

**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 11, 2009

**REPLY TO NRC STAFF AND DOE ANSWERS TO TIMBISHA SHOSHONE TRIBES'  
MOTION TO INTERVENE AS A FULL PARTY**

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## **I. Introduction**

The Tribe respectfully submits this Reply to NRC Staff and DOE Answers to the Timbisha Shoshone Tribe's Motion to Intervene as a Full Party ("Reply").

## **II. Argument**

The Tribe has met all requirements to participate in the High Level Waste Licensing Proceeding for Yucca Mountain ("Proceeding"), including; standing, substantial LSN compliance, and at submission of at least on admissible contention.

### **A. Standing**

On December 22, 2008, two petitions for leave to intervene in the hearing were filed with the Nuclear Regulatory Commission, seeking leave to intervene in the Yucca Mountain Oversight Hearing and License Application. One petition, filed by Darcie L. Houck entitled Timbisha Shoshone Tribe's Petition for Leave to Intervene in the Hearing ("Petition"), filed at the direction of the tribal leaders recognized by the Department of the Interior ("Interior") as the tribal leaders for government-to-government purposes, and is the Petition filed on behalf of the Tribe. The second petition, filed by Joe Kennedy entitled Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation Petition to Intervene as a Full Party ("Kennedy Petition") was filed at the direction of tribal members not recognized by Interior as tribal representatives for government-to-government purposes and not filed on behalf of the Tribe.

The Department of Energy ("DOE") filed its Answer to the Tribe's Petition for Leave to Intervene in the Hearing on January 15, 2009 ("DOE Answer").

The NRC Staff filed its NRC Staff Answer to Intervention Petitions on February 9, 2009 ("NRC Staff Answer"). In its answer, the NRC Staff addressed the issue of the two petitions for leave to intervene in the hearing claiming to be filed on behalf of the Tribe. Following a brief discussion of the Tribe's leadership dispute, the Commission concluded each petitioner should be required to specifically establish their authorization to represent the Tribe or address whether they meet the standing requirements as a non-governmental entity. *NRC Staff Answer* at 32.

Interior certified the Tribe as an affected Indian Tribe ("AIT") under the Nuclear Policy Waste Act of 1982 on June 29, 2007. Therefore, the appropriate entity with AIT status is the Tribe or any duly authorized representative of the Tribe for government to government purposes as recognized by Interior.

Interior recognized, for government-to-government purposes, the following individuals as the Timbisha Shoshone Tribal Council by letter dated February 17, 2009: Ed Beaman, Cleveland Casey, Virginia Beck, Joe Kennedy, and Madeline Esteves. This February 17, 2009 letter is Interior's determination on one of two administrative appeals pending before the Regional Director. Tribal members Joe Kennedy, Pauline Esteves, Madeline Esteves, Angie Boland, and Erick Mason subsequently appealed the Interior's decision of February 17, 2009 to the Interior Board of Indian Appeals ("IBIA") on February 24, 2009. Pursuant to 43 C.F.R. § 4.311, appellants' opening brief is due within thirty days of receipt of the notice of docketing, after which opponents' brief(s) is due within thirty days of receipt of appellants' opening brief, after which appellants' reply, if any, is due within fifteen days of receipt of opponents' opening brief. The Notice of Docketing was issued on March 3, 2009.

The individuals identified in Interior's February 17, 2009 decision are the legitimate tribal government for government to government purposes. These same

individuals are identified in Interior's November 10, 2008 letter as the status quo pending resolution of any appeals. Therefore, Interior currently recognizes Ed Beaman, Cleveland Casey, Virginia Beck, Joe Kennedy, and Madeline Esteves as the individuals that constitute the governing body of the Tribe for government to government purposes. Any authorization to represent the Tribe as an AIT must be approved by a majority vote of these 5 persons (approval by 3 members of the Tribal Council). See Timbisha Shoshone Tribal Constitution at Article VIII, Section 2(b). Three of these individuals (Ed Beaman, Lyle Casey, and Virginia Beck) have authorized the filing of the Timbisha Shoshone Tribe's Petition for Leave to Intervene in the Hearing, and therefore this petition should be deemed the petition of the entity authorized as the AIT in this proceeding pending any further determination by the Interior.

