

April 2009

High-level Waste Hearings Summary Table

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- Electronic Hearing Docket Notices for April, 2009.

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First are the orders, next are the motions and pleadings filed for the month of April.

High-Level Waste hearing

ORDERS Electronic Hearing Docket Board Orders for April (CAB01, CAB02, CAB03)

Date	April 1	April 7	April 17
	<p>ORDER On March 27, 2009, the Caliente Hot Springs Resort LLC (CHS) moved to dismiss the U.S. Department of Energy's application for construction authorization of a high-level waste repository at Yucca Mountain, Nevada. Pursuant to 10 C.F.R. § 2.323(b), a motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful. Pursuant to my authority under 10 C.F.R. § 2.346(j), the CHS motion is <i>denied</i> for failure to follow the cited regulation. IT IS SO ORDERED.</p>	<p>ORDER (Granting Motion for Extension of Time) At oral argument on April 1, 2009, counsel for the Timbisha Shoshone Tribe (TIM) and the Timbisha Yucca Mountain Oversight Non-Profit Corporation (TOP) agreed to confer regarding joint representation of the Timbisha Shoshone Tribe as an Affected Indian Tribe (AIT), and to file with the Board a supplemental brief by April 10, 2009. On April 6, 2009, counsel for TIM and TOP filed a joint motion requesting three additional business days to submit their supplemental filing to the Board.</p>	<p>ORDER (Granting Motion for Extension of Time) At oral argument on April 1, 2009, counsel for the Timbisha Shoshone Tribe (TIM) and the Timbisha Yucca Mountain Oversight Non-Profit Corporation (TOP) agreed to confer regarding joint representation of the Timbisha Shoshone Tribe as an AIT, and to file with the Board a supplemental brief by April 10, 2009. On April 7, 2009, the Atomic Safety and Licensing Board granted TIM's and TOP's joint motion requesting three additional business days to submit their supplemental filing to the Board, thereby extending the deadline to April 15, 2009. On April 15, TIM and TOP filed another joint motion requesting an extension of three additional business days. For good cause shown, TIM and TOP's request for an extension of time is granted. The deadline for TIM and TOP to file their supplemental briefing will be April 20, 2009. It is so ORDERED.</p>
Date	April 22	Continued	
	<p>ORDER (Accepting Joint Representation of Timbisha Shoshone Tribe) At oral argument on April 1, 2009, counsel for the Timbisha Shoshone Tribe (TIM) and the Timbisha Yucca Mountain Oversight Non-Profit Corporation (TOP) agreed to confer regarding possible joint representation of the Timbisha Shoshone Tribe (Tribe).¹ On April 20, 2009, TIM and TOP filed a Joint Statement Regarding Participation as a Single Entity, accompanied by a Letter of Understanding setting forth their agreement to work together as a single participant in this proceeding. The Construction Authorization Boards appreciate the efforts put forth by TIM and TOP to reach this agreement. We hereby recognize the Joint Timbisha Shoshone Tribal Group (JTS) as an entity requesting intervention in this proceeding. We also deem that JTS's contentions include all the contentions proffered by TIM and TOP in their respective petitions to intervene. At this time, however, we do not rule on whether JTS is entitled to party status. The issues of standing, contention admissibility, (continued next column)</p>	<p>and LSN compliance will be addressed in the Boards' forthcoming First Prehearing Conference Order. We wish to make clear, however, that TIM and TOP should proceed henceforth together as a single petitioner known as JTS. Therefore, in preparing any new or amended contentions on the Commission's Final Rule published on March 13, 2009,² which will be deemed timely if filed within sixty days after the Final Rule was published, or in preparing any new contentions with respect to DOE's February 19, 2009 updates and supplements to its application, which will be deemed timely if filed within 30 days after the Boards' issuance of our First Prehearing Conference Order, JTS should identify such contentions as proffered on behalf of JTS. In addition, any new or amended contentions should conform in all respects to the APAPO Order dated June 20, 2008. Lastly, we do not require counsel for TOP and TIM to re-submit their notices of appearance or to file a new petition on behalf of JTS. It is so ORDERED.</p>	

