

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of : Docket No. 72-22-ISFSI
: ASLBP No. 97-732-02-ISFSI
PRIVATE FUEL STORAGE, L.L.C. :
:
(Independent Spent Fuel :
Storage Installation) :
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University of Utah
College of Law
Moot Courtroom
332 South Street, 1400 East
Salt Lake City, Utah

Thursday, January 29, 1998

The above-entitled prehearing conference convened at
9:00 a.m. pursuant to notice, before:

THE HONORABLE G. PAUL BOLLWERK, III,
Administrative Judge,
Atomic Safety & Licensing Panel Chairman

DR. JERRY R. KLINE,
Atomic Safety & Licensing Panel Board member

DR. PETER S. LAM
Atomic Safety & Licensing Panel Board member

PRESENT FOR THE NRC STAFF:

Sherwin Turk
Catherine Marco

PRESENT FOR THE STATE OF UTAH:

Denise Chancellor
Diane Curran
Fred Nelson
Marvin Resnikoff
Lawrence White
Connie Nakahara

0507

1 PRESENT FOR THE SKULL VALLEY BAND OF GOSHUTE INDIANS:

2 Danny Quintana
3 Scott York

4 PRESENT FOR ONHGO GAUDADEH DEVIA:

5 Jean Belille
6 Robert Halstead

7 PRESENT FOR CASTLE ROCK LAND AND LIVESTOCK, L.C.:

8 Michael Later
9 Bryan Allan

10 PRESENT FOR THE CONFEDERATED TRIBES OF THE GOSHUTE
11 RESERVATION AND DAVID PETE:

12 John Kennedy

13 PRESENT FOR PRIVATE FUEL STORAGE, L.L.C.

14 Jay Silberg
15 Ernest Blake
16 Paul Gaukler

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P R O C E E D I N G S

[9:00 a.m.]

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3 CHAIRMAN BOLLWERK: Good morning everyone. We're
4 here this morning for the third session of our initial pre-
5 hearing conference. I think we made good progress yesterday
6 in getting a good overview of what all these contentions are
7 about. I think the Board got a lot of very useful
8 information yesterday. We appreciate it.

9 We'll press on to day with the environmental
10 contentions and then finish up at some point with the
11 emergency planning contentions.

12 Anyone have anything procedural that they want to
13 bring to the Board's attention before we start?

14 MS. CURRAN: Yes, I would please, Your Honor.
15 Colonel Como has provided 10 copies of a map of the Dugway
16 area.

17 They've taken it from their GIS system, and have
18 developed a detailed map of the various activity of the
19 various areas at Dugway, and they have also provided a list
20 of abbreviations.

21 WE have 10 copies of this, and I'd like to distribute that
22 to everybody if that's acceptable to you.

23 CHAIRMAN BOLLWERK: Certainly. Anybody that wants
24 a copy, as far as I'm concerned, if you have one for them,
25 you're welcome to it among the parties certainly,

1 participants.

2 MS. CHANCELLOR: Okay, I'll do that.

3 CHAIRMAN BOLLWERK: Yo don't have to do it now.

4 If you want to wait till the break to do it --

5 MS. CHANCELLOR: Right.

6 CHAIRMAN BOLLWERK: -- that's probably the best
7 time.

8 MS. CHANCELLOR: That's just fine.

9 CHAIRMAN BOLLWERK: One other matter I just wanted
10 to be clear on. Mr. Later, you'd mentioned yesterday that I
11 guess your contentions 20, 21, 22 and 23, you had an idea
12 about how to group those or about how to present them.

13 MR. LATER: Yes, I'd like to, if the Board agrees,
14 discuss 20, 21 and 22 together, and then deal separately
15 with contention 23.

16 CHAIRMAN BOLLWERK: All right. After we talk with
17 Ms. Belille about OGD J, would you be prepared to do that?
18 is that a good time to do that then?

19 MR. LATER: I would be happy to at any time.

20 CHAIRMAN BOLLWERK: Okay.

21 MS. CURRAN: Judge Bollwerk?

22 CHAIRMAN BOLLWERK: Yes.

23 MS. CURRAN: I'd also like an opportunity to make
24 a correction to an answer that we gave yesterday to a
25 question by Judge Lam.

1 CHAIRMAN BOLLWERK: All right.

2 MS. CURRAN: On further reflection we'd like to
3 amend.

4 CHAIRMAN BOLLWERK: Go ahead, please.

5 MS. CURRAN: Okay. I'm sorry. I don't remember
6 in what context it was, but yesterday you asked a question
7 in relation to a scenario involving spent fuel that was
8 degraded and a leaking canister. And you asked what would
9 be released from the canister into the environment. And the
10 answer that we gave was gases.

11 We reflected on that further, and we would like to
12 clarify that we believe that what would be released into the
13 environment would be everything that is in the gap between
14 the pellets and the cladding, which would include gases but
15 would also include small particulates of radii nuclides such
16 as cesium and iodine and potentially other radii nuclides.

17 DR. LAM: Thank you for the answer. I believe the
18 question was asked by Judge Kline.

19 MS. CURRAN: Oh, it was? I'm sorry.

20 DR. KLINE: Thank you for your answer.

21 MS. CURRAN: Things were going by pretty quickly
22 yesterday.

23 CHAIRMAN BOLLWERK: We're all interchangeable up
24 here.

25 You want to say something, Mr. Blake?

1 MR. BLAKE: Yeah, I also reacted I think in that
2 situation to the question, and I don't want to leave any
3 doubt but what any gases from earlier fuel that had been
4 damaged or was leaking would long since have been gone
5 before this point in its journeys.

6 CHAIRMAN BOLLWERK: All right. Anything further
7 on that point?

8 MS. CURRAN: No.

9 CHAIRMAN BOLLWERK: If not, then let's turn to Ms.
10 Belille and let her talk about OGD contention J which deals
11 with I guess licensing and permits.

12 MS. BELILLE: The staff does not oppose the
13 admission of this contention except insofar as it seeks to
14 incorporate by reference OGD's contention A. OGD at this
15 time would withdraw any portion of the contention which
16 deals with contention A concerning potential accidents.

17 We disagree, however, with staff that the concept
18 of trust responsibility does not create a litigable issue
19 regarding this ISFSI application. Because the NRC has
20 responsibilities under the Trust Doctrine, we argue that the
21 standards that PFS must meet must be by necessity higher
22 than the protection of the general public safety and
23 welfare.

24 This trust responsibility requires more protection
25 for the members of OGD and other tribal members regarding

1 protection of the natural resources of the tribal people.
2 This protection should be reflected in the environmental
3 report.

4 PFS argues that this regulation poses no
5 obligation on the applicant in its environmental report. We
6 would counter that Part 10 C.F.R. 51(c) requires that the
7 draft EIS list all federal permits, licenses, approvals and
8 other entitlements which must be obtained. Part 10 C.F.R.
9 (d) requires an analysis of the impacts of those.

10 We would point out to the Board the language in 54
11 Federal Register which says that any license or permit
12 applicable -- or application subject to NEPA's impact
13 statement requirements must contain a complete ER which is
14 essentially the applicant's proposal for a DEIS.

15 PFS makes two arguments regarding the trust
16 responsibility, and we'd like to just respond briefly to
17 those.

18 The first argument that they make is that the
19 trust responsibility is inapplicable to the NRC because the
20 Atomic Energy Act does not provide for different sets of
21 standard to be used for any special group. I'll address
22 that first.

23 PFS is mistaken in claiming the trust
24 responsibility does not apply to the NRC. The roots of this
25 responsibility come not from statutes but from the unique

1 relationship between the federal government and Indian
2 nations. The case most often cited for this proposition is
3 Seminole Nation v.

4 United States, which is found at 316 U.S. 286. This duty
5 applies to the government as a whole.

6 The United States acting through the Secretary of
7 Interior has charged itself with moral obligations of the
8 highest responsibility and trust. It's conduct as disclosed
9 in the acts of those who represent it in the dealings with
10 Indians should be therefore judged by the most exacting
11 fiduciary standards. That language is found in Pyramid Lake
12 Paiute Tribal Indians v. Morton.

13 And we would like you to note that this duty
14 applies to the United States not as might be suspected to
15 the Bureau of Indian Affairs. The trust responsibility thus
16 applies to all parts of the federal government.

17 Was the EPA requires to proceed in a trustee
18 capacity vis-a-vis the Crow Tribe? It is fairly clear that
19 any federal government action is subject to the United
20 States fiduciary responsibilities toward Indian tribes.
21 That's found in Nats v. Environmental Protection Agency, and
22 it's cite in Seminole Nation.

23 Also, in Navajo Tribe of Indians v. United States,
24 it has been said that since the Department of Interior has
25 an obligation to safeguard the property of the Navajos when

1 they are dealing with third parties, it is clear that an
2 even greater duty exists with the Department itself entered
3 into transactions with the Indians.

4 The second part of the -- the NRC is a sub-unit of
5 the United States Federal Government and thus subject to the
6 constraints of the trust responsibility as is other -- as
7 are other agencies of the federal government.

8 The second part of PFS' argument is that the trust
9 responsibility is attached as it is attached to the land is
10 only available as an argument by the tribe and not
11 individual tribal members.

12 The PFS argument about the applicability of the
13 trust responsibility is also without merit. In *Martin v.*
14 *Ruiz*, the supreme court directed the BIA to behave
15 responsibly in the termination of welfare payments with
16 respect to individual Indians. The trust responsibility was
17 not limited to application -- to the tribe.

18 Further, the cases cited by PFS to support their
19 notion that suits by individual Indians to enforce the trust
20 responsibility have been rejected, are inapplicable to the
21 issue at hand.

22 In both *Tesuque v. Mortin* and *Yazzie v. Morton* the
23 courts are dealing with tribal sovereign immunity. The
24 tribal individuals in question were unable to sue the tribe
25 because the tribe had sovereign immunity from suit, much

1 like the United States. The NRC cannot credibly claim that
2 a tribe's sovereign immunity from suit somehow absolves a
3 federal agency from its obligation to observe the trust
4 responsibility.

5 The trust responsibility applies to all members of
6 an Indian nation. While a contest between rivaling leaders
7 is going on in the New York Indian Nation, the court
8 observed in response to one rival's citing of the trust
9 responsibility, the protection would not apply solely to the
10 plaintiffs but to all New York Oneidas, including the
11 defendant intervenors.

12 In view of the well recognized responsibility of
13 the government to deal fairly with all Indians, the
14 Department's trust responsibility requires that it remain
15 neutral with regard to various Oneida factions. The
16 government must deal fairly with all New York Oneidas, not
17 just the executive committee. The NRC thus owes the trust
18 responsibility to all members of the Goshute, not just the
19 tribal leaders.

20 That's all we have.

21 CHAIRMAN BOLLWERK: All right. Applicant.

22 MR. SILBERG: First of all, I'd like to note that
23 the contention deals with a requirement to list all permits,
24 licenses and approvals required for this facility. The
25 trust issue which OGD has discussed we believe is simply

1 irrelevant to that neutral requirement. There is nothing in
2 the regulations that OGD has cited that would suggest that
3 one must get in to questions of tribal law and relationships
4 between tribes and the United State Government. That is not
5 a permit. That is not an approval. That is not a license.

6 So regardless of whether or not their view of the
7 trust responsibility is correct or whether our view is
8 correct, we believe it's simply irrelevant to any issue
9 which is pending before this Board.

10 I believe I heard OGD state that the NRC
11 regulation in question requires an analysis of the impacts
12 of these permits. I may have misheard, but that's what I
13 wrote down.

14 If that's what I heard I think that is not what the
15 regulation calls for.

16 We obviously have looked at the impacts of the
17 licensing action, but the impact of the permits is something
18 that is not covered by the regulations in question.

19 With respect to the underlying issue, which even
20 though we believe it's irrelevant, the idea that somehow NRC
21 standards are higher for Indian tribes than they are for
22 others in the trust responsibility doctrine, we believe is
23 incorrect. And to the extent it may be correct, it's a
24 challenge to the NRC regulations, because the NRC
25 regulations do not call for different standards depending on

1 which groups of individuals are involved. Those standards
2 embodied in NRC regulations reviewed multiple times and
3 blessed by the courts apply to all individuals, whether
4 they're Native Americans or not.

5 To the extent that the argument is NRC must apply
6 different and higher standards, that is a challenge to the
7 regulations and again not properly before this Board.

8 With respect to the intricacies of the trust
9 doctrine, w believe the cases as we have described in our
10 brief clearly show that the party who is entitled to assert
11 the benefit of a trust responsibility is the tribe. And
12 while that trust responsibility may extend to all members of
13 the tribe, the entity that is entitled to assert that
14 benefit is the tribe itself, rather than the individuals.

15 CHAIRMAN BOLLWERK: Anything further?

16 MR. SILBERG: That's all I have.

17 CHAIRMAN BOLLWERK: Mr. Quintana.

18 MR. QUINTANA: The trust responsibility that
19 exists under federal law towards Indian tribes is certainly
20 not going to be violated by the building of this facility.
21 This facility complies not only with international standards
22 but certainly with all federal standards, and nothing that's
23 been said by OGD would fit within 5170 Part C.

24 The trust responsibility is the responsibility
25 that the Executive Committee also has towards its own

1 members and is something that the Executive Committee has
2 sought at lengths to educate their members in the
3 surrounding communities about. The Executive Committee has
4 produced two films from visiting nuclear facilities in other
5 parts of the world, has produced numerous documentation, has
6 at all times been honest with the members in explaining to
7 them in detail what this facility would entail, and has
8 actually taken members to the Idaho National Engineering
9 Laboratory so that they could visit an actual facility and
10 see for themselves this is what it's all about.

11 So the trust responsibility is not going to be
12 violated, and I believe this contention has no merit. It's
13 an attempt to delay the proceedings, and therefore we would
14 object to it.

15 CHAIRMAN BOLLWERK: Staff?

16 MR. TURK: Our response, Your Honor, we do not
17 challenge the assertion that there's a trust responsibility.
18 We don't concede nor refute the point, because it's not
19 relevant. What has to happen here is this facility would
20 have to satisfy the existing regulations and the statutory
21 requirements to the extent applicable. If the facility
22 satisfies those regulations, then the NRC may proceed to
23 license the facility. And for that reason we do not think
24 that the issue of whether there is or is not a trust
25 responsibility needs to be addressed.

1 In short, even if OGD is correct that there is a
2 trust responsibility, that would not entitle them to any
3 relief in this proceeding, because the sole thing that must
4 happen here is that NRC regulations must be satisfied.

5 CHAIRMAN BOLLWERK: All right. Ms. Belille.

6 MS. BELILLE: The only thing that I would add is
7 that I believe that the trust responsibility adds a higher
8 standard that the NRC must meet in its obligations to the
9 tribal people. Thank you.

10 CHAIRMAN BOLLWERK: All right. Why don't we then
11 turn to, excuse me, Castle Rock contentions 20, 21, 22 and
12 23.

13 These deal generally with questions about land use, access
14 and related matters. So we'll see what you have to say, Mr.
15 Later.

16 MR. LATER: Thank you, Your Honor. I will
17 continue our practice from yesterday. I will not repeat
18 arguments that are appropriately set forth in the written
19 materials.

20 CHAIRMAN BOLLWERK: I appreciate that. I didn't
21 say that this morning, but obviously I'd appreciate it if
22 everyone would continue to do that.

23 MR. LATER: And I hope I will set a good example
24 by being very brief.

25 Let me deal first with contention 20 which is our

1 objection to the analysis set forth on the selection of road
2 or rail access. We have contended that the applicant
3 inappropriately fails to provide an explanation of the
4 choice between a road or rail access.

5 In contention 21 we claim that the applicant has
6 failed to identify the location of the proposed rail spur,
7 as the applicant is required to do.

8 And in contention 22 we contend that the applicant
9 has failed to identify authorizations that will be required
10 for the transportation corridor along the way.

11 These are issues that are obviously extremely
12 important to the Castle Rock petitioners. The choice of the
13 transportation mode and transportation location will
14 inevitably affect their operations. It may affect their
15 facilities, which as this panel has seen are for the most
16 part located immediately adjacent to the roadway that is
17 located there.

18 So it's quite important to my clients that the
19 applicant provide the required information and analysis on
20 the selection of the transportation corridor, why that
21 selection is made, the evaluation of alternatives and the
22 evaluation of impacts resulting from that. Because these
23 are all factors that will immediately and probably primarily
24 affect my clients.

25 The one portion of these three contentions which I

1 believe the staff has objected to is our contention that one
2 of the authorizations that the applicant has failed to
3 describe and discuss is authorization to utilize Castle Rock
4 land which we believe will be required in any expansion of a
5 transportation corridor along the Skull Valley Road. We've
6 made that claim. We have -- it's our understanding that the
7 right-of-way along that road is quite narrow. It does not
8 allow for expansion, and any expansion would have to be
9 accomplished along Castle Rock land.

10 The staff has objected that we haven't provided
11 sufficient detail or data on that. I think we have for
12 purposes of pleadings stating our understanding that we own
13 the land alongside that really very narrow right-of-way.

14 As I thought over that objection last night, my
15 first thought was that perhaps this is an issue that maybe
16 something like an issue we discussed yesterday. It may not
17 require litigation between the parties. If we're right and
18 we own the land, the applicant may be in a world of hurt as
19 far as transportation corridors go because they'll have a
20 problem to deal with. If they're right it won't matter.

21 But I think on further reflection it is probably a
22 significant issue, because I think the issues regarding
23 authorization and selection of corridor are problems the
24 applicant will encounter, are all potential issues that go
25 to the scheduling of this facility, its ability to be in

1 operation within the time frame that the applicant has
2 proposed. And that issue may well affect the costs of the
3 facility.

4 It potentially affects the cost benefit analysis.
5 The applicant claims the need to get this facility up
6 because of concerns with storage fuel in its member
7 facilities. If it's not on line on the schedule that they
8 propose that may affect the ultimate utility of this
9 facility and the significance of alternatives to it.

10 For that reason I think probably this panel needs
11 to look closely at issues of the transportation corridor,
12 and access, and the applicant's ability to actually secure
13 the kind of access that it needs. Because with respect to
14 all of those issues it's very clear that the applicant will
15 need to deal with governmental authorities aside from the
16 Goshute Band. It will need to deal with my clients I
17 believe, as well as the State of Utah. Thank you.

18 CHAIRMAN BOLLWERK: All right. Applicant.

19 MR. BLAKE: With all due respect to the
20 observation that he wouldn't repeat anything, I frankly
21 didn't hear anything new, and we'd stand on our written
22 responses.

23 CHAIRMAN BOLLWERK: All right, sir. Mr. Quintana.

24 MR. QUINTANA: No response.

25 CHAIRMAN BOLLWERK: Staff?

1 MR. TURK: We'll rest on our pleadings as well,
2 Your Honor. We do not oppose two of these contentions, 20
3 and 21. With respect to 22, the one objection we had is we
4 could see nothing in the presentation by Castle Rock which
5 would indicate a reason to think that the existing right-of-
6 way would be insufficient for transport along the Skull
7 Valley Road. There is nothing in the contention and nothing
8 that Mr. --

9 MR. LATER: Later.

10 MR. TURK: -- Later -- I was thinking Labor and I
11 knew that wasn't right.

12 Nothing Mr. Later has said today contributes more
13 information along that line. And Mr. Later's statement that
14 he believes enough has been presented to satisfy the
15 pleading requirements is incorrect, because in order to
16 state an admissible contention there must be some showing of
17 a reason to believe that there is a genuine dispute, and
18 that has not been shown.

19 CHAIRMAN BOLLWERK: All right, sir. Mr. Later.

20 MR. LATER: We'll rest on what we said, Your
21 Honor.

22 CHAIRMAN BOLLWERK: All right. I have a
23 recollection yesterday that you mentioned to me that you
24 thought might best go down with cumulative other impacts.
25 Is that -- or do you want to talk about it now?

1 MR. LATER: I believe it was 17 we thought might

2 --

3 CHAIRMAN BOLLWERK: Was it 17? Okay.

4 MR. LATER: -- go with cumulative and other
5 impacts.

6 CHAIRMAN BOLLWERK: I got the wrong one?

7 MR. LATER: I'm happy to deal with contention 23
8 now which is questions of existing land use. I'm not sure
9 it fits in this category, but --

10 CHAIRMAN BOLLWERK: If you have a better one, I'm
11 glad to put it wherever you'd like it.

12 MR. LATER: I'm not sure that there is a better
13 one.

14 CHAIRMAN BOLLWERK: Okay, then let's do it.

15 MR. LATER: In contention 23 we have claimed that
16 the application does not provide the required evaluation of
17 regional impacts. The staff in its objections to this
18 contention simply said that the notion of required
19 evaluation of regional impacts doesn't require a detailed
20 property. The property evaluation doesn't require the level
21 of analysis that we have contended the applicant needs to
22 come forward with.

23 I think that in our presentation of this
24 contention we've identified a series of what we believe to
25 be important admissions. Primarily what the applicant has

1 carved out and ignored are the set of impacts that will be
2 imposed on the Castle Rock petitioners as a result of this
3 facility.

4 Walking through those the past two days in terms of
5 potential groundwater impact, the impact of the
6 transportation corridor, the impact on potential development
7 and use of this property, the ability of Castle Rock to
8 successfully continue, expand and develop their ranching and
9 agricultural activities in the presence of this facility.

10 These are all impacts immediately in the facility
11 that we think fairly fall within the language of the
12 requirement that the applicant evaluate those regional
13 impacts. They're things that should be in the application.
14 They're not there. And they are obviously things that are
15 highly important to my clients that the applicant be
16 required to provide a clear, complete and accurate analysis
17 of just what that impact is going to be particularly on my
18 clients.

19 Thank you.

20 CHAIRMAN BOLLWERK: All right.

21 MR. BLAKE: I'm really in the same position on
22 this one that I was on the last one. I didn't hear anything
23 new that I need to respond to. He's emphasized points that
24 he's previously made in his written pleadings, and I don't
25 feel the need to emphasize ours.

1 CHAIRMAN BOLLWERK: All right, thank you, Mr.
2 Blake.

3 Mr. Quintana.

4 MR. QUINTANA: The literature that is available
5 out there indicates clearly that when a nuclear facility is
6 built within NRC standards, the value of the surrounding
7 real estate increases, not decreases, and the value of your
8 clients' property would probably increase as a result of
9 this facility being built.

10 CHAIRMAN BOLLWERK: Staff?

11 MR. TURK: We really have nothing more to add to
12 our written response, Your Honor.

13 CHAIRMAN BOLLWERK: All right. Mr. Later.

14 MR. LATER: We have submitted as part of our reply
15 here I'd like to note several letters from our clients that
16 I think would directly address the issue of impact of this
17 facility on the valuation of the land, use of the land, and
18 the adverse impacts on their operations. So the panel does
19 have that in the record before them.

20 CHAIRMAN BOLLWERK: All right.

21 MR. LATER: Thank you.

22 CHAIRMAN BOLLWERK: Thank you, sir.

23 All right. Let's then move next to State
24 contention U, subsequent impacts of on-site storage not
25 being considered.

1 This looked to be a stand alone to me unless someone sees
2 something else that relates to it that we haven't discussed
3 yet.

4 MS. CURRAN: Contention U has four bases that I'd
5 like to address.

6 The first basis is in regard to failure to
7 consider the impacts of over-heating casks due to the
8 facility's inadequate thermal design. In response to this
9 the applicant points to an analysis of over heating that was
10 done in the environmental report. Our concern here is that
11 that analysis is not adequate to address this issue, because
12 it only deals with the over heating of a single cask.

13 And the theory of contention H is that one of the
14 inadequacies of the applicant's thermal analysis is that it
15 doesn't consider the interaction of the many casks that will
16 be on site with each other and with the concrete pad on
17 which they will be stored. So this remains a valid and
18 viable concern that has not been addressed by the applicant.

19 The second basis for the contention relies on the
20 factual material in contention J which relates to the
21 inspection and maintenance of safety components, which is
22 adopted and incorporated by reference into this contention.
23 We will just stand on that basis that this is a reasonably
24 foreseeable and credible event that should be dealt with in
25 the environmental report.

1 With respect to the third basis relating to the
2 blockage of the cooling vents on the storage casks, again
3 PFS and the staff refer us to an analysis done in the
4 applicant's material of the over heating of the cask for
5 four- or five-day period due to blockage of the vents.

6 We have two concerns about this. First, as I
7 previously stated with respect to basis one, this analysis
8 only considers the over heating of a single cask in
9 isolation and doesn't consider the effects of many casks
10 upon each other, the interrelationship between the storage
11 pad and also the ambient temperatures, as they all relate
12 together.

13 Second, we're concerned that the applicant's
14 analysis was for a period of four or five days. We have
15 heard in this pre-hearing conference about a chemical
16 release from the Dugway site which killed 6,000 sheet I
17 believe it was by nerve gas. It's a legitimate concern that
18 if there is some event at Dugway which causes contamination
19 of the casks that are on the PFS site it may take more than
20 four or five days to remove that contamination.

21 I'd just like to add if the heat of these casks
22 becomes too high as a result of the interaction of the casks
23 and the pad, this could lead to degradation of the concrete
24 which in turn could lead to higher gamma doses potentially
25 in excess of health standards.

1 Also, if the interior of the cask gets too hot the
2 cladding can burst causing gross cladding defects which
3 would also degrade the radiation barrier to the environment.

4 With respect to the last basis which concerns
5 sabotage, the State has referred to that basis to be
6 material about sabotage that is contention D. These two
7 contentions are very much related. An environmental impact
8 statement doesn't make artificial distinctions between
9 storage and transportation but looks at the overall risks.

10 The applicant cites the Limeric decision,
11 Commission's Limeric decision, for the proposition that
12 sabotage is outside the scope of this hearing. It's quite
13 clear that under NEPA that one cannot merely rely on a past
14 decision or regulation or a generic environmental impact
15 statement to say this NEPA issue is beyond the scope of this
16 review.

17 NEPA is an action forcing statute. With each new major
18 federal action that the federal government undertakes, it's
19 required to take a hard look at the environmental impacts of
20 that action. That's well established in the case law.

21 Now, certainly the Commission is entitled to make
22 determinations that are binding on future cases, but it also
23 has to leave a way for new information and changed
24 circumstances to be evaluated. Otherwise NEPA becomes a
25 fossil which is what has been attempted here by the

1 applicant with respect to these NEPA issues relating to on-
2 site storage and transportation.

3 In this case we have shown that there is new
4 information, there are new circumstances that warrant the
5 reexamination of the issue of sabotage. They include the
6 incidents of major terrorist attacks in the last several
7 years. They include the development of new weapons that are
8 easily accessible, easily transportable and much more
9 powerful than weapons that were evaluated in the past by the
10 writers of Table S4 and various environmental studies of on-
11 site storage and transportation of nuclear waste.

12 I'd like to go through the various rationales in
13 the Limeric decision and discuss why they are no longer
14 applicable to the circumstances that we have here. In
15 Limeric the Commission said that at that time it was unable
16 to quantify the risk associated with sabotage. But we have
17 provided evidence that there is a reasonably foreseeable
18 risk of sabotage that whether it is quantifiable or not, it
19 is certainly qualitatively subject to evaluation.

20 And this is not -- although the Commission
21 regulations do require that quantification be done if it's
22 possible, that if quantification is not possible, if a
23 qualitative evaluation is possible it must be done. And
24 this does not absolve the Commission of the responsibility
25 to look at this if there is a way to evaluate the risk. And

1 we submit that we have presented evidence showing that it
2 is.

3 It's particularly important in this particular
4 case to bear in mind that there is an issue here as to
5 whether the intermodal transfer station at Rowley Junction
6 constitutes part of the storage facility that should be
7 subject to protection.

8 In fact whether or not it's considered a storage
9 or a transportation facility, that particular facility I
10 submit the Board can take official notice is vulnerable to
11 sabotage. It's within a stone's throw of an interstate
12 highway. There's absolutely no room for even a buffer zone
13 between the railroad tracks and Interstate 80. This is
14 something that is certainly capable of some kind of analysis
15 as to the level of risk posed by the proximity of that site
16 to the interstate highway.

17 CHAIRMAN BOLLWERK: Are there places along the
18 interstate highway where the train tracks come close to the
19 highway? I mean what's the difference between Rowley
20 Junction and any place else along the highway with railroad
21 tracks?

22 MS. CURRAN: Well, that's certainly an important
23 issue.

24 And we have put this into two different contentions, one
25 dealing with storage and one dealing with transportation.

1 We submit that the fact that the railroad tracks go along
2 the interstate highway anywhere is something that should be
3 subject to a NEPA analysis of the risk of sabotage caused by
4 that.

5 But also in this particular instance there is a
6 condition where a number of cars are likely to be sitting on
7 the side for periods of time which renders them even more
8 vulnerable than a railroad car is when it's traveling at
9 some speed along the tracks. So I think the distinction is
10 it's a significantly increases risk but it's certainly on a
11 spectrum of risk that needs to be examined.

12 In Limeric the Commission also held that the
13 intervenor had not shown how it could make a difference to
14 consider sabotage with relation to other severe accidents.
15 Well, here it's very clear that it's important for purposes
16 of analyzing mitigative measures and alternatives, which is
17 one of the key purposes of NEPA, to look at what are the
18 risks of someone being able to accomplish a sabotage
19 terrorist act as the PFS facility or at the Rowley transfer
20 station, and to take measures in order to mitigate or avoid
21 those kinds of risks.

22 So certainly there's great value in looking at the
23 risks of sabotage here, and it's peculiar to the nature of
24 the terrorist act.

25 Limeric also held that the security plans for the

1 facility, the Limeric facility were adequate to address the
2 problem of sabotage. However, Limeric was appealed to the
3 Third Circuit, and in that case the Third Circuit Court of
4 Appeals made it quite clear that merely by complying with
5 NRC safety requirements, the NRC doesn't end the NEPA
6 discussion. NEPA is a separate statute that requires its
7 own examination of the risks of particular accidents and
8 methods to avoid or mitigate them.

9 So we would submit that the fact that there are
10 security plan regulations that govern this particular site
11 does not absolve the applicant or the agency from reviewing
12 the risks of sabotage and evaluating alternatives and
13 mitigative measures.

14 DR. LAM: Ms. Curran.

15 MS. CURRAN: Yes.

16 DR. LAM: Would you be able to give us a reference
17 as to where in NEPA a requiremental consideration of
18 sabotage risk? Is there a citation somewhere? Is there a
19 reference?

20 MS. CURRAN: Well, the word "sabotage" doesn't
21 appear in NEPA, but NEPA requires the consideration of
22 significant impacts on the human environment. And that has
23 been interpreted by the courts to mean reasonably
24 foreseeable impacts that could have a significant effect on
25 the human environment.

