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NUCLEAR REGULATORY COMMISSION

Title: Crow Butte Resources, Inc.
Marland Expansion Area

Docket Number: 40-8943-MLA-2

ASLBP Number: 13-926-01-MLA-BD01

Location: teleconference

Date: Wednesday, June 5, 2013

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Pages 1-60

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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HEARING

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In the Matter of: : Docket No.
CROW BUTTE RESOURCES, : 40-8943-MLA-2
Inc. : ASLBP No.
: 13-926-01-MLA-BD01
(Marsland Expansion :
Area) :

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Wednesday, June 5, 2013

Teleconference

BEFORE:
G. PAUL BOLLWERK, III, Chair
DR. RICHARD E. WARDWELL, Administrative Judge
DR. THOMAS J. HIRONS, Administrative Judge

1 APPEARANCES:

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On Behalf of the Intervenor

W. Cindy Gillis, Esq.

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Also Present

Matthew Flyntz, NRC, Law Clerk

Nathan Goodman, NRC

Stephen Cohen, NRC

Mirabelle Shoemaker, NRC

P R O C E E D I N G S

1:01 p.m.

1
2
3 JUDGE BOLLWERK: Good morning to those of
4 you in the Mountain or the Western or the Pacific Time
5 Zones and good afternoon for anybody that's in the
6 Central or Eastern Time Zone. We're here today to
7 conduct an initial prehearing conference for the Crow
8 Butte Resources Marsland Expansion Area proceeding.
9 This is Judge Paul Bollwerk. I am the chair of the
10 Licensing Board that's going to be handling this
11 proceeding.

12 With me here in Rockville, Maryland today
13 is Judge Richard Wardwell. Judge Thomas Hirons, who
14 is joining us from New Mexico, his home there. And
15 also with me is our Board law clerk, Matt Flyntz.

16 What I'd like to do first is have all the
17 parties go around, introduce themselves, both their
18 counsel and if they have anybody in the room with them
19 in terms of their technical staff that's going to be
20 assisting them with this pre-hearing conference, you
21 might also give us their name as well.

22 So let me go ahead and start with the
23 Applicant, Crow Butte Resources.

24 MR. SMITH: This is Tyson Smith for Crow
25 Butte Resources. And on the line also is my

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1 associate, Noelle Formosa, and I believe Mark McGuire
2 is also on the phone.

3 MR. MCGUIRE: Correct.

4 JUDGE BOLLWERK: All right, anybody else
5 for Crow Butte Resources?

6 Then let's go to the Intervenors, please.

7 MS. GILLIS: Cindy Gillis and Mario
8 Gonzalez for the Oglala Sioux Tribe.

9 JUDGE BOLLWERK: All right. And then the
10 NRC staff, please?

11 MS. SIMON: Hi, this is Marcia Simon from
12 the Office of General Counsel. And with me are Emily
13 Monteith and Catherine Scott, also from the Office of
14 General Counsel. And from the technical staff, we
15 have Nathan Goodman, Stephen Cohen, and Mirabelle
16 Shoemaker.

17 JUDGE BOLLWERK: Let me just ask the court
18 reporter, do you need any spellings on those or are
19 you all right?

20 COURT REPORTER: I'll check at the end.
21 I think I'll just look them up in the NRC Directory.

22 JUDGE BOLLWERK: Okay, thank you. Before
23 we get going, just one administrative matter. I'm
24 going to try to remember and I'm probably not going to
25 be good at it, but I hope you all will, when you begin

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1 to speak, if you could identify yourself for the
2 record, that will help the court reporter considerably
3 in making sure that we have everybody listed with the
4 proper names and actually putting your name with what
5 you're saying.

6 Having said that, if for some reason the
7 court reporter at any point is unclear who is speaking
8 or needs any clarification, you should feel free to
9 interrupt us and we'll provide that for you so that we
10 -- I'll make sure we get a clear record. All right?

11 In terms of this conference and the
12 purposes for the conference, what we're here to do is
13 under the Agency's rules, specifically 20 Code of
14 Federal Regulations or CFR Section 2.332 and the
15 milestones that apply to Subpart L proceedings which
16 is the type of proceeding we're conducting here, that
17 are found in Appendix B to Part 2 of the Agency's
18 regulations, within 55 days of a Board order admitting
19 parties and contentions in a proceeding, the Board is
20 supposed to have issued an initial scheduling order
21 that sets out to the degree possible the different
22 scheduling milestones in the case.

23 And we're going to be talking about a
24 number of things here today, sort of aimed toward
25 coming up with such a schedule to the degree it's

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1 possible.

2 To help us with the task of establishing
3 an initial scheduling order in Section 3 of our May
4 10th ruling on standing contentions on pages 54 and
5 55, we listed a number of topics for consideration at
6 our initial prehearing conference. And also on pages
7 52 and 53, we asked the parties to hold a conference
8 within 10 days of the order to discuss various
9 administrative matters relating to the proceeding
10 which they did.

11 That party conference resulted in a May
12 22nd letter to the Board outlining certain agreements
13 regarding discovery which is the first item we'd like
14 to discuss today. Those relate to Items 1 and 2 of
15 the list of possible topics for the conference
16 provided by the Board in our May 10th issuance.

17 So let's go ahead and talk about discovery
18 for a couple of minutes. Just to kind of summarize,
19 the parties in their May 22nd letter indicated they
20 agreed, among other things, to first limit mandatory
21 disclosures to final documents and not include drafts.
22 Second, require production of only one copy of an
23 email that resides in multiple locations and only the
24 last email in an email string if all the previous
25 emails and associated attachments were previously

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1 disclosed. Third, mandate only production of an
2 electronic copy of a document, if the document also
3 exists in a hard copy. Fourth, weigh the need to
4 identify or produce any documents served on other
5 parties to the proceeding. And fifth, waive the need
6 to identify or produce press clippings. Also, any
7 documents identified by the staff in its Section
8 2.1203 hearing file are not required to be identified
9 or produced by any other party.

10 Let me go around and see if the parties
11 have anything else they want to add about these
12 particular agreed-upon items, given the way I've
13 described them including telling me if I've described
14 them incorrectly.

15 Let's start with the Applicant.

16 MR. SMITH: No, Your Honor. No questions
17 or any issues with those items.

18 JUDGE BOLLWERK: Okay. Anything for the
19 Intervenors?

20 MS. GILLIS: The tribe doesn't have
21 anything additional.

22 JUDGE BOLLWERK: And anything from the
23 staff's viewpoint?

24 MS. SIMON: Nothing from the staff, Your
25 Honor.

1 JUDGE BOLLWERK: Okay, so I think those
2 things are pretty clear. Those will be the sorts of
3 things that we would incorporate into our initial
4 prehearing order which we'll be issuing at some point
5 after we finish this conference today. So I think we
6 have clarity to those particular items.

7 Regarding Item 2 for our May 10th order
8 which basically mentions the need for time limits for
9 updating mandatory disclosures under 10 CFR Section
10 2.336(b) and updating the hearing file under 10 CFR
11 Section 2.1203(c), the parties have set the initial
12 disclosure for September 9th with the first day of the
13 month for disclosure thereafter. I'm taking it that
14 that was with the expectation that if the first day of
15 the month falls on a weekend or a federal holiday, the
16 next business day, federal business day would be the
17 disclosure date.

18 Anything the Applicant wants to say in
19 that regard?

20 MR. SMITH: No, Your Honor. That was my
21 intent at least.

22 JUDGE BOLLWERK: All right. Intervenors.

23 MS. GILLIS: The Intervenors agree with
24 that.

25 JUDGE BOLLWERK: All right, anything the

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1 staff wants to say about that?

