

RAS 14927

# Official Transcript of Proceedings

## NUCLEAR REGULATORY COMMISSION

Title: Crowe Butte Resources, Inc.

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USNRC

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Docket Number: 40-8943-MLA  
ASLBP Number: 07-859-03-MLA-BD01

Location: Chadron, Nebraska

Date: Wednesday, January 16, 2008

Work Order No.: NRC-1973

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TEMPLATE = SEU-032

SEU-02

1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

3 + + + + +

4 ATOMIC SAFETY AND LICENSING BOARD

5 In the Matter of: )

6 CROW BUTTE RESOURCES, INC. ) Docket No. 40-8943-MLA

7 (In-Situ Leach Facility, ) ASLBP 07-859-03-MLA-BD01

8 Crawford, Nebraska) )

9  
10 Wednesday, January 16, 2008

11  
12 Chicoine Atrium

13 Mari Sandoz High Plains

14 Heritage Center

15 Chadron State College

16 1000 Main Street

17 Chadron, Nebraska

18  
19 The above-entitled matter came on for oral  
20 argument, pursuant to notice, at 9:00 a.m.

21 BEFORE:

22 HONORABLE ANN MARSHALL YOUNG, Chair

23 HONORABLE RICHARD F. COLE

24 HONORABLE FREDERICK W. OLIVER

25 Administrative Law Judges

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16 LICENSING BRANCH

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C O N T E N T S

EXHIBITS

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## P R O C E E D I N G S

(9:00 A.M.)

JUDGE YOUNG: Let's go on the record.

Good morning, everyone. My name is Ann Marshall Young. I am the Chair of the Licensing Board. I am going to ask my colleagues to introduce themselves and then I'd like to go through the parties and have each of you introduce yourselves and all the people that you've brought with you.

Judge Cole.

JUDGE COLE: Yes. I'm Richard Cole. I'm the environmental technical member of the Licensing Board Panel.

JUDGE YOUNG: I guess I should have said I'm the lawyer member.

Judge Oliver.

JUDGE OLIVER: Fred Oliver and I'm the technical member of the board.

JUDGE YOUNG: All right, let's start with the Staff at the left and go across this way.

MS. JONES: Andrea Jones for the NRC Staff, Office of General Counsel.

JUDGE YOUNG: I'm going to have to say something at this point. These microphones are for the court reporter. We do not have microphones that

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1 amplify your voices so everyone is going to have to  
2 speak up. Either that or we have one microphone that  
3 you're going to have to pass around; I think that  
4 would be a little bit too cumbersome. So could you  
5 say that a little bit more loudly?

6 MS. JONES: Yes, I can. I don't know if  
7 it's on.

8 JUDGE YOUNG: That won't work for people  
9 out here.

10 MS. JONES: Okay.

11 JUDGE YOUNG: That will just help the  
12 court reporter.

13 MS. JONES: It doesn't amplify, okay.

14 Andrea Jones for the NRC Staff, Office of  
15 General Counsel.

16 MS. SIMON: Marcia Simon for the NRC  
17 Staff, Office of the General Counsel.

18 MS. MARCO: Catherine Marco, NRC Staff,  
19 Office of General Counsel.

20 JUDGE YOUNG: All right.

21 MR. SMITH: I'm Tyson Smith and I'm with  
22 Crow Butte Resources and have with me Mark McGuire.

23 JUDGE COLE: I'm sorry, the second?

24 MR. SMITH: Mark McGuire.

25 JUDGE COLE: Mark McGuire.

1 MR. SMITH: He's also an attorney for Crow  
2 Butte Resources.

3 MR. ELLISON: Bruce Ellison, I'm an  
4 attorney for Debra White Plume who is to my right, and  
5 Owe Aku.

6 JUDGE YOUNG: And?

7 MR. ELLISON: Owe Aku.

8 MR. FRANKEL: My name is David Frankel.  
9 And I have with me Tom Cook. And I also have with me  
10 Joe American Horse.

11 JUDGE YOUNG: And I don't know, did the  
12 Staff, did you want to introduce the project manager  
13 and your other people from NRC?

14 MS. JONES: Yes.

15 MR. von TILL: Bill von Till. I am the  
16 Chief of the Uranian Recovery Licensing Branch.

17 MR. COHEN: Steve Cohen, Uranium Recovery  
18 Licensing Branch. I'm the project manager for Crow  
19 Butte.

20 JUDGE YOUNG: Thank you. Anyone else?

21 (No response.)

22 JUDGE YOUNG: All right. Just to set a  
23 few ground rules. We talked about consolidation of  
24 arguments in the telephone conference that we had.  
25 Has that been worked out? Do you have that worked out

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1 between you or do we need to talk about that any  
2 further?

3 MR. FRANKEL: We're worked out.

4 JUDGE YOUNG: Okay.

5 MS. JONES: I think we're fine on that.

6 JUDGE YOUNG: Excellent. Very good.

7 One other thing that I think it might be  
8 helpful to touch on, and that is we received the  
9 corrected reference petition. Are the parties in  
10 agreement that the corrected reference petition is the  
11 one that we will be referring to? I have already  
12 marked up the original reference petition and it  
13 doesn't look as though page numbers or anything else  
14 have significantly changed; right?

15 MR. FRANKEL: The typo that was showed,  
16 Judge, in the March copy there was only some small  
17 deletion.

18 JUDGE YOUNG: Right.

19 MR. FRANKEL: I believe the page numbers  
20 are, if not identical, very, very close.

21 JUDGE YOUNG: Okay, so there are no issues  
22 on that?

23 MR. FRANKEL: We don't have any, Your  
24 Honor.

25 JUDGE YOUNG: All right. We'll start with

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1 argument on standing then move to the contentions one  
2 by one. And then at the end we will hear brief  
3 argument on the request to hold the Subpart G hearing.

4 MR. FRANKEL: Your Honor.

5 JUDGE YOUNG: Yes?

6 MR. FRANKEL: May I make a motion to  
7 consider the mixing of the aquifers issue first? The  
8 reason being that if there is a substantial basis to  
9 believe or if the Petitioners arguments are viewed  
10 favorably on that issue it would inform the standing  
11 issue because distance is an issue and if the water is  
12 shown to be traveling out toward Pine Ridge or that  
13 there is a possibility of that some determination of  
14 that prior to arguing standing would seem to save  
15 judicial resources.

16 I broached that with counsel for the  
17 company and counsel for the NRC and they were not  
18 amenable to stipulation so I'm making it as a motion.

19 JUDGE YOUNG: You're asking that we would  
20 make a ruling on that today?

21 MR. FRANKEL: Just that you would allow us  
22 to argue that issue first so that we might -- so that  
23 if viewed in the light most favorable to Petitioners  
24 then after hearing our arguments on that it might be  
25 possible for the panel to decide on that issue for

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1 purposes of analyzing standing and contentions.  
2 Because technically if there is a mixing of the  
3 aquifers then it is much more likely that the Court  
4 might find standing for Slim Buttes Ag. Dev. Corp. or  
5 for Owe Aku or for Ms. White Plume given that 40, 50  
6 mile distance. The proximity to the drinking of the  
7 water and proximity to the mining would be shown we  
8 think if we made a persuasive argument that there was  
9 in fact a mixing of the aquifers.

10 JUDGE YOUNG: Let me just give you a  
11 couple thoughts and then maybe other board members  
12 will have some thoughts as well.

13 In making rulings on standing and  
14 contentions we don't really get into the merits for  
15 purposes of making rulings on the merits. And  
16 sometimes that is sort of a slippery line because we  
17 will be talking about issues that are related to the  
18 merits in discussing standing and contentions but not  
19 for the purpose of making ruling based on that, rather  
20 for the purpose of seeing in the case of standing  
21 whether there is any potential for injury, for  
22 example, and in the case of contentions whether there  
23 is a genuine dispute on a material issue of law or  
24 fact.

25 I think it's reasonable for you to touch

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1 on those issues obviously in making your arguments on  
2 standing as well as on the contentions that have to do  
3 with that. But I don't know that it would save any  
4 judicial resources in any event to hear that argument  
5 first. I mean we've read your pleadings and I'm not  
6 persuaded that it would be a useful expenditure of  
7 time to talk about that first. And then we'll be  
8 bringing it back up in the standing and contentions in  
9 any event.

10 MR. ELLISON: So it can be part of our  
11 argument?

12 JUDGE YOUNG: Right; it can be part of  
13 your argument. I guess my sense is that I would  
14 counsel you not to go to a great extent into the  
15 argument. And if it seems as though you are being  
16 repetitive or spending a lot of time on something when  
17 I think everyone would agree that the issue is the  
18 potential I may, we may take a time out and see where  
19 we're going with it. But I think within the time  
20 frames allowed, and you can divide it up I think I  
21 indicated however you'd like, we would expect you to  
22 touch on those arguments since you've raised them.

23 Any other thoughts on that?

24 JUDGE COLE: Yes. I agree, it's very  
25 difficult to stay away from the merits on standing

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1 issues and on the contentions issue. Certainly  
2 Contention 1 is going to be the longest contention  
3 that we will be discussing. And certainly merits has  
4 got to be a factor in determining both of those issues  
5 of standing and contention. So I guess we should go  
6 ahead with the procedure that Judge Young described  
7 and put as much as you want in each of those  
8 categories without unnecessary repetition. But we  
9 understand the argument.

10 MR. FRANKEL: Thank you.

11 JUDGE YOUNG: What I think we will be  
12 looking at is, is there an issue?

13 Either of you have anything to add on  
14 that?

15 JUDGE OLIVER: I think that is the first  
16 issue anyway.

17 JUDGE YOUNG: Right.

18 JUDGE OLIVER: In the list.

19 JUDGE YOUNG: So we're going to go into  
20 standing first.

21 JUDGE OLIVER: Yes. But I'm saying it's  
22 not going to be too far back in general.

23 JUDGE YOUNG: It won't be, right, it will  
24 be the very next thing.

25 MR. FRANKEL: Thank you.

1 MS. JONES: Judge Young.

2 JUDGE YOUNG: Yes?

3 MS. JONES: We were having a little  
4 difficulty on this end hearing the conversation --

5 JUDGE YOUNG: Yes.

6 MS. JONES: -- on that side of the room.

7 JUDGE YOUNG: You know, if we want to take  
8 a break we could move those two tables back a little  
9 bit and slant these two tables in a little bit so  
10 everyone can see each other. That might help?

11 MS. JONES: Yes.

12 MS. SIMON: Yes.

13 JUDGE YOUNG: Let's take a five-minute  
14 break to do that.

15 (Brief recess.)

16 JUDGE YOUNG: All right, is everyone  
17 situated? Who wants to go first on standing?

18 MR. FRANKEL: I will, Judge.

19 JUDGE YOUNG: All right. And you don't  
20 have to stand. You may if you'd like but you don't  
21 have to.

22 MR. FRANKEL: Thank you. I thank  
23 everyone, everything that brings us here.

24 Judge, we want to enter into evidence and  
25 offer this Exhibit A, Petitioners' Exhibit A.

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1 (The document referred to was  
2 marked for identification as  
3 Petitioners' Exhibit A.)

4 We do this after looking at the Appendix  
5 in the Entergy/Pilgrim case which says that part of  
6 our job here in complying with these regulations is to  
7 bring forward some form of document or expert opinion  
8 to show that we are not making bald allegations. And  
9 I e-mailed this to counsel for the Applicant and  
10 counsel for the NRC Staff last night and let them know  
11 that I would be introducing this. I have enough  
12 copies.

13 So may I approach to give this to you all  
14 or should I bring it to the law clerk? I'm not sure.

15 JUDGE YOUNG: You can just bring it to us.  
16 You've discussed these?

17 MS. JONES: We would like our objection  
18 noted just for the record because we have not had an  
19 opportunity to examine those documents so we are  
20 really not prepared to respond to them.

21 MR. FRANKEL: You received them last night  
22 though by e-mail.

23 MS. JONES: At 12:30. And I don't have  
24 access to my e-mail since we've been here since early  
25 yesterday morning.

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1 MR. SMITH: And I did not see them until  
2 this morning on my e-mail.

3 MR. FRANKEL: Judge, we just received it  
4 on --

5 JUDGE YOUNG: Why don't you pass these  
6 around.

7 MR. FRANKEL: Sure, Your Honor.

8 JUDGE YOUNG: And let everyone look at  
9 them and.

10 MR. FRANKEL: This is the report that we  
11 referenced in Bruce McIntosh's affidavit. We had such  
12 a limited amount of time to collect any form of  
13 documentary evidence. And so this is a professor at  
14 Chadron State College who has made a career studying  
15 this area specifically and these issues specifically.  
16 And I will let everyone take a moment to glance at the  
17 four points and references that Dr. LaGarry states.

18 JUDGE YOUNG: You're offering this on  
19 standing only?

20 MR. FRANKEL: We're offering this, Your  
21 Honor, on standing and on contentions. To us when  
22 viewed most favorably to us this in our view carries  
23 the burden that we are here to carry that shows a  
24 mixing of the aquifers and it shows that it does  
25 effect through the porous sandstone the Ogallala and

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1 Applicant groups. And that brings Debra White Plume  
2 and Owe Aku and Slim Buttes Ag. Dev. directly in the  
3 course of the flow of that water.

4 MR. SMITH: This is Tyson Smith for Crow  
5 Butte. And I think we object to the introduction of  
6 this evidence. We haven't had a chance to look at it  
7 or review it. Petitioners have an ironclad obligation  
8 to review publicly available information before they  
9 submit their contentions. They've already been given  
10 an additional opportunity to respond to standing. And  
11 we've objected to portions of those as well. And I  
12 think we would renew that objection here that this is  
13 too late for us to have an opportunity to review.  
14 And, you know, it's not clear to us even how this  
15 affects their standing argument. There is no  
16 discussion here other than various statements  
17 referring to studies. We don't know how that has any  
18 relevance to the application at issue.

19 MS. JONES: Our position is the same,  
20 Judge. We would like to renew our objection.

21 JUDGE YOUNG: I guess I am going to have  
22 to really, I almost say that to you, --

23 MS. JONES: Yes.

24 JUDGE YOUNG: -- to speak up a little.

25 MS. JONES: Okay. Our position is the

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1 same. And again, we have not had an opportunity to  
2 examine whether or not this is relevant to contention  
3 admissibility or to their standing. And so we would  
4 like to reiterate our position that we think that it's  
5 too late at this juncture to attempt to introduce this  
6 information into the record.

7 MR. FRANKEL: Well, Your Honor, this is  
8 not hidden information. I don't understand why the  
9 most powerful uranium company in the world couldn't  
10 find it and put it in their environmental report.  
11 It's all published and it's all more current than most  
12 of the information that's in the Applicant's  
13 environmental report. So I think it's highly  
14 relevant, goes to standing and all our contentions.  
15 And we do hope that you will accept it.

16 JUDGE OLIVER: In the first paragraph it  
17 says that it's unpublished. He's referring to  
18 published articles but in the first paragraph it says  
19 that it's unpublished.

20 MR. FRANKEL: He's referring to another  
21 paper. And they didn't want to bring forward  
22 unpublished information so they simply summarized  
23 published available literature.

24 JUDGE YOUNG: I think we will take your  
25 submission under advisement and the objections under

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1. advisement.

2. I would note that we might make different  
3. rulings on standing and contentions with regard to the  
4. use of this. But in any event I think the appropriate  
5. thing, assuming my colleagues agree with me, is to  
6. take the issue under advisement at this point.

7. MR. FRANKEL: Very well, Judge, I will  
8. continue.

9. On water usage I will take water usage.  
10. Mr. Ellison will discuss the second part of our  
11. contention on water when that comes.

12. JUDGE YOUNG: Wait a minute. We're doing  
13. standing at this point.

14. MR. FRANKEL: Yes, Your Honor.

15. JUDGE YOUNG: So what I would really like  
16. you to focus on is the criteria for showing standing  
17. which will get you into the affidavits that you  
18. submitted. And by the way, I don't think we ever  
19. received any additional affidavits, if we did it was  
20. after we left, from Debra White Plume. You had asked  
21. for an extension to file additional affidavits. Were  
22. the additional ones ever filed yet?

23. MR. ELLISON: Yes, ma'am. My  
24. understanding from my paralegal was that they were  
25. sent electronically and, as appropriate, by mail.

1 JUDGE YOUNG: Okay. We may have missed  
2 those.

3 Maybe do you have copies of those? Would  
4 it be possible to -- do you all have copies?

5 MS. JONES: Yes.

6 JUDGE YOUNG: You did receive them, okay.  
7 I apologize, maybe we just missed them. But if you  
8 have copies.

9 MR. ELLISON: I don't have copies, I just  
10 have a copy, Your Honor. And we'd be happy to have  
11 them copied.

12 JUDGE YOUNG: I don't know whether we have  
13 the -- My big issue is if you're going to be going  
14 into that it might be good to see if we could copy  
15 those before we go on with the argument on standing.

16 MR. FRANKEL: Should I just continue,  
17 Judge, or would you like to wait on that?

18 JUDGE YOUNG: Well, hold on. Let's see.  
19 Let's see if we can copy these. Because really in the  
20 standing argument the primary thing that we're going  
21 to be looking at is whether you have shown standing  
22 according to the criteria that is in the case law.  
23 And so to the extent that you are going to be  
24 referring to those affidavits it would be good to be  
25 able to look at them.

1 MR. ELLISON: Should be three.

2 JUDGE YOUNG: Thank you.

3 JUDGE COLE: Is that the affidavit  
4 concerning David Allen House, Sandy Sauser, Lester  
5 "Bo" J. Davis?

6 MR. ELLISON: Yes, sir.

7 JUDGE COLE: Okay. Then we did receive  
8 them.

9 JUDGE YOUNG: I apologize. Well, anyway  
10 we'll get copies.

11 Go ahead.

12 MR. FRANKEL: Concerning standing, we take  
13 most of our support from the Hydro Resources case, HRI  
14 One and HRI Two. In that case I know you are all  
15 aware petitioners who demonstrate that they rely on  
16 water supplies that are adjacent to the mining  
17 project, the ISL mining project have a right to a  
18 hearing. Here we have Petitioner Tom Cook and Slim  
19 Buttes Ag. Dev., Western Nebraska Resources Council,  
20 Debra White Plume and Owe Aku.

21 We have Tom Cook to start. This  
22 Petitioner can see Crow Butte from his backyard. He  
23 owns 5.25 acres. The information that we have  
24 indicates that the water does travel and in the light  
25 viewed most favorable to us Petitioner drinks water

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1 from a well that may have water in it that mixes with  
2 the Basal Chadron. And at this point in this  
3 proceeding we are not obligated to provide proof of  
4 that. What we are saying is that that is sufficient  
5 to show injury in fact. As an addition, the exposure  
6 to radon living in close proximity to this mine also  
7 provides Mr. Cook with injury-in-fact standing.

8 And further, we have provided evidence in  
9 the form of literature, economic literature that shows  
10 that there is a proven decline in property values  
11 directly associated with a depletion of this aquifer,  
12 the High Plains Aquifer. And so that goes directly to  
13 our contentions concerning the water usage and the  
14 additional water usage that would be allowed if the  
15 amendment is granted.

16 So we have shown support for the adverse  
17 impact on property values, we have shown support for  
18 the fact that he relies on the water. We have shown  
19 support for the fact that there is a potential for  
20 negative impact on the quality of his water which  
21 could be determined when we get access to the hearing  
22 file.

23 For all these reasons we believe that it  
24 is clear that Mr. Cook has standing in this matter.  
25 And I could entertain questions on that.

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1 JUDGE COLE: Mr. Frankel, you stated that  
2 Mr. Cook can see the property from his property?

3 MR. FRANKEL: Yes, sir.

4 JUDGE COLE: How far is he from the  
5 property?

6 MR. FRANKEL: Eighteen to 20 miles.

7 JUDGE COLE: Eighteen to 20 miles.

8 MR. FRANKEL: I believe downgrade, 160  
9 feet downgrade.

10 JUDGE COLE: And he gets his water from a  
11 well but not from a public water supply system?

12 MR. FRANKEL: Yes, sir.

13 With the Court's permission I will reserve  
14 some of my time on Mr. Cook and move down to the other  
15 Petitioners.

16 Slim Buttes -- well no, let's go to Debra  
17 White Plume and Owe Aku. Again downwind, exposures to  
18 radon and use of the water well. We understand the  
19 company and the Staff's position and that there are  
20 some fine points factually and legally associated with  
21 how close is close enough to grant standing. In our  
22 view that determination must be made through the lens  
23 of an understanding of what happens with this water in  
24 these aquifers. If you accept our position that there  
25 is some mixing then water that flows from the mining

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1 area or excursion from the mining area could and does  
2 travel to and towards Debra White Plume's well and Owe  
3 Aku.

4 And we have some members of Owe Aku when  
5 we talk about representational and organizational  
6 standing who are much closer than Debra White Plume.  
7 We feel that the mixing combined with the reliance on  
8 the water again shows standing under HRI precedent.

9 JUDGE COLE: So are you prepared to put in  
10 any evidence to demonstrate that?

11 MR. FRANKEL: To demonstrate the movement  
12 of the water and the mixing of the aquifers?

13 JUDGE COLE: And the mixing, yes.

14 MR. FRANKEL: Yes, sir. We have studies  
15 that we haven't had an opportunity to copy yet but  
16 could be copied. Overnight they were just too  
17 voluminous to get to right for this hearing.

18 We've received most of this information at  
19 the very last minute after asking our clients to  
20 scramble. As you know, the Board has put us on a  
21 fairly fast time frame and we've been working to keep  
22 up with that time frame so as not to cause any delay  
23 to the process. But we would be prepared to put in  
24 evidence.

25 JUDGE COLE: Through an expert witness?

1 MR. FRANKEL: Through expert witness and  
2 studies related to that field of expertise.

3 JUDGE COLE: Got you. Thank you.

4 MR. FRANKEL: As to I'm going to handle  
5 Owe Aku later in terms of its organizational and  
6 representational standing. I'd like to move on to  
7 Slim Buttes Ag. Dev. Petitioner here is represented  
8 by myself and its president Mr. Joe American Horse  
9 sitting to my left. This organization has existed  
10 under tribal law. So to the extent that the NRC Staff  
11 made certain criticisms concerning the nature of  
12 membership, with due respect this is an entity that is  
13 a very loosely organized entity, it decides who its  
14 members are and it can provide factual bases for the  
15 kind of activities that are in the nature of a right  
16 of membership or a participation of membership as non-  
17 profits go.

18 I know it's outside the scope of this  
19 hearing to talk about corporate entities and  
20 membership, but if that becomes a question for the  
21 panel I would be happy to go into it further. But the  
22 point --

23 JUDGE YOUNG: Were you just responding to  
24 the concerns that I think the Staff raised about the  
25 dates of membership?

1 MR. FRANKEL: Yes, ma'am. There was --  
2 although our affidavits expressly state that the  
3 individuals authorizing the group to file the petition  
4 on his or her behalf there were several circumstances  
5 where the Staff objected to the form or content of the  
6 affidavit, suggesting that perhaps the individuals  
7 were not full members or were not expressly members.  
8 And I wanted to say that we are prepared to reply with  
9 more facts if that would serve the Court.

10 JUDGE YOUNG: Can you just summarize what  
11 the situation is with regard to the affidavits that  
12 were questioned?

13 MR. FRANKEL: Sure. In the affidavit of  
14 Jan Meese which goes to WNRC we have a statement that  
15 that person has authorized WNRC to file this on their  
16 behalf. I happen to know that Ms. Meese is a longtime  
17 member of WNRC and is -- I'm sure can provide  
18 additional facts, if desired, as to her historical  
19 relationship with WNRC, whether she has attended  
20 meetings, what kind of meetings, whether she has  
21 attended public actions and what.

22 The same goes for Ms. Beth Ranger who was  
23 also noted in the NRC's --

24 JUDGE YOUNG: Let me just interrupt you  
25 for a second.

1 MR. FRANKEL: Yes, Judge.

2 JUDGE YOUNG: Let me as the Staff and  
3 Applicant, if you have specific questions that you'd  
4 like to raise, raise them in your argument and then  
5 you can respond to them in the time you need to.

6 MS. JONES: Okay.

7 MR. FRANKEL: Thank you, Judge.

8 Moving on them to Slim Buttes Ag. Dev.  
9 This organization serves the entire Pine Ridge Indian  
10 Reservation. It is devoted to the development of  
11 small family and community gardens and farm projects.  
12 In 2007 it tractor-tilled and supported 356 family and  
13 community gardens across the reservation which is  
14 4,500 square miles.

15 This organization is in its 21st year of  
16 continuous operation. The whole point of this  
17 organization is to foster self-reliance and help  
18 reduce dependence on commodity foods and on handouts.  
19 The way they do this is by tilling gardens and  
20 providing assistance so that people can garden their  
21 own food when the weather permits.

22 The people irrigate these gardens with  
23 well water. If our position is accepted that there is  
24 a mixing of the aquifers, a mixing of the water  
25 between the aquifers, then that mixing contaminates.

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1 the well water. And the well water is used to water  
2 the gardens, and that subverts the entire  
3 organizational purpose of Slim Buttes Ag. Dev. Corp.  
4 That's why we have organizational standing in addition  
5 to representational standing.

6 JUDGE COLE: And where are these farms and  
7 what is the source of water?

8 MR. FRANKEL: The source of water are  
9 wells at Pine Ridge. Pine Ridge Indian Reservation is  
10 located 20 miles from here. And this particular group  
11 is based at Slim Buttes which is 40 miles from the  
12 site.

13 JUDGE COLE: And what aquifer are they on?

14 MR. FRANKEL: Arikaree.

15 JUDGE COLE: Arikaree. Thank you.

16 JUDGE YOUNG: I have one thing I wanted to  
17 raise with you and that is on the issue of  
18 organizational standing. I did a little bit of  
19 research because there is always the reference to  
20 organizational as opposed to representational  
21 standing. However, I'm not aware of any cases in  
22 which any organization has ever been granted  
23 organizational in the NRC. Now Staff may be able to  
24 point me to some. But I went and looked at the Sierra  
25 Club v. Morton case and that was a case in which the

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1 Supreme Court held that basically cases that had  
2 previously been brought by organizations as  
3 representing the public interest when they could not  
4 show any effect on any member that that would not  
5 constitute standing.

6 So I guess I'd like for all parties to  
7 focus your arguments insofar as they are based on  
8 organizational standing to -- I mean if you don't have  
9 any more argument that's fine but after reading the  
10 Morton case I was sort of left with the sense that  
11 basically you are going to have to show that a member,  
12 at least one member would be affected. So you're  
13 nodding your head, Mr. Ellison. So --

14 MR. ELLISON: Isn't that what the Northern  
15 State Power case talks about?

16 JUDGE YOUNG: Pardon?

17 MR. ELLISON: The Northern State Power  
18 Company case talked about that at least one member  
19 must be affected --

20 JUDGE YOUNG: Right.

21 MR. ELLISON: -- by the licensing action.  
22 And also Georgia Tech touched on that as well.

23 JUDGE YOUNG: So which is essentially the  
24 same thing as representational standing. So --

25 MR. FRANKEL: I don't understand, Judge,

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1 then why would there be two different tests?

2 JUDGE YOUNG: Well right, I mean that's  
3 the point. And I guess the reason I went and did the  
4 research was because I wondered what types of cases  
5 are there in which an organization would be granted  
6 organizational standing? I couldn't find any. And so  
7 I was left with the impression --

8 MR. FRANKEL: What about in the HRI case  
9 was two organizations were granted standing in that  
10 case and --

11 JUDGE YOUNG: As a organization? As  
12 organizational standing or?

13 MR. FRANKEL: I'm going to have to go back  
14 and look at that.

15 JUDGE COLE: I think they had to make  
16 another demonstration that at least one member was  
17 affected.

18 JUDGE YOUNG: You can make whatever  
19 arguments you want to on it. But, frankly, it was  
20 just a matter of interest for me because we always  
21 make reference to organizational standing but when  
22 looking at what does that actually mean it looks as  
23 though you have to show something through an actual  
24 human being. So anyway, go ahead.

25 MR. FRANKEL: I think for our purposes,

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1 Judge, we feel we have organizational and  
2 representational in both cases and so we've been  
3 proceeding on that assumption. And I don't want to  
4 belabor it with argument. If I can find a case during  
5 a break or at some point that makes sense to point out  
6 to you I will.

7 JUDGE YOUNG: Okay.

8 MR. FRANKEL: Otherwise, you know, I would  
9 only say that in many of these cases that come up  
10 there's some national or regional environmental group  
11 that's basically sticking its nose into some community  
12 where it doesn't live. And its organizational  
13 standing is expressed in various ways, I'm sure with  
14 more articulation than I have. But here, especially  
15 in the case of Western Nebraska Resources Council, we  
16 have an organization whose raison d'etre is this  
17 activity, this kind of expression, the focus on  
18 preserving and protecting the natural resources of  
19 this area, including the air from radon contamination,  
20 the water from the mining contamination.

21 So if ever there was an organization that  
22 might be well suited to meet that test, this would be  
23 it is what we would say, Your Honor. But again, no  
24 need to belabor it because, as you said, there is so  
25 little precedent that this Board could decide to do

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1 what it wants.

2 JUDGE YOUNG: Well, we're limited actually  
3 also, so.

4 JUDGE COLE: Don't we wish.

5 MR. FRANKEL: Still, we honor the  
6 discretionary power of the Board.

7 Just to move on and complete Slim Buttes  
8 Ag. Dev., the families that rely on Slim Buttes Ag.  
9 Dev. also drink the water and use the water. So  
10 again, if there is an assumption even for purposes of  
11 standing that there is a mixing based on the limited  
12 amount of information that we proffered, that  
13 assumption would enable us to reach the determination  
14 of standing here.

15 And moving on to the Western Nebraska  
16 Resources Council, again Petitioner lives downwind.  
17 And by extension through its members, particularly Ms.  
18 Meese, Dr. Anders and Ms. Ranger, as members of  
19 Western Nebraska Resources Council who have authorized  
20 it to act on their behalf they drink water from wells  
21 with the exception of Ms. Ranger who it turns out  
22 drinks water from the coffered water supply which  
23 itself is jeopardized potentially by these mining  
24 activities.

25 Petitioners' property values are adversely

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1 affected. All three are property owners: one in  
2 Chadron, two in Crawford. Again, the cite to that  
3 article from Torrell, the market value of water in the  
4 Ogallala Aquifer shows clearly that decline in  
5 property values results from depletion of the aquifer.  
6 And that petitioner was formed in 1983 specifically  
7 the protect the natural resources of Western Nebraska  
8 and has a history of testifying in public hearings  
9 challenging water quality, quantity, degradation,  
10 practices.

11 So moving on to the second, page 8 of 27,  
12 this second category that has to be addressed: What  
13 is the nature and extent of the Petitioner's property,  
14 financial and other, in the proceeding?

15 I guess before I -- I had put forth  
16 deferring some time on Owe Aku. And I feel that our  
17 arguments, unless, Mr. Ellison, you want to add any  
18 arguments on Owe Aku, my feeling is it's pretty much -  
19 - well, it's not for me to say. But do you want to  
20 jump in just briefly on it?

21 MR. ELLISON: If I may, Your Honor?

22 JUDGE YOUNG: Go ahead. And if you'd  
23 rather sit it's fine.

24 MR. ELLISON: Actually I've been sitting  
25 so much.

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1 JUDGE YOUNG: Okay.

2 MR. ELLISON: That if you don't mind. I  
3 don't know if I think better on my feet than sitting  
4 but.

5 In trying to address some of the specific  
6 concerns that you had as to the interrelationship of  
7 the representatives of Owe Aku we have submitted both  
8 from Ms. White Plume who, by the way, her family are  
9 farmer ranchers. They depend very much upon the water  
10 and the quality of the water. And as with some of the  
11 Petitioners that Mr. Frankel talked about, we have a  
12 study which shows that all of the wells on Pine Ridge,  
13 at least amongst our potential clients with Owe Aku,  
14 use the Arikaree.

15 So the quality of the water is very  
16 important to the farming and ranching operations. And  
17 obviously the value of those operations would be  
18 affected if the water quality depreciates. But in a  
19 general sense, Owe Aku is a 30-year-old organization  
20 that has had as its goals the preservation of the  
21 Lakota way of life. And understand that it is  
22 important to consider that the purity and the quality,  
23 quantity of the air, the water and the soil is so  
24 interrelated in Lakota ways, traditional Lakota ways  
25 of life that it is impossible to separate them out.

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1 We would submit that that alone, especially since the  
2 area of the current operation and the new site are  
3 within the 1868 Treaty boundaries, Lakota members, all  
4 of whom are part of Owe Aku, certainly have a very  
5 important interest.

6 Owe Aku also has as its goals to create  
7 allies, to protect treaty rights, and to protect human  
8 rights.

9 And as for some of the other specific  
10 persons with whom Owe Aku is hoping to represent in  
11 these proceedings, David House lives eight miles from  
12 the site. He gets his water from a well in the Brule  
13 Aquifer, breathes the air. Eight miles isn't very  
14 far. If we think of a wind blowing two miles an hour  
15 it would reach his house in four hours.

16 Mr. Lester Davis who lives across the  
17 South Dakota border on the Pine Ridge Reservation has  
18 lived his entire life within 100 years of the White  
19 River and uses that water for fishing, as a source of  
20 sustenance.

21 Sandy Sauser who lives in Slim Buttes,  
22 just four miles north of the Nebraska line, also uses  
23 water and is within the wind path.

24 And what I would like to do, if I may, is  
25 to expand a little bit on some of the arguments Mr.

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1 Frankel touched on because as I understand the  
2 standing question, and as I think the Board knows,  
3 this is a case of first impression for me, we have  
4 information that Crow Butte acknowledges, for example,  
5 that the water-bearing zone within the Brule is likely  
6 dissected and in communication with the White River.  
7 One of the things that --

8 JUDGE YOUNG: I'm sorry, could you repeat  
9 that?

10 MR. ELLISON: Sure.

11 JUDGE YOUNG: I missed a couple of words.

12 MR. ELLISON: Sure. Actually, let me back  
13 up just a little bit for a minute.

14 We have another document which we want to  
15 present to this Board. It is a document from the  
16 State of Nebraska from the Department of Environmental  
17 Quality which was sent to Mr. Stephen Collings who is  
18 the President of Crow Butte Resources on or about  
19 November 8 of 2007. So we know that Crow Butte  
20 Resources at least cannot argue that they are unaware  
21 of this document.

22 This document is providing a technical  
23 review of the aquifer exemption petition for the North  
24 Trend Expansion. And if I may, Your Honors, introduce  
25 this exhibit it is very important for our

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1 authoritative basis for many of our arguments on  
2 standing as well as the contentions because this  
3 document basically says that the data relied upon by  
4 the NRC Staff in the creation of the environmental  
5 report is based upon old data, insufficient data, and  
6 incorrect data so as to basically, according to the  
7 Nebraska Department of Environmental Quality, say that  
8 it's completely unacceptable.

9 JUDGE YOUNG: Which environmental report  
10 are you referring to?

11 MR. FRANKEL: I think he referred to the  
12 company's environmental report.

13 MR. ELLISON: Oh, I'm sorry. The company.

14 JUDGE YOUNG: You were talking about the  
15 company's, okay.

16 MR. ELLISON: Yes. My apologies.

17 May we hand out a copy of what we would  
18 like to have marked as Exhibit B?

19 JUDGE YOUNG: Give it to all the counsel  
20 first.

21 (The document referred to was  
22 marked for identification as  
23 Petitioners' Exhibit B.)

24 MR. SMITH: We would object again to its  
25 being introduced because again we haven't had a chance

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1 to review this. It wasn't submitted with their  
2 petition or their earlier standing declarations.

3 MR. ELLISON: One of the things I would  
4 like to at least put on the record in response to that  
5 contention, yes this is very new. Quite literally we  
6 received it yesterday. We are representing, Mr.  
7 Frankel and I, are representing individuals and  
8 organizations that have no resources. In the short  
9 time allowed for us to gather what we can we put out  
10 requests. And strangely enough, this came from a  
11 research organization of the southwest. But be that  
12 as it may, this is a letter and it is a 19-page letter  
13 going in detail to CBR's request for an exemption that  
14 was mailed to CBR. So I don't know how they can claim  
15 that they don't have notice of this document.

16 But since we have a burden of showing that  
17 there is a chain of causation which is plausible we  
18 would like to submit this document as part of our  
19 argument on that basis because since one of the  
20 standing requirements is that we show a potential for  
21 harm, and our clients use either the Brule or the  
22 Arikaree formations, and that this Board we feel need  
23 to actually -- I mean this document basically says  
24 that all of the data relied upon is just not accurate  
25 and is insufficient and is old. And I'd like to be a

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1 little specific if I may.

2 JUDGE YOUNG: Let me just say a couple  
3 things. We're going to take all the objections under  
4 advisement today. However, on standing at least, on  
5 the issue of curing defects in standing there is a  
6 case Virginia Electric and Power Company in which the  
7 former NRC Appeal Board found that a petition that was  
8 not submitted under oath and did not state expressly  
9 the manner in which the petitioners' interests would  
10 be affected by the proceeding was a defect that may be  
11 readily curable.

12 Now with that said and without making a  
13 formal ruling on it I think in any instance like this  
14 where something comes up at the last minute at the  
15 very least, and this is, you know, not making a final  
16 ruling, but at the very least it would be appropriate  
17 to give the other parties an opportunity and time  
18 after the oral argument to respond to it.

19 So I just wanted to say that at this point  
20 so that it gives us sort of a basic understanding of  
21 at least this case law which does say that on standing  
22 issues defects, including the manner in which a  
23 petitioner's interest would be affected, is something  
24 that can be cured later after the filing of the  
25 original petition.

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1 MR. ELLISON: Thank you. And we certainly  
2 have no objection.

3 JUDGE YOUNG: Did you want to say anything  
4 at this point?

5 MS. JONES: Yes, Judge. And I wanted to  
6 just reiterate another objection just to note it for  
7 the record that, again, this is a document that we  
8 haven't, we did not have an opportunity to examine.

9 JUDGE YOUNG: Right.

10 MS. JONES: And so I just wanted to have  
11 that noted, that's all.

12 JUDGE YOUNG: Right.

13 MS. JONES: Okay.

14 JUDGE YOUNG: Right. And as a matter of  
15 fact, given that, I mean it might even be appropriate  
16 to take a break to at least give people time to read  
17 it. Would you like that? Would that be helpful?

18 MS. JONES: I think that we could --

19 JUDGE YOUNG: This would not foreclose  
20 your being able to respond later also.

21 MS. JONES: Okay.

22 JUDGE YOUNG: But would it be helpful at  
23 least for everyone to take ten minutes to read the  
24 document?

25 MS. JONES: Yes.

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1 JUDGE YOUNG: Okay. Because since we are  
2 here we will hear arguments on it. If we need to hear  
3 and receive further written argument or even set up a  
4 telephone conference we can do that. But since we are  
5 here let's go ahead and take the time to read it.

6 JUDGE COLE: When did you receive this,  
7 Mr. Ellison?

8 MR. ELLISON: I received this by e-mail  
9 yesterday. And we thought it was so directly relevant  
10 to these proceedings and the issues herein that we  
11 felt it incumbent to bring it to the Board's  
12 attention. And we appreciate the discretion that the  
13 Board has.

14 I would state, however, that we feel that  
15 this is proof in support of our Contention A. And so  
16 really it's simply some additional, if we were to get  
17 a subpart G hearing and we're not there yet I realize  
18 because of argument, but certainly on the position of  
19 standing this document basically points to studies  
20 that have been done. This document does say there's  
21 so much that still needs to be done but at least what  
22 has been done shows the intermixing we talked to you  
23 about. I'd like to address that with particularity  
24 when we come back.

25 JUDGE COLE: This is a review of a

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1 document that the Applicant or Licensee submitted to  
2 the state for their review?

3 MR. FRANKEL: It was rejected and  
4 determined unacceptable.

5 MR. ELLISON: Yes.

6 MR. FRANKEL: For lack of including recent  
7 research.

8 MR. SMITH: I'm going to object to the  
9 characterization that this is rejecting their  
10 application. This is part of the regulatory process.  
11 What this is is the equivalent of a request for  
12 additional information, comments. It's part of the  
13 back and forth between the Applicant and the state to  
14 ensure that there is a reasonable basis for making a  
15 decision.

16 JUDGE COLE: This is what the NRC Staff  
17 does to an applicant or licensee, sends them an RAI,  
18 a request for additional information.

19 MR. ELLISON: Sure. But within there  
20 there is a lot of information which we feel is  
21 relevant to this hearing.

22 JUDGE YOUNG: Let me just say another  
23 thing. And I was thinking of standing before. On  
24 contentions there are different rules on what can be  
25 submitted. However, based on Judge Cole's question

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1 about when you received it there are also provisions  
2 in the NRC rules about contentions as to when you file  
3 an amended contention or a new contention based on new  
4 information. So when we get to the contention  
5 arguments, to the extent you want to rely on any of  
6 this stuff probably what we would be looking at would  
7 be those provisions in the rules relating to late-  
8 filed or newly-filed contention or amendments to  
9 contentions. And you would have to show that you met  
10 the criteria for bringing something up at a late time.

11 And again, also since we're here let's  
12 take the time to have everyone read it now in terms of  
13 characterizations and we'll hear all parties'  
14 arguments on that. But we'll also try to be careful  
15 in terms of how we characterize it. And we'll take  
16 all your arguments under advisement when we go back to  
17 D.C.

18 JUDGE COLE: It might not be fair to ask  
19 some of the other parties to comment on this because  
20 they might not have their technical people with them.  
21 So they're certainly at a disadvantage in evaluating  
22 it and commenting on it.

23 MR. ELLISON: Yes. And we would  
24 understand what disadvantage there would be. However,  
25 we also feel that the document does speak for itself

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1 at least in terms of references to existing studies  
2 and what is so far deficient. And some would go to  
3 standing, some would go to our contentions. But the  
4 document we feel does speak for itself. And certainly  
5 any time that CBR or the Staff needs to respond in  
6 addition we understand that.

7 We apologize, we wish we had this a couple  
8 of weeks ago because our review was fairly quick.

9 JUDGE YOUNG: Right.

10 MR. FRANKEL: And especially in light of  
11 our understanding of HRI where the lack of enough  
12 information was relevant to a finding of standing.

13 JUDGE YOUNG: Well again, we'll take a  
14 break, you can read it. And then this certainly does  
15 not foreclose the Applicant or the Staff from filing  
16 further argument or, as I said, it's possible that we  
17 could also set up a telephone conference for further  
18 oral argument in addition to written argument if to  
19 the extent that that's necessary.

20 So how much time would you like, 15  
21 minutes, 20 minutes?

22 MS. JONES: Fifteen.

23 MR. SMITH: I think the shorter time the  
24 better. I don't think there's really a whole lot  
25 we're going to be gaining from review of this on such

1 short notice.

2 JUDGE YOUNG: Okay, let's take 15 minutes  
3 at least to read it.

4 (Brief recess.)

