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1 April 2005

Rulemaking Adjudications Staff of the Secretary
US Nuclear Regulatory Commission

Office of General Counsel
US Nuclear Regulatory Commission

Donald J. Silverman, esq., USEC Counsel
Morgan Lewis Bockius

Dear Sirs and Mesdames,

Attached is the hard copy of my Reply to Answer of NRC Staff, which has also been filed electronically.

This copy contains two exhibits which were not possible to include with the electronic submission and which also were included with my reply to USEC. These two exhibits are:

V. Statement of Thomas F. King, preservation consultant, author of four books on federal preservation including *Federal Planning and Historic Places: the 106 Process*, dated March 30, 2005

W. Letter from Chief Hawk Pope, Shawnee Nation, United Remnant Band, undated, received March 29, 2005.

Two other exhibits, Exhibits T and U, have been sent under separate cover, along with a request that they be privacy protected.

This hard copy contains some very minor corrections of mainly typographical errors compared to the version sent electronically. Here is a correction sheet:

Page	Line	Correction
2	18	remove "to" after "granted"
3	20	change "Petition" to "Petitioner"
5	21	change "USEC" to "NRC staff"
6	11	add "residency." after "nearby"
7	14	change "that" to "the"
8	8	change "zone" to "zones"
	9	change "considerations" to "consideration"
	22	add after "property": "and his enjoyment of it"
9	7	add "to" after "threat"
	14	change "property" to "activity"
10	5	change "USEC" to "NRC staff"
	15	insert "of' before "its"
11	18	change "involved" to "applied"
12	3	change "is" to "its"
14	16	change "they" to "it"
17	1	insert "is" before "not"
19	5	remove quotation mark
	11	change "and this has routinely been interpreted in the same way as the similar" to "in the"
	15	change "an" to "a"
21	7	add paragraph break before "NRC" and remove parentheses
23	16	change "that" to "than"
24	8	insert quotation mark before "This"
29	13	insert "it" before "involves"
	21	correct spelling of "proffering" and "Petitioner"
30	1	change "are" to "area"
31	10	correct spelling of "centrifuge"
	20	change "has" to "have"

Respectfully,

Geoffrey Sea 4/1/05

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE SECRETARY

In the Matter of	)	Filed April 1, 2005
USEC Inc. (American Centrifuge Plant)	)	Docket No. 70-7004

REPLY BY GEOFFREY SEA TO ANSWER OF NRC STAFF

Petitioner Geoffrey Sea comes pro se seeking leave to intervene in the above-captioned proceeding and to raise certain issues material to the issuance of the licenses sought by USEC Inc. Petitioner has filed twenty-four pages of contentions with additional exhibits and expert statements for consideration by the Nuclear Regulatory Commission ("the Commission" or "NRC"). USEC has filed an answer on March 23, 2005. Commission staff has answered on March 25, 2005, accepting at least one of Petitioner's contentions as admissible, but raising questions as to whether Petitioner has standing to intervene.

Petitioner has filed a reply to USEC's answer. This filing is a reply to the NRC staff answer. Petitioner will here first discuss the general requirements for standing, then the specific issues of fact and law that qualify the Petitioner for presumptive standing and traditional standing, respectively, then the admissibility of Petitioner's contentions.

I. Petitioner's Qualification for Presumptive Standing

NRC staff concludes that "Petitioner has not established that he qualifies for presumed standing based on the geographic proximity of his residence to the facility, nor has he shown that he has or will suffer concrete and immanent injury under the traditional standing analysis" (page 9).

Petitioner acknowledges that, representing himself pro se, he was insufficiently aware of the distinction between the two different bases for standing. Therefore Petitioner presented evidence for his residency in Piketon and his equitable title in the Barnes home in a confused manner, and likewise presented a list of imminent injuries that was insufficiently linked to the Petitioner's various interests. Petitioner will here clarify that he qualifies for presumptive standing in two ways, and also qualifies for traditional standing arising from his concrete and imminent injuries.

Petitioner also wishes to make the observation that because he has many differend bases for standing, the analysis of these various bases by NRC staff is mired in confusion. NRC staff, like USEC, does not present a coherent analysis in which Petitioner's separate qualifications for standing are considered in sequence, and each on its applicable merits.

1. Petitioner does qualify for presumptive standing as a resident within geographic proximity

NRC has routinely granted presumptive standing to individuals residing within 22 miles of a proposed project.

Petitioner established residency in the immediate vicinity of the ACP project site in August 2004, when he committed to purchase the Barnes Home at 1832 Wakefield Mound Road,

across the southwest fence from the ACP project site. Petitioner's interest in the Barnes Home did not begin in 2004, but in 1983, while Petitioner resided in Pike County, after the Petitioner discovered the site of the slaying of the last wild passenger pigeon (see Petitioner's Exhibit C—the body of the bird was carried to the Barnes Home and was displayed there for 15 years.) It was Petitioner's interest in that story and in the home that led Petitioner to write a book proposal based on that story. Petitioner signed a book contract in April 2004, received his advance in August 2004, and immediately applied his advance toward relocating in Piketon, so he could write the book on location.

Petitioner asked the current owner of the Barnes Home in early August, 2004, if he could rent the house and move in (it is currently unoccupied). The owner informed Petitioner that the house could be purchased but not rented. Petitioner then immediately entered into negotiations for purchase of the home as his permanent domicile, drove to Piketon with a carload of clothing and other personal items, and signed a contract with deposit for purchase of the home on September 2, 2004. (USEC filed its license application for ACP while Petitioner was in Piketon, negotiating the house purchase.) Petitioner then stayed in southern Ohio for approximately three weeks, found a place to leave his carload of possessions, then returned to New York to arrange financing for the purchase.

Between August 2004 and the current time, Petitioner has divided his time roughly equally between Pike County and New York, while preparing to move. During five extended stays in Ohio during this transition period, Petitioner has often stayed at the Rittenour Home, another historic home in Sargents that is proximate to the Barnes Home and to the atomic site. Since October, Petitioner has stored a significant amount of his clothing, books, furnishings and other items at the Rittenour Home and at other nearby locations, pending permanent relocation.

Petitioner had access to a key and a standing arrangement with the occupants of the Rittenour Home since October of 2004. Petitioner has also stayed at local motels including the Piketon Motel. All of the locations in southern Ohio where Petitioner has stayed since August of 2004 are within 22 miles of the ACP site.

Since August of 2004, Petitioner has attended numerous public events in Pike County and nearby in Ohio, testifying to his regular presence there. These appearances included his attendance at the large Kerry Rally at the West Farm in Wakefield on October 16, 2004; his participation in the Ohio Historical Society's Preservation Conference in Columbus between November 4 and 6, 2004; his appearance at the Department of Energy Semiannual Environmental Hearing in Piketon on December 2, 2004; and his public testimony at the NRC scoping hearing for ACP in Piketon on January 18, 2005. Petitioner submits that his documented appearances in Ohio in August 2004, September 2004, October 2004, November 2004, December 2004, and January 2005, do establish a pattern of residency that began in mid-August. In October of 2004, Petitioner signed a one-year contract for cell phone service at the AT&T office in Portsmouth, Ohio.

As evidence of his regular presence in Pike County between August of 2004 and the present time, Petitioner here attaches Exhibit T, "Affidavit on Geoffrey Sea's Real Property Acquisition in Pike County, Ohio" from the Pike County attorney handling the transaction. (Petitioner is providing this exhibit under separate cover and requesting that it be withheld from public release, along with the names involved, since it contains privacy-protected material.) The affidavit confirms that:

a. Petitioner entered into negotiations for purchase of the Barnes Home and property in August, 2004, and signed a contract of sale with a deposit on September 2, 2004.

b. The contract has been in effect through extensions and purchase options since that time.

c. Petitioner has been diligently pursuing financing for the sale since that time. (Difficulties were encountered owing to both the age of the house and the looming prospect of USEC's centrifuge plant opening next door.)

d. The purchase is nearing completion with an estimated closing date of April 6, 2005.

e. Petitioner has been in Pike County "on five separate occasions in this time period to arrange appraisals, financing, execution of documents, down payment on the purchase contract and payment of considerations on the options to purchase."

f. Petitioner's "stated plan through this entire purchase process has been to make southern Pike County his permanent domicile. From my conversations with Mr. Sea and his actions, I have knowledge that Mr. Sea will be moving to Pike County immediately upon his completion of this purchase of real property..."

In November of 2004, Petitioner submitted a proposal and questionnaire with the Ohio Historic Preservation Office to have the Barnes Home listed on the National Register of Historic Places. This is a very serious and involved endeavor—Petitioner submitted over forty pages of material. This process resulted in the letter from Barbara Powers of OHPO on December 22, 2004, certifying that the Barnes Home does indeed qualify for listing under two separate criteria (architectural significance and association with historical events—it is unusual that a property qualifies under two criteria). This letter, submitted with the petition as Exhibit I, is not mentioned by NRC staff. Petitioner is now engaged in writing the draft National Register nomination letter for the Barnes Home, an extremely laborious process that no sane individual would undertake without profound commitment and interest.

As further evidence of his active relocation, Petitioner supplies a copy of his agreement with a Manhattan real estate company for the listing for sale of his Manhattan co-op apartment, as Exhibit U. (This is provided under separate cover with the same request for withholding from public disclosure.)

