, Resources, & Environmental Law, pp. 409-429 (2007).

[256] Jeffries, supra at 410-411 (cites omitted).

[257] Skibine, Alex Tallchief, "High Level Nuclear Waste on Indian Reservations: Pushing the Tribal Sovereignty Envelope to the Edge?" 21 Journal Land Resources & Environmental Law. 287, 290 (2001) "Although there never was a formal policy to store high-level nuclear waste on Indian reservations, the delays in finalizing a permanent solution to the problem of nuclear waste resulted in a de facto policy of temporarily storing the waste on Indian reservations."

[258] Jeffries, supra at 416.

transfer facility on, federal public lands were part of the project's design. In 1997, the BIA gave conditional approval of the lease, dependent on the other agencies approval.[259]

The Band's reservation is within 70 miles of Salt Lake City. The State of Utah and local non-Indian environmental groups went to work to prevent this economic venture. The State enacted laws designed to thwart the project; court battles ensued where those laws were held preempted by federal law.[260] Utah and opponents to the proposed facility looked to other means to stop it. Utah is not a state known for numerous wilderness areas, and in 2005, it had fewer wilderness areas that any other western state.[261] Utah Representative Rob Bishop then introduced legislation in Congress to designate 100,000 acres as the Cedar Mountain Wilderness, as part of the National Defense Authorization Act for Fiscal Year 2006. It so happened that this proposed wilderness area included the public lands needed for the right of way to the interim storage facility on Goshute land. The act passed both houses of Congress and was signed into law by President Bush in 2006. The sponsor of the legislation explicitly stated that one of the purposes of the wilderness designation was to thwart the Goshute plan:

> "First, it helps guarantee the ability of the military to use and overfly the lands that make up the range, ensuring continued military readiness and national security. Second, it blocks potential attempts to build a rail spur on federal lands near the range and the Goshute [Indian] reservation, thus inhibiting [a] nuclear waste storage facility from being built. And third, to resolve potential encroachment conflicts with wilderness study areas (WSAs), the bill designates roughly 100,000 acres of land as wilderness in the area of the range."

Use of a wilderness designation to protect military uses of adjacent land was not the only unusual tactic used by the people of Utah. It is a sad but true fact that some of the most toxic and hazardous activities are sited in areas where poor people and people of color reside. The concept of environmental justice is meant to change this situation. In 1994 President Clinton issued Executive Order 12898 which required federal agencies to identify and address "disproportionately high and adverse human health or environmental effects of programs, policies and activities on minority populations and low-income populations." The opponents of the facility took advantage of environmental justice issues to accuse the Nuclear Regulatory Commission and other federal agencies of environmental racism – using Goshute land for this facility was not good for the Skull Valley Band of Goshute Indians.[262] This, of course, implies

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[259] On May 23, 1997, BIA conditionally approved the lease agreement, contingent upon the completion of an Environmental Impact Statement (EIS), the inclusion of mitigation measures identified in the Record of Decision, and the issuance of an NRC license to construct, maintain, and operate the facility. 64 Federal Register 18451-18452, April 14, 1995.

[260] See, cases cited in notes 202-204, supra.

[261] In the beginning of 2005, only one tenth of one percent of the 22.9 million acres of federal public lands administered by the Bureau of Land Management had been designated as a wilderness area in the state of Utah. PEW Environment Group December 2005 Newsletter. http://www.leaveitwild.org/news/newsletter/issue/2005-12.

[262] "Environmental Racism is 'an extension of racism. It refers to those institutional rules, regulations, and policies or government or corporate decisions that deliberately target certain communities for least desirable land uses,

that people who were not Band members, who did not have to live with the wastes of the outside society surrounding them, could make a better decision than the Band members who, over several years and after exhaustive studies, reached the conclusion that they could benefit from this type of economic activity.[263] This led to the BIA's 2006 denial of the lease for the facility on the ground that as trustee, the federal government should not allow reservation land to be used for this purpose.[264]

Thus, through effective use of federal laws to protect wilderness areas and federal administrative decision-making, the state of Utah and its citizens were able to defeat the proposed siting of an interim nuclear waste storage facility on the lands of an Indian tribe, even when there was informed consent by the tribe, and the proposed facility was absolutely consistent with explicit federal statutes and policy.

In 2010, the U.S. District Court in Utah[265] held that the action of the BIA in denying the lease was arbitrary and capricious because it did not consider federal regulations that require the BIA to "defer to the landowners' determination that the lease is in their best interest, to the maximum extent possible."[266] The court ordered the BIA to reconsider its Record of Decision. The Department of Interior decided not to appeal the decision.[267]

5. MEANINGFUL CONSULTATION

5.1 Introduction - A Brief History Lesson

Federal policy towards Indian tribes has evolved over time. For the first 100 years of the United States' existence, the focus was on separating Indian tribes from the rest of the population through the creation of reservations. This was done, most often through treaties negotiated by the Executive Branch and approved by the Senate. The problem was that the House of Representatives had to fund the responsibilities created by the treaties, but had no say in them. In 1871 Congress attached a rider to an Indian appropriations act to deny the Executive Branch the authority to enter into treaties with Indian tribes: "No Indian nation or tribe …shall be

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resulting in the disproportionate exposure of toxic and hazardous waste on communities based upon certain prescribed biological characteristics. Environmental racism is the unequal protection against toxic and hazardous waste exposure and the systematic exclusion of people of color from environmental decisions affecting their communities.'" Jeffries, supra at nt.83, citing to David H. Getches & David N. Pellow, "Assessing Claims of Environmental Justice: Conceptual Frameworks, in Justice and Natural Resources: Concepts, Strategies, and Applications" 3, 3-4 (Kathryn M. Mutz, Gary C, Bryner & Douglas S. Kennedy eds). 2002.

[263] Indian tribes have often had to deal with this type of behavior by forces opposed to waste disposal on tribal lands. See, Gover, K. & Walker, J, "Escaping Paternalism: One Tribe's Approach to Developing a Commercial Waste Disposal Project in Indian Country", 63 Colo. L. Rev. 933, 942 (1992).

[264] 71 Federal Register 58630, October 4, 2006.

[265] *Skull Valley Band of Goshute Indians v. Davis, et al.*, 728 F.Supp.2d 1287 (D. Utah 2010)

[266] 25 C.F.R. §162.107

[267] "Interior Won't Fight Ruling on Nuclear Site", Salt Lake Tribune, September 28, 2010.

acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty."[268] This ended the era of Indian treaties.

Over the next one hundred years federal Indian policy vacillated from assimilating tribal people into the larger "American" culture, and subsequent actions trying to redress the disastrous results of the forced assimilation. Federal policy to force assimilation climaxed in the 1950s when Congress adopted the Termination Policy. Congress expressly stated a policy to "as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the United States…[.]"[269] Congress terminated the federal trust relationship with over 100 tribes by statute. As described by Canby, "the results were generally tragic."[270] With the removal of federal protection from state jurisdiction, tribal lands became subject to state taxation, and large areas were sold for back taxes. By the late 1960s, the policy was abandoned by Congress and by the Executive Branch.

After almost 200 years, federal Indian policy finally acknowledged the permanence of Indian tribes as governmental and cultural entities in the United States. President Richard M. Nixon announced in 1970 what has become known as the policy of Tribal Self-Determination.[271] He repudiated the Termination Policy and supported a federal relationship to tribes grounded in the federal trust responsibility that recognized the continued existence of Indian tribes and the importance of supporting tribal governments.

The Termination Policy implied that the federal government had taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people, and that it could therefore discontinue this responsibility on a unilateral basis whenever it saw fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the federal government is the result instead of solemn obligations which have been entered into by the United States government with tribal governments. Down through the years, through written treaties and through formal and informal agreements and statutes, our national government has made specific commitments to the Indian people. For their part, the Indians have surrendered or had taken from them some rights as political entities independent of the United States, have often surrendered claims to vast tracts of land, and have accepted life on government reservations. However, since the 1970s, the United States Indian policy has been to respect and encourage tribal self-determination. The Indian Self-Determination and Education Assistance Act of 1975 provides the statutory foundation for the current federal Indian policy of "self-determination."[272] The growth in tribal capacity since the Self-Determination era began has been significant.

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[268] 25 U.S.C. §71. Thereafter agreements with Indian tribes were embodied in Congressional Acts approved in the same manner as any other federal statute; See e.g. Title 25 U.S.C. Chapter 19 containing several Indian Land Claims Settlement Acts.

[269] H. Con.Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953).

[270] Canby, "American Indian Law", 2nd Ed. at p. 25.

[271] 116 Cong. Rec. 23258, see "Special Message to the Congress on Indian Affairs", 213 Pub. Papers 564 (July 8, 1970)

[272] 25 U.S.C. §§450-458bbb-2

5.2 Meaningful Consultation-An Essential Component of the Federal - Tribal Relationship

5.2.1 Congressional adoption of meaningful consultation

Congress enacted the Indian Self-Determination and Education Assistance Act in 1975, which is often cited as the source for the modern requirement of meaningful consultation with Indian tribes. The key language is as follows:

> "(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.
>
> "(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct and administration of those services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities."[273] (Emphasis added.)

As Indian tribes asserted their right to meaningful participation under this statute, the duty of consultation was recognized in federal court decisions interpreting this statute in light of the federal trust responsibility.[274] Other statutes governing federal agencies such as the Indian Health Service and the Bureau of Indian Affairs began to include specific provisions for consultation with Indian tribes. See, for example, 25 U.S.C., §2011 concerning education. Pursuant to that statute the BIA is required to "facilitate Indian control of Indian affairs in all matters relating to education," and this is to be done through "active consultation with tribes."[275]

Congress signified the importance of meaningful consultation with Indian tribes by explicitly requiring agencies to consult with Indian tribes in some federal statutes. The NWPA requires the DOE to engage in consultation with Indian tribes that may be affected by a repository siting effort (see section 3.7.1 and Appendix B). That Act states:

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[273] 25 U.S.C. §450a

[274] See, *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979); *Mescalero Apache Tribe v. Rhoades*, 804 F.Supp. 251, 261-62 (D.N.M. 1992) "[T]he Self-Determination Act 'created a justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views before the agency makes its decision.".

[275] 25 U.S.C. §2011(b)(1).

> "In performing any study of an area within a State for the purpose of determining the suitability of such area for a repository pursuant to section 112(c), and in subsequently developing and [locating] any repository within such State, the Secretary shall consult and cooperate with . . .the governing body of any affected Indian tribe in an effort to resolve the concerns of ... any affected Indian tribe regarding the public health and safety, environmental , and economic impacts of any such repository. In carrying out his duties under this subtitle, the Secretary shall take such concerns into account to the maximum extent feasibly and as specified in written agreements entered into under subsection (c)." (Emphasis added.)

"Meaningful consultation" with Indian tribes for federal actions taken under the Act is defined in the statute as:

> "a methodology by which the Secretary (A) keeps the ... eligible Tribal Council fully and currently informed about the aspects of the project related to any potential impact on the public health and safety and environment; (B) solicits, receives, and evaluates concerns and objections of such ... Council with regard to such aspects of the project on an ongoing basis; and (C) works diligently and cooperatively to resolve, through arbitration or other appropriate mechanisms, such concerns and objections. The process of consultation and cooperation shall not include the grant of a right to any ... Tribal Council to exercise an absolute veto of any aspect of the planning, development, modification, expansion, or operation of the project."[276]

Finally, the NWPA expressly allows federal action to be enjoined if consultation as mandated in the Act does not take place.[277]

Other federal statutes of general application, such as the Archaeological Resources Protection Act, 16 U.S.C. §470aa, and National Historic Preservation Act, also require consultation with Indian tribes. The NHPA was amended in 1992 to require consultation, not only about an Indian tribe's historic properties, but also to establish and implement procedures.[278] Consultation under the NHPA is now a codified regulatory process, set out at 36 C.F.R. §800.2(c)(2). This regulatory process goes further than that set out in the NWPA by encouraging consultation "early in the planning process in order to identify and discuss relevant preservation issues… [.]"[279] Congress has also adopted consultation in statutes that expressly address tribal concerns such as the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001, et seq., and the American Indian Religious Freedom Act, 16 U.S.C. §1996.

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[276] 42 U.S.C. §10155

[277] See § 119(a)(B) of Nuclear Waste Policy Act, codified at 42 U.S.C. §10101 *et seq*.

[278] 16 U.S.C. § 470a(d); 16 U.S.C. § 470h-2(a)(2)(e); Pub. L. 102-575, Title XL, § 4000 et seq.

[279] 36 C.F.R. §800.2(c)(2)(ii)(C).

5.2.2 Executive mandates for meaningful consultation

Virtually every President since Nixon has either reaffirmed or built upon his predecessor's statement.[280] For example, in 1994 President Clinton issued the Memorandum of April 29, 1994 to the heads of executive departments and agencies. It set out principles "that executive departments and agencies, including every component bureau and office, are to follow in their interactions with Native American tribal governments and requires each executive department and agency to consult with Indian tribes prior to taking actions that affect federally recognized tribal governments."[281]

In 2000, President Clinton issued Executive Order 13175 where meaningful consultation takes center stage as the primary tool for effectuating the government-to-government relationship mandated by the federal trust responsibility.

Executive Order 13175

Consultation and Coordination with Indian Tribal Governments

> By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States' government-to-government relationships with Indian tribes …
>
> …
>
> Sec. 5. Consultation
>
> a. Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications… [.] Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.
>
> …
>
> d. [Where an agency promulgates a regulation that has tribal implications] in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of the OMB a tribal summary impact statement, which consists of a description of the extent of the agency's

[280] See, President Ronald Reagan's American Indian Policy issued January 24, 1983; Statement by President George H. Bush issued June 14, 1991; Presidential Memorandum of May 4, 1994, 59 Fed. Reg. 22951; Executive Order No. 13007 (expressly addressing Indian Sacred Sites, 61 Fed. Reg. 26711); Presidential Memorandum for the Heads of Executive Departments and Agencies – Government-to-Government Relationship with Tribal Governments, September 23, 2004.

[281] 59 Fed. Reg. 22951.

prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met;

…

f. To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

1. consults with tribal officials early in the process of developing the proposed regulation;

2. in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

3. makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

g. On issues relating to tribal self-government, tribal trust resources [includes tribal lands and waters] and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.[282] (Emphasis added.)

The full text of Executive Order 13175 is set out in **Appendix F**.

President Bush issued a Memorandum for Heads of Executive Departments and Agencies, Government-to-Government Relationship with Tribal Governments, on September 23, 2004, reaffirming the federal government's commitment to work with tribes.

"My administration is committed to continuing to work with federally recognized tribal governments on a government-to-government basis and strongly supports and respects tribal sovereignty and self-determination for tribal governments in the United States. I take pride in acknowledging and reaffirming the existence and durability of our unique government-to-government relationship and these abiding principles."

[282] 65 Fed. Reg. 67,249 (November 6, 2000).

President Obama issued a Memorandum on November 5, 2009 adopting Executive Order 13175 and expanding on it.[283] This Memorandum reaffirms that meaningful consultation with Indian tribes "is a critical ingredient of a sound and productive Federal-tribal relationship."[284]

> "The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies (agencies) are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes."[285]

The Obama Memorandum goes further than Executive Order 13175 by explicitly requiring each executive department and agency to consult and collaborate with tribes in the development of federal policy, including the development of a tribal consultation policy. The OMB issued a guidance memorandum to federal entities that states that the Executive Order binds all Federal agencies, notably except for independent regulatory agencies, and adopts definitions of "agency" and "independent regulatory agency" used by the Paperwork Reduction Act of 1995. "Agency" is defined in the Act to mean:

> "[A]ny executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency, but does not include—
>
> (A) the General Accounting Office;
>
> (B) the Federal Election Commission;
>
> (C) the governments of the District of Columbia and of the territories and possessions of the United States, and their various subdivisions; or
>
> (D) Government-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities;" [286]

"Independent Regulatory Agency" is defined in the act to mean:

> "the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Board, the

[283] 74 Fed. Reg. 57,881. See Appendix G.
[284] *Id.*.
[285] *Id.*
[286] 44 U.S.C. §3502.

> Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Rate Commission, the Securities and Exchange Commission, and any other similar agency designated by statute as a Federal independent regulatory agency or commission[.]"[287] (Emphasis added.)

While these definitions limit those agencies that are required to have a policy for consultation with Indian tribes pursuant to the Executive Order specifically, the independent nature of the federal trust responsibility requires any entity exercising delegated federal authority to engage in consultation. This includes entities such as the Tennessee Valley Authority (TVA), and would also include any newly created federal entity that took over, in whole or in part, the federal responsibility under the Atomic Energy Act for spent nuclear fuel and high level wastes.[288]

Most federal agencies have policies in place mandating Consultation with Indian tribes.[289] It is in these policies, and court decisions enforcing the policies, that the key elements of meaningful consultation took shape.

5.3 Key Elements of Meaningful Consultation

5.3.1 Department of Energy policy

The DOE has an active consultation policy. (See, **Appendix H**, DOE American Indian and Alaska Natives Tribal Government Policy issued January 20, 2006 (DOE Policy)). DOE first issued an Indian Policy in 1992. As a result of requests for revision to that policy from Indian tribes, the Secretary of Energy revised the American Indian Policy in 2000 and again in 2006.

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[287] 44 U.S.C. §3502.

[288] See **Appendix E**

[289] Advisory Council on Historic Preservation Policy Statement issued November 17, 2000, Secretarial Order No. 3206 – American Indian Tribal Rights, Federal – Tribal Trust Responsibilities and the Endangered Species Act (Commerce and Interior) of June 5, 1997; Bureau of Land Management H-8160-1 General Procedural Guidance for Native American Consultation, November 3, 1994; United States Fish & Wildlife Service, Native American Policy, June 28, 1994; Environmental Protection Agency Policy for the Administration of Environmental Programs on Indian reservations, November 8, 1984; Memorandum to all EPA Employees Reaffirming Indian Policy, July 11, 2001; Housing and Urban Development Government-to-Government Tribal Consultation Policy, June 28, 2001; Housing and Urban Development Tribal Consultation Document – Implementation of Statutory Changes to NAHASDA, November 28, 2001; United States Forest Service Action Plan for Tribal Consultation and Collaboration, March, 2010; Internal Revenue Service – Outline of Tribal Consultation Policy, July 15, 2004; Federal Energy Regulatory Commission Policy Statement on Consultation with Indian tribes in Commission proceedings, 104 FERC ¶61,108, July 23, 2003; Department of Defense American Indian and Alaska Native Policy, October 20, 1998; Memorandum for U.S. Army Corps of Engineers Commanders – Policy Guidance Letter No. 57, Indian Sovereignty and Government-to-Government Relations with Indian tribes, February 18, 1998, Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes, 61 Fed. Reg. 29424, 29426, June 10, 1996; Bonneville Power Administration Tribal Policy issued April 29, 1996.

DOE issued Order 144.1 in 2009 which incorporated by reference the 2006 Policy and required implementation of the Indian Policy and its Implementation framework. The Order applies to "all Departmental elements, including those created after the Order is issued."[290] It defines "Consultation" as follows:

> "**Consultation** includes, but is not limited to prior to taking any action with potential impact upon American Indian and Alaska Native nations, providing for mutually agreed protocols for timely communication, coordination, cooperation and collaboration to determine the impact on traditional and cultural life ways, natural resources, treaty and other federally reserved rights involving appropriate tribal officials and representatives throughout the decision-making, including final decision-making and action implementation as allowed by law, consistent with a government to government relationship."

The policy further makes explicit that consultation is not limited to potential impacts on federal reserved lands, but also includes tribal interests outside tribal lands:

> "**Treaty and Trust Resources and Resource Interests** include, but are not limited to: natural and other resources specified and implicit in treaties, statutes, and agreements, or lands or other resources held in trust by the United States for the benefit of tribes or individual Indian beneficiaries, including land, water, timber, fish, plants, animals, and minerals. In many instances, Indian nations retain hunting, fishing, and gathering rights and access to these areas and resources on land or water that are outside of tribally-owned lands."

The area of concern is further expanded to include tribal cultural resources that could potentially be affected: "The Department will consult with any American Indian or Alaska Native tribal government with regard to any property to which that tribe attaches religious or cultural importance which might be affected by a DOE action"[291] The term "cultural resources" is defined broadly. Cultural resources "include, but are not limited to: archaeological materials (artifacts) and sites dating to the prehistoric, historic, and ethno historic periods that are located on the ground surface or are buried beneath it; natural resources, sacred objects, and sacred sites that have importance for American Indian and Alaska Native peoples; resources that the American Indian and Alaska Native nations regard as supportive to their cultural and traditional life ways."

