

October 31, 2017

Via Federal Express/Electronic Mail

Todd Anthony Bianco, PhD, EFSB Coordinator
RI Energy Facilities Siting Board
89 Jefferson Blvd.
Warwick, RI 02888

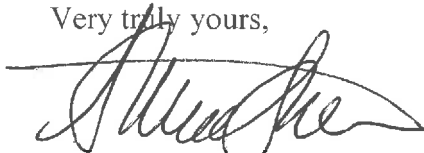
Re: Invenergy Docket No. SB-2015-06

Dear Dr. Bianco:

On behalf of Invenergy Thermal Development LLC and the Clear River Energy Center Project (“Invenergy”), enclosed please find an original and three (3) copies of Invenergy’s Responses to the Town of Burrillville’s 40th Set of Data Requests.

Please let me know if you have any questions.

Very truly yours,



ALAN M. SHOER
ashoer@apslaw.com

Enclosures

cc: Service List

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD

IN RE: Application of Invenergy Thermal
Development LLC's Proposal for
Clear River Energy Center

Docket No. SB-2015-06

**INVENERGY THERMAL DEVELOPMENT LLC'S RESPONSES TO
THE TOWN OF BURRILLVILLE'S 40th SET OF DATA REQUESTS**

Request 40-1 With regard to Invenergy's contract with the Narragansett Indian Tribe (Narragansetts) and their agreement to provide a back-up or contingent water supply for the applicant's proposed power plant, please provide the following:

- a. Copies of legible maps outlining the entire aquifer from which the Narragansetts draw water;
- b. Copies of all deeds, grants, treaties or any other document granting the land to the Narragansetts;
- c. Copies of all acts under any agreement with any federal or state governmental agency which authorizes or permits the Narragansetts to sell water from tribal or settlement land

Response 40-1 (a) Please see the report prepared by ESS Group, Inc., dated October 23, 2017, entitled "CREC's Proposed Water Use from the Lower Wood Watershed," Figure 3, attached hereto.

(b) Invenergy Thermal Development LLC ("Invenergy") does not have any deeds, grants, treaties and/or any other documentation granting land to the Narragansett Indian Tribe ("NIT"). Please see United States Public Law 95-395, 25 U.S.C. §§ 1701 through 1716, which codified a Joint Memorandum of Understanding which was signed by the NIT, then-Rhode Island Governor J. Joseph Garrahy, the Charlestown Town Council and certain landowners. Please also see letter from William P. Devereaux, Esq., attorney for the Narragansett Indian Tribe, to the Rhode Island Energy Facility Siting Board, dated October 25, 2017, attached hereto (not including attachments).

(c) Please see letter from William P. Devereaux, Esq., attorney for the Narragansett Indian Tribe, to the Rhode Island Energy Facility Siting Board, dated October 25, 2017, attached hereto, pages 3-5 (not including attachments).

DATE: October 31, 2017

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
ENERGY FACILITY SITING BOARD

IN RE: Application of Invenergy Thermal
Development LLC's Proposal for
Clear River Energy Center

Docket No. SB-2015-06

**INVENERGY THERMAL DEVELOPMENT LLC'S RESPONSES TO
THE TOWN OF BURRILLVILLE'S 40th SET OF DATA REQUESTS**

Request 40-2 Please advise whether the Narragansetts and/or Invenergy and/or CREC have any verbal or written agreements with any other municipality or entity which draws water from the subject aquifer. If so, please identify all such municipalities or entities and the names and titles of the authorized municipal officials or persons who made such verbal or written agreements on behalf of said municipality or entity.

Response 40-2 Invenergy does not have any verbal or written agreements with any other municipality or entity which draws water from the Lower Wood Aquifer. Invenergy does not know whether the NIT has any verbal or written agreements with any municipality or entity that draws water from the Lower Wood Aquifer.

RESPONDENT: John Niland, Invenergy Thermal Development LLC

DATE: October 31, 2017

INVENERGY THERMAL DEVELOPMENT LLC
By its Attorneys,

/s/ Alan M. Shoer

Alan M. Shoer, Esq. (#3248)

Richard R. Beretta, Jr. Esq. (#4313)

Nicole M. Verdi, Esq. (#9370)

ADLER POLLOCK & SHEEHAN, P.C.

