

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

U.S. DEPARTMENT OF ENERGY

(License Application for Geologic Repository
at Yucca Mountain)

Docket No. 63-001

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

March 17, 2009

**TIMBISHA SHOSHONE YUCCA MOUNTAIN OVERSIGHT PROGRAM
NON-PROFIT CORPORATION'S ANSWER TO THE TIMBISHA SHOSHONE
TRIBE'S REPLY TO NRC STAFF AND DOE ANSWERS
TO ITS MOTION TO INTERVENE AS A FULL PARTY**

Arthur J. Harrington, Esq.
Douglas M. Poland, Esq.
Steven A. Heinzen, Esq.

GODFREY & KAHN, S.C.
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
Telephone: (608) 257-3911
Fax: (608) 257-0609
E-mail: aharrington@gklaw.com
dpoland@gklaw.com
sheinzen@gklaw.com

COUNSEL FOR TIMBISHA SHOSHONE
YUCCA MOUNTAIN OVERSIGHT PROGRAM
NON-PROFIT CORPORATION

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In this Answer, the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation (“TOP”)¹ rebuts the assertion made by the Timbisha Shoshone Tribe (“TIM”) in its Reply² that it, not TOP, properly speaks for the Timbisha Shoshone Tribe (“Timbisha” or “Tribe”) in this proceeding. Without belaboring the matter, TOP is compelled to address briefly TIM’s Reply to correct TIM’s misstatements and to avoid waiving its right to challenge TIM’s unsupported assertions as to the Tribe’s leadership. TIM’s statements of “facts” are not only wrong, TIM does not so much as attempt to support its position: it provides no supporting documents, no supporting citations, and no supporting affidavit.

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

² TIMBISHA SHOSHONE TRIBE’S REPLY TO NRC STAFF AND DOE ANSWERS TO ITS MOTION TO INTERVENE AS A FULL PARTY (March 11, 2009).

1. THE EVIDENCE SUBMITTED TO THE BOARD ESTABLISHES THAT TOP IS THE PROPER LEGAL REPRESENTATIVE OF THE TIMBISHA IN THIS PROCEEDING.

As described more fully in its own Reply (“TOP Reply”),³ TOP is the proper Timbisha representative in this proceeding for at least the following two reasons:

A. There Has Been No Final Determination That The Tribal Council The Bureau Of Indian Affairs Has Recognized Represents The Tribe.

TIM relies heavily on the Bureau of Indian Affairs’ (“BIA”) February 17, 2009, opinion letter (the “BIA Opinion”) in which BIA states that, for present purposes, it will continue to recognize as the Tribe’s governing body the Tribal Council comprising Joe Kennedy, Chairman; Ed Beaman, Vice-Chairman; Madeline Esteves, Secretary/Treasurer; Virginia Beck, Executive Council Member; and Cleveland Lyle Casey, Executive Council Member—a Council elected more than two years ago. (*See* BIA Opinion, Attachment A to the Affidavit of Joe Kennedy (“Kennedy Aff.”) (March 3, 2009) (filed together with TOP’s ANSWER TO TIMBISHA SHOSHONE TRIBE’S AMENDED MOTION FOR EXTENSION OF TIME)). TIM argues that the BIA Opinion puts in place a Tribal Council over which Mr. Beaman has majority control, and that Mr. Beaman authorized only TIM to represent the Timbisha in this proceeding. (TIM Reply, at 3-4.)

The BIA Opinion offers little certainty or finality on the question of Tribal leadership, however, since it was appealed to the Interior Board of Indian Appeals (“IBIA”) on February 25,

³ REPLY OF THE TIMBISHA SHOSHONE YUCCA MOUNTAIN OVERSIGHT PROGRAM NON PROFIT CORPORATION IN SUPPORT OF ITS PETITION TO INTERVENE AS A FULL PARTY.

2009. (Kennedy Aff., ¶ 7.)⁴ Thus, at the moment, the BIA process has not resulted in a final decision that determines the Tribal leadership issue.

More significantly, the BIA Opinion's "status quo" position almost certainly will not be recognized as correct after all appeals have been exhausted. The Board should recognize TOP as the only legitimate representative of the Tribe in this proceeding notwithstanding the BIA Opinion, for several reasons. **First**, the Federal government may not interfere with intra-tribal matters. *Wheeler v. U.S. Dept. of the Interior*, 811 F. 2d 549, 551 (1987). Tribal leadership determination is a most fundamental intra-tribal matter, and those determinations necessarily raise issues of tribal sovereignty. *Hamilton v. Acting Sacramento Area Director*, 29 IBIA 122, 123 (1996). "[T]he Department has no authority to take action contrary to the tribal resolution of such disputes." *Wheeler*, at 553 (discussing the legality of Department of the Interior intervention into a tribal election). Instead, the Federal government must defer to tribal resolution of a dispute through an appropriate tribal forum, including the normal election process. *Smith v. Acting Pacific Regional Director, BIA*, 42 IBIA 224, 225 (2006).