2 MS. SIMON: That's fine with the staff.

3 JUDGE BOLLWERK: All right, then we'll go
4 ahead and incorporate that in the order. Obviously,
5 under the efileing system you can file on the weekend
6 if you want to. Not many people do, but you certainly
7 could, so -- but most of the time people's
8 expectations are they would file the next business
9 day. So we'll go ahead and incorporate that into the
10 order.

11 One question, I guess you have decided or
12 agreed to suspend the mandatory disclosures in the
13 hearing file propagation until the 9th of September of
14 2013. Does that agreement have any implications or
15 agreement among yourselves relative to the timing of
16 any new admitted contentions that are based on any
17 documents that might be part of that first disclosure?

18 Normally, we have the first disclosure
19 fairly promptly and those will be coming up.
20 Obviously, the staff will be placing things into the
21 docket of that proceeding and would become part of the
22 public record to the degree they can go out onto the
23 website in the interim which we're talking several
24 months, but there may be some things, for instance,
25 that the Applicant might have that nobody is going to

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1 see until September 9th which may be dated tomorrow
2 for all I know. And I'm just wondering if you all had
3 thought at all about the implications of that relative
4 to any new or amended contentions?

5 Let me talk to the Applicant first.

6 MR. SMITH: This is Tyson Smith for the
7 Applicant. I don't believe that -- we didn't discuss
8 that specifically, but at least with respect to
9 documents that the Applicant discloses to the other
10 parties for the first time on the 9th, our expectation
11 would be that anything that's filed within -- any new
12 contentions filed within 30 days of that would be good
13 cause for late filing. So at least in our view,
14 documents that we disclosed later, there's no
15 expectation that the tribe should have filed something
16 earlier based on those documents.

17 JUDGE BOLLWERK: All right. Anything the
18 Intervenors want to say about that?

19 MS. GILLIS: No, Your Honor. We don't
20 have anything.

21 JUDGE BOLLWERK: I should mention by the
22 way you were called petitioners originally and now
23 you've got a new name, Intervenors, so when you get
24 power party status you become a party or an Intervenor
25 for whatever it's worth.

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1 Anything the staff has to say?

2 MS. SIMON: No, Your Honor.

3 JUDGE BOLLWERK: All right. Well, that
4 sounds like -- I hope -- looks like that's clear to
5 the tribe then. Again, if anything particularly from
6 the Applicant comes out the first of September 9th and
7 there's some need to amend or file a new contention,
8 then obviously that will be your trigger date. I
9 mentioned, I suppose, what the staff normally does is
10 they'll be putting items into the docket of the
11 licensing proceeding on a regular basis if those
12 things come in. So again, that would be something
13 that will be out there whenever it's out there.

14 All right, regarding the third item from
15 the May 10th order which was basically whether any
16 party intends to assert a privilege or protected
17 status for any information and sort of the status of
18 any privilege logs, do any of the parties anticipate
19 that they're going to need to exchange much nonpublic
20 information or utilize it at the hearing when the two
21 admitted contentions, one of which is a cultural
22 resources contention and the other one has to do with
23 I guess the hydrology of the site? Let me start first
24 with the Applicant.

25 MR. SMITH: This is Tyson Smith for the

1 Applicant. On Contention 1, I guess I don't believe
2 Crow Butte itself has any proprietary or confidential
3 information. I guess there is some information that
4 is available --

5 JUDGE BOLLWERK: There's another tribal
6 cultural resources report that was only disclosed in
7 part. So --

8 MR. SMITH: Exactly. And so we haven't
9 seen that and I think at some point we would like to
10 have access to that so we could incorporate, for
11 instance, locations and what not into our filings. So
12 at least for that contention, I do anticipate there
13 being a need for protective order or some manner for
14 us to view those documents.

15 And then on Contention 2, I don't know --
16 there's not going to be any primary documents that we
17 anticipate being proprietary. That said, some of our
18 -- depending as we go through the documents, there may
19 be some documents that contain proprietary business
20 confidential relating to, for instance, locations of
21 or zones and amounts of uranium there that are
22 proprietary in terms of if they reveal the extent of
23 the resource that Crow Butte uses trying to tap into.
24 So there may be some. I'm not aware of any at this
25 point, but I wouldn't be surprised if there were some

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1 based on at least some discloses and some other Crow
2 Butte proceedings. There was some limited material
3 that was proprietary.

4 JUDGE BOLLWERK: All right. Anything that
5 the Intervenor wants to say about proprietary or
6 otherwise nondisclosable information at this point?

7 MS. GILLIS: Yes, the tribe does agree
8 that the cultural resources that were identified are
9 protected.

10 JUDGE BOLLWERK: Okay.

11 MS. GILLIS: We do agree with that.

12 JUDGE BOLLWERK: All right. Let me turn
13 to the staff then and see if you have any feeling for
14 the amount of proprietary or other potentially
15 nondisclosable information that might be involved in
16 this case?

17 MS. SIMON: Your Honor, the staff agrees
18 with the Applicant and the Intervenor regarding
19 Contention 1. Certainly, the one cultural resources
20 report that the Applicant has not seen, if you don't
21 mind, I'd like to go on mute for a second and discuss
22 with the staff whether they anticipate anything else.

23 JUDGE BOLLWERK: Okay, surely.

24 (Pause.)

25 MS. SIMON: Your Honor, thank you for

1 waiting. The staff has informed me that there's
2 potentially other information that could come in under
3 the Section 106 process and that would likewise have
4 possibly sensitive information. So any protective
5 orders that is agreed upon here would have to cover
6 that as well.

7 JUDGE BOLLWERK: All right. From our
8 perspective, obviously, we're going to kind of wait
9 for you to queue us in terms of protective orders.
10 When the information needs to be disclosed, there
11 ought to be a protective order in place before that
12 happens, along with any necessary affidavits or other
13 things that accompany it. Affidavits of
14 nondisclosure, whatever.

15 And if that's going to be something that's
16 going to be needed by September 9th, you have some
17 time, obviously, to put that together, but we'd
18 appreciate it if you could give us that at some point
19 in advance of followup in a proposed protective order
20 with the Board. Let us take a look at it.

21 Do you think that's something you could
22 generate, for instance, about 30 days before the 9th
23 of September, assuming that's the first time that sort
24 of information needs to be exchanged?

25 MR. SMITH: This is Tyson Smith for

1 Applicant. We'd be happy to take the lead in
2 developing that and circulating to the parties and
3 from my perspective, at least, having that to the
4 Judges within 30 days of September 9th shouldn't be a
5 problem at all.

6 JUDGE BOLLWERK: All right. I think that
7 will probably be helpful because that will give you
8 all a chance, you would have a couple of months here
9 to look at it and get it the way you want it and then
10 give us a little time to look at it.

11 So in the interim, if anything should come
12 up, obviously we will deal with that on an as-needed
13 basis, but if for some reason something should come up
14 that you all need to do something with that sooner
15 rather than later, please, just let us know.

16 Protective orders are fairly common items
17 around here and shouldn't be anything, I wouldn't
18 think, that would be controversial, but having said
19 that, if you have any problems coming up with
20 something, let us know that as well.

21 The one thing I would mention is that part
22 of the Agency's efilng system there is a protective
23 order file that exists where these sorts of documents
24 would be lodged and where they can be accessed.
25 Hopefully, if it operates properly, based on your

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1 e filing certificate or the same certificate, that
2 allows you to get into the e filing system will allow
3 you to get into that file and look at anything that's
4 in there. So when the time comes be aware that --
5 again, you're exchanging among yourselves and nothing
6 you need to file with the Board, but if a point does
7 come when you need to put it into the document
8 proceeding that does exist and you can find it under
9 the e filing system. So that is available to you.

10 All right, any questions, let me just go
11 around, that anybody has about this discovery in
12 general, anything you want to bring to the Board's
13 attention?

