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April 3, 1998

Dr. R.L. Mullins, Jr., PE, AICP
U.S. Army Corps of Engineers
St. Louis District
9170 Latty Avenue
Berkeley, MO 63134

Re: St. Louis Airport Site EE/CA (FUSRAP)
Hazelwood Interim Storage Site EE/CA (FUSRAP)

Dear Dr. Mullins:

I am Special Legal Counsel to the Spokane Tribe of Indians on various natural resource matters. One of the matters on which I work for the Tribe concerns an inactive uranium millsite located just off the Spokane Indian Reservation, but immediately adjacent to it and to an important Reservation waterway known as Chamokane Creek. Operated for decades by Dawn Mining Company, the millsite is known to contaminate both surface and ground waters, including waters to which the Tribe holds federally protected and adjudicated rights. See *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984). Under its off-reservation authority, the State of Washington in February 1995 licensed Dawn to convert a vast open impoundment at the site into a disposal cell for Atomic Energy Act 11.e(2) byproduct material. These comments are submitted on behalf of the Spokane Tribe regarding the USACE's engineering evaluation/cost analysis (EE/CA) documents prepared in support of proposed actions to remove radioactively contaminated soils from the St. Louis Airport Site (SLAPS), the Hazelwood Interim Storage Site (HISS), and related areas. Although neither the SLAPS nor the HISS EE/CAs describe the presence of 11.e(2) byproduct material, discussing instead low-level waste, these comments are nonetheless submitted to raise issues of specific impacts to the Spokane Indian Reservation anticipated to be caused by alternatives which require offsite disposal, in the event removal of 11.e(2) byproduct material from those sites is contemplated.

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INTRODUCTION

An Executive Memorandum issued by President Clinton on April 29, 1994 implements four key guiding principles for federal actions affecting Indian tribes and tribal trust resources:

- 1) federal departments and agencies are to "operate[] within a government-to-government relationship with federally recognized tribal governments,"
- 2) federal departments and agencies "shall consult . . . with tribal governments prior to taking actions that affect federally recognized tribal governments,"
- 3) federal departments and agencies "shall assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities," and
- 4) federal departments and agencies "shall take appropriate steps to remove any procedural impediments to working directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes."

Presidential Memorandum, 59 Fed. Reg. 22951 (1994), *reprinted in* 25 USCA § 450 note. If disposal of 11.e(2) byproduct material from SLAPS or HISS at Dawn's site next to the Spokane Reservation is even a remote possibility, these principles have not been realized.

If such materials might be removed from the SLAPS or HISS, the EE/CA documents are deficient because they do not discuss impacts specific to disposal at facilities licensed to receive such materials, particularly where tribes and their resources might be negatively impacted. At present, there are only three facilities in the United States licensed to receive 11.e(2) material for disposal: one was licensed in New Mexico last year by the Nuclear Regulatory Commission, another is located in Utah, and the third is Dawn's facility next to the Spokane Indian Reservation. To the Tribe's knowledge, the licenses at the Utah and New Mexico facilities are presently not under legal challenges, but Dawn's license is. Conceivably, however, administration of federal procurement and contracting laws may lead to an agreement by USACE to dispose 11.e(2) material at the Dawn facility despite the questionable legal status of the license.

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RISK TO TRIBAL TRUST RESOURCES AND HUMAN HEALTH

The Tribe questions whether the SLAPS and HISS EE/CA alternatives contemplating off-site disposal can be found to be protective of human health and welfare and the environment when the potential impacts at the disposal end of the proposal are not even considered. The Tribe is heavily dependent on the ground and surface waters of the Chamokane Creek Basin. See *United States v. Anderson*. In addition to supporting Reservation fish and wildlife, uses of this basin's waters include domestic, ranching, farming, and a Tribal fish hatchery. At present, the Dawn site is known to contaminate Chamokane Creek's surface water and an upper aquifer at the site. Tribal technical staff have determined it likely that the site also contaminates a deep aquifer from which drinking water is drawn. Further, the High Density Polyethylene liner in Dawn's disposal cell is only 30 mil, and is over 16 years old. The manufacturer's warranty for the liner expired more than one year ago. Similar concerns regarding this disposal cell's integrity have been raised by Department of Energy technical staff who should be consulted by USACE before determining to send any FUSRAP waste to eastern Washington. Beyond this, it is imperative that the Tribe be consulted with concerning any possible federal action which might threaten its Reservation, and that such consultation be conducted sufficiently early in the process that it will have a meaningful effect on the outcome. See *U.S. Army Corps of Engineers Tribal Policy Principles* (identifying as key principles Tribal Sovereignty, Trust Responsibility, Government to Government Relations, Pre-Decisional and Honest Consultation, Self-Reliance, and Natural and Cultural Resources).

In evaluating impacts related to the proposed removals, the EE/CA documents, in typical fashion, focus on the subject SLAPS and HISS sites. As stated in both, "[t]he effectiveness of an alternative is defined by its ability to protect human health and the environment from risks associated with the radioactive materials in both the short term and the long term." (Section 5.1). Both then proceed to determine that the proposed removals satisfy this requirement. As discussed above, however, these conclusions when applied to Dawn's facility are highly suspect from a technical standpoint. Moreover, from a federal Indian policy standpoint, they are wholly unsupported since no effort has been made by USACE to "assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs and activities." See Presidential Memorandum dated April 29, 1994. See also, Civil Rights Act of 1964, Title VI (42 USCA 2000d, et seq.) and related regulations. The reason the principles in the Presidential Memorandum exist is the federal trust responsibility to tribes and their resources, developed

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through more than 150 years of jurisprudence. States have no such responsibility, and indeed throughout history have routinely taken strongly adverse positions to tribes as sovereigns. In fact, this responsibility can be neither delegated to states nor abdicated by the federal government. *Assiniboine and Sioux Tribes v. Bd. of Oil and Gas*, 792 F.2d 782 (9th Cir. 1986). Thus, when disposal of federal waste is considered for a state-licensed site like Dawn's it is incumbent upon the responsible federal agency as trustee to ensure no injury to affected tribes and their resources. While offsite disposal impacts are often not considered in environmental reviews for reclamation, they must be where federal trust duties have not been addressed in the process of licensing the disposal facility. And this must be accomplished before the federal action has proceeded down a path where federal procurement and contracting laws render it irreversible.