5 JUDGE YOUNG: Okay, go ahead, Mr. Ellison.

6 MR. ELLISON: Thank you. One of the  
7 things that comes from both the Exhibit A from Dr.  
8 LaGarry, who is here, and the August 8 of '07 letter  
9 to CBR from the Nebraska Department of Environmental  
10 Quality is that the Basal Chadron which CBR is  
11 currently mining and which it proposes at the new site  
12 to mine is part of the Chamberlin Pass formation. And  
13 particularly it is a channel sandstone basis of the  
14 Chamberlin Pass formation according to these  
15 documents.

16 According to these documents as well as a  
17 publication called the "Cenozoic Paleogeography of  
18 Western Nebraska" by James Winter, Vernon Souders,  
19 Harold DeGraw and Robert Diffendal, the High Plains  
20 Aquifer is highly fractured and faulted. And the  
21 faulted zones contain groundwater which is considered  
22 an area of critical concern by the Upper Niobrara  
23 White Natural Resources District. Many of the fault  
24 zones connect the High Plains Aquifer and the uranium-  
25 bearing sandstones of the Chamberlin Pass Formation.

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1                   And I think that we would ask the Board to  
2                   consider in terms of our request for standing as to  
3                   the potential impact of something that happens here  
4                   with the Pine Ridge Reservation is that when there was  
5                   in 1997 there was a well casing failure here it  
6                   resulted in the closure of up to 98 wells on the Pine  
7                   Ridge Indian Reservation. And this has caused two  
8                   years ago the Oglala Sioux Tribe to pass a resolution  
9                   regarding uranium mining and its interest in anything  
10                  that could affect the water. And I'd like --

11                  JUDGE YOUNG: Would you mind repeating  
12                  that and the date?

13                  MR. ELLISON: Yes, ma'am. According to my  
14                  information, in 1997 there was a well casing failure  
15                  here. I believe this was a well that had been capped.  
16                  But our concern is not only with the operation of CBR  
17                  under its full performance according to the laws, our  
18                  concerns are what happens if there is an accident?  
19                  What happens if something breaks down? What happens  
20                  if the pumps fail? What happens if there is a spill  
21                  on the surface.

22                  And when such a substantial number of  
23                  wells get closed when something happens here,  
24                  obviously there is a connection we feel. And so --

25                  JUDGE COLE: Was there a cause and effect

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1 demonstration made there with that well casing  
2 failure?

3 MR. ELLISON: It's my understanding that  
4 there was. But and certainly the Oglala Sioux Tribe  
5 believes that. And if we would have further hearings  
6 we would try and secure expert testimony on that.

7 JUDGE COLE: And the problems at Pine  
8 Ridge were they associated with radiological  
9 contamination or was it --

10 MR. ELLISON: Yes.

11 JUDGE COLE: -- or was it more with the  
12 arsenic contamination?

13 MR. ELLISON: I think it was both. And I  
14 will address some of that as well.

15 JUDGE COLE: All right.

16 MR. ELLISON: One of the things that Dr.  
17 LaGarry refers to in Exhibit A is that surface spills  
18 south of the Pine Ridge Indian Reservation are  
19 transmitting according to existing studies through  
20 porous sandstone from the Ogallala and the Arikaree  
21 groups directly into the High Plains Aquifer. Surface  
22 spills we would submit since the White River is just  
23 about a half mile from the site, again you know we  
24 have Mr. Davis who is a life-long resident along the -  
25 - I'm sorry, the Yellow River. We're concerned about

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1 anything that would if there are surface spills, and  
2 we're aware that there has been one major one already,  
3 of how this could contaminate the surface water as  
4 well.

5 So we feel that there is standing, there  
6 is documentation in this both from Dr. LaGarry and  
7 also from the Technical Review of the Aquifer  
8 Exemption Petition of the North Trend Expansion by the  
9 Department of Environmental Quality, Nebraska, that  
10 there is this intermixing of aquifers. There are a  
11 lot of studies that are cited that show this. We feel  
12 that this raises us a plausible connection between the  
13 drinking supplies of our clients and Owe Aku even if  
14 they are outside of the immediate area.

15 Our clients are concerned not only for  
16 contamination that might occur tomorrow, and obviously  
17 if there was an underground contamination, an aquifer  
18 contamination it might take years for it to impact the  
19 Pine Ridge Reservation. But my clients believe that  
20 in anything that is done which could affect the air,  
21 the land or the water you can't just look at today,  
22 you have to look at what will be the impact in  
23 generations in the future. And we're concerned if CBR  
24 complies with everything to shut off the pumps and  
25 this mass is in the water if it could potentially

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1 affect their quality of life, their way of life that  
2 we believe that we should have the standing to present  
3 further evidence and experts and to raise admissible,  
4 what we feel are admissible contentions.

5 We feel this is part of admissible  
6 Contention A, not to address that specifically yet,  
7 but it is something that we have raised, it's  
8 something we are very concerned about. The Judges  
9 will note that there are quite a few people who have  
10 come down from the Pine Ridge Reservation because  
11 young people and elders, including some of our chiefs,  
12 in fact some of the chiefs are present here today, and  
13 we feel that one of the things that, you know, the  
14 United Nations last year in the Declaration of  
15 Indigenous Rights requires that any federal actions  
16 for anything that can affect the resources that are  
17 within Indian Country there must be consultation with  
18 the traditional indigenous leadership within that  
19 area. And due to the 1868 Treaty the chiefs have not  
20 been consulted and the tribe has not been consulted.

21 So for these reasons we would respectfully  
22 request standing in these proceedings. Thank you.

23 JUDGE YOUNG: All right.

24 MR. FRANKEL: If I could just add one  
25 small thing. Mr. Ellison made mention of this U.N.

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1 declaration. And in our petition we expressly refer  
2 to the need to take appropriate measures to mitigate  
3 adverse environmental, economic, social, cultural or  
4 spiritual impact. And we would suggest that a reading  
5 of the papers themselves cannot, nor can myself  
6 adequately express the social, cultural, spiritual  
7 attributes as they are perceived by the indigenous  
8 people in the room.

9 And we do have honoring us today in our  
10 presence both Chief Joseph American Horse whose  
11 grandfather as a shirt wearer signed the treaties with  
12 the United States, and Chief Oliver Red Cloud whose  
13 also grandfather signed the treaty with the United  
14 States. As you know, Indian tribes are not  
15 constituted the same as non-indigenous governmental  
16 units, something the United States has known for a  
17 long time. Even these regulations, I note section  
18 2.315(a) and (c) allow for a party, person who is not  
19 a party to make a limited appearance and also allow or  
20 actually require the presiding officer to afford an  
21 interested and affected Indian tribe that has not been  
22 admitted reasonable opportunity to participate. And  
23 at this time I would move that both Chief American  
24 Horse and Chief Red Cloud have a brief opportunity to  
25 make a limited appearance for purposes of expressing

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1 a short statement concerning the cultural and  
2 spiritual impacts related to the water and what it  
3 means to have the water geochemically changed.

4 So with the Court's permission both Chief  
5 American Horse and Chief Red Cloud with his colleague  
6 from the Treaty Council Mr. Floyd Looks For Buffalo  
7 Hand are here and would like to make a short  
8 statement.

9 JUDGE YOUNG: Are you requesting to do  
10 that now or do you want to wait until --

11 MR. FRANKEL: At a time convenient for the  
12 Board, Your Honor.

13 JUDGE YOUNG: Why don't we finish the  
14 argument on standing first.

15 MR. FRANKEL: Thank you, Your Honor. And  
16 obviously understanding that the spiritual and  
17 cultural impact from the perspective of indigenous  
18 petitioners is an injury-in-fact from our perspective.

19 JUDGE YOUNG: We'll finish the argument on  
20 standing and then we'd like to hear from the chiefs.  
21 Thank you.

22 MR. FRANKEL: Yes, Judge.

23 JUDGE YOUNG: Do you want to go next?

24 MS. JONES: There is one thing I would  
25 like to say regarding the document that we just

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1 received, the November 8, 2007 document from the State  
2 of Nebraska, Department of Environmental Quality. I  
3 just wanted to say that we are going to -- we are not  
4 really comfortable at this point addressing it. I  
5 know he cited it in his arguments for standing. We  
6 are not really comfortable at this point because we  
7 haven't been able to fully assess how this document is  
8 really relevant to our review, application review  
9 process.

10 In looking at it we did take an  
11 opportunity to review it and it appears that it is not  
12 really an application and that it is something of the  
13 equivalent of the request for additional information  
14 process that we go through at the NRC.

15 JUDGE COLE: Most of the people can't hear  
16 you.

17 MS. JONES: Okay. And so the commentary  
18 that it appears that NDEQ was providing in their  
19 document had more to do with the technical aspects of  
20 the application that CBR submitted to them for an  
21 aquifer exemption which is a whole nother, slightly  
22 different maybe a whole nother, you know, process and  
23 it's an entirely different consideration that's a  
24 little different from what we're doing here.

25 So I would just say that, you know, at

1 this point in addressing standing and responding to  
2 standing we're not really fully comfortable on  
3 addressing it at this point.

4 JUDGE YOUNG: We'll set timelines --

5 MS. JONES: Okay.

6 JUDGE YOUNG: -- at the end of argument on  
7 further things that you may want to submit in writing  
8 and the possibility of needing to do further oral  
9 argument.

10 MS. JONES: Okay. Thank you, Judge, I  
11 appreciate that.

12 JUDGE YOUNG: Okay.

13 MS. SIMON: Your Honor, Marcia Simon from  
14 the NRC staff.

15 JUDGE YOUNG: Okay.

16 MS. SIMON: And just so you know, we are  
17 going to start off with our standing arguments and  
18 then the Applicant will follow.

19 JUDGE YOUNG: Okay. And again if everyone  
20 could even try to shout. We may be able to get some  
21 microphones later on but for now we're just going to  
22 have to pretend like we're actors on a stage or  
23 something and project.

24 MS. SIMON: Okay, thank you.

25 With respect to the individual standing of

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1 Debra White Plume and Thomas Cook, the Staff feels  
2 that we have laid out our arguments in fairly  
3 significant detail in our written pleadings. And so  
4 basically we would just like to reiterate that the key  
5 for us is the fairly traceable element of injury-in-  
6 fact. We feel that neither Mr. Cook, who is about 20  
7 miles away, nor Ms. White Plume, who lives about 60  
8 miles away, can establish proximity-based standing  
9 and, therefore, they would have to establish an  
10 injury-in-fact fairly traceable to the amendment at  
11 hand.

12 And in terms of the fairly traceable that  
13 means there has to be a viable potential pathway for  
14 any contamination to reach them at their locations.  
15 And ignoring for now the recent exhibit that was put  
16 forth, given what we knew as of yesterday we feel that  
17 there is not sufficient evidence in the petition or  
18 the replies to indicate that this action is fairly  
19 traceable to the amendment.

20 JUDGE YOUNG: Let me just ask you a  
21 question.

22 MS. SIMON: Sure.

23 JUDGE YOUNG: I think the standard that we  
24 are looking at is plausibility here.

25 MS. SIMON: Right.

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1 JUDGE YOUNG: And how do you deal with the  
2 statements in the application admitting that there is  
3 not complete knowledge on certain issues relating to  
4 potential conductivity or faults and so forth, that  
5 further studies need to be done?

6 MS. SIMON: The statement in the  
7 application I believe regarded the White River fault  
8 which flows along the White River which is southeast  
9 of -- flows from southwest to northeast on the  
10 southeast boundary of the site. And in terms of water  
11 flowing northward or northeast towards Pine Ridge or  
12 towards Chadron it's not clear that any further  
13 information needed regarding that fault would be  
14 necessary in looking at that direction of flow.

15 The other issue is that the mining takes  
16 place in the Chadron Aquifer which the application  
17 states is confined by 100 to 200 feet of essentially  
18 impermeable material. And so not only is there an  
19 issue of horizontal conductivity going 20 or 60 miles  
20 but also vertical conductivity of water getting from  
21 that aquifer up to the upper aquifer.

22 JUDGE OLIVER: In your comment you  
23 mentioned the other individuals who live some  
24 distance. I think there is a Francis Anders who is  
25 one mile away; is that correct? And he was noticing

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1       discoloration in his well.

2                   MS. SIMON: Yes. If it's okay with you,  
3       Your Honor, I would like to address that when I get to  
4       representational standing, which I will in about a  
5       minute.

6                   With regard to organizational standing, as  
7       you mentioned there are -- we could not find any cases  
8       either that granted organizational standard. And the  
9       standard for organizational standing is that the  
10      organization has to show a discrete injury to the  
11      organization itself. In other words, the organization  
12      is treated as a person just as an individual would be.  
13      And given that the organizations are located again  
14      based in Chadron for Western Nebraska Resources  
15      Council and based in Slim Buttes for the Slim Buttes  
16      Agricultural Development Corporation and specific  
17      injury to their interests would occur in those  
18      locations and so we feel, you know, for the same  
19      reasons that as for the individuals that proximity  
20      would not apply and an injury-in-fact would have to be  
21      fairly traceable to the amendment. And we don't see  
22      that.

23                   JUDGE YOUNG: Could you expand a little  
24      bit more on how you see an organization could show  
25      organizational standing? Because it sounds like what

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1 you are saying is that it depends on where their  
2 headquarters are, their office is, and that there  
3 would have to be some effect on that office in the  
4 same way that a human being individual would have to  
5 show an effect on their residence, for example, or  
6 where they work. Is that what you're saying?

7 I mean it does strike me that this term is  
8 used over and over and over in the case law but if  
9 it's never been shown I mean is that the only way  
10 you're arguing it could be shown? And is there any  
11 reason to even talk about this if there is in fact no  
12 way to show it in all practical effect?

13 MS. SIMON: Your Honor, to be perfectly  
14 sure I would probably have to do more research. But,  
15 yes, the way that I am reading it is that it would  
16 have to be comparable to damage or injury to a  
17 residence or property that the organization owns,  
18 something like that. So I agree, I think that in  
19 every case that I have read the organizations have  
20 been granted standing based on representation.

21 And I think Mr. Frankel alluded to the  
22 Hydro Resources. And I did look at that quickly while  
23 he was -- after he mentioned that, and I believe that  
24 all the organizations in that case did in fact get  
25 representational standing.

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1           So I will go on and then talk about  
2 representational standing. And first I'd like to  
3 start with the Owe Aku. And I think I will just go  
4 through each affidavit in order.

5           Oh, let me just say with respect to the  
6 membership issue the Staff did point out that, you  
7 know, case law indicates that one should acknowledge  
8 one's membership, you know, in an affidavit and also  
9 how long they've been a member, especially in a case  
10 like this where supplemental affidavits are provided.  
11 But, you know, if the Applicants -- I mean if the  
12 Petitioners provide that, you know, that information,  
13 you know, we're not going to object to it, just a  
14 statement that they are members and they have been  
15 provided to the Board. It's just we want to make sure  
16 that the Board has that information in making its  
17 determination.

18           JUDGE YOUNG: Do you accept Mr. Frankel's  
19 statement as an officer of the court that they have  
20 been members as sufficient to address that issue?

21           MS. SIMON: I think we'd prefer to have  
22 statements from the individuals themselves.

23           JUDGE YOUNG: Are they here?

24           MR. ELLISON: You are talking about for  
25 Owe Aku or for all of them?

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1 MS. SIMON: I'm not talking about Owe Aku.  
2 I'm talking about Western Nebraska --

3 JUDGE YOUNG: It was Ms. Meese I think and  
4 some of the others.

5 MR. FRANKEL: Okay. No, Buffalo Bruce  
6 isn't here.

7 Is Beth Ranger here? Dr. Anders?

8 (No response.)

9 MR. FRANKEL: We would have to contact  
10 them separately.

11 MS. SIMON: Okay. Just if they could  
12 provide a supplemental statement that would be fine.

13 With respect to Owe Aku we have three  
14 affidavits. The affidavit of Lester Davis did not  
15 state with specificity where he lived. It said that  
16 simply he lived 100 yards from the White River. And  
17 Mr. Ellison has clarified that he lives in South  
18 Dakota along the White River. The South Dakota border  
19 distance from the North Trend area is - I think  
20 approximately 40 miles. And again, our same arguments  
21 with respect to Mr. Davis having individual standing  
22 which would give representational standing would apply  
23 in no proximity because of a distance 40 miles.

24 And in addition Mr. Davis I believe in his  
25 affidavit states that he used water from his well for

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1 33 years until a water line was installed. And he has  
2 lived there for 43. So I would infer from that that  
3 for ten years he has been using a water line and not  
4 well water. So for the purposes of this amendment  
5 then he would not be able to claim an injury from  
6 water use.

7 JUDGE YOUNG: With regard to the, well,  
8 the statements that you just made about proximity,  
9 most of the cases, if not all other than HRI, address  
10 proximity above ground. And we have a different  
11 situation when we are talking about underground  
12 aquifers where you've got water that's relatively more  
13 contained than the areas above ground. So it seems  
14 almost intuitive that there would be a different -- I  
15 mean first of all I think the cases say you determine  
16 this on a case by case basis. But it does seem sort  
17 of intuitive that there might be different  
18 considerations in play when you are talking about  
19 underground aquifers with potential faults and  
20 potential conductivity between them. How do you  
21 address that?

22 I mean I guess I don't think that in  
23 making a ruling on standing it would be appropriate to  
24 sort of make a mechanical determination on, well, this  
25 person got it based on this many miles from a, you

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1 know, uranium mill or some other kind of a facility  
2 that involved above ground potential for effects as  
3 compared to water. How do you address that?

4 MS. SIMON: Okay. Well, first of all the  
5 standard of course is there has to be a significant  
6 source of radioactivity and an obvious potential for  
7 offsite consequences.

8 I would refer to in one of the White Mesa  
9 cases, I believe it was LBP 0115, which was I believe  
10 affirmed by CLI 0121, there was an affidavit put forth  
11 by a person who lived about 25 miles away. And there  
12 was also an expert affidavit I believe that stated  
13 that there was a potential for seepage from the site.  
14 And the Board found that the petitioners had not  
15 demonstrate -- had not provided sufficient detail to  
16 show that any kind of seepage had actually occurred  
17 from the site and, therefore, that was one of the  
18 bases for denying standing.

19 And I would say that that is analogous  
20 here because not only do the Petitioners have to in  
21 order to make a fairly traceable argument not only do  
22 they have to show that water can move from the site to  
23 their location but they also have to provide some  
24 sense that there will in fact be an offsite  
25 consequence from it. And again, the sources of

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1 radiation --

2 JUDGE YOUNG: Before you go on can you  
3 give us the cite for that again and the date?

4 MS. SIMON: Yes. I just have -- I don't  
5 have the NRC cites. Actually CLI 0121 which was 2001  
6 and LBP 0115. And I believe that the CLI was  
7 affirming the Licensing Board.

8 JUDGE YOUNG: Okay, thanks.

9 MS. SIMON: Sure.

10 The sources in this case of possible  
11 radioactivity are two. One is radon and one is  
12 essentially natural uranium that is on a resin,  
13 coating the resin. Those are really the sources that  
14 we're dealing with.

15 The Chadron Aquifer there is information  
16 in the application indicating that the Chadron Aquifer  
17 already has in some areas significant amounts of  
18 radium and uranium in it. So the potential for the --  
19 the source material that comes out of the mining  
20 operation is dealt with above ground. And so I guess  
21 I would say that since the material that comes out is  
22 above ground then you, you know, you consider the  
23 above ground impact as well.

24 And in terms of the underwater impact,  
25 yes, you know, water does travel through aquifers but

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1 it, you know, again there are issues dealing with how  
2 much conductivity is there in the aquifer in terms of  
3 how fast and whether that water even gets someplace.

4 JUDGE YOUNG: But again if you are talking  
5 about plausibility and you want to stay away from  
6 making a merits determination --

7 MS. SIMON: Sure.

8 JUDGE YOUNG: -- on whether it actually  
9 does couldn't you argue that if there is a lack of  
10 complete knowledge about potential faults, potential  
11 means of conductivity that the argument about  
12 plausibility could carry a bit more weight than if  
13 there were no question whatsoever about the potential  
14 for that?

15 MS. SIMON: If a person was located very  
16 close to the site maybe. But again you're talking  
17 about 20 miles or 60 miles which is a very long  
18 distance. And in terms of plausibility, plausibility  
19 doesn't mean possible, it means you have to have some  
20 reasonable basis I think to indicate that the water  
21 would travel in that direction.

22 And again the Petitioner does have to show  
23 that plausible basis. And I think just saying that,  
24 you know, aquifers may be connected and, you know,  
25 talking about the High Plains Aquifer which the

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1 application doesn't even say exists at the site and,  
2 you know, I think there has to be some more detailed  
3 showing by the Petitioners.

4 JUDGE YOUNG: But isn't it, again maybe  
5 this is -- I'm not the technical member here but when  
6 you are talking about large aquifers certainly there  
7 has been some discussion about how fast things may  
8 move, but if you are talking about a large aquifer and  
9 something is in the large aquifer it seems to get over  
10 a plausibility argument about the potential for  
11 movement, for some contaminant being carried within  
12 the water. It's sort of hard to overcome a simple  
13 argument that something is plausible.

14 MS. SIMON: Well, the High Plains Aquifer  
15 is 174,000 square miles.

16 JUDGE YOUNG: Right.

17 MS. SIMON: And at some point I think one  
18 has to say that someone would be too remote from the  
19 location even if they, you know, even if the High  
20 Plains Aquifer is involved, you know, someone who  
21 lives in, I don't know, say the High Plains Aquifer  
22 went to Michigan for -- I don't think it does but just  
23 for example -- I mean at some point I think someone is  
24 going to be too remote to really have a realistic  
25 threat of injury. And I think that's sort of where we

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1 are going here, you know, with that argument.

2 JUDGE YOUNG: And is there anything that  
3 gives us any elucidation on how remote is too remote  
4 in cases involving underground water?

5 MS. SIMON: In cases involving underground  
6 water I don't believe I'm aware of any.

7 JUDGE YOUNG: So we're sort of on new  
8 ground here at least legally speaking.

9 MS. SIMON: Yes, I would have to, I would  
10 have to look and see if I could find any more cases on  
11 that.

12 JUDGE YOUNG: We do have the HRI case.

13 MS. SIMON: Right. And I would like to  
14 say with regard to HRI while that case did say, did  
15 hold that in that particular set of facts someone  
16 drinking water adjacent to the site would have  
17 standing, adjacent does not mean 20 miles away or 60  
18 miles away, adjacent means, you know, very near or  
19 even abutting. So I would just say I would suggest  
20 that HRI should be held to the facts of that  
21 particular case, you know, the location of the water  
22 supply in that case may have been different than here  
23 and other things like that.

24 JUDGE YOUNG: Another similarity between  
25 HRI and this case though is that there were certain

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1 aspects of the situation where there were unknowns  
2 which played into the standing decision I think.

3 MS. SIMON: The HRI decision -- well, the  
4 application here gives a fair amount of information  
5 about the delineation vertically of the aquifers at  
6 the North Trend site. And so I think that -- I don't  
7 know the facts of the HRI case so I can't speak to  
8 comparatively how well things were delineated. But  
9 again I think since the mining occurs in an area that  
10 is significantly confined from the upper aquifers I  
11 think that needs to be taken into consideration in  
12 terms of the plausibility aspect.

13 JUDGE YOUNG: But of course when they are  
14 drilling down to get to the Chadron they have to go  
15 through the aquifer that some of the wells are in;  
16 right?

17 MS. SIMON: Yes.

18 JUDGE YOUNG: So the question that Judge  
19 Oliver asked about the Anders well would seem, I mean  
20 again not being the technical expert, but it seems  
21 sort of intuitive that if that's occurring and if you  
22 are drilling down through an aquifer that people use  
23 that there is some possibility of there being  
24 something going on there. A plausibility I should  
25 say.

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1 MS. SIMON: Well, with respect to drilling  
2 would it be okay, Your Honor, if I briefly consult  
3 with the Staff on that?

4 JUDGE YOUNG: Sure.

5 MS. SIMON: Okay, thank you.

6 (Staff confer.)

7 MS. SIMON: Sorry, Your Honor, for that  
8 delay.

9 When the well is drilled there is no  
10 pressure on the aquifer that would force water out.  
11 The Staff has said that the water actually it relieves  
12 the pressure on the aquifer. And furthermore, the  
13 well once it's drilled is encased in cement. And so  
14 the chances of something occurring from that are  
15 probably remote.

16 And I will discuss Dr. Anders.

17 JUDGE YOUNG: Okay. We'll go on to Dr.  
18 Anders.

19 MS. SIMON: That's not really a -- that's,  
20 yeah, okay.

21 I was talking about the Owe Aku standing.  
22 And I dealt with Mr. Davis' affidavit.

23 With respect to Ms. Sauser who lives in  
24 Slim Buttes which is four miles north of the South  
25 Dakota state line, again which is 40 miles away,

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1 basically the argument is the same with respect to the  
2 proximity and the injury. So I think there is no need  
3 to discuss that anymore.

4 Finally with respect to Mr. House who  
5 asserts an injury from groundwater or surface water  
6 contamination, his affidavit gave his address as being  
7 approximately eight miles south southwest of Crawford.  
8 We did check on MapQuest. We wanted to get a sense  
9 of, you know, where he was located. And we actually  
10 used two online mapping services. And the address we  
11 found was more like 16 miles south of Crawford. We  
12 are not absolutely sure that that is correct but we  
13 used two different mapping software so we think it's  
14 pretty likely.

15 But in any case, whether it's eight miles  
16 or 16, again number one he also says that he has a  
17 well in the Brule Aquifer which is the upper aquifer.  
18 And the same arguments with respect to water getting  
19 from this lower one to the upper one would apply.

20 So again our argument is basically that he  
21 has asserted an injury from potential groundwater but  
22 it's not fairly traceable. And to the extent that his  
23 argument goes to surface water we would note that the  
24 White River flows from southwest to northeast and so  
25 he is actually upstream of the proposed operation and

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1 is unlikely to be affected then by surface water.

2 He did not actually I believe in his  
3 affidavit assert an injury from radon. I think he did  
4 express a concern for the air. So we would argue with  
5 respect to that that given that the application's  
6 analysis of radon indicates that a person in Crawford  
7 would get about less than 2 millirem per year from  
8 radon, any assertion of radon injury eight miles away  
9 would be too far away to have an injury.

10 JUDGE YOUNG: But let me back up again to  
11 the water issue.

12 MS. SIMON: Sure.

13 JUDGE YOUNG: In a prior position I was  
14 involved in some environmental cases and sometimes  
15 there would be issues of contamination of rivers. And  
16 I can't recall the exact facts of any of those cases  
17 but it does seem to me based on my memory, you know,  
18 talking about fish kills and plant, effects on plants  
19 and so forth, that eight miles would not seem to be a  
20 very large distance, especially when you are talking  
21 about, you know, water underground in an aquifer where  
22 something would obviously not be, could not be  
23 contained in a very small area would spread naturally  
24 to some extent. You are arguing that there is no  
25 possible, no plausible way that anything could -- or

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1 you say it's not eight miles, it's 16 miles -- that  
2 there is no plausible way that contaminant could  
3 travel 16 miles?

4 MS. SIMON: Yeah, our position is that  
5 there is not a plausible way.

6 JUDGE YOUNG: I mean I guess again I will  
7 just let you know that my own experience that I've  
8 been aware of situation where people talk about, well,  
9 the wells in this whole, you know, multi-county area  
10 may have been contaminated by in that case biological  
11 contaminants. And so I guess just looking at it from  
12 a common sense approach it's hard to understand how if  
13 you've got a semi-contained body of water underground,  
14 where I used to live in Tennessee there were a lot of  
15 caves, there's a lot of underground water. And you  
16 would hear people talk about water going in here and  
17 then miles and miles away coming out. So I guess when  
18 you are talking about plausibility just from a common  
19 sense standpoint it would seem that the burden almost  
20 shifts to you to show that it would not be plausible  
21 that something could travel at least that distance,  
22 the distance that we are talking about with Mr. House.

23 MS. SIMON: Well, Your Honor, respectfully  
24 I would, you know, the case law does say that the  
25 burden is on the Petitioner to show that plausibility.

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1 JUDGE YOUNG: Right. But I mean if they  
2 meet a burden of plausibility, if something seems sort  
3 of self-evidently plausible, in order for you to argue  
4 that it is not plausible you have to sort of go  
5 against common sense when you are talking about a  
6 distance like that of Mr. House, wouldn't you?

7 MS. SIMON: No, I don't think so. I don't  
8 think they have necessarily demonstrated that it is  
9 plausible. Again, you know, without looking at what  
10 they have recently supplied they, you know, they talk  
11 generally about mixing of aquifers and this aquifer  
12 may mix with this other aquifer but, you know, they  
13 have not provided specific information on the  
14 direction the aquifers flow and that kind --

15 JUDGE YOUNG: But that's consistent with  
16 the information in the application that talks about  
17 lack of knowledge in certain areas about the  
18 connections between these things. And, you know,  
19 certainly aquifers, as I understand it, will flow  
20 mainly in a certain direction. But we're not going to  
21 get into the merits here.

22 MS. SIMON: Right.

23 JUDGE YOUNG: But still again looking at  
24 it from a common sense standpoint -- well, I think you  
25 know, I think you know the question I'm asking.

1 MS. SIMON: Yes.

2 JUDGE YOUNG: And the distance that we're  
3 talking about with Mr. House certainly seems to be in  
4 a different category than 60 miles or 50 miles.

5 MS. SIMON: Oh, again we will disagree  
6 with that. And there is also there is other  
7 information in the application I believe that  
8 discusses the aquifers. And although we don't want to  
9 get to the merits here it might be that given the  
10 technical nature of trying to figure out, you know,  
11 whether this is plausible it might require looking at  
12 the application information in detail. Because I  
13 don't believe that the Applicants have mentioned  
14 certain sections of the application in their petition  
15 but there might be other sections which I can't tick  
16 off offhand that provide information.

17 JUDGE YOUNG: But if one part of the  
18 application says that there is insufficient  
19 information, we need to do more studies you can't  
20 exactly -- I know you talked about the areas in  
21 question that they're talking about, but still I mean  
22 on the face of it assuming that we are talking about  
23 something that could plausibly be connected if there  
24 is a statement in one place that says we don't know,  
25 we need to do more studies you couldn't have another

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1 section of the application that said with regard to  
2 something, that same area. We do have information.

3 MS. SIMON: Right. But I'll only say that  
4 if the area that they talked about needing further  
5 study is one particular area but for different areas  
6 they do have information, then that should be  
7 considered.

8 JUDGE YOUNG: But if the areas where there  
9 is lack of information concern where there could be  
10 faults and the possibility of faults being not limited  
11 to one particular place, I don't know that we need to  
12 go much further than this, but it seems to be when we  
13 are talking about standing we are talking about much  
14 less than you need to get in a contention which itself  
15 is less than you need to defend against a summary  
16 disposition motion. We're talking about plausibility,  
17 the standard is not maybe as high as what your arguing  
18 it should be.

19 MS. SIMON: Okay. Well, we can probably  
20 let that rest for now.

21 Okay, with respect to, we'll talk about  
22 Slim Buttes and their representational standing  
23 because I think basically the supplemental affidavits  
24 that they have provided are from Mr. American Horse  
25 and Mr. Cook. And again, you know, we've already

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1 discussed that Mr. Cook lives 20 miles away. I  
2 believe Mr. American Horse lives about 50 miles away.  
3 And so the arguments are the same: the remoteness in  
4 terms of proximity, whether for airborne or water  
5 contamination, and the injury-in-fact not being fairly  
6 traceable to the action. So we've discussed that in  
7 detail.

8 Finally we have Western Nebraska Resources  
9 Council. And as you mentioned, they did provide  
10 supplemental affidavits from two members who live  
11 within about a mile to a mile-and-a-half of the  
12 proposed site. With respect to proximity standing,  
13 you know, being granted without showing injury I guess  
14 given again, you know, we feel that they haven't, they  
15 have not shown the fairly traceable, although we  
16 realize that that's, you know, significantly shorter  
17 distance away from the site.

18 With respect to Ms. Ranger she says in her  
19 affidavit that she uses city water, not well water.  
20 And the application does state that her city water is  
21 obtained from the White River and the Brule Aquifer in  
22 a location southwest of the city of Crawford. And Ms.  
23 Ranger lives downstream of where that water is  
24 located. And the site is actually downstream of where  
25 that water is taken. And so --

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1 JUDGE COLE: So the water is taken out  
2 upstream in the White River?

3 MS. SIMON: Yes, Your Honor.

4 JUDGE COLE: Or from an aquifer beside the  
5 river?

6 MS. SIMON: There are -- I believe it's  
7 taken from the White River itself and from two wells  
8 in the Brule Aquifer. So with respect to any kind of  
9 water injury we feel that Ms. Ranger because she uses  
10 city water would not be affected.

11 JUDGE YOUNG: Really the one that you need  
12 to address probably --

13 MS. SIMON: Yes. Dr. Anders.

14 JUDGE YOUNG: -- all you need is one  
15 member; right?

16 MS. SIMON: Right. With respect to Dr.  
17 Anders the defects in his affidavit is, first, the  
18 injuries that he asserts are related to the existing  
19 operation. He is asserting that his water is now  
20 discolored and has a bad odor and that he, I believe  
21 that he's having issues with sand in some of his  
22 toilet and other facilities in his house. But that's  
23 related to the existing operation and that's really  
24 not within the scope of this proceeding. He has not  
25 asserted --

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1 JUDGE YOUNG: Let me interrupt you there.  
2 I warned you I'd be interrupting and I'm --

3 MS. SIMON: That's fine.

4 JUDGE YOUNG: -- fulfilling my promise  
5 here.

6 You say that review of the current  
7 operation is relevant to the Staff to the extent that  
8 it provides the Staff with a history on the adequacy  
9 of radiation protection and monitoring programs, site  
10 characterization, operating procedures and training  
11 programs. If the Staff looks at that, if the Staff  
12 looks at the history on the adequacy of radiation  
13 protection and we're talking about areas that are  
14 fairly close to each other, do you really want to make  
15 the argument that Dr. Anders hasn't shown sufficient  
16 proximity and along with the description that he gives  
17 of the discoloration and bad odor coming from his well  
18 on the days, well, connected to the cycle during which  
19 the CBR crew is drilling? That gets back to the  
20 earlier question I asked you also. I mean we're  
21 talking about standing here.

22 MS. SIMON: No, I understand that. And in  
23 fact we did realize in reviewing the application last  
24 night that Dr. Anders does have a well on his property  
25 that is in the Chadron Aquifer. It's not certain that

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1 this is the well, the well he refers to here is the  
2 one he's -- is that well, because he does say he  
3 drinks from this well and the water from the Chadron  
4 Aquifer is, you know, generally considered not  
5 drinkable. But in any event it is -- we just wanted  
6 to make that, make the Board aware that we are aware  
7 of that.

8           Again, to the extent that this involves a  
9 complaint about the existing facility it's not clear  
10 that this occurrence is coming from the existing  
11 facility. I mean the fact that the water has a bad  
12 odor could be because --

13           JUDGE YOUNG: It may not be clear but it's  
14 pretty plausible, don't you think?

15           MS. SIMON: Yes, it is, it is plausible.

16           JUDGE YOUNG: Okay.

17           MS. SIMON: Yes.

18           I would like to address just briefly the  
19 radon and the proximity of both Dr. Anders and Ms.  
20 Ranger. Although they are both in a location that  
21 would receive about 1 to 2 millirem per year of  
22 radiation, given that the standard is 100 for the --  
23 in 20.1301(a) the staff --

24           JUDGE YOUNG: Say that over again?

25           MS. SIMON: I'm sorry. The standard for

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1 the maximum dose to the public is 100 millirem per  
2 year.

3 JUDGE YOUNG: Under?

4 MS. SIMON: Under 20.1301(a).

5 The staff feels that any -- and  
6 furthermore, the dosages calculated in the application  
7 indicating about, you know, less than 2 millirem per  
8 year are based on both facilities including the recent  
9 amendment that raised the existing facility to 9,000  
10 gallons per minute. So the expected dosage from the  
11 new facility Crow Butte has indicated an application  
12 to residents near the existing facility would be less  
13 than 1 millirem per year. And the Staff feels that  
14 that would be, that is a minor injury. And we know  
15 the case law talks about that. That would be so minor  
16 as to be negligible in our view.

17 JUDGE YOUNG: Before we get past it, and  
18 this is just for informational purposes.

19 MS. SIMON: Okay.

20 JUDGE YOUNG: It's slightly off the point.  
21 But you mentioned the recent amendment. I noticed in  
22 your pleadings you also referenced the recent  
23 amendment. Was that something where there was a  
24 notice of hearing?

25 MS. SIMON: No, Your Honor.

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1 JUDGE YOUNG: Ordinarily for license  
2 amendments don't you have to give it, provide a notice  
3 of hearing?

4 MS. SIMON: One second, Your Honor.

5 JUDGE YOUNG: I mean a notice of the right  
6 for an opportunity for hearing.

7 (Staff confer.)

8 JUDGE YOUNG: I see Mr. Smith saying no.

9 MR. SMITH: Not for materials license  
10 amendments. You just have to, as I understand it the  
11 Commission just puts the notice up on their hearing  
12 opportunities website.

13 JUDGE YOUNG: Well, I'm not talking about  
14 the notice on the website as opposed to anyplace else.  
15 I'm asking was there even a notice on the website? I  
16 know for materials you can do, although I believe that  
17 -- I understand there may be a change in that. But in  
18 any event was there a notice even on the website?

19 MS. SIMON: No. The amendment was a minor  
20 amendment which did not impact anything outside the  
21 building on the site.

22 JUDGE YOUNG: Tell me the rule on that?

23 MS. SIMON: The rule for?

24 JUDGE YOUNG: Right.

25 MS. SIMON: For not requiring a hearing?

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1 JUDGE YOUNG: Right.

2 MS. SIMON: I'd have to look that up.

3 JUDGE YOUNG: Okay. Could you provide  
4 that?

5 MS. SIMON: Sure.

6 JUDGE YOUNG: Because I noticed that in  
7 your pleadings and I couldn't help but wonder about it  
8 because normally with a license amendment there is a  
9 notice of an opportunity for hearing and parties  
10 sometimes do petition for hearings on license  
11 amendments.

12 So what I am wondering is what's the law,  
13 what's the rule that defines which ones do require  
14 that and which ones don't require that? Because you  
15 seem to be saying that this one didn't require that.

16 MS. SIMON: Yes, we'll look that up.

17 JUDGE YOUNG: Okay.

18 MS. SIMON: Okay, I just finally I'd like  
19 to address Ms. Meese who says that she lives in  
20 Chadron but she owns property about four miles  
21 southeast of the -- we're not sure actually whether  
22 that's southeast of the existing or the proposed  
23 location. It wasn't stated in her affidavit. And she  
24 stated that she uses a spring on her property.

25 Again, you know, we basically I'll just be

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1 repeating the same arguments. And as for Mr. McIntosh  
2 as well who lives in Chadron which is 20 miles away.

3 Okay, I think that will conclude my  
4 portion.

5 JUDGE YOUNG: Okay. Go ahead.

6 MR. SMITH: Thank you. I'm right in the  
7 line from the sun coming in.

8 JUDGE YOUNG: This is a lovely room but  
9 the moment that the sun's on you sometimes it's a  
10 little difficult to see.

11 MR. SMITH: Thank you. And Crow Butte  
12 would like to welcome you to Nebraska. And thank you  
13 for presiding over this proceeding.

14 As you know, Crow Butte has applied for a  
15 license amendment to expand its operation into the  
16 North Trend area. That application included an  
17 environmental report which addresses the environmental  
18 impacts of the proposed expansion as well as a  
19 technical report which addresses the safety basis for  
20 the expansion. The technical report and the  
21 environmental report we believe demonstrate that Crow  
22 Butte is committed to safe and sustainable operations  
23 and that we've been following the regulatory process  
24 in good faith.

25 And as you know, another part of that

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1 regulatory process is determining who should be  
2 involved in the proceedings. And so we are opposing  
3 the contentions and the standing of the Petitioners  
4 here. And we don't do so lightly but we do so because  
5 we think it's appropriate under the NRC rules. We are  
6 opposing not because they are unimportant or because  
7 we think or because they've been ignored. Quite the  
8 opposite; we believe that we have addressed them fully  
9 and responsibly in the application.

10 JUDGE YOUNG: If you in your argument  
11 could address this plausibility argument, plausibility  
12 standard which is not perhaps as high a standard as in  
13 some instances staff is arguing it should be?  
14 Perhaps. We're not making our ruling here. But again  
15 let's talk about plausibility.

16 MR. SMITH: Well, as you know, there's  
17 three requirements for standing beyond just  
18 plausibility.

19 JUDGE YOUNG: Right.

20 MR. SMITH: One is that you have to have  
21 an injury-in-fact. And that's an injury that's actual  
22 or threatened, has to be concrete and particularized,  
23 not hypothetical.

24 JUDGE YOUNG: But plausibility plays into  
25 threatened; right?

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1 MR. SMITH: Right. But it can't be  
2 conjectural or hypothetical. And that's what we have  
3 here, it's all of these various alleged injuries,  
4 particularly with regard to the mixing of the aquifers  
5 are all based on conjecture and speculation rather  
6 than on physical hydraulic processes that are at play  
7 in this application.

8 What you have to have in terms of  
9 speculation in plausibility is you have to have a  
10 reasonable nexus between the application and the  
11 alleged injury. You can't just say look at the  
12 application and make some assertions about potential  
13 impact. There has to be a reasonable basis for  
14 concluding.

15 Simply showing the potential for  
16 radiological harm, no matter how negligible or minor  
17 or how trivial, that is not sufficient to meet the  
18 requirements.

19 JUDGE YOUNG: But it can be minor. It can  
20 be minor and it can be plausible; right?

21 MR. SMITH: Well, just the fact that there  
22 is some potential for harm is not enough to reach, to  
23 have an injury sufficient for standing purposes. And  
24 this is something that the Commission has addressed  
25 repeatedly. It's more than just some hypothetical

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1 circumstance that you can imagine demonstrates  
2 standing, there must be some actual plausible,  
3 reasonable, rational nexus between the injury and the  
4 application at issue.

5 When you talk about the potential for  
6 wells mixing there's a couple of things that, factual  
7 basis that may help clear up some of this for you.  
8 First of all you'd make clear that for the Petitioners  
9 who are alleging standing who live on the Pine Ridge  
10 Reservation about 20 or 40 miles to the east and to  
11 the north their wells that exist are in the Arikaree  
12 Aquifer or in there High Plains Aquifer, the Ogallala  
13 Aquifer, none of which overlie the North Trend area or  
14 the existing site. As I understand it the hills back  
15 behind you are those formations. So there is a  
16 vertical component that's hard to come up with some  
17 rational connection between their mines 20 -- their  
18 wells 20 miles away and the operations of the mine  
19 which are occurring in an aquifer at some large depth.

