

RAS X-7

**Official Transcript of Proceedings**  
**NUCLEAR REGULATORY COMMISSION**

Title: Crow Butte Resources, Inc.  
In-Situ Leach Facility, Crawford, NE  
Oral Arguments

Docket Number: 40-8943; ASLBP No. 08-867-02-OLA-BD01

Location: Chadron, Nebraska

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1 UNITED STATES OF AMERICA  
2 NUCLEAR REGULATORY COMMISSION  
3 ATOMIC SAFETY AND LICENSING BOARD

4  
5 IN THE MATTER OF: ||  
6 CROW BUTTE RESOURCES, INC. || Docket No. 40-8943  
7 (IN SITU LEACH FACILITY, || ASLBP No.  
8 CRAWFORD, NEBRASKA || 08-867-02-OLA-BD01  
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10  
11 Chicoine Atrium  
12 Mari Sandoz High Plains  
13 Heritage Center  
14 Chadron State College  
15 1000 Main Street  
16 Chadron, Nebraska 69337  
17

18 Wednesday, October 1, 2008  
19 9:00 a.m.

20 BEFORE:

21 MICHAEL M. GIBSON, Administrative Judge  
22 BRIAN K. HAJEK, Administrative Judge  
23 RICHARD F. COLE, Administrative Judge  
24 ALAN S. ROSENTHAL, Special Assistant to the Panel  
25

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

(9:00 A.M.)

1  
2  
3 JUDGE GIBSON: Taking up where we left off  
4 yesterday, we would like to turn to Consolidated  
5 Petitioners' Environmental Contention E. And we have  
6 a couple of questions for the NRC Staff.

7 In the order that we issued earlier this  
8 month we advised you that we would seek an explanation  
9 regarding whether the value of environmental benefits  
10 are to be addressed in the NEPA evaluation. So for  
11 starters, can you give me a yes or no, will it be  
12 addressed?

13 MR. KLUKAN: No, Your Honor.

14 JUDGE GIBSON: Pardon?

15 MR. KLUKAN: No, Your Honor.

16 JUDGE GIBSON: Don't you normally evaluate  
17 environmental benefits in the context of the "no  
18 action" alternative?

19 MR. KLUKAN: Oh, of course, Your Honor.  
20 We are a little confused as to what Petitioners are  
21 actually arguing with this contention. If we are  
22 looking at the impact of the loss of wetlands or not,  
23 we don't look at the loss in economic value of those  
24 wetlands. But in terms of the "no action" alternative  
25 we do look at the environmental benefits.

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1 JUDGE GIBSON: In this case is the "no  
2 action" alternative renewing the license or not  
3 renewing the license?

4 MR. KLUKAN: The "no action" alternative  
5 in this instance, Your Honor, would be not renewing  
6 the license.

7 JUDGE GIBSON: Perhaps to make sure that  
8 we don't have one of those situations where we're  
9 using different words and talking about the same thing  
10 perhaps it might be useful if you could take out a  
11 minute and explain what environmental benefits you  
12 would normally address in conjunction with the "no  
13 action" alternative? And perhaps those are the very  
14 environmental benefits that the Consolidated  
15 Petitioners were seeking to have you address. So we  
16 may be talking about nothing at all, on the other hand  
17 we may have a live issue.

18 MR. KLUKAN: The benefit, Your Honor, in  
19 this instance of the "no action" alternative would be  
20 the lack of impacts to the resources, or to whatever  
21 resources undergone by the operation of a facility.

22 JUDGE GIBSON: Okay, that seems like, you  
23 know, you gave me an answer to the question I asked by  
24 just repeating back the words. I'm trying to  
25 understand what specific things do you address in the

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1 context of environmental benefits so that all,  
2 everybody here can understand what you would normally  
3 do and, therefore, we will know are we really talking  
4 about an issue that exists or not?

5 MR. KLUKAN: It would be all media, Your  
6 Honor, ecology, wildlife, air impacts, water impacts,  
7 socioeconomic benefits, one way or the other on both  
8 sides of the "no action" alternative and continuing  
9 with or going forward with the renewal of the facility  
10 or not going forward with the renewal of the facility,  
11 run the whole gamut of issues.

12 JUDGE HAJEK: If the "no action"  
13 alternative is to deny the license renewal is there a  
14 follow-up action taken by NRC to require site cleanup  
15 and specify the criteria for cleanup and final  
16 disposition of the site?

17 MR. KLUKAN: Yes, Your Honor, of course.  
18 If the renewal is denied there are conditions in place  
19 and procedures in place for the restoration and  
20 decommissioning of a facility.

21 JUDGE HAJEK: Okay, you say those are in  
22 place, can you define "in place" for me, please?

23 MR. KLUKAN: At the time reclamation would  
24 be required, Your Honor, the Applicant would have to  
25 submit a reclamation plan and then the NRC Staff would

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1 review that and that process would on go.

2 JUDGE HAJEK: So let me repeat what I  
3 think I heard you say. If the license renewal is  
4 denied then NRC would ask the Applicant to develop a  
5 plan for restoration after the denial and require  
6 that?

7 MR. KLUKAN: Yes, Your Honor.

8 JUDGE HAJEK: NRC then has jurisdiction to  
9 have that or make that requirement post-license  
10 period?

11 MR. KLUKAN: Yes, Your Honor.

12 JUDGE HAJEK: A 10 C.F.R. 40 issue?

13 MR. KLUKAN: Most definitely, Your Honor,  
14 we have the authority to control the conduct of the  
15 decommissioning of the facility and the restoration of  
16 the aquifers used for mining or used for uranium  
17 extraction.

18 JUDGE COLE: Isn't that situation covered  
19 in the permit?

20 MR. KLUKAN: Let me be a little bit more  
21 clear about it. Already in the license there is a  
22 restoration plan for the restoration of the aquifers.  
23 Also in the license is the requirement that they  
24 submit a reclamation plan for the removal of  
25 infrastructure at the facility.

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1 JUDGE HAJEK: Those are both currently in  
2 the license?

3 MR. KLUKAN: The restoration plan for the  
4 restoring the aquifers currently used for extraction  
5 operations is in the license. There is a requirement  
6 in the license that they then submit a reclamation  
7 plan as opposed to a restoration plan for the removal  
8 of infrastructure from the site.

9 JUDGE HAJEK: And returning it basically  
10 to a green field condition?

11 MR. KLUKAN: To baseline condition, yes,  
12 Your Honor.

13 JUDGE COLE: Or as close as they can get  
14 to it?

15 MR. KLUKAN: Yes, Your Honor.

16 JUDGE GIBSON: Okay. Mr. Frankel, you've  
17 heard an explanation of what will be addressed in the  
18 environmental review that the staff will do in the  
19 context of the "no action" alternative, which is a  
20 requirement under NEPA. Is there anything else that  
21 you were hoping to see in terms of an evaluation of  
22 the economic value of environmental benefits?

23 MR. FRANKEL: Yes, thank you, Your Honor.  
24 Perhaps I just need a clarification from the NRC  
25 Staff. I heard it mentioned that they do consider

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1 socioeconomic costs. My review of the NUREG 1569 I  
2 note that there are four potentially applicable  
3 sections and I'm not sure if counsel for the NRC was  
4 referring generally to those sections or not. I will  
5 just refer to them now. 7.6.1.1 talks about social  
6 and economic benefits, so not mentioning environmental  
7 but it's in that vein. 7.6.2, socioeconomic costs.  
8 And we note also 7.6.2.1 which seems to refer to  
9 external costs. And then finally section 9.1, the  
10 cost/benefit analysis.

11 And I wasn't clear on NRC counsel's  
12 response whether when they do consider the  
13 socioeconomic costs or the cost/benefit analysis, and  
14 he mentioned a number of items that get evaluated, on  
15 the one hand if there is action, on the other hand if  
16 there is no action. Specifically we made a reference  
17 to a value of, and I know it's not converted to acres  
18 but just for discussion, \$7,000 a year of economic  
19 value per hectare of wetland, are they going to do  
20 that calculation for the size of the wetlands times  
21 \$7,000 a year and project out something that sits on  
22 the other side of the ledger concerning the value of  
23 the environmental benefits?

24 And if they say that's their intention is  
25 to take that notion into consideration I would be able

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1 to answer your question pretty briefly, .

2 JUDGE GIBSON: Okay, I think what I would  
3 like to do is juts get a explanation of the extent to  
4 which you guys are on the same page of the same script  
5 and the extent to which you are not because at a  
6 minimum it will enable us to narrow the issues here?

7 MR. KLUKAN: Your Honor, the NRC Staff has  
8 found that there was no impact to wetlands on this  
9 site. So we are a little confused by counsel for  
10 Petitioners' claim that wetlands would return to this  
11 site if we shut down the facility.

12 MR. FRANKEL: I could clarify.

13 JUDGE GIBSON: Hold on, let him finish.

14 MR. KLUKAN: But we would, as stated, if,  
15 if the facility was impacting wetlands, its current  
16 operation, we would evaluate, as stated, the lack of  
17 impact as an environmental benefit by shutting down  
18 the facility.

19 JUDGE GIBSON: Okay. Now, again if we  
20 take, if we just set aside wetlands for a minute,  
21 okay, and we are only talking about the rest of the  
22 issues it sounds to me on this end of the table like  
23 the things that you raise as concerns are mostly  
24 addressed here. The issue with wetlands, however, I  
25 take it is a result of your contention that the

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1 wetlands have been adversely affected by virtue of  
2 contaminants from the mine and that those would in  
3 turn need to be addressed in some way, whereas the  
4 Applicant has maintained that there is no impact on --  
5 there are no migration of contaminants. And at this  
6 point the Staff seems to be more disposed to believe  
7 the Applicant's story than yours. So just for  
8 purposes of what we are talking about here I just want  
9 to see if we can narrow this down to something that  
10 makes this manageable.

11 So I guess my first question would be  
12 setting aside wetlands first of all, tell me, did he  
13 address the rest of your concerns? And secondly, did  
14 I accurately characterize the issue with wetlands?

15 MR. FRANKEL: I'm not completely resolved  
16 but not out of a lack of desire. I feel like we're  
17 still talking slightly about apples and oranges and we  
18 can get closer to talking about apples and apples. As  
19 to your statement of the concern of the wetlands, it  
20 was accurate.

21 JUDGE GIBSON: Even a broken clock is  
22 right twice a day.

23 MR. FRANKEL: So in an effort to focus and  
24 clarify, I am raising, we are raising a contention  
25 which goes to value not cost, in the sense that there

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1 is a recognized value to an operating ecosystem. If  
2 you are saying that you accept that point, we have no  
3 contention. If you are saying that you do not accept  
4 that, then we do have a contention.

5 So what I am expressing is I have worked  
6 hard to bring into, you know, an expression in terms  
7 of dollars because the application talks about dollars  
8 when we talk about costs and benefits. And when we  
9 have this ledger of costs and benefits what is  
10 referred to in the application generally accepted by  
11 the NRC Staff is that the costs are environmental  
12 costs which are measured in terms of damage and  
13 remediation, and the benefits are job dollars and  
14 dollars in the community. And typically that is what  
15 is put on either side of the ledger. And what I am  
16 saying is in addition to the damage cost that's on the  
17 side of the ledger there needs to be a value, either  
18 it's the value that the wetlands serve, which I'm  
19 saying, okay, is \$7,000 a hectare per year, which if  
20 we are right and there is contamination going on then  
21 there is going to be a loss of that value because the  
22 wetland doesn't operate the way it should.

23 If there is no action then the ledger  
24 should read on one side the jobs and the dollars and  
25 go in the community and on the other side the full

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1 value of the wetlands operating as they should plus,  
2 you know, the lack of environmental damage. And it  
3 still may be that the NRC says that ledger still  
4 gravitates in favor of taking the action. But we want  
5 to see that on the ledger..

6 Have I explained it enough to be able to  
7 respond to?

8 JUDGE GIBSON: I will let you all respond.

9 Thank you for that clarification. I think  
10 that, you know, they may use different language than  
11 you do but it does sound to me like we're very close  
12 at least. Okay. In terms of their -- not in terms of  
13 the ultimate issues here but in terms of this one  
14 specific issue that when you do the "no action"  
15 alternative evaluation you are essentially looking at  
16 the value of that ecosystem per se, okay.

17 MR. KLUKAN: If, to clarify, if we found  
18 that there was an impact on wetlands we would do this  
19 value assessment that counsel is talking about. But  
20 the NRC Staff has found or at least that the Applicant  
21 has proposed there is no impact and thus this type of  
22 analysis is not necessary.

23 But, if there were found to be an impact  
24 on ecological resources as referenced by counsel we  
25 would do a value assessment of the loss of that

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1 ecosystem of what the impact would be. I can't speak  
2 to what specific methodology would be used for  
3 calculating that value but we would do that if we  
4 found that there would be an impact on the ecological  
5 issues.

6 JUDGE GIBSON: Okay. Do you need to say  
7 something else, Mr. Frankel, or can we get on?

8 MR. FRANKEL: You can't -- the NRC Staff  
9 said that they were not able to say whether the  
10 methodology includes the concept that we're asking be  
11 included. So if they are not able to say that the  
12 methodology includes that concept, I feel we have a  
13 dispute.

14 JUDGE GIBSON: Fair enough. I think I  
15 appreciate that. People that do environmental  
16 evaluations talk in different language than people who  
17 do licensing and permitting. And oftentimes they are  
18 saying the same thing but they are using different  
19 language, so.

20 JUDGE ROSENTHAL: I just have a point  
21 before you go on.

22 JUDGE GIBSON: Yes.

23 JUDGE ROSENTHAL: I'm sort of confused in  
24 one respect. I was under the impression that  
25 Contention E was basically addressing the adequacy of

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1 the content of the license application. And I'm  
2 wondering now whether we're really talking about  
3 whether the Staff in the course of its NEPA analysis  
4 is going to take into consideration the factors which  
5 the Petitioner seems to believe should be taken into  
6 account? In other words, have we moved from the  
7 question of the adequacy of the content of the license  
8 application to the matter of whether the Staff is  
9 going to consider the factors that the Petitioners  
10 believe should be considered?

11 I mean it's so I would like for my own  
12 purposes to be clear as to whether we are beyond now  
13 any issue of the content of the license application  
14 and we've moved on to what is the NRC Staff going to  
15 do in the course of this NEPA analysis? So I don't  
16 know where I get, I guess I get the clarification in  
17 the first instance from Mr. Frankel since it's his  
18 contention.

19 MR. FRANKEL: Thank you, Your Honor. In  
20 our Contention E we specifically complain that the  
21 license application fails to include the economic  
22 value of environmental benefits. I believe that the  
23 NRC Staff was responding to a direct question which  
24 came out of this order in paragraph 6 which also  
25 includes a question whether the Applicant is going to

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1 be required to provide information beyond that already  
2 found in the environmental report.

3 From our perspective, we just heard it  
4 said that these things are possibly taken into  
5 consideration depending on whether our view of the  
6 world is persuasive or whether the Applicant's view of  
7 the world is persuasive concerning potential  
8 contamination into the wetlands, for example. But  
9 whether that view is correct or not, it doesn't change  
10 the fact that there is no reference to any  
11 environmental benefits value in the application. So  
12 if it is something that the NRC considers, which it  
13 says that it is something that it possibly considers,  
14 it's still not in the application.

15 JUDGE ROSENTHAL: How are you answering my  
16 question? You are saying still that Contention E puts  
17 on the table the adequacy of the information that was  
18 supplied in the license application?

19 MR. FRANKEL: Yes, sir.

20 JUDGE ROSENTHAL: Well, how about that.

21 Now let me ask the Staff counsel this  
22 question. Has this application been accepted for  
23 technical review?

24 MR. KLUKAN: Yes, Your Honor. The NRC  
25 Staff has accepted this application for docket.

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1 JUDGE ROSENTHAL: Now, the NRC Staff in  
2 accepting it for technical review did it make a  
3 determination that the Applicant had supplied in its  
4 license application all that was, all the information  
5 that was required to enable the Staff to conduct its  
6 technical review?

7 MR. KLUKAN: The Staff found the  
8 application complete for review. This is not to say  
9 that there won't be RAIs issued in the course of the  
10 Staff's review of the application, but the Staff found  
11 there was sufficient information in the application  
12 for the Staff to conduct its review.

13 JUDGE ROSENTHAL: So I take it the Staff's  
14 view is that the application was not deficient in the  
15 specific respect that Contention E claims it was  
16 deficient?

17 MR. KLUKAN: Again recognizing that the  
18 Staff does not do a full technical review at the  
19 license application stage or the license acceptance  
20 stage -- or Applicant stage, excuse me, Your Honor,  
21 the Staff found that nothing was wholesale missing.  
22 No section we required in the Applicant was missing  
23 from the Applicant at the time of its submittal.

24 JUDGE ROSENTHAL: All right. But I take  
25 it that if in the course of its technical review the

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1 Staff concludes that it needs information that was not  
2 provided in the license application, information that  
3 it will need in order to conduct its technical review  
4 either on the safety side or the environmental side,  
5 then the licensee applicant will be required to supply  
6 that information?

7 MR. KLUKAN: That is correct, Your Honor.

8 JUDGE ROSENTHAL: So that I take it then  
9 from the Staff's standpoint it's not critical as to  
10 whether the license amendment application contains --  
11 or renewal application, excuse me, contains all of the  
12 information that will be needed, that if there is a  
13 gap, that gap will have to be filled; is that correct?

14 MR. KLUKAN: That is correct, Your Honor.

15 JUDGE ROSENTHAL: Does it follow from that  
16 that the issue at hand is really what is the Staff  
17 going to do, what is the Staff going to be looking at  
18 rather than what might or might not be currently in  
19 the license application because once if you accept the  
20 staff's view as to what its burden is, what it is  
21 going to be looking at, then it would follow it would  
22 seem that if there is information not now in the  
23 application that that information would have to be  
24 supplied to the Staff in order for the Staff to  
25 conduct its review?

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1 MR. KLUKAN: The Staff submits that the  
2 National Environmental Policy Act, the NEPA obligation  
3 is to do cost/benefit analysis and look at the impact  
4 is principally an obligation of the Staff not that of  
5 the Applicant. The Applicant need only submit  
6 information as required by the Staff in its  
7 regulations for the submittal of its application.

8 JUDGE ROSENTHAL: All right. If that's  
9 the case, Mr. Frankel, I ask you what is the  
10 significance of the completeness or incompleteness  
11 from your standpoint of the license application as it  
12 stands? I mean isn't the issue really what is the  
13 Staff going to be looking at because anything that the  
14 Staff looks at if the application is insufficient to  
15 provide the Staff with the ability to make an informed  
16 judgment the licensee will be required to supplement  
17 the information that's currently contained in this  
18 license application? So it seems to me, maybe I'm  
19 wrong about this, that the whole focus is on what is  
20 the Staff going to be doing, what is it going to be  
21 looking at? And is what it's going to be looking at  
22 the kinds of things that you feel, your client feels  
23 it should be looking at?

24 MR. FRANKEL: Well, my client being  
25 members of the public would not be privy to the

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1 interaction involving the RAIs and curing deficiencies  
2 in the application. My understanding of our work her  
3 is that it's incumbent on the public petitioners to  
4 point out specific sections in the application which  
5 we feel are deficient or lacking and that we have to  
6 tie our claims of deficiencies to something that the  
7 NRC is supposed to examine in order to grant the  
8 license renewal, which we have done.

9 If they examine it and say they need more  
10 information how could any member of the public  
11 possibly comment on that or participate meaningfully  
12 in the process? It excludes the public from the  
13 process unless you allow us to make a contention in  
14 this way.

15 MR. KLUKAN: If I may refocus the  
16 question, Your Honors, I think, as stated before, if  
17 there is an impact we look at the value lost in  
18 accordance with that impact, whatever that impact is,  
19 we quantify it per some methodology which I am not  
20 personally privy to. Counsel for the Petitioners has  
21 not identified any impacts that the Applicant in its  
22 submittal of the RAI has taken account of and, thus,  
23 this need for environmental benefit analysis is not  
24 necessary if there is no impact.

25 JUDGE GIBSON: It's not really, he's

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1 basically said that there are environmental -- there  
2 are economic values associated with not doing this,  
3 not doing the renewal, which we've sort of  
4 characterized now as the "no action" alternative. You  
5 are going to be evaluating that. And the things that  
6 you've said you're going to be evaluating are the very  
7 things, with I think hopefully one exception, that he  
8 said he wants evaluated. Okay? So that's the reason  
9 why I was trying to get this narrowed down to  
10 something that we could all deal with.

11 To the extent that there are issues that  
12 you need addressed you are going to turn to the  
13 Applicant, ask them to submit additional information.

14 The one place that I see that we probably  
15 are not going to be able to narrow this issue further  
16 has to do with the issue of wetlands because  
17 Consolidated Petitioners are asserting that those  
18 wetlands have been contaminated and the Applicant  
19 certainly believes they are not. And, you know, at  
20 this point at least it seems that you all are not  
21 convinced that they are being impacted. And so we  
22 just, I was just trying to see if we could narrow this  
23 issue down, and hopefully we've done so.

24 JUDGE ROSENTHAL: If I may just ask a  
25 question?

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1 JUDGE GIBSON: Please.

2 JUDGE ROSENTHAL: How can the Staff take  
3 a definitive position on this wetlands issue before  
4 its conducted its technical review?

5 MR. KLUKAN: The Staff is not taking a  
6 definitive position on this, Your Honor.

7 JUDGE ROSENTHAL: So that's from the  
8 Staff's standpoint that is an open issue?

9 MR. KLUKAN: It is an open issue, Your  
10 Honor. We are currently engaged in that review  
11 process. B ut we have not come to any conclusions  
12 regarding the information submitted in the Applicant's  
13 environmental report. This is I was simply saying  
14 hypothetically or generally speaking that if there is  
15 no impact there is no need to analyze it. But as  
16 Judge Gibson said, we will be doing this analysis for  
17 the "no impact" alternative in the course of our  
18 environmental review; that is completely correct.

19 JUDGE ROSENTHAL: So we don't know at this  
20 juncture whether there is ultimately going to be an  
21 issue as to whether wetlands is a factor?

22 MR. KLUKAN: That is correct, Your Honor,  
23 because the Staff has not come to any conclusions on  
24 that analysis.

25 JUDGE GIBSON: I see that counsel for the

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1 Applicant is uncharacteristically dying to say  
2 something. So we will let you do that since we let  
3 everybody else do that. Yes.