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Dated: October 31, 2017

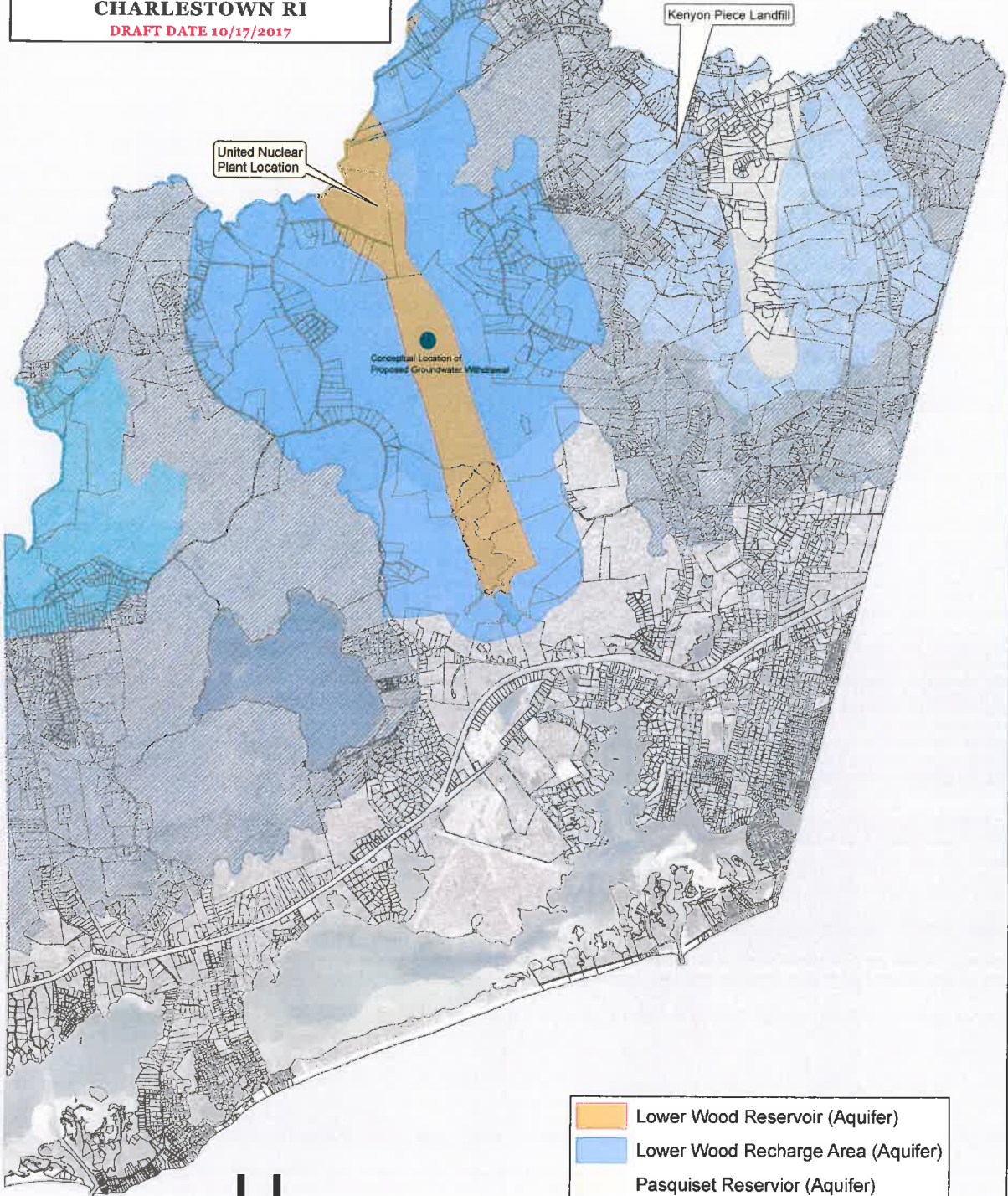
CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2017, I delivered a true copy of the foregoing responses to the Town of Burrillville's 40th Set of Data Requests via electronic mail to the parties on the attached service list.

/s/ Alan M. Shoer

**2017
GROUNDWATER
AQUIFERS AND RECHARGE AREAS
CHARLESTOWN RI
DRAFT DATE 10/17/2017**

**DRAFT
10/18/2017**






THIS MAP IS FOR PLANNING PURPOSES ONLY. IT IS NOT VALID FOR LEGAL DESCRIPTION OR CONVEYANCE

While the Town makes every attempt to ensure the accuracy and completeness of the data, the Town of Charlestown provides this data as is, with all faults. The Town of Charlestown makes no claims, no representations and no warranties, regarding the reliability, completeness or the accuracy of the GIS data and GIS data products furnished by the Town. In no event shall the Town be liable for any indirect or consequential damages incurred from the use or inability to use the data.

