

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the matter of:

U.S. DEPARTMENT OF ENERGY

(License Application for Geologic
Repository at Yucca Mountain)

Docket No. 63-001

ASLBP No. 09-892-HLW-CAB-04

August 26, 2011

**TIMBISHA SHOSHONE TRIBE'S MOTION FOR RECOGNITION OF THE TIMBISHA
SHOSHONE TRIBAL COUNCIL AS THE LEGITIMATE REPRESENTATIVE OF THE
TIMBISHA SHOSHONE TRIBE**

COMES NOW, the duly recognized Timbisha Shoshone Tribal Council ("Tribal Council")¹, and hereby moves the Atomic Safety and Licensing Board ("Board") pursuant to 10 C.F.R. § 2.323 to recognize the Tribal Council, as found by the Secretary of the Interior (Secretary of the Interior in its March 1, 2011 decision), as the duly authorized representative of the Timbisha Shoshone Tribe ("Tribe") with sole authority to submit filings on behalf of the Tribe as an Affected Indian Tribe ("AIT") in this proceeding. Further, the Tribal Council hereby moves the Board to cease recognition of

¹ The members of the duly recognized Tribal Council are George Gholson as Chairperson, Bill Eddy as Vice-Chairperson, Margaret Cortez as Secretary/Treasurer, Clyde Nichols as Executive Member and Earl Frank as Executive Member. These individuals are "the appropriate governmental officials of the Tribe" as determined by the Secretary of Interior. See 10 C.F.R. § 60.2, *Affected Indian Tribe*.

the Joint Timbisha Shoshone Tribal Group ("JTS"). This motion is based, in pertinent part, on (1) the Letter of Understanding dated April 20, 2009 by and between the two Tribal entities² comprising JTS, requiring the Tribal Council to assume control over representation of the Tribe in this proceeding; (2) the recent decision of Larry Echo Hawk, Assistant Secretary for Indian Affairs, dated March 1, 2011, resolving the administrative appeal in *Kennedy, et al. v. Pacific Regional Director* recognizing an interim Tribal Council, for the purpose of facilitating a special Tribal Council election held on April 29, 2011; and (3) the July 29, 2011 Certification by Assistant Secretary Echo Hawk of the results of the special election held on April 29, 2011 and the newly-elected Tribal Council.³ In submitting this motion, the Tribal Council does not seek to alter any of the contentions submitted on behalf of JTS, and hereby adopts all contentions admitted by the Board and accepts responsibility for the JTS LSN on behalf of the Tribe in its capacity as an AIT.

By email dated August 24, 2011, the Tribal Council notified the parties to this proceeding of its intent to file this motion and requested a response as to any position on the motion by 1:00 p.m., EST, August 26, 2011. As of the time of the filing of this motion, the following parties take no position on the merits of this motion: NEI, Nye County, NRS Staff, Clark County, State of Nevada, NARUC, County of Inyo, Aiken County, DOE, State of California, State of Washington, State of South Carolina, and County of White Pine. Of these parties, the NRC Staff, NEI and DOE reserve the right to respond to the motion, and the State of Nevada, County of Inyo, State of California,

² The Timbisha Shoshone Tribe ("TIM") and the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation ("TOP").

³ True and complete copies of the April 20, 2009 Letter of Understanding, the March 1, 2011 Order and the July 29, 2011 Certification are attached hereto as Exhibits "A", "B," and "C," respectively.

State of Washington, South Carolina, NEI, and County of White Pine do not oppose or object to the motion, nor did they take a position on the merits of the Motion.

Additionally, the DOE opposes the request for disbursement of funds being made to the Board on procedural grounds, and TOP does not oppose the motion but reserves the right to respond to the motion and specifically stated that it does not waive any legal rights that it may have concerning the request for release of DOE funds.

I. Creation of the Joint Timbisha Shoshone Tribal Group

Two entities purporting to represent the Timbisha Shoshone Tribe filed petitions to intervene in this proceeding on December 22, 2008: (1) the Timbisha Shoshone Tribe ("TIM"); and (2) the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation ("TOP"). Each entity claimed to be the sole legitimate representative of the Tribe, as each petition was submitted by competing Tribal Council factions.

The issue of which faction was the legitimate representative of the Tribe, authorized to conduct government-to-government relations and participate in this proceeding was brought before the Board during the hearing of April 1, 2009. See Transcript of Proceedings, *In the Matter of U.S. Department of Energy High-Level Waste Repository*, Docket No. 63-001-HLW, April 1, 2009, pp. 496 – 527. (A true and complete copy of this excerpt of the April 1, 2009 Hearing Transcript is attached hereto as Exhibit "D.") During the hearing of April 1, 2009, the Board stated in pertinent part:

Unfortunately, both TIM and TOP claim to be the sole legitimate representative of the Timbisha Shoshone Tribe [*d.* at 497:12-14]...[T]his licensing board is in no position to resolve the dispute between TIM and TOP in terms of which group is the sole legitimate representative of [the] Timbisha Shoshone Tribe [*d.* at 497:20-23]...Instead, this is something

that is going to have to be worked out through the administrative and judicial channels...[*Id.* at 497:24-25; 498:1]

At the direction of the Board, TIM and TOP came together and formed a single entity, the Joint Timbisha Shoshone Tribal Group (“JTS”), and submitted a joint petition to intervene on behalf of the Tribe. TIM and TOP had entered into a Letter of Understanding dated April 20, 2009 wherein the parties agreed to work together and form JTS pending a resolution of the Tribal dispute by the Department of the Interior (“Interior”). The Letter of Understanding contemplated that Interior would reach a final decision recognizing one Tribal Council as the legitimate representative of the Tribe for government-to-government purposes, and that the Tribal Council recognized by Interior for government-to-government purposes would then take on full responsibility for representation of the Tribe as the AIT in this proceeding. In this respect, the Letter of Understanding stated in pertinent part:

1. TIM and TOP and their respective counsel shall work together as a single participant in the Licensing Proceedings, each in good faith and using their best efforts, **until such time as the Department of the Interior issues a final decision not appealable to any agency** as to the recognized Tribal Council for government-to-government purposes. **At such time, the Tribal Council that is recognized shall assume control over the representation of the Timbisha Shoshone Tribe in the Licensing Proceedings.**

April 20, 2009 Letter of Understanding at 2 (emphasis added).

The Board granted party status to JTS by Order dated August 27, 2009. Since the time of the filing of the two petitions to intervene up to March 1, 2011, the status and composition of the duly authorized and recognized Timbisha Shoshone Tribal Council was in question, and subject to various administrative appeals before the Bureau of

Indian Affairs ("BIA")⁴, resulting in a consolidated appeal before the Office of the Secretary of the Department of the Interior, styled as *Kennedy, et al. v. Pacific Regional Director*.

II. March 1, 2011 Order of the Assistant Secretary

The *Kennedy, et al. v. Pacific Regional Director* appeal before the Office of the Secretary concerned the issue of who were the appropriate individuals comprising the Timbisha Shoshone Tribal Council with the authority to represent the Tribe in carrying out government-to-government relations.

Larry Echo Hawk, Assistant Secretary – Indian Affairs decided this issue by Order dated March 1, 2011. (See Exhibit "B.") Assistant Secretary Echo Hawk recognized an interim Tribal Council "headed by George Gholson." *Id.* at 10-11.⁵ The purpose of this interim Council was to facilitate a special Tribal Council election within 120 days of the date of the Order, and to carry out essential government-to-government relations. Assistant Secretary Echo Hawk stated in relevant part:

Therefore, I will recognize one of the two putative governments elected in November, for the limited time of **120 days** from the date of this order, and for the **limited purpose of carrying out essential government-to-government relations and holding a special election** that complies with the tribal law. For this limited purpose and time, I will recognize the **Tribal Council headed by George Gholson**....Pursuant to 25 C.F.R. § 2.6(c), this decision is final for the Department and effective immediately.

⁴ The Board previously recognized the various administrative appeals. See the Board's Order dated May 5, 2011 at 68, footnote 307.

⁵ Assistant Secretary Echo Hawk did not define the Tribal Council headed by George Gholson. The Tribal Council headed by George Gholson as referred to by the Assistant Secretary consisted of: George Gholson as Chairman, Bill Eddy as Vice-Chairman, Margaret Cortez as Secretary/Treasurer, and Clyde Nichols and Leroy Jackson as Executive Members.

See March 1, 2011 Order at 10-11 (emphasis added).⁶

The Tribal Council headed by George Gholson complied with the Assistant Secretary's Order and conducted an independent special Tribal Council election on April 29, 2011. The Final Report of Special Election for Tribal Council 2011 was issued on May 8, 2011. Subsequently, the newly-elected Council was seated in their respective offices on May 21, 2011 as follows:

- George Gholson as Chairperson;
- Bill Eddy as Vice-Chairperson;
- Margaret Cortez as Secretary/Treasurer;
- Clyde Nichols as Executive Member; and
- Earl Frank as Executive Member.

III. July 29, 2011 Tribal Council Certification

Assistant Secretary Echo Hawk certified the results of the April 29, 2011 special election and the newly-elected Tribal Council by letter dated July 29, 2011. Assistant Secretary Echo Hawk emphasized the particular circumstances and the long hiatus in government-to-government relations surrounding the Tribe in support of his certification of the newly-elected Tribal Council. Assistant Secretary Echo Hawk stated in pertinent part:

⁶ The aggrieved political faction subject to the March 1, 2011 Order filed suit for injunctive relief in United States District Court styled as *Kennedy, et al. v. Echo Hawk, et al.*, Case No. 2:11-cv-00995-GEB-GGH (USDC ED Calif.) on April 13, 2011, seeking the Court to enjoin the implementation of the March 1, 2011 Order and recognition of the special Tribal Council election referred to therein. Plaintiffs filed a Preliminary Injunction on April 27, 2011 which was denied by the Court by Memorandum and Order dated May 16, 2011. The Court held "because Plaintiffs have failed to make the requisite showing that they are entitled to bring this action on behalf of the Tribe, that this Court even has the jurisdiction to determine whether they can represent the Tribe, or that this case can proceed absent joinder of the Tribe or the Gholson Council,[] Plaintiffs have failed to carry their burden to show that this Court can reach the merits of their claims, let alone adjudicate those claims in Plaintiffs' favor." See Memorandum and Order dated May 16, 2011 at 17. The Plaintiffs filed a First Amended Complaint on August 5, 2011.

This letter follows inexorably from the March 1 Order's provisions for holding a special election. Acknowledging the Gholson government's authority to conduct an election, and providing clarity to the Bureau [of Indian Affairs'] recognition of the government elected thereby, are justified by the long hiatus in government-to-government relations, which has had numerous deleterious effects, including the inability to benefit from Federal programs and contracting. Today's letter, like the March 1 Order, is also justified by the need for the Department [of the Interior] to comply with its duty to recognize a government representative, if possible.

See July 29, 2011 Certification at 4.

IV. Conclusion

The Department of the Interior recognizes George Gholson, Bill Eddy, Margaret Cortez, Clyde Nichols and Earl Franks as the duly recognized Timbisha Shoshone Tribal Council (appropriate officials of the Tribe) authorized to represent the Tribe in government-to-government relations. The Interior does not recognize the Joint Timbisha Shoshone Tribal Group. The newly-elected Tribal Council is the only authorized entity to represent the Tribe in this proceeding. The Tribal Council respectfully requests the Board cease recognition of JTS and recognize the aforementioned individuals that make up the duly elected Tribal Council as the only entity permitted to represent the Tribe in this proceeding. Moreover, pursuant to the plain terms of the April 20, 2009 Letter of Understanding⁷, the newly-elected Tribal Council shall assume control over representation of the Tribe in this proceeding, and the

⁷ As previously noted, the April 20, 2009 Letter of Understanding provides the duly recognized Tribal Council that is subject to a "final decision not appealable to any agency... shall assume control over representation of the [Tribe]." See Exhibit "A" at 2. Assistant Secretary Echo Hawk's July 29, 2011 Certification is not appealable to any agency ("[t]his letter finalizes my office's disposition of matters related to the recognition of the Tribe's representatives..."). See Exhibit "C" at 1.

two entities comprising JTS must relinquish control over representation of the Tribe as an AIT.

Finally, the Tribal Council respectfully requests the Board direct the U.S. Department of Energy to meet and confer with the Timbisha Shoshone Tribal Council with regard to the release of federally-appropriated funds dedicated to the Tribe as an AIT in connection with this licensing proceeding.⁸ This is particularly critical given the potential for the proceeding to move into active discovery on the NEPA issues at any time, and the Tribe's need to ensure that it has resources to adequately participate in the proceeding and present witnesses.

