UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the matter of the

U.S. Department of Energy

High-Level Waste Repository

Docket No. 63-001-HLW

APRIL 1, 2009

TRANSCRIPT OF PROCEEDINGS

Oral Argument On the Admissibiliy of Contentions

Before the Administrative Judges:

CAB-02

Michael M. Gibson, Chairman

Alan S. Rosenthal

Nicholas G. Trikouros

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P R O C E E D I N G S

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

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

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

>>MS. SILVIA: Andrea Silvia NRC staff.

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

>>MR. SILBERG: Jay Silberg, representing Nuclear Energy Institute.

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

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

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

>>MR. POLANSKY: Alex Polansky,

representing the Department of Energy.

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

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

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

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

>>MS. GORES: Jennifer Gores on behalf of the Four Counties.

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

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

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

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

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

>>MR. POLAND: Good morning, Your Honor. Doug Poland on behalf of the Timbisha Shoshone Yucca

Mountain Oversight Program Non-Profit Corporation.

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

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

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

>>MR. VanNIEL: Jeff VanNiel, representing Nye County.

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

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

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

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

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

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

>>MR. WILLIAMS: Scott Williams, Your

Honor, on behalf of the Native Community Action Council.

>>MS. LEIGH: Good morning, Your Honor. Rovianne Leigh also on behalf of the Native Community Action Council.

>>JUDGE GIBSON: Thank you.

Our subject today, as it was yesterday, concerns standing and contention admissibility to challenge the Department of Energy's application for a license to construct a high-level waste repository at Yucca Mountain, Nevada.

Yesterday, Construction Authorization Board No. 3 devoted the first day of this proceeding to a number of issues, including standing for NEI, as well as the standards by which to evaluate certain groups of contentions and whether they could be admitted as set forth in Appendix A to our March 18 Order.

As was done yesterday, we will dispense with opening statements. We have read all 12,500 plus pages of your 300 and plus contentions. And we are familiar with the basic arguments that you've made.

Instead, what we are seeking today is a refinement of the positions that you all have already enunciated in those papers. And we have a number of

areas that we wish to explore with you today.

Hopefully, we have set them out with sufficient notice in Appendix B to our March 18 Order.

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

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

But if there truly is something that we overlook during the course of the day, then I would -- again, we'll try to give everybody, perhaps a minute, to let us know what you think that we

didn't cover today that really bears on the issues that are set forth in Appendix B to our March 18 Order.

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

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

I would also be remiss if I do not remind you that tomorrow, Construction Authorization Board No. 1 will be sitting here, and that not only will they expect you to address the issues that are set forth in Appendix C to our March 18 Order, but, in

addition, as Judge Ryerson noted yesterday, they expect each of you to be able to apprise it of the contentions that you believe are affected by the Nuclear Regulatory Commission's recent revisions to 10 CFR Part 63. So please don't forget that's your homework tonight.

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

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

I wish to stress that this statement, its content is mine alone. I do not presume to speak for my colleagues on this Board or my colleagues on the other two construction authorization boards.

For that reason I do not intend to entertain any commentary following my statement. The statement will just stand, as it's presented, and we'll then turn to the issues of the day.

This is the statement: As the parties to the proceeding are likely aware, I became a member of

this Board very recently. Upon joining it, I discovered to my amazement that the Department of Energy was taking the position that not a single one of the 100 -- of the 229 separate contentions filed by the State of Nevada was admissible.

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

That amazement stemmed from the fact that, on the face of it, it seemed most unlikely that experienced Nevada counsel, which included a former deputy general counsel of this agency were unable to come up with even one acceptable contention relating to this extraordinarily and unique proposed facility.

Put another way, I found it difficult offhand to believe that Nevada counsel were so unfamiliar with the requirements of Section 2.309(f)(1) that they simple were unable to fashion a single contention that met those requirements.

Now, it might turn out that despite this initial reaction, at day's end it will be determined

by the members of the three boards, myself included, that, in fact, none of Nevada's contentions is admissible.

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

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

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

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

Insofar as concerns the NRC staff, unlike DOE, it is the regulator, not the promoter of the proposal. That being the case, it would be even more unseemly for it to interpose to the admission of

contentions, objections that are plainly without substance.

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

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

>>JUDGE GIBSON: Thank you, Judge Rosenthal.

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

The second thing is, as there was one follow-up question I had to something that came up yesterday. And I believe this would be addressed to counsel for DOE.

I believe -- obviously, you all have taken the position that there's a number of petitioners here who have asserted transportation-based contentions. And your argument, as I understand it, is that -- you all went through this yesterday -- that it is outside the permissible scope of this proceedings to hear the -- for us to hear that matter, that exclusive jurisdiction rests in the courts of appeal, and that whatever decision has been reached under legal doctrines of res judicata, collateral estoppel, and merger, that they basically are going to prevent us from hearing the case.

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

The question really is simply this: I'm going to ask you to make some assumptions that I know are going to be incredibly painful for you. But

assume with me, if you would, that you were wrong, and, in fact, that we could hear transportation contentions in this proceeding. And assume with me something that I know is equally painful for you, and that is that for those petitioners who have a -- all the petitioners who have asserted a transportation-based contention, at least one of their contentions is going to be admissible.

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

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

>>JUDGE GIBSON: Gladly.

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

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

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

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

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

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

>>MR. SILVERMAN: My recollection is the parties that -- the only parties that we have contested standing on are the State of California, the Nuclear Energy Institute; we have the two purported representatives of the Timbisha Shoshone, and we have said that whichever one is the AIT,

affected Indian tribe, does have standing, but we have argued that beyond that they do not, have not shown that. I believe we made the similar argument with respect to NCAC, that they lack standing. And we probably did it with respect to Caliente Hot Springs Resort as well is my recollection.

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

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

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

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

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

>>MR. SILVERMAN: Thank you.

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

Now, if I understand correctly, the reasonable assurance concept is associated with

preclosure safety issues and the reasonable expectation concept is associated with post-closure activity; is that correct?

>> MR. POLANSKY: This is Alex Polansk for the Department. Yes, Your Honor, that appears to the way 63.31(a) and the safety findings are set up.

>>JUDGE GIBSON: Thank you. After reading your papers, it appears to me that you're asserting that a goodly number of Nevada's contentions fail the materiality threshold of 309(f)(4), and that specifically my understanding is, you're asserting that, even if those contentions were otherwise admissible, Nevada has failed to establish that such a contention that would impact the ultimate decision of the Nuclear Regulatory Commission, whether to authorize construction at Yucca Mountain.

Is that a fair statement?

>>MR. POLANSKY: This is Alex Polansky for the Department. Yes, Your Honor, and there was some lengthy discussion on that yesterday as well.

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

this.

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

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

>>MR. POLANSKY: Under 63.31(a) the Commission's ultimate safety finding is the same. For reasonable assurance, it's that you can receive and possess radioactive materials. Another reasonable expectation is that you can dispose of those materials. But the test is or the finding is, can you do that without unreasonable risk to the health and safety of the public.

So the Commission finding is the same. The rules, we think, are very clear, just on their face, that the methodology that the Commission must use to

reach those findings is different.

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

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

In 63.101, in describing the purpose and nature of the findings, it says specifically that for reasonable expectation that proof that the geologic repository will conform with the objectives for post-closure performance is not to be had in the ordinary sense of the word because of the uncertainties inherent in the understanding of the evolution of geologic setting biosphere and engineer barrier systems.

Similarly, it adknowleges that demonstrating compliance will involve the use of complex predictive models that are supported by limited data from the field and laboratory tests, analogue studies, et cetera.

It then further goes on to have a separate section, which its title is Reasonable Expectation in 63.304, which sets forth four items that set -- that identify characteristics of what reasonable expectations includes.

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

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

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

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

So in the abstract, to say reasonable assurance and reasonable expectation are the same, we believe the safety finding is the same, but we believe you cannot ignore the plain language of the

subsequent regulations which extrapolate on the characteristics of what a reasonable expectation is and what the burden of an applicant is to demonstrate reasonable expectation, and, therefore, what the staff and the Commission's job is to interpret whether they have met that burden.

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

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

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

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

>>MR. POLANSKY: Yes. And that's directly from the regulation; that it requires less than absolute proof, because absolute proof is impossible

to obtain, yes.

>>JUDGE GIBSON: Okay. And I believe -- again, I think this is consistent with what you said earlier; it is cautious but reasonable. Is that in the prior paragraph on this page? Yeah. There we go.

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

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

>>MR. POLANSKY: Yes.

>>JUDGE GIBSON: Okay.

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

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

I believe we have this language again from your pleading, "To merely assert the existence of such uncertainties without specifying their impact on

a finding NRC must make in its issuance of the construction authorization, amounts to an improper challenge to Part 63, which explicitly recognizes that such uncertainties exist and cannot be eliminated."

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

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

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

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

"Given the obligation of the Commission to modify its technical requirements and criteria to be consistent with the radiological protection standards promulgated by EPA, the proper application of the reasonable expectation standard must take into account the statements by EPA in promulgating the

standards required by EPACT."

Now, for everybody here who may not be familiar with that, could you please let us know what EPACT is, Mr. Polansky?

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

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

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

>>JUDGE GIBSON: What fair register that?

>>MR. POLANSKY: This is the final rule, it's 66 Fed Reg 32.101. It is the only citation to a

Fed Reg in footnote 27, and it goes directly to the sentence that you had brought up before.

>>JUDGE GIBSON: Okay.

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

>>JUDGE GIBSON: Did you say 32.101?

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

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

>>MR. WELKE: 74? 75?

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

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

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

>>MR. POLANSKY: Okay.

>>JUDGE GIBSON: -- available.

>>MR. POLANSKY: I don't know if it would help, but the previous footnote, Footnote 26, if it's

a hyperlink, the first citation they reference is 32.101 to pages 103. So maybe you have it from there. No. Okay.

The EPA was asked to clarify its meaning of what reasonable expectation was. And on page 32.102 it says, "We'll clarify our meaning here. Performance projections for deep geological disposal require the extrapolation of parameter values (site characteristics related to performance and performance calculations) (projections of radionuclide releases in transport from the repository) over very long time frames that make these projections fundamentally not confirmable."

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

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

We don't interpret it as a lesser standard. It is a different standard simply because you cannot physically confirm through observation during the life of the facility that the uncertainties and assumptions that you have made will be verified.

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

>>MR. POLANSKY: Yes.

>>JUDGE GIBSON: And one is?

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

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

You all were -- I want to sort of review with you the history of these terms in terms of rulemaking. And my understanding is that in 1999 the

Commission first planned to impose the standard of reasonable assurance on post-closure safety; is that correct?

>>JUDGE GIBSON: I don't think your mic's on.

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

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

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

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

>>MS. YOUNG: Correct.

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

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

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

>>MS. YOUNG: That's correct.

>>JUDGE GIBSON: Okay. Now, let's just keep with the history here. Later the same year in a

final rule that was issued in November of 1999, the Commission changed this language to replace the term "reasonable assurance" with the term "reasonable expectation;" is that correct?

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

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

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

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

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

>>MS. YOUNG: That's correct.

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

>>MS. YOUNG: Yes, I believe that was the

case, EPA versus NEI or --

>>JUDGE GIBSON: Something like that, huh?

>>MS. YOUNG: Right. Or NEI vs EPI.

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

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

>>MR. MALSCH: That's correct.

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

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

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

based upon less than a preponderance of the evidence.

But fortunately, the issue basically went away when the Commission -- Commission -- counsel for the Commission assured the Court that there was no consequential difference between reasonable expectation and reasonable assurance, and that the two standards for post-closure safety were substantively identical.

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

(A recess was taken)

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

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

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

Do you have that; I believe pages 47 to 48?

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

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

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

>>MR. MALSCH: Marty Malsch for Nevada.

>>JUDGE GIBSON: Thank you.

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

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

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

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

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

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

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

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

>>JUDGE GIBSON: And so back to where you

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

>>MR. MALSCH: That is correct.

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

>>MR. MALSCH: That's correct.

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

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

And so we thought that perhaps DOE hadn't

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

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

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

>>JUDGE GIBSON: Please. Please.

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

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

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

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

>>JUDGE GIBSON: Please.

>>JUDGE ROSENTHAL: How did DOE interpret the statement that was made by the staff to the Court and the Court's action on that statement? It seems to me from what I've just been told, that the staff had made a binding representation to the Court that these two standards were substantively identical. And if that's the case, then I don't understand at all, DOE's position as it, again, reiterated this morning, that in operation, there is some distinction.

It seems to me, if these two terms are indistinguishable, substantively, that's the end of the game. But maybe I'm missing something.

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

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

If we understand Nevada's position, it is a

concern that the preponderance of the evidence standard, the standard of proof would somehow be changed by changing the term from reasonable assurance to reasonable expectation standard.

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

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

>>JUDGE ROSENTHAL: I don't know. Maybe you have a different interpretation of the term "substantively identical" than I do, but, to me, if something is "substantively identical", that means that even from a standpoint of methodology, there's no difference.

>>MR. POLANSKY: Your Honor, we interpreted

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

>>JUDGE GIBSON: Thank you, Judge Rosenthal.

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

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

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

Yes. I mean, we would have been frankly surprised if the general counsel had issued a binding interpretation. NRC general counsels seldom do that. There was no harm in asking. But what we did get was

an informal opinion that reaffirmed the earlier position. And we thought that was helpful, at least to remind DOE that the Commission's statement before the Court of Appeals was still operative.

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

>>MR. MALSCH: Perhaps.

>>JUDGE GIBSON: Okay.

>>MR. MALSCH: But we were satisfied.

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

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

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

And I mean, the Commission never had any other expectation for Part 63 than what's reflected

in the final requirements now. And just to avoid any confusion on terminology, not that there was any substantive difference between the two terms, the Commission adopted the EPA terminology.

But it always had stated, I believe, even in the proposed rule, that they thought there was sufficient flexibility in the reasonable assurance standard to accommodate licensing of the repository.

>>JUDGE GIBSON: Thank you.

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

>>JUDGE GIBSON: Please.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

all. I was just curious.

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

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

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

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

parameters involved in those sequences are also difficult to quantify with a high degree of confidence. That doesn't distinguish any methodology used in reasonable assurance.

And then finally 63.304 says it focuses the performance assessment on the full range of defensible and reasonable parameters. Well, we do that in reactor licensing also.

So the one area where there might be a possible methodological distinction is in the part where they say that it accounts for greater uncertainties in projecting long-term performance.

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

Unfortunately the Commission, while saying that there, indeed, was such a thing as too much uncertainty, that is to say, an amount of uncertainty which would preclude a finding of reasonable expectation, it declined to define what that level was.

So at the same time insisting that it be -- it was very important to properly characterize uncertainty.

So let's go back with that in mind and look at these objections to any one of our TSPA contentions, where they say we have failed to account for reasonable expectation. What they must mean in the context of a single contention is that we have not shown -- and this is a materiality objection, so they have -- they must be arguing that we have not shown that our contention, if true, if taken as true, would result in some degree of uncertainty which exceeded acceptable bounds.

But there are no acceptable bounds. So asking us to do that is like asking the question how high is up? It's an unanswerable question.

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

So what the Commission is saying is we don't know what an unacceptable degree of uncertainty is now. You can't use that concept in ruling on the

admissibility of contentions. But later on, way down the road, we come to a final licensing decision, we'll tell you what it is.

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

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

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

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

We started on this discussion and the question about whether there is any difference in methodology, so let me address that first.

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

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

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

In addition, as a provision, we haven't

discussed, which is the one that comes right before, it, Section 63.303, which discusses the implementation of Subpart L, and how you are to achieve your dose limit on reasonable expectation. And it was modified slightly in the March 13th rule. And it now states --

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

>>MR. POLANSKY: Yes, Your Honor.

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

>>MR. POLANSKY: Yes.

>>JUDGE GIBSON: Okay.

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

Clearly the arithmetic mean or the mean of a value is there because of the great uncertainty that you have, and you are running many iterations and model runs, and you are getting numbers and possibilities above that mean and numbers and possibilities below that mean. In essence, you are running iterations that take into account all of the reasonable uncertainties.

And some of those uncertainties result in

very high dose, with low probabilities, and others in very low dose with low probabilities, and you get an arithmetic mean.

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

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

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

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

>>MR. POLANSKY: Judge Trikouros, it is -- in the contentions that we saw, the -- we did not think that the petitioners connected the dots. I think Mr. Silverman addressed yesterday that under the TSPA, total system performance assessment, which is what we're discussing for post-closure and reasonable expectation, that there was no attempt at all, an essential abandonment of, you know, it's not possible to do it and we haven't even tried. And so that failure, we believe, doesn't connect the dots to demonstrate whether there would be a qualitative or quantitative outcome.

And in performance assessment space, I guess the best example would be to look at 63 -- is it 114(e) and (f), which state that -- you know, (e), you need to provide the technical basis for either inclusion or exclusion of specific features, events, and processes in the performance assessment. That's the TSPA.

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

Now, DOE, in identifying it's FEPs, features, events, and processes, did not run the TSPA model for every single one of those in order to determine an inclusion or exclusion of those. It evaluated them.

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

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

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

>>JUDGE GIBSON: Please. Yes.

>>JUDGE TRIKOUROS: Would it be correct for me to say that applying the reasonable expectation

standard would provide reasonable assurance that the post-closure performance criteria would be met, and, conversely, if we applied the reasonable assurance standard, we would have reasonable expectation that the preclosure performance requirements would be met? Is that a -- are both of those correct and the same?

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

>>JUDGE TRIKOUROS: Does Nevada agree with that?

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

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

>>JUDGE TRIKOUROS: Judge Gibson

characterized this as trying to nail jello to a tree. Does the NRC staff agree that those two statements that I made are correct and the same?

