

**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

April 3, 2009

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

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

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

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

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While challenging every procedural step the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation (“TOP”) has taken, it is telling that the Department of Energy (“DOE”) does not challenge the substance of the one contention that TOP is pursuing.¹ That NEPA contention—TOP-NEPA-01—alleges 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 proposed Yucca Mountain geologic repository could have on the Timbisha Shoshone Tribe (the “Timbisha” or “Tribe”).² DOE does not disagree that effluent

¹ In its Amended Petition, TOP alleged two contentions: TOP-NEPA-01 (described immediately above) and TOP-MISC-01. The latter contention alleged that the 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. In its REPLY TO THE STAFF ANSWER TO TOP’S MOTION FOR LEAVE TO FILE AN AMENDED PETITION AND AMENDED PETITION, at 6-7, TOP withdrew TOP-MISC-01 “without intending to waive, abandon or forego any [] 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.”

² 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
(continued ...)

from its proposed geologic repository will reach the Death Valley springs. Nor does it challenge the central role the Death Valley springs play in the Tribe's culture, its history, and in its religious ceremonies.

Instead, elevating form over substance, and contrary to the Advisory PAPO Board's statement that failure to comply with case management requirements "shall not be grounds for any potential party to object to the admissibility of a proffered contention," DOE works to uncover what it believes to be TOP's procedural missteps in an effort to keep TOP's substantive concerns from this Board's consideration and from the record. For instance, in considering whether TOP has satisfied the requirements for leave to file a new or amended petition, the DOE asserts that TOP has failed to satisfy even *one* of the eight factors this Board is to consider when determining if it should grant leave under 10 C.F.R. § 2.309(c)(1). And, notwithstanding that TOP's one remaining contention is supported by affidavits and documentary materials that were available on the License Support Network ("LSN") at the time the Amended Petition was filed (and cited by LSN number in the Amended Petition), DOE argues that TOP's failure to certify its LSN compliance months before it filed its Amended Petition, at a time when it was not represented by counsel, is a bar to its participation as a full party here. Remarkably, DOE also challenges TOP's standing to participate in this proceeding (if it is not identified as an Affected Indian Tribe ("AIT")), despite the undisputed fact that TOP was expressly created by the Tribe for the singular purpose of representing it and the interests of Tribal members in this very proceeding.

(... continued)

"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.

But even if form were more important than substance—which TOP does not believe is the intention of the statutes, rules and regulations governing this proceeding—TOP still met each formal requirement necessary to participate in this proceeding as a full party. It is notable that the NRC Staff agrees that TOP may be admitted as a full party and does not challenge TOP’s standing, LSN compliance, or the admissibility of TOP’s contention.

I. THE COMMISSION SHOULD GRANT TOP’S MOTION FOR LEAVE TO FILE AN AMENDED PETITION UNDER 10 C.F.R. § 2.309(C)(1).

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, additionally, that leave to file the Amended Petition should be granted under 10 C.F.R. § 2.309(c)(1). Although the NRC Staff agrees that TOP satisfies the elements necessary for this Board to grant leave under 10 C.F.R. § 2.309(c)(1), DOE challenges TOP’s showing under both standards.

All parties agree that under 10 C.F.R. § 2.309(c)(1), the first of the eight balancing factors—good cause—is the most important. DOE argues that this “good cause” standard *requires* that the information upon which the Motion is based be new information. (*See* DOE Answer, at 11-12.) Indeed, citing only a 17-year-old case dealing with a predecessor to the current regulation, DOE refers to the presence of new information as “[t]he test” for good cause. (*Id.* at 11 (emphasis added).) This cramped reading of “good cause” is not supported by a plain reading of the rule or by case law. Nowhere does the plain text of the rule relating to good cause refer to new information, nor does the text of the rule suggest that good cause is limited to any particular consideration. Moreover, DOE’s reading is non-sensical; if DOE’s view were correct, § 2.309(c)(1) would be little more than a repetition of the standard set forth in § 2.309(f)(2) for timely filings. In essence, the DOE believes that new information is required for both timely *and*

untimely amendments. Its reading and application of the “good cause” standard is simply untenable.

DOE further argues against good cause to grant the Motion by contending that one of several factors cited by TOP—that the Timbisha did not have sufficient financial resources to prepare its initial petition—does not constitute good cause. There are at least two flaws with DOE’s argument. First, TOP’s lack of funds to prepare its petition here is distinguishable from other cases in which the Commission held that insufficient resources did not establish good cause because here, it was the DOE’s own failure to timely fund the Timbisha’s efforts to prepare TOP’s petition that caused TOP to prepare the Amended Petition. Second, DOE turns a blind eye to the extraordinary circumstances that TOP faced in the weeks leading up to the petition-filing deadline in December 2008, which involved a struggle for Tribal control and representation. As described in TOP’s Motion and the supporting affidavit of Chairman Kennedy, TOP’s records, computers, computer files and even the relationships it had with expert witnesses and counsel were removed and/or severed by its competing tribal leadership. Indeed, NRC staff found these to be exceptional circumstances; however, DOE failed to address them at all. If the loss of information, documents, and access to expert witnesses critical to framing contentions only weeks before a filing deadline do not constitute “good cause,” especially where a party is without legal representation, then it is difficult to imagine what *could* constitute good cause.

DOE’s discussion of the remaining factors for leave to amend are equally meritless. In challenging TOP’s showing under §§ 2.309(c)(1)(ii), (iii), and (iv), DOE appears to concede that if TOP is the AIT, then these factors weigh in favor of granting TOP’s Motion. (*See* DOE Answer, at 13.) If it is not, DOE argues that TOP cannot satisfy these factors because DOE does

not believe that TOP has standing in any other capacity and that whoever is the AIT can adequately represent TOP's interests. DOE's answer is wrong on both counts. As shown below and in TOP's Amended Petition, TOP has established representational standing and, alternatively, should be allowed to participate through discretionary standing.

Moreover, DOE's suggestion that the considerations of §§ 2.309(c)(1)(v) and (vi) do not weigh in TOP's favor because another entity, such as TIM, will represent TOP's interests in this proceeding is, as a practical matter, incorrect. (*See* DOE Answer at 15.) There is no assurance that TIM (the competitor for AIT status) will be permitted to intervene as a full party in this proceeding. Indeed, DOE argues in its Answer that TIM should not be permitted to participate because, among many other things, TIM does not have an admissible contention and it has not complied with its LSN obligations. (DOE Answer at 17-41.) Therefore, if DOE has its way, TIM will not be a party. In that case, it would be impossible for TIM to represent TOP's interests. Even if the Board were to permit TIM to participate as a full party, the contentions it has raised do not fully address the concerns and potential impacts identified in the one contention TOP has raised, which deals specifically with the devastating impacts to the culture and traditional religious practices of the Timbisha Shoshone, including TOP's directors, who live on the Tribal homelands. Nor has any other party raised these same cultural, historic and religious impacts, which is not surprising, as they are impacts that will be suffered by the Timbisha Shoshone who practice traditional culture, religion and ceremony on the Tribal homelands.

DOE's argument that the factors in §2.309(c)(1)(vii) weigh against TOP because its single amended NEPA contention would broaden the issues and delay this proceeding carries no credibility whatsoever. Not only is the issue of contamination of the Death Valley springs and waters on the Timbisha Homeland one of the bases for the original contention advanced in

TOP's initial petition to intervene, but transport of contaminated groundwater from the geologic repository to the Death Valley springs also has been advanced by other petitioners. It strains credulity to assert that, in a proceeding asserting hundreds of contentions, the inclusion of a single NEPA contention, which overlaps with contentions advanced by other petitioners, would broaden or delay the proceedings.