At this time all documents have been filed by both parties as to the second appeal pending before the Regional Director. The Tribe understands that Interior will make a determination on the second appeal prior to the first hearing in this proceeding scheduled for March 31, 2009. The Tribe also understands that the U.S. Attorney representing Interior in the pending litigation, Sylvia Quast, will contact both the NRC counsel and the DOE counsel to inform them as to the decision on the second administrative appeal. Pending a decision on the second appeal and depending on the outcome and appeal rights as to that decision, the current governing body of the Tribe is charged with making government to government decisions on behalf of the Tribe, including determinations as an AIT in this proceeding. The Tribe will file any new information or further determinations by Interior as such become available.

Regardless of the outstanding dispute the Tribe does have standing as of right. This is set forth in the NRC Staff Answer to Intervention Petitions (NRC Staff Answer), the Timbisha Shoshone Tribe (the "Tribe") does not need to address standing requirements in its petition to intervene as it is an affected Indian Tribe ("AIT") as defined in the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. § 10101(2) and NRC regulations at 10 C.F.R. § 60.2. See *NRC Answer* at pgs. 29 - 30. Neither NRC Staff nor the DOE object to the Tribe's Petition on the basis of standing<sup>1</sup>. See *DOE Answer* at pg. 7.

The Tribe will provide additional information to supplement the Petition and this Reply as it becomes available. The Tribe also requests that the Board consider the limited resources available to the Tribe and the complexity of the proceeding. Despite Interior's decisions that recognize one Tribal Council consisting of Joe Kennedy, Ed Beaman, Madeline Esteves, Lyle Casey, and Virginia Beck, the DOE has provided AIT support and funding to a Tribal Council made up of Joe Kennedy, Pauline Esteves, Madeline Esteves, Angie Boland, and Erick Mason which has unlawfully delegated representation of the Tribe as an AIT to a non-profit entity the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation ("TOP"). See documents filed by TOP on February 24, 2009 as attachments to TOP Reply. The Tribe has been significantly handicapped by having to address these issues in numerous forums, with DOE, NRC, Interior, the Federal Courts, and this proceeding while resources have been provided to a faction not recognized by Interior.

## **B. Licensing Support Network Requirements**

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<sup>1</sup> As stated below there is an ongoing dispute as to the leadership of the Tribe, and therefore DOE preferences the fact that it does not object to the Tribe's Petition if the Atomic Safety and Licensing Board (the "ASLB" or "Board") determines that the Tribe is the official representative of the AIT.

DOE objects to the granting of the Tribe's Petition on the grounds that the Tribe has not complied with the LSN requirements set forth at 10 C.F.R. § 2.1003, and 10 C.F.R. § 2.1012(b). The Tribe is in substantial compliance with the LSN requirements and did in fact meet all requirements set out in the regulations, other than filing its formal request for certification which has been filed to date. The Tribe has been faced with numerous internal and external pressures as to its participation in this proceeding. Without any resources, the Tribe has been diligently working with its consultant, Loreen Pitchford to ensure that the Tribe's LSN meets all requirements of the NRC regulations. The Tribe did attempt to confer with DOE as to filing a late certification, however, DOE requested that the Tribe provide its procedures and other related documents for DOE review prior to filing for certification. This request came on or about the deadline for filing interventions. The Tribe did attempt to consult with DOE's counsel, however, due to competing needs and limited resources the Tribe was unable to address both issues simultaneously, especially given the long list of questions and issues DOE wanted the Tribe to respond to, in spite of the fact that the Tribe's consultant is the national expert in preparing LSN, and works with a majority of the entities seeking party status in this proceeding.

DOE is disingenuous in its description of the communications between the Tribe and DOE as to this matter. The Tribe has worked diligently to prepare its LSN, consult with a national expert on the matter, and attempted to work with DOE to address any issues prior to filing (only to have DOE's involvement result in a further delay in the filing of the certification), while addressing internal issues as to tribal leadership without any support or funding from DOE (which the Tribe is entitled to under the NWPA). This proceeding is very complex and time consuming. It requires technical experts in the substantive areas addressed in the DOE

application, as well as compliance with the LSN procedural requirements. The Tribe has a right to participate in this proceeding as either a party or an interested governmental entity, and the entitlements under the NWPA that DOE must meet have not been met. This failure on DOE's part is the major contributing factor to issues concerning LSN compliance.