Pictometry Image
Flown Spring Dec. 2016
Town of Charlestown
4 inch pixel resolution.



-  Lower Wood Reservoir (Aquifer)
-  Lower Wood Recharge Area (Aquifer)
-  Pasquisset Reservoir (Aquifer)
-  Pasquisset Recharge Area (Aquifer)
-  Bradford Recharge Area (Aquifer)
-  Pawcatuck River Basin

**DRAFT
10/18/2017**

FIGURE 3

William P. Devereaux
401 824-5106
wdevereaux@pdlolaw.com

October 25, 2017

VIA HAND DELIVERY

Rhode Island Energy Facility Siting Board
Public Utilities Commission
89 Jefferson Boulevard
Warwick, RI 02888

Re: Narragansett Indian Tribe

Dear Board Members:

I write regarding issues recently brought to the attention of the duly constituted Narragansett Indian Tribal government through the filing of a "Motion for Intervention of the Tribal Council of the Narragansett Indian Tribe" by attorney Shannah Kurland. Please be advised that this filing was not authorized by the Narragansett Indian Tribe Tribal Council or the Tribe's Chief Sachem, and Attorney Kurland does not represent the properly constituted Tribal Council of the Narragansett Indian Tribe. Since Attorney Kurland elected not to identify her clients by name, it is believed that Attorney Kurland represents a dissident group of Tribal members, or former members, that have challenged the authority of the properly constituted Tribal leadership in the past. In fact, the Tribal Court of the Narragansett Indian Tribe has dealt with these individuals as recently as December 22, 2016, and ordered that they cease from holding themselves out as representing or having authority to represent the Tribe. Despite this strong directive from the Tribal Court, it appears as though these same members have once again taken it upon themselves to falsely represent that they hold lawful representative capacity by filing this Motion to Intervene through Attorney Kurland.

By way of background, a recent decision by Mr. Justice McConnell of the U.S. District Court for the District of Rhode Island entitled *Narragansett Indian Tribe Tribal Council v. Matthew Thomas, C.A. 16-cv-622-M (D.R.I. Dec. 22, 2016)* (attached as **Exhibit A**) determined that there was no Federal jurisdiction to consider internal Tribal Court decisions regarding Tribal governance disputes. In particular, Judge McConnell noted the 1st Circuit's decision in *Narragansett Indian Tribe v. Rhode Island, 449 F. 3d 16, 26 (1st Cir. 2006)*, wherein the Court stated, "We recognize that the Tribe may continue to possess some degree of autonomy 'in matters of local governance', including . . . the regulation of domestic relations." *Id.* Noting this decision as precedent, Judge McConnell then stated, "This Court finds elections and related judicial orders the archetypal function of self-governance." *Id. at 2.* Consequently, the U.S. District Court for the District of Rhode Island has recognized the autonomy of the Narragansett Tribal Court to render decisions regarding internal tribal government matters.

Northwoods Office Park
1301 Atwood Avenue, Suite 215 N Johnston, RI 02919
tel 401 824 5100 fax 401 824 5123

The Tribal Court's jurisdiction over this matter is also clear from the Tribe's Comprehensive Code of Justice. The Code provides for the establishment and maintenance of a Tribal Judiciary, including a Chief Judge. See Excerpted Portions of Comprehensive Code of Justice, attached as **Exhibit B**. Presently, the Chief Judge of the Tribal Court is Denise Dowdell, a graduate of Catholic University and the University of Wisconsin School of Law. Judge Dowdell has rendered decisions for nearly a decade on a number of Tribal matters, including issues related to Tribal elections, and has analyzed, at length, the jurisdiction of the Tribal Court to adjudicate such disputes.

Of equal importance, the United States District Court for the District of Rhode Island has also recognized, on more than one occasion, the authority of the Tribal Court to make determinations related to internal Tribal disputes. See *Luckerman v. Narragansett Indian Tribe, C.A. No. 13-185S (D.R.I. Sept. 30, 2016)*, attached as **Exhibit C** (analyzing and ultimately approving the authority of the Tribal Court to determine tribal jurisdiction over breach of contract claim); *Narragansett Indian Tribe Tribal Council, C.A. No. 16-cv-622-M*, previously cited and attached as **Exhibit A** (concluding that "elections and related judicial orders [are] the archetypal function of self-governance and declining to exercise jurisdiction where "underlying governance dispute culminat[ed] from a tribal judge's order"). Consequently, the decisions and orders of the Tribal Court constitute lawful and effective Tribal government decisions.

