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ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:                    )  
  ) Docket No. 63-001-HLW  
U.S. DEPARTMENT OF ENERGY    )  
(High-Level Waste Repository)

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APRIL 1, 2009

TRANSCRIPT OF PROCEEDINGS

(Oral Argument)

Before the Administrative Judges:

ASLBP BOARD

09-878-HLW-CAB03

Michael Gibson, Chairman

Alan Rosenthal

Nicholas Trikouros

## 1 APPEARANCES

2 For the Nuclear Regulatory Commission Staff:

3 Mitzi Young  
4 Andrea Silvia  
5 Dan Lenehan

6 For the Nuclear Energy Institute:

7 Jay Silberg  
8 David Repka

9 For the Department of Energy:

10 Paul Zaffuts  
11 Don Silverman  
12 Al ex Pol ansky

13 For the State of Nevada:

14 Martin Malsch  
15 John Lawrence  
16 Charles Fitzpatrick17 For the Nevada Counties of Churchill, Esmeralda, Lander and  
18 Mineral:19 Robert List  
20 Jennifer Gores

21 For the State of California:

22 Tim Sullivan  
23 Susan Durbin

24 For the Caliente Hot Springs Resort:

25 John Huston

## 1 APPEARANCES (Continued)

2 For the Native Community Action Council:

3 Rovianne Leigh  
4 Scott Williams

5 For the Nevada County of White Pine:

6 Michael Baughman  
7 Richard Sears

8 For the Nevada County of Clark:

9 Alan Robbins  
10 Debra Roby

11 For the Timbisha Shoshone Tribe:

12 Darcie Houck  
13 Ed Beanan

14 For the Nevada County of Nye:

15 Rob Anderson  
16 Jeff VanNiel

17 For the Nevada County of Inyo:

18 Greg James

19 For the Timbisha Shoshone Yucca Mountain Oversight Program:

20 Doug Poland  
21 Hannah Renfro

22 For the Nevada Counties of Lincoln and Eureka:

23 Diane Curran  
24 Baird Whgart

25

1           >>JUDGE GIBSON: Thank you. We are back on  
2 the record for oral argument before the Atomic Safety  
3 and Licensing board. My name is Michael Gibson. I  
4 am chair of Construction Authorization Board No. 2.  
5 With me, on my right, is Judge Alan Rosenthal, who,  
6 like me, is a lawyer. On my left is Judge Nicholas  
7 Trikouros, who is a technical judge.

8           In the interest of having a clean record --  
9 and I know that we've had some counsel switch in and  
10 out, I would like for us to have announcements of  
11 counsel again like we did yesterday, and let's start  
12 here on the left with the NRC staff.

13           >>MR. LENEHAN: Daniel Lenehan, NRC staff.

14           >>MS. SILVIA: Andrea Silvia NRC staff.

15           >>MS. YOUNG: Mitzi Young, NRC staff.

16           >>MR. SILBERG: Jay Silberberg, representing  
17 Nuclear Energy Institute.

18           >>MR. REPKA: David Repka, representing  
19 Nuclear Energy Institute.

20           >>MR. ZAFFUTS: Paul Zaffuts, representing  
21 the Department of Energy.

22           >>MR. SILVERMAN: Don Silverman,  
23 representing the Department of Energy.

24           >>MR. POLANSKY: Alex Polansky,  
25 representing the Department of Energy.

1 >>MR. MALSCH: Marty Malsch for the State  
2 of Nevada.

3 >>MR. LAWRENCE: John Lawrence, State of  
4 Nevada.

5 >>MR. FITZPATRICK: Charles Fitzpatrick,  
6 State of Nevada.

7 >>MR. LIST: Robert List on behalf of the  
8 four counties of Churchill, Esmeralda, Lander and  
9 Mineral.

10 >>MS. GORES: Jennifer Gores on behalf of  
11 the four counties.

12 >>MR. SULLIVAN: Tim Sullivan with the  
13 California Attorney General's Office on behalf of the  
14 State of California.

15 >>MS. DURBIN: Susan Durbin, California  
16 Attorney General's Office, State of California.

17 >>MR. HUSTON: John Huston for Caliente Hot  
18 Springs Resort.

19 >>MR. WHEGART: Baird Whegart on behalf of  
20 Lincoln County.

21 >>MS. CURRAN: Good morning. I'm Diane  
22 Curran, representing Eureka County.

23 >>MR. POLAND: Good morning, Your Honor.  
24 Doug Poland on behalf of the Timbisha Shoshone Yucca  
25 Mountain Oversight Program Non-Profit Corporation.

1 >>MS. RENFRO: Good morning. Hannah Renfro  
2 also for the Timbisha Shoshone Yucca Mountain  
3 Oversight Program Non-Profit Corporation.

4 >>MR. JAMES: Greg James representing Inyo  
5 County, and to my left we've invited the state of  
6 California to share counsel table.

7 >>MR. FELDMAN: Kevin Feldman, State of  
8 California.

9 >>MR. VANNIEL: Jeff VanNi el , representing  
10 the Nye County.

11 >>MR. ANDERSON: Robert Anderson on behalf  
12 of Nye County.

13 >>MS. HOUCK: Good morning. Darci e Houck  
14 on behalf of the Timbisha Shoshone Tribe, and with me  
15 is Ed Beanan, a member of the tribal council.

16 >>MR. ROBBINS: Good morning. Alan Robbins  
17 on behalf of Clark County, Nevada.

18 >>MS. ROBY: Good morning. Debra Roby on  
19 behalf of Clark County, Nevada.

20 >>MR. SEARS: Good morning, Sears White  
21 Pine County, Nevada.

22 >>MR. BAUGHMAN: Good Morning, Your Honor.  
23 Dr. Mike Baughman, representing White Pine County.

24 >>MR. WILLIAMS: Scott Williams, Your  
25 Honor, on behalf of the Native Community Action

1 Council.

2 >>MS. LEIGH: Good morning, Your Honor.

3 Rovi anne Leigh also on behalf of the Native Communi ty  
4 Acti on Council.

5 >>JUDGE GIBSON: Thank you.

6 Our subject today, as it was yesterday,  
7 concerns standing and contenti on admi ssi bi li ty to  
8 chal lenge the Department of Energy's appli ca ti on for  
9 a li cense to construct a high-level waste reposit ory  
10 at Yucca Mountai n, Nevada.

11 Yesterday Constructi on Authori zati on Board  
12 No. 3 devoted the fi rst day of thi s proceedi ng to a  
13 number of i ssues, i ncl udi ng standi ng for NEI , as well  
14 as the stand ards by which to eval uate certai n groups  
15 of contenti ons and whether they coul d be admi tted as  
16 set forth any Appendi x A to our March 18 order.

17 As was done yesterday, we wi ll di spense  
18 wi th openi ng statements. We have read all 12,500  
19 pl us pages of your 300 pl us contenti ons. And we are  
20 fami li ar wi th the basi c argu ments that you've made.

21 Inst ead what we are seeki ng today i s a  
22 refi ne ment of the posi ti ons that you all have al ready  
23 enu nci ated i n those papers. And we have a number of  
24 areas that we wi sh to expl ore wi th you today.

25 Hopeful ly, we have set them out wi th

1 sufficient notice in Appendix B to our March 18  
2 order.

3           Now, if time permits, at the end of the  
4 day, we will attempt to afford each of you an  
5 opportunity to apprise us of what you believe remains  
6 to be said about the topics that we cover today, but  
7 I want to add a caveat to that, and that is we're not  
8 looking for closing arguments, summations of the  
9 evidence you've already submitted. As I've said,  
10 we've already read your paper.

11           What I would encourage you to do instead is  
12 not to hold back anything that you want to say till  
13 your closing argument, because that's not what it is.  
14 I would encourage you to let us know that you wish to  
15 participate so that we can have a robust dialogue  
16 about the issues that we are trying -- that we are  
17 grappling with this Board, and to allow other people  
18 to respond to what you say so that we can try to  
19 fine-tune those issues.

20           But if there truly is something that we  
21 overlook during the course of the day, then I  
22 would -- again, we'll try to give everybody, perhaps  
23 a minute, to let us know what you think that we  
24 didn't cover today that really bears on the issues  
25 that are set forth in Appendix B to our March 18

1 order.

2           We also will make a little bit of a  
3 departure, I think, from what was done yesterday.  
4 What I would like to do is for us to go 50 minutes.  
5 I would like to break at 9:50. I would like to take  
6 a 15-minute break. I would like to go another  
7 50 minutes, take a 15-minute break. Break at noon  
8 for an hour and a half. I would like to go from 1:30  
9 to 2:30, take a 15-minute break. Go from 2:45 to  
10 3:45, take a 15-minute break, and then go from 4:00  
11 to 5:00.

12           So I would -- I promise you, we will try to  
13 stick to that schedule as closely as possible.  
14 Knowing that, I would ask each of you to try to do  
15 what you can to stay in your seats and whatever  
16 until -- so that you won't disrupt other people by  
17 getting up and leaving the room or moving from one  
18 place to another.

19           I would also be remiss if I do not remind  
20 you that tomorrow Construction Authorization Board  
21 No. 1 will be sitting here, and that not only will  
22 they expect you to address the issues that are set  
23 forth in Appendix C to our March 18 order, but, in  
24 addition, as Judge Ryerson noted yesterday, they  
25 expect each of you to be able to apprise it of the

1 contentions that you believe are affected by the  
2 Nuclear Regulatory Commission's recent revisions to  
3 10 CFR Part 63. So please don't forget that your  
4 homework tonight.

5 Before we proceed to oral argument, I  
6 believe that Judge Rosenthal wanted to make an  
7 observation, and after that we will proceed to oral  
8 argument.

9 >>JUDGE ROSENTHAL: Thank you, Judge  
10 Gibson. I have a brief prepared statement. It was  
11 prepared prior to yesterday's proceeding, but there  
12 was a colloquy between Judge Farrar and DOE counsel  
13 that I think is -- has tie to my statement.

14 I wish to stress that this statement, its  
15 content is mine alone. I do not presume to speak for  
16 my colleagues on this Board or my colleagues on the  
17 other two construction authorization boards. For  
18 that reason I do not intend to entertain any  
19 commentary following my statement. The statement  
20 will just stand, as it's presented, and we'll then  
21 turn to the issues of the day.

22 This is the statement: As the parties to  
23 the proceeding are likely aware, I became a member of  
24 this Board very recently. Upon joining it, I  
25 discovered to my amazement that the Department of

1 Energy was taking the position that not a single one  
2 of the 100 -- of the 229 separate contentions filed  
3 by the State of Nevada was admissible.

4 In addition, to my further amazement, I  
5 learned that the Nuclear Regulatory Commission staff  
6 had told the Boards that, in its view, only a very  
7 small number of those 229 contentions met the  
8 standards for admission contained in the Commission's  
9 rules of practice, more particularly, Section  
10 2.309(f)(1).

11 That amazement stemmed from the fact that,  
12 on the face of it, it seemed most unlikely that  
13 experienced Nevada counsel, which included a former  
14 deputy general counsel of this agency were unable to  
15 come up with even one acceptable contention relating  
16 to this extraordinarily and unique proposed facility.  
17 Put another way, I found it difficult offhand to  
18 believe that Nevada counsel were so unfamiliar with  
19 the requirements of section 2.309(f)(1) that they  
20 simply were unable to fashion a single contention  
21 that met those requirements.

22 Now, it might turn out that despite this  
23 initial reaction, at day's end it will be determined  
24 by the members of the three boards, myself included,  
25 that, in fact, none of Nevada's contentions is

1 admissible.

2 In that connection, DOE and the NRC staff  
3 can be assured that each of their objections to the  
4 admissibility of contentions will have received full  
5 consideration by the time of our decision.

6 Should, however, upon that full  
7 consideration, we conclude that a significant number  
8 of the Nevada contentions are clearly admissible,  
9 with the consequence that the objection to their  
10 admission was wholly insubstantial, for me at least,  
11 both DOE and the NRC staff will have lost  
12 credibility.

13 Obviously DOE has an interest in fending  
14 off at the threshold as much of the opposition to its  
15 Yucca Mountain proposal as responsibly can be done.

16 It is not responsible conduct, however, to  
17 interpose objections that are devoid of substance on  
18 an apparent invocation of the old adage, nothing  
19 ventured, nothing gained.

20 Insofar as concerns the NRC staff, unlike  
21 DOE, it is the regulator, not the promoter of the  
22 proposal. That being the case, it would be even more  
23 unseemly for it to interpose to the admission of  
24 contentions objections that are plainly without  
25 substance.

1           Indeed, in such circumstances, the staff  
2 would, to its detriment, create the impression that  
3 it is not a disinterested participant in the  
4 licensing process but rather a spear carrier for DOE.

5           Once such impression has been garnered,  
6 there would remain little reason to credit anything  
7 that the staff might have to offer. That is the end  
8 of my statement. I will now turn it back to Judge  
9 Gibson, and we can move forward with the  
10 consideration of the issues that are before this  
11 Board.

12           >>JUDGE GIBSON: Thank you, Judge  
13 Rosenthal.

14           Before we get to the items that are set  
15 forth in Appendix B to the March 18 order, I want to  
16 be sure and remind each of you that, when you speak,  
17 please say your name and who you represent. We have  
18 a very good court reporter here, but as you can  
19 imagine the job they're trying to do is almost  
20 incomprehensible to remember everybody's name and who  
21 they represent. So just if you could just be sure  
22 and say your name and who you represent before you  
23 speak.

24           The second thing is, as there was one  
25 follow-up question I had to something that came up

1 yesterday. And I believe this would be addressed to  
2 counsel for DOE. I believe -- obviously, you all  
3 have taken the position that there's a number of  
4 petitioners here who have asserted  
5 transportation-based contentions.

6 And your argument, as I understand it, is  
7 that -- you all went through this yesterday. That it  
8 is outside the permissible scope of this proceedings  
9 to hear the -- for us to hear that matter. That  
10 exclusive jurisdiction rests in the courts of appeal,  
11 and that whatever decision has been reached under  
12 legal doctrines of res judicata, collateral estoppel,  
13 and merger, that they basically are going to prevent  
14 us from hearing the case.

15 My question doesn't have anything to do  
16 with the substance of that argument. If you need to  
17 bring your other counsel forward, I appreciate the  
18 fact that you all may not be prepared to address this  
19 today. But I don't think that it actually requires  
20 any substantive response on his part.

21 The question really is simply this. I'm  
22 going to ask you to make some assumptions that I know  
23 are going to be incredibly painful for you. But  
24 assume with me, if you would, that you were wrong,  
25 and, in fact, that we could hear transportation

1 contentions in this proceeding. And assume with me  
2 something that I know is equally painful for you, and  
3 that is that for those petitioners who have a -- all  
4 the petitioners who have asserted a  
5 transportation-based contention, at least one of  
6 their contentions is going to be admissible.

7 Now, my question is just simply this --  
8 assume with me that both those things are true -- are  
9 there any parties that have transportation-based  
10 claims whose standing you would still oppose in the  
11 event both of those assumptions turned out to be  
12 true?

13 >>DOE: This is Don Silverman, Your Honor,  
14 Judge Gibson, give me just one moment. I think I  
15 know the answer to the question. I'd like to very  
16 briefly confer.

17 >>JUDGE GIBSON: Gladly.

18 >>MR. SCHMUTZ: Your Honor, may I approach  
19 the counsel table. I'm Tom Schmutz, representing  
20 DOE.

21 >>JUDGE GIBSON: Oh, yes. Yes. I know I  
22 threw you a curve. It's fine.

23 >>MR. SCHMUTZ: That's all right.

24 >>MR. SILVERMAN: I think I had it right.  
25 I'm sorry, Your Honor.

1           I mean, the question is, assume  
2   transportation NEPA contentions can be heard, and  
3   that for any party that may have alleged one, one  
4   is -- at least one is admissible, would there be any  
5   other basis for not admitting that party? Yes, the  
6   standing issue. And the party that comes to mind  
7   would be the State of California, where we've made  
8   independent arguments as to the standing of that  
9   state.

10           >>JUDGE GIBSON: Okay. And with respect to  
11   any others who have raised transportation claims.  
12   Assuming that we can hear transportation contentions,  
13   and assume that a contention is admitted, is there --  
14   are there other base -- are there other grounds that  
15   you would be opposing standing with respect to those  
16   parties, or is California the only one?

17           >>MR. SILVERMAN: My recollection is the  
18   parties that -- the only parties that we have  
19   contested standing on are the State of California,  
20   the Nuclear Energy Institute. We have the two  
21   purported representatives of the Timbisha Shoshone,  
22   and we have said that whichever one is the AIT,  
23   affected Indian tribe, does have standing, but we  
24   have argued that beyond that they do not, have shown  
25   that. I believe we made the similar argument with

1 respect to NCAC, that they lack standing. And we  
2 probably did it with respect to Caliente Hot Springs  
3 Resort as well is my recollection.

4 >>JUDGE GIBSON: Okay. That's helpful.

5 >>MR. SILVERMAN: That's the group, I  
6 think, because I think the ALUGs that are recognized,  
7 we have not contested standing.

8 >>JUDGE GIBSON: Okay. That's helpful.

9 >>MR. SILVERMAN: There is the LSN  
10 compliance issue, which we think is a gateway also.

11 >>JUDGE GIBSON: Sure. Fair enough. Fair  
12 enough. Okay. I just wanted to try to get that  
13 clarified because it's a little hard to keep all  
14 these parts in -- that are moving at the same time in  
15 line. Thank you.

16 >>MR. SILVERMAN: Thank you.

17 >>JUDGE GIBSON: While I've got you,  
18 Counsel for DOE, I would like to start today talking  
19 about the issue of reasonable expectation and  
20 reasonable assurance. In part -- in 10 CFR Part 63.

21 Now, if I understand correctly, the  
22 reasonable assurance concept is associated with  
23 preclosure safety issues and the reasonable  
24 expectation concept is associated with post-closure  
25 activity; is that correct?

1 >>DOE: This is Alex Polansky for the  
2 Department.

3 Yes, Your Honor, that appears to the way  
4 63.31(a) and the safety findings are set up.

5 >>JUDGE GIBSON: Thank you. After reading  
6 your papers, it appears to me that you're asserting  
7 that a goodly number of Nevada's contentions fail the  
8 materiality threshold of 309(f)(4), and that  
9 specifically my understanding is, you're asserting  
10 that, even if those contentions were otherwise  
11 admissible, Nevada has failed to establish that such  
12 a contention that would impact the ultimate decision  
13 of the Nuclear Regulatory Commission, whether or not  
14 to authorize construction at Yucca Mountain.

15 Is that a fair statement?

16 >>MR. POLANSKY: This is Alex Polansky for  
17 the Department.

18 Yes, Your Honor, and there was some lengthy  
19 discussion on that yesterday as well.

20 >>JUDGE GIBSON: I appreciate that. You  
21 know, these things sometimes bleed into each other.  
22 And I realize that, as today, sometimes we may have  
23 not the designated hitter up to talk about that  
24 issue, but hopefully we'll be able to get through all  
25 this.

1           Now, one of the reasons that I understand  
2 you to be asserting that this fails the materiality  
3 threshold is that Nevada's petition, at least in  
4 certain cases, fails to demonstrate that the license  
5 application of the Department of Energy fails to meet  
6 the reasonable assurance standard with respect to  
7 preclusion obligations and does not meet the  
8 reasonable expectation standards with respect to  
9 post-closure obligations.

10           Now, you are asserting, if I understand  
11 correctly, that these two terms reasonable  
12 expectation, reasonable assurance mean two different  
13 things; is that correct?

14           >>MR. POLANSKY: Under 63.31(a) the  
15 Commission's ultimate safety finding is the same.  
16 For reasonable assurance it's that you can receive  
17 and possess radioactive materials. Another  
18 reasonable expectation is that you can dispose of  
19 those materials. But the test is or the finding is,  
20 can you do that without unreasonable risk to the  
21 health and safety of the public. So the Commission  
22 finding is the same. The rules, we think, are very  
23 clear, just on their face, that the methodology that  
24 the Commission must use to reach those findings is  
25 different.

1           >>JUDGE GIBSON: Well, maybe I didn't ask  
2 my question right, but I meant to ask: Do those two  
3 terms mean two different things?

4           >>MR. POLANSKY: Your Honor, I don't know  
5 that I can answer that question in the abstract  
6 because the regulations are there and the  
7 regulations, for example, in interpreting what  
8 reasonable expectation is, set forth a number of very  
9 specific considerations that the Commission should,  
10 for lack of a better word, consider.

11           In 63.101, in describing the purpose and  
12 nature of the findings, it says specifically that for  
13 reasonable expectation that proof that the geologic  
14 repository will conform with the objectives for  
15 post-closure performance is not to be had in the  
16 ordinary sense of the word because of the  
17 uncertainties inherent in the understanding of the  
18 evolution of geologic setting biosphere and engineer  
19 barrier systems. Similarly, it acknowledges that  
20 demonstrating compliance will involve the use of  
21 complex predictive models that are supported by  
22 limited data from field and laboratory tests,  
23 analogue studies, et cetera.

24           It then further goes on to have a separate  
25 section, which its title is Reasonable Expectation in

1 63.304, which sets forth four items that set -- that  
2 identify characteristics of what reasonable  
3 expectation includes.

4           And those are that it requires less than  
5 absolute proof, because absolute proof is impossible  
6 to obtain because of the uncertainty in projecting  
7 long-term performance.

8           Two, it accounts for inherently greater  
9 uncertainties in making long-term projections of  
10 performance for the Yucca Mountain disposal system.

11           Three, it doesn't exclude important  
12 parameters from assessments and analyses simply  
13 because they are difficult to precisely quantify to a  
14 high degree of confidence.

15           And finally, it focuses performance  
16 assessments and analyses on the full range of  
17 defensible and reasonable parameter distributions  
18 rather than only upon extreme physical situations and  
19 parameter values.

20           So in the abstract, to say reasonable  
21 assurance and reasonable expectation are the same, we  
22 believe the safety finding is the same, but we  
23 believe you cannot ignore the plain language of the  
24 subsequent regulations which extrapolate on the  
25 characteristics of what a reasonable expectation is

1 and what the burden of an applicant is to demonstrate  
2 reasonable expectation, and, therefore, what the  
3 staff and the Commission's job is to interpret  
4 whether they have met that burden.

5 >>JUDGE GIBSON: Okay. Well, maybe we'll  
6 come back to this question. Maybe we can -- do we  
7 have the -- could you get the DOE answer to Nevada  
8 petition on page 40? I'm going to go over a couple  
9 of the points that I think you just made,  
10 Mr. Polansky.

11 If I understand correctly, you're saying  
12 that it would require a different level and type of  
13 proof, reasonable expectation would than reasonable  
14 assurance?

15 >>MR. POLANSKY: I don't know that proof is  
16 the word I would select, Your Honor. I look at it as  
17 a methodology that needs to -- a framework.

18 >>JUDGE GIBSON: Well, certainly the word  
19 proof appears in the last line of this page; doesn't  
20 it? This is from your --

21 >>MR. POLANSKY: Yes. And that's directly  
22 from the regulation. That it requires less than  
23 absolute proof, because absolute proof is impossible  
24 to obtain, yes.

25 >>JUDGE GIBSON: Okay. And I believe --

1 again, I think this is consistent with what you said  
2 earlier. It is cautious but reasonable. Is that in  
3 the prior paragraph on this page? Yeah. There we  
4 go.

5 We've got "conservative means the use of  
6 cautious but reasonable assumptions consistent with  
7 present knowledge."

8 And, again, this is how we can describe --  
9 I won't argue with you what it means, but whether it  
10 means something different, the reasonable assurance,  
11 but this is sort of how we describe it; is that  
12 right? It's from your -- from your pleading.

13 >>MR. POLANSKY: Yes.

14 >>JUDGE GIBSON: Okay.

15 >>MR. POLANSKY: I think our pleading is  
16 taken directly from the regulation in that particular  
17 instance, Your Honor.

18 >>JUDGE GIBSON: Yeah. And I think your  
19 previous answer was as well. If we could go to  
20 page 39.

21 I believe we have this language again from  
22 your pleading, "To merely assert the existence of  
23 such uncertainties without specifying their impact on  
24 a finding NRC must make in its issuance of the  
25 construction authorization, amounts to an improper

1 challenge to Part 63, which explicitly recognizes  
2 that such uncertainties exist and cannot be  
3 eliminated."

4           So we have these unavoidable uncertainties  
5 that are inherent in making long-term predictions  
6 about post-closure performance. And what we're  
7 trying to do is to figure out how -- what is this  
8 term, if we don't describe what it means, which seems  
9 to be a hard thing for you to do. At least we can  
10 try to describe what its significance is for the  
11 decision-making that NRC needs to make.

12           In doing that, you have invoked EPA and its  
13 use of the term "reasonable expectation."

14           Could we get 41 of the DOE answer, please?  
15 A little bit further up, if you could, please. Okay.

16           "Given the obligation of the Commission  
17 under" -- this is from your pleading on page 41.

18           "Given the obligation of the Commission to  
19 modify its technical requirements and criteria to be  
20 consistent with the radiological protection standards  
21 promulgated by EPA, the proper application of the  
22 reasonable expectation standard must take into  
23 account the statements by EPA in promulgating the  
24 standards required by EPCRA."

25           Now, for everybody here who may not be

1 familiar with that, could you please let us know what  
2 EPACT is, Mr. Polansky?

3 >>MR. POLANSKY: The Energy Policy Act of  
4 1992.

5 >>JUDGE GIBSON: Okay. Now, the basic idea  
6 is that reasonable assurance is a standard that the  
7 NRC uses in reactor licensing cases, and reasonable  
8 expectation is not a term that they use in those  
9 reactor licensing cases. And your reading of this is  
10 that the reasonable expectation would be something at  
11 least less restrictive or less stringent than the  
12 reasonable assurance standard that the NRC uses in  
13 reactor licensing cases; is that correct?

14 >>MR. POLANSKY: Your Honor, this is  
15 Mr. Polansky. I don't know that it is a lesser  
16 standard. It is a different methodology. The safety  
17 finding, as I said before, is the same. And I think,  
18 if I could go to one of the documents, the federal  
19 register notices that we site on the subsequent page,  
20 on page 42 at the top.

21 >>JUDGE GIBSON: What fair register that?

22 >>MR. POLANSKY: This is the final rule,  
23 it's 66 Fed Reg 32.101. It is the only citation to a  
24 Fed Reg in footnote 27, and it goes directly to the  
25 sentence that you had brought up before.

1 >>JUDGE GIBSON: Okay.

2 >>MR. POLANSKY: And in looking at what EPA  
3 is saying --

4 >>JUDGE GIBSON: Did you say 32.101?

5 >>MR. POLANSKY: 32.101 is where we --

6 >>JUDGE GIBSON: I think we may actually  
7 have that. So for the benefit of everyone here,  
8 could we call that up? I believe that's maybe the  
9 last one.

10 >>MR. WELKE: 74? 75?

11 >>JUDGE GIBSON: This would be 66 Fed Reg  
12 32.101. Could you call that up, please, Mr. Welke?

13 >>MR. POLANSKY: The exact page I'll be  
14 referencing is the next page 32.102. 32.101 is the  
15 page which has the heading which is entitled What  
16 Level of Expectation Will Meet Our Standard.

17 >>JUDGE GIBSON: Do you have 102 or not? I  
18 don't think we have that page. Okay. It's okay. Go  
19 ahead. I'm sorry. We don't have that page --

20 >>MR. POLANSKY: Okay.

21 >>JUDGE GIBSON: -- available.

22 >>MR. POLANSKY: I don't know if it would  
23 help, but the previous footnote, Footnote 26, if it's  
24 hyperlink, the first citation they reference is  
25 32.101 to pages 103. So maybe you have it from

1 there. No. Okay.

2 The EPA was asked to clarify its meaning of  
3 what reasonable expectation was. And on page 32.102  
4 it says, "We'll clarify our meaning here.

5 Performance projections for deep geological disposal  
6 require the extrapolation of parameter values (site  
7 characteristics related to performance and  
8 performance calculations) (projections of  
9 radionuclide releases in transport from the  
10 repository) over very long time frames that make  
11 these projections fundamentally not confirmable."

12 And I would focus on that language,  
13 "fundamentally not confirmable." In contrast to the  
14 situation of reactor licensing, where projections of  
15 performance are only made for a period of decades,  
16 and confirmation of these projections is possible  
17 through continuing observation.

18 "In this sense, a reasonable expectation  
19 approach to repository licensing would be necessarily  
20 less stringent than an approach to reactor licensing.  
21 We, therefore, must agree that these comments that  
22 reasonable expectation requires less rigorous proof  
23 than NRC's reasonable assurance approach."

24 We don't interpret it as a lesser standard.  
25 It is a different standard simply because you cannot

1 physically confirm through observation during the  
2 life of the facility that the uncertainties and  
3 assumptions that you have made will be verified.

4 >>JUDGE GIBSON: So one is fundamentally  
5 not confirmable?

6 >>MR. POLANSKY: Yes.

7 >>JUDGE GIBSON: And one is?

8 >>MR. POLANSKY: That is the major  
9 difference. And that's why uncertainties have to be  
10 taken into account. And as we said on page 39,  
11 therefore -- and this is in our opening, not  
12 attacking any particular contention, but a contention  
13 that merely asserts that there are uncertainties out  
14 there, that's not a legitimate contention because the  
15 rule expects uncertainties and directs DOE to take  
16 into account uncertainties.

17 >>JUDGE GIBSON: Okay. I think we'll come  
18 back to you. I want to check in with NRC staff  
19 counsel. Hopefully this won't be quite as abstract  
20 as what we've just been talking.

21 You all were -- I want to sort of review  
22 with you the history of these terms in terms of  
23 rule-making. And my understanding is that in 1999  
24 the Commission first planned to impose the standard  
25 of reasonable assurance on post-closure safety; is

1 that correct?

2 >>NRC STAFF: Mitzi Young.

3 >>JUDGE GIBSON: I don't think your mike's  
4 on.

5 >>MS. YOUNG: Mitzi Young for the NRC;  
6 staff. That's correct.

7 >>JUDGE GIBSON: Thank you. And that was  
8 in the rule that you proposed on February 22 of 1999?

9 >>MS. YOUNG: I believe that's correct.

10 >>JUDGE GIBSON: And I -- the cite I have  
11 for that is 64 Fed Reg 8640. Does that sound right?

12 >>MS. YOUNG: Correct.

13 >>JUDGE GIBSON: Does that look like what  
14 you all said. We've got that displayed.

15 >>MS. YOUNG: That's the proposed  
16 regulation, 63.31, findings for construction  
17 authorization.

18 >>JUDGE GIBSON: And the idea at that time  
19 in 1999 was that you all were going -- were proposing  
20 to use the reasonable assurance standard for  
21 post-closure; is that correct?

22 >>MS. YOUNG: That's correct.

23 >>JUDGE GIBSON: Okay. Now, let's just  
24 keep with the history here. Later the same year in a  
25 final rule that was issued in November of 1999, the

1 Commission changed this language to replace the term  
2 "reasonable assurance" with the term "reasonable  
3 expectation;" is that correct?

4 >>MS. YOUNG: Mitzzi Young again. That's  
5 correct.

6 >>JUDGE GIBSON: Okay. Now, I have, in  
7 some rule-making that was done, I guess, like two  
8 years later -- do we have 66 Fed Reg 55740?

9 Okay. In some rule-making that was done a  
10 couple years later, NRC, as I understand it, was  
11 explaining in like, 2000 -- was this 2001?

12 >>MS. YOUNG: November 2nd, 2001.

13 >>JUDGE GIBSON: It was trying to explain  
14 what it had done two years prior. And it said that  
15 the change from reasonable assurance to reasonable  
16 expectation was to avoid any misunderstanding and to  
17 achieve consistency with the final EPA standards; is  
18 that correct?

19 >>MS. YOUNG: That's correct.

20 >>JUDGE GIBSON: Okay. Okay. Now, once  
21 this was done, Nevada then challenged the reasonable  
22 expectation standard in the DC Circuit. Is that  
23 correct?

24 >>MS. YOUNG: Yes, I believe that was the  
25 case, EPA versus NEI or --

1 >>>>JUDGE GIBSON: Something like that,  
2 huh?

