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**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:

U.S. DEPARTMENT OF ENERGY

(License Application for Geologic Repository  
at Yucca Mountain)

Docket No. 63-001

ASLBP Nos. 09-876-HLW-CAB01  
09-877-HLW-CAB02  
09-878-HLW-CAB03

March 5, 2009

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**TIMBISHA SHOSHONE YUCCA MOUNTAIN OVERSIGHT PROGRAM  
NON-PROFIT CORPORATION'S  
CORRECTED MOTION FOR LEAVE TO FILE ITS  
AMENDED PETITION TO INTERVENE AS A FULL PARTY**

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Arthur J. Harrington, Esq.  
Douglas M. Poland, Esq.  
Steven A. Heinzen, Esq.

GODFREY & KAHN, S.C.  
One East Main Street, Suite 500  
P.O. Box 2719  
Madison, WI 53701-2719  
Telephone: (608) 257-3911  
Fax: (608) 257-0609  
E-mail: aharrington@gklaw.com  
dpoland@gklaw.com  
sheinzen@gklaw.com

COUNSEL FOR TIMBISHA SHOSHONE  
YUCCA MOUNTAIN OVERSIGHT PROGRAM  
NON-PROFIT CORPORATION

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In accordance with 10 C.F.R. §§ 2.309(f)(2) and 2.309(c)(1), and the Atomic Safety and Licensing Board's January 29, 2009 Case Management Order, the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation ("TOP")<sup>1</sup> requests leave to file an Amended Petition to Intervene as a Full Party ("Amended Petition"). TOP seeks leave to file the Amended Petition only if the Licensing Board determines that TOP's original Petition to Intervene (the "Original Petition") and its February 24, 2009, Reply in Support of Its Petition to Intervene ("Reply"), together, fail to state at least one admissible contention. TOP maintains that its Original Petition states at least one admissible contention. However, in the event the Licensing Board ultimately disagrees, TOP does not want to wait for a decision on the Original Petition before filing this Motion should its waiting result in any delay in these proceedings.

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<sup>1</sup> Throughout this Motion, to avoid confusion, the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation uses "TOP" to refer to itself; the term "Timbisha" or "Tribe" to refer generically to the Timbisha Shoshone Tribe; and "TIM" to refer to the individuals purporting to represent the Tribe in this proceeding through its own December 22, 2008 Petition to Intervene. The use here of the acronyms TOP and TIM are consistent with those acronyms, first used by the NRC Staff in its Answer to Intervention Petitions, to distinguish the two Petitions to Intervene filed on behalf of the Timbisha.

Accordingly, TOP files this motion now so that it will not be prevented from participating as a full party should the Licensing Board conclude that its Original Petition is flawed.

TOP's proposed Amended Petition, which is filed simultaneously with this Motion, narrows the scope of the issues presented in TOP's Original Petition and includes additional facts and information that support TOP's contentions and that are critical in both (1) establishing a full and complete record in this proceeding and (2) securing the integrity and soundness of the Licensing Board's decision on the Department of Energy's ("DOE") License Application for Geological Repository at Yucca Mountain ("License Application"). This Motion for Leave to File Its Amended Petition (the "Motion") should be granted on either of two grounds. First, the Licensing Board should conclude that TOP's Amended Petition is admissible under 10 C.F.R. § 2.309(f)(2) as a timely amendment based on information that was not previously available and is materially distinct from the information that was available. Alternatively, if the Licensing Board deems the Amended Petition untimely, it nonetheless should grant leave to file the Amended Petition because those factors it is required to consider in its decision, which are delineated in 10 C.F.R. § 2.309(c)(1), weigh in favor of granting the Motion.

The Amended Petition differs substantively from the Original Petition in three ways. It (1) eliminates two of the contentions stated in the Original Petition; (2) amends the remaining original contention on the environmental consequences of DOE's proposed geologic repository by expanding upon the facts and information that support the contention; and (3) adds a related but separate contention that DOE has breached a duty to consult with the Timbisha Shoshone Tribe.<sup>2</sup> The same facts that support the amended environmental contention also support the new contention added to the Amended Petition, and include declarations and affidavits of Tribal

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<sup>2</sup> See, generally, Amended Petition, filed simultaneously with this Motion.

Elders and an expert on Timbisha culture. These declarations and affidavits describe the Timbisha's cultural, historic, religious and other interests in, and practices requiring, the purity of the springs in Death Valley, California (the Timbisha's homeland), and establish that those interests will be adversely impacted as a result of the environmental consequences flowing from the geologic repository at Yucca Mountain. This critical information first became available in the past two weeks: the information is not included in the documents previously available to TOP and submitted to the Licensing Support Network ("LSN").

Not only has TOP filed its Amended Petition as soon as practicable after obtaining the supplementary information, but this Licensing Board must consider the supplementary information because, without it, its decision will be based on incomplete information and will be avoidable due to the DOE's failure to comply with its legal obligations to the Timbisha. The National Environmental Protection Act ("NEPA") and other applicable federal regulations require DOE and the U.S. Nuclear Regulatory Commission (the "Commission") to consider *all* pertinent information related to the environmental consequences of approving the license to operate the proposed geologic repository. In addition, Executive mandates, DOE's federal trust responsibility, and DOE's own policies demand that it consult with the Timbisha on the cultural, historic, religious and other impacts of the proposed geologic repository. As shown through the Tribal Elders' declarations and affidavits, DOE utterly failed to comply with its obligations, even though by its own acknowledgement in the environmental impact statements it was aware that operation of the geologic repository could contaminate the Death Valley springs that the Timbisha hold sacred and that are central to its culture, history, and religion.

## ARGUMENT

### 1. INTRODUCTION.

This license application proceeding promises to last many years and it now is only in its infancy. Indeed, the Commission has noted that the proceeding “has the potential to be one of the most expansive and complex adjudicatory proceedings in agency history.”<sup>3</sup> DOE filed its license application on June 3, 2008, just eight months ago. In response to the Commission’s October 22, 2008 notice of hearing of the DOE’s application, TOP filed its Petition to Intervene as an Affected Indian Tribe (“AIT”) on December 22, 2008. On January 15 and February 9, 2009, DOE and NRC Staff, respectively, filed their Answers, including an opposition to TOP’s contentions. The Atomic Safety and Licensing Board (“Licensing Board”) will hold the first prehearing conference on March 12, 2009.<sup>4</sup> Although several other potential parties filed petitions to intervene, the Timbisha is the only AIT seeking intervention.<sup>5</sup>

In the Original Petition, TOP alleged three admissible contentions, all of which DOE and NRC Staff contest. The NRC Staff refers to TOP’s contentions as TOP-MISC-001 (relating to the DOE’s rights to the land on which the geologic repository operations area (“GROA”) is located); TOP-MISC-002 (relating to whether DOE can obtain the proper water rights within the GROA); and TOP-MISC-003 (relating to the post-closure cultural impacts on the Timbisha). In its Reply, TOP explains that while it reserves its right to raise any proper contention, it currently is no longer pursuing the contentions identified by NRC Staff as TOP-MISC-001 and TOP-MISC-002. TOP also responds to DOE’s and NRC Staff’s arguments on TOP-MISC-003

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<sup>3</sup> Memorandum and Order (CLI-08-18), filed August 13, 2008.

<sup>4</sup> Notice of Conference Call, filed February 10, 2009.

<sup>5</sup> A separate entity, TIM, also claims to represent the Timbisha and filed a petition to intervene as a full party. (Timbisha Shoshone Tribe’s Petition for Leave to Intervene in the Hearing, filed December 22, 2008.) It is assumed for purposes of this motion that TOP is the Timbisha’s representative. It is not necessary for purposes here to discuss the merits of TIM’s claim of representing the Timbisha.

(renamed TOP-NEPA-001 in the accompanying Amended Petition). In so doing, TOP provided additional factual support essential to ensuring the creation of a full and complete record for this proceeding and that, therefore, must be considered by the Licensing Board. In the event the Licensing Board believes an amended contention is necessary to include these additional materials in the record, TOP seeks leave through this Motion.

The materials submitted in support of TOP's amended contention, TOP-NEPA-001, supplement the substance covered by TOP's original contention on the post-closure impacts of the proposed geologic repository on the Timbisha's culture, history, and religion. This same information also supports TOP's new contention, identified in the Amended Petition as TOP-MISC-001, which addresses DOE's failure to satisfy its obligations to the Timbisha. Among the supplementary materials underlying both contentions are declarations or affidavits from three Tribal Elders—Joe Kennedy, Barbara Durham, and Pauline Esteves—and from Timbisha cultural expert Professor Catherine Fowler. The common thread running through the declarations and affidavits is the importance to the Timbisha of the purity of the springs that run in and around Death Valley, California—part of the Timbisha's homeland and into which contaminated water could flow from the proposed geologic repository—and the adverse impacts that contamination of those springs will have on Timbisha's interests.<sup>6</sup>

All agree that contamination of the springs will harm the Timbisha. As Dr. Fowler explains, contamination of the springs will be “disrespectful to the Tribe's cultural heritage, their

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<sup>6</sup> LSN #: TOP000000012, February 21, 2009 Declaration of Catherine S. Fowler, referred to in TOP's Amended Petition, filed March 4, 2009, (“Fowler Decl.”) at ¶¶ 5-14; LSN #: TOP000000010, February 21, 2009 Declaration of Barbara Durham, referred to in TOP's Amended Petition, filed March 4, 2009, (“Durham Decl.”) at ¶¶ 3-8; LSN #: TOP000000011, February 21, 2009 Declaration of Pauline Esteves, referred to in TOP's Amended Petition, filed March 4, 2009, (“Esteves Decl.”) at ¶¶ 3-10; March 3, 2009 Affidavit of Joe Kennedy, Attachment 1 to Amended Petition (“Kennedy Aff.”).

ancestors, and their religious beliefs.”<sup>7</sup> The Tribal Elders agree. As Ms. Durham, Tribal Historic Preservation Officer, states:

[T]o the Timbisha Shoshone, water is life. . . . If the Yucca Mountain repository is built and causes contamination of our springs, it will greatly insult our cultural heritage, our ancestors, and our religious beliefs. *It will destroy the spiritual and medicinal significance to the Timbisha Shoshone of the spring waters and the plants that grow near them that are central to our culture and who we are as a people.*<sup>8</sup>

Similarly, Ms. Esteves explains that the springs at Death Valley “have been at the center of [the Timbisha’s] culture” and that, to the Timbisha, contamination of the springs would be the equivalent of robbing Mother Earth.<sup>9</sup> If the springs are contaminated, “the water and the plants that grow around them would be useless to [the Timbisha] for medicinal purposes” and the water would no longer hold spiritual healing powers for the Timbisha.<sup>10</sup> In addition, the springs are crucial components of a host of tribal ceremonies.<sup>11</sup> Specifically, it would be a “tremendous insult” to the Timbisha if the dancing grounds around the springs were contaminated.<sup>12</sup>

TOP has supplemented the record with this information as soon as practicable. As explained by Joe Kennedy, Tribal Chairman, DOE failed to provide funding for this Proceeding to the Timbisha until October 2008, nearly 15 months after the Timbisha was granted AIT status.<sup>13</sup> And even then TOP could not access the funds for an extended period of time because

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<sup>7</sup> Fowler Decl. at ¶ 13.

<sup>8</sup> Durham Decl. at ¶¶ 4, 7 (emphasis added).

<sup>9</sup> Esteves Decl. at ¶¶ 4, 5.

<sup>10</sup> *Id.* at ¶¶ 6, 7.

<sup>11</sup> *Id.* at ¶¶ 8-10.

<sup>12</sup> *Id.* at ¶ 10.

<sup>13</sup> Kennedy Aff. at ¶12; LSN #: TBS000000002, Amended Petition Seeking Determination of Affected Indian Tribe Status Under the Nuclear Waste Policy Act, July 29, 2007, at 1-4.

certain Tribal members—the individuals filing TIM's Petition—froze the bank account in which the funds were deposited.<sup>14</sup>

TOP previously provided to DOE information that it had available on the cultural impacts on the Timbisha. But, in direct contravention of its obligations under federal law, DOE failed to address these cultural impacts in its environmental impact statements related to the geologic repository.<sup>15</sup> Ms. Durham's Declaration makes clear that DOE has never even visited the Death Valley area to consult with the Timbisha on the geologic repository's potential impacts to the springs.<sup>16</sup> DOE's failure to consult with the Timbisha violates federal statutes, Executive branch mandates, and DOE's own policy regarding consultation with Indian tribes. Moreover, this failure leaves the Licensing Board with insufficient information and analyses upon which to make a ruling on the license application.

As discussed in more detail in TOP's Reply and the Amended Petition, federal law—including NEPA—requires DOE to analyze and consider the geologic repository's post-closure cultural impacts. NEPA and the regulations implementing NEPA clearly provide that DOE and the Licensing Board must analyze all pertinent information related to the environmental consequences of a project.<sup>17</sup> To satisfy the requirements under and to properly implement NEPA procedures and policies, the Licensing Board must have before it the views of those members of the public that will suffer environmental impacts from the DOE's proposed actions. *See* 40 C.F.R. §§1500.1, 1500.2, 51.71(b). The Licensing Board must also ensure that DOE has

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<sup>14</sup> Kennedy Decl. at ¶ 13.

<sup>15</sup> *See* LSN #: DEN001593669, Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada, June 1, 2008; LSN #: DOE2002073507, Final Environmental Impact Statement for a Geological Repository for the Disposal of Spent Nuclear Fuel and High-level Radioactive Waste at Yucca Mountain, Nye County, Nevada, Feb. 1, 2002.

<sup>16</sup> Durham Decl. at ¶ 8.

<sup>17</sup> *See* Reply at 7-12, 22-27, 35-38; Amended Petition at 18-32.

included in the environmental impact statements supporting its license application “evidence” that it has “made the necessary environmental analyses.” 10 C.F.R. § 1500.2(b); *see also* 10 C.F.R. § 51.71(b) (requiring EIS to include “analysis of significant problems and objections raised . . . by any affected Indian tribe”). DOE has not complied with these requirements.

DOE also has failed to comply with its obligation to consult with the Timbisha to ensure consideration of its concerns and any objections to the proposed geologic repository pursuant to the National Historic Preservation Act (“NHPA”), along with the Department’s trust responsibility, Executive mandates, and its internal policies.<sup>18</sup> NHPA obligates DOE to consult with native American tribes whose cultural interests may be affected by projects such as the proposed geologic repository at issue here. *See* 42 U.S.C. §§ 4321 – 4370d. DOE’s failure to consult with the Timbisha will have important ramifications on the tribe’s culture and our nation’s goal to preserve areas and items of great cultural and historic significance. For example, the Timbisha believe the Furnace Springs Site is eligible for inclusion on the National Register but that site has not been identified or evaluated as a National Historic site because DOE failed to consult with the Timbisha, its Tribal Historic Preservation Officer, and Tribal Elders.<sup>19</sup> Similarly, Executive Orders promulgated under President Clinton and reaffirmed by President Bush, along with DOE’s own internal consultation policies, require DOE to ensure the protection of cultural resources.<sup>20</sup> The DOE’s failure to consult with the Timbisha violates its NHPA obligations and its trust responsibility to the Tribe. 42 U.S.C. §§ 4321 to 4370d; *see generally* 40 C.F.R. §§ 1501.6, 1501.7; 16 U.S.C. §§ 470-470w-6; NEPA, Exec. Order 13175 (Nov. 6, 2000). The DOE’s failure can be remedied, in part, by allowing TOP the opportunity here to

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<sup>18</sup> *See* Reply at 4-12, 22-23, 31-39; Amended Petition at 34-42.

<sup>19</sup> Durham Decl. at ¶ 8.

<sup>20</sup> Reply at 27-38; Amended Petition at 34-36.

present, as a full party, this critical information to the Licensing Board for inclusion in the record.

**2. TOP's Amended Petition Is Admissible Under § 2.309(f)(2).**

Leave may be granted to file new or amended contentions where the moving party shows:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2). TOP's amended contention satisfies the three criteria.

- A. **“The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information” [10 C.F.R. § 2.309(f)(2)(iii)].**

The amended contention is timely. The Licensing Board's Case Management Order #1 provides that new and amended contentions will be considered timely if filed within 30 days of the petitioner's receipt of the new information on which the contention is based.<sup>21</sup> The new information on which TOP bases its amended contention are the declarations and affidavits of an expert of Timbisha culture and history, Professor Fowler, and three Tribal Elders, Mr. Kennedy, Ms. Durham, and Ms. Esteves, all of which are dated February 21, 2009 or March 3, 2009. These declarations describe the cultural significance to the Timbisha of the springs in and around the area in which DOE proposes to operate the geologic repository, as well as the DOE's failure to consult with the Timbisha on the cultural impacts. Mr. Kennedy's affidavit also explains the circumstances surrounding the Timbisha's lack of access to funds for analyzing the

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<sup>21</sup> Case Management Order #1, filed January 29, 2009.

environmental consequences of the proposed geologic repository. TOP has filed its Amended Petition less than two weeks after finalizing the new information, well within the 30 day period of time allotted by the Licensing Board.

**B. “The information upon which the amended or new contention is based was not previously available” [10 C.F.R. § 2.309(f)(2)(i)].**

TOP raised in its original Petition a contention based on the cultural impacts of the DOE’s proposed geologic repository. The amended and new contentions focus narrowly on a particular aspect of those impacts and provide supplemental support that was not previously available. The Amended Petition is, in many ways, simply a supplement to the original. *See In re Entergy Nuclear Vermont Yankee LLC*, 62 NRC 813, 820 (2005) (ruling admissible amended contention in which the petitioner “continued to pursue” the same issue that had been identified in the original contention). The supporting declarations and affidavits, and their analyses in support of the Amended Petition, became available only within the last few days.

Mindful of the schedule in place for this proceeding, TOP has not delayed the process of compiling and preparing materials to support its contentions. Until recently, TOP has lacked adequate financial resources to retain experts and prepare analyses.<sup>22</sup> Although DOE granted the Timbisha AIT status in July 2007, it was not until October 2008 that DOE provided funding to TOP so that the Timbisha could retain counsel to represent it in this proceeding.<sup>23</sup> Then, a separate faction of the Timbisha froze the account in which DOE’s funds were maintained, precluding for an extended period of time TOP’s access to these funds to prepare its

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<sup>22</sup> Kennedy Decl. ¶¶ 12-13.

<sup>23</sup> *Id.* at ¶ 12.

contentions.<sup>24</sup> It is for these reasons, not for the fault of TOP, that the information on which the amended contention is based was not previously available.

**C. “The information upon which the amended or new contention is based is materially different than information previously available” [10 C.F.R. § 2.309(f)(2)(ii)].**

Finally, the third factor of § 2.309(f)(2) is met. The Timbisha is the only tribe that has been granted AIT status. And the declarations and other support on which the Amended Petition relies are the only materials available representing the particular post-closure cultural impacts of the Yucca Mountain repository or the cultural and historic interests of the Timbisha. Without these materials, there is no information in the record on the cultural, historic, and religious impacts to the Timbisha at the Death Valley springs. Accordingly, the new information is undeniably materially different from the previously available information, satisfying the third and final factor.

**3. TOP’s Amended Petition Is Also Admissible Under § 2.309(c)(1).**

In the event the Licensing Board decides that TOP’s Amended Petition is untimely, it is still admissible pursuant to 10 C.F.R. § 2.309(c)(1). *See In re Shaw Areva Mox Servs.*, 66 NRC 169 (2007) (untimely amended or new contentions evaluated by balancing factors delineated in § 2.309(c)(1)). Section 2.309(c)(1) provides that untimely contentions are admissible where the balance of the following eight factors favors admission:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor’s/petitioner’s right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding;

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<sup>24</sup> *Id.* at ¶ 13.

- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1); *In re Dominion Nuclear Connecticut, Inc.*, 62 NRC 56 (2005).

In this case, all eight factors weigh in favor of admission. And even if the Licensing Board finds that the first factor weighs against admission because TOP has failed to show good cause for not filing the supplementary materials with the original Petition, the balance of the remaining factors favors admission of the Amended Petition.

**A. “Good cause, if any, for the failure to file on time” (10 C.F.R. § 2.309(c)(1)(i)).**

Good cause exists here. Although the Timbisha is an AIT, DOE failed to provide funding to TOP for nearly 15 months, funding that would have allowed the Timbisha to hire counsel and experts, and prepare analyses of the cultural impacts resulting from the Yucca Mountain repository much earlier than it was able.<sup>25</sup> TOP has filed this motion as soon as practicable after it obtained full access to the resources to retain counsel and compile the information on cultural impacts.<sup>26</sup> Moreover, DOE will not be prejudiced if the Licensing Board admits TOP's Amended Petition. Although based on years of preparation, this proceeding began

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<sup>25</sup> Kennedy Decl. at ¶¶ 12-13.

<sup>26</sup> See *id.*; see generally Fowler Decl.; Durham Decl.; Esteves Decl.; see also *supra* at p. 9.

only eight months ago. Indeed, DOE and NRC Staff filed their Answers less than a month ago, and the parties have not yet even been identified.

But even if the Licensing Board finds there is no good cause for the delay, it should still grant TOP's Motion. Although this first factor carries great weight, the absence of good cause is not dispositive. *Dominion Nuclear*, 62 NRC at 65; *In re Nuclear Fuel Servs., Inc.*, 1 NRC 273 (1975). In *Dominion Nuclear*, the Licensing Board found admissible a petition to intervene filed eight months after the deadline with no good cause because the balance of the remaining factors weighed in favor of admission. 62 NRC at 62, 65; *see also Nuclear Fuel Servs.*, 1 NRC 273 (deciding to entertain petition to intervene filed nine months after deadline). Here, TOP has filed its Amended Petition only two months after the deadline. If this factor weighs against TOP, it is only slightly against its favor.

**B. "The nature of the requestor / petitioner's right under the Act to be made a party to the proceeding; the nature and extent of the requestor's / petitioner's property, financial or other interest in the proceeding; and the possible effect of any order that may be entered in the proceeding on the requestor's / petitioner's interest" [10 C.F.R. § 2.309(c)(1)(ii), (iii), (iv)].**

Factors 2, 3, and 4 favor admitting TOP's Amended Petition. These three factors inquire as to whether the petitioner has met the requirements of 10 C.F.R. § 2.309(f)(1) by demonstrating standing and having submitted at least one admissible contention. *Entergy*, 62 NRC at 822; *Dominion Nuclear*, 62 NRC at 66. TOP's Reply and the Amended Petition show these factors are met. Those reasons are summarized here. First, the Timbisha has been granted AIT status, which presumptively confers standing on TOP. Second, the Timbisha undeniably have an interest in the proceeding. The DOE's environmental impact statements concede that contamination emanating from the repository will discharge into the Death Valley springs.<sup>27</sup> The

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<sup>27</sup> Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada, DOE 2008,

Timbisha's traditional homeland is in and around Death Valley, a geographic area downstream from Yucca Mountain.<sup>28</sup> The purity of the springs is sacred to the Timbisha. "To the Timbisha, water that emanates from springs in their traditional homeland is the lifeblood of the Earth."<sup>29</sup> The Timbisha rely on springs to help grow medicinal plants, for spiritual healing, as a part of ceremonies, and the contamination of those springs will have adverse impacts on Timbisha cultural and historic interests.<sup>30</sup> Third, the Licensing Board's order in this proceeding may have the requisite effect on TOP's interests because Timbisha's cultural and spiritual practices may be adversely affected by operation of the repository.<sup>31</sup>

**C. "The availability of other means whereby the requestor's / petitioner's interest will be protected" [10 C.F.R. § 2.309(c)(1)(v)].**

This factor strongly favors admitting TOP's Amended Petition. TOP has no other means of protecting the cultural and historic interests that will be severely impacted by the operation of the proposed geologic repository, which DOE concedes will contaminate the Death Valley springs. Also, DOE has failed to satisfy its statutory obligation to consult with the Timbisha about the impacts at the Death Valley springs. TOP, therefore, cannot rely on the United States government to protect its interests despite DOE's obligation to do so.