20 In addition you had talked about can we  
21 presume some injury at eight miles and you were  
22 looking for some explanation of what the difference  
23 might be between impacts at the surface and impacts on  
24 groundwater. And we would submit that the impacts  
25 need to be much more, much greater in groundwater,

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1 particularly given the flow rate which in the Chadron,  
2 Basal Chadron is on the order of 10 feet per year. So  
3 in order to get eight miles I can't even do that math  
4 in my head, that is, you know, 5,200 feet per mile and  
5 eight miles, that is a considerable difference for  
6 contending --

7 JUDGE COLE: You said eight miles per  
8 year?

9 MR. SMITH: No, 10 feet per year.

10 JUDGE COLE: Oh, 10 feet per year.

11 MR. SMITH: Is the flow rate. And in  
12 addition, the regional flow rate we're talking --

13 JUDGE YOUNG: That's the flow rate of the  
14 water. Is that the same if you -- it's been a long  
15 time since I took chemistry and biology, but if you  
16 put some foreign substance --

17 MR. SMITH: Right.

18 JUDGE YOUNG: -- into the water is that  
19 automatically the same as the flow rate, the rate at  
20 which it disperses I guess?

21 MR. SMITH: Right. That's correct.

22 JUDGE YOUNG: Right.

23 MR. SMITH: There's three components to  
24 how contaminants are transported. One of them is  
25 advection, and that's the component that's due to the

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1 flow moving through.

2 MR. FRANKEL: Excuse me, objection.  
3 Counsel is not here as an expert on water so I'm not  
4 clear of the basis for his explanation.

5 MR. SMITH: Well, she asked for -- If I  
6 may respond to your question?

7 JUDGE YOUNG: You can respond to my  
8 question, yes.

9 MR. SMITH: There's three components. One  
10 is advection in the flow.

11 JUDGE YOUNG: Basically the flow rate of  
12 10 feet per year would not necessarily be equal to the  
13 rate at which a substance is dispersed within a body  
14 of water?

15 MR. SMITH: The rate of dispersion is a  
16 small fraction of advection, of the advective flow in  
17 groundwater as a general rule. And there's nothing to  
18 suggest that it is any different here.

19 And more importantly, when we are talking  
20 about the operations of the North Trend they are  
21 controlling the flow so that it is not moving out of  
22 the North Trend area, it is staying confined within  
23 the well field patterns. And they have monitoring  
24 wells at 300 feet outside of the spacing for the  
25 production and injection wells. They are designed to

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1 capture any potential excursions. And then they can  
2 use that knowledge to reverse the flow and draw any  
3 contamination back in.

4 So we not only have the operations of the  
5 facility which are designed to prevent any  
6 contamination from leaking out, and we haven't had any  
7 allegations that that's occurred in the existing  
8 operations, although that's not relevant to the North  
9 Trend area, we also have the fact that these distances  
10 are considerable. And the length of time in the most-  
11 difficult-to-imagine circumstances is on the order of  
12 tens of years, and hundreds of years perhaps.

13 JUDGE YOUNG: Let me, I think there is  
14 some case law somewhere that says judges are not  
15 required to set aside their common sense. So now here  
16 is the picture that comes to mind. A swimming pool  
17 and some other type of liquid is put into the swimming  
18 pool. It's hard for me to imagine that it would take  
19 ten years or take a year for the substance that you  
20 pour into the swimming pool to travel ten feet across  
21 a swimming pool or even 30 or 40 feet across a large  
22 swimming pool. It just sort of goes against my common  
23 sense there.

24 MR. SMITH: Well, this is different  
25 physical processes at work when you are talking about

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1 an underground aquifer. There's interactions between  
2 the water and the water chemistry and the soil and the  
3 soil chemistry. That's why we have this as a uranium-  
4 bearing body.

5 JUDGE YOUNG: Right. But I mean again  
6 there is common sense, there is common knowledge about  
7 that maybe coming from where I come from where there  
8 are a lot of underground caves, a lot of underground  
9 aquifers, a lot of people who have wells. And certain  
10 things are sort of common knowledge. And so I guess  
11 your argument that a contaminant put into underground  
12 water would take a year to travel 10 feet sort of goes  
13 against common sense.

14 Now, you can make whatever argument you  
15 want to to respond to that but I have to sort of put  
16 that out there on the record.

17 MR. SMITH: Well, I respectfully submit  
18 that the difference, there are differences in aquifers  
19 and the flow rate has been measured to be --

20 JUDGE COLE: There are limestone aquifers  
21 that have big holes in it and the water goes very  
22 fast.

23 MR. SMITH: Correctly. Absolutely.

24 JUDGE COLE: You can take a uniform sand  
25 aquifer you can get a better average velocity

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1 traveling downstream.

2 MR. SMITH: And it's different here for  
3 different, you have shales that are, you know, a clay  
4 material --

5 JUDGE YOUNG: Right.

6 MR. SMITH: -- where water moves more  
7 slowly --

8 JUDGE YOUNG: Slow it down.

9 MR. SMITH: -- than large gravels. These  
10 are all why Crow Butte has spent so much time  
11 characterizing the aquifer. They performed pump tests  
12 which verify conditions beneath the surface, verified  
13 that there are no connections between these aquifers.

14 Let's see, there's a host of evidence  
15 talking about that. First, when you measure the water  
16 quality of these various aquifer levels you see  
17 differences in things like total dissolved solids,  
18 uranium content, arsenic content that are natural  
19 fluctuations, have nothing to do with the mine, just  
20 measuring regional baseline data. Those demonstrate  
21 that the aquifers are not connected.

22 You have measured potentiometric levels,  
23 that's the level of the water pressure in the  
24 different aquifers. And those are different in the  
25 different aquifers. That also demonstrates that they

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1 are not hydrologically connected. They performed the  
2 pump tests at the North Trend area which is where they  
3 withdraw water and measure in monitoring wells in the  
4 Brule and in other overlying aquifers to see if there  
5 is a response. There wasn't. So again that  
6 demonstrates that physically there is no connection  
7 between these various groups.

8 And again when they're doing the bore hole  
9 drillings they do well hole logs, they look at the  
10 types of material that comes out. Again, same sort of  
11 evidence that suggests that there is no connection  
12 between these.

13 And so when we're talking about standing  
14 we need to have some type of plausible connection  
15 between the two. And then when you overlay on top of  
16 all of this the fact that the regional groundwater  
17 flow is in the north to northwestern direction, and  
18 when you're talking 20 miles and 40 miles when you're  
19 looking at regional groundwater flow that's away from  
20 the Pine Ridge Reservation or away from Mr. Anders'  
21 well and the other gentleman who lives south of the  
22 existing site.

23 So without any evidence, anecdotal or  
24 otherwise, to suggest a connection between the Brule  
25 and the Basal Chadron that might cause some mixing or

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1 between the High Plains Aquifer and the Basal Chadron  
2 there's nothing to support any sort of injury showing  
3 to support standing.

4 JUDGE OLIVER: How is the 2.25 miles  
5 boundary determined? I mean I saw several references  
6 that, you know, you were sure that no one was within  
7 the 2.25. Why did you pick that number?

8 MR. SMITH: If I recall that's the  
9 distance for assessing the impacts. And I know  
10 there's a quick answer. I'm sure someone can answer  
11 behind me if you don't mind.

12 JUDGE OLIVER: And also another one that's  
13 related to that. With the new proposed sites how  
14 close will there be individuals living within those  
15 boundaries?

16 MR. SMITH: Well, with regard to  
17 individuals living within the boundaries of the site  
18 the application does show those individuals and where  
19 they live relative to the site. I'm not clear on the  
20 -- I think the nearest groundwater well in the Basal  
21 Chadron is several miles away and that would be Dr.  
22 Anders' well. There may be some other shallow wells  
23 in the Brule Aquifer but those are, again, outside of  
24 the North Trend Expansion Area. And of course, you  
25 know, there are some sites, some homesteads I guess or

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1 homes above ground that are the nearest receptors for  
2 things like radon dose. I mean those are, they're not  
3 petitioners here nor are they representing that they  
4 have standing.

5 And again, as counsel for the Staff  
6 mentioned, the dose from the North Trend Expansion to  
7 the nearest individual is on the order of 5 millirem  
8 which is a small fraction of the NRC limits in 20.1301  
9 of 100 millirem which again is an even smaller  
10 fraction of the natural background radiation which is  
11 350 to probably closer to 400 millirem per year in  
12 this area.

13 Apparently the 2.25 or 2.5 mile assessment  
14 area around is an NRC requirement guidance document.

15 JUDGE OLIVER: Okay. And you are saying  
16 the background radiation is higher than the limits  
17 allowed? I thought you said 350.

18 MR. SMITH: Natural background radiation  
19 is around 400 millirem per years.

20 JUDGE OLIVER: And that's higher?

21 MR. SMITH: NRC's regulation say that  
22 there should not be a dose to the nearest effected  
23 individual in excess of 100 millirem per year from  
24 licensed operations. And then the actual dose,  
25 calculated dose in the application is 5.5 millirem per

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1 years for the nearest individual. And that individual  
2 is about two miles from the site.

3 And given that radon disperses naturally  
4 in the air and has a relatively short half life,  
5 individuals living downwind at 20, 40 even 60 miles  
6 are going to have a negligible impact, it's not even  
7 measurable of calculable.

8 JUDGE COLE: Of the radon coming from the  
9 side.

10 MR. SMITH: From the North Trend.

11 JUDGE COLE: But they might have some  
12 natural radon coming from uranium in their area?

13 MR. SMITH: Absolutely. And that's, it's  
14 difficult at that level to --

15 JUDGE COLE: Which might be measured.

16 MR. SMITH: -- the natural background,  
17 right. And in this part of the country well when, you  
18 know, all the coal trucks go past they produce more  
19 radon than is coming from even this facility here.

20 JUDGE OLIVER: Yes, and that should be  
21 included in the background radiation already  
22 calculated.

23 MR. SMITH: It is. Right. That's why I  
24 gave sort of a range of what the background dose is  
25 here.

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1 JUDGE COLE: Can you speak to the issue of  
2 the lack of knowledge, the place where further studies  
3 need to be done or where the information is not  
4 completely clear?

5 MR. SMITH: Right. That's the discussion  
6 about the structural feature near the White River.

7 JUDGE YOUNG: Well, I think there were  
8 more than one if I recall.

9 MR. SMITH: The only one I recall that's,  
10 you know, particular interest that we've been talking  
11 about throughout the day I believe was the structural  
12 feature of the White River and that's where there, I  
13 believe there is a fault at depth in the Pierre Shale  
14 that manifests itself as a fold in the Basal Chadron  
15 and Chadron and then in the Brule Aquifer. But based  
16 on pump tests and regional groundwater data it doesn't  
17 suggest that that in any way changes the flow and flow  
18 direction or the connectivity between the aquifers  
19 which again was confirmed by all of the various  
20 testing, the monitoring wells and so on that  
21 demonstrated that the aquifers are hydraulically  
22 separate.

23 JUDGE YOUNG: Let's see. In one of the --  
24 I'm hesitant to start making reference to some of the  
25 sections cited by the Petitioners in support of

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1 Contention A but there are several different ones  
2 where the application uses words such as "difficult to  
3 correlate" or "exact definition of the overlying  
4 aquifer is somewhat difficult to determine." Language  
5 like that suggests a level of uncertainty.

6 MR. SMITH: What that suggests, well, it  
7 does suggest a level of uncertainty but the  
8 uncertainty is not great enough to call into question  
9 the overall conclusions. As you noted, this is  
10 underground. It's not something you can go in an  
11 observe directly.

12 JUDGE YOUNG: Right.

13 MR. SMITH: So everything we know about it  
14 has to be based on indirect observations. And  
15 everything that has been, that's in the application  
16 suggests that there is no connection and there is no  
17 mixing between these two. And at least at the level  
18 of standing there must be some rational causal, even  
19 just a potential causal connection between the  
20 activity at issue and some alleged impact to show that  
21 that's a possibility. And that's what we don't have  
22 here, we don't have any evidence of any type that  
23 there are uncertainties about certain geologic  
24 features or specific characterization of soil types or  
25 whatever, doesn't call into question overall

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1 conclusions that these are not mixing.

2 JUDGE YOUNG: Well, what you just said  
3 that what they needed to show was a possibility.  
4 You're saying that the conclusions, the conclusion and  
5 you said that what's underground we don't know for  
6 sure what's underground, so while conclusions could be  
7 drawn to a level of X amount of certainty we're in  
8 sort of a vague area here when talking about the  
9 levels of certainty and what constitutes possibility  
10 or plausibility enough to show standing which I think  
11 we all recognize is much lower than what would be  
12 necessary in other contexts.

13 MR. SMITH: Again simply showing that  
14 there is a potential for radiological impact, no  
15 matter how trivial this potential might be,  
16 possibility, it's not sufficient to meet the injury-  
17 in-fact prong under the Commission's standing test.  
18 Even just making some assertion doesn't make it so.  
19 There has to be some causal connection between the  
20 assertion and the activity at question that shows that  
21 there is a connection. And that just doesn't exist.  
22 And the standing declarations or anything else  
23 submitted don't support contentions either.

24 JUDGE YOUNG: I guess it's sort of a hard  
25 line to draw. I'll ask you where you'll draw it

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1 between potential, possible and plausible?

2 MR. SMITH: I would submit at this  
3 juncture it borders on a physical impossibility. And  
4 I --

5 JUDGE YOUNG: No, I'm just talking about  
6 how you define those terms differently?

7 MR. SMITH: Between plausible is a higher  
8 burden than possible. Possible just means you can  
9 imagine some circumstance where it might occur.

10 JUDGE YOUNG: Right. But where do you  
11 draw the line? It's hard to draw the line. That's  
12 partially why I think the Commission says you  
13 determine it on a case by case basis what's plausible.

14 We don't need to -- I think I've already  
15 asked the questions that I have about that issue so I  
16 don't need to repeat them any more but.

17 JUDGE OLIVER: I have one question. This  
18 new proposed site you're going to use the same methods  
19 as you used before. And you may have to defer to the  
20 technical people for this. What is the level of  
21 radiological activity in the water before and after?  
22 There are several references to the water being more  
23 radioactive.

24 MR. SMITH: That's a good point.

25 JUDGE YOUNG: You're talking about in the

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1 current, the current site?

2 JUDGE OLIVER: Well, we're talking about  
3 the proposed but they got basis on the current so they  
4 can propose what's going to happen at the future site.

5 MR. SMITH: Well, the Basal Chadron both  
6 in the existing site and in the proposed site water  
7 quality is poor for many reasons, among them is  
8 because they have high rate radium levels which are  
9 present.

10 JUDGE OLIVER: I'm talking about  
11 quantitative numbers roughly if they are known, what  
12 the radiological activity is say before because you do  
13 have uranium there, and then after going through the  
14 process it gets reinjected back into there.

15 MR. SMITH: So it's the natural level in  
16 the bore trend is 500 picocuries per liter of radium.  
17 The drinking water level is 5 picocuries per liter of  
18 radium. And then the goal after restoration is to  
19 bring it back down to baseline which would back to --

20 JUDGE OLIVER: The same.

21 MR. SMITH: -- the same. Correct.

22 And so in that regard there is no new  
23 radioactive plume that is going to be moving after  
24 operations. That's the goal of restoration is to  
25 prevent that from happening. And for the same

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1 physical processes that would have deposited the  
2 uranium in the first place those would also likely  
3 apply for any water if it was even possible moved  
4 beyond the current bore trend area.

5 JUDGE COLE: You mean that it's devoid of  
6 oxygen and you won't get much -- you'll get deposition  
7 of material rather than dissolving?

8 MR. SMITH: Correct. I'm sorry, could you  
9 -- maybe I misheard you.

10 JUDGE COLE: You would wind up with a  
11 situational environment underground that would not  
12 tend to dissolve any radioactive materials or other  
13 isotopes --

14 MR. SMITH: Correct.

15 JUDGE COLE: -- or other materials?

16 MR. SMITH: As I understand it the  
17 reduction zone exists outside of the bore trend area.

18 JUDGE COLE: That's the way the uranium  
19 got there in the first place?

20 MR. SMITH: Exactly. That's why it  
21 deposited there in the first place; correct.

22 JUDGE COLE: Now, I don't understand the  
23 standard of 500, that's what it was to begin with, of  
24 radon. And then you remove uranium and radon from  
25 this ore, pump the water back, it should have less

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1 radiation in it than when you took it out, shouldn't  
2 it?

3 MR. SMITH: Yes. Well, it's --

4 JUDGE COLE: How come the standard is the  
5 same before and after?

6 MR. SMITH: Because the process isn't --  
7 it's radium first of all, not radon.

8 JUDGE COLE: I'm sorry.

9 MR. SMITH: There is a diminishing, there  
10 is an equilibrium between the groundwater and the  
11 uranium that is bonded to the soil in the deposit.

12 JUDGE COLE: Okay.

13 MR. SMITH: And as I understand it, you  
14 know I'm not a technical person either, but as you  
15 pump it and then if you remove the uranium --

16 JUDGE COLE: Uranium.

17 MR. SMITH: -- you're just putting back in  
18 everything else. So there would be no difference in  
19 the constituents such as radium.

20 JUDGE COLE: So there should be a lot less  
21 uranium though?

22 MR. SMITH: Should be less uranium,  
23 correct.

24 JUDGE COLE: So how much of the  
25 radioactivity is attributable to the uranium as

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1 compared to other isotopes?

2 MR. SMITH: Radioactivity in terms of  
3 what, the radioactivity in the groundwater?

4 JUDGE COLE: Measurable radioactivity, you  
5 know, creating a dose of so many millirem per hour  
6 say.

7 MR. SMITH: Well, there's no dose to  
8 individuals because --

9 JUDGE COLE: Not doing anything.

10 MR. SMITH: -- it's down beneath the  
11 surface, about 600 feet of soil overlying the ore  
12 trend area.

13 JUDGE YOUNG: Well, could you, would it be  
14 fair to characterize the soil that has had uranium  
15 depleted from it, removed from it as more or less  
16 radioactive before or after the uranium was removed?

17 MR. SMITH: Common sense would say less  
18 radioactive.

19 JUDGE COLE: Common sense would. But I  
20 haven't seen anything that would say that.

21 MR. SMITH: I can think of no reason why  
22 it would be something other than yes, it would be less  
23 radio -- there would be less radioactivity down there  
24 than there was before.

25 JUDGE COLE: Okay.

1 MR. SMITH: Correct. Because you've  
2 removed it.

3 JUDGE YOUNG: Hasn't there been some --  
4 well, it seems like I recall reading something about  
5 the goal being to return the water to baseline  
6 conditions, which is another issue of how you  
7 determine baseline. But that the NDEQ regulations  
8 allow for more. And I'm not sure which types of  
9 contaminants those refer to. But it seems as though  
10 I've read somewhere that there was, there had been  
11 difficulty returning it to baseline but at least that  
12 they restored it to NDEQ standards in the current  
13 operation. Am I wrong on that?

14 MR. SMITH: I think that's accurate. I  
15 guess the primary goal, restoration goal is back to  
16 baseline. The secondary goal is to return it to the  
17 class of use as defined by NDEQ.

18 JUDGE YOUNG: Right. So my question would  
19 be if the NDEQ regulations refer to also levels of  
20 radioactivity in --

21 MR. SMITH: They would refer to levels of  
22 all sorts of different constituents.

23 JUDGE YOUNG: Of all things. But I'm  
24 asking does it include that?

25 MR. SMITH: Yes. It includes contaminant

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1 levels for things like uranium, radium, etc., yes.

2 JUDGE YOUNG: So the reason I'm asking is  
3 because from one standpoint common sense would tell  
4 you that if you take uranium out there would be less  
5 radioactivity at least from uranium when you restored  
6 it, but on the other hand if some of it comes out  
7 because of being disturbed, which is I think I also  
8 read some things about that, that that would also play  
9 into what you would restore that to. It's just a  
10 question. I'm not sure that we need to get into it in  
11 that thorough a detail but.

12 JUDGE COLE: Just one question. You have  
13 the primary NDEQ standards and the secondary NDEQ  
14 standards and they pertain to both radioactivity and  
15 other elements --

16 JUDGE YOUNG: Right.

17 MR. SMITH: Correct.

18 JUDGE COLE: -- like arsenic and other  
19 heavy metals.

20 JUDGE YOUNG: Right.

21 JUDGE COLE: And who determines which  
22 standard applies and when is that determination made?

23 MR. SMITH: Well, the determination that  
24 exists under current license is license condition 3C  
25 that was established as part of the NRC license is

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1 what these restoration, what Crow Butte is required to  
2 restore its values to. To the extent that there is  
3 any challenge to what Nebraska set its levels to  
4 that's an issue that is outside of the scope of this  
5 proceeding. If Nebraska sets its secondary levels the  
6 NRC has required the Applicant to meet those. But  
7 actually setting the levels is something that is  
8 within the purview of the state of Nebraska.

9 JUDGE COLE: Thank you.

10 JUDGE YOUNG: I did have one more  
11 question. And that is to sort of bring this back to  
12 focus somewhere that might be a little bit more  
13 helpful to me anyway, is that all they need is to have  
14 one member of each organization in any event. And so  
15 it would be helpful to me if you could address the Dr.  
16 Anders petition, for example, and any of the others  
17 that are very close by?

18 MR. SMITH: Certainly. Well, first of all  
19 in order to have standing for this current proceeding  
20 which is the North Trend Expansion we need to have  
21 some harm that's actual or threatened from the  
22 proposed expansion. His affidavit is based on harm  
23 that he alleges comes from the current operation. So  
24 in that sense there is nothing here to suggest that  
25 there is a connection between the North Trend

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1 operations and what would be in his well as it exists  
2 currently.

3 JUDGE YOUNG: How far are they apart?

4 MR. SMITH: They're separated by several  
5 miles.

6 JUDGE YOUNG: No, I mean the current and  
7 the proposed, the North Trend site and the current  
8 site how many miles are there between them?

9 MR. SMITH: Five to eight.

10 JUDGE YOUNG: Five to eight.

11 MR. SMITH: I don't know off the top of my  
12 head.

13 JUDGE YOUNG: Right. I guess what I was  
14 wanting you to address is those people who are in that  
15 -- we're talking we've got some people who are saying  
16 60 miles.

17 MR. SMITH: Right.

18 JUDGE YOUNG: Some 40. And then there's  
19 others that are within a --

20 MR. SMITH: That are closer, right.

21 JUDGE YOUNG: -- much closer range.

22 MR. SMITH: And so the closest would be  
23 Dr. Anders. His well is closest to the proposed North  
24 Trend Expansion Area but he's still several miles  
25 away. And as we discussed, the flow rate in the Basal

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1 Chadron is on the order of 10 feet per year. So it's  
2 unlikely there would be any contamination that would  
3 reach his well. It's not just unlikely it's extremely  
4 low probability that there would be any contamination  
5 that would reach his well, particularly given that  
6 there are monitoring wells that are designed to detect  
7 any excursions and there are procedures in place for  
8 reversing the flow if there were to be something like  
9 that.

10 JUDGE YOUNG: Well, can you address just  
11 to clear it up what he alleges about or states about  
12 what has happened with his own well?

13 MR. SMITH: Well, he says here he talks  
14 about his own well. He doesn't say anything about  
15 where his well, the depth of his well or where it  
16 draws water from. So we don't know. I don't know if  
17 this is in the Brule Aquifer or if this is in the  
18 Basal Chadron or if it's in the Pierre Shale. So  
19 there's, you know, there's lack of specificity in here  
20 and in Dr. Anders' affidavit.

21 JUDGE YOUNG: I think the Staff said that  
22 -- correct me if I'm wrong -- but for some reason you  
23 drew a conclusion that it was in the Chadron?

24 MS. SIMON: No. We said that there is  
25 language in the application that says he has a well in

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1 the Chadron but --

2 JUDGE YOUNG: That he has or that there is  
3 one well there?

4 MS. SIMON: He has one on his property but  
5 it's not clear that that's the same well he's  
6 referring to. He might have more than one well.

7 MR. SMITH: And at his property where it  
8 exists if there is a well in the Basal Chadron there  
9 is a slope of the Basal Chadron here. So we're  
10 talking about an elevation difference of a couple  
11 hundred feet beneath where his well if it is indeed in  
12 the Basal Chadron and the Basal Chadron production  
13 wells that will be used for the mining area. So we're  
14 talking again about a --

15 JUDGE YOUNG: What's the explanation for  
16 what happened with his well?

17 MR. SMITH: Well, now I'm speaking about  
18 just what I've heard anecdotally. But as I understand  
19 it when his well was drilled by Crow Butte Resources  
20 20-plus years ago and he himself did the well casing,  
21 so we don't have any information about the integrity  
22 of the well casing or whether it was constructed  
23 properly. I mean maybe it should be connected.

24 JUDGE YOUNG: But I mean you can't, you  
25 can't put a standard on petitioners that they have to,

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1 that any petitioner with a well has to have a perfect  
2 well casing. I mean what I'm asking you is what --  
3 you're arguing against his standing. He makes these  
4 statements about what happened with his well in  
5 relation to drilling that Crow Butte Resources was  
6 doing. So what I'm asking is what's your argument in  
7 response to that in terms of explaining the  
8 circumstances that he describes?

9 MR. SMITH: So I guess I think as far as  
10 based on what I know the circumstances he describes  
11 have not in any way been related to Crow Butte's  
12 operations, they are issues that he has raised  
13 previously with other parties before the fall of 2007.  
14 And there was investigations that demonstrated these  
15 issues similar to these were unrelated to Crow Butte's  
16 operations.

17 JUDGE YOUNG: Well wait, I'm not  
18 understanding. He states that there, that this is  
19 connected to the cycle with which the CBR crew drills.  
20 And so what I'm -- you're just saying he's wrong?  
21 What I'm asking is to let's assume that he is being  
22 truthful and what is the explanation for that other  
23 than that you just disagree and say that he's not  
24 telling the truth or he is wrong? Is that what you're  
25 saying?

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1 MR. SMITH: That is part of what I'm  
2 saying. And in addition I would note there were  
3 baseline water quality samples taken in this well, in  
4 this particular well 25 years ago. And there were  
5 water quality samples taken in that well in the last  
6 couple of months. And there showed no difference in  
7 water quality between then and now.

8 So I mean I can't speak, I can't speculate  
9 about what physical feature might be causing this or  
10 whether there is any connection. All Crow Butte knows  
11 is that they don't believe it's related to their  
12 operations. There's nothing to suggest it is  
13 historically or based on current operations to suggest  
14 any link.

15 JUDGE YOUNG: Okay. So we just we take it  
16 for what it is.

17 MR. SMITH: There also adds in terms of  
18 there's potential for bad odor emanating from his well  
19 water. There is a bad odor emanating from most Basal  
20 Chadron well water because it is high in hydrogen  
21 sulfide, that's the reductive that exists down there  
22 that was the reason for the deposition of the uranium  
23 deposits. And so there is a natural odor that exists  
24 with Basal Chadron well water. So again we don't see  
25 any connection between that and the current

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1 operations, much less proposed operations.

2 JUDGE YOUNG: Let's assume that he is  
3 telling the truth and that his well water becomes  
4 discolored at times that are related to CBR's  
5 drilling. That would at a minimum show that there is  
6 some kind of mixing between what Crow Butte is doing  
7 and his other than it being a complete coincidence;  
8 right?

9 MR. SMITH: No. In terms of Crow Butte  
10 current operations. But in order to have standing --

11 JUDGE YOUNG: Right, I'm talking about --  
12 well, let's talk about the current operations for now.  
13 And I'm trying to understand assuming he's telling the  
14 truth and he's saying that his well water becomes  
15 discolored at times when Crow Butte is drilling and  
16 then it gets clear when they're not drilling, and then  
17 they start drilling again and it becomes discolored  
18 again. What's your response?

19 MR. SMITH: I'm sorry, what's your  
20 question?

21 JUDGE YOUNG: What's your response to that  
22 apparently establishing some relationship between the  
23 discoloration in his well water and the drilling that  
24 Crow Butte is doing on the current, with the current  
25 site?

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1 MR. SMITH: I guess I don't see how that  
2 helps establish standing for the proposed North Trend  
3 Expansion Area.

4 JUDGE YOUNG: Well, let's put that  
5 question aside. All I'm asking you to do is address  
6 that statement for what it is.

7 MR. SMITH: I mean all I can do is read  
8 what is written there. And you asked for an  
9 explanation of what we thought was happening. And  
10 I've provided you the best information we have about  
11 we understand conditions to be out there.

12 JUDGE YOUNG: Okay. What I was asking you  
13 to do was assume the truth of this statement. And I  
14 haven't heard you give any response that would assume  
15 the truth of that statement. What I thought I heard  
16 you say before was that it couldn't really be.

17 MR. SMITH: Okay. If I assume the truth  
18 of this --

19 JUDGE YOUNG: Right.

20 MR. SMITH: -- I don't understand how, is  
21 there any connection with regard to how that impacts  
22 the North Trend Expansion Area.

23 JUDGE YOUNG: Right. But I'm asking you  
24 to put that question aside and focus on the question,  
25 simply the question of how do you explain the

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1 connection between discoloration in his well and Crow  
2 Butte's drilling in the current site, putting aside  
3 the question of standing for the future site. We can  
4 deal, that's a separate issue, we can deal with that  
5 separately. That's the only question I'm asking you  
6 to answer.

7 MR. SMITH: I'm uncomfortable speculating  
8 because we don't understand there to be any  
9 explanation for this if it exists.

10 In addition to the mixing of, the  
11 allegations of mixing which we believe are  
12 insufficiently supported to demonstrate that there is  
13 an injury, there are some other types of statements in  
14 the standing affidavits that we would also like to  
15 discuss briefly, one of which is that there were some  
16 impacts on property values. And I heard counsel for  
17 the Petitioners say that there was some technical  
18 report or some explanation for that. None of that is  
19 included in standing declarations that I can tell. So  
20 I think that type of injury is too speculative and  
21 that conclusory allegations about potential harm not  
22 tied to the specific amendment that's at issue here is  
23 insufficient, especially at large distances from the  
24 site.

25 So there is no new or distinct harm coming

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1 from the proposed North Trend Expansion so it's not  
2 clear how property values would be incrementally  
3 affected from the expansion of the existing facility.

4 And in addition, the Commission has held  
5 that the zone of interest rest for standing, which is  
6 the fourth prong of the standing inquiry, doesn't  
7 encompass economic harm that's not directly tied to  
8 environmental or radiological harm from the facility.  
9 So that psychic or perceptive injury is not within the  
10 zone of interest of standing for the Commission's  
11 hearing process.

12 That's all we have with regard to  
13 standing. Thank you.

14 JUDGE YOUNG: Okay. Did you have, Mr.  
15 Frankel?

16 MR. ELLISON: Mr. Frankel has left the  
17 room. He will be right back.

18 JUDGE YOUNG: Okay.

19 MR. ELLISON: I do have some things I  
20 would like to address if I may respond in terms of the  
21 fracturing issue.

22 Basically it seems to be the position of  
23 CBR and perhaps the NRC Staff that really any  
24 intermixing is really impossible because we don't know  
25 anything about fracturing. Well, I want to address

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1 that in a couple of different ways.

2 First of all, in terms of intermixing,  
3 potential intermixing between the Brule and the  
4 Chadron, CBR in its environmental report talked, cited  
5 a Souders study from 2004 which states and stated that  
6 fractures may increase Brule and Chadron permeability  
7 in localized areas. I have made an earlier reference  
8 in Exhibit A to Dr. LaGarry's summarization of some of  
9 the existing studies and one of the things that he  
10 talked about was that the connection between the fault  
11 zones or fault zones connecting the High Plains  
12 Aquifer and uranium-bearing sandstones of the  
13 Chamberlin Pass Formation with the potential for  
14 contamination of both surface and subsurface from  
15 uranium mining in Dawes County.

16 Part of what Dr. LaGarry was referring to  
17 was a 1985 study by Swinehart and others which I made  
18 reference to. In that particular study there is a  
19 figure six. Figure six shows fracturing on both sides  
20 of the Chadron Arch and the White River Fault that go  
21 from the Chadron formation all the way up to the  
22 Arikaree. So we have existing data which shows fault  
23 connections.

24 In addition, the technical review response  
25 that the Department of Environmental Quality from the

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1 State of Nebraska talked about, the subsurface  
2 structural anomaly, the White River Fault Fold, that  
3 is present in the southern portion of the proposed new  
4 site is inadequately defined and must be accurately  
5 delineated. So for all --

6 JUDGE YOUNG: Say that over again? I'm  
7 sorry.

8 MR. ELLISON: Yes, ma'am. And I quote.

9 "Finally, the subsurface structural  
10 anomaly, the White River Fault Fold, that is present  
11 in the southern portion of the NTEA," that's the North  
12 Trend Expansion, "is inadequately defined and must be  
13 accurately delineated for consideration."

14 What is really clear in what the State of  
15 Nebraska says in rejecting the proposal as currently  
16 submitted by CBR for all of the claims about all of  
17 the testing and the studies in the new site area this  
18 report is replete with specific references about how  
19 what CBR is doing is using its current site data and  
20 transferring it and saying that the new site is the  
21 same. And the Department of Environmental Quality of  
22 Nebraska says we have no way of knowing that from any  
23 of the data that's been submitted. In fact, what they  
24 said as a general statement, the document provided for  
25 review by CBR lacks site-specific data, inclusion of

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1 recent research, and the presentation of well-  
2 supported scientific interpretations to be considered  
3 acceptable.

4 One of the things that is noted on page 4  
5 is that because of lack of studies and what is known  
6 however that there may be significant textural changes  
7 in the Basal Chadron as well as mineralogical changes  
8 that would be related to the deformation along the  
9 Crawford/White River Structural Uplift.

10 And as for -- and I don't want to get into  
11 the merits but let me get down one further point.  
12 Textural change is likely across this boundary and  
13 that textural change will likely impact potential  
14 vertical and horizontal hydraulic conductivities and  
15 may also be coincident with mineralogical changes that  
16 ultimately correspond to significant facies shifts  
17 across the Crawford/White River Structure and into the  
18 associated Crawford Basin.

19 There are studies show there are  
20 fractures. It is simply unknown the full extent of  
21 the fracturing both in the immediate site and the  
22 surrounding site. But what is clear is that what is  
23 known is that there's fracturing that goes all the way  
24 from the site, the area that they're in all the way up  
25 to the potable or the Arikaree and which my clients

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1 use as their water supply. So there is data that does  
2 exist now that shows an interconnection, simply a lack  
3 of study.

4 JUDGE YOUNG: You just said something  
5 that, you said up to the potable Arikaree, that the  
6 water, the current or the baseline water quality in  
7 the Arikaree is there any issue about it being, having  
8 high levels of radioactivity or -- and I guess I'll  
9 ask all the parties this. There have been statements  
10 that the current state of the water it's already bad  
11 basically is the argument that's been made. Is there  
12 a distinction between the water that's drawn from the  
13 -- Is that what you said, first of all? And is there  
14 a distinction there?

15 MR. ELLISON: We understand that the Basal  
16 Chadron Formation that the water is considered  
17 generally to be undrinkable. However, people are  
18 using it for domestic water supply.

19 JUDGE YOUNG: You said undrinkable?

20 MR. ELLISON: Undrinkable.

21 MR. FRANKEL: Without filtering.

22 MR. ELLISON: Without filtering.

23 JUDGE YOUNG: Right.

24 MR. ELLISON: However, it is being  
25 utilized by domestic users in the relative immediate

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1 area.

2 Our concern is that due to fracturing, and  
3 especially where after the purported treatment because  
4 I think it's pretty clear that there is a problem in  
5 getting us back to the levels, and I will address that  
6 further when we get to the contentions, by injecting  
7 this stuff down into the ground one of the concerns is  
8 that this may itself cause further fracturing. And in  
9 fact there are studies which we'll talk about that  
10 suggest this as a problem. But because of this  
11 interconnection if there is further contamination or  
12 further deterioration of the water, and we think that  
13 from the USGS study it shows that there is in fact  
14 increased levels of uranium, of arsenic, vanadium  
15 after the purported treatment that CBR is doing.

16 So we're concerned that this fracturing  
17 and further pressure on that aquifer to inject water  
18 then upward through the fault we're concerned that we  
19 feel that there is a connection and therefore creates  
20 our standing. Because we get water --

21 JUDGE YOUNG: Okay, let me just interrupt  
22 because I was really trying to ask an informational  
23 question.

24 MR. ELLISON: I'm sorry.

25 JUDGE YOUNG: Earlier there's been

1 discussion about the current state of the water being  
2 undrinkable. And you mentioned filters. But and then  
3 you clarified that to say that that would be in the  
4 Chadron.

5 MR. ELLISON: Yes.

6 JUDGE YOUNG: From the Chadron Aquifer.  
7 And earlier I thought I heard you say that the water  
8 in the Arikaree Aquifer was potable. And so is that -  
9 - do all parties agree with that statement? Is there  
10 any dispute on that?

11 MR. SMITH: I don't think so. But there's  
12 some gloss that's important here and that's that the  
13 Basal Chadron is a depth, then there's the Brule  
14 Aquifer which is higher quality water than the Basal  
15 Chadron. And then there's the Arikaree Aquifer which  
16 is above that which does have potable water, but it  
17 doesn't exist at the North Trend Area or the existing  
18 area.

19 JUDGE YOUNG: The Arikaree is not over the  
20 North Trend?

21 MR. SMITH: Correct.

22 JUDGE YOUNG: But the argument's being  
23 made that there are faults that would connect it to  
24 the Brule and/or the Chadron.

25 MR. SMITH: But it doesn't overlay the

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1 site so it's unclear how that would, where that would  
2 occur. It doesn't.

3 JUDGE YOUNG: Okay. I just wanted to  
4 clarify what the situation was.

5 Go ahead.

6 MR. FRANKEL: Judge, if I might interject.  
7 We do not concur that the Basal Chadron is  
8 undrinkable. And we point to page 17 of this NDEQ  
9 Exhibit B where I quote. It says, "This presents an  
10 interesting paradox."

11 JUDGE YOUNG: I'm sorry, page?

12 MR. FRANKEL: Page 17, second paragraph.  
13 "This presents an interesting paradox in that the unit  
14 has been used as a drinking water source, but is also  
15 mineral bearing and thus meets two contradictory  
16 criteria covered within the regulations. Is there  
17 possibly an overarching solution that can be presented  
18 by CBR with regards to domestic water supplies to  
19 protect the health and safety of persons in the  
20 vicinity of Crawford?"

21 And what I think we're witnessing is that  
22 maybe 20 years ago when it was perceived that there  
23 was more drinking water as a resource than there is  
24 now it was written off or half written off that this  
25 aquifer did not have valuable potentially drinkable

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1 water. And what we're finding out now is that it has  
2 been used for drinking and it may be that there is  
3 going to be an increased desire to filter it and use  
4 it for drinking. At a time where fresh water is being  
5 mined out of the deep seas it's not farfetched to see  
6 that we'll start filtering the Basal Aquifer. So  
7 that's our position on behalf of the three Petitioners  
8 that I'm representing.

9 Did you finish your rebut?

10 MR. ELLISON: Yes.

11 MR. FRANKEL: Okay, I have a couple small  
12 rebuttals. That was the first one.

13 The second one was the reference to Beth  
14 Ranger's use of the Crawford water supply. We were  
15 informed that Crawford gets some of its water from the  
16 Brule. We're asserting that there's evidence that  
17 shows a mixing of the Brule with the Chadron. And so  
18 even if she uses the Crawford city water because it  
19 comes from the Brule, if you concur with us that there  
20 is some showing of mixing or plausibility of mixing  
21 then that supports standing.

22 JUDGE YOUNG: And where was, again just to  
23 refresh, where was the evidence of the mixing that  
24 you're referring to?

25 MR. FRANKEL: That we suggested in our

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1 Exhibit A that we submitted today which paragraph 3 of  
2 Professor LaGarry's report. And he is here if there  
3 are any specific questions for him. He's agreed to  
4 answer any questions of the Board.

5 But it says, "These faulted zones contain  
6 groundwater and are considered areas of critical  
7 concern. And based on exhaustive compilations of all  
8 data show that many of these fault zones connect the  
9 High Plains Aquifer and the Basal Chadron."

10 And so we're saying that with that we're  
11 meeting the minimum showings that we have to meet  
12 viewing our petition most favorably.

13 On the Judge's question concerning whether  
14 there was a regulation regarding the amendment to  
15 increase the water usage by another 4,500 gallons per  
16 minute, not being an expert in the NRC regulations I  
17 can only ask whether 10 C.F.R. 51.45(b) concerning  
18 disclosure of the irretrievable commitment of  
19 resources might be applicable. I would raise that as  
20 our rebuttal.

21 Counsel for the company stated that the  
22 conductivity was 10 feet a day. But the application  
23 says that it's less than 25 feet a day. So it's  
24 somewhere between 10 and 25. And I suspect if they  
25 had good evidence to show it was closer to 10 they

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1 would have said that in their application. That's in  
2 the environmental report, section 3.4.3.1.

3 On the issue of background radiation, it's  
4 completely irrelevant to this matter. The radiation  
5 could be ten times what North Trend is putting out or  
6 proposes to put out. The standard under HRI One and  
7 Two is any exposure to radiation, even within  
8 technical limits, conveys standing. So that being the  
9 leading ISL case we would hope that it would be  
10 followed.

11 And then on the issue of the baseline I  
12 refer to I believe it's Environmental Report 5.4.1.3.2  
13 which says, "Since ISL operations..."

14 JUDGE YOUNG: Say that again? I'm sorry,  
15 5.4.1?

16 MR. FRANKEL: Point three point two,  
17 concerning establishment of restoration goals.

18 Applicant says, "Since ISL operations  
19 alter the groundwater geochemistry it is unlikely that  
20 restoration efforts will return the groundwater to the  
21 precise water quality that existed before operations."  
22 So --

23 JUDGE YOUNG: That's one of the ones you  
24 cited in the contention?

25 MR. FRANKEL: Yes. Yes, Judge.

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1 JUDGE YOUNG: All right.

2 MR. FRANKEL: And there was a reference by  
3 counsel for the company to investigations. We would  
4 be curious what those were. That's the kind of  
5 evidence we would like to see as part of this hearing.

6 And then finally on the odor issue, Dr.  
7 Anders is willing to testify that the odor in question  
8 is different and worse than the typical sulfur smell  
9 and that it started only in fall 2007 after the most  
10 recent drilling started. So I know that if we are  
11 admitted to this then we will have an opportunity to  
12 present Dr. Anders for cross-examination.

13 And that's all I have on rebuttal, Your  
14 Honor, on standing.

15 JUDGE YOUNG: All right. Does that  
16 complete the argument on standing?

17 MS. SIMON: Your Honor, we just had one  
18 clarification question if we could?

19 When Mr. Ellison picked up a report I  
20 believe and showed a figure.

21 MR. ELLISON: Yes.

22 MS. SIMON: Could you tell us what report  
23 that was?

24 MR. ELLISON: I'd be happy to. I'm going  
25 to struggle through some of the pronunciations. But

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1 it's a 1985 study entitled "The Cenozoic  
2 Paleogeography of Western Nebraska."

