

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

In the matter of:

U.S. DEPARTMENT OF ENERGY

(License Application for Geologic  
Repository at Yucca Mountain)

Docket No. 63-001

September 30, 2013

**TIMBISHA SHOSHONE TRIBE’S RESPONSE TO NRC SECRETARY’S AUGUST 30,  
2013 ORDER AND RENEWED MOTION FOR RECOGNITION OF THE TIMBISHA  
SHOSHONE TRIBAL COUNCIL AS THE LEGITIMATE REPRESENTATIVE OF THE  
TIMBISHA SHOSHONE TRIBE**

By order dated August 30, 2013, the Secretary of the Commission invited all participants in the currently suspended Yucca Mountain licensing proceeding to provide their views as to how the Nuclear Regulatory Commission (the “Commission”) should continue with the licensing process in light of the August 13, 2013 opinion of the United States Court of Appeals for the District of Columbia Circuit in *In Re: Aiken County, et al.*, No. 11-1271 (“*Aiken County*”).

The Timbisha Shoshone Tribe (the “Tribe”) joins in the filing of the same date by the State of Nevada. The Tribe also wishes to express concern regarding the Atomic Safety and Licensing Board’s (“Licensing Board”) September 28, 2011 Order (“Order”) concerning the Tribe’s Motion for Recognition of the Timbisha Shoshone Tribal Council as the Legitimate Representative of the Timbisha Shoshone Tribe (“Motion for

Recognition”)<sup>1</sup> for the purpose of recognition as a party in this proceeding. Therefore, the Tribe respectfully renews its Motion for Recognition and requests that the Commission acknowledge the Tribal Council as the appropriate party for representation of the Tribe in this proceeding. The Tribe withdraws its request as to relief against the Department of Energy (“DOE), as DOE has released all outstanding funds to the duly recognized Tribal Council.

In support of the renewed Motion for Recognition the Tribe provides the following information for consideration by the Commission.

### **Procedural Background**

Pursuant to the Nuclear Waste Policy Act (“NWPA”), the Tribe was granted AIT status on June 29, 2007. The Tribe then filed a petition to intervene in this proceeding on December 22, 2008, this petition was granted and the Tribe was given the designation of “TIM”. Another entity, the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation, filed a petition to intervene the same day purportedly on behalf of the Tribe, this petition was also granted and this entity was designated as “TOP”. The TOP petition was filed by a faction consisting of tribal members led by Joe Kennedy that purported to represent the tribal government. On April 1, 2009, the Licensing Board, rather than interject itself in an intra-tribal dispute, directed both parties to file a single petition to intervene on behalf of the Tribe.

TIM and TOP, in order to ensure the Tribe’s participation in the proceeding as an AIT party, filed a Joint Statement of the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation (“TOP”) and Timbisha Shoshone Tribe (“TIM”) Regarding Participation as a Single Entity (“Joint Statement”) on April 20, 2009 with TIM and TOP jointed designated as

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<sup>1</sup> Attached hereto as Exhibit 1.

“JTS”. The Board issued an order Accepting Joint Representation of the Timbisha Shoshone Tribe on April 22, 2009, which included acceptance of the agreement between the parties submitted with the Joint Statement. The agreement between the parties included the following language:

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.*** (emphasis added).

Upon meeting the LSN requirements, the Board later granted formal party status to the Tribe through JTS by Order dated August 27, 2009, and in doing so acknowledged the provisions of this agreement.

Between August 2009 and August 2011, both factions of the Tribe pursued their claims as the rightful governing body of the Tribe through procedures governing the Department of Interior (“DOI”) as set forth in federal regulations. On March 11, 2011 the Assistant Secretary - Indian Affairs issued a final decision regarding the legitimate governing body of the Tribe (see Attachment B to Motion for Recognition), and an election was held in accordance with that decision that resulted in a Tribal Council chaired by George Gholson. On July 29, 2011, a subsequent decision was then issued by the Assistant Secretary – Indian Affairs resolving finally the various administrative appeals regarding the Tribe’s leadership dispute and recognizing the Gholson Council (as then comprised) as the legitimate governmental body of the Tribe (see Attachment C to Motion for Recognition). On August 26, 2011 TIM, through its attorney, filed the Motion for Recognition, citing then-recent developments in support of its request to the Licensing Board to recognize the “Gholson Council” as the legitimate governmental representative of the Tribe.

### **Argument in Support of Motion for Recognition**

The Licensing Board's September 28, 2011 Order<sup>2</sup> denied the Tribe's request for recognition of the Tribal Council based on the Licensing Board's conclusion that the Tribal Council was never admitted as a party to this proceeding, and thus had no standing to file its motion. See, Order at 2. The Licensing Board stated "any motion addressing the issues raised must be filed by JTS... and a motion by JTS to substitute the Tribal Council for JTS would be the appropriate manner in which to proceed." *Id.* at 3. Importantly, the Licensing Board "caution[ed] [TOP] that, as one of the two entities comprising JTS, its cooperation and consent for such a motion can be withheld only for legitimate reasons." *Id.*<sup>3</sup>

In issuing this order, however, the Licensing Board disregarded the fact that the Tribe is the entity that was granted status and JTS only existed because there was an outstanding dispute acknowledged by the DOI as to what entity had the authority to represent the Tribe in this proceeding. This was acknowledged by the Board in the acceptance of the agreement between TIM and TOP (see language cited from agreement above). This dispute no longer exists, as federal agencies and the federal courts now recognize one legitimate governing body for the Tribe. JTS as an entity no longer has a purpose, and cannot continue to represent the Tribe in this proceeding. It should be noted since the time of the Licensing Board's Order counsel for TOP has withdrawn from the proceeding, and it is no longer actively participating in the proceeding.

The DOI has, and continues to recognize the Tribal Council chaired by George Gholson as the legitimate governmental body of the Tribe. The Commission (and Licensing Board) therefore must defer to DOI's jurisdiction and decision to recognize the Tribal Council as the legitimate governmental representative of the Tribe for party and AIT status in this proceeding. The Tribal Council stands in the shoes of JTS and submits that it is the only legitimate

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<sup>2</sup> A copy of the September 28, 2011 Order is attached hereto as Exhibit 2.

<sup>3</sup> The Order referred to the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation as "TSO."

governmental body of the Tribe and the only entity authorized to act on behalf of the Tribe. Neither the Tribe, nor DOI recognizes TOP as an entity that has any power or ability to act on behalf of the Tribe. The Tribe respectfully submits that filing a motion through JTS is not a feasible option given the current circumstances regarding the prior leadership dispute.

In support of the Motion for Recognition, the Tribe cited the decision of the Assistant Secretary – Indian Affairs dated July 29, 2011 that recognized the Gholson Council as the legitimate governmental body of the Tribe. The Tribal members that formed TOP, namely Joe Kennedy, appealed this decision to the United States District Court for the Eastern District of California, styled as *Timbisha Shoshone Tribe, et al. v. U.S. Department of the Interior, et al.*, Case No. 2:11-cv-00995-MCE-DAD (Second Amended Complaint filed May 29, 2012). The District Court dismissed TOP’s suit by Memorandum and Order dated April 9, 2013, holding that then-comprised 2011 Gholson Council, being the appropriate Tribal Officials, were cloaked with the Tribe’s sovereign immunity and did not waive their immunity to suit.<sup>4</sup> The Court also dismissed TOP’s complaint for failure to join the entire 2011 Gholson Council as indispensable parties.