Second, although not discussed by TIM in its Reply, those who speak for TIM are without authority to speak for the Tribe. In 2007, three members of the Tribal Council then in office, Mr. Beaman, Ms. Beck, and Mr. Casey, initiated a tribal leadership challenge. As a result of the challenge, two competing annual elections have been held, resulting in the current Tribal Council which created TOP.⁵ (Kennedy Aff., ¶¶ 2-14; BIA Opinion.) The BIA Opinion

⁴ The TIM Reply incorrectly states the Notice of Docketing in the appeal of the BIA's February 17, 2009, decision is dated March 3, 2009. In fact, the IBIA has not issued a Notice of Docketing, and the 25 C.F.R. § 4.311 timeline associated with the Notice of Docketing has not begun. The IBIA issued a Pre-Docketing Notice on March 3, 2009, that summarized the appeal, noted the date of receipt, and requested that the Regional Director take certain actions with regards to the record. Interior Board of Indian Appeals Pre-Docketing Notice, March 3, 2009.

⁵ The current Tribal Council consists of Chairman Joe Kennedy, Vice Chairman Pauline Esteves, Secretary/Treasurer Madeleine Esteves, Executive Council Member Angie Boland, and Executive Council Member Erick Mason.

acknowledges the current leadership dispute and, recognizing that no final decision will be forthcoming, has instead chosen to recognize the Tribal Council that represented the Tribe in 2007. (BIA Opinion.) Significantly, this 2007 Tribal Council is no longer extant. Since 2007, all Tribal Council members' terms have expired and each has been re-elected or rejected by tribal members. (*Id.*) Chairman Kennedy, whose term expired in December 2007, was re-elected in November 2007; Ms. Esteves, whose term expired in December 2008, was re-elected in November 2008; Mr. Beck's and Mr. Casey's terms both expired in December 2007, and neither was re-elected; finally, Mr. Beaman's term expired in December 2008, and he also has not been re-elected. (Kennedy Aff.; BIA Opinion, at 4-5.) The current Tribal Council, which created TOP, represents the choice of the Tribe's membership made through appropriate and legitimate tribal processes. Tribes have the right to self-governance, and this requires BIA not insert itself into intra-tribal processes better left to intra-tribal dispute resolution, such as duly held elections.

Third, the BIA Opinion would return the Tribe to an obsolete "status quo" that would require participation by people who are not even members of the Tribe, in direct contravention of both tribal and federal law. Indian tribes have the power and authority to determine tribal membership for their own. *Montana v. U.S.*, 450 U.S. 544, 564 (1981). Courts are to defer the determination of qualifications of membership in a tribe to that tribe, "to comport with . . . traditional notion of tribal sovereignty and with federal policy of independence." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978); *see also* TOP Reply, at 16-17. TIM cannot be the Tribe's representative because it is controlled by non-tribal members.

B. Top Was Expressly Created To Represent The Tribe In These Proceedings.

While TIM argues that TOP cannot represent the Tribe in this proceeding as an AIT⁶, it nevertheless does recognize that “the appropriate entity with AIT status is the Tribe or *any duly authorized representative of the Tribe for government to government purposes* as recognized by Interior.” (Reply, at 3. (emphasis supplied)) TOP was so authorized. The Timbisha Tribal Council created TOP to represent the government in all matters related to the Tribe’s role in the Yucca Mountain matter. (TOP Reply, at 14.) To fulfill its purpose, TOP has been delegated the authority and responsibility to represent the Tribe in all capacities in this proceeding. (TOP Reply, at 14-15.) Thus, when TOP communicates with the United States government, it does so as the voice, and with the support, of the Tribe. Indeed, the Tribe expects TOP’s government-to-government communications to be accorded the same importance as communications between the Tribe’s Chairman and the federal government.⁷

To enable TOP to carry out these functions, the Tribal Council has enacted several resolutions. *First*, the Tribal Council approved TOP to receive and protect funds paid to the Timbisha by the federal government through the Nuclear Waste Fund, and any other funds received from any source for the specific use of oversight or opposition to the Yucca Mountain project.⁸ *Second*, the Tribal Council determined that funds in this account will be used for

⁶ There is a presumption of standing in this proceeding for the Timbisha entity that is an “Affected Indian Tribe,” or “AIT,” under 10 C.F.R. § 2.309(d)(2)(i) and 10 C.F.R. § 63.2. Even if the Board were to deny TOP AIT status, TOP still would have “representational standing” under 10 C.F.R. § 2.309(d)(1) and, in the alternative, should be granted standing through “discretionary intervention” under 10 C.F.R. § 2.309(e). *See* Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation’s AMENDED PETITION, pp. 11-16 (March 5, 2009).