1 And the issue with respect to sabotage up until
2 now has been whether these impacts are reasonably
3 foreseeable. I don't think there's even been any dispute
4 that if a sabotage action were successful, the consequences
5 could be very severe.

6 DR. LAM: So it is your reading of the statute
7 that sabotage and terrorist risks are part of the
8 requirement.

9 That's your reading.

10 MS. CURRAN: Well, it's my reading that because
11 sabotage and terrorist acts are reasonably foreseeable
12 impacts with significant potential consequences to the human
13 environment, therefore under the statute they must be
14 considered.

15 DR. LAM: Thank you.

16 CHAIRMAN BOLLWERK: Anything else?

17 MS. CURRAN: No.

18 CHAIRMAN BOLLWERK: Applicant, Mr. Blake.

19 MR. BLAKE: This in some ways is deja vu or a
20 second bite of the apple. These contentions, a couple of
21 them now in the environmental area, discuss rather precisely
22 and references back to contentions that we took up on the
23 safety side. So, you know, we argued some of these things,
24 and whether or not they're right, whether or not they're
25 wrong, whether or not it ought to be a contention sort of --

1 CHAIRMAN BOLLWERK: Drafting any safety contention
2 can often be made environmental.

3 MR. BLAKE: Well, and that's what's happened here.
4 So in some ways the argument is essentially a second bite of
5 the apple in the State's arguments here where they try to
6 improve the arguments that were made yesterday.

7 Let me say one thing with respect to the thermal
8 design. This was covered at length in contention H in the
9 arguments yesterday. But I believe I said yesterday -- if I
10 didn't I will say so now. Take my second bite at the apple.
11 Holtec did consider, and it's described in their technical
12 SAR, they did do a nine-array multiple-cask thermal
13 analysis, and the State's had a copy of that for some time.
14 I think the specific cite is T-STAR 4.1-1.

15 With respect to Dugway and the events there, if we
16 learned anything from the tour on Monday with regard to
17 Dugway and the potential threats from Dugway, it is less now
18 than it was when the tragic event occurred that had been
19 reported and referred to a number of times in 1968.

20 But even whether it's more or whether it's less,
21 the way all of the State's arguments run is if. If there's
22 this and if there's that. And our argument continues to be
23 you've got to show a basis. You can't just postulate. You
24 can't just speculate. You can't just imagine, and then say,
25 "Now, you ought to cope with what could be the

1 consequences." I continue to believe it's speculative.

2 That's even more important in this setting. If
3 NEPA requires anything, it requires a realistic assessment
4 to go along with an agency's decision making, not
5 speculation, not unrealistic attempts that you must run
6 down. And all the law is replete with that. That's the
7 basis really for the Limeric decision. That's why it's been
8 good law since 1985 and continues to be and should be
9 applied in this case.

10 As to the references to transportation, that topic
11 I think is more appropriately covered in the next contention
12 of the State, and I'm sure it will be the subject of some
13 arguments there.

14 With respect to the references to the intermodal
15 facility, I note at the outset that the State's contention U
16 regards impacts during storage of spent fuel on the ISFSI
17 site. I don't know why we're talking at this point about
18 intermodal facility. But the other points that have been
19 made now a number of times about the intermodal facility
20 would all apply equally to the arguments here.

21 I have no other comments.

22 CHAIRMAN BOLLWERK: All right. Mr. Quintana.

23 MR. QUINTANA: The State of Utah is trying to
24 require this facility to be built to withstand a direct hit
25 from an F-16 fighter plane, a cruise missile, possibly a

1 meteorite, and now of course they want it built to withstand
2 all human acts of terrorism known to man.

3 Under this standard there isn't a facility on each
4 which could be built, possibly with the exception of
5 Cheyenne Mountain which is built to withstand a near hit
6 from a hydrogen bomb. But that is not the law.

7 Mere speculation alone and assertions without
8 scientific evidence are not enough, and is certainly not
9 required by NEPA or by NRC rules.

10 Furthermore, let's assume that there's a
11 worst-case scenario and there was an act of terrorism. This
12 facility is unlike a chemical storage weapons facility.
13 It's unlike a nerve gas facility. If the fuel is somehow
14 through a major explosive one of these casks was ruptured, I
15 think it's within the capability of humans to get geiger
16 counters, find every one of the spent fuel pellets, pick
17 them up and put them in a new container and repackage them.

18 CHAIRMAN BOLLWERK: Anything else, sir?

19 MR. QUINTANA: No.

20 CHAIRMAN BOLLWERK: Just as a matter of -- I don't
21 think we've heard anything about meteorites, have we?

22 MS. CHANCELLOR: Only from Mr. Quintana.

23 CHAIRMAN BOLLWERK: Okay, I just wanted to make
24 sure I wasn't missing something.

25 All right. Staff, please.

1 MR. TURK: Your Honor, this essentially is a
2 bridge contention. There are four bases laid out in the
3 contention. Three of them simply incorporate by reference
4 other contentions. The only basis that sets out something
5 that does not depend upon another contention is item 3 which
6 talks about the risk posed by potential blockage of cooling
7 vents. We responded to that in our filing and we'll rest on
8 that.

9 With respect to the risk of sabotage, I think it's
10 best to address that when we address the next contention,
11 State V, which gets into that in more detail.

12 DR. LAM: Mr. Turk, I'd like to hear your view.
13 Does NEPA require consideration of sabotage risk?

14 MR. TURK: NEPA considers the -- requires the NRC
15 to consider potential impacts of reasonably foreseeable
16 consequences of licensing. If sabotage is a reasonably
17 foreseeable impact, then the NRC would be required to
18 consider it in its EIS. The NRC has determined generically
19 that the risk of sabotage does not present a reasonably
20 foreseeable or a credible risk which needs to be considered.

21 And as we'll discuss in our comments on contention
22 V, this appears in nureg 0170 which is a generic study of
23 transportation impacts. It appears implicitly as well in --
24 in fact explicitly in other generic statements, such as I
25 believe the license renewal generic impact statement.f

1 DR. LAM: So this opinion is primarily based on
2 51.45(c) in which it is expressed. Am I right?

3 MR. TURK: I'd have to look at the regulation. Is
4 that the one that states the scope of NEPA? It's an
5 established NEPA doctrine that you look at reasonably
6 foreseeable impacts.

7 DR. LAM: My reading of 51.45(c) basically says
8 what you are saying.

9 MR. TURK: Yes. I don't believe -- I'm looking to
10 see the words "reasonably foreseeable." I don't know if
11 that appears in the regulation or in the case law.

12 DR. LAM: Well, they talk about "to the extent
13 practicable." I guess that's perhaps --

14 MR. TURK: That may be another way of stating it.
15 The case law, the federal case law establishes that you look
16 at the reasonably foreseeable impacts of the federal action.

17 DR. KLINE: Mr. Turk, is my understanding correct
18 that if we were to review the security plan it would
19 disclose some form of design-basis threat to this facility,
20 or a defense against some sort of design-basis threat?

21 MR. TURK: You will not see in the security plan
22 or in the requirements for security plans any specific
23 design basis, except I believe the proposed rule which is up
24 for comment. It was published back in 1995. It did include
25 some design consideration.

1 DR. KLINE: Okay.

2 MR. QUINTANA: Your Honor?

3 CHAIRMAN BOLLWERK: Yes, sir.

4 MR. QUINTANA: It's important to note that the
5 reservation itself is off limits to the public and is not an
6 area where the general public frequents without permission
7 from the tribe itself. So and it's in an isolated area.
8 It's far enough removed from major population centers. That
9 there's going to be certainly on the reservation itself, not
10 necessarily at the intermodal transfer facility, but at the
11 reservation itself there would be plenty of advance notice
12 of any persons coming near it.

13 CHAIRMAN BOLLWERK: All right, sir.

14 MR. TURK: Incidentally, when I referred to the
15 proposed rule, I'm not sure if I'm referring to what is out
16 for comment or what I've seen in the mark up of the proposed
17 rule after comments are received. But the design
18 consideration that would appear there when the final rule is
19 published, it's my understanding that's not a design of the
20 facility itself but rather one aspect of the security
21 features for the facility.

22 MR. SILBERG: Excuse me. Was the question the
23 design basis as set forth in regulations or design of the
24 facility?

25 DR. KLINE: Well, I'm just trying to inquire if

1 there is a design basis threat that appears anywhere. That
2 is, whether a -- I know I asked in the security plan, but
3 what I had in mind is that there is just in the regulations
4 at least for reactors a design-basis threat, is there not?

5 MR. TURK: Part 73.

6 DR. KLINE: Yeah, right.

7 MR. TURK: It defines it for all facilities.

8 DR. KLINE: And what this is leading to is a
9 question of why the State could not ask for an environmental
10 assessment of that to the extent that it exists.

11 MR. TURK: I think there may be a little confusion
12 in terms of Part 73.

13 DR. KLINE: Okay.

14 MR. TURK: It's the staff's position, as you'll
15 see in our response to the security plan contentions, that
16 what applies is 73.37. It is a different set of security
17 requirements that applies for reactors.

18 DR. KLINE: Yeah, okay.

19 MR. TURK: There is in Part 72 a set of design
20 criteria with respect to structures which are important to
21 safety.

22 It's my understanding that that is not a radiological
23 sabotage standard but rather a structural standard, such
24 that the facility would be able to withstand various events
25 not specifically those which involve sabotage. It's my

1 understanding that there is not a sabotage design basis for
2 an ISFSI.

3 DR. KLINE: Okay, that's what I'm trying to
4 ascertain.

5 CHAIRMAN BOLLWERK: Anyone want to say anything
6 further on this point?

7 DR. KLINE: Well, let me clarify with Ms. Curran
8 then.
9 Are you asking us to consider essentially a sabotage event
10 de novo, something that's not defined in the regulations or
11 that go beyond the regulations?

12 MS. CURRAN: I'm not sure I can answer that. What
13 we want, because we would need to compare the regulations to
14 the accidents that are discussed in the basis of our
15 contention, and evaluate whether those accidents are the
16 same or one goes beyond the other.

17 But the point here is that this environmental
18 report says nothing about sabotage. And what we think needs
19 to be done is the applicant needs to assess what are the
20 reasonably foreseeable risks here and evaluate them. And if
21 they include the design-basis events, that seems pretty self
22 evidence that's where you start, but it may go beyond that
23 if other things are also reasonably foreseeable.

24 DR. KLINE: Doesn't it create new problems if it
25 goes beyond?

1 MS. CURRAN: Does it create new problems?

2 DR. KLINE: I mean as to admissibility or as to
3 challenge to regulations. I mean to admissibility of the
4 contention, wouldn't it create a new problem?

5 MS. CURRAN: No, no, because NEPA requires
6 consideration of reasonable foreseeable risks, even risks
7 that are relatively small, if they're foreseeable. And
8 sometimes those relatively small probability events are
9 considered to be outside the scope of NRC's safety
10 regulations but they're still recognized by NEPA. I'm not
11 helping you. I can tell.

12 MR. SILBERG: Excuse me.

13 DR. KLINE: We have to come up -- I mean if this
14 contention were to be admitted, and it's restricted to what
15 environmental consequences might flow from sabotage, as
16 opposed to all the others, but just what environmental
17 consequences flow from it, we have to have some kind of a
18 scenario to analyze. And the question is: Does the
19 scenario go beyond what's in the regulations? Could we
20 consider such a scenario, or are you restricting it just to
21 whatever scenario exists in the regulations?

22 MS. CURRAN: Well, I think you have to remember
23 that NEPA is its own statute, and NEPA imposes requirements
24 on the agency that -- you know, NRC takes a while to do
25 ruling making and comes up with a rule, and then that stays

1 in effect for a while until they catch up with the next one.
2 But NEPA requires the agency to look at things that may not
3 have been considered in the rule that the agency hasn't
4 caught up with yet. Just because the agency has a rule
5 about something doesn't mean the agency is exempt from
6 looking at some credible accident that is not addressed in
7 the rule.

8 DR. KLINE: We'll let somebody else chime in at
9 this point.

10 MR. SILBERG: Excuse me. If I could just clarify
11 the record. I think the staff was saying that there is in
12 the current rule no design-basis threat for an ISFSI. And I
13 think if you will read 73.1 you'll find that the design-
14 basis threat is specifically stated for all facilities, that
15 there are certain exceptions in that design-basis threat for
16 Part 72 facilities. But the design-basis threat is one that
17 is laid out and current in NRC regulations. Maybe subject
18 to change of the rule, but it does exist today.

19 MS. CURRAN: Judge Kline --

20 DR. KLINE: Is it reasonable then, could the Board
21 entertain a demand to analyze environmental impacts that
22 might specifically flow from that design-basis threat I mean
23 if it were to come to pass?

24 MR. SILBERG: Yeah, I think you have to come back,
25 as Mr. Blake said, to the underlying premise of NEPA, that

1 you do not address which are remote and speculative. This
2 Commission has determined that the consequences of a
3 sabotage event need not be considered for a variety of
4 reasons. One is that they are remote and speculative.

5 We have no evidence that there is such an event
6 that has occurred, and we certainly design against it, but
7 that doesn't mean that you have to evaluate the consequences
8 of something that has never happened, and the NRC has made a
9 decision that it's not likely to happen.

10 DR. KLINE: I take it that you would not agree
11 that the fact that it appears in the regulations at all is
12 an answer to the question of whether it's so remote and
13 speculative that it need not be considered.

14 MR. SILBERG: That's correct.

15 CHAIRMAN BOLLWERK: Anything further from Ms.
16 Curran in terms of your reply on the --

17 MS. CURRAN: Yes. Also in answer to your
18 question, I want to clarify that looking at the design basis
19 in 73.1, some of the accident scenarios that we have
20 described here do clearly go beyond that. For instance,
21 under 73.1(a)(1), sub C, they discuss suitable weapons up to
22 and including hand-held automatic weapons equipped with
23 silencers and having effective long-range accuracy.

24 And in our contention we discuss hand-held weapons
25 but much more powerful hand-held weapons that are now

1 available, including for instance, a modern shoulder-fired
2 anti-tank weapon. That's something that's not contemplated
3 in these regulations, but which we've provided a basis for
4 showing that this is something reasonably foreseeable that
5 should be considered.

6 MR. TURK: I'm becoming more confused than I was
7 when I spoke, and I was a little confused then.

8 CHAIRMAN BOLLWERK: I'm glad you said that.

9 MR. TURK: We're talking about different types of
10 design basis. On the one hand, what I believe Ms. Curran is
11 referring to is her belief that the design basis for the
12 cask must be able to withstand certain types of armed
13 attack.

14 What I'm talking about when we talked about Part
15 73 was the physical protection plan, not the cask structure.
16 The criteria for construction of the casks are set out in
17 Part 72, and those are generic standards.

18 What Ms. Curran is talking about now goes to what
19 -- I think what she's asserting is that casks have to be
20 hardened or be able to withstand certain events, and that is
21 not in the NRC's regulations. It's beyond what is in Part
22 72.

23 DR. KLINE: Well, let's try to clarify that then.
24 Because, for example, what would be wrong with simply
25 postulating a design-basis event, and then asking what are

1 the environmental consequences that flow from that. I mean
2 this is not the safety side question. It's the
3 environmental side question. Which I think in previous
4 environmental impact statements the NRC has in effect
5 postulated certain accidents and then analyzed what the
6 environmental impacts would be.

7 So the issue really is can she bring up
8 environmental impacts that would flow from any kind of
9 design-basis event, not to litigate the design-basis event
10 itself but only the environmental impacts that come from it.
11 Is that somehow prohibited?

12 MR. TURK: If something is a design-basis event,
13 then by definition it is within the bounds of events which
14 must be protected against, i.e., they're not so remote and
15 speculative that you would exclude them from consideration.

16 DR. KLINE: That was my point exactly. If it
17 appears in the regulation that one can hardly call it remote
18 and speculative, can you? I mean somebody thought it was
19 important to put in the regulation.

20 MR. TURK: But which regulation? If we're talking
21 about Part 72 I would agree.

22 DR. KLINE: Yeah, okay.

23 MR. BLAKE: Our only reservation about or
24 limitation about it would be you've got to continue to apply
25 the basic philosophy --

1 DR. KLINE: Yeah, I understand that.

2 MR. BLAKE: -- of NEPA with regard to whether or
3 not there's been an adequate basis and justification given
4 which would lead you to say, "This is a reasonable kind of
5 thing that we ought to take into account, and spend time
6 considering." DR. KLINE: Well, that's what I'm trying to
7 explore, whether the scenario goes beyond what appears in
8 the regulations versus a scenario that does appear in the
9 regulations.

10 MR. BLAKE: And I was going to give you an answer
11 to that from what I've heard, but Ms. Curran did.

12 DR. KLINE: Okay, yeah.

13 MR. BLAKE: And a good answer I think.

14 DR. KLINE: Okay, that's enough.

15 MR. TURK: If we come back to the matter of
16 transportation, which I believe is the specific contention
17 that would come before you in V which is incorporated by
18 reference in U, the question of radiological sabotage
19 affecting the transportation. The transportation of spent
20 fuel has been considered generically already, and that is in
21 0170; it's in other materials that we've referred to in our
22 response to that contention.

23 CHAIRMAN BOLLWERK: All right.

24 DR. KLINE: I've said enough.

25 CHAIRMAN BOLLWERK: All right, Ms. Curran.

1 MS. CURRAN: I do have a few more comments.

2 CHAIRMAN BOLLWERK: Okay.

3 MS. CURRAN: I just want to clarify our position
4 that just because an accident scenario is beyond the design
5 basis, it does not mean automatically that it's remote and
6 speculative. And it's our position that we have described
7 scenarios that are reasonably foreseeable and that should be
8 evaluated.

9 I want to respond to something that I heard Mr.
10 Blake say about the thermal design issue. And please
11 correct me if I'm wrong. I thought Mr. Blake said that
12 Holtec did consider a 9-array multiple-cask thermal analysis
13 and referred to page 4.1-1 of the SAR. We've looked at that
14 page of the SAR. We do not see a reference to more than one
15 cask on the SAR there. And even if there were nine casks,
16 we're talking about 4,000. So that still does not satisfy
17 our concern.

18 He also argued that we -- our concerns are based
19 on speculation and postulation. We don't give any factual
20 basis. I think that's contradicted by the very thorough
21 factual basis that we give for our concerns.

22 Finally, with respect to Nureg 170, and I know
23 we'll probably get back to this again in contention V. It's
24 important to bear in mind that Nureg 170 was written over 20
25 years ago. It's 20 years old now. And a great deal has

1 happened since 1977. And so to say that based on Nureg 170
2 the issue is closed is really, we think on its face,
3 something that should be examined. Okay.

4 CHAIRMAN BOLLWERK: That's it? Anything further?

5 MS. CURRAN: Yes.

6 CHAIRMAN BOLLWERK: Nothing here?

7 Nothing? All right.

8 DR. LAM: I have one question of Ms. Curran.

9 CHAIRMAN BOLLWERK: Oh, all right.

10 DR. LAM: Ms. Curran, I'd like to hear your
11 response to Mr. Blake's comment about this is a second bite
12 at the apple. Now I -- my understanding of his comment is
13 that he's thinking that the State of Utah -- Mr. Blake,
14 correct me if I'm wrong. He's thinking about the State of
15 Utah is litigating the same issue under the Commission's
16 regulation and under NEPA. I'd like to hear your response
17 to that.

18 MS. CURRAN: Well, it's true.

19 [Laughter]

20 MS. CURRAN: I'm not denying it.

21 CHAIRMAN BOLLWERK: Right.

22 MR. BLAKE: Okay. Thanks.

23 CHAIRMAN BOLLWERK: And there's --

24 MR. BLAKE: But I'm not as good as Mr. Silberg.

25 MS. CURRAN: It's the same facts, different legal

1 standard.

2 DR. KLINE: Yeah.

3 MS. CURRAN: And I think it's perfectly
4 appropriate to do it that way.

5 DR. LAM: Thank you.

6 MS. CURRAN: So we may have two bites, but the law
7 entitles us to the bites.

8 CHAIRMAN BOLLWERK: You weren't suggesting it was
9 inappropriate; you were simply saying it was the same
10 argument again?

11 MR. BLAKE: We'd never suggest that Ms. Curran was
12 inappropriate.

13 MR. QUINTANA: Your Honor, I say this only in
14 jest, but given the governor's statement of over my dead
15 body, we'll watch him closely.

16 CHAIRMAN BOLLWERK: All right. Anything further
17 on this?

18 Ms. Curran, you're finished? Anything else from
19 the applicant?

20 No. All right. Contention V then, which we've
21 already had some reference to.

22 MS. CURRAN: May I ask for a five minute break
23 before we get to V. It's a little after 10 and I think this
24 is going to take a while.

25 CHAIRMAN BOLLWERK: All right. Why don't we take

1 -- let's be, well, reasonable. We'll take 10 minutes.

2 How's that?

3 MS. CURRAN: Thank you.

4 CHAIRMAN BOLLWERK: But then we'll try to press on
5 till lunch.

6 [Recess.]

7 CHAIRMAN BOLLWERK: Why don't we go back on the
8 record.

9 Before we get started again, I'd like the record
10 to note that we've been given the map that Ms. Chancellor
11 mentioned. And we're going to consider that informational
12 material. I'm not going to put it into the record or
13 anything like that. It's sort of like the other items that
14 we got on part of the site tour.

15 MS. CHANCELLOR: Right. And every party received
16 a copy of that. That's the same thing that you received.

17 CHAIRMAN BOLLWERK: All right. Appreciate it very
18 much.

19 All right. I think we're ready to move on to
20 contention, State contention V. Deals with inadequate
21 consideration of transportation related radiological
22 problems.

23 MS. CURRAN: Okay.

24 CHAIRMAN BOLLWERK: And also let me just mention
25 that OGD C is one we identified that's related with this

1 one.

2 All right.

3 MS. CURRAN: There are a number of issues here
4 that I think we need to address without going over
5 everything that's been briefed.

6 One of the key issues is what's the role of Table
7 S-4 in this. And we've already argued that in our view it's
8 not applicable here.

9 I'd just like to point out that the regulations
10 that govern environmental reports for ISFSIs are found at 10
11 C.F.R. 51.61, which refer the applicant to 10 C.F.R. 51.45.
12 There's no mention in either of those regulations of either
13 10 C.F.R. 51.52 or Table S-4.

14 I'd also like to point out what to us is kind of a
15 point of confusion here, which is that the applicant, I
16 think rightly, makes the argument that under the
17 regulations, it's only required to consider regional impacts
18 in an environmental report. We're presuming that means that
19 it's the staff's job to consider the broader impacts.

20 But the data that the applicant relies on in Table
21 S-4 applied to national impacts of spent fuel
22 transportation.

23 So it's a little unclear to us what the applicant meant to
24 do when it used Table S-4 and basically did a generic
25 environmental impact analysis without looking at regional

1 impacts.

2 The applicant asserts that, at page 300, that it
3 used Table S-4 because taken together with Nureg 170 and
4 Nureg 1437, it is the best available data and information
5 that is approved by the Commission for use in a licensing
6 proceeding. And the applicant also cites a Federal Register
7 notice in which the Commission states that a generic EIS may
8 be incorporated by reference in an environmental report.

9 We would submit that this is not a requirement
10 that a generic EIS has to be the sole basis for an
11 environmental report. It's something that may be included.
12 And as we've previously stated, the standard here is whether
13 there are new changed circumstances or new information such
14 that that generic environmental impact statement no longer
15 constitutes a valid basis on which to rely.

16 I just want to point out that that standard is
17 found in 10 C.F.R. 51.92. I'm not 100 percent sure whether
18 51.92 applies in a case like this. It has to do with when
19 an impact statement has been completed before the final
20 action is taken, whether a new impact statement has to be
21 prepared.

22 In this case, we have a generic impact statement followed by
23 a proposed action.

24 But that principle was also cited by the supreme
25 court in Marsh v. Oregon Natural Resources Council at 49

1 U.S. 360, 109 Sup Ct 1851 and -- at page 1858 in 1989.

2 MR. TURK: Is this -- may I ask, is this in the
3 written reply?

4 MS. CURRAN: No.

5 MR. TURK: I don't think that we're moving towards
6 a clear record. It's certainly not helping me today, Your
7 Honor.

8 CHAIRMAN BOLLWERK: I don't see it either.

9 MS. CURRAN: Well, we --

10 MR. TURK: It's going to -- may I say, it's
11 difficult enough to respond to new things that we hear in
12 oral argument for the first time. It's even more difficult
13 if we have to try to understand how this expands upon, or if
14 it does expand upon what's been stated already. And where
15 the State has made an explicit lengthy written response, I
16 don't think we should have to respond to that as well as
17 another oral presentation.

18 MS. CURRAN: I believe it was in the staff's
19 response that the standard changed circumstances and new
20 information was raised. And I am elaborating on that,
21 citing the source for it.

22 MR. TURK: Without allowing --

23 MS. CURRAN: I haven't done anything more.

24 MR. TURK: Without allowing anyone else an
25 opportunity to even see if the case is applicable.

1 MS. CURRAN: Well, I'll rest on 10 C.F.R. 51.91,
2 which is cited --

3 MR. SILBERG: I'm sorry, did you say 91 or 92?

4 MS. CURRAN: 92, I'm sorry.

5 MR. TURK: 92.

6 MS. CURRAN: Okay. The staff agrees that, to the
7 extent the application may include elements beyond the
8 envelope of generic evaluations, more study may be required.
9 And that's at page 62 of the staff's response. But aside
10 from sabotage, which the staff opposes, the staff doesn't
11 address the admissibility of any of the various subportions
12 of our contention.

13 This brings us to a concern that we have that we
14 are involved in something of a game of hide the peanut here.
15 I'm aware of a requirement, a regulatory requirement that if
16 the staff is undertaking some action that's relevant to
17 issues that are in contention before the licensing board,
18 the staff is required to bring those to the attention of the
19 licensing board.

20 Without any assistance from the staff, or without
21 acknowledgement from the staff in its response to our
22 pleading, we have discovered that the staff is in fact
23 undertaking a re-evaluation of Nureg 170. In part, it
24 appears in response to exactly the circumstances that are
25 presented here.

1 Through the Freedom of Information Act, we have
2 obtained a memorandum that was written by Carl Cabarello,
3 the director of the Office of Nuclear Material Safety and
4 Safeguards, to David L. Morrison, director of the Office of
5 Nuclear Regulatory Research, on February 20, 1996, which
6 discusses the, quote unquote, the revalidation of Nureg 170.

7 It states that: "Nureg 170 provides the
8 regulatory basis for issuance of the general license for
9 shipment of NRC certified packages under NRC -- 10 C.F.R.
10 Part 71."

11 MR. SILBERG: Excuse me.

12 Mr. Chairman, I really don't know where we're
13 going with all this. It seems to me so far afield from the
14 contention, which as I remember, reads something like the
15 applicant's environmental report doesn't deal with
16 transportation related environmental impacts of the ISFSI.
17 I really think we're getting far afield.

18 MR. TURK: Oh, I'd like to hear.

19 MS. CURRAN: I will explain the relevance.

20 MR. TURK: I have no objection to Ms. Curran
21 making this attack. I look forward to responding.

22 CHAIRMAN BOLLWERK: All right. We'll -- then if
23 the staff is ready, we'll -- go ahead.

24 MR. TURK: In fact, I might just suggest that you
25 look at footnote 61 of our paper before you go on attacking

1 the staff.

2 MS. CURRAN: According to the staff: "Due to
3 recent changes in industry and government spent fuel
4 management strategies, the applicability of the EIS
5 assumptions and conclusions to these shipments should be
6 evaluated. In particular, new spent fuel shipment scenarios
7 are envisioned that were not considered when Nureg 170 was
8 prepared, including dual purpose and multi-purpose
9 canisters."

10 MR. SILBERG: Excuse me. Are you reading from the
11 footnote that the staff cited?

12 MS. CURRAN: I'm reading from a memorandum that
13 was written in February '96.

14 MR. SILBERG: Okay. Thank you. Just want to
15 understand what we're listening to.

16 MS. CURRAN: It states that the staff is going to
17 undertake this study: "To consider, at a minimum, the use
18 of larger capacity packages designed for storage and
19 transport, including MPC type containers, and the potential
20 non-radiological and radiological impacts of use of such
21 packages, shipment of older cooler spent fuel, and shipments
22 to and from a centralized facility." Now here the staff is
23 indicating that it believes it is time now to re-evaluate
24 Nureg 170. And yet in the staff's response to our
25 contentions, the staff does not express any opinion on

1 whether the concerns that we raise in our convention are
2 valid or not. And we believe the staff should be forthright
3 about these concerns which it is addressing in its own
4 study.

5 In addition, we believe that this constitutes a
6 re- evaluation of the EIS which should be subject to the
7 NRC's procedural requirements for scoping and participation
8 of the public. And at this point, the way it appears to be
9 being handled is simply through the hiring -- the definition
10 of the scope of the issues by the staff; the hiring of the
11 contract -- of a contractor, Sandia Labs, to evaluate the
12 issues as defined by the staff; and then the results will be
13 presented to the public as a fait accompli.

14 And I see that Part 6 -- footnote 61 say: "The
15 staff notes that a partial reassessment of Nureg 170 is
16 currently in progress, conducted by the Sandia National
17 Laboratory under contract to the NRC related to the shipment
18 of spent fuel to a repository or central storage facility."
19 But why do we have to hunt in a footnote for a
20 representation of something that is so vital to this issue?
21 This is a 20 year old environmental impact statement which
22 the staff is essentially defending in this proceeding, but
23 at the same time the staff has spent quite a few thousand
24 dollars to re-evaluate because apparently it does not have
25 confidence in it.

1 MR. TURK: Should we respond to that, or should we
2 just wait our turn?

3 CHAIRMAN BOLLWERK: Let's wait.

4 Do you have anything else you want to say with
5 respect to contention B?

6 MS. CURRAN: Yes. I will continue.

7 CHAIRMAN BOLLWERK: Just realize that I see you've
8 got about, oh, eight, nine pages here on -- in your reply.
9 So let's stick to what's --

10 MS. CURRAN: Okay. All right. I just want to go
11 through some of the individual points that PF made, PFS made
12 in response to the bases to our contention.

13 The first is that our contention that the SAR is
14 inadequate to supplement Table S-4. PFS, with respect to
15 intermodal transfer, PFS clarifies that it relies solely on
16 Table S-4 for the impacts of that operation.

17 But Wash 1238 has a very inadequate analysis of
18 intermodal transfer for this, the situation that we are
19 addressing in this particular case. It addresses transfers
20 of casks of much smaller size and weight. It doesn't
21 address the additional time needed to transfer casks of such
22 size and weight. That would incur additional occupational
23 doses.