3 MS. SIMON: Okay. And who are the --

4 MR. ELLISON: And it was by James  
5 Swinehart, Vernon Souders, S-O-U-D-E-R-S, Harold  
6 DeGraw, and Robert Diffendal, D-I-F-F-E-N-D-A-L, Jr.

7 MS. SIMON: Okay. Is that the one that  
8 you refer to in this Exhibit A under paragraph 2, for  
9 example?

10 MR. ELLISON: I believe that this is what  
11 Dr. LaGarry was referring to. And he's shaking his  
12 head yes, so I'll confirm that. And that is also what  
13 is referred to in paragraph 3 of Dr. LaGarry's  
14 summarization of existing studies.

15 MS. SIMON: Okay, thank you.

16 MR. SMITH: For your information the first  
17 study is cited on page 9-5 of the environmental  
18 report.

19 MS. SIMON: Okay.

20 MR. SMITH: The Cenozoic Paleogeography.

21 MS. SIMON: Thank you.

22 JUDGE YOUNG: Is the Souders -- you  
23 mentioned a Souders I think, Mr. Smith; right?

24 MR. SMITH: I don't believe so.

25 JUDGE YOUNG: It's a different person.

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1 MR. FRANKEL: You might have mentioned it.

2 MR. ELLISON: I mentioned it, Your Honor.

3 JUDGE YOUNG: Okay.

4 MR. ELLISON: With regard to the  
5 environmental report --

6 JUDGE YOUNG: Okay.

7 MR. ELLISON: -- making reference to a  
8 2004 study, the citation is to Souders 2004.

9 JUDGE YOUNG: Is that the same person that  
10 write the other study or co-wrote the other study?

11 MR. ELLISON: I'm not 100 percent sure.

12 JUDGE YOUNG: Okay.

13 MR. SMITH: They have the same first two  
14 initials.

15 JUDGE YOUNG: What?

16 MR. SMITH: They have the same first two  
17 initials.

18 MR. ELLISON: Thank you.

19 JUDGE YOUNG: I just thought there was  
20 some reference.

21 MR. SMITH: The Souders report is  
22 referenced on page 9-7 of the environmental report.

23 JUDGE YOUNG: Okay, so both of those  
24 studies are referenced in the environmental. Okay,  
25 thank you.

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1 MR. FRANKEL: Excuse me, Judge. Earlier  
2 you said that there would be an opportunity for Chiefs  
3 American Horse and Red Cloud to make a statement. And  
4 the gentlemen have been with us all morning and I'm  
5 wondering if you might allow them to do that before it  
6 gets too late in the day?

7 JUDGE YOUNG: Yes. If that would be good  
8 to do that before lunch that would be fine.

9 MR. FRANKEL: Joe, why don't you say a few  
10 words and then Chief Red Cloud can say a few words.

11 JUDGE YOUNG: Welcome to our proceeding  
12 also.

13 CHIEF AMERICAN HORSE: Justice Young,  
14 Justice Cole and Justice Oliver.

15 JUDGE YOUNG: You've just given us a  
16 promotion, but thank you.

17 CHIEF AMERICAN HORSE: (Speaking Lakota.)

18 My name is Joe American Horse. I am from  
19 Chief American Horse. Long Knife, the one who owned  
20 Long Knife Horses. What that means is that he get all  
21 the calvary horses.

22 I'm going to, this is my credential.  
23 Justice Cole you can give that to the Chief Judge. If  
24 I go to the United Nations I will get you another  
25 picture later on for Justice Cole and Oliver. I was

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1 in the Basketball Hall of Fame in Nebraska. I was an  
2 athlete when I was young. But today I am a diabetic.  
3 I have to watch myself what I eat. I don't use  
4 alcohol, I don't use tobacco, and I've got to watch  
5 what I eat and I've got to watch where I'm going.  
6 Because even the other day I fell down and I scraped  
7 myself and it got infected, so. I've also had two  
8 surgeries.

9 So in my life I like to have a clean  
10 environment. I like to not only myself but some of my  
11 other people they have the same thing that we have and  
12 that's diabetes. We have diabetics. I don't know  
13 where it came from. They say it's our diet and  
14 everything like that. But still we still have it on  
15 the Indian reservation.

16 Now David was mentioning about 1851 and  
17 1868 Treaty. We used to be a large nation. Lakota  
18 used to be a large nation with 10,000 campfires. That  
19 tells you how large we are. The State of Nebraska,  
20 Dakotas, Minnesota and Missouri area all Lakota names,  
21 are all Sioux names. So we were that big one time.

22 In 1949 the gold was discovered in  
23 California. They want to go through the Indian  
24 Country. So they signed this treaty, the 1851 Treaty,  
25 to let the settlers and the gold miners go through.

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1 And because of this bad things happened after 1851.  
2 And under the leadership of Oliver Red -- Chief Red  
3 Cloud, Oliver's grandfather, negotiating another  
4 treaty, 1868 Treaty, Fort Laramie Treaty. In that  
5 these treaties are supposed to act, they are supposed  
6 to follow what they say to us, how to conduct  
7 ourselves and like that. They've never been followed  
8 through.

9 And right now we're at the Pine Ridge  
10 Indian Reservation. They put us on the Indian  
11 Reservation after 1868 Treaty. And what happened is  
12 that you're not going to see in the -- you're going to  
13 see us under the Department of Interior where they  
14 have like relics like a skull and tin of our sons and,  
15 you know the whole, Yellowstone Park, we're in there  
16 somewhere the Indian people. And we'd like to see if  
17 we can get out of there.

18 And our concern is really important  
19 because the water which we're drinking, the water  
20 downwind, we're talking about a sweat lodge we have  
21 every two weeks. What that sweat lodge does is that  
22 we pray for those people having a hard time, whether  
23 the alcoholism, whatever it is. We pray for people  
24 that just came back from Vietnam that have a hard  
25 time. We also pray for ourselves and for guidance.

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1 And we've been doing this all this time. And it's not  
2 just something that we want to do, I mean we just  
3 started doing.

4 But anyway, we pray for all those.  
5 There's about 3,923 servicemen killed in Iraq. I  
6 remember the families like that, you know. So it's  
7 not only a prayer for ourselves but for all the  
8 people.

9 And the 1868 Treaty was signed in Fort  
10 Laramie and Fort Robinson in Crawford, Nebraska, is  
11 they used to call it Red Cloud Agency but then they  
12 moved to Pine Ridge and then the agency was, I mean  
13 Red Cloud Agency was gone. But anyway, just a little  
14 history of what happened. And my 1868 Treaty my  
15 grandfather, the picture I have is my grandfather. He  
16 died in 1910. But he signed the 1868 Treaty as one of  
17 the leaders.

18 And I thought I can at this time take a  
19 little time to have Mr. Oliver Red Cloud can say  
20 something. He's a grandson of Chief Red Cloud.

21 Thank you very much for your kind  
22 attention. And welcome to the Mari Sandoz Building  
23 and Chadron State College.

24 JUDGE YOUNG: Thank you, Chief American  
25 Horse.

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1 CHIEF AMERICAN HORSE: You're welcome.

2 (Applause.)

3 JUDGE YOUNG: And welcome, Chief Red  
4 Cloud.

5 CHIEF RED CLOUD: Okay, first of all I  
6 want to tell you who I am. I am Chief Red Cloud,  
7 Oglala Sioux Tribe. And my great, great grandpa made  
8 that treaty. Back in the days 1493 you people come  
9 here he made that resolution, I mean the treaty not on  
10 the United States Constitution, it's on the United  
11 Nations. So '51, some say '51. Talking here, at  
12 least that you're here you violate Lakota Treaty.  
13 Fifty-one, it still stands. Fifty-one it's all  
14 mineral rights. And I've been fighting for the treaty  
15 rights for Lakota people at reservation.

16 And today I look around, I see young  
17 people here talking about treaty. I'm 89 years old.  
18 And you kids, you people are just born the other day.  
19 And I know what I'm talking about. I've been in  
20 Washington, I've been to United Nations, and treaty  
21 rights. And today you're talking about some that  
22 concern about people.

23 I just had a meeting and I had the same  
24 problem about two months ago what we're talking about  
25 today. And again in the water rights, you're talking,

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1 mentioned water rights. That belongs to the Lakota  
2 people. We still stand because that '51 made on the  
3 United Nations, not on the United States Constitution.  
4 And your people have to understand your treaty and  
5 your rights because United States just organized here  
6 in 1776 or '78 and they make that United States  
7 Constitution law. But we are not in that, we are in  
8 the United Nations. We are the 43 nations in this  
9 world.

10 So you have to understand we have Article  
11 1 under United States Constitution and our treaty  
12 rights in United Nations. We could take anybody in  
13 this country, in the world, to court, use that. You  
14 don't trust, you don't believe me, read your treaty,  
15 it's in there. And we have 71. You people know your  
16 treaty or your rights or your state law all under  
17 United States Constitution law. We have 71, United  
18 States Constitution can't, Congress can't change  
19 those, our treaty. And they can't put no law under  
20 our treaty. That's our right. You better write it  
21 down and look where you write it down.

22 And today I listen and people about what's  
23 going to happen over here on the Crawford, Nebraska,  
24 I guess that's section that we own there. That's the  
25 first agency we used to have. And under that are

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1 water rights and mineral rights. Who changes back in  
2 74 A and B? They can't do that under 71. We still,  
3 we still own that Indian Reservation, Indian  
4 Territory. We still have that. It's in the  
5 Constitution of the United States and under United  
6 Nations.

7 So today what you talk, all this paper, I  
8 went through this here. I had a whole, whole, whole  
9 load of it like this here. And in there they violated  
10 my rights because I'm the chief of eight reservations,  
11 I take care of the treaty rights. And I could use  
12 Article 1, anybody I could take him to court, Supreme  
13 Court or the United Nations. Write it down because I  
14 could do it. And they have the respect, I respect the  
15 people here talking about, but talking about rights  
16 because what you're talking about concerns the people.

17 I used to work for BIA for 35 years and I  
18 studied water, the water bay that's under here and  
19 Colorado. And I know how the water works. So this  
20 water it still belongs to Lakota people under 51.  
21 United States can't say they changed that because  
22 state just organized after 51. So you have to  
23 remember.

24 And I want my nephew to talk about. Give  
25 us about 10 minutes or so, we're going to tell you

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1 what's right. Okay, Mr. Hand, come over tell.  
2 Because we fight this now we're going to have a big  
3 meeting in this end of the month. We called all the  
4 senators and we got a senator and we got a governor.  
5 And I even write in Washington what we're talking  
6 about here they tried that in our land here.

7 MR. LOOKS FOR BUFFALO HAND: First of all,  
8 Your Honor, thank you.

9 JUDGE YOUNG: Thank you.

10 MR. LOOKS FOR BUFFALO HAND: I identify  
11 myself as Floyd Looks For Buffalo Hand and the  
12 grandson of also Chief Red Cloud and he's an uncle.

13 JUDGE YOUNG: Say your name again please?

14 MR. LOOKS FOR BUFFALO HAND: Floyd Looks  
15 For Buffalo Hand.

16 JUDGE YOUNG: Thank you.

17 MR. LOOKS FOR BUFFALO HAND: My  
18 grandfather Big Hand is also a treaty signer. And my  
19 other grandfather Red Cloud is a treaty signer. And  
20 on my other side from my mother's side Big Foot is my  
21 grandfather. And Big Foot is known as Ten Elk and  
22 "Ahaka Gliska Sparga."

23 So one of the things that I want elaborate  
24 on what he has said, I'm a delegate on the city  
25 council. I'm the youngest member at '68. And we have

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1        been reorganizing our treaty laws. And under the '68  
2        and '51 treaty the mineral rights belong within the  
3        treaty boundaries, that's Section 16 of Crawford. And  
4        also that it falls under Article 1 of the '68 treaty.  
5        Therefore, this next meeting we have January 28, 29,  
6        30, eight reservations I believe there will be a  
7        resolution to charge all mining companies with  
8        trespassing and desecration and grave robbing which is  
9        the mineral rights that falls under. And I believe  
10       this is coming up in the statute of '68 and Article 1.

11                So the '51 and '71 supersedes the United  
12       States Constitution. But under Article 6 of the  
13       United States Constitution the European Americans hold  
14       no title to the mineral rights of North America. And  
15       that's where the law is. So it's a nation to nation  
16       agreement. So that's what he asked me to elaborate  
17       on.

18                And I want to also thank everyone that is  
19       here fighting over something that is ours. And thank  
20       you very much.

21                JUDGE YOUNG: Thank you, sir.

22                (Applause.)

23                JUDGE YOUNG: Thank you both.

24                Just it occurs to me I know Mr. Smith and  
25       I and some other lawyers maybe here are active in the

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1 American Bar Association. And the Judicial Division  
2 of the American Bar Association recently in the last  
3 few years there is a Tribal Council that's part of the  
4 American Bar Association's Judicial Division. So this  
5 prompts me to ask whether there is any argument that  
6 any of the parties have or want to make on treaty-  
7 related issues insofar as it relates to standing.

8 I'm not familiar with that but I know that  
9 it is an area of law in which there are issues that  
10 are discussed more presently.

11 MR. FRANKEL: Judge, I will speak briefly  
12 and then Mr. Ellison may want to speak briefly.

13 In our petition we referenced the General  
14 Assembly Resolution from September 2007. It refers to  
15 the environmental, economic, social, cultural,  
16 spiritual impact.

17 The treaties have also been mentioned.  
18 And to my knowledge there has never been a  
19 congressional abrogation of those treaties pertaining  
20 to mineral rights. And so we feel it conveys standing  
21 in the same way that the regulations contemplate  
22 standing for an Indian tribe that has a facility on  
23 its reservation. Here we're talking about the  
24 movement of water beneath the reservation and we're  
25 talking about mineral rights under treaty.

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1           It is beyond my expertise to argue that in  
2 detail. It's something that we could argue a brief if  
3 the Board desires.

4           MR. ELLISON: The only thing I'd want to  
5 add was that clearly we're talking about an area here,  
6 the new site, the existing site are well within the  
7 1851 and 1868 treaty boundaries. And we would  
8 certainly take the position that an organization like  
9 Owe Aku, let alone permitting an intervention by the  
10 traditional chiefs would be appropriate since, as Mr.  
11 Frankel pointed out, the treaties have not been  
12 abrogated. And they specifically talk about the air,  
13 the water and the soil.

14           And in addition, because of the  
15 interconnection in spiritual ways and cultural ways of  
16 life of the Lakota the purity of the water and the air  
17 and the soil are integral to the ability to fully  
18 worship. And so in that sense we would argue that the  
19 treaties would give additional standing. Owe Aku is  
20 a Lakota organization specifically designed to protect  
21 these things.

22           MR. FRANKEL: Infringement of the treaty  
23 rights would to us be a concrete injury-in-fat.

24           JUDGE YOUNG: When we set deadlines and  
25 talk about dates at the end of the argument this may

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1 be something that if anyone wants to submit any case  
2 law on it, it just reminded me that it is an area of  
3 law that I'm not that familiar with but I have some  
4 acquaintance with. And so if there is any case law  
5 out there that's something that we can hear more from,  
6 hear more of.

7 Okay, shall we break for lunch? Is there  
8 anything else?

9 MR. SMITH: I just have one comment about  
10 standing in reference to the treaties.

11 JUDGE YOUNG: Okay, go ahead.

12 MR. SMITH: And that's that treaty  
13 violations perceived are outside of the zone of  
14 interest related to the Atomic Energy Act. So I don't  
15 think that would be -- has any relevance with regard  
16 to standing for purposes of this NRC hearing. It may  
17 have relevance in other forums but it doesn't I don't  
18 believe for the Atomic Energy Act hearings.

19 MR. FRANKEL: We would argue the exact  
20 opposite, Your Honor.

21 JUDGE YOUNG: Pardon?

22 MR. FRANKEL: I said we would argue the  
23 exact opposite, Your Honor, in light of the purposes  
24 set forth by Congress for the Atomic Energy act.

25 JUDGE YOUNG: Well, the mineral rights and

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1 the water rights I mean we all know that particularly  
2 with water rights in the west it can become very  
3 controversial issues. So I don't know what the law is  
4 on it but if there is any law on it it would be good  
5 for us to be aware of that.

6 MS. JONES: And, Judge, we were just going  
7 to reiterate his comments that we are not really sure  
8 how this interplays with our review process. We're  
9 not really sure how this interplays with our review  
10 process under the AEA. So we would also, we're not  
11 knowledgeable enough to speak on it as well so we  
12 would also have to look into it and provide some  
13 additional information.

14 JUDGE YOUNG: I'm sorry, the last part?

15 MS. JONES: We would have to look into it  
16 as well.

17 JUDGE YOUNG: Sure.

18 All right, thank you. We will come back  
19 and start oral argument on Contention 1 at -- it's  
20 what, about 12:25? -- at 1:30. Does that give enough  
21 time? Okay, 1:30.

22 (Whereupon, at 12:15 p.m., the oral  
23 argument was recessed, to reconvene this same day at  
24 1:30 p.m.)

25

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A F T E R N O O N S E S S I O N

(1:40 P.M.)

1  
2  
3 JUDGE YOUNG: Okay, who is going to start  
4 on Contention 1?

5 MR. FRANKEL: I will, Judge.

6 JUDGE YOUNG: And as I said in the, as we  
7 said in the Order, if you could please focus on the  
8 contention admissibility criteria of 2309(f)1 through  
9 6.

10 MR. FRANKEL: Well, as I understand it we

11 --

12 JUDGE YOUNG: Excuse me for one second.

13 MR. FRANKEL: I'm sorry, Your Honor.

14 JUDGE YOUNG: The reason I pointed that  
15 out was because the standards for contentions in the  
16 HRI case were under the old rules. And so and I know  
17 you mentioned, you refer to that a fair amount in your  
18 replies. And those are no longer applicable.

19 MR. FRANKEL: But both get their authority  
20 from the same provision of the AEA; correct? Which --

21 JUDGE YOUNG: That's true. Except that  
22 the old, the Commission did a significant revision of  
23 the procedural rules, Subpart 2, that became effective  
24 I think it was February of 2004. And so our authority  
25 extends to ruling on contentions based on these

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1 criteria. Insofar as other law may be relevant to  
2 those and also insofar as there are no specific rules  
3 about ISL cases other law may come in. But in ruling  
4 on contentions we are required to look to whether they  
5 meet these six criteria. So that's a central thing  
6 that we will be looking at.

7 MR. FRANKEL: I understand, Judge. And in  
8 looking over our reply, except for one reference to  
9 HRI which relates to standing anyway it seems clear to  
10 me that our HRI references relate back to standing.

11 JUDGE YOUNG: Okay.

12 MR. FRANKEL: So I don't think we have any  
13 conflict on our interpretation from our perspective.

14 Thank you for the guidance certainly. And  
15 I will abide by it.

16 My understanding is that, and what I did  
17 when I looked at this petition we do have subsections  
18 here that at least are a starting point for that. And  
19 we do have the cited contentions with the technical  
20 report and the environmental report. So section  
21 2.309(f)(1), subparagraph 1 2 require a specific  
22 statement of the issue of law or fact to be raised and  
23 a brief explanation for the bases.

24 This brief explanation should be of the  
25 logical underpinnings of the contention. And a

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1 petitioner is not required to provide an exhaustive  
2 list of possible bases but to simply provide a  
3 sufficient alleged factual and legal bases to support  
4 the contention.

5 So our first contention is about water.  
6 And it has some different parts to it. We have  
7 allocated between us that I will discuss the parts  
8 having to do with water usage and Mr. Ellison will  
9 discuss the parts having to do with mixing of aquifers  
10 and/or contamination.

11 JUDGE YOUNG: Okay. And as you do that it  
12 just occurs to me probably the sections that play into  
13 rulings on contention the most are probably 5 and 6.  
14 Sometimes 3 and 4 come into play but 5 and 6 are  
15 really the ones that tend to be the determinative  
16 issues. So if you could try to tie in your arguments  
17 on those subjects to those sections.

18 MR. FRANKEL: I'd be happy to.

19 JUDGE YOUNG: Thank you.

20 MR. FRANKEL: Paragraph sub 3 that the  
21 contentions are germane and 4 that the issue raised is  
22 material to the findings the NRC must make such that  
23 resolution of the dispute would make a difference in  
24 the outcome of a licensing proceeding.

25 JUDGE YOUNG: Now are you reading from

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1 case law?

2 MR. FRANKEL: I'm reading from notes I  
3 have of an Appendix A to a case which I believe is the  
4 Entergy/Pilgrim Nuclear Power Station case. And so --

5 JUDGE YOUNG: Okay, the appendix that  
6 explains the various sections?

7 MR. FRANKEL: Exactly, Your Honor.

8 JUDGE YOUNG: Okay. All right.

9 MR. FRANKEL: It has a nice summary of the  
10 governing case law on the contention admissibility  
11 standards. And I think it was perhaps pointed out by  
12 the Board for us to look at.

13 JUDGE YOUNG: Right.

14 JUDGE COLE: I think the judge is familiar  
15 with that.

16 JUDGE YOUNG: I am familiar.

17 MR. FRANKEL: So I won't belabor repeating  
18 much of it except to just get a couple of highlights  
19 into the record since obviously you're familiar with  
20 it.

21 Sub 5 has been interpreted to require the  
22 petitioner provide the analyses and expert opinion  
23 showing why a bases -- I'm sorry, I was interrupted in  
24 between sub 4.

25 I was saying resolution of dispute would

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1 make a difference in the outcome of a licensing  
2 proceeding. This means that there must be some link  
3 between the claimed error or omission regarding the  
4 proposed licensing action and the NRC's role in  
5 protecting public health, safety or the environment.

6 Sub 5 has been interpreted to require the  
7 petitioner to provide the analyses for expert opinion  
8 showing why its bases support its contention and to  
9 provide documents or other factual information or  
10 expert opinion that set forth the necessary technical  
11 analysis to show why the proper bases support its  
12 contention. And this is the part where the material  
13 may be viewed in a light that is favorable to the  
14 petitioner. This is generally fulfilled when the  
15 sponsor of an otherwise acceptable contention provides  
16 a brief recitation of the factors underlying the  
17 contention or references the documents and tests that  
18 provide the reasons.

19 And then finally in 6, that petitioner  
20 must read pertinent portions of the license  
21 application, including the safety analysis report and  
22 environmental report, state the applicant's position  
23 and the petitioner's opposing view, explain why  
24 petitioner disagrees with applicant. If petitioner  
25 does not believe these materials address a relevant

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1 issue the petitioner is to explain why the application  
2 is deficient.

3 And then finally it's noted, technical  
4 perfection is not an essential element of contention  
5 pleadings, just that the sounder practice is deciding  
6 the issues on the merits, not avoiding them on  
7 technicalities, observing that a person does not  
8 become entitled to a hearing merely on bald or  
9 conclusory allegations that a dispute exists, there  
10 must be a minimal showing that material facts are in  
11 dispute thereby demonstrating that an inquiry in depth  
12 is appropriate.

13 So with the Court's permission I will just  
14 go through each one. And I'm sure that there may be  
15 questions.

16 So, one, the application states without  
17 dispute that they currently use 9,000 gallons per  
18 minute of pristine water, meaning unchanged by human  
19 hands, and returns that amount of radioactive  
20 geochemically changed water to the Chadron Aquifer.  
21 The company likes to use a made-up term, it was  
22 actually made up for them in creating the state NDEQ  
23 restoration technical requirements. They boast that  
24 they are the first ever to restore an aquifer. And  
25 that's because they are the first to convince a

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1 regulatory agency that such a thing could be done or  
2 they were allowed to do it.

3           And just because it's called restored for  
4 purposes of one Nebraska technical regulation we  
5 submit does not mean that it is appropriate to net out  
6 that amount of water that is being consumed and only  
7 use a so-called net consumptive number suggested by  
8 Applicant of only 113 gallons per minute. Petitioners  
9 believe that it gives the misimpression that water  
10 usage at the facility is relatively nominal rather  
11 than actively expressing the water usage.

12           So that states our issue. And our  
13 explanation for why it's a contention is that it does  
14 give this misimpression and it uses the fact that  
15 restoration meeting NDEQ regulations should be grounds  
16 for something completely different which is not  
17 counting the amount of wastewater that's put back into  
18 the aquifer when calculating the consumption of water  
19 from this project. And as we know, and I cited  
20 earlier, this is an issue in the scope of the  
21 proceeding because the NRC is required, among other  
22 things to, under 51.45(b) applicant is supposed to  
23 disclose irretrievable commitments of resources. The  
24 NRC is supposed to examine that. They can't do that  
25 if they are given the impression that it is not a

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1 substantial commitment of resources.

2 And it's clearly within the scope from  
3 that perspective. And from the perspective of the  
4 rules on whether it's in a germane area it goes  
5 directly to the NEPA requirements here and it goes  
6 directly to the AEA requirements which include some  
7 consideration for the environment and the health and  
8 safety of the public, as was cited in our brief.

9 Four, that it would make a difference.  
10 Well, if there is an agreement on this contention or  
11 if even the company stipulated to it that they were  
12 using 9,000 gallons and would like to use another  
13 4,500 gallons per minute and state it and disclose it  
14 properly, then it would make its way into the  
15 environmental assessment. That itself might trigger  
16 the difference between a FONSI decision or doing an  
17 environmental impact statement. And environmental  
18 impact statement would give a chance for public input  
19 in accordance with NEPA. So it is clear to me that it  
20 is an area that is germane to the proceeding. And  
21 that's our argument.

22 Number five, the -- oh, I'm sorry, that  
23 was number five, germane.

24 Number six, let's take a look. We did  
25 read the license application. Incidentally, it was

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1 not available on the Adams website for the week  
2 immediately prior to the filing deadline. Due to the  
3 courtesy of NRC Staff we received a CD, a burned CD  
4 copy and we had to go over the entire application  
5 within the 48 hours preceding the filing deadline.  
6 So, you know, I know that we have not achieved any  
7 form of technical perfection in our pleadings but with  
8 the time we had we did the best we could. And should  
9 we file an amended petition under the rules that you  
10 referred to earlier this morning we will refer to  
11 those circumstances as well.

12 Nonetheless, we did read it. And we cited  
13 specifically to the environmental report and to the  
14 technical report. We went basically in the order that  
15 Applicant's application did to the best extent that we  
16 could. So I believe that the consumption issues we  
17 have a contention. And I'm not sure, Bruce, you know,  
18 some of these hit on your area.

19 MR. ELLISON: Well, you do it.

20 MR. FRANKEL: Okay. So 2.2 we contend  
21 that there is no intention to pursue the goal of  
22 groundwater restoration.

23 JUDGE YOUNG: Excuse me; 2.2?

24 MR. FRANKEL: I'm sorry?

25 JUDGE YOUNG: Two point two of?

1 MR. FRANKEL: Yes. This is on page 10 of  
2 the corrected reference petition.

3 JUDGE YOUNG: Oh, okay.

4 MR. FRANKEL: My understanding is you'd  
5 probably want me to go through and discuss why we  
6 think we comply with --

7 JUDGE COLE: I think you can assume we've  
8 read this.

9 MR. FRANKEL: Yes, sir.

10 JUDGE COLE: And you can summarize this.

11 MR. FRANKEL: Okay. In that case, and  
12 thank you for that.

13 Well, we have provided some documentary  
14 and expert opinions in these Exhibits A and B to show  
15 that this is not merely a bald conclusion or a bald  
16 allegation, to show that drinking water, use of the  
17 water in the Chadron Aquifer is a real concern. We  
18 have met that minimum burden. And so it is a fact  
19 that's in contention. It is a material fact that is  
20 in dispute. And it is something that we have provided  
21 more than a bald and conclusory allegation on.  
22 Therefore, unless there are particular contentions  
23 that the Board feels we have not done that on I would  
24 perhaps just point to --

25 JUDGE YOUNG: You might want to also

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1 address the, excuse me, the Staff's, some of the  
2 Staff's argument against you contention.

3 MR. FRANKEL: No one has ever explained  
4 why this one company that has this one negotiated  
5 resolution with NDEQ should have a different  
6 interpretation applied to it called net consumptive  
7 use of water than applies to everyone else. So in  
8 terms of the Staff's comments there was a question on  
9 the what it is, what is pristine. The Staff seems to  
10 indicate that they accept the company view that CBR is  
11 -- that the water because it contains certain things  
12 that can be filtered out, but it omits to state that,  
13 renders the groundwater unsafe for human consumption.  
14 This is something that immediately contradicts Exhibit  
15 B and the sentence I read in earlier having to do with  
16 existing and future drinking water uses for the same  
17 aquifer and, thus, is not pristine.

18 So as I stated earlier this morning, we  
19 feel very strongly that the water when it is in the  
20 ground whether it requires some filtering to be used  
21 for drinking or whether it can be use for spiritual  
22 and religious purposes by native people here without  
23 filtering, it's still something that was given from  
24 the earth in an unchanged state. It is being removed,  
25 removed and returned in a changed state. And there

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1 needs to be a focus on the extent to which it is being  
2 changed and exactly what condition it's in.

3 There was conflict between counsel for the  
4 company and our position concerning whether the  
5 radiation is the same or different after it's put back  
6 in. And so what this shows me is that this is a real  
7 contention that should be brought to a deeper inquiry.  
8 And that's why we're here.

9 On the first contention as it pertains to  
10 water usage I don't have further arguments. And I  
11 would defer to Bruce Ellison to pick up the part of it  
12 that has to do with the mixing of the aquifers and the  
13 contamination issue.

14 JUDGE YOUNG: And that would include the  
15 arguments about the plume?

16 MR. ELLISON: To some extent.

17 JUDGE YOUNG: Okay. I just didn't know  
18 who to ask. I had a question but I'll wait.

19 MR. ELLISON: One of the things that we  
20 feel that there is a -- we feel that any of the issues  
21 pertaining to the intermixing of aquifers or potential  
22 intermixing of aquifers by fracturing is really a  
23 pretty central question here. And it really covers a  
24 lot of various contentions that we have that Mr.  
25 Frankel just stated the company takes the position

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1 that there's really no problems, there's no real  
2 intermixing. And thus we really get to the import of  
3 what's contained in Exhibit B because at least as I  
4 understand this report from the Nebraska Department of  
5 Environmental Quality they say that one of the  
6 difficulties with looking at the materials that have  
7 been provided by CBR is that there is very little that  
8 really is provided regarding the new site. And that  
9 CBR largely bases its application and conclusions that  
10 there's no problems based upon data that was submitted  
11 from the current operating site.

12 And this document, this 19-page document  
13 is just replete with point after point after point of  
14 how little information is known and how little  
15 information has been provided and how much needs still  
16 to be done because of the at least the NDEQ's  
17 recognition based upon some of the studies that we've  
18 been referring to earlier about the Basal sandstone,  
19 Chadron sandstone being a channel and one of the  
20 facets of the Chamberlin Pass Formation.

21 JUDGE YOUNG: A channel, is that what you  
22 said?

23 MR. ELLISON: A Chamberlin Pass formation.  
24 Thank you.

25 The NRC Staff in its reply, well, would

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1 like the Board to disregard the USGS study that was  
2 done on Groundwater Atlas of the United States,  
3 Kansas, Missouri and Nebraska. And we feel that  
4 that's at least one of a number of important resources  
5 and expert opinions that this Board should require be  
6 taken into consideration, especially where according  
7 to the USGS the treated, the wastewater which is  
8 basically includes common radioactive materials which,  
9 as the USGS points out, are mobilized by this process:  
10 uranium, thorium, radium, radon, the respective  
11 daughter products, trace elements, vanadium, zinc,  
12 selenium, lybdenum, iron, manganese. And that these  
13 must be looked at because they do go back into a  
14 different state than when they are taken out.

15 And one of the things that I would like to  
16 bring up for the Board's consideration is at least  
17 according to this study several --

18 JUDGE YOUNG: You were referring to the --

19 MR. ELLISON: USGS study.

20 JUDGE YOUNG: -- USGS study. Which?

21 MR. ELLISON: 2000 study. This is the,  
22 this is listed at -- I have a cite for it.

23 MS. JONES: Your Honor, we are a little  
24 unclear as to what document he is referring to.

25 JUDGE YOUNG: Yes.

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1 MR. ELLISON: I'm talking about the USGS  
2 Groundwater Atlas of the United States, Kansas,  
3 Missouri and Nebraska, HA730D.

4 MR. FRANKEL: Listed on page 9 of 27.

5 MS. SIMON: Can you point to where in that  
6 you see the vanadium?

7 JUDGE YOUNG: Can you speak up a little  
8 bit?

9 MS. SIMON: I'm sorry. Can you point to  
10 where in the Groundwater Atlas it talks about those  
11 vanadium and all those elements?

12 MR. ELLISON: Well, for example at Table  
13 5 on page 21 is the cite that I have in my notes. It  
14 talks about that the baseline water quality for radium  
15 226 was 229.7 picocuries per liter. But the post-  
16 restoration average was 246.7 picocuries per liter.

17 For uranium there was a tenfold increase  
18 after restoration.

19 MS. SIMON: Excuse me. I'm sorry, Your  
20 Honor. I think he -- are you referring to the NUREG  
21 6870?

22 MR. ELLISON: Yes. Yes.

23 MS. SIMON: That's not the same as the  
24 Groundwater Atlas.

25 MR. ELLISON: Is that different? Then I

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1 apologize.

2 MS. SIMON: Okay.

3 MR. ELLISON: That's what I'm referring  
4 to, the NUREG CR-6870 which is entitled "Consideration  
5 of Geochemical Issues in Groundwater Restoration at  
6 Uranium In Situ Leach Mining Facilities."

7 MR. SMITH: Where is this cited in your  
8 petition?

9 MR. FRANKEL: That was cited to us by the  
10 NRC during the conference call on December 17 and in  
11 the filing after. So that was provided to us after  
12 the filing of the petition but before the filing of  
13 the reply.

14 JUDGE YOUNG: Give me the cite again,  
15 which NUREG?

16 MR. ELLISON: It's NUREG CR-6870.

17 JUDGE YOUNG: Incidentally, on NUREGS,  
18 absent argument that we should do it differently,  
19 NUREGS are guidance. Since there are no rules, there  
20 may be rules coming out in the future but there are no  
21 rules on ISL mining NUREGS I guess you could argue are  
22 in the nature of law but they are only guidance, they  
23 are not binding or controlling. So that's for all  
24 parties' benefit.

25 MR. ELLISON: What this study seems to

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1 suggest is that the post-restoration averages are  
2 significantly higher. Uranium tenfold increase,  
3 arsenic tenfold increase, vanadium several times  
4 higher.

5 JUDGE YOUNG: And this is specifically  
6 about the current site?

7 MR. ELLISON: That's my understanding.

8 JUDGE YOUNG: Okay.

9 MR. ELLISON: There is a statement in the  
10 environmental report 3.11.1.2 that since there is no  
11 mechanism under the EPA or the NDEQ regulations to  
12 exempt an aquifer, therefore the groundwater in the  
13 immediate mining area will never be used as U.S.  
14 drinking water. But we know that it has been. And  
15 that's one of the things that the NDEQ points out.

16 The NRC Staff and CBR take the position  
17 there's no hydrological connection between the  
18 Arikaree Aquifer and the Brule Aquifer. We've gone  
19 over before, we cited the studies that show that in  
20 fact there is a lot of evidence of fracturing and  
21 faults that would in fact create such a hydrological  
22 connection. The biggest thing that this study done by  
23 -- or this response by Department of Environmental  
24 Quality is there is so much unknown. Point after  
25 point after point is unknown.

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1 JUDGE YOUNG: I guess with regard to  
2 unknowns, on standing unknowns are much more relevant.  
3 With regard to contentions you don't absolutely have  
4 to have an expert, you don't absolutely have to have  
5 documents. You can support a contention with a fact-  
6 based argument. You do have to show a genuine  
7 dispute.

8 So I guess I'd caution you that without --  
9 I mean we're not making any rulings today but the same  
10 arguments that might apply to unknown facts in  
11 standing would not have the same significance in  
12 ruling on contentions.

13 MR. ELLISON: Thank you.

14 But for example, one of the things that  
15 the Nebraska Department of Environmental Quality notes  
16 -- I'm looking at page 1 -- is that the regional  
17 deposition between the North Trend and the existing  
18 CBR mine site are similar, is the contention of CBR.  
19 And therefore, the expectation would be that the ore  
20 and chemistry would be similar as well as groundwater  
21 characteristics.

22 What the NDEQ points out is that CBR  
23 failed to discuss the difference, the fact that there  
24 are differences between the two which are significant,  
25 that the Basal Chadron at North Trend was deposited

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1 into a basin that may have been actively subsiding at  
2 the time of deposition; North Trend is dominated by an  
3 artesian groundwater system, significantly different  
4 from the existing mine site; that overlying aquitards  
5 and aquicludes may be significantly different  
6 texturally due to basin subsidence.

7           There what they seem to be saying is that  
8 there is more work that needs to be done but what is  
9 known raises questions. And we raised those questions  
10 as well. For example, there is a lot of discussion  
11 about this overlying layer of the Basal Chadron as  
12 being some kind of a barrier. And apparently there is  
13 a lot of questions about whether it really is as far  
14 as the Department of Environmental Quality is  
15 concerned.

16           For example, CBR contends that there is a  
17 persistent clay horizon, typically brick red in color,  
18 which generally marks the upper limit of the Basal  
19 Chadron sandstone. And what the Nebraska Department  
20 of Environmental Quality noted was that of the data  
21 that CBR did submit from borehole cuttings they don't  
22 contain this red clay.

23           So what we're finding is is that, as the  
24 Department of Environmental Quality which apparently  
25 looked into this in great depth, is that it's not just

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1 a question of unknowns but there's all kinds of hints  
2 from what is known but the data doesn't support a lot  
3 of their contentions of lack of intermixing, of  
4 containment within particular aquifers.

5 JUDGE YOUNG: What's the basis for the  
6 statement in the contention about the slow moving  
7 plume.

8 MR. ELLISON: I'm going to defer to Mr.  
9 Frankel.

10 JUDGE YOUNG: Okay. Well, I was going to  
11 ask him but then -- that's fine.

12 MR. FRANKEL: That comes from WNRC and the  
13 belief by Bruce McIntosh that the fractures and the  
14 fault lines create a drawing of water that results in  
15 some of the wastewater from the mine getting into the  
16 Brule, and therefore the High Plains Aquifer. And  
17 that since water mixes constantly and since the  
18 wastewater has a different geochemical characteristic  
19 that it would move together in the same way that a  
20 groundwater plume moves underneath the ground when  
21 there is a toxic spill. And this happens all the time  
22 in environmental work. So --

23 JUDGE YOUNG: Let me interrupt again for  
24 just refresh my memory on Bruce McIntosh, who he is  
25 and also the basis for his belief?

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1 MR. FRANKEL: Mr. McIntosh is both the  
2 scientist and also the Chairman of WNRC. And based on  
3 his personal research and his understanding that's his  
4 belief.

5 JUDGE YOUNG: A belief in itself I think  
6 there's case law that says a belief would not be  
7 enough on its own. And you say "on his research," can  
8 you expand on that?

9 MR. FRANKEL: I'm afraid him having  
10 surgery today and not being able to be here makes it  
11 impossible for me to contact him. I don't know what  
12 his research was, to tell you the truth. And I asked  
13 him point blank whether he believed this to be the  
14 case and if he could support it, and he said yes. And  
15 that became the basis for how it made it into his  
16 petition or the petition.

17 It would stand to reason and common sense  
18 that if there is mixing among the aquifers and there  
19 is admitted conductivity one part of CBR's application  
20 says 25 feet a day of conductivity. So if there is  
21 conductivity, and I am the most complete layman when  
22 it comes to these technical issues, it would seem to  
23 me that that indicates a movement, a movement of water  
24 and whatever is in the water.

25 JUDGE YOUNG: Where is the section of the

1 application that refers to the 25 feet a day?

2 MR. FRANKEL: I'll get that for you.

3 JUDGE YOUNG: Thank you.

4 MR. FRANKEL: That's section ER, ER  
5 section 3.4.3.1 concerning regional groundwater  
6 hydrology.

7 JUDGE YOUNG: Is that cited in your  
8 petition or?

9 JUDGE COLE: Page 11.

10 MR. FRANKEL: Yes.

11 JUDGE YOUNG: Page 11, okay.

12 MR. FRANKEL: Page 11 of 27. It says,  
13 "Souders indicates that the Brule is a tight formation  
14 with minimal, more than none, minimal hydraulic  
15 conductivity of less than 25 feet a day." We believe  
16 that if it was much less it would have said less, so  
17 we assume that that means 25 feet a day.

18 And then it goes on to say that  
19 permeability will be increased where there are  
20 fractures. And we've submitted this Exhibit A that  
21 says that there's fractures all over this place. So  
22 we feel that we've made more than a minimal or bald  
23 conclusory statement on that one.

24 In terms of common sense if it is  
25 fractured and it is conducting water at something that

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1 is less than 25 feet a day but more than zero, well  
2 then if there is contaminated wastewater that's also  
3 getting mixed. And I don't know anything about how  
4 fast it mixes, how much it stays together, how much it  
5 doesn't stay together, whether it can be tracked by  
6 monitoring wells that go throughout some of the  
7 174,000 square miles of the High Plains Aquifer, but  
8 I do know my intuition tells me that it goes beyond  
9 one kilometer. And I believe that at some point the  
10 burden shifts to the company to say or show that what  
11 we're saying is, as counsel for the company suggested  
12 earlier, impossible.

13 JUDGE YOUNG: Judge Cole asked you earlier  
14 if you were going to have an expert on particular  
15 issues. Will you have an expert on this issue?

16 MR. FRANKEL: Yes, Your Honor. You know,  
17 we, our intention is to bring forward every expert  
18 that we can on every issue. And unless there is no  
19 expert that can speak to this issue we would have one  
20 here. I don't have a person's name right now.

21 JUDGE COLE: My first reaction to seeing  
22 the 25 feet per day is in an aquifer with water moving  
23 that's moving pretty fast as aquifers go. And so I  
24 would question that number.

25 MR. FRANKEL: We are questioning that

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1 number. That number comes from the Applicant's  
2 application. So we are in contention on that, that's  
3 why we're asking the question, why we're here today,  
4 sir.

5 JUDGE OLIVER: Also, in your definition of  
6 a fracture plume this is you're just calling all of  
7 the reinjected water the radioactive plume? That's  
8 what you are doing?

9 MR. FRANKEL: Yes, sir.

10 JUDGE YOUNG: In some places, this is sort  
11 of an across-the-board type question, in some places  
12 you mention you quote some sections of the application  
13 and then you raise a question about those sections by  
14 reference to another section. I'm not sure whether  
15 there is any case law on whether in raising a dispute  
16 you can -- you have to raise a dispute with the  
17 application in some way. I'm not sure whether or what  
18 the case law might be on whether you can use one  
19 section of the application to raise a dispute with  
20 another section of the application. But I think it  
21 would be helpful for me in listening to your argument  
22 to if you could point out the sections of the  
23 application with which you have a dispute and then let  
24 me know what is the basis, what you are relying on to  
25 show that dispute. Does that make sense?

