

September 14, 2011

G. Paul Bollwerk, Chair  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
Mail Stop T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Kaye D. Lathrop  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
Mail Stop T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Craig M. White  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
Mail Stop T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

In the Matter of  
AREVA ENRICHMENT SERVICES, LLC.  
(Eagle Rock Enrichment Facility)  
Docket No. 70-7015-ML; ASLBP No. 10-899-02-ML-BD01

Dear Administrative Judges:

In a Memorandum and Order (“Order”) dated September 7, 2011, the Board asked the NRC staff to provide the Board with a status report concerning the Memorandum of Agreement (“MOA”) for treatment of historic/cultural resources at the Eagle Rock Enrichment Facility (“EREF”) site. Specifically, the Board asked for a “report on the status of (1) the process for finalizing the MOA, and (2) submission of the draft MOA to the Board.” Order at 2.

In response, the staff hereby notifies the Board that the required signatories — the NRC, AREVA Enrichment Services LLC, and the Idaho State Historic Preservation Office (“SHPO”) — have signed the final MOA. Consistent with 36 CFR § 800.6(b)(1)(iv), the staff will submit a copy of the executed MOA to the Advisory Council on Historic Preservation. A copy of the executed MOA is attached, and it is also publicly available in the Agencywide Documents Access and Management System (ADAMS) at Accession No. ML112560070.

With respect to the participation of the Shoshone-Bannock Tribes (“Tribes”) as an invited concurring party to the MOA, the staff notes that the Tribes have not replied to the staff with comments on the draft MOA or with a notification that they have no comments.<sup>1</sup> By letter dated September 1, 2011 (ADAMS Accession No. ML112140409), the staff sent a copy of the final MOA to the Tribes and requested the Tribes to sign the final MOA as an invited concurring party should they desire to do so. The staff has not received any communication from the Tribes in response to this letter.

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<sup>1</sup> The staff has made several attempts to reach the Tribes by both telephone and e-mail.

Respectfully submitted,

**/Signed (electronically) by/**

Marcia J. Simon  
Counsel for the NRC Staff  
U.S. Nuclear Regulatory Commission  
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Washington, DC 20555-0001  
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[Marcia.Simon@nrc.gov](mailto:Marcia.Simon@nrc.gov)

Dated at Rockville, Maryland  
This 14<sup>th</sup> day of September, 2011

Enclosure: Final Memorandum of Agreement

cc: EIE Service List

**MEMORANDUM OF AGREEMENT  
AMONG THE UNITED STATES NUCLEAR REGULATORY COMMISSION,  
THE IDAHO STATE HISTORIC PRESERVATION OFFICE,  
AND AREVA ENRICHMENT SERVICES LLC  
REGARDING THE PROPOSED EAGLE ROCK ENRICHMENT FACILITY PROJECT  
IN BONNEVILLE COUNTY, IDAHO.**

**WHEREAS**, the U.S. Nuclear Regulatory Commission (NRC) has determined that the issuance of an NRC license to AREVA Enrichment Services LLC (AES), which would allow AES to construct and operate the proposed Eagle Rock Enrichment Facility (EREF) in Bonneville County, Idaho, would be a Federal Undertaking (hereafter called "Project"), for purposes of compliance with Section 106 of the *National Historic Preservation Act of 1966*, as amended (NHPA, 16 U.S.C. §470); and

**WHEREAS**, the NRC, the Idaho State Historic Preservation Office (SHPO), and AES (collectively hereafter called "Signatories") agree that site MW004 is a historic property eligible for the National Register of Historic Places (NRHP) under Title 36 of the *U.S. Code of Federal Regulations* (36 CFR § 60.4), Criteria A and D, that will be adversely affected by Project-related activities as presently planned; and

**WHEREAS**, in accordance with 36 CFR § 800.6(a)(1), the NRC notified the Advisory Council on Historic Preservation (ACHP) of its adverse effect determination with documentation specified in 36 CFR § 800.11(e); and the ACHP chose not to participate in the consultation pursuant to 36 CFR § 800.6(a)(1)(iii); and

**WHEREAS**, the NRC acknowledges 36 CFR § 800.2(c)(2)(ii)(A) concerning an agency's responsibility to make a reasonable and good faith effort to identify Native American tribes and Native Hawaiian organizations that will be consulted during the NHPA Section 106 process and to provide the identified Native American tribes and Native Hawaiian organizations a reasonable opportunity to participate in the Section 106 process; and