On page 11 of the NRC staff Answer, the staff states: "Petitioner resides in New York...he has not resided in Piketon, Ohio since 1986...and his intention to relocate to Piketon remains an uncertain prospect." Petitioner believes he has demonstrated that this conclusion was in error. Any move necessarily involves a transition period and a period of effective dual residency. The effective date of the move was in August of 2004, before the applicant even submitted its application. Petitioner therefore meets the usual test for presumptive standing based on nearby residency.

2. Petitioner also qualifies for presumptive standing because his "zone of interest" is defined by the National Historic Preservation Act.

NRC has routinely granted presumptive standing on the basis of residency within geographic proximity, because the zone of interest typically at issue in NRC proceedings is defined by the Atomic Energy Act and by the National Environmental Policy Act. In other words, because interveners in NRC licensing actions are typically concerned about radiation injury to their persons, NRC implemented a presumptive test based on residency and proximity—because residency and proximity are the standards that relate to risk of radiation injury. That is fine as far as it goes, and Petitioner does qualify under that test.

However, AEA and NEPA are not the only governing acts—just the usual ones for NRC. The National Historic Preservation Act (NHPA) presents a body of law that is in all ways

comparable with and parallel to NEPA. Where NEPA seeks to protect environmental resources (primarily), NHPA seeks to protect and preserve cultural resources. Courts have generally held that NEPA and NHPA protected interests are of equal status. That is, where an agency offers protection for a zone of interests under one statute, it should also offer it under the other.

Some contentions of the Petitioner do relate to the risk of radiation injury. For example, Petitioner has pointed out that he will be the MEI (Maximally Exposed Individual) since he will be living on the south-southwest fence line, in the direction of greatest exposure to windborne contaminants as calculated by USEC. However, the main thrust of Petitioner's contentions relate to his zone of interests not under AEA and NEPA but under NHPA. These involve threats not of injury to his person but of injury to his historic property. Therefore, if NRC offers a test for presumptive standing based on potential bodily injury under AEA and NEPA, NRC should offer a commensurate test for presumptive standing based on potential property injury under NHPA and NEPA. What that test should be is obvious—ownership (including equitable title) of a property that is listed or is eligible for listing on the National Register of Historic Places and that is geographically proximate.

Petitioner would pass this test easily. He has held equitable title to the property since September 2, 2004. (Under common law, "A contract for the sale of land operates as an equitable conversion...In equity the purchaser is regarded as the owner subject to liability for the unpaid price...from the time a valid agreement for the purchase of land is entered into." --*77 Am Jur 2d VENDOR AND PURCHASER § 314.)* The property was deemed to be eligible for listing on the National Register by letter from the Ohio Historic Preservation Office dated 12/22/04. (Exhibit I). The property shares a one mile fence-line with the ACP site, is arguably the closest private

property to the ACP buildings, and the land that ACP sits on was originally taken from the Barnes estate.

That NRC has not before offered this kind of test for presumptive standing does not mean that it should not do so now. This is a highly unusual case. The Commission can recognize that the circumstances merit a precedent.

Petitioner has sought expert opinion on this issue, and the result is a five-page statement from Thomas King, attached as Exhibit V. There Dr. King examines the concept of presumptive standing as it might apply to zones of interests protected by NHPA, or the cultural resource provisions of NEPA. Petitioner urges careful consideration of Dr. King's analysis.

II. Petitioner's Qualification for Traditional Standing

In its general discussion of standing, the NRC staff discusses the various requisite components of traditional (non-presumptive) standing as involving: 1) a demonstration of interests at stake, 2) a showing that the proposed action will cause "injury in fact" to those interests and 3) a showing that the injury is arguably within the "zone of interests" protected by the statutes governing the proceeding. Again, the NRC staff errs when it assumes that the only "statutes governing the proceeding" are AEA and NEPA. Essentially, NRC staff faults the petitioner for failing to document the types of injury typically encountered in a licensing challenge at NRC.

But Petitioner is not typical. Though Petitioner did make reference to the alarming fact that he is the MEI for windborne contamination based on USEC's Environmental Report, these are not the principal injures about which Petitioner is concerned. The principal injuries of concern are the damages to Petitioner's historic property and his enjoyment of it under the zone

of interests defined by NHPA. Petitioner's entire petition including six expert statements can be read as documenting the basis for this imminent injury to his interests.

Petitioner supplied a letter from Linda A. Basye, Executive Director of the Pike County Convention and Visitors Bureau, dated 10/21/04, that makes clear Petitioner's intention to restore the Barnes Home and make it available for public visits—and the Pike County Bureau's support of that project. NRC staff ignores this letter, and ignores the expert statement of Professor John Hancock, wherein he describes the threat to the tourism industry of the locale posed by the impending project. Exhibit T, the attorney affidavit, further corroborates Petitioner's intention for the Barnes Home.

Petitioner provided ample evidence of imminent injury to his interests as defined by NHPA. Most of these are dismissed by NRC staff on the incorrect basis that they are mediated by DOE. NRC relies throughout in its discussion of both standing and contentions involving impact on the idea that an impact does not exist, or should be considered "beyond the scope" of NRC review, if that impact is mediated by DOE activity or through DOE land.

This concept merits intense analysis. This project is perhaps unique—and significantly different from the proposed NEF in New Mexico—in that a quasi-private company proposes to operate a licensed facility within federal buildings, on federal land, and using federally-owned equipment. First, it must be said that the dividing line between DOE and USEC is increasingly difficult to determine. On March 10, 2005 (three weeks ago), the DOE Office of Audit Services released an Audit Report on the Gas Centrifuge Enrichment Plant Cleanup Project at Portsmouth. (available at http://www.ig.doe.gov/pdf/ig-0678.pdf). A conclusion of the report is that $17 million of USEC ACP private expenses have been improperly picked up by DOE, and that

hundreds of millions of dollars in taxpayer funds are at risk of falling into this same category. (Petitioner will treat this report at length in a late filing based on the new information.)

What this means is that USEC can not only get its ACP expenses covered by American taxpayers (perhaps why they call it the American Centrifuge Plant) but that the more is diverted to public payment, the more is also shielded from regulatory review under NRC staff's interpretation.

There is a vital principle here, the principle of mediated impact. Suppose the centrifuge plant explodes. If shrapnel from the explosion hits the Petitioner, that's clearly an impact (though USEC might argue the point.) If shrapnel hits a tree on Petitioner's property and the tree falls on the Petitioner, that still has to be considered an impact. Mediated impacts have to be included.

So suppose that an action is initiated by USEC but the impact is mediated through DOE. Following USEC, NRC staff wants that to fall into a different category. Suppose the ACP explodes, and the shrapnel hits a tree on the DOE side of the fence line, and the tree then falls on the Petitioner. NRC staff would argue that this is "beyond the scope" of its proceeding. In other words, if a tree falls in the woods, and DOE owns the property, it does not make a sound.

It is only under this interpretation that NRC staff can claim that the Petitioner has shown no impacts on him or his interests. For example, the defoliation of a "security perimeter" around the ACP using an herbicide is ruled out as causing any impact precisely because it is done on behalf of USEC by DOE, even though the killed foliage now surrounds one side of the Barnes property. The erection of security fences and guard posts for ACP along the north side of the Barnes property is ruled out as an impact because it is done on behalf of USEC by DOE. The traffic of trucks carrying cylinders of uranium hexafluoride alongside and past the Petitioner's

home is ruled out as an impact, because it could be argued that DOE conducts that activity now. If the Commission buys into this interpretation, it might as well cancel the whole licensing review now, because it makes of that review a farce. NRC must seek some basis for regulation in this case that accounts for the unique DOE-USEC relationship and that abides by the Congressional intent of NEPA and NHPA protections for the public interest.

Under the NRC staff interpretation, no petitioner could ever demonstrate an ACP impact or injury, except in the case that a centrifuge would dislodge from its mount, go hurtling through the wall of the ACP buildings, and land on the person nearby. This cannot be the interpretation of impact and injury that is allowed to govern. It flouts and indeed negates the entire intent and meaning of NEPA and NHPA. (An analysis of this problem is included in the statement of Thomas King, a preservation expert whose c.v. was included with the petition, which is attached as Exhibit V).

So everything in this case really revolves around the test for mediated impacts. If everything and anything that involves DOE activity is ruled "beyond scope" then simply everything is beyond scope, and nobody can hope to intervene. Everything that USEC's ACP ever was or hopes to be involves some substantial element of DOE activity. That amounts to the NRC staff position .

The correct test of an impact or injury is the "but for" test, often applied in assessment of impacts and injuries under NEPA. If DOE engages in an activity that it otherwise would not, but for the existence of ACP, then it counts as an ACP impact, and resulting injuries count as ACP injuries. It doesn't matter that DOE is the mediating agency of that activity. So if DOE uses an herbicide to clear a security perimeter around ACP because of ACP's existence, that's an ACP impact. If trucks carry ACP feed and waste past my historic home, that's an ACP impact, If DOE

maintains a security fence with guard stations on the Southwest Access Road, adjacent to my home—fences and posts that otherwise could come down, that's an ACP impact. If DOE relaxes its cleanup standards for legacy contamination on its land—but it does this, as it says, because ACP has made the site unavailable for cleaner uses, that's an ACP impact on me. And if DOE continues to store depleted uranium waste in thousands of cylinders on-site, because its cleanup schedule has been relaxed by ACP, that's an ACP impact on my interests. And if commercial or public uses of my land and home are restricted because a new nuclear facility has just opened up next door, that's an ACP impact on me too. All of those impacts are material, impending and injurious, and they have all been demonstrated to the sufficient conditions required for the granting of standing.