If Dawn's facility is a potential disposal site, the Spokane Tribe's "rights and concerns" must yet be considered. In the context of trust resources, those "rights and concerns" include the following. What are the impacts the DMC site and the additional FUSRAP waste will have on Reservation resources? Will the quality or quantity of these waters be impacted in any way by the proposed alternative? What impacts will result to Reservation fish and wildlife? To cultural resources? What are the likely human health impacts if the FUSRAP waste in Dawn's impoundment contaminates the deep aquifer? What will be required as mitigation should this occur? Shouldn't the condition and integrity of the specific disposal cell at the facility be taken into account in order to complete this analysis? Have there been irreversible and irretrievable commitments of Tribal resources? How would a Tribal natural resource damage action under CERCLA for harm to Reservation resources affect the cost analyses contained in the SLAPS and HISS EE/CA documents? Does the federal government's trust responsibility over Tribal trust resources permit the disposal of FUSRAP materials at Dawn's site? These questions must be answered and a more meaningful opportunity for Tribal consultation presented before USACE commits to a course which may lead to further injury of Tribal trust resources.

TRAFFIC SAFETY RISKS TO TRIBE

The route selected by Dawn to transport its waste includes a narrow, winding and hilly highway which serves as the primary route for Tribal members and employees travelling to and from the Spokane Indian Reservation. The Tribe presently is contesting selection of this route, and has submitted to the State of Washington the enclosed document entitled "Traffic Safety Study, State Route 231, Reardan to Ford, Dawn Mining Mill Site Closure Proposal," which are formal comments prepared by a Tribal traffic safety consultant on a State conducted

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study, and which are to be considered as additional Tribal comments regarding the proposed actions at SLAPS and HISS.

In general, the issues of trust responsibility raised in the above section concerning threats to human health and natural resources apply equally to the traffic threats Dawn's plan poses to Tribal membership. Although traffic impacts are considered in the EE/CA documents, the guiding principles of the 1994 Executive Memorandum are not satisfied. The Tribe must be consulted with on a government-to-government basis and impacts to the Tribe must be assessed prior to implementation of the plan.

In assessing these impacts, the following must be considered. According to Washington data, nearly one-half of the accidents studied along Dawn's route result in death or injury. Dawn's proposal will increase large truck traffic on State Route 231 by 400% to 600%. Large trucks, during the period in which the State's studies provide such statistics, represented nearly one-sixth of the accidents in this corridor. A particularly winding stretch of this route is in a canyon adjacent to a stream which flows onto the Spokane reservation, and represents an area in which nearly one-fourth of the accidents studied along Dawn's preferred route occurred. Spills of radioactive waste from accidents in either this canyon or at a dangerous bridge which crosses the Spokane River will result in contamination of critical Tribal waters and other resources. Beyond an assessment of these issues, the Tribe, consistent with the Presidential Memorandum and the United States' trust responsibility, is entitled to consultation.

THE PROPOSED ACTIONS AT SLAPS AND HISS RAISE ISSUES OF ENVIRONMENTAL JUSTICE

The need to examine the disposal end of the proposed actions at SLAPS and HISS is important, not just to satisfy the guiding principles of the 1994 Presidential Memorandum, but also to satisfy the mandate of Executive Order 12898, dated February 11, 1994 (59 Fed. Reg. 7629 (1994), 60 Fed. Reg. 6381 (1995), *reprinted in* 42 USCA § 4321 note) and Title VI of the 1964 Civil Rights Act. The executive order requires agencies of the executive department to act consistent with the principle of environmental justice and the Civil Rights Act bars discrimination in federal programs and activities affecting human health and the environment. In other words, federal agencies must consider and address the disproportionate impact their actions have on minority and low income populations. Clearly, all impacts to the Spokane Tribe and its Reservation discussed above fall within this mandate. Federal agencies cannot escape applying this analysis to the disposal end of remediation actions where, as here, the

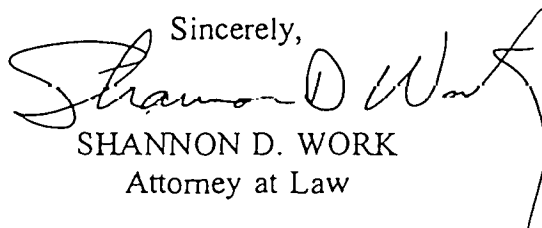
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licensing entity is not required to conduct a similar analysis. In this regard, environmental justice principles associated with the SLAPS and HISS proposals — as they relate to Dawn's facility — must be satisfied in addition to meeting the government's trust obligations to the Spokane.

CONCLUSION

The Spokane Tribe appreciates the opportunity to submit these comments and the attached comments to the USACE. Please advise at the earliest opportunity whether the consultation sought in these comments can be arranged. Also, please keep me advised as to future developments on this and other FUSRAP projects which might affect my client's interests.

Sincerely,



SHANNON D. WORK
Attorney at Law

SDW:jaf
enclosure