14 Anything from the Applicant?

15 MR. SMITH: No, Judge Bollwerk.

16 JUDGE BOLLWERK: All right, anything from
17 the Intervenor?

18 MS. GILLIS: Not at this time, Your Honor.

19 JUDGE BOLLWERK: And anything from the NRC
20 staff?

21 MS. SIMON: No, Your Honor.

22 JUDGE BOLLWERK: All right. Let's move on
23 to sort of schedule a little bit more generally,
24 looking at sort of Item 1 of our May 10th order talked
25 about estimates of when the case will be ready to go

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1 to an evidentiary hearing. There's a lot of different
2 things that go into that. So let's talk about several
3 of them over the next couple of minutes.

4 Recognizing that there are appeals pending
5 as to the tribe's standing and the admissibility of
6 its first and second contentions, the content,
7 nonetheless, is to begin to put together as firm a
8 schedule as possible, given the information that we
9 have.

10 What we're headed for is a general
11 schedule that looks something like another board that
12 I'm chairing, the Strata Energy proceeding, or the
13 Ross ISR facility proceeding. You can look at the
14 initial form of that prehearing conference order which
15 was issued on April 10, 2012. The prehearing
16 conference order and also the initial schedule at
17 ADAMS accession number ML 12101A290. And actually, I
18 think this in its current form of the general schedule
19 of that proceeding in an April 12, 2013 order it gets
20 changed from time to time as ADAMS accession ML
21 13102A158.

22 And obviously, one of the important pieces
23 of information that we have at this juncture in
24 establishing the schedule was provided by a May 16th
25 staff letter that outlined the currently projected

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1 dates for its Safety Evaluation Report which is
2 February 2nd of 2015, as well as its draft and final
3 environmental documents which are -- I'm sorry, the
4 31st of January of 2014 and the 31st of March of 2014,
5 respectively.

6 With regard to those, particularly, the
7 last two documents, let me ask the staff a question.
8 Do you feel that the Board correctly characterized
9 what the staff has in mind regarding environmental
10 review in footnote 32 on page 49 of the Board's May
11 10th issuance, given what's on the website in terms of
12 your thinking of the environmental assessment?

13 MS. SIMON: Your Honor, could you just
14 give us a minute?

15 JUDGE BOLLWERK: Sure.

16 MS. SIMON: Thank you.

17 (Pause.)

18 MS. SIMON: Your Honor, I'm going to have
19 Mr. Goodman answer that question.

20 JUDGE BOLLWERK: All right, thank you.

21 MR. GOODMAN: Hi, Your Honor. Yes, as of
22 right now, what is characterized in that footnote is
23 accurate. Our current process would be to do an
24 environmental assessment and issue a FONSI. If we
25 cannot issue a FONSI, obviously, according to NEPA, we

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1 would move into an Environmental Impact Statement at
2 that point and inform the Board as it goes.

3 JUDGE BOLLWERK: All right, and a FONSI
4 being a finding of no significant impact if I remember
5 my acronyms correctly?

6 MR. GOODMAN: You did in this case
7 remember your acronym correctly.

8 JUDGE BOLLWERK: All right. Again,
9 obviously, until you get to that point you may want to
10 file what you're going to do, but to the degree you're
11 comfortable talking about it, could you sort of
12 explain to us why you're taking that approach in this
13 proceeding, given what's been done in the in situ
14 recovery cases where there's, in fact, been
15 Environmental Impact Statements performed or prepared
16 or Supplemental Environmental Impact Statements, I
17 guess I should say.

18 MR. GOODMAN: Sorry, Your Honor, yes.
19 Because it's a license amendment and not a new
20 facility, FSME's approach in that case is to begin the
21 process with an EA, not an EIS.

22 JUDGE BOLLWERK: Is that consistent with
23 what you did in the North Trend proceeding which was
24 also a license amendment for the same facility?

25 MR. GOODMAN: Yes, Your Honor.

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1 JUDGE BOLLWERK: Okay, that case goes back
2 to 2007. There's been a lot of water under the bridge
3 or over the dam, depending on which way you want to
4 look at it on that case. But you actually started an
5 EA there as well?

6 MR. GOODMAN: Currently. It's still
7 currently an EA for that project, Your Honor.

8 JUDGE BOLLWERK: Okay, all right. Let me
9 just see if there are any questions that the Board
10 members have about that? Judge Wardwell or Judge
11 Hirons?

12 JUDGE WARDWELL: No, I think I understand
13 that.

14 JUDGE BOLLWERK: Let me just see if the
15 Applicant has any comments on that?

16 MR. SMITH: This is Tyson Smith. No, Your
17 Honor, we agree with the staff and think their
18 approach is appropriate.

19 JUDGE BOLLWERK: Okay, and anything the
20 Intervenor wants to say at this point?

21 MS. GILLIS: No, Your Honor.

22 JUDGE BOLLWERK: All right, thank you. So
23 in theory, those two dates, the environmental impact
24 documents are going to be important ones for this case
25 because both the contentions here have an

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1 environmental approach to them. And so we'll bear
2 those in mind and as we talk for the next couple of
3 minutes, we're going to try to add some additional
4 pieces to the scheduling puzzle, talking about a
5 couple of other items.

6 One item I'd like to discuss briefly is
7 summary disposition that which is item four on our
8 March 10th order.

9 MS. SIMON: Your Honor, I'm sorry. This
10 is Marsha Simon. Can I just interrupt you briefly and
11 make a comment about the characterization of the
12 contentions?

13 JUDGE BOLLWERK: Sure.

14 MS. SIMON: The staff, in looking at
15 Contention 2, the staff feels that there's a safety
16 component to that as well.

17 JUDGE BOLLWERK: Okay.

18 MS. SIMON: Given that it cites NUREG 1569
19 which is the staff's view plan for the technical
20 review. It talks about things like confinement and so
21 forth. And so we just wanted to make the Board aware
22 of that. I don't know how that will affect the
23 decisions on how to go about the scheduling of the
24 hearing and the need to have the SER done as well.
25 But just wanted to bring that to your attention.

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1 JUDGE BOLLWERK: All right. Let me just
2 see if the Applicant has anything to say in that
3 regard?

4 MR. SMITH: This is Tyson Smith for Crow
5 Butte. I agree with the staff. I would characterize
6 this contention, Contention 2 at least, as a mixed
7 environmental safety contention. So to the extent
8 where -- and maybe I'm skipping ahead a little bit, to
9 the extent we're going to key it off of some document,
10 it seems to me that it needs to the latter of the
11 environmental and the safety documents, simply because
12 it does involve both the safety and the environmental
13 issue.

14 JUDGE BOLLWERK: All right. Let me then
15 turn to the Intervenors and see if they have anything
16 they want to say in that regard?

17 MS. GILLIS: Your Honor, nothing at this
18 time.

19 JUDGE BOLLWERK: Okay. Well, given that
20 we won't consider anything we said here dispositive at
21 this point, but having said that, I will then think
22 seriously about including a schedule that keys off of
23 both the SER and the environmental assessments in
24 setting up the schedule. And then we can work through
25 it that way when the time comes in terms of which box

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1 it goes into and how we need to eventually resolve it
2 if we go to evidentiary hearing. So I appreciate the
3 staff bringing that up. That's a useful addition to
4 what we're discussing today. Thank you.

5 All right, anything else on that anybody
6 have for the summary disposition? Hearing nothing,
7 we'll move on then.

8 So again, recognizing that an appeal is
9 pending with the Commission about the Board's
10 determination on both standing and contention
11 admissibility, assuming the case goes forward after
12 the appeal, do any of the parties anticipate
13 submitting dispositive motions and have you given any
14 thought about if so, when you would do that? Those
15 could be as early as post-appeal. It could be the
16 post draft environmental documents, the post final
17 environmental document or post SER. And let me start
18 with the Applicant?