3 >>MS. YOUNG: Right. Or NEI versus.

4 >>JUDGE GIBSON: Okay. Now, I also will  
5 get back to you shortly, but, Counsel for Nevada,  
6 let's see if we can pick up the story from there.

7 When you challenged this reasonable  
8 expectation standard in the DC Circuit, was that in  
9 the NEI v. EPA case?

10 >>MR. MALSCH: That's correct.

11 >>JUDGE GIBSON: Now, when you challenged  
12 that standard, do I understand correctly that you  
13 argued that the National Waste Policy Act did not  
14 authorize this reasonable expectation standard, but  
15 instead required a reasonable assurance standard?

16 >>MR. MALSCH: You know, I don't remember  
17 making precisely that argument. I do remember  
18 arguing that there was no rational explanation for  
19 the departure from prior precedent in which the  
20 Commission said, in '99, that it would apply a  
21 reasonable assurance standard for post-closure  
22 safety.

23 And I do know we raised a concern in our  
24 brief that the reasonable expectation standard could  
25 be read in a way to authorize issuance of a license

1 based upon less than a preponderance of the evidence.

2 But fortunately, the issue basically away  
3 when the Commission -- Commission -- counsel for the  
4 Commission assured the court that there was no  
5 consequential difference between reasonable  
6 expectation and reasonable assurance, and that the  
7 two standards for post-closure safety were  
8 substantively identical.

9 >>JUDGE GIBSON: Okay. You anticipated my  
10 next question. But I appreciate that clarification.  
11 As we promised, we'll break. It is 10 till 10:00,  
12 and we will pick back up at 10:05. We will be in  
13 recess until then.

14 (A recess was taken.)

15 >>JUDGE GIBSON: Counsel for Nevada, when  
16 we recessed -- incidentally I apologize. I was  
17 looking at the clock at the back of the room and  
18 apparently it's a few minutes fast. So I'm sorry  
19 about that. I'll try to -- try to realize that one's  
20 fast when we break next time.

21 Counsel for Nevada, I believe when we  
22 recessed, we were talking about the NEI v. EPA case  
23 and what transpired there.

24 I want to, if I could, look at the June 6,  
25 2003, brief that the staff filed in the DC Circuit.

1 Do you have that? I believe pages 47 to 48.

2 Now, if we could -- I believe the header  
3 here -- and this is, I believe, the staff's brief  
4 that was filed. "As applied to a repository,  
5 reasonable expectation and reasonable assurance are  
6 virtually indistinguishable." And then they say,  
7 "And thus, the reasonable expectation standard is not  
8 too vague and does not reduce the applicant's burden  
9 of proof."

10 How did you -- how did you respond to  
11 this -- I'm just curious -- in the DC Circuit when  
12 this header came up? I think there's also a  
13 statement later in the next page that says something  
14 like, "As applies to Yucca Mountain, there's no  
15 consequential difference between the two standards,  
16 given the nature of the determinations at issue."

17 Now, you are had challenged this. So I'm  
18 just curious, what transpired?

19 >>MR. MALSCH: Marty Malsch for Nevada.

20 >>JUDGE GIBSON: Thank you.

21 >>MR. MALSCH: My recollection is that we,  
22 in our reply brief, advised the Court of Appeals that  
23 in view of the NRC's -- we may have called it  
24 concession, that there really wasn't much of an issue  
25 here. And I think that is reflected in the court's

1 decision, because my recollection is that in NEI v.  
2 EPA, there was no court decision on the merits of  
3 this original controversy.

4 >>JUDGE GIBSON: Yeah. In fact, let's --  
5 I've got a -- could we go to the NEI v. EPA excerpt?  
6 I actually pulled this off. It was a little hard to  
7 read the two column -- not that. There's actually  
8 a -- there we go. Here we go.

9 This paragraph right here, the whole  
10 thing's not highlighted, but it says -- explaining  
11 what NRC explained in the brief we just looked at,  
12 then it says, "Moreover, during oral argument counsel  
13 for NRC confirmed that the two standards are  
14 substantively identical."

15 Now, is that your recollection that there  
16 was a concession in oral argument that they're  
17 substantially identical?

18 >>MR. MALSCH: That is my recollection,  
19 Your Honor.

20 >>JUDGE GIBSON: Okay. And by virtue of  
21 that, the court said that you deemed the  
22 representation sufficient to satisfy its claim.

23 >>MR. MALSCH: That is correct. We were  
24 taking the Commission at its word.

25 >>JUDGE GIBSON: And so back to where you

1 left it when the NEI v. EPA case had concluded that  
2 you had basically gotten the concession that you had  
3 hoped for?

4 >>MR. MALSCH: That is correct.

5 >>JUDGE GIBSON: Okay. Let's fast forward  
6 to 2007. You requested a binding interpretation of  
7 the phrase "reasonable expectation" from the  
8 Commission; is that correct?

9 >>MR. MALSCH: That's correct.

10 >>JUDGE GIBSON: Now, having gotten this  
11 concession in the DC Circuit, were you -- did you  
12 look at this as sort of, you know, belt and  
13 suspenders that you'd already -- is that how you  
14 looked at it, or you were you just being greedy? I  
15 mean, why did you seek this?

16 >>MR. MALSCH: We had a good reason for  
17 seeking this, Your Honor, and that is because in the  
18 time period following the decision by the Court of  
19 Appeals and the time in which we filed our request  
20 for an opinion, we had been following interactions  
21 between DOE and NRC staff, in which DOE constantly  
22 harped on some perceived significant difference  
23 between the two statements of -- statements of the  
24 finding to be made.

25 And so we thought the perhaps DOE hadn't

1 gotten the message, and we wanted to secure from the  
2 Commission a reassurance that what they had told the  
3 Court of Appeals was still true.

4           So it wasn't so much a belt-and-suspenders;  
5 argument; it was asking for a reaffirmation so as to  
6 remind DOE, which seemed to have forgotten the  
7 concession, that there was no meaningful distinction,  
8 and that in preparing their license application, that  
9 they should bear this lack of meaningful distinction  
10 in mind.

11           >>JUDGE ROSENTHAL: Well, if I may  
12 interrupt a second.

13           >>JUDGE GIBSON: Please. Please.

14           >>JUDGE ROSENTHAL: I don't understand why  
15 that would have been necessary. It seems to me --  
16 maybe I'm wrong -- that if a federal agency, in this  
17 case the NRC, makes a particular statement to a court  
18 with respect to the meaning of particular provisions,  
19 that it's bound by it. Am I wrong about that?

20           >>MR. MALSCH: No. I think you're, Judge  
21 Rosenthal. In that represent, it may have been  
22 unnecessary. But as I say, we certainly would not  
23 have filed the petition had DOE not been constantly  
24 harping on some perceived significant difference.  
25 And they could read the Court of Appeals decision as

1 well as I could, and so we were wondering what on  
2 earth DOE was doing, and so we sought the  
3 affirmation.

4 >>JUDGE ROSENTHAL: If you could indulge me  
5 just one additional moment?

6 >>JUDGE GIBSON: Please.

7 >>JUDGE ROSENTHAL: How did DOE interpret  
8 the statement that was made by the staff to the court  
9 and the court's action on that statement? It seems  
10 to me, from what I've just been told, that the staff  
11 had made a binding representation to the court that  
12 these two standards were substantively identical.  
13 And if that's the case, then I don't understand at  
14 all DOE's position, as it, again, reiterated this  
15 morning, that in operation there is some distinction.  
16 It seems to me, if these two terms are  
17 indistinguishable, substantively, that's the end of  
18 the game, but maybe I'm missing something.

19 So I'm interested in how DOE interpreted  
20 the staff's representation to the court and the  
21 court's action on it.

22 >>MR. POLANSKY: This is Mr. Polansky from  
23 the Department.

24 If we understand Nevada's position, it is a  
25 concern that the preponderance of the evidence

1 standard, the standard of proof would somehow be  
2 changed by changing the term from reasonable  
3 assurance to reasonable expectation standard.

4 DOE is not saying that the preponderance of  
5 the evidence standard is different. And we believe  
6 that the NEI decision and how we've interpreted the  
7 NRC staff's action in its briefing during that case  
8 is that they agree the preponderance of the evidence  
9 standard is the operable standard.

10 The issue is that the methodology for the  
11 Commission to reach its finding of reasonable  
12 assurance and reasonable expectation is different.  
13 And it is, we think, plainly laid out in the  
14 regulations themselves. To interpret the methodology  
15 to be identical or substantially have no difference,  
16 would be to wholesale delete entire regulations out  
17 of Part 63, which we don't think --

18 >>JUDGE ROSENTHAL: I don't know. Maybe  
19 you have a different interpretation of the term  
20 substantively identical than I do, but, to me, if  
21 just substantively identical, that means that even  
22 from a standpoint of methodology, there's no  
23 difference.

24 >>MR. POLANSKY: Your Honor, we interpreted  
25 the dispute over the difference between reasonable

1 assurance and reasonable expectation, as I said, to  
2 be one of the standard of proof, the preponderance of  
3 the evidence. We believe that standard remains  
4 intact. We believe that the methodology that the  
5 Commission needs in order to reach its safety  
6 findings under 63.31(a) is clearly set forth in the  
7 regulations, and we don't think there's any dispute  
8 by Nevada or NRC staff that those regulations apply.

9 >>JUDGE GIBSON: Thank you, Judge  
10 Rosenthal.

11 Returning to our chronology, which is a lot  
12 easier for me to follow than this level of  
13 abstraction that Judge Rosenthal and Mr. Polansky got  
14 to.

15 I'm curious, what would -- I take it your  
16 response from the NRC was a denial of your request  
17 for a binding interpretation of the phrase  
18 "reasonable expectation"?

19 >>MR. MALSCH: Marty Mal sch. Marty Mal sch  
20 for Nevada.

21 Yes. I mean, we would have been frankly  
22 surprised if the general counsel issued a binding  
23 interpretation. NRC general counsels seldom do that.  
24 There was no harm in asking. But what we did get was  
25 an informal opinion that reaffirmed the earlier

1 position. And we thought that was helpful, at least  
2 to remind DOE that the Commission's statement before  
3 the Court of Appeals was still operative.

4 >>JUDGE GIBSON: So their response was sort  
5 of like, you got the belt; so you don't get the  
6 suspenders?

7 >>MR. MALSCH: Perhaps.

8 >>JUDGE GIBSON: Okay.

9 >>MR. MALSCH: But we were satisfied.

10 >>JUDGE GIBSON: Okay. All right. Now,  
11 let's go back to the NRC staff for a second. Pick up  
12 here.

13 Is that essentially what this letter from  
14 Karen Syr at the NRC to Nevada said, was that  
15 essentially you got the belt; so you don't get the  
16 suspenders?

17 >>MS. YOUNG: Mitzi Young for the NRC  
18 staff. We wouldn't disagree with that  
19 interpretation. I think this dispute or  
20 misunderstanding mostly lied within EPA's  
21 interpretation of what the words "reasonable  
22 assurance" meant.

23 And I mean, the Commission never had any  
24 other expectation for Part 63 than what's reflected  
25 in the final requirements now. And just to avoid any

1 confusion on terminology, not that there was any  
2 substantive difference between the two terms, the  
3 Commission adopted the EPA terminology. But it  
4 always had stated, I believe, even in the proposed  
5 rule, that they thought there was sufficient  
6 flexibility in the reasonable assurance standard to  
7 accommodate licensing of the repository.

8 >>JUDGE GIBSON: Thank you.

9 >>MS. YOUNG: And if I just might add,  
10 Karen Syr's --

11 >>JUDGE GIBSON: Please.

12 >>MS. YOUNG: -- Letter was dated May 18,  
13 2007, that you were referring to.

14 >>JUDGE GIBSON: Okay. Now, let's go to  
15 2009, if we could. My understanding is that the  
16 Commission issued a final rule implementing the those  
17 dose after 10,000 years, and as part of that  
18 rule-making -- do we have 74 Fed Reg 10826? There we  
19 go.

20 The Commission, once again, indicated, as  
21 noted by the state -- I assume that's the State of  
22 Nevada -- "NRC and the state have already agreed that  
23 two terms are substantially identical, see NEI v.  
24 EPA." Is that correct?

25 >>MS. YOUNG: Mitzi Young. That's correct.

1 >>JUDGE GIBSON: Is there any question in  
2 your mind, Counsel for the NRC, that these terms are  
3 substantially identical?

4 >>MS. YOUNG: No question. But you can say  
5 that Part 63, through its regulations, gives a lot of  
6 information on what DOE has to do to provide the  
7 staff reasonable expectation in the post-closure  
8 phase that the regs will be met.

9 So there's no difference in the terms.  
10 Either reasonable assurance or reasonable expectation  
11 always has to be judged in the context of what's  
12 being considered in terms of the proposed action that  
13 the NRC is considering. They both refer to a level  
14 of confidence with the NRC's decision-making. That  
15 based on fulfillment of the regulatory requirement  
16 set out in Part 63.

17 >>JUDGE GIBSON: Well, you know, you just  
18 heard counsel for NRC, and -- I mean counsel for  
19 Nevada and counsel for DOE, and, you know, it sounds  
20 like, you know, they're not -- they don't certainly  
21 view these terms as being quite the same.

22 Do you -- are you going to pick a dog in  
23 this fight? Do you have a -- or do you agree with  
24 DOE's interpretation or do you agree with Nevada's  
25 interpretation.

1 >>MS. YOUNG: We do not agree with DOE's  
2 interpretation. That's clear.

3 >>JUDGE GIBSON: Okay. Okay. Thank you.  
4 So when it comes to actually drafting a license, then  
5 you, the NRC, would be not be pursuing the  
6 methodology that Mr. Polansky has been proposing for  
7 reasonable expectation, but would be utilizing the  
8 methodology that counsel for Nevada has indicated  
9 should be used; is that correct?

10 >>MS. YOUNG: Mitzi Young for the NRC staff  
11 again.

12 I don't believe counsel for Nevada proposed  
13 a methodology. I do believe that Mr. Polansky for  
14 DOE identified the pertinent regulation in terms of  
15 the reasonable expectation findings. And the staff  
16 does not dispute that that's the regulation that  
17 actually elucidates what reasonable expectation is  
18 with respect to repository.

19 >>JUDGE GIBSON: Counsel for Nevada, while  
20 you have a chance here, do you have a methodology  
21 that you could describe so that anyone here could  
22 understand it so that counsel for NRC will understand  
23 what methodology you're proposing?

24 >>MR. MALSCH: We don't propose a  
25 methodology as such. We do propose in our replies an

1 approach to how one applies the reasonable  
2 expectation standard, which is consistent with the  
3 reasonable assurance standard.

4           And let me just go through each of the  
5 supposed differences between -- the supposed  
6 methodological differences offered by EPA or NRC that  
7 would distinguish the two terms. I mean, we've  
8 heard -- and go over them one by one. I think, if we  
9 go over them, we can see where there might be a  
10 possible difference in methodology between reasonable  
11 assurance and reasonable expectation, but then I  
12 think we could conclude that certainly at the  
13 contention stage that difference is of no  
14 consequence.

15           I mean, if you just go through the  
16 differences one by one, you can see that. For  
17 example, the statement is made that under reasonable  
18 expectation, one uses cautious but reasonable  
19 assumptions consistent with present knowledge. We do  
20 that with reactor --

21           >>JUDGE GIBSON: I'm sorry. But before you  
22 go on, is that set forth somewhere in some document?  
23 Are you just reading from some notes? I'm just  
24 curious. I just thought if you had it available, it  
25 might be worthwhile for us to be able to see it. That's

1 all. I was just curious.

2 >>MR. MALSCH: I don't have that handy. I  
3 believe that's from one of the preambles. When I get  
4 to -- perhaps I should just go to the definition,  
5 63.304, which is where the Commission actually  
6 defines reasonable expectation. I think that would  
7 be the more definitive place to look.

8 If you look at 63.304, you see that  
9 reasonable expectation requires less than absolute  
10 proof. While the Commission has been clear for over  
11 a quarter century that reasonable assurance does not  
12 require absolute proof, so that is not a meaningful  
13 or consequential distinction.

14 63.304 next says that reasonable  
15 expectation accounts for the greater uncertainties in  
16 making projections of long-term performance. And  
17 I'll come back to that in a second.

18 Thirdly it says, it does not exclude  
19 important parameters because of -- they are difficult  
20 to quantify with a high degree of confidence. Well,  
21 that doesn't distinguish reactor licensing. Reactor  
22 licensing involves lots of parameters which are  
23 difficult to quantify. For example, reactor  
24 licensing involves efforts to develop precise  
25 sequences of core melt accidents. And many of the

1 parameters involved in those sequences are also  
2 difficult to quantify what high degree of confidence.  
3 That doesn't distinguish any methodology used in  
4 reasonable assurance.

5           And then finally 63.304 says it focuses the  
6 performance assessment on the full range of  
7 defensible and reasonable parameters. Well, we do  
8 that in reactor licensing also. So the one area  
9 where there might be a possible methodological  
10 distinction is in the part where they say that it  
11 accounts for greater uncertainties in projecting  
12 long-term performance.

13           Now, that is a theoretical methodological  
14 difference, but it is, in this case, certainly at the  
15 contention stage of no practical significance. And  
16 that is because, what that seems to be saying is we  
17 should be allowing for greater amounts of  
18 uncertainty, because of the inherent uncertainties of  
19 projecting long-term performance.

20           Unfortunately the Commission, while saying  
21 that there, indeed, was such a thing as too much  
22 uncertainty, that is to say, an amount of uncertainty  
23 which would preclude a finding of reasonable  
24 expectation, it declined to define what that level  
25 was. So at the same time insisting that it be -- it

1 was very important to properly characterize  
2 uncertainty.

3           So let's go back with that in mind and look  
4 at these objections to any one of our TSPA  
5 contentions, where they say we have failed to account  
6 for reasonable expectation. What they must mean in  
7 the context of a single contention is that we have  
8 not shown -- and this is a materiality objection, so  
9 they have -- they must be arguing that we have not  
10 shown that our contention, if true, if taken as true,  
11 would result in some degree of uncertainty which  
12 exceeded acceptable bounds. But there are no  
13 acceptable bounds. So asking us to do that is like  
14 asking the question how high is up. It's an  
15 unanswerable question.

16           The Commission was very clear when it  
17 declined to define what was an acceptable,  
18 unacceptable amount of uncertainty. It was very  
19 clear that it reserved that decision to much  
20 later further -- much further down the line based  
21 upon a full record.

22           So what the Commission is saying is we  
23 don't know what an unacceptable degree of uncertainty  
24 is now. You can't use that concept in ruling on the  
25 admissibility of contentions. But later on, way down

1 the road we come to a final licensing decision, we'll  
2 tell you what it is.

3 Now, I wanted to add one further thought.  
4 Remember that DOE made this objection to virtually  
5 every single one of our TSPA contentions. So what  
6 they mean -- what they are arguing then necessarily  
7 is something which we called utterly irresponsible.  
8 Since they're arguing materiality, they are saying  
9 that every single one of our contentions, if true,  
10 would not warrant denial of the license application.

11 They must be saying, looking at our  
12 contentions, that uncertainty doesn't matter. You  
13 can have an infinite, undefined amount of  
14 uncertainty, and we still are entitled to get a  
15 construction authorization, and we maintain that is  
16 an utterly irresponsible position to take.

17 >>JUDGE GIBSON: I suspect that  
18 Mr. Polansky would not that that was utterly  
19 irresponsible, but I do want to add -- afford him an  
20 opportunity to respond to what you just said. I  
21 would ask if you could do it in two minutes, perhaps,  
22 please.

23 >>MR. POLANSKY: Thank you, Your Honor.  
24 This is Mr. Polansky.

25 We started on this discussion and the

1 question about whether there is any difference in  
2 methodology, so let me address that first.

3 Reasonable expectation -- we don't agree  
4 that they are identical up to reasonable assurance in  
5 their methodology implementation. For example, in  
6 the reactor world, it is perfectly acceptable, under  
7 most circumstances, to demonstrate that you have a  
8 bounding analysis.

9 And here under 63.304, No. 4, you are not  
10 allowed to using all bounding analyses, in essence,  
11 to be 100 percent in every single capacity so  
12 conservative that you are bounding. The rule asks  
13 you to focus performance assessments and analyses on  
14 the full range of defensible and reasonable parameter  
15 distributions rather than only upon extreme physical  
16 situations and parameter values.

17 Now, that's not to say we cannot select a  
18 bounding value in certain models or submodels, but if  
19 we said every single thing is bounding here and,  
20 therefore, we're fine, we don't believe that that  
21 meets the probabilistic aspects of the performance  
22 assessment that is required under Part 63 to  
23 demonstrate reasonable expectation.

24 In addition, as a provision we haven't  
25 discussed, which is the one that comes right before,

1 Section 63.303, which discusses the implementation of  
2 Subpart L, and how you are to achieve your dose limit  
3 on reasonable expectation. And it was modified  
4 slightly in the March 13th rule. And it now  
5 states --

6 >>JUDGE GIBSON: This is the one the  
7 Commission just issued?

8 >>MR. POLANSKY: Yes, Your Honor.

9 >>JUDGE GIBSON: That we were just  
10 referring to?

11 >>MR. POLANSKY: Yes.

12 >>JUDGE GIBSON: Okay.

13 >>MR. POLANSKY: And that section now has  
14 the arithmetic mean of the estimated doses to be used  
15 for determining compliance.

16 Clearly the arithmetic mean or the mean of  
17 a value is there because of the great uncertainty  
18 that you have, and you are running many iterations  
19 and model runs, and you are getting numbers and  
20 possibilities above that mean and numbers and  
21 possibilities below that mean. In essence, you are  
22 running iterations that take into account all of the  
23 reasonable uncertainties. And some of those  
24 uncertainties result in very high dose, with low  
25 probabilities, and others in very low dose with low

1 probabilities, and you get an arithmetic mean.

2 That, in essence, is incorporating  
3 63.304.2, which accounts for the inherently greater  
4 uncertainties in making long-term projections. You  
5 wouldn't use a mean, I don't think, if you didn't  
6 have those uncertainties. You would use a single  
7 value. You may not get there deterministically, but  
8 you would say here's my dose value, you know; I can't  
9 go above.

10 >>JUDGE TRIKOUROS: Mr. Polansky, when  
11 would it be acceptable to file a contention that  
12 claimed that there was uncertainty? Would any such  
13 contention be viable?

14 >>MR. POLANSKY: What we said in our answer  
15 is generically, upfront, a contention that merely  
16 says that there is uncertainty or you have unbounded  
17 uncertainty by itself is not an admissible  
18 contention. And itself is not material. You have to  
19 go further. You have to say more.

20 >>JUDGE TRIKOUROS: And what would you  
21 constitute going further? Quantifying the  
22 uncertainty? Is there a standard that somebody would  
23 apply to that quantification?

24 >>MR. POLANSKY: Judge Trikouros, it is --  
25 in the contentions that we saw, the -- we did not

1 think that the petitioners connected the dots. I  
2 think Mr. Silverman addressed yesterday that under  
3 the TSPA, total system performance assessment, which  
4 is what we're discussing for post-closure and  
5 reasonable expectation, that there was no attempt at  
6 all, an essential abandonment of, you know, it's not  
7 possible to do it and we haven't even tried. And so  
8 that failure, we believe, doesn't connect the dots to  
9 demonstrate whether there would be a qualitative or  
10 quantitative outcome.

11 And in performance assessment space, I  
12 guess the best example would be to look at 63 is it  
13 14(e) and (f), which state that -- you know, (e), you  
14 need to provide the technical basis for either  
15 inclusion or exclusion of specific features, events,  
16 and processes in the performance assessment. That's  
17 the TSPA.

18 Specific features, events, and processes  
19 must be evaluated in detail if the magnitude and time  
20 of the resulting radiological exposures to the REMI,  
21 the reasonably maximally exposed individual, or  
22 radionuclide releases to the environment, would be  
23 significantly changed by their omission.

24 Now, DOE, in identifying its FEPs,  
25 features, events, and processes, did not run the TSPA

1 model for every single one of those in order to  
2 determine an inclusion or exclusion of those. It  
3 evaluated them.

4 We would have expected, and we did expect,  
5 that any contention saying that there had to -- that  
6 there was a change, because you didn't look at this  
7 issue or this type of corrosion mechanism or whatever  
8 it was -- that they would have to demonstrate  
9 materiality to this provision; that there would be --  
10 it would be significantly changed by their omission;  
11 that is the dose to the REMI would be significantly  
12 changed by their omission. And we, frankly, did not  
13 see that in the contentions.

14 >>JUDGE GIBSON: We're going to get into  
15 that quite a bit today, I think, but I'm not sure if  
16 this is the appropriate time, because I think we want  
17 to finish the arguments with respect to reasonable  
18 expectation and reasonable assurance.

19 All right. But let me ask one question in  
20 that regard.

21 >>JUDGE GIBSON: Please. Yes.

22 >>JUDGE TRIKOUROS: Would it be correct for  
23 me to say that applying the reasonable expectation  
24 standard would provide reasonable assurance that the  
25 post-closure performance criteria would be met, and,

1 conversely, if we applied the reasonable assurance  
2 standard, we would have reasonable expectation that  
3 the preclusion performance requirements would be met?  
4 Is that a -- are both of those correct and the same.

5 >>MR. POLANSKY: We believe so, because the  
6 underlying principle, the standard of proof is  
7 preponderance of the evidence.

8 >>JUDGE TRIKOUROS: Does Nevada agree with  
9 that?

10 >>MR. MALSCH: Marty Malsch for Nevada. We  
11 would agree that this proceeding is governed by the  
12 Administrative Procedure Act and the standard  
13 definition of level of proof is preponderance of the  
14 evidence. I guess the question is the preponderance  
15 of the evidence showing what?

16 And in regard to the comment that our  
17 contentions didn't connect the dot, I think our  
18 response is that, if the contention is the first dot,  
19 the Commission hasn't told us what the second dot is,  
20 and there's no connection to be made. I would also  
21 want to add that there is no single Nevada contention  
22 which merely asserts that uncertainty exists, period.

23 >>JUDGE TRIKOUROS: Judge Gibson  
24 characterized this as trying to nail jello to a tree.  
25 Does the NRC staff agree that those two statements

1 that I made are correct and the same?

2 >>MS. YOUNG: Mitzi Young for the NRC  
3 staff. If I heard you correctly, I would agree with  
4 your postulation of the two standards.

5 >>JUDGE GIBSON: Okay. Well, since we are  
6 not going to be able to nail this jello to a tree,  
7 let me ask you this, Ms. Young: I asked you about  
8 what methodology you would use in terms of preparing  
9 a license for this facility, and I understand that we  
10 didn't have a methodology that Nevada can propose.

11 Let me ask you: With respect to the  
12 specific question of contention admissibility, you  
13 have heard the two assertions of these two gentlemen  
14 with respect to what should be demanded by this Board  
15 with respect to the admission of these contentions.

16 Do you have a preferred view -- between  
17 Nevada and DOE on that issue?

18 >>MS. YOUNG: Mitzi Young for the NRC  
19 staff. Again, I'm not sure I remember everything  
20 that each of the counsel said, but it is clear that  
21 the staff did not, to my recollection, oppose  
22 contentions based on this issue. Materiality in  
23 terms of uncertainty being a challenge to  
24 regulations, we did not oppose that. So I would  
25 state that our view is closer to what Nevada is

1 stating; although Nevada talked about contentions  
2 being decided at a later date. I'm not sure the  
3 staff would agree with that. I mean, we have the  
4 regulations, we have the standards, and the  
5 petitioner has the obligation to demonstrate that  
6 their issues satisfy the requirements of  
7 10 CFR 2.309.

8 >>JUDGE GIBSON: Okay. Well, rather than  
9 get into more tit for tat, let me just say I believe  
10 that what counsel for Nevada was talking about was he  
11 simply said the Commission has given us a dot but  
12 they haven't given us the second dot. I think that's  
13 what he was referring to when he was talking about  
14 how it would be hard for them to describe it with  
15 more specificity.

16 Okay. DOE, let's go back to this -- I want  
17 to understand how significant, if at all, the EPA  
18 rule-making is for the position that you have taken  
19 with respect to what is required by the NRC.

20 And to just give a little context for that  
21 for those of you who are not familiar, EPA  
22 promulgates regulations that have to do with the  
23 standards that must be met, and the NRC is then to  
24 develop the technical criteria to implement those  
25 regulations.

1 EPA used the term "reasonable expectations"  
2 in their regulations, and as Ms. Young indicated, the  
3 Commission then picked up that term. Now, I want to  
4 understand, is the -- are the EPA regulations an  
5 integral part of your position or are they just out  
6 there and something that you think that the NRC's  
7 going to need to implement?

8 >>MR. POLANSKY: Mr. Polansky. Your Honor.  
9 I don't think they have a great amount of weight or  
10 consideration in the discussion we have here. The  
11 one paragraph that I read to Your Honors earlier  
12 today, I tend to find just the logical observation  
13 that you cannot confirm those parameters because  
14 we're going out 10,000 years as opposed to a 50-year,  
15 40-year operating license for a nuclear facility. I  
16 think that's the distinction to keep in mind.

17 The NRC has adopted its own regulations in  
18 Part 63, and as we've already discussed and I've  
19 walked through, those regulations say what they say,  
20 and that's what the applicant DOE is trying to meet,  
21 and we believe that they're plain on their face and  
22 they can't be read out of the regulations.

23 >>JUDGE GIBSON: Okay. If -- could we get  
24 the 64 Fed Reg 46997? Would you call that up for me,  
25 please?

1           In 1999, EPA in proposing these rules  
2 basically -- they were -- they have to do with  
3 reasonable expectation and reasonable assurances said  
4 that -- I'm quoting now from the highlighted part --  
5 "While the provisions in this rule establish minimum  
6 requirements for implementation of the disposal  
7 standards, NRC may establish requirements that are  
8 stringent."

9           Now, I read that to say that if NRC wants  
10 to adopt technical criteria that would be based on  
11 reasonable expectations, it can do so, and by doing  
12 that, it will -- it will meet the EPA standard. But  
13 that if the NRC wants to devise technical criteria  
14 that are more restrictive or stringent, or I guess  
15 have a more rigorous methodology would be the way you  
16 would put it, than what EPA has proposed here, then  
17 that would be okay, because that would be more  
18 stringent than the EPA standards.

19           On the other hand, if NRC were to adopt  
20 standards that -- technical criteria that were  
21 looser, less restrictive, had a less rigorous  
22 methodology than the reasonable expectation  
23 standards, then that would not comply with the EPA  
24 rules, the EPA standard, with respect to  
25 radionuclides.

1           Now, I just want to know, do you agree with  
2 the way that I read that statement?

3           >>MR. POLANSKY: This is Mr. Polansky.  
4 Yes, I do, Your Honor.

5           >>JUDGE GIBSON: So if this more rigorous  
6 methodology that I think is connoted by reasonable  
7 assurances were to be adopted as the appropriate  
8 standard for post-closure -- and I'm not saying the  
9 NRC's done it. Okay. I don't want to go there. I  
10 just want to say, if they decided to do that, they  
11 would be -- not be inconsistent with the EPA  
12 radionuclide standards; is that correct?

13           >>MR. POLANSKY: Yes, Your Honor.

14           >>JUDGE GIBSON: I knew you'd want to say  
15 something else. Go ahead. I just wanted to -- at  
16 least I got a yes out of you. Thank you.

17           >>MR. POLANSKY: I am cognizant of some  
18 inability to tack jello to a tree; so I'm trying to  
19 make it a little firmer for you.

20           I think, from the conversation we've had,  
21 what DOE could say is that, if NRC had not changed  
22 the word "reasonable assurance" to "reasonable  
23 expectation" and had, for example, in Section  
24 63.304 -- instead of entitling it reasonable  
25 assurance or reasonable expectation, the methodology

1 used for post-closure would still be different than  
2 the methodology that would be used for preclosure,  
3 because it's the methodology that we're saying is  
4 different.

5           The standard of proof in court,  
6 preponderance of evidence, that's the same. The  
7 ultimate finding of unreasonable risk to the public  
8 health and safety, that's the same. It's just that  
9 the methodology recognizes, and has to, that you are  
10 looking out thousands or tens of thousands of years  
11 for your post-closure, and you cannot do that in  
12 preclosure.