**WHEREAS**, pursuant to 36 CFR § 800.6(c)(3), the NRC contacted the Shoshone-Bannock Tribes (Tribes) and invited them to participate in the development of this Memorandum of Agreement (MOA) as a concurring party, and the Tribes agreed to participate; and

**WHEREAS**, the AES "*A Treatment Plan for Historic Site MW004 in the Area of the Proposed Eagle Rock Enrichment Facility, Bonneville County, Idaho*," prepared by Western Cultural Resource Management, Inc. (WCRM), January 28, 2010 ("Treatment Plan"), is incorporated herein by reference; and

**WHEREAS**, the AES "*Archaeological Monitoring and Discovery Plan for the Eagle Rock Enrichment Facility, AREVA Enrichment Services LLC, in Bonneville County, Idaho*," prepared by WCRM, September 17, 2009 ("Discovery Plan"), is incorporated herein by reference; and

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**WHEREAS**, the SHPO acknowledges that it approved the Treatment Plan and Discovery Plan for the intended purposes of these documents; and

**WHEREAS**, the SHPO acknowledges that AES completed the obsidian artifacts X-ray fluorescence (XRF), geochemical, and hydration analysis work, as documented at the end of the Treatment Plan and in the two letter reports to Dr. Kenneth Reid, State Archaeologist and Idaho Deputy State Historic Preservation Officer, prepared by WCRM, dated June 28, 2011, and July 11, 2011; and

**WHEREAS**, the SHPO acknowledges that AES completed the mitigation and data recovery for site MW004 in accordance with the approved Treatment Plan, as documented in the (a) AES letter report to Dr. Kenneth Reid, State Archaeologist and Idaho Deputy State Historic Preservation Officer, dated November 17, 2010, prepared by WCRM; and (b) *"Archaeological Data Recovery Report at 10BV246: the John Leopard Homestead, Bonneville County, Idaho,"* prepared by WCRM, June 23, 2011; and

**WHEREAS**, in accordance with 36 CFR § 800.6(b)(1)(iv), following execution of this MOA, the NRC shall submit this MOA, along with the documentation specified in 36 CFR § 800.11(f), to the ACHP prior to approving the Project, in order to meet the requirements of Section 106 of the NHPA and 36 CFR § 800.6(b)(1); and

**WHEREAS**, the NRC and the State of Idaho do not waive their sovereign immunity by entering into this MOA, and each fully retains all immunities and defenses provided by law with respect to any action based on, or occurring as a result of, this MOA; and

**WHEREAS**, signing of this MOA does not constitute a record of decision or approval of the Project by any Federal agency; and

**WHEREAS**, this MOA, consisting of seven pages, represents the entire and integrated agreement between the Signatories and supersedes all prior negotiations, representations and agreements, whether written or oral, regarding the Section 106 review of the effects of the Project on site MW004 and other potentially affected cultural and historic resources that may be identified.

**NOW, THEREFORE**, the Signatories agree that, if approved by the NRC, the Project shall be implemented in accordance with the following stipulations regarding the mitigation of the adverse effects of project related activities at site MW004 and other potentially affected historic and cultural resources that may be identified.

## **I. STIPULATIONS:**

### **A. MITIGATION**

1. On November 8, 2010, AES completed the mitigation at site MW004 in accordance with the Treatment Plan. On November 17, 2010, WCRM submitted a letter report,

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on behalf of AES, for the SHPO review and approval. The SHPO approved the letter report on November 26, 2010.

In accordance with a provision in the November 17, 2010 WCRM letter report to the SHPO, WCRM also prepared a detailed final site MW004 archaeological data recovery report, *"Archaeological Data Recovery Report at 10BV246: the John Leopard Homestead, Bonneville County, Idaho,"* June 23, 2011. AES submitted this detailed data recovery report to the SHPO by letter dated June 27, 2011.

