UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
United States Department of Energy	)	Docket No. 63-001
	)	
(High Level Nuclear Waste Repository	)	December 22, 2008

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

Joe Kennedy, Board Member and
Executive Director
Timbisha Shoshone Yucca Mountain
Oversight Program Non-profit Corporation
3560 Savoy Boulevard
Pharump, NV 89061
NEWE SOGOBIA

Tel: (775) 751-7633

E-mail: joekennedy08@live.com

TABLE OF CONTENTS

I. INTRODUCTION 2

A. Request and Party Identity 3

B. Timeliness 3

C. Standing 4

(a) Injuries in Fact and Causation 5

(b) Zone of Interest 6

(c) Redressability 6

D. Hearing Requested 6

E. Subpart J 7

F. Joint Contentions 7

II. INTRODUCTION TO CONTENTIONS 7

III. CONTENTIONS 8

A. Legal Issue 8

(1) Ownership and Control 8

(2) Water Rights 10

B. Safety 13

(1) NEPA Requirements 13

IV. CONCLUSION AND PRAYER FOR RELIEF 16

I. INTRODUCTION

A. Request and Party Identity

The Timbisha Shoshone Yucca Mountain Oversight Program Non-profit Corporation (Timbisha) hereby petitions for a formal hearing to be held on the application of the Department of Energy (DOE) for a construction authorization for the proposed high-level radioactive waste repository at Yucca Mountain (hereinafter referred to as the "proceeding"). Timbisha is the legitimate successor duly entitled by the Timbisha Shoshone Tribe, to exercise the rights and powers of the Timbisha Shoshone Tribe as an "affected Indian tribe" under the Nuclear Waste Policy Act of 1982, as amended (NWPA) 42 USC. §10101. Timbisha also petitions to intervene as a full party to this proceeding. The name of the party and its address are as follows:

Name of Party:	Timbisha Shoshone Yucca Mountain Oversight Program Non-profit Corporation
Address:	Joe Kennedy Board Member and Executive Director 3560 Savoy Boulevard Pharump, NV 89061 NEWE SOGOBIA
Telephone:	(775) 751-7633
E-mail:	joekennedy08@live.com

B. Timeliness

1. The application was noticed for hearing on October 22, 2008 (73 Fed. Reg. 63029), and this Petition is timely filed within 60 days of publication of such notice.

2. Pursuant to 10 CFR Part 2, Subpart J, § 2.1014, good cause exists for any failure of timely filing. Timbisha is the sole affected Indian tribe, certified as such by the Department of the Interior on June 29, 2007. Granting "affected Indian tribe" status

affords Timbisha status as a "party" defined within the meaning of 10 CFR Part 2, Subpart J § 2.1001concurant with this filing. Timbisha has been denied funding for 17 months since being certified as an "affected Indian tribe" in amounts insufficient to stand up an independent oversight and monitoring program of the Yucca Mountain repository and prepare for licensing by the NRC to effectively protect the rights and interests of Timbisha. Timbisha views the failure by the DOE to provide the necessary financial resources manifest environmental racism.

3. There exists is no other means or representation by a party whereby Timbisha's interests can be represented fairly or otherwise protected.

4. Full participation by Timbisha will ensure the completeness of the record and confidence by the general public in the proceedings and the NRC's role as a nuclear regulator.

5. No other party can represent Timbisha and would frustrate the spirit and intent of the NWPA Section 117(b) requiring the Secretary of Energy to "consult and cooperate with…any affected Indian tribe in an effort to resolve the concerns of such State and any affected Indian tribe regarding the public health and safety, environmental, and economic impacts of any such repository."

6. Timbisha will sustain substantial permanent injury as set forth with particularity in contentions herein submitted in III Contentions.

C. Standing

1. The proposed repository would be located in the central Great Basin about 30 miles east of Death Valley, within the homelands of the Western Shoshone Nation, NEWE SOGOBIA, formally acknowledged by and through the 1863 Treaty of Ruby

Valley, 18 Stat. 689-692, Article V. Further, additional formal acknowledgment of Timbisha's right to these lands is acknowledged pursuant to the Timbisha Shoshone Homelands Act, 16 USC 410aaaa, PL 106-423 (Homeland Act). Therefore, Timbisha is entitled to request a hearing and be admitted as a full party pursuant to 10 CFR §§ 2.309(d)(2)(iii) and 63.63 section (a), and section III, Paragraph A. Right of Standing by an "affected Indian tribe" in the Notice of Hearing.