MOTIONS AND PLEADINGS

Date	April 3	April 6	April 10
	<p>REPLY OF THE TIMBISHA SHOSHONE YUCCA MOUNTAIN OVERSIGHT PROGRAM NON-PROFIT CORPORATION ("TOP") TO THE DEPARTMENT OF ENERGY'S ANSWER TO TOP'S MOTION FOR LEAVE TO FILE AN AMENDED PETITION AND AMENDED PETITION</p> <p>While challenging every procedural step the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation ("TOP") has taken, it is telling that the Department of Energy ("DOE") does not challenge the substance of the one contention that TOP is pursuing. That NEPA contention—TOP-NEPA-01—alleges that the DOE failed to consider and analyze cultural, historic, religious, and other impacts that contamination of springs in Death Valley, California, by effluent from the proposed Yucca Mountain geologic repository could have on the Timbisha Shoshone Tribe (the "Timbisha" or "Tribe"). DOE does not disagree that effluent from its proposed geologic repository will reach the Death Valley springs. Nor does it challenge the central role the Death Valley springs play in the Tribe's culture, its history, and in its religious ceremonies.</p> <p>THE COMMISSION SHOULD GRANT TOP'S MOTION FOR LEAVE TO FILE AN AMENDED PETITION UNDER 10 C.F.R. § 2.309(C)(1).</p> <p>TOP seeks leave to file the Amended Petition under two separate standards: first, that the Amended Petition is timely under 10 C.F.R. § 2.309(f)(2); and, additionally, that leave to file the Amended Petition should be granted under 10 C.F.R. § 2.309(c)(1). Although the NRC Staff agrees that TOP satisfies the elements necessary for this Board to grant leave under 10 C.F.R. § 2.309(c)(1), DOE challenges TOP's showing under both standards.</p>	<p>THE TIMBISHA SHOSHONE TRIBE'S AND TIMBISHA YUCCA MOUNTAIN OVERSIGHT NON-PROFIT CORPORATION'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL INFORMATION AS TO REPRESENTATION OF TRIBE AS AFFECTED INDIAN TRIBE</p> <p>On April 1, 2009, this Atomic Safety and Licensing Board ("Board") conducted a hearing before Construction Authorization Board 2 in this proceeding. During the hearing, the Board stated that both entities claiming to represent the Timbisha Shoshone Tribe ("Tribe") must resolve their disagreement as to how the Tribe will be represented in this proceeding as an affected Indian tribe ("AIT") by a single entity or risk the Tribe being precluded from participating in the instant proceeding entirely. (See 4/1/09 Tr. at 513:1-518:11.) Accordingly, counsel for both the Timbisha Shoshone Tribe ("TIM") and the Timbisha Yucca Mountain Oversight Non-Profit Corporation ("TOP") (collectively, the "Parties") agreed to confer regarding joint representation of the Tribe as an AIT, and to file with the Board a supplemental brief addressing the possibility of joint representation of the Tribe in this proceeding. No party objected to the proposal during the April 1, 2009 hearing, and the Board granted TIM and TOP leave to file a supplemental brief by April 10.</p>	<p>Letter to the Licensing Boards from NEI Re: Recent Court of Appeals Decision in <i>New Jersey Cep 't. of Environmental Protection v. NRC</i></p> <p>Dear Judges:</p> <p>The purpose of this letter is to bring to your attention, for consideration by the Boards, a decision issued last week by the U.S. Court of Appeals for the Third Circuit in the above referenced case. A copy of the decision is included with this letter. In the case the court upheld a decision of the Nuclear Regulatory Commission finding that consideration of the effects of terrorist attacks was not appropriate under the National Environmental Policy Act. The decision is relevant to the propriety of Nuclear Energy Institute contention NEI-NEPA-03 which takes issue with the consideration of the consequences of terrorist attacks as presented in the Final Supplemental Environmental Impact Statement for the Yucca Mountain repository.</p> <p>"ROTW, Circuit Judge: The issue presented by this appeal is whether the Nuclear Regulatory Commission (NRC), when it is reviewing an application to relicense a nuclear power facility, must examine the environmental impact of a hypothetical terrorist attack on that nuclear power facility. The New Jersey Department of Environmental Protection (NJDEP) contends that the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 5 4321 <i>et seq.</i>, requires the analysis of the impact of such an attack. NJDEP has petitioned for review of an NRC decision denying its request to intervene in relicensing proceedings for the Oyster Creek Nuclear Generating Station (Oyster Creek). The NRC concluded that terrorist attacks are "too far removed from the natural or expected consequences of agency action" to require...</p>

