

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

PETITION TO INTERVENE BY
NATIVE COMMUNITY ACTION COUNCIL

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INTRODUCTION

The United States Department of Energy (DOE) seeks a license to construct, operate, and then close permanently a high level nuclear waste storage facility. The Advisory Board to this Commission has described this licensing proceeding as “unique and complex” and potentially “one of the most expansive proceedings in agency history.” Memorandum and Order, PAPO-001, June 20, 2008. The facility is proposed to be built very near the geographic center of the lands used since the beginning of time for sustenance and spiritual guidance by the Western Shoshone and Southern Paiute people. The Native Community Action Council (NCAC), established and operated by Western Shoshone and Southern Paiute people, opposes licensure because it would bring about an irremediable loss of the lands and waters which have sustained them for millennia.

The United States, including the DOE, has an indisputable fiduciary obligation to protect the cultural and natural resources of the Western Shoshone and Southern Paiute people. It violates that duty here: not only does it refuse to act to protect the Native peoples’ natural resources, but it seeks a license to store other peoples’ nuclear waste in the lands upon which these Native people rely for food, spiritual activities, and cultural survival. The DOE compounds these violations of its fiduciary duties by seeking now to prevent the Western Shoshone and Southern Paiute people from even having an opportunity to be heard in the proceedings in which the United States seeks to further degrade the cultural

resources of Indian people.

Having been abandoned by the United States, its trustee, the NCAC without benefit of legal assistance sought to secure a voice in the proceedings by filing its Petition for Intervention. The petition, in all fundamental respects, complied with the highly technical regulatory obligations imposed upon a would-be intervenor. The DOE's response was to submit a 65-page, heavily footnoted, purportedly scholarly legal analysis of the hurdles to participation, and to argue (incorrectly as it turns out) that NCAC, the voice of these Western Shoshone and Southern Paiute people, should not be heard here. The DOE's legal team launched a scornful and unforgiving attack on the efforts of the non-lawyer member of the NCAC Board of Directors to demonstrate that NCAC has established its right to participate in this "unique and complex" proceeding.

The principles which guide the Nuclear Regulatory Commission (NRC) reflect the fact that the Commission values citizen participation in proceedings in which those citizens face, as here, an immediate threat of injury which cannot be mitigated. The DOE's refusal to protect the resources of these affected Native people, and its aggressive effort to prevent their participation on their own, are unwarranted. Under applicable legal principles, NCAC has established on its own its right to intervene and its right to be heard.

ARGUMENT

I. NCAC'S PETITION SHOULD BE GRANTED BECAUSE THE DEPARTMENT OF ENERGY HAS VIOLATED ITS TRUST OBLIGATION TO PROTECT THE CULTURAL AND NATURAL RESOURCES OF THE WESTERN SHOSHONE AND SOUTHERN PAIUTE PEOPLE.

Since 1831, it has been the law that the United States generally stands in a fiduciary relationship with Indian tribes with concomitant legal obligations to protect their property and resources. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). In 1886, three years after the Treaty of Ruby Valley was consummated with the Western Shoshone people, the Supreme Court affirmed this cardinal rule of federal law: the federal government owes Indian tribes a "duty of protection" as a consequence of what was then nearly a century of destructive federal Indian policies. *United States v. Kagama*, 118 U.S. 375, 383 (1886). The Court has held the United States to "the most exacting fiduciary standards" of the common law of trust in defining the nature and scope of the federal fiduciary obligation. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1941). The Court traced the origins of the trust duty to a "humane and self-imposed policy that has found expression in many acts of Congress and numerous decisions of this Court." *Id.* at 296.

Because of this trust relationship, the U.S. Government, in both its executive and legislative branches, is held to a high standard of conduct, one which satisfies its "moral obligations of the highest obligation and trust." *Seminole Nation*, 316 U.S. at 297. The existence of this obligation today cannot be questioned. *United States v. White Mountain Apache Tribe*, 537 U.S. 465,

475 (2003) (“elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch”).

The Supreme Court has recognized implicitly that one manifestation of this “moral obligation” is that stricter standards apply to federal agencies when dealing with Indians and Indian programs. *See Morton v. Ruiz*, 415 U.S. 199, 235 (1974). “When the Secretary is acting in his fiduciary role rather than solely as a regulator and is faced with a decision for which there is more than one ‘reasonable’ choice as that term is used in administrative law, he must choose the alternative that is in the best interests of the Indian tribe. In short, he cannot escape his role as trustee by donning the mantle of administrator” *Jicarilla Apache Tribe v. Supron Energy Corporation*, 728 F.3d 1555, 1567 (10th Cir. 1984)(Seymour, J., concurring in part and dissenting in part). If there is doubt in the interpretation of regulations applicable to Indians, the interpretation “should be made liberally in favor of the Indians.” *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982).

In this context, the trust duty means DOE has a duty to protect the cultural and natural resource interests of the Western Shoshone and Southern Paiute people which are threatened in this proceeding. *See, Northern Slope Borough v. Andrus*, 642 F.2d. 589, 614 (D.C.Cir. 1980) (trust duty includes obligation to protect Indian culture). If this license is granted, the damage to cultural resources of the Native people who use and whose activities surround Yucca Mountain would be irreparable. *See*, FSEIS, Executive Summary at page S-32

(Yucca Mountain is "integral to a valued cultural landscape" and the facility would be "intrusive" and have an "adverse impact." That "viewpoint has not changed."), and *FSEIS Executive Summary at page S-58* (adverse impacts on Native culture noted as an "area of controversy" still unresolved). The DOE is failing to satisfy its highest moral obligation of trust. And the DOE compounds its breach of its duties by seeking to prevent the Western Shoshone and Southern Paiute people from seeking on their own to protect the threatened cultural resources.

The DOE's actions here should be viewed through the lens of the agency's ongoing breach of its fiduciary duties to the Western Shoshone and Southern Paiute people. The trustee for the Native people, having abandoned its beneficiaries, should not be heard to protest those peoples' efforts to protect their cultural resources.

II. NCAC HAS STANDING TO INTERVENE, PARTICULARLY IN LIGHT OF THE FAILURE OF DOE TO ACT TO PROTECT INDIAN CULTURAL AND NATURAL RESOURCES.

The NCAC was established by Indian people, and operates under the direction of a Board composed of Indian people, solely "to protect the traditional histories . . . and tribal customs" and "manag[e] the risks of radiation and health related concerns" of the ancestral lands of Western Shoshone and Southern Paiute people. Declaration of Ian Zabarte ¶ 3a. (hereinafter "Zabarte Decl.")¹

¹ Petitioner is aware of the Commission's rule that a reply may not be used to provide "for the first time, the necessary threshold support for contentions." *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223 (2004), *reconsideration denied*, CLI-04-35, 60 NRC 619, 623 (2004). NCAC requests that the declarations submitted in support of its contentions be considered pursuant to the procedure approved in *In the Matter of Crow Butte Resources, Inc.*, (License Amendment for the North Trend Expansion Project), LBP-08-96, 67 NRC 241, 2008 WL 4790123, *3 ("With the permission of the Board, various affidavits related to standing and curing defects related thereto were submitted with the Replies or thereafter.")

“To the Western Shoshone people, culture is the most important aspect for measuring the strength of a nation.” *Id.* ¶ 2. Western Shoshone people are “forever bound” to the lands surrounding Yucca Mountain; without those lands the Native people “would cease to exist.” *Id.* The Yucca Mountain repository, if licensed, will contribute to massive desecration of Shoshone lands, and further “contribute to the dismantling of a living culture.” *Id.* The people represented by NCAC face the threat of direct and immediate harm from construction and operation of the repository: the transport of high level nuclear waste materials within one-half mile of their homes and businesses; and latent cancer deaths and illness arising from operation of the facility with consequences vastly more significant to a small population and threatened Indian culture within a 50 mile range of the facility. Declaration of Calvin Meyers ¶ 6 (hereinafter “Meyers Decl.”); Zabarte Decl. ¶ 4a; Declaration of Pauline Esteves ¶ 3 (hereinafter “Esteves Decl.”).

DOE would prefer that these voices not be heard in the licensing proceedings. Answer of U.S. Department of Energy to the [NCAC] Petition to Intervene as Full Party (hereinafter “DOE Answer”) (though DOE claims “brevity” as a goal (p.2, n.3), it devotes 65 pages of what appears on the surface to be a thorough legal analysis in support of its campaign to prevent NCAC’s participation). That analysis, however, overlooks fundamental facts and principles of law.

NCAC replies to the DOE’s misplaced claims in the order in which DOE asserts them.

A. LSN Compliance

The DOE, the trustee for the Western Shoshone and Southern Paiute people, argues that NCAC has failed to conduct itself as a party prior to seeking to intervene as a party, and therefore, is forever barred from participation as a party. It is a Kafkaesque argument. It is offered, as are all of DOE's assertions, in disregard both of its duties as a fiduciary to protect the Native cultural interests which NCAC advocates and of the inability of NCAC to secure legal counsel (until approximately 10 days ago). DOE should not be permitted to shirk its responsibilities to the Native population on behalf of which NCAC speaks, and then succeed in silencing the voice of that population because of purported failures which should be laid firmly at the doorstep of the trustee, DOE itself.

The applicable regulations state two requirements. First, a "potential party" is required within specific time periods to make available on an electronic network all "documentary material" generated or possessed by that potential party. 10 CFR § 2.1003(a)(1). Second, a "potential party given access" to this network may not become a party if it has not previously submitted the documentary material. 10 CFR § 2.1012(b)(1). A "potential party" who is denied "party" status for such a failure, may later be granted party status upon a showing of compliance with the electronic filing requirement. 10 C.F.R § 2.1012(b)(2).

DOE seizes upon the NCAC's lack of familiarity with the pre-party electronic data bank filing requirement, belittles its non-lawyer Board Member's attempt at compliance, and asserts that for these reasons alone, NCAC should never be permitted to be heard in this proceeding. DOE Answer at 3-5.

This extraordinary argument is precisely the sort of gamesmanship that this Commission has rejected. *In the Matter of Crow Butte Resources*, (License Amendment for the North Trend Expansion Project), LBP-08-06, 67 NRC 241 2008, 2008 WL 4790123, *20 (the federal courts and the Commission reject “the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome, and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.”).

Because these proceedings are guided by “fundamental fairness,” NCAC should not be held to the same standards of procedural regularity which the DOE would apply to those represented by a trustee, for example, or to those represented by counsel. *Id.* at 21 (“longstanding agency precedent instructs us that, as a rule, pro se petitioners are not held to the same standard of pleading as those represented by counsel”). A fair and reasonable solution to this procedural dilemma would be to permit NCAC to intervene conditioned upon its compliance with the filing requirements of § 2.1003. This assumes, of course, that NCAC even possesses documents not already in the record of several million documents. The regulation calls for materials which are not likely to have been generated or acquired by NCAC – “calibration procedures,” “probe locations,” “equations and sampling rates,” “analog computer, meter or other device print-outs” etc. § 2.1003(a)(2).

NCAC may possess some documents not in the record, and within the scope of the regulation. If such documents exist, they will be lodged in accordance with the regulation as quickly as practicable. The DOE’s proposal,

that an inadvertent failure to file such documents in advance of intervention should be a permanent bar to participation in these proceedings, is a draconian result that is not consistent with principles of fundamental fairness.

B. Standing

The legal principles governing standing are considerably more straightforward than a reading of DOE's lengthy academic analysis might suggest. NCAC addresses them briefly.

First, NCAC clearly has the burden of establishing that, on behalf of itself and its members, it has legal standing to participate; but this Commission is obliged to "construe the petition in favor of [NCAC]." *Crow Butte*, 2008 WL 4790123, *15.

Second, under the Atomic Energy Act, the Commission is obliged to provide a hearing "upon the request of any person whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a)(1)(A). Hence, the NRC must determine whether NCAC and its members have an "interest" here, and whether that "interest" "may be affected" by this license application. The NRC's regulations expand upon these two principles.

The regulations set forth three factors: (1) the nature of NCAC's right to participate as a party; (2) its "property, financial or other interest"; and (3) the possible effect of an order on that interest. 10 C.F.R. § 2.309(d)(1). Further, the NRC takes into account "judicial concepts of standing." *Crow Butte*, 2008 WL 4790123,*15. There are three such concepts, each of which parallels the NRC regulations: (1) whether the petitioner has alleged a "concrete and particularized

injury,” which (2) is “fairly traceable” to the proposed facility, and which (3) “is likely to be redressed” by an order favorable to the interests of the NCAC. *Id.*

A fair reading of NCAC’s petition reveals that the organization has satisfied both the regulations and the judicial concepts to which this Commission adheres. “Fundamental fairness” in assessing NCAC’s compliance with the standing principles is required (one of the fundamental principles that is never mentioned in the DOE’s relentless opposition to NCAC participation). *Crow Butte*, 2008 WL 4790123, *21. The analysis of NCAC’s standing, of its statement of its contentions, and, overall, of its right to participate in these proceedings must be made in the light of the fact that the petition was filed by a non-lawyer Board Member; the organization was then unrepresented by counsel. DOE faults the petitioners repeatedly for failing to satisfy strictly and completely the precise terms of the regulations. But DOE ignores the long history of the law in nuclear regulatory proceedings which rejects the gamesmanship approach to pleading. *Public Service Electric and Gas Company (Salem Nuclear Generating Station, Units 1 and 2)*, 6 AEC 487, 489 (1973). In addition, “pro se petitioners are not held to the same standard of pleading as those represented by counsel.” *Crow Butte*, 2008 WL 4790123, *20; and see, *Shaw Areva MOX Services (Mixed Oxide Fuel Fabrication Facility)*, LBP-07-14, 66 NRC 169, 188 (2007). “Fundamental fairness” requires that interests imperfectly stated by non-lawyer citizens be considered where, as here, those citizens “can furnish valuable assistance to the adjudicatory process.” *Crow Butte*, 2008 WL 4790123, *21;

accord, Public Service Electric and Gas Company, 6 AEC at 489.