2. In addition to this provision, Timbisha has standing to request a hearing because (a) it would suffer numerous concrete and specific injuries in fact, within the zone of interests protected by the NWPA, the Atomic Energy Act of 1954, as amended (AEA) 42 USC §§ 2011, *et seq.* and the National Environmental Policy Act of 1969, as amended (NEPA) 42 USC 4331, *et seq.*, should a repository at Yucca Mountain be built, (b) these injuries are consequent to licensing, transportation to, and operation of a geologic repository at Yucca Mountain, and (c) these injuries will be addressed by the denial of the Department of Energy (DOE) application.

(a) Injuries in Fact and Causation

Timbisha has a longstanding interest in protecting the high quality of life, health and safety of this and future generations of Newe[1] from radiation health effects that injure Newe collectively and individually. Among the inevitable injury to the Newe is the radioactive contamination of the land used an occupied by Newe and radiation exposure of the Newe that is cumulative with the past exposure from US testing of weapons of mass destruction at the Nevada Test Site (NTS) from 1951-1994. The sovereign interest of the Western Shoshone Nation under treaty is injured by radioactive contamination and,

[1] The word "Newe" is the language of the Western Shoshone people use to refer to themselves and translates in the English language as, "the people".

under the First Amendment to the US Constitution, Timbisha is injured because under Newe custom, Newe Sogobia[2] is sacred. Failure to protect Newe Sogobia concomitant with Timbisha is to discriminate against the Newe by establishing a religious preference that does penalize the Newe for their free exercise of religion and practice protective, preservation and conservation of Newe Sogobia. Timbisha is injured because special use areas contemplated under the Homeland Act, Section 5, to be used for "low impact, ecologically sustainable, traditional practices…" will be contaminated with radioactive material. These injuries are sufficient to give Timbisha standing to intervene.

(b) Zone of Interest

Timbisha's stated injuries are radiological in nature, and therefore, they fall within the interests protected by the NWPA, the AEA, and the NEPA.

(c) Redressibility

These injuries will not occur if the Yucca Mountain application in this proceeding is denied, the relief requested by Timbisha.

D. Hearing Requested

Timbisha hereby formally requests a formal adjudicatory hearing on each of its contentions herein submitted in accordance with section 189a(1)(A) of the AEA, Section 114(d) of the NWPA, and 10 CFR Part 2, Subpart C and J. In addition, Timbisha 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.

[2] The word "Sogobia" is the language of the Western Shoshone people that translates in the English language as, "Earth Mother". Used together, "Newe Sogobia" refers to the interconnected religious embodiment of the people and the land defined by the 1863 Treaty of Ruby Valley. There is no separation of church and state in the self-determined governance by the Western Shoshone Nation.

E. Subpart J

Timbisha has substantially complied with Subpart J in that it has designated a person to be responsible for electronic files of documentary material; including Section 2.1003, in that it has designated an official responsible for the administration of its responsibility to provide electronic files of documentary material; established procedures to implement the requirements in Section 2.1003; provided training to its staff on the procedures for the implementation of the responsibility to provide electronic files of documentary material; and ensure that all documentary material carries the submitters unique identification number; and its responsible designated representative has certified to the best of his knowledge that, the documentary material specified in Section 2.1003 has been identified and made electronically available.

F. Joint Contentions

Timbisha has no joint contentions but, may identify joint contentions later, in accordance with such reasonable schedule as may be set by the presiding officer.

II. Introduction to Contentions

Timbisha has drafted "single-issue" contentions, each raising a single legal issue, single safety issue, single environmental issue, and each supported by a single set of related facts proving: 1) an error in conclusion by the DOE; 2) demonstrating a lack of sufficient data to support a given conclusion made by the DOE; or, 3) omissions. There is a legal contention that challenges the lawfulness of what DOE proposes (such as site ownership) and should be resolved based on written briefs and oral arguments or other government-to-government interactions. Errors of omission are contentions based on the lack of completeness by the DOE to provide necessary documentation. Timbisha is prepared to

assist the Commission at any time in locating any document necessary to provide a full and complete record in the proceedings.

III. Contentions

A. Legal Issue

(1) Land Ownership and Control

(a) A specific statement of the issue of law or fact to be raised or controverted.

