

**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

February 24, 2009

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

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Introduction

The National Environmental Policy Act (“NEPA”) and federal regulations implementing NEPA require both the U.S. Department of Energy and the U.S. Nuclear Regulatory Commission to consider and analyze the significant environmental consequences that the proposed Yucca Mountain high-level nuclear waste repository might have on the Timbisha Shoshone Tribe, including its cultural and historical interests. In addition, the DOE’s federal trust responsibility, Executive mandates, and DOE’s own policies require DOE to consult with the Timbisha Shoshone on those potential impacts. NEPA further places on the NRC the obligation to ensure that the DOE’s license application, if granted, would not violate other federal statutes that might apply.

In its Petition to Intervene in this proceeding, the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation (“TOP”) submitted a contention that DOE’s license application and supporting environmental impact statements fail to satisfy DOE’s and NRC’s NEPA, regulatory, and other statutory obligations relating to the environmental consequences

that the proposed repository will have on Timbisha Shoshone cultural interests. As this Reply demonstrates, DOE concedes that contaminated groundwater from the proposed repository will reach springs in Death Valley, California, that are sacred to the Timbisha Shoshone and that have cultural, historic, and spiritual significance to the Tribe. Although DOE and the NRC Staff filed Answers that seek to disallow the TOP's NEPA contention on narrow procedural grounds,¹ they fail to demonstrate that DOE and NRC have, in fact, satisfied its NEPA, regulatory, and other statutory obligations to consider and analyze the particular impacts of the proposed repository on the Timbisha Shoshone's cultural and historic interests, or to consult with the Timbisha Shoshone on those anticipated impacts. If the NRC were to approve the license application without granting TOP's Petition, the Licensing Board would not have before it critical information about environmental consequences to the Timbisha Shoshone that must be considered in the decision-making process. Moreover, if the Licensing Board were to approve the license application without first ensuring that DOE has complied with statutory obligations to consult with the Timbisha Shoshone, its decision approving the application would violate the NRC's own statutory obligations and would be void.

While the failure to consult may be corrected by "after-the-fact" consultation if the Licensing Board preserves TOP's entitlement to full-party status in this proceeding, a contrary decision will create a reversible error that will jeopardize the finality of any eventual licensing decision in this proceeding.

In this Reply, TOP responds to each of the arguments raised by DOE and the NRC Staff in opposition to TOP's Petition. *First*, TOP establishes that the DOE's and NRC's failure to

¹ See Answer of the U.S. Department of Energy to the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation Petition to Intervene as a Full Party, January 15, 2009 ("DOE Answer"); NRC Staff Answer to Intervention Petitions, February 9, 2009 ("NRC Staff Answer").

consult with the Timbisha Shoshone regarding cultural and historic impacts on the Tribe precludes denying TOP full-party status. *Second*, TOP demonstrates that it has standing to intervene as a full party in this proceeding. *Third*, TOP shows that it has complied with its Licensing Support Network (“LSN”) requirements. *Fourth*, TOP establishes that it has at least one contention, an environmental contention under NEPA, that it has adequately supported and that states a genuine dispute on a material issue of law and fact. Accordingly, TOP has stated an admissible contention. Its Petition should be granted.

Argument

1. The U.S. Government, including DOE, has a statutory obligation to consult with the Timbisha Shoshone regarding the Tribe’s concerns about the environmental impact that a Yucca Mountain repository will have on tribal cultural and historic interests but has failed to satisfy those obligations.

Neither the DOE nor NRC has provided separate and meaningful consultations with the Timbisha Shoshone Tribe regarding specific effects that the DOE’s Yucca Mountain repository, if licensed, will have on unique Timbisha interests. The failure of DOE and NRC to consult with the Timbisha Shoshone violates federal statutes, Executive branch mandates, and DOE’s own policies regarding consultation with Indian tribes. That violation will have important ramifications on the Tribe’s culture and our Nation’s goal to preserve areas and items of great historical and cultural significance. For the purposes of TOP’s Petition to Intervene, the Federal agencies’ failure to consult significantly harmed TOP’s ability to participate in this proceeding, including TOP’s ability to investigate its concerns and prepare its contentions by the December 22, 2008 deadline. Given DOE’s and NRC’s failure to consult, TOP should not be precluded from being granted full-party status based on the alleged inadequacies of its Petition.

In particular, DOE and NRC should have consulted with the Timbisha Shoshone regarding the potential contamination of springs in Death Valley from repository operations. DOE concedes in its environmental impact statements that contamination from the Yucca Mountain repository may migrate to and discharge from springs in Death Valley that are sacred sites for the Timbisha with cultural and historic significance. (*See infra*, Part 4.D.) Remarkably, however, neither DOE nor NRC has sought to consult with the Timbisha Shoshone regarding the contamination of those sacred sites. (*See* Declaration of Barbara Durham (“Durham Decl.”) ¶ 8 (attached hereto as Attachment (“Att.”) 1); Declaration of Pauline Esteves (“Esteves Decl.”) ¶ 10 (attached hereto as Attachment (“Att.”) 2).) DOE’s lack of consultation violates its duty under the National Historic Preservation Act 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, Executive Order 13175 (November 6, 2000).²

A. DOE has failed to meet its obligations under the National Historic Preservation Act.

Furnace Creek Springs is one of a number of springs that are located along the north-eastern 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.3-13.³) As is discussed in the FEIS and the FSEIS⁴ for Yucca Mountain, these springs on the north-east boundary of Death Valley are an outfall for groundwater in the Death Valley regional groundwater flow regime that may be

² Although NRC is not required to consult, it is “encouraged” to do so. Executive Order 13175 (Nov. 6, 2000).

³ 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”).

