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NUCLEAR REGULATORY COMMISSION

Title: U.S. DOE High-Level Waste Repository
Pre-Application Matters

Docket Number: PAPO-00; ASLBP No.: 04-8239-01-PAPO

Location: Rockville, Maryland

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of: : Docket No.
U.S. DEPARTMENT OF ENERGY : PAPO-00
 : ASBLP No.
(High Level Waste Repository: : 04-8239-01-PAPO
Pre-Application Matters) :

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Hearing Room T3BB45
Nuclear Regulatory Commission
Two White Flint North
11545 Rockville Pike
Rockville, Maryland

Wednesday, May 18, 2005

The above-entitled matter came on for
hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

THE HONORABLE THOMAS S. MOORE, Chairman
THE HONORABLE ALEX S. KARLIN, Administrative Judge
THE HONORABLE ALAN S. ROSENTHAL, Administrative Judge

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ALSO PRESENT:

DANIEL J. GRASER - LSN ADMINISTRATOR

P R O C E E D I N G S

(8:59:36 a.m.)

CHAIRMAN MOORE: Good morning, ladies and gentlemen. At our first case management conference on May 4th, and in our May 11th confirmatory order, the Pre-License Application Presiding Officer Board scheduled today's second conference, and directed the participants to brief a number of issues associated with privilege logs and the associated procedures for resolving privilege disputes. Before turning to our questions for the participants about those matters, we would first like to address several additional matters.

First order of business, starting on my left, would each participant identify themselves for the record, please.

MR. WEDEWER: I'm Harry Wedewer, representing the NRC Staff.

MS. COLE: Shelly Cole, representing the NRC Staff.

MR. SMITH: Tyson Smith with the NRC Staff.

MS. YOUNG: Mitzi Young, Office of General Counsel, representing the NRC Staff.

MR. GRASER: Dan Graser, the LSN

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1 Administrator.

2 MS. FAGLIONI: Kelly Faglioni with
3 Department of Energy.

4 MR. SHEBELSKIE: Michael Shebelskie,
5 representing the Department of Energy.

6 MR. IRWIN: Donald Irwin, representing the
7 Department of Energy.

8 MR. EGAN: Joe Egan, representing the
9 State of Nevada.

10 MR. MALSCH: Marty Malsch, also
11 representing the State of Nevada.

12 MR. FITZPATRICK: Charles Fitzpatrick,
13 representing the State of Nevada, and our summer
14 intern, Vann Smith, is with us.

15 MR. WALSH: Tim Walsh with the Nuclear
16 Energy Institute.

17 MS. GINSBERG: Ellen Ginsberg, Nuclear
18 Energy Institute.

19 CHAIRMAN MOORE: Thank you. On page 27 of
20 DOE's May 12th filing, DOE indicates that the PAPO
21 Board stated at the first conference on May 4, that
22 DOE should remove certain bibliographic header only
23 documents from the publicly available LSN collection
24 that DOE now has determined do not meet the definition
25 of documentary material. DOE then states in its

1 filing that it is proceeding in compliance with our
2 purported direction, but would like such instruction
3 included in a formal order.

4 We disagree that the Board gave any such
5 direction to DOE at the May 4th conference.
6 Nevertheless, DOE - how many bibliographic header only
7 documents in your current publicly available LSN
8 collection do you wish to delete?

9 MR. SHEBELSKIE: The number is
10 approximately 60,000, Your Honor.

11 CHAIRMAN MOORE: Sixty thousand. Am I
12 correct in stating, as I believe it's set forth in
13 your May 12th filing, that these are bibliographic
14 header only documents, all of which you have now
15 determined do not meet the definition of documentary
16 material?

17 MR. SHEBELSKIE: Yes, sir.

18 CHAIRMAN MOORE: Mr. Graser, as the LSN
19 Administrator, in your opinion, are there any
20 technical difficulties for the LSN in deleting those
21 materials, and will it disrupt your current processing
22 of documents on the LSN?

23 MR. GRASER: There are no technical issues
24 associated with deleting the bibliographic header only
25 documents. With regard to the schedule, 60,000

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1 transactions would be the equivalent of two days worth
2 of processing, so that would mean deleting 60,000
3 records would preclude loading an additional 60,000
4 materials under the current schedule.

5 CHAIRMAN MOORE: In your opinion then, it
6 would make sense to delay this until your current
7 processing of new materials is completed?

8 MR. GRASER: I really think that that's a
9 call that has a lot more to do with DOE's management
10 of its schedule.

11 CHAIRMAN MOORE: DOE, do you have a gap in
12 your schedule of materials you're providing, two-day
13 gap?

14 MR. SHEBELSKIE: I believe right now, Your
15 Honor, we have a sufficient number of documents that
16 we have made available for the system to be crawling,
17 so there's no current gap. It may happen in the next
18 couple of weeks or so there's a two-day gap or so,
19 where those could be worked in, or they could be
20 worked in at the end.

21 CHAIRMAN MOORE: Does any other
22 participant have an objection to the deletion of these
23 materials that DOE has now determined are non-
24 documentary materials?

25 MR. FITZPATRICK: Charles Fitzpatrick for

1 Nevada. I don't think we have an objection, per se,
2 to the removal; if they're not documentary material,
3 they're not. But I think that because they were
4 determined under existing criteria at DOE to be
5 documentary material at one point, and we don't know
6 why the criteria changed, but we would ask that a
7 record be made of what's deleted. It's very difficult
8 to --

9 CHAIRMAN MOORE: These are header only
10 documents.

11 MR. FITZPATRICK: Right, Your Honor. We
12 would like to have a record of what the 60,000 headers
13 are that are removed, so that we can assess the
14 changed criteria. And also, determine whether Nevada
15 or other participants may feel they are documentary
16 material for their views, and choose to put them on
17 their LSN collections.

18 CHAIRMAN MOORE: Mr. Graser, is it
19 possible to publish on the LSN a list of those deleted
20 documents?

21 MR. GRASER: Yes.

22 CHAIRMAN MOORE: Is it possible, along
23 with that list to include, essentially, the
24 bibliographic header, the document accession number,
25 and the bibliographic header as being deleted?

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1 MR. GRASER: The bibliographic header is
2 already on the system. I'm not quite sure I'm
3 following. You're suggesting that we would delete
4 them, and then add them back in as part of the list?
5 If they're there --

6 CHAIRMAN MOORE: If it's just a list of
7 accession numbers, and there's 60,000 I believe was
8 the number, that is an enormous task for anyone to try
9 to pair up a number with a bibliographic header.

10 MR. GRASER: Well, again, I'm trying to
11 understand the logic. If the headers are already on
12 there and remain on there until someone has a chance
13 to peruse the list of 60,000 before they're deleted,
14 then there would be no reason to delete them, and then
15 put them back again.

16 CHAIRMAN MOORE: But there has to be some
17 identification to be able to do that of what 60,000
18 we're talking about.

19 MR. GRASER: That would seem logical.

20 CHAIRMAN MOORE: I have no idea how that
21 would be done.

22 MR. GRASER: We have the ability to post
23 lists of accession numbers. That was done for the
24 documentary material that was deleted subsequent to
25 June 30th, 2004. And that is a list of the

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1 participant and LSN accession numbers for documentary
2 material that was deleted.

3 MR. FITZPATRICK: Your Honor, the shortcut
4 might be, if Mr. Graser thinks so, if just a list of
5 the accession numbers were available, but available in
6 sufficient time ahead of the deletion of the headers
7 to allow the parties to keep them on 60,000 and in two
8 days; but in other words, why give us access to 60,000
9 headers and the accession numbers for a long period of
10 time and be putting the headers back up. Why not just
11 don't delete them until a list has been given and a
12 period of time to --

13 CHAIRMAN MOORE: What period of time do
14 you suggest?

15 MR. FITZPATRICK: Sixty days.

16 CHAIRMAN MOORE: I'm sorry?

17 MR. FITZPATRICK: Sixty days.

18 CHAIRMAN MOORE: Sixty days?

19 MR. FITZPATRICK: That way Mr. Malsch
20 could check a thousand a day.

21 (Laughter.)

22 CHAIRMAN MOORE: Does Staff have a dog in
23 this fight?

24 MR. SMITH: We do not. We have no
25 objection to removing the documents which are non-

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1 documentary material.

2 CHAIRMAN MOORE: Mr. Graser, if you, upon
3 receiving from DOE their deletion request list would
4 make those available -- leave them on -- publish the
5 list of accession numbers and leave them on for 60-
6 days after that publication before they're deleted,
7 that will take care of the situation.

8 MR. GRASER: It can be done.

9 CHAIRMAN MOORE: Thank you.

10 MR. SHEBELSKIE: Thank you, Your Honor.

11 CHAIRMAN MOORE: On May 16th, the State of
12 Nevada filed a motion for a show cause order directed
13 against the NRC Staff. All answers to that motion
14 shall be filed in accordance with the time limits in
15 10 CFR Section 2.3(2)(3).

16 Next, DOE - do you have an update for us
17 of your best good faith estimate of when DOE will
18 certify its document collection?

19 MR. IRWIN: Your Honor, there have been no
20 events during the last two weeks which would change
21 the estimate we gave at that time, sir.

22 CHAIRMAN MOORE: Starting with the first
23 of next month, which will be June, the Board hereby
24 orders you to file a monthly status report setting
25 forth your then best good faith estimate of when DOE

1 will certify its collection.

2 MR. IRWIN: We will do that. Your Honor,
3 is there a particular date in the month by which the
4 Board would like --

5 CHAIRMAN MOORE: By the first of the
6 month. And going on the calendar, I think until you
7 get to perhaps October, there's no first that falls on
8 the weekend.

9 MR. IRWIN: We're in business.

10 CHAIRMAN MOORE: In that same line, and as
11 should become obvious when we discuss time periods for
12 conducting various activities later this morning,
13 knowing the actual time frame that the participants
14 and this Board have for resolution of LSN disputes
15 involving privilege matters, has a direct bearing on
16 the schedules we set. So, Mr. Irwin, do you have an
17 update for us today of your current best good faith
18 estimate of when DOE will file its license
19 application?

20 MR. IRWIN: There haven't, again, been any
21 changes in circumstances in the past two weeks, Your
22 Honor.

23 CHAIRMAN MOORE: We would also like, as
24 with certification, you to file a monthly status
25 report setting forth your then current best good faith

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1 estimate of when that application will be filed.

2 MR. IRWIN: We'll do that. We'll put them
3 both in the same report.

4 CHAIRMAN MOORE: And to emphasize again,
5 and it would be helpful if you could at least give us
6 later this morning when we get down to talking time
7 periods, your best estimation of what you think
8 realistically this is going to be. And I'm not
9 interested, and this Board is not interested in the
10 politics of this. Those are for other people, and a
11 different group; but we have to wrestle with the
12 litigation, and it makes no sense to set time periods
13 that are going to make you sweat excessively if it's
14 unnecessary, nor does it make sense for us to do that
15 for any of the parties, or for ourselves. So this is
16 a matter that we consider to be of very serious import
17 in setting realistic schedules that can be met by
18 everyone.

19 If we have six months from the time of
20 certification before you file an application, that's
21 one set of circumstances. If it's nine months, or
22 twelve months, that makes a huge difference on how
23 many towels it's going to take you to keep your
24 forehead dry, Mr. Irwin.

25 MR. IRWIN: We have had those kinds of

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1 discussions, and I agree with your assessment. And
2 we'll do our best to keep the Board accurately
3 informed.

4 CHAIRMAN MOORE: Thank you. Judge Karlin,
5 do you have anything before we get into questions?

6 JUDGE KARLIN: Right. We have one item
7 from the fourth that I think warranted clarification,
8 so after consulting with my colleagues, we thought we
9 would give you our take on an issue that came up last
10 time. And this was with regard to the safeguards
11 information status. And you all are working on
12 submitting proposals on that by July 1, and so we
13 thought clarification on this item would be helpful in
14 making sure that we get the best work product at that
15 time.

16 What happened was, last meeting we had
17 dialogue, and Mr. Smith and I were talking about what
18 constitutes safeguards information, and I think an
19 error may have crept in, or I may have allowed an
20 error to creep in. On page 288 and 289 of the
21 transcript - you all may not have that in front of you
22 - we did have a dialogue, and Mr. Smith was opining on
23 an issue; that is to say, that no safeguards
24 information can essentially exist until the
25 application is submitted under the definition of

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1 safeguards. And we've studied that issue a bit, and
2 thought about it a bit, and we think that that's
3 probably not correct. That is not the correct
4 interpretation, not the interpretation we take; and,
5 thus, we thought we'd articulate what we do believe is
6 the proper interpretation.

7 We think that the regulations taken as a
8 whole do not require waiting until the moment of the
9 application submission in order for their to be
10 safeguards information in the possession of the
11 Applicant, or perhaps even the staff, if that's been
12 submitted to the staff. And we think this is kind of
13 important.

14 There are four reasons, and I'll give them
15 to you briefly, why we're sort of reached that
16 conclusion. First is Section 1003, specifically
17 states that headers must be provided for each document
18 that constitutes safeguards information during the
19 PAPO period. And so we think that this is sort of the
20 primary indicia that there is safeguards information
21 during the PAPO period.

22 Second, we recognize the point that when
23 you look at the definition, the current definition of
24 safeguards information - 73.2, it says: "Information
25 which specifically identifies an Applicant's detailed

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1 security measures for the physical protection of
2 special nuclear material." And focusing on the word
3 "Applicant", I guess the argument might be made, and
4 I'm not even sure that this is what Mr. Smith
5 intended, that you've got to have an application
6 before there can be safeguards information.

7 We don't buy that, particularly in this
8 proceeding, which is a pre-license application. We
9 think we know who the Applicant is going to be; and,
10 therefore, we think there is safeguards information
11 out there.

12 Third, if you look at the proposed
13 definition of safeguards information at *Federal*
14 *Register* 72-11, they have deleted or proposed to
15 delete entirely any reference to the word
16 "application" or "applicant" in the definition of
17 safeguards information; thus, we don't think that the
18 filing of the application suddenly causes this
19 safeguards information to spring into existence where
20 it didn't exist before.

21 And finally, our reasoning is that the
22 interpretation that you have to have an application
23 before you can have safeguards information creates
24 absurd and inappropriate results, whereby sensitive
25 information would be necessarily disclosed

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1 prematurely. Consider the example; let's say it's the
2 pre-license phase. Let's say this document contains
3 information about the physical protection of special
4 nuclear material at the Yucca facility. Let's say
5 it's not classified, it's not restricted, it is
6 relevant, and it is documentary material, under Mr.
7 Smith's apparent interpretation of this, this is not
8 safeguards information. Therefore, what is it? It is
9 a relevant document that must be put in full text into
10 the LSN. We think that's the inappropriate reading,
11 and that it should be given the protection of
12 safeguards information; and, therefore, we think that
13 this is categorized as safeguards information.

14 So for those reasons, we're asking the
15 parties and instructing the parties to take that
16 approach when you develop the safeguards information
17 proposals, protective orders, et cetera on July 1st.

18 MS. YOUNG: Judge Moore, may the Staff be
19 heard on this, just to ask a question?

20 CHAIRMAN MOORE: I'm sorry. I didn't hear
21 you.

22 MS. YOUNG: May the Staff be heard on this
23 just to ask a question?

24 CHAIRMAN MOORE: Yes.

25 MS. YOUNG: Did Judge Karlin or the

1 members of the Board in making this decision to convey
2 guidance to the parties also look at the statutory
3 definition of safeguards information?

4 JUDGE KARLIN: Yes.

5 MS. YOUNG: And that would be in Section
6 147, I believe.

7 JUDGE KARLIN: Yes.

8 MS. YOUNG: Okay. Did you have an
9 interpretation on how that also supports your ruling,
10 your guidance?

11 JUDGE KARLIN: We don't think that changes
12 the ruling. We think it's important to protect
13 safeguards information, and the consequence if we do
14 not call this safeguards information is that it's
15 relevant documentary material that has to be disclosed
16 under the normal definitional structure of this
17 proceeding, and, therefore, we reached this
18 conclusion.

19 MR. IRWIN: Judge Karlin --

20 CHAIRMAN MOORE: Mr. Irwin.

21 MR. IRWIN: Your discussion relates, I
22 take it, only to the type of information referred to
23 as safeguards information in Part 73. It doesn't
24 refer to that sort of undistributed middle between
25 safeguards and classified that consists of official

1 use only, UCNI, Homeland Security.

2 JUDGE KARLIN: Right.

3 MR. IRWIN: It was just a question of
4 clarification.

5 JUDGE KARLIN: I think that's right. I
6 think that the Unclassified Controlled Nuclear
7 Information, UCNI, and the Official Use Only, OOU, and
8 the other categories; those are, as I understand it,
9 DOE nomenclature more than NRC. But I think those,
10 also, should be included, as you all propose to do in
11 the submission that you initially did on the case
12 management order, in the submission you do on July
13 1st, how that should be managed.

14 MS. YOUNG: Judge Karlin, I believe that
15 Official Use Only is also used at the NRC.

16 JUDGE KARLIN: Oh, okay. I'm sorry.

17 MS. YOUNG: Just for clarification.

18 CHAIRMAN MOORE: Moving on then; Mr.
19 Graser, do you have anything to report to us about the
20 meeting that we instructed you to have with the
21 participants' technical experts on using the DDMS for
22 electronic privilege logs?

23 MR. GRASER: Yes, Your Honor. We
24 conducted the meeting as directed on May 11th. I have
25 provided your legal assistant with copies of the

1 meeting minutes of that meeting, and with a short
2 bulleted summary document of what transpired at that
3 meeting.

4 The meeting utilized a number of strawman-
5 type documents to facilitate discussion.

6 JUDGE KARLIN: May I ask, Mr. Graser, do
7 the other parties here have this, as well?

8 MR. GRASER: Yes, I have distributed it
9 beforehand.

10 JUDGE KARLIN: Thank you.

11 MR. GRASER: We used a number of strawman
12 documents to facilitate the discussion, and based on
13 the design concept represented there, focusing on the
14 issue of whether the participants would be able to
15 format materials in an easy way to submit it to such
16 a system. As a result of all of the discussions we
17 had that day, we identified no technical issues that
18 would preclude anybody from being able to deliver
19 information that would facilitate loading a privilege
20 log file under that design.

21 There were a number of items that are
22 delineated in the minutes, and also in the bulleted
23 item that I left, that would -- the decisions that are
24 made in regard to discussions about privilege
25 materials, in general; those decisions and whatever

1 the Board orders as a result of those discussions,
2 will influence a final design. So at this point in
3 time, we did not make an effort to come up with a
4 final design, but we believe that within the general
5 parameters of what we're discussing, there are no
6 technical issues, so that whatever the final order is,
7 we would be able to readily accommodate any changes.

