

TRIBAL PERSPECTIVES  
ON THE NUCLEAR WASTE POLICY ACT

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ABSTRACT

The Yakima Indian Nation and other tribes have been found to be affected Indian tribes under the Nuclear Waste Policy Act and to have treaty-guaranteed possessory or usage rights that will be adversely affected by location of a repository at the Hanford site. These tribes and the states of Washington and Nevada have a right to funding under the Act for study of the cumulative effects of defense waste and to do independent data gathering. Denial of such funding makes the chance of a repository being constructed under the Act less certain.

It would be most presumptuous for me to attempt to try to give tribal perspectives for the hundreds of the tribal sovereign governments in the United States and I do not attempt to do so. I have been granted permission by the appropriate committee of the governing body of the Yakima Indian Nation to voice my impressions of the perspective of the Yakima Indian Nation. Since these remarks have not received review by the Yakima Nation's governing body, they can only be attributed to me. With those limitations, I will attempt to add to your fine program.

The Yakima Indian Nation's first contact with the Nuclear Waste Policy Act ("Act") was during its enactment. Representatives attended and testified on parent legislation. After the Act became law on January 7, 1983, the Yakima Indian Nation petitioned the Secretary of Interior for status as an "affected Indian tribe" under Section 2 of the Act. This petition was filed on March 8, 1983. By March 30, 1983, the Secretary of Interior had found that this Section 2 petition had been filed by appropriate governmental officials and that possessory or usage treaty rights of the Yakima Indian Nation would be affected by a permanent repository on the Hanford Reservation and that such effects would be both substantial and adverse to the Yakima Indian Nation and its members.

The Hanford Reservation is located in the eastern portion of the area ceded by the Yakima Indian Nation to the United States of America by treaty in 1855. That ceded portion of the Yakima Indian Reservation's originally owned lands constitutes 25.4% of the now State of Washington. In ceding this over ten million acres by treaty, the Yakima Nation reserved the Yakima Indian Reservation of over 1,300,000 acres for their exclusive use and benefit. The Treaty with the Yakimas (12 Stat. 951) also reserved for the Yakima Nation gathering, pasturing, hunting and fishing rights in the ceded area outside of the Yakima Indian Reservation. These possessory and usage rights exist in the area designated as the Hanford Reservation.

In areas ceded by other tribes to the east and to the south of the Yakima ceded area, these other tribes have reserved like possessory and usage treaty rights. They also possess--as does the Yakima Nation--treaty-

guaranteed rights to take fish and to have fish runs environmentally protected at all usual and accustomed places used by these Indians at the time of their respective treaties. These usual and accustomed places exist in the Columbia River both at, above and below the Hanford Reach. This treaty-guaranteed Columbia River fishery is extensive and has great economic, social, cultural and religious importance to the tribes reserving these fishing rights.

In addition to the Yakima Indian Nation, both the Nez Perce Tribe of Idaho and the Umatilla Tribes of Oregon have been found by the Secretary of Interior to have their possessory and usage rights substantially and adversely affected by the location of a repository at the Hanford site. The Yakima Indian Reservation is 45.2% of the County of Yakima and 11.1% of the adjoining County of Klickitat in the State of Washington. This area explicitly reserved by treaty for the exclusive use and benefit of the Yakima Nation, is very near the Hanford Reservation. Only thirteen miles separate the western Hanford boundary from the eastern Yakima Reservation boundary. While the prevailing winds are from the west to the east and the Yakimas are therefore not in as much jeopardy from airborne radionuclides as the Nez Perce, the actual ash fallout from Mount St. Helens on two minor eruptions when the wind was blowing to the west indicates that the Yakima Nation can take little comfort in the word "prevailing".

Under present evidence the Yakima Indian Nation has serious concerns about groundwater and other contamination within the Hanford Reservation. Geological and chemical review indicate that the Hanford site is not suitable for a repository. Indeed, the situation is already quite serious. Documentation shows the movement of Hanford-related radionuclides in the unconfined aquifers and also by vertical percolation both above and below the level of the Columbia River along the 41-mile shoreline of the Hanford Reservation. These documented high levels of tritium, together with strontium-90 analyses, iodine-129 analyses and gross beta analyses indicate a present impact on the treaty-reserved and guaranteed fish runs of the Yakima Indian Nation and other affected Indian tribes, including the Umatilla Tribes and the Nez Perce Tribe. The Hanford Reservation already has a large

temporary storage of high-level and other nuclear waste, an operating dual purpose reactor, a nuclear generator, a breeder reactor, eight abandoned reactors, a low-level nuclear waste repository and many experimental programs. Admittedly the use of this site for such projects is the reason for Hanford's pre-Act selection. This reason ignores the unfairness of the burden of this national problem being unevenly distributed. Likewise it disregards health and safety risks that would cumulate on the Hanford Reservation with the addition of a repository. To ignore the cumulative risk from present status defies all logic.