⁴ 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”).

impacted by radionuclides derived from Yucca Mountain. (See FEIS, Fig. 3-15.) The Tribe believes 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 the DOE failed to engage in meaningful consultation with the Tribe, the Tribal Historic Preservation Officer (“THPO”), and tribal elders regarding the potential impacts of the proposed Yucca Mountain Repository on that site.

The Furnace Springs site is a property of traditional and cultural importance to the Tribe, thus it is potentially eligible for inclusion on the National Register. (See Att. 1, Durham Decl. ¶¶ 3-6.) Properties of traditional religious importance to an Indian tribe are eligible for inclusion on National Register. 16 U.S.C. § 470a(d)(6)(A). The Advisory Council on Historic Preservation regulations requires 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). DOE admits that water and contaminants from the proposed Yucca Mountain repository could migrate to springs in Death Valley and, therefore, the Furnace Springs would be an affected site. (FSEIS, Vol. III at CR-324; see also FSEIS §§ 3.1.4.2.1, 5.4, & Fig. 3.8; FEIS Fig. 3-15.) According to Tribal Elder and Tribal Council member Pauline Esteves, the Furnace Springs site is sacred to the Timbisha Shoshone (see Att. 2, Esteves Decl. ¶ 10); it therefore may be eligible for inclusion on the NRHP. However, DOE has not evaluated the Furnace Springs site as a potential historical site.

The Advisory Council on Historic Preservation (“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 Tribe 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.

As part of its duty to gather information and consult, the DOE also failed to gather information on the Furnace Springs area as required by 36 C.F.R. § 800.4. (Att. 1, Durham Decl., ¶ 8.) To fulfill its statutory requirement, the DOE must conduct a cultural survey with Timbisha Shoshone tribal leaders and elders, as well as experts who know the Furnace Springs site. Native Americans who regularly practice their religion and traditional culture throughout their original territory are keepers of the traditional knowledge. (Ian Zabarate, *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).)⁵

⁵ 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).

Thus, under the National Historic Preservation Act, DOE is required to determine whether the Furnace Springs site is eligible for inclusion on the National Register and to conduct a cultural survey of the property. In making that determination and conducting the survey, DOE is required to consult with the Tribe. In addition, it is required to develop and evaluate alternatives or modifications that could avoid, minimize, or mitigate adverse effects. DOE has done none of this, and therefore is both in violation of the National Historic Preservation Act and has placed this Licensing Board in a situation where it is likely to violate the law as well.

In addition, DOE's failure to meet the above requirements has caused it to fail to meet its obligation under NEPA to "insure the professional integrity, including scientific integrity of the discussions and analyses in the environmental impact statement." 40 C.F.R. § 1502.24. Without properly analyzing the Furnace Springs site, including consultation with the Tribe 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. Likewise, 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 its analysis.

B. DOE has violated its trust responsibility by failing to consult with the Tribe regarding the Furnace Springs site.

The federal trust responsibility, Executive mandates, and its own policies impose legal obligations on the DOE to consult with Indian tribes on all proposed federal actions that may affect the tribes' interests in a manner that ensures federal consideration of the tribes' concerns and objections with regard to such actions. In this case, the DOE made no effort to consult with the Tribal Historic Preservation Officer ("THPO") Barbara Durham or tribal elders to properly ascertain the impacted cultural resources. (Att. 1, Durham Decl. ¶ 8.)

The DOE's inadequate consultation and omission of the Furnace Springs site, as well as the failure to consult on the other Death Valley springs, violates DOE's trust responsibility to the Tribe. The trust responsibility of the United States requires the NRC and the DOE 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 (9th 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 (9th 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. Or. 1996). These principles are well-settled. *E.g.*, *Morton v. Ruiz*, 415 U.S. 1999, 236 (1974) (denial of general assistance benefits to Indians living near the reservation held to be “inconsistent with the ‘distinctive obligation of trust incumbent upon the government in its dealings with a dependent and sometimes exploited people’”) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)); *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) (“in some contexts, the fiduciary obligations of the United States mandate that special regard be given to the procedural rights of Indians by federal administrative agencies”) (quoting *Felix S. Cohen’s Handbook of Federal Indian Law* 225 (Rennard Strickland ed. 1982)).

C. DOE also violated its own consultation policies to ensure protection of cultural resources.

In addition to the required federal laws stated above, the DOE is responsible under Executive Orders and its own consultation policies to ensure the protection of cultural resources. President Clinton promulgated guidelines for federal agencies to follow in relation to matters affecting tribes. Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000). 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) (attached hereto as Attachment (“Att.”) 3). 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). Significantly for this proceeding, this definition does not include a loose affiliation of interested Native Americans such as the American Indian Writers Subgroup or Consolidated Group of Tribes and Organizations. Despite the DOE’s attempt to lump its consideration of all Indian tribe’s interest together under these umbrella organizations, the AIT has not delegated the recounting of its cultural issues or history to either of these entities. These groups are not the leadership of the AIT or the tribes in the region, and the DOE’s consideration of their views is not an adequate substitute for considering the Timbisha’s own unique interests.

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 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.”⁶ *Id.* at 4. As noted above, although the Tribe considers Furnace Springs to be of traditional and cultural importance, DOE has not consulted with the Tribe about this site or others the Tribe may consider sacred.⁷ Such consultation by DOE “will include the prompt exchange of information regarding identification, evaluation, and protection of resources.” *Id.* The American Indian Writers Subgroup or Consolidated Group of Tribes and Organizations may develop general concepts about the area around Yucca Mountain. However, the 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 has not yet adhered to its own policy. (*See, e.g.*, Att. 1, Durham Decl. ¶ 8.)

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. The DOE failed in its mission when it did not seek out the proper Timbisha Shoshone tribal representatives with which to consult after the Department of the Interior, on June 29, 2007, declared the Tribe to be an AIT. The DOE has failed to adhere to its own policy even now, eighteen months after the Tribe achieved its AIT status. That failure to

⁶ 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.