The DOE Policy states that the Department "will establish protocols for communication between tribal leaders, the Secretary and federal officials" and committed to "periodic review, assessment and collaboration with tribal representatives to audit the protocols" established by the Department. Specific elements of meaningful consultation are not listed in the DOE policy, but elements can be indentified throughout the entire document:

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[290] DOE Order 144.1, Section 3.
[291] DOE Policy, p. 4.

(1) Timely coordination throughout the decision-making process and action implementation;

(2) Communication and Collaboration to determine the potential impact of a decision beginning before drafting of any possible determination and continuing through decision-making and implementation;

(3) Consultation applies to Department-proposed legislation, including fiscal year budget matters as appropriate, regulatory policy implementation and program management activities as well as specific proposed actions;

(4) Federal agency responsibility to inform and educate state and local governmental entities and other stakeholders in a decision about the DOE's role and responsibilities regarding the federal trust responsibility;

(5) It also provides for the DOE providing technical and financial assistance related to DOE-initiated regulatory policy, identifying programmatic impacts and determining the significance of the impact.

5.3.2 Bureau of Indian Affairs policy

The Bureau of Indian Affairs adopted a Consulting Policy pursuant to Executive Order 13175 that defined consultation to mean "a process of government-to-government dialogue between the Bureau of Indian Affairs and Indian tribes regarding proposed Federal actions in a manner intended to secure meaningful and timely tribal input." Consultation required that Indian tribes were:

(1) to receive timely notification of the formulated or proposed Federal action;

(2) to be informed of the potential impact on Indian tribes of the formulated or proposed Federal action;

(3) to be informed of those Federal officials who may make the final decisions with respect to the Federal action;

(4) to have the input and recommendations of Indian tribes on such proposed action be fully considered by those officials responsible for the final decision; and

(5) to be advised of the rejection of tribal recommendations on such action from those Federal officials making such decision and the basis for such rejections.

> "Consultation does not mean merely the right of tribal officials, as members of the general public, to be consulted, or to provide comments, under the Administrative Procedures Act or other Federal law of general applicability."[292]

On January 14, 2011 Secretary of the Interior Salazar circulated a proposal for a new statement of the Department's policy to tribal leaders. It adds significant muscle to the existing skeleton. It states that "[c]onsultation is a deliberative process that aims to create effective collaboration and informed decision-making where all parties share a goal of reaching a decision together and it creates an opportunity for equal input from all governments."[293] It designates a Tribal Governance Officer who is tasked with assuring compliance with the consultation policy by the Department, and each Bureau or Office within the Department will have a Tribal Liaison Official to "promote collaboration between Tribes and the Bureau or Office." [294] It requires that the persons who engage in consultation on behalf of the Department "are knowledgeable about the matters at hand, are authorized to speak for Interior, and have decision-making authority… [.]" [295]

Consultation Guidelines are set out in Section VIII. Consultation should begin at the initial planning stages, with notice to Tribal Officials of an opportunity to consult at least 30 days in advance of any date for consultation. Adequate notice is not merely informing Tribal leaders that the Department wants to consult:

> "Adequate notice entails providing a description of the topic(s) to be discussed. Notification of a consultation should include sufficient detail of the topic to be discussed to allow Tribal leaders an opportunity to fully engage in the consultation."[296]

After the initial consultation, a proposal is developed that discloses the scope of a Departmental action. At this stage the Bureau or Office must select a process "that maximizes the opportunity for timely input by tribes," taking into account tribal schedules. Examples of different types of process are given including (1) negotiated rule making in accordance with the Federal Advisory Committee Act "for developing significant regulations of other formal policies;" (2) Tribal Leader Task Force for national or region-wide matters where negotiated rule making is impractical, with the composition to be determined by the tribes in collaboration with each other; (3) a series of open meetings for national, regional, or subject-matter specific issues; (4) single meetings only if appropriate. When the Department reaches a final decision, it must be communicated to the affected tribes in writing with an explanation of the final decision. Presumably that written explanation would include a statement as to why any recommendations of a tribe were not adopted as required by the existing Consultation Policy. The DOI 2011 Draft also suggests that consideration be given to a post-consultation review process.

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[292] BIA Consulting Policy.
[293] Section II, Department of Interior Draft Tribal Consultation Policy ("DOI 2011 Draft").
[294] DOI 2011 Draft at Section III.
[295] DOI 2011 Draft, Section II.
[296] DOI 2011 Draft, Section VIII(A).

5.4. Does the Federal Duty of Meaningful Consultation Apply to the Blue Ribbon Commission on America's Nuclear Future?

There is no question that any entity that the Commission recommends as the means to address the issue of nuclear waste storage should have a policy for meaningful tribal consultation and collaboration and a procedure to implement it. This conclusion raises a separate, but related question about the Blue Ribbon Commission – must it have a consultation policy? Although the Blue Ribbon Commission is an advisory committee, and not within the definition of a DOE "Departmental element" to which the DOE Indian Policy applies, DOE Indian Policy principle III, commits the Department to "a proactive outreach effort ... to all potentially impacted Indian nations in the early planning stages of the decision-making process, including predraft consultation, in the development of regulatory policies on matters that significantly or uniquely affect their communities." To the extent the BRC is proposing regulatory policies that may affect tribes, we urge BRC and DOE to undertake consultations before making any final policy recommendations.

On January 29, 2010, President Barack Obama issued a Memorandum for the Secretary of Energy directing the Secretary to establish the Blue Ribbon Commission on America's Nuclear Future. The memorandum advises that "[t]he Commission's business should be conducted in an open and transparent manner."[297] It also states that "[t]his memorandum shall be implemented consistent with applicable law… [.]"[298] Pursuant to the President's directive, the Secretary of the Department of Energy created the Blue Ribbon Commission "to provide recommendations for developing a safe, long-term solution to managing the Nation's used nuclear fuel and nuclear waste."[299] Implementation of the BRC's recommendations by DOE or another federal agency will certainly be subject to the duty to consult, "prior to taking any action with potential impact upon American Indian and Alaska Native Nations."[300]

The task of the BRC is tied to the development of a federal policy for handling "the back end of the nuclear fuel cycle, including all alternatives for the storage, processing and disposal of civilian and defense used nuclear fuel and nuclear waste."[301] The memorandum makes it clear that the BRC is to consider policy alternatives, and "[w]here appropriate, identify potential statutory changes." Thus the BRC is tasked with important policy initiatives and, if appropriate, proposing legislation. The BRC's Charter states:

> "[T]he Commission will provide advice, evaluate alternatives, and make recommendations for a new plan to address these issues:
>
> …

[297] 75Fed.Reg. 5485 (February 3, 2010).
[298] *Id*.
[299] U.S.D.O.E. press release of January 29, 2010 "Secretary Chu Announces Blue Ribbon Commission on America's Nuclear Future.", p. 1
[300] DOE Order 144.1, Section 7, Definitions, (d) consultation.
[301] *Id.*

(e) Options for decision-making processes for management and disposal that are flexible, adaptive and responsive;

(f) Options to ensure that decision on management of used nuclear fuel and nuclear waste are open and transparent, with broad participation;

(g) The possible need for additional legislation or amendments to existing laws, including the Nuclear Waste Policy Act of 1982, as amended…[.]"

President Obama's Memorandum of November 5, 2009 explicitly mandates consultation with Indian tribes when formulating federal policy.[302] It also mandates consultation when creating consultation policies.[303] The potential for formulating proposed legislation triggers consultation under the Department of Energy American Indian & Alaska Native Tribal Government Policy ("The DOE will seek to determine the impacts of Departmental-proposed legislation upon Indian nations, in extensive consultation and collaboration with tribes. The Secretary will implement this notice and consultation effort consistent with the intent and purpose of this Policy."). Congress already determined tribal consultation is an important component of federal action involving the national effort to address nuclear waste when it specifically provided for tribal consultation several times in the Nuclear Waste Policy Act.

That policy directs the Department to develop a consultation protocol for communication between DOE and Indian tribes to guide consultation efforts.[304] Generally, "protocol" is an international law concept that includes the appropriate manners and means for conducting interactions and communications that incorporates awareness of cultural diversity and the need for mutual respect. In the context of the Federal-Tribal government-to-government relationship, a document that is referred to as a protocol is a document that records mutually agreed-upon principles and procedures for conducting consultation. A protocol is usually specific to the particular type of issue. For example, the process to be followed for an issue of nationwide concern would be very different from that to be followed for an issue involving only one Indian tribe.

The BRC has held public meetings where representatives from Indian tribes have been invited to participate (and have participated). While this participation does not by itself constitute meaningful consultation, the comments and positions of Indian tribes that come to light as a result of tribal involvement in the BRC process provides valuable perspective to be incorporated into the final report of the BRC. Consideration of the role of Indian tribes in promoting the importance of long-term stewardship with the Department of Energy is strong evidence that consultation with Indian tribes at the policy-making level can be very beneficial for the nation.

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[302] 74. Fed.Reg. 57,881.

[303] *Id.*

[304] DOE Order 144.1 (2009) incorporating DOE American Indian and Alaskan Native Tribal Government Policy (2006) and Framework to provide guidance for implementation of U.S. Department of Energy's American Indian and Alaskan Native Tribal Government Policy (2007). Several other federal agencies have issued guidance materials on the creation of tribal consultation protocols as well. For example, see, Department of the Interior, Bureau of Reclamation, *Protocol Guidelines: Consulting with Indian Tribal Governments* (revised 2001).

The Charter of the Blue Ribbon Commission states that the Department of Energy will be responsible for administrative support. The Department has extensive experience in working with Indian tribes to create consultation protocols and having actual consultation. The Director of the Office of Indian Energy Policy is currently leading DOE efforts to meet with tribal leaders at a Tribal Summit scheduled for May 5, 2011.[305] The Tribal Summit is called for in principle VI of the DOE American Indian and Alaskan Native Tribal Government Policy. The DOE branch of environmental management has long experience consulting and meeting with tribes through the State and Tribal Government Working Group (STGWG).

We strongly recommend that the BRC request the Secretary to task appropriate personnel within the Department to initiate the creation of a consultation protocol or process in consultation with potentially affected tribes to be implemented prior to the release of the BRC's Interim Report for public review and continuing after issuance of BRC's final report by January 2012. Depending on the BRC's recommendations and options being considered for possible implementation, consultation with individual tribes likely to be affected will likely be necessary.

6. TRIBAL ACTIONS OR LAWS CONCERNING TRIBES THAT CAN BE DECISIVE IN A SITING DECISION FOR TEMPORARY OR LONG-TERM STORAGE OF NUCLEAR WASTE

6.1 Exercising Tribal Power

Too often, federal and state officials, as well as private entities, fail to consider Indian tribes in initial decision-making, and then an Indian tribe stops a project in its tracks. While this can only delay a project, in some circumstances, the delay can prove fatal. A good example of this in the private sector was the proposal of a power company to place a coal mine near the Zuni Salt Lake. Several Indian tribes had to be consulted because they consider the Zuni Salt Lake to be the physical manifestation of a spiritual being. The process of inventorying the cultural resources on the project site and trying to determine what techniques could effectively mitigate any damage to those resources took significant time. Once that was completed, Zuni Pueblo continued to challenge the proposed activity based on substantive technical questions about the hydrologic effect of the proposed mine on the water level in the Zuni Salt Lake. After several years, the power company voluntarily abandoned the project.

At the same time, this power can be used to support proposals as well. The Nuclear Waste Policy Act as enacted required the Office of Civilian Radioactive Waste Management (OCRWM) to negotiate consultation and cooperation agreements after approval of a site for characterization or upon the request of a state or affected Indian tribe. In 1983, after Hanford was designated as a potential site, the state of Washington and the Yakama Indian Nation

[305] The 2011 Tribal Summit is an important meeting and opportunity for dialogue among top DOE staff and tribal leaders, but it is not a formal consultation.

requested negotiations to create consultation and cooperation agreements.[306] No agreements were ever finalized with the State of Washington or the Yakama Indian Nation due to questions about liability coverage under the Price-Anderson Act.[307] Negotiations also took place with the Confederated Tribes and Bands of the Umatilla Indian Reservation, at the request of the Umatilla Tribes in 1985. In 1986 the President of the United States approved three potential repository sites in Nevada, Texas and Washington for detailed site characterization. This triggered the requirements of NWPA for consultation and cooperation agreements with states and affected Indian tribes. This led to additional meetings with the Umatilla Tribes and initial meetings with the Nez Perce Indian Tribe, at the Indian tribe's request.[308] The Nez Perce letter (**Appendix I**) specifies important tribal interests that must be recognized for successful consultation.

The negotiation efforts of the OCRWM came to an end with the amendments to the Nuclear Waste Policy Act of 1987 which created the office of the Nuclear Waste Negotiator. The Nuclear Waste Negotiator was active from 1987 to 1994. Several Indian tribes actively participated in attempts to site a storage facility, at least for retrievable storage, on tribal land.[309] The high level of tribal participation can be attributed, at least in part, to the congressionally mandated consultation and cooperation with Indian tribes in the NWPA.

Sixteen tribes in Nevada individually and through the Consolidated Group of Tribes and Organizations (CGTO) now contribute directly to Environmental Impact Statements and are involved in land use studies and planning at the Nevada Nuclear Test Site. The "landscape perspective" presented by the CGTO is now part of the operating perspective at that site.[310]

Indian tribes can, and do, use all their authority as provided in existing federal law to influence a project. Indian tribes, today, are also experienced in making their voices heard. They cannot be ignored, and will go to great lengths to ensure that there is a means for their

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[306] This discussion concerning consultation activities prior to the 1987 amendments to the Nuclear Waste Policy Act is taken from "Report by the U.S. Secretary of Energy on Efforts to Comply with Consultation and Cooperation Provisions of the Nuclear Waste Policy Act of 1982, submitted to the Energy and Water Development Appropriations Subcommittees of the Appropriations Committees of the United States Senate and House of Representatives, July, 1987, MOV.19990922.0101. The Secretary of Energy made regular reports to Congress on specific efforts to negotiation consultation and cooperation agreements. Indian tribes often submitted their own comments for these reports. See, "Report to Congress Concerning the Consultation and Cooperation Agreements Negotiations between the Confederated Tribes of the Umatilla Indian Reservation and the United States Department of Energy as Required by Section 117 of the Nuclear Waste Policy Act of 1982" Submitted by the Confederated Tribes of the Umatilla Indian Reservation, January, 1987. This report highlighted the importance of financial assistance to allow Indian tribes to meaningfully participate in these negotiations when an Indian tribe is affected, but is not the host government for the site. Id. at p. 3-4.

[307] See: 42 U.S.C. §2210. The Price-Anderson Act requires that each licensee and construction permittee have and maintain financial protection of such type and in such amounts as the Nuclear Regulatory Commission (NRC) in the exercise of its licensing and regulatory authority and responsibility shall require to cover public liability claims for a nuclear incident occurring within the U.S. The NRC may require, as a further condition of issuing a license, that an applicant waive any immunity from public liability conferred by Federal or State law.

[308] Letter of December 15, 1986 from J. Herman Reuben, Chairman, Nez Perce Tribal Executive Committee and Elliott L. Moffett, Secretary Nez Perce Tribal Executive Committee to J. Herrington, Secretary of the U,S. Department of Energy, MOV.19960903.0079

[309] See sections 2.1 and 4.2.

[310] Personal communication with tribal member, Pahrump Paiute Tribe.

participation in any major policy initiative that has the potential to affect a tribe, its natural and cultural resources, or its members. The level of tribal participation is, in part, due to efforts of the federal government and some state governments to involve Indian tribes in decision-making through meaningful consultation. That provides the opportunity. Tribes have only been able to take advantage of these opportunities due to funding for consultation activities and increased economic activity on tribal lands. Economic development provides Indian tribes with income that tribes expend to protect what is important to them. The clear trend in recent years is growing requirements for federal agencies to involve tribes early in their planning; the tribes have generally responded positively to these initiatives.

6.2 Sanctions under International Law

The U.N. Declaration expressly states that indigenous people "have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources."[311] It requires governments to "take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent."[312] However, even if a legislative proposal were to begin with the requirement that no sites for interim or long-term storage of nuclear waste were to be on Indian lands, Indian tribes could look to other provisions in the declaration if federal action did not have a process for the expression of their views, such as Article 19 which requires national governments to "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them". (Emphasis added.)

Typically, international law cannot be used to bring a lawsuit against the federal government where the federal government has not complied with international law or United Nations' declarations. However, petitions can be made to the United Nations for violations of their declarations of international rights, such as the Declaration of the Rights of Indigenous Peoples. A petition can lead to an investigation and report, which can then be the basis for international sanctions against the offending country. While sanctions are rare, the publicity surrounding a petition or investigation can be devastating for a project, possibly making it impossible to complete.

In 2003, the United Nations Special Rapporteur on human rights and indigenous issues submitted a report on the impact of large-scale or major development projects, focusing on the construction of large multi-purpose dams that affect indigenous areas. One project that was highlighted in the report was the proposed Boruca Dam in Costa Rica. As initially proposed, the dam would have flooded a large area affecting seven indigenous territories.[313] This led to great international attention. The Special Rapporteur suggested that "the Government of Costa Rica

[311] Article 29
[312] *Id.*
[313] R. Stavenhagen, United Nations, Economic and Social Council, Commission on Human Rights, Report of Special Rapporteur on Indigenous Issues, 21 January, 2003; UN Doc. E/CN.4/2003/90, at p. 12.

would be well advised to promote mechanisms whereby the opinion of indigenous peoples may be taken into account in relation to the Boruca project."[314] Thereafter a mediation process was used to significantly reduce the size of the affected territory. "The design of the smaller project El Diquis offers many advantages in comparison to the Boruca option as far as the size of the area flooded, relocation of people, environmental impacts, number of archaeological sites affected and finally the costs involved."[315] This scaled-down project is still quite controversial, and some indigenous groups remain opposed to the project.[316]

6.3 Failure to Engage In Meaningful Consultation

In the discussion about statutory mandates for meaningful consultation, we noted that the NWPA explicitly provides a legal cause of action where meaningful consultation does not take place as required by the Act. While each of the Executive Orders or Memoranda explicitly state that it creates no rights that can be enforced in a court of law, the federal trust responsibility has been found to be an independent basis for a Court to stop ("enjoin") a federal action.[317] Federal action has also been stopped where key requirements for meaningful consultation, as set out in a federal agency's own consultation policy, did not take place.[318] The irreparable harm that can stop a project need not even be tangible – under case law it can simply be the loss of the right to meaningful consultation.

Courts can and do enjoin or stop federal actions that could affect Indian tribes where there is a breach of the duty to consult. Decisions are not just based on a complete failure to consult, but also on what is found to be inadequate consultation. For example, where the Yankton Sioux Tribe was told in consultation concerning restructuring of the Bureau of Indian Affairs to create the Bureau of Indian Education that no funds would be diverted from school funding to pay for the restructuring, and funds, in fact, were diverted from school funding, the court found that the Bureau of Indian Affairs had not had adequate consultation with the Tribe.[319] The lawsuits over the Bureau of Indian Education restructuring imposed significant delays on the Bureau's restructuring efforts as consultation was mandated by court order. Any misallocated funds were to be reallocated to schools. In the southwest United States, the lawsuit challenging the Bureau of Indian Education restructuring led to the creation of a working group of Indian tribal representatives and Bureau of Indian Education staff to provide an avenue for on-going

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[314] Id.

[315] United Nations University for Peace, "Peace and Conflict Monitor, 11-4-2008; available at http://www.monitor.upeace.org/innerpg.cfm?id_article=560 [last visited 4-1-2011].

[316] See, http://intercontinentalcry.org/indigenous-groups-opposed-to-el-diquis-hydro-project, 2008 [last visited 4-1-2011].

[317] See, *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979).

[318] See, *Eight Northern Indian Pueblos, Inc. and All Indian Pueblo Council v. Kempthorne*, U.S. Dist.Ct. (D.N.M.) Cause No. 06-745 WJ/ACT Memorandum Opinion and Order of September 15, 2006 at pp. 9-10 ("If a [federal action] occurs without meaningful consultation, the Plaintiffs will lose a procedural right which is guaranteed by federal law and BIA policy. Thus, I find that there is a threat of irreparable harm to Plaintiffs which weighs in favor of granting a…. preliminary injunction.").