The Commission will have to adjust to the fact that impacts and injuries in the zone of interest defined by NHPA are not always like those encountered under AEA and NEPA. Fewer of the impacts and injuries are quantifiable. But even under NEPA, courts have ruled that cultural resource impacts are qualitatively different in that they are more, shall we say, qualitative. In considering the qualification for standing based on "aesthetic, conservational or recreational interests," courts have ruled that the mere inability to quantify or measure a harm does not deprive the person who suffers of standing. (Scenic Hudson Preservation Conference v. Federal Power Commision, 354 F2d 608, 1 ELR 20292, 2nd Circuit 1965). In general, under NHPA, when properties that qualify for the National Register are immediately threatened by adjacent federal projects, standing is granted to the owner as a matter of course. And beyond the owner, standing has also been granted under NHPA to specialists in cultural resources who have a special interest in preservation, just like the Petitioner. (And this is far different from mere

"academic interest" as discussed by NRC staff.) Here is a passage from the statement of Thomas King, Exhibit V:

> Courts have generally been quite liberal in recognizing the standing of interested parties in Section 106 litigation, and certainly have never imposed anything like a residency requirement. In the recent *Bonnichsen et.al. v. US* (Civil No. 96-1481JE, District of Oregon), for example, the court found that a group of physical anthropologists, none of whom lived in the vicinity of the discovery, not only were sufficiently "injured" by the Corps of Engineers' treatment of a human skeleton found on the bank of the Columbia River to give them standing to sue, but that the Corps had violated the NHPA by failing to consult them under Section 106.

Thus, even if the Commission chooses not to set a precedent for the granting of presumptive standing in this case, Petitioner qualifies for traditional standing on the basis of his voluminous demonstration of injury within the zone of interests as defined by NHPA.

III. Admissibility of Contentions

Contention 1.1 USEC's failure to identify cultural resources potentially impacted by the ACP.

NRC Staff does not oppose the admission of this contention, concluding that "it presents a genuine dispute with the applicant on a material issue of fact which is relevant to the subject of this proceeding and is thus admissible." (NRC Staff Answer, page 22.) Petitioner applauds this determination.

In footnote 5 on page 21, NRC staff comments on Petitioner's statement that "Nowhere in USEC's environmental report do the words 'National Register of Historic Places' appear." This claim by Petitioner has been repeated in his Reply to USEC's Answer, and has been echoed in Petitioner's Exhibit V, an expert statement by Dr. Thomas King. NRC staff correct this

observation by noting that the phrase does appear precisely once, on page 3-62 of USEC's environmental report. Petitioner accepts the correction (Petitioner did not have access to the capability of electronically searching the document). However, Petitioner notes that the phrase appears only in a paragraph that describes the general framework for protection of cultural resources, not with any specific reference to the Piketon area or the ACP site. Petitioner stands by his observation that USEC never identified any of the National Register sites, or National Register-qualifying sites, in proximity to the proposed project. In fact, it is even more culpable that USEC did recognize the centrality of the National Register for the whole regime of cultural resource protection, yet still managed to not check or not mention the listed sites proximate to their project.

Contention 1.2 USEC's failure to identify potential impacts of ACP on nearby historic and prehistoric sites.

Petitioner presented two types of basis for this contention: First, the logical basis that if USEC did not identify the cultural resources in the area, it could not have possibly identified the potential impacts upon those resources. Indeed, USEC's ER section dealing with potential impacts on cultural resources is very brief, because it had previously concluded that no significant cultural resources existed. NRC staff is silent about this logical basis, and Petitioner contends that it therefore should be considered admissible as a logical consequence and consort of the admissibility of Contention 1.1. If USEC failed to identify resources, it could not possibly have identified impacts on those resources.

Petitioner provided a second type of basis in the form of a list of potential impacts of ACP on cultural resources. Petitioner points out that this list was intended to be illustrative, not

exhaustive, as an exhaustive list cannot be compiled until all cultural resources in the area have been identified, and studied in compliance with the National Historic Preservation Act. Since NRC staff comment upon each listed item as a separate basis, Petitioner will here discuss those comments.

1. NRC Staff states (page 24): "Petitioner provides no support for his statement that water pumping will potentially damage the Scioto works." The staff is here confused. The earthworks in question are not "the Scioto works," which are at least half a mile away, but an unnamed section of an ancient roadway with segmented earthen walls that should properly be considered as part of the Piketon Works. DOE seized this land so that it could maintain its water wells along the earthen walls (arguably drilling into the base of the walls). Petitioner did provide the expert statement of Charles Beegle, who owned that land before it was seized by DOE (Petitioner's Exhibit B). In that statement, Mr. Beegle states:

> During 1966, the NHPA legislation was passed which mandated that government agencies had a moral and legal obligation to weigh the impact that projects have on historic surroundings. The government took 31.421 acres for a permanent easement in 1982. This was for a well field along the Scioto and for pipe lines and a road. Never was the NHPA legislation addressed.

To clarify: The reason that Mr. Beegle discusses the well field in connection with the failure to implement NHPA is that he knows that the pumping of water from directly underneath those earthworks was never studied. NHPA requires that it be studied. The potential for damage is manifestly obvious. (USEC in its Answer makes assertions about the small amount of additional water from this well field that ACP will require. USEC neither cites authority for its statement, nor any expert study of the issue, and can't, because no experts in hydrology have ever studied it. That is the Petitioner's point. Petitioner cannot be required to produce in advance the results of professional studies not yet undertaken.)

2. and 3. Petitioner listed as potential impacts of ACP the use of herbicides to clear a perimeter "security zone" around the entire DOE reservation, and the maintenance of a "national security regime" in the whole area, involving "fences, security gates and closed access to rare cultural treasures." NRC staff conclude (page 24) that all of this is "not within the scope of this proceeding" and that "DOE conduct is not subject to the NRC's jurisdiction and thus is not relevant." DOE conduct that is independent of ACP is properly considered beyond the scope. However, DOE conduct that flows from and is caused by the ACP project must be within the scope. Mediated impacts cannot be excluded only because the mediating agency is the DOE. Both of the potential impacts discussed here by the Petioner meet the "but for" test. They would not occur but for USEC's ACP. In the case of the herbicide spraying, DOE did not employ that measure during the entire lifespan of the Gaseous Diffusion Plant. Only after two years of the GDP cold standby status, in 2003, did DOE initiate the herbicide spraying, as preparation of the site for ACP. Similarly, the future high-security around the site is only related to ACP operation. By the time ACP is operating, the GDP will have been shut down completely and sensitive equipment removed. At the Fernald site, where dismantlement and cleanup are near completion, the imposing security apparatus has been removed. That would be true for Piketon also, as dismantlement and cleanup proceed, but for ACP.

4. Petitioner listed the discouragement of tourism and academic study "caused by real and perceived nuclear dangers." NRC staff rules this out as "psychological in nature" (page 24) It further states: "The Commission has determined that the NRC need not consider psychological impact or mental stress to the public in excercising its regulatory responsibilities under the Atomic Energy Act." NRC staff then go on to cite a number of nuclear power cases as authority, including the Three Mile Island case. This is profoundly confused and wrongheaded because it is

not the Atomic Energy Act in question here. The TMI case and others cited, related to psychological "harm" as an injury within the zone on interests covered by AEA and NEPA. In the present case we are talking about impacts on cultural resources under the National Historic Preservation Act. Under NHPA authority, psychological impacts cannot be excluded, because the Act specifically seeks to protect against "aesthetic" impacts and impacts to the public's "enjoyment" of cultural resources. The NRC staff is here stuck in the mindset of avoiding the quagmire of imagined radiation injury—that is, an imaginary danger to persons and their health. Petitioner's issue here is the real damage to properties and the public's enjoyment of those properties. It's a completely different issue, under different legal authority, and the mindset must be accordingly different. Aesthetic values and enjoyment are irrevocably psychological in part—but also material in that the security regime engendered by ACP will involve fences, check-points, and surveillance. This involves physical exclusion from culturally significant properties, and material impact on the tourism industry. Petitioner cited expert support for this, the expert statement of Professor John Hancock, Exhibit H:

> "The preservation of this site has at least two major benefits: -it will enable continuing study.....-it will strengthen the resource base for the increasingly lucrative cultural heritage tourism industry and the potential for its associated ***high-quality, non-intrusive economic development in southern Ohio.***"

By "the preservation of this site," Professor Hancock does mean cancellation of the ACP.

