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NUCLEAR REGULATORY COMMISSION

Title: Cogema Mining, Inc.
Irigaray and Christensen Ranch Facilities

Docket Number: 40-08502-MLR
ASLBP Number: 09-887-01-MLR-BD01

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
3 ATOMIC SAFETY AND LICENSING BOARD PANEL
4 ORAL ARGUMENTS
5

6 IN THE MATTER OF Docket No.
7 COGEMA MINING, INC. 40-08502-MLR
8 IRIGARAY AND CHRISTENSEN ASLBP No.
9 RANCH FACILITIES, 09-887-01-MLR-BD01
10 LICENSE NO SUA-8502

11
12 Tuesday, June 9, 2009

13
14 Presentation Hall, Room 136
15 Whitney Building
16 3059 Coffeen Avenue
17 Sheridan, Wyoming
18

19 The above-entitled matter came on for oral
20 argument at 9:00 a.m.

21 BEFORE:

22 HON. ALEX S. KARLIN

23 HON. PAUL B. ABRAMSON

24 HON. WILLIAM M. MURPHY
25

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P R O C E E D I N G S

1
2 JUDGE KARLIN: Good morning. Please
3 be seated.

4 Good morning. My name is Alex Karlin,
5 and I'd like to call this meeting of the Atomic
6 Safety and Licensing Board to order. I want to
7 have -- are the microphones on?

8 First, Ms. Reporter, I'd like to go on
9 the record, and welcome everyone here, the
10 representatives of parties, and the public, and
11 if any media are present, you're welcome as well.

12 We're here to conduct an oral argument
13 in the matter of Cogema Mining, Inc. This is a
14 challenge that has been filed to its application
15 for a 10-year renewal for its license to conduct
16 in situ leach mining operations for uranium at
17 two of its facilities --and I'm not sure I'll get
18 the pronunciation right -- the Irigaray Ranch
19 facility, which I believe to be in Campbell
20 County, Wyoming, and the Christensen Ranch
21 facility in Johnson County, Wyoming.

22 For the record, the Docket Number is
23 040-08-502. The License Number is SUA-1341.
24 This oral argument is being conducted pursuant to
25 an order that we issued on May 21 -- that this

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1 Board issued on-May 21. Today's date is June 9,
2 2009, and the location of this oral argument is
3 the Whitney Building on the campus of Sheridan
4 College in Sheridan, Wyoming.

5 First, I'd like to introduce the
6 members of this Board, this Atomic Safety and
7 Licensing Board. To my left is Dr. Paul
8 Abramson. He has a Ph.D. in physics and a juris
9 doctor in law. He served as the Atomic Safety
10 and Licensing Board panel's special associate
11 chief judge, legal and technical, from 2005 to
12 2009. That was a five-year stint.

13 Dr. Abramson's experience includes
14 being the head of LWR Safety Systems Analysis at
15 Argonne National Laboratory, and later as a
16 partner in several major law firms including
17 Winston and Strong, specializing in power project
18 development, construction and finance.

19 To my right is Dr. William Murphy. He
20 has a Ph.D. in geology. He's a professor of
21 geological and environmental sciences at
22 California State, Chico. He is a member of the
23 United States Nuclear Waste Technical Review
24 Board.

25 I am -- my name is Alex Karlin. I'm

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1 a lawyer. My training, I spent 30 years doing
2 primarily environmental law, and I've been a
3 judge since 2004, and I will serve as the Chair
4 of this Board, this three-judge Board.

5 I'd like to introduce the other
6 members of our staff today. Ms. Meghan Wright,
7 over here to my right, is a lawyer and she is the
8 law clerk who is assisting this Board on legal
9 research and other matters.

10 And Ms. Ashley Prange is, I guess,
11 outside, perhaps in the hall helping to let
12 people know what room to come in to. She is the
13 administrative assistant to this Board, and very
14 helpful.

15 We have a public affairs officer, who
16 is not here, but is available by phone. If any
17 media need to contact him, you can get the
18 information from Ms. Prange or Ms. Wright.

19 The second item of business, I'd like
20 to thank Sheridan College for allowing us to use
21 their beautiful facilities. Very nice, and I
22 think the acoustics are good. Randy Hyde is the
23 multimedia specialist who has helped set this up,
24 and Starr Zavel is the administrative assistant,
25 and we are very appreciative to be able to be a

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1 guest in their facility today. We welcome the
2 public, and we're glad to see a number of people
3 here.

4 Now I'd like the parties to introduce
5 themselves, if you would. Counsel to the
6 parties, identify yourselves, and perhaps we
7 could start with the Petitioner, the Oglala
8 Delegation of the Great Sioux Nation Treaty
9 Council.

10 Mr. Frankel?

11 MR. FRANKEL: Thank you, Judge. My
12 name is David Frankel; I am legal counsel, co-
13 counsel, for the Oglala Delegation.

14 JUDGE KARLIN: Welcome.

15 MR. FRANKEL: Thank you.

16 MR. BALLANCO: Good morning, Your
17 Honor. My name is Tom Ballanco. I'm also
18 counsel for the Oglala Delegation.

19 MS. ANDERSON: Good morning. I'm
20 Shannon Anderson with Powder River Basin Resource
21 Council.

22 JUDGE KARLIN: Welcome, Ms. Anderson.

23 MS. ANDERSON: Thank you.

24 JUDGE KARLIN: For Cogema, Morgan
25 Lewis. Mr. Glasgow?

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1 MR. GLASGOW: Good morning, Your
2 Honor. I'm James Glasgow; I'm a partner at the
3 Morgan Lewis law firm in Washington, D.C., and
4 I'm here today as counsel for Cogema Mining.

5 MR. BURDICK: Good morning, Your
6 Honor. I'm Stephen Burdick, also with Morgan
7 Lewis.

8 JUDGE KARLIN: Okay. Welcome.

9 MR. KUYLER: Good morning, Your Honor.
10 Ray Kuyler, also with Morgan Lewis.

11 JUDGE KARLIN: Welcome. Welcome.

12 And for the NRC staff introductions?

13 MR. KLUKAN: Your Honor, Brett Klukan
14 for the NRC staff.

15 MS. BOOTE: And Christine Jochim
16 Boote, NRC staff.

17 MS. MARCO: And Cathy Marco, NRC
18 staff.

19 JUDGE KARLIN: Okay. Great. Thanks
20 for the introductions.

21 Some words about housekeeping.
22 Everyone's got -- if anyone has a cell phone,
23 please put it on mute or turn it off entirely --
24 let me make sure I've done that. If you have any
25 cell phone conversations, please take them

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1 outside.

2 If there are any media present, the
3 Board welcomes the media and appreciates your
4 coverage because it's a way of getting word out
5 to the public. If there are any photography, it
6 should only be done with the ambient lighting,
7 and please be in a stationary position, no moving
8 around the room. This is to assure that cameras
9 and the media don't interfere with our
10 proceeding.

11 A transcript of this proceeding will
12 be available on the NRC webpage in about two
13 weeks, so for anyone who's not here, or who would
14 like to consult the transcript, you can do that.
15 I think it is through the Agency Document
16 Management System, we sometimes refer to as the
17 acronym ADMS, the ADMS system.

18 For the benefit of the public, I think
19 it is important for me to kind of make three
20 introductory points: the role of this Board, who
21 is this Board, what do we do; the history of this
22 application as far as we know it; and the purpose
23 of today's proceeding. I'd like to hit both --
24 all three of those.

25 The nature and the role of this Board.

1 There is several handouts that Ms. Prange has on
2 a desk, I think, outside that explain a little
3 bit of what the Atomic Safety and Licensing Board
4 is, and what we three judges do. But as an
5 overview, federal law creates Nuclear Regulatory
6 Commission, and it regulates all nuclear
7 radioactive facilities in this country. Right
8 now it's got four Commissioners who head the NRC.
9 They are appointed by the President and confirmed
10 by the Senate. They are essentially the
11 executive branch of the NRC.

12 They have a large regulatory staff
13 working for them, several thousand people who
14 work on applications and other important matters,
15 and they are what I will refer to, and we will
16 refer to, as the NRC staff. The NRC staff is
17 represented by counsel here today. They are the
18 people who are processing the application; they
19 are separate from us.

20 This Board is a different entity. We
21 are kind of the judicial branch of the NRC. We
22 are independent entirely of the staff and of the
23 Commissioners. We have no allegiance to them.
24 In fact, it is prohibited by law for us to have
25 any conversations with the staff about any

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1 matters associated with this license.

2 The same really holds true with regard
3 to the Applicant and the Petitioners as well.
4 We're prohibited from talking with them; that's
5 what's known as ex parte communications. But the
6 question often arises with regard to the staff
7 because they are in the same building as us. And
8 the NRC is comprised of both of us, but they are
9 a separate entity.

10 Our independence is assured by a
11 number of items. One is we don't have -- no one
12 ever does any performance reviews of us. We are
13 appointed, we do our job, we call them the way we
14 see them, and at the end of the year, or the end
15 of the day, no one can give us a bonus, or take
16 money away from us, or dock our pay if we don't
17 rule the way somebody likes.

18 You can appeal our decision, you can
19 take it up to the higher levels, and certainly
20 people do that all the time, but you can't, you
21 know -- but we're going to call them the way we
22 see them, as best we see them.

23 JUDGE ABRAMSON: And every now and
24 then we get reversed.

25 JUDGE KARLIN: And every now and then

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1 we get reversed. But every now and then we get
2 affirmed. And so, yes, we're here -- and
3 likewise we don't talk with the staff, we can't
4 talk with the Commissioners. They can't call us
5 up on the phone and say, Hey, you know, how's
6 that case coming, or how are you going to rule.
7 They are totally separate from us, and they honor
8 that.

9 So when we talk about the NRC, there's
10 the Commissioners, who are the executive; the
11 staff, who are kind of doing a lot of the work;
12 and then there are the Board that does the
13 judicial branch of the NRC.

14 As to the history of this proceeding,
15 some of you, and certainly the parties, may know
16 the history of this better than we do, because
17 all we know is what's been put into these
18 pleadings here that these parties have all filed
19 with us. We have not studied or mastered the
20 history of this facility, nor is that our job to
21 do. Our job is to rule on what's put before us
22 by the litigants, by the parties.

23 But as far as we can tell, or I can
24 tell, from looking at that, the original license
25 of this facility was issued in 1978. The

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1 ownership of it seems to have passed through a
2 number of companies. In 2001 the license status
3 apparently changed from in situ leach mining
4 operation to a decommissioning and restoration
5 mode in 2001. In 2007, apparently Cogema asked
6 that it be -- requested it be amended so that
7 they go back to an operational mode, and
8 apparently in September of 2008, the NRC staff
9 approved that change.

10 That change was not challenged as far
11 as I know. It's certainly not the issue in this
12 case, because this case involves the renewal of
13 the license, not the change from the
14 decommissioning status to the operational status.

15 This proceeding has a little shorter
16 life. On May 30, as I understand it, 2008,
17 Cogema applied for a license renewal. The
18 license was set to expire, if I have this right,
19 on June 30, 2008. At that time it was a
20 decommissioning and restoration license. At that
21 time. But, you know, under the provisions of
22 law, it's been continued.

23 On February 9, 2009, the Commission
24 issued a notice in the *Federal Register* saying
25 that they'd received an application for the

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1 renewal of this license, and if anyone has any
2 objection to the renewal of this license, they
3 have 60 days to file petitions challenging the
4 renewal, or forever hold your peace.

5 On April 10, 2008, two challenges,
6 petitions, were filed; one by the Oglala
7 Delegation for the Great Sioux Nation Treaty
8 Council --

9 And is it okay if I refer to it as
10 Oglala Delegation?

11 MR. FRANKEL: Yes, Your Honor.

12 JUDGE KARLIN: Okay. And the other is
13 the Powder River Basin Resource Council. They
14 also filed a challenge. And the Oglala
15 Delegation had 19 contentions, depending on how
16 you count them; and the Powder River Basin
17 Resource Council had 23 contentions, again,
18 depending on how you count them.

19 Cogema and the staff filed answers to
20 the petitions that were presented, and they have
21 alleged that neither of the parties have what's
22 known as standing to file these -- or haven't
23 shown that they have standing to file these
24 challenges, and they also allege and contend that
25 the contentions are not admissible under the

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1 criteria that is set out in the law. Oglala
2 Delegation filed a reply; Powder River did not as
3 far as I can tell.

4 So after reading all the pleadings,
5 this Board kind of looked at it and said, We have
6 some questions about what was filed, what was
7 written here, and so we thought we would have
8 this oral argument to ask some of these questions
9 and get clarification.

10 One thing that's important to cover at
11 this point is that this is not the time -- this
12 is not a trial, this is not a time when witnesses
13 come forward, or experts come forward, and sit on
14 the witness stand and swear to tell the truth,
15 the whole truth, nothing but the truth. This is
16 not an evidentiary proceeding. All the
17 information that is going to be considered by
18 this Board has been filed.

19 All we're going to seek today is
20 clarification of those filings. And we may ask
21 some factual type of questions, but really
22 they're an attempt to clarify and understand what
23 has been filed and whether it's adequate under
24 the legal criteria that apply.

25 Also, in the meantime, on May 18, the

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1 Commission, the NRC Commission, the four
2 Commissioners, issued a ruling in another case, a
3 somewhat similar case, it was an in situ leach
4 mining case in Crow Butte, one of the Crow Butte
5 boards, and they issued this ruling. And it
6 deals with a number of the contentions and issues
7 that are also in this case.

8 So we hurriedly read that decision.
9 I think it's relevant. We asked the parties to
10 brief the relevance of that decision to help us
11 understand, you know, because it may -- it does,
12 I think, affect some of our rulings here.

13 Okay. So what's the purpose of
14 today's proceeding? It's not a trial, it's not
15 an evidentiary hearing, it's -- the purpose for
16 us to decide whether the request for the hearing
17 meet two basic legal requirements. One is
18 standing, have the Petitioner shown that they
19 have standing, that they have some injury that
20 may affect them, that warrants --entitles them to
21 bring this case.

22 And second, have they showed
23 contention admissibility, have they raised issues
24 which are within the scope of what we can
25 consider under the law, have they met the

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1 criteria that are laid out in the relevant reg,
2 10 CFR 2.309(f)(1) 1 through 6. And these are
3 very strict criteria that we have to follow.

4 If we find that the parties have
5 standing, and have raised admissible
6 contentions, then we will grant their request
7 that a hearing be conducted. The hearing will
8 then be conducted later. And if we deny that
9 there -- if we find that they don't have
10 standing, or that even if they have standing they
11 haven't filed an admissible contention, then
12 their request for a hearing is denied, and that
13 would be the end of this proceeding, the end of
14 this adjudicatory proceeding, except if they
15 choose to appeal it to the Commission, which they
16 would be entitled to do.

17 So this is not the hearing, this is
18 not the trial, but it is a prerequisite that is
19 necessary before they could be entitled to it.

20 Do I have any additions? May I ask my
21 colleagues if there is anything they'd like to
22 add or say?

23 JUDGE MURPHY: No.

24 JUDGE ABRAMSON: Carry on.

25 JUDGE KARLIN: Okay. Format, before

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1 starting we talk about a little bit of logistics.
2 The proceeding breaks down into four -- several
3 basic parts. First we're going to have opening
4 statements. Each party is entitled to a 10-
5 minute opening statement, and Ms. Wright is going
6 to keep -- be the time keeper, 10 minutes, you
7 get a two-minute warning, and then, you know,
8 pretty much that'll be it. Try to keep it to 10
9 minutes.

10 The sequence will be we'll start with
11 the Oglala Delegation, Powder River Resource
12 Council, Cogema, and then the NRC staff, opening
13 statements. Next I think we're going to ask some
14 questions that are sort of orientation question,
15 both into time and geography. We have -- we're a
16 little unclear about some of the orientation, and
17 we're going to ask some questions.

18 We will allow the parties to --
19 usually we have a podium and they'll come up and
20 each lawyer will talk and then they'll sit down,
21 and the next lawyer -- this one we'll just --
22 everyone stay seated, we don't have enough space,
23 and we will ask questions of you on orientation.

24 Next we're going to get into standing.
25 Do the parties -- have the Petitioners shown in

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1 their pleadings that they have standing. And so
2 we'll start with the Oglala Delegation standing,
3 and probe and ask some questions about that of
4 Oglala, and the other two, the Cogema and the
5 staff, and then we'll go to the Powder River and
6 do the same thing, standing.

7 After standing we're going to get to
8 contention admissibility. We will start
9 contention admissibility with some generic cross-
10 cutting questions that we have. A number -- each
11 of the parties have given us some general
12 overview as to the criteria for contention
13 admissibility, and some of those are cross-
14 cutting and apply to a whole bunch of
15 contentions, so rather than dealing with them
16 contention by contention by contention, we
17 figured we might hit several issues on a generic
18 basis.

19 Then we're going to go to specific
20 contentions and ask questions about specific
21 contentions. And right now -- and this is a
22 list, please, parties, make a note of it, of the
23 ones where we think we have some questions. We
24 may add to this, we may delete some of this, but
25 right now these are the ones.

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1 And what I'm going to do is go through
2 the Oglala Delegation contentions, and I believe
3 the Powder River has a similar contention in each
4 case, and so we'll cover both of them together
5 essentially: Oglala Delegation Contention 4B,
6 and that is Powder River 2; Oglala 8A, and this
7 is Powder River 1A and 1E; Oglala 8B, 8C, 8D, and
8 then it jumps to F, and then it's G and then I
9 and K.

10 And I'm not going to go through the
11 Powder River equivalents, but I have them written
12 down here, and when we get to it, I will try to
13 mention the Powder River equivalent, and what
14 we'll do is ask questions about those
15 contentions. And pretty much those are the only
16 contentions we're going to ask question about.

17 And then we're going to have closing
18 arguments by the parties, five minutes apiece.
19 And the questions are really to focus on -- we're
20 not here today to evaluate whether or not the
21 allegation is true, or even that they would win
22 or lose on the end if we had a trial on it.

23 We're here to try to figure out
24 whether the contentions are articulated in a way
25 that meets the criteria that they have to meet

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1 under the reg: did they give us a specific
2 statement, did they provide alleged facts or
3 expert opinion to support it, did they show that
4 there's a genuine dispute. These are preliminary
5 criteria. It's not the merits of whether they're
6 right or wrong, it's just whether they've got
7 enough laid out in the papers to get in the door.

8 Let's see here. I think we're going
9 to be able to finish today. We've thought about
10 our questions and actually this is one of those
11 cases where the more we read and the more we
12 think about it, some of the times our questions
13 appear to be answered. So we've had fewer
14 questions, particularly since the Commission
15 issued its decision in Crow Butte. So I think
16 we're going to be able to get done today, and
17 we're going to give it a try. So hopefully the
18 parties will be relatively succinct in their
19 answers.

20 At this point I'd like to proceed with
21 oral argument, or opening statement, but I'd like
22 to ask each of the parties do they have any -- do
23 you have any questions -- let me start with
24 Oglala -- or additional things you think need to
25 be raised at this point?

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1 MR. FRANKEL: Your Honor, since -- in
2 your May 21 order, you said that you would give
3 us the questions ahead of time, or at the
4 commencement of the hearing --

5 JUDGE KARLIN: Yes.

6 MR. FRANKEL: -- and I recognize that
7 you've just read this list. If we might have
8 just three or five minutes to look at those so I
9 could organize my presentation, or even two
10 minutes, that would be very helpful.

11 JUDGE KARLIN: Well, what we're going
12 to do is take a break.

13 MR. FRANKEL: Oh, okay.

14 JUDGE KARLIN: So, I mean we're not
15 going to go straight through. Probably before --
16 I'm quite sure, you know, in about an hour and a
17 half or something we'll take a break. And I
18 don't know how far we'll have gotten on that, so
19 I don't know whether we'll have gotten to many of
20 them. But the first one is, you know, as I say,
21 Oglala 4B and Oglala 8A. So you might want to
22 think about those --

23 MR. FRANKEL: Oh, yes, Your Honor,
24 I'll be prepared for those. But thank you for
25 the clarification. I've had the experience in

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1 the past where the questions start flying at --

2 JUDGE KARLIN: Yes.

3 MR. FRANKEL: -- 9:01, and so I
4 appreciate that.

5 JUDGE KARLIN: Fair enough. Fair
6 enough. Well, we'll be a little while before
7 that.

8 JUDGE ABRAMSON: Yes, let me just make
9 sure that everybody understands this situation
10 here. First of all, as Judge Karlin said, this
11 is not an evidentiary hearing, nor is it an
12 opportunity for you to get on your soap box, any
13 of you. It's an opportunity for us to ask
14 questions to clarify what's in the written
15 record.

16 We're asking questions only of
17 attorneys and we're only interested in the legal
18 opinions of the attorneys about what's actually
19 written in the pleadings. We're not going to
20 take new factual evidence.

21 The second thing I'd like to do is to
22 plead with all of you to please keep it brief.
23 Remember, we're asking the questions, we're not
24 interested in you repeating or regurgitating
25 what's in the pleadings. Just answer the

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1 question, and please answer it succinctly. And
2 so even if we've allocated you 20 minutes, if you
3 can say it in two, say it in two, please.

4 JUDGE KARLIN: All right. Good.

5 Questions from Powder River, any
6 procedural issues or things we've missed?

7 MS. ANDERSON: No, Your Honor.

8 JUDGE KARLIN: Okay. Thanks.

9 Mr. Glasgow?

10 MR. GLASGOW: Nothing for us, Your
11 Honor.

12 JUDGE KARLIN: Okay. And staff?

13 MR. KLUKAN: Nothing from the staff,
14 Your Honor.

15 JUDGE KARLIN: Okay. Okay. Well,
16 then let's start with oral argument. This is
17 where you get 10 minutes to say hopefully
18 something relevant and succinct, but it's your
19 time, and we're going to try not to interrupt it.

20 So who's going to do the oral argument
21 for the Oglala?

22 MR. BALLANCO: Good morning, Your
23 Honor.. Tom Ballanco. If the Board permits, Mr.
24 Frankel and I would like to split the 10 minutes
25 between ourselves.

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1 JUDGE KARLIN: That's fine.

2 MR. BALLANCO: I'll go ahead and go
3 first. Thank you, Your Honor.

4 MR. BALLANCO: Good morning, members -

5 -

6 JUDGE KARLIN: We'll give you a one-
7 minute warning at the five -- for the five.

8 MR. BALLANCO: Thank you.

9 OPENING STATEMENTS ON BEHALF OF THE PETITIONERS

10 MR. BALLANCO: Good morning, members
11 of the Board, Council, staff, and members of the
12 general public. My honor to be here representing
13 the Oglala Delegation of the Great Sioux Nation
14 Treaty Council, on whose behalf I welcome you all
15 to this Treaty territory.

16 This is a contentious definition of
17 land here, and perhaps no one is more aware of
18 those contentions than the Oglala Delegation of
19 the Treaty Council. As I was driving up here
20 from Denver, I was reminded of the history of
21 this land around here, the Powder River country.
22 These are places I remember studying when I was
23 learning to be a cavalry officer at West Point.

24 And for many of us, even 120 years
25 later, we have this, I won't call it post-

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1 traumatic stress because -- I don't know what it
2 is, but it's an inherent fear of these Great
3 Plains. And most of the people that we're afraid
4 of are Oglala Sioux.

5 And, you know, we like to think that
6 the United States has been victorious in all its
7 military engagements since the beginning of our
8 history. And, matter of fact, that's not the
9 case, particularly when one thinks about what was
10 known as the Powder River War, also known as Red
11 Cloud's War, that took place here on this very
12 land.

13 And that is where the United States in
14 the aftermath of the Civil War was handily
15 defeated by the combined Lakota and Northern
16 Cheyenne forces. And such that they had to sue
17 for peace and remove roads and forts in this part
18 of the country.

19 And what we're talking about -- and,
20 you know, when I look back at that, it seems
21 like, oh, this is just a quaint part of American
22 history, but what that really was was intense
23 combat that took place here. And we're not
24 talking about, you know, something that was a
25 side thought. These were -- the U.S. cavalry

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1 that fought here were Civil War veterans. These
2 are the cavalry the defeated-Jeb Stuart. I mean
3 this is as good as American cavalry got.

4 And essentially what happened here is
5 every time they left the post they were wiped out
6 to the man. Custer's the most famous,
7 Fetterman's another. But that happened here.
8 And the people who fought so bitterly for this
9 land were the Lakota, and they have lived in this
10 land for thousands of years.

11 An analysis of Lakota language
12 reflects in the language certain understandings
13 of star positions that they've mapped that were
14 present thousands of years ago, at least 3,000
15 years ago, certain terms reflect places where
16 stars were 3,000 years ago.

17 So anthropologists have used that to
18 conclude that, A) this linguistic system is at
19 least 3,000 years old, and B) they're talking
20 about geography 3,000 years ago. So these bands
21 have been in this area since before the Greeks
22 were fighting the Persians. And that, just to
23 put us in a slight historical perspective, shows
24 what the attachment is to this land.

25 MR. WRIGHT: One minute.

1 MR. BALLANCO: Thank you.

2 I guess for the last 120 some odd
3 years this land has, in the definition of the
4 United States, belonged to the United States.
5 But it is a cultural and historical property of
6 the Lakota Nation, the Oglala Lakota. They're
7 uniquely qualified to know the cultural and
8 historical impact of artifacts here, and have a
9 deep desire to be involved in the process where
10 one evaluates the resources on land that they
11 have such a deep connection with, and have fought
12 so fiercely for.

13 And we hope that that is taken into
14 consideration, and placed in its appropriate
15 context. Thank you.

16 JUDGE KARLIN: Thank you, Mr.
17 Ballanco.

18 MR. FRANKEL: Thank you. So I'll talk
19 a little faster.

20 Okay. So the United States enters
21 into this treaty because it's costing so dearly
22 in blood and money. And the Treaty of 1868 has
23 never been fully abrogated; it still exists. A
24 federal court just ruled on that, it's in our
25 pleadings, 141 years after it was entered into.

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1 The Oglala people are still here. They've been
2 here this whole time, they're still here, they're
3 going to be here. This -- I mean if they were
4 going to get wiped out, it would have happened
5 already.

6 And so these canons of construction
7 that come out of the trust responsibility are
8 important because ultimately, as lawyers, we have
9 to explain it to the people. As the government,
10 you have to at least explain it to their lawyers.
11 And then when it gets explained in Lakota, to
12 Chief Red Cloud, or to every single member who is
13 interested, if you -- this is not an evidentiary
14 hearing, but if I were to pick my brother over
15 here who he knows the history just as well as any
16 historian, it's an oral history, it's a living
17 history, it was his great grandparents and
18 grandparents that fought over this land, and in
19 the same way their -- if there's bones, if
20 there's blood on the ground, that's our people's
21 bones and blood.

22 These 68 cultural resources that are
23 in this 288 square meters, our people want to
24 know about that. What do you mean buried
25 cultural materials? As Mr. Ballanco said, We're

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1 the only ones who can tell you how significant
2 those are.

3 And we have questions. Article 1 of
4 the Treaty says if there's a bad man among the
5 whites, right, I know that's a racist
6 connotation, we have to remember where we're at,
7 in that time period, but at that time period the
8 concern was how will you from Washington
9 restrains bad men among the whites from causing
10 injury to our people?

11 And just now \$600,000 was awarded
12 because a bad man among the whites did a sexual
13 harassment onto an Indian girl, and she sued and
14 she won that \$600,000 under Article 1 of the 1868
15 Treaty. That just happened this year. So you
16 can't just say it doesn't exist.