With this in mind, the relevant Tribal Court decisions on the issue referred to in the Motion as "internal disputes" has actually been adjudicated by the Tribal Court. The Tribal Court has unequivocally ruled that the dissident group of Tribal members (which the Tribal Court referred to as "the TEC Members") were restrained and enjoined on July 21st, 2016 from:

- Conducting any business, meeting, rally, election, or any other gathering on tribal property that concerns election matters or interferes through collective or individual conduct by the enjoined persons with same.
- Communicating or publishing any information or entering any contract in the name of the Narragansett Tribal Election Committee.
- Any further action or communications in any form, or use of any governmental resources, to represent themselves, singly or jointly, directly or indirectly as conducting official or lawful action on behalf of the Narragansett Tribal Government or the Narragansett Tribe (see *Narragansett Indian Tribal Court decision and order dated July 21, 2016*, attached as **Exhibit D**).

No appeal was taken from this order and therefore the so-called Tribal election that took place on July 30, 2016 at a local VFW hall in Charlestown (in which it is alleged that 68 ballots were cast out of a Tribe of at least 2400 recognized members) was in direct contravention of the Tribal Court's July 16th decision. On December 22nd, 2016, the Tribal Court entered a **permanent injunction** enjoining those individuals from the same conduct and activities the Court specifically noted in its July 16th, 2016 order. (see *Narragansett Indian Tribal Court*

decision, dated December 22nd, 2016, attached as **Exhibit E**). Furthermore, the December 22, 2016 opinion states that the “purported 2016 election is null and void for noncompliance with and misrepresentation of tribal law and policy.” Lastly, the TEC Members were “permanently enjoined from any further action or communications in any form, or use of any governmental resources, to represent themselves, singly or jointly, directly or indirectly, as conducting official or lawful action on behalf of the Narragansett Tribal Government or the Narragansett Tribe.”

The group that filed the Motion to Intervene before the EFSB is simply not the properly constituted Tribal Council, as they purport to be in the filing. Rather, upon information and belief, it is made up of either the same TEC Members that were enjoined by Chief Judge Dowdell, or the members that were purportedly “elected” in the 2016 election which Chief Judge Dowdell determined was null and void. Certainly, the lawful Tribal Council, headed by First Councilman Cassius Spears, did not take any action or vote on authorizing the filing of any such Motion to Intervene, and in fact, specifically oppose such a Motion from being filed.

In order to adequately protect the interests of the properly constituted Tribal leadership and government, a temporary restraining order was obtained from the Tribal Court on October 25, 2017 (attached as **Exhibit F**). This restraining order specifically ordered that:

- “1. Defendant, and its named counsel Shannah Kurland, Esq., are temporarily and immediately enjoined from (a) identifying itself and therefore themselves as the “Tribal Council of the Narragansett Indian Tribe” and (b) pursuing a Motion to Intervene before the Rhode Island Energy Facility Siting Board and
2. The Rhode Island Energy Facility Siting Board is hereby advised that the so-called “Tribal Council of the Narragansett Indian Tribe” cited in the filed EFSB Motion is not the lawful representative of the Narragansett Indian Tribe and was not elected by a duly authorized Tribal Election.”

This order went into effect at 11:00 AM on October 25th and remains in effect until November 6th, or until further order of the Tribal Court. Based on the above, I ask that you disregard and/or dismiss the motion filed by Attorney Kurland, as she does not represent the duly elected Tribal Council of the Narragansett Indian Tribe, and the Tribal Council of the Narragansett Indian Tribe has not authorized such a filing. To recognize this particular group, in any representative capacity, will in my opinion, thrust the EFSB unnecessarily into issues related to Tribal sovereignty.

While the Tribe, is ordinarily reluctant to discuss internal Tribal government matters, the actions of Attorney Kurland and whatever group she represents, require some clarification regarding the authority of the Narragansett Indian Tribal government to enter into a secondary water supply contract with Clear River Energy, LLC (“CRE”). In this regard, the Narragansett Indian Tribe, at tribal assemblies in 1998, 2005 and 2006, passed resolutions relating to the development of its water infrastructure and sources on the trust lands and other property that it owns in fee simple. Specifically the Narragansett Indian Tribal Historic Preservation Office and

the Land and Water Resources Committee of the Tribe were mandated to work on the development of water sources. As you are aware, the contract with CRE simply provides that the Narragansett Indian Tribe will serve as a *secondary* water source for the project in Burrillville. The signatories to that contract—the Chief Sachem and the Tribal Historic Preservation Officer—are authorized to enter into this contract.

