

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:

U.S. DEPARTMENT OF ENERGY

(License Application for Geologic Repository  
at Yucca Mountain)

Docket No. 63-001

ASLBP Nos. 09-876-HLW-CAB01  
09-877-HLW-CAB02  
09-878-HLW-CAB03

March 5, 2009

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**TIMBISHA SHOSHONE YUCCA MOUNTAIN OVERSIGHT PROGRAM  
NON-PROFIT CORPORATION'S  
CORRECTED MOTION FOR LEAVE TO FILE ITS  
AMENDED PETITION TO INTERVENE AS A FULL PARTY**

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In accordance with 10 C.F.R. §§ 2.309(f)(2) and 2.309(c)(1), and the Atomic Safety and Licensing Board's January 29, 2009 Case Management Order, the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation ("TOP")<sup>1</sup> requests leave to file an Amended Petition to Intervene as a Full Party ("Amended Petition"). TOP seeks leave to file the Amended Petition only if the Licensing Board determines that TOP's original Petition to Intervene (the "Original Petition") and its February 24, 2009, Reply in Support of Its Petition to Intervene ("Reply"), together, fail to state at least one admissible contention. TOP maintains that its Original Petition states at least one admissible contention. However, in the event the Licensing Board ultimately disagrees, TOP does not want to wait for a decision on the Original Petition before filing this Motion should its waiting result in any delay in these proceedings.

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<sup>1</sup> Throughout this Motion, to avoid confusion, the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation uses "TOP" to refer to itself; the term "Timbisha" or "Tribe" to refer generically to the Timbisha Shoshone Tribe; and "TIM" to refer to the individuals purporting to represent the Tribe in this proceeding through its own December 22, 2008 Petition to Intervene. The use here of the acronyms TOP and TIM are consistent with those acronyms, first used by the NRC Staff in its Answer to Intervention Petitions, to distinguish the two Petitions to Intervene filed on behalf of the Timbisha.

Accordingly, TOP files this motion now so that it will not be prevented from participating as a full party should the Licensing Board conclude that its Original Petition is flawed.

TOP's proposed Amended Petition, which is filed simultaneously with this Motion, narrows the scope of the issues presented in TOP's Original Petition and includes additional facts and information that support TOP's contentions and that are critical in both (1) establishing a full and complete record in this proceeding and (2) securing the integrity and soundness of the Licensing Board's decision on the Department of Energy's ("DOE") License Application for Geological Repository at Yucca Mountain ("License Application"). This Motion for Leave to File Its Amended Petition (the "Motion") should be granted on either of two grounds. First, the Licensing Board should conclude that TOP's Amended Petition is admissible under 10 C.F.R. § 2.309(f)(2) as a timely amendment based on information that was not previously available and is materially distinct from the information that was available. Alternatively, if the Licensing Board deems the Amended Petition untimely, it nonetheless should grant leave to file the Amended Petition because those factors it is required to consider in its decision, which are delineated in 10 C.F.R. § 2.309(c)(1), weigh in favor of granting the Motion.

The Amended Petition differs substantively from the Original Petition in three ways. It (1) eliminates two of the contentions stated in the Original Petition; (2) amends the remaining original contention on the environmental consequences of DOE's proposed geologic repository by expanding upon the facts and information that support the contention; and (3) adds a related but separate contention that DOE has breached a duty to consult with the Timbisha Shoshone Tribe.<sup>2</sup> The same facts that support the amended environmental contention also support the new contention added to the Amended Petition, and include declarations and affidavits of Tribal

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<sup>2</sup> See, generally, Amended Petition, filed simultaneously with this Motion.

Elders and an expert on Timbisha culture. These declarations and affidavits describe the Timbisha's cultural, historic, religious and other interests in, and practices requiring, the purity of the springs in Death Valley, California (the Timbisha's homeland), and establish that those interests will be adversely impacted as a result of the environmental consequences flowing from the geologic repository at Yucca Mountain. This critical information first became available in the past two weeks: the information is not included in the documents previously available to TOP and submitted to the Licensing Support Network ("LSN").

