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NUCLEAR REGULATORY COMMISSION

Title: Powertech USA, Inc. License Application

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June 14, 2010 8:30 am

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Docket Number: 40-9075-MLA

ASLBP Number: 10-898-02-MLA

Location: Custer, South Dakota

Date: Tuesday, June 8, 2010

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3 NUCLEAR REGULATORY COMMISSION

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5 ATOMIC SAFETY AND LICENSING BOARD PANEL

6 + + + + +

7 ORAL ARGUMENT

8

In the Matter of:	
POWERTECH (USA), INC.	Docket No. 40-9075-MLA
(Dewey-Burdock In Situ	ASLBP No. 10-898-02-MLA
Uranium Recovery Facility)	
(License Application)	

15 Tuesday, June 8, 2010

16 The above-entitled conference convened,

17 pursuant to notice, at 9:00 a.m. Mountain Daylight

18 Time in the Council Chambers, Custer City Hall,

19 Custer, South Dakota.

20 BEFORE:

21 THE HONORABLE WILLIAM J. FROEHLICH, Administrative

22 Judge (Chair)

23 THE HONORABLE RICHARD F. COLE, Administrative Judge

24 THE HONORABLE MARK O. BARNETT, Administrative Judge

25

APPEARANCES:

On Behalf of the Nuclear Regulatory Commission:

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PATRICIA A. JEHLE, Esquire

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10 and

11 GRACE DUGAN, Esquire

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15 Rapid City, South Dakota 57701

16 On Behalf of the Petitioner Dayton Hyde:

17 THOMAS J. BALLANCO, Esquire

18 Harmonic Engineering

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1 APPEARANCES (Continued):

2 On Behalf of Consolidated Petitioners:

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8 ALSO PRESENT:

9 MEGAN A. WRIGHT, ASLBP Law Clerk

10 ASHLEY H. PRANGE, ASLBP Administrative Support

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1 P-R-O-C-E-E-D-I-N-G-S

2 (9:01 a.m.)

3 CHAIR FROEHLICH: Good morning. We will
4 come to order. My name is William Froehlich, Chairman
5 of this Atomic Safety and Licensing Board which has
6 been designated to hear this matter and to decide the
7 issues related to the application of Powertech for a
8 license application, NRC combined source and product,
9 byproduct material license to construct and operate a
10 proposed in situ uranium recovery operation called the
11 Dewey-Burdock ISR project in South Dakota. The
12 proposed site is approximately 13 miles northwest of
13 Edgemont, South Dakota.

14 This matter has been docketed by the U.S.
15 Nuclear Regulatory Commission as docket No.
16 40-9075-MLA. The MLA stands for materials license
17 application. Its ASLBP number is 10-898-02-MLA.

18 Today proceeding was publicly noticed by
19 the ASLBP order issued on May 17th, 2010. The order
20 was supplemented by a second Board order issued on
21 June 1st, which laid out the general terms that we
22 will be discussing today and the types of questions we
23 would like answered at the oral argument.

24 For the record, today's date is Tuesday,
25 June 8th, 2010. It's 9:00 a.m. Mountain Daylight

1 Time. And we are in the Council Chambers of the
2 Custer City Hall in Custer, South Dakota.
3 First I would like to introduce the Atomic
4 Safety and Licensing Board. On my right is Judge
5 Richard Cole. Judge Cole is a member of the panel
6 since 1973, holds a Bachelor of Science from Drexel
7 and a Master's degree from the Massachusetts Institute
8 of Technology. And his Ph.D. is from the University
9 of North Carolina. He's a diplomat in the American
10 Academy of Environmental Engineers.
11 To my left is Judge Mark Barnett. Judge
12 Barnett holds a B.S. and M.S. from the University of
13 Tennessee and a Ph.D. from the University of North
14 Carolina. He is currently the Malcolm Pirnie
15 Associate Professor of Environmental Engineering in
16 the Department of Civil Engineering at Auburn
17 University.
18 As I mentioned earlier, my name is William
19 Froehlich. I have been designated Chairman of this
20 ASLBP panel. I am a lawyer by training and have had
21 35 years of federal administrative and regulatory law
22 experience. Because I'm a lawyer and one of the
23 judges here, I serve as Chairman of this Board for all
24 procedural issues.
25 Also, I would like to introduce a few

1 other people from the Atomic Safety and Licensing
2 Board panel. To my far left is our law clerk, a
3 attorney, Ms. Megan Wright.
4 We also have an administrative and
5 logistical support member with us, Ms. Ashley Prange,
6 who is in the doorway. Thank you.
7 At this point I would like to thank the
8 Custer City Council and Mayor Harold Stickney for
9 allowing us to use the Council Chambers.
10 And I would also like to thank the folks
11 in the office, Ms. Lisa Steever and Laurie Woodward,
12 who made it possible for us to use these facilities
13 and their help in coordinating the matters related to
14 this oral argument.
15 Our court reporter today is Mr. Ben Crane.
16 There will also be an electronic transcript made of
17 our argument today. And copies of that transcript
18 will be available in about a week. It will be posted
19 on the NRC website at that time.
20 Let's see. At this point perhaps I could
21 ask the parties to introduce themselves. I'd like for
22 each lead counsel to introduce him or herself, state
23 your name of your client, and if there's any counsel
24 who might be with you today who might participate in
25 the oral argument. I want to start with the

1 applicant.

2 MR. THOMPSON: Thank you, sir. My name is

3 Anthony Thompson, counsel for Powertech.

4 MR. PUGSLEY: And I'm Christopher Pugsley,

5 counsel of Powertech as well.

6 CHAIR FROEHLICH: For the petitioner?

7 MR. PARSONS: Thank you.

8 Jeff Parsons representing the Oglala Sioux

9 Tribe. With me back there is Grace Dugan, my

10 co-counsel.

11 CHAIR FROEHLICH: Thank you.

12 MR. BALLANCO: I'm Tom Ballanco

13 representing Dayton Hyde.

14 MR. FRANKEL: My name is David Frankel.

15 I represent the consolidated petitioners. And with me

16 is my co-counsel Bruce Ellison.

17 MR. CLARK: For the NRC staff, my name is

18 Mike Clark. With me is Patricia Jehle.

19 CHAIR FROEHLICH: Thank you for

20 introducing yourself.

21 Now just a few words of housekeeping and

22 a little bit of introductory material before we start.

23 Housekeeping matters. First, please turn off your

24 cell phones. Set them on vibrate or stun. And if you

25 have any conversations, please take them outside,

1 either cell phone or otherwise, in the hallway or
2 outside, please.
3 I would like to also say that the media is
4 most welcome at NRC proceedings. There's a member
5 here from our NRC Office of Public information, Mr.
6 Neil Sheehan. Neil, would you stand up? Thank you.
7 Feel free to contact him if you have any questions
8 about today's proceedings, background, or any
9 materials like that.
10 Members of the public are free to observe
11 our proceedings today and all NRC hearings, but only
12 the counsel to the parties will be allowed to
13 participate in today's oral argument because today's
14 oral argument is based on the pleadings that they had
15 previously filed with the Board and serves as an
16 opportunity for the Board to ask questions, clarify
17 issues that we will need to have clear in order to
18 write our decision.
19 I thought it might be useful at this point
20 just to give a brief organization and role, explain
21 the role of the Atomic Safety and Licensing Board, a
22 little background on the proceeding that we have
23 before us today, and the purpose of today's argument.
24 In essence, the Atomic Energy Act created
25 a Nuclear Regulatory Commission. And there are five

1 commissioners, which are the NRC. They are appointed
2 by the President, confirmed by the Senate, and they
3 have a large staff to advise them on matters that come
4 before them. The staff is a couple of thousand
5 strong. And they're represented here today by staff
6 counsel to my right.
7 This Board is entirely separate from the
8 NRC staff and separate from the commissioners
9 themselves. Our responsibility is to hear the cases
10 that are brought before us by litigants and who raise
11 questions. And our role is to address those questions
12 and move on the legal and factual issues that come
13 before us.
14 The only communications we have about this
15 case are from the pleadings that are filed by the
16 parties. There is no communication between this Board
17 and the Commission, nor is there any communication
18 between this Board and with NRC staff. Our decision
19 today will be based entirely on the record that has
20 been created in this docket.
21 The Commission is like an appellate body
22 to this Board. They can overrule our decision, but
23 they can't influence it while we draft it up, while we
24 write it and publish it. We do the best we can. And
25 then if the parties aren't satisfied, the appeal goes

1 to the Commission and ultimately to the courts.

2 I guess the main point for the public to

3 understand is that when we talk about the NRC, we are

4 really talking about three separate entities. There's

5 the Commission, the NRC itself, the five

6 commissioners. Then there's the NRC staff, the

7 professionals who will review the application and

8 ultimately grant the license if one is to be granted.

9 And then there's the Board, which will prepare the

10 record upon which a decision will be made on the

11 matters that have been brought before the Board.

12 This Board is independent and will call

13 the issues as we see them. And, like I say, if you

14 are dissatisfied with that decision, ultimately you

15 have appeal rights to both the Commission and the

16 courts.

17 Now a little background to this case. On

18 February 25th, 2009, Powertech submitted a license

19 application for a combined source, an 11e.(2)

20 byproduct materials license to construct and operate

21 a proposed Dewey-Burdock ISR project in South Dakota.

22 After completing a 90-day acceptance review, the NRC

23 determined that that application required additional

24 data.

25 It was refiled on August 10th, 2009.

1 After completion of the second 90-day acceptance
2 review period, the staff determined that the license
3 application as supplemented was acceptable for
4 detailed technical and environmental review. And it
5 was docketed by the agency.
6 On January 5th, 2010, the NRC issued a
7 Federal Register notice providing interested
8 stakeholders and interested members of the public with
9 an opportunity to request a hearing on the application
10 and to request access to sensitive unclassified
11 non-safeguards information, which we call SUNSI
12 information, associated with that application.
13 Timely petitions were received from the
14 consolidated petitioners on March 8th, 2010 and from
15 the Oglala Sioux Tribe on April 6, 2010. On March
16 12th, the Commission established this Atomic Safety
17 and Licensing Board to rule on these petitions for
18 leave to intervene and the hearing request and to
19 preside over any proceedings that may ultimately be
20 held on this matter.
21 So the Board will decide whether the
22 request for a hearing should be granted. We will
23 decide whether or not the Oglala Sioux Tribe and/or
24 the consolidated petitioners have standing and whether
25 they have filed what is known as an admissible

1 contention.

2 The NRC has regulations, which we are

3 bound to apply. It's found in 10 CFR 2.309(f)(1).

4 And the provision in 2.309(f)(1) has six criteria, six

5 subparts that every contention must meet. And we'll

6 have to go through the contentions and see whether

7 they meet these criteria in order to see whether that

8 is an admissible contention or not.

9 These six criteria include things like the

10 following. Petitioner has to state, give a specific

11 statement, of the law or fact to be raised or

12 controverted. Another requirement is the contention

13 provide a brief explanation of the basis for that

14 contention.

15 They also have to show that that

16 contention is within the scope of the proceeding,

17 within the scope of the matters that have been set

18 before the Board, and is material to a finding that

19 the NRC must ultimately make.

20 Finally, the petitioner must provide a

21 concise statement of the alleged facts or expert

22 opinions which support the petitioner's position on

23 that issue and which the petitioner intends to rely on

24 at hearing together with references to specific

25 sources and documents on which that petitioner intends

1 to present his case ultimately when we go to trial.
2 So we will be talking today and probing
3 the petitioners about their contentions, trying to
4 figure out whether they meet these requirements. If
5 they meet the six requirements, we will rule that the
6 contention is admissible. If they don't, we are
7 obligated to rule that the contention is not
8 admissible.
9 After we hear oral argument today, we will
10 go back and issue a written decision or rule. We
11 won't rule from the Bench today because the issues are
12 complicated and very detailed. If we find that one or
13 more of the contentions are admissible, we will
14 schedule further proceedings leading up to an
15 evidentiary hearing on the admitted contentions.
16 At this point, I would like to ask my two
17 colleagues if there is anything I left out or anything
18 they would like to add at this point. Dr. Cole?
19 JUDGE COLE: I would just like to say
20 there have been a lot of filings in this case. And
21 the quality of the filings doesn't make our job any
22 easier.
23 CHAIR FROEHLICH: Judge Barnett?
24 JUDGE BARNETT: I don't have --
25 CHAIR FROEHLICH: Okay. Then today's

1 argument will begin with an opening statement of about
2 ten minutes in length from each party. The
3 petitioners will go first, followed by the applicant
4 and then the NRC staff. Each will get about ten
5 minutes to give an uninterrupted opening statement.
6 And then we'll return to reviewing the questions of
7 standing and then admissibility of the individuals'
8 contentions.
9 As a general rule, we have allocated ten
10 minutes or so for each contention. You will have a
11 chance to talk about each of them as we go through
12 them. Our law clerk, Megan Wright, will keep time for
13 us and try to keep things relatively crisp. She will
14 give you a two-minute warning, call time. At that
15 point, I would ask that you finish up your remarks.
16 And we'll try to keep on schedule.
17 All right. Is there anything, any
18 procedural matter, any matters that any of the parties
19 would like to raise at this point? Yes, counsel?
20 MR. FRANKEL: Judge, before we start the
21 opening statement, might we take a short bathroom
22 break since we will be all focused on the -- I know we
23 just started 15 minutes ago, but if you wouldn't mind,
24 Judge?
25 CHAIR FROEHLICH: All right. I find

1 that's very reasonable. We'll take a five-minute
2 reason and please those who have to use the
3 facilities.
4 I will state for the record that the
5 facilities are located down the hall on the right.
6 There's both a men's room, ladies' room, and a
7 handicapped facility.
8 Okay. We'll stand in recess for five
9 minutes.
10 (Whereupon, the foregoing matter went off
11 the record at 9:15 a.m. and went back on the record at
12 9:20 a.m.)
13 CHAIR FROEHLICH: Okay. Let's come to
14 order, please. Can we start, please, with petitioner
15 for the tribe?
16 MR. PARSONS: Thank you, Judge. Again,
17 Jeff Parsons representing Oglala Sioux Tribe.
18 I guess I wanted to start by welcoming you
19 to South Dakota. And the tribe would like to relay
20 its welcome to its ancestral and treaty lands. It's
21 not hard spending a little time here to see why the
22 tribe feels so strongly about protecting its natural
23 and cultural resources of the area. It really is an
24 amazing place to be.
25 As Judge Cole indicated, this matter has

1 been briefed pretty extensively in several hundred
2 pages of briefs. I admire your persistence in getting
3 through all of that. It's quite a challenge, but we
4 do thank you for taking the interest in coming out.
5 I suppose as an initial matter, I think it
6 is important to focus the hearing a bit and as it
7 appears to have been a little bit of an issue in the
8 briefing on the standard of review. I think it makes
9 sense to go into those issues a little bit. Obviously
10 in ten minutes, I won't go on too long, but I do think
11 it's highly relevant to make sure that the hearing is
12 focused, really, on the stage, the preliminary stage,
13 that it is.
14 And the NRC has ruled on these issues and
15 pretty well set forth what the standard is at this
16 stage with respect to hearing argument on standing and
17 admissibility of contentions. The Crow Butte case was
18 very direct, stating that the Board should seek. Its
19 language was "to avoid the familiar trap of confusing
20 the standing and contention admissibility
21 determinations with the case on the merits."
22 I know that is an easy thing to do to
23 cross those lines. And I hope through the briefing
24 and through this argument, we will be able to focus in
25 on the proper standard for this preliminary hearing.

1 It is in my mind the equivalent at the pleading stage,
2 not to say that the tribe doesn't need to specifically
3 articulate and set forth its basis for standing and
4 the basis for its contentions, but that is the extent
5 of the requirement, to make those statements and set
6 forth that standing, those standing requirements, and
7 the contentions.
8 In doing some more research for this
9 hearing and in looking at this issue further, I found
10 some I think telling discussion from the Board in
11 other places. For instance, in the revision to the
12 rules in 1989, the NRC, as has been argued in the
13 briefs, did raise the standard for both standing
14 demonstrations and contentions, but I think the
15 context is very important. I think as the years move
16 forward, it gets a little bit lost as to what the NRC
17 was trying to do at that time when it passed those
18 rules.
19 And, incidentally, when those rules were
20 revised again in 2004, there is language in the
21 Federal Register notice from 2004 specifically
22 adopting that standard as was set forth in 1989. For
23 the Board's reference, in 2004, the Federal Register
24 notice is volume 69 at page 2,221, the Board
25 specifically states that their revisions to the

1 standards for setting forth standing and contentions
2 did need to, as they say, incorporate the longstanding
3 contention support requirements of the former
4 regulations.
5 And in those former regulations, it's
6 telling with the respect to the context. It was clear
7 that the Commission at that time was dealing with a
8 situation where there were lots of contentions being
9 offered and asserted in these kinds of proceedings.
10 And it was apparently a source of some frustrations
11 for the Board and the Commission itself.
12 There is a reference in the Federal
13 Register notice from that time. And that's 54 Federal
14 Register 33168 is where that starts. And they make
15 reference to proceedings where people were literally
16 raising 600 contentions in a single proceeding.
17 And this was talked about and discussed in
18 I think a very telling a case, a very influential case
19 on the standard here, in the matter of Duke Energy
20 Corporation. It's 49 NRC 328. And in that case, the
21 NRC talks about cases where several hundred, 500
22 contentions submitted, 60 admitted, and only 10 were
23 actually litigated after 2 and a half years, they say,
24 of negotiation.
25 So it's clear that they meant to elevate

1 the standard, but it's important to also recognize
2 that they were dealing with contentions that they
3 sought to be based on, as they say, little more
4 speculation, cases where the intervenors had no direct
5 case to present and were attempting to build a case
6 through, solely through, cross-examination and
7 discovery practices.
8 And the standard that they ultimately
9 arrived at was that the '89 revisions to the
10 contention rule thus insists on "some factual basis."
11 They went on to say that the standard is, in their
12 words and in the words of the NRC in their Federal
13 Register notice, "that a petitioner must provide some
14 sort of minimal basis indicating the potential
15 validity of the contention." And they used that
16 language several times throughout the Federal Register
17 notice, literally setting forth the standard as
18 minimal.
19 Not to downplay the specificity with which
20 a party must specify those contentions, but it
21 appeared to me from the briefing that there was some
22 language in the briefs attempting essentially to raise
23 that standard to what would appear to me anyway to be
24 much more than the minimal showing required from the
25 NRC when they made those rules.

1 I think that's a critical point to be
2 focused on. The language in this case and in the
3 Federal Register notice talk about contentions being
4 such that there are reasonable grounds to litigate.
5 When we were crafting our petition and our
6 contentions, the tribe took this exercise very
7 seriously. And we when crafting those contentions
8 really did focus in on issues we thought and we
9 observed to be critical to ensuring the protection of
10 public health and the environment and the tribe's
11 interest with respect to the proposed Dewey-Burdock in
12 situ recovery operation, as proposed.
13 And so we limited our contentions to ten.
14 We think they all provide substantial basis, far
15 beyond the minimal standard that is remarked and
16 relied upon by the NRC in crafting the rules.
17 So thank you for the time and for being
18 here to listen to our oral argument. Thank you.
19 CHAIR FROEHLICH: Thank you, Mr. Parsons.
20 From the from the consolidated
21 petitioners, please?
22 MR. FRANKEL: Thank you, Your Honor. Let
23 me make sure I am in the microphone here. Am I in?
24 My name is David Frankel. I am counsel for the
25 consolidated petitioners.

1 We have ten minutes. And, with the
2 Court's permission, my co-counsel will use four
3 minutes. I will use four minutes. And Mr. Ballanco,
4 representing Mr. Hyde, will use two minutes. I will
5 go first, and Mr. Ellison will go second. And Mr.
6 Ballanco will go third.
7 CHAIR FROEHLICH: Okay.
8 MR. FRANKEL: To begin, yes, this is a
9 very complicated thing. And there are a lot of
10 technicalities. Some of us in this room have more and
11 some have less experience and awareness of these
12 technicalities.
13 On a scale from 0 to 100, there are people
14 in this room, citizens of Fall River County and Custer
15 County, South Dakota and also citizens from Rapid
16 City, who are more or less in the 0 to 1 out of 100 on
17 a level of understanding of these technicalities.
18 And, of course, you have your judges and
19 the law clerk attorney and the NRC staff and the
20 company from Washington, D.C., these lawyers there,
21 maybe somewhere between 80 and 98. You can tell me.
22 And maybe I am somewhere between 40 and 50. I don't
23 know.
24 But the point is it is really hard to
25 understand it's really complicated and even you judges

1 don't always get it right. And even the NRC doesn't
2 always get it right.
3 But what it fundamentally comes down to is
4 not very complicated. It's actually really, really,
5 really simple. It comes down to something as simple
6 as can you all judges and you all staff and you all
7 company look these people behind me in the eye and
8 with the truth say, "This activity if licensed will
9 not poison your water. It will not deteriorate your
10 way of life. It will not deprive your children of the
11 water that is clean and healthy to drink and used for
12 gardening"?
13 Now, with all of these complexities and
14 all of this large application of something like 6,000
15 pages, one would think that the company would bend
16 over backwards and maybe even print out a copy of this
17 application and put it in the library so people could
18 read it. No. We actually asked for that. And we
19 were denied because it passed a "deadline."
20 I would think that the government and the
21 company and the staff would be delighted to find out
22 that the citizens of Fall River County and Custer
23 County actually take an interest in this issue. And
24 if you put the application in the public library, some
25 of these people will go read it because not everyone

1 around here has internet.

2 Believe it or not, out here I joke my

3 co-counsel chisels out his e-mails in stone and gives

4 it to his secretary. And she types them up on the

5 e-mail.

6 We have good American South Dakotan people

7 who don't make the internet part of their regular

8 life. They're ranching people. We're working on the

9 land. We're working on our houses. And we're working

10 to make ends meet.

11 But we do have some people who would go

12 down to the library and say, "Oh, I heard this section

13 of this application affects me. So I want to see it

14 with my own eyes" because the people here are smart,

15 intelligent people, educated. Many of them have

16 distinguished lives, careers, and professions that go

17 way beyond, you know, what most of us would dream of.

18 And it is kind of an insult not to give

19 them the fundamental information in a hard copy paper

20 form that they could look at.

21 That is my four minutes. I will wrap up

22 by saying we're here in the City of Custer mission

23 statement. It's right in front of us. It lies in

24 front of the implements and tools of mining. Okay?

25 We're in mining central. And, yet, this city wants it

1 to be smart and to preserve the core and family values
2 and high quality of life. And you can't do that if
3 there's no demonstration that the mining activity will
4 be adequately confined.
5 Thank you. And Mr. Ellison?
6 MR. ELLISON: Good morning. My name is
7 Bruce Ellison. I am an attorney from -- I live
8 outside of Rapid City. I am one of the attorneys for
9 the Clean Water Alliance and attorney for consolidated
10 petitioners.
11 It's kind of hard not to get into any of
12 the merits right away. So I'm going to try and avoid
13 that. I would like to give a context. First of all,
14 Mr. Parsons well laid out the position I thought in
15 terms of some of the standard issues, standing issues,
16 contention issues that have to be addressed.
17 What I would like to say in my opening
18 remarks is that for those of us who live here in the
19 Black Hills, the decision by the NRC in this
20 application is something that more fundamentally
21 affects our future than almost anything else that any
22 governmental action can be doing in our area. And I
23 say this because there is a lot of uranium here, a lot
24 of uranium that goes in Inyan Kara Belt, which the
25 outcropping forms an oval around the entire Black

1 Hills.

2 If Powertech is allowed to go forward, it

3 will be the first mine of what will undoubtedly be

4 many. Most of our major roads on the east side and

5 the west side of the Black Hills go through or are

6 closely related to where the Inyan Kara outcroppings

7 are, where such in situ mining, in situ leach mining,

8 could well take place.

9 So, really, what it is about is the

10 beginning. Powertech wants to build a mill.

11 Powertech wants to build a mill not only to service

12 its own operations for this proposed project but for

13 its anticipated expanded projects It is talking to

14 people all over the Black Hills, even just outside

15 Rapid City.

16 For us, this is about water. We are an

17 agricultural state. Our second largest industry is

18 tourism. If we can't grow things, if we can't raise

19 things that we can consume ourselves and market

20 elsewhere, our economy fails. Uranium mining can't

21 substitute for our agricultural economy.

22 If we have a place that tourists --

23 tourists don't usually like to come to visit places

24 where there is nuclear activity going on. They don't

25 like to be concerned about drinking water that may be

1 contaminated from operations: old and current and
2 future.
3 And, of course, those of us who live here
4 get our water from our underground water supplies. In
5 Fall River County, the Inyan Kara is a major water
6 supply. Fall River and the Dakota formations are
7 major aquifers. There's also the Minnelusa. There's
8 also the Madison.
9 We only have to look to what just happened
10 in the Gulf to understand what happens when our
11 federal agencies do not adequately protect us from
12 foreign corporations who come in just for the money,
13 want to take what they can and leave.
14 I'm less than two minutes. I want to
15 leave some time to Mr. Ballanco. I cannot tell you
16 how important this hearing is and these proceedings
17 are for all of us. Thank you.
18 MR. BALLANCO: Thank you, Your Honor. And
19 good morning. Again, my name is Tom Ballanco. And I
20 represent Mr. Dayton Hyde.
21 Just as a matter of opening, I really in
22 introducing my client have to explain his passion and
23 commitment to understanding what is proposed here in
24 the activity. He's a rare and unique individual in
25 not just his love of the West but his understanding of

1 the West. He's a true American resource. This is a
2 horse cowboy. People like him aren't being made
3 anymore. He learned how to run cattle on horseback in
4 the '30s on a ranch.
5 And, you know, I was just reflecting this
6 morning here at this very table. We have
7 representatives of what I would consider the darkest
8 day in American history and also the tallest day: the
9 Oglala Sioux Tribe survivors of the Wounded Knee
10 Massacre. They live in the shadow of a government
11 that thought for some time maybe their extermination
12 was a good idea, and they're still here. And they're
13 concerned about this area.
14 You know, just 66 years ago on Sunday, we
15 celebrated D-Day, what I would consider the tallest
16 day in American history, where Americans stormed the
17 beaches in Normandy and proved Hitler's statement that
18 "Fortress Europe that would stand for 1,000 years was
19 good for about 3 years."
20 And Dayton Hyde was there that day. So
21 he's a man who is very concerned about his life's work
22 here in the Black Hills utilizing the water and what
23 threats this new activity could have.
24 CHAIR FROEHLICH: Thank you.
25 MR. BALLANCO: And I know I am out of

1 time. So thank you.

2 CHAIR FROEHLICH: We'll develop that as we

3 go along.

4 From the applicant, please?

5 MR. THOMPSON: Yes. This is Tony Thompson

6 for Powertech.

7 I will be happy to say on behalf of

8 Powertech, unqualified statement, that we will not

9 harm your drinking water. But I would like to put

10 this into perspective as well. And that is the

11 perspective of the NRC's Atomic Energy Act regulatory

12 process, in which the applicant has the primary

13 responsibility for the management of Atomic Energy Act

14 materials.

15 The applicant or proposes a license

16 application or license amendment. The NRC addresses

17 that, determines if the information is adequate,

18 either denies it, accepts it, or accepts it with

19 conditions.

20 That is the process. So allegations or

21 claims in some of the pleadings that some third party

22 should review this application before it goes in are

23 simply not apart of the Atomic Energy Act process.

24 License amendments, license applications

25 involve two important documents: an environmental

1 report and a technical report. Environmental report
2 involves the NEPA review. The technical report
3 involves assessment of the license application in
4 terms of is it satisfying the health and safety
5 protection requirements of NRC as reflected in its
6 regulations and guidance?
7 Those two documents must be read together.
8 They are inexorably linked. And the petitioner has
9 the responsibility to read those documents and to if
10 they're going to have challenges base those challenges
11 on either issues within those documents, failure to
12 address issues required to be addressed, et cetera.
13 The second thing I would like to talk
14 about in the licensing process for ISL or ISR, which
15 incidentally are the same thing, -- just one is a
16 newer term -- is the phased and iterative nature of
17 the ISL process.
18 You begin with, as NUREG-1569, the
19 standard review plan. In chapter 2, it talks about
20 general site characterization. You are to get general
21 regional groundwater within the proposed mining zone
22 and without, where the monitor well rings are going to
23 be, so that you can tell the difference where the
24 mining zone or the recovery zone is and the
25 non-exempted areas.

1 Chapter 5 of the standard review plan
2 talks about operations. That is the time in which you
3 put in well fields and you develop detailed data
4 regarding the water quality in the well field; the
5 design of the well field; the upper control limits,
6 which are to be the constituents of concern for
7 determining if there has been an excursion. And,
8 indeed, there are allegations that the baseline data
9 are inadequate.
10 You have to look at the standard review
11 plan chapter 2 and recognize that they are not
12 allowed, in fact, by the staff's interpretation of
13 40.32(e). They are not allowed to put in all the well
14 fields. They are not allowed to put the monitoring
15 well ring in. They're not allowed to put in the deep
16 disposal well until they get a license.
17 So that is extremely important. And then
18 the phased and iterative process follows. You move to
19 the next well field, and you begin to develop more
20 detailed information about that well field. Well
21 fields are going to vary. Well field design is going
22 to vary. And then following right behind as you go to
23 the next well field, you begin restoring the well
24 field that you have depleted. So this is phased and
25 iterative.

1 It is important not only with respect to
2 what kind of baseline information is in an
3 application. The phased and iterative process is also
4 relevant to the National Historic Preservation Act.
5 As the Commission has determined in HRI, the HRI
6 decision, the National Historic Preservation Act and
7 the regulations to the Advisory Council on Historic
8 Preservation allow specifically allow phased approach
9 to completing NHPA review and consultations.
10 It is also important in the context of
11 financial assurance because you begin with well field
12 number 1 and you construct your stripping facilities
13 that Powertech has proposed. You don't put all of the
14 well fields in right away. You move in a phased
15 fashion through the, over the ore body. And you
16 follow with restoration.
17 So the phased and iterative nature is
18 important. And the 10th Circuit Court of Appeals in
19 affirming the HRI decision has stated that the
20 graduated nature of the project the NRC has approved,
21 however, represents a reasoned way to address unknowns
22 in play in this case, that case being a rather
23 detailed and torturously litigated ISL licensing
24 proceeding.
25 I also want to make a point that I believe

1 we made in our pleadings that the natural conditions
2 that create these roll-front deposits combined with
3 NRC licensing conditions plus NRC's requirement to
4 restore after you have depleted in a given well field
5 at a significant level of control, they complement
6 each other.
7 So the concept that uncontrolled fluids
8 are going to be somehow floating through various
9 aquifers is simply not accurate and not realistic.
10 There is precedent that says that NRC
11 cannot presume that its licensees will violate license
12 conditions. The license conditions for this site will
13 contain, for example, with respect to excursions, if
14 you note an excursion, you have certain provisions in
15 your license condition. You have to follow those. If
16 you can't fix the excursion, you have to shut down.
17 So you have to look at this process as one
18 that involves both the natural conditions that stop
19 this uranium where we find it, the NRC license
20 conditions, and then the provisions for restoration.
21 And there are other regulatory controls on these
22 proceedings. And they are under the Safe Drinking
23 Water Act.
24 The Safe Drinking Water Act deals with
25 public drinking water supplies. And there are

1 critical provisions in the Safe Drinking Water Act
2 regarding the underground injection control program.
3 Now, that is to protect underground sources of
4 drinking water, drinking water.
5 There are two critical elements before,
6 whether they have an NRC license or not, that uranium
7 can be produced. First is an aquifer exemption which
8 is based on technical demonstrations that there's
9 recoverable minerals. The aquifer exemption is based
10 on the fact that in this case because of the high
11 levels of naturally occurring radionuclides, you
12 cannot drink that water, can't be a source of public
13 drinking water in the exempted portion of the aquifer.
14 Secondly, you have to have a UIC permit.
15 In states with primacy, the states can actually
16 require more stringent controls. For example, in
17 Nebraska and Wyoming, the states require restoration.
18 EPA's UIC provisions do not require
19 restoration of the aquifer. That is an NRC
20 requirement, however, and one with which this licensee
21 must comply.
22 I think that's all I have at this time.
23 CHAIR FROEHLICH: Thank you.
24 From the NRC staff, please?
25 MR. CLARK: Thank you.

1 Again, it's Mike Clark for the NRC staff.
2 Because there are members of the public here who might
3 not be familiar with the NRC staff's review process,
4 I would like to begin by briefly describing how the
5 staff will be reviewing Powertech's application.
6 As Your Honor mentioned, the staff
7 accepted Powertech's application for detailed
8 technical review in October 2009. By accepting the
9 application, that does not mean that the staff found
10 the application is complete or that a license can be
11 granted. Those are issues the staff should be looking
12 at closely over the next year or so. Rather, the
13 staff simply found that there was sufficient
14 information to begin our detailed technical review.
15 The staff will review Powertech's
16 application by looking at two broad areas. First, the
17 staff will perform a safety review. As Judge
18 Froehlich mentioned, the safety review looks at
19 whether Powertech meets applicable criteria in part
20 10, title 10, of the Code of Federal Regulations.
21 It's a hard copy that should be available in the
22 libraries.
23 In particular, the staff looks at whether
24 Powertech will meet applicable standards in part 20,
25 which sets forth the standards for protection against

1 radiation. We'll also look at whether they meet
2 criteria in part 40, which sets forth standards for
3 licensing of source materials, such as uranium.
4 In addition, we'll look at appendix A in
5 part 40. Appendix A sets forth 13 criteria directed
6 to uranium milling operations.
7 Now, Powertech isn't seeking a uranium
8 milling license. However, the Commission has held in
9 the Hydro decision, a 1999 decision, Hydro Resources,
10 that certain criteria in appendix A are relevant to
11 reviewing NISI application. Will those criteria
12 sensibly govern the staff's review? We will apply
13 them.
14 At the same time the staff is going
15 forward with its safety review, we will also be doing
16 an environmental review. Environmental review is to
17 determine what impact granting Powertech a license
18 would have on the environment.
19 The staff will be doing an environmental
20 review, as required by the National Environmental
21 Policy Act. It's required in this case because,
22 although the staff will obviously not be operating
23 Powertech's facility, granting Powertech a license
24 would be a federal action.
25 In conducting our environmental review, we

1 will follow the criteria in part 51 of 10 CFR. That
2 sets forth the NRC's own NEPA implementing
3 regulations.
4 During its environmental review, the staff
5 will seek public input and consult tribal and other
6 governmental entities. The staff will publish a draft
7 environmental impact statement for our best facility,
8 which will open up the public comment. It will be a
9 45-day period where the public can review the draft
10 environmental impact statement and comment on it. The
11 staff will carefully consider all comments received.
12 And then it will document its findings in an final
13 environmental impact statement.
14 I should mention that here the
15 environmental impact statement will actually be
16 supplemental environmental impact statement. And
17 that's because the staff previously addressed
18 generically certain issues associated with licensing
19 uranium recovery facilities.
20 The public can find that on the NRC's
21 website by looking for NUREG -- that's the letters
22 N-U-R-E-G -- 1910. And that was published in May
23 2009.
24 Once the staff has completed safety and
25 environmental reviews and only then, only at that

1 point, can the staff decide whether the application
2 should be granted or whether it must be denied.
3 So far I've focused on the regulations
4 that apply to staff's review, but now I would like to
5 turn to the regulations that impose requirements on
6 any person seeking an NRC hearing. And, as the Board
7 mentioned, those regulations are in part 2 of 10 CFR.
8 Under 10 CFR 2.309(d), a hearing request
9 must be denied unless the petitioner shows both that
10 it has standing to intervene in the proceeding and
11 also sets forth at least one admissible contention.
12 As stated in our briefs, the staff's view is that
13 neither of the two petitioners meets both of those
14 requirements.
15 To show standing in a proceeding on a
16 uranium recovery application, a petitioner must
17 typically that there is a plausible pathway by which
18 you could or he or she could be injured by operations
19 at the site. The staff's view is that the tribe has
20 made that showing, but none of the consolidated
21 petitioners has.
22 The staff's position is that the
23 consolidated petitioners don't show a plausible
24 pathway to injury because they don't address features
25 specific to the Dewey-Burdock site. For example, the

1 directional flow of water in the aquifers underlying
2 Dewey-Burdock is generally southwestward.
3 None of the consolidated petitioners live
4 in that direction. Consolidated petitioners also
5 claim they could be affected by contamination entering
6 surface water on which they rely, but they don't
7 address specific features at the Dewey-Burdock site
8 and explain how contamination would enter the surface
9 water.
10 In our briefs, the staff also explains why
11 neither the tribe nor the consolidated petitioners
12 meet the specific requirements for an admissible
13 contention.
14 Earlier you heard some suggestion that
15 those requirements are minimal. In fact, the
16 Commission recently affirmed a month before the
17 parties submitted their hearing requests that those
18 are deliberately strict requirement. That was in
19 Shearon Harris, a decision issued on March 11th.
20 Other Commission cases hold that the
21 contention pleading requirements are strict by design.
22 They are not minimal requirements.
23 In one of those requirements, a petitioner
24 must show a genuine dispute with the applicant. To
25 show a genuine dispute, they must identify specific

1 portions of the application that they take issue with
2 and explain why their position is supported.
3 As we will get into over the next day or
4 two, the staff's position is that none of the
5 contentions meet the six specific requirements in
6 2.309(f)(1).
7 At this time I won't go into any specific
8 arguments, but I'm sure we'll get into those in the
9 next few days. The staff looks forward to addressing
10 those issues.
11 CHAIR FROEHLICH: Thank you all for your
12 opening statements.
13 This portion of the questioning now will
14 deal with standing. As I mentioned in my remarks and
15 as staff counsel alluded to, we must decide whether
16 the petitioners, individuals or the groups that have
17 petitioned here, meet the requirements of the agency's
18 regulations, specifically section 10 CFR section
19 2.309(d).
20 I think to help the Board with that as we
21 talk about standing and where people reside, where
22 they are in relation to the project, I would like to
23 ask the applicant at this point to talk just for a few
24 minutes about the boundaries of the project, explain
25 a little bit of what we talk about as the PAA in the

1 application.