8 CHAIRMAN MOORE: Do any of the
9 participants have any questions for Mr. Graser in this
10 regard?

11 MR. SHEBELSKIE: Not at this point, Your
12 Honor.

13 CHAIRMAN MOORE: Mr. Rosenthal.

14 JUDGE ROSENTHAL: What I am about to
15 address relates to only the so-called -- well, I use
16 the term second-tier privileges; namely,
17 confidential/proprietary, archeological privacy, and
18 copyright. What I'm addressing now does not refer to
19 any extent to the attorney/client deliberative
20 process, or work product privileges, nor does it
21 relate to the employee concerns issue, which Judge
22 Moore will be addressing shortly, or to safeguards.

23 The Board has tentatively concluded that
24 with respect to the four privileges that I have
25 referred to, there is good reason to require every

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1 potential party to place on the LSN a redacted version
2 of every document as to which it is claiming one of
3 these four privileges.

4 The Board further believes that this
5 undertaking should commence forthwith; by forthwith,
6 meaning tomorrow, with the view that the documents in
7 redacted form will be on the LSN within a reasonable
8 period. What's a reasonable period we'll be
9 discussing shortly.

10 In the case of DOE, completion of this
11 task would not be deemed an absolute condition
12 precedent to the filing of its next certification.
13 But once again, it is the contemplation of the Board
14 that by the time of the certification, a very
15 substantial percentage of the documents in question
16 will be on the LSN in redacted form.

17 With all documents on the LSN in redacted
18 form, it would not be necessary to resort to
19 protective orders with regard to this class of claimed
20 privileged matter. Any potential party seeking a
21 document as to which a privilege had been claimed, and
22 the redacted version placed on the LSN, could request
23 it of its possessor. In response to the request, the
24 document possessor could either provide an redacted
25 copy, or refer the requester to the redacted copy on

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1 the LSN.

2 If the requester believed either that the
3 privilege claim is without merit, or that the document
4 was over-redacted, it would have the option, of
5 course, of presenting that belief to the Board through
6 a motion to compel more extensive production.

7 Now as noted at the outset, this
8 represents the Board's current thinking. It is based,
9 first, on the belief that in the most unusual current
10 posture of this proceeding, with potential parties,
11 not actual ones, employment of protective orders has
12 decided associated problems; and, thus, should be
13 avoided to the extent possible through the use of
14 redaction.

15 In order for this alternative to serve as
16 a viable alternative to a protective order, however,
17 it appears to the Board that the redaction of a
18 particular document cannot be left to await some
19 request by a potential party for access to it. Hence,
20 the proposal that there be placed on the LSN a
21 redacted version of all documents, as to which one of
22 the privileges under present consideration has been
23 asserted.

24 So that, basically, is what, at this
25 juncture the Board has in mind. And now we'll open it

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1 up to Staff comments on the proposal. And we'll go
2 around the room. I might say that in the course of
3 the discussion, I think this relates principally to
4 DOE, we will want to get an estimate as to how long it
5 deems it necessary to have all of the documents in the
6 categories that I've indicated on the LSN. In that
7 case, DOE should bear in mind that we're not talking
8 about a leisurely pace. This has to be done on an
9 extremely expedited basis with a recognition that it
10 is important to have, as soon as possible, all of the
11 documents as to which it's claiming one of these four
12 privileges on the LSN in redacted form. So we'll
13 start with Mr. Smith.

14 MR. SMITH: Well, I guess as we said at
15 the first case management conference, the Staff
16 doesn't have any documentary material for which its
17 identified one of these privileges; so for us, it's
18 not a particular burden to do this, as you've
19 requested. I assume this will be followed up with a
20 written order that we'll be able to see.

21 CHAIRMAN MOORE: Most assuredly. This is
22 one component of the structure of the case management
23 order.

24 MR. SMITH: As I said, we don't see that
25 being a problem for us at this time. And again, the

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1 timing issue, because we haven't had -- I guess at the
2 last case management conference, we discussed perhaps
3 30 days in light of the processing time involved. And
4 I guess, without having further conversations with our
5 technical support staff, I think that's still our
6 estimate of what a reasonable time would be.

7 JUDGE ROSENTHAL: DOE.

8 MR. SHEBELSKIE: Your Honor, three general
9 observations. First, I believe copyright was included
10 among the categories.

11 CHAIRMAN MOORE: Copyright will be dealt
12 with separately. If we included it, it was our error.
13 I don't recall Judge Rosenthal mentioning it.

14 JUDGE ROSENTHAL: Yes, I did, and that was
15 my mistake.

16 CHAIRMAN MOORE: All right.

17 MR. SHEBELSKIE: Thank you.

18 CHAIRMAN MOORE: We are fully aware of,
19 and I believe it's correct for me to state that we are
20 in accord with essentially the way you, in your
21 proposal, are you going to deal with copyright. We
22 think that that's the only --

23 JUDGE ROSENTHAL: I misspoke, and so we're
24 now down to three.

25 MR. SHEBELSKIE: Okay. Very good. On the

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1 business proprietary documents, I know that the
2 process of redaction requires the Department to, after
3 identifying what it's going to redact, to go back to
4 the contractor who provided the information to make
5 sure that company is okay with the redaction. So
6 although, obviously, Judge, we will proceed with great
7 dispatch on our end, there is that additional
8 recognition that we have to do that other step.

9 CHAIRMAN MOORE: And if I might interrupt,
10 this is precisely my prior comment about how, in
11 setting the schedules which we'll get to subsequently,
12 knowing whether we have six months, nine months, or a
13 year, for example, before that application is going to
14 be filed makes a tremendous difference in how we deal
15 with the actual schedule and time period.

16 MR. SHEBELSKIE: And on the business
17 proprietary, we certainly think that the majority, if
18 not, a great percentage are those DOE's prime
19 contractor, VSC, but there are also any number of
20 other miscellaneous subcontractors and direct
21 contractors, and it takes as much time, in some sense,
22 to say to a company here's 4,000 documents. Look at
23 what we propose, versus having to go out to 24 of them
24 each with one document because you have to find the
25 contacts. So how that affects our schedule on that

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1 group of documents, I don't think I can elaborate on
2 that, other to alert the Board to that issue.

3 On the archeological privilege documents,
4 happily there I think we're dealing with a modest
5 number of documents, so that will be good. On the
6 privacy, I think my general observation at this point
7 would be as we go through the redaction review, I
8 would propose then that we also, just like we did with
9 last summer's collections, if we identify some
10 documents that in our considered judgment don't
11 qualify as documentary material; because we talked
12 last time that we collected broadly to make sure we
13 covered the waterfront on what needed to be produced,
14 and we had thought that we were willing to produce
15 more of these under protective orders without perhaps
16 doing too fine-tooth comb on relevancy, just to get
17 more out there for the State to see, but as we go
18 through this privacy, this redaction of these
19 documents, we would bring a tighter standard to bear
20 consistent with the regulations to make sure what we
21 end up, and to reduce our cost to expedite the
22 schedule, to make sure we get through this job fast of
23 redaction, is that standard. So I would suspect that
24 at the end of the day we will have fewer than the
25 70,000, so I just want to alert the Board to that.

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1 CHAIRMAN MOORE: In your numbers that you
2 previously identified to us, the 60,000 we discussed
3 at the opening of this conference this morning, where
4 do they fit in your numbers? Those were bibliographic
5 header only, so presumably there was a privilege to be
6 attached to them.

7 MR. SHEBELSKIE: I believe those - I'll
8 have a check with our IT folks - I believe those were
9 ones that they had separately identified. We had
10 already determined were irrelevant before we starting
11 the process process.

12 CHAIRMAN MOORE: So your prior numbers are
13 still then accurate without regard to --

14 MR. SHEBELSKIE: Yes, sir. I just want to
15 alert the Board to know that when we certify, or when
16 the redaction process is done, I would suspect that
17 that 70,000 number will come down. Beyond that, I
18 would also make the observation, is that on the
19 project management side of this, the resources both
20 with our litigation support contractor, CACI, and of
21 Hunton & Williams, are pretty much full devoted to a
22 variety of tasks that we had identified to get ready
23 for certification on the schedule we talked about last
24 time, and reiterated again today. And so we can start
25 the process of setting up what has to be done on

1 redaction, but it wouldn't be quite as simple as
2 saying tomorrow literally we would have a team of
3 people who could start the redactions. We will report
4 back to you maybe on that June 1st status report where
5 we stand, and what we think our schedule looks like
6 then on that task.

7 JUDGE ROSENTHAL: No, no. I think we
8 might want an earlier estimate as to how long you
9 believe that with all deliberate speed the redaction
10 process can be completed. When I said tomorrow, I did
11 not mean that literally, but I certainly did mean --
12 this Board means that this process has to start as
13 early as possible, and has to proceed with all
14 possible speed.

15 MR. SHEBELSKIE: Yes, sir. And I
16 understand that. My point there is in order for me to
17 give you a meaningful estimate, I would need to talk
18 with the DOE Project Manager on this, the CACI head of
19 the project to understand what resources they have in
20 terms of money, personnel for that schedule. But,
21 obviously, we will be insistent that it has to be done
22 very expeditiously, the commencement of it, and the
23 completion of it.

24 JUDGE ROSENTHAL: When do you think you
25 will be able to provide us with that information?

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1 MR. SHEBELSKIE: One moment, Judge
2 Rosenthal. Judge, would it be sufficient for your
3 purposes if we had a week, so that would be next
4 Wednesday?

5 JUDGE ROSENTHAL: That's fine.

6 MR. SHEBELSKIE: All right. Thank you.

7 JUDGE ROSENTHAL: Anything further from
8 DOE?

9 MR. SHEBELSKIE: No, sir.

10 JUDGE ROSENTHAL: Okay. Nevada.

11 MR. FITZPATRICK: Judge Rosenthal, first
12 of all, the State of Nevada believes that the concept
13 of providing for these materials in redacted form
14 rather than protective order is a prudent way to deal
15 with the I think you called it Yankee Stadium syndrome
16 that we talked about.

17 JUDGE ROSENTHAL: Well, that's what we had
18 in mind, was avoiding having to deal with that.

19 MR. FITZPATRICK: Two clarifications; one
20 would be, if a party choose to waive the privilege as
21 to these categories, archeological and the other
22 categories, can I assume then that it would be
23 appropriate simply for that party to include those
24 documents, bibliographic header and full text on its
25 LSN at the time of certification? In other words,

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1 there would be no reason for --

2 CHAIRMAN MOORE: On the surface, that
3 would seem to be the case, but one can posit a
4 situation where as to one party, one would be willing
5 to waive the privilege, but not to the world.
6 Although with these, as Judge Rosenthal has referred
7 to them, the second-tier privileges, that may be a
8 stretch. I guess we would need to fashion something
9 to cover that situation, and we would like to hear
10 from the other participants on that.

11 MR. FITZPATRICK: Well, my understanding,
12 what I was trying to put across was the idea that if
13 you intend to put the full text, as well as header, of
14 a particular document as to which you could have
15 asserted a privilege under these categories, you would
16 simply do so at the time of your certification.

17 CHAIRMAN MOORE: But the situation I'm
18 positing is that as to -- for example, if DOE is
19 willing to provide the State of Nevada an unredacted
20 copy for whatever reason, but wishes only to have
21 because of those second-tier privileges a redacted
22 version on the LSN, that's something that we hadn't
23 contemplated, and it brings up, frankly, the
24 distasteful use in the unique circumstances of this
25 case of protective orders that we're trying to avoid

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1 because there are innumerable problems with them.

2 MR. FITZPATRICK: I think my reaction to
3 that is I don't think we intend to assert privilege as
4 to some documents, as to some party, but not others.
5 We'll either waive it or not waive it.

6 CHAIRMAN MOORE: What I think the answer
7 to that is, the parties will have to be judicious in
8 either waiving the privilege across the board or not
9 waiving it, and redacting the document. And in those
10 circumstances, then the party seeking the unredacted
11 form would fall into line, as Judge Rosenthal has
12 outlined, seeking the entire document, doing it in
13 that fashion, as opposed -- if a party, however,
14 wishes to across the board waive the privilege, then
15 there's no need for redaction of it. The document
16 would be published.

17 MR. FITZPATRICK: Well, I think in many
18 circumstances, the delivery to a third person would
19 waive it in any event totally.

20 JUDGE ROSENTHAL: I don't see off-hand any
21 particular advantage to that. I certainly would hope
22 that DOE would not be claiming privilege
23 promiscuously, and that as, for the most part, the
24 documents that it was claiming privilege with regard
25 to would be supplied only in redacted form.

1 In other words, I think there are very few
2 cases in which a document which appears on the LSN in
3 redacted form because of a claim of privilege, would
4 then produce upon request the production of the full
5 document. I mean, that might happen in a few cases.
6 My guess is in very few. My guess is that in the
7 majority of cases when the document was requested,
8 what would be received would be the redacted copy, not
9 the full document. And I think there's so few
10 documents that are probably in the category that you
11 are suggesting that this is something that we need to
12 be concerned about.

13 CHAIRMAN MOORE: And once, of course,
14 they're on the LSN, the requests don't need to be made
15 because they're already there. DOE, do you have
16 anything --

17 JUDGE KARLIN: If I may.

18 CHAIRMAN MOORE: Certainly, Judge Karlin.

19 JUDGE KARLIN: I think I agree with what
20 you all are saying, but if I understand Mr.
21 Fitzpatrick's point, it's simply that if a party
22 chooses not to assert privilege, and at the outset
23 puts full text of the document on the LSN, they
24 certainly can choose to do that, and that would avoid
25 the whole hassle of having to redact the document. I

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1 see no problem with that, but I also agree that we
2 don't want to have a lot of things claimed to be
3 privileged, and then later well, oh, we'll just forget
4 that. We'll withdraw our claim of privilege. And we
5 don't want an artificial set of privilege documents
6 that suddenly disappear like mirages. So I see no
7 problem with the basic approach.

8 CHAIRMAN MOORE: DOE, do you have a
9 comment in response to Mr. Fitzpatrick?

10 MR. SHEBELSKIE: Only one observation, is
11 that the three privileges we're talking about are ones
12 that aren't really DOE's to waive, because it's the
13 business proprietary, it's the contractors,
14 archeological privilege - by statute it must be
15 protected, and on privacy - well, it's the employees'
16 personal information that we have to protect.

17 JUDGE KARLIN: On that point, let me
18 suggest a question here. We certainly have set aside
19 attorney work product, attorney/client communication,
20 and deliberative process privilege as sort of a
21 separate set, and then we're talking, I think, here
22 essentially about all of the others that are capable
23 of redaction, not copyright. So if we're speaking
24 these three, but if there are others, I mean, the FOIA
25 - there are nine FOIA exemptions. And if you all

1 think that you have something under Exemption 6, or 7,
2 or 3, or 2, and it's redactable, I think the principle
3 is the same here. And we're not limiting our approach
4 to just those three. Any redactable documents for
5 which privilege are claimed, should be treated in the
6 same way; the redacted version should be placed on the
7 LSN promptly after certification.

8 CHAIRMAN MOORE: Mr. Smith.

9 MR. SMITH: Request for a clarification
10 with respect to these documents that looking forward
11 we're going to be redacting prior to adding them to
12 the LSN. Will we still need to produce a
13 bibliographic header only that states that such
14 document is privileged, or will we just provide the
15 bibliographic header that goes with the redacted
16 version?

17 CHAIRMAN MOORE: At the time of
18 certification to meet your certification obligations,
19 any document for which you're claiming privilege has
20 a bibliographic header. Since everyone's
21 certification, assuming for the moment there will be
22 a second Staff certification of some kind, whether or
23 not the first certification still stands, and because
24 that is entitled to come after DOE's certification,
25 you may or may not, at the time of certification --

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1 I'm sorry. You would still have the bibliographic
2 only header claiming privilege, and then there would
3 be a second bibliographic header with the redacted
4 document tied to the first, and the privilege would
5 stand and be connected. That's the way the system
6 would work.

7 MR. SMITH: Okay. So you still want us to
8 include both documents, rather than reducing the
9 burden on the LSN.

10 CHAIRMAN MOORE: But it has nothing to do
11 with certification, per se.

12 MR. FITZPATRICK: Your Honor, I had a
13 second question back about Judge Rosenthal's -- you
14 spoke of beginning to gather these documents, redact
15 these documents. DOE, for instance, like tomorrow or
16 reasonable facsimile. Can I understand, that does not
17 necessarily mean public disclosure of them in the next
18 little while? Simply loading it on the LSN.

19 CHAIRMAN MOORE: I think that's a matter
20 to discuss, and I think that it was intended to be
21 discussed subsequently, and fits more neatly a bit
22 later. If for any reason we don't bring it up because
23 of our error, would you make sure you bring it up
24 again? But I think that's one we'll address when we
25 get the schedules.

1 JUDGE KARLIN: Right. I think we
2 contemplate a cash management order, and my colleagues
3 can correct me, that would say within X days of
4 certification, you must have all the documents
5 redacted and put on the LSN. Whether or not you start
6 putting the redacted versions on before you certify is
7 a question we really have --

8 CHAIRMAN MOORE: But certainly after
9 certification, those that are done or expecting to be
10 out there. But we'll discuss that in more detail
11 subsequently. Any other comments, discussion, or
12 cries of anguish?

13 MR. SHEBELSKIE: Can we just note that as
14 a standing --

15 (Laughter.)

16 CHAIRMAN MOORE: One historical comment on
17 Judge Rosenthal's use of the all-deliberate speed;
18 unlike him, who was actually involved with the remand
19 proceeding in the Supreme Court in briefing that in
20 *Brown v. Board of Education*, I would hope that all
21 deliberate speed means something much less than the
22 historical precedent of 40 some years.

23 JUDGE ROSENTHAL: Yes. Well, I take the
24 term as it means literally, not as it was understood
25 to mean by certain southern states.

1 CHAIRMAN MOORE: Let's turn now to
2 employee concern files. Although we are frank to
3 state we have serious reservation, indeed grave doubt,
4 that any privilege is at all applicable to these
5 documents other than the Privacy Act application, we
6 recognize there are important and serious policy
7 implications for these programs. That being the case,
8 we understand, and indeed tentatively agree, with
9 DOE's position that even in redacted forms, these
10 should not be on the LSN.

11 This is a relatively small group of
12 documents, and we would like your views on our current
13 thinking. If the stars properly align, and now I'm
14 talking about the bureaucracy in the NRC over which
15 this Board has absolutely no control, but if the stars
16 align and on the OCIO office part of this
17 organization, can make it possible, we would like to
18 use the DDMS, and perhaps something like a streamlined
19 protective order file in which those documents in
20 redacted form, redacted by DOE could be placed.