5. Petitioner cited the potential for "Additional degradation, contamination and obliteration of priceless archaeological sites caused by additional road-building, traffic congestion, waste storage and plant emissions." NRC staff (page 25) takes issue with the Petitioner's shorthand reference to "priceless archaeological sites," claiming that Petitioner "does not provide a reference to cultural or historic resources that appear on or qualify for the National

Historic Register" (sic—it's the National Register of Historic Places). To expand upon the shorthand expression: Both the Barnes Works (which are also called the Scioto Township or Seal Township Works) and the Piketon Works are listed on the National Register. Other earthworks in the area, including the segmented wall on DOE's riverfront property, can either be considered as a part of the listed works, or as eligible for listing in their own right. In addition, there are certainly undiscovered and unidentified earthworks and burial mounds both on the DOE reservation, and in close proximity. Petitioner provided expert authority for this, both in Professor Hancock's Exhibit H and in Exhibit P, showing a generalized model of an Ohio Hopewell Community, prepared by Dr. Paul Pacheco. In addition, there are earthworks associated with historic properties in the impacted locale. Part of the Barnes Works extend underneath the Barnes Home (hence the name of the works). The Barnes Home has now qualified for listing on the National Register, as evidenced by Petitioner's Exhibit I, Letter from Barbara Powers of the Ohio State Preservation Office to Geoffrey Sea, 12/22/04. The Rittenour Home is certainly eligible for listing on the Register, though it has not yet been nominated, and it too has associated earthworks on the property. As for the potential impacts of ACP, including its emissions, its waste, its resulting automotive and truck traffic, its access roads, on all of these sites, some immediately adjacent to the ACP site, none of that has yet been studied, though studies are required to be conducted by NHPA. Again, Petitioner cannot be required to provide the results of expert studies that have not yet been initiated. It is only Petitioner's obligation to identify the potential hazard, the potential sites in jeopardy, and a plausible mechanism for impact. Petitioner has met that obligation—and USEC is loudly silent on the whole matter because it failed even to identify any of the resources in question.

The National Historic Preservation Act was motivated by the belief that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." (16 USC Section 470(b)(2).) Without adherence to that aim, the American Centrifuge Plant becomes the Un-American Centrifuge Plant.

Contention 2. Lack of Compliance with the National Historic Preservation Act and Related legislation.

NRC staff here elaborates on its interpretation of how NHPA responsibilities apply in the proceeding, but in so doing, the staff shows that there has not yet been a comprehensive approach to applying NHPA to the ACP project as a whole. Section 106 of NHPA comes into force when any "major federal action is contemplated," in the phrasing in the National Environmental Protection Act. The division of responsibilities between DOE and NRC for implementing the Atomic Energy Act and the National Environmental Protection Act for the ACP project are pretty well delineated by both the legislation that created USEC (The USEC Privatization Act) and by a Memorandum of Understanding between DOE and NRC. This same kind of delineation of agency responsibilities has never been accomplished for implementation of the NHPA for the ACP project. Legally, it's open turf, because the fact is that no one at USEC or at the federal agencies contemplated an NHPA challenge to ACP. NRC staff should have acknowledged this. That is grounds alone for exploring these issues at hearing through Petitioner's intervention.

NRC staff does what it routinely does throughout its Answer to the Petitioner—it tries to apply AEA and NEPA precedent and proceeding to the implementation of NHPA. That is an

approach destined to failure, because NHPA is in a different universe, a universe of impacted properties and aesthetic values, and cultural resources, and party consultation—not in a universe of expert risk assessment and quantitative analysis. Petitioner asked Dr. Thomas King, perhaps the foremost authority on NHPA, to provide an overall assessment of the application of NHPA to the ACP project, and to the problems being encountered in NRC's proceedings and review. That assessment is attached as Exhibit V. (Previously provided also in Petitioner's Response to USEC.)

There is a very fundamental question here. When did the "major federal action" contemplating the ACP begin? NRC staff takes the view that its NHPA responsibility starts only with the licensing process and that it needn't look to any past DOE noncompliance. Thus NRC staff argues that Petitioner's issue of impacted parties not being consulted is "premature" (page 26), because NRC may yet contact them. But NHPA does not allow this compartmentalized approach to party consultation. It is the federal government as such that undertook this major project, even before USEC existed. The government budgeted funds for the development of centrifuge technology (which evolved directly into the technology that USEC will employ), it selected the site, it set aside the land, it built the buildings that USEC will use, and indeed it created USEC between 1990 and 1998, first as a chartered government corporation, then as a spinoff quasi-private company for pursing the mission that the government had started. At no point in this long chain of events—initiated around 1980—did Congress exempt any federal agency involved from compliance with NHPA.

If the Department of Energy ever implemented an NHPA compliance program for the centrifuge project (which started as the Gas Centrifuge Enrichment Plant and became the American Centrifuge Plant), there is no evidence for it. Petitioner has submitted written and

verbal inquiries to DOE for details about whether a 106 or 110 review was implemented and if not, why not. No reply has been forthcoming and Petitioner anticipates no reply. There is likewise no evidence that any Native American tribe or owner of a historic property was ever specifically consulted about the ACP (or its predecessor GCEP). Attached is Petitioner's Exhibit W, a letter from yet another Shawnee tribal authority who was never contacted or consulted about ACP from either USEC, DOE or NRC. (Previously provided along with Petitioner's Reply to USEC's Answer.)

NRC staff say in a footnote on page 27 that "DOE did in fact, contact, the Absentee Shawnee Tribe of Oklahoma" and reference is made to the Final EIS for the Depleted Uranium Hexafluoride Conversion Facility at Portsmouth. This is way off point. First, the Conversion Facility is not the ACP. The Conversion Facility was non-controversial and it enjoyed wide support from all communities, including from the Petitioner, as a part of site clean-up. ACP, on the contrary, will bring new nuclear production and more waste to the site. Second, it is unclear that the Shawnee were contacted by DOE for consultation on any 106 review. According to Karen Kaniatobe, Tribal Historic Preservation Officer of the Absentee Shawnee, DOE merely invited them to a "ground-breaking ceremony" for the Conversion Facility. This demonstrates that DOE was aware of the tribe's existence, yet still failed to consult them in any meaningful way for any 106 review.

On page 28, NRC refers to the definition of Indian tribes that must be consulted as part of 106 review as consisting of those whose "tribal lands or other properties of significance" are potentially impacted by the proposed project. It should be noted that all of the land of the DOE reservation was Shawnee land during historic times, that many qualities of the particular locale are considered sacred by the Shawnee (including the creeks and river, mounds and earthworks,

and certain species like the timber rattlesnake, the panther and the extinct passenger pigeon). The Shawnee do trace their ancestry to the Ohio Hopewell, who built the Barnes Works and the Piketon Works, and all of the other Algonquian tribes of the region (including the Miami, the Delaware, the Potawatomi, the Fox, the Illinois, the Chippewa, etc.) can also claim Hopewell descendency. It should also be noted since most Shawnee were removed from Ohio and the federally registered Shawnee Tribes are now located in Oklahoma and Missouri, and since those tribes were not consulted by either USEC or DOE, those tribal governments had no way to learn of the ACP project and no opportunity to intervene in the licensing proceeding, even though they would have been granted automatic standing. (Support for these facts can be found in Petitioner's Exhibits C, N and W.)

Native American attitudes toward the Scioto River and to the tributary creek that runs into it through the center of the Barnes Works, lie at the heart of the problem with USEC's approach to wetlands and rivers—namely, that they are not impacted either because they are beyond a one mile radius from ACP or because the concentration of radionuclides released from ACP will fall below "acceptable limits." Unfortunately, NRC staff endorses this dismissal, merely because the river is not "officially designated" as a "Scenic River" under the Wild and Scenic Rivers Act. This is precisely where consultation with affected tribes early in the process, as anticipated by NHPA, could have averted cultural blindness. The sacred aspect of those waterways and wetlands as cultural resources cannot be neglected. The Petitioner has contacted Chief Hawk Pope of the Shawnee Nation, United Remnant Band in Ohio, which is not only recognized in Ohio but which traces its history to Pike County and claims a decided interest in the land upon which USEC wants to place its project. Chief Hawk Pope was never contacted about ACP by either USEC or DOE or NRC. He's quite upset about not being contacted. He's

also upset to hear that USEC says "there are no scenic rivers" near the ACP site. Chief Hawk Pope told me that the word Scioto, in Shawnee, means "hair on the water." It was given that name because the river passes through so many ancient sacred burial grounds in the Pike County area, the hair from old graves would float upon the flood tides. All of this is verified in a letter from Chief Hawk Pope, attached as Exhibit W (also provided in Petitoner's Reply to USEC).

Both NRC staff and USEC take the position that the NHPA Section 106 responsibility of the federal government can be satisfied by the initiation of a 106 review by NRC now. But that interpretation is itself way out of sync with NHPA. Two federal agencies have been involved with this project—that is clear. NHPA requires that the 106 process be initiated at the commencement of the "major federal action," and it does not permit one agency to initiate an action, default on its responsibilities, then pass the baton to another agency to start the process de novo as if everything is kosher. If that were ever accepted as legal, it would give the federal government a mechanism to accomplish any action whatsoever without any of the protections afforded by NHPA—all the government would have to do is keep passing the baton from one defaulting agency to another.

NHPA does contain provisions for actions that involve two federal agencies: "If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part." (36 CFR 800.2(a)(2)) Note that these roles and relationships must be established at the outset of the action, not near its end-point. Furthermore, each Federal agency shall establish a preservation program that shall ensure..."that the preservation of

properties not under the jurisdiction or control of the agency, but subject to be potentially affected by agency actions are given full consideration in planning" (16 U.S.C. 470h-2(2)(C)) The NRC staff position that NRC is not responsible for DOE's Section 110 responsibility, or that NRC must refrain from any involvement or review of DOE's 106 responsibility is in flagrant contradiction to this section of the legislation.