Subsequent to the Assistant Secretary’s decision, DOI through the Bureau of Indian Affairs has, and continues to recognize the Gholson Council –as it is currently comprised – as the duly-recognized, legitimate governmental body for the Tribe. Part of the relief sought in the Tribe’s Motion for Recognition was to request the Licensing Board to direct the DOE to release certain funds to the Gholson Council that were dedicated to the Tribe because of its status as an AIT under the NHPA. The Licensing Board stated, in its September 28, 2011 Order, that it had substantial reservations as to whether it had jurisdiction to so direct the DOE. Importantly, subsequent to this Order, the DOE has in fact recognized the Gholson Council with the support

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<sup>4</sup> A copy of the April 9, 2013 Memorandum and Order is attached hereto as Exhibit 3. TOP appealed this decision on June 7, 2013, styled as *Timbisha Shoshone Tribe v. U.S. Department of the Interior*, Case No. 13-16182, United States Court of Appeals for the Ninth Circuit (Appeal filed June 10, 2013).

of DOI, and has disbursed said AIT funds to the Council for the Tribe's use in connection with this proceeding.

The State of Nevada filed its State of Nevada Motion for Commission Action Related to A Possible Restart of the Yucca Mountain Licensing Proceeding with the NRC on August 23, 2013. The State of Nevada emailed the parties to this proceeding beforehand, asking whether they would concur. In response, Doug Poland, then-counsel for TOP, advised the state that neither he nor his law firm represented any Timbisha Shoshone Tribal entity, and that, should this licensing proceeding re-commence, he would file a formal withdrawal of appearance.<sup>5</sup> Mr. Poland did in fact file a formal withdrawal of appearance on September 5, 2013.

To reiterate, the Tribe disagrees with the basis for dismissal of its Motion for Recognition set forth in the Licensing Board Order of September 28, 2011. TOP will not concur with the filing of a joint motion, and given the current and ongoing governance by the Tribal Council as recognized by other federal agencies, it is not reasonable to require JTS to file a motion on behalf of the Tribal Council. Accordingly, the Tribe stands in the shoes of JTS and hereby files this renewed request as to its Motion for Recognition. The Assistant Secretary of Indian Affairs has resolved the internal Tribal leadership dispute by decision dated July 29, 2011. This decision has and is recognized by federal and state agencies that interact with the Tribe on governmental matters. It should be recognized by the Commission as well. TOP appealed the Assistant Secretary's decision to the United States District Court, that case was dismissed for lack of jurisdiction on April 9, 2013.

As stated above the Licensing Board accepted the agreement between the parties forming JTS with the provision that once the intra-tribal dispute was resolved the prevailing entity would step into the shoes of JTS as the representative party for the Tribe in this

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<sup>5</sup> A true and complete copy of Mr. Poland's August 22, 2013 e-mail is attached hereto as Exhibit C.

proceeding. The DOI has made a final non-appealable decision recognizing the Tribal Council chaired by George Gholson, which has been upheld by the Federal Court. The DOE has recognized this decision and released funds to the Tribal Council in accordance with this decision. The Commission has sufficient information to recognize the Tribal Council as the appropriate party representative of the Tribe without a motion filed by JTS.

### **Conclusion**

The Tribe concurs with the filing submitted by the State of Nevada on September 30, 2013, and respectfully requests that the Commission formally acknowledge the Tribal Council of the Timbisha Shoshone Tribe, as recognized by DOI, as the representative party for the Tribe in this proceeding and as the AIT as set forth in the NWPA.

**Signed (electronically) by/**  
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# EXHIBIT 1



**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")<sup>1</sup>, 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

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<sup>1</sup> 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 entities<sup>2</sup> 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.<sup>3</sup> 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,

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

<sup>3</sup> 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”)<sup>4</sup>, 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.<sup>5</sup> 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.

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<sup>4</sup> The Board previously recognized the various administrative appeals. See the Board’s Order dated May 5, 2011 at 68, footnote 307.

<sup>5</sup> 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).<sup>6</sup>

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:

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<sup>6</sup> 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 Understanding<sup>7</sup>, the newly-elected Tribal Council shall assume control over representation of the Tribe in this proceeding, and the

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<sup>7</sup> 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.<sup>8</sup> 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

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<sup>8</sup> 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.

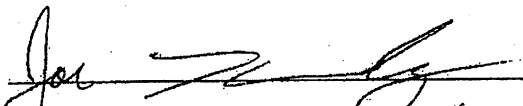
3. TOP shall provide an audit to both TIM and DOE as to expenditure of funds received to date from DOE for Yucca Mountain oversight activities, and shall agree to reimbursement of consultants that have provided services to date for participation in the Licensing Proceedings consistent with the Litigation 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:  Name: <u>Joe Kennedy</u> Date: <u>April 20, 2009</u>	For TIM:  Name: _____ Date: _____
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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.

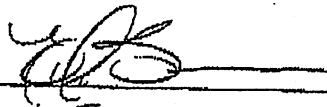
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For TOP:	For TIM:
  	
Name: _____	Name: <u>ED BEAMAN</u>
Date: _____	Date: <u>APRIL 20, 2009</u>

**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 20<sup>th</sup> 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.

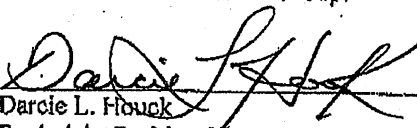
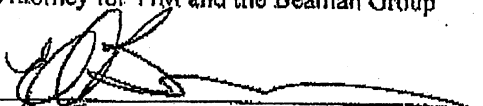
12. It is the opinion of both Lead GK Counsel and Lead FPM Counsel that the Board might be amenable to the filing of a single Amended Petition presenting all contentions that currently have been filed separately by TIM and TOP as a single, joint petition of TIM and TOP as the Joint Timbisha Shoshone 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:
<p>Douglas M. Poland  Godfrey &amp; Kahn, S.C.  Attorney for TOP and the Kennedy Group</p>	 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

3730982\_2

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 Peebles & Morgan LLP Attorney for TIM and the Beaman Group
 4-20-09 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.<sup>1</sup> 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.

<sup>1</sup> 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 (8<sup>th</sup> 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).<sup>2</sup> 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, 2007<sup>3</sup>.

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.<sup>4</sup> 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:

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<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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 9<sup>th</sup> 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.

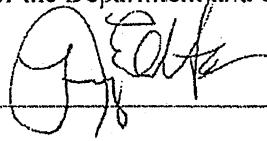
### **IX. Conclusion**

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 2<sup>nd</sup> 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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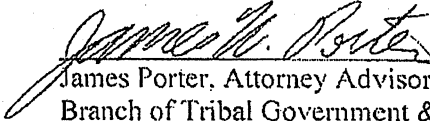
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# **EXHIBIT C**



# 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 (8<sup>th</sup> 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 (10<sup>th</sup> 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 (8<sup>th</sup> 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,<sup>1</sup> making it important that this letter provides the Bureau with an expeditious recognition of the Tribe's leadership.

---

<sup>1</sup> A key component of the 8<sup>th</sup> 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.

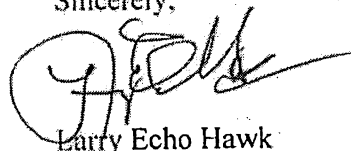
My decision to issue this letter is justified by the long hiatus in government-to-government relations, which has had numerous deleterious effects. These effects include the Tribe's inability to access Federal programs as provided for under the Indian Self-Determination and Education Assistance Act.