Finally, DOE again attempts to throw up a procedural barrier to TOP's participation in this proceeding by claiming that TOP has failed to demonstrate under §2.309(c)(viii) how its participation will assist in developing a sound record. Specifically, DOE claims that in its motion, TOP "does not describe, as it was required to do, the issues it plans to cover or identify potential witnesses and their testimony." (DOE Answer at 17.) A simple reading of TOP's Motion and its Amended Petition makes abundantly clear that TOP sets forth, in detail, its factual support for the contention that contaminated effluent from the proposed geologic repository might contribute to and discharge in the Death Valley springs, and the impacts that contamination of the springs would have on Timbisha cultural, religious, and other interests. TOP identifies its witnesses by name and cites to their declarations and affidavits, which are available on the LSN, as well as the LSN numbers of those declarations and affidavits. In its Motion and Amended Petition, TOP therefore provided the facts on which it would rely; it identified the witnesses on which its amended NEPA contention relies; and it provided the testimony of those witnesses. DOE's argument that all of this information would not contribute to the development of the record borders on frivolous.

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 granting the Motion. 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.)

Finally, although NRC Staff disagrees, TOP maintains that the Board also could grant leave to file the Amended Petition under 10 C.F.R. § 2.309(f)(2). The declarations and affidavits supporting TOP’s Amended Petition did not exist until only days before the Motion was filed. 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.)

II. LSN COMPLIANCE.

DOE also argues that TOP should be barred from participating in this proceeding for failing to comply with the LSN requirements. DOE bases its argument on an interpretation of 10 C.F.R. § 2.1003 that effectively requires full compliance with the LSN. (*See* DOE Answer at 17-23.) But full compliance is not the standard. The standard is whether a petitioner has **substantially and timely** complied. 10 C.F.R. § 2.1012(b). TOP has satisfied the letter and principle of this standard.

TOP pleads one contention, a NEPA contention primarily based on the DOE’s FEIS and FSEIS and a limited number of documents regarding TOP’s cultural, historic, and religious interests relating to the purity of the Death Valley springs. TOP has in no way disregarded the LSN requirements. Instead, TOP has complied with the requirements in good faith, filing documents on the LSN as soon as practicable. In its Amended Petition, TOP cites to these supporting documents, **all of which are on the LSN**, including citation to the LSN numbers. DOE never has complained that it cannot locate any of the supporting materials or evaluate TOP’s sole contention, much less that it has been prejudiced by any delay on TOP’s part to place documents on the LSN.

In a similar vein, DOE cites *In the Matter of U.S. Dep't of Energy (High Level Waste Repository: Pre-Application Matters)*, LBP-08-05, 67 NRC 205, 209-10 (2008), to argue that TOP is **required** to file an affidavit to support its statement that it has complied with the LSN and because TOP did not, the Board should disregard TOP's assertion. (DOE Answer at 19.) DOE misstates the holding of that case. *High Level Waste Repository* imposes no such requirement on parties. Moreover, the circumstances here certainly do not present the "rank speculation and conjecture" at issue in that case. *Id.* at 210.

The Board has made clear that the LSN supplants discovery and its purpose is to efficiently and fairly manage the extraordinary discovery that has and will be required in this case. The Board has described the LSN as a mechanism that requires parties to put on the LSN relevant materials for use by the other parties, thus "obviate[ing] the need for the traditional means of document discovery." (July 7, 2004 Order at 1.) The Board also has pointed out that "[a]mong other things, given the awareness that there will be millions of relevant documents in the hands of potential parties to the anticipated adjudicatory proceeding on the DOE application, the NRC established the internet-based LSN electronic document retrieval system." (July 8, 2005 Second Case Management Order at 2.)³ The LSN accounts for these "very special circumstances that attend upon the conduct in this matter." (*Id.* at 3.) There can be no dispute that the LSN is intended to supplant discovery. Concomitantly, compliance with the LSN should be treated the same as compliance with discovery.

It is also clear that the purpose of the LSN is to assist the parties petitioning to intervene and the Licensing Board, not to act as a procedural shield to keep parties out of this proceeding.

³ The Board goes on to state that it has given recognition, first and foremost, to the fact that pre-license application phase documentary discovery will be conducted in a setting not merely extraordinary but, indeed, totally without precedent." *Id.*

(July 7, 2004 Order at 1 (the LSN “will allow potential parties to use some part of the pre-application period to review documentary information and prepare contentions for filing in petitions to review”).)

Finally, the regulation’s provision on standing provides unequivocally that the Board “will admit as a party to a proceeding . . . a single designated representative for each Federally-recognized Indian tribe.” 10 C.F.R. § 2.309(d)(2). The admission of an AIT’s representative is not conditioned on any other requirement, including compliance with the LSN.

III. TOP HAS STANDING AS OF RIGHT, REPRESENTATIVE STANDING, OR SHOULD BE GRANTED DISCRETIONARY INTERVENTION.

There is no dispute that the Timbisha Shoshone is an Affected Indian Tribe (“AIT”) and that the Tribe and its authorized representative is entitled to standing. TOP and TIM each claim to be the sole authorized representative of the Tribe, and DOE takes no position on which of those two entities is the AIT. (*See* DOE Answer at 13.) But there is substantial factual support showing that TOP is the only entity that could be the authorized representative, all of which DOE ignores (*see* DOE Answer at 13-15, 23). Juxtaposed against the factual background of the individuals involved with TIM, it can hardly be more clear that it is TOP that represents the Timbisha Shoshone.⁴

Even so, TOP’s standing is not dependent on a decision that it is the authorized representative, because it also has representational standing. DOE argues that TOP is not entitled to representational standing because TOP did not support its claim with declarations that adequately set forth the injuries the declarant personally stands to suffer as a result of operating the repository. (*See* DOE’s Answer at 14-15.) DOE is wrong.

⁴ TOP is mindful that during oral argument, CAB2 made it abundantly clear that the Board does not intend to rule on the issue of Tribal representation.

As the NRC Staff notes in its Answer to TOP's Amended Petition, Joe Kennedy's affidavit states that TOP is authorized to represent him⁵; the declarations of Barbara Durham and Pauline Esteves make clear that they are each members of the Timbisha; and that operation of the proposed repository will impact Timbisha cultural interests due to contamination of the Death Valley springs that DOE concedes will result from operating the proposed repository.⁶ (See NRC Staff Answer at 9.) Ms. Durham explains that the springs at Death Valley are a crucial component of tribal culture and practices.⁷ Indeed, she expressly states that she—as a member of the Timbisha—will be injured if the Death Valley springs are contaminated by effluent discharged from the proposed repository:

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

Similarly, Ms. Esteves details the significance of un-contaminated, pure springs to the Tribe's culture: "If *our* springs were contaminated, the water and the plants that grow around them would be useless to *us* for medicinal purposes because they, too, would be contaminated."⁹

These affidavits are sufficient to establish a nexus between TOP—the designated representative of the Timbisha Shoshone Tribe—and members of the Tribe that demonstrates representational standing. See *Nuclear Energy Institute, Inc. v. Environmental Protection Agency*, 373 F.2d 1251, 1265-66 (D.C. Cir. 2004). But to make indisputably clear the

⁵ LSN #: TSP000000048, Affidavit of Joe Kennedy, March 3, 2009 ("Kennedy Aff.").