21 Any party or potential party seeking
22 access to those documents would make a request to DOE.
23 DOE could then determine whether that individual or
24 entity under a protective order - and this would be
25 the sole use of protective order for this class of

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1 documents - it wished to allow them access. Upon
2 making that determination, then the various gates of
3 the DDMS could be made open to that person, that
4 individual, that entity, to allow access.

5 If DOE were to determine that it would not
6 make that document available in redacted form under a
7 protective order to an individual, then a motion to
8 compel would have to be filed, and the Board would
9 determine whether such access should be permitted.
10 This type of treatment would only be applicable to
11 this subset of documents that DOE has categorized as
12 employee concern files.

13 Staff, what is your view of that approach
14 to this subset of documents?

15 MS. YOUNG: Well, certainly the Staff
16 appreciates the Board's acknowledge of the importance
17 of the policy considerations.

18 CHAIRMAN MOORE: And a similar -- if there
19 are any such animals in DOE's document collection; of
20 course, there has to be a bibliographic header on the
21 LSN for these documents. And we'll get to in a minute
22 any alterations of the normal bibliographic header
23 that would be required; although, frankly, we think
24 that it's unlikely that any such header would identify
25 the so-called whistle blower or Complainant in any

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1 event. I can't imagine you'd title your documents
2 that way, but in the unlikely event you do, we would
3 have to make arrangements for bibliographic headers to
4 deal with that problem. Anything else, Ms. Young?

5 MS. YOUNG: Well, my question would also
6 be would there be some type of quasi in-camera review
7 of information for which DOE would be opposed to
8 producing --

9 CHAIRMAN MOORE: In any privilege
10 situation, the Board always has the ability to view
11 the document in toto in-camera. That is not affected
12 one way or another, but that is something that is
13 unique to the decision maker. DOE.

14 JUDGE ROSENTHAL: Well, before we leave
15 the Staff, as a matter of idle curiosity, on page 11
16 of your May 12 filing, you said that "Staff lacked
17 sufficient information to determine whether there is
18 any privilege or exemption that would protect employee
19 concern files as a class of documents."

20 I'm sort of curious as to what the
21 information was that you lacked that would have
22 enabled you to make that determination. It seems to
23 me that there either is a privilege or there isn't a
24 privilege with respect to employee concerns. As Judge
25 Moore indicated, it's the Board's current inability to

1 find that privilege, but the Staff apparently thought
2 that with some additional information, it could make
3 that determination. And I'm curious as to what it
4 was, or what that information that you didn't have
5 would have enabled you to make the decision.

6 MS. YOUNG: Well, certainly the Staff did
7 not request that information of DOE and just used its
8 general knowledge of its practices with respect to
9 inspections and investigations to determine what
10 privileges it thought would apply. But after
11 reviewing the relevant case law, the Staff determined
12 there was no, to their knowledge, or to our knowledge,
13 particular privilege that would apply to documents as
14 a class.

15 JUDGE ROSENTHAL: All right. So the
16 current Staff position is that in so far as it can
17 determine, there is no such privilege.

18 MS. YOUNG: That's correct.

19 JUDGE ROSENTHAL: Thank you.

20 CHAIRMAN MOORE: DOE.

21 MS. FAGLIONI: The level of protection
22 that you are proposing I think is consistent with what
23 we've requested, and would, I think, appropriately
24 address the risk that's associated, the increased risk
25 with these files, as well as the programmatic chilling

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1 effect concern that we've discussed. And I would
2 affirm that it is certainly our intent to craft
3 headers that would go on the LSN, and they'd be
4 headers that would not be designed to disclose that
5 information which is the subject of protection, but
6 headers, nonetheless, that would flag that there is a
7 privilege document.

8 CHAIRMAN MOORE: We will address
9 subsequently the question of what type of privilege
10 log or log in this case since there's -- the Privacy
11 Act clearly applies to such documents, but what type
12 of privilege log would be necessary upon denying a
13 request so that then a motion to compel can be
14 intelligently filed. But we will address that in the
15 same context subsequently of developing a schedule for
16 the elements for each of those secondary privileges.
17 Nevada.

18 MR. FITZPATRICK: Your Honor, first a
19 clarification. Are the documents that you are
20 addressing within the employee concern program files
21 that would receive that treatment DDMS disclosure
22 under protective order, does that refer to the
23 documents which began with identifying information -
24 let's call it Privacy information - which information
25 has to be redacted. And when it's sought in toto, in

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1 full, then it would receive this treatment? You're
2 not talking about ECP program files, are you?

3 CHAIRMAN MOORE: I believe the answer to
4 the question is no, but DOE has indicated in their
5 filings, which all of you have before you, that it
6 would be claiming such a treatment for only certain
7 documents within its collection. Those that are not -
8 - that do not fall within that category are the type
9 of documents that must have a bibliographic header and
10 text underneath them in the LSN.

11 MR. FITZPATRICK: What they call the
12 subset in their briefing. I think it might be useful
13 to see how this particular thing fits with your
14 proposal. The parties had discussed yesterday an
15 attempt to reach an agreement with respect to
16 disposition of employee concern files, and I guess
17 it's fair to say that we had gotten 95 percent of the
18 way, but we have an element of disagreement, and I'll
19 tell you both.

20 The proposal that we agreed on - and I'll
21 tell the point at which we disagreed - was that with
22 respect to the cluster of documents --

23 JUDGE KARLIN: May I ask just a procedural
24 question. Are these settlement discussions, or
25 discussions you had, did the other parties agree that

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1 this should be raised, what was said in that meeting
2 yesterday?

3 MR. FITZPATRICK: I think we came here
4 with the idea of presenting it.

5 JUDGE KARLIN: Okay. I mean, if that was
6 the plan.

7 MS. FAGLIONI: And I think it's fair that
8 what it is we discussed is what I set forth in the
9 opening paragraph of that section of the brief in
10 terms of which categories we sought protection on.
11 And I think it's fair to say we did call it a subset,
12 and so I think what he's about to discuss is already
13 addressed in the brief.

14 MR. FITZPATRICK: No. Actually, what we
15 were talking about was -- I mean, we have taken the
16 position that it's not privileged whatsoever. There's
17 no basis for any redaction or protection.

18 CHAIRMAN MOORE: Even under the Privacy
19 Act.

20 MR. FITZPATRICK: Especially under the
21 Privacy Act, Your Honor, because the Privacy Act -
22 DOE's regulations at 10 CFR 1008 default the Privacy
23 Act to FOIA. They say, "No document will be withheld
24 under a claim of exemption under the Privacy Act
25 unless it is also exempt under FOIA." And we hadn't

1 seen until the recent brief that DOE has categorized
2 under the Privacy Act the category of employee
3 concerns files as - I forget the official name of the
4 system, a system of records. DOE-3 is a system of
5 records, employee concerns files, which may sound
6 persuasive that it deserves some kind of protection
7 under the Privacy Act, except for three things. One
8 is, their own regulations default Privacy Act to it
9 has to be exempt under FOIA or it will be produced.
10 The second is, the beginning of the discussion of this
11 DOE-3 system says that the individual documents must
12 be shown to fall within the Privacy Act. So if it
13 doesn't have Privacy information, it has to be a
14 record within a system of records in order to be
15 exempt from disclosure under the Privacy Act. The
16 definition of the record, it has to be within the
17 system of records to be protected, involves private
18 information, such as medical, financial, education,
19 background of the individual, or the like. So, of
20 course, we say --

21 CHAIRMAN MOORE: Well, the rub is "or the
22 like."

23 MR. FITZPATRICK: Well, it says --

24 CHAIRMAN MOORE: Similar files is --

25 MR. FITZPATRICK: -- information about the

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1 individual, files containing information about the
2 individual. We, of course, contend that these are
3 files about concerns, deficiencies at the site,
4 incidentally mentioning the name of the individual.
5 But that's besides the point, because we have said
6 without respect to whether it's privileged, we agree
7 with the concept that they should be protected, the
8 Privacy information should be protected. But this
9 DOE-3 system of records for employee concerns has an
10 opening that the offensive line would be proud of. It
11 says, "A record from this system may be disclosed as
12 a routine use for the purpose of the conduct of
13 litigation, either to a person representing the
14 Department, or others involved in the matter, and
15 their representatives." But the biggie, considering
16 what we're protecting here - we're protecting
17 individuals from disclosure of their -- to who? Not
18 some guy in New Jersey, disclosure to their co-workers
19 and their bosses on the site. Why? To protect them
20 from retaliation. Again, by whom? By their co-
21 workers or their managers at the site.

22 DOE in its categorization of this in the
23 system of records has also added, "A record from this
24 system may be disclosed as a routine use to DOE
25 contractors in the performance of their contracts."

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1 So what I'm suggesting, Your Honor, is that there's no
2 reason in the world for the Board to adopt a more
3 stringent standard for disclosure, or stringent
4 standard for withholding than that which is applied,
5 than the level of protection which is applied by DOE
6 itself.

7 But, in any event, just if you stand back
8 for a moment from the DOE cluster in the file and
9 analyze - and the reason I asked about what level of
10 documents - you can't tell me what percent, but I mean
11 the type - and we attach one such document to our
12 brief, where an ACAWIM representative responded to an
13 inquiry from the ECP program asking for your position
14 on this alleged concern, and the response explained
15 their position.

16 It didn't identify the employee - because
17 why? Because, of course, the ECP office when they
18 sent out feelers to ACAWIM or to the employer, Bechtel
19 or a subcontractor, they don't say we've received a
20 concern from so-and-so. Of course they don't do that.
21 That would blow the whole confidentiality thing to the
22 very persons most likely to retaliate. So for that
23 reason, once you get passed the intake form that's
24 attached as an exhibit to the DOE brief, which the
25 employee expresses their concern, and can ask for

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1 confidentiality. But if you picture a room full of
2 ECP program people, the word would say here's a new
3 ECP we need to investigate, the name of the individual
4 is not going to go outside this room. And we're going
5 to send letters out seeking information from ACAWIM,
6 from his boss, from the contractor, whatever. We will
7 not identify the complaining individual in those
8 letters, and then the responses that come back taking
9 positions, they will not identify the individual. So
10 it's very important to us. It wasn't an idle
11 question, whether your protection was referring to the
12 redacted documents, and particularly the privileged
13 matter redacted from those documents, or whether it
14 applies to all the files. Because the great majority
15 of the records in an ECP cluster don't have the
16 Privacy information. By definition, that's kept out.

17 CHAIRMAN MOORE: DOE, your response. I
18 mean, we understood this to be as per your filings,
19 some subset of the employee concerns, what you're
20 calling files in your initial presentation to us.

21 MS. FAGLIONI: That's correct. By way of
22 one comment, I cannot let it stand without stating
23 that I think that the attempt to say that
24 confidentiality is not particularly important to the
25 program is trying to point to some discreet exceptions

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1 and saying they swallow the rule. And I think that
2 Ms. Goeckner's affidavit, and I think the NRC history
3 and all the policy on this shows confidentiality is
4 the rule. It's not the exception that swallows the
5 rule.

6 But addressing the particular question of
7 what it is we seek protection on, and what I would
8 understand would be subject to your proposal on the
9 DDMS - I mean, we readily have, I think, set out in
10 the brief and agree we would take the set of employee
11 concern files that we have narrowed the universe, if
12 you will. Say there are 500 files --

13 CHAIRMAN MOORE: You started with the
14 number - what was it?

15 MS. FAGLIONI: About 5,000 documents.

16 CHAIRMAN MOORE: Five thousand.

17 MS. FAGLIONI: And let me tell you how we
18 got 5,000 documents, just so you understand where --

19 CHAIRMAN MOORE: Well, let's just get to
20 how many out of that 5,000 are going to need
21 redaction.

22 MS. FAGLIONI: Until we go through them
23 document by document, I don't know. But of that
24 5,000, I would agree there is a significant set of
25 them that could be not documentary material and gone,

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1 but could be documentary material with none of the
2 information that could lead to the identification of
3 an individual. And if those documents exist, header
4 full text only, I mean as we say in the opening
5 paragraph of the brief. So you're talking about it's
6 documentary material within that 5,000, a subset
7 within that 5,000. It is documentary material, and it
8 has information in it that could lead to the
9 identification of an individual.

10 CHAIRMAN MOORE: That's what you would be
11 deleting.

12 MS. FAGLIONI: That's what we would
13 redact, that's what would go, as I understand your
14 proposal, onto the DDMS subject to the protective
15 order, and the request for access to it, and the
16 process that you've set out.

17 CHAIRMAN MOORE: Now if I might say in
18 following up on what Mr. Fitzpatrick said, that you
19 were 90 or 95 percent of the way toward an agreement,
20 what was the agreement sticking point --

21 MR. SMITH: Well, first, the Staff wasn't
22 involved.

23 MR. FITZPATRICK: That's correct.

24 MR. SMITH: So we should point that out,
25 that this is between the Department and the State of

1 Nevada.

2 MR. FITZPATRICK: That's correct, Your
3 Honor. In other words, we were trying to hammer out
4 something that could then be offered, and we never got
5 to that point. But the tentative agreement, in
6 effect, was if it was not documentary material, it
7 wouldn't be on. If it was documentary material that
8 didn't disclose identifying information, it would be
9 full text disclosed. If it was documentary material
10 that contained Privacy-type information that would
11 disclose the identity, it would be produced in
12 redacted form, and then a requesting party faced with
13 the redaction would have to meet a test to ever get at
14 the redacted sort of a threshold, escape hatch.

15 We used an example of if one individual in
16 a concern raised a very important safety situation,
17 but discovery of other persons, they all deny that
18 such, that was a problem; and so really the only way
19 to get to the bottom of whether it really was a
20 problem was we need to know the identity of that
21 person, and maybe take their deposition. And so
22 that's what was all agreed to.

23 What was not was, we suggested - our
24 position was that that Privacy information should be
25 provided unredacted, you might say, put back in, if we

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1 show this threshold of need. And that otherwise we'd
2 honor it. They wanted a protective order, too, if
3 they produced it to us.

4 CHAIRMAN MOORE: In our contemplation, at
5 the LSN document discovery stage, which we're
6 entering, we thought in large measure those matters
7 would be avoided, yet we're fully cognizant that
8 during traditional discovery after the admission of
9 contentions, those matters might all be required to be
10 divulged. And at that point, the use of a protective
11 order in traditional litigation, and all of the
12 safeguards surrounding it will be in full force and
13 effect.

14 We've tried to limit the use of the
15 protective order to the barest of minimums here. And
16 with the redaction, are cognizant that it shouldn't be
17 necessary for any further showing at this stage, also
18 fully aware that if in some very unique circumstance
19 for purposes of filing contentions the level of
20 precision that the requester might wish could not be
21 reached, that would be something that could be fully
22 laid out in the contention, and Boards would be able
23 to take into consideration the alleged or so-called
24 handicap the author of the contention was under. But
25 frankly, at this stage, we're hard-pressed to consider

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1 or imagine a situation where all of the problems which
2 these employee concerns are revealing wouldn't be
3 revealed.

4 Speaking only for myself, if the redaction
5 is done reasonably, that's what we anticipate. And if
6 you feel it is unreasonable, over-redacted, or the
7 material shouldn't be redacted at all, that can be
8 challenged. So that should take care of that problem,
9 but we are hopeful - we know that we may be regretting
10 going down this path if we are faced with something
11 like 5,000 challenges - but, hopefully, the subset is
12 much, much smaller, and there will be few.

13 MR. FITZPATRICK: Could I ask one,
14 respectfully, probe of your proposal; and that is, if
15 the protection is afforded to those documents with
16 Privacy identity information, let's call it - that
17 they can be produced initially here in redacted form.
18 If they're going to be placed on the DDMS instead of
19 the publicly available LSN, for further protection
20 from disclosure, limited access, I guess - then why is
21 a Protective order necessary as a third tool?

22 CHAIRMAN MOORE: Because there's nothing
23 to stop the receiver of that information from then
24 publishing it subsequently, which is the chill factor,
25 that very frankly touched the nerve and is our

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1 concern. I, speaking for myself, am hard-pressed to
2 say with any degree of confidence that when you're
3 dealing with the world of employee concerns, having
4 had to deal with over many years whistle blower cases,
5 I've often been troubled by the lack of logic that
6 seemed to apply to motivations and what people do, and
7 why they do it, and what scares them off, and what
8 doesn't. And it's that factor that I have in mind,
9 and why a protective order is necessary; because if
10 you get it in redacted form, there's nothing to stop
11 you from doing the same thing, and putting it on the
12 LSN.

13 MR. FITZPATRICK: But if it's in redacted
14 form -- I understood the protective order would apply
15 if you pierce the redaction, and that information is
16 restored.

17 CHAIRMAN MOORE: It's an added step that
18 we think in the unique circumstances of employee
19 concern, in the unique circumstance of LSN document
20 discovery is worthwhile.

21 MR. FITZPATRICK: If the Privacy
22 information is redacted, doesn't that protect from
23 disclosure the deficient area, rather than simply
24 protecting the employee?

25 CHAIRMAN MOORE: Well, as we believe the

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1 subset of documents that exists, it does not preclude
2 the --

3 MR. FITZPATRICK: I think I understand.
4 In other words, if the majority of documents are
5 disclosed because they don't contain Privacy
6 information, then an awful lot of information about
7 the deficiency is simply going to be produced out
8 there. It's not going to be subject to this.

9 CHAIRMAN MOORE: That's correct.

10 JUDGE KARLIN: Let me try to speak to one
11 approach or issue on that. I am not particularly
12 enthused about employee concerns creating a
13 confidentiality privilege, and we are not going to do
14 that. But we are trying to propose or consider a
15 mechanism that would provide more protection than the
16 norm; which is, putting a redacted version on the LSN.
17 We think well, perhaps something more needs to be
18 done; and, therefore, I think that what we're
19 considering is putting a redacted version on the DDMS
20 that is only accessible to a requester only if the
21 provider does not object, or if the provider objects
22 and a motion to compel is filed, and we decide that
23 that particular requester should have access to that.
24 So this is a more limited access subset that we're
25 talking about.

1 I hope that such a more limited access
2 subset will allow more reasonable redaction by DOE and
3 anyone else who might have this kind of information to
4 be worried about, because what I'm concerned about is,
5 on the one hand we say we don't want to reveal the
6 identity of the individual in question. Well, one way
7 to do that is just delete or blackout that
8 individual's name. That may suffice in many cases,
9 but what I really am concerned about seeing is massive
10 redaction on the theory that if Sherlock Holmes read
11 this document, they would be able to somehow figure
12 out on a mosaic theory who the particular whistle
13 blower or individual was. And by putting it on a
14 limited subset under a protective order with
15 restricted access, I think such massive redactions
16 hopefully can be totally avoided.