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1 MR. FRANKEL: It does. It does, Your  
2 Honor. So, yeah, I thought that's what we did by  
3 stating the contentions in some proximity to different  
4 sections of the --

5 JUDGE YOUNG: You did. And I guess the  
6 reason I am asking that is one of the objections that  
7 the Staff has is that you are not raising disputes  
8 with specific sections of the application. So it  
9 might be helpful if you want to go over those with  
10 regard to certain issues, if you're talking about a  
11 certain issue we illustrate our dispute with X section  
12 by reference to XYZ, whatever it might be.

13 MR. FRANKEL: I understand. I mean our  
14 perspective is that all of this analysis gets its  
15 authority from that congressional statute that says  
16 "may be affected." And we find it hard to believe  
17 that this process could be so technical so that if you  
18 didn't dot the I in the place where the I is to be  
19 dotted but you dotted it down near the T, well, that  
20 doesn't count. That would seem to me to start to  
21 bring due process concerns and concerns as to the  
22 level of technicality.

23 And I believe if the Staff and the  
24 company's positions were accepted no one would have  
25 standing or admissible contentions. So --

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1 JUDGE YOUNG: You're right. And there's  
2 the case law cited in the Pilgrim case that says that  
3 we wouldn't make a ruling based on a mere  
4 technicality.

5 I think what the -- the Commission's  
6 contention admissibility rules are quite strict  
7 however.

8 MR. FRANKEL: Yes.

9 JUDGE YOUNG: And we are required to  
10 follow them. And so I am trying to get the  
11 information from you that we need in order to make our  
12 decision. One of the underlying purposes I think that  
13 you may also find somewhere in that Pilgrim decision  
14 of the contention admissibility rules is much as the  
15 standing inquiry is for the purpose of determining  
16 whether there is a party who has an actual dispute who  
17 will be motivated to pursue that dispute and  
18 demonstrate that dispute, the contention admissibility  
19 rules look to whether the party is actually raising an  
20 issue that can be litigated and is able to litigate  
21 that issue through showing the type of information  
22 that it would rely on to litigate that issue.

23 You don't have to provide everything at  
24 this point, obviously, that you would have to later in  
25 a hearing. But probably what's in the back, what's

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1 behind some of my questions is what do you have to --  
2 what would you -- what do you have to support the idea  
3 that you would be able to litigate the issue in a  
4 hearing, for example. And I'm not trying to state a  
5 position or a hint about how we're going to rule on  
6 that but just to sort of give you an idea of what the  
7 law is that governs what we have to decide and how we  
8 have to decide it.

9 In any event.

10 MR. FRANKEL: Thank you. Well, there  
11 where their application uses the word "net consumptive  
12 use" again it should be stricken and the consumption  
13 should be evaluated in terms of the regulations having  
14 to do with use of resources. Similarly, wherever it  
15 says --

16 JUDGE YOUNG: And regulations being which  
17 regulations?

18 MR. FRANKEL: There I cited that one,  
19 among others, but 51.45(b).

20 JUDGE YOUNG: Fifty-one.

21 MR. FRANKEL: And there's that Appendix A  
22 that was sent to us that had NEPA discussions in it I  
23 believe, if they're not Part 50 and Part 40. I could  
24 look it up. But those were cited to us by the Staff.

25 JUDGE YOUNG: The Staff, okay.

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1 MR. FRANKEL: As possible authority to  
2 look at in this case.

3 And so where the application in many  
4 places, in both the technical report and the  
5 environmental report says or assumes or has their  
6 assumption of their contention that there is no mixing  
7 sufficient that it is nearly impermeable, there is  
8 near confinement, sufficient confinement. These kinds  
9 of words indicate that it's not complete confinement.  
10 And we're saying that's it not sufficient confinement  
11 and I believe the company is saying that it is. So  
12 that everywhere it appears in the application in many  
13 different places, and I attempted to bring those  
14 together, is a point of contention, a material fact  
15 that's in dispute.

16 And I guess when we get to the other of  
17 the six I will say the same thing. I think in those,  
18 unlike the water issue, it's a much more discrete and  
19 focused discussion because there are very specific  
20 sections that deal with, fore example, the prehistoric  
21 Indian camp. And we don't go all over the place  
22 looking for them.

23 But this fundamental theme that runs  
24 throughout the application and public testimony, both  
25 the state and federal level, is hey, we're only using

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1 113 gallons per minute, that's the same as a corn  
2 irrigation sprinkler. But it's not really.

3 JUDGE COLE: Mr. Frankel.

4 MR. FRANKEL: Yes, sir?

5 JUDGE COLE: Tell me if someone could  
6 argue -- well, maybe I'll let them make the argument  
7 but I can't let them sit, could someone argue that  
8 they initially used 9,000 gallons per minute of water  
9 and put it in a cycling system that then returns  
10 constantly with a bleed-off taken out so that what's  
11 returned after the initial 9,000 gallons per minute  
12 gets into the system they then remove the uranium from  
13 that water and send it and then add some other  
14 oxidizing chemicals to it and send it back in a cycle  
15 so it's not really a consumptive use of water? Your  
16 contention is that it's industrial waste that's  
17 separate from the initial consumptive use and the  
18 9,000 gallons per minute is an ongoing continuing  
19 thing. But the second 9,000 gallons per minute or the  
20 next time they send it through it's the same water  
21 that started there and it just recycles.

22 Now how can you call that a consumptive  
23 use of water?

24 MR. FRANKEL: Well, Your Honor, before  
25 this cycling process it could be simply filtered with

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1 reverse osmosis and drunk. And if you can't do that  
2 after then is it really, is that cycling process  
3 really --

4 JUDGE COLE: But they use it in their  
5 process to go back and get more uranium. And then  
6 they constantly do that. So they are reusing the same  
7 water over and over again with a 113 gallon per minute  
8 bleed-off. So really the part that's consumed is 113  
9 gallons per minute.

10 MR. FRANKEL: Well, doesn't that assume  
11 that there is no mixing of the aquifers?

12 JUDGE COLE: Well, that's another, that's  
13 another question.

14 MR. FRANKEL: But it's a fundamental  
15 assumption to the argument that you were just making.

16 JUDGE COLE: Water use and consumptive use  
17 is different than mixing.

18 MR. FRANKEL: With due respect, I know  
19 that it is different but I also know that if there is  
20 mixing it's not that same 9,000 gallons that keeps  
21 coming out and getting put back every minute. If it's  
22 mixing with other aquifers then some of the water is  
23 coming from Brule and then it's going into the 9,000.

24 JUDGE COLE: Well, they then would argue  
25 something different, that they're constantly recycling

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1 it. And they are always, they are always taking out  
2 more water than they put in so the flow is towards the  
3 center well. And very little of it theoretically goes  
4 downstream.

5 MR. FRANKEL: Then my question would be  
6 then why did they need a permit to get 9,000 gallons  
7 a minute? I was informed, and I could provide it into  
8 the evidence at the appropriate time that this county  
9 is not granting any well permits more than 50 gallons  
10 per minute due to water shortages. So that indicates  
11 to me that it's very material exactly how much is  
12 being consumed and where. And if we also consider the  
13 bleed-off is not entirely only 113 gallons a minute  
14 when you consider that there is a history of spills of  
15 up to 300,000 gallons, that is a consumptive use  
16 that's not being discussed. So and --

17 JUDGE COLE: I understand your position.

18 MR. FRANKEL: I'm afraid I don't think I  
19 can say it or articulate it any better right now.

20 JUDGE COLE: No, I understand your  
21 position perfectly.

22 JUDGE YOUNG: Your basic contention is  
23 that through the use of the water contaminants are  
24 produced which are then, which then mix with other  
25 aquifers? That's basically the issue that you're

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1 raising in the contention; right?

2 MR. FRANKEL: Yes, it is.

3 JUDGE YOUNG: Okay.

4 MR. FRANKEL: We didn't have anything more  
5 on the first one.

6 MR. ELLISON: Other than statements we  
7 would submit.

8 MR. FRANKEL: Right.

9 JUDGE YOUNG: While we're on this I guess  
10 we can come back and argue on the timing of this and  
11 whether it meets the criteria under the rule. That's  
12 not to foreclose anybody from filing anything in  
13 writing. But while we are here and --

14 JUDGE COLE: You're talking about the EQ  
15 letter?

16 JUDGE YOUNG: Right, right. And the  
17 Exhibit A I don't remember what the issue on the  
18 timing was with that. But in particular the EQ letter  
19 under I think it would probably fall not under 2309(c)  
20 but it would fall under 2309(f)(2), the information  
21 under subheading small Roman numeral one, "the  
22 information upon which the amended or new contention  
23 is based was not previously available." You said you  
24 got that yesterday.

25 "The information is materially different

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1 than information previously available. And it's been  
2 submitted in a timely fashion based on the  
3 availability of the subsequent information." We can  
4 come back and do the argument on that if you like,  
5 again without foreclosing written arguments on it.  
6 Would you rather do that or go ahead with that?

7 MR. FRANKEL: No, we're happy to touch on  
8 each one now. As we said, it was not previously  
9 available to us. Again keeping in mind the short  
10 notice that we had to review the application didn't  
11 leave much time for reaching out to experts or doing  
12 much research.

13 The information upon which the amended or  
14 new contention is based is different from information  
15 previously available; well, my looking at the mailing  
16 date of the NDEQ letter indicates that it was probably  
17 crossing in the mail on November 8 and wasn't even  
18 available to anybody except possibly the company. And  
19 whether the company had an obligation to send that  
20 around to us we don't know. Sometimes in litigation  
21 there's a rule to that effect but it's quite specific  
22 on the proceeding, I'm sure.

23 The amended or new contention has been  
24 submitted in a timely fashion based on availability;  
25 you know, the first time I saw this was last night.

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1 And I brought it early a copy for each of the NRC and  
2 the company and let them know. I asked if they had  
3 seen it. I gave them copies of it. I told them that  
4 I was planning to introduce it, that we were having  
5 copies made for the ten copies, that they would be  
6 here shortly. And each of them gave it back to me and  
7 they didn't want it until it had been introduced into  
8 evidence. But an effort was made to share it at the  
9 earliest possible moment.

10 We feel it's highly material and that it  
11 would contribute to a sound and adequate record, Your  
12 Honor.

13 JUDGE YOUNG: Okay.

14 MR. FRANKEL: It supports -- it's not  
15 something new, we view it as supportive of the  
16 contentions in our original petition.

17 JUDGE YOUNG: Okay. Anything further?

18 MR. ELLISON: No, ma'am.

19 JUDGE YOUNG: Okay, who wants to go next?

20 MS. SIMON: Your Honor, we'll go next.

21 And we'll share time again.

22 JUDGE YOUNG: And again actually the  
23 suggestion has been made by our law clerk actually, so  
24 none of the parties, but that you might be more  
25 inclined to speak up if you stood. Now normally we

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1 don't require people to stand. But some people have  
2 been and they speak a little more loudly. So that  
3 might help also the audience to hear.

4 MS. SIMON: Okay. Before I get to the  
5 contention I'd like to address something that Your  
6 Honor actually brought up which is the -- well, with  
7 respect to Exhibit B the application to NRC is what's  
8 at issue, not the application to NDEQ for the aquifer  
9 exemption. So it's imperative on the Petitioners to  
10 point to inadequacies or deficiencies in the NRC  
11 application. And so to the extent that information  
12 that was not in the NDEQ application is in the  
13 Applicant's NRC application we just wanted to point  
14 out that they still have a duty to raise those issues  
15 from the application.

16 We haven't had a chance to look at Exhibit  
17 B obviously, and we'd like to with the Board's  
18 permission be able to respond on admissibility in  
19 writing as well.

20 JUDGE YOUNG: Sure. All parties are going  
21 to be allowed to do that.

22 MS. SIMON: Okay.

23 JUDGE YOUNG: I guess the way I am looking  
24 at this at this point, I myself anyway, is that this  
25 would be in the nature of additional support,

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1 additional basis for the contention, and that it was  
2 filed today because they only received it yesterday.

3 MS. SIMON: Right.

4 JUDGE YOUNG: So with that said go ahead  
5 and proceed.

6 MS. SIMON: Okay. And I'd also like to  
7 point out that I believe that case law indicates that  
8 for satisfying 2309(f)(2) the Petitioners also have to  
9 address 2309(c) which is the untimely filing  
10 requirement.

11 JUDGE YOUNG: Can you give us the cite for  
12 the case on that?

13 MS. SIMON: We believe it was Vermont  
14 Yankee, Judge Carlin's decision in Vermont Yankee. We  
15 don't have the specific cite right now. We can get  
16 that.

17 JUDGE YOUNG: That doesn't sound right but  
18 you may be right. You may be right.

19 MS. SIMON: Well, we definitely would want  
20 to check and give you the correct cite.

21 JUDGE YOUNG: Because I guess I had been  
22 thinking of those as being two separate, two separate  
23 standards. I'd be surprised but you may be right.

24 MS. SIMON: I know there has been some  
25 conflict among boards recently dealing with that. So

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1 it would be best to clarify.

2 JUDGE YOUNG: And that, all parties can  
3 file, as a matter of fact we will set deadlines for  
4 that at the end of the argument.

5 MS. SIMON: Okay. Second, this also  
6 actually came up in the standing portion too but it  
7 also has come up again in the contention discussion.  
8 The Commission in 2006 decided a case, a nuclear  
9 management company, the Palisades case, CLI0617, 63  
10 NRC 727. And that case clearly indicates the  
11 Commission's perspective on replies and the proper  
12 scope of a reply. And just for the record we want to  
13 express our objection to several portions of the  
14 replies or documents referred to in the replies that  
15 were as far as we can tell available to the  
16 Petitioners well before the petition deadline but  
17 which were not brought up in the reply -- in the  
18 original petition.

19 Under Palisades new bases for contentions  
20 cannot be introduced and petitioners cannot remediate  
21 deficient documentary support in the original petition  
22 with documents that were available at the time of the  
23 original filing.

24 And also under the rules that we just  
25 discussed, the new and amended contention rules and

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1 the timeliness of contentions, new issues and  
2 contentions cannot be raised without addressing those  
3 late filing and amended contention rules.

4 And if you would like I can go through the  
5 list of the particular, I can either go through the  
6 list or we can submit it in writing. I guess I should  
7 just go through it.

8 JUDGE YOUNG: Go ahead and go through it.

9 MS. SIMON: Okay. It shouldn't take long.

10 JUDGE YOUNG: And then we'll know what  
11 we're talking about.

12 MS. SIMON: Okay. All right.

13 JUDGE YOUNG: Basically looking at the  
14 issue of availability.

15 MS. SIMON: Sure. Sure.

16 With respect to the reply submitted by  
17 Thomas Cook and Western Nebraska Resources and Slim  
18 Buttes Agricultural, page 4 they reference the article  
19 by Torrell about the market value of water which Mr.  
20 Frankel referred to this morning. That was not cited  
21 in the original petition. And --

22 JUDGE YOUNG: I'm sorry, it took me a  
23 minute to get the document.

24 MS. SIMON: Okay.

25 JUDGE YOUNG: Page 2 of the?

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1 MS. SIMON: Page 4 of the reply.

2 JUDGE YOUNG: Page 4. The Torrell?

3 MS. SIMON: Right. Page 7 the entire, the  
4 assertion of the water rights and any other rights  
5 under the Fort Laramie treaties is an issue actually  
6 that was not raised in the original petition. To the  
7 extent that it's a question of law we can brief it as  
8 you suggested in the morning.

9 JUDGE YOUNG: Right. And I think factual  
10 issues are different than legal issues on this.

11 MS. SIMON: Sure. Okay.

12 JUDGE YOUNG: And as I said, tribal law  
13 and treaty law is something that I don't know if  
14 anyone here is very familiar with but I think it would  
15 be good to do some research on that and allow argument  
16 on that.

17 MS. SIMON: Certainly.

18 JUDGE YOUNG: But just off the top of my  
19 head I think you might want to draw a distinction  
20 between legal issues and factual.

21 MS. SIMON: Yes. I'm just trying to be  
22 complete just for the record.

23 JUDGE YOUNG: Right. Okay.

24 MS. SIMON: Page 9 the Applicant refers to  
25 the public testimony on water usage. And they supply

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1 the entire legislative hearing transcript. And we  
2 feel that it does not justifi -- the reference in the  
3 petition might justify inclusion of maybe that page  
4 but not the entire transcript.

5 JUDGE YOUNG: But they did make reference  
6 to it --

7 MS. SIMON: They did make reference to it.

8 JUDGE YOUNG: -- in the original then?

9 MS. SIMON: Yes.

10 Page 11 there is a reference to a Google  
11 search revealing significant amounts of information  
12 about the drought and the High Plains Aquifer. And  
13 again it's not really appropriate I guess to refer to  
14 a Google search with the possibility that it might be  
15 undertaken by the Board.

16 Page 11 also the paper by LaGarry on that  
17 page was not cited in the original petition.

18 And finally, on page 17 there is the  
19 assertion of interference with use of water for  
20 spiritual purposes is a new issue that was not raised  
21 in the original petition. So that would essentially  
22 be a new contention.

23 JUDGE YOUNG: You're not referring to its  
24 use in the standing, you're referring to its use in  
25 support of?

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1 MS. SIMON: Well, it's not clear actually  
2 from -- there are some cases that have said that  
3 spiritual issues are not within the realm of the  
4 Atomic Energy Act for the zone of interest test. But  
5 with respect to -- I would actually suggest that  
6 Palisades might be taken with respect to standing as  
7 well but I'm not certain on that.

8 JUDGE YOUNG: Well, there's contrary case  
9 law on standing and curing defects of standing. And  
10 that's a general principle of the law.

11 MS. SIMON: Right. And the Board has  
12 discretion.

13 JUDGE YOUNG: Right. So go ahead.

14 MS. SIMON: And then the Owe Aku reply.  
15 I will give you a minute to fine that if you'd like.  
16 Page 6 there is a reference to radon gas measurements  
17 at residences in Sharps Corner which were not  
18 mentioned in the original petition.

19 JUDGE YOUNG: Which paragraph?

20 MS. SIMON: It's on page 6.

21 JUDGE YOUNG: Sharps Corner, okay.

22 MS. SIMON: It's the second full  
23 paragraph. It says, unfortunately the documentation  
24 was lost in the fire.

25 JUDGE YOUNG: Right.

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1 MS. SIMON: On page 11 and 12 is the quote  
2 from the NUREG 6870 that Mr. Ellison referred to  
3 earlier.

4 JUDGE YOUNG: Hold on a second. I'm  
5 sorry. But the one you just mentioned that's in the  
6 standing discussion I believe.

7 MS. SIMON: The radon?

8 JUDGE YOUNG: Page 6 is under --

9 MS. SIMON: The documentation of radon gas  
10 studies at Sharps Corner I don't believe was raised in  
11 the affidavit for standing.

12 JUDGE YOUNG: No, what I'm saying is that  
13 the issue arises with regard to standing where the law  
14 on allowing for curing of standing defects is  
15 different than the law on replies to contention.

16 MS. SIMON: Well, to the extent that it  
17 applies to any contention we would --

18 JUDGE YOUNG: Okay. The reason I raised  
19 it is because on page 6 you're discussing -- or, I'm  
20 sorry, they're discussing standing not --

21 MS. SIMON: Okay, yeah. No, all of this  
22 is to the extent that it goes to admissibility.

23 JUDGE YOUNG: Okay. Okay. And what was  
24 the next one after that page? I'm sorry.

25 MS. SIMON: Page 11 and 12, the quotation

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1 from and the discussion of the NUREG CR 6870 is  
2 documentary support that it was not cited or brought  
3 up in the original petition.

4 JUDGE YOUNG: Well now again, on NUREGS,  
5 you cite actually NUREGS as one of the questions I had  
6 for you was you make references to a petitioner not  
7 being permitted to challenge NUREGS. But actually the  
8 law refers to you can't challenge a regulation. And  
9 so if you are arguing that NUREGS are in the nature of  
10 a regulation that's part of why I said NUREGS are not  
11 regulations, they are not law, they are guidance.  
12 They are in the nature of law but they are not law.  
13 So if you on the one hand make an argument that they  
14 are in the nature of law by saying, well, they can't  
15 challenge the standards that are found in NUREGS not  
16 in regulations, then this is more of a quasi-legal  
17 issue than a quasi-factual issue, isn't it sort of?

18 MS. SIMON: Well, Your Honor, I don't  
19 remember, maybe you can point it to me whenever you  
20 want to ask that question. I believe our argument was  
21 that they were challenging the license condition. I  
22 don't think we argue that they were impermissibly  
23 challenging the NUREG.

24 JUDGE YOUNG: Well, I think that what you  
25 said was the standards. And the standards usually.

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1 when the word "standards" is used I don't think of  
2 license conditions. Standards are generally used to  
3 refer to legal standards.

4 MS. SIMON: Well, regardless of the  
5 correctness of the issue of the license condition I  
6 don't think that we challenged, I don't think we  
7 stated that a NUREG was being impermissibly  
8 challenged. So I don't --

9 JUDGE YOUNG: Maybe I just assumed that  
10 they came from NUREGS because I didn't know where else  
11 the standards would come from.

12 MS. SIMON: Yeah. I think the standards  
13 we were discussing was the water quality restoration  
14 standards that are set forth in license condition I  
15 think it's 10.3(c) of the existing license. And I  
16 think we were saying that that couldn't be challenged.

17 But with respect to the NUREG that is a  
18 document that the Petitioners are citing in their  
19 reply as support for their contentions which was not  
20 cited -- which was available, publicly available but  
21 not cited in their original petition. And that's all  
22 I'm raising now.

23 JUDGE YOUNG: Well, but a NUREG is in the  
24 nature of law. They could site new law now, they  
25 can't site new facts.

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1 MS. SIMON: But the information they're  
2 citing from I think is more factual, like facts about,  
3 you know, it was numbers, it was concentrations before  
4 and after restoration. But --

5 JUDGE YOUNG: Let me get back to the page  
6 you were talking about so I can --

7 MS. SIMON: Okay.

8 JUDGE YOUNG: Too many papers here. Okay,  
9 what page was it?

10 MS. SIMON: Pages 11 and 12. So that  
11 there's nothing in here that seems to constitute a  
12 regulation or guidance of any sort, it's merely  
13 stating radioactive constituents that could be  
14 mobilized by uranium mining. And then it's discussing  
15 various numbers related to baseline water quality and  
16 post-restoration water.

17 JUDGE YOUNG: We'll take your arguments  
18 under consideration as to whether NUREGS are more like  
19 law or facts is an open question.

20 MS. SIMON: Okay, that's fine.

21 The next one is page 14, there's a  
22 reference to, and in fact the reply included the  
23 entire report, Indian Health Services Report on Well  
24 Water and Arsenic on the Pine Ridge Reservation. And  
25 that again was available well before the petition

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1 deadline and not supplied with the original petition.  
2 or even referenced in it.

3 And then the final thing, and again  
4 whether this is more legal or factual may be an issue,  
5 the letter from Chief Red Cloud and the resolution of  
6 the Black Hills Sioux Nation Treaty Council.

7 JUDGE YOUNG: What page are you on now?

8 MS. SIMON: I'm sorry, page 15.

9 JUDGE YOUNG: Fifteen?

10 MS. SIMON: Yes. Refers to a letter from  
11 Chief Red Cloud, a resolution passed by the Black  
12 Hills Sioux Nation Treaty Council, and a tribal  
13 ordinance of the Oglala Sioux. And those documents  
14 too were provided with the reply but they were not  
15 referred to or cited in the original petition.

16 JUDGE YOUNG: Well, it would seem that an  
17 ordinance and a treaty would be law.

18 MS. SIMON: Right. And to the extent that  
19 there is an element or so again we're just, just  
20 wanted to voice our objection to those for the record.

21 JUDGE YOUNG: Okay.

22 MS. SIMON: Okay.

23 MR. FRANKEL: Will we have an opportunity  
24 to rebut any of that or?

25 JUDGE YOUNG: We'll come back, right.

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1 MR. FRANKEL: Thank you.

2 MS. SIMON: Okay, so with respect to the  
3 contention I don't want to recite too much of the law  
4 as set out in the Pilgrim case that the Board referred  
5 us to and also the rules. And I think it was  
6 mentioned that 10 C.F.R. 2309(f)(1), (5) and (6) are  
7 typically the determining factors in contentions. And  
8 indeed we probably would find that the lack of raising  
9 a genuine issue, a genuine dispute is one of the  
10 primary defects in the contention here.

11 I would just like to point out again the  
12 Commission does not permit notice pleading. The rule  
13 is strict as was mentioned. Vague, unparticularized  
14 contentions unsupported by affidavit, expert or  
15 documentary support are not allowed. The petition  
16 must provide analysis and expert opinion showing why  
17 its bases support its contention. And the allegation  
18 that an application is inadequate does not give rise  
19 to a genuine dispute unless it is supported by facts  
20 and a reasoned statement of why the application was  
21 unacceptable.

22 Again, as the Petitioners mentioned, water  
23 usage and water contamination are the two primary foci  
24 of this contention, so I will address them in order.

25 With respect to water usage, as Judge Cole

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1 pointed out the Petitioner is not really disputing  
2 that 98 percent of this water is being returned to the  
3 aquifer. It seems as if Petitioner's main claim is  
4 that the returned water should not be counted as being  
5 returned because it has higher levels of radioactivity  
6 and it's geochemically changed. However, the existing  
7 license, which is not within the scope of this  
8 proceeding, this is an amendment, sets forth the  
9 standards, both the primary and secondary standards  
10 for the restoration. And those standards are not at  
11 issue in this licensing proceeding.

12 JUDGE YOUNG: This gets back to the  
13 question I had before. And I just found it in your  
14 responses --

15 MS. SIMON: Okay.

16 JUDGE YOUNG: -- at pages 32 and 33. At  
17 the bottom of page 32 you say, "the contention with  
18 regard to restoration flow is a challenge to the  
19 adequacy of NRC's groundwater restoration standards  
20 which is impermissible under 10 C.F.R. Part 2335(a).

21 2335(a) talks about rules and regulations  
22 of the Commission.

23 The next page, page 33, at the very end of  
24 your argument on Contention A you repeat that  
25 argument. And my question with regard to both of

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1 those is there are no regulatory standards; correct?  
2 So how could what they are saying be a challenge to  
3 agency rules or regulations?

4 MS. SIMON: I believe what we were  
5 arguing, and I believe it's somewhere earlier in the  
6 response although I'm not finding it right away, what  
7 we were referring to, and perhaps it wasn't as clear  
8 as it could have been in that particular paragraph is  
9 we were referring to existing license conditions in  
10 the application.

11 JUDGE YOUNG: Right. But you refer to  
12 2335(a). And 2335(a) has to do with regulations.

13 MS. SIMON: Right. And we --

14 JUDGE YOUNG: But not with license  
15 conditions. License conditions aren't regulations so  
16 I don't follow that argument.

17 MS. SIMON: I guess we were arguing it in  
18 the sense that a license condition is considered law  
19 just as a rule or regulation is. It's not guidance  
20 like a NUREG.

21 JUDGE YOUNG: Well, it may be binding on  
22 a particular individual company or licensee but it's  
23 not a rule or regulation which is all that 2336(a) is  
24 relevant to I mean, so.

25 MS. SIMON: Okay. In any event, that

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1 license condition is not within the scope of this  
2 proceeding. So we would argue that a challenge to  
3 that primary and secondary groundwater standard would  
4 not be applicable because of that.

5 JUDGE YOUNG: That's a different argument.  
6 And again it gets, sort of gets me back to the basic  
7 issue that we are talking about here. The restoration  
8 issue is something that was talked about but the  
9 actual contention itself concerns alleged mixing and  
10 contamination as a result of mixing of the whatever,  
11 I don't know if it's limited to the wastewater, but  
12 anyway the water that's used and/or the end result of  
13 the mining, that that mixes with water in other  
14 aquifers and contaminates other aquifers.

15 And I understanding the contention, the  
16 issue raised in the contention?

17 MR. ELLISON: Yes.

18 JUDGE YOUNG: So the restoration issue  
19 comes into play to support that contention but it's  
20 not the central issue in the contention.

21 MS. SIMON: Okay.

22 JUDGE YOUNG: So that's just to clarify  
23 maybe, to make sure we're sort of on the same page.

24 I noticed that in your response you refer  
25 to the different sort of bases offered. And I know

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1 sometimes there is confusion in arguments in all sorts  
2 of cases as to what's a contention and what's a basis  
3 rather. And sometimes a question comes up do you have  
4 to have a basis for the basis?

5 At this point the way I'm looking at it is  
6 that the contention is the short three-line statement  
7 of the issue and the rest of it is basis provided in  
8 support of the contention.

9 MS. SIMON: Okay. So you're saying that  
10 the contention is the initial statement on page --

11 JUDGE YOUNG: That's how I've been reading  
12 it.

13 MS. SIMON: -- on page 9.

14 Could you just clarify for me when you say  
15 the initial two- or three-sentence statement which one  
16 is that?

17 JUDGE YOUNG: That's page 9 on Contention  
18 A. Contention A, what I read is Contention A is the  
19 bolded three-line, two-and-a-half-line statement at  
20 the top of page 9. And that the rest of it are facts  
21 and basis in support of the contention. I know  
22 there's confusion sometimes that develops as to what  
23 is a contention and what is a basis.

24 MS. SIMON: Right.

25 JUDGE YOUNG: But I did notice in your

1 response that you sort of treated each of the separate  
2 arguments that the Petitioners make with regard to  
3 various sections of the application as being separate  
4 contentions. And actually that's reasonable because  
5 they use the word "contention." So maybe I should ask  
6 them to explain. But when I was reading that I was  
7 reading those as supporting the short contention at  
8 the top. The way we usually phrase contentions when  
9 we admit them they're short statements of an issue  
10 basically.

11 MS. SIMON: Right.

12 JUDGE YOUNG: And everything else is sort  
13 of provided in support of those.

14 MS. SIMON: Right.

15 JUDGE YOUNG: Feel free to argue to the  
16 contrary if you want to but that's how I've been  
17 reading it.

18 MS. SIMON: Okay. Well, I would just say  
19 that in some cases they referred to certain sections  
20 where they said the application permits this or fails  
21 to state this. And that sounds like a contention. So  
22 it was a little difficult to figure out how to respond  
23 to it.

24 But in any case could I ask just one  
25 second to consult with co-counsel?

1 JUDGE YOUNG: Yes. Let me just, before  
2 you do that let me just sort of try to wrap up that  
3 discussion.

4 I guess part of the basis for the way I  
5 read contention is that under subsection vi of  
6 2309(f)(1) it says that the information to show that  
7 a genuine dispute exists must include references to  
8 specific portions of the application that the  
9 Petitioner disputes and the supporting reason for each  
10 dispute. That's how I generally read information like  
11 this, that they are providing, they are making  
12 references to the sections of the application and  
13 they're showing their disputes. They use the word  
14 "contention" but they say at the beginning that they  
15 have these six contentions A through F, and so these  
16 contentions or disputes with the sections of the  
17 application would go to subsection 6 of 2309(f)(2).  
18 That's how I have been reading it.

19 So if you think I should read it  
20 differently then feel free to argue that. But overall  
21 it seems to make more sense to read it that way.

22 MS. SIMON: Okay.

23 JUDGE YOUNG: Otherwise there would be 30  
24 or 40 contentions here.

25 MS. SIMON: Right.

1 JUDGE YOUNG: And I think we're really  
2 talking about six.

3 MS. SIMON: Okay. Could I have just a  
4 second then?

5 JUDGE YOUNG: Sure.

6 (Counsel confer.)

7 MS. SIMON: With respect to the  
8 contamination then, all of the bases that the  
9 Applicants bring up with respect to that, their belief  
10 in the slow moving plume, the belief by Bruce McIntosh  
11 about fracturing without any indication that Bruce  
12 McIntosh is an expert in geology or hydrology, no  
13 cited mechanism for water to get from the site to  
14 anywhere through the aquifers. And again the  
15 heightened level of contention admissibility as  
16 opposed to standing. To the extent that the claim is  
17 based on the existing operation it's outside the scope  
18 of the proceeding because this is an amendment and it  
19 involves purely the amendment in the North Trend site.

20 JUDGE YOUNG: Let me ask you a question  
21 about that. I think I mentioned this before. You do,  
22 you do say that review of the current operation is  
23 relevant to the extent that it provides the Staff with  
24 a history on the adequacy of radiation protection in  
25 monitoring programs. And the application refers to

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1 the current operation frequently throughout.

2 So I guess sort of in the nature of a  
3 goose and gander rule, why is it okay for the  
4 application and for the Staff to consider the current  
5 operation but not the Petitioners in their, in the  
6 support for their contention to make an argument that  
7 if you are doing it in this, in the current operation  
8 it would be likely that the same thing might arise or  
9 similar thing might arise in the new operation?

10 MS. SIMON: One second please.

11 (Counsel confer.)

12 MS. SIMON: Your Honor, with respect to  
13 the existing operation whether or not it's within the  
14 scope of the proceeding the Petitioners have offered  
15 no factual evidence that any spills or leaks or  
16 anything has caused any kind of offsite consequence.  
17 And so there is no basis for them to conclude that  
18 there is going to be any basis for such an offsite  
19 consequence in the proposed facility.

20 JUDGE YOUNG: Well, aren't certain things  
21 almost *res ipsa loquitur*, I think is the term? If  
22 you've got a number of excursion spills and so forth  
23 I know what you're saying is that they were all  
24 contained or they were all remedied or whatever, but  
25 I mean in terms of factual support for something

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1 aren't you asking us to make a merits ruling that any  
2 leaks were appropriately remedied in order to not  
3 allow that argument to be made?

4 MS. SIMON: No. What I'm asking is that  
5 the Petitioner, as required by the contention rules,  
6 be required to provide sufficient support for its  
7 contention. And in the application the Applicant  
8 states, discusses the incidents that have occurred and  
9 states that there have been no offsite consequences.  
10 And if the Petitioners are going to contest that they  
11 need to provide some basis for their, for the  
12 statements. They misinterpret the term "excursion."  
13 As we discussed in our pleading, an excursion does not  
14 necessarily mean a release of radioactive material  
15 offsite. An excursion means that an indicator which  
16 is not a radioactive --

17 JUDGE YOUNG: Right.

18 MS. SIMON: -- element has risen in the  
19 well. And in fact it's just a warning signal to let  
20 them know --

21 JUDGE YOUNG: Right.

22 MS. SIMON: -- so they can deal with it.

23 JUDGE COLE: But they call that an  
24 excursion?

25 MS. SIMON: That's called an excursion,

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1 yes.

2 And how excursions are dealt with are in  
3 fact, if you look at the license it explains in some  
4 of the license conditions how they are dealt with.  
5 But --

6 JUDGE YOUNG: But is there any requirement  
7 that if you take one part -- I mean that if they take  
8 one part of a statement in an application they have to  
9 take the whole part of the statement? In the extreme  
10 case, not this case but in the extreme case, a  
11 hypothetical case where you get an application where  
12 there are some parts of the application where there  
13 are statements that, you know, we've done this, that,  
14 and the other thing and we've had absolutely no  
15 environmental impact on the, you know, local water or  
16 whatever, and then in other parts of the application  
17 there are statements that go completely to the  
18 contrary of that is there any reason why Petitioners  
19 should, any petition should not be able to point to  
20 internal consistencies, for example, in an application  
21 and say they say this thing here, however in another  
22 place they say something that's inconsistent which  
23 raises a question about the original statement?

24 MS. SIMON: I think that's permitted but  
25 I think the Petitioners have to do that and have to

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1 explain, you know, why, if it's not obvious why there  
2 is an inconsistency or why they disagree. I think  
3 it's clear from the case law that they need to show  
4 that.

5 And the Petitioners mention in their  
6 petition they talk about these, you know, numerous  
7 spills and leaks and this 300,000 gallon thing but  
8 they don't provide any support to document those. And  
9 it's not clear, you know, what they are actually  
10 referring to. And again that's something that they  
11 have to provide to support their contention.

12 JUDGE YOUNG: Aren't they, correct me if  
13 I'm wrong, but aren't they saying the Applicant in the  
14 application provides information about certain leaks;  
15 we take that as true. We don't take as true what the  
16 Applicant says about no contamination or we remedied  
17 it or whatever.

18 That's sort of how I am reading the what  
19 the Petitioners have said. So it gets back to what I  
20 was saying about the inconsistency. But certainly  
21 obviously better to have independent factual  
22 information, preferably provided by an expert, that  
23 would establish clearly that there had been problems.  
24 But in a situation where the information on that is  
25 obviously more in the hands of the Applicant,

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1 generally is in the hands of the Applicant, and where  
2 there are, there are time constraints the question of  
3 how much support you have to provide there's case law  
4 that says all you have to provide is a fact-based  
5 argument, at least a fact-based argument.

6 MS. SIMON: Well, to address your first  
7 point which was can they point out or can they agree  
8 with one part or disagree with another? Sure. But  
9 where they disagreed they have to explain why and  
10 provide some factual basis for disagreeing. And it  
11 has to be more than an unsupported belief that, you  
12 know, we think there is a plume.

13 JUDGE YOUNG: All right.

14 MS. SIMON: With respect to how much  
15 evidence they have to provide and time constraints the  
16 application was filed at the end of May and has been,  
17 I don't know exactly when it was available on Adams  
18 but it probably was available shortly thereafter.  
19 Typically it's a like a two-day turnaround is the  
20 usual.

21 JUDGE YOUNG: But in this case this was a  
22 case where -- and I know the new rule allows for it --  
23 but the notice was put on the NRC website but it was  
24 not published in the Federal Register.

25 MS. SIMON: Right. But the notice was put

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1 on the website 60 days before the petitions were due,  
2 so.

3 With reference to the mixing of aquifers,  
4 and again not discussing Exhibit B since we haven't  
5 really had a chance to look at it, in some cases what  
6 the Petitioner sites as support for their contention  
7 actually goes against their contention. They did cite  
8 in their original petition the USGS Water Atlas, which  
9 is not the same as the NUREGS. And the Water Atlas,  
10 as we pointed out, covers the entire High Plains  
11 Aquifer so it's a very broad picture. And there is  
12 nothing in it that the Staff could find that supported  
13 any of the contentions concerning specifically the  
14 North Trend site.

15 But also point out that in that document  
16 it refers to 97 percent of the water uses in the High  
17 Plains Aquifer being used for irrigation. And  
18 approximately from -- I have a hole punched through  
19 the number, unfortunately -- but 1 percent or less of  
20 that water in the entire aquifer goes to industrial,  
21 mining and thermoelectric power withdrawal. So Crow  
22 Butte is only one of, you know, presumably many mining  
23 or thermoelectric power or other withdrawals due to  
24 industry within the entire aquifer.

25 I think as we pointed out in our response

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1 also, the Water Atlas indicates that the effects in  
2 this section of Nebraska have not been drastic as  
3 opposed to the effects in other areas. So again, you  
4 know, rather than supporting their contention we feel  
5 that this actually goes against it.

6 In addition, some of the sections of the  
7 reports that they cite, especially those discussing  
8 confinement, they look at the number 1 times 10 to the  
9 minus 10 centimeters per second hydraulic conductivity  
10 and they say, look, there's conductivity. But that  
11 number is incredibly low.

12 I'd also like since the point came up  
13 earlier with respect to hydraulic conductivity I'd  
14 like to clarify what that is. It's not the same as  
15 flow velocity. Hydraulic conductivity is the product  
16 of the gradient or the head, the hydraulic head times  
17 the porosity of the rock formation in question times  
18 the conductivity. That's the velocity. So if the  
19 conductivity, say, is 25 feet per day the Staff has  
20 informed me that the gradient there is about .005, and  
21 a typical porosity, we don't know the exact porosity,  
22 but a typical porosity is on the order of .3.

23 So if you multiply .005 times .3 times 24  
24 feet per day you would get more what the flow velocity  
25 is.

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1 JUDGE YOUNG: Are the gradients are they  
2 something that are not -- that are a subject of clear  
3 unequivocal knowledge or is there some uncertainty  
4 there?

5 JUDGE COLE: Yes. The measurements that  
6 are made frequently, just the slope of the hydraulic  
7 grade line.

8 MS. SIMON: If you'd like I can ask the  
9 Staff where we got the number.

10 MR. SMITH: That's in there, it's in the  
11 application. It's 2.7-29.

12 MS. SIMON: Okay, I'm sorry, apparently I  
13 misstated the equation. It's gradient times  
14 conductivity divided by porosity.

15 JUDGE YOUNG: Okay.

16 MS. SIMON: And I'm told porosity is more  
17 like .4 to .5 -- I'm sorry, .3. Point three is an  
18 approximate porosity.

19 So I just wanted to clarify that since it  
20 came up earlier.

21 The other issue, another issue, and again  
22 in their report they talk about the confinement, and  
23 not only is this a tight formation with a low  
24 hydraulic conductivity but there is 100 to 200 feet of  
25 it between the Chadron and the Brule Aquifer. So any

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1 contention regarding the radioactive plume in the  
2 Brule flowing into the High Plains again has to  
3 consider the fact that the water from mining which is  
4 reinjected into the Chadron has to get through that  
5 confining layer.

6 And with respect to confinement there is  
7 not, you know, the conductivity is very low,  
8 indicating that it's, you know, adequate confinement.  
9 There might not be such a thing as perfect  
10 confinement. But for the purposes of any kind of  
11 water movement.

12 JUDGE YOUNG: Isn't this the kind of thing  
13 that would come out in evidence in a hearing or in  
14 affidavits to support a motion for summary  
15 disposition?

16 MS. SIMON: That kind, the point I just  
17 made might. But I think that again the Petitioner has  
18 to raise some basis. And the bases that they are  
19 raising relate back to the original application and  
20 paragraphs which were taken from it. And so we, you  
21 know, we need to address any information that's in  
22 those if it's going to be used to support the  
23 contention. So that's all that I'm trying to do now.

24 I think that's all that we have, Your  
25 Honor.

1 JUDGE YOUNG: Okay. Mr. Smith.

2 MR. SMITH: Thank you.

3 JUDGE YOUNG: Do you need a break? It's  
4 3:30, do you want to?

5 MR. SMITH: I think I will try and do  
6 this.

7 JUDGE YOUNG: Okay, go ahead. Let's maybe  
8 finish up on this contention and then take a break.

9 MR. SMITH: They both seemed to have  
10 covered a lot of ground on this.

11 JUDGE YOUNG: Okay.

12 MR. SMITH: As we mentioned, one of the  
13 requirements for admissible contention is there has to  
14 be a concise statement of alleged facts or expert  
15 opinions, including references to specific sources and  
16 documents that support their position. And there must  
17 also be sufficient information demonstrating that  
18 there is a genuine dispute with regard to a material  
19 issue of fact, again including not just references to  
20 someplace in the application but also supporting  
21 reasons for that belief.