Dated: August 26, 2011

Respectfully submitted,

[signed electronically]

DARCIE L. HOUCK

Fredericks Peebles & Morgan LLP
Attorney for Timbisha Shoshone Tribe
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Sacramento, CA 95814
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⁸ The DOE has provided contact information to the Tribe with regard to this issue.

EXHIBIT A

**FOR YUCCA MOUNTAIN LICENSING PROCEEDING PURPOSES ONLY
NOT ADMISSIBLE UNDER FEDERAL OR
STATE RULES OF EVIDENCE**

LETTER OF UNDERSTANDING

WHEREAS, since approximately November 2007, there has been a dispute over the composition of the Tribal Council of the Timbisha Shoshone Tribe.

WHEREAS, this dispute has resulted in at least four different Tribal Councils claiming to have authority over the Timbisha Shoshone since 2007: a council elected in November 2006 consisting of Joe Kennedy (Chair), Ed Beaman, Madeline Esteves, Virginia Beck, and Cleveland Lyle Casey; a council elected in November 2007 consisting of Joe Kennedy (Chair), Margaret Armitage, Madeline Esteves, Margaret Cortez, and Pauline Esteves; a council that purported to remove Joe Kennedy as Chairman and replace Margaret Armitage after she resigned in October of 2008 consisting of George Gholson (Chair), Wallace Eddy, Pauline Esteves, and Margaret Cortez; and a council elected in November 2008 consisting of Joe Kennedy (Chair), Madeline Esteves, Pauline Esteves, Angie Boland, and Erick Mason.

WHEREAS, the dispute among members of the various councils has resulted in several different appeals to, and decisions of, the Bureau of Indian Affairs ("BIA"), the Internal Board of Indian Appeals, and the Assistant Secretary of the BIA. Some of these appeals are outstanding and there is no indication of when they might be resolved.

WHEREAS, in 2007, the Assistant Secretary of the BIA designated the Tribe as a "federally-recognized Affected Indian Tribe" ("AIT") for the purposes of the proceedings before the U.S. Nuclear Regulatory Commission ("NRC") to determine whether the NRC would issue to the U.S. Department of Energy ("DOE") a license to operate the Yucca Mountain geologic repository (the "Licensing Proceedings"), and such designation confers upon the Tribe several benefits, such as the right of automatic standing to participate in any hearing before the NRC in the Licensing Proceedings and the right to receive funds from the DOE for the purpose of participating in the Licensing Proceedings, among other activities.

WHEREAS, two different groups, one calling itself the "Timbisha Shoshone Tribe" ("TIM") and the other calling itself the "Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation" ("TOP"), have each filed a separate Petition to Intervene in the Licensing Proceedings, each claiming to represent the AIT and to be the sole rightful representative of the Tribe in the Licensing Proceedings.

WHEREAS, TIM claims that it represents the AIT because its efforts in the Licensing Proceeding are being directed by Ed Beaman, who claims to control a majority of votes in the Tribal Council elected in November 2006 (the "2006-2007 Council"), which is the Tribal Council that, as of the date of the signing of this Letter of Understanding, the BIA currently recognizes for government-to-government purposes. The majority of the BIA-recognized Council claim to have reorganized the Council, and removed Joe Kennedy as Chairman, replacing him with Ed Beaman as Chairman, Cleveland Lyle Casey as Vice-Chairman,

Madeline Esteves as Treasurer/Secretary, Virginia Beck as Executive Council Member, and Joe Kennedy as Executive Council Member. The BIA-recognized Council has not authorized the creation of TOP, nor does it recognize TOP as a Tribal entity, therefore the BIA-recognized Council does not acknowledge, nor have they approved or authorized, any actions, expenditures, representations, or approvals made by TOP on behalf of the Tribe. TOP and its Board of Directors, as well as the members of the Tribal Council that created TOP, deny and dispute these claims, and nothing in this Letter of Understanding or the accompanying Litigation Plan is intended to or shall be construed to constitute a waiver of or agreement with these claims.

WHEREAS, TOP claims that it represents the AIT and the Tribe because its efforts in the Licensing Proceeding are being directed by Joe Kennedy, who is the Chairman of the BIA Pacific Regional Office-recognized 2006-2007 Tribal Council, Chairman of the 2008-2009 Tribal Council, and is a member of TOP's Board of Directors, and who further claims that Ed Beaman and the two other members of the 2006-2007 Council are not members of the Tribe and cannot represent the Tribe in the Licensing Proceedings. TIM and the members of the 2006-2007 Council that claim to control a majority of the 2006-2007 Council deny and dispute these claims, and nothing in this Letter of Understanding or the accompanying Litigation Plan is intended to or shall be construed to constitute a waiver of or agreement with these claims.

WHEREAS, in the Licensing Proceedings, neither DOE nor the NRC Staff has objected to the Tribe's standing as an AIT, but both have objected to TIM's standing in any capacity other than as an AIT and DOE has objected to TOP's standing in any capacity other than as an AIT.

WHEREAS, in the view of two separate counsels assisting both TIM and TOP, during oral arguments before the NRC's Atomic Safety and Licensing Review Board Panel ("Board") on April 1, 2009 on whether to allow TIM, TOP, and other entities to intervene in the Licensing Proceedings, the Board essentially ordered TIM and TOP to participate as a single entity in the Licensing Proceedings or risk the Tribe having no participation at all.

WHEREAS, neither TIM and its principals nor TOP and its principals intend to relinquish or waive their respective claims as the sole representative of the Tribe and their right to participate as the AIT but, at the same time, do not desire their respective claims to sole representative status of the Tribe to result in the Tribe being excluded from participating in the Licensing Proceedings before the NRC.

THEREFORE, it is agreed as follows:

1. TIM and TOP and their respective counsel shall work together as a single participant in the Licensing Proceedings, each in good faith and using their best efforts, until such time as the Department of the Interior issues a final decision not appealable to any agency as to the recognized Tribal Council for government-to-government purposes. At such time, the Tribal Council that is recognized shall assume control over the representation of the Timbisha Shoshone Tribe in the Licensing Proceedings.
2. Counsel for TIM and TOP shall work together to prepare and file in the Licensing Proceedings such pleadings, briefs, and other documents as are necessary to protect the interests

of the Timbisha Shoshone Tribe or are required to be filed by the Board in accordance with a jointly-approved and jointly prepared Litigation Plan.

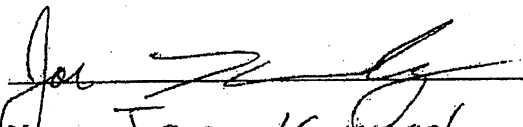
3. TOP shall provide an audit to both TIM and DOE as to expenditure of funds received to date from DOE for Yucca Mountain oversight activities, and shall agree to reimbursement of consultants that have provided services to date for participation in the Licensing Proceedings consistent with the Litigation Plan attached hereto.

4. By signing this Letter, both parties agree that this Letter of Understanding is for the limited purposes of insuring representation for the Tribe in the proceedings before the NRC's Construction Authorization Boards ("CAB"), and this Letter of Understanding and subsequent cooperation between the two parties was at the behest of the CAB.

5. By signing this Letter, both parties agree that this Letter of Understanding and subsequent actions of the parties pursuant to this Letter of Understanding or other agreements related to proceedings before CAB do not express or imply acquiescence of the other's authority pursuant to the Tribe's constitution, duties thereof, or membership in the Tribe.

6. This executed Letter of Understanding and actions pursuant to it may not be used by either party as evidence of the other's authority or membership status in any tribal, federal, or state proceeding.

7. The statements made in the "WHEREAS" clauses of this Letter of Understanding are intended to and shall be construed only as stating the positions and claims of the respective parties. They are not intended to and shall not be construed as admissions or concessions of any sort whatsoever of any acquiescence by any party to the claims or statements made by any other party or any waiver by any party of arguments opposing the claims or statements made by any other party.

For TOP:	For TIM:
	
Name: <u>Joe Kennedy</u>	Name: _____
Date: <u>April 20, 2009</u>	Date: _____

of the Timbisha Shoshone Tribe or are required to be filed by the Board in accordance with a jointly-approved and jointly-prepared Litigation Plan.

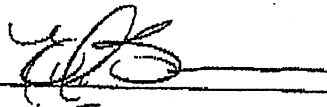
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For TOP: Name: _____ Date: _____	For TIM:  Name: <u>ED BEAMAN</u> Date: <u>APRIL 20, 2009</u>
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**PRIVILEGED & CONFIDENTIAL
FOR SETTLEMENT PURPOSES ONLY
INADMISSIBLE UNDER FEDERAL AND STATE
RULES OF CIVIL PROCEDURE**

**TIMBISHA SHOSHONE
YUCCA MOUNTAIN LICENSING
PROCEEDING JOINT LITIGATION PLAN**

Basis for and Purpose of Plan

1. This Joint Litigation Plan ("Plan") is created and agreed to as of this 20th day of April, 2009, by the undersigned counsel on behalf of the Parties, and is based on, and incorporated as part of the Letter of Understanding dated April 20, 2009. The Plan, however, may be amended as necessary with the written consent of both signatories to the Letter of Understanding and this Plan. The Parties also will enter into a Funding Agreement as soon as practicable.
2. There is pending before the Atomic Safety and Licensing Board (the "Board") of the U.S. Nuclear Regulatory Commission an action captioned, *In the Matter of U.S. Department of Energy (High Level Waste Repository)*, Docket No. 63-001-HLW (the "Licensing Proceeding"). On June 29, 2007, the Department of the Interior recognized the Timbisha Shoshone Tribe ("Tribe"), a federally recognized Indian tribe, as an Affected Indian Tribe ("AIT") under the Nuclear Waste Policy Act and implementing regulations, granting the Tribe the right to intervene in the Licensing Proceeding.
3. Presently, two entities purporting to represent the Tribe have filed Petitions to Intervene in the Licensing Proceeding. The entity that filed its Petition as the "Timbisha Shoshone Tribe" ("TIM"), has as its principals Ed Beaman, Virginia Beck and Cleveland Lyle Casey, and is represented before the Board by Fredericks Peebles & Morgan LLP. The entity that filed its Petition as the "Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation" ("TOP"), has as its Board of Directors, Joe Kennedy, Madeline Esteves, and Pauline Esteves, and is represented before the Board by Godfrey & Kahn, S.C. TIM and TOP are the "Parties" for the purposes of this Plan.
4. As of the date of the this Plan, the Bureau of Indian Affairs ("BIA") still recognizes the Tribal Council seated in December 2006: Joe Kennedy, Chairman; Ed Beaman, Vice-Chair; Madeline Esteves, Secretary-Treasurer; Virginia Beck, Member; and Cleveland Casey, Member (collectively, "2006-2007 Tribal Council"). Joe Kennedy and Madeline Esteves will be referred to collectively in this Plan as the "Kennedy Group" and Ed Beaman, Virginia Beck, and Cleveland Casey will be referred to collectively in this Plan as the "Beaman Group."
5. In order to maximize the likelihood of intervention as of right in the Licensing Proceeding and of consideration of all of their contentions, TIM and TOP have agreed to proceed jointly in the Licensing Proceeding, as if they were a single entity. This Plan provides the

framework for TIM and TOP to proceed jointly in the Licensing Proceeding under the title of the Joint Timbisha Shoshone Tribal Group ("JTS"). The sole purpose of the Plan is to establish the framework through which the two separate groups purporting to represent the Tribe will participate jointly in the Licensing Proceeding. It has no bearing on any other matter, and may not be proffered by TIM, the members of the Beaman Group, TOP, or the members of the Kennedy Group as evidence in any judicial or quasi-judicial proceeding or dispute resolution.

Counsel

6. Godfrey & Kahn, S.C. – Doug Poland, Steve Heinzen, Hannah Renfro, and Duncan Moss, representing TOP. For the purposes of this Plan, Doug Poland will be referred to as the "Lead GK Counsel."
7. Fredericks Peebles & Morgan LLP – Darcie Houck, Robert Rhoan, and Shane Thin Elk. For the purposes of this Plan, Darcie Houck will be referred to as the "Lead FPM Counsel"

Handling of Funding by DOE

8. The Parties, through legal counsel, will negotiate in good faith to reach an agreement ("Funding Agreement") that will establish a financial arrangement, through an escrow or trust account, ("Account") administered by a mutually acceptable third party, to receive and disburse funds from the U.S. Department of Energy ("DOE") appropriated to support the Tribe's participation in the Licensing Proceeding. The Parties anticipate that, among other things:
 - a. In negotiating the Funding Agreement, Lead GK Counsel and Lead FPM Counsel will consult jointly with DOE to ensure that DOE will agree to deposit funds into the Account, and with possible agents or trustees to ensure that they will agree to administer the Account.
 - b. The Funding Agreement will require that DOE funds will be used solely to fund the Parties joint participation in the Licensing Proceeding.
 - c. Lead FPM Counsel and Lead GK Counsel will jointly prepare a single budget for anticipated legal fees and costs that are expected to be incurred in their joint participation during the remainder of 2009 in the Licensing Proceeding. Lead Counsel shall use their best efforts, in good faith, to divide anticipated tasks as equitably and equally as practicable between the respective law firms, consistent with the best interests of the overall representation of JTS. Although the principals of TIM and TOP and Lead Counsel recognize that developments during the Licensing Proceeding may and likely will require adjustments to the allocation of work among law firms and consultants reflected in the budget, and that the amount of money paid to each law firm and each consultant might deviate from what is contemplated in the budget, they nonetheless agree that the payment of fees and costs to counsel for JTS pursuant to this Litigation Plan shall be as close to the budgeted amounts as is reasonably practicable. The budget shall be jointly

approved by Both TIM and TOP. Any changes to the budget shall also be approved by both TIM and TOP.

