

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
United States Department of Energy)	Docket No. 63-001
)	
(High Level Nuclear Waste Repository)	December 22, 2008

NATIVE COMMUNITY ACTION ACOUNCIL
PETITION TO INTERVENE AS A FULL PARTY

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I. INTRODUCTION

A. Request and Party Identity

The native Community Action Council (NCAC) hereby petitions for a formal hearing to be held on the application of the Department of Energy (DOE) for a construction authorization for the proposed high-level radioactive waste repository at Yucca Mountain (hereinafter referred to as the “proceeding”). The NCAC is a Nevada non-profit corporation composed of a Board of Directors from Native American communities downwind from the Nevada Test Site that experience adverse health consequences known to be plausible from exposure to radiation. The NCAC also petitions to intervene as a full party to this proceeding. The name of the party and its address are as follows:

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B. Timeliness

1. The application was noticed for hearing on October 22, 2008 (73 Fed. Reg. 63029), and this Petition is timely filed within 60 days of publication of such notice pursuant to 10 CFR Part 2, Subpart J § 2.1017.

2. Pursuant to 10 CFR Part 2, Subpart J, § 2.1014, good cause exists for any failure of timely filing. The Native Community Action Council has endeavors to have meaningfully advocate for the protection of its members that are victims of radiological

impacts known to be plausible from exposure from US and United Kingdom nuclear activities at the Nevada Test Site. The NCAC has not been protected by the US institutions trusted to protect us and are the unwilling victim of negligence by the US DOE. The NCAC views the failure by the DOE to protect the members of the NCAC as intent and manifest environmental racism.

3. There exists is no other means or representation by a party whereby the NCAC member's interests can be represented fairly or otherwise protected. The unique beliefs, values and customs exercised by the NCAC members individually and collectively are not represented or protected by any party to the proceedings.

4. Full participation by NCAC will ensure the completeness of the record and confidence by the general public in the proceedings and the NRC's role as a nuclear regulator.

5. Members of the NCAC will individually and collectively sustain substantial permanent injury to their health and property interests as set forth with particularity in contentions herein submitted in III Contentions.

C. Standing

1. The proposed repository would be located in the central Great Basin within the homelands of the Western Shoshone Nation, Newe Sogobia, formally acknowledged by and through the 1863 Treaty of Ruby Valley, 18 Stat. 689-692, Article V. The Yucca Mountain region is acknowledged by the Western Shoshone Nation as "joint-use" with Nuwuvi¹, Southern Paiute people. The NCAC is entitled to request a hearing and be admitted as a full party pursuant to 10 CFR §§ 2.309(d)(2)(iii), 2.309(d)(3), and 2.309(e).

¹ The word Nuwuvi is the language of the Southern Paiute and interpreted to English mean "the people".

2. In addition to this provision, the NCAC has standing to request a hearing because (a) it would suffer numerous concrete and specific injuries in fact, within the zone of interests protected by the NWPA, the Atomic Energy Act of 1954, as amended (AEA) 42 USC §§ 2011, *et seq.* and the National Environmental Policy Act of 1969, as amended (NEPA) 42 USC 4331, *et seq.*, should a repository at Yucca Mountain be built, (b) these injuries are consequent to licensing, transportation to, and operation of a geologic repository at Yucca Mountain, and (c) these injuries will be addressed by the denial of the Department of Energy (DOE) application.

(a) Injuries in Fact and Causation

NCAC has a longstanding interest in protecting the high quality of life, health and safety of this and future generations of Newe² and Nuwuvi from radiation health effects that injure them individually and collectively. Among the inevitable injury to the members of the NCAC is the radioactive contamination of the land used, occupied and shared by Newe with the Nuwuvi and radiation exposure of both peoples that is cumulative with the past exposure from US testing of weapons of mass destruction at the Nevada Test Site (NTS) from 1951-1994. The NCAC is injured because under Newe and Nuwuvi customs, Mother Earth is sacred. Failure to protect Mother Earth from radioactive material is to discriminate against Native American people because their free exercise of religion and practice of protective, preservation and conservation is not preferred for protection under the First Amendment of the US Constitution, a religious distinction. These injuries are sufficient to give the NCAC standing to intervene.