DOE then argues "that a potential party 'may not be granted' party status or participate under 10 C.F.R. § 2.315(c) if it cannot demonstrate substantial and timely compliance 'at the time it requests participation.'" See DOE Answer at footnote 7. The Tribe, however, has substantially complied with the LSN requirements set forth at 10 C.F.R. 2.1003, and as of this date has filed a request for certification of its LSN arguing good cause as to the late filing. The regulations allow for late filings for good cause as to "the time fixed or the period of time prescribed for an act that is required or allowed to be done at or within a specified time". See 10 C.F.R. § 2.307. The Tribe has filed a motion requesting that the Board find good cause as to the late filing for certification of the Tribe's LSN. See Motion for Certification of Licensing Support Network Out of Time for Good Cause, filed on March 11, 2009. If the Board grants this request then the arguments presented as to LSN compliance by DOE are moot.

DOE also argues "10 C.F.R. § 2.1012(b)(2) makes clear that the time to cure any such failure to meet LSN requirements is *after* party status or the right to participate has been 'denied', and not in any such Reply." See DOE Answer at footnote 7. This argument flies in the face of administrative efficiency and economy. If the Tribe submits its request for certification to the Board and meets all requirements prior to a determination on its Petition to Intervene it would save the Board, DOE, NRC Staff, and the other parties from having to consider and respond to subsequent requests for party status. The regulations and orders issued by the Board are clear that inefficiencies in process should be avoided, parties that

come late to the process must accept the status of the proceeding at the time of admission. It does not make sense to use regulations that are intended to further administrative efficiency as the basis to require what may very well be an unnecessary and inefficient use of resources by both the Board and the parties. See 10 C.F.R. § 2.319.

Additionally, DOE argues that “[t]he Tribe may not ‘cure’ this or any other defect in its Petition, in its Reply pursuant to 10 C.F.R. § 2.309(h)(2). It is well recognized that ‘[r]eplies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it.’” (citations omitted). See footnote 7. This statement and the decisions cited by DOE are inconsistent with its argument, as DOE in fact raised LSN compliance as an issue in its Answer and therefore the Tribe has a full right to address the issue in this reply. This premise is supported by each of the cases cited by DOE in footnote 7 of its answer.

Additionally, the Tribe is attempting to “cure” this matter through the filing of a motion to request late filing of the certification of the Tribe’s LSN for good cause, not specifically through this Reply. The Tribe has worked diligently to meet the requirements of participation in this and the PAPO proceeding with no resources<sup>2</sup>. DOE states the Tribe did not participate in the PAPO proceeding. This is wrong, as prior to the leadership dispute and immediately after AIT status was granted both Darcie L. Houck and John M. Peebles filed appearances in the PAPO proceeding on July 31, 2007 and actively pursued the Tribe’s entitlement to resources for

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<sup>2</sup> Other affected units of government have received significant funding over many years to allow for the development of oversight programs, collection of data, retention of experts and professionals to monitor the development of the project and participate in these proceedings. Given the complexity of the issues both technically and procedurally without access to these resources it is difficult to impossible for an entity to have meaningful participation in this process. The Tribe after many years of pursuing AIT status was finally granted its entitlement in June of 2007 (many years after other entities were granted similar status), and it was not until October 2008 that DOE was able to issue funds to the Tribe for participation in the process. DOE then released the funds to an entity not recognized by the BIA as the legitimate tribal government, leaving the Tribe again with no resources for meaningful participation in the process.

participation in this process. DOE is well aware of the complexity and extremely high cost of participation in this process. In fact the cost to fully and meaningfully participate in this process prohibitory barrier that prevents those without unlimited funds from adequately navigating the procedural quagmire set out in the regulations, and then distorted into something even more complex and impossible by DOE in its objections and oppositions to anything that any potential party raises. AIT status means that lands that the Tribe has rights to “may be substantially and adversely affected by the location of the facility”, and the Secretary of Interior has found “that the effects are both substantial and adverse to the Tribe.” See 10 C.F.R. § 63.2.

Despite the barriers in place to prevent meaningful participation by legitimate parties such as the Tribe, work has been done to ensure substantial compliance with the LSN requirements as quickly as possible given the resources and internal dispute as to the leadership of the Tribe. The LSN listed <http://www.lsnnet.gov> meets the requirements set forth in 10 C.F.R. § 2.1003 and the Tribe has made a request to the Board for certification with good cause as to the timing of the request. See Motion for Certification of Licensing Support Network Out of Time for Good Cause filed on March 11, 2009. Once the LSN is certified the Tribe will be in full compliance with the LSN requirements.