- d. An initial budget will be prepared at the earliest opportunity after the Board issues a discovery schedule for the remainder of 2009, but no later than May 18, 2009.
- e. The budget will guide the agent or trustee in releasing funds to TIM and TOP. Approval by both TIM and TOP will be required for release of any funds.
- f. DOE will continue to hold the allocated funds until a Funding Agreement is reached between TIM and TOP. DOE will only release funds to an escrow or trust account in accordance with the Funding Agreement entered into between TIM and TOP.
- g. TOP shall provide a comprehensive audit to TIM and DOE as to the expenditure of any funds received by TOP to date by DOE for Yucca Mountain oversight activities.
- h. TOP agrees to reimburse consultants that have provided services to the Tribe for participation in the Licensing Proceeding to date, including Loreen Pitchford and Fred Dilger, from the Yucca Mountain oversight funds that it received prior to entering into this agreement.

Experts and Consultants

9. TIM and TOP have separately been working with the following experts and consultants:

- a. Professor Catherine Fowler (cultural issues)
- b. Loreen Pitchford (LSN officer)
- c. Fred Dilger (transportation issues)
- d. Marty Mifflin (groundwater issues)
- e. Casey Johnson (groundwater issues)

10. With the approval of TIM and TOP, Lead GK Counsel and Lead FPM Counsel will confer and agree on the division of labor among the respective law firms with respect to the continued or new retention of any experts and consultants. Lead GK Counsel will be responsible for conferring with and obtaining the approval of TOP, and Lead FPM Counsel will be responsible for conferring with and obtaining the approval of TIM. It is expected that both TOP and TIM, in considering whether to give their approval as to expert and consultant issues, will act in good faith and in the best interests of the Timbisha Shoshone tribal membership as a

whole. Approval by both TIM and TOP is required for any retention of experts or consultants in the Licensing Proceeding.

Contentions and Amended Petition

11. Because both groups have been working separately, the contentions prepared and filed separately by TIM and TOP do not have the benefit of input from all of the experts and consultants retained by both entities. Consequently, it is the opinion of Lead FPM Counsel and Lead GK Counsel that some of the contentions currently proffered by both TIM and TOP would be stronger and, therefore, more likely to be admitted in the Licensing Proceeding, if they were modified appropriately and submitted in the Licensing Proceeding together as amended contentions in an Amended Petition.

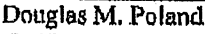
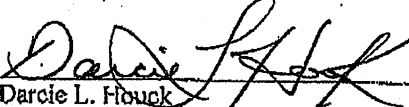
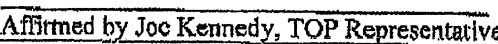
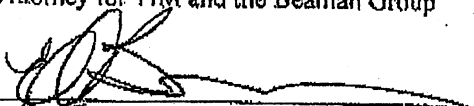
12. It is the opinion of both Lead GK Counsel and Lead FPM Counsel that the Board might be amenable to the filing of a single Amended Petition presenting all contentions that currently have been filed separately by TIM and TOP as a single, joint petition of TIM and TOP as the Joint Timbisha Shoshone Tribal Group, or TIM and TOP. Therefore, the following steps will be taken to present a joint Amended Petition:

13. On or before April 20, 2009, or as soon thereafter as is practicable, the following will be filed in the Licensing Proceeding:

- A motion or similar document seeking leave for TIM and TOP to proceed jointly.
- A motion for leave to file an Amended Petition to Intervene on behalf of the Tribe.
- An Amended Petition to Intervene.

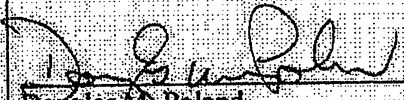



14. Lead FPM Counsel and Lead GK Counsel will have joint responsibility for preparing and filing these documents. They will work together jointly to prepare initial drafts of these documents as expeditiously as possible. They also will take all other steps procedurally necessary for TOP and TIM to participate in the Licensing Proceeding as a single entity, such as modifying LSN-related filings and appearances of counsel, if necessary.

15. Neither Lead FPM Counsel nor Lead GK Counsel will cause to be filed any document purporting to be a joint filing of the Parties or the Joint Timbisha Shoshone Tribal Group without the express written permission of the other. For purposes of this Plan, written permission includes electronic or telephonic facsimiles, or e-mail bearing the e-mail address of Lead FPM Counsel or Lead GK Counsel.

For TOP and the Kennedy Group:	For TIM and the Beaman Group:
 Douglas M. Poland Godfrey & Kahn, S.C. Attorney for TOP and the Kennedy Group	 Darcie L. Houck Fredericks Pecbles & Morgan LLP Attorney for TIM and the Beaman Group
 Affirmed by Joc Kennedy, TOP Representative	 Affirmed by Ed Beaman, TIM Representative

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For TOP and the Kennedy Group:	For TIM and the Beaman Group:
 Douglas M. Poland Godfrey & Kahn, S.C. Attorney for TOP and the Kennedy Group	 Darci L. Houck Fredericks Peebles & Morgan LLP Attorney for TIM and the Beaman Group
 Affirmed by Joe Kennedy, TOP Representative	 Affirmed by Ed Beaman, TIM Representative

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EXHIBIT B



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

MAR 01 2011

**JOE KENNEDY, PAULINE ESTEVES,
MADELINE ESTEVES, ANGIE BOLAND,
AND ERICK MASON,
PLAINTIFFS/APPELLANTS**

v.

**PACIFIC REGIONAL DIRECTOR,
BUREAU OF INDIAN AFFAIRS,
DEFENDANT/APPELLEE.**

ORDER

Appellants challenge the February 17, 2009, decision by the Director of the Pacific Region to reject the validity of actions taken by the General Council of the Timbisha Shoshone Tribe at a special meeting held January 20, 2008. For the reasons set out below, the Director's decision is affirmed.¹ Furthermore, as elaborated in Section VIII, I will recognize the government led by George Gholson for the limited purpose of holding a special election.

I. Background

The Timbisha Shoshone Tribe adopted its Constitution in 1986. The Constitution vests government powers in a General Council (GC), which consists of all tribal members over 16 years of age. (Constitution Article IV section 2). Management of the Tribe's affairs is delegated to a five-person Tribal Council (TC) (*Id.*, section 3). The Constitution also authorizes the establishment of a judicial branch of government, (*Id.*, section 1), but so far the Tribe has not established a separate judiciary.

In 2007, the TC broke into political factions. The last meeting held by a TC recognized by the Bureau of Indian Affairs (BIA) occurred on August 25, 2007. Three members of the TC walked out of that meeting (interested parties TC members Beaman, Beck, and Casey). Appellants Chairman Kennedy and TC member M. Esteves stayed at the meeting and purported to continue to conduct business as the TC. In November 2007, both factions purported to hold elections, but the Bureau deemed both elections invalid.

¹ As more fully set out in the "History of Appeals" section below (Section V), Kennedy opponents G. Gholson, M. Cortez, and W. Eddy filed a related appeal with the Regional Director on April 24, 2009, which was consolidated with the current appeal. On February 23, 2010, those parties withdrew their appeal.

The Tribe's General Council met on January 20, 2008, and voted on four resolutions presented by Chairman Kennedy. The first resolution validated the Kennedy faction election from the preceding November. The second resolution approved the acts of Kennedy and M. Esteves subsequent to the August 25 walk-out by Beaman, Beck, and Casey. The third resolution purported to interpret the Constitutional provision regarding "resignation" from the TC. The fourth resolution dealt with gaming development, and is not relevant to this appeal.

On February 17, 2009, at the culmination of the complex appeals history set out in Section II below, the Regional Director (RD) rejected the validity of the GC resolutions of January 2008. Kennedy appealed the Regional Director's decision on February 24, 2009, which appeal is the subject of this Order. According to a decision letter issued by the Superintendent on February 24, 2010, the BIA does not currently recognize the validity of any Tribal Council. In the months leading up to the Tribe's regularly-scheduled elections in November 2010, the BIA attempted to negotiate with the disputing factions to establish a framework for holding a special election. That attempt failed, and the factions held separate elections. To date, the BIA has not recognized the validity of either election.

II. Procedural timeline

December 14, 2007: the Superintendent rejected both factional elections held in November 2007.

January 11, 2008: Kennedy appealed the Superintendent's December 14 decision to the RD.

January 20, 2008: Kennedy held a special meeting of the GC. At that meeting, the GC voted on four resolutions presented by Kennedy, which Kennedy asserts should be accepted as valid acts of the Tribe to resolve their intra-tribal dispute through tribal means.

February 8, 2008: Kennedy filed a Statement of Reasons in support of his January 11 appeal.

February 29, 2008: The Superintendent reversed his December 14 decision, in reliance on the intervening GC meeting on January 20, 2008. Based on resolutions passed by the GC on January 20, 2008, the Superintendent accepted the Kennedy TC as representing the Tribe.

March 17, 2008: TC member Beaman appealed the Superintendent's February 29 decision; Beaman filed his Statement of Reasons on April 14.

February 17, 2009: The RD decided that the acts purportedly taken by the GC on January 20, 2008, exceeded the GC's authority and denied due process to interested parties. The RD reversed the Superintendent's decision, and denied recognition to any TC other than the one put in office via the last valid election, held in November 2006.

February 24, 2009: Kennedy submitted an appeal to the IBIA, appealing the RD's February 17 decision. The Assistant Secretary – Indian Affairs took jurisdiction over the appeal.

April 24, 2009: Interested parties Gholson, Eddy, and Cortez, purporting to be TC members, filed an administrative appeal of a different decision by the RD (see details in Section V, below). The Assistant Secretary took jurisdiction over that appeal (later withdrawn), and consolidated it with the Kennedy appeal.

June 22, 2009: Assistant Secretary signed first scheduling order.

July 13, 2009: Assistant Secretary signed second scheduling order.

February 19, 2010: Assistant Secretary signed third scheduling order.

February 23, 2010: Gholson, Cortez, and Eddy withdrew their appeal.

March 19, 2010: Kennedy filed his substantive brief as mandated by scheduling order.

April 16, 2010: Beaman filed a Response Brief.

April 30, 2010: Kennedy filed a Reply Brief with a box of supporting documents.

III. Applicable law

A. Relevant Federal law

1. The Department of the Interior (Department) has both the authority and the responsibility to interpret tribal law when necessary to carry out the government-to-government relationship with the Tribe. *Greendeer v. Minn. Area Director*, 22 IBIA 91, 95 (1992), citing *Reese v. Minneapolis Area Director*, 17 IBIA 169, 173 (1989).
2. "BIA 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." *Greendeer v. Minn. Area Director*, 22 IBIA 91, 97 (1992).
3. "The Secretary of the Interior is charged not only with the duty to protect the rights of the tribe, but also the rights of individual members. And the duty to protect these rights is the same whether the infringement is by non-members or by members of the tribe." *Milam v. Dept. of the Interior*, No. 82-3099; 10 ILR 3013, 3017 (D.D.C. 1982); quoted at *Seminole Nation v. Norton*, 223 F. Supp. 2d 122, 137 (D.D.C. 2002).
4. The Federal Government has a duty to recognize, if at all possible, a tribal government with which it can carry on government-to-government relations. *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983).
5. The Secretary of the Interior has a duty to ensure that trust resources belonging to a tribe, or Federal resources allocated to a tribe, are transmitted to an entity that legitimately represents the tribe. *Seminole Nation v. United States*, 316 U.S. 286 (1942); *Milam v. U.S.*, *supra*.