[319] *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp.2d 774 (D.S.D. 2006).

consultation on education issues.[320] From this we know that consultation must be transparent, candid and comprehensive. A Tribe must have all the information that the agency has for consultation to be meaningful.

In another instance the Bureau of Land Management ("BLM") approved the siting of a solar collector project on public lands. The proposed project area had a history of extensive use by Native American groups, and contained over 459 specific cultural resources, including prehistoric settlements, ancient trails, buried human remains and other archaeological sites. Over a period of three years BLM held several public meetings and invited the Quechan Tribe to identify its cultural resources within the area. However, the BLM did not sit down and actually meet with the Tribal government until after it approved the project. The Quechan Tribe went to court to enforce its federal right to consultation under the regulatory process for consultation in the National Historic Preservation Act.[321] A court subsequently stopped the project from going forward.

The Pueblo of Sandia, another federally recognized Indian tribe, successfully enjoined proposed action of the U.S. Forest Service on lands ancestral to the Pueblo but outside the Pueblo's reservation. Only public information meetings were held although the agency was well aware of the Pueblo's refusal to discuss its cultural resources in a public forum. Relevant information was withheld from consultation participants until after the proposed action was approved.[322] The Pueblo challenged the federal action and it was overturned by the Court. Ultimately, the Pueblo and the U.S. Forest Service negotiated a settlement which was approved by Congress.[323]

From these and other cases we know that merely creating a paper-trail, e.g., informing an Indian tribe about public informational meetings and requesting information from a tribe, is not sufficient to establish consultation when there have been no actual meetings with affected tribal governments on a site specific or programmatic issue prior to the decision being made. The DOE Indian Policy Principle III[324] states "to ensure protection and exercise of tribal treaty and other federally recognized rights, the DOE will implement a proactive outreach effort of notice and consultation regarding current and proposed actions affecting tribes…This effort will include timely notice to all potentially impacted Indian Nations in the early planning stages of the decision-making process, including pre-draft consultation, in the development of regulatory policies on matters that significantly or uniquely affect their communities." Policy Principle IV states in part "the Department will consult with any American Indian or Alaskan Native Tribal Government with regard to any property to which that tribe attaches religious or cultural importance which might be affected by DOE action. With regard to actions by DOE and areas

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[320] Settlement Agreement entered in *Eight Northern Indian Pueblos, Inc. and All Indian Pueblo Council v. Kempthorne*, U.S. Dist.Ct. (D.N.M.) Cause No. 06-745 WJ/ACT.

[321] *Quechan Tribe of the Fort Yuma Indian Reservation v, United States Department of the Interior*, ___ F.Supp.2d ___, 2010 WL 5113197 (S.D.Cal. 2010).

[322] *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995).

[323] Tu'f Shur Bien Preservation Trust Act, PL 108-007, Title IV, 2003

[324] See **Appendix H**

not under DOE control or an action of another federal agency takes place on DOE land, DOE will consult with tribes in accordance with this policy…"

The experience of Nevada Tribes with the Yucca Mountain repository project was unsatisfactory. While DOE recognized each County next to the Site as affected by the project, and provided technical assistance funding to them, it refused to recognize tribes within these counties as affected. The only tribe recognized as affected by that project was located in Death Valley, far from the site. Even then, project staff met rarely with that tribe's representatives.[325] This is in stark contrast to the behavior of another arm of DOE and its work with the CTGO described earlier.

Other positive examples of DOE's efforts to consult with affected tribes at the STGWG level produced recognition and implementation of Long Term Stewardship responsibility within DOE. Tribes affected by the Los Alamos National Laboratory and the Hanford sites have regular meetings of tribal representatives with site managers. These examples provide affected Indian tribes an effective voice in how resources that they once exclusively controlled will be used in the future. This helps DOE meet its responsibilities to protect environmental and human health in the present and for benefit of future generations.

7. CONCLUSION AND ACKNOWLEDGMENTS

Federally-Recognized Indian Tribal Governments that are potentially affected by recommendations of the Blue Ribbon Commission on America's Nuclear Future have rights and opportunities that can contribute to that future. Treaty rights, statutory rights, and the policy of the United States Government to consult with Indian nations early in the planning process, and before decisions are made that might affect tribal resources, are discussed in this paper, and can contribute to the understanding of the Blue Ribbon Commission as it develops recommendations.

The Executive Summary and body of this paper discuss these rights and opportunities, as well as working relationships already established by federal agencies involved in the nuclear complex with tribes affected by those activities. Providing resources to potentially affected tribes to obtain and evaluate information and independently analyze it has been shown to be an effective ingredient in developing a cooperative working relationship in the nuclear area.

Several lawyers within Chestnut Law Office contributed to this paper. Thanks go to Ann Berkley Rodgers, Joe M. Tenorio, and Janis E. Hawk. Our legal assistants, Wendi Willetto, Melanie Garcia and Melayna Ortiz contributed to the effort as well.

We also want to acknowledge the useful comments from Glenn Paulson, senior consultant to the BRC, and the peer reviewers Russell Jim and Alex Thrower.

Tribal members and staff with deep experience in working with the DOE and other federal agencies connected with America's nuclear work provided useful insights.

[325] Personal communication with tribal member, Pahrump Paiute Tribe.

We thank the Blue Ribbon Commission for the opportunity to be of service. My team and I hope this paper provides both useful information and an overall perspective for the Commission as it develops its recommendations on the entire range of issues it is considering.

(signed) Peter C. Chestnut, Esq.

THE ROLE OF INDIAN TRIBES IN AMERICA'S NUCLEAR FUTURE

prepared for

The Blue Ribbon Commission on America's Nuclear Future

by

Peter C. Chestnut
Ann Berkley Rodgers
Joe M. Tenorio
Janis E. Hawk

Chestnut Law Offices
121 Tijeras NE, Suite 2001
Albuquerque, New Mexico 87102
Phone: (505) 842-5864

APPENDICES

April 29, 2011

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United Nations

United Nations DECLARATION on the RIGHTS of INDIGENOUS PEOPLES

Published by the United Nations

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United Nations

United Nations Declaration on the Rights of Indigenous Peoples

Resolution adopted by the General Assembly

[*without reference to a Main Committee (A/61/L.67 and Add.1)*]

61/295. United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,[1] by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

107th plenary meeting
13 September 2007

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

[1] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 53* (A/61/53), part one, chap. II, sect. A.

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social

progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights[2] and the International Covenant on Civil and Political Rights,[2] as well as the Vienna Declaration and Programme of Action,[3] affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

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[2] See resolution 2200 A (XXI), annex.

[3] A/CONF.157/24 (Part I), chap. III.

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights[4] and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to

[4] Resolution 217 A (III).

their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(*a*) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(*b*) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(*c*) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(*d*) Any form of forced assimilation or integration;

(*e*) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources

equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law

and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

CITE: 42 USC §10101

NUCLEAR WASTE POLICY ACT

Sec. 10101. Definitions

For purposes of this chapter:

(2) The term ``affected Indian tribe" means any Indian tribe—

(A) within whose reservation boundaries a monitored retrievable storage facility, test and evaluation facility, or a repository for high-level radioactive waste or spent fuel is proposed to be located;

(B) whose federally defined possessory or usage rights to other lands outside of the reservation's boundaries arising out of congressionally ratified treaties may be substantially and adversely affected by the locating of such a facility: Provided, That the Secretary of the Interior finds, upon the petition of the appropriate governmental officials of the tribe, that such effects are both substantial and adverse to the tribe;

(15) The term ``Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village, as defined in section 3(c) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(c)).

(28) The term ``unit of general local government" means any borough, city, county, parish, town, township, village, or other general purpose political subdivision of a State.

(19) The term ``reservation" means—

(A) any Indian reservation or dependent Indian community referred to in clause (a) or (b) of section 1151 of title 18; or

(B) any land selected by an Alaska Native village or regional corporation under the provisions of the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.).

Sec. 10121. State and affected Indian tribe participation in development of proposed repositories for defense waste

(a) Notification to States and affected Indian tribes

Notwithstanding the provisions of section 10107 of this title, upon any decision by the Secretary or the President to develop a repository for the disposal of high-level radioactive waste or spent nuclear fuel resulting exclusively from atomic energy defense activities, research and

development activities of the Secretary, or both, and before proceeding with any site-specific investigations with respect to such repository, the Secretary shall notify the Governor and legislature of the State in which such repository is proposed to be located, or the governing body of the affected Indian tribe on whose reservation such repository is proposed to be located, as the case may be, of such decision.

(b) Participation of States and affected Indian tribes

Following the receipt of any notification under subsection (a) of this section, the State or Indian tribe involved shall be entitled, with respect to the proposed repository involved, to rights of participation and consultation identical to those provided in sections 10135 through 10138 of this title, except that any financial assistance authorized to be provided to such State or affected Indian tribe under section 10136(c) or 10138(b) of this title shall be made from amounts appropriated to the Secretary for purposes of carrying out this section.

(Pub. L. 97-425, title I, Sec. 101, Jan. 7, 1983, 96 Stat. 2206.)

Sec. 10132. Recommendation of candidate sites for site characterization

(G) Before nominating a site, the Secretary shall notify the Governor and legislature of the State in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be, of such nomination and the basis for such nomination.

(c) Presidential review of recommended candidate sites

(1) The President shall review each candidate site recommendation made by the Secretary under subsection (b) of this section. Not later than 60 days after the submission by the Secretary of a recommendation of a candidate site, the President, in his discretion, may either approve or disapprove such candidate site, and shall transmit any such decision to the Secretary and to either the Governor and legislature of the State in which such candidate site is located, or the governing body of the affected Indian tribe where such candidate site is located, as the case may be. If, during such 60-day period, the President fails to approve or disapprove such candidate site, or fails to invoke his authority under paragraph (2) to delay his decision, such candidate site shall be considered to be approved, and the Secretary shall notify such Governor and legislature, or governing body of the affected Indian tribe, of the approval of such candidate site by reason of the inaction of the President.

(2) The President may delay for not more than 6 months his decision under paragraph (1) to approve or disapprove a candidate site, upon determining that the information provided with the recommendation of the Secretary is insufficient to permit a decision within the 60-day period referred to in paragraph (1). The President may invoke his authority under this paragraph by submitting written notice to the Congress, within such 60-day period, of his intent to invoke such authority. If the President invokes such

authority, but fails to approve or disapprove the candidate site involved by the end of such 6-month period, such candidate site shall be considered to be approved, and the Secretary shall notify such Governor and legislature, or governing body of the affected Indian tribe, of the approval of such candidate site by reason of the inaction of the President.

Sec. 10134. Site approval and construction authorization

(F) the views and comments of the Governor and legislature of any State, or the governing body of any affected Indian tribe, as determined by the Secretary, together with the response of the Secretary to such views;

Sec. 10135. Review of repository site selection

a) ``Resolution of repository siting approval" defined

For purposes of this section, the term ``resolution of repository siting approval" means a joint resolution of the Congress, the matter after the resolving clause of which is as follows: ``That there hereby is approved the site at ..... for a repository, with respect to which a notice of disapproval was submitted by ..... on .....". The first blank space in such resolution shall be filled with the name of the geographic location of the proposed site of the repository to which such resolution pertains; the second blank space in such resolution shall be filled with the designation of the State Governor and legislature or Indian tribe governing body submitting the notice of disapproval to which such resolution pertains; and the last blank space in such resolution shall be filled with the date of such submission.

(b) State or Indian tribe petitions

The designation of a site as suitable for application for a construction authorization for a repository shall be effective at the end of the 60-day period beginning on the date that the President recommends such site to the Congress under section 10134 of this title, unless the Governor and legislature of the State in which such site is located, or the governing body of an Indian tribe on whose reservation such site is located, as the case may be, has submitted to the Congress a notice of disapproval under section 10136 or 10138 of this title. If any such notice of disapproval has been submitted, the designation of such site shall not be effective except as provided under subsection (c) of this section.

Sec. 10136. Participation of States

(a) Notification of States and affected tribes

The Secretary shall identify the States with one or more potentially acceptable sites for a repository within 90 days after January 7, 1983. Within 90 days of such identification, the Secretary shall notify the Governor, the State legislature, and the tribal council of any affected Indian tribe in any State of the potentially acceptable sites within such State. For the purposes of this subchapter, the term ``potentially acceptable site" means any site at which, after geologic studies and field mapping but before detailed geologic data gathering, the Department undertakes preliminary drilling and geophysical testing for the definition of site location.

(b) State participation in repository siting decisions

(1) Unless otherwise provided by State law, the Governor or legislature of each State shall have authority to submit a notice of disapproval to the Congress under paragraph (2). In any case in which State law provides for submission of any such notice of disapproval by any other person or entity, any reference in this part to the Governor or legislature of such State shall be considered to refer instead to such other person or entity.

(2) Upon the submission by the President to the Congress of a recommendation of a site for a repository, the Governor or legislature of the State in which such site is located may disapprove the site designation and submit to the Congress a notice of disapproval. Such Governor or legislature may submit such a notice of disapproval to the Congress not later than the 60 days after the date that the President recommends such site to the Congress under section 10134 of this title. A notice of disapproval shall be considered to be submitted to the Congress on the date of the transmittal of such notice of disapproval to the Speaker of the House and the President pro tempore of the Senate. Such notice of disapproval shall be accompanied by a statement of reasons explaining why such Governor or legislature disapproved the recommended repository site involved.

(3) The authority of the Governor or legislature of each State under this subsection shall not be applicable with respect to any site located on a reservation.

c) Financial assistance

(1) (A) The Secretary shall make grants to the State of Nevada and any affected unit of local government for the purpose of participating in activities required by this section and section 10137 of this title or authorized by written agreement entered into pursuant to section 10137(c) of this title. Any salary or travel expense that would ordinarily be incurred by such State or affected unit of local government, may not be considered eligible for funding under this paragraph.

(B) The Secretary shall make grants to the State of Nevada and any affected unit of local government for purposes of enabling such State or affected unit of local government--

(i) to review activities taken under this part with respect to the Yucca Mountain site for purposes of determining any potential economic, social, public health and safety, and environmental impacts of a repository on such State, or affected unit of local government and its residents;

(ii) to develop a request for impact assistance under paragraph (2);

(iii) to engage in any monitoring, testing, or evaluation activities with respect to site characterization programs with regard to such site;

(iv) to provide information to Nevada residents regarding any activities of such State, the Secretary, or the Commission with respect to such site; and

(v) to request information from, and make comments and recommendations to, the Secretary regarding any activities taken under this part with respect to such site.

(C) Any salary or travel expense that would ordinarily be incurred by the State of Nevada or any affected unit of local government may not be considered eligible for funding under this paragraph.

(2) (A) (i) The Secretary shall provide financial and technical assistance to the State of Nevada, and any affected unit of local government requesting such assistance.

(ii) Such assistance shall be designed to mitigate the impact on such State or affected unit of local government of the development of such repository and the characterization of such site.

(iii) Such assistance to such State or affected unit of local government of such State shall commence upon the initiation of site characterization activities.

(B) The State of Nevada and any affected unit of local government may request assistance under this subsection by preparing and submitting to the Secretary a report on the economic, social, public health and safety, and environmental impacts that are likely to result from site characterization activities at the Yucca Mountain site. Such report shall be submitted to the Secretary after the Secretary has submitted to the State a general plan for site characterization activities under section 10133(b) of this title.

(C) As soon as practicable after the Secretary has submitted such site characterization plan, the Secretary shall seek to enter into a binding agreement with the State of Nevada setting forth--

(i) the amount of assistance to be provided under this subsection to such State or affected unit of local government; and

(ii) the procedures to be followed in providing such assistance.

(3) (A) In addition to financial assistance provided under paragraphs (1) and (2), the Secretary shall grant to the State of Nevada and any affected unit of local government an amount each fiscal year equal to the amount such State or affected unit of local government, respectively, would receive if authorized to tax site characterization activities at such site, and the development and operation of such repository, as such State or affected unit of local government taxes the non-Federal real property and industrial activities occurring within such State or affected unit of local government.

(B) Such grants shall continue until such time as all such activities, development, and operation are terminated at such site.

(4) (A) The State of Nevada or any affected unit of local government may not receive any grant under paragraph (1) after the expiration of the 1-year period following--

(i) the date on which the Secretary notifies the Governor and legislature of the State of Nevada of the termination of site characterization activities at the site in such State;

(ii) the date on which the Yucca Mountain site is disapproved under section 10135 of this title; or

(iii) the date on which the Commission disapproves an application for a construction authorization for a repository at such site; whichever occurs first.

(B) The State of Nevada or any affected unit of local government may not receive any further assistance under paragraph (2) with respect to a site if repository construction activities or site characterization activities at such site are terminated by the Secretary or if such activities are permanently enjoined by any court.

(C) At the end of the 2-year period beginning on the effective date of any license to receive and possess for a repository in a State, no Federal funds, shall be made available to such State or affected unit of local government under paragraph (1) or (2), except for--

(i) such funds as may be necessary to support activities related to any other repository located in, or proposed to be located in, such State, and for which a license to receive and possess has not been in effect for more than 1 year;

(ii) such funds as may be necessary to support State activities pursuant to agreements or contracts for impact assistance entered into, under paragraph (2), by such State with the Secretary during such 2-year period; and

(iii) such funds as may be provided under an agreement entered into under subchapter IV of this chapter.

(5) Financial assistance authorized in this subsection shall be made out of amounts held in the Waste Fund.

(6) No State, other than the State of Nevada, may receive financial assistance under this subsection after December 22, 1987.

(d) Additional notification and consultation

Whenever the Secretary is required under any provision of this chapter to notify or consult with the governing body of an affected Indian tribe where a site is located, the Secretary shall also

notify or consult with, as the case may be, the Governor of the State in which such reservation is located.

Sec. 10137. Consultation with States and affected Indian tribes

(a) Provision of information

(1) The Secretary, the Commission, and other agencies involved in the construction, operation, or regulation of any aspect of a repository in a State shall provide to the Governor and legislature of such State, and to the governing body of any affected Indian tribe, timely and complete information regarding determinations or plans made with respect to the site characterization siting, development, design, licensing, construction, operation, regulation, or decommissioning of such repository.

(2) Upon written request for such information by the Governor or legislature of such State, or by the governing body of any affected Indian tribe, as the case may be, the Secretary shall provide a written response to such request within 30 days of the receipt of such request. Such response shall provide the information requested or, in the alternative, the reasons why the information cannot be so provided. If the Secretary fails to so respond within such 30 days, the Governor or legislature of such State, or the governing body of any affected Indian tribe, as the case may be, may transmit a formal written objection to such failure to respond to the President. If the President or Secretary fails to respond to such written request within 30 days of the receipt by the President of such formal written objection, the Secretary shall immediately suspend all activities in such State authorized by this part, and shall not renew such activities until the Governor or legislature of such State, or the governing body of any affected Indian tribe, as the case may be, has received the written response to such written request required by this subsection.

(b) Consultation and cooperation

In performing any study of an area within a State for the purpose of determining the suitability of such area for a repository pursuant to section 10132(c) of this title, and in subsequently developing and loading \1\ any repository within such State, the Secretary shall consult and cooperate with the Governor and legislature of such State and the governing body of any affected Indian tribe in an effort to resolve the concerns of such State and any affected Indian tribe regarding the public health and safety, environmental, and economic impacts of any such repository. In carrying out his duties under this part, the Secretary shall take such concerns into account to the maximum extent feasible and as specified in written agreements entered into under subsection (c) of this section.

