Department of Energy
Washington, DC 20585

NOV 2 7 2007

MEMORANDUM FOR DISTRIBUTION

FROM: THOMAS P. D'AGOSTINO
UNDER SECRETARY FOR NUCLEAR SECURITY
ADMINISTRATOR, NATIONAL NUCLEAR
SECURITY ADMINISTRATION

C. H. ALBRIGHT, JR.
UNDER SECRETARY OF ENERGY

RAYMOND L. ORBACH
UNDER SECRETARY FOR SCIENCE

SUBJECT: Offices of Environmental Management, Science, Nuclear Energy, and the National Nuclear Security Administration Framework for Implementing the Department of Energy's American Indian and Alaska Native Policy

The Department of Energy (DOE) issued its first American Indian Policy in 1992 and subsequently issued DOE Order 1230.2 establishing the responsibilities and roles of DOE management in carrying out the policy. In 1998, at the request of and in consultation with Indian Nations, DOE revised the Policy to effect greater and comprehensive implementation. A revised American Indian and Alaska Native Tribal Government Policy (DOE Indian Policy) was issued on October 31, 2000.

On January 20, 2006, Secretary Bodman reaffirmed the revised DOE Indian Policy that outlines the principles to be followed by the Department in its interactions with tribes. This reaffirmation demonstrates the Department's continuing commitment to meeting its responsibilities in the government-to-government relationships between federally recognized American Indian tribes and the Department.

We fully support the Secretary's reaffirmation, and because many of our facilities are adjacent to tribal lands, we are committed to ensuring that our respective organizations fully implement the core tenets of the DOE Indian Policy. We view

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implementation of the DOE Indian Policy as an important and continuing aspect of our work in the pursuit of our respective missions.

To ensure effective and comprehensive implementation of the DOE Indian Policy, a Framework providing guidance for implementation has been developed through the efforts of Environmental Management's (EM) Office of Public and Intergovernmental Accountability, Nuclear Energy's (NE) Office of Communications and Involvement, Science's (SC) Senior Advisor on Scientific Institutional Outreach, and the National Nuclear Security Administration's (NNSA) Office of Diversity and Outreach and Office of Infrastructure and Environment in coordination with other DOE programs. These offices received critical input from the State and Tribal Government Working Group. The EM, NE, SC, and NNSA Framework is provided for your immediate distribution and implementation. Additionally, a copy of Secretary Bodman's reaffirmation memorandum is attached along with a copy of the newly reaffirmed and revised DOE Indian Policy.

Should you have any questions, please contact Ms. Melissa Nielson, Director, EM Office of Public and Intergovernmental Accountability (EM-13), Mr. Justin Fleshman, Policy Advisor, NE Office of Corporate Communications and External Coordination (NE-44), Mr. Joseph V. Martinez, Senior Advisor on Scientific Institutional Outreach (SC-2) , or Ms. Mary Ann Fresco, Director, NNSA Office of Diversity and Outreach (NA-61).

Attachments

OFFICE OF ENVIRONMENTAL MANAGEMENT, OFFICE OF NUCLEAR ENERGY, OFFICE OF SCIENCE, AND NATIONAL NUCLEAR SECURITY ADMINISTRATION (NNSA) DEPUTY ADMINISTRATOR FOR DEFENSE PROGRAMS FRAMEWORK TO PROVIDE GUIDANCE FOR IMPLEMENTATION OF U.S. DEPARTMENT OF ENERGY'S AMERICAN INDIAN AND ALASKA NATIVE TRIBAL GOVERNMENT POLICY

I. Introduction and Scope

A. History and Background of the American Indian and Alaska Native Tribal Government Policy

To support the Department of Energy's (DOE) commitment to meeting its government-to-government relationships with federally recognized American Indian tribes, DOE issued its ***American Indian Policy*** in 1992 and subsequently issued DOE Order 1230.2 that established the responsibilities and roles of DOE management in carrying out its policy. Every Secretary since has formally reaffirmed it. At the request of Indian Nations in 1998, the Secretary agreed to revise the 1992 Policy and effect a comprehensive implementation.

A revised ***American Indian and Alaska Native Tribal Government Policy*** was issued on October 31, 2000 and on January 20, 2006 (hereinafter referred to as "DOE Indian Policy"). The revised DOE Indian Policy outlines the principles to be followed by the Department in its interactions with Indian nations.