B. Applicable Tribal Law

1. **Timbisha-Shoshone Constitution Article IV (1):** The Tribe's Constitution identifies the three parts of the Tribal government – General Council, Tribal Council, and Judiciary – and provides that none of these branches "shall exercise any powers belonging to one of the other branches, except as otherwise specified in this document."
2. **Timbisha-Shoshone Constitution Article IV section 3:** "The Tribal Council shall exercise, concurrently with the General Council, all the powers delegated to it by the General Council in Article V of this document and otherwise vested in the Tribal Council by this document."
3. **Timbisha-Shoshone Constitution Article VI section 4:** Tribal officers shall hold office for two years.
4. **Timbisha-Shoshone Constitution Article VI section 4(b):** "General elections to vote for tribal council members shall be held annually on the second Tuesday of the month of November. Notice of the general elections shall be posted by the Secretary of the Tribal Council at least 20 days before such election at the Tribe's business office, the voting place, and at three or more additional public places."
5. **Timbisha-Shoshone Constitution Article VIII section 3(b):** "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 General Council members to the Tribal Council requesting a special meeting. The notice in regard to any special meeting shall be given at least three (3) days prior to the meeting and shall specify the purpose of the meeting."
6. **Timbisha-Shoshone Constitution Article VIII section 2(b):** "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."
7. **Timbisha-Shoshone Constitution Article X section 1:** "The Tribal Council shall declare a Tribal Council position vacant for any of the following reasons:
...
b. When a Tribal Council member resigns;
...
d. When a Tribal Council member is removed from office;
e. When a Tribal Council member is recalled from office"
8. **Timbisha-Shoshone Constitution Article XI:** This section addresses Removal and Recall of Tribal Council members. Section 1 sets out the procedural requirements for removal of the member by the Tribal Council itself; section 2 sets out the procedural requirements for recall of the TC member by the General Council. Both sections require a public hearing where charges must be articulated and the member permitted to present a defense against those charges (Article XI section 1(d)(2); section 2(c)).

9. **Timbisha-Shoshone Constitution Article XI section 1(d)(3):** "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 the subject of the removal request shall not vote nor serve in his or her capacity as a Tribal Council member in the removal proceedings."

10. **Timbisha-Shoshone Constitution Article XIV section (5)(h):** "(The Tribe may not) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."

IV. Background

A. The August 25, 2007, Tribal Council meeting

The dissolution of the TC occurred at a TC meeting held August 25, 2007. The TC meetings are open to all members of the Tribe, and there were a number of such non-TC members at the August 25 meeting. One item of business for that meeting was to hear charges of misconduct in office against TC members Beck and Beaman, and their defenses to those charges. The Tribe's Constitution directs that "(t)he Tribal Council member who is the subject of the removal request shall not vote nor serve in his or her capacity as a tribal Council member in the removal proceedings." A tribal member at that meeting suggested that Beaman and Beck each be precluded from the removal proceedings of the other. While such a suggestion was plainly contrary to the Constitution's provision, and finds no support in the Tribe's ordinances, Chairman Kennedy put the proposal to the vote of all the tribal members present at the TC meeting. In response to the Chairman's decision, Beaman and Beck walked out of the meeting, as did TC member Casey and some of the other tribal members. After Beaman, Beck, and Casey walked out of the TC meeting, Chairman Kennedy decided that their departure constituted an admission of guilt regarding the charges against them.

The meeting minutes are explicit: immediately after the Chairman "stated" that Beaman and Beck were guilty of the charges against them, a motion was made to declare that Beaman and Beck were removed from the TC, but no vote was taken and the motion died. Nonetheless, the very next act at that TC meeting, as reflected in the minutes, was to replace Virginia Beck with Margaret Armitage as a TC member. Although this was a TC meeting, not a GC meeting, the Chairman permitted all the tribal members present to vote. The vote was 17 – 0 in favor of replacing Virginia Beck with Margaret Armitage.

The Tribe's Constitution requires that the *Tribal Council* must declare that a position on the TC is vacant, and that no business may be conducted by the TC without a quorum. After the departure of Beaman, Beck, and Casey, there was no quorum of the TC, and no possibility of a valid action by the TC. The record also makes it clear that the tribal members who remained at the TC meeting never purported to remove Beaman and Beck from the TC.

For these reasons, the Superintendent in his December 14, 2007, decision, and the Regional Director in his February 17, 2009, decision, correctly found that the acts by Chairman Kennedy at the August 25, 2007, TC meeting were invalid.

B. The November 2007 elections

Both factions purported to hold elections in November of 2007. According to Kennedy, there were four seats to fill: the terms in office had expired for himself and Casey; Beaman's term in office did not expire for another year, but he had been removed from office; and Beck had been removed from office and her term had expired. Thus the only carry-over officer was Madeline Esteves. According to the report on the Kennedy election, prepared by Indian Dispute Resolution Services, out of 262 eligible tribal voters, 117 ballots were cast in the Kennedy election of Nov. 13, 2007. The top four vote-getters were placed on the TC: Kennedy (79); M. Cortez (74); M. Armitage (69); P. Esteves (65).² Casey was included on the Kennedy faction's ballot, receiving seven votes. Beaman and Beck appealed the Kennedy election to the Election Board established by the Beaman faction via their resolution 2007-28, adopted at a meeting of the Beaman faction on September 22, 2007³.

Simultaneous with the Kennedy faction election, the Beaman faction purported to hold an election to fill the three vacancies created by the expiration of the terms in office for Kennedy, Beck, and Casey. Fifty-four ballots were submitted. The top three vote-getters were Doug (not George) Gholson (41); Casey (37); and Beck (30). According to the Beaman faction, these three joined carry-over officers Beaman and M. Esteves on the TC.

The question of which, if either, of these elections was valid, is not the topic of this appeal.⁴ Neither the Superintendent nor the RD deemed either election valid prior to the GC meeting of January 20, 2008. The Superintendent specifically rejected both elections in his decision letter of December 14, 2007. The Superintendent's reasoning is sound, and leaves no doubt that the Tribe was suffering from an important intra-tribal dispute after the November 13, 2007, elections, to wit:

² Ms. Pauline Esteves has been a key elder in the Tribe for years, playing a vital role in its formation. Indeed, Ms. Esteves was Chairman of the Tribal Council at the time the Constitution was adopted. Evidence in the record shows that P. Esteves was convicted of a felony in 1998; section 4.2 of the Tribe's election ordinance bars a convicted felon from office until "ten years after the completion of any punishment." It is unclear from the record when the ten-year ban on P. Esteves' holding office expires.

³ Beaman, Beck, and Casey held a purported TC meeting on September 22, 2007, at which the three of them voted on resolutions. Kennedy and M. Esteves purported to pass TC resolutions via a "polled vote" on September 15. It is clear on the face of the Kennedy faction resolutions that only Kennedy and M. Esteves voted on them.

⁴ According to the Notice of Appeal filed February 24, 2009, by counsel for Kennedy, "[t]he decision being appealed is Regional Director Dale Morris's decision of February 17, 2009, reversing Superintendent Troy Burdick's previous order accepting the action of the January 20, 2008, meeting of the Timbisha Shoshone General Council in ratifying the removal of three members of the Timbisha Shoshone Tribal Council." Thus the only question on appeal is whether the resolutions passed by the General Council on January 20, 2008, were valid. On March 19, 2010, counsel for Kennedy submitted a document titled "appeal of the Tribal Council of the Death Valley Timbi-Sha Shoshone Band of California from the February 17, 2009 Decision of the Pacific Regional Director, Bureau of Indian Affairs," which is accepted as the substantive brief called for in the scheduling order of February 19, 2010.

Kennedy and his supporters believed that the TC consisted of Kennedy, Armitage, M. Esteves, Cortez, and P. Esteves.

Beaman and his supporters believed that the TC consisted of Beaman, M. Esteves, Doug Gholson, Beck, and Casey.

The BIA continued to recognize Kennedy, Beaman, M. Esteves, Beck, and Casey.

C. The January 20, 2008, General Council meeting

On January 20, 2008, the Tribe held a special meeting of the General Council. Chairman Kennedy submitted four resolutions for approval by the GC. The GC approved the resolutions.

Resolution 2008-01, the first resolution passed by the GC, purported to ratify the Kennedy election of November 2007.

Resolution 2008-02 purported to ratify the actions of the Kennedy-lead TC after August 25, 2007.

Resolution 2008-03 purported to interpret the Tribe's Constitution. The Constitution provides that "[t]he Tribal Council shall declare a Tribal Council position vacant . . . [w]hen a Tribal Council member resigns" Art. X Sec. 1(b). Resolution 2008-03 reads "a Tribal Council member 'walking out' of a meeting, along with any other factors, can be used as the basis in determining the Tribal Council member resigning his or her Tribal office."

(Resolution 2008-04 dealt with gaming development, and is not relevant to this decision).

V. History of appeals

After the TC split in August 2007, both factions purported to wield the authority of the TC. Both factions held elections for tribal office in November 2007. Over the ensuing month, the parties and others sought recognition from the Superintendent. On December 14, 2007, the Superintendent rejected both of the factional elections, and stated the continuing recognition of the last validly-elected government.

On January 11, 2008, Kennedy filed his notice of appeal of the Superintendent's December 14 decision. On January 20, 2008, the GC passed the resolutions that are the focus of this appeal.

On February 9, 2008, the Superintendent reversed his decision, in a decision letter accepting that the Kennedy faction would be recognized as the tribal government, basing his decision on the acts of the GC at the January 20 meeting.

On March 17, 2008, interested parties Beaman, Beck, and Casey appealed the Superintendent's decision to the RD. As explicated in Beaman's Statement of Reasons, filed April 14, 2008, "the sole issue presented in this appeal is whether the General Council may resolve an intra-tribal dispute by adopting resolutions ratifying actions leading up to and including a General Election

that are in violation of the Timbisha Shoshone Constitution." On February 17, 2009, the RD reversed the Superintendent. Kennedy appealed the RD's decision to the Interior Board of Indian Appeals on February 24, 2009. I took jurisdiction over that appeal on March 10, 2010.

On September 20, 2008, Kennedy's opponents, apparently led by George Gholson, purported to hold a special GC meeting. On October 17, 2008, the Superintendent issued a decision letter accepting the actions taken at the September 20, 2008, meeting, and recognized a tribal government headed by George Gholson as Chairman. On November 13, 2008, Kennedy filed an appeal of the October 17 decision (as amended October 20 and 21), with the RD. On December 4, 2008, the RD affirmed the Superintendent's decision, and recognizing the Gholson faction as the TC. On December 22, 2008, however, the RD rescinded his December 4 decision to permit adequate time to file required documents. Kennedy filed all his appeal documents by January 26, 2009. On March 24, the RD reversed the Superintendent, and again stated Bureau recognition of the TC that was elected in 2006. George Gholson, Margaret Cortez, and Wallace Eddy appealed the RD's decision to the Interior Board of Indian Appeals on April 27, 2009. I took jurisdiction over Gholson appeal on May 8, 2009, and consolidated it with the Kennedy appeal.

On February 23, 2010, the Gholson appellants sent a letter to serving as a "formal withdrawal" of their appeal.

VI. Summary assessment of the Regional Director's findings

As stated by appellant Beaman, "the sole issue presented in this appeal is whether the General Council may resolve an intra-tribal dispute by adopting resolutions ratifying actions leading up to and including a General Election that are in violation of the Timbisha Shoshone Constitution." Statement of Reasons filed on behalf of Beaman, Beck, and Casey dated April 14, 2008; page 1.

The Regional Director answered that question in the negative, finding that "the August 25, 2007, actions by Chairman Kennedy and the General Council members were beyond the scope of their constitutional authority and far exceed their powers in their attempts to remove Ed Beaman and Virginia Beck. The ratification of these actions by the General Council on January 20, 2008, was inappropriate and also was beyond their constitutional authority, and these actions clearly violated Ed Beaman and Virginia Beck's rights to due process. Furthermore, it would be inappropriate for the Bureau of Indian Affairs to recognize tribal actions that violate provisions of Tribal laws." RD's decision of February 17, 2009, page 9.

VII. Analysis

My office has reviewed the extensive administrative record and the filings of the parties in this matter. While it is a very important principle of Indian law that the Federal government should defer to decisions of a tribal government when attempting to resolve internal disputes, such a presumption of deference can never permit the Federal government to accept actions by a tribal entity that are plainly contrary to the Tribe's own laws. In the matter at hand, the Tribe's Constitution permits the TC to "declare" a vacancy on the TC when a member "resigns." The word "resign" is a plain English word, with straightforward dictionary definitions:

- to give (oneself) over without resistance;
- to give up deliberately; esp: to renounce (as a right or position) by a formal act
- to give up one's office or position: QUIT

Webster's 9th New Collegiate Dictionary © 1985

The common thread through all of these definitions is that "resignation" is the voluntary act of the person resigning. One party cannot impose resignation on another party. I do not accept that the Tribe's Constitution permits the GC to distort the plain definition of "resign" such that the TC or GC can expel a TC member from the TC against the will of that member.