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,



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 Admissibility 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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# EXHIBIT 2

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

(High Level Waste Repository)

Docket No. 63-001-HLW

ASLBP No. 09-892-HLW-CAB04

September 28, 2011

ORDER

(Dismissing Timbisha Shoshone Tribal Council's Motion)

Before us is the August 26, 2011 motion of the Timbisha Shoshone Tribal Council (Tribal Council) requesting that the Licensing Board recognize the Tribal Council as the duly authorized representative of the Timbisha Shoshone Tribe (Tribe) in this proceeding.<sup>1</sup> The motion also requests that the Board cease recognition of the Joint Timbisha Shoshone Tribal Group (JTS)<sup>2</sup> and that the Board direct the Department of Energy (DOE) "to meet and confer with the [Tribal Council] with regard to the release of federally-appropriated funds dedicated to the Tribe as an AIT [Affected Indian Tribe] in connection with this licensing proceeding."<sup>3</sup>

The NRC Staff does not object to the Board recognizing the Tribal Council as the representative of the Tribe. The Staff asserts, however, that the Board lacks jurisdiction to direct DOE to meet and confer with the Tribal Council concerning federally-appropriated funds and that such request is also beyond the scope of this proceeding.<sup>4</sup> For its part, DOE

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<sup>1</sup> Timbisha Shoshone Tribe's Motion for Recognition of the Timbisha Shoshone Tribal Council as the Legitimate Representative of the Timbisha Shoshone Tribe (Aug. 26, 2011) [hereinafter Tribal Council Motion].

<sup>2</sup> Id. at 1-2.

<sup>3</sup> Id. at 8.

<sup>4</sup> NRC Staff Response to the Timbisha Shoshone Tribe's August 26, 2011 Motion (Sept. 6, 2011) at 1-3.

expresses no view on the motion's request for the Board to recognize the Tribal Council as the representative of the Tribe, but argues that the Board lacks jurisdiction to direct DOE to meet and confer with the Tribal Council concerning the release of funds to the Tribal Council.<sup>5</sup> No other party filed an answer to the Tribal Council's motion. Of the other parties responding to the Tribal Council's solicitation for its 10 C.F.R. § 2.323(b) statement for its motion, twelve parties took no position on the merits of the motion. The other parties to the proceeding did not respond.<sup>6</sup>

The Tribal Council's motion is dismissed. Because the Tribal Council has never been admitted as a party to the proceeding, the Tribal Council has no standing to file the present motion. The Timbisha Shoshone Tribal Council, as then constituted, joined with the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation (TSO) after both entities initially filed intervention petitions,<sup>7</sup> seeking to participate in the proceeding as a single entity – the Joint Timbisha Shoshone Tribal Group (JTS).<sup>8</sup> Thereafter, the three Construction Authorization Boards recognized JTS “as an entity requesting intervention in this proceeding” and deemed the contentions filed by both entities in their respective intervention petitions to

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<sup>5</sup> The Department of Energy's Response to the Timbisha Shoshone Tribal Council's Motion for Recognition as the Legitimate Representative of the Timbisha Shoshone Tribe (Sept. 6, 2011) at 1-3.

<sup>6</sup> Tribal Council Motion at 2-3.

<sup>7</sup> See Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation's Corrected Motion for Leave to File Its Amended Petition to Intervene as a Full Party (Mar. 5, 2009); Amended Petition of the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation to Intervene as a Full Party (Mar. 5, 2009); Timbisha Shoshone Tribe's Petition for Leave to Intervene in the Hearing (Dec. 22, 2008); Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation Petition to Intervene as a Full Party (Dec. 22, 2008).

<sup>8</sup> Joint Statement of Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation (“TOP”) and Timbisha Shoshone Tribe (“TIM”) Regarding Participation as a Single Entity (Apr. 20, 2009).

have been proffered by JTS.<sup>9</sup> Subsequently, CAB-04 granted party status to JTS.<sup>10</sup> Thus, although JTS has been granted party status, the movant, the Tribal Council, has never been admitted as a party to the proceeding and has no party status independent of JTS. Accordingly, the Tribal Council has no right to file a motion in this proceeding, and any motion addressing the issues raised must be filed by JTS.<sup>11</sup>

In that regard, we note that the continuation of the proceeding after the current fiscal year is, at best, uncertain. In the event the proceeding should continue at some time in the future and the Tribal Council pursues this matter, a motion by JTS to substitute the Tribal Council for JTS would be the appropriate manner in which to proceed. The Board cautions TSO that, as one of the two entities comprising JTS, its cooperation and consent for such a motion can be withheld only for legitimate reasons. Finally, the Board would be remiss in not stating that it has substantial reservations that it has jurisdiction under the Nuclear Waste Policy Act, the Atomic Energy Act, or the Commission's regulations to grant the relief sought against DOE.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

*/RA/*

\_\_\_\_\_  
Thomas S. Moore, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
September 28, 2011

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<sup>9</sup> CAB Order (Accepting Joint Representation of Timbisha Shoshone Tribe) (Apr. 22, 2009) at 1 (unpublished).

<sup>10</sup> CAB Order (Granting Party Status to the Joint Timbisha Shoshone Tribal Group) (Aug. 27, 2009) at 2 (unpublished); see LBP-09-06, 69 NRC 367, 455 (2009).

<sup>11</sup> We recognize that TSO did not file an answer to the Tribal Council's motion and, according to the Tribal Council's Section 2.323(b) statement, TSO does not oppose the motion. Tribal Council Motion at 3. Nonetheless, because of the nature of the dispute over Tribal leadership between the entities comprising JTS, see, e.g., LBP-09-06, 69 NRC at 427-429, the issue is not one where TSO's failure to file an answer can be deemed by the Board to represent TSO affirmatively joining the Tribal Council's motion. In the circumstances presented, it is not a mere matter of form over substance to insist that a properly admitted party, here JTS, file a motion addressing the matters at hand.



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
)  
U.S. DEPARTMENT OF ENERGY )  
(High-Level Waste Repository) )  
)

Docket No. 63-001-HLW  
ASLBP No. 09-892-HLW-CAB04

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Licensing Board **ORDER (Dismissing Timbisha Shoshone Tribal Council's Motion)**, dated September 28, 2011, have been served upon the following persons by Electronic Information Exchange.

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**ORDER (Dismissing Timbisha Shoshone Tribal Council's Motion)**

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**ORDER (Dismissing Timbisha Shoshone Tribal Council's Motion)**

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW  
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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW  
**ORDER (Dismissing Timbisha Shoshone Tribal Council's Motion)**

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[Original Signed by Linda D. Lewis] \_\_\_\_\_  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 28<sup>th</sup> day September 2011

# EXHIBIT 3



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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

TIMBISHA SHOSHONE TRIBE, et al.,  
Plaintiffs,  
v.  
UNITED STATES DEPARTMENT OF  
THE INTERIOR, et al.,  
Defendants.

No. 2:11-cv-00995-MCE-DAD

**MEMORANDUM AND ORDER**

The Timbisha Shoshone Tribe (“Tribe”), Joseph Kennedy, Angela Boland, Grace Goad, Erick Mason, Hillary Frank, Madeline Esteves and Pauline Esteves filed their Second Amended Complaint (“SAC”) in this action on May 29, 2012, seeking declaratory and injunctive relief against Defendants United States Department of the Interior (“DOI”), Bureau of Indian Affairs (“BIA”), Donald Laverdure, Acting Assistant Secretary of the Interior for Indian Affairs, Amy Dutschke (“Dutschke”), Director of the Pacific Regional Office of the BIA, Troy Burdick (“Burdick”), Superintendent of the Central California Agency of the BIA, Margaret Cortez, Bill Eddy, Earl Frank, George Gholson and Clyde Nichols (collectively, “Defendants”).

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1 Plaintiffs allege injuries suffered as a result of two DOI decisions issued by then DOI  
2 Assistant Secretary of Indian Affairs Larry Echo Hawk on March 1, 2011 (“EHD I”) and  
3 July 29, 2011 (“EHD II”) (collectively referred to as the “EHDs”). Presently before the  
4 Court is Defendants’ Motion to Dismiss Plaintiff’s SAC. (ECF No. 61; ECF No. 64.) For  
5 the following reasons, the Court will grant Defendants’ Motion to Dismiss for failure to  
6 join indispensable parties.<sup>1</sup> The Court will not permit further leave to amend.

