

1
2
3 UNITED STATES OF AMERICA
4 NUCLEAR REGULATORY COMMISSION
5 ATOMIC SAFETY AND LICENSING BOARD HEARING
6

7 In the Matter of
8 U. S. Department of Energy
9 High-Level Waste Repository
10 Docket No. 63-001
11 ASLBP No. 09-892-HLW-CAB04
12 September 15, 2009
13 9:00 a.m. PST
14

15 TRANSCRIPT OF PROCEEDINGS
16 Pre-Hearing Conference
17 Before the Administrative Judges
18 CAB-04
19

20 Judge Thomas Moore, Chairman

21 Judge Paul S. Ryerson

22 Judge Richard E. Wardwell
23

24 "Interim Draft Copy"
25

APPEARANCES

1
2 For the Nuclear Regulatory Commission Staff:

3 Margaret Bupp, Esq.

4 Chris Chandler, Esq.

5 For the Nuclear Energy Institute:

6 Michael Bauser, Esq.

7 Rodney J. McCullum, Esq.

8 For the Department of Energy:

9 Thomas A. Schmutz, Esq.

10 Alex S. Polansky, Esq.

11 Michael Shebelkie, Esq.

12 For the State of Nevada:

13 Charles J. Fitzpatrick, Esq.

14 John W. Lawrence, Esq.

15 Martin Malsch, Esq.

16 For the Nevada Counties of Churchill, Esmeralda,
17 Lander and Mineral:

18 Robert F. List, Esq.

19 Jennifer Gores, Esq.

20 For the State of California:

21 Timothy Sullivan, Esq.

22 Kevin W. Bell, Esq.

23 For the Native Community Action Council:

24 Rovi anne Leigh, Esq.

25 Scott Williams, Esq.

For the Nevada County of White Pine:

Richard Sears, Esq.

Michael Baughman, Esq.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES (Continued)

For the Nevada County of Clark:

Alan Robbins, Esq.
Debra D. Roby, Esq.

For the Timbisha Shoshone Tribe:

Darcie Houck, Esq.
Ed Beanan, Esq.

For the Nevada County of Nye:

Robert Anderson, Esq.
Jeffrey VanNiel, Esq.

For the California County of Inyo:

Michael Berger, Esq.
Greg James, Esq.

For the Timbisha Shoshone Yucca Mountain
Oversight Program:

Douglas M. Poland, Esq.

For the Nevada Counties of Lincoln and Eureka:

Diane Curran, Esq.

P R O C E E D I N G S

1
2 >> JUDGE MOORE: Good morning. Is there a
3 spokesman or a spokeswoman for all parties this morning who
4 can tell us how they wish to proceed?

5 >> MR. LAWRENCE: Judge Moore, John Lawrence,
6 State of Nevada. Last night, the parties asked the State of
7 Nevada to take the lead over the next, 12, 14 hours and they
8 asked me to do that. So I would like to report to you where
9 we are, what we would like to do and how we would like to
10 move forward this morning. And if anybody else would like
11 to make a comment, they can do so.

12 We took your directions to heart last night and
13 spent about an hour and a half, created rudimentary ideas
14 for an outline --

15 >> JUDGE MOORE: One moment please. We have a
16 problem with Diane Curran in Washington.

17 >> MS. CURRAN: Hi, Judge Moore.

18 >> JUDGE MOORE: May we proceed, Ms. Curran?

19 >> MS. CURRAN: Yes, please.

20 >> JUDGE MOORE: Thank you.

21 >> MR. LAWRENCE: Starting from the June 10th
22 proposed discovery schedule and all the additional
23 discussions and all the additional pleadings that were
24 heard since then, we have attempted to identify the issues
25 outlined for the pleading. And we have reached general

1 consensus on a lot of items. Last night we put together
2 that outline and circulated it to counsel. I have received
3 a few e-mails back with comments and I'm sure there are many
4 other comments. And what we would like to do is go through
5 the outline I circulated last night for about an hour or so
6 and try to incorporate and address those comments.