17 And, in fact, how, if there's any
18 person in the world who has the standing and the
19 right to stand up and ask, Hey, America, how do
20 you know these are not bad men among the whites,
21 how do you know you won't have to take them into
22 custody and pay damages to us under the Article 1
23 of the 1868 Treaty if you don't let us in to ask
24 these questions, because no one else can even
25 think of these questions. They don't know enough

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1 about the history to even ask about it.

2 So one of these questions I would ask
3 on behalf of my people, What happened to these
4 274 55-gallon drums of yellowcake uranium that
5 was part of this 2005 drying program that was a
6 cited violation that led to all these changes in
7 the application? This is not the first
8 Commission to come to Indian country and explain
9 a bunch of federal laws and get the Indians to
10 try to understand it and go along.

11 You have to understand, you should be
12 welcoming us to this process, you should be
13 inviting us. These lawyers from Washington, they
14 should be thanking us for being here because our
15 presence provides whatever scintilla of integrity
16 there is from the perspective of the Lakota.

17 And under the canons of construction,
18 under the trust responsibilities decided by the
19 Supreme Court, you must consider how the Indians
20 understood it at the time, and you must interpret
21 any ambiguities in favor of the Indians because
22 treaties are contracts and that's how treaty
23 contracts are interpreted under Indian law.

24 And you say, Well, this -- none of
25 this is in the federal regulations. We're going

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1 to hear about that, but yet your judged by a
2 standard -- even though you don't have
3 performance reviews, you're judged by the
4 standard of the Administrative Procedure Act.

5 MR. WRIGHT: One minute.

6 MR. FRANKEL: And so we know that
7 you're mindful of this, that you're very mindful
8 of your responsibilities, you're reading all the
9 pleadings, you've invited us to a hearing, we
10 really appreciate that. We really appreciate an
11 opportunity to state our position, and to do it
12 in a civil way.

13 And -- but we have to tell you that
14 this issue comes not without emotion for our
15 people. And, you know, there's a lot of roots
16 that go long time for the stewardship of the
17 land, the wildlife, the eagles. And the Oglala
18 Lakota have never handed around titles and deeds
19 for property, but they have always stewarded all
20 of their relations.

21 And I'm going to close my part of it
22 with that. I appreciate the opportunity. I will
23 answer any and all questions to the best of my
24 ability, as always, and, you know, we'll take it
25 from there. Thank you.

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1 JUDGE KARLIN: Thank you, Mr. Frankel.
2 Ms. Anderson?

3 MS. ANDERSON: Thank you, Your Honor.
4 And welcome to Sheridan, my beautiful community
5 that I have the pleasure of living in, and I'm
6 glad that you're able to make it here for this
7 important proceeding on this important facility
8 in the Powder River Basin.

9 Our organization has a long history of
10 working in the Powder River Basin. We were
11 formed in 1973 to address the impacts of large
12 surface coal mines coming in to our community and
13 what impact that would have on rural landowners,
14 particularly family farmers and ranchers who
15 homesteaded here many generations ago.

16 Since that time we've been active in
17 the Powder River Basin area, and have held
18 companies to a standard of responsible
19 development in our communities, development that
20 does not contaminate water resources, development
21 that does not hinder land resources, and
22 development that is responsive to community and
23 is done in a way that treats the people here that
24 have been here for multiple generations with
25 respect and dignity.

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1 We have brought this petition before
2 you as a way to participate in the process and
3 ensure that the public's interests are being
4 protected. We have reviewed the public
5 information on this facility, including a long
6 record of spills, leaks, underground excursions,
7 evaporation pond leaks, and the failure to
8 restore ground water to pre-mining conditions,
9 and we see no indication why those problems will
10 not continue if this license is renewed.

11 So we have that history and that
12 background in mind when we come before you today.
13 And we believe this history calls for stricter
14 oversight and stronger license conditions. We
15 also believe it calls for a hard look at the
16 overall regulatory program, and how it applies to
17 this license.

18 For instance, it is still somewhat
19 unclear what restoration standards you can apply
20 to ISL facilities. The NRC just clarified in
21 April 2009 30 years after this facility started
22 operation, that new reg 1569 is no longer
23 applicable, and the regulatory criteria used to
24 establish alternative concentration limits
25 applies to ISL facilities as opposed to state

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1 standards of restoring the class of use.

2 However, in the past, NRC has provided
3 "enforcement discretion", which allowed companies
4 such as Cogema, to meet state standards in lieu
5 of alternative concentration limits established
6 in the ISL licenses.

7 The ground water restoration rule
8 making is still ongoing and has not come to
9 fruition. While you may question the relevance
10 of all this regulatory background, we feel it
11 demonstrates that there is a large degree of
12 flexibility when it comes to around water
13 restoration, both from the companies and from the
14 regulators. And this can have negative impacts
15 on public health and the environment.

16 We are participating to ensure that
17 the NRC is enforcing its regulatory -- it's
18 regulations to the extent it can, and that
19 companies are not unduly taking advantage fo the
20 flexibility that those regulations provide.
21 Thank you. We appreciate your time.

22 JUDGE KARLIN: Thank you, Ms.
23 Anderson.

24 Mr. Glasgow?

25 OPENING STATEMENTS ON BEHALF OF THE APPLICANT

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1 MR. GLASGOW: Good morning, Your
2 Honors. I'm Jim Glasgow, and with me, as you
3 know, are Ray Kuyler and Stephen Burdick. And
4 throughout the presentations today, and responses
5 to the Board's questions, we will divide our
6 responses. It is a large mass of material, and
7 each of us has attempted to master parts of it.
8 And so any one person may be the expert on a
9 particular question:

10 No one can fail to be struck by the
11 sincerity and the emotion that's been shown today
12 by the Oglala Delegation's counsel. And we, too,
13 on behalf of Cogema Mining, have read in our own
14 way, and studied that history as presented
15 particularly in the Supreme Court's decision in
16 the Sioux Nation case in 1980, authored by
17 Justice Blackman. It is quite a tome, though
18 Justice Renquist has some dissenting points, and
19 from that we have learned of the Trail of Tears,
20 and the history which deserves compassion and
21 respect.

22 And, indeed, the Oglala Delegation and
23 the Sioux Nation have tried at different times
24 over history to gain redress before the Congress,
25 before the courts, and in other means as well.

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1 And we respect that. Certainly they are entitled
2 to pursue those avenues of redress.

3 But we are, of course, here before
4 this Board for a different purpose, and that is a
5 narrow purpose. It is the purpose of gaining a
6 10-year extension with respect to the Irigaray
7 and Christensen Ranch facilities, which, as the
8 Board has already noted, have been in existence
9 for more than three decades, and have been
10 addressed by the NRC on numerous occasions over
11 that time, both through license renewals of the
12 basic 10-year term, and through, as the Board
13 mentioned, a change in status to decommissioning
14 status and then yet again, quite recently, a
15 change in status to restore the right to operate
16 the mine.

17 And through all of these times the
18 Commission has made the necessary inquiries in
19 accordance with the Atomic Energy Act and the
20 Commission's own rules. So this is the focus
21 that we bring today, and our focus, of course, is
22 that we will look and answer in terms of the
23 NRC's rules, standards for contention
24 admissibility and standing.

25 And the question at hand, we say, is

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1 not the ability to address these broad injustices
2 that have been visited upon the Sioux Nation or
3 the Oglala Delegation, but rather to determine
4 whether this proceeding is being conducted, and
5 whether the Applicant has met the basic showings
6 that are required of it under the Atomic Energy
7 Act and the Commission's rules.

8 And further, since this is a renewal
9 proceeding, the focus is on a delta change. In
10 other words, the extent to which there is a
11 genuine and significant change and impacts
12 between what has been addressed in the past in
13 granting and addressing the status of the
14 application, to this proceeding which involves a
15 renewal for another 10 years.

16 Now, the Powder River Basin likewise
17 has presented a statement of its reasons for
18 desiring to be involved, but as I listened closed
19 to them, they seem to sound mostly of the desire
20 to have a different legal regime, or an interest
21 in the evolving regulatory process and the like.
22 But we feel that the Council, as with the
23 Delegation, in order to proceed and to gain a
24 hearing, must show instead the compliance with
25 the Commission's standards, which are judicial

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1 standards for standing and for contention
2 admissibility.

3 And we feel that neither the
4 Delegation nor the Council have presented the
5 kinds of facts and expert opinion that will back
6 up their contentions and establish their
7 standards in the way that is required by the
8 Commission's rules.

9 And the burden under the rules is, of
10 course, that of the Petitioners. They must show
11 that their organization, or at least one of their
12 respective members, will be injured. They must
13 show the plausible pathway, they must show the
14 causation, they must show the redressability.
15 Cogema contends that, in fact, these Petitioners
16 have fallen far short of those governing
17 standards.

18 A genuine dispute is also absent here.
19 That is to say a genuine dispute with matters
20 that are properly subject of the proceeding.
21 There may be a dispute about what else could or
22 should be done to remedy historical wrongs, to
23 craft different standards, but that is not the
24 genuine dispute that the Petitioners must show.

25 Now, of course, we, in the great mass

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1 of pleadings, have addressed many and varied
2 points that we think further amplify all of these
3 points. But maybe an overarching consideration
4 deserves emphasis at this point. And it stems
5 from what the Board has already mentioned, it is
6 the Commission's recent decision in the Crow
7 Butte case, Commission licensing issuance 0909.

8 And we think it is fundamental, as the
9 Board has recognized by asking that this be
10 briefed, because it is, in fact, first of all, a
11 reaffirmation of some of the fundamental
12 principles that apply. It reaffirms that the
13 Commission hearing process is not a forum for
14 litigating contentions based on conjecture or
15 vague allegations. Moreover, the Commission
16 expressly reiterated its strict requirements for
17 contentions admissibility, which are, as the
18 Commission has repeatedly said, strict as of
19 design.

20 Now we have heard from the Delegation
21 that perhaps the Board should disregard certain
22 portions of that Commission decision, but, in
23 fact, of course, it is binding upon the Board and
24 all boards. And we think it is dispositive of a
25 number of key points here, because many of the

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1 points are indeed identical to those that were
2 raised in the Crow Butte proceeding.

3 First and foremost, the Delegation
4 itself was not afforded legal standing in the
5 Crow Butte decision under the Commission's
6 decision. And it is -- I think, that is worthy
7 of key emphasis. And if you will, although
8 it's -- the details will wait -- the Commission
9 said, As the treaty was the only basis on which
10 the Delegation based standing, the Board
11 correctly found that the Delegation does not have
12 standing as a party in this proceeding.

13 While the Delegation's brief on appeal
14 offers interesting historical insights, it offers
15 no basis by which the Commission could disregard
16 the Supreme Court's holding with respect to
17 Congress's power to break a treaty.

18 And we feel and will show that, in
19 fact, the Delegation offers nothing else in this
20 proceeding that would establish standing for it.
21 And indeed the key distinction is that it was the
22 Oglala Sioux tribe, the officially recognized
23 tribe under federal law, that was afforded
24 standing in the Crow Butte decision. By marked
25 contrast it is the Delegation that is here before

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1 us today, not the tribe, and that's dispositive
2 of this issue in Cogema's view.

3 The matter of the contentions also
4 bears some study by way of comparison to those
5 that were admitted and those that were not in the
6 Commission's -- in the Crow Butte proceeding, and
7 such admission being either withheld or reversed
8 by the Commission. Foreign ownership is chief
9 among those, and we will come to that, I realize,
10 later. We feel that that is stare decisis on
11 this point. We feel that it is dispositive of
12 the inimicality consideration as well.

13 MR. WRIGHT: Two minutes.

14 MR. GLASGOW: And I will also say that
15 we believe that, on the basis of the arguments
16 that we will present later today, it will be
17 abundantly clear that these two fundamental
18 considerations are simply not met. Standing is
19 lacking for both Petitioners, no contention has
20 met the requirements of the Commission's rules
21 with respect to admissibility. Thank you.

22 JUDGE KARLIN: Thank you, Mr. Glasgow.

23 For the staff?

24 OPENING STATEMENTS ON BEHALF OF THE NRC STAFF

25 MR. KLUKAN: Your Honors, again, my

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1 name is Brett Klukan. I will be addressing
2 mostly, in our division of labor, the
3 Delegation's petition. Ms. Jochim Boote will be
4 addressing the Powder River Basin's.

5 in the interest of Judge Abramson's
6 direction to keep it brief, I will not burden the
7 Board with going over the positions taken in our
8 pleadings. Counsel for the Applicant has
9 already -- or furthermore, counsel for the
10 Applicant has already addressed many of the
11 issues that I was going to talk about in my
12 opening statement, and I feel no need to repeat
13 them.

14 I will just say that it is the
15 position of staff that neither Petitioner has
16 demonstrated standing, and neither Petitioner has
17 offered an admissible contention. In fact, the
18 Delegation offers up in favor of standing its --
19 what it offered up as contentions in the Crow
20 Butte renewal proceeding, all of which were
21 rejected by the Board.

22 What it offers up as contentions are
23 an amalgam of such proffered by it in the Crow
24 Butte renewal proceeding, and contentions
25 proffered somewhat successfully by the Oglala

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1 Tribe in the same. However, in transcribing
2 those contentions and making them relevant in
3 this context, in this license renewal proceeding,
4 it fails to offer up the same amount of support,
5 whether it be expert support, whether it be
6 factual discussions. It leaves those out of that
7 transcription to make it relevant here.

8 What we found, or what was present in
9 the Crow Butte renewal proceeding upon which the
10 Board and the Commission relied upon, for
11 example, the expert opinion of Dr. LaGarry. It
12 is noticeably absent. Not necessarily his, but
13 the equivalent is noticeably absent in their
14 petition before us today. PBR -- or the Powder
15 River Basin's contentions are likewise of a
16 reduction of contentions offered in the
17 Delegation's petition; some seemingly copied
18 straight out of the Delegation's petition into
19 their own. But as PBRC -- or PRBRC, doesn't
20 offer up any more support, doesn't add anything
21 to what the Delegation already states in its
22 petitions, just as the Delegation's petitions
23 fail -- or Delegation's contentions fail under
24 the factor of 10 CFR 2.309(f)(1), so do the
25 Powder River Basin's.

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1 With regard to some of the things said
2 here so far, the story of the Oglala Sioux tribe
3 and its relationship with the United States is,
4 by no doubt, a story of epic woe. One worthy of
5 Homer and the Greeks in terms of tragedy. A
6 story of cunning brutality and brutal cunning.
7 The staff does not deny that.

8 The question is what is the purpose of
9 the this proceeding today, and that purpose is to
10 talk about the two petitions with regard to this
11 facility. It is not to address those woes. It's
12 simply not within our authority, Your Honors.

13 With regard to several of the things
14 said by the Powder River Basin, this is not an
15 opportunity to go over the NRC's regulations, or
16 its regulatory processes. If the Council would
17 like to be a part of that, there are
18 opportunities for them to be involved in the rule
19 making. But this is not the opportunity to do
20 that.

21 Furthermore, this is about one
22 facility, one license, the Cogema. It is not
23 about all companies, it's not about addressing
24 their broad concerns they have with water
25 pollution in the state of Wyoming. It's simply,

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1 as counsel for the Applicant has said, whether
2 they've met their burden. And with that, Your
3 Honors, thank you.

4 JUDGE KARLIN: Thank you, Mr. Klukan?

5 MR. KLUKAN: Klukan.

6 JUDGE KARLIN: Klukan. Thank you.

7 Okay. That's great. That was the
8 opening statements. Thank you.

9 What we -- now I have a few questions
10 that sort of go to orienting me in time and in
11 space to what's going on here. We are -- the
12 first time I've been out here and it's the first
13 time I've heard of these facilities, or this
14 matter at all. I would like to ask, I think,
15 some questions first of the Applicants since they
16 can maybe fill me in a little bit on some history
17 and status, current status.

18 I would like to refer you to page 2 of
19 your brief in response to the Oglala Delegation.
20 I believe a similar discussion is found in your
21 response to the Powder River.

22 Let's -- perhaps it would be okay to
23 call the Powder River Resource Basin -- we'll
24 call you the Council, is that --

25 MS. ANDERSON: Yes.

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1 JUDGE KARLIN: Okay. So the
2 Delegation and the Council. I believe the same
3 passage is in the response to -- the answer to
4 the Council.

5 But on page 2 in your background, it
6 provokes the question for me, the final sentence
7 in that major paragraph, "Cogema has not yet
8 recommenced production activities." What is the
9 current status of activities at the facility? Is
10 it in decommissioning status, is it in
11 operational status, what is this production
12 activity status? What's the current status?

13 And I know there are two -- I guess
14 one of my problems here today will be there are
15 two ranches, two facilities, and I will ask this
16 question and I will be remiss because I need to
17 recognize that status may be different at each
18 facility. But what's the current status?

19 MR. BURDICK: I'll try and answer
20 this, Your Honor, but --

21 JUDGE KARLIN: And you're Mr. Burdick?

22 MR. BURDICK: Yes.

23 JUDGE KARLIN: Okay. Mr. Burdick.
24 Thank you.

25 MR. BURDICK: As you mentioned, Your

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1 Honor, the license was amended to return to an
2 operational status from a decommissioning status.
3 So right now there is no active ISL mining at the
4 site, but there are preparations to return to
5 that operational status.

6 And there are the two facilities, as
7 Your Honor mentioned. There's the Irigaray
8 facility and the Christensen Ranch facility.
9 Currently, the Irigaray facility, there's no
10 mining on that site, and I understand there's no
11 mining planned in the very near future at that
12 site.

13 There is a process facility at the
14 Irigaray site as well, which will be used for all
15 of the mining amongst the two facilities. As
16 current operations are resumed, those will occur
17 at the Christensen Ranch facility, as far as the
18 actual mining. But then the process facility
19 will be used at the Irigaray site as well.

20 JUDGE KARLIN: So the facilities --
21 there's no operational activities and mining
22 going on at either facility?

23 MR. BURDICK: Right now there is not,
24 Your Honor.

25 JUDGE KARLIN: Has there been since

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1 the license change?

2 MR. BURDICK: There has not been since
3 this fall when it was approved to move to an
4 operational status.

5 JUDGE KARLIN: And there's never been
6 any mining at the Irigaray facility at all --

7 MR. BURDICK: No --

8 JUDGE KARLIN: -- to date.

9 MR. BURDICK: There has been in the
10 past, but going forward there are no current
11 plans in the near future --

12 JUDGE KARLIN: Okay.

13 MR. BURDICK: -- to do mining there.

14 JUDGE KARLIN: Well, let me ask this,
15 on page 2 you say, "In March 2001 the license
16 status changed from operating to decommissioning
17 and restoration." And then in April 2007 you
18 requested the decommissioning go to operational.
19 So I take it that for six or seven years it's
20 been in the decommissioning and restoration
21 status?

22 MR. BURDICK: That's correct.

23 JUDGE KARLIN: And how many units have
24 been decommissioned and restored to the primary
25 standard required under Appendix A to Part 40?

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1 MR. BURDICK: Your Honor, I don't know
2 off the top of my head, but we do have a
3 representative from the company who would know
4 that --

5 JUDGE KARLIN: No --

6 MR. BURDICK: -- information.

7 JUDGE KARLIN: -- the question was
8 raised by the --

9 MR. BURDICK: Yes.

10 JUDGE KARLIN: -- parties. They said
11 none had ever been achieved.

12 MR. BURDICK: Oh.

13 JUDGE KARLIN: So has any -- you had
14 six years to restore. In the six years of
15 restoration, was any one achieved at the primary
16 standard of background levels --

17 JUDGE ABRAMSON: And if you're going
18 to answer this with factual material, can you
19 please advise us where it is in your pleadings,
20 and if it's not in your pleadings, just tell us
21 it's not in the pleadings. And I would prefer
22 you not add new factual material, just provide
23 the it either is or isn't in the pleadings.

24 MR. BURDICK: The --

25 JUDGE KARLIN: Let me put it this way,

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1 is it correct to say that they've never restored
2 to the background -- primary standard of
3 background levels?

4 MR. BURDICK: I believe it's correct
5 to say that the mines that have been restored had
6 been restored within regulatory compliance.

7 JUDGE KARLIN: That's not what I
8 asked.

9 MR. BURDICK: I do not know if they've
10 gone specifically to the baseline groundwater
11 levels --

12 JUDGE KARLIN: In your pleading --

13 MR. BURDICK: -- prior to mining.

14 JUDGE KARLIN: -- you say that it's --
15 at some page you say that it was achieved near
16 baseline. But baseline has not been achieved?

17 MR. KUYLER: That was not -- that
18 specific issue was not discussed in detail in our
19 pleadings, Your Honor. On page 1-4 of the
20 application, there is a discussion of the 2006
21 Irigaray well field restoration report that was
22 submitted to the NRC and the Wyoming Department
23 of Environmental Quality.

24 Baseline was not restored with respect
25 to all parameters, but that it was not the

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1 regulatory requirement. It was --

2 JUDGE KARLIN: Okay.

3 MR. KUYLER: -- restored with respect
4 to the applicable requirements.

5 JUDGE KARLIN: Now when you applied
6 for this license renewal, that was May 30, 2008.
7 As of that date you were still in the
8 decommissioning mode; the approval of moving to
9 operational had not occurred until September of
10 2008. Is that correct?

11 MR. BURDICK: That is correct.

12 JUDGE KARLIN: Okay. Is it your
13 interpretation that the license for what you've
14 applied for, the renewal, in a timely way and
15 therefore license is automatically continued
16 under the Administrative Procedure Act 558?

17 MR. BURDICK: That is correct, Your
18 Honor. I believe it's under the timely renewal
19 doctrine.

20 JUDGE KARLIN: Even though you were in
21 decommissioning status at the time you applied,
22 not operational?

23 MR. BURDICK: Yes, Your Honor, we
24 believe that because the license had not yet
25 expired, as you noted, until June 2008.

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1 JUDGE KARLIN: So the license expired
2 in June 2008. So now your license has expired,
3 and you're not operating I should say --

4 MR. BURDICK: Yes.

5 JUDGE KARLIN: -- under an expired
6 license. But not because it's expired, but
7 because you just choose not to operate.

8 MR. BURDICK: That's correct.

9 JUDGE KARLIN: Okay. How far apart is
10 the Irigaray and Christensen Ranches? I mean are
11 we talking a hundred miles, 10 minutes, are they
12 contiguous? I haven't idea.

13 MR. BURDICK: There is some separation
14 between them. I believe it's a couple of miles
15 between the facilities -- 12 miles between the
16 facilities --

17 JUDGE KARLIN: Okay.

18 MR. BURDICK: -- and that
19 information's in the application, there's some
20 miles.

21 JUDGE KARLIN: Okay. In your
22 pleadings you indicate, I think, that there's a
23 150 miles between the facilities and the Pine
24 Ridge Reservation?

25 MR. BURDICK: That's correct, Your

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1 Honor.

2 JUDGE KARLIN: How do -- is that as
3 the crow flies?

4 MR. BURDICK: That's correct, as the
5 crow flies.

6 JUDGE KARLIN: And is that just an
7 estimate, or what?

8 MR. BURDICK: It's using some large
9 scale USGS maps, we estimated it.

10 JUDGE KARLIN: And is that the closest
11 corner of the Pine Ridge Reservation?

12 MR. BURDICK: That is correct. To --

13 JUDGE KARLIN: Okay.

14 MR. BURDICK: -- the very northwest
15 corner of the reservation to the site.

16 JUDGE KARLIN: Now I'd like to ask Mr.
17 Frankel, or Mr. Ballanco, it's your choice, on
18 the Pine Ridge Reservation, is that like 90 miles
19 wide? How large is it?

20 MR. BALLANCO: I believe it's 90 miles
21 by about 60 miles, Your Honor.

22 JUDGE KARLIN: Okay. And where does
23 Chief Oliver Red Cloud live within that 90 mile
24 by 60 mile expanse?

25 MR. BALLANCO: Your Honor, he lives on

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1 the western edge of the reservation,
2 approximately eight miles from the western border
3 of the reservation.

4 JUDGE KARLIN: Is there -- what's the
5 closest town on the reservation, if there --

6 MR. BALLANCO: He's between the towns
7 of Pine Ridge Village and Slim Buttes.

8 JUDGE KARLIN: Okay. Do you agree
9 that it's 150 miles minimum, as the crow flies,
10 from the facilities here to the Pine Ridge
11 Reservation?

12 MR. BALLANCO: I do, Your Honor.

13 JUDGE KARLIN: How many miles is it as
14 the fish swims down the Willow River?

15 JUDGE ABRAMSON: You can't swim in it.

16 MR. BALLANCO: That's a good question,
17 Your Honor, and --

18 JUDGE KARLIN: Is it -- it's got to be
19 more than 150 miles. Right?

20 MR. BALLANCO: I would say so.

21 JUDGE KARLIN: Now the Powder River
22 goes way north and then it comes way back south.
23 Right?

24 MR. BALLANCO: Yes, Your Honor.

25 JUDGE KARLIN: Okay. Let's see, I had

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1 something -- well, we'll get to that in standing
2 I guess. But I just wanted to orient me. Let's
3 see --

4 JUDGE MURPHY: The Irigaray site is to
5 the west and the Christensen site is to the east.
6 Is that correct?

7 And I've looked at some of the hydrostratigraphy
8 that's described in the report and reiterated in
9 the petitions. Is the general groundwater flow
10 direction from west to east?

11 JUDGE ABRAMSON: And if so, where is
12 it in the pleadings? I don't want new
13 information. Is it in the pleadings, and if so,
14 where?

15 JUDGE MURPHY: Or referenced in the
16 pleadings to the application.

17 JUDGE ABRAMSON: Yes. Yes. Right.

18 MR. GLASGOW: Your Honor, without any
19 new information whatsoever, in the discussion of
20 the standing in our pleadings, in our answer, we
21 do trace what we understand to be the general
22 water flow of surface water. And we indicate
23 there that the flow is toward the north or
24 northwest of Willow Creek, and which the
25 Commission describes as being ephemeral in its

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1 environmental assessment. It flows into the
2 Powder River which flows generally to the
3 northwest, which eventually reaches the
4 Yellowstone River, and the Yellowstone River then
5 flows into the Missouri.

6 JUDGE KARLIN: Well, let's got to page
7 15 of your pleadings. I think that's where that
8 discussion occurs, 14 and 15.

9 Is there -- let me ask the Oglala
10 Delegation, is there anything in your pleadings
11 to indicate to us which direction the groundwater
12 flows?

13 MR. FRANKEL: We're checking on that
14 now, Your Honor.

15 JUDGE KARLIN: You don't know? Isn't
16 that important?

17 MR. FRANKEL: Your Honor, we have
18 alleged in our petition that the water flows
19 towards the direction of the reservation.

20 JUDGE KARLIN: All right. I'd like
21 you to find me that citation.

22 MR. FRANKEL: That's what I was doing
23 when you asked, Your Honor.

24 JUDGE KARLIN: All right. With regard
25 to page 15 of Cogema's brief in response to the

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1 Delegation, the top of the page, and I'll quote,
2 "In any event, contrary to the Petitioner's claim
3 that the Powder River flows west toward the
4 reservation, the Powder River actually flows
5 north where it connects to the Yellowstone River,
6 and eventually to the Missouri River. The White
7 River, which runs through the reservation, also
8 flows to the Missouri River, but significantly
9 downstream of the Yellowstone River. In other
10 words, there are no connections between water
11 sources at the license site and the reservation."