Also it should be noted that all documents referenced by the Tribe are either generally publicly available documents, or documents listed on other (potential) parties certified LSNs. Therefore, there is no prejudice to any party including DOE and NRC Staff.

### **C. The Tribe’s Contentions are Admissible**

DOE cites a litany of cases which hold that the NRC may not “flyspeck” an EIS by looking for any deficiency, no matter how minor or technical. However, the instant matter is distinguishable from that line of authority, since the draft SEIS and draft Rail EIS completely

omit any discussion of the proximity of the tribe to the site and likely impacts that will be felt throughout each phase of the Yucca Mountain Project. Far from being a technical or minor deficiency, the instant EIS completely fails to analyze the various ways in which this project will impact the Tribe. Accordingly, the “flyspeck” cases cited by the DOE are simply irrelevant to any decision in this matter. The Tribe as an AIT has special standing in this proceeding, and a presumption exists that it will suffer substantial and adverse impacts as a result of the Project. Therefore DOE was required to assess these impacts, develop specific mitigation in consultation with the Tribe, and ensure that a proper mitigation and monitoring plan is in place over the life of the project.

#### **1. The Tribe’s Supporting Affidavits Are Proper**

The NRC Staff and DOE aver the Tribe’s supporting affidavits do not provide a factual or technical basis in support of the Peition’s claim that the criteria set forth in 10 C.F.R. § 2.326(a) have been satisfied. (DOE pp. 64, 69, 73, 81, 88, 95, 103, and 113; NRC pp. 1473, 1476, 1478, 1480, 1484, 1489, 1495, 1499, and 1509.) NRC and DOE’s interpretation of the applicable regulations are flawed because the regulations do not require satisfaction of every element of 10 C.F.R. § 2.326(a). Additionally NRC Staff and DOE do not provide any basis as to why an affiviant’s adoption of paragraphs within the contention do not provide adequate factual or technical basis for their opinions. The Tribe’s supporting affidavits do provide a factual and/or technical basis in support of the affiviants’ opinions as required by 10 C.F.R. § 2.326 and therefore comply with the requirements set forth in 10 C.F.R. § 51.109(a)(2).

##### **a. The Regulations Do Not Require an Affiviant Provide a Factual and/or Technical Basis for Each Criteria Listed Under 10 C.F.R. § 2.326(a); DOE and NRC Erroneously Conflate 10 C.F.R. §§ 2.326 and 51.109.**

The DOE and the NRC Staff interpret 10 C.F.R. § 51.109(a)(2) as requiring a supporting affidavit to separately provide a factual or technical basis in support of each factor listed under 10 C.F.R. § 2.326(a). (DOE pp. 64, 68-9, 72-3, 81, 88-9, 95, 103, and

113; NRC 1473, 1478, 1480, 1484, 1489, 1494, and 1508-09.) However, 10 C.F.R. §§ 2.326 and 51.109(a)(2) do not specify what information to include in a supporting affidavit.<sup>3</sup> The PAPO Board has addressed this issue and concluded affidavits must be individually paginated with numbered paragraphs in order to be cited with specificity. (*U.S. Dep't of Energy* (High-Level Waste Repository; Pre-Application Matters, APAPO Board), LBP-08-10, 67 NRC 450, 455 (2008)).

The first part of 10 C.F.R. 2.326(b) addresses generally the requirements of a motion to reopen and the supporting affidavit. The section states "Each of the criteria must be separately addressed, with a specific explanation of why [10 C.F.R. § 2.326(a)] has been met." The regulation does not specify whether the movant or the affiant must separately address each criteria listed in § 2.326(a). Because § 2.326(b) applies to both movants and affiants, it therefore, is reasonable to interpret the regulation to mean criteria listed under § 2.326(a) can be separately addressed and satisfied by specific explanation of the movant or affiant or both.

The DOE and NRC Staff erroneously import the language of 10 C.F.R. § 51.109(a)(2) into § 2.326(b). Section 51.109(a)(2) states in pertinent part a "contention must be accompanied by one or more affidavits which set forth factual and/or technical bases for the claim that, under principles set forth in paragraphs (c) and (d) of this section, it is not practicable to adopt the DOE environmental impact statement..." According to the plain meaning of this regulation, the affiant need only demonstrate by factual and/or technical bases the *principles* contained in sections (c) and (d) of § 51.109 are not satisfied. The DOE and NRC Staff import the 'factual and/or technical basis' language of § 51.109(a)(2) into § 2.326(b) and assert the affiant must satisfy each element of § 2.326(a) by a factual and/or technical basis. This incorrect interpretation of §§ 2.326 and 51.109 is not reasonable. As the NRC Staff concede, the only specific requirements an affiant must meet are consecutive pagination and numbered paragraphs to facilitate specific citations. NRC Staff Answer at pg. 1501.