7 As part of that outline, I identified what I
8 thought were open issues, issues that might require your
9 resolution that we might want to come back to to resolve
10 them if we can't resolve them here so we would come back to
11 you and ask you those four or five questions some odd
12 questions, see if you would like to resolve them and give us
13 direction and then finalize that outline this morning.

14 it would be from that outline that I would draft a
15 draft order and try to circulate that to counsel by close of
16 business this week so that we can support your schedule to
17 make a filing by Wednesday of next week.

18 >> JUDGE MOORE: Excellent. We will -- then, is
19 it suitable if we come back into session at 1:00 or before
20 that at your call and then, again at 5:00 or do you wish it
21 just to be at your call? We stand ready to be available to
22 you that.

23 >> MR. LAWRENCE: I believe we will probably call
24 you before 1:00 and I believe we will probably be complete
25 at least with regard to those issues before 1:00 as well.

1 >> JUDGE MOORE: So we can expect something to --
2 sometime this morning to be a rap on the door that we will
3 come back into session.

4 >> MR. LAWRENCE: And we will also let you know
5 the rap on the door is fine, either way, we will let you
6 know.

7 >> JUDGE MOORE, Fine, We will recess and we wait
8 to hear from you. Are you all fine working in this room in
9 this environment and the people that are here are all part
10 of your party or NRC building staff?

11 I see three -- I don't know the others so the
12 people in the audience are all supposedly part of your group
13 and okay to be here?

14 >> MR. LAWRENCE: Your Honor, with regard to your
15 first question, we're very happy and thankful that you made
16 this facility available us. It has worked and we would like
17 to continue to use it. Thank you. With regard to who may
18 be sitting behind us, I don't know.

19 >> JUDGE MOORE: If there is a problem, we have
20 our staff that stands ready to make sure that there are
21 only authorized people here. Thank you.

22 (Whereupon, the hearing was recessed)

23 (Whereupon, Court Session was reconvened)

24 >> JUDGE MOORE: Please be seated. Mr. Lawrence,
25 the DDMS is on. Would you like us to stay so that a

1 transcript can be made of these sessions, or would you like
2 this to be off-the-record?

3 >> MR. LAWRENCE: We can be on the record, Your
4 Honor.

5 >> JUDGE MOORE: Then the DDMS is on. The floor
6 is yours.

7 >> MR. LAWRENCE: John Lawrence, State of
8 Nevada. We are down to one issue and we're going
9 to raise that issue to you and let the parties
10 discuss that issue with you, but let me frame its
11 context and pose the question and turn it over to
12 the parties to speak on it.

13 All parties understand that Phase 1
14 litigation includes all contentions related to SER
15 volumes I and III safety, miscellaneous contentions.
16 They also understand that's NEPA or environmental
17 contentions to the degree they are related to NEPA
18 related volumes 1 and III. And they include legal
19 contentions to the degree they are related to I and
20 III.

21 They would not include the groundwater
22 contention as we've previously stated. And that's
23 how we would frame out the general aspect of what
24 this Order would cover at the outset of the order in
25 which we would provide you with some proposed

1 details.

2 There is a narrow specific question, and
3 that is, whether you would permit the discovery
4 process to include two specific pure NEPA
5 contentions, if there is agreement to do so by the
6 party advocating that contention, DOE and the NRC
7 staff. To the degree any other party who like to can
8 comment, so be it.

9 That's pure questions on two pure NEPA
10 contentions. Can they also be processed now? Those
11 two contentions are being proffered by Four Counties,
12 counsel Robert List.

13 So I would like to turn the mic over to
14 Robert and let him articulate them. And we're not
15 necessarily looking for an answer but whether we
16 should accommodate that inside the proposed
17 scheduling order that you would receive, and then,
18 maybe later you decide not to do that.

19 So that's the real question for you. You
20 free to solve it, now or say include it.

21 >>JUDGE MOORE: Mr. List?