Date	April 10	April 14	(continued)
	<p>U.S. DEPARTMENT OF ENERGY RESPONSE TO REQUEST FROM THE MARCH 31, 2009 ORAL ARGUMENT</p> <p>During the March 31, 2009 oral argument in the above referenced proceeding, counsel for the U.S. Department of Energy (DOE) stated, that in his experience, there have been contentions submitted in other NRC proceedings that “are far more poorly drafted than in [sic] the State of Nevada and others that were likely better drafted.” March 31, 2009 Interim Draft Transcript (Tr.) at 234-35 (electronic version). The Board subsequently requested that DOE provide examples of contentions from other proceedings which were better drafted than those of the State of Nevada. Tr. at 235.1 DOE is providing a table with such examples in response to that request. The attached examples are better pled, not because they are longer or necessarily use more polished language, but rather because, unlike most of Nevada’s contentions, they clearly explain why the alleged deficiencies, if true, constitute a regulatory violation and would make a difference in the outcome of the proceeding. The Commission has recently reiterated that the “contention admissibility requirements are deliberately strict.” The attached examples illustrate what a petitioner must include in a contention to satisfy these strict admissibility standards. In contrast, Nevada frequently merely identified possible technical errors or omissions in DOE’s License Application, without providing an explanation of how those alleged errors or omissions violate the relevant regulations, or would, if true, be material to the proceeding.</p>	<p>Re: Petitions for Review in <i>State of California v. United States Department of Energy and State of Nevada v. United States Department of Energy</i></p> <p>Dear Judges:</p> <p>The United States Department of Energy (DOE) brings to your attention the Petitions for Review filed by the State of California, on April 6, 2009, and the State of Nevada, on April 7, 2009, in the United States Court of Appeals for the Ninth Circuit. On April 7, 2009, the United States Court of Appeals for the Ninth Circuit issued a Time Schedule Order in both matters. The <i>State of California v. United States Department of Energy</i> has been assigned Docket No. 09-71014 and the <i>State of Nevada v. United States Department of Energy</i> has been assigned Docket No. 09-71015. In both matters, the appellant/petitioners, the State of California and the State of Nevada, must file their opening briefs on May 18, 2009. DOE is required to file its brief on June 16, 2009. Copies of the Petitions for Review and Time Schedule Orders are attached. In the Petitions for Review, the State of California and the State of Nevada seek review, pursuant to Sections 119(a)(1)(A) and (D) of the Nuclear Waste Policy Act, of DOE’s final decision set forth in its “Record of Decision and Floodplain Statement of Findings – Nevada Rail Alignment for the Disposal of Spent Nuclear Fuel and High-Level Waste.” Additionally, on the first day of oral argument before the Construction Authorization Board 03, Thomas A. Schmutz, counsel for DOE, referred to the opinion issued by the U.S. Court of Appeals for the Ninth Circuit in <i>California Trout v. Schaefer</i>. See Transcript of Proceedings: Oral Argument on Admissibility of Contentions at 176, 190, <i>In the Matter of U.S. Dep’t of Energy: High Level Waste Repository</i>, Docket No. 63-001-HLW (March 31, 2009). In <i>California Trout</i>, the court held that when two federal agencies have independent jurisdiction over different aspects of a project subject to the National Environmental Policy Act (NEPA), one agency (here the NRC) is not required to prepare an EIS for the entire project. The citation for this case is as follows: <i>California Trout v. Schaefer</i>, 58 F.3d 469 (9th Cir. 1995). (Docket No. 63-001), regarding the appropriate forum for challenging DOE’s transportation decisions.</p>	<p>Radioactive Waste at Yucca Mountain, Nye County, NV” dated October 10, 2008 and published at 73 Fed. Reg. 60,247 (Record of Decision). The State of California and the State of Nevada also seek review of the environmental impact statements (EIS) relied upon by DOE, in part, in making its final rail alignment and rail corridor determination, as published in the Record of Decision. These Petitions for Review are relevant to the arguments set forth by DOE and the Petitioners in their written submissions and during oral argument, in the High-Level Waste Repository Construction Authorization Application proceeding</p>