B. Implementation of the Framework

This Joint Framework 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 Joint Framework 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.

The Assistant Secretaries for the Offices of Environmental Management (EM) and Nuclear Energy (NE), the Director of the Office of Science, and the National Nuclear Security Administration (NNSA) Deputy Administrator for Defense Programs have committed to a ***Framework to Provide Guidance for Implementation of the U.S. Department of Energy's American Indian and Alaska Native Tribal Government Policy*** (hereinafter referred as the "Framework") in order to enhance DOE's government-to-government working relationship with Indian Nations.

The Framework is intended to strengthen the government-to-government relationship between affected Indian Nations and DOE. The Framework supports improving consultation and communication with Indian Nations, and enhances participation in EM, NE, SC, or NNSA actions early in DOE's decision-making and implementation processes related to activities such as cultural resources protection, long-range planning, and other decisions that may affect the interests of Indian Nations.

The Framework is not intended to be a substitute for existing individual tribal protocols concerning specific DOE activities that result in consultation. Nor shall this Joint Framework serve as a substitute for specific consultation processes outlined in the National Historic Preservation Act, Native American Graves Protection and Repatriation Act, or replace dispute resolution processes available under Federal financial assistance regulations (10 CFR 600).

C. Scope

The Framework is directed at all EM, NE, SC, and NNSA facilities, programs, and sites, and at DOE sites where there are EM, NE, SC, or NNSA funded activities. The Framework recognizes that trust responsibilities extend to protected rights and resources. To the extent not already developed, specific site plans for EM, NE, SC, and NNSA programs and facilities will be developed to integrate program activities including cultural and natural resources management at those sites in a comprehensive approach.

D. Definitions

The DOE Indian Policy provides definitions of the following: Indian Nation, trust responsibilities, consultation, cultural resources, and treaty and trust resources. For purposes of this Framework, the following additional definitions shall apply:

"Field Elements" includes those entities outside DOE Headquarters (HQ) including but not limited to: field, operations, area, and site offices, and service centers.

"Affected tribe" means any Indian tribe whose reservation, or whose federally defined possessory or usage rights to other lands outside of the reservation's boundaries, arises out of ratified treaties or other statutes, and may be impacted by DOE policies, programs, and activities.

"Senior Representative" is an agent of the Government who has the authority to bind the Government in a decision-making process.

Definitions in 10 CFR 1021 (National Environmental Policy Act Implementing Procedures) applicable to Tribal Government Policy Implementation also include:

"Action" means a project, program, plan or policy that is subject to DOE/EM, NE, SC, and NNSA control and responsibility.

"DOE Proposal" means a proposal for an action, if the proposal requires a DOE decision.

"Natural resources," as defined under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) section 101(16) means:

> "land, fish, wildlife, biota, air, water, groundwater, drinking water, supplies, and other such resources belonging to, managed by, held in trust by, appertaining to or otherwise controlled by the United States, and State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction or alienation, any member of an Indian tribe."

II. Purpose and Goals

A. Purpose

To ensure consistent interpretation and application of the DOE Indian Policy and its principles when dealing with affected tribes, the Framework is intended to coordinate DOE's implementation of its policy with the activities at both HQ and Field Elements.

B. Goals

(1) Ensure that EM, NE, SC, and NNSA elements work with affected tribes at the start of any process that will impact tribal rights and resources in treaty or other protected areas in order to integrate the DOE Indian Policy into its mission, activities, work authorizations, and performance evaluations, and other decision-making processes and procedures.

(2) Raise the level of awareness of and knowledge of the DOE Indian Policy and the Framework for HQ and Field Elements. This may include regular training sessions and workshops.

(3) Foster awareness and a working knowledge of the DOE Indian Policy and the Framework among affected tribes.

(4) Ensure that implementation of the DOE Indian Policy and Framework is consistent with applicable requirements including DOE P 141.1 – DOE Management of Cultural Resources.

III. Policy Principles for Notification and Consultation

"<u>Policy Principle I</u> The Department recognizes the Federal Trust Relationship and will fulfill its trust responsibilities to American Indian and Alaska Native Nations."