4 MR. SMITH: Thank you. I understand and  
5 I followed the discussion that we all just had. I  
6 guess I would like to bring it back to the contention  
7 admissibility standards which is that there has to be  
8 a genuine dispute on the material issue and you've got  
9 to point to some sort of deficiency in the  
10 application. I am not sure I see where in their  
11 contention they are alleging that some wetlands are  
12 either impacted or not. So I don't see where they  
13 even get to that threshold issue of identifying some  
14 deficiency in the application.

15 JUDGE GIBSON: Okay. Okay, if we could  
16 turn to Consolidated Petitioners Technical Contention  
17 B, as in boy. We suggested in our order issued  
18 earlier this month that if we are going to admit  
19 Technical Contention B it does not seem necessary to  
20 retain for consideration Consolidated Petitioners'  
21 environmental Contention B. And I just want to know  
22 if Consolidated Petitioners have any objection to  
23 withdrawing for consideration Consolidated  
24 Petitioners' Environmental Contention B in the event  
25 Technical Contention B is admitted.

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1           MR. FRANKEL: Let me ask a clarifying  
2 question so I understand. If Technical Contention B  
3 is admitted and Environmental Contention B is  
4 discarded my understanding was that the environmental  
5 contentions are generally formulated under NEPA and  
6 the technical contentions are generally formulated  
7 under the AEA. Now, NEPA includes a variety of  
8 considerations obviously not included in the AEA, you  
9 know, environmental and cultural issues.

10           And I want to make sure that if we agree  
11 to consolidate them like that or have a lack of  
12 objections, because I know agreement is not really  
13 required because you all have the power to do that, I  
14 feel that the NEPA aspects would then be thrown away.  
15 And for purposes of efficiency we would have, you  
16 know, suffered a substantive impact. So for that  
17 reason unless I have some assurance that that's not  
18 going to happen, this is solely for purposes of  
19 efficiency, we would object.

20           JUDGE GIBSON: Okay. Go ahead, please.

21           JUDGE HAJEK: So I think what I understood  
22 you to say is that your evaluation of the two acts is  
23 that the NEPA is more restrictive in terms of what  
24 needs to be looked at than AEA. And so if we continue  
25 to have an interest in combining these contentions,

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1 your preference if we would do so would be to combine  
2 them under Environmental Contention B rather than  
3 combining them under Technical Contention B; is that  
4 correct?

5 MR. FRANKEL: That's correct. I mean,  
6 quite frankly, we understand that this is supposed to  
7 be for purposes of efficiency, so and not with an  
8 impact on the substantive legal rights. So if we're  
9 missing something then, you know, we will stand firm  
10 to not waiving something that affects our substantive  
11 legal rights. So that's why we pled it as two  
12 separate contentions. In the FRN it was specifically  
13 required to group the contentions between  
14 environmental, technical and miscellaneous. In the  
15 other expansion proceedings we didn't have to do that.

16 So, and in fact the Board in that matter  
17 had some difficulty breaking them out because so much  
18 of it is related to the faults and fractures and that,  
19 and that comes out of the safety part. But the  
20 environmental impacts and analysis come out of the  
21 environmental part.

22 JUDGE COLE: What about the possibility of  
23 giving it a different name, like convention or  
24 technical and environmental contention B and we'll  
25 cover both subjects?

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1 MR. FRANKEL: That would be fine, Your  
2 Honor. Or if it fits into miscellaneous or there's  
3 that category "Other" that we didn't use but it was in  
4 the FRN.

5 JUDGE GIBSON: We probably don't want to  
6 do that. But we appreciate your views on that.

7 MR. FRANKEL: Question for Your Honor.  
8 I've been keeping a list of some rebuttal points,  
9 including some from yesterday since we broke early and  
10 I didn't have a chance to address those. So at an  
11 appropriate time.

12 JUDGE GIBSON: Let me, we will go through  
13 the same procedure we did yesterday. I think that  
14 that worked relatively well. But we want to be sure  
15 and cover our questions. Okay?

16 MR. FRANKEL: Thank you.

17 JUDGE GIBSON: I'd like to turn to  
18 Consolidated Petitioners' Technical Contention C.  
19 Now, we have a similar issue there. It appears to us  
20 that if we admit Environmental Contention C it doesn't  
21 seem necessary to retain for consideration your  
22 Technical Contention C. Are your concerns the same as  
23 you just expressed with respect to B or different?

24 MR. FRANKEL: We feel more comfortable  
25 with the climate change one being an environmental

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1 contention and we would not have an objection to  
2 withdraw the Technical Contention C.

3 JUDGE GIBSON: Good. Thank you.

4 Okay, let's turn to Consolidated  
5 Petitioners' Technical Contentions D, E, F, G and  
6 Miscellaneous Contention L. For the NRC Staff, in the  
7 order that we issued earlier this month we noted that  
8 you have asserted that Consolidated Petitioners failed  
9 to identify specific supporting regulations for their  
10 technical contentions. AS I indicated yesterday, that  
11 seems like a pointless objection because there are no  
12 regulations covering this. And so in the absence of  
13 regulation the Staff is obviously going to go through  
14 some kind of a best engineering judgment about what  
15 sorts of practices for ISL uranium mining would be  
16 necessary and sufficient to protect the public health  
17 and safety.

18 So what I would like you to do is to  
19 provide us with an explanation of what that review  
20 will entail with respect to the issues that are raised  
21 by these contentions rather than simply saying it's  
22 not in the regulations.

23 MR. KLUKAN: To preface this I would like  
24 to point out what regulatory sections are applicable  
25 to this license. That would be 10 C.F.R. Part 40, 10

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1 C.F.R. Appendix A, parts thereof, parts of or portions  
2 of 10 C.F.R. Part 51, and then portions of 10 C.F.R.  
3 Part 20.

4 Your Honor, yes, there are in comparison  
5 to other sections of the NRC code, Chapter 10 C.F.R.,  
6 there aren't as many specifying regulations one could  
7 say in Part 40. Nonetheless, there are the general  
8 safety findings under 10 C.F.R. 40.32, one of which is  
9 that the issuance of a license will not be inimical to  
10 the defense and the applicant's proposed --

11 JUDGE GIBSON: I'm sorry, you will need to  
12 pull the microphone closer.

13 MR. KLUKAN: Microphone closer.

14 JUDGE GIBSON: And maybe talk a little  
15 slower because maybe the court reporter can pick this  
16 up but I can't.

17 MR. KLUKAN: Under 10 C.F.R. Part 40.32,  
18 Your Honor, which lists general safety findings the  
19 NRC must make several of those deal with the  
20 Applicant's proposed equipment, facilities and  
21 adequate to protect health and safety. Petitioners'  
22 contentions object to the methodology used by the  
23 Applicant but they do not contest the underlying  
24 results or prove that those results are insufficient  
25 or deficient or wrong, just generally wrong. While

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1 there is not set methodology for some of these  
2 analyses in the regulations what it then goes to, Your  
3 Honor, is whether they produce a sufficient result,  
4 whether the result of that methodology is sufficient.

5 Petitioners have not put forward that the  
6 underlying results of the methodologies Applicant has  
7 used in the construct of the information in the LRA is  
8 wrong. Simply arguing which methodology is better  
9 does not get to the ultimate question of whether the  
10 information is inaccurate, whether it is deficient or  
11 whether it is wrong.

12 JUDGE GIBSON: Okay. You've heard an  
13 explanation that what sort of review you are going to  
14 be getting to protect public health and safety. Does  
15 that satisfy Consolidated Petitioners with respect to  
16 these four technical contentions in Miscellaneous  
17 Contention L? And if not, would you please explain  
18 what you're seeking? Because again what I would like  
19 to try to do here is to see if we can figure out what  
20 we are talking about.

21 MR. FRANKEL: Mr. Ellison will talk about  
22 the statistical protocols in Contention D. I will  
23 discuss Contention I guess E and L.

24 MR. ELLISON: We have submitted as part of  
25 our petition here an opinion by Richard Abitz. And

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1 Mr. Abitz sets out in a fair amount of detail concerns  
2 that we have that we feel raise questions about the  
3 entire methodology of what is being done by the  
4 company here. For example, as to the location of  
5 baseline wells Mr. Abitz feels that there is no  
6 statistical justification for how the company set  
7 those wells out and that they did not -- they were  
8 clustered, they do not spread out over the entire  
9 exempt zone.

10 It really depends upon the, according to  
11 Mr. Abitz, and we, this is our position, it depends on  
12 the statistical confidence that one wishes to have.  
13 If one wishes to have the highest level of statistical  
14 confidence then we need something different than what  
15 is being done and that according to Mr. Abitz that  
16 more baseline wells, for example, would be required to  
17 have a proper sampling.

18 We also note concerns regarding how  
19 samples are being taken. For example, the Chadron  
20 Formation according to the application is between 50  
21 and 80 feet thick. But if the monitoring wells only  
22 sample 20 feet of that aquifer then it doesn't  
23 represent the entire aquifer and that this would be a  
24 deficiency. And that, according to our expert, would  
25 return a biased sample and not represent the water

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1 quality of the entire column.

2 So it is our position that in order to do  
3 proper sampling it must represent the entire thickness  
4 of the aquifer and not just a portion thereof.

5 There's also questions as to whether the  
6 median or the mean data should be utilized in  
7 computing changes to water quality. And there can be  
8 significant difference between those two. So it's the  
9 methodology that we have some problems with. And  
10 ultimately Mr. Abitz concluded that the baseline or  
11 restoration values presented in the application would  
12 be improperly biased to a high result and this allows  
13 for restoration and less cost and time but it doesn't  
14 necessarily provide good protection against  
15 contamination of the aquifer.

16 Now, Mr. Abitz sets out some 46 issues of  
17 concern as to the methodology that is being utilized  
18 at this time. And we think they raise real concerns  
19 as to whether the environmental, the health and safety  
20 aspects are being properly protected.

21 There is apparently regulation in EPA  
22 2000(a) and 2000(b) which states the statistical  
23 confidence that one wishes to have, according to  
24 report, to have an estimate as to mean or median for  
25 water quality parameters. And if the highest

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1 confidence level is to be achieved, then as I  
2 mentioned additional baseline wells would be required.

3 And Mr. Abitz sets out in his report  
4 graphs and diagrams as to what he feels would be  
5 really appropriate. We don't feel that that is  
6 occurring in this case.

7 JUDGE COLE: I'd like to ask the Staff  
8 some questions about Dr. Abitz' suggestions. Are you  
9 familiar with them, sir?

10 MR. KLUKAN: AS my knowledge equips me to  
11 be familiar with them, Your Honor, yes.

12 JUDGE COLE: It's an interesting  
13 collection of collections. And some of them appear to  
14 have real merit. And I'm just wondering in the Staff  
15 review of the application would they look at these  
16 suggestions and take them into account to see whether  
17 they might have some real merit in protecting the  
18 public health and safety and making it a better  
19 application?

20 MR. KLUKAN: I think, Your Honor, as  
21 stated with regard to environmental contentions before  
22 that the technical review is ongoing. And as part of  
23 that Staff does use the guidance in NUREG 1569. But  
24 for whatever methodology it adopts or for whatever it  
25 deems correct it will provide an analysis thereof.

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1 And so, yes, there is an opportunity to take some of  
2 these into consideration and evaluate them to see if  
3 they would be better and, if not, why.

4 JUDGE COLE: Like, for example, one that  
5 struck me particularly was the way samples were  
6 collected to determine baseline quality of the aquifer  
7 before you start mining. And I believe Dr. Abitz  
8 indicated that when the sampler takes samples only  
9 from the area where the uranium is directly being  
10 mined and not from the entire aquifer, since the  
11 entire aquifer doesn't have uranium throughout, when  
12 you sample just through the aquifer you get a quality  
13 of water that would be significantly different than  
14 the overall quality of the aquifer. Now, is the Staff  
15 going to make a determination as to how those samples  
16 are collected or are they going to do what Dr. Abitz  
17 indicated you might be doing?

18 MR. KLUKAN: I can't speak to what the  
19 specifics of the Staff review will be but I can say  
20 that the Staff will make determinations as to what it  
21 deems acceptable per its regulatory demands that it  
22 finds that it meets health and safety requirements.  
23 I can't speak to the technical knowledge of which is  
24 more appropriate at this time, but the Staff will make  
25 that determination in its review.

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1 JUDGE COLE: It seems to me can we be  
2 assured that you are going to look at Dr. Abitz'  
3 suggestions?

4 MR. KLUKAN: I don't know if we will  
5 reference his analysis per se, Your Honor but we will  
6 discuss these issues in the technical review. The  
7 type of issues raised in this analysis the Staff will  
8 address, it must address in order to make the findings  
9 that it needs to make in order to determine acceptable  
10 health and safety..

11 JUDGE ROSENTHAL: It seems to me offhand  
12 that a lot of these concerns that are being expressed  
13 by the Petitioners, they may be very valid concerns,  
14 are premature and it's not their fault. It's  
15 unfortunately, at least unfortunately in my opinion,  
16 the Commission has established rules of practice which  
17 require hearing requesters to come forward with  
18 contentions prior to the time that the Staff has  
19 conducted and completed its technical review. And at  
20 that point it seems to me it may well prove to be the  
21 case that many of the concerns that the Petitioners  
22 have will be resolved, other concerns will remain  
23 open. And at that point, of course, the Commissioner  
24 -- excuse me, the Petitioners will have an opportunity  
25 to file new contentions based upon newly acquired

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1 information that was not previously obtained.

2 And as I'm listening to this, it just  
3 seems to me that what I am hearing is a uncertainty on  
4 the part of the Petitioners that the Staff is going to  
5 be looking at all of the things that the Petitioners  
6 believe should be considered, either on the safety  
7 side or on the environmental side, and further there  
8 is this concern as to whether the Staff in conducting  
9 its review will obtain from the licensee Applicant  
10 information which the Petitioners think is part of the  
11 mix here to come to informed judgment and which the  
12 Petitioners are concerned might not currently be in  
13 the application and not currently, therefore,  
14 available to the Staff in the conduct of its review.

15 So what I am hearing here is really a  
16 product again of a procedure which requires the  
17 intervenors to come forward at the outset but where  
18 really whether these concerns are valid or not may  
19 well hinge upon what is the culmination of the  
20 technical review which, of course, the both the safety  
21 analysis report and the environmental impact statement  
22 will be available to the public at large, including  
23 the Petitioners, which will have an opportunity at  
24 that time to see just what the Staff has considered,  
25 what information it has utilized in reaching its

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1 conclusions. At which point it seems to me that those  
2 people who are concerned about the continued operation  
3 of this mine will have a much better ability to  
4 determine whether their concerns have been adequately  
5 considered.

6 Maybe I am missing something but I just  
7 have a feeling that a lot of what is going on here as  
8 a practical matter is quite premature and, again,  
9 through no fault of the Petitioners because they again  
10 were required to come forward at a very early stage  
11 with contentions before the whole picture was made.

12 That's just where I come out on this. And  
13 I don't know whether you have any comment on that, Mr.  
14 Frankel, or whether the Staff or Applicant do?

15 MR. FRANKEL: With your permission I will  
16 just make a short comment which is thank you for  
17 recognizing that it's not our fault. We came forward  
18 with quite a bit of expert information because we are  
19 working to participate in this process to improve it;  
20 that's our goal. We would be delighted to have Dr.  
21 Abitz' recommendations or many of them found to be  
22 further protective of health and safety and that the  
23 Staff would recognize that and ask the Applicant to do  
24 that. We would be delighted to see further  
25 applications that take those things into consideration

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1 so we don't have to relitigate these. We would like  
2 the bar to be raised so that my clients, the people in  
3 the community, feel more comfortable with the whole  
4 thing. And I think that's the goal of everybody here  
5 when we get through the technicalities.

6 So but we don't want to be excluded from  
7 the process in the meantime while the Staff figures  
8 out and the Applicant figure out their situation. I  
9 think there are some procedural ways of viewing things  
10 in the light most favorable to the Petitioners and  
11 things like that that enable us. And as you said, we  
12 also have an opportunity to add contentions based on  
13 new information when the new reports come out.

14 But we're talking about Dr. Abitz, and  
15 there is this paragraph 8 which talks about pre-  
16 operation monitoring was conducted for non-  
17 radiological parameters and that the disturbance of  
18 the ore exposes the mineral surfaces to groundwater  
19 which releases additional uranium. And the addition  
20 of oxygen to the disturbed region increases the  
21 dissolution of uranium. And in our petition we note  
22 that when uranium oxidizes it releases arsenic.

23 And we looked at all those tables  
24 yesterday that were referenced by the Applicant, we  
25 didn't see any that had arsenic values in them. So it

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1 appears they are not testing for arsenic. And  
2 yesterday we heard the NRC staff say they don't look  
3 at non-rads. So we haven't heard anybody come forward  
4 to say who is looking at the arsenic levels, who is  
5 monitoring them, who is testing them, because that's,  
6 you know, part of what Mr. Abitz is saying here is  
7 that the pre-monitoring, pre-operational monitoring  
8 is, you know, not acceptable.

9 So we feel this is a valid contention that  
10 we have general disputes and we'd like to see it  
11 admitted.

12 JUDGE GIBSON: Okay, before we go any  
13 further on that point would you please just address  
14 the question of monitoring for arsenic or other non-  
15 rad parameters?

16 MR. SMITH: Certainly. License condition  
17 10.3 says that the licensee shall establish baseline -  
18 - I'm sorry, pre-operational baseline groundwater  
19 quality for the following parameters: ammonia,  
20 arsenic, barium. And the list goes on to list looks  
21 like there is 16, 17 or so constituents.

22 JUDGE GIBSON: And now we're talking  
23 about, now just take it the next step, how frequently  
24 and where do you monitor for the non-rad parameters  
25 that you just discussed?

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1 MR. SMITH: Okay. I would say according  
2 to license condition 10.3(a), "three samples shall be  
3 collected from production and injection wells at a  
4 minimum density of one production or injection well  
5 per four acres. These samples shall be collected at  
6 least 14 days apart."

7 And I would note also that with respect to  
8 establishing baseline groundwater quality for  
9 restoration purposes the sampling methods are  
10 established by the NDEQ and those are in our NDEQ  
11 permit. It specifies that we have to use the standard  
12 method for examination of water and wastewaters by the  
13 American Public Health Association.

14 Another standard we have to comply with  
15 from the American Society for Testing and Materials.

16 And then lastly, an EPA method for  
17 chemical analysis, water and waste.

18 So these are actually specified by our DEQ  
19 permit. And again, non-rad parameters are what we are  
20 talking about here, those are really ultimately within  
21 the purview of NDEQ.

22 JUDGE GIBSON: Right. And but that would  
23 include arsenic?

24 MR. SMITH: Absolutely.

25 JUDGE GIBSON: Okay. Yeah, I believe the

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1 Staff wanted to have an opportunity to respond to what  
2 Judge Rosenthal just mentioned about the fact that we  
3 are having to address these issues before they might  
4 be issues.

5 MR. KLUKAN: I think, Your Honor, if the  
6 intervenors in this proceeding were to find at the  
7 time the Applicant completed it's SER or its  
8 environmental review and they found those to be  
9 deficient in some respect or that we adopted  
10 methodologies that they find contravened our general  
11 findings of health and safety, then that would be the  
12 time for late filed contentions. At this opportunity,  
13 Your Honor, it's about what the Applicant has  
14 submitted in their SAR, their technical safety report.  
15 And our Commission admissibility requirements lead us  
16 to looking at whether the Petitioners have submitted  
17 information which contravenes in a material way  
18 information submitted by the Applicant, not what the  
19 NRC Staff will do later on.

20 JUDGE GIBSON: Well, I realize that, I  
21 realize what you're saying. But part of the reason  
22 that they are essentially in a bind, okay, I mean  
23 because they have no way to know. They have concerns  
24 about these things. The Applicant hasn't addressed  
25 them because the Applicant wasn't required to address

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1 them. And you haven't addressed them yet because you  
2 haven't completed your technical and environmental  
3 review. So to some extent the Petitioners are in a  
4 catch-22. So let's not go overboard on that argument,  
5 okay?

6 MR. KLUKAN: We recognize that, Your  
7 Honor. We recognize that there is, as you phrased it,  
8 a catch-22 here. But we suggest that while it may be  
9 difficult to keep tabs on what the Staff is doing, the  
10 Staff does submit its SAR publicly. It's a publicly  
11 available document. And RAIs are also publicly  
12 available documents on the ADAMS docket for this  
13 proceeding, all of which can be obtained by  
14 Petitioners.

15 And part of it is if they want to continue  
16 with this contention, Your Honor, there is some  
17 obligation on them to maintain or keep watching what  
18 the staff is doing as it submits this information or  
19 obtains this information as part of its review.

20 JUDGE GIBSON: Okay. Well, we heard you.  
21 Now I want to ask you another question. There is I  
22 think some -- and I don't mean this is in a pejorative  
23 way, but I think there is a bit of a black box problem  
24 here for the Petitioners with respect to the sort of  
25 best engineering judgment analysis that is going to go

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1 into this work that you all are going to do in terms  
2 of what the license requirements are to protect public  
3 health and safety because there are no regulations  
4 that they can refer to. There are a few. You  
5 mentioned a few. But there is no comprehensive set of  
6 regulations that would address a lot of these issues  
7 that they've raised.

8 So my question is where would they go to  
9 find this, okay? Is it published somewhere? Is it in  
10 a guidance document? Are you using the uranium mill  
11 tailings rules? I mean what is, where would they go  
12 to find what it is that you are going to use as the  
13 basis for protecting the public health and safety in  
14 the absence of a comprehensive set of regulations for  
15 ISL mining?

16 MR. KLUKAN: The Staff, Your Honor,  
17 follows the methodology set out in NUREG 1569. And  
18 that will be the basis of its review and how it goes  
19 about constructing its findings with regard to safety  
20 issues as well as environmental. NUREG 1569 discusses  
21 both. But that is the methodology Staff will employ  
22 and to review the information submitted by the  
23 Applicant, and the methodology it employs to come to  
24 its conclusion.

25 JUDGE GIBSON: And that by itself is

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1 sufficient for them to know what this best engineering  
2 judgment is going to be based on?

3 MR. KLUKAN: The Staff will in its review  
4 cite what it is basing its judgment on, what factors  
5 lead it to conclude one way or another. That is a  
6 requirement that it needs to flush out in the SAR that  
7 it provides support for whatever its conclusion is,  
8 what are the factors that lead us to believe that this  
9 is the best engineering practice in consideration of  
10 other ways we could have gone about this, other  
11 techniques, other methodologies. But the principal  
12 methodology we employ to analyze this, to go about  
13 constructing, placing the backbone or the skeleton of  
14 our review will be NUREG 1569.