2 MR. THOMPSON: I'm not sure I quite

3 understand.

4 CHAIR FROEHLICH: In your opening remark,

5 you talked about the phased development of this

6 project.

7 MR. THOMPSON: Yes, right.

8 CHAIR FROEHLICH: I would like you to

9 describe for us, please, the scope of the project

10 geographically, where it is, what is going to be done,

11 or cite us to the record or to the pleadings that you

12 have previously filed where we can see footprints of

13 the project.

14 MR. THOMPSON: Okay. There is a portion

15 in the order that suggested that we should bring some

16 materials to demonstrate where the well fields are in

17 relation to the project. Would you like us to bring

18 that out for you?

19 CHAIR FROEHLICH: Why don't we see if it's

20 helpful. All right. And as we work with these

21 materials, if you can reference that to the technical

22 report or to the application, that would be helpful.

23 MR. THOMPSON: We have two. One of the

24 things that was asked for in the order was to show the

25 relation of where the well fields go in in relation to

1 the various aquifers and how they interconnect. And
2 then there was something requesting us to show where
3 the well fields are to be on the site and that sort of
4 thing.
5 CHAIR FROEHLICH: Right, right.
6 MR. THOMPSON: And that is what we have
7 got here.
8 CHAIR FROEHLICH: If you will just give us
9 that overview, I think we will start.
10 MR. THOMPSON: Maybe I can hold this up.
11 We'll get some tape. This is the outline of the site.
12 CHAIR FROEHLICH: Okay. In order for this
13 to be clear on the record, --
14 MR. THOMPSON: Yes.
15 CHAIR FROEHLICH: -- you will have to --
16 MR. THOMPSON: We have to explain what
17 this has.
18 CHAIR FROEHLICH: -- explain exactly what
19 --
20 MR. THOMPSON: Applicant's exhibit A or --
21 CHAIR FROEHLICH: Okay. Is this
22 duplicated in the application itself?
23 MR. THOMPSON: In different ways. We put
24 this together because of the request in the hearing.
25 CHAIR FROEHLICH: Right. All right.

1 MR. THOMPSON: So all of this information
2 is in the application. And I can't give you the
3 references now, but we can give you the references.
4 MR. FRANKEL: Your Honor, is it
5 appropriate to object because this is new information?
6 CHAIR FROEHLICH: Right. And your
7 objection is noted. What we're doing here is tieing
8 this just so we're all talking about the same area.
9 I want everyone to understand where the applicant
10 proposes the project. And then we're going to get
11 into where the petitioners are situated in relation to
12 it. So your objection is noted.
13 MR. FRANKEL: Thanks, Your Honor.
14 CHAIR FROEHLICH: And that's why we'll
15 have to tie this to the record itself, what has
16 previously been filed.
17 MR. FRANKEL: Yes, sir.
18 MR. THOMPSON: Well, yes. And I'm really
19 looking here at on the standing issues paragraph 2 and
20 paragraph 3, which appeared to us you requested some
21 additional information. So that is the way we
22 interpreted that.
23 So this is the outline of the site. This
24 is a specific well field. This is the monitor well
25 ring around it down here. It will be another well

1 field, a monitor well ring. In here are the wells,
2 any more bodies.
3 CHAIR FROEHLICH: Okay. Mr. Thompson, I'm
4 going to have to back you up. What you have posted on
5 the wall is a topographical map --
6 MR. THOMPSON: Yes.
7 CHAIR FROEHLICH: -- of what area? Where
8 is this --
9 MR. THOMPSON: The proposed Dewey-Burdock
10 site.
11 CHAIR FROEHLICH: Dewey-Burdock site,
12 which is located in the county of?
13 MR. THOMPSON: It's in Fall River. And
14 then it's 13 miles south of Edgemont, as I understand
15 it. Hold on a second.
16 CHAIR FROEHLICH: Okay. And as the map
17 that you have and the date is situated now, north is
18 up.
19 MR. THOMPSON: Right.
20 CHAIR FROEHLICH: Okay. The northernmost
21 boundary of the project is where? And can you
22 describe that in relation to longitude or latitude or
23 a town, a highway, or a railroad.
24 JUDGE COLE: And how far is it from the
25 state line to the west?

1 MR. THOMPSON: This is Wyoming.

2 CHAIR FROEHLICH: Okay. So the

3 westernmost boundary --

4 MR. THOMPSON: Is on the Wyoming boundary.

5 CHAIR FROEHLICH: -- very close to the

6 Wyoming boundary. Okay. And for the scale, how large

7 is the area that you have within the dark line?

8 MR. THOMPSON: I think it's what, 10,000

9 acres? Eleven thousand acres. Here is a well field

10 in here, well field here, down here. So what we did

11 is tried to show you what the well field is like.

12 The upper right hand corner of this is a

13 well field, one of the proposed well fields. I can

14 show you in larger relief what it looks like. And

15 down on the lower left-hand corner is an additional

16 well field.

17 CHAIR FROEHLICH: And are both of these

18 well fields that you are describing for us now part of

19 the initial phase that you referred to in your --

20 MR. THOMPSON: Yes.

21 CHAIR FROEHLICH: -- opening statement?

22 MR. THOMPSON: Yes. They are the initial

23 phase, but they show the well fields as completely

24 developed in the sense of all of the wells in the well

25 fields and the monitor well ring in place in both

1 cases.

2 But none of those would be permitted.

3 This wouldn't be permitted, nor any of these wells,

4 until the license is granted.

5 JUDGE COLE: That depiction in the lower

6 left-hand part of the diagram --

7 MR. THOMPSON: Yes.

8 JUDGE COLE: -- is a picture of some

9 section in the center of your territory?

10 MR. THOMPSON: Right.

11 JUDGE COLE: Could you point that out,

12 please? Okay. So that's --

13 MR. THOMPSON: Which just says, "Near

14 satellite processing plant."

15 JUDGE COLE: Okay. So the lower left-hand

16 corner is a blown-up section of that area?

17 MR. THOMPSON: Yes. And the upper

18 right-hand corner is a blown-up section of down here.

19 JUDGE COLE: The well field proposed --

20 MR. THOMPSON: The well field proposed --

21 JUDGE COLE: -- in the southern portion?

22 MR. THOMPSON: -- in the southern portion?

23 JUDGE COLE: All right, sir. Thank you.

24 CHAIR FROEHLICH: And which counties does

25 this represent or in which counties does this

1 footprint exist?

2 PARTICIPANT: Fall River and Custer

3 Counties.

4 MR. THOMPSON: Fall River and Custer.

5 CHAIR FROEHLICH: Okay. Because the

6 reason I am asking that question is that in response

7 to the consolidated petitioners, you speak of the

8 Custer and Johnson Counties. And that I guess caused

9 me a bit of confusion.

10 PARTICIPANT: Tony, do you have a map that

11 shows the location of the permanent area and the

12 petitioners?

13 MR. THOMPSON: Yes, I have that.

14 PARTICIPANT: And that is what he is

15 asking. Where is our permit boundary and our --

16 CHAIR FROEHLICH: Well, I have something

17 additional on that.

18 PARTICIPANT: Show him that map.

19 CHAIR FROEHLICH: All right. Now, could

20 you either repeat or identify who spoke because we

21 need to work, you know --

22 MR. THOMPSON: I can't answer why we had

23 Johnson County in there. It just had Johnson County

24 in response to the pleadings. I have --

25 JUDGE COLE: It's likely an error?

1 MR. THOMPSON: An error. Fall River and
2 Custer are the only ones that I have heard mentioned
3 by our clients.
4 JUDGE COLE: Okay.
5 MR. FRANKEL: I believe Johnson County, is
6 it not, in the Wyoming side?
7 MR. THOMPSON: As far as we're concerned,
8 it's not in Johnson County.
9 CHAIR FROEHLICH: For my purposes, this
10 project is proposed in --
11 MR. THOMPSON: Fall River.
12 CHAIR FROEHLICH: -- Custer and Fall River
13 Counties?
14 MR. THOMPSON: Correct.
15 CHAIR FROEHLICH: And that's what we're
16 looking for.
17 PARTICIPANT: So the area for review --
18 CHAIR FROEHLICH: In order for this to
19 work, you'll have to consult, and you'll have to state
20 it on the record for us.
21 MR. THOMPSON: I don't know what he was
22 going to say. All I'm saying is that --
23 MR. FRANKEL: Of course, we object to
24 this, Your Honor. It's sort of like calling an expert
25 witness, isn't it?

1 CHAIR FROEHLICH: Right now we're trying
2 to find out where the project is. I don't want any
3 misunderstanding on where it's going to take place.
4 MR. THOMPSON: As I understand it, Custer
5 County, Fall River County.
6 CHAIR FROEHLICH: Right in the middle.
7 MR. THOMPSON: Almost right in the middle
8 of the map, Custer County to the north, Fall River to
9 the south
10 JUDGE BARNETT: Are the locations of
11 private wells shown on the map here?
12 MR. THOMPSON: I can't answer the
13 question. No. They are shown, I believe, on maps in
14 the application.
15 JUDGE BARNETT: Yes. And I thought there
16 were some in the PAA or very near the PAA. Is that
17 right?
18 MR. THOMPSON: They're not shown on here.
19 This was just to show you because of the -- to look at
20 the footprint and show you where the well fields might
21 be and where the processing facilities are, not to
22 show you all of the stuff that's in the application.
23 CHAIR FROEHLICH: All right.
24 MR. THOMPSON: I do have a small map that
25 shows where the project is in relation to two of the

1 petitioners.

2 CHAIR FROEHLICH: Is that in the

3 application itself or is it derived from an exhibit

4 that you previously filed?

5 MR. THOMPSON: It is not.

6 CHAIR FROEHLICH: All right. Mr. Parsons,

7 I would like to ask a few questions of you at this

8 point. In your application, you list a post office

9 box as the address, I guess, the tribe is to receive

10 correspondence. Is that correct?

11 MR. PARSONS: We did list an address in

12 the petition.

13 CHAIR FROEHLICH: How close is the nearest

14 tribe member to the project?

15 MR. PARSONS: I do not have that

16 information at the moment, but I am happy to consult

17 and get that for you directly.

18 CHAIR FROEHLICH: Does the tribe in this

19 proceeding seek representational or organizational

20 standing for this case?

21 MR. PARSONS: The tribe seeks standing

22 based on their -- I guess it would be organizational

23 standing. If the Board would like to investigate it

24 further, there is a theory of standing called parens

25 patriae, where sovereign governments are allowed to

1 assert standing on behalf of their members. And the
2 tribe obviously is a sovereign government and asserts
3 standing in its own stead.
4 CHAIR FROEHLICH: If I could ask you,
5 please, the lands for which Denise Mesteth grants
6 leases, where are they in relation to the project
7 boundaries?
8 MR. PARSONS: They are in various
9 locations. The one lease that we specified in the
10 petition is the one held by Mr. Dayton Hyde, who
11 leases land from the tribe and is a member of the
12 consolidated petitioners.
13 CHAIR FROEHLICH: I thought in the
14 declaration of Denise Mesteth that she spoke also
15 about leases. Are they different from the leases that
16 Mr. Hyde --
17 MR. PARSONS: Mr. Hyde has one of the
18 leases that the tribe leases out for domestic and
19 agricultural purposes.
20 CHAIR FROEHLICH: Okay.
21 MR. PARSONS: And, again, I'm happy to
22 consult and get back with more specific information.
23 JUDGE COLE: So you don't have right now
24 detailed information exactly where the leased lands
25 are with respect to this project?

1 MR. PARSONS: I do have some information,
2 but I don't have it in a format that is easy to
3 present. But I am happy to get that for you by the
4 conclusion of the hearing.
5 JUDGE COLE: All right, sir. One of the
6 leasees is Mr. Hyde. And based upon the records that
7 I've seen here, he lives in Hot Springs, where his
8 facility with the wild horses also exists. Is that
9 correct?
10 MR. BALLANCO: It's actually somewhat
11 south of Hot Springs, Your Honor, probably eight to
12 ten miles south of the Town of Hot Springs, which
13 would be, I guess, towards the project site.
14 CHAIR FROEHLICH: I noticed one line, Mr.
15 Parsons, in your pleadings where you state that "the
16 tribe's ownership of lands in the proximity of the
17 proposed project." Would you elaborate a little bit
18 on that?
19 MR. PARSONS: Sure. The tribe owns land
20 obviously on the reservation as well as off and
21 including those leased by Dayton Hyde. And, as I
22 mentioned earlier, I'm happy to provide you with the
23 precise legal descriptions and locations of those
24 leased parcels.
25 JUDGE COLE: And distances from the parcel

1 we're concerned with.

2 MR. PARSONS: Noted.

3 MR. PUGSLEY: Your Honor, if I may, I

4 would like to provide you with the information you

5 requested. Chris Pugsley. Sorry. Powertech.

6 In August of 2009, when the application

7 was supplemental, Powertech provides NRC staff with

8 what was basically called a supplement to the original

9 application.

10 If you look at section 3.0, entitled

11 "Location of Extraction Operations," the language

12 following it says, "The following provides

13 supplemental information to sections 3.1.1, 3.1.3, and

14 5.2.3 of the technical report and sections 1.2.4" --

15 please let me know if I'm going too fast -- "1.2.6 and

16 6.2.2.3 of the environmental report." So that should

17 probably give you the information you are looking for

18 as to what was posted up here.

19 JUDGE BARNETT: Which is that map?

20 MR. PUGSLEY: It's not that map, sir.

21 It's just the information that we tried to provide for

22 you on this map is contained in those sections of the

23 original application as well as section 3 of the

24 August 2009 supplement.

25 JUDGE BARNETT: When you get a chance, not

1 right now but when you get a chance, maybe at lunch,
2 could you look and see how figure 2.2-4 relates to
3 that map?
4 MR. PUGSLEY: 2.2-4?
5 JUDGE BARNETT: Yes.
6 MR. PUGSLEY: Certainly.
7 JUDGE BARNETT: It looks a lot like that
8 map. And that's what I was -- but it's got some wells
9 on there. That's what I was trying to --
10 MR. PUGSLEY: Yes, sir.
11 JUDGE BARNETT: -- correlate to that map.
12 Thank you.
13 CHAIR FROEHLICH: Okay. You have our
14 assignments for location among the tribe and the
15 applicant. I would like to turn at this point to the
16 consolidated petitioners. And if we could move
17 through the petition in the order they are presented?
18 I would like to take each of the
19 petitioners individually, starting with Theodore
20 Ebert. I note from the pleadings that he lives in Hot
21 Springs.
22 Where is Hot Springs? And how far is it
23 from the area of the project?
24 MR. FRANKEL: Hot Springs is in Fall River
25 County. It's about 20 miles from the project area.

1 As the name implies, it sits on top of a network of
2 hot springs.
3 CHAIR FROEHLICH: And his source of water
4 and the concern he raises is from the municipal water
5 supply of Hot Springs. Is that correct?
6 MR. FRANKEL: Yes, sir.
7 CHAIR FROEHLICH: Okay. Staff, I noticed
8 in your pleadings that you state that he was 40 miles
9 away and up gradient. Can you explain the basis of
10 those statements?
11 MR. CLARK: Your Honor, this is Mike Clark
12 with NRC staff.
13 The 40-mile calculation was based on the
14 staff entering Mr. Ebert's address into I believe
15 Google Maps or some other online software. And I
16 don't recall exactly, but I believe it was based on
17 online software.
18 MR. FRANKEL: And was it from the outer
19 boundary of it? Sorry, sir. All right.
20 CHAIR FROEHLICH: Mr. Frankel, could you
21 describe for us, please, the pathway, a plausible
22 pathway, on how Mr. Ebert would be harmed from the
23 proposal?
24 MR. FRANKEL: Easily, Your Honor.
25 CHAIR FROEHLICH: Thank you.

1 MR. FRANKEL: The municipal water from Hot
2 Springs comes from the Madison Aquifer. The
3 application states that the Madison Aquifer will be
4 the source of water for the bleed or that it "might
5 be" the source of water for the bleed.
6 Given that that was stated in the
7 application, if the application license is granted,
8 the action will go forward. The bleed will occur.
9 Based on current information, the Madison will draw
10 down somewhere between 12 and some number of feet.
11 I'll have to look at the pleadings. But a drawdown
12 occurs.
13 And so anyone who uses the Madison Aquifer
14 is harmed to the extent of the drawdown of several
15 millions of gallons a year that would go to the bleed
16 and deep disposal well, taken out of the hydrological
17 cycle permanently.
18 That is how he would be affected. That's
19 his plausible connection.
20 JUDGE COLE: Mr. Frankel, how was the
21 drawdown calculated? Are you aware? What is your
22 source of the information for that?
23 MR. FRANKEL: The source is from the
24 application, Your Honor, solely from the application.
25 It states in there the number of feet expected as a

1 range, number of feet of drawdown.

2 JUDGE COLE: Do you have a reference in

3 the application for that, sir?

4 MR. FRANKEL: If you give me one minute,

5 sir, I sure do.

6 (Pause.)

7 MR. FRANKEL: ER table 8.1-1 describes the

8 impact to the groundwater. And then -- I'm sorry.

9 Strike that cite. On page 18 of the petition, there's

10 a footnote 142, which is to technical report 2.7.2.21

11 and also technical report 2.7.2.2.20 for the

12 proposition that "The applicant proposes to take a

13 large requirement of water for its operations from a

14 water supply well in the Madison formation. Applicant

15 states that it may need up to 500 gallons per minute

16 from the Madison Aquifer, which equals 262 million

17 gallons of drinking water per year." So those are the

18 two citations to the technical report from which that

19 information comes on the withdrawal of water.

20 JUDGE COLE: Does it state what the

21 drawdown is in those references you gave me?

22 MR. FRANKEL: One more second, Your Honor>

23 (Pause.)

24 JUDGE COLE: Let me tell you what my

25 concern is.

1 MR. FRANKEL: Yes, Your Honor.

2 JUDGE COLE: That seems to be a large
3 drawdown for the amount of water that would be used in
4 the bleed. And I don't think the bleed is of the
5 order of 500 gallons per minute based upon what I have
6 read in the record.

7 MR. FRANKEL: Well, Your Honor, that 500
8 gallons a minute came from somewhere. And it came
9 from the applicant's application. So to the extent
10 that that number is in doubt, that number is in doubt
11 from the application.

12 JUDGE COLE: I think you and I discussed
13 this one time before at another case with respect to
14 the amount of water that is going to be used in the
15 mining operations. And there is an initial amount
16 that has to be taken out of an aquifer. And then it's
17 recycled. And they bleed out a certain amount, which
18 is a small fraction of the amount of water --

19 MR. FRANKEL: Two to five percent.

20 JUDGE COLE: -- that is recycled.

21 MR. FRANKEL: But still a large amount of
22 gallons.

23 JUDGE COLE: Well, that's the thing that
24 worries me. When you say 500 gallons a minute for the
25 bleed, I've never seen a number that large for the

1 bleed in the record that I have before me.

2 MR. CLARK: Your Honor, if I could state,

3 I believe 500 gallons per minute refers to the

4 restoration amount.

5 JUDGE COLE: Right. When you're cleaning

6 up the well-to-sea area.

7 MR. FRANKEL: It said that there would be

8 an amount of water between .5 percent and 3 percent of

9 their amount of flow. And that comes from TR section

10 1.7. So three percent of their expected flow must

11 have been where that number comes from. But I

12 understand that you find that number to be high.

13 JUDGE COLE: Well, it seems to me to be

14 high.

15 MR. FRANKEL: They state the bleed. They

16 state their flow. They say it could go up to three

17 percent. And there is a way to calculate how much

18 that is.

19 JUDGE COLE: I think we have to make that

20 calculation somehow or have it reproduced so that we

21 know what we are talking about because it just seems

22 like an awful lot of water to me for this operation.

23 CHAIR FROEHLICH: Mr. Frankel, while we

24 have you, let's discuss the petitioner David Frankel.

25 Are you --

1 MR. FRANKEL: I know him.

2 CHAIR FROEHLICH: Are you representing

3 yourself or does Mr. Ellison represent you in your

4 personal capacity?

5 MR. FRANKEL: Am I to admit I am a fool as

6 a client?

7 (Laughter.)

8 MR. FRANKEL: Yes. Well, Bruce, why don't

9 you help me out? And I'll just do my best.

10 MR. ELLISON: All right. Go ahead.

11 CHAIR FROEHLICH: Mr. Ellison, I

12 understand your client lives in Buffalo Gap, South

13 Dakota?

14 MR. ELLISON: That's correct, Your Honor.

15 CHAIR FROEHLICH: How far away is that

16 from the proposed site?

17 MR. ELLISON: Probably about 50 or 60

18 miles to the east.

19 CHAIR FROEHLICH: And what county is that

20 located in?

21 MR. ELLISON: Fall River County.

22 MR. FRANKEL: No. Custer County.

23 MR. ELLISON: Oh. Custer County. I stand

24 corrected.

25 CHAIR FROEHLICH: And, Mr. Frankel, your

1 use is that you use well water for gardening and your
2 tap water comes from the Fall River water district.
3 Is that correct?
4 MR. FRANKEL: Yes, Your Honor. The city
5 has its own well in the Inyan Kara but has entered
6 into a municipal water supply agreement with Fall
7 River water district.
8 CHAIR FROEHLICH: And in your situation,
9 the specific and plausible means that you rely upon
10 for the harm that must be shown would be what?
11 MR. FRANKEL: Your Honor, staff for the
12 NRC pointed out that the Inyan Kara generally flows
13 southwest, but he didn't say and could not say it
14 flows exclusively in that direction.
15 In fact, we believe that it flows around
16 in both directions. And I believe Mr. Ellison has a
17 reference that it's shown to be going at least as far
18 as Cascade Springs. And the rest is unknown.
19 So the plausible connection is that the
20 actual flow of the Inyan Kara, while generally
21 southwest, is not exclusively so, that I use the Inyan
22 Kara. And it's not been demonstrated that the Inyan
23 Kara where I use it is not affected. So that is the
24 plausible --
25 CHAIR FROEHLICH: But the burden is on you

1 at this point to show how you would be affected. So
2 you need to present something that shows that where
3 you draw the water from, it's going in a direction
4 other than southwest.
5 MR. FRANKEL: Well, Your Honor, actually,
6 at this phase, I understand with regard to standing --
7 CHAIR FROEHLICH: Right.
8 MR. FRANKEL: -- it is incumbent on the
9 Board to look at what we say in the light most
10 favorable to us --
11 CHAIR FROEHLICH: Right.
12 MR. FRANKEL: -- with regard to standing.
13 And so as it pertains to standing, the burden of that
14 unknown is not on me. The burden of that unknown is
15 in favor of standing because the -- you have to find
16 in the light most favorable for us on standing. I
17 have asserted that it's an unknown whether it flows in
18 my direction.
19 I do use the Inyan Kara. And, therefore,
20 for purposes of standing, you can't use the unknown
21 against me and at the same time follow the rule of
22 looking at things in a light most favorable to
23 petitioners.
24 JUDGE COLE: How do you use the Inyan
25 Kara?

1 MR. FRANKEL: I have a well in my yard.
2 And I pour the water on the crops, the garden,
3 vegetable garden. It's not a big garden, but it's an
4 edible garden.
5 JUDGE COLE: Is it a well with a top or is
6 it an artesian well?
7 MR. FRANKEL: A pump.
8 JUDGE COLE: Pump. And do you use it for
9 drinking purposes or just for --
10 MR. FRANKEL: No.
11 JUDGE COLE: Just for crops?
12 MR. FRANKEL: Just for the crops because
13 we use our tap water for drinking because it's more
14 rigorously tested.
15 JUDGE COLE: And that comes from where,
16 your drinking water?
17 MR. FRANKEL: Our drinking water comes
18 from the -- it used to come from the city well. And
19 as of about a year ago, it comes from the Fall River
20 water district's water through an agreement.
21 JUDGE COLE: And that is in the Madison or
22 where?
23 MR. FRANKEL: They get their water from
24 the Madison. And I believe they might also get water
25 from the Inyan Kara, but I'm not sure.

1 JUDGE COLE: All right. Thank you.

2 CHAIR FROEHLICH: Okay. Moving to your

3 client Gary Henckenlaible -- did I pronounce that

4 correct?

5 MR. FRANKEL: Henckenlaible.

6 CHAIR FROEHLICH: My apologies, sir. Mr.

7 Henckenlaible, as I understand the pleadings, lives in

8 Rapid City. Is that correct?

9 MR. FRANKEL: Yes.

10 CHAIR FROEHLICH: And he's a member of

11 ARM. Rapid City is in what county?

12 MR. FRANKEL: Pennington County.

13 CHAIR FROEHLICH: Pennington. And the

14 approximate distance from Mr. Henckenlaible's

15 residence to the project is approximately?

16 MR. FRANKEL: It's pretty far. I'm

17 guessing maybe -- would you say it's 70 or 80 miles?

18 -- 70 or 80 miles.

19 CHAIR FROEHLICH: And would you articulate

20 the specific and plausible means by the harm?

21 MR. FRANKEL: Your Honor, it's the same

22 issue for the people using the Madison to the extent

23 the Madison is used as the bleed and water from it

24 goes into the deep disposal well and is removed from

25 the hydrological cycle.

1 Among other things, it is an irretrievable
2 commitment of resources under section 51.45. And it
3 is an indicator of adverse impact, its harm if the
4 action were to go forward.
5 JUDGE COLE: So it's harm that might be
6 potentially caused by things that are done to the
7 Madison Aquifer?
8 MR. FRANKEL: Yes, sir. It's what the
9 company said they were going to do. If it's granted,
10 what they might do but what they would have the
11 authority to go in their phased approach to go ahead
12 and do starts here. And that involves the bleed of up
13 to three percent into the deep disposal well.
14 Permanent removal from the hydrological cycle is an
15 impact on those who use the Madison Aquifer.
16 CHAIR FROEHLICH: All right. Moving on to
17 your client Susan Henderson --
18 MR. ELLISON: Yes. I will address Ms.
19 Henderson.
20 CHAIR FROEHLICH: Okay.
21 MR. ELLISON: If I may just briefly return
22 -- I have a terrible time with these mikes -- in
23 Powertech's application at 4.6.2.7.2, it states,
24 "Water requirements for proposed action facilities,
25 the CPB, and other facilities were estimated to have

1 a national requirement of 65 gallons per minute,
2 mostly from the Madison formation, some from the Inyan
3 Kara formation."
4 There are also other parts of the
5 application. For example, at page 4.24, there's a
6 well that is the nearest, from the nearest, domestic
7 well, is estimated by Powertech to go down 12.6 feet
8 after 8 years of operation. So I just wanted to give
9 an idea of some of the drawdown characteristics.
10 CHAIR FROEHLICH: Okay. That's the
11 drawdown of which aquifer, which portion?
12 MR. ELLISON: It doesn't say in this
13 particular document which it is. I'm assuming from
14 some of the above information maybe the Lakota
15 formation because most of the wells in that area from
16 the Lakota formation.
17 You know, when water is recycled in this
18 project, there is a certain amount which is spilled
19 out, but there is an increasing amount which is
20 contaminated because the site continually draws in
21 more and more and more water.
22 CHAIR FROEHLICH: Right.
23 MR. ELLISON: So when we talk about water,
24 we're talking about two things. One is the
25 diminishment of the quantity of water. The other

1 would be the ever-expanding quality of water issues
2 around contamination.
3 Powertech described how it is going to do
4 a one well field and then do another and do another.
5 Each of these continues to draw in water not only from
6 their immediate area but as far out as those pumps
7 will reach.
8 So we're really talking about potentially
9 a lot of water. In this project alone, it's something
10 like 23 square miles of aquifer. And I think
11 Powertech needs to be genuine about the fact that when
12 they ask for their aquifer exemption, they're talking
13 about everything under that entire border they want to
14 have exempted and say they're going to control them.
15 Ms. Henderson. Ms. Henderson lives
16 approximately 10-12 miles south southeast of the mine
17 project area. Her contact information is provided in
18 her affidavit. She is the owner-operator of over
19 8,100 acres of a cattle ranch in western Fall River
20 County.
21 She has a history of familiarity with
22 local water issues. She served for ten years as the
23 Chair of the Restoration Advisory Board for Black
24 Hills Army Depot cleanup, which is to her west. She
25 served 15 years as the Igloo-Provo Water Project

1 District, which is in that general area.

2 She, therefore, has spent a lot of time

3 working with governmental agencies, state and federal

4 agencies, communicates with a lot of people in the

5 local area, has a fair sense of the flow of water.

6 One of the things that we would -- well,

7 she uses well water from Dakota Sandstone Aquifer for

8 her residence and for her cattle operation. She buys

9 water from the Madison formation for her aquifer. And

10 she has a deep-source spring, which we don't know

11 really which aquifer it's in, but from her experience

12 over decades of working the land, she knows that

13 there's an interconnection with other ground surface

14 water sources for that deep-source well.

15 One of the other things that we would like

16 to state with regard to her standing question is, from

17 her work with the U.S. Army Depot down by Igloo and

18 the water contamination issues that have arisen from

19 there, one of the things that came out of those

20 matters was that the Army denies that increased

21 radioactive levels, radioactivity levels, and arsenic

22 in the Madison formation, they deny that it's from

23 their activities. And the only other source, we would

24 submit, is from the old mining area, which is to the

25 northwest of that site by not too many miles.

1 We are aware of U.S. Geological Survey
2 studies that seem to show pretty clearly that while
3 most of the flow of the aquifers is from the Black
4 Hills. The Black Hills are an upthrusting, the dome
5 upthruster approximately 62 million years ago. And
6 the general flow since the Black Hills is a major
7 recharge area for the Powder River Basin to the west
8 and to the plains on to the east, that generally the
9 flows do go perpendicular out from where the dome hits
10 the surface of the water in each one of the respective
11 strata of aquifers.
12 However, there appear to be studies which
13 show that a portion of the flow that comes out of the
14 mining area in northwestern Fall River County -- as
15 the map that Powertech put up here, you know, their
16 site is in Fall River County and then above it is part
17 of Custer County.
18 The part in Fall River County is the
19 northwesternmost part of this county. And there are
20 studies which show that water flows, some of the
21 water, from the Madison, from the Minnelusa, from the
22 Inyan Kara, flows, south southwest, then goes south,
23 and then goes east under the Black Hills.
24 There's a study that we cited in our
25 paperwork about Inyan Kara studies, Sandstone's, where

1 they linked uranium that was found there to the mine
2 sites in the northwestern part of the county.
3 Cascade Springs is, if I may, if I find
4 the right map -- this is a property map of Fall River
5 County. And if I might show you, up here is a mining
6 area. Here is Edgemont. Here is Ms. Henderson's
7 operation. Cascade Springs is over here.
8 And what they're saying is from this USGS
9 study, they found that nucleotides from up here were
10 over here. And so that's one of the suggestions, plus
11 the fact that there are just other studies which
12 indicate that all of these formations, a portion of
13 them, flow south and then east, which would come right
14 through the central and northern part of Fall River
15 County up in and including Dayton Hyde's area over by
16 the wild horse sanctuary.
17 CHAIR FROEHLICH: Okay. And is there a
18 reference to the USGS study and the maps in the
19 pleadings or the materials filed?
20 MR. ELLISON: Yes, yes.
21 CHAIR FROEHLICH: Could you give me that
22 cite so I can --
23 MR. THOMPSON: What material is it in?
24 You said it was in some of the materials in the
25 pleadings. What --

1 CHAIR FROEHLICH: That's what we're --
2 MR. THOMPSON: Yes.
3 CHAIR FROEHLICH: -- linking the cite to
4 the pleadings because that's what we're --
5 MR. ELLISON: The pleading is "The Geology
6 of the Cascade Springs Quadrangle, Fall River County,
7 South Dakota, a U.S. Geological Survey Study." It's
8 bulletin 1063-L.
9 CHAIR FROEHLICH: And that's referenced in
10 your pleadings?
11 MR. ELLISON: It's referenced in the
12 pleadings. It's part of the geological summary
13 attached to Dr. Jarding's affidavit. And there are
14 also some references to this flow in Dr. LaGarry's --
15 MR. THOMPSON: Who prepared that document?
16 MR. ELLISON: Who prepared what document?
17 MR. THOMPSON: The one you are citing.
18 MR. ELLISON: The U.S. Geological Survey.
19 MR. THOMPSON: No, no, no.
20 MR. ELLISON: I'm assuming per --
21 MR. THOMPSON: No. I'm talking about you
22 said there was a geological summary just --
23 MR. ELLISON: Oh, yes. Dr. Jarding
24 prepared a geological summary of known published
25 studies of the geology and hydrology of this area.