**D. "The extent to which the requestor's / petitioner's interests will be represented by existing parties" [10 C.F.R. § 2.309(c)(1)(vi)].**

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LSN: DEN001593669; Final Environmental Impact Statement for a Geological Repository for the Disposal of Spent Nuclear Fuel and High-level Radioactive Waste at Yucca Mountain, Nye County, Nevada, DOE 2002, LSN: DOE 2002073507.

<sup>28</sup> Declarations of Fowler, Durham, and Esteves.

<sup>29</sup> Fowler Decl. at ¶ 7.

<sup>30</sup> Fowler Decl. at ¶¶ 6-14; Durham Decl. at ¶¶ 3-8; Esteves Decl. at ¶¶ 3-10.

<sup>31</sup> *See id.*

This factor also strongly favors admission because there is no other party representing the Timbisha's interests.<sup>32</sup> TOP is the only representative of the Timbisha. If TOP's Amended Petition is not admitted, the Timbisha's cultural interests affected by DOE's proposed geologic repository will not be fully considered. This weighs in favor of admission not only because of the significance to the Timbisha's way of life, but Federal law—specifically, NEPA, the regulations implementing NEPA, and the National Historic Preservation Act—*requires* consideration of all relevant environmental consequences.<sup>33</sup>

Several others have petitioned to intervene in this proceeding but there is no certainty that any of the petitions will be granted. DOE opposes the intervention of all proposed parties. The NRC Staff opposes all of the petitions except the State of Nevada's and the County of Nye's. And even if other petitions to intervene are granted, the interests of others are decidedly not representative of the Timbisha's. Indeed, none of these other potential parties share TOP's cultural, historic, religious, and other interests in the Death Valley springs.

**E. “The extent to which the requestor's / petitioner's participation will broaden the issues or delay the proceeding” [10 C.F.R. § 2.309(c)(1)(vii)].**

This factor weighs in favor of admitting TOP's Amended Petition because its admission will actually narrow the issues and expedite the proceeding. TOP's original petition to intervene identified the issue of the Timbisha's cultural interests possibly implicated by operation of the repository. That original contention, however, did not identify the same extensive factual support that is included in the Amended Petition. As to the delay, this highly complex license application proceeding is in its beginning stages. The parties have not been identified as of yet and the first prehearing conference is not scheduled until March 12, 2009. Admission of the

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<sup>32</sup> See *supra* footnote 5.

<sup>33</sup> See *supra* at pp. 8-9.

Amended Petition will have no effect on the proceeding's schedule, especially considering that TOP has narrowed the scope of its contentions and merely expanded the factual support for them.

**F. "The extent to which the requestor's / petitioner's participation may reasonably be expected to assist in developing a sound record" [10 C.F.R. § 2.309(c)(1)(viii)].**

Finally, this factor strongly supports admitting TOP's Amended Petition for reasons similar to those outlined in subsection D above. Full presentation and consideration of this factual support is essential to a legitimate and legal decision by the Licensing Board on DOE's license application. Federal law requires the Licensing Board to consider a sound record.<sup>34</sup> A sound record in this proceeding necessarily includes the factual support added to TOP's Amended Petition. Significantly, without admitting the Amended Petition, that factual support will not be included in the record and any decision based on the incomplete record by the Licensing Board would be void.

**4. Certification Under 10 C.F.R. § 2.323(b).**

Pursuant to 10 C.F.R. § 2.323(b), counsel for TOP certifies that they have spoken with counsel for DOE and NRC Staff in an attempt to resolve the issues raised in this motion, and that the attempt was unsuccessful. DOE informed counsel for TOP that it opposes the Motion but will respond once the motion is filed. Counsel for NRC Staff informed counsel for TOP that the NRC Staff takes no position on the filing of this Motion but will respond to the motion after it is submitted.

On February 27, 2009, counsel for TOP also notified all proposed parties to this proceeding of its intention to file this Motion and asked that anyone who had objections to notify

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<sup>34</sup> See *supra* at pp. 6-8.

them at once. As of the date of this filing, four responded—Clark County, Nevada; Native Community Action Council; Nye City, Nevada; and the State of Nevada—and none of them oppose or object to TOP's Motion. The State of Nevada also indicated that it takes no position on who represents the Timbisha.

### CONCLUSION

For all the aforementioned reasons, the Licensing Board should grant TOP leave to file its Amended Petition to Intervene as a Full Party, either as a timely amendment under 10 C.F.R. § 2.309(f)(2) or an untimely amended petition under 10 C.F.R. § 2.309(c)(1).

Respectfully submitted,

*Signed electronically by Douglas M. Poland*

Arthur J. Harrington  
Douglas M. Poland  
Steven A. Heinzen  
Counsel for the Timbisha Shoshone Yucca  
Mountain Oversight Program Non-Profit  
Corporation

GODFREY & KAHN, S.C.  
One East Main St., Suite 500  
P.O. Box 2719  
Madison, WI 53701-2710  
Telephone: 608-257-3911  
Fax: 608-257-0609

Dated in Madison, WI  
this 5th day of March, 2009.

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:

U.S. DEPARTMENT OF ENERGY

(License Application for Geologic Repository  
at Yucca Mountain)

Docket No. 63-001-HLW

ASLBP No. 09-876-HLW-CAB01

09-877-HLW-CAB02

09-878-HLW-CAB03

March 5, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the *Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation's Corrected Motion for Leave to File Its Amended Petition to Intervene as a Full Party, Amended Petition of the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation to Intervene as a Full Party, and Affidavit of Joe Kennedy (with Attachments A and B)* in the above-captioned proceeding have been served on the following persons this 5th day of March 2009, by Electronic Information Exchange.

**U.S. Nuclear Regulatory Commission  
Atomic Safety and Licensing Board (ASLBP)**  
Mail Stop-T-3 F23  
Washington, D.C. 20555-0001

**CAB 01**

**William J. Froehlich, Chair**  
Administrative Judge  
E-mail: [wjf1@nrc.gov](mailto:wjf1@nrc.gov)

**Thomas S. Moore**  
Administrative Judge  
E-mail: [tsm2@nrc.gov](mailto:tsm2@nrc.gov)

**Richard E. Wardwell**  
Administrative Judge  
E-mail: [rew@nrc.gov](mailto:rew@nrc.gov)

**CAB 02**

**Michael M. Gibson, Chair**  
Administrative Judge  
E-mail: [mmg3@nrc.gov](mailto:mmg3@nrc.gov)

**Lawrence G. McDade**  
Administrative Judge  
E-mail: [lqm1@nrc.gov](mailto:lqm1@nrc.gov)

**Nicholas G. Trikouros**  
Administrative Judge  
E-mail: [ngt@nrc.gov](mailto:ngt@nrc.gov)

**CAB 03**

**Paul S. Ryerson, Chair**  
Administrative Judge  
E-mail: [psr1@nrc.gov](mailto:psr1@nrc.gov)

**Michael C. Farrar**  
Administrative Judge  
E-mail: [mcf@nrc.gov](mailto:mcf@nrc.gov)

**Mark O. Barnett**  
Administrative Judge

E-mail: [mob1@nrc.gov](mailto:mob1@nrc.gov);  
[mark.barnett@nrc.gov](mailto:mark.barnett@nrc.gov)

ASLBP (continued)

**E. Roy Hawkens, Chief Admin. Judge**

E-mail: [erh@nrc.gov](mailto:erh@nrc.gov)

**Anthony C. Eitrem, Chief Counsel**

E-mail: [anthony.eitrem@nrc.gov](mailto:anthony.eitrem@nrc.gov)

**Daniel J. Graser, LSN Administrator**

E-mail: [djg2@nrc.gov](mailto:djg2@nrc.gov)

**Anthony Baratta**

E-mail: [ajb5@nrc.gov](mailto:ajb5@nrc.gov)

**Andrew L. Bates**

E-mail: [alb@nrc.gov](mailto:alb@nrc.gov)

**G. Paul Bollwek, III**

E-mail: [gpb@nrc.gov](mailto:gpb@nrc.gov)

**Lauren Bregman**

E-mail: [lrb1@nrc.gov](mailto:lrb1@nrc.gov)

**Sara Culler**

E-mail: [sara.culler@nrc.gov](mailto:sara.culler@nrc.gov)

**Deborah Davidson**

E-mail: [deborah.davidson@nrc.gov](mailto:deborah.davidson@nrc.gov)

**Joseph Deucher**

E-mail: [jhd@nrc.gov](mailto:jhd@nrc.gov)

**Don Frye**

E-mail: [dxfs8@nrc.gov](mailto:dxfs8@nrc.gov)

**Rebecca Gitter**

E-mail: [rll@nrc.gov](mailto:rll@nrc.gov)

**Nancy Greathead**

E-mail: [nancy.greathead@nrc.gov](mailto:nancy.greathead@nrc.gov)

**Pat Hall**

E-mail: [pth@nrc.gov](mailto:pth@nrc.gov)

**Patricia Harich**

E-mail: [patricia.harich@nrc.gov](mailto:patricia.harich@nrc.gov)

**Emile Julian**

E-mail: [elj@nrc.gov](mailto:elj@nrc.gov);

[emile.julian@nrc.gov](mailto:emile.julian@nrc.gov)

**Zachary Kahn**

E-mail: [zxk1@nrc.gov](mailto:zxk1@nrc.gov)

**Erica LaPlante**

E-mail: [eal1@nrc.gov](mailto:eal1@nrc.gov)

**Linda Lewis**

E-mail: [linda.lewis@nrc.gov](mailto:linda.lewis@nrc.gov)

**David McIntyre**

E-mail: [david.mcintyre@nrc.gov](mailto:david.mcintyre@nrc.gov)

**Evangeline S. Ngbea**

E-mail: [esn@nrc.gov](mailto:esn@nrc.gov)

**Christine Pierpoint**

E-mail: [cmp@nrc.gov](mailto:cmp@nrc.gov)

**Matthew Rotman**

E-mail: [matthew.rotman@nrc.gov](mailto:matthew.rotman@nrc.gov)

**Tom Ryan**

E-mail: [tom.ryan@nrc.gov](mailto:tom.ryan@nrc.gov)

**Ivan Valenzuela**

E-mail: [ivan.valenzuela@nrc.gov](mailto:ivan.valenzuela@nrc.gov)

**Andrew Welkie**

E-mail: [axw5@nrc.gov](mailto:axw5@nrc.gov)

**Jack Whetstine**

E-mail: [jgw@nrc.gov](mailto:jgw@nrc.gov)

**U.S. Nuclear Regulatory Commission**

**Office of the Secretary of the Commission**

Mail Stop O-16 C1

Washington, D.C. 20555-0001

**Hearing Docket**

E-mail: [hearingdocket@nrc.gov](mailto:hearingdocket@nrc.gov)

**U.S. Nuclear Regulatory Commission**

**Office of Comm. Appellate Adjudication**

Mail Stop O-16 C1

Washington, DC 20555-0001

**OCAA Mail Center**

E-mail: [ocaamail@nrc.gov](mailto:ocaamail@nrc.gov)

**U.S. Nuclear Regulatory Commission**

**Office of the General Counsel**

Mail Stop O-15 D21

Washington, DC 20555-0001

**OGC Mail Center**

E-mail: [ogcmailcenter@nrc.gov](mailto:ogcmailcenter@nrc.gov)

**Marian L. Zobler, Esq.**

E-mail: [mlz@nrc.gov](mailto:mlz@nrc.gov)

**Mitzi A. Young, Esq.**

E-mail: [may@nrc.gov](mailto:may@nrc.gov)

**Margaret J. Bupp, Esq.**

E-mail: [mjb5@nrc.gov](mailto:mjb5@nrc.gov)

**Daniel H. Fruchter, Esq.**

E-mail: [daniel.fruchter@nrc.gov](mailto:daniel.fruchter@nrc.gov)

**Daniel W. Lenehan, Esq.**

E-mail: [dwl2@nrc.gov](mailto:dwl2@nrc.gov)

**Kevin Roach, Esq.**

E-mail: [kevin.roach@nrc.gov](mailto:kevin.roach@nrc.gov)

**Andrea L. Silvia, Esq.**

E-mail: [alc1@nrc.gov](mailto:alc1@nrc.gov)

**Karin Francis, Paralegal**

E-mail: [kxf4@nrc.gov](mailto:kxf4@nrc.gov)

**Joseph S. Gilman, Paralegal**

E-mail: [jsg1@nrc.gov](mailto:jsg1@nrc.gov)

**U.S. Department of Energy**  
**Office of General Counsel**  
1551 Hillshire Drive  
Las Vegas, NV 89134-6321  
**George W. Hellstrom, Esq.**  
E-mail: [george.hellstrom@ymp.gov](mailto:george.hellstrom@ymp.gov)  
**Jocelyn M. Gutierrez, Esq.**  
E-mail: [jocelyn.gutierrez@ymp.gov](mailto:jocelyn.gutierrez@ymp.gov)  
**Josephine L. Sommer, Paralegal**  
E-mail: [josephine.sommer@ymp.gov](mailto:josephine.sommer@ymp.gov)

**U.S. Department of Energy**  
**Office of General Counsel**  
1000 Independence Avenue, S.W.  
Washington, DC 20585  
**Martha S. Crosland, Esq.**  
E-mail: [martha.crosland@hq.doe.gov](mailto:martha.crosland@hq.doe.gov)  
**Nicholas DiNunzio, Esq.**  
E-mail: [nicholas.dinunzio@hq.doe.gov](mailto:nicholas.dinunzio@hq.doe.gov)  
**Angela Kordyak, Esq.**  
E-mail: [angela.kordyak@hq.doe.gov](mailto:angela.kordyak@hq.doe.gov)  
**James Bennett McRae**  
E-mail: [ben.mcrae@hq.doe.gov](mailto:ben.mcrae@hq.doe.gov)  
**Christina Pak, Esq.**  
E-mail: [christina.pak@hq.doe.gov](mailto:christina.pak@hq.doe.gov)

**For the U.S. Department of Energy**  
**Office of Counsel**  
Naval Sea Systems Command  
Nuclear Propulsion Program  
1333 Isaac Hull Avenue S.E.  
Washington Navy Yard, Building 197  
Washington, DC 20376  
**Frank A. Putzu, Esq.**  
E-mail: [frank.putzu@navy.mil](mailto:frank.putzu@navy.mil)

**Nevada Attorney General**  
**Bureau of Government Affairs**  
100 North Carson Street  
Carson City, NV 89710  
**Marta Adams, Chief Deputy AG**  
E-mail: [madams@ag.nv.gov](mailto:madams@ag.nv.gov)

**Egan, Fitzpatrick & Malsch, PLLC**  
12500 San Pedro Avenue, Suite 555  
San Antonio, TX 78216  
**Charles J. Fitzpatrick, Esq.**  
E-mail: [cfitzpatrick@nuclearlawyer.com](mailto:cfitzpatrick@nuclearlawyer.com)  
**John W. Lawrence**  
E-mail: [jlawrence@nuclearlawyer.com](mailto:jlawrence@nuclearlawyer.com)  
**Laurie Borski, Paralegal**  
E-mail: [lborski@nuclearlawyer.com](mailto:lborski@nuclearlawyer.com)

**Egan, Fitzpatrick & Malsch, PLLC**  
2001 K Street N.W., Suite 400  
Washington, DC 20006  
**Martin G. Malsch, Esq.**  
E-mail: [mmalsch@nuclearlawyer.com](mailto:mmalsch@nuclearlawyer.com)  
**Susan Montesi**  
E-mail: [smontesi@nuclearlawyer.com](mailto:smontesi@nuclearlawyer.com)

**Hunton & Williams LLP**  
Riverfront Plaza, East Tower  
951 East Byrd Street  
Richmond, VA 23219-4074  
**Donald P. Irwin**  
E-mail: [dirwin@hunton.com](mailto:dirwin@hunton.com)  
**Michael R. Shebelskie**  
E-mail: [mshebelskie@hunton.com](mailto:mshebelskie@hunton.com)  
**Kelly L. Faglioni**  
E-mail: [kfaglioni@hunton.com](mailto:kfaglioni@hunton.com)  
**Pat Slayton**  
E-mail: [pslayton@hunton.com](mailto:pslayton@hunton.com)

**Yucca Mountain Project Licensing Group  
Bechtel-SAIC**

1251 Center Crossing Road, M/S 423  
Las Vegas, NV 89144

**Jeffrey Kriner, Regulatory Programs**

E-mail: [jeffrey\\_kriner@ymp.gov](mailto:jeffrey_kriner@ymp.gov)

**Stephen Cereghino, Licensing/Nucl Safety**

E-mail: [stephen\\_cereghino@ymp.gov](mailto:stephen_cereghino@ymp.gov)

**Yucca Mountain Project Licensing Group  
Bechtel-SAIC**

6000 Executive Blvd., Suite 608  
North Bethesda, MD 20852

**Danny R. Howard, Sr. Licensing Engineer**

E-mail: [danny\\_howard@ymp.gov](mailto:danny_howard@ymp.gov)

**Edward Borella**

**Sr. Staff, Licensing/Nuclear Safety**

E-mail: [edward\\_borella@ymp.gov](mailto:edward_borella@ymp.gov)

**Talisman International, LLC**

1000 Potomac St., NW  
Suite 200 Washington, DC 20007

**Patricia Larimore, Senior Paralegal**

E-mail: [plarimore@talisman-intl.com](mailto:plarimore@talisman-intl.com)

**Morgan, Lewis, Bockius LLP**

1111 Pennsylvania Ave. N.W.  
Washington, DC 20004

**Lewis Csedrik, Esq.**

E-mail: [lcshedrik@morganlewis.com](mailto:lcshedrik@morganlewis.com)

**Jay Gutierrez, Esq.**

E-mail: [jgutierrez@morganlewis.com](mailto:jgutierrez@morganlewis.com)

**Charles B. Moldenhauer**

E-mail:

[cmoldenhauer@morganlewis.com](mailto:cmoldenhauer@morganlewis.com)

**Brian P. Oldham, Esq.**

E-mail: [boldham@morganlewis.com](mailto:boldham@morganlewis.com)

**Thomas Poindexter, Esq.**

E-mail: [tpoindexter@morganlewis.com](mailto:tpoindexter@morganlewis.com)

**Alex S. Polonsky, Esq.**

E-mail: [apolonsky@morganlewis.com](mailto:apolonsky@morganlewis.com)

**Thomas A. Schmutz, Esq.**

E-mail: [tschmutz@morganlewis.com](mailto:tschmutz@morganlewis.com)

**Donald Silverman, Esq.**

E-mail: [dsilverman@morganlewis.com](mailto:dsilverman@morganlewis.com)

**Annette M. White**

E-mail:

[annette.white@morganlewis.com](mailto:annette.white@morganlewis.com)

**Paul J. Zaffuts, Esq.**

E-mail: [pzaffuts@morganlewis.com](mailto:pzaffuts@morganlewis.com)

**Clifford W. Cooper, Paralegal**

E-mail: [ccooper@morganlewis.com](mailto:ccooper@morganlewis.com)

**Shannon Staton, Legal Secretary**

E-mail: [sstaton@morganlewis.com](mailto:sstaton@morganlewis.com)

**Carter Ledyard & Milburn, LLP**

1401 Eye Street, N.W., Suite 300  
Washington, DC 20005

**Barry S. Neuman, Esq.**

E-mail: [neuman@clm.com](mailto:neuman@clm.com)

**Carter Ledyard & Milburn, LLP**

2 Wall Street  
New York, New York 10005

**Ethan I. Strell, Esq.**

E-mail: [strell@clm.com](mailto:strell@clm.com)

**Lincoln County Nuclear Oversight Program**

P.O. Box 1068  
Caliente, NV 89008

**Connie Simkins, Coordinator**

E-mail: [jcciac@co.lincoln.nv.us](mailto:jcciac@co.lincoln.nv.us)

**Counsel for Lincoln County, Nevada**  
1100 S. Tenth Street  
Las Vegas, NV 89017  
**Bret Whipple, Esq.**  
E-mail: [baileys@lcturbonet.com](mailto:baileys@lcturbonet.com)

**CACI International**  
**Daniel Maerten**  
E-mail: [dmaerten@caci.com](mailto:dmaerten@caci.com)

**White Pine County, Nevada**  
Office of the District Attorney  
801 Clark Street, Suite 3  
Ely, NV 89301  
**Richard Sears, District Attorney**  
E-mail: [rwsears@wpcda.org](mailto:rwsears@wpcda.org)

**California Energy Commission**  
1516 9th Street  
Sacramento, CA 95814  
**Kevin W. Bell, Senior Staff Counsel**  
E-mail: [kwbell@energy.state.ca.us](mailto:kwbell@energy.state.ca.us)

**California Department of Justice**  
Office of the Attorney General  
1300 I Street  
P.O. Box 944255  
Sacramento, CA 94244-2550  
**Susan Durbin**  
**Deputy Attorney General**  
E-mail: [susan.durbin@doj.ca.gov](mailto:susan.durbin@doj.ca.gov)  
**Michele Mercado, Analyst**  
E-Mail: [michele.mercado@doj.ca.gov](mailto:michele.mercado@doj.ca.gov)

**California Department of Justice**  
Office of the Attorney General  
1515 Clay Street, 20th Floor  
P.O. Box 70550  
Oakland, CA 94612-0550  
**Timothy E. Sullivan**  
**Deputy Attorney General**  
E-mail: [timothy.sullivan@doj.ca.gov](mailto:timothy.sullivan@doj.ca.gov)

**California Department of Justice**  
300 S. Spring Street, Suite 1702  
Los Angeles, CA 90013  
**Brian Hembacher**  
**Deputy Attorney General**  
E-mail: [brian.hembacher@doj.ca.gov](mailto:brian.hembacher@doj.ca.gov)

**Counsel for Inyo County, California**  
Greg James, Attorney at Law  
710 Autumn Leaves Circle  
Bishop, CA 93514  
**Gregory L. James, Esq.**  
E-mail: [gljames@earthlink.net](mailto:gljames@earthlink.net)