22 >> MR. LIST: Thank you, Your Honor.
23 Thank you John. The two contentions that we're
24 proposing to infer at this time are for Nevada
25 County's NEPA 1, for Nevada County's, NEPA 2.

1 The first of those is -- deals with truck
2 transportation and that incorporates the value of
3 trucks on Nevada highways, the public safety
4 associated with that, the environmental impacts that
5 are related to it. And these are on the highways,
6 the non-leader state highways when truck
7 transportation leaves those highways.

8 The second proposed contention deals with
9 the emergency response capacity of the local
10 governments including the communication
11 interoperability among the agencies.

12 We believe that it's important to proceed
13 during Phase 1 with these two contentions for the
14 following reasons: First of all, the contentions
15 are -- are ripe. They are ready to go forward.

16 Secondly, they each involve a core issue of
17 utmost statewide significance in the State of Nevada
18 for the residents of Nevada.

19 The transportation to the repository
20 affects virtually all the counties in Nevada. And in
21 the event we're successful in demonstrating that the
22 -- that the Environmental Impact Statement, the scope
23 of the Environment Impact Statement should have
24 encompassed these issues in which it did not, then,
25 there is a significant amount of planning and

1 necessity to determine litigation.

2 There is a long design period for example,
3 relating to highway construction. There is a long
4 period required for both the design and the
5 construction actually.

6 All of these are special rate to the
7 residents in the State of Nevada. Not to diminish
8 the significance of the safety aspects of the
9 repository itself, but we believe that all of the
10 counties will benefit by the determination of these
11 two core issues at an early stage. There are very
12 few witnesses involved in this, probably fewer than
13 ten witnesses and we would do this concurrently with
14 the other deposition period starting in February and
15 so as do not to inconvenience the parties.

16 It could be prepared for hearing at a
17 relatively early date. We would say in the Spring,
18 this could be ripe for hearing it out. We have
19 conferred with other parties and I invite the judges
20 to seek the individual comments from them.

21 As I understand it, in summary, most of
22 the local Governments do support this. The State of
23 Nevada does not oppose it. The DOE is -- has it
24 under consideration as to whether they would oppose
25 it or not. NRC staff as I understand it does not

1 oppose it.

2 And certainly Nye County, White Pine
3 County, Lincoln County, have all expressed their
4 support for including these two important core
5 matters in Phase 1.

6 I'd be happy to answer questions as the
7 Court may wish.

8 >> JUDGE MOORE: Mr. List, you mentioned
9 that you thought there would be fewer than ten
10 witnesses involved. Is that from your standpoint as
11 the proponent of the contentions, or that is
12 recognizing that there may be witnesses on the DOE
13 side?

14 >> MR. LIST: There may be witnesses on the
15 DOE side but without knowing, we're speculating a
16 little bit here. We suspect that DOE made a
17 determination perhaps on the advice of counsel that
18 the scope of the Environmental Impact Statement did
19 not need to encompass these off-site traffic impacts.

20 I'm not quite sure who their witnesses
21 might be in the event that that evolves in that
22 fashion but we certainly at this point do not
23 envision any deposition of witnesses from the DOE,
24 although that could change.

25 >> JUDGE MOORE: Without me taking the

1 time additional to pull them up on my computer screen
2 and read those contentions, from your description and
3 I would preference what I'm saying now because I
4 cannot recall the contentions, but are they
5 essentially contentions of omission that DOE did not
6 address at all, transportation impacts on truck
7 traffic on Nevada roads?

8 >> MR. LIST: Yes, with one minor exception.
9 They did discuss it on Nevada highways virtually at
10 the gate, on the state highway right at the gate in
11 Nye County that will enter into the repository. But
12 beyond that, it's a matter of omission.

13 >> JUDGE MOORE: And the same general
14 label would be applicable to the emergency response
15 capability contentions?

16 >> MR. LIST: Yes, Judge Moore, that's
17 correct.