19 MR. SMITH: This is Tyson Smith for the
20 Applicant. I've given some thought to it. I guess at
21 this point it's a little premature for us to have very
22 fully fleshed out when and if it might be an
23 appropriate time for summary disposition. At least I
24 can say at present we don't anticipate filing one
25 unless there's some new or different information that

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1 becomes available before the SER or the EA or the
2 environmental document.

3 JUDGE BOLLWERK: All right. Let me take
4 it a little bit about of order. Let me see if the
5 staff has anything to say in that regard.

6 MS. SIMON: Your Honor, this is Marcia
7 Simon. The staff has not, again, it's kind of the
8 same view that it's been premature at this point and
9 so the staff has not really given serious
10 consideration to whether it would be filing a summary
11 disposition motion on either contention.

12 JUDGE BOLLWERK: All right. Anything that
13 the Intervenors want to say about summary disposition
14 given what they've heard?

15 MR. GONZALEZ: We have one question here.
16 To what extent -- this is Mr. Gonzalez -- to what
17 extent does Intervenor file motions for dispository
18 motions for summary disposition? Do we have standing
19 to file such motions?

20 JUDGE BOLLWERK: Absolutely, any of the
21 parties can move for summary disposition and I will
22 admit -- in my experience, here it tends to come from
23 the Applicant, occasionally from the staff, but there
24 has been recently at least one instance I know where
25 an Intervenor filed summary disposition and actually

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1 it was granted. It had to do with a foreign ownership
2 matter, if I recall. But nonetheless, absolutely,
3 sir. You would have that opportunity as well.

4 MS. GILLIS: Okay, at this time we'd like
5 to reserve our opportunity to file those motions.

6 JUDGE BOLLWERK: Given that and I can
7 understand the uncertainty in this instance, when we
8 put together the schedule, we will probably build in
9 at least some opportunities after the filing of
10 certain documents for the ones that -- basically, the
11 staff documents, for summary disposition with the idea
12 that we may or may not use those dates. They
13 certainly could come out.

14 One of the concerns I always have is that
15 summary disposition should not be filed too close to
16 the evidentiary hearing. That just tends to put sand
17 in the gears in terms of keeping the proceeding moving
18 forward, but we'll think about that and I know there's
19 some enthusiasm and less enthusiasm among some of the
20 Board members for summary disposition. But in terms
21 of the scheduling matter, we may well put it in the
22 schedule and we can certainly take it out if it
23 doesn't seem appropriate.

24 The one thing that I would say is that any
25 summary disposition that we do put in there has the

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1 potential to add six to eight weeks to the schedule,
2 so we need to be aware of that when the time comes and
3 kind of be thinking that through. Because this is
4 something that should definitely not be filed
5 frivolously. It's not sort of throw it all on the
6 wall and see if it sticks. It definitely should be
7 something that's a serious effort.

8 Again, let me just say with regard to page
9 limits also which I think is another thing we raised
10 about summary disposition. Unlike new or amended
11 contention motions where in the absence of a request
12 for a page limit extension, there's a ten-page limit
13 on those motions that applies no matter how many new
14 or amended contentions that are proposed. And if you
15 look at our February 8, 2013 initial prehearing order
16 at page 4, note 4, it makes that point.

17 Generally, the approach that I like to use
18 is absent some other approach by the parties the page
19 limit is generally set at 25 pages per contention, not
20 accounting any accompanying attachments or statements
21 of material facts that are or are not in dispute. And
22 the Board's preference, unlike with new or amended
23 contentions, we generally like to have one motion
24 filed that deals with all the contentions you want to
25 put in, that each contention have its own summary

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1 disposition motion so that things are clear in that
2 regard. So I just make you aware of that.

3 If there's anything that you have a
4 concern about, one of the things for one of these
5 scheduling orders is you have an opportunity to file
6 comments and I would urge you to do that if there's
7 anything you see that is unclear or you think you
8 have a better approach or a different approach that
9 you want to suggest to the Board. So I'll just make
10 you aware of that.

11 Let me see at this point if there's
12 anything else that any of the parties want to say
13 about summary disposition. We'll start with the
14 Applicant?

15 MR. SMITH: This is Tyson Smith. No,
16 Judge Bollwerk, we have nothing else.

17 JUDGE BOLLWERK: All right, anything on
18 the part of the Intervenor?

19 MS. GILLIS: The tribe doesn't have
20 anything further at this time, Your Honor.

21 JUDGE BOLLWERK: Thank you. And anything
22 from the staff?

23 MS. SIMON: This is Marcia Simon. The
24 staff has nothing further.

25 JUDGE BOLLWERK: All right. Let's move on

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1 then to talk to you a little about the evidentiary
2 hearing and some time limits that relate to Item 5 in
3 the Board's May 10th order. Again, we're a ways out,
4 but it's good to start these conversations because
5 things can develop and if nothing else, we put things
6 on the table, people get an initial impression or idea
7 of what's going to happen. And if things don't happen
8 or need to change, we can do that. But it's good to
9 talk about them a little bit upfront.

10 I mentioned, we mentioned in the order,
11 the May 10th order, the final list of potential
12 witnesses for each contention. And generally, the
13 parties provide their initial witness list with
14 mandatory disclosures that need to be updated. We get
15 those sorts of lists or that sort of list is
16 generated. So this may involved no more than looking
17 at the pre-filed testimony. But just to make you
18 aware, when your mandatory disclosure is due on
19 September 9th, you are supposed to provide a list of
20 witnesses to the degree you can and you need to update
21 that. So just so you're aware of that. Let me see if
22 there's any questions about that from the Applicant?

23 MR. SMITH: This is Tyson Smith. No
24 questions.

25 JUDGE BOLLWERK: All right. The

1 Intervenor?

2 MS. GILLIS: No questions at this time,
3 Your Honor.

4 JUDGE BOLLWERK: And the staff?

5 MS. SIMON: This is Marcia Simon. No
6 questions, Your Honor.

7 JUDGE BOLLWERK: All right, thank you.
8 Then another item was we would build into the schedule
9 potentially, the potential for a unanimous request
10 pursuant to 10 CFR Section 2.310(h) to handle any of
11 the contentions under 10 CFR Part 2 Subpart N which is
12 a hearing basically only on a written record. There
13 are no oral input into the record. That has not been
14 popular among participants in our proceedings. In
15 fact, I don't think there has ever been a Subpart N
16 proceeding held, but it is something we have to
17 recognize. And this generally has been provided for
18 at least from the schedule I worked on after the final
19 environmental document is submitted.

20 If the parties have any interest in this,
21 in Subpart N proceeding, I would really advise you to
22 let the Board know at the earliest opportunity.
23 Again, it has to be a unanimous request. So this
24 would be something you all would have to sit down and
25 talk about and decide that's the best way to proceed.

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1 I'm not going to say anything else about Subpart N at
2 this point, just to make you aware of it. But let me
3 see if any of you have anything you want to say about
4 it.

5 Anything from the Applicant's point of
6 view?

7 MR. SMITH: This is Tyson Smith. I don't
8 have anything on that at this time.

9 JUDGE BOLLWERK: All right. Anything from
10 the Intervenor?

11 MS. GILLIS: The tribe at this time wants
12 to proceed with oral arguments.

13 JUDGE BOLLWERK: Okay, that will be
14 Subpart L, an oral proceeding. Okay.

15 And what about the staff?

16 MS. SIMON: The staff has no -- the staff
17 doesn't have a position at this time.

18 JUDGE BOLLWERK: Nothing to say about
19 Subpart N. Okay, that's fine. I just want to make
20 everybody aware of it in case there was any
21 uncertainty about that.