⁶ LSN #: TSP000000014, Declaration of Barbara Durham, Feb. 21, 2009 ("Durham Decl."); LSN #: TSP000000008, Declaration of Pauline Esteves, Feb. 21, 2009 ("Esteves Decl.").

⁷ Durham Decl. at ¶¶ 3-8.

⁸ *Id.* at ¶ 7 (emphasis added).

⁹ Esteves Decl. at ¶ 6 (emphasis added).

relationship between TOP and the Tribe's members and the harm Ms. Durham and Ms. Esteves would suffer if the Death Valley springs were contaminated, and to attempt to satisfy DOE's unquenchable thirst for ever more detail, TOP submits additional (although in its view unnecessary) declarations of Ms. Durham and Ms. Esteves.¹⁰ In their second declarations, both tribal members state their name and address, their membership in the Tribe, TOP's authority to represent and speak for them in this proceeding, the personal injury each stands to suffer if the Death Valley springs are contaminated by effluent discharged from the proposed repository (Ms. Durham and Ms. Esteves live in Death Valley and use the springs in their cultural and religious practices); and the interests of each that will be directly affected by this Board's decision on the DOE's license application.¹¹ Clearly TOP satisfies the requirements of 10 C.F.R. § 2.309(d)(1).

Finally, DOE also argues that TOP is not entitled to discretionary intervention. DOE even goes so far as to state that "there is no evidence that Timbisha YMOP's participation in this proceeding will assist in the development of a sound record. . . ." (DOE Answer at 26.) DOE's statement is not only insulting to the undeniable interests of the Tribe that will be affected by operating the proposed repository, it belies logic.

DOE primarily contends that because the Tribe is an AIT, its interests will be represented in this proceeding regardless of whether TOP has standing. (DOE Answer at 26-27.) But TOP was created for the purpose of speaking for and representing the interests of the Tribe in this proceeding.¹² TOP is the *only* party seeking intervention that has raised the NEPA contention it

¹⁰ Second Declaration of Barbara Durham, April 2, 2009 ("Second Durham Decl."), attached as Attachment 1; Second Declaration of Pauline Esteves, April 2, 2009 ("Second Esteves Decl."), attached as Attachment 2.

¹¹ Second Durham Decl. at ¶¶ 1-8; Second Esteves Decl. at ¶¶ 1-8.

¹² LSN #: TSP000000003, Articles of Incorporation for the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation, Nov. 25, 2008; LSN #: TSP000000005, Corporate Bylaws for the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation, Nov. 25, 2008.

has—that effluent discharged from the proposed repository will contaminate the Death Valley springs, causing a devastating impact on the Timbisha’s cultural, historic, and religious interests in the purity of the springs. Without TOP’s participation in this proceeding, *those interests will not be heard*. They are interests that CEQ regulations, NRC regulations, and NRC guidance *require* to be analyzed and considered in the license application and supporting documents. Accordingly, if they are not reflected in the record, any decision made on the license application is susceptible to challenge. For this reason and the reasons outlined in TOP’s Amended Petition, DOE is wrong on this point and discretionary intervention is warranted.

IV. TOP-NEPA-01 IS AN ADMISSIBLE CONTENTION.

As NRC Staff identifies in its determination not to oppose the TOP-NEPA-01 contention, an environmental contention challenging DOE’s environmental impact statements¹³ that meets the requirements in 10 C.F.R. §§ 2.309(f) and 51.109 is admissible. (NRC Staff Answer at 11 (citing *Notice of Hearing and Opportunity to Petition for Leave to Intervene*, U.S. Dep’t of Energy (High Level Waste Repository), CLI-08-25, 68 NRC ___, (Oct. 17, 2008) (slip op. at 8)).) In addition, admissible NEPA contentions should meet, “to the extent possible”, the motion to reopen criteria in 10 C.F.R. § 2.326. 10 C.F.R. § 51.109(a)(2). As was determined by NRC Staff, TOP-NEPA-01 satisfies all these standards and is admissible. (NRC Staff Answer at 13.)

In its Answer, DOE states that TOP has failed to address any of the requirements of 10 C.F.R. §§ 51.109 and 2.326. (DOE Answer at 28.) While TOP may not have specifically listed the §2.326 criteria in its Motion, TOP-NEPA-01 does meet these requirements. TOP-NEPA-01

¹³ Two environmental impact statements are at issue here. These are the Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada, Summary, Vol. I, II, and III, June 1, 2008, LSN #: DEN001593669 (the “FSEIS”) and the Final Environmental Impact Statement for a Geological Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada, Feb. 1, 2002, LSN #: DN2002073507 (the “FEIS”). Collectively these are referred to as the “EISs” in this reply.

raises an environmental issue of utmost significance to the Timbisha Shoshone Tribe. Further, the EISs cannot be adopted unless formally supplemented to address the TOP-NEPA-01 contention. To do otherwise would prevent the NRC from conducting a “hard look” at the environmental consequences of this proposed licensing decision. *Kleppe v Sierra Club*, 427 U.S. 390, 410, n. 21 (1976). As such, TOP-NEPA-01 will result in a materially different outcome to these proceedings and satisfies the admissibility standards for NEPA contentions.

A. TOP-NEPA-01 meets the admissibility standards for contentions under 10 C.F.R. § 2.309(f)

1. DOE concedes that the criteria of 10 C.F.R. §§ 2.309(f)(i)-(iii) are met

DOE does not contend that the criteria set forth in 10 C.F.R. §§ 2.309(f)(i)-(iii) are not met. Therefore, there is no objection to the admissibility of TOP’s contention on those grounds.

2. TOP-NEPA-01 demonstrates that the issue is material to the findings that the NRC must make to support the decision (§ 2.309(f)(iv))

DOE and NRC are required under NEPA to consider and expressly analyze any potential adverse “historic” and “cultural” impacts of the proposed geologic repository on the Timbisha. (Amended Petition at 21.) For DOE and NRC to meet their NEPA mandate to take a “hard look” at the environmental consequences of this licensing action, the EISs must contain sufficient information and analysis. (DOE Answer to TOP Original Petition to Intervene at 44; *Kleppe*, 427 U.S., at 410, n. 21.) TOP-NEPA-01 contends that the lack of information and analysis on the impact that contaminated groundwater will have on Timbisha culture and religion in the EISs demonstrates that DOE has not conducted its required “hard look” at the cultural, historic and religious impacts and means that the EIS lacks information the NRC must consider in order to make a decision on DOE’s license application.

DOE somehow claims that it took the requisite “hard look”. (DOE Answer at 33.) However, contrary to DOE’s claims, the EISs do not adequately analyze the impacts that the

contamination will have on the only Affected Indian Tribe (“AIT”) in this proceeding. These impacts arise from DOE’s admitted likelihood of contamination from the proposed geologic repository reaching the springs in Death Valley. These springs are a major component of the Tribe’s cultural and religious identity. In TOP-NEPA-01, the Tribe contends that NEPA requires DOE to supplement the EISs before NRC can proceed with its decision-making. Therefore, TOP-NEPA-01 raises an issue that is material to the findings NRC must make to support its decision on licensing Yucca Mountain.

A “hard look” at environmental consequences of an agency’s actions requires more than simply identifying concerns in an EIS. The agency must prepare a detailed statement on “any adverse environmental effects which cannot be avoided should the proposal be implemented,” U.S.C. § 4332(C)(ii), and a discussion of the extent to which adverse effects can be avoided. *Robertson v. Methow Valley Cit. Council*, 490 U.S. 332, 351-52 (1989). Omission of a “reasonably complete discussion” of the issues undermines the function of NEPA because “[w]ithout such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.” *Id.* at 352.

