

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:

U.S. Department of Energy

(License Application for Geologic Repository  
at Yucca Mountain)

Docket No. 63-001-HLW

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

09-877-HLW-CAB-02

09-878-HLW-CAB-03

March 3, 2009

**TIMBISHA SHOSHONE YUCCA MOUNTAIN OVERSIGHT  
PROGRAM NON-PROFIT CORPORATION'S ANSWER TO  
TIMBISHA SHOSHONE TRIBE'S AMENDED MOTION FOR EXTENSION OF TIME**

The Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation ("TOP") takes no position on the Timbisha Shoshone Tribe's ("TIM") request for an extension of time in which to file its reply in support of its Petition to Intervene, as requested in TIM's AMENDED MOTION FOR EXTENSION OF TIME AND FINDING OF GOOD CAUSE FOR LATE FILED MOTION, filed and served on February 27, 2009 (the "Amended Motion"). TOP submits this Answer for the limited purpose of correcting and supplementing certain factual statements in the Amended Motion so that the Atomic Safety and Licensing Board (the "Board") has a complete and accurate factual record on which to base its ruling on the Amended Motion. In particular, TOP corrects and supplements the record with respect to: (1) the likelihood that disputes over the Tribe's proper representation will be fully and finally resolved on or before TIM's requested filing date of March 11, 2009; and (2) DOE's payment of money to the Timbisha Shoshone Tribe ("Timbisha" or the "Tribe")<sup>1</sup> to enable the Tribe to participate in these proceedings and, in

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<sup>1</sup> Throughout this Answer, to avoid confusion, the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation uses "TOP" to refer to itself; the term "Timbisha" or the "Tribe" to refer generically to the Timbisha Shoshone Tribe, and "TIM" to refer to the individuals purporting to represent the Tribe and who have brought the Amended Motion.

particular, both TOP's and TIM's access to that money and to other necessary resources. If the Board grants TIM's Amended Motion, TOP expressly reserves its right to respond to that filing.

*First*, TIM argues that it requires an extension of time until March 11<sup>th</sup> in which to file its reply because "the issues related to [its] need for an extension of time go to internal matters that require determinations by [certain] federal agencies with a trust responsibility to the Tribe." (Amended Motion at 3.) In particular, TIM offers that the Bureau of Indian Affairs ("BIA") is expected to issue a ruling soon on issues relating to the election of Tribal leaders. TOP does not believe that TIM's Amended Motion provides the Board with a full factual picture of the current BIA proceedings and, therefore, sets forth a more fulsome discussion here.

The dispute regarding the Timbisha's official representatives for both government-to-government relations and internal activities is long-standing, having arisen in 2007. (*See* Affidavit of Joe Kennedy ("Kennedy Aff.") ¶ 3, Attachment 1.) As a consequence of the dispute, two separate groups have asserted their respective authority to speak for the Timbisha in this proceeding (*i.e.*, TIM and TOP). (*Id.*) The competing claims to represent the Timbisha have resulted in several opinions by the BIA regarding tribal elections and representation for government-to-government purposes and, so far, one appeal of those rulings to the Interior Board of Indian Appeals ("IBIA"). (*Id.*)

A very brief overview of the dispute follows here. On November 13, 2007, Mr. Kennedy (who is the Tribal official associated with TOP) was elected as Tribal Council Chairman (with other elected members of the Tribal Council being Margaret Armitage, Madeline Esteves, Margaret Cortez and Pauline Esteves (together, the "Kennedy Council")). (Kennedy Aff. ¶ 4.) This election was recognized by the BIA in February 2008. (*Id.*) On March 17, 2008, Ed Beaman, Virginia Beck, and Cleveland Casey appealed the BIA's recognition of the Kennedy

Council (the “Beaman Appeal”), asking that the BIA recognize a purported tribal council selected in a separate election, also conducted on November 13, 2007 (the “Beaman-led Election”). (*Id.*)

After the BIA did not decide the Beaman Appeal for several months, Beaman and others filed suit against BIA in the United States District Court for the Eastern District of California seeking, among other things, a court order directing BIA to decide the Beaman Appeal. (Kennedy Aff. ¶ 5.) Quite recently—on February 17, 2009—and before the District Court ruled on the BIA’s resolution of the Beaman Appeal, the BIA concluded that the November 2007 election of the Kennedy Council was not effective (the “BIA’s February 17, 2009 Opinion”). (*Id.* ¶ 6, Attachment A.) The BIA provided further that it would continue to recognize for government-to-government relations the Tribal Council elected in November 2007 and comprised of Mr. Kennedy as Chairman, together with Ed Beaman, Madeline Esteves, Virginia Beck, and Cleveland Casey. (*Id.*) On February 24, 2009, Mr. Kennedy and others filed a Notice of Appeal of BIA’s February 17, 2009 Opinion to the IBIA (the “IBIA Notice of Appeal”). (*Id.* ¶ 7, Attachment B.)

Pending concurrently before the BIA is a second appeal, this one by Mr. Kennedy, challenging an October 17, 2008 decision by the BIA (the “Kennedy Appeal”). The Kennedy Appeal involves the purported election of George Gholson and others on September 20, 2008, when Gholson worked to hold a “general council” meeting in Las Vegas, Nevada, in order to recall Mr. Kennedy from his position as Chairman of the Tribal Council. (Kennedy Aff. ¶ 8.) It was during this same meeting that Mr. Gholson and his supporters sought to hold an election for seats on the tribal council. (*Id.*) Because the Las Vegas meeting was rife with constitutional and procedural errors, Mr. Kennedy has appealed the matter to the BIA. (*Id.* ¶¶ 8-9.) Answers in the

Kennedy Appeal were due to the BIA on February 24, 2009. (*See* BIA’s February 17, 2009 Opinion, Kennedy Aff. ¶¶ 6, 9, Attachment A, at 9.)