12 Is that -- do you dispute that
13 allegation, Mr. Frankel, or Mr. Ballanco? That
14 the rivers -- that's the way the rivers flow?

15 MR. BALLANCO: We don't dispute that,
16 the flow of the rivers, Your Honor, although as
17 we do mention, a bulk of the drinking water on
18 the reservation comes from the Mni Wiconi Project
19 that draws it from the Missouri River.

20 JUDGE KARLIN: But does it draw it
21 downstream or upstream of where the confluence
22 with the Yellowstone and --

23 JUDGE ABRAMSON: Alex, let me redirect
24 that one for a second.

25 Is there anything in your pleadings

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1 that indicates whether it draws upstream or
2 downstream? I understand that you think the
3 pleadings say that you draw from that river.

4 MR. BALLANCO: I don't know if it's in
5 our pleadings. It's, I think, common knowledge
6 that it's drawn in South Dakota, making it
7 downstream of where the Yellowstone enters.

8 JUDGE KARLIN: It isn't common
9 knowledge to us. I mean what we -- if you have a
10 citation in your pleadings that says that, we
11 want -- I'd like if you'd point it out to me. I
12 don't --

13 MR. FRANKEL: I'll just interject
14 here. First, page 86 of the Delegation petition,
15 citing application 2.7.2, quoting from the
16 Applicant, "Willow Creek flows northwesterly from
17 the edge of the Irigaray permit area" --

18 JUDGE KARLIN: Now I'm on that page,
19 86, there's several paragraphs. Which one is it?

20 MR. FRANKEL: Your Honor, it's in the
21 paragraph titled 2.7.2 in the --

22 JUDGE KARLIN: Okay. The first one?

23 MR. FRANKEL: -- bold language.

24 JUDGE KARLIN: Yes. Willow Creek --

25 MR. FRANKEL: Six lines down, "Willow

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1 Creek flows northwesterly."

2 JUDGE KARLIN: Okay.

3 MR. FRANKEL: "For approximately two
4 miles before it's confluence with the Powder
5 River."

6 JUDGE KARLIN: Right.

7 MR. FRANKEL: That's one.

8 JUDGE KARLIN: But they've said is
9 that the -- you know, the knee bone's connected
10 to the ankle bone, or the leg bone. Now the
11 Willow Creek goes to the Powder River, the Powder
12 River goes to the Missouri, and they all connect
13 in below the Pine Ridge Reservation. So it
14 doesn't even go through the Pine Ridge
15 Reservation. If I was a fish swimming downstream
16 to the Gulf of Mexico, I wouldn't even go through
17 the Powder River Reservation. If I was a stick
18 floating on the water --

19 JUDGE MURPHY: Pine Ridge. Pine
20 Ridge.

21 JUDGE KARLIN: -- or a piece of
22 pollution --

23 JUDGE MURPHY: Pine Ridge.

24 JUDGE KARLIN: -- I wouldn't even go
25 through --

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1 MR. BALLANCO: Unless you were sucked
2 up through --

3 JUDGE KARLIN: -- Pine Ridge.

4 MR. BALLANCO: -- the Mni Wiconi inlet
5 pipe, Your Honor.

6 JUDGE KARLIN: Sir? I'm sorry.

7 MR. BALLANCO: Unless you were sucked
8 up through the intake pipe for the Mni Wiconi
9 Project.

10 JUDGE KARLIN: And where is that in
11 your pleadings? That's not common knowledge to
12 me, that there's some intake pipe.

13 JUDGE ABRAMSON: And the other piece
14 was a quote from the application, it wasn't their
15 information. Right?

16 JUDGE KARLIN: So we know that the
17 Willow Creek goes into the Irigaray -- goes into
18 the Powder River. That's what your -- you cited
19 a quote from the application to that effect.
20 Okay.

21 JUDGE MURPHY: Well, we'll let you
22 look for that. If you find it in the pleadings,
23 let us know. Let's keep moving along.

24 JUDGE KARLIN: Yes, let's keep moving.
25 I'm not sure whether I have any more general

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1 questions. Restoration units, I'd like to ask
2 you, now there was six, seven years of
3 restoration going on. Right. Was that the time
4 frame when you all generated -- your client
5 generated 174,000 pounds of yellowcake in
6 restoration?

7 MR. KUYLER: Yes, Your Honor, I
8 believe that's correct.

9 JUDGE KARLIN: That was restoration?

10 MR. KUYLER: As I understand it, and
11 this is not, I think, described in any of the
12 pleadings. In the process of restoring the
13 groundwater, there is a some uranium yellowcake
14 that can be recovered from the groundwater that
15 is in the process of being restored.

16 JUDGE KARLIN: Does the restoration
17 process also involve the injection of chemicals
18 to stabilize, you know, to -- you injected
19 lixiviant to mobilize the uranium, and then in
20 restoration or closure, as I understand it, you
21 inject a chemical to stop the mobilization, stop
22 it from flowing. What is the chemical?

23 JUDGE MURPHY: Is the process
24 described in --

25 JUDGE KARLIN: Have you all done that?

1 It is described.

2 MR. KUYLER: It is described in the
3 application, Your Honor.

4 JUDGE KARLIN: Did you do that in the
5 restoration and decommissioning over the seven
6 years it was going on?

7 MR. KUYLER: I am not sure what
8 chemicals --

9 JUDGE KARLIN: Okay.

10 MR. KUYLER: -- if any, are used in
11 that restoration process, Your Honor.

12 JUDGE KARLIN: So you just kept
13 pumping? How many -- now within the -- which is
14 the active one, the Christensen is where the --
15 is it one big in-situ leach mine, or are there a
16 bunch of different places where injection and --

17 MR. KUYLER: My understanding --

18 JUDGE KARLIN: -- withdrawal is
19 occurring?

20 MR. KUYLER: My understanding, Your
21 Honor, is that there are a number of different
22 well fields.

23 JUDGE KARLIN: And they're called
24 units, they call them --

25 MR. KUYLER: Units.

1 JUDGE KARLIN: -- units? How many
2 units?

3 MR. KUYLER: I would have to look up
4 that number, or talk with Mr. Harker --

5 JUDGE KARLIN: And some of them, as
6 they're played out, they're moved on to another
7 unit. Is that what happens?

8 MR. KUYLER: Yes, Your Honor. And my
9 understanding is that all the well fields at
10 Irigaray as of now have been -- their use has
11 been completed.

12 JUDGE KARLIN: Now --

13 MR. KUYLER: -- and there's -- and so
14 the restoration activities involved the
15 previously used well fields at both Irigaray --

16 JUDGE KARLIN: At Irigaray.

17 MR. KUYLER: -- and the Christensen
18 Ranch.

19 JUDGE KARLIN: And so it's more than
20 six years of restoration. Some of them may be in
21 restoration for longer because they've been
22 played out and they're being restored.

23 MR. KUYLER: I believe that's correct.

24 JUDGE KARLIN: And none of them
25 achieved the primary background level of

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1 restoration.

2 MR. KUYLER: I'm not sure about that,
3 Your Honor. I would have to look that up as
4 well.

5 JUDGE KARLIN: Mr. Klukan, do you have
6 something here?

7 MR. KLUKAN: Yes, Your Honor. As far
8 as the NRC is aware, none of them achieved the
9 primary. They have achieved the secondary class;
10 that is listed in the license. As far as we
11 know, none have achieved primary, but they have
12 achieved secondary.

13 JUDGE KARLIN: And that's kind of
14 pursuant to criteria in 5(b), 5 in the --

15 MR. KLUKAN: Yes.

16 JUDGE KARLIN: -- appendix to Part 40.
17 Okay.

18 JUDGE ABRAMSON: And does the staff
19 view that there's any -- that that's somehow
20 violating the regulations, because it hasn't met
21 the primary criteria, or that satisfies the
22 regulations?

23 MR. KLUKAN: One moment, Your Honor.

24 (Pause.)

25 MR. KLUKAN: No, we do not view it as

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1 a violation. With a clarification, the class of
2 use isn't defined in the regulations, per se,
3 it's defined in the license per state
4 requirements, Your Honor. But, yes, you are
5 correct.

6 JUDGE ABRAMSON: It does comply with
7 the NRC's regulations?

8 MR. KLUKAN: The NRC does not view
9 this as a violation of your license.

10 JUDGE ABRAMSON: Okay.

11 JUDGE KARLIN: One of the contentions,
12 and we'll get to that, is that the primary
13 restoration standard is bogus because no one's --
14 the Applicant has never met it. And so why does
15 the NRC keep imposing it if everyone knows it's
16 never going to be met?

17 MR. KLUKAN: I think the Petitioners
18 make the statement that no one has every achieved
19 primary restoration. The NRC staff does not know
20 if that's necessarily true.

21 JUDGE KARLIN: Well, I'm not asking no
22 one ever in history, I'm talking these
23 facilities, and the --

24 MR. KLUKAN: There's nothing --

25 JUDGE KARLIN: -- answer is no.

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1 MR. KLUKAN: -- to suggest -- even
2 with past compliance, that suggests that they
3 couldn't -- they haven't done it. There's
4 nothing, as far as the NRC staff is aware, that
5 would suggest that they could not do this in some
6 of their mine fields.

7 JUDGE KARLIN: But they just haven't.

8 MR. KLUKAN: They just haven't.

9 JUDGE KARLIN: And they say, Well, why
10 do you keep imposing it if you let them off the
11 hook every time? Why not just --

12 MR. KLUKAN: It's not so much --

13 JUDGE KARLIN: -- dispense with it?

14 MR. KLUKAN: -- letting them off the
15 hook, Your Honor. I mean there's levels of -- or
16 classes of use to which they can restore it to.
17 So it's not just necessarily back to baseline,
18 and baseline does not necessarily mean -- you
19 could do anything with that water, like drink it,
20 so to speak. It's not potable, it's just
21 returning it to where it was before. And so
22 there are defined classes of use to which they --

23 JUDGE KARLIN: I understand.

24 MR. KLUKAN: -- can go back to.

25 JUDGE KARLIN: Okay. Okay.

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1 Orientation in time and in geography, that was
2 helpful to me.

3 Anything more on that, or should we
4 turn to standing?

5 JUDGE ABRAMSON: Let's move on.

6 JUDGE MURPHY: I have one other
7 question. Is it stated anywhere in the pleadings
8 the depth of the uranium buried in strata?

9 MR. BURDICK: I do not believe that's
10 anywhere in the pleadings. It might be in
11 there --

12 MS. ANDERSON: Your Honor, but it
13 would be in the application, as far as I'm aware.

14 JUDGE ABRAMSON: But we're only
15 considering the pleadings. So if somebody in the
16 pleadings had referred to it, then it gets
17 incorporated. If it --

18 MS. ANDERSON: Okay.

19 JUDGE KARLIN: I believe it is in --
20 there's a discussion of the in-situ leach mining
21 activities and the coal bed methane --

22 JUDGE ABRAMSON: Yes, there's a
23 summary of the stratigraphy at the K level, and
24 the aquatard in L level and so forth, but I
25 didn't see a scale associated with that --

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1 JUDGE KARLIN: Oh.

2 JUDGE ABRAMSON: -- and I wondered if
3 it might exist.

4 MR. GLASGOW: Your Honor, I do recall
5 that Appendix B to the application, as opposed to
6 the pleading, but the application does discuss in
7 detail where the coal bed, where the coal layer
8 is, and where the uranium layer is in
9 relationship to that. So at least there is some
10 data. With a little more time we can perhaps
11 find it --

12 JUDGE MURPHY: It's in the
13 application.

14 MR. GLASGOW: -- in the application --

15 JUDGE MURPHY: Thank you.

16 MR. GLASGOW: -- certainly in Appendix
17 B.

18 JUDGE KARLIN: Okay. Any more on
19 orientation?

20 (No response.)

21 JUDGE KARLIN: Hearing none, we'll
22 move to standing, and first we're going to focus
23 on the Oglala Delegation, the Delegation's
24 standing issues. And we focus obviously upon
25 what has been pled, what has been written and

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1 submitted to us, and this is not the time to
2 add -- or I don't know if you'd subtract, but add
3 to that.

4 I have a few questions. First, we are
5 a creature of the regulations, and I like to try
6 to stay -- use them as my lode star in trying to
7 understand how -- what we're required and allowed
8 to do.

9 So I want to ask Mr. Ballanco, or Mr.
10 Frankel, are you claiming -- let's look at
11 2.309(d)(2). Do you have that regulation in
12 front of you?

13 MR. FRANKEL: Yes.

14 JUDGE KARLIN: And that talks about a
15 state local governmental body and affected
16 federally recognized Indian tribe that desires to
17 participate. And so obviously we focused on, Do
18 you agree -- acknowledge, that you are not --
19 that the Oglala Delegation is not a federally
20 recognized Indian tribe?

21 MR. FRANKEL: Absolutely not, Your
22 Honor. We briefed that issue.

23 JUDGE KARLIN: Yes. Okay. I know you
24 briefed the issue. Now I have this reference
25 from the *Federal Register* by the Department -- or

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1 Bureau of Indian Affairs, April 4, 2008, it has a
2 list of hundreds and hundreds of federally
3 recognized Indian tribes, which is what the
4 statute says it's supposed to do. Is the Oglala
5 Delegation of the Great Sioux Nation on that
6 list?

7 MR. FRANKEL: No, it would not be
8 required to be on that list because it does not
9 receive federal funds.

10 JUDGE KARLIN: Well, the statute
11 defines federally recognized Indian tribe as that
12 which is recognized by the Bureau of Indian
13 Affairs and the Secretary of Interior, and is the
14 list that he or she publishes.

15 MR. FRANKEL: Your Honor, it says
16 recognized by the Bureau of Interior and
17 Secretary of the Interior. I don't believe it
18 says, If you're not on the list, you're not an
19 Indian that's recognized by the federal
20 government. There's nothing that says that.

21 JUDGE KARLIN: Well, do you claim that
22 you, the Oglala Delegation is an Indian tribe
23 under federal law?

24 MR. BALLANCO: The Oglala Delegation
25 is not a tribe in and of itself, as we briefed,

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1 Your Honor. It is the representative body of the
2 Oglala Lakota, which is a tribe.

3 JUDGE KARLIN: Okay. Is the Oglala
4 Lakota an Indian tribe, the definition of Indian
5 tribe in the federal statute, 25 USC Section
6 479(a)? It says, "The term 'Indian tribe' means
7 any Indian or Alaskan native tribe, band, nation,
8 pueblo, village, or community that the Secretary
9 of Interior acknowledges to exist as an Indian
10 tribe." And this list is supposed to be the list
11 that references that.

12 I ask you again, is the Oglala -- is
13 the Lakota on this list?

14 MR. FRANKEL: But, Your Honor, the
15 statute you just read doesn't refer to any list.
16 It just says recognized. Right?

17 JUDGE KARLIN: Right.

18 MR. FRANKEL: Okay.

19 JUDGE ABRAMSON: Let me pick this up
20 for a second.

21 JUDGE KARLIN: Well, let me change
22 that, because later the statute says, "The
23 Secretary of the Interior is charged with the
24 responsibility of keeping a list of all federally
25 recognized tribes." And this, they say, is the

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1 list that they -- and so in that very same
2 statutory provision they say they have to do a
3 list. This is the list. The -- your client does
4 not seem to be on that list.

5 MR. FRANKEL: Well, I think, Your
6 Honor, if you look into the list, there's a whole
7 process for getting on the list, it's very
8 controversial, the list was closed for some time,
9 and there's nothing that says -- it says
10 recognized by the Bureau of Interior, and then
11 something else says the Bureau of Interior has to
12 keep a list. There's nothing that says if you're
13 not on the list you're not an Indian tribe.

14 JUDGE KARLIN: It does say it has to
15 keep a list. The statute says --

16 MR. FRANKEL: It says he has to keep
17 a list.

18 JUDGE KARLIN: The Secretary of
19 Interior is charged with the responsibility of
20 keeping a list of all federally recognized
21 tribes, and then the *Federal Register* says, This
22 is our list that we have prepared pursuant to
23 that statutory mandate.

24 MR. FRANKEL: Nothing says that you
25 get your rights to be an Indian from some list.

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1 JUDGE KARLIN: I'm not saying you have
2 a right to be --

3 MR. FRANKEL: Okay.

4 JUDGE KARLIN: -- an Indian, I'm
5 saying you have a federally recognized Indian
6 tribe --

7 MR. FRANKEL: I apologize --

8 JUDGE KARLIN: -- under federal --

9 MR. FRANKEL: -- Your Honor --

10 JUDGE KARLIN: -- law.

11 MR. FRANKEL: -- for mis-paraphrasing.
12 I shouldn't have said that. What I meant to say
13 is, you can draw those connections and perhaps
14 the Department of the Interior, or Bureau of
15 Interior is not doing a good enough job in its
16 responsibility, as is often the case when it
17 comes to Indian affairs, in complying with its
18 responsibility to keep the list.

19 JUDGE ABRAMSON: So let me pick this
20 up for a second, because I think there may be
21 some common ground.

22 The Oglala Lakota view themselves as
23 a legitimate Indian body. Is that correct?

24 MR. BALLANCO: Yes, Your Honor.

25 JUDGE ABRAMSON: And has the Oglala

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1 Lakota advised the Department of Interior of
2 that, or is there any reason they would not want
3 to do that, advise the Department of Interior, We
4 are an Indian community, whatever the right
5 phrase is. I'm sorry, I don't know your internal
6 laws, but you view yourselves as a nation or as a
7 legitimate Indian community. Is there any reason
8 you wouldn't want to advise the Department of
9 Interior of that fact?

10 MR. BALLANCO: No, Your Honor, and the
11 Department is so advised. And, in fact, the BIA
12 chairman that is on the reservation has dialogued
13 with the Treaty Council. They have an open --

14 JUDGE ABRAMSON: Has the BIA -- is
15 there any documentation, anything in writing from
16 this BIA rep on site that he views them -- or
17 anything to indicate that he recognizes them?

18 So I'm looking for something that will
19 say, the BIA, at least at the administrative
20 level, is dealing with Oglala Lakota like they
21 are a legitimate Indian organization? You're
22 saying that the guy on site does that. There
23 must be some -- is there any written
24 correspondence that would indicate that?

25 MR. BALLANCO: Certainly there's not

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1 in the pleadings, Your Honor. I --

2 JUDGE ABRAMSON: Yes.

3 MR. BALLANCO: -- myself, don't know
4 off the top of my head. As I said, I know
5 there's open dialogue, there is papers that go
6 back and forth between the Delegation -- in fact,
7 the Oglala Sioux tribe, the federally recognized
8 on the list tribe, defers to the Oglala
9 Delegation on matters related to the treaty, and
10 that's --

11 JUDGE ABRAMSON: So let me see if I
12 can -- if I've understood something that seems to
13 be underlying the pleadings, but not explicit in
14 the pleadings. Oglala Delegation views itself as
15 a legitimate representative of the Oglala Lakota,
16 and the Oglala Lakota somehow have -- what's the
17 right word -- acknowledged that, or created that
18 situation. Is that the way it seems to be to
19 you?

20 MR. BALLANCO: Well, what they are,
21 Your Honor -- and I appreciate the difficulty of
22 this, and this is a problem that has plagued
23 Europeans trying to understand indigenous
24 communities since the beginning -- there is no
25 hierarchy in the Oglala Lakota nation. If people

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1 achieve a certain age, they are in position to --

2 JUDGE ABRAMSON: So how the Oglala
3 Delegation -- how is it that the Oglala
4 Delegation is -- I don't know the right word,
5 empowered under Oglala Lakota internal mechanics
6 to represent Oglala Lakota?

7 MR. BALLANCO: When the time of treaty
8 making came, Your Honor, a council was appointed
9 to confer with, make treaties, and enforce
10 treaties with the United States. That was the
11 Great Sioux Nation Treaty Council, each of the
12 bands provided their own delegation, the Oglala
13 Delegation for the Oglala Lakota.

14 So they were selected in the
15 traditional manner and that manner has continued
16 since the treaty making time. So they -- this
17 Treaty Council is still --

18 JUDGE KARLIN: How can we know that?
19 On what -- is there something in the pleadings --

20 JUDGE ABRAMSON: What in the
21 pleadings --

22 JUDGE KARLIN: -- that leads us to
23 that?

24 JUDGE ABRAMSON: -- or a document, or,
25 you know, that the Oglala -- the Great Sioux

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1 Nation of the Oglala Council met and decided
2 this, or decided that, or elected this person, or
3 appointed that person. How do -- I'm not looking
4 for documents. I appreciate the fact that the
5 cultural approach is an oral one perhaps and not
6 a documentary, but how do we know when an
7 individual comes in, or an entity comes in, and
8 makes a statement that he or she or it is the
9 representative, the true representative, and
10 there is an authorized Oglala Sioux tribe of the
11 Pine Ridge Reservation in South Dakota that is a
12 federally recognized Indian tribe, how do we know
13 that -- you're saying, Well, that entity is
14 beholden to the federal government, we're the
15 real representatives of the People. But how do
16 we know that? I mean just on the say so?

17 MR. BALLANCO: That's the first way,
18 Your Honor. And in the affidavits that Chief
19 Oliver Red Cloud has filed where he announces
20 that he's the chairman of the Oglala Delegation.

21 JUDGE ABRAMSON: Yes, and I appreciate
22 that the Chief has affirmed that he's the
23 representative of the Delegation. What I'm
24 missing is the next link. Where -- how do I get
25 to the conclusion that the Delegation is the

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1 proper representative of Oglala Lakota, and then
2 the next question is, what's the relationship
3 between Oglala Lakota and the Oglala tribe which
4 is the one that BIA lists?

5 MR. BALLANCO: Well, Your Honor, I
6 think you start with the statement that Chief Red
7 Cloud says, I am the chairman, I represent, and
8 if you want to add something against that and
9 say, Well, how do we know, is there an Oglala
10 Lakota who says he's not? Does the OST tribe say
11 no? And, no --

12 JUDGE ABRAMSON: Well, I think --

13 MR. FRANKEL: -- there's nothing
14 you'll find --

15 JUDGE ABRAMSON: -- our requirement
16 is -- you've reversed the burden in terms of
17 showing standing to say, Well, we assert it, and
18 until -- unless and until somebody says
19 otherwise, we win. I think there's more to it
20 than that.

21 JUDGE KARLIN: If foreign nations --

22 JUDGE ABRAMSON: I think that's the
23 position that the others have said.

24 MR. FRANKEL: If I might add a
25 clarification to Judge Abramson's comment. Mr.

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1 Ballanco mentioned no one has objected. In
2 Indian country, issues having to do with treaty
3 and sovereignty and representation are very
4 sensitive.

5 This is not something being done in
6 secret, and there would have been -- for example,
7 if I had just said, I represent the Great Sioux
8 Nation Treaty Council, someone like my brother
9 over here would physically restrain me from doing
10 that. And that's how it is in Indian country.
11 If you go and try to stand up for the tribe, the
12 tribal people, the Lakota, and you're not
13 authorized, some -- one or more people show up
14 and make a lot of noise about it. And that's
15 what we're saying.

16 We served the Oglala Sioux tribe, and
17 made not secret of what's going on. And no one
18 who is Oglala, and there are 60,000 members of
19 the Oglala Sioux tribe, 40,000 of them live at
20 Pine Ridge -- it's not in the pleadings, but just
21 for context, orientational context if you will --
22 and not one of them has come forward and said,
23 You guys are not authorized, you're not who you
24 say you are.

25 So we're not attempting to reverse the

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1 burdens within the federal regulations, we're not
2 attempting an impermissible challenge, anything
3 like that. We're just standing here and
4 answering the questions.

5 JUDGE ABRAMSON: Can you walk me
6 through the Chief's affidavits and show me where,
7 or how, he's saying that he's -- I understand
8 he's saying he represents the Delegation, but how
9 is he saying that the Delegation, or he's -- the
10 Delegation is somehow the internally appointed
11 representative of the Oglala Sioux?

12 MR. FRANKEL: Well, I would direct you
13 to page 2 of our petition, the Treaty Council
14 being the unbroken traditional entity established
15 by the Oglala Lakota. That tells you it supports
16 Mr. Ballanco's statement of the unbroken
17 continuity, the traditional entity. It's
18 established under traditional ways.

19 We'd be happy to show you --

20 JUDGE KARLIN: Let me ask --

21 MR. FRANKEL: -- what those are, but
22 you just have to --

23 JUDGE KARLIN: Let me ask --

24 MR. FRANKEL: -- understand --

25 JUDGE KARLIN: -- the traditional

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1 ways, what are the traditional ways? Does the --
2 do the -- is there a council that meets?

3 MR. FRANKEL: Sure. And I'm happy to
4 explain this.

5 JUDGE KARLIN: Well, no, I was only
6 saying, okay, the Council meets and they make a
7 decision, they have a consensus, or they somehow
8 reach a decision? When did that council meet and
9 make this decision?

10 MR. FRANKEL: I'll let Mr. Ballanco --

11 JUDGE KARLIN: Is there a date?

12 MR. FRANKEL: -- answer that because -
13 -

14 JUDGE KARLIN: Is there a person who
15 was there?

16 MR. FRANKEL: Yes, there was the
17 resolution.

18 MR. BALLANCO: I think there's two
19 questions inherent in yours, Your Honor. The
20 council that meets regarding treaty issues
21 started in 1867, and has met on and off, when
22 conditions permit, since then. They instigated
23 what has become known as the Black Hills Case, an
24 80-year litigation.

25 As regards to uranium mining, there

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1 were specific meetings of this council where
2 Chief Red Cloud was given the consensus power to
3 intervene in these proceedings to safeguard
4 water, cultural resources, and the environment in
5 the treaty territory. So that meeting did take
6 place. In his affidavit that he filed in the
7 Crow Butte case that we've incorporated by
8 reference, came from that meeting. I don't have
9 the exact date. I know that he begins his
10 affidavit by saying, I'm Chief Oliver Red Cloud,
11 Treaty Chief of the Great Sioux Nation. And --

12 JUDGE KARLIN: Well, in Crow Butte,
13 didn't the Commission say they're establishing a
14 bright red line requirement that affidavits need
15 to be under the title of the proceeding in
16 question? And in our order we issued an order
17 asking for you to submit such an affidavit.

18 The staff and the Applicant protested
19 against that. They didn't -- they said, We
20 shouldn't give you what you ask for, which was --
21 you said in your original petition, If you don't
22 agree that we are -- we have established
23 standing, please give us the time and we will
24 submit something later.

25 Now we, against their position, gave

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1 that opportunity, and you did not resubmit that
2 under this name. In fact, what you submitted --
3 and I'm looking at it right now, would you look
4 at what you attached to your answers to the
5 question?

6 MR. FRANKEL: At some point is there
7 an opportunity for me to respond to any of the
8 series --

9 JUDGE KARLIN: Yes, I'm going to ask
10 May 12 -- May 12, 2009 is the only thing you
11 submitted. "I am Chief Oliver Red Cloud,
12 Chairman of the Black Hills Sioux Nation Treaty
13 Council." That isn't a party in this case. I
14 thought it was the Great Sioux Nation something.
15 It's a different entity?

16 MR. BALLANCO: It's the same entity,
17 Your Honor. And actually --

18 JUDGE KARLIN: Okay.

19 MR. BALLANCO: -- Chief Red Cloud --

20 JUDGE KARLIN: Okay.

21 MR. BALLANCO: -- is the
22 representative -- the chairman of both the Oglala
23 Delegation, which is one band, and he's also
24 chairman of the combined treaty delegation.