**Nevada Agency for Nuclear Projects**  
Nuclear Waste Project Office  
1761 East College Parkway, Suite 118  
Carson City, NV 89706  
**Steve Frishman, Tech. Policy Coordinator**  
E-mail: [steve.frishman@gmail.com](mailto:steve.frishman@gmail.com)  
**Susan Lynch**  
E-mail: [slynch1761@gmail.com](mailto:slynch1761@gmail.com)

**Nye County Nuclear Waste Repository**  
**Project Office (NWRPO)**  
1210 E. Basin Road #6  
Pahrump, NV 89060  
**Sherry Dudley, Admin. Technical Coordinator**  
E-mail: [sdudley@co.nye.nv.us](mailto:sdudley@co.nye.nv.us)  
**Zoie Choate, Secretary**  
E-mail: [zchoate@co.nye.nv.us](mailto:zchoate@co.nye.nv.us)

**Nye County Regulatory/Licensing Advisor**  
18160 Cottonwood Road. #265  
Sunriver, OR 97707  
**Malachy Murphy, Esq.**  
E-mail: [mrmurphy@chamberscable.com](mailto:mrmurphy@chamberscable.com)

**Counsel for Nye County, Nevada**  
**Jeffrey D. VanNiel**  
530 Farrington Court  
Las Vegas, NV 89133  
E-mail: [nbrjdv@gmail.com](mailto:nbrjdv@gmail.com)

**Ackerman Senterfitt**  
801 Pennsylvania Avenue N.W. #600  
Washington, D.C. 20004  
**Robert M. Andersen**  
E-mail: [robert.andersen@akerman.com](mailto:robert.andersen@akerman.com)

**Native Community Action Council**  
P.O. Box 140  
Baker, NV 89311  
**Ian Zabarte**  
E-mail: [mrizabarte@gmail.com](mailto:mrizabarte@gmail.com)

**White Pine County Nuclear Waste Project Office**  
959 Campton Street  
Ely, NV 89301  
**Mike Simon, Director**  
E-mail: [wpnucwst1@mwpower.net](mailto:wpnucwst1@mwpower.net)

**Armstrong Teasdale, LLP**  
**Counsel for Churchill, Lander, Mineral, and Esmeralda Counties, Nevada**  
1975 Village Center Circle, Suite 140  
Las Vegas, NV 89134-6237  
**Robert F. List, Esq.**  
E-mail: [rlist@armstrongteasdale.com](mailto:rlist@armstrongteasdale.com)  
**Jennifer A. Gores, Esq.**  
E-mail: [jgores@armstrongteasdale.com](mailto:jgores@armstrongteasdale.com)

**Nuclear Energy Institute**  
Office of the General Counsel  
1776 Eye Street, NW, Suite 400  
Washington, DC 20006-3708  
**Ellen C. Ginsberg, General Counsel**  
E-mail: [ecg@nei.org](mailto:ecg@nei.org)  
**Michael A. Bauser, Deputy General Counsel**  
E-mail: [mab@nei.org](mailto:mab@nei.org)  
**Anne W. Cottingham, Esq.**  
E-mail: [awc@nei.org](mailto:awc@nei.org)

**Pillsbury Winthrop Shaw Pittman, LLP**  
**Counsel for Nuclear Energy Institute, Inc.**  
2300 N Street, N.W.  
Washington, D.C. 20037-1122  
**Jay E. Silberg Esq.**  
E-mail: [jay.silberg@pillsburylaw.com](mailto:jay.silberg@pillsburylaw.com)  
**Timothy J. V. Walsh, Esq.**  
E-mail: [timothy.walsh@pillsburylaw.com](mailto:timothy.walsh@pillsburylaw.com)  
**Maria D. Webb, Senior Energy Legal Analyst**  
E-mail: [maria.webb@pillsburylaw.com](mailto:maria.webb@pillsburylaw.com)

**Esmeralda County Repository Oversight Program, Yucca Mountain Project**  
P.O. Box 490  
Goldfield, NV 89013  
**Edwin Mueller, Director**  
E-mail: [muellered@msn.com](mailto:muellered@msn.com)

**Winston & Strawn LLP**  
**Counsel for the Nuclear Energy Institute**  
1700 K Street, N.W.  
Washington, DC 20006-3817  
**David A. Repka, Esq.**  
E-mail: [drepka@winston.com](mailto:drepka@winston.com)  
**William A. Horin, Esq.**  
E-mail: [whorin@winston.com](mailto:whorin@winston.com)  
**Rachel Miras-Wilson**  
E-mail: [rwilson@winston.com](mailto:rwilson@winston.com)  
**Carlos L. Sisco, Senior Paralegal**  
E-mail: [csisco@winston.com](mailto:csisco@winston.com)

**Fredericks, Peebles & Morgan, LLP**  
1001 Second Street  
Sacramento, CA 95814  
**Darcie L. Houck, Esq.**  
E-mail: [dhouck@ndnlaw.com](mailto:dhouck@ndnlaw.com)  
**John M. Peebles**  
E-mail: [jpeebles@ndnlaw.com](mailto:jpeebles@ndnlaw.com)

**Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation**  
3560 Savoy Boulevard  
Pahrump, NV 89061  
**Tameka Vazquez**  
E-mail: [purpose\\_driven12@yahoo.com](mailto:purpose_driven12@yahoo.com)

**Counsel for Caliente Hot Springs Resort LLC**  
6772 Running Colors Avenue  
Las Vegas, NV 89131  
**John H. Huston, Esq.**  
E-mail: [johnhhuston@gmail.com](mailto:johnhhuston@gmail.com)

**Beyond Nuclear**  
6930 Carroll Avenue, Suite 400  
Takoma Park, MD 20912  
**Kevin Kamps**  
E-mail: [kevin@beyondnuclear.org](mailto:kevin@beyondnuclear.org)

**Harmon, Curran, Speilberg & Eisenberg, LLP**  
1726 M Street N.W., Suite 600  
Washington, D.C. 20036  
**Diane Curran, Esq.**  
E-mail: [dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)  
**Matthew Fraser, Law Clerk**  
E-mail: [mfraser@harmoncurran.com](mailto:mfraser@harmoncurran.com)

**Eureka County, Nevada**  
Office of the District Attorney  
701 S. Main Street, Box 190  
Eureka, NV 89316-0190  
**Theodore Beutel, District Attorney**  
E-mail: [tbeutel.ecda@eurekanv.org](mailto:tbeutel.ecda@eurekanv.org)

**Eureka County Public Works**  
P.O. Box 714  
Eureka, NV 89316  
**Ronald Damele, Director**  
E-mail: [rdamele@eurekanv.org](mailto:rdamele@eurekanv.org)

**Nuclear Waste Advisory for Eureka Co.**  
1983 Maison Way  
Carson City, NV 89703  
**Abigail Johnson, Consultant**  
E-mail: [eurekanrc@gmail.com](mailto:eurekanrc@gmail.com)

**NWOP Consulting, Inc.**  
1705 Wildcat Lane  
Ogden, UT 84403  
**Loreen Pitchford, LSN Coordinator**  
E-mail: [lpitchford@comcast.net](mailto:lpitchford@comcast.net)

**Intertech Services Corporation**  
P.O. Box 2008  
Carson City, NV 89702  
**Mike Baughman**  
E-mail: [bigboff@aol.com](mailto:bigboff@aol.com)

**Clark County (NV) Nuclear Waste Division**  
500 S. Grand Central Parkway  
Las Vegas, NV 89155  
**Elizabeth A. Vibert, Deputy District Attorney**  
E-mail: [elizabeth.vibert@ccdanv.com](mailto:elizabeth.vibert@ccdanv.com)  
**Phil Klevorick, Sr. Mgmt. Analyst**  
E-mail: [klevorick@co.clark.nv.us](mailto:klevorick@co.clark.nv.us)

**Jennings Strouss & Salmon, PLC**  
1700 Pennsylvania Ave N.W., Suite 500  
Washington, D.C., 20006-4725  
**Alan I. Robbins, Esq.**  
E-mail: [arobbins@jsslaw.com](mailto:arobbins@jsslaw.com)  
**Debra D. Roby, Esq.**  
E-mail: [droby@jsslaw.com](mailto:droby@jsslaw.com)  
**Elene Belete, Legal Secretary**  
E-mail: [ebelete@jsslaw.com](mailto:ebelete@jsslaw.com)

**Jennings Strouss & Salmon**  
8330 W. Sahara Avenue #290  
Las Vegas, NV 89117  
**Bryce Loveland, Esq.**  
E-mail: [bloveland@jsslaw.com](mailto:bloveland@jsslaw.com)

Dated this 5th day of March 2009.

/signed (electronically) by/  
Jacqueline M. Schwartz

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**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:

U.S. DEPARTMENT OF ENERGY

(License Application for Geologic Repository  
at Yucca Mountain)

Docket No. 63-001

ASLBP Nos. 09-876-HLW-CAB-01

09-877-HLW-CAB-02

09-878-HLW-CAB-03

March 5, 2009

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**AMENDED PETITION OF THE TIMBISHA SHOSHONE YUCCA MOUNTAIN  
OVERSIGHT PROGRAM NON-PROFIT CORPORATION  
TO INTERVENE AS A FULL PARTY**

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Arthur J. Harrington, Esq.  
Douglas M. Poland, Esq.  
Steven A. Heinzen, Esq.

COUNSEL FOR TIMBISHA SHOSHONE  
YUCCA MOUNTAIN OVERSIGHT PROGRAM  
NON-PROFIT CORPORATION

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TO INTERVENE AS A FULL PARTY**

**1. Introduction**

**A. Request and Party Identity**

The Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation (“TOP”) hereby petitions for a formal hearing to be held on the application of the Department of Energy (“DOE”) for a construction authorization for its proposed high-level radioactive waste repository at Yucca Mountain, Nevada (hereinafter referred to as the “proceeding”). TOP also petitions to intervene as a full party to this proceeding. The name of the party and its address (and related contact information) are as follows:

Name of Party: Timbisha Shoshone Yucca Mountain  
Oversight Program Non-profit Corporation

Address: Joe Kennedy  
Board Member and Executive Director  
P.O. Box 4639  
Pahrump, NV 89041  
NEWE SOGOBIA

Telephone: (775) 751-7633

E-mail: Joekennedy08@live.com

TOP designates Joe Kennedy, or such legal counsel as he designates, as its single representative for the hearing.

**B. Timeliness**

DOE's application was noticed for hearing on October 22, 2008 (73 Fed. Reg. 63029, 10/22/2008), and TOP's original Petition to Intervene was timely filed within 60 days of publication of that notice.

**(1) *The Amended Petition is timely under 10 C.F.R. § 2.309(f)(2).***

This Amended Petition is timely submitted in accordance with 10 C.F.R. § 2.309(f)(2) because it is submitted within 30 days of the date on which new and material information on which the amended contentions are based became available. *See* CAB Case Management Order #1, at 3-4 (January 29, 2009). In particular, the factual information upon which the amended contentions are based is contained within the declarations or affidavits of tribal members Barbara Durham, Pauline Esteves, and Joe Kennedy, as well as Professor Catherine Fowler, a cultural expert on the Timbisha Shoshone Tribe (the "Timbisha"), which are on the LSN and cited in this Amended Petition.

**(2) *Alternatively, the Amended Petition should be granted based on the factors in 10 C.F.R. § 2.309(c).***

In the alternative, if the Amended Petition is deemed to be non-timely, then the Amended Petition should be granted in accordance with 10 C.F.R. § 2.309(c) for the following reasons, which are set forth in more detail in the simultaneously-filed Motion for Leave to Amend Petition to Intervene:

(i) *There is “good cause” to grant the Amended Petition (10 C.F.R. § 2.309(c)(i)).*

Good cause exists for TOP’s failure to timely file the Amended Petition. Although the Timbisha was granted “Affected Indian Tribe” (“AIT”) status on June 29, 2007, it was denied funding for nearly 15 months after being certified as an AIT and therefore lacked the financial resources to retain counsel to assist it in formulating and filing the contention in this Amended Petition. (Affidavit of Joe Kennedy (“Kennedy Aff.”) ¶ 12, attached hereto as Attachment 1.) Moreover, the DOE has an obligation pursuant to federal statutes, Executive Orders, and its own internal policies that require it to consult with Timbisha on potential impacts of DOE’s proposed geologic repository on the Timbisha’s cultural, historic, religious, and other resources. (*See infra* pp. 34-40). DOE’s failure to consult with Timbisha significantly harmed TOP’s ability to participate meaningfully in this proceeding, including TOP’s ability to investigate the potential effects on Timbisha resources and interests, and prepare its contentions by the December 22, 2008 deadline. Given DOE’s failure to consult, which constitutes a violation of federal statutes and other authorities that the NRC must not overlook pursuant to its own obligations under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (“NEPA”) (*see generally* 10 C.F.R. Part 51), as well as the NRC’s own trust obligations to Indian tribes under federal law (*see infra* pp. 34-40), TOP should not be precluded from being granted full-party status based on the alleged inadequacies of its original Petition.

(ii) *The nature of TOP’s right to be made a party (10 C.F.R. § 2.309(c)(ii)).*

The nature of the right under which TOP seeks to participate as a party is as that of an AIT, which confers a federally-recognized right to participate as a full party in this proceeding. TOP also has a right to participate in a representative capacity for those Timbisha members who are affiliated with TOP and, if the license application is granted, will suffer harm to their

cultural, historic, and religious resources from contamination of Death Valley springs caused by effluent released from DOE's proposed geologic repository. If TOP is permitted to participate as a party and present its contentions, NRC can take actions that would cure DOE's failure to consider and analyze the effects that the geologic repository will have on the Timbisha's cultural, historic, and religious interests, including requiring DOE to consider those effects and potential ways to mitigate them, as well as requiring DOE to fulfill its obligation to consult with the Timbisha. (See generally TOP-NEPA-01, *infra* pp. 18-32; TOP-MISC-01, *infra* pp. 34-43). These interests of the Timbisha, who are members of TOP, fall squarely within those interests that NEPA is designed to protect.

(iii) *The nature and extent of TOP's interests in the proceeding (10 C.F.R. § 2.309(c)(iii)).*

The Timbisha has significant cultural, historic, religious, and other interests at stake in the proceeding that will be directly and severely impacted if TOP is not permitted to participate as a full party. Specifically, the DOE's environmental impact statements concede that contamination from a high-level waste repository at Yucca Mountain may discharge at the Death Valley springs, which hold cultural, historic, and religious significance that are central to the Timbisha. (See *infra* pp. 24-32; FSEIS<sup>1</sup>, Vol. III at CR-324; see also FSEIS §§ 3.1.4.2.1, 5.4, & Fig. 3.8; FEIS<sup>2</sup> Fig. 3-15.) Federal statutes guarantee that the Timbisha will have continued use of water in its homeland for traditional tribal purposes. (See *infra* pp. 19-24.) Other federal

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<sup>1</sup> LSN #: DEN001593669, Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada, Summary, Vol. I, II, and III, June 1, 2008 ("FSEIS")

<sup>2</sup> LSN #: DOE2002073507, Final Environmental Impact Statement for a Geological Repository for the Disposal of Spent Nuclear Fuel and High-level Radioactive Waste at Yucca Mountain, Nye County, Nevada, Feb. 1, 2002 ("FEIS").

authorities also confer on DOE an obligation to consult with the Timbisha on any potential impacts to the Timbisha's cultural and historic resources. (*See infra* pp. 35-40.)

(iv) *An order in this proceeding would significantly impact the interests of TOP and those that it represents (10 C.F.R. § 2.309(c)(iv)).*

Any order that might be entered in this proceeding that would grant the DOE a license to operate the Yucca Mountain repository would have a devastating effect on Timbisha cultural and historic interests; would strip the Timbisha of its federally-conferred rights to continue traditional tribal religious and cultural activities associated with the springs; and would eviscerate the Timbisha's statutory rights to be consulted by the DOE on those impacts. *See generally* Declaration of Barbara Durham ("Durham Decl.")<sup>3</sup>; Declaration of Pauline Esteves ("Esteves Decl.")<sup>4</sup>; Declaration of Prof. Catherine Fowler ("Fowler Decl.")<sup>5</sup>.

(v) *There are no other means to protect TOP's interests (10 C.F.R. § 2.309(c)(v)).*

There are no other means by which the cultural, historic, religious, and other interests of the Timbisha will be protected if TOP is not permitted to intervene as a full party. DOE already has breached its obligations under NEPA and federal regulations to consider and evaluate the impacts of the contamination of the Death Valley springs on Timbisha cultural, historic, religious, and other interests, including federally-conferred and guaranteed rights to continued traditional tribal religious and cultural activities associated with the springs. (*See infra* pp. 19-24.) DOE also has failed to satisfy its statutory obligations to consult with the Timbisha on those impacts. (*See infra* pp. 35-40.)

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<sup>3</sup> LSN #: TOP00000010, Declaration of Barbara Durham, Feb. 21, 2009 ("Durham Decl.").

<sup>4</sup> LSN #: TOP00000011, Declaration of Pauline Esteves, Feb. 21, 2009 ("Esteves Decl.").

<sup>5</sup> LSN #: TOP00000012, Declaration of Catherine S. Fowler, Feb. 21, 2009 (Fowler Decl.).

- (vi) *There are no other existing parties to represent TOP's interests (10 C.F.R. § 2.309(c)(vi)).*

Similarly, there are no other existing parties to this proceeding that will represent the Timbisha's unique cultural, historic, religious, and other interests that will be affected if the requested license is issued. The license applicant, DOE, already has breached its obligations under NEPA and federal regulations to consider and evaluate the impacts of the contamination of the Death Valley springs on Timbisha cultural, historic, religious, and other interests, and it also has failed to satisfy its statutory obligations to consult with the Timbisha on those impacts. Although there are other entities that have petitioned to intervene as parties in this proceeding, the NRC has not yet ruled on their petitions. Indeed, the DOE has opposed the participation of *all* petitioners in this proceeding, and the NRC Staff has opposed the intervention of all proposed parties except the State of Nevada and Nye County, Nevada, neither of which share the same unique interests as the Timbisha. Moreover, even if the petitions of other potential parties are granted, none of those parties share the same cultural, historic, religious, and other interests in the Death Valley springs that are unique to the Timbisha, nor would they be impacted in the way that the Timbisha will be impacted by the contamination of the Death Valley springs. Thus, those other entities do not have the same unique interests and rights at stake as do the Timbisha.<sup>6</sup>

- (vii) *Granting the Amended Petition will not broaden or delay this proceeding (10 C.F.R. § 2.309(c)(vii)).*

Granting the Amended Petition containing one amended and one new contention will not broaden the issues or delay this proceeding; in fact, it will narrow the issues and expedite the

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<sup>6</sup> A second petition to intervene, filed by an entity calling itself the "Timbisha Shoshone Tribe," would not protect the interests and resources that TOP's Amended Petition seeks to protect even if it is granted because it ignores the impact of the proposed geologic repository on the significant cultural, historic, religious and other resources and interests of the Timbisha, and especially those resources and interests in and around the Death Valley springs.

proceeding. TOP's original Petition already raised the NEPA environmental contention that is the first of two contentions in this Amended Petition; the amended contention in the Amended Petition simply expounds on the original contention. The Amended Petition adds a single new contention, which involves the DOE's breach of its duty to consult with the Timbisha. In addition, the Amended Petition eliminates two of the contentions that had been raised in the original Petition, thus narrowing the overall issues in this proceeding.

*(viii) TOP's participation is crucial to developing a sound record (10 C.F.R. § 2.309(c)(viii)).*

Finally, TOP's participation in this proceeding, including the presentation of the contentions raised in this Amended Petition, is crucial to the integrity and soundness of the decision that the NRC must make in this proceeding. The amended contentions assert that DOE has failed to satisfy its obligations under NEPA and federal regulations to consider and analyze significant impacts that the proposed geologic repository will have on cultural, historic, religious, and other interests that are particular and unique to the Timbisha, and that DOE furthermore has failed to satisfy its statutory obligations to consult with the Timbisha on those impacts. In addition, the NRC itself is statutorily obliged to ensure that this proceeding does not violate federal statutes. If the NRC does not permit the Timbisha to participate as a full party in this proceeding, the record will be devoid of facts and considerations relating to the impacts that the proposed geologic repository will have on the Timbisha's cultural, historic, religious, and other interests, as well as the DOE's failure to satisfy its consultation obligations to the Timbisha. Full presentation and consideration of those facts and considerations are essential to a legitimate and legal decision by the NRC on the DOE's license application.

**C. Standing**

*(1) As an affected Federally-recognized Indian Tribe, TOP has standing as of right to participate as a party under 10 C.F.R. § 2.309(d)(2).*

An AIT presumptively has standing to participate as a party without being required to make any further showing. The presumption of standing for an “affected Federally-recognized Indian Tribe,” which is codified at 10 C.F.R. § 2.309(d)(2)(i), turns on the definition of AIT in 10 C.F.R. § 63.2:

[A]ny Indian Tribe within whose reservation boundaries a repository for high-level radioactive wastes or spent fuel is proposed to be located; or whose Federally-defined possessory or usage rights to other lands outside of the reservation’s boundaries arising outside of Congressionally-ratified treaties or other Federal law may be substantially and adversely affected by the location of the facility if the Secretary of the Interior finds, on the petition of the appropriate government officials of the Tribe, that the effects are both substantial and adverse to the Tribe.

Once AIT status is established for the Timbisha, the Licensing Board and, ultimately, the NRC, “shall not require further demonstration of standing.” 10 C.F.R. § 2.309(a)(2)(ii). Thus, the Timbisha’s showing of AIT status is sufficient evidence of its standing.

For more than a decade the Timbisha has sought to have a meaningful voice in the deliberations over the DOE’s proposed high-level waste geologic repository at Yucca Mountain. In 2007, the United States government granted the Timbisha the status of AIT under 10 C.F.R. § 63.2 in the Yucca Mountain licensing proceedings. (*See* Letter from Department of the Interior, Assistant Secretary – Indian Affairs Carl J. Artman to Chairman Joe Kennedy of Timbisha Shoshone Tribe, June 29, 2007 at 4.<sup>7</sup>) The Timbisha is the sole AIT of the approximately 17 tribes in the region. Its AIT status not only garners the Timbisha a voice in

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<sup>7</sup> LSN #: TBS00000002, Amended Petition Seeking Determination of Affected Indian Tribe Status Under the Nuclear Waste Policy Act, July 29, 2007, pp. 1-4.

this proceeding, it guarantees the Timbisha federal funding to research and document for the purposes of this proceeding the impact that the proposed geologic repository will have on its homelands, government, and culture.