17 JUDGE ROSENTHAL: Yes. It seems to me,
18 off-hand, that the Board's proposal takes into
19 consideration all of the differing concerns of
20 differing parties. I mean, the concerns with respect
21 to the protection of the identity of the employee
22 expressing the concern. On the other hand, ensuring
23 to the maximum extent possible that the substance of
24 the concern is in the hands of those people who have
25 a need for it. And it seems to me that it's not

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1 perfection, but this is a world in which,
2 unfortunately, perfection is not achievable.

3 CHAIRMAN MOORE: Any other comments?

4 MR. EGAN: Your Honors, I'd just like to
5 raise one question. I think it's just something to
6 ponder. I don't know the answer, and I don't really
7 have a position on it. These documents that would be
8 the subject of protective order, some of them would
9 be, I believe, required to be disclosed under the
10 Freedom of Information Act. And I worry a little bit
11 about the situation in which an attorney has signed a
12 protective order, and has obtained the same document
13 under FOIA.

14 CHAIRMAN MOORE: In that situation, in
15 challenging the redaction, would that not be something
16 that could be raised, and then, unfortunately, we
17 would have to decide?

18 MR. EGAN: Well, it could, but I think the
19 entire category would be subject to disclosure under
20 FOIA.

21 JUDGE KARLIN: Well, I think that's an
22 interesting point. Perhaps, the protective order
23 should say that if the person signing it, or person
24 signing the non-disclosure affidavit, has otherwise
25 had access to this in some legitimate and public way,

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1 then we're not trying to control use of that.

2 CHAIRMAN MOORE: There's nothing to stop
3 you from tomorrow seeking and litigating getting them
4 all under the FOIA, and this would all go away.

5 MR. EGAN: Okay.

6 CHAIRMAN MOORE: But then it's someone
7 else's headache, I guess.

8 MR. EGAN: Right. Thank you.

9 CHAIRMAN MOORE: Now if -- go ahead.

10 MS. GINSBERG: Just one point. I think we
11 support the approach that you've identified here, and
12 think it goes a long way to addressing many of the
13 issues that we had identified in our written proposal.
14 But one that I'd like to call to your attention is
15 that, if I understood what you said, you suggested
16 that it's not just parties, but potential parties who
17 could conceivably have access to these documents.

18 CHAIRMAN MOORE: Yes, but they would have
19 to make a request, and DOE would be in a position to
20 grant it under a protective order, access to the
21 redacted version, or deny it. On denial, privilege
22 log subsequently, the elements of which will be
23 determined, would be filed by DOE within a motion to
24 compel, and we would determine whether that party
25 could have access.

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1 Now in the event that the stars -- I'm
2 sorry.

3 MS. GINSBERG: May I just go on? I think
4 that in the context of a small number of potential
5 parties, if we were so limited, that that's a very
6 workable approach. My concern is that if we end up
7 with a Yankee Stadium kind of magnitude, that
8 potentially the burden that falls on DOE in that
9 situation would be very large, and very problematic;
10 and so I would encourage the Board one more time to
11 consider limiting this approach to parties, and
12 allowing potential parties later, as you suggested, to
13 come in and identify why they --

14 JUDGE ROSENTHAL: What is a party?

15 MS. GINSBERG: Pardon me?

16 JUDGE ROSENTHAL: Who is --

17 MS. GINSBERG: Party as of right, the NRC,
18 the Department of Energy, states, Indian Tribes.

19 JUDGE ROSENTHAL: How can you justify
20 limiting the category of parties to that? For
21 example, an individual who lives in close proximity to
22 a transportation route, and wishes to raise questions
23 pertaining to whether the transportation route
24 presents an unreasonable threat to his or her, or its
25 health or safety; presumably would be entitled to seek

1 to intervene in the proceeding, file a hearing
2 request, and I would think would have a reasonably
3 decent argument with respect to standing.

4 Now according to your suggestion, that
5 individual would not be, for present purposes,
6 regarded as a party. That you've laundry-listed the
7 parties as being Indian Tribes, and states, and other
8 governmental units, as well as, of course, DOE and the
9 Staff.

10 I, for the life of me, don't understand
11 how we possibly could draw a dichotomy that would have
12 these organizations that you list on one side of the
13 line, and my hypothetical resident close to a proposed
14 transportation route on the other. It just doesn't
15 seem to me that we have any legal basis within the
16 framework of the current regulations for doing what
17 you suggest.

18 MS. GINSBERG: Judge Rosenthal, I think
19 the definition of potential party is exactly the
20 answer to your question; that the folks along the
21 transportation route may all be potential parties, but
22 that they have not yet, because the hearing has not
23 been initiated, have not yet been allowed to intervene
24 as a party.

25 JUDGE ROSENTHAL: But there are no parties

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1 at this point. Am I incorrect in my belief that once
2 the application is docketed, the *Federal Register*
3 notice is forthcoming, that even the State of Nevada
4 has to file, or the states or counties, any other
5 interested governmental body would have to file a
6 hearing request?

7 MS. GINSBERG: I'm suggesting that those
8 entities that are parties as of right, should be
9 permitted to see the privilege documents along the
10 lines that we've talked about, that would include the
11 State of Nevada, at this point, and to avoid the
12 burden --

13 JUDGE ROSENTHAL: I still don't see how
14 you can be differentiating between what you
15 characterize as parties as a matter of right, and my
16 hypothetical resident along a transmission line, who
17 may well become a party as a matter of right if he can
18 establish standing.

19 JUDGE KARLIN: I think we've received
20 briefs on the issue of potential party, thorough,
21 helpful, where I'm not thinking we want to hear
22 argument on that issue today at all. But I think what
23 our proposal, which we've put out on the table - we
24 take your comment in consideration - is that, as Judge
25 Moore has explained, any potential party who wants to

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1 enter this fray, enter Yankee Stadium is going to have
2 to undertake some effort. They're going to have to
3 request the document, they're going to have to be
4 refused, review the privilege log, file a motion to
5 compel in this proceeding. Perhaps, they might need
6 to be represented, but not necessarily; and if we get
7 5,000 or 10,000 of those, I think we can deal with
8 them ultimately, and I'm not sure whether we need -
9 and I certainly do not feel that we should somehow
10 artificially change the regulations and redefine
11 potential party. But I think we've established a
12 procedure which, as a practical matter, may say a
13 potential party is going to have to do these things in
14 order to have a ticket to Yankee Stadium.

15 MS. YOUNG: Judge Karlin and Judge Moore,
16 may the Staff also just add a minor clarification that
17 arose as a result of the discussion.

18 CHAIRMAN MOORE: Could you speak up,
19 please?

20 MS. YOUNG: I'm sorry. May Staff add a
21 minor clarification that arose as a result of Judge
22 Rosenthal's discussion on the definition of party? To
23 the extent that 10 CFR, Section 2.1001 defines party,
24 at this point the State of Nevada is not a party in
25 the proceeding. Any host state, effected units of

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1 local government, Indian Tribes would not be parties
2 until they file a list of contentions, and have that
3 admitted in the proceeding. So I know that you're in
4 this awkward situation of being in the pre-license
5 application phase, and sometimes we loosely refer to
6 the term "parties" as including people we think might
7 some day have made that showing, but in NRC's
8 regulations there's a recognition of standing as a
9 matter of right. To the extent that the State of
10 Nevada or any effected unit of local government has
11 standing under our regulations they still, in order to
12 be a party, would have to file contentions, and have
13 those admitted; although, they could participate as an
14 interested governmental unit in lieu of that
15 participation, although not classically defined as a
16 party.

17 JUDGE ROSENTHAL: So we have no parties at
18 this point.

19 MS. YOUNG: That's correct.

20 JUDGE ROSENTHAL: We have just potential
21 parties.

22 JUDGE KARLIN: Well, I'm not sure whether
23 we agree with that interpretation.

24 CHAIRMAN MOORE: But whether we do or not,
25 we really don't want to argue that at this point.

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1 Yes, Mr. Irwin.

2 MR. IRWIN: Just a couple of observations.
3 I do not want to wade into the thicket of definitions
4 of potential parties in this neverland situation, and
5 I'm not going to. Just two observations; one is, that
6 the Board has aptly observed that there is a potential
7 significant logistic issue inherent in this. DOE is
8 prepared to try to cope with that, given the kinds of
9 protections that exist.

10 Historically, I do believe that Ms.
11 Ginsberg's argument is consistent with NRC practice,
12 but that's not a subject for here. The one issue I do
13 want to just draw clarification, I would hope is to
14 get clarification on from the Board, is that Judge
15 Rosenthal posited two factual situations with respect
16 to potential standing; one, individuals living along
17 the transmission corridor, and the other individuals
18 living near a railroad right-of-way. I am trusting
19 that the Board is not rendering a final decision on
20 either of those categories for purposes of
21 adjudication of standing today.

22 JUDGE ROSENTHAL: This Board is pre-
23 application. There'll be different Board or Boards
24 dealing with the proceeding once the application has
25 been docketed, the *Federal Register* notice has been

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1 published, and then hearing requests, contentions are
2 in order. Do not have any fear, Mr. Irwin, at least
3 in my case - I can assure you I'm not going to be on
4 any of those Boards - making the decisions as to
5 standing.

6 MR. IRWIN: Your presence would induce no
7 fear, Judge Rosenthal. I just wanted to make sure
8 that the issue was still open for briefing.

9 JUDGE ROSENTHAL: Of course.

10 CHAIRMAN MOORE: In that regard, the PAPO
11 Board, in relation to the case after the notice of
12 opportunity of filing are only potential
13 administrative judges.

14 (Laughter.)

15 In the event that the stars do not align,
16 and we are not able to use the DDMS as the repository
17 for these documents in redacted form, the same can be
18 accomplished by a mechanism, such as using a CD that
19 DOE would place the redacted documents on, and then
20 that could be turned over to the party under a
21 protective order.

22 And even in the event that we are able to
23 use the DDMS, it may not be possible to have a search
24 capability for those documents on the DDMS, because of
25 various and sundry technical constraints that I am

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1 frank to admit I neither understand, nor frankly in
2 trying to get this accomplished, have much patience
3 for the bureaucracy we're going to have to deal with
4 to get it done. That said, it can still be
5 accomplished by a quasi electronic form, burning them
6 on a CD, and use that mechanism.

7 And obviously, if it is possible to use
8 the DDMS for this purpose for this subset, a very
9 small subset of documents, it may be necessary for Mr.
10 Graser to meet with all of your technical experts to
11 ensure that there is no misunderstanding on how that
12 will work from a technical standpoint.

13 Now would probably be a good time to take
14 a brief recess, and we will reconvene at 10:45. It's
15 now 10:35. Thank you.

16 (Whereupon, the proceedings in the above-
17 entitled matter went off the record at 10:34:16 a.m.
18 and went back on the record at 10:50:39 a.m.)

19 MS. YOUNG: Judge Moore, we said the Staff
20 at some point in time after the license application is
21 filed would have allegation material that could be
22 afforded the similar protection as employee concerns
23 files would also be done?

24 CHAIRMAN MOORE: Ms. Young, I'm very
25 sorry. Back up and speak louder. For some reason,

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1 I'm not being able to hear you this morning.

2 MS. YOUNG: Certainly. This ruling on
3 employee concerns files and the procedures for
4 protections, the redacted information placed on the
5 DDMS or whatever method is used, and that it's only
6 released under protective order, would that also apply
7 to allegations information that the Staff may receive
8 with the license application file?

9 CHAIRMAN MOORE: For an employee concerned
10 group of files by NRC would be treated the same way.

11 MS. YOUNG: I'm asking in terms of
12 allegations. It could be an employee concern that is
13 also conveyed to the NRC through an allegation from
14 a DOE employee.

15 CHAIRMAN MOORE: The answer is, if I
16 understand correctly, yes; but NRC may wish to claim
17 such documents are privileged. A bibliographic header
18 would have to be provided to the NRC, I mean to the
19 LSN. And then the same system would work.

20 MS. YOUNG: That's the question. Thank
21 you.

22 CHAIRMAN MOORE: DOE, by June 1, would you
23 please provide us your best estimate of what that --
24 the number of that subset of documents, so that we can
25 begin to know that this will be possible to use the

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1 DDMS.

2 MS. FAGLIONI: We will.

3 CHAIRMAN MOORE: Just for current
4 purposes, we know that it's a subset of 5,000. Is it
5 likely to be under 1,000?

6 MS. FAGLIONI: I'm getting feedback, no.
7 But I can't quantify it for you, because we have not,
8 at this point, made by the document-by-document cut.

9 CHAIRMAN MOORE: Okay. Let's turn now to
10 the questions that we have on the proposed generic
11 protective order that has been submitted. I have a
12 couple of questions for you.

13 Unless I am totally wrong, this proceeding
14 is going to go on for a very long time, and there's no
15 yearly or annual accounting provision in this
16 protective order. And I would venture to say that
17 just in the old days with licensing proceedings where
18 we used protective orders, that there was sometimes a
19 three, five, or in one instance a seven-year period in
20 which that protective order material languished in
21 people's files. And memories fade, attorneys come and
22 go, judges come and go, and it gets lost. I think
23 it's imperative because of the likelihood that this
24 proceeding will go on for an extended period of time,
25 contrary to what's politically correct to say, that an

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1 annual accounting provision of protected material
2 needs to be placed in that protective order.

3 Secondly, the protective order somewhat
4 surprisingly as proposed, doesn't at all deal with the
5 electronic world in which we live. And unless the
6 parties are willing to not have the electronic media
7 which is used with this protected material cleansed,
8 hardware has limited useful life and goes back to from
9 whence it came, and that hard drive still retains that
10 information, or to one interested enough to make it
11 reveal its secrets, that protected information, unless
12 it is properly erased with proper software remains.
13 And the protective order doesn't deal with - and
14 that's just one example - of the problems that arise
15 when electronic media are used to deal with protective
16 order material. So I think that you need to go back
17 to the drawing board, and we understand that we put
18 you under very tight deadlines, and now with some
19 additional thought, deal with that problem.

20 Judge Karlin, I think you have a couple of
21 additional problems.

22 JUDGE KARLIN: A few comments on the
23 proposed protective order, I think with the thought,
24 ultimately, that the parties will submit a revised
25 version in some short order with these concerns or

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1 comments.

2 Footnote 2 of the proposed protective
3 order talks about the participants believes in good
4 faith the document qualifies for the privilege, et
5 cetera. I think what we have talked about before here
6 is that it's the attorney needs to make this
7 determination and certification when this protective
8 order, about the documents. So we're concerned about
9 the attorneys, not the participants or the parties
10 good faith assessment that these qualify for the
11 privilege. If you could think about that as you
12 rework this thing.

13 On page 3, just a minor concern with
14 Paragraph G. There you talk about, again, the timing
15 and the ultimate disposal or return of the documents
16 that were provided under the protective order. There
17 may be a point - well, there will be a point when
18 contentions are filed, standing is established,
19 parties are admitted, and at that point it seems to me
20 that the potential participants drop out of the game,
21 as it were. And so, at that point, any potential
22 participant who has received the document probably
23 needs to, under a protective order if there are any,
24 would need to destroy the document or return it. So
25 we probably want to address that, if you can, in the

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1 next version.

2 Paragraph K, page 4, this is the violation
3 of the terms of the protective order. Anything you
4 can do to properly and accurately articulate and beef
5 that up a little bit so that people will understand
6 the seriousness of obeying a protective order would
7 be, I think, well advised.

8 And finally, sort of question - and I
9 think I feel like I'm going to know the answer to this
10 - but on Footnote 1, we have this second-half
11 statement about the protective order does not apply to
12 NRC, sort of the special status issue and how that's
13 handled. So how does it work? I mean, what are we
14 going to do, vis a vis NRC?

15 MS. COLE: I think what we intended by
16 that, Your Honor, is that it would not apply to the
17 NRC in as far as the staff was entitled to receive the
18 information under something else; for example,
19 information that DOE is submitting to support a
20 license application. It would still apply to the
21 Staff with regard to information we were getting, say
22 from Nevada, that they were not required to submit to
23 us, and that we didn't have some independent right to
24 receive.

25 CHAIRMAN MOORE: That needs to be very

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1 clearly spelled out, because as it's now written, you
2 have exempted yourself from the terms of the
3 protective order.

4 JUDGE KARLIN: Yes. I think it would be
5 helpful if you could make that -- if that could be
6 clarified.

7 MS. COLE: We could do that.

8 CHAIRMAN MOORE: In light of Judge
9 Karlin's earlier comment about the necessity raised by
10 Nevada about the necessity for the exculpatory
11 language in the protective order for the identical
12 information received from a non-protective source, you
13 need to then agree on language that will appropriately
14 deal with that problem.

15 MR. SHEBELSKIE: Judge Moore.

16 CHAIRMAN MOORE: Yes.

17 MR. SHEBELSKIE: In connection with the
18 protective order, there was an issue that the Staff,
19 and Nevada, and DOE discussed, which we couldn't come
20 to resolution on; and we thought though it didn't
21 necessarily need to be in the protective order itself,
22 it might be addressed in the case management order.
23 It further ties to the annual true-up concept, and
24 that is some type of recordation of the particular
25 party or participant gets documents under this

1 protective order and begins to distribute them, and
2 having people sign the affidavits of non-disclosure -
3 how is that tracked? Should there, for example, be
4 copies provided to the party whose documents are being
5 distributed, filed with the Board? We seek some help
6 on that.

7 CHAIRMAN MOORE: I think the best practice
8 is that they are filed as any document in the
9 proceeding, and then they will be served on the EIE,
10 which all service in this proceeding will be
11 electronic. And that will be the record they will
12 then get into the electronic hearing docket, and will
13 be available through that mechanism. And that record,
14 in and of itself, is permanent.

15 MR. MALSCH: Judge Moore, could I be heard
16 on that issue? We did have a problem with that.
17 Certainly, we have no difficulty with obviously
18 keeping and storing, and maintaining copies of the
19 non-disclosure agreements. We did have a difficulty
20 with the concept of disclosing the agreements to the
21 whole world, particularly with respect to consultants
22 and advisors we might be using, who might not want to
23 have their identity disclosed at such a --

24 CHAIRMAN MOORE: I understand.

25 MR. MALSCH: So we have no difficulty --

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1 CHAIRMAN MOORE: Do you have a proposed
2 solution?

3 MR. MALSCH: Well, our proposal was that
4 we would simply obligate ourselves to make sure, as
5 the agreement provides, that consultants and advisors
6 would sign the agreements, and we would agree to keep
7 them in a formal file, and not destroy them.