## **B. FUTURE DISCOVERIES**

1. AES will conduct ground disturbing activities at the proposed Project in accordance with the Discovery Plan. The Discovery Plan provisions include training all contractors, subcontractors, and temporary and permanent AES employees, who will be performing ground disturbing activities onsite during preconstruction, construction, and operation of the proposed Project, on Federal laws and regulations concerning cultural artifacts and on the purposes and procedures regarding archaeological monitoring. AES will also employ a professionally qualified monitor ("Monitor"), to oversee ground disturbing activities at the designated areas within the proposed Project area. The Monitor's responsibilities will include ensuring that the Discovery Plan procedures will be followed if historic or cultural resources are discovered during ground disturbing activities. If an unexpected discovery occurs, ground disturbing activities in the vicinity of the discovery will immediately cease while the Monitor documents and evaluates the discovery's significance. The Monitor will also notify AES, the NRC, the SHPO, and the Tribes' Heritage Tribal Office (HeTO) by telephone within one business day of the discovery. Ground disturbing activities may continue at another location if another Monitor is present. The Discovery Plan procedures will be followed before ground disturbing activities proceed in the vicinity of the discovery.
2. If human remains are encountered, work will immediately stop in the vicinity of the discovery, the area will be secured, and the Monitor will immediately contact local law enforcement. If the remains are not associated with a crime, then the SHPO should be contacted to assure compliance with Idaho State Code Sections 27-502, 503 and 504 and other applicable Federal, State and local regulations relating to burial discoveries through inadvertent, construction-related disturbance of graves. If the human remains are determined to be Native American, the SHPO will contact the appropriate tribes.
3. If Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony are encountered by AES, the remains will be evaluated as a historic property and procedures relating to identification and effect will be determined by AES in consultation with the SHPO and appropriate tribes. Existing Federal, State and local laws will be followed pertaining to discovery of Native American human remains, funerary objects, sacred objects, or objects of cultural

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patrimony.

4. Prior to the implementation of ground disturbing activities in Project areas that have not been previously surveyed for historic and cultural resources (e.g., areas not identified until after final facility designs are completed), AES will perform a Class III cultural resource inventory(ies) and biological and/or other inventories or surveys as required to identify potential historic and cultural resources. AES will implement the following procedures when any previously un-surveyed areas are identified:
  - a. Inform the NRC, SHPO, and HeTO about proposed ground disturbing activities in previously un-surveyed areas.
  - b. Conduct the additional surveys, and participate in an on-site evaluation (if necessary).
  - c. Submit a report of the Class III cultural resource inventory and other survey results, to the NRC, SHPO, and HeTO.
5. Any additional mitigation to address adverse impacts to existing or newly identified historic or cultural properties will be conducted by AES in accordance with treatment plans submitted to, and approved by, the SHPO. No ground disturbance may be commenced by AES in any existing or newly identified historical or cultural areas until the SHPO approves the treatment plans and the performance of the mitigation activities.

#### **C. REPORTING**

1. AES will comply with the documenting and reporting procedures described in the Treatment Plan for site MW004.
2. AES will comply with the documenting and reporting procedures described in the Discovery Plan and any subsequent treatment plans developed to address adverse impacts on newly identified historic or cultural properties.

#### **D. NRC LICENCE CONDITIONS**

1. The NRC shall require as a condition of any license issued to AES that AES comply with the provisions in this MOA.
2. Any NRC license conditions will be enforced subject to the extent of NRC's regulatory authority and as NRC determines to be appropriate.

#### **E. AMENDMENTS**

1. Any Signatory to this MOA may request that it be amended, whereupon the Signatories will consult to reach agreement. Such amendment shall be effective upon the signature of all Signatories to this MOA, and the amendment shall be attached to the MOA as an Appendix.

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2. Modifications to the Discovery Plan may be executed upon concurrence of all Signatories as long as no modifications to the body of the MOA are required. Modifications to the Discovery Plan will not require a formal amendment to this MOA as per **STIPULATION E.1**.

## **F. DISPUTE RESOLUTION**

1. Should any Signatory to this MOA object within 30 days to any activity pursuant to this MOA, the NRC shall consult with the objecting Signatory to resolve the objection.

If the NRC determines the objection cannot be resolved, the NRC shall forward all documentation relevant to the dispute to the ACHP. Any comments or recommendations received from the ACHP will be forwarded to all Signatories for consideration.

Prior to reaching a final decision on the dispute, the NRC will prepare a written resolution of the objection taking into account any timely advice or comments regarding the dispute from the ACHP and Signatories and distribute a copy of the written response to all Signatories. If a Signatory fails to respond within 30 days of receipt of the written resolution, concurrence with the resolution will be assumed by the other Signatories and the resolution will go into effect.

If resolution of the objection requires an amendment to the MOA, it will be done per **STIPULATION E.1** of this MOA.

2. Nothing in this Section shall be construed or interpreted as a waiver of any judicial remedy that would be available to any party to this MOA.
3. Nothing in this Section shall be construed or interpreted to apply to the NRC's enforcement actions related to compliance with the NRC's regulations or license conditions.

