

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:

U.S. DEPARTMENT OF ENERGY

(License Application for Geologic Repository  
at Yucca Mountain)

Docket No. 63-001

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

March 17, 2009

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**REPLY OF THE TIMBISHA SHOSHONE YUCCA MOUNTAIN OVERSIGHT  
PROGRAM NON-PROFIT CORPORATION (“TOP”) TO THE NRC STAFF ANSWER  
TO TOP’S MOTION FOR LEAVE TO FILE AN AMENDED PETITION  
AND AMENDED PETITION**

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The upshot of the Nuclear Regulatory Commission (“NRC”) Staff’s Answer to the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation’s (“TOP”) <sup>1</sup> Amended Petition is that the NRC Staff does not oppose TOP’s participation as a full party in this proceeding. NRC Staff does not oppose TOP’s request that the Atomic Safety and Licensing Board (the “Board”) grant TOP’s Motion for Leave to File an Amended Petition (the “Motion”). NRC Staff also agrees that TOP has demonstrated in its Amended Petition that it has standing to participate as a full party. Furthermore, NRC Staff does not oppose the admission of the single NEPA contention in TOP’s Amended Petition. Thus, as requested by TOP, and without opposition by NRC Staff, this Board should permit TOP to participate as a full party to pursue its

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<sup>1</sup> 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 February 9, 2009, Answer to Intervention Petitions to distinguish the two groups and their respective Petitions to Intervene filed on behalf of the Timbisha.

sole NEPA contention that the Department of Energy failed to consider and analyze cultural, historic, religious, and other impacts that contamination of springs in Death Valley, California, by effluent from the Yucca Mountain geologic repository could have on the Timbisha Shoshone Tribe and members of TOP.

### **Procedural Posture**

TOP filed its initial Petition to Intervene on December 22, 2008, alleging, among other things, three contentions. On February 24, 2009, after Department of Energy (“DOE”) and NRC Staff answered TOP’s initial Petition, TOP withdrew two of its three contentions, maintaining the contention that the DOE failed to consider and analyze the post-closure impacts of the Yucca Mountain geologic repository on the Timbisha Shoshone Tribe’s cultural interests. (*See, generally*, TOP’s Reply in Support of its Petition to Intervene as a Full Party (the “Reply to Initial Petition”).) On March 5, 2009, TOP filed the instant Motion and Amended Petition, in which TOP alleges two admissible contentions.

Under CAB Case Management Order #1, answers to TOP’s Motion, as well as to the Amended Petition itself, are due by March 30, 2009. (CAB Case Management Order #1, Jan. 29, 2009, at 3.) NRC Staff filed its Answer on March 20, 2009, ten days earlier than required. TOP appreciates NRC Staff’s efforts to Answer TOP’s Motion and Amended Petition before it was required to do so, which has allowed TOP sufficient opportunity to file this Reply before the March 31, April 1, and April 2, 2009, oral arguments. Both this Motion and the contentions set forth in the Amended Petition have been identified by the Board as disputed issues on which it seeks argument. Thus, by filing its Answer ten days early, NRC Staff has allowed the issues (at

least vis-à-vis it and TOP) to be fully briefed for the Board’s consideration at the oral arguments.<sup>2</sup>

While NRC Staff’s Answer supports the admission of TOP as a full party to this proceeding to pursue at least one of TOP’s contentions, there are certain points to which TOP wishes to reply and that it believes will benefit the Board in making its decision.

**A. NRC STAFF DOES NOT OPPOSE TOP’S MOTION FOR LEAVE TO FILE AN AMENDED PETITION.**

TOP seeks leave to file the Amended Petition under two separate standards: first, that the Amended Petition is timely under 10 C.F.R. § 2.309(f)(2); and, alternatively, that leave to file the Amended Petition should be granted under 10 C.F.R. § 2.309(c)(1). NRC Staff agrees that TOP satisfies the elements necessary for this Board to grant leave under 10 C.F.R. § 2.309(c)(1), but disagrees with respect to 10 C.F.R. § 2.309(f)(2). Although TOP welcomes NRC Staff’s agreement that the Board should grant its Motion under 10 C.F.R. § 2.309(c)(1), TOP maintains that the Board should conclude that it may grant the Motion under both standards.

In connection with 10 C.F.R. § 2.309(c)(1), NRC Staff recognizes that the factors this Board should consider weigh in favor of granting the Motion. *First*, NRC Staff acknowledges that TOP has satisfied the most important factor—that of “good cause.” In particular, NRC Staff finds compelling the removal of the Timbisha’s records, computers, computer files and even the relationship it had with its expert witnesses and counsel, by the competing Tribal leadership. NRC Staff recognizes these “exceptional circumstances” to be “sufficient explanation,” and that

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<sup>2</sup> Just before TOP filed this Reply, it received DOE’s Answer to TOP’s Motion and Amended Petition. TOP’s counsel has not yet had an opportunity to review it. TOP will timely file a reply, although it does not anticipate that it will be able to file its reply before the March 31, April 1, and April 2 oral arguments.