22 One of the other things the schedules
23 generally provide for is a motion for cross
24 examination under 10 CFR Section 2.1204(b). This is
25 a Subpart L proceeding. It is permitted for a party

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1 to ask for cross examination with respect to
2 particular contentions or portions of the proceeding.
3 So that would be something again the schedule would
4 provide for. It generally would be filed after the
5 initial prefiled testimony is submitted at the same
6 time any proposed Board cross examination questions
7 are due. It's sort of a potential alternative to the
8 Board asking the questions which is the general rule
9 under Subpart L which is an instance where the parties
10 felt it was necessary that cross examination by a
11 particular party or more than one party would be
12 useful for developing the record. This has happened
13 recently, I believe in the Indian Point case it was
14 used. So there is some precedent for it.

15 That would again come at a point in the
16 schedule.

17 One thing I would like to bring to the
18 parties' attention is that the proposed Board cross
19 examination questions, which are normally submitted
20 under a Subpart L proceeding, as well as the proposed
21 cross examination plan that would need to accompany
22 any motion requesting cross examination by a party,
23 should be filed using the in camera functionality
24 that's part of the Agency's efileing system.
25 Basically, those documents we do not want those to go

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1 into the public record. And the way to avoid it
2 because they are sort of confidential to the parties,
3 and they are not disclosed generally until after the
4 evidentiary hearing --

5 (Automated voice interruption.)

6 Is everyone still there?

7 MR. SMITH: This is Tyson Smith. I'm
8 still here.

9 JUDGE BOLLWERK: Let me check with the
10 Intervenor. Are you still there?

11 MS. GILLIS: I'm here.

12 (Automated voice interruption.)

13 JUDGE BOLLWERK: Can we go around one time
14 to make sure everybody is still here and then we'll
15 proceed. Is everybody for the Applicant still around?

16 MR. McGUIRE: Judge, Mike McGuire. I'm
17 here.

18 JUDGE BOLLWERK: You're here?

19 MS. FORMOSA: Noelle Formosa.

20 MR. SMITH: Tyson Smith is here, so all
21 Crow Butte is on the line.

22 JUDGE BOLLWERK: Okay. Let's check with
23 the Intervenors, are you still around?

24 MS. GILLIS: Intervenors are still here,
25 Your Honor.

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1 JUDGE BOLLWERK: Thank you. Anybody from
2 the staff still with us?

3 MS. SIMON: Staff is here, Your Honor.

4 JUDGE BOLLWERK: Court reporter?

5 COURT REPORTER: I'm still here, Your
6 Honor.

7 JUDGE BOLLWERK: You're still here. Okay.
8 And Judge Hirons is obviously?

9 JUDGE HIRONS: Yes.

10 JUDGE WARDWELL: Hopefully, we won't hear
11 that again. What I was mentioning was the fact that
12 there is an in camera functionality that is part of
13 the efilings system. What that means is that anything
14 that you only want the Board to see, you should submit
15 it electronically through that and only the Board
16 members will see it. And two examples of that would
17 be proposed cross examination questions for the Board
18 as part of a Subpart L proceeding or alternatively as
19 part of a motion for cross examination. One of the
20 things it asks for is a cross examination plan. And
21 that would also be submitted to the Board in camera.
22 So just so you're aware of that.

23 If you send it through the normal efilings
24 system, it's going to get into SECY and SECY is going
25 to do what SECY does which is they're going to send it

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1 out to the world and you don't want that to happen.
2 So it's important that you recognize that.

3 I should mention that if there were any
4 other reasons that you needed to contact the Board in
5 camera, you would use that as well. Things like
6 subpoenas or things. I don't think that would
7 necessarily be applicable here. I don't want to say
8 one way or the other, but that would be another way to
9 use the in camera filing functionality. So just so
10 you're aware that it is available. And if you have
11 any questions about that, feel free to call our law
12 clerk, Matt Flyntz, and we'll talk it through with you
13 if necessary.

14 Let me see if there's any questions about
15 motions for cross examination or the related in camera
16 filing. From the Applicant?

17 MR. SMITH: This is Tyson Smith. I guess
18 the only thing I would ask, am I correct that the
19 motion for cross examination would itself be public,
20 but the cross examination plan would be filed in
21 camera? And I believe I'm correct on that, but I just
22 want to confirm that.

23 JUDGE BOLLWERK: You're correct, sir.
24 That would be the motion is a matter of public record,
25 but the cross examination plan would not be. That's

1 something that's provided only to the Board.

2 MR. SMITH: With that, I have no other
3 comments.

4 JUDGE BOLLWERK: All right. Anything from
5 the Intervenor's point of view?

6 MS. GILLIS: Your Honor, we just reserve
7 the right to make that motion at this time.

8 JUDGE BOLLWERK: All right. Anything from
9 the staff?

10 MS. SIMON: Nothing further from the
11 staff, Your Honor.

12 JUDGE BOLLWERK: All right. Another item
13 we mentioned in the May 10th order was the parties'
14 initial written statements of position and written
15 direct testimony with supporting affidavits which are
16 filed pursuant to 2.1207(a)(1). And also
17 consideration of whether the parties should file
18 simultaneously or sequentially. And if sequentially,
19 which party should file first and also the timing of
20 any written response statements of the rebuttal
21 testimony and in limine motions relative to direct or
22 prefiled testimony.

23 Let's talk first in that regard about the
24 filing sequence which is important. Do the parties
25 have any views at this point about whether they want

1 to file their prefiled testimony and accompanying
2 documents simultaneously or sequentially? Let me go
3 to the Applicant first.

4 MR. SMITH: This is Tyson Smith. We don't
5 have a strong view either way. I guess my experience
6 has been that filing simultaneously works well and
7 keeps the deadlines very clear for all the parties, so
8 everyone is doing it at the same time. So I guess I
9 suppose we're in favor of that. But I'm amenable to
10 whatever the Board thinks is appropriate.

11 JUDGE BOLLWERK: All right. And again,
12 with simultaneous, just so everybody is on the same
13 page, when they're filed -- when the direct testimony
14 comes in simultaneously, then the rebuttal testimony
15 also comes in simultaneously by all parties.
16 Sequentially, generally, the Applicant files first,
17 although we can talk about that. One of the things we
18 talk about, if the Intervenor files first, the
19 Applicant files first and who files in the rebuttal.
20 But we do simultaneously then we don't have to explore
21 that.

22 Let me see if the Intervenor has any
23 feelings about how they would file their testimony?

24 MS. GILLIS: Your Honor, the tribe would
25 like to do sequentially, with Applicant being the

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1 first one to file.

2 JUDGE BOLLWERK: All right. That raises
3 questions about burden of proof, so we'd have to
4 settle that as well. I'll come back to the Applicant
5 on that. Does the staff have anything they want to
6 say at this point?

7 MS. SIMON: Your Honor, the staff has no
8 preference as to whether we do it simultaneously or
9 sequentially. And we don't really have a position
10 with regard to who goes first.

11 JUDGE BOLLWERK: All right. Let me go
12 back to the Applicant in terms of filing testimony.

13 MR. SMITH: This is Tyson Smith for Crow
14 Butte. I have a couple of thoughts. I think my first
15 thought is if we are going to do it sequentially and
16 it seems to us that the Intervenor's ought to go first
17 because they're the ones who are alleging that there's
18 a problem with our application. Plus, if there is
19 further development of what the contention is, we
20 frankly don't know what it is we're supposed to be
21 showing other than what is already in our application.

22 So sequentially, with the Applicant first
23 doesn't seem like that's likely to be very productive
24 unless there's further development and we can really
25 hone in on a specific issue that we're going to be

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1 addressing in our testimony.