In applying legal principles of standing in light of the fact that the DOE has access to a wealth of legal experience and the NCAC did not, it is clear that the NCAC has satisfied the requirements of standing.

1. Concrete and Particularized Injury

The Western Shoshone and Southern Paiute people have suffered injury for decades from the United States' use of their ancestral lands as a site for the testing of nuclear weapons. These were once a nomadic people; they inhabited the Yucca Mountain and surrounding regions to the fullest extent (Final Environmental Impact Statement, (FEIS Figure S-21 at page S-58, attached hereto as Attachment 1) and relied upon a wealth of available natural resources for sustenance. See, Treaty of Ruby Valley, Attachment 2. The United States moved them from their lands, denied them access to those lands, conducted nuclear weapons testing on the lands, which made cultural survival an ongoing challenge. The addition of both a nuclear waste repository to those lands, and the complex web of routes to be constructed to transport that waste to the site, will further degrade Native lands, further threaten a culture for which access to and use of the lands is critical, and increase a direct threat to the health of Native people who live and work in the rural areas surrounding the proposed facility. See *generally*, Declarations of Ian Zabarte, Pauline Esteves, and Calvin Meyers.

To satisfy subsistence, cultural and spiritual needs, Western Shoshone and Southern Paiute people represented by NCAC gather seeds, plants, beans and wood from the lands of, and surrounding Yucca Mountain. Meyers Decl. ¶ 8.

They hunt wild game throughout those lands. *Id.* They have gatherings on ancestral land, including Yucca Mountain, which are essential to maintaining the cultural connection to the land. Zabarte Decl. ¶ 4b; Meyers Decl. ¶ 9. Yucca Mountain with the waste facility in place will no longer be a place to which Native people may go for subsistence hunting or gathering, and will no longer be available as a place of cultural or spiritual sustenance. The construction, operation, and maintenance for eternity of this repository for the United States' nuclear waste will take away forever another piece of Shoshone and Paiute land, and will diminish yet again the culture of a people which has existed since time immemorial. Esteves Decl. ¶ 4 ("Storing nuclear waste in Yucca Mountain would be harmful to the land, and would therefore be harmful to my cultural, spiritual and religious practices because those practices are inextricably tied to the land and my Tribal culture.")

NCAC has both organizational and representational standing. NCAC's mission is to protect the traditions of the Western Shoshone and Southern Paiute people from further degradation of culturally significant and sensitive lands and to protect the health of Indian people from radiologic harm. Zabarte Decl ¶ 3b. The threatened harm from the proposed repository to the organizational interests of the NCAC gives it organizational standing.

The facts which support representational standing are set forth in the declarations of Ian Zabarte, Pauline Esteves and Calvin Meyers. Mr. Zabarte lives within one-half mile of the railroad tracks and very near trucking routes that are projected to be used to transport nuclear waste to the proposed site on

Yucca Mountain. Zabarte Decl. ¶ 4a. His residence puts him at risk of exposure to radiation from leaks, accidents, acts of sabotage or other events. *Id.* Angie Boland, a member of NCAC lives within 20 miles of the proposed site, which, as acknowledged by the FEIS, places her at increased risk of latent cancer death.

Pauline Esteves, a member of the Board of Directors of NCAC, lives on tribal trust land within 50 miles of the proposed site. Esteves Decl. ¶ 3. Ms. Esteves gathers traditional Shoshone foods and plants as a cultural practice on lands that are threatened by the proposed repository. *Id.* ¶¶ 3,7. Water that is used on the Reservation where Ms. Esteves lives is directly threatened by the proposed repository, as it flows down gradient from Yucca Mountain through the Amargosa Desert and into Death Valley, where she lives. *Id.* ¶6.

Calvin Meyers is a Southern Paiute Indian and a member of NCAC's Board of Directors who has concrete interests directly threatened by the proposed repository facility. He lives on the Moapa Indian Reservation, and his residence is one-half mile from the railroad lines and truck routes that are proposed for shipment of radioactive waste and spent nuclear fuel to the Yucca Mountain site. Meyers Decl. ¶ 6. Mr. Meyers uses the areas within and adjacent to the Yucca Mountain site for cultural and subsistence activities, including hunting wild game, gathering cultural foods, and gathering medicines. *Id.* ¶ 8. Mr. Meyers personal identity is tied directly and concretely to the health of the land, which will be adversely affected by the proposed repository. *Id.* ¶ 10.

2. The Threatened Injuries are Traceable to the Facility.

The irreparable damage to the land and its natural resources, the loss of

access to sites of cultural significance, and the inability to engage in spiritual practices on Yucca Mountain are obviously related to the placement of the waste facility there. The risks to the health and safety of NCAC members arising from transport of waste material on routes which pass within a half mile of their homes and businesses, are obviously a direct consequence of placing the waste facility on Yucca Mountain.

3. An Order Denying Licensure Will Protect NCAC From These Injuries.

If the license is denied, the United States will be unable to construct the facility. The nuclear waste from throughout the country will not be shipped over the rail lines to Yucca Mountain. Western Shoshone and Southern Paiute people will continue to gather mesquite wood for their ceremonies, will continue to have their gatherings on the mountain, and will continue to strive to maintain the spiritual connection to the land which is essential to their cultural survival.

NCAC has established standing. Without the ability to call upon the legal expertise available to the DOE, NCAC in its petition nonetheless described itself, described the injury, and sought relief. The Commission is asked, respectfully, to construe the petition in light of this reply and the accompanying declarations. As the Commission has stated previously, "a licensing board may permit potential intervenors to cure defects in petitions in order to obviate dismissal of an intervention petition because of inarticulate draftsmanship or procedural or pleading defects." *Crow Butte*, 2008 WL 4790123, *20. NCAC and the Native communities for which it advocates, whose ancestral lands and current homes

literally surround Yucca Mountain, have a contribution which only they can make to this proceeding: the history, traditions, and culture of Western Shoshone and Southern Paiute people are at issue here, and those with the knowledge about that culture should participate. See, FEIS Summary at page S-57 (attributing the information to Native people, DOE reports that Indians "believe that the water, animals, plants, air, geology, sacred sites, and artifacts are interrelated and dependent on each other for existence. Because of the general level of importance attributed to the land by these Native Americans, and because they regard the land as part of an equally important integrated cultural landscape, these Native Americans consider the intrusive nature of the repository to be an adverse impact to all elements of the natural and physical environment.")

Because the DOE is decidedly not protecting their interests, "fundamental fairness" requires full participation by those people whose continued cultural existence is at risk in the decision to be made in this proceeding.

III. NCAC'S CONTENTIONS, PROPERLY AND FAIRLY CONSTRUED, ARE ADMISSIBLE.

NCAC has established in its petition as amplified here that injury from the construction, operation and ongoing existence of the waste facility at Yucca Mountain is significantly more than just "plausible." The legal standard here is well established. "During the threshold standing inquiry, a petitioner need not establish an asserted injury in fact . . . with 'certainty' or provide extensive technical studies. [Citation omitted]. Such an assertion of injury in fact will be accepted if it is at least facially plausible that it is neither remote nor speculative and the opposing party fails to establish a fatal flaw in its analysis." *In the Matter of Carolina Power & Light Company (Shearon Harris Nuclear Power Plant)*, 50 NRC 25 (1999)(at 26). The contentions each set forth asserted injuries in fact which are more than "facially plausible."

NCAC has demonstrated that its contentions are admissible under the applicable standard. NCAC makes three contentions with regard to the application: 1) there are encumbrances on DOE's title to the repository site arising from use of the area pursuant to tribal law and custom and from the decision of the Inter-American Commission on Human Rights with regard to violations of international human rights; 2) DOE cannot obtain the necessary water rights for the repository because the Western Shoshone and Southern Paiute people have not relinquished their aboriginal water rights under federal law; and 3) the environmental reviews for the proposed repository fail to adequately identify, address or mitigate significant adverse health impacts and

fail to take into account the disproportionate burden those impacts will have on the health, welfare and spiritual well-being of the members of NCAC.

A. Encumbrance on DOE's Land Title

NCAC's petition to intervene sets forth with particularity the contention that the Department of Energy has not acquired lands for the Geologic Repository Operations Area (GROA) that are free of encumbrances, as required by 10 C.F.R. § 63.121(a)(1)(2). This contention is admissible.

1. Statement of Issue of Law or Fact to be Controverted

The applicable regulation requires that DOE must acquire lands under its jurisdiction and control for the GROA that are "free and clear of all encumbrances, if significant . . ." 10 C.F.R. § 63.121(a)(1) and (2). NCAC disputes the legal and factual conclusion of the application that DOE has obtained such lands in conformity with this regulation. NCAC will controvert this legal and factual conclusion in two ways: 1) the use by the tribes and NCAC members of the GROA lands pursuant to tribal law and custom constitutes a significant encumbrance on such lands within the meaning of the regulation; and 2) the decision of the Inter-American Commission on Human Rights that the United States violated fundamental human rights law by failing to accord legal protection to the title of the Western Shoshone people to their ancestral lands constitutes a cloud on the title of DOE and/or the Bureau of Land Management with regard to the GROA.

This contention is fairly comprehended within the petition to intervene filed pro se by NCAC on December 22, 2008. Native Community Action Council

Petition to Intervene as a Full Party at pages 7-10. The Petition asserts that “Yucca Mountain is owned by *Newe* People under tribal custom and laws of the Western Shoshone Nation,” and it cites to principles of international law in discussing the relations between the Western Shoshone Nation and the United States. *Id.* at 8.

2. Explanation of Basis for Contention

a. Tribal Law and Custom as Basis for Land Use

The Declarations of Calvin Meyers, Ian Zabarte and Pauline Esteves establish beyond dispute that the Western Shoshone and Southern Paiute people have used and continue to use the area that is designated as the GROA as traditional, ancestral lands pursuant to tribal law and custom. For purposes of this Contention, the critical fact is that such use occurs under a long-standing body of law and custom which regulates the nature, scope, frequency and purpose of such use. Activities undertaken pursuant to this law and custom are significant encumbrances within the meaning of 10 C.F.R. § 63(a)(2).

Section 63(a)(2) does not define the term “encumbrances.” Rather, it sets forth examples of the kind of restrictions on land use that qualify as encumbrances, including mineral rights; easements for rights-of-way; leases; rights of entry; deeds; patents; mortgages, appropriations or “prescriptions.” The list of examples is not intended to be exclusive, as evidenced by the inclusion of the words “or otherwise” at the end of the list. As a result, restrictions similar in nature to those listed qualify as encumbrances.

Tribal law and custom regulating land use qualifies as an encumbrance

under this section. The examples in the regulation share a common characteristic: most of them recognize or grant rights to use land for which the formal legal title is held by another. Tribal law and custom may be understood as conferring a similar right in this context. Under the laws of the United States, the DOE may hold so-called record legal title², but tribal law and custom grants rights to use such lands that must be respected by federal agencies. Conceptually, the example in the regulation that comes closest to capturing the nature of this encumbrance is a prescription.

The policy to respect and protect tribal law and custom with regard to land use is deeply engrained in federal law, and DOE may not violate it. The foremost authority on federal Indian law confirms the legal force of tribal law in relation to the federal government: "Federal law recognizes and respects the force of tribal customs and traditions." Nell Newton, ed., *Cohen's Handbook of Federal Indian Law*, § 4.05[3] at 281 (2005). This policy finds expression in executive orders, statutes and federal court decisions. For example, federal agencies have long been directed to respect Indian sovereignty and self-government, to honor treaties and to protect other rights, whether based on federal law or tribal law. Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67249, November 9, 2000. The American Indian Religious Freedom Act requires federal agencies to allow access to sacred sites that are used pursuant to tribal law and custom. 42 U.S.C. § 1996. The long-

² The Native Community Action Council does not concede that the United States has valid legal title to Western Shoshone Nation ancestral lands even as to United States law.

standing policy to respect tribal law is followed by the federal courts as well. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (deferring to the law of the Santa Clara Pueblo in membership determinations); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (requiring exhaustion of tribal court remedies pursuant to tribal law before seeking federal judicial review); *United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996) (trespass action brought by the United States should be heard in Navajo Nation court because the validity of the land title at issue is determined by Navajo law and custom). Because the use of the GROA site by NCAC members occurs pursuant to tribal law and custom that has legal force and effect, such use constitutes an encumbrance within the meaning of the requirement for DOE to have free and clear title.

b. Decision of the Inter-American Commission on Human Rights

The 1863 Treaty of Peace and Friendship signed at Ruby Valley, Nevada between the United States and the Western Shoshone Nation demarcated the boundaries of the Western Shoshones' ancestral territory. As is plain from the language of the treaty, the Western Shoshones did not cede title to any lands to the United States. Rather, the treaty was designed to end hostilities by granting non-Indian settlers certain limited rights-of-way through Western Shoshone territory. Despite the treaty's limit on non-Indian use, the United States gradually assumed control of Western Shoshone territory and today asserts record title for the vast majority of those lands. The GROA site is located within the boundaries of the Treaty of Ruby Valley lands.

The recent findings of the Inter-American Commission on Human Rights make clear that the legal and factual questions regarding the United States' legal title to Western Shoshone ancestral lands remain unresolved. *Dann v. United States*, Case 11.140, Inter-Am. C. H.R., Report No. 75/02/OEA/Ser. LV/III 717, doc. 1 rev. (2002). This case involved the question of whether the Indian Claims Commission proceeding purporting to adjudicate the taking of Western Shoshone land by the United States comported with fundamental principles of human rights, particularly the right to equality before the law, the right to a fair trial and the right to property, as set forth in the American Declaration of the Rights and Duties of Man.