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

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

Let me ask you with respect to the specific question of contention admissibility; you have heard the two assertions of these two gentlemen with respect to what should be demanded by this Board with respect to the admission of these contentions.

Do you have a preferred view which was between Nevada and DOE on that issue?

>>MS. YOUNG: Mitzi Young for the NRC staff. Again, I'm not sure I remember everything that each of the Counsel said, but it is clear that the staff did not, to my recollection, oppose contentions based on this issue.

Materiality in terms of uncertainty being a

challenge to regulations, we did not oppose that. So I would state that our view is closer to what Nevada is stating; although Nevada talked about contentions being decided at a later date. I'm not sure the staff would agree with that. I mean, we have the regulations, we have the standards, and the petitioner has the obligation to demonstrate that their issues satisfy the requirements of 10 CFR 2.309.

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

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

And to just give a little context for that for those of you who are not familiar, EPA promulgates regulations that have to do with the standards that must be met, and the NRC is then to

develop the technical criteria to implement those regulations.

EPA used the term "reasonable expectations" in their regulations, and as Ms. Young indicated, the Commission then picked up that term.

Now, I want to understand, is the -- are the EPA regulations an integral part of your position or are they just out there and something that you think that the NRC's going to need to implement?

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

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

>>JUDGE GIBSON: Okay. If -- could we get

the 64 Fed Reg 46997? Would you call that up for me, please?

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

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

On the other hand, if NRC were to adopt standards that -- technical criteria that were looser, less restrictive, had a less rigorous methodology than the reasonable expectation standards, then that would not comply with the EPA

rules, the EPA standard, with respect to radionuclides.

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

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

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

>>MR. POLANSKY: Yes, Your Honor.

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

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

I think, from the conversation we've had, what DOE could say is that, if NRC had not changed the word "reasonable assurance" to "reasonable expectation" and had, for example, in Section

63.304 -- instead of entitling it reasonable assurance or reasonable expectation, the methodology used for post-closure would still be different than the methodology that would be used for preclosure, because it's the methodology that we're saying is different.

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

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

>>JUDGE GIBSON: Okay. Thank you. Counsel for Nevada, I don't want to leave this without you having an opportunity to respond to what Mr. Polansky

said. I gave him the chance to respond to you.

>>MR. MALSCH: Let me begin by just remarking that we agree with Your Honor's statement. And I would just add that the EPA observation and its rulemaking that you cited is actually consistent with almost identical language in the conference report for the Energy Policy Act of 1992. So this was not just some generous statement by the EPA. It was reflecting the state of the law.

Secondly, under the Energy Policy Act, the EPA rule itself has no direct application in this proceeding because, under the statute, the EPA rule only has significance insofar as it leads to a second NRC rule. And if it were even possible to argue theoretically that there was some inconsistency between the NRC implementing rule and the EPA rule, that would actually be an impermissible challenge to an NRC rule, which is not allowed in NRC practice.

So for a number of reasons, the controlling regulation in this case is the NRC rule, not anything the EPA might have said or done in its rulemaking.

With regard to Mr. Polonsky's statement, I guess I can't disagree that the differences in methodology are, at best, slight. I would say that I don't see any problem with establishing compliance

with an EPA dose standard using only bounding estimates.

I don't think that's precluded so long as one also -- in connection with making that proof of compliance, also includes a discussion of -- and characterization of the uncertainty involved. But I think that's almost of academic significance.

I would also add that, if you look at DOE's objections in their Answers, their objections along the lines of we have not established no reasonable expectation; those objections don't sound in methodology. They sound in risk, acceptable levels of risk, which I addressed earlier.

So I don't understand exactly what DOE's objections to our contentions are if they're talking about methodology and not levels of acceptable risk. I've just sort of lost track of what they're trying to say in their Answers.

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

I guess I'm curious how would -- I realize, you know, you don't want to be aiding and abetting the enemy here, but how would you, if you were, you know, going to be a petitioner in this case, how

would you draft a contention to challenge DOE's license application with respect to this post-closure standard that you say fails the materiality threshold?

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

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

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

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

>>JUDGE GIBSON: 63.114(e)?

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

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

>>MR. POLANSKY: If I were crafting a

contention, the requirement for materiality for this provision, for example, is that the omission of this FEP, this feature, event, or process, would be that the radiological exposure to their RMEI would be significantly changed by its omission.

So I would have experts and expert opinion that had some evaluation that demonstrated that the exclusion or omission of this -- and I'd have to find a place where it was omitted in the application -- would have significantly changed the dose to the RMEI.

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

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

And DOE, as I mentioned, in evaluating those FEPs, features, events, and processes,

evaluated them and did not run them all through the TSPA. It might have done it on a model or submodel basis in order to make its decision.

Clearly a petitioner could do that and have met the materiality requirement. We do not believe that any of the contentions that are proffered in good faith did that.

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

>>JUDGE TRIKOUROS: You need -- you need to provide me with more than that of how exactly would this process work?

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

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

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

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

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

And so what I'm trying to wrestle with is how does Nevada meet your standard? You're very nebulous about it. You make statements like they don't need to run the whole model, they could run parts of the model, but it's still -- from my perspective, is still not very clear how they could

have met your materiality concern. Can you enlighten me perhaps some more?

>>MR. POLANSKY: This is Mr. Polansky. I'm having trouble articulating a specific for you because I don't want to talk out of school because I'm not a technical expert. I don't know all the details and machinations of how the models or submodels were run, but I could point the Board to how the DOE evaluated inclusion or exclusion of FEPs, the features, events, and processes.

I believe it's Section -- SAR Section 2.2 which discusses the inclusion or exclusion of FEPs. And there are supporting references which go on for hundreds, if not thousands, of pages for each feature, each event, each process, and how it was that DOE evaluated it for inclusion or exclusion against this criteria of significant effect.

And so if there are some people who are expert in the field -- and this is not just a single field. I mean, this covers corrosion. This covers igneous.

It covers Martians coming from outer space. If those experts can do that evaluation and say to the NRC that we meet this criteria, then our assumption was that it would be relatively easy for

experts in those same fields, if retained by petitioners, to make similar allegations with appropriate support that was a violation of that criteria or that regulation. And, as I said, in good faith, we did not think any of the contentions did that.

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

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

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

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

>>JUDGE GIBSON: No, I'm not. No, I'm not. I'm not talking about that at all. I'm talking about the post-closure contentions. And I realize that you don't think that's what they need to mean.

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

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

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

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

>>MR. POLANSKY: Okay.

>>JUDGE GIBSON: Okay. You indicated that these contentions that Nevada has asserted with

respect to post-closure flunk the materiality threshold for contention admissibility because reasonable expectation means something different than what they've alleged and they have not met those materiality requirements with respect to reasonable expectation.

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

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

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

>>JUDGE GIBSON: And why?

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

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

>>MR. POLANSKY: Yes. As I said previously, we believe that the ultimate safety finding is the same and the methodology is different. And so whether you call it apples or oranges or reasonable expectation, the methodology is what the methodology is in the rules. And we believe they need to meet that in order to show that there's a material issue, not meet it but raise a material issue within those -- that methodology.

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

>>MR. POLANSKY: Yes.

>>JUDGE GIBSON: Okay.

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

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

(A recess was taken)

>>MR. MALSCH: Judge Gibson, if I may, I

would like to respond briefly to -- a minute's worth to one of the comments that DOE made just before the Board broke.

>>JUDGE GIBSON: That will be fine. I hope you won't be surprised if Mr. Polansky may feel, you know, moved to speak to respond to you as well, but go ahead. One of these days you guys will finish.

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

>>JUDGE GIBSON: Go ahead.

>>MR. MALSCH: When you asked DOE to frame what they perceived to be an admissible contention, they actually attempted to frame a contention in a very narrow field dealing with inclusion of features, events, and processes. That has a whole separate regime in which one looks at probabilities and consequences.

In fact, Nevada has only, I would say, less than a dozen contentions specifically dealing with FEPs. But two things I would say about this.

First of all, the account of the definition of FEPs and the standards for their inclusion offered by DOE is incomplete because elsewhere the Commission says quite clearly that we should also include features, events, and processes that might affect the

performance of the repository and we should include those expected to materially affect compliance or be potentially adverse to performance.

Now, that's important because the calculations which DOE was insisting for -- need -- DOE was insisting be included for FEPs contentions is actually something which the Department itself did not or perhaps could not do in its own FEPs screening.

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

So they were looking for implications and links to releases in including in FEPs but were not themselves engaging in doing the kinds of dose calculations which DOE now insists would have been a precondition for admission of one of our contentions. So ultimately DOE's notion of an acceptable FEP

contention went beyond what DOE itself purported to do in its license application.

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

>>MR. POLANSKY: This is Mr. Polansky. In response, DOE can clearly be more conservative than the rules require; so I don't think the issue that Mr. Malsch raised in itself suggests that DOE did anything wrong or changes our position.

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

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

This is where we come back to our central

theme which we think is correct, that you need to show or demonstrate a material change to the outcome of the proceeding. One contention could have said -- and it did not. I'm not saying they filed this contention, but a contention could have said, you didn't account for flowers on these plants. Now, why does that raise a material -- a material dispute, something that's material here, that we should have a hearing about.

And the same thing on plant height. It is not the requirement of these regulations that the Department of Energy take into account every single kind of perturbation or parameter that happens to exist in real life, that plants are not all the same height. But there has to be a proxy in some of these models that, by itself, saying that there's a change in plant height, that that could affect infiltration, that that somehow creates a material dispute. And our response to Nevada Safety 29 said this doesn't raise a material dispute for that reason.

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

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

>>MR. MALSCH: Just very briefly in defense

of that contention.

>>JUDGE GIBSON: Please, briefly.

>>MR. MALSCH: There is a separate enforceable requirement in Part 63, and it's in, among other places, 63.101(a)(2) which says that the total system performance assessment must include the full range of defensible and reasonable parameters, otherwise, the TSPA itself is not valid. That is a separate issue. A contention which alleges a violation of that standard is, per se, material because it raises an issue of compliance with an applicable regulation.

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

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

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

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

I believe the Board made reference to a statement in the EPA rulemaking about differences between the EPA standard being either more lenient or more restrictive than the NRC requirements.

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

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

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

>>MS. YOUNG: Okay. I just wanted to point the Board's attention to the words in the final rule issued November 2nd, 2001, regarding reasonable

assurance and a response to a comment that EPA --

>>JUDGE GIBSON: Was this an EPA standard?

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

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

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

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

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

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

>>JUDGE GIBSON: Okay.

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

>>JUDGE GIBSON: Okay.

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

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

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

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

>>MS. YOUNG: Yes.

>>JUDGE GIBSON: Issue 2. "Does the term reasonable assurance denote a specific statistical parameter related to either the probability distribution of calculated individual doses or important variables used in that calculation."

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

>>JUDGE GIBSON: Okay.

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

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

>>MS. YOUNG: Right.

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

Is that the language you're talking about, Ma'am?

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

>>JUDGE GIBSON: Okay.

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

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

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

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

>>JUDGE GIBSON: Bottom of that column.

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

>>JUDGE GIBSON: Okay.

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

So this is just to highlight, again, that EPA's interpretation of reasonable assurance was different than the NRC's interpretation of reasonable

assurance. But there is no difference in the NRC's mind between the terminology reasonable assurance and reasonable expectation.

Each considers either uncertainties or the particular action that's being authorized or considered for authorization and obviously the time period that that proposed action would be undertaken.

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

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

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

Would 50 percent be the answer to that? In

other words, you know, where the -- where we were just looking at 95 percentile, would the truth be in terms of preponderance of evidence, what I would call 50 percentile, 50th percentile?

>>MR. MALSCH: Marty Malsch for the State of Nevada. I mean, if you look at law school books, the preponderance of the evidence standard is equated to, you know, 51 percent versus 49 percent; although, in fact, in most cases and certainly in this case, it doesn't come down to such, you know, quantitative measures. I would say the difficulty here is that the preponderance of the evidence standard really applies not at the contention stage. I mean, indeed, the Commission's rules are quite clear that one need not make his case at the contention stage.

The preponderance of the evidence standard applies when the entire record is completed on any one issue and the -- and the Boards and Commission are deciding and weighing the evidence.

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

>>JUDGE TRIKOUROS: I understand that. However, we're trying to get through the contention

admissibility phase, and people are using words like "uncertainty" in contentions with no clear definition of how much uncertainty is acceptable and how much uncertainty is unacceptable.

There are contentions that you -- your organization has filed that indicate that certain parameters -- because of certain reasons, various parameters have a greater uncertainty than was assumed by the DOE; therefore, you want that admitted as a contention.

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

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

based upon the full record.

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

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

>>MR. MALSCH: Well -- Marty Malsch for Nevada. Obviously that's not a problem for us. We think we've raised a great number of very legitimate issues, and I think they are all admissible, and the fact that there are a great number of them derives from two facts. One is we have very specific contentions, unlike most intervenors in most proceedings. And, two, the Commission in Part 63 purported to adopt a performance-based regulation in which there are not a whole lot of quantitative

standards other than the ultimate dose standard.

Yet the Commission was very clear that, for post-closure safety, safety would not depend just upon the simple results of a dose calculation at the end of a performance assessment. Instead there had to be compliance with a whole subset of requirements, including, as one of them, a separate and enforceable requirement that the full range of reasonable and defensible parameters be included.

Now, I would agree that admits of a great number of specific complaints about whether that has been done, but that's the nature of the regulation. It's the nature of the fact that we chose to file very specific contentions.

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

>>JUDGE ROSENTHAL: Yes. Another area of overarching disagreement between DOE, joined in this instance by the NRC staff and Nevada, relates to the sufficiency of the affidavits of experts that Nevada

has submitted in fulfillment of certain of the requirements of the rules of practice governing contention admissibility.

The controversy specifically centers upon Nevada's practice of first placing everything that it is offering in support of each of its contentions in the body of the contention itself. Then in affidavits accompanying the totality of the Nevada contentions, to the extent relevant, its experts adopt as their own opinions, that content.

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

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

Now, in exploring this issue, I'd first like to inquire of Nevada what prompted its decision

to place the supporting material in the body of the contention rather than in the affidavit of the expert and then having the expert endorse the content of the contention. And this is -- basically deals with Paragraphs 5 and Paragraph 6 of 2.309(f)(1). So I would like to get its rationale for adopting that procedure.

>>MR. MALSCH: This is Marty Malsch for Nevada. It was done, first, for practical reasons. We had hundreds of contentions, and it was a considerable burden on Nevada to review the license application and all the supporting materials within the time frame allotted and file contentions on a timely basis. So we adopted this practice of having affidavits incorporate materials by reference solely to avoid the burden on Nevada of having to file hundreds of individual affidavits.

Also, we were aware of no NRC rule or precedent at all that would preclude the practice that we followed.

And I wanted to emphasize here that, in fact, the language in paragraph 5 and to some extent Paragraph 6 of our contentions was, with very limited exceptions and those exceptions deal with primarily legal contentions or contentions in which we use the

support of government documents. With those rare exceptions, in fact, the statements in Paragraph 5 of our contentions were drafted by our experts, not by counsel.

>>JUDGE ROSENTHAL: And you have, if I recall correctly in your reply to the DOE objection, a specific representation that your experts had a major role in the formulation of the supporting material; is that correct?

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

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

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

These were essentially drafted by the experts.

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

DOE, can you point to any specific provision in the rules of practice that preclude the course that was pursued by Nevada in this instance or any decision of the Commission or of a licensing board that states that the support that's being offered for a particular contention must be contained in the expert's affidavit?

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

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

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

I'm now focusing on the question as to whether it is permissible to have the support

contained in the body of the contention, with then the expert in his or her affidavit endorsing that content as his or her own opinion.

And I'm not getting into the question as to whether in a particular instance what's been put in the contention is sufficient to the day. I'm just now addressing the question of whether, as apparently is your claim, joined by the staff, that it is not adequate to have the expert in his or her affidavit simply adopt as his or her opinion what's set forth in the body of the contention.

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

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

>>JUDGE ROSENTHAL: And what provision of the Commission's rules of practice did the Board refer to?

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

>>JUDGE ROSENTHAL: That was just in the Board's personal opinion that it felt that that was not a desirable practice? I mean, I want to know where in the regulations, the rules of practice, there is a proscription against this practice.

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

>>MR. POLANSKY: Correct, Your Honor. In the rule itself, there is none, but the rules themselves are based on the Federal Rules of Civil Procedure where there is an adoption or a principle that, if you are going to use an affidavit to identify specific facts that are setting out a

genuine issue of fact for trial, that you do that in an affidavit form. And this -- an advisory PAPO Board also set forth in LBP 08-10 that affidavits shall be individually paginated and contain numbered paragraphs that can be cited with specificity.

We read into that requirement an understanding that these affidavits would have that material so that we could challenge individual paragraphs or that the Board could look at those paragraphs and agree or disagree with certain provisions in them. There's no ability to do that here.

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

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

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

>>MR. LENEHAN: No.

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

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

>>JUDGE ROSENTHAL: Okay. Now, in the real world, why is not the position that you're taking, DOE, exalting form over substance? I mean, isn't it important for the purposes of fulfilling the objective that the Commission had in proposing this requirement in Paragraph 5 and in Paragraph 6, isn't it enough that you have an expert who is endorsing as his or her opinion, certain conclusions or certain facts?

What practical difference does it make whether the body of the supporting material is found in the contention or in the affidavit?

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

>>MR. LENEHAN: Your Honor, Dan Lenehan here, NRC staff. The starting point is the simple

fact that the 2.309(f)(1)(v), Roman Numeral v, does not require an affidavit for a non-NEPA contention. The body of the contention or an affidavit has to state the contention -- the substance of the contention.