25 JUDGE KARLIN: Okay.

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1 MR. FRANKEL: Your Honor, to go back
2 to an earlier question you had, if we were a
3 corporation, and the secretary of our corporation
4 said the Board approved a resolution to do
5 something, it would be accepted. You wouldn't go
6 back and look at the corporate law and go back
7 and see, well, was it a super-majority required,
8 a majority required.

9 And in the same way, when the Lakota
10 act and they come out with an action, it's a very
11 similar circumstance.

12 JUDGE KARLIN: Well, I think you're
13 talking about the business records exception to
14 the federal rules of evidence, which allow
15 certain business records to be submitted if the
16 corporation or the entity of any kind can show
17 that they regularly keep records in the course of
18 their business and these records were obtained
19 from those files, and therefore they have some
20 validity to them. Do you --

21 MR. FRANKEL: I was not --

22 JUDGE KARLIN: -- are you saying
23 that --

24 MR. FRANKEL: No, I was --

25 JUDGE KARLIN: -- your client

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1 regularly keeps records and there's some record
2 you're producing under --

3 MR. FRANKEL: I was not --

4 JUDGE KARLIN: -- that exception?

5 MR. FRANKEL: I was not referring to
6 that, Your Honor.

7 JUDGE KARLIN: Okay.

8 MR. FRANKEL: I was referring to
9 something more like the business judgment rule
10 where a court, in the absence of fraud or some
11 misconduct, respects the business judgment of the
12 board. And similarly this Court must respect
13 that the decisions have occurred in a duly
14 authorized way. There's been no allegation by
15 any party to this that the representations fo the
16 Treaty Council are not duly authorized --

17 JUDGE ABRAMSON: No, let's --

18 MR. FRANKEL: -- that Chief Red Cloud
19 is not duly authorized.

20 JUDGE ABRAMSON: Let me see if I can
21 pick this up again. To me the proper analogy is
22 not to a corporation, but to us dealing with a
23 foreign nation. And if we were dealing with
24 another nation, somehow that nation would say,
25 Here's our representative, this is the guy we're

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1 appointing to deal with you, like we send Hillary
2 Clinton off to deal with somebody. Right?

3 And so what I'm looking for, what I
4 would personally be looking for here is how do
5 I -- how can I get to the conclusion that Chief
6 Red Cloud is the person who was sent out by the
7 Oglala Sioux to deal with us on this? And then
8 we have to deal with the question of what's the
9 relationship with the Oglala tribe, which is a
10 whole other question. But if you can help me get
11 to the first question, that would be useful.

12 MR. BALLANCO: I think that's an
13 excellent analogy, Your Honor. When Hillary
14 Clinton goes to France, for instance, the don't
15 say, Wait a minute, you say you're the Secretary
16 of State. Do you have a document that says that?
17 No, she's the Secretary of State. That's her
18 title.

19 JUDGE KARLIN: Well, let me ask a
20 question on that. When an ambassador comes to a
21 new capital, do they not -- and they say, I am
22 the representative of the United Kingdom, or of
23 Spain, or of the United States, and I'm here in
24 your capital as the ambassador of that company,
25 they are required to present letters of official

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1 mark showing that they are the ambassador.

2 So, you know, the next time they
3 probably don't have to, but the first time they
4 probably do. So that's what's required for
5 ambassadors. So I think the analogy may be a
6 problem.

7 JUDGE ABRAMSON: Well, when we sent
8 Ben Franklin to France or to England --

9 JUDGE KARLIN: Yes, they presented
10 letters of mark --

11 JUDGE ABRAMSON: -- did he have a
12 letter --

13 JUDGE KARLIN: -- that say, I am the
14 duly -- okay.

15 JUDGE ABRAMSON: So anyway that's the
16 first question. And what I -- so what I'm
17 hearing, I think, is that you think the right
18 information was presented in the Crow Butte case,
19 and that in this case, what we have is an
20 affidavit of the Chief saying, I'm the Chief of
21 this tribe -- or, I'm sorry, of this
22 organization. I'm sorry, I just don't know
23 what -- how to address it.

24 MR. FRANKEL: Delegation.

25 JUDGE ABRAMSON: Well, but he says

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1 more than that --

2 MR. FRANKEL: Oh, that's true.

3 JUDGE ABRAMSON: -- he says he's
4 Chief --

5 MR. FRANKEL: Of the whole Council.
6 That's true.

7 JUDGE ABRAMSON: Yes.

8 MR. FRANKEL: Your Honor, I heard some
9 upset about the affidavit. Nothing in -- the
10 problem that the Crow Butte -- that the CLI0909
11 found with the affidavit was having two different
12 cases using the affidavit from one in the other
13 based on some assumption that the affiant's
14 feelings did not change.

15 And there was specific discussion in
16 CLI0909 about how, for example, you can't
17 necessarily assume that Dr. Anders in that case
18 was -- would be as upset with the renewal as he
19 was with the expansion. And since there was no
20 prior rule about that, due process required
21 giving us an opportunity in that case to file
22 those conforming affidavits.

23 In this case we originally filed the
24 affidavit of Chief Red Cloud. We incorporated by
25 reference the entire document that was filed in

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1 CBI. There was no criticism of the legality of
2 incorporation by reference in CLI0909. So we
3 filed a short affidavit which basically -- my
4 reading of your order was to file one that was in
5 compliance.

6 And I noted that we didn't have Chief
7 Red Cloud make a specific reference to Cogema in
8 a way that would comply, so we filed that
9 conforming affidavit. Since there was no
10 criticism in CLI0909 about the incorporation by
11 reference doctrine, we saw no need to repeat at
12 length that language. And when you're dealing
13 with an 89 year old man who doesn't speak
14 English, you try to keep the paperwork to a
15 minimum.

16 JUDGE ABRAMSON: Might not have that
17 last qualifier on that, no matter whether he
18 speaks English, you still try to keep the
19 paperwork to a minimum.

20 MR. FRANKEL: Yes, sir.

21 JUDGE KARLIN: And in the Crow Butte
22 Board, as I understand it, the Oglala Delegation
23 was denied standing, and the Commission affirmed
24 that. And yet the Board granted the Oglala
25 Delegation status as an interested governmental

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1 entity, or local governmental body, and the
2 Commission did not comment on that.

3 So let's go to that, 2.315(c). You
4 come in and you say, Well, because even if I
5 don't have standing, I want to be an interested -
6 - I am an interested governmental body. And
7 haven't the Applicant and the staff pointed out
8 that in order to be an interested governmental
9 body, you need to establish that the entity has
10 not just advisory, because there's many
11 governmental bodies in the world, but has
12 executive and legislative functions.

13 What do we have in the pleadings that
14 establishes that for the Oglala Delegation to the
15 Great Sioux Nation or the Treaty Council?

16 MR. FRANKEL: And isn't that on page
17 2 of the petition? They're the ones established
18 to negotiate treaties.

19 JUDGE KARLIN: On the petition. So
20 the --

21 JUDGE ABRAMSON: It's on -- it's his
22 statement. It's his statement.

23 JUDGE KARLIN: Where is it? First --
24 page 2 of your petition?

25 JUDGE ABRAMSON: So, counselor, if I

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1 understand --

2 JUDGE KARLIN: No, no, no -- his
3 attached affidavit describes in painful detail
4 what his ancestors, is that what you're referring
5 to?

6 MR. FRANKEL: Well, and that the
7 Treaty Council is the entity established by the
8 Oglala Lakota.

9 JUDGE KARLIN: Okay. So, again, how
10 do I know that? They just say so and it's ipse
11 dixit? That's it?

12 MR. FRANKEL: Well, Your Honor --

13 JUDGE KARLIN: Does it know what
14 affidavits are for?

15 MR. FRANKEL: -- we're a treaty party,
16 and we're telling you that we're authorized. No
17 one is saying different. So what exactly do you
18 expect?

19 JUDGE KARLIN: Well, you have a burden
20 to come forward and show us that you have
21 standing. For example, you have to show us
22 there's an injury in fact; you have to show us
23 there's plausible chain of causation here. And
24 you need to show those things. It's not just,
25 Well, nobody says there isn't, so I'm in.

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1 JUDGE ABRAMSON: Okay. Well, let's --

2 MR. FRANKEL: No, but, you know, we're
3 talking about our recognition by our people for
4 purposes of whether we're either a federally
5 recognized Indian tribe, or a local governmental
6 body. And none of the regulations say that you
7 have to plead that, present that to any degree of
8 probative, you know --

9 JUDGE KARLIN: Well, I -- let me ask -
10 -

11 MR. FRANKEL: -- there are specific
12 regulations, but what you have to show under the
13 other parts of this section, 2.309, and if the
14 NRC wanted to, it could make this part about the
15 government -- you could write five more pages of
16 regulations of specificity to give guidance to
17 people who are like us. But we did the best we
18 could under the circumstances, and with due
19 respect you owe a trust responsibility --

20 JUDGE KARLIN: Well, you were --

21 MR. FRANKEL: -- you can't just shirk
22 it.

23 JUDGE KARLIN: -- denied standing in
24 the other case, you are not inexperienced in this
25 litigation, therefore you just decided that you

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1 would just do the same thing here?

2 MR. FRANKEL: Well, denied standing,
3 but recognized as a local governmental body, and
4 for that reason it seemed no need really to
5 believe that we wouldn't be recognized by another
6 Board of the same organization when we were
7 recognized by the first one. And the Delegation
8 did not appeal because we were already part of
9 the case.

10 All the -- by being allowed to
11 participate and ask questions in that case,
12 especially with the Oglala Sioux tribe being a
13 party and pressing their issue and the private
14 petitioners being parties and pressing those
15 issues, the Oglala Delegation was satisfied
16 with --

17 JUDGE KARLIN: Well, but we --

18 MR. FRANKEL: -- that invitation.

19 JUDGE KARLIN: -- submitted an order
20 and we asked specifically, submit a memorandum
21 that documents, or demonstrates, that the Oglala
22 Delegation is a local governmental body, is a
23 federally recognized tribe. Not just asserts it,
24 but documents and demonstrates. We asked that.
25 We gave you a second bite of the apple, which is

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1 quite unusual, I think, in these proceedings.

2 JUDGE ABRAMSON: Particularly for me.

3 JUDGE MURPHY: Particularly.

4 JUDGE KARLIN: I'd like to ask the
5 Applicant here a question. Let's set aside for
6 the moment -- well, you've raised these
7 difficulties, well, they're not a federally
8 recognized Indian tribe, staff has taken the same
9 position, they're not an Indian tribe; both say
10 that. Let's set aside -- let's say they're not a
11 federally recognized Indian tribe, they're not an
12 Indian tribe, they're not even a local
13 governmental body. Let's just assume all that
14 stuff.

15 What about your typical environmental
16 group that comes in here and says, I'm the Blue
17 Ridge Environmental Defense Fund, or I'm the
18 Northeast Iowa Ladies Club Against Nuclear, or
19 something, and I have people who -- and we're
20 going to be adversely impacted. If we assess
21 them in that way, do they make the grade?

22 MR. BURDICK: Your Honor, I think even
23 if you put aside 2.309(d)(2), they still do not
24 satisfy --

25 JUDGE KARLIN: Well, I'm not asking to

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1 put it aside --

2 MR. BURDICK: Yes.

3 JUDGE KARLIN: -- I'm just saying
4 let's say they came and do what we -- and say,
5 Well, how do we know you're really the president
6 of the Northeast Iowa Ladies Association Against
7 Nuclear? How do we know that? Or who says?

8 MR. BURDICK: Well, if we do not
9 consider them a federally recognized Indian
10 tribe, then they have to show, as any other
11 organization --

12 JUDGE KARLIN: Right.

13 MR. BURDICK: -- standing through
14 either representational standing --

15 JUDGE KARLIN: And they could do that.

16 MR. BURDICK: -- or organizational
17 standing. And that's right, they can do that,
18 and in this proceeding, as we stated, 2.309(d)(2)
19 does not apply. They have to do it and show
20 standing --

21 JUDGE KARLIN: Okay.

22 MR. BURDICK: -- in that manner. But
23 we explained in our answer --

24 JUDGE KARLIN: So not being a
25 federally recognized Indian tribe, or an Indian

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1 tribe, or any other federal thing, that's not
2 fatal to their standing.

3 MR. BURDICK: That's correct, Your
4 Honor. They do have the opportunity, just as any
5 other organization, to show standing. And we
6 showed in our answer, they have not done that
7 either. To show representational standing, even
8 aside from the procedural issues of providing an
9 affidavit with the name and the address of a
10 member, and to show that that member authorizes
11 the Delegation to represent him or her in this
12 proceeding, you know, it also fails because
13 they're required to show that one of their
14 members is -- has standing on his or her own
15 merits in this proceeding.

16 JUDGE KARLIN: For a representational
17 standing.

18 MR. BURDICK: That's correct. And we
19 say they have not done that. I think that's
20 apparent from their affidavit, which is very
21 brief, does not explain how Chief Oliver Red
22 Cloud would have standing in this proceeding.
23 They would have to show some sort of harm to
24 Chief Oliver Red Cloud from operations at the
25 proceeding in connection with this license

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1 renewal --

2 JUDGE KARLIN: Well, what --

3 MR. BURDICK: -- proceeding.

4 JUDGE KARLIN: -- about his other
5 affidavit, the one that's cross-referenced and
6 the longer one that was used in Crow Butte?

7 MR. BURDICK: That proceeding likewise
8 does not demonstrate any harm from this licensing
9 action on him, himself.

10 JUDGE KARLIN: And that was the basis
11 in which standing was denied to them in that
12 proceeding?

13 MR. BURDICK: That is correct, Your
14 Honor.

15 JUDGE KARLIN: Because it's the same
16 affidavit in that -- from that proceeding.

17 MR. BURDICK: That's correct, Your
18 Honor.

19 JUDGE KARLIN: Mr. Klukan, did you
20 want to say something, or add something?

21 MR. KLUKAN: No, we agree with the
22 Applicant, Your Honor, that an Indian tribe, or
23 any organization outside of (d)(2) would act as
24 any other organization would, whether it be the
25 Environmental Defense Fund, or whatnot. They act

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1 as an organization, or are treated as an
2 organization, and would have to demonstrate
3 standing either as an organization or for
4 representation as such, as anyone else would.

5 JUDGE ABRAMSON: Can I pick this up
6 for a minute?

7 JUDGE KARLIN: Go ahead.

8 JUDGE ABRAMSON: Yes. We're getting
9 bogged down -- or I shouldn't say bogged down --
10 we're leap frogging to the question of standing.
11 And to me there's an underlying challenge here
12 that I think that the Delegation's raising, which
13 is we're the proper representative of this Indian
14 group. And we, and correct me if I've got this
15 wrong, but we believe we should be the ones that
16 should be consulted about the artifacts and other
17 things on the site. Is that the principal issue
18 here for the Delegation?

19 MR. BALLANCO: Yes, it is, Your Honor.
20 And I appreciate the difficulty we're having
21 here, and I just want to reference -- I know it's
22 in our pleadings, but part of why this decision
23 was easier in Crow Butte is because it took place
24 very near the reservation. So we had the
25 president of the Oglala Sioux tribe present, we

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1 had Oliver Red Cloud present.

2 And they were able to explain this
3 somewhat complicated relationship and how these
4 two voices for the same body in many cases
5 compliment each other and are not in conflict
6 with each other.

7 JUDGE ABRAMSON: So let's pick this
8 up. What's going on in this particular situation
9 is that the Applicant and the staff are
10 consulting with the Oglala tribe and not
11 consulting with Delegation. Is that correct?

12 MR. BURDICK: That is correct.

13 JUDGE ABRAMSON: And is --

14 JUDGE KARLIN: Well, we'll get that
15 from the staff's --

16 JUDGE ABRAMSON: Staff hasn't started,
17 I guess, on this piece.

18 MR. KLUKAN: Yes, we would consult
19 with the Oglala Sioux tribe, or their tribal
20 historical preservation officer.

21 JUDGE ABRAMSON: Okay. Now for
22 Delegation, you've said that the tribe defers to
23 Delegation in a lot of matters. Is there any
24 reason why, in the question of consultation, the
25 tribe and the Delegation can't work this out so

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1 the Delegation has its input into what's going on
2 so that we don't need to get bogged down in who
3 gets consulted, because to me that sounds to me
4 like that's what you're after, and if the tribe
5 defers to Delegation in a lot of matters, why not
6 just get that done internally and get the federal
7 United States Government out of it?

8 MR. FRANKEL: Well, Your Honor, we
9 understand that NRC staff would consult -- would
10 with the THPO. I am not aware of any actual
11 consultation with the THPO that's been responded
12 to by the THPO. The THPO has not been responsive
13 in Crow Butte, or to the Oglala Delegation for
14 reasons unknown after --

15 JUDGE KARLIN: Well, let me ask --

16 MR. FRANKEL: -- several requests.

17 JUDGE KARLIN: -- let me interrupt you
18 there. The -- I don't believe I heard from the
19 staff or the Applicant that the NRC indeed sent a
20 letter to the Oglala Sioux tribe, maybe to the
21 tribal officer, on February something or other
22 '09 about the opportunity to consult. Do you
23 dispute that?

24 MR. FRANKEL: Your Honor, I said it
25 was never responded to.

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1 JUDGE KARLIN: Never responded. So
2 the ball is in the Oglala Sioux tribe's court?

3 MR. FRANKEL: For all we know, it's
4 sitting in a PO Box and never been opened.

5 JUDGE KARLIN: February? Well, whose
6 fault is that? The NRC --

7 MR. FRANKEL: I didn't mail --

8 JUDGE KARLIN: -- is attempting to --

9 MR. FRANKEL: -- or address the
10 letter.

11 JUDGE KARLIN: The NRC says they sent
12 a letter. Do you dispute that?

13 MR. FRANKEL: It's certainly not the
14 Oglala Delegation's fault, Your Honor. And what
15 we're asking for on behalf of the Delegation is
16 participation at the failure of the Oglala Sioux
17 tribe.

18 JUDGE ABRAMSON: Is there --

19 MR. FRANKEL: And that's why the
20 Delegation's --

21 JUDGE ABRAMSON: Is there -- okay.

22 MR. FRANKEL: -- come forward here.

23 JUDGE ABRAMSON: So there's some
24 schism between the tribe and the Delegation. All
25 right. And what's being held out to -- I hate to

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1 put it this way -- what's being held out to the
2 United States Government is that the tribe is the
3 one that should talk, and what you're saying is,
4 Wait a minute, it's the Delegation. We're the
5 proper representative. Is that -- this is not
6 something you can resolve internally, you'd like
7 the U.S. Government to step in and say, Wait a
8 minute?

9 MR. BALLANCO: Actually, I'm sure we'd
10 like the U.S. Government to step out.

11 (General laughter.)

12 JUDGE ABRAMSON: Well, but can't you
13 accomplish that as an independent nation by
14 saying, We're going to handle this internally. I
15 mean, you know, you're telling me about you won't
16 be allowed to step up and speak. Well, all
17 right, step up and handle it, folks. I mean
18 isn't that the kind of thing you can deal -- that
19 your clients can deal with internally, or can
20 attempt to resolve internally?

21 Because it sounds to me like --
22 correct me -- let me ask the Applicant instead.
23 Is there any reason you would not consult with
24 Oglala Delegation or Oglala Sioux if these people
25 told you they're the ones they want you to

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1 consult with?

2 MR. KLUKAN: Actually, the regulations
3 make clear that if a tribe does not have a tribal
4 historical preservation officer, we are to
5 consult with whoever the tribe appoints for that
6 purpose.

7 JUDGE KARLIN: And by tribe you mean
8 federally recognized in the --

9 JUDGE ABRAMSON: Yes, and then --

10 JUDGE KARLIN: -- tribe, the Indian
11 tribe which is not, according to --

12 JUDGE ABRAMSON: Puts you back
13 though -- yes.

14 JUDGE KARLIN: -- you, the -- so --

15 MR. KLUKAN: Delegation. No.

16 JUDGE KARLIN: -- the Delegation.

17 MR. KLUKAN: It is the --

18 JUDGE KARLIN: Now the --

19 MR. KLUKAN: -- federally --

20 JUDGE KARLIN: -- Delegation argues,
21 Well -- and I'm looking at page -- I don't know,
22 do they have a number on this page -- page 3 and
23 4 of their answers to our questions. We asked
24 them to document that they're a federally
25 recognized tribe, we asked them to document that

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1 they must be consulted under the National
2 Historic Preservation Act. And they kind of
3 seemed to say, Well, if the Oglala Sioux tribe
4 drops the ball, then we should be the alternate.
5 And that's nice, but I don't know where that
6 comes from regulatorily or statutorily.

7 MR. FRANKEL: I have a citation, Your
8 Honor, if it would help.

9 JUDGE KARLIN: Well, I'm asking him at
10 the moment --

11 MR. FRANKEL: I'm sorry.

12 JUDGE KARLIN: -- then I'll get back
13 to you. Yes, that would be helpful.

14 MR. KLUKAN: No, Your Honor, I mean if
15 the tribe chooses not to participate in
16 consultation, whatever its reasons may be, that
17 is the decision of the tribal government.

18 JUDGE KARLIN: And the tribe we're
19 meaning the Oglala Sioux tribe.

20 MR. KLUKAN: Correct, Your Honor.

21 JUDGE KARLIN: So the tribe can either
22 have their historic preservation officer consult,
23 or they can delegate somebody else to consult,
24 but all of this is the Oglala Sioux tribe making
25 those decisions or appointments or whatever.

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1 MR. KLUKAN: That is correct, Your
2 Honor.

3 JUDGE KARLIN: Now, Mr. Frankel.

4 MR. FRANKEL: Yes, sir. Your Honor,
5 in the NEPA regs, Section 800.2(c) --

6 JUDGE KARLIN: No, those aren't NEPA
7 regs.

8 MR. FRANKEL: Oh, I'm sorry.

9 JUDGE KARLIN: The National Historic
10 Preservation Act regs, 36 CFR 800?

11 MR. FRANKEL: 36 CFR
12 800.2(c)(2)(i)(B) --

13 JUDGE KARLIN: Is that what you cite
14 at the page 5, the bottom of page 5 --

15 MR. FRANKEL: And so --

16 JUDGE KARLIN: -- of your answers.

17 MR. FRANKEL: -- it says, If the
18 Indian tribe has not assumed the
19 responsibilities, that means they have -- if they
20 have a functioning --

21 JUDGE KARLIN: Yes. Yes.

22 MR. FRANKEL: -- tribal historic
23 preservation officer who's doing the job --

24 JUDGE KARLIN: Right.

25 MR. FRANKEL: -- and if they don't,

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1 and which is what we're saying --

2 JUDGE KARLIN: Yes.

3 MR. FRANKEL: -- so that is the
4 support for that.

5 JUDGE KARLIN: Well, but let me --

6 MR. FRANKEL: And there's Section --

7 JUDGE KARLIN: -- wait a second, wait
8 a second, let's finish that sentence.

9 JUDGE ABRAMSON: Yes, what's the
10 upshot?

11 JUDGE KARLIN: Where the tribes have
12 not assumed an SHPO, and I'm citing here, "Where
13 the tribes have not assumed an SHPO functions as
14 the OST has not", it's a factual question I'm not
15 sure is true, but let's assume it is, the Agency,
16 "shall consult with a representative designated
17 by such Indian tribe," designated by the Oglala
18 Sioux Nation.

19 MR. FRANKEL: It doesn't say
20 designated by the IRA government of the tribe.

21 JUDGE KARLIN: Such Indian tribe.

22 MR. FRANKEL: Right, Your Honor. And
23 so let's look at --

24 JUDGE KARLIN: And Indian tribe --

25 MR. FRANKEL: -- the definition.

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1 JUDGE KARLIN: -- Indian tribe is
2 defined as --

3 MR. FRANKEL: At 800.16. Right?

4 JUDGE KARLIN: So has that Indian
5 tribe, the federally recognized one, delegated
6 the Oglala Delegation --

7 MR. FRANKEL: But, Your Honor --

8 JUDGE KARLIN: -- as its --

9 MR. FRANKEL: -- it doesn't say that

10 JUDGE KARLIN: -- representative?

11 MR. FRANKEL: I'm sorry --

12 JUDGE KARLIN: Okay. I understand --

13 MR. FRANKEL: -- but due respect --

14 JUDGE KARLIN: -- your position. I
15 understand your position.

16 MR. FRANKEL: -- Indian tribe, and
17 then it says, "which is recognized as eligible
18 for special programs." Sir, it doesn't refer to
19 any list, so we have a treaty, we're entitled to
20 programs and services that makes us an Indian
21 tribe, and as far as we are concerned, under the
22 canons of construction, we've done our part.

23 JUDGE KARLIN: Okay. I understand
24 your position.

25 MR. FRANKEL: Thank you, Your Honor.

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1 JUDGE ABRAMSON: Is there a simple
2 solution here, folks? Is there any reason why
3 Cogema can't talk to Delegation about -- consult
4 with them about these artifacts, and the staff
5 can't consult with them about these artifacts? I
6 mean they are an independent nation, they claim
7 to have tribal --

8 MR. KLUKAN: The problem with that,
9 Your Honor, is that's the tribe's right. Who are
10 we to say that they would do it in the way that
11 the tribe wanted without tribal authorization?
12 This right attaches to the tribe, and if the
13 tribe -- I mean if the tribe came in today and
14 said, Yes, do it with them, or, yes, we represent
15 them -- or authorize them to do that, that would
16 be a whole different thing, Your Honor.

17 JUDGE ABRAMSON: Well, that's why I
18 was hoping they could just get that done
19 internally.

20 MR. KLUKAN: But without that, I don't
21 think we have a right to go around the tribe to
22 talk to people whom the tribe does not authorize
23 to do that. I mean they're free to submit public
24 comments and whatnot, and to submit whatever
25 they'd like to the NRC, and we'll evaluate it,

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1 but they can't just assume the function without
2 the tribe's authorization.

3 MR. GLASGOW: And let me respond for
4 the Applicant, if I may, to that question. In
5 some instances, it is true that there is informal
6 consultation that occurs by way of a settlement
7 or some accord. But in this instance, I think
8 Cogema has to be concerned that were it to start
9 treating the Delegation as if it were a tribe,
10 that it may actually be inadvertently giving some
11 sort of status to the Delegation that could come
12 back and cause the Delegation later to rely on
13 that consultation as our evidence of doing that.

14 Further, we're impressed by the very
15 detailed, heavily-nuanced, precise regulations in
16 Part 800. Tribes that have not assume and SHPO
17 function, in that portion of Section 800.2, it
18 really narrowly limits the applicability. When
19 an Indian tribe has not assumed the
20 responsibilities of that SHPO for Section 106, on
21 tribal lands, another section, 101(d)(2) of the
22 Act, the representative designated by such Indian
23 tribe, in addition to the SHPO, regarding
24 undertakings occurring on or affecting historic
25 properties on its tribal lands. So there are the

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1 two key caveats to even the threshold potential
2 applicability of that section.

3 There would have to be tribal lands
4 involved, and there would have to be historic
5 properties on its tribal lands. And from the
6 beginning, in its pleadings, Cogema has indicated
7 and reiterated several times that Wyoming is no
8 longer within the tribal territory of the Oglala
9 Sioux. And this was accomplished by virtue of
10 the Treaty of the 1877, affirmed by Congress, and
11 also upheld by the Supreme Court in 1980 in the
12 *Sioux Tribe v United States* case, which case, by
13 the way, refers to the Oglala Sioux tribe, not to
14 the Delegation.

