UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

ASLBP BOARD 09-876-HLW-CAB01 William J. Froehlich, Chairman Thomas S. Moore Richard E. Wardwell	ASLBP BOARD 09-877-HLW-CAB02 Michael M. Gibson, Chairman Alan S. Rosenthal Nicholas G. Trikouros	ASLBP BOARD 09-878-HLW-CAB03 Paul S. Ryerson, Chairman Michael C. Farrar Mark O. Barnett

In the Matter of:	)	March 27, 2009
	)	
U.S. Department of Energy	)	
	)	Docket No. 63-001
(High Level Waste Repository	)	
Construction Authorization Application)	)	
	)	

U.S. DEPARTMENT OF ENERGY'S ANSWER TO TIMBISHA SHOSHONE YUCCA MOUNTAIN OVERSIGHT PROGRAM CORRECTED MOTION FOR LEAVE TO FILE AMENDED PETITION TO INTERVENE AND AMENDED PETITION TO INTERVENE

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I. INTRODUCTION

On December 22, 2008, the Timbisha Shoshone Yucca Mountain Oversight Program ("Timbisha YMOP") filed a Petition to Intervene in this proceeding. In its Petition, Timbisha YMOP proposed three contentions regarding: (1) land ownership and control, (2) water rights, and (3) whether the United States Department of Energy ("DOE") met the requirements of the National Environmental Policy Act ("NEPA").

On January 15, 2009, DOE filed its Answer to Timbisha YMOP's Petition. DOE argued that the Petition should be denied because Timbisha YMOP was not in substantial and timely compliance with Licensing Support Network ("LSN") requirements and because Timbisha

YMOP lacked standing, if it was not the representative of the Affected Indian Tribe[1] (*i.e.*, the Timbisha Shoshone Tribe ("Tribe")). DOE also argued that none of Timbisha YMOP's contentions were admissible.

On February 24, 2009, Timbisha YMOP filed its Reply, and on March 5, 2009, filed a Motion for Leave to File Its Amended Petition to Intervene as a Full Party ("Motion").[2] In the Motion, as well as in its Reply, Timbisha YMOP withdrew two of the contentions raised in its Petition filed on December 22, 2009, dealing with land ownership and control, and water rights. Reply at 22, n.2; Motion at 5. These two contentions, therefore, are no longer before the Board for disposition.

In its Motion, Timbisha YMOP seeks to file an Amended Petition based on information it claims was previously unavailable (*i.e.*, new information). The allegedly new information consists of four declarations. Motion at 3-4, 6. Based on the allegedly new information, Timbisha YMOP proposes to "amend" its original NEPA contention (which it renames TOP-NEPA-01) and proffer a brand new contention (which it labels TOP-MISC-01). Motion at 6-10.

Notwithstanding Timbisha YMOP's characterization, TOP-NEPA-01 is an entirely new contention and not merely an amendment to its original NEPA contention. In the original Petition, this contention stated that DOE's Final Environmental Impact Statement ("2002 FEIS") and DOE's Final Supplemental Environmental Impact Statement ("Repository SEIS") are inadequate because their consideration of postclosure radiological dose impacts did not use a

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1 From here forward, the Affected Indian Tribe will be abbreviated as "AIT."

2 Later that day, Timbisha YMOP also filed a corrected Motion. Timbisha YMOP never explained, as it is required to, why it filed a corrected Motion. *See USEC, Inc.* (American Centrifuge Plant), LBP-05-28, 62 NRC 585, 593 (2005) (finding that when filing a corrected document petitioner required to file a motion for leave to file the corrected document and explain what is different from the original document). After comparing the Motion and the corrected Motion, it appears that the only difference between the two is that the corrected Motion includes a copy of the Amended Petition to Intervene. Timbisha YMOP failed to number the pages of its corrected Motion. In order to be able to refer the Board to the appropriate parts of that Motion, DOE numbered the pages and started by numbering the cover page as page 1.

Reasonably Maximally Exposed Individual ("RMEI") with a diet reflective of a Native American diet. Petition at 13. The amended contention, in contrast, does not concern radiological health and safety impacts to members of the Tribe. Its focus is the potential postclosure impacts on places (specifically springs in Death Valley) with *cultural* significance to the Tribe. Amended Petition at 19-33.

TOP-MISC-01 raises a NEPA-related matter as well. It alleges that DOE failed to comply with its obligation to consult with the Tribe pursuant to the requirements of NEPA, the National Historic Preservation Act ("NHPA"), DOE's trust responsibility, various executive orders and its own internal policies. Motion at 8-12; Amended Petition at 35-44.

As demonstrated in Section II below, Timbisha YMOP's corrected Motion should be denied because Timbisha YMOP failed to show that: (1) the Amended Petition is timely under 10 C.F.R. § 2.309(f)(2); or that (2) the balancing of the factors in Section 2.309(c)(1) weigh in favor of admitting the Amended Petition. As demonstrated in Section III, the Amended Petition should be denied for the additional reasons that Timbisha YMOP has failed to demonstrate: (1) substantial and timely compliance with its LSN obligations, (2) that it has standing (if it is not the representative of the AIT), and (3) that either of its contentions meets the contention admissibility requirements of Section 2.309(f)(1), as well as the additional requirements for NEPA-based contentions in Sections 51.109 and 2.326.

II. THE CORRECTED MOTION SHOULD BE DENIED

A. The Amended Petition Fails to Meet the Requirements of 10 C.F.R. § 2.309(f)(2).

A late-filed petition to intervene must meet the same standards as a late-filed contention. *See State of New Jersey* (Dep't of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 295 (1993). Contentions may be amended or new contentions filed after the initial filing only upon a showing that:

(i) The information upon which the amended or new contention is based *was not previously available* [*i.e.*, is new];

(ii) The information upon which the amended or new contention is based is *materially different* than information previously available; and

(iii) The amended or new contention has been submitted in a *timely fashion* based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2)(i)-(iii) (emphasis added). As shown below, Timbisha YMOP has failed to show that the Amended Petition satisfies these criteria.

1. The allegedly new information Timbisha YMOP relies on does not meet the definition of "previously unavailable information."

In support of the contentions in its Amended Petition, Timbisha YMOP has submitted four declarations. On February 24, 2009, with its Reply, Timbisha YMOP submitted three of the declarations, two from members of the Tribe (Barbara Durham and Pauline Esteves) and one from an anthropologist, Dr. Catherine S. Fowler, who states that she has studied the Tribe for more than twenty years. On March 3, 2009, with its Motion, Timbisha YMOP submitted an additional declaration from Joe Kennedy[3], who asserts that he is a member of the Tribe and Chairman of the Timbisha Tribal Council. According to Timbisha YMOP, "[t]he common thread running through the declarations . . . is the importance to the Timbisha of the purity of the springs that run in and around Death Valley, California—part of the Timbisha's homeland and into which contaminated water could flow from the proposed geologic repository—and the adverse impacts that contamination of those springs will have on Timbisha's interests." Motion at 6.

In their declarations, Barbara Durham and Pauline Esteves describe the cultural significance of springs to the Timbisha Shoshone people and the potential for damage to the

[3] Although unsworn, the document is titled the "Affidavit of Joe Kennedy." Hereafter, DOE refers to Joe Kennedy's affidavit as a declaration.

Tribe's culture if the springs are contaminated. Declaration of Barbara Durham ("Durham Decl."), ¶¶ 3-7; Declaration of Pauline Esteves ("Esteves Decl."), ¶¶ 3-10. In her declaration, Catherine S. Fowler describes the cultural and religious significance of the springs in and around Death Valley, California. Fowler Decl., ¶¶ 5-14. She also gives her opinion that the likelihood that radionuclides would travel in groundwater to the springs will damage the Tribe's culture. *Id*. at ¶ 14.

Joe Kennedy's declaration does not address the cultural importance of the springs or the possibility that the Tribe's culture could be damaged. Rather, in his declaration, Mr. Kennedy describes the dispute between Timbisha YMOP and the other entity purporting to represent the Tribe. Declaration of Joe Kennedy ("Kennedy Decl."), ¶¶ 1-10. The dispute over who is the proper representative of the Tribe is currently pending before the Bureau of Indian Affairs and subject to appeals. *Id*. at ¶¶ 9-10. In an attempt to explain its original deficient Petition and to justify the filing of an Amended Petition, Mr. Kennedy also describes the alleged problems Timbisha YMOP has had with obtaining sufficient funds to participate in this proceeding. *Id*. at ¶¶ 12-13. In addition, Mr. Kennedy talks about how the Tribe has participated in these proceedings for "between 10 and 20 years . . . ." *Id*. at ¶ 14. He further states that the Tribe, "for the purposes of this licensing proceeding, . . . spoke with one voice until late October 2008 . . . [and that the Tribe] had participated in the pre-application procedures." *Id*. at ¶ 11.