(b) Zone of Interest

² The word “Newe” is the language of the Western Shoshone people use to refer to themselves and translates in the English language as, “the people”.

NCAC's stated injuries are radiological in nature, and therefore, they fall within the interests protected by the NWPA, the AEA, and the NEPA.

(c) Redressibility

These injuries will not occur if the Yucca Mountain application in this proceeding is denied, the relief requested by NCAC.

D. Hearing Requested

NCAC hereby formally requests a formal adjudicatory hearing on each of its contentions herein submitted in accordance with section 189a(1)(A) of the AEA, Section 114(d) of the NWPA, and 10 CFR Part 2, Subpart C and J. In addition, NCAC requests to participate in the resolution of any and all uncontested issues to the same extent, and in the same manner, as DOE or any other party may be allowed to participate in the resolution of those issues.

E. Subpart J

NCAC has substantially complied with Subpart J in that it has designated a person to be responsible for electronic files of documentary material; including Section 2.1003, in that it has designated an official responsible for the administration of its responsibility to provide electronic files of documentary material; established procedures to implement the requirements in Section 2.1003; provided training to its staff on the procedures for the implementation of the responsibility to provide electronic files of documentary material; and ensure that all documentary material carries the submitters unique identification number; and its responsible designated representative has certified to the best of his knowledge that, the documentary material specified in Section 2.1003 has been identified and made electronically available.

F. Joint Contentions

NCAC has no joint contentions but, may identify joint contentions later, in accordance with such reasonable schedule as may be set by the presiding officer.

II. Introduction to Contentions

NCAC has drafted “single-issue” contentions, each raising a single legal issue, single safety issue, single environmental issue, and each supported by a single set of related facts proving: 1) an error in conclusion by the DOE; 2) demonstrating a lack of sufficient data to support a given conclusion made by the DOE; or, 3) omissions. Errors of omission are contentions based on the lack of completeness by the DOE to provide necessary documentation. NCAC is prepared to assist the Commission at any time in locating any document necessary to provide a full and complete record in the proceedings.

III. Contentions

A. Legal Issue

(1) Land Ownership and Control

- (a) A specific statement of the issue of law or fact to be raised or controverted.

Pursuant to 10 CFR § 63.121 (a)(1)(part of Subpart E) the geologic repository operations area (GROA) is required to be located in and on lands that are either acquired lands under the jurisdiction and control of DOE, or lands permanently withdrawn and reserved for its use. Also, 10 CFR § (a)(2) requires such lands to be held free and clear of all such encumbrances including easements, if significant, such as: (iii) All other rights..., or

otherwise. This contention alleges non-compliance with this regulatory provision and therefore raises a material issue within the scope of the licensing proceeding.

(b) A brief explanation of the basis of the contention.

Yucca Mountain is owned by Newe people under tribal custom and laws of the Western Shoshone Nation together in privity with every individual Newe citizen. The DOE is unable to demonstrate ownership of Yucca Mountain acquired under the jurisdiction of the DOE because the Treaty of Ruby Valley, 18 Statute 689-692, is “in full force and effect” and thereby controlling. The treaty does not cede land to the US and requires payment by the US to the Newe for the specific interests sought, acknowledging that the Western Shoshone Nation possessed the specific interests that the US sought to purchase.

(c) A concise statement of the alleged facts or expert opinion that support the contention, along with appropriate citations to supporting scientific material.