⁷ This delegation of responsibility is no different than the United States Congress delegating its responsibilities for its government-to-government relationship with tribes to the trustee-delegate, the executive branch of the United States Government.

⁸ Article VI, Section 4 of TOP’s Corporate Bylaws states: “All Funds of the Corporation shall be deposited into the Timbisha Shoshone Yucca Mountain Oversight Project Trust, with such bank or other depository as the TSYMOP Board of Directors may select. Trust funds are to be used for the sole purpose of overseeing the YMP [Yucca Mountain Project] on behalf of the Tribe and its members. Trust funds may only be withdrawn by the fiscal agent, if
(continued ...)

oversight of the Yucca Mountain Project and will be accessible only by TOP. *Third*, as long as TOP exists and is operating with the powers delegated to it by the Tribal Council, these funds may not be used for any other purpose or by any other division of the Tribe, nor may the Tribe access the funds for any other purpose. This account is separate and apart from the general operating funds of the Tribe's government and may not be accessed for any purpose other than that of the TOP, in accordance with Article VI, Section 4 of the By-Laws.

In short, the very creation of TOP evinces the Tribe's intention to participate fully in this proceeding and to ensure that participation by segregating funds that the Tribe receives for use on the Yucca Mountain project for TOP to use for that purpose alone. Moreover, the bulwark surrounding TOP insulates it from political ebbs and flows that may occur in any dynamic political environment. These bulwarks ensure that the funds the U.S. government gives to the Tribe for overseeing the Yucca Mountain licensing process are used for their proper and stated purpose as mandated by the Tribe and federal law.

2. THE BOARD'S ACTIONS MUST NOT STRIP THE TIMBISHA OF ITS RIGHT TO PARTICIPATE IN THIS PROCEEDING.

Notwithstanding TOP's showing that it does speak for the Tribe, TOP recognizes that the Board may choose to defer a decision on the Tribe's proper representative until the IBIA, the Assistant Secretary of Indian Affairs, or the federal courts decide the issue. Should the Board choose to wait for a final determination of the disputes now before the BIA and IBIA, TOP

(... continued)

any President and Secretary, with the President and Secretary having forwarded a jointly executed document to the bank or financial institution where the Trust is located, as evidence of the TSYMOP Board of Directors intent to withdraw such funds for YMP oversight purposes." (See LSN #TSP000000005.)

The original Corporate Bylaws uses the term "Executive Director" instead of "President." However, "Executive Director" was changed to "President" through Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation Corporate Resolution 2009-02, LSN #TSP000000013, Feb. 9, 2009.)

renews its request that the Board withhold its own decision as to which of the competing tribal “representatives” holds AIT status until such time as this question is fully resolved through the appeals process. Significantly, the one—indeed, the most critical—position on which TOP and TIM are in agreement is that the Tribe is an AIT. Neither the NRC Staff nor the Department of Energy questions that status. And since AIT status guarantees that the Tribe has standing to actively participate in this proceeding, and given the federal government’s trust obligations to the Tribe, the Board must not decide the question of standing in a manner that would work to strip the Tribe of its right to fully participate in this proceeding in order that it may protect its interests, which are unique to the Tribe.

CONCLUSION

For these reasons, the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation respectfully requests that the Board decide that TOP has standing to participate in this proceeding as a full party, whether as an AIT or otherwise. In the alternative, the Board should withhold a decision on that issue until the appeals in connection with the internal dispute are fully resolved.

Respectfully submitted,

 /s/ Steven A. Heinzen

Arthur J. Harrington
Douglas M. Poland
Steven A. Heinzen
Counsel for the Timbisha Shoshone Yucca
Mountain Oversight Program Non-Profit
Corporation

GODFREY & KAHN, S.C.
One East Main St., Suite 500
P.O. Box 2719
Madison, WI 53701-2710
Telephone: 608-257-3911
Fax: 608-257-0609

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