18 >> JUDGE WARDWELL: And just for
19 clarification, it's not -- it's not an issue of
20 whether or not they considered it. You're saying
21 it's completely missing and Nevada and DOE agrees
22 that this analysis is completely missing? There's a
23 difference between the relative degree of
24 consideration and your contention may very well say,
25 they haven't adequately, considered this.

1 That's different than a pure intention of
2 omission. And that's why I'm inquiring about. Is it
3 truly completely missing and that position would be
4 supported by the reply that DOE made to your
5 contention?

6 MR. LIST: I believe that's the case. We
7 believe there were some preliminary reports. The
8 record does contain some initial studies of
9 transportation.

10 They have -- the record includes
11 designation of representative routes through Nevada.
12 So it's touched upon at various points, but simply
13 does not address in particular, for example, the
14 impact of overweight trucks.

15 There was one study that's in the LSN that
16 considers heavy haul trucks. But then, the project
17 was modified or the design was modified just to
18 include overweight trucks and there was no similar
19 study done for those. I mean, the element of the
20 Environment Impact Statement therefore, does not
21 include -- does not include an analysis of that
22 impact of those vehicles.

23 We also believe that there's a -- so while
24 it is touched upon in various ways, the element, the
25 Environmental Impact Statement does not discuss

1 litigation which NEPA requires of the impacts on the
2 human environment, physical environment, or the
3 public safety or the litigation in any fashion.

4 >> JUDGE WARDWELL: Thank you. I got
5 another question. What distinguishes these two
6 transportation contentions from the other
7 transportation contentions or the other
8 transportation contentions or the other pure NEPA
9 contentions, if we dare use that phrase anymore? Why
10 do yours stand out any different than the other
11 petitioners' submittals?

12 >> MR. LIST: There are other petitioner
13 contentions that touch on these same topics. I have
14 gone through -- we have gone through and --

15 >> Judge Wardwell: Let me interrupt
16 quickly. Even if it doesn't touch upon it, there are
17 other transportation contentions that are out there.
18 And I'm sure they could create the same arguments
19 you've just created for their contentions ought to
20 be looked at in this intervening period.

21 What distinguishes yours from theirs?

22 >> MR. LIST: I think the fact that they
23 are so fundamentally significant from a statewide
24 standpoint.

25 They are core matters that are pacing items

1 for this entire project. If this Environmental
2 Impact Statement has to be supplemented, we know
3 that there's at least a year required to do that and
4 that should be determined early. And particularly
5 because of the consequential planning that goes into
6 the resulting construction design transportation and
7 the design of -- for example, interoperability
8 facilities that all of the Governments would have to
9 install, they would all have to be designed.

10 So there is a long lead time on these
11 particular contentions in terms of the litigation.

12 >> JUDGE WARDWELL: Well, isn't that true
13 with all of the NEPA contentions?

14 >> MR. LIST: I don't think to all this
15 extent, no.

16 >> JUDGE WARDWELL: And so it's your
17 opinion the other parties would think theirs aren't
18 significant and aren't pacing?

19 >> MR. LIST: Well, I think they can each
20 answer for themselves. Certainly, we don't mean to
21 denigrate the significance of the other contentions.
22 We would simply say that these are -- these are
23 shared contentions from the standpoint of impacts on
24 every community in the State of Nevada. And they
25 deserve -- they deserve a highlighting and a

1 prioritization.

2 >> JUDGE WARDWELL: Thank you.

3 >> MR. SCHMUTZ: Might I say something?

4 We -- I haven't even looked at these contentions.

5 The proposition was made to me. I said we would

6 take them under advisement. That's where we are.

7 The agreement is we have a veto over whether this

8 is going to occur or not.

9 The question -- and we haven't decided at
10 all whether we would agree to this or not, whether we
11 oppose it. And if we oppose it, my sense is that
12 what we have agreed to with Mr. List is that if we
13 would say no, it doesn't happen. And we have not
14 come even close to that decision, number one, and for
15 many of the same reasons you just raised.