## 8 BACKGROUND<sup>2</sup>

### 10 A. Tribal History

11  
12 In 1982, the DOI formally recognized the Tribe as a sovereign Indian nation with  
13 whom the United States would maintain government-to-government relations. The Tribe  
14 organized itself under a written Constitution that establishes the General Council as the  
15 Tribe’s supreme governing body. The General Council has delegated some of its  
16 powers to a five-member Tribal Council.

17 The Tribe’s Constitution limits tribal membership to persons listed on the 1978  
18 Base Roll and to certain of those members’ lineal descendants. The Constitution  
19 requires that the Tribal Enrollment Committee “remove any person enrolled erroneously,  
20 fraudulently or otherwise incorrectly enrolled from the membership list.”

21 The Tribe holds general elections for the Tribal Council every November, and  
22 members serve two-year, staggered terms. The Tribe’s Constitution requires that an  
23 Election Board certify these elections.

24  
25 <sup>1</sup> Because oral argument would not have been of material assistance, the Court ordered this  
matter submitted on the briefs. E.D. Cal. Local Rule 230(g).

26 <sup>2</sup> Unless otherwise noted, the following facts are taken, sometimes verbatim, from Plaintiffs’ SAC.  
27 (ECF No. 59.) “Because the question whether a party is indispensable ‘can only be determined in the  
28 context of particular litigation,’ it is necessary to set forth in some detail the legal and factual context of the  
present controversy.” *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1018 (9th Cir. 2002) (quoting  
*Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 (1968)).

1 The Tribe's "Election Ordinance" governs the actions of the Election Board. Because  
2 members of this Election Board may only be removed for specific, non-political reasons,  
3 the Board generally remains unchanged from year to year.

4  
5 **B. The Tribe's Leadership Dispute**

6  
7 The current lawsuit is the culmination of a long-standing dispute over the election  
8 and composition of the proper Tribal Council. While it is undisputed that in 2006 the  
9 Tribal Council consisted of Joe Kennedy ("Kennedy"), who was elected as Chairman, Ed  
10 Beaman ("Beaman"), Madeline Esteves, Virginia Beck ("Beck") and Cleveland Casey  
11 ("Casey") ("2006 Council"), since then multiple factions have claimed to lead the Tribe.

12 The current fracture in the Tribe's governance began on August 25, 2007, when  
13 the 2006 Council held a Tribal Council meeting. Charges were brought against Beaman  
14 and Beck seeking their removal from office. Beaman, Beck and Casey left the meeting,  
15 though Casey returned at some point before eventually leaving again. The remaining  
16 members of the 2006 Council determined Beaman and Beck had resigned, and the  
17 council purportedly replaced Beck with another Tribe member (hereafter this group is  
18 referred to as the "2006 Kennedy Faction"), while leaving Beaman's seat vacant for the  
19 next election. Beaman, Beck and Casey (the "Beaman Faction") subsequently met  
20 separately and passed resolutions also purporting to take control of the Tribe's  
21 administration.

22 In November of 2007, both the 2006 Kennedy Faction and the Beaman Faction  
23 held general elections that resulted in the election of the "2007 Kennedy Council" and  
24 the "Beaman Council." On December 14, 2007, Burdick issued a decision declining to  
25 recognize the results of either election.

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1 The 2007 Kennedy Council subsequently called a General Council meeting, which  
2 convened on January 20, 2008. Satisfied a quorum existed, the General Council  
3 adopted several resolutions purporting to ratify, as is relevant here, the general election  
4 resulting in the election of the 2007 Kennedy Council and the 2006 Kennedy Faction's  
5 interpretation of the term "resign" in the Timbisha Constitution.

6 On February 29, 2008, Burdick rescinded his December 14, 2007, decision and  
7 purported to recognize the 2007 Kennedy Council. The Beaman Council appealed that  
8 decision ("Beaman Appeal"), staying its effect.

9 On September 25, 2008, the 2007 Kennedy Council Enrollment Committee  
10 performed a review of the Tribe's membership rolls and determined seventy-four people  
11 did not qualify for Tribe membership. The Enrollment Committee notified those  
12 members they were to be disenrolled, and, when the time to appeal expired, the 2007  
13 Kennedy Council performed the ministerial act of adopting resolutions confirming the  
14 membership revocations. During this same time frame, in September 2008, George  
15 Gholson ("Gholson"), a member of the Tribe purportedly disenrolled pursuant to the  
16 above 2007 Kennedy Council efforts, convened another General Council meeting. At  
17 this meeting, Gholson allegedly recalled Kennedy and replaced him with both Gholson  
18 and another individual. On October 17, 2008, based on the actions taken at that  
19 General Council meeting, Burdick issued a decision recognizing Gholson as the  
20 Chairman of the Tribe. Although Burdick's decision was not yet effective, Gholson  
21 allegedly used it to justify the removal of Tribal assets from the Tribal Office on the Death  
22 Valley reservation.

23 Just a few weeks later, on November 10, 2008, Burdick issued another decision  
24 recognizing the 2006 Council. The following day, the 2007 Kennedy Council Tribal  
25 Election Board conducted a general election, resulting in the election of the "2008  
26 Kennedy Council." No other election was held at this time.

27 On December 4, 2008, Defendant Dutschke's predecessor, Regional Director  
28 Dale Morris ("Morris"), nonetheless recognized Gholson as the Tribe's chairman.

1 A few days later, on December 12, 2008, Gholson again allegedly removed Tribal  
2 property from the Tribal Office in Death Valley. On December 22, 2008, Morris  
3 rescinded his decision recognizing Gholson as the Tribe's chairman. Gholson  
4 nevertheless refused to return any Tribal property.

5 On February 17, 2009, Morris reversed Burdick's decision, which recognized the  
6 2007 Kennedy Council. Additionally, on March 24, 2009, Morris reversed Burdick's  
7 October 17, 2008, decision recognizing Gholson. Morris proposed in both decisions to  
8 recognize the 2006 Tribal Council. The 2008 Kennedy Council appealed Morris's  
9 February 17 decision ("Kennedy Appeal"), and Gholson, among others, appealed the  
10 March 24 decision. These two groups will hereafter be referred to as the "Kennedy  
11 Faction" and the "Gholson Faction." Echo Hawk took jurisdiction over and consolidated  
12 these appeals.

13 In November of both 2009 and 2010, the Kennedy Faction and the Gholson  
14 Faction each purportedly held general elections resulting in the election of what will be  
15 referred to as the "current Kennedy Council" and the "Gholson Council." According to  
16 Plaintiffs, the Gholson Faction permitted disenrolled members to vote in its elections and  
17 to elect to its council disenrolled members or individuals who did not qualify for  
18 membership.

19 The Gholson Faction eventually withdrew its appeal of the March 24, 2009,  
20 decision but nonetheless continued to work to freeze Tribe bank accounts. On  
21 February 24, 2010, Burdick issued a decision determining that no Tribal Council existed.  
22 The Kennedy Faction appealed the decision, and the BIA has not yet acted on that  
23 appeal.

24 Plaintiffs allege Burdick's latest decision was used to again freeze Tribal funds  
25 and to convince federal agencies to cease funding of various Tribe services.

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**C. Echo Hawk’s March 1, 2011, Decision**

On March 1, 2011, Echo Hawk issued a decision on the Beaman and Kennedy Appeals. That decision affirmed Morris’s decision rejecting the validity of the resolutions purporting to give power to the 2007 Kennedy Council and recognized the Gholson Council “for the limited purpose of carrying out essential government-to-government relations and holding a special election that complies with the tribal law.” (ECF No. 48-1 at 10-11.) Echo Hawk provided two justifications for his latter decision: 1) more votes were cast in the Gholson-conducted election, supporting the conclusion it would be less intrusive to vest temporary recognition in that council; and 2) despite Kennedy’s belief that numerous members voting in the Gholson-conducted elections had been disenrolled, because the DOI rejected those disenrollments on procedural grounds, any election barring those members from voting was facially invalid.