24 It doesn't address the bottleneck effect, which we
25 previously discussed the general effect of stuffing an

1 elephant into a mouse hole, as someone put it here. Again,
2 something that would increase the normal occupational doses
3 to workers.

4 Intermodal transfer also involves the use of heavy
5 haul trucks, which are going to move very slowly back and
6 forth down Skull Valley Road. Of course Wash 1238 wouldn't
7 have any analysis of the slow movement of these casks down
8 the road between the intermodal transfer site and the plant.

9 Contrary to PFS' argument at page 305, the impacts
10 of transfer of spent fuel at the original -- at the
11 originating site to the truck or rail carrier are not
12 outside the scope of this NEPA analysis. Now it's possible
13 they may be outside the scope of the regional analysis
14 required of PFS, but certainly not outside the scope of the
15 NEPA analysis of the impacts of this proposal.

16 Like to make -- clarify something on the issue of
17 the return of the substandard or degraded pass. First of
18 all, PFS says that this is not contemplated in the SAR.
19 What we are talking about here is PFS' plan if it should
20 find that there's any problem with a cask such that it has
21 to return the cask, to put it back on the rails and ship it
22 back to the originating plant. That can be found at page
23 7.2-11 in Section 4.7; in Section 8.2.7.4 also.

24 And what we're concerned about here is principally
25 the normal releases that are incurred, or the normal -- the

1 releases related to normal operation. We are concerned
2 about accidents. But in addition, just the fact that
3 additional casks are going to be transferred and the normal
4 exposures that occur as a result of that is something that
5 hasn't been considered in the environmental report. So PFS
6 is wrong in arguing that we're just concerned about
7 accidents.

8 PFS asserts that a cask drop accident involving
9 warping of the canister and other bases that we offer is not
10 credible. But I'd like to point out that cask or canister
11 warp is an issue that is being addressed by the staff right
12 now in its review of the Holtec and Safestore casks.

13 The staff has requested more information in a
14 letter of December 17, 1996 to Sierra Nuclear Corporation.
15 The staff requested more information from Sierra Nuclear
16 about the possible deformation of the casks during a
17 tip-over, following a tip-over event. So until that review
18 is completed, there's really not a basis to say that warping
19 of the canister is not a credible accident.

20 We also have submitted a contention, contention
21 EE.
22 It's a proprietary contention, but it is related to possible
23 cask tip-over during an earthquake event. So we would
24 submit that also constitutes a basis for positing a canister
25 warping event which would prevent the placement of the

1 canister into a cask.

2 PFS relies on Table S-4 for the proposition that
3 the risks of transportation can't be quantified. There's a
4 -- footnote 4 explicitly states that. But the risk of a
5 transportation accident, I'm sorry, cannot be quantified.
6 That's at page 307 and 308.

7 This may have been true 25 years ago when Wash
8 1238 was written, but as we demonstrate in our contention,
9 it is no longer the case. The Commission now has available
10 to it the RADTRAN methodology, which is now in about its
11 fifth version, which allows the quantification of
12 transportation accident risks and other risks associated
13 with transportation.

14 It is commonly used by the Department of Energy
15 and other federal agencies in their risk assessments. And
16 in fact, it's being used by the NRC's contractor in re-
17 evaluating Nureg 170. So there simply is no longer any
18 basis for relying on the assertions in Table S-4 that
19 accident risks are not quantifiable.

20 With respect to human error, the applicant points
21 out that Wash 1238 does address human error. Wash 1238
22 states that human error is in the range of about 1 in
23 1000,000 chance. Of course this was postulated 25 years ago
24 when there was very little experience with transportation of
25 spent fuel.

1 In the State's contention, the State points to
2 four instances of human error in either the construction or
3 the packaging of transportation casks. This is, considering
4 that there have been something in the neighborhood of 1,000
5 shipments of casks since the process began, this is
6 certainly a higher probability than 1 in 100,000.

7 With respect to criticality, again, the fact that
8 criticality is designed against under the NRC safety
9 regulations does not mean that the Commission does not need
10 to address the risk in an EIS. That was established in the
11 Third Circuit's decision in Landmark Ecology Action v. NRC.

12 In addition, we have in our contention presented
13 scenarios involving, for instance, a cask falling from a
14 railroad trestle into a rocky river in which the cask is
15 penetrated and water entered the cask, enters the cask.
16 This could lead to a criticality accident.

17 Finally, with respect to sabotage. Again, both
18 the applicant and the staff argue that this is not litigable
19 in this proceeding. And I think that I have already
20 discussed the sabotage issue with respect to contention U.
21 And I'd just leave it there and respond to anything new that
22 other parties may add.

23 CHAIRMAN BOLLWERK: All right. Mister --

24 MS. CURRAN: Oh, I have one more. And that is
25 maximum credible accidents. At page 15-55, the State

1 describes the risks and costs of various severe accident
2 scenarios with specificity and basis. The foreseeability of
3 these accidents and their significant consequences is
4 established in the contention and the documents cited by the
5 State.

6 PFS just argues that these accidents are not
7 credible.

8 But again, they are deemed incredible based on information,
9 based on Table S-4, which is now 25 years old and has been
10 supervised -- superseded by the new analyses cited by the
11 State.

12 The question is not whether Table S-4 or any other
13 generic determination would bar consideration of these
14 accidents, but whether we have demonstrated they're
15 foreseeable with reasonable specificity and basis. And that
16 is all I have.

17 CHAIRMAN BOLLWERK: All right. I'm just sort of
18 trying to figure out why you filed eight pages and then --
19 should have just said we had lots to say, I don't know.

20 Okay. All right. Anyway, go on.

21 MS. CURRAN: Well, we -- what we did, and we were
22 pressed for time in trying to provide --

23 CHAIRMAN BOLLWERK: I recognize that.

24 MS. CURRAN: -- written answer to this. And we
25 addressed the major legal issues and left the addressing of

1 the factual bases for the prehearing conference.

2 CHAIRMAN BOLLWERK: All right.

3 Mr. Blake or Mr. Silberg. Oh, all right.

4 MR. SILBERG: I think as the discussion before
5 indicated, it's awfully hard to listen to a lengthy
6 discussion and then try to compare that with what's been
7 said before and see what is new and what hasn't been
8 responded to and hear cases that are cited for the first
9 time.

10 Let me make a couple points with respect to the
11 written submission from the State. The State -- I'm sorry,
12 the State argues that S-4 is limited to construction permits
13 for nuclear power plants. The NRC case law is determinative
14 of that and is to the contrary.

15 The State argues that, I take it from the
16 reference to the Calver Cliffs case, that individual
17 consideration of environmental impacts must be done in each
18 case. The supreme court has ruled to the contrary with
19 respect to these specific tables, S-3 and S-4, in the
20 Vermont Yankee and Baltimore Gas cases.

21 I won't comment on the statements on the top of
22 page 86 as to what the NRC staff does or doesn't concede,
23 but it didn't square with my reading of the staff's
24 response, but I'll let them adopt that.

25 The statement that the licensing -- that

1 preclusion from considering sabotage under Nureg 170 is, you
2 know, is old stuff and we should ignore it. Those
3 determinations are certainly been looked at more recently.

4 There have been obviously additional
5 environmental, generic environmental studies that the NRC
6 has done. There have been recent, more recent cases which
7 have adopted those analyses. You have Nureg 1437; you have
8 Nureg 0575; other studies that we've cited.

9 You have cases as recent as the New Jersey v. Long
10 Island Power Authority case in the Third Circuit that
11 certainly considered the applicability of Table S-4. The
12 risk of sabotage, the Limmer case, to my knowledge, has not
13 yet been overruled and is good law.

14 The statement that the Commission may not restrict
15 the scope of a NEPA analysis to a geographic area that's
16 narrower than the actual area of impact tells half the
17 story. It is clear that NRC -- that's a statement on page
18 87 of their written submission.

19 It is clear that NRC is entitled to deal with
20 these issues generically, which it has done. It is clear
21 under NEPA law that agencies are entitled to deal with these
22 issues generically through generic and programmatic impact
23 statements, which the commission has done.

24 And I would also note that every nuclear power
25 plant that will ship fuel to the private fuel storage site

1 has already evaluated these impacts in their own
2 site-specific environmental impact statements, which do look
3 at the transportation impacts of shipments from that reactor
4 to other destinations, of spent fuel from that reactor to
5 other destinations.

6 And while the State may not like the fact that
7 Table S- 3 is still a governing regulation, to the extent
8 that they don't like it, the right way to challenge that is
9 not before this licensing board but through a rule making
10 petition or a 2758 petition.

11 And I would also note on page 87, the State's
12 statement that NEPA determinations may not be insulated from
13 challenge, again flies in the face of the rulings of the
14 United States Supreme Court, which rulings make sense both
15 as a matter of law and as a matter of common sense. It just
16 makes no sense whatsoever to relitigate generic issues on a
17 case by case basis whenever that may come up. You do it
18 once and that -- you ought to be able to rest on that.

19 A couple comments. I can't be comprehensive
20 because there was just too much flying too quickly for me
21 even to take notes.

22 The State's criticality hypothesis of the cask
23 falling off the trestle, hitting a rock, being underwater or
24 having water come in, does sound to me like the meteorite
25 which we discussed a little bit ago. Just to postulate

1 these what ifs, what ifs, what ifs doesn't get you either
2 the basis for a contention, or certainly not the basis for a
3 NEPA requirement of reasonably foreseeable.

4 The examples of human error, I haven't gone back
5 to look at them, and I'm not sure which ones they're
6 referring to, but to my knowledge, there are no off-site
7 consequences for any of those. With respect to the risk of
8 transportation accidents not being quantifiable, I think
9 those risks, the impacts from those are in fact quantified
10 in Table S-4 and in the subsequent studies. And that is
11 what in fact they do.

12 With respect to the warping of the casks and the
13 fact that the staff may have asked additional information.
14 The obligation in this proceeding is for the State to come
15 up with a basis that meets the requirements. The fact that
16 the staff may be asking questions does not excuse the
17 State's compliance with 2.714.

18 With respect to the return of casks and the fact
19 that the State is concerned about normal releases, yeah, I
20 think we're all concerned with normal releases. And Table
21 S-3 and S-4 deal with normal releases. And to my
22 recollection, so do all the other generic environmental
23 impact statements that the NRC has looked at.

24 The fact that the NRC staff is undertaking a re-
25 evaluation of Nureg 170. That was not a secret. It's been

1 on -- in the NRC's weekly information report. I'm sure that
2 the State or State's counsel has known about that for as
3 long as I've known about it. It's not a secret.

4 Fact that people are doing additional work to
5 revalidate other studies certainly can't be a basis to
6 challenge existing rules, otherwise you create a
7 disincentive for anyone ever to try to use the most current
8 information.

9 All the studies to date have shown that while
10 there are changes, that the data in Table S-4 is still a
11 bounding analysis. The fact that we may be using fuel with
12 higher burn-up than is covered by S-4 has been evaluated by
13 the NRC in the documents that we've cited, for example.

14 And notwithstanding that, the -- those NRC studies
15 have concluded that the values in Table S-4 are still
16 appropriate to use. So we see the fact that the NRC is
17 going out to take another look at these not as something
18 that they ought to be criticized for, or that they're
19 playing hide the peanut, because I think the peanut's been
20 sitting out on the table for everyone to find, but rather,
21 something that I'm confident we'll show that the values
22 we're using still remain conservative.

23 If it turns out that some new document by the
24 staff shows that they're not, we'll deal with it at that
25 time.

1 But until that happens, I think this Board is entitled and
2 it's indeed obligated to use the values that are set forth
3 in the Commission's rules and in their generic statements.

4 That's all I have.

5 CHAIRMAN BOLLWERK: All right. I have one
6 question.

7 You mentioned about Table S-4 being a bounding rule. My
8 understanding from the contention is that there's questions
9 of truck weight and traffic density that seem to fall
10 outside the parameters of the rule. Am I misunderstanding,
11 or do you want to respond to that?

12 MR. SILBERG: No. I think the subsequent NRC
13 statements, subsequent NRC evaluations like Nureg 1437 have
14 looked at questions such as, you know, the assumptions in
15 Table S-4 and Wash 1238; and using current data, have
16 concluded that those values are still appropriate to use.

17 Now with respect to a, you know, a specific
18 postulated traffic jam or a specific, you know, postulated
19 transportation structure, I don't think those generic
20 statements are intended to deal with those other than to
21 make the generic determination that those bound what the NRC
22 would expect to see on a national basis for all
23 transportation.

24 I'm sure anyone can postulate that there's going
25 to be a red light at this intersection, or there may be a

1 narrowing of a roadway at this particular location. The
2 NRC's determination is that they need not look at those
3 because looking at these on a national basis, on an overall
4 basis, that they have properly characterized what the risks
5 are, what the impacts are, what the costs are.

6 CHAIRMAN BOLLWERK: All right.

7 DR. LAM: Mr. Silberg, would you give me that
8 reference again? Specifically Table S-4 referred to a
9 truck, a weight limit of 100 tons per cask per rail car.
10 And the State of Utah is asserting the cask would weigh 140
11 ton. With that 40 percent difference, would you give me a
12 reference as to what the staff analysis had concluded?

13 MR. SILBERG: Well, I believe, and I don't know if
14 I can find it right now, but I believe that 1437 looks at
15 the current assumptions and determines that the Table S-4
16 values are still bounding. We refer to that at page 301 of
17 our brief. I don't know for sure, I can't tell you right
18 now, whether that includes the truck. I think it does.

19 DR. LAM: Okay. It's Nureg 1437; right?

20 MR. SILBERG: Yeah.

21 DR. LAM: Page 301 of your pleading?

22 MR. SILBERG: Right.

23 DR. LAM: Okay. Thank you.

24 CHAIRMAN BOLLWERK: All right. Anything further
25 from the Board?

1 All right. Mr. Quintana.

2 MR. QUINTANA: Once again, the contention from the
3 State of Utah is not supported by science, and we would
4 therefore object.

5 We would also further object because in the --
6 when the Tribe was in the MRS process, the Tribe wrote a
7 report. And in Chapter 6 of the report it addressed the
8 transportation problems: municipal solid waste, hazardous
9 and low level radioactive wastes, as well as other waste.

10 And in there, the Tribe -- thereafter, the Tribe
11 wrote a letter to the governor asking if there was any
12 scientific or technical data that the governor was aware of
13 on why a facility of this type should not be built and
14 concerns that should be addressed. And that was several
15 years ago and the letter was never responded to.

16 And now we see this response today, and the
17 response today of course, as well as the other contentions,
18 are not supported with any science. These contentions are
19 in bad faith and they're politically motivated, and we would
20 therefore challenge them.

21 CHAIRMAN BOLLWERK: All right. Mr. Turk.

22 MR. TURK: The focus for this Board's inquiry has
23 to be whether the applicant satisfies NRC requirements. I
24 will address that first.

25 I will come later to Ms. Curran's attack on the

1 staff as an attempt to hide the peanut, because I think that
2 tries to change the whole tenor of this proceeding and
3 raises an issue which is not appropriate for your
4 consideration here today. However, I cannot ignore it
5 entirely.

6 First, Ms. Curran stated that she agrees with the
7 applicant that they are only required to evaluate regional
8 impacts, but she expects the NRC staff will do more. If Ms.
9 Curran is correct that only regional impacts need be looked
10 at, that will be the scope of the evaluation.

11 I don't know if she meant to bind herself with
12 that statement, but I believe they may in fact be bound.
13 And if only regional impacts need be evaluated, then that
14 would be the scope of both the environmental report as well
15 as the environmental impact statement.

16 Ms. Curran incorrectly stated that the only aspect
17 of the contention which the staff opposes has to do with
18 sabotage. That is another instance in which the State has
19 mischaracterized the staff's response.

20 In fact, at page 54 of the staff's written
21 response to this contention, we indicated three objections
22 we had to it.

23 The first was our assertion that Table S-4 does in fact
24 apply to this facility. We do not concede, as the State
25 suggests in its written reply, in their footnote 29, that

1 Table S-4 does not apply.

2 In fact, as we indicate in the body of our
3 argument, Table S-4 has been interpreted to apply regardless
4 of whether the shipments are from a reactor to a
5 reprocessing facility or reactor to reactor. As has been
6 stated I believe by the appeal board in a decision cited in
7 our paper, it is the same fuel regardless of where it is
8 being transported. So we would accept reference to Table
9 S-4 as appropriate by the applicant.

10 Let me explain that last qualification. 10 C.F.R.
11 51.52 specifically states that "A reactor may use Table S-4
12 if it fits within certain parameters stated therein. But if
13 not, then in 51.52(b), it states that "A full description, a
14 detailed analysis of the environmental effects of
15 transportation of fuel and wastes should be presented." And
16 that is what we would look to here.

17 To the extent that there are differences between
18 the assumptions in Table S-4 and the factors which pertain
19 to transportation for this applicant, we will look to see if
20 those differences have been adequately evaluated.

21 The applicant in its environmental report relies
22 upon Table S-4 and then goes further by citing certain
23 generic studies which conclude that even for higher burn-off
24 fuel, and for greater mega watt day usage per ton of
25 material, the Table S-4 factors still apply.

1 We will consider, with regard to this application,
2 whether that is in fact a valid reference and reliance by
3 the applicant. It would appear on its face to be
4 acceptable, but I will not make that merits determination
5 here. We will allow that to be reviewed by staff in its
6 review of the application.

7 The one principle difference between us and the
8 State in this contention is the State would like you, a
9 licensing board sitting with respect to a particular
10 proceeding, a particular facility, they would like you to
11 disregard generic studies by the commission and undertake in
12 an individual licensing action a matter which is most
13 appropriately considered by the Commission on a generic
14 basis.

15 If there is a flaw in Table S-4, or if there is a
16 need for Nureg 0170 to be re-evaluated, that is something
17 that would apply and would be done in a generic context,
18 applicable to all radioactive material facilities, not just
19 this ISFSI. This board should not have to consider, and
20 it's improperly being asked to consider to do something
21 which the Commission should do on a generic basis, if at
22 all.

23 I'm getting close now to the discussion of Nureg
24 0170.

25 In fact, the staff did mention in its brief, as I pointed

1 out during Ms. Curran's argument, we did mention in a foot
2 note to our response that there is a limited reassessment
3 going on now with respect to Nureg 0170. That reassessment
4 is not being done because the staff believes Nureg 0170 can
5 no longer be relied upon.

6 However, there was a determination that perhaps
7 the parameters evaluated in Nureg 0170, which have changed
8 to some extent under current technology, simply need to be
9 looked at. The staff does not expect that there will be
10 greater environmental impacts associated with the new
11 parameters. The contrary may be true, that in fact the
12 environmental impacts may be even less than those stated in
13 Nureg 0170.

14 However, no determination has been made as to what
15 the overall impact might be of new factors, and that is
16 being considered on a generic basis. We brought that to the
17 Board's attention, and Ms. Curran's expression of her
18 frustration with the staff is unfortunate. Because in fact
19 the staff's actions are never the subject of inquiry by the
20 licensing board in an individual proceeding, but rather are
21 matters, which if she has a problem with, she should bring
22 to the Commission's attention.

23 I want to respond to a few additional points, Your
24 Honor.

25 The State made reference to some correspondence

1 between the NRC staff and Sierra Nuclear regarding the
2 deformation of casks following a tip-over event. As I
3 mentioned yesterday in response to another argument by the
4 State, that correspondence relates to cask certification.

5 That is a matter which is being considered with
6 respect to the acceptability of the casks for certification
7 and is not a proper subject for consideration in this
8 proceeding.

9 To the extent that that may affect cask certification, it is
10 in the rule making proceeding that that matter will be
11 addressed.

12 May I have just a moment, Your Honor?

13 CHAIRMAN BOLLWERK: Sure.

14 MR. TURK: I would like to point out something
15 that is stated explicitly in Nureg 0170. And this is at
16 page IX, and I will quote: "Based on the above conclusions,
17 the NRC staff has determined that the risks of successful
18 theft of a significant quantity of strategic special nuclear
19 material, or sabotage of radioactive materials in transit
20 resulting in a significant radiological release, are
21 insufficient small to constitute no major adverse impact on
22 the environment," close quote.

23 That is a statement that has generic applicability
24 and it applies in this proceeding as well.

25 As we mentioned in our written response, the

1 Commission has relied upon Nureg 0170 in determining that no
2 further rule making was required with respect to the
3 transportation of radioactive materials. And that matter is
4 stated on page 61 of our written response and explicitly
5 referred to also in footnote 61 on that page.

6 In essence, the State's complaint with regard to
7 this contention is that more is required. Not just with
8 respect to this facility but in general, with respect to the
9 transportation of radioactive materials. That is a matter
10 which, if the State or Ms. Curran or Dr. Resnikoff wish to
11 pursue, they should pursue on a generic basis. They can
12 request rule making; they can write to the Commission; they
13 can take whatever action they wish to on a generic basis.
14 But this proceeding is not the proper place to consider
15 whether to abrogate existing Commission rules and guidance.

16 CHAIRMAN BOLLWERK: Just so I understand, you've
17 indicated to me that you, or indicate to the Board I think
18 that you are actually going to look at questions about
19 higher burn-up fuel and greater mega wattage?

20 MR. TURK: It's my understanding that that is a
21 matter that will be addressed in the Sandia reassessment.

22 CHAIRMAN BOLLWERK: In the, I'm sorry, the Sandia?
23 That's -- am I missing something here?

24 DR. KLINE: Have we heard about that before?

25 CHAIRMAN BOLLWERK: I don't know. I'm trying to

1 figure out, what is the -- explain to me what the Sandia
2 reassessment is. I'm sorry.

3 MR. TURK: The NRC staff has contracted with
4 Sandia.

5 CHAIRMAN BOLLWERK: Okay.

6 MR. TURK: To do what I understand to be a limited
7 reassessment of Nureg 0170 as it pertains specifically to a
8 --

9 CHAIRMAN BOLLWERK: Okay.

10 MR. TURK: To the MRS or other central storage
11 facility. It is not an entire re-evaluation of Nureg 0170.
12 It is very limited in its scope.

13 CHAIRMAN BOLLWERK: All right. And that will deal
14 with the questions of higher burn-up fuel and greater mega
15 wattage. Is that --

16 MR. TURK: Yes.

17 CHAIRMAN BOLLWERK: All right.

18 MR. TURK: Now in addition, however, I am not
19 saying that this applicant need not consider those factors
20 when it tells us what are the environmental impacts of
21 transportation. However, to the extent that they're able to
22 rely on Table S-4 or other generic determinations by the
23 Commission, we believe that would be appropriate.

24 But we'll have to look to make sure that the
25 factors that affect this facility are bounded by Table S-4

1 or the other generic determinations.

2 DR. LAM: Mr. Turk, when you say the Commission is
3 now contemplating further rule making based on Nureg 0170,
4 when was that decision made? Is it a recent decision?

5 MR. TURK: That was in 1981. At that time, there
6 had been consideration of whether further rule making was
7 required with respect to transportation risks. And in 1981,
8 the Commission withdrew the advanced notice of proposed rule
9 making. And that's found a Federal Register cite too back
10 in our responsive pleading at footnote 61.

11 CHAIRMAN BOLLWERK: Let me just ask one other
12 question.

13 If the staff believes that this may need some individual
14 analysis, then why shouldn't the Board be looking at the
15 same thing?

16 MR. TURK: The question I would have for you is to
17 what extend do you go beyond the existing rule and the
18 existing generic determinations. What the State would like
19 you to do is to go back and reassess entirely the
20 probability of a sabotage event and the consequences of such
21 an event. And we do not believe that there's any need for
22 that, or that there's any reason to set aside Table S-4.

23 The only thing that would need to be examined here
24 is the type of analysis that's set forth in 51.52(b), which
25 is where a reactor does not, as stated in the rule, where a

1 reactor does not meet the Table S-4 specific parameters,
2 then lay out an evaluation of what the impacts are.

3 To the extent that it's -- that the Table S-4
4 criteria or assumptions apply, then they should continue to
5 be relied upon. And that is the risk of sabotage that is
6 considered in the rule making and in the generic studies is
7 no different for this facility or any other facility. The
8 generic determinations of those risks should continue to be
9 relied upon. The only thing that may be different is the
10 size of the shipping cask, the amount of fuel in it, the
11 burn-up, the enrichment factor. And those are matters which
12 are extraneous, or which are beyond the parameter assumed in
13 Table S-4 and generic studies. We think it's proper for
14 evaluation.

15 CHAIRMAN BOLLWERK: By the staff, I take it? And
16 the Board?

17 MR. TURK: Yes.

18 CHAIRMAN BOLLWERK: So if I ask, because I asked
19 Mr. Silberg before. If the truck weight is different or the
20 traffic density is different and there's some showing of
21 that, then that's something we should be looking at to see
22 if that makes a difference?

23 MR. TURK: The traffic density. You mean with
24 respect to traffic on the roads, or the number of --

25 CHAIRMAN BOLLWERK: Right. I'm not trying to play

1 --

2 MR. TURK: No, I --

3 CHAIRMAN BOLLWERK: I'm not trying to play hide
4 the peanut here.

5 MR. TURK: I'm talking here --

6 CHAIRMAN BOLLWERK: I'm talking about what, on the
7 contention page, 147 and 148. That's what I'm referring to.

8 MR. TURK: I'm looking at Table S-4, which sets
9 out certain assumptions.

10 CHAIRMAN BOLLWERK: Right.

11 MR. TURK: That's where the 100 tons per truck --

12 CHAIRMAN BOLLWERK: Right.

13 MR. TURK: I'm sorry, per cask per rail care
14 exists and the number of shipments --

15 CHAIRMAN BOLLWERK: Right.

16 MR. TURK: -- per day. If those are different
17 here, then those differences should be evaluated.

18 CHAIRMAN BOLLWERK: All right. I think as Judge
19 Lam pointed out, there seems to be at least a discrepancy of
20 40 tons. Am I right? Is that --

21 DR. LAM: 40 ton. And as a matter of fact, Mr.
22 Silberg had given me a citation, you know, Nureg 1437 and
23 page 301 of his pleading.

24 MR. SILBERG: And if I might, let me correct that
25 in part, because the issue of the higher weight trucks is

1 specifically addressed in our environmental report at page
2 4.7-3. And if I recall, it may be that we specifically
3 addressed it there because it was not specifically addressed
4 in Nureg 1437. But we did address it.

5 CHAIRMAN BOLLWERK: All right. Anything further,
6 Mr. Turk?

7 MR. TURK: No, Your Honor.

8 CHAIRMAN BOLLWERK: All right.

9 Ms. Curran.

10 MS. CURRAN: I think we lay out in laborious
11 detail in our pleadings the ways in which Table S-4 is not
12 bounding of the circumstances that are present here, the
13 ways in which Nureg 170 and Nureg 1437 do not thoroughly
14 update Table S-4 in relation to the kinds of circumstances
15 that we have here.

16 This includes issues like the weight of the trucks, which
17 could create additional significant safety hazards.

18 I want to make it also -- also make it clear that
19 Table S-4 does not consider the return of full casks from
20 the destination point back to the originating facility.
21 That's another omission that needs to be clear.

22 Also, that in order to evaluate the impacts of
23 this facility, one cannot just multiply the effects that are
24 listed in Table S-4 by 19, for the 19 odd reactors that are
25 -- this fuel is being taken here by PFS. One needs to look

1 at the cumulative effects, the synergistic effects of taking
2 fuel from 19 locations around the country and focusing it on
3 a single facility, a single entry point to that facility at
4 Rowley Junction. It is not as simple as the applicant would
5 have it.

6 I'd like to respond to a few points made by the
7 NRC staff. I believe I heard Mr. Turk say that if the
8 applicant only has to evaluate the regional impacts of this
9 proposal, then that would apply to the staff as well; that
10 the staff does not believe it has to evaluate any impacts
11 other than the regional impacts of this proposal.

12 We think that would be in violation of NEPA, which
13 requires consideration of all foreseeable impacts. And that
14 would include impacts at the originating nuclear power
15 plant, which presumably is outside the region. It would
16 also include impacts related to the transportation of the
17 fuel to its ultimate destination at a repository.

18 Because once this step is taken, then it triggers
19 other steps. And once of the purposes of NEPA is to insure
20 that all of the actions that will follow from the one that's
21 being undertaken are looked at in one environmental impact
22 statement.

23 That was the purpose of Table S-4 in the first
24 place when these nuclear plants were being given their
25 construction permits, to try to figure out what could be the

1 consequences at the far end of the cycle when the fuel was
2 ultimately shipped off-site for reprocessing.

3 We don't see anywhere in the regulations that
4 Table S-4 is a regulation that has to apply in this
5 situation. Table S-4 is put into the regulations in
6 connection with Section 51.52. And there's no other
7 regulation in Part 51 which references Table S-4.

8 The applicant itself is indicated that it used
9 Table S- 4 as the best available data that was approved by
10 the NRC.

11 But in fact as we demonstrate in our contention, there is
12 much better data available that could have been used,
13 including the RADTRAN calculations.

14 I just want to address this -- the staff's
15 argument that we are here trying to get the licensing board
16 to order a new generic environmental impact statement for
17 Nureg 170.

18 We want to make it clear that the State doesn't
19 believe it has control over how the licensing board or the
20 Commission addresses the manner in which the impacts of this
21 facility is addressed. But it is really clear that this
22 licensing board has to have some assurance that the
23 environmental statement for this facility is adequate to
24 address the environmental impacts.

25 And if the applicant and the staff are relying on

1 generic analyses 20 years older and more, and older, that
2 are -- have been superseded by significant new facts and
3 circumstances, then you won't have done your job under NEPA
4 unless you require a new environmental analysis.

5 It could be that a case specific environmental
6 impact statement is done, or it could be that the Commission
7 chooses to do it in a generic fashion. It really doesn't
8 matter. What matters is that there is some impact statement
9 that fully takes into account the impacts of this facility.

10 DR. LAM: Now, Ms. Curran, my reading of the
11 Commission's regulation on this is that the Commission
12 require the applicant to provide environmental impact
13 analysis, both quantitative and qualitative, to the extent
14 practicable. Now you seem to convey a different view on
15 that. And to me, the whole issue would be what is to the
16 extent practicable? I am specifically referring to
17 51.45(c). What is your view on this?

18 I mean the burden on the applicant is -- it's only
19 to the extent applicable. I mean practicable. If they
20 could quantify the risk, they would; if they cannot, they
21 would not be required to. And of course the Commission
22 further imposed the data should be of sufficient quality so
23 that the Commission can make an independent analysis.

24 MS. CURRAN: Oh, are you -- oh, 51.45(c). That's
25 what you're talking about?

1 DR. LAM: Right, right. The Commission --

2 MS. CURRAN: Yeah.

3 DR. LAM: -- clearly spoken on, you know, provided
4 guidance as to what the applicant's burden is.

5 MS. CURRAN: Well, my interpretation of that is
6 that that sentence relates to what is the obligation to
7 quantify the factors in an environmental analysis, not
8 what's the obligation to look at them. The obligation under
9 NEPA that really extends to the applicant here is to take a
10 hard look at the environmental impacts of a proposed action.
11 Then there's a question of to what extent can you quantify
12 those impacts.