When does a major action begin and when do Section 106 responsibilities begin? According to NHPA, the agency official must complete the section 106 process "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." [quoting from 16 USC 470f] "This does not prohibit agency officials from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking." (36 CFR 800.1(c))

The precise commencement date for USEC's project is debatable, but the only reasonable interpretation is that it was set in motion at some point between 1980, when DOE began to upscale its R&D for centrifuge technology, and 1983, when DOE started construction on the GCEP buildings at Piketon. From the perspective of NHPA, this is when the 106 process had to also commence, and when impacted parties had to be brought in for consultation. DOE also had a procedural duty to consult with the Advisory Council on Historic Preservation at that time. (16 USC Section 470f.) The federal government, viewed as a singular entity, cannot wait more than

twenty years from the inception of a major action, until the licensing and completion of that action are immanent, and then start the 106 consultation processes fresh. That's a mockery of the law. It forecloses all of the options normally available in a 106 review—options including the detailed study of a site, the involvement of consulting parties in site selection, the exploration of alternative sites, and alterations to the project proposal for the purpose of ameliorating impacts on cultural resources. None of this has been or will be available to the consulting parties in NRC's 106 review of ACP.

That is why, logically and by law, NRC must examine the issue of DOE's noncompliance with NHPA, and determine for itself whether the USEC lease agreement for those buildings rests on a survivable legal foundation. This would not involve NRC "regulation of DOE" under AEA or NEPA. Petitioner understands that is forbidden. But NRC can and must look at the legal basis for the ACP project, because that legal basis will determine the project's schedule and viability. (For example, if NRC determines that DOE failed to conduct necessary studies involving cultural resources, then NRC must order those studies for itself, and that may radically alter the project's schedule.) This is the essence of Petitioner's Contention 2 that NRC completely missed.

(In assessing the legal basis for USEC's lease, NRC will have to examine DOE's compliance with Section 110 of NHPA as well as Section 106. Section 110 provides for stewardship of resources that are located on agency land. Petitioner never contended that NRC need initiate its own 110 Review, as NRC staff implies—only that it must examine DOE's 110 non-compliance.)

NRC staff expresses frustration at the fact that Petitioner seems not to grasp that "DOE activities...are not subject to NRC regulation," (page 27). Petitioner does grasp that this applies within the regulatory universe of AEA and NEPA. Petitioner does not ask NRC to regulate DOE.

Petitioner does ask that NRC make the mental shift to the consultative universe of NHPA, and this necessitates examining the historic DOE NHPA non-compliance issue, in much the same way that NRC will have to examine many other facts that involve the DOE site in evaluating this project. This is a major inconsistency in the NRC staff position, adopted no doubt because of the difficulty involved in adjusting the agency to a whole new regulatory universe. How is it that NRC will conduct its environmental impact assessment using all kinds of site date provided by DOE, but staff feels that the agency is barred from conducting a cultural resource impact assessment based in part on the data that DOE provides about its past Section 106 and 110 reviews, or lack thereof?

NRC staff asserts on page 30 that the Petitioner lacks expert authority for his contentions about NHPA compliance and the DOE-USEC-NRC relationship. With his original petition, Petitioner did provide a brief summary statement of the views on these issues of Thomas King, foremost authority in the field, along with Dr. King's c.v. (Exhibits Q and R respectively). Petitioner here provides a five page elaboration of Dr. King's opinions on these issues (Exhibit V).

In sum, if the Commission does not evaluate the twenty-year pattern of DOE non-compliance with NHPA, it will not only be unable to assess the legal survivability of the USEC-DOE lease agreement, but it will be in violation of NHPA itself, and will also find itself in a room with a lot of very angry Indians when it tries to conduct its own Section 106 consultations.

Contention 3. Failure to consider a broad range of alternatives.

The NRC staff answer to this contention is indicative of the unfamiliarity of Commission staff with NHPA. The Staff suffers under the misapprehension that the only governing legislation

that mandates consideration of action alternatives is NEPA. And so the staff proceeds to recite a litany of rulings on this point under NEPA alone.

The staff neglects that a consideration of action alternatives is also mandated under NHPA, and it was the NHPA model of action alternatives that guided the Petitioner in framing his contention. Specifically when there's an adverse effect on a historic property, the agency is required to consult with the SHPO, Indian tribes, and consulting parties "to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties." (36 CFR 800.6(a)) In practice, the NHPA process for considering alternatives is fundamentally different from the NEPA process. Under NEPA consideration is essentially a technical procedure that proceeds on the basis of expert analysis of various instrumental options.

Under NHPA, on the other hand, the consideration of alternatives is essentially a consultative process that involves participation of all consulting parties and that respects the broad aims of the Act in protecting the cultural resource base of America. Under the NHPA concept of action alternatives, the very idea of constricting the scope only to the aims of the action as proposed would be ludicrous. The scope is as broad as the aim of NHPA itself. Alternatives that relate not at all to the federal action but do relate to the preservation of the cultural resources at issue, are commonly considered and implemented during the Section 106 process. Thus, the various proposed alternative actions suggested by the petitioner—such as transferring the forested part of the DOE Reservation to the National Park Service, entombing the X-326 building as a National Monument, or moving the ACP project to Kentucky, are all well within the scope of alternative actions as contemplated under NHPA.

But let's say, for the sake of argument, that NRC has some magic dispensation from compliance with NHPA and only needs to consider action alternatives as envisioned under NEPA. The cases cited by NRC staff still do not apply, because all of them involve either (a) federal assistance or a federal license for private actions that proceed on private land, or (b) federal agency actions for which the agency is the executor of the action. In both cases, there is sound reason to constrain the scope of considered alternatives to those that "serve the purpose and need of the project" (page 32). In the former case, it's a matter of not compelling private parties with only marginal federal assistance to adopt public aims. In the latter case, it's a matter of assuming that a federal agency executing a federal action is already pursuing an aim that is in the public interest.

USEC's ACP falls into neither category, and as the creation of special legislation, USEC is indeed in a class by itself. Here we have a private company that says repeatedly throughout its public filings that it is making decisions on the basis of private profit, namely its own. And yet it's operating on federal land inside federally-owned buildings. We cannot allow USEC's pecuniary private decisions to substitute for public policy decisions about the best legal use of those buildings and that land. No one, not even Congress, instructed USEC to choose Piketon as the site for ACP. USEC made that decision itself. It made that decision on the basis of "financial considerations." Under both NEPA and NHPA, that decision must now be subject to review and to a competitive process of other proffered alternatives.

Courts have held that the preclusion of alternative uses can constitute a public harm under NEPA. For example, in *Delaware vs. Penn Central*—an unusual case like the one at hand because two public agencies were battling each other—the Court found that the defendant's planned fill operation would be injurious in fact, as it would "make the land unusable for the

purposes presently planned by the State and the County." (33 FSupp at 492, 1 ELR 20105—D. Del. 1971)

And USEC cannot argue that it has no place to go. It can go to Kentucky. USEC states it can go to Kentucky. So let's have the open disputation. Applicant says it wants to locate at Piketon for its own financial interests. Petitioner says that NHPA and NEPA considerations warrant a full analysis of the relative environmental and cultural impacts at Paducah and Piketon, and of the site alternatives at either location. Petitioner further asserts on the basis of expert analysis submitted (see the statements of Dr. Roger Kennedy and Professor John Hancock, Exhibits F and H respectively), that the Piketon site involves impacts on unique world-class archaeological resources, that development alternatives are available for the Piketon site, and that Paducah is therefore the better site for ACP. Let the public debate happen.

Contention 4. Neglect of potential local impacts.

The primary NRC staff objection to this contention is, once again, that it involves DOE activity and is therefore "beyond scope." As Petitioner has stated previously, the test is not whether an activity is conducted by DOE, but whether that activity is occurring "but for" ACP or not. Thus the use of herbicides to clear a perimeter "security strip," and the closing of the perimeter road to local traffic must both be considered as impacts of ACP—but for ACP, they would not be happening.

NRC staff also finds fault with the Petitioner for not invoking expert opinion and for not referring to USEC's socioeconomic analysis as contained within its Environmental Report, when proffering the suggestion that ACP will have negative socioeconomic impacts. Petitioner reminds the Commission once again that the Petitioner's contentions hinge on the discovery that

USEC has completely failed to identify significant cultural resources in the area (see Petition, Contention 1). This holds equally true for USEC's socioeconomic analysis. USEC did not understand the region's economic potential, because it did not understand the vast cultural resource base that is there. This is made abundantly clear by Petitioner's expert, Professor John Hancock, in Exhibit H, as previously cited.

Contention 5. Impacts on clean-up standards and community reuse

Once again, NRC staff raises the issue of DOE activity being "beyond scope." Here it is most obvious that the DOE activity in question would not exist but for the prospective existence of ACP. In the Department of Energy's Risk-Based End-State document for the Piketon site, DOE premised its entire plan for the site's future, including clean-up standards, on the assumption that the site would be dedicated to "continuing nuclear production"—in other words, to operation of ACP. DOE has been in continuing negotiations with SODI: The Southern Ohio Diversification Initiative on the issue of clean-up standards and community reuse plans. In these negotiations, DOE has consistently argued that prior commitments to clean the site to "agricultural standards" can now be relaxed to "industrial standards," now that ACP is rolling toward a license. Documentation of these negotiations can be obtained from SODI or can be provided by the Petitioner at a later time. That the centrifuge buildings themselves would not be available for community reuse if ACP proceeds is manifestly obvious and requires no documentation.