While DOE claims that it took the required “hard look” in the EISs, that is not the case. At no point in the EIS is there a “reasonably complete discussion” of the specific cultural and religious impacts to the only affected AIT in this proceeding that contamination in the Death Valley springs will cause. TOP can find only scant mention of general concerns of Native American people whose traditional lands include Yucca Mountain (TOP Amended Petition at 31-32) and a brief admission that radiological contamination will reach springs in Death Valley (TOP Amended Petition at 26). DOE in its Answer points only to one brief sentence on page 4-89 of Volume I of the 2002 FEIS that DOE purports demonstrates that it took a “hard look” at

this issue. Nothing could be further from the truth. One short sentence does not constitute the “reasonably complete discussion” contemplated by the Supreme Court as required by NEPA.

Robertson, 490 U.S. at 352.

In addition to lacking in completeness, DOE’s mention of the Native American cultural issues in the FEIS is generalized and contains no reasonably complete discussion of the specific impacts to the Timbisha Shoshone. At no point in either EIS can TOP locate a complete discussion and analysis of springs in the region of Yucca Mountain and their cultural significance to the culture and religion of the Native American people in this area. There is no excuse for DOE’s omission because DOE has had such information in its possession since 1991. (See Fowler et al., *Native Americans and Yucca Mountain, A Revised and Updated Summary Report on Research Undertaken Between 1987 and 1991, Vol. I*, pp. 30, 92, Oct. 1, 1991, LSN #: NEV000000308.) While DOE trumpets its “long-standing” relationship with the CGTO, it appears that little of the information provided to DOE through this relationship actually made it into the EISs, and certainly *no* information specific to the impacts on the Timbisha Shoshone was included.

DOE mentions Native American cultural issues generally but the EISs fail to tie contamination that DOE expects will occur in groundwater and at the springs in Death Valley to impacts on Timbisha Shoshone cultural interests. While brief mention of Native American cultural issues is made in Volume I, admission that contamination will reach springs in Death Valley occurs in Volume III. There is no attempt to analyze the relationship between radiological contamination that is anticipated to reach springs in Death Valley and the cultural significance of these springs to the Timbisha Shoshone. Absence of such analysis means that the

EISs lack “reasonably complete discussion” of the environmental impacts and therefore are inadequate.

3. TOP-NEPA-01 provides a precise statement of the alleged facts and expert opinions supporting the contention and on which TOP intends to rely at the hearing (§ 2.309(f)(v))

TOP-NEPA-01 contends that construction and operation of Yucca Mountain will cause radiological contamination to reach springs located in Death Valley and that contamination of those springs will severely impact the cultural and religious resources of the Timbisha Shoshone Tribe. The facts that support this contention are straight-forward: (1) that contaminated groundwater from Yucca Mountain will reach the Death Valley Springs; (2) that purity of water in the springs is essential to the Timbisha culture; (3) that any contamination of these springs will impact their religious and cultural significance. TOP’s motion clearly provided facts and expert opinions that TOP will rely on at the hearing to support these facts. DOE does not challenge the substance of the facts or expert opinions provided to support TOP-NEPA-01.

As pointed out by NRC Staff, the DOE EISs establish that radiological contamination derived from operations at Yucca Mountain may discharge at the Death Valley springs. (NRC Staff Answer at 13; TOP Amended Petition at 26.) Moreover, the declarations of Dr. Fowler, Barbara Durham, and Pauline Esteves present clear statements that purity of water in the Death Valley springs has cultural religious significance and that contamination of the springs would severely impact the Timbisha culture. (TOP Amended Petition Attachment 1, Declaration of Barbara Durham; TOP Amended Petition Attachment 2, Declaration of Pauline Esteves.) The substance of these declarations is not challenged by DOE.

Dr. Fowler is a preeminent anthropologist who has conducted research into the culture of the Timbisha Shoshone for over 20 years and has testified before Congress on the culture and religion of the Timbisha Shoshone. (TOP Amended Petition Attachment 1, Declaration of

Catherine S. Fowler, ¶ 3.) DOE attempts to belittle Dr. Fowler’s testimony by claiming that she is offering expert opinion on the transport of radionuclides in groundwater. DOE supports its argument by quoting a partial sentence from Dr. Fowler’s Declaration completely out of context. (DOE Answer at 29.) For clarity, the complete sentence from Dr. Fowler’s opinion is as follows:

In my capacity as an anthropologist who has studied the religion and culture of the Timbisha Shoshone Tribe for more than 20 years, it is my opinion, to a reasonable degree of scientific certainty, that construction and operation of a high-level nuclear waste repository at Yucca Mountain and the likelihood that radionuclides would travel in groundwater to the springs that the Timbisha Shoshone hold sacred will damage the Timbisha Shoshone's culture.

In this statement, as in all the statements made in Dr. Fowler’s Declaration, Dr. Fowler is offering her expert opinion regarding the impact of contamination at the Death Valley Springs on the culture of the Timbisha Shoshone, for which she is eminently qualified. DOE neither challenges her qualifications in this regard nor the factual statements themselves. At no point does Dr. Fowler offer expert opinion on the mechanisms of contaminant transport and whether contaminated groundwater will reach the Death Valley Springs.

DOE also attempts to waive off the declarations of Barbara Durham and Pauline Esteves by claiming that they “only discuss what *could* happen” because they clarify their statements with an “if.” (DOE Answer at 29.) Again, DOE mischaracterizes testimony of people who clearly have knowledge and expertise to offer to NRC’s NEPA process by attacking the manner in which they present this information and taking their statements out of context. In both declarations, the witnesses simply clarify their statements that the impact to the Timbisha culture depends on whether or not contamination reaches the springs. However, this is no different from the way DOE characterizes its statements in its EISs. In the FSEIS, DOE states that “[t]he Repository SEIS recognizes in Sections 3.1.4.2.1 and 5.4 that groundwater flowing through the

Amargosa Desert *might* contribute to the Death Valley springs to the west and, therefore, those springs *could* be potential discharge areas for groundwater from beneath Yucca Mountain.” (FSEIS, Vol. III at CR-324 (emphasis added); *see also* FSEIS §§ 3.1.4.2.1 (“Environmental Setting”), 5.4 (“Postclosure Repository Performance”), Fig. 3.8.). In this context, these witnesses are right to clarify their statements. Again, DOE does not challenge the expertise of either witness nor the statements regarding the Timbisha culture and the significance of purity of water at the Death Valley springs.

Finally, DOE characterizes TOP-NEPA-01 as a “simple disagreement with an agency’s findings or its methods” that is not “sufficient to render an EA or EIS inadequate under NEPA.” (DOE Answer at 34 (citing *City of Los Angeles v. Nat’l Highway Traffic Safety Admin.*, 912 F.2d 478, 488 (D.C. Cir. 1990)).) DOE mischaracterizes the holding of the D.C. Circuit Court of Appeals. In *City of L.A.*, the court held that petitioner’s argument with the agency’s “judgment” was not “a sufficient basis for overturning the agency’s decision.” *Id.* This decision cannot be proffered for the contention that an agency’s “method” was inadequate as DOE attempts to do. Rather *City of L.A.* stands for the prospect that a petitioner’s disagreement with an agency’s judgment—which there, meant the outcome of the agency’s decision-making—is not grounds for dismissing the EIS.