Not only has TOP filed its Amended Petition as soon as practicable after obtaining the supplementary information, but this Licensing Board must consider the supplementary information because, without it, its decision will be based on incomplete information and will be voidable due to the DOE's failure to comply with its legal obligations to the Timbisha. The National Environmental Protection Act ("NEPA") and other applicable federal regulations require DOE and the U.S. Nuclear Regulatory Commission (the "Commission") to consider *all* pertinent information related to the environmental consequences of approving the license to operate the proposed geologic repository. In addition, Executive mandates, DOE's federal trust responsibility, and DOE's own policies demand that it consult with the Timbisha on the cultural, historic, religious and other impacts of the proposed geologic repository. As shown through the Tribal Elders' declarations and affidavits, DOE utterly failed to comply with its obligations, even though by its own acknowledgement in the environmental impact statements it was aware that operation of the geologic repository could contaminate the Death Valley springs that the Timbisha hold sacred and that are central to its culture, history, and religion.

## ARGUMENT

### 1. INTRODUCTION.

This license application proceeding promises to last many years and it now is only in its infancy. Indeed, the Commission has noted that the proceeding “has the potential to be one of the most expansive and complex adjudicatory proceedings in agency history.”<sup>3</sup> DOE filed its license application on June 3, 2008, just eight months ago. In response to the Commission’s October 22, 2008 notice of hearing of the DOE’s application, TOP filed its Petition to Intervene as an Affected Indian Tribe (“AIT”) on December 22, 2008. On January 15 and February 9, 2009, DOE and NRC Staff, respectively, filed their Answers, including an opposition to TOP’s contentions. The Atomic Safety and Licensing Board (“Licensing Board”) will hold the first prehearing conference on March 12, 2009.<sup>4</sup> Although several other potential parties filed petitions to intervene, the Timbisha is the only AIT seeking intervention.<sup>5</sup>

In the Original Petition, TOP alleged three admissible contentions, all of which DOE and NRC Staff contest. The NRC Staff refers to TOP’s contentions as TOP-MISC-001 (relating to the DOE’s rights to the land on which the geologic repository operations area (“GROA”) is located); TOP-MISC-002 (relating to whether DOE can obtain the proper water rights within the GROA); and TOP-MISC-003 (relating to the post-closure cultural impacts on the Timbisha). In its Reply, TOP explains that while it reserves its right to raise any proper contention, it currently is no longer pursuing the contentions identified by NRC Staff as TOP-MISC-001 and TOP-MISC-002. TOP also responds to DOE’s and NRC Staff’s arguments on TOP-MISC-003

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<sup>3</sup> Memorandum and Order (CLI-08-18), filed August 13, 2008.

<sup>4</sup> Notice of Conference Call, filed February 10, 2009.

<sup>5</sup> A separate entity, TIM, also claims to represent the Timbisha and filed a petition to intervene as a full party. (Timbisha Shoshone Tribe’s Petition for Leave to Intervene in the Hearing, filed December 22, 2008.) It is assumed for purposes of this motion that TOP is the Timbisha’s representative. It is not necessary for purposes here to discuss the merits of TIM’s claim of representing the Timbisha.

(renamed TOP-NEPA-001 in the accompanying Amended Petition). In so doing, TOP provided additional factual support essential to ensuring the creation of a full and complete record for this proceeding and that, therefore, must be considered by the Licensing Board. In the event the Licensing Board believes an amended contention is necessary to include these additional materials in the record, TOP seeks leave through this Motion.

The materials submitted in support of TOP's amended contention, TOP-NEPA-001, supplement the substance covered by TOP's original contention on the post-closure impacts of the proposed geologic repository on the Timbisha's culture, history, and religion. This same information also supports TOP's new contention, identified in the Amended Petition as TOP-MISC-001, which addresses DOE's failure to satisfy its obligations to the Timbisha. Among the supplementary materials underlying both contentions are declarations or affidavits from three Tribal Elders—Joe Kennedy, Barbara Durham, and Pauline Esteves—and from Timbisha cultural expert Professor Catherine Fowler. The common thread running through the declarations and affidavits is the importance to the Timbisha of the purity of the springs that run in and around Death Valley, California—part of the Timbisha's homeland and into which contaminated water could flow from the proposed geologic repository—and the adverse impacts that contamination of those springs will have on Timbisha's interests.<sup>6</sup>