2 JUDGE BOLLWERK: All right. Let me see if
3 the Intervenor has anything further they want to say?

4 MS. GILLIS: We just would leave that up
5 to the Board, Your Honor.

6 JUDGE BOLLWERK: In terms of the
7 sequential versus simultaneous or who files first?

8 MS. GILLIS: Who files first, Your Honor.

9 JUDGE BOLLWERK: I should mention that
10 sequential is not the general way it's done here.
11 It's generally simultaneous, but if that's something
12 you really want to do we can consider it.

13 MS. GILLIS: Okay, Your Honor, that's fine
14 with us.

15 JUDGE BOLLWERK: So you have no problem
16 with simultaneous then? You want to think about it?

17 MS. GILLIS: Yes, Your Honor, we'd like to
18 think about it, Your Honor.

19 JUDGE BOLLWERK: Let me have you do this,
20 and make a suggestion. This might be something, given
21 it affects all the parties that maybe you all can have
22 a discussion some point this week about that question
23 of simultaneous versus sequential. See if you all
24 among yourselves can come up with any kind of
25 agreement as to how this would proceed. Obviously,

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1 the Board would prefer to do something that everybody
2 agrees to. Can you hold on one second, please?

3 (Pause.)

4 JUDGE BOLLWERK: This is Judge Bollwerk
5 again, sorry. Go ahead and if you can, give us
6 whatever your views are say by the end of the week if
7 you have a brief discussion, maybe you can do it after
8 this is over, and any suggestions you have about
9 sequentially versus simultaneously.

10 We also need to talk with Judge Hiron
11 about this who obviously isn't here with us. I don't
12 think the Board really at this point has a preference
13 one way or the other, although it would seem to us
14 that if we do it sequentially, we would want to hear
15 why the Intervenor, I guess, would not be filing
16 initially here if that's the sort of recommendation
17 that's going to come or someone in that position.

18 And again, if you could let us know where
19 you're at on this say by next Monday, that would be
20 useful. That gives you a couple of days this week and
21 someone can provide us with a letter by Monday
22 indicating if there's any agreement among the parties
23 sequentially versus simultaneously and also what the
24 parties positions are in terms of who should file
25 first, recognizing that it seems to us that's probably

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1 something the Intervenor is going to have to justify.

2 Hold on one second.

3 (Pause.)

4 JUDGE BOLLWERK: And if you can't come to
5 an agreement, if it's possible, you can send us one
6 letter outlining what your disagreement is, if not,
7 you can each file a separate letter. Again, let's see
8 if we can't do that by Monday. If there's a problem
9 with that, let us know and we can give you some
10 additional time, although I'd like to get this order
11 wrapped up in the next week to ten days.

12 Let me go around and see if there's any
13 questions about what I've just asked for. The
14 Applicant?

15 MR. SMITH: This is Tyson Smith for Crow
16 Butte. That's fine. I guess I would put this in the
17 Intervenors' court if they want to do something
18 different. I'm happy to -- please give me a call and
19 we can talk about it. Otherwise, I think the
20 Applicant's position is that simultaneously is the
21 appropriate way to do this.

22 JUDGE BOLLWERK: All right, anything from
23 the staff?

24 MS. SIMON: Your Honor, this is Marcia
25 Simon. In considering this as people have been

1 talking, one concern that we would have is if the
2 Applicant goes first is when would the staff go
3 because normally we would go when the Applicant does
4 and in that case if it's sequential, the Intervenor
5 going first makes more sense to us.

6 JUDGE BOLLWERK: All right, go ahead, I'm
7 sorry. I didn't mean to interrupt you.

8 MS. SIMON: We don't have any further
9 questions regarding conferring and trying to reach an
10 agreement.

11 JUDGE BOLLWERK: All right. Let's hear
12 from the Intervenor then.

13 MR. GONZALEZ: Can you explain why it
14 makes more sense for the Intervenors to go first?

15 JUDGE BOLLWERK: You're asking us to
16 explain it or for the staff to explain it?

17 MR. GONZALEZ: The person that spoke last.
18 She said it makes more sense for the Intervenors to go
19 first, but she didn't explain why it makes more sense.
20 We'd like to hear why it makes more sense.

21 MS. SIMON: This is Marcia Simon again.
22 The reason that I said that is that normally if it's
23 sequential, the staff typically provides its input
24 when the Applicant does and if the Applicant goes
25 first that seems to indicate that the staff would

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1 chime in, but the staff is not taking a position --
2 the staff is not defending the application. The staff
3 is reviewing the application. And therefore, since
4 the Intervenor, as Mr. Smith said, since the
5 Intervenor raised the contention initially, and is
6 trying to make the case for why there's a problem with
7 the application, it makes sense that the Intervenor
8 would go first to us.

9 JUDGE BOLLWERK: Anything else the
10 Intervenor wants to say?

11 MS. GILLIS: Your Honor, at this time we
12 would just go into conference with the other parties
13 and come to an agreement.

14 JUDGE BOLLWERK: All right, I appreciate
15 that. Or again, if you can't come to an agreement,
16 let us know what your disagreement is. We'll deal
17 with that, we'll deal with it then, depending on what
18 you all send us.

19 And again, if getting back to us by next
20 Monday raises a problem, then let us know and we'll
21 put something on the record providing additional time.

22 Hold on one second, please.

23 (Pause.)

24 JUDGE BOLLWERK: Let's just clarify one
25 thing here just so everyone is on the same page on

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1 what we're talking about. Whichever party or parties
2 file first, then the remaining parties would file
3 after that, this is sequentially. And then the first
4 party to file or parties to file would file a reply.
5 So that's the sequential filing process.

6 With simultaneously, all parties file at
7 the same time, their direct testimony. And then all
8 parties file at the same time their rebuttal
9 testimony. So just so we're all on the same page. I
10 want to make sure that was clear to everyone.

11 And again, we'll wait to hear from you
12 all, hopefully by next Monday or shortly thereafter,
13 about any agreements you've reached or if you've
14 agreed to disagree what your positions are.

15 Let me also mention briefly the question
16 of in limine motions. I have in the past had those
17 filed in Subpart L proceedings. I'm sort of thinking
18 about that again in part because frankly if the Board
19 feels that testimony of any kind is put in, it can
20 simply deal with that testimony at the time
21 appropriate whether it has any questions or not.

22 Also, in limine motions tend to add four
23 to five weeks to the process because they generally
24 have to be filed both with respect to -- if they're
25 filed simultaneously to the first set of testimony,

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1 plus the rebuttal set of testimony. So having said
2 that, let me go around and find out what your all's
3 feelings might be again about in limine motions
4 designed to have portions of either direct or rebuttal
5 testimony stricken as irrelevant or somehow
6 inappropriate in some other way.

7 Let's talk with the Applicant first,
8 please.

9 MR. SMITH: This is Tyson Smith for Crow
10 Butte. Unfortunately, I think my view, our views on
11 the appropriateness of a motion in limine hinges in
12 part on the manner in which parties make their
13 filings, whether sequentially or simultaneously, but
14 in general, I think having an opportunity to file
15 motions in limine are important in order to ensure
16 that the filings stay within the bounds of the
17 admitted contention.

18 JUDGE BOLLWERK: All right, anything the
19 Intervenor wants to say about in limine motions?

20 MS. GILLIS: Your Honor, the tribe agrees
21 with that.

22 JUDGE BOLLWERK: All right, anything the
23 staff wants to say about in limine motions?

24 MS. SIMON: Your Honor, the staff agrees
25 as well.

1 JUDGE BOLLWERK: Well, it sounds like you
2 all are interested in in limine motions. We'll have
3 to think about that. But again, those would be filed
4 as part of the process following the testimony, so all
5 right.

