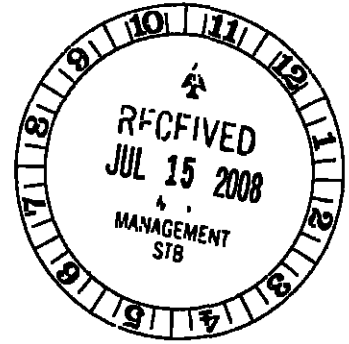




Native Community Action Council  
P.O. Box 140  
Baker, NV 89311

July 14, 2008

222920

Anne K. Quinlan, Acting Secretary  
Surface Transportation Board  
395 E Street, S W  
Washington DC 20423-0001

*RE Finance Docket No. 35106, Comments*

Dear Acting Secretary Quinlan,

The Native Community Action Council is a Party of Record in Finance Docket 35106 and hereby submits comments in **OPPOSITION** to the Application for a Certificate of Public Convenience and Necessity for the Department of Energy – Rail Construction and Operation – Caliente Line in Lincoln, Nye and Esmerelda Counties, Nevada

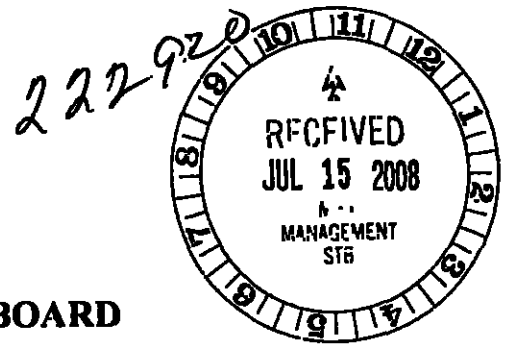
Sincerely,

  
Margene Bullcreek, President  
Native Community Action Council

ENTERED  
Office of Proceedings

JUL 15 2008

Part of  
Public Record



**BEFORE THE**  
**SURFACE TRANSPORTATION BOARD**

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**Finance Docket No. 35106**

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**United States Department Of Energy**  
**Rail Construction And Operation**  
**Caliente Rail Line In Lincoln, Nye,**  
**And Esmeralda Counties, Nevada**

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**Comments of the**  
**Native Community Action Council**

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**July 14, 2008**

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**Office of Proceedings**  
**JUL 15 2008**  
**Part of**  
**Public Record**

## **Comments in Opposition to an Application for a Certificate of Public Convenience and Necessity**

**Comments are provided to the Surface Transportation Board (“Board”) by the Native Community Action Council in OPPOSITION to the Department of Energy Application for a Certificate of Public Convenience and Necessity for the Department of Energy – Rail Construction and Operation – Caliente Line in Lincoln, Nye and Esmerelda Counties, Nevada**

### **A. Background**

**Pursuant to the Nuclear Waste Policy Act of 1982, as amended (NWPA), the Department of Energy (“DOE”) was directed to select a site for the disposal of spent nuclear fuel (“SNF”) and high-level nuclear waste (“HLNW”) from in an underground geologic repository at Yucca Mountain. The DOE filed an application on March 17, 2008 seeking prior approval from the Board under provisions of 49 U.S.C. § 10901 for the proposed construction and operation of a 300-mile rail line, known as the Caliente Rail Line in Lincoln, Nye and Esmerelda Counties, Nevada. The application seeks a certificate from the Board to allow the DOE to construct and operate a common carrier railroad for the purpose of transporting 77,000 metric tons of SNF and HLNW to Yucca Mountain.**

**On April 10, 2008, the Board issued a Decision on Notice of Construction and Operation and Adoption of Procedural Schedule acknowledging receipt of the DOE application and set a schedule for interested parties to file notices of intent to participate in the proceeding and submit comments in support or opposition to the DOE application including the basis for the party’s position either in support or opposition. On April 30, 2008 the Native Community Action Council submitted a timely Notice of Intent to Participate and is a Party of Record.**

## **B. Position and Basis for Position**

The Native Community Action Council (“NCAC”) is an organization composed of Native Americans with collective and individual ownership interests in the lands that are the subject of the DOE application. For the purposes of the proceedings the NCAC is a stakeholder and an interested party acting for the purpose “to protect the people’s rights that should accrue to us pursuant to our tribal customs and by empowering our communities in understanding, educating and managing the risks of radiation and health related concerns ”<sup>1</sup>