**D. Initiation of the Current Litigation**

Six weeks after issuance of EHD I, Plaintiffs, both as individuals and as members of the current Kennedy Council, which was purportedly empowered to act on behalf of the Tribe, filed their Complaint in this action. They argued that EHD I was arbitrary and capricious because Echo Hawk had: (1) improperly considered evidence outside of the Administrative Record in deciding the appeal; (2) misapplied Tribal enrollment law; (3) misapplied Tribal Election law; and (4) relied on irrelevant factors and ignored relevant factors in rendering his decision. Plaintiffs also argued EHD I was issued in violation of Defendants’ federal trust responsibilities.

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1 Plaintiffs subsequently filed a Motion for a Preliminary Injunction. In that motion,  
2 Plaintiffs argued that the EHD:

3  
4 [D]id not consider tribal membership or the qualifications of candidates or  
5 voters as at all relevant; based its conclusions and reasoning on facts not  
6 in the record, including vote totals using very different qualifications for  
7 voting in two elections held by two rival factions; authorized the  
8 replacement tribal government to conduct a new election . . . even though  
the EHD also denied the validity of the election that is the sole claim to  
legitimacy for the replacement tribal government; and offered no sensible  
or reasonable basis for replacing the tribal government or authorizing the  
replacement government to conduct a new election.

9 (ECF No. 20 at 7.)

10 Plaintiffs thus sought an order enjoining Defendants from:

11 (1) assisting in the conduct, or recognizing the results of, the imminent  
12 purported special election administered by the Gholson faction in which  
13 persons who do not meet the criteria for membership in the Tribe are  
14 permitted to vote or run for office; (2) further recognition or assistance to  
the replacement tribal government; and (3) failing to recognize and assist  
legitimate Tribal Council led by plaintiff Tribal Council members.

15 (Id. at 7-8.) This Court denied Plaintiff's Motion on May 16, 2011. (ECF No. 38.)

16

17 **E. The 2011 Election**

18

19 In the meantime, in keeping with the mandates of EHD I's interim recognition, the  
20 Gholson Council conducted a Tribal Council election. The Tribe elected George  
21 Gholson as Chairperson, Bill Eddy as Vice-Chairperson, Margaret Cortez as Secretary-  
22 Treasurer and Clyde Nichols and Earl Frank as Executive Members. (ECF No. 48.)  
23 According to Plaintiffs, Gholson included Plaintiffs on the election ballot but did not  
24 permit Plaintiffs to provide campaign statements to voters.

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1 Gholson also purportedly again permitted non-members to vote in addition to preventing  
2 his opponents from challenging ballots or voters, examining or viewing the ballots,  
3 envelopes or serial numbers on the ballots and envelopes, examining any of the  
4 documentation after the election, or utilizing any other means by which Plaintiffs could  
5 have verified the election results.

6 Without admitting the legitimacy of the election, more than twenty percent of the  
7 General Council appealed the election to Gholson, alleging a number of infirmities in the  
8 electoral process. Gholson refused to provide documents that Plaintiffs requested, but  
9 he apparently scheduled a hearing and later rejected Plaintiffs' appeal. According to  
10 Plaintiffs, however, the DOI failed to review Plaintiffs' objections to the election prior to  
11 declaring that Gholson had reasonably rejected their challenges.

12  
13 **F. Echo Hawk's July 29, 2011, Decision**

14  
15 On July 29, 2011, Echo Hawk issued another decision, EHD II, in which he stated  
16 that Gholson's 2011 election complied with tribal law and that Gholson had addressed  
17 the appeals before him adequately. Plaintiffs now allege that EHD II impermissibly fails  
18 to include any reasoning or legal basis for its conclusions as the APA requires and that it  
19 fails to acknowledge various violations of Plaintiffs' free speech rights. Plaintiffs also  
20 aver they were denied any meaningful agency review by issuance of EHD II because  
21 Echo Hawk made his decision immediately final for the DOI.

22 In EHD II, Echo Hawk reasoned that the election, rather than his decision in  
23 EHD I, "constituted the resolution of an internal tribal dispute in a valid tribal forum."  
24 (ECF No. 48-2 at 3.)

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1 He further stated:

2 The Timbisha Shoshone people embraced a tribal government by means  
3 of an election compliant with their Constitution. The Federal Government  
4 may not ignore or reject the results of a tribal election that clearly states the  
5 will of a sovereign Indian nation. Therefore, the Department should  
6 recognize the Timbisha Shoshone Tribal government consisting of the five  
7 people identified in the Election Committee's report as having received the  
8 most votes in the April 29 election.

9 (Id.) Finally, Echo Hawk noted that his decision was justified by the long-hiatus in  
10 government-to-government relations with the Tribe, especially given the fact that the  
11 interim recognition of the Gholson Council, which extended only 120 days, expired  
12 approximately one month prior, leaving the Tribe with no recognized governing body.

13 (Id. at 4.)

### 14 **G. Plaintiffs' First and Second Amended Complaints**

15 A few days after EHD II was issued, Plaintiffs filed their First Amended Complaint  
16 alleging that: (1) the EHDs improperly recognized the Gholson Faction based solely on  
17 information not made part of the administrative record on appeal; (2) in issuing the  
18 EHDs, DOI failed to defer to the Tribe's own interpretations of tribal law and entertained  
19 appeals that had not been exhausted via internal tribal mechanisms; (3) DOI issued the  
20 EHDs in contravention of rules and federal common law that bar its interference in tribal  
21 membership decisions; (4) the EHDs impermissibly created a hiatus in recognition of a  
22 tribal government since Echo Hawk determined there was no existing government  
23 capable of recognition; and (5) in issuing the EHDs, Defendants improperly relied on  
24 irrelevant factors and ignored relevant factors.

25 On May 9, 2012, this Court granted Defendants' Motion to Dismiss with leave to  
26 amend, finding Plaintiffs failed to join indispensable parties. (ECF No. 58 at 2.) On  
27 May 29, 2012, Plaintiffs filed their SAC, realleging the five previous claims.

28

1 Plaintiffs also added a sixth claim, alleging the DOI violated the APA by discriminating  
2 against the Kennedy Council when the DOI installed the Gholson Faction to conduct the  
3 2011 election. Plaintiffs claim the discrimination was in retaliation for the Kennedy  
4 Faction’s previous lawsuits against the federal government.

5 By way of substantive relief, Plaintiffs now ask this Court to declare “that the  
6 [EHDs] violated the APA because they were made in a manner that was arbitrary,  
7 capricious, and otherwise not in accordance with law, violated the Plaintiffs’  
8 constitutional right to due process of law, exceeded DOI’s statutory authorities, and  
9 failed to comply with procedures required by law.” (ECF No. 59 at 49.) Plaintiffs insist  
10 they are not requesting that this Court declare one of the tribal factions legitimately  
11 elected. Plaintiffs further request that this Court remand the EHDs “for further  
12 proceedings consistent with federal law,” but Plaintiffs purport to not want this Court to  
13 stay the EHD decisions or “enjoin DOI to recognize or cease to recognize any particular  
14 tribal faction for the purpose of government-to-government relations.” (*Id.*) Lastly,  
15 Plaintiffs want this Court to declare “the Rollback Rule violates the APA” and enjoin the  
16 DOI from using it “unless and until [the DOI] promulgates the rule pursuant to the APA.”  
17 (ECF No. 59 at 49.) In addition, following this Court’s prior dismissal of Plaintiffs’ SAC,  
18 Plaintiffs added the Gholson council members as Defendants.