8 CHAIRMAN MOORE: Mr. Graser, recognizing
9 that today I do not have the DDMS protective order
10 file, but when the stars align and I do, is that not
11 precisely the kind of thing that could be put in a
12 protective order file, so that the distribution would
13 be available certainly to the Board, and any other
14 appropriate party subsequently to be determined?

15 MR. GRASER: That's correct, Your Honor.

16 CHAIRMAN MOORE: We have a mechanism in
17 the DDMS to deal with that. Then the question becomes
18 to whom access to the protective order file is given.
19 Obviously, the Board. Is there any reason why -- back
20 up. Is this going to be a problem in your estimation
21 for all of your experts that are going to see this
22 material, or only some small subset?

23 MR. MALSCH: Well, I guess at this point
24 we already have a group of experts and consultants,
25 and their names have been disclosed, and so there's no

1 concern about that. I think our concern would be a
2 future subset of experts, and I'm not sure how many
3 would be involved.

4 We have no difficulty at all disclosing
5 these agreements, or for that matter, the experts and
6 consultants to the Licensing Board. Our concern is
7 disclosure to the other parties.

8 CHAIRMAN MOORE: DOE, do you have a
9 comment?

10 MR. SHEBELSKIE: Yes, sir; two
11 observations. One, I would think that for signatories
12 to the affidavits who don't fall into that type of
13 special category as a consulting non-testifying
14 experts whose identities would otherwise be protected,
15 there would be no reason not to go ahead and file the
16 affidavits on the EIE for the publicly known experts
17 who --

18 CHAIRMAN MOORE: And I think Mr. Malsch
19 agrees with that.

20 MR. SHEBELSKIE: And I was going to
21 suggest that. The second, for a special class of
22 people maybe whose identity should be protected under
23 discovery rules, I think what would be appropriate is
24 to - although the Board may get copies of the
25 disclosures, at least allow the count to be disclosed

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1 - how many people have been provided access; because
2 here is our concern, especially if the definition of
3 potential parties is expansive. A potential party
4 gets access to some documents in a protective order,
5 and then starts a chain distribution that goes out and
6 out, and if we saw somebody, suddenly an individual
7 getting access --

8 CHAIRMAN MOORE: But each member of the
9 chain has to execute, and that has to be in the
10 protective order file.

11 MR. SHEBELSKIE: That's right. So if we
12 saw, for example, the person had two affidavits filed,
13 we'd go okay, that's understandable. But suddenly you
14 see 100, 200, 300, a thousand - that raises a red
15 flag, and we could then ask the Board for what relief
16 might be appropriate. So not the names, but just how
17 many have been filed.

18 CHAIRMAN MOORE: A related question; how
19 would the annual accounting work with the anonymous?

20 MR. SHEBELSKIE: I think the anonymous, as
21 it were, would have to file a statement that they have
22 done their annual accounting, and they could file that
23 in the same protective order file; if that's what you
24 have in mind.

25 CHAIRMAN MOORE: Mr. Malsch, is that

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1 appropriate?

2 MR. MALSCH: I think that works. We have
3 no difficulty with disclosing numbers. Our concern is
4 identities.

5 CHAIRMAN MOORE: I think in that regard,
6 we would like the parties to present us the new draft
7 proposed protective order by June 1. Why don't you
8 include at that same time your joint agreed proposal
9 on how we should deal with this precise question,
10 recognizing that that's legitimate concern for all
11 parties, but I suspect it only has real meaning for
12 the State of Nevada, although there might be other
13 potential parties where that comes into play.

14 And in that regard, it would be most
15 helpful if you would spread your net, as you did in
16 your first proposed case management order, as wide as
17 possible to bring in those others so that they are not
18 excluded if they have any particular insight on this
19 problem.

20 Does the Staff have anything to add on
21 this matter?

22 MS. COLE: No, Your Honor.

23 CHAIRMAN MOORE: So on June 1st, when you
24 supply us with your new joint proposed protective
25 order, if you would also provide a report on this

1 particular issue, how you propose that it be handled,
2 recognizing that the DDMS has a protective order file
3 controlled by the Board as to who has access to any
4 particular file therein. Isn't that correct, Mr.
5 Graser?

6 MR. GRASER: Yes, sir, down to the
7 document level.

8 CHAIRMAN MOORE: Let's turn now to the
9 development and the schedule for developing the
10 parties' proposed privilege logs or elements for
11 privilege log for the - in Judge Rosenthal's term -
12 the secondary privileges, the Privacy, proprietary,
13 archeological, and any others that the parties wish,
14 which includes the 2.390 of the regulations inclusion
15 of the Freedom of Information Act protections.
16 Recognizing, and include within this group your
17 proposals to us for the employee concern files
18 "privilege log" elements that will be necessary under
19 what we have discussed.

20 We think that there should not be any
21 difficulty for you all to agree as to the elements of
22 these, and there shouldn't be any need for separate
23 proposals, unlike attorney/client litigation, work
24 product, and deliberative process privileges. But in
25 the unlikely and unfortunate event that you all can't

1 agree, then you'll each have to file separate
2 proposals. And we would like to have those by June
3 8th. Any questions or comments in that regard? Judge
4 Karlin, do you have a next item?

5 MR. SHEBELSKIE: Actually, I thought of a
6 comment. For the archeological, privacy, and business
7 privilege documents, since we're now on a track to
8 redact and produce redacted versions of those --

9 CHAIRMAN MOORE: But should any of those
10 be challenged, we're right back to --

11 MR. SHEBELSKIE: Right. My initial
12 reaction is that the information for the privilege log
13 for those documents perhaps should be directed and
14 tailored to the information that is redacted. In
15 other words, if you have a document, you already have
16 on the redacted versions author, recipient, that sort
17 of stuff.

18 CHAIRMAN MOORE: Correct.

19 MR. SHEBELSKIE: And what you're redacting
20 is someone's Social Security number, it wouldn't be
21 needed for the challenge to list job title,
22 relationship - just what was redacted.

23 CHAIRMAN MOORE: That is correct. The
24 challenge will be to over-redaction, or that it is not
25 entitled to protection at all. As we see it, those

1 are the Option A and Option B someone has in
2 challenging the redaction.

3 JUDGE KARLIN: Right. If I may comment,
4 I think the contemplation is the privilege logs, the
5 case management order will set out that the privilege
6 logs for attorney work product, or let's say
7 litigation work product, attorney/client
8 communication, and deliberative process privilege, the
9 privilege logs would be something we would need sort
10 of up front and early in the process for those
11 privileges. The privilege logs for these other
12 secondary, shall we call them, would not be perhaps
13 needed as early in the process because there's going
14 to be this redaction mechanism by which people will be
15 able to see the redacted version on the LSN. Only at
16 that point, having seen that document, if a party or
17 a potential party raises a concern, challenges whether
18 it qualifies for the privilege, or challenges the
19 over-redaction, at that point, a privilege log would
20 need to be provided, so that then there could be a
21 resolution, or a motion to compel filed, and we could
22 then address the issue.

23 CHAIRMAN MOORE: And, obviously, those
24 would be on a request-by-request basis. There's no
25 need to prepare privilege logs because we are hopeful,

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1 and we see it unlikely that there will be very many of
2 those challenges, especially if the parties are
3 judicious in their redactions.

4 MR. SHEBELSKIE: Thank you.

5 CHAIRMAN MOORE: If you could provide
6 those to us also by June 8th, we think that that is a
7 reasonable time, unless you all have strenuous
8 objection. I really don't think this assignment is a
9 difficult one.

10 JUDGE KARLIN: But again, it's a process
11 that's open to all potential parties, and not just the
12 three that are seated here, or four today.

13 CHAIRMAN MOORE: Judge Karlin, you have an
14 additional item?

15 JUDGE KARLIN: Okay. We wanted to address
16 the question raised by the Department of Energy in its
17 briefing about a request for a briefing schedule on
18 the license application issue. First, we've talked
19 about this a bit, obviously, at the last hearing. We
20 see there may be up to four issues, or perhaps even
21 more, that are involved in this. Is it documentary
22 material? Perhaps there's a fight about that. Is it
23 a circulated draft, a preliminary draft; those sort of
24 regulatory interpretation issues. And it's a factual
25 question, perhaps, as to what draft are we talking

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1 about, and whether it was circulated or preliminary.
2 If not a circulated draft, is it otherwise covered by
3 the deliberative process privilege? And also, is it
4 covered by the work product privilege? I think that
5 was one of the issues we got into to some extent last
6 time, and some briefing has occurred, but DOE has
7 asked for a briefing schedule on this, and we've tried
8 to think that through.

9 A question we'd sort of like to hear from
10 you all about is, do you think this should be briefed
11 now before certification occurs? Can it be adequately
12 briefed and resolved now, or is it something that
13 should wait until after certification, and a
14 particular document or draft, such as the July '04
15 version, I think, that the State of Nevada referred
16 to. So question; should we try to confront and
17 resolve this issue prior to certification? Maybe we
18 could go around the other direction here with the
19 State this time.

20 MR. FITZPATRICK: Just to change it up, we
21 feel pretty strongly that it should be done as soon as
22 possible, because for the very same reasons that we
23 initially requested the draft license application
24 shortly after it was produced by FOIA, failing which
25 we requested it from DOE counsel, who asserted

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1 litigation work product privilege, following which
2 rejection we had the Governor of Nevada requested it
3 from the Secretary of Energy, who declined.

4 JUDGE KARLIN: Okay. But your answer is
5 now, before certification.

6 MR. FITZPATRICK: And the reason is
7 because the team of experts you've heard about -- I
8 mean, this Draft LA has taken years to produce, and
9 the component parts, and the TSPA and all that are
10 mega-sized. And so, the later that they are delayed -
11 I mean, it's obviously going to be fairly close to
12 the final product, and so the later that they're
13 delayed in beginning their analyses, the less prepared
14 they can be to form intelligent contentions and so on.
15 So that's why we asked for the Draft LA in the first
16 place, and to postpone it until after certification
17 just draws you closer -- invades the six month
18 province unduly.

19 JUDGE KARLIN: Okay. And when you say the
20 "Draft LA", are you referring to a particular draft?

21 MR. FITZPATRICK: Yes, sir. The July,
22 2004 tome that was sent up through the ranks.

23 JUDGE KARLIN: Okay

24 JUDGE ROSENTHAL: So your position is that
25 has to be on the LSN?

1 MR. FITZPATRICK: Sure. It meets the
2 definition of documentary --

3 JUDGE ROSENTHAL: So I take it that if the
4 issue was not decided now, and certification is filed
5 by DOE without this draft having been included on the
6 LSN, you will challenge the certification.

7 MR. FITZPATRICK: We may, Your Honor, but
8 win or lose on that, our experts would be --

9 JUDGE ROSENTHAL: I understand that, but
10 what I'm getting at is, whether from your perspective
11 there is reason to be deciding that promptly so it
12 does not become a potential issue with respect to the
13 validity of the certification, should the
14 certification be filed at a time when the draft is not
15 included in the LSN.

16 MR. FITZPATRICK: If the suggestion is we
17 could get one big obvious challenge to the LSN out of
18 the way by dealing with it even before its
19 certification, we agree.

20 JUDGE ROSENTHAL: All right.

21 MR. FITZPATRICK: The sooner the better.

22 CHAIRMAN MOORE: Before moving on to DOE,
23 I have a question. What would be the mechanism
24 procedurally by which that could be put in front of
25 us? Would it be under 2.1018 or 2.1004? And then as

1 a document that is not in the collection, just
2 procedurally how do you perceive we get that in front
3 of us?

4 MR. FITZPATRICK: I mean, you all
5 certainly have the powers once you've been put in this
6 position by order of the Commission to control the
7 proceedings, and that's the whole purpose of many of
8 these paragraphs and things like that we've been
9 talking about. And so to perceive ahead of time and
10 deal with that issue is comparable to perceiving ahead
11 of time in dealing with privilege log issues, and
12 these other issues.

13 CHAIRMAN MOORE: I'm looking for the
14 precise manner in which we might do that. For
15 example, if it were certified, the collection were
16 certified and it's not there, you make a request, DOE
17 has five days to turn it over or tell you no, motion
18 to compel, issue is squarely and properly procedurally
19 in front of us. And the issue would be framed then by
20 the motion to compel. An opposite way would be if DOE
21 says no, you cannot have it, you're not entitled to
22 it. They'd seek a protective order, and the issue
23 would be fairly framed that way. Are either of those
24 mechanisms available to us prior to certification?

25 MR. EGAN: Your Honor, could I suggest

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1 that the issue is ripe for a motion for a declaratory
2 ruling, because we've asked DOE for this document.
3 They've declined it on the basis of the privileges
4 that they're now asserting. And they're not going to
5 change. We've taken it all the way up to the
6 President of the United States. And so it seems to be
7 ripe for a declaratory ruling.

8 CHAIRMAN MOORE: In that regard, just as
9 idle curiosity timing-wise, are you going to go to
10 Federal District Court under 117(b)?

11 MR. EGAN: We're going to go to Federal
12 District Court, but I don't know what we're going to
13 go under. We may go under FOIA.

14 CHAIRMAN MOORE: Okay.

15 MR. EGAN: But that won't be resolved
16 before LSN will be resolved.

17 CHAIRMAN MOORE: DOE.

18 JUDGE KARLIN: DOE having made the request
19 that this be briefed, perhaps signals to us - but the
20 question really is, can we resolve this before
21 certification? And if so, how?

22 MR. SHEBELSKIE: Let me first state, I'm
23 not going to address the merits of the arguments or
24 respond to it, so don't take my silence as
25 acquiescence in anything that was said in that regard.

1 DOE has a legitimate concern. We know this is a high
2 profile document that the State has FOIA and policy
3 act requests trying to pursue this. DOE does not,
4 obviously, want its certification struck for this
5 basis. We don't think the document should be on
6 there, but I think for orderly proceedings, we know
7 that this is a specific document, an important
8 document that the State has raised that they're trying
9 to get.

10 I think we would like to have it resolved
11 so we know what we need to do. In that regard, I
12 think that the proper way it should come up is for
13 Nevada to make a request under 1018. We would deny
14 the request, and then it can file a motion to compel.

15 CHAIRMAN MOORE: So you don't see a need
16 to have a bibliographic header on the LSN that they
17 can -- on what basis would you deny the request;
18 privilege?

19 MR. SHEBELSKIE: On the grounds that it is
20 not documentary material, that it is a preliminary
21 draft, and that it is privileged. And then if Nevada
22 wants -- now I don't think we want to open the door in
23 the pre-license phase to just challenges to every
24 single little document.

25 CHAIRMAN MOORE: Neither do we.

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1 JUDGE KARLIN: May I ask, there may be a
2 factual component to the issue, whether it's a
3 circulated draft, exactly to whom it was circulated,
4 what happened, that sort of thing, versus being a
5 preliminary draft. And I wonder how we elicit and
6 obtain the factual information we need, if that's part
7 of resolving the issue. I guess, affidavits - how
8 does the State of Nevada or anyone else know to whom
9 it was circulated, and whether it exceeds whatever the
10 criteria of the definition of circulated draft. How
11 do we get those facts into the record?

12 MR. SHEBELSKIE: Well this would be a
13 situation you address not only for this document, but
14 with respect to any motion to compel in the
15 proceeding. And the movant's obligation, of course,
16 bears the burden to show that it qualifies as
17 documentary material, or otherwise needs to be
18 produced.

19 JUDGE KARLIN: But at least it would
20 theoretically have a header after certification with
21 who it was distributed to, that sort of thing. We
22 don't even have a header at this point.

23 MR. SHEBELSKIE: Well, that's correct.
24 The State has --

25 JUDGE KARLIN: Unless you think it's not

1 documentary material, there might not be a header.

2 MR. SHEBELSKIE: Right. The State has an
3 argument, its moving paper, as it were, or its prima
4 facie case would say the prime contract between BSC
5 and DOE purportedly required delivery of a draft on
6 this date. Their argument is in their papers so far,
7 that that contractual obligation facially makes it a
8 circulated draft. That satisfies their prima facie
9 case. We come back on burden of production and say
10 well, here's why not. Either legally why that's not
11 the case, and here's some additional facts, and then
12 you make the decision based on the record that the
13 parties present before you.

14 JUDGE ROSENTHAL: Well, it seems to me
15 that it serves the legitimate interests of no one to
16 have this issue hang fire until the certification is
17 filed, and then it becomes very likely an issue,
18 perhaps among other, perhaps standing alone respecting
19 the validity of the certification.

20 Now DOE has suggested that the ball in
21 getting this for us rests in the corner of Nevada.
22 Can request the document, doesn't get it, then can
23 come forth with a motion to compel; which, off-hand,
24 sounds to me to be a good means for getting the ball
25 rolling. How about that, Nevada?

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1 MR. EGAN: That's acceptable to us, Your
2 Honor. I guess we would probably - just to make sure
3 it was impervious to challenge - we would probably
4 also make the motion as just an order to compel - I'm
5 sorry - an order for a declaratory ruling, as well,
6 which is under your general jurisdiction or authority.

7 JUDGE ROSENTHAL: Well, whatever, but it
8 seems to me, again, that it's important from the
9 standpoint of the legitimate interests of all
10 concerned, and that includes the Board, as well as the
11 potential parties before us this morning, to have this
12 matter get a proper resolution, so I would certainly,
13 speaking for myself, encourage Nevada to get the ball
14 rolling very quickly. DOE, I'm sure, would then
15 respond with equal alacrity. Then the matter could
16 get before us, and I would hope at a time that we
17 would be able to consider it, and to decide it before
18 the current estimate as to when the certification is
19 likely to be filed.

20 JUDGE KARLIN: All right. Thank you,
21 Staff. Mr. Smith, I know you may not have a dog in
22 this particular fight, but legally what's your
23 thoughts on resolving it at this stage?

24 MR. SMITH: Well, I think both of the
25 methods that we've heard proposed for getting this in

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1 front of the Board, we don't have an objection to this
2 issue being dealt with sooner rather than later;
3 although, I think we believe that the appropriate time
4 would be after certification.

5 JUDGE ROSENTHAL: Why?

6 MR. SMITH: Well, because there's no
7 obligation to produce documentary material until at
8 the time of certification. And based on what the
9 Department just said, it sounds like they have sort of
10 three ways in which they are claiming that this
11 information doesn't need to be produced. It's not
12 documentary material, it's privileged, or it's --

13 CHAIRMAN MOORE: It is privilege.

14 MR. SMITH: It is privileged, or it's a
15 preliminary draft. So for us addressing the issues of
16 whether a document is a circulated draft or
17 documentary material, those sort of legal issues might
18 need to be addressed in sort of a phased way in light
19 of the difficulty in obtaining the factual information
20 as to whether a document has been circulated, and has
21 a non-concurrence. And that's the only way in which
22 it becomes a circulated draft.