(c) Written agreement

Not later than 60 days after (1) the approval of a site for site characterization for such a repository under section 10132(c) of this title, or (2) the written request of the State or Indian tribe in any affected State notified under section 10136(a) of this title to the Secretary, whichever,\2\ first occurs, the Secretary shall seek to enter into a binding written agreement, and shall begin negotiations, with such State and, where appropriate, to enter into a separate binding agreement with the governing body of any affected Indian tribe, setting forth (but not limited to)

the procedures under which the requirements of subsections (a) and (b) of this section, and the provisions of such written agreement, shall be carried out. Any such written agreement shall not affect the authority of the Commission under existing law. Each such written agreement shall, to the maximum extent feasible, be completed not later than 6 months after such notification. Such written agreement shall specify procedures--

(1) by which such State or governing body of an affected Indian tribe, as the case may be, may study, determine, comment on, and make recommendations with regard to the possible public health and safety, environmental, social, and economic impacts of any such repository;

(2) by which the Secretary shall consider and respond to comments and recommendations made by such State or governing body of an affected Indian tribe, including the period in which the Secretary shall so respond;

(3) by which the Secretary and such State or governing body of an affected Indian tribe may review or modify the agreement periodically;

(4) by which such State or governing body of an affected Indian tribe is to submit an impact report and request for impact assistance under section 10136(c) of this title or section 10138(b) of this title, as the case may be;

(5) by which the Secretary shall assist such State, and the units of general local government in the vicinity of the repository site, in resolving the offsite concerns of such State and units of general local government, including, but not limited to, questions of State liability arising from accidents, necessary road upgrading and access to the site, ongoing emergency preparedness and emergency response, monitoring of transportation of high-level radioactive waste and spent nuclear fuel through such State, conduct of baseline health studies of inhabitants in neighboring communities near the repository site and reasonable periodic monitoring thereafter, and monitoring of the repository site upon any decommissioning and decontamination;

(6) by which the Secretary shall consult and cooperate with such State on a regular, ongoing basis and provide for an orderly process and timely schedule for State review and evaluation, including identification in the agreement of key events, milestones, and decision points in the activities of the Secretary at the potential repository site;

(7) by which the Secretary shall notify such State prior to the transportation of any high-level radioactive waste and spent nuclear fuel into such State for disposal at the repository site;

(8) by which such State may conduct reasonable independent monitoring and testing of activities on the repository site, except that such monitoring and testing shall not unreasonably interfere with or delay onsite activities;

(9) for sharing, in accordance with applicable law, of all technical and licensing information, the utilization of available expertise, the facilitating of permit procedures, joint project review, and the formulation of joint surveillance and monitoring arrangements to carry out applicable Federal and State laws;

(10) for public notification of the procedures specified under the preceding paragraphs; and

(11) for resolving objections of a State and affected Indian tribes at any stage of the planning, siting, development, construction, operation, or closure of such a facility within such State through negotiation, arbitration, or other appropriate mechanisms.

(d) On-site representative

The Secretary shall offer to any State, Indian tribe or unit of local government within whose jurisdiction a site for a repository or monitored retrievable storage facility is located under this subchapter an opportunity to designate a representative to conduct on-site oversight activities at such site. Reasonable expenses of such representatives shall be paid out of the Waste Fund.

Sec. 10138. Participation of Indian tribes

(a) Participation of Indian tribes in repository siting decisions

Upon the submission by the President to the Congress of a recommendation of a site for a repository located on the reservation of an affected Indian tribe, the governing body of such Indian tribe may disapprove the site designation and submit to the Congress a notice of disapproval. The governing body of such Indian tribe may submit such a notice of disapproval to the Congress not later than the 60 days after the date that the President recommends such site to the Congress under section 10134 of this title. A notice of disapproval shall be considered to be submitted to the Congress on the date of the transmittal of such notice of disapproval to the Speaker of the House and the President pro tempore of the Senate. Such notice of disapproval shall be accompanied by a statement of reasons explaining why the governing body of such Indian tribe disapproved the recommended repository site involved.

(b) Financial assistance

(1) The Secretary shall make grants to each affected tribe notified under section 10136(a) of this title for the purpose of participating in activities required by section 10137 of this title or authorized by written agreement entered into pursuant to section 10137(c) of this title. Any salary or travel expense that would ordinarily be incurred by such tribe, may not be considered eligible for funding under this paragraph.

(2) (A) The Secretary shall make grants to each affected Indian tribe where a candidate site for a repository is approved under section 10132(c) of this title. Such grants may be made to each such Indian tribe only for purposes of enabling such Indian tribe--

(i) to review activities taken under this part with respect to such site for purposes of determining any potential economic, social, public health and safety, and environmental impacts of such repository on the reservation and its residents;

(ii) to develop a request for impact assistance under paragraph (2);

(iii) to engage in any monitoring, testing, or evaluation activities with respect to site characterization programs with regard to such site;

(iv) to provide information to the residents of its reservation regarding any activities of such Indian tribe, the Secretary, or the Commission with respect to such site; and

(v) to request information from, and make comments and recommendations to, the Secretary regarding any activities taken under this part with respect to such site.

(B) The amount of funds provided to any affected Indian tribe under this paragraph in any fiscal year may not exceed 100 percent of the costs incurred by such Indian tribe with respect to the activities described in clauses (i) through (v) of subparagraph (A). Any salary or travel expense that would ordinarily be incurred by such Indian tribe may not be considered eligible for funding under this paragraph.

(3) (A) The Secretary shall provide financial and technical assistance to any affected Indian tribe requesting such assistance and where there is a site with respect to which the Commission has authorized construction of a repository. Such assistance shall be designed to mitigate the impact on such Indian tribe of the development of such repository. Such assistance to such Indian tribe shall commence within 6 months following the granting by the Commission of a construction authorization for such repository and following the initiation of construction activities at such site.

(B) Any affected Indian tribe desiring assistance under this paragraph shall prepare and submit to the Secretary a report on any economic, social, public health and safety, and environmental impacts that are likely as a result of the development of a repository at a site on the reservation of such Indian tribe. Such report shall be submitted to the Secretary following the completion of site characterization activities at such site and before the recommendation of such site to the President by the Secretary for application for a construction authorization for a repository. As soon as practicable following the granting of a construction authorization for such repository, the Secretary shall seek to enter into a binding agreement with the Indian tribe involved setting forth the amount of assistance to be provided to such Indian tribe under this paragraph and the procedures to be followed in providing such assistance.

(4) The Secretary shall grant to each affected Indian tribe where a site for a repository is approved under section 10132(c) of this title an amount each fiscal year equal to the amount such Indian tribe would receive were it authorized to tax site characterization activities at such site, and the development and operation of such repository, as such Indian tribe taxes the other commercial activities occurring on such reservation. Such grants shall continue until such time as all such activities, development, and operation are terminated at such site.

(5) An affected Indian tribe may not receive any grant under paragraph (1) after the expiration of the 1-year period following--

(i) the date on which the Secretary notifies such Indian tribe of the termination of site characterization activities at the candidate site involved on the reservation of such Indian tribe;

(ii) the date on which such site is disapproved under section 10135 of this title;

(iii) the date on which the Commission disapproves an application for a construction authorization for a repository at such site;

(iv) December 22, 1987; whichever occurs first, unless there is another candidate site on the reservation of such Indian tribe that is approved under section 10132(c) of this title and with respect to which the actions described in clauses (i), (ii), and (iii) have not been taken.

(B) An affected Indian tribe may not receive any further assistance under paragraph (2) with respect to a site if repository construction activities at such site are terminated by the Secretary or if such activities are permanently enjoined by any court.

(C) At the end of the 2-year period beginning on the effective date of any license to receive and possess for a repository at a site on the reservation of an affected Indian tribe, no Federal funds shall be made available under paragraph (1) or (2) to such Indian tribe, except for--

(i) such funds as may be necessary to support activities of such Indian tribe related to any other repository where a license to receive and possess has not been in effect for more than 1 year; and

(ii) such funds as may be necessary to support activities of such Indian tribe pursuant to agreements or contracts for impact assistance entered into, under paragraph (2), by such Indian tribe with the Secretary during such 2-year period.

(6) Financial assistance authorized in this subsection shall be made out of amounts held in the Nuclear Waste Fund established in section 10222 of this title.

Sec. 10155. Storage of spent nuclear fuel

(d) Review of sites and State participation

(1) In carrying out the provisions of this part with regard to any interim storage of spent fuel from civilian nuclear power reactors which the Secretary is authorized by this section to provide, the Secretary shall, as soon as practicable, notify, in writing, the Governor and the State legislature of any State and the Tribal Council of any affected

Indian tribe in such State in which is located a potentially acceptable site or facility for such interim storage of spent fuel of his intention to investigate that site or facility.

(2) During the course of investigation of such site or facility, the Secretary shall keep the Governor, State legislature, and affected Tribal Council currently informed of the progress of the work, and results of the investigation. At the time of selection by the Secretary of any site or existing facility, but prior to undertaking any site-specific work or alterations, the Secretary shall promptly notify the Governor, the legislature, and any affected Tribal Council in writing of such selection, and subject to the provisions of paragraph (6) of this subsection, shall promptly enter into negotiations with such State and affected Tribal Council to establish a cooperative agreement under which such State and Council shall have the right to participate in a process of consultation and cooperation, based on public health and safety and environmental concerns, in all stages of the planning, development, modification, expansion, operation, and closure of storage capacity at a site or facility within such State for the interim storage of spent fuel from civilian nuclear power reactors. Public participation in the negotiation of such an agreement shall be provided for and encouraged by the Secretary, the State, and the affected Tribal Council. The Secretary, in cooperation with the States and Indian tribes, shall develop and publish minimum guidelines for public participation in such negotiations, but the adequacy of such guidelines or any failure to comply with such guidelines shall not be a basis for judicial review.

(3) The cooperative agreement shall include, but need not be limited to, the sharing in accordance with applicable law of all technical and licensing information, the utilization of available expertise, the facilitating of permitting procedures, joint project review, and the formulation of joint surveillance and monitoring arrangements to carry out applicable Federal and State laws. The cooperative agreement also shall include a detailed plan or schedule of milestones, decision points and opportunities for State or eligible Tribal Council review and objection. Such cooperative agreement shall provide procedures for negotiating and resolving objections of the State and affected Tribal Council in any stage of planning, development, modification, expansion, operation, or closure of storage capacity at a site or facility within such State. The terms of any cooperative agreement shall not affect the authority of the Nuclear Regulatory Commission under existing law.

(4) For the purpose of this subsection, ``process of consultation and cooperation'' means a methodology by which the Secretary (A) keeps the State and eligible Tribal Council fully and currently informed about the aspects of the project related to any potential impact on the public health and safety and environment; (B) solicits, receives, and evaluates concerns and objections of such State and Council with regard to such aspects of the project on an ongoing basis; and (C) works diligently and cooperatively to resolve, through arbitration or other appropriate mechanisms, such concerns and objections. The process of consultation and cooperation shall not include the grant of a right to any State or Tribal Council to exercise an absolute veto of any aspect of the planning, development, modification, expansion, or operation of the project.

(5) The Secretary and the State and affected Tribal Council shall seek to conclude the agreement required by paragraph (2) as soon as practicable, but not later than 180 days following the date of notification of the selection under paragraph (2). The Secretary shall

periodically report to the Congress thereafter on the status of the the status of negotiations of such agreement by the Secretary shall be accompanied by comments solicited by the Secretary from the State and eligible Tribal Council.

(6) (A) Upon deciding to provide an aggregate of 300 or more metric tons of storage capacity under subsection (a)(1) of this section at any one site, the Secretary shall notify the Governor and legislature of the State where such site is located, or the governing body of the Indian tribe in whose reservation such site is located, as the case may be, of such decision. During the 60-day period following receipt of notification by the Secretary of his decision to provide an aggregate of 300 or more metric tons of storage capacity at any one site, the Governor or legislature of the State in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be, may disapprove the provision of 300 or more metric tons of storage capacity at the site involved and submit to the Congress a notice of such disapproval. A notice of disapproval shall be considered to be submitted to the Congress on the date of the transmittal of such notice of disapproval to the Speaker of the House and the President pro tempore of the Senate. Such notice of disapproval shall be accompanied by a statement of reasons explaining why the provision of such storage capacity at such site was disapproved by such Governor or legislature or the governing body of such Indian tribe.

(B) Unless otherwise provided by State law, the Governor or legislature of each State shall have authority to submit a notice of disapproval to the Congress under subparagraph (A). In any case in which State law provides for submission of any such notice of disapproval by any other person or entity, any reference in this part to the Governor or legislature of such State shall be considered to refer instead to such other person or entity.

(C) The authority of the Governor and legislature of each State under this paragraph shall not be applicable with respect to any site located on a reservation.

(D) If any notice of disapproval is submitted to the Congress under subparagraph (A), the proposed provision of 300 or more metric tons of storage capacity at the site involved shall be disapproved unless, during the first period of 90 calendar days of continuous session of the Congress following the date of the receipt by the Congress of such notice of disapproval, the Congress passes a resolution approving such proposed provision of storage capacity in accordance with the procedures established in this paragraph and subsections (d) through (f) of section 10135 of this title and such resolution thereafter becomes law. For purposes of this paragraph, the term ``resolution" means a joint resolution of either House of the Congress, the matter after the resolving clause of which is as follows: ``That there hereby is approved the provision of 300 or more metric tons of spent nuclear fuel storage capacity at the site located at _____, with respect to which a notice of disapproval was submitted by _____ on _____.". The first blank space in such resolution shall be filled with the geographic location of the site involved; the second blank space in such resolution shall be filled with the designation of the State Governor and legislature or affected Indian tribe

governing body submitting the notice of disapproval involved; and the last blank space in such resolution shall be filled with the date of submission of such notice of disapproval.

(E) For purposes of the consideration of any resolution described in subparagraph (D), each reference in subsections (d) and (e) of section 10135 of this title to a resolution of repository siting approval shall be considered to refer to the resolution described in such subparagraph.

(7) As used in this section, the term ``affected Tribal Council'' means the governing body of any Indian tribe within whose reservation boundaries there is located a potentially acceptable site for interim storage capacity of spent nuclear fuel from civilian nuclear power reactors, or within whose boundaries a site for such capacity is selected by the Secretary, or whose federally defined possessory or usage rights to other lands outside of the reservation's boundaries arising out of congressionally ratified treaties, as determined by the Secretary of the Interior pursuant to a petition filed with him by the appropriate governmental officials of such tribe, may be substantially and adversely affected by the establishment of any such storage capacity.

h) Participation of States and Indian tribes

Any facility authorized pursuant to this section shall be subject to the provisions of sections 10135, 10136(a), 10136(b), 10136(d), 10137, and 10138 of this title. For purposes of carrying out the provisions of this subsection, any reference in sections 10135 through 10138 of this title to a repository shall be considered to refer to a monitored retrievable storage facility.

Sec. 10165. Site selection

(e) Notification before selection

(1) At least 6 months before selecting a site under subsection (a) of this section, the Secretary shall notify the Governor and legislature of the State in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be, of such potential selection and the basis for such selection.

(2) Before selecting any site under subsection (a) of this section, the Secretary shall hold at least one public hearing in the vicinity of such site to solicit any recommendations of interested parties with respect to issues raised by the selection of such site.

(f) Notification of selection

The Secretary shall promptly notify Congress and the appropriate State or Indian tribe of the selection under subsection (a) of this section.

Sec. 10166. Notice of disapproval

(a) In general

The selection of a site under section 10165 of this title shall be effective at the end of the period of 60 calendar days beginning on the date of notification under such subsection, unless the

governing body of the Indian tribe on whose reservation such site is located, or, if the site is not on a reservation, the Governor and the legislature of the State in which the site is located, has submitted to Congress a notice of disapproval with respect to such site. If any such notice of disapproval has been submitted under this subsection, the selection of the site under section 10165 of this title shall not be effective except as provided under section 10135(c) of this title.

Sec. 10167. Benefits agreement

Once selection of a site for a monitored retrievable storage facility is made by the Secretary under section 10165 of this title, the Indian tribe on whose reservation the site is located, or, in the case that the site is not located on a reservation, the State in which the site is located, shall be eligible to enter into a benefits agreement with the Secretary under section 10173 of this title.

Sec. 10169. Financial assistance

The provisions of section 10136(c) or 10138(b) of this title with respect to grants, technical assistance, and other financial assistance shall apply to the State, to affected Indian tribes and to affected units of local government in the case of a monitored retrievable storage facility in the same manner as for a repository.

Sec. 10173. Benefits agreements

(a) In general

(1) The Secretary may enter into a benefits agreement with the State of Nevada concerning a repository or with a State or an Indian tribe concerning a monitored retrievable storage facility for the acceptance of high-level radioactive waste or spent nuclear fuel in that State or on the reservation of that tribe, as appropriate.

(2) The State or Indian tribe may enter into such an agreement only if the State Attorney General or the appropriate governing authority of the Indian tribe or the Secretary of the Interior, in the absence of an appropriate governing authority, as appropriate, certifies to the satisfaction of the Secretary that the laws of the State or Indian tribe provide adequate authority for that entity to enter into the benefits agreement.

(3) Any benefits agreement with a State under this section shall be negotiated in consultation with affected units of local government in such State.

(4) Benefits and payments under this part may be made available only in accordance with a benefits agreement under this section.

(b) Amendment

A benefits agreement entered into under subsection (a) of this section may be amended only by the mutual consent of the parties to the agreement and terminated only in accordance with section 10173c of this title.

(c) Agreement with Nevada

The Secretary shall offer to enter into a benefits agreement with the Governor of Nevada. Any benefits agreement with a State under this subsection shall be negotiated in consultation with any affected units of local government in such State.

(d) Monitored retrievable storage

The Secretary shall offer to enter into a benefits agreement relating to a monitored retrievable storage facility with the governing body of the Indian tribe on whose reservation the site for such facility is located, or, if the site is not located on a reservation, with the Governor of the State in which the site is located and in consultation with affected units of local government in such State.

(e) Limitation

Only one benefits agreement for a repository and only one benefits agreement for a monitored retrievable storage facility may be in effect at any one time.

(f) Judicial review

Decisions of the Secretary under this section are not subject to judicial review.

Sec. 10173a. Content of agreements

(a) In general

(1) In addition to the benefits to which a State, an affected unit of local government or Indian tribe is entitled under this subchapter, the Secretary shall make payments to a State or Indian tribe that is a party to a benefits agreement under section 10173 of this title in accordance with the following schedule:

BENEFITS SCHEDULE

(amounts in $ millions)

Event	MRS	Repository
(A) Annual payments prior to first spent fuel receipt.....	5	10
(B) Upon first spent fuel receipt.....	10	20
(C) Annual payments after first spent fuel receipt until closure of the facility.....	10	20

(2) For purposes of this section, the term--

(A) ``MRS'' means a monitored retrievable storage facility,

(B) ``spent fuel'' means high-level radioactive waste or spent nuclear fuel, and

(C) ``first spent fuel receipt'' does not include receipt of spent fuel or high-level radioactive waste for purposes of testing or operational demonstration.

(3) Annual payments prior to first spent fuel receipt under paragraph (1)(A) shall be made on the date of execution of the benefits agreement and thereafter on the anniversary date of such execution. Annual payments after the first spent fuel receipt until closure of the facility under paragraph (1)(C) shall be made on the anniversary date of such first spent fuel receipt.

(4) If the first spent fuel payment under paragraph (1)(B) is made within six months after the last annual payment prior to the receipt of spent fuel under paragraph (1)(A), such first spent fuel payment under paragraph (1)(B) shall be reduced by an amount equal to one-twelfth of such annual payment under paragraph (1)(A) for each full month less than six that has not elapsed since the last annual payment under paragraph (1)(A).

(5) Notwithstanding paragraph (1), (2), or (3), no payment under this section may be made before January 1, 1989, and any payment due under this subchapter before January 1, 1989, shall be made on or after such date.

(6) Except as provided in paragraph (7), the Secretary may not restrict the purposes for which the payments under this section may be used.

(7) (A) Any State receiving a payment under this section shall transfer an amount equal to not less than one-third of the amount of such payment to affected units of local government of such State.

(B) A plan for this transfer and appropriate allocation of such portion among such governments shall be included in the benefits agreement under section 10173 of this title covering such payments.

(C) In the event of a dispute concerning such plan, the Secretary shall resolve such dispute, consistent with this chapter and applicable State law.

(b) Contents

A benefits agreement under section 10173 of this title shall provide that--

(1) a Review Panel be established in accordance with section 10173b of this title;

(2) the State or Indian tribe that is party to such agreement waive its rights under this subchapter to disapprove the recommendation of a site for a repository;

(3) the parties to the agreement shall share with one another information relevant to the licensing process for the repository or monitored retrievable storage facility, as it becomes available;

(4) the State or Indian tribe that is party to such agreement participate in the design of the repository or monitored retrievable storage facility and in the preparation of

documents required under law or regulation governing the effects of the facility on the public health and safety; and

(5) the State or Indian tribe waive its rights, if any, to impact assistance under sections 10136(c)(1)(B)(ii), 10136(c)(2), 10138(b)(2)(A)(ii), and 10138(b)(3) of this title.