13 And here, the Commission is saying to the extent
14 practicable you should quantify them, but you still have to
15 look even if you haven't quantified them.

16 DR. LAM: Right. I'm not being an advocate for
17 any party here. What I'm saying is if I were the applicant,
18 what would preclude me from meeting my obligation to this
19 part of the regulation by saying aha, I look, I consider.
20 Now here's my qualitative analysis. It posed no significant
21 risk. What would be preventing me from doing that?

22 MS. CURRAN: Well, but what -- I guess the
23 question is what prevents you from getting away with it.
24 And what prevents that is that if the citizen intervenor
25 comes in and says -- and provides with reasonable basis and

1 specificity a showing that you could have done -- A) you
2 could have done a better job; and B) the job you did isn't
3 adequate because there are significant risks that you
4 overlooked and this could be more dangerous than you say.

5 DR. LAM: Oh, I understand that. But then again,
6 the burden it's, it now shift to you. For example, to, in
7 your proposed scenarios, what would be the significant risk.
8 It would have a incremental risk. Now that's a big arena.
9 I mean, for example, you know, in your assertion you assert
10 the cask may hit a rock and open up; and therefore, water
11 would come in. There would -- leading to a criticality
12 accident.

13 Now on its face, one would argue gee, this cask is
14 designed to withstand 63 G. Now that perhaps would be
15 related to a speed of, according to the staff who made that
16 answer on there. 63 G's is a lot of G's. You know, what
17 speed of the rail car would you be proposing that would be
18 leading to the acceleration exceeding that, and therefore,
19 leading to a failure?

20 MS. CURRAN: Thirty miles an hour into an
21 unyielding surface.

22 DR. LAM: And then of course, then the issue is
23 what is the official material inside the cask.

24 I am not trying to get into a debate of the
25 merits, and I think I've said enough.

1 [Laughter]

2 CHAIRMAN BOLLWERK: All right. Anything further
3 on this contention?

4 Mr. Silberg.

5 MR. SILBERG: The State has said that there is
6 significant risks overlooked. I don't think they've
7 provided any basis for that statement. They may quarrel
8 with some of the numbers. We have looked at the
9 transportation risks.

10 They said we could have done a better job. NEPA
11 law clearly says that perfection is not required. The
12 supreme court has often used the expression "Thou shalt not
13 fly speak an environmental impact statement." And what we
14 have here is a lot of fly specking going on.

15 The hard look that's required is one that is an
16 obligation on the agency and not on the applicant. We are
17 giving the agency what we think is the material they need to
18 take a hard look.

19 The comment that RADTRAN is somehow better and
20 will show that Table S-4 is, you know, is grossly non-
21 conservative. If you look at the State's description that
22 purports to support that on page 160, they say that "RADTRAN
23 allows the users to enter parameters: the number of persons
24 at a rest stop, the stop time, the distance of onlookers
25 from the cask, number of stops per mile. The standard

1 default assumption of RADTRAN is 50 persons at a rest stop,"
2 et cetera, et cetera.

3 Since our shipping is going to be by rail to
4 Rowley Junction, since there are no rest stops between
5 Rowley Junction and the facility, at least they have
6 provided no basis for suggesting that RADTRAN somehow will
7 give terribly more accurate results than that which is
8 already in Table S- 4.

9 In terms of we need to look at Rowley Junction,
10 we've done that. And the hypotheticals that the State is
11 postulating are nothing more than that.

12 With respect to the argument that Table S-4
13 doesn't consider the return of full casks. If one is
14 looking at the environmental impacts of shipping a full cask
15 from a reactor to the ISFSI, you're going to have the same
16 impacts if it goes back the other way. Those numbers are
17 there. If you're talking about -- if the State is
18 postulating that some significant number of full casks are
19 going to be returning to the reactors, they simply haven't
20 provided a basis for that.

21 And with respect to the argument that somehow the
22 weight of trucks will create higher impact, again, we have
23 one of these verbal statements that is not supported by
24 anything enough to generate -- to warrant the admission of
25 the contention.

1 CHAIRMAN BOLLWERK: All right. Ms. Curran, I'll
2 give you the last word.

3 MR. TURK: Your Honor, I have a --

4 CHAIRMAN BOLLWERK: Oh, Mister --

5 MR. TURK: -- brief reply to Ms. Curran's oral
6 response.

7 CHAIRMAN BOLLWERK: All right.

8 MR. TURK: I want to make sure the record is
9 clear. I know that when I was discussing the question of
10 regional impacts, I put it in the form of a statement that
11 if, if the licensee or if the State is correct in -- not the
12 licensee.

13 If the State is correct in stating that only regional
14 impacts need to be looked at by the licensee, then they
15 would be bound by that and that would govern the staff's
16 look at impacts as well.

17 I did not state that the staff considers that only
18 regional impacts need to be looked at. I put that statement
19 in the form of an if statement. The -- and I did not
20 address the question of whether regional impacts or national
21 impacts need to be looked at.

22 Reference has to be made to 51.45(c) again, which
23 states that the applicant's environmental report should
24 contain sufficient data to aid the Commission in its
25 development of an independent analysis. There is a

1 parallelism between what the applicant is required to tell
2 us and what we are required to consider in the EIS.

3 We do not go out and do independent EIS's without
4 regard to what is contained in the environmental report. So
5 to the extent that we will need to consider transportation
6 impacts, the licensee will be required, or I'm sorry, the
7 applicant would be required to address those same impacts in
8 its environmental report.

9 CHAIRMAN BOLLWERK: All right. Ms. Curran, you
10 have the --

11 MR. TURK: And second -- I'm sorry.

12 CHAIRMAN BOLLWERK: I'm sorry. Go ahead.

13 MR. TURK: And second, Ms. Curran characterized my
14 statements as stating that the Board would be asked by Ms.
15 Curran to order a new generic EIS. I never made that
16 statement. I was distinguishing between her request that
17 the Board consider in this proceeding a matter which would
18 have generic applicability versus what I believe is to be
19 proper, and that is to consider the impacts of this facility
20 in line with existing rules and generic evaluations.

21 CHAIRMAN BOLLWERK: All right. Anything else,
22 sir?

23 All right. Ms. Curran, you have the last word.

24 MS. CURRAN: Really having trouble understanding
25 these distinctions, but I guess I'll leave it to the briefs.

1 I'd just like to point out that we gave an example
2 of how RADTRAN works with respect to bystanders along the
3 road.

4 It's one example of how the risks are quantified by this
5 methodology. RADTRAN is a comprehensive methodology that
6 addresses other aspects of transportation.

7 In addition, Mr. Silberg just stated unequivocally
8 that the transportation is going to be by rail. And I think
9 I heard him say the other day that the applicant was
10 considering several alternative means of transporting the
11 casks.

12 MR. SILBERG: That's not what I said, Ms. Curran.

13 MS. CURRAN: At any rate, the bottom line is that
14 the applicant had a choice of a method for evaluating the
15 risks of this facility. It chose to base it on Table S-4,
16 which we have demonstrated is outdated; and that there are
17 other means which would fully address the significant
18 impacts which the applicants overlooked.

19 CHAIRMAN BOLLWERK: All right. Anything else?

20 MS. CURRAN: No.

21 CHAIRMAN BOLLWERK: All right. Ms. Belille, I
22 think we have OGD C, which raises sort of questions about
23 transportation impacts as well.

24 MR. SILBERG: Can I just --

25 CHAIRMAN BOLLWERK: Oh.

1 MR. SILBERG: -- take a minute to switch books?

2 CHAIRMAN BOLLWERK: Yes, you can.

3 [Pause.]

4 CHAIRMAN BOLLWERK: All right. Go ahead.

5 MS. BELILLE: Your Honor, we would stand by what
6 we submitted in our original contention, but we would like
7 to clarify four areas within that contention.

8 What we've tried to do is to redefine our
9 definition of transportation activities. And we've divided
10 them into four phases: Phase A would be on-site,
11 on-reservation transportation, either by rail or heavy haul
12 truck from the site boundary to the cask receiving building.

13 Phase B would be on-reservation transportation,
14 rail, by rail or heavy haul truck from the reservation
15 boundary to the site entrance.

16 Phase C would be local transportation by rail or
17 heavy haul truck from the main line rail connection to the
18 reservation boundary via Rowley Junction, the intermodal
19 transfer point, and heavy haul truck or via new rail access
20 spur.

21 And then finally Phase D, which would be national
22 regional rail from reactors and other origination to the
23 intermodal transfer facility or the rail access spur.

24 Because the PFS site is unlike all other ISFSI
25 sites by the Commission, that the Commission is considering,

1 it's being proposed solely for the purpose of storing spent
2 fuel transported from PFS from distant reactors. OGD's
3 transportation concerns are valid at least for those
4 transportation activities that occur between the rail
5 shipment, which are switched to a new rail access spur or
6 are transferred to heavy haul trucks until such shipments
7 enter the cask transfer facility at the site. Thus, Phase
8 A, B and C of the transportation activity should be
9 addressed in Part 72, license proceedings.

10 We acknowledge NRC's staff response that
11 transportation activities we designate as Phase D; that is,
12 transport from the originating reactors to the rail access
13 spur or the intermodal transfer point, are more
14 appropriately considered in a Part 71 licensing proceeding.
15 However, OGD expects NRC to address these regional and
16 national transportation issues as part of the EIS to be
17 prepared pursuant to NEPA.

18 The selection of a near site transportation
19 method, either direct rail shipment via a new rail access
20 spur or rail-to-rail transfer and heavy haul shipments via
21 Skull Valley Road, could have significant impacts for risk
22 and impacts to OGD and the reservation. OGD believes that
23 all rail transportation would probably be safer; and
24 therefore, OGD has recommended that PFS adopt an all rail
25 strategy.

1 OGD acknowledges that construction and operation
2 of a new rail spur may, however, result in significant
3 adverse environmental impacts. OGD believes that the
4 potential trade-offs between accidental risks and
5 environmental impacts must be addressed by PFS in its
6 selection of a near site transportation method.

7 NRC staff has responded that OGD's contention C
8 constitutes an impermissible challenge to the NRC safety
9 regulations in 10 C.F.R. 71. OGD notes for the record that
10 the NRC representatives at various public meetings between
11 April and December of 1997 have stated that NRC itself is
12 currently re-evaluating spent fuel transportation risks
13 generally; and that specifically, applicability of Nureg
14 1070.

15 Regarding the consequences of terroristic attacks
16 on spent fuel shipments, OGD notes that the Commission last
17 considered this issue in 1984, as documented in Exhibit 3,
18 which I believe is written by Halstead and Ballard, and is
19 noted in our exhibit.

20 There have been major changes since 1984 in the
21 matter of terroristic threat, weapons available to
22 terrorist, and shipping cask design changes. Taken
23 together, these changes suggest that the shipping cask used
24 for transporting spent fuel to PFS may be significantly more
25 vulnerable to terroristic threat -- attack than those used

1 in the Commission -- when the Commission published its last
2 comprehensive statement on the issue. OGD believes that the
3 risk of terroristic attack is so significant that it must be
4 addressed in the licensing proceeding.

5 OGD finally stands by its contentions regarding
6 routine heavy haul operations along Skull Valley Road and
7 the potentially significant radiation exposures to members
8 of OGD and members of the general public during gridlock
9 incidents.

10 Neither the applicant is responsible nor NRC
11 staff's response counter OGD's contention that PFS' proposed
12 activity and the NRC's current regulations would allow
13 persons caught in gridlock situations to receive doses of 10
14 to 40 milliram below the doses allowed by NRC regulations
15 per event. Such exposures could potentially cause adverse
16 health effects to certain individuals. Staff's response
17 that OGD has not demonstrated the probability of such events
18 is unreasonable because PFS has not specified what
19 infrastructure upgrades, such as construction of slow
20 traffic lanes, or administrative controls, such as time of
21 day travel restrictions, would be required if the HT -- if,
22 at the intermodal heavy haul scenario as selected by PFS.

23 CHAIRMAN BOLLWERK: Anything further?

24 MS. BELILLE: No. That's all, Your Honor.

25 CHAIRMAN BOLLWERK: All right. Applicant please.

1 MR. SILBERG: We would rest on our written
2 statement.

3 CHAIRMAN BOLLWERK: All right. Mr. Quintana.

4 MR. QUINTANA: We've previously addressed this.
5 And again, in the 50 year history of nuclear power, there
6 has never been a transportation accident anywhere in the
7 world where a leak of radiation from one of these casks ever
8 killed or injured anyone. At least that's what the
9 literature would indicate.

10 CHAIRMAN BOLLWERK: All right, sir.

11 Staff.

12 MR. TURK: We just have a few comments, Your
13 Honor.

14 First, I -- there was a statement in our written
15 response at the bottom of 79 to the top of page 80 which, in
16 which we indicated that issues pertaining to transportation
17 safety and shipping cask design are properly the subject of
18 an application for a transportation license under the
19 pendency of our Part 71 and applicable DOT regulations. I
20 think that's the reference that Ms. Belille was referring
21 to.

22 In fact, that's probably a misstatement in our
23 written response. I don't anticipate that there would be a
24 specific licensing proceeding under Part 71. Rather, we
25 should have stated that an existing NRC licensee would have

1 a general license under Part 71. And that the Part 71
2 requirements and the DOT requirements are what would pertain
3 to transportation. So I wish to correct that misstatement.

4 Ms. Belille also referred to statements made by
5 NRC representatives concerning a reassessment of Nureg 0170.
6 I believe that's the same matter that we discussed in
7 connection with the State's contention V. The staff has not
8 stated that it is considering revoking or pulling Nureg
9 0170, or that Nureg 0170 may understate risk. That is not
10 what's going on. There is simply a desire to reconfirm
11 Nureg 0170's applicability in light of new technology and
12 changes in spent fuel character being shipped; that is, the
13 mega watt days of usage and the burn-up.

14 The staff does not consider and has not reached a
15 determination that Nureg 0170 should not apply. It
16 continues to be applicable. As we stated in our footnote 66
17 at page 80 of our response: "Although further consideration
18 of these issues may continue, it is clear that the
19 Commission's regulations in 10 C.F.R. Part 71 govern the
20 transportation of spent fuel at this time." That is a
21 correct statement, and we stand on that.

22 And beyond that, Your Honor, I have nothing
23 further to add.

24 CHAIRMAN BOLLWERK: All right.

25 MR. TURK: We would rest on our written response.

1 CHAIRMAN BOLLWERK: All right. Ms. Belille.

2 MS. BELILLE: Your Honor, we would accept the
3 staff's clarification, and -- but we don't believe that it
4 requires any change in our statement. And that's all that
5 we have.

6 CHAIRMAN BOLLWERK: That's it?

7 You have a question?

8 DR. LAM: Yeah.

9 CHAIRMAN BOLLWERK: Sorry.

10 DR. LAM: Before we leave these two contention.
11 What I heard from the State counsel concerns me. Perhaps
12 I'm seeking some feedback from both the applicant and from
13 the staff.

14 My reading of the application is these casks are
15 designed to withstand 63 G. And if the State counsel's
16 respond is correct, that would correspond to a 30 miles per
17 hour collision; and therefore, would subject these casks to
18 impact, risks. That concerns me. I like to hear from both
19 the staff and the applicant on that.

20 MR. SILBERG: Well, the one comment I would make
21 is that the State, I don't know whether it was advertent or
22 inadvertent, said it was a 30 mile collision with an
23 unyielding surface. Now the unyielding surface is a term of
24 art. It is not the side of a bridge, it is not falling off
25 a trestle into a creek and hitting a rock.

1 The NRC, as I recall, requirements for
2 transportation casks require that a cask withstand a drop
3 onto an unyielding surface. And as I remember the
4 description of that unyielding surface, it's a one foot
5 thick steel plate anchored into a concrete block that goes
6 down to bedrock. I mean it's in essence a non-physical
7 structure.

8 Now I don't know whether 30 miles into an
9 unyielding surface of that type is in fact 63 G's. I would
10 tend to doubt it. But an unyielding surface is not a real
11 physical object. It is a test object.

12 DR. LAM: And I also like clarification on if 63 G
13 the failure threshold, is it. And if not, what is the
14 safety margin?

15 MR. SILBERG: I don't know. I'd have to consult
16 with the technical people.

17 DR. LAM: Right. I'd like to hear an answer on
18 that.

19 MR. SILBERG: I understand that 63 G's is the
20 design for the cask.

21 CHAIRMAN BOLLWERK: Anything -- you're waiting to
22 hear from someone else. I'm sorry.

23 Anything you want to say, Mr. Turk?

24 MR. TURK: Yes. I would simply provide the
25 staff's understanding of the matter.

1 What would be required is that the cask be able to
2 withstand a 30 foot drop to a totally unyielding surface.
3 And I'm told there's no such thing in nature. It equates to
4 a 60 mile per -- I'm sorry, a 60 --

5 This could equate to a 60 mile per hour collision
6 on a partially yielding surface, or even more. But the
7 standard is the 30 foot dropping onto a totally unyielding
8 surface.

9 May I have just a minute, Your Honor?

10 CHAIRMAN BOLLWERK: Let me just ask a procedural
11 question while we're waiting here.

12 The next thing we're coming to is cumulative and
13 other impacts, which is Utah W. You have about a paragraph.
14 Do you have -- how much time were you thinking you're going
15 to need to discuss this?

16 MS. CHANCELLOR: Not very long. Just three or
17 four minute, a couple minutes.

18 CHAIRMAN BOLLWERK: All right. Then we're
19 supposed to go to Castle Rock 9, 14 and 17. What are we
20 looking at there, do you think?

21 MR. TURK: I do have one more statement I should
22 make, Your Honor.

23 CHAIRMAN BOLLWERK: Okay.

24 MR. TURK: If I -- just in response to Judge Lam's
25 question. I'm told also that the question of how many G's,

1 how many gravitational force pulls apply. That relates to
2 the tip-over stress that the cask would have, which I
3 believe the applicant is saying they would have to -- they
4 intend to be able to withstand. And that would be a Part 72
5 design basis issue rather than a Part 71 transportation
6 collision issue.

7 And with respect to Part 72, I believe the staff
8 replies, the SAME, A-S-M-E code allowed those stresses.

9 DR. LAM: Right, right. Because the way I was
10 getting at is if what the State of Utah counsel statement is
11 true, then if 30 miles an hour pose a risk to the cask, that
12 would be a concern.

13 MS. CURRAN: Since this originated with me --

14 CHAIRMAN BOLLWERK: All right.

15 MS. CURRAN: Just say that yes. Thirty miles an
16 hour would be falling to bedrock. If it was not bedrock, we
17 think that it would be somewhat higher, but not necessarily
18 60 miles an hour.

19 CHAIRMAN BOLLWERK: All right. Anything further
20 on the subject?

21 All right. Mr. -- I'm sorry, Mr. Later. I was
22 asking you. You had -- we then had the way that you had
23 these grouped, Castle Rock 9, 14 and 17. Do you anticipate
24 a lot of discussion as you --

25 MR. LATER: What I would propose to the panel, if

1 acceptable, is that we deal with 9 and 14 --

2 CHAIRMAN BOLLWERK: Okay.

3 MR. LATER: -- together. If the State takes about
4 what they projected, we could probably do 9 and 14 before
5 lunch.

6 And then I would be prepared to address number 17 just after
7 lunch. I don't think any of them will take a long time.

8 CHAIRMAN BOLLWERK: All right.

9 MR. LATER: I'm going to experiment with the
10 theory that brevity is indeed the soul of wit.

11 CHAIRMAN BOLLWERK: Okay.

12 MR. LATER: And try and be quick.

13 CHAIRMAN BOLLWERK: I won't disabuse you with
14 that.

15 And then I guess we have OGD P, which would be the
16 third one we -- another one we deal with on this.

17 Okay. Why don't we go ahead then and see if we
18 can get this done before lunch, at least up as Mr. Later has
19 outlined it. Utah W please.

20 MS. CHANCELLOR: Utah W. Utah W basically goes to
21 the scope of the environmental impact statement. If I heard
22 Mr. Turk correctly, he said that NRC does not intend to do
23 anything additional to what it expects the applicant to do.
24 NRC staff has opposed this contention, primarily because it
25 says that the State has no basis. And it refers to

1 incorporation by reference and seems to think that
2 incorporation by reference doesn't provide a basis.

3 Some of the cumulative impacts that we think need
4 to be addressed in this contention are those of credible
5 accidents. And we incorporate contention K by reference.
6 And K deals with the safety analysis of credible accidents.

7 Here we're talking about the environmental effects
8 under NEPA of credible accidents: the F-16 crashes, the 120
9 over flights a month, the hanging bombs that pass the area,
10 the GOCD air facility where 43 percent of the nation's
11 stockpile of chemical weapons is stored. To think that NRC
12 is going to license this facility without looking at the
13 cumulative impacts of such dangerous activities that occur
14 in this region, we believe, would be a dereliction of NRC's
15 duty.

16 Also, the transportation corridor. As you saw,
17 the road is very narrow. Skull Valley, I mean Castle Rock
18 herd their cows on that road. It's used for access to
19 Dugway.

20 When there are national guard exercises and other exercises
21 at Dugway, that -- the traffic on that road slows quite
22 considerably.

23 The other area that we address in this contention
24 is flooding. And we, again, we incorporate by reference our
25 safety contentions. Again, I don't think it's legitimate

1 for NRC staff to oppose those incorporations by reference.

2 The only one I really want to focus on that PFS
3 says that it addresses is the visual impacts. At the ER on
4 page 2.2-3, the applicant does list certain recreational
5 activities that occur in the area. And it talks about
6 hiking trails, bird watching, nature studies, fishing,
7 waterfowl hunting, off-road vehicle use.

8 However, in its analysis of the visual impacts of
9 their license activities, including construction, the casks
10 being transported along the road, et cetera, et cetera, they
11 -- in ER 4.1-19 the applicant states that "In this barren
12 landscape," and they are the words that the applicant uses.

13 "In this barren landscape, the presence of
14 construction equipment will naturally draw attention to the
15 viewers -- will draw the viewers's attention to the
16 temporary focal point." However, they go on to conclude that
17 that's only going to be a temporary activity, and that there
18 really are inconsequential visual impacts from this
19 licensing action.

20 Well, these Eastern utility companies may consider
21 Skull Valley a barren landscape. We in Utah don't. And we
22 think that the visual impact of what is occurring under
23 these license activities needs to be addressed under NEPA.

24 That's all I have.

25 CHAIRMAN BOLLWERK: All right. Applicant.

1 MR. BLAKE: This is, by and large, another bite of
2 the apple kind of contention with respect to just portions
3 of it. Some of it is just -- I won't -- some of it's
4 inappropriate. Because when they quarrel with whether the
5 staff is going to take various impacts into account and
6 cumulatively look at them, it -- they're misusing the term
7 cumulative.

8 Cumulative is with narrowly focused, directed
9 kinds of activities which together, collectively, have one
10 particular impact. The wide ranging kinds of impacts which
11 might occur here will be taken into account cumulatively in
12 that they'll be discussed in one environmental impact
13 statement, not because they need to be determined as a
14 cumulative impact themselves.

15 With respect to the colorful language about the
16 beauty of Skull Valley and all. It is true, and we all
17 observed that on Monday, this area and the people that live
18 in it.

19 And I'm sure they enjoy it and respect it, as do the
20 utilities that want to make this use of it.

21 That doesn't fill the void of whether or not they
22 provided an adequate basis in a contention, or nor does it
23 contradict the fact that we have taken into account visual
24 impacts and we have addressed them in the ER. And the staff
25 I'm sure will as well in its environmental impact statement.

1 CHAIRMAN BOLLWERK: All right. Mr. Quintana.

2 MR. QUINTANA: Very briefly. If the State of Utah
3 is interested in giving the Goshutes back Skull -- Park City
4 and Heber Valley and Salt Lake Valley and Ogden Valley, and
5 some of the other lands that have been taken from the tribe,
6 then perhaps we should talk.

7 CHAIRMAN BOLLWERK: Staff.

8 MR. TURK: I want to address only a few of the
9 oral comments made by Ms. Chancellor.

10 I don't know how she managed to get this
11 interpretation of staff statements. But the staff did not
12 state, either in writing or here today, that we don't intend
13 to do more than the applicants. What I was discussing was
14 the parallelism required for an environmental report and an
15 environmental impact statement.

16 The same issues are addressed. To the extent that
17 the staff needs further information to support its
18 environmental impact statement, we routinely get that
19 information from the applicant. Where other sources bring
20 information to us which we believe to be important, we will
21 consider that information and we will probably ask the
22 applicant to address that information.

23 So I did not say that we do not intend to do more
24 than the applicant. The staff does have an obligation, as
25 an arm of the Commission, to prepare a good environmental

1 impact statement consistent with requirements of NEPA, and
2 we will do that.

3 Secondly, with respect to staff's -- the staff's
4 statements in its written response. We did not say in our
5 written response that you do not have to look at the impacts
6 of various kinds of operations in the area or environmental
7 pollution. Repeatedly in our response to this contention,
8 at page 63 and 64, we use the word "further." We stated
9 "The State has not shown that further consideration is
10 required by the applicant in its environmental report."
11 We did not say that these issues are not fair for
12 consideration. But what we were addressing was the State's
13 obligation in its contention to provide a reason to believe
14 that more is needed than what appears in the environmental
15 report. We said that on three different occasions on that
16 limited discussion which appears on those two pages.

17 And what is required at this time is that a
18 determination be made as to whether the contention provides
19 the basis needed to challenge the environmental report
20 statements made by the applicant.

21 CHAIRMAN BOLLWERK: All right. Ms. Chancellor.

22 MS. CHANCELLOR: We believe we have brought
23 additional information to the NRC staff and they appear not
24 to be going to address that, and that's our major concern.

25 With respect to -- I just can't let Mr. Quintana's

1 comments, whether they're gratuitous or not, I just can't
2 let all of them go unanswered. The State of Utah did not
3 take any lands from the Goshute Indians. It was the federal
4 government who took certain lands from the Indian tribes.
5 And quite frankly, it's getting a little insulting sitting
6 here listening to such comments.

7 CHAIRMAN BOLLWERK: I think we need to keep this
8 on a professional level --

9 MR. QUINTANA: I apologize.

10 CHAIRMAN BOLLWERK: -- for everyone; all right?
11 Whatever problems there were in the past, in that regard, is
12 not going to be solved in this case. That's certainly the
13 case. So --

14 I just had one question. I'm looking through my
15 papers here again. I had the impression, at least from one
16 of my notes, that the Private Fuel Storage did find part of
17 this contention admissible. Is that correct? That's what
18 I'm trying to -- I may have misread it. Sometimes I was
19 doing these kind of late at night, and that happens.

20 DR. KLINE: They did not object to --

21 CHAIRMAN BOLLWERK: They didn't object to part of
22 it, the seismic portion?

23 DR. KLINE: Wait a minute. Never mind.

24 CHAIRMAN BOLLWERK: That's what I -- I have a
25 note. Is that --

1 [Pause.]

2 MR. BLAKE: The way we subdivided the contention
3 was to go through -- have subdivisions A through F. With
4 respect to E, which is addressed on page 321 in our answer
5 --

6 CHAIRMAN BOLLWERK: Okay. Let me just --

7 MR. BLAKE: We said see the applicant's response
8 to Utah contention L.

9 CHAIRMAN BOLLWERK: Right.

10 MS. CHANCELLOR: And if I may add, they did not
11 oppose contention L.

12 CHAIRMAN BOLLWERK: That's my question. They
13 didn't oppose contention L, which -- would that -- is that
14 -- am I to take that that they don't oppose the admission of
15 at least that portion of this contention? That's what I'm
16 trying to understand.

17 MR. BLAKE: Yes, sir.

18 CHAIRMAN BOLLWERK: That's correct then? Okay.

19 And let me just ask them, since the staff did not
20 oppose the admissibility of contention L, are they in the
21 same status with respect to this?

22 MR. TURK: No, I would oppose the admission of
23 that subcontention. That subissue appears on page 163 of
24 the State's contentions. It consists of a very brief
25 statement that says: "The site chosen is one with complex

1 seismicity, capable of faults and potentially unstable
2 soils.

3 See contention L, whose basis is incorporated
4 herein by reference. The impact of placing 4,000 casks over
5 such a site is not fully assessed." That's it. Now there's
6 no reference in there to the applicant's environmental
7 report, which a contention is required to do in order to
8 satisfy 10 C.F.R.
9 2.714(b)(2)(III). So we believe that also is insufficient
10 to support the admission of this contention.

11 That is different from saying that contention L is
12 admissible. Contention L raised a safety issue rather than
13 an environmental one. So we opposed the reference here. We
14 did not, I believe we did not oppose contention L.

15 CHAIRMAN BOLLWERK: All right.

16 MS. CHANCELLOR: If I may. I think the staff is
17 looking at form over substance. I mean we incorporated
18 contention L into our NEPA contentions. We could have done
19 a cut and paste and put everything in L into, what one are
20 we dealing with? W. And if the applicant doesn't oppose
21 this, I submit that there is something to look at in the
22 environmental report and that this contention should be
23 admitted.

24 CHAIRMAN BOLLWERK: All right. And --

25 DR. LAM: The question to staff is this. If the

1 State of Utah did in fact paraphrase everything they said in
2 contention L, would that be acceptable to the staff?

3 MR. TURK: In L, there are repeated references to
4 the SAR. Page after page there are references to that. So
5 for L, there was a valid contention stated.

6 DR. LAM: Right. But what I'm saying is if the
7 State of Utah did cut and paste everything, verbatim,
8 putting L in there, would that satisfy the staff?

9 MR. TURK: May I have a moment? I want to take a
10 look at the environmental report.

11 CHAIRMAN BOLLWERK: Okay.

12 [Pause.]

13 MS. CHANCELLOR: While Mr. Turk is looking, I
14 think contention L addresses why the site is unstable. And
15 we back that up with expert testimony and references to
16 technical data. And that if the site is unstable for the
17 safety of the casks, that should also be looked at for
18 purposes of NEPA in determining the scope of the impacts
19 from siting such a facility in what may be an earthquake
20 prone area. And to say that you don't need to look at that
21 under NEPA, I believe --

22 If the only thing that Mr. Turk is looking for is
23 to see whether we cited the ER in contention L, I believe
24 that that misses the point.

25 MR. TURK: The -- we continue to oppose it, Your

1 Honor.

2 Even if you assume that the matters stated in the safety
3 analysis are -- I'm sorry, in a safety analysis report
4 contention, contention L are correct, where does that tie
5 into the discussion of environmental impacts of a facility
6 stated in the environmental report?