All agree that contamination of the springs will harm the Timbisha. As Dr. Fowler explains, contamination of the springs will be “disrespectful to the Tribe's cultural heritage, their

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<sup>6</sup> LSN #: TOP000000012, February 21, 2009 Declaration of Catherine S. Fowler, referred to in TOP's Amended Petition, filed March 4, 2009, (“Fowler Decl.”) at ¶¶ 5-14; LSN #: TOP000000010, February 21, 2009 Declaration of Barbara Durham, referred to in TOP's Amended Petition, filed March 4, 2009, (“Durham Decl.”) at ¶¶ 3-8; LSN #: TOP000000011, February 21, 2009 Declaration of Pauline Esteves, referred to in TOP's Amended Petition, filed March 4, 2009, (“Esteves Decl.”) at ¶¶ 3-10; March 3, 2009 Affidavit of Joe Kennedy, Attachment 1 to Amended Petition (“Kennedy Aff.”).

ancestors, and their religious beliefs.”<sup>7</sup> The Tribal Elders agree. As Ms. Durham, Tribal Historic Preservation Officer, states:

[T]o the Timbisha Shoshone, water is life. . . . If the Yucca Mountain repository is built and causes contamination of our springs, it will greatly insult our cultural heritage, our ancestors, and our religious beliefs. *It will destroy the spiritual and medicinal significance to the Timbisha Shoshone of the spring waters and the plants that grow near them that are central to our culture and who we are as a people.*<sup>8</sup>

Similarly, Ms. Esteves explains that the springs at Death Valley “have been at the center of [the Timbisha’s] culture” and that, to the Timbisha, contamination of the springs would be the equivalent of robbing Mother Earth.<sup>9</sup> If the springs are contaminated, “the water and the plants that grow around them would be useless to [the Timbisha] for medicinal purposes” and the water would no longer hold spiritual healing powers for the Timbisha.<sup>10</sup> In addition, the springs are crucial components of a host of tribal ceremonies.<sup>11</sup> Specifically, it would be a “tremendous insult” to the Timbisha if the dancing grounds around the springs were contaminated.<sup>12</sup>

TOP has supplemented the record with this information as soon as practicable. As explained by Joe Kennedy, Tribal Chairman, DOE failed to provide funding for this Proceeding to the Timbisha until October 2008, nearly 15 months after the Timbisha was granted AIT status.<sup>13</sup> And even then TOP could not access the funds for an extended period of time because

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<sup>7</sup> Fowler Decl. at ¶ 13.

<sup>8</sup> Durham Decl. at ¶¶ 4, 7 (emphasis added).

<sup>9</sup> Esteves Decl. at ¶¶ 4, 5.

<sup>10</sup> *Id.* at ¶¶ 6, 7.

<sup>11</sup> *Id.* at ¶¶ 8-10.

<sup>12</sup> *Id.* at ¶ 10.

<sup>13</sup> Kennedy Aff. at ¶12; LSN #: TBS000000002, Amended Petition Seeking Determination of Affected Indian Tribe Status Under the Nuclear Waste Policy Act, July 29, 2007, at 1-4.

certain Tribal members—the individuals filing TIM’s Petition—froze the bank account in which the funds were deposited.<sup>14</sup>

TOP previously provided to DOE information that it had available on the cultural impacts on the Timbisha. But, in direct contravention of its obligations under federal law, DOE failed to address these cultural impacts in its environmental impact statements related to the geologic repository.<sup>15</sup> Ms. Durham’s Declaration makes clear that DOE has never even visited the Death Valley area to consult with the Timbisha on the geologic repository’s potential impacts to the springs.<sup>16</sup> DOE’s failure to consult with the Timbisha violates federal statutes, Executive branch mandates, and DOE’s own policy regarding consultation with Indian tribes. Moreover, this failure leaves the Licensing Board with insufficient information and analyses upon which to make a ruling on the license application.