As is apparent from the above descriptions of the declarations, they are not based on any information that was "previously unavailable." Previously unavailable information means information provided by someone other than the party making the motion to amend or add a contention. *See Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 265 n.12 (2007) (finding that the NRC adjudicatory process

begins very early in the application process and that 2.309(f)(2) was included to allow petitioners to respond, by amending a contention or filing a new one, when the applicant or NRC Staff produces new information); *Crow Butte Res., Inc.* (License Amendment for the North Trend Expansion Project), LBP-08-06, 67 NRC 241, 259 (2008) (finding document was not available prior to the date petitioner received it from another organization).

The declarations here do not recount information newly provided by DOE, NRC or some other organization. They recount information that, if true, the declarants have long known.

- ***Declarations of Barbara Durham and Pauline Esteves***: These declarations outline how important springs in Death Valley, California are to the Timbisha Shoshone culture and how any contamination to the springs will impact their culture. Durham Decl., ¶¶ 3-8; Esteves Decl., ¶¶ 3-10. This is not new information. Clearly, lifelong Tribe members like these declarants have known that the springs are important to the Tribe's culture—they did not just discover the importance of the springs in the last thirty days. In addition, Timbisha YMOP admits that it "provided to DOE information it had available on the cultural impacts on the Timbisha . . ." while DOE was drafting its Environmental Impact Statement. Motion at 8. This means, at the latest, the information was provided sometime before June 2008[4]—and that it is not new.

- ***Declaration of Catherine S. Fowler***: As in the Durham and Esteves declarations, Dr. Fowler addresses the importance of the springs and the potential cultural impacts of any contamination to them. Fowler Decl., ¶¶ 6-14. However, the declaration is not based on any new information. Dr. Fowler cites her Congressional testimony, given in March 2000, and two articles she authored in 1991 and 1995. Fowler Decl., ¶¶ 3 & 4. This information has been available for years and cannot plausibly be considered new.

- ***Declaration of Joe Kennedy***: Mr. Kennedy's declaration only provides information about TOP-MISC-01, which addresses DOE's alleged failure to consult. With regard to the failure to consult, Mr. Kennedy does not reference any dates after October 2008. Kennedy Decl., ¶¶ 11, 12 & 14. Mr. Kennedy does not cite any new information that is relevant to the Board's determination regarding whether the contentions and Amended Petition are admissible.[5]

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[4] DOE's 2002 FEIS was issued in 2002. DOE's Repository SEIS was issued in June 2008, almost six months before the deadline for filing petitions to intervene in this proceeding.

[5] The only information that could be considered new is information regarding events that have happened recently in the dispute between Timbisha YMOP and the other group claiming to represent the Tribe. Kennedy Decl., ¶¶ 6-7, 9-10. However, that information is irrelevant to the timeliness determination the Board must make.

In short, the declarants have known for many years the information contained in the declarations. The Amended Petition thus cannot be considered to be based on previously unavailable information and must therefore be considered late.

Nor does it matter, contrary to Timbisha YMOP's argument, that the "supporting declarations and affidavits [which Timbisha YMOP created]. . . became available only within the last few days." Motion at 11. A declaration can be considered previously unavailable under Section 2.309(f)(2) only if the information the declaration is based on was also previously unavailable. *See Crow Butte Res., Inc.*, LBP-08-06, 67 NRC at 258 (one reason the declaration was found to not be timely under 2.309(f)(2) is that the declaration "primarily references articles published years earlier"). If a petitioner could satisfy the timeliness requirement simply by filing a declaration shortly after the declaration was executed—regardless of whether the information contained in the declaration is new—the requirement that information be "previously unavailable" would be nullified.

2. The information, upon which the Amended Petition is based, is not *materially different* than information previously available to Timbisha YMOP.

Timbisha YMOP states that the new information (*i.e.,* the declarations) it has submitted is materially different than information "in the record" because it is the only information that deals with the "cultural, historic, and religious impacts to the Timbisha at the Death Valley Springs." Motion at 12. Timbisha YMOP's assertion is based on a misunderstanding of Section 2.309(f)(2)(ii). This section requires that the information be materially different than information previously available, *whether or not in the record*. The declarations do not meet this standard, because the information on which they are based was available long before Timbisha YMOP filed its original Petition to Intervene on December 22, 2008.

First, Timbisha YMOP claims that the springs in Death Valley are culturally significant to the Timbisha Shoshone people. Motion at 6. As shown by the declarations of Ms. Durham and Ms. Esteves, this information is general knowledge of the members of the Tribe. *See* Durham Decl., ¶¶ 2-8; Esteves Decl., ¶¶ 2-10. Dr. Fowler's declaration likewise refers to her previously available Congressional testimony (2001) and her publications (1991 and 1995) on the same topic. Thus, information about the cultural significance of the springs cannot be considered materially different than what was available when Timbisha YMOP filed its original Petition.

Second, Timbisha YMOP states that DOE's Environmental Impact Statements recognize that waste from the geologic repository may contaminate the springs in Death Valley. Motion at 4. DOE's 2002 FEIS was issued in 2002. DOE's Repository SEIS was issued in June 2008. Thus, Timbisha YMOP's information regarding possible effects to the springs cannot be considered materially different than what has been available since at least June 2008.

Finally, Timbisha YMOP claims that DOE failed to consult with the Tribe as required by NEPA, the NHPA, DOE's trust responsibility, various executive orders and DOE's own internal policies regarding Indian tribes. In support of this contention, Timbisha YMOP states that "Ms. Durham's declaration makes clear that DOE has never even visited the Death Valley area to consult with the Timbisha on the geologic repository's potential impacts to the springs." Motion at 8. Ms. Durham states that "no one from DOE or NRC ever has even bothered to visit our traditional homeland to investigate our concerns or discuss them with us." Durham Decl., ¶ 8. Neither Ms. Durham, Ms. Esteves nor Dr. Fowler mention any facts that have occurred since the filing of the original Petition to Intervene (December 22, 2008) that would affect this claim. Timbisha YMOP knew of the alleged failure to consult when it filed its original Petition and

cannot now claim that this alleged failure to consult is materially different than what Timbisha YMOP knew when it filed its original Petition. [6]

3. Timbisha YMOP failed to submit the Amended Petition in a timely fashion.

Timbisha YMOP claims that its Motion is timely because the Motion was filed within thirty days of when the declarations were signed. The declarations of Ms. Durham, Ms. Esteves and Dr. Fowler were signed on February 21, 2009. The declaration of Mr. Kennedy was signed on March 3, 2009. As discussed previously, none of the declarations is based on any actual new information. As a result, the Board cannot find that the Amended Petition was submitted in a timely manner.

Furthermore, Timbisha YMOP provides no valid reason why it waited so late to prepare the declarations. It asserts a lack of funding, but that is not a legitimate excuse because a party is not relieved of its hearing obligations due to limited resources. *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981). Moreover, in light of the fact that Ms. Durham and Ms. Esteves are members of the Tribe, Timbisha YMOP does not explain how its alleged lack of funding prevented it from obtaining declarations from these individuals.

The same is true even with respect to the declaration of Catherine Fowler. In *Crow Butte*, LBP-08-06, 67 NRC at 255, at the hearing on standing and contention admissibility, the petitioner submitted a new email from its expert witness. The hearing was held on January 16, 2008; the email was dated only two days before—January 14, 2008. *Id*. at 255. The Board found that the email was not timely under Section 2.309(f)(2), because the petitioner did not indicate when it contacted the expert and the expert only referenced old information (material published before 1999) in his email. *Id*. at 258.

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[6] In any case, contrary to the claims about failing to consult, Mr. Kennedy states that he has participated in "these proceedings for between 10 and 20 years." Kennedy Decl., ¶ 14.

Like the petitioner in *Crow Butte*, Timbisha YMOP did not state when it first contacted Dr. Fowler. Also, like the expert in *Crow Butte*, Dr. Fowler references only old material in her declaration; the most recent material is from March 2000. Thus, like the Board in *Crow Butte*, the Board should find that, based on this declaration, the Amended Petition was not filed in a timely fashion.

B. The Eight Factor Balancing Test for Untimely Contentions, Set Forth in Section 2.309(c)(1)(i)-(viii), Weighs Against Admitting the Amended Petition.

When a contention is untimely (because it does not meet the requirements of Section 2.309(f)(2)), the petitioner must show that the eight factors set forth in Section 2.309(c)(1)(i)-(viii) weigh in favor of admitting it. These factors are:

(i) Good cause, if any, for the failure to file on time;

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interest will be represented by other parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. 2.309(c)(1)(i)-(viii).