1 And she attached it to affidavit, which was submitted
2 as part of her application.
3 CHAIR FROEHLICH: Okay. So the reference
4 you have been making is to the geology and hydrology
5 in uranium areas in the southern Black Hills, which
6 was attached to Dr. Jarding's declaration?
7 MR. ELLISON: That's correct. And one of
8 the things that is also interesting about that is that
9 they suggest that a good source for exploration of
10 uranium, which would be you go to Cascade Springs and
11 you go to the southeast and it's our understanding
12 that, actually, that's one area that Powertech is very
13 interested in. So they know about how that flow has
14 gone through the Inyan Kara over the years in that
15 direction.
16 CHAIR FROEHLICH: Okay. So the source for
17 Ms. Henderson as well as Dr. Jarding's plausible flow
18 is from the statement, I guess, at page 4 of her
19 geology and hydrology in the uranium areas in the
20 southern Black Hills, which states that "The water
21 moves from the proposed mining area to the east and
22 around the southern part of the Black Hills."
23 MR. ELLISON: Yes.
24 CHAIR FROEHLICH: Is that the cite that
25 you are directing me to?

1 MR. ELLISON: Yes. There are other cites.
2 And I think that they're part of the application. We
3 have consolidated petitioners. We need --
4 CHAIR FROEHLICH: Just as my colleague Dr.
5 Cole pointed out that the application is lengthy and
6 difficult to maneuver, the declarations and the
7 petitions have also that same fault.
8 MR. ELLISON: Yes, sir. That's true.
9 There's also a study. And I believe it is cited in
10 Ms. Jarding's report, "The Anisotropic Transmissivity
11 Model for the Madison Aquifer in the Black Hills Area"
12 that was done at the School of Mines in the Geological
13 Engineering Department.
14 And it is talking about the Madison
15 formation, but it is another cite on page 13, "Water
16 from the lower western part of the Black Hills flows
17 both westernly and easterly, bending around the
18 southern tip of the Black Hills uplift."
19 CHAIR FROEHLICH: Page 13 of?
20 MR. ELLISON: Of "The Anisotropic
21 Transmissivity Model for the Madison Aquifer in the
22 Black Hills Area."
23 CHAIR FROEHLICH: And that was submitted?
24 MR. ELLISON: I believe that was part of
25 Ms. Jarding's summary, too. I'm not positive if

1 that's an oversight, and that is possibly mine. There
2 is a map at figure 5 which clearly shows the flow --
3 CHAIR FROEHLICH: Do you have that figure?
4 MR. ELLISON: -- around the southern Black
5 Hills.
6 CHAIR FROEHLICH: Well, is that figure 17
7 at page 6?
8 JUDGE COLE: Yes.
9 MR. ELLISON: Well, that's one. It's
10 actually page -- a figure. There's another figure
11 which actually shows it more clearly. But it's not
12 from thin air that we're drawing this idea that this
13 stuff comes out from southern hills.
14 CHAIR FROEHLICH: It would help to have
15 the specific cite to the pleadings.
16 MR. ELLISON: Yes, sir. Yes, sir. Yes.
17 I think there's also figure 2.
18 CHAIR FROEHLICH: At page 6 to the figure
19 2, "General Water Movement in the North Central
20 States." That's the reference?
21 MR. ELLISON: Yes. There's another
22 reference there. The other part of it is also, you
23 know, as I mentioned previously, we have Ms.
24 Henderson's active working knowledge of the hydrology
25 in that area. And the concerns that she was getting

1 over the contamination of the Madison water, which
2 first was thought to come from the Black Hills Army
3 Depot, which we know that heavy metals, arsenic are
4 common byproducts of these kinds of mining operations
5 and increase radioactivity within the water.
6 And the Army says it's not them. That
7 only leaves one other source to the northwest.
8 JUDGE COLE: And what source is that, sir?
9 MR. ELLISON: That would be the mining,
10 the old mining areas.
11 JUDGE COLE: Old mining areas?
12 MR. ELLISON: Yes, sir. The old mining
13 areas are all throughout this area where Dewey-Burdock
14 wants to mine. And that's one of the problems because
15 there are some studies -- and I'm a been overwhelmed.
16 I know it is in our pleadings. But there are some
17 studies of the old mine sites which show
18 interconnection between some of the aquifers.
19 So what goes on in northwestern Fall River
20 County can affect the water through the central part
21 of the county as well as points further to the east
22 and because there is this section which seems to flow
23 that way of all of the aquifers, they all do it.
24 So she is very concerned about her
25 potential situation because if she -- if her water

1 becomes unusable for agriculture and domestic
2 purposes, she can't work there, her livelihood is
3 gone.
4 She is concerned also about the problems
5 of surface contamination for leaks that may through
6 cracks get into some of the other aquifers. I mean,
7 there are flowing springs all throughout this area.
8 And we know that flowing springs, in part, are the
9 result of secondary porosity of some kind of a nature.
10 And so there's just so much that's unknown
11 about this site. And that is one of our biggest
12 contentions, that we have a basis for our conclusions,
13 we have a plausible connection.
14 CHAIR FROEHLICH: We need to connect some
15 dots here.
16 MR. ELLISON: All right.
17 CHAIR FROEHLICH: We need to make this
18 plausible connection.
19 MR. ELLISON: Yes, sir.
20 CHAIR FROEHLICH: We need to refer to your
21 pleadings.
22 MR. ELLISON: Yes.
23 CHAIR FROEHLICH: I'm focused now on the
24 affidavit of Susan Henderson.
25 MR. ELLISON: Yes.

1 CHAIR FROEHLICH: And, specifically, at
2 paragraph 2, page 8, she states in her understanding,
3 from the scientific research studies and that there's
4 an eastward flow that affects her as part of the
5 plausible stream that you allude to.
6 Those studies, is that the Jarding
7 statement or study or are there other studies in your
8 pleadings that I should be looking at for support for
9 paragraph 8?
10 MR. ELLISON: What Dr. Jarding did was not
11 through her own study. She simply extracted. She
12 researched available data, available studies. It is
13 referenced in her affidavit, yes. It is referenced in
14 her geological summary, yes.
15 JUDGE COLE: Library research.
16 MR. ELLISON: Library research and then
17 document research.
18 CHAIR FROEHLICH: All right. Thank you,
19 Mr. Ellison.
20 I guess I would like to talk for a few
21 moments now with Mr. Ballanco and your client, Dayton
22 Hyde. He relies on water from his affidavit, as I see
23 it, from the Cheyenne River. Can you tell me from the
24 boundaries of the sanctuary its relation to the
25 Dewey-Burdock site?

1 MR. BALLANCO: Yes, Your Honor. I would
2 say it's generally about 20 miles, probably closer to
3 20, maybe about 17 miles.
4 CHAIR FROEHLICH: And the plausible
5 pathway that underlies his concern, would you
6 articulate that with reference to the pleadings?
7 MR. BALLANCO: Your Honor, as he states in
8 the pleadings, it's both the surface flow of the
9 Cheyenne River, he being downstream from where the
10 Beaver and Pass Creek enter the Cheyenne. He uses the
11 water for all of his domestic and ranching operations
12 and for the mustang operation as well as the wells in
13 the Cheyenne River.
14 He also uses the Inyan Kara for wells.
15 And this study that we were just referencing
16 demonstrating that there is some eastern flow in the
17 Inyan Kara as far as Cascade Springs, Mr. Hyde's
18 property is west of Cascade Springs; that is, it's
19 towards the project site, albeit somewhat south. But
20 it is in an area of the Inyan Kara that you have I
21 think showing up at Cascade Springs. They would be
22 from under the wild horse sanctuary as well, so both
23 the Cheyenne River surface flow and the Inyan Kara.
24 JUDGE COLE: How far is the horse
25 sanctuary from the Angustura Reservoir? Do you know?

1 MR. BALLANCO: If I could count miles
2 here, Your Honor -- I will just consult there with Mr.
3 Dayton Hyde. Ten.
4 JUDGE COLE: Ten miles. Okay. And the
5 sanctuary is west of highway 71?
6 MR. BALLANCO: Yes, Your Honor.
7 JUDGE COLE: Okay. So this tourist map
8 that I have must be an accurate depiction of it.
9 (Laughter.)
10 MR. BALLANCO: Well, actually, the
11 sanctuary does have land on both sides of 71, but --
12 JUDGE COLE: Okay.
13 MR. BALLANCO: -- I don't know that I
14 would rely on your map.
15 JUDGE COLE: That's okay. I think I know
16 where it is now. Thank you. Okay.
17 JUDGE BARNETT: I had a question about the
18 flow through the Cheyenne River. In Mr. Hyde's
19 affidavit, he says, "The Cheyenne River, which flows
20 through the wild horse sanctuary, is the primary
21 source for wild horses, domestic horses, and wildlife
22 protected by our land, which land flows through our
23 land downstream from where the Beaver and the Pass
24 Creek flows through the Dewey-Burdock project area
25 into the Cheyenne River. It is, thus, downstream for

1 me to surface. There is surface impact by spills or
2 leaks or mine waste or other contaminants by the
3 proposed Powertech mining operation."
4 I wanted to ask the staff, is that a
5 plausible pathway by which operations Dewey-Burdock
6 might harm this interest?
7 MR. CLARK: Your Honor, the staff does not
8 believe Mr. Hyde has shown that simply because he does
9 not address the features at Dewey-Burdock and explain
10 how -- he explains how water would flow through the
11 sanctuary but not how contamination would enter the
12 water. And to do that, the staff would look for some
13 allegation that or some explanation of how the
14 contamination would enter Beaver and Pass Creek and,
15 thus, into the Cheyenne River.
16 JUDGE BARNETT: Surface impact and spills?
17 MR. CLARK: Again, Your Honor, the
18 affidavit does not address features at Dewey-Burdock
19 and explain where those spills might occur, how those
20 spills would enter Beaver Creek and Pass Creek.
21 There's no analysis of the distance between Beacher's
22 containment ponds or impoundments at Dewey-Burdock and
23 Beaver and Pass Creek.
24 JUDGE BARNETT: I guess what kind of
25 specific information would you be looking for, then?

1 MR. CLARK: At least some reference to the
2 material in the application, such as the maps that
3 were provided and the figures that were provided in
4 the application addressing the Dewey-Burdock site.
5 JUDGE BARNETT: Do you think that's
6 getting pretty close to the merits?
7 MR. CLARK: Your Honor, we're not asking
8 for proof that contamination would enter. We're just
9 asking for a plausible pathway by which it may enter.
10 So the staff's position is that under Commission
11 precedent, the petitioner does have to at least allege
12 how it might get there, not prove that it would get
13 there.
14 JUDGE BARNETT: Thank you.
15 MR. ELLISON: Can I add something that may
16 be of help to the panel? If you look at -- I'm just
17 kind of drawing the first one that came to me. If you
18 look at Powertech's application, figure 17.2, this is
19 about --
20 JUDGE BARNETT: I don't have a printed
21 copy.
22 MR. ELLISON: It's at figure 17.2. It's
23 on page --
24 CHAIR FROEHLICH: Could you give me just
25 a moment?

1 MR. ELLISON: Sure.

2 CHAIR FROEHLICH: Let me --

3 MR. ELLISON: I'm sorry.

4 CHAIR FROEHLICH: That's all right.

5 MR. ELLISON: I apologize. It's from
6 their April 2009 submission. It's on page 17.10.

7 CHAIR FROEHLICH: You're going to the
8 Powertech application?

9 MR. ELLISON: Yes, going to the Powertech
10 application, figure 17.2. And it's not so much for --
11 this is about baseline water quality quarterly sampled
12 wells.

13 CHAIR FROEHLICH: 17.2 of the?

14 MR. ELLISON: Of the April 2009
15 submission, the underground injection control permit
16 application. And I wanted to direct the Judges'
17 attention to this map diagram not for the quarterly
18 sampled wells, but what it shows very clearly is it
19 shows Beaver Creek and Pass Creek.

20 And, if I may approach, their diagram up
21 here, the Cheyenne River -- let's see. Here's Beaver
22 Creek. And Beaver Creek goes through the site. Pass
23 Creek goes through the other site. They join below
24 the site very shortly thereafter at the Cheyenne River
25 and before they hit anything flow through the wild

1 horse sanctuary. And that is where the containment
2 was passed.
3 So I wanted to show that diagram because
4 it makes it really clear that these are major drainage
5 areas where they want to mine into the Cheyenne River,
6 major drainage areas.
7 JUDGE BARNETT: So, NRC staff again, are
8 surface spills plausible?
9 MR. CLARK: Your Honor, to decide whether
10 they're plausible, we would expect the petitioner to
11 at least address the features that Powertech has
12 proposed to control such spills. Again, that
13 information is in the application.
14 JUDGE BARNETT: So was that a "Yes" or a
15 "No"?
16 MR. CLARK: It depends on what the
17 petitioner sets forth. We would at least -- I don't
18 want to make the case for anyone, but at least there
19 should be an allegation that there may be a spill.
20 JUDGE BARNETT: Well, I think there is.
21 MR. CLARK: With reference to specific
22 features at the site, an allegation that there would
23 be a spill in this location and that material may be
24 released from that particular, say, ponds or
25 containment.

1 JUDGE BARNETT: To me, a surface-impacting
2 spill is -- I don't know how much more specific they
3 need to get. A surface-impacting spill, water flows
4 downhill, how much more specific do they need to get?
5 MR. CLARK: Well, we would ask that they
6 describe the pathway where the spill is, what
7 direction the water is going to go in after it's
8 spilled, where that would leave the water, how much
9 water would be left by the time it got to either
10 Beaver Creek or Pass Creek, which I know I don't
11 dispute they are major drainages, but my understanding
12 is they're intermittent dry streams, that a good part
13 of the year, they're completely dry. And they would
14 not transmit water to the Cheyenne River.
15 But, again, we would look for information,
16 an explanation of how in practice the spill might
17 bring contamination to the Cheyenne River.
18 MR. THOMPSON: May I say that it seems to
19 me when you're looking at plausibility, you have to
20 look at the whole picture. And we're alleging there's
21 a potential for spill or leak. Okay. Fine. How is
22 that going to get into the creek? And once it gets
23 into the creek, how far is it before it gets to the
24 Cheyenne River and what other creeks and things
25 intersect?

1 Presumably the only way it is going to get
2 into intermittent streams is in the event of some sort
3 of significant, probably a flood of some sort. I
4 guess then you look at the whole string of
5 plausibility. Is it plausible that by the time it
6 gets to the horse sanctuary, that there will be
7 contaminants in some level that would hurt the horses
8 and the wildlife?
9 JUDGE BARNETT: Does he have to do
10 modeling?
11 MR. THOMPSON: No, no. I don't think you
12 have to do modeling. You have to say what you think
13 is going to be up there and that those things are
14 likely to move in the event that the containment
15 doesn't take care of it and they're going to get in
16 the river.
17 CHAIR FROEHLICH: Mr. Thompson, isn't it
18 correct that the mining operation is putting in place
19 certain precautions to control potential spill?
20 MR. THOMPSON: Correct.
21 CHAIR FROEHLICH: And because you're
22 putting in place these precautions or whatever, it
23 shows that a potential spill is at least plausible?
24 MR. THOMPSON: Sure. Again, we look at
25 license conditions. And there are all sorts of early

1 warning alarms and so forth and so on. So there can
2 be a spill, but the question is, the spill itself
3 isn't going to get into the creek. There's going to
4 have to be some means to wash it into the creek.
5 MR. FRANKEL: Your Honor?
6 CHAIR FROEHLICH: Yes?
7 MR. FRANKEL: Is it appropriate? Could I
8 respond to Judge Cole's? He had that specific
9 question about the 500 gallons per minute --
10 JUDGE COLE: Sure.
11 MR. FRANKEL: -- And in the section that
12 I cited in response to your question, TR 2.7.2.20 and
13 2.7.2.2.21. It turns out it's on page 2-182 of the
14 technical report, and I quote, "In the case of land
15 application disposal of water during restoration, 500
16 gallons per minute of makeup water will be required
17 from the Madison Aquifer."
18 JUDGE COLE: In the case of land
19 application.
20 MR. FRANKEL: "In the case of land
21 application disposal of water during restoration,"
22 which they're applying for permission to do, "500
23 gallons per minute of makeup water will be required
24 from the Madison Aquifer." The entire paragraph
25 reads, "Depending on the exact aquifer restoration

1 process, Powertech may need to produce up to 500
2 gallons per minute from the Madison Aquifer." So
3 that's where we got that number.
4 JUDGE COLE: But 500 gallons per minute is
5 a rate of flow. And for how long will it be operating
6 for a total volume?
7 MR. FRANKEL: Well, it doesn't say, Your
8 Honor.
9 JUDGE COLE: It doesn't say that.
10 MR. FRANKEL: Yes. But I just wanted to
11 reply specifically to that.
12 JUDGE COLE: Thank you.
13 MR. THOMPSON: But may I make the point
14 that earlier -- this is Tommy Thompson for Powertech
15 -- earlier they were talking about the bleed during
16 operations. This is not the bleed during operations.
17 This is potential use for restoration. They're not
18 going to be drawing down the Madison during
19 operations.
20 JUDGE COLE: I understand.
21 MR. THOMPSON: And, by the way, I might
22 ought to add one point here, Your Honor. The South
23 Dakota Water Rights Board has to give Powertech the
24 authority to utilize water rights in the Madison. And
25 if they're going to cause an impact, they can't get

1 those. So if they get the water rights from the South
2 Dakota Water Rights Board, it will be based on a
3 demonstration that it will not draw down wells of
4 people nearby, much less people 20 or 30 miles away.
5 MR. FRANKEL: But I don't believe we're
6 required to rely on that for purposes of this
7 proceeding. I also note that, in addition to the
8 bleed, the application asks for the license to cover
9 their proposed form of restoration. So it's
10 appropriate for the petitioners to mention that as a
11 form of harm.
12 MR. ELLISON: And I'm sorry if I just make
13 -- counsel for Powertech just brought up the Water
14 Management Board. I think it's incumbent upon the
15 Judges to know that a month and a half ago the DENR
16 rejected Powertech's latest application. And they did
17 so because they said it lacks sufficient detail to
18 address fundamental questions related to whether
19 Powertech can conduct the project in a controlled
20 manner to protect groundwater resources.
21 So yes. And, if I may and in that regard,
22 we did not put it in our pleadings. A copy has been
23 sent to Powertech as by the normal process. A copy
24 has been sent to the Nuclear Regulatory Commission
25 staff of this April 19th, 2010 decision of the DENR on

1 just this basic point about their operations.

2 I would like to request leave of you all

3 to permit us to supplement our record with this April

4 19th, 2010 decision from the DENR. As I said, the

5 staff have it. Powertech has it. Only the Judges

6 don't have it. We just got it a couple of weeks ago.

7 CHAIR FROEHLICH: We won't be accepting

8 any additional pleadings other than what has already

9 been received. The decision will be based solely on

10 the pleadings received thus far and the application

11 and the petitions that are in the record.

12 MR. PARSONS: If I may, Your Honor? That

13 document was attached to the Oglala Sioux Tribe's

14 reply.

15 CHAIR FROEHLICH: Then it's in the record.

16 MR. FRANKEL: Thank you.

17 MR. PUGSLEY: Your Honor, based on Mr.

18 Parsons' comment, I believe it is important to note

19 and first ask the question, are you referring to the

20 letter that came from DENR regarding the UIC permit

21 application? Is that the letter?

22 MR. PARSONS: Yes.

23 MR. PUGSLEY: Okay. The first thing to

24 note here is that EPA retains jurisdiction for issuing

25 UIC permits in the State of South Dakota because South

1 Dakota does not have primacy under the Safe Drinking
2 Water Act.
3 The second thing I would like to note is
4 if I remember the letter correctly, it stated that the
5 application was deemed to not be complete. And that
6 is really from my best knowledge. It is basically the
7 functional equivalent of NRC issuing a request for
8 additional information in its license review process.
9 So my opinion is I believe calling that a
10 rejection of the application would be a
11 mischaracterization.
12 CHAIR FROEHLICH: Thank you.
13 I think at this point we will take a
14 15-minute recess. When we resume, I think we will
15 pick up with the declaration and the standing
16 arguments concerning Dr. Jarding. So we will stand in
17 recess for 15 minutes.
18 (Whereupon, the foregoing matter went off
19 the record at 11:01 a.m. and went back on the record
20 at 11:18 a.m.)
21 CHAIR FROEHLICH: Anything to follow up on
22 our session before the break?
23 MR. PUGSLEY: Yes, sir.
24 CHAIR FROEHLICH: Yes?
25 MR. PUGSLEY: Your Honor, I have an answer

1 to your question regarding this map vis-a-vis figure
2 2.2-4. It's not an appropriate representation of this
3 map. However, as part of the license process, we were
4 asked by the staff to provide site footprint maps.
5 And those are in our supplement at the following
6 locations.
7 CHAIR FROEHLICH: Okay.
8 MR. PUGSLEY: If you look at exhibits
9 3.1-1 through 4, those are all maps that show wells,
10 location of other wells, proposed facilities and well
11 fields for each of the two liquid waste management
12 options of land application or deep disposal as well
13 as future minings.
14 JUDGE BARNETT: Okay. Give me the exhibit
15 numbers again.
16 MR. PUGSLEY: Yes, sir. 3.1-1 through 4.
17 And those are all in the August 2009 supplement.
18 JUDGE BARNETT: Thank you.
19 MR. PUGSLEY: You're welcome, sir.
20 MR. CLARK: Your Honor, if I could make
21 one point --
22 CHAIR FROEHLICH: Yes.
23 MR. CLARK: -- before we move? It relates
24 to the standing claims of the first three petitioners.
25 In their petitions, in their affidavits, they did not

1 or at least the staff did not understand Mr.
2 Henckenlaible, Mr. Frankel, or Ms. Henderson to be
3 raising a claim based on groundwater drawdown. We
4 understood their claim to be based on groundwater
5 contamination.
6 I know we have been discussing groundwater
7 drawdowns. And in the statute, that was not presented
8 in the affidavits accompanying the petition.
9 CHAIR FROEHLICH: We'll go through the
10 pleadings and look to make sure that the arguments
11 made here correspond with the arguments in the
12 pleadings.
13 MR. CLARK: Thank you.
14 CHAIR FROEHLICH: All right. Let's turn
15 now to --
16 MR. BALLANCO: Your Honor, excuse me. We
17 got kind of off on a tangent speaking about Dayton
18 Hyde. And I just wanted to make sure I understood
19 that his concern as far as the surface contamination
20 and, as he said in his affidavit, where present mining
21 operations that he could look at, every one that we
22 experienced, have a history of spills and accidents,
23 not always catastrophic but always, in fact, every one
24 that we looked at has some release. He being
25 downstream makes that release relevant.

1 I just want to remind the Board of what
2 this panel said in the Crow Butte case, where such
3 matters as the geological makeup of the area, the
4 direction of flow, and the time required for water to
5 flow a certain distance go to the merits of the case.
6 And so the same would be said of the Inyan
7 Kara, where it's headed in that easterly direction on
8 its way to Cascade Springs, as the USGS report states,
9 so just a little summary back on that.
10 Thanks, Your Honors.
11 CHAIR FROEHLICH: Thank you.
12 JUDGE COLE: But isn't his concern more
13 with spills, rather than groundwater flow?
14 MR. BALLANCO: He has both concerns. He
15 has the groundwater contamination and the surface
16 spill consideration. And he did bring that up in his
17 affidavit.
18 JUDGE COLE: All right, sir. Thank you.
19 MR. ELLISON: Just so I could throw in
20 something, too, --
21 CHAIR FROEHLICH: Yes?
22 MR. ELLISON: -- as well, if I might?
23 Water usage, the CPP, which Powertech defines in its
24 February 2009 application as essential processing
25 plant because we had some discussion about how there's

1 no milling license going on but there's going to be a
2 processing plant, they would require 65 gallons per
3 minute, which is 93,600 gallons per day and 34,000,164
4 gallons per year.
5 And the reclamation process, according to
6 Powertech at its table 4.6-1 and 4.6-2, for their
7 restoration process with reverse osmosis, they would
8 use as much for the Madison formation as 917 million
9 gallons. And for net water usage in 4.6-2 table --
10 JUDGE COLE: Excuse me a minute, sir?
11 MR. ELLISON: Yes, sir.
12 JUDGE COLE: The 917 million gallons, how
13 was that calculated?
14 MR. ELLISON: It was calculated --
15 JUDGE COLE: Because during reclamation,
16 they use water to pass through the system. And then
17 they have so many passes of that. But that's not
18 continuous. You don't multiply that by the number of
19 hours in --
20 MR. ELLISON: I'm going simply by the
21 figure that is quoted in table 4.6-1, Powertech's
22 application, for Madison total usage. In millions of
23 gallons, to says 917.
24 JUDGE COLE: Over what time period?
25 MR. ELLISON: Cumulative in the

1 restoration process. And that is with reverse
2 osmosis. Without reverse osmosis, the figure is
3 2,423,000,000 gallons. So it depends on the process
4 they use. We're still not talking about a small
5 amount of water. And this is over a ten-year period.
6 CHAIR FROEHLICH: Thank you.
7 MR. THOMPSON: May I make one more point?
8 If we look at Mr. Hyde's affidavit, he says he has
9 five wells, but he doesn't say they're in the Inyan
10 Kara. He just says the Inyan Kara comes somewhere
11 under his property.
12 CHAIR FROEHLICH: Thank you.
13 I would like to move now to just the
14 standing arguments for Dr. Jarding. And I have a
15 little bit of confusion as to the way this was pled.
16 Is Dr. Jarding seeking to intervene in an individual
17 capacity or as the Executive Director of the Clean
18 Water Alliance?
19 MR. ELLISON: It's both, Your Honor.
20 CHAIR FROEHLICH: Both. Okay. And then
21 as to her -- I guess as to the Clean Water Alliance,
22 is that the entity that has the physical address on
23 Harder Drive?
24 MR. ELLISON: P.O. Box 591, Rapid City.
25 CHAIR FROEHLICH: P.O. box is going to be

1 the address for the Clean Water?

2 MR. ELLISON: Alliance.

3 CHAIR FROEHLICH: Alliance. Okay. And

4 then the Harder Drive address would be in Dr.

5 Jarding's individual capacity?

6 MR. ELLISON: Yes.

7 CHAIR FROEHLICH: Okay. Thank you.

8 And, as I understand the pleadings, Dr.

9 Jarding is from Rapid City and uses Rapid City tap

10 water. Am I correct?

11 MR. ELLISON: Yes.

12 CHAIR FROEHLICH: The petition states that

13 the Rapid City water comes from the Madison Aquifer --

14 I saw it on page 26 of the petition -- and that the

15 geology and hydrology summary that was attached to

16 this declaration indicates the water in the aquifer

17 flows in an easterly direction. It's at page 4,

18 figures 2 and 5.

19 In that directional flow in relation only

20 to the Minnelusa Aquifer or is it part of the

21 contention that this applies to the directional flow

22 in the Madison and the Inyan Kara as well as the

23 Minnelusa?

24 MR. ELLISON: Yes. They want the flow

25 eastward from that point in the Black Hills.

1 CHAIR FROEHLICH: Okay. And as to each of
2 these individual aquifers or flows, is that all
3 contained in the studies I guess that are referenced
4 in the declaration that refers to each one of those?
5 MR. ELLISON: They are.
6 CHAIR FROEHLICH: Okay.
7 MR. ELLISON: They were accompanying her
8 geological summary with its citations to the various
9 studies. I would also note that the studies showed
10 the interconnection between the Minnelusa and the
11 Madison formation as well as in some places all three
12 through different parts of the hills.
13 CHAIR FROEHLICH: Okay. I guess for that
14 interconnection and for that statement to be accurate,
15 you have to look at the Inyan Kara as a whole, the
16 Madison as a whole, and the Minnelusa as a whole.
17 That doesn't assume any isolated segments within or
18 parts that don't interconnect. To make that statement
19 true, it would have to be --
20 MR. ELLISON: Right.
21 CHAIR FROEHLICH: -- looking at the
22 entirety --
23 MR. ELLISON: Yes.
24 CHAIR FROEHLICH: -- of an aquifer?
25 MR. ELLISON: Yes.

1 CHAIR FROEHLICH: Okay.

2 MR. ELLISON: I mean, one of the
3 difficulties that exists throughout this whole region
4 is the state of the voids in the studies. It was like
5 the fracturing north of the mine site, south of the
6 mine site, but there is not supposed to be any in the
7 mine site. But yes, you are looking at --

8 CHAIR FROEHLICH: Okay. Did you have
9 anything further, counsel?

10 MR. FRANKEL: No.

11 CHAIR FROEHLICH: All right. If I could
12 move on now, then, to the Clean Water Alliance, I
13 guess, as an entity, Does the Clean Water Alliance
14 seek representational or organizational standing in
15 this case?

16 MR. ELLISON: Well, I would submit it
17 seeks both.

18 CHAIR FROEHLICH: Both?

19 MR. ELLISON: And the affidavits of Ms.
20 Henderson and Mr. Hyde also authorize the Clean Water
21 Alliance to be representing them in this particular
22 matter. We would submit that assuming that they are
23 granted standing, that, therefore, there would be
24 representational standing.

25 And also as an organization, we feel that

1 the actions of this Board could be a furtherance of
2 what the purposes of the Clean Water Alliance are. To
3 grant a permit would be contrary to the purposes. So
4 we would like to get organizational standing as well
5 since our mission statement is to educate people about
6 things that would potentially endanger water supplies
7 and to try and protect them.
8 CHAIR FROEHLICH: Okay. So, then, we'll
9 have to look, then, to members Jarding, Henderson, and
10 Hyde. How close is the nearest member of any of those
11 three individuals of the CWA to the proposed project?
12 MR. ELLISON: Ten to 12 miles.
13 CHAIR FROEHLICH: Ten to 12 miles.
14 MR. ELLISON: Ms. Henderson.
15 CHAIR FROEHLICH: And you said that would
16 be Ms. Henderson?
17 MR. ELLISON: That's correct. Yes, sir.
18 CHAIR FROEHLICH: Okay. And what is the
19 institutional injury that CWA alleges here if the NRC
20 grants the permit?
21 MR. ELLISON: It would be the failure of
22 the organization to help protect the groundwater and
23 surface water resources of the Black Hills.
24 CHAIR FROEHLICH: And how would it be
25 adversely affected should the permit be granted?

1 MR. ELLISON: If it's granted, then the
2 mission statement will have failed. The purpose of
3 the whole organization will have failed because it
4 will not have protected ground and surface water
5 resources.
6 CHAIR FROEHLICH: Is the sole purpose of
7 the alliance to oppose this individual project?
8 MR. ELLISON: The purpose of the alliance
9 is for us to try and educate ourselves about any
10 potential sources of contamination or degradation of
11 water quality as well as quantity that would be in our
12 water supplies that we use for all purposes within the
13 Black Hills.
14 It's not just this project. It's not an
15 anti-uranium project. It's a pro-water resource
16 group.
17 CHAIR FROEHLICH: Okay. Then I need some
18 --
19 MR. ELLISON: It was founded as a result
20 of this project, but that would be to further answer
21 the question.
22 CHAIR FROEHLICH: Okay. And where in the
23 pleadings is the discrete institutional injury that
24 you described stated?
25 MR. ELLISON: Well, what we state is our,

1 I believe, is that I believe that Ms. Jarding in her
2 affidavits states in paragraph 3, "The Clean Water
3 Alliance is a local citizens' organization founded to
4 educate ourselves and our community and to protect our
5 air, water, soil resources from potential negative
6 impacts of in situ leach mining in and around the
7 Black Hills." And so, therefore, our impact would be
8 -- the impact on us would be great if the permit was
9 to go forward.
10 CHAIR FROEHLICH: And is that the specific
11 and plausible means as to how the organization would
12 be harmed, what you just read?
13 MR. ELLISON: Well, implicit within that
14 is that people who share the same concerns within the
15 Black Hills who drink the water or use the water for
16 professional business or for domestic purposes would
17 be harmed by the granting of this as the first of many
18 permits, same as the people in the Southern Hills in
19 Fall river County would be harmed because their waters
20 would be impacted more immediately.
21 CHAIR FROEHLICH: Is there anything else
22 in the pleadings that would point to the specific and
23 plausible means that I should be aware of?
24 MR. ELLISON: I believe that's it. Thank
25 you.

1 CHAIR FROEHLICH: Okay. Thank you. Let's
2 then move to the other group or entity. That is the
3 ARM group, Aligning for Responsible Mining. If I'm
4 correct, their standing would be based on members
5 Henckenlaible, Frankel, or Ebert. Is that correct?
6 MR. FRANKEL: Yes, the three members who
7 are also petitioners.
8 CHAIR FROEHLICH: Does the ARM seek
9 representational or organizational standing in the
10 case?
11 MR. FRANKEL: Representational, Your
12 Honor.
13 CHAIR FROEHLICH: Okay. And how close
14 does the nearest member of ARM of any of those three
15 members live to the close project?
16 MR. FRANKEL: Mr. Ebert in Hot Springs.
17 CHAIR FROEHLICH: How far away was Hot
18 Springs? Please refresh my recollection.
19 MR. FRANKEL: I thought we had said 30
20 miles, was it, Hot Springs to --
21 JUDGE COLE: According to the standard
22 response, it's 40.
23 MR. FRANKEL: Forty? That's fine with us.
24 CHAIR FROEHLICH: What is the
25 institutional injury that ARM alleges if the NRC

1 grants this permit?

2 MR. FRANKEL: With respect, Your Honor,

3 does that not go to organizational standing?

4 CHAIR FROEHLICH: Thank you.

5 MR. FRANKEL: I'm informed that Hot

6 Springs is 28 miles as the crow flies. So I guess we

7 say 28, they say 40.

8 MR. CLARK: Could I mention now it comes

9 back to me how we calculated our distances? We took

10 Edgemont, added 13 miles because that is the

11 information in the application that the Dewey-Burdock

12 site is 13 miles along Dewey Road. Then we calculated

13 the distance from Edgemont to each individual

14 petitioner. So we added 13 to whatever the distance

15 from Edgemont was for the petitioners who lived on the

16 other side of Edgemont.

17 CHAIR FROEHLICH: Okay. Could we relate

18 the decision in the Hydro Resources case to the

19 standing of the consolidated petitioners? I wonder if

20 counsel would be able to address that case vis-a-vis

21 the position of the parties that you represent?

22 MR. FRANKEL: Yes, Your Honor.

23 CHAIR FROEHLICH: Thank you.

24 MR. FRANKEL: In HRI, the Judges discussed

25 different angles of standing. They discussed standard

1 proximity, proximity plus.

2 CHAIR FROEHLICH: Right.

3 MR. FRANKEL: What they focused on was

4 this notion that if you live adjacent, that's the

5 technical phrase, adjacent to the proposed mining area

6 and you have standing. And in that case, the word

7 "adjacent" was found, despite many miles of distance

8 where the water was independent, a person 100 miles

9 away could be adjacent from the perspective of their

10 water usage if the water from the mine site connects

11 with the water that they use. And that was the focus

12 on the part of HRI that we feel as well as in --

13 CHAIR FROEHLICH: I wonder if the staff or

14 applicant would care to address the HRI decision?

15 MR. THOMPSON: I'll be happy to, Your

16 Honor.

17 CHAIR FROEHLICH: Okay.

18 MR. THOMPSON: The facts in the HRI

19 decision are considerably different than what we're

20 dealing with here. One of the individuals who was

21 involved in the organization that got standing lived

22 100 yards across the road from the HRI section 8 site.

23 That individual and others were using section 17,

24 which is right next to section 8, for agricultural

25 purposes, feeding livestock.