(c) Payments by Secretary

The Secretary shall make payments to the States or affected Indian tribes under a benefits agreement under this section from the Waste Fund. The signature of the Secretary on a valid benefits agreement under section 10173 of this title shall constitute a commitment by the United States to make payments in accordance with such agreement.

Sec. 10173b. Review Panel

(a) In general

The Review Panel required to be established by section 10173a(b)(1) of this title shall consist of a Chairman selected by the Secretary in consultation with the Governor of the State or governing body of the Indian tribe, as appropriate, that is party to such agreement and 6 other members as follows:

(1) 2 members selected by the Governor of such State or governing body of such Indian tribe;

(2) 2 members selected by units of local government affected by the repository or monitored retrievable storage facility;

(3) 1 member to represent persons making payments into the Waste Fund, to be selected by the Secretary; and

(4) 1 member to represent other public interests, to be selected by the Secretary.

(b) Terms

(1) The members of the Review Panel shall serve for terms of 4 years each.

(2) Members of the Review Panel who are not full-time employees of the Federal Government, shall receive a per diem compensation for each day spent conducting work of the Review Panel, including their necessary travel or other expenses while engaged in the work of the Review Panel.

(3) Expenses of the Panel shall be paid by the Secretary from the Waste Fund.

(c) Duties

The Review Panel shall--

(1) advise the Secretary on matters relating to the proposed repository or monitored retrievable storage facility, including issues relating to design, construction, operation, and decommissioning of the facility;

(2) evaluate performance of the repository or monitored retrievable storage facility, as it considers appropriate;

(3) recommend corrective actions to the Secretary;

(4) assist in the presentation of State or affected Indian tribe and local perspectives to the Secretary; and

(5) participate in the planning for and the review of preoperational data on environmental, demographic, and socioeconomic conditions of the site and the local community.

(d) Information

The Secretary shall promptly \1\ make available promptly \1\ any information in the Secretary's possession requested by the Panel or its Chairman.

(e) Federal Advisory Committee Act

The requirements of the Federal Advisory Committee Act shall not apply to a Review Panel established under this subchapter.

Sec. 10173c. Termination

(b) Termination by State or Indian tribe

A State or Indian tribe may terminate a benefits agreement under this subchapter only if the Secretary disqualifies the site under consideration for its failure to comply with technical requirements established by the Secretary in accordance with this chapter or the Secretary determines that the Commission cannot license the facility within a reasonable time.

(c) Decisions of Secretary

Decisions of the Secretary under this section shall be in writing, shall be available to Congress and the public, and are not subject to judicial review.

Sec. 10175. Transportation

(a) Packaging

No spent nuclear fuel or high-level radioactive waste may be transported by or for the Secretary under part A of this subchapter or under part C of this subchapter except in packages that have been certified for such purpose by the Commission.

(b) Advance notification

The Secretary shall abide by regulations of the Commission regarding advance notification of State and local governments prior to transportation of spent nuclear fuel or high-level radioactive waste under part A of this subchapter or under part C of this subchapter.

(c) Training for public safety officials

The Secretary shall provide technical assistance and funds to States for training for public safety officials of appropriate units of local government and Indian tribes through whose jurisdiction the Secretary plans to transport spent nuclear fuel or high-level radioactive waste under part A of this subchapter or under part C of this subchapter. Training shall cover procedures required for safe routine transportation of these materials, as well as procedures for dealing with emergency response situations. The Waste Fund shall be the source of funds for work carried out under this subsection.

Sec. 10191. Purpose

(3) to provide for an improved cooperative role between the Federal Government and States, affected Indian tribes, and units of general local government in the siting of a test and evaluation facility.

Sec. 10195. Test and evaluation facility siting review and reports

(a) Consultation and cooperation

The Governor of a State, or the governing body of an affected Indian tribe, notified of a site identification under section 10193 of this title shall have the right to participate in a process of consultation and cooperation as soon as the site involved has been identified pursuant to such section and throughout the life of the test and evaluation facility. For purposes of this section, the term ``process of consultation and cooperation" means a methodology—

(1) by which the Secretary—

(A) keeps the Governor or governing body involved fully and currently informed about any potential economic or public health and safety impacts in all stages of the siting, development, construction, and operation of a test and evaluation facility;

(B) solicits, receives, and evaluates concerns and objections of such Governor or governing body with regard to such test and evaluation facility on an ongoing basis; and

(C) works diligently and cooperatively to resolve such concerns and objections; and

(2) by which the State or affected Indian tribe involved can exercise reasonable independent monitoring and testing of onsite activities related to all stages of the siting,

development, construction and operation of the test and evaluation facility, except that any such monitoring and testing shall not unreasonably interfere with onsite activities.

(b) Written agreements

The Secretary shall enter into written agreements with the Governor of the State in which an identified site is located or with the governing body of any affected Indian tribe where an identified site is located in order to expedite the consultation and cooperation process.
Any such written agreement shall specify—

(1) procedures by which such Governor or governing body may study, determine, comment on, and make recommendations with regard to the possible health, safety, and economic impacts of the test and evaluation facility;

(2) procedures by which the Secretary shall consider and respond to comments and recommendations made by such Governor or governing body, including the period in which the Secretary shall so respond;

(3) the documents the Department is to submit to such Governor or governing body, the timing for such submissions, the timing for such Governor or governing body to identify public health and safety concerns and the process to be followed to try to eliminate those concerns;

(4) procedures by which the Secretary and either such Governor or governing body may review or modify the agreement periodically; and

(5) procedures for public notification of the procedures specified under subparagraphs (A) through (D).

(c) Limitation

Except as specifically provided in this section, nothing in this subchapter is intended to grant any State or affected Indian tribe any authority with respect to the siting, development, or loading of the test and evaluation facility.

Sec. 10199. Payments to States and Indian tribes

(a) Payments

Subject to subsection (b) of this section, the Secretary shall make payments to each State or affected Indian tribe that has entered into an agreement pursuant to section 10195 of this title. The Secretary shall pay an amount equal to 100 percent of the expenses incurred by such State or Indian tribe in engaging in any monitoring, testing, evaluation, or other consultation and cooperation activity under section 10195 of this title with respect to any site. The amount paid by the Secretary under this paragraph shall not exceed $3,000,000 per year from the date on which the site involved was identified to the date on which the decontamination and decommission of

the facility is complete pursuant to section 10197(h) of this title. Any such payment may only be made to a State in which a potential site for a test and evaluation facility has been identified under section 10193 of this title, or to an affected Indian tribe where the potential site has been identified under such section.

(b) Limitation

The Secretary shall make any payment to a State under subsection (a) of this section only if such State agrees to provide, to each unit of general local government within the jurisdictional boundaries of which the potential site or effectively selected site involved is located, at least one-tenth of the payments made by the Secretary to such State under such subsection. A State or affected Indian tribe receiving any payment under subsection (a) of this section shall otherwise have discretion to use such payment for whatever purpose it deems necessary, including the State or tribal activities pursuant to agreements entered into in accordance with section 10195 of this title. Annual payments shall be prorated on a 365-day basis to the specified dates.

Sec. 10242. Office of Nuclear Waste Negotiator

(a) Establishment

There is established the Office of the Nuclear Waste Negotiator that shall be an independent establishment in the executive branch.

(b) Nuclear Waste Negotiator

(1) The Office shall be headed by a Nuclear Waste Negotiator who shall be appointed by the President, by and with the advice and consent of the Senate. The Negotiator shall hold office at the pleasure of the President, and shall be compensated at the rate provided for level III of the Executive Schedule in section 5314 of title 5.

(2) The Negotiator shall attempt to find a State or Indian tribe willing to host a repository or monitored retrievable storage facility at a technically qualified site on reasonable terms and shall negotiate with any State or Indian tribe which expresses an interest in hosting a repository or monitored retrievable storage facility.

Sec. 10243. Duties of Negotiator

(a) Negotiations with potential hosts

(1) The Negotiator shall--

(A) seek to enter into negotiations on behalf of the United States, with—

(i) the Governor of any State in which a potential site is located; and

(ii) the governing body of any Indian tribe on whose reservation a potential site is located; and

(B) attempt to reach a proposed agreement between the United States and any such State or Indian tribe specifying the terms and conditions under which such State or tribe would agree to host a repository or monitored retrievable storage facility within such State or reservation.

(b) Consultation with affected States, subdivisions of States, and tribes

In addition to entering into negotiations under subsection (a) of this section, the Negotiator shall consult with any State, affected unit of local government, or any Indian tribe that the Negotiator determines may be affected by the siting of a repository or monitored retrievable storage facility and may include in any proposed agreement such terms and conditions relating to the interest of such States, affected units of local government, or Indian tribes as the Negotiator determines to be reasonable and appropriate.

d) Proposed agreement

(1) The Negotiator shall submit to the Congress any proposed agreement between the United States and a State or Indian tribe negotiated under subsection (a) of this section and an environmental assessment prepared under section 10244(a) of this title for the site concerned.

(2) Any such proposed agreement shall contain such terms and conditions (including such financial and institutional arrangements) as the Negotiator and the host State or Indian tribe determine to be reasonable and appropriate and shall contain such provisions as are necessary to preserve any right to participation or compensation of such State, affected unit of local government, or Indian tribe under sections 10136(c), 10137, and 10138(b) of this title.

(3) (A) No proposed agreement entered into under this section shall have legal effect unless enacted into Federal law.

(B) A State or Indian tribe shall enter into an agreement under this section in accordance with the laws of such State or tribe. Nothing in this section may be construed to prohibit the disapproval of a proposed agreement between a State and the United States under this section by a referendum or an act of the legislature of such State.

(4) Notwithstanding any proposed agreement under this section, the Secretary may construct a repository or monitored retrievable storage facility at a site agreed to under this subchapter only if authorized by the Nuclear Regulatory Commission in accordance with the Atomic Energy Act of 1954 [42 U.S.C. 2011 et seq.], title II of the Energy Reorganization Act of 1982 (42 U.S.C. 5841 et seq.) and any other law applicable to authorization of such construction.

Sec. 10246. Monitored retrievable storage

(a) Construction and operation

Upon enactment of legislation to implement an agreement negotiated under section 10243(a) of this title to site a monitored retrievable storage facility, the Secretary shall construct and operate such facility as part of an integrated nuclear waste management system in accordance with the terms and conditions of such agreement.

(b) Financial assistance

The Secretary may make grants to any State, Indian tribe, or affected unit of local government to assess the feasibility of siting a monitored retrievable storage facility under this section at a site under the jurisdiction of such State, tribe, or affected unit of local government.

HAZARDOUS MATERIALS TRANSPORTATION ACT

49 U.S.C. §5101 *et seq.*

Excerpts

Sec. 5102. Definitions

In this chapter—

(1) ``commerce'' means trade or transportation in the jurisdiction of the United States—

(A) between a place in a State and a place outside of the State;

(B) that affects trade or transportation between a place in a State and a place outside of the State; or

(C) on a United States-registered aircraft.

(2) ``hazardous material'' means a substance or material the Secretary designates under section 5103(a) of this title.

(3) ``hazmat employee''—

(A) means an individual—

(i) who--

(I) is employed on a full time, part time, or temporary basis by a hazmat employer; or

(II) is self-employed (including an owner-operator of a motor vehicle, vessel, or aircraft) transporting hazardous material in commerce; and

(ii) who during the course of such full time, part time, or temporary employment, or such self employment, directly affects hazardous material transportation safety as the Secretary decides by regulation; and

(B) includes an individual, employed on a full time, part time, or temporary basis by a hazmat employer, or self employed, who during the course of employment—

(i) loads, unloads, or handles hazardous material;

(ii) designs, manufactures, fabricates, inspects, marks, maintains, reconditions, repairs, or tests a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce;

(iii) prepares hazardous material for transportation;

(iv) is responsible for the safety of transporting hazardous material; or

(v) operates a vehicle used to transport hazardous material.

(4) ``hazmat employer''--

(A) means a person—

(i) who—

(I) employs or uses at least 1 hazmat employee on a full time, part time, or temporary basis; or

(II) is self-employed (including an owner-operator of a motor vehicle, vessel, or aircraft) transporting hazardous material in commerce; and

(ii) who—

(I) transports hazardous material in commerce;

(II) causes hazardous material to be transported in commerce; or

(III) designs, manufactures, fabricates, inspects, marks, maintains, reconditions, repairs, or tests a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce; and

(B) includes a department, agency, or instrumentality of the United States Government, or an authority of a State, political subdivision of a State, or Indian tribe, carrying out an activity described in clause (ii).

(5) ``imminent hazard'' means the existence of a condition relating to hazardous material that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of that death, illness, injury, or endangerment.

(6) ``Indian tribe'' has the same meaning given that term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

(7) ``motor carrier''—

(A) means a motor carrier, motor private carrier, and freight forwarder as those terms are defined in section 13102; but

(B) does not include a freight forwarder, as so defined, if the freight forwarder is not performing a function relating to highway transportation.

(8) ``National Response Team'' means the National Response Team established under the National Contingency Plan established under section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9605).

(9) ``person'', in addition to its meaning under section 1 of title 1—

(A) includes a government, Indian tribe, or authority of a government or tribe that—

(i) offers hazardous material for transportation in commerce;
(ii) transports hazardous material to further a commercial enterprise; or
(iii) designs, manufactures, fabricates, inspects, marks, maintains, reconditions, repairs, or tests a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce; but

(B) does not include--
(i) the United States Postal Service; and
(ii) in sections 5123 and 5124 of this title, a department, agency, or instrumentality of the Government.

(10) ``public sector employee''—
(A) means an individual employed by a State, political subdivision of a State, or Indian tribe and who during the course of employment has responsibilities related to responding to an accident or incident involving the transportation of hazardous material;
(B) includes an individual employed by a State, political subdivision of a State, or Indian tribe as a firefighter or law enforcement officer; and
(C) includes an individual who volunteers to serve as a firefighter for a State, political subdivision of a State, or Indian tribe.

(11) ``Secretary'' means the Secretary of Transportation except as otherwise provided.

(12) ``State'' means—
(A) except in section 5119 of this title, a State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, the Virgin Islands, American Samoa, Guam, and any other territory or possession of the United States designated by the Secretary; and
(B) in section 5119 of this title, a State of the United States and the District of Columbia.

(13) ``transports'' or ``transportation'' means the movement of property and loading, unloading, or storage incidental to the movement.

(14) ``United States'' means all of the States.

Sec. 5108. Registration

(a) Persons Required to File.—

(1) A person shall file a registration statement with the Secretary under this subsection if the person is transporting or causing to be transported in commerce any of the following:

(A) a highway-route-controlled quantity of radioactive material.
(B) more than 25 kilograms of a Division 1.1, 1.2, or 1.3 explosive material in a motor vehicle, rail car, or transport container.
(C) more than one liter in each package of a hazardous material the Secretary designates as extremely toxic by inhalation.
(D) hazardous material in a bulk packaging, container, or tank, as defined by the Secretary, if the bulk packaging, container, or tank has a capacity of at least 3,500 gallons or more than 468 cubic feet.
(E) a shipment of at least 5,000 pounds (except in a bulk packaging) of a class of hazardous material for which placarding of a vehicle, rail car, or freight container is required under regulations prescribed under this chapter.

(2) The Secretary may require any of the following persons to file a registration statement with the Secretary under this subsection:
(A) a person transporting or causing to be transported hazardous material in commerce and not required to file a registration statement under paragraph (1) of this subsection.
(B) a person designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.

(3) A person required to file a registration statement under this subsection maytransport or cause to be transported, or design, manufacture, fabricate, inspect, mark, maintain, recondition, repair, or test a package, container packaging component, or container for use in transporting, hazardous material, only if the person has a statement on file as required by this subsection.

(4) The Secretary may waive the filing of a registration statement, or the payment of a fee, required under this subsection, or both, for any person not domiciled in the United States who solely offers hazardous materials for transportation to the United States from a place outside the United States if the country of which such person is a domiciliary does not require persons domiciled in the United States who solely offer hazardous materials for transportation to the foreign country from places in the United States to file registration statements, or to pay fees, for making such an offer.

(b) Form, Contents, and Limitation on Filings.—

(1) A registration statement under subsection (a) of this section shall be in the form and contain information the Secretary requires by regulation. The Secretary may use existing forms of the Department of Transportation and the Environmental Protection Agency to carry out this subsection. The statement shall include--
(A) the name and principal place of business of the registrant;
(B) a description of each activity the registrant carries out for which filing a statement under subsection (a) of this section is required; and
(C) each State in which the person carries out any of the activities.

(2) A person carrying out more than one activity, or an activity at more than one location, for which filing is required only has to file one registration statement to comply with subsection (a) of this section.

(c) Filing.--Each person required to file a registration statement under subsection (a) shall file the statement in accordance with regulations prescribed by the Secretary.

(d) Simplifying the Registration Process.--The Secretary may take necessary action to simplify the registration process under subsections (a)-(c) of this section and to minimize the number of applications, documents, and other information a person is required to file under this chapter and other laws of the United States.

(e) Cooperation With Administrator.--The Administrator of the Environmental Protection Agency shall assist the Secretary in carrying out subsections (a)-(g)(1) and (h) of this section by providing the Secretary with information the Secretary requests to carry out the objectives of subsections (a)-(g)(1) and (h).

(f) Availability of Statements.--The Secretary shall make a registration statement filed under subsection (a) of this section available for inspection by any person for a fee the Secretary establishes. However, this subsection does not require the release of information described in section 552(b) of title 5 or otherwise protected by law from disclosure to the public.

(g) Fees.—

(1) The Secretary shall establish, impose, and collect from a person required to file a registration statement under subsection (a) of this section a fee necessary to pay for the costs of the Secretary in processing the statement.

(2) (A) In addition to a fee established under paragraph (1) of this subsection, the Secretary shall establish and impose by regulation and collect an annual fee. Subject to subparagraph (B) of this paragraph, the fee shall be at least $250 but not more than $3,000 from each person required to file a registration statement under this section. The Secretary shall determine the amount of the fee under this paragraph on at least one of the following:

(i) gross revenue from transporting hazardous material.

(ii) the type of hazardous material transported or caused to be transported.

(iii) the amount of hazardous material transported or caused to be transported.

(iv) the number of shipments of hazardous material.

(v) the number of activities that the person carries out for which filing a registration statement is required under this section.

(vi) the threat to property, individuals, and the environment from an accident or incident involving the hazardous material transported or caused to be transported.

(vii) the percentage of gross revenue derived from transporting hazardous material.

(viii) the amount to be made available to carry out sections 5108(g)(2), 5115, and 5116 of this title.
(ix) other factors the Secretary considers appropriate.

(B) The Secretary shall adjust the amount being collected under this paragraph to reflect any unexpended balance in the account established under section 5116(i) of this title. However, the Secretary is not required to refund any fee collected under this paragraph.

(C) The Secretary shall transfer to the Secretary of the Treasury amounts the Secretary of Transportation collects under this paragraph for deposit in the Hazardous Materials Emergency Preparedness Fund established under section 5116(i) of this title.

(3) Fees on exempt persons.--Notwithstanding subsection (a)(4), the Secretary shall impose and collect a fee of $25 from a person who is required to register under this section but who is otherwise exempted by the Secretary from paying any fee under this section. The fee shall be used to pay the costs incurred by the Secretary in processing registration statements filed by such persons.

(h) Maintaining Proof of Filing and Payment of Fees.--The Secretary may prescribe regulations requiring a person required to file a registration statement under subsection (a) of this section to maintain proof of the filing and payment of fees imposed under subsection (g) of this section.

(i) Relationship to Other Laws.—

(1) Chapter 35 of title 44 does not apply to an activity of the Secretary under subsections (a)-(g)(1) and (h) of this section.

(2) (A) This section does not apply to an employee of a hazmat employer.

(B) Subsections (a)-(h) of this section do not apply to a department, agency, or instrumentality of the United States Government, an authority of a State or political subdivision of a State, an Indian tribe, or an employee of a department, agency, instrumentality, or authority carrying out official duties.

Sec. 5112. Highway routing of hazardous material

(a) Application.—

(1) This section applies to a motor vehicle only if the vehicle is transporting hazardous material in commerce for which placarding of the vehicle is required under regulations prescribed under this chapter. However, the Secretary by regulation may extend application of this section or a standard prescribed under subsection (b) of this section to--

(A) any use of a vehicle under this paragraph to transport any hazardous material in commerce; and

(B) any motor vehicle used to transport hazardous material in commerce.