The Constitution, viewed in its entirety, supports my interpretation. It sets out very explicit procedures to be followed whenever the TC or the GC wishes to expel a TC member against that member's will. The existence of such provisions reinforces the conclusion that the Constitution does not permit "involuntary resignation."

A further point to raise is that the GC never purported to take the specific act that would be necessary in order to accomplish the goal of putting the winners of the Kennedy faction election into office. While resolution 2008-03 purported to interpret "resign" in such a way as to permit the TC or GC to find that Beaman, Beck, and Casey had resigned, the GC never did "declare" that there was a vacancy on the TC. Therefore, there was no formal act by a valid TC or GC that purported to expel Mr. Beaman from his seat on the TC, and the GC's resolutions purporting to validate the Kennedy faction's election cannot accomplish the involuntary removal of Mr. Beaman.

While I deem the unconstitutional "resignation" to be sufficient basis for rejecting the emplacement of the Kennedy faction as Tribal Council through the January 20 resolutions, I would also note for the record that the failure to include the four resolutions in the notice of the upcoming Special General Council meeting seriously undermines the validity of the meeting notice itself. Obviously, the Chairman had those resolutions in his possession prior to holding the meeting; distributing them to the members would ensure compliance with the constitutional mandate to "specify the purpose of the meeting" Art. VII sec. 7(3)(b).

The passage of time since the Special General council meeting constitutes a third reason not to give effect to the acts of that meeting. Even if the Department accepted the validity of all the acts purportedly taken by the General Council at that meeting, the fact remains that more than three years have passed since the November 2007 election. Under the Tribe's Constitution, officers serve only two year terms in office. The terms purportedly begun in November 2007 expired more than a year ago; furthermore, a great deal has transpired with the Tribe in the intervening years. For the Department to attempt to recognize those long-past-term officers would not provide the Tribe with a useful resolution to its dispute.

VIII. Recognition of Gholson government for limited purpose

The final decision on this appeal leaves the long-standing break in government-to-government relations unresolved. But the Department has a duty to recognize a government if at all possible. Since my decision on the appeal has not provided a solution, I must seek another way to reestablish a government-to-government relationship between the United States the Tribe. At present, there are two putative Tribal Councils, one headed by Joe Kennedy, and the other by George Gholson. Where two unrecognized factions hold competing elections, I usually cannot accept that the result of either election expresses the will of entire Tribe. In certain unusual circumstances it may be possible to identify a valid government even when competing elections have been held, but such circumstances are not present in this case.

The Department must use the least intrusive means possible to overcome the obstacles presented by the long hiatus in government-to-government relations. Even though neither of November's elections was sufficiently valid to compel me to recognize the outcome, I find it would be unacceptably intrusive to ignore the elections entirely. That is to say, while I am not bound to recognize the results of either of the two elections, it is permissible for me to do so. The elections provide me with information from which I can make a reasonable inference respecting the will of the majority of the Tribe in a manner that minimizes Federal intrusion into tribal mechanisms. On the other hand, it is very important to have a tribal government that is put in place by valid elections. Therefore, I will recognize one of the two putative governments elected in November, for the limited time of 120 days from the date of this order, and for the limited purpose of carrying out essential government-to-government relations and holding a special election that complies with the tribal law.

For this limited purpose and time, I will recognize the Tribal Council headed by George Gholson. Two reasons support my decision. First, based on the information submitted by the factions, there were approximately 137 votes cast in the Gholson-conducted elections, versus about 74 in the Kennedy election. This very significant difference argues strongly that it is less intrusive to vest limited recognition in the Gholson group than in the Kennedy group.

Second, the Kennedy election was facially flawed by its exclusion of certain Tribe members. I understand very well that Mr. Kennedy believes 74 people shown on the tribal roll were wrongfully enrolled and should be disenrolled; I understand that Mr. Kennedy believes that those people have already been disenrolled. But the Department has consistently and explicitly rejected the validity of those disenrollments on procedural grounds. To be clear, the Department takes no position on the merits of the allegations respecting the qualifications for membership for the 74 members at issue. Disenrollments conducted in compliance with tribal law and Indian Civil Rights Act (ICRA) must be honored by the Federal government. But until such time as the Tribe conducts it disenrollments in a manner consistent with tribal law and ICRA, those members remain on the rolls, and barring them from voting fatally invalidates an election.

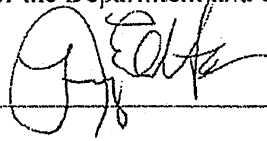
IX. Conclusion

The longstanding tribal government dispute within the Timbisha Shoshone Tribe was not resolved by the elections conducted by the competing factions in November 2007, nor by the

unconstitutional resolutions passed by the GC at the special meeting in January 2008. I affirm the Regional Director's decision to reject the validity of the resolutions dated January 20, 2008. In order to fulfill the Department's duty to recognize a tribal government if possible, for purposes of carrying out government-to-government relations, I will recognize the government led by George Gholson for the next 120 days, for the limited purpose of carrying out government-to-government relations and conducting a special election.

Pursuant to 25 C.F.R. § 2.6(c), this decision is final for the Department and effective immediately.

Dated: MAR 01 2011



Larry Echo Hawk
Assistant Secretary – Indian Affairs

CERTIFICATE OF SERVICE

I certify that on the 2nd day of March, 2011, I delivered a true copy of the foregoing Order to each of the persons named on the attached list, either by depositing an appropriately-addressed copy in the United States mail, or by hand-delivery.

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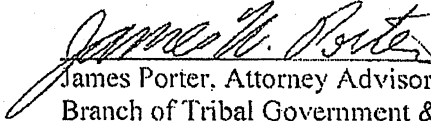

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EXHIBIT C



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

JUL 29 2011

The Honorable George Gholson
Chairman, Timbisha-Shoshone Tribe
1349 Rocking W Drive
Bishop, California 93514

Dear Chairman Gholson:

This letter responds to communications sent by the Timbisha-Shoshone Tribe (Tribe) to the Superintendent of the Central California Agency of the Bureau of Indian Affairs, and to the Director of the Pacific Regional Office of the Bureau (RD). You informed the Bureau that the Tribe conducted an election on April 29, 2011, in compliance with tribal law and as requested by my Order of March 1, 2011. My decision on March 1, 2011, resolves matters appealed to the Interior Board of Indian Appeals (IBIA) over which I took jurisdiction and that related to the Tribe's need for Federal recognition of the Tribe's representatives.

This letter finalizes my office's disposition of matters related to the recognition of the Tribe's representatives that I relayed in my March 1 order so that necessary Federal actions may be taken by the Bureau of Indian Affairs to continue government-to-government relations with the Tribe's recently elected leadership.

Background: Resolution of appeals did not settle internal government dispute

Factions led by Joe Kennedy and Ed Beaman held competing elections in November 2007. The Bureau rejected both elections. At a special General Council meeting in January 2008, the Tribe purportedly voted to validate the Kennedy election and actions of the Kennedy-led Tribal Council. The Superintendent accepted the acts of the General Council, but the RD reversed the Superintendent, and rejected the General Council's actions. The RD's decision was appealed to the IBIA, and the Assistant Secretary took jurisdiction. Review and analysis of the extensive record took months.

During the long pendency of the appeal, the factions continued to vie for Federal recognition as the tribal government. On February 24, 2010, the Superintendent had issued a decision denying Federal recognition of any tribal council. In the summer of 2010, the Bureau undertook negotiations with the Kennedy faction and the opposing faction, led by George Gholson, to facilitate a special election in late 2010, but an enrollment dispute stymied that effort. The factions held separate elections on the constitutionally-established date in November 2010, resulting in competing tribal councils.

On March 1, 2011, I issued an order (March 1 Order) affirming the RD's rejection of the resolutions passed at the General Council meeting held on January 8, 2008. As elaborated in the March 1 Order, my affirmation of the RD alone left the Tribe still without a federally-recognized government. The Federal Government has a duty to recognize a tribal government if possible.

The Tribe's intractable membership disputes made internal resolution of the government dispute apparently impossible, and hindered the Federal Government's ability to meet its duty to recognize a tribal government for the purposes of carrying Federal dealings with the Tribe. I included in the March 1 Order a decision to recognize the Gholson factional government (March 1 government) for a limited time and for the limited purpose of conducting government-to-government relations necessary for holding a special election. The March 1 government chose to act under the authority of the March 1 Order, and held an election on April 29, 2011. By complying with tribal law, the special election reflects the will of the Tribe and enables the Federal Government to unconditionally recognize a tribal government for the purposes of carrying out Federal dealings with the Tribe.

Election Analysis: The March 1 government complied with tribal law

On election day, April 29, the Tribe's Election Committee issued the preliminary vote count, showing that, out of a field of eleven candidates, George Gholson had obtained the second-most votes (159 - two fewer than first-place finisher Bill Eddie), and Joe Kennedy the fewest (60). Mr. Kennedy and others filed an appeal with the Election Committee, which held a hearing on the appeal. The Election Committee ruled against the appellants and certified the results of the April 29 election.

The Tribe (via the April 29 government) requested the Bureau to recognize the newly-elected tribal government. In a memorandum dated June 26, 2011, the Superintendent's office provided an analysis of the April 29 election. As fully set out in that report, the Superintendent's office determined that the election was conducted in compliance with tribal law.

The Department should recognize the results of the April 29 election

The recognition of a tribal government by the Federal Government is an important act, charged with solemn commitments; an act upon which the maintenance of the government-to-government relationship depends. The courts have made it clear that tribal government disputes must be resolved by the affected tribe if at all possible, and that the Bureau should be very hesitant of getting involved in a tribe's internal disputes. "We commend the BIA for its reluctance to intervene in the election dispute." *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983). Similarly, "[i]t is a well-established principal of federal law that intra-tribal dispute should be resolved in tribal forums. This rule applies with particular force to intra-tribal disputes concerning the proper composition of a tribe's governing body." *Bucktooth v. Acting Eastern Area Director*, 29 IBIA 144, 149 (1996).

Guided by the courts and by our own commitment to respect for tribal sovereignty and self-determination, this Department urged the Tribe to resolve its internal disputes through tribal mechanisms, specifically by conducting a valid tribal election on the constitutionally-mandated date last November. The Tribe failed to do so. Therefore I issued the March 1 Order, giving limited recognition to the Gholson government, as the least intrusive means of reaching a resolution of the tribal dispute. According to the Superintendent's report, the March 1 government held a special election that complied with the Tribe's election laws, and the Election Committee certified the election results.

As the Tenth Circuit Court of Appeals has explained, certification of an election result by a tribe's election committee enables the Bureau to carry out government-to-government relations with that tribe:

Once the Cherokee Tribal Election Board certifies an election result, the Department can carry out its statutory obligation to interact with the legal government, and does not need to reexamine the results of the tribal election.

Wheeler v. Dep't of the Interior, 811 F.2d 549, 552 (10th Cir. 1987).

Similarly, citing to *Goodface v. Grassrope* and *Wheeler v. Dep't of the Interior*, the Eighth Circuit stated: "Once the dispute is resolved through internal tribal mechanisms, the BIA must recognize the tribal leadership embraced by the tribe itself." *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 943 (8th Cir. 2010).

The April 29 election – not my March 1 Order – constituted the resolution of an internal tribal dispute in a valid tribal forum. The Timbisha Shoshone people embraced a tribal government by means of an election compliant with their Constitution. The Federal Government may not ignore or reject the results of a tribal election that clearly states the will of a sovereign Indian nation. Therefore, the Department should recognize the Timbisha Shoshone Tribal government consisting of the five people identified in the Election Committee's report as having received the most votes in the April 29 election.

Circumstances justify issuance of recognition decision by the Assistant Secretary

Agency Superintendents usually issue tribal government recognition decisions. I believe that the Assistant Secretary, exercising by delegation the Secretary's authority over the relations between Indian tribes and the United States, may issue a tribal government recognition decision when the facts of a case justify that unusual step. The fact that the Tribe held its special election in April in response to my March 1 Order, as well as the long hiatus in government-to-government relations that justified the March 1 order in the first place, provide such justification. In addition, my determination follows numerous efforts by the parties to seek administrative remedies over numerous years at all levels within the Department beginning with the BIA agency office.

In ordinary circumstances surrounding a disputed tribal government representative, the Bureau maintains a full government-to-government relationship by working with the last undisputed tribal government or representative. That option is unavailable here,¹ making it important that this letter provides the Bureau with an expeditious recognition of the Tribe's leadership.