13           That being said, you know, we did have the  
14 exchange with Mr. Malsch that, under 63.304, I think  
15 there are some slight differences. And I use the  
16 example of a bounding scenario that we could not, in  
17 every single model and submodel, use bounding  
18 parameters. That's not what the concept is under  
19 63.304, No. 4. But besides those subtle differences,  
20 I hope that's firmed up our position for you.

21           >>JUDGE GIBSON: Okay. Thank you. Counsel  
22 for Nevada, I don't want to leave this without you  
23 having an opportunity to respond to what Mr. Polansky  
24 said. I gave him the chance to respond to you.

25           >>MR. MALSCH: Let me begin by just

1 remarking that we agree with Your Honor's statement,  
2 and I would just add that the EPA observation and its  
3 rule-making that you cited is actually consistent  
4 with almost identical language in the conference  
5 report for the Energy Policy Act of 1992. So this  
6 was not just some generous statement by the EPA. It  
7 was reflecting the state of the law.

8           Secondly, under the Energy Policy Act, the  
9 EPA rule itself has no direct application in this  
10 proceeding because, under the statute, the EPA rule  
11 only has significance insofar as it leads to a second  
12 NRC rule. And if it were even possible to argue  
13 theoretically that there was some inconsistency  
14 between the NRC implementing rule and the EPA rule,  
15 that would actually be an impermissible challenge to  
16 an NRC rule, which is not allowed in NRC practice.  
17 So for a number of reasons, the controlling  
18 regulation in this case is the NRC rule, not anything  
19 the EPA might have said or done in its rule-making.

20           With regard to Mr. Polansky's statement, I  
21 guess I can't disagree that the differences in  
22 methodology are, at best, slight. I would say that I  
23 don't see any problem with establishing compliance  
24 with an EPA dose standard using only bounding  
25 estimates. I don't think that's precluded so long as

1 one also -- in connection with making that proof of  
2 compliance, also includes a discussion of -- and  
3 characterization of the uncertainty involved. But I  
4 think that's almost of academic significance.

5 I would also add that, if you look at DOE's  
6 objections in their answers, their objection's along  
7 the lines of we have not established no reasonable  
8 expectation. Those objections don't sound in  
9 methodology. They sound in risk, acceptable levels  
10 of risk, which I addressed earlier. So I don't  
11 understand exactly what DOE's objections to our  
12 contentions are if they're talking about methodology  
13 and not levels of acceptable risk. I've just sort of  
14 lost track of what they're trying to say in their  
15 answers.

16 >>JUDGE GIBSON: Counsel for DOE, I think  
17 Mr. Malsch's statement raises a question in my mind.  
18 I hope I can formulate this.

19 I guess I'm curious how would -- I realize,  
20 you know, you don't want to be aiding and abetting  
21 the enemy here, but how would, you, if you were, you  
22 know, going to be a petitioner in this case, how  
23 would you draft a contention to challenge DOE's  
24 license application with respect to this post-closure  
25 standard that you say fails the materiality

1 threshold?

2 How would you -- would it be possible to draft a  
3 contention that, under your standard, would be  
4 admissible to challenge the post-closure rules -- or  
5 the post-closure regime that you have proposed in  
6 your application?

7 >>MR. POLANSKY: This is Mr. Polansky. It  
8 certainly would be possible to craft a contention.  
9 This -- you know, we were accused yesterday of  
10 creating a fortress to contention admissibility, and  
11 that's certainly not the case.

12 >>JUDGE GIBSON: Well, I think someone was  
13 just quoting out of a case. I'm not sure they  
14 accused you of anything. But that's okay.

15 >>MR. POLANSKY: Fair enough, Your Honor.  
16 Under 63.114(e), which is a provision I had read from  
17 earlier --

18 >>JUDGE GIBSON: 63.114(e)?

19 >>MR. POLANSKY: (e), yes.

20 >>JUDGE GIBSON: Can we call that up,  
21 Mr. Welke?

22 >>MR. POLANSKY: If I were crafting a  
23 contention, the requirement for materiality for this  
24 provision, for example, is that the omission of this  
25 FEP, this feature, event, or process, would be that

1 the radiological exposure to their RMEI would be  
2 significantly changed by its omission. So I would  
3 have experts and expert opinion that had some  
4 evaluation that demonstrated that the exclusion or  
5 omission of this -- and I'd have to find a place  
6 where it was omitted in the application -- would have  
7 significantly changed the dose to the RMEI.

8 Now, we had discussion yesterday about, you  
9 know, replicating the TSPA to do that. You know,  
10 that's not what DOE is asserting, and that's where  
11 the impossibility came up yesterday that no one can  
12 replicate what DOE has done. And by replicate we  
13 meant exactly model what DOE has done.

14 But, you know, we do point out that EPRI  
15 has its own model. NRC has its own model. It's not  
16 identical, it's not a replication, but they clearly  
17 have run some performance assessment-like analyses  
18 and have come up with their own opinions about the  
19 outcome.

20 And DOE, as I mentioned, in evaluating  
21 those FEPs, features, events, and processes,  
22 evaluated them and did not run them all through the  
23 TSPA. It might have done it on a model or submodel  
24 basis in order to make its decision. Clearly a  
25 petitioner could do that and have met the materiality

1 requirement. We do not believe that any of the  
2 contentions that are proffered in good faith did  
3 that.

4 >>JUDGE GIBSON: Okay. I think Judge  
5 Trikouros has got a question.

6 >>JUDGE TRIKOUROS: You need -- you need to  
7 provide me with more than that. How exactly would  
8 this process work?

9 Let me ask the question this way: Do you  
10 believe -- do you truly believe that any one  
11 parameter discussed in any one contention, if  
12 propagated through the TSPA, could result in failure  
13 to meet the standard?

14 >>MR. POLANSKY: Mr. Polansky. Judge  
15 Trikouros, I am not fully versed on the implications  
16 of this nonlinear model, the TSPA. What I can say is  
17 I think from some of the figures that are at the  
18 back -- and at a break I can provide you with those  
19 numbers -- there are clearly some features, events,  
20 phenomena which have greater implications on  
21 significance of dose than others.

22 >>JUDGE TRIKOUROS: Has the DOE done any  
23 sensitivity analyses in all of the years they were  
24 working with this model to identify which of those  
25 are sensitive and which of those aren't?

1 >>MR. POLANSKY: I believe there's a whole  
2 host of sensitivity studies. Whether they were done  
3 on the entire TSPA or on a model or submodel basis,  
4 I'd have to talk with our experts at a break.

5 >>JUDGE TRIKOUROS: But in answers -- well,  
6 let me say it this way. The only viable way that I  
7 can see to evaluate the implication of all of these  
8 contentions, many of which is still with individual  
9 parameter issues, would be to basically rerun the  
10 entire model with all of the parameters altered to  
11 the -- to be what the intervenors are indicating they  
12 should be and possibly reducing conservatism in other  
13 parameters that the DOE deems are overly conservative  
14 to try and reach something that makes sense.

15 And so what I'm trying to wrestle with is  
16 how does Nevada meet your standard? You're very  
17 nebulous about it. You make statements like they  
18 don't need to run the whole model, they could run  
19 parts of the model, but it's still -- from my  
20 perspective, is still not very clear how they could  
21 have met your materiality concern. Can you enlighten  
22 me perhaps some more?

23 >>MR. POLANSKY: This is Mr. Polansky. I'm  
24 having trouble articulating a specific for you  
25 because I don't want to talk out of school because

1 I'm not a technical expert. I don't know all the  
2 details and machinations of how the models or  
3 submodels were run, but I could point the Board to  
4 how the DOE evaluated inclusion or exclusion of FEPs,  
5 the features, events, and processes. I believe it's  
6 Section -- SAR Section 2.2 which discusses the  
7 inclusion or exclusion of FEPs. And there are  
8 supporting references which go on for hundreds, if  
9 not thousands, of pages for each feature, each event,  
10 each process, and how it was that DOE evaluated it  
11 for inclusion or exclusion against this criteria of  
12 significant effect.

13 And so if there are some people who are  
14 expert in the field -- and this is not just a single  
15 field. I mean, this covers corrosion. This covers  
16 igneous. It covers Martians coming from outer space.  
17 If those experts can do that evaluation and say to  
18 the NRC that we meet this criteria, then our  
19 assumption was that it would be relatively easy for  
20 experts in those same fields, if retained by  
21 petitioners, to make similar allegations with  
22 appropriate support that was a violation of that  
23 criteria or that regulation. And, as I said, in good  
24 faith, we did not think any of the contentions did  
25 that.

1 >>JUDGE TRIKOUROS: All right. Well, I'd  
2 like to -- we'll come back to this again. I don't  
3 think we've reached a resolution on this.

4 >>JUDGE GIBSON: I appreciate the fact that  
5 you can't tell me what these two terms mean,  
6 Mr. Polansky, and whether they mean the same thing or  
7 not. I understand that. I understand that you're  
8 saying that there is a different methodology, one  
9 more rigorous, one less rigorous, that one would  
10 utilize to determine whether, you know, you met this  
11 standard.

12 Setting that aside for a minute, have the  
13 contentions that Nevada has drafted, recognizing in  
14 your estimation they do not comply with the criteria  
15 that would be necessary for them to be admissible  
16 because of materiality, with respect to reasonable  
17 expectation, do they, nevertheless, meet the  
18 materiality threshold with respect to reasonable  
19 assurance?

20 >>MR. POLANSKY: This is Mr. Polansky.  
21 Judge Gibson, are you referring then to those few  
22 contentions that are challenging DOE's preclusion?

23 >>JUDGE GIBSON: No, I'm not. No, I'm not.  
24 I'm not talking about that at all. I'm talking about  
25 the post-closure contentions. And I realize that you

1 don't think that's what they need to mean.

2 But I just want to ask you, with respect to  
3 contention admissibility, you're saying they flunk  
4 the materiality threshold, okay, because reasonable  
5 expectation is something that your application meets  
6 and their contentions don't get there.

7 I'm just saying: Do you concede that they  
8 at least meet the reasonable assurance standard, even  
9 though you think that's not what applies?

10 >>MR. POLANSKY: This is Mr. Polansky. My  
11 gut reaction is that, no, but I'm not sure I fully  
12 still understand the question.

13 >>JUDGE GIBSON: Well, I definitely do not  
14 want you to -- as I would tell a deponent in my prior  
15 life, I would never want you to answer a question you  
16 did not understand. So let's start over.

17 >>MR. POLANSKY: Okay.

18 >>JUDGE GIBSON: Okay? You indicated that  
19 these contentions that Nevada has asserted with  
20 respect to post-closure flunk the materiality  
21 threshold for contention admissibility because  
22 reasonable expectation means something different than  
23 what they've alleged and they have not met those  
24 materiality requirements with respect to reasonable  
25 expectation.

1           Now, I know you don't think that reasonable  
2 assurance is the standard, that they -- that you need  
3 to meet for post-closure. And I'm sorry I have to  
4 ask you to assume that that is the case, just for  
5 purposes of this question. We're not going to hold  
6 you to this, Mr. Polansky.

7           But with respect to reasonable assurance,  
8 did Nevada's contentions that you say flunked the  
9 materiality threshold at least meet the contention  
10 admissibility requirements for that standard?

11           >>MR. POLANSKY: This is Mr. Polansky. No,  
12 Your Honor.

13           >>JUDGE GIBSON: And why?

14           >>MR. POLANSKY: I think what you're asking  
15 is, if we were just to say that reasonable assurance  
16 was the requirement that they needed to meet, as I  
17 hope I was clear --

18           >>JUDGE GIBSON: Actually, it would be you  
19 meet, but . . .

20           >>MR. POLANSKY: Yes. As I said  
21 previously, we believe that the ultimate safety  
22 finding is the same and the methodology is different.  
23 And so whether you call it apples or oranges or  
24 reasonable expectation, the methodology is what the  
25 methodology is in the rules, and we believe they need

1 to meet that in order to show that there's a material  
2 issue. Not meet it but raise a material issue within  
3 those -- that methodology.

4 >>JUDGE GIBSON: So you're saying that they  
5 don't even meet the materiality threshold with  
6 respect to reasonable assurance? I know you don't  
7 think they need to, Mr. Polansky, and I'm not asking  
8 you to concede that they do. I just want to know  
9 that question.

10 >>MR. POLANSKY: Yes.

11 >>JUDGE GIBSON: Okay.

12 >>MR. POLANSKY: We believe they wouldn't  
13 meet the materiality for that.

14 >>JUDGE GIBSON: Fair enough. I think we  
15 are at a point where we agreed we would take a break.  
16 We will take a 15-minute break, and we will be back  
17 on the record then. Thank you.

18 (A recess was taken.)

19 >>MR. MALSCH: Judge Gibson, if I may, I  
20 would like to respond briefly to -- a minute's worth  
21 to one of the comments that DOE made just before the  
22 Board broke.

23 >>JUDGE GIBSON: That will be fine. I hope  
24 you won't be surprised if Mr. Polansky may feel, you  
25 know, moved to speak to respond to you as well, but

1 go ahead. One of these days you guys will finish.

2 >>MR. MALSCH: That will be fine. And this  
3 is Marty Malsch with the State of Nevada.

4 >>JUDGE GIBSON: Go ahead.

5 >>MR. MALSCH: When you asked DOE to frame  
6 what they perceived to be an admissible contention,  
7 they actually attempted to frame a contention in a  
8 very narrow field dealing with inclusion of features,  
9 events, and processes. That has a whole separate  
10 regime in which one looks at probabilities and  
11 consequences. In fact, Nevada has only, I would say,  
12 less than a dozen contentions specifically dealing  
13 with FEPs. But two things I would say about this.

14 First of all, the account of the definition  
15 of FEPs and the standards for their inclusion offered  
16 by DOE is incomplete because elsewhere the Commission  
17 says quite clearly that we should also include  
18 features, events, and processes that might affect the  
19 performance of the repository and we should include  
20 those expected to materially affect compliance or be  
21 potentially adverse to performance.

22 Now, that's important because the  
23 calculations which DOE was insisting for -- need --  
24 DOE was insisting be included for FEPs contentions is  
25 actually something which the Department itself did

1 not or perhaps could not do in its own FEPs  
2 screening.

3 And let me call the Board's attention to  
4 their safety analysis report at page 2.2-17, in which  
5 it appears that the DOE, in screening in FEPs, didn't  
6 engage always or perhaps never in doing dose  
7 calculations, as what Mr. Polansky would suggest  
8 needed to be the case for an admissible contention.  
9 But instead FEPed in a feature, event, or process if,  
10 quote, "it would have an intermediate performance  
11 measure that can be linked to radiological exposure  
12 or radiological release."

13 So they were looking for implications and  
14 links to releases in including in FEPs but were not  
15 themselves engaging in doing the kinds of dose  
16 calculations which DOE now insists would have been a  
17 precondition for admission of one of our contentions.  
18 So ultimately DOE's notion of an acceptable FEP  
19 contention went beyond what DOE itself purported to  
20 do in its license application.

21 >>JUDGE GIBSON: Okay. I suspected you  
22 would want to say something, Mr. Polansky. Go ahead.

23 >>MR. POLANSKY: This is Mr. Polansky. In  
24 response, DOE can clearly be more conservative than  
25 the rules require; so I don't think the issue that

1 Mr. Malsch raised in itself suggests that DOE did  
2 anything wrong or changes our position.

3 In order to bring -- and, also, to get back  
4 to issues that you were -- we were discussing before  
5 the break, in order to take this down from the  
6 high-level discussion to something more concrete, we  
7 would like to call to your attention Nevada  
8 Safety 29, which is a contention that alleges that  
9 DOE should have taken into account plant height,  
10 differentiating plant height in its infiltration  
11 analysis.

12 And the allegation or the materiality is  
13 based on a purported violation of 63.114(b), which is  
14 account for uncertainties and variabilities in  
15 parameter values and provide for the technical basis  
16 for parameter ranges, probability distributions, or  
17 bounding values used in performance assessment.

18 This is where we come back to our central  
19 theme which we think is correct, that you need to  
20 show or demonstrate a material change to the outcome  
21 of the proceeding. One contention could have said --  
22 and it did not. I'm not saying they filed this  
23 contention, but a contention could have said, you  
24 didn't account for flowers on these plants. Now, why  
25 does that raise a material -- a material dispute,

1 something that's material here, that we should have a  
2 hearing about.

3           And the same thing on plant height. It is  
4 not the requirement of these regulations that the  
5 Department of Energy take into account every single  
6 kind of perturbation or parameter that happens to  
7 exist in real life, that plants are not all the same  
8 height, but there has to be a proxy in some of these  
9 models that, by itself, saying that there's a change  
10 in plant height, that that could affect infiltration,  
11 that that somehow creates a material dispute.

12 And our response to Nevada Safety 29 said this  
13 doesn't raise a material dispute for that reason.

14           >>JUDGE GIBSON: I hope that this doesn't  
15 degenerate into a colloquy on plant height.

16           Mr. Malsch, is there anything you need to  
17 say to what Mr. Polansky said?

18           >>MR. MALSCH: Just very briefly in defense  
19 of that contention.

20           >>JUDGE GIBSON: Please, briefly.

21           >>MR. MALSCH: There is a separate  
22 enforceable requirement in Part 63, and it's in,  
23 among other places, 63.101(a)(2) which says that the  
24 total system performance assessment must include the  
25 full range of defensible and reasonable parameters,

1 otherwise, the TSPA itself is not valid. That is a  
2 separate issue. A contention which alleges a  
3 violation of that standard is, per se, material  
4 because it raises an issue of compliance with an  
5 applicable regulation.

6 Now, insofar as flowers are concerned, I  
7 think DOE is confusing materiality with the minimal  
8 showing required under the contention requirements.  
9 I mean, obviously if we had alleged a violation of  
10 63.101(a)(2) and had said that the full range of  
11 defensible and reasonable parameters had not been  
12 included because flowers weren't accounted for, one  
13 would expect to see some reasonable explanation by  
14 our expert under paragraph 5 as to why flowers were  
15 important. I think here we are confusing the minimal  
16 showing required to show there was a genuine dispute  
17 under paragraph 5 with materiality standard  
18 elsewhere.

19 >>JUDGE GIBSON: We are talking about  
20 materiality, I hope. Fair enough. Okay.

21 We have not heard from the NRC staff in a  
22 while. Before we move on to the next area, I just  
23 want to see -- ask you: Is there anything else that  
24 you all wanted to say about reasonable expectation  
25 and reasonable assurance?

1 >>MS. YOUNG: Ms. Young for the NRC staff.

2 I believe the Board made reference to a  
3 statement in the EPA rule-making about differences  
4 between the EPA standard being either more lenient or  
5 more restrictive than the NRC requirements.

6 >>JUDGE GIBSON: That was actually -- I  
7 believe I got an agreement from counsel from DOE on  
8 that.

9 >>MS. YOUNG: Right. I guess --

10 >>JUDGE GIBSON: To go back over it, it  
11 simply was that technical criteria that EPA -- that  
12 NRC promulgates must be at least as restrictive,  
13 stringent, or meet the standard that the EPA  
14 promulgates in its radionuclide standards. I believe  
15 that's all we were really talking about.

16 >>MS. YOUNG: Okay. I just wanted to point  
17 the Board's attention to the words in the final rule  
18 issued November 2nd, 2001, regarding reasonable  
19 assurance and a response to a comment that EPA --

20 >>JUDGE GIBSON: Was this an EPA standard?

21 >>MS. YOUNG: No. This is the NRC rule.

22 >>JUDGE GIBSON: The NRC rule in 2001. Do  
23 you have a cite to that?

24 >>MS. YOUNG: Absolutely. It's 66 Federal  
25 Register. The exact page is 55740.

1 >>JUDGE GIBSON: Could you call that up,  
2 please, Mr. Welke. Be sure everybody can see it?  
3 Okay. It's not coming up. Thank you. Okay.

4 Is this the language you're referring to,  
5 ma'am?

6 >>MS. YOUNG: I believe it's a little  
7 further.

8 >>JUDGE GIBSON: Okay.

9 >>MS. YOUNG: It's the next column.

10 >>JUDGE GIBSON: Okay.

11 >>MS. YOUNG: It's issue 2, which talks  
12 about "Does the term reasonable assurance denote a  
13 specific statistical parameter related to either  
14 probability distribution."

15 >>JUDGE GIBSON: You know what? Could you  
16 help Mr. Welke find that, please?

17 >>MS. YOUNG: Yeah, he was there. It's at  
18 the bottom of the first column.

19 >>JUDGE GIBSON: Bottom of the first  
20 column. I thought you said on the second one. Go  
21 down to the bottom.

22 >>MS. YOUNG: Yeah.

23 >>JUDGE GIBSON: Issue 2. "Does the term  
24 reasonable assurance denote a specific statistical  
25 parameter related to either the probability

1 distribution of calculated individual doses or  
2 important variables used in that calculation."

3 >>MS. YOUNG: And you'll see at the top of  
4 the next column --

5 >>JUDGE GIBSON: Okay.

6 >>MS. YOUNG: -- the EPA's interpretation  
7 of reasonable assurance, in their minds, would lead  
8 to the extreme approach of selecting worst case  
9 values.

10 >>JUDGE GIBSON: Okay. Do you see that,  
11 coupled with, according to the EPA, that approach?

12 >>MS. YOUNG: Right.

13 >>JUDGE GIBSON: Yeah. Could you highlight  
14 that for her, please?

15 Is that the language you're talking about,  
16 ma'am?

17 >>MS. YOUNG: Yes. And a little further  
18 down.

19 >>JUDGE GIBSON: Okay.

20 >>MS. YOUNG: "EPA concludes that the  
21 application of reasonable assurance standard could be  
22 inconsistent, number one, but also, number two, would  
23 result in applying margins of safety beyond the  
24 standard for individual protection set by the EPA,  
25 which, in effect, alters the standard."

1           And you'll see, in the Commission's  
2 response here, again, was to --

3           >>JUDGE GIBSON: And that would be in the  
4 next column; is that right?

5           >>MS. YOUNG: Actually starts at the bottom  
6 of that column.

7           >>JUDGE GIBSON: Bottom of that column.

8           >>MS. YOUNG: The word "response."

9           >>JUDGE GIBSON: Okay.

10          >>MS. YOUNG: Even though the Commission  
11 was adopting EPA's terminology of reasonable  
12 expectation, again, there was no view of the  
13 Commission that reasonable assurance would involve  
14 such extreme values being used for important  
15 parameters.

16          So this is just to highlight, again, that  
17 EPA's interpretation of reasonable assurance was  
18 different than the NRC's interpretation of reasonable  
19 assurance. But there is no difference in the NRC's  
20 mind between the terminology reasonable assurance and  
21 reasonable expectation. Each considers either  
22 uncertainties or the particular action that's being  
23 authorized or considered for authorization and  
24 obviously the time period that that proposed action  
25 would be undertaken.

1 >>JUDGE GIBSON: Okay. Thank you very much  
2 for that clarification. We are ready to go to the  
3 next topic unless somebody has some burning desire to  
4 say something about reasonable expectation or  
5 reasonable assurance.

6 Oh, I'm sorry. Judge Trikouros has got a  
7 question. I'm sorry. Please.

8 >>JUDGE TRIKOUROS: When we agreed earlier  
9 that reasonable assurance and reasonable expectation  
10 were fundamentally significantly the same, Mr. Malsch  
11 indicated in his agreement that, yes, I agree that  
12 they are significantly the same in that both referred  
13 to a burden of proof of the preponderance of the  
14 evidence. And, however, the statement was made that  
15 we don't know what the preponderance of evidence is.  
16 So it kind of shifted the issue to preponderance of  
17 evidence but left it nebulous again.

18 Would 50 percent be the answer to that? In  
19 other words, you know, where the -- where we were  
20 just looking at 95 percentile, would the truth be in  
21 terms of preponderance of evidence what I would call  
22 50 percentile, 50th percentile?

23 >>MR. MALSCH: Marty Malsch for the State  
24 of Nevada. I mean, if you look at law school books,  
25 the preponderance of the evidence standard is equated

1 to, you know, 51 percent versus 49 percent; although,  
2 in fact, in most cases and certainly in this case, it  
3 doesn't come down to such, you know, quantitative  
4 measures. I would say the difficulty here is that  
5 the preponderance of the evidence standard really  
6 applies not at the contention stage. I mean, indeed,  
7 the Commission's rules are quite clear that one need  
8 not make his case at the contention stage. The  
9 preponderance of the evidence standard applies when  
10 the entire record is completed on any one issue and  
11 the -- and the Boards and Commission are deciding and  
12 weighing the evidence.

13 I don't think you can easily equate  
14 preponderance of the evidence with such things as  
15 using the 95 percent distribution or the mean or the  
16 median. I think --

17 >>JUDGE TRIKOUROS: Right. I understand  
18 that. However, we're trying to get through the  
19 contention admissibility phase, and people are using  
20 words like "uncertainty" in contentions with no clear  
21 definition of how much uncertainty is acceptable and  
22 how much uncertainty is unacceptable.

23 There are contentions that you -- your  
24 organization has filed that indicate that certain  
25 parameters -- because of certain reasons, various

1 parameters have a greater uncertainty than was  
2 assumed by the DOE; therefore, you want that admitted  
3 as a contention.

4           And DOE comes back and says, you know,  
5 that's not sufficient to simply say that. So, you  
6 know, we're dealing with a -- what really would  
7 satisfy me to be a quantitative aspect of this that  
8 we can't get ahold of, really, and, you know, somehow  
9 I think we need to come to grips with that, at least  
10 to some extent.

11           >>MR. MALSCH: Let me just respond by  
12 saying that the issue you're struggling with, I  
13 think, is precisely the issue the Commission itself  
14 struggled with when it addressed this question in  
15 promulgating Part 63. It declined to define for the  
16 purposes of the regulation what would be an  
17 acceptable or unacceptable level of uncertainty and  
18 said, instead, we'll make that decision later on  
19 based upon the full record.

20           So I think your struggle is symptomatic of  
21 a problem with DOE's objection. It's just not the  
22 kind of thing you could properly wrestle with or even  
23 possibly decide at the contention stage. This is  
24 clearly the kind of thing that is reserved for the  
25 merits decision much later down the road.

1 >>JUDGE TRIKOUROS: Correct. Correct. But  
2 the problem is the far-reaching nature of this is  
3 such that it encompasses a very large number of  
4 contentions. If one were to come on one side of  
5 this, basically every contention would be admitted.  
6 If one were to come on the other side of this,  
7 basically every contention would be denied.  
8 That's the problem.

9 >>MR. MALSCH: Well -- Marty Malsch for  
10 Nevada. Obviously that's not a problem for us. We  
11 think we've raised a great number of very legitimate  
12 issues, and I think they are all admissible, and the  
13 fact that there are a great number of them derives  
14 from two facts. One is we have very specific  
15 contentions, unlike most intervenors in most  
16 proceedings; and, two, the Commission in Part 63  
17 purported to adopt a performance-based regulation in  
18 which there are not a whole lot of quantitative  
19 standards other than the ultimate dose standard.

20 Yet the Commission was very clear that, for  
21 post-closure safety, safety would not depend just  
22 upon the simple results of a dose calculation at the  
23 end of a performance assessment. Instead there had  
24 to be compliance with a whole subset of requirements,  
25 including, as one of them, a separate and enforceable

1 requirement that the full range of reasonable and  
2 defensible parameters be included. Now, I would  
3 agree that admits of a great number of specific  
4 complaints about whether that has been done, but  
5 that's the nature of the regulation. It's the nature  
6 of the fact that we chose to file very specific  
7 contentions.

8 >>JUDGE GIBSON: Okay. Thank you. Seeing  
9 no hands up there, I'm assuming we won't hear any  
10 more about reasonable expectation or reasonable  
11 assurance the rest of the day, unless Judge Trikouros  
12 decides to, you know, get back into this issue later.  
13 And I think Judge Rosenthal has some specific  
14 questions for you all.

15 >>JUDGE ROSENTHAL: Yeah. Another area of  
16 overarching disagreement between DOE, joined in this  
17 instance by the NRC staff and Nevada, relates to the  
18 sufficiency of the affidavits of experts that Nevada  
19 has submitted in fulfillment of certain of the  
20 requirements of the rules of practice governing  
21 contention admissibility.

22 The controversy specifically centers upon  
23 Nevada's practice of first placing everything that it  
24 is offering in support of each of its contentions in  
25 the body of the contention itself. Then in

1   affidavits accompanying the totality of the Nevada  
2   contentions, to the extent relevant, the experts  
3   adopt as their own opinions that content.

4           In the view of DOE, again supported by the  
5   NRC staff, the pertinent requirements of  
6   Section 2.309(f)(1) are not satisfied by the  
7   submission of expert affidavits that simply  
8   incorporate by reference what is offered in the  
9   contention itself by way of support for the challenge  
10  to the proposal under consideration. Thus, DOE would  
11  have it that virtually all of Nevada's submitted  
12  contentions must fail for this reason alone.

13           By way of response, Nevada insists that the  
14  course that it followed was entirely consistent with  
15  the discharge of the obligations imposed upon it by  
16  the applicable rules of practice.

17           Now, in exploring this issue, I'd first  
18  like to inquire of Nevada what prompted its decision  
19  to place the supporting material in the body of the  
20  contention rather than in the affidavit of the expert  
21  and then having the expert endorse the content of the  
22  contention, and this is -- basically deals with  
23  paragraphs 5 and paragraph 6 of 2.309(f)(1), so I  
24  would like to get its rationale for adopting that  
25  procedure.

1           >>MR. MALSCH: This is Marty Malsch for  
2 Nevada. It was done, first, for practical reasons.  
3 We had hundreds of contentions, and it was a  
4 considerable burden on Nevada to review the license  
5 application and all the supporting materials within  
6 the time frame allotted and file contentions on a  
7 timely basis. So we adopted this practice of having  
8 affidavits incorporate materials by reference solely  
9 to avoid the burden on Nevada of having to file  
10 hundreds of individual affidavits. Also, we were  
11 aware of no NRC rule or precedent at all that would  
12 preclude the practice that we followed.

13           And I wanted to emphasize here that, in  
14 fact, the language in paragraph 5 and to some extent  
15 paragraph 6 of our contentions was, with very limited  
16 exceptions -- and those exceptions deal with  
17 primarily legal contentions or contentions in which  
18 we use the support of government documents. With  
19 those rare exceptions, in fact, the statements in  
20 paragraph 5 of our contentions were drafted by our  
21 experts, not by counsel.

22           >>JUDGE ROSENTHAL: And you have, if I  
23 recall correctly, in your reply to the DOE objection  
24 a specific representation that your experts had a  
25 major role in the formulation of the supporting

1 material; is that correct?

2 >>MR. MALSCH: Marty Malsch of Nevada.  
3 That is not only correct, but you've actually  
4 understated their role. Their role was not just a  
5 major role. It was they were the -- virtually, the  
6 only drafters of those contentions.

7 I mean, we, as lawyers, reviewed them and  
8 maybe corrected some grammatical mistakes and such,  
9 but, by and large, what you're seeing here are the  
10 statements of our experts, not the statements of  
11 counsel, not, though, that would have made any  
12 difference.

13 We pointed out an NRC case in which said  
14 that, actually, it would not have been impermissible  
15 to have counsel draft these statements and have the  
16 statements drafted by counsel adopted by experts,  
17 but, in fact, that is not the practice we followed.  
18 These were essentially drafted by the experts.

19 >>JUDGE ROSENTHAL: Okay. Thank you,  
20 Mr. Malsch.

21 DOE, can you point to any specific  
22 provision in the rules of practice that preclude the  
23 course that was pursued by Nevada in this instance or  
24 any decision of the Commission or of a licensing  
25 board that states that the support that's being

1 offered for a particular contention must be contained  
2 in the expert's affidavit?

3 >>MR. POLANSKY: This is Mr. Polansky.

4 Yes, Your Honor. Before I answer, I did  
5 note that the topics for discussion included not only  
6 what format the affidavits may take but what is  
7 needed to satisfy the standards for contention  
8 admissibility under 2.309(f)(15). Would you like my  
9 answer to encompass both of those?