7 I would say that inasmuch as contention L has not
8 been opposed by the staff, I believe neither by the
9 applicant, as a safety contention, that's where it should be
10 litigated.

11 If the contention wins on a safety basis, that's enough to
12 affect licensing. There is nothing in the environmental
13 report that's been challenged. And therefore, as an
14 environmental contention, it fails.

15 MS. CHANCELLOR: The contention itself says: "The
16 environmental report does not adequately consider the adverse
17 impacts of the proposed ISFSI and does -- and thus, does not
18 comply with NEPA and 10 C.F.R. 40 -- 51.45(b)."

19 That's the basis of the -- that is the contention.

20 MR. TURK: Again then, I --

21 CHAIRMAN BOLLWERK: Wouldn't an environmental
22 impact statement otherwise consider the impacts that would
23 flow from a seismic event? Am I correct in stating it that
24 way?

25 MS. CHANCELLOR: Yes, it should. And that's --

1 CHAIRMAN BOLLWERK: And I guess your point is that
2 there are -- you raised a contention that indicates that
3 there is essential seismic impacts here. I mean, or
4 potential seismic problems here than those impacts would be
5 assessed?

6 MS. CHANCELLOR: I think if you, you know, just
7 stop and think about this practically. If there's an
8 earthquake out there, there are many, many dangerous
9 activities. And the impact of what is going to occur if an
10 earthquake happens in terms of evacuating various other
11 facilities should be taken into account. So the
12 environmental consequences of the instability of the site
13 has to be addressed.

14 DR. KLINE: This kind of comes back to the issue I
15 was raising yesterday about making assertions of inadequacy
16 without more. And the -- as the matter stands now, I can't
17 tell if the applicant simply said nothing about
18 environmental impacts, because you haven't cited anything in
19 the environmental report, or if what he said just didn't
20 satisfy you. I just don't know the difference. And so what
21 is it you want to litigate there?

22 I mean I'm not saying you shouldn't point out
23 deficiencies. I'm saying we are asking you to go further
24 and say well, the ER is inadequate. And give us the
25 citation to where it's inadequate, and then give us some

1 reason to think that there's an environmental impact out
2 there that's gone unnoticed.

3 MS. CHANCELLOR: Well, the --

4 DR. KLINE: You have experts here. I think we
5 have to have some kind of concreteness.

6 MS. CHANCELLOR: The environmental report refers
7 us back to the SAR. The environmental report on page 2.6-7
8 refers us back to the SAR.

9 DR. KLINE: No. As --

10 MS. CHANCELLOR: As -- for purposes of --

11 DR. KLINE: For the --

12 MS. CHANCELLOR: -- describing the site
13 stratigraphy and the geology of the site.

14 DR. KLINE: No. But I want to know what does the
15 -- does the ER, is the ER silent on the matter of what
16 environmental impacts flow from a seismic event?

17 MS. CHANCELLOR: Yes. Yes, it is.

18 DR. KLINE: It is totally silent on it. Is that
19 your assertion?

20 MS. CHANCELLOR: That's our assertion.

21 DR. KLINE: Okay.

22 MS. CHANCELLOR: Totally silent to meet NEPA.

23 DR. KLINE: Does the applicant agree with that, or
24 --

25 MR. BLAKE: We'll get you an answer to that,

1 Doctor.

2 DR. KLINE: Okay.

3 MR. BLAKE: But let me add one other related,
4 unfortunately not clarifying, but I think I need to point it
5 out to the board, citation here.

6 Footnote six in our answer to Utah contention CC,
7 which appears at page 36 of the filing in which we addressed
8 CC.

9 CHAIRMAN BOLLWERK: All right. That's cost
10 benefit analysis; correct?

11 MR. BLAKE: Yes, it is.

12 CHAIRMAN BOLLWERK: Okay.

13 MR. BLAKE: Would appear to have us taking the
14 opposite position. So I have some sympathy to Mr. Turk's
15 position.

16 I apologize for not, as I say, clarifying or helping. But
17 it is, and it should be taken into account as well in the
18 Board's determination.

19 CHAIRMAN BOLLWERK: All right. Well, I guess
20 that's what we're here to resolve.

21 MR. TURK: I think I heard Mr. Blake saying that
22 he's retracting his position, although he didn't say --

23 MR. BLAKE: Well, it is.

24 CHAIRMAN BOLLWERK: Or he's looking -- I think
25 maybe he's looking at us to resolve his conflict. I'm not

1 sure which one, but --

2 MR. BLAKE: It's inconsistent. To the extent I'm
3 able to at this point, this is the later position that the
4 applicant filed and the one that we adopt. And I can only
5 apologize for the inconsistency, which we didn't really
6 observe until this was brought to our attention today by
7 this discussion. And I apologize.

8 CHAIRMAN BOLLWERK: Okay.

9 MS. CHANCELLOR: I think what this points out is
10 that there really is a dispute here. The applicant may
11 agree, may not agree, but I think that there is actually a
12 factual dispute.

13 CHAIRMAN BOLLWERK: Okay. And I guess we need to
14 look --

15 MR. TURK: May I add something, Your Honor?

16 CHAIRMAN BOLLWERK: Yes, sir.

17 Go ahead, I'm sorry.

18 MR. TURK: All right. I'm looking at 10 C.F.R.
19 2.714(b)(III), which says that: "A contention must provide
20 sufficient information to show that a genuine dispute exists
21 with the applicant, a material issue of law or fact.
22 This showing must include references to the specific portions
23 of the application, including the applicant's environmental
24 report and safety report, that the petitioner disputes, and
25 the supporting reasons for each dispute. Or if the

1 petitioner believes that the application fails to contain
2 information on a relevant matter as required by law,
3 identification of each failure and the supporting reasons
4 for that belief. On issues arising under the National
5 Environmental Policy Act, the petitioner shall file
6 contentions based on the applicant's environmental report."

7 Now there's nothing in this contention with
8 respect to seismic matters that references anything specific
9 in the environmental report.

10 I'm not going to represent to you that the
11 environmental report is complete with respect to the
12 consequences of seismic events, because that would go to the
13 merits. But I will note that in the environmental report,
14 Chapter 5, the environmental effects of accidents are
15 discussed. And there is a discussion in there of the
16 consequences of man-made as well as natural causes.

17 Specifically stated on page 5.1-3 is the word
18 "earthquake." Now is that sufficient or not? I don't know.
19 Is the applicant's discussion sufficient or not? I don't
20 know. But the contention had to address whether or not the
21 environmental report is adequate, and the contention did not
22 do that.

23 DR. LAM: So are you saying the State's assertion
24 that the environmental report -- the applicant's report was
25 silent on seismic event is incorrect?

1 MR. TURK: That it's certainly incorrect. Now
2 whether the discussion is adequate is another question. But
3 the contention doesn't show a reason to believe it's
4 inadequate.

5 DR. LAM: Right. Because we just heard the State
6 counsel saying it -- the report did not have it.

7 MS. CHANCELLOR: We'll stick by our cut and paste
8 argument and the fact that the ER refers you back to the
9 SAR.

10 CHAIRMAN BOLLWERK: All right. Anything further
11 from the applicant on this point?

12 [Pause.]

13 CHAIRMAN BOLLWERK: I think, Mr. Later, we're
14 probably going to talk with you this afternoon.

15 MR. BLAKE: Maybe I can help, at least on this
16 one, since I didn't help on the last.

17 Mr. Paderk has pointed out an instance in the
18 environmental reports where the term "earthquake," the word
19 appears. And the State is taking the position that there's
20 no discussion of impacts associated with seismic events.
21 They're both right. And there's an obvious reason for that.

22 We don't believe there's any impacts associated
23 with seismic event. So we have no discussion of it and
24 that's our position.

25 Now you could allow the contention, and then we'd

1 say that's why we don't have any discussion. There are no
2 impacts. But I think I'd prefer that you adopt our other
3 position and disallow it. Thank you.

4 CHAIRMAN BOLLWERK: That it -- I'm sorry, that it
5 is?

6 MR. BLAKE: I say I hope -- I'd prefer that you
7 adopt our position that I took earlier, which is in view of
8 the inconsistencies, the later position, we don't think it's
9 appropriate, and you would disallow this aspect of the
10 contention as well.

11 CHAIRMAN BOLLWERK: Okay.

12 All right. Why don't we go ahead and take our
13 luncheon break then. Let's come back at -- right. 1:30
14 please.

15 [Recess.]

16 CHAIRMAN BOLLWERK: Why don't we go back on the
17 record.

18 We're here for our afternoon session. Let me check and see
19 at this point any procedural matters anybody wants to take
20 up quickly?

21 All right. If not, I think we were ready to hear
22 from Mr. Later about Castle Rock 9 and 14 and then 17.

23 MR. LATER: Let me deal with contentions 9 and 14
24 initially together. I think they raise a set of issues that
25 are sufficiently related. I can say what I need to say as a

1 group. The contentions deal with regional and cumulative
2 impacts of the facility.

3 In contention number 9 we have noted that the
4 application does not provide consideration of the impact of
5 other nuclear facilities and the cumulative impact of
6 nuclear facilities that are near the proposed site. The
7 dispute, as I understand it from the staff and applicant's
8 response is first that they need only consider facilities
9 within a five-mile radius. And in any event, they see no
10 foreseeable impact from any of the other nuclear facilities
11 that are a greater distance.

12 In quick response let me note that there is
13 currently the Envirocare low-level nuclear waste facility,
14 and there is just recently a proposed Laidlaw low-level
15 facility which Laidlaw proposes to place in proximity to
16 this facility which would fall within the ambit of this
17 concern.

18 We think that the five-mile limitation is
19 artificial and not mandated by the regulations. The
20 regulations simply require the applicant to consider other
21 nuclear facilities that are near, and that the standard for
22 that should be if there are foreseeable impacts, as we
23 believe there are, and the scenario as presented by both the
24 State and Castle Rock have shown potential scenarios for
25 cumulative impacts among those facilities that should be

1 considered.

2 The EPA NEPA requirements also require
3 consideration of regional impacts, and in that regard we
4 believe a showing has been made of the potential and
5 foreseeable and viable potential for accidents at the other
6 hazardous facilities which we have enumerated which are in
7 the vicinity, and that accidents at those facilities could
8 impact the operation of the PFS facility potentially
9 requiring its evacuation leaving the facility unmonitored,
10 unmanned and subject to its own resulting accidents.

11 That those scenarios need to be considered and are
12 not in the ER.

13 And finally in contention number 14, we have
14 raised the failure to consider impacts on groundwater
15 contamination and resulting food source contamination. And
16 I think this raises an issue which I would characterize not
17 as a second- bite issue but simply as a failure of the
18 applicant's approach to this facility that impacts not only
19 safety considerations but environmental considerations as
20 well, and that is the treatment for potential groundwater
21 contamination.

22 The applicant has staked out the position the
23 facility will be designed that there will be no releases.
24 The conclude that therefore there will not be any releases
25 and therefore they need not plan for any releases, and

1 therefore need not consider the impacts of any such
2 releases.

3 The critical step in there is that there is no
4 foreseeable reasonable potential for any releases
5 irrespective of what is planned. We've gone over that
6 ground, and we think we've shown there is an issue of fact
7 as potentiality of releases irrespective of the design
8 conditions of that facility. And if there are releases,
9 there needs to be planning or handling those releases, as
10 well as anticipation of the consequences of those releases.

11 I think in particular the potential for
12 contamination of food sources, contamination of livestock is
13 one that should be particularly attended to in light of the
14 applicant's position that it will do no monitoring of the
15 groundwater in the event of any releases. So simply
16 contamination could exist for a significant period of time
17 in the absence of any measures to detect and remediate.

18 So we think in those two contentions we have
19 stated a sufficient basis for a reasonable identification of
20 issues for litigation. Thank you.

21 CHAIRMAN BOLLWERK: All right, sir. Mr. Blake, I
22 see you picking up the microphone.

23 MR. BLAKE: Yes, sir. This response to these two
24 points out the difficulty we've had in preparing to react
25 here. This is 9. It had a couple of pages of response.

1 Fourteen had on the reply none, and yet here we are. I'll
2 do my best.

3 With respect to 9 and the pages that have been
4 already put in where this is our first opportunity to react,
5 Castle Rock argues that the five-mile radius around the
6 proposed ISFSI site is really too small to take into account
7 the cumulative impacts and that we should do something more.

8 We did do something more, and we did look at
9 facilities outside, and we did look at them to the extent
10 that they might have impacts on us, or that we might have
11 impacts on them. And we don't get credit for that.

12 To the extent they also believe that we should
13 take into account the cumulative impacts of these events, I
14 read the cases that they cite, Thomas and pre-ISFSI cases,
15 and they simply don't apply to our situation. Those cases
16 were -- in one case concerning timber sales and logging
17 within specific water shed and whether or not more would be
18 allowed. And in another case concentrated housing
19 development in a sensitive shoreline area around West
20 Galveston, Texas.

21 In each of those the decision maker was faced with
22 collective impacts on a specific area. We simply don't have
23 that here. You keep saying over and over again the impacts
24 are more facility -- they could be very limited. We hear
25 that there's the potential for others, but we never see the

1 basis. We never see the factual discussion. We never see
2 the expert opinion to support that there in fact is a real
3 basis for off-site impacts of the kind that are raised only
4 as a potential. It simply isn't enough. Potential is not
5 enough.

6 With regard to what we've heard from Castle Rock
7 today orally, the first reference I believe was to
8 Envirocare facility, which is some 20 miles away without any
9 showing of crossed impacts we would have on Envirocare and
10 Envirocare would have on us. It's simply not good enough.

11 The final reference was to livestock and the
12 potential for impacts of livestock. We went by there. Even
13 all the cattle which had been moved down closer to our
14 facility for purposes of our tour on Monday, did not to me
15 seem in any way to be impacted or could be impacted by
16 having this very quiet and silent facility sitting next to
17 them. I don't understand the impact on the cows.

18 I do understand that there are hypotheticals for
19 water or others all of which we've addressed in our papers,
20 and none of which do they take on. It's not the basis -- I
21 said it I don't know how many times, Judge. Every time it
22 comes up I think we have to react again. There's not a
23 sufficient basis with specificity to allow a contention of
24 this type.

25 CHAIRMAN BOLLWERK: All right, sir. Mr. Quintana.

1 MR. QUINTANA: I think this have been stated
2 previously. So I'll reiterate it again briefly. There is
3 no scientific basis for this contention, and therefore the
4 tribe would object.

5 CHAIRMAN BOLLWERK: Staff?

6 MR. TURK: Thank you, Your Honor. The staff has
7 opposed both of these contentions on the principal ground
8 that there is a lack of basis shown to support it.

9 I'd like to rely upon those submissions, but then
10 respond also to a few of the comments made by Mr. Later.

11 In particular Mr. Later stated that both the
12 applicant and the staff limit the regional impact analysis
13 to five miles. That's not correct for the staff. Whatever
14 may be the extent of the applicant's analysis, we will
15 follow the requirements in 72.98 which requires us to
16 consider regional impacts.

17 And I would note that the definition of "region"
18 in 10 C.F.R. 72.3 is not limited to a five-mile area, but
19 rather it's defined as the geographical area surrounding and
20 including the site which is large enough to contain all the
21 features related to a phenomenon or to a particular event
22 that could potentially impact the safe or environmentally
23 sound construction, operation or decommissioning of an
24 ISFSI.

25 So we will consider the regional impacts. Whether

1 that would be limited to five miles or two miles or ten
2 miles will really depend upon the particular impact and the
3 regional impact that might be expected. So we are not going
4 to limit it to five miles.

5 I would add also that when you look at the
6 assertion of cumulative impact, nothing has been provided in
7 support of this contention which would lead you to believe
8 that this facility will have a combined impact when
9 considered in conjunction with the impacts at any other
10 facility that requires consideration here.

11 There was another proceeding which both Mr. Blake
12 and I were involved back in the early 1980s in Waterford in
13 which a contention was raised that there would be a
14 synergistic effect between the radiation emitted from the
15 effluent stream of a nuclear reactor when combined with
16 chemicals present in the Mississippi River. There were
17 studies submitted in support with that contention. The
18 contention was admitted. By the way, that was before the
19 rules were amended in 1989. I doubt that that contention
20 would be admissible today.

21 However, that was an assertion of a combined
22 impact.

23 Nothing of that nature has been submitted to you here to
24 warrant consideration of this alleged cumulative impact
25 that's set forth in contention 9.

1 CHAIRMAN BOLLWERK: If we do not admit this
2 contention or these contentions in dealing with -- I guess
3 the regional -- the question of regional coverage, regional
4 impacts, and then the staff decides later it's 50 miles, is
5 that cause for a late file contention then or how does it --
6 I mean obviously then there is not -- you and the outcome
7 are now all on the same page at least to a degree.

8 MR. TURK: The existence of some fact which can be
9 known today would establish the timeliness of the contention
10 filed later. For instance, if the staff's EIS came up with
11 some information which was in existence today but which the
12 intervenors and the applicant did not cite, that wouldn't
13 make it any less the responsibility of intervenors today to
14 be aware of that information or to cite it in support of the
15 contention.

16 On the other hand, if the staff comes up with
17 something that could not have been foreseen through
18 available information today, that could constitutes grounds
19 for a new contention later. I don't know that that would
20 happen though.

21 CHAIRMAN BOLLWERK: And I take it when the staff
22 makes a determination on what the region is they give their
23 reasons for doing that --

24 MR. TURK: The staff --

25 CHAIRMAN BOLLWERK: -- in terms of how they define

1 the region, what went into their thoughts about that?

2 MR. TURK: Typically the staff would request
3 information from the applicant to support the applicant's
4 submission of what the regional impacts would be. And the
5 staff through inquiry and through further deaccessions which
6 would be part of the public record would then determine
7 whether that's appropriate or whether additional factors
8 have to be taken into consideration.

9 CHAIRMAN BOLLWERK: And if it decided that
10 additional factors needed to be there, they would discuss
11 those I take it?

12 MR. TURK: Yes, that would be in the
13 correspondence.

14 CHAIRMAN BOLLWERK: Any other questions?

15 MR. TURK: As well as the steps of safety
16 evaluation and possibly in the environmental impact
17 statement if they accepted those into the environmental
18 impact.

19 CHAIRMAN BOLLWERK: All right. Mr. Later.

20 MR. LATER: Very quickly. If I have tarred the
21 staff with the same brush used on the applicant on the
22 standard radius I apologize for that. I think the standard
23 is articulated by Mr. Turk, as I listened to it, as the one
24 that we propose here. I think where we differ from both the
25 applicant and the staff is on the issue of whether we have

1 shown through these proceedings foreseeable scenarios of
2 accidents or events at other facilities in Tooele County
3 that we have referred to, impacting this facility.

4 I think we're simply asked to look at that
5 proffer.

6 And hopefully in light of the early stage of these
7 proceedings except that it has raised issues of fact that in
8 fact make this fair ground for litigation on that issue.

9 As far as the impacts that we've referred to on
10 groundwater, I guess I wish that I were clever enough to
11 have thought to move all the cattle down next to the
12 facility for purposes for its tour. Unfortunately I wasn't.
13 I guess I ought to take the credit if it's offered.

14 The impact we referred to is groundwater impact.
15 I think we've shown that in detail our concerns about the
16 contamination of groundwater, and the water that those
17 cattle drink comes from that groundwater as well as the
18 water that human inhabitants use. We think that is clearly
19 demonstrated scenario of impacts that is not addressed by
20 the applicant. Thank you.

21 CHAIRMAN BOLLWERK: All right, sir. Then I guess

22 --

23 MR. BLAKE: Well, I think I need to say at least,
24 Judge Bollwerk, that I believe no one had seen so many
25 cattle so close to the road that we took at recent times.

1 CHAIRMAN BOLLWERK: All right. I have no basis
2 for saying one way or the other, other than I know cattle
3 wander around.

4 MR. TURK: I need to reply to one of Mr. Later's
5 comments just now.

6 CHAIRMAN BOLLWERK: All right.

7 MR. TURK: There is a regulation, and we discuss
8 it and the contention mentions it as well. It's 72.122
9 which deals with the combined impacts of nuclear facilities.
10 This contention would seek to expand the regulation to
11 require more than just a consideration of combined effective
12 nuclear facilities. And there is no regulatory basis for
13 that.

14 That is discussed in our papers.

15 So to accept that Mr. Later is now referring to
16 groundwater impacts that combine effective nuclear
17 facilities would be subject to that regulation.

18 DR. LAM: I'd like to hear Mr. Later's response.

19 CHAIRMAN BOLLWERK: Yes, I'm coming to that. I
20 was just looking at Judge Kline. Sort of done some
21 environmental impact statements in his day. I wanted to see
22 if he had anything to say.

23 Go ahead.

24 MR. LATER: I believe some of that is a product of
25 my trying to bundle together separate issues. We're aware

1 that the first standard we relied on in contention number 9
2 does refer to nuclear facilities and cumulative impacts
3 there.

4 Also in part of number 9 we refer to the need requirements
5 requiring need regional analysis. And then in contention
6 number 14 I believe we invoke different regulatory authority
7 in consideration of the groundwater impacts.

8 So I think if you look at those contentions I
9 believe that you will see that we have appropriately sorted
10 out the authority under which we're raising the contention,
11 and we're not trying to bundle it all together under the
12 cumulative impacts of nuclear facilities.

13 CHAIRMAN BOLLWERK: All right. Anything further
14 on that one?

15 MS. MARCO: I would just like to know from Mr.
16 Later what the status is of that Laidlaw facility. Isn't it
17 true that it's not built yet? Isn't it true there's
18 potential litigation for that?

19 MR. LATER: The Laidlaw facility does exist and is
20 built. I'm sure additional construction would be required
21 if it were licensed to handle low-level nuclear waste. It's
22 currently before the state legislature seeking legislation
23 fast-track licensing procedure. I'm not aware of any
24 litigation that's currently under way regarding that
25 facility. I know that -- or at least I read in the

1 newspapers that Laidlaw counsel threatened litigation if
2 their license efforts are they believe unfairly thwarted.

3 Mr. Nelson may have better authority --

4 MR. NELSON: May I just make a comment on that?

5 CHAIRMAN BOLLWERK: Sure.

6 MR. NELSON: The Laidlaw facility exists. It is a
7 hazardous waste disposal facility run by Laidlaw. The
8 proposal is to change it to a low-level and include
9 receiving low-level waste. It is that part of it that is in
10 the process of going through State approval, but the
11 hazardous waste facility exists, and it's operational.

12 CHAIRMAN BOLLWERK: All right. Thank you, sir.
13 Anything further?

14 All right. I think then we have Castle Rock 17.

15 MR. LATER: We do have number 17. And as
16 applicant's counsel pointed out to me, it might be
17 appropriate to group our contention number 18 dealing with
18 health impacts on public health. And we have bundled
19 together our reply on those two.

20 CHAIRMAN BOLLWERK: All right.

21 MR. LATER: So if the panel is agreeable, I will
22 deal with those two together.

23 CHAIRMAN BOLLWERK: Certainly, sir.

24 MR. LATER: Contention number 17 raises the issue
25 of the applicant's consideration of land impacts. The

1 staff, as we read it, does not oppose this contention. We
2 raised the contention under 10 C.F.R. 72.98 which requires
3 consideration of present and future uses of land and water
4 within the region.

5 We are particularly concerned of course of the
6 impact of this facility on Castle Rock property and its
7 potential.

8 And I think that some of this should be graphically brought
9 home to the panel as a result of our tour through Skull
10 Valley at the first of this week.

11 It is easy to understand why the Goshutes should
12 be attracted to the Private Fuel Storage facility. I think
13 all of us can understand the paucity of opportunities in
14 development that have existed in that valley in the past,
15 and it's hard to fault the temptation of money from Private
16 Fuel Storage.

17 But the panel has also seen the potential for
18 dynamic and substantial development in that area. I hope
19 the panel has observed the development plans and activities
20 that Castle Rock currently have under way there. And as we
21 drove west out of the almost full Salt Lake Valley into the
22 now the valley Tooele, you can see the pace of development
23 moving west and the opportunities that soon will exist in
24 Skull Valley both for my client as well as others. The
25 development of agriculture light industry, residential

1 development.

2 We are concerned, and we believe we have presented
3 evidence to this panel that the Private Fuel facility will
4 potentially close the door on development in that valley.
5 For a period of time that this applicant cannot even
6 credibly tell us or give us a maximum extension for. It
7 will clearly close it for the lifetimes of my clients'
8 owners, lifetimes of everyone who are here.

9 At the very least my clients are entitled to an
10 analysis of what those real impacts are done in a realistic
11 and credible manner, and that is an issue that is
12 appropriate for litigation before this panel. We think we
13 clearly have raised serious issues of fact as to what is the
14 potentially devastating impact on the future of Skull Valley
15 from this facility. We take this contention very seriously.
16 Thank you.

17 CHAIRMAN BOLLWERK: Anything else?

18 MR. LATER: No, Your Honor.

19 CHAIRMAN BOLLWERK: All right. Mr. Blake.

20 MR. BLAKE: I take it that when he said "this
21 contention" he meant "17" and "18" both.

22 MR. LATER: That is correct.

23 CHAIRMAN BOLLWERK: Okay, I was wondering the same
24 thing. Thank you for pointing that out. Go ahead.

25 MR. BLAKE: There's a basic problem between Mr.

1 Later's view of impacts and the applicant's view of impacts.
2 And it's pointed out pretty graphically with respect to
3 these contentions and even the cases that he cites. I urge
4 the Board to look at the cases that are cited here with
5 regard to impacts and which are obviously the best cases
6 that Mr. Later believed would be supportive of his position.

7 The first one he cites is the Forked River case.
8 I tried that case. Mr. Later probably didn't realize it,
9 but I did. And there were impacts there, but we're talking
10 about physical impacts. We're talking about holes in wood
11 piers and pilings downstream of a plant, and that led to
12 economic woes of the owners of those pilings and piers with
13 holes in them.

14 We're talking here about the potential for some
15 kind of concern of people surrounding, but there are no
16 holes in wood, and there are no holes in pilings, and
17 there's no off- site contamination. We do not -- there are
18 not those physical impacts on the property which
19 appropriately would take into account in that situation in
20 New Jersey.

21 It's not the same thing to have people potentially
22 have a concern about it, a psychological concern. That case
23 again was a case I did at Three-Mile Island. It went to the
24 supreme court. The determination is it can't take into
25 account the potential psychological concern that a nuclear

1 power facility might bring or even, in my view, that case's
2 application here to a much more docile facility than a
3 nuclear power plant. That's the law.

4 You might not like it as the owner of the land or
5 representing clients that want to develop the land in the
6 future, but that's the law, and I urge the Board to apply
7 it.

8 CHAIRMAN BOLLWERK: All right, sir. I haven't
9 disappeared on you. Here I am. Anything further?

10 MR. BLAKE: No.

11 CHAIRMAN BOLLWERK: Mr. Quintana.

12 MR. QUINTANA: Very briefly, the nuclear
13 facilities that we visited in other parts of the world,
14 including the one at Oscarsham in Sweden, was located next
15 to their most plush summer resort. Some of the power plants
16 that we visited, in talking with the local residents, the
17 value of their real estate increased, not decreased. It
18 will just depend on how this facility is constructed and the
19 manner in which it is operated.

20 If it is operated as a world-class facility for
21 the storage of spent nuclear fuel, and the money is used by
22 the tribe to build new housing and provide health care, and
23 to improve the lives of the people, and increase their land
24 base and preserve their language, then the value of the
25 surrounding real estate will go up. If the money is used

1 for dividends and just used by the members in a manner
2 that's a detriment to themselves and to others, then I
3 suppose the value of the real estate will go down.

4 CHAIRMAN BOLLWERK: All right. Staff?

5 MS. MARCO: The staff did not oppose contention
6 17.

7 CHAIRMAN BOLLWERK: All right. But you did oppose
8 18.

9 I'm sort of wondering what --

10 MS. MARCO: We did oppose 18, because it did not
11 provide sufficient information to show a genuine dispute, as
12 is required by 2714.

13 CHAIRMAN BOLLWERK: Let me ask one question.
14 There's a statement in here about a 50-mile radius at one
15 point, and contention 17 is part of the basis. And I'm
16 wondering does that have any impact on what you already said
17 about cumulative impacts in terms of where those have to be?
18 Or the regional impacts I should say. I'm sorry.

19 MR. TURK: Do you have a page reference for that?

20 CHAIRMAN BOLLWERK: Yes, I'm sorry, page 56 and 57
21 of the contentions of Castle Rock. Is that 50-mile radius
22 for a different purpose? I just want to make sure I'm not
23 misunderstanding.

24 MS. MARCO: Can we have a minute, Your Honor?

25 CHAIRMAN BOLLWERK: Surely.

1 MR. TURK: As we understand what the contention is
2 asserting, Your Honor, it's really a merits' issue as to how
3 broad an area needs to be evaluated.

4 MR. LATER: I think that's a fair reading of what
5 we're saying there.

6 DR. KLINE: Mr. Turk, I understood you in one of
7 your earlier statements as sort of resisting defining an
8 arbitrary area that has to be evaluated, and instead citing
9 us something that said you would in a since follow the
10 impact. If something reached out 50 miles you'd go that
11 far, but if it didn't you wouldn't. And is that a fair
12 understanding of what you told us before?

13 That is to say that if one does an assessment say
14 of an effluent and finds that it goes one mile, that you
15 wouldn't necessarily look for it 50 miles out. Is that
16 correct?

17 MR. TURK: That's true.

18 DR. KLINE: Yeah. That you would follow the
19 impact, not set in an arbitrary radius.

20 MR. TURK: Yes.

21 DR. KLINE: Okay.

22 MR. TURK: And by comparison also, if there's
23 deposition into a stream of running -- fast-moving stream of
24 running water that was deposited 100 miles away that would
25 be an impact --

1 DR. KLINE: Okay.

2 MR. TURK: -- which would not --

3 DR. KLINE: It would be just helpful -- I mean if
4 we could sort of add something concrete to the word "impact"
5 which is a kind of abstract thing that really doesn't help
6 us a whole lot. It seems like NEPA really asks us to look
7 at what's happening to air, water and land, you know, in
8 this project. And the things that happen normally are like
9 an effluent reaches out and gets deposited, or something
10 gets dissolved in water.

11 And this is -- it would be more illuminating to
12 the Board to hear what your real problem is. It isn't
13 helpful just to say, "Hey, I think there's an impact."
14 Well, like what? What's the effluent? What's the emission?
15 What's the hole? What is it that is the impact? So that
16 that abstract term isn't very illuminating to us.