1 The NCAC is in **OPPOSITION** to the DOE application and urges rejection/dismissal by the Board on the basis that upon information contained in the DOE application the proposed action constitutes a major federal action the effects of constitute environmental racism. The Board has an obligation and responsibility to address environmental racism under Executive Order 12898 to ensure that low-income, minority and subsistence population are considered and do not suffer disproportionately in the management of federal programs resulting in environmental consequences from the siting and operation of federal facilities. Yucca Mountain and the associated Caliente rail line constitute a federal facility that require the Board to exercise its trust responsibility and investigate the claim of environmental racism. NCAC members have existing inherent tribal rights and interests and possess a beneficial interest in lands sought in the DOE application for the Caliente rail line and would force the Native American occupants vested by treaty to bear a disproportionate burden of risk from the shipment of SNF and HLW.

Members of the NCAC are also members of the Timbisha Shoshone Tribe, the sole “affected Indian tribe” certified in June of 2007 as such by the Department of the Interior under the NWPA to conduct independent oversight and monitoring of the DOE Yucca Mountain project. The Timbisha Shoshone Tribe has not received funding to participate in the Board proceedings, or conduct its own independent oversight and monitoring to

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<sup>1</sup> Articles of Incorporation, August 19, 2001  
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protect tribal rights and interests and is struggling to adequately represent its interests, suffering the effects of environmental racism

The DOE engages in a process of minimizing Native American interests violating individual and collective tribal rights by denying them the use of their aboriginal and treaty lands and continuing to apply discriminatory legal doctrines, the US deprived the Western Shoshone Indians of their human rights under Articles II (right to equality before the law), XVII (right to recognition of juridical personality and civil rights), and XVIII (right to a fair trial) under the American Declaration.<sup>2</sup> The pattern of argument used by the DOE eliminates any consideration of ongoing Native American ownership interests in land or potential impacts to the land and the people that rely upon them for their existence

2. The NCAC is in OPPOSITION to the DOE application and urges rejection/dismissal by the Board on the basis that the DOE application is incomplete for failure to comply with the Board's regulations, principle of which are those that require the application to include basic information about the proposal required by §1150 4(a) *Information about the proposal*. The DOE omits correct and accurate land status information in its application. See Application, p. 14. While it is true that the Bureau of Land Management manages 96 percent of the land required for construction of the rail line, all of the land sought in the DOE application constitutes no portion of the US, the State of Nevada, or Lincoln, Nye or Esmerelda Counties, in as much as the 300-mile rail line exists within the exterior boundaries of the Western Shoshone Nation<sup>3</sup>. The usufruct enjoyed by the US is subject to the treaty

Article 7, "The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes traveled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same, therefore, and in

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<sup>2</sup> Inter-Am. C.H.R., Preliminary Report of the Inter-American Commission on Human Rights, Case No. 11,140, Report No. 113/01 (Mary and Carrie Dann) (Oct. 15, 2001)

<sup>3</sup> Treaty of Ruby Valley, 18 Stat. 689-692 (1863)

consideration of the preceding stipulations, and of their faithful observance by the said bands, the United States promise and agree to pay to the said bands of the Shoshone nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsman And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded ”

The US has failed to fulfill its obligations under the terms of Article 7 and therefore it is the position of the Western Shoshone national Council that failure by the US obligation of payment constitutes an abandonment of the interests sought

The DOE fails to include or provide reference to all applicable laws acknowledging the basic principles of territorial integrity and continuity of Native American interests to the lands referenced in the DOE application and thereby misinterprets the ownership status of the 300-mile Caliente rail line as submitted in information about the proposal

Ongoing and continuing Native American land rights exist under

#### **US Constitution**

Article 6, Clause 2 “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, ”

The Northwest Ordinance, 1 Stat 51 (July 13, 1787)

The utmost good faith shall always be observed towards the Indians, their lands and their liberty shall never be taken from them without their

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consent, and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress .. ”

**Treaty of Guadeloupe Hidalgo, 9 Stat 922 (1848)**

Article 11, "special care shall be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions (against the Indians) which the United States have solemnly obliged themselves to restrain."