The Treaty of Ruby Valley, 18 Statute 689-692, is a fact of International Law entered into by the Western Shoshone Nation and the US as customarily practiced among nations and is the accepted manner of foreign relations intercourse between sovereign nations. The interests of the Western Shoshone Nation were deemed of such importance to the US Congress, when Nevada was admitted by An Act of Congress Organizing the Territory of Nevada, 12 Statute at Large 209-214 (1861) as a territory, that in the organic act it was provided, “...that nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of

said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Nevada, until said tribe shall signify their assent to the President of the United States to be included within the said Territory ...” No provision in the treaty outside of the specific interests the US sought to purchase could be legitimately claimed by the US as affording the US of the State of Nevada entitlement, and such land would be under the jurisdiction of the Western Shoshone Nation.

(d) Sufficient information to show that a genuine dispute exists with the DOE’s application on a material issue of law or fact, with reference to the documentary material that provides a basis for the contention, or the identification of failure and the supporting reasons for NCAC’s belief.

This contention provides undisputed fact of law including the US Constitution, the Treaty of Ruby Valley, 18 Statute 689-692, and the Act of Congress Organizing the Territory of Nevada, 12 Statute at Large 209-214 (1861), permanently preserve the interests of NCAC and the individual and collective interests of its members. The facts presented raise a material issues of law that the DOE must bear the burden of demonstrating do not apply to the Yucca Mountain GROA pursuant to 10 CFR § 63.121 (a)(1). NCAC believes, that the DOE omission of these facts from the License Application (LA) is more than a mere dispute but, in fact is an ongoing US practice of environmental racism that singles out the homeland vulnerable Native American stakeholders for abuse.

(e) The specific regulatory or statutory requirement to which the contention is relevant.

The DOE is required to demonstrate that the GROA must be located in and on lands that are either acquired lands under the jurisdiction and control of the DOE, or lands permanently withdrawn and reserved for its use pursuant to 10 CFR §§ 63.121 (a)(1), (2);and 10 CFR 63.121 (a)(2)(iii). The DOE has failed to

(2) Water Rights

(a) A specific statement of the issue of law or fact to be raised or controverted.

Pursuant to 10 CFR § 63.121 (d)(1) the DOE is to obtain such water rights as may be needed to accomplish the proposed repository; and 10 CFR § 63.121 (d)(2) water rights are included in the additional controls to be established. Water right are a reserved property interest not ceded to the US by the Treaty of Ruby Valley, 12 Statute 689-692 and are a shared right in privity with other NCAC members. The NCAC challenges the availability of water as insufficient to meet the needs of DOE since no lawful entitlement accrues to the US or the State of Nevada for use by the DOE.

(b) A brief explanation of the basis of the contention.

Water rights are an exclusive reserved property interest not ceded by the Treaty of Ruby Valley, 12 Statute 689-692, to the US by the Western Shoshone Nation. Water used by the DOE impairs the property interests of the Newe and are insufficient to meet the requirement of 10 CFR § 63.121 because the treaty does not relinquish water as a property right to the US.

(c) A concise statement of the alleged facts or expert opinion that support the contention, along with appropriate citations to supporting scientific material.

Water rights are the property interest of the Western Shoshone Nation held in trust for the beneficial use and enjoyment of Newe and are not a subject the US sought to purchase through the Treaty of Ruby Valley, 18 Statute 689-692. Tribal water rights of the Newe members of the NCAC are a property interest customarily held in privity with all other Newe. Absent a legitimate claim under the Treaty of Ruby Valley, 18 Statute 689-692, no legitimate right of the US exists to exercise authority within the boundaries of the Western Shoshone Nation or allow the DOE to use the water resources of the Western Shoshone Nation. No legitimate water rights accrue to the US in any amount to sufficiently meet the requirements of 10 CFR § 63.121(b) and (d).

(d) Sufficient information to show that a genuine dispute exists with the DOE's application on a material issue of law or fact, with reference to the documentary material that provides a basis for the contention, or the identification of failure and the supporting reasons for the NCAC's belief.