22 It's not enough if you show there's a  
23 material issue of fact or that there is an issue of  
24 fact involved, there has to be a genuine dispute about  
25 the fact such that there is enough doubt about it that

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1 it is worthwhile to have a hearing. So this isn't  
2 about the merits but at some level the Board, your  
3 obligation is to look at their contention and see  
4 whether there is any basis for it. You've got to look  
5 closely at it and see whether there is some genuine  
6 dispute about an issue there.

7 And looking at their contentions all they  
8 have done is point to places in the ER where the  
9 Applicant has made some statement and then say, we  
10 disagree. There is no "we disagree because," there is  
11 no basis for where that disagreement comes from.

12 In particular in light of the statements  
13 that are in the application they haven't controverted  
14 any of those, specifically with regard to say mixing  
15 among the aquifers. I believe I mentioned this  
16 earlier but I think it bears repeating here is that  
17 water quality data shows that the Brule and Basal  
18 Chadron and the Arikaree and the High Plains Aquifer  
19 are different aquifers based on water quality of the  
20 water measured at those different levels.

21 With respect to the Chadron and the Basal  
22 Chadron and the Brule in the area of the North Trend  
23 site there are water level head differences between  
24 them that show that there is confinement. The water  
25 level in the Brule -- in the, excuse me, in the Basal

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1 Chadron is actually 80 to 90 feet above the Brule. So  
2 that shows that it is confined and that it is under  
3 pressure now. Again, that shows that there is no  
4 hydraulic connection between the two aquifers.

5 Pump testing at the North Trend site  
6 performed in the area where the proposed activity  
7 would take place again demonstrates there is no  
8 hydraulic connection between the Basal Chadron and the  
9 overlying Brule Aquifer. Again which she mentioned  
10 briefly is 200 to 300 feet of soil separates them.  
11 We're talking very low hydraulic conductivities.  
12 There are aquitards and aquicludes between them that  
13 do not readily transmit water vertically.

14 And given all that evidence, significant,  
15 just pointing to portions of the application and  
16 saying, oh, we disagree, or there is some little  
17 question here or there, that is not sufficient to  
18 raise a genuine dispute with a material issue of the  
19 application.

20 With regard to the issue involving water  
21 consumption and consumptive use I think the statements  
22 made by the Petitioners sort of prove the point that  
23 the information is available. It is clear what their  
24 formula that they're using for calculating consumptive  
25 use. Again, it's not 9,000 gallons per minute of the

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1 pure water that's never been circulated being pulled  
2 out. And as Your Honor pointed out, some of the water  
3 that's being pulled out is water that was recently  
4 reinjected. That is part of the cycling, the  
5 recirculation within the pumping system.

6 Again, there is no evidence that there has  
7 been any -- that there would be any mixing or  
8 connection between the Brule Aquifer or any of the  
9 overlying aquifers in the Basal Chadron. And so it's  
10 not -- one of the purposes of the contention  
11 requirement is to make sure that there is sufficient  
12 information to warrant further exploration of the  
13 issue. At this point it's not clear to us what else  
14 we could do to satisfy Petitioners of confinement.  
15 We've got pump tests, geologic borehole tests, water  
16 quality data, actual operational data at the existing  
17 site that shows this confinement as well. So there  
18 doesn't seem to be -- there is not a genuine issue of  
19 material fact that warrants admitting this contention.

20 JUDGE YOUNG: Let me just ask you about  
21 the statements in the three, the section 3.4.3.1, the  
22 reference to, yes, the low hydraulic conductivity but  
23 also the fact that fractures may increase Brule and  
24 Chadron permeability in localized areas.

25 MR. SMITH: Correct.

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1 JUDGE YOUNG: I think the argument was  
2 made earlier that there may be long-term effects. And  
3 I think my understanding anyway is that although I  
4 think there is one other company that does this type  
5 of mining and it may have been in existence for some  
6 years, probably if predictions bear out this might be  
7 sort of the beginning of a different technology than  
8 has been used in the past as much. And in terms of  
9 the long-term effects and this statement that  
10 fractures may increase Brule and Chadron permeability  
11 in localized areas and the statements to that effect,  
12 how do you address the long-term effects that they are  
13 talking about?

14 MR. SMITH: Well, there's a couple of  
15 points there. One is that the current mine --

16 JUDGE YOUNG: Let me just add one more  
17 thing. I think there is a reference somewhere to once  
18 -- and this was not in the new exhibits but I think  
19 this was in the filings that were already before us  
20 about exempt aquifers and aquifers not -- that you  
21 can't non-exempt aquifers, that it's once it's gone  
22 past a certain point then it becomes an exceedingly  
23 difficult thing to reverse, as I understand it.

24 MR. SMITH: Well, one, the aquifer  
25 exemption is an entirely separate regulatory process

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1 that is overseen by the EPA who has delegated in the  
2 State of Nebraska to the State of Nebraska.

3 JUDGE YOUNG: Right. But what I'm talking  
4 about is, what I'm talking about is their argument  
5 that there may be long-term effects to the  
6 groundwater. And together with these references to  
7 the factors and the possibilities of localized area --

8 MR. SMITH: Right.

9 JUDGE YOUNG: Right.

10 MR. SMITH: Okay, well first with regard  
11 to fractures in the localized area, that's referring  
12 to these aquifers and the geologic features at a  
13 regional scale. So just because there may be  
14 fractures somewhere within the Basal Chadron or the  
15 Chadron or the Brule or the Pierre Shale doesn't mean  
16 that they exist at the site. Which is why one of the  
17 main reasons they they're required to do pump tests at  
18 the site.

19 The pump tests did not indicate any  
20 connection between the Basal Chadron and the Brule at  
21 the site. So that sort of right there shows you there  
22 is not significant fracturing at the site as it  
23 exists.

24 JUDGE YOUNG: Right. But again let me see  
25 if I can kind of focus what I want you to address

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1 here. On the one hand it said that, well, for example  
2 the High Plains Aquifer is so huge that it's really  
3 not relevant to talk about here. And the other --

4 MR. SMITH: Well, the High Plains Aquifer  
5 doesn't exist in the area of the site.

6 JUDGE YOUNG: Okay.

7 MR. SMITH: So I would say --

8 JUDGE YOUNG: Let me finish my question.

9 MR. SMITH: Excuse me. I'm sorry.

10 JUDGE YOUNG: At the same time you are  
11 talking about things being very localized. There has  
12 been an argument that there can be long-term effects.  
13 So if there are fractures, localized fractures, if  
14 these aquifers can cover large areas and if we're  
15 talking, if the Petitioners have raised the issue of  
16 long-term effects and if there is some indication that  
17 if there is any lessening of the quality of the water  
18 that it's a difficult proposition to turn around, how  
19 do you address the possibility that there could be  
20 long-term effects resulting from something that starts  
21 out as a small localized thing?

22 Now, maybe this is reading more into what  
23 the Petitioners have said than they have said. But I  
24 don't think so. I think I heard them say that.

25 MR. SMITH: Well, first, the first thing

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1 that comes to mind is there is no evidence to support  
2 that. They didn't submit any evidence to indicate  
3 that there is even a potential for long-term effects.

4 JUDGE YOUNG: And I'm talking about the  
5 sort of logical chain of or the taking the chain of  
6 logic that I just gave to you that contains several  
7 fairly basic facts, the localized factors, the size of  
8 the aquifer, some of the basic facts about what  
9 happens when an aquifer first develops some lessening  
10 of quality, for lack of the more accurate technical  
11 word; how do you deal with that sort of very simple,  
12 as I understand it, sort of fact-based argument that  
13 does have some, a certain chain of logic to it? Maybe  
14 I'm not repeating --, maybe I'm not characterizing it  
15 correctly but.

16 MR. FRANKEL: We'll respond to that.

17 JUDGE YOUNG: Okay.

18 MR. SMITH: Respectfully, we don't see the  
19 chain of logic there. We have an aquifer that in  
20 order to mine we have to get an aquifer exemption from  
21 the state which means that no one can use that for any  
22 more drinking water. The aquifer is going to be  
23 restored before they're completed. And that's one of  
24 the requirements of their license. And at that point  
25 the water will be restored to its original use quality

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1 according to the primary and secondary.

2 JUDGE YOUNG: But there have been  
3 statements about the doubt whether -- about doubts  
4 that CBR has about whether they can restore it to its  
5 original.

6 MR. SMITH: To the primary water quality  
7 standard.

8 JUDGE YOUNG: Right.

9 MR. SMITH: In their license they are  
10 permitted to restore it after reasonable effort to the  
11 secondary water quality standards.

12 JUDGE YOUNG: Right.

13 MR. SMITH: That's part of their existing  
14 license. And those again are set by the State of  
15 Nebraska, those are not really within the scope of the  
16 NRC proceeding. So that --

17 JUDGE YOUNG: But you're relying on those?  
18 You're relying on those in the NRC proceeding?

19 MR. SMITH: I'm not sure what you mean by  
20 relying on them in the NRC proceeding.

21 JUDGE YOUNG: You're making commitments to  
22 restore to those standards.

23 MR. SMITH: In our license the NRC is  
24 requiring us to do that.

25 JUDGE YOUNG: So you are relying on those

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1 standards.

2 MR. SMITH: The NRC is requiring us to --

3 JUDGE YOUNG: Right.

4 MR. SMITH: -- restore the groundwater to  
5 those standards.

6 JUDGE YOUNG: Right.

7 MR. SMITH: Correct. And so there should  
8 be no degradation of water quality that will go beyond  
9 the area of the proposed expansion area. And to the  
10 extent, as we discussed earlier, the movement of water  
11 in the Basal Chadron is on the order of 10 feet per  
12 day so that's -- or 10 feet per year, I'm sorry. So  
13 that is 10 feet per year, big difference. So that's  
14 100 years to go a mile? No. Five hundred years to go  
15 a mile. And so -- my math skills are poor. But as  
16 you can see that's -- and plus we're monitoring this  
17 to make sure it doesn't move on, move forward. And  
18 there are requirements to monitor after restoration to  
19 make sure that the groundwater is stable.

20 So respectfully, there is not any  
21 potential for contamination to reach significant  
22 distances downstream. In the localized area there is  
23 no mixing between the various aquifers. The High  
24 Plains Aquifer doesn't exist at the site.

25 JUDGE YOUNG: You're making these

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1 arguments, and with all due respect I think they sort  
2 of go to the merits. And again it's hard to draw the  
3 line there. But you are making some statements and it  
4 seems to me that the Petitioners dispute, in effect  
5 dispute the statements that you're making.

6 MR. SMITH: It's clear that they dispute  
7 the statements we're making. I guess the requirement  
8 for a contention admissibility they've got to state  
9 why they dispute them.

10 JUDGE YOUNG: Right.

11 MR. SMITH: And provide some basis. And  
12 that is what their petition lacks. There is no  
13 evidence that shows that some pump test was performed  
14 inadequately or, you know, a whole host of other  
15 reasons that they could potentially demonstrate that  
16 there is some mixing or some linkage. That's not  
17 present here.

18 JUDGE YOUNG: You are not, okay, you are  
19 not seeing that they have made the fact-based argument  
20 which is sort of I guess the minimum requirement.

21 MR. SMITH: Absolutely, absolutely not.  
22 And even if you look at some of these exhibits that  
23 they have submitted late that talk about fracturing  
24 and so on, they talk about fracturing in the High  
25 Plains Aquifer that might connect the Brule to the

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1 High Plains Aquifer. Again, those don't even overlay  
2 the North Trend or the current areas.

3 JUDGE YOUNG: But I think there has been  
4 an allegation that there could be fractures between  
5 the Brule and the High Plains and then the Brule and  
6 the Chadron; right? Am I wrong on that?

7 MR. SMITH: Well, potentially but there is  
8 no -- that could not occur in the area of the site.  
9 That would have to occur at some significant distance  
10 away. And again we're talking about movement of water  
11 that is on the order of 10 feet per year. That's not  
12 a genuine dispute sufficient to rise to the level of  
13 an admissible contention here.

14 JUDGE YOUNG: I understand your argument.

15 MR. SMITH: And lastly with respect to  
16 these exhibits that were submitted, given to us today,  
17 Exhibit A and Exhibit B, I will just respond briefly  
18 to the arguments for late filed, supporting bases and  
19 late filed contentions.

20 JUDGE YOUNG: Right.

21 MR. SMITH: But I think we prefer to  
22 respond to them more formally in a written response,  
23 as you've indicated.

24 JUDGE YOUNG: Definitely, yes.

25 MR. SMITH: But first of all I would just

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1 note that the Exhibit B, both of these in fact,  
2 Petitioners have an ironclad obligation to examine the  
3 publicly available record for any supporting documents  
4 to support their petition.

5 JUDGE YOUNG: Well, let me just ask you  
6 something. Is this in the publicly available, is  
7 Exhibit B in the publicly available? I mean is it --

8 MR. SMITH: Presumably.

9 JUDGE YOUNG: -- part of the application?

10 MR. SMITH: No, it's not part of the  
11 application. And they provided it.

12 JUDGE YOUNG: Where would they have found  
13 it if they wanted to search to find it? Where would  
14 they?

15 MR. SMITH: The Department, the State of  
16 Nebraska, essentially the NRC.

17 JUDGE YOUNG: You think the NRC has a copy  
18 of this?

19 MR. SMITH: They were cc'd on it.

20 And then the other document refers to  
21 studies that were performed in '85, '94, and  
22 specifically to even studies that are referenced in  
23 the application. So to say that they were unable to  
24 find them or identify them prior to yesterday or last  
25 week.

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1 JUDGE YOUNG: Right, I think the Exhibit  
2 B is the one they make the argument about only getting  
3 it yesterday. And again we want to hear from  
4 everybody on this.

5 MR. SMITH: And focusing more specifically  
6 on this as well, this is just a recitation of  
7 questions that the State of Nebraska has. They start  
8 raising questions does it indicate that there is any  
9 deficiency in the application or any deficiency in the  
10 information that's in the application they're  
11 requesting more information or additional discussion.  
12 There is in the Commission case of NRC Staff requests  
13 for additional information petitioners are not  
14 permitted to mine RAIs and point to and RAI as in and  
15 of itself representing a genuine dispute that's  
16 subject to contentions.

17 JUDGE YOUNG: But that's not to say that  
18 they cannot use information that comes out in RAI.

19 MR. SMITH: Certainly. If they provide  
20 support for it and, you know, it meets the other  
21 factors for a late filing.

22 JUDGE YOUNG: Right.

23 MR. SMITH: That's all. Thank you.

24 JUDGE YOUNG: Okay. Any follow-up?

25 MR. FRANKEL: Yes. Just a few rebuttal

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1 points.

2 On this Exhibit B, judging from the letter  
3 I believe Petitioners were the only party that didn't  
4 have a copy of this by the middle of November. And --

5 JUDGE YOUNG: When did you --

6 MR. FRANKEL: Well, we got this Exhibit B  
7 yesterday. But I note it was sent to the company  
8 November 8. And it was cc'd to the NRC project  
9 manager on that date. So I find the argument that  
10 they didn't have access to it and couldn't read it,  
11 therefore it's not acceptable, doesn't seem to make  
12 any sense to me. But we did get it at the last moment  
13 and we did comply with the 3.09(f) requirement, as we  
14 previously discussed, and we will add to that in  
15 writing.

16 I'd like to rebut the point that NRC  
17 counsel made concerning a statement. She said that  
18 there was no reference in the original petition to the  
19 spiritual use of water or the spiritual issue. I  
20 would just refer back to the there's a paragraph 9 on  
21 page 3 of 27. It goes into the rights of indigenous  
22 people. And on the carryover paragraph on page 4 it  
23 says, "States shall provide effective mechanisms for  
24 just, fair redress for any activities. Appropriate  
25 measures shall be taken to mitigate adverse cultural

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1 and spiritual impact." It says no opportunity has  
2 been provided for that kind of opportunity.

3 And then in the contentions themselves  
4 that paragraph 9 together with the other paragraphs is  
5 incorporated by reference. So from our perspective it  
6 is made part of the contention clearly.

7 On the NRC Staff's question about the  
8 public testimony from Nebraska, we provided it because  
9 it was noted that the staff had a hard time finding  
10 it. It was provided to us. Just because we have Mr.  
11 Cook, my client, is as you know a member of the  
12 Nebraska State Commission on Indian Affairs, and so it  
13 was provided to him in that regard. When we filed the  
14 petition we had assumed that the NRC Staff would be  
15 able to access that, as would the company, and so we  
16 filed it as it was requested.

17 We understand that even under this  
18 Appendix A from the case we were discussing there is  
19 a reference that talks about supporting documents may  
20 be proffered, expert opinions may be proffered.

21 This Exhibit A is exactly that. And while  
22 it was given to us just Monday afternoon it is the  
23 expert testimony that we had hoped to receive. It is  
24 what we asked for from when we found an expert, we  
25 asked for this to be confirmed. This is pretty much

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1 what the Petitioners suggested. And paragraph 2  
2 states clearly, this is on paragraph 2 of Exhibit A,  
3 "Many of these fault zones connect the High Plains  
4 Aquifer and the uranium-bearing sandstones of the  
5 Chamberlin Pass Formation, i.e. the Basal Chadron of  
6 their terminology."

7 JUDGE YOUNG: I'm sorry, paragraph, which  
8 paragraph?

9 MR. FRANKEL: Oh, I'm sorry, paragraph 3.  
10 This is on the second page where it talks about that  
11 these fault zones connect.

12 JUDGE YOUNG: Okay, I see which paragraph.

13 MR. FRANKEL: Middle way through the  
14 paragraph.

15 And so in providing this as support for  
16 our dispute, our disputed contention, we think it  
17 clearly supports it in a way that takes us well beyond  
18 the minimal standard of making a factually based  
19 argument.

20 JUDGE YOUNG: And what was the issue, can  
21 you respond on the issue of when this became available  
22 and why it was not provided sooner?

23 MR. FRANKEL: We received this the  
24 professor says in his e-mail of January 14 in the  
25 afternoon, "sorry about the delay in getting this to

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1 you." So we had done our best. And of course we  
2 don't pay any of these experts so we tend not to be  
3 the highest priority sometimes given other work  
4 demands.

5 I'd also like to spend a second talking  
6 about --

7 JUDGE YOUNG: Hold on just one second  
8 before we move on from that. Do you want to address  
9 the other criteria under 2309(f)(2) and the Staff is  
10 arguing (c) also? Now, we can address these in  
11 written filings as well.

12 MR. FRANKEL: I'd prefer to just leave it  
13 in written. We'll address that in written form for  
14 now, Your Honor.

15 JUDGE YOUNG: Okay. Go ahead then.

16 MR. FRANKEL: There was a reference to the  
17 long-term effects. We are specifically disputing the  
18 statement made in ER Section -- this is on page 18 of  
19 27 of the petition. We're disputing ER 3.11.1.2 which  
20 states in the second paragraph there, "Long-term  
21 impacts of groundwater quality should also be  
22 minimal."

23 The next sentence says, "Additionally,  
24 there is no mechanism in EPA or NDEQ regulations to  
25 unexempt an aquifer." And then the key sentence,

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1 "Therefore, the groundwater in the immediate mining  
2 area will never be used as U.S. drinking water. The  
3 primary purpose of restoration is to ensure that post-  
4 mining conditions do not affect U.S. drinking water."

5 And that conflicts with the primary goal  
6 of restoration to be to return it to the baseline.  
7 And goes directly to what we say in contention which  
8 can be read as dispute, We do not agree. Long-term  
9 impacts on groundwater quality are major. Restoration  
10 activities are not the same as returning the water to  
11 its original condition. I'll paraphrase my statement  
12 there.

13 So in this rebuttal we say it's major,  
14 they say it's minimal, and that's our dispute.

15 Did you have something, Bruce, on the  
16 fracturing that you wanted to go into?

17 MR. ELLISON: Well, I thought that you  
18 actually had covered it. I mean with the now  
19 available expert testimony of Dr. LaGarry we feel we  
20 can put all of this into contention. And especially  
21 although I understand the things that are unknown are  
22 not something that we can really talk about too much  
23 here, we've had representations from CBR that there  
24 has been all kinds of extensive drilling in here and  
25 testing and whatnot. That doesn't seem to be what the

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1 Nebraska Department of Environmental Quality says.  
2 And, in fact, they criticize CBR for lack of those  
3 things.

4 So, and the fact that we need to really  
5 look at more specific fracturing that does exist in  
6 that area and in the adjacent areas. Because since  
7 we're concerned about long-term effects in the  
8 movement 10, 15 years, as well as fracturing right  
9 there. I mean we're talking about the White River  
10 Fault, for example, which does go right through part  
11 of this area. And the questions that the Nebraska  
12 Department of Environmental Quality raises is how,  
13 because this is largely undetermined we don't know  
14 about how fast everything is going up and down. And  
15 while CBR would like to limit any discussion to flow  
16 just within the Basal Chadron, if we have intermixing  
17 with other aquifers that flow at different rates we  
18 contend that they need to be looked at as well because  
19 that then goes to the long-term effects.

20 One other point that I just wanted to  
21 touch on briefly is NRC Staff counsel made reference  
22 to why we cited a Oglala Sioux tribal water study  
23 report. One of the things that we did was simply to  
24 cite it for our contention that Pine Ridge residents,  
25 including Debra White Plume, utilize the Arikaree

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1 Formation. We did not have a cite for that at the  
2 time that we submitted it so we submitted this in our  
3 response because that provided the specifics.

4 JUDGE YOUNG: And tell me again the report  
5 that you cite?

6 MR. ELLISON: It's an Indian Health  
7 Service study report.

8 JUDGE YOUNG: Oh, okay, I remember. Yes,  
9 I know remember that.

10 MR. ELLISON: 2003 report. And it was  
11 simply cited --

12 JUDGE YOUNG: Indian Health Service.

13 MR. ELLISON: -- to just simply show that  
14 all of the reservation wells are in the Arikaree and  
15 not for anything more than that.

16 JUDGE YOUNG: Okay. Anything else?

17 MR. ELLISON: No, ma'am.

18 JUDGE YOUNG: Anything else?

19 MR. FRANKEL: Just that we will hit this  
20 in our written submission. But these NUREGS being  
21 legal guidance we didn't feel constrained in being  
22 able to add those. we didn't feel that they would  
23 require a form of amendment in any way.

24 And we also note that that Appendix A that  
25 we're referring to allows for statements in the

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1 petition to be amplified. And so we will hit that in  
2 our written brief.

3 JUDGE YOUNG: Staff, do you have anything  
4 else on Contention A?

5 MS. SIMON: No, Your Honor.

6 JUDGE YOUNG: Applicant?

7 MR. SMITH: I would just point out with  
8 respect to NUREGS, and this is just for everyone's  
9 explanation, NUREGS come in different forms. Some of  
10 them are staff guidance and those are, as we  
11 discussed, have not force of law but they're guidance  
12 and they're followed again to constitute satisfaction  
13 of NRC regulations.

14 There are others like the NUREG referenced  
15 here which is a contractor report. This is why you've  
16 got the CR after it.

17 JUDGE YOUNG: Right.

18 MR. SMITH: It's not, it's neither  
19 guidance nor law, it's just a report that --

20 JUDGE YOUNG: Right.

21 MR. SMITH: -- the NRC has ordered from a  
22 contractor. Other ones are labeled BR which is a  
23 brochure. So, you know, the NUREGS that you are going  
24 to rely on for factual information those were  
25 available previously. That's not a legal issue,

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1 that's a factual issue.

2 JUDGE YOUNG: Well, I think the issue of  
3 what NUREGS are and what the NRC uses them for I mean  
4 I'm not sure that in practical effect in some  
5 circumstances contractor-produced NUREGS aren't also  
6 used by the NRC to establish standards for licensees.

7 MR. SMITH: Sure.

8 JUDGE YOUNG: Now, you could prove me  
9 wrong but it seems to me that if they serve the same  
10 person in defining standards they are in the same sort  
11 of nature of being law. In any event, that's  
12 generally their use. They're not put forward to lay  
13 out facts, they're to set standards, they're to tell  
14 licensees how they are supposed to conduct themselves  
15 to meet the standards that the NRC wants them to meet.  
16 Sometimes that's by reference to rules that exist. In  
17 this case there are no rules yet so we're just sort of  
18 a unique case of first impression, at least early  
19 impression if not first impression of a case where  
20 there are no rules that govern apart from the general  
21 ones that the Staff has already provided to us.

22 MS. SIMON: Your Honor, may I, if I may,  
23 can I read to you from the foreword to NUREG --

24 JUDGE YOUNG: Pardon?

25 MS. SIMON: May I read to you from the

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1 foreword of the NUREG 6870 just to give you a sense --

2 JUDGE YOUNG: Sure.

3 MS. SIMON: -- of what the purpose was?

4 JUDGE YOUNG: Did we ever find it, 6870,  
5 CR 6870?

6 MS. SIMON: Let me blow it up so I can  
7 read it. This is the third paragraph from the  
8 foreword.

9 JUDGE YOUNG: Okay.

10 MS. SIMON: It says, "This report  
11 summarizes the application of a geochemical model to  
12 the restoration process to estimate the degree to  
13 which a license has decontaminated a site where the  
14 leach mining process has been used."

15 JUDGE YOUNG: Raise your voice a little.

16 MS. SIMON: I'm sorry, okay.

17 "Toward that end, this report analyzes the  
18 respective amounts of water and chemical additives  
19 pumped into the mine regions to remove and neutralize  
20 the residual contamination using ten different  
21 restoration strategies.

22 The analyses show that strategies that use hydrogen  
23 sulfide in systems with low natural oxygen content  
24 provided the best results. On the basis of those  
25 findings this report also summarizes the conditions

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1 under which various restoration strategies will prove  
2 successful."

3 So just to give you a sense that is not,  
4 does not seem to be the kind of NUREG that offers  
5 guidance but is more a specific contract that NRC  
6 wanted to look at this model. Just wanted to offer  
7 that.

8 JUDGE YOUNG: Anything else? Let's take  
9 a break and then come back and start on Contention B.  
10 Be back at 5 after 4:00.

11 (Brief recess.)

12 JUDGE YOUNG: If everyone is ready let's  
13 go ahead and get started on Contention B.

14 MR. FRANKEL: Contention B relates to  
15 water but it focuses on the accidental spills. It  
16 focuses on the 300,000 leak that only 200,000 gallons  
17 was cleaned up, so presumably 100,000 went somewhere  
18 else. There was this one gallon per hour leak at a  
19 coupling.

20 And in our petition we did use the phrase  
21 that Your Honor brought up earlier, *res ipsa loquitur*,  
22 that, you know, 98 water wells on Pine Ridge, not that  
23 far away from here, well they've been contaminated and  
24 closed. And we don't know why but we know that that  
25 doesn't happen naturally.

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1           And we also know that for 17 or 18 years  
2           or so of constant operation and a few leaks and  
3           spills, and what we're talking about is holding ponds  
4           that are lined with thick plastic liners. And, yes,  
5           they have a sophisticated monitoring system to say  
6           when it leaks. But there is a statement in here that  
7           says the leaks are unavoidable, these small leaks are  
8           virtually unavoidable. So in our view that's an  
9           admission right there that there is an intent to  
10          release toxic radioactive material into the  
11          environment.

12           And then as to materiality it goes  
13          directly to the findings the NRC needs to make under  
14          NEPA or at an environmental level. Current operation  
15          is clearly material not because it's already licensed  
16          but because they are intending to replicate it in the  
17          North Trend Expansion. And it's to us we went through  
18          and it comes down basically to a conflict or a dispute  
19          as to whether, as Applicant believes, its operations  
20          result in minimal short-term impacts and no long-term  
21          impacts, that would be zero, no, zero long-term  
22          impacts, or as Petitioner believes, that the  
23          operations result in major short-term and long-term  
24          adverse impacts.

25           We know very little mainly because this is

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1 a self-monitoring, self-regulating entity. They do  
2 their own tests and they report them. But no one is  
3 double checking the tests to my knowledge. There is  
4 no control, as there would be in peer review science.  
5 And so we have a self-monitoring party basically  
6 telling us it's okay. And then sometimes there are  
7 reports of leaks and spills. And then we're told not  
8 to worry about it. And those are extreme paraphrases,  
9 but that's our basis contention.

10 And in going through the specifics, yes,  
11 we don't understand fully the difference between an  
12 excursion of one kind and an excursion of another. To  
13 us an excursion means a release of chemicals into the  
14 environment.

15 It says that CBR 6.3 they don't do any  
16 ecological monitoring, there is no knowledge of the  
17 effect of this on the wildlife in the area, on the  
18 environment in the area. And there is no statement of  
19 that at all. And so, you know, it's our position that  
20 the environmental information is lacking to a point  
21 that the NRC Staff doesn't have, wouldn't have  
22 sufficient and adequate information to prepare the  
23 mandated environmental assessment review and  
24 possibility determination of the impact statement  
25 being required.

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1           There is also a complete failure to  
2           consider climate change, drought conditions, and that  
3           Chadron's water supply comes from the White River, and  
4           that the North Trend project drains into the White  
5           River. Which to us means that the community water  
6           supplies may be contaminated with radioactive waste  
7           from the CBR mine. And we are not alone because in  
8           Exhibit B it's clear that the NDEQ shares our concern  
9           and shared it, we were probably writing up the letter  
10          at the same exact time that they were writing up the  
11          letter.

12                   And the contamination of water quality,  
13           particularly as it pertains to water quality that  
14           affects the reservation is something that we  
15           specifically brought to the attention of everyone when  
16           we cited to Technical Report 2.4.1 which says that  
17           Harvey White Woman, Mr. Harvey White Woman of the  
18           Oglala Sioux Tribe called before the follow calls were  
19           begun to ask what effect the proposed project might  
20           have on water quality. And from what we can tell no  
21           one called him back.

22                   Environmental Justice, TR 2.3.3, as if  
23           completely inapplicable the company says no adverse  
24           implied if environmental impacts would occur to the  
25           population from the proposed project activities.

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1 There would be no disproportionate adverse impact upon  
2 the populations living below the poverty level. Pine  
3 Ridge Indian Reservation, Shannon County is the second  
4 poorest county in the country. We submit that  
5 potential contamination there should be disclosed as  
6 potential adverse environmental impact that would  
7 disproportionately affect that lower income population  
8 at Pine Ridge.

9 We already discussed in the prior session  
10 ER 3.11.1.2 and our dispute over whether, as they say,  
11 the long-term impacts are minimal or, as we say, even  
12 with reference to their application that they're long  
13 term. And we cite their application against them for  
14 the proposition that if they say the groundwater in  
15 the mining area will never be used as U.S. drinking  
16 water there must be a reason that that statement is  
17 made. There must be something in the restored water  
18 that makes it illegal or unhealthful to use as  
19 drinking water. And at the same time we are told by  
20 NDEQ that the application itself divulges it is being  
21 used for drinking water. So there's a dispute and  
22 conflict.

23 Again, ER 4.4.3.3, groundwater impacts  
24 from accidents, says small leaks are virtually  
25 unavoidable since the liners are exposed to the

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1 elements. Presumably, and counsel asked, Well, what  
2 could we at CBR do? Well, I guess the liners could be  
3 changed more frequently, for example. This is  
4 something that we could talk about if we are admitted  
5 to this case.

6 And our contention is that they have  
7 admitted that leaks of radioactive material are  
8 unavoidable. And in light of the fact that there is  
9 no safe low dose of radioactivity small leaks to us  
10 are leaks. And leaks of radioactive material are  
11 serious, have major environmental consequences. And  
12 we would submit that having said that a burden would  
13 then shift to the company or the Staff to show why  
14 scientifically they're negligible or irrelevant.

15 In our contention we say Technical Report  
16 2.5.1, 2.5.3 fails to account for climate change.  
17 This is clearly an area of germane concern due to the  
18 requirements under NEPA to describe the effect on the  
19 environment. It is now beyond scientific doubt  
20 according to the U.S. panel that recently won the  
21 Nobel Prize that there is in fact climate change  
22 occurring. And anyone experiencing our weather might  
23 share that opinion.

24 Section TR 2.6.2.8 these are conclusions,  
25 very technical conclusions concerning site geology and

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1       confining strata. Much of this leads to the often-  
2       stated conclusion that confinement must be adequate,  
3       that the upper and lower confinements. But it doesn't  
4       say that they're impermeable. It says they're  
5       significantly less permeable. It says that they are  
6       essentially impermeable. But we dispute that and cite  
7       to even the small amounts talked about as being  
8       significant.

9                     It says that -- I'm going to move on to  
10       the next one.

11                    Liquid waste, ER 1.3.2.5.2, liquid waste  
12       disposal, it says that ten years of excellent results  
13       and no serious compliance issues. We dispute that.  
14       At the beginning of this contention we note that there  
15       were at least 23 reported spills. And our position is  
16       that there may be more spills that for one reason or  
17       another went unknown or unreported, for example, that  
18       one gallon per hour leak that went on for a couple  
19       years. This shows that the company's representations,  
20       while they may be good intentions, are not sufficient  
21       to give anyone the kind of confidence that would make  
22       our participation in this matter irrelevant.

23                    The exposures from water pathways from  
24       Environmental Report 3.11.2.1 in the first paragraph  
25       it's talking about the plastic liner, 34 mil. plastic

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1 liner. I know that even Home Depot sells 50 mil. The  
2 ponds, it says, are not considered a source of liquid  
3 radioactive effluence because there is a leak  
4 detection system. And there are no routine liquid  
5 discharges -- meaning planned I would think. And as  
6 a result, there are no definable water-related  
7 pathways. Which is a way of not answering the  
8 question.

9 Based on the information that we've  
10 brought in the small amount of time to date, we're  
11 showing that there is a substantial possibility,  
12 possibly a probability that there is this kind of  
13 leakage. And we pointed to at least one very large  
14 incident and one smaller incident of leakage. And in  
15 light of prior incidences of leakage the question  
16 should be answered concerning water-related pathways.  
17 What is known about the water-related pathways?

18 JUDGE OLIVER: A portion of the  
19 contamination, what type of contamination? Is that  
20 radiological or arsenic or? The wells that were  
21 closed.

22 MR. FRANKEL: I'm not sure. I believe  
23 that the 300,000 gallon leak was of liqsivient. And  
24 possibly counsel for the company can elaborate on it.

25 JUDGE OLIVER: Talking about the closing

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1 of the wells there must have been -- see, the wells  
2 are on the reservation.

3 MR. FRANKEL: Oh, those wells.

4 JUDGE OLIVER: Yes.

5 MR. ELLISON: This is in materials that  
6 unfortunately were in Ms. White Plume's house and  
7 which burned to the ground two weeks ago. So we would  
8 like to try and duplicate those materials and get that  
9 to you.

10 JUDGE OLIVER: What I'm looking for to see  
11 if there is any correlation between the closing of the  
12 wells, what they would do to them, if there is any  
13 possible relationship to the ISL mining?

14 MR. FRANKEL: Well, the wells draw from  
15 the Arikaree. And we're suggesting that conductivity  
16 --

17 JUDGE OLIVER: Yeah, but I'm wanting to  
18 know the exact contamination.

19 JUDGE COLE: Who closed the wells?

20 MR. FRANKEL: Was it EPA or the Health  
21 Services?

22 MR. ELLISON: Tribal Water Program.

23 JUDGE COLE: Why did they close it? What  
24 was the basis?

25 MR. ELLISON: Contamination.

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1 MR. FRANKEL: I think it was arsenic and  
2 radionuclides, wasn't it?

3 JUDGE COLE: So it was both radionuclides  
4 and arsenic?

5 MR. FRANKEL: Yes.

6 JUDGE COLE: Thank you.

7 JUDGE YOUNG: You said the Tribal Water  
8 Program?

9 MR. ELLISON: Yes.

10 MR. FRANKEL: Is there anybody here from  
11 the tribe who could give us better information?

12 JUDGE OLIVER: The reason I'm bringing  
13 that up, throughout you keep referring to "may," you  
14 say "may have" caused health effects, it "may have"  
15 led to the closing of the wells and etc. There's not  
16 a definitive statement there of the correlation.

17 MR. FRANKEL: Well, Judge, I realize that.  
18 And we understand that these are serious allegations.  
19 And to say definitively that those wells were closed  
20 due to spillage from the mine, we believe that they  
21 have. But we don't have facts exactly that say  
22 precisely that. And we know we're not supposed to get  
23 into the merits here. And so what we are saying here  
24 is what we know and what we believe is based on the  
25 logical process of events and common sense and the

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1 limited expertise that we have.

2 So, you know, I guess as counsel we felt  
3 that it would have been irresponsible to make a  
4 stronger statement. And at the risk of cutting into  
5 our arguments on something like that, may versus did,  
6 you know, we're getting this based on a lot of verbal  
7 and anecdotal information that has not been proven  
8 out. And may be proven out with the opportunity to do  
9 discovery or to do this sort of investigation. I'm  
10 sure it will be proven out. But to put it in our  
11 public filings that we knew would be released  
12 publicly, basically we didn't want to get into a  
13 defamation sort of situation with the company. We  
14 didn't know for a fact, we just know that it may. We  
15 know that it's odd and to us *res ipsa loquitur* tells  
16 us that the thing speaks for itself, that if these  
17 wells are on the part of the reservation closest to  
18 the site where the mining is occurring and it's where  
19 the fault runs, and that there may be a mixture of the  
20 aquifers, and we say that there is and they say that  
21 there isn't, then we are saying that there is a  
22 relationship. And we just don't know what that  
23 relationship is right now.

24 MR. ELLISON: Additionally, if I might  
25 add, this is something that Dr. LaGarry could talk to.

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1 Because as we put in Exhibit A with regard to the  
2 surface spill, for example the 100 of the 300 thousand  
3 gallons that's unaccountable that wasn't cleaned up,  
4 according to Dr. LaGarry's research, and he looks at  
5 Swinehart and others from the '85 study, surface  
6 spills south of Pine Ridge would be transmitted  
7 through porous sandstones of the Ogallala and Arikaree  
8 groups directly into the High Plains Aquifer.

9 So here's a spill of this magnitude and it  
10 went somewhere, at least what a local geological  
11 expert would be prepared to testify is that this could  
12 be a real potential source for contamination of the  
13 groundwater source for the people of Pine Ridge.

14 JUDGE OLIVER: I think you answered my  
15 question.

16 MR. FRANKEL: Thank you, Judge.

17 MR. ELLISON: Thank you. I'm sorry.

18 MR. FRANKEL: That 300,000 gallon spill I  
19 was informed by my client Bruce McIntosh on behalf of  
20 WNRC that that occurred in the wintertime and that  
21 that spill actually landed on the top of frozen river  
22 water. And that it would have been much worse and  
23 none of it probably would have been cleaned up if it  
24 were summertime. So that was a good luck for a lot of  
25 people. But it shows that there are significant

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1 risks, environmental risks and potential for long-term  
2 serious adverse impacts.

3 JUDGE YOUNG: Did you, if you can refresh  
4 my memory, unless I'm remembering this from somewhere  
5 else, did you make some reference to, or possibly it  
6 was in the testimony that you provided, to the mining  
7 process somehow drawing out arsenic, was there some  
8 reference to that somewhere?

9 MR. FRANKEL: Do you remember if it was a  
10 comment by the company or?

11 JUDGE YOUNG: I don't know. I was  
12 thinking that it was an allegation by the Petitioners.  
13 But it might have been I might have remembered that  
14 from reading that testimony. I'm not sure.

15 Is that something that you're alleging  
16 anyway?

17 (Counsel confer.)

18 JUDGE YOUNG: Here it is. I'm sorry, it  
19 was in the testimony. It's when Ms. White Plume was  
20 talking and she says, "It's a scientific fact that  
21 mining can pull other minerals and metals from the  
22 earth in addition to the intended element. If they  
23 want to mine uranium they also pull our arsenic."

24 JUDGE COLE: That's on page 48.

25 JUDGE YOUNG: Right.

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1 JUDGE COLE: Of the testimony.

2 JUDGE YOUNG: I was mis-remembering it  
3 maybe as being in the petition. But is that one of  
4 the allegations you're making? And if so, what's the  
5 basis? Where does that come from?

6 MR. FRANKEL: Well, we do have paragraph  
7 14 on page 4. It refers to uranium not arsenic. We  
8 talk about contamination from the mining. And I don't  
9 believe that we specify all the different elements of  
10 that kind of contamination.

11 JUDGE YOUNG: Okay.

12 MR. FRANKEL: Let me check.

13 MR. ELLISON: We do have the U.S.  
14 Geological Survey, the NUREG which makes reference to  
15 arsenic, amongst other things, being mobilized by the  
16 in situ process.

17 JUDGE YOUNG: I'm sorry, the USGS?

18 MR. ELLISON: It's the U.S. -- it's the  
19 NUREG. The NUREG refers --

20 JUDGE YOUNG: The CR 6870 or?

21 MR. ELLISON: Yes, ma'am. And it makes  
22 reference to a 1979 Kasper report, with a K, Kasper  
23 with a K, and talks about the various minerals which,  
24 and elements which may be mobilized by this process:  
25 uranium, thorium, radium, radon, respective daughter

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1 products, trace elements.

2 JUDGE YOUNG: What you read before; right?

3 MR. ELLISON: Yes, ma'am.

4 MR. FRANKEL: And page 3 out of 27 of the  
5 petition, paragraph number 5, it says, it refers to  
6 CBR's application states that contaminants may enter  
7 the human body through water or through ingestion of  
8 meat, of livestock and/or fish or wild game exposed to  
9 the contamination. It says contaminants include  
10 radon, thorium, uranium and arsenic, inorganic  
11 arsenic.

12 So, yes, Your Honor, those have been  
13 incorporated by reference into this Contention B. And  
14 so, yes, it is part of our contention.

15 JUDGE YOUNG: Okay, thank you.

16 MR. FRANKEL: I believe that our comment  
17 concerning the radon 222 that it needs to be  
18 recalculated, I'm not sure if that is in contention  
19 anymore. I thought I saw a reference from the NRC  
20 Staff that since the amendment was passed that that  
21 was being recalculated. But to our knowledge it  
22 hasn't been.

23 And contention finally on page 21,  
24 Petitioner contends that there is no such thing as a  
25 safe low dose of radiation and that the cumulative

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1 effects of these contaminations causes adverse health  
2 impacts. And the cumulative nature of the  
3 contamination is relevant to the NEPA analysis and  
4 it's relevant to the zone of interest protected by the  
5 Atomic Energy Act and the parts of it that speak to  
6 protecting the environment and the public's safety.

7 Let me see if there is anything more I  
8 want to shed on that.

9 Yeah, I'm not repeating all those  
10 arguments about mixing of the aquifers here but it's  
11 understood that we would make them again here if that  
12 wasn't the case.

13 I'm concluded with Contention B.

14 JUDGE YOUNG: All right. You didn't have  
15 anything to add.

16 Staff next.

17 MS. SIMON: Okay. Your Honor, again the  
18 Staff points to the, I won't repeat them again, but  
19 the contention requirements. And we would like to  
20 repeat in general first that, you know, there are  
21 allegations of spills and leaks with no specifics, and  
22 we just don't know what they're pointing to. You  
23 know, an allegation that there is a large spill  
24 without anything to support it is not sufficient.