1 Also, the Crownpoint portion of that
2 project was right in, literally in, the sea of
3 Crownpoint. The unit 1 section of that case involved
4 selected individual Native Americans. And it was like
5 right under their property.
6 And I believe the term wasn't "adjacent."
7 I think it was are you in a reasonably contiguous to
8 -- is a user of water for personal or agricultural
9 purposes reasonably contiguous?
10 And also in the Crow Butte case, it seems
11 to me it declared that reasonably contiguous is
12 something that is going to have to be figured on a
13 case-by-case basis.
14 I think that it doesn't just end with just
15 how far you are away. It also has to consider if
16 there is a plausible pathway.
17 Now, if you were 100 yards or 2 miles or
18 a mile up gradient of the site and your elevation was
19 2,000 feet above the site, the water is not going to
20 get there. It is not going to get there.
21 In fact, there was an allegation at one
22 point in the HRI case where the water was going to
23 travel nine miles up gradient and across a river.
24 So I do think that "reasonably contiguous"
25 is a relative term, has to be looked at on a

1 site-specific basis. And if somebody is 30 or 40
2 miles away, then you do have to consider the
3 plausibility of the pathway.
4 MR. FRANKEL: Your Honor, I have the HRI
5 case in front of me. I would like to quote from that
6 case, "Petitioners who demonstrate that they rely on
7 water supplies adjacent to the in situ leach mining
8 project have a right to a hearing."
9 CHAIR FROEHLICH: Okay. And in HRI when
10 they talked about "adjacent," they were speaking with
11 those people who lived 100 miles away or the people
12 who were --
13 MR. FRANKEL: It doesn't matter, Your
14 Honor.
15 CHAIR FROEHLICH: -- at the border of the
16 project?
17 MR. FRANKEL: It says, "The water supplies
18 are adjacent." They rely on water supplies that are
19 adjacent. And there I believe was one petitioner --
20 now, it wasn't my case. So I don't know all of the
21 petitioners and where they were, but there was at
22 least a petitioner several miles away. And that case
23 was cited in support in the Crow Butte case to provide
24 standing for petitioners some 60 miles away.
25 CHAIR FROEHLICH: Staff, do you care to be

1 heard on your read of HRI and how it affects the
2 standing contentions in this case?
3 MR. CLARK: Your Honor, my understanding
4 is that the wells in HRI were approximately a half
5 mile from the petitioners' water sources, which is
6 with that information, you can understand why the
7 Board phrased the decision the way it did.
8 Staff would also emphasize that the
9 reasonably contiguous test does not override the
10 plausible pathway test. In fact, in Crow Butte, even
11 though the Commission affirmed, in both decisions the
12 Commission affirmed, the reasonably contiguous test,
13 it was as a way of informing the plausible pathway
14 test.
15 So where there is no support and
16 Commission precedent for, if a petitioner cannot
17 demonstrate plausible pathway, there is no Commission
18 decision saying that, you can instead show the source
19 from which you draw water as reasonably contiguous.
20 So they have to be looked at together. And so the
21 staff would emphasize that petitioners do, in fact,
22 need to show a plausible pathway.
23 CHAIR FROEHLICH: Any of the other
24 petitioners' counsel care to be heard on the
25 applicability of HRI to the standing decision?

1 MR. ELLISON: I would just like to add
2 that --
3 CHAIR FROEHLICH: Okay.
4 MR. ELLISON: -- the Crow Butte case is
5 important because we were confronted with this same
6 question. Previous to Crow Butte, it seemed as though
7 the only recognition of standing was really close to
8 the mine site. And what we argued there and
9 successfully was the plausible connection.
10 It doesn't matter, then, how far
11 downstream or downflow you are because we are also
12 urging that we not look at just what is going to
13 happen tomorrow, but we're looking on the potential
14 impacts of future generations.
15 And according to Hannan LaGarry, some of
16 the flows from the mine site could reach the north,
17 part of the Pine Ridge Reservation, southeast in South
18 Dakota in five years.
19 And we're talking about connections.
20 We're talking about a relatively short period of time.
21 That's in Hannan LaGarry's affidavit.
22 CHAIR FROEHLICH: Right.
23 MR. ELLISON: We do have to take into
24 consideration flow rates. What we really have to take
25 into consideration is this toxic mass that we created

1 if this is allowed to go forward as it goes downflow.
2 And I think Powertech will have to admit that once
3 they shut the pumps off, you're going to -- that is
4 the circumstances it will flow, that anyone who is
5 downflow of that could be potentially impacted.
6 And we are urging the three of you to
7 please allow for an expansive concept of standing
8 because if Ms. Henderson's descendants want to still
9 work her land, it should not matter if it takes them
10 until they are of adult age before her land water is
11 contaminated. If it can happen from this project
12 because of this plausible connection, she should be
13 able to get standing, same thing, no matter how far.
14 So that is all I wanted to add. We
15 expanded HRI and the Crow Butte cases. We would ask
16 for similar applications.
17 MR. PUGSLEY: Your Honor, if I may, first,
18 in response to that Powertech would have to admit that
19 when we stop operations, that there is a toxic mass
20 there? We would certainly deny that because this is
21 again another reason why my co-counsel mentioned
22 earlier that you cannot assess these things in a
23 manner that you think is uncontrolled because there is
24 a restoration requirement by regulation. It is not
25 policy. It is not guidance. It is regulation under

1 the Atomic Energy Act.

2 The second thing I would like to say is to

3 read Judge Block's words literally about adjacent to

4 water supplies and to assume that the supplies he

5 referred to were these massive regional aquifers would

6 then implicate that a person because -- the Madison

7 Aquifer is a very large regional aquifer. And it

8 stretches unless I'm wrong from Canada down through

9 even to Colorado. So that would mean by petitioners'

10 view of the case that a person who drew water from the

11 Madison in Colorado would satisfy the test for

12 standing.

13 And I just don't think that's what HRI

14 stated because while the language quoted by

15 petitioners does state that they would have a right to

16 a hearing in that case, it was further clarified by

17 the statement a couple of sentences down that states

18 "I have determined that for the purpose of determining

19 standing, anyone who uses a substantial quantity of

20 water, personally or for livestock, from a source that

21 is reasonably contiguous to either the injection or

22 processing sites has suffered an injury, in fact."

23 And you put the word "reasonably"

24 contiguous because it has to be a reasoned inquiry as

25 to whether there is a plausible pathway to create

1 harm. And that is part of the reason we agree with
2 the staff on their interpretation of Crow Butte.
3 MR. FRANKEL: And counsel for the
4 petitioners would note that in determining if it's
5 reasonably contiguous and these other issues, again,
6 for purposes of standing, you have to look at the
7 issue in the light most favorable to us. To go to the
8 merits and say, "How contiguous? What is reasonable?"
9 is not an appropriate determination just at this
10 phase.
11 CHAIR FROEHLICH: Counsel Ballanco or
12 Parsons, do you care to be heard on interpretation of
13 HRI as it relates to standing questions?
14 MR. BALLANCO: Yes, Your Honor. Thank
15 you. Just one comment on that classic example of the
16 Madison Aquifer, for example.
17 I think when you're talking about in situ
18 leach mining uranium that we know creates both toxic
19 byproducts and toxic products that linger and are
20 persistent in the environment, I think we're far
21 better off taking a more expansive view of standing
22 and saying that somebody who draws water 200 miles
23 away if that's how far the aquifer really goes ought
24 to have standing if it is possible in a generation
25 that that water will be impacted by this project than

1 to say, "Oh, you know, you're 20 miles away, not
2 really reasonable." I think you get down to making a
3 decision that tends to be splitting values that way.
4 We're better being an expansive view of what standing
5 is by that contiguous description.
6 CHAIR FROEHLICH: Mr. Parsons?
7 MR. PARSONS: Thank you. Just very
8 briefly on the point about -- and this was raised in
9 our opening brief -- that the regulations require
10 restoration.
11 That is true, obviously, but what is also
12 true is the track record of every in situ leach
13 uranium mine to date has had restoration standards
14 that have been relaxed from the baseline.
15 And so it's not a question of restoring
16 the aquifer back to its original condition so that
17 there is no harming aquifer. It's a question of how
18 much harm will occur and how much pollution,
19 additional pollution, will be added to the aquifer.
20 So I think there has to be based on the
21 track record an assumption that there will be
22 increased contaminants in the aquifer. So I think
23 that's relevant to the determination.
24 MR. FRANKEL: A point of clarification,
25 Your Honor. Figure 4 of the Jarding summary shows the

1 Madison Aquifer entirely within the States of Wyoming
2 and South Dakota. So at least this indicates that
3 it's not as large as was indicated by counsel for the
4 company.
5 MR. PUGSLEY: I'm sorry, Your Honor. I'm
6 not going to get into Mr. Parsons' statements here
7 because we could be here for a long time, but I would
8 respectfully disagree with that and refer the Board to
9 the Commission's directive to NRC staff to provide a
10 report to them regarding potential or past impacts on
11 adjacent, non-exempt sources of drinking water and the
12 staff's report and surface water sources. And the
13 report stated, "There have been none."
14 That is the goal of restoration, to
15 prevent migration of recovery solutions out of the
16 exempted portion of the aquifer to nearby adjacent
17 non-exempt underground sources of drinking water.
18 MR. THOMPSON: And, by the way, let me
19 just say that the groundwater corrective action
20 standard implying that there is some sort of
21 relationship between the licensee and the NRC is
22 simply wrong. The standard is EPA's groundwater
23 corrective action standard for hazardous waste site
24 groundwater corrective action. It is, "Baseline or
25 background or an MCO, whichever is higher, or an

1 alternate concentration limit." That is the standard
2 that is used.
3 MR. ELLISON: It's interesting, though,
4 that South Dakota just changed its water management
5 laws, regulations in the last two years that would
6 have prohibited this kind of mining because it used to
7 require the company to prove that it could restore
8 water to baseline levels before it could get a mining
9 permit.
10 The company, the industry put pressure on
11 the South Dakota Water Management Board and Mining
12 Board and changed it so that now the company sets the
13 standards with the board approval.
14 So, really, when we're talking about
15 contamination, we are -- the NRC has acknowledged time
16 and time again studies, USGS. This process
17 contaminates water.
18 CHAIR FROEHLICH: All right. I think this
19 is a convenient point. I see we are approaching the
20 noon hour. I would propose that we take a luncheon
21 break.
22 JUDGE BARNETT: Can I follow up before we
23 go?
24 CHAIR FROEHLICH: Yes. Excuse me.
25 JUDGE BARNETT: In this instance -- and

1 I'll throw this out to anyone who can answer this
2 question factually. In Inyan Kara only, what is the
3 nearest private or municipal well to the PAA outside
4 the PAA?
5 CHAIR FROEHLICH: Maybe I could suggest
6 that counsel take that question under advisement over
7 the noon hour and that when we reconvene at 1:00 p.m.
8 --
9 JUDGE BARNETT: Okay. It's a two-part
10 question.
11 CHAIR FROEHLICH: Okay.
12 JUDGE BARNETT: One is, what is the
13 nearest private and municipal well? And, two, what is
14 the nearest private and municipal represented by the
15 petitioners?
16 CHAIR FROEHLICH: Okay. That being said,
17 I wish everyone a good lunch. We will resume at 1:00
18 o'clock with the answers to Judge Barnett's questions.
19 And then what I would intend to do is move through the
20 individual contentions. And we'll begin with the
21 tribe. Okay. We'll stand in recess until 1:00 p.m.
22 (Whereupon, a luncheon recess was taken at
23 11:50 a.m.)
24
25

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

2 (1:02 p.m.)

3 CHAIR FROEHLICH: All right. Before we

4 took our luncheon recess, Judge Barnett posed a

5 question to the parties. And I wonder if the parties

6 have had an opportunity to do the research, make their

7 consultations, and report back. Applicant?

8 MR. PUGSLEY: There are -- with respect to

9 the question of wells within and about the PAA, there

10 are some wells within the permit boundary, the

11 proposed permit boundary, but outside of the aquifer

12 exemption boundary, the proposed aquifer exemption

13 boundary. Actually, just for point of reference, if

14 you see the site boundary here, there is a well

15 here --

16 MR. THOMPSON: Right where it says the

17 word --

18 MR. PUGSLEY: Right where it say the word

19 "fall" right over here. And there is one here. And

20 as you see the site boundary is here to the south, and

21 this is in the southern part of the boundary. And

22 then, there is also another well out here to the west,

23 on the westernmost edge of the proposed permit

24 boundary.

25 CHAIR FROEHLICH: Okay. And is there a

1 reference that shows the location of the wells you
2 have just indicated --
3 MR. PUGSLEY: There is --
4 CHAIR FROEHLICH: -- in the filing? And
5 which diagram or slide would be the best to see those
6 wells you just pointed out?
7 MR. PUGSLEY: Unless my colleagues tell me
8 differently, the reference I provided earlier in
9 response to Judge Barnett's request -- it is
10 Exhibit 3.1 dash -- I want to say 1.
11 CHAIR FROEHLICH: 3.1.1.
12 MR. PUGSLEY: 3.1-1.
13 CHAIR FROEHLICH: Dash 1.
14 MR. PUGSLEY: In the 2009 -- August 2009
15 supplement.
16 CHAIR FROEHLICH: Okay.
17 ADMIN. JUDGE BARNETT: These are private
18 wells?
19 MR. PUGSLEY: Yes.
20 ADMIN. JUDGE BARNETT: So I'm not sure --
21 how would this work? They are private wells within
22 the PAA?
23 MR. PUGSLEY: Yes. It is not an uncommon
24 thing. And as I made an emphasis earlier, that it's
25 outside the proposed aquifer exemption boundary,

1 because by definition inside the aquifer exemption
2 boundary you cannot have -- it cannot now, nor ever in
3 the future, serve as a source of public drinking
4 water. But they can be used for other purposes such
5 as stock watering, irrigation, etcetera.
6 ADMIN. JUDGE BARNETT: So it can be within
7 the PEA -- or the PAA can encompass this because
8 Powertech owns the mineral rights, is that the idea?
9 MR. PUGSLEY: And we have the surface
10 rights leased from the ranchers as well.
11 ADMIN. JUDGE BARNETT: Okay. So would
12 those wells be reasonably contiguous?
13 GALLERY SPEAKER: To the proposed permit
14 boundary?
15 ADMIN. JUDGE BARNETT: Right. So --
16 GALLERY SPEAKER: If they're within the
17 PAA, then I would say yes.
18 ADMIN. JUDGE BARNETT: Okay.
19 ADMIN. JUDGE COLE: Do you know what
20 aquifer they draw from?
21 ADMIN. JUDGE BARNETT: The Inyan Kara.
22 ADMIN. JUDGE COLE: Okay.
23 GALLERY SPEAKER: And then, also, to
24 answer another part of your question, sir, the outside
25 of the PAA, we're looking at about a mile is the

1 closest, is that correct? There are several within a
2 mile of the proposed permit boundary, or with
3 various --
4 MR. THOMPSON: And I believe the company
5 is committed to address either providing other water
6 if these wells can't be used by whoever owns them, so
7 that's something they have worked out with the
8 landowners.
9 ADMIN. JUDGE COLE: And that is
10 Section 5.1 also?
11 MR. THOMPSON: Is that --
12 MR. PUGSLEY: I'm sorry, sir. Can you --
13 ADMIN. JUDGE BARNETT: Yes. In
14 Section 5.1 that is identified as Wells Within the
15 Aquifer Exemption Boundary, indicated that these wells
16 will be replaced with a -- it's in that section, if
17 I'm --
18 MR. PUGSLEY: Yes, sir. And that is not
19 inconsistent with the premise in the HRI case of 1998
20 where the Crown Point -- as you remember, sir, the
21 Crown Point site had municipal wells, and a license
22 condition was placed in the license saying, "Before
23 you even think about operating here, you have to move
24 the municipal wells and replace it, pay for it and
25 replace it with alternate source."

1 ADMIN. JUDGE COLE: So a similar clause as
2 here.
3 MR. PUGSLEY: Without question.
4 ADMIN. JUDGE BARNETT: Well, thank you.
5 That's what had been confusing to me about the private
6 wells and the PAA in relation to the surface rights,
7 and that's what had been confusing to me.
8 MR. PUGSLEY: Yes. It's completely
9 understandable, Your Honor, because there are so many
10 different areas.
11 ADMIN. JUDGE BARNETT: Right.
12 MR. PUGSLEY: There is the PAA, there is
13 the aquifer exemption boundary, there is the area of
14 review required under the Safe Drinking Water Act
15 regulation, so yes.
16 ADMIN. JUDGE BARNETT: Understood. And
17 then, I had asked the question from the Petitioners
18 also, what was in their wells from PAA that was
19 represented by someone from the Petitioners?
20 MR. ELLISON: I would say Susan Henderson
21 and I -- and I want to make a point of clarification
22 on the question. It said that -- question 7 says,
23 "Consolidated petition states that Powertech will be
24 mining from Inyan Kara." One individual, Dayton Hyde,
25 claims he draws water from Inyan Kara. Susan

1 Henderson draws water from the Lakota sandstone, which
2 is part of the Inyan Kara. So --
3 ADMIN. JUDGE BARNETT: Right.
4 MR. ELLISON: -- I just wanted to make
5 sure that --
6 ADMIN. JUDGE BARNETT: Okay. Yes,
7 that's --
8 MR. ELLISON: -- where we are at on that.
9 She is approximately 10, 12 miles --
10 ADMIN. JUDGE BARNETT: Okay.
11 MR. ELLISON: -- from the project.
12 MR. PUGSLEY: And we'd like to -- if we
13 could, to answer your question, sir. Go ahead.
14 MR. THOMPSON: Well, we are -- as I
15 understand it, we are 13 miles south of Edgemont.
16 MR. PUGSLEY: North.
17 MR. THOMPSON: North. We are 13 miles
18 north of Edgemont, and she is at least six miles south
19 of Edgemont. So she has got to be 18 or 19 miles
20 away. The most contiguous portion of her property has
21 to be closer to 18 miles.
22 ADMIN. JUDGE BARNETT: Okay. But this is
23 -- this is Susan Henderson?
24 MR. THOMPSON: Yes.
25 MR. PUGSLEY: Right.

1 ADMIN. JUDGE BARNETT: So I should be
2 able, from the maps, to figure -- look at that myself
3 and figure out how far away she is.
4 MR. ELLISON: Yes, sir.
5 ADMIN. JUDGE BARNETT: And I'm assuming
6 you're talking about -- you're talking about not road
7 distance but as the crow flies.
8 MR. THOMPSON: As the crow flies, yes,
9 sir.
10 ADMIN. JUDGE BARNETT: Right. I think I
11 should be able to figure that out myself, how far away
12 she is.
13 MR. THOMPSON: Yes.
14 ADMIN. JUDGE BARNETT: Okay.
15 MR. ELLISON: And we have -- you know,
16 there is a Fall River County property map.
17 ADMIN. JUDGE BARNETT: Okay.
18 MR. ELLISON: It is not part of the
19 record, but it is broken into sections, which is by
20 miles.
21 ADMIN. JUDGE BARNETT: Okay.
22 MR. ELLISON: Square miles, so --
23 ADMIN. JUDGE BARNETT: Okay.
24 MR. ELLISON: -- it would be actually easy
25 to figure out.

1 ADMIN. JUDGE BARNETT: Okay. Thank you.
2 I'm sorry. Was there anything closer from
3 the tribe that you wanted to add?
4 MR. PARSONS: No.
5 MR. ELLISON: But I guess I would also
6 figure it's worth a mention that the city of Edgemont
7 is closer.
8 ADMIN. JUDGE BARNETT: Okay. The city of
9 Edgemont is not represented by the petition.
10 MR. ELLISON: No. But I thought one of
11 the questions was, "Were there any municipal or -- as
12 well as private wells?"
13 ADMIN. JUDGE BARNETT: Right, right.
14 MR. ELLISON: I'm responding to that.
15 ADMIN. JUDGE BARNETT: Right, right.
16 Okay. Thank you.
17 CHAIR FROEHLICH: All right. What I'd
18 like to do now is move on and address the individual
19 contentions that have been filed by the Petitioners.
20 And as part of the rules under which the NRC and this
21 Board operate, the Petitioner must show standing as
22 well as at least one admissible contention.
23 And what I'd like to do now is walk
24 through the individual contentions. The Board has
25 questions on most of them. And on the subject of

1 contentions, in general, I would like to ask, first,
2 Public Commission staff, where in the Commission's
3 rules would we find the requirements for what must be
4 filed in application for an ISL proposal?
5 MR. CLARK: Your Honor, generally, those
6 requirements are in 10 CFR Part 40. They can also be
7 found in other parts, however. As mentioned, Part 20
8 prescribes standards for radiation protection. An
9 applicant must meet certain criteria or demonstrate
10 that it will meet certain criteria, in Part 20.
11 I also mentioned Appendix A in Part 40,
12 several criteria of which are relevant to reviewing an
13 ISR application.
14 In terms of the environmental report, an
15 applicant must submit both a safety report addressing
16 the criteria in the Commission's safety regulations in
17 Part 20, Part 40, and Appendix A, and must also submit
18 an environmental report as required by 10 CFR
19 Part 5145. And Section 5145 governs the contents of
20 the environmental report.
21 CHAIR FROEHLICH: Now, a number of the
22 contentions are talking about the quantity of
23 information necessary that are outlined in the
24 sections of the CFR that you just cited for us. How
25 does an applicant or a petitioner know how much

1 information is required to support their petition?

2 MR. CLARK: Your Honor, in some cases the

3 plain language of the regulations will provide that

4 information. But the staff has attempted, through

5 guidance, through its standard review plan for uranium

6 recovery facilities, the staff has attempted to

7 provide guidance on the information that we need to

8 conduct our review.

9 I can provide that -- the standard review

10 plan is in fact a NUREG. I explained earlier that

11 NUREG is capital letters, N-U-R-E-G. NUREG-1569, I

12 wanted to be certain. And that also is available on

13 the NRC's website.

14 CHAIR FROEHLICH: Okay. I think we'd like

15 to move at this point to Contention Number 1 from the

16 Sioux tribe. And there the contention, as stated

17 there, states, "Contention 1. Failure to meet

18 applicable legal requirements regarding protection of

19 historical and cultural resources, and failure to

20 involve or consult with the Oglala Sioux tribe, as

21 required by federal law."

22 All right. As I read this, I'd like to

23 compare Contention 1 that was filed by the tribe, with

24 what the Commission did in the Crow Butte case, the

25 one that was issued May 18, 2009, where it appeared,

1 at least on a first reading, that that is an identical
2 contention. I believe in that case it was
3 environmental contention B, and the Commission held
4 that it was inadmissible, I believe, because it was
5 not ripe.
6 Would you please address the situation we
7 have here with what the Commission found and held in
8 CLI-09-09?
9 MR. PARSONS: Sure. Jeff Parsons for the
10 record, for the Oglala Sioux tribe. I do agree that
11 there are similarities, and certainly I think the Crow
12 Butte case is relevant. But the -- you know, as it
13 was fleshed out in the briefing, I think there are two
14 -- really two components to Contention 1.
15 One aspect deals with a contention that
16 there is a lack of adequate description in the
17 application of the cultural resources at the site, and
18 the second deals with the failure of the NRC staff or
19 the NRC to consult under the National Historic
20 Preservation Act. That second -- I'm sorry. Let me
21 back up.
22 That first contention did not appear --
23 excuse me, that first component did not appear in the
24 Crow Butte case, so I think it's distinguishable in
25 that respect. There is an argument in this case that

1 the application materials do not provide the required
2 description of cultural and historic resources.
3 With respect to the second component --
4 and I think that's more -- is closer to the situation
5 in Crow Butte, but -- and in that case it is true the
6 NRC ruled that the contention was not ripe. And the
7 basis for that contention -- you know, the Crow Butte
8 decision from the NRC did not provide a wealth of
9 analysis on that.
10 But the gist of it was an argument from
11 the NRC staff that it will get to the NHPA, National
12 Historic Preservation Act, consultation down the road
13 when it conducts its National Environmental Policy Act
14 review. And in this case, we are arguing -- it is
15 different, it is distinguishable. In this case, there
16 is a temporal argument.
17 Our argument in this case is that the
18 National Historic Preservation Act requires
19 consultation from the federal agency, between the
20 federal agency and the tribe, to begin at the earliest
21 possible time. And so whereas in the Crow Butte case
22 there was an argument that you haven't consulted, and
23 the response was, "It's not ripe, because we haven't
24 gotten to that point yet."
25 In this case, there is a similar argument

1 -- we haven't consulted -- but the difference is we're
2 saying that there is a current, ongoing violation of
3 federal law, because the National Historic
4 Preservation Act requires consultation at the very
5 beginning of the process, not after the detailed
6 technical review is done and after the NEPA process is
7 conducted. And so --
8 CHAIR FROEHLICH: Is there any case law or
9 guidance material that supports that proposition, that
10 proposition that it should be -- that it should have
11 occurred now or should be at this stage of the
12 proceeding?
13 MR. PARSONS: Yes, there is. There is
14 language, and it was quoted in our -- and cited in our
15 brief, where it talks about the regulations issued by
16 the National Park Service through the Advisory Council
17 on Historic Preservation, at 36 CFR Section 800.1(c),
18 talks about the agency officials "shall ensure that
19 Section 106 process is initiated early in the
20 undertakings planning." So that broad range of
21 alternatives may be considered during the planning
22 process for the undertaking.
23 In addition, the Advisory Council on
24 Historic Preservation, November 2008 guidance
25 document, references that same requirement -- early

1 engagement, early as possible time, at four separate
2 places in their regulations, or in that guidance
3 document.
4 And so reading those together, the
5 argument that we're making is that the -- this
6 contention is ripe at this time, because the federal
7 law requires as soon as they receive an application,
8 as soon as they begin activity related to an
9 undertaking, as it is defined in the National Historic
10 Preservation Act, that the agency must engage the
11 tribe and begin that consultation process. And that
12 argument was not made in Crow Butte.
13 CHAIR FROEHLICH: Okay. So your argument
14 is that the -- is not with the Applicant so much as
15 with the staff. And it's the staff's violation, in
16 your opinion, of Section 106 of the NHPA that is the
17 basis or the foundation of this contention?
18 MR. PARSONS: As I tried to explain at the
19 outset, I think there are two components to it. One
20 is the inadequate information contained in the
21 application itself, and the second portion is as you
22 describe, yes, that there is an ongoing violation of
23 the National Historic Preservation Act, because that
24 law requires consultation to begin at the earliest
25 possible time.

1 And, again, that was an argument that was
2 not made in Crow Butte, so I don't -- we would contend
3 that the ripeness determination made in Crow Butte is
4 not -- was not faced with that argument, was faced
5 with an argument that -- without that temporal
6 component.
7 CHAIR FROEHLICH: Okay. So you would
8 agree with me that the NHPA does not speak to a
9 consultation between the applicant and the tribe.
10 MR. PARSONS: I don't think the NHPA
11 speaks to that, correct. I do think that the
12 regulations governing an applicant's submittal does
13 speak to involving the tribe and including -- and
14 including the tribal authorities on the likely impacts
15 to the cultural resources. So just to flesh that out.
16 CHAIR FROEHLICH: All right. So your
17 quarrel is with the staff and with the agency's
18 consultation with the tribe.
19 MR. PARSONS: In addition to --
20 CHAIR FROEHLICH: In addition to the --
21 MR. PARSONS: Yes.
22 CHAIR FROEHLICH: -- to the other -- the
23 second, or the first in your --
24 MR. PARSONS: Yes. Thank you.
25 CHAIR FROEHLICH: Okay. I'd like to hear

1 back now from the staff as to the concept of the
2 consultation, when it should take place, and any
3 support that would give us guidance as to when it is
4 intended -- when the statutes or the regulations
5 intend that consultation to take place and when in the
6 staff processing of the application it will take
7 place.
8 MS. JEHLE: The statutes and regulations
9 anticipate that consultation will take place when the
10 staff begins its environmental review, and will mature
11 when they issue the draft or supplemental
12 environmental impact statement. And that our
13 contention is that the consultation obligation, which
14 we recognize applies to the staff, has not become
15 ripe.
16 CHAIR FROEHLICH: This application was
17 filed in 2009. When do you anticipate it becoming
18 ripe?
19 MS. JEHLE: We anticipate that the draft
20 or supplemental EIS will be issued about spring of
21 2010 -- I mean, 2011.
22 CHAIR FROEHLICH: And the consultation
23 would take place before, during, or after the
24 preparation of the supplemental DEIS?
25 MS. JEHLE: All. All stages. The staff

1 has already initiated its consultation process, and
2 they will continue to engage both tribal entities and
3 the public.
4 MR. PARSONS: For the record, the tribe is
5 not aware of an effort to begin consultation in this
6 matter. We understand that the NRC has sent letters
7 with respect to the Crow Butte, which happened just
8 late last year, but I'm not aware -- and maybe it
9 happened just very recently.
10 MS. JEHLE: Letters have been sent in
11 February and March of this year, and a number of
12 telephone calls and e-mails have been sent throughout
13 the winter and the spring, both to the Oglala Sioux
14 officials, officers, as well as any other tribal
15 units, identities -- or tribes that have been given --
16 the names have been provided by the state Historic
17 Preservation Office as part of our investigations for
18 any groups that may have information on the historic
19 or religious significance of the project area.
20 ADMIN. JUDGE COLE: These were letters
21 requesting information?
22 MS. JEHLE: Letters requesting
23 information, letters requesting a contact with the
24 tribal entities, with individuals, and anyone who has
25 information to do -- to come forward, but that's a

1 process that is just -- we consider initiating. It
2 isn't the end of the process, and we would anticipate
3 that both the Oglala Sioux and other tribes may come
4 forward with information that would help us assess the
5 environmental --
6 CHAIR FROEHLICH: And, counsel, to be
7 clear, this initiation, these letters filed -- sent in
8 March, I believe you said, of this year, they would
9 all appear in the ADAMS system?
10 MS. JEHLE: Yes, they do.
11 CHAIR FROEHLICH: Okay. Okay. ADAMS
12 being the Commission's public --
13 MS. JEHLE: I have copies of the
14 correspondence between the staff and tribal entities
15 -- well, I should just say to the tribal entities.
16 Only one tribe has responded to our letters as of this
17 date.
18 CHAIR FROEHLICH: But the outgoing
19 letters, wherever they were, to whomever they were,
20 they are part of the public record and appear in the
21 ADAMS compilation that the Commission --
22 MS. JEHLE: Yes.
23 CHAIR FROEHLICH: -- maintains for the
24 public to see.
25 MS. JEHLE: Yes, they do.

1 MR. PARSONS: Counsel for the tribe would
2 represent that in a conversation with legal counsel
3 Brett Klukan for the NRC not three weeks ago was
4 informed that consultation had not begun, and would
5 not begin for some time with respect to the Dewey-
6 Burdock proposal specifically.
7 I understand that there is an ongoing
8 effort to have a tribal liaison identified for NRC --
9 in general respect for NRC matters, but the
10 information I had direct from NRC counsel was that
11 consultation had not, and would not, for some time
12 begin with specific respect to the Dewey-Burdock. So
13 I would be very interested in --
14 MS. JEHLE: We are --
15 MR. PARSONS: -- the letters that have
16 been sent.
17 MS. JEHLE: -- initiating the consultation
18 process, which is to make outreach to all the tribal
19 entities who may have information on the Dewey-Burdock
20 action area. And we have invited any entity who is
21 interested to participate in formal consultation,
22 government to government, or less formal consultation.
23 I am not -- I did not say that we have
24 started actual consultation, but the solicitation for
25 any groups that are interested in engaging, any groups

1 -- whether they -- we welcome information that would
2 be given on an informal basis from individual tribal
3 members who have information about any particular
4 activities, religious or subsistence that have
5 occurred on the land, and that isn't something that
6 has to be done within the hearing process.
7 There is two different processes going on.
8 One is the right of the tribe to participate through
9 the National Historic Preservation Act in
10 consultation. The general public has the right to
11 come and provide us with information as well, or
12 individual tribal members.
13 The hearing process is separate from that,
14 and our obligations under -- to consider the
15 environmental and the cultural resources at this point
16 won't ripen until the supplemental EIS are issued --
17 the supplemental EIS is issued. But we are -- we
18 welcome the beginning of consultation on an informal
19 level and -- but we have not received any specific
20 information from tribes at this time.
21 MR. CLARK: If I could just add, Your
22 Honor, even if the staff was shirking its
23 responsibilities under Crow-Butte, a contention
24 challenging the staff's consultation would not be ripe
25 until the staff releases at least its draft SEIS for

1 Dewey-Burdock. I just hope that we don't go too much
2 into, what is the staff doing, because what is
3 relevant is that the contention challenging the
4 staff's consultation under Crow Butte is not ripe
5 until the staff releases its environmental document.
6 MR. PARSONS: And I would say that --
7 MS. JEHLE: Which is spring of 2011, we
8 anticipate.
9 MR. PARSONS: Understood. I would say
10 that there appears still to be a difference of opinion
11 of a live issue with respect to what the law requires
12 that as soon -- I mean, what we have here is an
13 application that has been deemed complete, despite the
14 fact that the tribe has not -- had not been involved
15 in any way whatsoever with respect to providing that
16 information.
17 I think that may be one of the reasons
18 that the application is -- we feel the application
19 materials are inadequate, because there is -- the
20 methodology employed to conduct the cultural review at
21 the site did not consider the information from the
22 people who are most directly involved.
23 CHAIR FROEHLICH: But wasn't that the
24 issue in Crow Butte? I mean, wasn't that the same
25 argument, that they had -- that the analysis had begun

1 on the part of the staff when -- I'm sorry -- the
2 application had been filed in Crow Butte, the
3 contention was raised saying that the consultation had
4 not yet taken place. The Commission ruled that that
5 was not yet ripe, premature, and isn't that sort of in
6 a time sequence the exact -- exact same situation we
7 have here?
8 MR. PARSONS: Again, I think it is
9 distinguishable with respect to the argument made here
10 that the law requires that consultation begin at the
11 earliest possible time, and that appears to not be the
12 case, has not been the case, and is the legal position
13 of the NRC staff that they have no obligation to do
14 that in this case or any future cases. And so I think
15 there is a live issue with -- currently that is ripe
16 with respect to what the law requires, and that is the
17 National Historic Preservation Act in this case.
18 MS. JEHLE: The staff would like to point
19 out that the -- you're referring to the completeness
20 as the document submitted by Powertech.
21 MR. PARSONS: The completeness of the
22 application materials, you mean?
23 MS. JEHLE: Yes.
24 MR. PARSONS: I think that is a part of
25 this analysis. I don't think that that's the

1 end all/be all. I think as soon -- I mean, under the
2 law, the NHPA, the position is that as soon as the NRC
3 receives an application it is obligated under the
4 National Historic Preservation Act to begin
5 consultation.
6 MS. JEHLE: The staff would say that our
7 obligation does not begin until the issuance of the
8 SEIS. However, our procedures start -- as part of the
9 review, they begin outreach.
10 MR. PARSONS: So I think we have distilled
11 the legal controversy. I would just like to mention
12 in the Crow Butte case the NRC looked at this issue in
13 the context of both the contention and the standing.
14 And for purposes of standing, the Commission did find
15 that this procedural injury did grant standing to the
16 tribe in that case, and of course we make the same
17 allegation here.
18 MS. JEHLE: And as part of our process in
19 the issuance of the SEIS, once we have a draft that
20 the staff is -- has proposed, they will -- they begin
21 an active consultation. And so we expect the
22 consultation to be an ongoing process, but we have not
23 been required at this stage to have both our EIS -- or
24 supplemental EIS and consultation to be going --
25 ongoing at the very same time, the preparation and the

1 consultation.

2 We are beginning an outreach. In fact,

3 the tribe itself, under our regulations and under the

4 National Historic Preservation Act, has the ability to

5 provide information on its own. All tribes are able

6 to provide that information, and before we begin our

7 formal government-to-government consultations. So --

8 MR. PARSONS: Understood.

9 MS. JEHLE: But also in the -- discussing

10 the completeness, did you mention that the staff had

11 found the application to be complete?