16 Number two, the question proposed to the
17 Board was simply, if this is a non-startup, I don't
18 want to waste my time even looking at it.

19 If the Board says, look, we have a
20 schedule, we don't understand why we're looking at
21 these two, it doesn't make much sense to us, so no,
22 let's keep this record clean look let's look at SER
23 I and III and related issues. That's the end of it.
24 And it was just to make sure if it's a threshold
25 issue that the Board says, no on, I don't want to

1 waste my time figuring out what the problems are with
2 this. One last thing --

3 >>JUDGE MOORE: Mr. Schmutz, because we're
4 on the DDMS, I want to get your name on the record.

5 MR. SCHMUTZ: Oh, I'm sorry. This is Tom
6 Schmutz from the Department of Energy just giving
7 that long winded talk.

8 One last thing: Seated to my right is
9 Martha Crossand, counsel with the Office of General
10 Counsel and I did shift on this first because she's
11 my boss. But I just wanted the Board to be
12 introduced to her.

13 >> JUDGE MOORE: Thank you. I recognize
14 that your familiarity with these contentions without
15 going back and looking at them -- so we're on a level
16 playing field.

17 Do they strike you as potential models of
18 the NEPA contentions that could be used to resolve
19 the outstanding questions that are novel and unique
20 on how NEPA issues are to be dealt with in the
21 administrative adjudicatory process? Is there
22 anything about them that would allow them to be good
23 pacing horses in that regard?

24 >> MR. SCHMUTZ: The only thing from what I
25 have heard this morning and it frankly troubles me,

1 is that they raised the issue of representative of
2 routes. That issue is a far reaching one, one that
3 if we were to be briefed, involves a lot of parties
4 and we are hoping their transportation contentions
5 are going to be in Phase 2.

6 If we conclude that they do involve
7 representative routes and in due course, we would
8 have to move to dismiss them -- summary judgment or
9 otherwise -- move to dismiss them because we believe
10 representative routes -- the contention is you use
11 representative routes to determine impacts rather
12 than the actual routes.

13 The reason you do that of course is because
14 the routes is 15 years from now before we are ever
15 going to have any actual routes. We don't know what
16 the routes are but try to look as a surrogate to look
17 at representative routes.

18 A lot of parties have challenged the
19 representative routes. That is not an issue we want
20 to take up at this time. So we will veto this if we
21 think we in good conscious have to raise the
22 representative routes. We will say this one can't be
23 hurt. That is a big problem for us and the parties.

24 >>JUDGE MOORE: Putting aside for the
25 moment, the question of representative routes, just

1 the whole issue of how NEPA contentions are going to
2 be dealt with in this unique proceeding under the
3 Nuclear Waste Policy Act which makes it -- because
4 what we're looking at is the Staff's adoption and the
5 Staff's decision in whether it was appropriate and
6 whenever -- and I'm sorry, I can't recall the
7 language of either the regulations or --

8 >> MR. SCHMUTZ: Rule to Adopt --

9 >> JUDGE MOORE: Yeah, and whether that as
10 a practical matter changes how in the administrative
11 adjudication of issues, they are dealt with as
12 opposed to the normal way in which NEPA contentions
13 are dealt with at NRC, licensing litigation.

14 >> MR. SCHMUTZ: Good question. If they
15 are contention omissions, I think they are not good
16 examples. We would prefer if we're going to have a
17 test case, that there be a factual controversy where
18 both parties have not just a legal issue. You seem
19 to raise a legal issue more than anything.

20 >> JUDGE RYERSON: Without regard to these
21 two possible contentions, there must be some NEPA
22 contentions in this first phase, are there not?

23 >> MR. SCHMUTZ: Absolutely Your Honor that
24 are heavily factually disputed volcanic -- White Pine
25 has -- I believe it's White Pine has some volcanic

1 contentions which are very detailed which raise a
2 great deal of factual issues in our view and which
3 will be the subject of expert testimony both on their
4 part and ours during the first phase.