Contention 6. Nuclear proliferation considerations.

NRC staff argues that Commission regulations relieve a license applicant from the requirement of addressing nuclear proliferation policy. In the case of the typical license applicant, that makes sense. A nuclear power operator could not be expected to enter onto the complex terrain of nuclear proliferation policy. USEC, however, wants to open what may be the first operating centrifuge plant in the United States. This follows upon a number of key developments including: 1. the exposure of an international proliferation ring based in Pakistan under the coordination of Abdul Qadir Khan, that spread centrifuge designs and technology throughout the world, 2. The announcement of Iran's centrifuge enrichment program, which caused USEC to delay its first announcement of ACP, 3. The announcement of Libya's centrifuge enrichment program, which caused a second delay in USEC's announcement of the ACP, 4. The revelation of North Korea's centrifuge enrichment program, which has turned North Korea into an emergent nuclear weapons state.

These striking developments make USEC with its centrifuge technology quite different from the ordinary NRC license applicant. Centrifuge technology is at the crux of international debate and scrutiny. At issue is not just whether the technology will incite proliferation—which arguably is a public policy matter—but also whether the technology will continue to be permitted, or on the other hand, whether international agreements and developments might make the ACP project impossible to complete. Early project termination after USEC contaminates the GCEP buildings would have a dramatic negative impact on the site and surrounding community. Among other things, it would mean that local cultural resources have been adversely impacted for no good reason. Because of these considerations, proliferation issues must be considered, not for their international repercussions, but for their local repercussions. The case is different from those previously considered by the Commission.

Contention 7 The unique structure of USEC and the unique nature of the USEC-DOE relationship.

The only objection raised by NRC staff to this contention is a brief refrain about DOE activities being "beyond the scope of the proceeding" (page 41). And once again, NRC has failed to apply the "but for test." Petitioner does not ask NRC to regulate the DOE. Petitioner asks that NRC subject USEC's relationship with DOE to scrutiny, as it would scrutinize any company's structure, history and financing. In USEC's case, the relationship with DOE cannot be ignored, as USEC emerged from DOE, depends on DOE, and plans to operate from within the belly of DOE.

The dividing line between DOE and USEC is increasingly difficult to determine, as evidenced by the recent DOE Office of Audit Services Audit Report on the Gas Centrifuge Enrichment Plant Cleanup Project at Portsmouth. (available at http://www.ig.doe.gov/pdf/ig-0678.pdf). If DOE is prone to pick up USEC's private bills, while NRC backs away from scrutinizing any such DOE-USEC collaboration, how can the public interest in this proceeding ever be defended?

IV. Conclusion

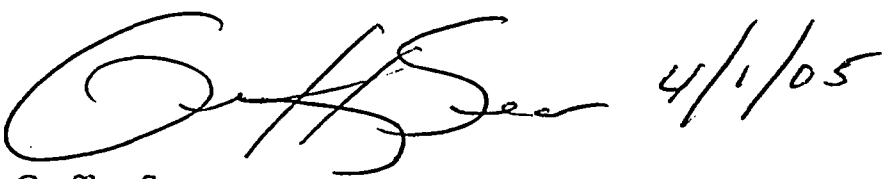
NRC staff supports the Petitioner's core contention regarding the failure of USEC to identify significant cultural resources in the locale of its planned ACP. On other issues, the staff has mistakenly taken a view of ACP that regards it as shielded from even the possibility of causing impacts, by the fact that it will be housed in DOE buildings—and NRC has agreed not to

"regulate DOE." Thus NRC staff even seeks to deny the Petitioner standing, because the theoretical absence of impact, creates a theoretical absence of injury. This interpretation cannot stand. The Commission must search for a way to account for the unique aspects of the ACP project, and the unique basis for challenging an NRC license on historic preservation issues.

Petitioner has demonstrated both presumptive and regular basis for standing, and has proffered numerous admissible contentions. Petitioner should be admitted as an intervener in this matter.

Petitioner hereby requests a hearing for oral arguments on the questions of standing and admissibility of contentions.

Respectfully submitted,



Geoffrey Sea

Dated April 1, 2005

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Telephone numbers: 212-568-9729 or 740-835-1508

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V. List of Exhibits (not included in electronic version)

T. Affidavit on Geoffrey Sea's Real Property Acquisition in Pike County, Ohio, from a Pike County attorney, dated March 29, 2005. (Privacy protected, provided under separate cover.)

U. Realtor's agreement for exclusive listing of Geoffrey Sea's New York apartment, dated March 28, 2005. (Privacy protected, provided under separate cover.)

V. Statement of Thomas F. King, preservation consultant, author of four books on federal preservation including *Federal Planning and Historic Places: the 106 Process*, dated March 30, 2005.

W. Letter from Chief Hawk Pope, Shawnee Nation, United Remnant Band, undated, received March 29, 2005.

EXHIBIT V

Thomas F. King, PhD
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Cultural Resource Impact Assessment and Negotiation, Writing, Training

March 29, 2005

Geoffrey Sea
340 Haven Ave., Apt. 3C
New York NY 10033

Dear Geoffrey:

You've asked me for my observations on how the Nuclear Regulatory Commission (NRC) staff's positions on the scope of its responsibilities in the USEC matter, and on the tests that you must meet in order to intervene, relate to the purposes and requirements of the National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA). I provide these observations based on some 40 years of professional practice under both statutes, including participation in the development of amendments to the latter and federal regulations and guidelines implementing both.

Both NEPA and NHPA were enacted in order to protect the public interest in the human environment in general (in the case of NEPA) and historic resources in particular (NHPA). It follows that the interested public – made up of people like yourself – has a large role to play in implementation of these laws, and this is reflected in the regulations that agencies must follow in complying with them. Both the NEPA regulations (40 CFR 1500-1508) and the Section 106 NHPA regulations (36 CFR 800) provide for participation in review by interested parties and the general public. The Section 106 regulations are particularly directive in this regard, providing both for general public involvement and participation and for identifying particular "consulting parties" whose interests in the undertaking under review, or its effects, entitle them to ongoing active involvement in the negotiation of ways to resolve adverse effects on historic properties.

It appears that the NRC staff has a much, much more restrictive notion of public involvement than that underlying either NEPA or NHPA. I suspect that this reflects the fact that the staff's policies and procedures for environmental review spring from a different intellectual tradition than do those underlying laws like NEPA and NHPA. A thought-provoking (though rather turgid) recent book that explores this sort of dichotomy is *Citizens, Experts, and the Environment: The Politics of Local Knowledge,* by Frank Fischer (Durham, Duke University Press, 2000). Fischer discusses the world-view that is common among environmental engineers and others involved in the sort of environmental review that is driven by the toxic, hazardous,

and radiological substances laws, in which environmental impact analysis is construed to be a matter of rigorous, generally quantitative, scientific analysis. It is a matter for scientific experts to concern themselves with, and is viewed as far too complicated for ordinary citizens to understand. In this world-view, public involvement is a troublesome requirement imposed by the political system, which should be kept to a minimum so the experts can get on with their work. Fischer documents that this sort of thinking is widespread in the environmental specialist community from which agencies like NRC draw their staffs, and from which their personnel derive their intellectual direction. He also documents how thoroughly wrongheaded it is, but that's another matter. My point is simply that the NRC staff's thinking on how people like you should be involved and issues like yours should be considered in its decision making has much more to do with the philosophical biases of its members than it does with any actual legal requirements.

The NRC staff seeks to limit your access to its decision making process in a variety of ways – for example by insisting that to be recognized as having "presumptive standing" you not only be "injured," but be a resident of the surrounding vicinity, and at the same time insisting that your "injury" must be of a particular kind. Let's look at the last of these first.

The staff asserts that "(i)n Commission proceedings, the injury must fall within the zone of interests sought to be protected by the AEA or the National Environmental Policy Act ("NEPA")." It is not clear to me why only these two laws are pertinent and not, for instance, NHPA, but for the moment let's assume the staff is correct; your "injury" must relate to the "zone of interests sought to be protected" by the AEA and NEPA. I claim no expertise in the AEA, but I do know about NEPA, and it appears to me manifestly obvious that your "injury" falls well within the sphere of NEPA's "protected interests."

NEPA directs agencies to consider the impacts of their actions on "the quality of the human environment." At 40 CFR 1508.27(b) the NEPA regulations of the Council on Environmental Quality (CEQ) list a range of factors to be considered in judging the significance of impacts on the quality of that environment. It is a long and varied list, and it repeatedly refers to "cultural" and "historic" resources. It surely follows that "interests" in such resources are "protected" to the extent NEPA affords protection to anything. Thus your interests in protecting the historic character of the area subject to effect by NRC's permit action are entirely within NEPA's "sphere of protection."

Why does the NRC staff not understand this? I suspect that – based on the intellectual tradition from which they come – the staff's experts honestly believe that the quality of the human environment is not affected by anything that fails to irradiate someone to a hazardous degree. It follows from that line of reasoning that your interests in the historic character of the area are irrelevant to the potential for environmental impacts.