12 MR. PARSONS: I believe that's the case.

13 MS. JEHLE: Right. We accepted it for

14 review.

15 MR. PARSONS: Thank you for that

16 clarification. I think -- when you say, "The staff is

17 not required to conduct the consultation process prior

18 to the release of the NEPA documents," I think

19 that's --

20 MS. JEHLE: And we prepared the NEPA

21 documents.

22 MR. PARSONS: I think that's where the

23 legal issue lies, that we contend that the National

24 Historic Preservation Act literally kicks in at -- the

25 obligation, the requirement for the staff, kicks in at

1 the earliest possible time.

2 CHAIR FROEHLICH: So from your

3 perspective, the letters and the solicitation is not

4 early, and certainly not enough at this point from the

5 perspective of the tribes, correct?

6 MR. PARSONS: Yes, that would be the case.

7 CHAIR FROEHLICH: And from the staff

8 perspective, the contention, staying away from the

9 merits, but the contention itself, if this were raised

10 after the supplemental DEIS came out, it would not

11 raise a challenge saying it was not ripe --

12 MR. CLARK: Your Honor --

13 CHAIR FROEHLICH: -- only to the timing,

14 not to the merit.

15 MR. CLARK: Exactly. Of course, any

16 petitioner would have to meet the requirements in --

17 CHAIR FROEHLICH: Right.

18 MR. CLARK: -- 2.309(f)(2). We likely

19 would not raise a claim to ripeness. We would, of

20 course, have to evaluate it based on the contention,

21 but we wouldn't raise the same arguments.

22 CHAIR FROEHLICH: The applicant --

23 MR. PARSONS: I'm sorry. If I might just

24 briefly on that point, I think that's a very important

25 distinction. As the NRC regulations read, a

1 subsequently-filed contention is not granted the same
2 status as an initially-filed contention. And so I
3 think the tribe suffers an injury, a procedural
4 disadvantage. I think there is a meaningful prejudice
5 there in the tribe's inability to raise these issues
6 as of right now. But we have to meet the late-filed
7 contentions, really discretionary exceptions of a
8 contention at a later time.
9 CHAIR FROEHLICH: My response would be
10 that if this contention were filed based on new
11 information, i.e. information you saw for the first
12 time in the supplemental DEIS, then it would fall
13 under the same standard that you are operating under
14 today.
15 MR. PARSONS: Understood. Our fear is
16 that it's a potential -- its potential that the
17 information that is provided in the application would
18 provide -- would be the information that is provided
19 in the NEPA document, and they'd say, "Well, that
20 information came up in the application, and now we're
21 incorporating it into our environmental study. But it
22 has been available for months and months. Why didn't
23 you raise" -- I mean, the catch 22 is --
24 CHAIR FROEHLICH: Fortunately, for your
25 client, you did raise it at this point. It is in the

1 record.

2 MR. PARSONS: Well, and we assume that,
3 you know, obviously, the way this process is set up,
4 you have to raise -- despite the handicap of not
5 having complete information, you have to dissect that
6 and raise all contentions at this time.

7 So I think, you know, the difference --
8 the procedural difference between filing an initial
9 contention and a late contention puts the tribe in a
10 bind, so to speak, because a late-filed contention, as
11 it is stated in the regs, is not afforded the same
12 credence or the same ability to be admitted as a -- it
13 has to jump through additional hoops, that is, than an
14 initially-filed contention.

15 Thank you for indulging me on that.

16 ADMIN. JUDGE COLE: Mr. Parsons, if the
17 staff and the tribe were currently involved in
18 consultation, what would be taking place? How do you
19 -- what happens in this? If you were to have full
20 consultation with the Commission, what goes on?

21 MR. PARSONS: Typically, in a process of
22 consultation, the tribe will provide information to
23 the NRC, be invited to provide information. They will
24 be provided with all information that the agency has.

25 ADMIN. JUDGE COLE: It would be a two-way

1 street.

2 MR. PARSONS: Absolutely. They would be

3 invited to -- for things like look at the site itself,

4 and to evaluate. I mean, one of the issues we have,

5 as we raised, is -- and not to disparage Augustanna

6 College's cultural department, from all understanding

7 they are a very competent department, but without

8 having the information from the tribe as to the

9 significance of various sites, or things that they may

10 not even recognize as historical or cultural, more

11 cultural resources, it is impossible for a third party

12 like that to be able to comprehensively review a site

13 for its cultural values without involving the tribe.

14 And I think that's why the NHPA is set up

15 the way it is, to involve the tribe at the earliest

16 possible time, so that exchange of information can

17 take place, and the tribe can be allowed to conduct

18 its assessment. And some tribes are not -- you know,

19 are not interested or may not want to conduct as

20 robust of a cultural review, but oftentimes they do.

21 More likely than not they do.

22 And it -- we believe the NHPA puts an

23 obligation on the agency to provide the tribe that

24 opportunity at the earliest possible time.

25 ADMIN. JUDGE COLE: Thank you.

1 MR. PARSONS: Thank you.

2 CHAIR FROEHLICH: All right. I notice

3 that the Applicant, in addition to challenging the

4 standing of the tribe, challenges this contention as

5 premature as well.

6 MR. PUGSLEY: Yes.

7 CHAIR FROEHLICH: Based on I guess the

8 discussion that was just held, if this same contention

9 were raised when the DEIS -- supplemental DEIS were

10 issued, would the company be raising the premature

11 argument?

12 MR. PUGSLEY: No, Your Honor, we would

13 not. We agree with the staff's position, legal

14 position on this issue.

15 CHAIR FROEHLICH: Okay. And, therefore,

16 it would be a timely contention if filed in response

17 to the supplemental DEIS.

18 MR. PUGSLEY: Yes. It would have to -- as

19 counsel for the staff stated earlier, it would have to

20 meet the requirements of 2.309(f)(2), but we would

21 not, as a company, raise a ripeness argument.

22 CHAIR FROEHLICH: I notice in the

23 Powertech answer to many of the contentions you state

24 that 10 CFR 5145 doesn't impose adequacy requirements

25 on an applicant. Do you have in mind that argument

1 that was raised?

2 MR. PUGSLEY: Yes, sir.

3 CHAIR FROEHLICH: Is it Powertech's

4 argument that a petitioner can never challenge the

5 adequacy of a statement made by an applicant in their

6 filed application?

7 MR. PUGSLEY: No, it is not, Your Honor.

8 Our argument is simply that using 10 CFR Part 5145 and

9 5160 as a legal basis for an inadequacy claim is not

10 the appropriate regulation upon which to base that.

11 What we are arguing is merely confining it to those

12 two regulatory provisions.

13 They basically prescribe what types of

14 items should be discussed in the environmental report,

15 per Part 51. We -- and as you notice in our

16 responses, we went to great pains to cite portions of

17 the application that address these issues. So the

18 short answer, Your Honor, is no, we do not believe --

19 it is not our position that someone can never raise an

20 inadequacy claim.

21 CHAIR FROEHLICH: Had they not raised the

22 particular section, 5145, left that out completely, no

23 reference to that particular part of the regulations,

24 would they be in a position to raise a challenge to

25 the adequacy of the application?

1 MR. PUGSLEY: It would depend on how the
2 contention was worded, Your Honor. I think that it
3 all really depends on how the alleged inadequacy is
4 formulated. I mean, for example, in response to this
5 particular contention, the tribe's brief does -- and
6 I agree with Mr. Parsons that there are two elements
7 to his contention.
8 However, they are both on point with Crow
9 Butte in my opinion, because if you look at the part
10 of the contention directed at the company, it
11 continuously states that the information offered in
12 the application -- and it was just said a moment ago
13 -- is inadequate because there was no consultation
14 with the tribe.
15 So, but the consultation with the tribe is
16 not the applicant's responsibility. It is the staff's
17 responsibility. And because, as my colleague said
18 earlier, this is a phased project, and I would not
19 only endorse the staff's position that it is an
20 ongoing consultation process prior to license
21 issuance, it is also an ongoing process after license
22 issuance, because we will go to the next well field
23 and the next well field.
24 And we are -- and it is standard procedure
25 for applicants to have to basically commit to a

1 license condition that says if you identify any
2 potential historic or cultural resource while you are
3 moving forward with your project, you must stop what
4 you're doing, assess it, determine what action would
5 need to be taken -- whether it be preservation or
6 avoidance or both -- and that -- I would like to
7 emphasize that point because -- and the reason that
8 these two portions of Mr. Parsons' contentions are
9 linked to Crow Butte is it all centers on the same
10 issue, which is tribal consultation.
11 And that is the staff's responsibility,
12 and I agree with the position that it is not yet ripe.
13 So I believe Crow Butte speaks directly to it.
14 MR. PARSONS: If I may --
15 CHAIR FROEHLICH: Mr. Parsons?
16 MR. PARSONS: -- we agreed -- we agreed,
17 as stated earlier, that the National Historic
18 Preservation Act, that Act does not put -- and maybe
19 it's -- does not put a duty on the applicant to
20 consult under that statute. And maybe it's a failure
21 to define terms precisely, but consultation under the
22 NHPA is one thing.
23 But there are also requirements in the
24 regulations in terms of ensuring a description of the
25 environment affected and the impacts of a proposed

1 action on the environment. And these are reflected in
2 the NUREG-1569 where it talks about the company
3 conducting consultation.
4 Now, it is not -- it is not talking about
5 NHPA consultation. It is talking about making sure
6 that the company knows what they are looking at. You
7 know, no disrespect to the company, but they are --
8 there is a real potential that when they are out there
9 doing their work they will not recognize what is a
10 cultural resource as they are conducting -- I mean,
11 there is a pile of rocks. Well, it's a pile of rocks.
12 How would we know if that's -- I mean, you
13 know, that sort of thing is a very real potential that
14 the regulations try to address. And this is addressed
15 on page 13 of our opening brief, where it talks about
16 the duty is on the applicant to conduct a review and
17 provide the information on cultural resources that
18 includes working with tribal authorities on the likely
19 impacts.
20 And so, you know, I understand the wording
21 is similar, talking about consultation, but I think we
22 are talking about two different things. The NHPA
23 applies to the staff only, but the requirements in
24 1545 and -- excuse me, pardon me, 10 CFR Section
25 5145 apply, and, a implemented through the NUREG-1569,

1 apply to the company.

2 CHAIR FROEHLICH: I see your reference on

3 page 13 to the NUREG-1569. You cited me also to a CFR

4 cite at this point that requires this consultation?

5 Could I have that again, please?

6 MR. PARSONS: Well, it's the 10 CFR

7 5145(b) requires a description of the affected

8 environment and a discussion of the impacts of the

9 proposed action on the environment. And as evidenced

10 through the NUREG, that includes involving the tribe

11 and having some basis for that information.

12 CHAIR FROEHLICH: Okay. The consultation

13 requirement I think you are suggesting comes from the

14 NUREG, not from the CFR reg.

15 MR. PARSONS: I'm sorry. It derives from

16 the CFR.

17 CHAIR FROEHLICH: The consultation

18 portion.

19 MR. PARSONS: As implemented and fully --

20 fully vetted or fully described through the NUREG-

21 1569. But the basis, the legal basis -- as I

22 understand, there is an argument from the company that

23 the NUREG-1569 cannot form the basis of a contention

24 because it is not binding.

25 CHAIR FROEHLICH: Right.

1 MR. PARSONS: I mean, incidentally, it is
2 interesting how NUREG-1569 is relevant in some cases
3 when it benefits one party but not when it benefits
4 the other. But that aside, as implemented through
5 NUREG-1569, as discussed and fully described, the
6 description of the affected environment and impacts of
7 the proposed action on the environment are
8 requirements of -- in the CFR.
9 CHAIR FROEHLICH: And the consultation is
10 in what section of 5145?
11 MR. PARSONS: Well, what -- what I'm
12 getting at is that in order to provide a description
13 of the affected environment, and to describe the
14 impacts of the proposed action, information is
15 necessary for the company to make that -- to provide
16 that information.
17 CHAIR FROEHLICH: Right.
18 MR. PARSONS: And that's why the NUREG
19 says you have to talk with the people who place
20 cultural import on those areas, to make sure that you
21 are indeed able to provide a description of the
22 affected environment and the impacts. And so it
23 derives from 15 -- from the CFR and is fleshed out
24 through the NUREG.
25 MR. PUGSLEY: Sir, if I may?

1 CHAIR FROEHLICH: Please.

2 MR. PUGSLEY: I respectfully disagree with
3 Mr. Parsons' characterization of how the NUREG-1569
4 implements Part 51. I do not believe that's the case.
5 NRC has a NUREG entitled NUREG-1748 that is the
6 contents for an environmental report, and as well as
7 how an EIS is set up for agency reviews. That would
8 be more appropriately tailored to Part 51 than the
9 SRP.

10 And, secondly, I -- I don't see anything
11 in the pleadings that shows that these provisions of
12 the standard review plan are directly linked to
13 Part 51 requirements. So, I mean, that is just our
14 position on that.

15 CHAIR FROEHLICH: Staff, do you care to
16 enlighten us on that subject?

17 MR. CLARK: Your Honor, just a brief
18 comment. I mean, the Commission's position on NUREGs
19 is abundantly clear and stated in the Commission's
20 decisions. They merely provide guidance and show one
21 way of complying with the regulations, but they are
22 not binding.

23 So a violation of a NUREG, even if an
24 applicant were not to comply with a NUREG, is not a
25 basis for an admissible contention.

1 CHAIR FROEHLICH: All right. I'd like to
2 move on to Contention 2, which is failure to include
3 necessary information for adequate determination of
4 baseline groundwater quality.
5 I'd like to ask the applicant if the
6 tribe, in Contention 2, has not raised a genuine
7 dispute over a material issue with respect to the
8 level of detail and scientifically defensible
9 methodology used by the Applicant with respect to the
10 baseline water data? Isn't that the crux of this
11 contention?
12 MR. THOMPSON: I believe it is.
13 CHAIR FROEHLICH: Okay. So they've -- so
14 you can see that they have raised a genuine dispute
15 over a material issue.
16 MR. THOMPSON: No, I don't. And that's --
17 what I said earlier is that with respect -- and I
18 alluded to 1569 talking about the two phases, and I
19 think that's what Mr. Parsons was referring to. But
20 I also alluded to 4032(e), which says that under the
21 current condition interpretation you cannot go forward
22 and put in your well fields and your monitor well ring
23 until you get a license, because they have a nexus to
24 health and safety, and it has to await the completion
25 of the environmental review.

1 Therefore, it is not possible under NRC's
2 licensing procedures to have all of that detailed
3 information on baseline at this stage of the process.
4 It would be in violation of 4032(e) to attempt to
5 gather it.
6 MR. PARSONS: If I might interject, I do
7 think that that's a mischaracterization of the rules.
8 The NRC regulations -- and this was played out in a
9 mine site in Wyoming where the mine in Wyoming started
10 to put in their monitoring ring and their -- so their
11 well field activities, their production operation
12 wells, and in that case it was found that, as Mr.
13 Thompson alludes to, that they cannot go that far.
14 But what they clarified is that gathering of baseline
15 information does not fall under that prohibition for
16 beginning pre-construction of operational facilities.
17 And, in fact, as set forth in our petition
18 at page 18, 10 CFR Part 40, Appendix A, Criterion 7,
19 requires the Applicant to provide "complete baseline
20 data on the milling site and the environs." And so
21 the idea -- I understand that as a production, as an
22 operational matter an ISL mine site is an iterative
23 process, but that's an operational phase and not a
24 baseline gathering phase.
25 It is our -- based on Appendix A, it is

1 hard to get more plain language than "complete
2 baseline data." And so I think that that's the basis
3 of our contention here to say that they need complete
4 baseline data, not to say that they won't do more work
5 in terms of figuring out where to put their well
6 field, how to align their well field and where to put
7 their monitoring rings, but in terms of baseline data
8 that is not part of that operational pre-construction
9 prohibition.
10 MR. THOMPSON: That is incorrect. Seven
11 doesn't apply strictly to ISL, first of all. It is
12 applied to conventional uranium mill tailings.
13 CHAIR FROEHLICH: Right. But until the
14 Commission has separate regulations on ISL, we are
15 supposed to seek guidance and direction from the
16 existing milling regs. Isn't that correct?
17 MR. THOMPSON: That is correct.
18 CHAIR FROEHLICH: So why would it not be
19 appropriate to take a look at Part 40, Appendix A,
20 Criterion 7?
21 MR. THOMPSON: You have to modify all of
22 the guidance that exists for determining baseline
23 information with respect to a conventional mill. It
24 has to be modified in applications to NRC staff with
25 respect to an ISL facility. And the NRC staff has

1 said, "Yes, we need some regional baseline data."

2 We need to know -- you need to know where

3 the ore body is. You need to know where the well

4 fields are likely to go. That means installing some

5 wells in the area where you are going to produce.

6 You need to know the water quality outside

7 of the mining zone, because in the future all of that

8 is addressed in 1569 in the general gathering of

9 baseline data, but you do not have the highly detailed

10 water quality data and other things that you get after

11 you get a license. You are not required to have it,

12 and you are not allowed to seek it.

13 MR. PARSONS: If I might provide one more

14 citation, the regulations cited by Powertech in their

15 defense on pre-construction states -- 40.32(e), the

16 very last sentence specifically addresses this issue

17 I think, or at least is highly relevant.

18 It says the term does not mean site

19 exploration, roads necessary for site exploration,

20 borings to determine foundation conditions, or other

21 pre-construction monitoring or testing to establish

22 background information related to the suitability of

23 the site or the protection of environmental value.

24 So I think it is relatively clear that

25 when we are talking about baseline data-gathering that

1 is to be conducted prior to and as part of an
2 application requirement.
3 MR. THOMPSON: I don't think what that
4 says is inconsistent with what I have been saying.
5 You have to develop enough baseline information to
6 determine what the water quality is generally in the
7 mining zone and what the water quality is on the
8 immediate outside. You have to do that in order to
9 get an aquifer exemption. You have to know the
10 boundaries.
11 And of course you have to have that basic
12 information. But if you look at 1569, which says,
13 "This is what the NRC staff is going to be looking
14 for," they specifically say, "Don't expect to have all
15 of the detailed information on the water quality in a
16 given well field, because it is going to vary from
17 well field 1 to well field 2." It can even vary in
18 different portions of the well field.
19 So what he says, I don't disagree with.
20 CHAIR FROEHLICH: I would like the staff
21 to address the issue of the level of detail that is
22 expected at this stage, and maybe elaborate a bit on
23 the NUREG that was just cited.
24 MR. CLARK: Your Honor, first, I would
25 like to clarify that both the Petitioner and the

1 Applicant are referring to Criterion 7. And I want to
2 make clear that what is relevant here is the first
3 sentence of Criterion 7 that refers to baseline data.
4 And I just want to make sure there is no
5 suggestion that at this time Powertech needs to
6 provide the information required in the second
7 sentence of Criterion 7, which refers to pre-
8 operational monitoring program.
9 The staff's position is that the staff
10 cannot take a position right now as to whether
11 Powertech provided complete information. As made
12 clear, the staff's review is ongoing. And it is
13 considering -- that is obviously an important area in
14 the review of an ISL application.
15 But the staff expects that the Applicant
16 provide adequate baseline data addressing major
17 constituents, addressing any major studies in the
18 region, and beyond that I am hesitant to say what in
19 each case the staff would require. The information
20 provided by Powertech was, in the words of the
21 Petitioner's expert, voluminous.
22 And the staff's position isn't that
23 Powertech did in fact provide complete information,
24 but that the Petitioners haven't met their burden
25 showing they failed to provide complete information.

1 Our position is that Dr. Moran does not identify any
2 deficiency. Dr. Moran is the expert upon whom the
3 tribe relies, and also the Petitioners rely on Dr.
4 Moran's opinion.
5 Dr. Moran alleges some fairly specific
6 deficiencies. He claims that the information
7 Powertech provided is incomplete, and he states a
8 number of reasons why he believes that to be the case.
9 As stated in the staff's brief, though, none of Dr.
10 Moran's concerns raises to the level of inadmissible
11 contention.
12 CHAIR FROEHLICH: I read very carefully
13 the staff brief on this section, and I note that you
14 criticized Dr. Moran, because according to the staff,
15 at page 23, he didn't cite specific sections of the
16 NUREG to support his claim that additional analyses
17 were required.
18 The staff also says on the same page that
19 that NUREG doesn't impose any requirements. Don't you
20 have poor Dr. Moran in at catch 22?
21 MR. CLARK: No, Your Honor. Simply if you
22 are going to -- regardless of whether the support can
23 be used to support our contention or not, we expect
24 that somebody give us the benefit of knowing what they
25 are relying on. Our position, as stated previously,

1 is the NUREG does not impose binding requirements on
2 an applicant.
3 CHAIR FROEHLICH: Right.
4 MR. CLARK: However, if you are going to
5 rely on something, even if it's wrong, we would expect
6 that you at least identify the specific portions of
7 the document. So even -- we made that statement of
8 course to hedge our bet, say to the Board that we are
9 willing to entertain the notion that a NUREG doesn't
10 impose binding requirements.
11 Well, even assuming the NUREG imposed
12 requirements on Powertech, which it does not, but even
13 assuming that were the case, the Petitioner would
14 still have to meet 2.309(f)(1)(6) and refer to
15 specific -- or 2.309(f)(1)(5) and provide specific
16 support for its contention.
17 CHAIR FROEHLICH: Well, doesn't
18 2.309(f)(1)(5) say that he has to have the alleged
19 facts and an expert opinion which support his
20 contention? Isn't that just what Dr. Moran has put in
21 the record?
22 MR. CLARK: Well, under Commission
23 precedent, the Petitioner must provide specific
24 references. It's just that the NUREG is -- the Board
25 is aware that the NUREG is, I believe, almost 300

1 pages long. And we think it is incumbent on the
2 Petitioner to at least identify a section of that
3 NUREG.
4 ADMIN. JUDGE BARNETT: If he did identify
5 a section of the NUREG, would you say, "Well, the
6 NUREG is not applicable"?
7 MR. CLARK: Yes, Your Honor. We've said
8 that before, and we believe that -- but there is
9 nothing inconsistent with our position being that the
10 NUREG does not apply -- does not impose requirements.
11 But even if we were wrong, there is still not
12 sufficient support.
13 MR. PARSONS: If you look at --
14 CHAIR FROEHLICH: Mr. Parsons?
15 MR. PARSONS: Thank you. If you look at
16 page 18 of our petition, it cites the numerous
17 provisions of the NUREG. And then, in addition,
18 throughout -- as stated in the petition and throughout
19 Dr. Moran's analysis, there are -- it is replete with
20 references to the application materials itself.
21 Now, I understand that Powertech and NRC
22 staff want to cite a bunch of other provisions of the
23 -- or sections of the application that they think
24 meets that, you know, that they demonstrate the proof.
25 But here we are well into the merits at this point.

1 CHAIR FROEHLICH: If I took specific
2 references that staff points out in 10 CFR
3 2.309(f)(1)(5), would be in your petition at pages 18
4 through 21, is that your argument, Mr. Parsons?
5 MR. PARSONS: Yes, sir.
6 CHAIR FROEHLICH: Thank you.
7 MR. PUGSLEY: Your Honor, if I may.
8 CHAIR FROEHLICH: Yes.
9 MR. PUGSLEY: One thing we -- Powertech
10 would like to make -- to note for the record is when
11 evaluating this contention, because we are basically
12 dealing with a contention about baseline water quality
13 data and the level of completeness of that data. I
14 would ask that when you consider your decision that
15 you take in mind page 23 of our pleading where we cite
16 directly from the SRP. It is not a --
17 CHAIR FROEHLICH: Just one second. It
18 will be easier if I follow with you.
19 MR. PUGSLEY: No problem.
20 CHAIR FROEHLICH: Okay.
21 MR. PUGSLEY: It is not a requirement per
22 se. We have been talking about whether there are
23 requirements in the SRP. This is not a requirement.
24 This is basically staff's view on acceptance criteria
25 that says reviewers should keep in mind that the

1 development and initial licensing of an in situ leach
2 facility is not based on comprehensive information.
3 Reviewers should not expect that
4 information needed to fully describe each aspect of
5 all the operations, which in my mind includes baseline
6 water quality data, will be available in the initial
7 application.
8 The reason I am raising this point, Your
9 Honors, is because when looking at allegations about
10 a failure to include information, or a failure to
11 include adequate information, you have to read it in
12 light of this statement, because it would -- to not do
13 that would hold the company to a standard of
14 information-gathering that we are prohibited by
15 regulation to satisfy, which is 4032(e).
16 So as far as I'm concerned, when you're
17 evaluating baseline water quality at a site, its
18 stages, as was noted by my colleague earlier, there is
19 going to be more information later in the game. But
20 what we're looking at in terms of an admissible
21 contention is what level of data needed to be present
22 at this stage of the game.
23 And that's why I ask when you consider
24 your decision on this contention to consider it in
25 light of that statement.

1 ADMIN. JUDGE COLE: And that statement is
2 guidance in NUREG-1569.
3 MR. PUGSLEY: It is guidance in NUREG-
4 1569, but, however, it directly reflects the staff's
5 interpretation of regulation at 40.32(e).
6 ADMIN. JUDGE BARNETT: Well, I'm not sure
7 -- did the staff not say that this was supposed to be
8 complete baseline water quality information at this
9 stage?
10 MR. CLARK: Your Honor, the information
11 would be complete in the sense it provides background
12 information, but it is not complete in the sense that
13 it would support operations. In fact, they will have
14 to, under the second sentence of Criterion 7,
15 Powertech, if the license is granted, would have to
16 provide pre-operational -- or, excuse me, operational
17 data. So it's a different set of data that is
18 required under the first and second sentences in
19 Criterion 7.
20 ADMIN. JUDGE BARNETT: Can Dr. Moran not
21 challenge whether it's complete or not?
22 MR. CLARK: Certainly, Your Honor, Dr.
23 Moran can challenge whether it's complete. But he is
24 required to -- or the Petitioners are required to meet
25 the requirements at 2.309(f)(1).

1 ADMIN. JUDGE BARNETT: You've got a lot of
2 stuff in here. It's got a lot of information in it.
3 MR. PARSONS: And if I may briefly, you
4 know, again, I am always a bit confused as to how
5 NUREG-1569 is credible interpretation of how the regs
6 are applied, and then, all of a sudden, when we cite
7 to it, it's just one way to do it, and it's not really
8 relevant.
9 But regardless, Appendix A, Criterion 7,
10 talks about complete baseline data. And with respect
11 to Dr. Moran's expert report, he not only challenges
12 the quantity of information, but also the methodology
13 that is employed.
14 And so I think that not to get lost is the
15 fact that we are challenging the scientific
16 methodology that is being applied to determine the
17 baseline data, and it is unclear to me how you could
18 have any -- regardless of the amount of information
19 you have, if it's not using an acceptable scientific
20 methodology, you know, it is not worth, you know,
21 putting in.
22 MR. PUGSLEY: Well, I think, Your Honors,
23 that if we want to leave the SRP out of this and look
24 at the regulations being cited here, Criterion 7 of
25 Appendix A, and 4032(e), if we were to read Mr.

1 Parsons' statement literally that the criteria
2 requires complete baseline data, then those two
3 regulations are diametrically opposed, because then we
4 have to read the regulation as the Commission has
5 directed, which is as -- applied as appropriate to ISL
6 projects.
7 So forgetting guidance aside, that in and
8 of itself is critical, plus the fact that methodology
9 of gathering data is also directly linked to this
10 process, because there are certain methodologies we
11 can't engage in, I mean, we can't go in, because in
12 order to determine water quality inside a recovery
13 zone, as compared to water quality at a proposed
14 monitor well ring, which has direct impact on well
15 placement, hydraulic controls, well field balance,
16 etcetera, that goes beyond what the regulations allow
17 us to do.
18 So as I stated earlier, just -- if you
19 would please keep in mind those statements when you
20 are determining whether the contention is admissible.
21 MR. FRANKEL: Your Honor, I'm afraid that
22 I might get lost -- just a clarification on a
23 procedural question? I haven't been chiming in on a
24 lot of this, because it's -- well, you haven't asked
25 me to. But some of these issues come up in our

1 contentions. We'll get a chance to --

2 CHAIR FROEHLICH: Take good notes.

3 MR. FRANKEL: Yes, sir.

4 CHAIR FROEHLICH: Look forward to hearing

5 from you --

6 MR. FRANKEL: Thank you, sir.

7 CHAIR FROEHLICH: -- when it's your turn.

8 Mr. Pugsley?

9 MR. PUGSLEY: Yes, sir.

10 CHAIR FROEHLICH: Getting back to this

11 iterative process and the timing of when additional

12 permissions are requested or required, and the

13 filings, what is the opportunity for Petitioners to

14 raise a new contention, or maybe raise this contention

15 again? Are they publicly noticed? You know, when is

16 -- in the procedural timeline of this, do they ever

17 get another chance to raise this?

18 MR. PUGSLEY: Your Honor, if you look back

19 at the long lineage of cases in the Hydro Resources,

20 the long issued decisions, hearing rights under the

21 Atomic Energy Act was an issue that was litigated.

22 And it was found that the process by which a licensed

23 application is reviewed, based on the data, allowed to

24 be compiled.

25 The process of getting a license and then

1 phasing in -- not only phasing in the initial well
2 field, because we have to wait until we get a license
3 to put that in, but also the installation of future
4 well fields, while they -- I would defer to my
5 colleague on this, because he had more time on that
6 case than I did, but it was found that there were no
7 violation of hearing rights under the Atomic Energy
8 Act.
9 I don't know if you want to add something
10 to this.
11 MR. THOMPSON: No, it -- there could be --
12 there can be potential opportunities. For example, if
13 in the Hydro case there was a -- an estimate of nine
14 pore volumes for restoration, if the staff decided,
15 based on evidence presented by Hydro Resources, to
16 reduce that, and to amend the license to require
17 something less, or more, presumably that would be
18 subject to potential hearing.
19 CHAIR FROEHLICH: Could I ask the staff to
20 explain for the Board the iterative process from the
21 perspective of notice to the public as we move from
22 one stage, the initial well fields, to future well
23 fields, to moving into the operational stage?
24 MR. CLARK: Well, Your Honor, future well
25 fields that aren't contemplated by Powertech's

1 proposal would require a license amendment, and that
2 would have with it hearing opportunities, and the
3 Petitioners could again seek a hearing or any other
4 interested person. So --
5 CHAIR FROEHLICH: I'm not sure if I was
6 clear. The iterative process that we are hearing
7 about.
8 MR. CLARK: For the current --
9 CHAIR FROEHLICH: For the current
10 application. Are the future -- they will start with
11 the pre-operational authorizations that they receive,
12 and then they will move from there and look at
13 different areas. Are those individual next steps,
14 notice to the public, and is there opportunity for
15 public input?
16 MR. CLARK: Typically, they are not, Your
17 Honor. However, each step would require the submittal
18 of certain information. As the Petitioners are aware,
19 the Commission's rules provide for late-filed
20 contentions. So if there is significant new
21 information, not just -- earlier we talked about the
22 staff's draft to final supplemental environmental
23 impact statements. But 2.309(f)(2) also applies to
24 other information, and other information could also
25 serve as a basis for a late-filed contention.

1 CHAIR FROEHLICH: And the fact that you
2 have received additional information, or they are
3 moving to the next stage of this process, there is no
4 public notice of that given?
5 MR. CLARK: Your Honor, I don't want to
6 misstate the staff position, but typically my
7 understanding is there is not.
8 CHAIR FROEHLICH: There is not.
9 MR. CLARK: No.
10 CHAIR FROEHLICH: And is there any special
11 notice given to a sovereign tribe under the
12 consultation understandings and agreement when we move
13 from one stage to the next?
14 MR. CLARK: It would -- it would depend
15 what authority -- of course, if this case is involved
16 in a hearing, there would be more than notice that the
17 tribe would be a party, or the consolidated
18 petitioners. I'm unaware, under the NHPA, of any
19 requirement for additional consultation. I --
20 ADMIN. JUDGE COLE: Unless they find
21 something.
22 MR. THOMPSON: Yes.
23 MR. CLARK: If they find --
24 MR. THOMPSON: Well, if you're referring
25 to the NHPA process, as we said, there is typically a

1 license condition -- there was in Hydro Resources --
2 which very, very plainly says, as Judge Cole
3 suggested, if you find something, you have to go back
4 to NRC. And presumably if NRC sets up, during the
5 consultation process, a memorandum of agreement with
6 the SHPO and the tribal historical preservation
7 officer, any future actions would be governed by
8 consultations pursuant to that agreement.
9 And that goes on until license termination
10 and release for unrestricted use. It is an ongoing
11 obligation. It is not static in any way, shape, or
12 form.
13 MR. PUGSLEY: And just to add to that,
14 Your Honors, the -- to provide you with a more
15 contemporaneous example, the applications before the
16 staff right now, if you look at some of the requests
17 for additional information, they are requesting a
18 commitment from the license applicants to do that very
19 process.
20 So it is not just licenses such as HRI
21 that was issued 12, 13 years ago. That -- unless I'm
22 mistaken -- the staff can correct me -- that is still
23 current staff policy.
24 CHAIR FROEHLICH: Mr. Parsons?
25 MR. PARSONS: It appears to me the answer

1 to your initial question, after all of that, was no.
2 Once the license is issued, that is it. I mean, I
3 understand that if new information comes up in the
4 NEPA process, and whatever, what have you, we end up
5 with potential for late-filed contention.
6 But once the license is issued, we are not
7 able to file a contention challenging a methodology or
8 an issue with respect to information gathered. I
9 mean, their whole argument is that they can -- they
10 want to do that data-gathering after they get a
11 license. At that point, it's over. And so I think
12 your question is well phrased that what they're
13 setting up is a situation where we can't, in fact,
14 challenge the completeness or the methodology, which
15 I think is simply not tenable.
16 CHAIR FROEHLICH: Let's move swiftly along
17 to Contention 3. Contention 3 is a failure to include
18 adequate hydrological information to demonstrate
19 ability to contain fluid migration. Let me ask the
20 Applicant here, has not the tribe in Contention 3
21 raised a genuine dispute over a material issue with
22 respect to the level of detail and the scientifically
23 defensible methodology used by the Applicant with
24 respect to baseline water data?
25 MR. PUGSLEY: I would say our position is

1 no. There's a lot of similarities between the one we
2 just finished -- yes.
3 CHAIR FROEHLICH: Well, in that case, what
4 parts of 10 CFR 2.309(f)(1) are missing from this
5 contention?
6 MR. PUGSLEY: Well, as you know, in our
7 response we went through the specific statements of
8 Dr. Moran, almost item by item. Basically, it is kind
9 of similar to the last one, which is that there wasn't
10 -- there weren't -- there wasn't a specific showing or
11 demonstration of aspects of the license application
12 that would lead to -- one to believe that this would
13 result in an issue. So I guess it would be (f)(1)(6),
14 I believe.
15 MR. THOMPSON: There are general
16 discussions of fractures and various things like that,
17 but there is no analysis or no allegations with
18 respect to the information in the application that
19 shows where the aquitards and confining layers are,
20 etcetera. They don't address those issues.
21 There is a generalized concern about
22 things like fractures, and so forth, but it doesn't
23 point to anything in the application that shows where
24 the ore zone is versus confining layers, and so forth
25 and so on. And we have to show -- I would think there

1 has to be some specificity to the concerns rather than
2 general regional fractures and things of that nature.
3 I mean, we're talking about a huge region here.
4 ADMIN. JUDGE COLE: What about the
5 reference to pumping tests that are used to
6 demonstrate confinement? It raises questions about
7 that. That seems to be right on point with what the
8 most important issues in this case are.
9 MR. PUGSLEY: Well, let me -- if we may
10 note a couple of things. One, there is no NRC
11 regulation that states specifically that you can't
12 conduct an ISL mining operation in an area where there
13 is no confinement. So that hasn't been referenced,
14 and I know of no regulation that says that.
15 The pumping tests and other items such as
16 that are in Powertech's environmental report and
17 discussed there in Chapter 4 of the environmental
18 report. I can give you specific citations if you'd
19 like, but that information is in the application.
20 ADMIN. JUDGE COLE: Were there
21 allegations, though, that it is not complete or
22 sufficiently complete to demonstrate that there is no
23 intermixing between aquifers?
24 MR. PUGSLEY: Well, I guess the -- again,
25 this contention does rely on Part 51 again in many

1 instances. And we have, you know, ad nauseam provided
2 the -- our position on that. And basically what we
3 are saying is there has not been a specific basis
4 offered to demonstrate, one, that there is no
5 confinement, or even to allege that; and, secondly,
6 even if there wasn't, that there would be an issue
7 related to that lack of confinement.
8 MR. THOMPSON: Well, or that -- in detail
9 why the pump tests are inadequate.
10 CHAIR FROEHLICH: I read with interest the
11 staff response on this contention. And I have focused
12 on page 27 of your answer, staff. At the top of the
13 page you state, "It's clear that paragraph 36 itself
14 does not satisfy 10 CFR 2.309(f)(5) and (6)." Are you
15 arguing to the Board that each paragraph or each
16 sentence must meet all of the 2.309 criteria?
17 MR. CLARK: No, Your Honor. We're not
18 arguing that.
19 CHAIR FROEHLICH: And so, for example, the
20 paragraph 36, that might very well satisfy
21 2.309(f)(1)(i) or (ii)?
22 MR. CLARK: No, Your Honor. I think I
23 misunderstood you. We did not understand paragraph 36
24 to be actually a basis. We understood it as being
25 merely an introduction to the remainder of Dr. Moran's

1 argument. So we didn't want to be construed as
2 criticizing Dr. Moran for not raising a contention,
3 for not meeting the contention admissibility
4 requirements, when in fact it appeared to us he was
5 merely providing an introductory paragraph.
6 CHAIR FROEHLICH: I see.
7 MR. CLARK: So we --
8 CHAIR FROEHLICH: Okay.
9 ADMIN. JUDGE BARNETT: I'm not sure I
10 understand that. You went through paragraph by
11 paragraph and applied all of the criteria, right?
12 MR. CLARK: Yes.
13 ADMIN. JUDGE BARNETT: So weren't you
14 applying the criteria for the -- for each contention
15 to each paragraph?
16 MR. CLARK: Your Honor, we were. I guess
17 my point was just that, in our review, paragraph 36
18 clearly does not meet the contention admissibility
19 criteria. However, we didn't want to suggest that we
20 are faulting Dr. Moran, because we thought there was
21 a question whether he even intended paragraph 36 as a
22 basis.
23 There are numerous sections in his
24 opinion. He has 72 paragraphs. Many of them clearly
25 aren't bases, because they provide his background.