The eight factors are not of equal importance: "good cause" for failing to timely file (factor 1) is the weightiest factor. *State of New Jersey*, 38 NRC at 296. When a petitioner fails to show good cause, then it "must show a compelling case on the remaining factors." *Id*. (citing *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation) ("*PFS*"), LBP-98-29, 48 NRC 286, 293 (1998)). Furthermore, factors 7 (broadening issues/delaying proceeding) and 8 (assistance with developing sound record) carry greater weight than factors 5 (other means to protect petitioner's interests) and 6 (petitioner's interests represented by other parties). *La. Energy Srvcs., LP* (Nat'l Enrichment Facility), LBP-04-826, Docket No. 70-3103, Memorandum and Order at 10, n. 11 (Jan. 26, 2005) (unpublished) (citing *PFS*, LBP-98-29, 48 NRC at 294 (citation omitted)). Here, the factors weigh against admitting the untimely contentions, especially in light of Timbisha YMOP's failure to show good cause.

(i) Good cause, if any, for the failure to file on time.

Because the Amended Petition is not based on new information, Timbisha YMOP cannot show that it has good cause, as required by Section 2.309(c)(1)(i), for failing to timely file these contentions. The test for good cause is that "the information itself must be new information . . . not information already in the public domain" and "petitioner . . . [must have] acted promptly after learning of the new information . . . ." *Texas Util. Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 70 (1992).[7] Here, Timbisha YMOP has submitted new declarations in support of the Amended Petition. However, as previously explained, those declarations are not based on any new information. As a result, Timbisha YMOP has failed to show that it has good cause for late filing these contentions.

[7] This case deals with good cause under Section 2.714(a)(1)(i), the predecessor to Section 2.309(c)(1)(i). Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004).

Timbisha YMOP claims that it has good cause because DOE did not provide funding until October 2008—15 months after the Timbisha Shoshone Tribe was classified an AIT. Motion at 13-14. It is well established that limited resources do not constitute good cause. *La. Energy Srvcs.*, LBP-04-826 at 15; *see Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981) ("the fact that a party may . . . possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations.").

In any case, Timbisha YMOP's attempt to use the excuse of lack of funds to show good cause is inconsistent with statements from its chairman that he has been participating in the proceedings "for between 10 and 20 years." Kennedy Decl., ¶ 14.

Furthermore, Mr. Kennedy's declaration indicates that, in October 2008, he used DOE funds to hire Fred C. Dilger, as Timbisha YMOP's expert on NEPA-related matters, and Loreen Pitchford to handle Timbisha YMOP's LSN requirements. Kennedy Decl., ¶ 12. He gives no explanation why Timbisha YMOP did not retain counsel or an expert in cultural resources at the same time.

Because Timbisha YMOP failed to show that it had good cause for its late filing, it must make a compelling case on the remaining factors. *State of New Jersey*, 38 NRC at 296 (citing *PFS*, 48 NRC at 293). As shown below, its motion must be denied because it fails to make that showing.

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding.

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding.

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest.

Factors (ii), (iii) and (iv) essentially deal with the question of whether a petitioner has standing to intervene in the proceeding. *See La. Energy Srvs.*, LBP-08-826 at 9, n.10. Timbisha YMOP claims that because the Timbisha Shoshone Tribe has been granted AIT status, Timbisha YMOP has standing in this proceeding. Motion at 14. While it is true that the Tribe has been granted AIT status and is entitled to standing, it is currently unclear who is authorized to represent the Tribe in this proceeding. If Timbisha YMOP is found to be the authorized representative of the Tribe, then it will be entitled to standing in this proceeding. However, if it is not the representative of the AIT, then it must show that it is entitled to standing like any other intervenor. *See* 10 C.F.R. § 2.309(d)(2)(iii).

Timbisha YMOP does not assert organizational standing; it only asserts representational standing to intervene in this proceeding. To invoke representational standing, an organization must: (1) show that at least one of its members has standing in his or her own right (*i.e.*, by demonstrating injury-in-fact within the zone of protected interests, causation, and redressability); (2) identify that member by name and address; and (3) show, "preferably by affidavit," that the organization is authorized by that member to request a hearing on behalf of the member. *Consumers Energy Co.*, CLI-07-18, 65 NRC at 408-10; *see also N. States Power Co.* (Monticello Nuclear Generating Plant, Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000); *Gen. Pub. Utils. Nuclear Inc*. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC

193, 202 (2000). Where the affidavit of the member is devoid of any statement that he or she wants and has authorized the organization to represent his or her interests, the Presiding Officer should not infer such authorization. *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 411 (1984).

Timbisha YMOP failed to show that it is entitled to representational standing in this proceeding. Any member whose declaration is submitted to support representational standing needs to show that the declarant personally will suffer an injury. *See Hydro Resources, Inc.*, LBP-98-9, 47 NRC 261, 276 n.26 (1998) (Board grants representational standing to numerous organizations because members showed that they use water that could be impacted by the mine). Timbisha YMOP has submitted three declarations (specifically, from Ms. Durham, Ms. Esteves and Mr. Kennedy) to support its Motion and Amended Petition. None of the declarations even mention Timbisha YMOP, much less state that the declarant is a member of Timbisha YMOP, and only assert that the declarant is a member of the Timbisha Shoshone Tribe. Durham Decl., ¶ 1; Esteves Decl., ¶ 4; Kennedy Decl., ¶ 1. It is understandable that the declarants do not claim to be members of Timbisha YMOP because its Articles of Incorporation and Corporate Bylaws specifically say that Timbisha YMOP does not have any members. Articles of Incorporation, LSN # TSP000000023, ¶ 6; Corporate Bylaws, LSN # TSP000000021 at 2. Without members, Timbisha YMOP cannot show representational standing.

Moreover, none of the three declarants describe injuries that they will personally suffer if the license is granted. In his declaration, Joe Kennedy does not give any facts that would show that he will suffer an injury if the license is granted—he merely recites events in the dispute between Timbisha YMOP and the other entity claiming to represent the AIT, as well as his involvement with this proceeding. *See* Kennedy Decl. Ms. Durham's declaration discusses the

importance of the springs to the Tribe, including the need to clear the springs of any debris. Durham Decl., ¶¶ 5-6. She only discusses potential harm to the Tribe in the future; she does not mention any personal injury that she will suffer. *See* Durham Decl. Ms. Esteves also reiterates the importance of the springs to the Tribe's culture and discusses how the Tribe has sacred dancing grounds located at Furnace Creek. Esteves Decl., ¶¶ 4, 10. She never sets forth a specific injury to herself that will result from the potential contamination of the springs. *See id*. Finally, none of the declarants demonstrate that they will suffer harm from contamination that, even if it were to occur, would occur during their lifetimes.

Thus, factors (ii), (iii), and (iv) weigh against admitting the late filing.

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected.

(vi) The extent to which the requestor's/petitioner's interest will be represented by other parties.

In support of these factors, Timbisha YMOP claims that it "has no other means of protecting the cultural and historic interests that will be severely impacted by the operation of the proposed geologic repository." Motion at 15. Essentially, Timbisha YMOP's admitted interest in this proceeding is to protect the interests of the Tribe. *Id*. Even if Timbisha YMOP is not a party to this proceeding, the interests of the Tribe will be protected by the entity that is determined to be its authorized representative.[8] *See* 10 C.F.R. § 2.309(c)(1)(v). Thus, these factors weigh against allowing the late filing.

[8] This is true even if the Petition to Intervene for the party ultimately found to represent the AIT is denied. The representative of the AIT is entitled to participate in any hearing as an interested AIT. 10 C.F.R. § 2.315(c).

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding.

Timbisha YMOP claims that granting the Amended Petition will narrow the issues compared to what it filed in its original Petition. Motion at 16. Timbisha YMOP is wrong. As discussed above, the contentions in the Amended Petition concern impacts to the Tribe's cultural resources and DOE's consultation. Those issues are distinct from those in Timbisha YMOP's original Petition. Furthermore, none of the parties have submitted admissible contentions dealing with the issues Timbisha YMOP raises in its Amended Petition.[9] Thus, Timbisha YMOP's participation would broaden the issues in the proceeding.[10]

With regard to delaying the proceeding, Timbisha YMOP claims that there will be no delay because this is a highly complex licensing proceeding where the parties have not yet been identified. Motion at 16. Timbisha YMOP fails to recognize that this proceeding is "time-limited by statute." *U.S. Dep't of Energy* (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board), CLI-08-14, 67 NRC __ (slip op. at 5-6) (June 17, 2008). In addition, as shown by this late filing, Timbisha YMOP has already complicated this proceeding by late filing contentions that could have been filed with its original Petition. Finally, as shown by the declaration of Mr. Kennedy, Timbisha YMOP is distracted by other matters regarding

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[9] In its original Petition, Native Community Action Council ("NCAC") proffered a NEPA-based contention almost identical to Timbisha YMOP's original NEPA-based contention. In its Reply (which is actually titled a Petition to Intervene), NCAC submits what appears to be a new contention that makes claims similar to those of TOP-NEPA-01. NCAC's contention is different in that it focuses on impacts to more than one tribe, while TOP-NEPA-01 only addresses potential impacts to the Tribe. In any case, as shown in DOE's Answer to NCAC's original Petition, NCAC failed to show that it has standing. Furthermore, like TOP-NEPA-01, NCAC's NEPA-based contention is not admissible. Thus, admitting Timbisha YMOP as a party would broaden the issues in this proceeding.