As discussed in more detail in TOP’s Reply and the Amended Petition, federal law—including NEPA—requires DOE to analyze and consider the geologic repository’s post-closure cultural impacts. NEPA and the regulations implementing NEPA clearly provide that DOE and the Licensing Board must analyze all pertinent information related to the environmental consequences of a project.<sup>17</sup> To satisfy the requirements under and to properly implement NEPA procedures and policies, the Licensing Board must have before it the views of those members of the public that will suffer environmental impacts from the DOE’s proposed actions. *See* 40 C.F.R. §§1500.1, 1500.2, 51.71(b). The Licensing Board must also ensure that DOE has

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<sup>14</sup> Kennedy Decl. at ¶ 13.

<sup>15</sup> *See* 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, June 1, 2008; 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.

<sup>16</sup> Durham Decl. at ¶ 8.

<sup>17</sup> *See* Reply at 7-12, 22-27, 35-38; Amended Petition at 18-32.



included in the environmental impact statements supporting its license application “evidence” that it has “made the necessary environmental analyses.” 10 C.F.R. § 1500.2(b); *see also* 10 C.F.R. § 51.71(b) (requiring EIS to include “analysis of significant problems and objections raised . . . by any affected Indian tribe”). DOE has not complied with these requirements.

DOE also has failed to comply with its obligation to consult with the Timbisha to ensure consideration of its concerns and any objections to the proposed geologic repository pursuant to the National Historic Preservation Act (“NHPA”), along with the Department’s trust responsibility, Executive mandates, and its internal policies.<sup>18</sup> NHPA obligates DOE to consult with native American tribes whose cultural interests may be affected by projects such as the proposed geologic repository at issue here. *See* 42 U.S.C. §§ 4321 – 4370d. DOE’s failure to consult with the Timbisha will have important ramifications on the tribe’s culture and our nation’s goal to preserve areas and items of great cultural and historic significance. For example, the Timbisha believe 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 DOE failed to consult with the Timbisha, its Tribal Historic Preservation Officer, and Tribal Elders.<sup>19</sup> Similarly, Executive Orders promulgated under President Clinton and reaffirmed by President Bush, along with DOE’s own internal consultation policies, require DOE to ensure the protection of cultural resources.<sup>20</sup> The DOE’s failure to consult with the Timbisha violates its NHPA obligations 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, Exec. Order 13175 (Nov. 6, 2000). The DOE’s failure can be remedied, in part, by allowing TOP the opportunity here to

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<sup>18</sup> *See* Reply at 4-12, 22-23, 31-39; Amended Petition at 34-42.

<sup>19</sup> Durham Decl. at ¶ 8.

<sup>20</sup> Reply at 27-38; Amended Petition at 34-36.

present, as a full party, this critical information to the Licensing Board for inclusion in the record.

**2. TOP's Amended Petition Is Admissible Under § 2.309(f)(2).**

Leave may be granted to file new or amended contentions where the moving party shows:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2). TOP's amended contention satisfies the three criteria.

**A. "The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information" [10 C.F.R. § 2.309(f)(2)(iii)].**

The amended contention is timely. The Licensing Board's Case Management Order #1 provides that new and amended contentions will be considered timely if filed within 30 days of the petitioner's receipt of the new information on which the contention is based.<sup>21</sup> The new information on which TOP bases its amended contention are the declarations and affidavits of an expert of Timbisha culture and history, Professor Fowler, and three Tribal Elders, Mr. Kennedy, Ms. Durham, and Ms. Esteves, all of which are dated February 21, 2009 or March 3, 2009. These declarations describe the cultural significance to the Timbisha of the springs in and around the area in which DOE proposes to operate the geologic repository, as well as the DOE's failure to consult with the Timbisha on the cultural impacts. Mr. Kennedy's affidavit also explains the circumstances surrounding the Timbisha's lack of access to funds for analyzing the

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<sup>21</sup> Case Management Order #1, filed January 29, 2009.

environmental consequences of the proposed geologic repository. TOP has filed its Amended Petition less than two weeks after finalizing the new information, well within the 30 day period of time allotted by the Licensing Board.