Each EM, NE, SC, and NNSA Field Element shall endeavor to comply with the DOE Indian Policy for all activities within their purview and shall use their best efforts to inform state and local governmental entities, and other stakeholders about DOE's roles and responsibilities regarding affected tribes, including its responsibility to treat tribes as sovereign governments.

EM, NE, SC, and NNSA will work to foster the government-to-government relationship with Indian Nations impacted by its activities and to maintain DOE's trust responsibilities including:

Consulting, to the greatest extent practicable and permitted by law, with Indian Nations prior to taking actions that affect federally recognized tribal governments;

Protecting tribal people and tribal resources from EM, NE, SC, or NNSA actions that could harm their health, safety, or sustainability; and

Protecting cultural and religious artifacts and sites on lands managed by DOE.

EM, NE, SC, and NNSA's role, including Field Elements, in coordination with CI, is to raise awareness and distribute documents related to the DOE Indian Policy, including DOE Orders pertaining to the DOE Indian Policy, the Framework, and other documents related to the DOE Indian Policy.

"<u>Policy Principle II</u> The Department recognizes and commits to a government-to-government relationship and will institute appropriate protocols and procedures, for program and policy implementation."

EM, NE, SC, and NNSA, including Field Elements, will ensure periodic review and assessments, and will collaborate with tribes to examine current DOE protocols and financial assistance to tribes. To the extent not already done, EM, NE, SC, and NNSA, including Field Elements, will also collaborate with affected tribes on protocols to enhance a working government-to-government relationship.

"<u>Policy Principle III</u> The Department will establish mechanisms for outreach, notice, and consultation, and ensure integration of Indian Nations into decision-making processes."

A. Consultation

Consultation is formal communication on a government-to-government basis. It is conducted between leaders of tribal governments and senior representatives from the Federal Government. After a relationship has been developed, agreements may be reached that recognize and sanction communications between federal and tribal designated representatives. A key component of this type of consultation is the federal government's recognition of tribal sovereignty.

Staff-to-staff discussions frequently occur between federal and tribal mid-level management and technical staff at meetings, through telephone contacts, and during on-site visits. Although generally not recognized by tribes as government-to-government consultation, staff-to-staff communication serves as a useful, and sometimes necessary, conduit for sharing information, satisfying certain legal requirements, and developing relationships. If agreed upon by both the DOE and tribal officials, staff-to-staff discussions or communications can be considered government-to-government consultation.

When staff-to-staff discussions are ongoing, both DOE and the tribes should regularly consider whether the level of consultation should be elevated. Site implementation plans may amplify protocols in this regard and can reflect differences in definition of consultation. Site implementation plans should encourage tribal and contractor interaction as a form of staff or technical discussion but not as consultation at the policy level.

EM, NE, SC, and NNSA will consult with the potentially affected tribe(s) in accordance with DOE Order 1230.2 and the DOE Indian Policy principles which define consultation as including, but not limited to, coordination, cooperation, and collaboration to determine the impact on traditional and cultural life ways, natural and cultural resources, treaty and other federally reserved rights.

Appropriate tribal officials and representatives will be invited to participate as allowed by law and consistent with a government-to-government relationship. Consultations and resulting decisions are to be documented, including a description of information provided, as part of the consultation process.

B. Notification of Proposed Activities that May Affect Tribe(s)

EM, NE, SC, and NNSA will, in consultation with appropriate tribal governments, develop protocols to implement notification and consultation in accordance with DOE Order 1230.2, and the principles stated in the DOE Indian Policy, to the extent its programs affect or may affect tribal interests. Protocols will be consistent with, but may expand upon, existing tribal notification and consultation procedures defined in 10 CFR 1021 for DOE proposed actions and 36 CFR 78 and 800. At a minimum, notification protocols will be established for all EM, NE, SC, and NNSA proposed

actions, and for other activities, meetings, or areas that may be of interest to affected tribes:

(1) When the proposed EM, NE, SC, or NNSA activity originates at DOE HQ, there will be an internal process as outlined below to ensure that tribes are apprised of activities that concern them.