(2) Except as provided by subsection (d) of this section and section 5125(c) of this title, each State and Indian tribe may establish, maintain, and enforce--

(A) designations of specific highway routes over which hazardous material may and may not be transported by motor vehicle; and

(B) limitations and requirements related to highway routing.

(b) Standards for States and Indian Tribes.—

(1) The Secretary, in consultation with the States, shall prescribe by regulation standards for States and Indian tribes to use in carrying out subsection (a) of this section. The standards shall include--

(A) a requirement that a highway routing designation, limitation, or requirement of a State or Indian tribe shall enhance public safety in the area subject to the jurisdiction of the State or tribe and in areas of the United States not subject to the jurisdiction of the State or tribe and directly affected by the designation, limitation, or requirement;

(B) minimum procedural requirements to ensure public participation when the State or Indian tribe is establishing a highway routing designation, limitation, or requirement;

(C) a requirement that, in establishing a highway routing designation, limitation, or requirement, a State or Indian tribe consult with appropriate State, local, and tribal officials having jurisdiction over areas of the United States not subject to the jurisdiction of that State or tribe establishing the designation, limitation, or requirement and with affected industries;

(D) a requirement that a highway routing designation, limitation, or requirement of a State or Indian tribe shall ensure through highway routing for the transportation of hazardous material between adjacent areas;

(E) a requirement that a highway routing designation, limitation, or requirement of one State or Indian tribe affecting the transportation of hazardous material in another State or tribe may be established, maintained, and enforced by the State or tribe establishing the designation, limitation, or requirement only if--

(i) the designation, limitation, or requirement is agreed to by the other State or tribe within a reasonable period or is approved by the Secretary under subsection (d) of this section; and

(ii) the designation, limitation, or requirement is not an unreasonable burden on commerce;

(F) a requirement that establishing a highway routing designation, limitation, or requirement of a State or Indian tribe be completed in a timely way;

(G) a requirement that a highway routing designation, limitation, or requirement of a State or Indian tribe provide reasonable routes for motor vehicles transporting hazardous material to reach terminals, facilities for food, fuel, repairs, and rest, and places to load and unload hazardous material;

(H) a requirement that a State be responsible--

(i) for ensuring that political subdivisions of the State comply with standards prescribed under this subsection in establishing, maintaining, and enforcing a highway routing designation, limitation, or requirement; and

(ii) for resolving a dispute between political subdivisions; and

(I) a requirement that, in carrying out subsection (a) of this section, a State or Indian tribe shall consider--

(i) population densities;
(ii) the types of highways;
(iii) the types and amounts of hazardous material;
(iv) emergency response capabilities;
(v) the results of consulting with affected persons;
(vi) exposure and other risk factors;
(vii) terrain considerations;
(viii) the continuity of routes;
(ix) alternative routes;
(x) the effects on commerce;
(xi) delays in transportation; and
(xii) other factors the Secretary considers appropriate.

(2) The Secretary may not assign a specific weight that a State or Indian tribe shall use when considering the factors under paragraph (1)(I) of this subsection.

(c) List of Route Designations.--In coordination with the States, the Secretary shall update and publish periodically a list of currently effective hazardous material highway route designations.

(d) Dispute Resolution.--(1) The Secretary shall prescribe regulations for resolving a dispute related to through highway routing or to an agreement with a proposed highway route designation, limitation, or requirement between or among States, political subdivisions of different States, or Indian tribes.

(2) A State or Indian tribe involved in a dispute under this subsection may petition the Secretary to resolve the dispute. The Secretary shall resolve the dispute not later than one year after receiving the petition. The resolution shall provide the greatest level of highway safety without being an unreasonable burden on commerce and shall ensure compliance with standards prescribed under subsection (b) of this section.

(3) (A) After a petition is filed under this subsection, a civil action about the subject matter of the dispute may be brought in a court only after the earlier of--

(i) the day the Secretary issues a final decision; or
(ii) the last day of the one-year period beginning on the day the Secretary receives the petition.

(B) A State or Indian tribe adversely affected by a decision of the Secretary under this subsection may bring a civil action for judicial review of the decision in an appropriate district court of the United States not later than 89 days after the day the decision becomes final.

(e) Relationship to Other Laws.--This section and regulations prescribed under this section do not affect sections 31111 and 31113 of this title or section 127 of title 23.

(f) Existing Radioactive Material Routing Regulations.--The Secretary is not required to amend or again prescribe regulations related to highway routing designations over which radioactive material may and may not be transported by motor vehicles, and limitations and requirements related to the routing, that were in effect on November 16, 1990.

Sec. 5116. Planning and training grants, monitoring, and review

(a) Planning Grants.—

(1) The Secretary shall make grants to States and Indian tribes—

(A) to develop, improve, and carry out emergency plans under the Emergency Planning and Community Right-To-Know Act of 1986 (42 U.S.C. 11001 et seq.), including ascertaining flow patterns of hazardous material on lands under the jurisdiction of a State or Indian tribe, and between lands under the jurisdiction of a State or Indian tribe and lands of another State or Indian tribe; and

(B) to decide on the need for a regional hazardous material emergency response team.

(2) The Secretary may make a grant to a State or Indian tribe under paragraph (1) of this subsection in a fiscal year only if--

(A) the State or Indian tribe certifies that the total amount the State or Indian tribe expends (except amounts of the United States Government) to develop, improve, and carry out emergency plans under the Act will at least equal the average level of expenditure for the last 5 fiscal years; and

(B) the State agrees to make available at least 75 percent of the amount of the grant under paragraph (1) of this subsection in the fiscal year to local emergency planning committees established under section 301(c) of the Act (42 U.S.C. 11001(c)) to develop emergency plans under the Act.

(3) A State or Indian tribe receiving a grant under this subsection shall ensure that planning under the grant is coordinated with emergency planning conducted by adjacent States and Indian tribes.

(b) Training Grants.—

(1) The Secretary shall make grants to States and Indian tribes to train public sector employees to respond to accidents and incidents involving hazardous material.

(2) The Secretary may make a grant under paragraph (1) of this subsection in a fiscal year--

(A) to a State or Indian tribe only if the State or tribe certifies that the total amount the State or tribe expends (except amounts of the Government) to train public sector employees to respond to an accident or incident involving hazardous material will at least equal the average level of expenditure for the last 5 fiscal years;

(B) to a State or Indian tribe only if the State or tribe makes an agreement with the Secretary that the State or tribe will use in that fiscal year, for training public sector employees to respond to an accident or incident involving hazardous material--

(i) a course developed or identified under section 5115 of this title; or

(ii) another course the Secretary decides is consistent with the objectives of this section; and

(C) to a State only if the State agrees to make available at least 75 percent of the amount of the grant under paragraph (1) of this subsection in the fiscal year for training public sector employees a political subdivision of the State employs or uses.

(3) A grant under this subsection may be used--

(A) to pay--

(i) the tuition costs of public sector employees being trained;

(ii) travel expenses of those employees to and from the training facility;

(iii) room and board of those employees when at the training facility; and

(iv) travel expenses of individuals providing the training;

(B) by the State, political subdivision, or Indian tribe to provide the training; and

(C) to make an agreement the Secretary approves authorizing a person (including an authority of a State or political subdivision of a State or Indian tribe) to provide the training--

(i) if the agreement allows the Secretary and the State or tribe to conduct random examinations, inspections, and audits of the training without prior notice; and

(ii) if the State or tribe conducts at least one on-site observation of the training each year.

(4) The Secretary shall allocate amounts made available for grants under this subsection for a fiscal year among eligible States and Indian tribes based on the needs of the States and tribes for emergency response training. In making a decision about those needs, the Secretary shall consider--

(A) the number of hazardous material facilities in the State or on land under the jurisdiction of the tribe;

(B) the types and amounts of hazardous material transported in the State or on that land;
(C) whether the State or tribe imposes and collects a fee on transporting hazardous material;
(D) whether the fee is used only to carry out a purpose related to transporting hazardous material; and
(E) other factors the Secretary decides are appropriate to carry out this subsection.

(c) Compliance with Certain Law.--The Secretary may make a grant to a State under this section in a fiscal year only if the State certifies that the State complies with sections 301 and 303 of the Emergency Planning and Community Right-To-Know Act of 1986 (42 U.S.C. 11001, 11003).

(d) Applications.--A State or Indian tribe interested in receiving a grant under this section shall submit an application to the Secretary. The application must be submitted at the time, and contain information, the Secretary requires by regulation to carry out the objectives of this section.

(e) Government's Share of Costs.--A grant under this section is for 80 percent of the cost the State or Indian tribe incurs in the fiscal year to carry out the activity for which the grant is made. Amounts of the State or tribe under subsections (a)(2)(A) and (b)(2)(A) of this section are not part of the non-Government share under this subsection.

(f) Monitoring and Technical Assistance.--In coordination with the Secretaries of Transportation and Energy, Administrator of the Environmental Protection Agency, and Director of the National Institute of Environmental Health Sciences, the Administrator of the Federal Emergency Management Agency shall monitor public sector emergency response planning and training for an accident or incident involving hazardous material. Considering the results of the monitoring, the Secretaries, Administrators, and Director each shall provide technical assistance to a State, political subdivision of a State, or Indian tribe for carrying out emergency response training and planning for an accident or incident involving hazardous material and shall coordinate the assistance using the existing coordinating mechanisms of the National Response Team and, for radioactive material, the Federal Radiological Preparedness Coordinating Committee.

(g) Delegation of Authority.--To minimize administrative costs and to coordinate Federal financial assistance for emergency response training and planning, the Secretary may delegate to the Administrator of the Federal Emergency Management Agency, Director of the National Institute of Environmental Health Sciences, Chairman of the Nuclear Regulatory Commission, Administrator of the Environmental Protection Agency, and Secretaries of Labor and Energy any of the following:

(1) authority to receive applications for grants under this section.
(2) authority to review applications for technical compliance with this section.
(3) authority to review applications to recommend approval or disapproval.

(4) any other ministerial duty associated with grants under this section.

(h) Minimizing Duplication of Effort and Expenses.--The Secretaries of Transportation, Labor, and Energy, Administrator of the Federal Emergency Management Agency, Director of the National Institute of Environmental Health Sciences, Chairman of the Nuclear Regulatory Commission, and Administrator of the Environmental Protection Agency shall review periodically, with the head of each department, agency, or instrumentality of the Government, all emergency response and preparedness training programs of that department, agency, or instrumentality to minimize duplication of effort and expense of the department, agency, or instrumentality in carrying out the programs and shall take necessary action to minimize duplication.

(i) Annual Registration Fee Account and Its Uses.--The Secretary of the Treasury shall establish an account in the Treasury (to be known as the ``Hazardous Materials Emergency Preparedness Fund'') into which the Secretary of the Treasury shall deposit amounts the Secretary of Transportation transfers to the Secretary of the Treasury under section 5108(g)(2)(C) of this title. Without further appropriation, amounts in the account are available--

(1) to make grants under this section;
(2) to monitor and provide technical assistance under subsection (f) of this section;
(3) to publish and distribute an emergency response guide; and
(4) to pay administrative costs of carrying out this section and sections 5108(g)(2) and 5115 of this title, except that not more than 2 percent of the amounts made available from the account in a fiscal year may be used to pay those costs.

(j) Supplemental Training Grants.--

(1) In order to further the purposes of subsection (b), the Secretary shall, subject to the availability of funds, make grants to national nonprofit employee organizations engaged solely in fighting fires for the purpose of training instructors to conduct hazardous materials response training programs for individuals with statutory responsibility to respond to hazardous materials accidents and incidents.
(2) For the purposes of this subsection the Secretary, after consultation with interested organizations, shall--
    (A) identify regions or locations in which fire departments or other organizations which provide emergency response to hazardous materials transportation accidents and incidents are in need of hazardous materials training; and
    (B) prioritize such needs and develop a means for identifying additional specific training needs.

(3) Funds granted to an organization under this subsection shall only be used--
    (A) to train instructors to conduct hazardous materials response training programs;
    (B) to purchase training equipment used exclusively to train instructors to conduct such training programs; and

(C) to disseminate such information and materials as are necessary for the conduct of such training programs.

(4) The Secretary may only make a grant to an organization under this subsection in a fiscal year if the organization enters into an agreement with the Secretary to train instructors to conduct hazardous materials response training programs in such fiscal year that will use--

(A) a course or courses developed or identified under section 5115 of this title; or

(B) other courses which the Secretary determines are consistent with the objectives of this subsection; for training individuals with statutory responsibility to respond to accidents and incidents involving hazardous materials. Such agreement also shall provide that training courses shall be open to all such individuals on a nondiscriminatory basis.

(5) The Secretary may impose such additional terms and conditions on grants to be made under this subsection as the Secretary determines are necessary to protect the interests of the United States and to carry out the objectives of this subsection.

Sec. 5121. Administrative

(g) Grants and Cooperative Agreements.--The Secretary may enter into grants and cooperative agreements with a person, agency, or instrumentality of the United States, a unit of State or local government, an Indian tribe, a foreign government (in coordination with the Department of State), an educational institution, or other appropriate entity--

(1) to expand risk assessment and emergency response capabilities with respect to the security of transportation of hazardous material;

(2) to enhance emergency communications capacity as determined necessary by the Secretary, including the use of integrated, interoperable emergency communications technologies where appropriate;

(3) to conduct research, development, demonstration, risk assessment, and emergency response planning and training activities; or

(4) to otherwise carry out this chapter.

Sec. 5125. Preemption

(a) General.--Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if--

(1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or

(2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation

prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.

(b) Substantive Differences.—

(1) Except as provided in subsection (c) of this section and unless authorized by another law of the United States, a law, regulation, order, or other requirement of a State, political subdivision of a State, or Indian tribe about any of the following subjects, that is not substantively the same as a provision of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security, is preempted:

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

(E) the designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing a package, container, or packaging component that is represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.

(2) If the Secretary prescribes or has prescribed under section 5103(b), 5104, 5110, or 5112 of this title or prior comparable provision of law a regulation or standard related to a subject referred to in paragraph (1) of this subsection, a State, political subdivision of a State, or Indian tribe may prescribe, issue, maintain, and enforce only a law, regulation, standard, or order about the subject that is substantively the same as a provision of this chapter or a regulation prescribed or order issued under this chapter. The Secretary shall decide on and publish in the Federal Register the effective date of section 5103(b) of this title for any regulation or standard about any of those subjects that the Secretary prescribes. The effective date may not be earlier than 90 days after the Secretary prescribes the regulation or standard nor later than the last day of the 2-year period beginning on the date the Secretary prescribes the regulation or standard.

(3) If a State, political subdivision of a State, or Indian tribe imposes a fine or penalty the Secretary decides is appropriate for a violation related to a subject referred to in paragraph (1) of this subsection, an additional fine or penalty may not be imposed by any other authority.

(c) Compliance with Section 5112(b) Regulations.-

(1) Except as provided in paragraph (2) of this subsection, after the last day of the 2-year period beginning on the date a regulation is prescribed under section 5112(b) of this title, a State or Indian tribe may establish, maintain, or enforce a highway routing designation over which hazardous material may or may not be

transported by motor vehicles, or a limitation or requirement related to highway routing, only if the designation, limitation, or requirement complies with section 5112(b).

(2) (A) A highway routing designation, limitation, or requirement established before the date a regulation is prescribed under section 5112(b) of this title does not have to comply with section 5112(b)(1)(B), (C), and (F).

(B) This subsection and section 5112 of this title do not require a State or Indian tribe to comply with section 5112(b)(1)(I) if the highway routing designation, limitation, or requirement was established before November 16, 1990.

(C) The Secretary may allow a highway routing designation, limitation, or requirement to continue in effect until a dispute related to the designation, limitation, or requirement is resolved under section 5112(d) of this title.

(d) Decisions on Preemption.—

(1) A person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision, or tribe may apply to the Secretary, as provided by regulations prescribed by the Secretary, for a decision on whether the requirement is preempted by subsection (a), (b)(1), or (c) of this section or section 5119(e). The Secretary shall publish notice of the application in the Federal Register. The Secretary shall issue a decision on an application for a determination within 180 days after the date of the publication of the notice of having received such application, or the Secretary shall publish a statement in the Federal Register of the reason why the Secretary's decision on the application is delayed, along with an estimate of the additional time necessary before the decision is made. After notice is published, an applicant may not seek judicial relief on the same or substantially the same issue until the Secretary takes final action on the application or until 180 days after the application is filed, whichever occurs first.

(2) After consulting with States, political subdivisions of States, and Indian tribes, the Secretary shall prescribe regulations for carrying out paragraph (1) of this subsection.

(3) Subsection (a) of this section does not prevent a State, political subdivision of a State, or Indian tribe, or another person directly affected by a requirement, from seeking a decision on preemption from a court of competent jurisdiction instead of applying to the Secretary under paragraph (1) of this subsection.

(e) Waiver of Preemption.--A State, political subdivision of a State, or Indian tribe may apply to the Secretary for a waiver of preemption of a requirement the State, political subdivision, or tribe acknowledges is preempted by subsection (a), (b)(1), or (c) of this section or section 5119(b). Under a procedure the Secretary prescribes by regulation, the Secretary may waive preemption on deciding the requirement--

(1) provides the public at least as much protection as do requirements of this chapter and regulations prescribed under this chapter; and

(2) is not an unreasonable burden on commerce.

(f) Fees.—

(1) A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

(2) A State or political subdivision thereof or Indian tribe that levies a fee in connection with the transportation of hazardous materials shall, upon the Secretary's request, report to the Secretary on--

(A) the basis on which the fee is levied upon persons involved in such transportation;

(B) the purposes for which the revenues from the fee are used;

(C) the annual total amount of the revenues collected from the fee; and

(D) such other matters as the Secretary requests.

(g) Application of Each Preemption Standard.--Each standard for preemption in subsection (b), (c)(1), or (d), and in section 5119(b), is independent in its application to a requirement of a State, political subdivision of a State, or Indian tribe.

(h) Non-Federal Enforcement Standards.--This section does not apply to any procedure, penalty, required mental state, or other standard utilized by a State, political subdivision of a State, or Indian tribe to enforce a requirement applicable to the transportation of hazardous material.

Sec. 5126. Relationship to other laws

(a) Contracts.--A person under contract with a department, agency, or instrumentality of the United States Government that transports hazardous material, or causes hazardous material to be transported, or designs, manufactures, fabricates, inspects, marks, maintains, reconditions, repairs, or tests a package, container, or packaging component that is represented as qualified for use in transporting hazardous material shall comply with this chapter, regulations prescribed and orders issued under this chapter, and all other requirements of the Government, State and local governments, and Indian tribes (except a requirement preempted by a law of the United States) in the same way and to the same extent that any person engaging in that transportation, designing, manufacturing, fabricating, inspecting, marking, maintaining, reconditioning, repairing, or testing that is in or affects commerce must comply with the provision, regulation, order, or requirement.

(b) Nonapplication.--This chapter does not apply to--

(1) a pipeline subject to regulation under chapter 601 of this title; or

(2) any matter that is subject to the postal laws and regulations of the United States under this chapter or title 18 or 39.

Sec. 5127. Judicial review

(a) Filing and Venue.--Except as provided in section 20114(c), a person adversely affected or aggrieved by a final action of the Secretary under this chapter may petition for review of the final action in the United States Court of Appeals for the District of Columbia or in the court of appeals for the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not more than 60 days after the Secretary's action becomes final.

(b) Judicial Procedures.--When a petition is filed under subsection (a), the clerk of the court immediately shall send a copy of the petition to the Secretary. The Secretary shall file with the court a record of any proceeding in which the final action was issued, as provided in section 2112 of title 28.

(c) Authority of Court.--The court has exclusive jurisdiction, as provided in subchapter II of chapter 5 of title 5, to affirm or set aside any part of the Secretary's final action and may order the Secretary to conduct further proceedings.

(d) Requirement for Prior Objection.--In reviewing a final action under this section, the court may consider an objection to a final action of the Secretary only if the objection was made in the course of a proceeding or review conducted by the Secretary or if there was a reasonable ground for not making the objection in the proceeding.