15 JUDGE GIBSON: Okay.

16 MR. SMITH: I'm sorry, if I may just have  
17 two or three seconds?

18 JUDGE GIBSON: Yes, that's fine.

19 MR. SMITH: NUREG 1569 identifies the  
20 criteria that the Staff has determined to be  
21 sufficient to demonstrate compliance with NRC  
22 regulations. And it has gone through notice and  
23 comment. The public has had an opportunity to review  
24 it. And it lists the information and the criteria  
25 that the NRC has previously determined to be necessary

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1 and sufficient to satisfy NRC regulations.

2 So certainly the primary place I would  
3 look to identify whether there was some deficiency in  
4 our application would be to go compare it relative to  
5 what NUREG 1569 says and state whether or not that is  
6 different more or less. That's a great place to start  
7 because you know that the Staff has previously said  
8 this is what complies with our regulations.

9 MR. FRANKEL: I have some NUREG 1569 cites  
10 if I could share them now. There is 5.7.8.3,  
11 subparagraph 3, monitoring wells, vertical excursion.  
12 These monitoring wells should be placed to maximize  
13 the likelihood of detection.

14 Dr. Abitz just made a very specific  
15 criticism that was referenced by Judge Cole about how  
16 that might not be the case. So we're doing what we  
17 have been asked to do.

18 Section 6.1.2, subparagraph 1, evaluate  
19 whether there are aspects of the model of groundwater  
20 flow where additional data could provide new  
21 information that could invalidate the modeling results  
22 and significantly affect the groundwater restoration  
23 plan. Well, in Contention E we submit the J.R.  
24 Engineering opinion which talks about 3-D computer  
25 modeling. So we are matching item to item.

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1                   Page 6-10 of 1569, this is subparagraph 6,  
2 water users from nearby municipal or domestic wells  
3 that were in use before ISL operations should be  
4 provided with reasonable assurance that their water  
5 quality will not be impacted. Impacts are not limited  
6 to -- they include but are not limited to chemical  
7 constituent concentrations, changes in color. We note  
8 Dr. Anders' experience in his affidavit. Change in  
9 odor, hardness, taste. And that water consumption  
10 impacts that the more pour volumes equals greater  
11 water consumptions and that that needs to be  
12 considered.

13                   So every time we hear where we should go  
14 look and we go look there we find something that ties  
15 back to our basic contentions. If we articulate them  
16 in too much of a primitive way because we are not  
17 scientists, we get our scientists to articulate them  
18 in the same language and then we are told that we  
19 might hear about it later.

20                   When we are told that we have to do a  
21 daily review of the ADAMS system to find out notices  
22 about something that we can act on and that we only  
23 have a certain number of days to act it gives us  
24 terrible due process concerns. If we are told that we  
25 are a party and we're going to get certificate of

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1 service and we're going to get notified with a report  
2 and we have a certain number of days to respond, we  
3 can do that, but we need to know we're getting the  
4 notice.

5 Or if we get a notice, Hey, go to the  
6 ADAMS because something came up on your docket, we can  
7 live with that too. Because if we get an e-mail that  
8 says go check ADAMS it's now then our responsibility  
9 to go check ADAMS. But to be responsible for checking  
10 it daily over a period of 365 days a year just seems  
11 not appropriate to us, Your Honor.

12 JUDGE GIBSON: Yes?

13 MR. SMITH: I would just note that the  
14 J.R. Engineering report, the Abitz report, contentions  
15 that we are discussing, none of them reference NUREG  
16 1569.

17 MR. FRANKEL: Paul Robinson's expert  
18 report does. And his expert report is included by  
19 incorporation by reference. And Mr. Robinson's report  
20 even attaches part of Appendix A to NUREG 1569.

21 JUDGE GIBSON: Okay, I think we ought to  
22 take a recess for 10, 15 minutes.

23 (Brief recess.)

24 JUDGE GIBSON: Recognizing that 1569 is  
25 the provision that has to do with, you know, what you

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1 need to put in your application, I am still having  
2 difficult understanding specifically how the public  
3 can appreciate, know, find out what the technical  
4 basis is for the protection of public health and  
5 safety. Not what goes in the application, but how are  
6 they going to find that out? And if not until you do  
7 this safety report or the draft license or whatever,  
8 when that will happen so we can get a better  
9 appreciation for these technical contentions and not  
10 get bogged down in them?

11 MR. KLUKAN: NUREG 1569, Your Honor, not  
12 only discusses what must be submitted as part of the  
13 application but it provides that standard review plan  
14 for what information is submitted in the application.  
15 It does, as counsel for the Applicant stated, provide  
16 acceptance criteria for the Staff to judge the  
17 information that's submitted in the application by.

18 It will also be documented, Your Honor, in  
19 the report or in Staff's final analysis. But again,  
20 the analysis for the Staff will engage as part of its  
21 review or that will constitute its review of the  
22 application is documented in NUREG 1569.

23 JUDGE HAJEK: I'm not sure that answered  
24 what the question was. The question was how will the  
25 Petitioners as the review process goes forward have an

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1 opportunity to observe and/or review what is being  
2 determined or has been determined? And when will they  
3 have an opportunity to make comment on that process?

4 MR. KLUKAN: The Commission has clearly  
5 delineated what this process entails. If the  
6 Petitioners find an inadequacy with an RAI or some  
7 other piece of information that is in the public  
8 docket the Petitioners are free, and Commission  
9 regulations provide, that they can file a late filed  
10 contention.

11 JUDGE HAJEK: Can you just restate that?  
12 I'm having a difficult time, like Judge Gibson,  
13 understanding you.

14 MR. KLUKAN: Let's say the Petitioners  
15 disagree on this basis of safety adequacy, of  
16 something being discussed in an RAI or information  
17 we're requesting. They find that the tactic we are  
18 taking, the methodology we are approaching is  
19 insufficient. Or at the time we issue or make  
20 publicly available our SER, Safety Evaluation Report,  
21 they find a methodology inappropriate with regard to  
22 the regulatory mandates that we must abide by with  
23 regard to the general health and safety, they are free  
24 to file a contention at that time if it's new  
25 information.

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1 JUDGE ROSENTHAL: Wait a minute. They  
2 cannot challenge the adequacy of the Staff's technical  
3 review on safety issues, can they? I thought that the  
4 Commission has made it abundantly clear that on safety  
5 issues the question is whether the licensee or  
6 Applicant has performed its, has carried the burden of  
7 establishing that its proposals do not pose a threat  
8 to the public health and safety. On the environmental  
9 side the adequacy of the review of the staff is up for  
10 challenge. Is that not correct?

11 MR. KLUKAN: That is correct, Your Honor.  
12 I was referencing new information submitted by the  
13 Applicant in reference to our RAIs.

14 JUDGE ROSENTHAL: As a practical matter,  
15 and it may well be that technically the members of the  
16 public can track the progress of the Staff review, but  
17 in a real world isn't it the case that as a practical  
18 matter the public basically has to wait until the  
19 issuance of the final safety or a draft safety  
20 analysis report and a draft environmental impact  
21 statement before they will really have a handle on  
22 what is the culmination of the Staff's technical  
23 review in those two areas? And now I am talking about  
24 in a real world, not as a matter of theoretical  
25 possibility.

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1 MR. KLUKAN: Your Honor, the Commission  
2 has clearly stated that it is the obligation of  
3 intervenors or the public to comb the record for  
4 information which, I might add, is the obligation of  
5 the NRC Staff to put on the public docket.

6 JUDGE ROSENTHAL: So they're supposed to  
7 on a daily basis check? That is maybe what the  
8 Commission sets forth as the expectation. I would  
9 submit, at the risk of being the victim of the  
10 Commission's wrath, that that is not realistic, that  
11 as a practical matter that's not something that  
12 members of the public, and I would say this includes  
13 the representatives of these various petitioners, do.  
14 Generally technical review is completed, out come  
15 those documents, and those are the documents, the SAR  
16 and the EIS then become the basis for the possible  
17 formulation and submission of new contentions. I  
18 prefer the word "new" to "late filed" because I don't  
19 think they are late in circumstances where they are  
20 based on new information.

21 Leaving aside what the Commission  
22 "expectations" might be, in a real world would you  
23 disagree with me on that?

24 MR. KLUKAN: I don't know if I'm in a  
25 position, Your Honor, as representative, but I can't,

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1 I'm in no position, Your Honor, to contradict the  
2 Commission's statements or its expectations for the  
3 conduct of this proceeding. The Staff does  
4 appreciate, though, your concerns, Your Honor.

5 JUDGE ROSENTHAL: But you certainly would  
6 agree that it's the FSAR and the EIS that provides  
7 really the ingredients of what has been determined by  
8 the Staff on both the environmental and the safety  
9 aspects of this particular proposal, whatever it might  
10 be?

11 MR. KLUKAN: As you stated yourself, Your  
12 Honor, the obligation for safety materials is on the  
13 Applicant, not on the NRC. It's difficult for  
14 environmental contentions. NEPA obligations are  
15 principally our own. But it's the burden of  
16 production on the Applicant to submit sufficient  
17 safety information.

18 But again, it is the obligation of  
19 individuals who wish to participate as parties to a  
20 proceeding to review the docket which the NRC has set  
21 up in ADAMS for relevant information, whether that be  
22 safety information submitted by the Applicant in  
23 response to Staff RAIs or whether it be environmental  
24 information submitted by the Applicant in response to  
25 the Staff environmental RAI.

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1 JUDGE HAJEK: Is there anything in you  
2 regulations, your red guide that you are using or  
3 processing, that precludes a relationship being  
4 developed between the staff and the Petitioners such  
5 that the Staff will make it a little bit easier on the  
6 Petitioners to see that these reports are progressing  
7 and find them on the docket? As Mr. Frankel indicated  
8 earlier, some type of e-mail type notification, direct  
9 notification?

10 MR. KLUKAN: I think, Your Honor, with all  
11 due respect the Board could not order us to do so  
12 absent finding and admissible contention. But the  
13 Staff has discretion for how it will publicly identify  
14 information through various media, whether on its  
15 website or on ADAMS or in some other method.

16 JUDGE ROSENTHAL: The question I think was  
17 not whether this Board can order it. If I understood  
18 Judge Hajek's question was whether this was something  
19 that the Staff on its own would undertake to relieve  
20 the public, petitioners, of the obvious burden that is  
21 imposed upon them to read on a daily basis the  
22 contents of ADAMS?

23 MR. KLUKAN: The Staff fully appreciates  
24 the Board's concerns with regard to this, as the Judge  
25 puts it, the burden to review ADAMS. But that has

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1       been the Commission expectation for how the Commission  
2       will conduct its proceedings. But again, nothing  
3       precludes the Staff from engaging in such  
4       communications.

5               The Staff cannot say at this time whether  
6       it is ready or in what method such communications  
7       could occur in this proceeding or as to these  
8       particular intervenors.

9               JUDGE GIBSON: Well, I think it's pretty  
10       clear that we have given you some things to take back  
11       to your management. Okay? Those thing are, first of  
12       all, that it's probably not advisable to interpose an  
13       objection to a contention on the basis that someone  
14       didn't site a regulation in support of it when there  
15       is no regulation they could have cited to.

16               The second thing is it's obviously  
17       difficult for a party, and cumbersome frankly for all  
18       of us, for a party to have to interpose contentions to  
19       based on what might happen as a result of the safety  
20       and the environmental review that are going to take  
21       place in the future. But when you pile onto that the  
22       fact that then you oppose the contention on the basis  
23       they didn't cite to something, and they couldn't have  
24       cited anything because it doesn't exist yet, that also  
25       is bad form. And you might want to want to take that

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1 back to your management.

2 The third thing is purely from the P.R.  
3 standpoint it might be advisable when parties have  
4 raised issues in a proceeding and you know that you  
5 are going to be promulgating or acting on that  
6 information that would be pertinent to the contentions  
7 that they've raised, it would certainly improve your  
8 P.R. if you were to actually communicate with them  
9 instead of drop it somewhere in the catacombs of the  
10 NRC for them to try to find it.

11 MR. KLUKAN: The NRC Staff appreciates the  
12 Board's concerns and the Board's recommendations here.  
13 But again not -- regarding what the Board has said,  
14 the position of the Staff still has been that the  
15 Petitioners have not controverted the safety or the  
16 adequateness of the information submitted by the  
17 Applicant in the application. While they have put  
18 forward recommendations that have already been  
19 discussed here, they have not stated that such  
20 information is not sufficient to maintain safety.

21 JUDGE GIBSON: In your answer you have  
22 suggested that Dr. LaGarry's opinion does not  
23 challenge the license renewal application or the  
24 adequacy of the license renewal application. I find  
25 it difficult to understand how you could make that

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1 assertion in light of the fact that his opinion  
2 specifically states that there is newly discovered  
3 information controverting the analysis done by Crow  
4 Butte in its application that more studies should be  
5 conducted to verify these recent discoveries.

6 Now, surely you are not suggesting that  
7 the NRC Staff is not going to benefit from requiring  
8 the Applicant to use more recent data, are you?

9 MR. KLUKAN: Your Honor, I think we're  
10 getting hung up on the age of the data. If the data  
11 is correct and sufficient and no changes have occurred  
12 since that time or the Petitioners have not put  
13 forward any information to controvert the adequacy of  
14 that data then we submit that they have not  
15 controverted the adequacy of that data and the  
16 contention isn't valid.

17 JUDGE GIBSON: Well, it sounds to me like  
18 a chicken and egg issue. And if there is more recent  
19 data it might be appropriate to look at it. If there  
20 is a new analysis of that data it might be appropriate  
21 to look at it.

22 MR. KLUKAN: The NRC Staff understands  
23 Your Honor's concerns but that's not the standard for  
24 contention admissibility. The Petitioners, it is the  
25 Petitioners' obligation to say why this data is wrong

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1 not simply that it's old. Being old is not a material  
2 concern. If it's old because new things have been  
3 developed which show that the information is then  
4 wrong then, yes, that would be an adequate challenge.  
5 But simply saying it's old does not make it wrong.

6 JUDGE COLE: So you're saying that the  
7 information that Dr. LaGarry came forth with is not  
8 contrary to some of the information that's in the  
9 record of this case?

10 MR. KLUKAN: I think Dr. LaGarry's  
11 position he challenges, he does challenge the  
12 assumption or the assumption made by Applicant that  
13 there is no hydrological connection between the  
14 various aquifers or aqua layers. But he does not  
15 contradict the data put forward in support of that  
16 conclusion. Monitoring wells have been done by the  
17 Applicant to show there is no contradiction.

18 Simply by combining studies to say there  
19 could be faults without controverting the data that  
20 suggests that there aren't, various tests, as  
21 Applicant had stated yesterday, have been done to show  
22 there is no hydrological connection between these two.  
23 And without addressing the adequacy of that  
24 information, as Staff's technical review has not been  
25 completed, Dr. LaGarry does not challenge any of that.

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1 He makes some bald assertions based upon various  
2 reviews of information. And not to say that that  
3 there is in terms of semantic arguments could be  
4 changed, that we should probably call it this  
5 formation as opposed to this formation. But that does  
6 not controvert the data submitted by the Applicant  
7 with regard to the lack of hydrological connection  
8 between the aquifers.

9 JUDGE GIBSON: Obviously the Consolidated  
10 Petitioners have characterized Dr. LaGarry's opinion  
11 differently than you. We just heard about this A-B-I-  
12 T-Z. How do you say that?

13 MR. FRANKEL: Abitz (pronouncing).

14 JUDGE GIBSON: Abitz. The Abitz report.  
15 Now, you argued in your papers that there is no  
16 genuine dispute with the application with respect to  
17 what Abitz said. And I think we heard 46, 42,  
18 something like that, specific places where he felt  
19 that a more detailed evaluation was necessary. How  
20 does that not qualify as a dispute with the  
21 application?

22 MR. KLUKAN: To clarify, Your Honor, Abitz  
23 does not dispute the adequacy of the information. One  
24 could always --

25 JUDGE GIBSON: Adequacy of what?

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1 MR. KLUKAN: The information, the safety  
2 information submitted in the application. And the  
3 sense is that he doesn't prove that that information  
4 is inadequate in some respect. We could also have  
5 more studies, we could always have more monitoring  
6 wells, we could always have more mechanisms in place  
7 to ensure safety. But he does not controvert that  
8 what the Applicant has done is safe. You could always  
9 have more safety. You can always go one step further,  
10 10 more monitors, 20 more wells, 20, 1,000 more  
11 monitoring wells. But he hasn't shown that what was  
12 done was inadequate.

13 JUDGE GIBSON: Well, again I think they  
14 obviously characterize his opinion differently than  
15 you.

16 Yes?

17 MR. SMITH: Well, I mean I would just add  
18 some of what's in there is just incorrect. So  
19 instance, you were asking earlier about screening  
20 depths for baseline, determining baseline pre-  
21 operational water quality. The NDEQ permit section  
22 3.B says these wells shall be screened to the entire  
23 aquifer thickness with a screen to blank ratio of at  
24 least one. And then it goes on to specify the  
25 distance between these monitoring wells. So.

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1 JUDGE COLE: That solves that problem.

2 MR. SMITH: It does solve that problem.

3 And so I think that this is exactly the  
4 point that the Staff is trying to make. They raise  
5 all these issues but they don't actually say where the  
6 application doesn't do this or how this leads to some  
7 unaddressed safety concern or calls into question the  
8 conclusions that the Applicant has made regarding the  
9 safety of the operation of the site.

10 JUDGE GIBSON: Yes?

11 MR. FRANKEL: I heard Applicant counsel  
12 site to the permit that they're under but not to the  
13 actual application. Can you point out where Mr. Abitz  
14 doesn't -- where your information is in your  
15 application that Mr. Abitz --

16 JUDGE GIBSON: Would you please address  
17 your comments to the bench?

18 MR. FRANKEL: I apologize to everybody.

19 JUDGE GIBSON: Thank you.

20 MR. FRANKEL: I heard Applicant's counsel  
21 say make a reference to the permit that they're  
22 required to do this testing. Mr. Abitz had access to  
23 the application, made his comments directly on the  
24 application. So I haven't heard a reference to where  
25 in the application Mr. Abitz' concerns are addressed.

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1 JUDGE GIBSON: Okay.

2 MR. SMITH: I note here simply -- I don't  
3 have the, I could look through the application to see  
4 -- but I note that Petitioners have an ironclad  
5 obligation to examine all publicly available  
6 information to determine whether or not there is a  
7 basis for their contention. The NDEQ permit is  
8 publicly available and it explicitly prescribes the  
9 way that these wells are to be constructed and how  
10 baseline samples are to be gathered.

11 JUDGE COLE: But the NDEQ permit is not  
12 part of this record.

13 MR. SMITH: It's part of the publicly  
14 available information.

15 JUDGE COLE: How would I get it?

16 MR. SMITH: I think it's WWW.NDEQ.GOV or  
17 .NE or something like that. But it's available on the  
18 website. That's where I got it from.

19 JUDGE COLE: Thank you.

20 MR. FRANKEL: May I? There's been  
21 reference to various ironclad obligations. And I  
22 believe that that comes from the obligation of  
23 Petitioners when they want to intervene to review the  
24 application, make specific comments to the  
25 application. There is no "ironclad obligation" to

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1. comb through ADAMS, as has been suggested by NRC Staff  
2. counsel. Furthermore, there is no ironclad obligation  
3. to be familiar with every publicly filed or public  
4. information document.

5. The Board in the expansion proceeding for  
6. whatever merit this Board finds it did find that the  
7. ironclad obligation part is met when we look at the  
8. application in great detail and make very specific  
9. comments in our concerns citing to specific portions  
10. of the application and not just saying in general the  
11. application is no good.

12. JUDGE HAJEK: Okay, so we have an  
13. application for a byproduct materials license on the  
14. table. We don't have an application for dealing with  
15. non-radioactive materials on the table. Is that  
16. correct?

17. MR. KLUKAN: That is correct, Your Honor.

18. JUDGE HAJEK: Okay. The Applicant,  
19. however, chooses to operate an ISL mine in the State  
20. of Nebraska. And the State of Nebraska has a set of  
21. requirements that the Applicant must meet. Now, those  
22. requirements are promulgated by the state and the  
23. state has some obligation to monitor the performance  
24. of the mine under those requirements; is that correct?

25. MR. SMITH: In fact the state has an on-

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1 site inspector who is there every day monitoring the  
2 site.

3 JUDGE HAJEK: And how often does that on-  
4 site inspector as an individual how often is he  
5 replaced. And I kind of go and where am I coming from  
6 on that? NRC has on-site inspectors also. They don't  
7 -- does NRC have an on-site inspector for mining?

8 MR. KLUKAN: Not with respect to this  
9 facility, Your Honor.

10 JUDGE HAJEK: Okay. But you do with  
11 respect to nuclear power plants. And there is an  
12 inspection protocol that replaces the on-site  
13 inspector once every two years or three years or so,  
14 something like that. And that's where I'm coming from  
15 on that question. Is he?

16 MR. SMITH: I don't know offhand.

17 JUDGE HAJEK: Okay.

18 MR. SMITH: I'm not focused on the  
19 Nebraska.

20 JUDGE HAJEK: So you have an obligation  
21 under the -- you have a separate license then with the  
22 State of Nebraska for operation of this mine?

23 MR. SMITH: Well, there are several  
24 licenses and permits from the State of Nebraska. This  
25 particular one is for the NDEQ, authorization for

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1 underground injection and mineral production wells.  
2 There's NPDS permits, there's water withdrawal  
3 permits, there's a variety of state permits involved.

4 JUDGE HAJEK: Okay. So the requirements  
5 are inspected by the State of Nebraska and you make  
6 periodic publicly available reports in response to  
7 those regulations; is that correct?

8 MR. SMITH: Yes. There are reporting  
9 requirements similar to those that are in the NRC  
10 license with respect to the Nebraska permits.

11 JUDGE HAJEK: So in this case the  
12 Petitioners should be looking for these questions of  
13 non-radioactive materials should be engaged in looking  
14 at State of Nebraska, would that be your position,  
15 requirements rather than NRC requirements? I mean  
16 what should this Board be considering here in  
17 combination of these two?

18 Want me to rephrase that?

19 MR. SMITH: I think I understand the  
20 question. I'm not sure exactly how to step back and  
21 describe it because I think there are some fundamental  
22 principles at issue which is that the Atomic Energy  
23 Act, which is what the NRC is implementing, that's  
24 involved with radiological health and safety. So the  
25 NRC's technical review and safety review is really

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1 focused on the radiological health and safety impacts.