TOP filed as promptly as possible given the exceptional circumstances. (NRC Staff Answer, at 4-5.)

*Second*, NRC Staff agrees that the balance of the remaining factors under 10 C.F.R. § 2.309(c)(1) that this Board may consider in determining whether it should grant the Motion also weigh in favor of doing so. Indeed, NRC Staff recognizes that *none* of the factors weigh against allowing the Amended Petition; it found one factor to be neutral, and *all* remaining factors to “weigh in favor of TOP.” (NRC Staff Answer, at 5-6.)

Although NRC Staff disagrees, TOP maintains that the Board should grant leave to file the Amended Petition under 10 C.F.R. § 2.309(f)(2) as well. The declarations and affidavits supporting TOP’s Amended Petition did not exist until only days before the Motion was filed. Those materials should be recognized as satisfying the standards for permissible filings. Should the Board disagree, though, as NRC Staff concludes, the Amended Petition nonetheless should be permitted under 10 C.F.R. § 2.309(c)(1). (NRC Staff Answer, at 6.)

**B. NRC STAFF DOES NOT OPPOSE TOP’S PARTICIPATION AS A FULL PARTY.**

**1. NRC Staff Agrees that TOP Has Satisfied The Standing Requirement.**

TOP maintains that it has standing in three distinct ways: First, it has standing as an Affected Indian Tribe (“AIT”); second and, in the alternative, TOP has representational standing; and third, as yet another alternative, TOP should be granted standing through discretionary intervention. NRC Staff only addressed the substance of TOP’s second argument, that it has representational standing, *agreeing* that TOP has representational standing.<sup>3</sup> (See NRC Staff Answer, at 8-10.)

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<sup>3</sup> Having concluded that TOP has shown representational standing, NRC Staff does not address whether TOP should be granted standing through discretionary intervention. (NRC Staff Answer, at 10 n.6.)

NRC Staff also agrees that the Tribe, as an AIT, has standing. (*See* NRC Staff Answer, at 7.) Because of the Tribe’s internal leadership dispute, however, NRC Staff “does not take a position as to which group, TIM or TOP, is the duly authorized representative of the Tribe.” (*Id.*) Although NRC Staff does not take a position on that issue, TOP brings to the Board’s attention a very recent decision by the Bureau of Indian Affairs in connection with the leadership dispute. (*See* Attachment A, March 24, 2009, letter from the Bureau of Indian Affairs (the “BIA Letter”).)

The BIA Letter is the decision of the BIA on Timbisha Shoshone Tribe Chairman Joe Kennedy’s<sup>4</sup> appeal of an earlier BIA decision recognizing Chairman Kennedy’s removal from the Tribal Council. The BIA Letter overturns the earlier decision, explaining in some detail that the effort was without effect and not in conformance with the Timbisha’s constitutional provisions. (*See* BIA Letter, pages 1, 10.) The BIA further explains that until full resolution of the appeals, it will continue to recognize the Tribal Council from 2006-07, on which Mr. Kennedy served as Chairman. The BIA recognized that there may still be appeals to the Interior Board of Indian Appeals, but also explained that as to its own actions, it expects a “decision to acknowledge [the election of November 11, 2008, an election that yields the current Tribal Council chaired by Mr. Kennedy] [to] be rendered shortly.” (*Id.* at 10.<sup>5</sup>)

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<sup>4</sup> Chairman Kennedy authorized TOP’s participation in this proceeding.

<sup>5</sup> The DOE recently sent Chairman Kennedy and Tribal Historian Durham (both of whom support TOP’s Amended Petition) an invitation to “Review and Request Concurring Party Status to the Programmatic Agreement (PA) among the U.S. Department of Energy (DOE) Office of Civilian Radioactive Waste Management, the Nevada State Historic Preservation Office (SHPO), and the Advisory Council on Historic Preservation (ACHP) for Licensing and Development of a Nuclear Waste Repository at Yucca Mountain, Nye County, Nevada.” (*See* Attachment 1 to NRC Staff Answer.)

In short, while TOP maintains that it formally represents the interests of the Timbisha, and has standing in this proceeding as an AIT, for present purposes it is sufficient for the Board to conclude, as has NRC Staff, that TOP has representational standing.