¹ A key component of the 8th Circuit's decision in *Goodface v. Grassrope* was that the BIA's decision to recognize both competing tribal government factions was arbitrary and capricious because recognizing both was "in effect, recognizing neither," and "effectively created a hiatus in tribal government." Thus, *Goodface* stands for the proposition that the Bureau must look not only at the legality of its position, but also its actual effects on the Department's ability to carry out an inter-governmental relationship. The last undisputed government of the Timbisha Shoshone Tribe dissolved into the current factions in August of 2007. Under the principle set out in *Goodface v. Grassrope*, it would be arbitrary and capricious to recognize these factions as the tribal government today.

I also note that the March 1 Order limited the recognition of the Gholson government to a term of 120 days. That recognition expired on or about June 29, 2011. This fact is another reason why failure to make the Bureau's recognition of the April 29 government immediately effective would imperil the government-to-government relationship.

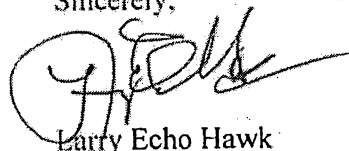
My decision to issue this letter is justified by the long hiatus in government-to-government relations, which has had numerous deleterious effects. These effects include the Tribe's inability to access Federal programs as provided for under the Indian Self-Determination and Education Assistance Act.

Documentary support for my decision consists of the Tribe's certification of the election – which includes a careful analysis and rejection of the Kennedy group's appeal of the April 29 election – as well as the election report produced by the office of the Superintendent, concurring with the conclusion reached by the Election Committee. Agency Superintendents are typically responsible for making tribal government recognition decisions, because they are close to and familiar with the tribes and their members in a way that Department officials in Washington, DC cannot be. The Superintendent's report supports the conclusion that the procedures followed by the Tribe in conducting the April 29 election were consistent with the Tribe's Constitution and bylaws.

Conclusion:

This letter follows inexorably from the March 1 Order's provisions for holding a special election. Acknowledging the Gholson government's authority to conduct an election, and providing clarity to the Bureau's recognition of the government elected thereby, are justified by the long hiatus in government-to-government relations, which has had numerous deleterious effects, including the inability to benefit from Federal programs and contracting. Today's letter, like the March 1 Order, is also justified by the need for the Department to comply with its duty to recognize a government representative if possible.

Sincerely,

A handwritten signature in black ink, appearing to read "Larry Echo Hawk", written over a circular stamp or seal.

Larry Echo Hawk
Assistant Secretary – Indian Affairs

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EXHIBIT D

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

In the matter of the
U.S. Department of Energy
High-Level Waste Repository

Docket No. 63-001-HLW

APRIL 1, 2009

TRANSCRIPT OF PROCEEDINGS

Oral Argument On the Admissibiliy of Contentions

Before the Administrative Judges:

CAB-02

Michael M. Gibson, Chairman

Alan S. Rosenthal

Nicholas G. Trikouros

1 >> JUDGE TRIKOUROS: All right. Well, as
2 I've done before, I'm going to defer additional
3 discussion of these themes for now and try and come
4 back to it later.

5 >> JUDGE GIBSON: Yeah, I -- we will come
6 back to the themes issue. There are some tribal
7 questions that I want to be sure that -- we need to
8 cover now. So I would like to turn to those now.

9 First, I'd like to discuss the issue of
10 standing. As I understand it, there are two entities
11 that claim to represent the Timbisha Shoshone Tribe.
12 The first group calls itself the Timbisha Shoshone
13 Tribe. But for purposes of the questions that I will
14 pose today, I'm not going to refer to that group as
15 the Timbisha Shoshone Tribe, but I will instead refer
16 to them as TIM. You will understand why in a minute.

17 The second group calls itself the Timbisha
18 Shoshone Yucca Mountain Oversight Program Nonprofit
19 Corporation, and not surprisingly, I don't want to
20 have to say that every time either. And so we will
21 simply refer to that group as TOP. So I'm going to
22 be referring to TIM and TOP. Does everybody know
23 who they are?

24 Okay. I think the record is clear that no
25 one who has entered an appearance here disputes that

1 the Timbisha Shoshone Tribe is an affected Indian
2 tribe under the Nuclear Waste Policy Act.

3 Now, as determined by the Secretary of
4 Interior, and as such, the Timbisha Shoshone Tribe is
5 to be accorded automatic standing here.

6 But just to be sure, I want to make sure
7 that there is not anybody in the room here who would
8 dispute that the Timbisha Shoshone tribe, itself, is
9 to be accorded automatic standing? No problem there,
10 right?

11 Okay. Speak now or forever hold your
12 peace. Unfortunately, both TIM and TOP claim to be
13 the sole legitimate representative of the Timbisha
14 Shoshone Tribe. And at least of the last filing we
15 had, which I think was at least last night or this
16 morning, TIM and TOP have been unable to resolve the
17 dispute between themselves as to which entity is
18 authorized to represent the tribe in this proceeding.

19 I need to make it clear, initially, to both
20 of you that this licensing board is in no position to
21 resolve the dispute between TIM and TOP in terms of
22 which group is the sole legitimate representative of
23 Timbisha Shoshone Tribe.

24 Instead, this is something that is going to
25 have to be worked out through the administrative and

1 judicial channels, where I understand a dispute is
2 pending. And again, just so the record is clear
3 here, do I understand correctly that there are two
4 appeals pending within the Bureau of Indian affairs
5 and another case pending in Federal District Court?

6 >> MS. HOUCK: Your Honor, Darcy Houck for
7 TIM.

8 >> JUDGE GIBSON: Yes.

9 >> MS. HOUCK: Currently, there are
10 actually three appeals in Interior. The first appeal
11 was decided at the regional director level on
12 February 17th recognizing the '06 '07 tribal
13 council as the last duly elected council and that
14 council is made up of Joe Kennedy, Ed Beanan,
15 Virginia Beck, Madeleine Estevez and Cleveland Casey.

16 And I will indicate that regardless of what
17 the ultimate outcome is on all of these appeals, four
18 of those five people are in the room today and this
19 is probably the first time since this dispute started
20 in 2007 that that has occurred.

21 So overall, the issues in this proceeding
22 are critically important to the tribe and regardless
23 of the ultimate outcomes, the tribes very much wants
24 to make sure that the impacts to the tribe, itself,
25 are addressed in this proceeding and that they have a

1 seat at the table. But with that said, the first
2 appeal, the regional director made the decision on
3 February 17th.

4 That was then appealed to the Interior
5 Board of Indian Appeals. Under Interior regulations,
6 the Assistant Secretary of Indian Affairs has the
7 ability to take jurisdiction within 20 days of the
8 filing of that appeal. That did occur in this case,
9 so acting Assistant Secretary George Staben has taken
10 jurisdiction over the first appeal to the IBIA.

11 The second appeal, the regional director
12 made a decision on March 24th also recognizing
13 the '06-'07 tribal council consisting of Joe Kennedy,
14 Ed Beanan, Virginia Beck, Madeleine Estovez and
15 Cleveland Casey.

16 There is a 30 day period that can be
17 appealed to the Interior Board of Indian Appeals at
18 which time, it's my understanding from the U.S.
19 Attorney's Office, I can't confirm this, but if an
20 appeal is made, the Assistant Secretary will likely
21 also take jurisdiction over that appeal.

22 There was an election in November, 2008,
23 that was conducted -- it was not approved by that '06
24 '07 council. It was the other faction. And there
25 has been an appeal as to that election, which a

1 decision is still pending at the Superintendent's
2 level.

3 So those are the three administrative
4 appeals that are pending.

5 >> JUDGE GIBSON: Is there also a case in
6 Federal District Court?

7 >> MS. HOUCK: There are actually -- my
8 understanding is there are two cases in Federal
9 Court, one that was filed I believe -- and I believe
10 in December. That one I believe is moot and nothing
11 has happened. I don't know, I would have to check.
12 That was filed on behalf of Mr. Kennedy by I believe
13 Judy Shapiro and George Foreman's law firm, I don't
14 know.

15 I believe the issue was resolved
16 administratively, though, by deciding -- by
17 retracting a December 4th decision.

18 There's a whole litany of decisions I think
19 you've seen from the pleadings between December 14
20 of '07 up through actually March 24th of last
21 week.

22 The second district court case was filed in
23 regards to the appeal that was decided on
24 January 17th. The U.S. Attorney's Office filed a
25 motion to dismiss based on the two recent decisions

1 and the fact that they have consistently since
2 November and indicated in their motion to dismiss
3 that pending resolution of all appeals, the Bureau of
4 Indian Affairs is recognizing for
5 government-to-government purposes, the tribal council
6 made up of Joe Kennedy, Ed Beaman, Virginia Beck,
7 Madeleine Estovez and Cleveland Casey, that the whole
8 matter is moot.

9 That case is likely -- we're in
10 discussions with the U.S. Attorney about withdrawing
11 that lawsuit. And that one may go away based on
12 their representation that that is the council that
13 they're going to be recognizing pending resolution of
14 these appeals.

15 >> JUDGE ROSENTHAL: Can I ask you a
16 question at this point? When the final determination
17 in the BIA is made, is that subject to judicial
18 review or does the BIA determination have finality?

19 What I'm getting at is, as Judge Gibson
20 pointed out, it's beyond our province to become
21 involved at all in this dispute. And I'm sort of
22 curious as to whether there is any basis for
23 concluding at this point that this dispute is going
24 to be ultimately resolved, whether administratively
25 or after a judicial review within this century.

1 >> MS. HOUCK: Once the Acting Assistant
2 Secretary makes his determination which is likely to
3 take roughly five months, probably, it is subject to
4 judicial review as a final agency action under the
5 APA.

6 >> JUDGE GIBSON: Okay. We heard from TIM,
7 with TOP. Just with respect to the factual
8 recitation that she gave, is there anything else that
9 you would like to add or correct?

10 >> MR. POLAND: Judge Gibson, there are two
11 things I would like to say. First of all, as far as
12 the November 28, 2008 election is concerned that is
13 not yet on appeal right now to BIA. There is no
14 appeal pending as to that election. So I do want to
15 make that correction.

16 >> JUDGE GIBSON: Thank you.

17 >> MR. POLAND: Second of all -- I'm sorry.

18 >> JUDGE GIBSON: I said thank you.

19 >> MR. POLAND: Okay. Second of all, Ms.
20 Houck referred to four or five members of the tribal
21 council being in this room. I understand, Your
22 Honor's statement that this particular Board does not
23 have the expertise or is not going to decide these
24 issues.

25 We would like to make clear, TOP would like

1 to make clear that the problem with deferring to what
2 the BIA might determine is that some of these issues
3 are not issues for the BIA to determine. They are
4 issues that are to be resolved by a sovereign tribe.

5 >> JUDGE GIBSON: Okay.

6 >> MR. POLAND: And the U.S. Supreme Court
7 has made clear that these are sovereign tribal issues
8 and that the BIA does not have a say over this.

9 >> JUDGE GIBSON: Okay, fair enough. And
10 we'll get to that in a minute.

11 Let me just go back to TIM now. Judge
12 Rosenthal asked if it would be resolved in this
13 century. I think you said you are hoping to get a
14 decision in five months and then that decision can be
15 appealed. Is that a fair statement?

16 >> MS. HOUCK: Yes, that is a fair
17 statement. I would like to note though that the
18 March 24th regional director's decision indicates
19 that there is a pending determination regarding the
20 November 11th, 2008 general election, and so we
21 are unsure what they're going to do as far as
22 recognizing that.

23 It was my understanding there was an
24 appeal. But there is some decision pending.

25 >> JUDGE GIBSON: Okay. And do you at

1 least agree with her with respect to the five month's
2 Board decision plus that can then be appealed to
3 Federal District Court?

4 >> MR. POLAND: I think that there is some
5 range, Your Honor, but I don't disagree -- it's a
6 matter of months as opposed to years.

7 >> JUDGE GIBSON: Fair enough. Thank you.
8 Okay. Now, I know that, you know, I made DOE answer
9 some questions earlier today that I knew were painful
10 for them. I'm going to do the same thing for you
11 guys.

12 And in the event that the pending dispute
13 in other forms is not resolved in your favor, which
14 would mean that your organization would not be found
15 to be the sole authorized representative of the
16 Timbisha Shoshone Tribe, and I know that that's
17 painful for both of you to make that assumption, but
18 just for purposes of helping us out here, we need to
19 try to make the record, okay.

20 It's my understanding that each of you is
21 nevertheless claiming that your organization meets
22 the requirements for standing as a matter of right in
23 failing that for discretionary intervention. And so
24 if that's correct, I want to make sure that we can
25 unpack that a little bit so that we will have a clear

1 record for purposes of entering an Order in this
2 case.