15 So we would say, quite strongly, that
16 we, as the Applicant, are guided, indeed are
17 required to abide by this federal structure. We
18 seek to do so precisely and not to improvise
19 additional mechanisms.

20 JUDGE KARLIN: Okay. It's about 10 --
21 five of 11:00. I would suggest we -- I think we
22 can deal -- I'd like to try and deal with the
23 Powder River Council's standing now for about 10
24 minutes. We're very -- I don't have very many
25 questions, and then we'll take a break.

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1 JUDGE ABRAMSON: Works for me.

2 JUDGE KARLIN: Is that all right?

3 JUDGE ABRAMSON: Works for me.

4 JUDGE KARLIN: Okay.

5 JUDGE ABRAMSON: But let me just --

6 JUDGE KARLIN: Unless you --

7 JUDGE ABRAMSON: Can I -- I don't have
8 another question, but I just want to make sure
9 that the Delegation understands what's going on
10 in my mind at least. To get standing, first of
11 all you have to show me that you're the right
12 party, and then you have to assert the other
13 elements of standing under federal law. And I'm
14 focused only on the first element, are you, in
15 fact, the right -- is the Delegation, in fact,
16 the right representative of this organization.

17 Had you properly demonstrated that, or
18 indicated that to my satisfaction, you still have
19 to satisfy the other elements of standing.

20 JUDGE KARLIN: Okay. Powder River
21 Council, standing. And I refer to page 2 of 11
22 of your petition. Now you filed no reply.
23 Right?

24 MS. ANDERSON: That is correct. And
25 partly because -- I mean this -- I'll be honest,

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1 this is the first time I've ever done one of
2 these, and I was told by opposing counsel in a
3 footnote that I couldn't submit new information
4 in a reply, or present -- you know, even amend my
5 pleading. So I didn't see a need to do that.

6 JUDGE KARLIN: Well, one of the things
7 you probably need to do is don't automatically
8 accept even the honorable advice of opposing
9 counsel, and you ought to --

10 (General laughter.)

11 JUDGE KARLIN: -- look at the regs
12 yourself, and read it for yourself and decide
13 what you --

14 MS. ANDERSON: Sorry.

15 JUDGE KARLIN: -- want to do.

16 MS. ANDERSON: I just -- you know, I
17 don't have the history in these proceedings that
18 opposing counsel does, so.

19 JUDGE KARLIN: Well, but let's look.
20 You should be familiar with standing.

21 MS. ANDERSON: Sure. Sure.

22 JUDGE KARLIN: You've got to show an
23 injury in fact, and it can't be hypothetical or
24 speculative. You have to show a plausible chain
25 of causation, you have to show redressability.

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1 Your allegation of standing, page 2, you've got a
2 thousand members, it was formed in '73, ranchers
3 and concerned citizens concerned with impacts,
4 this petition is brought on behalf of our
5 members who live and work near -- I don't know
6 what that means, that's very important, but you
7 didn't tell us the facilities, and they will be
8 impacted -- interests that will be adversely
9 affected concern, one, breathing clean air,
10 drinking clean water, and protecting natural
11 ecology.

12 Are you saying that that's a concrete
13 and particularized injury in fact to your
14 organization? Or is that more a generalized
15 interest in clean air and clean water?

16 MS. ANDERSON: Your Honor, I think it
17 is a genuine and concrete interest. Our members
18 in Johnson and Campbell Counties near the
19 facility, they drink water from the Wasatch
20 formation which --

21 JUDGE KARLIN: Well, of course you
22 didn't allege any of that.

23 MS. ANDERSON: No.

24 JUDGE KARLIN: You didn't tell us that
25 they drink water from -- I don't even know -- the

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1 Wasatch formation, you didn't tell us how far
2 they live, or which direction the wind blows, one
3 mile, 50 miles, 150 miles?

4 MS. ANDERSON: Sure. And, Your
5 Honor --

6 JUDGE KARLIN: Now there's --

7 MS. ANDERSON: -- again, it's --

8 JUDGE KARLIN: -- the NRC has two
9 types of standing --

10 MS. ANDERSON: Okay.

11 JUDGE KARLIN: -- representational --

12 MS. ANDERSON: Sure.

13 JUDGE KARLIN: -- standing and
14 organizational standing.

15 MS. ANDERSON: Sure.

16 JUDGE KARLIN: Representational
17 standing you have to give us the name of an
18 individual who says, who's a member of our
19 organization who says, I -- and normally what it
20 is -- I, Joe Blow, live within one mile down
21 grade of the facility and I'm going to be
22 impacted, and I -- and then the organization
23 says, Well, we represent Joe Blow and he's
24 authorized us to represent him.

25 Now you agree you haven't done

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1 anything to establish that?

2 MS. ANDERSON: No, I haven't, Your
3 Honor.

4 JUDGE KARLIN: So you're trying to
5 assert organizational standing? But the
6 organization is going to be -- have a concrete
7 and particularized injury?

8 MS. ANDERSON: Yes, Your Honor, we
9 believe we meet both organizational standing and
10 representational standing to the extent that --

11 JUDGE KARLIN: No, no, you just said -
12 -

13 MS. ANDERSON: -- this is not --

14 JUDGE KARLIN: -- you don't have
15 representational because you have no one you're
16 representing.

17 JUDGE ABRAMSON: She did not, she said
18 she didn't assert it.

19 JUDGE KARLIN: Oh, okay.

20 MS. ANDERSON: I didn't assert it.
21 It's not --

22 JUDGE KARLIN: All right.

23 MS. ANDERSON: Thank you.

24 JUDGE ABRAMSON: She may -- we may
25 conclude she doesn't have it --

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1 MS. ANDERSON: Sure.

2 JUDGE ABRAMSON: -- because she didn't
3 assert it.

4 MS. ANDERSON: Sure. Sure.

5 JUDGE KARLIN: Well, that kind of goes
6 together.

7 MS. ANDERSON: Thank you.

8 JUDGE KARLIN: Okay.

9 JUDGE ABRAMSON: There you go again.

10 JUDGE KARLIN: Okay. Any questions --

11 JUDGE ABRAMSON: No, sir.

12 JUDGE KARLIN: -- from my colleagues?

13 MS. ANDERSON: Your Honor, would you
14 like me to clarify the organizational standing,
15 or --

16 JUDGE ABRAMSON: If he has a question,
17 he'll ask it.

18 MS. ANDERSON: Okay.

19 JUDGE KARLIN: Well, I just asked you
20 to clarify it and you just gave me -- breathing
21 clean air, drinking clean water, protecting
22 natural -- now, if I say I live in Potomac,
23 Maryland, and I believe in breathing clean air
24 and drinking clean water and --

25 JUDGE ABRAMSON: And we doubt you.

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1 JUDGE KARLIN: Do I have standing in
2 this things in Wyoming?

3 MS. ANDERSON: No.

4 JUDGE KARLIN: Why not? I've got --
5 I'm interested in that everywhere.

6 MS. ANDERSON: The air probably
7 doesn't reach Potomac, Maryland, the water
8 probably doesn't reach Potomac, Maryland.

9 JUDGE KARLIN: Does the air probably
10 reach your people?

11 MS. ANDERSON: Yes.

12 JUDGE KARLIN: How do we know that?

13 MS. ANDERSON: Right. I mean we
14 didn't put that in the pleadings, but we can
15 submit additional --

16 JUDGE ABRAMSON: Next time --

17 MS. ANDERSON: -- information --

18 JUDGE KARLIN: Next time.

19 JUDGE ABRAMSON: Next time.

20 MS. ANDERSON: -- next time. Sure.

21 JUDGE ABRAMSON: Next time. We're a
22 very different organization from a typical
23 Article 3 court. We have very strict criteria
24 that you've got to get to get in, and it's done
25 in the interest of making sure that the staff,

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1 who does an enormous job of reviewing the
2 application, iterating with the Applicant, making
3 sure they comply with all the regulations. It
4 doesn't get diverted to deal with things that
5 aren't particularized. And so that's the
6 Commission's directives to us, and we --

7 MS. ANDERSON: Okay.

8 JUDGE ABRAMSON: -- deal with them
9 that way. So next time --

10 JUDGE KARLIN: Right.

11 JUDGE ABRAMSON: -- be more thorough.

12 JUDGE KARLIN: Anything else at this
13 moment?

14 (No response.)

15 JUDGE KARLIN: Okay. It is now, by
16 that clock, five after -- six after. We will
17 reconvene at 15 after; that is to say 10 minutes
18 from now, and take a short break.

19 All right. We stand adjourned.

20 (Whereupon, a short recess was taken.)

21 JUDGE KARLIN: Please be seated.

22 We'll call to order. We're back on
23 the record, and for the record I would reflect
24 that Judge Abramson is temporarily detained. He
25 will be joining us momentarily. But we try to

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1 keep it crisp. I see we've missed the deadline
2 by a couple of minutes. I'm sorry, my watch was
3 different from that, and it was a short break,
4 and I know we're all moving along.

5 Our contemplation is we're going to
6 keep going maybe till one o'clock, maybe to two
7 o'clock. We might skip lunch, or we might go out
8 for -- get a quick lunch, but we may be able to
9 finish this by 3:00 or something like that. This
10 is the hope anyway. And it's really dependent on
11 us, because we're the ones who are asking the
12 questions, it's not your fault that -- if we have
13 questions. We need them answered, and that's
14 what we'll do.

15 So now we are proceeding with the
16 Cogema mining application for renewal. And what
17 we want to do now is turn to contention
18 admissibility. And first we will talk about
19 contention admissibility as a general matter, or
20 actually we'll ask some questions about
21 contention admissibility as a general matter and
22 try to elicit clarification in general, because
23 there are some cross-cutting issues.

24 And we're not going to go through all
25 the cross-cutting issues, because we don't have

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1 questions on all the cross-cutting issues. For
2 example, 10 CFR 40.9 has been a cross-cutting
3 issue that has been raised, and I don't know that
4 we have that many questions about that.

5 But let me get my notes together. And
6 my questions start with the Applicant, Mr.
7 Glasgow, or, you know, whoever you delegate.
8 Let's see, page 22 of your brief. You have a
9 theme that is of concern, 21, 22 and 23. You are
10 going through -- the contentions must be within
11 the scope of the proceeding. That is one of the
12 required elements certainly.

13 And you make note, at the bottom of
14 page 21, that the proposal is to continue uranium
15 mining operations. And you assert a position
16 that you asserted, I think, in your opening
17 statement, that the scope of this proceeding is
18 very narrow, or is narrow.

19 I'm not sure I -- I'm just not sure
20 whether -- I think I need some clarification on
21 that.

22 MR. GLASGOW: Okay. Your Honor,
23 that's correct. We stated --

24 JUDGE KARLIN: Well, I'll ask the
25 question.

1 MR. GLASGOW: Okay.

2 JUDGE KARLIN: But you're going to
3 speak to this --

4 MR. GLASGOW: Yes, Your Honor.

5 JUDGE KARLIN: -- or Mr. Burdick?

6 MR. GLASGOW: Mr. Burdick will --

7 JUDGE KARLIN: Mr. Burdick.

8 MR. GLASGOW: -- address this.

9 JUDGE KARLIN: Yes. Thank you. Thank
10 you.

11 Let's go to 10 CFR 51.60. You cite
12 that many times in your theme of narrowness of
13 the proceeding. And that says, The Applicant's
14 environmental report shall contain the
15 information specified in 51.45, and then as you
16 quoted, it says, "If the application for an
17 amendment or a renewal, the supplement to the
18 environmental report may be limited to
19 incorporating by reference, updating, or
20 supplementing the information previously
21 submitted to reflect any significant
22 environmental change."

23 All right. Now I interpret that as an
24 instruction that the environmental report
25 doesn't -- is sort of an informational

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1 requirement. What does the environmental report
2 need to contain? It -- well, if it's a renewal,
3 you don't need to reiterate all the stuff that's
4 already on the record; you just put in the
5 changes. Do you agree with that?

6 MR. BURDICK: I do agree with that.

7 JUDGE KARLIN: But I don't interpret
8 that necessarily as saying that means the scope
9 of the proceeding is necessarily limited only to
10 the changes. And you seem to assert that it
11 does. It doesn't specify the scope of the
12 proceeding, it just says, well, for convenience
13 you don't need to reiterate all the stuff that's
14 already in the record, you just need to put the
15 changes in.

16 How in the world is that a limitation
17 on the scope of our -- of this proceeding?

18 MR. BURDICK: I think, Your Honor,
19 the -- so the scope is defined by the hearing
20 notice, and that scope does discuss that it's
21 just the continuance of operations here. And
22 that continuing operation is requested through
23 the application. And so I think as the
24 application is narrowed in its scope, then so is
25 this proceeding.

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1 JUDGE KARLIN: Well, if you have
2 your -- it's a continued operation, we all pause
3 at that. You know, if the operation, let's say,
4 is, as the Petitioners allege, is polluting the
5 environment, are you saying that so long -- the
6 renewal, which allows them to continue to pollute
7 the environment for another 10 years is
8 irrelevant, the only thing that is relevant is if
9 it changes the way its polluting the environment,
10 or the amount that it's polluting the
11 environment.

12 MR. BURDICK: I would say if its
13 polluting in violation of NRC regulations.

14 JUDGE KARLIN: No, no, I --

15 MR. BURDICK: Okay. Or if it's --

16 JUDGE KARLIN: Where is the violation?
17 NEPA doesn't worry about violation.

18 MR. BURDICK: If it's polluting
19 separate from what was already approved in a
20 prior NRC licensing proceeding.

21 JUDGE KARLIN: It's continuing to
22 pollute for another 10 years -- let's pause it --
23 and that's irrelevant? Because it's a mere
24 continuation?

25 MR. BURDICK: If it's already been

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1 approved by the NRC --

2 JUDGE KARLIN: But it hasn't.

3 MR. BURDICK: -- in granting a
4 license.

5 JUDGE KARLIN: It's been terminated;
6 that license expired.

7 JUDGE ABRAMSON: Well, that's part of
8 the underlying question, isn't it, what happened
9 here. You know, the license -- did the licensing
10 date expire -- and I think this is what Judge
11 Karlin was asking you earlier, did it indeed
12 expire, or --

13 JUDGE KARLIN: Right.

14 JUDGE ABRAMSON: -- is it still in
15 existence because you converted back from
16 decommissioning to being operational?

17 JUDGE KARLIN: So --

18 JUDGE ABRAMSON: I don't know this.

19 JUDGE KARLIN: Right. So you have a
20 citation to 51.60, which prescribes the content
21 of the ER. I have trouble with whether that --
22 not that really circumscribes the scope of a
23 renewal proceeding. Now I'd like to go to the --
24 to your HRI quote. At the bottom of page 22 you
25 quote something from one Board as explaining the

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1 analogy between the license renewal under Part 54
2 and Part 40 as follows, and this is the Hydro
3 Resources Board that you cite in footnote 127,
4 and let me pluck that out.

5 In the quote -- in the text you say,
6 "A license renewal proceeding under Part 40
7 cannot be used to relitigate issues from the
8 initial licensing proceeding." Relitigate. Look
9 at the footnote 127, Hydro Resources. And
10 although Hydro Resources decision rejected the
11 admissibility of certain contentions, that had
12 issues that had been raised in the litigation
13 during the original licensing proceeding. So
14 indeed that was a relitigation. They were
15 attempting to relitigate something that had
16 already been litigated.

17 That's not analogous here. Nobody's
18 ever tried to litigate this stuff. So how is
19 Hydro Resources relevant, because nobody's trying
20 to relitigate something. It was never litigated.

21 MR. BURDICK: Your Honor, we gave this
22 as an example of one of the few places where
23 there was even a discussion of the scope of a
24 material license renewal proceeding. There have
25 been very few of these proceedings that have been

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1 litigated. Hydro Resources, you know, there's
2 some discussion there, and that wasn't even a
3 renewal proceeding necessarily. And then there's
4 been the chemical proceeding.

5 Beyond those two proceedings, there's
6 very little precedent here, and we identified
7 this as, you know, the closest thing we could
8 find. I think --

9 JUDGE KARLIN: Well, then it's an
10 inapt analogy because that was a case where they
11 were attempting to relitigate something that had,
12 by definition, already been litigated. In this
13 case they're trying to litigate something new.

14 MR. BURDICK: Your Honor, we were
15 trying to point out that this was as close as we
16 could find to -- where an issue had been resolved
17 previously. And I understand there's a
18 difference between it being resolved in an NRC
19 licensing proceeding and in -- versus in
20 litigation with the participants. But we thought
21 it was analogous. And in that same paragraph we
22 also discuss an analogy with 10 CFR Part 54.

23 JUDGE KARLIN: Well, let me ask about
24 that, Part --

25 MR. BURDICK: Okay.

1 JUDGE KARLIN: -- 54. Now Part 54 the
2 regs have this thing called a continuing
3 licensing basis, don't they?

4 MR. BURDICK: That's correct.

5 JUDGE KARLIN: And that's the baseline
6 and you can't litigate that. There's no
7 continuing licensing basis in these -- Part 40,
8 is there?

9 MR. BURDICK: It's not as specifically
10 outlined in this proceeding.

11 JUDGE KARLIN: There's not at all.

12 MR. BURDICK: That's correct. We
13 think 10 CFR Part 51.68 does give a flavor of
14 that. We're using similar --

15 JUDGE KARLIN: Well, it --

16 MR. BURDICK: -- language of a
17 significant environmental change.

18 JUDGE KARLIN: Doesn't Part 54 have a
19 lot of history that says you can't relitigate the
20 original, you have to at the baseline. Do you
21 have any legislative history of the Part 40 that
22 says anything like that? Part 54 is very strict
23 about, you know, only the new stuff can be
24 litigated.

25 MR. BURDICK: You're correct, Your

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1 Honor, we do not cite to any legislative history
2 for Part 40. But, again, I think that these
3 proceedings simply have not addressed this issue
4 in earlier materials for licensing. So I think
5 it is a new issue here --

6 JUDGE KARLIN: Well --

7 MR. BURDICK: -- and that's why we
8 raised it.

9 JUDGE KARLIN: -- then you refer to
10 the staff guidance somewhere. Somewhere -- okay,
11 page 23, staff guidance for reviewing
12 applications specifies a limited review. Now,
13 staff guidance, you will admit, is not binding
14 law. It's not law at all. Right?

15 MR. BURDICK: That's correct, Your
16 Honor.

17 JUDGE KARLIN: Okay. But let's look
18 at the staff guidance, page -- footnote 128, this
19 is the limited review. Eleven items. You quote,
20 and I quote you, "The eleven items are, NRC
21 inspection reports, amendments, license
22 violations, excursions, investigations,
23 exceedances of any regulatory standard,
24 contamination, or release limits, exceedances of
25 any --

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1 So the Petitioners have raised
2 concerns about there's a history of spills and
3 exceedances that have occurred. And you say, Oh,
4 it's not within the scope. Well, it sounds like
5 it's exactly within the scope of the guidance
6 document. You look at it, history of violations,
7 exceedances, and all these are past obviously,
8 they can't be future. So isn't this a very --
9 isn't this saying that history of violations is
10 within the scope?

11 MR. BURDICK: Well, Your Honor, I
12 think here on footnote 128 it is talking about
13 what the NRC staff is to review, and I agree that
14 that is analogous to the scope of this
15 proceeding. And I think, you know, there are
16 contentions that could be put together within the
17 scope here.

18 I think where we primarily use
19 50.61(a) are issues such as claims that seismic
20 information was not repeated in this application,
21 you know, those sorts of situations where that
22 information has been set and resolved in the
23 application. And they have no identified any,
24 you know, environmental --

25 JUDGE KARLIN: Well, but I mean this

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1 is cross-cutting, I think, with regard to the
2 contention about -- and that's why we're not
3 going to need to get into it too much past bills,
4 excursion, and that, oh, that's not relevant,
5 it's not within the scope, we're just looking to
6 the future, we're looking to -- that's all. But,
7 here the guidance specifically says that should
8 be looked at.

9 MR. BURDICK: Yes, Your Honor, I have
10 to look at the specific contention, but --

11 JUDGE KARLIN: Right. Well --

12 MR. BURDICK: -- I don't disagree that
13 some of these items are within the scope of the
14 staff's review.

15 JUDGE KARLIN: Oh, okay. And even if
16 the staff wanted to limit the review, that's the
17 staff's convenience. Let's go to footnote 130,
18 and that's page 23. The narrow scope of this
19 proceeding also serves -- again, narrow scope --
20 serves to avoid significant prejudice to the
21 Applicant in making considerable investments over
22 time. Cogema has relied upon prior NRC
23 determinations.

24 You're aware of the doctrine that
25 there's no collateral -- there's no estoppel

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1 against the government. Right?

2 MR. BURDICK: Yes.

3 (General laughter.)

4 JUDGE KARLIN: So this reliance is
5 misplaced. Do you agree?

6 MR. BURDICK: I don't know if
7 misplaced -- our intent here was to say that
8 there are issues that have been resolved in past
9 licensing actions --

10 JUDGE KARLIN: I had a --

11 MR. BURDICK: -- by the NRC.

12 JUDGE KARLIN: -- when I was in
13 private practice, I had a PCB case, and it was a
14 situation where I was representing a licensee who
15 had a PCB treatment facility, and it had been
16 inspected by EPA five years running, and they
17 thought it was great. A new inspector came in
18 and that person identified beaucoup violations,
19 filed a notice, we were in court, and we lost.

20 And it was all your fault.

21 JUDGE ABRAMSON: And it was my fault.

22 JUDGE KARLIN: Probably.

23 (General laughter.)

24 JUDGE KARLIN: And the government
25 said, Well, you know, just the fact that one

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1 inspector didn't catch it for five years was --
2 does not preclude the government, either the
3 staff, or this Board, or this Petitioner coming
4 in and saying, Hey, there's a problem here and
5 you can't -- sir, we relied, so you can't correct
6 your legal error. All right. So that doesn't
7 cut much in the way of narrowing the scope.

8 MR. BURDICK: That's correct, Your
9 Honor. If the NRC staff would identify a new
10 violation, you know, we could not oppose that.
11 You know, here again I think we're trying to rule
12 out the topics where they simply claim that
13 something's omitted that was in a prior
14 application, you know, for example seismic. And
15 not just that they can't challenge it, but they
16 haven't identified a significant environmental
17 change to show that there's even an issue in
18 dispute.

19 JUDGE KARLIN: Well, the materiality
20 standard you assert next, and it kind of relates
21 to scope as well, I mean you assert that there's
22 materiality. Let's see, there's four findings.
23 Materiality is limited, and that's page 25.
24 Contentions must raise a material issue. This is
25 true. To issue this renewed license under Part

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1 40, "the NRC must make the following four
2 findings" and then you list the 40 CFR -- 10 CFR
3 40.32(a) (b) (c) (d).

4 Now let's go down to the third one,
5 that the proposed equipment, facility, and
6 procedure are adequate to protect health and
7 minimize danger to life or property. That sounds
8 pretty broad to me. Adequate to protect health?
9 There's a lot of stuff covered under that rubric,
10 isn't there?

11 MR. BURDICK: Yes, I agree, Your
12 Honor. And, again, we're trying to identify --
13 or place the burden on the Applicant -- or,
14 excuse me, on the Petitioners to identify the
15 significant --

16 JUDGE KARLIN: Well, I --

17 MR. BURDICK: -- environment change --

18 JUDGE KARLIN: -- agree they need to
19 identify --

20 MR. BURDICK: -- that would show a
21 violation --

22 JUDGE KARLIN: -- well, I don't know
23 why it has to be significant. Now the
24 significant environmental change comes from
25 51.60, which we just established is not a scope

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1 of this proceeding, but is the scope of the ER.
2 Now let's go back to the ER now. The ER scope is
3 not the same as the NEPA scope, is it?

4 MR. BURDICK: That's correct. The
5 NEPA scope will be guided by the --

6 JUDGE KARLIN: By NEPA.

7 MR. BURDICK: -- NRC staff's -- yes,
8 NEPA documents.

9 JUDGE KARLIN: So, once again, on this
10 one there are four findings required under 40 --
11 10 CFR 40.32(a)(b)(c)(d). What about the NEPA
12 finding, there's a NEPA finding required, isn't
13 there? That's not listed here.

14 MR. BURDICK: That's correct, Your
15 Honor.

16 JUDGE KARLIN: Okay. And just one
17 thing -- one more thing, on the -- contention
18 must be supported by adequate factual information
19 or expert opinion. Then you state, "A Petitioner
20 bears the burden to present the factual
21 information or expert opinion." Well, there's a
22 word missing there. Go to the regs and tell me
23 what word is missing. A crucial word.

24 MR. BURDICK: So Section
25 2.309(f)(1)(v) states, "Provide a concise

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1 statement of the alleged facts or expert
2 opinions."

3 JUDGE KARLIN: Okay. So which word is
4 missing? Alleged --

5 MR. BURDICK: The alleged.

6 JUDGE KARLIN: -- facts. They don't
7 have to present facts, they just have to allege
8 facts. And they don't have to present expert
9 opinion; they can present alleged facts or expert
10 opinion. So whenever we read this, when I read
11 this, I have to insert the word "alleged" which
12 you seem to omit. But I think --

13 MR. BURDICK: Your Honor --

14 JUDGE KARLIN: -- it's important.

15 MR. BURDICK: -- if we omitted it, it
16 was an oversight. I think our argument still --

17 JUDGE KARLIN: An oversight? Well,
18 let's --

19 MR. BURDICK: -- applies.

20 JUDGE KARLIN: -- go to page 28, 28,
21 the top of page 28. "In short, a contention will
22 be ruled inadmissible if the Petitioner has
23 offered no tangible information, no experts, no
24 substantive affidavits." Can you cite me any
25 place in that reg that says you have to present

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1 substantive affidavits?

2 MR. BURDICK: Your Honor --

3 JUDGE KARLIN: Can you show me
4 anything in the reg that says you've got to offer
5 tangible information?

6 MR. BURDICK: Your Honor, I believe --
7 so that quotation is from the *Fansteel* case.

8 JUDGE KARLIN: Yes, and what was the
9 date of that case? 2000, 2003 and 2000, both of
10 them are before the 2004 amendments to the regs,
11 and I don't care what it's from, the regulation -
12 - show me where the regulation says that. It
13 doesn't say that. I've heard that phrase a
14 number of times, and I can't find anyone who
15 believes that. I might believe the other part
16 and their assertions and speculation, but I don't
17 think it was an inadvertent error when --

18 MR. BURDICK: Well, yes, I think we're
19 using this case to provide the ways the
20 Commission has said that Petitioners have
21 provided sufficient support. And I agree not
22 every one of these items needs to be satisfied
23 for every contention. But I think this statement
24 is discussing ways in which that adequate factual
25 support --

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1 JUDGE KARLIN: But --

2 MR. BURDICK: -- can be provided.

3 JUDGE KARLIN: -- is there any
4 requirement to provide substantive affidavits?
5 Can you show me any case which held that they
6 failed to provide a substantive affidavit, and
7 that in itself was -- made it fatally defective.
8 Those cases don't hold that, the ones you cite.

9 MR. BURDICK: Well --

10 JUDGE KARLIN: So I just think it's a
11 pernicious canard that gets repeated and, you
12 know, it's unfortunate because sometimes poor
13 Petitioners will actually believe that that's the
14 law. And I don't -- and sometimes even boards
15 will believe that as well.

16 JUDGE ABRAMSON: Some boards might
17 write the law that way.

18 (General laughter.)