2 The NDEQ, their focused on the impacts to  
3 issues that are outside the scope of the NRC  
4 proceeding, outside the scope of the NRC's Atomic  
5 Energy Act jurisdiction. those involve things like  
6 protection of the aquifer, groundwater resources,  
7 those sorts of things. Those are Nebraska issues.  
8 Which is why we have this underground injection  
9 permit. There is an aquifer exemption which is a  
10 whole other permit you have to receive before you can  
11 even begin mining which ensures that the aquifer will  
12 never be used for drinking water. You have to go  
13 through a whole permitting process for that. That's  
14 actually an EPA responsibility that's been delegated  
15 to Nebraska. That's another huge effort that goes  
16 into lots of information that's provided with respect  
17 to the site, the geology and so on that goes into that  
18 review as well.

19 JUDGE HAJEK: So the relationship that I  
20 am seeing between the application to operate the mine  
21 under AEA or under NRC regulations has a connection  
22 with the State of Nebraska requirements through NEPA  
23 and through NRC's responsibility for NEPA?

24 MR. SMITH: That's correct. The NRC is  
25 required to consider the impacts of the action,

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1 including those that are outside of its jurisdiction  
2 in NEPA, yes.

3 JUDGE HAJEK: So then the question I'd  
4 have for the Staff is do you in your NEPA study or  
5 NEPA analysis incorporate the requirements in the  
6 State of Nebraska's licensing process for the mine?

7 MR. KLUKAN: We do review, Your Honor,  
8 what the NDEQ regulations would allow or prohibit the  
9 Applicant from doing in terms of its release. If the  
10 NDEQ does not allow them to release arsenic or it does  
11 allow them to release arsenic we then take that into  
12 account in evaluating what impact the operation of the  
13 facility will have, the effect of the NDEQ permits on  
14 the operation of the facility.

15 JUDGE HAJEK: You kind of emphasized not  
16 allow. But what NDEQ would require such as their  
17 methodology, the Applicant's methodology for sampling  
18 wells, you would also be looking at that would you  
19 not, and determining whether they indeed have those  
20 procedures in place to do so?

21 And if that's the case then the  
22 contentions that are being brought to the table here  
23 seem to me to be reasonable at this point.

24 MR. KLUKAN: Maybe you could for clarity's  
25 sake rephrase the question. But at the outset I'd say

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1 we, it is not the obligation of the NRC to evaluate  
2 whether NDEQ's standards are correct.

3 JUDGE HAJEK: No, that's not what I asked,  
4 not at all. But if the -- well, first of all when we  
5 use the word "standards" it was my understanding on  
6 the scientific side of use of the word "standards."  
7 And if you're making, it doesn't matter whether you're  
8 on the scientific side of operating a nuclear power  
9 plant or an ISL mine, it also impacts us in the  
10 manufacturing of our cars, in the safety standards  
11 that go into our cars, these are consensus standards.  
12 The Applicant mentioned ASTM standards a few minutes  
13 ago. And I don't remember what the specific number  
14 was but it was an example of standards.

15 I don't feel that it's the NRC's  
16 obligation to look at those standards to determine  
17 whether those standards have merit because the NRC  
18 probably participated in the development of them along  
19 with hundreds of other scientific personnel and non-  
20 scientific personnel. So I'm not asking you to look  
21 at those, the NDEQ standards and whether or not they  
22 have merit, appropriate merit in the way that they  
23 would have their requirements. I'm asking whether you  
24 look at the application of those standards by the  
25 Applicant? And does the Applicant indeed have

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1 processes in place as part of your NEPA review to meet  
2 the requirements of those standards? That's what I  
3 mean.

4 MR. KLUKAN: So you mean compliant  
5 therewith, Your Honor?

6 JUDGE HAJEK: That's correct.

7 MR. KLUKAN: Compliant with.

8 JUDGE HAJEK: Complying with those  
9 standards, yes.

10 MR. KLUKAN: The NRC Staff, Your Honor,  
11 does -- let me frame it this way -- we do put out the  
12 EA or environmental assessment for the state's comment  
13 thereupon. So if Nebraska would like to comment on  
14 the state's environmental report or has input into it  
15 there is an opportunity for it to give that input.  
16 But we don't look in the environmental report to  
17 ensure -- how can I put this? We look at the  
18 standard, Your Honor, and we look at what that  
19 standard would mean in terms of the impact. But  
20 whether we ensure compliance therewith I don't think  
21 is the issue.

22 If you're saying if we're made aware of  
23 any, if the application isn't following that standard  
24 then, yes, we are made aware of that. But we don't  
25 verify I guess in the sense that the Applicant is

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1 complying with the standard. If we are given notice  
2 by the Applicant that they have complied with the  
3 standard, that they have done everything that the NDEQ  
4 warrants, then that's where we leave it, we don't go  
5 and check or I guess you could say re-do what the NDEQ  
6 does itself.

7 But I guess if your question is just do  
8 you -- if we were made aware that they didn't comply  
9 to standard, there had been mass one could say  
10 violations, then yes, we would take that into  
11 consideration. But absent that type of information we  
12 don't do it double turn again of ensuring compliance.

13 JUDGE HAJEK: Okay. So you look to see --  
14 I'm looking for a yes or no type answer here -- do you  
15 look to see whether they have procedures in place to  
16 meet the requirements that NDEQ has upon them? I'm  
17 not asking the question do you provide a compliance  
18 inspection of that, I'm asking simply whether they  
19 have processes in place?

20 MR. KLUKAN: We can get -- I think Staff  
21 may have to get back to you on this one, Your Honor.  
22 And I think I am going to have to leave it at that.

23 JUDGE HAJEK: Okay, that's fine, we can  
24 leave it at this and we'll take it back. And there  
25 will be a management discussion and a response on that

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1 from you. Okay, thank you.

2 And then for the Applicant you do have  
3 inspections by NDEQ and you said you have an on-site  
4 inspector. And they look at not only whether you have  
5 procedures in place to perform their requirements  
6 adequately, but they also look at the results of the  
7 tests and the monitoring that their requirements  
8 require you do?

9 MR. SMITH: That's correct.

10 JUDGE HAJEK: And those are placed in a  
11 public record on a periodic basis?

12 MR. SMITH: Regular inspection reports,  
13 say daily inspection reports or weekly inspection  
14 reports, those are not, maybe not generated or we  
15 don't know if they're generated or not, they're not  
16 publicly available from NDEQ. Certainly there are  
17 reporting requirements, events that may take place  
18 that require, that trigger formal reports to NDEQ  
19 either from NDEQ inspector or from Crow Butte  
20 themselves. So I assume without knowing that NDEQ has  
21 some internal inspection procedures. I don't know, we  
22 don't know what those are. But again, under our NDEQ  
23 permit certain events are reported to the state and  
24 are publicly available.

25 JUDGE COLE: So you don't know what

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1 happens with the reports that the inspector prepares  
2 as part of his obligations to the State of Nebraska?

3 MR. SMITH: I'm not sure. I don't know  
4 that the inspector prepares physical reports on a  
5 daily basis or a weekly basis. We don't know. I  
6 don't know the frequency of that, if at all.

7 JUDGE COLE: Thank you.

8 MR. FRANKEL: May I on these points?

9 JUDGE GIBSON: Very brief.

10 MR. FRANKEL: Briefly rather than talk  
11 about hypotheticals, what would the NRC do about the  
12 May 23, 2008, NDEQ consent decree which shows 32  
13 months of continuous failure to self report violation  
14 by the application of the NDEQ permit? The two  
15 violations were failure to self report for a long  
16 basis daily continuous violation, and the daily  
17 continuous violation was using well water, well  
18 development water which is radioactive, and the permit  
19 says it's not supposed to be used for drilling, it's  
20 supposed to go to the evaporation pond, it didn't for  
21 32 straight months. Where is the integrity in the  
22 process? And I don't see the reasonableness for  
23 relying so heavily on Applicant's self reporting and  
24 the potential for compliance all the time by  
25 application.

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1 MR. SMITH: I'm sorry, I must respond to  
2 that. That's false. There was no non-reporting for  
3 some period of time. There was a discovered leak that  
4 we have addressed and resolved but as soon as it was  
5 discovered it was reported to the NDEQ inspector. It  
6 was later reported to NDEQ formally. And the actual  
7 consent decree notes that there was no failure to  
8 report, it was accurately reported, and that there was  
9 no environmental damage as a result.

10 JUDGE ROSENTHAL: I don't think this back  
11 and forth is very helpful on the resolution of these  
12 contentions.

13 JUDGE GIBSON: Okay. I would like to move  
14 on. We do have a lot to cover. And you all will have  
15 an opportunity to provide a brief summary at the  
16 conclusion, provided we have enough time and we don't  
17 get stung by that wasp, who came back I noticed just  
18 now.

19 For Consolidated Petitioners with respect  
20 to Technical Contention E, there is a reference in  
21 there to best available technology. I realize the,  
22 and hopefully the Staff realizes that, you know,  
23 referencing the fact that you don't cite to specific  
24 regulation isn't really a legitimate objection. But  
25 I do want to understand what you are seeking, what you

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1 mean by the phrase "best available technology" and  
2 what you're seeking so we can find out if that is  
3 something again that the Staff is going to be doing in  
4 their review or not?

5 MR. FRANKEL: Only because it's helpful  
6 and I have the citations, the NUREG 1569 in section  
7 2.6.2 requires thorough evaluation of the geologic  
8 setting for the purpose of ISL mining, that it's been  
9 prepared, presented along with the basic data  
10 supporting the conclusions.

11 Then there is in 2.7, subparagraph 6,  
12 there is a reference to faults and fractures to be  
13 evaluated that might preclude fluid barriers from  
14 performing adequately and that major and minor faults  
15 should be evaluated. And so we're suggesting that a  
16 thorough evaluation requires the use of best available  
17 technology.

18 Our experts tell us that 3-D computer  
19 modeling, etc., in the J.R. Engineering opinion  
20 described is industry standard, not prohibitively  
21 expensive. And we raise the question of why it's not  
22 employed by Applicant and suggest that it should be.

23 JUDGE GIBSON: Hold on just a minute. I  
24 think Geppetto needs to talk to you for a minute.

25 (Staff confer.)

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1 JUDGE GIBSON: And incidentally, that was  
2 no suggestion that you are Pinocchio. Your nose has  
3 not grown longer as this thing has gone on, so. Go  
4 ahead.

5 MR. KLUKAN: While the Petitioner does put  
6 forward information to suggest that scatter modeling  
7 may be more appropriate --

8 JUDGE GIBSON: No, you've got to speak  
9 into the microphone. We just can't hear you when  
10 you're back that far.

11 MR. KLUKAN: Though Petitioner does  
12 suggest that scatter modeling would be more  
13 appropriate it doesn't show why. If it was so not  
14 prohibitively expensive why didn't Petitioners want to  
15 come up with a different result and then show that our  
16 results were wrong? Simple suggestions that maybe  
17 this methodology would be better or maybe that  
18 methodology would be better without contradicting the  
19 results that the Applicant put forward in the  
20 information is simply not what the Commission demands  
21 of the pleading of a contention.

22 JUDGE GIBSON: Okay. Just wanted to get  
23 a little clarification of where we stood on that  
24 issue, okay. We are not going to get that resolved.  
25 I just wanted to make sure I understood what you were

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1 seeking and what you all were seeking as well.

2 Crow Butte, in your pleadings you  
3 indicated, as the Staff did, with respect to Technical  
4 Contention F, as in Frank, that there was no  
5 identification of recent research. We've talked a  
6 little bit about that with respect to the LaGarry  
7 opinion. There is one specific reference that LaGarry  
8 has that I would like you to address.

9 If I understand correctly, and please  
10 correct me if I misstate this for him, but there was  
11 his indication was that recent mapping of the region  
12 demonstrates that the geological data overestimates  
13 the thickness and aerial extent by as much as 60  
14 percent. Now, is that -- I'm sure that you don't  
15 agree with this characterization and I understand  
16 that, but what I'm really trying to get at is that  
17 does seem to me to be recent research and it does seem  
18 to be in their opinion. And I'm having difficulty  
19 understanding why that would not be a dispute, some  
20 wide contention between the parties?

21 MR. SMITH: This is an easy one in my  
22 opinion which is that --

23 JUDGE GIBSON: Well, take a swing at it  
24 then.

25 MR. SMITH: -- this is talking about the

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1 regional geology of Northwestern Nebraska. And at  
2 some level it doesn't matter if we're talking 20 miles  
3 from the site, 50 miles from the site, 100 miles from  
4 the site, what really matters is what is going on at  
5 the site and in the immediate vicinity around it.

6 As we discussed yesterday, we've got a lot  
7 of data, 10,000-plus holes where we have here's what  
8 the soils are, here's where these various aquifers  
9 begin and end, here is the pump test we've performed  
10 that shows that there is confinement above and below,  
11 here's the monitoring wells we've got that shows that  
12 there's confinement above and below, that there is no  
13 laterally extending area of this mining zone. So  
14 again the fact that there may be some dispute at a  
15 regional level about what's going on in no way calls  
16 into question the very detailed, site-specific data  
17 that Crow Butte used as a basis for its conclusions in  
18 its application.

19 JUDGE GIBSON: Okay, I will let you  
20 respond in just a second.

21 JUDGE COLE: How far outside of the area  
22 of actual mining do you have that kind of data?

23 MR. SMITH: I'm not sure exactly how far  
24 outside. I can say, for instance, the North Trend  
25 area which is several miles away we have not quite

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1 obviously not as many holes because there is no mining  
2 going on there. But there has been a significant  
3 amount of exploratory drilling all throughout that  
4 area and in other areas nearby. And those, none of  
5 that calls into question the conclusions that are in  
6 this application.

7 JUDGE COLE: Well, the reason why I ask is  
8 I was surprised to learn yesterday that certain of the  
9 geologic structures weren't in certain areas that I  
10 thought they might be and others are in areas where I  
11 didn't think they would be. Seems to me I got the  
12 impression that there is some incomplete knowledge  
13 here which would be very helpful if we had that kind  
14 of information upon which we could look at the mine  
15 areas and try to draw some information or conclusions  
16 about what could possibly happen outside if certain  
17 things happened at the mine.

18 MR. SMITH: I'm not sure I can answer your  
19 question exactly but I can say that geologic maps of  
20 the area show where these various aquifers and  
21 formation, I guess formations at the surface where  
22 they outcrop. And so from that you can draw various  
23 conclusions. For instance, the Pierre Shale outcrops  
24 between Chadron and Crawford. You know, that's one  
25 example that shows the lateral extent of the Basal

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1 Chadron doesn't extend beyond that. So there are  
2 limits to that of course.

3 JUDGE COLE: Well, we might be getting a  
4 little bit too much on the merits of an issue but I'm  
5 just telling you what was troublesome.

6 JUDGE HAJEK: And the question I have is  
7 if you have this data from 10,000 bore holes, has this  
8 data been made public in a report? And if not, why  
9 not? And if not, then I would ask that you put it on  
10 the record.

11 MR. SMITH: Well, that information shows  
12 the exhibits of the ore body that's commercial  
13 proprietary information which is the reason why it's  
14 not public. The information that we do make public is  
15 our exploratory holes that talk about the regional  
16 geology. We do the representative cross-sections are  
17 in this application. You know, and it shows where the  
18 transects are and you can see the consistency among  
19 the various formations through that.

20 So there is more than enough information  
21 in the public record to enable anyone to make  
22 conclusions about the extent of these formations.

23 And again, I don't read LaGarry's report  
24 as calling into question the model, the specific model  
25 used at the site. I think he's talking specifically

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1 about fractures and faults. And we address those  
2 through the pump tests and the data that we performed  
3 at the site and are monitoring. And that's how we've  
4 addressed that issue.

5 JUDGE COLE: So you will have, be prepared  
6 to bring forth a witness that would attest to the fact  
7 that the representations in the application with  
8 respect to where these formations are within the  
9 mining area and based upon the further information  
10 that we also have 10,000 holes that do not disavow  
11 this kind of information or backs it up?

12 MR. SMITH: If there were an admitted  
13 contention and there were a hearing then, yes, we  
14 would put forth such an expert. But I think based on  
15 what I have seen in the Petitioners' request for a  
16 hearing there has not been enough information to call  
17 into question, to create the, to get over the  
18 threshold of a genuine dispute of a material issue in  
19 the application, particularly in light of the weight  
20 of the evidence that Crow Butte has provided.

21 JUDGE COLE: I understand your position,  
22 sir.

23 JUDGE GIBSON: Okay, Mr. Frankel.

24 MR. FRANKEL: I am getting better at  
25 waiting patiently.

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1 JUDGE GIBSON: I'm sorry, what?

2 MR. FRANKEL: I said I'm getting better at  
3 waiting patiently.

4 JUDGE GIBSON: Good. It is a virtue,  
5 patience is a virtue. At least that's what my  
6 grandmother always told me, so.

7 MR. FRANKEL: Okay. Applicant's counsel  
8 distinguishes Dr. LaGarry's opinion in the part that  
9 you asked about by saying it's regional. But we have  
10 to note that Dr. LaGarry says on page 1 of his opinion  
11 that from 1996 to 2006 he led a team of geologists  
12 from Nebraska Geological Survey that mapped in detail  
13 the surfacial geology of most of Northwestern  
14 Nebraska. And he refers to 80 quadrangles, which is  
15 a very large segment, that the mapping included the  
16 entire Pine Ridge area, the area between Crawford and  
17 Pine Ridge. So his regional analysis includes the  
18 licensed area. So I don't understand the basis to  
19 distinguish that somehow the licensed area is  
20 different.

21 LaGarry also talks about doing a large  
22 amount of work in the Toadstool Park area which is  
23 very close to the mined area. And as a result we feel  
24 that there must have been some reason why his study  
25 was not cited. It can't be complete oversight and

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1 negligence.

2 And we also note that in the NDEQ  
3 criticism of the application submitted for the state  
4 permit for the expansion, which was rejected, it's the  
5 underground injection permit, that not only was Dr.  
6 LaGarry's research cited as missing from the  
7 application but that they went into great detail about  
8 the parts of Dr. LaGarry's research that are relevant  
9 to that geology. And that is part of this record in  
10 exhibit -- it's Exhibit B to the expansion,  
11 incorporated by reference in our petition.

12 JUDGE GIBSON: Okay. I think there is one  
13 other thing that we probably need to address that --  
14 and again we're not getting into merits or anything  
15 else, but I just want to be sure that the record is  
16 clear for purposes of our analysis of the  
17 admissibility of these contentions, and that has to do  
18 with the allegation regarding a 1989 letter. I would  
19 like the Applicant to address that. And there is some  
20 claim that geologic information was suppressed. And  
21 I want to make sure that you have an opportunity to  
22 address that issue. And again this is not for merits,  
23 this is simply we're trying to get enough information  
24 with respect to the admissibility contentions.

25 And please all of you keep that in mind or

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1 we're not going to get this done today.

2 MR. SMITH: This is difficult for me to  
3 discuss it without getting into the merits, which are  
4 that there is nothing to it.

5 JUDGE GIBSON: Okay.

6 MR. SMITH: All the studies that have been  
7 done at the site on core, all the core samples that  
8 have been done demonstrate that the mineralization,  
9 the grain mineralization is around individual grains  
10 of sand, not in faults, period.

11 JUDGE GIBSON: Well, my question really  
12 had more to do with providing context for this because  
13 the allegation is that there was suppression of  
14 geologic data. And I am only asking you for context,  
15 okay, that's all.

16 MR. SMITH: Okay. As I understand it,  
17 this letter was sent to the NRC. The NRC knew about  
18 it at the time they did their initial licensing of  
19 Crow Butte. So they took into account the issues  
20 raised in the letter when they were performing their  
21 review of the commercial, issuing the commercial  
22 license for Crow Butte. Frankly, at Crow Butte we  
23 don't know what this data is that we are alleged to  
24 have suppressed. We provided all the information we  
25 had to NRC and to NDEQ at that time. So we're a

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1 little puzzled by it. But again and we've taken  
2 active steps since then to demonstrate that that's not  
3 an issue.

4 JUDGE GIBSON: Okay. That's all we wanted  
5 was some context.

6 If we could turn to Miscellaneous -- Okay,  
7 yes, please do.

8 JUDGE COLE: Are you familiar with this  
9 1989 letter from, is it from Mr. Peterson?

10 MR. KLUKAN: Yes. Yes, Your Honor.

11 JUDGE COLE: Do you have any information  
12 concerning that letter, any knowledge?

13 MR. KLUKAN: I have not personally  
14 reviewed that report. I am familiar with its  
15 existence, Your Honor. But the person who would be  
16 equipped to speak to that, our Project Manager, simply  
17 isn't here right now. And if you --

18 JUDGE COLE: I'm sorry, I can't hear you,  
19 sir.

20 MR. KLUKAN: Due to the microphone again.

21 I'm not equipped to answer that question.  
22 I haven't personally reviewed that report myself. The  
23 person equipped to speak to that point, our Project  
24 Manager, simply isn't here right now. But if your  
25 Board would like additional information on that report

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1 the NRC Staff will be happy to oblige.

2 JUDGE COLE: But do you know if the NRC  
3 reviewed that and considered it in its actions in  
4 issuing the initial license?

5 MR. KLUKAN: I am simply not privy to any  
6 information regarding what we considered at the  
7 initial licensing stage or how that was incorporated  
8 into Staff's analysis or not.

9 JUDGE COLE: Is that information available  
10 in the archives of NRC?

11 MR. KLUKAN: It is. As far as I am aware,  
12 Your Honor, it is available on public ADAMS.

13 JUDGE COLE: Thank you.

14 JUDGE GIBSON: Recognizing you are not  
15 familiar with this particular document, you did read  
16 the Consolidated Petitioners' pleadings, didn't you,  
17 and they did make this allegation? Is no one, can no  
18 one speak to that except somebody that's not here? I  
19 mean did you just not bother to research it?

20 MR. KLUKAN: While I'm not personally  
21 familiar with the document, Your Honor, I think it's  
22 the NRC Staff position that that report isn't relevant  
23 to the current proceeding. If it was reviewed by the  
24 NRC Staff, and again I'm not aware of that, that was  
25 an issue for the prior licensing, initial licensing

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1 action. The NRC Staff found at that time the  
2 Commission approved that initial license on the basis  
3 of the information it had available to it. I can't  
4 speak more to what the NRC Staff with the document did  
5 at that time.

6 JUDGE COLE: You say it is available on  
7 ADAMS. Are you sure of that, sir?

8 MR. KLUKAN: I am sure. As to my personal  
9 belief, I have seen an ML number for this document.  
10 But I can again verify that, Your Honor.

11 JUDGE COLE: Even more importantly, does  
12 the ADAMS record hold the NRC response to that  
13 document and a summary of its review of that document?

14 MR. KLUKAN: It does, Your Honor.

15 JUDGE COLE: Thank you.

16 MR. FRANKEL: Excuse me, Your Honor. In  
17 the July 23 hearing the NRC Staff specifically said  
18 that while it had evaluated the faults and fractures  
19 component it had not necessarily evaluated the  
20 suppression component. And in that hearing NRC Staff  
21 counsel promised, that was the July 23 hearing in the  
22 expansion proceeding, the NRC Staff counsel promised  
23 to look into that and get back to us. And here we are  
24 in September and they still don't know.