If the question here, as I understand it, is the format of the affidavit as used in this proceeding by Nevada, what, in effect, you've got with these -- these affidavits, the way they are structured, is that, at the time the affidavit is signed, the affiant is attesting to something that at that time is not a presently existing fact. He's attesting to a future event that will occur when the attorney assigns a specific number to them. That does not go to the contention admissibility issue. It goes to the affidavit.

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

>>MR. LENEHAN: Okay.

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

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

Now, my question was a very simple one, and that is: What practical difference does it make whether this substantive material is found in the contention, with the expert then endorsing it in its affidavit, or, rather, than on the other hand it all being put in the affidavit. I mean, to me, offhand -- I mean, I may be missing something, but, to me, offhand it makes no real difference whether it's in one place or in the other place.

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

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

First of all, Your Honor, you stated that it was unrefuted that these paragraphs were written by the individuals who are proposed as experts by

Nevada. In fact, Nevada didn't articulate that that's what had happened until it filed its reply. So it would be unrefuted because DOE did not have an opportunity to file a reply.

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

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

>>JUDGE ROSENTHAL: Counsel has made a representation -- they're officers of this Board. They have made a representation that their experts were heavily involved in the formulation of these contentions.

Now, I'm asking you whether you are raising a question as to the authenticity of a representation of counsel before this Board.

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

In its reply, Nevada provides a photograph

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

Obviously this is a corrosion contention, a corrosion-related contention. This is not expert opinion. This is statements of counsel. And we believed that this kind of statement -- well, let me back up. We know it's not a statement of an expert, because there are no affidavits attached to Nevada's reply.

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

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

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

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

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

Let's move on to the other issue. Now, Mr. Malsch, the -- let's turn to the provisions of 2.309(f)(1)(v), and it says that you must provide a concise statement of the alleged facts or expert opinions which support the requester's/petitioner's position on the issue and on which the petitioner

intends to rely at hearing together with references to the specific sources of documents on which the requester/petitioner intends to rely to support his position on the issue.

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

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

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

>>MR. MALSCH: I think that is -- that is permissible that they expect that, if we have available specific sources and documents to support our contention, we would be coming forward with them

at the time, but I don't think that is -- the fact that a particular Paragraph 5 does not itself reference additional sources and documents, I do not think is fatal to contention admissibility. And I don't think there's any NRC case which stands for that proposition.

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

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

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

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

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

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

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

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

For example, you could have a contention that says, you know, corrosion can happen in the following circumstance, and here's a paper I wrote, but you don't give the citation to the paper. If you don't give a citation to the paper, it's impossible for the applicant to determine whether the underlying provision in there, let's say it was corrosion caused

by sulfuric acid, whether that is even applicable here. If that Board knew that that paper was about sulfuric acid, they probably would determine there's no genuine dispute because we're not having sulfuric acid infiltrating through the repository.

>>JUDGE ROSENTHAL: Well, but, if you have -- well, that may go to relevance, but if you have an expert, qualified expert, who expresses an opinion on a matter that is of plain materiality, why isn't that enough?

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

Now, there were both the intervenor and the applicant had highly qualified seismologists. One of them was associated with the laboratory at Columbia University, the other one with the laboratory at the Massachusetts Institute of Technology. Both of these men had credentials as long as your arm.

One of them had a view that intensity 5, let us say, was sufficient. The other one thought it was intensity 9.

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

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

I mean, in Seabrook, I mean, I just offered that as an example. I mean, why would there have been any need there and why is there any need here for something, given, again, that the objective of the Commission is just to make certain that it's something that's worth pursuing, and that's why they

want an expert to be expressing an opinion on a matter that is material to the outcome of the particular proceeding.

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

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

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

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

This is not merits here. The objective, again, as I see it -- I may be wrong -- of the Commission was just to make certain that this wasn't

some flight of fancy that's being advanced that should never get beyond the stage of Commission -- of contention admissibility.

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

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

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

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

>>MR. POLANSKY: This is Mr. Polansky. If I could finish. I was not referring to (f)(1)(v). I was referring to (f)(1)(vi), which says that there

has to be a genuine dispute, not merely a dispute.

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

>>JUDGE GIBSON: Before you go through the examples, since it's noon, perhaps you can take the noon hour to limit your examples down. Would that be okay? You can finish your answer.

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

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

(A recess was taken)

>> JUDGE ROSENTHAL: I think that when we adjourned, the ball was in Mr. Polansky's corner; was

it not?

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

>> MR. POLONSKY: Thank you, Your Honor, I'm Mr. Polansky. I'd just like to bring two examples of where we believe that there is a requirement to identify specific sources and documents and that challenging that is not a challenge to the merits. It is merely allowing -- informing the Board of whether a genuine dispute exists under (f(1)(vi).

The section alleges that there are NACE studies, National Association of Corrosion Engineers, involving failure of titanium tubing and petroleum refineries. There are no cites provided to the NACE studies at all. Nevada Safety-85 relies on alleged results of quote "numerous tests made by laboratories engaged in testing of titanium for corrosion applications," end quote. And again, there is no citations for the applicant to identify what these tests are to, for example, to determine if they are even relevant to the proceeding. We believe that the Board needs to look at these documents to determine

whether there is a genuine dispute; so that is why we were objecting in many of the contentions to a requirement that there be documents specifically identified.

There also is the LSN obligation to have provided your supporting and non-supporting information. And so those documents should be in existence and on the LSN. And we believe the Advisory PAPO Board informed the parties that they needed to either provide the LSN document number for those documents or attach them to their petitions. Thank you, Your Honor.

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

>> MR. MALSCH: Yes. Thank you. It seems to me, looking at the basis for these contentions, we have provided levels of detail and specificity far beyond the norm. And the mere fact that not every single expert conclusion is further supported by specific references to our mind, doesn't detract from the admissibility of the contention. And I'd like just to call the Board's attention to the contention to which we attached to our reply to DOE's answer. We gave there an example a contention that was filed in the LES case. It was admitted by the licensing

board and then that admission was specifically affirmed by the Commission in CLI O4-25. And just note that the basis in that contention included only one reference and that was a newspaper article.

So, clearly, we have provided levels of detail and specificity in support far beyond contentions, which in other cases, specifically the LES case we mentioned ever provided. I think what we have done here is more than sufficient.

>> JUDGE ROSENTHAL: I think, Mr. Polansky, the problem that I have is that it seems to me offhand, that the purpose of the Paragraph 5 and Paragraph 6 requirements was to ensure that time was not being wasted in the litigation of vague contentions put forth by, in my many instances, people who have zero qualifications.

The objective was to make certain that the contentions that were in litigation that got beyond the contention stage were ones that had some potential worthiness to them, not necessarily that they would turn out at the end of the day to be winners. Now, it seems to me, offhand, that as long as you have a qualified expert -- now, you always raise the question as to whether the particular expert that's being offered is qualified to speak on

the subject that he's addressing or that she's addressing.

But as long as that expert is qualified and as long as that expert is addressing an issue that is material, that as a matter of fact, you have got a genuine dispute because you have an expert who is challenging -- a qualified expert who is raising a challenge or supporting a challenge that's material. And now whether or not that expert's opinion down the road is going to carry the day, again, that's not -- it seems to me, an issue on the contention admissibility level.

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

>>MR. POLANSKY: Your Honor, I don't think we think you are wrong. We don't think we are litigating at this stage. We think that -- and if I hear you correctly, it would seem that once the petitioner raises a prima facie case that they have something to put forward, there's no burden shift at

all. It would seem there would be no need for an applicant to even file an answer, because there would be nothing that we could say that would demonstrate that the contention is not admissible. So, clearly --

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

>>MR. POLANSKY: Would it not be appropriate to also say the specific study that the expert is relying on -- I will go back to sulpheric acid example -- relies on sulpheric acid corroding titanium and that simply's not what's -- that's not the environment in the Yucca Mountain Repository. Therefore, that doesn't raise a geniune dispute.

>> JUDGE ROSENTHAL: Well, then, you're raising materiality aren't you? In that circumstance, you're saying that, well, that expert may be qualified, what he's talking about, he may have the appropriate expertise, but that happens not to be material to the issue at hand. Materiality, I would think, or relevance is something you can raise,

but the expert is up there and he's a qualified astronomer talking about some kind of astronimical phenomenon which has no relevance at all to the proceeding.

You are certainly free to raise that, but I'm assuming that the contention or his claim is within the bounds of materiality. If it's not, you can make that claim.

>>MR. POLANSKY: I think we felt handicapped, Your Honor, in not knowing these studies that they're citing to. They cite studies but don't provide any citations. Well, they identify studies but don't identify citations. And so -- and that's required under Section (f)(1)(v), so it was impossible for us to make an argument on genuine dispute or materiality on those scientific studies that they didn't tell us what they were.

So that's why we attacked it under 5, because that's where we thought the information ought to have been provided. That's all we were trying to express. Thank you.

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

documents?

>> MR. LENEHAN: Dan Lenehan for the staff. No, the staff does not make that requirement. However, Your Honor --

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

>> MR. LENEHAN: Your Honor, the staff's view is that a contention -- the expert opinion that merely states a conclusion without providing a recent basis for that explanation is inadequate for a couple of reasons. First, it deprives the Board of the ability to make the necessary assessment of the opinion -- that's a UC case. And, secondly, it puts -- it's necessary to provide -- put the other parties on notice of the issues that they're going to have to litigate and decide whether or not they're going to support or, you know, oppose the contention.

>> JUDGE ROSENTHAL: All right. But if the expert sets forth the reasons for his conclusion but does not accompany that with reference to specific sources, that, insofar as you are concerned, would not be a fatal defect, if I understand you correctly?

>> MR. LENEHAN: It's difficult to respond to this in the abstract. It -- provided that situation that you've hypothesized puts the parties

on notice to the claims that it would be adequate.

>> JUDGE ROSENTHAL: Let me -- if I might refer to an illustrative example to one of the safety contentions of the -- that this was Nevada's Safety-OO9. Now, in that case -- and I think, I know that DOE objected, I think, to that contention. But the contention, in essence, or the support for it said that the document on the basis of which DOE had reached certain conclusions was flawed.

And they pointed to some other document. Now that -- supposing that they had not pointed to the other document, but they'd said the DOE document is flawed and these are the reasons why we think it's flawed, and they hadn't pointed to some other document which they thought demonstrated the flaw. It just said, in my expert opinion, the document that DOE relied upon for the conclusion that it reached that we're challenging, was flawed. That's my expert opinion.

Would that be, in your view, sufficient for contention and admissibility purposes?

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

>> JUDGE ROSENTHAL: What does the expert have to do? He gives his personal reasons why he

thinks it's flawed, but he doesn't point to a document in support of those reasons.

>> MR. LENEHAN: Your Honor, if he says the document was flawed and stops, it would not be admissible. If he says it's flawed and provides a reasonable basis to support that opinion, under those circumstances in the hypothetical, it would be --

>> JUDGE ROSENTHAL: Even though he did not say that my reasons for believing it's flawed is supported by X document? He doesn't have to come up in your view, with a source?

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

>> JUDGE ROSENTHAL: Yes, we're talking all the way through this discussion, I'm making an assumption that the expert is qualified and that what he's talking about is material. And so it's the thing as to whether he has to -- in detailing his reasons, I grant you, he can't simply provide a conclusion. But in providing his reasons, the question is whether he has to take the next step and say, well, my reasons are supported by the X, Y, Z documents. I take it that staff's standpoint, he wouldn't have to do that?

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

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

>> MR. LENEHAN: Yes, Your Honor.

>> JUDGE ROSENTHAL: Well, I think I understand your position, Mr. Polansky. From my standpoint, I think I got -- do you have some questions?

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

>> JUDGE TRIKOUROS: I'll address this to Mr. Malsch. And I've been thinking this through for some time here, everything we have been discussing here. And thinking through how technical people behave when they -- when they document something, and you can see this by looking at any technical paper anywhere in the world, you'll find a substantial list of references. So technical people have a tendency to put forth a plethora of references to support technical papers. And I was struck by the lack of any references in -- in a large number of contentions and I was wondering if there was some reason for that.

Was that -- was it a purposeful thing that it was a -- an agreement among all the technical experts to not provide references, because even under the circumstances in which they make statements, such as a result -- well, they make a technical statement. I'll try and keep his general. And then they say -- and this is supported by numerous publications and documents.

So, clearly, their knowledge is something they derive from those documents. Not all technical people have done all experiments, themselves. You know, they get knowledge from reading papers, from reading textbooks, from reading other material. That's the source of their knowledge.

It's not personal research or anything like that. And yet, they don't provide that source of knowledge, but they refer to it as existing. Was there some logic behind that or was this just the way it was with all these experts?

>> MR. MALSCH: The decision on -- first of all, effectively we're talking about Paragraph 5 of our contentions, primarily, and as I mentioned, they were all drafted primary by the experts, themselves. We defer largely to the experts in terms of the level of support that they would offer.

And I would say that there was no conscious decision on our part to limit any expert in what he or she wanted to provide. On the other hand, we did not advise the experts in situations where they offered a opinion and reasons but no documents, that the contentions were inadmissible without supporting those documents. And really what it came down to was a matter of time and resources.

I mean, we complained to the Commission that we really didn't have sufficient time to draft contentions. We really were strongly driven by powerful time constraints in putting our package of contentions together, and so we did the best we could under the circumstances. And, as a lawyer, I was not in a position based on what I knew about contention practice to tell the expert that in every case they had to go back and document every single conclusion that they offered.

Although, I think they fully understand that the matter of supporting your opinions with references and studies is a matter which experts are expected to do, and I think they all fully expect to be held accountable in that respect on discovery and at the hearing, and that's where things stand.

I think all of our experts are fully

prepared to provide sources and reference in discovery and then ultimately at the hearing.

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

So technical people have a natural tendency to not do that because you're going to get caught short and you better know the experiment that you're talking about, otherwise, the whole thing falls apart.

So, again, it just struck me as odd. So if you're telling me this is all about time, then, and just resource constraints, then let me ask you this: For those contentions in which statements are made regarding experimentation, available experimentation and numerous publications and that sort of thing where clearly the statement is being made as being derived from those sources, not necessarily from personal knowledge but from those sources, would those still -- would you still consider those admissible contentions as opposed to those contentions that are, in fact, very well reasoned and

provide a factual basis that, that don't even -- don't even mention experiments and publications and that sort of thing; and there are numerous contentions that do meet that criterion where they're very well reasoned and provide very logical progression of thought that would lead you to conclude that that makes sense. But for those references that do -- for those contentions that do specifically hang on the statement of these documents that are out there, would you still think those contentions are admissible?

>> MR. MALSCH: Again, Marty Malsch for the State of Nevada. I think that they indeed are admissible because the Commission's rules are quite clear that all that is required is a minimal showing. And as long as the expert offers an opinion and supports it with some reason, the contention is -- is admissible.

And I think the matter of coming up with detailed sources is a matter for discovery and ultimately the merits. I think I would say that if we had had, you know, the full amount of time which we had asked for, we might have perhaps gone back and with, you know, another round of with the experts that come up with more references, but in the time

available, that simply was not possible. But we fully expected that once our contentions were admitted, our experts would be asked those questions and we would then be fully prepared to respond to them.

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

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

Yes, Clark County.

>> MR. ROBBINS: Thank you, Your Honor, Alan Robbins on behalf of Clark County. I think it's important to keep in mind and there was reference to this earlier, but it is not uncommon on a petitioner to prove its case at this stage. This is not at the merits stage. This is the stage to establish whether there is a genuine issue of material fact.

By analogy, if the expert, if the issue was, you know, is some sort of surgery required and the contention is, yes, it is, well, if you have a lawyer's statement with no affidavit that says I represented all kind of patients and I don't think this guy needs surgery; well, that should not fly.

But if you are supported by an affidavit of a qualified surgeon or other type of doctor who says, yes, you know -- I've forgotten my own example which side I'm going on on this -- but gives the opinion on surgery, and says it's based on examination or based on a review of, you know, a medical history, that ought to be enough at this stage. And he ought not have to identify or attach every last document that he or she reviewed or test that he or she ran or reviewed or that sort of thing.

That can be tested later. But you have on the record a contention supported by an expert who's giving more than a conclusion and may disappoint the DOEs of the world but maybe did not cite or attach every last document. I think that is roughly what we're dealing with here. I would also add, in the case of Clark County contentions, some are highly dependent on experts. First of all, all are supported by affidavits. Those that really turn on

expert opinions such as forecasted volcanic activity is one example. That's a number of our contentions.

There is considerable explanation of the geology and the basis for the geology on which the expert bases his opinion about DOE's under forecast of probable volcanic activity. He does not simply say, I'm pretty sure it's going to be more than what they say, which would not be a sufficient example.

So it is a document and it cites papers, it cites research. So it's important in this discussion that a lot of this general discussion not unwittingly -- I'm not suggesting the Board would do this at all, with too broad a brush on all this, because the contentions do differ.

Quickly, as to format, does it really make a difference if the witness says, I adopt the following or following is a summary of my professional expert opinion as set forth below, and then it's in the affidavit. Or, if he said, the summary as attached to Exhibit A, for Exhibit A to this affidavit, rather than set forth below; does that make a difference?

It shouldn't. Or, it says, as set forth in Contention Safety 5 or Safety 5 through 8. What difference does it make?

The practical difference is that if all of the detailed explanation was set forth in the affidavit, either below or attached, it's our view that our pleading would not be very effective if we said, to save repetition, we're not going to tell you here in the pleading what the contention is or the basis for it. Please see the attached affidavit.