Pursuant to 10 CFR § 63.121 (a)(1)(part of Subpart E) the geologic repository operations area (GROA) is required to be located in and on lands that are either acquired lands under the jurisdiction and control of DOE, or lands permanently withdrawn and reserved for its use. Also, 10 CFR § (a)(2) requires such lands to be held free and clear of all such encumbrances including easements, if significant, such as: (iii) All other rights…, or otherwise. This contention alleges non-compliance with this regulatory provision and therefore raises a material issue within the scope of the licensing proceeding.

(b) A brief explanation of the basis of the contention.

Yucca Mountain is not federally owned. The DOE is unable to demonstrate ownership of Yucca Mountain acquired under the jurisdiction of the DOE because the Treaty of Ruby Valley, 18-Stat. 689-692, is "in full force and effect" and thereby controlling. The treaty does not cede land to the US and requires payment by the US to the Newe for the specific interests sought. The US failed to make the payment schedule required by Article VII, the purchase clause, and therefore the land returned to the status quo ante the treaty.

(c) A concise statement of the alleged facts or expert opinion that support the contention, along with appropriate citations to supporting scientific material.

The Treaty of Ruby Valley, 18 Stat. 689-692, entered into by the Western Shoshone Nation and the US emanates from International Law as customarily practiced among nations and is the most formal recognition between nations of one another with the intent to preserve the existence and interests of each treaty making party. The importance of Indian interests were deemed of such importance to the US Congress, when Nevada was admitted as a territory in March of 1861, that in the Organic Act it was provided, "…that nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such shall remain unextinguished by treaty between the United States and such Indians;…" No provision in the Treaty of Ruby Valley, 18 Stat. 689-692 outside of the specific interests the US sought to purchase then defaulted payment on could effect an extinguishment. No other treaty exists between the Western Shoshone Nation and the US.

(d) Sufficient information to show that a genuine dispute exists with the DOE's application on a material issue of law or fact, with reference to the documentary material that provides a basis for the contention, or the identification of failure and the supporting reasons for Timbisha's belief.

This contention provides undisputed fact of law including the US Constitution, the Treaty of Ruby Valley, 18 Stat. 689-692, and the Act of Congress Organizing the Territory of Nevada, 12 Stat. 209-214, that permanently preserve the interests of Timbisha, a constituent of the Western Shoshone Nation. The facts presented raise a material issues of law that the DOE must bear the burden of demonstrating do not apply to the Yucca Mountain GROA pursuant to 10 CFR § 63.121 (a)(1). Timbisha believes, that the DOE omission of these facts from the License Application (LA) is more than a mere dispute but, in fact an ongoing US practice of environmental racism that singles out the already vulnerable Western Shoshone Nation for special treatment, as institutions we trust to keep us safe fail to do so.

(e) The specific regulatory or statutory requirement to which the contention is relevant.

The DOE is required to demonstrate that the GROA must be located in and on lands that are either acquired lands under the jurisdiction and control of the DOE, or lands permanently withdrawn and reserved for its use pursuant to 10 CFR §§ 63.121 (a)(1), (2);and 10 CFR 63.121 (a)(2)(iii).

(2) Water Rights

(a) A specific statement of the issue of law or fact to be raised or controverted.

Pursuant to 10 CFR § 63.121 (d)(1) the DOE is to obtain such water rights as may be needed to accomplish the proposed repository; and 10 CFR § 63.121 (d)(2) water rights are included in the additional controls to be established. Pursuant to the Homeland Act, 16 USC 410aaaa, PL 106-423, Section 5 (b)(2) Timbisha's water rights are established with "The priority date of the Federal water rights described in subparagraphs (A) through (E) of paragraph (1) shall be the enactment of this Act…shall not be subject to relinquishment, forfeiture or abandonment." Timbisha challenges the availability of water as insufficient to meet the needs of both the DOE and Timbisha.

(b) A brief explanation of the basis of the contention.

Timbisha's water rights are guaranteed in the Homeland Act and will require further determination to identify appropriate parcels and associated water needs, and are insufficient or otherwise impaired by the requirement of 10 CFR § 63.121 for the DOE to obtain water rights from the same source as Timbisha.

(c) A concise statement of the alleged facts or expert opinion that support the contention, along with appropriate citations to supporting scientific material.

Water sufficient for Timbisha are guaranteed pursuant to the Homeland Act and are to be taken into trust but, are insufficiently available or otherwise impaired by the requirement of 10 CFR § 63.121(b) and (d).