Title to the lands within the Hanford Reservation was acquired by the United States from title-holders in the 1940's under the War Powers Act. The usage rights of the Yakima Indian Nation still remain. Also remaining is the question of using lands, taken for national security purposes, for private utility use. The Yakima Nation does not take second place to any group in its concern about the security of the United States. However, examination of some basic principles needs to be made as regards to the way that departments of the federal government have responded to that trust and the trust of many other responsible citizens of the United States.

Let us first look at whether government will, without our insistence, let us know about the danger and any damage. Being that it is my discipline, I would like to relate what a federal judge found--as a matter of fact--regarding the truthfulness of the government in this field. This judge found that the federal government had not only failed to inform the public, but had fraudulently deceived the court which had believed the government in a case regarding nuclear fallout. Bullock v. United States, 95 FRD 123 (D.C. Utah, 1982).

As I write these remarks, an incident has just happened that makes the previously found judicial determination most disturbing. We have just had another incident at the PUREX plant at Hanford. As an interested person you try to find out what is going on. There have been several incidents. Perhaps the best documented is one about eleven months ago. On January 25, 1984, plant operators shut the facility down when detected alpha emissions were going up the stack at levels both higher than expected and higher than internal controls were showing. However, this was classified by the operator as an emission, not a leak, even though it exceeded expected parameters. The way to correct this situation is just to redefine the parameters to accommodate the January 25, 1984 emissions. When this is written, on February 25, 1985 there is a public announcement that americium nitrate and ruthenium-106 have been released above expected parameters and the plant is shut down. The confidence level of the Yakima Indian Nation is not high.

Further, the Yakima members have some real concern about the permissible doses of emissions into both air and water. The radionuclides in both the air and the water can have a great effect on the Yakimas. First, the members of the Yakima Indian Nation remain in this area longer than members of the dominant society who tend to move more often. Secondly, the members of the Yakima Indian Nation consume more of the natural foods and particularly more fish from the Columbia River than the dominant society. The Yakima Indian Nation has great concern because radioactive isotopes end up in the food chains in higher concentrations than in either air or water. The difference in the conclusions of the governmental monitors and

private monitors as to the level of contamination is marked--an area in which the Yakima Nation has a pre-emptory interest. When we hear Karl Z. Morgan, a former head of the International Commission on Radiological Protection, whom we hear called the "father of health physics" tell us that radiation risks are greater than we used to consider them and know that he is urging both NRC and EPA--yet unsuccessfully--to re-evaluate and reject relaxed allowances, it doesn't give the Yakima Indian Nation a lot of confidence that its interests are being adequately protected.

The State of Washington and the Yakima Indian Nation have been notified by the Secretary of Energy who purportedly was acting pursuant to Section 116(a) of the Nuclear Waste Policy Act, that a potentially acceptable site for a high-level nuclear waste repository has been identified within the Hanford Reservation. On December 20, 1984, the Secretary of Energy released draft environmental assessments on nine potentially acceptable sites. Chapter 7 of all these nine draft EA's makes a preliminary determination that the Hanford site will be nominated for, and is one of the three preferred sites to be recommended to the President for site characterization pursuant to Section 113 of the Act. Likewise, Yucca Mountain in Nevada has also been designated as a potential and preferred site.

The Yakima Indian Nation and the states of Washington and Nevada find themselves in similar circumstances. In the area of the potential repository sites, the federal government has been and is engaged in nuclear activities for the armed forces. Although Yucca Mountain is not within a nuclear reservation principally dedicated to such activity, as is the case regarding the Hanford site, the potential Yucca Mountain site is contiguous with such a defense dedicated reservation. Secondly, the Yakima Indian Nation, the State of Washington and the State of Nevada have all requested and sought to obtain funding and/or funding authorization to study the cumulative health and safety effects of nuclear military activity in the areas of the potential sites and also to seek limited independent data. These requests have been denied. Likewise, by internally generated rules promulgated without following rule-making procedure, the Department of Energy's Internal General Guidelines for Implementing Financial Assistance for Repository Programs under Sections 116 and 118 of the Nuclear Waste Policy Act, prohibit financial assistance for said purposes. This action on the part of the Department of Energy defies both Sections 111 and 112 of the Act.