**2. NRC Staff Does Not Oppose The Admission of One of TOP's Contentions.**

In its Amended Petition, TOP alleges two contentions—one involving NEPA, the second involving the DOE's duty to consult. For those reasons set forth in its Amended Petition, and as supported by NRC Staff, this Board should find admissible TOP's NEPA contention—that the DOE failed to consider and analyze cultural, historic, religious and other impacts that contamination of springs in Death Valley, California, by effluent from the Yucca Mountain geologic repository could have on the Timbisha.

In response to NRC Staff's Answer, however, TOP will withdraw at this time its second contention, TOP-MISC-01, which contends that DOE has failed to satisfy its trust obligations by failing to consult with the Timbisha regarding the potential cultural and historic impacts that contamination of springs in Death Valley could have on the Timbisha. As noted in NRC Staff's Answer, DOE has extended to the Timbisha, through Chairman Kennedy, the opportunity to comment on the DOE's Programmatic Agreement among the DOE and the Office of Civilian Radioactive Waste Management, the Nevada State Historic Preservation Office, and the Advisory Council on Historic Preservation. (*See* NRC Staff Answer at 16, Attachment 1.) NRC Staff maintains that this overture to Chairman Kennedy to comment on the Programmatic Agreement may satisfy DOE's duty to consult. (*Id.* at 15-16.) Although TOP withdraws its TOP-MISC-1 contention at this time, based on NRC Staff's representations about the Programmatic Agreement in its Answer and DOE's representations in its letter to Chairman Kennedy, TOP does so without intending to waive, abandon or forego any of legal rights or arguments that it might have regarding DOE's duty to consult the Timbisha, and TOP expressly

reserves the right to re-assert this contention should the Programmatic Agreement process fail to provide adequate consultation.

### **Conclusion**

For the foregoing reasons, and for the reasons stated by NRC Staff in its Answer, TOP urges the Board to grant its Motion for Leave to File an Amended Petition and to conclude that under the Amended Petition, TOP has demonstrated that it has standing to participate as a full party in this proceeding, and that TOP-NEPA-01 is an admissible contention.

Respectfully submitted,

*Signed electronically by Steven A. Heinzen*

Arthur J. Harrington  
Douglas M. Poland  
Steven A. Heinzen  
Counsel for the Timbisha Shoshone Yucca  
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Dated in Madison, WI  
this 27<sup>th</sup> day of March 2009.

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## ATTACHMENT A



IN REPLY REFER TO:

## United States Department of the Interior

BUREAU OF INDIAN AFFAIRS  
Pacific Regional Office  
2800 Cottage Way  
Sacramento, California 95825

MAR 24 2009

**CERTIFIED MAIL NO.7006 3450 0002 4647 5353**  
**RETURN RECEIPT REQUESTED**

Judith A. Shapiro, Esq.  
Attorney for Joe Kennedy et, al.  
7064 Eastern Avenue, NW  
Washington, DC 20012

Dear Ms. Shapiro:

The purpose of this correspondence is to inform you of my decision regarding the Notice of Appeal (Appeal) dated November 13, 2008, which you filed on behalf of Mr. Joe Kennedy, Ms. Madeline Esteves, and Ms. Pauline Esteves, from the decision of Superintendent Troy Burdick dated October 17, 2008, as subsequently amended on October 20 and 21, 2008. The Appellants are appealing the portion of the Superintendent's October 17th decision that recognized actions taken to recall Joe Kennedy from his position on the Tribal Council and elected George Gholson and Wallace Eddy to the Tribal Council of the Timbisha Shoshone Tribe (Tribe) and seeking the reversal of the Superintendent's decision of October 17, 2008.

The Appellant's Appeal was postmarked November 13, 2008; the Statement of Reasons was received and postmarked on January 23, 2009<sup>1</sup>; both were timely filed pursuant to 25 CFR § 2.10. The Administrative Record from the Bureau of Indian Affairs, Central California Agency, Superintendent (Superintendent) was received on December 3, 2008 at this office. George Gholson et, al., as an Interested Party, filed an answer to Appellant's Notice of Appeal and that was received in this office on February 23, 2009.

Based on the record before me, I am unable to affirm the Superintendent's decision of October 17, 2008, regarding the actions taken at the September 20, 2008 Special General Council Meeting. I find, in particular, that the actions taken by the General Council to remove/recall Joe Kennedy from his position on the Tribal Council and the election of George Gholson and Wallace Eddy, did not conform to the constitutional provisions for the removal/recall of a Tribal Council member and the election of successors to declared vacant Tribal Council position(s). We present our analysis as follows:

<sup>1</sup> The Regional Director on December 22, 2008, rescinded and nullified his December 4, 2008 decision on the Appellant's Notice of Appeal dated November 13, 2008, because the Appellants time to file a Statement of Reason did not expire and afforded the Appellants until January 23, 2009 to file their Statement of Reasons.