10 >>JUDGE ROSENTHAL: No. I am dealing  
11 with -- I don't know whether what you now have in  
12 mind is the question as to whether the expert must  
13 provide documentary support for his opinion. Is that  
14 what you're addressing? Because if that is what you  
15 have in mind, I'm going to get to that subsequently.

16 I'm now focusing on the question as to  
17 whether it is permissible to have the support  
18 contained in the body of the contention, with then  
19 the expert in his or her affidavit endorsing that  
20 content as his or her own opinion.

21 And I'm not getting into the question as to  
22 whether in a particular instance what's been put in  
23 the contention is sufficient to the day. I'm just  
24 now addressing the question of whether, as apparently  
25 is your claim, joined by the staff, that it is not

1 adequate to have the expert in his or her affidavit  
2 simply adopt as his or her opinion what's set forth  
3 in the body of the contention.

4 >>MR. POLANSKY: Yes, your Honor. This is  
5 Mr. Polansky.

6 I understand the focus of your question,  
7 and my answer remains yes. In our answer, DOE's  
8 answer at pages 47 and 48, we did cite to a Vermont  
9 Yankee Board decision in which that Board criticized  
10 the State of Vermont in a power upgrade proceeding  
11 for the wholesale adoption of contentions by its  
12 expert, because it, quote, seriously undermines our  
13 ability to differentiate between the legal pleadings  
14 and the facts and opinions expressed by the expert.  
15 The board in that decision expressly prohibited the  
16 State of Vermont from doing it again in the  
17 proceeding in 2004.

18 >>JUDGE ROSENTHAL: And what provision of  
19 the Commission's rules of practice did the board  
20 refer to?

21 >>MR. POLANSKY: The Board was not  
22 referring to any specific language.

23 >>JUDGE ROSENTHAL: That was just in the  
24 board's personal opinion that it felt that that was  
25 not a desirable practice? I mean, I want to know

1 where in the regulations, the rules of practice,  
2 there is a proscription against this practice.

3 This board, apparently, this one licensing  
4 board, apparently for reasons of its own, decided  
5 that it didn't like the practice. But I'm getting at  
6 where it appears that the rules of practice proscribe  
7 it. Because I can't -- I couldn't find anything in  
8 the rules myself, and I don't think that either you  
9 or the staff referred me to any proscription in the  
10 rules. So the answer is there is none; is that  
11 right?

12 >>MR. POLANSKY: Correct, Your Honor. In  
13 the rule itself, there is none, but the rules  
14 themselves are based on Federal Rules of Civil  
15 Procedure where there is an adoption or a principle  
16 that, if you are going to use an affidavit to  
17 identify specific facts that are setting out a  
18 genuine issue of fact for trial, that you do that in  
19 an affidavit form, and this -- an advisory PAPO board  
20 also set forth in LBP 08-10 that affidavits shall be  
21 individually paginated and contain numbered  
22 paragraphs that can be cited with specificity.

23 We read into that requirement an  
24 understanding that these affidavits would have that  
25 material so that we could challenge individual

1 paragraphs or that the Board could look at those  
2 paragraphs and agree or disagree with certain  
3 provisions in them. There's no ability to do that  
4 here.

5 >>JUDGE ROSENTHAL: You're referring to  
6 something of the PAPO Board?

7 >>MR. POLANSKY: Advisory PAPO Board,  
8 your Honor.

9 >>JUDGE ROSENTHAL: The advisory, all  
10 right. All right. Well, before -- I'm going to get  
11 back to you in a moment, but I'm going to ask the  
12 staff: Do you find anything in the rules of practice  
13 that specifically proscribe the course of action that  
14 the State of Nevada pursued? Yes or No.

15 >>MR. LENEHAN: No.

16 >>JUDGE ROSENTHAL: Staff says no. All  
17 right.

18 >>MR. LENEHAN: Required to make a one-word  
19 answer to that.

20 >>JUDGE ROSENTHAL: Okay. Now, in the real  
21 world, why is not the position that you're taking,  
22 DOE, exalting form over substance? I mean, isn't it  
23 important for the purposes of fulfilling the  
24 objective that the Commission had in proposing this  
25 requirement in paragraph 5 and in paragraph 6 --

1 isn't it enough that you have an expert who is  
2 endorsing as his or her opinion certain inclusions or  
3 certain facts? What practical difference does it  
4 make whether the body of the supporting material is  
5 found in the contention or in the affidavit?

6 I mean, to me, the material is set forth,  
7 and there's an expert who's endorsing it. I have  
8 difficulty in understanding just what difference it  
9 makes, particularly if, as in this case, there is a  
10 representation unchallenged by the staff that these  
11 supporting statements were not simply lawyer's talk  
12 but were formulated by the expert. So why -- why  
13 can't -- why shouldn't I conclude that this is  
14 entirely a matter of form over substance?

15 >>MR. LENEHAN: Your Honor, Dan Lenehan  
16 here, NRC staff. The starting point is the simple  
17 fact that the 2.309(f)(1)(v), Roman Numeral v, does  
18 not require an affidavit for a non-NEPA contention.  
19 The body of the contention or an affidavit has to  
20 state the contention -- the substance of the  
21 contention.

22 If the question here, as I understand it,  
23 is the format of the affidavit as used in this  
24 proceeding by Nevada, what, in effect, you've got  
25 with these -- these affidavits, the way they are

1 structured, is that, at the time the affidavit is  
2 signed, the affiant is attesting to something that at  
3 that time is not a presently existing fact. He's  
4 attesting to a future event that will occur when the  
5 attorney assigns a specific number to them. That  
6 does not go to the contention admissibility issue.  
7 It goes to the affidavit.

8 >>JUDGE ROSENTHAL: I don't follow you at  
9 all. But we're dealing here, I thought, with the  
10 question: There is supporting material advanced for  
11 a particular contention. Now, I'm not getting into  
12 the matter now as to whether what's offered in  
13 support is adequate or not.

14 >>MR. LENEHAN: Okay.

15 >>JUDGE ROSENTHAL: What I'm dealing with  
16 is simply the manner of where it is set forth.

17 My question, again, is: Here is this  
18 material. Instead of putting it in the expert's  
19 affidavit, it's put in the contention, and then the  
20 expert's -- in this instance, I think they were all  
21 men -- affidavit adopts what was in the contention as  
22 his own opinion.

23 Now, my question was a very simple one, and  
24 that is: What practical difference does it make  
25 whether this substantive material is found in the

1 contention, with the expert then endorsing it in its  
2 affidavit, or, rather, than on the other hand it all  
3 being put in the affidavit. I mean, to me,  
4 offhand -- I mean, I may be missing something, but,  
5 to me, offhand it makes no real difference whether  
6 it's in one place or in the other place.

7           What's important is that an expert has  
8 endorsed the -- whatever the statements are. Now, if  
9 those statements are inadequate, that's a different  
10 matter, but that's not what I'm addressing here. But  
11 I'm going to ask DOE, why isn't this form over  
12 substance?

13           >>MR. POLANSKY: This is Mr. Polansky.

14           First of all, Your Honor, you stated that  
15 it was unrefuted that these paragraphs were written  
16 by the individuals who are proposed as experts by  
17 Nevada. In fact, Nevada didn't articulate that  
18 that's what had happened until it filed its reply.  
19 So it would be unrefuted because DOE did not have an  
20 opportunity to file a reply.

21           >>JUDGE ROSENTHAL: Well, is DOE -- let's  
22 pursue that a minute. Are you challenging the  
23 veracity of that statement?

24           >>MR. POLANSKY: Well, the statement is not  
25 from the experts who made it, Your Honor. It's from

1 counsel .

2 >>JUDGE ROSENTHAL: Counsel has made a  
3 representation -- they're officers of this Board.  
4 They have made a representation that their experts  
5 were heavily involved in the formulation of these  
6 contentions. Now, I'm asking you whether you are  
7 raising a question as to the authenticity of a  
8 representation of counsel before this Board.

9 >>MR. POLANSKY: No. We have to accept  
10 that now, but we did not have an opportunity to  
11 refute that. I'd like to draw your attention to the  
12 replies that Nevada filed and their paragraph 5's,  
13 and in specific Nevada Safety 84 I think is a good  
14 example.

15 In its in its reply, Nevada provides a  
16 photograph of titanium tubing alleged from a heat  
17 exchanger which Nevada's lawyers state it was taken  
18 from one of its experts -- taken by one of its  
19 experts after the tubing failed. And this is a quote  
20 from that reply, "In this illustrative example, there  
21 was no apparent general corrosion observed on the  
22 tube inside surface and none on the outside surface  
23 in the short exposed end of the tube."

24 Obviously this is a corrosion contention, a  
25 corrosion-related contention. This is not expert

1 opinion. This is statements of counsel, and we  
2 believed that this kind of statement -- well, let me  
3 back up. We know it's not a statement of an expert,  
4 because there are no affidavits attached to Nevada's  
5 reply.

6 >>JUDGE ROSENTHAL: Well, we are dealing  
7 here with the question as to whether those statements  
8 that are contained in contentions which the expert  
9 endorses as his own opinion can be accepted as the  
10 expert opinion supporting the contention, even  
11 though, again, the supporting material is found in  
12 the contention rather than in the affidavit. That's  
13 the issue I'm addressing.

14 >>MR. POLANSKY: Yes, Your Honor. This is  
15 Mr. Polansky.

16 We think it blurs the line between what is  
17 the expert opinion and what is the statement of  
18 counsel, and I raise the example of the reply to show  
19 that just as an example. If you looked at the text  
20 of paragraph 5 in the contention and you looked at  
21 the text of the paragraph 5 in the reply, you would  
22 not know which statements were from counsel and which  
23 ones are from the experts. And in the reply, in  
24 fact, they were all from counsel. We don't know  
25 which ones are expert opinion.

1           And the Board in looking at its  
2     admissibility needs to look at all of the provisions  
3     of 2.309(f)(1), and, if under 5 a statement is  
4     purported to have been from an expert, we should know  
5     which of those statements are from the expert;  
6     otherwise, counsel is not qualified to make those  
7     statements. That's the point we were trying to make.

8           >>JUDGE ROSENTHAL: Well, I don't follow it  
9     at all. All right.

10           Let's move on to the other issue. Now,  
11     Mr. Malsch, the -- let's turn to the provisions of  
12     2.309(f)(1)(v), and it says that you must provide a  
13     concise statement of the alleged facts or expert  
14     opinions which support the requester's/petitioner's  
15     position on the issue and on which the petitioner  
16     intends to rely at hearing today together with  
17     references to the specific sources and documents on  
18     which the requester/petitioner intends to rely to  
19     support his position on the issue.

20           Now, here is this mention of specific  
21     sources and documents. Now, I take it, it's your  
22     position that it is not necessary in all cases for  
23     the expert to buttress the opinion that he or she is  
24     expressing with documents or specific resources. Am  
25     I correct in that?

1 >>MR. MALSCH: Yes. Marty Malsch from  
2 Nevada. Yes, that is correct. In many cases our  
3 expert did so, but it seemed to us that under the  
4 rules the only requirement is that there be a  
5 sufficient accumulation of facts and opinions to make  
6 the minimal showing required, and if the explanation  
7 is reasonable and understandable, that should satisfy  
8 the requirements of this section.

9 >>JUDGE ROSENTHAL: Well, how do you  
10 interpret then as together with references to the  
11 specific sources and documents?

12 >>MR. MALSCH: I think that is -- that is  
13 permissible that they expect that, if we have  
14 available specific sources and documents to support  
15 our contention, we would be coming forward with them  
16 at the time, but I don't think that is -- the fact  
17 that a particular paragraph 5 does not itself  
18 reference additional sources and documents, I do not  
19 think is fatal to contention admissibility, and I  
20 don't think there's any NRC case which stands for  
21 that proposition.

22 >>JUDGE ROSENTHAL: DOE, what case  
23 authority do you have for the proposition that in all  
24 instances the expert must provide specific sources or  
25 documents?

1           In that connection, I might say that we  
2 looked at the cases that were cited in your papers,  
3 and I'm frank to state that I didn't find those cases  
4 to support the proposition that an expert opinion  
5 must, in all instances, be accompanied by the -- by  
6 specific sources.

7           I mean, what those cases, as I read them,  
8 stand for is the proposition, which is quite  
9 understandable, that the offered expert opinion must  
10 not be limited to bold and conclusory statements such  
11 as that the application under consideration is  
12 deficient or is inadequate or is wrong.

13           But that, to me, is a far cry from saying  
14 that in all instances the expert opinion must be  
15 accompanied by specific sources or documents.

16           Now, do you have any authority that  
17 addresses specifically the manner of whether an  
18 expert opinion is, per force, insufficient unless it  
19 is accompanied by specific sources or documents?

20           >>MR. POLANSKY: This is Mr. Polansky.

21           We believe that the rule is plain in its  
22 reading, that it does require this together with  
23 references. We also realize you cannot read this  
24 particular provision (f)(1)(v) without looking at its  
25 accompanying provisions (f)(1)(vi).

1           We think it's difficult for a Board to  
2 determine whether there's a genuine dispute of a  
3 material fact if the expert merely says, my opinion  
4 is this. If they're not attaching the documents, the  
5 specific sources and documents, on which they intend  
6 to rely, there is very little ability for the  
7 applicant to respond or the Board to determine  
8 whether there's a genuine dispute.

9           For example, you could have a contention  
10 that says, you know, corrosion can happen in the  
11 following circumstance, and here's a paper I wrote,  
12 but you don't give the citation to the paper. If you  
13 don't give a citation to the paper, it's impossible  
14 for the applicant to determine whether the underlying  
15 provision is there.

16           Let's say it was corrosion caused by  
17 sulfuric acid, whether that is even applicable here.  
18 If that Board knew that that paper was about sulfuric  
19 acid, they probably would determine there's no  
20 genuine dispute because we're not having sulfuric  
21 acid infiltrating through the repository.

22           >>JUDGE ROSENTHAL: Well, but, if you  
23 have -- well, that may go to relevance, but, if you  
24 have an expert, qualified expert, who expresses an  
25 opinion on a matter that is of plain materiality, why

1 isn't that enough?

2 I'll give you a concrete example from my  
3 own prior history. In the Seabrook case, one of the  
4 issues -- and I'm going back to the 1970's, which  
5 shows how long I've been in this game. There were --  
6 there was an issue as to what should be regarded as  
7 the safe shutdown earthquake, in other words, what  
8 was the largest earthquake that might occur in the  
9 region of the Seabrook plant located on the coast of  
10 New Hampshire.

11 Now, there were both the intervenor and the  
12 applicant had highly qualified seismologists. One of  
13 them was associated with the Laboratory at Columbia  
14 University, the other one with the Laboratory at the  
15 Massachusetts Institute of Technology. Both of these  
16 men had credentials as long as your arm. One of them  
17 had a view that intensity 5, let us say, was  
18 sufficient. The other one thought it was  
19 intensity 9.

20 Now, why, given the fact that these two  
21 individuals had qualifications beyond any dispute and  
22 that they were addressing a clearly material issue --  
23 why wasn't that enough to get it to a hearing without  
24 there having to be contention admissibility level go  
25 through with their whole documentary basis for the

1 conclusions that they were reaching?

2           It seems to me that what the Commission's  
3 requirements here is to make certain that there is at  
4 least enough to go forward to an evidentiary hearing.  
5 And it seems to me, frankly -- you can persuade me,  
6 perhaps, that I'm wrong -- that, if you have a highly  
7 qualified expert who is offering an opinion on a  
8 matter that is plainly material, that that is enough  
9 to satisfy both paragraph 5, the expert opinion  
10 paragraph, and paragraph 6, the genuine material.

11           I mean, in Seabrook, I mean, I just offered  
12 that as an example. I mean, why would there have  
13 been any need there and why is there any need here  
14 for something, given, again, that the objective of  
15 the Commission is just to make certain that it's  
16 something that's worth pursuing, and that's why they  
17 want an expert to be expressing an opinion on a  
18 matter that is material to the outcome of the  
19 particular proceeding.

20           >>MR. POLANSKY: This is Mr. Polansky.

21           Your Honor, in the example you've given --  
22 I mean, I can't respond to that. What I can tell you  
23 here in this proceeding is that, as an applicant,  
24 there is a fundamental principle of fairness that the  
25 applicant be given an opportunity to file a

1 meaningful answer.

2           And if a petitioner comes forth under its  
3 paragraph 5 with expert opinions that in many cases  
4 cite to studies or say that there's, quote, numerous  
5 tests made by laboratories in testing of titanium for  
6 corrosion applications and provides no citations,  
7 there is no ability for the applicant or the  
8 NRC staff to look at those documents, and no ability  
9 for the Board to look at those documents.

10           >>JUDGE ROSENTHAL: But the merits aren't  
11 up at this stage. Where you get that opportunity, if  
12 the contention is admitted, at the summary  
13 disposition phase, if you found one.

14           This is not merits here. The objective,  
15 again, as I see it -- I may be wrong -- of the  
16 Commission was just to make certain that this wasn't  
17 some flight of fancy that's being advanced that  
18 should never get beyond the stage of Commission -- of  
19 contention admissibility.

20           And it seems to me, if you've got a highly  
21 qualified expert who is -- expresses an opinion that  
22 there is substance to this particular contention,  
23 that, for the purposes of contention admissibility,  
24 that's enough. You people then have the opportunity  
25 to fully explore it in the context in the first

1 instance of a motion for summary disposition.

2 >>MR. POLANSKY: This is Mr. Polansky.  
3 Your Honor, it's not enough under the plain reading  
4 of the rules to identify a dispute.

5 >>JUDGE ROSENTHAL: Don't give me plain  
6 meaning of the rules. None of the rules of this  
7 Commission are that plain. I mean, they're all open  
8 to interpretation.

9 And I would say that this rule could be  
10 read the way you read it. I think it can be equally  
11 read the way Mr. Malsch reads it. And what you have  
12 here is what makes good sense, given what seems to be  
13 the ultimate objective of the Commission.

14 >>MR. POLANSKY: This is Mr. Polansky. If  
15 I could finish. I was not referring to (f)(1)(v). I  
16 was referring to (f)(1)(vi), which says that there  
17 has to be a genuine dispute, not merely a dispute.

18 And the way that the Board looks at whether  
19 there is a genuine dispute is to look at the  
20 documents and supporting statements that are  
21 identified by the petitioner and the response from  
22 the applicant and anyone else who has filed an  
23 answer. And, if I could go through some examples,  
24 Nevada Safety 80 --

25 >>JUDGE GIBSON: Before you go through the

1 examples, since it's noon, perhaps you can take the  
2 noon hour to limit your examples down. Would that be  
3 okay? You can finish your answer.

4 >>MR. POLANSKY: I'd be happy to break as  
5 long as we'll be allowed an opportunity to address  
6 this.

7 >>JUDGE GIBSON: Oh, yeah. You definitely  
8 will. You'll definitely will. You'll be able to  
9 finish your answer. And like I said, you may be able  
10 to take your lunch hour to reduce the number of  
11 examples you want to use. We all look forward to  
12 seeing you back at 1:30, and we will take it up  
13 promptly at that point. Thank you.

14 (A recess was taken.)

15 >> JUDGE ROSENTHAL: I think that when we  
16 adjourned, the ball was in Mr. Polonsky's corner; was  
17 it not?

18 >> JUDGE GIBSON: Yes, he was in the middle  
19 of an answer, and I -- since it was noon, I made him  
20 stop. So I hope you can start back up in  
21 mid- thought.

22 >> MR. POLONSKY: Thank you, Your Honor,  
23 I'm Mr. Polonsky. I'd just like to bring two  
24 examples of where we believe that there is a  
25 requirement to identify specific sources and

1 documents and that challenging that is not a  
2 challenge to the merits. It is merely allowing --  
3 informing the Board of whether a genuine dispute  
4 exists under F-1-6. The first example is Nevada  
5 Safety-80 where the facts section alleges that there  
6 are NACE studies, National Association of Corrosion  
7 Engineers, involving failure of titanium tubing and  
8 petroleum refineries. There are no sites provided to  
9 the NACE studies at all. Nevada Safety-85 relies on  
10 "alleged results of numerous tests made by  
11 laboratories engaged in testing of titanium for  
12 corrosion applications," end quote. And again, there  
13 is no citations for the Applicant who identified what  
14 these tests are to, for example, to determine if they  
15 are even relevant to the proceeding. We believe that  
16 the Board needs to look at these documents to  
17 determine whether there is a genuine dispute; so that  
18 is why we were objecting in many of the contentions  
19 to a requirement that there be documents-specifically  
20 identified. There also is the LSN obligation to have  
21 provided your supporting and non-supporting  
22 information. And so those documents should be in  
23 existence and on the LSN . And we believe the  
24 advisory PAPO Board informed the parties that they  
25 needed to provide the LSN document number for those

1 documents or attach them to their Petitions. Thank  
2 you, Your Honor.

3 >> JUDGE ROSENTHAL: Would you like to  
4 respond, Mr. Malsch?

5 >> MR. MALSCH: Yes. Thank you. It seems  
6 to me, looking at the basics for these contentions,  
7 we have provided levels of detail and specificity far  
8 beyond the norm and the mere fact that not every  
9 single expert conclusion is further supported by  
10 specific references, to our mind, doesn't detract  
11 from the admissibility of the contention; and I'd  
12 like us to call the Board's attention to the  
13 contention to which we attached to our reply to DOE's  
14 Answer. The contention was filed in the LES case.  
15 It was admitted by the licensing Board and then that  
16 admission was specifically affirmed by the Commission  
17 in CLI 04-25. And just note that the bases in that  
18 contention included only one reference and that was a  
19 newspaper article. So, clearly, we have provided  
20 levels of detail and specificity in support far  
21 beyond contentions, which in other cases,  
22 specifically the LES case we mentioned ever provided.  
23 I think what we have done here is more than  
24 sufficient.

25 >> JUDGE ROSENTHAL: I think, Mr. Polonsky,

1 the problem I have is that it seems to me offhand,  
2 that the purpose of the Paragraph 5 and Paragraph 6  
3 requirements was to ensure that time was not being  
4 wasted in the litigation of vague contentions put  
5 forth by, in many instances, people who have zero  
6 qualifications. The objective was to make certain  
7 that the contentions that were in litigation that got  
8 beyond the contention stage were ones that had some  
9 potential worthiness to them, not necessarily that  
10 they would turn out at the end of the day to be  
11 winners. Now, it seems to me, offhand, that as long  
12 as you have a qualified expert -- now, you can always  
13 raise the question as to whether the particular  
14 experts being offered is qualified to speak on the  
15 subject that he's addressing or that she's  
16 addressing; but as long as that expert is qualified  
17 and as long as that expert is addressing an issue  
18 that is material, that as a matter of fact, you have  
19 got a genuine dispute because you have an expert who  
20 is challenging, a qualified expert who is raising a  
21 challenge or supporting a challenge that's material.  
22 And now whether or not that expert's opinion down the  
23 road is going to carry the day, again, that's  
24 not -- it seems to me, an issue on the contention  
25 admissibility level. That's an issue that's resolved

1 down the road, but I don't see why your client is  
2 entitled to litigate the substance of a qualified  
3 expert's opinion at the contention and admissibility  
4 stage. It seems to me, that's just not open at that  
5 stage. Now, I'll give you an opportunity to tell me  
6 why I'm wrong.

7 >> MR. POLONSKY: Your Honor, I don't think  
8 we think you are wrong. We don't think we are  
9 litigating at this stage, we think that -- and if I  
10 hear you correctly, it would seem that once the  
11 Petitioner raises a prima facie case that they have  
12 something to put forward, it would seem there would  
13 be no need for an Applicant to even file an Answer,  
14 because there would be nothing that we could say that  
15 would demonstrate that the contention is not  
16 admissible. So, clearly --

17 >> JUDGE ROSENTHAL: No you could say that  
18 the expert or alleged expert wasn't qualified. You  
19 could say the alleged expert or the expert, even if  
20 qualified, was addressing a matter that was  
21 immaterial. I mean, those defenses would be  
22 available.

23 >> MR. POLONSKY: Would it not be  
24 appropriate to also say the specific study that the  
25 expert is relying on -- I will go back to sulphuric

1 acid example -- relies on sulphuric acid corroding  
2 titanium and that simply is not what's -- that's not  
3 the environment in the Yucca Mountain repository.  
4 Therefore, that doesn't raise a dispute.

5 >> JUDGE ROSENTHAL: Well, then, you're  
6 raising -- aren't you, in that circumstance, you're  
7 saying that, well, that expert may be qualified, what  
8 he's talking about, he may have the appropriate  
9 expertise, but that happens not to be material to the  
10 issue at hand. Materiality, I would think, or  
11 relevance is something you can raise, but the expert  
12 is up there and he's talking about some kind of  
13 astronomical phenomenon which has no relevance to the  
14 proceeding. You are certainly free to raise that,  
15 but I'm assuming that the contention or his claim is  
16 within the bounds of materiality; if it's not, you  
17 can make that point.

18 >> MR. POLONSKY: I think we felt  
19 handicapped, Your Honor, in not knowing these studies  
20 that they're citing to. They cite studies but don't  
21 provide any citations. Well, they identify studies  
22 but don't provide citations. And to -- and that's  
23 required under Section F-1-5, so it was impossible  
24 for us to make an argument on genuine dispute or  
25 materiality on those scientific studies that they

1 didn't tell us what they were. So that's why we  
2 attacked it under 5, because that's where we thought  
3 the information ought to have been provided. That's  
4 all we were trying to express. Thank you.

5 >> JUDGE ROSENTHAL: Staff, if you want to  
6 add anything on this subject, I mean, is it the  
7 staff's view that there is a in violate requirement  
8 that the expert accompany his opinion with sources of  
9 documents?

10 >> MR. LENEHAN: Dan Lenehan for the staff.  
11 No, the staff does not make that requirement;  
12 however, Your Honor --

13 >> JUDGE TRIKOUROS: What's the staff's  
14 view on what Mr. Polonsky has just offered?

15 >> MR. LENEHAN: The expert opinion merely  
16 states a conclusion without providing a recent basis  
17 for that explanation is inadequate for a couple of  
18 reasons. First, it deprives the Board of the ability  
19 to provide a necessary opinion -- that's a UC case.  
20 And, secondly, it puts -- it's necessary to  
21 provide -- put the other parties on notice of the  
22 issues that they're going to have to litigate and  
23 decide whether or not they're going to support or,  
24 you know, oppose the contention.

25 >> JUDGE ROSENTHAL: All right. But if the

1 expert sets forth the reasons for his conclusion but  
2 does not accompany that with reference to specific  
3 sources. That, in so far as you are concerned, would  
4 not be a fatal defect, if I understand you correctly?

5 >> MR. LENEHAN: It's difficult to respond  
6 to this in the abstract. It provided that situation  
7 that you've hypothesized puts the parties on notice  
8 to the claims that it would be adequate.

9 >> JUDGE ROSENTHAL: Let me -- might if I  
10 refer to a list of the example to one of the safety  
11 contentions of the of that this was Nevada's Safety-  
12 009. Now, in that case -- and I think, I know that  
13 DOE objected, I think, to that contention; but the  
14 contention, in essence, or the support forth said  
15 that the document on the basis of which DOE had  
16 reached certain conclusions was flawed and he pointed  
17 to some other document. Now, that -- supposing that  
18 they had not pointed to the other document, but  
19 they'd said the DOE document is flawed and these are  
20 the reasons why we think it's flawed and they hadn't  
21 pointed to some other document which they thought  
22 demonstrated the flaw. It just said, in my expert  
23 opinion, the document that DOE relied upon for the  
24 conclusion that it reached that we're challenging was  
25 flawed. That's my expert opinion. Would that be, in

1 your view, sufficient for contention and  
2 admissibility purposes?

3 >> MR. LENEHAN: No, Your Honor, it would  
4 not.

5 >> JUDGE ROSENTHAL: What does the expert  
6 have to do?

7 He gives his personal reasons why he  
8 thinks it's flawed, but he doesn't point to a  
9 document in support of those reasons, what would he  
10 have to do?

11 >> MR. LENEHAN: He doesn't support the  
12 documents. Your Honor, if he says the document was  
13 flawed, it would not be admissibility because and  
14 provides a reasonable basis to support that opinion.  
15 Under those circumstances in the hypothetical, it  
16 would be flawed.

17 >> JUDGE ROSENTHAL: Even though it did  
18 not -- my reason for saying it's flawed is supported  
19 by X-document?

20 He doesn't have to come up, in your view,  
21 with a source?

22 >> MR. LENEHAN: We're talking about an  
23 established expert that provides reasons to provide a  
24 source.

25 >> JUDGE ROSENTHAL: Yes, we're talking all

1 the way through this discussion, I'm making an  
2 assumption that the expert is qualified and that what  
3 he's talking about is material, and so it's the thing  
4 as to whether he has to -- in detailing his reasons,  
5 I grant you, he can't simply provide a conclusion,  
6 but in providing his reasons, the question is whether  
7 he has to take the next step and say, well, my  
8 reasons are supported by the X, Y, Z documents. I  
9 take it that at staff's standpoint, he wouldn't have  
10 to do that?

11 >> MR. LENEHAN: That is correct, Your  
12 Honor.

13 >> JUDGE ROSENTHAL: As long as he gave  
14 his -- he sets forth the bases for the ultimate  
15 conclusion that he's reached?

16 >> MR. LENEHAN: Yes, Your Honor.

17 >> JUDGE ROSENTHAL: Well, I think I  
18 understand your position, Mr. Polonsky, from your  
19 standpoint, I think I got -- do you have some  
20 questions?

21 >> JUDGE GIBSON: Yes, I believe Judge  
22 Trikouros has some questions on this point.

23 >> JUDGE TRIKOUROS: I'll address this to  
24 Mr. Malsch. And I have been thinking this through  
25 for some time here, everything we have been

1 discussing here, and thinking through how technical  
2 people behave when they -- when they document  
3 something, and you can see this by looking at any  
4 technical paper anywhere in the world, you'll find a  
5 substantial list of references, so technical people  
6 have a tendency to put forth a plethora of references  
7 to support technical papers; and I was struck by the  
8 lack of any references in -- in a large number of  
9 contentions and I was wondering if there was some  
10 reason for that.

11           Was that -- was it a purposeful thing that  
12 it was a -- an agreement among all the technical  
13 experts to not provide references because even under  
14 the circumstances in which they make statements, such  
15 as...as a result -- well, they make a technical  
16 statement, I'll trying to keep our this general. And  
17 then they say -- and this is supported by numerous  
18 publications and documents. So, clearly, their  
19 knowledge is something they derive from those  
20 documents, not all technical people have done all  
21 experiments, themselves. You know, they get  
22 knowledge from reading papers, from reading  
23 textbooks, from reading other material. That's the  
24 source of their knowledge. It's not a personal  
25 research or anything like that. And yet, they don't

1 provide that source of knowledge, but they refer to  
2 it as existing. Was there some logic behind that or  
3 was this just the way it was with all these experts?

4 >> MR. MALSCH: The decision on, first of  
5 all, we're talking about paragraph five of our  
6 contentions, primarily, and as I mentioned, they were  
7 all drafted primary by the experts, themselves. We  
8 deferred largely to the experts in terms of the level  
9 of support that they would offer and I would say that  
10 there was no conscious decision on our part to limit  
11 any expert in what he or she wanted to provide. On  
12 the other hand, we did not advise the experts in  
13 situations where they offered a opinion and reasons  
14 but no documents that the contentions were  
15 inadmissible without supporting those documents; and  
16 really what it came down to was a matter of time and  
17 resources. I mean, we complained to the commission  
18 that we really didn't have sufficient time to draft  
19 contentions. We really were strongly driven by  
20 powerful time constraints in putting our package of  
21 contentions together, and so we did the best we could  
22 under the circumstances and, as a lawyer, I was not  
23 in a position based on what I knew about contention  
24 practice to tell the expert that in every case they  
25 had to go back and document every single conclusion

1 that they offered. Although, I think they fully  
2 understand that the matter of supporting your  
3 opinions with references and studies is a matter  
4 which experts are expected to do, and I think they  
5 all fully expect to be held accountable in that  
6 respect on Discovery and at the Hearing, and that's  
7 where things stand. I think all of our experts are  
8 fully prepared to provide sources and reference in  
9 Discovery and then ultimately at the Hearing.