**B. “The information upon which the amended or new contention is based was not previously available” [10 C.F.R. § 2.309(f)(2)(i)].**

TOP raised in its original Petition a contention based on the cultural impacts of the DOE’s proposed geologic repository. The amended and new contentions focus narrowly on a particular aspect of those impacts and provide supplemental support that was not previously available. The Amended Petition is, in many ways, simply a supplement to the original. *See In re Entergy Nuclear Vermont Yankee LLC*, 62 NRC 813, 820 (2005) (ruling admissible amended contention in which the petitioner “continued to pursue” the same issue that had been identified in the original contention). The supporting declarations and affidavits, and their analyses in support of the Amended Petition, became available only within the last few days.

Mindful of the schedule in place for this proceeding, TOP has not delayed the process of compiling and preparing materials to support its contentions. Until recently, TOP has lacked adequate financial resources to retain experts and prepare analyses.<sup>22</sup> Although DOE granted the Timbisha AIT status in July 2007, it was not until October 2008 that DOE provided funding to TOP so that the Timbisha could retain counsel to represent it in this proceeding.<sup>23</sup> Then, a separate faction of the Timbisha froze the account in which DOE’s funds were maintained, precluding for an extended period of time TOP’s access to these funds to prepare its

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<sup>22</sup> Kennedy Decl. ¶¶ 12-13.

<sup>23</sup> *Id.* at ¶ 12.

contentions.<sup>24</sup> It is for these reasons, not for the fault of TOP, that the information on which the amended contention is based was not previously available.

**C. “The information upon which the amended or new contention is based is materially different than information previously available” [10 C.F.R. § 2.309(f)(2)(ii)].**

Finally, the third factor of § 2.309(f)(2) is met. The Timbisha is the only tribe that has been granted AIT status. And the declarations and other support on which the Amended Petition relies are the only materials available representing the particular post-closure cultural impacts of the Yucca Mountain repository or the cultural and historic interests of the Timbisha. Without these materials, there is no information in the record on the cultural, historic, and religious impacts to the Timbisha at the Death Valley springs. Accordingly, the new information is undeniably materially different from the previously available information, satisfying the third and final factor.

**3. TOP’s Amended Petition Is Also Admissible Under § 2.309(c)(1).**

In the event the Licensing Board decides that TOP’s Amended Petition is untimely, it is still admissible pursuant to 10 C.F.R. § 2.309(c)(1). *See In re Shaw Areva Mox Servs.*, 66 NRC 169 (2007) (untimely amended or new contentions evaluated by balancing factors delineated in § 2.309(c)(1)). Section 2.309(c)(1) provides that untimely contentions are admissible where the balance of the following eight factors favors admission:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor’s/petitioner’s right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding;

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<sup>24</sup> *Id.* at ¶ 13.

- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1); *In re Dominion Nuclear Connecticut, Inc.*, 62 NRC 56 (2005).

In this case, all eight factors weigh in favor of admission. And even if the Licensing Board finds that the first factor weighs against admission because TOP has failed to show good cause for not filing the supplementary materials with the original Petition, the balance of the remaining factors favors admission of the Amended Petition.

**A. “Good cause, if any, for the failure to file on time” (10 C.F.R. § 2.309(c)(1)(i)).**

Good cause exists here. Although the Timbisha is an AIT, DOE failed to provide funding to TOP for nearly 15 months, funding that would have allowed the Timbisha to hire counsel and experts, and prepare analyses of the cultural impacts resulting from the Yucca Mountain repository much earlier than it was able.<sup>25</sup> TOP has filed this motion as soon as practicable after it obtained full access to the resources to retain counsel and compile the information on cultural impacts.<sup>26</sup> Moreover, DOE will not be prejudiced if the Licensing Board admits TOP's Amended Petition. Although based on years of preparation, this proceeding began

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<sup>25</sup> Kennedy Decl. at ¶¶ 12-13.

<sup>26</sup> See *id.*; see generally Fowler Decl.; Durham Decl.; Esteves Decl.; see also *supra* at p. 9.

only eight months ago. Indeed, DOE and NRC Staff filed their Answers less than a month ago, and the parties have not yet even been identified.