25 JUDGE GIBSON: Well, I think it would be

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1 an easy matter perhaps to consult with the person or  
2 persons. And perhaps you can amplify the record.  
3 Okay? And we will be able to do that later this  
4 afternoon.

5 If there is nothing else on that, I would  
6 like to turn to Consolidated Petitioners'  
7 Miscellaneous Contention L. What is the amount of the  
8 bond? Is it 3 million?

9 MR. MCGUIRE: Oh no.

10 JUDGE GIBSON: No?

11 MR. MCGUIRE: 35 million.

12 JUDGE GIBSON: 35 million, okay.

13 MR. SMITH: The amount of the bond was --  
14 I have the numbers with me if I can have just a  
15 second.

16 JUDGE GIBSON: Please, please. That's all  
17 right. We are very confused, so.

18 MR. SMITH: So the 2008 surety bond, which  
19 is something that is required by license condition to  
20 update on an annual basis, was \$25,207,672.

21 This week we were required to submit our  
22 annual update for 2009. That has been increased to  
23 \$34,207,741. That's what we've submitted to the NRC.  
24 They will review and approve that as part of their  
25 regular regulatory processes.

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1 JUDGE GIBSON: Good.

2 Okay, next question. Is the bond limited  
3 to the existing site? Will you be posting an  
4 additional for if you get the amendment granted or  
5 will this cover the satellite facility North Trend  
6 amendment area?

7 MR. SMITH: This does not cover the North  
8 Trend because it's not part of our current license.

9 JUDGE GIBSON: So you will be going  
10 through the bonding process for that as well when you  
11 get to that point if the amendment is granted?

12 MR. SMITH: Absolutely.

13 JUDGE HAJEK: Where specifically are the  
14 calculations for the size of the bond contained?

15 MR. SMITH: The calculations for the size  
16 of the bond are included in the application to the NRC  
17 that's made on an annual basis for approval of the  
18 next year's surety bond.

19 JUDGE HAJEK: I guess my question was  
20 different from that. Where do the calculations come  
21 from? I mean what's the basis for the calculations  
22 for the size of the bond? Is there a regulatory  
23 section you can site on that?

24 MR. SMITH: If you're talking about what  
25 elements need to be included in the bond.

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1 JUDGE HAJEK: Yes.

2 MR. SMITH: The elements, those are  
3 included in 10 C.F.R. Part 40, Appendix A, I think  
4 it's criterion 9 is what discusses the elements that  
5 must be included. The actual calculations that are  
6 made under that are done by Crow Butte or a contractor  
7 as appropriate.

8 JUDGE HAJEK: So there is a formula that  
9 is developed out of Appendix A, Part 9?

10 MR. SMITH: I wouldn't call it a formula.  
11 It's not reactors where there is sort of a generic  
12 formula. Instead it's based on what the actual cost  
13 of decommissioning would be. You have to look into,  
14 you have to provide a contingency factor, you have to  
15 make sure that you provided enough bond for an  
16 independent third party to perform the decommissioning  
17 and restoration so that, you know, in case Crow Butte  
18 goes out of operation there is enough money to pay  
19 someone to do it.

20 You've got to take into account the number  
21 of times you have to sweep the groundwater, what kind  
22 of treatment processes you are going to use, what kind  
23 of waste you're going -- volume of waste you're going  
24 to expose of and estimate the cost for that. You  
25 know, there's removal of pipe, disposal and so on.

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1 There's lots of different components that go into  
2 that.

3 JUDGE GIBSON: Now, are those calculations  
4 you just mentioned are those in publicly available  
5 documents that the Petitioners would have access to?

6 MR. SMITH: I assume. They are submitted  
7 to the NRC.

8 JUDGE GIBSON: Are they?

9 MR. SMITH: Or, I'm sorry, they're  
10 submitted to DEQ.

11 JUDGE GIBSON: Okay.

12 MR. SMITH: And presumably a copy is sent  
13 to the NRC.

14 JUDGE GIBSON: Okay. Let's start with the  
15 DEQ and then I will ask the NRC. Are those, are the  
16 calculation documents that show how you reach that  
17 number available at the DEQ office?

18 MR. SMITH: Yes, we presume so.

19 JUDGE GIBSON: Okay.

20 MR. KLUKAN: Yes, Your Honor.

21 JUDGE GIBSON: And at the NRC?

22 MR. KLUKAN: Yes, Your Honor.

23 JUDGE GIBSON: Okay.

24 MR. SMITH: It's broken out by year, by  
25 activity. It shows what the change was from the year

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1 previous to the year past. You know, for instance  
2 we're undertaking new and different activities this  
3 year which is why the increase in the amount of the  
4 bond and so forth.

5 JUDGE GIBSON: Okay. And are they broken  
6 down by equipment costs, labor costs, monitoring  
7 costs, remediation costs?

8 MR. SMITH: Yes.

9 JUDGE GIBSON: In such a way that somebody  
10 who is not a cost accountant could understand what it  
11 was all about?

12 MR. SMITH: I can understand them so, yes,  
13 they can be understood by someone who is not a cost  
14 accountant.

15 JUDGE GIBSON: Okay.

16 MR. SMITH: It's broken down at level of  
17 detail of this many feet of such and such pipe needs  
18 to be disposed of. I mean it's got a pretty finely  
19 grained level of detail.

20 JUDGE GIBSON: Okay. Now, let's go to  
21 Miscellaneous Contention G. I just have one question  
22 about that. Is there any dispute when it flows of the  
23 direction of the White River that it goes toward the  
24 Pine Ridge Reservation?

25 MR. SMITH: Not from us, no.

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1 JUDGE GIBSON: Okay. Well, it appeared  
2 that there was based on what I was looking at. But,  
3 you know, maybe there's no dispute about that issue.

4 MR. SMITH: No, there's no dispute. It's  
5 just a matter of where you stop your description. We  
6 don't say that it goes on to the Missouri River and  
7 the Missouri River goes on. It's just a level of  
8 detail.

9 JUDGE GIBSON: Okay. But no dispute about  
10 the flow. Okay.

11 MR. SMITH: Absolutely not.

12 JUDGE GIBSON: Okay, Miscellaneous  
13 Contention J. It's my understanding is that there was  
14 some dispute about a missing page in the renewal  
15 application that may have been attached to the Staff's  
16 respond. Crow Butte added it as an appendix. I just  
17 want to know for Consolidated Petitioners, have you  
18 seen that page, that missing page?

19 MR. FRANKEL: We have by now.

20 JUDGE GIBSON: All right. And there is no  
21 dispute about the missing page or something on that  
22 page particularly that raises any concerns for you, is  
23 there?

24 MR. FRANKEL: Well, there is actually.

25 JUDGE GIBSON: Okay, would you please tell

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1 us what it is?

2 MR. FRANKEL: Of course.

3 JUDGE GIBSON: Be careful, the wasp may  
4 sting you.

5 MR. FRANKEL: We're friends.

6 The missing page has a section 3.1.4 which  
7 talks specifically about the process description. And  
8 it states that the chemistry of solution mining  
9 involves an oxidation step to convert uranium and a  
10 solid state to a form that is easily dissolved. We --  
11 and it describes chemically the oxidation process.  
12 The only part of concern here is that we don't want to  
13 be penalized for not including this small amount of  
14 information in the parts of our petition relating to  
15 oxidizing of the uranium and the release of arsenic  
16 through that oxidation.

17 So while I feel that personally that this  
18 would be grounds to even republish the whole  
19 application, I do feel that most, if not all, of the  
20 Petitioners that would be interested in it are here.  
21 We have the information. And we already have the  
22 concept in our petition. We just don't want to be  
23 penalized for not referring to this information.

24 JUDGE GIBSON: Okay. I think we can  
25 probably make a ruling right now that you're not going

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1 to be penalized for not putting that in your  
2 application. If there needs to be some reference I'm  
3 sure that neither the Staff nor the Applicant is going  
4 to object to some reference to this missing page that  
5 may not have been in your original petition.

6 Is that a fair statement? Okay?

7 MR. KLUKAN: Of course, Your Honor.

8 JUDGE GIBSON: Great.

9 MR. FRANKEL: Thank you.

10 JUDGE GIBSON: Got your relief.

11 MR. FRANKEL: Every little bit helps.

12 Thank you, Your Honor.

13 JUDGE GIBSON: With respect to  
14 Miscellaneous Contention K, Consolidated Petitioners,  
15 you have -- I have said previously we are not going to  
16 get into the issue of foreign ownership. And I can  
17 guarantee you we're not going to get into that. But  
18 there is one thing that I saw as a procedural twist  
19 that we need to clear up.

20 Are you asserting that the entire license  
21 renewal application needs to be republished?

22 MR. FRANKEL: I'm sorry, Miscellaneous  
23 Contention K?

24 JUDGE GIBSON: K.

25 (Pause.)

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1 MR. FRANKEL: No, Your Honor. We are  
2 suggesting --

3 JUDGE GIBSON: In the reply that you  
4 submitted I believe you indicated that you were  
5 seeking --

6 JUDGE HAJEK: That was for J.

7 JUDGE GIBSON: That was for J. My  
8 mistake. I'm sorry. For J. I apologize.

9 MR. FRANKEL: And we got our ruling on  
10 that one.

11 JUDGE GIBSON: Okay. Okay, I'm sorry, I  
12 got my -- it's my fault. My fault. Okay, great.  
13 Well, that takes care of another issue we don't have  
14 to deal with.

15 I think this might be a good time to  
16 recess for lunch. I've actually got some questions  
17 that I think we've already addressed that I can clean  
18 up. And I suspect the other Board members do as well.  
19 So we will stand in recess.

20 What's the time now?

21 JUDGE COLE: 11:38.

22 JUDGE GIBSON: 11:38. We want to get back  
23 together at 1:00 o'clock. Okay.

24 (Whereupon, at 11:38 p.m., the hearing was  
25 recessed, to reconvene this same day at 1:00 p.m.)

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

(1:05 P.M.)

JUDGE GIBSON: I'd like to turn to the Tribe's Environmental Contention A.

MR. KLUKAN: Your Honor, before that, Staff resolved some of the comments the Board had about the previous discussion this morning, Judge Cole's question regarding the Peterson letter and Judge Hajek's comments about or regarding compliance with the NDEQ permit condition. I don't know if this would be a time to resolve those now or if there would be a time better on?

JUDGE GIBSON: That would be fine, yes.

MR. KLUKAN: Okay. Our *mea culpa*, Your Honors, Judge Cole, the Staff for whatever reason, wires getting cross or whatnot, but I do understand what you were saying. If you look at page 45 of the Staff's response we do discuss the Peterson letter there and the allegations made therein and provide the ML citations as well.

The Staff did review the Peterson letter, the arguments regarding suppression of information. The Staff took it very seriously but nonetheless found that the issues have been resolved.

The information is also, satisfaction of

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1 that information is addressed in the December 19, 1998  
2 finding of no significant impact.

3 With regard to your question, Judge Hajek,  
4 I think I gave a slight misimpression about whether  
5 these NDEQ permits were dispositive or not. We look  
6 at them, for lack of a better term, holistically. We  
7 look at a variety of information, including the NDEQ  
8 permits. But we don't specifically look at compliance  
9 therewith, we look at their existence as a piece of  
10 information within it. So the existence or the lack  
11 of existence of one of the permits is not dispositive  
12 of whether we will find an impact or not, but we do  
13 look at it if the information is available.

14 JUDGE HAJEK: Thank you.

15 MR. SMITH: Thank you.

16 JUDGE HAJEK: And that's part of the  
17 documents?

18 MR. KLUKAN: Yes, Your Honor.

19 JUDGE GIBSON: Thank you for that  
20 clarification.

21 With respect to the Tribe's Environmental  
22 Contention A, Crow Butte has indicated in its briefing  
23 that there is -- well, let me, I shouldn't  
24 characterize it that way. I am confused. There seems  
25 to be some distinction between the phrase "non-

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1 radiological health effect" and "non-radiological  
2 health impact". And are you suggesting there is a  
3 difference between those two phrases? And if so,  
4 could you please edify us? If not, I was just simply  
5 mistaken.

6 MR. SMITH: I apologize, maybe I'm not  
7 sure I understand your question. There is a  
8 difference between the phrase "non-radiological  
9 impacts" and non-radiological health impacts" because  
10 non-radiological impacts encompasses a much greater  
11 universe of impacts than just the health impacts.

12 JUDGE GIBSON: Okay. And that is the --  
13 is there any difference between the phrase "non-  
14 radiological health effect" and "non-radiological  
15 health impact"?

16 MR. SMITH: Thank you. I'm sorry, I now  
17 recognize your earlier question. No.

18 JUDGE GIBSON: There is none?

19 MR. SMITH: We don't make a distinction  
20 between those two phrases.

21 JUDGE GIBSON: Okay, thank you.

22 I don't want to plow ground we've already  
23 covered but I just want to make sure with respect to  
24 this contention there is in the order we issued  
25 earlier we had asked you to address or be prepared to

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1 address whether non-radiological parameters were going  
2 to be addressed in the environmental review that you  
3 conducted. My understanding from what you said  
4 earlier is, yes, they are. But I just want to be sure  
5 that we get clarification with respect to this  
6 contention.

7 MR. KLUKAN: Yes, Your Honor, non-  
8 radiological health effects will be addressed, will be  
9 addressed in the Staff's NEPA environmental review.

10 JUDGE GIBSON: Okay. I realize we have a  
11 motion for leave to file a new contention and we'll  
12 hopefully get to that later on this afternoon. But I  
13 just, it appeared to me that there were some pretty  
14 significant, some pretty significant overlap between  
15 that newly -- that motion for leave, the contention  
16 that's the subject of that motion for leave and this  
17 Environmental Contention A in so far as it contains  
18 arsenic in drinking water. Do you see any difference  
19 or do you see those as being closely related?

20 MS. LORINA: Well, I think that was in my  
21 motion to the Tribe. Just so we're clear. I  
22 certainly object to combining them. It's part of the  
23 overall investigation into possible health effects  
24 that we are seeking and which we would certainly wish  
25 that the possible effects of arsenic.

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1 JUDGE GIBSON: Staff?

2 MR. KLUKAN: Your Honor, --

3 JUDGE GIBSON: We can into the merits of  
4 the motion for leave later.

5 MR. KLUKAN: Okay.

6 JUDGE GIBSON: I just want to know if you  
7 had any specific -- I'm only asking for the  
8 relationship that appears to exist to me between this  
9 new contention that they're seeking to have added and  
10 Environmental Contention A that the Tribe has filed?

11 MR. KLUKAN: No, Your Honor. If both were  
12 admitted we would not have an objection to joinder  
13 thereof.

14 JUDGE GIBSON: Okay. How about Crow  
15 Butte?

16 MR. SMITH: I think the bases that are  
17 raised in this petition to leave to file a new  
18 contention are significantly different and unlike any  
19 of the bases that were provided previously. So in my  
20 view there's -- if you phrase the contention broad  
21 enough to encompass those than I guess it's the same.  
22 But I don't see any bases here for a contention, much  
23 less an admissible contention.

24 JUDGE GIBSON: I realize you don't. But  
25 I'm only really speaking to the question of the

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1 overlap. And it appeared to me that there was  
2 substantial overlap between the two. I mean I realize  
3 you don't think that either one has validity and  
4 should be admitted. And I'm not really addressing  
5 that.

6 MR. SMITH: I understand. But not even to  
7 a question of validity, it's that they don't meet the  
8 standard for an admissible contention.

9 JUDGE GIBSON: And that's fine. That's  
10 fine. Again, I'm only questioning whether there is  
11 overlap between the two.

12 Consolidated Petitioners?

13 MR. FRANKEL: We would not object to  
14 joining them.

15 JUDGE GIBSON: Okay. Okay, now I promised  
16 you yesterday that we would get to this. I know that  
17 you are prepared to address it. Again I don't want to  
18 get into the merits at all on this but I do want you  
19 to perhaps provide us with some context.

20 In your Contention B and in the  
21 Consolidated Petitioners' Miscellaneous Contentions A  
22 and B there is a claim asserted that has to do with a  
23 failure to consult with tribal authorities. And what  
24 I think the Board needs is some context and a little  
25 clarity about specifically what you are seeking. And

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1 when you address this I would like for you to sort of  
2 divide it up, even though I realize that that may not  
3 be quite what everyone would like to see. But I would  
4 like for you to divide it up between consultation with  
5 respect to the existing site and with respect to  
6 anywhere else. Okay?

7 MS. LORINA: Under NEPA consultation is  
8 required any time --

9 JUDGE GIBSON: You may need to get just a  
10 little closer to the mike. Thank you.

11 MS. LORINA: Any time there is major  
12 federal action that could have an impact. So we would  
13 require or consultation is required for the existing  
14 site for this renewal, the satellite facility of  
15 course, and any impact caused by this federal action,  
16 so perhaps the trucking back and forth between the two  
17 sites. That's part of the license. So if that's  
18 going to impact any potential cultural resources,  
19 consultation would be required.

20 And, of course, under NEPA its cumulative  
21 effect must be looked at.

22 JUDGE ROSENTHAL: Who has to do the  
23 consulting with the Tribe?

24 MS. LORINA: It's a government to  
25 government consultation so only the NRC can. However,

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1 in their application they made representations about  
2 what cultural resources are in the area, that they've  
3 consulted with the SHPO and this is what we found.

4 JUDGE ROSENTHAL: But if it's consultation  
5 and it's the NRC that has to do the consulting, why  
6 isn't this contention premature? Because at this  
7 point the NRC, as I understand it, has, if it's  
8 embarked at all in its NEPA review it's in a very  
9 preliminary stage and who knows at this point whether  
10 there's going to be this consultation? I mean this  
11 again is a problem that I have with a lot of the  
12 contentions that have been put forth because any kind  
13 of contention that deals with an obligation on the  
14 part of the NRC in the course of its NEPA review as I  
15 see it, since we don't know what the NRC is going to  
16 do or refrain from doing, the contention is plainly  
17 premature.

18 Once the NRC has completed its NEPA  
19 review, issued its environmental impact statement,  
20 then we will see what the NRC did, what the NRC did  
21 not do. If it had an obligation to consult, it didn't  
22 consult, then it would seem to me you have a  
23 contention. But if we're dealing now with the failure  
24 to consult and the obligation of consultation is on  
25 the NRC, I don't see how this contention at this

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1 juncture is admissible.

2 MS. LORINA: Perhaps I should back up for  
3 a moment. Part of the reason why consultation is  
4 required is because the Tribe, it's their cultural  
5 resources, they are uniquely capable of identifying  
6 those resources. Now, this goes to the accuracy and  
7 completeness of their application. Because in their  
8 application they made representations about what  
9 cultural resources and artifacts are in the area.  
10 NEPA requires the NRC to consult with the Tribe, but  
11 as part of their application they had to identify  
12 those resources. And plainly, as Congress recognized,  
13 they're incapable.

14 Now, not that the SHPO can't have any  
15 input or no knowledge on this, but the Tribe is  
16 uniquely capable of identifying those resources.

17 JUDGE ROSENTHAL: That may be so but still  
18 if the licensee or Applicant has not presented  
19 information at this point that it was required to  
20 supply at some juncture for the benefit of the Staff's  
21 conduct of its NEPA evaluation, the benefit of the  
22 Staff's consultation with the Tribe, the NRC then  
23 presumably has to deal with the licensee Applicant in  
24 that respect. But it seems to me, again, if the legal  
25 obligation is an obligation that falls on a party, the

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1 NRC not on the part of the Applicant, your contention  
2 it would appear to me must abide the event of the NRC  
3 issuing its environmental impact statement, at which  
4 point they either have consulted or they have not  
5 consulted, and they've either required the Applicant  
6 to put forth the information they need or they  
7 haven't. But that's the way it seems to me at this  
8 point.

9 MS. LORINA: But I'm not sure why the  
10 Applicant had to identify cultural resources in the  
11 area in their application if it weren't meant to be  
12 complete and accurate.

13 JUDGE ROSENTHAL: Again you're talking  
14 about the failure to fulfill an obligation to consult.  
15 And again that obligation falls on the NRC, it does  
16 not fall upon the Applicant as I understand it.

17 MS. LORINA: I guess perhaps I read it  
18 differently because the reason why there is the  
19 requirement of consultation is for accuracy and  
20 completeness, not just respect to the Tribe as a  
21 sovereign nation but their unique knowledge, so only  
22 they can identify those resources, not with a  
23 consultation but just the fact that they even exist.  
24 And they are claiming certain things either exist or  
25 don't exist. And we would put forth in their

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1 application that's facially invalid because who are  
2 they to identify these resources? We'd be questioning  
3 the accuracy of that part of their application.  
4 That's our contention.

5 JUDGE ROSENTHAL: But if they can do that  
6 -- if they consult with you as they're obliged, you  
7 say, to do then you can put forth to them any  
8 information you have that you want to be considered in  
9 the course of the NEPA evaluation. I mean isn't that  
10 the point of the consultation is to get the benefit of  
11 the Tribe's input into the deliberations that the  
12 Commission has to make. So as long as they consult  
13 with you it seems to me you have the full opportunity  
14 to bring to their attention any concerns that you  
15 have, any information that you have that you think is  
16 relevant.

17 JUDGE COLE: I have a question for the  
18 Staff. This is a license renewal. And in previous  
19 applications was the issue of cultural resources  
20 addressed in any documents that the Staff produced?

21 MR. KLUKAN: As far as I am aware, Your  
22 Honor, we did. We did review cultural resources as  
23 part of our environmental review of the initial  
24 licensing facility. But nonetheless, the NRC Staff  
25 will again make that review as part of its renewal

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1 environmental review. So there will be, as counsel  
2 requests, there will be this consultation. It is  
3 mandatory upon the NRC to engage in this consultation  
4 and participation of the Tribes has to be obliged by  
5 the NRC if they so desire to participate in this  
6 consultation.

7 The Applicant is only required by the NRC  
8 Staff or by the NRC to provide certain information to  
9 facilitate that process. In no way do the assertions  
10 of the Applicant in the application constitute in any  
11 manner the NRC's conclusions with regard to this  
12 consultation. It's just a way for us to start  
13 gathering information. But that in no way constitutes  
14 what we need to do. This process has begun.

15 I have been in contact with the counsel  
16 and the NRC -- counsel for the Tribe, and NRC  
17 personnel have been in contact with personnel in the  
18 Tribe, and this is ongoing and will occur, Your Honor.