Date	April 15	April 20	April 28
	<p>THE TIMBISHA SHOSHONE TRIBE'S AND TIMBISHA YUCCA MOUNTAIN OVERSIGHT NON-PROFIT CORPORATION'S MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL INFORMATION AS TO REPRESENTATION OF TRIBE AS AFFECTED INDIAN TRIBE</p> <p>...On April 6, 2009 the Timbisha Shoshone Tribe ("TIM") and the Timbisha Yucca Mountain Oversight Non-Profit Corporation ("TOP") filed THE TIMBISHA SHOSHONE TRIBE'S AND TIMBISHA YUCCA MOUNTAIN OVERSIGHT NON-PROFIT CORPORATION'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL INFORMATION AS TO REPRESENTATION OF TRIBE AS AFFECTED INDIAN TRIBE with the Atomic Safety and Licensing Board ("Board"). TIM and TOP at the Board's suggestion immediately began meet and confer sessions as to the potential to reach agreement on a process for joint representation in the Yucca Mountain Licensing Proceeding ('Licensing Proceeding'). TIM and TOP jointly requested leave to file supplemental information as to the progress of these discussions on or before April 15, 2009. In order to final details and determine whether an agreement can be reached, TIM and TOP respectfully request an extension of time to file supplemental information with Board. The Parties respectfully request that the Board grant them leave to file supplemental information regarding the results of this meet and confer process and their position on joint representation of the Tribe as an AIT in the instant proceedings on or before April 20, 2009.</p>	<p>JOINT STATEMENT OF TIMBISHA SHOSHONE YUCCA MOUNTAIN OVERSIGHT PROGRAM NON-PROFIT CORPORATION ("TOP") AND TIMBISHA SHOSHONE TRIBE ("TIM") REGARDING PARTICIPATION AS A SINGLE ENTITY</p> <p>Petitioners Timbisha Shoshone Tribe ("TIM") and Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation ("TOP") submit a Joint Statement pursuant to the directive from Construction Authorization Board 02 ("CAB02") of the Atomic Safety and Licensing Board (the "Board") at the April 1, 2009 oral argument on the admissibility of contentions and in accordance with the extensions of time to file this Joint Statement that the Board has granted.</p> <p>As CAB02 directed, the principals of TOP and TIM and their respective counsel have conferred regarding the possibility of participating in this proceeding as a single entity and have reached an agreement to do so. On behalf of Joint Timbisha Shoshone Tribal Group (JTS), the undersigned counsel intend to seek leave to file a Petition to Intervene that will collect in one Petition the contentions of both TIM and TOP.</p>	<p>ERRATA TO ANSWER OF THE U.S. DEPARTMENT OF ENERGY TO THE STATE OF NEVADA'S PETITION TO INTERVENE</p> <p>It has come to the U.S. Department of Energy's (DOE) attention that its Answer to the State of Nevada's Petition to Intervene, filed on January 16, 2009, contains an error in responding to contention NEV-SAFETY-189 (Patent 27-83-0002).¹ The error concerns footnote # 119. Attached is a table (Attachment 1), which identifies the page on which this error occurs and identifies the text to be corrected. Also attached is a replacement for the affected page (Attachment 2), which reflects the correction identified in the table.</p> <p>Footnote # 119 of DOE's Answer to this contention identified administrative errors in the License Application regarding the patent ownership and associated patent area acreage of Patent 27-83-0002. DOE's Answer correctly stated that the Patented Mining Claim was granted to Hollie O. Allen for 182.5 acres. In doing so, however, the Answer attributed the errors in the License Application to errors in a U.S. Department of Interior Bureau of Land Management mining claim geographic report. In fact, that report was not incorrect but was misread by a DOE reviewer. Accordingly, the language from DOE's Answer regarding the mining claim geographic report is now being deleted by the correction submitted today. This correction should have no impact on the Licensing Boards' deliberations with respect to this contention, but is being provided simply to ensure that the record before the Licensing Boards is accurate.</p> <p>Respectfully submitted, Signed electronically by Alex S. Polonsky</p>
Date	April 24		
	<p>FOR YUCCA MOUNTAIN LICENSING PROCEEDING PURPOSES ONLY NOT ADMISSIBLE UNDER FEDERAL OR STATE RULES OF EVIDENCE LETTER OF UNDERSTANDING</p> <p>WHEREAS, since approximately November 2007, there has been a dispute over the composition of the Tribal Council of the Timbisha Shoshone Tribe. WHEREAS, TIM claims that it represents the AIT because its efforts in the Licensing Proceeding are being directed by Ed Beaman, who claims to control a majority of votes in the Tribal Council elected</p>	<p>(continued)</p> <p>of the Timbisha Shoshone Tribe or are required to be filed by the Board in accordance with a jointly-approved and jointly-prepared Litigation Plan.</p> <p>3. TOP shall provide an audit to both TIM and DOE as to expenditure of funds received to date from DOE for Yucca Mountain oversight activities, and shall agree to reimbursement of consultants that have provided services to date for participation in the Licensing Proceedings consistent with the Litigation Plan attached hereto.</p>	