[10] This argument does not conflict with DOE's argument that Timbisha YMOP's interests will be adequately represented by the petitioner who is determined to represent the AIT. Even if none of the representative's contentions are admitted, the AIT can still participate in any hearing pursuant to Section 2.315(c).

tribal leadership disputes, which is what appears to have caused it to file the facially deficient original Petition.

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

Timbisha YMOP has failed to show that its participation can reasonably be expected to assist in the development of a sound record. When a petitioner addresses this criterion "it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." *Texas Util. Electric Co.*, 36 NRC at 74. In its Motion, Timbisha YMOP merely asserts that "[f]ull presentation and consideration of this factual support is essential to a legitimate and legal decision by the Licensing Board on DOE's licensing application." Motion at 17. In the section addressing Section 2.309(c)(1)(viii), Timbisha YMOP does not describe, as it was required to do, the issues it plans to cover or identify potential witnesses and their testimony.

In sum, Timbisha YMOP has failed to show that its Amended Petition is timely under Section 2.309(f)(2), and has failed to show that the eight-factor test in Section 2.309(c)(1) weighs in favor of admitting the Amended Petition. Thus, the Motion should be denied.

III. TIMBISHA YMOP'S AMENDED PETITION TO INTERVENE SHOULD BE DENIED

Even if the Board were to grant Timbisha YMOP's Motion, the Amended Petition should be denied for the reasons stated in this Answer to the Amended Petition. As demonstrated below, Timbisha YMOP has not shown substantial and timely compliance with its LSN obligations. In addition, if it is not the representative of the AIT, then it has failed to establish its standing. Furthermore, a finding that Timbisha YMOP has standing will not alter the ultimate result—denial of the Amended Petition—because the contentions do not meet the contention

admissibility requirements of Section 2.309(f)(1), and the additional requirements for NEPA-based contentions in Sections 51.109 and 2.326.[11]

A. Timbisha YMOP Has Not Shown Compliance With LSN Requirements.

As a threshold matter, a petitioner seeking to participate in the licensing proceeding must demonstrate that it is in compliance with the NRC's LSN requirements.[12] Specifically, 10 C.F.R. § 2.1012(b) states that:

> A person, including a potential party given access to the [LSN] under this subpart, may not be granted party status under [10 C.F.R.] § 2.309 or status as an interested governmental participant under [10 C.F.R.] § 2.315, if it cannot *demonstrate substantial and timely compliance* with the requirements of

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[11] In its Answer to Timbisha YMOP's original Petition, DOE set out a detailed discussion of these requirements. DOE respectfully refers the Board to pages 30 through 50 of its Answer to Timbisha YMOP's original Petition.

[12] 10 C.F.R. § 2.1003 (a) requires that "each other potential party, interested governmental participant or party shall make available [on the LSN] no later than ninety days after the DOE certification of compliance under 2.1009(b) – an electronic file including bibliographic header for all documentary material . . . generated by, or at the direction of, or acquired by, a potential party, interested governmental participant or party."

Each potential party, interested governmental participant or party is required thereafter to "continue to supplement its documentary material made available to the other participants via the LSN with any additional material created after the time of initial certification in accordance with [§ 2.1003(a)] until the discovery period in the proceeding has concluded." 10 C.F.R. § 2.1003(e).

10 C.F.R. § 2.1009 prescribes the following additional LSN requirements:

(a) Each potential party, interested government participant, or party shall –

(1) Designate an official who will be responsible for the administration of its responsibility to provide electronic files of documentary material;

(2) Establish procedures to implement the requirements of § 2.1003;

(3) Provide training to its staff on the procedures for implementation of the responsibility to provide electronic files of documentary material;

(4) Ensure that all documents carry the submitter's unique identification number;

(5) Cooperate with the advisory review process established by the NRC under § 2.1011(d).

(b) The responsible official designated under paragraph (a)(1) of this section shall certify to the [PAPO] that the procedures [specified above] have been implemented and that …. the documentary material specified in 2.1003 has been identified and made electronically available. The initial certification must be made [within 90 days of the DOE certification of compliance].

Each potential party also is "responsible for obtaining the computer system necessary to comply with the requirements for electronic document production and service." 10 C.F.R. § 2.1011(a).

> [10 C.F.R.] § 2.1003 at the time it requests participation in the HLW licensing proceeding under § 2.309 or § 2.315.

Emphasis added.

Section 2.1012(c) additionally provides that the "Presiding Officer *shall not* make a finding of substantial and timely compliance pursuant to paragraph (b) of this section for any person who is not in compliance with all applicable orders of the [PAPO Board]." 10 C.F.R. § 2.1012(c) (emphasis added).[13]

Further, § 2.309(a) states that, in ruling on a petition to intervene in this proceeding, the Presiding Officer shall consider "any failure of the petitioner to participate as a potential party in the pre-license application phase" governed by 10 C.F.R. Part 2, Subpart J.[14]

In an effort to address these requirements, the Amended Petition asserts that Timbisha YMOP "has substantially and timely complied with the provisions of Subpart J, including Section 2.1003 and Section 2.1009 . . . ." Amended Petition at 16. That bare assertion, however, is not substantiated by any affidavit. *See In the Matter of U.S. Dep't of Energy* (High Level Waste Repository: Pre-Application Matters), LBP-08-05, 67 NRC 205, 209-210 (2008) ("As in the case of any motion resting on assertions of fact, it is reasonable to expect that the movant will

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[13] The PAPO Board has issued a series of Case Management Orders that impose certain requirements regarding privilege claims for documentary material on the LSN. One of those orders also requires each participant to supplement its LSN production each month with newly created or discovered documentary material, and to file a certification with the PAPO Board when the monthly supplement is made. Revised Second Case Management Order § VI(A) (July 6, 2007).

[14] Compliance with LSN requirements is crucial to the efficient conduct of this proceeding, insofar as the LSN is designed to enable "the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the proceeding, so as to permit the earlier submission of better focused contentions resulting in a substantial saving of time during the proceeding." Final Rule, Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste, 54 Fed. Reg. 14,925, 14,926 (April 14, 1989) (amending hearing rules for adjudication on application for a license to receive and possess HLW and establishing basic LSN procedures) (Final Rule, Documents Related to the Licensing of Geologic Repository). It also is intended to facilitate the sharing of information between DOE, the NRC Staff, and the admitted parties throughout the licensing process. *See* Final Rule, Licensing Proceeding for a High-Level Radioactive Waste Geologic Repository: Licensing Support Network, Submissions to the Electronic Docket, 69 Fed. Reg. 32,836, 32,840 (June 14, 2004) ("[A]n LSN participant does have an obligation to maintain its existing LSN collection intact and available for the balance of the construction authorization proceeding.") (Final Rule, LSN, Submissions to the Electronic Docket).

buttress it with some concrete evidence, often if not usually supplied in the form of an affidavit or declaration by a person with asserted knowledge of the fact or facts upon which the motion is based.").

Nor should the Board accept that bare assertion in light of the similar representation in the original Petition that Timbisha YMOP now admits was incorrect. As here, Timbisha YMOP asserted in its original Petition that it "has substantially complied with Subpart J in that it has" complied with the requirements of Sections 2.1003 and 2.1009. DOE delineated in its Answer various respects in which Timbisha YMOP had not, in fact, met those requirements. DOE Answer at 4-7. In its Reply, Timbisha YMOP "acknowledge[d] that it has not fully satisfied each of the NRC's LSN requirements . . . ." Timbisha YMOP Reply at 17. Timbisha YMOP again asks the Board to accept a bare assertion of compliance, yet the Amended Petition provides no factual basis to conclude this latest assertion is any different than its earlier erroneous one.

Moreover, the only other information the Amended Petition provides regarding Timbisha YMOP's LSN compliance highlights the unreliability of Timbisha YMOP's assertion. The Amended Petition makes the following three statements:

- The Amended Petition states that Timbisha YMOP "submitted an adequate and timely LSN certification on December 22, 2008." Amended Petition at 17.

Even overlooking that this certification was not timely—it was due nearly a year earlier, on January 17, 2008—the Timbisha YMOP's certification was demonstrably inadequate. It represented that the Timbisha YMOP had made available on the LSN all its documentary material, with unique identifiers. That was incorrect, as Timbisha YMOP had made available no documentary material and did not even have an electronic portal linked to the LSN at the time.

- The Amended Petition states that Timbisha YMOP submitted an "adequate and timely supplemental certification on February 28, 2009." *Id*.