The Timbisha's Constitution bestows on its five-member Tribal Council the authority to charter and regulate corporations and other entities. (*See* Timbisha Shoshone Const. Art. V, § 2(h).<sup>8</sup>) In accordance with that authority, the Tribal Council adopted a Non-Profit Corporations Code as a means to create corporations to advance the best interests of the Timbisha and to which the Tribal Council could delegate day-to-day authority and oversight over specific matters. (Timbisha Shoshone Tribal Resolution 2008-29.<sup>9</sup>) Exercising that authority, on November 25, 2008, the Tribal Council, with Joseph Kennedy as the Tribal Council Chairman, created TOP to represent the Timbisha's interests in this proceeding. (Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation Articles of Incorporation, Nov. 25, 2008.<sup>10</sup>)

In creating TOP, the Tribal Council specifically delegated to TOP the authority and responsibility to take the following actions with regard to these proceedings: to advance the oversight of the Yucca Mountain Repository Project on behalf of the Timbisha; to ensure that the Timbisha participates fully in the Yucca Mountain oversight activities; to ensure that future generations of Timbisha have the means to continue the Yucca Mountain oversight activities; and to receive funds from the federal government pursuant to the Nuclear Waste Policy Act and other laws or grants to advance the aforementioned purposes. (*Id.*; *see also* Corporate Bylaws

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<sup>8</sup> LSN #: TOP000000002, Timbisha Shoshone Tribe, Timbisha Shoshone Constitution, Feb. 17, 1986 ("Timbisha Shoshone Const.").

<sup>9</sup> LSN #: TOP000000003, Timbisha Shoshone Indian Tribe Tribal Council Resolution 2008-29, Nov. 25, 2008.

<sup>10</sup> LSN #: TOP000000006, Articles of Incorporation for the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation, Nov. 25, 2008.

for the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation at 1.<sup>11)</sup> Thus, when TOP communicates with the United States government, it does so as the voice, and with the support, of the Timbisha. Indeed, the Timbisha expects TOP's government-to-government communications to be accorded the same importance as communications between the Timbisha's Chairman and the federal government.<sup>12</sup>

To enable TOP to carry out these functions, the Tribal Council has enacted several resolutions. *First*, the Tribal Council resolved that all funds received from the federal government through the Nuclear Waste Fund, and any other funds received from any source for the specific use of oversight or opposition to the Yucca Mountain Project, be immediately or directly deposited into a separate bank account designated solely for this purpose, in accordance with Article VI, Section 4 of TOP's Corporate Bylaws.<sup>13</sup> *Second*, it determined that funds in this account will be used for oversight of the Yucca Mountain Project and will be accessible only by TOP. *Third*, as long as TOP exists and is operating with the powers delegated to it by the Tribal Council, these funds may not be used for any other purpose or by any other division of the Timbisha, nor may the Timbisha access the funds for any other purpose. This account is separate

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<sup>11</sup> LSN #: TOP00000007, Corporate Bylaws for the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation, Nov. 25, 2008 ("TOP's Corporate Bylaws").

<sup>12</sup> This delegation of responsibility is no different than the United States Congress delegating its responsibilities for its government-to-government relationship with tribes to the trustee-delegate, the executive branch of the United States Government.

<sup>13</sup> Article VI, Section 4 of TOP's Corporate Bylaws states: "All Funds of the Corporation shall be deposited into the Timbisha Shoshone Yucca Mountain Oversight Project Trust, with such bank or other depository as the TSYMOP Board of Directors may select. Trust funds are to be used for the sole purpose of overseeing the YMP [Yucca Mountain Project] on behalf of the Tribe and its members. Trust funds may only be withdrawn by the fiscal agent, if any President and Secretary, with the President and Secretary having forwarded a jointly executed document to the bank or financial institution where the Trust is located, as evidence of the TSYMOP Board of Directors intent to withdraw such funds for YMP oversight purposes."

The original Corporate Bylaws uses the term "Executive Director" instead of "President." However, "Executive Director" was changed to "President" through Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation Corporate Resolution 2009-02. LSN #: TOP00000005, Feb. 9, 2009.

and apart from the general operating funds of the Timbisha's government and may not be accessed for any purpose other than that of TOP, in accordance with Article VI, Section 4 of the By-Laws. (*See generally* Corporate Bylaws Art. VI, § 4.)

The very creation of TOP evinces the Timbisha's intention to participate fully in this proceeding and to ensure that participation by segregating funds that the Timbisha receives for use on the Yucca Mountain Project for TOP to use for that purpose alone. Moreover, the bulwarks surrounding TOP insulate it from political ebbs and flows that may occur in any dynamic political environment. These bulwarks ensure that the funds the U.S. government gives to the Timbisha for overseeing the Yucca Mountain Project are used for their proper and stated purpose as mandated by the Timbisha and federal law. Because it is an affected federally-recognized Indian Tribe, TOP has standing as a matter of right and is entitled to request a hearing and be admitted as a full party to the proceeding under 10 C.F.R. § 2.309(d)(2) and section III, paragraph A of the Notice of Hearing.

**(2) *TOP also has representational standing to intervene under 10 C.F.R. § 2.309(d)(1) as a matter of right because its members have cultural, historic, religious, and other interests that will be affected by the decision or order that the Licensing Board issues on the license application.***

In addition to meeting the standing requirements to intervene as a full party with AIT status, and as a separate basis for standing in this proceeding, TOP has standing to participate as a full party because it meets the standing requirements of 10 C.F.R. § 2.309(d)(1)(i)-(iv).

***First***, TOP meets the requirements of Section 2.309(d)(1)(i). (*See supra* Part I.A.)

***Second***, TOP meets the requirements of Section 2.309(d)(1)(ii) because it is both an AIT and, if the license application is granted, members of the Timbisha represented by TOP will suffer harm to their cultural, historic, religious, and other resources from contamination of Death Valley springs caused by effluent released from DOE's proposed geologic repository. If TOP is

permitted to participate as a party and present its contentions, NRC can take actions that would cure DOE's failure to consider and analyze the effects that the geologic repository will have on the Timbisha's cultural, historic, and religious interests, including requiring DOE to consider those effects and potential ways to mitigate them, as well as requiring DOE to fulfill its obligation to consult with the Timbisha. (*See generally* TOP-NEPA-01, *infra* pp. 18-32; TOP-MISC-01, *infra* pp. 34-43). These interests of the Timbisha, who are members of TOP, fall squarely within those interests that NEPA is designed to protect.

*Third*, TOP meets the requirements of Section 2.309(d)(1)(iii). TOP, as a representative of members of the Timbisha, has significant, long-standing, and federally guaranteed interests at stake in the proceeding that will be directly and severely impacted if TOP is not permitted to participate as a full party. Specifically, the DOE's environmental impact statements concede that contamination from a high-level waste repository at Yucca Mountain may discharge at the Death Valley springs, which hold cultural, historic, and religious significance that are central to the Timbisha. (*See infra* pp. 24-29.) Federal statutes guarantee that the Timbisha will have continued use of water in its homeland for traditional tribal purposes. Other federal statutes also confer on DOE an obligation to consult with the Timbisha on any potential impacts to the Timbisha's cultural and historic resources. TOP has an interest in ensuring that all of the Timbisha's cultural, historic, religious, and other resources and rights that will be affected by the issuance of the proposed license are fully presented to and considered by the Licensing Board in ruling on the license application.

*Fourth*, TOP meets the requirements of Section 2.309(d)(1)(iv). Any order that might be issued in this proceeding granting the license application potentially would have a devastating effect on Timbisha cultural, historic, and religious interests; would strip the Timbisha of its

federally conferred rights to use water for traditional tribal purposes; and would eviscerate the Timbisha's statutory rights to be consulted by the DOE on those impacts, as well as the statutory protection under NEPA requiring NRC to ensure that DOE did not violate its statutory duties in the process of seeking a license for the geologic repository.

**(3) *In the alternative, TOP should be granted standing through discretionary intervention under 10 C.F.R. § 2.309(e).***

If TOP is not permitted to intervene as a party in this proceeding as a matter of right under 10 C.F.R. § 2.309(d)(1), the Licensing Board should permit TOP to intervene as a party in this proceeding as a matter of discretion. Each of the requirements of Section 2.309(e) is met (or, upon the Licensing Board's determination that there is at least one petitioner with standing and at least one admissible contention, will be met) here.

*First*, TOP's participation may reasonably be expected to assist in developing a sound record. The amended contentions assert that DOE has failed to satisfy its obligations under NEPA and federal regulations to consider and analyze significant impacts that the proposed geologic repository will have on cultural, historic, religious, and other interests that are particular and unique to the Timbisha, and that DOE furthermore has failed to satisfy its statutory obligations to consult with the Timbisha on those impacts. In addition, the NRC itself is statutorily obliged to ensure that this proceeding does not violate federal statutes. If the NRC does not permit the Timbisha to participate as a full party in this proceeding, the record will be devoid of facts and considerations relating to the impacts that the proposed geologic repository will have on the Timbisha's cultural, historic, religious, and other interests, as well as the DOE's failure to satisfy its consultation obligations to the Timbisha. Full presentation and consideration of those facts and considerations are essential to a legitimate and legal decision by the NRC on the DOE's license application. *See* 10 C.F.R. § 2.309(e)(1)(i).

**Second**, TOP, as a representative of members of the Timbisha, has significant, long-standing, and federally-guaranteed interests at stake in the proceeding that will be directly and severely impacted if TOP is not permitted to participate as a full party. Specifically, the DOE's environmental impact statements concede that contamination from a high-level waste repository at Yucca Mountain may discharge at the Death Valley springs, which hold cultural, historic, and religious significance that are central to the Timbisha. Federal statutes guarantee that the Timbisha will have continued use of water in its homeland for traditional tribal purposes. Other federal statutes also confer on DOE an obligation to consult with the Timbisha on any potential impacts to the Timbisha's cultural and historic resources. TOP has an interest in ensuring that all of the Timbisha's cultural, historic, religious, and other resources and rights that will be affected by the issuance of the proposed license are fully before and considered by the Licensing Board in ruling on the license application. *See* 10 C.F.R. § 2.309(e)(1)(ii).

**Third**, as set forth above and in the proposed contentions, any order that might be issued in this proceeding granting the license application potentially would have a devastating effect on Timbisha cultural, historic, and religious interests; would strip the Timbisha of its federally-conferred rights to use water for traditional tribal purposes; and would eviscerate the Timbisha's statutory rights to be consulted by the DOE and NRC on those impacts. *See* 10 C.F.R. § 2.309(e)(1)(iii).

In addition, none of the factors set forth in Section 2.309(e)(2) weighing against allowing intervention applies here.

**First**, there are no other means by which the cultural, historic, and religious interests of the Timbisha that TOP seeks to bring before the Licensing Board will be protected in the absence of TOP's participation as a full party. DOE's environmental impact statements concede that

contamination from a high-level waste repository at Yucca Mountain may discharge at the Death Valley springs, which hold cultural, historic, and religious significance that are central to the Timbisha. Federal statutes and regulations require those effects to be considered and analyzed in this proceeding, both by DOE and then, separately, by NRC. In addition, other federal statutes, agency policies, and Executive Orders confer on DOE an obligation to consult with the Timbisha on any potential impacts to the Timbisha's cultural and historic resources. Those procedural safeguards that TOP has through this proceeding to protect the interests of the Timbisha people, including the requirement for DOE to consider and present alternative scenarios that would prevent or minimize impacts on Timbisha cultural, historic, and religious resources, are not available through other means. *See* 10 C.F.R. § 2.309(e)(2)(i).

*Second*, none of the existing or other potential parties to this proceeding will adequately protect the interests that TOP seeks to protect through its Amended Petition. As stated above, DOE, already has breached its obligations under NEPA and federal regulations to consider and evaluate the impacts of the contamination of the Death Valley springs on Timbisha cultural, historic, religious, and other interests, and it also has failed to satisfy its statutory obligations to consult with the Timbisha on those impacts. Although there are other entities that have petitioned to intervene as parties in this proceeding, their petitions have not yet been granted. Indeed, the DOE has opposed the participation of all proposed intervenors in this proceeding, and the NRC Staff has opposed the intervention of all proposed parties except the State of Nevada and Nye County, Nevada, neither of which share the same unique interests as the Timbisha. Moreover, even if the petitions of other potential parties are granted, none of those parties share the same cultural, historic, religious, and other interests in the Death Valley springs that are unique to the Timbisha, nor would they be impacted in the way that the Timbisha will be

impacted by the contamination of the Death Valley springs. Thus, those other entities do not have the same unique interests and rights at stake as do the Timbisha. *See* 10 C.F.R.

§ 2.309(e)(2)(ii).

*Third*, granting TOP the right to discretionary intervention will not broaden the issues or delay this proceeding; in fact, it will narrow the issues and expedite the proceeding. TOP's original Petition already raised the NEPA environmental contention that is the first of two contentions in this Amended Petition; the amended contention in the Amended Petition simply expounds on the original contention. The Amended Petition adds a single new contention, which states that DOE has breached a duty to consult with the Timbisha. In addition, the Amended Petition eliminates two of the contentions that had been raised in the original Petition, thus narrowing the overall issues in this proceeding. *See* 10 C.F.R. § 2.309(e)(2)(iii).

#### **D. Hearing Requested**

TOP hereby formally requests a formal adjudicatory hearing on each of its contentions herein submitted in accordance with Section 189a(1)(A) of the Atomic Energy Act of 1954 ("AEA"), as amended, Section 114(d) of the Nuclear Waste Policy Act of 1982 ("NWPA"), as amended, 5 U.S.C. § 554-558, and 10 C.F.R. Part 2, Subparts C and J. In addition, TOP requests to participate in the resolution of any and all uncontested issues to the same extent, and in the same manner, as DOE or any other party may be allowed to participate in the resolution of those issues.

#### **E. Subpart J**

TOP has substantially and timely complied with the provisions of Subpart J, including Section 2.1003 and Section 2.1009, in that it has designated an official responsible for administration of its responsibility to provide electronic files of Documentary Material;

established procedures to implement the requirements of Section 2.1003; provided training to its staff on the procedures for implementation of the responsibility to provide electronic files of Documentary Material; has expended substantial time and good-faith effort to ensure that it has made all its Documentary Material publicly available; and its responsible designated official has certified that to the best of his knowledge, the Documentary Material specified in Section 2.1003 has been identified and made electronically available.

TOP submitted an adequate and timely LSN certification on December 22, 2008, and adequate and timely supplemental certification on February 28, 2009. Moreover, TOP participated in the pre-application phase of this proceeding. (*See* Att. 1, Kennedy Aff. ¶¶ 11-12.) Therefore, TOP has complied fully with the provisions of section II, paragraphs 2, 3, and 7 of the Notice of Hearing, there is no “failure . . . to participate as a potential party in the pre-License Application phase under Subpart J of [10 C.F.R. Part 2],” and correspondingly, there is no basis for limiting or denying full party status to TOP under 10 C.F.R. § 2.309(a).

**F. Joint Contentions**

At this time, TOP has no joint contentions. TOP might identify joint contentions later, in accordance with such reasonable schedule as may be set by the presiding officer.

**2. Introduction to Contentions**

In accordance with the Pre-License Application Presiding Officer Board’s June 20, 2008 Memorandum and Order (LBP-08-10), TOP drafted two “single-issue” contentions, one of which raises a single environmental (NEPA) issue and the other which raises a single (miscellaneous) legal issue. Both are supported by a single set of related facts or omissions.

**3. Contentions**

**A. NEPA Contentions**

**TOP-NEPA-01-FAILURE TO CONSIDER AND ANALYZE CULTURAL, HISTORIC,  
RELIGIOUS, AND OTHER IMPACTS**

***(1) Specific statement of the issue of law or fact to be raised or controverted.***

DOE's 2002 FEIS and 2008 FSEIS fail to evaluate the potential cultural and historic impacts that contamination of springs in Death Valley, California, by effluent from the Yucca Mountain geologic repository could have on the Timbisha. This omission is significant because contamination of the Death Valley springs and other water bodies in Death Valley by effluent from the geologic repository would harm cultural and historic resources of the Timbisha, which would in turn violate the Timbisha's federally-conferred water rights, and, without considering and evaluating those impacts, there is no adequate disclosure of environmental impacts under NEPA. If cultural and historic impacts on the Timbisha from contamination of the Death Valley springs were added, including impacts to the Timbisha's federally-conferred water rights, the disclosure of environmental impacts could be materially different, and thus the NRC may not adopt the FEIS and FSEIS.

***(2) Brief explanation of the basis for the contention.***

In the FSEIS, DOE commented that its own groundwater flow model recognizes that effluent from Yucca Mountain could be discharged into the Death Valley springs. (FSEIS, Vol. III at CR 324; *see also* FSEIS §§ 3.1.4.2.1 ("Environmental Setting"), 5.4 ("Postclosure Repository Performance"), Fig. 3.8.) Despite the cultural and historic significance of the Death Valley springs to the Timbisha, and the critical value of the purity of those springs to tribal spiritual beliefs, culture, and heritage, DOE has ignored the impacts that the contamination of the Death Valley springs would have on tribal cultural and historic resources, as well as on water rights conferred to the Timbisha by federal statute.

**(3) *Demonstration that the issue raised in the contention is within the scope of the proceeding.***

This contention raises an issue whether DOE's license application, including supporting materials, complies with the provisions and policy goals of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*; NRC regulations implementing NEPA, 10 C.F.R. Part 51; Council on Environmental Quality regulations implementing NEPA, 40 C.F.R. Parts 1500 *et seq.*; NRC regulations at 10 C.F.R. Part 63; as well as case law and agency rules, guidance, and internal policies involving environmental impact statements, which apply to Yucca Mountain. This contention falls squarely within the scope of the hearing as specified in section II, paragraph 1 of the Notice of Hearing.

**(4) *Demonstration that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding.***

Federal regulations implementing NEPA are designed to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken" and are intended "to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(b),(c). Generally, the regulations implementing NEPA place several affirmative and mandatory obligations on federal agencies to ensure that they comply with NEPA's policy, including the obligations to:

- "Interpret and administer the policies, regulations, and public laws of the United States in accordance with policies set forth in the Act and in these regulations." 40 C.F.R. § 1500.2(a).
- Produce environmental impact statements that "shall be supported by evidence that agencies have made the necessary environmental analyses." *Id.* § 1500.2(b).
- "Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice . . . ." *Id.* § 1500.2(c).

- “Encourage and facilitate public involvement in decisions which affect the quality of the human environment.” *Id.* § 1500.2(d).
- “[I]dentify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.” *Id.* § 1500.2(e).
- “Use all practicable means . . . to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.” *Id.* § 1500.2(f).

Among the NRC regulations governing DOE’s license application in this proceeding are 10 C.F.R. §§ 51.67 and 63.21(a), which require DOE to submit an environmental impact statement (EIS) with its license application. DOE also has an obligation to supplement its EIS to take into account the environmental impacts of any substantial changes in its proposed actions or any significant new circumstances or information relevant to environmental concerns bearing on the proposed action or its impacts. 10 C.F.R. § 63.24(c).

Generally, an EIS must contain a reasonably thorough discussion of the significant probable environmental consequences of the proposed action, which requires a license applicant and the NRC to take a hard look at the potential environmental consequences of its proposed license, as well as the various alternatives. 40 C.F.R. § 1502.14; *see Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9<sup>th</sup> Cir. 1992); *Northwest Ecosystem Alliance v. Rey*, 380 F. Supp. 2d 1175, 1185 (W.D. Wash. 2006); *In The Matter of Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site)*, 2007 WL 4129154 at \*6 (N.R.C., 2007) (citing *Robertson v. Methow Valley Cit. Council*, 490 U.S. 332, 333 (1989) (NEPA requires agencies to take a “Hard Look” at the probable environmental consequences of their actions)). Here, that means that DOE’s FEIS and FSEIS must “present environmental impacts” of the various proposals in comparative form to “sharply defin[e] the issues” and to “provid[e] a clear basis for choice among options by the decisionmaker *and the public.*” (Emphasis added.) The

“environmental consequences” to be weighed and compared in the FEIS and FSEIS as dictated by Section 1502.14 are defined in 40 C.F.R. § 1502.16. They include “any adverse environmental effects which cannot be avoided should the proposal be implemented.”

The term “effects,” in turn, is defined by 40 C.F.R. § 1508.8:

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, *historic, cultural*, economic, social, or health, *whether direct, indirect, or cumulative*. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

(Emphasis added.) The inclusion of the absolute mandate that DOE consider and expressly analyze any potential adverse “historic” and “cultural” impacts of the proposed geologic repository on the Timbisha is not incidental or accidental. Indeed, the focus on historic and cultural effects or impacts is specifically repeated in Section 1502.16, which provides that the FEIS and FSEIS “*shall* include discussions of . . . Urban quality, *historic and cultural resources*, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.” *Id.* § 1502.16(g) (emphasis added).<sup>14</sup>

The requirement that DOE’s FEIS and FSEIS specifically consider and analyze the proposed geologic repository’s potential historic and cultural effects or impacts on the Timbisha are echoed in the regulations that NRC has promulgated to implement NEPA’s policies. Under those regulations, NRC requires that an EIS include the following:

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<sup>14</sup> See also U.S. Department of Energy American Indian and Alaska Native Tribal Government Policy, DOE Notice 144.1 (Oct. 20, 2006), at p. 2 (“Cultural resources include, but are not limited to: archeological 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 American Indian and Alaska Native nations regard as supportive to their cultural and traditional lifeways.”).

Analysis of major points of view. To the extent sufficient information is available, the draft environmental impact statement will include consideration of major points of view concerning the environmental impacts of the proposed action and the alternatives, and ***contain an analysis of significant problems and objections raised*** by other Federal, State, and local agencies, ***by any affected Indian tribes***, and by other interested persons.

10 C.F.R. § 51.71(b) (emphasis added). In sum, there can be no debate that the DOE's FEIS and FSEIS must consider and evaluate the cultural and historic impacts on the Timbisha from repository operations, both during the time of proposed operation and post-closure.

Among the cultural and historic impacts from repository operations would be the impact on the Timbisha's federally-conferred water rights. The reservation for the Timbisha was established by the Timbisha Homeland Act of 2000, Pub. L. 106-423, 114 Stat. 1875 (2000) (codified at 16 U.S.C. § 410aaa) (the "Homeland Act"). The Homeland Act reserves five separate parcels of land in and around Death Valley National Park for the Timbisha. 16 U.S.C. § 410aaa5(b)(1). In addition, the Homeland Act established specific consumptive water rights for the Timbisha at each parcel. *Id.* § 5(b)(2). The Homeland Act also established certain rights for traditional use by the Timbisha of natural resources in Death Valley National Park. *Id.* § 5(d). For example, the Homeland Act provides that "the Secretary [of Interior] shall permit the Tribe's continued use of Park resources for traditional tribal purposes, practices, and activities" and further establishes "special use areas" for the use of the Timbisha for "traditional purposes." *Id.* §§5(d)(2),(4). Thus, the Homeland Act not only has a purpose to establish a reservation of land for the Timbisha with sufficient water supply on the reservation but also has as a purpose the establishment of access rights to areas on and off the reserved land for the purpose of continuing the Timbisha's traditional lifestyle. In this way, the Homeland Act establishes reserved original rights to maintain sufficient flow and quality of water in the springs in the Timbisha's traditional homeland for the purpose of continuing the Timbisha's traditional tribal

purposes, practices and activities. *Winters v. United States*, 207 U.S. 564 (1908); *United States v. Adair*, 723 F.2d 1394, 1410-11 (9<sup>th</sup> Cir. 1983) (referring to the original reserved water rights of American Indians as “aboriginal” rights).