⁷ “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.” *Id.*

consult has adversely affected the Timbisha's ability to comply with the requirements to achieve full-party status. NRC should cure that violation by allowing TOP to participate as a full party.

2. TOP has standing as an “Affected Indian Tribe” to participate as a party under 10 C.F.R. § 2.309.

Both the DOE and the NRC Staff challenge TOP's standing to participate in this proceeding as a party. TOP, representing the Timbisha Shoshone Tribe (the “Tribe”), filed its Petition to Intervene as an Affected Indian Tribe (“AIT”) on December 22, 2008. On that same day, a second Petition to Intervene was filed by a group of individuals (“TIM”) purporting to represent the Tribe. (*See* Timbisha Shoshone Tribe's Petition for Leave to Intervene in the Hearing, December 22, 2008.)

No one disputes that the Tribe is an AIT as that term is defined in 10 C.F.R. § 63.2. Both the DOE and NRC Staff Answers expressly acknowledge that the Tribe is an AIT and, as a consequence, has standing to participate as a party in this proceeding. (*See* DOE Answer, pp. 21-22; NRC Staff Answer, pp. 29-30.) Notwithstanding their respective acknowledgements that the Tribe has standing, both the DOE and NRC Staff raise the question of which of the two groups—TOP or TIM—properly represents the Tribe, and argue that only one of the two has standing as the AIT in this proceeding. As is demonstrated below, TOP was expressly created for representing the Tribe in this matter, and only it has standing to fully participate as a party in this proceeding as the AIT.

The dispute over which group speaks as the legally recognized representative for the Tribe currently is being litigated in a California federal district court. *Timbisha Shoshone Tribe, et al. v. Salazar, et al.*, U.S. District Court Eastern District of California, Case No. 09-CV-246. Although TOP believes that it demonstrates in this Reply that it speaks for the Tribe and is the proper AIT, if the Licensing Board chooses to defer to the ruling in the federal court action in

which the question to Tribal representation is now being considered, TOP respectfully requests that the Board withhold any ruling on its Petition until such time as the issue is resolved in that action.

A. The Tribe is an AIT and, therefore, has standing in this proceeding.

As a threshold matter, it is clear that an AIT presumptively has standing to participate as a party without being required to make any further showing, and neither DOE nor the NRC Staff challenge that presumption. The presumption of standing for an “affected federally recognized tribe,” which is codified at 10 C.F.R. § 2.309(d)(2)(iii), 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 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.

For over a decade the Tribe 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 Tribe the status of AIT 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.)⁸ The Tribe is the *sole* AIT of the approximately 17 tribes in the region. This status not only garners the Tribe a voice in this proceeding but allows it to receive funds from the federal

⁸ LSN #: TBS00000002 Amended Petition Seeking Determination of Affected Indian Tribe Status Under the Nuclear Waste Policy Act, July 29, 2007, pp. 1-4.

government to research and document the impact that the proposed repository will have on its homelands and its government. Because the Tribe is an AIT, the only remaining question for the purpose of satisfying the standing requirement is to resolve which group—TOP or TIM—is the authorized representative of the Tribe. As demonstrated below, that is TOP.

B. TOP was expressly created to represent the Tribe in these proceedings.

(1) The Tribe’s Tribal Council properly created TOP.

The Tribe’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) (attached hereto as Attachment (“Att.”) 4).) 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 Tribe and to which the Tribal Council could delegate day-to-day authority and oversight over specific matters. (Timbisha Shoshone Tribal Resolution 2008-29 (attached hereto as Attachment (“Att.”) 5).) Exercising that authority, on November 25, 2008, the Tribal Council created TOP to represent the Tribe’s interests in this proceeding. (Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation Articles of Incorporation, Nov. 25, 2008 (attached hereto as Attachment (“Att.”) 6).)

(2) TOP is the official representative of the Tribe and is the AIT for the purposes of this proceeding.

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 Tribe; to ensure that the Tribe 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 for the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation at 1 (attached hereto as Attachment (“Att.”) 7).) Thus, when TOP communicates with the United States government, it does so as the voice, and with the support, of the Tribe. Indeed, the Tribe expects TOP’s government-to-government communications to be accorded the same importance as communications between the Tribe’s Chairman and the federal government.⁹

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.¹⁰ **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 Tribe,

⁹ 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.

¹⁰ 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.” (*See* Att. 7.)

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 (attached hereto as Attachment (“Att.”) 8).

nor may the Tribe access the funds for any other purpose. This account is separate and apart from the general operating funds of the Tribe's government and may not be accessed for any purpose other than that of the TOP, in accordance with Article VI, Section 4 of the By-Laws. (See generally Att. 7, Corporate Bylaws Art. VI, § 4.)

The very creation of TOP evinces the Tribe's intention to participate fully in this proceeding and to ensure that participation by segregating funds that the Tribe receives for use on the Yucca Mountain project for TOP to use for that purpose alone. Moreover, the bulwark surrounding TOP insulates 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 Tribe for overseeing the Yucca Mountain licensing process are used for their proper and stated purpose as mandated by the Tribe and federal law.

C. The TIM petition was made by individuals who are not members of the Tribe and who therefore cannot represent the Tribe in this proceeding.