(a) The Assistant Secretaries for EM and NE, the Director of the Office of Science, and the NNSA Deputy Administrator for Defense Programs will notify tribes through EM's Office of Public and Intergovernmental Accountability, NE's Office of Corporate Communications and External Affairs, SC's Office of the Deputy for Programs, or NNSA's Office of Diversity and Outreach (hereinafter collectively referred to as "HQ Tribal Lead Offices") in coordination with the relevant HQ-EM, NE, SC, or NNSA programs. HQ Tribal Lead Offices will notify and follow-up with the EM, NE, SC, or NNSA tribal issues point of contact (POC) at the site and the tribes; and

(b) At the site, the EM, NE, SC, or NNSA tribal issues POC will also notify the potentially affected tribe(s) in advance of the action being taken.

(2) When the proposed activity originates from or affects the site, coordinating notification among field elements of proposed activities that may impact tribes is the responsibility of the EM, NE, SC, or NNSA programmatic office where the proposed activity originates. Such EM, NE, SC, or NNSA programmatic office will notify the HQ Tribal Lead Office and the POC for the site who will notify the tribe(s). The site office, through the POC, in consultation with appropriate Indian Nation officials, may establish protocols for notification.

C. Timeframe

The timeframe for notifying tribes of any proposed activity that may affect them will be to the extent practicable at the earliest stages in the development of the proposed activity after having been identified. EM, NE, SC, and NNSA will endeavor to involve tribes throughout the development and implementation of the proposed activity. In all cases, notification is intended to allow for a reasonable and timely comment by Indian Nations prior to a DOE final decision.

IV. Policy Principle for Cultural and Natural Resource Protection

"<u>Policy Principle IV</u> Department-wide compliance with applicable cultural resource protection and other laws and Executive Orders will assist in the preservation and protection of historic and cultural sites including traditional religious practices, and traditional cultural properties and places."

EM, NE, SC, and NNSA Field Elements in consultation with tribes, have established site-specific cultural resource management plans as needed for their programs or sites, for implementing DOE P 141.1, meeting responsibilities established therein for compliance with cultural resource laws and regulatory requirements, and consultation with affected tribes on cultural resource management. Field Elements will provide appropriate access to Indian nations to make use of sacred areas located on DOE lands consistent with safety and national security considerations. EM, NE, SC, and NNSA will endeavor to protect natural resources which include plants, animals, minerals, and natural features that have religious significance to Indian tribes and/or are held in trust by the Federal Government. EM, NE, SC, and NNSA Field Elements should utilize tribal expertise as needed and when appropriate.

V. Policy Principle for Economic Self-Determination

"Policy Principle V The Department will initiate a coordinated Department-wide effort for technical assistance, business and economic self-determination, development opportunities, education and training programs."

EM, NE, SC, and NNSA will, consistent with their mission, consult with tribal leaders to identify types of technical assistance and business and economic development opportunities available to tribes. EM, NE, SC, and NNSA and Field Elements will regularly meet with tribes to understand the tribe's ability to provide services. To the maximum extent practicable, EM, NE, SC, and NNSA will notify tribes of applicable grants, scholarships, or other educational, training assistance, and requests for proposals concurrent with public announcements of non-sensitive procurement information.

VI. Policy Principle for Tribal Summit

"Policy Principle VI The Secretary of Energy will conduct periodic summits with tribal leaders for performance review of policy implementation and issue resolution."

EM, NE, SC, and NNSA, along with other DOE elements, will actively support regional and/or national summit efforts, including receiving comments related to summit preparation, and will coordinate with the Office of the Secretary and tribes on scheduling and agenda as appropriate.

VII. Policy Principle for Interagency and Interdepartmental Coordination

"Policy Principle 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."

EM, NE, SC, and NNSA will seek and promote interagency and interdepartmental coordination and cooperation as it relates to EM, NE, SC, or NNSA's missions in order to assist tribal governments. Applicable related responsibilities of other state and federal entities that affect implementation of the DOE Indian Policy may be included in site

specific procedures. Affected Tribes will be consulted and involved regarding interagency and interdepartmental issues affecting tribes for EM, NE, SC, and NNSA activities.

VIII. Other Issues

A. Transportation

Transportation of hazardous and radioactive materials by DOE and other federal agencies across reservations is an activity that could potentially impact tribes across the country, including tribes that are not directly impacted by the DOE site activities. The scope of transportation-related issues, including pre-notification of shipments, emergency response training, and others has been addressed in a series of transportation protocols.