6 In terms of -- we're getting near the end
7 of the list that we had in our order. The order
8 mentioned some items outlined in 10 CFR Section
9 2.329(c)(1) through (3). That talks about
10 consolidation and simplification of contentions. I
11 don't think that's anything we need to talk about here
12 at this point. But it also mentions stipulations,
13 admissions of fact, and authenticity of documents or
14 agreements to authenticity of documents.

15 I would simply mention at this point that
16 if it should go to evidentiary hearing, those sorts of
17 stipulations, admissions, and agreements to
18 authenticity of documents are very important to moving
19 the proceeding forward officially and that's something
20 we'll be bringing up again with the hopes that the
21 parties will be thinking about it as well of ways that
22 we can get things everybody agrees to taken care of
23 before even the evidentiary hearings for the most part
24 so that we can simply at the hearing worry about
25 things that are in dispute rather than things that are

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1 agreed to. So I would simply mention that at this
2 point.

3 Let me, however, see if any of the parties
4 have any comments about either contention
5 consolidation or simplification or the sorts of
6 stipulations that I just mentioned. Applicants?

7 MR. SMITH: This is Tyson Smith for the
8 Applicant. Certainly have no objection to the sorts
9 of stipulations and agreements and authenticity that
10 you mentioned. And with respect to simplification of
11 the contention, I think that would be helpful to have
12 some discussion of that at some point. I don't know
13 that now is the appropriate time. So I guess I think
14 as we get closer to any hearing, maybe perhaps we
15 should revisit that issue. That's something we can
16 also just discuss among the parties as well.

17 JUDGE BOLLWERK: All right. Thank you
18 Anything from the Intervenors' perspective?

19 MS. GILLIS: Intervenors would agree with
20 that.

21 JUDGE BOLLWERK: Thank you. And anything
22 from the staff?

23 MS. SIMON: This is Marcia Simon. Nothing
24 further, Your Honor.

25 JUDGE BOLLWERK: All right. Thank you

1 very much then. There was an item number seven, I
2 believe, that talked about the possibility of settling
3 any of these contentions in whole or in part,
4 including the status of any current settlement
5 negotiations and the utility of appointing a
6 settlement judge pursuant to Section 2.338(b).

7 The parties, in their May 22nd letter,
8 indicated that one of the items they might be prepared
9 to discuss during the conference was settlement and
10 recognizing there are appeals pending, is there
11 anything you all want to say about settlement? And
12 I'll turn to the Applicant first.

13 MR. SMITH: This is Tyson Smith for Crow
14 Butte. We'd be certainly open to some discussions
15 about settlement. I'm not sure that there's -- well,
16 we would be open to discussions about settlement.

17 JUDGE BOLLWERK: All right. That's
18 something I would always encourage. Anything the
19 Intervenor wants to say?

20 MS. GILLIS: The Intervenor would just
21 like to say that we are open to any settlement
22 negotiations.

23 JUDGE BOLLWERK: And then the staff?

24 MS. SIMON: Your Honor, this is Marcia
25 Simon. The staff would defer to the Applicant's and

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1 Intervenor's views, but we would be happy to
2 participate in any discussions.

3 JUDGE BOLLWERK: All right. Well, let me
4 make two points about this then. Obviously,
5 settlement is always to be encouraged. Generally, if
6 you settle it, everybody is going to go away happy.
7 If we have to decide it, somebody is probably going to
8 be unhappy. That's always a consideration.

9 If you feel it's appropriate at this point
10 and I certainly would encourage this while you're
11 talking about the simultaneous versus sequential
12 filings, if you all want to raise that among
13 yourselves, talk about settlement, feel free to do
14 that. And on the basis of those discussions if you
15 think it would be appropriate for us to explore with
16 the Chief Administrative Judge about the appointment
17 of a settlement judge, we are certainly happy to do
18 that. It would not be the members of this Board. It
19 would be someone else from the panel who is not
20 involved in the proceeding and would be willing to
21 talk and potentially meet with you all to talk about
22 settlement. And if that's something you want, please
23 let us know and we would be glad to approach the Chief
24 Administrative Judge and see what this druthers are
25 and if possible get someone appointed to help you.

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1 So please feel free to get back in contact
2 with us if that were the case.

3 MR. GONZALEZ: Question.

4 JUDGE BOLLWERK: Yes.

5 MR. GONZALEZ: The settlement judge is
6 like a mediator, is that -- does the tribe incur any
7 expense paying for that person to -- the settlement
8 judge to sit and hear -- try to resolve these
9 disputes? Or is that provided for without charge to
10 the tribe?

11 JUDGE BOLLWERK: If it comes to
12 settlement, it would be someone that the Nuclear
13 Regulatory Commission or the Atomic Safety and
14 Licensing Board panel would be responsible for
15 providing and paying for. If there were any meetings
16 that required travel, you obviously would have to do
17 that on your own to get wherever that meeting might
18 be, but the settlement judge would be coming at his or
19 her expense, the expense of the panel and would be
20 participating on that basis.

21 The parties would have to bear all their
22 own expenses relative to any travel or anything else
23 that was involved. Does that answer your question?

24 MR. GONZALEZ: Yes.

25 JUDGE BOLLWERK: Let me go around very

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1 quickly and see if there's anything anybody wants to
2 say about settlement at this point. Anything from the
3 Applicant?

4 MR. SMITH: This is Tyson Smith. No,
5 Judge Bollwerk.

6 JUDGE BOLLWERK: Anything further from the
7 Intervenors?

8 MS. GILLIS: Nothing further at this time,
9 Your Honor.

10 JUDGE BOLLWERK: And anything from the NRC
11 staff?

12 MS. SIMON: This is Marcia Simon, nothing
13 further, Your Honor.

14 JUDGE BOLLWERK: All right. Couple of
15 last times, this is looking well ahead, but is there
16 any feeling about whether it would be appropriate or
17 helpful for the Board to have a site visit at the
18 Marsland site at some point as part of this
19 proceeding?

20 Let me turn first to the Applicant.

21 MR. SMITH: This is Tyson Smith.
22 Obviously, we would defer to you on whether or not you
23 believe a site visit would be helpful to you, but Crow
24 Butte said we would support such a site visit and
25 would be happy to show you around, along with all the

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1 other parties and in fact, we think it would probably
2 be helpful, perhaps not now, maybe some time later in
3 the proceeding though.

4 JUDGE BOLLWERK: All right. Anything the
5 Intervenors want to mention about site visit?

6 MS. GILLIS: Yes, Your Honor. The tribe
7 thinks it is important to this proceeding and would
8 encourage it and also would like to say that we
9 conduct the site visit probably during the months of
10 April through September due to the snow cover during
11 the winter and fall months.

12 JUDGE BOLLWERK: All right. Anything
13 staff wants to say about a site visit?

14 MS. SIMON: Your Honor, this is Marcia
15 Simon. The staff certainly doesn't object to the
16 concept of a site visit. But we don't really have a
17 position as to the utility of it.

18 JUDGE BOLLWERK: All right. Well, again
19 if the Board were to do this, it probably would be
20 something we would do, for instance, in conjunction
21 potentially with the evidentiary hearing which might
22 be an instance where we would probably be in the area,
23 but we would have to see how that plays out. But it's
24 good to know that certainly the Applicant is willing
25 to support the site visit if we should decide to do

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1 that. And the April through September is something we
2 need to bear in mind as well that would be the best
3 months.

4 The last thing we have is sort of a catch-
5 all which is any other procedural or scheduling
6 matters the Board might deem appropriate. The only
7 thing I would say in that regard is that the model
8 guidelines for Subpart L indicate that within 175 days
9 after the final environmental document, the hearing --
10 any evidentiary hearing is supposed to be held. That
11 would put, if it was based on the environmental
12 documents that would put in a hearing potentially, the
13 last part of those being in March of 2014, that would
14 put a hearing in the fall of 2014. And if we're
15 looking at the SER which is not until -- let me grab
16 my documents, February of '15, then we're probably
17 looking at the summer of 2015. So I would just let
18 you know that that's under the model guidelines we
19 normally use. That's what we would be looking at.