In fact, it is well-established that following the correct method or procedure is precisely what NEPA is about. *Robertson v. Methow Valley Cit. Council*, 490 U.S. 332, 351 (1989) (“it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process”) (citing *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-228, 100 S.Ct. 497, 499-500, 62 L.Ed.2d 433 (1980) (per curiam); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558, 98 S.Ct. 1197,

1219, 55 L.Ed.2d 460 (1978).) These procedures “provide for broad dissemination of relevant environmental information” to enable agencies to take a “hard look” at environmental consequences. *Id.* (citing *Kleppe*, 427 U.S., at 410, n. 21). TOP-NEPA-01 contends that DOE has not followed this necessary NEPA process in that relevant environmental information provided by the Timbisha Shoshone has not been included in the EIS. This establishes that DOE has not undertaken the required “hard look” at the environmental consequences of licensing the Yucca Mountain repository and NRC lacks the information to conduct a “hard look” as part of the licensing proceedings.

4. TOP-NEPA-01 provides sufficient information to demonstrate that a genuine dispute exists (§ 2.309(f)(vi))

For the reasons outlined in A.2. and A.3. above, TOP-NEPA-01 provides sufficient information to demonstrate that a material issue of fact and law that DOE did not adequately address the impact to cultural and religious resources of the Timbisha Shoshone in its EIS. Specifically, as stated above, it is clear from the lack of analysis on this issue in the EIS that DOE has not taken the required “hard look” at this issue in its NEPA activities. Further, the EIS is deficient in that it does not present sufficient information on the issue to the NRC for that agency to undertake its “hard look” at this issue. DOE obviously disputes TOP’s contention, arguing that it *did* take a sufficiently “hard look.” Clearly a dispute exists.

B. TOP-NEPA-01 meets the criteria of 10 C.F.R. § 51.109 – Public hearings in proceedings for issuance of a materials license with respect to a geologic repository.

Both NRC Staff and DOE point out that TOP does not specifically address the criteria for 10 C.F.R. §§ 51.109 and 2.326 in its contention. While NRC Staff was able to determine that TOP-NEPA-01 contains sufficient information to satisfy the standards, for clarity, TOP specifically addresses these criteria here.

1. TOP-NEPA-01 is accompanied by affidavits which set forth the factual and/or technical basis demonstrating that it is not practicable to adopt the DOE environmental impact statement. 10 C.F.R. § 51.109(a)(2).

As is outlined in A.3. above and in the NRC Staff Answer, TOP-NEPA-01 is accompanied by affidavits which set forth the factual and/or technical basis for the claim.

2. The presiding officer cannot find that it is practicable to adopt the environmental impact statement because TOP-NEPA-01 presents significant and substantial new considerations that render the EIS inadequate. 10 C.F.R. § 51.109(c)(2).

The Notice of Hearing states that “[u]nder 10 C.F.R. § 51.109(c), the presiding officer should treat as a cognizable new consideration an attack on the Yucca Mountain environmental impact statements based on significant and substantial information that, if true, would render the statements inadequate.” For reasons outlined in A.2. and A.3. above, TOP-NEPA-01 raises a claim that is based on significant and substantial information that renders the EISs inadequate. As such, TOP-NEPA-01 *is* a cognizable “new consideration” under 10 C.F.R. § 51.109(c).

3. To the extent possible, TOP-NEPA-01 meets criteria of 10 C.F.R. § 2.326 – Motions to Reopen
 - a. *To the extent possible, TOP-NEPA-01 was timely raised (10 C.F.R. § 2.326(A)(1)).*

The single NEPA contention that TOP proffers was timely raised. As TOP’s motion makes clear, because of DOE’s delay in providing the statutory funding to the Timbisha Shoshone to participate in this proceeding and because of issues relating to the Tribe’s leadership and representation in this proceeding, it filed its Amended Petition as quickly as it could once it had secured counsel and obtained the factual information on which its proffered amended NEPA contention is based. (*See* Motion at 3, 9-10; Amended Petition at 2, Kennedy Aff.) DOE’s Answer argues that TOP’s Amended Petition was untimely based on a strict reading of the § 2.326 standards. However, as the amended rule makes clear, the reopening procedures and

standards in §2.326 are to be applied only “to the extent possible,” which implies a more lenient standard. TOP has shown its good faith in obtaining facts and filing its Amended Petition as quickly as it could after obtaining access to the funding provided by DOE for use in this proceeding and securing counsel to represent it. It has acted in good faith and complied with the §2.326 standards to the extent possible.

b. TOP-NEPA-01 addresses a significant environmental issue (10 C.F.R. § 2.326(A)(2))

For reasons outlined in A.2. and A.3. above, the issue raised by TOP-NEPA-01 is significant. While DOE argues that the EIS already addresses this issue and that sufficient analysis was conducted, the DOE’s efforts, as evidenced by the minimal mention of this issue and the total lack of analysis, fall woefully short of the “hard look” required by NEPA.

c. TOP-NEPA-01 demonstrates that a materially different result would be likely as a result of the newly proffered evidence (10 C.F.R. § 2.326(A)(3))

As is outlined in TOP-NEPA-01 DOE and NRC are required under NEPA to consider and expressly analyze any potential adverse “historic” and “cultural” impacts of the proposed geologic repository on the Timbisha. (Amended Petition at 22.) In the context of the Yucca Mountain proceeding, the requirement that the motion demonstrate that a materially different result would likely result means that the contention should severely impact the EIS such that it could not be adopted unless formally supplemented by NRC or DOE. (DOE Answer to TOP Petition to Intervene at 50.) As demonstrated in A.2. and A.3. above, if NRC is to meet its mandate to take a “hard look” at the environmental consequences of its action, the EIS must be supplemented to include the significant and substantial information raised by TOP-NEPA-01.

Conclusion

TOP proffers to this Board in its Amended Petition a single NEPA contention, which alleges that DOE has conceded in its own EISs that contaminated effluent from the proposed geologic repository might contribute to and discharge into the Death Valley springs, with a devastating impact on the Timbisha Shoshone's culture, tradition, religious practices, and other interests. At the same time, TOP has shown that DOE's EISs failed to analyze these significant impacts, in derogation of NEPA, CEQ and NRC regulations, and NRC guidance. The purpose of NEPA and the agencies' implementing regulations is to ensure that agency decisions are made with consideration given to all of the important effects and consequences of the proposed action. The procedural hurdles that DOE throws up to TOP's Amended Petition should not be permitted to deprive the Board and the public of the critical information that TOP seeks to present in this proceeding. The NRC Staff agrees. Accordingly, the Board should grant TOP's motion for leave to file its Amended Petition, and it should grant the Amended Petition to Intervene.

Respectfully submitted,

Signed electronically by Douglas M. Poland

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

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

Dated in Madison, WI
this 3rd day of April 2009.