3 Let's begin with TOP. In your amended
4 petition to intervene, you argue that you've met the
5 requirements representational standing. Assume for a
6 minute that the Board grants your motion for leave to
7 file your amended petition, the NRC staff, as I
8 understand in answer to your amended petition has
9 conceded that you have satisfied the criteria for
10 representational standing. Is that your
11 understanding?

12 >> MR. POLAND: Yes, it is, Your Honor.

13 >> JUDGE GIBSON: Is that correct, staff?

14 >> MS. SILVA: That is correct.

15 >> JUDGE GIBSON: Thank you. But DOE in its
16 answer has not addressed this question as I
17 understand it, have you, with respect to TOP?

18

19 >>MR. ZAFFUTS: Yes, Your Honor, I believe
20 we have stated that they do not have representational
21 standing based on the pleadings they provided.

22 >> JUDGE GIBSON: Okay. And what was the
23 basis for that?

24 >>MR. ZAFFUTS: One moment, Your Honor. It
25 would have been in the pleading that DOE filed on I

1 believe it was Friday of last week in response to the
2 Amended Petition. And for representational standing,
3 as you know, an organization which is not asserting
4 standing on itself, must demonstrate that one of its
5 members who is authorizing the organization to
6 represent it, itself has standing.

7 And we do not believe that the information
8 provided in the pleading demonstrated that the
9 individual members have standing in their own right
10 and, therefore, there was no ability for TOP to have
11 representational standing.

12 I think we may have also mentioned that the
13 Articles of Incorporation and the corporate bylaws
14 state that TOP has no members and we may also have
15 relied on that.

16 >> JUDGE GIBSON: TOP, could you address
17 the two points that DOE just raised?

18 >> MR. POLAND: Certainly, Your Honor.

19 >>JUDGE GIBSON: Thank you.

20 >>MR. POLAND: TOP was formed specifically
21 and incorporated specifically to represent the
22 interests of the Timbisha Shoshone Tribe in these
23 very proceedings. That is its purpose. It stands in
24 place of the Timbisha Shoshone Tribe. It represents
25 the interest of the members of the tribe.

1 And so, Mr. Polansky says, well, TOP,
2 itself, is a corporate entity, and so it doesn't have
3 any members, it just has directors and that precludes
4 it from participating.

5 Your Honor, I would refer the Board to the
6 NEI vs. EPA case.

7 >> JUDGE GIBSON: What? Could you please
8 give us that case?

9 >> MR. POLAND: Sure. NEI vs EPA.

10 >> JUDGE GIBSON: Okay, NEI vs EPA. Okay,
11 I'm sorry, I just I didn't hear what you said.

12 >> MR. POLAND: Yes, YOur Honor. There,
13 the D.C. Circuit addressed the question whether the
14 environmental organizations there had standing. And
15 I don't see a big difference between the decision
16 that the D.C. Circuit made there where they clearly
17 held that the individual members addressed an injury
18 that they would suffer if they had standing.

19 And I don't see representational standing
20 as well as credential standing.

21 And I don't see a difference here. We have
22 submitted the affidavits of several members of the
23 Timbisha Shoshone Tribe who live in the traditional
24 home lands in the Death Valley area. They have set
25 out real concrete injuries that they will suffer

1 based on concessions in DOE's own Environmental
2 Impact Statements. They're members of the tribe.
3 They are current members of the tribe.

4 So we certainly don't see a problem with
5 representational standing.

6 >> JUDGE GIBSON: And are those members of
7 the tribe also members of TOP?

8 >> MR. POLAND: Two of them are on the
9 Board of Directors of TOP.

10 >> JUDGE GIBSON: Okay. Now, I do
11 understand that both DOE and the NRC staff are
12 opposing TOP's request for discretionary intervention
13 in this case?

14 >> MS. SILVIA: This is Andrea Silva from
15 the NRC staff. We did not address the discretionary
16 intervention because we found that they had standing
17 as -- representational standing.

18 >> JUDGE GIBSON: Well, just assume for the
19 sake of argument, that discretionary intervention is
20 on the table; do you have any problem with them being
21 accorded discretionary intervention in this case?

22 >> MS. SILVIA: No, we do not.

23 >> JUDGE GIBSON: DOE?

24 >> MR. POLONSKY: Thank you, Your Honor.

25 Mr. Polansky. I believe that the answer we filed on

1 Friday. Based on the petition provided, we do not
2 believe that TOP had discretionary standing.

3 I think in particular, we were conflicted
4 by the fact that whoever is the affected Indian tribe
5 really represents the interests of that tribe. So
6 whoever that entity is should be the entity that
7 represents them.

8 And to the extent that TOP is not the AIT,
9 then it shouldn't be given discretionary standing
10 because the interests of the tribe will already be
11 represented, for lack of a better word, Your Honor.

12 >> JUDGE GIBSON: Okay. Would you like to
13 respond to that, TOP?

14 >> MR. POLAND: Yes, I would, Your Honor,
15 thank you. I think that if we go through the
16 factors, Mr. Polansky mentioned one, are there other
17 entities that could represent the interests of TOP if
18 they were not granted discretionary intervention.
19 But that's only one of the factors.

20 That's not all the factors. One of the
21 first factors is will the participation assist the
22 Board in developing a sound record?

23 Here, there is no question that it will.
24 These are people, these are Timbisha Shoshone tribal
25 members who live at the Death Valley Springs. They

1 live in the area. They practice traditional tribal
2 customs and religions. They clearly will be injured.

3 And the views that they have, the injuries
4 that they will suffer, those need to be made a part
5 of the record. They must be made a part of the
6 record. And so if they are not participating, those
7 views will not be made a part of the record.

8 So I don't understand how DOE can say that
9 they will not, their participation would not assist
10 the development of a sound record.

11 The second factor that's to be considered
12 under Section 2.309 (e(1)) is the nature and extent of
13 the property financial or other interest in the
14 proceedings.

15 I did mention these yesterday at the end of
16 the day. We have culture, heritage interests that
17 are at stake here, our members do who live in the
18 Death Valley area. Clearly, those are interests that
19 ought to be considered. They are significant
20 interests. They are significant to the tribe and to
21 the members of TOP.

22 Third is the possible effect of any
23 decision or Order that may be issued in the
24 proceeding. And here, if an Order is issued, I think
25 it's a sort of a two-step process.

1 The first question is the NRC's staff
2 review of the EIS. If the EIS is lacking because
3 these cultural issues should be considered, clearly,
4 the NRC staff could choose to reject that EIS and
5 require a supplement.

6 But then as a second step, as well, the
7 Board could reject the application if the information
8 is not contained in the EIS. So none of those
9 factors which are the ones that are to be taken into
10 account weigh against us. They all weigh in our
11 favor. And then there are also several factors that
12 would weigh against granting discretionary
13 intervention.

14 We don't think any of those are present.
15 We don't think that there are other organizations
16 that can represent our interests.

17 Mr. Polansky mentions the other entity,
18 TIM. None of the members of TIM live in the Death
19 Valley area. They live outside the traditional
20 tribal homeland. They don't practice the traditional
21 tribal customs. They cannot represent the interests
22 of the people who live in the homeland. So those
23 interests will not be represented.

24 And then there's a question as well as to
25 whether the participation of TOP will inappropriately

1 broaden the issues or delay the proceeding. And we
2 talked about this yesterday. Mr. Silverman on behalf
3 of the DOE even focused on the word "inappropriately
4 broadened."

5 We certainly would submit that it is not
6 inappropriate to include TOP's concerns at this FE
7 contention stage.

8 >> JUDGE GIBSON: Okay. Thank you. TIM, I
9 understand that -- first of all, I guess I want to
10 know, are you all asserting standing as a matter of
11 right?

12 >> MS. HOUCK: Yes, Your Honor, we're
13 asserting standing as a matter of right.

14 >> JUDGE GIBSON: In the event, that, you
15 know, you don't get where you want to be with BIA?

16 >> MS. HOUCK: In the event that we don't
17 get there, we've also requested discretionary
18 standing and given the decision on the potential
19 appeals and the litigation that could follow could
20 take months or potentially at least more than a year
21 while this proceeding is moving very quickly.

22 And even though there is case law regarding
23 internal governmental affairs issues, there is also
24 case law looking at the Bureau having to recognize
25 some governmental entity for government-to-government

1 purposes when the tribe's dealing directly with a
2 federal agency.

3 For right now, the Bureau of Indian Affairs
4 has identified five people as who they are
5 recognizing as the Tribal Council. And regardless of
6 what happens in those appeals, if one of those
7 entities isn't allowed to participate in this
8 proceeding, they're not going to be able to make up
9 that time or be able to come back and correct
10 whatever errors or information is omitted here in
11 these proceedings to represent their members.

12 And TIM is indicating that as the Tribal
13 Council recognized by the Bureau, that they're
14 representing all of the members of the tribe.

15 So at this point, they do believe that
16 members of TIM are going to be directly impacted and
17 if the BIA is looking to them to make decisions on
18 behalf of the tribe, that would include all members.

19 We are not opposed to discretionary
20 standing for TOP. I, will put that on the record.
21 We think that the more information that this Board
22 has, particularly given the lack of information in
23 DOE's documents, the more informed the Board is going
24 to be as to the actual substantial and adverse
25 impacts that the tribe is likely to suffer in this

1 matter.

2 And those substantial and adverse impacts
3 that may be suffered by the tribe are not just
4 hypothetical or theoretical based on the
5 certification of the affected Indian tribe's data.
6 As the Secretary of Interior has basically certified,
7 that those impacts could occur and they haven't even
8 been analyzed sufficiently.

9 So the tribe does need to be represented in
10 these proceedings, and because of the unique
11 circumstances in this case and these outstanding
12 appeals and the Bureau's current position on this
13 matter, it would seem appropriate that the Board
14 would allow discretionary standing at a minimum to
15 the entities that have a legitimate right to claim
16 representation to the tribe -- of the tribe.

17 >> JUDGE GIBSON: Okay. Let's turn to your
18 claim for representational standing that you've made.

19 Now, I understand from DOE's answer that
20 they are claiming that you failed to address the
21 criteria for representational standing in your
22 Petition To Intervene by failing to identify a member
23 by name and address, by demonstrating that that
24 member has standing in his or her own right, and
25 showing that the member hasn't authorized

1 intervention on his or her behalf.

2 Do you agree with DOE that those are
3 defects in that pleading or do you wish to dispute
4 that?

5 >> MS. HOUCK: Your Honor, we don't believe
6 that there's a defect in the pleading. As we said
7 before, that the Bureau currently is representing
8 this group for government-to-government purposes, so
9 even if there's not a member that's actually -- the
10 members of the tribe as a whole is who they're acting
11 on behalf of and also in protection of the land base,
12 which includes the trust land as well as the use
13 rights of the tribe to the federal land.

14 If the Department of Interior would like a
15 list of each of the members of the tribes and their
16 address, we could provide that to the Board and to
17 DOE.

18 >> JUDGE GIBSON: I think it's -- yeah,
19 it's the Department of Energy, not the Department of
20 Interior.

21 >> MS. HOUCK: Department of Energy.

22 >> JUDGE GIBSON: That's okay. Hopefully
23 DOI already has that. Let's see. So you'd be glad
24 to provide that additional information to them?

25 >> MS. HOUCK: Yes.

1 >> JUDGE GIBSON: Okay. They may still
2 find that defective but I appreciate your offer and
3 thank you.

4 Now, with respect to organizational
5 standings, DOE argues that your alleged injuries are
6 not the distinct and palpable particular and concrete
7 injuries required to establish standing as a
8 non-affected Indian tribe. And I guess, DOE, could
9 you give us what specifically you find inadequate
10 about the injuries that TIM has alleged?

11 >>MR. ZAFFUTS: Your Honor, we took the
12 pleading at its face and the pleading assumed because
13 it appears -- TIM assumed that it was the only entity
14 that would be petitioning here as the AIT. So at the
15 time that TIM submitted it's petition, it assumed it
16 was the AIT and sought to intervene in this
17 proceeding on its automatic standing basis as the
18 AIT.

19 We don't believe that they pled that they
20 had organizational standings, because, as I said,
21 they assumed they were the AIT. We merely responded
22 to that by saying they haven't demonstrated
23 organizational standing. They don't request
24 representational standing and, therefore, they don't
25 meet discretionary standing.

1 Now, it's reasonable to make those
2 arguments because they assumed they were the AIT.

3 >> JUDGE GIBSON: Yeah, I think they
4 definitely made that assumption but that obviously,
5 you know what happens when you make assumptions.

6 NRC staff: Do you all have a position on
7 whether TIM has established standing,
8 representational or organizational standing here?

9 >> MS. SILVIA: We didn't address it
10 because we didn't think they were requesting it.

11 >> JUDGE GIBSON: Recognizing you didn't.