It has been accepted since the early 1950's that a permanent solution to the problem of radioactive wastes must some day be found. For thirty years, proposals have ranged from ejecting high-level radioactive waste into outer space to burying it in a deep ocean trench. In many circles the debate still continues; but by the enacting of the Nuclear Waste Policy Act, Congress and the Administration determined that the political and institutional issues were resolved in favor of a geological repository for high-level radioactive waste. In so resolving these issues, the Act not only addressed the disposal of spent nuclear fuel from nuclear reactors but from other sources as well.

The Act likewise recognized that the previous 30 years of federal efforts have been inadequate. The Act determined that affected Indian tribes and states, within whose boundaries the potentially acceptable

sites were located, were to be virtual partners with the federal government in the planning and development of the repositories. Such participation was to exist from the time that a potentially acceptable site was selected within a state's boundary and where it affected treaty rights, upon the tribe's designation as an "affected tribe". This level of participation was designed not only to insure that the best site could be selected, but also to promote essential public confidence in the safety and disposal of such radioactive waste and spent fuel. The Act determined that there should be a high level of public confidence; and furthermore, precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or future generations. The Act also clearly established that the costs involved in this essential participation ensuring public confidence and that there would be no adverse effect on health and safety and environment would be borne by the Nuclear Waste Fund. The Act also provided that the Secretary of Energy should issue general guidelines to fulfill these purposes in consultation with the Council on Environmental Quality, the Administrator of the Environmental Protection Agency, the Director of the Geological Survey, governors from states having potentially acceptable sites, and with the concurrence of the Nuclear Regulatory Commission.

The Department of Energy's General Guidelines for Implementing Financial Assistance for Repository Programs under Sections 116 and 118 of the Act, revised September 7, 1984, have not only been promulgated without rulemaking procedures specified by the Administrative Procedures Act, but also have failed to comply with the aforementioned consultation and concurrence requirements of the Nuclear Waste Policy Act.

It is under these guidelines of the Department of Energy that the states of Nevada and Washington and affected Indian tribes have been denied funding to examine the effects of existing site-specific high-level radioactive waste and present radionuclide-producing activities that contribute to adverse effects on the public health and safety and environment. The action of the Department of Energy proceeding in such a manner may provide satisfaction to those who seek no permanent solution to the problems of high-level radioactive waste and spent fuel. To those who seek a permanent solution and consider the Nuclear Waste Policy Act as a means of reaching such a goal, the Department's actions should give more than a passing concern.

If the past 30 years are to show us anything, it is that permanent disposal of radioactive high-level waste and spent nuclear fuel cannot take place without adequate state, tribal and public participation to promote public and Congressional confidence in the safety of such disposal and without adequate assurance that the public health and safety and environment for this and future generations will not

be adversely affected. While this lesson is clear to most observers and by many within the Department of Energy, actions that the Department has taken in regards to necessary independent monitoring or study of radioactivity at or near the prospective sites raises the question as to whether the message has been received by important decisionmakers within the Department. To use the Act as a facade behind which the Department proceeds with the perspective that it alone will adequately protect the health and safety and environment is just not going to be satisfactory to insure that a waste repository will be built.

Can those who appear not to have adequately considered the purpose of the Act believe that they can fulfill their responsibility under the Act by proceeding in such a manner? Could this merely be a way to reach some other method of disposal or a method to keep things as they are? Or do those making decisions believe that the consultation provisions were put into the Act merely for dressing? Or, are these decisions made in a mistaken attempt to fulfill DOE's responsibility under the Act?

It is not my place to suggest that the answer is one of the above. I do, however, suggest that one of the reasons for the long delay in solving the high-level radioactive waste problem is that federal departments charged with this duty have failed in the past to secure public confidence. I would likewise repeat what has been pointed out before, that when data production is limited to contractors who will be favored by future earnings, there is a real problem with public confidence. When there will be no independent study, then the studies during the site recommendation phase are limited to contractors who will be favored with multimillion dollar contracts if their site is selected for site characterization. Likewise, there will be multibillion dollar contracts during the operation stage. Even if these contractors do their work in a fair, honest and most objective manner, their public confidence will be lacking unless an opportunity for independent research is provided. We have only to note that the Site Characterization Report regarding the Hanford site has been the subject of considerable criticism and that the DOE has receded from that report. Are the new studies to receive any more public confidence unless independent studies are allowed?

Furthermore, it is not logical to say that one can reach a decision as to whether an activity will adversely affect the health and safety and environment without considering the effect of existing activity on the health and safety and environment. To refuse to consider defense wastes' cumulative effect takes one to such an illogical conclusion.

The Yakima Nation takes its consultation responsibility under the Act very seriously. We want the Act to be followed. Only by following the purpose and terms of the Act can there be any hope for a permanent solution to the high-level nuclear waste problem.