NRC’s own guidance on the review of the adequacy of an EIS and Environmental Report associated with licensing actions state specifically that the report should evaluate impacts to other water users including their water rights. *See* NUREG–1748, Environmental Review Guidance for Licensing Actions Associated With NMSS Programs, Final Report, NRC (Aug. 2003). Specifically, the EIS should identify consumptive and non-consumptive water uses that could be affected by construction and operation of the project including water rights potentially impacted. The EIS “should identify water uses that provide potential pathways” for radiological effluents including “locations of receptors for non-consumptive uses.” *Id.* at 5-8, 9. To fulfill this requirement, the EIS preparer should fully utilize all available sources of information, including “local water supply companies or agencies, river basin commissions, State agencies (e.g., water resources, fish and wildlife), Federal agencies (e.g., U.S. Army Corps of Engineers and the U.S. Geological Survey) and *American Indian tribal agencies*.” *Id.* at 5-9 (emphasis added). The EIS should compile data “adequate to serve as a basis for assessing the impacts of proposed project construction and operation on consumptive and *non-consumptive water uses*.” *Id.* (emphasis added). In its review of the potential impacts to water users, the NRC should consider “the potential for an incompatibility between water availability as affected by project activities and existing and known future water rights and allocations.” *Id.* pp. 5-15, § 5.4.4.

Moreover, 10 C.F.R. § 63.13(c) provides that a construction authorization will not issue until the NRC weighs the environmental, economic, technical, and other benefits against environmental costs, and considers available alternatives contained in the EIS. The failure to

ensure that NEPA and its various implementing regulations are strictly followed and satisfied is crucial to ensuring that a federal agency has before it the information necessary to understand the full environmental consequences of an action that the agency is being asked to take or approve. For the purposes of this proceeding, that requires the Licensing Board to have before it information sufficient both to understand the environmental consequences of granting the DOE's license application and to act in a way that protects the environment. To satisfy these requirements and to properly implement NEPA procedures and policies, NRC must ensure that it has before it the views of those members of the public that will suffer environmental impacts from DOE's proposed actions and that DOE has included in the environmental impact statements supporting its license application "evidence" that it has "made the necessary environmental analyses." Without the information and analyses of the environmental consequences on Timbisha historic and cultural interests, any decision by the Licensing Board on DOE's license application will violate NEPA because the Licensing Board will have violated NRC's own obligations to comply with NEPA. *See, e.g., Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981) (observing that NEPA requires "environmental concerns [to] be integrated into the very process of agency decision making"); *see also Massachusetts v. United States*, 522 F.2d 115, 119 (1<sup>st</sup> Cir. 2008) (applying NEPA requirements to NRC).

**(5) Concise statement of the alleged facts or expert opinions supporting TOP's position on the issue and on which TOP intends to rely, and references to the specific sources and documents on which TOP intends to rely to support its position on the issue.**

DOE admits that groundwater and contaminants below Yucca Mountain may migrate to and discharge from springs in Death Valley, contaminating both the springs and the water bodies in Death Valley that derive water from the springs. The FSEIS states that water below Yucca Mountain could contribute to springs in Death Valley. Specifically, in its response to comments on the FSEIS, DOE acknowledges that its own groundwater flow model recognizes that effluent

from Yucca Mountain would migrate toward Death Valley Junction and could be discharged into the Death Valley springs:

The analysis described in the Repository SEIS bounds the impacts that would result if the plume reached Death Valley. The DOE model of groundwater flow estimates *the plume from Yucca Mountain would move south into Amargosa Desert and on toward Death Valley Junction and the discharge area of Alkali Flat/Franklin Lake Playa*. The Repository SEIS recognizes in Sections 3.1.4.2.1 and 5.4 that *groundwater flowing through the Amargosa Desert might contribute to the Death Valley springs to the west and, therefore, those springs could be potential discharge areas for groundwater from beneath Yucca Mountain*.

(FSEIS, Vol. III at CR-324 (emphasis added); *see also* FSEIS §§ 3.1.4.2.1 (“Environmental Setting”), 5.4 (“Postclosure Repository Performance”), Fig. 3.8.)

In its review of the FEIS, the NRC staff indentified that DOE failed “to completely and adequately characterize potential contaminant release to groundwater and from surface discharge and that this failure “renders the EISs inadequate.” (*U.S. Nuclear Regulatory Commission Staff’s Adoption Determination Report For the U.S. Department of Energy’s Environmental Impact Statements For The Proposed Geologic Repository At Yucca Mountain*, pp. 3-8.<sup>15</sup>) However, despite the inadequacy of the groundwater analysis in the FEIS, DOE recognizes that groundwater below Yucca Mountain may contribute to the discharge at springs in Death Valley, irrespective of its flow path or the cumulative impacts. (*Id.*) DOE notes “water from beneath Yucca Mountain could contribute to Death Valley springs whether or not it reaches the carbonate aquifer in the area of Yucca Mountain” and should the upward gradient at Yucca Mountain be eliminated, this would simply result in a different flow path. (FSEIS, Vol. III at CR-324.)

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<sup>15</sup> LSN #: NRC000029699, U.S. Nuclear Regulatory Commission Staff’s Adoption Determination Report For the U.S. Department of Energy’s Environmental Impact Statements For The Proposed Geologic Repository At Yucca Mountain, Sept. 5, 2008, pp. 3-8.

For nearly a decade, the Timbisha have consistently identified the potential impacts of a Yucca Mountain repository on their cultural interests as one of their primary reasons for opposing the licensing of a high-level waste repository there. In November 1999, the Timbisha stated their opposition, in part, in this way:

The Timbisha Shoshone Tribe opposes the Yucca Mountain Project because it places highly radioactive wastes in Timbisha Shoshone land for thousands and millions of years. . . . The containers will eventually leak *and contaminate the groundwater*, poisoning future generations. *The Timbisha Shoshone people will eventually become effected by the groundwater when it becomes contaminated.* . . . Although the DOE considers it a wasteland, *this desert land is sacred.*

(Comments, Yucca Mountain Project Draft EIS (emphasis added).<sup>16</sup>)

Similarly, in February, 2000, commenting further on the Draft EIS, the Timbisha noted that the Draft EIS concluded that groundwater with varying concentrations of different radionuclides would reach wells in the Amargosa Valley and springs in Death Valley, and that the DEIS acknowledged that Native Americans consider the repository “to be an adverse impact to all elements of the natural and physical environment.” Even more specifically, the Timbisha referred to comments that they and other Native Americans consider the contamination that will result from Yucca Mountain repository operations to be “pollution of . . . holy lands” but that DOE failed to address these clear cultural concerns. (Letter from Pauline Esteves to Wendy Dixon, February 24, 2000.<sup>17</sup>)

In its January 10, 2008 comments submitted to the DOE on the Draft FSEIS, the Timbisha specifically noted that the Timbisha “has particular concerns as to . . . cultural

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<sup>16</sup> LSN #: DN20022421185, Public Comments Regarding the Draft Environmental Impact Statement by Pauline Esteves, Tribal Chair, Timbisha Shoshone Tribe, Nov. 4, 1999.

<sup>17</sup> LSN #: DEN001388576, Letter to Wendy Dixon from Pauline Esteves re: Draft Environmental Impact Statement, Yucca Mountain Project; and Proposed Rulemaking, Yucca Mountain Site Suitability Guidelines, 10 C.F.R. Parts 960 and 963(c), Feb. 24, 2000.

resources . . . impacts,” and requested that DOE “assess and analyze . . . impacts to cultural resources” of the Timbisha. (Timbisha letter to Jan Summerson and M. Lee Bishop, January 10, 2008.)<sup>18</sup>

Among the concerns that the Timbisha has about impacts from a Yucca Mountain geologic repository are that repository operations will have significant adverse impacts on Timbisha cultural and historic resources. In particular, the Timbisha are concerned about impacts on the purity of springs and other water bodies in Death Valley in the vicinity of which they traditionally have lived for thousands of years, which they hold as sacred and that are required to be kept clean and pure.

The purity of water in springs has cultural religious significance to the Timbisha. (Durham Decl. ¶¶ 4-8; Esteves Decl. ¶¶ 4-9; Fowler Decl. ¶¶ 6-12<sup>19</sup>; *see also* Fowler et al., *Native Americans and Yucca Mountain, A Revised and Updated Summary Report on Research Undertaken Between 1987 and 1991*, Vol. I, pp. 30, 92;<sup>20</sup> Fowler, *Residence without Reservation: Ethnographic Overview and Traditional Land Use Study, Timbisha Shoshone, Death Valley National Park, California* (August 25, 1995)<sup>21</sup>.) For multiple generations the Timbisha have lived in the areas around what is now Death Valley National Park. (Fowler Decl. ¶ 6.) While the Timbisha has gained trust lands in its traditional and original homeland, the area tribal homeland encompasses mountain ranges, valleys, springs over a wider area than their trust

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<sup>18</sup> LSN #: TBS00000001, The Timbisha Shoshone Tribe’s Comments on Draft Repository Supplemental Environmental Impact Statement and Draft Nevada Rail Corridor/Alignment Environmental Impact Statement, Jan. 10, 2008.

<sup>19</sup> LSN #: TOP000000012.

<sup>20</sup> LSN #: NEV000000308, *Native Americans and Yucca Mountain, A Revised and Updated Summary Report on Research Undertaken Between 1987 and 1991*, Vol. I, Oct. 1, 1991.

<sup>21</sup> LSN #: TOP000000001, *Residence without Reservation: Ethnographic Overview and Traditional Land Use Study, Timbisha Shoshone, Death Valley National Park, California*, August 25, 1995.

lands. The Timbisha's lifestyle and culture is intimately connected to the water resources in the area and, in particular, to the cleanliness and purity of those water resources.

Life in the desert environment is harsh, and the Timbisha developed a deep attachment to the land and its natural resources that is reflected in the Timbisha cultural values and religion. Water, including the springs, are a part of the Timbisha's creation stories. Important to the Timbisha from the perspective of religion is the concept of a power or energy, called "puha," an impersonal force that can potentially reside in any natural or living thing including people, water, and plants. Puha is also reflected in various classes of anthropomorphic spirits. This translates into the Timbisha's cultural and religious view that the Earth is sacred and that the Creator requires the Timbisha to protect the Earth, including water, and maintain its purity. (Durham Decl. ¶ 4, 6; Esteves Decl. ¶¶ 4-8; Fowler Decl. ¶ 6.)

To the Timbisha, water that emanates from springs in their traditional homeland is the lifeblood of the Mother Earth. Springs are locations in their homeland where the people and animals may thrive. This has developed into the Timbisha's cultural and religious view that all tribal members have an obligation to protect the springs and to ensure that the springs continue to flow and remain clean. To maintain the purity and flow of the springs, traditionally, the Timbisha would regularly clean springs to ensure a ready supply of clean water for Tribal members and wildlife. (Durham Decl. ¶¶ 4-6; Esteves Decl. ¶¶ 4-6; *The Timbisha Shoshone Tribal Homeland, A Draft Secretarial Report to Congress to Establish a Permanent Tribal Land Base and Related Cooperative Activities*, p. 5.<sup>22</sup>)

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<sup>22</sup> LSN #: DN2002427532, *The Timbisha Shoshone Tribal Homeland, A Draft Secretarial Report to Congress to Establish a Permanent Tribal Land Base and Related Cooperative Activities*, June 12, 2000, p. 5.

In Timbisha's cultural and religious view, all springs are interconnected and are linked by a vast underground network. This water network in the earth is the vehicle that allows puha and spirits to travel throughout the tribal homeland. (Esteves Decl. ¶ 5; Fowler Decl. ¶ 8.)

In the Timbisha's cultural and religious view, people who obtained considerable amounts of puha were called "puhaganta," Doctors or shamans. Some Doctors have a special relationship with springs, which are one source of puha. In the past, Doctors were able to travel through the water network from spring to spring. (Esteves Decl. ¶ 7; Fowler Decl. ¶ 9.)

All sources of puha, such as mountains, springs and water courses and living things that possess puha such as animals and people, are to be treated with respect. In recognition of the springs as a source of puha, ordinary members of the Timbisha would make offerings to springs. For example, offerings or specific prayers were made at springs when they were visited, such as at harvest time. Offerings would also make sure that puha did not act in an unfriendly way towards the Timbisha. (Esteves Decl. ¶ 9; Fowler Decl. ¶ 11.)

Purity and cleanliness of springs in their traditional homeland is of great importance to the Timbisha's culture and religion. The Timbisha considers critical the purity of the springs, as it affects living things that may draw puha from the springs and the spirits that may reside at springs. To the Timbisha, even small amounts of contamination would be disrespectful to the springs and to the earth. (Durham Decl. ¶ 7; Esteves Decl. ¶¶ 5, 7, 10; Fowler Decl. ¶ 12.)

**(6) *There is sufficient information to show that there is a genuine dispute with DOE on a material issue of law or fact, with references to the specific portions of the license application that TOP disputes or the information that the application fails to contain and the supporting reasons for TOP's dispute or belief.***

There is a genuine dispute between TOP and DOE regarding the evaluation of the potential impacts that the proposed geologic repository might have on the Timbisha's cultural and historic resources, as well as on their water rights conferred by federal statute. Despite the

Timbisha's express requests that the DOE consider and evaluate the potential harm to the Timbisha's own particular cultural interests, including effects from contamination of the Death Valley springs that DOE's own groundwater flow model shows may occur, the DOE has failed to present any such analysis. The FEIS and FSEIS limit their assessment of impacts on cultural resources solely to the withdrawal land and fail even to mention impacts on Timbisha cultural or historic resources, including water rights, lying in the region outside the withdrawal lands that might be affected by repository operations, including the contamination of the Death Valley springs by contaminated groundwater from Yucca Mountain repository operations. (FEIS, § 3.1.6 pp. 3-77; FSEIS, § 3.1.6, pp. 3-62.) In fact, despite NRC's EIS guidance, the FEIS and FSEIS lack any mention of the consumptive and non-consumptive water use by the Timbisha or the Timbisha's water rights and lacks any analysis of the potential impacts to those uses and water rights by the proposed geologic repository.

Moreover, DOE failed to investigate and understand the Timbisha's particular and unique cultural and historic resources, including water rights, instead simply lumping those interests in with those of all other Native American groups. In considering impacts of construction of the repository, the FEIS, for example, contains a single section titled "A Native American Perspective," which covers a scant three pages. (FEIS, § 4.1.13.4, p. 4-88.) DOE's FSEIS, furthermore, also contains only three pages addressing Native American environmental and cultural concerns. (FSEIS, § 4.1.5, p. 4-40.) That analysis simply lumps together all Native American groups' cultural interests, treating them as a single, indistinct entity:

However, because of the general level of importance that American Indians attribute to these places, which they believe are parts of an equally important integrated cultural landscape, American Indians consider the intrusive nature of the proposed repository to be a significant adverse impact to all elements of the natural and physical environment. Based on Tribal Update

Meetings for members of the Consolidated Group of Tribes and Organizations held since the completion of the FEIS, the American Indian viewpoint is unchanged.

DOE's FEIS and FSEIS further fail to address the various Native American tribes' (including the Timbisha's) particular cultural concerns about potential environmental consequences based on DOE's belief that it would have an "opportunity" to meet with the tribes after the repository is licensed and in operation, and that the availability of such opportunities should "lessen[]" the respective tribes' concerns:

DOE recognizes that it could not undertake disposal of spent nuclear fuel and high-level radioactive waste in a repository at Yucca Mountain without conflict with the viewpoint expressed in the American Indian Writers Subgroup document, but believes that, should the repository be designated, DOE would have the opportunity to engage in regular consultations with representatives of tribes in the region to identify further measures to protect cultural resources, thereby lessening the concern expressed by Native American people.

(FEIS § 4.1.13.4, p. 4-90.)

DOE's environmental justice analysis in the FSEIS also fails to address any specific concern raised by the Timbisha and, again, simply rolls the interests of all Native American groups into one, without any analysis of specific impacts on the Timbisha:

DOE has not identified any subsection of the population, including minority and low-income populations, that would receive disproportionate impacts, and no unique exposure pathways, sensitivities, or cultural practices that would expose minority or low-income populations to disproportionately high and adverse impacts. Accordingly, DOE has concluded that no disproportionately high and adverse impacts would result from the Proposed Action.

(FSEIS § 4.1.13.3, pp. 4-96.)

Thus, despite the Timbisha's repeated efforts to inform the DOE of the adverse impacts on Timbisha cultural interests that they are concerned will result from a repository operated at

Yucca Mountain, including the effects on tribal cultural and historic resources from contaminated groundwater emanating from a Yucca Mountain repository, DOE's environmental impact statements have failed to consider and analyze those concerns. Specifically, neither the FEIS nor the FSEIS even mentions the cultural or historic significance of the purity of the Death Valley springs to the Timbisha or the impacts that contamination will have on the Timbisha's water rights conferred by federal statute. Nor do the FEIS or FSEIS consider and analyze how to mitigate any potential adverse cultural or historic effects on the Death Valley springs caused by groundwater contamination that would emanate from a Yucca Mountain repository.

This contention is not a joint contention.

**B. Miscellaneous Contentions**

## TOP-MISC-01-FAILURE TO SATISFY TRUST OBLIGATIONS

***(1) Specific statement of the issue of law or fact to be raised or controverted.***

DOE failed to consult with the Timbisha regarding the potential cultural and historic impacts that contamination of springs in Death Valley, California, by effluent from the Yucca Mountain geologic repository could have on the Timbisha. This failure is significant because contamination of the Death Valley springs by effluent from the geologic repository would harm cultural and historic resources of the Timbisha, and, by failing to consult with the Timbisha about these potential impacts and how they might be avoided, DOE violated statutory, regulatory, and policy-based consultation requirements. Because of those violations of federal law, the NRC may not grant the license application.

***(2) Brief explanation of the basis for the contention.***

DOE bears a federal trust responsibility to the Timbisha and other Native American tribes impacted by DOE projects. This trust responsibility may manifest itself through a duty to consult with tribes on policies or actions that impact those tribes. The duty to consult is established by the National Historic Preservation Act, Executive Branch orders, and DOE's own internal policies. These promulgations require DOE to make a meaningful consultation with the Timbisha regarding the potential adverse affects that the proposed geologic repository could have on the Timbisha's cultural and historic resources, including the Death Valley springs, and the alternatives and modifications that could avoid, minimize, or mitigate those adverse effects. DOE furthermore has a statutory duty to consult the Timbisha regarding the potential eligibility of the sites where those springs are located for listing on the National Register, which includes conducting a cultural survey. Despite the cultural and historic significance of the Death Valley springs to the Timbisha, DOE has failed to consult with the Timbisha and has not conducted the

required cultural survey or properly evaluated the Death Valley springs sites for inclusion on the National Register.

**(3) *Demonstration that the issue raised in the contention is within the scope of the proceeding.***

This contention raises an issue whether DOE's license application, including supporting materials, complies with the provisions and policy goals of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*; NRC regulations implementing NEPA, 10 C.F.R. Part 51; Council on Environmental Quality regulations implementing NEPA, 40 C.F.R. Part 1500; NRC regulations at 10 C.F.R. Part 63; as well as case law and agency rules, guidance, and internal policies involving environmental impact statements, which apply to Yucca Mountain. This contention falls squarely within the scope of the hearing as specified in section II, paragraph 1 of the Notice of Hearing.

**(4) *Demonstration that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding.***

The trust responsibility of the United States requires the DOE and NRC to observe the most exacting fiduciary standards in considering actions that impact tribal right, land or resources. *Seminole Nation v. United States*, 316 U.S. 286, 297 & 297 n.12 (1942). The trust responsibility applies to all actions of all federal agencies in the Executive Branch impacting Indians. *Nance v. EPA*, 645 F.2d 581, 586 (9<sup>th</sup> Cir. 1990). The federal trust responsibility is a separate legal doctrine that exists independent of and in addition to specific legal obligations imposed by treaties, statutes, regulations and executive orders. *See Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972) (where no specific statute or treaty was violated, Court found that agency officials had violated the trust responsibility). Thus, these obligations function as independent restraints on all federal actions that may affect Indian tribes. *Parravano v. Babbitt*, 70 F.3d 539, 546 (9<sup>th</sup> Cir. 1995) (“[t]his trust responsibility extends not just to the

Interior Department, but attaches to the federal government as a whole”) (citations omitted); *Northwest Sea Farms Inc. v. United States Army Corps of Engineers*, 931 F. Supp. 1515, 1519-20 (W.D. Wash. 1996) (finding that the trust responsibility imposes “a fiduciary responsibility with respect to any ‘federal government action’ which relates to Indian tribes”) (quoting *Nance*, 645 F.2d at 711). The trust responsibility includes the duty to consult with tribes of Indians to ensure their understanding of federal actions that may affect their rights and to ensure federal consideration of their concerns and objections with regard to such actions. As the court explained in *Klamath Tribes v. United States Forest Service*, “[i]n practical terms, a procedural duty has arisen from the trust responsibility such that the federal government must consult with an Indian tribe in the decision-making process to avoid adverse affects on treaty resources.” 1996 WL 924509, No. 96-391-HA, slip op. at 8 (D. Ore. 1996).

The license application submitted by the DOE that is the subject of this proceeding implicates at least three separate sources of a legal duty of DOE to consult with the Timbisha regarding its license application:

#### The National Historic Preservation Act

Properties of traditional religious importance to an Indian tribe are eligible for inclusion on the National Register. 16 U.S.C. § 470a(d)(6)(A). The Advisory Council on Historic Preservation (“ACHP”) regulations require that the DOE evaluate “all identified archaeological and historical sites in the area of potential effect” and determine whether any of the identified sites are eligible for the NRHP. 36 C.F.R. § 800.4(c). The ACHP regulations confer “consulting party” status on tribes in the Section 106 process. *See* 36 C.F.R. § 800.2(c). Under the Section 106 process, once an agency determines that an undertaking exists that has potential to cause effects on historic property, it must determine whether this property is listed on the

National Register or is eligible for listing. 36 C.F.R. § 800.4. Since properties of traditional religious and cultural significance to Indian Tribes are eligible for listing, 16 U.S.C.

§ 470(a)(d)(6)(A), agencies are required to gather information from Indian tribes to help identify historic properties, including those located off Tribal lands, that may have a religious or cultural significance to the Timbisha and are eligible for listing on the National Register. 36 C.F.R.

§ 800.4(a)(4). Tribes must be invited as consulting parties if the “historic properties in the area of potential effect” have “religious and cultural significance.” *See* 36 C.F.R. § 800.3(f)(2). In addition, 36 C.F.R. § 800.6(a) directs the agency official to consult with tribes to develop and evaluate alternative or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on the historic properties. Among other consultation requirements, 36 C.F.R. § 800.11(c)(2) directs federal agencies to provide the ACHP with the view of the tribes with regard to whether to withhold or release confidential information about the location, character or ownership of a historic property.