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<sup>3</sup> NRC concedes that "neither [10 C.F.R. §§ 2.326(b) and 51.109(a)(2)] specifies what must be contained in a supporting affidavit." NRC Staff Answer at pg. 1501.

Further, as the NRC concedes, 10 C.F.R. §§ 2.326 and 51.109 do not specify what must be included in the affidavit. *Id.*

By the plain meaning of 10 C.F.R. §§ 2.326 and 51.109, a *movant* for a motion to reopen must separately address the criteria listed under § 2.326(a) – by either its contentions or supporting affidavit or both – and the presiding officer shall, *to the extent possible*, apply the criteria listed under § 2.326(a) in ruling on motions to reopen. Further, by the plain meaning of 10 C.F.R. § 51.109(a)(2) an affiant must provide a factual and/or technical basis to support not the criteria listed under § 2.326(a), but rather under the *principles* of § 51.109(c) and (d) it is not practicable to adopt the DOE environmental impact statement. Accordingly, the criteria listed under § 2.326(a) need not be satisfied only by a supporting affidavit. An affiant need only provide a factual and/or technical basis as to why the principles under § 51.109(c) and (d) render it impracticable to adopt the DOE environmental impact statement. Whether or not the Tribe's supporting affidavits properly set forth a factual and/or technical basis under the principles articulated in 10 C.F.R. § 51.109(c) and (d) to render it impracticable to adopt the DOE environmental impact statement is a proper issue for the presiding officer to decide in determining the admissibility of contentions.

## **2. Tribe's Contentions Are Proper**

The ASLB must review contentions in a light as favorable as possible to the petitioner. *In the Matter of Arizona Public Service Company, et al.*, 34 N.R.C. 149, 155 (1991). Technical perfection is not an essential element in pleading contentions. *Private Fuel Storage*, 53 N.R.C. 84, 99. Factual support of a genuine dispute need not be in evidentiary form and need not be so strong as to withstand a summary judgment disposition. *In the Matter of Gulf States Utilities Company, et al.*, 40 N.R.C. 43, 51. Rather, petitioner need only demonstrate the minimum threshold by showing material facts are disputed necessitating an in-depth inquiry. *Id.*

In order to meet the minimum threshold requirement, a contention need only include a specific statement of the issue of law or fact to be raised or challenged, a *brief* explanation of the bases of the contention, and a concise statement of the alleged facts or expert opinion in support of the contention, together with references to those specific sources and documents to be relied on by the petitioner. *Id.* (Emphasis added.) The Timbisha Shoshone Tribe's contentions satisfy all of these requirements and therefore should be considered by the ASLB.

Just because a presiding officer *may* use some or all of the factors listed under 10 C.F.R. § 2.326(a) pursuant to 10 C.F.R. § 51.109(a)(2) in ruling on a motion to reopen does *not* mean each and every element listed under § 2.326(a) is a mandatory pleading requirement under § 51.109(a)(2). Rather, § 51.109(a)(2) specifically directs a petitioner to accompany its NEPA contentions with an affidavit containing a factual and/or technical basis in support of the NEPA claim, and this section further specifically directs the factual and/or technical bases in the affidavit be such that under the *principles* of § 51.109(c) and (d) adoption of the DOE's environmental impact statement would be impracticable.

### **3. The Tribes Individual Contentions Satisfy Admissibility Requirements of the Applicable Regulations**

For years the Tribe has petitioned the DOI for certification as an affected Indian Tribe ("AIT") under the Nuclear Policy Waste Act of 1982 (NPWA). Finally, Interior granted the Tribe's petition as an AIT on June 29, 2007. Interior articulated concerns of the proximity of the repository to tribal lands and stated the "Tribe may be substantially and adversely affected by the proposed geologic repository at Yucca Mountain, Nevada and is an 'affected Indian tribe' for purposes of the [Nuclear Policy Waste] Act." The NRC Staff Answer acknowledges the potential substantial significant and adverse impact of the repository on the Tribe in its concession that the Tribe need not address standing in its petition to intervene. (NRC Staff Answer pp. 29-30)