The Inter-American Commission on Human Rights, which implements the Declaration, made several findings and conclusions that are relevant to the admissibility of the NCAC's contention with regard to title. First, the Commission found that "the issue of title to Western Shoshone lands [is left] without definitive substantive adjudication by the U.S. courts." Paragraph 139, *Id.* at 37. Second, the Commission found that the United States did not obtain title to Western Shoshone lands through the informed and mutual consent on the part of the Western Shoshone people, as required by international human rights principles. Paragraph 141, *Id.* at 38. Third, to the extent the Indian Claims Commission decision is believed to have extinguished Western Shoshone title, that "extinguishment" occurred through proceedings in which the many Western Shoshone were not effectively represented and where the circumstances of this alleged extinguishment were never actually litigated nor the merits of the finding

finally reviewed by the courts.” Paragraph 144, *Id.* at 39. Based on these findings, the Commission found violations of the human rights of the Western Shoshone people, and recommended that the United States provide them with an “effective remedy,” including measures necessary to ensure respect for their right to property with regard to Western Shoshone ancestral lands. Recommendations, Paragraph 1, *Id.*, at 48.

As agencies of the United States, the Department of Energy and the Nuclear Regulatory Commission are obligated to adhere to the rulings of international human rights bodies in which the United States has membership. International law, including human rights law and decisions, are part of the law of the United States. *Sampson v. Fed. Rep. of Germany*, 250 F.3d 1145 (7th Cir. 2001), *see also* Restatement (Third) of the Foreign Relations Law of the United States, pt. I, ch. 1 (introductory note) (“International law is law like other law promoting order, guiding, restraining, regulating behavior It is part of the law of the United States, respected by Presidents and Congress, and by the States and given effect by the courts.”). The ruling of the Inter-American Commission that the United States’ determination of Western Shoshone title violates several fundamental principles of international human rights law creates a cloud on the title of the United States to the GROA lands. As a result, it is an encumbrance on DOE’s title, within the meaning of 10 C.F.R. § 63(a)(2).

3. Scope of the Proceeding

NCAC’s contention with regard to title is within the scope of this proceeding, because the law requires that DOE have free and clear title to the

lands to be used for the repository.

4. Material to Commission's Required Findings

NCAC's contention with regard to title is material to the findings that the Nuclear Regulatory Commission must make in this proceeding, because 10 C.F.R. § 63(a)(2) requires that DOE must hold the lands for the geologic repository operations free and clear of all encumbrances.

5. Statement of Facts on Which Petitioner Intends to Rely

The facts and references to specific sources and documents on which NCAC intends to rely to support its position on the title issue are contained in Section 2 above, Explanation of Basis for Contention.

B. DOE's Insufficient Water Rights.

NCAC's petition sets forth with particularity the contention that DOE has not acquired the water rights that may be needed to accomplish the purpose of the geologic repository operations area, as required by 10 C.F.R. § 63.121(d). The nuclear waste facility application does not account for the fact that the Western Shoshone and Southern Paiute people did not relinquish their water rights at any time after the arrival of non-Indians to their lands. The application also fails to properly account for Native peoples need for water to support the natural resources upon which they rely and the spiritual ceremonies which are essential to their continued existence.

Water is held in high regard by the people who are members of NCAC. The NCAC petition, reflecting this reverence for scarce clean water, states both that the applicant has "fail[ed] to consider the Western Shoshone Nation's

jurisdiction over the water rights” within these lands, and failed to consider “the needs of the *Newe* [People] individually or collectively.” Petition at 11. This contention is admissible.

1. Statement of Issue of Law or Fact to be Controverted

NCAC disputes the legal and factual conclusion of the application that DOE has obtained sufficient water rights to operate the GROA. NCAC will controvert this conclusion by showing that the Western Shoshone people have not relinquished their water rights and that the project will interfere with those rights by degrading water resources on which NCAC's members depend.

2. Explanation of Basis for Contention

The Western Shoshone people did not give up their aboriginal water rights when they entered into a treaty with the United States. Treaty of Ruby Valley, Attachment 2. The United States Supreme Court has held that Indians' rights to water are implied from a treaty which reserved and protected aboriginal ways of life. *United States v. Winans*, 198 U.S. 371, 381 (1905). The treaty with the Western Shoshone signed at Ruby Valley, Nevada, in 1863, acknowledges specifically their “roaming life.” Treaty at Article 6. The Shoshone Bands agreed to allow the United States to use in peace its then existing travel routes across Indian lands, to allow non-Indian exploration for mineral mining, and to allow non-Indians to harvest timber for building; but they did not cede their water. Though title to these lands is very much in dispute, even assuming for the sake of argument that the Bands do not have beneficial ownership of the lands, they still retain an implied right to water sufficient to maintain their “roaming” way of a life.

United States v. Adair, 723 F.2d 1394, 1417-1418 (9th Cir. 1983)(the Tribe's treaty right to hunt and fish within a former reservation continued even though, by an act of Congress the Tribe itself was terminated and its lands sold; nonetheless, the tribe retained an implied right to water sufficient to maintain a fishery). The Western Shoshone lifestyle, then and now, relies upon hunting wild game, gathering plants for food and medicine, and gathering wood for heat and ceremonies, all of which are dependent upon sufficient clean water sources to survive.

The DOE misconstrues this contention as one addressed to ownership of the lands. DOE Answer 54-61. Title to the land is simply not material to the principles, ignored by DOE, that the Shoshone Bands retain their reserved water rights, and that access to clean water is essential today to maintenance of a culture which has existed since long before these lands were considered to be part of the United States.

According to the DOE's own analyses, access by people who live, travel, hunt, gather, and pray in the area of Yucca Mountain to clean, safe, uncontaminated water, will be at great risk with construction of the nuclear waste facility. NCAC has demonstrated a facially plausible threat of real injury – a threat which will exist for all of the centuries in which the waste storage facility exists. A short list from the DOE's own analyses will demonstrate:

- The repository temperature could affect the surrounding earth "which in turn could influence groundwater flow and the transport of radionuclides from the engineered and natural barrier systems to the environment. . . . [R]adioactive materials that entered the groundwater would produce the

primary impacts from the repository to human health in the far future.” FEIS Summary Section S.5.1.8 at page S-61. Radioactive materials in the groundwater could then affect the “nearest surface-water discharge point,” which is Ash Meadows. *Id.*

- Some modeling concludes that the aquifers in the Yucca Mountain area are integrated “into a single groundwater basin” with pathways for flow between basins. FSEIS Section 3.1.4.2.1 at page 3-29. Contaminants entering one aquifer, would thereby infect the entire basin including the water sources used by NCAC members.
- As mentioned in Mr. Zabarte’s declaration, one groundwater model “demonstrated the feasibility of flow from the carbonate aquifer in the Amargosa Desert to the major springs in the Furnace Creek area of Death Valley.” FSEIS Chapter 3 at page 3-34. The groundwater in the Amargosa Desert is fed by groundwater at Yucca Mountain. Contaminants which entered the groundwater at the waste storage facility could then be transported to the springs in Death Valley which provide water for, among other people, the Timbisha Shoshone Tribe. FSEIS Chapter 3 at pages 3-31 through 3-33.

The environmental analyses are extensive. Those analyses acknowledge threatened direct injury to water resources relied upon by the people who live in the region of, and surrounding Yucca Mountain. These injuries, according to the DOE, are substantially more than facially plausible.

The DOE’s response to these risks is similar to its stance throughout these proceedings: it simply abandons the rural residents of these lands. DOE relies upon the fact that the Native population in this area is small, and takes comfort in the fact that major population areas will be spared the cataclysm of a nuclear disaster which contaminates the air and water. From the DOE’s perspective, benefits of the Yucca Mountain site lie, in its words, in

"characteristics . . . that indicate a high potential for reducing possible long-term impacts" from the disposal of spent nuclear fuel and high-level radioactive waste. FEIS at Section 9.2.3.2 at page 9-8. The DOE states that the facility is "isolated from concentration of human population and human activity" and "the sparsely populated hydrogeologic basin" provides a "barrier to the general spread of radionuclides" in the event of groundwater contamination. FEIS at Section 9.2.3.2 at page 9-8. The agency does not mention, much less protect, the interests of those who have resided in these lands since time immemorial. They would not be protected in consequence of an event which contaminates air, surface water, or groundwater. The Native people of this region, and other unprotected rural residents, are part of a "barrier" which protects urban America from nuclear catastrophe. *But see*, FSEIS Summary at pages S-39-40 (Curiously, DOE does not identify any "disproportionate impacts" to minority or low-income populations, though it does acknowledge that "American Indians" have a contrary view.)

In addition to the risks to life, health and safety, there are concrete threats to the significant cultural sites of Native people as well. The springs at Ash Meadows, for example, are revered; historically, those springs were the one place at which both Shoshone and Paiute people could meet together, and is the place where they exchanged knowledge, goods and practices which allowed both people to thrive. Zabarte Declaration ¶¶ 4e. Those springs are connected to the groundwater aquifer which flows from Yucca Mountain. That groundwater from Yucca Mountain flows past the meadows, gathers water from the Ash

Meadows springs, and from there flows into Death Valley, the current home of the Timbisha Shoshone. See, FEIS Figure 3-15 at page 3-62 (Groundwater Basins and sections of the Central Death Valley subregion); *and see*, FSEIS Summary at page S-29 (DOE would draw from groundwater for Yucca Mountain from one basin; groundwater "from that area flows into Amargosa Desert aquifers. Because those aquifers meet most of the regional water demand, the potential effects of DOE groundwater use on this down-gradient use is of particular concern.") Contamination of the aquifer under Yucca Mountain, at any time from the date of construction through the vast centuries that the nuclear waste is expected to remain there, will deprive Native people of clean water, safe food and fuel, and a place necessary for ceremonies.

3. Scope of the Proceeding

NCAC's contention that DOE has not obtained sufficient water rights and that the project proposed by the application will interfere with Western Shoshone water rights plainly falls within the scope of this proceeding, inasmuch as "water rights as may be needed to accomplish the purpose of the geologic repository operations area" is a legal requirement of the project. 10 C.F.R. § 63.121(d).

4. Material to Commission's Required Findings

The Commission must find that, pursuant to 10 C.F.R. § 63.121(d), the agency has obtained water rights sufficient to operate the facility. As a result, NCAC's contention with regard to its water rights is material to a finding required to be made by the Commission.

5. Statement of Facts on Which Petitioner Intends to Rely

The facts and references to specific sources and documents on which NCAC intends to rely to support its position on the water rights contention are contained in Section 2 above.

C. Inadequacy of Environmental Reviews

NCAC's petition sets forth with particularity the contention that the Final Environmental Impact Statement and Final Supplemental Environmental Impact Statement are inadequate because they fail to identify, address or mitigate significant adverse health and cultural impacts on the members of NCAC, and the documents also fail to account for the disproportionate burden such impacts will impose on the members. Moreover, culturally appropriate studies, ethnographic assessments, and consultation, including supplemental analysis regarding impacts to cultural resources and disproportionate adverse health impacts to American Indian people, must be completed in order to comply with federal law prior to the adoption of the FEIS and FSEIS.

1. Statement of Issue of Law or Fact to be Controverted

NCAC disputes the legal and factual conclusion that the environmental reviews for the proposed repository are adequate and sufficient to identify, assess and mitigate impacts to health and culture that can be expected to occur if the application is granted. NCAC will controvert these conclusions with declarations and analysis as set forth below.

2. Brief Explanation for the Basis of the Contention

NCAC asserts, on behalf of its members, that DOE failed to adequately assess the disproportionate burden of adverse health impacts to its members resulting from the proposed construction of, and transportation of radioactive nuclear waste to, the proposed Yucca Mountain Repository. See Zabarte Decl. Specifically, DOE failed to adequately study, using culturally appropriate modeling based on different exposure pathways for traditional, Indian lifestyles, the actual radiological impacts that will be inflicted on its members. Moreover, these impacts will disproportionately impact NCAC members due to lifestyle differences from the general population, such as traditional gathering practices and the hunting of wild game. See, Esteves Decl. ¶¶ 4, 5. The record further shows that DOE failed to adequately consult regarding traditional cultural practices, including the presence and significance of cultural resources. NCAC asserts that in order to adequately identify cultural resources, including potential impacts to those resources, further consultation and study must occur.

3. Scope of Proceeding

The adequacy of the FEIS and FSEIS is properly within the scope of this proceeding pursuant to 10 C.F.R. § 51.109(a)(2), which requires the adoption of adequate environmental reviews under federal law.

4. Material to Commission's Required Findings

The adequacy of the FEIS and FSEIS is material to the findings the NRC must make in these proceedings pursuant to 10 C.F.R. § 51.109(b).

5. Statement of Facts on Which Petitioner Intends to Rely

The proposed Yucca Mountain Repository site, surrounding lands, and lands that would be affected by the transportation of spent nuclear fuel to the Repository site, "contain traditional gathering, ceremonial, and recreational areas for Indian people" which have been used continuously by multiple Indian tribes and Indian peoples since time immemorial. *See, American Indian Perspectives on the Yucca Mountain Site Characterization Project and the Repository Environmental Impact Statement* (Feb. 1998) (LSN #DN20025426852) at 2-1; These lands contain "numerous ceremonial resources and power places that are *crucial* for the continuation of American Indian culture, religion, and society." *Id.* (italics added). Indian people acknowledge that Yucca Mountain and the surrounding lands are part of a "cultural landscape extending many miles in all directions." *Id.* Cultural resources are not limited to archaeological or historic remains of native ancestors but include all natural resources in the area. *Id.* Traditional cultural, spiritual and religious practices cannot be properly performed without access to these lands and their natural resources. *Id.* at 2-2 - 2-11; *see also*, Esteves Decl. ¶¶ 4, 5, 6.

The proposed construction of the Yucca Mountain Repository, and transportation of spent nuclear fuel to the proposed Site, would result in *irreparable harm to cultural resources*, including but not limited to archaeological and historic sites, which are part of a living cultural landscape. These adverse impacts have not been adequately identified, addressed or mitigated in order to prevent or minimize such irreparable harm. *See, Zabarte Decl.; see also, Tribal*

Concerns About the Yucca Mountain Repository: An Ethnographic Investigation of the Moapa Band of Paiutes and the Las Vegas Paiute Colony, (Oct. 2002)(LSN # CLK000000033) at 36 (“A loss of the tribal landscape is a significant impact to tribal society”). DOE has utterly failed to perform the necessary consultation and study in order to adequately identify cultural resources, potential impacts to such resources, and potential mitigation measures to cultural resources.