19 JUDGE COLE: So in previous applications  
20 were any cultural resources found and reported?

21 MR. KLUKAN: Yes, Your Honor. There were  
22 found to be cultural resources in the vicinity.

23 JUDGE COLE: In your view did the NRC  
24 Staff contact the appropriate authorities?

25 JUDGE GIBSON: Actually you mean the Sioux

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1 Tribe authorities?

2 JUDGE COLE: That's one of them, yes.

3 JUDGE GIBSON: I'm sure they talked with  
4 the Crow Butte authorities.

5 MR. KLUKAN: As far as we are aware at  
6 this point during that review we talked to the State  
7 Historical Preservation Office. I am not aware that  
8 we talked to the Tribe at that point. But even if we  
9 had, NRC views this obligation as redundant in some  
10 sense, so we would do it again as part of our NEPA  
11 review. It's built in by the National Historic  
12 Preservation Act under section 106.

13 JUDGE COLE: Thank you.

14 JUDGE GIBSON: Well, it sounds to me like  
15 then the Tribe was not apprised at least directly that  
16 you all had found cultural resources previously?

17 MR. KLUKAN: We just don't know at this  
18 time, Your Honor, who --

19 JUDGE GIBSON: Could you find out for us,  
20 please?

21 MR. KLUKAN: Sure.

22 JUDGE GIBSON: Thank you.

23 Let me ask you, counsel, is the basis for  
24 the consultation involve -- let me use, I don't want  
25 to limit myself to the word consultation, let's just

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1 say involvement, okay. Is the sole basis for the  
2 Tribe's involvement under NEPA? Is there some other  
3 independent statutory obligation on the part of the  
4 NRC with respect to these cultural resources? I'm  
5 sorry, I'm just not aware of this, the statutory law  
6 in this area.

7 MS. LORINA: Perhaps I should back up for  
8 a moment.

9 JUDGE GIBSON: Please.

10 MS. LORINA: Because in order to  
11 understand Indian law there are basic canons of  
12 construction you must understand. To understand the  
13 relationship between the Federal Government and any  
14 federally recognized tribe you need to understand  
15 these canons. That's why even in an undergraduate  
16 class on American Indian Studies this is the very  
17 first thing you learn the first day because you cannot  
18 understand anything else without understanding this.

19 Number one, the trust responsibility  
20 dating back the recognition to the Marshall Trilogy.  
21 The Federal Government has a trust responsibility with  
22 these tribes. It's a fiduciary duty of the highest  
23 order.

24 Number two, only Congress can modify or  
25 abrogate a treaty. A long line of United States

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1 Supreme Court cases, U.S. v. Dion, Menominee Tribe v.  
2 United States, Washington Commercial Fishery, etc. It  
3 goes on. This is undisputed. And when Congress  
4 intends to modify a treaty it must be clear and  
5 unequivocal that Congress debated actually abrogating  
6 the treaty before they do it. They never imply that  
7 Congress intended to.

8 So these are the basic canons of  
9 construction that color everything. And even the very  
10 first canon, the trust responsibility, is what informs  
11 the fact that you read a treaty as the Indians would  
12 have. You don't say, well, this is what a lay, even  
13 a typical lay person would have understood, it's what  
14 the Indians intended when they negotiated these  
15 treaties.

16 That's why you have Minnesota v. Mille  
17 Lacs Band of Chippewa, I believe a 1999 Supreme Court  
18 case. In it they had a subsequent treaty where the  
19 Indian tribe conceded certain property interests and  
20 rights and other things. Minnesota argued, well, they  
21 gave up their hunting rights that were recognized in  
22 a previous treaty. The Supreme Court says, no, there  
23 is no discussion of that. They would not have done  
24 that lightly, so no. You know, the United States is  
25 the one that actually wrote the treaty, and if they

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1 wanted that. This informs all of it, every  
2 interaction.

3 Now, the NRC as a federal agency is an arm  
4 of the Federal Government. It's already cited in the  
5 petition the fact that the federal agencies have the  
6 same trust responsibility as the rest of the Federal  
7 Government. It's a fiduciary duty.

8 Now, there's also of course a line of  
9 cases that say these cultural resources and other  
10 usufructuary rights are property rights. They have a  
11 fiduciary duty. That's why in Gila River, it's a  
12 Court of Claims case, Gila River Band community sued  
13 the United States successfully for not protecting  
14 their water rights from upstream diversion. That's  
15 their responsibility as a trustee.

16 So these cultural resources on our  
17 aboriginal lands belong to the Tribe, not just a  
18 consultation as to recognition of the government, but  
19 it's a right, it's a property right that the NRC has  
20 an obligation not to allow that right to be taken  
21 away, those property rights destroyed. It's a  
22 fiduciary duty as the Tribe's trustee.

23 And I can also -- I know we were going to  
24 address it later. I can address it now if you want,  
25 federal agencies considering treaties. It's --

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1 JUDGE GIBSON: I just want to get  
2 specific, a specific answer to the question. I  
3 appreciate your case law discussion there but I want  
4 to know what other, if there is other statutory  
5 authority independent of NEPA that would provide for  
6 the NRC and the Tribe to be involved together in this  
7 cultural resource discussion or protection?

8 MS. LORINA: The only thing I could say is  
9 reading it in harmony the fact that a tribe has to be  
10 involved under NEPA to identify those resources, I  
11 would just point to the trust responsibility so that  
12 they don't be destroyed. If the tribe isn't  
13 consulted, how do we know there are cultural resources  
14 being destroyed?

15 MR. SMITH: Your Honor, I could perhaps  
16 answer that question and clarify.

17 JUDGE GIBSON: That's okay. I don't think  
18 she's finished.

19 Go ahead.

20 MS. LORINA: And there are also various  
21 executive orders that I know I cited it in my amicus  
22 brief about consultation with tribes. It was a  
23 President Clinton order. I can pull it up in a few  
24 minutes. But it specifically mandates consultation.  
25 I believe 1994, but I will have to look.

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1 JUDGE GIBSON: Okay. Well, just the  
2 President Clinton order involving consultation. You  
3 don't have to find it.?

4 Go ahead.

5 MR. SMITH: Thank you. I guess I would  
6 start with NEPA, the National Environmental Policy  
7 Act, doesn't require consultation. That is not a  
8 requirement of NEPA despite what we've heard.

9 The requirement to consult comes from the  
10 National Historic Preservation Act which is a  
11 different statutory basis for requiring consultation.  
12 So that's sort of the basic outlines of the statutes  
13 that would apply regarding consultation. It's not  
14 from NEPA, it comes from NHPA.

15 At the time Crow Butte was first licensed  
16 there was no process by which you could perform those  
17 consultations through the NEPA process. Since then in  
18 the late 1990s or early 2000s there has been a change  
19 in the National Historic Preservation Act regulations  
20 which permit agencies like the NRC to fulfill their  
21 section 106 responsibilities under the National  
22 Historic Preservation Act through the NEPA process,  
23 that is through the process of creating an  
24 environmental impact statement and consulting with  
25 tribes so that they can satisfy their section 106 NHPA

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1 responsibilities. And that's, as I understand it, the  
2 framework that applies to consultation.

3 JUDGE GIBSON: That was helpful. Now just  
4 one second.

5 Now does that resonate with you and do you  
6 see anything, do you disagree with what he just said?

7 MS. LORINA: No. It's just that what is  
8 commonly accepted is that section 106 under NHPA  
9 brings in NEPA, NAGPRA, National Archeology, ARTA,  
10 etc. It brings it all in. Restoration Act. Thank  
11 you.

12 JUDGE GIBSON: Okay, thanks.

13 Okay, then you'd agree with that?

14 MR. SMITH: Yes.

15 JUDGE GIBSON: Okay. So I think we are at  
16 least now talking about the same statutory basis for  
17 the -- I'm sorry, Judge Rosenthal, I didn't mean to  
18 interrupt you.

19 JUDGE ROSENTHAL: Consultation to what  
20 end? I mean what constitutes a consultation, just to  
21 go and get the views of the tribe which it can then  
22 use or not use as it sees fit? I mean is there any  
23 kind of substantive aspect of this consultation or is  
24 it simply to have to touch base with them and obtain  
25 their views, which again they could reject or accept

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1 in the course of a NEPA review? I'm not --  
2 consultation is a term that can have many different  
3 meanings.

4 MR. SMITH: That's right. And I think  
5 there's regulations that lay out what occurs during  
6 the actual consultation. As I understand it there is  
7 a range of actions that an agency, any agency can take  
8 into account the consultation, they can address those  
9 requirements, they can enter into various MOUs with  
10 regard to the tribe on how certain resources are going  
11 to be managed.

12 Also there is a process by which they can  
13 determine that they disagree, the agency disagrees  
14 with the assessment of the consulting parties and can  
15 opt out or take the action nonetheless. There is a  
16 whole series of requirements and procedures that apply  
17 in that situation.

18 JUDGE GIBSON: Okay. Now, again for  
19 purposes of this consultation I want to -- there  
20 appears to be a role, and perhaps a central role for  
21 the State Historic Preservation Officer; is that  
22 correct?

23 MS. LORINA: No, not for consultation.

24 JUDGE GIBSON: Okay. So --

25 MS. LORINA: That's part of NEPA or NHPA,

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1 that's one aspect.

2 JUDGE GIBSON: Okay.

3 MS. LORINA: But for consultation it's  
4 with the Tribe, either the tribe's THPO, Tribal  
5 Historic Preservation Officer, or someone else they  
6 nominate.

7 JUDGE GIBSON: Okay. Now, so it sounded  
8 like earlier, although you are going to confirm this,  
9 it sounds earlier like if you all had consultation you  
10 had consultation with the State Historic Preservation  
11 Officer but not with the Tribe? Is that a fair  
12 assessment?

13 MR. KLUKAN: We don't know yet, Your  
14 Honor.

15 JUDGE GIBSON: But you are going to find  
16 out for us?

17 MR. KLUKAN: We are, we're finding that  
18 out right now.

19 JUDGE GIBSON: Good, good. Okay. We look  
20 forward to that answer.

21 MR. FRANKEL: Your Honor, if I might chime  
22 in briefly?

23 JUDGE GIBSON: Yes, why not.

24 MR. FRANKEL: Less than 30 seconds.

25 JUDGE GIBSON: Everyone else has.

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1 MR. FRANKEL: Just to remind the Board  
2 that we filed a detailed brief on indigenous rights  
3 and Indian law. Section F of that brief, that's the  
4 February 22 brief, it was incorporated by reference in  
5 our petition, it includes all those, those two  
6 executive orders and as well as a discussion, partial  
7 discussion anyway of what meaningful consultation is.  
8 I believe that there is substantial case law on that.

9 JUDGE GIBSON: Okay. And this also goes  
10 to your Miscellaneous Contentions A and B. I didn't  
11 mean to excluded you from the conversation.. But let  
12 me just ask, is there anything else substantively that  
13 you feel needs to be added other than what you just  
14 said to the rest of the discussion we've had here?  
15 We're trying to get the context within which we need  
16 to make a determination about it.

17 MR. FRANKEL: We don't have anything to  
18 add.

19 JUDGE GIBSON: Okay, thank you.

20 Okay, for Consolidated Petitioners'  
21 Miscellaneous Contentions D, E and F, we've had some  
22 discussion about, in there about Winters rights,  
23 treaty rights and hunting and fishing rights. Now, I  
24 appreciate the fact that you may have some concerns  
25 about the new area that they are planning on mining.

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1 But specifically just with respect to the existing  
2 site, what is it that, what is it that is affecting  
3 hunting and fishing rights?

4 MR. FRANKEL: I can cite a couple  
5 examples. One would be this being the aboriginal  
6 territory my Lakota petitioners have a right to go  
7 fishing at Squaw Creek or English Creek, the White  
8 River. If there is a trail of arsenic that is  
9 released that we don't know about because it's not  
10 being monitored and it's not being reported, then that  
11 contamination would clearly interfere with the fishing  
12 rights; the fish would not be good to eat.

13 Similarly, --

14 JUDGE GIBSON: Let me just ask you a  
15 question. Are you suggesting that the Tribe has  
16 rights greater than the public at large with respect  
17 to access to, you know, those fish and whether they  
18 are healthy or not?

19 MR. FRANKEL: Absolutely, Your Honor.  
20 Those hunting and fishing rights are treaty rights and  
21 federal law rights that go beyond what I enjoy as a  
22 non-tribal person. And then in addition because of  
23 the White River and the potential contamination into  
24 the alluvium of the White River and the fact the White  
25 River does go onto the reservation, that even within

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1 the reservation those hunting and fishing rights  
2 exist. They exist in two places, you know, concentric  
3 circles where the small circle is the reservation and  
4 the larger circle is the aboriginal territory that  
5 includes that reservation.

6 I think you interrupted me but my second  
7 example, I'll just put it out, the hunting rights  
8 pertain when there's a cumulation of contaminants in  
9 the grass or in the lower food chain animals that  
10 could go into the higher food chain. And, of course,  
11 the Lakota Petitioners are used to hunting in the  
12 higher food chain and having subsistence off of that.

13 JUDGE GIBSON: Okay. We had a discussion  
14 about bio-accumulation yesterday. And also about  
15 these treaty rights with Delegation Treaty Council.  
16 So again I don't want to belabor the point.

17 How do you square your claim to tribal  
18 hunting and fishing rights with the Lone Wolf v.  
19 Hitchcock case?

20 MR. FRANKEL: I'm not familiar with that  
21 case. So if you could help me?

22 JUDGE GIBSON: Okay, let's look at 187  
23 U.S. 533. It's a 1903 decision. My understanding was  
24 that the -- I realize that the Delegation Treaty  
25 Council doesn't, isn't too cracked up about it, but my

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1 understanding is that the case law has basically held  
2 that the 1877 Act effectively prohibited the Tribe  
3 from asserting hunting and fishing rights off the  
4 reservation. Am I mistaken about that?

5 MR. FRANKEL: First I will make an initial  
6 remark then I would like counsels for the tribal  
7 entities to chime in on that.

8 JUDGE GIBSON: Okay, right. He can,  
9 either one or them or both can address that issue. I  
10 assume you are familiar with Lone Wolf v. Hitchcock?

11 MR. BALLANCO: Yes, Your Honor.

12 JUDGE GIBSON: Okay, why don't you go  
13 ahead and address that for us then?

14 MR. BALLANCO: I think you have pretty  
15 much said what I can say but I will just rephrase it  
16 so it's in my words too, Your Honor. The Delegation  
17 does not accept that and adheres to the original  
18 hunting and fishing guarantees that were in the treaty  
19 which does include this area.

20 JUDGE GIBSON: Okay. I think that's  
21 essentially Lone Wolf v. Hitchcock didn't actually  
22 involve this tribe but it did involve another tribe.  
23 And it was essentially the same. But it essentially  
24 said that where unless there is a specific reservation  
25 of those rights off the reservation. I hate to use

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1 that word twice in a different meanings in the same  
2 sentence. I shouldn't do that. But anyway --

3 MR. FRANKEL: I'm with you on that.

4 JUDGE GIBSON: You know where I am?

5 MR. FRANKEL: Yep.

6 JUDGE GIBSON: Okay. Unless there is a  
7 specific exception made for those hunting and fishing  
8 rights in the 1877 Treaty, Lone Wolf v. Hitchcock  
9 would suggest that other than on the reservation  
10 itself there are no specific hunting and fishing  
11 rights off the reservation. I think that's what the  
12 case holds.

13 MR. FRANKEL: And I know counsel for the  
14 Tribe wants to make a comment. But let me just make  
15 this --

16 JUDGE GIBSON: Please. Please do.

17 MR. FRANKEL: -- preparatory comment  
18 because I was going to make one and then I got handed  
19 off before I actually got to make it.

20 JUDGE GIBSON: Okay.

21 MR. FRANKEL: Which is only to say that I  
22 identified two ways that the hunting and fishing  
23 rights are implicated for my Petitioners, one of them  
24 was on the reservation, one of them was off the  
25 reservation. So in direct response to your first

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1 question it wouldn't apply to those on the  
2 reservation.

3 JUDGE GIBSON: No problem. And I  
4 understand that with respect to wildlife on the  
5 reservation. I understand that. Not suggesting  
6 that's been impaired in any way. I'm only talking  
7 about off the reservation.

8 MR. FRANKEL: Thank you.

9 JUDGE GIBSON: Yes, you wanted to say  
10 something?

11 MS. LORINA: Well, I know Lone Wolf v.  
12 Hitchcock stands for the proposition that Congress,  
13 unfortunately, can abrogate treaties. There is no  
14 1877 Treaty. Congress stopped making treaties in  
15 1871.

16 JUDGE GIBSON: Okay. I'm sorry, there was  
17 a -- I thought there was an act of Congress that --

18 MS. LORINA: Yes, the Black Hills Act of  
19 1877.

20 JUDGE GIBSON: Okay.

21 MS. LORINA: Okay. It's been a while  
22 since I've read Lone Wolf, however other case law says  
23 that even if it's on private land tribal members, not  
24 just the tribe, can assert their right under the  
25 treaty for hunting and fishing. When it comes to the

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1 ocean I don't know how you would have that on the  
2 reservation. It's been a while since I read Lone  
3 Wolf, I just remember it for that one particular  
4 proposition.

5 JUDGE GIBSON: Why don't you read it then  
6 we'll chat. Okay?

7 MR. KLUKAN: Your Honor, just a  
8 clarification. The treaty seemed to speak, there is  
9 a specific reservation for hunting rights which is  
10 then abrogated by the 1877 Act. But that doesn't  
11 speak to fishing acts -- fishing rights which has  
12 always been implied. And because they were implied  
13 whether they've been abrogated or not is still  
14 unclear. But the NRC submits that it's not within our  
15 jurisdiction to determine where and when those fishing  
16 rights end. But the NRC staff concedes that within  
17 the reservation they do have unlimited hunting and  
18 fishing rights without reservation thereto.

19 JUDGE GIBSON: Okay. Well, I'm sure that  
20 if the Tribe does have any extra-reservation hunting  
21 and fishing rights that the NRC would recognize them.

22 Crow Butte, I believe that you made an  
23 assertion that the hunting and fishing rights accrue  
24 to the tribe and not the individual. Is there some  
25 legal authority you have for that proposition?

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1 MR. SMITH: No, not off the top of my  
2 head. But the cases that were cited by Petitioners  
3 didn't speak to the opposite conclusion either. As I  
4 understand it the existence of these rights has to be  
5 asserted by the tribe rather than by the individual  
6 members.

7 JUDGE GIBSON: Could you speak to that?

8 MR. BALLANCO: I will see his "not off the  
9 top of my head" and raise that. I don't have it off  
10 the top of my head either. But I am quite certain  
11 that individual tribal members can assert rights that  
12 are ascribed to a tribe, partially because of this  
13 difficulty in determining what exactly is a tribe and  
14 who speaks for a tribe. So I am quite certain that  
15 individual tribal members are afforded the rights that  
16 are guaranteed by treaty to tribes.

17 MR. SMITH: And I guess I wouldn't  
18 disagree that the tribal members have those rights.  
19 It's just that in order to adjudicate and determine  
20 them it would necessarily involve the tribe itself.  
21 The examples cited, So Happy v. Smith and Puyallup  
22 Tribe, both are consistent with that. Those suits  
23 were brought by the tribe on behalf of its members who  
24 were attempting to assert their rights.

25 JUDGE GIBSON: Yes, but those cases didn't

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1 hold that an individual could not --

2 MR. SMITH: That's correct.

3 JUDGE GIBSON: -- assert the rights.  
4 Okay.

5 MS. LORINA: Off the top of my head,  
6 specifically I am certain that hunting and fishing,  
7 those are the only ones I am absolutely certain of off  
8 the top of my head, can be asserted by tribal members,  
9 including the right to sue on their behalf. And they  
10 can access private property for that.

11 JUDGE GIBSON: I really don't want us to  
12 be deluged with post-trial briefing but I do think  
13 that a one paragraph statement from you all on this  
14 specific point would be useful. No argument, I just  
15 want the cases and what they mean for this specific  
16 purposes.

17 JUDGE ROSENTHAL: Well, if it has to be  
18 asserted by the tribe is there a specific individual  
19 that has to do it on behalf of the tribe? I mean  
20 obviously the tribe is an amorphous body in a sense.  
21 And is it somebody who has been designated as the  
22 representative of the tribe for that purpose? I mean  
23 you're taking a position, as I understand it, that  
24 individual tribe members can't assert these rights, it  
25 has to be asserted by "the tribe."

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1 MR. SMITH: Correct.

2 JUDGE ROSENTHAL: And who does it on  
3 behalf of "the tribe"?

4 JUDGE ROSENTHAL: The tribal government  
5 presumably. The tribe itself.

6 I actually I'm not entirely familiar with  
7 how individual tribes are organized but there is a,  
8 obviously the tribes are federally recognized and they  
9 have government/government interactions with the  
10 Federal Government. That government that is the tribe  
11 is who I believe asserts those rights.

12 JUDGE GIBSON: Would you speak to that, to  
13 Judge Rosenthal's question, please?

14 MS. LORINA: Absolutely. Under our IRA-  
15 approved constitution, Article 4, it's the tribal  
16 council who is authorized to negotiate government to  
17 government and employ legal counsel on their behalf to  
18 assert treaty right. We do have a close working  
19 relationship with the Black Hills Sioux Nation Treaty  
20 Council and we are expected to work with them as part  
21 of our own tribal government. That's what we do is we  
22 work together on that. But under the IRA constitution  
23 it is the Oglala Sioux Tribe and who they employ to do  
24 that.

25 JUDGE GIBSON: Okay. One thing that came

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1 up this morning I would like to go over a little bit  
2 with the Staff. And that has to do with the prior  
3 notices with respect to this facility and the  
4 questions that have arisen about notice and  
5 opportunity to comment. Normally we would only look  
6 at what specifically is involved in this specific  
7 license application but because these questions have  
8 come up we did a little bit of research. And I wanted  
9 to see if you could help us with these questions. And  
10 I do appreciate the fact that you may not know the  
11 answer to all these, but again I would appreciate if  
12 you all would do a little homework and get us back  
13 some, get answers to all of here today to these  
14 questions.

15 Is there a with respect to the first  
16 issuance was there an initial opportunity for hearing  
17 noticed?

18 MR. KLUKAN: Our search of ADAMS did not  
19 reveal that document. But I can't say one way or  
20 another whether that occurred, just that our review of  
21 our records did not pull up that initial notice.

22 JUDGE GIBSON: Thank you.

23 MR. SMITH: I would add there is no  
24 requirement that there be such a notice in the Federal  
25 Register.

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1 JUDGE GIBSON: Okay.