1 They make other -- provide other references. So we
2 didn't want to suggest that he failed to do something
3 he wasn't trying to do.
4 ADMIN. JUDGE BARNETT: Well, I guess I'm
5 still not sure I understand. So what was the point?
6 So you are trying to not -- so what was the point of
7 applying each of these criteria for contention to each
8 paragraph?
9 MR. CLARK: We are trying to -- excuse me,
10 Your Honor. We are trying to be careful, in case the
11 Board looked at paragraph 36 with an eye toward
12 whether it formed an admissible basis. And we wanted
13 to be sure if the Board looked at it as offering a
14 basis that we made clear it did not form an admissible
15 contention.
16 ADMIN. JUDGE BARNETT: Right. But that's
17 -- we should not be looking at that paragraph as a
18 Board. We should look at the contention as a whole,
19 each of the -- however many paragraphs there are, is
20 that correct?
21 MR. CLARK: Your Honor, I know that the
22 tribe argued that in their reply. They were presented
23 to us paragraph by paragraph. We feel like we did our
24 job and addressed them paragraph by paragraph in
25 response. If the parts do not form an admissible

1 contention, it is difficult for me to see how the
2 whole can.
3 ADMIN. JUDGE BARNETT: Well, the whole can
4 be greater than the sum of the parts. I mean, any
5 contention I guess you could pick apart the individual
6 sentences and say this didn't meet the criteria of the
7 contention, right?
8 MR. CLARK: Your Honor, it was not the
9 staff who labeled the contentions in 11 paragraphs.
10 And as you mentioned before, Dr. Moran does provide a
11 lot of opinion. However, the length of a contention
12 is not a basis for admitting the contention. So the
13 staff -- we went through carefully to see whether any
14 paragraph met the contention admissibility
15 requirements, and we concluded that none of the
16 paragraphs did.
17 ADMIN. JUDGE BARNETT: Okay. All right.
18 If all of the criteria in 2.309(f)(1) are identified
19 in at least one paragraph, does that make the
20 contention admissible?
21 MR. CLARK: No, Your Honor. I would have
22 to see the example, because, again, they weren't
23 presented that way. If the tribe cross-referenced
24 various -- to be admissible, a contention has to refer
25 to specific portions of the application. Clearly, the

1 paragraphs were structured as different paragraphs
2 because they refer to different parts of the
3 application.
4 In most cases, they don't refer to
5 specific parts, so they fail to meet that requirement
6 in 2.309. But I'm not saying it's impossible, but
7 that's not what the tribe presented to us here. They
8 did not cross-reference, say, paragraph 36 with
9 paragraph 41. If they had presented it that way, we
10 could have addressed it that way. We responded to
11 what we received.
12 ADMIN. JUDGE BARNETT: Okay. I guess I'm
13 just having a little -- a hard time understanding how
14 if each of the paragraphs is taken individually, and
15 if the criteria from 203 -- 2.309(f)(1) were
16 identified in at least one paragraph for all the
17 paragraphs together, how that would not make an
18 admissible contention.
19 MR. CLARK: Well, Your Honor, because, for
20 example, one requirement in 2.309 is that they
21 identify a dispute with the licensee. Well, if
22 they --
23 ADMIN. JUDGE BARNETT: And so somewhere in
24 there you pointed out that they -- they did identify
25 a dispute with the licensee.

1 MR. CLARK: And they also need to provide
2 support for their position on that dispute. Now, if
3 they provide support for their position on another
4 dispute, that's not an admissible contention. If they
5 claim Powertech should have addressed one issue, and
6 then they don't support that claim, but elsewhere they
7 support some other issue which isn't in fact a dispute
8 -- one example is they claim that Powertech hasn't
9 shown there is no community between aquifers.
10 Well, that is not a genuine dispute,
11 because there are portions of the application
12 referring to a certain amount of communication between
13 aquifers. So there are -- in that case, there is some
14 support for their position that there is some degree
15 of communication between certain aquifers, but there
16 is no dispute with the applicant.
17 So they can't -- I'm not aware of any NRC
18 precedent. I'm not saying there's not a case out
19 there, but --
20 CHAIR FROEHLICH: How about the case of
21 Progress Energy, the Levy County case, CLI-10-2?
22 There the Commission spoke to I guess contentions
23 where you have a single contention with many, many
24 subparts, and that, as I read this, the Board was not
25 required to read each section of the contention in a

1 vacuum, nor was it required to discuss each subpart,
2 as its own preceding -- preceding findings had not
3 been set forth.
4 What I think Progress-Levy -- in the
5 Commission's words, was that you can't atomize a
6 contention, that it has to be looked at as a whole.
7 And if you can find that the six criteria are
8 satisfied within the whole of the contention, not
9 within the whole of any particular paragraph, that you
10 have an admissible contention. Am I reading this
11 decision correctly?
12 MR. CLARK: Your Honor, no, I believe
13 that's correct, if the overarching contention -- but
14 here, what -- I was responding to a question of
15 whether the bases can be mixed to form the contention.
16 I am not aware of any precedent for that.
17 If there is sufficient support in the
18 contention, it doesn't matter --
19 CHAIR FROEHLICH: I'm sorry. You said
20 "bases mixed." Can't a single contention have more
21 than a single basis?
22 MR. CLARK: Yes.
23 CHAIR FROEHLICH: Okay. And so they could
24 be mixed.
25 MR. CLARK: They can be mixed, but each

1 basis -- each basis needs to meet the criteria in
2 2.309(f)(1).
3 CHAIR FROEHLICH: Each basis, or the
4 contention?
5 MR. CLARK: Either each basis or the
6 contention as a whole. But it still has to -- the
7 Petitioner still has the burden of presenting, meeting
8 all the requirements, showing what issue is in
9 dispute, pointing to relevant parts of the
10 application, and providing adequate support.
11 Now, it is also -- the Petitioner here has
12 not done that. I'm referring to the tribe. The tribe
13 has not presented, at least in a way that is clear to
14 the staff. I'm not --
15 CHAIR FROEHLICH: So the staff is saying
16 not -- that if you take all 72, or whatever number
17 there were in this particular contention, if you take
18 that in its totality and disregard the paragraph
19 numbering that this Petitioner used, if within that
20 single contention I can find, or the Board can find,
21 each of the six criteria in 2.309, this contention
22 should be admitted. Is that correct?
23 MR. CLARK: If you can find each of those
24 criteria for a claim. But the staff has addressed
25 each of the specific claims, and we are unaware of any

1 general claim that also has support.

2 CHAIR FROEHLICH: Isn't the general claim

3 the statement or the contention at the beginning of

4 the numbered paragraphs?

5 MR. CLARK: That's the general claim, and

6 then the support is included in these paragraphs.

7 CHAIR FROEHLICH: Okay.

8 MR. CLARK: And both the paragraphs -- my

9 understanding is the paragraphs attempt to provide

10 support as required by 2.309(f)(1)(5), and also they

11 are supposed to show there is a genuine dispute as

12 required by 2.309(f)(1)(6). And we have addressed

13 each of those claims, both the support cited by the

14 tribe and also the issues that they claim are in

15 dispute.

16 All I can say, Your Honor, is we have gone

17 through everything that was presented to us and

18 responded to it. And we -- our position is that they

19 don't meet the contention pleading requirements.

20 CHAIR FROEHLICH: Now, in the view of the

21 staff, I guess you are contending that Dr. Moran, who

22 has raised concerns about groundwater pathways, which

23 he believes are not sufficiently addressed by the

24 Applicant, isn't that -- isn't that a material

25 dispute? He feels, as I read his declaration, that a

1 number of these pathways that I guess you can cite
2 literature for and statements in support, he feels
3 that these type of concerns aren't adequately
4 addressed by the Applicant. Is that not a dispute, a
5 genuine dispute, with this application?
6 MR. CLARK: Your Honor, to raise a genuine
7 dispute, Dr. Moran has to address sections of the
8 application that are relevant to his concerns, and he
9 does not do that in numerous instances here.
10 CHAIR FROEHLICH: Now, he does acknowledge
11 certain portions of it. But you're not saying he has
12 to acknowledge every single time communication is
13 mentioned in the application. If he can show us one
14 or two or three portions of the application which deal
15 with communication with which he disagrees, wouldn't
16 that get this contention in?
17 MR. CLARK: He has to at least address
18 those portions that are relevant to his claim. He
19 doesn't -- if they are redundant he has to -- he
20 doesn't have to address every repeat statement in the
21 application. But if the application addresses the
22 issue, and he ignores it, he does not meet the
23 contention pleading requirements.
24 CHAIR FROEHLICH: I'm still not sure. He
25 has to -- are you saying that he has to cite in his

1 declaration, or as part of this contention, every time
2 the Applicant mentions or makes a statement that is
3 related to something that he disagrees with? So if,
4 indeed, the issue is communication, does he have to go
5 to the Applicant's -- I'm sorry, to the Applicant's
6 application and cite to the Board every single
7 instance in which communication is mentioned which --
8 and he disagrees with their conclusion as to the level
9 of communication?
10 MR. CLARK: Well, if the statements are
11 different, then without him citing I think there is no
12 way the Board can determine whether he disputes those
13 statements by the Applicant.
14 CHAIR FROEHLICH: But if he disputes two
15 or three statements out of maybe 20, is that
16 sufficient?
17 MR. CLARK: Then, it's sufficient to show
18 a dispute. But to show a genuine dispute, and to also
19 support the dispute, as required by Part 5 of
20 2.309(f)(1), he has to do more. It is not enough just
21 to raise a dispute; he also has to --
22 CHAIR FROEHLICH: No. But if he can cite
23 three of 20 instances -- let's just take that as a
24 number. He cites three instances where he disagrees
25 with the conclusion that is in the application.

1 Although the application, granted, may mention a
2 communication issue 20 or 30, or 40 times even, is
3 that sufficient?
4 MR. CLARK: If he meets all requirements,
5 all six requirements under 2.309(f)(1), it would be.
6 He doesn't need to -- he doesn't need to exhaustively
7 dispute every section of the application.
8 Your Honor, if I could just mention,
9 though, it is difficult talking hypothetically when --
10 Contention 3 includes a lot of information, and I'm
11 not sure -- I'm trying to guess what you might be
12 referring to. If we had an example of a paragraph, it
13 is almost like we're talking about a contention and
14 ignoring the specific arguments made, where it is --
15 if we talked about specific arguments, then I can
16 explain where in the application Powertech addresses
17 the information.
18 CHAIR FROEHLICH: In a contention, if an
19 expert witness disagrees with the conclusion, or some
20 of the conclusions that the Applicant has set forward,
21 if he can meet the six criteria under 10 CFR
22 2.309(f)(1), aren't we home?
23 MR. CLARK: I'm not sure where home is,
24 but --
25 CHAIR FROEHLICH: I mean, we have an

1 admissible contention. We have a contention that
2 identifies two or three issues, areas, in which the
3 Petitioner, the Petitioner's expert, identifies
4 disagreement and cites to support for it, expert
5 opinion, alleged facts, along with references and the
6 other criteria of 2.309(f)(1).
7 Is that not sufficient to admit this
8 contention, even though he doesn't acknowledge that in
9 other portions of the application there are still
10 references and he just doesn't address them. He has
11 isolated three instances, let's say, of maybe 40
12 references, and he disagrees with those three.
13 MR. CLARK: If the other references would
14 remove the dispute, then that's not enough. If the
15 other references notwithstanding which --
16 CHAIR FROEHLICH: Okay.
17 MR. CLARK: -- there would still be a
18 dispute, then it is enough.
19 CHAIR FROEHLICH: Okay. And move the --
20 if he has a professional difference of opinion on
21 those other 27 or 37 points, issues, would the three
22 that he identified be sufficient?
23 MR. CLARK: No. Again, this is difficult
24 hypothetically, Your Honor. If Dr. Moran says this --
25 I believe he does that -- Powertech did not identify

1 bore holes in a certain section of the application,
2 and they do in fact identify bore holes, there is no
3 genuine dispute.
4 CHAIR FROEHLICH: Right. Okay.
5 MR. CLARK: If -- he does not need to go
6 through every section, but that's an example where, if
7 the information is in fact in another section it does
8 not -- it shows there is no genuine dispute.
9 CHAIR FROEHLICH: Okay.
10 MR. CLARK: He does not need to show -- if
11 he supports -- if he shows Powertech hasn't adequately
12 addressed communication between aquifers, he doesn't
13 need to address the communication between every
14 possible aquifer, as long as he provides adequate
15 support, meets all of the requirements of 2.309(f)(1).
16 So I think we may be -- I'm sorry if I
17 don't understand --
18 CHAIR FROEHLICH: No, this is helpful.
19 No, this is helpful.
20 MR. CLARK: -- the Board's question, but
21 we -- the staff's position, as stated in our brief,
22 and after reviewing, again, we find that for most of
23 the claims where Dr. Moran claims Powertech should
24 have provided additional information, the information
25 is in fact in the application.

1 Now, that does not preclude Dr. Moran from
2 challenging the adequacy, based either on his expert
3 opinion or by citing studies or facts. But in most
4 cases -- in some cases there are immediately adjacent
5 sections of the application, and the staff would just
6 want to make clear that a petitioner can't simply say,
7 "Hey, it should have been there, it's not in this
8 section," and ignore immediately adjacent sections
9 that include it and say there is a genuine dispute.
10 That's is what the staff puts forth in our brief.
11 CHAIR FROEHLICH: Okay.
12 ADMIN. JUDGE COLE: Dr. Moran questioned
13 the isolation of the ore bearing zone. Do you agree
14 with that, sir?
15 MR. CLARK: Your Honor, I would --
16 ADMIN. JUDGE COLE: This is what --
17 MR. CLARK: -- obviously, the isolation of
18 the ore bearing zone is something the staff will look
19 at carefully in its review.
20 ADMIN. JUDGE COLE: I understand that.
21 MR. CLARK: It's no doubt a material
22 issue, so it meets 309(f)(1)(4).
23 ADMIN. JUDGE COLE: Okay. And you also
24 mentioned the historic drilling in the area with
25 thousands of drill holes in the area. And he said

1 some of them have been improperly sealed, or possibly
2 improperly sealed, and that could cause a problem with
3 communication between different levels. Do you agree
4 with that?
5 MR. CLARK: Your Honor, he raises a
6 question as to whether there could be a problem.
7 Powertech identifies -- there is a section of their
8 application that we cite in our brief that addresses
9 old bore holes or wells that were improperly plugged.
10 Now, if Dr. Moran wants to dispute
11 Powertech's analysis in that section, he could do so.
12 But simply saying -- raising a general concern
13 regarding whether bore holes are plugged properly,
14 without challenging the information in the
15 application, that is not enough under Commission
16 precedent to admit a contention.
17 MR. THOMPSON: Your Honor?
18 CHAIR FROEHLICH: Yes.
19 MR. THOMPSON: It seems to me that, as I
20 noted earlier, there is precedent suggesting that the
21 Petitioners are responsible for understanding the
22 entire application. So if Dr. Moran or anybody else
23 identifies some area where he doesn't think the
24 discussion of communication or any other issue is
25 adequate, but it is discussed in more considerable

1 detail someplace else, then it is not appropriate.

2 I mean, he may dispute that later, and

3 then that's another issue. But if you don't read the

4 whole thing, just identifying it in some areas but not

5 addressing where else it is, and questioning that,

6 then that's not appropriate either.

7 MR. PARSONS: And just to interject here,

8 Your Honor, I take exception to the characterization

9 that Dr. Moran cherrypicked a sentence here or there

10 or did not review the whole application. I mean, I

11 think his expert opinion is -- and it is being

12 criticized already for being overly verbose, but I

13 think you get the idea of why, you know, he went

14 through the detail that he did. And he went through

15 some pretty extreme detail to lay out these scientific

16 critiques.

17 And it gets me back to the standard of

18 review at this stage in the proceeding. If -- I mean,

19 the argument on the merit, what is the argument on the

20 merits if the argument here is, yes, but there are

21 other parts -- we did do -- we did provide adequate

22 information. We are saying you didn't provide

23 adequate information, and that is our contention on

24 the merits. I can envision a process where they would

25 demonstrate that they did in fact provide that.

1 CHAIR FROEHLICH: I think Mr. Thompson was
2 suggesting that if the Petitioner identified an
3 omission, or something was not addressed in the
4 application, and in another part of the application
5 indeed it was, then that -- then that contention would
6 not be admissible, because --
7 MR. PARSONS: Understood. I don't think
8 we're -- I don't think we have that case here. I
9 think we are talking about the information that is
10 provided, and I think Dr. Moran did a comprehensive
11 review, identified not only gaps in the information
12 but presumably also improper or inadequate
13 methodologies that were applied.
14 And those -- I mean, you are -- I think
15 there is a risk here if you accept the arguments made
16 by NRC. And I think just the fact that the staff --
17 just the fact that they had to go on, you know, for 20
18 minutes just trying to articulate what their position
19 is, indicates that we are -- you are likely -- if you
20 accept their arguments, you are going down a road
21 where you are raising the burden on Petitioners to a
22 level that no one is ever going to be able to get an
23 admissible standard in one of these cases.
24 I mean, the Duke Power case I mentioned
25 earlier talked about the standard is not meant to be

1 an impenetrable fortress to disallow contentions. And
2 I think that is exactly what we are -- the road we are
3 going down.
4 So I would hope that the Board would take
5 a look at the contentions, determine if there are --
6 if the criteria are met from the regulations, and
7 determine if there are legitimate grounds for
8 litigation here, and we can move on and debate the
9 merits.
10 MR. PUGSLEY: Your Honor, a couple of
11 items. One, that this contention also should be read
12 in the same way as Contention 2 that we discussed
13 earlier. This -- we are talking about levels of
14 information that can be gathered pursuant to NRC
15 regulations. And that is something I believe should
16 be taken into account in this case when you are
17 reviewing it.
18 The second thing is the case in which Mr.
19 Thompson was referring to is a Duke Power case cited
20 on page 46 and 47 of our brief. Basically, referring
21 -- the first sentence of the quote, sir, has been made
22 abundantly clear by my colleague.
23 But the second sentence is quite important
24 as well. It says, "Stated otherwise, neither Section
25 189(a) of the Atomic Energy Act, nor Section 2.309 of

1 the Rules of Practice, permit the filing of an
2 unparticularlized contention followed by an endeavor
3 to flesh it out through discovery against the
4 applicant or staff."
5 Well, that is part of this as well, that
6 we are basically saying that it has to be more
7 specific in terms of the information you are citing as
8 a failure to address the issue, because if you don't
9 take into account the entire application, which this
10 case says you have to, then you are going to miss
11 important points that the Applicant may have already
12 addressed.
13 So I think what -- your characterization
14 of what Mr. Thompson was saying before is correct,
15 that if you identify an omission or something that
16 wasn't addressed, or something -- even in some cases
17 if you read it in light of Part 40.32(e), inadequacy,
18 that you have to look at the entire application and
19 read it in that light, rather than simply isolate your
20 view to certain things.
21 CHAIR FROEHLICH: I think that's -- I took
22 my turn at summarizing Mr. Thompson's position. I
23 think if I summarize Mr. Parsons' position is that if
24 you look through this contention and the declaration
25 that supports it, that we have -- we have instances

1 where Dr. Moran identifies issues that are not
2 addressed, but that are -- that even if you look at
3 the application in its entirety, there are still gaps
4 or issues with which he disagrees, and, from Mr.
5 Parsons' perspective, provide support. Is that fair?
6 MR. PARSONS: That's fair. Thank you.
7 MR. PUGSLEY: And in light of that
8 viewpoint, that is where the comment I made earlier
9 about Contention 2 applies to Contention 3.
10 CHAIR FROEHLICH: Why don't you elaborate
11 on that?
12 MR. PUGSLEY: Again, we are -- an
13 applicant -- it's not just Powertech. Any applicant
14 who conducts -- seeking to construct and operate an
15 ISL facility -- I'm sorry, I mean ISR.
16 CHAIR FROEHLICH: We're using them
17 interchangeably today.
18 (Laughter.)
19 MR. PUGSLEY: Has to be -- has to follow
20 rigid regulatory interpretation from the staff as to
21 the level of data that would be --
22 CHAIR FROEHLICH: Regulatory
23 interpretation of -- are we talking NUREG here?
24 MR. PUGSLEY: No, no, no. We're talking
25 Part 40.32(e).

1 CHAIR FROEHLICH: Okay.

2 MR. PUGSLEY: And, in my opinion, that is
3 about as rigid an interpretation as I've seen. But be
4 that as it may, the point is it would be a gross -- I
5 don't want to say -- okay, it would be -- you can't
6 overlook that part of these type of operations,
7 because it is really the dividing line between what
8 can be done by an applicant and then what can be done
9 by a licensee.

10 CHAIR FROEHLICH: Okay.

11 ADMIN. JUDGE BARNETT: I want to follow up
12 on -- is that okay? Follow up on the -- which is a
13 carry over from Contention 2. So Contention 3, one
14 sentence here says, "Failure to include adequate
15 hydrogeological information to demonstrate ability to
16 contain fluid migration."

17 And on page 23 through 24 of your response
18 you state that, "The pre-licensing site
19 characterization phase of ISR projects are designed to
20 provide general information. This phase is not,
21 however, designed to provide site-specific geologic
22 and hydrologic data and analysis," which I guess is
23 just what you were talking about for Contention 2. Is
24 that --

25 MR. PUGSLEY: Yes, sir.

1 ADMIN. JUDGE BARNETT: Is that correct?

2 MR. PUGSLEY: Yes, sir. The quote right

3 above the language you are reading, I believe you are

4 reading from the bottom of page 23?

5 ADMIN. JUDGE BARNETT: Okay. All right.

6 Let me get there.

7 MR. PUGSLEY: Because that was the --

8 right above that, sir, was the quote that I had read

9 earlier with regard to Contention 2.

10 ADMIN. JUDGE BARNETT: Okay.

11 MR. PUGSLEY: And that it was not -- and

12 it was not a "requirement" that is imposed by the SRP.

13 It is an overview of how the process works, regardless

14 of what requirements you think there are. That -- and

15 that conceptual overview is dictated by the staff's

16 interpretation of 40.32(e), period.

17 ADMIN. JUDGE BARNETT: Well, certainly at

18 some point the Petitioners can challenge the site-

19 specific geological and hydrologic data of this

20 license, is that right? Surely at some point.

21 MR. PUGSLEY: Well, you can -- I guess the

22 best way of putting it is that you have to -- you have

23 to take -- you have to show -- well, there is that --

24 ADMIN. JUDGE BARNETT: Assuming an

25 adequate showing.

1 MR. PUGSLEY: Assuming an adequate
2 showing --
3 ADMIN. JUDGE BARNETT: So what you're
4 saying is now, despite an adequate showing, it is not
5 -- now is not the point to challenge that, is that
6 right?
7 MR. THOMPSON: No. We're saying that the
8 contention is not adequate, that they have not
9 identified the areas of dispute in a particularized
10 way that show where the harm is going to come. It is
11 just talking about saying generally that the
12 information is inadequate on the separation of
13 aquifers. It is not addressing the specifics of the
14 application. And where it does identify the specifics
15 of the aquitards and -- in the mining zone --
16 ADMIN. JUDGE BARNETT: And this --
17 MR. THOMPSON: -- we're saying it is not
18 adequate.
19 ADMIN. JUDGE BARNETT: -- you say this
20 phase is not, however, designed to provide detailed,
21 site-specific, geological and hydrological data and
22 analysis. So my question is: at what phase is that
23 designed to be provided, and when can they challenge
24 that? Can they challenge that? Surely they can. And
25 when can they challenge that?

1 MR. THOMPSON: If we can't do it until
2 after the license is issued, and there are specific
3 criteria put in for quality control and all that, if
4 we follow those things in the license application,
5 unless they can show that there is an adverse impact
6 on public health and safety, they cannot challenge it.
7 ADMIN. JUDGE BARNETT: They can never
8 challenge that?
9 MR. THOMPSON: No.
10 ADMIN. JUDGE BARNETT: They can never
11 challenge the site-specific geological and hydrologic
12 data?
13 MR. PUGSLEY: The post-license issuance.
14 ADMIN. JUDGE BARNETT: So, but now --
15 you're saying now they can't challenge it pre-license.
16 MR. THOMPSON: They have to show that it's
17 inadequate pre-license.
18 MR. PUGSLEY: Yes.
19 ADMIN. JUDGE BARNETT: Well, it sounds to
20 me like you're saying right now, this phase, however,
21 is not designed to provide detailed, site-specific,
22 geological and hydrological data analysis. It's not
23 in there at this point, right?
24 MR. THOMPSON: No, it's not in there, and
25 that data is to determine well field design. That

1 data is to determine what your UCLs are, your upper
2 control limits, to determine how you determine when
3 you have an excursion. Those -- that kind of
4 information is post-licensing. And if it's inadequate
5 as far as NRC is concerned, they will not let you go
6 forward.
7 ADMIN. JUDGE BARNETT: But can the
8 Petitioners challenge the site-specific geological and
9 hydrologic data, given adequate showing?
10 MR. PUGSLEY: They can -- they can
11 challenge it, in our opinion, to the extent that it is
12 in the parameter -- within the parameters of what we
13 are allowed to do pursuant to the Commission's
14 interpretation of 4032(e), yes.
15 ADMIN. JUDGE BARNETT: So if it's not in
16 the application now, they can never challenge it. Is
17 that what --
18 MR. PUGSLEY: If it deals with things that
19 are post-license issuance, that is my -- my take on
20 it.
21 MR. THOMPSON: Well, there is also the
22 provision that goes back to sort of the NHPA I think,
23 that if the draft EIS comes out with information that
24 is different than what is in the ER, or significantly
25 different, then they can file a contention, a late-

1 filed contention. But it has to be based -- you're
2 looking -- you are challenging the license based on
3 the license application, the ER, and the TR.
4 ADMIN. JUDGE BARNETT: Well, it sounds to
5 me like you're putting them in a catch 22 a little
6 bit.
7 MR. PUGSLEY: Well, Your Honor, maybe here
8 is an example. As you are well aware, as this process
9 is ongoing during this proceeding, the staff is asking
10 the Applicant to explain this. They have two stages,
11 if I recall correctly. The first is what are called
12 RAIs, requests for additional information. And then,
13 there is something called open items, which are things
14 that are basically -- it wasn't adequately addressed
15 by the request.
16 But all of that information is -- at least
17 I would think would become part of the environmental
18 review and the final -- the draft SEIS, and eventually
19 the final. So based on 2.309(f)(2), if that document
20 comes out and they look at the hydrologic analysis,
21 let's say, and they say, "This wasn't in the
22 application, this is totally different," or --
23 MR. THOMPSON: Or in some material way.
24 MR. PUGSLEY: -- or it's significantly
25 different, according to the regulations, then, yes,

1 they would be able to file a -- go for a late-filed
2 contention to meet the requirements of that
3 regulation.
4 But one thing that is important here is,
5 for example, in the HRI case, it was specifically
6 noted that the staff had a license condition, and the
7 applicant had detailed procedures for determining
8 water quality parameters.
9 Now, and so basically there was not a
10 violation of hearing rights, because you could -- that
11 was already there. But a different example would be
12 we are talking about the hydrologic flow here. The
13 main process control for lateral -- vertical movement
14 of fluids are monitor wells. Well, as was just stated
15 previously, the staff has issued a written decision
16 saying that Part 4032(e) does not allow us to install
17 monitor wells -- monitor wells now.
18 So if we -- we have to wait until the
19 license is issued, and that serves as the only reason
20 I am saying you should inform your review of the
21 contention.
22 MR. PARSONS: One point of clarification.
23 Monitoring wells for -- let's define our terms here.
24 Monitoring wells on the operational side -- that is,
25 to determine a leak once operation starts -- they are

1 not talking about monitoring wells for purposes of
2 baseline data collection. That is allowable,
3 explicitly allowable, pre-operation.
4 And so, you know, again, it is the same
5 discussion we had previously. It appears the answer
6 is no. I mean, if the EIS comes out, and it has only
7 the data that they have in there now, you know, we
8 can't challenge apparently the site-specific. And
9 that -- again, that is just untenable.
10 MR. PUGSLEY: Well, I mean, with -- it is
11 perfectly fine to say that that would be untenable,
12 but that is the regulation. And, I mean, we -- and if
13 I'm not mistaken, the provisions 10 CFR 2.335 or 355,
14 that says you cannot challenge Commission regulations
15 in a proceeding. So if the regulation is deemed
16 inadequate by Petitioners, then there are regulatory
17 pathways to deal with that.
18 MR. THOMPSON: And, wait a minute, I would
19 like to clarify. We are not suggesting that -- and I
20 think I made that earlier -- point earlier, that a
21 general site characterization, you have to put in some
22 monitoring wells outside -- you have to be able to
23 identify the ore zone and the extent of the ore zone.
24 So you have to put wells within what you project to be
25 the ore zone.

1 You cannot put in a well field package.
2 A well field package means a well field and a monitor
3 well ring. We are not suggesting that you don't have
4 to put in some monitor wells. Otherwise, you don't
5 know what the delineation of the ore body is, and the
6 quality on the outside, which is different than the
7 quality of the water on the inside of the ore zone.
8 We are not suggesting you don't have to
9 provide general information. That is exactly what
10 1569 says.
11 MR. PARSONS: It appears we may have a --
12 not an argument that regulations are inadequate, but
13 an argument -- a legal argument as to what the
14 regulations require in this case.
15 And my -- what I would say to that is
16 that's -- that states a live legal issue that ought to
17 be considered a contention, as a basis for a
18 contention as -- if their response to this argument is
19 that the regulations don't require us to do any site-
20 specific baseline review in this proceeding, then we
21 have an issue as to whether the regulations are being
22 properly applied in this case.
23 MR. PUGSLEY: That is not our position.
24 CHAIR FROEHLICH: And I'm not sure we have
25 a legal contention or a legal dispute here.

1 MR. PARSONS: It just sounds like we
2 are --
3 ADMIN. JUDGE BARNETT: Is it okay -- would
4 you rather finish up three here before we take a
5 break, or would you rather go ahead and take a break?
6 CHAIR FROEHLICH: Why don't you -- still
7 on three, right?
8 ADMIN. JUDGE BARNETT: Yes.
9 CHAIR FROEHLICH: Okay.
10 ADMIN. JUDGE BARNETT: This is for the
11 Applicant, quickly. I'm going to ask you the same
12 questions I did for the staff. So do each of the
13 individual paragraphs in the contention, Contention 3,
14 have to conform to the requirements of 2.309(f)(1),
15 because you did the same thing as the staff, you went
16 through and looked at the ending paragraph and said,
17 "This one didn't meet Criterion 3, this one didn't
18 meet Criterion 3." Do each of the individual
19 paragraphs have to conform to all six criteria?
20 MR. PUGSLEY: Your Honor, I wouldn't -- I
21 actually would not dispute Mr. Clark's interpretation.
22 I think that we got deeply into the issue of whether
23 there was reference to something that was an omission
24 or not discussed, but it -- but then the opinion
25 didn't reference the other provisions.

1 I guess in the event that a contention met
2 the requirements, I would think so, but I wouldn't --
3 I don't disagree with Mr. Clark on his interpretation.
4 And that's part of the reason why we went through it
5 line by line, not only about of an abundance of
6 caution, because it was quite large, but also to try
7 to get to the crux of each statement.
8 ADMIN. JUDGE BARNETT: Okay. And the
9 follow up, if all of the criteria in 2.309(f)(1) are
10 identified in at least one paragraph, does that make
11 the contention admissible?
12 MR. PUGSLEY: Sorry to take the cop-out
13 position, but I wouldn't disagree with Mr. Clark's
14 characterization either. But -- do you want to add
15 something?
16 MR. THOMPSON: No. I'm not sure I
17 understand that question.
18 MR. PUGSLEY: Go ahead
19 ADMIN. JUDGE BARNETT: You went through
20 paragraph by paragraph and you said, "Okay. This one
21 doesn't meet five, this one doesn't meet six," but if
22 each of the criteria were met in at least one of those
23 paragraphs -- at least one of those paragraphs in the
24 contention, according to your response, would that the
25 contention admissible?