	<p>in November 2006 (the "2006-2007 Council"), which is the Tribal Council that, as of the date of the signing of this Letter of Understanding, the BIA currently recognizes for government-to-government purposes. The majority of the BIA-recognized Council claim to have reorganized the Council, and removed Joe Kennedy as Chairman, replacing him with Ed Beaman as Chairman, Cleveland Lyle Casey as Vice-Chairman, Madeline Esteves as Treasurer/Secretary, Virginia Beck as Executive Council Member, and Joe Kennedy as Executive Council Member. The BIA-recognized Council has not authorized the creation of TOP, nor does it recognize TOP as a Tribal entity, therefore the BIA-recognized Council does not acknowledge, nor have they approved or authorized, any actions, expenditures, representations, or approvals made by TOP on behalf of the Tribe. TOP and its Board of Directors, as well as the members of the Tribal Council that created TOP, deny and dispute these claims, and nothing in this Letter of Understanding or the accompanying Litigation Plan is intended to or shall be construed to constitute a waiver of or agreement with these claims. THEREFORE, it is agreed as follows:</p> <p>1. TIM and TOP and their respective counsel shall work together as a single participant in the Licensing Proceedings, each in good faith and using their best efforts, until such time as the Department of the Interior issues a final decision not appealable to any agency as to the recognized Tribal Council for government-to-government purposes. At such time, the Tribal Council that is recognized shall assume control over the representation of the Timbisha Shoshone Tribe in the Licensing Proceedings.</p> <p>2. Counsel for TIM and TOP shall work together to prepare and file in the Licensing Proceedings such pleadings, briefs, and other documents as are necessary to protect the interests (cont. next column)</p>	<p>4. By signing this Letter, both parties agree that this Letter of Understanding is for the limited purposes of insuring representation for the Tribe in the proceedings before the NRC's Construction Authorization Boards ("CAB"), and this Letter of Understanding and subsequent cooperation between the two parties was at the behest of the CAB.</p> <p>5. By signing this Letter, both parties agree that this Letter of Understanding and subsequent actions of the parties pursuant to this Letter of Understanding or other agreements related to proceedings before CAB do not express or imply acquiescence of the other's authority pursuant to the Tribe's constitution, duties thereof, or membership in the Tribe.</p> <p>6. This executed Letter of Understanding and actions pursuant to it may not be used by either party as evidence of the other's authority or membership status in any tribal, federal, or state proceeding.</p> <p>7. The statements made in the "WHEREAS" clauses of this Letter of Understanding are intended to and shall be construed only as stating the positions and claims of the respective parties. They are not intended to and shall not be construed as admissions or concessions of any sort whatsoever of any acquiescence by any party to the claims or statements made by any other party or any waiver by any party of arguments opposing the claims or statements made by any other party.</p>	
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