But even if the Licensing Board finds there is no good cause for the delay, it should still grant TOP's Motion. Although this first factor carries great weight, the absence of good cause is not dispositive. *Dominion Nuclear*, 62 NRC at 65; *In re Nuclear Fuel Servs., Inc.*, 1 NRC 273 (1975). In *Dominion Nuclear*, the Licensing Board found admissible a petition to intervene filed eight months after the deadline with no good cause because the balance of the remaining factors weighed in favor of admission. 62 NRC at 62, 65; *see also Nuclear Fuel Servs.*, 1 NRC 273 (deciding to entertain petition to intervene filed nine months after deadline). Here, TOP has filed its Amended Petition only two months after the deadline. If this factor weighs against TOP, it is only slightly against its favor.

**B. “The nature of the requestor / petitioner’s right under the Act to be made a party to the proceeding; the nature and extent of the requestor’s / petitioner’s property, financial or other interest in the proceeding; and the possible effect of any order that may be entered in the proceeding on the requestor’s / petitioner’s interest” [10 C.F.R. § 2.309(c)(1)(ii), (iii), (iv)].**

Factors 2, 3, and 4 favor admitting TOP's Amended Petition. These three factors inquire as to whether the petitioner has met the requirements of 10 C.F.R. § 2.309(f)(1) by demonstrating standing and having submitted at least one admissible contention. *Entergy*, 62 NRC at 822; *Dominion Nuclear*, 62 NRC at 66. TOP's Reply and the Amended Petition show these factors are met. Those reasons are summarized here. First, the Timbisha has been granted AIT status, which presumptively confers standing on TOP. Second, the Timbisha undeniably have an interest in the proceeding. The DOE's environmental impact statements concede that contamination emanating from the repository will discharge into the Death Valley springs.<sup>27</sup> The

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<sup>27</sup> Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada, DOE 2008,

Timbisha's traditional homeland is in and around Death Valley, a geographic area downstream from Yucca Mountain.<sup>28</sup> The purity of the springs is sacred to the Timbisha. "To the Timbisha, water that emanates from springs in their traditional homeland is the lifeblood of the Earth."<sup>29</sup> The Timbisha rely on springs to help grow medicinal plants, for spiritual healing, as a part of ceremonies, and the contamination of those springs will have adverse impacts on Timbisha cultural and historic interests.<sup>30</sup> Third, the Licensing Board's order in this proceeding may have the requisite effect on TOP's interests because Timbisha's cultural and spiritual practices may be adversely affected by operation of the repository.<sup>31</sup>

**C. "The availability of other means whereby the requestor's / petitioner's interest will be protected" [10 C.F.R. § 2.309(c)(1)(v)].**

This factor strongly favors admitting TOP's Amended Petition. TOP has no other means of protecting the cultural and historic interests that will be severely impacted by the operation of the proposed geologic repository, which DOE concedes will contaminate the Death Valley springs. Also, DOE has failed to satisfy its statutory obligation to consult with the Timbisha about the impacts at the Death Valley springs. TOP, therefore, cannot rely on the United States government to protect its interests despite DOE's obligation to do so.

**D. "The extent to which the requestor's / petitioner's interests will be represented by existing parties" [10 C.F.R. § 2.309(c)(1)(vi)].**

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LSN: DEN001593669; 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, DOE 2002, LSN: DOE 2002073507.

<sup>28</sup> Declarations of Fowler, Durham, and Esteves.

<sup>29</sup> Fowler Decl. at ¶ 7.

<sup>30</sup> Fowler Decl. at ¶¶ 6-14; Durham Decl. at ¶¶ 3-8; Esteves Decl. at ¶¶ 3-10.