17 And in order to evaluate a contention we need to
18 know what your problem is. Well, what's happening to air,
19 water and land as a result of this project or life thereon?
20 You know, I mean --

21 MR. LATER: Let me respond, if I may.

22 DR. KLINE: Yeah.

23 MR. LATER: First I think the standard we are
24 operating under is one that speaks of requiring
25 consideration of present and future uses of land and water

1 within the region, and that's what we say isn't there.

2 In terms of immediate tangible impacts, we have
3 recited the potential contamination of groundwater, a
4 serious concern. Effluent -- that clearly if there's
5 contamination of groundwater it will extend on our property.
6 That's the nature of the gradient.

7 There are the concerns of traffic on that road.
8 You've seen that's a road that's used by our property. It's
9 the lifeline of our property. It's used for moving cattle
10 up and down, which means letting the cattle out on the road
11 and having them walk down so that they can move from the
12 south end of the property to the north end or wherever the
13 grazing is appropriate.

14 We are concerned with the impacts construction
15 activity: dust and noise.

16 We are concerned and believe that the regulation
17 property addresses the legitimate concerns the potential of
18 radiation releases, the impact of an accident on another
19 facility that may result in contamination of that property,
20 all of which will result in making it unsuitable for the
21 kinds of future land uses that my owners project for that
22 property as described.

23 For example, their efforts to market their beef as
24 beef grown in a particularly range-fed market would simply
25 be blocked by the fact that it's beef that's grown adjacent

1 to a nuclear waste storage facility. The potential of
2 groundwater contamination, it ceases to be marketable. We
3 submit to you that that is a legitimate limitation and
4 impact on the future use of that land that this Board should
5 consider.

6 Those are the kinds of impacts I think we've
7 described in enough detail that I hope the Board can get
8 your hands on --

9 DR. KLINE: Okay, thank you.

10 CHAIRMAN BOLLWERK: Yes, Mr. Turk.

11 MR. TURK: I should probably just point out while
12 we're on this discussion that the standard review plan for
13 spent fuel dry storage facilities, noreg 1567, specifies at
14 page 2-6 that current population data and projections should
15 be presented. A sector map of population should be included
16 in the area within an 8-kilometer 5-mile radius of the site
17 is divided into concentric circles.

18 And I'm sure there's another reference somewhere
19 too in staff guidance as to a 50-mile circle. And I don't
20 find that in front of me now.

21 CHAIRMAN BOLLWERK: I understand. What you're
22 saying is both of those are staff-drawn circles and are
23 suggested guidance in terms of --

24 MR. TURK: I'm sure the five-mile circle is -- as
25 I sit here I can't find the reference to the 50-mile circle.

1 But it's really a staff guidance as to what is necessary in
2 order to show compliance with the regulation.

3 CHAIRMAN BOLLWERK: All right.

4 MR. LATER: And we think both in contention number
5 9 as well as in these contentions that the appropriate area,
6 whatever that kind of rule of thumb of the staff is, is that
7 you look to the area where there are impacts wherever that
8 may lie.

9 MR. TURK: If I may also add -- I know I'm a
10 little bit out of turn here. Before we were talking about
11 the impacts of other facilities. On that same page of the
12 nureg 1567, page 2-6, there's a statement that locations of
13 nearby nuclear industrial, transportation and military
14 installations should be indicated on a map which would
15 include all facilities within an eight-kilometer five-mile
16 radius, as well as facilities at greater distances as
17 appropriate to their significance.

18 CHAIRMAN BOLLWERK: All right. Anything further
19 on that?

20 MR. LATER: I believe we'll submit it on that
21 record.

22 CHAIRMAN BOLLWERK: All right. We also have OGD
23 P.
24 Ms. Belille.

25 MS. BELILLE: Your Honor, contrary to NRC staff

1 response, OGD specifically identified those aspects of the
2 PFS routine operations which would adversely impact the
3 ability of the members of OGD to pursue a traditional
4 Goshute lifestyle. Visual intrusion, noise, traffic,
5 presence of strangers, transportation activities, especially
6 very large, heavy haul trucks, the potential for accidents,
7 and most importantly the physical presence of a dangerous
8 waste storage facility on their ancestral home lands.

9 OGD did not challenge the specific portions of the
10 environmental report dealing with such impacts as NRC staff
11 asserts OGD should have done. The reason was the
12 environmental report completely ignores this issue. OGD
13 acknowledges that the environmental report adequately
14 addresses what are considered generally referred to as
15 standard socio-economic impacts. And those are found in ER
16 4.111 to 4.118, 4.25 to 4.29, 4.38 to 4.39, 7.21 to 7.24.

17 However, OGD finds no reference in the
18 environmental report to potentially adverse cultural impacts
19 generally nor any reference to adverse impacts on the
20 ability of OGD members or other members of the tribe to
21 pursue a traditional Goshute lifestyle.

22 Contrary to NRC staff assertion that OGD provided
23 no basis to support this contention, OGD submitted
24 affidavits signed by four members of the Skull Valley
25 Goshute Tribe, all of whom reside on the reservation within

1 two to three miles of the proposed PFS site, all of whom
2 testified to their concerns about potential adverse impacts
3 on their ability to pursue a traditional lifestyle. See
4 Exhibits 16, 17, 18 and 19.

5 Since these affidavits are part of the record in
6 this proceeding they need not be cited extensively today in
7 oral argument. These affidavits document tribal members'
8 concerns ranging from specific issues such as adverse
9 impacts on traditional activities such as plant gathering,
10 to a generalized fear that the land of their ancestors will
11 not be the land of their tribe's children's children because
12 of the nuclear waste that will be brought upon the land and
13 made forever tainted.

14 The OGD affidavits also refute NRC staff assertion
15 that OGD has failed to show that a genuine dispute exists
16 with the applicants. PFS' environmental report identifies
17 no significant adverse impact on tribal members in contrast
18 to potentially great economic benefits. Those are found in
19 the environmental report 7.23 to 7.24.

20 The affidavits show that some members of the tribe
21 oppose the PFS project in spite of its promised economic
22 benefits, because of safety concerns, because of potentially
23 adverse impacts on traditional Goshute lifestyles, and
24 because of potentially adverse impacts on the reservation
25 itself.

1 Finally, OGD challenges the NRC staff's assertion
2 that issues such as community or individual loss or sense of
3 well being are improper for consideration in NRC proceedings
4 under NEPA.

5 When the NRC docketed an application for a facility
6 such as the site on an Indian reservation, the Native
7 American people affected by the agency's actions have a
8 right to expect consideration of cultural impacts. The fact
9 that members of the Skull Valley Goshute Tribe are divided
10 over the proposed facility does not excuse the NRC from
11 consideration of cultural impacts in the licensing process.
12 Thank you.

13 CHAIRMAN BOLLWERK: All right. Mr. Blake or Mr.
14 Silberg.

15 MR. SILBERG: We would rest on our written
16 submissions.

17 CHAIRMAN BOLLWERK: All right. Mr. Quintana.

18 MR. QUINTANA: We agree with OGD that there is a
19 division within the band on whether or not this facility
20 should be built.

21 We disagree that from a scientific standpoint that
22 there would be any radiological danger or other dangers to
23 the band members.

24 The building of any facility on the reservation is
25 going to have an impact on this small reservation. The

1 building of the rocket test facility had an impact. The
2 building of the tribal store. If the proposed reservoir is
3 built that will have an impact. The current sheep
4 investigation on the sheet burial site is obviously having
5 an impact.

6 All of these things will have an impact but we
7 disagree that it's going to disrupt the culture or adversely
8 affect the band.

9 CHAIRMAN BOLLWERK: All right, sir. Staff?

10 MR. TURK: We'll rest on our written submission.
11 And I would simply note that where there is a perceived
12 impact upon Native American historic sites or religious
13 practices or a gathering, that would be an impact to
14 consider. The only thing mentioned in this contention is
15 that there is a fear that those activities would be
16 impacted.

17 We do require consideration of environmental
18 effects, such as radiation, effluent will affect on the
19 nearby area, transportation impacts which Ms. Belille
20 discussed, the noise impacts. All of those things are the
21 proper subject for the environmental report and the
22 environmental impact statement. But this other broader
23 concern is really one of psychological well being and
24 psychological impact, and that is improper for consideration
25 in our proceedings.

1 CHAIRMAN BOLLWERK: All right, sir. Any response
2 from OGD?

3 MR. KENNEDY: Your Honor, during this hiatus might
4 I just mention while the staff might think that
5 psychological impacts are not worthy to be considered, they
6 certainly are a reality. And if you think that grandmothers
7 are going to bring their children to play on the reservation
8 in a neighborhood of a nuclear storage facility such as
9 this, you're wrong. And if you think that people are going
10 to want to bury their dead in an area like this, you're
11 wrong.

12 There clearly is an impact.

13 And if this process that we're going through
14 doesn't take that into account, then the process is faulted,
15 and somehow that needs to be considered and evaluated.

16 MR. TURK: Our response at page 99 then, I believe
17 this is referred to by the applicant as well, cites a
18 Supreme Court decision, Metropolitan Edison Company v.
19 People against Nuclear Energy. The citation was given in our
20 paper at page 99.

21 It has been held at the level of the Supreme Court
22 that the assertions of psychological impact are not matters
23 which raise concrete and litigable issues, and therefore are
24 improper for consideration in NRC proceedings. It's on that
25 basis that we oppose the admission of that kind of an issue.

1 MR. KENNEDY: I'm not disagreeing with your
2 interpretation of the law necessarily. I'm just saying if
3 that's what the law is, it's seriously flawed in this
4 regard.

5 CHAIRMAN BOLLWERK: All right.

6 MS. BELILLE: Your Honor, I have one more comment.

7 CHAIRMAN BOLLWERK: Go ahead.

8 MS. BELILLE: I just want to stress that the
9 affidavits that were cited as evidence in this contention
10 cites specific concrete activity that the tribal members
11 believe is going to be impacted, the impact that it's going
12 to have on them. And we would like to call to the attention
13 of the staff that there is a specific allegation that plant
14 gathering is going to be one of those impacts.

15 DR. LAM: Mr. Turk, to go back to what you were
16 saying, are you saying that the NEPA impact on culture and
17 lifestyle are appropriate?

18 MR. TURK: Impacts upon aesthetic effects have
19 been looked at. Impacts upon food gathering to the extent
20 that there may be contamination of foods, that would be
21 looked at in the environmental report. But not a matter
22 such as a perception that this plant somehow presents
23 members to be afraid, presents concerns which people are
24 afraid of. That is not looked at.

25 CHAIRMAN BOLLWERK: Anything further on this?

1 MS. BELILLE: Yes. Your Honor, the only other
2 thing that we would add is that the affidavits would bring
3 to the attention of the Board that perceived risk that
4 others may have on the -- of the facility would be an impact
5 on the members of the Goshute Tribe.

6 CHAIRMAN BOLLWERK: All right.

7 MR. QUINTANA: Very briefly, I do need to bring to
8 the Board's attention that in the first phase of the
9 nerve-gas contaminated sheep case the sheep were actually
10 found, and it was determined that it was nerve agent DX that
11 killed the sheep.

12 In the second phase which we're going to undertake
13 this year, the plan is to do an environmental analysis of
14 all of the plants and animals and everything that exists on
15 the reservation to determine whether there has been any
16 other effects from the nerve and biological releases from
17 Dugway Proving Grounds, and that is in phase two.

18 But based upon the scientific research and our
19 review of the scientific literature that exists out there,
20 there is at least to the best of the knowledge of the Tribal
21 Executive Committee no scientific basis for believing that
22 there would be a radiological impact or releases from this
23 storage facility.

24 CHAIRMAN BOLLWERK: All right, sir. Anything else
25 you want to say, Ms. Belille?

1 MS. BELILLE: No, Your Honor.

2 CHAIRMAN BOLLWERK: All right. Let's then look
3 next at Utah contention X, need for the facility. And I
4 don't think I found one that was -- although some of the
5 other contentions were in the same area, this one seemed to
6 be the one that presented this question most directly, so --

7 MS. CHANCELLOR: The applicant addresses this on
8 ER --

9 MR. SILBERG: Excuse me. Could you just --

10 MS. CHANCELLOR: Oh, sorry.

11 CHAIRMAN BOLLWERK: Switch books here. Now the
12 paper.

13 MS. CHANCELLOR: I was going to give Mr. Blake
14 credit, but I guess it's Mr. Silberg.

15 The ER addresses the need for the facility on ERP
16 -- it starts on page 1.2-1. However, all of the discussion
17 deals with what are the pros of signing this facility, such
18 as the economic advantage to the utility companies, the
19 ability to decommission.

20 Under 51.45(e), there's a requirement that the
21 adverse -- that all adverse information be presented. And
22 we believe this has not been done. For example, there's no
23 discussion of why dry storage should not take place at the
24 reactor as opposed to the environmental consequences of
25 transporting this fuel halfway across the country.

1 If part of the reason for the need for this
2 facility is so that nuclear power plants can decommission,
3 there should be a discussion of what's going to happen to
4 the spent nuclear fuel that leaks that needs to be sent back
5 to the originating reactor.

6 This gets to some of our other contentions, but
7 also in terms of need for the facility, that is PFS'
8 primarily plan for dealing with leaking and contamination
9 casks. And there's no discussion of that in the need for
10 the facility.

11 I think we need to step back and remember what we
12 discussed on day one. That is, this should be a national
13 decision. This is something that we believe is not
14 authorized by statute. And that this national decision
15 should be a decision that's made by Congress.

16 I believe --

17 DR. LAM: Ms. Chancellor, do you want this Board
18 to tell Congress what to do?

19 MS. CHANCELLOR: No, I want Congress to tell this
20 Board what to do.

21 I think I'll rest on that.

22 CHAIRMAN BOLLWERK: All right. Anything from the
23 applicant?

24 MR. SILBERG: First let me make a few brief
25 comments with respect to the State's written response to

1 this.

2 First, the State says that we made an unsupported
3 assertion that there's a need. Well, the environmental
4 report section 1.2 provides that support.

5 Second, the State cites on the bottom of page 89
6 that NEPA requires an affirmative description and
7 demonstration of need, not an unsupported assertion. And it
8 cites CQ regulation section 1502.10. 1502.10 describes the
9 standard format for an EIS. It says nothing about the need
10 for an affirmative description and demonstration of need. I
11 don't know if that's a typographical error or I'm unaware of
12 any CQ regulation that makes such a statement.

13 I would note that CQ regulation Section 1502.13
14 says that the EIS shall briefly, their words, specify the
15 underlying purpose and need. Well, all that one must do to
16 meet the CQ regulation, not the one that they cited by a
17 different one, is to make a brief description of the purpose
18 and need, and we have certainly done that.

19 I'd also note on page 90 their reference to their
20 Exhibit 9 which is an excerpt from a Northern States Power
21 home page which they say has now been deleted so it doesn't
22 exist electronically, but they have captured it forever and
23 ever on paper.

24 They say that the representations in that home
25 page support the State's contention that need is not

1 accurately discussed. That paper which I think they also
2 included in their original contention, indicates that the
3 existing Prairie Island dry-storage facility is physically
4 big enough to take a lot more fuel than is stored there now.
5 That's not the question. That's not the issue in terms of
6 their ability to store fuel, at least at that plant.

7 The questions there deal with limitations that are
8 imposed by state legislation and state regulatory
9 restrictions.

10 With respect to the concept that the need analysis
11 has to consider sending leaking fuel back to a reactor, and
12 therefore we can't consider decommissioning as part of the
13 need, we have discussed in our application other
14 alternatives in the event that there's leaking fuel. That
15 is not the only alternative.

16 And the idea that there's a constant stream of
17 leaking fuel that's going to be heading back to keep
18 reactors from ever shutting down I think is another
19 unsupported what if from the State.

20 And finally with respect to the argument that there
21 should be a national decision to go forward with this
22 project and that we should put to Congress, that simply has
23 no relevance whatsoever to this contention. And I think
24 we've covered that amply in previous days.

25 That's all.

1 CHAIRMAN BOLLWERK: All right. Mr. Quintana.

2 MR. QUINTANA: Well, very briefly, the fact that
3 Congress has not properly acted with this issue, and because
4 it's been politicized is why we don't have centralized
5 storage at Oakridge, Tennessee or in some other place.

6 The previous program known as the MRS Program, was
7 killed after the Goshutes agreed with the federal government
8 to build the facility. This facility could literally be
9 built anywhere. It could literally be built just right next
10 to Washington D.C., and there would be no physical danger to
11 anyone. But because it's been politicized it has not been,
12 and it's forced the utility companies to seek other
13 alternatives.

14 And since the utility companies to the tribe, the
15 tribe didn't go to the utility companies, and the tribe had
16 previously studied the issue, the tribe voted on it and felt
17 that it was warranted.

18 This contention that the State brings does not
19 have a basis in fact. There's no expert opinion supporting
20 it, and therefore we would object to it.

21 CHAIRMAN BOLLWERK: All right, sir. Staff?

22 MS. MARCO: The staff opposes Utah contention X.
23 We're going to rest on our pleading.

24 CHAIRMAN BOLLWERK: All right. Ms. Chancellor.

25 MS. CHANCELLOR: Just a couple of things.

1 The CEQ regulation cite, it does -- 150210 is the
2 table of contents that's required for an environmental, an
3 EIS.

4 And then later on Mr. Silberg is correct. 150213 discusses
5 need of the facility.

6 With respect to the Northern States Power home
7 page, we don't know if it was our pleadings or what that
8 prompted them to change their home page, but at the time we
9 looked at the Internet site it did say that they had
10 adequate space, on-site storage space to store the
11 containers, all the storage space that the plant will need.

12 I think this points out with the way you should
13 site Internet home pages. I guess we should have put the
14 date and the time or something to that effect. But at the
15 time we looked at it that was certainly a legitimate
16 citation to what was actually there on that home page.

17 I think I would just like to stress that NEPA
18 requires that we look at the need for the facility, and this
19 facility is going to be a national facility. So under NEPA
20 we would assert that the national need for this facility
21 must be evaluated in the environmental report.

22 CHAIRMAN BOLLWERK: All right.

23 MS. CHANCELLOR: That's all I have.

24 CHAIRMAN BOLLWERK: Anything further?

25 MS. CHANCELLOR: No.

1 CHAIRMAN BOLLWERK: All right. Next contention
2 then is contention Z which is the no-action alternative.
3 And I notice on my sheet, Mr. Later, I've listed Castle Rock
4 13 number both no-action alternative and site selection
5 alternative. So I'll give you the choice. You can argue
6 wherever you'd like to.

7 MR. LATER: I thought you'd adopted the two
8 bite-of- the-apple rule there.

9 CHAIRMAN BOLLWERK: That was just --

10 MR. LATER: I can argue it under either one.
11 Perhaps since ours is cumulative it would appropriately come
12 after State AA since it appears that both of those are
13 contentions dealing with alternatives consideration.

14 CHAIRMAN BOLLWERK: Okay. Then for purposes of
15 the order, we'll deal with Utah Z, OGD 0 or O, excuse me,
16 and Confederated Tribes D. Utah Z, please.

17 MR. NELSON: Utah Z, the contention is is that the
18 environmental report does not meet the requirements of
19 adequately discussing a no-action alternative.

20 There is no specific mention of no-action
21 alternative in the NRC rules.
22 The CEQ rules are specific in that regard at 40 C.F.R.
23 1502.14, sub-paragraph 2. Again those rules are expected by
24 the agency to be -- that the rules that they adopt should
25 comply with those CEQ regulations. And we believe that the

1 reference to the Nuclear Regulatory Commission rules
2 requiring a discussion of alternative also requires a no-
3 action alternative be discussed.

4 We cited a number of cases. The applicant attacks
5 those cases on the basis that in those cases a no-build
6 alternative was not even considered. And we have cited to
7 Section 8.1.2 of the environmental report that purports to
8 be a discussion of the no-build alternative.

9 And if you look at that section and you eliminate
10 pages, it ends up being -- if you eliminate the introduction
11 and the summary paragraph it ends up being four double-
12 spaced paragraphs which we have specifically commented on e
13 do not believe to be adequate.

14 The applicant then says, "Go read chapters four,
15 five and seven and ipso facto you will find the answer to
16 your questions." We don't believe that that's met by --
17 that NEPA's purpose is met by that, that it requires a
18 specific discussion in the environmental impact statement.
19 And on that basis we feel it's deficient.

20 I would add one comment or two comments. And that
21 is, Judge Kline has discussed the question of adequacy. And
22 in this particular case this points out the issue of
23 adequacy as well as we can perhaps define it. And that is
24 if nothing was said, if there was no paragraph 1812 we would
25 say that it hasn't been considered.

1 By simply putting a few sentences in, we believe
2 that that is also not adequate. You can't just add a few
3 sentences and then call that adequate. There is a line
4 demarcation that you have to look at.

5 And we would refer the Board to specifically
6 looking at that section. Look at the specific issues that
7 have been raised by the State, and it will be obvious that a
8 good faith effort has not been made -- or probably a good
9 faith effort was made. An adequate discussion has not been
10 made on the no-build alternative.

11 Finally, in two places in applicant's responses on
12 page 13 and page 17 of the reply, the applicant cites some
13 cases and some language which seems to infer that because
14 they are a private facility and asking for a license, that
15 somehow that diminishes the standard or the requirements
16 under NEPA.

17 And the case law is clear that the license that is being
18 considered is no different than if this were a government
19 action constructing this facility for purposes of NEPA.

20 That's all I have.

21 CHAIRMAN BOLLWERK: All right. Mr. Silberg. I
22 don't want to put the burden on you if it's not your burden.

23 MR. SILBERG: No. It's our burden. We would ask
24 that the Board read the material that we've cited. I
25 suspect that no matter how many pages we wrote on the

1 no-build alternative that the State would say it is
2 inadequate.

3 their descriptions of inadequacy we think don't meet the
4 tests for inadequate contention as we've spelled out.

5 The cases that we have cited are the most recent
6 cases on point with respect to an agency's entitlement to
7 credit the choices that a licensed applicant or a private
8 applicant has made. I believe it's in a later contention
9 that the State has set forth some earlier cases which they
10 claim would undermine the authority of the cases that we've
11 relied on. Their cases date back 20 years or more. And
12 contrary to the NRC's analyses of transportation which have
13 not been superseded by subsequent NRC analyses, their cases
14 in fact have been superseded by subsequent U.S. Court of
15 Appeals' cases.

16 That's all I have to say on this.

17 CHAIRMAN BOLLWERK: All right. Mr. Quintana.

18 MR. QUINTANA: No comment.

19 CHAIRMAN BOLLWERK: Staff?

20 MS. MARCO: Your Honor, staff did not oppose this
21 contention.

22 CHAIRMAN BOLLWERK: All right. Anything further
23 that the State would like to say?

24 MR. NELSON: Just one comment in response to the
25 outdatedness of the State's cases that are cited. I would

1 refer the Board to page 170. The Tanaque case is a 1990
2 Ninth Circuit case. Bob Marshal case is 1988 Ninth Circuit
3 case. The Benella case is a 1986 Circuit case. Those are
4 not 20-year-old cases, and we believe they're good law.

5 CHAIRMAN BOLLWERK: All right.

6 MR. SILBERG: Excuse me. If I might. Those I
7 believe are cases in which there was no discussion of the
8 no-build alternative. We're not facing that issue here.

9 MR. NELSON: We take issue on that. We believe
10 that in one of those cases specifically there was the
11 failure to discuss the no build.

12 DR. LAM: I would like to hear from Mr. Nelson.
13 The applicant had demonstrated if. Okay, that's a big if,
14 there's a genuine need for a facility where would that put
15 these no-action alternative contentions?

16 MR. NELSON: The demonstration of need does not
17 eliminate the requirement that you consider the no-action
18 alternative. NEPA requires that the decision maker be
19 presented with options in order to make a decision. And
20 clearly one of those actions that has to be considered is no
21 action, and in the environmental impact it should be
22 considered.

23 MR. SILBERG: My comment on that, Judge Lam, to a
24 great degree the need issue under no-action analysis are
25 mirror images. What happens in the event of a no action in

1 large part was avoiding the need addressed.

2 DR. KLINE: More clearly, I think isn't it the
3 case that in past NRC practice, in any event, one considers
4 the no-action alternative, and that the applicant may use
5 the need analysis as a kind of defense against an assertion
6 that he should take no action. In other words, an answer to
7 the no-action alternative is, "Yes, but we need the
8 facility." MR. SILBERG: Yes, that's correct.

9 DR. KLINE: Isn't that correct? They are mirror
10 images in that case, yeah.

11 MR. SILBERG: Doing a cost benefit of the
12 no-action alternative, the cost of taking no action is what
13 you --

14 DR. KLINE: Yeah, yeah. I mean in reactor cases,
15 for example the Appeal Board once ruled that in the question
16 of whether one should consider no action in building a
17 reactor, a demonstration of need for power was an adequate
18 answer to that question. So that you needn't consider the
19 no-action alternative beyond that assuming that the
20 demonstration was adequate.

21 MR. SILBERG: Correct.

22 DR. KLINE: But in that light I was wondering
23 given that these are sort of mirror images of one another,
24 why the staff accepts this one and rejects the previous one.

25 MS. MARCO: It really came down to whether we felt

1 that the --

2 CHAIRMAN BOLLWERK: Just let me clarify. When you
3 said a "previous one" you mean X which was the need for the
4 facility.

5 DR. KLINE: The need, yes.

6 CHAIRMAN BOLLWERK: Which is actually two
7 contentions back, but --

8 DR. KLINE: Yeah, right, okay.

9 MS. MARCO: Whether the requirements of 2714 were
10 met, and we believe they were.

11 MR. TURK: We should also add though that the
12 environmental report does consider the no-build alternative
13 glancing at page 8.1-2 and going up to 8.1-4. So we don't
14 agree with the assertion that there is no discussion of
15 that. We just saw this as a merits' issue as to whether
16 that discussion was sufficient.

17 DR. KLINE: Right, yeah, I understand that,
18 uh-huh.

19 CHAIRMAN BOLLWERK: Anything further on this one?
20 All right. Then we have OGD 0 -- I'm sorry -- OGD
21 0.

22 Excuse me, not zero, 0, the letter O.

23 MS. BELILLE: Your Honor, OGD did not perform a
24 complete benefit cost analysis of the no-action alternative,
25 because this is the applicant's responsibility, not the

1 responsibility of OGD or other petitioners.

2 Applicant's response to OGD contention O found on
3 page 601 and 605 raises several issues to which we will
4 respond regarding comparative environmental impacts. The
5 applicant's analysis in the environmental report Section
6 8.1.2 only addresses the cost of the no-build alternative.

7 Assuming that the Department of Energy meets its
8 responsibility under the Nuclear Waste Policy Amendment Act
9 to accept spent fuel at a repository currently scheduled for
10 the year 2010, as applicant should have assumed in its
11 analysis, applicant failed to address potential benefits of
12 storing spent fuel on site until opening of the repository.

13 OGD outlines only a few of the transportation
14 benefits which applicant should have addressed.

15 One, under the no-build alternative spent fuel
16 would only need to be handled for transit and --

17 MR. SILBERG: Excuse me. I hate to interrupt.
18 I'm a little confused. OGD contention O is environmental
19 justice.

20 CHAIRMAN BOLLWERK: It is, but there's also -- a
21 significant portion of it I think goes into this question as
22 well.

23 MR. HALSTEAD: Your 601, 605.

24 CHAIRMAN BOLLWERK: Right.

25 MR. SILBERG: Oh, so you broke it down to respond

1 then.

2 MS. BELILLE: Yeah.

3 CHAIRMAN BOLLWERK: Right. And I should have made
4 that clear, and that's my fault. Why don't you go ahead and
5 discuss what you're discussing now. We'll come back to the
6 environmental justice portion of it when you get to that.

7 MS. BELILLE: Okay, all right.

8 CHAIRMAN BOLLWERK: I think though the Castle Rock
9 ones are close enough to this general subject that you can
10 pick your choice in terms of which one you want to discuss
11 it in.

12 I'm sorry. That was my fault. Go ahead, Ms. Belille.

13 MS. BELILLE: All right. OGD outlines only a few
14 of the transportation benefits which applicant should have
15 addressed.

16 One, under the no-build alternative spent fuel
17 would only need to be handled for transport and transported
18 once directly from current storage locations to the
19 repository reducing costs and risks.

20 Two, under the no-build alternative U.S. DOE is
21 financially responsible for all costs of transportation to
22 the repository from the utility storage sites.

23 And three, under the no-build alternative spent
24 fuel would be aged an additional 8 to 12 years on average
25 before off-site shipment allowing for a considerable

1 additional decay in the spent fuel fission products which
2 are a major driver of radiological risk. An 8-to-12-year
3 delay in shipment would therefore reduce the routine
4 radiological exposures resulting from shipment, and also
5 reduce the expected radiological consequences in an accident
6 or transit incident resulting in loss of cask shielding or a
7 release of radioactive material.

8 That would be all that we have on that.

9 CHAIRMAN BOLLWERK: All right. Any response from
10 the applicant if I haven't totally confused you?

11 MR. SILBERG: I'm confused only partially.

12 For the most part we rest on our response. I
13 would note that the so called benefits of increased on-site
14 storage have not been quantified. I don't believe that OGD
15 has made any showing that the increased decay will cause any
16 significant diminution in normal exposure to transportation
17 or indeed accident of exposure should they occur during
18 transportation.

19 In any event, all these issues are we believe
20 bounded by to pay less for regulation, and we I think
21 discussed that.

22 CHAIRMAN BOLLWERK: All right. Mr. Quintana.

23 MR. QUINTANA: No comment.

24 CHAIRMAN BOLLWERK: Staff?

25 MR. TURK: We'll rest on our pleading, Your Honor.

1 Essentially we did not oppose the contention except as
2 stated in our response to the psychological fears impacts as
3 not having been supported with sufficient basis.

4 CHAIRMAN BOLLWERK: All right. And anything
5 further, Ms. Belille?

6 MS. BELILLE: We would just add that we were
7 simply responding to the assertion that we should have done
8 a complete cost benefit analysis.

9 MR. TURK: I would like to know one thing, Your
10 Honor.

11 That is, the contention does try to bring in a lot of
12 different issues under the panoply or under the protective
13 cover up of environmental justice label.

14 CHAIRMAN BOLLWERK: Yes.

15 MR. TURK: We point out on page 97 of our paper
16 that a lot of these issues do not seem to be related to
17 environmental justice. So we don't see how those can be
18 litigated as part of this contention.

19 CHAIRMAN BOLLWERK: Well, that in fact you
20 emphasize a point which I made by giving them a separate
21 argument on both. And it may well be that if that were to
22 come in we'd have to do some rearranging of that to make the
23 title at least reflect exactly what was involved.