25 I think since the Petitioner kind of went

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1 through, you know, page by page I think I will follow  
2 the same.

3 I think Judge Oliver made an excellent  
4 point regarding the question of correlation and  
5 causality with respect to the 98 wells that were  
6 closed. I'm not certain of it but I looked, I did  
7 look at the report that was provided with the Owe Aku  
8 reply regarding the arsenic levels of homesites in  
9 Pine Ridge. And on page 2 of that, page 2 of 18 in  
10 that report --

11 JUDGE YOUNG: I'm sorry, which report now?

12 MS. SIMON: This is the, this was  
13 submitted it's at the end of the Owe Aku reply. It's  
14 the Arsenic Levels of Individual Scattered Homesites,  
15 Pine Ridge Reservation. And we were given not the  
16 whole thing, I think three pages and a map.

17 JUDGE YOUNG: Go ahead. I'll find it.

18 MS. SIMON: Okay. Again I can't say for  
19 certain that this is the closing they referred to but  
20 I do note that the report says that 123 wells were  
21 identified in this search and 25 were either no longer  
22 operational or were abandoned in place. 123 minus 25  
23 does equal 98. And so there's a good possibility that  
24 this is the closures they're referring to.

25 Also, this report does indicate that what

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1 happened here was that the EPA changed the maximum  
2 level of arsenic that was allowable in drinking water.  
3 And as a result of that they went through all the  
4 wells and they identified wells that had once been  
5 okay by the old standard and now were no longer okay.  
6 So I just want to point that out that it doesn't  
7 necessarily point to any contamination coming from  
8 elsewhere, if this is indeed the closing that they're  
9 referring to.

10 And again the distance to the reservation,  
11 even the closest part of the reservation is I believe  
12 at least 40 miles. And it's important to have support  
13 for a reason of a way that that water or that arsenic  
14 or whatever the contaminant is can get from the site  
15 to any of those wells. And so, again, we reiterate  
16 the Petitioner has to provide an explanation of why or  
17 of the basis for their contention that water,  
18 contaminated water is getting to the wells on the  
19 reservation.

20 With respect to the liner leaks, this is  
21 a very good indication why the rules require an  
22 explanation. Because if you look at page 4-15 of the  
23 environmental report which is where the Petitioners  
24 took these phrases, it's completely out of context.  
25 They do say, it is true that the report says that

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1 these small leaks are virtually unavoidable since the  
2 liners are exposed to the elements. But what the  
3 Petitioners did not point to was that there are two  
4 liners, the inner liner, which is the one exposed to  
5 the elements, and another liner beneath it, the outer  
6 liner.

7 The paragraph goes on to state in none of  
8 these situations was the shallow groundwater affected  
9 since the outer pond liner functioned as designed and  
10 prevented a release. And so, again, it seems that  
11 throughout this petition if the Petitioners are simply  
12 pulling phrases and paragraphs that seem to support  
13 their contention without considering the context and  
14 other information that goes against it that's  
15 something that needs to be considered.

16 I addressed the excursions in discussing  
17 Contention A. And I just want to point out that just  
18 because the meaning of an excursion to the Petitioners  
19 might be one thing, the meaning of an excursion as  
20 defined in the technical sense is what it is. And so  
21 I think that's all I need to say about that.

22 With respect to climate change, nothing in  
23 the regulations in Part 40 or Part 51 require that  
24 climate change be evaluated in the environmental  
25 report. So we would consider that potentially a

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1 challenge to the regulations which are insisting that  
2 that be a requirement.

3 JUDGE YOUNG: To which regulations?

4 MS. SIMON: In Part 40 and Part 51. Part  
5 51 especially describes what the contents of the  
6 environmental report has to be. And that would be  
7 51.45 I believe.

8 JUDGE YOUNG: Okay. For any environmental  
9 report. Okay.

10 MS. SIMON: Right.

11 The issue of the disposal well. The  
12 disposal well the Staff isn't exactly sure how deep it  
13 is but the disposal well is a deep disposal well which  
14 is at least a thousand and potentially several  
15 thousand feet below. The Applicant probably can speak  
16 to that. But this is a deep disposal well which is  
17 way, way below any of the aquifers that we have been  
18 talking about today. And, therefore, it's virtually  
19 impossible that any leak from that deep disposal well  
20 would have an effect on anything.

21 The fact that the site drains into the  
22 White River for purposes of surface water drainage  
23 that would be a concern. But, again, the Applicant --  
24 I mean the Petitioners, I'm sorry, have not pointed to  
25 any support for why the monitoring and the protections

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1 that the Applicant has discussed in their reports  
2 would be inadequate. They haven't challenged the  
3 inadequacy of monitoring of any of the design of  
4 evaporation ponds or other structures that provide  
5 that protection for surface water.

6 With respect to the water supply to the  
7 community, the Crawford water supply, as I stated  
8 earlier, is upstream and so that would not be affected  
9 by the site. And any contention about water supplies  
10 of other communities such as the reservation or here  
11 in Chadron go back to the point that there is no  
12 support for the contention that water is in fact being  
13 released offsite or that it's moving in this plume  
14 through the aquifers.

15 The issue of water in the exempted aquifer  
16 not being used as drinking water again has to do with  
17 the EPA and state regulations regarding exempted  
18 aquifers. And that's really a determination that they  
19 make and not one that the NRC makes.

20 And finally --

21 JUDGE YOUNG: But that is mentioned in the  
22 application; right?

23 MS. SIMON: Yes. I think that's for  
24 information, yes.

25 And finally, the contention that there is

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1 no safe dose of radiation is an attack on the NRC  
2 Regulation 20.1301(a) which states a maximum public  
3 dose of 100 millirem per year.

4 So again just to summarize, you know,  
5 these bases that the Petitioners have provided for  
6 supporting their contention are simply insufficient to  
7 support admissibility because they do not explain, the  
8 misinterpret or take out of context statements in the  
9 application and they really don't point to  
10 inadequacies in the application that are supported.  
11 That's all I have.

12 JUDGE YOUNG: Thank you. Mr. Smith.

13 MR. SMITH: Thank you. I don't have a  
14 whole lot to add to that. I think the Staff covered  
15 most of our responses. I would just maybe explain a  
16 couple of things briefly for context.

17 One is the aquifer exemption process, and  
18 that's something that the EPA or the State of Nebraska  
19 has been delegated the authority to do that. And when  
20 you designate exempt an aquifer that means that it can  
21 never again be used as an underground source of  
22 drinking water. So and you're exempting a portion of  
23 an aquifer and so even if someone else uses a portion  
24 of the aquifer many miles away or nearby, that  
25 particular portion of the aquifer can never be used

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1 for an underground source of drinking water again.  
2 There's an entirely separate that process that goes  
3 into that and there are various requirements that are  
4 involved. And that is a prerequisite from a  
5 regulatory perspective before any mining will take  
6 place at the North Trend site.

7 So it is mentioned in the application  
8 because it is important as to whether or not the  
9 project goes forward but it is not an issue that is  
10 within the scope of the NRC aspect of the proceeding,  
11 it's something the NDEQ works out.

12 And then with regard to the 300,000 gallon  
13 leak that's referenced in the facts in the applicat --  
14 or in the petition there was not a surface spill, that  
15 was a spill into the shallow aquifer that came from an  
16 incomplete casing, a problem with the casing of the  
17 well. And that was into the shallow aquifer. And so  
18 that aquifer was actually pumped and treated and was  
19 fully restored to baseline water quality and not just  
20 the secondary standards but all the way back to  
21 baseline water quality. So there were no long-term  
22 impacts whatsoever from that leak.

23 I that demonstrates just additionally that  
24 there are processes in place to control any excursion  
25 which in the history of the current facility have been

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1 few and far between. And those that have been they  
2 have been able to respond to quickly and reverse any  
3 problems before they migrated offsite or even out of  
4 the mining area.

5 Thank you.

6 JUDGE YOUNG: All right. Any quick  
7 follow-up on that one?

8 MR. FRANKEL: Just a couple, couple  
9 points. NRC counsel said that our assertion regarding  
10 the spills and leaks is not supported at all, and yet  
11 it was admitted in public testimony and we understand  
12 it has occurred, so.

13 The climate change, we're not challenging  
14 any regulations on that. The regulations say the  
15 effect on the environment has to be considered.  
16 Climate change is part of the environment.

17 JUDGE YOUNG: In which regulation again?

18 MR. FRANKEL: I believe the ones that the  
19 Staff was referring to, the ones that tie to NEPA,  
20 51.45 is one of them.

21 JUDGE YOUNG: Okay.

22 MR. FRANKEL: But then there was the --  
23 was it Part 40 and Part 50 that were referenced?

24 JUDGE YOUNG: Let's see. What part did  
25 you reference?

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1 MS. SIMON: It was Part 51.

2 JUDGE YOUNG: Part 51. The general  
3 environmental section.

4 MR. FRANKEL: Right, the general  
5 environmental section.

6 JUDGE YOUNG: Okay.

7 MR. FRANKEL: What we're saying is that  
8 common knowledge is that climate change is part of the  
9 environment. And we're not saying there needs to be  
10 a special regulation that says there is a new heading  
11 called climate change, fill it out. What we're saying  
12 is the regulation should have been interpreted in  
13 light of existing, current known information including  
14 the impact of climate change on the environment.

15 And there's discussion in the application  
16 concerning tornadoes, concerning flooding, concerning  
17 erosion, soil disturbance. And all those things are  
18 materially affected by climate change.

19 One last point, well two. On inadequacy  
20 of monitoring we have said that the monitoring is  
21 inadequate. The environment includes wildlife. There  
22 is no ecological monitoring. So what we are saying is  
23 is that there is inadequate monitoring to fulfill the  
24 regulations concerning the environmental disclosures  
25 to enable the environmental assessment.

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1           Then finally, we just heard that once the  
2 water is used for mining it cannot be used for  
3 drinking. In our view that completely negates the  
4 analysis involving net consumptive use and cycling  
5 water and these sorts of things because the primary  
6 use for water on this planet is drinking, and that use  
7 is prohibited immediately after the Applicant's  
8 activities and operations interact with that water.  
9 And in our view that's complete consumption of 9,000  
10 per minute and another 4,500 gallons per minute to be  
11 consumed in the sense that it can no longer be used  
12 for drinking water by any other person under these  
13 applicable laws.

14           That's all I have for rebutting on  
15 Contention B.

16           JUDGE YOUNG: All right. Well, it's about  
17 a quarter to 5:00 so why don't we move on to  
18 Contention C and see where we get on that one.

19           MR. ELLISON: We note from referring to  
20 Technical Report 2.4.1, Historic and Archeological and  
21 Cultural Resources, as well as Environmental Report  
22 3.8 on Historic and Cultural Resources, there's  
23 referenced to -- as well as Environmental Report 4.8,  
24 there's references to the location of both historic  
25 and prehistoric sites. Now, at least according to the

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1 information that was disclosed in the technical report  
2 and environmental report it appears that most of the  
3 sites are in the close proximity but outside of the  
4 immediate operation area. However, it is noted that  
5 artifacts and some other sites were found within the  
6 general area.

7 From what we heard earlier from the  
8 traditional chiefs as well as the cultural resources  
9 part of NEPA, the National Historic Preservation Act,  
10 the Indian Religious Freedom Act, the U.N. Declaration  
11 on the requirement of consultation with traditional  
12 governments, and the 1851 and 1868 Treaty we feel that  
13 when CBR basically said they don't need to do any  
14 further studies, that they concluded that there were  
15 no impacts or no adverse effects on these historic  
16 properties we feel that they were not really qualified  
17 to make such a decision. And that especially where  
18 there should have been consultation with the  
19 traditional indigenous leaders within this area as to  
20 the important of those sites that was not conducted.

21 And we feel that it should have been. We  
22 feel that this is a major omission with regard to  
23 protecting religious and cultural rights of the Lakota  
24 people. There is a lot of historic events that  
25 happened right in this immediate area, from the

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1 signing of the 1868 Treaty, the assassination of Crazy  
2 Horse. There are -- this is a historically what is  
3 referred to as seems like Indian, indigenous stuff  
4 gets referred to as prehistory and then since the  
5 settlers came it's referred to as history. For all of  
6 the peoples in this area there are important resources  
7 in this area that involve the two major peoples here.

8 And to simply just say "no problem"  
9 without appropriate consultation with people who would  
10 be in the know, especially as required with the  
11 indigenous population under U.N. declaration on  
12 treaties we feel is an issue which is germane. It is  
13 something that if this expansion was not allowed we  
14 feel that it would certainly -- we dispute the lack of  
15 any importance of need for further analysis. If this  
16 expansion was not allowed or this new site was not  
17 allowed it would certainly protect those resources as  
18 they still exist. We feel there are, as we heard  
19 around the noon hour, experts that are available who  
20 have not had a chance to examine these sites. And we  
21 feel that, therefore, there should be, this is a  
22 contention that should be further explored at a  
23 hearing.

24 JUDGE OLIVER: One question. When the  
25 Nebraska State historical preservation officer makes

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1 a determination does he follow through with that  
2 procedure do you know?

3 MR. ELLISON: No.

4 JUDGE OLIVER: He does not?

5 MR. ELLISON: No, I mean often does not  
6 occur.

7 JUDGE OLIVER: Because here somewhere in  
8 all of this paper there is a comment that he felt that  
9 at least it shouldn't qualify for the historical  
10 preservation.

11 MR. ELLISON: One of the difficulties that  
12 the Lakota traditional community continually finds is  
13 the lack of consultation. And we feel the  
14 consultation is mandated. And we feel that because  
15 especially since sites were identified as prehistoric  
16 sites the Lakota look at these sites differently than  
17 an archeologist might. And in order to protect  
18 cultural and religious sites of significance they  
19 certainly need to be examined to see whether they are.  
20 And there needs to be input from people who would  
21 know.

22 And I'm not aware of any consultation with  
23 the traditional elders on Pine Ridge as to the  
24 potential significance of even some of the artifacts  
25 that were found.

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1 JUDGE YOUNG: Are there any specific  
2 treaty provisions or law or regulations that spell out  
3 the extent and nature of the consultation that you're  
4 aware of?

5 MR. ELLISON: Well, I'm aware it's not so  
6 much from the treaties because under the treaties this  
7 area would still be part of the treaty land. But  
8 under the U.N. Declaration of last year this  
9 consultation is required with regard to anything that  
10 might affect any resources that are within historic  
11 and ancestral lands, let alone treaty lands.

12 I believe that NEPA also requires a  
13 certain amount of cultural resource communication.  
14 And I know it has been argued in the past, as does the  
15 National Historic Preservation Act, one of the things  
16 that indigenous people have for decades now been  
17 claiming is that federal agencies have been ignoring  
18 them.

19 JUDGE YOUNG: Right. And I guess what I'm  
20 wondering about is whether there is any -- I get the  
21 sense that it's looking at what's reasonable and that  
22 there is not necessarily anything that spells out the  
23 exact parameters of it, it's a question of what's  
24 reasonable.

25 MR. ELLISON: I would agree. And then the

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1 question is whether there was input.

2 JUDGE YOUNG: Right.

3 MR. ELLISON: Certainly if there was none

4 --

5 JUDGE YOUNG: Right.

6 MR. ELLISON: -- and there doesn't appear  
7 to be any, and there doesn't appear to be any plan to  
8 do any further inquiry, that that would not be  
9 reasonable.

10 MR. FRANKEL: Just to add to that. That  
11 U.N. declaration does require the states take -- state  
12 meaning the U.S. Government to take appropriate  
13 measures to mitigate adverse environmental, economic,  
14 social, cultural or spiritual impact. The --

15 JUDGE YOUNG: Could you give us the cite  
16 to that? Where?

17 MR. FRANKEL: Certainly. This is General  
18 Assembly Resolution A/61/L.67, September 2007.

19 And so appropriate measures to mitigate  
20 adverse economic, environmental, social, cultural,  
21 spiritual impact. The nature of that coming through  
22 as federal law of the United States brings it within  
23 the zone of area germane, zone of interest protected,  
24 as does the Atomic Energy Act provisions for  
25 protecting the interests of the public of which the

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1 Native Americans are part.

2 And, specifically, there is a sentence  
3 that we are disputing in the -- it's a conclusory  
4 sentence in ER 4.8, about halfway down, where the  
5 company says on page 23 of 27 of the petition, "These  
6 resources," meaning these historical resources, "are  
7 not likely to yield information important in  
8 prehistory or history and are considered not eligible  
9 for the National Register." Well, the determination  
10 and our dispute listed here as a contention in bold it  
11 says that we submit the company is not qualified to  
12 make any such determinations about the significance of  
13 these items or this camp and that these elders should  
14 be consulted.

15 I was consulting with one of the Lakota  
16 who are connected with Slim Buttes Ag. Dev. Corp. and  
17 it was explained to me that since time immemorial  
18 wherever springs would come up plants would grow,  
19 attract the animals, the four-leggeds, and those  
20 attract the two-leggeds. And these camps are very  
21 significant. And these camps have been there. And we  
22 don't know the legends that tell us whether a  
23 particular camp, maybe even this camp here, has some  
24 relevance to a very well known Lakota myth or Lakota  
25 legend where it would be an extreme impact. We just

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1 don't know.

2 What we dispute is the company having no  
3 authority or qualification to make that determination.  
4 And that's the basis. That's basically it. Thank  
5 you.

6 JUDGE YOUNG: Okay.

7 MS. JONES: In addressing their claims  
8 about the prehistoric Indian camp, because that seemed  
9 to be their primary contention --

10 (Counsel stands.)

11 JUDGE YOUNG: Thank you.

12 MS. JONES: Excuse me. Sorry. I always  
13 think that my voice carries.

14 JUDGE YOUNG: It does on the phone but in  
15 this room it does not.

16 MS. JONES: It doesn't carry.

17 JUDGE YOUNG: Right.

18 MS. JONES: Okay. As far as their claims  
19 about the prehistoric Indian camp I'm going to address  
20 that first because that seemed to be what their  
21 contention, at least the original contention, that  
22 seemed to be what it was focused on. And even the  
23 bases that they provided, that bases also as well  
24 seemed to be focused on the prehistoric Indian camp.

25 And so to that extent I could not find any

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1 information in the Applicant's application where they  
2 make conclusions that that particular site was not  
3 significant. So I just want to bring that out.

4 Also, too, I want to renew my objections  
5 as far as the Laramie Treaty and what its  
6 applicability is in this process. And also, too, any  
7 additional testimony that we have heard today that  
8 they are also using as a basis to support their  
9 contention I just want that to be noted for the record  
10 as well.

11 And so in looking at their claim regarding  
12 the Indian campsite I could, again, aside from the  
13 Laramie Treaty they cited no real authority to  
14 demonstrate that that is a requirement in this  
15 particular, that that is a requirement in this  
16 particular process. And they didn't really explain to  
17 what extent that information, if there is a  
18 consultation, how it would contribute to the  
19 information that's been provided in this particular  
20 application.

21 The Applicant did provide information  
22 about the prehistoric Indian campsite. In fact, they  
23 said that there wasn't very much information about it.  
24 They also apparently sent letters to several tribes,  
25 including the Oglala Sioux Indian Tribe, basically

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1 requesting any concerns that they may have about the  
2 proposed operation.

3 And let me go back and sort of correct  
4 something that I said. There is a requirement under  
5 the National Historic Preservation Act that any  
6 potential archeological sites be taken into  
7 consideration. So I just want to correct myself on  
8 that.

9 And so as far as their claims about the  
10 other artifacts, again their original contentions  
11 weren't really focused on that, it was focused on the  
12 prehistoric Indian camp. But to the extent that they  
13 are arguing that these additional archeological sites  
14 that somehow that there is a consultation that should  
15 have taken place, I would say that the NRC has not  
16 gotten to the point of actually looking at that  
17 particular piece of, particular portion of the  
18 application. It's our, it's my understanding that in  
19 observing section 106 for the National Historic Act it  
20 is part of our process to take a look at the  
21 information that the Applicant has provided. It is  
22 part of our process to consult with the state historic  
23 preservation officer and to make assessments with  
24 regard to their findings and what's listed as a  
25 historical site according to their data.

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1                   But we also as part of our process we also  
2                   have to potentially look at the possibility of  
3                   consulting tribal historic preservation offices. And  
4                   so that is actually part of our process. But in this  
5                   instance we are not quite there yet because the,  
6                   again, the NRC has not quite gotten to that part of  
7                   their review. But where we are right now is in  
8                   looking at the contention admissibility of Contention  
9                   C. And again, they haven't really provided any  
10                  information to really dispute what's in the  
11                  application, they's just basically made very general  
12                  statements about what they think should happen in the  
13                  way of consultation.

14                  And again, as I said earlier, that is  
15                  something that the NRC looks at as part of their  
16                  process in looking at section 106.

17                  JUDGE YOUNG: Let me just interrupt you.  
18                  The NRC does look at it. And depending on what the  
19                  NRC does then that might be enough for more  
20                  contentions, for example. But it seems to me that  
21                  what they are arguing here is that what was done was  
22                  not reasonable. And so the dispute is whether or not  
23                  the, I guess whatever contact was made without any  
24                  follow-up was reasonable. And they are saying that  
25                  that was not reasonable so that would be the dispute.

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1 MS. JONES: I understand. But  
2 unfortunately I don't have a response for that other  
3 than to say that again they haven't really provided  
4 any information as to what in the application they are  
5 disputing, you know, in terms of what information has  
6 been provided. So while they think that that may not  
7 be reasonable, well, I suppose that's their opinion.  
8 But I think that there was a process here that the  
9 Applicant was attempting to follow under section 106.

10 JUDGE YOUNG: The section that they quote  
11 is this section ER 3.8 where they talk about the  
12 follow-up. And their dispute is that what's described  
13 in the application is not sufficient, as I understand  
14 it. And the NRC may come in later and you may reach -

15 -

16 MS. JONES: Right.

17 JUDGE YOUNG: -- the same conclusion, you  
18 may reach a different conclusion, but the contention  
19 is that what was done was not reasonable basically.

20 MS. JONES: And I would say to that I  
21 think they need to point out a specific authority.  
22 They need to point out something that demonstrates  
23 that that was not sufficient. And they just haven't  
24 done that.

25 JUDGE YOUNG: Are you aware of any law

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1 that defines what the standard is?

2 MS. JONES: As far as?

3 JUDGE YOUNG: As far as what needs to be  
4 done in terms of the amount of consultation. It  
5 sounds as though it's a reasonableness sort of case by  
6 case inquiry.

7 MS. JONES: Okay. I will have to talk to  
8 the Staff about that.

9 JUDGE YOUNG: Right. If you know. That's  
10 the same question I asked them.

11 MS. JONES: Right. I'd like to consult  
12 with them --

13 JUDGE YOUNG: Sure.

14 MS. JONES: -- so that I don't give you an  
15 incomplete or inaccurate answer.

16 (Counsel and Staff confer.)

17 MS. JONES: I consulted with the Staff and  
18 they tell me that the process typically is that they  
19 will, they do the follow-up. They will --

20 JUDGE YOUNG: I'm sorry; what?

21 MS. JONES: The Staff, they do a follow-up  
22 on the information submitted in the application --

23 JUDGE YOUNG: Right.

24 MS. JONES: -- with regard to any  
25 historic, any potential historical sites.

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1 JUDGE YOUNG: Right.

2 MS. JONES: And so they do the follow-up  
3 with the state historic preservation officer.

4 JUDGE YOUNG: Right.

5 MS. JONES: They send letters. And they  
6 also potentially send letters -- I think I outlined it  
7 a little bit earlier -- they also potentially if they  
8 determine in looking at the information that they do  
9 have that it is necessary to consult with the tribal  
10 historic preservation officers then they follow-up  
11 with them as well.

12 JUDGE YOUNG: Right. But I mean that's  
13 how -- I mean when the NRC does its environmental  
14 evaluation, whatever document results it sort of  
15 supersedes the environmental report of the Applicant.

16 MS. JONES: Yes.

17 JUDGE YOUNG: But until the NRC has done  
18 that the basis for any contention would be the  
19 environmental report of the Applicant.

20 MS. JONES: That's correct.

21 JUDGE YOUNG: So I don't think that the  
22 fact that the NRC comes in later forecloses a party  
23 from raising a contention about the Applicant's  
24 environmental report.

25 I guess the other thing, I said the

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1       reasonableness of the follow-up and I think also  
2       mentioned was the important issue regarding the other  
3       resources I guess is the right word to use.

4                In any event, go ahead, you can finish  
5       your argument.

6                MS. JONES: Oh. Well, actually I was, I  
7       think I was done.

8                JUDGE YOUNG: Okay. Mr. Smith.

9                MR. SMITH: Thank you.

10               Well, I think first we would agree with  
11       the Staff that there hasn't been any evidentiary  
12       showing here that there are impacts or issues that  
13       weren't considered that should have been considered.  
14       They said that Crow Butte is not authorized or  
15       qualified to make these determinations. In fact, Crow  
16       Butte didn't make these determinations, they had a  
17       qualified archeologist who submitted cultural  
18       resources plans to the state SHPO. That was approved  
19       by the SHPO. There was also --

20                JUDGE YOUNG: State?

21                MR. SMITH: State historic preservation  
22       officer.

23                JUDGE YOUNG: Thank you.

24                MR. SMITH: The SHPO. Sorry.

25                Then they sent letters identifying the

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1 nature and location of the proposed project to the  
2 Nebraska Commission on Indian Affairs, to 13 tribes.  
3 And also apparently about 50 letters were sent to  
4 other various tribal leaders soliciting input on the  
5 project or help identifying any proposed impacts.

6 They made follow-up telephone calls to  
7 verify their letters were received and see if anyone  
8 had any questions. There were no concerns identified.

9 With regard to the actual assessment that  
10 was performed a few sites were found. But both of  
11 those sites again were outside of the assessment of  
12 the area, outside of the area of the North Trend  
13 project where there is actually going to be any  
14 activities taking place. So there is no evidence, no  
15 indication of a dispute as to whether are there going  
16 to be any impacts on cultural resources at the site.

17 With regard to compliance --

18 JUDGE YOUNG: I'm sorry. What about Mr.  
19 White Woman's question about the effect of the project  
20 and what?

21 MR. SMITH: Yes. So those, he discussed  
22 that with Crow Butte Resources and there were no other  
23 issues identified. I mean he called to --

24 JUDGE YOUNG: What was the -- what  
25 happened after the call I mean?

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1 MR. SMITH: So he calls and says tell me  
2 a little bit more about the project. What are the  
3 possible impacts on water issues? And he discusses  
4 that with Crow Butte. And they discuss the project  
5 and apparently his concerns were addressed. There was  
6 nothing else, there's no follow-up action necessary  
7 either on his part or on the part of Crow Butte  
8 Resources.

9 And that's a similar process, the same  
10 process actually that the NRC has to comply with under  
11 the National Historic Preservation Act. That's  
12 exactly what they will do. They will consult with the  
13 state historic preservation officer. They will send  
14 out letters to tribal leaders. And then they will  
15 respond to any comments and see whether any sites were  
16 identified. So --

17 JUDGE YOUNG: Well, I guess what I'm  
18 wondering is you say apparently his concerns were  
19 addressed but it's not listed in the application that  
20 they were.

21 MR. SMITH: It just says he discussed,  
22 called to ask if there were, what the proposed project  
23 might have on water quality.

24 JUDGE YOUNG: No other tribal concerns  
25 were identified?

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1 MR. SMITH: Were identified, right.

2 JUDGE YOUNG: Period.

3 MR. SMITH: Period.

4 JUDGE YOUNG: And there's no reference to  
5 any discussion or addressing that. I think that's one  
6 of the things that's being raised.

7 MR. SMITH: There's nothing else to  
8 discuss. I mean his concerns were addressed. You  
9 know, could this be in the nature of a fact finding.

10 JUDGE YOUNG: How do you tell that they  
11 were addressed from reading this?

12 MR. SMITH: I mean that we wrote the  
13 application. The application is based on the facts.  
14 This is a statement of fact. This is what happened.  
15 I'm not sure that there is anything else to add to it  
16 other than he, Harvey White Woman called and spoke to  
17 the Crow Butte. That's a statement of fact, that's in  
18 the nature of a consultation. And again that element  
19 relates to the impact of the project on water quality  
20 not to cultural resources.

21 JUDGE YOUNG: So the question is there was  
22 no sense that there needed to be another sentence  
23 saying what you just said which was his concerns were  
24 discussed and addressed to his satisfaction or  
25 whatever the wording might be?

1 MR. SMITH: Well, this is a section on  
2 historic and archeological and cultural resources.

3 JUDGE YOUNG: Right.

4 MR. SMITH: His question was about water  
5 quality.

6 JUDGE YOUNG: The reason I ask the  
7 question is because you said apparently they were  
8 addressed. And I was wondering how you drew that  
9 conclusion since it didn't say that. That was simply  
10 my question. It was based on your statement.

11 MR. SMITH: Right.

12 JUDGE YOUNG: And looking in here to see  
13 where you were reading that statement from and not  
14 seeing it.

15 And I guess the other thing is could you  
16 address the issue that they raised about the  
17 importance of the resources that are listed not being  
18 likely to yield information important?

19 MR. SMITH: Actually that information  
20 comes from the cultural resource inventory which was  
21 prepared by architects, a qualified architect which  
22 was submitted to and approved by the state historic  
23 preservation officer. So that's not an assessment  
24 that Crow Butte made, that's an assessment that was  
25 made by a qualified expert. And there is nothing to

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1 suggest that those statements are inaccurate.

2 JUDGE YOUNG: Let me just ask, and you may  
3 not be the one to ask this. You may not know the  
4 answer. Maybe the Staff would know this. But in a  
5 situation where you're talking about tribal issues are  
6 there any standards on when the -- is the national or  
7 the state historical, whatever the term you used was -

8 -  
9 MR. SMITH: SHPO.

10 JUDGE YOUNG: -- is that the person who is  
11 sort of the end, who has the authority to make all  
12 those determinations?

13 MR. SMITH: Yes.

14 JUDGE YOUNG: Is there never an exception  
15 for tribal issues? I know in some states tribal  
16 issues might not come up. Is there any exception? I  
17 know that it's not unusual to see in environmental  
18 reports references to consultations with tribes. So  
19 I'm wondering whether there is some?

20 MR. SMITH: Well, the overlap between the  
21 two is this: there's the National Historic  
22 Preservation Act, Section 106, which requires  
23 consultation on natural historic -- with regard to  
24 cultural resources.

25 JUDGE YOUNG: Right.

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1 MR. SMITH: That process is a legal  
2 requirement that applies to the federal government  
3 when they are approving projects.

4 JUDGE YOUNG: Right. Right.

5 MR. SMITH: So that's the law.

6 JUDGE YOUNG: Right.

7 MR. SMITH: That sets the framework for  
8 these responses.

9 JUDGE YOUNG: Right..

10 MR. SMITH: What that authorizes is as  
11 part of an agency's complying with the NEPA process  
12 they do that consultation through the NEPA process.  
13 That satisfies the National Historic Preservation Act.

14 JUDGE YOUNG: Right.

15 MR. SMITH: So if you comply with NEPA  
16 you've satisfied the obligation under section 106 of  
17 the National Historic Preservation Act. Those  
18 requirements are that you consult with tribes, tribal  
19 governments in the potentially affected area, send out  
20 letters, follow up to make sure they respond.

21 JUDGE YOUNG: Now wait. How does that  
22 relate to the consultation with the National Historic  
23 Preservation Act?

24 MR. SMITH: Two parts. One is you consult  
25 with tribes. And the other part you have to consult

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1 with the state historic preservation officer.

2 JUDGE YOUNG: Okay.

3 MR. SMITH: Because they are the person  
4 who maintains the sort of master inventory of  
5 archeological or cultural resources in a state. And  
6 so by consulting with them they look at their list and  
7 then they respond to the federal agency with we've got  
8 this list of sites in this area, here's the potential  
9 historic sites that might be affected. And if there  
10 are potential impacts then the SHPO's role is to help  
11 work with the NRC and other parties to mitigate those  
12 impacts or avoid the impacts or do whatever might be  
13 necessary.

14 JUDGE YOUNG: Okay. And then how does the  
15 tribal part come in? Because the reference is and the  
16 statement about the importance, the sentence preceding  
17 that do talk about plans, shirt point fragment, shirt  
18 core, some things that would be "history" after  
19 settlers came --

20 MR. SMITH: Right.

21 JUDGE YOUNG: -- and some that would be  
22 "prehistory" involving --

23 MR. SMITH: The substance of that is sort  
24 of irrelevant to the process that's the requirement to  
25 comply with the National Historic Preservation Act.

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1 JUDGE YOUNG: Right. But you said that  
2 there was an overlap, that there were two different  
3 parts. One related to consulting with tribes.

4 MR. SMITH: Yes.

5 JUDGE YOUNG: And so my question is what -  
6 - I'm reading this statement and I'm reading what you  
7 said as saying that the state historic preservation  
8 officer has the authority to make this determination  
9 about importance. I thought I heard you say that.

10 MR. SMITH: Right.

11 JUDGE YOUNG: My question was what gives  
12 the authority to that officer? And when does the  
13 authority of a tribal officer come in under the other  
14 part relating to tribal consultation?

15 MR. SMITH: The authority there's no,  
16 there's no -- the way the law is it's process oriented  
17 that you consult. And so that is the sending of the  
18 letter and then the tribes respond or don't, SHPO  
19 responds or doesn't. And that if there are potential  
20 impacts then you move to the next step. But here  
21 there were no impacts identified, so that's the end of  
22 that, of that process.

23 JUDGE YOUNG: Okay. So but my question is  
24 the person that made that determination you're telling  
25 me was the state historic preservation officer. And

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1 my question is why is it considered that the state  
2 historic preservation officer had the authority to  
3 make the determination on the issues that were related  
4 to tribal concerns? The contention has to do with the  
5 expertise authority of tribes or tribal authority to  
6 make determinations like this as opposed to or maybe  
7 in addition to.

8 MR. SMITH: Right.

9 JUDGE YOUNG: But certainly the contention  
10 has to do with the tribal people's authority to make  
11 those determinations. So that was the question: where  
12 does that come in? It doesn't look like it did come  
13 in in that determination.

14 MR. SMITH: Well, in here, in this  
15 particular set of circumstances it doesn't because no  
16 one from the tribes responded to the letter and  
17 identified potential cultural or archeological  
18 resources in the area of the project. They didn't  
19 respond to the consultation. So that they didn't  
20 avail themselves of the opportunity to make a  
21 determination. That's all there is.

22 JUDGE YOUNG: So if they don't identify  
23 them there is no follow-up to say we are aware of this  
24 prehistoric Indian camp, do you have any comments on  
25 this information?

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1 MR. SMITH: I'm not sure of that.

2 JUDGE YOUNG: If it's not identified by  
3 the tribe then the tribe you're saying has no right  
4 to?

5 MR. SMITH: It's not that it's not  
6 identified. It's they're told that here is the  
7 project.

8 JUDGE YOUNG: Right.

9 MR. SMITH: Are there any potential  
10 impacts that you're aware of in the area? But there  
11 is another assessment that goes on with the relation  
12 with the SHPO and the qualified archeologist. And  
13 those proceed down different paths. It's a  
14 consultation which is here is what we are going to do,  
15 do you have anything to say back. And if there is  
16 nothing back then that is the end of the process,  
17 there's nothing more for the applicant to do there.  
18 They've responded.

19 JUDGE YOUNG: So once you found out this  
20 information about the Indian camp and the shirt core  
21 and the shirt point fragment was that information  
22 shared with the tribe so that they could comment on  
23 that information? And are you arguing that it should  
24 or should not have been and they would have any right  
25 or not a right to comment on that?

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1 MR. SMITH: It's not that there's a right  
2 or not, it's a matter of was there a lack of  
3 compliance, dispute of law or fact here. And there is  
4 no in terms of admitting a contention on this issue.  
5 There's no --

6 JUDGE YOUNG: Okay, but my question was .

7 MR. SMITH: -- area of law --

8 JUDGE YOUNG: Hold on. My question was  
9 did you feel that you had any responsibility under any  
10 standards, and if so, what, to provide that  
11 information or not? It sounds as though what you're  
12 saying is that you consult once. And you say we're  
13 going to do this project having to do with ISL mining,  
14 do you have any concerns? And you get back  
15 information. And you may get information from the  
16 state historic preservation officer that identifies  
17 sites or resources that may be related to tribal  
18 issues.

19 MR. SMITH: Correct.

20 JUDGE YOUNG: But that then there is no  
21 responsibility to go further and say in doing this  
22 project we have come across these resources, this  
23 information, provide that information to the tribes  
24 and give them an opportunity to comment on that  
25 specific information that you've gotten?

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1 MR. SMITH: I don't believe there is any  
2 legal, factual requirement to do that here. And there  
3 is no evidence that there would be any different  
4 conclusions if that was done. I think that's the  
5 primary --

6 JUDGE YOUNG: So basically would you agree  
7 it's sort of a reasonableness determination then?

8 MR. SMITH: I think it's a process-  
9 oriented -- it's a process that an applicant must go  
10 through.

11 JUDGE YOUNG: Right. The question is, is  
12 it reasonable to have a process that asks, says we're  
13 going to do this project and we want your input about  
14 this project. And then you get input from the state  
15 historic preservation officer saying there's an Indian  
16 camp here, there are these resources that we've  
17 identified, some of the resources have to do with  
18 tribal history. You're saying that the process, it's  
19 reasonable that the process does not include the step  
20 that says you go out and contact the Indian tribes and  
21 say we have become aware of these resources, this  
22 Indian camp, do you have any input that you would like  
23 to offer on these things?

24 MR. SMITH: I think it's, well, it is more  
25 than reasonable or it is reasonable to do what's

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1 required by the law.

2 JUDGE YOUNG: That is the question: what  
3 is required by the law?

4 MR. SMITH: And as to what Applicant has  
5 done here is more than what's required by the law.

6 JUDGE YOUNG: Anything further?

7 MR. SMITH: No, ma'am.

8 JUDGE YOUNG: Okay.

9 MR. ELLISON: Not if you consider what's  
10 required by the Declaration of Rights of the World's  
11 Indigenous Peoples passed by the United Nations  
12 because it requires informed consent. It requires  
13 consultation and cooperation in good --

14 JUDGE YOUNG: You said informed consent?

15 MR. ELLISON: Informed consent. It  
16 requires consultation and cooperation in good faith.  
17 It --

18 JUDGE YOUNG: I'm sorry, I'm having a hard  
19 time.

20 MR. ELLISON: In good faith.

21 JUDGE YOUNG: In good faith.

22 MR. ELLISON: Yes, ma'am.

23 And it requires an effective mechanism for  
24 dealing with potential impacts on cultural and  
25 spiritual matters.

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1                   And we would submit that your questions  
2 were totally correct. Once items, artifacts were  
3 found, once this camp was found that in order to be  
4 acting in good faith because to presume that  
5 indigenous leaders, Lakota indigenous leaders would  
6 know of every artifact of every camp, and as Mr.  
7 Frankel alluded to earlier from some of the  
8 information that we have from the traditional chiefs  
9 who were here about camps and their springs, etc., it  
10 would seem to me that sending out a general statement,  
11 "Hi, we're doing this in situ mine, you got any  
12 issues?" is a whole lot different than saying we found  
13 some specific things that are clearly indigenous in  
14 nature, what can you tell us about this? What are  
15 your concerns? What is your information? We think  
16 that the U.N. declaration at a minimum would require  
17 that.

18                   And this, really what is being argued  
19 against that seems to be the typical problem that  
20 traditional elders have had in trying to be able to  
21 give input and to preserve and protect the -- you  
22 know, we get down to what is good faith? What is  
23 reasonable? What might be in compliance with NEPA or  
24 the National Historic Preservation Act? There are  
25 conflicts there. And we submit that there are

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1 conflicts.

2 And we heard today that the traditional  
3 chiefs were not consulted. Harvey White Woman works  
4 or worked at the time for Fifth Members, part of the  
5 Executive Council of the tribe. Part of the concerns  
6 were around water. I would submit that there is no  
7 evidence of any -- that the locations of the camps and  
8 the artifacts were ever made known to the Lakota  
9 leadership and that, therefore, they were not, it was  
10 not reasonable, it was not done in good faith as  
11 required. We feel that this is the dispute. And we  
12 feel that it is a dispute that in ER 4.8 that  
13 resources not likely to yield information important in  
14 prehistory. Well, if you don't tell people that you  
15 found something how can you get input as to what is  
16 important or not? And to say that no further cultural  
17 resource is recommended, it sounds like an absolute  
18 minimum was done to try and get input. Nothing  
19 specific about these items. And that is certainly  
20 unreasonable.

21 MR. FRANKEL: Specifically what this says  
22 is that Harvey White Woman called. It doesn't say if  
23 he called and left a message, it doesn't say if there  
24 was a discussion, it doesn't say with whom that  
25 discussion may have occurred. So we're getting a lot

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1 of attacks on us that we haven't provided evidence,  
2 but we have provided factually based argument. And  
3 when it comes to evidence, the company has no evidence  
4 that anyone actually even talked to Harvey White Woman  
5 or inquired to see what his position was with the  
6 tribe.

7 So we find that there is a lot of gaps in  
8 the company's action. We're not saying it was an  
9 intentional gap, what we're saying is is that it  
10 failed to comply with the requirements. And that's  
11 our contention dispute.

12 JUDGE YOUNG: Thank you. Shall we move on  
13 to Contention D? And before we start this one I'm  
14 assuming that at this point I can't recall if we  
15 provided that to you, but I think we did, the  
16 reference to the Diablo Canyon case and the  
17 Commission's subsequent orders finding that terrorism  
18 is not a -- other than in the Ninth Circuit is not an  
19 issue that needs to be addressed?

20 MR. FRANKEL: We saw a reference to that -

21 -

22 JUDGE YOUNG: Okay.

23 MR. FRANKEL: -- in the NRC's brief. I  
24 don't think we actually got that -- well, we got the  
25 cite from the NRC's brief.

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1 JUDGE YOUNG: Okay. The reason I raise  
2 that is because obviously that is something that you  
3 need to address with regard to the terrorism part of  
4 this. And with regard to the trucking part of this I  
5 think there is case law that suggests that -- well,  
6 let's see. Give me a second.

7 MR. FRANKEL: Your Honor, that Diablo case  
8 was a nuclear power plant case, wasn't it?

9 JUDGE YOUNG: Right.

10 MR. FRANKEL: And nuclear power plants are  
11 already designed to have some form of security. And,  
12 therefore, I can understand that -- I know there is a  
13 court case that the Commission is dealing with but I  
14 understand why you have a rule like this that splits  
15 the circuits and why that rule exists. And so we  
16 distinguish that because this is not a nuclear power  
17 plant. This does not have the kind of security that  
18 a nuclear power plant has. This is not even a feature  
19 of the existing operation.