2 JUDGE ROSENTHAL: But you could determine,  
3 could you not, whether one was published in the  
4 Federal Register. All that you do for that is to  
5 check the index of the Register. So I would think  
6 that publication in the Federal Register would be  
7 something readily determinable.

8 MR. KLUKAN: As far as I know, Your Honor,  
9 it would also show up in ADAMS. And that's what we  
10 did our search of our own licensing in case such  
11 notices were not published in the Federal Register.  
12 But we can go back and do that review as well, but  
13 they should be coextensive.

14 JUDGE GIBSON: I think that would be  
15 useful. And it may well be, as Counsel for Crow Butte  
16 said, that there was no obligation to do that. But at  
17 least we would like to know whether there was or not.  
18 Okay?

19 MR. SMITH: I would note there is still no  
20 obligation that a notice be published in the Federal  
21 Register.

22 JUDGE GIBSON: Okay. Now, from our  
23 initial search we were able to locate seven notices  
24 relating to the mining operation going back to 1990  
25 when the license was transferred to Ferret for

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1 commercial production. There seemed to be simple  
2 notice of a finding of no significant impact. But it  
3 did not appear that there was an opportunity for the  
4 public for a hearing. Does that sound accurate?

5 MR. KLUKAN: Just for clarification, what  
6 date was that, Your Honor?

7 JUDGE GIBSON: Hold on one second. I want  
8 to be sure I get this date right.

9 (Board confers.)

10 JUDGE GIBSON: This was June 4, 1990, 55  
11 Fed. Reg. 22869.

12 MR. KLUKAN: We don't have that notice,  
13 Your Honor. Or from what our Project Manager obtained  
14 for us that was not included in the list.

15 JUDGE GIBSON: I couldn't hear what you  
16 said. Could you speak into the microphone and more  
17 slowly, please?

18 MR. KLUKAN: Sure. We are not aware of  
19 that notice, Your Honor. The list our Project Manager  
20 gave us did not include that notice per his review of  
21 the record for this proceeding or for this license.

22 JUDGE GIBSON: I still can't hear you.  
23 I'm sorry.

24 MR. KLUKAN: Your Honor, the list the  
25 Project Manager gave us for this docket did not

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1 include the notice to which you currently are  
2 referring.

3 MR. SMITH: Your Honor, again I would add  
4 that just because there is no Federal Register notice  
5 doesn't mean that there is not an opportunity for a  
6 hearing. Even in the current version of the Federal  
7 Register it provides that agency actions where there  
8 is no Federal Register notice the opportunity to  
9 petition for a hearing exists for 60 days after notice  
10 of the action but not later than 60 days after the  
11 actual action was taken. Similar requirements were in  
12 place then.

13 So there was an opportunity for a hearing,  
14 absolutely, on all of these actions. It was just not  
15 available.

16 JUDGE ROSENTHAL: How does the public  
17 learn of that opportunity for hearing if it's not  
18 published in the Federal Register? I thought that the  
19 Federal Register is what members of the public are  
20 called upon to consult in terms of agency action and  
21 opportunities for a hearing. I mean I don't  
22 understand how if it's not in the Federal Register one  
23 learns this opportunity.

24 MR. SMITH: Well, the Federal Register is  
25 constructive notice to everyone for stuff that's

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1 published in there. But that's not the only way in  
2 which the NRC perceives notice to be perfected. For  
3 instance, all licensing actions are available in the  
4 Public Document Rooms and the NRC has long held that  
5 that's an acceptable and available to the public and  
6 they can obtain it there.

7 JUDGE GIBSON: In our Public Document  
8 Rooms, is that what you said?

9 MR. SMITH: Correct. And it's not as  
10 useful, the Public Document Room is not as commonly  
11 used now because we have access to databases like  
12 ADAMS and the ADAMS Legacy Library. The PDR, the  
13 Public Document Room, has always been available to  
14 members of the public. And that's what the Commission  
15 for most all material licensing actions has deemed to  
16 be adequate notice.

17 JUDGE COLE: I think we've closed an awful  
18 lot of Public Document Rooms around the country. So  
19 not very many are available.

20 MR. SMITH: Correct. Because we have  
21 ADAMS now. Absolutely.

22 JUDGE GIBSON: Judge Rosenthal, did you  
23 have something else?

24 JUDGE ROSENTHAL: No, no. I'm just amazed  
25 that maybe the Commission has imposed that obligation

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1 but it seems to me for somebody now to have to consult  
2 the Federal Register for all kinds of -- Federal Crop  
3 Insurance v. Merrill states that the Federal Register  
4 is now constructive notice to the world. So a citizen  
5 who thinks that the NRC might possibly be doing  
6 something that might be of concern to him has to on a  
7 daily basis go to ADAMS or go to a Public Document  
8 Room to see if by some chance the agency has in mind  
9 some kind of proposal that might impact them, now  
10 maybe you are right that that's the Commission's  
11 requirement, but it seems to me offhand that it  
12 imposes an insuperable obligation.

13 And it's my impression that these days  
14 that most significant applications get noticed in the  
15 Federal Register.

16 MR. SMITH: That's correct.

17 JUDGE ROSENTHAL: And so I'm hopeful that  
18 there isn't too much reliance upon the Staff on this  
19 right to simply bypass the Federal Register and let  
20 people consult ADAMS daily.

21 MR. SMITH: That's right. And these  
22 actions for this proceeding obviously were put in the  
23 Federal Register even though there is not a  
24 requirement.

25 And just to close the loop on this, the

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1 Commission in their recent Rules of Practice when they  
2 determined what kind of actions had to be in the  
3 Federal Register or not, they noted that they take  
4 thousands of licensing actions a month and that to  
5 publish all of them in the Federal Register notice  
6 would be too expensive and, therefore, for that reason  
7 they struck a balance and decided which ones would be  
8 published or not.

9 JUDGE ROSENTHAL: That's fair enough. But  
10 if you're talking about something as significant as  
11 the licensing of a uranium mine I would hope that that  
12 would have been regarded as on the Federal Register  
13 side.

14 MR. KLUKAN: Again, we don't have that  
15 notice, Your Honor, for the initial licensing. But  
16 again Staff is going to find it for the Board and the  
17 parties.

18 Maybe it just makes sense to give the four  
19 notices of opportunity for hearing that Staff was able  
20 to find. There was one in February 21 of 1996, to  
21 increase the maximum processing flow rate. A notice  
22 of hearing was issued June 25, 1996, to increase the  
23 maximum concentrations of radium, uranium and sulfate  
24 in processing waste fluids. May 23, 1997, to increase  
25 the maximum production flow rate of 5,000 gallons per

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1 minute. And then February 13, 1998, and that is to  
2 remove a license.

3 JUDGE GIBSON: Consolidated Petitioners,  
4 there was a -- with respect to this 1998 notice they  
5 just mentioned what would, do you have any reason why  
6 you did not petition to intervene at that point to  
7 express the concerns that you've expressed now?

8 MR. FRANKEL: Well, with regard --

9 JUDGE GIBSON: I can appreciate the fact  
10 that you might not have had a clue until 1998. And  
11 the fact that you didn't is I think understandable for  
12 the reasons that Judge Rosenthal mentioned. But I'm  
13 just speaking of 1998 when we do appear to have a  
14 notice.

15 MR. FRANKEL: Thank you, Your Honor. With  
16 respect to all the Petitioners that are the indigenous  
17 Petitioners that I represent, they were completely  
18 unaware of the notice of the renewal and even of the  
19 mine itself. And that was indicated in the affidavit  
20 I read from yesterday.

21 With regard to WNRC, WNRC was aware and so  
22 doesn't have that excuse.

23 And I believe that we heard that there was  
24 no government to government consultation. And my  
25 indigenous clients they rely on that. They don't

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1 expect to have to read the "Chadron Record," they  
2 expect that if there is a consultation their Tribal  
3 Council will inform them of the issue. So they have  
4 a reason why they didn't know about the 1998.

5 MR. ELLISON: And if I might add, the  
6 concept of the internet being available on the  
7 reservation is a very recent thing post-1998. In 1998  
8 still, as even today, most homes did not have phones.  
9 People had access to information about what goes on in  
10 the world is limited to a T.V. station that broadcasts  
11 into the reservation. So people's ability to simply  
12 find out because of economics, because of rural  
13 isolation, because of some of the matters we touched  
14 on a little bit yesterday in terms of feelings of  
15 hostility from surrounding communities, those we  
16 believe are factors that we would like to encourage be  
17 considered or at least taken notice of in terms of the  
18 realities, the practical reality of people's ability  
19 to find out about and actually get involved in any  
20 such process on the reservations back in 1998.

21 JUDGE GIBSON: Do you all have anything  
22 you all wanted to say in addition to what they said?  
23 Anything else? Okay.

24 MR. BALLANCO: No, Judge.

25 JUDGE GIBSON: Okay.

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1 MS. LORINA: If I may go back for one  
2 moment?

3 JUDGE GIBSON: That's fine. I read what  
4 I could of Lone Wolf on my tiny little Blackberry  
5 screen. Essential the principle as I understand it,  
6 which I knew, Congress with the clear express content  
7 can abrogate treaties. With the 1877 Act which  
8 whether they recognize it as the most rank and  
9 dishonorable dealing in United States history, as  
10 Justice Blackmun did, regardless, that didn't concern  
11 this area. The 1851 area was not at issue in the 1877  
12 Act. So I wouldn't say that as the Congress expressed  
13 its intent to abrogate the hunting rights in this  
14 area.

15 JUDGE GIBSON: Okay. I can appreciate the  
16 distinction you're drawing. And I'm certainly not  
17 going to try to argue Indian law with you. It does  
18 strike me initially, however, that the Tribe had  
19 essentially vacated these aboriginal lands at that  
20 point in time, had they not? These lands we're  
21 talking about now? Or were they still on the --

22 MS. LORINA: No. Hunting was still  
23 occurring. And this is part of what led to things  
24 like Wounded Knee massacre because of not sitting on  
25 the reservation. I mean vacated as was in was the

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1 Pine, was that part of the Great Sioux Reservation?  
2 Not to my knowledge. I could be corrected on that.

3 JUDGE GIBSON: Okay. Please, if you know  
4 please clarify. We're just trying to get.

5 MR. BALLANCO: Your Honor, I have a bit of  
6 a time delay thing going on. So I believe it was 1888  
7 or possibly 1887 when the Red Cloud Tiospaye basically  
8 became the Pine Ridge community moved from the Fort  
9 Robinson area to the present location. So  
10 approximately a decade after 1877.

11 And I just wanted to go back, if I could,  
12 while I've got the microphone here. And I can save  
13 everybody a --

14 JUDGE GIBSON: You won't be the first one  
15 who decided to appropriate some time.

16 MR. BALLANCO: And maybe I will save  
17 everybody a paragraph's worth of writing this evening.  
18 In the 1986 Supreme Court case U.S. v. Dion the  
19 Supreme Court said, quoting itself in the case of U.S.  
20 v. Winans, that rights reserved by a tribe under a  
21 treaty with the United States can be asserted by an  
22 individual member of that tribe.

23 So that's that part.

24 JUDGE GIBSON: I suspect that is going to  
25 resolve the issue for all of us. I don't think anyone

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1 else will assert that again.

2 Okay, I believe that with respect to the  
3 contentions that concludes our questions. What I  
4 would like to do is take a ten minute recess, give you  
5 all a chance to go back over your notes, make sure  
6 what it is you want to take, and again briefly. I  
7 would ask you all to keep your remarks to three to  
8 five minutes. You all can go back over the  
9 contentions with respect to anything you didn't get a  
10 chance to say and say it again.

11 So we will stand in recess for ten  
12 minutes.

13 (Brief recess.)

14 JUDGE GIBSON: Okay.

15 MS. LORINA: To correct my earlier  
16 statement, not to get into the validity of the 1877  
17 Act but I was in error. Article One did extinguish  
18 hunting rights outside the Great Sioux Reservation.  
19 So to the extent of the Act language it does apply in  
20 so far. I want to retract my earlier statement where  
21 I said it didn't apply to the land at issue.

22 JUDGE GIBSON: Okay, that's fine. Thank  
23 you for that clarification. Okay, I'll let the Staff  
24 start.

25 MR. KLUKAN: Your Honor, just a couple of

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1 things. With regard to --

2 JUDGE GIBSON: Be sure and speak into the  
3 mike and speak slowly so we can hear you. And I  
4 promise you I will keep interrupting you until you do.

5 MR. KLUKAN: Just a couple of things, Your  
6 Honor. With regard to treaty rights beyond hunting  
7 and fishing, Petitioners make a specific intention  
8 with regard to them. Staff still isn't aware of what  
9 treaty rights Petitioners are talking about outside of  
10 hunting or fishing within the reservation.

11 Consultation, I think someone may have  
12 stated that consultation applies to a wide variety of  
13 things. Consultation under the National Historic  
14 Preservation Act applies only to cultural resources  
15 under section 106.

16 Winters rights, that was kind of thrown  
17 out here as well, applies only to waters on the  
18 reservation or abutting the reservation. The NRC  
19 Staff is not aware of any case that would extent  
20 Winters some 40 miles away to water at the Crow Butte  
21 facility.

22 With regard to the trust responsibility  
23 with the counsel for the Tribe has stated applies to  
24 the NRC, the NRC as an agent of the Federal Government  
25 recognizes the trust, such trust responsibility

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1 exists. But cases in the circuit which counsel cites  
2 state that unless the agency has a specific obligation  
3 under statute, the agency complies with its trust  
4 responsibility through general compliance with  
5 statutes of general applicability. This was stated  
6 with regard to FERC, Skokomish Indian Tribe.

7 JUDGE GIBSON: No, no. Wait till you find  
8 the place and speak into the microphone.

9 MR. KLUKAN: Okay. The Skokomish Indian  
10 Tribe v. FERC, which is 121 F.3d 1303, which equally  
11 applies to the NRC. The 9th Circuit Court of Appeals  
12 stated the FERC undergoes its obligations per its  
13 relevant act, the Federal Power Act. Much in the same  
14 manner does the NRC exert its obligations under the  
15 AEA or NEPA. It is not required to extend to the  
16 Tribe any more leniency than it would any other person  
17 under either of these statutes.

18 JUDGE GIBSON: Okay.

19 MR. SMITH: I don't have much to add. I  
20 just wanted to say that we've appreciated the  
21 opportunity to answer any questions you have and hope  
22 that you've found our responses helpful. We believe  
23 that based on the extensive site-specific information  
24 that we've gathered and our experience at the site  
25 that we have shown in our application that the plant

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1 can be operated safely and can protect the public  
2 health and safety.

3 You know, while we are opposing the  
4 contentions in this proceeding we don't do so lightly  
5 or because we think that the issues involved are  
6 unimportant or not critical, we oppose because we  
7 think it is not appropriate under the NRC's rules and  
8 because we think that we have already addressed these  
9 issues in our application.

10 Thank you.

11 MR. FRANKEL: I assume I don't get their  
12 leftover time?

13 JUDGE GIBSON: You assume correctly.

14 MR. FRANKEL: I'll take three minutes.

15 JUDGE GIBSON: It never hurts to ask, does  
16 it.

17 MR. FRANKEL: I have a couple rebuttal  
18 points and then want to offer some solutions to some  
19 of the issues that came up.

20 JUDGE GIBSON: Be sure and speak into the  
21 microphone. Thank you.

22 MR. FRANKEL: I said I just have a couple  
23 short rebuttal point and then I want to offer some  
24 solutions to some of the issues that came up.  
25 Specifically I feel called to do this by paragraph 8

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1 of your order where you ask us to address the  
2 standards that could be used.

3 First, a short rebuttal on the issue of  
4 the surety bond. There was a description by NRC Staff  
5 counsel as to the several factors taken into  
6 consideration. From our perspective the most  
7 significant factors are the number of pour volumes and  
8 the time it takes. So where it's understood that  
9 restoration on a mining unit has taken longer than  
10 expected that translates into increased dollars, often  
11 at a multiplier effect.

12 And so we made reference in our petition  
13 to what happened in Wyoming where their surety bond  
14 was increased I think almost fourfold to \$80 million.  
15 And it was because of that analysis, more pour volumes  
16 required, more time required.

17 So that's a clarification I wanted to make  
18 in rebuttal.

19 The second clarification --

20 JUDGE GIBSON: Just one second. I realize  
21 we can't make an absolute comparison of dollars to  
22 dollars, we need to make a comparison of, you know,  
23 one hole to another hole if you will. What would the  
24 number be that you are suggesting it should be instead  
25 of 35?

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1 MR. FRANKEL: Fifty.

2 JUDGE GIBSON: Thank you.

3 MR. FRANKEL: A second clarification jus  
4 briefly. We just heard NRC Staff counsel say that as  
5 to them under this cited case trust responsibility is  
6 complied with when they comply with general statutes  
7 of general applicability. I feel in light of the  
8 discussions about the entire lack of a complete set of  
9 regulations having to do with ISL mining, that that  
10 particular principle does not insulate them from  
11 complying with the trust responsibility as we see it  
12 because there are no full statute or regulatory  
13 implementations specific to ISL mining as of now.

14 Now, moving beyond rebuttal and suggesting  
15 some --

16 JUDGE GIBSON: Hold on. Hold on. You're  
17 saying that because there is no comprehensive series  
18 of regulations that?

19 MR. FRANKEL: That they can't rely on that  
20 case.

21 JUDGE GIBSON: Which case was that, the  
22 FERC case?

23 MR. FRANKEL: The FERC. The FERC case.

24 JUDGE GIBSON: Okay, thank you.

25 MR. FRANKEL: As for solutions, I note

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1 that there is some procedural disconnects that have  
2 been identified. Some contentions seem premature at  
3 the present time because there is future action and  
4 future information that's occurring. And yet we are  
5 in this kind of catch-22 which, you know, goes  
6 directly to due process and our ability to participate  
7 meaningfully in the process.

8 And so I note that the presiding officer  
9 under 10 C.F.R. 2.319(g) has the power to issue orders  
10 to regulate the conduct among the parties. And that  
11 would give this Board the authority to order that  
12 certain actions get e-mailed directly to us so that we  
13 have notice of them.

14 Similarly, orders could exist to allow for  
15 the submission of commercial proprietary information  
16 under circumstances that protect the proprietary  
17 nature of that information but still allow the  
18 Petitioners to review it under appropriate  
19 confidentiality protection.

20 We also note that something can be done to  
21 preserve our rights so that we don't lose them. Our  
22 problem is not that we don't want -- that we have a  
23 problem waiting until this action occurs, but we don't  
24 want to get to that point in time and be told that we  
25 should have done something now in order to perfect our

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1 rights now. We don't want to be under attack because  
2 it was some late filed contention or that the  
3 objections on us not presenting information now. So  
4 we would be open to a form of remedy from the Board  
5 that to the extent that parts of our contentions or  
6 certain contentions might be found to be premature  
7 that we are able to preserve our rights in this moment  
8 in time so that when we file later based on new  
9 information it's the new information plus the  
10 information we have in our petition that we are  
11 allowed to use.

12 And if I was inarticulate in that, I'm  
13 sorry, but I just want to make sure that we don't lose  
14 those rights due to awkwardness in the procedures that  
15 we are all subject to.

16 JUDGE GIBSON: No, I think we understand  
17 what you're saying.

18 MR. FRANKEL: Finally, as to a way of  
19 perceiving these standards, NUREG 1569 obviously is  
20 very broad and it's only a guidance document. And yet  
21 we do have some guidance from section 40.9 which is a  
22 regulation and it makes reference to disclosure of  
23 things that are material. We do have a body of  
24 federal law of what is material. And we have cited  
25 this on page 47 of our petition in footnote 6. We've

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1 made reference to this as a solution, a legal lens to  
2 view these requirements through as to how much data is  
3 sufficient. We have suggested that the standard  
4 should be the information that a reasonable, prudent  
5 person of average skills and intelligence that  
6 information they would consider important in making a  
7 decision, the decision either to intervene or not or  
8 the decision to issue the license or not.

9 And it seems to me that lawyers all across  
10 America, corporate America, businesses and  
11 corporations have found a way to live with a federal  
12 materiality standard in the context of securities laws  
13 transactions. So I am confident that the Applicant  
14 and the industry can live with a legal materiality  
15 standard when deciding what kinds of disclosures to  
16 make. And I propose this in an effort to streamline  
17 this kind of proceeding and future proceedings so that  
18 we don't have to relitigate the same things over and  
19 over.

20 MR. ELLISON: Just a couple of quick  
21 points. One of the places that we believe provides  
22 authority and therefore the impacts on water which  
23 could be used for agrarian uses, in the 1868 Treaty  
24 there is an express right of heads of household to  
25 farm. And we feel that that would incorporate also

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1 the Winters Doctrine then in terms of the quality and  
2 quantity of the water that would affect agrarian  
3 rights.

4 Also on the point about consultation with  
5 tribes, an additional document that we cited by  
6 reference in these proceedings and expressly before  
7 was the U.N. Declaration on Indigenous Rights that  
8 indicated that whenever there was any kind of a major  
9 action that could potentially affect a tribe of  
10 indigenous nation that there needed to be  
11 consultation. So I wanted to add those as well.

12 Finally I just wanted to reemphasize our  
13 position that even if the NDEQ looks at arsenic level  
14 in water and even if the Crow Butte has to report to  
15 that, we think that it's an important thing for NRC to  
16 consider when it looks at NEPA requirement. Because  
17 clearly I mean one of the things that goes as we cited  
18 in our petition had to do with the Spaulding study  
19 back from the early '80s. And in there Dr. Spaulding  
20 clearly talked about how oxidizing environments will  
21 tend to release arsenic. And because with our  
22 proposed contention, perhaps now joined with  
23 Contention A, we, or B, we just want to make sure, we  
24 just feel that this is a responsibility of the NRC to  
25 look at too. It can't just be the nuclear materials

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1 because this is something which clearly affects or has  
2 the potential to affect the environment. And by the  
3 oxidizing process that's used in ISL mining we don't  
4 know how much actually is being released.

5 And that's one of the things that Dr.  
6 Abitz talked about was that he felt that this should  
7 be discussed along with selenium. And he said also  
8 that there was questions what is the quantity  
9 generated and where does it end up in the waste  
10 stream? So we'd submit that one of those places may  
11 be the White River going up and through the Pine Ridge  
12 Indian Reservation.

13 MS. LORINA: To just briefly address the  
14 NRC staff's argument about trust responsibility and  
15 general applicability, that's not true when treaty  
16 rights are at stake. I can point the attention to  
17 Northwest Sea Farms v. United States Army Corps of  
18 Engineers. There the Corps actually denied a permit  
19 to the Northwest Sea Farms because it would infringe  
20 upon the treaty rights of the Lummi Nation. Or Lumni.  
21 Whatever, I will spell it for you later. And in that  
22 the argument by Northwest was that, well hey, it's not  
23 in your regulations that you are supposed to consider  
24 treaty rights. And the Army Corps responded, well,  
25 it's our trust responsibility. That mandates us.