Indian tribes have the power and authority to determine tribal membership. *Montana v. U.S.*, 450 U.S. 544, 564 (1981). Courts defer the determination of qualifications of membership in a tribe to that tribe, "to comport with. . . traditional notion of tribal sovereignty and with federal policy of independence." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978). The Tribe's Constitution sets forth the criteria for eligibility for membership and removal from the Tribal Enrollment. (Att. 4, Timbisha Shoshone Const., Art. III.) The Enrollment Ordinance No. 002 authorizes and requires the Enrollment Committee to review and update the membership roll on an annual basis to remove those persons erroneously, fraudulently, or incorrectly enrolled. This ordinance requires the Tribal Council to revoke the membership of any person the Enrollment Committee has determined to be erroneously, fraudulently, or incorrectly enrolled. During the most recent annual review, the Enrollment Committee determined that, and the Tribal

Council subsequently disenrolled, 73 people that were erroneously, fraudulently, or incorrectly enrolled in the Tribe. (Timbisha Shoshone Tribal Council Resolution No. 2009-01, attached hereto as Attachment (“Att.) 9.) Included within this list were George Gholson, Cleveland Casey, Ed Beaman, and Virginia Beck. These individuals, who purport to represent the Tribe in this licensing proceeding through the TIM Petition, are not eligible for any membership privileges or services; they may not identify themselves as Timbisha Shoshone members, affiliates, or representatives; and they are prohibited from use of the Tribal identity. (*Id.*)

3. TOP has met its Licensing Support Network requirements.

The DOE also challenges TOP’s compliance with the NRC’s LSN requirements, arguing that TOP’s December 22, 2008, Certification of Electronically Available Documentary Material fails to satisfy the requirements of 10 C.F.R. § 2.1003. (*See* DOE Answer, p. 4.) DOE argues further that TOP has not “complied with all applicable orders of the [PAPO Board]” and suggests that TOP did not participate in the pre-license application phase of this proceeding.” (*Id.* at 5.)

Although TOP acknowledges that it has not fully satisfied each of the NRC’s LSN requirements, the DOE’s portrayal of TOP’s lack of involvement in this proceeding before TOP filed its December 22, 2008, Petition to Intervene is inaccurate and misleading. It was not until mid-October 2008 that the Tribe’s internal dispute over its representation affected, in any way, the Tribe’s involvement in this proceeding. Tribal participation in connection with the DOE’s interest in establishing Yucca Mountain as a nuclear waste repository before that date must be regarded as TOP’s involvement (just as it may be regarded as TIM’s involvement). Until October, no distinction existed within or without the Tribe in connection with this proceeding.

Regardless, and notwithstanding its alleged LSN insufficiencies, TOP may still participate in this proceeding as a full party, as the NRC Staff recognizes. (*See* NRC Answer, pp. 33-34.) Documents have been filed on behalf of the Tribe. And once TOP comes into full compliance with its LSN obligations—which it is actively working to do as this Reply is filed—the NRC should admit it as a full party to this proceeding under 10 C.F.R. § 2.1012(b)(2).

A. TOP’s contention is based on publicly available materials.

As explained at the outset, TOP is pursuing a single contention. That contention is supported by publicly available materials. Thus, TOP did not need to provide documents to the LSN that would support the contention. 10 C.F.R. § 2.1003 requires potential parties to

make available, no later than ninety days after the DOE certification of compliance under § 2.1009(b), an “electronic file including bibliographic header for all documentary material . . . generated by, or at the direction of, or acquired by, a potential party”

Excepted from these requirements, however, are several categories of materials including “[r]eference books and text books” and “[r]eadily available references, such as journal articles and proceedings, which may be subject to copyright.” *See* 10 C.F.R. § 2.1005. These excepted documents are those upon which TOP’s NEPA contention is based. DOE’s criticism of TOP’s LSN involvement is, as a legal and practical matter, overblown. Yes, the LSN is important to the efficient conduct of this proceeding, and is intended to facilitate the sharing of information among the DOE, NRC Staff and potential parties. (*See* DOE Answer, p. 5 n.6.) But DOE can’t properly object that it is at all prejudiced when the materials that TOP’s Petition cited in support of TOP’s NEPA contention are expressly excepted from the LSN document requirements. By arguing that TOP should not be admitted because it did not properly certify that it had no documents that needed to be filed, DOE is pressing form over substance in a matter that would

have no practical effect on the outcome of this proceeding. Thus, because TOP's NEPA contention did not require the documents that it cited to be made available electronically on the LSN, the NRC should conclude that TOP has substantially and timely met its LSN obligations.

B. If the Licensing Board were to conclude that TOP has not met its LSN requirements, it should afford TOP an opportunity to remedy any insufficiency because TOP has been prejudiced by DOE's and NRC's failure to consult with the Tribe.

If TOP has not substantially complied with its LSN obligations, any such non-compliance is due, in large part, to the failure of the NRC and DOE to consult with the Tribe contributed to any alleged deficiencies for TOP in meeting the LSN requirements. Those agencies' duty to consult with an AIT includes the requirement that DOE and NRC provide prior and timely consultation with the Tribe regarding all of the requirements for full-party status in this proceeding. The record in this proceeding lacks a showing that DOE and NRC made any specific consultation with the AIT regarding the LSN requirement.

Accordingly, in the event the Licensing Board were to determine that the TOP is not entitled to full-party status for failing to meet the LSN requirement, such a decision would create grounds for a reversible error in this proceeding. Under the circumstances, the appropriate remedy to correct any alleged deficiencies in meeting the LSN requirement would be to afford the TOP the opportunity to correct any such LSN deficiency (which TOP is in the process of doing) in an established timeline while continuing to maintain the full-party status of TOP. This would be a method to cure the agencies' factual deficiency of failure to consult with the tribe on this important LSN requirement.

C. In the alternative, TOP should be admitted upon its showing of subsequent compliance with LSN certification.

Should the NRC conclude that TOP has not demonstrated substantial and timely compliance with requirements of Section 2.1003 at the time that TOP filed its Petition, TOP nonetheless should be admitted as a party upon a showing of subsequent compliance, conditioned on it accepting the status of the proceeding at the time of its admission. *See* 10 C.F.R. § 2.1012(b)(2).