This contention challenges the DOE application as materially incomplete because it fails to consider the Western Shoshone Nation's jurisdiction over the water rights within Newe Sogobia or the needs of the Newe individually or collectively. The DOE fails to comply with the legal requirement of 10 CFR § 63.121 (b) and (d). The NCAC believes that additional water resources are needed to meet its needs of the Newe. Use of water by the DOE denies the Newe their property interests and places a unreasonable burden on the Newe to access water resources or otherwise impairs Newe water rights by the DOE requirements in the additional controls established under paragraph (b).

(e) The specific regulatory or statutory requirement to which the contention is relevant.

Pursuant to 10 CFR§ 63.31 (a)(3)(iii), provides that, “The site and design comply with the performance objectives and requirements contained in subpart E of this part;” The DOE is required to obtain water rights as may be needed to accomplish the purposes of the GROA and to include those water rights in the additional controls to be established under 10 CFR § 63.121 (d). This contention alleges non-compliance with these regulatory provisions and therefore raises a material issue within the scope of the licensing proceedings.

B. Safety

(1) NEPA Requirements

(a) A specific statement of the issue of law or fact to be raised or controverted.

DOE’s 2008 FSEIS and 2002 FEIS are inadequate because they fail to reasonably identify post-closure impacts to human health that are culturally appropriate to members of the NCAC. This deficiency is significant, and if it were to be addressed in a satisfactory manner, the disclosure of the radiological impact to the Newe would be materially disproportionate and significant.

(b) A brief explanation of the basis of the contention.

DOE’s 2008 FSEIS and 2002 FEIS are inadequate because neither address a culturally appropriate estimate of radiation exposure to a Native Americans. The reasonably maximally exposed individual is an individual living 11 miles away on a farm with a lifestyle and diet that do not adequately replicate Native American lifestyle. NCAC

members' experience is that, based upon lifestyle differences alone, the expected outcome for the Newe is a significant increase in exposure risk when a culturally appropriate lifestyle is considered.

(c) A concise statement of the alleged facts or expert opinion that support the contention, along with appropriate citations to supporting scientific material.

The NCAC was fostered by the Western Shoshone National Council as an independent research organization directed to understand and communicate the biological impacts of radiation exposure upon the New. Through efforts of the CAC Nuclear Risk Management for Native Communities project, the Western Shoshone Nation discovered that Newe and Nuwuvi exposure from radioactive fallout from US testing of weapons of mass destruction was significant based on lifestyle differences such as diet, through the consumption of wild game. The study, *The Assessment of Radiation Exposure in Native American Communities from Nuclear Weapons Testing in Nevada* (2000), published in *Risk Analysis*, 20(1), 101-111, demonstrates that assessments of risk need to take into account different lifestyle, different diet and life-ways.

(d) Sufficient information to show that a genuine dispute exists with the DOE's application on a material issue of law or fact, with reference to the documentary material that provides a basis for the contention, or the identification of failure and the supporting reasons for the NCAC belief.

This contention challenges the adequacy of the DOE's 2008 FSEIS and 2002 FEIS because neither uses an assessment of radiation exposure to a RMEI that is appropriate to the Newe and Nuwuvi members of the NCAC. The NCAC believes that, based on

lifestyle differences that the DOE failed to study, Newe and Nuwuvi will bear a disproportionate burden of risk of radiological exposure.

(e) The specific regulatory or statutory requirement to which the contention is relevant.

10 CFR § 63.31 (a)(1) requires, before a license is issued, that there is reasonable assurance that the types and amounts of radioactive materials described in the application can be received and possessed in a GROA of the design proposed without unreasonable risk to the health and safety of the public. This contention challenges compliance with NEPA and 10 CFR § 63.31 (a)(1) and therefore raises a material issue.

IV. CONCLUSION AND PRAYER FOR RELIEF

Based upon the foregoing, the Department of Energy's License Application should be denied.

Respectfully Submitted,

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