5 >> JUDGE MOORE: What other parties would
6 like to be heard on this matter?

7 MR BAUSER: Mike Bauser, NEI. With respect
8 to --

9 >>JUDGE MOORE: Okay, go ahead Mr. Bauser.

10 >>MR. BAUSER: With respect to one of the
11 fundamental issues that came up yesterday and that
12 you alluded to today, that is to say, whether or not
13 environmental matters are handled as they typically
14 are within the context of garden variety everyday NRC
15 proceedings, or whether the Nuclear Waste Policy Act
16 changes that, I would suggest that -- I think NEI
17 agrees with a -- an approach that you suggested
18 yesterday which is that maybe that issue cannot
19 addressed in the abstract because for example, while
20 NEPA issues are normally considered within the
21 context that you described in detail, as in effect
22 supplementing an Environmental Impact Statement on
23 the basis of hearings; even in that context, you have
24 circumstances where formal supplementation of an NRC
25 EIS is required as a result of the hearing.

1 For example, one case that I've alluded to
2 a couple of times because I was involved in it was
3 where a supplementation of an NRC EIS was required in
4 a case where it had been found there was an
5 inadequate consideration of alternative sites in
6 which case a form of supplementation process was
7 used.

8 So, again, to close the loop, I'm
9 suggesting that maybe this question can't be handled
10 and maybe shouldn't be handled in the abstract.

11 >> JUDGE MOORE: Mr. Robbins for Clark
12 County, you wish to be heard?

13 >> MR ROBBINS: Yes, thank you, Your Honor.
14 Clark County has one and possible two contentions
15 that we think could be grouped with the two, one or
16 both of the Four Counties' contentions that are the
17 subject of this proposal.

18 While we have told the Four Counties that
19 we have under consideration our position on that and
20 whether we can find a way to at least not object to
21 their proposal, we do have concerns and feel obliged
22 to alert the Board to that.

23 One of the major concerns we have is if
24 those two contentions go forward, how, if at all, can
25 we not go forward which is our preference at the

1 moment and not be prejudiced, particularly if these
2 contentions are going to go to hearing perhaps as
3 early as next Spring.

4 And so even though right now, we're talking
5 about a discovery case management order, it's
6 discovery with a view towards potential early hearing
7 on these issues. We don't know the answer to that
8 question.

9 We don't know if we're necessarily joined
10 at the hip and if they go forward, we must go forward
11 too, which we at the moment prefer not to do.

12 The flip side is, how can we be separated
13 and not be prejudiced if those contentions go forward
14 and ours don't? We're not -- it's not clear to us
15 how that can happen.

16 >>JUDGE MOORE: Mr. Robbins, you may not
17 be able to answer this, but is it your impression
18 that if contentions were being grouped for hearing
19 after all discovery, that these two Four Counties
20 NEPA 1 and Four Counties NEPA 2 would not be either
21 in the same group or would be with -- grouped with
22 other contentions?

23 >> MR. ROBBINS: We think, Your Honor, that
24 at least one of our contentions, Clark NEPA 1 which
25 deals with what we consider inadequate consideration

1 of the impacts and needs regarding emergency response
2 by local entities such as Clark County, that that
3 would likely be grouped with one of the two Four
4 Counties' contentions that is the subject of their
5 proposal. And it may be that we also have a
6 transportation NEPA contention.

7 Our deals more with the failure to consider
8 various well corridors whereas I understand from the
9 description that the Four Counties contentions being
10 discussed deal more with highway and trucking
11 considerations. So it's less clear to me at the
12 moment whether that one would be grouped -- you
13 know -- with their trucking one or not. But it
14 seems reasonably clear to us and certainly not clear
15 the other way that our emergency response would
16 likely be a certainly strong candidate to be grouped
17 with their emergency response contention.