**Treaty of Ruby Valley, 18 Stat 689-692 (1863).**

“It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows On the north by Wong-goga-da Mountains and Shoshone River Valley, on the west by Su-non-to-yah Mountains or Smith Creek Mountains, on the south by Wi-co-bah and the Colorado Desert, on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley “<sup>4</sup>

**Act to Organize the Territory of Nevada, 12 Stat. 210 (1861)**

“Nothing in this act contained shall be construed to impair the rights of persons or property pertaining to the Indians in said territory, so long as such rights 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 in said territory ”

The assumption of the DOE does not reflect an understanding of diplomacy and foreign affairs. The Treaty of Guadeloupe Hidalgo established the boundary between the US and Mexico and clarified the status of the "Indians" in relation to their (Indian) "homelands". The entire length of the proposed Caliente rail line exists within the exterior boundaries of the Treaty of Ruby Valley and constitute no portion of the State of Nevada.

3. The NCAC is in OPPOSITION to the DOE application and urges rejection/dismissal by the Board on the basis that the DOE has not complied with 1150 4(c) *The purpose of the proposal and an explanation of why the public convenience and necessity require or permit the proposal.* The DOE has demonstrated public convenience or necessity where the Congress, the President, and the Secretary of Energy are not required to follow the US Constitution, treaties and laws. Omission of facts that evidence existing ongoing rights and interests in the 300-mile Caliente rail line inuring to the benefit of Native American stakeholders under the US Constitution, treaties and statutes including the Organic Act of Nevada is misleading and not in the national interest.

In 1863 the US was weak from fighting the American civil war and sought to enter into relations with the Shoshone by treaty, the most formal recognition between one nation and another. America's need was great and in the interest of the national security of both nations the Western Shoshone answered America's need and allied itself with the Union in 1863 through the Treaty of Ruby Valley allowing for the shipments of gold from the Sierra Nevada east through the Western Shoshone country to finance the war against the Confederacy. The debt created by the alliance is still owing. The liberties and freedoms of the Western Shoshone Nation are not to be trampled upon and have implication upon the larger foreign policy and national security interests of the US.

During the 1980's, Western Shoshone government officials engaged the US in formal negotiations in the national interests of both the Western Shoshone Nation and the US. The basis for negotiations are the existing rights, title and interests inuring to the Western Shoshone people by treaty and a desire of the Western Shoshone Nation to seek fulfillment of the Treaty of Ruby Valley.

**Article 6 “The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described, and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein ”**

**One example of the continuing ongoing interests of the Western Shoshone people is exhibited by the efforts of the Timbisha Shoshone Tribe to achieve liberty and enjoyment of tribal land through the Timbisha Shoshone Homelands Act of 2000, 16 USC 410 aaa, PL 106-423. Additional efforts are underway for expansion of tribal trust lands and the ongoing effort by the Western Shoshone National Council to achieve liberty and enjoyment of tribal land through creation of the reservation contemplated by Article 6 of the Treaty of Ruby Valley *ibid***

**Negotiations are the preferred method of achieving liberty and free enjoyment of rights and interests belonging to the Western Shoshone people The DOE proposal to construct and operate a 300-mile rail line would interfere and obstruct the ongoing efforts seeking to fulfill Article 6 of the Treaty of Ruby Valley by Native American Stakeholders and is not convenient and necessary in relation to the paramount obligation of the US vis-à-vis the treaty Further, the proposal does not exhibit the principle of fair and honorable dealings between allies, friends and among larger nations to respect smaller ones Rather, it seeks to induce the Board to the belief in a truth of what does not exist.**

**4 The NCAC is in OPPOSITION to the DOE application and urges rejection/dismissal by the Board on the basis that incomplete and absent accurate required information by 1150 4(d) *Map* (EXHIBIT C) and is in error, deficient for not reflect continuing Native American land ownership interests including those belonging to the Western Shoshone Nation under the Treaty of Ruby Valley, Article V**

5. The NCAC is in OPPOSITION to the DOE application and urges rejection/dismissal by the Board on the basis of failure to comply with the Boards regulation that require the application to include information about the proposal by §1150 7 *Environmental and energy Data*. The application is incomplete as admitted by the DOE.