For example, in its 1998 Report, the Consolidated Group of Tribes and Organizations (CGTO) identified the following list of studies that would be required in order for an adequate assessment of American Indian cultural resources:

- a. Ethnoarchaeology
- b. Ethnobotany
- c. Ethnozoology
- d. Rock Art
- e. Traditional Cultural Properties
- f. Ethnogeography
- g. Cultural Landscapes

See, *American Indian Perspectives on the Yucca Mountain Site Characterization Project and the Repository Environmental Impact Statement* (Feb. 1998) (LSN #DN20025426852) at 2-2. DOE failed to perform these required studies, as recommended by the CGTO, and, as a result, the agency has failed to adequately identify cultural resources, potential impacts to such resources, and potential mitigation measures to cultural resources. DOE’s repeated failures to complete the required consultation and study regarding cultural resources renders the FEIS and FSEIS inadequate.

NCAC members, who are comprised of Indian peoples living and carrying out traditional cultural activities in the vicinity of the proposed repository and its proposed transportation corridor, will disproportionately suffer from the effects of the proposed repository. Their close proximity to the proposed repository and their unique traditional lifestyle make these effects particularly harsh. NCAC members will suffer disproportionate impacts to their food supply, which is based on subsistence use of local plants, animals and birds that may be lethally contaminated. *See, Summary Report, Native American Concerns: Yucca Mountain Nuclear Waste Management Project* (Oct. 2001) (LSN # NEV000001421) at 3; *see also*, Esteves Decl. ¶ 5; Zabarte Decl. ¶ 4c; Meyers Decl. ¶ 8. Significant health concerns, including what may be unusually high rates of childhood leukemia and thyroid diseases among Western Shoshone and Southern Paiute peoples, have led to studies aimed at specifically studying radiation health affects in rural reservation populations and the formation of an alliance to monitor radiation effects on Indian people (Nuclear Risk Task Force) in the area. *See, Summary Report, Native American Concerns: Yucca Mountain Nuclear Waste Management Project* (Oct. 2001) (LSN # NEV000001421) at 3. The removal of these lands from traditional, cultural uses and practices due to in-transit accidents or onsite accidents resulting in radioactive releases at Yucca Mountain would not only harm American Indian ways of life, but could contaminate traditional food sources and lead to disproportionate human health effects from radioactive contamination. *See, Summary Report, Native American Concerns: Yucca Mountain Nuclear Waste Management Project* (Oct. 2001)

(LSN # NEV000001421). DOE has failed to adequately identify, assess and mitigate adverse health impacts to Native American peoples using a culturally appropriate model, and has failed to adequately assess the potential for accidents along the rail corridor to disproportionately affect Native American populations as well. See, *A Mountain of Trouble: A Nation at Risk (Report on Impacts of the Proposed Yucca Mountain High-Level Nuclear Waste Program*, Nevada Agency for Nuclear Projects, Office of the Governor (Feb. 2002) (LSN # DN2002054712) at xii (DOE has done "little or nothing" to evaluate impacts to Native American communities that would be directly impacted by shipments of spent nuclear fuel and high-level nuclear waste to Yucca Mountain).

6. Existence of a Genuine Dispute on a Material Issue of Law or Fact Or the Identification of Failures Within the Application to Provide Information as Required by Law

a. DOE's FEIS and FSEIS Fail to Adequately Identify, Address and Mitigate Significant, Adverse Health Impacts Which Will Disproportionately Affect Indian People and the NCAC's Members.

DOE claims to have complied with Executive Order 12898, which requires an environmental justice analysis to identify and address the potential for its actions to cause disproportionately high and adverse impacts to minority or low-income populations, which would include the members of the NCAC. See generally, Zabarte Decl.; Esteves Decl; and Meyers Decl.; see also, *American Indian Perspectives on the Yucca Mountain Site Characterization Project and the Repository Environmental Impact Statement* (Feb. 1998) (LSN #DN20025426852) at 1-2 (Recommending that environmental justice issues for

American Indians, as a minority group indigenous to the area, be systematically evaluated by the DOE for this project). DOE claims, in response to comments, to have "reevaluated available information to determine whether the Draft EIS overlooked any unique exposure pathways or unique resource uses that could create opportunities for disproportionately high and adverse impacts to minority and low-income populations, even though the impacts to the general population would not be high and adverse." FEIS Volume III at page CR-18. DOE further claims to have estimated the potential health impacts from a subsistence diet based primarily on game taken from lands near the repository exclusion areas.

However, DOE does not appear to have considered a subsistence diet based on traditional food sources in a scenario which is *not* incident free. Nor does DOE provide any information as to whether it consulted with Native Americans regarding their traditional gathering practices, which include traditional food sources other than wild game, in reevaluating the disproportionate health affects which could result from radioactive contamination not only to wild game, but to plants and water as well. See, Esteves Decl. ¶¶ 4-6. Because of these failures to adequately identify and address disproportionate impacts to Native Americans, the FEIS and FSEIS do not comply Executive Order 12898.

DOE also failed to analyze potential public health and safety impacts to Native American populations resulting from the transportation of spent nuclear fuel and high-level radioactive waste by relying on an "incident free" transportation model. It defies logic to conclude that it "is not necessary to examine the composition of the population along existing transportation corridors

to conclude that the potential public health and safety effects from exposure to radioactive materials during routine exposure do not implicate environmental justice concerns.” See, FEIS Volume III at page CR-18; see also, Zabarte Decl. ¶ 4a (residence located approximately one-half mile from the proposed railroad line and trucking lines proposed to be used to ship radioactive waste and spent nuclear fuel to the Yucca Mountain Site); see also, *A Mountain of Trouble: A Nation at Risk (Report on Impacts of the Proposed Yucca Mountain High-Level Nuclear Waste Program*, Nevada Agency for Nuclear Projects, Office of the Governor (Feb. 2002) (LSN # DN2002054712) at xii (Native Americans are especially vulnerable populations when transportation of nuclear waste to the proposed repository is considered).

DOE concludes, without analysis or factual support, that the potential for the affected population along the rail corridor to sustain adverse health effects is “so remote” under an “incident free” transportation analysis. This is simply inadequate. DOE must analyze the potential adverse health effects to minority populations along the rail corridor in *both* an incident-free scenario *and* a scenario in which an incident occurs. Two of NCAC’s board members live along the proposed rail corridor and they would certainly be placed at a higher risk than the general population if an accident was to occur. Zabarte Decl. ¶ 4a; Meyers Decl. ¶ 6. Because DOE failed to analyze the disproportionate health impacts to minority populations living along the proposed rail corridor should an accident occur, the FEIS and FSEIS are inadequate. See, e.g., *In the Matter of Private Fuel Storage, L.L.C.*, 55 N.R.C. 171, 197 (2002) (Principles of environmental

justice would preclude making tribal members disproportionately bear, from a NEPA balancing standpoint, the net effect of these adverse impacts).

b. DOE's FEIS and FSEIS Fail to Adequately Identify, Address and Mitigate Significant, Adverse Impacts to Cultural Resources Which Would Result from the Proposed Yucca Mountain Repository.

DOE failed to satisfy its obligation under NEPA to take a "hard look" at the impacts the proposed Yucca Mountain Repository would have on cultural resources. NEPA requires an agency to engage in "informed and reasoned decision-making" that is guided by NEPA's mandate to "preserve important historic, cultural, and natural aspects of our national heritage...." See, *In the Matter of Hydro Resources, Inc.*, 62 N.R.C. 442, 472 (2005); 42 U.S.C. § 4331(4). DOE was required to reasonably consider the historic and cultural resources in the affected area; to assess impacts of the proposed action on cultural resources (including reasonable alternatives); to disseminate the relevant facts for public comment; and to respond to legitimate concerns. See, *In the Matter of Hydro Resources, Inc.*, 62 N.R.C. 442, 472 (2005), citing *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 288 (4th Cir. 1999); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194-96 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991); *Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2)*, CLI-03-17, 58 NRC 419, 431 (2003). DOE has failed to meet this burden. As a result, the very existence of irreplaceable cultural resources with spiritual, religious, and traditional significance to the NCAC and its members is threatened.

The FSEIS states that estimated impacts to cultural resources “would be small.” FSEIS Chapter 4 at page 4-40. The NCAC vigorously disputes this finding: it both lacks factual support and is incorrect. In fact, impacts to the extensive cultural resources within and surrounding Yucca Mountain, including the proposed Caliente rail corridor, would cause irreparable harm to a living cultural landscape filled with cultural significance on spiritual, religious, cultural, and subsistence levels. See e.g., *Tribal Concerns About the Yucca Mountain Repository: An Ethnographic Investigation of the Moapa Band of Paiutes and the Las Vegas Paiute Colony*, (Oct. 2002)(LSN #CLK000000033) at 36 (“A loss of the tribal landscape is a significant impact to tribal society”). DOE’s finding that impacts to cultural resources would be “small” demonstrates that it failed to adequately identify and assess the significant impacts that would occur to cultural resources as a result of the proposed repository. See, *American Indian Perspectives on the Yucca Mountain Site Characterization Project and the Repository Environmental Impact Statement* (Feb. 1998) (LSN #DN20025426852) at 4-1 (Finding it “virtually impossible” to support the proposed action without the provisions of systematic studies, proper assessments and considerations to the cultural dynamics involved).

Furthermore, the FEIS incorrectly concludes that the “overall effect of the proposed repository on the long-term preservation of archeological and historic sites in the analyzed land withdrawal area would be beneficial.” FSEIS Chapter 4 at page 4-41. The NCAC controverts this finding as inadequate, incorrect, and a misguided attempt to deny that significant cultural impacts will occur as a result

of the construction of the proposed repository. The NCAC, on behalf of its members, which include tribal members and Indian people indigenous to the area that would be irreparably and adversely affected by the construction of the proposed Yucca Mountain Repository, asserts that the overall effect of the proposed repository on cultural resources, including archeological and historic sites, would be far from beneficial. In fact, tribal members and Indian people have been claiming, with considerable factual and legal support, exactly the opposite since the outset of these proceedings. NCAC strongly disagrees that there would be any beneficial effects associated with the construction of the proposed repository. To the contrary, the proposed construction of the Yucca Mountain Repository would result in irreparable harm to archaeological and historic sites, which are part of a living cultural landscape, and that such adverse impacts cannot be adequately mitigated to prevent such irreparable harm. See *generally*, Zabarte Decl.; Esteves Decl.; and Meyers Decl.; *see e.g.*, *In the Matter of Private Fuel Storage, L.L.C.*, 55 N.R.C. 171, 197 (2002) (Applicant is not entitled to a ruling that there are *no* adverse environmental impacts associated with the physical presence of the proposed facility on the Indian Reservation).

The Final Supplemental EIS also "reported that construction activities would have no direct impacts on several delineated American Indian sites, areas, and resources in or immediately adjacent to the analyzed land withdrawal area." FSEIS Chapter 4 at page 4-42. This conclusion is based on a factually erroneous premise that only specific, delineated sites have cultural significance.

DOE admits as much, acknowledging that “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. . . .” See FSEIS Chapter 4 at page 4-42. Yet DOE’s environmental analysis ignores its own finding and provides no analysis whatsoever of the “cultural insult” that the proposed Repository would pose to Native Americans. FSEIS Chapter 4 at page 4-42; *In the Matter of Private Fuel Storage, L.L.C.*, 55 N.R.C. 171, 197 (2002). The fact that nuclear waste would be permanently entombed on Indian lands represents an irremediable intrusion into Indian lands. See, Esteves Decl. ¶ 4.

NCAC further disputes the FEIS’ finding that the proposed repository’s eventual closure “would have the beneficial effect of returning much of the disturbed landscape to a natural setting.” See FEIS Chapter 4 at page 4-41. This is circular logic. NEPA does not allow the agency to destroy the landscape and claim beneficial effects from abandoning the site. Under no reasonable interpretation of NEPA could the permanent enclosure of nuclear waste within Yucca Mountain be said to constitute a beneficial effect on the environment. Similarly, DOE’s characterization of the overall effect on archaeological and historic sites as “beneficial” because human access would be restricted cannot be accepted as adequate to fulfill the agency’s NEPA responsibilities. That analysis fails to take into account the destructive effects of the construction on such sites in the first instance. See, FEIS Chapter 4 at page 4-39.

CONCLUSION

The NCAC and its members face an immediate and concrete threat of injury to their traditional ways of life if the application for a construction license is granted. NCAC's petition to intervene satisfies the technical requirements for participation as a party in this proceeding, and principles of fundamental fairness require the granting of the petition. NCAC's right to be heard here is particularly compelling in light of the wholesale failure of DOE adhere to its trust responsibility to protect the interests of NCAC and its members. NCAC raises contentions of substantial merit that call into question the legality of granting the license.

For these reasons, the Petition to Intervene should be granted.