10 >> JUDGE TRIKOUROS: The -- if I were  
11 talking to another technical person and said, you  
12 know, there are plenty of experiments that show this  
13 position, I would never do that because I know,  
14 immediately, the next question is going to be, what  
15 are you talking about?

16 So technical people have a natural tendency  
17 to not do that. It's because you're going to get  
18 caught short and you better know the experiment that  
19 you're talking about, otherwise, the whole thing  
20 falls apart. So, again, it just struck me as odd,  
21 so if you're telling me this is all about time, then  
22 and just resource constraints, then let me ask you  
23 this...for those contentions in which statements are  
24 made regarding experimentation, available  
25 experimentation and numerous publications and that

1 sort of thing where there were clearly the statement  
2 is being made as being derived from those sources,  
3 not necessarily from personal knowledge but from  
4 those sources, would those still -- would you still  
5 consider those admissible contentions as opposed to  
6 those contentions that, that are, in fact, very well  
7 reasoned and provide a factual basis that, that don't  
8 even -- don't even mention experiments and  
9 publications and that sort of thing; and there are  
10 numerous contentions that do meet that criterion  
11 where they're very well reasoned and provide very  
12 logical progression of thought that would lead you to  
13 conclude that that makes sense; but for those  
14 references that do -- for those contentions that do  
15 specifically hang on the statement of these documents  
16 that are out there, would you still think those  
17 contentions are admissible?

18 >> MR. MALSCH: Again, Marty Malsch for the  
19 State of Nevada. I think the commission's rules are  
20 quite clear all that is required is a minimal showing  
21 and as long as the expert offers an opinion and  
22 supports it with some reason, the contention is, is  
23 admissible; and I think the matter of coming up with  
24 detailed sources is a matter for discovery and  
25 ultimately the merits. I think I would say that if

1 we had, you know, the full amount of time which we  
2 had asked for, we might have perhaps gone back and  
3 with, you know, another round of with the experts  
4 that come up with more references, but in the time  
5 available, that simply was not possible; but we fully  
6 expected that once our contentions were admitted, our  
7 experts would be asked those questions and we would  
8 then be fully prepared to respond to them.

9 >> JUDGE TRIKOUROS: Sometime later  
10 today -- and I'm not sure of the exact timing, I'm  
11 going to be referring to what we've started to call  
12 themes that involve numerous contentions and -- and  
13 then we can be specific there about some of these  
14 issues that we're talking about, but I'll defer that.

15 >> JUDGE GIBSON: Before we move to Judge  
16 Trikouros' themes, I want to see if there is anybody  
17 else that feels moved to speak to the issue of the  
18 factual support necessary to support a contention  
19 relative to the Affidavit discussion that we've had?

20 Yes, Clark County.

21 >> MR. ROBBINS: Thank you, Your Honor,  
22 Alan Robbins on behalf of Clark County. I think it's  
23 important to keep in mind and it is there was  
24 reference to this earlier, but it is not uncommon on  
25 a Petitioner to prove its case at this stage. This

1 is not the merits stage. This is the stage to  
2 establish whether there is a genuine issue of  
3 material fact. By analogy, if the expert, if the  
4 issue was, you know, is some sort of surgery required  
5 and the contention is, yes, it is, well, if you have  
6 a lawyer's statement with no Affidavit that says I  
7 represented all kind of patients and I don't think  
8 this guy needs surgery, well, that should not fly;  
9 but if you are supported by an Affidavit of a  
10 qualified surgeon or other type of doctor who says,  
11 yes, you know -- I've forgotten my own example which  
12 side I'm going on, on this -- but gives the opinion  
13 on surgery, and says it's based on examination or  
14 based on a review of, you know, a medical history,  
15 that ought to be enough at this stage, and he ought  
16 not have to identify or attach every last document  
17 that he or she reviewed or test that he or she ran or  
18 reviewed or that sort of thing. That can be tested  
19 later; but you have on the record a contention  
20 supported by an expert who's giving more than a  
21 conclusion and may disappoint the DOE's of the world  
22 but maybe did not cite or attach every last document.  
23 I think that is roughly what we're dealing with here.  
24 I would also add, in the case of Clark County  
25 contentions, some are highly dependent on

1 experts -- first of all, all are supported  
2 by Affidavits. Those that really turn on expert  
3 opinions such as forecasted volcanic activity is one  
4 example. That's a number of our contentions. There  
5 is considerable explanation of the geology and the  
6 basis for the geology on which the expert bases his  
7 opinion about DOE's under forecast of probable  
8 volcanic activity. He does not simply say -- I'm  
9 pretty sure it's going to be more than what they say,  
10 which would not be a sufficient example. So it is a  
11 document and it cites papers, it cites research. So  
12 it's important in this discussion that a lot of this  
13 general discussion not unwittingly -- I'm not  
14 suggesting the Board would do this at all, and with  
15 too broad a brush on all this, because the  
16 contentions do differ. Quickly, as to format, does  
17 it really make a difference if the witness says...uh,  
18 I adopt the following or the following is a summary  
19 of my professional expert opinion as set forth below  
20 and then it's in the Affidavit, or if he said...the  
21 summary as attached to Exhibit A, for an Exhibit A to  
22 this Affidavit rather than set forth below; does that  
23 make a difference?

24           It shouldn't. Or, it says, as set forth in  
25 contention Safety 5 or Safety 5 through 8. What

1 difference does it make?

2           The practical difference is that if all of  
3 the detailed explanation was set forth in the  
4 Affidavit, either below or attached, it's our view  
5 that our Pleading would not be very effective if we  
6 said to save repetition, we're not going to tell you  
7 here in the Pleading, or please see the attached  
8 Affidavit. You don't want to make it inconvenient  
9 for the reader, and you want to be able to have that  
10 reader just continue to read, not have to start  
11 fumbling looking for attachments. So what we would  
12 end up doing is repeating it. And now we would take  
13 the whole substance of the Affidavit and put it back  
14 in the Petition twice. Well, what does that do other  
15 than increase the thickness -- those that are printed  
16 out -- of the actual document. So this whole form  
17 argument is bothering to me; and for DOE, the irony  
18 is the discussion is supposedly about a genuine issue  
19 and, yet, we have to have this kind of discussion.  
20 Is that a genuine argument over the form of the  
21 Affidavit? I'd respectfully suggest it's not. They  
22 will have their time to deal with the qualifications  
23 of the witness, the credibility of the witness, the  
24 basis for the witness, at Hearing. As I forget  
25 which, one of Your Honors said so earlier this

1 morning, the basic purpose at this stage is to make  
2 sure that you are not embarking on a waste of time,  
3 that there's some basis for the contention, that it's  
4 not just something made up by lawyers sitting in  
5 their office; and I think virtually, you know, all or  
6 virtually all of the contentions in this case passes  
7 that test and we have to not lose sights of what  
8 these rules are being taken out of context and the  
9 burden that lies with the department as the applicant  
10 is now being presented by the department as the  
11 burden on the Petitioners presenting contentions.  
12 And those burdens don't apply to contentions, they  
13 apply to the application. Thank you.

14 >> JUDGE GIBSON: Okay. Nick, pardon me,  
15 Judge Trikouros, did you need to say something?

16 Go ahead.

17 >> JUDGE TRIKOUROS: If the medical  
18 Affidavit said that the patient might need surgery,  
19 would that be sufficient?

20 >> MR. ROBBINS: Does -- assuming, if  
21 that's his opinion and it says, based on I've  
22 reviewed the patient's history or something, I would  
23 say, yes, it is.

24 >> JUDGE TRIKOUROS: All right. Thank you.

25 >> JUDGE GIBSON: Okay. Is there anyone

1 else who feels that they've just got to talk about  
2 Affidavits?

3           Okay. Seeing none, we will move on to  
4 Judge Trikouros' themes.

5           >> JUDGE TRIKOUROS: First of all, there  
6 were some issues that I think were not -- were sort  
7 of left over from some discussions yesterday  
8 regarding this TSPA and I wanted to at least discuss  
9 a couple of those. The one question that came to my  
10 mind was how we would, if we go to hearing on a  
11 number of these TSPA issues, how would we litigate  
12 those?

13           I think it would be helpful to me to  
14 understand that.

15           So I'll start with Mr. Malsch.

16           >> MR. MALSCH: Okay. I think what I  
17 imagined would happen would be that the litigation  
18 would proceed subject area by subject area and that  
19 in particular what we have attacked a DOE model as  
20 being unsupported or wrong or not really representing  
21 the full range of parameters. I would expect in the  
22 normal circumstance and, of course, this is a  
23 strategy question for the DOE, but I would expect  
24 that the simplest way to proceed in a litigation  
25 would be for them to say and defend their model,

1 which would be a subject matter area in which they  
2 would simply defend their model or say their  
3 infiltration model as actually, you know, supported  
4 by the data consistent with the scientific  
5 understanding of infiltration and the like. There  
6 would be no need in that context to go through  
7 elaborate dose calculations and computer runs. The  
8 question would simply be, as a matter of the science  
9 of infiltration, is their model reasonable and  
10 credible and is it supported by some combination of  
11 site-specific data or analogue data?

12           And I would think that's the way things  
13 would proceed contention by contention or a group of  
14 contentions by groups of contentions. It would be, I  
15 think, at DOE's option if they thought that our model  
16 attack were too difficult to counter, it would be  
17 their option to say, oh, well, okay, let's assume  
18 it's true and let's see if it makes any difference?

19           That would, though, I think encounter a  
20 serious problem, which is that in every case of our  
21 TSPA contentions, we have cited a violation of a  
22 specific provision in Part 63 that requires, for  
23 example, that models be defensible and credible, that  
24 the full range of parameters be represented; and as  
25 we've explained yesterday, those requirements are

1 independently enforceable. So, if we are correct, in  
2 our attack on a DOE model, the TSPA fails regardless  
3 of the results of the dose calculations.

4 >> JUDGE TRIKOUROS: Well, let's explore  
5 that a little bit. Let's start with the premise that  
6 experts discuss the parameter variation and let's  
7 assume that your experts prevail. Now, the value of  
8 the parameter that was used in the license  
9 application is agreed to be incorrect and that  
10 another value is appropriate. Does that end it?

11 >> MR. MALSCH: Well, again -- this is  
12 Marty Malsch again for Nevada. I mean, from our  
13 standpoint, that would be a nice end because we would  
14 prevail and an essential piece of the TSPA models  
15 were destroyed, in deed, we could not meet their  
16 burden of proof of the EPA dose standard. Now what I  
17 suspect would happen would be either the DOE would  
18 introduce -- well, I suppose at that point they'd  
19 have to introduce a new model and there would be  
20 another round of contentions on that model, but that  
21 would be their choice; but I think in a situation in  
22 which we prevail that a part of the TSPA is in  
23 noncompliance with 63, that's the end of the case, we  
24 win.

25 >> JUDGE TRIKOUROS: So, now let's assume

1 that we go through two weeks of this and the DOE then  
2 does sensitivity studies on the whole range of  
3 parameters in the range that were being discussed in  
4 the Hearing and conclude that there is an  
5 insignificant change in the dose; would that be an  
6 end point?

7 >> MR. MALSCH: That could conceivably be  
8 an end point. I mean, what they would be doing, in  
9 effect, would be volunteering to modify their TSPA to  
10 include our concern and then show that their now  
11 compliant TSPA was still showing a -- while still  
12 showing a compliance with the ultimate dose standard.  
13 I think if that were to be done, then DOE would  
14 prevail, all though, we would have the opportunity to  
15 show that perhaps their model didn't do all it said,  
16 but their dose calculation was incorrect; but in your  
17 hypothetical, if we attack their model, we win that  
18 their model was wrong. They then modify their model  
19 to conclude our contention and establish that their  
20 TSPA, with that model as so amended was still in  
21 compliance, then DOE prevails; although, we have  
22 other contentions also that would have to be  
23 addressed as well. But just looking at it on a  
24 contention by contention basis, I think that's how it  
25 would progress.

1           >> JUDGE TRIKOUROS:  And if they ran that  
2 model for each contention -- assuming a contention  
3 dealt with one parameter for the sake of argument --  
4 individually, would that be satisfactory or would --  
5 or would you argue that -- that  TSPA would have to  
6 be -- would have to accommodate all of the changes of  
7 all the parameters at one time?

8           >> MR. MALSCH:  Oh, I think, we would -- we  
9 would argue very much that it would be very  
10 misleading to, to do dose calculation runs, including  
11 only one contention at a time, because that would  
12 overlook the cumulative effect of all of our  
13 contentions.

14          >> JUDGE TRIKOUROS:  All right.  Well, DOE,  
15 do you have any thoughts on how this might be  
16 litigated?

17          >> MR. POLONSKY:  Yes, Your Honor.  This is  
18 Mr. Polonsky.  If a contention comes in, clearly, we  
19 would present experts to defend the model.  I think  
20 already there are sensitivity studies that have been  
21 done on various parameters and we would probably just  
22 bring those out and try and demonstrate why on the  
23 merits of what we've already done in sensitivity  
24 analysis based what addressed the concern that's  
25 raised; but as for the last statement that Mr. Malsch

1 made about us having to do this in a cumulative  
2 capacity, A, they did not plead that, none of the  
3 contentions are pled cumulatively as the Advisory  
4 PAPO Board had suggested in its May conference --  
5 May, 2006 conference. And also, I believe Mr. Malsch  
6 stated yesterday that it was an impossibility to do  
7 it and their own expert said it could not do it and  
8 its experts could not. So they are -- if I'm hearing  
9 it correctly -- espousing a situation that would be  
10 impossible for us to meet.

11 >> JUDGE TRIKOUROS: Do NRC staff have any  
12 comments on this or should we move on?

13 >> MS. YOUNG: Mitzi Young for the NRC  
14 staff. I don't disagree with what has been stated by  
15 Nevada and DOE up until now established in terms of  
16 what we provide after preparing its safety  
17 evaluation. Its position with respect to whether  
18 DOE's modeling of performance assessment satisfied  
19 the requirements of Part 63.

20 >> JUDGE TRIKOUROS: All right. We'll move  
21 on. Yesterday, Dr. Barnett began asking a few  
22 questions regarding sort of general themes that were  
23 observed in various contentions and -- and I will  
24 repeat one because I want to confirm your answers.  
25 The -- that had to do with the treatment of

1 contentions that referred to a non-ITS and a  
2 non-ITWI structure, system, or a component.

3 >> JUDGE GIBSON: Judge Trikouros, would  
4 you mind making sure everybody knows what those  
5 acronyms are, so we don't have a misunderstanding?

6 >> JUDGE TRIKOUROS: A structure system or  
7 component that is not important to safety or not  
8 important to waste isolation, which means, in effect,  
9 that -- that that component cannot result in a change  
10 to the conclusion that the post-closure criteria will  
11 be met regardless of the nature of the contention  
12 attacking it. And I just want to confirm that,  
13 Mr. Malsch, that you had agreed that that can -- such  
14 a contention would not be admissible, assuming that  
15 your -- and that, that your reply did not take that  
16 on successfully?

17 >> MR. MALSCH: If -- let me try to answer  
18 that this way -- if we had a contention which says  
19 that a structure system or component was not properly  
20 analyzed as, let's say, important to the waste  
21 isolation, and the DOE Answer said, oh, no, you're  
22 wrong, we did so analyze whether that structure  
23 system or component was important to waste isolation  
24 and reached a conclusion that it was not, then you  
25 would have to come up with some explanation as to why

1 that evaluation was flawed; otherwise, our contention  
2 would be dismissed.

3 >> JUDGE TRIKOUROS: Okay. And if -- if  
4 your attack on the structure system or component did  
5 not mention anything regarding whether it was  
6 important to the safety or waste isolation or not and  
7 the DOE Answer came back and said, that's an ITS/ITWI  
8 component and your reply did not mention anything  
9 about that, would that sequence then be a not  
10 admissible contention?

11 >> MR. MALSCH: If -- if DOE replied that  
12 it was neither important to the safety or important  
13 to waste isolation and explained why, and we didn't  
14 counter that explanation, I think there'd be a  
15 problem with our contention.

16 >> JUDGE TRIKOUROS: And I don't think --  
17 and there are specific contentions like this -- I  
18 don't think that one would have to say anything more  
19 than that, because the components are identified in  
20 the license application as ITS or ITWI; and if you're  
21 not attacking that or in any of your follow-up, then,  
22 clearly, that conclusion remains. Does DOE want to  
23 say anything about that?

24 >> MR. ZAFFUTS: Paul Zaffuts for DOE. I  
25 think I agree with the premise of your question.

1           >> MR. ZAFFUTS:  If the contention doesn't  
2 disagree with a classification, non-ITS and non-ITWI,  
3 then some allegation regarding that SSC, we don't  
4 believe would be able to provide a general interim of  
5 that.

6           >> JUDGE TRIKOUROS:  Let's take a situation  
7 in which the contention refers to an omission using  
8 terminology such as fails to consider or words to  
9 that effect, but in the -- in the DOE Answer, it's  
10 pointed out that, that it was considered, in fact, in  
11 the screening process and it was screened out because  
12 it didn't meet the established criteria that are  
13 indicated there.  The contention, itself, doesn't  
14 provide any reference to or comment on the screening  
15 process at all so that in reading the contention, one  
16 would not have any -- there would be no connection to  
17 any screening process issues.  Would such a  
18 contention be admissible?

19           >> MR. MALSCH:  This is Marty Malsch for  
20 Nevada.  Again, if we were to claim that a process  
21 had been ignored and, in fact, DOE had not ignored  
22 it, then I don't think we'd have an admissible  
23 contention; however, I think in the cases in which I  
24 can think of, where we allege that DOE had ignored  
25 some process and DOE came back in their Answer and

1 said...oh, no, you're wrong, we did not ignore the  
2 process, our replies in such cases I think invariably  
3 remain clear that they did not consider it in the  
4 sense in which it was considered in Part 63.

5           As a for example, in a number of  
6 contentions dealing with screening of thefts, DOE  
7 would point to the fact that they had screened out a  
8 theft on legal grounds; and our reply usually was  
9 that that is completely unexplained and wrong and is  
10 that is not an adequate basis for screening out a  
11 contention and the fact that screening out effect and  
12 the fact that an effect was screened out on legal  
13 grounds does not actually demonstrate that the effect  
14 was actually considered for inclusion in any  
15 legitimate sense. So, it is usually not always  
16 apparent just on the face of what DOE says in its  
17 Answer that it is true, that, in fact, something we  
18 say was ignored was, in fact, ignored. In almost all  
19 cases in which I can think of, we have said in our  
20 replies that, no, we were right, this consideration  
21 was, in fact, ignored and here's why. But in theory,  
22 if in the barer case in which we claim something was  
23 omitted and DOE says, no, it was not and we have  
24 nothing else to say, our contention has a problem.

25           >> JUDGE TRIKOUROS: All right. The -- if

1 the original contention did not question the  
2 screening process but the reply questioned the  
3 screening process after the DOE Answer indicated that  
4 there was a screening process, would you consider  
5 that acceptable to discuss at that -- at the reply  
6 stage?

7 >> MR. MALSCH: I would consider that to be  
8 acceptable. That's an elaboration of your original  
9 contention on the basis for the contention. It's not  
10 raising an entirely new contention.

11 >> JUDGE TRIKOUROS: I'd like to hear DOE's  
12 response to that.

13 >> MR. ZAFFUTS: Paul Zaffuts, DOE.  
14 Regarding that last point, Petitioners have a burden  
15 to bear complete contentions, although the subject  
16 matter that we're dealing with, generally, is  
17 complex, dealing with complex issues, the issues and  
18 the language that Nevada generally uses is straight  
19 forward. We're dealing here with words here like  
20 "omissions" and "consideration." These are not  
21 complex concepts. So when Nevada provides a  
22 contention, for example, we didn't consider  
23 something -- DOE didn't consider something, we  
24 demonstrate and point to the specific parts of where  
25 we did. And then they turn around and they say,

1 well, we didn't really mean consider like that.

2           What we really mean is, you didn't do a  
3 sufficient job of considering. And then they start  
4 beginning to go on and discussing facts and other  
5 standards. I think that's just, that's unacceptable.  
6 I think that's -- that is something they had a burden  
7 to, to discuss in clarity if their initial Petition;  
8 and if that was the case, we would have Answered it  
9 in respect to the particular contention or issue that  
10 was involved. I believe that in change -- this would  
11 be a change. This is a change of the basis for the  
12 contention. That's not acceptable.

13           >> JUDGE TRIKOUROS: Would the staff  
14 consider that that discussion and the reply that  
15 there were deficiencies in the screening process  
16 where that was not discussed in the original  
17 contention, would the staff consider that an  
18 acceptable thing to do with respect to a reply?

19           >> MS. YOUNG: Mitzi Young for the NRC  
20 staff, unless it were clear in the initial contention  
21 that that was a concern being raised, it would be  
22 inappropriate to raise it for the first time in a  
23 reply. So any chances depends on what the original  
24 contention raised. Sometimes, there are -- there are  
25 statements that would be akin to that, although, not

1 specifically stated, but you have to reasonably  
2 construe whether the reply is just a response to the  
3 legal and factual arguments raised, or whether the  
4 reply tries to amend and bootstrap and raise  
5 arguments that weren't previously raised in the  
6 initial Petition.

7 >> JUDGE TRIKOUROS: All right. Thank you.  
8 Any other comment on this?

9 Should I move on?

10 Another area that was of interest was  
11 contentions that identify a particular item and they  
12 might state that it was omitted or that it was  
13 incorrectly considered in this case and, and conclude  
14 that the impact that this, this will have is unknown,  
15 that it introduces a, an unknown characteristic to  
16 the analysis. With no further characterization other  
17 than to say it's unknown, what would -- Mr. Malsch,  
18 what would you say about contentions that have that  
19 characteristic?

20 >> MR. MALSCH: I would say that, in  
21 general, such a contention would be admissible so  
22 long it was, you know, reasonably supported and it  
23 was dealing with an obligation by DOE a separate and  
24 enforceable obligation by DOE to include in its  
25 models the full range of uncertainties and defensible

1 and reasonable parameters. It seems to me those  
2 requirements are independently enforceable and  
3 independently of significance. And so, for example,  
4 if DOE -- a DOE model considered a range of some  
5 parameter between five and six and we filed a  
6 supported contention and said the range is really  
7 between one and ten, that would be a independently  
8 significant violation of several requirements in Part  
9 63 to include the full range of defensible and  
10 reasonable parameters. I think that in itself is a  
11 violation of a particular requirement in Part 63 and  
12 that's the material contention.

13 >> JUDGE TRIKOUROS: But what if it didn't  
14 provide magnitude, if it just simply said  
15 that -- with you giving your five-to-six  
16 example -- if it said that the license application  
17 assumes five-to-six, but given certain phenomenology  
18 that's discussed, they can't know that.

19 And nothing more -- no, no characterization  
20 that it's two-to-ten, just they can't know that.

21 >> MR. MALSCH: I think that is absolutely  
22 admissible. I mean, it is DOE's obligation under  
23 Part 53 to present the range, the full and defensible  
24 range of parameters. If they fail to do so, it is  
25 DOE that is not in default and has not complied with

1 Part 63. It is not our obligation as an Intervenor  
2 to do our job for and supply what is missing, namely,  
3 the full range of permissible and defensible  
4 parameters. It says with adequate support their  
5 range is five-to-six. That is not supported or is  
6 wrong, it is in itself an admissible contention  
7 because of the way Part 63 is drafted.

8 >> JUDGE TRIKOUROS: DOE?

9 >> MR. ZAFFUTS: Paul Zaffuts, DOE. To go  
10 back to something Mr. Malsch said -- well, let's talk  
11 about uncertainty, I know we talked about that a bit,  
12 this idea of a range of uncertainty, it's -- I think  
13 we have a fundamental disagreement here, it's  
14 something like a range of uncertainty. Okay. It  
15 could be 1%. It could be 2%. It could be 90%. It  
16 could be .01%. That's what a particular range would  
17 be and I don't think any of these contentions get to  
18 that specificity, I guarantee you. That's a  
19 technical disagreement. Okay. That's -- we're not  
20 talking about regulatory violations with something  
21 like that.

22 This is a technical disagreement that the  
23 materiality standards have to apply. It's  
24 Petitioner's burden to demonstrate why should we have  
25 a hearing, a full evidentiary hearing on something

1 that may have absolutely no significance whatsoever.  
2 I don't know what this significance would be, that's  
3 Petitioner's burden, they have to demonstrate with a  
4 basis sufficient for your understanding, the Board,  
5 to say, yes, this is an issue that's sufficient for a  
6 Hearing. That's not what's being done in these  
7 contentions. They don't do that. They just say --  
8 your example was a good one, sometimes they just say,  
9 "We don't know."

10 I just don't understand what kind of a  
11 contention that is and how you are supposed to or  
12 anyone is supposed to determine materiality or  
13 importance sufficient to have a hearing on that.

14 So, I think we need to understand it in  
15 those realistic and rational terms, so, so in the  
16 case of where there is some inaccuracy or some other  
17 allegation, I think we just need to continue to look  
18 at it from the terms of a materiality aspect.

19 >> JUDGE TRIKOUROS: So, the statement that  
20 something is wrong with a -- with a reasoned basis,  
21 is a genuine dispute and might be material, but the  
22 statement that something is not right or the  
23 statement that something may not be right, do you  
24 consider that to be a genuine dispute?

25 >> MR. ZAFFUTS: Well, let me go back to

1 the first thing that was said that was it was a  
2 statement that is wrong. I mean, they have to  
3 support that.

4 It's got to be supported with the bases.

5 >> JUDGE TRIKOUROS: Well, I understand  
6 that, with a reasonable justification.

7 >> MR. ZAFFUTS: That in and of itself I  
8 don't believe is necessarily material. As you know  
9 with a model such as like this, what is right? What  
10 is wrong?

11 It's another way of saying you may not know  
12 the precise words of uncertainty, because that's what  
13 we're dealing with here generally is, you may have a  
14 difference in a data point and is that quote wrong or  
15 is it not wrong?

16 I don't know what the answer is. I don't  
17 think anyone knows what the answer to that is.  
18 That's sure not a basis of determination of  
19 materiality. They have to show an effect. What is  
20 the impact of that error or something being wrong?

21 >> JUDGE TRIKOUROS: The problem that we're  
22 having here is, in essence, you could be hiding  
23 behind that screen as well. The analogy I used was,  
24 you provided wax wings to the -- to Intervenor with  
25 the requirement to prevail, they have to provide the

1 sun at a certain distance.

2 >> MR. ZAFFUTS: Okay. Well, if I could, I  
3 think they could probably put a heat lamp on those  
4 wings and determine that without having to fly to the  
5 sun, so I think there is many ways of assessing  
6 issues that they bring up and they did, they had a  
7 burden to do that.

8 >> JUDGE TRIKOUROS: But this hiding behind  
9 the complexity of the TSPA is a two-edged sword, it's  
10 both ways. We're in a position to sort that out. So  
11 we're going to ask a lot of questions, maybe repeat  
12 things if we have to.

13 >> JUDGE GIBSON: But before we do that,  
14 why don't we take a recess here for 15 minutes.  
15 We'll be back on the record. Fifteen minutes.

16 (A recess was taken.)

17 >> JUDGE GIBSON: Back on the record.  
18 Judge Trikouros.

19 >> JUDGE TRIKOUROS: All right. We were  
20 discussing what I had referred to as a contention  
21 that indicated that an impact would be unknown. We  
22 went through some discussion regarding that. Would  
23 it be necessary for a contention to state as a  
24 minimum that the effect that it's alleging would be  
25 in the -- let me say, the non-conservative direction

1 or I could say the conservative direction, depending  
2 on which, how you're looking at it, but it would have  
3 to state that the effect would be in a direction to  
4 prevent or possibly prevent meeting the post-closure  
5 criteria. Would it at least have to say that?

6 >> MR. MALSCH: This is Marty Malsch again  
7 for Nevada. I think it would depend upon the  
8 contention. If the contention asserts that a DOE  
9 model is simply wrong or not supported, I think the  
10 model disappears, it can't be used in the assessment  
11 and that's the end of it. There is no further  
12 obligation on our part. If we're dealing with ranges  
13 of uncertainties or ranges of parameter  
14 distributions, that's a slightly different story, but  
15 again, it seems to me that the requirement in the  
16 the regulations that uncertainty be accurately  
17 characterized and described and that the full range  
18 of programs be included is independently enforceable,  
19 because the Commission wanted to know whether the  
20 ultimate result or the extent to which the ultimate  
21 result was neither conservative or non-conservative,  
22 because remember that the ultimate decision is based  
23 upon the full record of a whole bunch of  
24 considerations, not just -- although this is the most  
25 important part -- but the record includes a whole

1 range of considerations, unless the Commission knows  
2 on a model by model basis exactly what the full range  
3 is.

4           Regardless of how the effects of an  
5 individual model are, when you get to the final  
6 decision on the validity of the dose calculation, you  
7 need to know all about uncertainties and ranges for  
8 all of the models.

9           So I don't think we have any obligation in  
10 any one contention attacking any one model or  
11 sub-model to either, to show that the range or part  
12 of the range that we think is missing is on the  
13 conservative or non-conservative side, who knows, if  
14 that could be either way, ultimate dose calculations  
15 considering all of the other models.

16           >> MR. ZAFFUTS: May I respond?

17           >> JUDGE TRIKOUROS: Yes.

18           >> MR. ZAFFUTS: This is Paul Zaffuts, DOE.  
19 I again, I think a couple points. When we're dealing  
20 with, again, the fundamental difference here, if  
21 we're dealing with things like ranges of uncertainty,  
22 notwithstanding what Mr. Malsch believes, it's our  
23 position that does not deal with violations.

24           If they can demonstrate that we have  
25 utterly, utterly not taken uncertainty into account,

1 you can look at 113 -- or 114, 63-114. That's the  
2 uncertainty regulation that primarily deals with  
3 uncertainty in the TSPA. What we're dealing with  
4 here in the vast majority of these contentions are  
5 technical disagreements related to ranges of  
6 uncertainty, data values, what particular type of  
7 data or piece of data that may or may not be  
8 important.

9           These are very common types of contentions  
10 in proceedings. They're technical issues between  
11 disagreements between technical  
12 experts -- disagreements related to a technical  
13 issue, not a violation. And when you are dealing  
14 with things like that, there has to be a sense of  
15 materiality. You need to, your example is perfect.  
16 If the allegation suggests that conservatism will  
17 increase, how can -- I just don't -- I do not fathom  
18 how that can have a significant effect or a material  
19 effect that we are going to have a hearing over.

20           >> JUDGE TRIKOUROS: Okay. Well, let me  
21 explore this a little bit. What I think I'm hearing  
22 is that a contention could actually say that  
23 something will have an uncertainty in a direction  
24 that will improve the dose response. But what you're  
25 saying is that even a negative -- let's call it a

1 conservative uncertainty, might be material in such a  
2 complex model that even though it appears  
3 conservative when you run the model, it may go the  
4 other way or you know, eddies and currents in this  
5 model might drive it some place where no one  
6 expected.

7           That's the issue of materiality. But then  
8 you're saying, that someone else has to determine  
9 that materiality?

10           I don't understand where you are coming  
11 from on that.

12           >> MR. MALSCH: Again, Marty Malsch for  
13 Nevada. That's precisely what we're trying to argue,  
14 that you cannot on an individual independent basis  
15 when you are talking about contentions along those  
16 lines, hope to demonstrate materiality in the sense  
17 of its ultimate effect on the dose calculation  
18 because who knows what that actually might be in  
19 terms of the ultimate calculation especially  
20 considered with your other contention.

21           >> JUDGE TRIKOUROS: But is it a valid  
22 contention to say that you may have made a mistake  
23 here and it might be material without demonstrating  
24 materiality, or at least having an expert say, I'm  
25 confident that if you utilize what I am telling you,

1 it will have a significant effect on the outcome?

2 >> MR. MALSCH: Well, I think though as a  
3 matter of fact, for every one or virtually every one  
4 of our TSPA contentions, we always have in paragraph  
5 five, an opinion by the expert that he believes his  
6 contention, if true, would have an adverse effect in  
7 terms of increasing doses of releases.