You don't want to make it inconvenient for the reader, and you want to be able to have that reader just continue to read, not have to start fumbling looking for attachments.

So what we would end up doing is repeating it. And now we would take the whole substance of the affidavit and put it back in the petition and now you have it twice. Well, what does that do other than increase the thickness -- those that are printed out -- of the actual document.

So this whole form argument is bothering to me. And for DOE, the irony is the discussion is supposedly about a genuine issue and, yet, we have to have this kind of discussion. Is that a genuine argument over the form of the affidavit? I'd respectfully suggest it is not. They will have their time to deal with the qualifications of the witness, the credibility of the witness, the basis for the

witness, at hearing. As -- I forget which one of Your Honors said so earlier this morning, the basic purpose at this stage is to make sure that you are not embarking on a waste of time, that there's some basis for the contention, that it's not just something made up by lawyers sitting in their office.

And I think virtually, you know, all or virtually all of the contentions in this case pass that test and we have to not lose sight of what these rules are being taken out of context. And the burden that lies with the Department as the applicant is now being presented by the Department as the burden on the petitioners presenting contentions.

And those burdens don't apply to contentions, they apply to the application. Thank you.

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

Go ahead.

>> JUDGE TRIKOUROS: If the medical affidavit said that the patient might need surgery; would that be sufficient?

>> MR. ROBBINS: Does -- assuming, if that's his opinion and it says, based on, you know, I've reviewed the patient's history or something, I

would say, yes, it is.

>> JUDGE TRIKOUROS: All right. Thank you.

>> JUDGE GIBSON: Okay. Is there anyone else who feels that they've just got to talk about affidavits?

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

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

I think it would be helpful to me to understand that. So I'll start with Mr. Malsch.

>> MR. MALSCH: Okay. I think what I imagined would happen would be that the litigation would proceed subject area by subject area and that in particular what we have attacked a DOE model as being unsupported or wrong or not really representing the full range of parameters, I would expect in the normal circumstance and of course, this is a strategy question for DOE, but I would expect that the

simplist way to proceed in a litigation would be for them to say and defend their model, which would be a subject matter area in which they would simply defend their model or say their infiltration model as actually, you know, supported by the data consistent with the scientific understanding of infiltration and the like.

There would be no need in that context to go through elaborate dose calculations and computer runs. The question would simply be, as a matter of the science of infiltration, is their model reasonable and credible and is it supported by some combination of site-specific data or analogue data?

And I would think that's the way things would proceed, contention by contention or a group of contentions by groups of contentions.

It would be, I think, at DOE's option if they thought that our model attack were too difficult to counter, it would be their option to say, oh, well, okay, let's assume it's true and let's see if it makes any difference.

That would, though, I think encounter a serious problem, which is that in every case of our TSPA contentions, we have cited a violation of a specific provision in Part 63 that requires, for

example, that models be defensible and credible, that the full range of parameters be represented. And as we've explained yesterday, those requirements are independently enforceable. So, if we are correct in our attack on a DOE model, the TSPA fails regardless of the results of the dose calculations.

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

>> MR. MALSCH: Well, again -- this is Marty Malsch again for Nevada. I mean, from our standpoint, that would be a nice end because we would prevail and an essential piece of the TSPA model were destroyed, and DOE could not meet their burden of proof of the EPA dose standard.

Now, what I suspect would happen would be either the DOE would introduce -- well, I suppose at that point they'd have to introduce a new model and there would be another round of contentions on that model, but that would be their choice. But I think in a situation in which we prevail, that a part of

the TSPA is in noncompliance with 63, that's the end of the case, we win.

>> JUDGE TRIKOUROS: So, now, let's assume that we go through two weeks of this and the DOE then does sensitivity studies on the whole range of parameter variations that are within the range that were being discussed in the hearing and conclude that there is an insignificant change in the dose; would that be an end point?

>> MR. MALSCH: That could conceivably be an end point. I mean, what they would be doing, in effect, would be volunteering to modify their TSPA to include our concern and then show that their now compliant TSPA was still showing a compliance with the ultimate dose standard.

I think if that were to be done, then DOE would prevail, although we would have the opportunity to show that perhaps their model didn't do all it said, but their dose calculation was incorrect. But in your hypothetical, if we attack their model, we win that their model was wrong, they then modify their model to conclude our contention and establish that their TSPA, with that model as so amended was still in compliance, then DOE prevails. Although, we have other contentions also that would have to be

addressed as well. But just looking at it on a contention by contention basis, I think that's how it would progress.

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

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

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

>>MR. POLANSKY: Yes, Your Honor. This is Mr. Polansky. If a contention comes in, clearly, we would present experts to defend the model. I think there already are sensitivity studies that have been done on various parameters and we would probably just bring those out and try and demonstrate why on the

merits of what we've already done in sensitivity analysis space what addressed the concern that's raised.

But as for the last statement that Mr. Malsch made about us having to do this in a cumulative capacity, A, they did not plead that. None of the contentions are pled cumulatively as the Advisory PAPO Board had suggested in its May conference -- May, 2008 conference.

And also, I believe Mr. Malsch stated yesterday that it was an impossibility to run the TSPA with all of its changes and their own expert said it could not do it and its experts could not. So they are -- if I'm hearing it correctly -- espousing a situation that would be impossible for us to meet.

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

>> MS. YOUNG: Mitzi Young for the NRC staff. I don't disagree with what has been stated by Nevada and DOE up to now. Just in terms of the hearing, the staff's role, what we provide after the hearing preparing its safety evaluation, its position with respect to whether DOE's modeling of performance assessment satisfied the requirements of Part 63.

>> JUDGE TRIKOUROS: All right. We'll move on. Yesterday, Dr. Barnett began asking a few questions regarding sort of general themes that were observed in various contentions and -- and I will repeat one because I want to confirm your answers. The -- that had to do with the treatment of contentions that referred to a non-ITS and a non-ITWI structure, system, or component.

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

>> JUDGE TRIKOUROS: A structure system or component that is not important to safety or not important to waste isolation, which means in effect, that -- that that component cannot result in a change to the conclusion that the post-closure criteria will be met regardless of the nature of the contention attacking it.

And I just want to confirm that, Mr. Malsch, that you had agreed that that can -- such a contention would not be admissible, assuming that your -- and that your reply did not take that on successfully?

>> MR. MALSCH: If -- let me try to answer

that this way: If we had a contention which says that a structure system or component was not properly analyzed as, let's say, important to the waste isolation, and the DOE Answer said, oh, no, you're wrong, we did so analyze whether that structure system or component was important to waste isolation and reached a conclusion that it was not, then you would have to come up with some explanation as to why that evaluation was flawed; otherwise, our contention would be dismissed.

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

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

>> JUDGE TRIKOUROS: And I don't think -- and there are specific contentions like this -- I

don't think that one would have to say anything more than that, because the components are identified in the license application as ITS or ITWI. And if you're not attacking that in any of your follow-up, then, clearly, that conclusion remains.

Does DOE want to say anything about that?

>> MR. ZAFFUTS: Paul Zaffuts for DOE. I think I agree with the premise of your question. If the contention doesn't disagree with a classification, non-ITS and non-ITWI, then some allegation regarding that SSC, we don't believe would be able to provide a general dispute of material value.

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

contention be admissible?

>> MR. MALSCH: This is Marty Malsch for Nevada. Again, if we were to claim that a process had been ignored and, in fact, DOE had not ignored it, then I don't think we'd have an admissible contention.

However, I think in the cases in which I can think of where we allege that DOE had ignored some process and DOE came back in their answer and said, oh, no, you're wrong, we did not ignore the process; our replies in such cases I think invariably remain clear that they certainly did not consider it in the sense in which it was considered in Part 63.

As for example, in a number of contentions dealing with screening of FEPs, DOE would point to the fact that they had screened out a FEP on legal grounds. And our reply usually was that that is completely unexplained and wrong and is that is not an adequate basis for screening out a contention and the fact that screening out effect and the fact that an effect was screened out on legal grounds does not actually demonstrate that the effect was actually considered for inclusion in any legitimate sense.

So, it is usually not always apparent just on the face of what DOE says in its answer that it is

true, that, in fact, something we say was ignored was, in fact, ignored.

In almost all cases in which I can think of, we have said in our replies that, no, we were right, this consideration was, in fact, ignored and here's why. But in theory, if in the bare case in which we claim something was omitted and DOE says, no, it was not and we have nothing else to say, our contention has a problem.

>> JUDGE TRIKOUROS: All right. The -- if the original contention did not question the screening process but the reply questioned the screening process after the DOE Answer indicated that there was a screening process; would you consider that acceptable to discuss at that -- at the reply stage?

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

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

>> MR. ZAFFUTS: Paul Zaffuts, DOE. Regarding that last point, petitioners have a burden

to prepare clear, complete contentions. Although the subject matter that we're dealing with generally, is complex, dealing with complex issues, the issues and the language that Nevada generally uses is straight forward.

We're dealing here with words here like "omissions" and "consideration." These are not complex concepts. So when Nevada provides a contention, for example, we didn't consider something -- DOE didn't consider something, we demonstrate and point to the specific parts of the SAR where we did. And then they turn around and they say, well, we didn't really mean "consider" like that.

What we really mean is, you didn't do a sufficient job of considering. And then they start beginning to go on and discussing FEPs and other standards. I think that's just, that's unacceptable. I think that's -- that is something that they had a burden to discuss in clarity in their initial petition. And if that was the case, we would have answered it in respect to the particular contention or issue that was involved. I believe that in change -- this would be a change. This is a change of the basis for the contention. That's not

acceptable.

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

>> MS. YOUNG: Mitzi Young for the NRC staff. Unless it were clear in the initial contention that that was the concern being raised, it would be inappropriate to raise it for the first time in a reply. So any chances depends on what the original contention raised. Sometimes, there are -- there are statements that would be akin to that, although not specifically stated, but you have to reasonably construe whether the reply is just a response to the legal and factual arguments raised or whether the reply tries to amend and bootstrap and raise arguments that weren't previously raised in the initial petition.

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

Should I move on?

Another area that was of interest was contentions that identify a particular item. They

might state that it was omitted or that it was incorrectly considered in this case and conclude that the impact that this -- this will have is unknown, that it introduces an unknown characteristic to the analysis.

With no further characterization other than to say it's unknown, what would -- Mr. Malsch, what would you say about contentions that have that characteristic?

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

It seems to me those requirements are independently enforceable and independently of significance. And so, for example, if DOE -- a DOE model considered a range of some parameter between five and six and we filed a supported contention and said the range is really between one and ten, that would be a independently significant violation of several requirements in Part 63 to include the full range of defensible and reasonable parameters. I

think that in itself is raising a violation of a particular requirement in Part 63 and that's the material contention.

>> JUDGE TRIKOUROS: But what if it didn't provide magnitude, if it just simply said that -- with you giving your five to six example, if it said that the license application assumes five to six, but given certain phenomenology that's discussed, they can't know that. And nothing more. No characterization that it's two to ten, just -- they can't know that.

>> MR. MALSCH: I think that is absolutely admissible. I mean, it is DOE's obligation under Part 63 to present the range, the full and defensible range of parameters. If they fail to do so, it is DOE that is in default and has not complied with Part 63.

It is not our obligation as an intervenor to do our job for them and supply what is missing, namely, the full range of defensible and reasonable parameters. So a contention that simply says, with adequate support their range is five to six and that is not supported or is wrong, is in itself an admissible contention because of the way Part 63 is drafted.

>> JUDGE TRIKOUROS: DOE?

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

This is a technical disagreement that the materiality standards have to apply. It's petitioner's burden in that case to demonstrate why should we have a hearing, a full evidentiary hearing on something that may have absolutely no significance whatsoever. I don't know what the significance would be, that's petitioner's burden. They have to demonstrate with a basis sufficient for your understanding, the Board, to say, yes, this is an issue that's sufficient for a hearing. That's not what's being done in these contentions. They don't

do that. They just say -- your example was a good one, sometimes they just say, "we don't know."

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

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

>> JUDGE TRIKOUROS: So, the statement that something is wrong with a -- with a reasoned basis, is a genuine dispute and might be material. But the statement that something is not right or the statement that something may not be right; do you consider that to be a genuine dispute?

>> MR. ZAFFUTS: Well, let me go back to the first thing that was said which is that it was a statement that something is wrong. I mean, they have to support that.

It's got to be supported with a basis.

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

>> MR. ZAFFUTS: That in and of itself I

don't believe is necessarily material. As you know with a model such as like this, what is right? What is wrong?

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

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

>> JUDGE TRIKOUROS: The problem that we're having here is that in essence, you could be hiding behind that screen as well. The analogy I used was, you provided wax wings to the -- to intervenors with the requirement to prevail, they have to approach the sun at a certain distance.

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

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

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

(Whereupon, a recess was taken)

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

>> JUDGE TRIKOUROS: All right. We were discussing what I had referred to as a contention that indicated that an impact would be unknown. We went through some discussion regarding that.

Would it be necessary for a contention to state as a minimum that the effect that it's alleging would be in the -- let me say, the non-conservative direction, or I could say the conservative direction, depending on which -- how you're looking at it, but that it would have to state that the effect would be in a direction to prevent or possibly prevent meeting the post-closure criteria. Would it at least have to say that?

>> MR. MALSCH: This is Marty Malsch again

for Nevada. I think it would depend upon the contention. If the contention asserts that a DOE model is simply wrong or not supported, I think the model disappears, it can't be used in the assessment and that's the end of it. There is no further obligation on our part.

If we're dealing with ranges of uncertainties or ranges of parameter distributions, that's a slightly different story, but again, it seems to me that the requirement in the regulations that uncertainty be accurately characterized and described and that the full range of parameters be included is independently enforceable, because the Commission wanted to know whether the ultimate result or the extent to which the ultimate result was neither conservative or non-conservative, because remember that the ultimate decision is based upon the full record of a whole bunch of considerations, not just -- although this is the most important part -- but the record includes a whole range of considerations. Unless the Commission knows on a model by model basis exactly what the full range is, regardless of how the effects of an individual model are, when you get to the final decision on the validity of the dose calculation, you need to know

all about uncertainties and ranges for all the models.

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

>> MR. ZAFFUTS: May I respond?

>> JUDGE TRIKOUROS: Yes.

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

If they can demonstrate that we have utterly, utterly not taken uncertainty into account, you can look at 113 -- or 114, 63-114, that's the uncertainty regulation that primarily deals with uncertainty in the TSPA. What we're dealing with here in the vast majority of these contentions are technical disagreements related to ranges of uncertainty, data values, what particular type of

data or piece of data that may or may not be important.

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

>> JUDGE TRIKOUROS: Okay. Well, let me explore this a little bit. What I think I'm hearing is that a contention could actually say that something will have an uncertainty in a direction that will improve the dose response. But what you're saying is that even a negative -- let's call it a conservative uncertainty, might be material in such a complex model that even though it appears conservative when you run the model, it may go the other way or you know, eddies and currents in this model might drive it some place where no one expected.

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

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

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

>> JUDGE TRIKOUROS: But is it a valid contention to say that you may have made a mistake here and it might be material without demonstrating materiality, or at least having an expert say, I'm confident that if you utilize what I am telling you, it will have a significant effect on the outcome?

>> MR. MALSCH: Well, I think though as a matter of fact, for every one or virtually every one of our TSPA contentions, we always have in Paragraph 5, an opinion by the expert that he believes his contention, if true, would have an adverse effect in

terms of increasing doses of releases.

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

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

And let's suppose we did that. In some cases as we've explained, that might take a month's worth of work. But let's suppose we did tht and we produced a single dose calculation; what good would that do?

No one would know whether that was at the high end or low end or in between. We would have to actually run enough number of realizations to show it affected the mean.

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

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

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

>> MR. MALSCH: I wouldn't agree that that would always be the case. It would depend upon the contention. For example, a contention that says the model is simply wrong or unsupported, that's it. No further demonstration required.

You can't have a TSPA that uses the wrong model or a model that is unsupported because the regulations have apart from the requirement to do the dose calculation, a separate requirement that

each model be defensible scientifically.

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

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

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

>>JUDGE TRIKOUROUS: Yes.

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

Statements like that need to have support. That's just a conclusory statement without any basis. That's insufficient. I don't care if it comes from an expert; it's not sufficient. That's exactly what they do in a vast majority of the cases. They will have some issue related to -- I'm going to use the example we used this morning, plant height over the mountain.

We take plant height into account, but maybe some are taller and some are lower. Ergo, there is potentially a little increase and uncertainty in our estimation. And then they

summarize the discussion by saying it could widen the range of infiltration. As you suggest earlier, which direction?

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

No basis for that. Just a statement. Significant changes in corrosion, radionuclide release in transport and radionuclide impacts on the REMI. It's one sentence. That's not sufficient.

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

>> JUDGE TRIKOUROS: Yes.

>> MR. REPKA: Certainly before we leave the topic of TSPA, I would be remiss if I didn't make a few points. NEI does have several contentions directed to the TSPA.

First, on the issue of the threshold and the materiality, I do agree there is some materiality showing required at the contention stage. And I would point out that NEI's contentions specifically address that and meet that threshold based upon expert affidavits that not only establish their own expertise, the model that they rely on developed by

and for EPRI and that they show us specific impact with respect to the TSPA.

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

I think with respect to the issue of showing conservatisms, the question came up earlier as to whether or not these issues would need to be heard or addressed together. And I do believe that assuming there are contentions admitted, they do have to be considered together in some way.

Obviously, focusing on specific contentions, yes, but in terms of total effect, a holistic effect, it's clearly relevant.

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

I think our model would probably show a different outcome than his would. But I think that the point is, there is a materiality showing. NEI's contentions I think meet that showing and I think that are certainly relevant to this issue and the litigation of it.