Date: March 11, 2009

Respectfully submitted

Signed electronically by Curtis G. Berkey
Curtis G. Berkey

ATTACHMENT 1

MAP. TRADITIONAL BOUNDARIES AND LOCATIONS
OF TRIBES IN THE YUCCA MOUNTAIN REGION

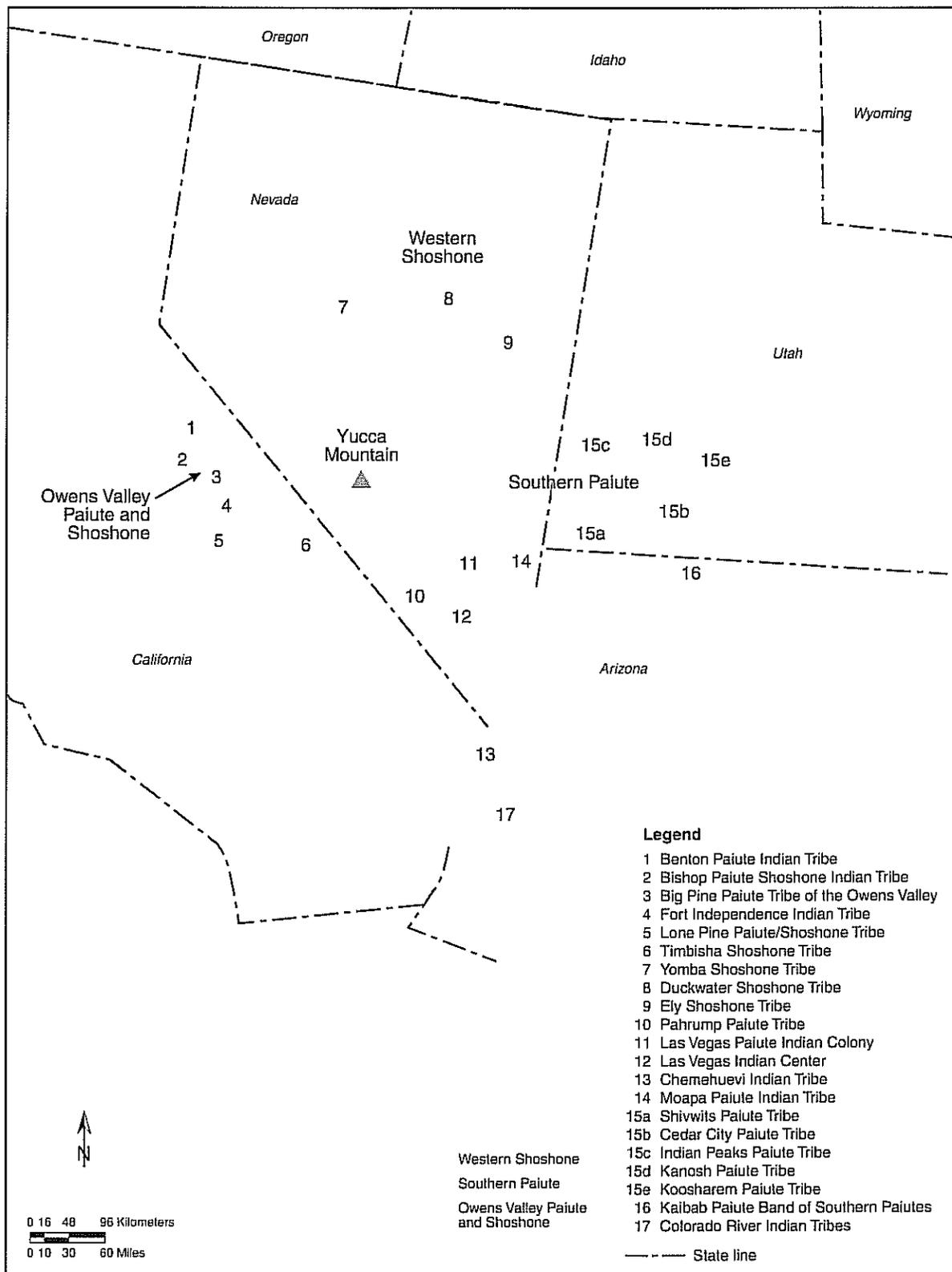


Figure S-21. Traditional boundaries and locations of tribes in the Yucca Mountain region.

ATTACHMENT 2

TREATY WITH THE WESTERN SHOSHONI, 1863

TREATY WITH THE WESTERN SHOSHONI, 1863.

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Done at Box Elder, this thirtieth day of July, A. D. 1863.

James Duane Doty,
Governor and acting superintendent of Indian
affairs in Utah Territory.

P. Edw. Connor,
Brigadier-General U. S. Volunteers, commanding
District of Utah.

Pokatello, his x mark, chief.

Toomontso, his x mark, chief.

Sanpitz, his x mark, chief.

Tosowitz, his x mark, chief.

Yahnoway, his x mark, chief.

Weerahsoop, his x mark, chief.

Pahragoosahd, his x mark, chief.

Tahkwetoonah, his x mark, chief.

Omashee, (John Pokatello's brother,) his x mark, chief.

Witnesses:

Robt. Pollock, colonel Third Infantry, C. V.

M. G. Lewis, captain Third Infantry, C. V.

S. E. Jocelyn, first lieutenant Third Infantry, C. V.

Jos. A. Gebone, Indian interpreter.

John Barnard, jr., his x mark, special interpreter.

Willis H. Boothe, special interpreter.

Horace Wheat.

TREATY WITH THE WESTERN SHOSHONI, 1863.

Treaty of Peace and Friendship made at Ruby Valley, in the Territory of Nevada, this first day of October, A. D. one thousand eight hundred and sixty-three, between the United States of America, represented by the undersigned commissioners, and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs and Principal Men and Warriors, as follows:

Oct. 1, 1863.

18 Stats., 489,
Ratified June 25,
1868.
Proclaimed Oct. 21,
1869.

ARTICLE 1.

Peace and friendship shall be hereafter established and maintained between the Western Bands of the Shoshonee nation and the people and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States within their country, shall cease.

Peace established:
depredations to cease.

ARTICLE 2.

The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all emigrants and travellers under its authority and protection, without molestation or injury from them. And if depredations are at any time committed by bad men of their nation, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travellers passing peaceably over either of said routes is hereby guarantied by said bands.

Routes of travel; of
fenders; safety of trav-
ellers.

Military posts may be established by the President of the United States along said routes or elsewhere in their country; and station houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travellers or for mail or telegraph companies.

Military posts; sta-
tions.

ARTICLE 3.

Telegraph and over-
land stage lines.

The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said bands, and that their property and the lives and property of passengers in the stages and of the employes of the respective companies, shall be protected by them. And further, it being understood that provision has been made by the government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by the said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of country claimed or occupied by them.

Railway.

ARTICLE 4.

Explorations, mining,
settlements, use of
timber.

It is further agreed by the parties hereto, that the Shoshonee country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required. Mills may be erected and timber taken for their use, as also for building and other purposes in any part of the country claimed by said bands.

ARTICLE 5.

Boundaries of west-
ern bands of Shosho-
ni.

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows: On the north by Wong-goga-da Mountains and Shoshonee River Valley; on the west by Su-non-to-yah Mountains or Smith Creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

ARTICLE 6.

Reservations may
be established.

The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

ARTICLE 7.

Annuity, accept-
ance of, as compensa-
tion for loss of game.

The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, and of their faithful observance by the said bands, the United States promise and agree to pay to the said bands of the Shoshonee nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded.

TREATY WITH THE CHIPPEWA—RED LAKE AND PEMBINA BANDS, 1863. 853

ARTICLE 8.

The said bands hereby acknowledge that they have received from said commissioners provisions and clothing amounting to five thousand dollars as presents at the conclusion of this treaty. Presents acknowledged.

Done at Ruby Valley the day and year above written.

James W. Nye.
James Duane Doty.

Te-moak, his x mark.
Mo-ho-a.
Kirk-weedgwa, his x mark.
To-nag, his x mark.
To-so-wee-so-op, his x mark.
Sow-er-e-gah, his x mark.

Po-on-go-sah, his x mark.
Par-a-wost-ze, his x mark.
Ga-ha-dier, his x mark.
Ko-ro-kout-ze, his x mark.
Pon-ge-mah, his x mark.
Buck, his x mark.

Witnesses:

J. B. Moore, lieutenant-colonel Third Infantry California Volunteers.
Jacob T. Lockhart, Indian agent Nevada Territory.
Henry Butterfield, interpreter.

TREATY WITH THE CHIPPEWA—RED LAKE AND PEMBINA BANDS, 1863.

Articles of a treaty made and concluded at the Old Crossing of Red Lake River, in the State of Minnesota, on the second day of October, in the year eighteen hundred and sixty-three, between the United States of America, by their commissioners, Alexander Ramsey and Ashley C. Merrill, agent for the Chippewa Indians, and the Red Lake and Pembina bands of Chippewas; by their chiefs, head-men, and warriors.

Oct. 2, 1863.

U. S. Stat., 667.
Ratified Mar. 1, 1864.
Proclaimed May 5, 1864.

ARTICLE 1. The peace and friendship now existing between the United States and the Red Lake and Pembina bands of Chippewa Indians shall be perpetual. Perpetual peace and friendship.

ARTICLE 2. The said Red Lake and Pembina bands of Chippewa Indians do hereby cede, sell, and convey to the United States all their right, title, and interest in and to all the lands now owned and claimed by them in the State of Minnesota and in the Territory of Dakota within the following described boundaries, to wit: Beginning at the point where the international boundary between the United States and the British possessions intersects the shore of the Lake of the Woods; thence in a direct line southwesterly to the head of Thief River; thence down the main channel of said Thief River to its mouth on the Red Lake River; thence in a southeasterly direction, in a direct line toward the head of Wild Rice River, to the point where such line would intersect the northwestern boundary of a tract ceded to the United States by a treaty concluded at Washington on the 23d day of February, in the year eighteen hundred and fifty-five, with the Mississippi, Pillager, and Lake Winnebigoishish bands of Chippewa Indians; thence along the said boundary-line of the said cession to the mouth of Wild Rice River; thence up the main channel of the Red River to the mouth of the Shayenne; thence up the main channel of the Shayenne River to Poplar Grove; thence in a direct line to the Place of Stumps, otherwise called Lake Chicot; thence in a direct line to the head of the main branch of Salt River; thence in a direct line due north to the point where such line would intersect the international boundary aforesaid; thence eastwardly along said boundary to the place of beginning. Lands ceded to the United States.

Boundaries

ARTICLE 3. In consideration of the foregoing cession, the United States agree to pay to the said Red Lake and Pembina bands of Chippewa Indians the following sums, to wit: Twenty thousand dollars per annum for twenty years; the said sum to be distributed among the Payment for lands ceded.

ATTACHMENT 3

DECLARATION OF IAN ZABARTE
IN SUPPORT OF PETITION TO INTERVENE
BY NATIVE COMMUNITY ACTION COUNCIL

**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

**DECLARATION OF IAN ZABARTE
IN SUPPORT OF PETITION TO INTERVENE
BY NATIVE COMMUNITY ACTION COUNCIL**

I, Ian Zabarte, being duly sworn, state as follows:

1. I am employed by the Moapa Band of Paiutes on the Moapa River Indian Reservation; my work address is Box 340, Moapa, Nevada 89025. I am a member of the Duckwater Shoshone Tribe and Secretary of State of the Western Shoshone National Council. By reason of my upbringing, I am familiar with the custom and traditions of the Western Shoshone people and have engaged in traditional practices of my people over the course of my lifetime (44 years).

2. To the Western Shoshone people, Yucca Mountain is part of a seamless landscape known in the Shoshone language as *Newe Sogobia*. *Newe*, or people, is what the Western Shoshone call themselves. *Sogobia* is the name of Mother Earth. Together, *Newe Sogobia* is the political, social, cultural and spiritual embodiment of the

Western Shoshone nation, people and land. (See Figure S-21, Supplemental EIS, which demonstrates that Yucca Mountain is literally within the heart of, and surrounded by the lands of the Native people of this region.) To the Western Shoshone people, culture is the most important aspect for measuring the strength of a nation. Cultural identity is obtained from living in a place that provides that identity; the Western Shoshone people are forever bound to *Newe Sogobia*; without these lands, we cease to exist. To us, every act which desecrates the land is an act which contributes to the dismantling of our living culture; for the benefit of others in the United States, our lives and future are being taken piece by piece, permanently, with each bore hole, each test site, each step toward the construction of this facility.

3. I am one of the incorporators, and am currently a Vice President of the Native Community Action Council (NCAC), a non-profit corporation chartered under Nevada law. NCAC was established by Native people in 1994, and incorporated in 2001, in response to the decades of above-ground nuclear weapons tests conducted by the United States government in the area known by non-Indians as the Nevada Test Site. NCAC noted that radiation created by the weapons tests disproportionately affected Native reservations and communities (Ely, Duckwater, Moapa and Goschutes Indian Reservations) and other small rural communities in Nevada and Utah. NCAC is a corporation the members of which are limited to those individuals "of a Native/Indigenous community affected by the Nevada Test Site." The Nevada Test Site is now projected to include an additional source of nuclear risk to Native people, the Yucca Mountain Nuclear Waste Repository.

a. The Articles of Incorporation and Bylaws of NCAC, attached, set forth the

purposes of NCAC: to "preserve traditional histories [of Native people] for our future generation;" and "to protect the peoples['] rights and benefits which should accrue to us pursuant to our Tribal customs by empowering our communities in understanding, educating and managing the risks of radiation and health related concerns." Article 2, NCAC Bylaws.

- b. NCAC's petition to intervene in this proceeding is wholly consistent with the organization's mission: to protect the traditions of the Western Shoshone and Southern Paiute people from further degradation by construction and operation in culturally significant and sensitive Indian lands, of the proposed repository for nuclear waste materials; and to protect the health of Indian people who, since the beginning of time and today, have used the natural resources of the Yucca Mountain area for traditional practices which include hunting, gathering, healing and prayer activities.
 - c. NCAC is composed of the Western Shoshone and Southern Paiute people, and represents the very Native people described in the SEIS (Figure S-21.)
4. Construction and operation of the proposed repository will have direct adverse impacts upon me and my Western Shoshone people. The direct adverse impacts include the following:
- a. My present home is within one-half mile of the railroad tracks, and very near trucking routes that are projected to be used to transport nuclear waste to the proposed site on Yucca Mountain. I work in and use the

lands along the rail transportation route near Moapa. The delivery of nuclear material through these homelands will increase the risks of exposure to radiation from leaks, accidents, acts of sabotage or other events. The Supplemental Environmental Impact Study demonstrates that these concerns are quite real, the risks quite serious, and the potential adverse impacts upon me and my people potentially significant. I note, for example, that the Moapa Band of Paiutes has perhaps 300 members. The loss to radiation sickness in consequence of a train accident on the Moapa River Indian Reservation of even one member of the Moapa Band of Paiutes would be a blow of great significance to people already decimated by the incursion of non-Indians into our traditional territory, the use of our homelands as a nuclear weapons testing site, and the resulting disease and poverty inflicted on the Native American people.