18 >>JUDGE MOORE: Do any of the other parties
19 have contentions that would be natural to group with
20 Four Counties' NEPA 1 recognizing that this is not
21 binding on anyone but because you all know your own
22 contentions, that if we're grouping contentions for
23 hearing, that would be natural to group with these.

24 State of California?

25 >> MR. SULLIVAN: Tim Sullivan for the

1 State of California: As to Nye County NEPA 2 which
2 is the emergency response contention, California has
3 two emergency response contentions that are -- we
4 think that are very similar.

5 On Nye County's first contention which
6 deals with truck impacts, the specific contention
7 is -- I guess it's different on a general level but
8 there are issues embedded within it such as routing,
9 decisionmaking, the capabilities of the generator
10 sites, and any requirements and impacts related to
11 heavy haul truck shipments.

12 Those are issues and contentions we have.
13 So I'm not sure if they would be formerly grouped,
14 but certainly litigation of those issues would
15 implicate issues that we would implicate as part of
16 our contentions.

17 >> JUDGE MOORE: Any other party have
18 contentions that they feel would be natural allies
19 to be heard with these contentions?

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

22 >> JUDGE MOORE: Yes, Mr. Lawrence?

23 >> MR. LAWRENCE: Nevada NEPA 07 may
24 possibly be grouped within our opinion, with Four
25 Counties NEPA 1, truck transportation issue. We

1 don't have any first responder emergency plan issues.

2 >>> JUDGE MOORE: Would anyone else like
3 to be heard on this? NRC staff?

4 >>> MS. BUPP: Thank you, Your Honor.
5 While Mr. Lawrence was correct that the NRC staff
6 does support his proposition that just these two,
7 4NC -- 4 Nevada County contentions move forward, if
8 the scope were to be expanded to include some of
9 these related contentions, the Staff is not sure it
10 can continue to support the proposition.

11 >> JUDGE MOORE: Your last word, please?

12 MS. BUPP: The staff isn't sure that it
13 would be able to continue to support the proposition
14 of moving forward with --

15 >> JUDGE MOORE: That was a negative, would
16 not?

17 >> MS. BUPP: Yes, would not.

18 >> JUDGE MOORE: Thank you.

19 >> JUDGE WARDWELL: If I may ask --

20 >> JUDGE MOORE: State of California.

21 >> MR. SULLIVAN: Yes, if I could just
22 add, just a brief description of our position. I
23 think we're in somewhat of the same position as
24 Clark County but we're evaluating it, but concerned
25 about the impacts it would have on us.

1 In theory, it doesn't matter if somebody
2 else gets to litigate their contentions but we think
3 that the purity of the contentions belong in Phase 2
4 and we're concerned about getting dragged into Phase
5 1 because we have to participate in legal briefing or
6 we need to participate in depositions.

7 If there is a window that comes up related
8 to the Four Counties 'contentions, will we be able to
9 depose that person two years from now? Will someone
10 make a collateral estoppel argument against us should
11 the Four Counties not prevail in that contention. So
12 we're concerned about the practical effect it will
13 have on us and whether or not we can stay out of it.

14 >>JUDGE MOORE: Thank you.

15 >> MS. CURRAN: Judge Moore, this is Diane
16 Curran.

17 >> JUDGE MOORE: Yes, Ms. Curran.

18 >>MS. CURRAN: I would just like to comment
19 that Eureka County has like Clark County would like
20 to accommodate the Four Counties if possible but
21 we're also concerned about the prejudicial effect of
22 going ahead with just a couple of contentions that
23 may have implications or other contentions that are
24 litigated later on.

25 >> JUDGE MOORE: Thank you.

1 >> JUDGE WARDWELL: Yes. Mrs Bupp, is
2 there a reason why you support these two or is it
3 that you just don't oppose that they move forward?
4 Is there true support for it or you just saying you
5 don't have any objection to moving forward on these
6 two?