8 What's missing is a quantitative  
9 discussion of what precisely that would be. And as  
10 we explained yesterday, that is far beyond any  
11 Intervenor's ability to do, because of the  
12 complexities in the model, the recognition that there  
13 are at least five separate modeling cases, and the  
14 fact that we'd have to include combinations of  
15 contentions.

16 And then also, it wouldn't be sufficient to  
17 modify -- let's say we took one contention and let's  
18 say we attempted to do a calculation of the effects  
19 on doses and releases if they included our different  
20 parameter range. If we did that, we would perhaps  
21 have to change as many as five different versions of  
22 the TSPA because there are at least five different  
23 modeling cases.

24 And let's suppose we did that. In some  
25 cases as we explained, that might take a month's

1 worth of work and we produced a single dose  
2 calculation; what good would that do?

3           No one would know if that was at the high  
4 end or low end or in between. We would have to  
5 actually run enough numbers of realizations to show  
6 it affected the means.

7           So we would have to actually modify as many  
8 as five different modeling cases and then run those  
9 things, at least perhaps 300 times. It is just not  
10 within our ability to do. I think you're asking for,  
11 you know, what is actually the impossible?

12           The best you could ask for would be an  
13 opinion from the expert that this would have an  
14 effect in terms of doses and releases and that's the  
15 best we did.

16           >> MR. TRIKOUROS: So if a contention has  
17 that statement by the expert, that he believes this  
18 would be a significant effect in the direction of the  
19 improper direction, let's say, then, then that  
20 contention might be admissible. But if that  
21 statement is not there, would you then agree that  
22 contention might not be admissible?

23           >> MR. MALSCH: I wouldn't agree that would  
24 always be the case. It would depend upon the  
25 contention. For example, a contention that says the

1 model is simply wrong or unsupported, that's it. No  
2 further demonstration required.

3           You can't have a TSPA which uses the wrong  
4 model or a model that is unsupported because the  
5 regulations have apart from the requirement to do  
6 the dose calculation, a separate requirement that  
7 each model be defensible scientifically.

8           >> JUDGE TRIKOUROS: But if a statement is  
9 made that is wrong, I'm assuming that it's  
10 reasonably -- there is a reasonable basis for that  
11 statement.

12           >> MR. MALSCH: Of course. Of course.

13           >> MR. ZAFFUTS: Your Honor, may I respond?

14           >>JUDGE TRIKOUROS: Yes.

15           >> MR. ZAFFUTS: Paul Zaffuts, DOE. Just a  
16 quick one. You mentioned -- Mr. Malsch mentioned a  
17 statement by an expert that says there is some  
18 significant effect and that's sufficient. I  
19 fundamentally disagree with that.

20           Statements like that need to have support.  
21 That's just a conclusory statement without any basis.  
22 That's insufficient. I don't care if it comes from  
23 an expert, It's not sufficient. That's exactly what  
24 they do in a vast majority of the cases. They will  
25 have some issue related to -- I'm going to use the

1 example we used this morning, plant height over the  
2 mountain.

3 We take plant height into account, but  
4 maybe some are taller, some are lower. Ergo, there  
5 is potentially a little increase and uncertainty in  
6 our estimation. And then they summarize the  
7 discussion by saying it could widen the range of  
8 infiltration. As you suggested earlier, which  
9 direction?

10 I would like an expert to tell me which  
11 direction so one could determine if it's conservative  
12 or non-conservative. And the next line is in  
13 consequence, "seepage would be altered."

14 No basis for that. Significant changes in  
15 corrosion, radionuclide impacts on the REMI. It's  
16 one sentence. That's not sufficient.

17 >>MR. REPKA: David Repka, NEI. May I be  
18 heard?

19 >> JUDGE TRIKOUROS: Yes.

20 >> MR. REPKA: Certainly before we leave  
21 the topic of TSPA, I would be remiss if I didn't make  
22 a few points in saying I do have several contentions  
23 directed to the TSPA.

24 First, on the issue of the threshold and  
25 the materiality, I do agree there is some materiality

1 showing required at the contention stage and I would  
2 point out that NEI's contentions specifically address  
3 that and meet that threshold based upon expert  
4 Affidavits, that not only establish their own  
5 expertise, the model that they rely on developed by  
6 and for EPRI and that they show us specific impact  
7 with respect to the TSPA.

8           Those impacts are that the TSPA are  
9 conservative and that we would establish further  
10 conservatisms. I think that demonstrates that that  
11 kind of threshold showing can be made and has been  
12 made in this case.

13           I think with respect to the issue of  
14 showing conservatisms, the question came up earlier  
15 as to whether or not these issues would need to be  
16 heard or addressed together. And I do believe that  
17 assuming there are contentions admitted, they do have  
18 to be considered together in some way. Obviously,  
19 focusing on specific contentions, yes, but in terms  
20 of total effect, a holistic effect, it's clearly  
21 relevant.

22           Mr. Malsch stated, you know, I think he  
23 said something about there's a whole range of  
24 considerations and I certainly agree with that.

25           I think our model would probably show a

1 different outcome than his would. But I think that  
2 the point is, there is a materiality showing. NEI's  
3 contentions I think meet that showing and I think  
4 that are certainly relevant to this issue and the  
5 litigation of it.

6 >> JUDGE TRIKOUROS: All right. Well, as  
7 I've done before, I'm going to defer additional  
8 discussion of these themes for now and try and come  
9 back to it later.

10 >> JUDGE GIBSON: Yeah, I -- we will come  
11 back to the themes issue. There are some tribal  
12 questions that I want to be sure that -- we need to  
13 cover now. So I would like to turn to those now.

14 First, I'd like to discuss the issue of  
15 standing. As I understand it, there are two entities  
16 that claim to represent the Timbisha Shoshone Tribe.  
17 The first group calls itself the Timbisha Shoshone  
18 Tribe. But for purposes of the questions that I will  
19 pose today, I'm not going to refer to that group as  
20 the Timbisha Shoshone Tribe, but I will instead refer  
21 to them as TIM. You will understand why in a minute.

22 The second group calls itself the Timbisha  
23 Shoshone Yucca Mountain Oversight Program Nonprofit  
24 Corporation, and not surprisingly, I don't want to  
25 have to say that every time either. And so we will

1 simply refer to that group as TOP. So I'm going to  
2 be referring to TIM and TOP. Does everybody know  
3 who they are?

4 Okay. I think the record is clear that no  
5 one who has entered an appearance here disputes that  
6 the Timbisha Shoshone Tribe is an affected Indian  
7 tribe under the Nuclear Waste Policy Act.

8 Now, as determined by the Secretary of  
9 Interior, and as such, the Timbisha Shoshone Tribe is  
10 to be accorded automatic standing here.

11 But just to be sure, I want to make sure  
12 that there is not anybody in the room here who would  
13 dispute that the Timbisha Shoshone tribe, itself, is  
14 to be accorded automatic standing? No problem there,  
15 right?

16 Okay. Speak now or forever hold your  
17 peace. Unfortunately, both TIM and TOP claim to be  
18 the sole representative of the Timbisha Shoshone  
19 Tribe. And at least of the last filing we had, which  
20 I think was at least last night or this morning, TIM  
21 and TOP have been unable to resolve the dispute  
22 between themselves as to which entity is authorized  
23 to represent the tribe in this proceeding.

24 I need to make it clear, initially, to both  
25 of you that this licensing board is in no position

1 to resolve the dispute between TIM and TOP in terms  
2 of which group is the sole legitimate representative  
3 of Timbisha Shoshone Tribe.

4           Instead, this is something that is going to  
5 have to be worked out through the administrative and  
6 judicial channels, where I understand a dispute is  
7 pending. And again, just so the record is clear  
8 here, do I understand correctly that there are two  
9 appeals pending within the Bureau of Indian affairs  
10 and another case pending in Federal District Court?

11           >> MS. HOUCK: Your Honor, Darcy Houck for  
12 TIM.

13           >> JUDGE GIBSON: Yes.

14           >> MS. HOUCK: Currently, there are  
15 actually three appeals in Interior. The first appeal  
16 was decided at the regional director level on  
17 February 17th recognizing the '06 '07 tribal  
18 council as the last duly elected council and that  
19 council is made up of Joe Kennedy, Ed Beanan,  
20 Virginia Beck, Madeleine Estevez and Cleveland Casey.

21           And I will indicate that regardless of what  
22 the ultimate outcome is on all of these appeals, four  
23 of those five people are in the room today and this  
24 is probably the first time since this dispute started  
25 in 2007 that that has occurred.

1           So overall, the issues in this proceeding  
2 are critically important to the tribe and regardless  
3 of the ultimate outcome, the tribe very much wants  
4 to make sure that the impacts to the tribe, itself,  
5 are addressed in this proceeding and that is how they  
6 are seated at the table. But with that said, the  
7 first appeal the Regional Director made the decision  
8 on February 17th.

9           That was then appealed to the Interior  
10 Board of Indian Appeal. Under Interior regulations,  
11 the Assistant Secretary of Indian Affairs has the  
12 ability to take jurisdiction within 20 days of the  
13 filing of that appeal. That did occur in this case,  
14 so acting Assistant Secretary George Staben (phn)  
15 Has taken jurisdiction over the first appeal to the  
16 IBIA.

17           The second appeal, the regional director  
18 made a decision on March 24th. Also, recognizing  
19 the '06-'07 tribal council consisting of Joe  
20 Kennedy, Ed Beanan, Virginia Beck, Madeleine Estovez  
21 and Cleveland Casey.

22           There is a 30 of day period that can be  
23 appealed to the Interior Board of Indian Appeals at  
24 which time, it's my understanding from the U.S.  
25 Attorney's Office, I can't confirm this, if an appeal

1 is made, the Assistant Secretary will likely also  
2 take jurisdiction over that appeal.

3           There was an election in November, 2008,  
4 that was conducted -- it was not approved by that '06  
5 '07 council. It was the other faction. And there  
6 has been an appeal as to that election, which a  
7 decision is still pending at the Superintendent's  
8 level.

9           So those are the three administrative  
10 appeals that are pending.

11           >> JUDGE GIBSON: Is there also a case in  
12 Federal District Court?

13           >> MS. HOUCK: There are actually -- my  
14 understanding is there are two cases in federal  
15 court, one that was filed I believe in December.  
16 That one I believe is moot and nothing has happened  
17 and I don't know, I would have to check. That was  
18 filed on behalf of Mr. Kennedy by I believe Judy  
19 Shapiro and George Foreman's law firm. I don't know,  
20 I believe the issue was resolved administratively,  
21 though, by deciding -- by retracting a  
22 December 4th decision.

23           There's a whole litany of decisions I think  
24 you've seen from the pleadings between December 14  
25 of '07 up through actually March 24th of last

1 week.

2           The second district court case was filed --  
3 the appeal that was decided on January 17th.  
4 The U.S. Attorney's Office filed a motion to dismiss  
5 based on the two recent decisions and the fact that  
6 they have consistently since November and indicated  
7 in their motion to dismiss that pending resolution of  
8 all appeals, the Bureau of Indian Affairs is  
9 recognizing for government-to-government purposes,  
10 the tribal council made up of Joe Kennedy, Ed Beaman,  
11 Virginia Beck, Madeleine Estovez and Cleveland Casey,  
12 that the whole matter is moot.

13           That case is likely -- we're in  
14 discussions with the U.S. Attorney about withdrawing  
15 that lawsuit. And that one may go away based on  
16 their representation that that is the counsel that  
17 they're going to be recognizing pending resolution of  
18 these appeals.

19           >> JUDGE ROSENTHAL: Can I ask you a  
20 question at this point? When the final determination  
21 in the BIA is made, is that subject to judicial  
22 review or does the BIA termination have finality?

23           What I'm getting at is, as Judge Gibson  
24 pointed out, it's beyond our province to become  
25 involved at all in this dispute. And I'm sort of

1 curious as to whether there is any basis for  
2 concluding at this point that this dispute is going  
3 to be ultimately resolved, whether administratively  
4 or after a judicial review, within this century.

5 >> MS. HOUCK: Once the Acting Assistant  
6 Secretary makes his determination which is likely to  
7 take roughly five months, probably, it is subject to  
8 judicial review as a final agency action under the  
9 APA.

10 >> JUDGE GIBSON: Okay. We heard from TIM,  
11 with TOP. Just with respect to the factual  
12 recitation that she gave, is there anything else that  
13 you would like this add or correct?

14 >> MR. POLAND: Judge Gibson, there are two  
15 things I would like to say. First of all, as far as  
16 the November 28, 2008 election is concerned that is  
17 not yet on appeal right now to BIA. There is no  
18 appeal pending as to that election. So I do want to  
19 make that correction.

20 >> JUDGE GIBSON: Thank you.

21 >> MR. POLAND: Second of all -- I'm sorry.

22 >> JUDGE GIBSON: I said thank you.

23 >> MR. POLAND: Okay. Second of all, Ms.  
24 Houck referred to four or five members of the tribal  
25 council being in this room. I understand, Your

1 Honor's statement that this particular Board does not  
2 have the expertise or is not going to decide these  
3 issues.

4 We would like to make clear, TOP would like  
5 to make clear that the problem with deferring to what  
6 the BIA might determine is that some of these issues  
7 are not issues for the BIA to determine. They are  
8 issues that are to be resolved by a sovereign tribe.

9 >> JUDGE GIBSON: Okay.

10 >> MR. POLAND: And the U.S. Supreme Court  
11 has made clear that these are sovereign tribal issues  
12 and that the BIA does not have a say over this .

13 >> JUDGE GIBSON: Okay, fair enough. We'll  
14 get to that in a minute.

15 Let me just go back to TIM now. Judge  
16 Rosenthal asked if it would be resolved in this  
17 century. You said you are hoping to get a decision  
18 in five months and then that decision can be  
19 appealed. Is that a fair statement?

20 >> MS. HOUCK: Yes, that is a fair  
21 statement. I would like to note that the  
22 March 24th regional director's decision indicates  
23 there is a pending determination regarding the  
24 November 11th, 2008 general election and so we  
25 are unsure what they're going to do as far as

1 recognizing that.

2           It was my understanding there was an  
3 appeal. But there is some decision pending.

4           >> JUDGE GIBSON: And do you at least agree  
5 with her with respect to the five month's Board  
6 decision-plus factored into the appeal to Federal  
7 District Court?

8           >> MR. POLAND: I think that there is some  
9 range, Your Honor, but I don't disagree -- it's a  
10 matter of months as opposed to years.

11           >> JUDGE GIBSON: Fair enough. Thank you.  
12 Okay. Now, I know that, you know, I made DOE answer  
13 some questions earlier today that I knew were painful  
14 for them. I'm going to do the same thing for you  
15 guys.

16           And in the event that the pending dispute  
17 in other forms is not resolved in your favor, which  
18 would mean that your organization would not be found  
19 to be the sole authorized representative of the  
20 Timbisha Shoshone Tribe, and I know that that's  
21 painful for both of you to make that assumption, but  
22 just for purposes of helping us out here, we need to  
23 try to make the record, okay.

24           It's my understanding that each of you is  
25 nevertheless claiming that your organization meets

1 the requirements for standing as a matter of right in  
2 failing that for discretionary intervention. And so  
3 if that's correct, I want to make sure that we can  
4 unpack that a little bit so that we will have a clear  
5 record for purposes of entering an Order in this  
6 case.

7           Let's begin with TOP. In your amended  
8 petition to intervene, you argue that you've met the  
9 requirements representational standing. Assume for a  
10 minute that the Board grants your motion for leave to  
11 file your amended petition, the NRC staff, as I  
12 understand in answer to your Amended Petition, has  
13 conceded that you have satisfied the criteria for  
14 representational standing. Is that your  
15 understanding?

16           >> MR. POLAND: Yes, it is, Your Honor.

17           >> JUDGE GIBSON: Is that correct, staff?

18           >> MS. SILVA: That's is correct.

19           >> JUDGE GIBSON: DOE has not addressed it  
20 as I have, have you with respect to TOP?

21           >> MR. SILVERMAN: Yes, Your Honor. I  
22 believe we have stated that they do not have  
23 representational standing based on the pleadings they  
24 provided.

25           >> JUDGE GIBSON: Okay. What was the basis

1 for that?

2 >> MR. SILVERMAN: One moment, Your Honor.  
3 It would have been in the pleading that DOE filed on  
4 I believe it was Friday of last week in response to  
5 the Amended Petition. And the representational  
6 standing, as you know, an organization which is not  
7 asserting standing on itself, must demonstrate that  
8 one of its members who is authorizing the  
9 organization to represent it, itself has standing.

10 And we do not believe that the information  
11 provided in the pleading demonstrated that the  
12 individual members had standing in their own right  
13 and, therefore, there was no ability for TOP to have  
14 representational standing.

15 I think we may have also mentioned that the  
16 Articles of Incorporation and the corporate bylaws  
17 state that TOP has no members and we may also have  
18 relied on that.

19 >> JUDGE GIBSON: TOP, could you address  
20 the two points that DOE just raised?

21 >> MR. POLAND: Certainly, Your Honor. TOP  
22 was formed specifically and incorporated specifically  
23 to represent the interests of the Timbisha Shoshone  
24 Tribe in these very proceedings. That is its  
25 purpose. It stands in place of the Timbisha Shoshone

1 Tribe. It represents the interest of the members of  
2 the tribe.

3 And so, Mr. Polonsky says, well, TOP,  
4 itself, is a corporate entity, so it doesn't have any  
5 members, it just has directors and that precludes it  
6 from participating.

7 Your Honor, I would refer the Board to the  
8 NEI vs. EPA case.

9 >> JUDGE GIBSON: What? Could you please  
10 give us that case?

11 >> MR. POLAND: Sure. NEI vs EPA.

12 >> JUDGE GIBSON: Okay, NEI vs EPA. Okay,  
13 I'm sorry, I just I didn't hear what you said.

14 >> MR. POLAND: There, the D.C. Circuit  
15 addressed the question whether the environmental  
16 organizations there had standing. And I don't see a  
17 big difference between the decision that the D.C.  
18 Circuit made there where they clearly held that the  
19 individual members addressed an injury that they  
20 would suffer if they had standing.

21 And I don't see representational standing  
22 as well as credential standing.

23 And I don't see a difference here. We have  
24 submitted the affidavits of several members of the  
25 Timbisha Shoshone Tribe who live in the traditional

1 homes in the Death Valley area. They have set out  
2 real concrete injuries that they will suffer based on  
3 concessions in DOE's own Environmental Impact  
4 Statements. They're members of the tribe. They are  
5 current members of the tribe.

6 So we certainly don't see a problem with  
7 representational standing.

8 >> JUDGE GIBSON: And are those members of  
9 the tribe also members of TOP?

10 >> MR. POLAND: Two of them are on the  
11 Board of Directors of TOP.

12 >> JUDGE GIBSON: Okay. Now, I do  
13 understand that both DOE and the NRC staff are  
14 opposing TOP's request for discretionary intervention  
15 in this case?

16 >> MS. SILVIA: This is Andrea Silva from  
17 the NRC staff. We did not address the discretionary  
18 intervention because we found that they had  
19 representational standing.

20 >> JUDGE GIBSON: Well, just assume for the  
21 sake of argument, that discretionary intervention is  
22 on the table; do you have any problem with them being  
23 accorded discretionary intervention in this case?

24 >> MS. SILVIA: No, we do not.

25 >> JUDGE GIBSON: DOE?

1           >> MR. POLONSKY: Thank you, Your Honor, Mr.  
2 Polonsky. I believe that the Answer we filed on  
3 Friday, based on the Petition provided, we do not  
4 believe that TOP had discretionary standing.

5           I think in particular, we were conflicted  
6 by the fact that whoever is the affected Indian tribe  
7 really represents the interests of that tribe. So  
8 whoever that entity is should be the entity that  
9 represents them.

10           And to the extent that TOP is not the AIT,  
11 then it shouldn't be given discretionary standing  
12 because the interests of the tribe will already be  
13 represented, for lack of a better word, Your Honor.

14           >> JUDGE GIBSON: Okay. Would you like to  
15 respond to that, TOP?

16           >> MR. POLAND: Yes, I would, Your Honor,  
17 thank you. I think if we go through the factors,  
18 Mr. Polonsky mentioned one, are there other entities  
19 that could represent the interests of TOP if they  
20 were not granted discretionary intervention. But  
21 that's only one of the factors.

22           That's not all the factors. One of the  
23 first factor is will the participation assist the  
24 Board in developing a sound record?

25           Here, there is no question that it will.

1 These are people, these are Timbisha Shoshone tribal  
2 members who live at the Death Valley Springs. They  
3 live in the area. They practice traditional tribal  
4 customs and religions. They clearly will be injured.

5 And the views that they have, the injuries  
6 that they will suffer, those need to be made a part  
7 of the record. They must be made a part of the  
8 record. And so if they are not participating, those  
9 views will not be made a part of the record.

10 So I don't understand how DOE can say that  
11 they will not, their participation would not assist  
12 the development of a sound record.

13 The second factor that's to be considered  
14 under Section 2.309E1 is the nature and extent of  
15 the property financial or other interest in the  
16 proceedings.

17 I did mention these yesterday at the end of  
18 the day. We have culture, heritage interests that  
19 are at stake here, our members do who live in the  
20 Death Valley area. Clearly, those are interests that  
21 ought to be considered. They are significant  
22 interests. They are significant to the tribe and to  
23 the members of TOP.

24 Third, is the possible effect of any  
25 decision or Order that may be issued in the

1 proceeding and here, if an Order is issued, I think  
2 it's a sort of a two-step process.

3           The first question is the NRC's staff  
4 review of the EIS. If the EIS is lacking because  
5 these cultural issues should be considered, clearly,  
6 the NRC staff could choose to reject that EIS and  
7 require supplement.

8           But as a second step as well, the Board  
9 could reject the application if the information is  
10 not contained in the EIS. So none of those factors,  
11 which are the ones that are to be taken into account  
12 weigh against us. They all weigh in our favor. And  
13 then there are also several factors that would weigh  
14 against granting discretionary intervention.

15           We don't think any of those are present.  
16 We don't think that there are other organizations  
17 that can represent out interests.

18           Mr. Polonsky mentions the other entity,  
19 TIM. None of the members of TIM live in the Death  
20 Valley area. They live outside the traditional  
21 tribal homeland. They don't practice the traditional  
22 tribal customs. They cannot represent the interests  
23 of the people who live in the homeland. So those  
24 interests will not be represented.

25           And then there's a question as well as to

1 whether the participation of TOP will inappropriately  
2 broaden the issues or delay the proceeding. And we  
3 talked about this yesterday. Mr. Silverman on behalf  
4 of the DOE even focused on the word "inappropriately  
5 broadened."

6 We certainly would submit that it is not  
7 inappropriate to include TOP's concerns at this FE  
8 contention stage.

9 >> JUDGE GIBSON: Okay. Thank you. TIM, I  
10 understand that -- first of all, I guess I want to  
11 know, are you all asserting standing as a matter of  
12 right?

13 >> MS. HOUCK: Yes, Your Honor, we're  
14 asserting standing as a matter of right.

15 >> JUDGE GIBSON: In the event, that, you  
16 know, you don't get where you want to be with BIA?

17 >> MS. HOUCK: In the event that we don't  
18 get there, we've also requested discretionary  
19 standing and given the decision on the potential  
20 appeals and the litigation that could follow could  
21 take months or potentially at least more than a year  
22 while this proceeding is moving very quickly. And  
23 even though there is case law regarding internal  
24 governmental affairs issues, there is also case law  
25 looking at the Bureau having to recognize some

1 governmental entity for government-to-government  
2 purposes when the tribe is dealing directly with a  
3 federal agency.

4           For right now, the Bureau of Indian Affairs  
5 has identified five people as who they are  
6 recognizing as the tribal council. And regardless of  
7 what happens in those appeals, if one of those  
8 entities isn't allowed to participate in this  
9 proceeding, they're not going to be able to make up  
10 that time or be able to come back and correct  
11 whatever errors or information is omitted here in  
12 these proceedings to represent their members.

13           And TIM is indicating that as the tribal  
14 council recognized by the Bureau, that they're  
15 representing all of the members of the tribe.

16           So at this point, they do believe that  
17 members of TIM are going to be directly impacted and  
18 if the BIA is looking to them to make decisions on  
19 behalf of the tribe, that would include all members.

20           We are not opposed to discretionary  
21 standing for TOP. I will put that on the record. We  
22 think that the more information that this Board has,  
23 particularly given the lack of information in DOE's  
24 document, the more informed the Board is going to be  
25 as to the actual substantial and adverse impacts that

1 the tribe is likely to suffer in this matter.

2           And those substantial and adverse impacts  
3 that may be suffered by the tribe are not just  
4 hypothetical or theoretical based on the  
5 certification of the affected Indian tribe's data.  
6 The Secretary of Interior has basically certified  
7 that those impacts could occur and they haven't even  
8 been analyzed sufficiently.

9           So the tribe does need to be represented in  
10 these proceedings. And because of the unique  
11 circumstances in this case and these outstanding  
12 appeals and the Bureau's current position on this  
13 matter, it would seem appropriate that the Board  
14 would allow discretionary standing at a minimum to  
15 the entities that have a legitimate right to claim  
16 representation to the tribe -- of the tribe.

17           >> JUDGE GIBSON: Okay. Let's turn to your  
18 claim for representational standing that you've made.

19           Now, I understand from DOE's answer that  
20 they are claiming that you failed to address the  
21 criteria for representational standing in your  
22 Petition To Intervene by failing to identify a member  
23 by name and address, by demonstrating that that  
24 member has standing in his or her own right, and  
25 showing that the member hasn't authorized

1 intervention on his or her behalf.

2 Do you agree with DOE that those are  
3 defects in that pleading or do you wish to dispute  
4 that?

5 >> MS. HOUCK: Your Honor, we don't believe  
6 that there's a defect in the pleading. As we said  
7 before, that the Bureau currently is representing  
8 this group for government-to-government purposes, so  
9 even if there's not a member that's actually -- the  
10 members of the tribe as a whole is who they're acting  
11 on behalf of and also in protection of the land base,  
12 which includes the trust land as well as the use  
13 rights of the tribe to the federal land.

14 If the Department of Interior would like a  
15 list of each of the members of the tribes and their  
16 address, we could provide that to the Board and to  
17 DOE.

18 >> JUDGE GIBSON: I think it's -- yeah,  
19 it's the Department of Energy, not the Department of  
20 Interior.

21 >> MS. HOUCK: Department of Energy.

22 >> JUDGE GIBSON: That's okay. Hopefully  
23 DOI already has that. Let's see. So you'd be glad  
24 to provide that additional information to them?

25 >> MS. HOUCK: Yes.

1           >> JUDGE GIBSON: Okay. They may still  
2 find that defective but I appreciate your offer and  
3 thank you. Now, with respect to organizational  
4 standings, DOE argues that your alleged injuries are  
5 not the distinct and palpable particular and concrete  
6 injuries required to establish standing as a  
7 non-affected Indian tribe. And I guess, DOE, could  
8 you give us what specifically you find inadequate  
9 about the injuries that TIM has alleged?

10           >> MR. SILVERMAN: Your Honor, we took the  
11 pleading at its face and the pleading assumed because  
12 it appears -- TIM assumed that it was the only entity  
13 that would be petitioning here as the AIT. So at the  
14 time that TIM submitted its petition, it assumed it  
15 was the AIT and sought to intervene in this  
16 proceeding on its automatic standing basis as the  
17 AIT.

18           We don't believe that they pled, that they  
19 had organizational standings, because, as I said,  
20 they assumed they were the AIT. We merely responded  
21 to that by saying they haven't demonstrated  
22 organizational standing. They don't request  
23 representational standing and, therefore, they don't  
24 meet discretionary standing.

25           Now, it's reasonable to make those

1 arguments because they assumed they were the AIT.

2 >> JUDGE GIBSON: Yeah, I think they  
3 definitely made that assumption but that obviously,  
4 you know what happens when you make assumptions.

5 NRC staff: Do you all have a position on  
6 whether TIM has established standing,  
7 representational or organizational standing here?

8 >> MS. SILVIA: We didn't address it  
9 because we didn't think they were requesting it.

10 >> JUDGE GIBSON: Recognizing you didn't.

11 >> MS. SILVIA: Andrea Silva for NRC.

12 >> JUDGE GIBSON: In the event that TOP  
13 turns out to be the one that gets the, you know, the  
14 golden ring here from BIA?

15 >> MS. SILVA: We would like to see them  
16 demonstrate that they have met the requirements,  
17 but --

18 >> JUDGE GIBSON: Which it sounds like  
19 they can probably do. They just pled because they  
20 assumed they were the AIT.

21 >> MS. SILVA It seems reasonable that they  
22 would be able to --

23 >> JUDGE GIBSON: Thank you. Now, if they  
24 were to provide this information albeit belatedly,  
25 DOE, would that be okay with you or are you still

1 going to object?

2 >> MR. SILVERMAN: I can't answer that  
3 question right now, Your Honor. I have to consult  
4 with my client.

5 >> JUDGE GIBSON: How about staff, if they  
6 do it belatedly?

7 >> MS. SILVIA: The one thing I wasn't  
8 aware of until this discussion, if it's true, that  
9 none of TIM's members live in Death Valley, that  
10 might complicate the way that we look at TOP's  
11 standings, so it might not necessarily be a positive  
12 thing.

13 >> JUDGE GIBSON: I'm sorry. Death Valley,  
14 can you amplify on that point?

15 >> MS. SILVIA: Tribe traditional homeland  
16 in death valley.

17 >> JUDGE GIBSON: Yeah.

18 >> MS. SILVIA: I thought I heard TOP's  
19 council claim that none of TIM's members resided in  
20 Death Valley.

21 >> JUDGE GIBSON: I don't believe he said  
22 that. I think he said a lot of TOP's members do.

23 I'm not sure he said none of TIM's members  
24 do. Right?

25 >> MR. POLAND: Your Honor, I believe I did

1 say -- when we talk about TIM, again, we have to be  
2 careful talking about organizations here. Really  
3 what we're talking about as Ms. Houck indicated is  
4 tribal councils and disputed tribal councils.

5 So what I was referring to was the people  
6 who are on the tribal council that Ms. Houck is  
7 representing, those people do not live in the  
8 traditional Timbisha homeland in and around Death  
9 Valley.

10 >> JUDGE GIBSON: Okay. Do you want to  
11 amplify on that point?

12 >> MS. HOUCK: Yes, Your Honor, I would  
13 like to say that TIM did not intervene on behalf of  
14 one or two individuals. It was on behalf of the  
15 tribal members as a whole, which the council that  
16 they're acting under does also include Mr. Kennedy,  
17 who is a part of TOP and is the other side of this  
18 dispute, but he also a member of both councils as  
19 well.

20 >> JUDGE GIBSON: Okay. Does that help you  
21 understand now and knowing with that additional  
22 information, can you say if belatedly they supply you  
23 with that information, will you be okay with them  
24 giving standing in this case?

25 >> MS. SILVIA: Well, if TIM is not the

1 official representative of the government, then I'm  
2 not sure their membership would be the same as their  
3 tribal council. So I still have questions about who  
4 their members are.

5 >> JUDGE GIBSON: Fair enough. So you  
6 can't give me an answer.

7 >> MS. SILVIA: Right.

8 >> JUDGE GIBSON: That's okay. We have to  
9 get accomplished what we can today.

10 DOE, are you still need to confer with your  
11 client?

12 >> MR. SILVERMAN: Yes, we would. In the  
13 discussion that has ensued since, I think there is a  
14 complication that has arisen. That is, if I hear TIM  
15 and TOP's counsel correctly, we would have two  
16 separate groups that if granted discretionary handling  
17 would be representative of the exact same people and  
18 that would be an interesting precedent for the Board  
19 to set and perhaps the Board would want one entity  
20 representing those people, one entity representing a  
21 tribe.

22 >> JUDGE GIBSON: Yeah, well, I appreciate  
23 what you're saying, but, you know, that -- that may  
24 be something that would be convenient for us. It  
25 might be convenient for you, but it might not be

1 agreeable to them. And so, we basically have to try  
2 to find out if there is a way for all of these people  
3 to participate in this proceeding or not.