## **FINDING OF FACTS**

The chronological events which occurred that led to the actions taken by the parties are as follows:

The petition for recall of Joe Kennedy, Chairman, was circulated amongst eligible voters of the Tribe beginning June 2008 through August 9, 2008. The petition for recall with 94 signatures was provided to Tribal Council on or after August 9th. The petition listed the charges against Joe Kennedy and cited the provisions for recall as required under the Tribe's Constitution. Article XI, Section 2. Recall.

**On August 13, 2008**, the Timbisha Shoshone Tribal Council, consisting of Margaret Armitage, Pauline Esteves and Madeline Esteves, responded to the Timbisha General Council regarding the correction of misinformation in the attempted recall of Chairman Joe Kennedy.

**August 16, 2008**, letter from Margaret Armitage, Vice-Chairperson, to the General Council stating that the alleged charges against Chairman Kennedy are fraudulent and have no validity. Moreover, fraudulent activity was perpetrated and misrepresentation was committed against the Tribal Government, Tribal Council and the General Council. A determination was made that forgery of signatures and false information had been used in gathering signatures; therefore, according to the Constitution and after review, there was no validity in the recall petition, no recall of Chairman Kennedy, and no General Council meeting would be called.

Undated letter from George Gholson, General Council member, in response to the **August 16, 2008** letter from Margaret Armitage, Vice-Chairperson, requested that the petition for recall of Mr. Kennedy be forwarded to the election committee for a valid verification of the signatures; set a date for a general council meeting to provide Joe Kennedy an opportunity to face charges and schedule a special recall election. Mr. Gholson also advised the Tribal Council that if they continued to refuse them their constitutional rights, they would call a Special General Council meeting to allow members to sort out the difference. There is no record that the Vice-Chairman complied with Mr. Gholson's request. Consequently, no recall could be pursued.

**On September 9, 2008**, Chairman, Joe Kennedy, by letter to all General Council members, informed them that the meeting scheduled for September 20, 2008, in Las Vegas, NV, was invalid for the following reasons: the Petition was delivered certified mail to Joe Kennedy on September 5, 2008; the Notice for the proposed Las Vegas Special meeting was delivered regular mail to Joe Kennedy, meaning that the meeting was already established prior to his approval; the recall Petition was not delivered in accordance with Article VIII, Section 3, a.; Mr. Kennedy stated he was the only person who received the Notice, which should have been delivered to the entire Tribal Council; the Petition was not dated and contained the names of ten (10) General Council members, in which two (2) signatures were printed and one was incomplete; the meeting location could not be determined by the General Council. Due to these deficiencies, the Special meeting was not called by the Chairman, and there was no duly authorized special General Council meeting as allowed for in the Constitution. But recall provisions state that the Vice-Chairman must certify valid signatures, not the Chairman, so Mr. Kennedy has nothing to do with a General Council recall vote.

**On September 10, 2007**, General Council member, George Gholson, noticed Joe Kennedy, Chairman, of a Special General Council meeting scheduled for September 20, 2008, in Las Vegas, NV, to provide an opportunity for reply to the allegations of misconduct. The notification was in accordance with the Tribe's Constitution, Article VIII, Meetings, Section 2, c. Included were detailed allegations and misconduct charges attributed to Joe Kennedy.

**On September 16, 2008**, George Gholson provided a response to Chairman Joe Kennedy's letter of September 9, 2008, with copies of the Certified Mail receipts showing proof of receipt that delivery was made to the entire Council of the notice of proposed meeting, as specified under Article VIII, Section 3, b. In addition, a copy of the Petition was included to verify that the signatures of the individuals that were invalidated for the Petition were also written and accepted in a January 2008, meeting in support of Joe Kennedy.

**On September 20, 2008**, the Special General Council meeting held by the Timbisha Shoshone General Council, in Las Vegas, Nevada was held to address the removal of Joe Kennedy and to conduct other Tribal business. The minutes of the meeting indicate that the meeting was observed by Daniells, Phillips Vaughan & Bock, a third party, to ensure fairness and objectivity in the voting process. The meeting began at 1:00 pm and 22 sheets of paper were circulated throughout the room to determine the number of tribal members that would be voting. After counting the signatures of purported eligible voters, 136 names were counted on 22 sheets of paper. After determining the number of voters present, a discussion ensued regarding the removal of Joe Kennedy as Tribal Chair and then a hand vote was taken on the issue. The hand vote count resulted in 91 Yes, 29 No, 16 Abstain, to remove Joe Kennedy as Tribal Chairperson.