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1           And the court resoundingly rejected  
2 Northwest's argument.

3           It's this fiduciary duty rather than any  
4 expressed regulatory provision which mandates that the  
5 Corps take treaty rights into consideration.

6           First, their position ignores the duty of  
7 the trust responsibility. But second, even if the  
8 Corps were not bound by the trust relationship,  
9 Northwest's argument assumes by negative implication  
10 that the Corps' regulations allow it to make  
11 permitting decisions which would alter Indian treaty  
12 rights. This interpretation, however, is directly  
13 contrary to the principle that only Congress has such  
14 power.

15           And there's many other cases where the  
16 federal agencies must take into account treaty rights,  
17 even though it's not necessarily part of their  
18 expressed regulations.

19           JUDGE GIBSON: Hold on just one second.  
20 I understand what you just said. I understand what  
21 you said previously about consultation with respect to  
22 cultural resources.

23           MS. LORINA: This would be for water.

24           JUDGE GIBSON: And my question is are we  
25 talking about the cultural resources consultation

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1 being a function of these treaty rights or are we  
2 talking about something else? I just want to make  
3 sure I understand what you're talking about when you  
4 are talking about treaty rights.

5 MS. LORINA: My intention, this is  
6 specifically targeted to the treaty rights as  
7 recognized by Winters.

8 JUDGE GIBSON: Okay, you're talking about  
9 Winters issues, fine. But you are not talking about  
10 cultural resource issues; right?

11 MS. LORINA: Well, beyond recognizing it  
12 as a property right, no.

13 JUDGE GIBSON: Okay. All right, I just  
14 wanted to be sure.

15 MS. LORINA: And the government to  
16 government relationship.

17 JUDGE GIBSON: That's just fine. I'm with  
18 you. I'm with you.

19 Okay, thank you. Keep going.

20 MS. LORINA: Briefly those questions about  
21 the Mni Wiconi project I looked into yesterday. I  
22 couldn't answer the technical ones such as well depth.  
23 However, according to the final engineering report,  
24 when it's completed 50 percent of the pilot will be  
25 Missouri River water, 50 percent will be groundwater.

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1 Unless Congress changes Mni Wiconi that is a final  
2 determination. It was not until last month that any  
3 Missouri River water reached the reservation. That  
4 water is treated I believe in Fort Pierre before it  
5 reaches the reservation.

6 JUDGE GIBSON: Is the well water treated?

7 MS. LORINA: They say it is. I couldn't  
8 find a specific at that time where it -- it's supposed  
9 to be under the purview of our Rural Water system. To  
10 what extent it's treated I don't know.

11 JUDGE COLE: It might just be chlorinated?

12 MS. LORINA: That's what I have heard that  
13 it's simply basically bleach. I don't think there is  
14 any facility on the reservation that would be capable  
15 of treating the water, the groundwater actually on the  
16 res.

17 JUDGE COLE: If it had arsenic in it  
18 they'd have to do something about it.

19 MS. LORINA: Yes. I drink bottled water  
20 when I'm there.

21 A final bit of housekeeping, those lab  
22 reports I referenced yesterday I have copies for  
23 everybody. And I am going to look to see if there is  
24 a baseline. And when I find it I will do it through  
25 the EIE system to everyone.

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1 And as I mentioned yesterday, we finally  
2 received approval from the Tribe. We took several  
3 water samples from Tom Cook's area and along the White  
4 River close to the area in question. And those will  
5 also be submitted when reached. I believe it's six  
6 weeks for the kind of testing we want by Energy Labs.  
7 And we will also submit that through the EIE system.

8 JUDGE GIBSON: Thank you. I'm sorry, hold  
9 on just a second. I think Judge Hajek has a question.

10 JUDGE HAJEK: Did I understand you to say  
11 that since yesterday when the question came up on  
12 water sampling that someone went out and took water  
13 samples?

14 MS. LORINA: No. I'm sorry, we actually  
15 took these back in June in preparation for these  
16 hearings. It's just taking us this long to get  
17 actually someone to pay for these water samples. But  
18 these samples were taken in June. So the lab results  
19 I mentioned, these were the ones that were handed to  
20 me yesterday, and those were done in July.

21 JUDGE HAJEK: Okay. So going back to  
22 having taken water samples in June were these taken,  
23 were they taken using appropriate standards for  
24 collection?

25 MS. LORINA: Yes, they were. Some weren't

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1 and that's why we've already thrown them out. Once we  
2 learned that one of the samples taken weren't an  
3 appropriate method of collecting it from a stream.

4 JUDGE HAJEK: So you have a legal and  
5 scientific history, and I'm not sure what the right  
6 term is to use here, Lance Armstrong --

7 JUDGE COLE: Chain of custody?

8 JUDGE HAJEK: Chain of custody, there we  
9 go.

10 MS. LORINA: Well they're sitting in my  
11 office.

12 JUDGE HAJEK: Okay. For these water  
13 samples?

14 MS. LORINA: WE received instructions from  
15 Energy Labs as well as consulting the industry  
16 standards. And I believe Energy Labs is what Crow  
17 Butte uses for their sampling. At least I've noticed  
18 their name on quite a few lab reports.

19 JUDGE HAJEK: Okay, thank you.

20 JUDGE GIBSON: Okay.

21 MR. BALLANCO: Thank you, Your Honors.

22 I just wanted to echo what Consolidated  
23 Petitioners had said about certain of these concerns  
24 related to the overall quality of the water in general  
25 which for my client, in addition to the concerns that

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1 we addressed yesterday that may be and are beyond the  
2 jurisdiction of this Board, the major contention we  
3 have deals with water quality, and it's twofold.

4 It's not just the potential for seepage  
5 and leakage that makes its way to the reservation and  
6 ends up in the groundwater there which my clients end  
7 up drinking and may suffer the health effects from,  
8 but also even assuming that we have a completely self-  
9 contained aquifer under the Crow Butte mine, that  
10 water may some day come back into the ownership of my  
11 client. And we have a concern about the restoration  
12 of that water itself.

13 And I think we've seen a good deal of  
14 evidence, particularly from the Consolidated  
15 Petitioners gave its opinion that raise some  
16 legitimate questions about whether in fact the water  
17 is being restored to its pre-mine quality. And I know  
18 some of these concerns are properly addressed to the  
19 NDEQ but we do believe that these are the things that  
20 NRC should be considering when thinking about renewing  
21 a license. Is this mine ever really going to be able  
22 to restore the water that it is using, not to mention  
23 the tens of millions of gallons per year that we all  
24 acknowledge are being consumed from the bleed effect,  
25 potential drinking water that is just removed from the

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1 system which based on the price I pay for drinking  
2 water is about equal to the price of 700,000 pounds of  
3 uranium as far as I understand.

4 But so we do have concerns about the water  
5 both if it does stay there completely self-contained  
6 and, in light of particularly concerns that the  
7 LaGarry opinion expresses whether there is some  
8 migration, another concern.

9 And we do hope to be involved in the  
10 proceedings if they go forward to see how these issues  
11 can be addressed and ensure that we are doing the best  
12 that we all can collectively to make sure this is done  
13 safely, and if it can't be done safely then that it's  
14 not done.

15 And additionally, just now speaking for  
16 tomorrow's tour, on behalf of my client the Oglala  
17 Delegation of the Treaty Council I do welcome all of  
18 you onto the Treaty lands on behalf of the Treaty  
19 Council. And for some of us that may be one of the  
20 first times we're actually walking on native lands  
21 with permission and invitation from the owners. So I  
22 invite you to enjoy yourselves tomorrow and appreciate  
23 everyone's willingness to take a look around.

24 Thank you.

25 JUDGE GIBSON: I have just one note. This

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1 may be my fault, I interrupted you in your  
2 presentation and I may have thrown you off track. I  
3 want to make sure though that I understand the  
4 assertion that the NRC made about this FERC case and  
5 that the NRC's obligations are relatively limited  
6 under that case. And I just want to make sure I  
7 understand what your position is with respect to that?

8 MS. LORINA: The position of the Tribe  
9 would be the NRC as a federal agency cannot do  
10 anything that would abrogate or somehow undermine a  
11 treaty. We're not saying they have a general duty of  
12 consideration for every single action they do. But if  
13 any action they would undertake breaches their  
14 fiduciary duty to the Tribe then, yes, that would be  
15 a breach of their trust responsibility.

16 JUDGE GIBSON: Okay, okay, I'm with you on  
17 the treaty. But I'm talking about its responsibility  
18 beyond the treaty. And this has to do with these  
19 cultural resources. I just want to make sure I  
20 understand what your position is, that's all.

21 MS. LORINA: Well, cultural resources --

22 JUDGE GIBSON: What your position is as to  
23 the NRC's responsibility to you for consultation  
24 purposes?

25 MS. LORINA: Well, for consultation

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1 purposes it's a government to government relationship  
2 so that would come under the trust responsibility.

3 And two, cultural resources are also a  
4 property right so that would also come under the trust  
5 relationship, not necessarily a treaty right  
6 specifically.

7 JUDGE GIBSON: Okay. Thank you for  
8 clarifying that because I didn't understand you to say  
9 that earlier.

10 Okay, I believe we have finished with the  
11 contentions.. There's a couple of other minor  
12 housekeeping matters I have before I knock this thing  
13 over completely here.

14 I just wanted to make a note of a couple  
15 of things. I don't expect anyone to address this at  
16 all, I just want to leave this issue of contentions  
17 with this note. And perhaps we can figure out what to  
18 do about it later, but I at least want to let you all  
19 know about it.

20 In the application for license renewal on  
21 page 2-4A there is a note at the bottom of the page,  
22 the last two paragraphs, "Intensive pedestrian  
23 inspection of the R&D area in 1982 and the full CSA  
24 survey unit in 1987 resulted in identification of 21  
25 newly recorded resource locations, including eight

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1 sites representing Native American components, 12  
2 Euro-American locations, and a buried bone deposit of  
3 undetermined cultural association. Fifteen of these  
4 newly identified resources contained limited observed  
5 evidence of scientifically important cultural remains  
6 or were not determined to be of significant historic  
7 value. Based on the archival research these sites do  
8 not warrant further National Register consideration."

9 And on page 7-27 the last sentences says,  
10 "These resources, however, have been avoided and not  
11 directly impacted as a result of construction  
12 activities. Any further construction activities will  
13 avoid these identified resources and coordination will  
14 be maintained with the Nebraska State Historical  
15 Society."

16 So I just want to make a note of the fact  
17 that this was put in the application to Crow Butte's  
18 credit. However, it does appear that the NRC has  
19 known about this for some time. And it appears that  
20 there was never any consultation with the Tribe. And  
21 it appears that the only way that they knew anything  
22 about this was as a result of the intervention of the  
23 Consolidated Petitioners and the awareness of that.

24 MR. KLUKAN: Two things, Your Honor.  
25 Again, we haven't been able to come up with an answer

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1 as to what -- we have not been able to come up with an  
2 answer yet as to whether there was cultural  
3 consultation in the past. But as counsel for  
4 Applicant stated, we may not have been required at  
5 that time to engage such consultation. It's simply  
6 the case that the National Historic Preservation Act  
7 and the regulations thereunder may not have mandated  
8 that we engage such consultation.

9 The NRC Staff will take that under  
10 advisement and bring an answer to you. But I suggest  
11 that may be the case.

12 JUDGE GIBSON: And I appreciate that. I  
13 just do want you to understand it's certainly the  
14 Tribe's position that you were mandated to do that  
15 consultation. You do understand that?

16 MR. KLUKAN: I do, Your Honor.

17 JUDGE GIBSON: Okay. I think what we  
18 would like to do is briefly, and I want to underline  
19 that word briefly, just talk about the motion for  
20 leave. We are going to allow you all, your motion for  
21 extension of time to file a response will be granted.  
22 We will have briefing on this.

23 I will say I would like for the parties in  
24 addition to address, since you are going to be  
25 briefing it anyway, this question of the possible

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1 consolidation of this contention with the Sioux  
2 Tribe's contention that we've already talked about in  
3 the event that we deem both were admissible.

4 Just very briefly I want you to make sure  
5 and explain to us why it is that this was filed when  
6 it was instead of earlier?

7 MR. FRANKEL: We didn't receive knowledge  
8 of the Johns Hopkins study until October 20, 2008.

9 JUDGE GIBSON: The Johns Hopkins study is  
10 about --

11 JUDGE COLE: October 20?

12 MR. FRANKEL: I'm sorry. August 20.  
13 August 20, 2008. Sorry.

14 JUDGE GIBSON: That's okay. And this is,  
15 the Johns Hopkins study is the study of detection of  
16 arsenic?

17 MR. FRANKEL: Yes, Your Honor. That's the  
18 study that was published in the "Journal of the  
19 American Medical Association" that indicates a link  
20 between diabetes and low level presence of arsenic in  
21 the water. That study incidentally was published on  
22 the front page of the local Pine Ridge newspaper. And  
23 that awareness led us to deeply examine what we had  
24 already known a little bit about, the connection  
25 between the oxidation, massive oxidation going on at

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1 the mine, and the release of arsenic.

2 And it got us to thinking about that the  
3 arsenic is not -- I'm sorry, the oxygen releases are  
4 not being tracked, which means that they can leach  
5 into deposits of uranium that are not being mined,  
6 cause those to decay and reduce and oxidize and  
7 release arsenic and create many point sources of  
8 arsenic release which then would be a result of the  
9 mining activity but one that is not being tracked or  
10 trackable under the current monitoring systems.

11 JUDGE ROSENTHAL: The study by Johns  
12 Hopkins was this disclosure the first information to  
13 that effect or was this confirmatory of what other  
14 studies have revealed? In other words, what I'm  
15 trying to get at is was this a revelation, --

16 MR. FRANKEL: Yes, Your Honor.

17 JUDGE ROSENTHAL: -- this study, as  
18 opposed to simply again another study reaching a  
19 conclusion of prior studies? This one is brand new  
20 territory?

21 MR. FRANKEL: It was publicized as a  
22 revelation, new science by top scientists. And I  
23 think that's why it got publication in the "Journal of  
24 the American Medical Association."

25 Based on that and in subsequent

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1 discussions I became aware of the high, seemingly high  
2 incidence of pancreatic cancer in the area. When  
3 compared with the national statistics it seems about  
4 20 times.

5 Now, diabetes is an interesting problem  
6 because Native American people have certain genetic  
7 predispositions to diabetes and there is health --

8 JUDGE GIBSON: This is stuff that's  
9 already in your brief; right?

10 MR. FRANKEL: I can rest now if you like.

11 JUDGE GIBSON: That's all right. I mainly  
12 wanted you to explain why it was you were late. That  
13 was the main thing.

14 MR. FRANKEL: Thank you, Your Honor.  
15 That's why we were late.

16 JUDGE GIBSON: Okay, that's good.

17 Okay, we will allow you all, I don't think  
18 you all want to say anything about this now, we will  
19 just allow you all to submit your briefs. Is there  
20 anything you needed to say about this issue though?

21 MR. SMITH: I mean I would just I would  
22 like to start with one thing and point out that there  
23 is, this petition seems to suggest that there is some  
24 link between Chadron drinking water, arsenic levels in  
25 the Chadron drinking water that's causing some

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1 contamination or problems here in town. I would just  
2 point out that Chadron drinking water comes from well  
3 fields that are 20 miles away from here. They are in  
4 a different, unconnected aquifer. And the Chadron and  
5 Brule don't exist there. So again we are talking  
6 about the drinking water here in Chadron is unrelated  
7 to any water, any mining that might be going on at  
8 Crow Butte.

9 So and we will respond to the rest of it  
10 but I wanted to for the purpose of members of the  
11 public here I would like to make clear that there is  
12 no link between activities at Crow Butte, any offsite  
13 arsenic, or any of these diabetes or pancreatic  
14 cancer.

15 JUDGE GIBSON: Okay, I appreciate your  
16 clarification.

17 Just one point though. That would only  
18 apply to people that were on city water and not people  
19 that are drinking out of wells in this area; correct?

20 MR. SMITH: Well, as a factual matter the  
21 aquifers don't exist here either so it would be just  
22 as true.

23 JUDGE GIBSON: Okay, fine. But the point  
24 is you were just saying that the water for the city  
25 was drawn somewhere else. I was just making the point

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1 that that might not be the case for people that are  
2 drawing their water here from wells.

3 Okay, yes?

4 MR. KLUKAN: Just one point, Your Honor,  
5 real quickly. One of the standards for new  
6 contentions is they are materially different from  
7 already pled contentions.

8 A review of the Consolidated Petitioners'  
9 petition reveals that they discuss arsenic at length  
10 as a potential contaminant which has human health  
11 effects. If the Consolidated Petitioners wanted  
12 because this wasn't available at the time of their  
13 submission of their petition to include this as  
14 support for their already admitted contentions I don't  
15 think the NRC Staff would object. But we fail to see  
16 how this is a materially different issue from that  
17 already presented. Yes, it does go into length about  
18 human health effects and what exactly the consequences  
19 of ingestion of arsenic are, but how is that a  
20 different issue from that already pled.

21 JUDGE GIBSON: Okay. And you are going to  
22 be addressing that in your briefing. Okay, that's  
23 fine. I just thought you might have some context  
24 about the timeliness, that's all.

25 Okay, I believe there has been some

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1 interest in you having if there is a trial of this  
2 case that it be under subpart G rather than under  
3 subpart L. Do you wish to -- I don't want lengthy  
4 argument, I just want you to give us a brief  
5 explanation of why it is you think that would be  
6 beneficial in this case?

7 MR. FRANKEL: Obviously without repeating  
8 all the briefing, it's all in there, we feel that  
9 especially in light of all the unknowns and especially  
10 in light of difference of scientific opinions, in  
11 light of the public health and safety concerns and the  
12 fact that we have here all of the parts of the public  
13 and petitioners represented here amongst us, it would  
14 behoove us to establish a proper record by allowing  
15 more than the streamlined discovery procedures of  
16 subpart L.

17 And we have discussed that the subpart L  
18 procedures are based on element of trust in the  
19 Applicant of making full and complete disclosures.  
20 And we have challenged in several places our belief  
21 that that is happening.

22 JUDGE GIBSON: Okay, thank you. Do you  
23 all want to say anything at all about subpart L versus  
24 subpart G?

25 MR. SMITH: I would only add that Crow

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1 Butte has at all times complied with the regulatory  
2 process in good faith and hasn't withheld any  
3 information from any parties.

4 JUDGE COLE: Do you have a view on part L  
5 or part G?

6 MR. SMITH: Well, it's not authorized for  
7 this proceeding, subpart G is not authorized, only  
8 subpart L is permitted.

9 MR. KLUKAN: The NRC staff agrees with  
10 that position but won't go into that here because it  
11 is put in our response.

12 JUDGE COLE: I didn't understand what you  
13 said, sir.

14 MR. KLUKAN: The NRC staff agrees with the  
15 Applicant's position that subpart G does not apply to  
16 this proceeding nor could apply under the Commission's  
17 rule. But we don't want to get into that here. It's  
18 already in our response, Your Honor.

19 JUDGE GIBSON: Judge Rosenthal, I think  
20 you were getting ready to say something?

21 JUDGE ROSENTHAL: Well, are you telling us  
22 that this Board does not have the authority to decide  
23 to conduct a G proceeding? I realize that in this  
24 type of proceeding L is the default. I was under the  
25 impression, and correct me if I am wrong, that the

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1 Board has the authority to convert it into a G  
2 proceeding. Am I wrong about that?

3 MR. SMITH: For materials license  
4 application, Your Honor, such as the one at issue here  
5 subpart G is not available, only subpart L, which is  
6 the less formal proceedings, and subpart N with the  
7 agreement of the parties, which we don't have here.

8 JUDGE ROSENTHAL: So you are telling us  
9 that we do not have the authority to conduct a G  
10 proceeding in this case?

11 MR. SMITH: Correct. The Commission has  
12 not made that available.

13 MR. FRANKEL: We've disputed that  
14 obviously in our briefing.

15 JUDGE ROSENTHAL: It seems to me that's a  
16 issue for our determination based upon our reading of  
17 the applicable regulations, assuming that we were to  
18 decide that apart from that a G proceeding was  
19 desirable.

20 JUDGE GIBSON: A couple of other  
21 housekeeping matters. Consolidated Petitioners'  
22 request for paper filing will be granted.

23 MR. FRANKEL: E-mail filing?

24 JUDGE GIBSON: Yes. But you just filed  
25 something, you would need, yes, that's fine.

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1 Now, I asked yesterday if anyone was going  
2 to object to the Delegation Treaty Council in this  
3 case as a interested governmental participant. Do you  
4 all have any objection?

5 MR. KLUKAN: Your Honor, as we read  
6 2.315(c) it talks about federally recognized Indian  
7 tribes. So if that is done in conjunction with the  
8 Tribe Government itself, then we have no objection to  
9 that.

10 MS. LORINA: They're certainly here with  
11 the full support of the Oglala Sioux Tribe.

12 JUDGE GIBSON: Okay. Applicant?

13 MR. SMITH: I don't guess we object to  
14 providing them with briefings and so on, but it would  
15 be in the interest of efficiency it would be more  
16 efficient and easier for the other parties if they  
17 only had to respond to one set of briefs from the  
18 Tribe rather than two sets of briefs. So perhaps if  
19 they could agree to consolidate their briefs then we  
20 would have no problem with that.

21 JUDGE GIBSON: Well, I think that he's  
22 already shown that he's benefitted our case by finding  
23 some cases that prevented you all from having to do  
24 any research. So but we will take your suggestion  
25 under consideration.

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1 I assume you have no objection?

2 MR. FRANKEL: Thank you. No objection.

3 JUDGE GIBSON: Okay. I think the last  
4 thing that we need to do is to get details for our  
5 tours tomorrow. And so I guess we'll start with you.

6 JUDGE ROSENTHAL: We can go off the record  
7 if you want.

8 JUDGE GIBSON: Yes, we can do this off the  
9 record.

10 (Discussion off the record.)

11 JUDGE GIBSON: Is there any further  
12 business that we need to take up?

13 (No response.)

14 JUDGE GIBSON: Hearing none, we are  
15 adjourned.

16 (Whereupon, at 3:15 p.m., the hearing in  
17 the above-entitled matter was concluded.)

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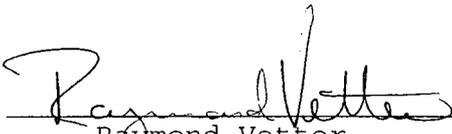
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