A party, however, is required to file a supplemental certification by the first of each month following its initial certification. At a minimum, therefore, Timbisha YMOP was required to file supplemental certifications by the beginning of January and February, 2009, and not just by the beginning of March.

- The Amended Petition states that Timbisha YMOP "participated in the pre-application phase of this proceeding." *Id*.

However, the Electronic Hearing Docket for the pre-License Application proceeding, NRC Docket PAPO-00, shows no filing on behalf of the Tribe (either through Timbisha YMOP or any other body). The suggestion that the Timbisha YMOP participated as a potential party in the pre-License Application proceeding is incorrect.

Also, Timbisha YMOP has an improperly narrow view of the documentary material it must make available on the LSN. In seeking to defend its original Petition even though it made no documents available on the LSN, Timbisha YMOP stated that its contention "is supported by publicly available materials" that are exempt from the LSN pursuant to 10 C.F.R. § 2.1005. Timbisha YMOP Reply at 18. That argument misconceives a party's LSN obligations in three material respects.

First, Section 2.1005 does not exclude documentary material just because it is "publicly available." To be excluded from the LSN, documentary material must fit into one of the specific exclusions of Section 2.1005. Just because other documentary material may be "publicly available" does not exempt it from production on the LSN.

Second, a party is required to make available "all" the information on which it "intends to rely and/or cite in support of its position" in the licensing proceeding. 10 C.F.R. § 2.1001 & 2.1003(a)(1). To state that a contention "is supported by publicly available materials" does not

demonstrate that a party has made available on the LSN all the information it intends to cite or rely on in support of that contention in the licensing proceeding.[15]

Third, Timbisha YMOP's position ignores altogether the other two categories of documentary material. Those categories are the non-supporting information and reports and studies. 10 C.F.R. § 2.1001. A party cannot be in substantial compliance if it has not made all these categories of documentary material available even if it has otherwise made available all its supporting information.

In sum, Timbisha YMOP was not in substantial and timely compliance with its LSN obligations when it filed its original Petition on December 22, 2008. It has not demonstrated substantial and timely compliance now, either. All it provides is a bare assertion of compliance that is unsupported by a factual record. Too many circumstances call into question the reliability of the Amended Petition's assertion of compliance, not the least of which is Timbisha YMOP's incorrect view of what it is required to produce.

Subpart J makes clear in Section 2.1012(b) that the burden rests on a petitioner to demonstrate compliance with LSN requirements, articulating this in subsection (b)(1) as a requirement to "*demonstrate* substantial and timely compliance with the requirements of § 2.1003" (emphasis added) and in subsection (b)(2) as a condition to entering the proceedings only "upon a *showing* of subsequent compliance with the requirements of § 2.1003" (emphasis added). In addition, 10 C.F.R. § 2.1012(c) clarifies that the Presiding Officer must have a basis to make a "*finding* of substantial and timely compliance" (emphasis added). This language

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[15] This is not an academic concern. Since filing its Reply, Timbisha YMOP has made 14 documents available on the LSN. One is a study from 1995. LSN # TSP000000027. Others are affidavits that, though signed in 2009, clearly reflect information that pre-dates 2009. *E.g.,* LSN # TSP000000019. It thus appears that Timbisha YMOP does intend to cite or rely on information in support of its contentions other than information it claims is exempt from production under 2.1005.

clearly requires more than a bare certification. The same is true of 10 C.F.R. § 2.325, which places the burden of proof on the movant.

10 C.F.R. § 2.1012(b)(1) is clear that a potential party "may not be granted" party status or participate under 10 C.F.R. § 2.315(c) if it cannot demonstrate substantial and timely compliance "at the time it requests participation." Timbisha YMOP has not carried its burden of demonstrating substantial and timely compliance with its LSN obligations, and the Board should thus deny the Petition on this basis.[16]

B. Unless It Is Found to Be the Representative of the AIT, Timbisha YMOP is not entitled to standing in this proceeding.

As a threshold matter, if the Board determines that Timbisha YMOP is the official representative of the AIT, then DOE does not object to the Petition on the basis of standing. However, as demonstrated in Section II(B) above regarding the factors of Section 2.309(c) that relate to standing, if it is determined that Timbisha YMOP is not the official representative of the AIT, then it has failed to demonstrate that it has standing in this proceeding.

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[16] 10 C.F.R. § 2.1012(b)(2) makes clear that the time to cure any such failure to meet LSN requirements is *after* party status or the right to participate has been "denied."

The Timbisha YMOP may not "cure" this or any other defect in its Petition, in its Reply pursuant to 10 C.F.R. § 2.309(h)(2). It is well recognized that "[r]eplies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it." *Nuclear Mgmt Co., L.L.C.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006)(citing cases); *see Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004)(citing Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004)). Replies cannot be used to "expand the scope of the arguments set forth in the original hearing request," nor should they be used to introduce new bases for contentions submitted with the original petition. *See Nuclear Mgmt Co., L.L.C.*, CLI-06-17, 63 NRC at 732. Additionally, the Advisory PAPO Board explicitly stated that "[r]eplies shall be limited to addressing points that have been raised in answers." *U.S. Dep't of Energy* (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board), LBP-08-10, 67 NRC __ (slip op. at 9) (June 20, 2008).

DOE reserves the right to move to strike any portions of Timbisha YMOP's Reply that fails to adhere to these limitations or to seek other relief as appropriate.

C. Timbisha YMOP Has Failed to Show That It Should Be Granted Discretionary Intervention.

Pursuant to 10 C.F.R. § 2.309(e), a Presiding Officer may consider a request for discretionary intervention where a party lacks standing to intervene as of right under § 2.309(d)(1). In addition to addressing the factors in 10 C.F.R. § 2.309(d)(1), a petitioner who seeks intervention as a matter of discretion (if standing as of right is not shown), must address in its initial petition the six factors set forth in 10 C.F.R. § 2.309(e), which the Presiding Officer will consider and balance.

The petitioner has the burden to establish that the factors in favor of intervention outweigh those against intervention. *See Nuclear Eng'g* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 744-45 (1978) (requiring discretionary intervenor to show "that it is both willing and able to make a valuable contribution to the full airing of the issues . . . in this proceeding"). Factors weighing in *favor* of allowing intervention include: (1) the extent to which its participation would assist in developing a sound record; (2) the nature of petitioner's property, financial or other interests in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding. *See* 10 C.F.R. § 2.309(e)(1)(i)-(iii). Conversely, factors weighing *against* allowing intervention include: (1) the availability of other means whereby the petitioner's interest will be protected; (2) the extent to which petitioner's interest will be represented by existing parties; and (3) the extent to which petitioner's participation will inappropriately broaden the issues or delay the proceeding. *See* 10 C.F.R. § 2.309(e)(2)(i)-(iii).

Of the six factors, primary consideration is given to the first factor—assistance in developing a sound record. *See Portland Gen. Elec. Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976); *see also Gen. Pub. Utils. Nuclear Corp.* (Oyster

Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 160 (1996); Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2201 (The extent to which a petitioner's participation will inappropriately broaden the issues or delay the proceeding also is accorded greater weight).

In assessing a particular petitioner's ability to contribute to the development of a sound record, NRC tribunals have focused on the petitioner's showing of *significant ability to contribute on substantial issues of law or fact that will not otherwise be properly raised or presented*; the specificity of such ability to contribute on those substantial issues of law or fact; justification of time spent on considering the substantial issues of law or fact; the ability to provide additional testimony, particular expertise, or expert assistance; and specialized education or pertinent experience. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 33 (1981) (emphasis added) (citing cases); *see also Fla. Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-24, 32 NRC 12, 15-17 (1990), *aff'd*, ALAB-952, 33 NRC 521, 532 (1991).

Discretionary intervention has been granted by NRC tribunals sparingly. *See*, *e.g.*, *Va. Elec. & Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-363, 4 NRC 631, 633 (1976) (finding the petitioner "well equipped to make a 'genuinely significant' contribution" on the safety issue in question – integrity of steam generator and reactor coolant pump supports – because it had fabricated the supports for the facility in question and sought to present related design and construction information); *see also Andrew Siemaszko*, CLI-06-06, 63 NRC 708, 716-717 (2006) (Commission notes that discretionary intervention is an extraordinary procedure and only eight petitions have ever been granted, without reversal, during the thirty years the six factor test has been applied); Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2201

("discretionary intervention is an extraordinary procedure, and will not be allowed unless there are compelling factors in favor of such intervention").

The Timbisha YMOP fails to satisfy the criteria for the extraordinary grant of discretionary intervention. First, there is no evidence that Timbisha YMOP's participation in this proceeding will assist in the development of a sound record, despite its unsupported claim to the contrary. *See* 10 C.F.R. § 2.309(e)(1)(i). Timbisha YMOP's asserted interest in this proceeding is to protect the interests of the Tribe. The Tribe is an AIT, which means its authorized representative has standing to participate in the proceeding and protect the Tribe's interests. Timbisha YMOP's participation in this proceeding is thus not critical to ensure that the Tribe's interests will be heard.

