

SPENT NUCLEAR FUEL STORAGE ON INDIAN LANDS: CAN IT BE JUST?

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ABSTRACT

In the recent past the Office of the Nuclear Waste Negotiator awarded grants to several Indian tribes to study the feasibility of siting a monitored retrievable storage facility for spent nuclear fuel on their lands. More recently, the Mescalero Apache Tribe in New Mexico and the Skull Valley Band of Goshute Indians in Utah have entertained proposals to locate a private interim spent nuclear fuel storage facility on their lands. Critics of such proposals argue that proponents of such proposals are exercising a form of environmental racism by preying on relatively unsophisticated, impoverished communities with few options for economic development. The authors argue that proposals to site spent nuclear fuel storage facilities in Indian country are not *per se* unjust. They briefly describe the history of tribal involvement in spent nuclear fuel storage activities including those of the Yakama Indian Nation, Nez Perce Tribe and Confederated Tribes of the Umatilla Indian Reservation for the Basaltic Waste Isolation Project and the role of tribal sovereignty and federal Indian policy play in establishing tribal standing to participate in such activities. The authors also suggest a series of “environmental justice indicia” which can be used to assess and strengthen the “justness” of interim spent nuclear fuel storage proposals in Indian country.

INTRODUCTION

In the past, Indian tribes have been approached by solid waste and hazardous waste operators with proposals to site waste disposal and treatment facilities on tribal lands. Other tribes, notably the Mescalero Apache Tribe and the Goshute Tribe in Utah, have actively sought to construct and operate an interim spent nuclear fuel storage facility on their lands. These proposals have been condemned by environmental activists as environmentally unjust. These accusations are based on the notion that government and/or industry has targeted economically depressed, powerless tribes which already bear a disproportionate share of environmental insults, accordingly, any high level waste management facility proposed by a tribe is *per se* environmentally unjust. We do not agree. We are not suggesting that Indian tribes actively seek out high level radioactive waste treatment and disposal facilities for economic development purposes, however, if the waste merchant comes calling, tribal decision-makers should be aware of the relative merits and demerits of entertaining such proposals, because neither do we believe that a tribally-initiated or approved waste management proposal is *per se* environmentally just. We believe proposals to site waste management facilities in Indian country can be just, but only if the conditions we set forth below are adopted.

What to do when the High-Level Waste Merchant Comes Calling

Operators of high level radioactive waste facilities will have to invest millions of dollars to get a waste facility sited. The economics of the industry is not conducive to quick-buck operators. But the operators generally will not be familiar with the multi-faceted nature of Indian tribes and

will approach the tribe merely as another community that might be interested in hosting a high level radioactive waste facility. The waste operator will set out a proposal that promises millions of dollars in revenue and several high wage jobs for on environmentally safe facility to be located on tribal lands. The easiest response to such a proposal is to dismiss it out of hand and just say no.

But what if decision-makers find the promise of huge economic benefits and an environmentally sound facility attractive and worthy of further study? What should the tribal decision-maker do in that instance? The first thing to realize is that the study of waste proposals entails significant costs—not just in money, but in time, effort, energy and emotional capital. The tribal decision-maker may think that the tribe is merely undertaking a rational, technical review of a proposal, but that is not how the decision will be portrayed by the media, by the governor and attorney general of the state and by the tribal members and other members of the public who are opposed to locating any waste facility on tribal lands.

The independent review of the proposal is an expensive proposition. That is a cost that the tribe should not have to bear. The technical and legal consultants should work for the tribe and not for the operator. Accordingly, the tribe should require the operator to pay the tribe for the study of the proposal. The tribe can then retain and pay for whatever consultant or advisor it deems necessary. Similarly, the tribe should operate its own public involvement and information program which the waste operator should pay for. The failure of the facility proponent to financially support such efforts in our mind is an indication that the proposal is indeed environmentally unjust.

Openness and Transparency

Two fundamental principles that should guide any examination, study, analysis or review of any radioactive waste proposal are openness and transparency. However cursory or preliminary the review might be, tribal decision-makers should announce their decision to conduct the review and should invite public participation in setting out the scope of the review. Decision-makers should explain to their constituents what they intend to do and why they want to do it. Certainly at this juncture, they should keep an open mind and not be advocates for the proposed facility. Decision-makers should outline a participation process which is acceptable to the community and explain this process to the proposing waste operator.