4           And that's what we're about this afternoon.  
5 Okay. I think it is clear, however, and I think your  
6 point is well taken, that there is no way that we  
7 could allow both parties, both of these entities to  
8 represent the tribe. That in itself cannot happen.  
9 And I don't think either one of them is asking us to  
10 do that. I think you realize we couldn't do that  
11 either.

12           >> JUDGE TRIKOUROS: Now this is just my  
13 ignorance; are these two entities really operating in  
14 cross-purposes here?

15           They both were purporting to represent a  
16 particular tribe, the interest of the tribe which  
17 assertedly are being impacted in some way or would be  
18 impacted by the construction and/or operation of this  
19 facility?

20           Now, I would think, I understand that there  
21 seems to be a jurisdictional dispute here, but  
22 really, are these two organizations at loggerheads  
23 with respect to precisely what the interests are of  
24 their members, how those interests might be impacted  
25 so that -- because I would have thought the

1 possibility that if one of these organizations  
2 was allegedly admitted as on the basis of  
3 representational standing, the other entity got in on  
4 the discretionary standing, that there might be a  
5 board requirement two groups operate collegially.

6           And I'm just trying to find out whether  
7 this is a Hatfield and Mccoy situation where that  
8 would not be possible.

9           I mean I would hoped that there would be  
10 some agreement as to how the interests of this group  
11 that they're both purporting to represent would be  
12 impacted by the -- the operation of this facility.  
13 So I would like to get a little clarification from  
14 both TIM and TOP as to just how they see their  
15 relationship with each other.

16           >> JUDGE GIBSON: Before they answer the  
17 question, Judge Rosenthal, I think it's interesting  
18 that there's actually a third group, the Native  
19 Community Action Council that we haven't gotten to  
20 yet, so there is actually three.

21           >> JUDGE ROSENTHAL: Maybe we can put  
22 three -- I'm just concerned about that, because it  
23 didn't -- offhand I would think that there would be  
24 at bottom, even though there is a jurisdictional  
25 battle, when it came to the merits of this, they

1 would be on the same track, but perhaps that's not  
2 the case.

3 >> MR. POLAND: Your Honor, if I may, Doug  
4 Poland for TOP. I think one thing that Ms. Houck and  
5 I probably can agree on is that certainly we want to  
6 both act in the best interests of the tribe itself,  
7 the Timbisha Shoshone Tribe, and we would like those  
8 interests to be represented.

9 Your Honor referred to -- Judge Gibson  
10 referred to the Hatfield-Mccoy type of situation.  
11 And it's clear the dispute goes much deeper and  
12 beyond this particular proceeding and has  
13 implications for other proceedings as well. We have  
14 said in our amended petition, we believe that we are  
15 the AIT. We represent the AIT and we should have AIT  
16 status. We set out the reasons for that.

17 We have said as a secondary position,  
18 however, that if we are not selected to be the AIT,  
19 we would request respectfully that the Board rule in  
20 a way that does not preclude our group TOP from  
21 participating in these proceedings, whether it's  
22 through representational standing or otherwise.

23 So we certainly are looking out for the  
24 best interests of the tribe as a whole.

25 >> JUDGE ROSENTHAL: You have a different

1 view as to how the interests of the tribe is best  
2 served in this proceeding than is possessed by TIM?

3 >> MR. POLAND: Well, we've raised  
4 different contentions, Your Honor. They do not  
5 overlap.

6 >> JUDGE GIBSON: Well, let's turn to the  
7 Native Community Action Council. Now, I understand  
8 NCAC is not claiming to be either an effective Indian  
9 tribe, nor is it claiming to represent an affected  
10 Indian tribe; is that correct.

11 >> MR. WILLIAMS: Scott Williams. Yes,  
12 Your Honor, that's correct.

13 >> JUDGE GIBSON: Who then are the members  
14 of NCAC and who does NCAC purport to represent?

15 >> MR. WILLIAMS: NCAC is a nonprofit  
16 corporation chartered under state law to represent  
17 western Shoshone and southern Paiute people who are  
18 in the words of their articles, members of indigenous  
19 communities in the Nevada testing ground area, which  
20 includes Yucca Mountain.

21 It does not purport to represent tribes.  
22 It represents members of tribes. Its Board of  
23 Directors is composed of members of five federally  
24 recognized tribes in the area of Yucca Mountain.

25 >> JUDGE GIBSON: And you are arguing both

1 for organizational and representational standing, is  
2 that correct?

3 >> MR. WILLIAMS: That is correct. We  
4 would have argued discretionary standing if it had  
5 been mentioned in the Petition, but it was not. I  
6 feared that I was blocked from raising that issue.

7 >> JUDGE GIBSON: Okay. Well, we can  
8 deal with that issue in a minute. As to  
9 organizational standing, let's start with that. What  
10 are the organizational injuries that NCAC alleges as  
11 a basis for standing?

12 >> MR. WILLIAMS: NCAC has as its mission,  
13 the protection of the customs and traditions of the  
14 Shoshone and Paiute people. Those customs and  
15 traditions are explained to some degree in the  
16 Affidavits submitted by the three board members.

17 Those customs and traditions describe these  
18 three people as nomadic people historically. They  
19 range over this area historically. They use the  
20 water, the game, the vegetation of these areas  
21 traditionally.

22 Ceremonies were held throughout this area  
23 traditionally. All of those practices go on today,  
24 obviously to a considerably lesser degree, but they  
25 continue to happen. It is the view of NCAC that the

1 construction of the facility at Yucca Mountain is an  
2 irremediable injury, it cannot be fixed. It cannot  
3 be mitigated.

4 It is as Calvin Meyers, one of the  
5 declarants and one of the Board members would say, is  
6 taking another chapter out of the equivalent of their  
7 Bible.

8 So the answer to your question, Your Honor,  
9 is that organizational standing is present here in  
10 that the construction operation program maintenance  
11 of the facility, forever, causes a direct and  
12 immediate injury to the interests of the  
13 organization, itself, which is the preservation of  
14 traditional practices which could no longer occur on  
15 Yucca Mountain.

16 >> JUDGE GIBSON: Okay. Now, it just  
17 occurred to me, you mentioned Shoshone. I take it  
18 that your -- the Shoshone and Paiute people that you  
19 are representing are not any of the same as these two  
20 party, Shoshones that these two are representing?

21 Is that a fair assessment?

22 >> MR. WILLIAMS: I wish the answer were  
23 yes.

24 JUDGE GIBSON: Maybe some overlap?

25 >> MR. WILLIAMS: One of the board members

1 of NCAC is a member of the Timbisha Shoshone Tribe,  
2 Colleen Estevez. We do not purport to represent the  
3 tribe, the Timbisha Shoshone Tribe.

4 >> JUDGE GIBSON: Fair enough. In its  
5 answer, DOE argues that your allegations of injury  
6 are too broad and un-particularized to provide a  
7 basis for standing.

8 Council for DOE, could you tell us what you  
9 find deficient about these injuries as they have been  
10 alleged?

11 >> MR. POLONSKY: Yes, Your Honor. This is  
12 Mr. Polonsky. I don't believe there were the  
13 Affidavits of Calvin Meyers or Ms. Estevez attached  
14 because they were not provided until a Reply. At the  
15 time we looked at the Petition, it identified, you  
16 know, a longstanding interest in radiological harm,  
17 et cetera, to native people, but we believe the  
18 longstanding precedent that says that's not enough  
19 for organizational standing and that the allegations  
20 of injury, we thought, were just too broad.

21 You know, unspecified Native American  
22 communities will quote, "experience adverse health  
23 consequences, "for example.

24 So, organizational standing, we did not  
25 think it was met under the Petition that we saw. And

1 I don't believe representational standing,  
2 representational standing --

3 >> JUDGE GIBSON: That you also addressed  
4 at -- if you look at pages 22 and 23?

5 >> MR. POLONSKY: There were no affidavits  
6 asserting that an individual had standing in their  
7 own right which would have supported such  
8 representational standing.

9 >> JUDGE GIBSON: Okay. I think we'll take  
10 a 15-minute break here at this point and then we will  
11 go back on and conclude. We will probably will run  
12 all the way to 5:00 today. Thank you.

13 [ recess taken ]

14

15 >> JUDGE GIBSON: Okay. One thing I need  
16 to clear up for the record, with respect to NCAC, NRC  
17 staff, do you have a view about their participation  
18 or their standing in this case?

19 >> MS. SILVIA: Andrea Silva, NRC staff.  
20 We believe in their initial petition, they did not  
21 represent standing and the reply went beyond the  
22 permissible scope of a reply by raising new arguments  
23 and supplying Affidavits for the first time.

24 >> JUDGE GIBSON: Okay. I believe Judge  
25 Rosenthal --

1                    >> JUDGE ROSENTHAL:  It's one thing that  
2  seems quite apparent here and that is that the  
3  ultimate determination as to which of you two groups,  
4  TIM or TOP is the legitimate representative of the  
5  tribe in this proceeding is not going to be  
6  determined before this Board acts on the various  
7  petitions before it.

8                    So the question, it seems to me is this:  
9  Does the seat of the tribe, which has itself clearly  
10 standing, remain vacant until such time as a dispute  
11 between the two groups is resolved, or will those two  
12 groups, no matter what their differences may be,  
13 reach some agreement as to who will occupy that chair  
14 until such time as the matter is finally resolved?

15                    I mean, it seems to me, that if these two  
16 warring factions cannot get together, to at least  
17 to come to some understanding as to what is going to  
18 transpire in the interim, there will be simply no  
19 representation of the tribe.  That seat will as the  
20 saying goes, will remain empty.  Because, once again,  
21 this Board neither can nor will endeavor to resolve  
22 that dispute and it's going to be up to the two  
23 groups.  I didn't -- I don't think I got a full  
24 answer to my question as to just what is the  
25 relationship between the two groups, but it seems to

1 me that in the interest of this tribe, you two  
2 groups, no matter who your differences might be,  
3 should be coming to some understanding as to what  
4 will be the arrangement in the interim.

5           And if you can't come to an understanding,  
6 again there will be an empty chair and the tribe will  
7 not be represented.

8           >> MR. POLAND: Your Honor, Doug Poland for  
9 TOP. If I may, I don't think that it necessarily has  
10 to be the case that the tribe is not represented and  
11 that there is an empty chair. I think there are a  
12 variety of options that are open to the Board.

13           Certainly as I said before, we believe we  
14 are the AIT. The decision by the BIA -- and I can't  
15 stress this strongly enough, does not necessarily  
16 determine who is the rightful representative of the  
17 tribe. We have taken the position, we will continue  
18 to take the position that that is a matter of tribal  
19 sovereignty. Controlling the United States Supreme  
20 Court authority clearly holds that tribal membership  
21 rests with the sovereignty of the tribe.

22           >> JUDGE ROSENTHAL: You have that  
23 position. The other group has, I gather, a different  
24 position and we're not going to resolve it. This is  
25 not within our province. We're not going to make a

1 decision.

2 I think it does come down to a matter of  
3 some kind of interim arrangement between the two  
4 groups or no representation at all.

5 >> MR. POLAND: Judge again, Doug Poland  
6 for TOP. One option that would be open to the Board  
7 would be to give both parties discretionary standing  
8 and say, we'll wait and see what happens later on.  
9 That might be one way to do it.

10 >> JUDGE GIBSON: Let me just hasten to  
11 add, even if the Board were to reach some sort of  
12 determination that you all were entitled to either  
13 standing as of right, or discretionary standing, the  
14 fact remains that, you know, in a proceeding of this  
15 complexity, we would be doing everything we could to  
16 try to ensure that groups with similar interests  
17 would be working together. So I -- you know, it  
18 certainly behooves both of you all to try to find  
19 some accommodation so that you can make it easy not  
20 just for this Board, but for all these parties who  
21 are all willing, I think you heard it, they are  
22 unanimous in their acquiescence in letting the  
23 Timbisha Shoshone Tribe have a seat at the table.

24 But we can't make that decision and so  
25 whatever happens, you all are going to have to find

1 some way to work together, okay. Yeah.

2 >> MS. HOUCK: Your Honor, just to respond  
3 in -- I know that Mr. Rosenthal has made the  
4 statement, and we agree you are not going to make  
5 this decision, but just on two points, one, we  
6 are -- we would request that the Board grant possibly  
7 five days to allow us to confer with TOP and see if  
8 there is any way that we can come up with some kind  
9 of an arrangement where both entities claiming to be  
10 the tribal council can work something out to make  
11 sure the substantive issues on behalf of the tribe  
12 are addressed in a way that is going to represent the  
13 tribe's interests and that the governmental entity  
14 does have a seat and a say in this proceeding.

15 Again, TIM does believe that the Bureau of  
16 Indian Affairs' determination on who they're going to  
17 interact with for government-to-government purposes,  
18 particularly in regards to proceedings involving  
19 other federal agencies and the affected status  
20 granted, is important and does have to be considered,  
21 particularly since 10 CFR 60.2 indicates that the  
22 Secretary of the Interior has to determine that the  
23 entity that petitioned was the appropriate  
24 governmental entity.

25 So it is the -- the Department of the

1 Interior, the federal government, determination as to  
2 who the affected tribe is that does have some  
3 importance here.

4 We do want the substantive issues  
5 addressed, though, despite the ongoing appeals and  
6 the tribal dispute, and TIM is more than willing to  
7 sit down with TOP and see if there is a way that both  
8 entities can assure that there is representation of  
9 the tribe and all of its members, because all of the  
10 tribe's members are impacted by this proposed  
11 project.

12 The land base encompasses much more than  
13 the trust lands in Death Valley, and the impacts are  
14 far reaching, both from the transportation aspect,  
15 the water, and all of the issues that have been  
16 raised by both tribe entities represented -- claiming  
17 representation to the tribe. And TIM is more than  
18 willing to make an attempt to talk to TOP and would  
19 ask that we be allowed to submit a supplemental brief  
20 that either comes up with a solution of how to  
21 address representation of the tribe or what the  
22 positions of the party are after those discussions  
23 occur.

24 >> JUDGE GIBSON: Okay. And you're  
25 suggesting five days?

1 TOP? Five days? Ten days?

2 What do you need?

3 >> MR. POLAND: Until the end of next week  
4 would be appreciated.

5 >> JUDGE GIBSON: Let me just make sure.  
6 Anybody here have any objection to such a solution  
7 even though that would be a belated filing?

8 Hearing none, okay. End of next week.  
9 Okay?

10 Hopefully, we will hear from you the first  
11 part of the following week.

12 >> MS. HOUCK: Thank you, Your Honor.

13 >> JUDGE GIBSON: I'd like now to turn to  
14 the contentions. Specifically, both NCAC and TOP  
15 have raised some claims related to land ownership and  
16 water rights and unique cultural impacts of this  
17 possible repository on the Timbisha Shoshone peoples.  
18 And I'd like to start with TOP in that regard. The  
19 Board has yet to rule on your motion to file for  
20 leave on an amended petition, and we'll get to that  
21 in a minute, but, for now, I'd like to focus on the  
22 contentions that have been raised in both the  
23 original petition and the amended petition.

24 Let's start with the original petition to  
25 intervene. You've raised three contentions, and,

1 although you've failed to characterize them as  
2 safety, environmental, or miscellaneous, NRC staff  
3 was kind enough to characterize them for you, and I  
4 think we'll just go with those characterizations for  
5 purposes of our discussion here.

6 And I want to refer to your first  
7 contention as Miscellaneous Contention 1 and  
8 Miscellaneous Contention 2 and your third contention  
9 is NEPA Contention 1. Fair enough?

10 >> MR. POLAND: That's fair, Your Honor.

11 >> JUDGE GIBSON: Thank you.

12 >> MR. POLAND: Although I might be able to  
13 shortcut this a little because we have withdrawn two  
14 of those contentions.

15 >> JUDGE GIBSON: Okay. That was going to  
16 be my first question, you have withdrawn the first  
17 two contentions?

18 >> MR. POLAND: Well, we have withdrawn the  
19 contentions the safety contention and the  
20 miscellaneous contention. The NEPA contention has  
21 been modified in our amended petition.

22 >> JUDGE GIBSON: Which we'll get to in a  
23 minute. Okay, so all we're dealing with is the NEPA  
24 contention from TOP?

25 >> MR. POLAND: That's correct, Your Honor.

1           >> JUDGE GIBSON: Okay. Now, in the  
2 original petition, it's alleged that DOE's  
3 environmental impact statements are inadequate  
4 because they failed to identify post closure  
5 biological impacts specific to members of the tribe  
6 who have a different diet and lifestyle than the  
7 general population. That was what was in your  
8 original petition, correct?

9           >> MR. POLAND: That was in the original  
10 petition, Your Honor.

11          >> JUDGE GIBSON: Okay. Now, both DOE and  
12 the NRC staff have objected to that, and they've  
13 argued that you failed to explicitly address the  
14 requirements of 10 CFR 51.109 and 2.326, all which  
15 apply to NEPA contentions that are filed in this  
16 proceeding.

17           Among the requirements is the requirement  
18 to file an affidavit with the petition to intervene.  
19 Now, although I understand you did not file an  
20 affidavit with your initial petition, at that time  
21 you were not -- TOP was not represented by counsel,  
22 is that correct?

23          >> MR. POLAND: That's correct, Your Honor.

24          >> JUDGE GIBSON: And, once represented by  
25 council, was an affidavit submitted in?

1 >> MR. POLAND: In support of our -- yes,  
2 with our reply it was, correct.

3 >> JUDGE GIBSON: Right, right, but just  
4 not with the original one?

5 >> MR. POLAND: That's correct, Your Honor.

6 >> JUDGE GIBSON: Okay. I just want to  
7 ask, in light of the fact that they had no counsel at  
8 the beginning, I want to know if NRC staff and BOE  
9 are willing to cut them slack just with respect to  
10 they didn't have an affidavit but they didn't have  
11 counsel, once they got counsel, they submitted an  
12 affidavit. NRC staff?

13 >> MS. SILVIA: We didn't object to their  
14 amended petition.

15 >> JUDGE GIBSON: So you're okay with it?  
16 DOE?

17 >> MR. POLONSKY: This is Mr. Polonsky. On  
18 that sole basis, yes.

19 >> JUDGE GIBSON: Just on that sole basis,  
20 thank you. Appreciate that.

21 >> MR. POLONSKY: Yes.

22 >> JUDGE GIBSON: Now, in addition they  
23 have also asserted with respect to your initial  
24 petition that a study regarding radiation exposure on  
25 Native Americans from nuclear weapons testing does

1 not speak to the potential impacts from the Yucca  
2 Mountain repository and so it does not constitute  
3 adequate support. Do you disagree with what they  
4 have said in that regard?

5 >> MR. POLAND: Your Honor, the contention  
6 that we're pressing at this point really doesn't, it  
7 doesn't rely on human health effects.

8 >> JUDGE GIBSON: Okay.

9 >> MR. POLAND: It is solely a cultural and  
10 other tribal interest, heritage interest impact  
11 contention.

12 >> JUDGE GIBSON: Okay. So is it fair to  
13 say, then, that we can just drop in the grace this  
14 argument that you originally made about the potential  
15 impact, the nuclear weapons testing?

16 >> MR. POLAND: Yes, Your Honor.

17 >> JUDGE GIBSON: Okay, great. Okay.  
18 Thank you. Now, with respect to the -- what is  
19 it -- what is it that remains that you are asserting?

20 >> MR. POLAND: Your Honor, the nexus  
21 between the NEPA contention that was raised in the  
22 original petition and the amended petition is the  
23 contamination of the springs and waters in the Death  
24 Valley area in the tribal homelands.

25 In the original petition, it was framed,

1 the original NEPA contention, it was framed really  
2 more as a human health risk issue, and we are not  
3 framing it that way now. It's a cultural impact  
4 issue is how we frame that contention.

5 >> JUDGE GIBSON: Okay. And is it  
6 essentially a failure to consult or is it a  
7 destruction of cultural -- of culture procedurally?

8 >> MR. POLAND: It's the latter, Your  
9 Honor. We did have a failure to consult contention  
10 that we did put into our amended petition.

11 >> JUDGE GIBSON: Right.

12 >> MR. POLAND: But we did take a look at  
13 what the NRC staff said in their answer.

14 >> JUDGE GIBSON: Right.

15 >> MR. POLAND: And, at that point after  
16 reading that, we decided that we would withdraw the  
17 failure to consult contention, which was a  
18 miscellaneous one.

19 >> JUDGE GIBSON: Okay. So we don't have  
20 nuclear weapons testing, we've gotten rid of that,  
21 and we don't have failure to consult. But what we  
22 have left is what?

23 >> MR. POLAND: We have a single NEPA  
24 contention, Your Honor. And the contention is that  
25 both the FEIS and the SCIS that DOE have prepared and

1 submitted concede that contaminants from the geologic  
2 repository could make their way to Death Valley and  
3 discharge in the springs and to other surrounding  
4 waters in the area. The purity of those waters is  
5 critical to the Timbisha Shoshone culture to  
6 religious practices and would have a devastating  
7 effect on the culture and their religious and that  
8 that is not considered in the EISs.

9 >> JUDGE GIBSON: Okay. NRC staff, do you  
10 all have any problem with that as an admissible  
11 contention?

12 >> MS. SILVIA: Andrea Silvia, NRC staff.  
13 No, we don't.

14 >> JUDGE GIBSON: Okay. DOE?

15 >> MR. POLONSKY: Yes, Your Honor, in the  
16 answer we filed on Friday, we did say that it was not  
17 admissible.

18 >> JUDGE GIBSON: Okay. As it has been  
19 narrowed by TOP?

20 >> MR. POLONSKY: Yes.

21 >> JUDGE GIBSON: You understand that  
22 that's all they're asserting now?

23 >> MR. POLONSKY: Yes.

24 >> JUDGE GIBSON: The effluent reaches the  
25 springs in Death Valley, affects the purity of that

1 water, and that, in turn, impairs their ability to  
2 practice whatever culture's associated with those  
3 waters?

4 >> MR. POLONSKY: It's not a safety  
5 contention, Your Honor. It's a NEPA contention  
6 attacking the adequacy of whether -- of the  
7 discussion of those unique impacts, whether they were  
8 covered by the EIS, and our view of the affidavits  
9 that were provided and the information provided we  
10 don't think supports an admissible contention for the  
11 reasons we stated in that answer filed on Friday.

12 >> JUDGE GIBSON: Okay. Just for purposes  
13 of the record, was that issue addressed in any EIS  
14 that is DOE prepared, the specific question about the  
15 culture related to the purity of the water that might  
16 be affected by the effluent from Yucca to the Death  
17 Valley springs?

18 >> MR. POLONSKY: This is Mr. Polonsky.  
19 I'll take a moment to confirm with my client after I  
20 get the answer, just to make sure you are getting the  
21 right information.

22 >> JUDGE GIBSON: That's always a dangerous  
23 proposition, Mr. Polonsky. Having been in private  
24 practice the last 21 years, I don't know if I would  
25 say what I think the answer is without consulting

1 with my client, but, you know, it's your neck.

2 >> MR. POLONSKY: We have discussed this  
3 issue, and my recollection is that the SCIS  
4 references itself and then references back to the  
5 final environmental impact statement from 2002 where  
6 the impacts of contaminated water on cultural water  
7 resources is discussed. I do not believe the  
8 SCIS covers the very specific issue of whether water  
9 at the Death Valley springs would have been, but the  
10 general discussion of cultural impacts from  
11 contaminated water are discussed.

12 >> JUDGE GIBSON: Fair enough. I think  
13 that's a fine answer. Okay.

14 >> MR. POLAND: May I respond to that, Your  
15 Honor?

16 >> JUDGE GIBSON: Yeah, very briefly.

17 >> MR. POLAND: Very briefly. And I made  
18 this yesterday to -- which was sitting, there is a  
19 single mention, and it's the same in the FEIS, and it  
20 was the same six years later in the SCIS. There is  
21 no mention of the Timbisha Shoshone in this injury,  
22 all the DOE says, and this is what they see as the  
23 hard look, they say equally important are water  
24 resources and minerals. Okay. That is not an  
25 adequate analysis.

1 >> JUDGE GIBSON: Fair enough.

2 >> MR. POLONSKY: Your Honor, I wasn't  
3 given an opportunity to the respond yesterday, and,  
4 if Mr. Poland is raising it again, I'd just like to  
5 respond with three citations.

6 >> JUDGE GIBSON: Go ahead.

7 >> MR. POLONSKY: The repository SCIS does  
8 reference back to the FEIS, and In that FEIS there  
9 are three separate sections which discuss affected  
10 environment, analysis of culture resources, and  
11 American Indian perspectives on environmental  
12 justice. Those sections are section 3.1.6.2, section  
13 4.1.5, and section 4.1.13.4 respectively. We're not  
14 relying on a single paragraph.

15 >> JUDGE GIBSON: I appreciate your  
16 clarification in the record. Rather than responding  
17 to him, I would just ask this: I think we have the  
18 information we need to evaluate the admissibility of  
19 the contention. That's the purpose we're here.  
20 We're not interested in the merits, at this point,  
21 okay?

22 >> MR. POLAND: Thank you, Your Honor.

23 >> JUDGE GIBSON: All right. All right.

24 Let's move to the native community action council.

25 Now, as I understand it, at least initially you all

1 have raised three contentions. Do you still have  
2 three live contentions?

3 >> MR. WILLIAMS: Yes, sir.

4 >> JUDGE GIBSON: Again, as with TOP, you  
5 didn't actually characterize them in terms of safety  
6 and environmental miscellaneous, but the staff was  
7 kind enough to do that for you, and, for purposes of  
8 this discussion, I'd like to stick with the staff's  
9 characterization. We'll refer to your first two  
10 contentions as miscellaneous contentions 1 and 2 and  
11 identify the third contention as NEPA contention 1.  
12 Fair enough?

13 >> MR. WILLIAMS: Yes, thank you.

14 >> JUDGE GIBSON: Okay. Let's start with  
15 miscellaneous contention 1. In this contention,  
16 NCAC has alleged that Yucca Mountain is owned by the  
17 Western Shoshone Nation under tribal law and custom  
18 and under the 1863 treaty of Ruby Valley. Is that  
19 correct?

20 >> MR. WILLIAMS: Yes, sir.

21 >> JUDGE GIBSON: Okay. Now, you're  
22 contending that DOE has failed to meet the  
23 requirement that the repository be located on lands  
24 that acquired under the jurisdiction control of DOE  
25 were permanently withdrawn and reserved for use and

1 that the lands have to be free and clear of any  
2 encumbrances, and, essentially, you're saying that  
3 this is -- at a minimum an encumbrance on that land  
4 that would prevent Yucca Mountain from being located  
5 there. Is that a fair assessment?

6 >> MR. WILLIAMS: It is.

7 >> JUDGE GIBSON: First I'd like to turn to  
8 the treaty of Ruby Valley. DOE and NRC staff were, I  
9 think, highly critical would probably be a pretty  
10 accurate assessment of your reliance on this treaty,  
11 and they have maintained that federal law precludes  
12 the Western Shoshone Nation from asserting a claim of  
13 land ownership under the treaty of Ruby Valley. And  
14 they have cited the case of United States Vs. Dann,  
15 which they claim found that this claim of Aboriginal  
16 title to lands in the western United States had been  
17 extinguished and that there were a number of lower  
18 federal court decisions in recent years that have  
19 upheld that result. And DOE also noted that there  
20 was a federal law passed in 2004 affirming that  
21 Western Shoshone land claims to lands in the western  
22 United States under Aboriginal title have been  
23 originally subsumed. Now, how do you respond to  
24 those claims? And I would just ask you to try to be  
25 short because we do have to be out of here by 5:00

1 and I've got a lot more ground to cover.

2 >> MR. WILLIAMS: Two points, Your Honor.  
3 Scott Williams for NCAC. First, our focus is on  
4 encumbrance. The Western Shoshone people, the  
5 traditional Western Shoshone people, do not concede  
6 that, irrespective of how many court decisions there  
7 are, that this land was rightfully taken by others.  
8 We do not need to resolve that.

9 We're not asking you, the Board, to become  
10 involved in that.

11 We are asking you to decide whether or not  
12 the existence of the dispute constitutes an  
13 encumbrance, and there are two ways in which we think  
14 it does.

15 First, as I mentioned earlier, the land is  
16 used by Indian people today. Irrespective of who  
17 holds record title, it is used by Indian people for  
18 Indian purposes.

19 Secondly, an international tribunal has  
20 determined that the United States violated the human  
21 rights of the Western Shoshone people in taking the  
22 land and declaring it to be the property of the  
23 United States.

24 >> JUDGE GIBSON: Are you referring to the  
25 Inter-American Commission on Human Rights?

1 >> MR. WILLIAMS: Yes, sir.

2 >> JUDGE GIBSON: Okay.

3 >> MR. WILLIAMS: This strikes us as the  
4 kind of contention that was discussed yesterday in  
5 that it is a legal contention. Either those two  
6 factors constitute an encumbrance within the meaning  
7 of the regulation or they do not. It is a matter  
8 which could be resolved within the meaning of the  
9 Board's regulations relatively simply.

10 >> JUDGE GIBSON: Okay. Well, you know,  
11 starting with Worcester v. Georgia and going on to  
12 Lone Wolf v. Hitchcock, I know that there is a long  
13 line of cases establishing the plenary power of  
14 Congress over tribes. Whether that's, you know, a  
15 good thing or not, it is the law of the United  
16 States. Congress can abrogate these treaties.

17 You know, what's happened, you know, may be  
18 very unfortunate to native peoples. I'm not here to  
19 address that issue, but I think the law is clear,  
20 and, as you have seen, our jurisdiction here is very  
21 limited. We are not about to go questioning the  
22 decisions of the U.S. Supreme Court. Regardless of  
23 what the Inter-American Commission on Human Rights  
24 may say, that's about as far as we can go, and you  
25 may have to go take this contention to another

1 tribunal. But I don't -- I just can tell you, I  
2 doubt that you are going to be getting very far with  
3 it here.

4 I doubt you're surprised.

5 >> MR. WILLIAMS: No comment, Your Honor.

6 >> JUDGE GIBSON: Okay. Now, I would like  
7 to address the -- your miscellaneous contention 2,  
8 and that is that DOE fails to meet the water rights  
9 requirements of 10 CFR 63.121 because the Western  
10 Shoshone Nation maintains a reserved property  
11 interest in water rights under the treaty of Ruby  
12 Valley.

13 Now, separate and apart from what  
14 individual peoples may have who may be affiliated  
15 with this tribe or with these claims, is there -- is  
16 the basis for the claim the treaty of Ruby Valley or  
17 the Aboriginal use of these peoples with respect to  
18 these water rights?

19 Because, if it is, I think the answer to  
20 this contention is going to be the same as it was to  
21 the first contention.

22 I'm sorry to tell you that, but I think it  
23 will be.

24 >> MR. WILLIAMS: I don't think I can  
25 answer the question with a yes or no.

1 >> JUDGE GIBSON: Okay.

2 >> MR. WILLIAMS: Can I take a minute to  
3 the explain?

4 >> JUDGE GIBSON: You can. Just don't take  
5 too long.

6 >> MR. WILLIAMS: Got it. The United  
7 States chose to put this facility at Yucca Mountain.  
8 Yucca Mountain is in the middle of Indian country.  
9 The United States, therefore, has to deal, in my  
10 opinion, with the realities of working with the  
11 people whose land this was. One of those realities  
12 is the treaty. Another of those realities is the  
13 United States' interpretation of federal Indian law  
14 with respect to those treaties, and one of those  
15 principles is that there is a reserved water right  
16 which arises from a treaty which acknowledges  
17 Aboriginal ways of life as does the Ruby Valley  
18 Treaty. So it took me a few sentences, but I think I  
19 got to the answer, which is, yes, it does depend on  
20 the treaty.

21 And then the second point is that the  
22 federal courts have consistently since that time,  
23 since Winans, they have consistently said that the  
24 destruction of -- by the United States, by Congress,  
25 of the tribe's land interest does not destroy

1 reserved hunting, fishing, gathering, water rights.

2 And that's the Adair case that we also cited.

3           So our position, Your Honor, is that these  
4 water rights did not disappear simply because  
5 Congress acted.