Second, Timbisha YMOP does not establish that its property, financial or other interests in the proceeding favor allowing intervention. *See* 10 C.F.R. § 2.309(e)(1)(ii). Insofar as the Amended Petition shows, any interest that the Timbisha YMOP has flows from its alleged status as the official representative of the AIT. If that predicate is incorrect, the Timbisha YMOP has not identified any interest that warrants its intervention.

Third, pursuant to 10 C.F.R. § 2.309(e)(1)(iii), the Timbisha YMOP claims that if an order is issued, it will "have a devastating effect on Timbisha cultural, historic and religious interests . . . ." Amended Petition at 14. But again, this alleged injury is dependent on its status as the official representative of the AIT. Without that status, the Timbisha YMOP has not demonstrated any injury to itself.

Fourth, pursuant to 10 C.F.R. § 2.309(e)(2)(i), the Timbisha YMOP asserts that "[t]here are no other means by which the cultural, historic, and religious interests of the Timbisha . . . will be protected . . ." in the absence of Timbisha YMOP's participation. Amended Petition at 14.

Contrary to its unsupported assertion, the Timbisha YMOP's claimed interests will be adequately represented by the official representative of the Federally-recognized AIT that has standing to intervene, if it is an entity other than the Timbisha YMOP.

Fifth, as explained above, the Federally-recognized AIT representative that has standing to intervene (if it is not Timbisha YMOP) can be expected to adequately represent the interests of Timbisha YMOP per 10 C.F.R. § 2.309(e)(2)(ii).

Sixth, its participation is likely to inappropriately broaden the issues or delay the proceeding. As discussed above, *see* 16 and n. 9, *supra*, the Timbisha YMOP contentions, which are being raised for the first time more than two months after the deadline for petitions to intervene, touch upon issues that no party has addressed in an admissible contention. Furthermore, Timbisha YMOP has already demonstrated its unwillingness or inability to comply with NRC requirements governing this proceeding, including but not limited to, its ironclad obligation to review the application and all publicly-available documents before filing its original Petition, failure to timely file the contentions at issue here (which are based on information that was available when it filed its original Petition), and failure to comply with LSN requirements and PAPO Board orders during the lengthy pre-license application phase.[17]

[17] Furthermore, Timbisha YMOP has, in each of its contentions, failed to comply with the requirements of Sections 2.309(f)(1), 51.109 and 2.326.

D. Timbisha YMOP Has Not Proffered an Admissible Contention.

1. TOP-NEPA-01 – Failure to Consider and Analyze Cultural, Historic, Religious, and Other Impacts

DOE's 2002 FEIS and Repository SEIS fail to evaluate the potential cultural and historic impacts that contamination of springs in Death Valley, California, by effluent from the Yucca Mountain geologic repository could have on Timbisha. Amended Petition at 19.

RESPONSE

In this contention, the Timbisha YMOP claims that DOE failed, in its 2002 FEIS and its Repository SEIS, to consider the potential cultural impacts to the Tribe that could result from potential contamination to springs at Death Valley, California. *Id*.

As demonstrated in Section IV.A.4 of its Answer to Timbisha YMOP's original petition for leave to intervene, all NEPA contentions must demonstrate that they meet the criteria of 10 C.F.R. § 51.109 and 10 C.F.R. § 2.326, as well as the standards for contentions of 10 C.F.R. § 2.309. Despite the matter having been squarely raised by DOE, Timbisha YMOP continues to fail to address the requirements of these provisions in this Amended Petition. For its contention to be admissible on NEPA grounds, Timbisha YMOP must (1) raise a significant environmental issue, and (2) demonstrate that its contention, if proven to be true, would or would likely result in a materially different outcome in this proceeding. 10 C.F.R. § 2.326(d). Timbisha YMOP was required to submit an affidavit of a qualified witness that sets forth the factual and/or technical basis supporting the claim that these two criteria have been met, including a "specific explanation of why it has been met." 10 C.F.R. § 2.326(b).

Timbisha YMOP fails to address any of the requirements of Sections 51.109 and 2.326 in its contention. Similarly, the declarations submitted by Timbisha YMOP in support of this contention do not address any of the criteria of Sections 51.109 or 2.326. "[T]he Commission

expects its adjudicatory boards to enforce the [§ 2.326] requirements rigorously – *i.e.*, to reject out-of-hand reopening motions that do not meet those requirements within their four corners." *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), ALAB-915, 29 NRC 427, 432 (1989).

Furthermore, Timbisha YMOP failed to demonstrate that the contention is timely. Under Section 2.326(d), "a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in § 2.309(c)."[18] To demonstrate that its contention is timely, Timbisha YMOP needed to show that the information on which the contention is based "could not have been presented earlier." *Entergy Nuclear Generating Co.* (Pilgrim Nuclear Power Station), LBP-06-848, 67 NRC __ (slip op. at 8) (June 4, 2008). As discussed in Section II of this Answer, the information on which the Amended Petition is based was available to Timbisha YMOP before December 22, 2008, and thus it could have filed this contention with its original Petition. Indeed, the fact that the contention is untimely is obvious from the face of the contention. Timbisha YMOP is complaining about alleged deficiencies in DOE's 2002 FEIS, and the Repository SEIS, which was issued in June 2008. Both of these were available far before the deadline for filing a Petition to Intervene (December 22, 2008), which means that Timbisha YMOP cannot show that the contention is timely as required by Sections 2.326 and 2.309 and the contention therefore should be denied.

Finally, the allegations in the contention and supporting declarations would not lead to a materially different outcome in this proceeding. First, Dr. Fowler is an anthropologist, and although she may be knowledgeable regarding Timbisha cultural issues, there is nothing in her training or experience that would qualify her to offer expert opinions on the transport of radionuclides through groundwater. Thus, her opinion regarding "the likelihood that

[18] Although Timbisha YMOP has characterized TOP-NEPA-01 as an amendment to its original NEPA contention, as previously explained, it is so different from the original contention that it is effectively a new contention. *See* 2-3, *supra*.

radionuclides would travel in groundwater to the springs that the Timbisha Shoshone hold sacred," Fowler Declaration, ¶ 14, fails to meet the NRC's admissibility standards, and provides no support for the contention. Her declaration is no more valid or reliable than the rejected testimony of a mathematician who tried to provide expert opinions on engineering matters, *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-86-23, 24 NRC 108 (1986), or the environmental health expert who tried to provide expert evidence on physical security matters. *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360 (1998).

As for the declarations of Pauline Esteves and Barbara Durham, those declarations only discuss what could happen. *E.g.* Esteves Declaration, ¶ 6 ("If our springs were contaminated"); *id.*, ¶ 10 ("if our dancing grounds are contaminated"); Durham Declaration, ¶ 7 ("if the Yucca Mountain repository is built and causes contamination of our springs"). Such allegations do not meet the requirements of Section 2.326 that a "materially different result would be or would have been likely." DOE has also made clear in the Repository SEIS that its "postclosure monitoring" would provide early detection of any unusual conditions in the groundwater, which would allow "ample time to plan corrective measures to protect the public." Repository SEIS, Vol. III at CR-527.

Under § 2.326, the contention must raise information so "substantial" that the alleged inadequacy in the DOE EIS is "likely" to dictate a "materially different result." As the Commission explained in *Private Fuel Storage*, this means that any "new information" proffered by a petitioner must present a "*seriously* different picture of the environmental landscape," such that it would "be likely to change the outcome of the proceeding or affect the licensing decision in a material way." CLI-06-03, 63 NRC 19, 28 (2006). Timbisha YMOP has failed to

demonstrate that a more detailed evaluation of the potential cultural or historic impacts from contamination to the springs at Death Valley would have led to a materially different result. The contention should therefore be rejected.