All reports should be made available and accessible to the tribal and state publics and all meetings related to the review should be open and accessible to the public. By accessible we mean that reports should be written with the lay public in mind and that meetings are held at places and times convenient to the public. The public should also be invited to participate in establishing the criteria for selecting the technical consultants who will be conducting the review.

Tribal decision-makers should be aware that openness and transparency is no guarantee of approval or consent to the proposal. Secrecy and obfuscation is generally a guarantee of rejection and possibly electoral recall.

Scope of Review

Identifying and assessing alternative off-reservation sites

The first order of business should be to determine what other sites are being considered to locate the high level radioactive waste facility and to determine if the tribe has interests that may be affected by a facility located on the other sites. For example, the Yucca Mountain facility is not located on tribal lands. Yet its proximity to several tribes means that important tribal interests may be at stake. Questions that should be considered include:

- Are the other off-reservation sites adjacent or close to tribal lands?
- Will the other off-reservation sites require transportation through tribal lands?
- Are there tribal religious, cultural, or historical interests located on the other off-reservation sites?
- Does the tribe share underground or surface waters that could be contaminated by the off-reservation proposed sites?
- Are the off-reservation sites upwind or upriver from the reservation?

Almost any facility located in Arizona, New Mexico and other western states will have some impact on tribal interests. If a proposed facility on non-tribal lands will have significant impact on tribal interests without returning any economic or other benefit or without providing the tribe the resources necessary to protect its interests, tribal decision-makers must decide if tribal interests can best be protected by having the facility located on tribal lands. But exactly what advantages for protecting tribal interests does an on-reservation facility have over an off-reservation one? Advantages can include:

- Establishing tribal engineering, design, construction and operating standards for the facility.
- Enhancing tribal sovereignty and authorities by regulating all aspects of the construction and operation of the facility including establishing stricter standards for cultural resource protection, packaging, transportation, emergency response, environmental protection and worker health and safety.
- Enhancing tribal sovereignty and authorities by establishing tribal inspection facilities at off-reservation staging areas and conducting inspections of off-reservation generators.

Concept

The reviewers should characterize the waste management concept being proposed. We mean by concept something much more than whether it is a shallow land burial facility or aboveground vault being proposed. For example, does the proposal view the tribe as simply a passive community that could host a high level radioactive waste facility? Or does the proposal contemplate a multi-faceted tribe taking an active role in all aspects of the design, engineering, construction, regulation, and operation of the facility.

The waste management concept can include many factors relating to design, engineering, transportation and the like. Generally, the simpler the concept is the more passive the tribal role will be. If, as a result of the proposal review, the tribe determines that it would want to play a more active role in the design, engineering and operation of the facility, tribal decision-makers should be asking questions such as the following:

- Is the waste being packaged for final disposal and inspected to assure compliance at points close to the generators? This avoids the problem of transporting non-conforming waste packages from the disposal facility back to the generators and back again.
- Will the tribe have the right to approve the design, engineering, and operating procedures for the proposed facility?
- Will the tribe be provided the funds necessary to retain its own independent technical consultants to advise them on the design, engineering and operating procedures for the proposed facility?
- Will the tribe have the right to monitor the inspection and packaging processes at off-reservation generator and staging facilities?
- Does the proposal contemplate only a waste disposal facility or does it include facilities to house federal and tribal regulators, research laboratories, environmental laboratories, training facilities, etc.
- Will the tribe have the right to monitor air, surface water and groundwater as well as the right to close down the facility when releases exceed standards?

Environmental Protection

Preventing environmental problems at the facility requires a good site, sound engineering, design and construction of the facility, and sound operating procedures. The proposal review is not a detailed environmental impact study of alternative sites on the reservation. It should be a review of the historic, cultural, scientific, technical and other literature to identify “deal killers.” For example, the reviewers can determine if the existing hydrogeological data means that the proposal should be rejected out of hand. There may be endangered species or cultural resource interests that will kill the deal. The absence of such deal killing information does not mean that the deal should be accepted, only that further study is warranted.