As I am sure you are aware the Tribe is a federally recognized Indian Tribe and therefore a recognized “Indian Tribe” within 54 U.S.C. §300309. The Tribe’s constitution and by-laws (“Tribal Constitution”) provide that the Chief Executive of the Tribe is the Chief Sachem. Section One of the Tribal Constitution provides that the Chief Sachem is the proper party to sign all documents on behalf of the Tribe, and accordingly, the Chief Sachem has the authority to sign any agreement regarding natural resources on tribal land. Furthermore, the NITHPO has the authority to determine if any such agreement would involve construction that could disturb Indian burial grounds or Indian historical artifacts.

Importantly, the Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 *et seq.* (the “Act”), specifically recognized that the transfer of lands pursuant to the Act included “water and water rights.” Pursuant to the Act, the State of Rhode Island was to arrange for the transfer of certain “land and natural resources” which constituted the settlement lands. The Act defines “land and natural resources” as “any real property or natural resources, or any interest in or right involving any real property or natural resource, including but not limited to . . . **water and water rights** . . .” (emphasis added). Accordingly, it is without a doubt that the Tribe has the authority to exercise rights over water located within Tribal lands.

An important and inherent power of any sovereign is the ability to make and enforce its own laws. United States v. Wheeler, 435 U.S. 313, 324 (1978) (enforcing laws is an exercise of retained tribal sovereignty); Williams v. Lee, 358 US 217, 220 (1959) (a state may not infringe on a tribe’s rights to “make their own laws and be ruled by them.”) The Indian Tribal Justice Act, 25 U.S.C. §3601(5)(200) indicates that “tribal justice systems are an essential part of tribal governments and serve as important forums for insuring public health and safety and the political integrity of tribal governments.” See also Montana v. Gilham, 133 F.3rd 1133, 1140 (9th Cir. 1998) (“development of tribal court systems is a critical component of tribal self-government, one which courts have encouraged”). Indian tribes are free to set up their courts however they feel appropriate, save for the restrictions found in the ICRA. See Stephen L. Pevar, The Rights of Indians and Tribes: The Authoritative ACLU Guide to Indian and Tribal Rights 103 (3rd ed. 2004). Subsequent congressional legislation has also affirmed the position that tribal customs are an important tool for tribal courts. See Indian Tribal Justice Act, 25 U.S.C. §3601-02, 3611-14, 3621, 3631 (2000) (“the congress finds and declares that . . . traditional tribal justice practices are essential to the maintenance of the culture and identity of Indian tribes. . .) Id. §3601(7).

Closely related to self-determination is the doctrine of inherent sovereignty. See Burrell v Armijo, 456 F.3d 1159 (10th Cir. 2006) (the role of comity in Federal Court review of tribal court judgments). Thus, while the federal government can divest tribes of some of their

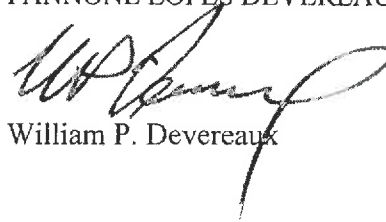
authority, that which remains is not delegated, it is inherent. United States v. Wheeler 435 U.S. at 322-23. A tribe's right to self-determination does not exist because of a federal policy of self-determination; rather, a tribe's right to self-determination exists because it has always existed. Federal policy, then, can be seen as recognition, not a delegation of this authority.

In summary, the Narragansett Indian Tribe is a sovereign government. It objects to any characterization by the petitioners that they are the "Tribal Council of the Narragansett Indian Tribe" or are representative of any lawful Narragansett Indian Tribal government entity. On behalf of the Tribe, I sincerely hope that the EFSB will recognize the doctrine of tribal sovereignty and the inherent right of Indian Tribes to self-governance and therefore this petition to intervene should either be disregarded or dismissed.

Please contact me with any additional questions or concerns regarding this matter.

Very truly yours,

PANNONE LOPES DEVEREAUX & O'GARA LLC



William P. Devereaux

WPD

cc: Shannah Kurland, Esq. (skurland.esq@gmail.com)
Alan Shoer, Esq. (ashoer@apslaw.com)
Patricia S. Lucarelli, Esq. (patricia.lucarelli@puc.ri.gov)