It also follows, of course, that only actual residents of the vicinity can be "injured," because only residents are likely to suffer a high enough dosage of something emanating from the proposed facility to affect their health and safety. Therefore, it is logical within the staff's likely framework of assumptions, that only nearby residents should be recognized as having presumptive standing. But NEPA isn't about only health and safety. The great bulk of NEPA cases that have been litigated have been brought by parties whose injuries involved damage to places and things they enjoyed and thought important – forests, mountains, animals, bodies of water, beautiful vistas, wilderness, fish, sacred sites, historic places, archaeological sites. Courts routinely grant standing to plaintiffs under NEPA on such grounds; can the staff be seriously proposing that the Commission adhere to a more exclusive standard?

It is also difficult to understand why, if an "injury" within NEPA's "zone of protected interests" is a legitimate topic for NRC consideration, an "injury" within NHPA's "zone" is not equally legitimate. Both laws were enacted by Congress; both apply to all federal agencies; both impose rather similar requirements. To the best of my knowledge, NRC has never been granted an exemption from NHPA's requirements. Your interests clearly fall within NHPA's "zone," since they concern historic properties and effects on them. Under the Section 106 regulations, your interests entitle you to consult about the significance of such properties and how to resolve adverse effects on them. Why does the NRC staff think the Commission can or should deprive you of this entitlement?

Here again, I suspect that the culprit is the world-view of NRC's staff experts. If one believes that environmental impacts are limited to things that scientific experts can quantify, and ordinary citizens have nothing useful to contribute to the discussion, then it follows that all NRC need do to address impacts on historic properties under NHPA is to have expert surveys done and consult with the State's designated expert, the State Historic Preservation Officer. If further follows that the Commission's staff can and should keep the results of its expert studies secret, as it has in this case, and simply present the public with its conclusions. Within this framework of assumptions, the fact that the Section 106 regulations call repeatedly for participation by interested parties and the public is irrelevant; such requirements are mere politico-regulatory hoops to be gotten through with as little effort as possible.

But this interpretation of NHPA's requirements is inconsistent not only with the letter of the regulations but with routine practice in Section 106 review and with the record of case law. Courts have generally been quite liberal in recognizing the standing of interested parties in Section 106 litigation, and certainly have never imposed anything like a residency requirement. In the recent *Bonnichsen et.al. v. US* (Civil No. 96-1481JE, District of Oregon), for example, the court found that a group of physical anthropologists, none of whom lived in the vicinity of the discovery, not only were sufficiently "injured" by the Corps of Engineers' treatment of a human skeleton found on the bank of the Columbia River to give them standing to sue, but that the Corps had violated the NHPA by failing to consult them under Section 106. Here again,

NRC's staff seems to be establishing for the Commission a more exclusive standard than that imposed by courts of law; I have to wonder about the basis for this.

In summary then, what I think we see in the NRC staff's conclusions about your intervention is the expression of a world-view that is common among experts in toxic, hazardous, and radiological impact analysis, that may be sensible in some contexts but thoroughly warps the process of review under NEPA and NHPA. To narrowly limit the range of interests in the public with whom one will engage in environmental impact analysis, and then to insist that these interests themselves demonstrate the existence of impacts ("injuries"), stands the process of environmental review on its head. It is the responsibility of the Commission and its staff to ascertain what impacts its permit action may have on the quality of the human environment under NEPA, and on historic properties under Section 106; it is not your responsibility to do so for them.

I realize that the NRC staff would doubtless argue that all the above factors might give you "regular" standing but not "presumptive" standing – you might have standing, but it would not be automatic unless you actually lived adjacent to the facility. But this distinction still reflects the assumption that one cannot be really "injured" unless one is likely to be subjected to irradiation. Setting aside the question of whether, as a near-term prospective resident, you are not likely to be subjected in the future to this kind of "injury," it seems to me that NHPA (among other laws) provides the basis for other standards for awarding "presumptive standing" that are as good as nearby residency; one merely needs to recognize that exposure to radiation is not the only way one can be "injured" by a project like USEC's. Surely the owner of a National Register or Register-eligible property that is subject to potential effect by the project, who appreciates the historic qualities of the property, must be presumed to be subject to injury by the project. Similarly, I would suggest, someone whose cultural identity is tied up in a property that might or might not be eligible for the National Register, or who has research interests in such a property, or who traditionally uses or enjoys such a property, must be presumed to be subject to injury, and hence should be recognized as having presumptive standing. People in all these categories and others are routinely included as consulting parties under the Section 106 regulations; why should the Commission, acting in the public interest, not do the same?

Although the NRC staff does not comment on it, I have to believe that its beliefs about the environmental review process are in line with those of USEC, which in its response to your petition summarily rejected the earlier letter I provided you. USEC wrote:

"(4) Finally, Petitioner cites a letter from Dr. Thomas F. King (Exhibit Q), which makes no reference to any specific aspect of the ACP application and therefor (sic) does not provide meaningful support for the contention."

My letter, of course, was intended simply to advise NRC that, in my fairly well-informed professional opinion, you had a point in your allegations, which I thought (and think) it appropriate for the Commission to consider further in its decision making. Under NHPA and NEPA it is not my job, or yours, to go out and conduct the studies necessary to identify and address the impacts of NRC's permit actions; it is NRC's job to do so, or to cause the applicant to do so, with our advice and assistance. You have provided substantive information indicating that NRC needs to take a further look at the historic preservation implications of its permit decision; I was advising NRC that I thought you had a good point, that I didn't think you were an eccentric who could safely be ignored. But because I did not refer to a "specific aspect" of the application, in the eyes of USEC my opinion – like yours – can be rejected out of hand. And of course, as you know, it was impossible for me (or anyone else trying to figure out how USEC had considered impacts on historic places) to address "a specific aspect of the ACP application" because neither the application nor the accompanying Environmental Report refer to the requirements of NHPA or to the National Register of Historic Places. The absence of specific evidence in my statement merely reflects the absence of specifics in USEC's application. To judge from the available record, at least (such as it is), USEC has not thoroughly identified historic properties subject to possible effect by its actions – to say nothing of other kinds of cultural resources that ought to be considered under NEPA. This creates a flawed record for use by NRC in making its permit decision. I trust the Commission will understand this, and appreciate your efforts to provide it with a broader and more complete basis for its deliberations.

Good luck in your continuing efforts.

Sincerely,

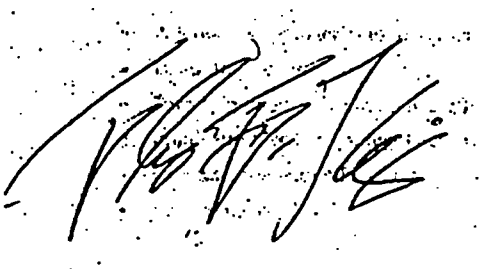

EXHIBIT IV

SHAWNEE NATION, UNITED REMNANT BAND

TUKEMAS / HAWK POPE - PRINCIPLE CHIEF

ZANE SHAWNEE CAVERNS and SOUTHWIND PARK
SHAWNEE-WOODLAND NATIVE AMERICAN MUSEUM

Nuclear Regulatory Commission
and whom-ever it may concern,

Dear Sirs.

We were only recently informed of plans to further develop the Nuclear project in Pike County, Ohio. I represent the Shawnee Nation, United Remnant Band. The U.R.B. is recognized as a decendant group / Tribe of the historic Shawnee Nation in Ohio - SUB. A.M. H.J.R. 8 - 1980. Our People do have historic and cultural ties to the site in Pike County, near the Scioto river. We do consider the earth works and other Ceremonial and Cultural features there to be sacred. We do, therefore object to the proposed project, for reasons of the projects incompatable and in-appropriate use of the land. Any destruction of features on the site, further poisoning of the ground, or limits to access to the site would be very disturbing and considered by us, wrong.

We are regularly informed of sites for proposed transmission towers and pipe lines. We were not told of this project, similarly. In the future we want to be a consulting source. We await your response.

Chief Hawk Pope

2911 ELMO PLACE • MIDDLETOWN, OHIO 45042

SEE OTHER SIDE →

P.S.

We were informed by Jeffrey Lee, and we do support his intervention in this matter. In the Shawnee language Scioto means, 'Hair in the water' as the river passes through so many burial sites and is so prone to flooding. Again, this place is Sacred to Shawnee People.

Thank you for your time & Consideration.

Chief Hawk Pope

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE SECRETARY

In the Matter of	)	Filed April 1, 2005
USEC Inc. (American Centrifuge Plant)	)	Docket No. 70-7004

MOTION FOR LEAVE TO AMEND REPLY TO ANSWER OF USEC INC. BY GEOFFREY SEA

Petitioner Geoffrey Sea comes pro se seeking leave to intervene in the above-captioned proceeding and to raise certain issues material to the issuance of the licenses sought by USEC Inc. Petitioner has filed twenty-four pages of contentions with additional exhibits and expert statements for consideration by the Nuclear Regulatory Commission ("the Commission" or "NRC"). USEC has filed an answer on March 23, 2005 and Commission staff has answered on March 25, 2005. Petitioner has replied to these answers on March 30, 2005 and April 1, 2005, respectively.