23 CHAIRMAN MOORE: And what is a non-
24 concurrence?

25 MR. SMITH: And what is a non-concurrence.

1 So I see an opening for resolving some of these
2 issues, but I'm not sure how the factual questions
3 that --

4 JUDGE ROSENTHAL: All right. If it waits
5 until certification, and it comes before us because
6 Nevada challenges the certification, and then we
7 determine hypothetically that Nevada is right, that
8 this material is documentary material, and it had to
9 be included in the LSN, whether it's privileged or not
10 is another matter. It seems to me that that puts back
11 unnecessarily the process of getting that application
12 docketed and the proceeding underway. Am I wrong
13 about that?

14 It seems to me there's a definite reason
15 why, if at all possible, this certification coming up
16 carries the day, so that everything else can move
17 forward. And it seems to me that we would be removing
18 one issue with respect to the validity of the
19 certification if we decide it at this point. So it
20 seems to me, off-hand, that there are decided
21 practical reasons why this issue should be decided
22 prior to certification, if at all possible. Why am I
23 wrong?

24 MR. SMITH: I don't think you're wrong.
25 I think that the Board, though, has demonstrated that

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1 it can have the parties address these issues in short
2 order, and we've demonstrated the ability to resolve
3 these. So perhaps between now and then, there will be
4 enough information available as to the factual
5 underpinnings of any of these claims, the document is
6 not documentary material, or is it preliminary draft,
7 or circulated draft. I mean, I have no information
8 about --

9 CHAIRMAN MOORE: Well, that couldn't come
10 out in any event, could it, except in the addressing
11 of the issue? What possible mechanism could you ever
12 find out whether it's a circulated draft with a non-
13 conformance, regardless of what definition you put on
14 all that, except in a litigation process to resolve
15 that issue.

16 MR. SMITH: I'm not sure. It seems that
17 the definition of preliminary draft is any non-final
18 document that's not a circulated draft. And the
19 documentary material that you have to make available
20 in the LSN includes circulated drafts, but excludes
21 preliminary drafts; and so, I guess from -- we have a
22 hard time. We just don't know the factual
23 circumstances the way this document has been addressed
24 at the Department, whether they even have a final
25 document now, whether that draft has changed. Those

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1 are all questions we just don't know, and don't feel
2 comfortable opining about.

3 CHAIRMAN MOORE: Okay. Now assume
4 certification had happened, and it happened yesterday.
5 And that document is not on the LSN, there's no
6 bibliographic header, and there's no text - why is
7 that situation any different from the situation Judge
8 Rosenthal posed?

9 MR. SMITH: Well, because the Department
10 in their certification has to certify they've made all
11 documentary material available, so they will have to
12 have thought deliberately about whether they want to
13 include this document or not.

14 CHAIRMAN MOORE: But that's a given
15 because the document is going to be requested, and DOE
16 is going to say no, for the following reasons. And
17 now you have your rejection. That would be the second
18 and third line of their opening brief.

19 JUDGE KARLIN: I think maybe DOE made the
20 suggestion, that the factual information or the record
21 will be little different after certification than
22 before in terms of helping resolve this, so it does
23 seem that there's a motion or request for it to be
24 briefed early. I'm not sure whether you all will die
25 in a ditch on the issue, or just simply trying to help

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1 us think this through, but certainly you would have
2 the opportunity to brief the issue, and say it's not
3 ripe, or something else, if that's what you really
4 think needs to be said at that point.

5 MR. EGAN: Judge Karlin, I know you've
6 made reference several times to other participants,
7 many of whom aren't here today, but I'd like to
8 suggest that this is a matter of acute public
9 interest, as well, the timing of this, because the EPA
10 is about to institute a rulemaking for a new Radiation
11 Dose Standard to conform with the D.C. Circuit Court
12 case. That's anticipated some time at the end of the
13 summer or early fall, and we believe that the draft
14 license application bears extremely importantly on
15 setting that standard, because DOE has been asserting
16 that uncertainty is too great over the long term to
17 take a 15 millirem standard out to the peak dose.
18 Well, that question will be answered in the draft
19 license application, we believe. And that's why we
20 want that application so bad.

21 JUDGE ROSENTHAL: But in any event, as I
22 understand it, Mr. Egan, you have agreed to get the
23 ball rolling.

24 MR. EGAN: Yes, sir.

25 JUDGE ROSENTHAL: The DOE has, I gather,

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1 accepted, indeed suggested that as the process for
2 getting this issue before us. And you two are the
3 principal gladiators here, and so I think that it's
4 pretty well settled now as to how this is going to be
5 handled.

6 CHAIRMAN MOORE: And I would suggest in
7 light of Nevada's comment, because this is an issue of
8 certain import, that those that aren't making a
9 similar request could file amicus memoranda on this,
10 if it's helpful. And that way the contest would be
11 essentially you request it, and I'll request. And
12 that would be the envelope in which we resolve that
13 issue. And, of course, if there are subsequent
14 requests for the same document, the issue has already
15 been resolved one way or the other.

16 In that regard, I have a question for the
17 Staff, and the same question for DOE. Have the Staff
18 received, or been receiving from DOE drafts of the
19 application?

20 MR. SMITH: Absolutely not.

21 CHAIRMAN MOORE: So at no time the Staff
22 has gotten these.

23 MR. SMITH: NO, Your Honor.

24 CHAIRMAN MOORE: And just out of idle
25 curiosity, does not the Staff have an interest in

1 seeing this in draft form sooner rather than later?

2 MR. SMITH: No, Your Honor. Our interest
3 is in seeing what the Department files with their
4 license application. We're going to base our review
5 entirely on those documents submitted at that time.

6 CHAIRMAN MOORE: So you want to have your
7 restful slumber uninterrupted until you're jerked out
8 of bed.

9 MR. SMITH: Well, certainly we're taking
10 steps to prepare to receive the application.

11 CHAIRMAN MOORE: Mr. Shebelskie.

12 MR. SHEBELSKIE: Yes, I had two comments
13 I wanted to make, Your Honor. One is, make sure the
14 proceeding is clear here - that even if Nevada were to
15 win on this motion to compel, what we're talking about
16 is whether the license application, this draft that
17 they have in mind, meets the regulatory definition for
18 a document that needs to be in DOE's LSN collection by
19 the time we certify. There's no mechanism that allows
20 them to get it before we certify under the LSN Subpart
21 J regulations.

22 Also, the standards and criteria that
23 we're arguing about here, again are what qualifies as
24 non-privilege documentary material that needs to be in
25 our certification, not are they going to argue that

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1 they have some independent desire to get this for
2 collateral litigation on a challenge to the EPA --

3 CHAIRMAN MOORE: That's a given, but would
4 you restate your first point? I think I misunderstood
5 it.

6 MR. SHEBELSKIE: Yes. DOE's obligation is
7 to, at the time we certify, have on the LSN our non-
8 privileged documentary material, bibliographic headers
9 for the privileged ones. There's no provision that
10 says the State can get our documents on the LSN sooner
11 than we certify. In other words, we're not required
12 to put on -- if you were to rule that this Draft LA
13 qualifies as non-privileged documentary material, that
14 we didn't have to turn it over tomorrow before our
15 certification.

16 JUDGE ROSENTHAL: What I gather you're
17 saying is that the certification must indicate that
18 all of the documents required to be on the LSN are
19 there, and you don't have to put any specific document
20 on it a day sooner.

21 MR. SHEBELSKIE: Correct.

22 JUDGE KARLIN: My initial take, and my
23 colleagues I have no spoken -- is that's probably
24 right. It might be a different answer if you had put
25 the draft license application on your certification

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1 last year as a header only document.

2 MR. SHEBELSKIE: We did not.

3 CHAIRMAN MOORE: In that regard, I'm not
4 sure that I would necessarily agree with your
5 conclusion, especially in light of the Commission's
6 urging all parties, and one of the footnotes of last
7 summer's decision it's quoted that, "All parties
8 should make every effort to get their material out as
9 soon as it's available and not wait certification to
10 get it onto the LSN, because this was not supposed to
11 be a game of gotcha."

12 Now that said, and with that very clear
13 Commission exhortation, if it's not something more
14 than that, we would hope that the -- at least I would,
15 speaking solely for myself, that DOE as a government
16 agency, and I'm sure firmly committed to the notion of
17 cutting square corners, as Justice Black used to say,
18 that we wouldn't turn this into a game of gotcha. But
19 in any event, assuming that there is a regulatory
20 right to withhold that until the moment of
21 certification, if we had the decision already -- the
22 issue already decided at that point, then at a minimum
23 at that point, the document would have to be turned
24 over. Is that accurate?

25 MR. SHEBELSKIE: Well, the LSN guidelines

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1 create this process called Access Control, that allows
2 a party or a participant to provide the --

3 CHAIRMAN MOORE: I understand that. I
4 also understand the Commission's very clear
5 exhortation that was cited in last summer's decision.

6 MR. SHEBELSKIE: We also -- I mean, the
7 Department is obviously mindful, very much, of what
8 you state, Judge Moore. We're also, though, mindful
9 that the rules ought to apply equally to all the
10 parties, and Nevada is not out there putting out its
11 draft contentions, all its draft work from its
12 scientists.

13 CHAIRMAN MOORE: Absolutely good point.

14 MR. SHEBELSKIE: And that was the need to
15 be balanced.

16 CHAIRMAN MOORE: And I fully agree that
17 clean hands are a very important doctrine in these
18 matters.

19 JUDGE KARLIN: We might want to see if NEI
20 or any other potential participant, if I may use that
21 word, has any thoughts on this issue.

22 MR. FITZPATRICK: Two quick thoughts --

23 JUDGE KARLIN: Well, let me just first get
24 them, and then we can go back, perhaps. Ms. Ginsberg.

25 MS. GINSBERG: We don't have any objection

1 to expediting the review of this issue.

2 JUDGE KARLIN: Yes. Okay.

3 MS. GINSBERG: And we would appreciate the
4 opportunity, as I think Judge Moore suggested, that
5 amicus briefs be permitted to the extent that this
6 issue is going to be briefed.

7 JUDGE KARLIN: All right. NIRS, do you
8 have something? Could you identify yourself again,
9 please.

10 MR. KAMPS: My name is Kevin Kamps from
11 Nuclear Information and Resource Service, and I'd just
12 like to point out something I raised at the last
13 hearing; that under the Nuclear Waste Policy Act, the
14 Department of Energy was supposed to file its license
15 application 90-days after the President approved the
16 Congressional override of Nevada's veto. That would
17 have been October 23rd of 2002, so whether or not your
18 panel or the ASLB has the authority to have anything
19 to say about the law in that regard, there is the
20 creation of this double standard where the key
21 document in this entire proceeding, the license
22 application, is very long delayed so that potential
23 parties, such as ourselves and others across the
24 country cannot formulate contentions, while the DOE is
25 able to withhold this most essential document

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1 indefinitely.

2 JUDGE ROSENTHAL: What do you expect we to
3 do about that?

4 MR. KAMPS: I'm not sure, but there is
5 this double standard, or appearance of a double
6 standard for deadlines.

7 JUDGE ROSENTHAL: Maybe, but I don't see
8 off-hand what this Board could do about that.

9 MR. KAMPS: I just --

10 JUDGE ROSENTHAL: You mean it was a
11 violation of a statutory requirement, as you suggested
12 two weeks ago, and you now renew that suggestion, but
13 it seems to me that that's not something that we're in
14 a position to provide any meaningful remedy.

15 MR. KAMPS: Other than to require DOE to
16 release this document.

17 JUDGE ROSENTHAL: Well, if the document
18 falls within the category of documents that have to be
19 released. And that's the issue that's going to be, I
20 hope very soon, briefed by the various gladiators.

21 JUDGE KARLIN: Anything else?

22 MR. KAMPS: No.

23 JUDGE KARLIN: Okay. Thank you. Yes, Mr.
24 Fitzpatrick.

25 MR. FITZPATRICK: Two quick comments. One

1 is, it's a little disingenuous for the DOE to suggest
2 that we should be working on our draft contentions
3 without the benefit of having access to the draft
4 license application on which they're --

5 JUDGE KARLIN: Well, let me ask; are you
6 working on your draft contentions?

7 MR. FITZPATRICK: We're trying to do so in
8 anticipation of what's likely to be suggested.

9 JUDGE KARLIN: Yes.

10 MR. FITZPATRICK: That the document is
11 sitting there available. The second observation, just
12 so it's really clear, because something Judge Moore
13 brought up about the exhortation of the LSN
14 Administrator, and I invite Mr. Graser to check me if
15 I say anything incorrect - last go-around, by the time
16 June 30th last year came, I believe DOE had
17 approximately 1.2 million documents accumulated on the
18 LSN, or maybe 2 million if you count all the header
19 onlies. But in any event, pursuant to an agreement
20 with Mr. Graser, which he had to agree to in order to
21 get those documents on an ongoing basis, rather than
22 have a dump truck come on June 29th. The agreement
23 was that not a single one of those documents would be
24 made publicly available until the day DOE certified,
25 and so no, there was no advance -- the exhortation was

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1 ignored, in short.

2 This year, as I understand it, starting
3 about March 1st, DOE has been providing about 30,000
4 documents per day, five days a week, to Mr. Graser,
5 but pursuant to the same arrangement, where not one of
6 them is being made publicly available. So maybe
7 there's nothing you can do about that as far as
8 ordering them to do so. I just suggest that the Board
9 can keep that, if it's true, the Board can keep it
10 under its contemplation when it enters orders as to
11 what its expectations of the others are. You should
12 not predicate orders on an understanding that on an
13 ongoing basis --

14 JUDGE KARLIN: All right. Okay.

15 JUDGE ROSENTHAL: I don't think we need to
16 deal with who struck John this morning.

17 JUDGE KARLIN: In that regard, we have
18 asked DOE to give us estimates that would help us with
19 our schedule here on a number of different elements.
20 And as you bring up, we talk about contentions -
21 perhaps we could ask the State, what is your best
22 estimate now in terms of the number of contentions you
23 would expect to be filing?

24 MR. EGAN: Your Honor, I don't think we
25 can really give you a great number until we see the

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1 license application, but I would say our goal is not
2 to file frivolous contentions, but to pick and choose
3 carefully for things that are meaningful.

4 JUDGE ROSENTHAL: That's a laudable goal.

5 JUDGE KARLIN: A hundred, two hundred?

6 MR. EGAN: I would say at least a hundred.

7 JUDGE KARLIN: A thousand?

8 MR. EGAN: I don't think we'll have that
9 many.

10 JUDGE KARLIN: Okay. That was helpful.
11 All right. Let me ask this; assuming we would ask for
12 the briefing of this, early briefing of this, and
13 assuming what we would do is have the State file a
14 motion under 1018 and/or for declaratory judgment, and
15 then a response sometime later by DOE and any other
16 party, including what we have been calling amicus, any
17 other potential party who chooses to file, and then a
18 reply by the State; what do you think would be an
19 expeditious schedule for that? Perhaps, again, start
20 with the State.

21 MR. EGAN: Well, I think we can get DOE
22 our request by tomorrow.

23 JUDGE KARLIN: This would be a motion, I
24 guess, you would be filing with --

25 MR. EGAN: The first would be the request

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1 under 1018.

2 JUDGE KARLIN: Okay. Request, then a
3 denial.

4 MR. EGAN: I think by tomorrow we can give
5 them that.

6 JUDGE KARLIN: Okay.

7 CHAIRMAN MOORE: DOE, how soon can you
8 deny that request?

9 MR. SHEBELSKIE: Fairly expeditiously.

10 JUDGE KARLIN: So 24 hours. And then a
11 motion to compel would be filed by the State, when?

12 MR. EGAN: Early next week.

13 JUDGE KARLIN: That would include briefing
14 of the issue, response by the DOE.

15 MR. EGAN: Mid-next week.

16 JUDGE KARLIN: Mid-next week. Okay. Give
17 yourself a fair shot.

18 MR. EGAN: We've just conferred and
19 suggest two weeks for each side.

20 JUDGE KARLIN: Okay. The point being is
21 that if we proceed on the basis that the document
22 will not actually be produced until certification
23 occurs at any rate, there may not be need for heroic
24 efforts to get the briefing done in the next week or
25 so. But I think we would want to have it done

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1 reasonably promptly, if we can resolve it. Let me
2 confer with my colleagues, and we'll see if we have a
3 schedule. Two weeks after the brief by the State.
4 Is that right?

5 MR. IRWIN: I think what we were proposing
6 was that Nevada would send us a request, whenever they
7 send it which we understand will be very soon. We
8 will be very prompt, probably same-day service on our
9 response, and then they would have two weeks to
10 prepare their brief in chief, and then we would have
11 two weeks to respond.

12 CHAIRMAN MOORE: Well, for calculation
13 purposes, why don't we assume that the clock for
14 Nevada will start on - this is Wednesday - on Monday.
15 They put in a request to you on Thursday. They should
16 have in-hand your response denying it by Monday -
17 Friday, so their clock would start, your clock on
18 Monday - two weeks to fully brief the issue.

19 JUDGE KARLIN: Let me pose this, though,
20 with regard to the request by the State; let's say
21 it's the 19th. That's tomorrow, right. And then you
22 have a response due. I think it would be -- and if we
23 make that next Monday, the 23rd, but I think as a part
24 of that response we would probably want to see the
25 information we would have otherwise have expected to

1 see in a header. Would that be appropriate, which is
2 to say to whom it was distributed, this kind of
3 information. We're going to need that information --

4 MR. IRWIN: I think in response to the
5 motion -- I think the request comes in identifying the
6 document. The briefing on the motion to compel
7 provides that kind of information, because there is,
8 obviously, no header for it on the LSN.

9 JUDGE ROSENTHAL: If tomorrow the request
10 is made, now when you, let's say hypothetically on
11 Monday deny the request, are you just going to say
12 denied, or are you going to provide the basis for
13 denying it?

14 MR. SHEBELSKIE: I think a summary of the
15 basis. That's fine. So they know what issues to
16 brief on the motion to compel.

17 CHAIRMAN MOORE: And just exploring this
18 to save an interim step, the same kind of information
19 for each of those denials, privilege denials that you
20 would have put in a privilege log, would that not
21 speed the process considerably?