The DOE never considered the Timbisha Shoshone Tribe as an AIT under the NPWA in its review of the Project impacts<sup>4</sup>. Had the DOE assessed the adverse impacts on the Tribe as an AIT, the SFEIS and ROD would have included a specific assessment of the substantial and adverse impacts to the Tribe. The DOE simply failed or ignored to address this crucial fact and this renders it impracticable to adopt the SFEIS at this time. A complete and adequate SFEIS would have incorporated the Tribe as an AIT and specifically assessed the potential substantial significant and adverse impact on the Tribe. A materially different result would be or would have been likely had DOE considered this evidence and fully assessed the potential impacts to the Tribe. DOE had and continues to have an obligation to consult with the Tribe, assess substantial and adverse impacts, develop an adequate mitigation and monitoring plan, and ensure that it will continue to do so through the life of the Project. DOE failed to consider the specific substantial and adverse impacts to the Tribe. DOE failed to develop mitigation that specifically addresses the substantial and adverse impacts that the Tribe will suffer. DOE, also failed to ensure that a proper mitigation and monitoring plan was developed in consultation with the Tribe. These are all direct violations of the NWPA, and NEPA.

The Tribe's status as an AIT supports a factual or technical basis to the claim that it may suffer substantial and adverse impacts as a result of this Project. Failure of DOE to assess these impacts and develop a specific mitigation and monitoring plan for impacts suffered by the Tribe raises a significant environmental issue. If DOE had complied with the law and specifically assessed these impacts, a materially different result would or would likely have occurred.

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<sup>4</sup> See the *Final 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/EIS-0250F, February 2002) (2002 FEIS); the *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/EIS-0250F-S1, July 2008) (Repository SEIS); the *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/EIS-0369, July 2008) (Rail Alignment EIS); and the DOE Record of Decision (ROD) issued October 10, 2008.

### **TIM-NEPA-01: DOSES RELATED TO INGESTION OF PARTICULATE MATTER**

The Tribe addresses the general objections made by DOE as to 10 C.F.R. §§ 2.326 and 51.109. DOE additionally states “the basis for the contention is inconsistent with the statement of the contention itself.” See DOE Answer at pg. 66. However, DOE fails to acknowledge that the reference to failing to consider particulate contamination goes directly to the issue of examining specifically the area within the Tribe’s jurisdiction, and that if you transfer estimates of DOE as to other areas to the Tribe, the amounts exceed DOE’s estimates. Therefore if DOE had considered specific impacts to the Tribe, a materially different result would likely have occurred.

### **TIM-NEPA-02: ANALYSIS OF ALTERNATIVES TO THE PROPOSED ACTION**

The Tribe addresses the general objections made by DOE above, as to application of 10 C.F.R. §§ 2.326 and 51.109.

### **TIM-NEPA-03: REPOSITORY THERMAL EFFECTS**

The Tribe addresses the general objections made by DOE above as to application of 10 C.F.R. §§ 2.326 and 51.109.

### **TIM-NEPA-07 MITIGATION**

All DOE environmental studies including the SFEIS did not include the Tribe as an AIT. Had DOE included the Tribe as an affected Indian Tribe in its mitigation plan there would be or would have been likely a materially different result regarding mitigation as the DOE would have considered the adverse impacts on the culture, environment, and health policy of the Tribe. Moreover, had DOE considered the cultural impacts on the Tribe in its mitigation plan the DOE would have appropriately developed a cultural resource mitigation plan with ongoing consultation to continually assess cultural impacts on the Tribe throughout the existence of the repository, an arrangement akin to consultation agreements of the Federal Energy Regulatory Commission (“FERC”). The absence of a mitigation plan specifically addressing the Tribe, as an AIT, raises a significant environmental issue, and this failure demonstrates a factual or technical basis to support a significant environmental issue and the likelihood of a materially different result of the SEIS.

For years the Timbisha Shoshone Tribe attempted to regain their land the Tribe inhabited since time immemorial. On November 1, 2000, the Tribe celebrated the passage of Public Law 106-423 (a/k/a the "Timbisha Shoshone Homeland Act") which returned 7753+ acres of aboriginal lands in Nevada and California to the original aboriginal inhabitants: the Timbisha Shoshone Tribe. Some or all of this land was subsequently held in trust by the DOI as trustee for the benefit of the Tribe ("Trust Lands"). Unfortunately, soon thereafter the Tribe's lands were once again under threat by the Federal government when the Department of Energy decided to propose a nuclear repository at Yucca Mountain and proposed a rail line to transport spent nuclear fuel either through or adjacent to the Tribe's aboriginal territory.