3689343_1

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

U.S. DEPARTMENT OF ENERGY

(License Application for Geologic Repository
at Yucca Mountain)

Docket No. 63-001

ASLBP Nos. 09-876-HLW-CAB-01
09-877-HLW-CAB-02
09-878-HLW-CAB-03

April 1, 2009

SECOND DECLARATION OF BARBARA DURHAM

I, Barbara Durham, declare as follows:

1. My address is 500 Indian Village Road, P.O. Box 358, Death Valley, California 92328. My telephone number is (760) 786-2320.
2. I am a member of the Timbisha Shoshone Tribe. I am 53 years old and have been a member of the Timbisha Shoshone Tribe my entire life. I serve on the Tribal Staff as the Tribal Historic Preservation Officer.
3. I authorize the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation ("TOP") to speak for me, and represent my interests and request a hearing in the proceedings related to the Department of Energy's ("DOE") license application to develop a high-level nuclear waste repository at Yucca Mountain.
4. I have an interest in the license proceedings related to the proposed repository at Yucca Mountain due to the likely contamination that its operation will cause to the Death Valley

Springs. The nature of the right under which I seek TOP to represent my interests is as a member of the Timbisha Shoshone, an Affected Indian Tribe.

5. I understand that the DOE's environmental impact statements related to the proposed repository concede that contamination from the proposed repository may discharge at the Death Valley Springs. As a member of the Timbisha Shoshone, I will suffer harm to my cultural, historic and religious practices with which I have been involved my entire life if the Death Valley Springs are contaminated by effluent released from the proposed repository.

6. The Death Valley Springs hold cultural, historic, and religious significance to the Timbisha Shoshone and to me as a member of the Tribe. I live on tribal land and use the Death Valley Springs in my religious and spiritual practices as a Timbisha Shoshone. These springs are sacred to me and the other members of my Tribe. The contamination of the Death Valley Springs would be an insult to our Tribe and would destroy the significance of those water resources for our cultural, historic and religious practices and interests.

7. Any order that would allow the DOE to operate the proposed repository would have a devastating effect on my Tribe's cultural, historic and religious interests. It would strip me and my Tribe of our interests to continue traditional religious and cultural activities associated with the Death Valley Springs.

8. I trust TOP will represent the interests I have described here.

9. I declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

Dated this 2nd day of April 2009.

Barbara Durham
Barbara Durham, THPO
Timbisha Shoshone Tribe

3689551_1

License Application for Geologic Repository at Yucca Mountain
SECOND DECLARATION OF BARBARA DURHAM
April 2009

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

In the Matter of:

U.S. DEPARTMENT OF ENERGY

(License Application for Geologic Repository
at Yucca Mountain)

Docket No. 63-001

ASLBP Nos. 09-876-HLW-CAB-01

09-877-HLW-CAB-02

09-878-HLW-CAB-03

April 1, 2009

SECOND DECLARATION OF PAULINE ESTEVES

I, Pauline Esteves, declare as follows:

1. My address is 300 Indian Village Road, P.O. Box 108, Death Valley, California 92328. My telephone number is (760) 786-2418.
2. I am a member of the Timbisha Shoshone Tribe. I am 84 years old and have been a member of the Tribe my entire life. I am an Elder in the Tribe and serve on the Tribal Council and also as the Elder Coordinator for the Historic Preservation Committee. I am also one of three members of the Board of Directors of the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation ("TOP"). The Timbisha Shoshone Tribe created TOP expressly to represent the Tribe's interests in connection with the United States Department of Energy's ("DOE") activities concerning the Yucca Mountain Nuclear Waste Depository Project located in the State of Nevada.

3. I authorize TOP to speak for me, and represent my interests and request a hearing in the proceedings related to the DOE's license application to develop a high-level nuclear waste repository at Yucca Mountain.

4. I have an interest in the license proceedings related to the proposed repository at Yucca Mountain due to the likely contamination that its operation will cause to the Death Valley Springs. The nature of the right under which I seek TOP to represent my interests is as a member of the Timbisha Shoshone, an Affected Indian Tribe.

5. I understand that the DOE's environmental impact statements related to the proposed repository concede that contamination from the proposed repository may discharge at the Death Valley Springs. As a member of the Timbisha Shoshone, I will suffer harm to my cultural, historic and religious practices with which I have been involved my entire life if the Death Valley Springs are contaminated by effluent released from the proposed repository.

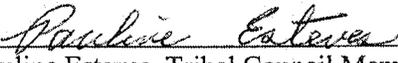
6. The Death Valley Springs hold cultural, historic, and religious significance to the Timbisha Shoshone and to me as a member of the Tribe. I live on tribal land and use the Death Valley Springs in my religious and spiritual practices as a Timbisha Shoshone. These springs are sacred to me and the other members of my Tribe. The contamination of the Death Valley Springs would be an insult to our Tribe and would destroy the significance of those water resources for our cultural, historic and religious practices and interests.

7. Any order that would allow the DOE to operate the proposed repository would have a devastating effect on my Tribe's cultural, historic and religious interests. It would strip me and my Tribe of our interests to continue traditional religious and cultural activities associated with the Death Valley Springs.

8. I trust TOP will represent the interests I have described here.

9. I declare under penalty of perjury under the laws of the United States of America,
that the foregoing is true and correct.

Dated this 2 day of April 2009.



Pauline Esteves, Tribal Council Member
Timbisha Shoshone Tribe
and
Member of the Board of Directors
Timbisha Shoshone Yucca Mountain Oversight
Program Non-Profit Corporation

3689704_1

**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

April 3, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies of the *Reply of the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation ("TOP") to the Department of Energy's Answer to TOP's Motion for Leave to File an Amended Petition and Amended Petition* in the above-captioned proceeding have been served on the following persons this 3rd day of April 2009, by Electronic Information Exchange.

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

CAB 01

William J. Froehlich, Chair
Administrative Judge
E-mail: wjfl@nrc.gov

Thomas S. Moore
Administrative Judge
E-mail: tsm2@nrc.gov

Richard E. Wardwell
Administrative Judge
E-mail: rew@nrc.gov

CAB 02

Michael M. Gibson, Chair
Administrative Judge
E-mail: mmg3@nrc.gov

CAB 02 (continued)

Alan S. Rosenthal
Administrative Judge
E-mail: axr@nrc.gov; rsnthl@verizon.net

Nicholas G. Trikouros
Administrative Judge
E-mail: ngt@nrc.gov

CAB 03

Paul S. Ryerson, Chair
Administrative Judge
E-mail: psr1@nrc.gov

Michael C. Farrar
Administrative Judge
E-mail: mcf@nrc.gov

Mark O. Barnett
Administrative Judge
E-mail: mobl@nrc.gov; mark.barnett@nrc.gov

ASLBP (continued)

