



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

NOV 20 1987

MEMORANDUM FOR: Ronald M. Scroggins, Deputy Director
for Financial Management and Controller, ARM

THRU: Graham D. Johnson, Director
Division of Accounting and Finance, ARM

FROM: C. James Holloway, Jr., Chief
License Fee Management Branch
Division of Accounting and Finance, ARM

SUBJECT: FEE EXEMPTION-DESIGN AND ENGINEERING SERVICES
DEPARTMENT, NAVAJO NATION

We recently received an application for a byproduct material license from the Design and Engineering Services Department of the Navajo Nation in Window Rock, Arizona. If licensed, they will be using cesium 137/ameridium 241 contained in a Troxler moisture density gauge.

The question of whether or not the Navajo Nation is subject to fees has been raised. Based on our discussions with the Office of General Counsel (OGC), attached, they have indicated that the Navajo Nation does not fall within the strict definition of a Federal Agency as defined in 10 CFR 170.3(b) nor are they considered a State agency. Therefore neither the fee exemption provision of 170.11(a)(5) nor 170.11(a)(9) apply with respect to the application that has been filed with the NRC. OGC has indicated however, that given the fact that the Indian tribes are organized as governmental entities similar to State governments, consideration should be given to granting Indian tribes and their governmental organizations the same exemptions granted by the NRC to States and Government Agencies. Since the Indian tribes are organized as Governmental entities similar to State governments, we recommend that in accordance with 10 CFR 170.11(b)(1) you grant an exemption from fees to the Design and Engineering Services Department of the Navajo Nation having determined that such exemption is authorized by law and is otherwise in the public interest.

If the exemptions of 10 CFR 170.11 are continued in the next revision of 10 CFR 170, we propose to broaden the definition of "Government Agency" to include the Indian Tribes.

C. James Holloway, Jr.
C. James Holloway, Jr., Chief
License Fee Management Branch
Division of Accounting and Finance
Office of Administration and
Resources Management

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Ronald M. Scroggins

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APPROVED:

Lee T. Hill

DATE:

11/27/82

for

Ronald M. Scroggins, Deputy Director
for Financial Management and Controller



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

NOV 17 1987

MEMORANDUM FOR: Glenda Jackson
License Fee Management Branch
Division of Accounting and Finance
Office of Administration & Resources Management

FROM: Ronald M. Smith, Attorney
Division of Rulemaking & Fuel Cycle
Office of the General Counsel

SUBJECT: APPLICATION FOR A MATERIALS LICENSE BY THE
NAVAJO NATION--FEES EXEMPTION

In your memorandum of November 3, 1987, concerning the application by the Design & Engineering Services Department, a subdivision of the Navajo Nation, for a materials license, you raised several questions regarding NRC jurisdiction and the applicability of fees to such applications. First, the NRC has jurisdiction over tribal activities requiring a license to use radioactive materials on tribal lands and not the Agreement States; and, second the tribe does not fall within the exemptions from fees afforded under 10 CFR 170.11(a)(5) or (9). However, the NRC could exempt Design & Engineering Services Department from fees pursuant to § 170.11(b)(1), as being in the public interest. This result also means that fees would not have to be collected for the license issued to the Navajo Agricultural Products Industry in 1977.

The separate governmental and legal status of Indian tribes is recognized in the U.S. Constitution wherein Article I, § 8, clause 3, grants Congress the power "(t)o regulate Commerce...with the Indian Tribes." Generally, this has meant that the Indian tribes have been treated as wards of the Federal government. More recently, their special status has been recognized in such laws as the Nuclear Waste Policy Act of 1982, P. Law 97-425, Jan. 7, 1983 (42 U.S.C. 10101, et seq.). This is consistent with the Federal policy of encouraging Indian self-determination and economic self-reliance. Unfortunately, for our purposes, the Indians were not thought of in the same terms when the AEA and Agreement States provision were enacted. As a result, both are silent on the issue of Indian tribes.

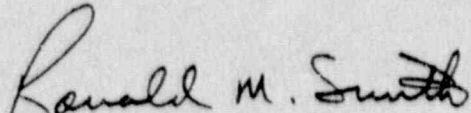
For an Agreement State to have jurisdiction over an Indian tribe(s) for the licensing of radioactive materials, the appropriate legislation would have to expressly give them such authority. Otherwise, there is presumed to be a right of tribal self-government in Indian country free of state interference.