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

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

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

The second group calls itself the Timbisha Shoshone Yucca Mountain Oversight Program Nonprofit Corporation, and not surprisingly, I don't want to have to say that every time either. And so we will simply refer to that group as TOP. So I'm going to be referring to TIM and TOP. Does everybody know who they are?

Okay. I think the record is clear that no one who has entered an appearance here disputes that

the Timbisha Shoshone Tribe is an affected Indian tribe under the Nuclear Waste Policy Act.

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

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

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

I need to make it clear, initially, to both of you that this licensing board is in no position to resolve the dispute between TIM and TOP in terms of which group is the sole legitimate representative of Timbisha Shoshone Tribe.

Instead, this is something that is going to have to be worked out through the administrative and

judicial channels, where I understand a dispute is pending. And again, just so the record is clear here, do I understand correctly that there are two appeals pending within the Bureau of Indian affairs and another case pending in Federal District Court?

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

>> JUDGE GIBSON: Yes.

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

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

So overall, the issues in this proceeding are critically important to the tribe and regardless of the ultimate outcomes, the tribes very much wants to make sure that the impacts to the tribe, itself, are addressed in this proceeding and that they have a

seat at the table. But with that said, the first appeal, the regional director made the decision on February 17th.

That was then appealed to the Interior Board of Indian Appeals. Under Interior regulations, the Assistant Secretary of Indian Affairs has the ability to take jurisdiction within 20 days of the filing of that appeal. That did occur in this case, so acting Assistant Secretary George Staben has taken jurisdiction over the first appeal to the IBIA.

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

There is a 30 day period that can be appealed to the Interior Board of Indian Appeals at which time, it's my understanding from the U.S. Attorney's Office, I can't confirm this, but if an appeal is made, the Assistant Secretary will likely also take jurisdiction over that appeal.

There was an election in November, 2008, that was conducted -- it was not approved by that '06 '07 council. It was the other faction. And there has been an appeal as to that election, which a

decision is still pending at the Superintendent's level.

So those are the three administrative appeals that are pending.

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

>> MS. HOUCK: There are actually -- my understanding is there are two cases in Federal Court, one that was filed I believe -- and I believe in December. That one I believe is moot and nothing has happened. I don't know, I would have to check. That was filed on behalf of Mr. Kennedy by I believe Judy Shapiro and George Foreman's law firm, I don't know.

I believe the issue was resolved administratively, though, by deciding -- by retracting a December 4th decision.

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

The second district court case was filed in regards to the appeal that was decided on January 17th. The U.S. Attorney's Office filed a motion to dismiss based on the two recent decisions

1 and the fact that they have consistently since
2 November and indicated in their motion to dismiss
3 that pending resolution of all appeals, the Bureau of
4 Indian Affairs is recognizing for
5 government-to-government purposes, the tribal council
6 made up of Joe Kennedy, Ed Beaman, Virginia Beck,
7 Madeleine Estovez and Cleveland Casey, that the whole
8 matter is moot.
9 That case is likely -- we're in
10 discussions with the U.S. Attorney about withdrawing
11 that lawsuit. And that one may go away based on
12 their representation that that is the council that
13 they're going to be recognizing pending resolution of
14 these appeals.
15 >> JUDGE ROSENTHAL: Can I ask you a
16 question at this point? When the final determination
17 in the BIA is made, is that subject to judicial
18 review or does the BIA determination have finality?
19 What I'm getting at is, as Judge Gibson
20 pointed out, it's beyond our province to become
21 involved at all in this dispute. And I'm sort of
22 curious as to whether there is any basis for
23 concluding at this point that this dispute is going
24 to be ultimately resolved, whether administratively
25 or after a judicial review within this century.

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

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

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

>> JUDGE GIBSON: Thank you.

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

>> JUDGE GIBSON: I said thank you.

>> MR. POLAND: Okay. Second of all, Ms. Houck referred to four or five members of the tribal council being in this room. I understand, Your Honor's statement that this particular Board does not have the expertise or is not going to decide these issues.

We would like to make clear, TOP would like

to make clear that the problem with deferring to what the BIA might determine is that some of these issues are not issues for the BIA to determine. They are issues that are to be resolved by a sovereign tribe.

>> JUDGE GIBSON: Okay.

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

>> JUDGE GIBSON: Okay, fair enough. And we'll get to that in a minute.

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

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

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

>> JUDGE GIBSON: Okay. And do you at

least agree with her with respect to the five month's Board decision plus that can then be appealed to Federal District Court?

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

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

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

It's my understanding that each of you is nevertheless claiming that your organization meets the requirements for standing as a matter of right in failing that for discretionary intervention. And so if that's correct, I want to make sure that we can unpack that a little bit so that we will have a clear

record for purposes of entering an Order in this case.

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

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

>> JUDGE GIBSON: Is that correct, staff?

>> MS. SILVA: That is correct.

>> JUDGE GIBSON: Thank you. But DOE in its answer has not addressed this question as I understand it, have you, with respect to TOP?

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

>> JUDGE GIBSON: Okay. And what was the basis for that?

>>MR. ZAFFUTS: One moment, Your Honor. It would have been in the pleading that DOE filed on I

believe it was Friday of last week in response to the Amended Petition. And for representational standing, as you know, an organization which is not asserting standing on itself, must demonstrate that one of its members who is authorizing the organization to represent it, itself has standing.

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

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

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

>> MR. POLAND: Certainly, Your Honor.

>>JUDGE GIBSON: Thank you.

>>MR. POLAND: TOP was formed specifically and incorporated specifically to represent the interests of the Timbisha Shoshone Tribe in these very proceedings. That is its purpose. It stands in place of the Timbisha Shoshone Tribe. It represents the interest of the members of the tribe.

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

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

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

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

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

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

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

And I don't see a difference here. We have submitted the affidavits of several members of the Timbisha Shoshone Tribe who live in the traditional home lands in the Death Valley area. They have set out real concrete injuries that they will suffer

based on concessions in DOE's own Environmental Impact Statements. They're members of the tribe. They are current members of the tribe.

So we certainly don't see a problem with representational standing.

>> JUDGE GIBSON: And are those members of the tribe also members of TOP?

>> MR. POLAND: Two of them are on the Board of Directors of TOP.

>> JUDGE GIBSON: Okay. Now, I do understand that both DOE and the NRC staff are opposing TOP's request for discretionary intervention in this case?

>> MS. SILVIA: This is Andrea Silva from the NRC staff. We did not address the discretionary intervention because we found that they had standing as -- representational standing.

>> JUDGE GIBSON: Well, just assume for the sake of argument, that discretionary intervention is on the table; do you have any problem with them being accorded discretionary intervention in this case?

>> MS. SILVIA: No, we do not.

>> JUDGE GIBSON: DOE?

>> MR. POLONSKY: Thank you, Your Honor. Mr. Polansky. I believe that the answer we filed on

Friday. Based on the petition provided, we do not believe that TOP had discretionary standing.

I think in particular, we were conflicted by the fact that whoever is the affected Indian tribe really represents the interests of that tribe. So whoever that entity is should be the entity that represents them.

And to the extent that TOP is not the AIT, then it shouldn't be given discretionary standing because the interests of the tribe will already be represented, for lack of a better word, Your Honor.

>> JUDGE GIBSON: Okay. Would you like to respond to that, TOP?

>> MR. POLAND: Yes, I would, Your Honor, thank you. I think that if we go through the factors, Mr. Polansky mentioned one, are there other entities that could represent the interests of TOP if they were not granted discretionary intervention. But that's only one of the factors.

That's not all the factors. One of the first factors is will the participation assist the Board in developing a sound record?

Here, there is no question that it will. These are people, these are Timbisha Shoshone tribal members who live at the Death Valley Springs. They

live in the area. They practice traditional tribal customs and religions. They clearly will be injured.

And the views that they have, the injuries that they will suffer, those need to be made a part of the record. They must be made a part of the record. And so if they are not participating, those views will not be made a part of the record.

So I don't understand how DOE can say that they will not, their participation would not assist the development of a sound record.

The second factor that's to be considered under Section 2.309 (e(1) is the nature and extent of the property financial or other interest in the proceedings.

I did mention these yesterday at the end of the day. We have culture, heritage interests that are at stake here, our members do who live in the Death Valley area. Clearly, those are interests that ought to be considered. They are significant interests. They are significant to the tribe and to the members of TOP.

Third is the possible effect of any decision or Order that may be issued in the proceeding. And here, if an Order is issued, I think it's a sort of a two-step process.

The first question is the NRC's staff review of the EIS. If the EIS is lacking because these cultural issues should be considered, clearly, the NRC staff could choose to reject that EIS and require a supplement.

But then as a second step, as well, the Board could reject the application if the information is not contained in the EIS. So none of those factors which are the ones that are to be taken into account weigh against us. They all weigh in our favor. And then there are also several factors that would weigh against granting discretionary intervention.

We don't think any of those are present. We don't think that there are other organizations that can represent our interests.

Mr. Polansky mentions the other entity, TIM. None of the members of TIM live in the Death Valley area. They live outside the traditional tribal homeland. They don't practice the traditional tribal customs. They cannot represent the interests of the people who live in the homeland. So those interests will not be represented.

And then there's a question as well as to whether the participation of TOP will inappropriately

broaden the issues or delay the proceeding. And we talked about this yesterday. Mr. Silverman on behalf of the DOE even focused on the word "inappropriately broadened."

We certainly would submit that it is not inappropriate to include TOP's concerns at this FE contention stage.

>> JUDGE GIBSON: Okay. Thank you. TIM, I understand that -- first of all, I guess I want to know, are you all asserting standing as a matter of right?

>> MS. HOUCK: Yes, Your Honor, we're asserting standing as a matter of right.

>> JUDGE GIBSON: In the event, that, you know, you don't get where you want to be with BIA?

>> MS. HOUCK: In the event that we don't get there, we've also requested discretionary standing and given the decision on the potential appeals and the litigation that could follow could take months or potentially at least more than a year while this proceeding is moving very quickly.

And even though there is case law regarding internal governmental affairs issues, there is also case law looking at the Bureau having to recognize some governmental entity for government-to-government

purposes when the tribe's dealing directly with a federal agency.

For right now, the Bureau of Indian Affairs has identified five people as who they are recognizing as the Tribal Council. And regardless of what happens in those appeals, if one of those entities isn't allowed to participate in this proceeding, they're not going to be able to make up that time or be able to come back and correct whatever errors or information is omitted here in these proceedings to represent their members.

And TIM is indicating that as the Tribal Council recognized by the Bureau, that they're representing all of the members of the tribe.

So at this point, they do believe that members of TIM are going to be directly impacted and if the BIA is looking to them to make decisions on behalf of the tribe, that would include all members.

We are not opposed to discretionary standing for TOP. I, will put that on the record. We think that the more information that this Board has, particularly given the lack of information in DOE's documents, the more informed the Board is going to be as to the actual substantial and adverse impacts that the tribe is likely to suffer in this

matter.

And those substantial and adverse impacts that may be suffered by the tribe are not just hypothetical or theoretical based on the certification of the affected Indian tribe's data. As the Secretary of Interior has basically certified, that those impacts could occur and they haven't even been analyzed sufficiently.

So the tribe does need to be represented in these proceedings, and because of the unique circumstances in this case and these outstanding appeals and the Bureau's current position on this matter, it would seem appropriate that the Board would allow discretionary standing at a minimum to the entities that have a legitimate right to claim representation to the tribe -- of the tribe.

>> JUDGE GIBSON: Okay. Let's turn to your claim for representational standing that you've made.

Now, I understand from DOE's answer that they are claiming that you failed to address the criteria for representational standing in your Petition To Intervene by failing to identify a member by name and address, by demonstrating that that member has standing in his or her own right, and showing that the member hasn't authorized

intervention on his or her behalf.

Do you agree with DOE that those are defects in that pleading or do you wish to dispute that?

>> MS. HOUCK: Your Honor, we don't believe that there's a defect in the pleading. As we said before, that the Bureau currently is representing this group for government-to-government purposes, so even if there's not a member that's actually -- the members of the tribe as a whole is who they're acting on behalf of and also in protection of the land base, which includes the trust land as well as the use rights of the tribe to the federal land.

If the Department of Interior would like a list of each of the members of the tribes and their address, we could provide that to the Board and to DOE.

>> JUDGE GIBSON: I think it's -- yeah, it's the Department of Energy, not the Department of Interior.

>> MS. HOUCK: Department of Energy.

>> JUDGE GIBSON: That's okay. Hopefully DOI already has that. Let's see. So you'd be glad to provide that additional information to them?

>> MS. HOUCK: Yes.

>> JUDGE GIBSON: Okay. They may still find that defective but I appreciate your offer and thank you.

Now, with respect to organizational standings, DOE argues that your alleged injuries are not the distinct and palpable particular and concrete injuries required to establish standing as a non-affected Indian tribe. And I guess, DOE, could you give us what specifically you find inadequate about the injuries that TIM has alleged?

>>MR. ZAFFUTS: Your Honor, we took the pleading at its face and the pleading assumed because it appears -- TIM assumed that it was the only entity that would be petitioning here as the AIT. So at the time that TIM submitted it's petition, it assumed it was the AIT and sought to intervene in this proceeding on its automatic standing basis as the AIT.

We don't believe that they pled that they had organizational standings, because, as I said, they assumed they were the AIT. We merely responded to that by saying they haven't demonstrated organizational standing. They don't request representational standing and, therefore, they don't meet discretionary standing.

Now, it's reasonable to make those arguments because they assumed they were the AIT.

>> JUDGE GIBSON: Yeah, I think they definitely made that assumption but that obviously, you know what happens when you make assumptions.

NRC staff: Do you all have a position on whether TIM has established standing, representational or organizational standing here?

>> MS. SILVIA: We didn't address it because we didn't think they were requesting it.

>> JUDGE GIBSON: Recognizing you didn't.

>> MS. SILVIA: Andrea Silva for NRC staff.

>> JUDGE GIBSON: Any objection? In the event that TOP turns out to be the one that gets the, you know, the golden ring here from BIA?

>> MS. SILVA: We would like to see them demonstrate that they have met the requirements, but --

>> JUDGE GIBSON: Which it sounds like they can probably do. They just pled because they assumed they were the AIT.

>> MS. SILVA It seems reasonable that they would be able to --

>> JUDGE GIBSON: Okay, thank you. Now, if they were to provide this information albeit

belatedly, DOE, would that be okay with you or are you still going to object?

>>MR. ZAFFUTS: I can't answer that question right now, Your Honor. I have to consult with my client.

>> JUDGE GIBSON: How about staff, if they do it belatedly?

>> MS. SILVIA: The one thing that I would add that I wasn't aware of until this discussion, if it's true, that none of TIM's members actually live in Death Valley, that might complicate the way that we look at TOP's standing, so it might not exactly be the same.

>> JUDGE GIBSON: I'm sorry. Death Valley, can you amplify on that point?

>> MS. SILVIA: The tribe traditional homeland in Death Valley.

>> JUDGE GIBSON: Right, yeah.

>> MS. SILVIA: I thought I heard TOP's counsel state that none of TIM's members resided in Death Valley.

>> JUDGE GIBSON: I don't believe he said that. I believe he said TOP's members -- a lot of TOP's members do.

I'm not sure he said none of TIM's members

do. Right?

>> MR. POLAND: Your Honor, I believe that I did say -- when we talk about TIM, again, we have to be careful talking about organizations here. Really what we're talking about as Ms. Houck indicated is tribal councils and disputed tribal councils.

So what I was referring to was the people who are on the tribal council that Ms. Houck is representing, those people do not live in the traditional tribal homeland in and around Death Valley.

>> JUDGE GIBSON: Okay. Do you want to amplify on that point?

>> MS. HOUCK: Yes, Your Honor, I would just like to say that TIM did not intervene on behalf of one or two individuals. It was on behalf of the tribal members as a whole, which the council that they're acting under does also include Mr. Kennedy, who is a part of TOP and is the other side of this dispute, but he is also a member of both councils as well.

>> JUDGE GIBSON: Okay. Does that help you understand now and knowing with that additional information, can you say if belatedly they supply you

with that information, will you be okay with them getting standing in this case?

>> MS. SILVIA: Well, if TIM is not the official representative of the government, then I'm not sure their membership would be the same as their tribal council. So I would still have questions about who their members are.

>> JUDGE GIBSON: Fair enough. So you just can't give me an answer.

>> MS. SILVIA: Right.

>> JUDGE GIBSON: That's okay. We have to get accomplished what we can accomplished today.

DOE, are you still need to confer with your client?

>>MR. ZAFFUTS: Yes, we would. But in the discussion that has ensued since, I think there is a complication that has arisen. And that is, if I hear TIM and TOP's counsel correctly, we would have two separate groups that if granted discretionary standing, would be representative of the exact same people; and that would be an interesting precedent for the Board to set. And perhaps the Board would want one entity representing those people, one entity representing the tribe.

>> JUDGE GIBSON: Yeah, well, I appreciate

what you're saying, but, you know, that -- that may be something that would be convenient for us. It might be convenient for you, but it might not be agreeable to them. And so, we basically have to try to find out if there is a way for all of these people to participate in this proceeding or not.

And that's what we're about this afternoon. Okay. I think it is clear, however, and I think your point is well taken, that there is no way that we could allow both parties, both of these entities to represent the tribe.

That in itself cannot happen. And I don't think either one of them is asking us to do that. I think you realize that we couldn't do that either.

>>JUDGE ROSENTHAL: Now this is just my ignorance; are these two entities really operating in cross purposes here?

They both were purporting to represent a particular tribe, the interest of that tribe which assertedly are being impacted in some way or would be impacted in some way by the construction and/or operation of this facility?