- b. Western Shoshone people who are members of NCAC live in Beatty, Nevada, approximately 20 miles from the proposed site at Yucca Mountain. Individual who is a member of NCAC who resides in the Beatty area is: Angie Boland, 405 W. Amargosa, Beatty, Nevada 89003. The Final Environmental Impact Statement characterizes the risks to non-worker populations from operation of the project as "small;" nonetheless, the FEIS acknowledges that the risks are increased with respect to latent cancer deaths ("from 16 to 31 chances in 1,000,000" over a lifetime of 70 years). FEIS, Summary S.5.1.8. Accidents affecting the Yucca Mountain

repository present further risks to residents. FEIS, Summary, S.5.1.9 (“38 millrem” “maximumally exposed offsite individual” and “an estimated 0.011 additional latent cancer fatality for the population” within 50 miles. For other accidents, exposures and concomitant statistical risk of cancer fatalities are increased.) Again, the population of Indian people native to the Yucca Mountain area has been depleted; the death of even one member of that vastly diminished group has an impact upon our culture and our future as Indian people, which is far greater than the clinical statistical analyses of FEIS would reveal.

- c. Traditionally, Western Shoshone people were very mobile; our trails lead throughout our aboriginal territory including through Yucca Mountain. We hunted game, gathered plants, and built our houses in all of our territory. Though those lands are largely no longer available to us and, by necessity, we have become less mobile, we still hunt, still gather, still use medicinal plants from throughout the region including Yucca Mountain and Amargosa Valley, an area connected to Yucca Mountain through the groundwater basins. See, SEIS at 3-31 (The Alkali Flat-Furnace Creek groundwater basin would be “most” affected by Yucca Mountain development. Though there are considerable “uncertainties” about the regional groundwater flow systems (SEIS at 3-33), it appears that “Water that infiltrates at Yucca Mountain . . . flows south to the Amargosa Desert and a primary discharge area of Alkali Flat, with some flow potentially moving into Death Valley along the same general course followed by the

Amargosa River channel." There, water from the Ash Meadows groundwater basin joins it.) We are not a wealthy people, and many of us still rely upon the native plants and animals for sustenance. In Amargosa Valley I hunt rabbits and mountain sheep for food; I also gather pine nuts, Indian spinach, mesquite beans and other plants. I gather mesquite wood for cooking and heating. I gather medicinal plants for healing. We use these resources in our ceremonies. I have hunted these animals and gathered these plants for my entire life, and continue to do so; I have hunted and gathered within the past six months and look forward to the spring blossoms and roots of Yucca plants to cook or eat raw in salad with Indian spinach. The risks of leaks of waste materials, radiation exposure, contamination of surface and groundwater, and other dangers outlined by the SEIS and described above, present risks not just to humans, but to the plants and animals which breathe the air and drink the water, and upon which I and other Western Shoshone people rely for food. We live a unique lifestyle with unknown exposure pathways that contribute to our vulnerability.

- d. I have participated in traditional spring gatherings on and around Yucca Mountain, and elsewhere in our aboriginal territory. I have participated in gatherings on Yucca Mountain which took place every year, for many years until about 2007. Spring gathering occurs every year but might not be on Yucca Mountain this spring. The Shoshone tradition is that there is a fall and a spring gathering. These gatherings are generally small,

almost family-type events; strangers usually are not permitted to attend. We have sweats, feeds, singing, drummers, and prayers. We sing to the plants, animals, water, air and the land as well as about them. We are communing with the land during the gathering, because as I said, our culture exists only in relationship to the land. There are not certain specific times and places for these gatherings – they happen when and where the land speaks to us. When we look at the land, the unspoiled vastness as far as we can see gives us our sense of being. If Yucca Mountain is taken from us to be used for the benefit of others, that vastness will be diminished, our gatherings there will not occur, and our culture and our very existence as Shoshone people will be diminished yet again.

- e. Though Shoshone people use all of the aboriginal areas, and all that is alive in those areas because of our connection with Mother Earth, there is a place of particular historical importance, what is now known as Ash Meadows, or Ash Meadows National Wildlife Refuge. There are springs at Ash Meadows, and in consequence, there are plants and wildlife there. Ash Meadows has been considered as shared territory by the Shoshone and Paiute people. Trails were established to Ash Meadows by both Nations, and in past times, Shoshone and Paiute people met there, had ceremonies there, and shared knowledge there. The Paiute people in earlier times were an agricultural people; the Shoshone people were not. Paiute people gave seeds to Shoshones at Ash Meadows, and taught the

Shoshones to garden. Shoshone and Paiute people still go to these meadows, even though they are now managed by the U.S. Fish and Wildlife Service; the Service consults with us when it manages the refuge to insure that our trails are not disturbed by the wooden boardwalks constructed there, for example. The SEIS notes that Ash Meadows are the “nearest surface-water impoundments” to Yucca Mountain. SEIS at 3-26 (30 miles from the proposed nuclear waste site). The surface waters of Ash Meadows drain to the Amargosa River, which in turn drains to the Badwater Basin in Death Valley a few miles south of the Timbisha Shoshone Reservation. *Id.* The Ash Meadows surface water and springs are connected to the groundwater as well, though as the SEIS states, “there are differing opinions among investigators on how extensively [the carbonate aquifers] are interconnected over the region.” SEIS at 3-29. Apparently some investigators assert that the aquifers are compartmentalized, while others view them as “highly connected over the region . . . acting, where applicable, to integrate individual valleys into a single groundwater basin.” *Id.* Apparently the water that infiltrates at Yucca Mountain flows below the Amargosa Desert and into Death Valley. SEIS at 3-31. As the groundwater in this Alkali Flat-Furnace Creek groundwater basin moves beneath Amargosa Desert, “underflow from the Ash Meadows groundwater basin joins it.” *Id.* (Allegedly this flow is one-way, that is from Ash Meadows to the Alkali Flat-Furnace Creek basin.) But the SEIS speaks to the “uncertainties about the regional groundwater

flow system” and the studies being done to resolve those uncertainties. Id. at 3-33. What I see is that the Ash Meadows waters, which remain of significant importance to our two Nations, are connected to groundwater which originates at Yucca Mountain. Given the uncertainties about the “groundwater flow system,” it appears to us that contaminated ground waters at Yucca Mountain have the potential to infect groundwater at Ash Meadow, where Paiute and Shoshone people have ceremonies, and at Death Valley where Shoshone people live and rely upon Furnace Creek waters.

5. NCAC educates and advocates for the Western Shoshone and Southern Paiute people. Yucca Mountain lies nearly in the center of the territories of these Nations, and literally is surrounded by the tribes of bands of the Shoshone and Paiute. SEIS Figure S-21. I have said here that these lands, and the resources produced by these lands, are our Mother Earth to which we are inextricably linked. Construction at Yucca Mountain of a place to deposit other peoples' wastes will take from us another piece of our land and another piece of our culture, and will further diminish us. That repository will add to the existing contamination and threatened contamination of our water, the animals and plants which depend upon that water, and our people who depend upon these lands and its resources.

6. I suggest with respect that as advocates of the Western Shoshone and Southern Paiute people facing the threat of immediate and irreparable injury from the licensing of this project, NCAC could furnish valuable assistance to the Commission in

its deliberations.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 9, 2009, in Berkeley, California, in accordance with 10 C.F.R.
2.304(d).



Ian Zabarte
Director
Native Community Action Council

ATTACHMENT 4

ARTICLES OF INCORPORATION OF
THE NATIVE COMMUNITY ACTION COUNCIL (NCAC)

ARTICLES OF INCORPORATION
OF THE
NATIVE COMMUNITY ACTION COUNCIL (N C A C)
A NON-PROFIT CORPORATION

The undersigned incorporator(s), in order to form a non-profit corporation under the laws of the State of Nevada, adopt the following Articles of Incorporation:

ONE: The name of this corporation is the Native Community Action Council.

TWO: The name and address of the registered agent of this corporation is:

Patricia George
236 Arrowhead Circle
Ely, NV 89301

THREE: The specific purposes for which this corporation is organized are

1. To preserve traditional histories for our future generations.

2. To protect the people's rights and benefits that should accrue to us pursuant to our tribal customs by empowering our communities in understanding, educating, and managing the risks of radiation and health related concerns.

FOUR: The maximum number of directors of this corporation shall be twenty-one (21) and a minimum of nine (9). Their names and address are as follows:

Virginia Sanchez, P.O. Box 140064, Duckwater, NV 89314;

Dolly Bigsoldier, P.O. Box 317, Santa Clara, UT 84765;

Corrina Bow, 476 South, 700 West, Cedar City, UT 84720;

Margene Bullcreek, P.O. Box 155, Tooele, UT 84074;

Laura Saunders, P.O. Box 36, Gabbs, NV 89409;

Pauline Esteves, P.O. Box 108, Death Valley, CA 92328;

Grace Goad, P.O. Box 421, Death Valley, CA 92328;

Eleanor Tom, 4562 North Wagon Wheel, Cedar City, UT 84720;

Ian Zabarte, P. O Box 210, Indian Springs, NV 89018;

FIVE: The name(s) and address(es) of the incorporator(s) of this corporation are:

Virginia Sanchez, P.O. Box 140064, Duckwater, NV 89314;

Dolly Bigsoldier, P.O. Box 317, Santa Clara, UT 84765;

Corrina Bow, 476 South, 700 West, Cedar City, UT 84720;

Margene Bullcreek, P.O. Box 155, Tooele, UT 84074;

Laura Saunders, P.O. Box 36, Gabbs, NV 89409;

Pauline Esteves, P.O. Box 108, Death Valley, CA 92328;

Grace Goad, P.O. Box 421, Death Valley, CA 92328;

Eleanor Tom, 4562 North Wagon Wheel, Cedar City, UT 84720;

Ian Zabarte, P. O Box 210, Indian Springs, NV 89018;

SIX: The period of duration of this corporation is perpetual.

SEVEN: The classes, rights, privileges, qualifications, and obligations of members of this corporation are as follows:

This corporation shall have one class of membership. Any person shall be qualified to become a member that is an individual of a Native/Indigenous community affected by the Nevada Test Site.

EIGHT: Any additional provisions for the operation of the corporation are as follows:

Upon the dissolution of this corporation, its assets remaining after payment, or provision for payment, of all debts and liabilities of this corporation shall be distributed for one or more exempt purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code or shall be distributed to the federal government, tribal government, or to a state or local government, for a public purpose.

No substantial part of the activities of this corporation shall consist of carrying on propaganda, or otherwise attempting to influence legislation (except as otherwise provided by Section 501(h) of the Internal Revenue Code), and this corporation shall not participate in, or intervene in (including the publishing or distribution of statements), any political campaign on behalf of, or in opposition to, any candidate for public office.

No part of the net earnings of this corporation shall inure to the benefit of, or be distributable to, its members, directors, officers, or other private persons, except that this corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in these Articles.

Notwithstanding any other provision of these Articles, this corporation shall not carry on any other activities not permitted to be carried on (1) by a corporation exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code or (2) by a corporation contributions to which are deductible under Section 170(c)(2) of the Internal Revenue Code.

The undersigned incorporators hereby declare under penalty of perjury that the statements made in the foregoing Articles of Incorporation are true.

Dated: August 19, 2001


Virginia Sanchez, incorporator


Dolly Big Soldier, incorporator


Corrina Bow, incorporator


Margene Bullcreek, incorporator


Laura Saunders, incorporator


Pauline Esteves, incorporator


Grace Goad, incorporator


Eleanor Tom, incorporator


Ian Zabarte, incorporators

ATTACHMENT 5
BY-LAWS OF THE
NATIVE COMMUNITY ACTION COUNCIL (NCAC)

**BYLAWS
OF THE
NATIVE COMMUNITY ACTION COUNCIL (NCAC)**

**ARTICLE 1
OFFICES**

SECTION 1. PRINCIPAL OFFICE

The principal office of the corporation is located in White Pine County, State of Nevada.

SECTION 2. CHANGE OF ADDRESS

The designation of the county or state of the corporation's principal office may be changed by amendment of these Bylaws. The Board of Directors may change the principal office from one location to another within the named county by noting the changed address and effective date.

SECTION 3. OTHER OFFICES

The corporation may also have offices at such other places, within or without its state of incorporation, where it is qualified to do business, as its business and activities may require, and as the board of directors may, from time to time, designate.

**ARTICLE 2
NONPROFIT PURPOSES**

SECTION 1. IRS SECTION 501(C)(3) PURPOSES

This corporation is organized exclusively for one or more of the purposes as specified in Section 501(c)(3) of the Internal Revenue Code.

Section 2. SPECIFIC OBJECTIVES AND PURPOSES

The specific objectives and purposes of this corporation shall be:

- A. To preserve traditional histories for our future generation.

B. To protect the peoples rights and benefits which should accrue to us pursuant to our tribal customs by empowering our communities in understanding, educating, and managing the risks of radiation and health related concerns.

ARTICLE 3 DIRECTORS

SECTION 1. NUMBER

The corporation shall have a maximum of twenty-one (21) directors and a minimum of nine (9) directors and collectively they shall be known as the Board of Directors.

SECTION 2. QUALIFICATIONS

Directors shall be as follows:

- A. Must be at least 18 years of age.
- B. A person that is an individual of a Native/Indigenous community affected by the Nevada Test Site.

SECTION 3. POWERS

Subject to the provisions of the laws of this state and any limitations in the Articles of Incorporation and these Bylaws relating to action required or permitted to be taken or approved by the members, if any, of this corporation, the activities and affairs of this corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the Board of Directors.