12 >> MS. SILVIA: Andrea Silva for NRC staff.

13 >> JUDGE GIBSON: Any objection? In the
14 event that TOP turns out to be the one that gets the,
15 you know, the golden ring here from BIA?

16 >> MS. SILVA: We would like to see them
17 demonstrate that they have met the requirements,
18 but --

19 >> JUDGE GIBSON: Which it sounds like
20 they can probably do. They just pled because they
21 assumed they were the AIT.

22 >> MS. SILVA It seems reasonable that they
23 would be able to --

24 >> JUDGE GIBSON: Okay, thank you. Now, if
25 they were to provide this information albeit

1 belatedly, DOE, would that be okay with you or are
2 you still going to object?

3 >>MR. ZAFFUTS: I can't answer that
4 question right now, Your Honor. I have to consult
5 with my client.

6 >> JUDGE GIBSON: How about staff, if they
7 do it belatedly?

8 >> MS. SILVIA: The one thing that I would
9 add that I wasn't aware of until this discussion, if
10 it's true, that none of TIM's members actually live
11 in Death Valley, that might complicate the way that
12 we look at TOP's standing, so it might not exactly be
13 the same.

14 >> JUDGE GIBSON: I'm sorry. Death Valley,
15 can you amplify on that point?

16 >> MS. SILVIA: The tribe traditional
17 homeland in Death Valley.

18 >> JUDGE GIBSON: Right, yeah.

19 >> MS. SILVIA: I thought I heard TOP's
20 counsel state that none of TIM's members resided in
21 Death Valley.

22 >> JUDGE GIBSON: I don't believe he said
23 that. I believe he said TOP's members -- a lot of
24 TOP's members do.

25 I'm not sure he said none of TIM's members

1 do. Right?

2 >> MR. POLAND: Your Honor, I believe that
3 I did say -- when we talk about TIM, again, we have
4 to be careful talking about organizations here.
5 Really what we're talking about as Ms. Houck
6 indicated is tribal councils and disputed tribal
7 councils.

8 So what I was referring to was the people
9 who are on the tribal council that Ms. Houck is
10 representing, those people do not live in the
11 traditional tribal homeland in and around Death
12 Valley.

13 >> JUDGE GIBSON: Okay. Do you want to
14 amplify on that point?

15 >> MS. HOUCK: Yes, Your Honor, I would
16 just like to say that TIM did not intervene on behalf
17 of one or two individuals. It was on behalf of the
18 tribal members as a whole, which the council that
19 they're acting under does also include Mr. Kennedy,
20 who is a part of TOP and is the other side of this
21 dispute, but he is also a member of both councils as
22 well.

23 >> JUDGE GIBSON: Okay. Does that help you
24 understand now and knowing with that additional
25 information, can you say if belatedly they supply you

1 with that information, will you be okay with them
2 getting standing in this case?

3 >> MS. SILVIA: Well, if TIM is not the
4 official representative of the government, then I'm
5 not sure their membership would be the same as their
6 tribal council. So I would still have questions
7 about who their members are.

8 >> JUDGE GIBSON: Fair enough. So you just
9 can't give me an answer.

10 >> MS. SILVIA: Right.

11 >> JUDGE GIBSON: That's okay. We have to
12 get accomplished what we can accomplished today.

13 DOE, are you still need to confer with your
14 client?

15 >>MR. ZAFFUTS: Yes, we would. But in the
16 discussion that has ensued since, I think there is a
17 complication that has arisen. And that is, if I hear
18 TIM and TOP's counsel correctly, we would have two
19 separate groups that if granted discretionary
20 standing, would be representative of the exact same
21 people; and that would be an interesting precedent
22 for the Board to set. And perhaps the Board would
23 want one entity representing those people, one entity
24 representing the tribe.

25 >> JUDGE GIBSON: Yeah, well, I appreciate

1 what you're saying, but, you know, that -- that may
2 be something that would be convenient for us. It
3 might be convenient for you, but it might not be
4 agreeable to them. And so, we basically have to try
5 to find out if there is a way for all of these people
6 to participate in this proceeding or not.

7 And that's what we're about this afternoon.
8 Okay. I think it is clear, however, and I think your
9 point is well taken, that there is no way that we
10 could allow both parties, both of these entities to
11 represent the tribe.

12 That in itself cannot happen. And I don't
13 think either one of them is asking us to do that. I
14 think you realize that we couldn't do that either.

15 >>JUDGE ROSENTHAL: Now this is just my
16 ignorance; are these two entities really operating in
17 cross purposes here?

18 They both were purporting to represent a
19 particular tribe, the interest of that tribe which
20 assertedly are being impacted in some way or would be
21 impacted in some way by the construction and/or
22 operation of this facility?

23 Now, I would think -- I understand that
24 there seems to be a jurisdictional dispute here, but
25 really, are these two organizations at loggerheads

1 with respect to precisely what the interests are of
2 their members, how those interests might be impacted
3 so that -- because I would have thought the
4 possibility that if one of these organizations
5 was allegedly admitted as -- on the basis of
6 representational standing, the other entity got in on
7 the discretionary standing, that there might be a
8 Board requirement two groups operate collegially.

9 And I'm just trying to find out whether
10 this is a Hatfield and McCoy situation where that
11 would not be possible.

12 I mean I would have hoped that there would
13 be some agreement as to how the interests of this
14 group that they're both purporting to represent would
15 be impacted by the -- the operation of this facility.

16 So I would like to get a little
17 clarification from both TIM and TOP as to just how
18 they see their relationship with each other.

19 >> JUDGE GIBSON: Before they answer the
20 question, Judge Rosenthal, I think it's interesting
21 that there's actually a third group, the Native
22 Community Action Council that we haven't gotten to
23 yet, so there is actually three.

24 >> JUDGE ROSENTHAL: Maybe we can put
25 three -- I'm just concerned about that, because it

1 didn't -- offhand, I would think that there would be
2 at bottom, even though there is a jurisdictional
3 battle, that when it came to the merits of this, that
4 they would be on the same track. But perhaps that's
5 not the case.

6 >> MR. POLAND: Your Honor, if I may, Doug
7 Poland for TOP. I think one thing that Ms. Houck and
8 I can probably agree on is that certainly we want to
9 both act in the best interests of the tribe itself,
10 the Timbisha Shoshone Tribe, and we would like those
11 interests to be represented.

12 Your Honor referred to -- Judge Gibson
13 referred to the Hatfield-McCoy type of situation.
14 And it's clear the dispute goes much deeper and
15 beyond this particular proceeding and has
16 implications for other proceedings as well.

17 We have said in our amended petition, we
18 believe that we are the AIT. We represent the AIT
19 and we should have AIT status. We set out the
20 reasons for that.

21 We have said as a secondary position,
22 however, that if we are not selected to be the AIT,
23 we would request respectfully that the Board rule in
24 a way that does not preclude our group, TOP from
25 participating in these proceedings, whether it's

1 through representational standing or otherwise.

2 So we certainly are looking out for the
3 best interests of the tribe as a whole.

4 >> JUDGE ROSENTHAL: You have a different
5 view as to how the interests of the tribe is best
6 served in this proceeding than is possessed by TIM?

7 >> MR. POLAND: Well, we've raised
8 different contentions, Your Honor. They do not
9 overlap.

10 >> JUDGE GIBSON: Well, let's turn to the
11 Native Community Action Council. Now, I understand
12 NCAC is not claiming to be either an effective Indian
13 tribe, nor is it claiming to represent an affected
14 Indian tribe; is that correct?

15 >> MR. WILLIAMS: Scott Williams. Yes,
16 Your Honor, that's correct.

17 >> JUDGE GIBSON: Okay. Who then are the
18 members of NCAC and who does NCAC purport to
19 represent?

20 >> MR. WILLIAMS: NCAC is a nonprofit
21 corporation chartered under state law to represent
22 western Shoshone and southern Paiute people who are
23 in the words of their articles, members of indigenous
24 communities in the Nevada testing ground area, which
25 includes Yucca Mountain.

1 It does not purport to represent tribes.
2 It represents members of tribes. Its Board of
3 Directors is composed of members of five federally
4 recognized tribes in the area of Yucca Mountain.

5 >> JUDGE GIBSON: And you are arguing both
6 for organizational and representational standing, is
7 that correct?

8 >> MR. WILLIAMS: That's correct. We would
9 have argued discretionary standing if it had been
10 mentioned in the petition, but it was not. I feared
11 that I was blocked from raising that issue.

12 >> JUDGE GIBSON: Okay. Well, we can
13 deal with that issue in a minute. As to
14 organizational standing, let's start with that. What
15 are the organizational injuries that NCAC alleges as
16 a basis for standing?

17 >> MR. WILLIAMS: NCAC has as its mission,
18 the protection of the customs and traditions of the
19 Shoshone and Paiute people. Those customs and
20 traditions are explained to some degree in the
21 affidavits submitted by the three board members.

22 Those customs and traditions describe these
23 two people as nomadic people, historically. They
24 rein over this area historically. They use the
25 water, the game, the vegetation of these areas

1 traditionally.

2 Ceremonies were held throughout this area
3 traditionally. All of those practices go on today,
4 obviously to a considerably lesser degree, but they
5 continue to happen. It is the view of NCAC that the
6 construction of the facility at Yucca Mountain is an
7 irremediable injury; it cannot be fixed. It cannot
8 be mitigated.

9 It is as Calvin Meyers, one of the
10 declarants and one of the Board members would say, is
11 taking another chapter out of the equivalent of their
12 Bible.

13 So the answer to your question, Your Honor,
14 is that organizational standing is present here in
15 that the construction operation program maintenance
16 of the facility forever causes a direct and immediate
17 injury to the interests of the organization, itself,
18 which is the preservation of traditional practices
19 which could no longer occur on Yucca Mountain.

20 >> JUDGE GIBSON: Okay. Now, it just
21 occurred to me, you mentioned Shoshone. I take it
22 that your -- the Shoshone and Paiute people that you
23 are representing are not any of the same as these two
24 party, Shoshones that these two are representing?

25 Is that a fair assessment?

1 >> MR. WILLIAMS: I wish the answer were
2 yes.

3 JUDGE GIBSON: Maybe some overlap?

4 >> MR. WILLIAMS: One of the board members
5 of NCAC is a member of the Timbisha Shoshone Tribe,
6 Pauline Estevez. She submitted a declaration.

7 >>JUDGE GIBSON: Okay.

8 MR. WILLIAMS: But we do not purport to
9 represent the tribe, the Timbisha Shoshone Tribe.

10 >> JUDGE GIBSON: Fair enough. Okay. In
11 its answer, DOE argues that your allegations of
12 injury are too broad and un-particularized to provide
13 a basis for standing.

14 Counsel for DOE, could you tell us what you
15 find deficient about these injuries as they have been
16 alleged?

17 >>MR. POLANSKY: Yes, Your Honor. This is
18 Mr. Polansky. I'd note at the time we filed our
19 answer, I don't believe there were the affidavits of
20 Calvin Meyers or Ms. Estevez attached because they
21 were not provided until the reply. At the time we
22 looked at the Petition, it identified, you know, a
23 longstanding interest in radiological harm, et
24 cetera, to native people, but we believe the
25 longstanding precedent that says that's not enough

1 for organizational standing, and that the allegations
2 of injury, we thought, were just too broad.

3 You know, unspecified Native American
4 communities will quote, "experience adverse health
5 consequences," for example.

6 So, organizational standing, we did not
7 think it was met under the Petition that we saw. And
8 I don't believe representational standing,
9 representational standing --

10 >> JUDGE GIBSON: That you also addressed
11 at -- if you look at pages 22 and 23 --

12 >>MR. POLANSKY: Yes, but there were no
13 affidavits asserting that an individual had standing
14 in their own right which would have supported such
15 representational standing.

16 >> JUDGE GIBSON: Okay. I think we'll take
17 a 15-minute break here at this point and then we will
18 go back on and conclude. We probably will run all
19 the way to 5:00 today. Thank you.

20 [Whereupon, a recess was taken]
21

22 >> JUDGE GIBSON: Okay. One thing I need
23 to clear up for the record, with respect to NCAC, NRC
24 staff, do you have a view about their participation
25 or their standing in this case?

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. 09-892-HLW-CAB-04

August 26, 2011

CERTIFICATE OF SERVICE

I hereby certify that copies of the "**TIMBISHA SHOSHONE TRIBE'S MOTION FOR RECOGNITION OF THE TIMBISHA SHOSHONE TRIBAL COUNCIL AS THE LEGITIMATE REPRESENTATIVE OF THE TIMBISHA SHOSHONE TRIBE**" in the above-captioned proceeding have been served on the following persons this 26 day of August, 2011, by Electronic Information Exchange.

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