20 This is an attempt to admit that the cost-  
21 effective nature of the project does not permit them  
22 to build another processing facility and so they would  
23 like to truck radioactive resin twice a day 8.1 miles  
24 of which 7.1 is on a dirt or trail road, assuming at  
25 least two trips per day, or assuming conservatively

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1 two trips per day, every day, 365 days a year for  
2 about 20 years. And unlike that Diablo Canyon case,  
3 the nuclear power plant case where substantial thought  
4 and consideration has gone into the potential of  
5 terrorist attack, probably went into it from the very  
6 first day and probably was updated substantially in  
7 light of the events of September 11, and yet here no  
8 one has ever sat down and evaluated the security risks  
9 associated with this facility in some part probably  
10 because it was considered a low risk or relatively low  
11 risk target, especially in the early '90s when these  
12 licenses were originally given and evaluated.

13 Here the company plans to divert from the  
14 existing operation and introduce this new element,  
15 daily trucking of radioactive resin. They say that  
16 they will continue to comply with the transportation  
17 rules, and I believe them. I suspect those  
18 transportation rules deal with things related to  
19 competency of truckers and training to have a  
20 commercial driver's license and things like that. But  
21 would firearms, for example, firearms training be part  
22 of those transportation regulations? I suspect not.

23 And I believe that those transportation  
24 regulations may be applicable to transporting yellow  
25 cake uranium final product from one facility to

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1 another. I'm sure a lot of good thought's gone into  
2 that. But no, no one besides the company and perhaps  
3 some members of the Staff have had an opportunity to  
4 consider the security risks associated with trucking  
5 radioactive material like this on a back dirt road in  
6 Crawford, Nebraska.

7 We submit that this planning, this  
8 movement of the radioactive material makes that  
9 material a potential target for an attack. And  
10 without of course never wishing such a thing to happen  
11 we are aware that the government of this country  
12 considers any threat of a radioactive, radiological  
13 terrorist attack so serious that our government has  
14 declared an individual who proposed to do such a thing  
15 an enemy combatant of the United States. And while  
16 those issues work their way through the legal system,  
17 in this proceeding what we know is that the NRC is  
18 required to make a finding concerning the safety to  
19 the public and the safety to the environment. We know  
20 that in the HRI case transportation of radioactive  
21 material was found, was discussed and was found  
22 relevant at least to standing and possibly to a  
23 contention. But in that case I don't think it was  
24 clear. But it was referred to expressly as a risk  
25 that caused an injury-in-fact.

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1 JUDGE YOUNG: For standing?

2 MR. FRANKEL: For standing.

3 JUDGE YOUNG: And just this is the case  
4 that I was thinking of a minute ago that I wanted to  
5 mention. In one of the IUSA White Mesa cases, this is  
6 CLI 0121, the Commission was dealing with I think the  
7 presiding officer denied a I think it was a  
8 contention, in any event about the potential for an  
9 accident involving trucks hauling materials to be  
10 dumped, stored or processed at the White Mesa Mills.  
11 And then the Commission goes on and says "but the  
12 group's appellate brief does not reiterate or explain  
13 its accident theory, hence we deem it abandoned." And  
14 then they say "speculation about accidents along feed  
15 materials transport routes does not establish stand" -  
16 - oh, this is for standing.

17 In any event basically the same kind of  
18 thing to the extent that it would be, I mean as a  
19 contention the Commission seems to be speaking to the  
20 specificity aspect of any potential accidents or harm.

21 MR. FRANKEL: Well, it looks to me, Your  
22 Honor, that if we point out the omission of the  
23 discussion of any terrorist attack or security risk to  
24 this trucking plan that is an add-on to the existing  
25 operation and is expressly associated with this

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1 amendment request, and if we look at ER 1.3.2 which  
2 expresses the opinion that it is relatively safe and  
3 simple to transport this material, well, we dispute  
4 that. And they have provided no evidence that shows  
5 that it is relatively safe and simple. And since  
6 they're proposing this arrangement as something that  
7 has not previously been approved we feel it is  
8 incumbent on the Applicant to describe the security  
9 and describe how the security mitigates the risk for  
10 a terrorist attack.

11 JUDGE YOUNG: Does your contention go  
12 beyond terrorist attack? It seems to in talking about  
13 the event of accidents and spills.

14 MR. FRANKEL: It does. We're talking  
15 about 7.1 miles of dirt road. I presume that the case  
16 you just read talked about highway transportation of  
17 radioactive waste.

18 JUDGE YOUNG: I mean do you know, is there  
19 any information about a history of accidents on those  
20 roads or the roads being particularly dangerous or  
21 anything like that?

22 MR. FRANKEL: Just that if 7.1 miles are  
23 on dirt or "trail" roads we would submit that those  
24 are not necessarily up to the safety requirements of  
25 highways or even county roadways. There is a lot of

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1 safety construction requirements that go into how the  
2 road sits above waterways, how the road sits above  
3 different areas. And I don't think that an analysis  
4 that would call highway transportation safe and  
5 relatively free of traffic accidents should also apply  
6 to daily transport on 7.1 miles of dirt or trail  
7 roads. And therefore we are saying that there is a  
8 risk of traffic accidents, slow speed traffic  
9 accidents, and that the failure of -- that CBR's  
10 conclusion, we take issue with CBR's conclusion that  
11 it is relatively safe and simple to transport the  
12 resin.

13 JUDGE YOUNG: Staff.

14 MS. JONES: There's a couple of points I  
15 would like to make, Judge. As the Board probably  
16 knows, the Diablo Canyon case of course was not a  
17 nuclear power plant case it was an irradiator case, it  
18 was a materials license case.

19 JUDGE YOUNG: You're going to need to  
20 speak up.

21 MS. JONES: I'm sorry. It was an  
22 independent spent fuel storage installation. My  
23 apologies; I'm confusing it.

24 And so I wanted to make that first point.  
25 But I also wanted to make another point that the

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1 Commission has been pretty clear about terrorism  
2 contentions in the context of NEPA and that as I  
3 suppose as a policy matter they will not be looking  
4 at, as you stated earlier, they will not be  
5 considering terrorism contentions in the context of  
6 NEPA. And as I understand that, that is absolute  
7 across the board. There's been several decisions. I  
8 believe this policy came primarily out of the Oyster  
9 Creek case. But again that case dealt with a nuclear  
10 power reactor but as I understand it it applies across  
11 the board.

12 But I also want to say that in addition to  
13 that Oyster Creek case and how it governs with regard  
14 to what the Petitioners are asserting here, there is  
15 really no requirement in Part 40, Appendix A, that  
16 these issues be looked at because of the type of  
17 material that is the subject of the operation in this  
18 particular case. As I understand it in nuclear power  
19 plants we're talking about a totally different kind of  
20 material, we're talking about highly enriched uranium,  
21 and that triggers all sorts of other design threat  
22 bases, vulnerability assessments and things of that  
23 nature.

24 But again, in this particular case under  
25 Part 40, Appendix A, there is no requirement that

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1 those Homeland Security issues that they speak of be  
2 taken into consideration.

3 Now, in the application the Applicant did  
4 address security. They did address security. And if  
5 I could locate, it's in the environmental report  
6 1.3.2.7 they did look at security issues.

7 JUDGE YOUNG: Is that -- give me a page  
8 number?

9 MS. JONES: That's page 1-50. And they  
10 looked at insofar as I believe transportation issues.  
11 But also, too, I want to point out too that in the  
12 application they also addressed spills. And they also  
13 addressed --

14 JUDGE YOUNG: I'm sorry, they also  
15 addressed?

16 MS. JONES: They addressed spills. And I  
17 believe that --

18 JUDGE YOUNG: Spills, okay.

19 MS. JONES: Yes. -- that is part of their  
20 contention. That was actually addressed in the  
21 application as well. They also addressed, they also  
22 provided emergency procedures with regard to spills.  
23 They also provided information on 1-52 for  
24 transportation security. They went through an  
25 analysis with regard to transportation security.

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1                   And so this brings me back to my original  
2 point which is the Petitioners in raising their  
3 contention they haven't really disputed the adequacy  
4 of the application. And as you can see, there are a  
5 number of analyses that address the issues that  
6 they're raising. And so I fail to understand how this  
7 contention would be admissible under the  
8 circumstances.

9                   And that's notwithstanding that we haven't  
10 completed our review.

11                   That's all I have.

12                   JUDGE YOUNG: Okay.

13                   MS. JONES: Unless you have more questions  
14 for me.

15                   JUDGE YOUNG: Mr. Smith.

16                   MR. SMITH: Thank you.

17                   Again I think this contention again  
18 suffers from similar infirmities as the other  
19 contentions, that is, it doesn't provide an adequate  
20 factual support for the contention. Simply disputing  
21 the Applicant's conclusions without more doesn't meet  
22 the standards for an admissible contention. The  
23 Petitioner is obligated to provide the analyses and  
24 supporting evidence, that's factual information or  
25 expert opinion, showing why its contention should be

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1 admissible. Again, the intervenor has the obligation  
2 to come forward with respect to issues raised by his  
3 contentions.

4 The Applicant has addressed these issues  
5 and we believe we have done so fully and adequately in  
6 the application. We addressed the environmental  
7 impacts of transportation due to potential traffic  
8 accidents. We provided information regarding our  
9 procedures to minimize exposures and risk to the  
10 public and the environment from accidents. And we  
11 also provided emergency procedures for addressing  
12 spills.

13 There is nothing in the proposed  
14 contentions that call into question any of the  
15 conclusions by the Applicant. Thank you.

16 JUDGE YOUNG: Thank you. Any follow-up or  
17 shall we move on?

18 MR. FRANKEL: Well, the law here that  
19 implicates not just NEPA and the environmental but the  
20 Atomic Energy Act and the responsibility to protect  
21 the public safety and the U.S. national interests and  
22 the common defense are also relevant to this analysis  
23 in light of not just the environmental impacts of a  
24 potential terrorist attack but the threat to the  
25 national interest and common defense.

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1           And then the final point I would have to  
2 say is without understanding more about the  
3 transportation security aspects, and I did not see a  
4 place in there where specific discussion was made of  
5 the relationship between the highway, the security on  
6 the highway and the security on the dirt roads. And  
7 I saw some references to Department of Transportation  
8 regulations concerning the trucking of these materials  
9 and it did not seem to me to be applicable to the dirt  
10 or trail road trucking.

11           Also, we're aware of no other circumstance  
12 where uranium-laden water is being transferred as it  
13 would be here, where this resin, I'm not quite sure  
14 how thick this resin is. It seems to be some form of  
15 concentrate of what was taken from the aquifer. But  
16 I don't have an understanding enough technically to  
17 express further.

18           That's all I would have.

19           JUDGE YOUNG: All right. Now E and F  
20 let's go to obviously E next. But I'd caution you to  
21 try to tie this to any -- well, show how it would be  
22 relevant to any of the concerns that we should be  
23 considering. And I guess I should say I'm not aware  
24 of anything that would make, that would cause this to  
25 make a difference, but we'll hear your argument.

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1 MR. FRANKEL: Thank you, Your Honor.

2 The Atomic Energy Act requires that  
3 nuclear source materials be regulated in the U.S.  
4 national interest. What is the U.S. national interest  
5 served by allowing a foreign-owned company to extract  
6 800,000 pounds a year of uranium, sell it to whomever  
7 it wants outside of the U.S., keep that profit out of  
8 the U.S.? Is the U.S. interest served then just to  
9 provide a forum for mineral extraction and profit  
10 making by a foreign entity?

11 So I believe that in addition to the  
12 technical regulation the Nuclear Regulatory Commission  
13 is authorized to act only for the purpose of  
14 regulating nuclear materials in the U.S. national  
15 interest. And in our brief we ask, it says the NRC  
16 and the Applicant have been silent as to any way that  
17 this would serve the U.S. national interest. They  
18 have completely ignored the issue. And yet we still  
19 don't understand.

20 One of our Petitioner clients Dr. Anders  
21 told me that if this was for the U.S. he'd give the  
22 government his land. But this is for a foreign  
23 company. So it means something to Dr. Anders that  
24 this is a foreign-owned company.

25 When dealing with issues of U.S. national

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1 defense and uranium issues elements of patriotism  
2 cannot be far behind. And as a result the issue of  
3 the ownership and the real vested interests here being  
4 foreign and being outside of U.S. regulation once the  
5 yellow cake leaves the country is a germane area, it  
6 is an area of germane interest because it goes  
7 directly to the underlying authority of the Commission  
8 to regulate this proceeding.

9 If the Commission were to find that yellow  
10 cake from this mine were actually ending up in the  
11 hands of enemies of the U.S. then this system will  
12 have failed entirely. And despite criticizing our  
13 contentions and petition as being sensationalist,  
14 nowhere in this process in any of the filings by  
15 Applicant has it made the offer of a written assurance  
16 that no, these materials will only be used for power  
17 generation, that no, these materials will not be sold  
18 to countries like Pakistan, like India, China, Korea,  
19 even Iran which are potential threats to the United  
20 States. It would have been very simple for the  
21 company to say this is completely ridiculous and we  
22 will give you a written agreement right this second  
23 and we will implement this for our Canadian parent  
24 company or ask that our parent company implement this  
25 for us, because they are a wholly-owned subsidiary

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1 have no power to wag the dog so to speak.

2           And perhaps someone at the NRC can point  
3 out a Canadian regulation or law that limits the  
4 ability of Cameco to export uranium products to these  
5 other countries. But I suspect that if there are none  
6 then if there were why haven't we heard about them at  
7 this point through all this briefing? We submit that  
8 there are none. And so there is a lot of statements  
9 in the application which have the effect of making it  
10 difficult to discern that this is actually a Canadian-  
11 owned company.

12           It says that this project was started by  
13 Wyoming Fuel Corporation. The project was acquired by  
14 Ferret Exploration of Nebraska in 1994. The name was  
15 changed to Crow Butte Resources. This was a name  
16 change, not an ownership change. But where is the  
17 disclosure of the ownership change? This company is  
18 now known publicly as Cameco Resources.

19           CBR is the owner and operator of the Crow  
20 Butte Project it says in ER 1.1.1. CBR is the owner  
21 and operator of the Crow Butte Project. But who  
22 decides who the president of CBR is? A Canadian  
23 company with a Canadian board of directors. We don't  
24 know who those people are.

25           Who decides how they operate? Who decides

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1 what expert gets hired? Who decides anything related  
2 to this company? And you're going to find out that  
3 those people are not U.S. people and they are not  
4 subject to the law of the United States.

5 Canada is a very friendly country to the  
6 United States. And there are other countries not so  
7 friendly. I would think that the rule applies the  
8 same throughout. And, therefore, our dispute is that  
9 the authority of the Nuclear Regulatory Commission  
10 comes from a demonstration that it is acting in the  
11 U.S. national interest. And to date it has been  
12 silent and so has the Applicant on how these benefits  
13 to this foreign company, leaving only environmental  
14 detriments to the public and the environment of the  
15 United States. how that is in the U.S. national  
16 interest, how it is in the interest of the public,  
17 common defense and the people of the United States.  
18 That's our dispute.

19 JUDGE YOUNG: As we go to the Staff let me  
20 just ask you a question. With the reactors if there  
21 is a license transfer there is an opportunity for a  
22 hearing. I asked you before about the license  
23 amendment and the opportunity, notice of opportunity  
24 for hearing and you're going to brief that for us.  
25 What's the situation with license transfers in

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1 materials licensees?

2 MS. JONES: Unfortunately I am not as  
3 knowledgeable about that particular process so I would  
4 have to consult with the Staff.

5 JUDGE YOUNG: Okay. Because I know that  
6 with reactor cases it just jogged my memory, I think  
7 in Palisades maybe it was, there was a license  
8 transfer. And there typically are notices of  
9 opportunities for hearings with license transfers. It  
10 would make a transfer issue not relevant in a renewal  
11 case, for example. And I was just wondering. If you  
12 don't know now you can brief it.

13 MS. JONES: Okay.

14 JUDGE YOUNG: We can set a timeline for  
15 that.

16 MS. JONES: Okay, yes.

17 JUDGE YOUNG: But it's sort of similar to  
18 the license amendment issue.

19 MS. JONES: I'd hate to give you  
20 inaccurate information.

21 JUDGE YOUNG: That's fine.

22 MS. JONES: Can you give me just two  
23 seconds? I will talk to the staff.

24 (Counsel and Staff confer.)

25 MS. JONES: Judge Young.

1 JUDGE YOUNG: Yes?

2 MS. JONES: I just have one, sort of one  
3 preliminary question. And I just want to make sure  
4 that I am clear on the question regarding the transfer  
5 of the materials license. Is this in the context of  
6 change of ownership or?

7 JUDGE YOUNG: Right.

8 MS. JONES: Okay.

9 JUDGE YOUNG: Right. The way it goes is  
10 when Mr. Frankel was discussing the various changes of  
11 ownership --

12 MS. JONES: Right.

13 JUDGE YOUNG: -- it jogged my memory that  
14 in a reactor case there would have been a notice of  
15 opportunity for hearing when there is a license  
16 transfer. And in change of ownership the new owner  
17 would have the license would be transferred to the new  
18 owner. I may be wrong on that but that's my general  
19 recollection of that.

20 MR. SMITH: Well, if it helps shorten this  
21 conversation a bit, there has never been a license  
22 transfer in Crow Butte Resources. The operator has  
23 stayed the same throughout the history of the project.

24 JUDGE YOUNG: So the ownership of the  
25 operator changed?

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1 MR. SMITH: And I don't believe that  
2 that's necessarily changed either. Maybe the owner of  
3 the owner.

4 JUDGE YOUNG: Oh, well maybe -- well,  
5 okay.

6 MS. JONES: That's part of what I was  
7 going to say.

8 JUDGE YOUNG: In any event it's --

9 MR. SMITH: There's never been a need for  
10 a license transfer.

11 MR. FRANKEL: Is that a legal opinion?

12 MR. SMITH: Yes.

13 JUDGE YOUNG: Okay. Well, one of the  
14 things while you were consulting we were just  
15 discussing is there are several things that we're  
16 going to be needing to set some deadlines for.

17 MS. JONES: Okay.

18 JUDGE YOUNG: It might be a good idea to  
19 reconvene on the telephone maybe next Tuesday  
20 afternoon or so and we can talk about what needs to be  
21 briefed and when and so forth.

22 MS. JONES: Okay. Would you like for me  
23 to continue with the contention?

24 JUDGE YOUNG: Yes, go ahead.

25 MS. JONES: Okay.

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1 JUDGE YOUNG: I didn't mean to stop you.

2 MS. JONES: Okay. Well, I'm just going to  
3 make it really, really short because I think that our  
4 response sort of I think it speaks for itself. But I  
5 will just say that our regulations don't limit  
6 ownership as far as I can tell from domestic or a  
7 foreign entity. The NRC does not get into the  
8 business decisions and decisions with regard to or  
9 information with regard to profits and markets.  
10 That's not really part of or it's not really within  
11 the scope of what we look at under safety and  
12 environment.

13 And so I would say to the Petitioners that  
14 I think they're making a lot of general statements but  
15 I think that it's important to them again in looking  
16 at the adequacy of the application they need to  
17 present some information or they need to provide some  
18 sort of authority to support their position. And they  
19 haven't really done that. They are leaving it to us.  
20 And the burden is not really with us, the burden is  
21 with them because, again, there is nothing in our  
22 process that limits ownership. And again, there is --

23 JUDGE YOUNG: I'm going to interrupt here.  
24 I agree with you that this contention is not one of  
25 the ones that sort of stands out as one that might be

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1 higher on the level of ones that would be likely to be  
2 admitted, without making any statement about whether  
3 it will or won't. However, part of the problem that  
4 you refer to is of your own making because if there  
5 were regulations that defined what was necessary then  
6 you would have a lot stronger ground to stand on.  
7 There are no regulations. And so we're sort of, you  
8 know, you've got these guidance documents. But unlike  
9 in just about any other type of case where there is  
10 specific regulations that set specific standards there  
11 are none here.

12 So to that extent I think the problem is  
13 of your own making. And when I say you I mean the  
14 fact that the NRC in not having specific regulations  
15 at this point. So in any event, go ahead. You can  
16 wrap it up.

17 MS. JONES: Yes, that pretty much  
18 completes, that completed my response. I think that  
19 completes the response.

20 JUDGE YOUNG: Thank you. Mr. Smith.

21 MR. SMITH: Thank you.

22 Clearly this contention doesn't raise any  
23 issues in the scope of this proceeding. This  
24 proceeding is about an amendment to the existing  
25 license. Any challenges to the ownership regarding

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1 the current facility are a challenge to the existing  
2 license and that's outside the scope of this  
3 proceeding.

4 But more directly to address one of your  
5 concerns, Cameco is a Canadian company. Both the  
6 United States and Cameco are only permitted to supply  
7 uranium to countries that have signed the nuclear non-  
8 proliferation treaty and they are subject to the  
9 control and audits of the International Atomic Energy  
10 Agency. And Cameco's uranium is used exclusively for  
11 peaceful purposes, it's not used for weapons  
12 production at all.

13 JUDGE YOUNG: Can you provide the  
14 citations for all that to us afterwards?

15 MR. SMITH: Sure.

16 JUDGE YOUNG: Okay. Anything further on  
17 E before we go to F?

18 MR. FRANKEL: No.

19 JUDGE YOUNG: Okay.

20 MR. FRANKEL: That was E, yes. And Mr.  
21 Ellison will deal with F.

22 JUDGE YOUNG:

23 JUDGE COLE: And I think this is probably  
24 going to be a similar type of issue. But with that  
25 said, go ahead.

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1 MR. ELLISON: Well, you know, one of the  
2 things that we noticed was that in ER 3.10.1.1 CBR  
3 seemed in its application to incorporate areas within  
4 an 80 kilometer, 80 kilometers of the project.

5 JUDGE YOUNG: Was that -- okay, never  
6 mind, I see now what you're doing.

7 JUDGE COLE: Fifty miles.

8 MR. ELLISON: Approximately 50 miles.  
9 Which is interesting because on the one hand there is  
10 argument that we should only look at just this narrow  
11 little mine site. And in other parts now they are  
12 saying that we should look for economic benefits  
13 within 80 kilometers. Which really goes to the fact  
14 that, for example, environmental report Table 2.1 or  
15 2-1 it discusses economic benefits to Crawford,  
16 Nebraska. Our contentions are the potential long-term  
17 ramifications of environmental consequences are severe  
18 to people who will not be economically benefitted from  
19 this particular project.

20 And as we state various allegations in  
21 support of that we note that 7.3, the benefit cost  
22 summary involves comparing societal benefit of the  
23 constant U308 supply against possible local  
24 environmental costs: groundwater, radiological impact.  
25 Now, obviously disturbance of the land that would be

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1 very local. Our contention is groundwater and  
2 radiological impact is much broader than the immediate  
3 current mine site and the propose new mine site.

4 In 7.3 there's the contention that  
5 groundwater impact is temporary in nature and that  
6 successful restoration has been shown. Well, these  
7 really therefore bring in all of our other  
8 contentions. The people who we are concerned about,  
9 the people outside of Crawford within northwestern  
10 Nebraska, the people on the Pine Ridge Reservation who  
11 may be impacted by environmental damage really do not  
12 have any economic benefit from this.

13 So in terms of a economic benefit versus  
14 cost it's only going to cost anyone who is not  
15 directly economically benefitting from working for CBR  
16 or profiting from its work. And so what we feel is  
17 that this is something which is germane, that we  
18 dispute many of the assumptions that or conclusions  
19 that are stated in the environmental report regarding  
20 the cost benefit analysis. If this new mine was not  
21 allowed obviously they wouldn't, our clients would not  
22 be potentially suffering from environmental, the costs  
23 of environmental problems. This is certainly  
24 something that we can present in conjunction with our  
25 other issues expert testimony on in terms of potential

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1 impacts and costs.

2 As I mentioned in my standing argument for  
3 someone say such as Debra White Plume who is a farmer  
4 rancher, others within this area are in that same  
5 situation. If water quality, quantity is degraded, if  
6 air quality is degraded there are certainly costs that  
7 are not included for people who are not going to  
8 profit from this.

9 So we would submit that this is a  
10 contention which requires further testimony of experts  
11 and would encourage that the Board so find.

12 JUDGE YOUNG: Before the Staff, before we  
13 hear from the Staff let me, I maybe spoke too soon  
14 before. I was just looking at the, basically the  
15 listing of what environmental issues are considered to  
16 be within scope and without scope in a license renewal  
17 case for comparison purposes. And there are  
18 socioeconomic impacts that the Commission found,  
19 several that the Commission found for license renewal  
20 would be something that would be open for contention  
21 essentially in a license renewal case. So I guess by  
22 comparison why wouldn't, why wouldn't these kinds of  
23 issues be the kinds of issues that are appropriate for  
24 a contention?

25 MS. JONES: I'm sorry, can you clarify

1 your question? I'm not really sure I, I'm not really  
2 sure about that.

3 JUDGE YOUNG: Well, if we were in a  
4 license renewal case there are socioeconomic issues --

5 MS. JONES: Right.

6 JUDGE YOUNG: -- found in, let's see,  
7 appendix -- Part 51, subpart A, Appendix B, Table B-1.  
8 And it comes from the generic environmental impact  
9 statement for license renewal cases. And various  
10 issues are listed as being generic issues which are  
11 not open for dispute in adjudications and so-called  
12 Category 2 issues which are open for dispute in  
13 adjudication --

14 MS. JONES: Right.

15 JUDGE YOUNG: -- in license renewal cases.  
16 So by comparison, why would not those similar types of  
17 issues come into play in this proceeding?

18 MS. JONES: Well, my first impression on  
19 a response is that --

20 JUDGE YOUNG: Can't hear you.

21 MS. JONES: Sorry. My first impression of  
22 your question is that I believe that a lot of those  
23 are decided generically at least as far --

24 JUDGE YOUNG: A lot of?

25 MS. JONES: A lot of the information that

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1 you are citing with regard to license renewals, as I  
2 understand it a lot of those are decided generically.

3 JUDGE YOUNG: But what I am saying is that  
4 under socioeconomic impacts there are several,  
5 including housing impacts, public services, public  
6 utilities, public services education, refurbishment,  
7 offsite land use, offsite land use, public services,  
8 transportation, and then historical and archeological  
9 resources. So those are found to be non-generic.

10 MS. JONES: Right. And as I understand  
11 it, in looking at the application the Applicant  
12 actually did look at that information. They did a --  
13 I don't want to say, I don't want to characterize  
14 their analysis but they did do a detailed analysis on  
15 the very criteria or the very items that you are  
16 raising.

17 JUDGE YOUNG: So you're not saying it's  
18 out of scope, you're saying that there's not enough  
19 support. Okay.

20 MS. JONES: Right. And they actually did  
21 look at all of that. There's a lot of information in  
22 the technical report as well as in the environmental  
23 report with regard to those --

24 JUDGE YOUNG: Well, I'm sorry, excuse me.  
25 Pardon me for interrupting. But you do at the very

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1 end of your argument on that you do say "nor do they  
2 identify a regulation under 10 C.F.R. Part 40,  
3 Appendix A, or provide documentation or expert opinion  
4 to show that such a review is required under 10 C.F.R.  
5 Part 51 in this amendment application." So I guess my  
6 question related to that final argument that you make  
7 is in a license renewal case those types of impacts  
8 are relevant so why wouldn't they be relevant here and  
9 why should they provide a rule when you don't have any  
10 rules.

11 MS. JONES: I understand and I think I can  
12 explain the context in which I made, we made that  
13 statement. And it was made in the context of the  
14 particular communities that they are alleging in their  
15 contention that should have been included in the cost  
16 benefit analyses. And so that statement was made with  
17 regard to those particular communities requesting that  
18 they haven't really provided any information to  
19 explain why those communities should be included in  
20 the analysis. There has been at least -- I don't want  
21 to say, again I don't want to characterize the  
22 analysis, but there has been an analysis with regard  
23 to wages, salary, jobs that have been provided for  
24 people who are impacted.

25 And so I would say that, you know, as far

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1 as the Petitioners' burden is concerned again they  
2 just, they haven't really explained what those burdens  
3 are and why those communities should have been  
4 included in the application.

5 JUDGE OLIVER: I also have a question.  
6 Mr. Smith is Cameco private or publicly owned?

7 MR. SMITH: It's a publicly owned company.  
8 It's traded on the New York Stock Exchange.

9 JUDGE YOUNG: Anything further from you?

10 MS. JONES: I think that -- did I answer  
11 your question or at least explain the last part of my  
12 --

13 JUDGE YOUNG: I understood what you said,  
14 yes.

15 MS. JONES: Okay.

16 JUDGE YOUNG: Right.

17 MS. JONES: All right.

18 JUDGE YOUNG: Right. I mean we're in an  
19 odd situation here because there are no rules.

20 MS. JONES: I understand. Understood.

21 MR. SMITH: Well, just to follow up on  
22 that a little bit. I think the specific statement  
23 that you're referring to at the end of the Staff's  
24 response is relating to their references of use of  
25 depleted uranium and its impact on innocent civilians

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1 and our troops when used in conflicts abroad. And  
2 that is a community where there are no regulations  
3 suggesting that there needs to be any consideration of  
4 those types of issues, particularly when, as I stated  
5 previously, this uranium is only used for peaceful  
6 purposes.

7 JUDGE YOUNG: Okay. So the scope argument  
8 is limited to those --

9 MR. SMITH: To that basis.

10 JUDGE YOUNG: -- those, okay. Thank you.

11 MR. SMITH: And then with regard to the  
12 specific question about economic benefits I would note  
13 that the economic benefits are not just -- the  
14 discussion of economic benefits is not just limited to  
15 the impacts in Crawford, it refers to the impact more  
16 broadly regionally but also in Dawes County more  
17 specifically which includes Chadron.

18 With reference to the contention  
19 admissibility standards the Commission has said that  
20 a failure to receive a benefit from a project is not  
21 an environmental impact. That is the failure to  
22 receive an economic --

23 JUDGE YOUNG: Can you us -- go ahead.

24 MR. SMITH: I'm sorry.

25 JUDGE YOUNG: Then give a cite on that.

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1 MR. SMITH: Sure. That's from the PFS  
2 decision, Private Fuel Storage, independent spent fuel  
3 storage installation, 56 NRC at 153 and 154. And  
4 that's also part of the Licensing Board's decision in  
5 the Grand Gulf ESP which actually I don't have the NRC  
6 cite but I believe it's LBP 04-24. And that's in the  
7 initial ruling on standing and contentions. There was  
8 a contention about disparate receipt of the tax  
9 benefits of a project. And it said very clearly that  
10 NEPA is just about disclosing the impacts but a  
11 failure to receive a benefit is not the same thing as  
12 a negative or an adverse impact of a project.

13 JUDGE YOUNG: Okay, thank you.

14 MR. SMITH: And that's all I have with  
15 regard to that contention. Thank you.

16 JUDGE YOUNG: Okay. Any follow-up?

17 MR. FRANKEL: Not much, Your Honor. Just  
18 that it was just mentioned about environmental impact  
19 but we're talking about economic benefits not  
20 environmental benefits.

21 JUDGE YOUNG: The reason I was referring  
22 to the category is that the way in license renewal  
23 cases that NEPA issues come in, I mean that  
24 socioeconomic issues come in is under NEPA. And  
25 having done several of those cases it just struck me

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1 that that might, there might be a comparable situation  
2 there, but.

3 MR. FRANKEL: Then I don't have anything  
4 to add on that.

5 JUDGE YOUNG: Okay. Well, thank you all.  
6 And thank you all for staying with us so late.

7 MR. FRANKEL: Your Honor, what about  
8 Exhibit G, what about subpart G?

9 JUDGE YOUNG: Subpart G, yes. Thank you  
10 for reminding me. I was just going to say everyone is  
11 getting tired and so maybe we should put off our  
12 deadlines until later. But we could do that later but  
13 if you'd like to do it now.

14 Do you have any problem with going ahead  
15 and hearing the argument on subpart G?

16 MR. FRANKEL: I would actually prefer to  
17 recess. I just was hoping, I didn't want to, you  
18 know, conclude.

19 JUDGE YOUNG: No, thank you for reminding  
20 me. That was on my list.

21 MR. SMITH: I think we should finish it  
22 now. I don't think it's going to take very long at  
23 all.

24 MS. SIMON: It's not going to take us long  
25 to make our argument.

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1 JUDGE YOUNG: Okay.

2 MR. SMITH: I've got two sentences and  
3 that's about all.

4 JUDGE YOUNG: Okay.

5 MR. FRANKEL: Subpart G is it's clear.

6 JUDGE YOUNG: Can you just point me back  
7 to your reference petition, what page you discussed it  
8 on?

9 MR. FRANKEL: Oh. It's on page 5 of 27.

10 JUDGE YOUNG: Thank you.

11 MR. FRANKEL: And we ask for discovery and  
12 expert testimony under Subpart G. And the case, I  
13 think it was the Andrew Siemaszko, or anybody can  
14 pronounce that.

15 MS. SIMON: That's the discretionary  
16 intervention.

17 MR. FRANKEL: I'm sorry?

18 MS. SIMON: That's the discretionary  
19 intervention.

20 MR. FRANKEL: That's the discretionary  
21 intervention. Thank you for that correction.

22 My computer died so I can't reference the  
23 case right now. But it was very clear that was it  
24 Enterqy/Vermont Yankee, okay, where the court found,  
25 rejected the argument that both the Staff and the

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1 company which had argued that if you fail the  
2 requirements under section 310 then it has to be  
3 Subpart L. And the court rejected that and said  
4 there's a "may" in there, "may" is permissive. So  
5 this Board has the discretion and we submit in light  
6 of the seriousness of the dispute related to expert  
7 testimony, highly scientific matters, that in this  
8 case the Board and especially here in a case of first  
9 impression and where there is a lack of any concrete  
10 regulations, most of the time I keep hearing more than  
11 any other proceeding I've ever been part of that there  
12 are no rules to speak of on such an issue or this  
13 issue or that issue.

14 So we are asking the Board to include some  
15 Subpart G discovery and expert testimony in this  
16 proceeding. We recognize and we're not arguing that  
17 it is mandatory but we are pointing out that they are  
18 appropriate due to the nature of the issues in this  
19 case, the technical issues related to water movement,  
20 geological formations, intermixing of the aquifers, as  
21 well as the cultural and indigenous peoples issues,  
22 and that in order to have a proper record the Subpart  
23 L procedures while they have been found to comply  
24 technically with the Administrative Procedure Act and  
25 the requirements for ample cross-examination under

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1 most circumstances it doesn't mean that it would, that  
2 the application of Subpart L in this case where there  
3 is such a lack of concrete rules and regulations and  
4 there's lack of context, and which I'm not saying as  
5 a critical matter, it's just the situation that we  
6 find ourselves in and for that reason we think that it  
7 is incumbent on this Board to craft some discovery and  
8 some expert testimony procedures that go beyond  
9 Subpart L and include some of what is available under  
10 Subpart G.

11 So that's our position.

12 JUDGE YOUNG: Okay.

13 MS. SIMON: Your Honor, while it is true  
14 that, as the Petitioners' counsel says, that Section  
15 2.310(a) does say the following proceedings may be  
16 conducted under Subpart L, I refer the Board to  
17 several other provisions in the rules that clearly  
18 indicate that Subpart L is to be applied.

19 In 10 C.F.R. 2.700, the scope of Subpart  
20 G, says, "The provisions of this subpart apply to,"  
21 and it lists the proceedings that it applies to. And  
22 materials license amendments are not on that list. It  
23 also says they can apply to any other proceeding as  
24 ordered by the Commission but the Commission has not  
25 ordered another procedure in this matter.

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1           Section 2.1200 says the provisions of this  
2           subpart, which is the Subpart L rule, govern all  
3           adjudicatory proceedings except for, and it lists five  
4           or six types of proceedings none of which are material  
5           license amendments. So again from the other rules it  
6           seems clear that the "may" is really not intended for  
7           these proceedings.

8           If there is any question, if it is  
9           considered ambiguous we can go to the final rule in  
10          the Federal Register, 69 Federal Register page 2182,  
11          and the specific cite would be page 2205, section  
12          2.310(a) through section 2.310(g) of the proposed rule  
13          applies to the hearing procedures of the new Subpart  
14          L to all other proceedings not specifically named.  
15          And then it lists the ones that Subpart L would apply  
16          to and it includes licensee-initiated amendment of  
17          licenses subject to 10 C.F.R., and it lists several  
18          parts and it includes Part 40.

19                 So that's all I have.

20                 MR. SMITH: Thanks. I would also note in  
21          section 2.310, which is the selection of hearing  
22          procedures, it says that proceedings may be conducted  
23          under Subpart L except as determined in paragraphs B  
24          through H. Matters B through H below, none of B  
25          through G apply to Part 40 proceedings. And when you

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1 get to Subpart H it refers to the possibility to  
2 conduct proceedings under Subpart N. There is no  
3 opportunity to conduct Part 40 amendment proceedings  
4 under Subpart G, it's just not permitted under the  
5 rules.

6 Thank you.

7 JUDGE YOUNG: All right. Anything further  
8 on that?

9 MR. FRANKEL: No, Your Honor.

10 JUDGE YOUNG: Are there any other subjects  
11 that we could usefully address tonight? I mentioned  
12 the possibility of having a telephone conference next  
13 Tuesday afternoon. Would everyone be available for  
14 that to discuss the various things we still want to  
15 hear from you on?

16 MS. SIMON: Your Honor, I won't be  
17 available Tuesday.

18 JUDGE YOUNG: You won't?

19 MS. SIMON: I won't be.

20 JUDGE YOUNG: Pardon?

21 MS. SIMON: I'm sorry. I won't be  
22 available Tuesday.

23 JUDGE YOUNG: What about Wednesday?

24 MS. SIMON: Wednesday would be okay.

25 JUDGE YOUNG: Would Wednesday work for

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1 everyone else? And what time is the best time in  
2 terms of the time zones? Afternoon for us, morning  
3 for you; right?

4 MR. FRANKEL: Yeah. Last time it was  
5 pretty early for me.

6 JUDGE YOUNG: Are you going to be back in  
7 Hawaii?

8 MR. FRANKEL: I will on Friday.

9 JUDGE YOUNG: How nice for you.

10 MR. SMITH: Really.

11 MR. FRANKEL: I live under a big tarp,  
12 Your Honor, so I don't know if it's for everybody.  
13 But I'll make myself available. And if it could be  
14 possibly at 2:00 or 3:00 p.m. instead of at 1:00 p.m.  
15 that will help a lot.

16 JUDGE YOUNG: Sure, yes.

17 MR. McGUIRE: How about 3:00?

18 MS. JONES: That's fine for us.

19 JUDGE YOUNG: 3:00 o'clock?

20 MS. JONES: Yes, 3:00 o'clock is fine.

21 MR. McGUIRE: 3:00 o'clock.

22 JUDGE YOUNG: 3:00 o'clock Wednesday.

23 MR. ELLISON: 3:00 o'clock Eastern time?

24 JUDGE COLE: What time is that in Hawaii?

25 MR. FRANKEL: That's, let's see, 9:00,

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1 that's no 10:00 o'clock. 10:00 o'clock, 10 a.m.

2 JUDGE YOUNG: 3:00 o'clock okay with  
3 everyone? Okay.

4 MR. ELLISON: I think so.

5 JUDGE YOUNG: What?

6 MR. ELLISON: I think so, ma'am. I know  
7 I have court appearances in the morning. I don't  
8 believe I have any in the afternoon. But I wasn't  
9 thinking of my calendar.

10 JUDGE YOUNG: E-mail everybody tomorrow if  
11 there is a problem.

12 MR. ELLISON: If there is a problem, yes,  
13 ma'am.

14 JUDGE YOUNG: Okay.

15 MR. SMITH: I think just so I'm prepared  
16 for the conference call could we maybe go through what  
17 issues we were going to discuss?

18 JUDGE YOUNG: Well, as I was, as we were  
19 going these are the issues I wrote down. There may be  
20 others that I overlooked. But the late filing  
21 criteria with regard to Exhibits A and B, in  
22 particular Exhibit B.

23 MR. SMITH: Right.

24 JUDGE YOUNG: And this is not in order.  
25 I just, the case law, any case law with regard to

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1 consultation with tribal authorities. The issue of  
2 notice of opportunity for hearing with regard to  
3 license amendments and license -- well, you said  
4 license transfer was not an issue. But in lieu of  
5 briefing of the legal requirements for that I think  
6 probably it would be helpful to get the authority for  
7 it not being a requirement and what the situation was.

8 And then the treat-related issues. I'm  
9 trying to remember if there were any, there were other  
10 treat-related issues that I didn't mention.

11 MR. FRANKEL: I think, Your Honor, didn't  
12 you want us to address whether the NUREGS were more  
13 like law or more like fact? Or was that something  
14 that you thought you had adequately --

15 JUDGE YOUNG: That's something if people  
16 want to address that it's certainly something that  
17 we'll be looking at with regard to the NUREGS, so.

18 MR. ELLISON: Just so I'm clear, ma'am, is  
19 the conference call to discuss the merits of these  
20 issues --

21 JUDGE YOUNG: No, no.

22 MR. ELLISON: -- or to schedule briefing?

23 JUDGE YOUNG: To set deadlines. Just to  
24 set deadlines for. And, you know, I think a major one  
25 is the issue of the late filing and whether if --

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1 there have been situations before where information  
2 like this has been brought out, in my recollection,  
3 and you look at whether the new information or the new  
4 filing that's based on new information meets the  
5 criteria. Whether it's an amendment to a contention  
6 or a contention how we want to approach that and under  
7 what kind of a process and format. But no, no merits  
8 argument, just simply to sort of look at scheduling  
9 issues and definition of the issues that need to be  
10 addressed.

11 So I may have left some out there when I  
12 go back and look at my notes and read the transcript  
13 and so forth. So everyone be prepared to help us out  
14 and say what I may have left out.

15 MS. SIMON: Your Honor, may I just point  
16 out one thing right now since it came to mind is our  
17 responses to Exhibits A and B which were just not  
18 necessarily in terms of late filing but just in terms  
19 of the how they relate to standing and admissibility  
20 since we, as we discussed, we --

21 JUDGE YOUNG: Right.

22 MS. SIMON: Okay, that's just to note  
23 that.

24 JUDGE YOUNG: And that will be part of the  
25 figuring out exactly what, you know, what kind of a

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1 context we want to put it in that takes into account  
2 everybody's concerns and desires about what they want  
3 to address.

4 MS. SIMON: Okay.

5 JUDGE YOUNG: So anything else?

6 (No response.)

7 JUDGE YOUNG: Well, again thank you. It's  
8 been lovely being here. You live in a very nice  
9 place. We admired it driving up or down from Rapid  
10 City. And we will adjourn for now. Thank you.

11 (Whereupon, at 6:24 p.m., the oral  
12 argument was adjourned.)

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CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Crow Butte Resources, Inc.

Oral Arguments

Docket Number: 40-8943-MLA

Location: Chadron, Nebraska

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.



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