Now, I would think -- I understand that there seems to be a jurisdictional dispute here, but really, are these two organizations at loggerheads

with respect to precisely what the interests are of their members, how those interests might be impacted so that -- because I would have thought the possibility that if one of these organizations was allegedly admitted as -- on the basis of representational standing, the other entity got in on the discretionary standing, that there might be a Board requirement two groups operate collegially.

And I'm just trying to find out whether this is a Hatfield and Mccoy situation where that would not be possible.

I mean I would have hoped that there would be some agreement as to how the interests of this group that they're both purporting to represent would be impacted by the -- the operation of this facility.

So I would like to get a little clarification from both TIM and TOP as to just how they see their relationship with each other.

>> JUDGE GIBSON: Before they answer the question, Judge Rosenthal, I think it's interesting that there's actually a third group, the Native Community Action Council that we haven't gotten to yet, so there is actually three.

>> JUDGE ROSENTHAL: Maybe we can put three -- I'm just concerned about that, because it

didn't -- offhand, I would think that there would be at bottom, even though there is a jurisdictional battle, that when it came to the merits of this, that they would be on the same track. But perhaps that's not the case.

>> MR. POLAND: Your Honor, if I may, Doug Poland for TOP. I think one thing that Ms. Houck and I can probably agree on is that certainly we want to both act in the best interests of the tribe itself, the Timbisha Shoshone Tribe, and we would like those interests to be represented.

Your Honor referred to -- Judge Gibson referred to the Hatfield-Mccoy type of situation. And it's clear the dispute goes much deeper and beyond this particular proceeding and has implications for other proceedings as well.

We have said in our amended petition, we believe that we are the AIT. We represent the AIT and we should have AIT status. We set out the reasons for that.

We have said as a secondary position, however, that if we are not selected to be the AIT, we would request respectfully that the Board rule in a way that does not preclude our group, TOP from participating in these proceedings, whether it's

through representational standing or otherwise.

So we certainly are looking out for the best interests of the tribe as a whole.

>> JUDGE ROSENTHAL: You have a different view as to how the interests of the tribe is best served in this proceeding than is possessed by TIM?

>> MR. POLAND: Well, we've raised different contentions, Your Honor. They do not overlap.

>> JUDGE GIBSON: Well, let's turn to the Native Community Action Council. Now, I understand NCAC is not claiming to be either an effective Indian tribe, nor is it claiming to represent an affected Indian tribe; is that correct?

>> MR. WILLIAMS: Scott Williams. Yes, Your Honor, that's correct.

>> JUDGE GIBSON: Okay. Who then are the members of NCAC and who does NCAC purport to represent?

>> MR. WILLIAMS: NCAC is a nonprofit corporation chartered under state law to represent western Shoshone and southern Paiute people who are in the words of their articles, members of indigenous communities in the Nevada testing ground area, which includes Yucca Mountain.

It does not purport to represent tribes. It represents members of tribes. Its Board of Directors is composed of members of five federally recognized tribes in the area of Yucca Mountain.

>> JUDGE GIBSON: And you are arguing both for organizational and representational standing, is that correct?

>> MR. WILLIAMS: That's correct. We would have argued discretionary standing if it had been mentioned in the petition, but it was not. I feared that I was blocked from raising that issue.

>> JUDGE GIBSON: Okay. Well, we can deal with that issue in a minute. As to organizational standing, let's start with that. What are the organizational injuries that NCAC alleges as a basis for standing?

>> MR. WILLIAMS: NCAC has as its mission, the protection of the customs and traditions of the Shoshone and Paiute people. Those customs and traditions are explained to some degree in the affidavits submitted by the three board members.

Those customs and traditions describe these two people as nomadic people, historically. They rein over this area historically. They use the water, the game, the vegetation of these areas

traditionally.

Ceremonies were held throughout this area traditionally. All of those practices go on today, obviously to a considerably lesser degree, but they continue to happen. It is the view of NCAC that the construction of the facility at Yucca Mountain is an irremediable injury; it cannot be fixed. It cannot be mitigated.

It is as Calvin Meyers, one of the declarants and one of the Board members would say, is taking another chapter out of the equivalent of their Bible.

So the answer to your question, Your Honor, is that organizational standing is present here in that the construction operation program maintenance of the facility forever causes a direct and immediate injury to the interests of the organization, itself, which is the preservation of traditional practices which could no longer occur on Yucca Mountain.

>> JUDGE GIBSON: Okay. Now, it just occurred to me, you mentioned Shoshone. I take it that your -- the Shoshone and Paiute people that you are representing are not any of the same as these two party, Shoshones that these two are representing?

Is that a fair assessment?

>> MR. WILLIAMS: I wish the answer were yes.

JUDGE GIBSON: Maybe some overlap?

>> MR. WILLIAMS: One of the board members of NCAC is a member of the Timbisha Shoshone Tribe, Pauline Estevez. She submitted a declaration.

>>JUDGE GIBSON: Okay.

MR. WILLIAMS: But we do not purport to represent the tribe, the Timbisha Shoshone Tribe.

>> JUDGE GIBSON: Fair enough. Okay. In its answer, DOE argues that your allegations of injury are too broad and un-particularized to provide a basis for standing.

Counsel for DOE, could you tell us what you find deficient about these injuries as they have been alleged?

>>MR. POLANSKY: Yes, Your Honor. This is Mr. Polansky. I'd note at the time we filed our answer, I don't believe there were the affidavits of Calvin Meyers or Ms. Estevez attached because they were not provided until the reply. At the time we looked at the Petition, it identified, you know, a longstanding interest in radiological harm, et cetera, to native people, but we believe the longstanding precedent that says that's not enough

for organizational standing, and that the allegations of injury, we thought, were just too broad.

You know, unspecified Native American communities will quote, "experience adverse health consequences," for example.

So, organizational standing, we did not think it was met under the Petition that we saw. And I don't believe representational standing, representational standing --

>> JUDGE GIBSON: That you also addressed at -- if you look at pages 22 and 23 --

>>MR. POLANSKY: Yes, but there were no affidavits asserting that an individual had standing in their own right which would have supported such representational standing.

>> JUDGE GIBSON: Okay. I think we'll take a 15-minute break here at this point and then we will go back on and conclude. We probably will run all the way to 5:00 today. Thank you.

[Whereupon, a recess was taken]

>> JUDGE GIBSON: Okay. One thing I need to clear up for the record, with respect to NCAC, NRC staff, do you have a view about their participation or their standing in this case?

>> MS. SILVIA: Andrea Silva, NRC staff. We believe in their initial petition, they did not demonstrate standing and that the reply went beyond the permissible scope of a reply by raising new arguments and supplying affidavits for the first time.

>> JUDGE GIBSON: Okay. I believe Judge Rosenthal --

>> JUDGE ROSENTHAL: It's one thing that seems quite apparent here and that is that the ultimate determination as to which of you two groups, TIM or TOP is the legitimate representative of the tribe in this proceeding, is not going to be determined before this Board acts on the various petitions before it.

So the question, it seems to me is this: Does the seat of the tribe which has itself, clearly standing, remain vacant until such time as a dispute between the two groups is resolved, or will those two groups, no matter what their differences may be, reach some agreement as to who will occupy that chair until such time as the matter is finally resolved?

I mean, it seems to me, that if these two warring factions cannot get together, at least to come to some understanding as to what is going to

transpire in the interim, there will be simply no representation of the tribe.

That seat will as the saying goes, will remain empty, because once again, this Board neither can nor will endeavor to resolve that dispute and it's going to be up to the two groups.

I didn't -- I don't think I got a full answer to my question as to just what is the relationship between the two groups, but it seems to me that in the interest of this tribe, you two groups, no matter what your differences might be, should be coming to some understanding as to what will be the arrangement in the interim.

And if you can't come to some understanding, again there will be an empty chair and the tribe will not be represented.

>> MR. POLAND: Your Honor, Doug Poland for TOP, if I may. I don't think that it necessarily has to be the case that the tribe is not represented and that there is an empty chair. I think there are a variety of options that are open to the Board.

Certainly as I said before, we believe we are the AIT. The decision by the BIA -- and I can't stress this strongly enough -- does not necessarily determine who is the rightful representative of the

tribe. We have taken the position, we will continue to take the position that that is a matter of tribal sovereignty. Controlling United States Supreme Court authority clearly holds that tribal membership rests with the sovereignty of the tribe.

>> JUDGE ROSENTHAL: You have that position. The other group has, I gather, a different position and we're not going to resolve it. This is not within our province. We're not going to make a decision as to that so I think it does come down to a matter of some kind of interim arrangement between the two groups or no representation at all.

>> MR. POLAND: Judge, again, if I could, Doug Poland for TOP. One option that would be open to the Board would be to give both parties discretionary standing and say, we'll wait and see what happens later on. That might be one way to do it.

>> JUDGE GIBSON: Let me just hasten to add, even if the Board were to reach some sort of determination that you all were entitled to either standing as of right, or discretionary standing, the fact remains that, you know, in a proceeding of this complexity, we would be doing everything we could to try to ensure that groups with similar interests

would be working together.

So I -- you know, it certainly behooves both of you all to try to find some accommodation so that you can make it easy not just for this Board, but for all these parties who are all willing, I think you heard it, they are unanimous in their acquiescence in letting the Timbisha Shoshone Tribe have a seat at the table.

But we can't make that decision and so whatever happens, you all are going to have to find some way to work together, okay. Yeah?

>> MS. HOUCK: Your Honor, just to respond in -- I know that Judge Rosenthal has made the statement, and we agree that you are not going to make this decision. But just on two points:

One, we are -- we would request that the Board grant possibly five days to allow us to confer with TOP and see if there is any way that we can come up with some kind of an arrangement where both entities claiming to be the Tribal Council can work something out to make sure the substantive issues on behalf of the tribe are addressed in a way that is going to represent the tribe's interests and that the governmental entity does have a seat and a say in this proceeding.

Again, TIM does believe that the Bureau of Indian Affairs' determination on who they're going to interact with for government-to-government purposes, particularly in regards to proceedings involving other federal agencies and the affected status granted, is important and does have to be considered, particularly since 10 CFR 60.2 indicates that the Secretary of the Interior has to determine that the entity that petitioned was the appropriate governmental entity.

So it is the the Department of Interior, the Federal Government's determination as to who the affected tribe is that does have some importance here.

We do want the substantive issues addressed, though, despite the ongoing appeals and the tribal dispute. And TIM is more than willing to sit down with TOP and see if there is a way that both entities can assure that there is representation of the tribe and all of its members, because all of the tribe's members are impacted by this proposed project.

The land base encompasses much more than the trust lands in Death Valley and the impacts are far reaching, both from the transportation aspect,

the water, and all of the issues that have been raised by both tribe entities represented -- claiming representation to the tribe. And TIM is more than willing to make an attempt to talk to TOP and would ask that we be allowed to submit a supplemental brief that either comes up with a solution of how to address representation of the tribe or what the positions of the party are after those discussions occur.

>> JUDGE GIBSON: Okay. And you're suggesting five days?

TOP? Five days? Ten days?

What do you need?

>> MR. POLAND: Until the end of next week would be appreciated.

>> JUDGE GIBSON: Yeah, okay. Let me just make sure. Anybody here have any objection to such a solution even though that would be a belated filing?

Hearing none, okay. End of next week, okay? Hopefully, we will hear from you the first part of the following week.

>> MS. HOUCK: Thank you, Your Honor.

>> JUDGE GIBSON: I'd like now to turn to the contentions. Specifically, both NCAC and TOP have raised some claims related to land ownership and

water rights and unique cultural impacts of this possible repository on the Timbisha Shoshone peoples. And I'd like to start with TOP in that regard.

The Board has yet to rule on your motion to file for leave on an amended petition, and we'll get to that in a minute, but for now, I'd like to focus on the contentions that have been raised in both the original petition and the amended petition.

Let's start with the original Petition to Intervene. You've raised three contentions, and although you've failed to characterize them as safety, environmental, or miscellaneous, NRC staff was kind enough to characterize them for you, and I think we'll just go with those characterizations for purposes of our discussion here.

And I want to refer to your first contention as Miscellaneous Contention 1 and Miscellaneous Contention 2 and your third contention is NEPA Contention 1. Fair enough?

>> MR. POLAND: That's fair, Your Honor.

>> JUDGE GIBSON: Thank you.

>> MR. POLAND: Although I might be able to shortcut this a little because we have withdrawn two of those contentions.

>> JUDGE GIBSON: Okay. That was going to

be my first question, you have withdrawn the first two contentions?

>> MR. POLAND: Well, we have withdrawn the contentions, the safety contention and the miscellaneous contention. The NEPA contention has been modified in our amended petition.

>> JUDGE GIBSON: Which we'll get to in a minute. Oaky, so all we're dealing with is the NEPA contention from TOP?

>> MR. POLAND: That's correct, Your Honor.

>> JUDGE GIBSON: Okay. Now, in the original petition, it's alleged that DOE's environmental impact statements are inadequate because they failed to identify postclosure biological impacts specific to members of the tribe who have a different diet and lifestyle than the general population. That was what was in your original petition, correct?

>> MR. POLAND: That was in the original petition, Your Honor.

>> JUDGE GIBSON: Okay. Now, both DOE and the NRC staff have objected to that, and they've argued that you failed to explicitly address the requirements of 10 CFR 51.109 and 2.326, all which apply to NEPA contentions that are filed in this

proceeding.

Among the requirements is the requirement to file an affidavit with the Petition to Intervene. Now, although I understand you did not file an affidavit with your initial petition, at that time you were not -- TOP was not represented by counsel; is that correct?

>> MR. POLAND: That's correct, Your Honor.

>> JUDGE GIBSON: And once represented by counsel, was an affidavit submitted?

>> MR. POLAND: In support of our -- yes, with our reply it was, correct.

>> JUDGE GIBSON: Right, right, but just not with the original one?

>> MR. POLAND: That's correct, Your Honor.

>> JUDGE GIBSON: Okay. I just want to ask, in light of the fact that they had no counsel at the beginning, I want to know if NRC staff and DOE are willing to cut them slack just with respect to they didn't have an affidavit but they didn't have counsel. Once they got counsel, they submitted an affidavit. NRC staff?

>> MS. SILVIA: We didn't object to their amended petition.

>> JUDGE GIBSON: So you're okay with it?

>>MS. SILVIA: Yes.

>>JUDGE GIBSON: DOE?

>>MR. POLANSKY: This is Mr. Polansky. On that sole basis, yes.

>> JUDGE GIBSON: Just on that sole basis, thank you. Appreciate that.

>>MR. POLANSKY: Yes.

>> JUDGE GIBSON: Now, in addition, they have also asserted with respect to your initial petition that a study regarding radiation exposure on Native Americans from nuclear weapons testing does not speak to the potential impacts from the Yucca Mountain Repository and so it does not constitute adequate support. Do you disagree with what they have said in that regard?

>> MR. POLAND: Your Honor, the contention that we're pressing at this point really doesn't, it doesn't rely on human health effects.

>> JUDGE GIBSON: Okay.

>> MR. POLAND: It is solely a cultural and other tribal interest -- heritage interest impact contention.

>> JUDGE GIBSON: Okay. So is it fair to say, then, that we can just drop in the grace this argument that you originally made about the potential

impact, the nuclear weapons testing?

>> MR. POLAND: Yes, Your Honor.

>> JUDGE GIBSON: Okay, great. Okay. Thank you. Now, with respect to the -- what is it -- what is it that remains that you are asserting?

>> MR. POLAND: Your Honor, the nexus between the NEPA contention that was raised in the original petition and the amended petition is the contamination of the springs and waters in the Death Valley area in the tribal homelands.

In the original petition, it was framed -- the original NEPA contention, it was framed really more as a human health risk issue, and we are not framing it that way now. It's a cultural impact issue is how we frame that contention.

>> JUDGE GIBSON: Okay. And is it is essentially a failure to consult or is it a destruction of cultural -- of culture procedurally?

>> MR. POLAND: It's the latter, Your Honor. We did have a failure to consult contention that we did put into our amended petition.

>> JUDGE GIBSON: Right.

>> MR. POLAND: But we did -- we did take a look at what the NRC staff said in their answer.

>> JUDGE GIBSON: Right.

>> MR. POLAND: And, at that point after reading that, we decided that we would withdraw the failure to consult contention, which was a miscellaneous one.

>> JUDGE GIBSON: Okay. So we don't have nuclear weapons testing; we've gotten rid of that. And we don't have failure to consult. But what we have left is what?

>> MR. POLAND: We have a single NEPA contention, Your Honor. And the contention is that both the FEIS and the SCIS that DOE have prepared and submitted concede that contaminants from the geologic repository could make their way to the Death Valley and discharge in the springs and to other surrounding waters in the area.

Those are -- the purity of those waters is critical to the Timbisha Shoshone culture to religious practices and would have a devastating effect on the culture and their religious practices, and that that is not considered in the EISs.

>> JUDGE GIBSON: Okay. NRC staff, do you all have any problem with that as an admissible contention?

>> MS. SILVIA: Andrea Silvia, NRC staff. No, we don't.

>> JUDGE GIBSON: Okay. DOE?

>>MR. POLANSKY: Yes, Your Honor. In the answer we filed on Friday, we did say that it was not admissible.

>> JUDGE GIBSON: Okay. As it has been narrowed by TOP?

>>MR. POLANSKY: Yes.

>> JUDGE GIBSON: You do understand that that's all they're asserting now?

>>MR. POLANSKY: Yes.

>> JUDGE GIBSON: The effluent reaches the springs in Death Valley, affects the purity of that water, and that, in turn, impairs their ability to practice whatever culture's associated with those waters?