SECTION 4. DUTIES

It shall be the duty of the directors to:

- (a) Perform any and all duties imposed on them collectively or individually by law, by the Articles of Incorporation, or by these Bylaws;
- (b) Appoint and remove, employ and discharge, and, except as otherwise provided in these Bylaws, prescribe the duties and fix the compensation, if any, of all officers, agents and employees of the corporation;
- (c) Supervise all officers, agents and employees of the corporation to assure that their duties are performed properly;
- (d) Meet at such times and places as required by these Bylaws.

(e) Register their addresses with the Secretary of the corporation, and notices of meetings mailed or telegraphed to them at such addresses shall be valid notices thereof.

SECTION 5. TERM OF OFFICE

Each director shall hold office for an indefinite period.

SECTION 6. COMPENSATION

Directors shall serve without compensation except that a reasonable fee may be paid to directors for attending regular and special meetings of the board. In addition, they shall be allowed reasonable advancement or reimbursement of expenses incurred in the performance of their duties.

SECTION 7. PLACE OF MEETINGS

Meetings shall be held at the principal office of the corporation unless otherwise provided by the board or at such other place as may be designated from time to time by agreement of the Board of Directors. This may also include teleconferencing.

SECTION 8. REGULAR MEETINGS

Regular meetings of Directors shall be held three times a year.

At a regular meeting of directors, directors shall be appointed by consensus of the Board of Directors.

SECTION 9. SPECIAL MEETINGS

Special meetings of the Board of Directors may be called by any of the directors. Such meetings shall be held at the principal office of the corporation or, if different, at the place designated by the director or directors calling the special meeting, including teleconferencing.

SECTION 10. NOTICE OF MEETINGS

Unless otherwise provided by the Articles of Incorporation, these Bylaws, or provisions of law, the following provisions shall govern the giving of notice for meetings of the board of directors:

(a) Regular Meetings. At least seven (7) days prior notice will be given of any regular meeting of the board of directors.

(b) Special Meetings. At least one week (7) day's prior notice shall be given by the Secretary or designate of the corporation to each director of each special meeting of the board. Such notice must be written, may be given personally, by first class mail, or by e-mail, facsimile machine, and shall state the place, date and time of the meeting and the matters proposed to be acted upon at the meeting. In the case of facsimile notification, the director to be contacted shall acknowledge personal receipt of the facsimile notice by a return facsimile message or telephone call within twenty-four hours of the first facsimile transmission. In the case of e-mail notification, the director to be contacted shall acknowledge personal receipt of the e-mail notice by a return e-mail message or telephone call within twenty-four hours of the first e-mail.

(c) Waiver of Notice. Whenever any notice of a meeting is required to be given to any director of this corporation under provisions of the Articles of Incorporation, these Bylaws, or the law of this state, a waiver of notice in writing signed by the director, whether before or after the time of the meeting, shall be equivalent to the giving of such notice.

SECTION 11. QUORUM FOR MEETINGS

A quorum shall consist of five (5) of the members of the Board of Directors.

Except as otherwise provided under the Articles of Incorporation, these Bylaws, or provisions of law, no business shall be considered by the board at any meeting at which the required quorum is not present, and the only motion which the Chair shall entertain at such meeting is a motion to adjourn.

SECTION 12 CONSENSUS ACTION AS BOARD ACTION

Every act or decision done or made by a consensus of the directors present at a meeting duly held at which a quorum is present is the act of the Board of Directors.

SECTION 13. CONDUCT OF MEETINGS

Meetings of the Board of Directors shall be presided over by the President of the corporation or, in his or her absence, by the Vice President of the corporation or, in the absence of each of these persons, by a Chairperson chosen by a consensus of the directors present at the meeting. The Secretary of the corporation shall act as secretary of all meetings of the board, provided that, in his or her absence, the presiding officer shall appoint another person to act as Secretary of the Meeting.

Meetings shall be governed by consensus decision making process insofar as such rules are not inconsistent with or in conflict with the Articles of Incorporation, these Bylaws, or with provisions of law.

SECTION 14. VACANCIES

Vacancies on the Board of Directors shall exist (1) on the death, resignation or removal of any director, and (2) whenever the number of authorized directors is increased.

Any director may resign effective upon giving written notice to the President, the Secretary, or the Board of Directors, unless the notice specifies a later time for the effectiveness of such resignation. No director may resign if the corporation would then be left without a duly elected director or directors in charge of its affairs, except upon notice to the Office of the Attorney General or other appropriate agency of this state.

Directors may be removed from office, with or without cause, as permitted by these bylaws and in accordance with the laws of this state.

Unless otherwise prohibited by the Articles of Incorporation, these Bylaws or provisions of law, vacancies on the board may be filled by approval of the board of directors. If the number of directors then in office is less than a quorum, a vacancy on the board may be filled by approval of a consensus of the directors then in office or by a sole remaining director. A person elected to fill a vacancy on the board shall hold office until the next election of the Board of Directors or until his or her death, resignation or removal from office.

SECTION 15. NONLIABILITY OF DIRECTORS

The directors shall not be personally liable for the debts, liabilities, or other obligations of the corporation.

SECTION 16. INDEMNIFICATION BY CORPORATION OF DIRECTORS AND OFFICERS

The directors and officers of the corporation shall be indemnified by the corporation to the fullest extent permissible under the laws of this state.

SECTION 17. INSURANCE FOR CORPORATE AGENTS

Except as may be otherwise provided under provisions of law, the Board of Directors may authorize the purchase and maintenance of insurance on behalf of any agent of the corporation (including a director, officer, employee or other agent of the corporation) against liabilities asserted against or incurred by the agent in such capacity or arising out of the agent's status as such, whether or not the corporation would have the power to indemnify the agent against such liability under the Articles of Incorporation, these Bylaws or provisions of law.

ARTICLE 4 OFFICERS

SECTION 1. DESIGNATION OF OFFICERS

The officers of the corporation shall be a President, a Vice President, a Secretary, and a Treasurer.

SECTION 2. QUALIFICATIONS

Officers of this corporation shall be as follows:

A. Must be at least 18 years of age.

B. A person that is an individual of a Native/Indigenous community affected by the Nevada Test Site.

SECTION 3. ELECTION AND TERM OF OFFICE

Officers shall be elected by the Board of Directors, at any time, and each officer shall hold office for two (2) years until he or she resigns or is removed or is otherwise disqualified to serve, or until his or her successor shall be elected and qualified, whichever occurs first.

SECTION 4. REMOVAL AND RESIGNATION

Any officer may be removed, either with or without cause, by the Board of Directors, at any time. Any officer may resign at any time by giving written notice to the Board of Directors or to the President or Secretary of the corporation. Any such resignation shall take effect at the date of receipt of such notice or at any later date specified therein, and, unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective. The above provisions of this Section shall be superseded by any conflicting terms of a contract which has been approved or ratified by the Board of Directors relating to the employment of any officer of the corporation.

SECTION 5. VACANCIES

Any vacancy caused by the death, resignation, removal, disqualification, or otherwise, of any officer shall be filled by the Board of Directors. In the event of a vacancy in any office other than that of President, such vacancy may be filled temporarily by appointment by the President until such time as the Board shall fill the vacancy. Vacancies occurring in offices of officers appointed at the discretion of the board may or may not be filled as the board shall determine.

SECTION 6. DUTIES OF PRESIDENT

The President shall be the chief executive officer of the corporation and shall, subject to the control of the Board of Directors, supervise and control the affairs of the corporation and the activities of the officers. He or she shall perform all duties incident to his or her office and such other duties as may be required by law, by the Articles of Incorporation, or by these Bylaws, or which may be prescribed from time to time by the Board of Directors. Unless another person is specifically appointed as Chairperson of the Board of Directors, the President shall preside at all meetings of the Board of Directors and, if this corporation has members, at all meetings of the members. Except as otherwise expressly provided by law, by the Articles of Incorporation, or by these Bylaws, he or she shall, in the name of the corporation, execute such deeds, mortgages, bonds, contracts, checks, or other instruments which may from time to time be authorized by the Board of Directors.

SECTION 7. DUTIES OF VICE PRESIDENT

In the absence of the President, or in the event of his or her inability or refusal to act, the Vice President shall perform all the duties of the President, and when so acting shall have all the powers of, and be subject to all the restrictions on, the President. The Vice President shall have other powers and perform such other duties as may be prescribed by law, by the Articles of Incorporation, or by these Bylaws, or as may be prescribed by the Board of Directors.

SECTION 8. DUTIES OF SECRETARY

The Secretary shall:

Certify and keep at the principal office of the corporation the original, or a copy, of these Bylaws as amended or otherwise altered to date.

Keep at the principal office of the corporation or at such other place as the board may determine, a book of minutes of all meetings of the directors, and, if applicable, meetings of committees of directors and of members, recording therein the time and place of holding, whether regular or special, how called, how notice thereof was given, the names of those present or represented at the meeting, and the proceedings thereof.

See that all notices are duly given in accordance with the provisions of these Bylaws or as required by law.

Be custodian of the records and of the seal of the corporation and affix the seal, as authorized by law or the provisions of these Bylaws, to duly executed documents of the corporation.

Exhibit at all reasonable times to any director of the corporation, or to his or her agent or attorney, on request therefor, the Bylaws, and the minutes of the proceedings of the directors of the corporation.

In general, perform all duties incident to the office of Secretary and such other duties as may be required by law, by the Articles of Incorporation, or by these Bylaws, or which may be assigned to him or her from time to time by the Board of Directors.

SECTION 9. DUTIES OF TREASURER

The Treasurer shall:

Have charge and custody of, and be responsible for, all funds and securities of the corporation, and deposit all such funds in the name of the corporation in such banks, trust companies, or other depositories as shall be selected by the Board of Directors.

Receive, and give receipt for, moneys due and payable to the corporation from any source whatsoever.

Disburse, or cause to be disbursed, the funds of the corporation as may be directed by the Board of Directors, taking proper vouchers for such disbursements.

Keep and maintain adequate and correct accounts of the corporation's properties and business transactions, including accounts of its assets, liabilities, receipts, disbursements, gains and losses.

Exhibit at all reasonable times the books of account and financial records to any director of the corporation, or to his or her agent or attorney, on request therefor.

Render to the President and directors, whenever requested, an account of any or all of his or her transactions as Treasurer and of the financial condition of the corporation.

Prepare, or cause to be prepared, and certify, or cause to be certified, the financial statements to be included in any required reports.

In general, perform all duties incident to the office of Treasurer and such other duties as may be required by law, by the Articles of Incorporation of the corporation, or by these Bylaws, or which may be assigned to him or her from time to time by the Board of Directors.

SECTION 10. COMPENSATION

The salaries of the officers, if any, shall be fixed from time to time by resolution of the Board of Directors. In all cases, any salaries received by officers of this corporation shall be reasonable and given in return for services actually rendered to or for the corporation.

Wittman
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ARTICLE 5 COMMITTEES

SECTION 1. EXECUTIVE COMMITTEE

The officers of the Board of Directors constitute the Executive Committee. This executive committee has the powers and authority of the board in the management of the business and affairs of the corporation, to the extent permitted, and except as may otherwise be provided, by these bylaws and provisions of law. Policy decisions must be brought before the Board of Directors.

By a consensus vote of its members, the board may at any time revoke or modify any or all of the Executive Committee authority so delegated, increase or decrease but not below two (2) the number of the members of the Executive Committee, and fill vacancies on the Executive Committee from the members of the board. The Executive Committee shall keep regular minutes of its proceedings, cause them to be filed with the corporate records, and report the same to the board from time to time as the board may require.

SECTION 2. OTHER COMMITTEES

The corporation shall have such other committees as may from time to time be designated by consensus of the Board of Directors. These committees may consist of persons who are not also members of the board and shall act in an advisory capacity to the board.

SECTION 3. MEETINGS AND ACTION OF COMMITTEES

Meetings and action of committees shall be governed by, noticed, held and taken in accordance with the provisions of these Bylaws. The Board of Directors may also adopt rules and regulations pertaining to the conduct of meetings of committees to the extent that such rules and regulations are not inconsistent with the provisions of these Bylaws.

ARTICLE 6 EXECUTION OF INSTRUMENTS, DEPOSITS AND FUNDS

SECTION 1. EXECUTION OF INSTRUMENTS

The Board of Directors, except as otherwise provided in these Bylaws, may by resolution authorize any officer or agent of the corporation to enter into any contract or execute and deliver any instrument in the name of and on behalf of the corporation, and such authority may be general or confined to specific instances. Unless so authorized, no officer, agent, or employee shall have any power or authority to bind the corporation by any contract or engagement or to pledge its credit or to render it liable monetarily for any purpose or in any amount.

SECTION 2. CHECKS AND NOTES

Except as otherwise specifically determined by resolution of the Board of Directors, or as otherwise required by law, checks, drafts, promissory notes, orders for the payment of money, and other evidence of indebtedness of the corporation shall be signed by the Treasurer and countersigned by the President of the corporation.

SECTION 3. DEPOSITS

All funds of the corporation shall be deposited from time to time to the credit of the corporation in such banks, trust companies, or other depositories as the Board of Directors may select.

SECTION 4. GIFTS

The Board of Directors may accept on behalf of the corporation any contribution, gift, bequest, or devise for the nonprofit purposes of this corporation.

ARTICLE 7 CORPORATE RECORDS, REPORTS AND SEAL

SECTION 1. MAINTENANCE OF CORPORATE RECORDS

The corporation shall keep at its principal office:

(a) Minutes of all meetings of directors, committees of the board and, indicating the time and place of holding such meetings, whether regular or special, how called, the notice given, and the names of those present and the proceedings thereof;

(b) Adequate and correct books and records of account, including accounts of its properties and business transactions and accounts of its assets, liabilities, receipts, disbursements, gains and losses;

(c) A copy of the corporation's Articles of Incorporation and Bylaws as amended to date, which shall be open to inspection by the Board of Directors of the corporation at all reasonable times during office hours.