See F. Cohen, Handbook of Federal Indian Law 378-9 (1982 ed.). Section 274 of the AEA does not contain any language indicating that the Agreement State program is intended to alter the assumptions underlying the relationship of Indian Tribes to the United States Government and to the States. An Indian tribe is within the definition of a "person," as defined in § 115., AEA, in that it is a "group" or "other entity;" but it is not a Government agency, as the term is defined in § 111., because it is not an establishment "in the executive branch of Government." The exemption within § 170.11(a)(5) applies only to a Government agency and the exemption within § 170.11(a)(9) applies only to an "agency of a State or any political subdivision thereof." Thus neither exemption applies to Indian tribes. Nevertheless, the Commission has provided itself with authority "upon its own initiative" to grant other exemptions, § 170.11(b)(1). Given the current Federal climate of encouraging self-reliance by Indian tribes and that they are organized as Governmental entities similar to state governments, it may be in the public interest to grant Indian tribes and their governmental organizations the same exemptions granted by the Commission to States and Government agencies. If § 170.11 exemptions are continued under the planned revision to Part 170, it would appear to be logical to treat the Indian tribes in the same manner as we do States and Government agencies in this regard.

It should be noted that this response is based on an assumption that the Bureau of Indian Affairs, Department of the Interior, has no objection to the NRC issuing licenses directly to Indian tribes and their governmental agencies or departments. I understand that many times in the past NRC licenses have been issued to the Bureau of Indian Affairs for the Indian tribes. Clearly, no fees were collectable under such circumstances. If the NRC intends to treat the Indian tribes in the manner described above, fees will not be a problem. Issuing the license to BIA, however, leaves open the potential issue of whether the NRC will be able to enter Indian lands and inspect and take enforcement actions to insure proper use of the license. Issuance of the license directly to the user may avoid that issue.

It is also my understanding that NMSS intends to merely advise the Bureau of Indian Affairs that it has issued a license to the Design & Engineering Services Department, The Navajo Nation. In anticipation that the practice of issuing NRC licenses directly to Indian tribes may expand, I believe it prudent to clear with the Bureau of Indian Affairs that they see no objection or concern with the practice, particularly in terms of NRC ability to properly oversee its licenses and the licensed material. NRC inspectors must have unfettered access to licensed material without prior notice to the

licensee. If there is any possibility that this will not be so because of the unique status of the Indian tribes, the matter should be resolved prior to issuance of this or other licenses.


Ronald M. Smith, Attorney
Division of Rulemaking & Fuel Cycle
Office of the General Counsel

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MEMORANDUM FOR: Ron Smith, OGC
FROM: Glenda Jackson, LFMB/ARM
SUBJECT: THE NAVAJO NATION'S SEPTEMBER 18, 1987
APPLICATION FOR A MATERIALS LICENSE

Attached is a copy of The Navajo Nation's September 18, 1987 application for a materials license, and a copy of NRC correspondence dated March 9, 1977 and March 10, 1977, concerning an exemption from fees for a license application filed by the Navajo Agricultural Products Industry.

I would appreciate your opinion as to whether an exemption from fees is appropriate in these cases, and, if so, whether the exemption should be §170.11(a)(5) or §170.11(a)(9), 10 CFR 170. If it is your opinion that an exemption is not appropriate, I would appreciate your advice on whether we should collect fees for the applications filed by the Navajo Agricultural Products Industry in the past, which were processed at the time as fee Exempt under §170.11(a)(5).

I notice that in both instances, the applicant/licensee is located in an Agreement State. Does the fact that NRC apparently has licensing jurisdiction mean that the Tribe is considered a federal agency or that the intended place of use is considered to be on federal land?

Glenda Jackson

Glenda Jackson
License Fee Management Branch
Division of Accounting and Finance
Office of Administration and
Resources Management

Attachments:
As Stated

DISTRIBUTION:
Exemption Fee File
ARM/DAF R/F
LFMB R/F (2)
DW/GJ/Navajo

OFFICE: ARM/LFMB
SURNAME: GJackson:rej
DATE: 11/3/87

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