E. Roy Hawkens, Chief Admin. Judge

E-mail: erh@nrc.gov

Anthony C. Eitreich, Chief Counsel

E-mail: anthony.eitreich@nrc.gov

Daniel J. Graser, LSN Administrator

E-mail: djg2@nrc.gov

Anthony Baratta

E-mail: ajb5@nrc.gov

Andrew L. Bates

E-mail: alb@nrc.gov

G. Paul Bollwek, III

E-mail: gp@nrc.gov

Lauren Bregman

E-mail: lrb1@nrc.gov

Sara Culler

E-mail: sara.culler@nrc.gov

Deborah Davidson

E-mail: deborah.davidson@nrc.gov

Joseph Deucher

E-mail: jhd@nrc.gov

Don Frye

E-mail: dxfs@nrc.gov

Rebecca Gütter

E-mail: rll@nrc.gov

Nancy Greathead

E-mail: nancy.greathead@nrc.gov

Pat Hall

E-mail: pth@nrc.gov

Patricia Harich

E-mail: patricia.harich@nrc.gov

Emile Julian

E-mail: elj@nrc.gov; emile.julian@nrc.gov

Zachary Kahn

E-mail: zxk1@nrc.gov

Erica LaPlante

E-mail: eal1@nrc.gov

Linda Lewis

E-mail: linda.lewis@nrc.gov

David McIntyre

E-mail: david.mcintyre@nrc.gov

Evangeline S. Ngbea

E-mail: esn@nrc.gov

Christine Pierpoint

E-mail: cmp@nrc.gov

Matthew Rotman

E-mail: matthew.rotman@nrc.gov

Tom Ryan

E-mail: tom.ryan@nrc.gov

Ivan Valenzuela

E-mail: ivan.valenzuela@nrc.gov

Andrew Welkie

E-mail: axw5@nrc.gov

Jack Whetstone

E-mail: jgw@nrc.gov

**U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission**

Mail Stop O-16 C1

Washington, D.C. 20555-0001

Hearing Docket

E-mail: hearingdocket@nrc.gov

**U.S. Nuclear Regulatory Commission
Office of Comm. Appellate Adjudication**

Mail Stop O-16 C1

Washington, DC 20555-0001

OCAA Mail Center

E-mail: ocaamail@nrc.gov

**U.S. Nuclear Regulatory Commission
Office of the General Counsel**

Mail Stop O-15 D21

Washington, DC 20555-0001

OGC Mail Center

E-mail: ogcmailcenter@nrc.gov

Marian L. Zobler, Esq.

E-mail: mlz@nrc.gov

Mitzi A. Young, Esq.

E-mail: may@nrc.gov

Margaret J. Bupp, Esq.

E-mail: mjb5@nrc.gov

Daniel H. Fruchter, Esq.

E-mail: daniel.fruchter@nrc.gov

Daniel W. Lenehan, Esq.

E-mail: dwl2@nrc.gov

Kevin Roach, Esq.

E-mail: kevin.roach@nrc.gov

Andrea L. Silvia, Esq.

E-mail: alc1@nrc.gov

Karin Francis, Paralegal

E-mail: kxf4@nrc.gov

Joseph S. Gilman, Paralegal

E-mail: jsg1@nrc.gov

U.S. Department of Energy
Office of General Counsel
1551 Hillshire Drive
Las Vegas, NV 89134-6321
George W. Hellstrom, Esq.
E-mail: george.hellstrom@ymp.gov
Jocelyn M. Gutierrez, Esq.
E-mail: jocelyn.gutierrez@ymp.gov
Josephine L. Sommer, Paralegal
E-mail: josephine.sommer@ymp.gov

U.S. Department of Energy
Office of General Counsel
1000 Independence Avenue, S.W.
Washington, DC 20585
Martha S. Crosland, Esq.
E-mail: martha.crosland@hq.doe.gov
Nicholas DiNunzio, Esq.
E-mail: nicholas.dinunzio@hq.doe.gov
Angela Kordyak, Esq.
E-mail: angela.kordyak@hq.doe.gov
James Bennett McRae
E-mail: ben.mcrae@hq.doe.gov
Christina Pak, Esq.
E-mail: christina.pak@hq.doe.gov

For the U.S. Department of Energy
Office of Counsel
Naval Sea Systems Command
Nuclear Propulsion Program
1333 Isaac Hull Avenue S.E.
Washington Navy Yard, Building 197
Washington, DC 20376
Frank A. Putzu, Esq.
E-mail: frank.putzu@navy.mil

Nevada Attorney General
Bureau of Government Affairs
100 North Carson Street
Carson City, NV 89710
Marta Adams, Chief Deputy AG
E-mail: madams@ag.nv.gov

Egan, Fitzpatrick & Malsch, PLLC
12500 San Pedro Avenue, Suite 555
San Antonio, TX 78216
Charles J. Fitzpatrick, Esq.
E-mail: cfitzpatrick@nuclearlawyer.com
John W. Lawrence
E-mail: jlawrence@nuclearlawyer.com
Laurie Borski, Paralegal
E-mail: lborski@nuclearlawyer.com

Egan, Fitzpatrick & Malsch, PLLC
1750 K Street N.W., Suite 350
Washington, DC 20006
Martin G. Malsch, Esq.
E-mail: mmalsch@nuclearlawyer.com
Susan Montesi
E-mail: smontesi@nuclearlawyer.com

Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074
Donald P. Irwin
E-mail: dirwin@hunton.com
Michael R. Shebelskie
E-mail: mshebelskie@hunton.com
Kelly L. Faglioni
E-mail: kfaglioni@hunton.com
Pat Slayton
E-mail: pslayton@hunton.com

Yucca Mountain Project Licensing Group
Bechtel-SAIC
1251 Center Crossing Road, M/S 423
Las Vegas, NV 89144
Jeffrey Kriner, Regulatory Programs
E-mail: jeffrey_kriner@ymp.gov
Stephen Cereghino, Licensing/Nucl Safety
E-mail: stephen_cereghino@ymp.gov

Yucca Mountain Project Licensing Group
Bechtel-SAIC
6000 Executive Blvd., Suite 608
North Bethesda, MD 20852
Danny R. Howard, Sr. Licensing Engineer
E-mail: danny_howard@ymp.gov
Edward Borella
Sr. Staff, Licensing/Nuclear Safety
E-mail: edward_borella@ymp.gov

Talisman International, LLC
1000 Potomac St., NW
Suite 200 Washington, DC 20007
Patricia Larimore, Senior Paralegal
E-mail: plarimore@talisman-intl.com

Morgan, Lewis, Bockius LLP
1111 Pennsylvania Ave. N.W.
Washington, DC 20004
Lewis Csedrik, Esq.
E-mail: lcshedrik@morganlewis.com
Jay Gutierrez, Esq.
E-mail: jgutierrez@morganlewis.com
Charles B. Moldenhauer
E-mail: cmoldenhauer@morganlewis.com
Brian P. Oldham, Esq.
E-mail: boldham@morganlewis.com
Thomas Poindexter, Esq.
E-mail: tpoindexter@morganlewis.com
Alex S. Polonsky, Esq.
E-mail: apolonsky@morganlewis.com
Thomas A. Schmutz, Esq.
E-mail: tschmutz@morganlewis.com
Donald Silverman, Esq.
E-mail: dsilverman@morganlewis.com
Annette M. White
E-mail: annette.white@morganlewis.com
Paul J. Zaffuts, Esq.
E-mail: pzaffuts@morganlewis.com
Clifford W. Cooper, Paralegal
E-mail: ccooper@morganlewis.com
Shannon Staton, Legal Secretary
E-mail: sstaton@morganlewis.com

Counsel for Lincoln County, Nevada
1100 S. Tenth Street
Las Vegas, NV 89104
Bret O. Whipple, Esq.
E-mail: bretwhipple@nomademail.com

Counsel for Lincoln County, Nevada
P.O. Box 60
Pioche, NV 89043
Gregory Barlow, Esq.
Lincoln County District Attorney
E-mail: lcta@lcturbonet.com

**For Lincoln County and White Pine County,
Nevada**
P.O. Box 2008
Carson City, NV 89702
Dr. Mike Baughman
Intertech Services Corporation
E-mail: bigboff@aol.com

Lincoln County Nuclear Oversight Program
P.O. Box 1068
Caliente, NV 89008
Connie Simkins, Coordinator
E-mail: jcciac@co.lincoln.nv.us

CACI International
Daniel Maerten
E-mail: dmaerten@caci.com

White Pine County, Nevada
Office of the District Attorney
801 Clark Street, Suite 3
Ely, NV 89301
Richard Sears, District Attorney
E-mail: rwsears@wpcda.org