Sec. 5128. Authorizations of appropriations

(a) In General.--In order to carry out this chapter (except sections 5107(e), 5108(g)(2), 5113, 5115, 5116, and 5119), the following amounts are authorized to be appropriated to the Secretary:
- (1) For fiscal year 2005, $24,940,000.
- (2) For fiscal year 2006, $29,000,000.
- (3) For fiscal year 2007, $30,000,000.
- (4) For fiscal year 2008, $30,000,000.

(b) Hazardous Materials Emergency Preparedness Fund.--There shall be available to the Secretary, from the account established pursuant to section 5116(i), for each of fiscal years 2005 through 2008 the following:
- (1) To carry out section 5115, $200,000.
- (2) To carry out sections 5116(a) and (b), $21,800,000 to be allocated as follows:
  - (A) $5,000,000 to carry out section 5116(a).
  - (B) $7,800,000 to carry out section 5116(b).
  - (C) Of the amount provided for by this paragraph for a fiscal year in excess of the sub-allocations in subparagraphs (A) and (B)--
    - (i) 35 percent shall be used to carry out section 5116(a); and

(ii) 65 percent shall be used to carry out section 5116(b),except that the Secretary may increase the proportion to carry out section 5116(b) and decrease the proportion to carry out section 5116(a) if the Secretary determines that such reallocation is appropriate to carry out the intended uses of these funds as described in the applications submitted by States and Indian tribes.

(3) To carry out section 5116(f), $150,000.
(4) To publish and distribute the Emergency Response Guidebook under section 5116(i)(3), $625,000.
(5) To carry out section 5116(j), $1,000,000.

(c) Hazmat Training Grants.--There shall be available to the Secretary, from the account established pursuant to section 5116(i), to carry out section 5107(e) $4,000,000 for each of fiscal years 2005 through 2008.

(d) Issuance of Hazmat Licenses.--There are authorized to be appropriated for the Department of Transportation such amounts as may be necessary to carry out section 5103a.

(e) Credits to Appropriations.--The Secretary may credit to any appropriation to carry out this chapter an amount received from a State, Indian tribe, or other public authority or private entity for expenses the Secretary incurs in providing training to the State, authority, or entity.

(f) Availability of Amounts.--Amounts made available by or under this section remain available until expended.

RESTATEMENT OF ACCORD BETWEEN THE

PUEBLO OF SAN ILDEFONSO, A FEDERALLY RECOGNIZED INDIAN TRIBE,

AND THE

UNITED STATES DEPARTMENT OF ENERGY

I. RECITAL

This Restatement, effective this 20 day of OCTOBER, 2005, amends in its entirety the ACCORD between the Pueblo of San Ildefonso and the United States Department of Energy, dated December 15, 1992, and is in accordance with Paragraph VIII of said ACCORD. The intent of this Amendment is to update and reaffirm the principles, goals and mutual understandings originally outlined in said ACCORD.

II. PREAMBLE AND GUIDING PRINCIPLES

This ACCORD is executed between the Pueblo of San Ildefonso, a Federally recognized Indian Tribe, hereafter referred to as "the Pueblo," through its Governor, and the United States Department of Energy, an Executive Department of the United States of America, hereafter referred to as "DOE," through its Secretary, in order to better achieve mutual goals through an improved relationship between the parties. The Secretary has the authority for carrying out Department of Energy missions and functions authorized by the Atomic Energy Act of 1954 and has overall administrative responsibility for the Los Alamos National Laboratory (LANL). His execution of this ACCORD is binding on the Department of Energy as a whole.

This ACCORD provides the framework for a government-to-government relationship between the parties and includes procedures to assure implementation of that relationship.

Each party to this ACCORD respects the sovereignty of the other. Consistent with Federal laws, DOE acknowledges that the sovereign character of the Pueblo gives it authority to govern and DOE recognizes and respects the continued existence of the Pueblo's values and culture in the exercise of its sovereignty.

DOE has authority to enter into this ACCORD and to conduct negotiations concerning issues of mutual concern with the Pueblo pursuant to Public Law 95-91 and other applicable laws. The Pueblo has authority, as recognized by the United States of America, to enter into this ACCORD and conduct negotiations concerning issues of mutual concern with DOE.

DOE recognizes that a trust relationship derives from a historical relationship between the Federal government and American Indian Tribes as expressed in certain treaties and Federal Indian law.

DOE will consult with the Pueblo to assure that tribal rights, responsibilities, and concerns are addressed prior to the DOE taking actions, making decisions, or implementing programs that may affect the Pueblo.

Consistent with Federal laws, including, but not limited to, the American Indian Religious Freedom Act (Public Law 95-341), DOE, through its Los Alamos Site Office and other DOE organizations, including DOE Headquarters as appropriate, will consult with the Pueblo about the potential impacts of proposed actions on the Pueblo and its cultural, religious and environmental resources and will avoid unnecessary interference with traditional practices.

DOE will work with the Pueblo to identify and seek to remove impediments to working directly and effectively with the Pueblo on DOE programs.

DOE will work with other Federal agencies and State and local agencies that have responsibilities related to activities at LANL to clarify the roles and responsibilities of such organizations as they relate to the Pueblo. DOE will also work with its contractors and subcontractors, including its management and operations contractor, and others, that have responsibilities related to activities at LANL to clarify their roles and responsibilities as they relate to the Pueblo.

DOE will incorporate the principles of this ACCORD into its long-term planning and management processes.

Finally, the parties to this ACCORD share a desire for a complete understanding between DOE and the Pueblo reflecting a full government-to-government relationship and the parties will work with all elements of DOE and the Pueblo to achieve such an understanding.

III. DEFINITIONS

"ACCORD," shall mean this written agreement stating the basic understandings and commitments of the parties and describing the general framework for their working together.

"GOVERNOR," is the Governor of the Pueblo of San Ildefonso.

"LOS ALAMOS NATIONAL LABORATORY or LANL," is a facility of the Department of Energy located in Los Alamos County, New Mexico, which is operated pursuant to a contract with the Department of Energy.

"LOS ALAMOS-PUEBLO PROJECT," is the working group or team composed of authorized representatives of the Pueblo of San Ildefonso, Santa Clara Pueblo, Cochiti Pueblo, Jemez Pueblo and DOE. Participants in the Los Alamos-Pueblo Project shall coordinate activities and assist in administering programs developed to implement activities related to the purposes and objectives of this ACCORD, including associated funding provided by DOE.

"SECRETARY," is the Secretary of the United States Department of Energy.

"TRIBAL COUNCIL," is the Tribal Council of Pueblo of San Ildefonso, a sovereign Indian Nation with a traditional form of government duly recognized by the United States of America.

IV. PARTIES

The parties of this ACCORD are DOE and the Pueblo.

V. PURPOSE AND OBJECTIVES

This ACCORD formalizes the government-to-government relationship between DOE and the Pueblo, and is consistent with Executive Order 13175, Consultation and Coordination with Indian Tribal Government, November 6, 2000, Executive Order 13007, Indian Sacred Sites, May 24, 1996, Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, February 11, 1994, Presidential Memorandum regarding Government-to-Government Relationships with Native American Tribal Governments, dated September 23, 2004, the U.S. Department of Energy American Indian & Alaska Native Tribal Government Policy, August 22, 2001, and DOE Order 1230.2, issued April 8, 1992. This relationship respects the sovereignty of the Pueblo and affirms the trust relationship of the United States of America towards the Pueblo as a Federally recognized tribe.

This ACCORD is intended to build confidence and trust and to improve communication between the parties in the government-to-government relationship by outlining the process for implementing the relationship and by institutionalizing the relationship within the organizations represented by the parties.

This ACCORD provides the foundation and framework for developing agreements between the parties to address and resolve specific issues of mutual concern.

This ACCORD will assure that the Pueblo has access to information, which is not otherwise restricted by law, and resources necessary for the Pueblo to participate meaningfully in DOE activities prior to DOE taking actions, making decisions, or implementing programs that may affect the interests of the Pueblo.

VI. IMPLEMENTATION PROCESS AND RESPONSIBILITIES

The parties have established the Los Alamos-Pueblo Project to carry out the purposes and objectives of this ACCORD. The parties to the Los Alamos-Pueblo Project agree to meet regularly to establish goals and objectives and delineate tasks relating to implementation of the principles of this ACCORD and to identify obstacles to the achievement of those goals, objectives and tasks.

The parties agree to work toward more efficient and beneficial communications to enhance participation by the Pueblo in DOE actions, including, but not limited to, on-going activities, long-range planning, and decisions and their implementation, which may affect the interests of the Pueblo.

DOE acknowledges that the Pueblo of San Ildefonso is the only Native American community that shares a common boundary with a National Nuclear Weapons Research facility (LANL). DOE further acknowledges that in order to meaningfully participate in DOE actions and the Los Alamos-Pueblo Project, the Pueblo will need to gain access to accurate information concerning LANL and other related DOE activities, obtain human and technological resources to independently verify the validity of the information

received from the Laboratory and identify possible consequences to the Pueblo of planned DOE actions, and obtain the resources to respond to DOE actions affecting the interests of the Pueblo. DOE also acknowledges that to accomplish these goals the Pueblo will require access to monetary resources beyond that generated by the Pueblo. DOE agrees to pursue continued and adequate funding for the Pueblo for these purposes.

The parties recognize that implementation of this ACCORD will require a comprehensive effort to educate members and officials of the Pueblo and agents, employees, contractors, and subcontractors of DOE and other interested Federal, State, and County agencies of the government-to-government relationship between DOE and the Pueblo. The parties agree to develop strategies for carrying out this educational effort.

The parties recognize that a key principle of their relationship is a requirement that individuals working to resolve issues of mutual concern are accountable to act in a manner consistent with this ACCORD. In furtherance of this principle, the Manager of the DOE Los Alamos Site Office shall be accountable to the Secretary, for implementation of this ACCORD. The Pueblo representative is accountable to the Pueblo's Tribal Council and the Governor.

As a component of the system of accountability, the parties agree to review and evaluate, on an annual basis, the ACCORD and their ability to implement the government-to-government relationship and to prepare for the Secretary and the Tribal Council an annual report summarizing this evaluation.

The Secretary shall, in good faith, use his executive discretion to help implement the government-to-government relationship. The Governor shall, in good faith, use his discretion to implement the government-to-government relationship.

VII. RESERVATION OF RIGHTS

In executing this ACCORD, neither party waives any rights, including, but not limited to, treaty rights, immunities, including sovereign immunities, or jurisdictional defenses or defenses based on other laws protecting status. Neither does this ACCORD diminish any rights or protections afforded other Indian persons or entities under state or Federal law.

Nothing in this ACCORD creates, nor shall be construed to create, any right of action by either party against the other.

VIII. DISPUTES

While the relationship described by this ACCORD increases the ability of the parties to solve problems, it likely will not resolve all issues. Therefore, the ACCORD does not affect the right of each party to elevate any disputed issue to the higher decision-making authority of another party, and to defer to the decision-making authority, including, when appropriate, to the Secretary, the Tribal Council, or the Governor.

IX. AMENDMENT

This ACCORD may be amended by mutual written agreement between the Pueblo and DOE.

NOW, THEREFORE, the signatory parties have executed this ACCORD on the dates shown by their signatures and agreed to be duly bound by its commitments as of the effective date stated hereinabove.

PUEBLO DE SAN ILDEFONSO

BY: _____ **DATE:** 10/20/05

Dale Martinez, Governor

UNITED STATES DEPARTMENT OF ENERGY

BY: _____ **DATE:** October 18, 2005

Samuel W. Bodman, Secretary
United States Department of Energy

MEMORANDUM OF AGREEMENT
PURSUANT TO 36 CFR PART 800 BETWEEN THE TENNESSEE VALLEY AUTHORITY
AND THE TENNESSEE STATE HISTORIC PRESERVATION OFFICER
KNOX COUNTY, TENNESSEE

WHEREAS, the Knoxville Utilities Board (Applicant) has requested a permit under Section 26a of the *Tennessee Valley Authority* (TVA) *Act* to install a new sewer line segment and replace the existing portion of the line that crosses the Tennessee River on Fort Loudoun Reservoir (Tennessee River Mile 647.6); and

WHEREAS, TVA, in consultation with the Tennessee State Historic Preservation Officer (TN SHPO), has determined the area of potential effect (APE) to be the sewer line route and temporary/permanent construction easements related to the pipeline installation (Appendix A); and

WHEREAS, identification and evaluation studies have been conducted within APE (Appendix B); and

WHEREAS, TVA and TN SHPO (together, the "Signatories") agree that archaeological site 40KN317 is eligible for listing on the National Register of Historic Places (NRHP); and

WHEREAS, TVA, in consultation with TN SHPO, has determined that the undertaking will adversely affect archaeological site 40KN317 (Appendix A); and

WHEREAS, TVA, in consultation with TN SHPO, has determined that the undertaking will not affect any archaeological site listed on or eligible for listing on NRHP other than 40KN317; and

WHEREAS, TVA, in consultation with TN SHPO, has determined that the undertaking will not affect historic structures listed on or eligible for listing on NRHP; and

WHEREAS, TVA has notified the Advisory Council on Historic Preservation (Council) regarding the adverse effect finding pursuant to 36 CFR § 800.6(a)(1); and

WHEREAS, the Applicant has been invited to be a Signatory to this agreement and will be responsible for all costs necessary for implementation of this agreement; and

WHEREAS, TVA has consulted with Eastern Band of Cherokee Indians, Cherokee Nation, United Keetoowah Band of Cherokee Indians in Oklahoma, The Chickasaw Nation, Muscogee (Creek) Nation of Oklahoma, Kialegee Tribal Town, Thlopthlocco Tribal Town, Alabama Quassarte Tribal Town, Alabama-Coushatta Tribe of Texas, Shawnee Tribe, Absentee-Shawnee Tribe of Oklahoma, Eastern Shawnee Tribe of Oklahoma, and Choctaw Nation of Oklahoma, and has invited them to participate with this undertaking (Appendix A); and

WHEREAS, the Eastern Band of Cherokee Indians, United Keetoowah Band of Cherokee Indians, and Alabama-Coushatta Tribe of Texas (together with the Applicant, the "Invited Signatories") have participated in the consultation and TVA has invited them to be signatories to this agreement; and

WHEREAS, there is no evidence that human remains, associated or unassociated funerary objects, sacred objects, or objects of cultural patrimony (collectively termed cultural items) are present at 40KN317; and

WHEREAS, the possibility still exists that cultural items could be inadvertently discovered during mitigation and construction activities associated with this undertaking; and

WHEREAS, a Treatment Plan has been developed in consultation with Signatories and Invited Signatories and is made a part of this agreement as Appendix C, Treatment Plan.

NOW THEREFORE, TVA, the Applicant and TN SHPO agree that the undertaking shall be implemented in accordance with the following stipulations to satisfy TVA's responsibilities under Section 106 of the *National Historic Preservation Act (NHPA)*. The TVA Federal Preservation Officer, or the designee thereof, shall act for TVA in all matters concerning the administration of this agreement.

STIPULATIONS

TVA shall ensure that the following stipulations are carried out before the commencement of any ground-disturbing activities that could affect historic properties.

1. TREATMENT

The Treatment Plan, attached as Appendix C, has been developed in consultation with the Signatories and Invited Signatories. This Treatment Plan consists of avoidance and data recovery at Site 40KN317. Applicant shall comply with the Treatment Plan.

2. REPORTS

The surveys required under the Treatment Plan will be carried out in a manner consistent with the Secretary of the Interior's (Secretary) *Standards and Guidelines for Identification* (48 FR 44720-44724) and the TN SHPO *Standards and Guidelines for Architectural and Archaeological Resource Management Studies*.

A written report of the survey results shall be submitted by the Applicant to TVA for distribution to the Signatories and Invited Signatories for review and comment. Recipients will be allowed thirty (30) days for review and comment. Failure to respond within the allotted number of days will indicate concurrence with the findings of the survey report.

3. TREATMENT OF HUMAN REMAINS AND FUNERARY OBJECTS

The Applicant, in consultation with TVA, TN SHPO and federally recognized Indian tribes that attach religious and cultural significance to NRHP-eligible properties (concerned Indian tribes), shall ensure that the treatment of any human remains and cultural items discovered within the project's APE complies with all applicable state and federal laws. Should human remains be encountered during archaeological properties investigations hereunder or later discovered post-review, the remains will be treated with respect to the deceased, and shall be protected from the

a. If Stipulations 1 to 4 have not been implemented within two (2) years from the date of this agreement's execution, this agreement shall be considered null and void, unless the Signatories have agreed in writing as provided in Paragraph 5.b. (below) to an extension for carrying out its terms. Upon the agreement becoming null and void, Signatories and Invited Signatories will resume consultation pursuant to 36 CFR Part 800.

b. If the implementation of Stipulations 1 to 4 has not commenced within two (2) years from the date of this agreement's execution, Signatories and Invited Signatories shall review the agreement to determine whether the agreement should be extended. If an extension is deemed necessary, Signatories and Invited Signatories will consult in accordance with 36 CFR § 800.6(c) to make appropriate revisions to the agreement.

c. The Signatories or Invited Signatories to this agreement may agree to amend the terms of the agreement. Such amendment shall be effective upon the signatures of all Signatories to this agreement, and the amendment shall be appended to the agreement as an attachment.

d. Should any Signatory and Invited Signatory object within thirty (30) days after receipt of any plans, specifications, contracts, or other documents provided for review pursuant to this agreement, TVA shall consult with the objecting party to resolve the objection.

e. If any Signatory to this agreement determines that the terms of the agreement cannot be or are not being carried out, the Signatories shall consult to seek an amendment to the agreement. If the agreement is not amended, then any Signatory may terminate the agreement. If the agreement is so terminated, TVA shall ensure that historic properties within the APE for the undertaking are protected in accordance with Section 106 of NHPA until such time as TVA may enter into a new Memorandum of Agreement with the Signatories or request the comments of the Council pursuant to 36 CFR § 800.7(a).

Execution of this agreement by TVA and TN SHPO, and implementation of its terms, evidence that TVA has taken into account the effects of the undertaking on historic properties, and that TVA has complied with its obligations under Section 106 of *NHPA*.

time of discovery from further construction activities pending consultation to resolve treatment of such remains.

The Applicant shall immediately notify the Knox County Coroner, the State Archaeologist, TVA, and TN SHPO should any human remains and/or cultural items be encountered in connection with any activity covered by this agreement. TVA will notify the concerned Indian tribes within seventy two (72) hours of being informed of the presence of human remains and/or cultural items. TVA, in consultation with concerned Indian tribes, will treat these human remains and/or cultural items within seven (7) calendar days. Whenever and wherever feasible, human remains will be preserved-in-place.

The Applicant, in consultation with TVA, TN SHPO, and concerned Indian tribes, shall ensure that those human remains and/or cultural items are treated in a manner that is consistent with the Council's *Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects* (2007). Further, this treatment will be conducted in accordance with applicable provisions of Tennessee state law, including Tennessee Code Annotated (T.C.A.) § 46-4-101 *et seq.* (*Termination of Use of Land as a Cemetery*), T.C.A. § 11-6-116 (*Excavation of Areas Containing Native American Indian Remains*), T.C.A. § 11-6-119 (*Reburial of Human Remains or Native American Burial Objects following Discovery or Confiscation*), and Tennessee Rules and Regulations Chapter 0400-9-1 (*Native American Indian Cemetery Removal and Reburial*). (Appendix D); and in accordance with the policies of the culturally affiliated Indian tribes regarding the treatment of human remains and funerary objects, if such human remains are of Native American origin and cultural affiliation can be determined.

Decisions for determining the treatment of Native American human remains and cultural items identified during data recovery and/or project construction will be based on the following:

1. Preference will be to avoid human remains and cultural items. Avoidance would require no disturbance or any activity that would impact or affect the context of a burial.
2. Human remains and cultural items that can neither be avoided nor preserved-in-place, due to the necessity of excavation or construction activity, must be relocated. These human remains and cultural items will be re-interred in a new location to be determined in consultation with TVA, the Applicant, TN SHPO, and concerned Indian tribes. The relocated human remains and cultural items will be protected from any further disturbance.

4. TIMETABLE FOR COMPLIANCE

a. TVA and the Applicant shall ensure that Stipulations 1-3 of this agreement are met before commencement of any ground-disturbing activities within the temporary/permanent construction easements to the pipeline installation at 40KN317.

b. Throughout this agreement, unless otherwise stated, the Signatories and Invited Signatories shall have thirty (30) days to review and comment on all reports concerning investigations of historic properties. Comments received from the Signatories and Invited Signatories shall be taken into consideration in preparing final plans. TVA will supply copies of the final reports and data recovery plans to the Signatories and Invited Signatories.