DOE has not consulted with the Timbisha regarding the potential impact on properties of traditional religious and cultural significance. (Durham Decl. ¶ 8; Esteves Decl. ¶ 10.) This lack of consultation has resulted in insufficient assessment of the location and character of the historic properties. In a consultation with the Timbisha, the DOE would have developed a record that noted that keepers of the Timbisha’s traditional knowledge identify the Furnace Creek Springs site as being of traditional, historical, and cultural importance. This site might even be eligible for inclusion on the National Register. Additionally, DOE’s lack of consultation under the NHPA is evident from the lack of modifications to the project to minimize or mitigate adverse impacts on the properties of significance to the Timbisha.

Executive Orders and DOE's consultation policies to ensure protection of cultural resources.

DOE also is responsible under Executive Orders and its own consultation policies to ensure the protection of cultural resources. President Clinton promulgated an Executive Order for federal agencies to follow in relation to matters affecting tribes. Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).<sup>23</sup> President Bush reiterated his support for this policy. Memorandum for Heads of Executive Departments and Agencies: Government-to-Government Relationship with Tribal Governments, 40 Weekly Comp. Pres. Doc. 2016 (Sept. 23, 2004).<sup>24</sup> Executive Order 13175 directs that “Each agency shall have an accountable process to ensure meaningful and timely input by tribal official in the development of regulatory policies that have tribal implications.” Exec. Order No. 13175, § 5(a). It further states that “no agency shall promulgate any regulation that has tribal implications” unless “the agency prior to the formal promulgation of the regulation . . . consulted with tribal officials early in the process . . .” *Id.* § 5(b)(2)(A). “Tribal official” is defined as the “elected or duly appointed officials of the Indian tribal governments or authorized intertribal organizations.” *Id.* § 1(d).

The DOE consultation process requires the DOE to 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. U.S. Department of Energy American Indian and Alaska Native Tribal Government Policy, DOE Notice 144.1 (Oct. 20, 2006). The Policy is based upon the dynamic relationship between the United States and tribal governments. *Id.* at 1. “The most important doctrine derived from this relationship is

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<sup>23</sup> Although NRC is not required to consult, it is “encouraged” to do so. Executive Order 13175 (Nov. 6, 2000).

<sup>24</sup> LSN #: TOP000000014, Memorandum for the Heads of Executive Departments and Agencies, Government-to-Government Relationship with Tribal Governments, Sept. 23, 2004.

the trust responsibility of the United States to protect tribal sovereignty and self-determination, tribal lands, assets, resources, and treaty and other federal recognized and reserved rights.” *Id.*

“The DOE recognizes Tribal governments as sovereign entities.” *Id.* at 3. It further supports the principles of self-governance, and highlights its belief that tribal governments are “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.” *Id.*

The DOE consultation policy mandates the “Department will consult with any American Indian . . . tribal government with regard to any property to which that tribe attaches religious or cultural importance which might be affected by a DOE action.”<sup>25</sup> *Id.* at 4. Such consultation by DOE “will include the prompt exchange of information regarding identification, evaluation, and protection of resources.” *Id.* DOE policy requires its employees and agents to speak directly with the impacted tribal nation, in this case the AIT, about its specific cultural issues.

The DOE Policy states that “DOE will be diligent in fulfilling its federal trust obligations” and that it “will pursue actions that uphold treaty and other federally recognized and reserved rights of Indian nations and peoples.” (DOE Notice 144.1 at 2.) This is an affirmative action DOE must take to adhere to its policies. The onus is on DOE, not the tribal government, leadership, or officials.

In sum, the federal trust responsibility, Executive mandates, and DOE’s own policies impose legal obligations on the DOE to consult with Indian tribes on all proposed federal actions

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<sup>25</sup> For purposes of the DOE Policy, “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.” *Id.* at 2.

that may affect the tribes' interests in a manner that ensures federal consideration of the tribes' concerns and objections with regard to such actions. This contention alleges non-compliance with the regulatory provisions and case-law requirements cited above, and therefore raises a material issue within the scope of this licensing proceeding.

**(5) Concise statement of the alleged facts or expert opinions supporting TOP's position on the issue and on which TOP intends to rely, and references to the specific sources and documents on which TOP intends to rely to support its position on the issue.**

DOE admits that water and contaminants from the proposed geologic repository could migrate to springs in Death Valley. (*See supra* pp. 24-29; FSEIS, Vol. III at CR-324; *see also* FSEIS §§ 3.1.4.2.1, 5.4, & Fig. 3.8; FEIS Fig. 3-15.) Furnace Creek Springs is one of a number of springs that are located along the northeastern side of Death Valley. Other springs in this area include Texas Spring, Travertine Springs, and Salt Springs. These springs constitute an outfall for groundwater in the Death Valley regional groundwater flow regime. (*See* FEIS, Fig.3-13.<sup>26</sup>) As is discussed in the FEIS and the FSEIS<sup>27</sup> for Yucca Mountain, these springs on the northeast boundary of Death Valley are an outfall for groundwater in the Death Valley regional groundwater flow regime that may be impacted by radionuclides derived from Yucca Mountain. (*See* FEIS, Fig. 3-15.)

According to Timbisha Tribal Elders and historical officers, the Death Valley springs generally, and the Furnace Creek Springs site in particular, are sacred to the Timbisha and are of traditional and cultural importance to the Timbisha. (*See* Esteves Decl. ¶ 10; Durham Decl. ¶¶ 3-6.) These and other Tribal Elders, who regularly practice their religion and traditional culture throughout their original territory, are keepers of the traditional knowledge. (Ian Zabarte,

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<sup>26</sup> LSN #: DOE2002073507, FEIS.

<sup>27</sup> LSN #: DEN001593669, FSEIS.

*Tribal Concerns About the Yucca Mountain Repository: An Ethnographic Investigation of the Moapa Band of Paiutes and the Las Vegas Paiute Colony* (Oct. 20, 2002).<sup>28</sup> Because these keepers of the traditional knowledge have identified the Furnace Creek Springs site, among others, as being of traditional, historical, and cultural importance to the Timbisha, it is potentially eligible for inclusion on the National Register. The potential contamination of the Death Valley springs generally, and the Furnace Creek Springs site particularly, will have severe impacts to the Timbisha's cultural interests, including disrespecting, insulting, and injuring the Timbisha's ancestors, traditions, spiritual beliefs, religious practices, values, and heritage. (Fowler Decl. ¶ 14.) The contamination of the Death Valley springs would, for example, rob the Mother Earth; render the springs and plants growing around them useless for medicinal purposes; take the medicinal value from the water, and destroy the spiritual significance of the springs and plants and animals that depend on them. (Durham Decl. ¶¶ 4, 6, 7; Esteves Decl. ¶¶ 4-10.)

Despite the sacred and historic nature of the Furnace Creek Springs site and DOE's recognition of the potential contamination of the Death Valley springs by the proposed geologic repository, DOE has not engaged in meaningful consultation with the Tribal Historic Preservation Officer ("THPO") Barbara Durham or Tribal Elders to properly ascertain the impacted cultural or historic resources there. (Durham Decl. ¶ 8; Esteves Decl. ¶ 10.) Nor has DOE conducted a cultural survey with Timbisha tribal leaders and elders or experts who know the Furnace Creek Springs site, or identified or evaluated the Furnace Creek Springs site as a potential historical site for inclusion on the National Register.

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<sup>28</sup> LSN #: CLK000000033, *Tribal Concerns About the Yucca Mountain Repository: An Ethnographic Investigation of the Moapa Band of Paiutes and the Las Vegas Paiute Colony*, Oct. 20, 2002 (Prepared for the Clark County Department of Comprehensive Planning Nuclear Waste Divisions).

- (6) *There is sufficient information to show that there is a genuine dispute with DOE on a material issue of law or fact, with references to the specific portions of the license application that TOP disputes or the information that the application fails to contain and the supporting reasons for TOP's dispute or belief.*

There is a genuine dispute between TOP and DOE regarding DOE's failure to consult with the Timbisha about the potential impacts that the proposed geologic repository could have on the Timbisha's cultural and historic resources. DOE's own groundwater flow models show that effluent from a Yucca Mountain repository could contaminate Death Valley springs, including Furnace Creek Springs, that are sacred and culturally and historically significant to the Timbisha. The Timbisha have expressed their concerns to the DOE about the potential harm to the Timbisha's cultural and historic resources. Nonetheless, neither the DOE nor NRC has provided separate and meaningful consultations with the Timbisha regarding the potential adverse effects on the Death Valley springs, including Furnace Creek Springs, and the alternatives and modifications that could avoid, minimize, or mitigate adverse effects to the Furnace Springs site. Nor has DOE determined whether the Furnace Springs site is eligible for inclusion on the National Register or conducted a cultural survey of the property.

TOP contends that this failure to consult violates DOE's consultation duty under the National Historic Preservation Act and its trust responsibility to the Timbisha. 42 U.S.C. §§ 4321 to 4370d; *see generally* 40 C.F.R. §§ 1501.6, 1501.7; 16 U.S.C. §§ 470-470w-6; NEPA, Executive Order 13175 (November 6, 2000). In addition, without properly analyzing the Furnace Springs site, including consultation with the Timbisha regarding the cultural importance of the site, the impacts from the Yucca Mountain repository to the site and the alternatives and modifications that could avoid, minimize, or mitigate adverse effects to the Furnace Springs site, DOE cannot insure the professional or scientific integrity of its EIS, in violation of 40 C.F.R. § 1502.24. DOE's failure to satisfy its duty to consult the Timbisha also has placed this

Licensing Board in a situation where it is likely to violate the law as well if it grants the license application. If the Licensing Board relies on DOE's EIS without requiring that the above analysis be conducted, the Licensing Board cannot insure the integrity of DOE's analysis.

This contention is not a joint contention.

Respectfully submitted,

Signed electronically by Douglas M. Poland

Arthur J. Harrington  
Douglas M. Poland  
Steven A. Heinzen  
Counsel for the Timbisha Shoshone Yucca  
Mountain Oversight Program Non-Profit  
Corporation

GODFREY & KAHN, S.C.  
One East Main St., Suite 500  
P.O. Box 2719  
Madison, WI 53701-2710  
Telephone: 608-257-3911  
Fax: 608-257-0609

Dated in Madison, WI  
this 5th day of March, 2009.

**ATTACHMENT 1**

**AFFIDAVIT OF  
JOE KENNEDY**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

U.S. Department of Energy

(License Application for Geologic Repository  
at Yucca Mountain)

Docket No. 63-001-HLW

ASLBP Nos. 09-876-HLW-CAB-01

09-877-HLW-CAB-02

09-878-HLW-CAB-03

March 3, 2009

**AFFIDAVIT OF JOE KENNEDY**

I, Joe Kennedy, solemnly affirm and state as follows:

1. I am a member of the Timbisha Shoshone Tribe ("Timbisha"). On behalf of the Timbisha, I have actively participated in the proceedings involving the Department of Energy's ("DOE") License Application for Geologic Repository at Yucca Mountain, and I have personal knowledge of the matters set forth in this Affidavit.
2. In 2007 and again in 2008, I was re-elected as Chairman of the Timbisha Tribal Council.
3. A dispute regarding the Timbisha's official representatives for both government-to-government relations and internal activities arose in 2007. As a consequence of the dispute, several groups have asserted their respective authority to speak for the Timbisha. The competing claims to represent the Timbisha have resulted in several opinions by the Bureau of Indian Affairs ("BIA") regarding tribal elections and representation for government-to-government purposes and, so far, one appeal of those opinions to the Interior Board of Indian Appeals ("IBIA").

4. On November 13, 2007, I was elected as Tribal Council Chairman (with other elected members being Margaret Armitage, Madeline Esteves, Margaret Cortez and Pauline Esteves (together, the "Kennedy Council")). The election was recognized by the BIA in February 2008. On March 17, 2008, Ed Beaman, Virginia Beck, and Cleveland Casey appealed the BIA's recognition of the Kennedy Council (the "Beaman Appeal"), asking that the BIA recognize a purported tribal council selected in a separate election, also conducted on November 13, 2007 (the "Beaman-led Election").

5. After the BIA did not decide the Beaman appeal for several months, Beaman and others filed suit in the United States District Court for the Eastern District of California seeking, among other things, an order directing BIA to decide the Beaman Appeal.

6. On February 17, 2009, before the District Court ruled on the BIA's resolution of the Beaman Appeal, the BIA concluded that the November 2007 election of the Kennedy Council was not effective (the "BIA's February 17, 2009 Opinion"). The BIA provided further that it would continue to recognize for government-to-government relations the Tribal Council elected in November 2007 and comprised of me as Chairman, together with Ed Beaman, Madeline Esteves, Virginia Beck, and Cleveland Casey. A true and correct copy of BIA's February 17, 2009 Opinion is attached to this Affidavit as Attachment A.

7. On February 24, 2009, I (and others) filed a Notice of Appeal of BIA's February 17, 2009 Opinion to the IBIA (the "IBIA Notice of Appeal"). A true and correct copy of the IBIA Notice of Appeal is attached to this Affidavit as Attachment B.

8. In addition to the purported council elected in the Beaman-led Election, on September 20, 2008, George Gholson purported to hold a "general council" meeting in Las Vegas, Nevada, to recall me from my position as Chairman of the Tribal Council. At this same

meeting, Gholson and his supporters sought to hold an election for seats on the tribal council. However, the Las Vegas meeting was rife with constitutional and procedural errors.

9. Pending concurrently before the BIA is my appeal of an October 17, 2008, opinion by the BIA that Gholson and others were purportedly elected as the Tribal Council on September 20, 2008 (the "Kennedy Appeal"). Answers in the Kennedy Appeal were due to the BIA on February 24, 2009. *See* Attachment A, BIA's February 17, 2009 Opinion, at 9. Although not specifically identifying a date certain, the BIA notes in its February 17, 2009 Opinion that "a decision [on the Kennedy Appeal] is likely to be issued shortly . . . ." *Id.*

10. Once the BIA has ruled on the Kennedy Appeal, that ruling, like the BIA's February 17, 2009 Opinion on the Beaman Appeal, may be appealed to the IBIA. Although I do not have any information as to the time within which the IBIA will address the Beaman Appeal (or the Kennedy Appeal, should that also be appealed to the IBIA), I understand that the party not prevailing in the appeal(s) may appeal further to the United States District Court with jurisdiction.

11. Notwithstanding these internal disputes, for purposes of this licensing proceeding, the Timbisha spoke with one voice until late October 2008. Before then, the Timbisha had participated in the pre-application procedures. On behalf of the Timbisha, I and other members submitted numerous documents with the Department of Energy and the Nuclear Regulatory Commission. I have also attended meetings of the Affected Units of Government ("AUG") concerning the Yucca Mountain project, testified before numerous governmental bodies concerning the Yucca Mountain project, hired consultants to oversee the Yucca Mountain project, and petitioned the DOE for oversight funding.

12. Further, on behalf of the Timbisha, I coordinated the Timbisha's request for and receipt of DOE funding to participate as a full party in this docket. In July 2007, the Timbisha were granted Affected Indian Tribe ("AIT") status. The DOE was to fund the Timbisha's active participation in this proceeding, but that DOE funding was not provided until October 2008. On October 15, 2008, on behalf of the Timbisha, I retained Fred C. Dilger as the Timbisha's expert on NEPA-related matters and Loreen Pitchford as the Timbisha person responsible for establishing and supplementing the Timbisha's Documentary Material for the NRC's License Support Network. Both were paid out of funds received from the Timbisha for our active participation in this proceeding. In addition, other members of the Kennedy Council, and Tribal members serving in an official capacity with the Kennedy Council, including Pauline Esteves (a Tribal Elder, a member of the Kennedy Council, and the Cultural Advisor for the Historic Preservation Committee) and Barbara Durham (the Tribal Historic Preservation Officer), assisted the Timbisha's efforts to participate in this proceeding.

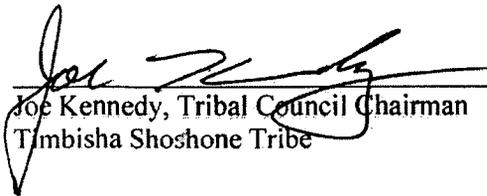
13. On and after October 20, 2008, George Gholson and others literally absconded with the Timbisha's records and other resources, including its administrative and fiscal computers and computer files, being used in this proceeding. These individuals have since that time been working with John M. Peebles and Darcy L. Houck of Fredericks Peebles & Morgan LLP, and have filed documents in this proceeding purportedly on behalf of the Timbisha Shoshone Tribe. George Gholson, Ed Beaman and others also persuaded Mr. Dilger and Ms. Pitchford to sever their professional relationships with the Kennedy Council and provide their support to the "Timbisha Shonshone Tribe." Further, George Gholson, Ed Beaman and others successfully froze for a significant period of time the bank account in which were held the DOE's funds earmarked for the Timbisha's use in this proceeding. Notwithstanding these

difficulties in preparing a timely response to the DOE's Application in this proceeding, I (and those many others representing the Timbisha) nonetheless did prepare a timely Petition.

14. Of great concern also is the fact that I and other members of the Kennedy Council have participated in these proceedings for between 10 and 20 years, while Gholson and Beaman and others working with them have only recently shown any interest in this important matter. Moreover, some, like Beaman who lives in Las Vegas, Nevada, do not have strong ties to the Timbisha homeland. I and other members of the Kennedy Council have very deep and strong ties to our homeland.

15. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 3<sup>rd</sup> day of March 2009.

  
\_\_\_\_\_  
Joe Kennedy, Tribal Council Chairman  
Timbisha Shoshone Tribe



IN REPLY REFER TO:

## United States Department of the Interior

BUREAU OF INDIAN AFFAIRS  
Pacific Regional Office  
2800 Cottage Way  
Sacramento, California 95825

FEB 17 2009

**CERTIFIED MAIL NO. Z 155 874 769**  
**RETURN RECEIPT REQUESTED**

John M. Peebles, Esq.  
Fredericks Peebles & Morgan LLP  
Attorneys at Law  
1001 Second Street  
Sacramento, CA 95814

Dear Mr. Peebles

The purpose of this correspondence is to inform you of my decision regarding the Notice of Appeal (Appeal) dated March 17, 2008, filed pursuant to 25 Code of Federal Regulations (CFR) Part 2, by John M. Peebles, Attorney for Ed Beaman, Virginia Beck, and Cleveland Casey (Appellants), from the Bureau of Indian Affairs, Central California Agency, Superintendent's decision of February 29, 2008, wherein the Superintendent rescinded his letter dated December 14, 2007, and recognized the results of a November 13, 2008 General election conducted by Joe Kennedy and Madeline Esteves. The February 29, 2008 decision recognized the following individuals to be official tribal representatives of the Timbisha Shoshone Tribal Council: Joe Kennedy, Chairman; Margaret Armitage, Vice-Chairman; Madeline Esteves; Secretary/Treasurer, Margaret Cortez; Council Member and Pauline Esteves, Council Member (Kennedy Council).

The Appeal was received on March 18, 2008 and the Appellants' Statement of Reasons was received on April 16, 2008; both were timely filed pursuant to 25 CFR § 2.10. The Administrative Record from the Bureau of Indian Affairs, Central California Agency, Superintendent (Superintendent) was received on December 3, 2008 at this office.

The Appellants are seeking reversal of the Superintendent's decision of February 29, 2008 and assert that the Tribe's Tribal Council consisting of Ed Beaman, Madeline Esteves, Doug Gholson, Virginia Beck and Cleveland Casey, should be recognized. Appellants assert that, as a result of a competing November 13, 2007 General election conducted by Ed Beaman, Virginia Beck and Cleveland Casey, Doug Gholson, Virginia Beck and Cleveland Casey were elected to the three expired terms of the Tribal Council.

We have carefully reviewed the administrative record and documents provided by the parties. Based on our analysis, I am reversing the Superintendent's decision of February 29, 2008,

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IN AMERICA** 

**Attachment A**

because the actions taken by Tribal Council members Joe Kennedy and Madeline Esteves lacked a quorum of the Tribal Council. Therefore, the Bureau of Indian Affairs continues to recognize the Tribal Council that was in place prior to the Superintendent's February 29, 2008 decision, consisting of: Joe Kennedy, Chairman, Ed Beaman, Vice-Chairman, Madeline Esteves, Secretary/Treasurer, Virginia Beck, Executive Council Member, Cleveland Lyle Casey, Executive Council Member. We present our analysis as follows:

### **Finding of Facts**

**On July 9, 2007** charges were filed by General Council members Wallace Eddie and Margaret Cortez against Tribal Council members Ed Beaman and Virginia Beck requesting their removal from the Timbisha Shoshone Tribal Council (Tribal Council).

**On July 21, 2007**, the Tribal Council of the Timbisha Shoshone Tribe conducted a Tribal Council meeting at Fish Lake Valley. The Tribal Council members present at the meeting were; Joe Kennedy, Chairman, Virginia Beck, Madeline Esteves, Lyle Casey and on the phone was Ed Beaman. A quorum of the Tribal Council was established. The charges filed by General Council members; Margaret Cortez and Wallace Eddy against Tribal Council members Ed Beaman and Virginia Beck were discussed. Ed Beaman stated that he did not get the July 9, 2007 letter and Virginia Beck said she received her letter on July 20, 2007. Therefore, no removal action was taken by the Tribal Council and the request for removal of Ed Beaman and Virginia Beck from the Tribal Council filed by the General Council members was rescheduled for the next Tribal Council meeting on August 25, 2007 at Bishop, California.

**On August 25, 2007**, the Tribal Council of the Timbisha Shoshone Tribe conducted a duly called monthly Tribal Council Meeting at Bishop, California. The minutes of the Tribal Council meeting indicate the following members of the Tribal Council were present; Joe Kennedy, Chairman, Ed Beaman, Virginia Beck, Madeline Esteves, and Lyle Casey. A quorum of the Tribal Council was established.

**On August 31, 2007**, Chairman, Joe Kennedy sent a letter addressed to the Superintendent informing him of the events that occurred during the Tribal Council meeting on August 25, 2007, and of the charges filed against Council members Virginia Beck and Ed Beaman. He explained that in accordance with the Tribe's Constitution, Article XI, Section 1, 3, the Tribal Council member who is the subject of a removal request, shall not vote nor serve in his or her capacity as a Tribal Council member in the removal proceedings. Therefore, their request to vote on each other's removal was denied. Shortly after, both Ed Beaman and Virginia Beck walked out of the meeting. Joe Kennedy indicated that Ms. Armitage replaced Virginia Beck in order to continue with the Tribe's business.

**On September 22, 2007**, Ed Beaman, Vice-Chairman, Cleveland Lyle Casey and Virginia Beck called a Special Tribal Council meeting to address the actions taken at the August 25, 2007 meeting. The following resolutions were passed: Resolution #2007-24 declared the attempted illegal removal of Ed Beaman and Virginia Beck null and void; Resolution #2007-25 declared the duly recognized Tribal Council as Joe Kennedy, Ed Beaman, Madeline Esteves, Virginia Beck, and Cleveland Casey, and declared purported Resolution #2007-23 signed by Joe Kennedy

and Madeline Esteves, setting a date for the General Election, null and void; Resolution #2007-26 amended certain provisions of the Timbisha Shoshone Election Ordinance, applicable only to the 2007 General Election, in order to facilitate a General Election in compliance with the Constitution; Resolution #2007-28 appointed an Election Board to supervise and carry out the General Election.