Following the hand vote, 136 ballots were distributed to eligible voting members. Each of the voting members was verbally instructed to write "Removal of Joe Kennedy" on the ballot. Each of the ballots was counted by Ed Blackford and Mya Shaw. The total votes were reconciled and agreed and verified by Mr. Bock. Once this process was completed, the ballots were placed in a sealed envelope, labeled and signed by Ed Blackford and Mya Shaw. The results of the ballots on the resolution to remove Joe Kennedy as Tribal Chair was as follows: 130 Yes, 5 Abstain, 1 No. Following the removal of Mr. Kennedy, it was then acknowledged that Margaret Armitage had resigned as Vice-Chairperson.

Oral nominations were taken for the positions of Tribal Chair and Vice-Chairperson. The person receiving the highest number of votes would be the Tribal Chair and the second highest would be the Vice-Chairperson. The following people were orally nominated: Wallace Eddy, Ed Beaman, George Gholson, and Jacob Parra. Ballots were then created with the individuals' names. Then, it was announced that each member was allowed to vote for 2 of the 4 nominees. Some ballots only contained a vote for 1 nominee. One hundred thirty-six (136) ballots were distributed and collected. Again, each ballot was counted by Ed Blackford and Mya Shaw. The results were; George Gholson received 106 votes, Wallace Eddy received 53 votes, Jacob Parra received 50 votes and Ed Beaman received 27 votes. Mr. Gholson received the highest number of votes and was placed as the new Chairman. Mr. Eddy received the second highest votes and was placed as the Vice-Chairman.

**On September 22, 2008,** Joel A. Bock, MST, Daniells Phillips Vaughan & Bock, by letter to George Gholson provided the September 20, 2008 Minutes of the Special Council meeting and copies of the "sign-in" sheets.

**On September 24, 2008,** George Gholson by letter to the Superintendent, requested the Superintendent recognize the General Council's recall of Joe Kennedy and the election of George Gholson and Wallace Eddy to the Tribal Council at the September 20, 2008 Special General Council meeting.

**On September 26, 2008,** George Gholson by letter to the Superintendent, provided documentation of the results of the September 20, 2008, Special General Council meeting.

**On September 29, 2008,** Joseph L. Kitto, Esq., on behalf of George Gholson, by letter to the Superintendent, stated that he was retained by Mr. Gholsen to review the factual events of the September 20, 2008, meeting held in Las Vegas, NV, wherein the General Council voted to remove Joe Kennedy, elected George Gholson as the Tribe's Chairman and elected Mr. Wallace Eddy as Vice-Chairperson.

**On October 1, 2008,** Joe Kennedy by letter to the Superintendent invalidated the September 20, 2008, Special General Council meeting. Mr. Kennedy provided the following documents: the September 9, 2008, Notice to All General Council Members, invalidating the meeting; a copy of Article VIII, Section 3, b.; the August 20, 2008 Resignation letter of Margaret Armitage; the Resolution Authorizing the Delay to Fill Office of Vice-Chairman until November 11, 2008; a copy of Joel Bock's minutes of the September 20, 2008 meeting; the June 26, 2008 letter to Tribal Members, re: Gaming Development Update, and Flyers re: Joe Kennedy. Mr. Kennedy further reiterated his position that the September 20, 2008 meeting was invalid and the attempted recall and replacement of the Chairman did not comply with the provisions of the Tribe's Constitution.

**On October 14, 2008,** George Gholson by letter to the Superintendent requested an expedited review of the request for recognition and provided an opinion on the events of September 20, 2008.

**On October 16, 2008,** Mr. Gholsen sent a facsimile to the Superintendent, a letter to Mr. Joe Kennedy requesting him to cease and desist from conducting any business on behalf of the Tribe.

**On October 17, 2008,** the Superintendent by letter to both Joe Kennedy and George Gholson, provided a response to documentation submitted on September 26, 2008, regarding the removal of Joe Kennedy as Chairman of the Tribe by the General Council at the Special General Council meeting held on September 20, 2008. The Superintendent stated that he would recognize the General Council's Petition and the two (2) printed names and signatures, because the same individuals printed and signed their names in the same manner for a General Council meeting previously held in January 2008, under similar circumstances. Therefore, there was no basis to deny the petition. In addition, he stated that because the Tribal Council declined to call the Special meeting, the General Council moved forward and continued the process of holding the September 20, 2008, meeting, in which a quorum was present, to conduct business, which

resulted in the removal of Joe Kennedy and the replacement of Margaret Armitage on the Tribal Council. Therefore, the Superintendent acknowledged the actions taken at the September 20, 2008, Special General Council meeting, and recognized the following individuals to be official tribal representatives of the Timbisha Tribal Council until the Tribe's November 2008, Tribal Council Elections.