As is clear from the two petitions having been filed on behalf of the Tribe, a disagreement among tribal members over the Tribe's representation in this proceeding has emerged. Although the disagreement over Tribal governance extends back over several years, the disagreement over representation for this proceeding is a much more recent event. Indeed, the Tribe had a single voice in this matter—including during the pre-application phase—for years until this past October. The Tribe, through the efforts of Chairman Joe Kennedy, had been participating in this proceeding, and making filings on its behalf, since at least 2005. Mr. Kennedy had contracted with experts, attorneys, and an administrator for the Tribe's LSN documents in early 2008. Mr. Kennedy worked with these individuals for a lengthy period of time, until October 17, 2008, when the Bureau of Indian Affairs stated in a letter that the Tribal Council comprised individuals not including Mr. Kennedy (the "Gholson Council"). (*See* Letter from Troy Burdick to Joe Kennedy and George Gholson, Oct. 17, 2008 (attached hereto as Attachment ("Att.") 10).)

Although the BIA reversed its decision within a matter of days (*see* Letters from T. Burdick to J. Kennedy, Oct. 21, 2008 and Nov. 10, 2008 (attached hereto as Attachment ("Att.") 11)), the harm had already been done as Gholson and the members of the Gholson Council had by then interfered with Kennedy's relationship with the Tribe's experts, legal team,

and LSN administrator. As a consequence, the documents that the Tribe has made available on the LSN (42 in total) were made available on behalf of TIM.

Significantly, since December 22, 2008, TOP has worked to come into full compliance with the LSN provisions. It has prepared a computer system and administrator for making documents available on the LSN. And it has made its initial certification of compliance. Thus, it makes little practical sense for the NRC to deny TOP's admittance as a party because it had not complied with the LSN requirements on December 22, 2008 when, today, TOP has so complied. The NRC is expressly permitted to admit TOP as a party once full compliance is established, and that compliance is complete. And, as required by § 2.1012(b)(2), TOP does stand ready to accept the proceedings in their current posture.

4. TOP has stated at least one admissible contention: the DOE's license application and environmental impact statements fail to consider and analyze the post-closure environmental impacts of the proposed repository on the Timbisha Shoshone's cultural interests as required by NEPA, federal regulations, and the U.S. Government's trust obligations.

In its Petition, TOP identified three single-issue contentions:

- TOP-MISC-001,¹¹ which contends that the DOE cannot demonstrate that the geologic repository operations area ("GROA") is located in and on lands that are under the jurisdiction or control of DOE or are permanently withdrawn and reserved for DOE's use. (TOP Petition at pp. 8-10.)
- TOP-MISC-002, which contends that DOE's license application and supporting environmental impact statements fail to demonstrate that DOE can obtain the water rights that it requires to operate the repository. (TOP Petition at pp. 10-13.)
- TOP-MISC-003, which contends that DOE's license application and supporting environmental impact statements fail to adequately consider and analyze post-closure cultural impacts on the Timbisha Shoshone, as both NEPA and NRC regulations require. (TOP Petition at pp. 13-15.)

¹¹ For convenience, references to TOP and its contentions in this Reply are in the same format as set forth in the NRC Staff's Answer.

Both DOE and the NRC Staff argue in their respective Answers that, for different reasons, none of these three contentions is admissible. To the contrary, and as is demonstrated below, TOP has stated at least one admissible contention in TOP-MISC-003.¹²

In its Petition, TOP identified as one of its contentions that DOE's FSEIS and FEIS are inadequate because they fail to "identify post-closure impacts to human health that are culturally appropriate to Timbisha." (TOP Petition at 13.) In its Answer to the TOP's contentions, the NRC Staff correctly observes that the TOP's contention pertaining to NEPA requirements is an "environmental" contention and not a "safety" contention. (NRC Staff Answer at p. 1512.) The Staff concludes, nonetheless, that this environmental contention is inadmissible for the following reasons: (1) it does not present supporting affidavits; (2) it is not supported by adequate facts or expert opinion; and (3) it does not raise a genuine dispute on a material issue of law or fact as required by Section 2.309(f)(1)(v) and (vi). As will be shown below, all three arguments are without merit.

A. The DOE's trust obligations, as well as NEPA, require both DOE and NRC to consult with the Timbisha Shoshone on the environmental impacts that the proposed repository might have on Timbisha cultural and historic interests.

As established above, DOE and NRC have federal obligations either requiring (in the case of DOE) or encouraging (in the case of NRC) them to consult with the Timbisha. (*See supra*, Part 1.) That duty to consult extends to potential impacts that the proposed repository

¹² TOP stands by its claim that the Treaty of Ruby Valley controls the property rights at issue here and that the GROA is not located on land free from encumbrances (namely, the Timbisha Shoshone's rights as a constituent of the Western Shoshone Nation). TOP similarly maintains the argument expressed in its Petition that it has water rights that will be adversely impacted by the operation of the repository and the GROA if they are licensed as proposed. Without intending to waive, abandon, or forego any of those or similar legal rights or arguments, TOP withdraws TOP-MISC-001 and TOP-MISC-002 as contentions in this proceeding at this time. Notwithstanding TOP's withdrawal of those two contentions at this time, TOP expressly reserves all rights, legal arguments, and factual assertions expressed in its Petition, including TOP's ability to assert any such rights, legal arguments, or factual assertions at a different time in this proceeding or in any other proceeding.

operations might have on Timbisha Shoshone cultural and historic interests. As demonstrated below, both agencies have failed to satisfy those obligations.

NEPA also requires tribal consultation. Congress enacted NEPA, 42 U.S.C. § 4321 *et seq.*, to ensure that environmental concerns are considered in federal decision-making processes. NEPA directs federal agencies to prepare an Environmental Impact Statement (“EIS”) for every “major Federal action significantly affecting the quality of the human environment.” *Id.* § 4332(2)(C). “Major Federal action” is defined as including “actions with effects that may be major and which are potentially subject to Federal control and responsibility.” 40 C.F.R. § 1508.18. Such federal actions include “actions approved by permit or other regulatory decision as well as federal and federally assisted activities.” *Id.* § 1508.27(b)(8).