19 Defendants responded by filing the present Motion to Dismiss Plaintiffs’ SAC in its  
20 entirety. (ECF No. 61; ECF No. 64.)

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1 **ANALYSIS**

2  
3 Defendants challenge Plaintiffs' SAC on a number of fronts, arguing that this  
4 Court lacks jurisdiction over the action for a variety of reasons, that Plaintiffs failed to  
5 state a claim for violation of departmental regulations or the Due Process Clause, and  
6 that the Tribe and the 2011 Elected Council are required parties that must either be  
7 joined or the case dismissed pursuant to Federal Rule of Civil Procedure 19.<sup>3</sup> The only  
8 argument this Court need address is Plaintiffs' failure to join necessary and  
9 indispensable parties under Rule 19.

10  
11 **A. The Tribe and 2011 Elected Council's Sovereign Immunity**

12  
13 Following this Court's dismissal of Plaintiff's FAC for failure to join indispensable  
14 parties (ECF No. 58), Plaintiffs filed their SAC, continuing to list the Tribe as a plaintiff  
15 and adding the five members of the 2011 Elected Council – Margaret Cortez, Bill Eddy,  
16 Earl Frank, George Gholson and Clyde Nichols – as Defendants. (ECF No. 59.)  
17 Plaintiffs contend that the Tribe and members of the 2011 Elected Council are not  
18 indispensable parties under Rule 19 because Plaintiffs seek no relief from the council  
19 members and the 2011 Elected Council has "no genuine legal interest in the subject  
20 matter of this action." (*Id.* at 7-8.) Additionally, even if this Court were to find that the  
21 Tribe and the five council members are indispensable parties, Plaintiffs argue the 2011  
22 Elected Council cannot withstand joinder on sovereign immunity grounds because the  
23 members were not legitimately elected. (*Id.* at 8.) Defendants counter that this Court  
24 must dismiss the Tribe and the 2011 Elected Council members as parties because  
25 sovereign immunity continues to protect their official actions and they have not waived  
26 their immunity. (ECF No. 65 at 13-15.)

27  
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<sup>3</sup> All further references to "Rule" or "Rules" are to the Federal Rules of Civil Procedure unless otherwise noted.

1 This Court first will address the issue of sovereign immunity. The law is well  
2 settled, and the parties agree (ECF No. 65 at 13; ECF No. 72 at 25), that Indian tribes  
3 enjoy sovereign immunity absent an express waiver or federal statute to the contrary.  
4 See United States v. Oregon, 657 F.2d 1009, 1012-13 (9th Cir. 1981). It is clear the  
5 Tribe has sovereign immunity and cannot be joined in this suit. “This immunity also  
6 extends to tribal officials when acting in their official capacity and within their scope of  
7 authority.” Id. at 1012 n.8 (internal citations omitted). The parties dispute whether  
8 sovereign immunity shields the 2011 Elected Council from suit.

9 Plaintiffs cite Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978), and  
10 Ex parte Young, 209 U.S. 123 (1908), to support their claim that “tribal officials do not  
11 possess immunity from suits seeking prospective declaratory or injunctive relief for  
12 violations of federal law.” (ECF No. 72 at 25.) However, that misstates so-called the  
13 Ex parte Young doctrine, which “permits actions for prospective non-monetary relief  
14 against state or tribal officials in their official capacity to enjoin them from violating  
15 federal law, without the presence of the immune State or tribe.” Salt River Project Agr.  
16 Imp. & Power Dist. v. Lee, 672 F.3d 1176, 1181 (9th Cir. 2012) (emphasis added).

17 Plaintiffs admit that the issue in this case is “whether the Department of the  
18 Interior violated the Constitution of the United States, the Administrative Procedure Act,  
19 and other federal laws in its decision making procedures.” (ECF No. 59 at 9.) Plaintiffs  
20 assert the 2011 Elected Council was not elected in accordance with the Tribe’s  
21 Constitution; however, Plaintiffs do not make any claims that the members of the 2011  
22 Elected Council themselves violated federal law to get elected. Rather, Plaintiffs’ claims  
23 focus on the DOI’s alleged wrongdoing. In cases where courts found Tribal officials  
24 were not immune, the officials themselves engaged in acts that violated federal law.  
25 See Lee, 672 F.3d at 1181-82 (finding tribal officials did not have immunity from a suit,  
26 which alleged they violated federal common law by violating the terms of a lease).  
27 “[T]he Ex parte Young doctrine is a narrow exception . . . [that] allows government  
28 officials to be sued in their official capacity for violating federal law.”

1 Sodaro v. Supreme Court of Arizona, 2013 WL 1123384, at \*1 (D. Ariz. Mar. 18, 2013)  
2 (emphasis added) (citing Lee, 672 F.3d at 1181). Because Plaintiffs do not allege any  
3 members of the 2011 Elected Council violated federal law, the council members retain  
4 their immunity from suit as tribal officials.

5 Therefore, because the 2011 Elected Council members did not waive their  
6 immunity from this suit, they cannot be joined as parties. The Tribe is likewise immune  
7 from suit.

## 8

### 9 **B. Federal Rule of Civil Procedure 19**

#### 10

#### 11 **1. Overview**

12

13 Having concluded the Tribe is not a proper party, Plaintiff and the 2011 Elected  
14 Council members are not proper defendants, the Court now addresses the issue of  
15 whether they are indispensable parties under Rule 19. Courts must dismiss cases in  
16 which Plaintiffs cannot join indispensable parties. In determining whether parties are  
17 indispensable, courts must: (1) determine whether the party is necessary to the suit  
18 under Rule 19 (a); and if the party is necessary and cannot be joined, (2) determine  
19 under Rule 19(b) “whether the party is indispensable so that in equity and good  
20 conscience the suit should be dismissed.” Makah Indian Tribe v. Verity, 910 F.2d 555,  
21 558 (9th Cir. 1990) (internal citations and quotations omitted).

#### 22

#### 23 **2. Necessary Parties**

24 “There is no precise formula for determining whether a particular non-party is  
25 necessary to an action. The determination is heavily influenced by the facts and  
26 circumstances of each case.” Confederated Tribes of the Chehalis Indian Reservation v.  
27 Lujan, 928 F.2d 1496, 1498 (9th Cir. 1991) (internal citations and quotations omitted)  
28 [hereinafter Chehalis].

1 In conducting this analysis, the Court must examine whether it can “award complete  
2 relief to the parties present without joining the non-party” or, alternatively, “whether the  
3 non-party has a legally protected interest in [the] action that would be impaired or  
4 impeded by adjudicating the case without it.” Paiute-Shoshone Indians of the Bishop  
5 Cmty. of the Bishop Colony, Cal. v. City of Los Angeles, 637 F.3d 993, 997 (9th Cir.  
6 2011) (internal quotations and citations omitted). If the Court answers either question in  
7 the affirmative, the absent party is a necessary party. Id.

8 Plaintiffs assert that “the Ninth Circuit has only found interests legally protected for  
9 Rule 19 purposes where a plaintiff’s claims could jeopardize the non-party’s bargained-  
10 for exchange or share of a limited resource.” (ECF No. 72 at 17.) Plaintiffs conclude  
11 that “[s]peculation that the [Gholson Faction] will not retain recognition after remand to  
12 DOI” does not suffice as a legally protected interest” and the DOI can adequately  
13 represent the Tribe and 2011 Elected Council’s interests in this suit. (Id. at 17-18.)