1 MR. THOMPSON: I don't think so
2 necessarily. I don't think so, because I think this
3 thing has to hang together in some fashion. If you
4 have paragraphs that are saying one thing and they
5 qualify with one part of it, it doesn't make sense to
6 me that that somehow fits in with another paragraph
7 that doesn't satisfy another part.
8 No, I think you have to read the thing as
9 a whole, and I think you have to say that in terms of
10 what Mr. Pugsley said it was very detailed. We
11 addressed the specific paragraphs. But just because
12 one paragraph hits some portion of the six things in
13 some fashion, but isn't necessarily consistent with
14 the rest of the things in the contention, no, I
15 wouldn't think it would be
16 ADMIN. JUDGE BARNETT: Okay. Thank you.
17 CHAIR FROEHLICH: Okay. It's approaching
18 3:00. I would suggest we take a 15-minute recess. We
19 will reconvene at 10 minutes after 3:00 and begin with
20 Contention 4.
21 (Whereupon, the proceedings in the
22 foregoing matter went off the record a
23 2:56 p.m. and went back on the record at
24 3:13 p.m.)
25 CHAIR FROEHLICH: Let's begin. We'll be

1 on the record.

2 Okay. Moving forward to Contention 4,

3 Contention 4 is premised on an inadequate analysis of

4 groundwater quantity impacts. I would like to focus

5 with Mr. Parsons, please. Is the staff correct when

6 it states, as I understand their response, that Dr.

7 Moran's concern with groundwater quantity impact is

8 due to a misunderstanding of the 65 gallons per minute

9 for the central processing plant and the 320 gallons

10 per minute for the total groundwater consumption?

11 MR. PARSONS: We understood that response,

12 but we -- we do not think that that takes care of the

13 issue. And we think that the problem is a failure to

14 discuss all of the impacts that arise from that

15 consumption of water.

16 CHAIR FROEHLICH: Staff, how would you

17 respond to what Mr. Parsons just said on the failure

18 to discuss the impacts? Is that the gist of the

19 objection to the contention?

20 MR. CLARK: Your Honor, Mr. Parsons is

21 correct that the tribe makes two claims in

22 Contention 4. They do claim -- Dr. Moran claims that

23 the estimates of groundwater use are inconsistent, in

24 that the staff maintains its position that his claim

25 is based on a misreading of the application for

1 reasons that we state in our response at page 33.
2 They refer to different -- the 65 gallons
3 per minute is the water requirements of the central
4 processing plant versus 320 gallons per minute is
5 restoration. So he fails to explain why those two
6 numbers should be the same.
7 But the tribe does, through the opinion of
8 Dr. Moran, they also claim that Powertech doesn't
9 provide an analysis of groundwater quantity impacts.
10 Powertech does provide information on that point. The
11 staff at this point takes no position on whether that
12 information is accurate or not, but the information is
13 in the application.
14 It is in -- we cite -- in footnote 42 of
15 our brief we cite numerous sections that -- I believe
16 we cite six to eight sections of the TR, the technical
17 report, and the environmental report that discuss
18 groundwater quantity impacts or drawdowns. And under
19 2.309(f)(1)(6), because Dr. Moran doesn't address
20 those sections, he fails to show a genuine dispute
21 with Powertech.
22 CHAIR FROEHLICH: So you view this as the
23 tribe putting forth a contention of omission when
24 indeed you find within the record where the subjects
25 that they claim are omitted are indeed addressed. Is

1 that correct?

2 MR. CLARK: Yes, Your Honor, for that part

3 of their contention.

4 CHAIR FROEHLICH: Okay.

5 ADMIN. JUDGE COLE: Now, Mr. Parsons, the

6 tribe is concerned with the effects of the use of the

7 water, depleting their water resources.

8 MR. PARSONS: Correct.

9 ADMIN. JUDGE COLE: What is the basis for

10 that? Because I'm thinking the -- I'm not sure what

11 the source of their water is going to be, which

12 aquifer they're going to take it from, although it

13 might very well be the Madison. But the amount of

14 water we are talking about, has any evaluation been

15 made of the impact on the total aquifer itself? We're

16 taking out a certain amount of water.

17 It seems to me that the volume of water

18 compared to the size of these aquifers might result in

19 a non-problem. I want to know how come you determined

20 that it is a problem that has to be addressed.

21 MR. PARSONS: Well, I think the

22 regulations require a description of the environmental

23 impacts of the operation. And without that

24 information, which we think is required to be in the

25 application, there is no way to determine what the

1 extent of those impacts will be.

2 And so we feel we complied with the

3 contention requirements, you know, the -- looking at

4 the requirements, it asks that the Petitioner include

5 references to specific portions of the application

6 that the Petitioner disputes and supporting the

7 reasons for the dispute.

8 I guess, you know, there is an argument

9 going on here that we have to cite to every portion.

10 I mean, you know, I -- my read of that contention

11 statement rule is that it is necessary to make

12 specific reference to places in the application that

13 you dispute or make reference to omissions that are

14 not included in the application. And we think that is

15 done here with respect to impacts associated with the

16 groundwater drawdown.

17 ADMIN. JUDGE COLE: Do you know how the

18 calculations on groundwater drawdown were made? And

19 was that part of the basis that you used to determine

20 it was a problem?

21 MR. PARSONS: Well, it does appear that

22 there was some confusion as to that. You know, I am

23 hesitant, as a lawyer, to play scientist. So, you

24 know, I'm not sure I can speak in depth as to the

25 specific way that the application conducted that

1 review and those calculations.

2 But even assuming that the conflicting

3 information is resolved, there does -- there is -- our

4 contention remains that the impacts associated with

5 that drawdown have not been disclosed and reviewed in

6 the application materials.

7 ADMIN. JUDGE COLE: I understand your

8 position.

9 MR. PARSONS: Thank you.

10 ADMIN. JUDGE COLE: Mr. Thompson or Mr.

11 Pugsley, the amount of water that the plant will use

12 during normal operation is what quantity when they are

13 in operation?

14 MR. PUGSLEY: The 65 gallons per minute

15 refers to the operating requirements of the central

16 processing plant and other ancillary facilities.

17 ADMIN. JUDGE COLE: Right. So during

18 normal operation at 65 gallons a minute --

19 MR. PARSONS: Isn't it both?

20 ADMIN. JUDGE COLE: The restoration is

21 another process.

22 MR. THOMPSON: Plus, the bleed.

23 ADMIN. JUDGE COLE: Plus, the bleed.

24 MR. THOMPSON: Which is about one percent.

25 ADMIN. JUDGE COLE: So the 65 gallons a

1 minute is what goes into the --

2 MR. THOMPSON: It's the central processing

3 facility.

4 ADMIN. JUDGE COLE: Okay. How much is the

5 bleed?

6 MR. THOMPSON: Forty gallons a minute.

7 ADMIN. JUDGE COLE: Okay. So the total

8 average water use during operation, not counting

9 restoration --

10 MR. THOMPSON: Correct.

11 ADMIN. JUDGE COLE: -- is a little over

12 100 gallons a minute.

13 MR. THOMPSON: Yes.

14 ADMIN. JUDGE BARNETT: That's consumptive

15 use or -- this is being recirculated a lot, right?

16 MR. THOMPSON: Well, the bleed is not

17 being recirculated.

18 ADMIN. JUDGE BARNETT: Right, right.

19 MR. THOMPSON: And some of the water

20 processed through the central processing facility may

21 be.

22 ADMIN. JUDGE BARNETT: Okay. So the 100

23 gallons per minute is consumptive use. That's gone.

24 Is that --

25 MR. PUGSLEY: Yes.

1 ADMIN. JUDGE BARNETT: Okay. Thank you.
2 ADMIN. JUDGE COLE: And then, with respect
3 to the 40 gallons a minute, that's a bleed from the
4 water that is recirculating at a rate of around 4,000
5 gallons a minute.
6 MR. THOMPSON: Correct.
7 ADMIN. JUDGE COLE: That is constantly
8 recirculating.
9 MR. THOMPSON: Correct.
10 ADMIN. JUDGE COLE: You bleed off 40
11 gallons a minute.
12 MR. THOMPSON: That's correct.
13 ADMIN. JUDGE COLE: Now, has any estimate
14 been made of the real impact on the amount of water in
15 the aquifer that you are going to use as a source?
16 And has any determination been made whether that is
17 significant or insignificant?
18 MR. PUGSLEY: Your Honor, in terms of the
19 analyses done on potential drawdown impacts and
20 consumption, both NRC staff's and Powertech's
21 pleadings cite to numerous places in the environmental
22 and technical report that specifically address those,
23 including parts of Section 4 of the environmental
24 report that are specifically designed under NUREG-1748
25 to address impacts.

1 MR. PARSONS: If I may, as described in
2 the declaration of Dr. Bob Moran, Robert Moran, as a
3 for instance, at paragraph 14, he does identify
4 specific portions of the application as well as make
5 an assertion in his scientific review upon which we
6 rely that there is no credible project water balance
7 that investigates the potential impact on local
8 groundwater levels.
9 So I think there is a contention here.
10 Part of the contention here, again, is that the
11 methodology employed to conduct their review is not --
12 is not sufficient, is not reliable. And it does say
13 -- I'll note we talked about 65 gallons per minute,
14 and then 40 gallons per minute, but even in their
15 pleadings there is a discussion that in contradicting
16 us -- our assumption that the 65 and 320 were a
17 mistake, they clarify that by saying the 65 refers to
18 the operating requirements of a central processing
19 facility.
20 And then, they go on to say, and this is
21 in the NRC staff's response, for instance, at 34, that
22 the 320 gallons per minute estimate, on the other
23 hand, refers to the total water usage from operations
24 at Dewey-Burdock from construction through
25 reclamation.

1 And our position is that it is relevant to
2 look at the entire life of the project, not just, for
3 instance, the operational life. If there is
4 consumptive use associated with the restoration, we
5 think that that's a relevant consideration with
6 respect to considering the ultimate impacts of the
7 project on the groundwater table.
8 ADMIN. JUDGE COLE: I understand that.
9 They certainly should consider the amount of water
10 used in reclamation, but that doesn't happen all the
11 time. It only happens when they are reclaiming an
12 area.
13 MR. PARSONS: Understood. But the way I
14 understand is, as explained to me before and in line
15 with this iterative process, is that while they are
16 operating on one well field they are restoring the
17 previous well field. So it is not as if they do the
18 activity and then stop the mining and then conduct
19 restoration. It actually occurs at the same time.
20 ADMIN. JUDGE COLE: But it's not clear to
21 me that they are doing both things simultaneously
22 forever.
23 MR. PUGSLEY: Right.
24 MR. THOMPSON: Correct.
25 ADMIN. JUDGE COLE: They do -- maybe

1 feeding the 4,000 gallons a minute, recirculating it
2 through, and then bleeding out 40 gallons a minute,
3 that might be more continuous than the reclamation
4 process, which only happens until the area is
5 reclaimed and after they leave that area.
6 MR. PARSONS: Understood.
7 ADMIN. JUDGE COLE: Okay. So when you
8 talk about total volume and impact on the water
9 reservoirs, the aquifers, you have to take a look at
10 the timeline for each of the activities, and the total
11 amount of water. And that's what we have to look at.
12 MR. PARSONS: Understood.
13 ADMIN. JUDGE COLE: Agreed?
14 MR. THOMPSON: I just would like to make
15 a point here that the statement that Mr. Parsons read
16 from Mr. Moran that the analysis was inadequate is
17 hardly a specific and particularized concern. That is
18 just a general conclusion. That is conclusory
19 statement without any support whatsoever for it. Why
20 is it inadequate?
21 CHAIR FROEHLICH: Let's move to Contention
22 5, if we could. And Contention 5, which is failure to
23 adequately calculate the bond for decommissioning --
24 staff, could you tell me, please, what an applicant
25 must do at this stage of the proceeding as to

1 financial assurance for decommissioning? Can you cite
2 me to the requirements?
3 MR. CLARK: Sure, Your Honor. The
4 requirements for financial assurance are Criterion 9
5 in Appendix A of Part 40. And they require cost
6 estimates with an application in order to support the
7 applicant's surety instrument. If an application is
8 granted before the applicant -- or before the licensee
9 begins operations, it must take out bond for the
10 project. The purpose of the cost estimates is to
11 support the surety instrument.
12 The staff looks for two things. The staff
13 wants to see in the application the methodology that
14 the applicant has used to arrive at cost estimates,
15 and the staff also looks of course for the cost
16 estimates to support the initial surety instrument.
17 The problem with cost estimates is that
18 they are -- first, let me step back. Under
19 Criterion 9, a licensee is required to annually update
20 its surety instrument, and to update the surety
21 instrument he must provide updated cost estimates.
22 In fact, Powertech submitted cost
23 estimates as Appendix 6.6(a) in its application. In
24 there it provides about 30 pages where it sets forth
25 the methodology that it used to arrive at the surety

1 amount, the initial surety amount, and also provide
2 some cost estimates for the early construction and
3 operation of, I believe, two well fields.
4 Even if the NRC approves the license, we
5 are going to need updated cost estimates even before
6 we grant -- or if we grant the application or grant
7 the license. Before Powertech can begin operations,
8 we are going to need updated cost estimates. So those
9 cost estimates in the application are going to be out
10 of date, because -- given the time and the staff's
11 review process.
12 So what the staff seeks in the application
13 -- and we need the methodology, and we need the
14 estimates that will support the initial surety
15 arrangement.
16 CHAIR FROEHLICH: And from your review,
17 did you come to the conclusion that they had the
18 requirements of Criterion 9 that you outlined?
19 MR. CLARK: We have concluded they met the
20 acceptance criteria. However, that is -- of course,
21 we are reviewing right now -- and I believe we -- I'm
22 not sure if we have issued RAIs on financial
23 assurance, but there may be some issues where we will
24 follow up either to clarify, you know, some questions
25 for the staff. We would never want to rule out RAIs,

1 so we may have questions about -- particularly about
2 Appendix 6.6(a).
3 CHAIR FROEHLICH: Okay. I guess, Mr.
4 Parsons, as I reviewed the Crow Butte case, I noticed
5 that there was a contention there that dealt with
6 financial assurance. Can you either compare or
7 distinguish the contention in that case -- I think it
8 was Contention L of the Consolidated Petitioners in
9 Crow Butte -- and relate it to the financial assurance
10 contention here, if you are familiar with that case
11 and that contention?
12 MR. PARSONS: I have read the Crow Butte
13 case, but I might need to refresh myself as to the
14 particular ruling with respect to the bond. I was not
15 involved, obviously, in that case.
16 MR. CLARK: Your Honor, could I point
17 out --
18 CHAIR FROEHLICH: Sure.
19 MR. CLARK: -- that actually I think it
20 was Contention L in -- I don't think it made it --
21 that issue didn't make its way to the Commission on
22 appeal.
23 CHAIR FROEHLICH: That's correct. That's
24 correct. It's a contention that was presented to the
25 Board and denied by the Board in Crow Butte. And I

1 was just curious to what extent it is similar to or
2 different from that contention.
3 MR. CLARK: Okay.
4 CHAIR FROEHLICH: You are correct.
5 MR. CLARK: I just wanted to be clear.
6 CHAIR FROEHLICH: It was denied by the
7 Board.
8 MR. CLARK: That was LBP-08-24, I think?
9 MR. PARSONS: My understanding is that the
10 ruling by the Board in the Crow Butte was that the
11 contention with respect to bonding was -- did not
12 contain support, whereas in this case we have provided
13 evidence that the bond does not -- does not account --
14 the proposed bond, I guess, that is submitted with the
15 application does not encompass all of the activities
16 that will need to be conducted, that will need to be
17 bonded for.
18 And so whereas in Crow Butte there was not
19 support -- no support identified for that contention,
20 in this case we believe there is. That is, we have
21 identified specific activities that were not included
22 in the bonding assessment.
23 CHAIR FROEHLICH: Staff counsel has just
24 said that this stage of the proceeding, at this stage,
25 the threshold requirements have been met, at least in

1 the staff acceptance review, if I understood Mr.
2 Clark.
3 MR. CLARK: That's correct.
4 MR. PARSONS: Well, I guess we take issue
5 with the completeness of that assessment, that at this
6 point there is no information. For instance, as
7 described in our reply at page 32, there is no
8 information calculating decommissioning costs
9 associated with or disposal costs associated with
10 11e.(2) byproduct material, for instance.
11 CHAIR FROEHLICH: Mr. Thompson, you look
12 like you are --
13 MR. THOMPSON: First of all, let me see if
14 I can explain to you what I understand the situation
15 to be. The Commission ruled in HRI that its
16 interpretation of Criterion 9 requires an approved --
17 an NRC-approved estimate for financial assurance
18 before a license can be issued.
19 And I believe Mr. Clark saying, okay, the
20 -- that has been accepted for review, and presumably,
21 if NRC finds some deficiencies, they will go back and
22 ask for some additional information. That is separate
23 from the surety instrument, i.e. a surety bond or a
24 letter of credit or cash, whatever might be put up.
25 The licensee is not required to have the

1 actual financial mechanism in place until after the
2 license is granted and before operations begin. So
3 the question here is: has the licensee, or the would-
4 be licensee, addressed financial assurance? The staff
5 has said they have accepted it for review.
6 I don't know what the criticisms are. I
7 don't have it right in front of me. There was one
8 criticism that costs weren't based on averaging costs
9 from other ISL facilities, and that is simply not an
10 appropriate allegation, because, as we know,
11 everything is highly site-specific with ISL, and,
12 therefore, restoration cost, which is the largest cost
13 of decommissioning, is going to be different because
14 of the groundwater chemistry and the groundwater
15 conditions.
16 So averaging things that were done at
17 other ISL facilities is not relevant. Secondly, with
18 respect to 11e.(2) disposal, the regulations of the
19 NRC's requirements are that before you can begin
20 operations, even if you have a license, you must have
21 a signed contract with a disposal facility to take
22 your 11e.(2). The volumes of material generated on an
23 annual basis by ISL facilities are very, very small.
24 So if they don't have an actual cost, I'm
25 sure that the contract that they have to submit to NRC

1 will have an actual cost at that point.

2 CHAIR FROEHLICH: Mr. Parsons, do you wish

3 to add anything to the --

4 MR. PARSONS: Well, it just seems that the

5 argument I guess I just heard is that we will get to

6 it later, and it cannot form the basis for our

7 contention at this time. We would, obviously, dispute

8 that. And to the extent that the NRC regulations

9 require the bond estimate and the -- to be in

10 application materials, it needs to be accurate.

11 I understand the bond doesn't need to be

12 put in place until the operation actually begins. But

13 it seems to me that the argument made, again, would

14 never allow for a challenge to a bond. So if the bond

15 is inadequate at the time operations begin, or if we

16 feel it is inadequate or not considering certain

17 aspects, when does that -- again, I think we are

18 setting up a situation where essentially it makes it

19 impossible to challenge at any time the bonding

20 calculation.

21 MR. THOMPSON: Not correct. Once again,

22 that is not correct, because, as we said -- we

23 mentioned the HRI case. There the initial requirement

24 was an estimate for restoration of nine pore volumes.

25 If that is lowered -- if that is lowered,

1 it requires a license amendment, and they can be --
2 that can be challenged. The bond is going to be
3 addressed on an annual basis. It will be raised or
4 lowered, depending upon where you are in the process
5 at the time. And the Commission has held that that is
6 adequate protection to assure adequate financial
7 assurance, and that has been affirmed by the 10th
8 Circuit Court of Appeals.
9 MR. PARSONS: My understanding is that,
10 indeed, if the pore volumes required is lowered, it
11 would require additional review. But if it's
12 increased, it is not clear to me that it would be
13 notice for an additional review, and the concern would
14 be -- certainly if the pore volume is lowered, the
15 bond presumably would go down. If it's increased, the
16 bonding amount would go up.
17 And I think that would be where -- would
18 also raise potential concerns with the public that if
19 the reclamation is to be more intense or more robust,
20 to make sure that that is bonded for.
21 And I think in this contention we have
22 stated and identified specific elements that were not
23 included in the bonding calculation, and we think that
24 that supports a genuine dispute and a viable
25 contention.

1 CHAIR FROEHLICH: Okay. And that would be
2 found exclusively I guess on page 27 or the top of 28.
3 Is there somewhere else I should be looking?
4 MR. PARSONS: In the reply, at 31 and 32.
5 CHAIR FROEHLICH: Okay.
6 MR. CLARK: Your Honor, can I make a quick
7 point on --
8 CHAIR FROEHLICH: Sure. Mr. Clark?
9 MR. CLARK: -- contention? We would
10 object to including that discussion of -- the original
11 contention -- in the reply, the tribe sought to expand
12 this contention to include Dr. Moran's claims in
13 paragraphs 70 through 72 of his affidavit. Those were
14 not cited in the original contention, nor was the
15 substance of Dr. Moran's claims set forth in any way
16 in Contention 5.
17 When the staff responded to Contention 5,
18 we did not understand the tribe to be relying on Dr.
19 Moran's claims that paragraphs 70 through 72 is the
20 basis for their contention. It is simply not there.
21 They claim, as Mr. Thompson said, Dr. Moran claims
22 that Powertech should have used some averaging with
23 ISL restoration costs for other well fields.
24 If the Board looks at Contention 5, that
25 claim is not set forth in the contention itself.

1 CHAIR FROEHLICH: It shows up in the
2 reply, right?
3 MR. CLARK: It does show up in the reply,
4 but under Commission and general court precedent, a
5 reply can't expand the scope of the original filing.
6 So we would object to the tribe's claim as going
7 beyond the scope of a properly-filed --
8 MR. PARSONS: Just briefly in response, I
9 think you -- there is an allowance for what is termed
10 "amplifying" a contention.
11 CHAIR FROEHLICH: And I guess if we are
12 going to amplify, Mr. Parsons, you will have to focus
13 me on what paragraph, what sentence, what portion of
14 pages 27 and 28 are being amplified, so that we don't
15 get into that line of cases that talk about ambush?
16 MR. PARSONS: We wouldn't want to get
17 into --
18 CHAIR FROEHLICH: We wouldn't want to get
19 into that, right.
20 MR. PARSONS: Well, I think in the
21 discussion of what Criterion 9 requires that amounts
22 of funds insured essentially for all aspects, to cover
23 the costs of decommissioning and reclamation of the
24 areas that are expected to be disturbed, and so we
25 think it is reasonably within that discussion. It is

1 a short discussion, but that is broad language quoted
2 from Criterion 9.
3 MR. PUGSLEY: I would join in the staff's
4 objection on this and state, Your Honor, that if you
5 read the language in 27 and 28, the thrust of --
6 really, not the thrust, the entire contention is based
7 on what are called -- quoted as grossly underestimated
8 and insufficient estimates based on the fact that the
9 costs were projected out over until minor production
10 in 2012.
11 There is no mention here of any items
12 lacking. So I don't see what is being amplified here.
13 CHAIR FROEHLICH: I guess the contention,
14 as I read it, also talked about the length of the
15 restoration time, at least in the initial part of the
16 pleading.
17 MR. PUGSLEY: Yes. Well, it argues that
18 restoration times may be longer than expected, which
19 we addressed in our pleading regarding the annual
20 surety updates, and that has been endorsed by the
21 Commission and the 10th Circuit.
22 CHAIR FROEHLICH: Mr. Clark?
23 MR. CLARK: Your Honor, my final point, I
24 would ask the tribe to clarify whether it is
25 presenting Dr. Moran's opinion on this issue as expert

1 opinion, because Dr. Moran -- we don't question his
2 expertise in some areas, but financial assurance does
3 not appear to be within his expertise. At least it is
4 not apparent to us.
5 MR. PARSONS: To the extent this is
6 relevant at this stage, Dr. Moran's vast experience in
7 working on mining issues around the world. In that
8 experience he has dealt extensively with
9 reclamation/bonding issues. So I think based on his
10 experience he does qualify as an expert.
11 CHAIR FROEHLICH: Okay. Let's move,
12 please, to Contention 6. Contention 6 alleges
13 inadequate technical sufficiency of the application
14 and failure to present information to enable effective
15 public review, resulting in a denial of due process.
16 Is this contention basically saying that the
17 application is somewhat disorganized, and, therefore,
18 is technically deficient? Is that the gist of this
19 contention?
20 MR. PARSONS: I think it is -- the
21 contention is based on a requirement in the
22 regulations and in NEPA, National Environmental Policy
23 Act, that information presented in this manner needs
24 to be written for instance in plain language and may
25 -- such that the public can readily understand the

1 information provided.

2 And while I understand -- and as we have

3 seen with some of the other technical issues that have

4 been raised, there are several areas of the

5 application that address the same issues. And if you

6 look between the technical report and the

7 environmental report, you know, that is 6,000 pages

8 where you have information presented in various

9 different places on the same issue.

10 And so the contention is not necessarily

11 that information isn't in there -- I mean, that's

12 contained in the other contentions, the previous

13 contentions, certainly. But for purposes of this

14 contention, it is more that the presentation and the

15 availability of the information within the document is

16 not up to the standards applicable in the law.

17 MR. PUGSLEY: Your Honor, if I may.

18 CHAIR FROEHLICH: Sure.

19 MR. PUGSLEY: There is precedent on this

20 in -- back in the HRI decision in 47 NRC 261, Judge

21 Block put a chart together of what were then called

22 areas of concern, and the standard was germaneness, if

23 that's a word. And in the chart there was a specific

24 -- specific language that said license application is

25 disjointed, incoherent, and contradictory.

1 And whether it was germane, which is a
2 lower threshold than the current contention
3 admissibility requirements, the language Judge Block
4 put in was, "No, this is not an objection to the
5 action that will be licensed. This concern may be
6 discussed with the staff, which may consider how to
7 improve the orderliness of the hearing record that it
8 will assemble and file." So that's the best precedent
9 we have.
10 CHAIR FROEHLICH: Yes, Mr. Parsons, I
11 might agree with you that you have to jump around in
12 a 6,000-page application between the environmental
13 report, the technical report, the other portions of
14 the application itself, and its supplement.
15 But I'm not really aware of any legal
16 precedent that says that even if you have to do that
17 that somehow the application itself is technically
18 deficient. Do you have anything to support that
19 proposition? The fact that it's lengthy, that a
20 number of subjects are discussed both in the
21 application itself and in the technical report. Yes,
22 it is time-consuming sometimes, and, granted,
23 difficult. I had my difficulties as well jumping
24 between.
25 But if they are addressing the matters

1 that are required to be addressed, and if you look
2 within the four corners of the application, including
3 the ER and the TR, everything is there, is there any
4 precedent that says we should find this technically
5 deficient?
6 MR. PARSONS: What we have is statements
7 from federal regulations under the National
8 Environmental Policy Act, as stated, NEPA Regulatory
9 Guide 3.46, and NUREG-1569 that dictate and encourage
10 that the application be presented in a clear and
11 concise manner.
12 CHAIR FROEHLICH: Any guidance the staff
13 might be able to bring on this, as far as cases or
14 precedent that talk to the organization of or the
15 format or the length and the cross-referencing that we
16 have here?
17 MS. JEHLE: The staff would like to point
18 out that the CEQ regulations apply to federal agencies
19 rather than to the Applicant's application. And then,
20 our NUREG applies to the staff. It gives the staff
21 guidance in its interpretation and what it expects
22 from that -- from the Applicant. And I don't know of
23 any case law that would indicate there is an
24 organizational requirement on the application.
25 ADMIN. JUDGE BARNETT: So, for the

1 Applicant, are there any organizational requirements
2 whatsoever?
3 MR. PUGSLEY: I terms of organizational
4 requirements, not that I am aware of, other than
5 guidance that is in NUREG-1748 as to the recommended
6 format for an environmental report. And there is a
7 standard and format reg guide that addresses technical
8 -- would address technical reports, but those are not
9 express requirements. You are permitted, under
10 Appendix A criteria, to propose alternatives to just
11 about -- to the process. So I wouldn't see those as
12 requirements.
13 ADMIN. JUDGE BARNETT: Okay. Staff, any
14 organizational requirements whatsoever?
15 MS. JEHLE: If the application were so
16 disorganized as to be incomprehensible to the staff,
17 yes, it would not be acceptable for review. But the
18 staff's initial determination that it was acceptable
19 for review found that it wasn't incomprehensible. The
20 staff does not -- in its determination does not make
21 a statement as to the completeness of the application.
22 In fact, it anticipates requests for
23 additional information, and, in fact, has issued
24 requests for additional information, which the
25 Commission has found in several cases doesn't indicate

1 there is prima facie evidence of lack of completeness
2 or lack of adequacy by the staff requesting additional
3 information.
4 ADMIN. JUDGE BARNETT: But if there were,
5 like, missing page numbers and inconsistent page
6 numbers and hundreds of pages of the appendices, or
7 something like that, is that disorganized?
8 MS. JEHLE: I don't think that that would
9 be sufficiently disorganized. If it's possible for
10 the staff to follow the application, whether page
11 numbers are missing or a particular exhibit is
12 misidentified, if --
13 ADMIN. JUDGE BARNETT: Are we talking
14 about hundreds of page numbers missing?
15 MS. JEHLE: I'm not sure that it would
16 matter. I would have to see the sections where
17 hundreds of pages were -- before I would advance an
18 opinion. But if it -- if the page numbers were in a
19 particular exhibit, probably not, you know, page
20 numbers that were missing, but it seemed sequential,
21 but only if it became incomprehensible. And I think
22 the staff, in its initial acceptance review,
23 determined that it was not.
24 ADMIN. JUDGE BARNETT: But the Petitioner
25 can't argue that it is incomprehensible to them?

1 MS. JEHLE: No. I don't think so.

2 ADMIN. JUDGE BARNETT: They have 60 days.

3 It's 6,000 pages.

4 MS. JEHLE: I think -- I think the

5 Commission expects the Petitioners to have either

6 expert support, if it is so complicated that they

7 themselves cannot understand it.

8 ADMIN. JUDGE BARNETT: Well, they have

9 expert support. He says it is incomprehensible to

10 him.

11 MS. JEHLE: I find that a sad admission.

12 But he only addresses I think five specific places

13 where tables are misidentified or page numbers are

14 incorrect. And I don't think that rises to the level

15 of significant disorganization, certainly not in the

16 view of the staff.

17 ADMIN. JUDGE BARNETT: Thank you.

18 MS. JEHLE: And, you know, I think I might

19 just mention that to the -- in the tribe's reply, to

20 the extent that they are adding additional bases to

21 this contention, the staff would object to the use of

22 the RAIs to bolster their contention.

23 CHAIR FROEHLICH: Let's move to

24 Contention 7, which alleges a failure to include in

25 the application a review of a plan for the disposal of

1 11e.(2) byproduct material. From the tribe's
2 perspective, is this alleging a contention of
3 omission?
4 MR. PARSONS: Yes, it is.
5 CHAIR FROEHLICH: Okay. And what
6 regulations would you cite to this Board to require a
7 disposable plan for the associated contaminants that
8 you --
9 MR. PARSONS: As cited on page 31 of the
10 petition, and 35 of the reply brief, 10 CFR Part 40,
11 Appendix A, talks -- specifically says, "Every
12 applicant for a license to possess and use source
13 material in conjunction with uranium or thorium
14 milling, or byproduct material at sites" -- getting a
15 little irrelevant here. It says, "To include in the
16 license application proposed specifications relating
17 to milling operations and the disposition of tailings
18 or waste resulting from such milling activities."
19 And while I understand there is an
20 argument that the Appendix A issues do not -- that
21 they only apply to ISL where relevant, to the extent
22 that an ISL mine is going to create and have to
23 dispose of byproduct waste, that this provision of
24 Appendix A does indeed apply to require a plan for
25 disposing of such waste.

1 CHAIR FROEHLICH: Okay. Applicant
2 response, if I could?
3 MR. PUGSLEY: Your Honor, I believe that
4 Powertech's response to this is thoroughly detailed in
5 our pleadings. We have extensive citations to parts
6 of the application that address this issue, as well as
7 the fact that, as Mr. Thompson said earlier, we are
8 required by NRC to have a contract in place with a
9 disposal facility, an 11e.(2) disposal facility, prior
10 to the commencement of operations.
11 In addition, the Criterion 2 of Appendix A
12 merely imposes a requirement under Commission
13 interpretation that an ISL facility must dispose its
14 11e.(2) byproduct material at a -- solid 11e.(2)
15 byproduct material at an already -- at a licensed
16 11e.(2) facility, such as the White Mesa Mill in Utah
17 or the new waste control specialist facility in Texas,
18 etcetera.
19 But the provisions of our application that
20 are cited in the pleadings, most notably on page 52,
21 we believe addresses the issue at this stage of the
22 proposed action.
23 MR. THOMPSON: May I just add --
24 CHAIR FROEHLICH: Sure.
25 MR. THOMPSON: -- we are not dealing with

1 tailings here, which is a whole different ballgame.
2 What we're talking about is small volumes of material,
3 filters, spent resins, that -- and the application
4 says that they are going to store these things until
5 it is ready for shipment, and they will ship it by an
6 appropriately licensed or certified contractor to a
7 licensed 11e.(2) facility.
8 They cannot dispose of it onsite under
9 Criterion 2. It is not rocket science. It is pretty
10 straightforward.
11 CHAIR FROEHLICH: This is a question for
12 the staff, please. Has the Commission spoken to the
13 question of waste from an ISL proposal?
14 MR. CLARK: In the context of Appendix A?
15 CHAIR FROEHLICH: Either from Appendix A
16 or, in general, has there been any guidance from the
17 Commission or any cases where the Commission has
18 spoken to the disposal issue from an ISL operation?
19 MR. CLARK: Well, the chief guidance
20 provided by the Commission was in Hydro Resources --
21 I don't remember the CLI number -- but where they
22 acknowledged that not all provisions in Appendix A
23 apply to ISLs, and that the many provisions in
24 Appendix A are directed toward tailings associated
25 with conventional mills.

1 In the Commission's language it was -- the
2 Commission directed the staff to apply those
3 provisions in Appendix A that essentially govern ISL
4 operations. And that -- as the Commission said, it is
5 on a case-by-case basis where the staff looks to see
6 whether the language in a particular criterion does
7 sensibly govern ISL operations.
8 Additional guidance was provided by the
9 Presiding Officer in Hydro Resources. I do have the
10 cite, because the staff cited it in our response.
11 CHAIR FROEHLICH: Okay.
12 MR. CLARK: LBP-99-149 NRC 29. That
13 addressed -- in the staff's view, that disposes of the
14 tribe's first argument that 10 CFR 4031(h) requires an
15 11e.(2) disposal arrangement at this time. And we
16 quoted a block quotation in our response -- our answer
17 to the tribe, on page 39 of our answer. 4031(h) does
18 not apply to 11e.(2) byproduct material associated
19 with ISLs for the reasoning stated in the Presiding
20 Officer's decision.
21 Likewise, if I could emphasize, the only
22 two regulatory criteria cited in the tribe's
23 contention were 4031(h) and Criterion 1. Criterion 1,
24 if the Board looks at the language, that is clearly
25 directed towards tailings associated with conventional

1 milling. And under Hydro, that would not sensibly
2 govern ISL mining, so the staff would not apply
3 Criterion 1.
4 Those were the only two provisions cited
5 in the tribe's contention.
6 CHAIR FROEHLICH: Is there anything in the
7 NEPA statute that would require an analysis of the
8 waste disposal issue?
9 MR. CLARK: NEPA would require possibly an
10 analysis by the staff. Nothing in NEPA would place a
11 burden on the Applicant at this time to -- NEPA, as
12 the staff stated, does not impose substantive
13 requirements. So if there is no NRC requirement that
14 the Applicant provide a plan at this time, NEPA would
15 not require that.
16 CHAIR FROEHLICH: What would be the
17 applicability, if any, of staff NUREG-1569 to this
18 issue?
19 MR. CLARK: Again, Your Honor, the NUREG
20 would provide one way for Powertech to meet the
21 requirements of Part 40 and Appendix A. It would not
22 be the only way.
23 I believe that under NUREG-1569 it is
24 appropriate to include a plan for the disposal of
25 11e.(2) byproduct material with the application, or

1 for the staff to deal with it by license condition,
2 impose a license condition requiring that before the
3 Applicant can begin operations, or then the licensee,
4 that the licensee have the plan in place before they
5 begin operation.
6 So it can be done one of two ways. I
7 believe that is consistent. And court's indulgence if
8 I --
9 MR. PUGSLEY: Your Honor, Section 6.2 of
10 the SRP, we have a quote on page 51 of our pleading
11 that speaks directly to this. It says, "The review
12 should confirm that the licensee will have an approved
13 decommissioning radiation protection program in place
14 before the start of reclamation and cleanup work, and
15 that an acceptable agreement is in place for offsite
16 disposal of 11e.(2) byproduct material." That's
17 Section 6.2.1, page 6-15, of the SRP.
18 MR. THOMPSON: And as far as NEPA is
19 concerned, it seems to me the generic environmental
20 impact statement, upon which Appendix A of Part 40 is
21 primarily based, addresses the disposal of 11e.(2)
22 byproduct material from ISL facilities, and that is
23 reflected in Criterion 2, which says we don't want a
24 whole lot of small disposal sites. You have to take
25 it to a licensed mill tailings disposal facility.