## **G. TERMINATION**

1. Signatories to this MOA may initiate termination by providing written notice to the other Signatories of their intent. After notification by the initiating Signatory, the remaining Signatories shall have 60 business days to consult to seek agreement on amendments or any other actions that would address the issues and avoid termination. If such consultations fail, the termination will go into effect at the end of this 60-day period, unless all the Signatories agree to a longer period.
2. In the event of termination, the NRC will comply with any applicable requirements of 36 CFR §§ 800.4 through 800.6 with regard to the individual Project covered by this MOA.

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## **H. DURATION OF AGREEMENT**

1. This MOA shall remain in effect from its date of execution by the Signatories (last date of signature) until termination of the NRC license to construct and operate the proposed EREF, unless extended by agreement among the Signatories pursuant to **STIPULATION E.1.**

## **XIII. GENERAL PROVISIONS OF THE AGREEMENT**

- A. ENTIRETY OF AGREEMENT.** This MOA, consisting of seven pages, represents the entire and integrated agreement between the Signatories and supersedes all prior negotiations, representations and agreements, whether written or oral.
- B. SEVERABILITY.** Should any portion of this MOA be judicially determined to be illegal or unenforceable, the remainder of the MOA shall continue in full force and effect according to its terms, and any Signatory may renegotiate the terms affected by the severance.
- C. THIRD PARTY BENEFICIARY RIGHTS.** The Signatories do not intend to create in any other individual or entity the status of third party beneficiary, and this MOA shall not be construed so as to create such status. The rights, duties, and obligations contained in this MOA shall operate only between the Signatories to this MOA, and shall inure solely to the benefit of the Signatories to this MOA. The provisions of this MOA are intended only to assist the Signatories in determining and performing their obligations under this MOA. The Signatories to this MOA intend and expressly agree that only the Signatories to this MOA shall have any legal or equitable right to seek to enforce this MOA, to seek any remedy arising out of a Signatory's performance or failure to perform any term or condition of this MOA, or to bring an action for the breach of this MOA.

Execution of this MOA by the NRC, the SHPO, and AES, the submission of documentation and filing of this MOA with the ACHP pursuant to 36 CFR § 800.6(b)(1)(iv) prior to the NRC approval of the Project, and implementation of its terms, are evidence that the NRC has taken into account the effects of the Project on historic properties and afforded the ACHP an opportunity to comment.

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Signatures: In witness thereof, the Signatories to this MOA through their duly authorized representatives have executed this MOA on the date(s) set out below, and certify that they have read, understood, and agreed to the terms and conditions of this MOA as set forth herein.

The effective date of this MOA is the date of the last signature affixed to this page.

**Signatories:**

U.S. Nuclear Regulatory Commission (NRC)

By:  Date: 9/1/11  
Larry W. Camper, Director  
Division of Waste Management and Environmental Protection  
Office of Federal and State Materials and Environmental Management Programs

Idaho State Historic Preservation Office (SHPO)

By:  Date: 9/8/11  
Susan Pengilly, Deputy State Historic Preservation Officer

AREVA Enrichment Services LLC (AES)

By: \_\_\_\_\_ Date: \_\_\_\_\_  
George Harper, Vice President of Engineering and Licensing

**Invited Concurring Party:**

The Shoshone-Bannock Tribes

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Nathan Small, Chairman, Fort Hall Business Council

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Idaho State Historic Preservation Office (SHPO)

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Susan Pengilly, Deputy State Historic Preservation Officer

AREVA Enrichment Services LLC (AES)

By:  Date: 9/8/11  
George Harper, Vice President of Engineering and Licensing

**Invited Concurring Party:**

The Shoshone-Bannock Tribes

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Nathan Small, Chairman, Fort Hall Business Council

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for Proposed Eagle Rock Enrichment Facility Project in Bonneville County, Idaho.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
AREVA ENRICHMENT SERVICES, LLC	)	Docket No. 70-7015-ML
	)	
(Eagle Rock Enrichment Facility)	)	ASLBP No. 10-899-02-ML-BD01

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "STATUS REPORT CONCERNING MEMORANDUM OF AGREEMENT" in the above-captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 14<sup>th</sup> day of September, 2011, which to the best of my knowledge resulted in transmittal of copies to those on the EIE Service List for the above-captioned proceeding.

**/Signed (electronically) by/**  
Marcia J. Simon  
Counsel for the NRC Staff  
U.S. Nuclear Regulatory Commission  
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(301) 415-1261  
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