20 At this point, let me check and see if
21 there is anything that the parties want to bring to
22 the Board's attention in terms of what we talked about
23 today or anything else relative to the proceeding, the
24 schedule, anything else the parties think they would
25 like to discuss with the Board right now.

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1 Let me start with the Applicant.

2 MR. SMITH: This is Tyson Smith. I just
3 had one question that didn't occur to me earlier and
4 that was whether the Board would like for the parties
5 to file under our agreement, monthly disclosure
6 supplements or initial disclosure or monthly
7 disclosure supplements with the Board or that's just
8 something we should circulate among the parties? I
9 now the practice varies a little bit within the Atomic
10 Safety and Licensing Board. So I just wanted to
11 confirm what it is that you expect from us.

12 JUDGE BOLLWERK: My recollection is that
13 the rules don't provide that needs to be filed with
14 us, although you're right, I recall I do get something
15 every month. So it's probably better to go ahead and
16 file. That way we know that there's things happening
17 and if we don't see those then we know there's
18 potentially an issue with someone. Generally, they
19 tend to be pretty short, at least the ones after the
20 initial one are. So why don't you go ahead and submit
21 those unless you hear something else from us.

22 MR. SMITH: Okay, thank you. Crow Butte
23 has nothing else.

24 JUDGE BOLLWERK: Let me turn then to the
25 Intervenors and see if they have anything further?

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1 MS. GILLIS: We have nothing further at
2 this time, Your Honor.

3 JUDGE BOLLWERK: And anything from the
4 staff?

5 MS. SIMON: Your Honor, this is Marcia
6 Simon. I just wanted to make -- clarify one thing.
7 When we sent the letter on May 24 and we explained
8 that we usually do our hearing file in conjunction
9 with the initial disclosure, so I just wanted to make
10 absolutely sure that that's the understanding that the
11 Board and parties have. The hearing file and initial
12 disclosures would be combined and submitted on
13 September 9th.

14 JUDGE BOLLWERK: Correct. I recognize that
15 and obviously that would given what the rules provide
16 for, that would require the Board to agree to that and
17 that's something we'll be discussing, but I understand
18 that's what you're requesting, yes.

19 MS. SIMON: Okay, and the reason I'm
20 asking is that otherwise the 30-day limit is next
21 Monday.

22 JUDGE BOLLWERK: Right.

23 MS. SIMON: So we'd appreciate if we can
24 get confirmation, obviously, as soon as possible.

25 JUDGE BOLLWERK: Okay. Actually, the

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1 faster you can get back to me, let us know about your
2 simultaneous versus sequential filing, the faster I
3 can get the order out. If it looks like there's going
4 to be an issue, we may need to issue something on
5 Monday just to extend that until you've given us that
6 information and we can issue the initial prehearing
7 order.

8 So that would be another good reason to at
9 least to let us know if it looks like you're going to
10 -- my assumption is, I guess we're not going to hear
11 from you until Monday. So I think we need to -- we
12 think to think about probably issuing something to
13 extend that for at least a week. And we'll go ahead
14 and do that. How is that? That way we're not on the
15 clock and you all can have whatever discussions you
16 need to this week.

17 MS. SIMON: That would be wonderful, Your
18 Honor.

19 JUDGE BOLLWERK: We'll go ahead and do
20 that. You don't need to make a motion. We'll just go
21 ahead and issue an order that says based on our
22 conversation here today that we're extending the time
23 for the staff to file its hearing file by the -- is a
24 week enough time, I would think?

25 MS. SIMON: Yes, Your Honor, that should

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1 be fine.

2 JUDGE BOLLWERK: I'll take a look at the
3 dates and we'll give you something. Part of that
4 depends on us getting our order out. So we want to
5 make sure that leaves us enough time as well.

6 MS. SIMON: Your Honor, this is Marcia
7 Simon. I think a week would be the 17th of June.

8 JUDGE BOLLWERK: Okay, all right. Very
9 good. Then we'll go ahead and take care of that for
10 you.

11 Anything else from the staff then? No.
12 Then let me then go around to each of the Judges and
13 see if they have anything.

14 Judge Wardwell?

15 Judge Wardwell has asked me to remind you
16 there is a provision in the rules, the rule dealing
17 with motions that indicates that you are required to
18 -- before you file a motion to consult with the other
19 parties. And how you do that is up to you. I think
20 a lot of people do it by email, but however you
21 accomplish it, you just need to accomplish it and you
22 have to certify that you've made that effort and then
23 indicate what the result was, if it wasn't agreed to
24 or whatever.

25 And also, I think we put this in our

1 initial prehearing order that obviously the observe of
2 that is that the parties will make the effort if
3 they're contacted to respond and make themselves
4 available to discuss or give an answer when this
5 question is raised about a motion in a timely manner
6 so that the person that's making the certification can
7 do so with respect to the motion.

8 And I would remind you again to take a
9 look at the initial prehearing order, but there are
10 dates for if your motion is -- if you have something
11 you want to file that's going to be late, when you
12 need to ask for an extension and also if you need an
13 extension of the page limit, when you need to do that,
14 those sorts of things as well. So the little boxes
15 that need to be checked, but if you don't file a
16 motion on time, then that gets complicated in terms of
17 motions to file out of time and all kind so other
18 things. So I just want to make you aware of that.

19 But again, make sure that you've taken
20 care of that consultation issue. It is part of the
21 rules and it's important to us to actually know that
22 you've talked and what the parties' approaches are to
23 the motion that's been put on the table.

24 Anything else, Judge Wardwell?

25 JUDGE WARDWELL: No, that's it.

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1 JUDGE BOLLWERK: Judge Hirons, anything?

2 JUDGE HIRONS: I would just like to confer
3 with the Board after we're done with this call.

4 JUDGE BOLLWERK: Yes, we will definitely
5 be giving you a call.

6 JUDGE HIRONS: Nothing else.

7 JUDGE BOLLWERK: Let me then -- if we need
8 to, Mr. Court Reporter, we can talk with you after
9 we're done here. Would that be necessary?

10 COURT REPORTER: That will not be
11 necessary, Your Honor.

12 JUDGE BOLLWERK: You've got everything you
13 need?

14 COURT REPORTER: Yes, Your Honor.

15 JUDGE BOLLWERK: Okay, very good. The if
16 there's nothing else, we appreciate you all making
17 yourselves available to the Board today. You all,
18 obviously, have other things to do in this case.
19 Certainly, the Intervenors do, I think. And obviously
20 I have no idea how long it will take the Commission to
21 rule on the appeals. I would think from the time that
22 all the briefing is finished it may well be several
23 months, sometime into the fall. But that's again the
24 Commission's business, not ours.

25 And we will carry on with this proceeding

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1 until we hear something from the Commission that would
2 suggest that we need to do something else.

3 Again, on behalf of the Board, I
4 appreciate you making yourselves available today. I
5 think it's been a good conference. We've gotten a lot
6 of good information. We'll wait to hear from you on
7 the question of simultaneous or sequential filings.
8 We will take care of the issue with the staff hearing
9 file and I would certainly urge you that if you think
10 settlement would work for one or both of those
11 contentions, that you go ahead and start that process
12 and if you can take care of it before the appeal is
13 even finalized, that's a good thing for everybody, I
14 think, if you're happy with the settlement. And let
15 us know about a settlement judge.

16 At this point we stand adjourned and I
17 thank everyone.

18 MR. SMITH: Thank you.

19 MS. GILLIS: Thank you.

20 MS. SIMON: Thank you.

21 (Whereupon, at 2:08 p.m., the
22 teleconference was concluded.)
23
24
25