(d) Sufficient information to show that a genuine dispute exists with the DOE's application on a material issue of law or fact, with reference to the documentary material that provides a basis for the contention, or the identification of failure and the supporting reasons for Timbisha's belief.

This contention challenges the DOE application as materially incomplete because it fails to sufficiently consider the water requirements of Timbisha pursuant to the Homeland Act, 16 USC 410aaaa, PL 106-423, in the LA. The DOE fails to comply with the legal requirement of 10 CFR § 63.121 (b) and (d). Timbisha believes that additional water resources are needed to meet its needs and that the current competing requirements places a disproportionate heavy burden on Timbisha to locate high quality water resources that are insufficient or otherwise impaired by the DOE requirements in the additional controls established under paragraph (b).

(e) The specific regulatory or statutory requirement to which the contention is relevant.

Pursuant to 10 CFR§ 63.31 (a)(3)(iii), provides that, "The site and design comply with the performance objectives and requirements contained in subpart E of this part;" The DOE is required to obtain water rights as may be needed to accomplish the purposes of the GROA and to include those water rights in the additional controls to be established under 10 CFR § 63.121 (d). This contention alleges non-compliance with these regulatory

provisions and therefore raises a material issue within the scope of the licensing proceedings.

B. Safety

(1) NEPA Requirements

(a) A specific statement of the issue of law or fact to be raised or controverted.

DOE's 2008 FSEIS and 2002 FEIS are inadequate because they fail to reasonably identify post-closure impacts to human health that are culturally appropriate to Timbisha. This deficiency is significant, and if it were to be addressed in a satisfactory manner, the disclosure of the radiological impact to the Newe would be materially disproportionate and significant.

(b) A brief explanation of the basis of the contention.

DOE's 2008 FSEIS and 2002 FEIS are inadequate because neither address a culturally appropriate estimate of radiation exposure to a Native Americans. The reasonably maximally exposed individual is based upon an individual living 11 miles away with a lifestyle and diet that do not adequately replicate Native American lifestyle. Timbisha's experience is that based upon lifestyle differences alone the expected outcome for the Newe is a significant increase in exposure risk.

(c) A concise statement of the alleged facts or expert opinion that support the contention, along with appropriate citations to supporting scientific material.

Timbisha, first sought to understand the biological impacts of radiation exposure upon the Newe through efforts of the Native Community Action Council, Nuclear Risk Management for Native Communities project, of which Timbisha tribal members are a part. Through the research of the NCAC, NRMNC Timbisha discovered that Newe exposure from radioactive fallout from US testing of weapons of mass destruction was significant based on lifestyle differences such as diet, through the consumption of wild game. The study, The Assessment of Radiation Exposure in Native American Communities from Nuclear Weapons Testing in Nevada (2000), published in Risk Analysis, 20(1), 101-111, demonstrates that assessments of risk need to take into account different lifestyle, different diet and life-ways.

(d) Sufficient information to show that a genuine dispute exists with the DOE's application on a material issue of law or fact, with reference to the documentary material that provides a basis for the contention, or the identification of failure and the supporting reasons for Timbisha's belief.

This contention challenges the adequacy of the DOE's 2008 FSEIS and 2002 FEIS because neither uses an assessment of radiation exposure to the RMEI that is appropriate to Timbisha or other Newe. Timbisha believes that, based on lifestyle differences that the

DOE failed to study, Timbisha will unreasonably bear a disproportionate burden of risk of radiological exposure.

(e) The specific regulatory or statutory requirement to which the contention is relevant.

10 CFR § 63.31 (a)(1) requires, before a license is issued, that there is reasonable assurance that the types and amounts of radioactive materials described in the application can be received and possessed in a GROA of the design proposed without unreasonable risk to the health and safety of the public. This contention challenges compliance with NEPA and 10 CFR § 63.31 (a)(1) and therefore raises a material issue.

IV. CONCLUSION AND PRAYER FOR RELIEF

Based upon the foregoing, the Department of Energy's License Application should be denied.

Respectfully Submitted,

Joe Kennedy, Board Member and
Executive Director
Timbisha Shoshone Yucca Mountain
Oversight Program Non-profit Corporation
3560 Savoy Boulevard
Pharump, NV 89061
NEWE SOGOBIA

Tel: (775) 751-7633

E-mail: joekennedy08@live.com