<sup>31</sup> *See id.*

This factor also strongly favors admission because there is no other party representing the Timbisha's interests.<sup>32</sup> TOP is the only representative of the Timbisha. If TOP's Amended Petition is not admitted, the Timbisha's cultural interests affected by DOE's proposed geologic repository will not be fully considered. This weighs in favor of admission not only because of the significance to the Timbisha's way of life, but Federal law—specifically, NEPA, the regulations implementing NEPA, and the National Historic Preservation Act—*requires* consideration of all relevant environmental consequences.<sup>33</sup>

Several others have petitioned to intervene in this proceeding but there is no certainty that any of the petitions will be granted. DOE opposes the intervention of all proposed parties. The NRC Staff opposes all of the petitions except the State of Nevada's and the County of Nye's. And even if other petitions to intervene are granted, the interests of others are decidedly not representative of the Timbisha's. Indeed, none of these other potential parties share TOP's cultural, historic, religious, and other interests in the Death Valley springs.

**E. “The extent to which the requestor’s / petitioner’s participation will broaden the issues or delay the proceeding” [10 C.F.R. § 2.309(c)(1)(vii)].**

This factor weighs in favor of admitting TOP's Amended Petition because its admission will actually narrow the issues and expedite the proceeding. TOP's original petition to intervene identified the issue of the Timbisha's cultural interests possibly implicated by operation of the repository. That original contention, however, did not identify the same extensive factual support that is included in the Amended Petition. As to the delay, this highly complex license application proceeding is in its beginning stages. The parties have not been identified as of yet and the first prehearing conference is not scheduled until March 12, 2009. Admission of the

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<sup>32</sup> See *supra* footnote 5.

<sup>33</sup> See *supra* at pp. 8-9.



Amended Petition will have no effect on the proceeding's schedule, especially considering that TOP has narrowed the scope of its contentions and merely expanded the factual support for them.

**F. “The extent to which the requestor’s / petitioner’s participation may reasonably be expected to assist in developing a sound record” [10 C.F.R. § 2.309(c)(1)(viii)].**

Finally, this factor strongly supports admitting TOP's Amended Petition for reasons similar to those outlined in subsection D above. Full presentation and consideration of this factual support is essential to a legitimate and legal decision by the Licensing Board on DOE's license application. Federal law requires the Licensing Board to consider a sound record.<sup>34</sup> A sound record in this proceeding necessarily includes the factual support added to TOP's Amended Petition. Significantly, without admitting the Amended Petition, that factual support will not be included in the record and any decision based on the incomplete record by the Licensing Board would be void.

**4. Certification Under 10 C.F.R. § 2.323(b).**

Pursuant to 10 C.F.R. § 2.323(b), counsel for TOP certifies that they have spoken with counsel for DOE and NRC Staff in an attempt to resolve the issues raised in this motion, and that the attempt was unsuccessful. DOE informed counsel for TOP that it opposes the Motion but will respond once the motion is filed. Counsel for NRC Staff informed counsel for TOP that the NRC Staff takes no position on the filing of this Motion but will respond to the motion after it is submitted.

On February 27, 2009, counsel for TOP also notified all proposed parties to this proceeding of its intention to file this Motion and asked that anyone who had objections to notify

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<sup>34</sup> See *supra* at pp. 6-8.

them at once. As of the date of this filing, four responded—Clark County, Nevada; Native Community Action Council; Nye City, Nevada; and the State of Nevada—and none of them oppose or object to TOP's Motion. The State of Nevada also indicated that it takes no position on who represents the Timbisha.

### **CONCLUSION**

For all the aforementioned reasons, the Licensing Board should grant TOP leave to file its Amended Petition to Intervene as a Full Party, either as a timely amendment under 10 C.F.R. § 2.309(f)(2) or an untimely amended petition under 10 C.F.R. § 2.309(c)(1).

Respectfully submitted,

*Signed electronically by Douglas M. Poland*

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Dated in Madison, WI  
this 5th day of March, 2009.

**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 No. 09-876-HLW-CAB01  
09-877-HLW-CAB02  
09-878-HLW-CAB03

March 5, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the *Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation's Corrected Motion for Leave to File Its Amended Petition to Intervene as a Full Party, Amended Petition of the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation to Intervene as a Full Party, and Affidavit of Joe Kennedy (with Attachments A and B)* in the above-captioned proceeding have been served on the following persons this 5th day of March 2009, by Electronic Information Exchange.

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Dated this 5th day of March 2009.

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