The protocols are included in DOE's Radioactive Material Transportation Practices Manual (DOE M 460.2-1). The manual establishes a set of standard transportation practices for DOE organizations, including EM, NE, SC, and NNSA, to use in planning and executing shipments of radioactive materials. These practices establish a standardized process and framework for interacting with state, tribal and local authorities regarding DOE radioactive shipments. The transportation of hazardous and radioactive materials across reservations will be in accordance with the limits and types of materials that are covered by the highway route regulations governing controlled quantities. EM, NE, SC, and NNSA and other DOE organizations are responsible for compliance with all applicable transportation regulations and agreements with state, tribal, or local authorities.

B. Review of this Joint Framework

When new legislation, regulations, changes in Departmental policy, or other developments impacting Indian Nations require corresponding changes in the Framework, EM, NE, SC, or NNSA will review the changes and the DOE Indian Policy and collaborate fully with affected tribes on revisions to the Framework.

C. Contractor Role

This section is to be implemented by cognizant program officials within EM, SC, NE, and NNSA, who shall insure that contract provisions include the following:

(1) The DOE American Indian and Tribal Government Policy (DOE 1230.2, October 2000) shall be implemented by contractors to the degree it has been included in contracts affecting tribal interests awarded to private corporations.

(2) For extensions of contracts or for future contracts at sites with tribal implications, inclusion of the Policy should be considered.

(3) This Framework should be included as needed and appropriate in contracts through the use of a special contract clause.

(4) Where the Policy and/or the Framework have been included in contracts, the standard review process for contracts should be utilized to insure contractor compliance.

D. Evaluation

EM, NE, SC, and NNSA HQ and Field Elements will be evaluated at least biennially on how successfully they implement the Policy and the Framework. The HQ Tribal Lead Offices will have the responsibility for ensuring that the evaluation is conducted in a meaningful manner. EM, NE, SC, and NNSA will involve affected tribes in this evaluation. Tribal concerns and input will be considered. EM, NE, SC, and NNSA HQ and field employees should participate and provide input for this evaluation.

E. Education and Training

EM, NE, SC, and NNSA will establish training and/or awareness programs for their federal and contractor employees. At sites which interact frequently with tribal governments, EM, NE, SC, and NNSA Field Elements will establish additional and ongoing training and awareness programs for DOE and contractor staff.

EM, NE, SC, and NNSA Program offices and sites shall require employees who work directly with Tribal governments to read the DOE Indian Policy, the Framework, and DOE Employees Guide, "Working with Indian Tribal Governments," and the HSS Guide on Consultation. In addition, it is recommended that all EM, NE, SC, and NNSA employees and contractors review the Guide to aid in the understanding of Tribal Governmental roles, responsibilities, and status in relation to the Federal Government.

EM, NE, SC, and NNSA will also provide training to employees regarding the affected Tribes, their culture, treaty and aboriginal rights, Tribal government, and at times collaborate with tribes on their specific Tribal identity.

As appropriate, EM, NE, SC, and NNSA will provide information and training to the tribes about their respective programs, including other DOE programs if necessary.

F. Points of Contact

(1) A list of DOE tribal issues points of contact (POCs) is attached.

(2) A list of tribal contacts for DOE-related issues will be provided to DOE HQ and Field Elements.

(3) Where appropriate, tribes are encouraged to identify a POC for technical issues in addition to leadership points of contact for DOE policy consultation issues.

(4) Both DOE and tribal POC lists will be updated on an annual basis by September 30, and will be distributed to appropriate parties.

(5) The internet can be used to list DOE and Tribal POCs. If websites are utilized, the information will be reviewed at least annually and updated as needed.

G. Financial Support and Technical Assistance

EM, NE, SC, and NNSA commit to using their best efforts to provide sustained and timely funding to affected tribes where requirements have been identified and agreed to by DOE. In addition, EM, NE, SC, and NNSA, in coordination with tribes, will seek to improve funding mechanisms and reporting activities. EM, NE, SC, and NNSA may also provide technical assistance directly to tribes or provide access to technical assistance where needs have been identified and the assistance agreed upon by DOE.

