



**EPA Region 10 Tribal Operations Committee (RTOC)
P.O. Box 689
Spokane, Washington 99210
www.region10rtoc.net**

January 31, 2024

U.S. Department of Energy
Office of Indian Energy Policy and Programs
1000 Independence Ave. SW
Washington DC 20585

RE: DOE Order 144.1

Dear Madam or Sir:

This letter is sent on behalf of the Tribal Caucus members of EPA Region 10's Tribal Operations Committee ("RTOC"). This letter is not sent on behalf of EPA Region 10 or any employees of EPA, but solely tribal government representatives of the RTOC. This letter is sent regarding Order 144.1 Discussion Draft ("the Order"). The RTOC strongly supports DOE's efforts to develop the updated to increase and improve Tribal consultation and involvement of Tribes in DOE's decision-making processes.

The RTOC does have some comments that should be included in the finalization of the Order:

1. The Order could provide more substantial commitments as a regulation.

The positive changes within this order are laudable progress that should be protected against future incursion by being passed as formal agency regulations. The obligations of the Federal Government towards Tribes are long-lived and rooted in the Constitution, treaties, and centuries of law. The Department of Energy's current steps toward fulfilling its legal responsibilities to the Tribes should not be able to be quickly, or lightly undone. These policies should be drafted into a binding regulation that establishes a floor for future actions. Therefore, these laudable policies and responsibilities will at least have the protection of the Administrative Procedure Act to prevent a later administration's quick dismantling of them.

2. Inconsistent standards are used for identifying contractor work with Tribal impacts.

Within the Order, two different standards are used to determine whether an action by contractors necessitates the inclusion of Contractor Requirements Documents that respect Tribal rights. This contradiction should be resolved in favor of the more expansive standard.

The Order notes that “each DOE Head of Departmental Element must ensure the CRD . . . is included in contracts . . . under which work and contractor interactions *may potentially* result in an impact on the traditional and cultural lifeways, natural resources, treaty rights, reserved treaty rights, and any other legal rights of federally recognized Indian tribes.” (emphasis added) DOE Order 144.1 Discussion Draft (3)(b)(2). However, it also notes that “Heads of Departmental Elements or designees will identify affected contracts by determining, if under the contract work, contractor interactions *could reasonably be expected to* result in an impact on the traditional and cultural lifeways, natural resources, treaty rights, reserved treaty rights, and any other legal rights of a federally recognized Indian tribe or tribes.” (emphasis added) DOE Order 144.1 Discussion Draft (4)(k)(3); *see also* DOE Order 144.1 Discussion Draft (5)(a)(8). The phrase “may potentially” is broader than “could reasonably be expected to,” and this contradiction could result in unpredictability in the Order’s application.

Instead of having competing standards, DOE should adopt the “may potentially” standard, as it is the most congruous with the purpose of the Order. Tribes are the only entities that could know the full extent of traditional and cultural lifeways, natural resources, treaty rights, and reserved rights. The “reasonably expected” standard implicitly applies the expectations of the Heads of Departmental Elements regarding Tribal lifeways and resources. Considering the chance for error or unfamiliarity, a “may potentially” standard would more frequently protect Tribal rights.

3. High turnover rates may limit the benefit of liaison officers.

Consistency in personnel is important because of the complexity of Federal Indian law, the heterogeneity of Tribal treaties and reserved rights, and diverse governance structures across Tribes. Federal Government employees dealing with Tribal treaty rights and reserved rights face a substantial learning curve. However, high turnover rates in liaison positions prevent the development of skilled local experts in the field. Having new liaisons every year or two results in a great deal of teaching and cultivating relationships, but then the position changes before that learning and those relationships can be functionally relied upon.

It is hoped that the Tribal Liaison Officers be structured in such a way as to promote stability and the application of legal and local knowledge.

4. Internal definition of subsistence arbitrarily limits obligations.

The Order defines “subsistence” according to the regulations for National Park System Units in Alaska. DOE Order 144.1 Discussion Draft (7)(m) (specifying that it is “the customary and traditional uses by rural Alaska residents”); *see* 36 C.F.R. Part 13 Subpart F. The Order refers to subsistence only when

noting that DOE will try to recognize a willingness to avoid scheduling meetings that interrupt “ceremonies, cultural traditions, and critical times of year for subsistence harvest, fishing, or hunting.” DOE Order 144.1 Discussion Draft (4)(d)(1)(b)(6). There does not seem to be a reason for limiting this promise to Alaskan subsistence practices. The general subsistence practices of non-Alaskan Tribes should also be considered when scheduling consultations.

5. Periodic dialogues addressing consultation process itself preserve intent of consultation.

RTOC appreciates DOE’s commitment to periodic summits and dialogues to address the efficacy of the consultation process. The ability to have continued input on the form of consultations is a valuable tool for ensuring effective communication and productive collaboration. These periodic meetings can be used to continue improving the communication between Tribes and the Federal Government. It is hoped that these meetings presage DOE’s further development in communications with Tribes.

6. Treaty rights and reserved rights should be protected equally.

In general, RTOC believes that this Order represents positive change and a step forward for the fulfillment of Tribal treaty rights and reserved rights. Although, it is also hoped that Tribes’ reserved rights and sovereignty are not ignored. Many Tribes do not have treaties with the Federal Government. Nevertheless, all Tribes have a trust relationship with the Federal Government, and all Tribes have inherent sovereignty, which begets reserved rights. While the language of the Order respects these reserved rights, it is important that the practice of the Order do a similarly balanced job in protecting both treaty rights and inherent, reserved rights.

7. Acknowledgement of Indigenous Knowledge is important for consultation.

RTOC appreciates the Order’s acknowledgement and intent to incorporate Indigenous Knowledge in its practices. Indigenous Knowledge is important for holistic decision-making. For government-to-government consultation to be productive, both sides need to be open to the other’s ideas. DOE’s consideration of Indigenous Knowledge establishes the basis for much more productive consultations.

The RTOC appreciates your consideration of these comments.

Sincerely,

Raymond Paddock

Raymond E. Paddock III
Central Council of the Tlingit and Haida Indian Tribes of Alaska
Region 10 Tribal RTOC Chair