

**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)	
)	Docket No. 63-001-HLW
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 09-892-HLW-CAB04
)	
(High Level Waste Repository))	September 6, 2011
)	

**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**

On August 26, 2011, the Timbisha Shoshone Tribal Council (Tribal Council) filed a motion with this Construction Authorization Board (Board), requesting that the Board recognize it as the duly authorized representative of the Timbisha Shoshone Tribe (Tribe) in this proceeding. The Tribal Council’s motion, among other things, also asked the Board to direct the United States Department of Energy (DOE) “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 [Affected Indian Tribe] AIT in connection with this licensing proceeding.” Timbisha Shoshone Tribe’s [*sic*] Motion for Recognition of the Timbisha Shoshone Tribal Council as the Legitimate Representative of the Timbisha Shoshone Tribe, at 8 (filed Aug. 26, 2011) (Motion).

DOE expresses no view on the merits of the Tribal Council’s request for recognition as representative of the Tribe.¹ DOE respectfully submits that the Tribal Council seeks action that

¹ There is still federal litigation pending over the July 29, 2011 decision of the Interior Department (the agency with actual jurisdiction) recognizing the Tribal Council as the Tribe’s

is beyond this Board's, or the Commission's, jurisdiction. DOE specifically opposes the request in the Motion that the Board direct DOE to "meet and confer" with the Tribal Council regarding the release of federal funds to the Tribal Council, on the ground that the Commission and this Board are without jurisdiction to grant this relief.

The Nuclear Waste Policy Act (NWPA) contains provisions concerning the participation of affected Indian tribes, including providing financial assistance for such participation. NWPA § 118(b), 42 U.S.C. § 10138(b); *see also* NWPA § 2(2), 42 U.S.C. § 10101(2)(2) (Secretary of the Interior, upon petition from an Indian tribe, must decide if the effects of locating a repository "are both substantial and adverse to the tribe"); NWPA § 119(a), 42 U.S.C. § 10140(a) (providing for judicial review of any final decision or action by the Secretary under Subtitle A of the NWPA, which includes participation of Indian tribes). The NWPA then specifically instructs that the "Secretary [of Energy] shall make grants to each affected Indian tribe" and lists the activities for which those financial grants relate. NWPA § 118(b), 42 U.S.C. § 10138(b). Moreover, NWPA § 302(d)(6) identifies the Nuclear Waste Fund as the source of funds from which the Secretary is to make those financial grants.

But the NWPA does not assign the Nuclear Regulatory Commission any authority or responsibility with respect to DOE's provision of this financial assistance. *See* NWPA § 114(d), 42 U.S.C. § 10134(d). Nor is there any mention of this process in the portion of the NWPA constituting this proceeding. NWPA § 114(b),(d), 42 U.S.C. § 10134(b),(d). And the Notice of

representative in government-to-government relations. The Motion notes that the "aggrieved political faction" unsuccessfully sought a preliminary injunction to prevent the recognition of the Tribal Council as the Tribe's representative. It also acknowledges that this "aggrieved political faction" has "filed a First Amended Complaint on August 5, 2011." Motion at 5, n. 6 (attached as Exhibit A to DOE's Response is a copy of that First Amended Complaint filed on August 5, 2011). The First Amended Complaint purports to assert causes of action based under federal law and the Administrative Procedures Act. *See* Ex. A hereto. The question of who is the Tribe's authorized representative is still an open one in federal court. Thus, in addition to being beyond the Board's and the Commission's jurisdiction, the relief sought in the motion may be premature.

Hearing convening this Board does not charge this Board with any special responsibilities regarding financial assistance to Affected Indian Tribes. 73 Fed. Reg. 63029 (Oct. 22, 2008). These issues are thus beyond the scope of this proceeding and jurisdiction of the Commission and perforce of this Board.

DOE respectfully requests that the Board deny the request of the Tribal Council for a meet-and-confer order respecting funding for it as representative of the Tribe under the NHPA because it is beyond the scope of this proceeding to direct the Secretary regarding the release of these funds.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

By Electronically Signed by Donald P. Irwin

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CERTIFICATE OF SERVICE

I hereby certify that copies of **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** have been served on the following persons on this 6th day of September 2011 through the Nuclear Regulatory Commission's Electronic Information Exchange.

CAB 04

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