IX. Dispute Resolution

EM, NE, SC, and NNSA and the tribes will commit to utilizing their best efforts to resolve any disagreements that arise concerning EM, NE, SC, and NNSA actions or policies that the tribes believe are not in compliance with applicable laws or which could adversely affect tribal interests. In the event that a dispute should arise, existing procedures should be utilized, but if none exist, the following dispute process can be used:

- First, attempts to resolve the issue(s) informally by working through the appropriate tribal and EM, NE, SC, or NNSA program counterparts should be made, primarily at the field level where the dispute has arisen. If this first attempt does not resolve the issue during the informal process, then the issue will be referred to the HQ Tribal Lead Offices for resolution.

- If the parties are unable to resolve the dispute at the field/site office level, then the aggrieved party shall submit the matter to the appropriate DOE Assistant Secretary, Director, or NNSA Deputy Administrator for Defense Programs, and the tribe's senior official.

- If the parties are unable to resolve the dispute at the Assistant Secretarial or Administrator and tribal leadership levels, the matter can be submitted to the Office of the Secretary of Energy and the proper tribal official(s) for resolution.

- Ultimately as to matters interpreting DOE policies, the decision of the Secretary of Energy shall be final.

X. Site-Specific Implementation

In the event that EM, NE, SC, and NNSA Field Elements develop plans and/or procedures, these are to be supplemental to the Framework and are to address specific concerns or needs to achieve compliance with the DOE Indian Policy. It is understood that some EM, NE, SC, and NNSA sites and facilities have established programs and protocols that effectively serve to implement the DOE Indian Policy. The Framework is not intended to replace such programs and/or protocols, but merely to serve as a tool to bring consistency as needed.

The internet is a valuable tool, and as each site and its affected tribes develop their site-specific implementation procedures, they may be posted on an Internet site. If websites are utilized, the information will be reviewed at least annually and updated as needed. EM, NE, SC, and NNSA in addition will inform affected Tribes of such websites.

XI. References

The following documents provide guidance concerning the government-to-government relationship between DOE and tribal governments when implementing the DOE Indian Policy:

- Relevant treaties and other agreements between the U.S. and individual affected tribes, Executive Orders and Acts of Congress
- DOE Order 1230.2 transmitting the original American Indian Tribal Government Policy and established responsibilities for implementation of the DOE Indian Policy within DOE
- DOE Notice 144.1, revises the Order pertaining to the Policy
- Executive Order 13007 on Indian sacred sites
- Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments
- Executive Order 13827 concerning the disclosure of information
- Executive Memorandum, April 29, 1994, on Government to Government Relations with Native American Tribal Governments
- DOE Policy 141.1, which establishes DOE policy for cultural resource management, compliance with cultural resource laws, regulations

Supplemental References

- List of Tribal POCs for DOE-related issues
- DOE Employee Guide: *Working With Indian Tribal Nations (DOE/EM-0771, December 2000)*
- Native American Graves Protection and Repatriation Act
- Archaeological Resources Protection Act
- American Indian Religious Freedom Act
- National Historic Preservation Act [36 CFR 78 and 36 CFR 800]

- National Environmental Policy Act (42 USC 4321 et seq)
- Comprehensive Environmental Response, Compensation and Liability Act (42 USC 9601 et seq)
- "Native American Consultation Information Brief" (DOE/EH-41-0019/1204, December 2004)
- "Environmental Guidelines for the Development of Cultural Resource Management Plans – Update" (DOE Guide 450.1-3)
- Radioactive Material Transportation Practices Manual (DOE M 460.2-1)
- Freedom of Information Act
- Privacy Act
- Executive Order 13021, "Tribal Colleges and Universities"
- Executive Order 12898, "Environmental Justice"
- DOE Financial Assistance Regulations, 10 CFR 600
- NEPA Implementation Procedures, 10 CFR 1021
- Tribal Consultation/Best Practices in Historic Preservation; May, 2005
- National Association of Tribal Historic Preservation Officers (NATHPO)
- Working with Indian Tribal Nations; December, 2000 U.S. Department of Energy
- Transportation Resources for Tribes; July, 2003 U.S. Department of Energy, EM
- Government to Government, Understanding States and Tribal Governments; June 2000 National Conference of State Legislatures/National Congress of American Indians
- Models of Cooperation Between States and Tribal Government: May, 2002 National Conference of State Legislatures/National Congress of American Indians
- Resource Conservation and Recovery Act, (42 USC 6901 et seq)

Attachment:
Tribal Issues Point of Contact List

2005-011317

The Secretary of Energy
Washington, DC 20585

BACKGROUND

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

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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.

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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.