

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository)

Docket No. 63-001

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

May 29, 2009

**NATIVE COMMUNITY ACTION COUNCIL'S
BRIEF IN OPPOSITION TO NRC STAFF APPEAL**

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10 Code of Federal Regulations §63.121. 3, 4

10 Code of Federal Regulations §63.121(a)(1) and (2). 3

Cases and Administrative Decisions:

Advanced Medical Systems Inc.
(One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994). 1

Dann v. United States,
Case 11.140, Inter-Am.C.H.R., Report No. 75/02, Doc. 5 rev. 1 at 860 (2002). . . 3

Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 &3),
CLI -09-08, 69 NRC ____ (May 18, 2009) (slip op. at 7). 4

The Nuclear Regulatory Commission (NRC) Staff has appealed from the “Memorandum and Order (Identifying Participants and Admitted Contentions)” dated May 11, 2009. In general, the NRC Staff challenges the Construction Authorization Boards’ (Boards) decision to admit certain legal contentions. See, NRC Staff Notice of Appeal. Among the legal contentions which the Boards found admissible and which are challenged by NRC Staff, is one submitted by the Native Community Action Council (NCA): that the lands proposed for the Geologic Repository Operations Area are not without encumbrances (denominated NCA-MISC-001). See, NRC Staff Brief in Support of Appeal at 8, 29.

Curiously, the NRC Staff has not explained at all, anywhere in its brief, the basis for its challenge to the NCA lands contention.¹ Because of the complete failure to identify the basis of the appeal, NCA can do no more here than demonstrate, again, that its contention meets the standards for admissibility set forth in the regulations.

DISCUSSION

I. NRC STAFF’S FAILURE TO EXPLAIN THE BASIS OF ITS APPEAL CONSTITUTES A WAIVER OF THAT APPEAL

Both this Commission and the NCA are entitled to know the basis of the NRC Staff’s objections to the admissibility of the challenged contention. *Advanced Medical Systems Inc. (One Factory Row, Geneva, Ohio 44041)*, CLI-94-6, 39 NRC 285, 297 (1994) (“The appellant bears the responsibility of clearly identifying the errors in the

¹ One must read the NRC Staff brief with a careful eye in order to catch the references to the NCA contention. NRC Staff Brief In Support of Appeal. The references appear only in a list of challenged contentions buried in the text (page 8) and in the conclusion (page 29). The NCA contention is otherwise not addressed at all.

decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims.") Having failed to meet that obligation, and having left the Commission and NCA ignorant as to the bases of the appeal, the appeal should be rejected and the Boards' order affirmed.

In the event that the Commission considers the appeal despite this failure, the NCA demonstrates that the Boards correctly admitted this contention.

II. THE NCA LANDS CONTENTION MEETS THE STANDARDS FOR ADMISSIBILITY SET FORTH IN 10 C.F.R. § 2.309(f) .

The Boards determined that legal contentions may be admissible without necessarily demonstrating satisfaction of all requirements of § 2.309(f)(1). Memorandum and Order at 61. The NRC Staff takes issue with that determination. NRC Staff Brief at 5. Resolution of that dispute is not material to the admissibility of NCA's contention, however, since the contention clearly satisfies the requirements of the regulation.

NCA summarizes here the nature of the land contention, and the manner in which it meets the requirements of the regulation. ²

§ 2.309(f)(1)(i) – specific statement of law or fact to be controverted, and identification of license criteria which cannot be met.

NCA, an organization representing Western Shoshone and Southern Paiute Indians, contends that the lands on which the Repository is proposed to be sited, is

² For two reasons, NCA confines itself to a summary. It has previously fully briefed this issue, and the Board has agreed that the land contention is admissible. Reply of NCA to Department of Energy Answer to Petition, at 17-23 (filed March 11, 2009). Secondly, the volume of pleadings compiled thus far in this proceeding is enormous, and repetition is wasteful.

encumbered by Shoshone claims to title. Applicable law requires that the DOE must acquire lands for the Repository that are “free and clear of all encumbrances, if significant . . .” 10 C.F.R. § 63.121(a)(1) and (2). The Tribes currently use, and have since time immemorial used the lands on which the Repository is proposed for construction – a factual matter which is not disputed. In addition, the Inter-American Commission on Human Rights has held that the United States’ claim to Shoshone lands is made in violation of fundamental human rights law – a legal determination the existence of which is not disputed. *Dann v. United States*, Case 11.140, Inter-Am.C.H.R., Report No. 75/02, Doc. 5 rev. 1 at 860 (2002). The issue of law or fact to be determined here is whether either, or both of these factors constitute an “encumbrance” within the meaning of § 63.121. If the nature of Tribal use of the land, or the existence of a decision finding that the United States’ claim to title is made in violation of law, constitutes an encumbrance within the meaning of the regulation, the application fails to meet all requirements of law.

§ 2.309(f)(1)(ii) – basis for contention.

The NCA has described in its reply and the attached affidavits, the use of Yucca Mountain lands by Indian people pursuant to a long-standing body of law and custom which regulates the nature, scope, frequency and purpose of such usage. Reply at 18 – 22. These factual and legal contentions are set forth in detail.

§ 2.309(f)(1)(iii) and (iv) – the issue of whether the lands are encumbered is within the scope of, and is material to the proceeding.

It cannot reasonably be disputed that if the Tribal use and International Human Rights Commission decision constitute “encumbrances” within the meaning of the

regulation, the license application fails to satisfy an essential condition. §63.121.

§ 2.309(f)(1)(v) – a concise statement of facts which support the contention, and on which the petitioner intends to rely at hearing.

The NCA has submitted affidavits which demonstrate that Yucca Mountain and its surrounding lands are used by Indian people for subsistence (hunting of game and gathering of plants for food), cultural, ceremonial and spiritual purposes; that use has been ongoing since time immemorial. It seems unlikely that these facts would be subject to dispute; but if they are, NCA will prove them at hearing.

In summary, the NCA has offered a contention, found admissible by the Boards, which meets every requirement of the regulation defining admissibility. The Boards' decision to admit the contention is correct, and was neither "clear error [nor] abuse of discretion." *Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 &3)*, CLI -09-08, 69 NRC ____ (May 18, 2009) (slip op. at 7).

III. CONCLUSION

The NRC Staff appeal as to the Native Community Action Council's land contention should be dismissed. The NRC Staff failed to disclose the basis of its objection to the Boards' decision to admit the contention. The contention, in any event, meets all admissibility requirements of the regulation.

Date: May 29, 2009

Respectfully submitted

Signed electronically by Scott W. Williams
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2009, copies of the **Native Community Action Council's Brief in Opposition to NRC Staff Appeal** have been served upon the following persons by the Nuclear Regulatory Commission's Electronic Information Exchange:

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