Petitioner hereby asks leave to amend his reply to USEC's answer, for the following reason. USEC included with its answer an "Attachment 1" that was unexplained in the body of USEC's answer. Attachment 1 appeared to be an electronically generated comparison of the uncorrected and corrected versions of Petitioner's original petition, both of which had been provided by Petitioner through electronic filing. Because USEC's Attachment 1 appeared to be

an accurate comparison of the filings, without explanation of its presence, Petitioner did not originally subject this attachment to scrutiny. (The attachment is significantly longer than the body of USEC's answer.)

Upon scrutiny, it now appears that USEC's Attachment 1 is not an accurate comparison of the two electronic versions provided by the Petitioner. Specifically, USEC included the Petitioner's cover letter that accompanied the uncorrected version, but omitted the second cover letter, which accompanied the corrected version. The second cover letter is essential for understanding that the second version was submitted as a correction with explanation, not a "second filing," as USEC wants to allege. USEC's omission of the second cover letter appears to be an intentional omission designed to support its false allegation. Petitioner therefore wishes to complete the record by amending his Reply to USEC's Answer with a copy of the second cover letter, and an explanation of its relevance.

An amendment to Petitioner's reply accompanies this filing.

Respectfully submitted,

4/1/05

Geoffrey Sea

Dated April 1, 2005

Temporary mailing address: 340 Haven Avenue, Apt. 3C, New York, NY 10033

Permanent address after relocation: 1832 Wakefield Mound Road, Piketon; OH 45661

Telephone numbers: 212-568-9729 or 740-835-1508

E-mail: GeoffreySeaNYC@aol.com

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE SECRETARY

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Filing Requirements

USEC, in its Answer to Petitioner, contended that the Petitioner did not meet the Commission's filing requirements because two different petitions were submitted, a position

unsupported by the facts. In Petitioner's reply, filed March 30, 2005, Petitioner stipulated that he filed an uncorrected electronic version of his petition before the deadline, and then followed up with both a mailed and an e-mailed copy of a corrected version, each version with explanatory cover letters. (Petitioner's Reply to USEC, pages 2-4.)

USEC included with its answer an "Attachment 1" that was unexplained in the body of the Answer. Attachment 1 appeared to be an electronically generated comparison of the uncorrected and corrected versions of Petitioner's original petition, both of which had been provided by Petitioner through electronic transmission. Because USEC's Attachment 1 appeared to be an accurate comparison of the filings, without explanation of its presence, Petitioner did not originally subject this attachment to scrutiny. (The attachment is significantly longer than the body of USEC's answer.)

Upon scrutiny, it is apparent that USEC's Attachment 1 is not an accurate comparison of the two electronic versions provided by the Petitioner. Specifically, USEC included the Petitioner's cover letter that accompanied the uncorrected version, but omitted the second cover letter, which accompanied the corrected version. The second cover letter is essential for understanding that the second version was submitted as a correction with explanation, not a "second filing," as USEC wants to allege.

Petitioner's second cover letter includes the following text:

> The attached petition for intervention in the USEC American Centrifuge Plant licensing action was filed today, February 28, electronically (by e-mail) before the 5 pm deadline.
>
> This hard copy contains some changes to the body of the petition and supercedes the electronic version. This copy also includes all the exhibits, whereas only some of the exhibits were available in electronic form.
>
> Hard copies may bear a March 1 postmark for the following reason: Two supporting statements arrived by fax and Fedex too late to be included in a mailing by Monday midnight. These were the statements of

> Charles Beegle, the owner of a historic property on the boundary of DOE land in Piketon, and of Karen Kaniatobe, Tribal Historic Preservation Officer of the Absentee Shawnee Tribe of Oklahoma.
>
> Both Mr. Beegle and Ms. Kaniatobe have standing to intervene themselves by virtue of their landowner and tribal status. Because of the security problem related to the timing of this case, each of them came to the case very late. While I am not speaking for them, they both decided to support my intervention in lieu of challenging the Commission's ruling limiting intervention to specific parties. For this reason I felt it essential to include their statements, even if causing some hours delay. I am sending these packages by overnight mail, so that they will arrive earlier than they would have had I mailed them first class.
>
> A corrected copy of the electronic text is available upon request.

The electronic version of the cover letter, which was provided even though it was not requested, contained the additional following note:

> I perhaps should have added that the late receipt of the statements of Mr. Beegle and Ms. Kaniatobe necessitated certain changes to the text of the petition as well. So that all parties may receive a more complete and corrected electronic copy as soon as possible, I am here attaching that copy, which supercedes that filed on Monday. The text of the Beegle and Kaniatobe statements is included here, but other exhibits must still await the hard copy.

Thus, Petitioner made it extremely clear to all parties that he was submitting a corrected version, made necessary by the late receipt of the statements of Ms. Kaniatobe and Mr. Beegle—NOT a second petition.

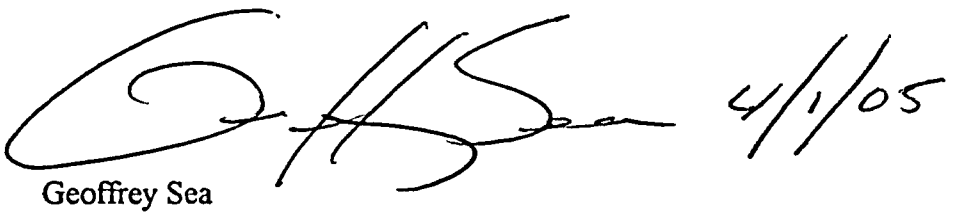
USEC's omission of the second cover letter appears to be an intentional omission designed to support its false theory of two separate filings. Petitioner objects to USEC's attempted deception. A full copy of the missing cover letter is attached as Exhibit X.

Petitioner reiterates that the purpose of the filing requirements is to ensure speed and clarity in communications. Petitioner fulfilled that purpose by giving lucid explanation of his

filing. USEC's attempt to distort the matter by providing strategically incomplete documentation must fail.

Petitioner concludes by observing that USEC's attempt to create a false issue around filing requirements reveals USEC's weakness on all other matters.

Respectfully submitted,



Geoffrey Sea

Dated April 1, 2005

Temporary mailing address: 340 Haven Avenue, Apt. 3C, New York, NY 10033

Permanent address after relocation: 1832 Wakefield Mound Road, Piketon, OH 45661

Telephone numbers: 212-568-9729 or 740-835-1508

E-mail: GeoffreySeaNYC@aol.com

EXHIBIT X

Subj: **More Complete Filing–Re: USEC Inc. ACP**
Date: 3/2/2005
To: HEARINGDOCKET@nrc.gov, OGCMailCenter@nrc.gov, dsilverman@morganlewis.com

To all parties:

Electronic filing of my petition of intervention was made to all parties before 5 pm on Monday, February 28. Hard copies of the complete filing, including exhibits that could not be reproduced electronically, have been sent to all parties by FedEx for delivery either today or tomorrow. Those packages contain the following cover letter:

Geoffrey Sea
340 Haven Ave., Apt. 3C
New York NY 10033 USA
Tel: (212) 568-9729
E-mail: GeoffreySeaNYC@aol.com

---

28 February 2005

Attn:. Rulemaking Adjudications Staff of the Secretary
US Office Nuclear Regulatory Commission
16th Floor
One White Flint North
11555 Rockville Pike
Rockville MD 20852

Office of the General Counsel
US Nuclear Regulatory Commission
Washington DC 20555-0001

Donald j Silverman esq.
USEC Counsel
Morgan Lewis Bockius
1111 Pennsylvania Ave. NW
Washington DC 20004

Dear Sirs and Mesdames,

The attached petition for intervention in the USEC American Centrifuge Plant licensing action was filed today, February 28, electronically (by e-mail) before the 5 pm deadline.

This hard copy contains some changes to the body of the petition and supercedes the electronic version. This copy also includes all the exhibits, whereas only some of the exhibits were available in electronic form.

Hard copies may bear a March 1 postmark for the following reason: Two supporting statements arrived by fax and Fedex too late to be included in a mailing by Monday midnight. These were the statements of Charles Beegle, the owner of a historic property on the boundary of DOE land in Piketon, and of Karen Kaniatobe, Tribal Historic Preservation Officer of the Absentee Shawnee Tribe of Oklahoma.

Both Mr. Beegle and Ms. Kaniatobe have standing to intervene themselves by virtue of their

landowner and tribal status. Because of the security problem related to the timing of this case, each of them came to the case very late. While I am not speaking for them, they both decided to support my intervention in lieu of challenging the Commission's ruling limiting intervention to specific parties. For this reason I felt it essential to include their statements, even if causing some hours delay. I am sending these packages by overnight mail, so that they will arrive earlier than they would have had I mailed them first class.

A corrected copy of the electronic text is available upon request.

Thank you for your consideration.

Respectfully,

Geoffrey Sea

I perhaps should have added that the late receipt of the statements of Mr. Beegle and Ms. Kaniatobe necessitated certain changes to the text of the petition as well. So that all parties may receive a more complete and corrected electronic copy as soon as possible, I am here attaching that copy, which supercedes that filed on Monday. The text of the Beegle and Kaniatobe statements is included here, but other exhibits must still await the hard copy.

Sincerely,

Geoffrey Sea