24 All right. You understand the distinction he's
25 making.

1 MS. BELILLE: Yes, I do.

2 CHAIRMAN BOLLWERK: I mean you've combined several
3 things. That's something the Board may well have to take
4 care of in terms of if we were to admit the contention. All
5 right.

6 MS. BELILLE: Yes, I understand that.

7 CHAIRMAN BOLLWERK: All right. Then we have
8 Confederated Tribes D.

9 MR. QUINTANA: Your Honor?

10 CHAIRMAN BOLLWERK: Yes.

11 MR. QUINTANA: On the environmental justice issue,
12 were you planning on covering the separate portion of the
13 environmental justice, so my understanding on this is
14 correct, the argument that this was environmental racism
15 separately from the cost benefit?

16 CHAIRMAN BOLLWERK: Yes, that's correct; that's
17 correct.

18 MR. QUINTANA: Okay, thank you, Your Honor.

19 CHAIRMAN BOLLWERK: We'll get to that in a while
20 anyway.

21 Confederated Tribe D.

22 MR. TURK: May I ask a question on that last
23 comment?

24 CHAIRMAN BOLLWERK: Sure.

25 MR. TURK: My understanding of how environmental

1 justice issues are to be addressed is they are considered as
2 part of the NEPA cross-benefit balancing. So it's not
3 wholly apart from that, but it's just one of the factors
4 that's considered.

5 CHAIRMAN BOLLWERK: We're talking about labeling
6 here I think, unless I'm -- given the way that these are
7 divided out, I mean there's different ways to put these
8 under different headings. If the time comes and there's a
9 question about the way the Board labels them or has to
10 divide this up, if the parties have a problem with it let us
11 know about it and we'll sort it out at that point. That's
12 assuming that we do admit any portion of the contention.

13 MR. SILBERG: I would assume that the
14 sub-contentions that we just discussed are not truly
15 environmental justice contentions, but rather generic
16 general cross-benefit issues.

17 CHAIRMAN BOLLWERK: That's correct.

18 MR. KENNEDY: The staff has not objected to the
19 State's contention or to most of OGD's contention regarding
20 this matter. We believe our statement is virtually the same
21 as the others.

22 And with respect to the specific points that the
23 State and OGD have made, without repeating those specific
24 points here and just prolonging the record, we would concur
25 with what they have said.

1 With respect to this matter, either the applicant
2 has adequately discussed this no-action alternative or not.
3 We think that the Board certainly can review the statement
4 and make that determination.

5 Concerning Judge Kline's comment that a mere
6 description of need supplants the necessity of showing all
7 aspects of the no-action alternative, if that's what the
8 judge said I think we would respectfully disagree with that.
9 We think that there is more that needs to be done merely
10 than stating the need. An analysis needs to be made of what
11 would happen if nothing was done, and that goes a lot
12 farther than we think or further than the statement of need.

13 That's all I have.

14 CHAIRMAN BOLLWERK: All right. Anything from the
15 applicant?

16 MR. SILBERG: Yes. And I guess this may be a
17 little repetitive. But if you look at the entire contention
18 of Confederated Tribes you will see zero basis. You will
19 see zero specificity. You will see zero reference to the
20 application, the environmental report or any other document.

21 This contention, if it were standing on its own,
22 would clearly not come close to meeting the requirements of
23 2.714.

24 And I think what Confederated Tribes' counsel was
25 saying is that you should look at the basis and the

1 contentions of all the other parties and let me adopt them
2 by reference. Well, at some point, Your Honor, I believe
3 that if you adopt that approach you wipe out the requirement
4 that each party submit at least one adequate contention to
5 be entitled to participate in this proceeding.

6 And clearly with respect to this contention, and I
7 think as we've said with respect to the other contentions,
8 this contention does not meet the grade, and Confederated
9 Tribes cannot bootstrap their way into an acceptable
10 contention by seeking to borrow the work that the other
11 petitioners have done.

12 CHAIRMAN BOLLWERK: Nothing further? Mr.
13 Quintana.

14 MR. QUINTANA: I have no comment on the Goshutes'
15 contentions.

16 CHAIRMAN BOLLWERK: Staff?

17 MS. MARCO: Staff opposes as set forth in our
18 pleading.

19 CHAIRMAN BOLLWERK: All right. Mr. Kennedy.

20 MR. TURK: May I --

21 CHAIRMAN BOLLWERK: Oh, sorry, Mr. Turk.

22 MR. TURK: The whole of the contention is a
23 paragraph, the contention and the basis. There's maybe
24 eight lines to the whole thing. And we oppose it for lack
25 of basis.

1 In particular, the basis says that there is no
2 discussion of the no-action alternative. And as we point
3 out in our response, in fact that does appear in the
4 environmental report. And this is something that we
5 discussed also with respect to the State's contention where
6 we said we find something in the environmental report on no
7 action, and we read this as a challenge to the adequacy of
8 that statement which was a merits' determination. This
9 contention by contrast says that there's nothing in the ER.
10 That's simply wrong as a matter of fact.

11 Also, with respect to Mr. Silberg's comment on the
12 necessity for each intervenor to have one admissible
13 contention at a minimum, that is a standing requirement in
14 order for an intervenor to be admitted. In the event that
15 the Board upon reviewing all of the contentions of the
16 Confederated Tribes determines that none of their
17 contentions are admissible by themselves, then that should
18 lead to a determination to exclude the Confederated Tribes
19 from participation as an intervenor.

20 I would note that there's one case that seems to
21 go against that principle. That's the Sequoia Fuels case in
22 which Ms. Curran was an advocate. That case stands contrary
23 to every existing case in Commission practice. There was a
24 requirement first for the intervenor to have an admissible
25 contention. After that perhaps there would be other

1 intervenors' contentions as a co-sponsor, but first they
2 have to show a contention on their own.

3 CHAIRMAN BOLLWERK: All right. Sequoia Fuels is
4 an enforcement case though; is that correct? Are we talking
5 about the same case?

6 MR. TURK: Yes.

7 CHAIRMAN BOLLWERK: I think I had something to do
8 with that. I think I know about that one.

9 MR. TURK: Was that your case?

10 CHAIRMAN BOLLWERK: I believe it was, yes.

11 MR. TURK: I need to see a transcript.

12 MR. SILBERG: Your Honor would know better than me
13 what factors there were.

14 CHAIRMAN BOLLWERK: Nobody needs a dissertation on
15 that case at this point. So okay.

16 Mr. Kennedy, anything further you want to say?

17 MR. KENNEDY: Well, just a couple comments. First
18 of all, I didn't realize the sun was that bright that we
19 would have sun burned faces like we have here already.

20 But the well-reasoned Sequoia case needs to be
21 kept --

22 CHAIRMAN BOLLWERK: That may or may not help you,
23 sir.

24 MR. KENNEDY: I think Mr. Nelson put it aptly when
25 he said earlier that when you have an inadequate response

1 there's not a lot that you can say about the basis. We
2 think that our caption or description of our contention is
3 inadequate discussion of no-action alternative. And we
4 state that they have failed to satisfy the NEPA requirement
5 because they do not adequately discuss the alternatives.

6 And as I said before, I think that's a very simple
7 decision for this Board to make by just looking at it. And
8 as I think Mr. Nelson indicated, if they said nothing at all
9 what would you say?

10 So beyond that I think I'd just point out that we
11 do have at least one contention that comes to mind that the
12 staff hasn't objected to, and that involved the wild fire
13 issue. So I don't know that everything turns on this
14 particular issue. But we do feel that it's adequately
15 stated, and we would submit it.

16 CHAIRMAN BOLLWERK: All right. Let's see. We're
17 at the end of the alphabet but not at the end of the
18 contentions. Utah AA, how much do you think you have to say
19 on that subject?

20 MR. NELSON: Not a lot.

21 CHAIRMAN BOLLWERK: All right. Why don't we go
22 ahead and try to do that one and Castle Rock 13. Then we'll
23 take a break.

24 MR. NELSON: Utah contention AA is related to
25 contention Y. The NEPA requirement in this case is a

1 requirement that is listed in two different places in the
2 act which emphasizes the importance. It requires that
3 alternatives to a proposed action be discussed, and
4 additionally it specifically requires the study development
5 and description of appropriate alternatives to recommend
6 courses of action in any proposal which involves unresolved
7 conflicts concerning alternative use of available resources.
8 And that language is brought into the regulation in Section
9 51.45.

10 The discussion revolves around Chapter 8. The
11 State contends that Chapter 8 is not adequate. It is a
12 siting and design alternative description which does not
13 meet the intended scope of NEPA, other kinds of
14 alternatives, a locally built alternative, the no-action
15 alternative which has been discussed, other feasible
16 locations have not been specifically addressed. Those kinds
17 of alternatives must be addressed in order to meet this
18 requirement.

19 The staff indicates that it does not oppose the
20 admission of this contention limited to the single issue
21 raised by the State in its basis, the applicant's evaluation
22 of alternative sites in its ER. We think that this
23 contention is not limited to simply an evaluation of
24 alternative sites, that it involves other alternatives of
25 locally-built alternatives, other feasible locations, and

1 the information that supports the specific concerns which
2 Chapter 8 are listed, and I don't believe I'll go through
3 those.

4 And I think that's all I need to say on this.

5 CHAIRMAN BOLLWERK: All right. Mr. Silberg.

6 MR. SILBERG: I guess I'm really confused now. I
7 read the State's contention, and I read their response, and
8 all I see in it is a criticism of our alternate siting
9 analysis and methodology. I may have missed it, but I
10 didn't see any reference to other feasible locations. I
11 didn't see any reference to locally-built alternatives, and
12 I don't even know what that means. And certainly I haven't
13 seen anything in which the State provides any suggestion
14 that there are such that we haven't considered.

15 And certainly to add in a new concept as vague and
16 unspecific as these two are at this late stage of the
17 process seems to me totally out of line. If I've missed
18 something in the write up I apologize, and I'm sure Mr.
19 Nelson will call that to our attention and then we can
20 discuss it, but I simply don't know where that is covered.

21 Let me make a few comments on the State's written
22 -- excuse me -- on the State's written response.

23 On page 96 the State asks the rhetorical question
24 that surely PFS is not arguing that the environmental report
25 constitutes an adequate NEPA IES. I thin that's obvious

1 because the NEPA EIS has to be a federal document and not
2 one prepared by an applicant.

3 The State then goes on to say that nowhere does
4 the State argue that PFS is required to send questionnaires
5 to all 38 site owners as claimed by PFS. That's not what we
6 said, and I would suggest that if the Board is interested to
7 look at what the State actually said at page 173 where they
8 said there's no mention of whether the applicant sent
9 questionnaires to all 38 site owners.

10 With respect on page 97 to the statement that NRC
11 cannot unduly restrict the range of alternatives considered,
12 we agree, and the key word there is "unduly." And I think
13 if you look at the cases we've cited you'll see that the
14 case law, the modern case law would suggest would hold that
15 our approach is not an undue restriction of the range of
16 alternatives to be considered.

17 The cases that I was referring to before as being
18 20- year-old cases are the ones that the State cites on the
19 bottom of page 97. For those purposes I would suggest that
20 the more recent cases we have pointed out, including cases
21 by the same court of appeals that's cited here but 20 years
22 later, have superseded the positions that the State is
23 relying on.

24 And therefore, the statement on the bottom of page
25 97 which they draw from those cases, that courts have not

1 been willing to accept an applicant's project definition as
2 a basis for narrowing the range of alternatives is clearly
3 incorrect.

4 The two cases that they cite, Venabema (phonetic
5 spelling) -- I'm sure I'll butcher that name as well as I
6 did the Puyallup case yesterday -- does not stand for the
7 proposition that they cite. Merely that case says that the
8 agency has to take a hard look at alternatives and not a,
9 quote, blind reliance, the court's term, on the applicant's
10 position.

11 And with respect to this Sierra v. Marsh case,
12 what that case holds is that what is required, and I'm
13 reading from page 574 of that decision. I'm sorry. Yes,
14 that's right. What is required is information sufficient to
15 permit a reasoned choice of alternatives so far as
16 environmental aspects are concerned.

17 And finally, the last sentence in their response
18 it states that CQ clearly points out that NEPA does not
19 provide any justification for dual standard, and it quotes
20 Federal Register CEQ guidance.

21 I think that quote is clearly incorrect. And if
22 the Board is to look at the decision actually on the same
23 page that's cited there where the court discusses the
24 Roosevelt Capabellum case, a First Circuit 1982 decision,
25 the court and the CEQ specifically adopted the ability of an

1 agency to choose agency's choice of sites to be focused by
2 the applicant's primary objectives. And that is clearly
3 what we have done here, and that is what we would hope that
4 the staff in its environmental impact statement would do at
5 the appropriate time. That's all I have.

6 CHAIRMAN BOLLWERK: All right. Mr. Quintana.

7 MR. QUINTANA: I have nothing on this contention.

8 CHAIRMAN BOLLWERK: All right. Staff?

9 MS. MARCO: The staff does not oppose, but it does
10 look like the contention only addresses alternative sites
11 and siting. And so we believe it should be limited to that.

12 CHAIRMAN BOLLWERK: So it should be limited the
13 way you've discussed it and Mr. Silberg's discussed it, I
14 take it then?

15 MS. MARCO: Correct, yeah.

16 CHAIRMAN BOLLWERK: You're in sync then in terms
17 of what you think the contention is aimed at. You just
18 disagree on its admissibility, I take it?

19 MS. MARCO: That's right.

20 CHAIRMAN BOLLWERK: All right. Mr. Nelson.

21 MR. NELSON: I don't know what definition they're
22 using for alternative sites. If they're using the
23 definition that was used in the ER of well, we'll put it
24 here or here or here on the reservation within a couple a
25 hundred feet of each other, or however far that distance

1 was, that is not what we intended when we used the term
2 "alternative site." Alternative sites being a location here
3 at this reservation or other sites that the applicant looked
4 at, or leaving the materials in place at the site that it is
5 currently located at, with alternative sites being that site
6 too.

7 The -- it's very difficult, we have heard several
8 criticisms and objections to the State bringing up new
9 information. It's very difficult to respond to an assertion
10 that 20 year old cases have been replaced without any
11 references or sites. And if the information could be
12 submitted, we would evaluate it and give you a response.

13 MR. SILBERG: Those cases are cited on our
14 response on page 17.

15 MR. NELSON: I have no other comments.

16 CHAIRMAN BOLLWERK: All right.

17 MR. SILBERG: If I could just add one more quick
18 comment.

19 The idea that leaving spent fuel at an existing
20 site is an alternate site analysis, I think is turning
21 alternate sites on its head. That's the no action
22 alternative.

23 That's amply covered in other contentions, but it's not an
24 alternate site issue.

25 And with respect to the statement that sites a

1 couple hundred feet from each other are the alternate sites
2 that we considered, I would urge the Board to read our
3 alternate site evaluation where we talk about 38 sites that
4 were considered all over the country, narrowed down through
5 a phased process, and ultimately the site was chosen.

6 CHAIRMAN BOLLWERK: All right. And I take it that
7 is what the staff is talking about when they --

8 MS. MARCO: Yes.

9 CHAIRMAN BOLLWERK: All right. Anything further,
10 Mr. Nelson?

11 MR. NELSON: Excuse me. Could I ask for -- you're
12 talking, the staff is talking about the alternative, the 38
13 alternative sites?

14 MR. TURK: The entire discussion of alternative
15 sites.

16 MS. MARCO: Yes.

17 MR. TURK: We've not opposed that issue.

18 MR. NELSON: And that includes the 38 sites?

19 MR. TURK: Whatever is the adequacy of the
20 alternative sites --

21 MS. MARCO: That includes the 38 sites, yes.

22 MR. TURK: Whatever is the adequacy of the
23 alternate site evaluation, we are saying that's a merits
24 issue. We don't oppose litigation of the issue.

25 MR. NELSON: No other comments.

1 CHAIRMAN BOLLWERK: All right. Any questions from
2 the Board?

3 All right.

4 DR. LAM: Now --

5 CHAIRMAN BOLLWERK: Go ahead.

6 DR. LAM: Mr. Turk, you mean while you're not
7 opposing this issue, you want to restrict it to the 38 site
8 that was in the applicant's analysis?

9 MR. TURK: I'm not saying that, Your Honor.

10 DR. LAM: Oh, you're not?

11 MR. TURK: The contention they -- the one sentence
12 statement of contention says that the environmental report
13 fails to evaluate the range of reasonable alternatives to
14 the proposed action. But there's nothing in the basis that
15 discusses anything except alternate sites.

16 So when we did not oppose admission of this
17 contention, we said all right; the basis talks about
18 alternate sites.

19 That's what the contention is all about. We don't oppose
20 that issue.

21 We would oppose it as a broad alternate range, a
22 range of alternatives other than consideration of the
23 alternate site issue, because there's no basis for anything
24 in this contention beyond consideration of alternate sites.

25 Whatever is the appropriateness of the 38 sites

1 being the ones which the applicant considered, that gets to
2 the merits; did they do a good job with listing those or
3 not; did they appropriately select down from those 38 or
4 not.

5 That's -- that goes to the merits. We would look at that as
6 part of our evaluation.

7 DR. LAM: That's good.

8 CHAIRMAN BOLLWERK: So you're saying that because
9 it just simply said reasonable alternatives, you felt that
10 it, what it really meant was reasonable -- well, alternative
11 sites?

12 MR. TURK: Alternate sites.

13 CHAIRMAN BOLLWERK: Okay.

14 MR. TURK: Because there's nothing else in the
15 basis except a discussion of site.

16 CHAIRMAN BOLLWERK: Right.

17 All right. Why don't we go with Castle Rock 13
18 and then we'll take our break.

19 MR. LATER: Thank you, Your Honor.

20 Let me start by doing something that may be
21 relatively unheard of; I was trying to agree with some other
22 parties.

23 We tax the applicant for failing to consider as an
24 alternative pending legislation before congress. The staff
25 objects to that. We're persuaded by the staff's arguments

1 and would withdraw the contention to that extent on that --
2 for that basis.

3 We recite as one of the failures to consider
4 impacts and alternatives; again, the costs and risks of
5 transporting waste and storing waste at this site during the
6 2002 Olympics. As I understood the applicant to say earlier
7 when we were talking about sabotage potential and risks,
8 that it is their intention that there would be no waste
9 transported to the site or stored at the site prior to or
10 during those games. And certainly if the applicant agrees,
11 would agree to that as a condition of licensure, those I
12 believe would cease to be issues for us as well.

13 The staff further objects to our raising as an
14 alternative that needed to be considered utilization of and
15 compliance with the existing provisions of the Nuclear Waste
16 Policy Act. That one unfortunately we can't agree to
17 withdraw. We think that the basis we made those arguments
18 in our first four or five contentions is well taken. We
19 think that those are things that are certainly available to
20 the applicant; in fact bind the applicant to this procedure,
21 and should be considered as alternatives.

22 We have also raised as an issue within this scope
23 the consideration of all alternatives, not simply citing
24 alternatives. The staff again has suggested that our
25 contention should be limited simply to citing alternatives.

1 I would note that in our submission to the contention we
2 recited as points that needed to be considered, and in fact
3 were not considered, the environmental benefits of the
4 combination of expanded on-site storage and regional IFSFIS
5 as opposed to a national centralized approach; to the
6 benefits of government sponsored, monitored retrievable
7 storage as prescribed by the NWPA.

8 We think that we have in fact brought forward as
9 part of the basis of our contention recitation of
10 alternatives other than simply site selection alternatives.
11 We think it's appropriate that the applicant, as part of its
12 consideration, be required to consider alternatives in
13 addition to simply just different sites. We think we fairly
14 raised that as well. Thank you.

15 CHAIRMAN BOLLWERK: All right. Applicant.

16 Mr. Silberg.

17 MR. SILBERG: Yes. In the spirit of good
18 friendship and inter-party agreements, we can make that
19 stipulation.

20 Schedule was not intended to have spent fuel on-site by the
21 time of the Olympics.

22 With respect to the other issues, I think we've
23 covered them more than adequately in our written submittal.
24 We will rest on that.

25 CHAIRMAN BOLLWERK: All right. So let me just

1 understand. Does that mean that the portions -- there was
2 two contentions that dealt with the Olympics then would be
3 --

4 MR. LATER: There are two contentions in which we
5 have raised issues relating to the Olympics, terrorism
6 risks, and consideration of the risks of transportation.
7 And both of those bases of contention we would withdraw.
8 There are portions of each contention of course that remain.

9 CHAIRMAN BOLLWERK: Right.

10 MR. LATER: Not the entire contention goes away.
11 But those specific bases we would withdraw.

12 CHAIRMAN BOLLWERK: All right. Mr. Quintana.

13 MR. QUINTANA: I have no comment on those
14 contentions.

15 CHAIRMAN BOLLWERK: All right. Mr. Turk or Ms.
16 Marco.

17 MS. MARCO: We did not oppose this contention.

18 With respect to the Nuclear Waste Policy Act
19 issue, we've addressed that in our response to Utah
20 contention A.

21 And we don't see any support for the alternative
22 technologies issue that is a part of this contention.

23 CHAIRMAN BOLLWERK: So let me, just so we're clear
24 about what parts you are and aren't objecting to. I have to
25 admit to some degree I've used the applicant's sort of

1 breakdown, and maybe you can --

2 MS. MARCO: We'll just rest on the pleading, Your
3 Honor.

4 CHAIRMAN BOLLWERK: All right. I hope that's
5 clear enough.

6 Let's do this. Maybe we can take -- why don't we
7 take our break. And let's make sure we're clear on what --

8 MR. LATER: Your Honor, may I make one last point?

9 CHAIRMAN BOLLWERK: Sure.

10 MR. LATER: I'm sorry to do that. I know
11 everybody wants to go on a break.

12 CHAIRMAN BOLLWERK: That's all right.

13 MR. LATER: But I would just like to note, and
14 this may be a good point, that with respect to contention
15 13, we don't agree on that contention and several others
16 with the applicant's rephrasing of that. In fact, in our
17 reply, we've restated what we believe is an appropriate
18 reworking of that. We continue to work with the applicant
19 trying to narrow the range, and we hope to be able to
20 present, as far as we can, a coherent set.

21 CHAIRMAN BOLLWERK: All right.

22 MR. LATER: But on this one, we don't agree with
23 the rewrite.

24 CHAIRMAN BOLLWERK: Okay. My only concern, if the
25 staff simply wants to rest on their pleading, that's fine.

1 I just want to make sure that it's clear to us what, because
2 that had a number of different subparts, at least as Mr.
3 Silberg broke it out. And some of them weren't specifically
4 addressed.

5 So I'm -- if you think it's clear enough to us
6 where you are at in terms of the type of analysis he laid
7 out, I will look through it and deal with it that way. If
8 you want to take a second to look at it and maybe come back
9 to the board and tell us a little more --

10 MR. LATER: We'll do that over the break, Your
11 Honor.

12 CHAIRMAN BOLLWERK: All right.

13 Why don't we take then a break until 3:30. And I
14 need to see one counsel from each party up at the bench real
15 quick.

16 MR. TURK: May I ask a question also?

17 CHAIRMAN BOLLWERK: On the record?

18 MR. TURK: On the record.

19 CHAIRMAN BOLLWERK: Please.

20 MR. TURK: Judge Lam had asked a question before
21 as concerning the 38 sites. I believe my answer tried to
22 set out what the staff would evaluate when it does its
23 environmental impact statement.

24 My reading of the contention -- this goes back to
25 State AA. My reading of the contention is that it

1 essentially attacks the siting evaluation after the 38 sites
2 were identified. So I don't mean to expand upon the State's
3 contention.

4 We, the staff, will consider the entire process.
5 But it seemed to me that the State was really getting at
6 whether the selection criteria applied to that slate of 38
7 sites was effectively and appropriately done. But I don't
8 see them as challenging issues beyond the adequacy of the
9 site selection process up to the point of the 38 sites that
10 were selected.

11 CHAIRMAN BOLLWERK: All right. The question is
12 why do they choose -- how did they choose among those 38
13 then, as you see their contention?

14 MR. TURK: That's how I --

15 CHAIRMAN BOLLWERK: All right.

16 DR. LAM: Thank you for the clarification.

17 CHAIRMAN BOLLWERK: And that is what you're saying
18 you believe is admissible?

19 MR. TURK: As a contention in the proceeding, yes.

20 CHAIRMAN BOLLWERK: Yes. All right.

21 All right. Why don't we go ahead and take our
22 break then till 3:30. And if I could just see one counsel
23 from each party.

24 [Recess.]

25 CHAIRMAN BOLLWERK: Back on the record.

1 And Judge Kline wanted me to note that his
2 recollection is the Sequoia Fuels case was affirmed by the
3 Commission.

4 So it may be the only one, but it's the right one as far as
5 the Commission is concerned, I guess.

6 MR. SILBERG: Shows what they know.

7 MR. TURK: I don't think anyone appealed the
8 question of admissibility.

9 CHAIRMAN BOLLWERK: I thought somebody did. Maybe
10 they didn't. Well --

11 MR. TURK: In terms of admissibility on
12 contention. I looked at that as -- are we on the record?

13 CHAIRMAN BOLLWERK: Yeah, we are. Well, that's
14 all right.

15 MR. TURK: I -- Your Honor, I look at that as
16 different procedural posture, where there was an existing
17 intervenor with admitted contentions. The charging agents
18 came in later and said we'll adopt on the regular merit, as
19 opposed to this posture where everyone's coming out for the
20 first time --

21 CHAIRMAN BOLLWERK: First time.

22 MR. TURK: -- presenting contentions.

23 CHAIRMAN BOLLWERK: Right.

24 DR. LAM: And also for the record, two member of
25 this licensing board sat on that case, and I'm not one of

1 them.

2 [Laughter.]

3 CHAIRMAN BOLLWERK: So if it's wrong, it's not his
4 problem.

5 DR. KLINE: Not his problem.

6 CHAIRMAN BOLLWERK: We all stick together here.
7 You can tell.

8 All right. I guess briefly say something about
9 the contention, Castle Rock 13 we're talking about, in terms
10 of the staff and admissibility of any portions of the bases
11 or things they had problems with in the bases.

12 MS. MARCO: Okay. The staff went through and
13 looked at the applicant's rewrite of contention 13. And we
14 decided that subpart A is what we do not oppose. We do not
15 oppose subpart B. We oppose subpart C. And D was dropped
16 out; and also, there is a portion of C that was dropped out.
17 And this is --

18 CHAIRMAN BOLLWERK: So you had no problem with A
19 or B, you object to C?

20 MS. MARCO: Correct. And D was withdrawn.

21 CHAIRMAN BOLLWERK: Withdrawn.

22 MS. MARCO: But understand we both, the applicant
23 and the staff filed at the same time, so we didn't have
24 this.

25 CHAIRMAN BOLLWERK: I recognize that.

1 MS. MARCO: Okay.

2 CHAIRMAN BOLLWERK: And that's why I wanted to,
3 you know, you can't -- right. You wouldn't know what they
4 were going to say, obviously, so --

5 Okay. And again, the Olympics portion of that is
6 gone, as well as the legislative portion. So as long as
7 that's clear.

8 Okay. All right. Let's then turn to, I believe
9 that takes care of the site selection alternatives. Let's
10 turn then to Utah BB, which is an environmental justice
11 question.

12 Also, OGD letter O, which, a portion of it which deals with
13 the same thing, and Confederated Tribes C.

14 MS. CHANCELLOR: Ready, Mr. Silberg?

15 MR. SILBERG: Yeah.

16 CHAIRMAN BOLLWERK: Got the right book? Okay.

17 MR. SILBERG: Before we do that --

18 CHAIRMAN BOLLWERK: Yes.

19 MR. SILBERG: Let me just, on the record, note a
20 few minor corrections to our response that might help, or
21 maybe hinder, but they're --

22 CHAIRMAN BOLLWERK: To your response on BB?

23 MR. SILBERG: On BB.

24 CHAIRMAN BOLLWERK: Okay.

25 MR. SILBERG: On page 22, at the bottom of the

1 page, the little i in parenthesis should be a small b in
2 parenthesis. You know, instead of being a subpart of A
3 above, should be a new subpart.

4 MS. CHANCELLOR: It's all now crystal clear.

5 MR. SILBERG: I want to wait for the chairman to
6 get his --

7 CHAIRMAN BOLLWERK: All right.

8 MR. SILBERG: On the bottom of page 22, the --

9 CHAIRMAN BOLLWERK: 20?

10 DR. LAM: 22.

11 MR. SILBERG: Page 22. It's our response to BB.

12 CHAIRMAN BOLLWERK: Okay.

13 MR. SILBERG: The supplemental response.

14 CHAIRMAN BOLLWERK: Ah, all right. You're right.
15 I'm looking at the wrong -- I'd forgotten that.

16 DR. KLINE: It's a separate filing.

17 MR. SILBERG: The subtitle that is now little i,
18 Roman i, italic i, should be small b, evaluation of siting
19 process for racial discrimination should be b, close parens.

20 CHAIRMAN BOLLWERK: All right.

21 MR. SILBERG: On page 23, the subtitle little ii
22 should be single i. And on page 26, the subtitle little 3,
23 iii, NEPA, should be double i.

24 CHAIRMAN BOLLWERK: Okay.

25 MR. SILBERG: And then finally on page 29, what is

1 now subtitle b, applicant site selection process, should be
2 c, small c, applicant site selection process.

3 And then finally, I'm sorry, wrong order, the
4 first line on page 29, what is now little Roman 4, iv,
5 should be triple i, iii.

6 CHAIRMAN BOLLWERK: All right.

7 MR. SILBERG: Sorry, but that was the confusion
8 anyway.

9 CHAIRMAN BOLLWERK: Does that help you, Ms.
10 Chancellor?

11 MS. CHANCELLOR: Oh, heaps (laughs).

12 BB of the State's contentions is titled "Site
13 Selection and Discriminatory Effects." First of all, I want
14 to recognize that no, the State was not using investigation
15 as apparently NRC uses the term of art. And I think we
16 acknowledge that in our reply.

17 In PFS' answer, they state that "It is well
18 established that executive orders lacking statutory" -- oh,
19 this is on page 25 of their answer.

20 "It's well established that executive orders
21 lacking a statutory basis or some other congressional
22 delegation of authority cannot create enforceable rights or
23 obligations."

24 And PFS mainly contends that the executive order
25 cannot create any sort of obligation on them to look at

1 discriminatory effects under the environmental impact
2 statement. However, NEPA itself provides for such a
3 requirement.

4 Under Section 101, 101(b)(1) of NEPA: "The
5 purposes of NEPA are to assure, for all Americans, safe,
6 healthful and productive and aesthetically and culturally
7 pleasing surroundings."