**October 15, 2007**, letter from Vice-Chairman, Ed Beaman, via facsimile, addressed to the Superintendent requesting a letter stating who the Bureau of Indian Affairs recognizes as the Tribal Council of the Timbisha Shoshone Tribe. A letter dated September 25, 2007, was also attached, addressed to the General Council responding to improper removal actions taken at the August 25, 2007 Tribal Council meeting.

**October 29, 2007**, letter from Joe Kennedy, Chairman addressed to the Superintendent regarding Virginia Beck and Ed Beaman's relinquishment of their Tribal Council position on August 25, 2007. Included were Virginia Beck and Ed Beaman's removal charges, which were submitted to members of the General Council.

**On November 13, 2007**, as a result of a dispute within the Tribal Council two General Elections were held; one by Joe Kennedy, Madeline Esteves and Margaret Armitage conducted by Mark Thompson, Indian Dispute Resolution Services, in which 117 ballots were cast with Joe Kennedy, Margaret Cortez, Margaret Armitage, and Pauline Esteves receiving the highest number of votes; the other by Ed Beaman, Virginia Beck and Cleveland Lyle Casey conducted by Joslyn Chvala, of Daniels, Philips, Vaughan, & Bock in which 55 votes were cast with Doug Gholson, Cleveland Lyle Casey, and Virginia Beck receiving the highest number of votes.

**November 15, 2007**, a copy of a letter from Ed Beaman to the Timbisha Shoshone Election Committee, appealing the Tribe's November 13, 2007 General Election conducted by the Kennedy Council, alleging that the election was not conducted pursuant to the Tribe's Constitution and Election ordinance.

**December 3, 2007**, letter from Ed Beaman, addressed to the Superintendent regarding the Election Board's report of the Tribe's 2007 General election conducted by Daniels, Phillips, and Vaughan for Ed Beaman, Virginia Beck and Cleveland Casey was valid and recognized the new elected members of the Tribal Council as: Doug Gholson, Cleveland Lyle Casey, and Virginia Beck, with 55 votes cast in the election. The Election Board found that the election conducted by the Kennedy Council was invalid and void.

**December 3, 2007**, Mark Thompson, Indian Dispute Resolution Services, Inc. sent a facsimile, to the Superintendent regarding the November 13, 2007 Kennedy Council's Election Results. The purpose of the Memorandum was to certify the results of the Timbisha Shoshone Election conducted by Indian Dispute Resolution Services, Inc. in coordination with the Tribal Council Election Board. The results identified the Election procedures that were followed, 117 absentee ballots cast, total votes for each candidate, and that no appeals were received. The results showed that the new council consisted of Joe Kennedy, Margaret Armitage, Margaret Cortez, and Pauline Esteves.

**December 4, 2007**, Barbara Durham, Election Board Chairman, sent a facsimile to the Superintendent, providing the Report of Tribal Election and Addendum to Kennedy Council Report of Tribal Election held November 13, 2007, certifying the results to be true and correct. Further, stating that four (4) General Council members were elected to the Tribal Council and the purported vacant Vice-Chairman position will be filled at the first Tribal Council meeting to be held on December 15, 2007.

**December 11, 2007**, letter from Joe Kennedy addressed to the Superintendent, providing additional documentation and the history of where the Tribe was up to that point. Included was documentation regarding legal cases concerning issues similar to Timbisha and what constituted a resignation.

**December 14, 2007**, letter from the Superintendent in response to Mr. Kennedy's letter of December 11, 2007, regarding the purported resignation of Ed Beaman, Vice Chairman, and Virginia Beck, Executive Council Member at a Tribal Council meeting held August 25, 2007, and the annual general election conducted on November 13, 2007. The Superintendent, after review of the documents submitted, was unable to recognize any of the actions initiated by the Beaman Council or the Kennedy Council. As a result of the above, for the purposes of continuing the government-to-government relationship with the Tribe, the Superintendent continued to recognize the last duly elected Tribal Council as follows:

Joe Kennedy, Chairman  
Ed Beaman, Vice-Chairman  
Madeline Esteves, Secretary/Treasurer  
Virginia Beck, Executive Council Member  
Cleveland Lyle Casey, Executive Council Member

In addition, the Superintendent recommended that the Tribe conduct a special general election to comply with the provisions of the Tribe's Constitution for an annual general election to fill the three expired positions, and that Ed Beaman and Madeline Esteves positions should be held over until November 2008.

**December 14, 2007**, letter via facsimile from Joe Kennedy responding to the Superintendent's letter of December 14, 2007, objecting to the Superintendent's request for a Special Election and listing the duly elected tribal council elected on November 13, 2007 as follows: Joe Kennedy, Margaret Cortez, Margaret Armitage, Madeline Esteves and Pauline Esteves. (2007 Kennedy Council)

**December 17, 2007**, letter from Lyle Casey to the Agency Superintendent responding to his December 14, 2007, decision not recognizing the actions taken at a Special meeting of the Tribal Council held September 22, 2007, and subsequent election organized and executed by the Ed Beaman, Virginia Beck and Cleveland Lyle Casey.

**January 11, 2007**, Notice of Appeal filed by Jack Duran, Attorney on behalf of his clients: Joe Kennedy, Margaret Armitage, Margaret Cortez, Madeline Esteves and Pauline Esteves. The appeal was from the December 14, 2007 decision of the Superintendent for failing to

acknowledge the Tribal Council's determination that Mr. Ed Beaman and Ms. Virginia Beck resigned their tribal council positions at an August 25, 2007 Tribal Council meeting and failing to acknowledge the November 13, 2007, General Council Election whereby Joe Kennedy, Margaret Armitage, Margaret Cortez, Madeline Esteves and Pauline Esteves were elected to serve as members of the Timbisha Shoshone Tribal Council.

**January 18, 2008**, memorandum from the Superintendent to the Regional Director, transmitting the January 11, 2008 Notice of Appeal filed by Jack Duran, Attorney on behalf of his clients: Joe Kennedy, Margaret Armitage, Margaret Cortez, Madeline Esteves and Pauline Esteves. The Superintendent indicated that the Appellant's Statement of Reason, upon receipt, will be forwarded to this office along with the administrative record.

**January 20, 2008**, a Special meeting of the General Council was held in Hesperia, CA, to address the results of the November 13, 2007 Tribal Council Elections and to seek approval of specific actions that would stabilize the Tribe's government.

**February 4, 2008**, letter from Joe Kennedy to the Superintendent in which he updated the Superintendent on the most recent actions that occurred with the Timbisha Shoshone Tribe and notifying him of a special meeting of the General Council held on January 20, 2008, at Hesperia, CA. The purpose of the meeting was to find out what the General Council of the Tribe wanted and what direction they felt was appropriate for the Timbisha. In support of the actions taken by Joe Kennedy, Madeline Esteves and Margaret Armitage, the General Council voted and enacted four (4) Tribal Resolutions as follows: Resolution No. 2008-01, Ratifying the Joe Kennedy, Madeline Esteves and Margaret Armitage's November 13, 2007 General Election; Resolution No. 2008-02 Ratifying the Actions and Authority of the Tribal Council Subsequent to August 25, 2007; Resolution No. 2008-03 Interpreting What Constitutes a Resignation from the Tribal Council; Resolution No. 2008-04 Authorizing the Tribal Council to Pursue Prospective Gaming Developers. Furthermore, the Agency Superintendent was requested to recognize all actions adopted by the Timbisha Shoshone General Council at the January 20, 2008 Special General Council Meeting.

**February 29, 2008**, the Superintendent, reversed his December 14, 2007 decision and issued a new letter recognizing the actions of the General Council during a January 20, 2008, General Council meeting, wherein the General Council voted to ratify: Tribal Resolutions No. 2008-01, ratifying the Joe Kennedy, Madeline Esteves and Margaret Armitage's November 13, 2007 General Election; Tribal Resolutions No. 2008-02 ratifying the Actions and Authority of the Tribal Council Subsequent to August 25, 2007; Tribal Resolutions No. 2008-03 Interpreting What Constitutes a Resignation from the Tribal Council. Based on the above actions of the General Council the Superintendent recognized the results of the Joe Kennedy, Madeline Esteves and Margaret Armitage's November 13, 2007 election as follows:

Joe Kennedy, Chairman  
Margret Armitage, Vice-Chairman  
Madeline Esteves, Secretary/Treasurer  
Margret Cortez, Executive Council Member  
Pauline Esteves, Executive Council Member

## APPLICABLE TRIBAL LAW

The Tribe is organized and governed under the Constitution of the Timbisha Shoshone Indian Tribe adopted by its membership on February 17, 1986. In analyzing the parties' positions, it is appropriate to look to the Tribe's Constitution as it relates to the actions taken by the parties

Article IV, Section 1, provides that, the powers of the government of the Tribe shall be divided into three distinct branches; the General Council, the Tribal Council and the Tribal Judiciary. No branch, group or person charged with the exercise properly belonging to one of these branches shall exercise any powers belonging to one of the other branches, except as otherwise specified in this document.

Article IV, Governing Body, Section 2, provides that, the governing body of the Tribe shall be the General Council. The General Council shall consist of all tribal members sixteen (16) years of age or older. All members of the General Council shall be able to vote at all General Council meetings and all tribal elections, referenda, initiatives, recalls and repeals.

Article V, Section 1, General Council, a., provides in part that, all powers of the Tribe shall be vested in the General Council, subject to any limitations imposed upon such powers delegated to the Tribal Council, etc..

Article V, Section 1, General Council, b., provides that, The General Council shall exercise its powers of self-government through initiative, referendum, repeal and recall powers as set forth in this document.

Article V, Section 1, General Council, c., provides in part that, the following powers shall be exclusively reserved to the General Council. All powers that are not expressly mentioned in this document or which are not expressly delegated in this document by the General Council to the Tribal Council or any other officer or agency of the Tribe, shall not be abridged but shall be reserved to the General Council.

Article V, Section 3, Reserved Powers of General Council, provides that, the Tribal Council shall have all appropriate powers necessary to implement specific provisions of this document and to effectively govern tribal affairs. All powers heretofore vested in the Tribe, but not specifically referred to in this document, shall not be abridged, but shall be reserved to the General Council.

Article VII, Duties of Officers Section 1, a., provides in part that, the Chairman shall have the following duties:

1. To preside at all meetings of the Tribal and General Councils;
2. To vote at Tribal and General Council meeting only when it is necessary to break a tie vote;

8. The Chairperson shall hold no other Tribal Office or engage in private remunerative employment which may pose a conflict of interest with the Tribe's enterprise or business activities during his term of office:

Article VIII, Meetings Section 1, provides that, all meetings of the General or Tribal Councils shall be open to all tribal members, except in those cases where the matter under discussion would invade the privacy of an individual tribal member.

Article VIII, Meetings Section 2, provides in part that, all meeting of the Tribal Council shall be held in accordance with the following provisions:

a. A majority of the members of the Tribal Council shall constitute a quorum at all Council meetings. No business shall be conducted in the absence of a quorum.

Article VIII, Meetings Section 3(b), provides that Specials meetings of the General Council may be called by the Tribal Chairperson or by any member of the General Council who submits a petition with ten (10) signatures of the General Council members to the Tribal Council requesting a special meeting. The notice in regard to any special meetings shall be given at least three (3) days prior to the meeting and shall specify the purpose of the meeting.

Article X, Vacancies Section 1, Tribal Council shall fill the vacancy by appointment of a General Council member who qualifies for candidacy for the vacant position. If more than twelve (12) months remain in the vacant term a special election shall be held to fill the vacant position. Such a special election shall be held within thirty (30) days after the Tribal Council declares the position vacant.

Article XI, Removal, Section 1, 1., provides in part that, any member of the Tribe can request removal of any Tribal Council member by submitting a written statement of charges to the Chairperson, etc... Such written statement must be received by the accused Council member no later than ten (10) days before the next regular Council meeting at which he or she is to appear.

Section 1, 2., provides that, at the next regular Tribal Council meeting following the submission of such written statement, the charging party shall present his or her allegations and proof against the accused member of the Tribal Council, and the accused member shall be given an opportunity to reply to all charges by presenting his or her allegations and proof to the Tribal Council.

Section 1, 3., provides that, after hearing all the charges and proof presented by both sides, the Tribal Council shall take a vote on whether the accused member shall be removed from office. If a majority of the Tribal Council vote to remove the accused Council member, his or her seat shall be declared vacant. The Tribal Council member who is subject to the removal request shall not vote nor serve in his or her capacity as a Tribal Council member in the removal proceedings.

## DISCUSSION

Review of the minutes of the Tribal Council monthly meeting of August 25, 2007, indicates a quorum had been established with all five (5) Tribal Council members present to, among other things, address removal charges filed by Wallace Eddy, to allow Ed Beaman and Virginia to refute the alleged charges and for the Tribal Council to vote on the matter. Only Wallace Eddy, one of the two General Council members who had filed the charges and requested the removal of Ed Beaman and Virginia Beck from the Tribal Council was present along with 30 General Council members. Ed Beaman and Virginia Beck requested that the removal action be conducted in Executive Session, but the General Council members present opposed their request. Before the charges were presented, a dispute ensued on whether or not Ed Beaman and Virginia Beck could vote on each others removal; Chairman Kennedy referred the matter to the General Council members for a decision. The General Council voted not to allow Ed Beaman and Virginia Beck to vote on each others removal; Chairman Kennedy announced the motion carried. Ed Beaman and Virginia Beck along with Cleveland Lyle Casey left the meeting and did not return. Upon the departure of Tribal Council members Ed Beaman and Virginia Beck along with Cleveland Lyle Casey from the meeting, Chairman, Kennedy stated that Ed Beaman and Virginia Beck leaving before responding to the charges meant they were guilty of the charges. A motion was made by Madeline Frank, General Council member, to remove Ed Beaman and Virginia Beck from the Tribal Council, and seconded by Pauline Esteves, General Council member; however, no vote was taken and the motion died. Another motion was made by Barbara Durham, General Council member, to replace Virginia Beck with Margaret Armitage, General Council member, seconded by Pauline Esteves, General Council member, by a vote of 11 for, 0 against, 0 abstain; the motion carried. Following the motion, Margaret Armitage took a place at the Tribal Council table as an Executive Council member.

The Tribe's Constitution provides specific procedures governing the removal of Tribal Council members. Article XI, Removal, Section 1, Et seq., of the Tribe's Constitution clearly specifies the procedures governing the removal of Tribal Council members, and further specifies that the Tribal Council shall take a vote on whether the accused member shall be removed from office and explicitly states that the Removal of Tribal Council members is delegated to the Tribal Council and not to the General Council. The record indicates that no vote was taken by the Tribal Council to remove Ed Beaman or Virginia Beck from the Tribal Council as required by the Tribe's Constitution. Therefore, Ed Beaman and Virginia Beck both remain members of the Tribal Council.

With the departure of Tribal Council members Ed Beaman, Virginia Beck, and Cleveland Casey, only Joe Kennedy and Madeline Esteves, two of the five Tribal Council members, remained; a quorum no longer existed. No further business of the Tribal Council should have been conducted because Joe Kennedy and Madeline Esteves were the only two of the five Tribal Council members who remained and they did not constitute a quorum. Any action by the Tribal Council without a quorum is a violation of Article VII, Section 2 a., of the Tribe's Constitution, which provides in part, No business shall be conducted in the absence of a quorum.

As the record indicates, two Tribal Councils emerged claiming to be the leadership of the Tribe: Joe Kennedy, and Madeline Esteves, and the other Tribal Council consisting of Ed Beaman,

Virginia Beck and Lyle Casey. Both Tribal Councils conducted separate meetings to prepare for the November 2007 General election. On November 13, 2007, both Tribal Councils conducted their own annual General elections. The record indicates that 55 Tribal members voted in the Beaman Council election and 171 Tribal members voted in the Kennedy Council's election. The Superintendent on December 14, 2007 refused to recognize either election and recommend that the Tribe conduct a special general election to comply with the provisions of the Tribe's constitution for an annual general election to fill the three expired positions.

Joe Kennedy, and Madeline Esteves, on January 20, 2008 conducted a duly noticed General Council meeting at Hesperia, CA; the purpose of the meeting was to seek the Tribe's approval, in particular, the Tribal Council meeting of the August 25, 2007 and the Joe Kennedy and Madeline Esteves' General election results of November 13, 2007. However, as discussed above and based on the record, the actions of August 25, 2007 violated several provision of the Tribe's Constitution.

### CONCLUSION

As the record indicates, the August 25, 2007 actions by Chairman Kennedy and the General Council members were beyond the scope of their constitutional authority and far exceed their powers in their attempts to remove Ed Beaman and Virginia Beck. The ratification of these actions by the General Council on January 20, 2008, was inappropriate and also was beyond their constitutional authority, and these actions clearly violated Ed Beaman and Virginia Beck's rights to due process. Furthermore, it would be inappropriate for the Bureau of Indian Affairs to recognize tribal actions that violate provisions of Tribal laws.

For the reason stated above I am reversing the Superintendent's February 29, 2008 decision. Consequently, the Bureau of Indian Affairs continues to recognize Joe Kennedy, Chairman, Ed Beaman, Vice-Chairman, Madeline Esteves, Secretary/Treasurer, Virginia Beck, Executive Council Member, Cleveland Lyle Casey, Executive Council Member, which was the governing body of the Tribe that was recognized prior to the February 29, 2008 decision.

Please be advised that there is also a pending appeal regarding the November 2008 General election of the Tribe, with answers of interested parties due by February 24, 2009, and a decision is likely to be issued shortly thereafter.

This decision may be appealed to the Interior Board of Indian Appeal, 801 North Quincy Street, Arlington, Virginia 22203 in accordance with regulations in 43 CFR§ 4.310 4.340. Your Notice of appeal to the Board must be signed by you or your attorney and must be mailed within 30 days of the date you receive this decision. It should clearly identify the decision being appealed. If possible, attach a copy of the decision. You must send copies of your Notice of Appeal to (1) The Assistant Secretary - Indian Affairs, 4160 MIB, U.S. Department of the Interior, 1849 C Street, N. W. Washington, D.C. 20240, (2) each interested party known to you, and (3) this office. Your Notice of Appeal sent to the Board of Indian Appeals must certify that you have sent copies to these parties. If you file a Notice of Appeal, the Board of Indian Appeals will notify you of further appeal procedures. If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a Notice of Appeal.

Sincerely,

A handwritten signature in cursive script that reads "Dal Marin". The signature is written in black ink and is positioned above the typed name.

Regional Director

cc: See Enclosed Distribution List

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Bureau of Indian Affairs  
Chief, Tribal Government Services  
1849 C Street, NW., MS-4513-MIB  
Washington, DC 20240

Lawrence G. Brown  
United States Attorney  
SYLVIA QUAST  
Assistant United States Attorney  
501 I Street, Suite 10-100  
Sacramento, CA 95814

Judith A. Shapiro, Esq.  
6856 Eastern Avenue, NW  
Suite 206  
Washington, DC 20012

**JUDITH A. SHAPIRO, ESQ.**

7064 EASTERN AVENUE, NW

WASHINGTON, DC 20012

202-723-6400

jshapiro@earthlink.net

February 24, 2009

Interior Board of Indian Appeals  
801 North Quincy Street  
Arlington, Virginia 22203

**RE: NOTICE OF APPEAL**

To whom it may concern:

PLEASE TAKE NOTICE, that this NOTICE OF APPEAL is filed at the direction of the Timbisha Shoshone Tribal Council whose members are Chairman Joe Kennedy, Pauline Esteves (Vice Chair), Timbisha Shoshone Tribal Council Members Madeline Esteves (Secretary/Treasurer, Angie Boland and Erick Mason. This APPEAL challenges the decision of Regional Director Dale Morris dated February 17, 2009, attached hereto as Exhibit A.

Appellants' address is P.O. Box 206, Death Valley, California 92328-0206, (760) 786-2374. Any correspondence concerning this appeal should be copied to Judith A. Shapiro, 7064 Eastern Ave., NW, Washington, DC 20012, (202) 723-6400, attorney for Appellants.

**Issues to be Developed on Appeal**

As will be more fully developed in Appellants' Statement of Reasons, the lawfully elected Timbisha Shoshone Tribal government is facing attack by two separate factions. Each of those factions is supported by gaming developers, each represented by the same lawyer, and each focused on the single goal of supplanting the government that rejected a gaming contract with one more amenable to that proposal. The opponents have had significant success thus far in disrupting the governmental activities of the Timbisha Shoshone Tribe. They have ignored constitutional requirements of governmental process, frozen the program funds intended to provide services to tribal members, and have convinced local officials of the Bureau of Indian Affairs to support their efforts, supplanting the actions of the Tribe's General Council as the forum charged with resolving disputes within the Tribe.

Further, those seeking to supplant the lawful government of the Timbisha Shoshone Tribe cannot demonstrate that they are tribal members within the administrative purview of the Bureau of Indian Affairs. All three members of the

Attachment B

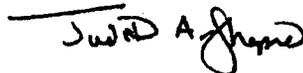
Beaman faction have been notified by the Tribe's Enrollment committee of their failure to meet the Tribe's Constitutional Requirements for membership. The Constitution limits tribal membership (outside of adoption) to those who can provide genealogical evidence of their connection to the 1978 base roll of the Timbisha Shoshone Tribe established at the time the Tribe secured federal acknowledgment from the United States through the federal Acknowledgment process at 25 C.F.R. Part 83. Pursuant to 25 C.F.R. § 83.12, upon acknowledgment as an Indian tribe, the list of members submitted as part of the petition process "shall be the tribe's complete base roll for purposes of Federal funding and other administrative purposes." Additional members may be added only by meeting the same requirements (historical maintenance of social and political ties with tribe) as those on the list. *Id.* That limitation bars the United States from extending administrative recognition to individuals claiming governmental responsibility if those same individuals fall outside the tribal roll authorized by the acknowledgment process.

As will be detailed later, by operation of Tribal law, the Beaman faction that is the subject of this appeal, is made up of individuals whose terms have expired, whose seats have been filled in subsequent elections, and who have been found, by the Tribe's Enrollment Committee, to be ineligible for tribal membership, and thus incapable of holding office. Appellants herein, Chairman Kennedy and his Council will therefore be filing a comprehensive Statement of Reasons within 30 days.

#### **DECISION BEING APPEALED**

he decision being appealed is Regional Director Dale Morris's decision of February 17, 2009, reversing Superintendent Troy Burdick's previous order accepting the action of the January 20, 2008 meeting of the Timbisha Shoshone Tribe's General Council in ratifying the removal of three members of the Timbisha Shoshone Tribal Council.