George Gholsen, Chairman  
Wallace Eddy, Vice-Chairman  
Madeline Esteves, Secretary/Treasurer  
Margaret Cortez, Council Member  
Pauline Esteves, Council Member

**On October 21, 2008**, the Superintendent issued another letter providing notice that his decision of October 17, 2008, to acknowledge the actions taken by the General Council on September 20, 2008, was not yet effective in accordance with 25 CFR 2.6, and reversed his decision to recognize the Tribal Council prior to the September 20, 2008, Special meeting, which consisted of:

Joe Kennedy, Chairman  
Margaret Armitage, Vice-Chairman  
Madeline Esteves, Secretary/Treasurer  
Margaret Cortez, Council Member  
Pauline Esteves, Council Member

**On November 10, 2008**, the Superintendent by letter to George Kennedy, clarifying that for government-to-government purposes, the Bureau of Indian Affairs continued to recognize Joe Kennedy, Ed Beaman, Madeline Esteves, Virginia Beck and Cleveland Lyle Casey, as the recognized Tribal Council of the Timbisha Shoshone Tribe. Further, the Superintendent acknowledged the actions taken at the January 20, 2008 meeting, but noted that his decision of February 29, 2008, to acknowledge the results of January 20, 2008 meeting was appealed and therefore, is not yet final. He also stated that his October 17, 2008 letter providing his response to documentation submitted on September 26, 2008 regarding the removal of Mr. Kennedy on September 20, 2008, was also subject to appeal before it becomes final.

#### **APPLICABLE TRIBAL LAW**

The Tribe is organized and governed under the Constitution of the Timbisha Shoshone Indian Tribe, adopted by its membership on February 17, 1986. Furthermore, the Tribe conducts its tribal election in accordance with an Election Ordinance adopted by the Tribal Council<sup>2</sup> on September 20, 2005. In analyzing the parties' positions, it is appropriate to look to the Tribe's Constitution as it relates to the actions taken by the parties.

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<sup>2</sup> Tribal Council: Joe Kennedy, Chairman, Ed Beaman, Vice-Chairman, Virginia Beck, Secretary/Treasure, Grace Goad and Cleveland Casey.

## **CONSTITUTION OF THE TIMBISHA SHOSHONE INDIAN TRIBE**

### **Article IV, Governing Body,**

**Section 2,** provides that, the governing body of the Tribe shall be the General Council. The General Council shall consist of all tribal members sixteen (16) years of age or older. All members of the General Council shall be able to vote at all General Council meetings and all tribal elections, referenda, initiatives, recalls and repeals.

### **Article V, Powers**

**Section 1, General Council, a.,** provides in part that, All powers of the Tribe shall be vested in the General Council, subject to any limitations imposed upon such powers by the laws of the United States, including those powers delegated to the Tribal Council, etc...

**Section 1, General Council, b.,** provides that, The General Council shall exercise its powers of self-government through initiative, referendum, repeal and recall powers as set forth in this document.

### **Article VIII, Meetings,**

**Section 2,** provides in part that, All meetings of the Tribal Council shall be held in accordance with the following provisions:

- a. A majority of the members of the Tribal Council shall constitute a quorum at all Council meetings. No business shall be conducted in the absence of a quorum.

**Section 3, b.,** provides that, Special meetings of the General Council may be called by the Tribal Chairperson or by any member of the General Council who submits a petition with ten (10) signatures of the General Council members to the Tribal Council requesting a special meeting. The notice in regard to any special meetings shall be given at least three (3) days prior to the meeting and shall specify the purpose of the meeting.

### **Article X, Vacancies**

**Section 1,** provides in part, The Tribal Council shall declare a Tribal Council position vacant for any of the following reasons:

- b. When a Tribal Council member resigns.
- e. When a Tribal Council member is recalled from office.

If less than (12) months of a vacant term remains, the Tribal Council shall fill the vacancy by appointment of a General Council member who qualifies for candidacy for the vacant position. If more than twelve (12) months remain in the vacant term a special

election shall be held to fill the vacant position. Such a special election shall be held within thirty (30) days after the Tribal Council declares the position vacant.

## **Article XI, Removal and Recall**

### **Section 1. Removal**

**Section 1, 1.**, provides in part that, any member of the Tribe can request removal of any Tribal Council member by submitting a written statement of charges to the Chairperson, etc... Such written statement must be received by the accused Council member no later than ten (10) days before the next regular Council meeting at which he or she is to appear.