14 First, this Court previously rejected Plaintiffs’ assertion that “legally protected  
15 interests” are limited to non-party’s bargained-for exchanges or limited resources; the  
16 Court now reiterates that nothing in the case law supports such a limitation. (ECF  
17 No. 58 at 18.) Second, even assuming Plaintiffs’ assertion is correct, their claims still  
18 could jeopardize a “limited resource.”

19 Because only five members can sit on the council, those seats are a limited  
20 resource. While Plaintiffs assert that they do not request this Court mandate the  
21 recognition of one faction or the other and only request prospective relief, they ignore the  
22 potential effect of Plaintiff’s request. Plaintiff’s sought-after relief – declaring the EHDs in  
23 violation of the APA – would strip the 2011 Elected Council of its current recognition. A  
24 decision in Plaintiffs’ favor thus would deprive an absent party, the 2011 Elected Council,  
25 of its current interest in being the Tribe’s sole governing body and holding those five  
26 seats on the council.

27 ///

28 ///

1 Defendants also correctly conclude that finding for Plaintiffs in the 2011 Elected  
2 Council's absence could interfere with the Tribe's government-to-government relations  
3 with the United States. Declaring the EHDs in violation of the APA would terminate the  
4 United States's recognition of the 2011 Elected Council and invalidate the 2011 election,  
5 leaving the Tribe without a recognized body through which to transact with the United  
6 States. That result would deprive the Tribe of any stability it might enjoy by having a  
7 single recognized body through which to work with the United States on a government-  
8 to-government basis and from having the ability to resolve membership and leadership  
9 disputes on its own.

10 Therefore, the Court finds the Tribe and the 2011 Elected Council members are  
11 necessary parties whose legally protected interests would be impaired by this action.

12 Makah illustrates this point. In Makah, the Ninth Circuit found the district court  
13 could grant prospective injunctive relief on a plaintiff tribe's procedural claims without the  
14 presence of other tribes as long as that relief affected "only the future conduct of the  
15 administrative process." 910 F.2d at 559. However, with regard to the Secretary of  
16 Commerce's past inter-tribal allocation decisions regarding the salmon harvest, the Ninth  
17 Circuit found the absent tribes were necessary parties with legally protected interests.  
18 Id. While Plaintiffs in this action have dressed up the relief they seek in prospective  
19 form, what they actually seek is to undo past decisions by the DOI. This relief is far from  
20 prospective. As in Makah, Plaintiffs cannot challenge those decisions without the 2011  
21 Elected Council and the Tribe being parties to this action.

22 Other cases are in accord. See Timbisha Shoshone Tribe v. Bureau of Indian  
23 Affairs, 2003 WL 25897083, at \*5 (E.D. Cal. Apr. 10, 2003) (noting that "[a]t bottom, this  
24 case is an internal dispute between two tribal factions." The court found the dispute  
25 "raise[d] questions about compliance with the Tribe's Constitution and Election  
26 Ordinance, questions in which the Tribe as a whole has a clear interest." The court  
27 added "[t]he governance of the Tribe is at stake in this dispute, and the Tribe has an  
28 interest in any such change in its governing body.

1 Accordingly, both the Tribe and the Kennedy Council are necessary parties.”); see also  
2 Chehalis, 928 F.2d at 1498 (“[T]he Quinault Nation undoubtedly has a legal interest in  
3 the litigation. Plaintiffs seek a complete rejection of the Quinault Nation’s current status  
4 as the exclusive governing authority of the reservation. Even partial success by the  
5 plaintiffs could subject both the Quinault Nation and the federal government to  
6 substantial risk of multiple or inconsistent legal obligations. ”).

7 Plaintiffs lastly allege that even if the Tribe and 2011 Elected Council have an  
8 interest in this case, the DOI can adequately represent those legal interests in the Tribe  
9 and 2011 Elected Council’s absence. Therefore, according to Plaintiffs, the Tribe and  
10 the 2011 Elected Council members are not necessary parties. (ECF No. 72 at 25.)

11 “In assessing an absent party’s necessity under [Federal Rule of Civil Procedure]  
12 19(a), the question whether that party is adequately represented parallels the question  
13 whether a party’s interests are so inadequately represented by existing parties as to  
14 permit intervention of right under [Federal Rule of Civil Procedure] 24(a).” Shermoen v.  
15 United States, 982 F.2d 1312, 1318 (9th Cir. 1992).

16 Consequently, [the Court] will consider three factors in determining whether  
17 existing parties adequately represent the interests of the absent tribes:  
18 whether the interests of a present party to the suit are such that it will  
19 undoubtedly make all of the absent party’s arguments; whether the party is  
20 capable of and willing to make such arguments; and whether the absent  
21 party would offer any necessary element to the proceedings that the  
22 present parties would neglect.

23 Id. (emphasis added) (internal citations and quotations omitted).

24 Plaintiffs offer conclusory assertions that because only one tribe is involved in this  
25 case, the United States can adequately represent the Tribe and 2011 Elected Council’s  
26 interests and that all three parties share the same goal of upholding the EHDs.

27 However, the United States already has stated that its interest lies in being able to  
28 recognize some tribal government with which to work on a government-to-government  
29 basis. “[T]he leader of that governing body need not be Gholson or any other members  
30 of the 2011 Tribal Council.” (ECF No. 55 at 11.)

///



1 Meanwhile, the Tribe has an interest in ensuring that the proper council governs the  
2 Tribe in compliance with its Constitution and ordinances. Furthermore, the 2011 Elected  
3 Council has an interest in maintaining its position as the Tribe's recognized governing  
4 body. Both the Tribe and the 2011 Elected Council will offer necessary and currently  
5 unrepresented perspectives on tribal issues, that in their absence will likely be  
6 neglected. This Court still cannot say with any certainty that Defendants "will  
7 undoubtedly make all of the absent [parties'] arguments" or that Defendants are even  
8 capable of doing so.

9 Therefore, this Court once again concludes that Defendants cannot adequately  
10 represent either the Tribe or the 2011 Elected Council. Furthermore, adjudicating this  
11 case without joinder of the Tribe and the 2011 Elected Council would impair or impede  
12 the interests of the absent parties in this action. Both the Tribe and the 2011 Elected  
13 Council are thus necessary parties under Rule 19(a).

14 **3. Whether the Tribe and the 2011 Elected Council are**  
15 **Indispensable Parties**

16 As discussed in Section A, both the Tribe and the 2011 Elected Council enjoy  
17 sovereign immunity in this case and cannot be joined as parties. Because this Court  
18 determined the Tribe and the 2011 Elected Council are necessary parties under Rule  
19 19(a), the only remaining question is whether "in equity and good conscience, the action  
20 should proceed among the existing parties or should be dismissed" because the Tribe  
21 and the 2011 Elected Council are indispensable parties. Fed. R. Civ. P. 19(b).

22 Pursuant to Rule 19(b), this Court will consider:

- 23 (1) The extent to which a judgment rendered in the person's absence might  
24 prejudice that person or the existing parties;  
25 (2) The extent to which any prejudice could be lessened or avoided by:  
26 (A) Protective provisions in the judgment,  
27 (B) Shaping the relief, or  
28 (C) Other measures;  
(3) Whether a judgment rendered in the person's absence would be  
adequate;  
(4) And whether the plaintiff would have an adequate remedy if the action

1           were dismissed for nonjoinder.

2           “Because both the Tribe and the [2011 Elected Council] have sovereign immunity,  
3 little balancing of these factors is required.” Timbisha Shoshone, 2003 WL 25897083, at  
4 \*6 (citing Kescoli v. Babbitt, 101 F.3d 1304, 1311 (9th Cir. 1996) (“If the necessary party  
5 is immune from suit, there may be very little need for balancing Rule 19(b) factors  
6 because immunity itself may be viewed as the compelling factor.”) (internal citations and  
7 quotations omitted)). When taken together, the factors nonetheless weigh in favor of this  
8 Court’s conclusion that both the Tribe and the 2011 Elected Council are indispensable.