>>MR. POLANSKY: It's not a safety contention, Your Honor. It's a NEPA contention attacking the adequacy of whether -- of the discussion of those unique impacts, whether they were covered by the EIS. And our view of the affidavits that were provided and the information provided we don't think supports an admissible contention for the reasons we've stated in that answer filed on Friday.

>> JUDGE GIBSON: Okay. Just for purposes of the record, was that issue addressed in any EIS

that is DOE prepared; the specific question about the culture related to the purity of the water that might be affected by the effluent from Yucca to the Death Valley Springs?

>>MR. POLANSKY: This is Mr. Polansky. I'll take a moment to confirm with my client after I give the answer, just to make sure you are getting the right information.

>> JUDGE GIBSON: That's always a dangerous proposition, Mr. Polansky. Having been in private practice for the last 21 years, I don't know if I would say what I think the answer is without consulting with my client, but, you know, it's your neck.

>>MR. POLANSKY: We have discussed this issue, and my recollection is that the SCIS references itself and then references back to the final Environmental Impact Statement from 2002 where the impacts of contaminated water on cultural water resources is discussed.

I do not believe the SCIS covers the very specific issue of whether water at the Death Valley Springs would have been, but the general discussion of cultural impacts from contaminated water are discussed.

>> JUDGE GIBSON: Fair enough. I think that's a fine answer. Okay.

>> MR. POLAND: May I respond to that, Your Honor?

>> JUDGE GIBSON: Yeah, real briefly.

>> MR. POLAND: Very briefly. And I made this point yesterday to CAB 3 which was sitting; there is a single mention, and it's the same in the FEIS, and it was the same six years later in the SCIS. There is no mention of the Timbisha Shoshone specificall in this injury. All the DOE says, and this is what they see as the hard look. They say "equally important are water resources and minerals." Okay. That is not an adequate analysis.

>> JUDGE GIBSON: Fair enough. And I think

>>MR. POLANSKY: Your Honor, I wasn't given an opportunity to respond yesterday, and, if Mr. Poland is raising it again, I'd just like to respond with three citations.

>> JUDGE GIBSON: Go ahead.

>>MR. POLANSKY: The repository SCIS does reference back to the FEIS, and in that FEIS there are three separate sections which discuss affected environment, analysis of culture resources, and American Indian perspectives on environmental

justice. Those sections are Section 3.1.6.2, Section 4.1.5, and Section 4.1.13.4 respectively. We're not relying on a single paragraph.

>> JUDGE GIBSON: I appreciate your clarification in the record. Rather than responding to him, I would just ask this: I think we have the information we need to evaluate the admissibility of the contention. That's the purpose we're here. We're not interested in the merits at this point, okay?

>> MR. POLAND: Thank you, Your Honor.

>> JUDGE GIBSON: All right. All right. Let's move to the Native Community Action Council. Now, as I understand it, at least initially you all have raised three contentions. Do you still have three live contentions?

>> MR. WILLIAMS: Yes, sir.

>> JUDGE GIBSON: Again, as with TOP, you didn't actually characterize them in terms of safety and environmental miscellaneous, but the staff was kind enough to do that for you, and, for purposes of this discussion, I'd like to stick with the staff's characterization. We'll refer to your first two contentions as miscellaneous contentions 1 and 2 and identify the third contention as NEPA contention 1.

Fair enough?

>> MR. WILLIAMS: Yes, thank you.

>> JUDGE GIBSON: Okay. Let's start with miscellaneous contention 1. In this contention, NCAC has alleged that Yucca Mountain is owned by the Western Shoshone Nation under tribal law and custom and under the 1863 treaty of Ruby Valley. Is that correct?

>> MR. WILLIAMS: Yes, sir.

>> JUDGE GIBSON: Okay. Now, you're contending that DOE has failed to meet the requirement that the repository be located on lands that acquired under the jurisdiction control of DOE were permanently withdrawn and reserved for use and that the lands have to be free and clear of any encumbrances. And, essentially, you're saying that this is -- at a minimum an encumbrance on that land that would prevent Yucca Mountain from being located there. Is that a fair assessment?

>> MR. WILLIAMS: It is.

>> JUDGE GIBSON: First, I'd like to turn to the treaty of Ruby Valley. DOE and NRC staff were, I think, highly critical would probably be a pretty accurate assessment of your reliance on this treaty, and they have maintained that federal law

precludes the Western Shoshone Nation from asserting a claim of land ownership under the treaty of Ruby Valley. And they have cited the case of United States Vs. Dann which they claim found that this claim of Aboriginal Title to lands in the western United States had been extinguished. And that there were a number of lower federal court decisions in recent years that have upheld that result.

And DOE also noted that there was a federal law passed in 2004 affirming that Western Shoshone land claims to lands in the western United States under Aboriginal Title have been originally subsumed.

Now, how do you respond to those claims? And I would just ask you to try to be short because we do have to be out of here by 5:00 and I've got a lot more ground to cover.

>> MR. WILLIAMS: Two points, Your Honor. Scott Williams for NCAC. First, our focus is on encumbrance. The Western Shoshone people, the traditional Western Shoshone people, do not concede that, irrespective of how many court decisions there are, that this land was rightfully taken by others. We do not need to resolve that.

We're not asking you, the Board, to become involved in that.

We are asking you to decide whether or not the existence of the dispute constitutes an encumbrance, and there are two ways in which we think it does.

First, as I mentioned earlier, the land is used by Indian people today. Irrespective of who holds record title, it is used by Indian people for Indian purposes.

Secondly, an international tribunal has determined that the United States violated the human rights of the Western Shoshone people in taking the land and declaring it to be the property of the United States.

>> JUDGE GIBSON: Are you referring to the Inter-American Commission on Human Rights?

>> MR. WILLIAMS: Yes, sir.

>> JUDGE GIBSON: Okay.

>> MR. WILLIAMS: This strikes us as the kind of contention that was discussed yesterday in that it is a legal contention. Either those two factors constitute an encumbrance within the meaning of the regulation or they do not. It is a matter which could be resolved within the meaning of the Board's regulations relatively simply.

>> JUDGE GIBSON: Okay. Well, you know,

starting with Worcester v. Georgia and going on to Lone Wolf v. Hitchcock, I know that there is a long line of cases establishing the plenary power of Congress over tribes. Whether that's, you know, a good thing or not, it is the law of the United States. Congress can abrogate these treaties.

You know, what's happened, you know, may be very unfortunate to native people. I'm not here to address that issue, but I think the law is clear, and, as you have seen, our jurisdiction here is very limited. We are not about to go questioning the decisions of the U.S. Supreme Court.

Regardless of what the Inter-American Commission on Human Rights may say, that's about as far as we can go. And you may have to go take this contention to another tribunal, but I don't -- I just can tell you, I doubt that you are going to be getting very far with it here.

I doubt you're surprised.

>> MR. WILLIAMS: No comment, Your Honor.

>> JUDGE GIBSON: Okay. Now, I would like to address the -- your Miscellaneous Contention 2, and that is that DOE fails to meet the water rights requirements of 10 CFR 63.121 because the Western Shoshone Nation maintains a reserved property

interest in water rights under the Treaty of Ruby Valley.

Now, separate and apart from what individual peoples may have who may be affiliated with this tribe or with these claims; is there -- is the basis for the claim the Treaty of Ruby Valley or the Aboriginal use of these peoples with respect to these water rights?

Because, if it is, I think the answer to this contention is going to be the same as it was to the first contention. I'm sorry to tell you that, but I think it will be.

>> MR. WILLIAMS: I don't think I can answer the question with a yes or no.

>> JUDGE GIBSON: Okay.

>> MR. WILLIAMS: Can I take a minute to to explain?

>> JUDGE GIBSON: You can. Just don't take too long.

>> MR. WILLIAMS: Got it. The United States chose to put this facility at Yucca Mountain. Yucca Mountain is in the middle of Indian country. The United States, therefore, has to deal, in my opinion, with the realities of working with the people whose land this was.

One of those realities is the treaty. Another of those realities is the United States' interpretation of federal Indian law with respect to those treaties. And one of those principles is that there is a reserved water right which arises from a treaty which acknowledges Aboriginal ways of life as does the Ruby Valley Treaty. So it took me a few sentences, but I think I got to the answer, which is, yes, it does depend on the treaty.

And then the second point is that the federal courts have consistently since that time, since Winans, they have consistently said that the destruction of -- by the United States, by Congress, of the tribe's land interest does not destroy reserved hunting, fishing, gathering, water rights. And that's the Adair case that we also cited.

So our position, Your Honor, is that these water rights did not disappear simply because Congress acted.

>> JUDGE GIBSON: Okay, fair enough. I understand your position. And we will get to water rights, you know, their context, in a minute. But I just -- you know, we will evaluate the contention, but I just want to give you fair warning that I doubt that anything that is based on the Treaty of Ruby

Valley by virtue of Worcester v. Georgia and Lone Wolf v. Hitchcock is going to enable us to go anywhere, particularly in light of the U.S. Supreme Court on this specific topic.

>> MR. WILLIAMS: Understood. One other point, though, please, Your Honor.

>> JUDGE GIBSON: Yes.

>> MR. WILLIAMS: And that is, not withstanding the NRC staff objections, there was in the original petition, and we emphasized it in our reply, a statement about the use of the water and the importance of that water. This is not limited to the springs in Death Valley as with the tribe. This is general within the area used by Shoshone and Piaute people that part of the contention, in our view, does not depend on the Treaty of Ruby Valley.

>> JUDGE GIBSON: I appreciate your clarification and that may well be very more than in the evaluating contention. Thank you.

DOE claims that it's been pursuing water applications from the State of Nevada and, although those applications have been denied, it's appealed those decisions, as I understand it, by the State of Nevada to the U.S. District Court for the District of Nevada.

I'm curious if you believe that the fact that there is a dispute over these water rights matters before federal district court in anyway affects what we can do here as a Board.

Obviously, there is this water rights issue that several people have been asserting. Do you all have a view?

>>MR. POLANSKY: This is Mr. Polansky. Your Honor, the water rights issue, and I think there was perhaps some discussion yesterday, the view that DOE views this as any other permit or environmental requirement, the decision maker for whether DOE gets water is a different decision maker than this Board.

And so it is not anything that's within the scope of this proceeding. I can't speak to timing or anything else as to when this might be resolved.

>> JUDGE GIBSON: Do you think that that affects in any way our ability to consider either water quality issues or water quantity issues with respect to either the tribes or individual land owners in this proceeding?

>>MR. POLANSKY: No, Your Honor.

>> JUDGE GIBSON: To the extent that they have raised contentions that Yucca Mountain will deplete their water quantity or adversely affect

their water quality?

>>MR. POLANSKY: No, Your Honor, not the way these contentions are pled. We didn't read.

>> JUDGE GIBSON: Okay. Thank you.

Now, with respect to your contention, TOP and possibly the NCAC contention to the extent that it is not dependent on the Treaty of Ruby Valley or these aboriginal land claims, I did not see any briefing of the Winters doctrine by either of you. And I'm wondering if you think that that has any bearing on how we should proceed in this matter and what DOE is proposing to do.

>> MR. POLAND: Your Honor, if I could, Doug Poland for TOP.

>> JUDGE GIBSON: Yes.

>> MR. POLAND: We do mention this in our amended petition. We believe that --

>> JUDGE GIBSON: I guess I didn't catch that. I'm sorry.

>> MR. POLAND: It's in our amended petition. It's at pages 23 to 24. We do cite to the Winters case, but it really relates to our NEPA contention. And it has to do with the contamination. We believe that they're --

>> JUDGE GIBSON: Right.

>> MR. POLAND: So that's cited in there. I think the argument's set forth.

>> MR. WILLIAMS: In my world -- Scott Williams, Your Honor, for NCAC. In my world, there is a fine distinction between Winters rights and Winans rights.

>> JUDGE GIBSON: Could you take a minute and explain to us the difference between Winters rights and Winans rights? I thought I understood the Winters doctrine, but I don't know if I -- you're making a distinction that I'm not familiar with in Indian law.

>> MR. WILLIAMS: I'm impressed that you asked. The Winters doctrine stands for the principle that, when the United States sets aside a reservation, there is an implied reservation of water sufficient to carry out the purposes of that reservation.

The reservation might be an Indian reservation, it might be a military reservation, it might be a national park. If they set aside Yosemite National Park as a national park, there is an implied reservation of sufficient water in the Red River to maintain the park in the state in which Congress desires.

The Winan rights, which I talked about earlier, stand for the proposition that, based on a treaty which establishes hunting, fishing, or gathering rights, or reserves to the tribe those rights, that reservation of rights is maintained irrespective of what might happen later with the land itself.

>> JUDGE GIBSON: Fair enough. Now, let me just to make sure I understand that. The Winters rights to water are a function of a reservation, correct, and that you essentially have to be able to maintain the tribal customs and practices on your reservation that you did before and so people cannot deprive the tribe of those rights on the reservation?

Okay. Now, what you're talking about with respect to Winans rights have to do, if I understand correctly, with some rights that would exist independent of a tribal reservation. And that would be something that would -- individual tribal members or the tribe, itself, probably the tribe, itself, would be entitled to by virtue of the fact that they lived in that area and, you know, were able to continue to carry on their lifestyle. And you mentioned hunting and fishing.

Now, if I -- my recollection of that line

of cases is that the language of the treaty that creates those rights must be explicit. It -- can you point me to an explicit treaty that accords those rights to the peoples that you are representing here under this Winans doctrine?

>> MR. WILLIAMS: Your characterization of the two cases and the differences is accurate, in my view.

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

>> MR. WILLIAMS: I didn't say that, Your Honor. With respect to the specific question, I can point only to language in the Treaty at Ruby Valley which acknowledges that the Shoshone people are nomadic people. I cannot point to language there which specifically reserves to them, fishing, hunting, or gathering rights.

>> JUDGE GIBSON: And the treaty of Ruby Valley was abrogated subsequently by Congress, correct, which has plenary power under Worcester v. Georgia and Lone Wolf versus Hitchcock, correct?

>> MR. WILLIAMS: There is no question but that Congress has plenary power over Indians.

>> JUDGE GIBSON: Fair enough. Well, again, without prejudging anything, I just want to be

sure that you to understand that, to the extent you're claiming a contention here based on the Treaty of Ruby Valley may be a hard sell.

>> MR. WILLIAMS: Understood. And I would ask in return, Your Honor, that the Board look carefully at the question of essential nature of water to the lifestyle of the native people and how that is included in Miscellaneous Contention No. 2.

>> JUDGE GIBSON: Okay. If we could go to your environmental contention.

>> MR. WILLIAMS: My request, Your Honor, is that, to use your word, you allow me to ask my designated hitter on NEPA contentions to come in. Rovianne Leigh can give you more intelligent responses on these issues than I can.

>> JUDGE GIBSON: That's fine. Now, if I understand correctly, you are alleging that DOE's environmental impact statements are inadequate because they failed to identify postclosure biological impacts, specific to members of the NCAC who have a different diet and lifestyle than the general population, is that correct?

>>MS. LEIGH: That's correct. And if I may expand on that a little bit.

>> JUDGE GIBSON: Just a little bit. You

don't have much time.

>>MS. LEIGH: To our members, the culture impacts are inextricably linked, and so in our reply, and I do know that the original petition was filed without assistance of counsel, we do attempt to clarify that link between the cultural resources and the adverse health impacts alleged in that original petition, so I would just hope that the Board would consider that.

>> JUDGE GIBSON: Let me just ask the staff and DOE, recognizing that they had no counsel initially, they did try to clean this up. I'm not asking you to agree to the admission of the contention, but are you all willing to cut them some slack with respect to cleaning this up in their reply? Staff?

>> MS. SILVIA: Andrea Silva for NRC staff. Again, we believe that the reply went beyond the scope of the initial contention. Perhaps a little leeway is in order. However, I think it still goes, even if you assume that the health and cultural impacts are integrated, there is still a lot more in the reply. It's not a single issue contention, and I think it's hard to discern the scope of the contention of the reply, even.

>> JUDGE GIBSON: Okay. DOE?

>>MR. POLANSKY: This is Mr. Polansky. On the sole issue of whether we'll object to the fact that they've attached affidavits to the reply for the first time because they were not represented by counsel, DOE will not object to that.

But we do echo NRC staff's concern in that essentially the reply provided a new contention with new bases that we think was impermissible. Thank you.

>> JUDGE GIBSON: Okay. Thank you.

DOE and the NRC staff allege that your support for this contention is a study regarding radiation exposure on Native Americans from nuclear weapons testing, and that this does not speak to the potential impacts from the Yucca Mountain repository.

Do you disagree with what staff and DOE have with their criticism of that study?

>> MS. LEIGH: Your Honor, that study goes to the lifestyle differences such as traditional gathering and hunting, traditional diets. People have mentioned, the traditional diet of pinunet (phn)and wild game.

Our client does believe that its members would be adversely impacted by potential

contamination of those traditional cultural resources, and that NCAC's members are in a unique position because of their traditional cultural practices. So we would disagree with the position that that study does not provide any support for the contention that NCAC's members would suffer disproportionate impacts as a result of their traditional gathering and cultural practices, including ceremonies.

>> JUDGE GIBSON: Okay. We have a similar issue here with respect to TOP's question, I think, for you, and that is, you all have alleged a cultural lifestyle -- adverse effect on cultural lifestyle.

DOE claims that they studied impacts on different lifestyles. Is your claim essentially that, well, they might have but they didn't address the lifestyles that are invloved dwith -- implicated for the peoples that you all represent?