22 JUDGE ROSENTHAL: How do they know what
23 they're -- if they do not have that information,
24 they're now challenging your denial, but they really
25 have to know some detail, do they not, as to the basis

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1 upon which --

2 CHAIRMAN MOORE: They're essentially
3 filing the equivalent in some fashion, whether it's
4 called a declaratory request or a motion to compel.
5 Normally where there's a privilege claim involved,
6 they would have the prima facie case established in a
7 privilege log. Now for it's not documentary material,
8 obviously that doesn't apply. But some information on
9 the concurring draft - circulated draft with a non-
10 concurrence has to be provided. It's not this, and
11 there's -- because otherwise, you're adding -- there's
12 going to have to be a response and surreply coming.

13 MR. SHEBELSKIE: Well, I think this issue
14 is a generic issue that will arise in the course of
15 the proceedings if a party is moving to compel
16 production of a document that someone else has not put
17 on the LSN, so there's no header there at all. If in
18 the course of discovery they learn about the existence
19 of a cache of documents that weren't included --

20 CHAIRMAN MOORE: But this isn't a cache,
21 this is one document.

22 MR. SHEBELSKIE: Well, that's right.

23 CHAIRMAN MOORE: Even though it fills a
24 cache.

25 MR. SHEBELSKIE: But what would you do in

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1 that circumstance? I mean, here the issue relates to
2 that of circulated draft. In other words, they know
3 the document they want to move to compel on. They
4 have legal arguments why they think it should be
5 produced unrelated to circulated draft concept, and
6 then they have this argument, this legal argument
7 about circulated draft. I would propose in the
8 context of the briefing on that, that to carry our
9 case on that, our burden on that, we have to come
10 forth with evidence to explain what is --

11 CHAIRMAN MOORE: But that's factual.

12 MR. SHEBELSKIE: That's right.

13 CHAIRMAN MOORE: It's factual.

14 MR. SHEBELSKIE: That's right.

15 CHAIRMAN MOORE: It is not a circulated
16 draft, and there was no non-concurrence, but there is
17 zero way, unless they're going to start taking
18 depositions, that they know what your considering a
19 non-concurrence, unless factually you spell out, for
20 example, Expert X disagreed with Subsection 2.1000.
21 Now is that a non-concurrence?

22 MR. SHEBELSKIE: Part of my difficulty,
23 Judge Moore, is the draft wasn't circulated. It
24 didn't get any non-concurrences, so I don't know what
25 facts to provide other than there were no non-

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1 concurrences on it.

2 MR. IRWIN: Mr. Shebelskie always covers
3 every issue more completely and more elegantly than I
4 could, but there is a little bit of an issue here of
5 DOE being forced to anticipate and make its opponent's
6 arguments here. And that is problematic for us.

7 CHAIRMAN MOORE: Mr. Irwin, let's back up.
8 Your papers requested that we address this and set a
9 briefing schedule.

10 MR. IRWIN: Absolutely.

11 CHAIRMAN MOORE: Okay. What you're now
12 trying to do is corral the herd.

13 MR. IRWIN: Absolutely, Judge. All we're
14 saying is that normally in a motion, the proponent of
15 the motion takes the facts as it understands them,
16 applies them to the law as it understands it, and uses
17 them as a basis for the motion. We then have a burden
18 to respond. And if it's necessary to give the State
19 an opportunity to respond again, so be it.

20 Our problem is, we do not want to have to
21 be responsible for stipulating all the facts for
22 arguments which we do not necessarily know in advance
23 the State may make.

24 JUDGE ROSENTHAL: They're at least
25 entitled to a sufficient explanation as to why you are

1 turning down their request, so that they're able in
2 their motion to compel to confront the reasons that
3 you've turned it down. Now I don't know that we can
4 fine tune at this point precisely what you have to say
5 in your denial, but I think that that much is --

6 CHAIRMAN MOORE: And the question of a
7 circulated draft, if I correctly understood you, Mr.
8 Shebelskie, you said it wasn't circulated at all.
9 Well, I know -- I would be shocked to learn that it's
10 locked up in a closet, so somebody had to see it, and
11 at least under some circumstances, those somebodies
12 would be considered it would have been circulated to
13 them, I would think.

14 MR. SHEBELSKIE: But it wasn't circulated
15 within DOE, and BSC, to my knowledge, obviously they
16 had something ready at a certain time, but there were
17 no non-concurrences on it, so I don't -- beyond saying
18 there were no non-concurrences -- I understand Judge
19 Rosenthal's point that in the denial we say we're
20 denying your request for reasons A, B, C, D, and an
21 explanation of that so they can frame the issues.

22 JUDGE ROSENTHAL: I don't think we can now
23 specify precisely what you have to put in, and it may
24 be that the way it'll turn out, there will have to be
25 a rebuttal presentation. But I think at this point,

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1 we're talking about the schedule. I think that it
2 appears that the request and denial will take place by
3 next Monday. If we're then talking about two weeks
4 for Nevada then to file its motion to compel - I don't
5 have the calendar. I think that Judge Karlin does.
6 That's a specific date. We can then have two weeks
7 from that date for the DOE response. And at that
8 point, I think we can see whether --

9 CHAIRMAN MOORE: Well, there would be a
10 week to reply.

11 JUDGE ROSENTHAL: Yes, a week to reply,
12 and we're off to the races. And if, as I understand
13 it, the current view or estimate is that the
14 certification would be filed by the end of July or
15 into August - is that the period that we're talking
16 about, that schedule I think would give us a fair
17 opportunity to get this matter resolved pre-
18 certification, which for reasons that I indicated
19 earlier, I feel very strongly would be in the best
20 interest of all concerned. They're working the
21 calendar at this point.

22 MR. FITZPATRICK: Judge Moore, two points.
23 We mentioned the sequence of requests, the request in
24 each case asked for more than just one document. It
25 was the draft and the TSPA calculations supporting it,

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1 and we'd probably ask for that again. The second
2 question or point is, that the assertion of the non-
3 existence of the facts that would give rise to
4 circulated draft will, no doubt, be made by an affiant
5 in an affidavit that will make conclusory statements
6 about those facts. Those facts are totally within the
7 knowledge of DOE and not us, and so I suggest that we
8 tentatively, and it may not be necessary, but be given
9 permission to take the deposition of an affiant.

10 CHAIRMAN MOORE: No.

11 JUDGE KARLIN: We don't have that
12 authority.

13 CHAIRMAN MOORE: This is one of the
14 difficulties with trying to do this in a declaratory
15 fashion prior, obviously, to certification. But I
16 think, and if proves that this matter cannot be
17 decided on the factual basis that we have it, that's
18 the risk you all are running until a proper factual
19 record could be developed subsequent, because there is
20 provision for at least limited discovery in the LSN
21 period, well during the -- so I think that's the
22 qualification that goes on all of this.

23 JUDGE KARLIN: Maybe we could sum this up
24 or conclude this. I mean, one of the things I do want
25 to say is that the way we've got it contemplated for

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1 the case management order, there will be privilege
2 logs for attorney/client, attorney work product, these
3 sort of things, kind of from the beginning. And so
4 anyone who makes a request or a motion to compel would
5 have the advantage of that factual information.

6 Even with the secondary privileges, the
7 privilege log will, I think is our contemplation, be
8 provided before anyone has to file a motion to compel.
9 Therefore, I think when the DOE responds to the
10 initial request, they need to provide a summary and
11 some support for what they're saying that would be
12 akin to what they might otherwise see in a privilege
13 log. So yes, we think this is deliberative process
14 privilege and here's why we think it meets these
15 elements. It doesn't have to be long, but I think
16 there needs to be something there, some meat that then
17 the State may very well say well, we're convinced this
18 is privileged, so we're not going to ask for it any
19 more. So I think there needs to be a little bit --

20 CHAIRMAN MOORE: Well, it could be a
21 persuasive log, Mr. Irwin.

22 MR. IRWIN: I was thinking of the
23 familiar doctrine of fat chance, Your Honor.

24 (Laughter.)

25 JUDGE KARLIN: You ought to give it a try,

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1 anyway.

2 MR. IRWIN: We will. We will.

3 MR. SHEBELSKIE: Judge Karlin, I want to
4 respond to something I heard creep into Mr.
5 Fitzpatrick's statement there. The last hearing and
6 in the briefing that was filed, there was focus on the
7 draft license application. Now I heard in his
8 dialogue there well, now maybe we'll also include in
9 the request this analysis and this other document over
10 here. The document that had been discussed at the
11 last hearing subject to our request is this draft
12 license application that they identified. I don't
13 think we want to open the door to a bunch of other
14 things.

15 CHAIRMAN MOORE: And we agree. It's a
16 single issue. We're not going to get into the
17 category of reports, et cetera, et cetera in the
18 definition of documentary material. I think just this
19 identified draft will present enough difficulty to see
20 if we can do it in a declaratory fashion. Judge
21 Karlin, would you set forth the dates in the schedule,
22 please.

23 JUDGE KARLIN: Okay. I think we've come
24 up with a schedule that might work, and so by
25 tomorrow, May 19th, the State will make this request

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1 on the record. Next week, the 23rd of May, the
2 deadline for DOE to respond to the request. If that
3 response is not satisfactory to the state, they have
4 until June 6th to file a motion to compel production,
5 and June 30th - I'm sorry - June 20th, two weeks later
6 is the DOE's and anyone else's opportunity to respond
7 pro or con on this issue. And then the State will
8 have June 28th for a reply brief. I hope that
9 schedule will work. I think it'll get us where we
10 need to go. I think we may want to impose a page
11 limit on this. I think we'll say 20-pages for each of
12 those should suffice. And we would also like to have
13 a table of contents, table of cases at the beginning
14 of that. My colleagues want to consult on that, so
15 we'll hold off on that.

16 MR. IRWIN: One consideration, gentlemen.
17 Particularly as respects factual issues, there may be
18 a need to attach documents, and we'd appreciate the
19 Board's considering that fact in setting any page
20 limits.

21 JUDGE KARLIN: That wasn't included.

22 CHAIRMAN MOORE: We're painfully aware
23 from the filings that we have that we erred in setting
24 page limits not using including appendices, exhibits
25 attached, et cetera.

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1 JUDGE KARLIN: Thank you.

2 CHAIRMAN MOORE: With that schedule, we'll
3 get back to the page limit. The next matter that we
4 need to address is DOE's request for the establishment
5 of uniform requirements for the retention of emails.
6 Judge Karlin, did you have some matters on that?

7 JUDGE KARLIN: Well, we just wanted to
8 first ask - DOE made this request, so could you please
9 explain to us what you have in mind, what your concern
10 is?

11 MR. SHEBELSKIE: Yes, sir. Particularly,
12 this concern grew out of thinking about the issue of
13 potential parties, and the potentially expansive
14 nature of that. And some of the dialogue from the
15 last hearing when there was a discussion about whether
16 people may show up 90-days after our certification and
17 simply say we have no documents. And these may be
18 people who have not been participating, obviously, as
19 closely in all of this pre-application work. And then
20 we find that when they come and certify they say, oh,
21 well we didn't know we needed to have these kinds of
22 procedures. We didn't need to retain emails, backup
23 tape emails, review emails, this sort of thing. And
24 we just envision the possibility that a lot of people
25 could certify come 90-days, to say they have nothing,

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1 when in fact they haven't taken adequate steps to
2 collect and identify all the documents leading up to
3 here. And we thought that maybe there ought to be a
4 separate process like we've had with this privilege
5 log, the privilege concepts, where maybe the Board has
6 some initial suggestions, but then the three statutory
7 parties and anyone else who's interested, participates
8 in that discussion, and we come back with some
9 proposals to the Board on that. So it really was just
10 an opening suggestion that there's another line beyond
11 privilege logs that we should be discussing.

12 JUDGE KARLIN: All right. Reaction from
13 the State and the Staff, please.

14 MR. EGAN: Your Honor, I don't have a full
15 reaction to that. I didn't really understand exactly
16 what Mr. Shebelskie was talking about in the pleading.
17 I have a much better idea now. I think that this is
18 an issue that you face in all litigation these days,
19 because emails become such an important part of the
20 commerce of communications. And it's usually the case
21 that emails are automatically deleted. Most programs
22 automatically delete emails after a certain amount of
23 days, unless you instruct them otherwise. And I know
24 from my own experience, it's hard for anybody but a
25 good computer geek to instruct them otherwise, so I

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1 think if you're looking at this issue it would be hard
2 to impose a requirement that somebody retroactively
3 have retained something that in the ordinary course of
4 business is usually destroyed, even though they might
5 have anticipated themselves being a party to this
6 proceeding at some point in time.

7 And I think there has to be notice to the
8 world that would go out like the day of the case
9 management order, anybody who wants to participate is
10 hereby instructed turn-off your email destroying
11 mechanism, and save all emails. I just don't know how
12 you --

13 JUDGE KARLIN: What about the parties here
14 in this room, for example, who have participated
15 actively since last July - first, do we issue
16 something prospectively next month that says oh, you
17 know all those emails you deleted in the last year,
18 well that's okay, but from here on out you better
19 start saving them. What kind of diligence is required
20 of people who know they're sort of in the soup on this
21 one all along?

22 MR. EGAN: Your Honor, all I can say is I
23 know that we have issued a call memo to our parties
24 and participants on our side last summer, DOE has
25 issued a call memo because we have a copy of it. I

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1 think it was somewhat before that time, but I guess
2 based on the dates of those call memos, there would be
3 not an issue. Before that, I think there would be an
4 issue.

5 JUDGE ROSENTHAL: What's a call memo?

6 MR. EGAN: A call memo is the term that
7 DOE used for sending our instructions to all people to
8 keep all your documents because we're in anticipation
9 of litigation. Don't destroy anything. Save
10 everything, if it has anything to do with Yucca
11 Mountain.

12 JUDGE KARLIN: Mr. Smith, does NRC have a
13 call memo out, a similar sort of instruction to
14 moratorium on the destruction of emails?

15 MR. SMITH: No, we don't have a call memo,
16 per se. We do have record retention requirements, and
17 official agency record requirements.

18 CHAIRMAN MOORE: Those are every hundred -
19 - periodically all emails are erased.

20 MR. SMITH: Not all emails, emails that
21 were required to be retained --

22 CHAIRMAN MOORE: Here's the rub. Official
23 agency records are nowhere found in the definition of
24 documentary material in my copy of the regulations.
25 Now you may be equating them, but the other parties

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1 may not, and this Board may not. And so the question
2 then is, documentary material may be lying on your
3 desk, and not be "an official agency record", either
4 yet, because it hasn't gone through that process, or
5 because for any number of other bureaucratic reasons,
6 it doesn't happen.

7 Now that doesn't preclude it from being
8 documentary material, so I guess the question always
9 becomes in the electronic world, what needs to be done
10 by this Board to ensure that at least prospectively
11 from this date forward, this pitfall is precluded.

12 MR. SHEBELSKIE: And I think that's why we
13 need to have a process where people confer about it,
14 because I would think --

15 CHAIRMAN MOORE: But the process has to
16 begin now.

17 MR. SHEBELSKIE: Yes, sir.

18 CHAIRMAN MOORE: It can't begin when we
19 get it resolved, because I hate to always appear to be
20 cynical, but I'm afraid that the delete button will be
21 in use over time. That being said, how do you propose
22 we begin this process?

23 JUDGE KARLIN: Well, let's go to the
24 Staff. I mean, there's still -- Ms. Young.

25 MS. YOUNG: Judge Moore, if I could just

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1 add something on this issue. Obviously, when the
2 Staff certified its compliance with the LSN in July,
3 we indicated we had procedures where we were
4 diligently searching for information that constituted
5 documentary material. There is nothing special about
6 an email, that all emails needs to be preserved,
7 because all emails are not documentary material. And
8 the Staff --

9 CHAIRMAN MOORE: No, but some of them may
10 be.

11 MS. YOUNG: Yes, but all emails are not
12 documentary material, and we have procedures where
13 part of the process in determining what information
14 should be included on the LSN, we evaluate the
15 criteria to see what a particular document, regardless
16 of its format, whether it constitutes documentary
17 evidence.

18 JUDGE ROSENTHAL: Who is doing that for
19 you?

20 MS. YOUNG: There is a group on the Staff
21 that does that, and OGC participates.

22 JUDGE KARLIN: Okay. That's helpful. I
23 mean, I think one of my concerns and it's not just
24 prospective, is every organization, whether it's a
25 governmental entity or a private entity, has document

1 retention policies, and those sometimes are mandated
2 by law - three years for this document, six years for
3 that document. And document retention policies also
4 mean document destruction policies; that is, at the
5 end of that three year, six year period, or whatever
6 it is, the document may, or perhaps must, be destroyed
7 or eliminated from the system. That's just the way it
8 works.

9 I believe the regs that we operate under
10 may be 36 CFR 1228, and other systems that the
11 governmental agencies have to do. But the problem I
12 see is that when an organization is in anticipation of
13 litigation, then there needs to be a moratorium placed
14 upon the normal document destruction process, and
15 documents retained for a longer period of time, or
16 until the litigation, or the hearing, or whatever it
17 is, the proceeding is over with. So I hope that long
18 ago each of the parties in this room, including the
19 Staff, have taken that to heart, and not just said
20 well, we have a procedure in place that calls for the
21 destruction of a document after 180 days, or three
22 years - so be it. Goodbye document. Knowing this
23 procedure is pending, I think there was an affirmative
24 obligation for parties to preserve these.

25 I mean, we gave DOE a very difficult time,

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1 and I think rightfully so, however, with regard to the
2 10 million archival emails last year in this room,
3 you'll remember, and perhaps there are other archival
4 emails that everyone else has to make sure do not get
5 inadvertently eliminated.

6 With that said, is there anything that the
7 other potential participants, NEI or NIRS, may want to
8 contribute to this? I mean, I think the point being
9 made, among others, is that all potential parties out
10 there who want to certify on the 90th day are going to
11 have to think about the same issue, and not have a
12 mechanism where all their emails are just willy-nilly
13 being deleted without contemplation of what's going on
14 here.

15 With that in mind, it sounds like all
16 you're asking is that perhaps a mechanism be set up
17 for the parties to discuss and maybe generate a
18 proposal to us on how to manage this. Is that what
19 you're looking at, Mr. Shebelskie?

20 MR. SHEBELSKIE: Yes, sir. And I think it
21 has mutual benefits both to the broad universe of
22 other potential parties who have not been actively
23 engaged in this, but also can provide helpful guidance
24 to the statutory parties to set bounds on what they
25 may not need to do either; because one can, if left to

1 their own devices, begin to think well gosh, I need to
2 be extra cautious to do this, this, this, and suddenly
3 you find yourself in a stage where you're saving
4 backup tapes in perpetuity for 20 years. I think we
5 need some bounds on that end, too.