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

Without prejudice to other positions taken by DOE, DOE expresses no legal objection based upon this requirement.

b. Brief Explanation of Basis

Without prejudice to other positions taken by DOE, DOE expresses no legal objection based upon this requirement.

c. Whether the Issue is Within the Scope of the Proceeding

Without prejudice to other positions taken by DOE, DOE expresses no legal objection based upon this requirement.

d. Whether the Issue is Material to the Findings that the NRC Must Make

This contention fails to raise an issue that is material to the findings NRC must make because, contrary to Timbisha YMOP's claim, the EISs demonstrate that DOE recognized and addressed the Tribe's interest in water sources as a cultural resource and complied with its obligations under NEPA. Timbisha YMOP complains that DOE "lumps together all Native American groups' cultural interests, treating them as a single, indistinct entity . . . ." Amended Petition at 31. Timbisha YMOP, however, has made no attempt to identify particular concerns it has regarding water resources that are unique to it. In fact, the Tribe was part of the Consolidated Group of Tribes and Organizations ("CGTO"), a group that gathered the concerns from seventeen tribes and organizations and presented American Indian perspectives on the Yucca Mountain site characterization project and the repository environmental impact statement

to DOE. American Indian Perspectives on the Yucca Mountain Site Characterization Project and the Repository Environmental Impact Statement, American Indian Resource Document" ("AIRD"), LSN # DEN000867301, 1-1. Moreover, both Ms. Esteves and Mr. Kennedy emphasized, in comments to DOE, the unity of the American Indian point of view and the need to consider American Indian interests as a whole. Ms. Esteves stated that "the people of the Shoshone Nation is [sic] responsible to protect all life within all of the Native American Nations . . . ." Yucca Mountain Tribal Interaction Meeting Reporter's Transcript of Comments, LSN # DN20005425651 at 11 (lines 11-13). Mr. Kennedy sought to have DOE "recognize the Western Shoshone Nation as a whole rather than individual tribes for interactions and consultation purposes." Yucca Mountain Project Native American Interaction Project Tribal Update Meeting, LSN # DN2001785082 at 3.

The CGTO, in which the Tribe participates, is a group with "a long-standing relationship with . . . DOE." LSN # DEN000867301 at 1-1, 1-3-1-4. "The primary focus of the group has been the protection of cultural resources and environmental restoration." *Id*. at 1-1. In February 1998, a subgroup of the CGTO, called the American Indian Writers Group ("AIWG"), prepared the AIRD in response to a request by DOE. The CGTO described the AIRD as "a summary of opinions expressed by the . . . [CGTO, which includes the Tribe,] regarding the proposed Repository Environmental Impact Statement." *Id*. at 1-1 & 1-8. DOE used the AIRD as a resource to prepare the 2002 FEIS. 2002 FEIS, Vol. II, App. C at C-15. The AIRD focuses on cultural resources and was extensively quoted by DOE in the 2002 FEIS in a section of the 2002 FEIS devoted to "A Native American Perspective." 2002 FEIS, Vol. I at 4-88 to 4-91. The language quoted in the 2002 FEIS expressly raised the interest of American Indians, including

the Timbisha Shoshone, in water sources as a cultural resource. 2002 FEIS Vol. I at 4-89. DOE continued to recognize this interest in the Repository SEIS, stating:

> The American Indian people believe cultural resources are not limited to the remains of native ancestors but include all natural resources and geologic formations in the region, such as plants and animals and natural landforms. *Equally important are water resources and minerals.*

Repository SEIS, Vol. I at 3-63 (emphasis added). Furthermore, Timbisha YMOP itself points to those places in DOE's EISs where the Death Valley Springs were discussed. Amended Petition at 19. Although DOE did not specifically refer to "the cultural or historic significance of the purity of the Death Valley Springs to the Timbisha," Amended Petition at 33, as quoted above, DOE recognized the importance of such water resources to American Indian people, including the Timbisha. Indeed, the declaration of Timbisha YMOP's expert, Dr. Fowler, is consistent with DOE's approach. Fowler Declaration, ¶ 8 ("In Timbisha Shoshone's cultural and religious view, all springs are interconnected and are linked by a vast underground network.")

Finally, as demonstrated above, the contention does not raise a material issue because it is limited to what could happen, and does not present "a seriously different picture of the environmental landscape." *Private Fuel Shortage*, CLI-06-03, 63 NRC 19, 28 (2006). Although DOE is currently in the process of preparing a Supplement to its EISs at the request of the NRC Staff which will further evaluate groundwater-related issues, including impacts in Death Valley, whether TOP-NEPA-01 is admissible is not dependent on the outcome of that analysis. Timbisha YMOP's position is that any impact on water resources having cultural value is unacceptable. *See* Fowler Declaration, ¶12 ("even small amounts of contamination would be disrespectful to the springs, the spirits within them, and to the earth"). As demonstrated above, DOE recognized this position in its EISs and took the "hard look" required under NEPA. *See*

Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).[19] The Timbisha YMOP may disagree with DOE's conclusion, but simple disagreement with an agency's findings or its methods is not sufficient to render an EA or EIS inadequate under NEPA. *City of Los Angeles v. Nat'l Highway Traffic Safety Admin.*, 912 F.2d 478, 488 (D.C. Cir. 1990).

In the alternative, if the Board finds that the requirements of 10 C.F.R. § 51.109 and 10 C.F.R. § 2.326 have been met, and if the Timbisha YMOP's claim is dependent on DOE's supplemental analysis of possible contamination at the Death Valley Springs, the contention is premature and consideration of the contention should be deferred until DOE issues its Final Supplement. If the Timbisha YMOP disagrees with the resolution of this issue in the Final Supplement, it can seek to raise the issue at that time.

e. Statement of Alleged Facts or Expert Opinion Supporting Petitioner's Position and Supporting References

For the reasons discussed above with respect to the requirements of 10 C.F.R. §§ 51.109 and 2.326, and as addressed in Section IV.A.3 of DOE's Answer to Timbisha YMOP's original Petition regarding the legal standards under 10 C.F.R. § 2.309(f)(i)(v), Timbisha YMOP has failed to provide the requisite supporting facts, expert opinion and references required for a NEPA-based contention.

f. Existence of a Genuine Dispute on a Material Issue of Law or Fact, With Supporting References to the License Application

For the reasons discussed in section d. above, this contention does not raise a genuine dispute on a material issue of fact or law that DOE did not adequately address the cultural

[19] Timbisha YMOP also incorrectly claims that DOE is required to take a hard look at the potential environmental consequences of alternatives to the repository. Amended Petition at 21. Section 114 of the NWPA, however, provides that DOE, for purposes of complying with the requirements of NEPA, "need not consider alternative sites to the Yucca Mountain site . . . ." 42 U.S.C. § 10134(f)(3).

impacts of potential contamination to the Tribe's water resources. The contention should therefore be rejected.

2. TOP-MISC-01-Failure to Satisfy Trust Obligations

DOE failed to consult with the Timbisha regarding the potential cultural and historic impacts that contamination of springs in Death Valley, California, by effluent from the Yucca Mountain Geologic Repository could have on the Timbisha.

RESPONSE

In this contention, Timbisha YMOP claims that DOE failed to consult with the Tribe, as it is allegedly required to by the NHPA, various executive orders and internal DOE policy, regarding potential cultural impacts that may result from contamination by effluent from the Yucca Mountain Geologic Repository to springs in Death Valley, California. Amended Petition at 35. Although it is labeled as a miscellaneous contention, Timbisha YMOP also alleges that "[t]his contention raises an issue whether DOE's license application . . . complies with the provisions and policy goals of the National Environmental Policy Act . . . ." *Id*. at 36.[20]

This contention is supported by the same declarations as TOP-NEPA-01, and for the same reasons discussed above regarding that contention, this contention and supporting declarations fail to meet the requirements of Sections 51.109 and 2.326. *See* 28-31, *supra*.[21]

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

Without prejudice to the other positions taken by DOE, DOE expresses no legal objection based on this requirement.

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[20] The NRC addresses its obligations under the NHPA as a part of its NEPA process. *See USEC, Inc*., CLI-06-09, 63 NRC 433, 438 (2006). Thus, this is at least in part a NEPA-based contention and to that extent is subject to the heightened requirements of environmental contentions.

[21] With respect to the timeliness requirement of Section 2.326(d), this contention is untimely, albeit for somewhat different reasons. Here, the untimeliness of the contention is obvious because if DOE has never consulted with Timbisha YMOP, such a claim predates the filing of its original Petition and could have been included therein.

b. Brief Explanation of Basis

Without prejudice to the other positions taken by DOE, DOE expresses no legal objection based on this requirement.

c. Whether the Issue is Within the Scope of the Proceeding

The scope of an NRC adjudicatory proceeding is defined by the Commission in its initial hearing notice and order. *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790-791 (1985); *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-10, 66 NRC 1, 23 (2007). The Commission's regulations in 10 C.F.R. Part 63 and the environmental regulations related to a construction authorization for a geologic repository under 10 C.F.R. Part 51 detail specific matters that must be considered for the construction authorization to be granted. Timibisha YMOP has not demonstrated that those regulations give the NRC any authority over DOE's execution of its trust responsibilities, the referenced executive orders, or DOE's internal policies. As a result, those issues are outside the scope of this proceeding.

d. Whether the Issue is Material to the Findings that the NRC Must Make

As set forth in Section c., to the extent that any failure of DOE to comply with its trust responsibilities, various executive orders and DOE's internal policy, is outside the licensing jurisdiction of the NRC, it does not raise an issue material to the findings the NRC must make. Moreover, because any alleged trust responsibilities would not apply to the Timbisha YMOP unless it were the authorized representative of the AIT, the contention cannot raise a material issue unless the Board first finds that the Timbisha YMOP is the authorized representative of the Tribe.

e. Statement of Alleged Facts or Expert Opinion Supporting Petitioner's Position and Supporting References

For the reasons discussed above with respect to the requirements of 10 C.F.R. §§ 51.109 and 2.326, and as addressed in Section IV.A.3 of DOE's Answer to Timbisha YMOP's original petition to intervene regarding the legal standards under 10 C.F.R. § 2.309(f)(i)(v), Timbisha YMOP has failed to provide the requisite supporting facts, expert opinion and references required for a NEPA-based contention.

f. Existence of a Genuine Dispute on a Material Issue of Law or Fact, With Supporting References to the License Application

Timbisha YMOP has failed to show that there is a genuine dispute on a material issue of law or fact. Timbisha YMOP cites numerous authorities for the proposition that DOE had an obligation to consult with the Tribe regarding potential cultural impacts from storage of HLW and SNF at the repository. Regardless of which authority Timbisha YMOP cites, the allegations of what DOE was required to do are similar—consult with the Tribe about any property with religious or cultural significance that might be affected by DOE action. *See* Amended Petition at 35-44.