6           >> JUDGE GIBSON: Okay, fair enough. I  
7 understand your position. And we will get to water  
8 rights, you know, their context, in a minute, but I  
9 just -- you know, we will evaluate the contention,  
10 but I just want to give you fair warning that I doubt  
11 that anything that is based on the treaty of Ruby  
12 Valley by virtue of Worcester v. Georgia and Lone  
13 Wolf v. Hitchcock is going to enable us to go  
14 anywhere, particularly in light of the U.S. Supreme  
15 Court on this specific topic.

16           >> MR. WILLIAMS: Understood. One other  
17 point, though, please, Your Honor.

18           >> JUDGE GIBSON: Yes.

19           >> MR. WILLIAMS: And that is, not  
20 withstanding the NRC staff objections, there was in  
21 the original petition, and we emphasized it in our  
22 reply, a statement about the use of the water and the  
23 importance of that water. This is not limited to the  
24 springs in Death Valley as with the tribe. This is  
25 general within the area used by Shoshone and Piaute

1 people that part of the contention, in our view, does  
2 not depend on the treaty of Ruby Valley.

3 >> JUDGE GIBSON: I appreciate your  
4 clarification. And that may well be very more than  
5 in the evaluating contention. Thank you.

6 DOE claims that it's been pursuing water  
7 applications from the State of Nevada and, although  
8 those applications have been denied, it's appealed  
9 those decisions, as I understand it, by the State of  
10 Nevada to the U.S. District Court for the District of  
11 Nevada. I'm curious if you believe that the fact  
12 that there is a dispute over these water rights  
13 matters before federal district court in anyway  
14 affects what we can do here as a Board.

15 Obviously, there is this water rights issue  
16 that several people have been asserting. Do you all  
17 have a view?

18 >> MR. POLONSKY: This is Mr. Polonsky.  
19 Your Honor, the water rights issue, and I think there  
20 was perhaps some discussion yesterday, the view that  
21 DOE views this as any other permit or environmental  
22 requirement, the decision-maker for whether DOE gets  
23 water is a different decision-maker than this Board,  
24 and so it is not anything that's within the scope of  
25 this proceeding. I can't speak to timing or anything

1 else as to when this might be resolved.

2 >> JUDGE GIBSON: Do you think that that  
3 affects in any way our ability to consider either  
4 water quality issues or water quantity issues with  
5 respect to either the tribes or individual land  
6 owners in this proceeding?

7 >> MR. POLONSKY: No, Your Honor.

8 >> JUDGE GIBSON: To the extent that they  
9 have raised contentions that Yucca Mountain will  
10 deplete their water quantity or adversely affect  
11 their water quality?

12 >> MR. POLONSKY: No, Your Honor, not the  
13 way these contentions are pled we didn't read.

14 >> JUDGE GIBSON: Okay. Thank you.

15 Now, with respect to your contention, TOP  
16 and possibly the NCAC contention to the extent that  
17 it is not dependent on the treaty of Ruby Valley or  
18 these Aboriginal land claims, I did not see any  
19 briefing of the Winters doctrine by either of you,  
20 and I'm wondering if you think that that has any  
21 bearing on how we should proceed in this matter and  
22 what DOE is proposing to do.

23 >> MR. POLAND: Your Honor, if I could,  
24 Doug Poland for TOP.

25 >> JUDGE GIBSON: Yes.

1 >> MR. POLAND: We do mention this in our  
2 amended petition. We believe that --

3 >> JUDGE GIBSON: I guess I didn't catch  
4 that. I'm sorry.

5 >> MR. POLAND: It's in our amended  
6 petition. It's at pages 23 to 24. We do cite to the  
7 Winters case, but it really relates to our NEPA  
8 contention, and it has to do with the contamination.  
9 We believe that they're --

10 >> JUDGE GIBSON: Right.

11 >> MR. POLAND: So that's cited in there.  
12 I think the argument's set forth.

13 >> MR. WILLIAMS: In my world -- Scott  
14 Williams, Your Honor, for NCAC. In my world, there  
15 is a fine distinction between Winters rights and  
16 Winans rights.

17 >> JUDGE GIBSON: Could you take a minute  
18 and explain to us the difference between Winters  
19 rights and Winans rights? I thought I understood the  
20 Winters doctrine, but I don't know if I -- you're  
21 making a distinction that I'm not familiar with in  
22 Indian law.

23 >> MR. WILLIAMS: I'm impressed that you  
24 asked. The Winters doctrine stands for the principle  
25 that, when the United States sets aside a

1 reservation, there is an implied reservation of water  
2 sufficient to carry out the purposes of that  
3 reservation. The reservation might be an Indian  
4 reservation, it might be a military reservation, it  
5 might be a national park. If they set aside Yosemite  
6 National Park as a national park, there is an implied  
7 reservation of sufficient water in the Red River to  
8 maintain the park in the state in which Congress  
9 desires.

10           The Winan rights, which I talked about  
11 earlier, stands for the proposition that, based on a  
12 treaty which establishes hunting, fishing, or  
13 gathering rights or reserves to the tribe those  
14 rights, that reservation of rights is maintained  
15 irrespective of what might happen later with the land  
16 itself.

17           >> JUDGE GIBSON: Gibbs fair enough. Now,  
18 let me just to make sure I understand that. The  
19 Winters rights to water are a function of a  
20 reservation, correct, and that you essentially have  
21 to be able to maintain the tribal customs and  
22 practices on your reservation that you did before and  
23 so people cannot deprive the tribe of those rights on  
24 the reservation?

25           Okay. Now, what you're talking about with

1 respect to Winans rights have to do, if I understand  
2 correctly, with some rights that would exist  
3 independent of a tribal reservation and that would be  
4 something that would -- individual tribal members or  
5 the tribe, itself, probably the tribe, itself, would  
6 be entitled to by virtue of the fact that they lived  
7 in that area and, you know, were able to continue to  
8 carry on their lifestyle, and you mentioned hunting  
9 and fishing.

10           Now, if I -- my recollection of that line  
11 of cases is that the language of the treaty that  
12 creates those rights must be explicit. It -- can you  
13 point me to an explicit treaty that accords those  
14 rights to the peoples that you are representing here  
15 under this Winans doctrine?

16           >> MR. WILLIAMS: Your characterization of  
17 the two cases and the differences is accurate, in my  
18 view.

19           >> JUDGE GIBSON: Even a broken clock is  
20 right twice a day.

21           >> MR. WILLIAMS: I didn't say that, Your  
22 Honor. With respect to the specific question, I can  
23 point only to language in the treaty at Ruby Valley,  
24 which acknowledges that the Shoshone people are  
25 nomadic people. I cannot point to language there

1 which specifically reserves to them fishing, hunting,  
2 or gathering rights.

3 >> JUDGE GIBSON: And the treaty was  
4 abrogated by Congress, correct, which has plenary  
5 power under Worcester v. Georgia and Lone Wolf versus  
6 Hitchcock, correct?

7 >> MR. WILLIAMS: There is no question but  
8 that Congress has plenary power over Indians.

9 >> JUDGE GIBSON: Fair enough. Well,  
10 again, without prejudging anything, I just want to be  
11 sure that you to understand that, to the extent  
12 you're claiming a contention here based on the treaty  
13 of Ruby Valley may be a hard sell.

14 >> MR. WILLIAMS: Understood. And I would  
15 ask in return, Your Honor, that the Board look  
16 carefully at the question of essential nature of  
17 water to the lifestyle of the native people and how  
18 that is included in miscellaneous contention No. 2.

19 >> JUDGE GIBSON: Okay. If we could go to  
20 your environmental contention.

21 >> MR. WILLIAMS: My request, Your Honor,  
22 is that, to use your word, you allow me to ask my  
23 designated hitter on NEPA contentions to come in.  
24 Rovanie Leigh can give you more intelligent  
25 responses on these issues than I can.

1 >> JUDGE GIBSON: That's fine. Now, if I  
2 understand correctly, you are alleging that DOE's  
3 environmental impact statements are inadequate  
4 because they failed to identify post-closure  
5 biological impacts, Pacific to members of the  
6 NCAC who have a different diet and lifestyle than the  
7 general population, is that correct?

8 >>MS. LEIGH: That's correct. And if I may  
9 expand on that a little bit.

10 >> JUDGE GIBSON: Just a little bit. You  
11 don't have much time.

12 >>MS. LEIGH: To our members, the culture  
13 impacts are inextricably linked, and so in our reply,  
14 and I do know that the original petition was filed  
15 without assistance of counsel, we do attempt to  
16 clarify that link between the cultural resources and  
17 the adverse health impacts alleged in that original  
18 petition, so I would just hope that the Board would  
19 consider that.

20 >> JUDGE GIBSON: Let me just ask the staff  
21 and DOE, recognizing that they had no counsel  
22 initially, they did try to clean this up. I'm not  
23 asking you to agree to the admission of the  
24 contention, but are you all willing to cut them some  
25 slack with respect to cleaning this up in their

1 reply? Staff?

2 >> MS. SILVIA: Andrea Silva for NRC staff.

3 Again, we believe that the reply went beyond the  
4 scope of the initial contention. Perhaps a little  
5 leeway is in order. However, I think it still goes,  
6 even if you assume that the health and cultural  
7 impacts are integrated, there is still a lot more in  
8 the reply. It's not a single issue contention, and I  
9 think it's hard to discern the scope of the  
10 contention of the reply even.

11 >> JUDGE GIBSON: Okay. DOE?

12 >> MR. POLONSKY: This is Mr. Polonsky. On  
13 the sole issue of whether we'll object to the fact  
14 that they've attached affidavits to the reply for the  
15 first time because they were not represented by  
16 counsel, DOE will not object to that.

17 But we do echo NRC staff concern in that  
18 essentially the reply provided a new contention with  
19 new bases that we think was impermissible. Thank  
20 you.

21 >> JUDGE GIBSON: Okay. Thank you.

22 DOE and the NRC staff allege that your  
23 support for this contention is a study regarding  
24 radiation exposure on Native Americans from nuclear  
25 weapons testing and that this does not speak to the

1 potential impacts from the Yucca Mountain repository.

2 Do you disagree with what staff and DOE have with  
3 their criticism of that study?

4 >> MS. LEIGH: Your Honor, that study goes to the  
5 lifestyle differences such as traditional gathering and hunting,  
6 traditional diet. People have mentioned, the traditional diet  
7 of wild game. Our client does believe that its members would be  
8 adversely impacted by potential contamination of those  
9 traditional cultural resources and that NCAC's members are in a  
10 unique position because of their traditional cultural practices,  
11 so we would disagree with the position that that study does not  
12 provide any support for the contention that NCAC's members would  
13 suffer disproportionate impact as a result of their traditional  
14 gathering and cultural practices, including ceremonies.

15 >> JUDGE GIBSON: Okay. We have a similar  
16 issue here with respect to TOP's question, I think,  
17 for you, and that is, you all have alleged a cultural  
18 lifestyle -- adverse effect on cultural lifestyle.  
19 DOE claims that they studied impacts on different  
20 lifestyles. Is your claim essentially that, well,  
21 they might have but they didn't address the  
22 lifestyles that are implicated for the peoples that  
23 you all represent?

24 >>MS. LEIGH: I believe the contention of  
25 our client is the that the environmental impact

1 statement does not take into account the specific and  
2 unique cultural lifestyles of NCACs members and the  
3 disproportionate impacts that those members may  
4 suffer.

5 >> JUDGE GIBSON: Okay. Fair enough. I'm  
6 sure the DOE thinks they did and that was adequate,  
7 but, you know, I jut want to make sure I understand  
8 where you're coming from.

9 Okay. I think we've got a couple of  
10 pending motions, and, I'm sorry, but I think we need  
11 to try to clean this up, because we've to get this  
12 order out by May 11.

13 TOP and TIM both have motions pending  
14 before the Board. By my count, there's three of  
15 them. TOP has a motion to leave to file an amended  
16 petition. TIM has a motion for LSN certification out  
17 of time, and TOP has a motion for leave to file an  
18 answer to TIM's reply. Now, are there any more of  
19 these motions involving the tribes that I've  
20 overlooked?

21 >> MR. POLAND: Not from our standpoint,  
22 Your Honor.

23 >> JUDGE GIBSON: TIM?

24 >> MS. HOUCK: I don't believe so, Your  
25 Honor.

1 >> JUDGE GIBSON: NCAC?

2 >> MR. WILLIAMS: We have filed no motion.

3 >> JUDGE GIBSON: Fantastic. Okay. Let's  
4 start with TOP's motion for leave to file an amended  
5 petition. NRC staff's filed an answer to this motion  
6 stating the Board should entertain the amended  
7 petition. I understand Friday DOE filed an  
8 opposition to that, is that correct?

9 >> MR. POLONSKY: This is Mr. Polonsky.  
10 Yes, that's correct, Your Honor, March 27th.

11 >> JUDGE GIBSON: Thank you. Now, you're  
12 asserting that the only way a petitioner can show  
13 good cause for an untimely filing is to demonstrate  
14 that the new contentions are based on new  
15 information, is that correct?

16 >> MR. POLONSKY: This is Mr. Polonsky. We  
17 do state that one of the criteria that the  
18 information be based on new information, not just new  
19 documents, and, in this case, we believe, if we read  
20 the amended petition correctly, that they are basing  
21 their motion on four new declarations from either  
22 experts or members; but the information in those  
23 declarations we do not believe is new, so that there  
24 is no adequate justification for good cause. The  
25 information was available for some time, and,

1 therefore, this contention could have been brought  
2 some time ago.

3 >> JUDGE GIBSON: Okay. Let me make  
4 sure --

5 >> MR. POLONSKY: That's the crux of what  
6 our response was.

7 >> JUDGE GIBSON: Fair enough. Were these  
8 declarations filed as soon as possible after TOP got  
9 counsel?

10 >> MR. POLAND: Absolutely, Your Honor.

11 >> JUDGE GIBSON: But you are not willing  
12 to cut them slack insofar as that goes, right?

13 >> MR. POLONSKY: That's correct, Your  
14 Honor, because the underlying information has been  
15 available for a very long time.

16 >> JUDGE GIBSON: Okay. Now, I understand  
17 you guys are okay with TOP's motion for leave?

18 >> MS. SILVIA: This is Andrea Silvia with  
19 NRC staff. Yes, we're okay.

20 >> JUDGE GIBSON: Let's go to the next one.  
21 I'd like to talk about TIM's motion for LSN  
22 certification out of time for good cause. As the  
23 parties are aware, any party seeking to file a motion  
24 must first make a sincere effort to contact other  
25 parties and resolve the issue raised in the motion.

1           DOE is arguing that TIM did not make a  
2 sincere attempt and, therefore, the motion to get LSN  
3 certification out of time for good cause was not  
4 admitted. Is that correct, DOE?

5           >> MR. POLONSKY: This is Mr. Polonsky.  
6 I'm sorry, Your Honor, if I could have just a moment.

7           >> JUDGE GIBSON: Please.

8           >> MR. POLONSKY: Your Honor, if you could  
9 indulge me in just repeating the question.

10          >> JUDGE GIBSON: Sure. My understanding  
11 is that you're arguing that TIM did not make a  
12 sincere attempt to consult under 10 CFR 2.232(b) and,  
13 therefore, their motion to get LSN certification out  
14 of time should be denied?

15          >> MR. POLONSKY: That is one of the many  
16 arguments we made, yes, Your Honor.

17          >> JUDGE GIBSON: Okay. Now, TIM indicated  
18 that it would -- it notified you in December of 2008  
19 that it was going to be filing this motion, it sent  
20 an e-mail to all the parties on May 10, it didn't  
21 receive any objection. And those are the  
22 representations they've made. Are you disputing the  
23 representations that counsel for TIM made in that  
24 regard?

25          >> MR. POLONSKY: I don't believe so, but

1 merely making DOE aware of TIM's intent to the file  
2 is not an effort to resolve our narrow issues under  
3 323(b). DOE and TIM had discussions, but, as  
4 explained in our opposition, they weren't substantive  
5 discussions but were efforts by DOE to get TIM to  
6 discuss substance which we believe they would not do  
7 with us. And they did provide us with the procedures  
8 that they were using or thought to use. But that  
9 doesn't really have any meaning since they refused to  
10 discuss any questions we had about them.

11 >> JUDGE GIBSON: Okay. I think I  
12 understand your position. Can you envision any  
13 scenario under which a light LSN certification would  
14 not be a complete bar to intervention?

15 >> MR. POLONSKY: I'm sorry, would not be a  
16 complete bar to --

17 >> JUDGE GIBSON: Correct.

18 >> MR. POLONSKY: I believe it's DOE's  
19 position that, if you -- it's not a complete bar to  
20 intervention. It's a bar to intervention I believe  
21 at this time. A party can come into compliance at a  
22 later time and they find the proceeding as it is, but  
23 the criteria that are set out, which are proscriptive  
24 and which we believe we have applied to every party  
25 equally, we believe cannot be read to allow a party

1 to intervene at this stage if they have not  
2 adequately met their obligations under LSN

3 >> JUDGE GIBSON: I'd like to know from  
4 TIM's counsel, as of the day that you filed your  
5 petition to intervene, how many of your documents  
6 were missing from the LSN system, if any?

7 >> MS. HOUCK: None, Your Honor. All of  
8 the documents were on the LSN by other parties or  
9 fell within the exception, I believe. Or --

10 >> JUDGE GIBSON: As of March 11th when  
11 you filed your motion for late certification, how  
12 many documents, if any, were still missing from the  
13 LSN?

14 >> MS. HOUCK: Just to clarify my answer  
15 earlier, all of the documents were on our LSN before  
16 we filed for intervention. We just had not filed our  
17 certification.

18 >> JUDGE GIBSON: Right. I understand.  
19 I'm not asking for your certification. I'm asking  
20 for the documents. How many of them were on there?

21 Were any missing?

22 >> MS. HOUCK: No.

23 >> JUDGE GIBSON: Were any missing on March  
24 11th?

25 >> MS. HOUCK: No, Your Honor.

1 >> JUDGE GIBSON: DOE, can you point to any  
2 missing documents that TIM has not mentioned?

3 >> MR. POLONSKY: We acknowledge that TIM  
4 posted documents on the LSN for the first time one  
5 week before it filed this petition. But the -- I  
6 believe our reading of the LSN requirements is that  
7 you cannot simply do that.

8 There are all -- a whole host of other  
9 requirements that need to be met, including initial  
10 certification within 90 days of when DOE made its  
11 certification, monthly supplemental productions and  
12 certifications, monthly certifications, in accordance  
13 with the second case management order of the  
14 PAPO Board, et cetera.

15 >> JUDGE GIBSON: And what sort of  
16 prejudice has DOE sustained as a result of the fact  
17 that the LSN certification occurred lately but no  
18 documents were missing?

19 Any prejudice?

20 Can you tell us about any prejudice you've  
21 sustained?

22 >> MR. POLONSKY: No, Your Honor, we cannot  
23 identify any prejudice.

24 >> JUDGE GIBSON: All right.

25 >> MR. POLONSKY: But we believe that the

1 Commission has already spoken to the issue of strict  
2 compliance. You know, we didn't just fabricate this  
3 requirement. The Commission had an opportunity in  
4 its September 8th, 2008 decision, CLI 822, and it  
5 said, we remind potential parties that we expect full  
6 compliance with our LSN requirements and we expect  
7 all participants to make a good faith effort to have  
8 made available all documentary materials by the dates  
9 specified for initial compliance in section 2.1003(a)

10 >> JUDGE ROSENTHAL: There is no doubt,  
11 Mr. Polonsky, that was directed, but I think the  
12 question is whether in circumstances where, as you  
13 can see, there was no prejudice to DOE. This Board  
14 has the latitude to, in this instance, grant the  
15 motion, in an effective way, for a failure to comply.  
16 I mean, it does seem to me that this would not in  
17 this instance set such a dreadful precedent that  
18 parties would decide that as a result of the granting  
19 of a motion that they could now just willy-nilly  
20 disregard the LSN requirement. I mean, I think  
21 everybody understands there is supposed to be  
22 compliance. In this instance, there was not, buy no  
23 prejudice. And I don't see -- and I don't see,  
24 frankly, the basis for your objection.

25 >> MR. POLONSKY: I agree with you, Judge

1 Rosenthal, that under most circumstances, the Board  
2 has great discretionary powers; but if there is a  
3 commission decision, we believe that that's binding  
4 and there is additional language from that CLI-08-22  
5 which says, quote, "We expect the presiding officer  
6 to impose appropriate sanctions for any failure to  
7 fully comply with our LSN requirements." It did not  
8 create an exception. We read the same document you  
9 read. That is why we responded the way we did. We  
10 assumed the Board would act the same way.

11 >> JUDGE GIBSON: And you did, you did  
12 respond that way, and we have that in the record. We  
13 also might let you know that sometimes, you know, you  
14 need to know when to hold 'em and sometimes when to  
15 fold 'em. Let me finally end with TOP's Motion for  
16 Leave to file an Answer to TIM's reply. I just want  
17 to know if either DOE or the NRC staff has a dog in  
18 this fight?

19 You all aren't going to object to that; are  
20 you?

21 >> MS. SILVIA: Andrea Silvia from NRC  
22 staff. I believe -- are you referring to TOP's  
23 Motion to respond to -- it was just the portions  
24 about the leadership dispute? In which case we don't  
25 have an objection to that.

1 >> MS. HOUCK: Your Honor.

2 >> JUDGE GIBSON: Yes.

3 >> MS. HOUCK: Based on our earlier  
4 discussions and supplemental filings, the Board  
5 granted leave for parties to file. I would say that  
6 TOP's request to file a response to our reply would  
7 not be necessary at this point, because the only  
8 issues I believe they indicated they wanted to  
9 address were related to that inner-governmental  
10 dispute; and, hopefully, both TIM and TOP's filing at  
11 the end of next week will fully address those issues  
12 as to where we stand at this point.

13 >> JUDGE GIBSON: TOP?

14 >> MR. POLAND: I saw you looking my  
15 direction, Your Honor.

16 >> JUDGE GIBSON: I thought you were going  
17 to say, "That's great."

18 >> MR. POLAND: Well --

19 >> JUDGE GIBSON: I figured that's what you  
20 would say. Go ahead.

21 >> MR. POLAND: Will you give me time to  
22 consider whether we will withdraw the Motion?

23 It did speak solely to those  
24 representation-type issues.

25 >> JUDGE GIBSON: We certainly encourage

1 you to work this out. Okay.

2 >> MR. POLAND: We understand that, Your  
3 Honor.

4 >> JUDGE GIBSON: Yeah, I promised you all  
5 that you all would have time to tell us what you  
6 didn't cover. I have to believe that we have covered  
7 everything that we planned to cover today and nobody  
8 has anything else to say, but I have to, you know,  
9 follow with Judge Ryerson's effort yesterday  
10 afternoon, so we'll started with NCAC today. Is  
11 there anything NCAC that we have to -- that you need  
12 to say that we didn't cover?

13 >> MR. WILLIAMS: Two sentences, Scott  
14 Williams.

15 >> JUDGE GIBSON: Yes.

16 >> MR. WILLIAMS: Earlier today DOE  
17 asserted that it required -- it wished to benefit  
18 from fundamental fairness in this proceeding. That  
19 goes both ways. There are a long list of Opinions of  
20 the Commission requiring fundamental fairness in  
21 these proceedings and we have for the same benefits.  
22 Thank you.

23 >> JUDGE GIBSON: Okay.

24 >> JUDGE GIBSON: Great. Okay. Clark  
25 County.

1                   >> MR. ROBBINS: Nothing further, thank  
2 you.

3                   >> JUDGE GIBSON: TIM.

4                   >> MS. HOUCK: Yes, Your Honor. I'll try  
5 not to take too much time, but I just want to state  
6 that these issues are critically important to the  
7 entire tribe and that TIM's representation is of the  
8 entire tribe and the land base and the resources that  
9 are affected as well as I believe TOP is also looking  
10 at that, and we are hopeful that we can resolve these  
11 issues; but I would ask that the Board -- which  
12 you've demonstrated today -- shows some flexibility  
13 in how you deal with the issues between the tribes as  
14 they have -- and I'm talking about the tribe, not TIM  
15 or TOP, but the tribe as a whole has faced  
16 significant barriers in being able to adequately  
17 participate in this proceeding, including having to  
18 wait six years for there to be a determination on  
19 their Petition for affected tribal status. And then  
20 after that, another year and a half to resolve issues  
21 regarding funding to be able to participate, which  
22 was only issued a month after Petitions had to be  
23 filed in this proceeding. So they have been having  
24 to deal with significant disadvantages in regards to  
25 the immense complexities in this proceeding and we

1 thank you for taking the time to address these issues  
2 and to grant leave to provide additional information  
3 to the Board on how to deal with the sensitive issue.  
4 Thank you.

5 >> JUDGE GIBSON: Thank you.

6 Nye County.

7 >> MR. ANDERSON: Rob Anderson on behalf of  
8 Nye County. Nothing further.

9 >> JUDGE GIBSON: TOP, I bet you're gonna  
10 say something?

11 >> MR. POLAND: No, Your Honor, I'm not.  
12 Nothing further.

13 >> JUDGE GIBSON: Fantastic.

14 >> MR. POLAND: Thank the Board for its  
15 time today.

16 >> JUDGE GIBSON: Thank you. Yes. Okay.  
17 Colleen, say nothing? California.

18 >> MR. SULLIVAN: Tim Sullivan. Nothing to  
19 add.

20 >> JUDGE GIBSON: Four Counties.

21 >> MR. LIST: Robert List. Nothing.

22 >> JUDGE GIBSON: Nevada.

23 >> MR. MALSCH: Marty Malsch for Nevada.  
24 Nothing, Your Honor, thank you.

25 >> JUDGE GIBSON: DOE.

1 >> MR. SILVERMAN: Your Honor, Don  
2 Silverman. Sorry to disappoint, but I promise I will  
3 do this in less -- far less time than the five  
4 minutes left in the day. I do need to make a brief  
5 comment, if I may.

6 >> JUDGE GIBSON: That's fine.

7 >> MR. SILVERMAN: Thank you. A brief  
8 closing comment. I wanted to note that the  
9 discussions -- particularly this morning that  
10 occurred in the proceeding -- underscored the  
11 complexity of the regulations that the Board is  
12 dealing with and the considerable room that there is  
13 for differing interpretations of those regulations as  
14 the Board, itself, I think recognized earlier today.  
15 I assured the Board yesterday that the department has  
16 proceeded in good faith in evaluating the Petitions  
17 to intervene in this case and in making its best  
18 judgments with respect to the admissibility of the  
19 contentions. As I stated, we did not proceed on the  
20 basis of a predetermined decision to challenge all of  
21 the contentions, nor did we decide to throw  
22 everything against the wall to see what might stick.  
23 I want to reassure this Board as well, as to our  
24 positions and the manner in which we arrived at them.  
25 We take our ethical obligations seriously, as I am

1 sure every attorney in this room does. It's not at  
2 all unusual in NRC proceedings for Applicants to  
3 challenge admissibility of large numbers of  
4 contentions. In my own experience, in the Mock's  
5 proceeding, all tolled, there were over 80  
6 contentions that were proper, but only approximately  
7 11 admitted; and as I recall, ultimately, those 11  
8 were either withdrawn or dismissed on the basis of  
9 summary disposition. Our positions in that case, on  
10 behalf of that Applicant, which was not the  
11 Department of Energy -- although, it was a DOE  
12 contractor -- were reasonable and proper. More  
13 recently, in the Indianian Point licensing renewal  
14 proceedings, there were over 150 contentions  
15 submitted. Some by sophisticated Petitioners, like  
16 the State of New York. All of the contentions were  
17 challenged by the Applicant. And while one  
18 Petitioner was dismissed from the proceeding, I  
19 believe for improper conduct, only about roughly in  
20 the -teens, mid- teens, about 15 contentions were  
21 admitted. In this case before us, it's no less  
22 plausible that Nevada's 200-plus contentions are not  
23 admissible than it is that they're all permissible as  
24 the Petition alleges. In closing, however the  
25 matters before these Boards, established in this

1 proceeding are decided, I would be remiss if I did  
2 not make it absolutely clear that the department has  
3 acted professionally in good faith and with due  
4 regard for the integrity for the NRC adjudicatory  
5 process. You may disagree with us on individual  
6 issues, but our credibility as -- as an honest  
7 participant in this proceeding should not be  
8 questioned. And thank you for taking the time.

9 >> JUDGE GIBSON: Thank you. NEI. David  
10 Repka for NEI. Mr. Chairman, very briefly. I  
11 withheld my comment this morning. There has been  
12 much discussion this morning of the pre-closure  
13 performance assessment and the post-closure  
14 assessment. NEI has a number of contentions that go  
15 to those issues. The Department of Energy, NRC staff  
16 in Nevada have opposed all of those contentions. We  
17 believe, for the reasons stated in our Reply, they  
18 are all admissible. There was some discussion  
19 yesterday of whether an issue could be material if it  
20 did not plead a violation of NRC requirements. We  
21 believe that for a party in a contention that would  
22 support the application and support compliance, that  
23 materiality provision would not apply. It would not  
24 have to allege a violation; but even beyond that, our  
25 contentions did allege violations and to that point,

1 this morning, I heard the Department of Energy  
2 Council referenced, for example, 10 CFR 63.304, which  
3 is the reasonable expectation requirement with  
4 respect to the post-closure analysis, to say that DOE  
5 cannot use bounding parameters for everything,  
6 because that would be too conservative. That's  
7 precisely the argument we've made in several of our  
8 contentions and we do believe that, for example, our  
9 contention -- that we are -- it's perfectly  
10 admissible to allege, as we have, for example, that  
11 the seismic design is based upon an earthquake that  
12 is greater than anything that has been experienced in  
13 the history of the world or as we have with respect  
14 to the total system performance assessment, we've  
15 alleged there is a margin of safety that amount in  
16 the igneous or volcanic assessment that accounts for  
17 up to 40% of the total post-closure dose. Those are  
18 the kinds of contentions we do believe are admissible  
19 based upon a violation of the various standards  
20 discussed this morning and for other reasons as well.  
21 We have also alleged that those contentions relate to  
22 a lot of violations -- I won't get into that here,  
23 that's addressed in our Pleadings, but I did want the  
24 record to reflect those points.

25 >> JUDGE GIBSON: Okay. Okay. NRC staff,

1 anything you need to clean up that we didn't address  
2 today?

3 >> MS. YOUNG: Mitzi Young for the NRC  
4 staff, just a few statements.

5 >> JUDGE GIBSON: Okay.

6 >> MS. YOUNG: The staff wanted to  
7 emphasize that the Part 63 regulatory scheme is risk  
8 informed and performance-based. I believe Nevada has  
9 always focused on the performance-based and argued  
10 about the independent enforceability of certain  
11 provisions in 63. I think when you look at the  
12 preamble to the final rule, the commission makes it  
13 clear that the purpose of performance assessment and  
14 Part 63 is to focus attention on those activities  
15 that are most important. So, therefore, where there  
16 were concerns about uncertainty or certain  
17 parameters, it is not a theoretical request for a  
18 perfect calculation, but it has to do with  
19 understanding the performance of the repository and  
20 what things are significant contributors to dose.  
21 With respect to the Board statement earlier today, in  
22 terms of the staff positions on the filings for this  
23 proceeding, the staff would like the Board to  
24 understand that regardless of whether -- in the  
25 staff's view -- a contention meets contention and

1 admissibility requirements, if there is a significant  
2 safety issue raised by a contention, even though it  
3 does not satisfy the requirements for admissibility  
4 under 10 CFR.2.309 F-1. The staff will consider that  
5 significant safety issue in its review. Thank you.

6 >> JUDGE GIBSON: Thank you. Let me just  
7 say, you all will be -- we will stand in recess until  
8 9:00 tomorrow morning at which point, construction  
9 authorization Board 1 will be here on the bench.  
10 They will address the issues that are set forth in  
11 Appendix C, but I want to remind each of you about  
12 your homework to make sure you apprise them of any  
13 contentions that are affected by the new rule-making;  
14 and we stand recessed until then. Thank you.

15 [ Whereupon, the hearing was concluded ]

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