SECTION 2. CORPORATE SEAL

The Board of Directors may adopt, use, and at will alter, a corporate seal. Such seal shall be kept at the principal office of the corporation. Failure to affix the seal to corporate instruments, however, shall not affect the validity of any such instrument.

SECTION 3. DIRECTORS' INSPECTION RIGHTS

Every director shall have the absolute right at any reasonable time to inspect and copy all books, records and documents of every kind and to inspect the physical properties of the corporation and shall have such other rights to inspect the books, records and properties of this corporation as may be required under the Articles of Incorporation, other provisions of these Bylaws, and provisions of law.

SECTION 4. PERIODIC REPORT

The Board shall cause any annual or periodic report required under law to be prepared and delivered within the time limits set by law.

ARTICLE 8 IRs 501(C)(3) TAX EXEMPTION PROVISIONS

SECTION 1. LIMITATIONS ON ACTIVITIES

No substantial part of the activities of this corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation [except as otherwise provided by Section 501(h) of the Internal Revenue Code], and this corporation shall not participate in, or intervene in (including the publishing or distribution of statements), any political campaign on behalf of, or in opposition to, any candidate for public office.

Notwithstanding any other provisions of these Bylaws, this corporation shall not carry on any activities not permitted to be carried on (a) by a corporation exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code, or (b) by a corporation, contributions to which are deductible under Section 170(c)(2) of the Internal Revenue Code.

SECTION 2. PROHIBITION AGAINST PRIVATE INUREMENT

No part of the net earnings of this corporation shall inure to the benefit of, or be distributable to, its members, directors or trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes of this corporation.

SECTION 3. DISTRIBUTION OF ASSETS

Upon the dissolution of this corporation, its assets remaining after payment, or provision for payment, of all debts and liabilities of this corporation shall be distributed for one or more exempt purposes within the meaning of Section 510(c)(3) of the Internal Revenue Code or shall be distributed to the federal government, tribal government, or to a state or local government, for a public purpose. Such distribution shall be made in accordance with all applicable provisions of the laws of this state.

ARTICLE 9 AMENDMENT OF BYLAWS

SECTION 1. AMENDMENT

These Bylaws, or any of them, may be altered, amended, or repealed and new Bylaws adopted by approval of the Board of Directors.

ARTICLE 10 CONSTRUCTION AND TERMS

If there is any conflict between the provisions of these Bylaws and the Articles of Incorporation of this corporation, the provisions of the Articles of Incorporation shall govern.

Should any of the provisions or portions of these Bylaws be held unenforceable or invalid for any reason, the remaining provisions and portions of these Bylaws shall be unaffected by such holding.

All references in these Bylaws to the Articles of Incorporation shall be to the Articles of Incorporation, Articles of Organization, Certificate of Incorporation, Organizational Charter, Corporate Charter, or other founding document of this corporation filed with an office of this state and used to establish the legal existence of this corporation.

All references in these Bylaws to a section or sections of the Internal Revenue Code shall be to such sections of the Internal Revenue Code of 1986 as amended from time to time, or to corresponding provisions of any future federal tax code.

ADOPTION OF BYLAWS

We, the undersigned, are all of the initial directors or incorporators of this corporation, and we consent to, and hereby do, adopt the foregoing Bylaws, consisting of twelve (12) preceding pages, as the Bylaws of this corporation.

Dated: August 19, 2001

Virginia Sanchez
Virginia Sanchez, incorporator

- Resigned 12/3/09

Dolly Big Soldier
Dolly Big Soldier, incorporator

- ~~Vacant~~ Deceased 3/09

Corrina Bow
Corrina Bow, incorporator

- Resigned 3/09

OK

Margene Bullcreek
Margene Bullcreek, incorporator

① Bennie Reilley OK

OK

Laura Saunders
Laura Saunders, incorporator

② Calvin Meyers OK

OK ③ Maurice Frank-Churchill

OK

Pauline Esteves
Pauline Esteves, incorporator

④ Dorena Martineau OK

OK

Grace Goad
Grace Goad, incorporator

⑤ Carmen Martineau OK

OK

Eleanor Tom
Eleanor Tom, incorporator

⑥ Angie Boland OK

OK

Ian Zabarte
Ian Zabarte, incorporators

Corbin Harney - Deceased 3/09

ATTACHMENT 6

DECLARATION OF PAULINE ESTEVES
IN SUPPORT OF PETITION TO INTERVENE
BY NATIVE COMMUNITY ACTION COUNCIL

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

In the Matter of:

U.S. Department of Energy

Docket No. 63-001

(License Application for Geologic
Repository at Yucca Mountain)

**DECLARATION OF PAULINE ESTEVES
IN SUPPORT OF PETITION TO INTERVENE
BY NATIVE COMMUNITY ACTION COUNCIL**

I, Pauline Esteves, hereby declare as follows:

1. I am an enrolled member of the Timbisha Shoshone Tribe (Tribe), a federally recognized Indian tribe with offices in Death Valley, California. I currently serve as a Tribal Council member for the Tribal Government, and speak my native dialect. My Tribe has over 200 tribal members. I am familiar with and actively participate in my Tribal culture, including traditional spiritual and religious practices, on a daily basis.
2. I also serve as a Board Member for the Native Community Action Council (NCAC), a non-profit corporation formed under Nevada law by Western Shoshone and Southern Paiute peoples to address the adverse human health impacts from exposure to radiation. NCAC gathers and distributes research findings to tribal stakeholders and others that specifically address the differences

in human health impacts to Native American communities based on cultural and lifestyle differences, such as different exposures through traditional food sources.

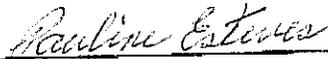
3. I was born on December 20, 1924 in Death Valley, California and have lived in Death Valley, California for my entire life. My home address is 300 Village Road, Death Valley, California, 92328. My mailing address is P.O. Box 108, Death Valley, CA 92328. I live on Tribal lands held in trust status by the United States for the Timbisha Shoshone Tribe. These Tribal lands are located within fifty (50) miles of the proposed Yucca Mountain Nuclear Repository Site. I do not have an email address.
4. Every morning, I begin my day with a prayer and acknowledgment of the Great Spirit. As an Indian person, I believe that the land is sacred. Any harm to the land, including wildlife, plants and water, is harmful to my cultural, spiritual, and religious practices. I believe that the construction of the proposed Yucca Mountain Nuclear Repository would be harmful to mother earth and to the land. It is not culturally appropriate to store highly radioactive nuclear waste deep within the mother earth in Yucca Mountain. Storing nuclear waste in Yucca Mountain would be harmful to the land, and would therefore be harmful to my cultural, spiritual and religious practices because these practices are inextricably tied to the land and my Tribal culture. As an Indian person, it is my responsibility to care for Mother Earth's belongings and protect her for future generations.
5. I currently gather traditional foods and plants as a cultural practice. I seasonally gather pine nuts and mesquite beans on Tribal lands and surrounding lands and consume these traditional foods. I also gather wood periodically on Tribal lands

and surrounding lands to be used for heating as needed. These traditional practices are directly threatened by the proposed Yucca Mountain Nuclear Repository, which is located within approximately 50 miles or less from the lands on which I regularly and currently engage in these traditional gathering activities. My ability to gather traditional foods and wood is directly threatened by the risks of increased radiation exposure, contamination to the groundwater supply, and the increased use of water at the proposed Yucca Mountain site. Any reduction to the water levels within the aquifer or adverse impacts to the quality of the groundwater would have a direct and adverse effect on my ability to gather traditional foods and wood, and would threaten my ability to subsist by eating traditional foods and heating my home with gathered wood.

6. The water that is used on our Tribal Reservation is directly threatened by the proposed Yucca Mountain Nuclear Repository. I am informed that groundwater flows down gradient from Yucca Mountain through the Amargosa Desert and into Death Valley, where our Tribal Reservation is located, through Furnace Creek Springs and Travertine Springs. Any reduction to the water levels within the aquifer or adverse impacts to the quality of the groundwater would have a direct and adverse effect on the water supply to my home on the Reservation.
7. As a Tribal leader and elder in the Timbisha Shoshone Tribe, and a Board Member of the NCAC, I am in a unique position to describe the threats to Tribal people and Tribal culture posed by the proposed Yucca Mountain Nuclear Repository. Adverse impacts to the health and welfare of my people through increased exposure to radiation from stored nuclear waste at Yucca Mountain, to

traditional foods such wild game, pine nuts and mesquite beans, to water quality and water quantity, and to Tribal cultural, spiritual and religious practices, would irreparably harm my Tribal culture, Tribal identity, and way of life.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 06, 2009, in Death Valley, California, in accordance with 10 C.F.R. 2.304(d).



Pauline Esteves
P.O. Box 108
Death Valley, CA 92328
(760) 786-2418

ATTACHMENT 7

DECLARATION OF CALVIN MEYERS
IN SUPPORT OF PETITION TO INTERVENE
BY NATIVE COMMUNITY ACTION COUNCIL

**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

**DECLARATION OF CALVIN MEYERS
IN SUPPORT OF PETITION TO INTERVENE
BY NATIVE COMMUNITY ACTION COUNCIL**

I, Calvin Meyers, hereby declare as follows:

1. I am an enrolled member of the Moapa Band of Paiutes, a federally recognized Indian tribe made up of Southern Paiute people. I am also a member of the Board of Directors of the Native Community Action Council. This Declaration is based on my personal knowledge.

2. The Native Community Action Council (NCAC), a non-profit corporation, has petitioned the Nuclear Regulatory Commission to intervene as a full party in the proceeding to consider the application by the Department of Energy to build a spent fuel radioactive waste repository at Yucca Mountain, Nevada.

3. The NCAC wishes to participate in this proceeding in order to protect the interests of the organization and its members in lands and waters that are necessary to sustain traditional cultural ways of life for the Shoshone and Paiute Indian people.

4. The NCAC Articles of Incorporation provide that a main purpose of the organization is to “protect the people’s rights and benefits that should accrue to us pursuant to our tribal customs by empowering our communities in understanding, educating, and managing the risks of radiation and health related concerns.” NCAC’s participation in this proceeding promotes that purpose.

5. I reside on the Moapa Indian Reservation, which is located southwest of Moapa, Nevada. The Reservation consists of 74, 954 acres. The proposed Yucca Mountain Site is approximately 80 miles west of the Reservation.

6. My residence is approximately one-half mile from the railroad line and trucking lines that are proposed to be used to ship radioactive waste and spent nuclear fuel to the Yucca Mountain Site.

7. I do not believe the threats of sabotage, terrorism directed at rail shipments have been adequately studied analyzed, nor have adequate measures been adopted to protect my safety as rail shipments pass by my home. Nor has the possibility of accidents along the rail line that comes near my home been reduced to safe levels. As a result, there is a reasonable possibility that I may be personally injured by such shipments. The delivery of spent nuclear fuel by rail or truck will increase my risk of exposure to radiation. The Final Supplemental Environmental Impact Statement shows that my concerns are well-founded and the risks to my safety and health are real and concrete. *Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada (DOE/EIS-0250F-S1).*

8. The Yucca Mountain Site is located within the area that is jointly used as ancestral lands by the Southern Paiute Indian people and as treaty lands of the Western Shoshone Indian people. I use the area within the Yucca Mountain Site and the areas adjacent to it for a variety of cultural and subsistence activities, all of which are important for maintaining my culture as a Southern Paiute Indian person. These activities include hunting wild game during the season; gathering cultural foods, such as mesquite beans and pine nuts, as required for ceremonial use and for my personal consumption; and gathering medicines when necessary. It is difficult to pinpoint the locations of these activities and the specific times at which they occur, because Southern Paiute people traditionally and today moved throughout the land as their needs require. We have a holistic view of the land, in which the land provides for our needs when we respect and honor it as a being that is woven in the daily fabric of our lives.

9. Every year at the Yucca Mountain Site, the Southern Paiute and Western Shoshone people gather to celebrate our relationship to the land and to conduct ceremonies of prayer, sweats, song and dance for the continued health of the earth. The construction of the spent nuclear fuel storage facility at Yucca Mountain will make these cultural gatherings impossible. Our culture will suffer as a result.

10. As a Southern Paiute Indian, my spiritual connection to the land defines my identity. Because of my religious and cultural beliefs, when the land is harmed, I also suffer harm. From the perspective of non-Indians, we would say that when a part of the land is taken away, a part of the Bible is taken away. Destruction of the land,

whether by radioactive contamination or construction of a spent nuclear fuel storage facility, destroys a part of me. My beliefs about the connection between my health and the health of the land extends to the Yucca Mountain Site.

11. The Muddy River flows through a portion of the Moapa Indian Reservation where my home is located. I use the River for cultural purposes, including gathering willows along its banks. I am concerned that railroad accidents, sabotage or terrorist attacks might harm the River, and also prevent these cultural practices.

I declare under the penalty of perjury that the statements in this Declaration are true and correct.

Date: March 6, 2009

Signed electronically by Calvin Meyers
Calvin Meyers
P. O. Box 129
Moapa, NV 89025
(702) 513-1329
Email: moapapaiute@hotmail.com

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
U.S. DEPARTMENT OF ENERGY) Docket No. 63-001
)
(License Application for Geologic Repository)
At Yucca Mountain))

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2009, copies of the **Petition to Intervene by Native Community Action Council** have been served upon the following persons by the Nuclear Regulatory Commission's Electronic Information Exchange:

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Panel Mail Stop-T-3 F23
Washington, D.C. 20555-0001

Administrative Judges
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E-mail: tsm2@nrc.gov
G. Paul Bollwerk
E-mail: gpb@nrc.gov

Anthony C. Eitreim, Esq. Chief Counsel
E-mail: ace1@nrc.gov

U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

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E-mail: Daniel.Fruchter@nrc.gov

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Andrew L. Bates
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U.S. Nuclear Regulatory Commission
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