In support of its claim that DOE did not fulfill its duty to consult, Timbisha YMOP cites the declarations of Barbara Durham and Pauline Esteves. Amended Petition at 42. A thorough review of Ms. Esteves' declaration shows that she does not say anything about DOE's failure to consult; she only talks about the cultural significance of springs at Death Valley to the Tribe. Ms. Durham claims to be the Tribal Historic Preservation Officer.[22] Durham Decl., ¶ 2. She also claims that "no one from DOE or NRC ever has even bothered to visit our traditional homeland to investigate our concerns or discuss them with us." *Id*. at ¶ 8. DOE notes that

[22] As described earlier, there is a dispute between multiple entities regarding who actually represents the Tribe, not just in this proceeding, but in other matters as well. As a result, it is unclear whether Ms. Durham is still the Tribe's Tribal Historic Preservation Officer.

representatives of the DOE have visited the traditional homeland and have met with tribal members. *E.g.*, Letter regarding Consultation Meeting with Timbisha Shoshone Tribe, LSN # DN2001678222 (July 25, 2001) (DOE states "[w]e enjoyed the opportunity to visit you on your now official reservation lands . . . ."); Tribal Council Update, LSN # 2001595028 (December 19, 1991) (letter to Tribe's Chairperson regarding visit by DOE employees to Tribe's office in Death Valley and scheduling another visit).

In fact, Timbisha YMOP's own declarations show that DOE consulted extensively with the Tribe. Joe Kennedy states that, "[o]n behalf of the Timbisha," he has "actively participated in the proceedings involving the Department of Energy's ("DOE") License Application for Geologic Repository at Yucca Mountain." Kennedy Decl., ¶ 1. He has been "participat[ing] in these proceedings for between 10 and 20 years." *Id*. at ¶ 14. Some of the specific actions he has taken are: "submitt[ing, along with other members,] numerous documents with the Department of Energy and the Nuclear Regulatory Commission . . .[,] attend[ing] meetings of the Affected Units of Government . . . concerning the Yucca Mountain project, testif[ying] before numerous governmental bodies concerning the Yucca Mountain project, hir[ing] consultants to oversee the Yucca Mountain project, and petition[ing] the DOE for oversight funding." *Id*. at ¶ 11.

Furthermore, members of the Tribe, including Ms. Esteves and Mr. Kennedy, have provided statements to DOE regarding the Tribe's interests and positions throughout the EIS drafting process. *E.g.*, Public Comment Regarding Draft Environmental Impact Statement by Pauline Esteves, Tribal Chair, LSN # DN2002421185 (Nov. 4, 1999); Transcript for Native American EIS Tribal Update Meeting Taken at Desert Research Institute, Las Vegas, Nevada, on Friday Morning, Jan. 14, 2000, LSN # DN2001675924 (Statement of Ms. Esteves); Public Comments Regarding the Site Recommendation by Bill Helmer, LSN # DN2001659859 (Oct. 5,

2001); Statement of Grace Goad, LSN # DN2000542565 at 10 (lines 7-24); Statement of Joe Kennedy, *Id*. at 12 (line 8)-15 (line 10). Another example is the detailed comments the Tribe provided DOE regarding the draft Repository SEIS and Rail Corridor/Alignment EIS on January 10, 2008, LSN # DEN001598986.

DOE commits to continued engagement in the Repository SEIS in which DOE states, "DOE currently uses the following measures . . . and would continue to use them upon implementation of the Proposed Action . . . [c]ontinue the Yucca Mountain Project Native American Interaction Program . . . to promote government-to-government relationship . . . [and c]ontinue to abide by Section 106 of the National Historic Preservation Act . . . among DOE . . . [and] the Advisory Council on Historic Preservation . . . ." Respository SEIS, Vol. I at 9-9. Additionally, a commitment of continued engagement is also found in the Rail Alignment Record of Decision, where DOE states, "Further, DOE will conduct an ethnographic evaluation of the rail alignment area to develop a cultural resources management program. DOE proposes that the Consolidated Group of Tribes and Organizations assist in the ethnographic evaluation, and in the development and implementation of best management practices and mitigation measures." 73 Fed. Reg. 60258 (Oct. 10, 2008).

Further evidence that DOE consulted with the Tribe includes, as previously discussed (*see* 31-33, *supra*), the Tribe's participation in the CGTO, which is a group of Indian tribes with a long-standing relationship with DOE that focuses on the protection of cultural resources and environmental restoration. This consultation resulted in DOE's recognition of American Indian cultural interests in water resources. Furthermore, consultations with the CGTO, including the Timbisha Shoshone remained ongoing as reflected in the Repository SEIS. *E.g.*, Repository SEIS, Vol. I at 11-23.

Not only did DOE consult with the Tribe, it considered the results of its consultation in both the 2002 FEIS and Repository SEIS. For example, in the 2002 FEIS, DOE stated with respect to the views expressed in the AIRD:

> DOE recognizes that it could not undertake disposal of spent nuclear fuel and high-level radioactive waste in a repository at Yucca Mountain without conflict with the viewpoint expressed in the American Indian Writers Subgroup document, but believes that, should the repository be designated, DOE would have the opportunity to engage in regular consultations with representatives of tribes in the region to identify further measures to protect cultural resources, thereby lessening the concern expressed by Native American people.

2002 FEIS, Vol. I at 4-90.

Finally, the fact that DOE has engaged in consultations with the Timbisha Shoshone is illustrated by the instance in which, in response to a request from the Tribe, DOE changed its proposed action. Rail Alignment EIS, Vol. 11 at 3-53. Specifically, during the scoping period for the Rail Alignment EIS, the Tribe requested that DOE alter the Caliente rail alignment to avoid their land. *Id*. Based on the Tribe's request, DOE altered the proposed rail route so that it would be more than two miles east of their parcel of land near Scotty's Junction. *Id*.

In light of that record, Timbisha YMOP has failed to show that there is a genuine dispute on a material issue of law or fact and the contention should therefore be denied.

IV. CONCLUSION

Timbisha YMOP has not shown that its Amended Petition is timely under Section 2.309(f)(2), or that the balancing of the factors in Section 2.309(c)(1) weighs in favor of admitting the Amended Petition. Thus, its Motion should be denied.

Furthermore, the Amended Petition must be denied for the additional reasons that Timbisha YMOP has failed to demonstrate that (1) it is in substantial and timely compliance with its LSN obligations, (2) it has standing (if it is not the representative of the AIT), and (3) either of the contentions in its Amended Petition meets the requirements of Sections 2.309(f)(2), 51.109 and 2.326.

Respectfully submitted,

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Dated in Washington, DC
this 27th day of March 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

ASLBP BOARD 09-876-HLW-CAB01 William J. Froehlich, Chairman Thomas S. Moore Richard E. Wardwell	ASLBP BOARD 09-877-HLW-CAB02 Michael M. Gibson, Chairman Alan S. Rosenthal Nicholas G. Trikouros	ASLBP BOARD 09-878-HLW-CAB03 Paul S. Ryerson, Chairman Michael C. Farrar Mark O. Barnett

In the Matter of:	)	March 27, 2009
	)	
U.S. Department of Energy	)	
	)	Docket No. 63-001
(High Level Waste Repository	)	
Construction Authorization Application)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "**U.S. DEPARTMENT OF ENERGY'S ANSWER TO TIMBISHA SHOSHONE YUCCA MOUNTAIN OVERSIGHT PROGRAM CORRECTED MOTION FOR LEAVE TO FILE AMENDED PETITION TO INTERVENE AND AMENDED PETITION TO INTERVENE**," have been served on the following persons this 27th day of March 2009 through the Nuclear Regulatory Commission's Electronic Information Exchange.

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