**Section 1, 2.**, provides that, at the next regular Tribal Council meeting following the submission of such written statement, the charging party shall present his or her allegations and proof against the accused member of the Tribal Council, and the accused member shall be given an opportunity to reply to all charges by presenting his or her allegations and proof to the Tribal Council.

**Section 1, 3.**, provides that, after hearing all the charges and proof presented by both sides, the Tribal Council shall take a vote on whether the accused member shall be removed from office. If a majority of the Tribal Council vote to remove the accused Council member, his or her seat shall be declared vacant. The Tribal Council member who is subject to the removal request shall not vote nor serve in his or her capacity as a Tribal Council member in the removal proceedings.

### **Section 2. Recall**

Every person elected to a position on the Tribal Council or who is an elected officer of the Tribe shall be subject to recall from such office by the General Council as follows:

- a. Any member of the Tribe may circulate one or more petitions among the eligible voters of the Tribe requesting a special recall election, which petition(s) shall contain the name(s) of the person(s) whose recall is sought and shall state the charges being proffered against such person(s) in 25 words or less. If one-third (1/3) of the eligible voters of the General Council shall sign the petition(s), such petition(s) shall be presented to the Tribal Council Chairperson, or if charges are being proffered against the Tribal Council Chairperson, to the Vice-Chairperson of the Tribal Council.
- b. The Tribal Council Chairperson, or if charges are being proffered against the Tribal Chairperson, the Tribal Council Vice-Chairperson, shall then certify the validity of such signatures of eligible voters maintained by the Tribe. If the required number of valid signatures appear on the recall petition, the Tribal Council shall call a special recall election within sixty (60) days from receipt of the petition(s).



c. Within thirty (30) days after the special recall election has been established, a General Council meeting shall be held. The charging party shall present his or her allegations and proof against the accused member of the Tribal Council, and the accused member shall be given an opportunity to reply to all charges by presenting his or her allegations and proof to the General Council.

d. The ballot used for a recall election shall contain the question: "Shall (name of member(s)) be recalled from office on the Timbisha (Tribal) Council?" The ballot shall contain a space opposite such question in which the words "Yes-No" shall be printed so that the voter may indicate with a mark whether he or she wishes to vote for or against the recall of the member(s) so named. In the case of a recall of two (2) or more Council members, there shall be a separate ballot for each member being recalled.

e. If a majority of the General Council members voting in a special recall election vote to recall the council member(s) or any other officer(s) of the Tribe named on the ballot, and provided that two-thirds (2/3) of the General Council vote in said election, the Tribal Council shall immediately declare the Council member(s) or officer(s) to be recalled from office and his or her seat(s) shall be declared vacant.

## **ELECTION ORDINANCE**

### **Section 1. General Provisions**

**1.2 Purpose.** The purpose of this Ordinance is to promulgate tribal law in order to establish rules and procedural requirements for the conduct of Tribal Council elections of the Timbisha Shoshone Tribe in accordance with the Constitution of the Timbisha Shoshone Tribe.

### **Section. 6. ELECTION BOARD DUTIES AND RESPONSIBILITIES**

**6.3 Special Recall Election.** If a Special Recall Election is called for by the Tribal Council, pursuant to the Constitution, the Election Board shall have the following duties and responsibilities:

- a. To conduct the Special Recall Election on the date called for by the Tribal Council.
- b. To prepare the Special Recall Election ballots.
- c. To count the Special Recall Election ballots and determine:
  1. Whether two-thirds (2/3) of the General Council participated in the Special Recall Election; and

2. Whether majority of the votes cast were to recall the person(s) subject to the Special Recall Election.

## **DISCUSSION AND CONCLUSION:**

The Tribe's Constitution provides that the powers of the government of the Tribe shall be divided into three distinct branches; the General Council, the Tribal Council and the Tribal Judiciary. No branch, group or person charged with the exercise properly belonging to one of these branches shall exercise any powers belonging to one of the other branches, except as otherwise specified in this document.

The Constitution further sets out detailed procedures for removing and recalling any Tribal Council member during a term of office and for appointing/electing a successor(s). Further, it identifies powers belonging to the General Council and/or the Tribal Council, i.e., the General Council shall exercise its powers of self-government through initiative, referendum, repeal and recall. The Tribal Council has the power to determine the validity of petitions for recall/removal and if applicable, the calling of a special recall election and for the election of successor(s). The Tribal Council has the delegated power to remove any Tribal Council member from the Tribal Council; the General Council has the delegated power to recall any Tribal Council member.