9           “The first factor in the Rule 19(b) analysis is essentially the same as the legal  
10 interest test in the ‘necessary party’ analysis.” Timbisha Shoshone, 2003 WL  
11 255897083, at \*6 (citing Quileute Indian Tribe v. Babbitt, 18 F.3d 1456, 1460 (9th Cir.  
12 1994)); see also American Greyhound, 305 F.3d at 1024-25 (“Not surprisingly, the first  
13 factor of prejudice, insofar as it focuses on the absent party, largely duplicates the  
14 consideration that made a party necessary under Rule 19(a).”). Therefore, for the  
15 reasons already stated above, the prejudice prong weighs in favor of an indispensability  
16 finding here.

17           In evaluating the next two prongs, the Court finds it cannot effectively minimize  
18 this prejudice or render an adequate judgment absent the presence of the necessary  
19 parties. Granting any of Plaintiffs’ requested relief would leave the Tribe with no  
20 recognized government, which, as this Court already stated, would be extremely  
21 detrimental to a sovereign entity just beginning to rebuild after years of unrest. The  
22 Court finds there is no way to grant Plaintiffs’ relief without divesting the 2011 Elected  
23 Council of its current position as the Tribe’s recognized government.

24           Plaintiffs contend that this Court can craft relief to avoid prejudice to the Tribe or  
25 the 2011 Elected Council because this Court is not required to vacate an agency  
26 decision and instead can remand to the appropriate agency, here the DOI, for further  
27 proceedings. (ECF No. 72 at 26.)  
28

1 Plaintiffs cite to a number of cases involving environmental law in which courts  
2 remanded agency regulations they found violated the APA; however, the courts vacated  
3 those regulations in order to protect a species or preserve the operation of an  
4 environmental act. See Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405 (9th  
5 Cir. 1995) (“Ordinarily when a regulation is not promulgated in compliance with the APA,  
6 the regulation is invalid. However, when equity demands, the regulation can be left in  
7 place while the agency follows the necessary procedures.”) (internal citations omitted);  
8 Cal. Communities Against Toxics v. EPA, 688 F.3d 989 (9th Cir. 2012) (opting not to  
9 vacate an EPA decision after the EPA admitted its reasoning was flawed and requested  
10 remand to reconsider its action); W. Oil and Gas Ass'n v. EPA, 633 F.2d 803 (9th Cir.  
11 1980). However, these cases, which deal with endangered species and environmental  
12 acts, are factually distinguishable on their face. Plaintiffs cite to no cases in which a  
13 court has extended its equitable power of remand absent vacatur from environmental  
14 issues to those on a more comparable footing to tribal law.

15 Nevertheless, Plaintiffs maintain that the Court’s equitable power “includes  
16 adjudications as well as rulemakings” and that the remand they request is therefore  
17 proper. (ECF No. 72 at 26.) They cite to Checkosky v. SEC, 23 F.3d 452 (D.C. Cir.  
18 1994), and United Mine Workers of America v. Federal Mine Safety & Health  
19 Administration, 920 F.2d 960, 966-67 (D.C. Cir. 1990), to support their position.  
20 However, both of those cases dealt with agency decisions that included “an inadequate  
21 statement . . . of findings and conclusions,” Checkosky, 23 F.3d at 462, and “a want of  
22 reasoned decisionmaking.” United Mine Workers, 920 F.2d at 966. In both cases, the  
23 D.C. Circuit remanded the cases without vacatur not because the agencies clearly  
24 violated the APA, but, rather, “to afford the agency an opportunity to set forth its view in  
25 a manner that would permit reasoned judicial review,” Checkosky, 23 F.3d at 462, and  
26 because of “some possibility that substantial evidence may be missing on some points.”  
27 United Mine Workers, 920 F.2d at 966.

28 ///

1 In United Mine Workers, the D.C. Circuit concluded that because “the record affords us  
2 no basis for concluding that the deficiencies of the order will prove substantively fatal, we  
3 remand the case but do not vacate.” Id. The D.C. Circuit declined to vacate the agency  
4 decisions because the court did not have enough information to conclude the agency  
5 decisionmaking warranted vacating.

6 This Court finds no such lack of reasoning or paucity of evidence in the EHDs and  
7 no reason to extend the doctrine to this case. Therefore, factors two and three favor  
8 dismissal. The fourth prong likewise favors dismissal. Even though there remains no  
9 alternative forum available to Plaintiffs at this point, which would seem to weigh in  
10 Plaintiffs’ favor here, the Ninth Circuit has recognized that “a plaintiff’s interest in  
11 litigating a claim may be outweighed by a tribe’s interest in maintaining its sovereign  
12 immunity.” Kescoli, 101 F.3d at 1311 (quoting Chehalis, 928 F.2d at 1500); see also  
13 Am. Greyhound, 305 F.3d at 1025 (“[W]e have regularly held that the tribal interest in  
14 immunity overcomes the lack of an alternative remedy or forum for the plaintiffs.”).  
15 Indeed, the Tribe’s sovereign immunity in this case presents a compelling factor favoring  
16 dismissal. See Kescoli, 101 F.3d at 1311. Accordingly, when evaluating the facts and  
17 circumstances of this case as a whole, the Court finds that equity and good conscience  
18 demand dismissal of this action.

19  
20 **C. Leave to Amend**

21  
22 A court granting a motion to dismiss a complaint must then decide whether to  
23 grant leave to amend. Leave to amend should be “freely given” where there is no  
24 “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice  
25 to the opposing party by virtue of allowance of the amendment, [or] futility of the  
26 amendment . . . .”

27 ///

28 ///

1 Foman v. Davis, 371 U.S. 178, 182 (1962); see also Eminence Capital, LLC v. Aspeon,  
2 Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to be  
3 considered when deciding whether to grant leave to amend). Dismissal without leave to  
4 amend is proper only if it is clear that “the complaint could not be saved by any  
5 amendment.” Intri-Plex Techs., Inc. v. Crest Group, Inc., 499 F.3d 1048, 1056 (9th Cir.  
6 2007) (internal citations and quotations omitted).


7 As discussed above, the Tribe and the 2011 Elected Council members are  
8 indispensable parties that enjoy sovereign immunity. They cannot be joined to this  
9 action unless they agree or expressly waive their immunity. At this point, neither the  
10 Tribe, through the 2011 Elected Council, nor the individual members of the council  
11 waived their immunity. The Court already accorded Plaintiffs leave to amend their  
12 complaint, and the SAC fares no better than its predecessors in avoiding dismissal.  
13 Consequently, this Court sees no way Plaintiffs can cure their complaint through any  
14 further amendment. Therefore, this Court GRANTS Defendants’ Motion to Dismiss  
15 without leave to amend.

16  
17 **CONCLUSION**

18  
19 For the reasons just stated, Defendants’ Motion to Dismiss, (ECF No. 64), is  
20 GRANTED without leave to amend.

21 IT IS SO ORDERED.

22 DATED: April 8, 2013

23  
24  
25   
26 MORRISON C. ENGLAND, JR., CHIEF JUDGE  
27 UNITED STATES DISTRICT JUDGE  
28

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of ) Docket No. 63-001-HLW  
)  
U.S. Department of Energy )  
)  
(High-Level Waste Repository) )  
)  
)  
)  
\_\_\_\_\_ )

CERTIFICATE OF SERVICE

I hereby certify that copies of the “**TIMBISHA SHOSHONE TRIBE’S RESPONSE TO NRC SECRETARY’S AUGUST 30, 2013 ORDER AND RENEWED 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 30th day of September, 2013, through the Nuclear Regulatory Commission’s Electronic Information Exchange.

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