19 JUDGE KARLIN: In terms of generic
20 issues on contention admissibility, restoration -
21 - okay.

22 MR. KLUKAN: Your Honor, if staff
23 might make a comment regarding the scope of the
24 license review. If you look at 10 CFR 40.45, it
25 says that new applications, plus renewal

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1 applications, will be analyzed per the four
2 factors per 10 CFR 40.32. Meaning that under the
3 scope, the staff -- well, the findings are the
4 same regardless of whether it's a new or renewal.

5 JUDGE KARLIN: Okay.

6 MR. KLUKAN: I mean granted under new
7 reg 15.69, the staff conveniences itself by not
8 having to go back and do it over again. But that
9 doesn't affect the scope of the actual license.
10 The findings are the same.

11 JUDGE KARLIN: I see. Yes. Okay.
12 That's, I think --

13 JUDGE ABRAMSON: That's helpful.

14 JUDGE KARLIN: -- a helpful --

15 JUDGE ABRAMSON: Thank you.

16 JUDGE KARLIN: -- cite. Okay. No
17 other questions about specific general -- I mean,
18 sorry, general contention admissibility.

19 Let's move to the first of our listed
20 contentions, and let's see what that is. I'm
21 going to pull this out. The first one we listed,
22 I think, where we have some questions is Oglala
23 contention 4B. And I believe that is similar to
24 Powder River Contention number 2.

25 Would you agree with that, Powder

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1 River counsel, Ms. Anderson?

2 MS. ANDERSON: Yes, I would, Your
3 Honor.

4 JUDGE KARLIN: Okay. And my question
5 here, again, is kind of for the staff and the
6 Applicant. I'll start with -- who will be
7 handling this, Mr. Glasgow?

8 MR. GLASGOW: Yes, I'll be handling
9 that, Your Honor.

10 JUDGE KARLIN: Okay. The Crow Butte
11 council -- the Commission decision, CLI0909 --
12 well, I guess let me ask the question. Is there
13 an inimicality determination that's still
14 required that the staff must make in this renewal
15 proceeding?

16 MR. GLASGOW: I would say, Your Honor,
17 that in every license proceeding there is an
18 inimicality requirement, the ultimate foundation
19 for the Commission's determination. And despite
20 the fact that this is a renewal proceeding, the
21 inimicality determination nevertheless is
22 applicable.

23 JUDGE KARLIN: Okay.

24 MR. GLASGOW: But, of course, as we
25 argue in our briefs, it is a narrowly focused

1 application that has a very high threshold for
2 when inimicality is determined by the Commission.

3 JUDGE KARLIN: So and the Crow Butte
4 decision holds -- let me see if I can find it --
5 that foreign ownership, control and dominion --
6 domination is not, per se, inconsistent with any
7 of the regs.

8 MR. GLASGOW: Yes, that's right,
9 under -- as the Commission explains under Section
10 103(d) --

11 JUDGE KARLIN: Yes --

12 MR. GLASGOW: -- of the Act --

13 JUDGE KARLIN: -- 103(d) does not
14 apply.

15 MR. GLASGOW: -- does not apply, it's
16 not a production or utilization facility.

17 JUDGE KARLIN: 10 CFR 40.38 does not
18 apply.

19 MR. GLASGOW: Does not apply because
20 this is not a case involving the U.S. Enrichment
21 Corporation, which is --

22 JUDGE KARLIN: o

23 MR. GLASGOW: -- the sole subject of
24 that section.

25 JUDGE KARLIN: So foreign ownership,

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1 control and dominion, per se, is not a problem,
2 the Commission says in Crow Butte. They further
3 say that the potential that the facility may
4 export the yellowcake, or whatever, is not
5 relevant --

6 MR. GLASGOW: Yes, that's how we --

7 JUDGE KARLIN: -- because --

8 MR. GLASGOW: -- read it.

9 JUDGE KARLIN: -- there is an export
10 license that would be required and there would be
11 a review at that time. But I don't see these
12 Petitioners raising export as being the primary
13 thing. Their concerns have been, well, you know,
14 there are other inimicality -- do they have a
15 foot in the door on inimicality, i.e., we're not
16 saying export is the problem, and let's set aside
17 foreign ownership, per se, but we think there is
18 an inimicality based upon, and then they allege
19 the record keeping problems, well, the records
20 are going to be kept over in France, or the
21 management is going to be over in France, and
22 they won't be responsive.

23 So is it -- there's a theoretical door
24 still open. Inimicality still has to be
25 determined, and foreign ownership, as the staff

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1 has said, is a relevant factor in inimicality
2 determination.

3 MR. GLASGOW: Yes, we do not resist
4 the relevance of inimicality as being a relevant
5 factor in this proceeding. It's simply that we -
6 - what we do attempt to do is put it in its
7 proper focus and give some of the citations and
8 quotations from Commission decisions assessing
9 what does constitute inimicality.

10 True, it's a general term and about --
11 and on it there's extreme little legislative
12 history. But on the other hand the Commission
13 has, in several decisions, established that
14 essentially inimical is equivalent to
15 exceptionally grave harm to the United States,
16 the threat of exceptionally grave harm.

17 And it's simply difficult for us even
18 to begin to see how the fact that a French
19 government-owned entity, the CEA, involvement, as
20 the ultimate indirect owner, could possibly even
21 begin to be considered to be inimical. For
22 example, in breaking it down into the sub-points,
23 for one --

24 JUDGE KARLIN: Well, but -- now let me
25 ask the staff.

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1 Mr. Klukan, they assert what sounds to
2 be an extraordinarily high threshold of
3 inimicality. It has to be grave endangerment.
4 Your brief, could you point me to your section of
5 the brief that deals with this, because you
6 didn't assert such a standard at all it seemed to
7 me.

8 MR. KLUKAN: We did not, Your Honor.

9 JUDGE KARLIN: What is the standard-
10 according to --

11 MR. KLUKAN: Quite frankly, Your
12 Honor, it's really unclear what the standard is.
13 The Commission precedent on the subject is very
14 limited. The Commission does at one point, in
15 *Florida Power*, say what could be -- or what's
16 within the scope of inimicality, and that
17 includes foreign ownership. But there's nothing
18 to say -- and that CLI0909 does not say here's
19 what the standard is for an inimicality.

20 JUDGE KARLIN: Right.

21 MR. KLUKAN: CLI0909 just said, this
22 is not enough. So based upon that, in our later
23 brief we said, well, based upon that -- the
24 Petitioners were alleging the exact same thing,
25 it's not enough. Essentially what we say, Your

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1 Honor, is the Commission has oft stated that it
2 is not through licensing of foreignly owned
3 companies, it's not -- that is not prohibited.

4 We say all the Petitioner raised are
5 generic concerns that would pertain to any
6 foreignly-owned entity, any single one. You can
7 raise the same question, so what about keeping
8 foreign records in Canada, or what about this.
9 Thus, that can't constitute inimicality, or how
10 else would the Commission have licensed
11 foreignly-owned entities. So we have to allege
12 something more than just the mere fact of foreign
13 ownership.

14 JUDGE KARLIN: Right. I understand
15 that. And, you know, I think the reference is
16 your page 26 of your brief, in which you say what
17 you just said, the absence of foreign control of
18 the Applicant. The Commission has held that the
19 phrase "inimical to the common defense of
20 security" refers to, among other things, the
21 absence of foreign control over the Applicant.
22 It is one potential factor the staff may
23 consider.

24 Now I'd like to ask the Oglala
25 Delegation. I think there's a footnote. Why do

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1 we deal with this footnote in the Applicant's,
2 saying, well, look, there's a lot of companies
3 that are materials licensees that are foreign
4 owned. There's LES, Louisiana Energy Services in
5 New Mexico; there are several others. So foreign
6 ownership can't be a, per se, problem. I think
7 the Commission has said that.

8 MR. FRANKEL: I think your --

9 JUDGE KARLIN: What criteria should we
10 use for inimicality?

11 MR. FRANKEL: We believe the criteria
12 includes full disclosure of the relevant entities
13 so they can be evaluated. And we believe that it
14 includes -- that something more is constituted by
15 a failure to make the disclosure. Otherwise it's
16 incumbent on the public to do research outside
17 the application to understand the level of
18 foreign ownership, and the Commission would have
19 to do the same thing.

20 JUDGE ABRAMSON: Where -- sorry,
21 Counselor, but this is for us to ask -- where in
22 the regulations does the requirement you'd like
23 to see exist, that there's complete full
24 disclosure of the entire ownership chain?

25 MR. FRANKEL: Well, we have Section

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1 40.9, and we also have a requirement to disclose
2 citizenship in the application itself. That come
3 from the Atomic Energy Act. So a disclosure to
4 disclose citizenship, and a disclosure to
5 disclose, if not material information, all the
6 information that the NRC staff would consider
7 important, and then we have a requirement than an
8 inimicality analysis is required, and that
9 foreign ownership is critical to that.

10 It's impossible, in our view, to read
11 those together and not find the requirement to
12 disclose the ultimate parent, and there are other
13 laws, like in securities law and anti-trust law,
14 where that's the common practice. We feel this
15 has just not been fleshed out enough for the
16 parties and counsels to understand fully what the
17 rules are in this situation.

18 JUDGE KARLIN: I'd like to ask the
19 staff on that. I mean that has a ring of
20 validity to it. Does the staff require I mean
21 citizenship -- well, Cogema Mining, Inc. is a
22 U.S. corporation, so there's your answer. Does
23 the staff require --

24 JUDGE ABRAMSON: Does it stop there?

25 JUDGE KARLIN: -- you know, well, who

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1 owns you and who owns you. What's the -- is
2 there a requirement beyond that, and is it -- not
3 in a reg but in a reg guide?

4 MR. KLUKAN: To address whether it
5 exists in the regulations, there's nothing in
6 Part 40 that says you have to disclose your
7 citizenship. Section 182 --

8 JUDGE KARLIN: Well, it does -- well,
9 the citizenship or the parentage?

10 MR. KLUKAN: Either, Your Honor.

11 JUDGE KARLIN: Do they even require
12 citizenship?

13 MR. KLUKAN: It doesn't -- you don't
14 have to --

15 JUDGE KARLIN: Okay.

16 MR. KLUKAN: -- disclose the chain.
17 Section 182 does say that we -- the Commission
18 may impose a citizenship requirement, but the
19 Commission has not imposed that in its
20 regulations. So 182 doesn't say you have to
21 disclose citizenship, it says the Commission can
22 require, I mean. And nowhere in Part 40 does it
23 say that it is required, thus Section 182 is
24 inapplicable, given that we haven't actually
25 implemented it.

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1 40.9(a) and 40.9(b). 40.9(a) says if
2 you have to disclose something, it has to be
3 complete and material -- or complete and accurate
4 in all material respects. But it is not required
5 to be disclosed, then 40.9(a) seems inapplicable.
6 40.9 says, for significant -- let me actually get
7 the text out -- but essentially what 40.9(b)
8 boils down to is that you have to disclose stuff
9 that would be significant effect, that you
10 wouldn't even otherwise be required to disclose.

11 Well, if they're not otherwise
12 required to disclose it, how is it then within
13 the scope of this licensing application. Really
14 this licensing application goes on what the
15 Applicant was required to disclose in the
16 application.

17 JUDGE ABRAMSON: Well, except you're
18 sort of bypassing the letter of that reg, if
19 you're reading it to me right. So you've got to
20 disclose other things that are material. Who
21 makes the determination? I guess in the first
22 pass it's the Applicant, and maybe there's an
23 assertion here that there were other things
24 material that the Applicant didn't disclose.

25 And what then is the proper

1 requirement in the staff's view of the
2 application, when is it -- who makes the
3 determination whether it's significant? Is it
4 the staff? Is it the Board? I mean obviously
5 it's put the Board here, right, that it's -- that
6 these things are significant and should have been
7 disclosed. Is that where we're going?

8 MR. FRANKEL: Yes, how can you
9 understand control otherwise, and that's
10 something NRC has to understand in order to sign
11 off on inimicality.

12 MR. GLASGOW: These are important
13 questions and probably relevant at this point to
14 put in a brief mention of what, in fact, the
15 Applicant, Cogema Mining, did disclose in this
16 respect. And without repeating our briefs and so
17 forth, but just touching lightly on it, and we --

18 JUDGE ABRAMSON: Well, just tell us
19 where it is in the brief --

20 MR. GLASGOW: All right. Well --

21 JUDGE ABRAMSON: -- and then we'll be
22 able to read the record.

23 MR. GLASGOW: -- it certainly was
24 attached to our answer, and it is -- our May 5
25 answer, and it takes the form of a letter dated

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1 December 10, 1993 from Cogema to Mr. Ramon Hall,
2 Director of the Uranium Recovery Office of the
3 NRC in Denver. And it explains and requests the
4 basis for --

5 JUDGE KARLIN: Well, I remember --

6 MR. GLASGOW: -- recognizing a name
7 change.

8 JUDGE KARLIN: -- you referencing
9 that. Did you attach that?

10 MR. GLASGOW: Oh, did we not?

11 JUDGE KARLIN: No, I don't think you
12 ever attached it.

13 MR. GLASGOW: Oh, I'm sorry, Your
14 Honor, we attached the CFIUS documents --

15 JUDGE KARLIN: Yes.

16 MR. GLASGOW: -- in which that -- and
17 Mr. Burdick has corrected me that we did not
18 attach this, we were --

19 JUDGE KARLIN: Explain what CFIUS is
20 for --

21 MR. GLASGOW: The Committee on Foreign
22 Investment in the United States, CFIUS --

23 JUDGE KARLIN: Yes. Okay. That's all
24 I wanted. I know what it is, but --

25 MR. GLASGOW: And we did enclose the -

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1 - attached to the brief the documents related to
2 that where, in fact, Cogema did apply and
3 received no objection to a change of ownership
4 where Cogema acquired ownership of the
5 Christensen and Irigaray Ranch property from its
6 previous owner, again, a French corporation,
7 Total.

8 JUDGE KARLIN: Okay.

9 MR. GLASGOW: So there was very
10 complete disclosure, and no, we did not attach,
11 but did refer to the accession number in ADMS
12 where this particular letter is, and it just lays
13 out in very clear terms --

14 JUDGE KARLIN: Okay. That's --

15 MR. GLASGOW: -- and even gives an --

16 JUDGE KARLIN: -- good.

17 MR. GLASGOW: -- organizational chart.

18 JUDGE KARLIN: Thank you, Mr. Glasgow.

19 We're going to move to the next
20 contention, which is, as I have it --

21 JUDGE ABRAMSON: 8A.

22 JUDGE KARLIN: -- 8A, water
23 restoration values. I believe that comes up in
24 the petition at page 70, I believe it is
25 reflected in the Powder River Council contention

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1 1A and 1E, and we alluded to this earlier.
2 Please give me a minute to find.

3 JUDGE ABRAMSON: Did more than allude
4 to it, we asked some questions about it.

5 JUDGE KARLIN: Well, asked a few
6 questions about it. That's true enough. True
7 enough.

8 Petitioner, the Delegation, on page 1
9 of the -- Cogema's brief, they make a point which
10 I think is important. Is it -- you allege that
11 there is a problem with regard to -- you know,
12 for example you say no one has ever restored a
13 unit to baseline.

14 What -- you can't provide no
15 supporting information at all, or allegations, or
16 anything on that. How can we, you know --
17 haven't you read the reg? I mean isn't it
18 required to at least allege some facts that would
19 say -- how do you know that? Nobody knows that
20 here.

21 MR. FRANKEL: Your Honor, no one has
22 ever brought forward an example.

23 JUDGE KARLIN: Well, you're reversing
24 the burden of proof. You can't just come in and
25 make a statement and say, Well, until somebody

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1 disproves it you've got to believe what I say.
2 You have to present something that gives us a
3 basis to believe what you say.

4 MR. FRANKEL: Understood, Your Honor.
5 But the answers didn't provide any facts to the
6 contrary. We raised the issue, if there were
7 such a fact, why wasn't it --

8 JUDGE KARLIN: Well, the answer --

9 MR. FRANKEL: -- provided?

10 JUDGE KARLIN: -- did say, they said,
11 Well, you've made this bald allegation, you have
12 no basis for it, no -- only bare assertions.
13 What possible basis do they have --

14 MR. FRANKEL: But they didn't say --

15 JUDGE KARLIN: -- for making that?

16 MR. FRANKEL: -- it wasn't true.

17 JUDGE KARLIN: The Petitioners provide
18 only bare assertions that Cogema has failed in
19 any prior restoration that "no ISL operation is
20 ever returned to ground or to baseline levels."
21 It is your responsibility to come forward and
22 give us something on that, not theirs to give you
23 examples to the contrary.

24 MR. FRANKEL: Wouldn't that require us
25 to prove a negative?

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1 JUDGE ABRAMSON: No, let's come in
2 another door. If you read 23.09(f) 5 and 6,
3 they're pretty clear. And that's where we think
4 there's -- well, I think there's a shortcoming in
5 your pleadings. That you've said that they
6 haven't restored it, but you've offered neither
7 fact -- like for example here in the application
8 they said they got to this level, and that
9 doesn't get you to compliance, or here's our
10 expert who says they can't get there.

11 And you haven't offered us either --
12 you haven't either -- you have neither alleged
13 facts, and by facts I mean not that they haven't
14 got there but a specific fact, nor have you
15 alleged an error in the application, nor have you
16 alleged or provided any expert support for the
17 proposition. And those are hard and fast, as our
18 Commission puts it, requirements which are strict
19 by design.

20 So if you can show us something where
21 you did provide either a specific fact, not that
22 they didn't come back and say, no, we're wrong,
23 but something specific you asserted that was
24 wrong. For example, they didn't get the
25 groundwater down to .1 parts per million of PCBs,

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1 they got it to .25 and here's where it says that.
2 Those kinds of specifics that would enable us to
3 have a material issue, a genuine issue on a
4 material fact.

5 MR. FRANKEL: Thank you, Your Honor.

6 JUDGE KARLIN: Let me ask the
7 Applicant -- oh, did you have something more to
8 say, sir?

9 MR. FRANKEL: I was going to attempt
10 to reply to that very briefly.

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

12 MR. FRANKEL: The application doesn't
13 state that the primary goal was satisfied during
14 the restoration. And we've just heard that the
15 application's required to make a statement, under
16 the new reg anyway, which is a guidance, as to
17 the extent to which there's been compliance in
18 the past with the goals for restoration. They
19 didn't make that disclosure and we cited a
20 specific part of the application, we quoted from
21 it, that they are representing that they have a
22 goal which is misleading because their real goal
23 is simply --

24 JUDGE ABRAMSON: Yes, we understood
25 that.

1 MR. FRANKEL: Okay.

2 JUDGE ABRAMSON: Thank you.

3 MR. FRANKEL: I'm sorry to go over old
4 ground.

5 JUDGE ABRAMSON: That's okay.

6 MR. FRANKEL: Thank you, Your Honor.

7 JUDGE ABRAMSON: We understood that.

8 JUDGE KARLIN: Well, and I'd like to
9 follow up on that with the Applicant and the
10 staff. Let me ask the staff.

11 Mr. Klukan, on page 71 of the
12 Petitioner's brief, the Delegation's brief, they
13 are talking now about an irretrievable commitment
14 of resources in 50 -- and it's NEPA type of
15 thing, not a -- and they're basically saying,
16 well, look, you have a -- there's a situation
17 here where the Applicant has said it wants to
18 continue mining, or maybe move to a new unit, as
19 I understand it.

20 Let me ask that question. When they
21 say -- when you say continue mining, Mr. Glasgow,
22 there are let's say 10 units on one ranch, and
23 they're not all pumping at the same time, are
24 they? They go from one and then they move to
25 another unit that they haven't been developing

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1 next, and they move to another unit developing
2 next? Or is it all just continuing, all of them
3 are currently operating and just want to keep
4 them operating?

5 MR. GLASGOW: We're going to check
6 with our expert here, Mr. Hardgrove --

7 JUDGE KARLIN: Right. Because this
8 makes a difference --

9 MR. GLASGOW: -- but my general
10 impression is that, of course, some of the
11 injection wells might not be operating any given
12 time. There's a plan of operation, of course,
13 and the idea is to keep the wells in accordance
14 with the plan of operation. But as production
15 declines in certain areas, it might be the case
16 that the production is reduced through that.

17 JUDGE KARLIN: Well, it's sort of
18 having additional units opened and developed.

19 MR. GLASGOW: Can you answer that?

20 MR. KUYLER: Yes, sir.

21 Just to add, under the existing
22 license there are certain numbers of well fields
23 that have been approved in principle for
24 operation. Some of those have already been used
25 and are now in the process of being

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1 decommissioned; some of those may be restarted in
2 the future, or maybe drilled and then used --

3 JUDGE KARLIN: Started.

4 MR. KUYLER: -- in the future,
5 started.

6 JUDGE KARLIN: Started, so --

7 MR. KUYLER: Sorry, started.

8 JUDGE KARLIN: -- it's not just a
9 continuation of an existing set of wells, it's
10 actually new wells that will be installed and
11 commenced to be operated.

12 MR. KUYLER: Yes, Your Honor, but
13 these are wells that were identified and
14 evaluated in previous licensing --

15 JUDGE KARLIN: Right. But --

16 MR. KUYLER: -- proceedings.

17 JUDGE KARLIN: -- it's somewhat --
18 it's not really a continuation of existing wells,
19 it's building new wells and new units which will,
20 as it were, contaminate, they would allege, this
21 new area.

22 JUDGE ABRAMSON: But I want to make
23 sure I heard this correctly. You said these were
24 well fields, if you will, that were identified in
25 a previous license, so we're not at this point

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1 looking for new well field approval, we're saying
2 we want an extension of our existing license,
3 which identified well fields which we might
4 drill, and for which we got approval. So those
5 are past acts that were already approved, even
6 though they haven't been drilled?

7 MR. KUYLER: Yes, Your Honor, this
8 license renewal application does not identify any
9 new well fields beyond those that have previously
10 been authorized.

11 JUDGE KARLIN: I understand. Now, Mr.
12 Klukan, a question on irretrievable commitment of
13 resources. Do you agree with their position
14 that, well, if you have a virgin field, and then
15 you go out and you start putting in some new
16 pumps, and you say you're going to restore it to
17 what it was from the get go, baseline, and you
18 don't, and you come to -- you don't meet the
19 primary goal, you make the secondary, well, it'll
20 leave some contamination there. Isn't that an
21 irretrievable commitment of resources?

22 MR. KLUKAN: First of all, Your Honor,
23 let me characterize, these -- in order to drill,
24 to operate a well field, it needs an aquifer
25 exception, meaning that you couldn't use this for

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1 drinking water --

2 JUDGE KARLIN: I understand.

3 MR. KLUKAN: -- even as is.

4 JUDGE KARLIN: It's not -- I'm not
5 saying it's drinking water, I'm just saying it's
6 an irretrievable commitment of resources.

7 MR. KLUKAN: I'm not sure what those
8 resources would be. What are we losing by --
9 well; it's not meeting the primary goal.

10 JUDGE KARLIN: Well, that's a
11 different question. I'm not saying it's drinking
12 water, I'm not saying it's potable, maybe it
13 possible is. I come from EPA where drinking --
14 well, groundwater is considered important whether
15 it's immediately potable, or drinking water
16 source, or being used or not.

17 So all I'm saying, isn't this an
18 irretrievable commitment of resources if you take
19 a resource, you take an environmental situation
20 and you degrade it, and you leave it that way.

21 JUDGE ABRAMSON: Let me --

22 JUDGE KARLIN: I mean, no --

23 JUDGE ABRAMSON: Well, I want to
24 expand on that question --

25 JUDGE KARLIN: No, wait a minute,

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1 we're just going to ask questions --

2 JUDGE ABRAMSON: So let him answer
3 that, and then I'm going to expand on the
4 question.

5 MR. KLUKAN: No one disputes in the
6 application, or even their environmental report,
7 or in the past licensing actions for this that
8 there will be changes to the geochemical water.
9 I mean that's documented in the reports, so, yes,
10 we recognize that there will be changes to the
11 water potentially, which may not be restored. If
12 that answers your question, Your Honor.

13 JUDGE KARLIN: I think it does, yes.

14 Dr. Abramson --

15 JUDGE ABRAMSON: To me this whole
16 thing's become very hypothetical, so I'll digress
17 for just a moment, or broaden the inquiry for
18 just a moment. When NEPA talks about an
19 irretrievable commitment of resources --

20 JUDGE KARLIN: It's not the same.

21 JUDGE ABRAMSON: -- doesn't it mean we
22 consider the uranium as a resource, which is now
23 being irretrievably committed to be taken out?
24 Isn't that a resource that should validly be
25 considered also? We're talking about all the

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1 resources. Or are we only talking about specific
2 resources that somebody wants to make a deal
3 about?

4 MR. KLUKAN: No, I think you're right,
5 Your Honor, is that uranium is a resource. What
6 I don't get, Your Honor, is what we need to say
7 more. The ER recognizes there may be geochemical
8 changes, the ER says we're going to take out
9 uranium. What else do they want, and that's what
10 I don't fully comprehend, Your Honor.

11 JUDGE KARLIN: Well, I think what I
12 hear them saying is that so long as there is this
13 promise that we're going to restore it to primary
14 baseline, and everyone continues to believe this,
15 which has never happened along at least the
16 history of this facility, there -- people are
17 avoiding the proposition that that really isn't
18 going to happen and that therefore this is an
19 irretrievable commitment of resources.

20 Now it may be an acceptable one, I'm
21 not saying it's a terrible one, or an
22 unacceptable one, but I'm saying if you continue
23 to assert that it's going to be restored to
24 primary background, and it's not and it never has
25 been, you're deluding yourself and you're

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1 deluding us. It's not going to happen.

2 Now is that the end of the world?
3 Maybe not. No, I'm not saying it necessarily is,
4 but that's their point, and I understand it.

5 MR. KLUKAN: I think we recognize, in
6 the environmental documents for this, is that it
7 may not reach the primary -- that's the whole
8 point of the secondary standard.

9 JUDGE KARLIN: The probably won't.

10 JUDGE ABRAMSON: Let me --

11 JUDGE KARLIN: They never have.

12 JUDGE ABRAMSON: -- let's go down this
13 one more step. There's a complaint basically
14 being made here that the use of the phrase
15 "primary goal" in the regulations is meaningless
16 because it's never obtained. What's the right
17 path for complaining about the way a regulation
18 is written? Is it here, or is it in a rule
19 making?

20 MR. KLUKAN: It would be in a rule
21 making, Your Honor.

22 JUDGE KARLIN: Okay. Do you have any
23 questions on this one? Any more?

24 JUDGE ABRAMSON: No, sir.

25 JUDGE KARLIN: Okay. We are moving

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1 right along to 8B, no evidence-based science
2 supporting a conclusion that impacts to water
3 resources will be minimal. That's page 74 of the
4 petition. And I don't believe that the Powder
5 River Council has any contention that
6 specifically alleges that. Let me see if I can -
7 - whether we have any questions.

8 Do we still have any questions on
9 that, 8B?

10 JUDGE MURPHY: I think the questions
11 that arose in my mind related to the relationship
12 between the effects of the mining at the site and
13 the potential individuals that might be effected
14 by it, how tightly is that connection made?