>>MS. LEIGH: I believe the contention of our client is that the Environmental Impact Statement does not take into account the specific and unique cultural lifestyles of NCAC's members and the disproportionate impacts that those members may suffer.

>> JUDGE GIBSON: Okay. Fair enough. And

I'm sure the DOE thinks they did and that was adequate, but, you know, I jut want to make sure I understand where you're coming from.

Okay. I think we've got a couple of pending motions, and, I'm sorry, but I think we need to try to clean this up, because we've got to get this order out by May 11.

TOP and TIM both have motions pending before the Board. By my count, there's three of them. TOP has a motion for leave to file an amended petition. TIM has a motion for LSN certification out of time. And TOP has a motion for leave to file an answer to TIM's reply. Now, are there any more of these motions involving the tribes that I've overlooked?

>> MR. POLAND: Not from our standpoint, Your Honor.

>> JUDGE GIBSON: TIM?

>> MS. HOUCK: I don't believe so, Your Honor.

>> JUDGE GIBSON: NCAC?

>> MR. WILLIAMS: We have filed no motions.

>> JUDGE GIBSON: Fantastic. Okay. Let's start with TOP's motion for leave to file an amended petition. NRC staff's filed an answer to this motion

stating the Board should entertain the amended petition. I understand Friday, DOE filed an opposition to that; is that correct?

>>MR. POLANSKY: This is Mr. Polansky. Yes, that's correct, Your Honor, March 27th.

>> JUDGE GIBSON: Thank you. Now, you're asserting that the only way a petitioner can show good cause for an untimely filing is to demonstrate that the new contentions are based on new information, is that correct?

>>MR. POLANSKY: This is Mr. Polansky. We do state that one of the criteria that the information be based on new information, not just new documents. And, in this case, we believe, if we read the amended petition correctly, that they are basing their motion on four new declarations from either experts or members; but the information in those declarations we do not believe is new, so that there is no adequate justification or good cause.

The information was available for some time, and, therefore, this contention could have been brought some time ago.

>> JUDGE GIBSON: Okay. Let me make sure --

>>MR. POLANSKY: That's the crux of what

our response was.

>> JUDGE GIBSON: Fair enough. Were these declarations filed as soon as possible after TOP got counsel?

>> MR. POLAND: Absolutely, Your Honor.

>> JUDGE GIBSON: But you are not willing to cut them slack insofar as that goes, right?

>> MR. POLONSKY: That's correct, Your Honor, because the underlying information has been available for a very long time.

>> JUDGE GIBSON: Okay. Now, I understand you guys are okay with TOP's motion for leave?

>> MS. SILVIA: This is Andrea Silvia with NRC staff. Yes, we're okay.

>> JUDGE GIBSON: Let's go to the next one. I'd like to talk about TIM's motion for LSN certification out of time for good cause. As the parties are aware, any party seeking to file a motion must first make a sincere effort to contact other parties and resolve the issue raised in the motion.

DOE is arguing that TIM did not make a sincere attempt and, therefore, the motion to get LSN certification out of time for good cause was not admitted. Is that correct, DOE?

>>MR. POLANSKY: This is Mr. Polansky. I'm

sorry, Your Honor, if I could have just a moment.

>> JUDGE GIBSON: Please.

>>MR. POLANSKY: Your Honor, if you could indulge me in just repeating the question.

>> JUDGE GIBSON: Sure. My understanding is that you're arguing that TIM did not make a sincere attempt to consult under 10 CFR 2.232(b) and, therefore, their motion to get LSN certification out of time should be denied?

>>MR. POLANSKY: That is one of the many arguments we made, yes, Your Honor.

>> JUDGE GIBSON: Okay. Now, TIM indicated that it would -- it notified you in December of 2008 that it was going to be filing this motion. It sent an e-mail to all the parties on May 10. It didn't receive any objection. And those are the representations they've made.

Are you disputing the representations that counsel for TIM made in that regard?

>>MR. POLANSKY: I don't believe so, but merely making DOE aware of TIM's intent to file is not an effort to resolve our narrow issues under 323(b). DOE and TIM had discussions, but as explained in our opposition, they weren't substantive discussions but were efforts by DOE to get TIM to

discuss substance which we believe they would not do with us.

And they did provide us with the procedures that they were using or thought to use. But that doesn't really have any meaning since they refused to discuss any questions we had about them.

>> JUDGE GIBSON: Okay. I think I understand your position. Can you envision any scenario under which a light LSN certification would not be a complete bar to intervention?

>>MR. POLANSKY: I'm sorry, would not be a complete bar to --

>> JUDGE GIBSON: Correct.

>>MR. POLANSKY: I believe it's DOE's position that, if you -- it's not a complete bar to intervention. It's a bar to intervention I believe at this time. A party can come into compliance at a later time and they find the proceeding as it is, but the criteria that are set out, which are proscriptive and which we believe we have applied to every party equally, we believe cannot be read to allow a party to intervene at this stage if they have not adequately met their obligations under LSN.

>> JUDGE GIBSON: I'd like to know from TIM's counsel, as of the day that you filed your

Petition To Intervene, how many of your documents were missing from the LSN system, if any?

>> MS. HOUCK: None, Your Honor. All of the documents were either on the LSN by other parties or fell within an exception, I believe. Or --

>> JUDGE GIBSON: Okay. As of March 11th when you filed your motion for late certification, how many documents, if any, were still missing from the LSN?

>> MS. HOUCK: Just to clarify my answer earlier, all of the documents were on our LSN before we filed for intervention. We just had not filed our certification.

>> JUDGE GIBSON: Right, I understand. I'm not asking for your certification. I'm asking for the documents. How many of them were on there?

Were any missing?

>> MS. HOUCK: No.

>> JUDGE GIBSON: Were any missing on March 11th?

>> MS. HOUCK: No, Your Honor.

>> JUDGE GIBSON: DOE, can you point to any missing documents that TIM has not mentioned?

>>MR. POLANSKY: We acknowledge that TIM posted documents on the LSN for the first time one

week before it filed this petition. But the -- I believe our reading of the LSN requirements is that you cannot simply do that.

There are all -- a whole host of other requirements that need to be met, including initial certification within 90 days of when DOE made its certification, monthly supplemental productions and certifications, monthly certifications in accordance with the second case management order of the PAPO Board, et cetera.

>> JUDGE GIBSON: And what sort of prejudice has DOE sustained as a result of the fact that the LSN certification occurred lately but no documents were missing?

Any prejudice?

Can you tell us about any prejudice you've sustained?

>> MR. POLONSKY: No, Your Honor, we cannot identify any prejudice.

>> JUDGE GIBSON: All right.

>>MR. POLANSKY: But we believe that the Commission has already spoken to the issue of strict compliance. You know we didn't just fabricate this requirement. The Commission had an opportunity in its September 8th, 2008 decision, CLI 822, and it

said, "we remind potential parties that we expect full compliance with our LSN requirements and we expect all participants to make a good faith effort to have made available all documentary materials by the dates specified for initial compliance in Section 2.1003(a)."

>> JUDGE ROSENTHAL: There is no doubt, Mr. Polansky that that was a directive. But I think the question is whether in circumstances where as you can see, there was no prejudice to DOE. This Board has the latitude to, in this instance, grant the motion, and in fact waive the failure to comply.

I mean, it does seem to me that this would not in this instance set such a dreadful precedent that parties would decide that as a result of the granting of a motion that they could now just willy-nilly disregard the LSN requirement. I mean, I think everybody understands there is supposed to be compliance. In this instance, there was not, but no prejudice. And I don't see -- and I don't see, frankly, the basis for your objection.

>>MR. POLANSKY: I agree with you, Judge Rosenthal, that under most circumstances, the Board has great discretionary powers. But if there is a Commission decision, we believe that that's binding

and there is additional language from that CLI-08-22 which says, quote, "We expect the presiding officer to impose appropriate sanctions for any failure to fully comply with our LSN requirements." It did not create an exception. We read the same document you read and that is why we responded the way we did. We assumed the Board would act the same way.

>> JUDGE GIBSON: And you did, you did respond that way and we have that in the record. We also might let you know that sometimes, you know, you need to know when to hold 'em and sometimes when to fold 'em.

Let me finally end with TOP's Motion for Leave to file an Answer to TIM's reply. I just want to know if either DOE or the NRC staff has a dog in this fight?

You all aren't going to object to that; are you?

>> MS. SILVIA: Andrea Silvia from NRC staff. I believe -- are you referring to TOP's motion to respond to -- it was just the portions about the leadership dispute, in which case we don't have an objection to that.

>> MS. HOUCK: Your Honor.

>> JUDGE GIBSON: Yes.

>> MS. HOUCK: Based on our earlier discussions and the supplemental filing, that this Board granted leave for parties to file. I would say that TOP's request to file a response to our reply would not be necessary at this point, because the only issues I believe they indicated they wanted to address were related to that inner-governmental dispute. And, hopefully, both TIM and TOP's filing at the end of next week will fully address those issues as to where we stand at this point.

>> JUDGE GIBSON: TOP?

>> MR. POLAND: I saw you looking in my direction, Your Honor.

>> JUDGE GIBSON: I was hoping you were going to say that's great.

>> MR. POLAND: Well --

>> JUDGE GIBSON: I figured that's what you would say. Go ahead.

>> MR. POLAND: Will you give me time to consider whether we will withdraw the motion?

It did speak solely to those representation type issues.

>> JUDGE GIBSON: We certainly encourage you to work this out. Okay.

>> MR. POLAND: We understand that, Your

Honor.

>> JUDGE GIBSON: Now, I promised you all that you all would have time to tell us what you didn't cover. I have to believe that we have covered everything that we planned to cover today and nobody has anything else to say. But I have to, you know, follow with Judge Ryerson's effort yesterday afternoon. So let me just go around the room. We started with NCR staff yesterday. So let me start with NCAC today. Is there anything NCAC that we have to -- that you need to say that we didn't cover?

>> MR. WILLIAMS: Two sentences; Scott Williams.

>> JUDGE GIBSON: Yes.

>> MR. WILLIAMS: Earlier today DOE asserted that it required -- it wished to benefit from fundamental fairness in this proceeding. That goes both ways. There are a long list of opinions of the Commission requiring fundamental fairness in these proceedings and we ask for the same benefits. Thank you.

>> JUDGE GIBSON: Okay, great. Okay. Clark County.

>> MR. ROBBINS: Nothing further, thank you.

>> JUDGE GIBSON: TIM.

>> MS. HOUCK: Yes, Your Honor. I'll try not to take too much time, but I just want to state that these issues are critically important to the entire tribe and that TIM's representation is of the entire tribe and the land base and the resources that are affected as well as I believe TOP is also looking at that. And we are hopeful that we can resolve these issues.

But I would ask that the Board -- which you've demonstrated today -- show some flexibility in how you deal with the issues between the tribes as they have -- and I'm talking about the tribe, not TIM or TOP, but the tribe as a whole has faced significant barriers in being able to adequately participate in this proceeding, including having to wait six years for there to be a determination on their petition for affected tribal status; and then after that, another year and a half to resolve issues regarding funding to be able to participate, which was only issued a month after petitions had to be filed in this proceeding.

So they have been having to deal with significant disadvantages in regards to the immense complexities in this proceeding. And we thank you

for taking the time to address these issues and to grant leave to provide additional information to the Board on how to deal with the sensitive issue. Thank you.

>> JUDGE GIBSON: Thank you.

>> MR. ANDERSON: Robert Anderson on behalf of Nye County. Nothing further, Your Honor.

>> JUDGE GIBSON: Thank you.

>>MR. JAMES: Greg James on behalf of Inyo County, nothing further.

>>JUDGE GIBSON: TOP, I bet you're gonna say something?

>> MR. POLAND: No, Your Honor, I'm not.

>> JUDGE GIBSON: Fantastic.

>> MR. POLAND: Thank the Board for its time today.

>> JUDGE GIBSON: Thank you. Yes. Okay.

>>MS. CURRAN: Diane Curran, nothing further.

>>JUDGE GIBSON: Calintene, nothing? California?

>>MR. SULLIVAN: Tim Sullivan, nothing to add.

>>JUDGE GIBSON: Four Counties?

>>MR. LIST:

>> MR. SULLIVAN: Tim Sullivan. Nothing to add.

>> JUDGE GIBSON: Four Counties.

>> MR. LIST: Robert List. Nothing.

>> JUDGE GIBSON: Nevada.

>> MR. MALSCH: Marty Malsch for Nevada. Nothing, Your Honor, thank you.

>> JUDGE GIBSON: DOE.

>> MR. SILVERMAN: Your Honor, Don Silverman. Sorry to disappoint, but I promise I will do this in less -- far less time than the five minutes left in the day. I do need to make a brief comment, if I may.

>> JUDGE GIBSON: That's fine.

>> MR. SILVERMAN: Thank you. A brief closing comment. I wanted to note that the discussions -- particularly this morning that occurred in the proceeding underscored the complexity of the regulations that the Board is dealing with and the considerable room that there is for differing interpretations of those regulations, as the Board, itself, I think recognized earlier today.

I assured the Board yesterday that the Department has proceeded in good faith in evaluating

the Petitions to intervene in this case and in making its best judgments with respect to the admissibility of the contentions. As I stated, we did not proceed on the basis of a predetermined decision to challenge all of the contentions, nor did we decide to throw everything against the wall to see what might stick. I want to reassure this Board as well, as to our positions and the manner in which we arrived at them. We take our ethical obligations seriously, as I am sure every attorney in this room does.

It's not at all unusual in NRC proceedings for applicants to challenge the admissibility of large numbers of contentions.

In my own experience, in the Mox proceeding, all told, there were over 80 contentions that were proper, but only approximately 11 admitted. And as I recall, ultimately, those 11 were either withdrawn or dismissed on the basis of summary disposition. Our positions in that case, on behalf of that Applicant, which was not the Department of Energy -- although, it was a DOE contractor -- were reasonable and proper.

More recently, in the Indiana Point licensing renewal proceedings, there were over 150 contentions submitted, some by sophisticated

petitioners, like the State of New York. All of the contentions were challenged by the Applicant. And while one petitioner was dismissed from the proceeding, I believe for improper conduct, only about roughly in the teens, mid teens, about 15 contentions were admitted. In this case before us, it's no less plausible that Nevada's 200-plus contentions are not admissible than it is that they're all admissible as the petition alleges.

In closing, however the matters before these Boards, established in this proceeding are decided, I would be remiss if I did not make it absolutely clear that the Department has acted professionally in good faith and with due regard for the integrity for the NRC adjudicatory process. You may disagree with us on individual issues, but our credibility as -- as an honest participant in this proceeding should not be questioned. And thank you for taking the time.

>> JUDGE GIBSON: Thank you. NEI.

>>MR. REPKA: David Repka for NEI. Mr. Chairman, very briefly: I withheld my comment this morning. There has been much discussion this morning of the preclosure performance assessment and the postclosure assessment. NEI has a number of

contentions that go to those issues. The Department of Energy, the NRC staff and Nevada have opposed all of those contentions. We believe, for the reasons stated in our Reply, they are all admissible. There was some discussion yesterday of whether an issue could be material if it did not plead a violation of NRC requirements. We believe that for a party in a contention that would support the application and support compliance, that materiality provision would not apply.

It would not have to allege a violation; but even beyond that, our contentions did allege violations and to that point, this morning, I heard the Department of Energy counsel referenced, for example, 10 CFR 63.304, which is the reasonable expectation requirement with respect to the postclosure analysis, to say that DOE cannot use bounding parameters for everything, because that would be too conservative.

That's precisely the argument we've made in several of our contentions and we do believe that, for example, our contention -- that we are -- it's perfectly admissible to allege as we have, for example, that the seismic design is based upon an earthquake that is greater than anything that has

been experienced in the history of the world or as we have with respect to the total system performance assessment, we've alleged there is a margin of safety that amounts in the igneious or volcanic assessment that accounts for up to 40% of the total postclosure dose. Those are the kinds of contentions that we do believe are admissible based upon a violation of the various standards discussed this morning and for other reasons as well. We have also alleged that those contentions relate to a lot of violations -- I won't get into that here, that's addressed in our pleadings, but I did want the record to reflect those points.

>> JUDGE GIBSON: Okay. Okay. NRC staff, anything you need to clean up that we didn't address today?

>> MS. YOUNG: Mitzi Young for the NRC staff, just a few statements.

>> JUDGE GIBSON: Okay.

>> MS. YOUNG: The staff wanted to emphasize that the Part 63 regulatory scheme is risk-informed and performance-based. I believe Nevada has always focused on the performance-based and argued about the independent enforceability of certain provisions in 63.

I think when you look at the preamble to the final rule, the Commission makes it clear that the purpose of performance assessment and Part 63 is to focus attention on those activities that are most important. So, therefore, where there were concerns about uncertainty or certain parameters, it is not a theoretical request for a perfect calculation, but it has to do with understanding the performance of the repository and what things are significant contributors to dose.

With respect to the Board statement earlier today in terms of the staff's positions on the filings for this proceeding, the staff would like the Board to understand that regardless of whether -- in the staff's view -- a contention meets contention and admissibility requirements, if there is a significant safety issue raised by a contention, even though it does not satisfy the requirements for admissibility under 10 CFR.2.309 F(1), the staff will consider that significant safety issue in its review. Thank you.

>> JUDGE GIBSON: Thank you. Let me just say, you all will be -- we will stand in recess until 9:00 tomorrow morning at which point, Construction Authorization Board 1 will be here on the bench. They will be addressing the issues that are set forth

in Appendix C, but I want to remind each of you about your homework to make sure you apprise them of any contentions that are affected by the new rulemaking. And we stand recessed until then. Thank you.

[Whereupon,the hearing was concluded]

CERTIFICATE OF REPORTER

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