It is highly unlikely that the appeal now before the BIA will be fully resolved before the new date on which TIM has asked to file its reply brief. First, in its February 17, 2009 Opinion, the BIA did not propose a date certain by which it would resolve the Kennedy Appeal, but instead simply noted that “a decision [...] is likely to be issued shortly . . . .” (Kennedy Aff. ¶ 9.) Moreover, once the BIA has ruled on the Kennedy Appeal, that ruling, like the BIA’s February 17, 2009 Opinion on the Beaman Appeal, may be appealed to the IBIA. (*Id.* ¶ 10.) Although it is not clear how quickly the IBIA will resolve the Beaman Appeal (and the Kennedy Appeal, should that also be appealed to the IBIA), it might be months before the IBIA rules, and even then the party not prevailing in the appeal(s) may appeal further to the United States District Court with jurisdiction. (*Id.*)

In short, particularly with the current Notice of Appeal to the IBIA of the BIA’s February 17, 2009 Opinion, there is no way that the questions of Tribal representation currently before the BIA and the IBIA will be resolved on or before March 11, 2009. TOP maintains that it is the rightful legal representative of the Timbisha Shoshone Tribe in this proceeding, in accordance with the Tribal Constitution and Tribal Law, as it did in its Reply in Support of its Petition to Intervene as a Full Party, filed with the Board on February 24, 2009. Nonetheless, if the Board declines to rule on that issue in light of the ongoing legal proceedings now before BIA and IBIA, then TOP requests that the Board withhold ruling at this time in a way that precludes the Timbisha from participating as full parties in this proceeding until such time as the federal agencies and courts fully resolve this dispute.

**Second**, TIM argues that “good cause” for granting its Amended Motion exists insofar as it has not had access to the funds necessary to provide a timely response to the Department of Energy’s and the NRC Staff’s Answers to its Petition to Intervene. (Amended Motion at 1-2.) TIM’s statements do not provide a full and accurate picture of the facts surrounding the payment of money by DOE to the Timbisha Shoshone Tribe to enable it to participate in this proceeding.

Notwithstanding the significant internal disputes described above, for purposes of this licensing proceeding, the Timbisha spoke with one voice until late October 2008. (*See Kennedy Aff.* ¶ 11.) Before that date, the Timbisha had participated in the pre-application procedures. (*Id.* ¶¶ 11-12.) On behalf of the Timbisha, Mr. Kennedy and other members of the Kennedy Council working on behalf of the Timbisha submitted numerous documents to DOE and NRC and testified before numerous governmental bodies regarding Yucca Mountain, among other things. (*Id.* ¶ 11.)

On behalf of the Timbisha, Mr. Kennedy coordinated the Timbisha’s request for and receipt of DOE funding to participate as a full party in this docket. (*Kennedy Aff.* ¶ 12.) In July 2007, the Timbisha were granted Affected Indian Tribe (“AIT”) status. (*Id.*) The DOE was to fund the Timbisha’s active participation in this proceeding, but that funding was not provided until October 2008. (*Id.*) In connection with that funding, and again on behalf of the Timbisha, Mr. Kennedy retained Fred C. Dilger as the Timbisha’s expert on NEPA-related matters and Loreen Pitchford as the Timbisha person responsible for establishing and supplementing the Timbisha’s Documentary Material for the NRC’s License Support Network. (*Id.*) Both were paid out of funds received from the Timbisha for its active participation in this proceeding. (*Id.*) In addition, other members of the Kennedy Council, and Tribal members serving in an official capacity with the Kennedy Council, including Pauline Esteves (a Tribal Elder, a member of the

Kennedy Council, and the Elder Coordinator for the Historic Preservation Committee) and Barbara Durham (the Tribal Historic Preservation Officer), assisted the Timbisha's efforts to participate in this proceeding. (*Id.*)

However, on and after October 20, 2008, George Gholson and others purporting to represent the Timbisha (*i.e.*, TIM) literally absconded with the Timbisha's records and other resources, including its computer and computer files, that were being used by the Timbisha in this proceeding. (Kennedy Aff. ¶ 13.) Those individuals have since that time been working with John M. Peebles and Darcy L. Houck of Fredericks Peebles & Morgan LLP, and have filed documents in this proceeding purportedly on behalf of the Timbisha Shoshone Tribe, including the instant Amended Motion. (*Id.*) Ed Beaman, George Gholson and others also persuaded Mr. Dilger and Ms. Pitchford to sever their professional relationships with the Kennedy Council and provide their support to the "Timbisha Shonshone Tribe." (*Id.*) Further, Ed Beaman and others successfully froze for a significant period of time the bank account in which were held the DOE's funds earmarked for the Timbisha's use in this proceeding. (*Id.*) Notwithstanding those difficulties in preparing a timely response to the DOE's Application in this proceeding, TOP nonetheless did prepare and file a timely Petition and Reply to the DOE's and NRC Staff's Answers. Only recently did the bank release the funds that Beaman and others had caused to be frozen and unavailable to TOP.

TOP reserves its right to respond in full to the substance and arguments of TIM's reply should the Board grant TIM leave to file that document.

Respectfully submitted,

*(signed electronically)*

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NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:

U.S. DEPARTMENT OF ENERGY  
(High Level Waste Repository)

Docket No. 63-001-HLW

March 3, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the *Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation's Answer to Timbisha Shoshone Tribe's Amended Motion for Extension of Time* and the *Affidavit of Joe Kennedy (with Attachments A and B)* in the above-captioned proceeding have been served on the following persons this 3rd day of March 2009, by Electronic Information Exchange.

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

/signed (electronically) by/  
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