6 CHAIRMAN MOORE: But am I correct that in
7 the regulations and definition of documentary
8 material, documentary material is not synonymous with
9 under the requisite federal statutes on record
10 retention and archival statutes, it's not synonymous
11 with official record, official agency record.

12 MR. SHEBELSKIE: I'll agree it's not
13 synonymous, but I think if you're dealing with parties
14 or participants who are federal entities, the fact
15 that they have those types of retention mandates
16 because of the acts, is appropriate to take into
17 consideration for what they do. But if you're talking
18 about the other body of potential participants who
19 have nothing, then that opens up the greatest concern.
20 And, for example, I don't want it to go unremarked
21 here that we just heard Nevada say they didn't send
22 out a call memo to their project personnel until last
23 summer to preserve emails and documents. I think
24 that's very troubling, and I think as part of this
25 process we need to explore what Nevada has been doing

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1 to preserve documents.

2 CHAIRMAN MOORE: So we need a proposal on
3 how you think we should best proceed on what I can
4 promise you is a can of worms.

5 JUDGE KARLIN: Well, do you think you
6 could get together and then propose something to us,
7 perhaps joint - three weeks?

8 MR. SHEBELSKIE: Three weeks sounds like
9 a good time to us, Your Honor.

10 MR. EGAN: Your Honor, I think this one is
11 particularly important to involve any other
12 prospective participants because this burden will be
13 widespread.

14 JUDGE KARLIN: Yes, I think that's right.
15 And if you can get them to participate --

16 CHAIRMAN MOORE: And it may well affect
17 their ability to be made parties. If memory serves,
18 having full compliance with the certification
19 requirements has to be one of the elements of
20 admission, ultimate admission.

21 JUDGE KARLIN: So are you suggesting four
22 weeks, a bit longer time frame for that? I mean, I,
23 quite frankly, speaking only for myself, are somewhat
24 disappointed that somewhat disappointed that we don't
25 have some briefs or other information from NIRS and

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1 other entities on the issues presented last couple of
2 weeks here, potential party being one of them. That
3 said, there's nothing we can do, or any of you can do
4 to force them to participate. But I think if they've
5 got something that can help us here, it's important
6 that they contribute, because this is going to affect
7 them, ultimately, once we work out the ground rules.

8 CHAIRMAN MOORE: And how do we wrestle
9 with the question previously posed, that
10 prospectively from this day forward we put the world
11 on notice, unlike a Federal District Court, who can
12 issue the order and back it up with an injunction,
13 we're not in that same posture, but we need to make
14 sure that there is notice so that they can be taken
15 into account for what powers we do have, a need for it
16 later.

17 MR. SHEBELSKIE: You obviously may not be
18 able to enjoin people to do that, but the regulations
19 require every potential participant who certifies, to
20 certify that they had procedures in place. And I
21 think the Board, through the guise of a case
22 management order, can direct these are the types of
23 things we expect the procedures to cover, and to have
24 in place. And there may be many different roads to
25 get to the same point, but a potential participant has

1 to have a system for identifying relevant emails,
2 maybe and preserving them for a certain period of
3 time, or preserving emails until they can be reviewed
4 for relevance, things like that. Because right now,
5 basically, it's an open black box, what the
6 regulations require, what the Board would require by
7 way of document collection, retention practices to be
8 to meet that requirement.

9 JUDGE KARLIN: I'm a little hesitant on
10 that, because for the same reason the State comes in
11 here last week, or two weeks ago and says redaction
12 should be a condition of certification, and we say
13 well, no, we don't really see it that way, and it may
14 be somewhat unfair to impose that at this relatively
15 late point, what may be an additional requirement. If
16 we start imposing additional requirements on what
17 constitutes certification, or what's required for
18 these procedures, then someone may say well, wait a
19 second. You should have told us that. That's not
20 written in the regs, where is it written? So I think
21 you all have to be careful about going beyond any
22 regulatory requirements, but I think it would be
23 useful to come up with -- see if there's a proposal to
24 make.

25 MR. SHEBELSKIE: Agreed, and here there is

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1 an existing regulatory requirement. People have to
2 have had procedures.

3 JUDGE KARLIN: Right.

4 MR. SHEBELSKIE: And I realize for the
5 world at large, as opposed to people sitting at the
6 table, your approach may be somewhat different,
7 obviously, tailored to the facts and perspective
8 versus retrospective may be one thing. But we don't
9 want to find ourselves in a position where 90-days
10 after we certify everyone comes in and says we didn't
11 know we had to do anything. And then we say we can't
12 get their documents.

13 CHAIRMAN MOORE: I can promise you, even
14 after we spell it out in minute detail -- that said,
15 we need a schedule.

16 JUDGE KARLIN: I think I heard three, and
17 the State suggested -- are you suggesting it should be
18 longer than that?

19 MR. EGAN: I guess I would ask Mr. Kamps
20 because you're plugged into the public interest
21 community. I don't know how many of them are planning
22 to participate.

23 MR. KAMPS: Right. I would just say that
24 there's quite a differential in resources at the table
25 here between the DOE with its hundreds of millions,

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1 and perhaps soon billions of dollars in annual
2 resources, and the non-profit NGO community of the
3 United States. And just to emphasize that point, our
4 neighbors to the north in Canada provide for
5 governmental resources to NGOs to take part in
6 interventions, which our country does not, to my
7 knowledge.

8 CHAIRMAN MOORE: Well, that being the case
9 it's totally irrelevant, because we can do nothing
10 about that either. We're very much aware of the
11 limitations that we're operating under. That said,
12 what's a reasonable schedule to ensure that groups
13 such as yourself will have an opportunity, if they
14 wish, to participate in this participant effort to put
15 a proposal in front of us?

16 MR. KAMPS: I would say as soon as DOE's
17 license application is available. That's going to
18 enable our organizations to much more fully
19 participate in this process, and other organizations
20 across the country to take it more seriously, that
21 this is actually proceeding.

22 It's difficult for organizations with
23 limited resources and lots of responsibilities in
24 addition to this proceeding, to give it their full
25 attention, especially when even the regulations from

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1 EPA are not yet out, or even the public comment period
2 open for it. So I would request months, instead of
3 weeks, for this.

4 JUDGE KARLIN: If I may, before we end
5 this, I really think it would be -- I understand you
6 have limited resources, but I think your help and your
7 briefing on issues such as potential party could be
8 helpful and meaningful to this proceeding. And I know
9 it's early, but it is disappointing that we don't have
10 that. You have limited resources, that's fine. We
11 want to hear from everyone we can hear from on how to
12 make this process work right. And if you've got
13 something to contribute, we'd be willing to hear that.
14 And we are particularly making sure that whereas these
15 parties as the parties at the table meet, that they
16 accommodate your presence, and allow other potential
17 participants to participate, and they have been doing
18 that. And you have participated, so that's good.

19 MR. IRWIN: Judge Karlin and gentlemen,
20 let me just try to draw it to a bottom line. Last
21 winter when we began putting together proposals for
22 what have become a series of agreements, DOE, the
23 Staff, and Nevada agreed on a form of notice which we
24 published on the proceedings website, and published
25 also through the Staff's good offices in the Federal

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1 Register, and we were able to elicit substantial
2 participation in those discussions.

3 My suggestion would be that we do the same
4 thing again this time, put out a notice, and be under
5 a four-week clock to report back to the Board from the
6 time the notice is published in the *Federal Register*.
7 In the meantime, we will convene meetings and try to
8 reach agreements on the treatment of document
9 production, or document retention issues.

10 JUDGE KARLIN: Well, how about if we said
11 July 1? That's more like five weeks. You can get
12 your notice out, and have your four weeks to report
13 back to us.

14 CHAIRMAN MOORE: In that regard, it would
15 appear to be perhaps the most practical way if the
16 Staff as a participant in this effort to put forth a
17 joint proposal drafted and published in the *Federal*
18 *Register* the notice inviting all participants.

19 MR. SMITH: I think for the Staff, I'm not
20 sure that if we make it available on our website that
21 we use to provide notice --

22 CHAIRMAN MOORE: Well, the Staff also has
23 the ability to publish in the *Federal Register*. You
24 do it all the time.

25 MR. SMITH: But it costs money, and that's

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1 one of the reasons why the Commission decided to move
2 to the web-based notice for proceedings, and they
3 provided for that, and we have procedures in place to
4 do that. And we provide notice via the electronic
5 information exchange the last time, and we think
6 that's an acceptable way to get notice to the general
7 world.

8 CHAIRMAN MOORE: The Board will have to
9 publish the *Federal Register* notice, since the Staff,
10 obviously, is impecunious. That being the case, I'm
11 somewhat at a loss to know how we phrase - what we put
12 forth in this notice. This is definitely a unique
13 animal. We're not publishing an order, which is why
14 I had thought it made eminent good sense for the Staff
15 as a participant to do it.

16 MR. IRWIN: May I suggest, Judge Moore,
17 that the Board could order the parties to convene, and
18 along with that by publication in the *Federal*
19 *Register*, putting everybody else in the world on
20 notice of --

21 CHAIRMAN MOORE: We will take care of
22 that. Anything else on this matter, this schedule?

23 JUDGE KARLIN: We will be shooting for
24 July 1 and report back.

25 CHAIRMAN MOORE: There is a lag time from

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1 the time we send it to the *Federal Register* to when it
2 gets published, but we will order the parties to
3 convene a conference no later than X date, and we will
4 get that into the *Federal Register*, as well as, as
5 soon as we do that, you'll all be served with it. And
6 I would urge all of you on your respective websites to
7 put it up, as well.

8 MR. IRWIN: If it would be useful to the
9 Board, since the three principal parties here have at
10 least one round of this, we'd be happy to serve a
11 potential draft of a *Federal Register* notice to the
12 Board, if that would be of use to you all in
13 considering what you would like to order us to do.

14 JUDGE KARLIN: By what date?

15 MR. IRWIN: Friday of this week.

16 JUDGE KARLIN: Yes.

17 MR. IRWIN: Okay.

18 MR. FITZPATRICK: Judge Moore, would it be
19 prudent to not say the parties will convene before a
20 certain date, but pick a date and say on that date,
21 because otherwise you get into who picks the date, and
22 how does notice go around once again about that date.

23 CHAIRMAN MOORE: All right. See if you
24 can all get together on a date. What we're going to
25 have to do in light of that is take a break, and then

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1 come back. I had hoped to wrap this all up 32 minutes
2 ago. as you can see, I have failed. I do think it
3 probably makes sense for a brief recess, push on and
4 finish, rather than take a lunch break.

5 That said, let's reconvene at 12:45. It's
6 not 12:32, and finish up. And if you could all in
7 that interim give us then a date for such a proposed
8 potential party participation in this matter, it would
9 be helpful. Thank you. We'll recess now.

10 (Whereupon, the proceedings in the above-
11 entitled matter went off the record at 12:32:00 p.m.
12 and went back on the record at 12:47:09 p.m.)

13 CHAIRMAN MOORE: Before we go further, the
14 first matter - page limitations on the question of the
15 DOE material which will be sought by Nevada, the
16 Nevada and DOE briefs should be limited to 40-pages
17 for those issues, exclusive of attachments. Nevada's
18 reply brief is limited to 25-pages.

19 JUDGE ROSENTHAL: I would just add that
20 there is no requirement that you go up to that page
21 limit. If you're short of it you don't have any worry
22 about being sanctioned.

23 JUDGE KARLIN: Bonus points will be
24 awarded for shorter --

25 CHAIRMAN MOORE: And in that regard, some

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1 time downstream in this proceeding, the panel will be
2 issuing citation conventions, because we're living now
3 in an electronic world, and this is largely an
4 electronic case. We're not there yet, so in your
5 filings please, official court reporters cite to us
6 that designate the court that you're citing, or the
7 body that you're citing, and no unpublished decisions,
8 which is the real, in most every court in the land,
9 because just because WestLaw has it out there, it has
10 not been officially reported, and we really don't want
11 to enter that thicket at this point. So we're
12 expecting officially reported citations with the
13 official reporter cited to us. If you then wish to
14 add an electronic cite, so be it, but the official
15 reporter cite has to be there.

16 JUDGE ROSENTHAL: And we want a table of
17 contents, as well as a table of cases and other
18 authorities, same thing that you would put in any
19 brief that you filed with the court.

20 CHAIRMAN MOORE: And that doesn't count as
21 part of your pages. Judge Rosenthal, you would like
22 to address briefly --

23 JUDGE ROSENTHAL: I want to address again
24 briefly the matter of DOE's estimate that it is to
25 provide to us within a week regarding the length of

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1 time that will be required to accomplish the redaction
2 of the material, as to which a secondary privilege is
3 being claimed.

4 I used before the term "with all
5 deliberate speed", and Judge Moore pointed out I had
6 some association with the relief aspects in *Brown v.*
7 *The Board*. That's probably why I used it, but on
8 reflection, I think it was a very poor choice. Again,
9 because the accomplishment of public school
10 desegregation was not, as it turned out, a matter of
11 all deliberate speed. It was anything but that.

12 Now in this instance, the Board fully
13 appreciates the fact that we have put a substantial
14 burden on DOE in requiring that all of the matters
15 it's claiming privilege under the secondary privilege
16 be provided in redacted form.

17 While that is a significant burden, we
18 concluded that it was necessary as a practical matter.
19 What is also necessary, as we see it, is that the
20 accomplishment of this task be done very, very
21 expeditiously. We realize that that's going to impose
22 additional burdens on DOE, but in the totality of the
23 circumstances that confront all of us in this
24 extraordinarily unusual proceeding, that's the way it
25 simply has to be.

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1 The redacted documents simply have to be
2 available to other parties in relatively short order.
3 So in going back to consult with the folks that are
4 going to be responsible for this undertaking, I hope
5 that DOE counsel will impress upon them that there is
6 a decided element of urgency to this project, so it's
7 not simply a matter - well, fellows, if you approach
8 it in the normal course, how long is it going to take
9 - because I have no doubt that the response, if it's
10 put to them that way, will be - well, we may be able
11 to get it by the next century. That's not going to
12 fly with us.

13 We are going to impose in our eventual
14 case management order a time limit, and it's going to
15 necessarily take into account the considerations to
16 which I have referred. And so it's our hope that when
17 we receive within the week the DOE estimate, it will
18 reflect the fact that this is not a situation in which
19 business as usual will be found satisfactory. So ends
20 the sermon.

21 CHAIRMAN MOORE: Judge Rosenthal addressed
22 when you go back and speak, go downstairs to speak, I
23 would like to take a moment when you go back and go
24 upstairs to speak. What I started this conference
25 with was that the reasonableness of the schedule is

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1 directly impacted by when that DOE application is
2 going to be filed, so it may be prudent for you to try
3 to make a very realistic determination of when that's
4 going to happen, and let us know because that will be
5 a very important factor in setting the schedule.

6 That said, the other parties will be
7 required to do this task for their documents by a
8 date certain that we will set. But since everyone's
9 certification is subsequent to DOE's certification,
10 they will, of course, not have the same time frame in
11 which DOE is operating; first, because they don't have
12 the magnitude of documents. And second, because their
13 certification comes subsequent to DOE's certification.
14 So that being the case, forewarned is forearmed.
15 We're contemplating something in the neighborhood of
16 30-days for the other collections after certification,
17 and it may not be necessary to give that long a time,
18 because if everyone undertakes those tasks now, and
19 certification is still many months away, it may be
20 reasonable to make that date something like 10-days.

21 Now when we took the brief recess, the
22 parties were to try to give us a date in which, so
23 that we could publish it in the *Federal Register*
24 notice of the conference in which you will all get
25 together to work out the details of a joint proposal

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1 regarding document retention.

2 MR. IRWIN: Judge Moore, we did talk with
3 the Staff and Nevada, and NEI, and NIRS during the
4 break. We agreed that the 15th of June, which is a
5 Wednesday, leaves enough time for a *Federal Register*
6 notice to get published, and circulated. We would
7 propose probably to do what we did last winter, and
8 have the meeting in a large conference room in our
9 firm's Washington office with telephone, and if
10 necessary, other kinds of hookups to remote locations.
11 We'll also provide you with a proposed draft of a
12 notice not later than Friday of this week.

13 CHAIRMAN MOORE: Okay. Just curiously, is
14 there any intimidation factor by having this at Hunton
15 & Williams' Washington office, as opposed to --

16 JUDGE KARLIN: And I think in the nature
17 of what we would publish might be more of an order by
18 the PAPO, our Board, with this information and
19 requiring a meeting to be held, and submissions to be
20 made.

21 MR. IRWIN: Yes, sir. That was the format
22 we contemplated.

23 JUDGE KARLIN: Okay. Thank you.

24 CHAIRMAN MOORE: And could you include an
25 address, and time, and all of those things so that

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1 we'll try to get that correct.

2 MR. IRWIN: Absolutely.

3 CHAIRMAN MOORE: So that all parties can
4 be aware of the general time frame, it is not unlikely
5 that we will set another case management conference
6 some time late June/early July. The time frame will
7 be dependent somewhat on materials that we're yet to
8 see. It is now our current intention, instead of what
9 I had said at the last conference, to have the parties
10 get together and try once again to give us a proposal
11 on a case management order. We will shoulder that
12 burden, and move forth, and issue a case management
13 order. We've had many inputs, and still have more
14 inputs to come from all of you. And we feel that that
15 is the most efficient and efficacious way to get it
16 done.

17 We have nothing else, unless Judge Karlin
18 does, Judge Rosenthal.

19 JUDGE ROSENTHAL: I would just want to say
20 that I think I speak for my colleagues, as well as
21 myself, I was very impressed with the level of
22 agreement on many of these very difficult issues that
23 was apparent during the course of our conference this
24 morning. I think there is a general recognition that
25 we are all faced with a very difficult task, and

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1 again, we can readily agree is a most unusual
2 proceeding. And I think that that recognition was
3 reflected by the counsel for all of the participants
4 this morning, and I greatly appreciated it, and I
5 think my colleagues did, as well.

6 CHAIRMAN MOORE: Do any of the
7 participants have any other matters to bring before us
8 now? Then my final word is that you will all have
9 access to the transcript, and these dates are clear.
10 You have all be studiously taking notes this morning.
11 I see no need for us to issue a confirmatory order on
12 this, and we do expect those deadlines, though, on the
13 future inputs that we've asked for to be met.

14 Please, if any of them can't for any
15 reason, give us early notice with suggested time by
16 which it can be met. And these are matters that we
17 should always have agreement among all of you.
18 There's no reason not to.

19 That said, we again thank all of you for
20 your participation, and your help in this matter. We
21 stand adjourned. Thank you.

22 (Whereupon, the proceedings in the above-
23 entitled matter went off the record at 1:01 p.m.)
24
25

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