DOE application p 10, "The DOE anticipates that the Final Rail Alignment EIS will be issues in June, 2008 The Final Rail Alignment EIS will assist the DOE in deciding whether to construct and operate a railroad, and if so, within which corridor and alignment The Final Rail Alignment EIS will also assist the DOE in Deciding whether to implement the Shared-Use Option These decisions will not be made until DOE issues the Final Rail Alignment EIS and a record of Decision "

The Board should require compliance with its regulation an a complete Final Rail Alignment EIS and Record of Decision from the DOE on the corridor and alignment chosen

The Board should assess and implement its own trust responsibility analysis as it applies the Exhibit H and explain how it intends to implement the trust responsibility to Native American tribes in the instant proceedings

Throughout the process of site characterization and selection that produced the Draft Nevada Rail Corridor SEIS and the Draft Rail Alignment EIS the DOE eliminated any consideration of resistance by Native American stakeholders through contrived processes and studies that employed "cultural triage"<sup>5</sup> (Exhibit H -- DIRS 103465-Stoffle et al 1990 p. 167) under DOE control that ethical researchers would not employ.

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<sup>5</sup> A tribal study group was created by the DOE in 1987 The researchers themselves provided the outcomes that allowed for the removal or destruction of cultural artifacts, objects and tribal relationships to the land to meet environmental compliance needs to support the DOE Yucca Mountain project The researchers understood that the recommendation they offered violated Native American traditional religious beliefs The word triage is of French origin It denotes, "The action of sorting according to quality" Used lawfully, "triage" in declared war, flood, famine or natural disaster is appropriate However, when applied by the DOE for the benefit and evident profit of the US nuclear industry as a substantial destruction of national, Native Community Action Council

**The Board should conduct an independent and thorough environmental analysis in order to fulfill its own National Environmental Policy Act requirements and not accept the Draft Nevada Rail Corridor SEIS and the Draft Rail Alignment EIS**

**The NCAC challenges the basic assumptions of Exhibit H regarding land use and ownership that underlay Native American stakeholder radiological risk, tribal risk perception, stigma, potential impact and culturally appropriate impact mitigation**

**In Exhibit H the DOE omits information and misrepresent the facts of extant title vested in the Western Shoshone Nation , 3 4 3 American Treaty Issues (3-712) The legal dispute began when the US failed to meet its obligation due by Article 7 of the Treaty of Ruby Valley and persists to this day The Western Shoshone Nation possesses all the interests sought by the US The ICC never completed its statutorily required final report to Congress in Docket 326-k and was disbanded in 1978 The final report to congress did not cease to be a condition of finality when the ICC was terminated by Congress in 1978 Thus, since the ICC no longer exists to file the necessary report, it is now too late for the US to ever achieve “finality” in the western Shoshone case within the statutory framework of the ICC Act The ICC proceedings did not effect title transfer or extinguishment of Western Shoshone title No reference to the assertions by the DOE that “Western Shoshone title to Nevada lands had gradually been extinguished ..” exists. Such misrepresentations do a disservice to the Board and the public The DOE focus on judicial opinions seeks to derogate from law it is unwilling to abide by and fashion court opinions as judicial legislation without avoiding the appearance of impropriety.**

### **C. Conclusion**

**The NCAC requests that the Board to fully implement its regulations and employ the trust relationship as it relates to Native American stakeholders and tribes The rights and**

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**ethnic or religious groups as viable entities under provisions of the Proxmire Act of 1987 (PL 100-606) effects genocide**

**Native Community Action Council**

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liberties of free people should not be trampled and require protection by the US Constitution, treaties and law. The foreign policy implication of the instant transaction sought by the DOE application and the impacts upon Native American stakeholders have not been considered by the DOE Large-scale deployment of technology has unintended and largely unknown consequence impact that are disproportionately borne by Native American stakeholders who deserve full benefit of the protection of all laws and full implementation of all environmental regulations for their protection

The NCAC urges rejection/dismissal of the DOE application

Respectfully submitted,

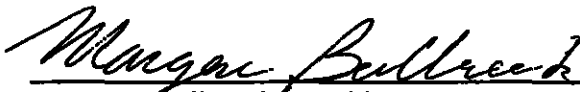


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## **CERTIFICATE OF SERVICE**

I, Margene Bullcreek, hereby certify that I have caused to be served upon each Party of Record on the attached list a true and correct copy of the Comments of the Native Community Action Council via first-class mail on this 14<sup>th</sup> day of July 2008

  
Margene Bullcreek, President  
Native Community Action Council

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Native Community Action Council  
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