15 JUDGE KARLIN: You have a question of
16 some person?

17 MR. GLASGOW: I can certainly respond
18 for the Applicant, if that would be appropriate?

19 JUDGE KARLIN: Please.

20 MR. GLASGOW: First of all, we think
21 there is not any demonstration of such a
22 connection because of the, for one thing, the
23 shear geography of the situation. No one here
24 has come forward and just pointed to particular
25 people that are going to be using the water, any

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1 of the aquifers for watering cattle or crops or
2 the like. So it's quite different than in the
3 Crow Butte situation where the proximity was
4 within 40 miles.

5 And at least there was some evidence,
6 including statements of one of the Nebraska state
7 people, that there might be some faults that
8 would -- could cause communication between
9 aquifers, and furthermore, the White River, which
10 runs through the Pine Ridge Reservation, was only
11 something on the order of 40 miles away.

12 What's more, there were some other
13 petitioners that were right -- were even closer
14 to the mining operations. So we would say that
15 here the situation is in very stark contrast. As
16 the crow flies, as we've shown, it's 140 miles to
17 the reservation.

18 But if we want to talk about anyone
19 else, the Council itself, that mentions it has
20 lots of members and familiarity with mining
21 proceedings and the like, has not brought forward
22 any of their members and said that they had some
23 sort of use of the water. So we fail to find
24 such a linkage.

25 And as far as the evidence-based

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1 science for control and prevention of migrations,
2 that was discussed very thoroughly in the
3 application, and it's difficult for us, Your
4 Honor, to understand what more really is being
5 sought.

6 JUDGE MURPHY: Is it stated anywhere
7 in your answer, or elsewhere, where the discharge
8 point is for the K aquifer?

9 MR. GLASGOW: Well, Your Honor, as far
10 as the K aquifer, I admit that I am unable to
11 respond adequately to that level of detail, that
12 while I address something closely related and
13 perhaps Mr. Hardgrove, our environmental manager,
14 could write us a note, if that would be all
15 right.

16 JUDGE ABRAMSON: Let me redirect it.
17 Is there anything in the pleadings that addresses
18 that point?

19 JUDGE MURPHY: That's what I said.

20 JUDGE ABRAMSON: Yes, I thought -- but
21 I think it -- I don't want them going off and
22 looking at the application. Is there something
23 in the pleadings that addresses that question?

24 MR. GLASGOW: I cannot recall
25 anything --

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1 JUDGE KARLIN: While you all --

2 MR. GLASGOW: -- about that.

3 JUDGE KARLIN: -- are thinking about
4 that, may I ask a question of the Petitioner,
5 which is, you know, in 62 of the answer, I mean
6 there's no evidence-based science for the
7 Applicant's conclusion that potential impacts are
8 expected to be minimal. It seems to me that
9 there's a substantial amount of information and
10 data in the application about the groundwater,
11 the impacts of the water resources, they talk
12 about it extensively.

13 Now they characterize it as minimal,
14 and I think they've given a goodly amount of
15 evidence-based science for that proposition.
16 What do you give to say that it's not minimal?

17 JUDGE ABRAMSON: Well, and let me pick
18 up --

19 JUDGE KARLIN: What do you allege --

20 JUDGE ABRAMSON: -- on this --

21 JUDGE KARLIN: -- in the pleadings --

22 JUDGE ABRAMSON: Yes, what are you
23 really alleging, because we can view this in one
24 of two ways. We can say, well, there's nothing
25 in there that it -- there's no science in there,

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1 in which case you'd be asserting an omission.

2 We have two kinds of assertions that
3 we consider, one is they never talked about this
4 at all, it's an omission; and if it's a valid --
5 if it's an omission that should have been there
6 and you say why they should have covered it, then
7 it can be an admissible contention. The other
8 option is you can say what they put's wrong, and
9 explain to us why it's wrong. But a general
10 statement of, it's insufficient, or there's not
11 science-based evidence doesn't help me.

12 So what are you saying here? Are you
13 saying they never addressed it, in which case I
14 think Judge Karlin's saying, well, it sounds to
15 me like there's -- it's not an omission because
16 there's plenty of stuff in there, or are you
17 saying it's insufficient in which case -- or it's
18 inaccurate --

19 JUDGE KARLIN: I wasn't going to say
20 that.

21 JUDGE ABRAMSON: -- sorry -- if it's
22 inaccurate, where is it wrong? And where in your
23 petition have you provided either asserted facts
24 that are wrong, asserted facts that show it's
25 wrong, or expert opinion that shows it's wrong.

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1 This is our process, and --

2 MR. FRANKEL: Thank you, Your Honor.

3 Fundamentally we want to understand,
4 as the public, what's going on, and we're getting
5 a sale job on this primary goal to baseline
6 thing. And if they would just say, as in the
7 corporate securities area, we might lose some
8 money here, not it's going to be great. Because
9 when you say it's going to be great, and it
10 doesn't turn out that way, we feel misled as the
11 public.

12 If they would just tell us, we
13 probably aren't going back to primary, it's
14 probably going to be the secondary, and if you
15 consider that minimal, like we do, then it's
16 minimal. If you consider it major -- the problem
17 is that they choose what information to put in.
18 They characterize it in the way that they want.

19 It gives a misimpression to the
20 public. The public thinks that it's better than
21 it really is, and then when they see a statement
22 that this is minimal, no irretrievable -- or
23 irreversible consequences, that's based on a lot
24 of assumptions and all this that it makes it
25 sound like it's better than it really is.

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1 And frankly it would be better to just
2 have a straight up statement that a person can
3 believe or not, which is, we're not going back to
4 primary, it's going to be secondary. We think
5 it's minimal. And if you don't like it, tough.
6 And if it said that, we wouldn't be arguing so
7 much. They would be telling us what they've got
8 without shading it so much and without coloring
9 it --

10 JUDGE ABRAMSON: Yes, and I --

11 MR. FRANKEL: -- and misleading the
12 public.

13 JUDGE ABRAMSON: -- think all of us
14 taxpaying citizens of the U.S. these days are
15 very sensitive to people telling us that this is
16 our goal, and we knowing full well they're not
17 getting there. And I needn't quote anything
18 specific about the current economic situation for
19 us to all know what we're talking about.

20 But the fact is, our regs don't
21 require them to get to primary, and for them to
22 say that it's their goal that they're going to
23 get there doesn't strike me as particularly
24 surprising. You know, it's like my goal might be
25 to be as wealthy as Warren Buffett. I know very

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1 well I'm not going to get there.

2 MR. FRANKEL: But we're not counting
3 on you to achieve that goal.

4 (General laughter.)

5 JUDGE ABRAMSON: Gee, I might help you
6 out if I did.

7 MR. FRANKEL: However --

8 MR. GLASGOW: If it would it be
9 helpful to the Board, Mr. Kuyler here is very
10 familiar with the application, and could speak
11 very concisely to where in the application itself
12 there is a great deal of data about the
13 restoration and even the ability to achieve at
14 least baseline for some, but not all,
15 contaminants. But we will do that only if it
16 would be helpful, and within the Board's
17 schedule.

18 JUDGE KARLIN: Well, you referenced --
19 your brief referenced to a chart, or a table, in
20 the application.

21 JUDGE MURPHY: Table 3 -- in fact,
22 it's the Oglala petition cites the application
23 citing your table 3.2, which has baseline
24 chemistry and --

25 JUDGE KARLIN: And we don't have table

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1 3.2. I mean it's like nobody attached it as an -
2 - you know, I mean we don't go scrounging around
3 and finding these things. If you don't put it on
4 a platter for us, we don't have it.

5 MR. KUYLER: Your Honor, if I could
6 answer that. In our initial answer we did
7 provide ADMS citations which is what we have been
8 used to doing, but we would be more than happy to
9 attach --

10 JUDGE KARLIN: No --

11 MR. KUYLER: -- any citations that --

12 JUDGE KARLIN: No, but in the future,
13 in this Board, if you've got some document you
14 want us to look at, you better attach it as an
15 exhibit or an attachment, and, you know, then to
16 say, oh, go off the ADMS and find it. Same thing
17 with articles or anything else. We need to have
18 them attached as exhibits.

19 JUDGE ABRAMSON: An ounce of
20 prevention.

21 JUDGE KARLIN: Make it easy on us if
22 it would, and, well, it may be a good chance.

23 Anything else on this one we want to
24 ask?

25 (No response.)

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1 JUDGE KARLIN: Okay. And I mean I
2 don't mean to -- Powder River, we don't have any
3 questions of you at this point. I don't even
4 know whether you had a contention on this one,
5 but our next one is 8C, application inaccurately
6 assesses potential environmental harm to Willow
7 Creek and Powder River groundwater and surface
8 water, page 83.

9 I mean I have a problem with this,
10 Mr. -- I'm sorry --

11 JUDGE ABRAMSON: Frankel.

12 JUDGE KARLIN: -- Frankel. You
13 allege, for example, on page 83, that Cogema will
14 negatively impact surface -- the mined aquifer,
15 Wasatch, provides food and water for local
16 domestic stocks and mining activities may
17 endanger these. How -- you have to affirmatively
18 assert that they will and give us some indicia of
19 why and how we should think that. And have you
20 done that?

21 (No response.)

22 JUDGE KARLIN: During restoration
23 activities Cogema may inject hydrogen sulfide.
24 Well, I guess that's probable they'll do that,
25 but --

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1 JUDGE ABRAMSON: I would caution you
2 not to use the word "may" in future pleadings.
3 If you think they will, say why -- say what they
4 do and why.

5 MR. FRANKEL: All right. On page 85
6 of our petition --

7 JUDGE KARLIN: Yes.

8 MR. FRANKEL: -- and the quotation to
9 the application, Section 2.7.1 --

10 JUDGE KARLIN: This long quote to the
11 application.

12 MR. FRANKEL: Right.

13 JUDGE KARLIN: Okay.

14 MR. FRANKEL: It's at the bottom
15 there, it's the very bottom of page 85, it's
16 bolded.

17 JUDGE KARLIN: Yes.

18 MR. FRANKEL: Carry over, although the
19 total dissolved concentrations, and this is their
20 quote, it's below drinking -- "the water cannot
21 be considered potable within the ore zones due to
22 excessive concentrations of the radium and the
23 radon gas." And then it goes on to say --

24 JUDGE KARLIN: Does that establish
25 that this is causing it, or is it just saying

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1 that's the way it is, that's the existing lay of
2 the land?

3 MR. FRANKEL: And then it goes on to
4 say that the coal bed methane wells not yet
5 produced in the vicinity, but which are planned
6 over the next few years, there'll be significant
7 changes to the groundwater use in the general
8 area, and that groundwater withdrawals are not
9 anticipated to have a significant impact.

10 And then into the surface water,
11 there's some description of the Willow Creek
12 area, and there's no discussion of how the impact
13 of a spill would affect the quality of that
14 water. What we're saying is that it will
15 negatively impact the ground and surface water
16 quality to some extent, and we don't know how
17 much that will be.

18 But we do know that the application
19 does not state that there will be environmental
20 harm to Willow Creek or Powder River because it
21 describes the clean up processes in a
22 hypothetical way without reference to what has
23 really happened.

24 JUDGE KARLIN: What we need I mean is
25 in what -- you know, I think the Applicant and

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1 the staff point out the deficiency, or they
2 allege a deficiency in this contention, and you
3 haven't provided us in what way is it inaccurate,
4 in what way is it wrong, how is it wrong, what
5 would you say in contrast? Well, it's wrong
6 because of this, or that. You just say, well,
7 this is what they said, and it's not accurate.

8 MR. FRANKEL: I would characterize
9 this as a contention of omission where the
10 Applicant has just simply ignored entirely.

11 JUDGE KARLIN: Ignored? They went for
12 pages and pages talking about the impact --

13 MR. FRANKEL: What I --

14 JUDGE KARLIN: -- on Willow Creek and
15 the Powder River. All this stuff.

16 MR. FRANKEL: Well, they go on to say
17 that, "our clean up efforts should be so great so
18 that there would be no impact."

19 JUDGE KARLIN: Well, they talk about
20 all the things that are -- you know, this is a
21 long discussion of this. So I don't think it's
22 an omission. I don't know an omission. They
23 qualify -- they don't think it's going to be --
24 they thinks it's going to be minimal, they don't
25 think it's a problem, but they don't say anything

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1 it ain't going to happen.

2 MR. FRANKEL: Well, they say that
3 there'll be no surface water affected --

4 JUDGE KARLIN: Because --

5 MR. FRANKEL: -- in the event of an
6 accident.

7 JUDGE KARLIN: Because the spills that
8 they've had have never reached the surface
9 water. And have you come forward and said, oh,
10 yes, they have? Have you given us any
11 indication -- you know, it didn't even come
12 within 400 feet of the Willow Creek, which is an
13 ephemeral stream anyway. And have you showed,
14 well, no, it has come within -- it has reached
15 that? I don't know.

16 MR. FRANKEL: I don't believe we need
17 to show that there have been catastrophic spills
18 in the past to raise concerns about the potential
19 for problems in the future. There's 110,000
20 gallon spill that happened to flow in a lucky
21 way, soaked into the dry draw adjacent. There's
22 nothing that says if the pipe had been left open
23 for an extra 10 hours it wouldn't be 225,000
24 gallons and that it would have been catastrophic.

25 JUDGE KARLIN: And they came back and

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1 said, all that was was groundwater. That
2 wasn't --

3 MR. FRANKEL: Which is --

4 JUDGE KARLIN: -- anything from the --

5 MR. FRANKEL: -- radioactive.

6 JUDGE KARLIN: -- that isn't from the
7 well. It's radioactive because it's naturally
8 radioactive.

9 MR. FRANKEL: - It's still radioactive
10 and controlled.

11 JUDGE KARLIN: Okay. But it's just
12 groundwater, it's naturally occurring groundwater
13 that people would -- so they haven't added that
14 pollution. And it didn't get --

15 MR. FRANKEL: But it's --

16 JUDGE KARLIN: -- to the river.

17 MR. FRANKEL: -- naturally occurring
18 groundwater that's brought to the surface and
19 released --

20 JUDGE KARLIN: That's true. That's
21 true.

22 MR. FRANKEL: -- and contains
23 radiation and where if it was left where it was
24 it wouldn't be in pathways for human ingestion.

25 JUDGE KARLIN: Okay. Anything else on

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1 contention 8 -- what were we on?

2 JUDGE ABRAMSON: You were on Charlie,
3 I thought.

4 JUDGE KARLIN: Charlie, 8C?

5 JUDGE ABRAMSON: Yes, you're up to D.

6 JUDGE KARLIN: Coal bed mining next.
7 D is the coal bed mining one, I believe.

8 JUDGE ABRAMSON: Which I think Bill
9 was --

10 JUDGE KARLIN: And did you --

11 JUDGE ABRAMSON: -- Judge Murphy was
12 addressing earlier.

13 JUDGE KARLIN: -- have anything on
14 that?

15 And this --

16 JUDGE MURPHY: My --

17 JUDGE KARLIN: I'm sorry. Go ahead.

18 JUDGE MURPHY: My question goes to the
19 Applicant, and on page 86 of the petition your
20 application is quoted, we just referred to this a
21 moment ago, and you conclude there that there's a
22 likelihood of coal bed methane extraction and
23 other potential exploration, gas exploration, and
24 you conclude that, let's see, wells over the next
25 few years in the vicinity of both Irigaray and

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1 Christensen Ranch, there will be significant
2 changes to groundwater use in the general area,
3 but the coal bed methane groundwater withdrawals
4 are not anticipated to have a significant impact
5 on the Wasatch aquifer, the zone of completion,
6 for the wells in the Ranch wells.

7 And I'm interested in the combined
8 effects of in-situ leaching and coal bed methane
9 extraction and potential other hydrocarbon
10 extraction, and is there within your documents,
11 or your pleading a substantiation of this
12 conclusion that the CBM groundwater withdrawals
13 are not anticipated to have a significant impact
14 on the aquifer?

15 MR. GLASGOW: Well, Your Honor, in the
16 pleadings themselves, this is addressed on page
17 76 of Cogema's answer of May 5, and it speaks in
18 some detail of Appendix B as being the bedrock
19 for arguments and information put forth in this
20 pleading.

21 It speaks of Appendix B, which
22 comprises 34 pages and includes various tables
23 and figures, literally hundreds of data points,
24 so I will not read the rest, but the point of
25 this is that the Applicant made a considerable

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1 effort to document its conclusions with respect
2 to coal bed methane and the impact of that on the
3 vertical or horizontal excursions of lixiviant,
4 and the impact of additional drilling.

5 It spoke of the rationale it had for
6 feeling that because of the amount of intervening
7 geological strata, that there wouldn't be the
8 vertical excursions, except if there happened to
9 be a well that penetrated, you know, this area
10 down into the relevant strata that had not yet
11 been plugged.

12 In some length, Appendix B discusses
13 that, and where the wells were, and gives a
14 rationale for why this is not a significant
15 concern. Or if one or more wells that have been
16 drilled that do reach that strata turn out to be
17 a concern, they can be plugged. And the
18 development of the additional Cogema mining wells
19 can proceed on a basis that would not happen
20 until and unless plugging has occurred of any
21 relevant penetration.

22 So this was a great deal of data that
23 the Applicant has put forward, and has endeavored
24 to supply that scientific basis to the best of
25 its ability, and we simply fail to see where

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1 there is the requisite specificity in the
2 Petitioner, the Delegation's, challenge to this
3 material. We're without any knowledge of what
4 specifically is the complaint.

5 JUDGE MURPHY: Okay.

6 JUDGE KARLIN: Okay. I think we'll
7 move to the next one, which I believe is 8F, if
8 I've got my numbering correct, that we have
9 questions about.

10 JUDGE ABRAMSON: F comes after E.

11 JUDGE KARLIN: And that is on page 98
12 of the petition, it deals with the arsenic
13 contamination. This -- I do not know whether the
14 Powder River Council -- Basin Council actually
15 had one on this or not.

16 Did you?

17 MS. ANDERSON: You know, Your Honor,
18 in contention 4 on page 6 we do talk about
19 contaminants that will be left over after the
20 mining process, and one of those contaminants we
21 listed was arsenic.

22 JUDGE KARLIN: Oh, okay.

23 MS. ANDERSON: But we didn't specify
24 in the same --

25 JUDGE KARLIN: Okay.

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1 MS. ANDERSON: -- I guess way --

2 JUDGE KARLIN: Yes, I didn't --

3 MS. ANDERSON: -- as the other
4 Petitioner.

5 JUDGE KARLIN: -- I think that was
6 there.

7 JUDGE MURPHY: Are there any
8 documentation presented, or data available, for
9 arsenic contamination of wildlife?

10 MS. ANDERSON: No, I mean we didn't
11 include anything in our petition.

12 JUDGE KARLIN: Let me just get
13 oriented here and find the page in the answer.

14 Okay. The allegation, this is for the
15 Delegation, Mr. Frankel, and I'm quoting the
16 quote on page 88, "The Oglala Delegation contends
17 that in-situ leach mining operations at the mine
18 will cause an increase in the natural level of
19 arsenic in the water of the target aquifer and
20 that such arsenic-laden water leaks into the
21 surface and underground water sources that supply
22 drinking water to the people and wildlife who
23 live near the mine."

24 Are you saying that the Oglala
25 Delegation represents people who live near the

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1 mine? What do you mean by people who live near
2 the mine? Are there any people who live near the
3 mine? Are your clients, do they live near the
4 mine?

5 MR. FRANKEL: My clients do not live
6 near the mine.

7 JUDGE KARLIN: Okay.

8 MR. FRANKEL: And we've asserted our
9 arguments on stewardship; I won't go over them
10 again.

11 JUDGE KARLIN: Well, you go on -- so
12 your clients don't live near the mine. Then you
13 go on to say the Oglala Delegation further
14 contends that an increased level of arsenic in
15 drinking water results in corresponding increase
16 in incidents of diabetes among the people,
17 including the Oglala Lakota.

18 Let's posit that that's true, that the
19 statement is true, that increased arsenic causes
20 an increase in diabetes. Is there any connection
21 between the arsenic and diabetes that the people
22 that you say in Pine Ridge have experienced and
23 this mine 150 miles away?

24 MR. FRANKEL: Just based on the
25 communication of the aquifers and the water

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1 transport of contaminants.

2 JUDGE KARLIN: And in the standing
3 discussion we talked about, the Crow Butte, they
4 had Dr. LaGarry and a letter from the state of
5 Nebraska I believe it was, indicating that there
6 was a connection in the groundwater, you know,
7 there might be fissures and cracks, and you don't
8 have anything like that here.

9 What basis do we have for you to
10 assert, you know, that there is some plausible
11 chain of causation between the diabetes on the
12 reservation and this operation 150 miles away?

13 MR. FRANKEL: Well, Your Honor, we did
14 assert in our contention 8E, that you had no
15 questions about, information concerning
16 communication of the aquifers.

17 JUDGE KARLIN: Yes.

18 MR. FRANKEL: So it's not that there's
19 nothing in there about that, but you had --

20 JUDGE KARLIN: Well --

21 MR. FRANKEL: -- nothing for us --

22 JUDGE KARLIN: -- that was the
23 vertical --

24 MR. FRANKEL: -- today on that.

25 JUDGE KARLIN: -- connection, as I

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1 understood it, between the ISL and the coal bed
2 methane, and you were concerned that that was --
3 there was a connection and they weren't
4 acknowledging that.

5 MR. FRANKEL: I believe it's not just
6 me. I thought I just heard counsel for the
7 Applicant say that they were concerned about the
8 vertical holes --

9 JUDGE KARLIN: Well, that's right,
10 that's --

11 MR. FRANKEL: -- that might penetrate
12 through the aquifers.

13 JUDGE KARLIN: -- and that's why I
14 didn't have any questions about it, because I'm
15 not asking about whether this layer here is
16 connected -- I'm looking at whether this layer is
17 connected 150 miles away.

18 MR. FRANKEL: Right. If one aquifer
19 is connected to another one, and the second one
20 goes that distance because of its nature, then
21 they're communicating.

22 JUDGE ABRAMSON: Yes, and I think --

23 JUDGE KARLIN: But you started that
24 with an if though. If one is connected to the
25 other, and I don't know -- you haven't even

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1 alleged that it is.

2 JUDGE ABRAMSON: Well, see, that's, to
3 me, an important link that you need to have made,
4 and that is, you just -- to provide something
5 that leads people to believe that the arsenic
6 that's on the site somehow gets to the
7 reservation 150 miles away.

8 So you've got to have something --
9 factual assertions like, for example, X aquifer
10 runs from the mine to the site. That would be
11 the simplest one. Or things like that that would
12 show us how there's a link between arsenic on the
13 site, on the mining site, and the potential for
14 contamination at the reservation, and that's what
15 I don't see here now. You've said it might,
16 you've said we know there are linkages.

17 But that's too vague to get to -- to
18 either say here's a fact that would support it,
19 or an expert opinion that would support the
20 proposition. In other words, just saying that --
21 just asserting that it can, or that it might,
22 doesn't do it. You've got to show me a fact, and
23 a fact such as we know there's an aquifer that
24 runs from 50 miles away from the site directly to
25 the reservation, and we know there's another

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1 aquifer that runs from the site right up to that
2 aquifer that runs to the reservation, and they
3 could communicate, and here's some fact that
4 shows how they communicate. So that's the link
5 that I'm missing.

6 JUDGE KARLIN: Any questions are
7 arsenic, further --

8 JUDGE ABRAMSON: No, and I haven't put
9 any in your water either.

10 (General laughter.)

11 JUDGE KARLIN: If I keep going you
12 probably will.

13 JUDGE ABRAMSON: That's right.

14 JUDGE KARLIN: Okay. 8G. 8G is a
15 long one, I think. It starts on page 110, if
16 I've got my -- of the petition, the Oglala
17 petition. I believe that the Powder River has
18 quite a number of contentions that are -- pick up
19 on, or essentially repeat -- I mean let me ask
20 counsel for Powder River.

21 Is there any contention that you've
22 raised that is not already subsumed in the Oglala
23 Delegation's contentions? Is there anything new
24 or different that you raise that they didn't
25 raise?

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1 MS. ANDERSON: I don't think so, Your
2 Honor.

3 JUDGE KARLIN: Okay.

4 JUDGE ABRAMSON: So if we walk through
5 our thoughts about those, we'll cover what your
6 concerned about?

7 JUDGE KARLIN: Right.

8 MS. ANDERSON: I think so.

9 JUDGE KARLIN: Okay. Contention G on
10 page 110 talks about failure to update research
11 and analysis pursuant to 51.60(a), failure to
12 make required disclosures of environmental
13 impacts. So it's kind of two-part -- and it's
14 really multi-part. I need to collect my thoughts
15 on this one for a moment.

16 JUDGE MURPHY: I have a specific
17 question for the staff here. Are you -- one of
18 the assertions here is that there's a question
19 about the availability of the Pathfinder Tailings
20 facility for tailings. Are you aware of
21 regulations that require a tailings facility to
22 be identified?

23 MR. KLUKAN: No, Your Honor. No.

24 JUDGE KARLIN: This is one of these
25 contentions, Mr. Glasgow, that you start off on

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1 page 85 -- and maybe it's Mr. Burdick -- saying
2 it's outside of the scope because all we're
3 planning to do is continue operations and you
4 have to show there's a significant environmental
5 change, a mere continuation is not a sufficient -
6 - this, I think you will agree, is not
7 necessarily correct.

8 I'm not sure whether I can, you know -
9 - so you dispense with the whole contention and
10 say, well, that's not significant, they haven't
11 shown any significant change.

12 MR. BURDICK: Your Honor, and for each
13 of the items we identify, you know, other
14 reasons --

15 JUDGE KARLIN: Yes. Yes.

16 MR. BURDICK: -- that the contentions
17 should have rejected.

18 JUDGE KARLIN: Right.

19 MR. KLUKAN: Your Honor, Judge Murphy,
20 I want to clarify. There's nothing in the
21 regulations that requires us to list it, but if
22 you look at license condition 9.7, it says Cogema
23 must dispose of byproduct material at a site
24 licensed by the NRC in our agreement state. And
25 then the NRC be notified of the disposal

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1 agreement. But they don't have to pick one.
2 That's not how the requirement works. But that
3 is in license condition 9.7.

4 JUDGE KARLIN: Does this contention
5 have any viability, Ms. Glasgow, in the sense,
6 you know, there's several boards that have
7 admitted contentions relating to Barnwell, that
8 is to say that the application is based upon the
9 proposition of different kind of waste, low-level
10 waste will be sent off site for disposition and
11 the only facility that was available to handle
12 that, i.e. Barnwell, went out of operation in --
13 you know, a year ago, and they raise a
14 contention, they say, well, they haven't -- is
15 this analogous to that type of contention that
16 has occasionally been admitted?

17 MR. GLASGOW: With your permission,
18 Your Honor, Mr. Burdick --

19 JUDGE KARLIN: Oh, Mr. Burdick. Okay.

20 MR. GLASGOW: -- is the right --

21 MR. BURDICK: Your Honor, I think this
22 is a different situation than the Barnwell
23 contentions. And I believe each case in which
24 that contention that has been admitted, it was
25 when there was not a disposal facility available.

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1 So it was for those facilities that had no place
2 to send it at the time.

3 JUDGE KARLIN: And so this one there
4 is a disposal facility available, and it is -- on
5 what basis do they allege there's any reason to
6 suspect it won't be available?

7 MR. BURDICK: Their allegation is that
8 there needs to be an agreement in place, or there
9 needs to be proof that there will be a facility
10 in place for the entire operation, the lifetime
11 of the Cogema facilities. As the staff stated,
12 there's no such requirement, and there is this
13 license condition that requires Cogema to have a
14 facility available in order to be operated.