But tribal decision-makers should also be aware that hosting a high level radioactive waste disposal facility will result in other environmental impacts as well. For example, there will be significant increases in truck traffic which will probably have an adverse impact on reservation air quality. On-reservation repair and refueling facilities for trucks will require the tribe to establish hazardous waste and underground storage tank regulatory regimes. The reviewers should identify and describe the full range of environmental consequences of hosting a high level radioactive waste facility. The reviewers should also give some indication of the costs of establishing and operating the necessary tribal environmental regulatory regimes.

Health and Safety Analysis

The direct health and safety impacts of the facility will be addressed in detail by the environmental impact study. However, tribal decision-makers should require the proposal

reviewers to describe in general the biological impacts of exposure to different radionuclides and the procedures, as well as the adequacy thereof, to prevent releases of such radionuclides to the environment. The reviewers should also describe the regulatory, scientific and technical regime, and the cost thereof, the tribe should establish to protect the health and safety of workers and the public during the operating life of the facility and especially after the facility closes. We suggest that an environmentally just proposal requires the facility proponents to bear the major cost of establishing and operating these regulatory, scientific and technical regimes whether these are tribal or state.

Moreover, for the purposes of the proposal review, tribal decision-makers will want to have some indication of the magnitude of the expected increase in traffic, the impact of such increases on highway safety, an assessment of the adequacy of the transportation infrastructure, including highways, bridges as well as law enforcement capability and the cost of the required improvements or additions to the transportation infrastructure. Again, we suggest that an environmentally just proposal requires the facility proponents to bear the major cost of constructing or improving the transportation infrastructure whether these are located on tribal lands or on state lands.

Legal and Political Factors

A decision to review a proposal to host a high level radioactive waste facility should not be considered lightly. These facilities are not popular and engender strong, heartfelt opposition from within and without the tribe. Addressing all the concerns raised by the public participation program and fending off attacks on the legitimacy of the tribe's actions by state agencies and public interest groups will exact a cost in tribal council energy and the expenditure of the tribe's capital. Accordingly, tribal decision-makers should conduct a realistic assessment of tribal opinions early on in the process to determine if there is tribal member support for, at least, studying the proposal. Some tribes such as the Mescalero Apache Tribe and the Campo Band of Kumeyaay Indians have had tribal member support for waste facilities, but others have not. If there is no support for the proposal, tribal decision-makers are best advised to avoid the disruption that will most assuredly result, and table the proposal at the outset.

However, if there is some indication of support, tribal decision-makers should be aware that one way of attacking these proposals is to challenge the tribe's authority or jurisdiction to host and regulate these facilities. Therefore, the proposal review should include a detailed legal analysis of the tribe's authorities and the authority of the Nuclear Regulatory Commission and Environmental Protection Agency to cooperate with tribes for the regulation of high level radioactive waste facilities in Indian country.

Financial Proposals

We have purposely left the financial aspects of the proposal for last. Our sense is that the initial proposal cannot begin to realistically identify the financial arrangements for the waste management proposal until the waste management concept is fully described. The tribe and the operator have to first agree on the waste management concept that will be established, the regulatory, scientific, legal infrastructure the tribe will have to put into place, the construction and improvements to the transportation infrastructure the facility will require and a raft of other issues that have to be considered. Any initial proposal that sets out a dollar amount based on cubic feet or metric tons of waste views the tribe solely as the passive host to a radioactive waste dump and not as a governmental entity with a wide range of sovereign, environmental, health,

safety, cultural, economic and other interests that it will seek to protect or that could be accommodated by the high level radioactive waste facility.

CONCLUSION

Indian tribes are governmental entities. They are social, cultural, and economic entities as well. Tribal decision makers have responsibilities to protect the political standing of the tribe. They are also charged with the responsibility of safeguarding the social and cultural aspects of the tribe. High level waste management proposals can provide the economic base to support these efforts. Done in an environmentally just manner, these proposed facilities can also enhance the governmental powers of the tribe. Done otherwise is to doom these proposals to failure and result in financial losses and more importantly, losses in the political capital of the tribe.