1 MR. CLARK: Your Honor, if I could mention
2 that the staff did send an RAI to Powertech inquiring
3 about their plans for disposal of 11e.(2) byproduct
4 material. And it asked whether they had a plan or
5 whether they intended to proceed by license condition.
6 The RAI essentially noted that you either
7 need a plan or you are going to have a license
8 condition requiring you to have a plan before you
9 begin operations. So it is consistent with the NUREG
10 to address it one of those two ways.
11 CHAIR FROEHLICH: Okay. Because that --
12 as I read through that NUREG-1569 I saw the phrase or,
13 I quote, "The reviewer shall examine the terms of the
14 approved waste disposal agreement," which led me to
15 believe that the staff was looking for an approved
16 waste disposal agreement when it conducts its review.
17 MR. CLARK: That is not always the case.
18 I mean, set practice is to allow for imposing the plan
19 by license condition.
20 CHAIR FROEHLICH: Mr. Parsons, can you --
21 MR. PARSONS: I would just say a review
22 requires more than a promise from the company that we
23 will do it at a further time. We think that
24 Appendix A and the provisions cited in our briefing
25 with respect to NUREG require a plan to be in place --

1 or, excuse me, a plan to be provided for the disposal
2 of this. I mean, it's benign material. This is
3 material that should be treated carefully, and I think
4 there is a reason why there is a requirement for these
5 waste -- a plan for these wastes to be provided.
6 MR. PUGSLEY: Your Honor, we would echo
7 the staff's view on the legal -- the regulatory
8 provision cited by the tribe that they do not go to
9 this issue, which is 4031 and Criterion 1 of
10 Appendix A, but, further, this -- let me again
11 reiterate that it is not as if Powertech provided an
12 application that just said, "Yes, we will dispose of
13 it offsite."
14 That's -- we have extensive sections of
15 our reports cited on page 52 of our brief that -- let
16 me just make -- yes, 52, sir -- that address these
17 issues. And it's not as if -- and Section 4, as you
18 can see there, the environmental report, two sections
19 in Section 4 which, by format, is the impact analysis
20 specifically directed towards this issue.
21 CHAIR FROEHLICH: Staff, in a number of
22 recent COL cases, which I realize are not ISL cases,
23 most particularly the Vogtle decision by the
24 Commission in CLI-09-16, as I read that decision in
25 the context of the COL, the Commission insisted that

1 there be a statement of where the waste will go at the
2 end of the project or during the life of the project,
3 and that be included with the application and subject
4 to review.
5 Is there any guidance in that Vogtle
6 decision that you think would apply to ISLs?
7 MR. CLARK: Your Honor, I'm sorry, I'm not
8 immediately familiar with Vogtle. I'll certainly look
9 at it as soon as I can. Could I ask Your Honor,
10 though, if that dealt with safety criteria, or was
11 that requirement imposed by Part 51?
12 CHAIR FROEHLICH: Now you have me --
13 MR. CLARK: Because my short answer would
14 be if the Vogtle -- requirement of Vogtle were a
15 safety requirement, there is no parallel provision --
16 CHAIR FROEHLICH: Okay.
17 MR. CLARK: -- applying to ISR operations.
18 If it is based on environmental criteria, or
19 environmental regulations, it's a different issue.
20 CHAIR FROEHLICH: My law clerk tells me it
21 was a Part 51 requirement.
22 MR. CLARK: Well, I would be interested in
23 hearing what the Commission said. Unfortunately, I am
24 not --
25 CHAIR FROEHLICH: That cite is CLI-09-16,

1 the decision in Vogtle, July 31, 2009.

2 MR. THOMPSON: What kind of waste is that

3 decision dealing with?

4 MR. PUGSLEY: Was it dealing with spent

5 fuel?

6 CHAIR FROEHLICH: Low level waste. This

7 was a low level waste, gloves and equipment, tools and

8 such things.

9 MR. THOMPSON: Right. Well, I mean, the

10 Commission has mandated that 11e.(2) can only go to a

11 licensed 11e.(2) facility. It's pretty

12 straightforward.

13 CHAIR FROEHLICH: Let's move on to

14 Contention 8. This contention speaks to requiring the

15 tribe to formulate the contention before an EIS is

16 released violates NEPA. I guess I need to ask the

17 tribe, where in I guess the Sierra case do we have

18 support for the timing requirement that is the basis

19 of this contention?

20 MR. PARSONS: Well, the Sierra Club v.

21 Marsha, is that the case you are --

22 CHAIR FROEHLICH: Yes.

23 MR. PARSONS: Yes. That is one of the

24 citations provided. I think that the crux of this

25 argument, frankly, is not unlike the NHPA argument,

1 that NEPA requires that the NEPA process begin --
2 again, similar language -- at the earliest possible
3 time.
4 In this case -- and I understand it is not
5 unique to this case, but with respect to this case,
6 there is review going on. The agency is engaged in a
7 detailed environmental review. And under the National
8 Environmental Policy Act, agencies are required to
9 begin the NEPA process as soon as they begin that
10 detailed review.
11 CHAIR FROEHLICH: Staff, please confirm
12 for me that the NEPA statement and the comments are
13 reviewed at a point in time before the license is
14 issued?
15 MR. CLARK: Can I just --
16 CHAIR FROEHLICH: Sure.
17 MR. CLARK: -- Your Honor, to me this
18 seems more like Contention 9 than Contention 8, as
19 stated by Mr. Parsons. I just want to be clear we are
20 talking about --
21 CHAIR FROEHLICH: I was looking at
22 Contention 8, I guess the first paragraph that follows
23 the heading where the Sierra Club v. Marsh is cited,
24 and I believe that dealt with requiring the agency to
25 take a hard look, and so on, in recognition of a

1 decision made without the information put before --
2 and the harm to NEPA seeks -- it talks about the
3 application of NEPA to the process, and, as I read it,
4 to the timing of that.
5 I think there was a concern here that the
6 tribe was somehow at a disadvantage because it
7 couldn't put forward its NEPA contentions until -- at
8 this point, it would have to come in, I thought, after
9 the SDEIS.
10 MR. CLARK: Oh, okay. Thank you. They
11 are closely related, 8 and 9, so --
12 MR. PARSONS: Yes.
13 MR. CLARK: -- I just wanted to be sure.
14 Thank you.
15 MR. PARSONS: There is several references
16 in NEPA to early as possible time. I think that is --
17 they may have some intersection and bolster each
18 other, but understood that -- what the confusion.
19 CHAIR FROEHLICH: Would staff please
20 address the timeline of the NEPA review and the
21 opportunity for interested parties to raise their
22 concerns dealing with NEPA issues consistent with the
23 statute itself and the cases that have been decided
24 under it?
25 MS. JEHLE: The staff has -- once it

1 received the application began its review, which
2 includes the environmental review, and will culminate
3 with the issuance of a final environmental impact
4 statement, which is down the road.
5 They have begun their environmental
6 review, and when they are ready to issue a draft EIS
7 it will be available for public comment. And those
8 comments, as always, will be reviewed, analyzed, and
9 addressed. They will be integrated into a final
10 supplemental EIS, and so there are several stages of
11 opportunity for public comment, and the tribe would be
12 able to amend or bring in new contentions based on the
13 staff's EIS, supplemental EIS, should they find new
14 information. Yes?
15 CHAIR FROEHLICH: So in your answer I
16 think you said, "As always, this is the way the agency
17 staff and the agency conduct" --
18 MS. JEHLE: Procedures.
19 CHAIR FROEHLICH: -- "NEPA and complies
20 with the statute," is that correct?
21 MS. JEHLE: Correct.
22 CHAIR FROEHLICH: So then, Mr. Parsons, my
23 question for you is, is not this contention a
24 challenge on the way the agency does, as always, to
25 use staff counsel's phraseology, the way the

1 Commission conducts its NEPA review in all cases?

2 MR. PARSONS: As I stated, that it may be

3 the case that other -- that they do conduct it in this

4 manner in other cases. I think our concern is with

5 this case, and that, as applied to this application in

6 this proceeding, that the way the NRC is going about

7 conducting its NEPA analysis is contrary to the

8 statute, particularly with respect to the timing.

9 So, and as a result, it puts the tribe in

10 a position in this case of having to develop

11 contentions without the benefit of the analysis that

12 the NEPA process would provide. And then, again, this

13 concern of a liability later for the tribe, to the

14 extent that there is additional information provided

15 in the NEPA process, we don't have the same ability to

16 admit contentions -- that is, they are discretionary

17 down the road -- whereas they are not at the front

18 end.

19 And so it sets up a process. It

20 essentially puts the cart ahead of the horse, and we

21 think that under NEPA that -- the way that the NRC is

22 processing this application with putting the NEPA at

23 the back end is not consistent with the National

24 Environmental Policy Act.

25 MR. PUGSLEY: Well, if I may, Your Honor,

1 this harkens back to the staff's comment regarding the
2 fact that NEPA imposes requirements on agencies and
3 not applicants, because the Commission's regulations
4 say that this proceeding is based on the Applicant's
5 license application.
6 If we are talking about the earliest
7 possible time that contentions could be filed
8 regarding NEPA actions, which are taken by NRC staff,
9 the earliest possible time that can happen is when a
10 draft NEPA document is issued. And the regulations at
11 2.335 specifically state that you can't challenge
12 these regulations, including 2.309(f)(2).
13 And the other point I would like to make
14 is, while Mr. Parsons says that the admission of
15 contentions later in the process is discretionary,
16 well, they are discretionary now. So it is a matter
17 of, what are the Commission's regulations for the
18 admissions of these contentions? And this -- if I'm
19 not mistaken, the regulation at (f)(2) was promulgated
20 in 2004, and the time to address the viability of that
21 contention was then, not now.
22 CHAIR FROEHLICH: That regulation.
23 MR. PUGSLEY: Yes.
24 CHAIR FROEHLICH: I thought I heard you
25 say "contention."

1 MR. PUGSLEY: Of the regulation, not the
2 contention. No.
3 CHAIR FROEHLICH: Okay. I think there is
4 perhaps, among some of the Petitioners, a
5 misunderstanding of the burden, and also the timing I
6 think of certain of these contentions. The burden is
7 no different when a contention is based on new
8 information. The burden it must meet is exactly the
9 same as it is now.
10 So if there is new information that was
11 not available to the Petitioners before that time, and
12 it shows up in the SDEIS, that is the time to raise
13 it. And the standard and the burden is exactly the
14 same. That is not a late contention.
15 MR. PUGSLEY: Thank you for that.
16 CHAIR FROEHLICH: Okay? Staff, can you
17 confirm that --
18 MS. JEHLE: Yes.
19 CHAIR FROEHLICH: -- my understanding of
20 the regulation.
21 MR. PUGSLEY: Yes, sir. That's -- we
22 agree.
23 CHAIR FROEHLICH: The Applicant, my
24 understanding of --
25 MR. PUGSLEY: Yes.

1 CHAIR FROEHLICH: Okay. Thank you.

2 Moving right along, Contention 9, failure

3 to consider connected actions. Again, this I think

4 goes to a timing question. I'm wondering if this is

5 indeed premature. Staff, can you comment on the

6 procedure that the agency staff will undertake as it

7 relates to the coordination with other agencies?

8 MR. CLARK: Your Honor, the staff is --

9 the NRC is the lead agency in the review of the

10 Powertech application, and we will consult with other

11 agencies, such as the Environmental Protection Agency,

12 and other relevant federal and state agencies. Those

13 consultations are -- some of them have begun, some of

14 them have yet to begin, but we will engage in those

15 consultations.

16 When we issued the final environmental

17 impact statement, and possibly when we issued the

18 draft EIS, some of those consultations will be

19 completed. At that time, we will put our findings

20 before the public, and they will have an opportunity

21 to challenge them under 2.309(f)(2).

22 Similar to -- I don't know if I'm going

23 into more than you asked for --

24 CHAIR FROEHLICH: No, I want you to go

25 into -- and also address the timing of, you know,

1 contentions based on those consultations and materials
2 that will be contained in the DSEIS.
3 MR. CLARK: Generally, when we issue the
4 draft supplemental EIS, generally, under Commission
5 precedent, contentions are timely filed within 25 days
6 of the release of new information. In fact, in this
7 case we have -- already have had a late-filed
8 contention, so the Petitioners are aware of that
9 timeframe, and they will be able to take advantage of
10 that and file contentions challenging any conclusions
11 in the draft SEIS or the final SEIS that different
12 significantly from conclusions in Powertech's report.
13 We, at this time, are hesitant to provide
14 a timetable for release of those documents, frankly,
15 because I haven't consulted with the staff, and
16 appropriate staff people probably aren't here to tell
17 us exactly when. We would be happy to get back to the
18 Board with that information, if anyone is interested
19 in a schedule for release of the draft SEIS. At this
20 time, we don't have that information. It will
21 probably be somewhere -- court's indulgence a second.
22 CHAIR FROEHLICH: Sure.
23 MR. CLARK: My hesitancy was justified.
24 In part, the release date will be related to
25 additional information we receive, for example, in

1 response to Powertech's RAIs, based on that. We will
2 have to review that information carefully, and that
3 may affect the timetable. It should be roughly within
4 -- it won't be five years. It should be within a year
5 or so.
6 MR. PARSONS: Take your time.
7 (Laughter.)
8 MR. CLARK: We'll take all the time we
9 need, but we appreciate that.
10 Your Honor, I'd turn to Crow Butte,
11 because Crow Butte was mentioned in the order
12 scheduling this oral argument.
13 CHAIR FROEHLICH: Yes.
14 MR. CLARK: The Commission's decision in
15 Crow Butte, CLI-09-09, is on point with respect to
16 Contention 9. And there the Commission likewise found
17 that on issues arising under NEPA, Petitioners shall
18 file contentions based on the environmental report,
19 and the Petitioner can later amend those contentions
20 based on the -- based on conclusions in the staff's
21 environmental document that differ significantly.
22 The Commission was merely repeating
23 language in 2.309(f)(2), but that's in the Crow Butte
24 decision, CLI-09-09, 69 NRC at 348 through 351. And
25 it is also in the other Crow Butte decision, CLI-09-

1 12, 69 NRC at 566. In the staff's view, there is
2 really nothing more to say on this issue.
3 CHAIR FROEHLICH: Well, let me ask the
4 staff a number of questions relating to the fact that
5 we have a number of NEPA allegations, multiple
6 contentions, and we are dealing with a sovereign
7 entity. And I understand that the Commission has
8 evidently a strategy for outreach and communication
9 with Indian tribes potentially affected with the
10 uranium recovery sites. Are you familiar with that
11 document, counsel?
12 MR. CLARK: Your Honor, I am not closely
13 familiar with it. I know that our staff are familiar
14 with that.
15 CHAIR FROEHLICH: Okay.
16 MR. CLARK: May have to --
17 CHAIR FROEHLICH: For the record, I am
18 referring to ADAMS accession number ML 09 21 101 01.
19 And in this document it says it is -- the purpose of
20 the document is a strategy to articulate the U.S.
21 NRC's approach to promote government-to-government
22 relations between itself and federally-recognized
23 Indian tribes that have no interest in, or may be
24 potentially affected by, NRC's regulation of uranium
25 recovery facilities.

1 So, in my quick reading, I thought this
2 might have application to the situation and the
3 Petitioner concerns of the tribe.
4 This document talks about the background
5 of the NRC's trust responsibilities, and also leads in
6 and discusses how that affects recovery facilities.
7 And it talks about extra efforts that the agency and
8 its staff are to undertake in dealing with Indian
9 tribes. And I wanted to be sure that in this case
10 this strategy is being implemented as it affects the
11 Petitioner, the Oglala Sioux tribe.
12 The strategy talks about those things
13 could happen at different steps along the way in a
14 licensing process. And I wanted to know if the steps
15 that are articulated in this document have taken place
16 in this case or are scheduled to take place as the
17 environmental documents are prepared.
18 It says in the document that the process
19 begins with a formal letter of intent for planned
20 actions that major license applications are to send
21 one of these letters of intent to the NRC, and the NRC
22 will put such a letter of intent on the ADAMS system
23 and make it available to the public.
24 Was that done in this case?
25 MR. CLARK: It was done, Your Honor.

1 CHAIR FROEHLICH: And this strategy
2 document goes on to say that in addition to the
3 website notification the NRC plans to phone or e-mail
4 federally-recognized Indian tribes in the area of the
5 proposed action to inform them of a matter of
6 potential interest as part of the tribal outreach
7 program. Was that done in this case?
8 MR. CLARK: Your Honor, I believe it was
9 done. I know there were e-mails sent from the NRC
10 project manager for the Powertech application to
11 counsel for the tribe in April 2009 informing counsel
12 of the receipt of Powertech's application, and that
13 was publicly available.
14 And I want to clarify, it wasn't present
15 counsel for the tribe.
16 CHAIR FROEHLICH: Okay. All right.
17 MR. PUGSLEY: Your Honor, if I may
18 interject, please.
19 CHAIR FROEHLICH: Yes.
20 MR. PUGSLEY: While I agree that this
21 Commission directive and policy initiative regarding
22 outreach is an extremely important one -- and I don't
23 think you will get any question from the company on
24 that -- with respect to Contention 9, if you look at
25 the language of the initial pleading, the focus is on

1 NRC as the lead agency for NEPA purposes, has failed
2 to engage other agencies.
3 And the only example offered in the
4 contention is Powertech's filing of a Class 5 UIC
5 permit. And that the tribe would be harmed, according
6 to the pleading, if NRC should continue to ignore the
7 EPA permitting process.
8 While you did mention before, Your Honor,
9 that this is a question of timing, I would
10 respectfully suggest it is a question of jurisdiction,
11 because EPA Class 5 permits are not in any way issued
12 by NRC. They are exclusively under the purview of
13 EPA, in this case Region 8 for South Dakota, under the
14 Safe Drinking Water Act.
15 Commission precedent has shown that the
16 review of an NRC license is wholly independent, for
17 purposes of review, from things such as aquifer
18 exemptions or UIC. Now, grant you, NRC has provisions
19 in its regulations that somehow are linked, such as
20 you have to do a Part 20 analysis on a deep disposal
21 well for potential radiation exposure.
22 But this is really a question of
23 jurisdiction here, and the point is, when it comes to
24 the NRC review process, the only agencies that they
25 coordinate with are ones that have interests in terms

1 of the land where the project is, such as like BLM,
2 there is an MOU between NRC and BLM right now. But
3 the NRC review is its review. It is not NRC and BLM's
4 review. BLM would do its own review. EPA would do
5 its own review of a Class 5 permit.
6 And history has shown that in these
7 examples EPA is an interested stakeholder. The agency
8 does speak with them, but that is what they are in the
9 context of this application -- an interested
10 stakeholder, not a joint reviewing agency.
11 CHAIR FROEHLICH: I didn't read the
12 contention that narrowly. I believe the crux of it --
13 and correct me if I'm wrong, Mr. Parsons -- but it
14 alleges that at this stage there hasn't been the
15 engagement of the other federal agencies that might be
16 affected. Is that --
17 MR. PARSONS: Yes, that's correct. And
18 just briefly, although there is independent permitting
19 authority, the requirements of NEPA are such that even
20 though NRC does not have jurisdiction over a Safe
21 Drinking Water Act permit, they are required to
22 analyze all connected actions regardless of who the
23 permitting -- even if there is no -- even if it is
24 just a private party conducting an activity, they have
25 to review that within the NEPA process as well. There

1 is lot of case law on that.

2 I see some shaking heads over here, but I

3 have to tell you that NEPA is extremely comprehensive

4 in its -- the scope of its review for environmental

5 impacts, particularly with respect to cumulative and

6 connected actions.

7 MR. PUGSLEY: But I think there is some

8 confusion here between what the practical effects of

9 EPA's review of Powertech's Class 5 UIC permit is vis-

10 a-vis the Atomic Energy Act license application. And

11 essentially the Commission has interpreted NEPA, which

12 it is empowered to do, and basically its regulations

13 say that they are reviewing all aspects of this,

14 including the fact -- and if you go through

15 Powertech's application it is full of discussions and

16 impact analysis associated with a deep disposal well

17 option.

18 So NRC is reviewing this information, but

19 the reference to the fact that NRC needs to follow the

20 EPA permitting process for a Class 5 well -- well,

21 maybe they'll follow it, sure. But at the same time,

22 it does not impact its final decision on whether to

23 issue an Atomic Energy Act license.

24 MR. THOMPSON: Let me just add, it will

25 follow it, because if Powertech's only option was deep

1 well disposal or classified UIC disposal, and they
2 didn't get the permit, they would have to come back to
3 NRC, because NRC wouldn't let them begin operations.
4 Yes, it is taken into account. There are
5 alternatives proposed for disposal of 11e.(2) waste.
6 And depending upon what they ultimately decide, if
7 they get a deep well, the environmental analysis and
8 the safety and health analysis associated with that by
9 EPA, with respect to groundwater contamination, NRC
10 isn't going to countermand that. They are going to
11 say, "Okay, if EPA says you have the permit, you may
12 use it. If you don't have the permit, you won't."
13 And, in fact, NRC puts in its licenses for
14 ISL, "If you don't have an aquifer exemption, and you
15 don't have a UIC permit, you can't go forward."
16 CHAIR FROEHLICH: Okay. Thank you. If
17 you have --
18 MR. CLARK: Oh, no.
19 CHAIR FROEHLICH: I wanted to go through
20 and sort of work with this strategy as it applies to
21 dealing with other federal agencies and dealing with
22 Indian tribes in particular, and make sure that the
23 things that are outlined in the strategy are taking
24 place in the field.
25 MR. CLARK: Sure, I would be happy to,

1 Your Honor. The staff's view was that even if the
2 staff were not doing these things the contention would
3 not be ripe until we release the document, but I would
4 be happy to discuss --
5 CHAIR FROEHLICH: Right.
6 MR. CLARK: -- the issues.
7 CHAIR FROEHLICH: I'm not --
8 MR. CLARK: Sure.
9 CHAIR FROEHLICH: I understand that it is
10 the intent during the process of the license
11 application review that all meetings for either safety
12 or environmental purposes, they will be publicly
13 noticed. And in addition to the public notice at
14 least 10 days before the meeting, the NRC will notify
15 the tribes, either by phone or e-mail, of any notices
16 of planned early meetings of potential interest on the
17 website. Is that the --
18 MR. CLARK: That's the policy, and, as
19 best I know, we have followed that. The meeting on --
20 we held a teleconference to discuss RAIs that went
21 out, and I believe some counsel here participated in
22 that call, some counsel for the Petitioners.
23 MR. PARSONS: Indeed, I asked to be added
24 to that call at a very late date, and the staff
25 accommodated me at that time, so --

1 CHAIR FROEHLICH: Okay. And I suppose to
2 the extent that it is part of the environmental
3 review, any scoping sessions, or whatever they are,
4 scheduled to be held will be, again, subject to the
5 public notice as well as the supplemental notice to
6 the federally-recognized tribes.
7 MR. CLARK: They will be, Your Honor. I
8 do not know at this time whether there will be an
9 additional scoping meeting. There was a meeting I
10 believe in June, almost this time last year, June 11,
11 2009, on the Dewey-Burdock proposal at the time.
12 Maybe Powertech or Mr. Frankel can correct me, but I
13 believe there was a public meeting on the receipt of
14 the initial application.
15 And because the supplement is really just
16 another 100 pages or so, I don't know if the staff has
17 yet decided whether there will be another public
18 meeting, public scoping meeting for the supplemental
19 EIS. However, we will certainly hold it open for at
20 least 45 days to receive comments on the draft SEIS.
21 Also, as noted in our briefs, we posted
22 notices and ads in six western South Dakota papers in
23 January inviting public comments on issues to consider
24 in the EIS.
25 CHAIR FROEHLICH: Okay. Thank you.

1 MR. PARSONS: Your Honor?

2 CHAIR FROEHLICH: Yes.

3 MR. PARSONS: If I may, you stopped just
4 short of where I was hoping you'd go, which is
5 distribution -- one of the bullets here is
6 distribution of accepted license application. One of
7 the --

8 CHAIR FROEHLICH: Okay.

9 MR. PARSONS: One of the issues we have
10 been going back and forth with NRC staff and, to some
11 extent, Powertech with is the failure of either NRC
12 staff or Powertech to provide any hard copies in any
13 locations other than Maryland, which, as you might
14 suspect, is not quite as convenient for the local
15 population here as it might be.

16 The tribe has not received a hard copy of
17 the application, and even though this document says
18 that following NRC's acceptance the applicant is
19 required to serve a copy of the application, minus
20 SNSI document, to the Chief Executive in the
21 municipality or county in which the facility is
22 located, we did some research and made several calls,
23 and were unable to confirm, and in fact received
24 information that neither Fall River County nor Custer
25 County had received any hard copies.

1 So we have great concern and the tribe --
2 I met with the tribal government officials yesterday,
3 and they were very concerned with the fact that
4 although there is a tribal college that has a uranium
5 program with students active in the issue, and the
6 tribal government offices in Pine Ridge are very --
7 the folks there are very -- government officials are
8 very interested in this project, as you see from our
9 pleadings, we have not received any hard copies.
10 And to the extent a motion is appropriate,
11 to ask for that indulgence, we would be happy to make
12 it.
13 CHAIR FROEHLICH: In reference to the hard
14 copy, it comes from the Commission strategy document
15 or --
16 MR. PARSONS: It says on page 3 in the
17 middle, "Distribution of accepted license
18 application." It is our understanding that the license
19 applications have been accepted.
20 MR. CLARK: Your Honor, I would just base
21 -- I don't have the language in front of me, but I
22 would read that different. I believe the distribution
23 that the license application has been accepted, we
24 send out an acceptance letter to Powertech's
25 executives informing them that their application has

1 been accepted for detailed technical review. And that
2 is about an eight-page document. I think that might
3 be -- again, I don't want to overstate --
4 MR. PARSONS: No, not at all.
5 MR. CLARK: -- the staff's position, but
6 I think that might be what that's referring to.
7 MR. PARSONS: Well, it does say,
8 "Following NRC's acceptance of the application, the
9 applicant is required to serve a copy of the
10 application, minus any information deemed sensitive
11 and non-public, to the Chief Executive of the
12 municipality or county in which the facility is
13 located.
14 "In the interest of outreach to the local
15 community, including area tribes, the NRC will
16 encourage the applicant to contact the local library
17 and make arrangements to distribute a copy of the
18 application, minus sensitive and non-public
19 information, to the local library for public
20 inspection.
21 "While local library distribution is not
22 a regulatory requirement, library availability would
23 facilitate public accessibility for those who do not
24 have access to electronic files." And, frankly, we
25 have asked several times now that that be done and

1 have been rebuffed. And I guess maybe sitting here
2 today Powertech can agree to provide a copy to the
3 Pine Ridge Reservation as well as the Oglala Sioux
4 College and -- excuse me, Oglala Lakota College, and
5 also to the local governments here in Fall River and
6 Custer County.
7 MR. PUGSLEY: Counsel, can I ask your
8 indulgence to peruse that document?
9 MR. PARSONS: Oh, absolutely.
10 MR. PUGSLEY: I don't have it.
11 MR. PARSONS: Sure. Do you think that you
12 might have it, or --
13 MR. PUGSLEY: I wish I could say I did.
14 MR. PARSONS: Third full paragraph.
15 MR. PUGSLEY: Yes.
16 MR. PARSONS: Okay.
17 (Pause.)
18 MR. PUGSLEY: Just for my information
19 purposes, just because -- and I apologize for taking
20 so much time here. Because I'm not familiar with
21 this, I -- when was this issued? I just -- and this
22 is why I'm pleading ignorance here.
23 CHAIR FROEHLICH: This is August 6, 2009.
24 MR. PUGSLEY: August 6, 2009. Okay. All
25 right. Well, we'll -- counsel, we will speak with our

1 principals today. And if we reconvene tomorrow, which
2 it looks like we are probably going to, we can answer
3 your request then.
4 MR. PARSONS: Wonderful.
5 MR. PUGSLEY: Okay?
6 MR. PARSONS: Thank you.
7 MR. PUGSLEY: And I thank you for sharing.
8 MR. PARSONS: Appreciate the
9 consideration.
10 CHAIR FROEHLICH: From the Board's
11 perspective, I would encourage the Applicant to make
12 copies of the application available to the affected
13 tribes. I would encourage the staff to encourage the
14 Applicant, as the document says here, to make this
15 available to -- in all manner that would facilitate
16 public access for those who do not have access to
17 electronic files, consistent with the Commission's
18 strategy for outreach of communication with Indian
19 tribes.
20 MR. ELLISON: Judge Froehlich, also, if
21 you could please expand that to local municipalities.
22 For example, Susan Henderson does not have a computer
23 and e-mail. She has no ability to get electronic
24 copies. And if it was copied in the local
25 municipality of Edgemont, and there was a copy in Hot

1 Springs, that would make it available to -- and Custer
2 -- available to her and Mr. Nye.
3 CHAIR FROEHLICH: Indeed. The staff
4 document here -- or Commission's recitation of the
5 staff responsibility speaks to provide to the Chief
6 Executive of the municipality or county in which the
7 facility is located, I think we call -- I will talk
8 with our principals and perhaps tomorrow report for
9 the record what actions we can take, and state on the
10 record in this case that are in compliance or to what
11 degree they are in compliance with the Commission's
12 strategy.
13 I think we can do one more contention this
14 afternoon and start fresh with the Consolidated
15 Petitioners in the morning. Contention 10 deals with
16 the fact that the environmental report, the report
17 prepared by the Applicant, does not examine impacts of
18 a direct tornado strike.
19 Let me ask Mr. Parsons, is this contention
20 supported by anything else other than the one-page
21 attachment to the petition denominated I think Tribe
22 Exhibit 11?
23 MR. PARSONS: I think that was added to
24 demonstrate that this potential occurrence is not so
25 out of the realm of possibility to not be considered.

1 And so apart from the statements in the contention,
2 and the exhibit demonstrating that this kind of
3 preparedness is a common practice in the region, and
4 the requirements associated with 40 CFR 1502, which is
5 a CEQ regulation, that is the basis for the
6 contention.
7 CHAIR FROEHLICH: Isn't the issue of
8 tornado strikes assessed or discussed in Section 7.5.5
9 of the technical report?
10 MR. PARSONS: I'm sorry. I don't have
11 that in front of me.
12 CHAIR FROEHLICH: Well, perhaps I can ask
13 the applicant.
14 MR. PUGSLEY: Yes, it is.
15 CHAIR FROEHLICH: Where, if at all, are
16 tornado strikes discussed in the application or your
17 technical report?
18 MR. PUGSLEY: Yes, sir. The Section 7.5.5
19 of the technical report addresses this issue in light
20 of NRC's NUREG CR-6733 analysis of tornado strikes and
21 ISL facilities. And as stated -- as quoted in the --
22 excuse me, I apologize.
23 Oh. As stated in page 58 of our
24 pleadings, basically, that NUREG concluded that no
25 design or operational changes would be required for an

1 ISR facility, but that chemical storage tanks should
2 be located far enough apart to prevent contact during
3 a potential tornado. So that is part of our
4 application.
5 CHAIR FROEHLICH: And the Fansteel case
6 requires examination of reasonably foreseeable
7 impacts. Is this a reasonably foreseeable impact from
8 the Applicant's perspective? A tornado strike, I
9 mean.
10 MR. PUGSLEY: Well, from our perspective,
11 it is not based on NRC's analysis, first and foremost.
12 And Fansteel also, mind you, Your Honor, is a
13 different type of facility, which is why NUREG/CR-
14 6733's analysis pertaining specifically to ISLs,
15 rather than the Fansteel facility, which was not --
16 CHAIR FROEHLICH: Right.
17 MR. PUGSLEY: -- is particularly relevant
18 here.
19 CHAIR FROEHLICH: Mr. Parsons, can you add
20 anything to the reasonably foreseeable impacts of
21 tornado strikes in this area in your pleadings?
22 MR. PARSONS: Yes. As cited on page 49,
23 Exhibits 3 and 4 to the reply, and on page -- sorry,
24 that's on page 49, and on page 51, again, an
25 admonition for the Black Hills region of South Dakota

1 from the National Oceanic and Atmospheric
2 Administration, too, that facilities and people in
3 this region should have such plans in place.
4 Page 49 discusses the -- of the reply,
5 sorry, discusses the probability of such an event.
6 MR. PUGSLEY: Your Honor, I know while
7 you're looking -- I apologize, sir -- if we assume,
8 arguendo, that a tornado strike would happen, if we
9 say it is reasonably foreseeable under Fansteel, which
10 we do not say it is, but if you say it is,
11 NUREG/CR-6733 analyzed the potential impacts if it
12 were to happen. And it says, "No operational design
13 changes would be necessary."
14 So Powertech's view is that that speaks
15 directly to the contention.
16 CHAIR FROEHLICH: And the company has
17 stated that in the technical report the possibility or
18 the probability of a tornado strike is assessed in
19 accordance with the reg. And this, I take it from
20 staff, is an issue that will be addressed in the NEPA
21 documents that are being prepared as well. Is that an
22 issue that is considered in the staff's NEPA?
23 MR. CLARK: Your Honor, in our review, the
24 staff will look at the reasonably foreseeable
25 consequences. And, as you can tell, there is some

1 uncertainty over whether a tornado strike or the
2 impacts of a tornado strike would be something the
3 staff has address, whether they would be reasonably
4 foreseeable.
5 The tribe cites a provision in CEQ regs --
6 the Council on Environmental Quality regulations --
7 saying you have to consider the impacts where they
8 would be catastrophic. That is something the staff
9 will certainly look at, but it may be the case the
10 staff decides the impacts are so slight, and, in
11 addition, that tornado strikes are simply not
12 reasonably foreseeable that I can't say for sure it is
13 something the staff will consider.
14 But my guess is the staff -- given that it
15 is an issue raised in litigation, the staff will take
16 a close look at it.
17 CHAIR FROEHLICH: All right. I don't want
18 to overstay our welcome in City Council Chambers.
19 They had asked that we wrap up today by 5:00 p.m. And
20 what I think we will do is start promptly at 9:00 a.m.
21 tomorrow, bathroom breaks prior to our convening, and
22 we will take up the Consolidated Petitioners'
23 contentions seriatim. We stand adjourned.
24 (Whereupon, at 4:46 p.m., the proceedings
25 in the foregoing matter were adjourned.)

CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of: Powertech USA, Inc.

Name of Proceeding: License Applicaiton

Docket Number: 40-9075-MLA

ASLBP Number: 10-898-02-MLA

Location: Custer, South Dakota

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

Benjamin Crane

Benjamin Crane
Official Reporter
Neal R. Gross & Co., Inc.