7 >> MS. BUPP: Well, all of the parties have
8 agreed that the purity of the contentions would be
9 saved until the second phase of litigation. And
10 from that -- from a resource standpoint, we were very
11 pleased with that. We want to accommodate the four
12 Nevada counties because they asked, and because of
13 the limited scope of these contentions, it adds a
14 small amount of work to the discovery relative to
15 what's already going on with dealing with SER Volumes
16 I and III.

17 However, with all the other issues the
18 parties have raised about the related contentions, if
19 we did have to move and expand the scope, that is
20 actually adding a lot of resource burden to the
21 first phase of the litigation.

22 JUDGE MOORE: Thank you. The Board would
23 like to recess for ten minutes so that we can discuss
24 this.

25 And we will stand adjourned -- it is now

1 11:15 to 11:25 and we will reconvene and have
2 something to tell you. Thank you.

3 (Whereupon, a short recess was taken)

4 JUDGE MOORE: Please be seated. The Board
5 has considered the question imposed by Mr. Lawrence
6 and determined that the parties should proceed with
7 the Safety NEPA miscellaneous and legal contentions
8 associated with Volumes I and III of the SER in the
9 first phase covered by this proposed case management
10 Order.

11 Are there any other questions that you have
12 for us at this point? And secondly, can you give us
13 some idea of when you would like us to come back into
14 session if at all or matters along that line? Mr.
15 Lawrence?

16 >> MR. LAWRENCE: Thank you. John
17 Lawrence, State of Nevada. We have no further
18 questions for you at this point and time. As I
19 indicated at the outset this morning, we're going to
20 finalize a draft outline to circulate amongst our
21 counsel and I hope to have that done within a half
22 hour to an hour. And I will circulate that by email
23 to counsel that are here in this room.

24 They will use that simply as a guidance to
25 talk over with their clients and be aware of what we

1 generally agreed on. From that, I will be drafting a
2 draft case management order that I will circulate by
3 Friday, close of business, again to counsel in this
4 room for their review and comment. That would be the
5 pleading that would eventually be filed with you in
6 accordance with your request on Wednesday, the 23rd of
7 September for your consideration from there on.

8 But we have no further questions,
9 therefore, at least from my perspective but I think I
10 speak collectively, we have no further need for you
11 to come back in session at 1:00 or 5:00. I think we
12 are effectively done.

13 >> JUDGE MOORE: Do you wish to continue
14 to use the facility for remainder of the day?

15 >> MR. LAWRENCE: I don't believe we need
16 to use this room for me to finalize what I need do
17 and to ship it out. Some of the parties would like
18 to meet collectively to discuss legal contentions or
19 perhaps other issues and they may want to use the
20 conference room or perhaps even this facility, I
21 don't know. But I think they would like to
22 potentially use the conference room facility.

23 >> JUDGE MOORE: Okay, one moment please.
24 The facility is available to you until 5 o'clock if
25 that's all right.

1 And if you don't have any further questions
2 for us, then, we will go ahead and adjourn the case
3 management conference. If you need to reach us,
4 notify the staff and they will give us a call and we
5 will be here for you.

6 I would like to thank all of you for your
7 participation. I think it is it has been most
8 helpful and productive and I would hope that the
9 spirit of cooperation which has been well exhibited
10 over the past day and a half will continue in years
11 to come because this is a marathon that we are all
12 running and there will be a need for a lot of water
13 stops along the way.

14 And again, I thank you. And if there are
15 no other matters that you wish to put before us, we
16 stand adjourned until further notice. Thank you
17 again.

18 (Whereupon the proceedings were concluded)

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of U. S. Department of Energy High-Level Waste Repository, Docket No. 63-01, ASLBP No. 09-892-HLW CAB04 on September 15, 2009, Las Vegas, Nevada, was held as herein appears and that this is the Original Transcript thereof for the file at the U.S. Nuclear Regulatory Commission transcribed from the DDMS video tape on September 25, 2009 taken by Caption Reporters Inc., and that the transcript is a true and accurate record of the foregoing proceedings.

Lorraine Carter, RPR

Official Court Reporter

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25