15 MS. ANDERSON: Your Honor, if I may?

16 JUDGE KARLIN: Yes.

17 MS. ANDERSON: You know, our
18 contention was based on what if this facility
19 becomes unavailable during the lifetime of the
20 mine --

21 JUDGE KARLIN: Yes?

22 MS. ANDERSON: -- and then would there
23 not be a disposal facility.

24 JUDGE KARLIN: But isn't that entirely
25 speculative? Or did you have any reason to think

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1 it will become, and is there some -- I don't
2 know, I've never heard of this --

3 MS. ANDERSON: Yes.

4 JUDGE KARLIN: -- disposal facility.
5 But is there something going on which leads you
6 to suspect that it might become unavailable? Are
7 you just saying, what if it becomes unavailable?

8 MS. ANDERSON: I don't know if we has
9 specific reasons, but we believe that it's an
10 admission in the application to not discuss at
11 least the potential -- you know, kind of what
12 this facility --

13 JUDGE KARLIN: Well, okay, so --

14 MS. ANDERSON: -- is like, if
15 there's -- if it's available -- you know, if
16 they're saying it's available --

17 JUDGE KARLIN: So they have one they
18 discuss and they're planning to send it to
19 Facility X, and you're raising, well, what if X
20 becomes unavailable. Well, then --

21 MS. ANDERSON: But what if --

22 JUDGE KARLIN: -- they say, well,
23 let's send it --

24 MS. ANDERSON: Yes.

25 JUDGE KARLIN: -- to Y. Well, what if

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1 Y becomes unavailable? And how far do you go,
2 and is there any reason to think X or Y will
3 become unavailable? Until you can sort of show
4 that, I don't see how we can -- it's a very
5 speculative thing. Well --

6 MS. ANDERSON: Okay. No, I guess we
7 were just looking --

8 JUDGE KARLIN: What if this place
9 was --

10 MS. ANDERSON: Yes.

11 JUDGE KARLIN: -- hit by a tornado?
12 I mean, you know --

13 MS. ANDERSON: Yes.

14 JUDGE KARLIN: -- I mean I guess --

15 MS. ANDERSON: I guess we were just
16 looking for some kind of analysis in the
17 application of this is the type of waste and the
18 amount of waste that's produced by this facility,
19 and we're sending it to a licensed facility that
20 has capacity to dispose of that waste in a manner
21 that does not harm the public. And that analysis
22 is not in the application.

23 JUDGE ABRAMSON: Is that correct?

24 MS. ANDERSON: And maybe it doesn't
25 have to be.

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1 JUDGE ABRAMSON: Well, let's find out.
2 Is that correct, that that's not in
3 the --

4 MR. BURDICK: Your Honor, I don't
5 believe that's the initial contention either, and
6 so we never responded to that. I believe the
7 application does discuss, you know, the
8 generation of waste and what's going to happen,
9 the environmental consequences of that.

10 But that is not in the initial
11 contention. This contention just focuses on
12 whether that facility will be available
13 throughout the lifetime of Cogema as a facility
14 for byproduct waste disposal.

15 JUDGE ABRAMSON: Well, and I think
16 what we heard from the staff is particularly
17 informational. Informative, sorry.

18 JUDGE KARLIN: Let me ask this
19 question with regard to baseline. That comes up
20 on page 116. Again, this is part of the -- the
21 application -- on 116 of the petition, the
22 application does not contain a description of
23 baseline, e.g. pre-mining groundwater quality.
24 In particular, baseline data for new mine fields
25 should be disclosed in the application. By that

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1 I take it they mean new units.

2 And you respond in sort of two ways,
3 sort of arguing in the alternative perhaps, Mr.
4 Burdick. You say, well, oh, yes, we do have
5 base -- groundwater, you know, baseline, and oh,
6 by the way, there's a license condition that
7 requires us to do baseline. Now let me ask, when
8 you say, yes, we do have baseline, you seem to
9 use the word "regional" a lot. How big is this
10 regional, a 100-mile baseline, or --

11 MR. BURDICK: Your Honor, I think it's
12 discussing the -- kind of the area of the
13 facility.

14 JUDGE KARLIN: Well, again, what
15 region? There's vast open spaces out here
16 sometimes, and the Powder River Basin Region is
17 thousands of square miles.

18 MR. BURDICK: I'm looking for our
19 citation to that --

20 JUDGE KARLIN: Yes.

21 MR. BURDICK: -- so I can find --

22 JUDGE KARLIN: Let me see if I can
23 find that myself. Oh, here we go. I think it's
24 page 91, 91 of your brief. You say baseline
25 water quality, this claim's incorrect. The

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1 section at 5.8.2.1 addresses regional groundwater
2 monitoring, including historical results. And
3 then you go to Table 5.23 provides a listing of
4 historical regional groundwater monitoring
5 results.

6 So do you have the baseline for the
7 units? Do you have the baseline for each of the
8 units?

9 MR. BURDICK: In that paragraph, Your
10 Honor, when we're citing to these various
11 sections of the application, that's more of a
12 general discussion of the things such as the
13 regional groundwater, and in that case it's
14 talking about just a few square miles in that
15 region. Now, when we look at the groundwater --
16 the baseline water quality for a specific mine
17 unit, that's prepared prior to operation of that
18 mine unit.

19 And so all that information isn't
20 provided in the application itself right now, but
21 is prepared and a package is submitted to the
22 Wyoming agency.

23 JUDGE KARLIN: So on page 92, in the
24 middle paragraph, you say, for example, license
25 condition 10.3 states the licensee shall

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1 establish pre-operational baseline water quality
2 for all production units.

3 MR. BURDICK: That's correct. Your
4 Honor.

5 JUDGE KARLIN: So it hadn't been
6 established yet.

7 JUDGE ABRAMSON: Well, it probably was
8 for the ones that are already running.

9 JUDGE KARLIN: Well, the ones that are
10 already --

11 MR. BURDICK: That's right.

12 JUDGE KARLIN: -- running.

13 MR. BURDICK: Yes, it's just for
14 future wants, there's this obligation to prepare
15 that --

16 JUDGE KARLIN: Okay.

17 MR. BURDICK: -- prior to operation.

18 JUDGE KARLIN: And here's a discussion
19 of criterion 5.B.5 of the Appendix in several
20 places.

21 Let's talk about page 94 of the Cogema
22 brief. You've argued, Oglala Delegation, that
23 the application omits any discussion of economic
24 value, the environmental benefits of the 18
25 watersheds associated with Willow Creek. And

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1 then you start talking about wetlands, and they
2 make the point that a watershed and a wetland are
3 two totally different things.

4 A watershed is an area within which a
5 surface water drains, a river, creek, whatever.
6 There may be no wetlands associated with it.
7 What's going on there? I mean two -- they say
8 two entirely different geographical concepts,
9 wetlands and watersheds, so --

10 MR. FRANKEL: Well --

11 JUDGE KARLIN: -- just because they've
12 got 18 --

13 MR. FRANKEL: -- not to me.

14 JUDGE KARLIN: -- watersheds doesn't
15 mean they have any wetlands. Are there any
16 wetlands?

17 MR. FRANKEL: I'm trying to find the
18 reference. You don't want us to outside the
19 pleadings, but when I looked it up on the EPA
20 website, it said that watershed -- wetlands were
21 either a kind of watershed, or watersheds are
22 kind of wetlands. And I just don't see any
23 meaning in the distinction for the purposes of
24 this proceeding.

25 JUDGE KARLIN: Well, come on. Come

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1 on. To say that an elephant is a kind of mammal
2 doesn't mean that all mammals are elephants. You
3 know, just to say that a wetland is a type of
4 watershed does not mean that 18 watersheds
5 necessarily include wetlands.

6 Okay. All right. Anything more on G?

7 JUDGE ABRAMSON: No.

8 JUDGE KARLIN: Now we're on 8I, which
9 I believe is the surety bond issue. I'm not sure
10 we have any questions left on that. You allege
11 that the bank may not pay, it's a French bank,
12 they may decide not to pay. But I think of more
13 concern on this is the adequacy of the Cogema's -
14 - the adequacy of the bond, not whether it be
15 paid, but the adequacy of the bond.

16 On page 98 of your brief, Mr. Burdick,
17 you say this contention is outside the scope
18 because it is -- this addresses an issue that is
19 subject to annual review by NRC. Right? Now the
20 fact that it's subject to annual review doesn't
21 make it outside the scope of this proceeding,
22 does it?

23 MR. BURDICK: Your Honor, if that's
24 okay, Mr. Kuyler will address that.

25 JUDGE KARLIN: Okay.

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1 MR. KUYLER: I would say, Your Honor,
2 that there's a similar obligation with respect to
3 power reactor facilities.

4 JUDGE KARLIN: Yes?

5 MR. KUYLER: There is a periodic --
6 I'm not sure if it's --

7 JUDGE KARLIN: Right.

8 MR. KUYLER: -- annual or biannual
9 review of the adequacy of decommissioning, and
10 that has not reopened in a Part 54 proceeding.
11 This is an ongoing staff responsibility, and if
12 the Petitioners do have an issue with this, I do
13 think that perhaps a 2206 process would be more
14 appropriate.

15 JUDGE KARLIN: Well, you have a
16 facility, a ranch, that has let's say 20 units,
17 and eight of them have been developed and are
18 processing. And then they're going to start --
19 and now they're going to develop number nine,
20 then they're going to develop number 10, they're
21 going to develop number 11 over the next 10
22 years. And whatever contamination that may be
23 generated may increase over that time frame, over
24 the -- as you get all 20 units developed.

25 And there certainly is -- the mere

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1 fact that, you know, the NRC reviews the adequacy
2 of the financial, you know, responsibility every
3 few years does not make it outside of the scope
4 of a proceeding for renewal, or an application of
5 any kind. I mean, a COLA, a, you know,
6 construction -- a combined operating license,
7 they come in, they say, well, yes, the bond is
8 not adequate for closure of this -- oh, that's
9 outside the scope because the NRC reviews that
10 every couple of years.

11 MR. KUYLER: I would say, Your Honor,
12 that the contention that Petitioners have
13 proffered does not allege that the addition of
14 additional mining units has not been accounted
15 for sufficiently, it doesn't provide the sorts
16 of -- those sorts of factual allegations.

17 JUDGE KARLIN: Well, what it seems to
18 allege, if you put it together, is to say, well,
19 you guys haven't restored the groundwater to
20 primary, or background, ever. And that's why the
21 bond is so cheap, because you're giving up too
22 early.

23 MR. KUYLER: Again, Your Honor, that's
24 not the allegation that they've proffered. And
25 those are not the -- that's not the factual

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1 support that they relied upon in this contention.

2 JUDGE ABRAMSON: Well, speaking of
3 factual support, let me come back to Mr. Frankel
4 once again with this. There's an assertion that
5 the bond is -- let's say that the funding
6 mechanism is going to be insufficient. If I
7 wanted to know that the funding level was
8 insufficient, I'd have to know why it was
9 insufficient, I'd have to have somebody tell me,
10 well, it's going to cost X dollars to
11 decommission this, or historically it cost Y
12 dollars.

13 MR. FRANKEL: I'm sorry. A
14 clarification --

15 JUDGE ABRAMSON: Yes.

16 MR. FRANKEL: -- because I just got
17 confused, because first you said the mechanism,
18 which I thought you were talking about the French
19 bank might not --

20 JUDGE ABRAMSON: Oh, no, no, no.

21 MR. FRANKEL: -- but you said then the
22 levels, the funding levels.

23 JUDGE ABRAMSON: Forget the French
24 bank for a minute. I don't want to address that
25 one. I'm more concerned with what Judge Karlin

1 has been pursuing, which is, is there going to be
2 enough money. Forget the mechanics of whether
3 the money's going to be in an LC, or it's going
4 to be a bond, or whatever.

5 MR. FRANKEL: Okay.

6 JUDGE ABRAMSON: Is there enough
7 money, and it seems to me that what Judge
8 Karlin's been pursuing is the question of whether
9 there's enough money. And if -- for a contention
10 to be admissible about there not being enough
11 money, or arguing that there isn't enough money,
12 somebody has to give me an indication of why they
13 think there isn't enough money. And I didn't see
14 any dollars and cents, I didn't see any
15 assertions about it cost -- they spent Y dollars
16 to do this and now they're going to have 10 times
17 that. Is there something I missed from your
18 petition?

19 MR. FRANKEL: Well, I don't know if
20 you missed it, I don't think we have anything to
21 add.

22 JUDGE KARLIN: One thing I might ask
23 is, on page 120 of your petition, you do say
24 something which I think is -- in the middle --
25 well, the second paragraph, Cogema underestimates

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1 the length of operation including restoration ore
2 reclamation activities, and this gets to the
3 cost.

4 And then you go into your final
5 sentence in that paragraph, for instance, based
6 on past experience, it is unlikely that,
7 "Restoration of each mine unit is designed to be
8 accomplished within a two- to three-year period
9 to keep up with the mining schedules as stated in
10 the application at X."

11 Then it seems to me that that has a
12 little bit of legs to it because on the one hand
13 I think we've heard that Cogema had six or seven
14 years to achieve restoration when that's all they
15 were doing was restoration, and they didn't
16 achieve these primary goals. And now they say
17 they're going to go it in two to three years, and
18 if they base their cost estimate on two to three
19 years, and it really takes more than six, then
20 maybe there's a problem.

21 And that's what I hear you saying.
22 But I'm not sure whether you substantiated it
23 enough. You know, you just alleged. You know,
24 if you could have given us something to say, you
25 know, why that cost -- because then you mentioned

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1 the 9.5 million that they're bonding, and say,
2 well, that's not enough. And they don't say that
3 it is, but --

4 MR. FRANKEL: You're right. We just
5 alleged facts.

6 JUDGE KARLIN: Okay. You allege
7 facts.

8 JUDGE ABRAMSON: Well, I'm not sure
9 it's an alleged fact. For example, the fact that
10 I'm going to spread my payments out over six
11 years versus two years doesn't tell me it's going
12 to cost any more. You said it's going to take
13 them six years instead of two years, but that
14 doesn't mean that they're spending at the same
15 rate in the two years that the would have spent
16 in six. Somebody's got to link it together for
17 me. And it's not linked.

18 JUDGE KARLIN: Anything more on this
19 one?

20 JUDGE ABRAMSON: No. No.

21 JUDGE KARLIN: Well, let's see, we
22 have one last one. I'm not sure I have
23 anything -- wildlife impacts, 8K, sage grouse
24 leks. This one's the wildlife impacts, and let
25 me see if I have any questions.

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1 This is one that I note that the
2 Powder River -- you must have a lot of hunters in
3 your organization or something like that.

4 MS. ANDERSON: We have a lot of
5 interested ranchers who are interested --

6 JUDGE KARLIN: Ranchers.

7 MS. ANDERSON: -- in not having
8 species listed actually.

9 JUDGE KARLIN: Oh, I see. Not having
10 any listed. Yes, I've heard that story before.

11 But on reflection, I don't know that
12 I have any questions.

13 JUDGE ABRAMSON: I don't have anything
14 on it.

15 JUDGE MURPHY: No,

16 JUDGE KARLIN: Okay. And that, I
17 think is all the contentions, specific
18 contentions that we had questions on. So we now,
19 I think, are in a position where we could --
20 would hear a five-minute closing statement, or
21 argument, by each of the parties. And in terms
22 of sequence of this, I think what we'll do is
23 reverse it and start with the staff, the
24 Applicant, and then the two Petitioners, and with
25 the Oglala going last, if that would be all

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1 right.

2 So, Mr. Klukan?

3 CLOSING ARGUMENT ON BEHALF OF THE NRC STAFF

4 MR. KLUKAN: Again, I will try to keep
5 this short, Your Honor. Again the staff
6 reiterates, as the Board here discussed, that
7 many of these contentions, it's not all these
8 contentions, lack adequate support, or failure to
9 meet the requirement of 10 CFR 2.309(f)(1)(v),
10 and, again, that's the same for the Powder River
11 Basin's contentions as well since they are, in a
12 way, a derivative of the Delegation's
13 contentions.

14 Again, we discussed that the
15 Delegation is not a federally recognized tribe,
16 nor has it shown that it's a local governmental
17 body of such, in accordance with the Commission's
18 requirement, or at least statement, that it has,
19 you know, legislative and executive authority
20 over the people of the Oglala Sioux tribe.
21 Again, neither Petitioner has shown under (d)(1)
22 as an organization or through representatives
23 that they have standing.

24 And with that, Your Honors, thank you.

25 JUDGE KARLIN: Thank you. Thank you,

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1 Mr. Klukan. -

2 Mr. Glasgow?

3 CLOSING ARGUMENT ON BEHALF OF THE APPLICANT

4 MR. GLASGOW: Your Honors, during this
5 proceeding today, it seems to me that we've
6 established that there is a lack of standing in
7 the Petitioners here. We certainly subscribe to
8 the things that the NRC staff has said on that.
9 I won't repeat them. I will just say that it
10 seems that the standing issue was at least in
11 part resolved in any event in the Crow Butte
12 proceeding in CLI0909.

13 We believe that the same could be said
14 of the Powder River Resource Basin counsel, that
15 they failed to bring forward any specific
16 individuals, ranchers, hunters, or otherwise, who
17 have shown the requisite linkage and made the
18 showings required to establish standing.

19 With respect to contentions, Cogema
20 Mining submits that this proceeding today has
21 showed that it has included a wealth of detail in
22 its application, and has provided the requisite
23 information in accordance with the NRC rules and
24 the Atomic Energy Act, and that any contentions
25 that alleged to the contrary by way of omission

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1 or inaccuracies have simply not been
2 substantiated by the Petitioners today.

3 And so with that, we would
4 respectfully submit and request that the Board,
5 based on this proceeding today and the pleadings,
6 determine that these Petitioners' petition should
7 be denied.

8 JUDGE KARLIN: Okay. Thank you, Mr.
9 Glasgow.

10 Ms. Anderson?

11 MS. ANDERSON: Sure.

12 JUDGE KARLIN: And I might say I think
13 we -- if it's okay with my colleagues, we'll
14 allow each of the counsel for the Delegation to
15 speak for five minutes if you so choose.

16 CLOSING ARGUMENT ON BEHALF OF
17 PETITIONER POWDER RIVER

18 MS. ANDERSON: Thank you. I would
19 just say according to Department of Environmental
20 Quality records dating back to the original 1978
21 application, our organization's been involved
22 with this facility. And since that time we have
23 served a vital watchdog role, and with that we do
24 rely on applications that contain complete and
25 scientifically defensible information in order

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1 for us to exercise our organizational rights to
2 comment and otherwise participate in the process.

3 We are concerned, as I mentioned in my
4 opening remarks, that this organization does have
5 a long-standing history of environmental issues,
6 spills, excursions, leaks, and otherwise other
7 problems that have not been addressed by NRC
8 staff or the company.

9 And if, you know, it sounds like from
10 how this has gone this morning, if we're down and
11 out after today, I would encourage the staff that
12 when it gets to this stage, the state of Wyoming
13 to really take a hard look at this facility and
14 make sure the license conditions are adequate and
15 make sure the regulations are being complied
16 with.

17 We understand there's -- as I
18 mentioned in my opening statement, there's a
19 large degree of regulatory flexibility in the
20 regulations. You regulate by appendix, and
21 that's problematic to the public. So we would
22 encourage you to, you know, look at the
23 regulations, make sure they're complied with, and
24 make sure this facility is protecting the public.
25 Thank you.

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1 JUDGE KARLIN: Thank you, Ms.
2 Anderson.

3 Mr. Frankel? Mr. Ballanco?

4 MR. FRANKEL: Thank you. I'll say a
5 few words and then turn it over to Mr. Ballanco.

6 CLOSING ARGUMENT ON BEHALF OF
7 PETITIONER OGLALA DELEGATION

8 MR. FRANKEL: I appreciated the
9 introductory comments because we all come to this
10 from a different place. And my own personal
11 background has involved a different area, a lot
12 of my practice involved corporate securities law.

13 JUDGE KARLIN: Never would have
14 guessed.

15 MR. FRANKEL: And so I know that it's
16 possible for the lawyers of corporations and the
17 lawyers of government and the lawyers of the
18 public to get on the same page. And we have some
19 of the best lawyers on this issue going through
20 these Boards in the sense that if Morgan, Lewis
21 and Bockius decides because the NRC staff decides
22 because you all decide, that things could be done
23 a little better, that the bar could be lifted.

24 Quite frankly, I feel like so much
25 more money is being spent, including client

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1 money, and all of this effort, to clarify
2 questions that could have been clarified before
3 this thing got filed. And a lot of what we're
4 doing after the fact could be done in the
5 beginning if knowing what our concerns are, they
6 were addressed up front. And it might result in
7 a lot less litigation and a lot less waste of
8 judicial resources.

9 So that's my overall comment to
10 conclude here is that we come here as members of
11 the public without a special nuclear expertise,
12 and without a special scientific expertise. We
13 come here with clients that are by and large
14 indigent and uneducated in these ways, and
15 they're very knowledgeable and experienced and
16 educated in other ways. And so I'm not talking
17 about lack of sophistication, I'm talking about a
18 lack of sophistication with this.

19 And so I appreciate all the time and
20 all the questions, and I'll turn it over to Mr.
21 Ballanco with the note that we are here for a
22 reason, we will keep in this picture with this
23 Board or another Board until we are satisfied.
24 And we are not going anywhere, so it's up to the
25 staff and the industry to start satisfying the

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1 concerns of the public.

2 JUDGE KARLIN: Thank you, Mr. Frankel.

3 Mr. Ballanco?

4 MR. BALLANCO: Thank you, Your Honor.

5 And I do appreciate the opportunity for both of
6 us to address the Board at the end.

7 And I noticed there's asbestos
8 abatement going on in this very building. And it
9 struck me as a bit of an irony that it wasn't
10 many years ago when this building was built, that
11 was state of the art in fire suppression with
12 this miracle fiber known as asbestos. And lo and
13 behold, we've learned that that was a mistake.
14 It was mistake of science. There was a time when
15 open pit uranium mining stopped to be state of
16 the art. And that was a mistake.

17 So now we're dealing with a new state
18 of the art, and I just remind us all in here that
19 our procedures and our science makes mistake.
20 And the more we risk on what we think we know at
21 this time, the more powerful those mistakes
22 happen to be.

23 Our clients -- and, frankly, as Mr.
24 Frankel pointed out, we ourselves lack a certain
25 experience in the procedures required of this

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1 Board and this field of the law. This is not
2 really our background, it's certainly not my
3 background. And I want to acknowledge, you know,
4 the same with our clients. They're doing the
5 best they can. They don't have a financial
6 interest in what happens here.

7 We all have our unique skills and
8 sensitivities, and something that the Oglala
9 still have, that I think ought to be
10 acknowledged, is this sensitivity, and particular
11 sensitivity to water. These people, some of the
12 people in this room who came today, are going to
13 go out this summer in the sun and spend four days
14 without water. And they do that, and they -- a
15 blind man is said to have enhanced sense of
16 hearing and smell and notice things that someone
17 with their eyesight might take for granted. Same
18 is true for someone who sits there without water
19 in the hot sun.

20 There are sensitivities to a living
21 system like groundwater and surface water that
22 people engaged in the day-to-day life of the
23 United States are not aware of. And the people
24 who struggle to maintain a culture that has been
25 oppressed at every angle by the United States are

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1 aware of certain things, and came to these
2 proceedings because they bring that concern and
3 that awareness.

4 I don't think there's any question
5 that the NRC is adhering to the regs. I don't
6 think industry or most members of the public have
7 a real question about how regulations are being
8 enforced. But the Oglala do. And they're
9 curious about what's happening here.

10 So they want to have a level of
11 comfort and say, does this really say let us in
12 to see how safe it is, because we don't really
13 believe that. And it's not because we don't
14 trust any individual person here or corporation,
15 we just don't trust a) the English language, b)
16 the United States.

17 (General laughter.)

18 MR. BALLANCO: It's not personal
19 against the people, it's just based on history.
20 And so that's why they're here.

21 And we understand there's big choices
22 being made here. In a sense, when we talked
23 about the irretrievable commitment of resources,
24 we're talking about trading water, both at the
25 mining level and really in all of nuclear power,

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1 for energy and jobs to a certain extent, and
2 bring a message from the Pine Ridge Reservation
3 with persistent 85 percent unemployment, I can
4 assure you that life and culture and history,
5 tradition goes on without jobs.

6 MS. WRIGHT: One minute.

7 MR. BALLANCO: But that is not true
8 without water. So I just want to leave you with
9 that. I appreciate everyone's time, counsel, and
10 members of the public, and the Board for coming
11 here and hearing us out. Thank you.

12 JUDGE KARLIN: Okay. Thank you, Mr.
13 Ballanco.

14 Thank you to all of the lawyers and
15 the parties who have expended obviously a
16 substantial amount of time and effort preparing
17 these pleadings and going through these
18 documents. And it's been a very major amount of
19 work from all sides, and we've spent a goodly
20 amount of time trying to study it and understand
21 it and to apply the regs and the laws that we
22 have to apply to whether or not what's been
23 submitted here meets the criteria that we have to
24 judge by and we have to make decisions by.

25 But I think I speak for all of us to

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1 say there's a lot of -- a tremendous amount of
2 effort has been dedicated here, and I think this
3 proceeding has been conducted with
4 professionalism and civility, which is
5 appreciated.

6 We originally had and thought we had
7 a greater number of questions because, as we
8 initially read the materials, that was our
9 initial reaction. Upon further studying we ended
10 up -- we've been able to finish this relatively
11 early. I hope that doesn't inconvenience anyone;
12 they can get home a little bit earlier. But we
13 appreciate the time and effort.

14 Now where do we go from here? We will
15 adjourn this proceeding, we'll go and confer,
16 review some of the stuff that you've said, review
17 the transcripts that'll come out in two or three
18 days that we'll get. They will be publically
19 available on ADMS probably in 10 days or two
20 weeks. And we will then discuss and debate among
21 ourselves on the issues of standing and on the
22 issues of the contention admissibility criteria.

23 We're not here to judge the merits of
24 whether anything was right or wrong, but whether
25 it met the contention admissibility standards,

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1 and that's what we'll do. And then we'll issue a
2 decision. And it'll probably come out some time
3 in the next month or two, you know, in July, end
4 of July, I think for -- pretty sure, maybe before
5 that. And that would be our plan.

6 So is there anything more, Dr.
7 Abramson, Dr. Murphy, you want to say?

8 JUDGE ABRAMSON: I just want to say
9 that, for myself, I appreciate the stewardship
10 that the Oglala are trying to maintain. It's a
11 difficult task, and I know that our proceedings
12 are very specific, very complicated, and I'm glad
13 you were here, and I hope that you're able to
14 continue doing what you're trying to do.

15 JUDGE KARLIN: All right. Thank you.
16 With that we will stand adjourned. Thank you.

17 (Whereupon, at 1:10 p.m., the hearing
18 was concluded.)

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CERTIFICATE

This is to certify that the attached proceedings
before the United States Nuclear Regulatory Commission
in the matter of: Cogema Mining, Inc.

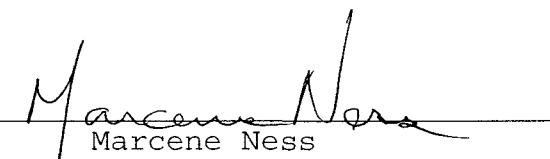
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Docket Number: 40-08502-MLR

ASLBP No. 09-887-01MLR-BD01

Location: Sheridan, Wyoming

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