The record indicates that the following actions initiated by the parties were not in conformance with the provisions and delegated authorities of the Constitution, which has violated the members' right to due process of the law as follows: 1. The Tribal Council's basis for determining the validity of the recall petition and the request for a Special General Council meeting, prevented the General Council membership's right to seek redress of its grievance against Joe Kennedy. (*Article VIII, Meetings, Section 3, b, and Article XI, Section 2, Recall, Et, seq.*) 2. The General Council membership, in their attempt to resolve the Tribal leadership dispute, did not have the constitutional authority to remove Joe Kennedy from the Tribal Council, that authority is delegated to the Tribal Council. (*Article XI, Section 1, Removal, Et, seq.*) The General Council also did not follow proper recall procedures. 3. The removal of Joe Kennedy without a notice and hearing by the Tribal Council also violated his right to due process of law. (*Article XI, Section 1, Removal, 2, and Section 2, Recall, c.*) 4. The election of George Gholson and Wallace Eddy did not conform to the established procedures for electing successors to declared vacant Tribal Council positions. (*Article XI, Section 1, Removal, 3, Section 2, Recall, e, Article X Vacancies, Section 1 Et, al.*) Furthermore, the parties' actions violated rights of other tribal members not in attendance due to lack of notice; their right to vote in duly called and conducted Tribal elections and their right to be considered as candidates for the Tribal Council.

It is evident that the Tribal Constitution does not delegate to the Bureau the authority to be involved in the Tribe's leadership dispute. However, whatever accommodations must be made by the Tribe to determine (in this case) the rightful leadership of the tribe, a short-circuiting of the rights of individuals cannot be one of them. As a matter of Federal law, i.e., the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302 (1988), Indian tribes are required to afford their members due process of law. Where, as here, a tribal member is deprived of procedural rights set out in the Tribal Constitution, he is also deprived of due process of law within the meaning of ICRA. The Bureau of Indian Affairs has the authority and the responsibility to decline to recognize the

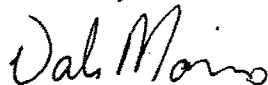
results of tribal actions when those results are tainted by a violation of ICRA. Cf. United Keetoowah Band of Cherokee Indians v. Muskogee Area Director, 22 IBIA 75 (1992).

Since August 2007, politics and disputes between the 2006 duly elected Tribal Council consisting of Joe Kennedy, Chairman, and Ed Beaman, Vice-Chairman, Virginia Beck, and Cleveland Lyle Casey, Executive Council Members, resulted in other groups claiming to be the elected leaders, and among other things, has caused confusion and uncertainty amongst the membership as to whom their rightful leaders and members are, and among third parties i.e., developers, attorneys, banks, local law enforcement, etc..., that provide services and funding to the Tribe, including the Bureau of Indian Affairs. Therefore, it is imperative that the governing body of the Tribe initiate the appropriate tribal action(s) necessary to resolve this leadership dispute as soon as possible and what ever action(s) they determine appropriate, must follow the detailed procedures afforded by the Tribe's Constitution. Until this happens and for the foregoing reason stated; I will, for government to government purposes, continue to recognize the tribal representatives of the Tribe's Tribal Council as follows: **Joe Kennedy, Chairman, Ed Beaman, Vice-Chairman, Madeline Esteves, Secretary/Treasurer, Virginia Beck, and Cleveland Lyle Casey, Executive Council Members.**<sup>3</sup>

Please be advised, that there is also a pending determination regarding the November 11, 2008 General election of the Tribe, and a decision to acknowledge that election will be rendered shortly.

This decision may be appealed to the Interior Board of Indian Appeal, 801 North Quincy Street, Arlington, Virginia 22203 in accordance with regulations in 43 CFR§ 4.310 4.340. Your Notice of appeal to the Board must be signed by you or your attorney and must be mailed within 30 days of the date you receive this decision. It should clearly identify the decision being appealed. If possible, attach a copy of the decision. You must send copies of your Notice of Appeal to (1) The Assistant Secretary - Indian Affairs, 4160 MIB, U.S. Department of the Interior, 1849 C Street, N. W. Washington, D.C. 20240, (2) each interested party known to you, and (3) this office. Your Notice of Appeal sent to the Board of Indian Appeals must certify that you have sent copies to these parties. If you file a Notice of Appeal, the Board of Indian Appeals will notify you of further appeal procedures. If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a Notice of Appeal.

Sincerely,



Regional Director

cc: See Distribution List

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<sup>3</sup> The last uncontested tribal election, duly called and conducted on November 2006

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**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:

U.S. DEPARTMENT OF ENERGY

(License Application for Geologic Repository  
at Yucca Mountain)

Docket No. 63-001-HLW

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

March 27, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the *Reply of the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation to the NRC Staff Answer to its Motion for Leave to File an Amended Petition and Amended Petition* in the above-captioned proceeding have been served on the following persons this 27<sup>th</sup> day of March 2009, by Electronic Information Exchange.

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