The EIS must address all potentially significant environmental effects, including short-term as well as long-term. *Sierra Club v. Morton*, 510 F.2d 813, 820-21 (5th Cir. 1975). Potential issuance of a licensing permit for Yucca Mountain is unquestionably a major federal action; thus, DOE and NRC must take a hard look at the significant effects on the environment caused and the effects on the Timbisha Shoshone’s historic and cultural resources.

B. Both NEPA and the express provisions of NRC regulations implementing NEPA policies require DOE’s license application and supporting environmental impact statements to consider and analyze cultural impacts on the Timbisha Shoshone, including those that the Timbisha Shoshone raised in their comments on the draft FEIS.

DOE and the NRC Staff must concede that NEPA and NRC regulations implementing NEPA policies require DOE in its license application to consider and analyze the post-closure impacts of the repository on the Timbisha Shoshone’s cultural interests and forbid NRC from approving DOE’s license application in the absence of such consideration and analysis.

The purpose of NEPA as identified in the federal regulations is succinct but forceful: NEPA “is our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). Congress specifically included provisions in NEPA that are ““action-forcing”” to ensure that federal agencies, such as both DOE and NRC here, “act according to the letter and spirit” of NEPA. *Id.* NEPA’s implementing regulations spell out in more detail what federal agencies such as DOE and NRC *must* do to comply with NEPA. *Id.* Those regulations and the federal agencies’ adherence to them are not mere technicalities that may be glossed over or treated lightly. Rather, the 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, NEPA’s implementing regulations 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).

Thus, the seriousness of compliance with regulations implementing NEPA policies cannot be understated. The failure to ensure that such 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.”

Moving from the general to the specific, federal regulations implementing NEPA policy with respect to preparation of environmental impact statements are unambiguous and precise in their requirements that DOE’s environmental impact statements submitted in this proceeding address potential cultural impacts on the Timbisha Shoshone. Under 40 C.F.R. § 1502.14, which is the “heart of the environmental impact statement,” an EIS must consider the relative merits of the environmental consequences of the proposal and the various alternatives. This regulation requires DOE’s FEIS and FSEIS to “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 repository on the Timbisha Shoshone 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).

The requirement that DOE’s FEIS and FSEIS specifically consider and analyze the proposed repository’s potential historic and cultural effects or impacts on the Timbisha Shoshone 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:

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 Shoshone from repository operations, both during the time of proposed operation and post-closure. It is absolutely critical to the Licensing Board's ability to fulfill its own NEPA obligations that the information and analysis of those historic and cultural impacts be put before the Board. Without the information and analyses of the environmental consequences on Timbisha Shoshone 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 (1st Cir. 2008) (applying NEPA requirements to NRC).

C. In its comments to DOE's draft environmental statements, the Tribe consistently has raised multiple concerns about the potential for contaminated groundwater effluent from repository operations to reach sacred Timbisha Shoshone sites and to damage the Timbisha Shoshone's cultural interests.

For nearly a decade, the Timbisha Shoshone 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 Shoshone 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).¹³)

Similarly, in February, 2000, commenting further on the Draft EIS, the Timbisha Shoshone 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 Shoshone specifically 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, 2000.¹⁴)

In its January 10, 2008 comments submitted to the DOE on the Draft FSEIS, the Timbisha Shoshone Tribe specifically noted that the Tribe “has particular concerns as to . . . cultural resources . . . impacts,” and requested that DOE “assess and analyze . . . impacts to cultural resources” of the Timbisha Shoshone Tribe. (Letter from Ed Beaman to Jan Summerson and M. Lee Bishop, January 10, 2008 (attached hereto as Attachment (“Att.”) 12).)¹⁵ Despite the Timbisha Shoshone’s express request that the DOE consider and evaluate the potential harm to Tribe’s own particular cultural interests, including effects from contaminated groundwater, the DOE failed to present any such an analysis. In fact, the FEIS and FSEIS limit their assessment

¹³ LSN #: DN20022421185, Public Comments Regarding the Draft Environmental Impact Statement by Pauline Esteve, Tribal Chair, Timbisha Shoshone Tribe, Nov. 4, 1999.

¹⁴ 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.

¹⁵ LSN #: TBS000000001, 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.

of impacts on cultural resources *solely* to the withdrawal land and fail even to mention impacts on Timbisha Shoshone cultural resources lying in the region outside the withdrawal lands that may 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 p. 3-77; FSEIS, § 3.1.6, p. 3-62.)

Although the FEIS comprises multiple volumes of detailed environmental and socioeconomic analyses covering thousands of pages, DOE failed to investigate and understand the Timbisha Shoshone's particular and unique cultural interests, 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, which is woefully deficient, 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.

The FSEIS is cavalier, simply rolling the divergent interests of all Native American groups into one and dismissing the tribes' respective concerns about the potential environmental impacts of the repository. More shocking still is DOE's utter failure to address the various Native American tribes' (including the Timbisha Shoshone'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.)

What passes for DOE's environmental justice analysis in the FSEIS is equally vapid, failing to address any specific concern raised by the Timbisha Shoshone and, again, simply rolling the interests of all native American groups into one, without any analysis of the specific impacts that the Timbisha Shoshone identified:

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, p. 4-96.)

Thus, despite the Timbisha Shoshone's repeated efforts to inform the DOE of the adverse impacts on Timbisha Shoshone cultural interests that they are concerned will result from a repository operated at Yucca Mountain, including the effects on tribal cultural interests from contaminated groundwater emanating from a Yucca Mountain repository, DOE's environmental impact statements thus far have failed to consider and analyze those concerns. Specifically,

neither the FEIS nor the FSEIS even mentions the cultural significance of water resources to the Timbisha Shoshone, who are the only affected Native American Tribe in this proceeding, or how to mitigate any adverse cultural effects on the Death Valley springs caused by groundwater contamination that would emanate from a Yucca Mountain repository. As is demonstrated below, it is those significant cultural and historical interests that will be adversely impacted by the proposed repository.