The Tribe immediately protested to the DOE and DOI in 2004. The Tribe also petitioned the Secretary of the Interior for affected Indian status pursuant to the Nuclear Policy Waste Act of 1982, 42 U.S.C. § 10101, 10 C.F.R. § 60, *et seq.* ("NPWA"). On February 7, 2006 the Tribe submitted its Amended Petition Seeking Determination of Affected Indian Tribe Status to the Secretary of the Interior. On June 29, 2007, Interior finally certified the Tribe as an affected Indian Tribe ("AIT") under the NPWA. Interior iterated its concerns regarding the close proximity of the proposed repository to the Tribe's Trust Lands and certified the Tribe with AIT status because the "Tribe may be substantially and adversely affected by the proposed geologic repository at Yucca Mountain, Nevada..."

The NRC Staff has acknowledged the Timbisha Shoshone Tribe as an AIT. (NRC Staff Answer pp. 29-30) Accordingly, because the NRC Staff concedes the Tribe need not address standing in its petition, the Staff acknowledges the potential substantial significant and adverse impact of the proposed repository on the Tribe, and this implicit concession lends credence to the Tribe's claim that DOE's environmental documents should have included in its analysis the Tribe as an AIT. Because the DOE failed to incorporate the Tribe in its environmental documents, it is impracticable to adopt the FEIS. A materially different result would or likely would occur had the FEIS

properly considered the Tribe as an AIT because the mitigation studies would have considered the adverse impacts on the Tribe's lands.

The DOE proposed repository will exist for over 10,000 years. At a minimum, the proposed project should adhere to the standards of cooperative agreements between the Federal Energy Regulatory Commission ("FERC") and other governmental entities concerning hydroelectric projects that last for 50 years. The National Historic Preservation Act, 16 U.S.C. § 470, *et seq.*, DOE to consult with Indian tribes in order to help sustain the preservation of tribal historic properties. 16 U.S.C. § 470a(d). The DOE should be held to at least the same standards applicable to the FERC proceedings with regard to fulfilling their government-to-government trust obligation. Accordingly, the DOE should at a minimum enter into an ongoing Cultural Resources Mitigation and Management Plan with the Timbisha Shoshone Tribe in order to address the adverse impacts the repository may have on the Tribe's cultural properties. The DOE failed to address this obligation in their environmental documents. The DOE should have at a minimum considered an ongoing cultural mitigation plan to address substantial and adverse impacts in its SFEIS. DOE's failure to do so raises a significant environmental issue. This failure supports a factual or technical basis lending support to the claim that had DOE properly assessed the mitigation of adverse impacts on Timbisha Shoshone cultural properties, a materially different result would or likely would occur.

#### **D. Reservation of Right to Participate in Proceedings as Interested Governmental Entity**

The Tribe has stated admissible contentions as set forth above. However, in the event the Board does not admit any of the contentions proffered by the Tribe, the Tribe as an AIT has standing to participate as an interested governmental participant (IGP) in this proceeding. See 10 C.F.R. § 2.315(c). The reserves its right to such participation and would request that in the event the Tribe's Petition is not granted as to intervention that the Board in the alternative grant IGP status to the Tribe. See *Entergy Nuclear Generation Company and Entery Nuclear Operations, Inc.*, (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 349 (2006); and

*Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.*, (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 209 (2006).

### **III. Conclusion**

The Tribe has met its burden to demonstrate standing, substantial LSN compliance, and at least one admissible contention. The Tribe based on this showing respectfully requests that the ASLB grant the Tribe's request to participate in the proceeding as a full party and a grant a hearing as to the admissible contentions submitted.

Dated: March 11, 2009

Respectfully submitted:

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket No. 63-001
	)	
U.S. Department of Energy	)	ASLBP Nos. 09-876-HLW-CAB-01
	)	09-877-HLW-CAB-02
(High-Level Waste Repository)	)	09-878-HLW-CAB-03
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the **"REPLY TO NRC STAFF AND DOE ANSWERS TO TIMBISHA SHOSHONE TRIBES' MOTION TO INTERVENE AS A FULL PARTY"** in the above-captioned proceeding have been served on the following persons this 27<sup>th</sup> day of March 11, 2009, by Electronic Information Exchange.

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