California Energy Commission
1516 9th Street
Sacramento, CA 95814
Kevin W. Bell, Senior Staff Counsel
E-mail: kwbell@energy.state.ca.us

California Department of Justice
Office of the Attorney General
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Susan Durbin
Deputy Attorney General
E-mail: susan.durbin@doj.ca.gov
Michele Mercado, Analyst
E-Mail: michele.mercado@doj.ca.gov

California Department of Justice
Office of the Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Timothy E. Sullivan
Deputy Attorney General
E-mail: timothy.sullivan@doj.ca.gov

California Department of Justice
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013
Brian Hembacher
Deputy Attorney General
E-mail: brian.hembacher@doj.ca.gov

Counsel for Inyo County, California
Greg James, Attorney at Law
710 Autumn Leaves Circle
Bishop, CA 93514
Gregory L. James, Esq.
E-mail: gljames@earthlink.net

Nevada Agency for Nuclear Projects
Nuclear Waste Project Office
1761 East College Parkway, Suite 118
Carson City, NV 89706
Steve Frishman, Tech. Policy Coordinator
E-mail: steve.frishman@gmail.com
Susan Lynch
E-mail: slynch1761@gmail.com

**Nye County Nuclear Waste Repository
Project Office (NWRPO)**
1210 E. Basin Road #6
Pahrump, NV 89060
Sherry Dudley, Admin. Technical Coordinator
E-mail: sdudley@co.nye.nv.us
Zoie Choate, Secretary
E-mail: zchoate@co.nye.nv.us

Nye County Regulatory/Licensing Advisor
18160 Cottonwood Road. #265
Sunriver, OR 97707
Malachy Murphy, Esq.
E-mail: mrmurphy@chamberscable.com

Counsel for Nye County, Nevada
Jeffrey D. VanNiel
530 Farrington Court
Las Vegas, NV 89133
E-mail: nbrjdv@gmail.com

Ackerman Senterfitt
801 Pennsylvania Avenue N.W. #600
Washington, D.C. 20004
Robert M. Andersen
E-mail: robert.andersen@akerman.com

Native Community Action Council
P.O. Box 140
Baker, NV 89311
Ian Zabarte
E-mail: mrizabarte@gmail.com

**Alexander, Berkey, Williams & Weathers
LLP**
**Counsel for Native Community Action
Council**
2030 Addison Street, Suite 410
Berkeley, CA 94704
Curtis G. Berkey
E-mail: cberkey@abwwlaw.com
Scott W. Williams
E-mail: swilliams@abwwlaw.com
Rovianne A. Leigh
E-mail: rleigh@abwwlaw.com

**White Pine County Nuclear Waste Project
Office**
959 Campton Street
Ely, NV 89301
Mike Simon, Director
E-mail: wpnucwst1@mwpower.net

Armstrong Teasdale, LLP
**Counsel for Churchill, Lander, Mineral, and
Esmeralda Counties, Nevada**
1975 Village Center Circle, Suite 140
Las Vegas, NV 89134-6237
Robert F. List, Esq.
E-mail: rlist@armstrongteasdale.com
Jennifer A. Gores, Esq.
E-mail: jgores@armstrongteasdale.com

Nuclear Energy Institute
Office of the General Counsel
1776 Eye Street, NW, Suite 400
Washington, DC 20006-3708
Ellen C. Ginsberg, General Counsel
E-mail: ecg@nei.org
Michael A. Bauser, Deputy General Counsel
E-mail: mab@nei.org
Anne W. Cottingham, Esq.
E-mail: awc@nei.org

Pillsbury Winthrop Shaw Pittman, LLP
Counsel for Nuclear Energy Institute, Inc.
2300 N Street, N.W.
Washington, D.C. 20037-1122
Jay E. Silberg Esq.
E-mail: jay.silberg@pillsburylaw.com
Timothy J. V. Walsh, Esq.
E-mail: timothy.walsh@pillsburylaw.com
Maria D. Webb, Senior Energy Legal Analyst
E-mail: maria.webb@pillsburylaw.com

**Esmeralda County Repository Oversight
Program, Yucca Mountain Project**
P.O. Box 490
Goldfield, NV 89013
Edwin Mueller, Director
E-mail: muellered@msn.com

Winston & Strawn LLP
Counsel for the Nuclear Energy Institute
1700 K Street, N.W.
Washington, DC 20006-3817
David A. Repka, Esq.
E-mail: drepka@winston.com
William A. Horin, Esq.
E-mail: whorin@winston.com
Rachel Miras-Wilson
E-mail: rwilson@winston.com
Carlos L. Sisco, Senior Paralegal
E-mail: csisco@winston.com

Fredericks, Peebles & Morgan, LLP
1001 Second Street
Sacramento, CA 95814
Darcie L. Houck, Esq.
E-mail: dhouck@ndnlaw.com
John M. Peebles
E-mail: jpeebles@ndnlaw.com

**Timbisha Shoshone Yucca Mountain
Oversight Program Non-Profit Corporation**
3560 Savoy Boulevard
Pahrump, NV 89061
Tameka Vazquez
E-mail: purpose_driven12@yahoo.com

Counsel for Caliente Hot Springs Resort LLC
6772 Running Colors Avenue
Las Vegas, NV 89131
John H. Huston, Esq.
E-mail: johnhhuston@gmail.com

Beyond Nuclear
6930 Carroll Avenue, Suite 400
Takoma Park, MD 20912
Kevin Kamps
E-mail: kevin@beyondnuclear.org

Harmon, Curran, Speilberg & Eisenberg, LLP
1726 M Street N.W., Suite 600
Washington, D.C. 20036
Diane Curran, Esq.
E-mail: dcurran@harmoncurran.com
Matthew Fraser, Law Clerk
E-mail: mfraser@harmoncurran.com

Eureka County, Nevada
Office of the District Attorney
701 S. Main Street, Box 190
Eureka, NV 89316-0190
Theodore Beutel, District Attorney
E-mail: tbeutel.ecda@eurekanv.org

Eureka County Public Works
P.O. Box 714
Eureka, NV 89316
Ronald Damele, Director
E-mail: rdamele@eurekanv.org

Nuclear Waste Advisory for Eureka Co.
1983 Maison Way
Carson City, NV 89703
Abigail Johnson, Consultant
E-mail: eurekanrc@gmail.com

NWOP Consulting, Inc.
1705 Wildcat Lane
Ogden, UT 84403
Loreen Pitchford, LSN Coordinator
E-mail: lpitchford@comcast.net

Clark County (NV) Nuclear Waste Division
500 S. Grand Central Parkway
Las Vegas, NV 89155
Elizabeth A. Vibert, Deputy District Attorney
E-mail: elizabeth.vibert@ccdanv.com
Phil Klevorick, Sr. Mgmt. Analyst
E-mail: klevorick@co.clark.nv.us

Jennings Strouss & Salmon, PLC
1700 Pennsylvania Ave N.W., Suite 500
Washington, D.C., 20006-4725

Alan I. Robbins, Esq.

E-mail: arobbins@jsslw.com

Debra D. Roby, Esq.

E-mail: droby@jsslw.com

Elene Belete, Legal Secretary

E-mail: ebelete@jsslw.com

Jennings Strouss & Salmon
8330 W. Sahara Avenue #290
Las Vegas, NV 89117

Bryce Loveland, Esq.

E-mail: bloveland@jsslw.com

Dated this 3rd day of April 2009.

/signed (electronically) by/
Julie A. Dobie