D. Although the DOE's FEIS and FSEIS admit that contaminated groundwater effluent from the repository will reach springs that the Timbisha Shoshone hold as sacred and require to be kept pure, those documents contain no consideration or analysis of this injury to Timbisha Shoshone cultural interests or how these effects can be prevented.

In failing entirely to address the specific concerns about cultural impacts raised by the Timbisha Shoshone, DOE's EIS conveniently ignores the Agency's own finding that radionuclides from waste stored at Yucca Mountain will travel in groundwater, and that the contaminated groundwater will impact springs that are the cultural centers of Timbisha Shoshone life.

(1) DOE admits that contaminated groundwater will reach the Springs in Death Valley.

DOE admits that groundwater and contaminants below Yucca Mountain may migrate to and discharge from springs in Death Valley. 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. 3-8.¹⁶) 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.)

Even though the FSEIS concludes that radiological contaminants derived from Yucca Mountain could discharge into the springs in Death Valley, the FSEIS does not account for any potential environmental consequences of the radiological contamination at the springs in Death Valley on Timbisha Shoshone cultural interests. Rather, DOE limits its discussion of potential impacts to those on *health alone*, simply concluding that doses at these downgradient locations

¹⁶ 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.

need not be quantified because they would be no greater than those calculated for the Reasonably Maximally Exposed Individual (“RMEI”) located 37 miles from the repository but upgradient of the Death Valley springs. (FSEIS Vol. III, at CR-324; *see also* FSEIS § 5.1.1.4.; FEIS § 5.4.2.1.)

Despite these discussions about expected human health impacts, the FEIS and FSEIS are devoid of any consideration or analysis of the potential adverse cultural impacts on the Timbisha Shoshone, which, as shown below, will be significant.

(2) *The Timbisha Shoshone hold the springs that they have traditionally lived at in Death Valley for over a millennia as sacred and required to be kept clean and pure.*

The purity of water in springs has cultural religious significance to the Timbisha Shoshone. (Att. 1, Durham Decl. ¶¶ 4-8; Att. 2, Esteves Decl. ¶¶ 4-9; Declaration of Professor Catherine Fowler (“Fowler Decl.”) ¶¶ 6-12 (attached hereto as Attachment (“Att.”) 13); *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;¹⁷ Fowler, *Residence without Reservation: Ethnographic Overview and Traditional Land Use Study, Timbisha Shoshone, death Valley National Park, California* (August 25, 1995) (attached hereto as Attachment (“Att.”) 14).) For whole generations the Timbisha Shoshone have lived in the areas around what is now Death Valley National Park. (Att. 13, Fowler Decl. ¶ 6.) While the Tribe 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 lands.) The Tribe’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.

¹⁷ 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.

Life in the desert environment is harsh, and the Timbisha Shoshone developed a deep attachment to the land and its natural resources that is reflected in the Timbisha Shoshone cultural values and religion. Water, including the springs, are a part of the Timbisha Shoshone's creation stories. Important to the Timbisha Shoshone 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 Shoshone's cultural and religious view that the Earth is sacred and that the Creator requires the Tribe to protect the Earth, including water, and maintain its purity. (Att. 1, Durham Decl. ¶ 4, 6; Att. 2, Esteves Decl. ¶¶ 4-8; Att. 13, Fowler Decl. ¶ 6.)

To the Timbisha Shoshone, 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 Shoshone'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 Tribe would regularly clean springs to ensure a ready supply of clean water for Tribal members and wildlife. (Att. 1, Durham Decl. ¶¶ 4-6; Att. 2, 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. 5.¹⁸)

In Timbisha Shoshone'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

¹⁸ 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.

allows puha and sprits to travel throughout the tribal homeland. (Att. 2, Esteves Decl. ¶ 5; Att. 13, Fowler Decl. ¶ 8.)

In the Timbisha Shoshone'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. (Att. 2, Esteves Decl. ¶ 7; Att. 13, 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 Tribe 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 Tribe. (Att. 2, Esteves Decl. ¶ 9; Att. 13, Fowler Decl. ¶ 11.)

Purity and cleanliness of springs in their traditional homeland is of great importance to the Timbisha Shoshone's culture and religion. The Tribe 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 Tribe, even small amounts of contamination would be disrespectful to the springs and to the earth. (Att. 1, Durham Decl. ¶ 7; Att. 2, Esteves Decl. ¶¶ 5, 7, 10; Att. 13, Fowler Decl. ¶ 12.)

(3) Future contamination of the Springs in Death Valley contemplated by the FSEIS is a significant environmental impact to the culture and tradition of the Timbisha Shoshone that the NRC must consider in making its licensing decision and on which DOE was required to consult the Tribe.

As established above, the DOE anticipates that contaminated effluent from Yucca Mountain eventually will reach the springs at Death Valley that the Timbisha Shoshone hold to

be sacred and central to their culture, history, and traditions. The facts submitted in support of the TOP's contention also demonstrate that the contamination of the springs will have severe impacts to the Timbisha Shoshone's cultural interests, including disrespecting, insulting, and injuring the Timbisha Shoshone's ancestors, traditions, spiritual beliefs, religious practices, values, and heritage. (Att. 13, 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. (Att. 1, Durham Decl. ¶¶ 4, 6, 7; Att. 2, Esteves Decl. ¶¶ 4-10.) These are not just minor or incidental effects; rather, they are significant impacts that would destroy values and beliefs that are central to the Timbisha Shoshone's culture.