5. ADMINISTRATIVE CONDITIONS

SIGNATORY

THE TENNESSEE STATE HISTORIC PRESERVATION OFFICER

By: E. Patrick McIntyre Jr. Date: 12/14/07

E. Patrick McIntyre, Jr., State Historic Preservation Officer

SIGNATORY
TENNESSEE VALLEY AUTHORITY

By: Anda A Ray Date: 11-25-09
Anda A. Ray, Senior Vice President, Office of Environment and Research and Senior Policy Officer

Executive Order 13175--Consultation and Coordination with Indian Tribal Governments

November 6, 2000

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions.

For purposes of this order:

a. "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.
b. "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.
c. "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).
d. "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles.

In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

a. The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.
b. Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.
c. The United States recognizes the right of Indian tribes to self- government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria.

In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

a. Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.
b. With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.
c. When undertaking to formulate and implement policies that have tribal implications, agencies shall:
    1. encourage Indian tribes to develop their own policies to achieve program objectives;
    2. where possible, defer to Indian tribes to establish standards; and
    3. in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. Special Requirements for Legislative Proposals.

Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation.

a. Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.
b. To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:
    1. funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or
    2. the agency, prior to the formal promulgation of the regulation,
c. consulted with tribal officials early in the process of developing the proposed regulation;
d. in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and
e. makes available to the Director of OMB any written communications submitted to the agency by tribal officials.
f. To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,
    1. consulted with tribal officials early in the process of developing the proposed regulation;
    2. in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and
    3. makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

g. On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

a. Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.
b. Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.
c. Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.
d. This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. Accountability.

a. In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.
b. In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.
c. Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies.

Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions.

a. This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.
b. This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).
c. Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.
d. This order shall be effective 60 days after the date of this order.

Sec. 10. Judicial Review.

This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

William J. Clinton

The White House,

November 6, 2000.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release November 5, 2009

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Tribal Consultation

The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies (agencies) are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.

History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.

My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175. Accordingly, I hereby direct each agency head to submit to the Director of the Office of Management and Budget (OMB), within 90 days after the date of this memorandum, a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175. This plan shall be developed after consultation by the agency with Indian tribes and tribal officials as defined in Executive Order 13175. I also direct each agency head to submit to the Director of the OMB, within 270 days after the date of this memorandum, and annually thereafter, a progress report on the status of each action included in its plan together with any proposed updates to its plan.

Each agency's plan and subsequent reports shall designate an appropriate official to coordinate implementation of the plan and preparation of progress reports required by this memorandum. The Assistant to the President for Domestic Policy and the Director of the OMB shall review agency plans and subsequent reports for consistency with the policies and directives of Executive Order 13175.

In addition, the Director of the OMB, in coordination with the Assistant to the President for Domestic Policy, shall submit to me, within 1 year from the date of this memorandum, a report on more (OVER) 2 the

implementation of Executive Order 13175 across the executive branch based on the review of agency plans and progress reports. Recommendations for improving the plans and making the tribal consultation process more effective, if any, should be included in this report.

The terms "Indian tribe," "tribal officials," and "policies that have tribal implications" as used in this memorandum are as defined in Executive Order 13175.

The Director of the OMB is hereby authorized and directed to publish this memorandum in the Federal Register.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Executive departments and agencies shall carry out the provisions of this memorandum to the extent permitted by law and consistent with their statutory and regulatory authorities and their enforcement mechanisms.

BARACK OBAMA

The Secretary of Energy
Washington, DC 20585

January 20, 2006

MEMORANDUM FOR HEADS OF DEPARTMENTAL ELEMENTS

FROM: SAMUEL W. BODMAN

SUBJECT: DOE American Indian and Alaska Natives Tribal Government Policy

I am committed to ensuring that the Department of Energy (DOE) meets its responsibilities to Indian Nations and works in a consistent manner with the government-to-government relationships between federally recognized tribes and the U.S. Government.

The attached American Indian and Alaska Natives Tribal Government Policy reaffirms that commitment and outlines the principles for the Department to follow. I am modifying this existing policy to provide for "periodic" summits.

I request that you be responsive to the Department's policy and look for ways to improve its implementation in order to ensure that all employees are aware of this Policy and its provisions. Tribal participation is frequently critical to DOE's decision-making processes.

If further guidance is needed, or if you have suggestions to improve the current policy, please contact Mr. Eric Ciliberti, Deputy Assistant Secretary for Intergovernmental Affairs, Office of Congressional and Intergovernmental Affairs, at (202) 586-4220.

Attachment

U.S. DEPARTMENT OF ENERGY AMERICAN INDIAN & ALASKA NATIVE TRIBAL GOVERNMENT POLICY

PURPOSE

This Policy sets forth the principles to be followed by the Department of Energy (DOE) to ensure an effective implementation of a government to government relationship with American Indian and Alaska Native tribal governments. This Policy is based on the United States Constitution, treaties, Supreme Court decisions, Executive Orders, statutes, existing federal policies, tribal laws, and the dynamic political relationship between Indian nations and the Federal government.[1] The most important doctrine derived from this relationship is the trust responsibility of the United States to protect tribal sovereignty and self-determination, tribal lands, assets, resources, and treaty and other federally recognized and reserved rights. This Policy provides direction to all Departmental officials, staff, and contractors regarding fulfillment of trust obligations and other responsibilities arising from Departmental actions which may potentially impact American Indian and Alaska Native traditional, cultural and religious values and practices; natural resources; treaty and other federally recognized and reserved rights.

BACKGROUND

Indian nations are sovereign with unique political and legal standing derived from a longstanding relationship as stated in the Purpose section of this document. The Indian nations retain an inherent right to self-governmental authority, and, therefore, Federal activities affecting self-governance rights and impacting upon trust resources require policy implementation in a knowledgeable and sensitive manner protective of tribal sovereignty and trust resources. The DOE released its Indian Policy in 1992 and subsequently issued DOE Order 1230.2 that established the responsibilities and roles of the DOE management in carrying out its policy. At the request of Indian nations in 1998, the Secretary of Energy agreed to revise the 1992 American Indian Policy and effect comprehensive implementation. This revision was based in part on comments from Indian nations and their leadership and replaces the 1992 Policy that is part of the 1992 Order.

DEFINITIONS

Indian Nation means any American Indian or Alaska Native Tribe, Band, Nation, Pueblo, or other organized group or community, including any Alaska Native village [as defined or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)], which is acknowledged by the Federal government to constitute a tribe with a government to government relationship with the United States and eligible for the programs, services, and other relationships established by the United States for indigenous peoples because of their status as American Indian and Alaska Native tribes, Bands, Nations, Pueblos or communities.

American Indian and Alaska Native Tribal Government means the recognized government of an Indian nation and any affiliated or component band government of such nation that has been determined eligible for specific services by Congress or officially recognized in 25 CFR Part 83, "Indian Entities Recognized and Eligible to

Receive Services from the United States Bureau of Indian Affairs," as printed in the Federal Register.

Trust Responsibility includes, but is not limited to: promotion and protection of tribal treaty rights, federally recognized reserved rights, and other federally recognized interests of the beneficiary American Indian and Alaska Native nations; determining, documenting, notifying, and interacting with tribal governments with regard to the impact of Departmental programs, policies, and regulations to protect American Indian and Alaska Native traditional and cultural lifeways, natural resources, treaty and other federally recognized and reserved rights.

Consultation includes, but is not limited to: prior to taking any action with potential impact upon American Indian and Alaska Native nations, providing for mutually agreed protocols for timely communication, coordination, cooperation, and collaboration to determine the impact on traditional and cultural lifeways, natural resources, treaty and other federally reserved rights involving appropriate tribal officials and representatives throughout the decision-making process, including final decision-making and action implementation as allowed by law, consistent with a government to government relationship.

Cultural Resources include, but are not limited to: archaeological materials (artifacts) and sites dating to the prehistoric, historic, and ethnohistoric periods that are located on the ground surface or are buried beneath it; natural resources, sacred objects, and sacred sites that have importance for American Indian and Alaska Native peoples; resources that the American Indian and Alaska Native nations regard as supportive to their cultural and traditional lifeways.

Treaty and Trust Resources and Resource Interests include, but are not limited to: natural and other resources specified and implicit in treaties, statutes, and agreements, or lands or other resources held in trust by the United States for the benefit of tribes or individual Indian beneficiaries, including land, water, timber, fish, plants, animals, and minerals. In many instances, Indian nations retain hunting, fishing, and gathering rights, and access to these areas and resources on lands or waters that are outside of tribally-owned lands.

POLICY PRINCIPLES

I. DOE RECOGNIZES THE FEDERAL TRUST RELATIONSHIP AND WILL FULFILL ITS TRUST RESPONSIBILITIES TO AMERICAN INDIAN AND ALASKA NATIVE NATIONS.

The DOE will be diligent in fulfilling its federal trust obligations to American Indian and Alaska Native governments in policy implementation and program management activities. The DOE will pursue actions that uphold treaty and other federally recognized and reserved rights of the Indian nations and peoples. The Department recognizes that some Tribes have treaty-protected and other federally recognized rights to resources and

resource interests located within reservation boundaries, aboriginal territories, and outside reservation and jurisdictional boundaries, and will, to the extent of its authority, protect and promote these treaty and trust resources and resource interests, and related concerns in these areas.

When internal policies, regulations, and statutes, or other barriers prohibit or hinder the DOE trust protection actions or participation in eligible program initiatives, the Secretary will direct the agency to seek corrective protection measures, and tribal government program inclusion.

The DOE is committed to protecting treaty compliance and trust interests of Indian nations during interactions with state and local governments and other stakeholders with regard to DOE actions impacting upon American Indian and Alaska Native governments and peoples. The Department will inform and educate state and local governmental entities and other stakeholders about the DOE's role and responsibilities regarding its trust relationship with Indian nations.

The DOE will seek to determine the impacts of Departmental- proposed legislation upon Indian nations, in extensive consultation and collaboration with tribes. The Secretary will implement this notice and consultation effort consistent with the intent and purpose of this Policy.

II. THE DEPARTMENT RECOGNIZES AND COMMITS TO A GOVERNMENT TO GOVERNMENT RELATIONSHIP AND WILL INSTITUTE APPROPRIATE PROTOCOLS AND PROCEDURES FOR PROGRAM AND POLICY IMPLEMENTATION.

The DOE recognizes Tribal governments as sovereign entities with primary authority and responsibility for the protection of the health, safety and welfare of their citizens. The Department will recognize the right of each Indian nation to set its own priorities and goals in developing, protecting, and managing its natural and cultural resources. This recognition includes separate and distinct authorities that are independent of state governments.

The Department, in keeping with the principle of self-governance, recognizes American Indian and Alaska Native governments as necessary and appropriate non-Federal parties in the federal decision-making process regarding actions potentially impacting Indian country energy resources, environments, and the health and welfare of the citizens of Indian nations. The DOE will establish protocols for communication between tribal leaders, the Secretary, and federal officials. The DOE will ensure consistent application of program and policy implementation with Indian nations through periodic review, assessment, and collaboration with tribal representatives to audit protocol systems. Principles of consistent policy implementation will be tempered with consideration of the diverse cultures and ideals of the Indian nations.

III. THE DEPARTMENT WILL ESTABLISH MECHANISMS FOR OUTREACH, NOTICE, AND CONSULTATION, AND ENSURE INTEGRATION OF INDIAN NATIONS INTO DECISION-MAKING PROCESSES.

To ensure protection and exercise of tribal treaty and other federally recognized rights, the DOE will implement a proactive outreach effort of notice and consultation regarding current and proposed actions affecting tribes, including appropriate fiscal year budget matters. This effort will include timely notice to all potentially impacted Indian nations in the early planning stages of the decision-making process, including predraft consultation, in the development of regulatory policies on matters that significantly or uniquely affect their communities. As appropriate, the DOE will provide delivery of technical and financial assistance related to DOE-initiated regulatory policy, identifying programmatic impacts, and determining the significance of the impact. The DOE will continue to conduct a dialogue with Indian nations for long and short term decision-making when DOE actions impact Indian nations. The DOE will comply with the Consultation and Coordination With Indian Tribal Governments Executive Order 13084, May 14, 1998, and the Government to Government Relations With Native American Tribal Governments Executive Memorandum, April 29, 1994.

The DOE will implement permanent workshops and programs for field and headquarters staff on American Indian and Alaska Native cultural awareness and tribal governance.

Due to the nature of the trust responsibility to tribal governments, performance reviews of consultation activities will be conducted, in collaboration with tribal governments.

IV. DEPARTMENT-WIDE COMPLIANCE WITH APPLICABLE FEDERAL CULTURAL RESOURCE PROTECTION AND OTHER LAWS AND EXECUTIVE ORDERS WILL ASSIST IN PRESERVATION AND PROTECTION OF HISTORIC AND CULTURAL SITES AND TRADITIONAL RELIGIOUS PRACTICES.

The Department will consult with any American Indian or Alaska Native tribal government with regard to any property to which that tribe attaches religious or cultural importance which might be affected by a DOE action. With regard to actions by DOE in areas not under DOE control or when an action of another federal agency takes place on DOE land, DOE will consult with tribes in accordance with this Policy. Such consultation will include tribal involvement in identifying and evaluating cultural resources including traditional cultural properties; facilitating tribal involvement in determining and managing adverse effects; collaboration in the development and signing of memoranda of understanding with DOE, when appropriate.

Departmental consultation will include the prompt exchange of information regarding identification, evaluation and protection of cultural resources. To the extent allowed by law, consultation will defer to tribal policies on confidentiality and management of cultural resources. Consultation will include matters regarding location and management methodology; repatriation and other disposition of objects and human remains; access to

sacred areas and traditional resources located on DOE lands, consistent with safety and national security considerations; and cultural resources impact assessment of potential loss to tribal communities.

The DOE will comply with current and forthcoming cultural resource protection laws and Executive Orders including Native American Graves Protection and Repatriation Act; Archaeological Resources Protection Act; American Indian Religious Freedom Act; National Historic Preservation Act; National Environmental Policy Act; Freedom of Information Act; Privacy Act; Indian Sacred Sites Executive Order 13007, May 24, 1996; Consultation and Coordination With Indian Tribal Governments Executive Order 13084, May 14, 1998; Government to Government Relations With Native American Tribal Governments Executive Memorandum, April 29, 1994; Tribal Colleges and Universities Executive Order 13021; Executive Order 12898 on Environmental Justice.

V. THE DEPARTMENT WILL INITIATE A COORDINATED DEPARTMENT-WIDE EFFORT FOR TECHNICAL ASSISTANCE, BUSINESS AND ECONOMIC SELF-DETERMINATION DEVELOPMENT OPPORTUNITIES, EDUCATION, AND TRAINING PROGRAMS.

The Department will implement a consistent national outreach and communication effort to inform tribal leaders and tribal program officials about access to internships and scholarships; availability of technical assistance and training opportunities; conventional and renewable energy development programs; related tribal business and individual member business enterprise, service-provider, and contracting opportunities.

The DOE recognizes the need for direct funding and technical assistance from applicable DOE-sponsored programs within the Department and the National Laboratories which deal with regulation, energy planning, and development of energy resources on tribal lands and Alaska Native site-controlled and trust lands.

The Department will provide information and outreach programs to tribal and individual member businesses on opportunities to participate, compete, and participate in renewable and conventional energy generation, transmission, distribution, marketing and energy services, grants, and contracts. The Department will assist in development of balanced, sustainable, and viable American Indian and Alaska Native communities by continuing to implement Title XXVI, Indian Energy Resources, of the National Energy Policy Act that provides for the promotion of resource development and energy integration.

The Secretary will create programs that encourage and support the establishment of federal, private, tribal and intertribal partnerships. The Department will provide assistance and coordinate with other federal agencies in the development of energy-related projects.

VI. THE SECRETARY OF ENERGY WILL CONDUCT PERIODIC SUMMITS WITH TRIBAL LEADERS FOR PERFORMANCE REVIEW OF POLICY IMPLEMENTATION AND ISSUE RESOLUTION.

The Secretary will engage tribal leaders in periodic dialogue, to discuss the Department's implementation of the American Indian and Alaska Native Policy. The dialogue will provide an opportunity for tribal leaders to assess policy implementation, program delivery, and discuss outreach and communication efforts, and other issues.

VII. THE DEPARTMENT WILL WORK WITH OTHER FEDERAL AGENCIES, AND STATE AGENCIES, THAT HAVE RELATED RESPONSIBILITIES AND RELATIONSHIPS TO OUR RESPECTIVE ORGANIZATIONS AS THEY RELATE TO TRIBAL MATTERS.

The DOE will seek and promote cooperation with other agencies that have related responsibilities. The Department's mission encompasses many complex issues where cooperation and mutual consideration among governments (federal, state, tribal, and local) are essential. The DOE will encourage early communication and cooperation among all governmental and non-federal parties regarding actions potentially affecting Indian nations. The DOE will promote interagency and interdepartmental coordination and cooperation to assist tribal governments in resolving issues requiring mutual effort.

January 2006

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[1] This Policy is not intended to, and does not, grant, expand, create or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this Policy be construed to alter, amend, repeal, interpret, or modify tribal sovereignty, any treaty rights of any Indian tribes, or to preempt, modify, or limit the exercise of any such rights. Nothing herein shall be interpreted as amending or changing current DOE orders and guidance regarding classified information, including need to know.

Nez Perce

TRIBAL EXECUTIVE COMMITTEE

(208) 843-2253

December 15, 1986

The Honorable John Herrington
Secretary
Department of Energy
1000 Independence Avenue, S.W.
Room 74-257
Washington, D.C. 20585

Dear Mr. Herrington:

Pursuant to Section 117 of the Nuclear Waste Policy Act of 1982 and at the direction of the Nez Perce Tribal Executive Committee, I am writing to request the initiation of negotiations on the provisions of a Consultation and Cooperation "C&C" Agreement between the Tribe and the Department of Energy. A copy of Resolution NP 87-76, authorizing negotiations and appointing a negotiating team, is attached. Also attached is a copy of Resolution NP 87-75, which conditions negotiations on a favorable resolution of an issue currently under consideration.

As you may see from the Resolutions, our participation in negotiations is strictly conditioned upon a satisfactory resolution of the question of the Tribe's eligibility for impact assistance under Section 118 (b). That question currently is under consideration in the Department. A rapid and favorable resolution of the question obviously will expedite the commencement of negotiations.

In addition, we request from you an acknowledgement of the following principles to provide the context for the conduct of negotiations.

1. The Tribe has a critical interest in maintaining the environmental integrity of the Columbia River and its tributaries, and Departmental activities at Hanford should be designed to avoid adverse impacts on the River.

2. The Tribe has critical interest in protecting the natural resources in the Tribe's possessory and usage rights area, and Departmental activities at Hanford should be designed to avoid adverse impacts on those resources.

3. By virtue of its treaties with the United States, the Tribe has prior and paramount reserved rights to certain natural resources, and the Department is obliged to take all reasonable measures to avoid harm to those resources.

4. As acknowledged in the President's policy statement of January, 1983; a government-to-government relationship exists between the United States and the Tribe under which the United States is obliged to protect and enhance the proprietary and governmental rights of the Tribe.

5. The provisions of Section 117 (c) do not constitute a limitation on the contents of a C&C Agreement; all issues arising from the NWPA program are open for discussion in C&C negotiations.

Finally, we wish to advise you that before we will engage in discussions on the contents of an agreement, rules for the conduct of negotiations must be agreed upon. We will insist that transcripts of negotiations be made. Furthermore, we will insist upon procedures for the prompt ratification of agreements reached in discussions between Tribal and Department negotiations by the Nez Perce Tribal Executive Committee and DOE headquarters, respectively. We believe such procedures are necessary to facilitate the efficient disposition of issues during negotiations.

In taking this step, we are mindful that many problems exist in our relationship with the Department. There are, however, concerns common to us. We both, for example, seek to ensure the health and safety of the public during the Department's activities at the Hanford Reservation. We are hopeful that C&C negotiations will result in a mutually beneficial arrangement for the advancement of both of our interests.

Sincerely,

J. Herman Reuben, Chairman
NPTEC

JHR:ceg

cc: Ben Rusche
Stephen Kale
John Antonnen
B. Kevin Gover
Dan Hester

Elliott L. Moffett, Secretary
NPTEC