Respectfully Submitted,



Judith A. Shapiro, Esq.  
Attorney for Appellants

**EXHIBIT A**



IN REPLY REFER TO:

## United States Department of the Interior

BUREAU OF INDIAN AFFAIRS  
Pacific Regional Office  
2800 Cottage Way  
Sacramento, California 95825

FEB 17 2009

**CERTIFIED MAIL NO. Z 155 874 769**  
**RETURN RECEIPT REQUESTED**

John M. Peebles, Esq.  
Fredericks Peebles & Morgan LLP  
Attorneys at Law  
1001 Second Street  
Sacramento, CA 95814

Dear Mr. Peebles

The purpose of this correspondence is to inform you of my decision regarding the Notice of Appeal (Appeal) dated March 17, 2008, filed pursuant to 25 Code of Federal Regulations (CFR) Part 2, by John M. Peebles, Attorney for Ed Beaman, Virginia Beck, and Cleveland Casey (Appellants), from the Bureau of Indian Affairs, Central California Agency, Superintendent's decision of February 29, 2008, wherein the Superintendent rescinded his letter dated December 14, 2007, and recognized the results of a November 13, 2008 General election conducted by Joe Kennedy and Madeline Esteves. The February 29, 2008 decision recognized the following individuals to be official tribal representatives of the Timbisha Shoshone Tribal Council: Joe Kennedy, Chairman; Margaret Armitage, Vice-Chairman; Madeline Esteves; Secretary/Treasurer, Margaret Cortez; Council Member and Pauline Esteves, Council Member (Kennedy Council).

The Appeal was received on March 18, 2008 and the Appellants' Statement of Reasons was received on April 16, 2008; both were timely filed pursuant to 25 CFR § 2.10. The Administrative Record from the Bureau of Indian Affairs, Central California Agency, Superintendent (Superintendent) was received on December 3, 2008 at this office.

The Appellants are seeking reversal of the Superintendent's decision of February 29, 2008 and assert that the Tribe's Tribal Council consisting of Ed Beaman, Madeline Esteves, Doug Gholson, Virginia Beck and Cleveland Casey, should be recognized. Appellants assert that, as a result of a competing November 13, 2007 General election conducted by Ed Beaman, Virginia Beck and Cleveland Casey, Doug Gholson, Virginia Beck and Cleveland Casey were elected to the three expired terms of the Tribal Council.

We have carefully reviewed the administrative record and documents provided by the parties. Based on our analysis, I am reversing the Superintendent's decision of February 29, 2008,

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because the actions taken by Tribal Council members Joe Kennedy and Madeline Esteves lacked a quorum of the Tribal Council. Therefore, the Bureau of Indian Affairs continues to recognize the Tribal Council that was in place prior to the Superintendent's February 29, 2008 decision, consisting of: Joe Kennedy, Chairman, Ed Beaman, Vice-Chairman, Madeline Esteves, Secretary/Treasurer, Virginia Beck, Executive Council Member, Cleveland Lyle Casey, Executive Council Member. We present our analysis as follows:

### **Finding of Facts**

**On July 9, 2007** charges were filed by General Council members Wallace Eddie and Margaret Cortez against Tribal Council members Ed Beaman and Virginia Beck requesting their removal from the Timbisha Shoshone Tribal Council (Tribal Council).

**On July 21, 2007**, the Tribal Council of the Timbisha Shoshone Tribe conducted a Tribal Council meeting at Fish Lake Valley. The Tribal Council members present at the meeting were; Joe Kennedy, Chairman, Virginia Beck, Madeline Esteves, Lyle Casey and on the phone was Ed Beaman. A quorum of the Tribal Council was established. The charges filed by General Council members; Margaret Cortez and Wallace Eddy against Tribal Council members Ed Beaman and Virginia Beck were discussed. Ed Beaman stated that he did not get the July 9, 2007 letter and Virginia Beck said she received her letter on July 20, 2007. Therefore, no removal action was taken by the Tribal Council and the request for removal of Ed Beaman and Virginia Beck from the Tribal Council filed by the General Council members was rescheduled for the next Tribal Council meeting on August 25, 2007 at Bishop, California.

**On August 25, 2007**, the Tribal Council of the Timbisha Shoshone Tribe conducted a duly called monthly Tribal Council Meeting at Bishop, California. The minutes of the Tribal Council meeting indicate the following members of the Tribal Council were present; Joe Kennedy, Chairman, Ed Beaman, Virginia Beck, Madeline Esteves, and Lyle Casey. A quorum of the Tribal Council was established.

**On August 31, 2007**, Chairman, Joe Kennedy sent a letter addressed to the Superintendent informing him of the events that occurred during the Tribal Council meeting on August 25, 2007, and of the charges filed against Council members Virginia Beck and Ed Beaman. He explained that in accordance with the Tribe's Constitution, Article XI, Section 1, 3, the Tribal Council member who is the subject of a removal request, shall not vote nor serve in his or her capacity as a Tribal Council member in the removal proceedings. Therefore, their request to vote on each other's removal was denied. Shortly after, both Ed Beaman and Virginia Beck walked out of the meeting. Joe Kennedy indicated that Ms. Armitage replaced Virginia Beck in order to continue with the Tribe's business.

**On September 22, 2007**, Ed Beaman, Vice-Chairman, Cleveland Lyle Casey and Virginia Beck called a Special Tribal Council meeting to address the actions taken at the August 25, 2007 meeting. The following resolutions were passed: Resolution #2007-24 declared the attempted illegal removal of Ed Beaman and Virginia Beck null and void; Resolution #2007-25 declared the duly recognized Tribal Council as Joe Kennedy, Ed Beaman, Madeline Esteves, Virginia Beck, and Cleveland Casey, and declared purported Resolution #2007-23 signed by Joe Kennedy

and Madeline Esteves, setting a date for the General Election, null and void; Resolution #2007-26 amended certain provisions of the Timbisha Shoshone Election Ordinance, applicable only to the 2007 General Election, in order to facilitate a General Election in compliance with the Constitution; Resolution #2007-28 appointed an Election Board to supervise and carry out the General Election.

**October 15, 2007**, letter from Vice-Chairman, Ed Beaman, via facsimile, addressed to the Superintendent requesting a letter stating who the Bureau of Indian Affairs recognizes as the Tribal Council of the Timbisha Shoshone Tribe. A letter dated September 25, 2007, was also attached, addressed to the General Council responding to improper removal actions taken at the August 25, 2007 Tribal Council meeting.

**October 29, 2007**, letter from Joe Kennedy, Chairman addressed to the Superintendent regarding Virginia Beck and Ed Beaman's relinquishment of their Tribal Council position on August 25, 2007. Included were Virginia Beck and Ed Beaman's removal charges, which were submitted to members of the General Council.

**On November 13, 2007**, as a result of a dispute within the Tribal Council two General Elections were held; one by Joe Kennedy, Madeline Esteves and Margaret Armitage conducted by Mark Thompson, Indian Dispute Resolution Services, in which 117 ballots were cast with Joe Kennedy, Margaret Cortez, Margaret Armitage, and Pauline Esteves receiving the highest number of votes; the other by Ed Beaman, Virginia Beck and Cleveland Lyle Casey conducted by Joslyn Chvala, of Daniels, Phillips, Vaughan, & Bock in which 55 votes were cast with Doug Gholson, Cleveland Lyle Casey, and Virginia Beck receiving the highest number of votes.

**November 15, 2007**, a copy of a letter from Ed Beaman to the Timbisha Shoshone Election Committee, appealing the Tribe's November 13, 2007 General Election conducted by the Kennedy Council, alleging that the election was not conducted pursuant to the Tribe's Constitution and Election ordinance.

**December 3, 2007**, letter from Ed Beaman, addressed to the Superintendent regarding the Election Board's report of the Tribe's 2007 General election conducted by Daniels, Phillips, and Vaughan for Ed Beaman, Virginia Beck and Cleveland Casey was valid and recognized the new elected members of the Tribal Council as: Doug Gholson, Cleveland Lyle Casey, and Virginia Beck, with 55 votes cast in the election. The Election Board found that the election conducted by the Kennedy Council was invalid and void.

**December 3, 2007**, Mark Thompson, Indian Dispute Resolution Services, Inc. sent a facsimile, to the Superintendent regarding the November 13, 2007 Kennedy Council's Election Results. The purpose of the Memorandum was to certify the results of the Timbisha Shoshone Election conducted by Indian Dispute Resolution Services, Inc. in coordination with the Tribal Council Election Board. The results identified the Election procedures that were followed, 117 absentee ballots cast, total votes for each candidate, and that no appeals were received. The results showed that the new council consisted of Joe Kennedy, Margaret Armitage, Margaret Cortez, and Pauline Esteves.

**December 4, 2007**, Barbara Durham, Election Board Chairman, sent a facsimile to the Superintendent, providing the Report of Tribal Election and Addendum to Kennedy Council Report of Tribal Election held November 13, 2007, certifying the results to be true and correct. Further, stating that four (4) General Council members were elected to the Tribal Council and the purported vacant Vice-Chairman position will be filled at the first Tribal Council meeting to be held on December 15, 2007.

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**January 18, 2008**, memorandum from the Superintendent to the Regional Director, transmitting the January 11, 2008 Notice of Appeal filed by Jack Duran, Attorney on behalf of his clients: Joe Kennedy, Margaret Armitage, Margaret Cortez, Madeline Esteves and Pauline Esteves. The Superintendent indicated that the Appellant's Statement of Reason, upon receipt, will be forwarded to this office along with the administrative record.

**January 20, 2008**, a Special meeting of the General Council was held in Hesperia, CA, to address the results of the November 13, 2007 Tribal Council Elections and to seek approval of specific actions that would stabilize the Tribe's government.

**February 4, 2008**, letter from Joe Kennedy to the Superintendent in which he updated the Superintendent on the most recent actions that occurred with the Timbisha Shoshone Tribe and notifying him of a special meeting of the General Council held on January 20, 2008, at Hesperia, CA. The purpose of the meeting was to find out what the General Council of the Tribe wanted and what direction they felt was appropriate for the Timbisha. In support of the actions taken by Joe Kennedy, Madeline Esteves and Margaret Armitage, the General Council voted and enacted four (4) Tribal Resolutions as follows: Resolution No. 2008-01, Ratifying the Joe Kennedy, Madeline Esteves and Margaret Armitage's November 13, 2007 General Election; Resolution No. 2008-02 Ratifying the Actions and Authority of the Tribal Council Subsequent to August 25, 2007; Resolution No. 2008-03 Interpreting What Constitutes a Resignation from the Tribal Council; Resolution No. 2008-04 Authorizing the Tribal Council to Pursue Prospective Gaming Developers. Furthermore, the Agency Superintendent was requested to recognize all actions adopted by the Timbisha Shoshone General Council at the January 20, 2008 Special General Council Meeting.

**February 29, 2008**, the Superintendent, reversed his December 14, 2007 decision and issued a new letter recognizing the actions of the General Council during a January 20, 2008, General Council meeting, wherein the General Council voted to ratify: Tribal Resolutions No. 2008-01, ratifying the Joe Kennedy, Madeline Esteves and Margaret Armitage's November 13, 2007 General Election; Tribal Resolutions No. 2008-02 ratifying the Actions and Authority of the Tribal Council Subsequent to August 25, 2007; Tribal Resolutions No. 2008-03 Interpreting What Constitutes a Resignation from the Tribal Council. Based on the above actions of the General Council the Superintendent recognized the results of the Joe Kennedy, Madeline Esteves and Margaret Armitage's November 13, 2007 election as follows:

Joe Kennedy, Chairman  
Margret Armitage, Vice-Chairman  
Madeline Esteves, Secretary/Treasurer  
Margret Cortez, Executive Council Member  
Pauline Esteves, Executive Council Member

## APPLICABLE TRIBAL LAW

The Tribe is organized and governed under the Constitution of the Timbisha Shoshone Indian Tribe adopted by its membership on February 17, 1986. In analyzing the parties' positions, it is appropriate to look to the Tribe's Constitution as it relates to the actions taken by the parties

Article IV, Section 1, provides that, the powers of the government of the Tribe shall be divided into three distinct branches; the General Council, the Tribal Council and the Tribal Judiciary. No branch, group or person charged with the exercise properly belonging to one of these branches shall exercise any powers belonging to one of the other branches, except as otherwise specified in this document.

Article IV, Governing Body, Section 2, provides that, the governing body of the Tribe shall be the General Council. The General Council shall consist of all tribal members sixteen (16) years of age or older. All members of the General Council shall be able to vote at all General Council meetings and all tribal elections, referenda, initiatives, recalls and repeals.

Article V, Section 1, General Council, a., provides in part that, all powers of the Tribe shall be vested in the General Council, subject to any limitations imposed upon such powers delegated to the Tribal Council, etc..

Article V, Section 1, General Council, b., provides that, The General Council shall exercise its powers of self-government through initiative, referendum, repeal and recall powers as set forth in this document.

Article V, Section 1, General Council, c., provides in part that, the following powers shall be exclusively reserved to the General Council. All powers that are not expressly mentioned in this document or which are not expressly delegated in this document by the General Council to the Tribal Council or any other officer or agency of the Tribe, shall not be abridged but shall be reserved to the General Council.

Article V, Section 3, Reserved Powers of General Council, provides that, the Tribal Council shall have all appropriate powers necessary to implement specific provisions of this document and to effectively govern tribal affairs. All powers heretofore vested in the Tribe, but not specifically referred to in this document, shall not be abridged, but shall be reserved to the General Council.

Article VII, Duties of Officers Section 1, a., provides in part that, the Chairman shall have the following duties:

1. To preside at all meetings of the Tribal and General Councils:
2. To vote at Tribal and General Council meeting only when it is necessary to break a tie vote;

8. The Chairperson shall hold no other Tribal Office or engage in private remunerative employment which may pose a conflict of interest with the Tribe's enterprise or business activities during his term of office;

Article VIII, Meetings Section 1, provides that, all meetings of the General or Tribal Councils shall be open to all tribal members, except in those cases where the matter under discussion would invade the privacy of an individual tribal member.

Article VIII, Meetings Section 2, provides in part that, all meeting of the Tribal Council shall be held in accordance with the following provisions:

a. A majority of the members of the Tribal Council shall constitute a quorum at all Council meetings. No business shall be conducted in the absence of a quorum.

Article VIII, Meetings Section 3(b), provides that Specials meetings of the General Council may be called by the Tribal Chairperson or by any member of the General Council who submits a petition with ten (10) signatures of the General Council members to the Tribal Council requesting a special meeting. The notice in regard to any special meetings shall be given at least three (3) days prior to the meeting and shall specify the purpose of the meeting.

Article X, Vacancies Section 1, Tribal Council shall fill the vacancy by appointment of a General Council member who qualifies for candidacy for the vacant position. If more than twelve (12) months remain in the vacant term a special election shall be held to fill the vacant position. Such a special election shall be held within thirty (30) days after the Tribal Council declares the position vacant.

Article XI, Removal, Section 1, 1., provides in part that, any member of the Tribe can request removal of any Tribal Council member by submitting a written statement of charges to the Chairperson, etc... Such written statement must be received by the accused Council member no later than ten (10) days before the next regular Council meeting at which he or she is to appear.

Section 1, 2., provides that, at the next regular Tribal Council meeting following the submission of such written statement, the charging party shall present his or her allegations and proof against the accused member of the Tribal Council, and the accused member shall be given an opportunity to reply to all charges by presenting his or her allegations and proof to the Tribal Council.

Section 1, 3., provides that, after hearing all the charges and proof presented by both sides, the Tribal Council shall take a vote on whether the accused member shall be removed from office. If a majority of the Tribal Council vote to remove the accused Council member, his or her seat shall be declared vacant. The Tribal Council member who is subject to the removal request shall not vote nor serve in his or her capacity as a Tribal Council member in the removal proceedings.

## DISCUSSION

Review of the minutes of the Tribal Council monthly meeting of August 25, 2007, indicates a quorum had been established with all five (5) Tribal Council members present to, among other things, address removal charges filed by Wallace Eddy, to allow Ed Beaman and Virginia to refute the alleged charges and for the Tribal Council to vote on the matter. Only Wallace Eddy, one of the two General Council members who had filed the charges and requested the removal of Ed Beaman and Virginia Beck from the Tribal Council was present along with 30 General Council members. Ed Beaman and Virginia Beck requested that the removal action be conducted in Executive Session, but the General Council members present opposed their request. Before the charges were presented, a dispute ensued on whether or not Ed Beaman and Virginia Beck could vote on each others removal; Chairman Kennedy referred the matter to the General Council members for a decision. The General Council voted not to allow Ed Beaman and Virginia Beck to vote on each others removal; Chairman Kennedy announced the motion carried. Ed Beaman and Virginia Beck along with Cleveland Lyle Casey left the meeting and did not return. Upon the departure of Tribal Council members Ed Beaman and Virginia Beck along with Cleveland Lyle Casey from the meeting, Chairman, Kennedy stated that Ed Beaman and Virginia Beck leaving before responding to the charges meant they were guilty of the charges. A motion was made by Madeline Frank, General Council member, to remove Ed Beaman and Virginia Beck from the Tribal Council, and seconded by Pauline Esteves, General Council member; however, no vote was taken and the motion died. Another motion was made by Barbara Durham, General Council member, to replace Virginia Beck with Margaret Armitage, General Council member, seconded by Pauline Esteves, General Council member, by a vote of 11 for, 0 against, 0 abstain; the motion carried. Following the motion, Margaret Armitage took a place at the Tribal Council table as an Executive Council member.

The Tribe's Constitution provides specific procedures governing the removal of Tribal Council members. Article XI, Removal, Section 1, Et seq., of the Tribe's Constitution clearly specifies the procedures governing the removal of Tribal Council members, and further specifies that the Tribal Council shall take a vote on whether the accused member shall be removed from office and explicitly states that the Removal of Tribal Council members is delegated to the Tribal Council and not to the General Council. The record indicates that no vote was taken by the Tribal Council to remove Ed Beaman or Virginia Beck from the Tribal Council as required by the Tribe's Constitution. Therefore, Ed Beaman and Virginia Beck both remain members of the Tribal Council.

With the departure of Tribal Council members Ed Beaman, Virginia Beck, and Cleveland Casey, only Joe Kennedy and Madeline Esteves, two of the five Tribal Council members, remained; a quorum no longer existed. No further business of the Tribal Council should have been conducted because Joe Kennedy and Madeline Esteves were the only two of the five Tribal Council members who remained and they did not constitute a quorum. Any action by the Tribal Council without a quorum is a violation of Article VII, Section 2 a., of the Tribe's Constitution, which provides in part, No business shall be conducted in the absence of a quorum.

As the record indicates, two Tribal Councils emerged claiming to be the leadership of the Tribe: Joe Kennedy, and Madeline Esteves, and the other Tribal Council consisting of Ed Beaman,

Virginia Beck and Lyle Casey. Both Tribal Councils conducted separate meetings to prepare for the November 2007 General election. On November 13, 2007, both Tribal Councils conducted their own annual General elections. The record indicates that 55 Tribal members voted in the Beaman Council election and 171 Tribal members voted in the Kennedy Council's election. The Superintendent on December 14, 2007 refused to recognize either election and recommend that the Tribe conduct a special general election to comply with the provisions of the Tribe's constitution for an annual general election to fill the three expired positions.

Joe Kennedy, and Madeline Esteves, on January 20, 2008 conducted a duly noticed General Council meeting at Hesperia, CA; the purpose of the meeting was to seek the Tribe's approval, in particular, the Tribal Council meeting of the August 25, 2007 and the Joe Kennedy and Madeline Esteves' General election results of November 13, 2007. However, as discussed above and based on the record, the actions of August 25, 2007 violated several provision of the Tribe's Constitution.

### CONCLUSION

As the record indicates, the August 25, 2007 actions by Chairman Kennedy and the General Council members were beyond the scope of their constitutional authority and far exceed their powers in their attempts to remove Ed Beaman and Virginia Beck. The ratification of these actions by the General Council on January 20, 2008, was inappropriate and also was beyond their constitutional authority, and these actions clearly violated Ed Beaman and Virginia Beck's rights to due process. Furthermore, it would be inappropriate for the Bureau of Indian Affairs to recognize tribal actions that violate provisions of Tribal laws.

For the reason stated above I am reversing the Superintendent's February 29, 2008 decision. Consequently, the Bureau of Indian Affairs continues to recognize Joe Kennedy, Chairman, Ed Beaman, Vice-Chairman, Madeline Esteves, Secretary/Treasurer, Virginia Beck, Executive Council Member, Cleveland Lyle Casey, Executive Council Member, which was the governing body of the Tribe that was recognized prior to the February 29, 2008 decision.

Please be advised that there is also a pending appeal regarding the November 2008 General election of the Tribe, with answers of interested parties due by February 24, 2009, and a decision is likely to be issued shortly thereafter.

This decision may be appealed to the Interior Board of Indian Appeal, 801 North Quincy Street, Arlington, Virginia 22203 in accordance with regulations in 43 CFR§ 4.310 4.340. Your Notice of appeal to the Board must be signed by you or your attorney and must be mailed within 30 days of the date you receive this decision. It should clearly identify the decision being appealed. If possible, attach a copy of the decision. You must send copies of your Notice of Appeal to (1) The Assistant Secretary - Indian Affairs, 4160 MIB, U.S. Department of the Interior, 1849 C Street, N. W. Washington, D.C. 20240, (2) each interested party known to you, and (3) this office. Your Notice of Appeal sent to the Board of Indian Appeals must certify that you have sent copies to these parties. If you file a Notice of Appeal, the Board of Indian Appeals will notify you of further appeal procedures. If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a Notice of Appeal.

Sincerely,

A handwritten signature in cursive script that reads "Dal Marin". The signature is written in black ink and is positioned above the typed name.

Regional Director

cc: See Enclosed Distribution List

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Washington, DC 20240**

**Lawrence G. Brown  
United States Attorney  
SYLVIA QUAST  
Assistant United States Attorney  
501 I Street, Suite 10-100  
Sacramento, CA 95814**

---

**Judith A. Shapiro, Esq.  
6856 Eastern Avenue, NW  
Suite 206  
Washington, DC 20012**

**CERTIFICATE OF SERVICE**

I certify that on February 24, 2009, I caused to be deposited for mailing in the United States Postal Service postage prepaid, true and correct copies of the foregoing NOTICE OF APPEAL, addressed as follows:

**REGIONAL DIRECTOR**

Dale Morris  
PACIFIC REGION  
Bureau of Indian Affairs  
2800 Cottage Way, Rm W-820  
Sacramento, CA 95825

**ASSISTANT SECRETARY OF INDIAN AFFAIRS**

Mr. George Skibine  
Acting Assistant Secretary-Indian Affairs  
4160 Main Interior Building  
U.S. Department of the Interior  
1849 C Street, NW  
Washington, DC 20240

**INTERESTED PARTIES**

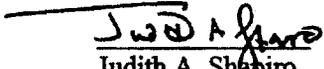
Service was made on the attorneys representing the following interested parties:

I. Mr. Ed Beaman  
Ms. Virginia Beck  
Mr. Cleveland Lyle Casey

and

II. Mr. George Gholson  
Mr. Wallace Eddy

c/o John Peebles, Esq.  
Fredericks, Peebles & Morgan  
1001 Second Street  
Sacramento, CA 95814

  
Judith A. Shapiro