It is equally clear and beyond dispute that NEPA and its implementing regulations require DOE to address and analyze these very grave environmental consequences to the Timbisha Shoshone's culture and also mandate the Licensing Board to evaluate these significant cultural impacts in the decision-making process. Indeed, neither the DOE's nor the NRC Staff's Answers to TOP's Petition raises as an argument against the admissibility of TOP's NEPA contention that the Timbisha Shoshone cultural interests do not need to be taken into consideration and analyzed. Nor could they make such an argument. As set forth above, the applicable federal regulations *require* DOE to consider and analyze within its environmental impact statements, and further *require* the Licensing Board to take into account, the environmental effects of the proposed repository on "cultural" and "historic" interests, and further *requires* the DOE's environmental impact statements to "*contain an analysis of significant problems and objections raised . . . by any affected Indian tribes.*" (See *supra*

Part 4.B.) In addition, DOE has a separate but related obligation to consult with the Tribe on those impacts and concerns. (*See supra*, Parts 1, 4.A.) As shown below, DOE has failed to satisfy those obligations.

(4) *DOE has not complied with its express legal obligations to consider and analyze in its environmental impact statements the cultural impacts of the proposed repository on the Timbisha Shoshone, has not provided sufficient information for the Licensing Board to evaluate those impacts in the course of making its decision on the DOE's license application, and has failed to consult the Tribe.*

Despite the repeated efforts by the Timbisha Shoshone to identify to the DOE their concerns about the impact that the proposed Yucca Mountain repository will have on Timbisha Shoshone cultural and historic interests (*see supra* Parts 1, 4.D.(2), (3)), DOE has failed to identify, consider, or evaluate in any of its draft environmental impact statements the concerns that the Timbisha Shoshone raised or any of the potential impacts that the repository will have on Timbisha Shoshone cultural and historic interests. Nor has DOE met its obligation under the NHPA to consult with the Tribe to evaluate whether the Furnace Springs site is eligible for inclusion on the National Register or taken steps to mitigate impacts to that site. Nor has DOE satisfied its trust obligations to consult with the Timbisha Shoshone on the impacts to the Death Valley springs that would result from approval of DOE's license application. (*See supra*, Parts 1, 4.A.)

Although DOE claims in its Answer that it did, in fact consider the "lifestyle differences" to which TOP's Petition refers in two of its environmental impact statements, a review of the references that the DOE cites reveals that those discussions are inadequate and fail to satisfy DOE's obligation to consider and analyze the Timbisha Shoshone's concerns and the effects on Timbisha Shoshone cultural and historic interests. DOE's Answer specifically refers to three pages in each of the 2008 FSEIS and the 2002 FEIS. But a review of those pages reveals no mention whatsoever, and certainly no consideration, of the cultural impacts on the Death Valley

springs or the contamination of sacred Timbisha Shoshone waters outside the withdrawal area. (FEIS, § 4.1.13.4 pp. 4-88 – 90; FSEIS, § 4.1.5 p. 4-40; *see also* DOE Answer at p. 65; NRC Staff Answer at p. 1516.) Thus, the dispute that is set forth in TOP’s Petition is not a “simple disagreement with an agency’s findings or its methods”; rather, it is a dispute that a federal agency, the DOE, has discharged its regulatory obligations in obtaining data and analyzing cultural impacts in its environmental impact statements. What’s more, DOE has failed to consult the Timbisha with respect to the potential contamination of the Death Valley Springs. That failure is particularly significant where DOE has *conceded* that contamination from the Yucca Mountain repository will make its way to the Death Valley springs yet it has failed entirely to analyze the cultural impacts that contamination will have or the concerns of the Timbisha Shoshone. If the Licensing Board denies TOP’s Petition and does not permit TOP to participate as a full party, not only will the Licensing Board have before it insufficient information and analyses upon which to make a ruling on the license application but it also will be allowing a proceeding to move forward in the shadow of the DOE’s breach of its federal trust obligations, in violation of federal statutes.

E. TOP’s NEPA contentions satisfy the regulatory requirements for “admissible” contentions.

As noted above, the DOE and NRC Staff raise three primary arguments that TOP fails to state an “admissible contention”: (i) it failed to submit any affidavits; (ii) it failed to state specific facts forming the basis for its contentions; and (iii) it failed to show that the facts establish a genuine dispute between DOE and TOP on a material issue of fact or law. (*See supra* Part 4.) As this Reply clearly shows, TOP has declarations, admissible in federal proceedings, from an expert witness as well as members of the Timbisha Shoshone Tribe in support of the

facts that they assert in their Petition. Moreover, TOP has set forth specific facts in this Reply (as well as in the supporting declarations) that support its contention.

There can be no question that those facts and declarations set forth a “genuine dispute” between the DOE and TOP with respect to whether the DOE’s environmental impact statements adequately consider and analyze the consequences that contamination from Yucca Mountain repository operations in the Death Valley springs – which DOE concedes will occur – will have on Timbisha Shoshone cultural and historic interests or whether DOE has satisfied its trust obligations to consult with the Tribe on those impacts. This is a material issue of fact because, had DOE considered these cultural impacts on the Timbisha Shoshone at the Death Valley springs, and had DOE satisfied its duty to consult, it would have been required to consider and present alternatives that would have mitigated or eliminated the impacts on the springs, not from a human health risk standpoint but from a cultural and historic impact standpoint. Moreover, as set forth above and in the accompanying declarations, the impacts to Timbisha Shoshone cultural and historical interests from contamination of the Death Valley springs go to the very heart of Timbisha Shoshone culture, values, history, and spiritual beliefs, and constitute a significant environmental issue that would have required the DOE to consider and present alternatives to mitigate or eliminate contamination of the Death Valley springs.

Conclusion

For the foregoing reasons, TOP’s Petition to Intervene should be granted, and TOP should be permitted to participate in this proceeding as a full party.

Respectfully submitted,

Signed electronically by Douglas M. Poland

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Dated in Madison, WI
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