8 That is to all Americans, so it's both individual,
9 to individuals and groups.

10 And under 101, 101(c) of NEPA: "Major federal
11 action must address actions significantly infecting --
12 affecting the quality of the human environment." And this,
13 we submit, requires that the NRC look at the discriminatory,
14 any discriminatory effects in site selection. And one
15 method of complying with that NEPA requirement is to use the
16 executive order. There may be other ways of doing it, but
17 we submit that the executive order is one way in which they
18 can do that.

19 On page 31 of the answer, PFS maintains that the
20 decision to locate the proposed ISFSI on the Skull Valley
21 Reservation was a lawful determination by the Skull Valley
22 Band. If that were the case, then we question why OGD is
23 here.

24 There are certain portions of the band that
25 certainly do not agree with or are in favor of this

1 proposal. And that the procedural protections, or the
2 procedural measures for the protection of the human
3 environment should apply to everybody, not those who are
4 merely in favor of it, but also to those that are opposed to
5 it.

6 And I think in our contention we discuss why we
7 believe that there could be discriminatory effects,
8 especially where you have 38 sites and all of a sudden it
9 goes down to two sites which are contiguous, one a little
10 closer to Hickman Knolls than the other. I think that's all
11 I have for the moment. Thank you.

12 CHAIRMAN BOLLWERK: All right. Applicant.

13 MR. SILBERG: Let me respond to the oral comments
14 first.

15 NEPA simply doesn't provide a basis for analysis
16 of whether or not siting is discriminatory. If it did, you
17 would have seen cases in the 28 years, think that's right,
18 that environmental impact statements have been written.
19 There are none. There is no basis in NEPA for singling out
20 individuals based on ethnic or racial or economic status.

21 NEPA does say you protect the environment for all
22 Americans, not better for some or worse for others. The
23 idea that you can read into protecting the human environment
24 the idea that we have to look for racial, economic, ethnic
25 divisions and treat people differently is simply at odds

1 with any sensible reading of those provisions.

2 And further, I'd note that neither of those
3 provisions deal with the environmental impact statement,
4 which is in Section 1022(c) of NEPA, not 101(b)(1) or
5 101(c). And I don't believe either of those are judicially
6 enforceable.

7 Those are motivational, if you will, statements, statements
8 of purpose. But the provision that this Commission is
9 operating under under NEPA is 1022(c).

10 So a method of complying with NEPA, the executive
11 order isn't one.

12 We go in great detail in our written response, and
13 I won't go over it again here, why discrimination in any
14 event is not part of the direction, such as it is, for the
15 -- that the executive order purports to direct towards
16 agencies.

17 And to the extent that the State is relying on the LES
18 decision, that decision, as the Board knows, is under appeal
19 before the Commission. We were certainly hoping that we
20 would have a Commission decision on that before this
21 prehearing conference, but unfortunately that hasn't been
22 the case.

23 The legal analysis that we set forth, we believe,
24 is the correct analysis of the discrimination aspects of the
25 executive order. I will note that there is nothing in the

1 State's contention which deals with that provision of the
2 executive order which calls for certain activities
3 concerning, think it's high or adverse environmental impacts
4 on low income populations and minority populations. The
5 State's contention is simply limited to the discrimination
6 in the siting process.

7 If the State looks at the environmental report, I
8 think they will see, and we hope the Board will see, that
9 the movement from 38 sites to 2 sites within a short
10 distance of each other on the Skull Valley Reservation was
11 not something that occurred by magic. It occurred by a
12 process. That process is described in the environmental
13 report and it is clearly not one which was discriminatory.

14 With respect to the statement that the Skull
15 Valley site, referring -- and I lost the page. I guess it's
16 on -- towards the end of our response. The State was taking
17 issue with the statement that the Skull Valley siting
18 decision was a legal activity, an action by the Skull Valley
19 Band. And the fact that there are certain members of the
20 band who may not agree somehow entitles the State to raise
21 an issue on discriminatory siting is a total bootstrap
22 aberration.

23 To the extent that there are individuals within
24 the Skull Valley Band who had an opposing view, the Skull
25 Valley Band had its own governance; made the decision to

1 proceed.

2 And it would be grossly improper for this Commission to
3 second-guess that decision in any way.

4 And with respect to the comment that the
5 procedural protections for the human environment should
6 apply to everyone, including the opponents of the project,
7 we would completely agree with that. However, that doesn't
8 advance the State's cause an inch. And the opponents of the
9 project have no better or worse environmental protection
10 than the proponents of the project, and NEPA requires
11 nothing more.

12 That's all I have.

13 CHAIRMAN BOLLWERK: All right. Mr. Quintana.

14 MR. QUINTANA: The State's contention should be
15 defeated for several reasons.

16 First is they lack standing to argue this
17 contention.

18 The State does not have jurisdiction on the reservation.
19 And for them to argue about the rights of a completely
20 separate jurisdiction smacks of state paternalism once
21 again.

22 Furthermore, this decision does not have a basis
23 in fact, as required by 2.7142. The, as the State is well
24 aware, the Skull Valley Band of Goshutes has, for the last
25 eight years, been carefully studying this issue.

1 Initially, the reason the Skull Valley Goshutes
2 got a Phase 1 grant from the Department of Energy is when
3 David Leroy circulated the petition around to have the
4 proposed storage of spent nuclear fuel on reservations, we
5 wanted to gather the data, slam dunk the proposal, because
6 we believed there was a conspiracy on the part of the
7 Department of Energy and the utility companies in this area.

8 After the investigation took place in Phase 1, we
9 found out there was not a conspiracy. The utility companies
10 and the Department of Energy hate each other.

11 [Laughter.]

12 MR. QUINTANA: The utility companies --

13 CHAIRMAN BOLLWERK: We'll let that note that's
14 your characterization.

15 MR. QUINTANA: The utility companies --

16 CHAIRMAN BOLLWERK: You want to speak to that, Mr.
17 Silberg? I'll let you now.

18 MR. SILBERG: No, I'll let the record speak for
19 itself.

20 MR. QUINTANA: The utility companies feel that
21 they have been somehow mistreated by the federal government,
22 to which the executive committee started laughing, given the
23 experience of Indian tribes and their dealings with the
24 federal government.

25 So in Phase 2, because there is no trust of the

1 federal government, the Skull Valley Band of Goshutes
2 Executive Committee decided to visit nuclear storage
3 facilities in other countries and see exactly what and how
4 these facilities came about, and exactly how they were run
5 and managed, and if in fact this was a safe proposal to
6 undertake.

7 In that regard, the Skull Valley Band of Goshutes
8 developed two films. The films were to explain to not only
9 tribal members but to the public as a whole how this project
10 worked, and what was expected and what the dangers were.

11 Well, the Skull Valley Band of Goshutes Executive
12 Committee visited nuclear facilities at Laab, LaHaig in
13 France, met with Andra in France, with Cogima. And from
14 France, visited with the British nuclear fields at
15 Southfield, and then went to Sweden and visited interim
16 storage at Oscarsam and met with the Swedish scientists and
17 with their government representatives, as well as with peace
18 groups, with anti-nuclear groups.

19 In Japan, the Skull Valley Band of Goshutes
20 visited the Tokai Reprocessing facility and went up north to
21 the Amborg Peninsula to visit the proposed storage facility
22 there, and met with Japanese scientists and studied on
23 exactly what the relation of the Japanese economy is and
24 their expertise in this area to spent nuclear fuel.

25 In this country, the Skull Valley Band of Goshutes

1 has visited Idaho National Engineering Laboratory, Yucca
2 Mountain, Rancho Secco in Sacramento, the Hanford facility
3 in Washington. Some have visited Prairie Islands Nuclear
4 Power Plant; Surrey, Virginia; West Palm Beach, Florida's
5 nuclear facility. Some have gone down and visited the
6 Barnwell facility in South Carolina, as well as attended the
7 high level waste conferences and talked with scientists from
8 all over the world.

9 The Skull Valley Band of Goshutes did a
10 comprehensive comparison of Utah's waste facilities to the
11 proposed high level nuclear facility, a copy of which was
12 provided to the governor and --

13 MS. CHANCELLOR: Objection. There's nothing in
14 the record as to this effect, Your Honor.

15 MR. QUINTANA: I'll be brief, Your Honor.

16 CHAIRMAN BOLLWERK: I'd appreciate it.

17 MR. QUINTANA: So in terms of other than obtaining
18 physics degrees, which the executive committee has not done,
19 the Skull Valley Band of Goshutes has done everything
20 humanly possible to educate their members and the
21 surrounding communities as to exactly what this project is,
22 its effects, and whether or not it should proceed.

23 I think that's all the First Amendment can
24 possibly require. We have recently met with some of the
25 world's top physicists and they have too given a

1 recommendation that it's safe.

2 Environmental justice is allowing communities to
3 properly study issues of science, of law, or any area, and
4 make informed decisions, informed decision, that will
5 withstand the scrutiny of the First Amendment. If this
6 facility is not built because it does not withstand the
7 scrutiny of the First Amendment, that's justice. And I can
8 live with that. But for the paternalism and the blatant
9 rhetoric that somehow a group of Native Americans cannot
10 make an informed decision on their future, on their own
11 land, smacks not only of paternalism, but also its blatantly
12 racist. It's wrong.

13 Of course the Band is divided on this issue. The
14 Band's divided on many, many issues. There is some issues
15 that some Band member are in favor of and others that
16 they're against, but that is the Band's absolute right. It
17 is not the State's right to interfere within tribal matters.

18 CHAIRMAN BOLLWERK: Anything further?

19 MR. QUINTANA: I think that's enough.

20 CHAIRMAN BOLLWERK: Staff?

21 MR. TURK: We do not oppose the admission of this
22 contention. I would note that I share Mr. Silberg's view
23 that NEPA does not establish a separate requirement apart
24 from the executive order for consideration of environmental
25 justice. The staff will look at environmental justice

1 issues and will, as I said before, consider it as part of
2 the NEPA cost benefit balancing.

3 But I would also note, again as stated in our
4 papers, and Mr. Silberg referred to it, the LES decision is
5 on appeal before the Commission now. And we would suggest
6 that that decision was wrongly decided, in part because it
7 effectively established a right for a group contrary to the
8 express provision in Section 6-609 of the executive order,
9 which states that the executive order does not create any
10 right, benefit, trust, responsibility, substantive or
11 procedural, with respect to the matters of race in the
12 executive order.

13 CHAIRMAN BOLLWERK: All right. Ms. Chancellor.

14 MS. CHANCELLOR: In answer to one of Mr. Silberg's
15 points, he seems to think that we're relying solely on the
16 purposes section, 101. And he mentioned 101(c). It was --
17 I didn't mention 101(c), but apparently he thinks I relied
18 on 101(c).

19 What we're relying on is 102(c), which is the
20 trigger mechanism for NEPA. Maybe we should go over this.

21 Under 102, congress authorizes and directs that:
22 "To the fullest extent possible: "1) The policies,
23 regulations and public laws of the United States shall be
24 interpreted and administered in accordance with the policies
25 set forth in this chapter; and "2) All agencies of the

1 federal government shall," And I'll skip down to c:
2 "include in every recommendation or report on proposals for
3 legislation and other major federal actions significantly
4 affecting the quality of the human environment, a detailed
5 statement by the responsible official."

6 We believe that the key words here are "major
7 federal action," which triggers an EIS, "significantly
8 affecting the human environment." And the human environment
9 in this case is the right to be free from discrimination.
10 And here, we contend that it's -- that there is -- that the
11 discrimination in the siting process is what we think that
12 the environmental impact statement should address.

13 The applicant says that it has addressed its site
14 selection process. Well, I've looked at their rendition of
15 how they selected the sites. I think if you look at the ER
16 on pages 8.1-4, 8.1-5, they talk about how they have these
17 38 sites, but nowhere do they say how they whittled down
18 those 38 sites and arrived at the two sites on the Goshute
19 Reservation, one on Section 6 and one directly south on
20 Section 7.

21 Furthermore, we believe that regardless of the,
22 whether or not there is a willing site, the EIS still must
23 address whether there are discriminatory effects in the
24 siting process. And I certainly do not intend to address
25 any other of Mr. Quintana's comments.

1 CHAIRMAN BOLLWERK: All right. We also have
2 contention OGD letter O.

3 MR. SILBERG: And if I could -- I'm sorry. If I
4 could just respond for a second.

5 I'm sorry if I misheard you when -- if you said
6 102(c) originally. I heard you say 101(c). But to say that
7 the human environment means the right to be free from
8 discrimination is simply inventing words in a way that no
9 one has ever done.

10 The CEQ regulations, which you've taken great
11 credit, which the State has taken great credit for, nowhere
12 mention this discrimination aspect as part of the NEPA
13 process. And it is inappropriate to reinvent this statute
14 in the light of an executive order which simply doesn't mean
15 what the State says it means.

16 CHAIRMAN BOLLWERK: Anything further?

17 MS. CHANCELLOR: We have a disagreement.

18 CHAIRMAN BOLLWERK: All right. OGD O.

19 MS. BELILLE: Yes, Your Honor. We have a few
20 comments.

21 First of all, the staff does not oppose the
22 admission of this contention except so -- except for insofar
23 as OGD asserts that the psychological fear of living in
24 proximity to this facility must be considered and that the
25 cumulative impacts of the facility must be considered.

1 The first issue that I we'd like to address is our
2 reliance on the executive order. And we would just draw the
3 attention of the Court, and it's already been mentioned, to
4 the LES case.

5 As far as the disparate impacts issue, we would
6 also rely on LES. And as far as the negative economic and
7 sociological impacts of native communities of Goshute
8 Indians, OGD's assertion is basically that the applicant's
9 environmental report does not adequately describe or weigh
10 the various social and economic aspects of the proposed
11 site. As part of that, OGD also asserts that this -- that
12 disparate impact should be considered.

13 The Board also says that "Where environmental and
14 NEPA issues are involved, care must be taken in applying the
15 Commission's general burden of proof." First of all, let me
16 -- I just was citing from the Louisiana Energy case, where
17 the Board said that it is an agency responsibility.

18 "To the greatest extent practicable and permitted
19 by law, each federal agency shall make achieving
20 environmental justice part of its mission by identifying and
21 addressing, as appropriate, disproportionately high and
22 adverse human health or environmental effects of its
23 programs, policies, and activities on minority populations
24 and low income populations in the U.S." The Board also goes
25 on to say that: "Where environmental and NEPA issues are

1 involved, care must be taken in applying the Commission's
2 general burden of proof rule because the NRC, not the
3 applicant, has the burden of complying with NEPA."

4 Accordingly, because the Commission's regulations
5 require the applicant to file an environmental report and
6 prescribes its contentions, the applicant has the burden on
7 the contentions or portions of the contentions inserting
8 deficiencies in the ER. Therefore, OGD would submit that
9 the arguments made by PFS regarding the disproportionate
10 impacts, as well as the requirement of NEPA, are without
11 merit.

12 PFS further argues that this subcontention must be
13 dismissed for lack of a basis. Contrary to this assertion,
14 OGD has provided several bases upon which this contention is
15 based. OGD also asserts that it has asserted basis for the
16 assertion made in the contention; that therefore, this
17 portion of the contention should be approved.

18 PFS states that it has addressed the topics of
19 sociological and economic impacts on native communities by
20 stating that the ISFSI would be located on the Skull Valley
21 Indian Reservation. And that's a quote from their response.
22 And that they have analyzed the persons living within the
23 five miles of the site by counting the approximately 30
24 members of the Skull Valley Band of Goshute Indians living
25 on the reservation.

1 I don't believe by simply stating that the site
2 will be located on an Indian reservation and that the site
3 -- and that by analyzing the persons living within three to
4 five miles of the approximately 30 members of the Skull
5 Valley Band of Goshutes the applicant has made -- has met
6 its burden of identifying negative economic or sociological
7 impacts on the native Goshute community. We believe that
8 this section of the contention should be approved.

9 On page 605 of PFS' reply, PFS argues that the
10 subcontention regarding disproportionate impacts must be
11 dismissed for lack of a factual basis. OGD asserts that it
12 has provided a factual basis in identifying nine toxic
13 release inventory sites, six comprehensive environmental
14 response compensation and liability sites, two national
15 pollution discharge elimination sites, and 40 resource
16 recovery act sites, all within 35 miles of the proposed
17 site. Further, OGD has identified hundreds of different
18 chemicals in the facilities around the Goshute Reservation.

19 OGD would again turn to Louisiana Energy, in which
20 disproportionate impacts on two black communities were
21 considered and it was found that there had been no attempt
22 to award -- to avoid or mitigate the disparate impacts of
23 the facility on the minority community.

24 PFS argues that a petitioner is obligated to
25 provide the technical analysis and expert opinion or other

1 information showing why its bases support the contention.
2 When the Commission amended the rules governing
3 admissibility of the contentions in 1989, the Commission did
4 not require that an intervenor or a petitioner prove its
5 case prior to the admission of its contentions.

6 The licensing board in Pacific Gas and Electric
7 Company has stated that: "In reviewing the petitioner's
8 proposed contentions, it will keep in mind both the
9 upholding of the purpose of the rule and the need to
10 interpret it as not foreclosing reasonable inquires into the
11 licensing action."

12 In the legislative history of the amended rules,
13 the rule makers make it clear that the petition need only
14 make a minimal showing that material facts are in dispute,
15 thereby demonstrating that an inquiry in depth is
16 appropriate. OGD asks that this contention be admitted in
17 its entirety.

18 CHAIRMAN BOLLWERK: All right. Anything from Mr.
19 Silberg?

20 MR. SILBERG: Just very briefly.

21 First, to the extent that OGD takes credit, seeks
22 to take credit for the various hazardous waste sites that
23 it's identified around the reservation as forming the basis
24 for admitting this contention, I have not heard nor I've
25 seen any suggestion that somehow the operations of this

1 facility are linked to the operations of these other
2 facilities which are owned and operated by entirely
3 different entities at great distances from this site.
4 There's just no connection between the two. So those
5 facilities can't possibly form any sensible basis for this
6 contention.

7 With respect to the argument that there's been no
8 attempt to mitigate, there certainly has. The, at least
9 between the Tribe and the PFS is such a mitigation attempt.
10 The burden of identifying negative impacts is not a burden
11 of proof here. I fully agree that the burden of proof when
12 the issue, when any issue comes to litigation is on the
13 proponent. We're here talking about the burden of
14 establishing an appropriate contention. And the LES comment
15 is simply inapposite with respect to what we're dealing with
16 now.

17 With respect to the other items, I would just rely
18 on our written submission on this issue, and on the previous
19 one as well.

20 CHAIRMAN BOLLWERK: All right. Mr. Quintana.

21 MR. QUINTANA: I think enough's been said to
22 divide the tribe by the various parties and I will seek not
23 to do that any further in this proceedings. I respect the
24 views of counsel.

25 CHAIRMAN BOLLWERK: All right. Mr. Turk?

1 MR. TURK: One limited statement, Your Honor. We
2 do not oppose the admission of the environmental justice
3 issues. However, I think Ms. Belille was mistaken. We
4 oppose not just the issue of psychological fear, but also
5 the assertion in this contention of cumulative impacts. So
6 we would rest on our written submission.

7 CHAIRMAN BOLLWERK: All right. Ms. Belille,
8 anything further?

9 MS. BELILLE: No. Just that we did understand
10 that they did oppose that part of it.

11 CHAIRMAN BOLLWERK: All right. So in terms of O
12 then, the only thing you have no objection to is the
13 environmental justice portion of it. Is that -- make sure
14 I'm -- we're on the same page here, terms of your position.

15 DR. LAM: I had a question for Mr. Quintana.

16 When the Skull Valley Band make the decision to
17 actively welcome the facility, is this a simple majority of
18 the members, or is it -- can you share with us the extent,
19 the degree of majority view?

20 I understand there dissent within the members of
21 the Band. Is it a simple majority decision of two-third
22 majority?

23 MR. QUINTANA: There is a strong majority decision
24 that supports this business with private utility companies.
25 And it has been circulated to all Band members. And the

1 ones that have opposed it have been vocal in their
2 opposition, and the ones that have supported it have been
3 vocal in their support.

4 DR. LAM: Do you have some number for the report?
5 I understand there are more than 100 members of the Band.

6 MR. QUINTANA: The adult voting members over the
7 age of 18. I believe there are -- I believe that there are
8 60 adult voting members, and the overwhelming majority
9 approved of it.

10 DR. LAM: What do you mean by "overwhelming"?

11 MR. QUINTANA: I think there are eight opponents.

12 DR. LAM: Over?

13 MR. QUINTANA: Of the -- on the tribe as a whole.

14 DR. LAM: One hundred?

15 MR. QUINTANA: Of the 60 voting members.

16 DR. LAM: Oh, 60. I see. I see.

17 MR. QUINTANA: Minor children, children under 18
18 don't vote.

19 DR. LAM: Yeah.

20 MS. BELILLE: Your Honor, may I say something?

21 CHAIRMAN BOLLWERK: Yes.

22 MS. BELILLE: I would just like to say that there
23 is a dispute about the number of people that were in favor
24 and the number that were opposed.

25 CHAIRMAN BOLLWERK: All right. Are you --

1 MR. TURK: You had posed a question to me as to
2 which parts of the contention we oppose.

3 CHAIRMAN BOLLWERK: Yes. Or which parts you had
4 no objection to. I'll put it that way.

5 MR. TURK: All right.

6 CHAIRMAN BOLLWERK: Either way.

7 MR. TURK: As an environmental justice contention,
8 we don't see that the issues of need and cost are part of
9 that contention.

10 CHAIRMAN BOLLWERK: All right.

11 MR. TURK: So initially in our written response,
12 we had made the statement that we don't see how those are
13 related.

14 That implied that we would oppose those subissues as being
15 brought up in this contention.

16 CHAIRMAN BOLLWERK: All right.

17 MR. TURK: Now the other further question is do we
18 think that a separate contention can be carved out of this
19 in order to address the issues of need and the cost benefit
20 balance.

21 CHAIRMAN BOLLWERK: Okay.

22 MR. TURK: I don't think it's the Board's
23 responsibility to do that for this intervenor. The Board
24 has to look at the contention itself and admit it to the
25 extent that it's supported by bases.

1 The contention is an environmental justice
2 contention.

3 That's what has to be ruled upon. So I would exclude the
4 consideration of those other matters as irrelevant to this
5 issue and ask you to rule simply on whether the
6 environmental justice contention is admissible.

7 DR. KLINE: Mr. Turk, this environmental justice
8 contention has in it what appears to be significant legal
9 disputes as to its applicability. And the applicant has
10 asserted in his reply that this -- that the environmental --
11 that the executive order doesn't confer any rights on
12 anybody and that --

13 MR. TURK: That's a correct statement.

14 DR. KLINE: -- it really doesn't even belong in
15 the case.

16 MR. TURK: That's not correct.

17 DR. KLINE: Well, no. I mean he has asserted
18 that. I don't know if it's correct or not, but --

19 MR. TURK: I'm disagreeing with his argument then.

20 DR. KLINE: Yeah.

21 MR. TURK: If that's his assertion.

22 DR. KLINE: Okay. So then you're confirming that
23 there is a legal dispute then. Is this something that we
24 would set for summary disposition then if it were admitted,
25 or --

1 I don't know if we'd set it. But once LES gets
2 decided, somebody might file it. So --

3 Well, it isn't clear to me how you'd handle this
4 contention if it got in. Because another assertion is that
5 it sets burdens on the staff to perform certain analyses,
6 but the staff -- the adequacy of the staff performance isn't
7 going to be known for years. So what do we do with this
8 contention now if it comes in?

9 MR. TURK: Well, I don't know if this is going to
10 be a direct enough response to you, but I want to give you
11 my understanding of how the environmental justice issues
12 will be analyzed.

13 DR. KLINE: Okay. Yeah, I would -- that would be
14 helpful.

15 MR. TURK: The executive order creates a
16 responsibility for the NRC.

17 DR. KLINE: Yeah.

18 MR. TURK: Not for the applicant, but for the
19 federal agency.

20 DR. KLINE: Right.

21 MR. TURK: To consider whether federal actions or
22 activities, I think the word activities is used in the
23 executive order, federal activities and programs; consider
24 whether those things have negative environmental justice
25 effects. We have to consider and address that in the -- in

1 our decision as -- I'm sorry. In our documents concerning
2 the licensing of the facility.

3 We will do that in the environmental impact
4 statement.

5 DR. KLINE: Yeah, I understand.

6 MR. TURK: The executive order also, however,
7 indicates quite clearly that it does not create any
8 procedural or substantive right for a party who may be
9 affected, such as here, OGD or other persons who may assert
10 that they're going to be environmentally discriminated
11 against. So it is an executive order that requires our
12 consideration of effects, but does not result in rights for
13 other parties.

14 DR. KLINE: Yeah.

15 MR. TURK: Now coming back to your first question
16 as to whether the issue should be set for summary
17 disposition.

18 I'd have to look very closely at the wording of the
19 contention.

20 DR. KLINE: Let me --

21 MR. TURK: It may be that the applicant does not
22 disagree with my characterization.

23 DR. KLINE: Well, look at page 24. The applicant
24 asserts, at the top of the page, that the executive order
25 prohibits discrimination in any program or activity

1 receiving federal assistance; and that to the extent that
2 there is no federal assistance in this program, it doesn't
3 even apply. Is that --

4 MR. TURK: That's only one portion of the
5 executive order.

6 DR. KLINE: Okay.

7 MR. TURK: I was referring more to the general
8 statement at the beginning of the executive order, which
9 places this overall responsibility on federal agencies to
10 consider the impacts of their actions. That's a different
11 section from the one that the applicant discusses there.

12 DR. KLINE: Okay.

13 MR. SILBERG: There is a significant, as I think
14 you recognize, a significant legal problem with applying the
15 executive order in this case. Because the executive order,
16 I believe at Section 601 --

17 609, specifically says that this executive order
18 creates no judicial rights, no rights that are enforceable
19 in court. And it's difficult to see how you can litigate an
20 issue and then not have judicial rights arising from it.

21 DR. KLINE: Well --

22 MR. SILBERG: But that's getting into the merits
23 of the legal issues, which we've really briefed.

24 DR. KLINE: But the -- I'm still confused as to
25 how we handle this contention, because the contention itself

1 alleges a deficiency on the part of the performance of the
2 applicant.

3 MR. SILBERG: Right.

4 DR. KLINE: And the -- and whether or -- however
5 we consider it, it is apparently going to turn on the
6 performance of the staff. And one of the -- is there any
7 duty of the applicant to --

8 MR. SILBERG: None whatsoever.

9 DR. KLINE: Well, that's what I'm trying to
10 understand.

11 CHAIRMAN BOLLWERK: Except as my understanding,
12 the staff asks for them to --

13 DR. KLINE: The staff believes that there is a
14 duty of the applicant to do something here?

15 CHAIRMAN BOLLWERK: To make it part of their
16 environmental report. Is that not correct, or is that --

17 MR. TURK: In order to support our evaluation of
18 effects, it is likely --

19 DR. KLINE: Okay.

20 MR. TURK: -- that we will send inquiry to the
21 applicant asking for information.

22 DR. KLINE: Yeah.

23 MR. SILBERG: The issue, typically phrased, aside
24 from the discrimination aspect, which is really a separate
25 aspect of the environmental -- of the executive order. The

1 issue that was litigated as a factual matter in the LES
2 case, and Ms. Curran can talk in much greater firsthand
3 detail about that, was whether there were disproportionately
4 high and adverse human health or environmental effects
5 caused by the licensing action.

6 And in that case, the licensing board found two
7 such effects. And in that case, they litigated whether
8 there were such disproportionately high and adverse human
9 health environmental effects. That is one way, at least the
10 LES board, saw fit to deal with litigating this issue.

11 DR. KLINE: Well, if I read the contention
12 correctly, the State is asserting that the applicant has
13 failed to perform some duty under the executive order. And
14 the applicant is saying we have no such duty under the
15 executive order. Doesn't that frame a legal issue?

16 MS. CHANCELLOR: That's not quite our contention.
17 We're saying the applicant site selection process does not
18 satisfy the demands of the executive order or NEPA, and the
19 NRC staff must be directed to conduct a thorough and in-
20 depth investigation of the applicant site selection process.

21 We're saying that the applicant site selection
22 process is deficient; and therefore, the NRC staff cannot
23 comply with what is required by the executive order or NEPA.
24 And our concern is if we do not raise these issues now and
25 want to challenge them when the final EIS comes out, both

1 the applicant and the staff will say waiver, that we should
2 have brought them up at this stage.

3 DR. KLINE: But we can't read the citation to the
4 executive order out of it, because we understand there's a
5 separate NEPA obligation to undertake an alternative site
6 analysis. You don't need the executive order to assert
7 that.

8 MS. CHANCELLOR: No.

9 DR. KLINE: When you site the executive order,
10 you're citing some special requirement, which the,
11 apparently the applicant disagrees that he has. And I'm --
12 it isn't clear to me at all how this contention gets
13 handled, I mean given what we've heard so far.

14 MR. SILBERG: Well, our --

15 DR. KLINE: It seems like there's a legal dispute
16 here.

17 MR. QUINTANA: Your Honor.

18 DR. KLINE: Yeah.

19 MR. QUINTANA: The reason for my objection is we
20 believe that the decision made by the majority of the Tribe
21 is an informed decision which complies with the executive
22 order. It is because the Tribe has gone to such great
23 lengths and efforts, including going through the entire
24 federal process under the MRS and the program being canceled
25 out from under it, that this would comply.

1 DR. KLINE: Yeah.

2 MR. QUINTANA: I think to allow this contention
3 would be to muddy the issues and bring on unnecessary delay
4 and litigation.

5 DR. KLINE: Well --

6 MR. SILBERG: I think there are two issues that
7 the Board needs to face at this stage of the process.
8 First, is there a legal issue to be -- is the contention
9 legally acceptable.

10 DR. KLINE: Yeah.

11 MR. SILBERG: We think it isn't. We've briefed
12 that.

13 DR. KLINE: I understand that.

14 MR. SILBERG: Second, even if --

15 DR. KLINE: And you think it is. Doesn't that
16 frame a dispute?

17 MR. SILBERG: Well, then the Board --

18 DR. KLINE: You say yes, it is; you say no, it
19 isn't?

20 MR. SILBERG: And the Board can make that -- and
21 the Board can reach that decision and decide

22 DR. KLINE: Yeah. All right.

23 MR. SILBERG: -- either to admit the contention or
24 not to admit it.

25 DR. KLINE: Yeah.

1 MR. SILBERG: If they take our view of what the
2 executive order means, we think the appropriate thing would
3 be to exclude the contention avonitio.

4 Second, assuming that the Board reached the
5 conclusion that legally this contention was correct, that
6 there is, under the executive order, an obligation under
7 NEPA to look at discrimination notwithstanding the fact no
8 one's ever done it before in all the years of NEPA. Then
9 you get to the factual issue. Has the State set forth an
10 adequate basis --

11 DR. KLINE: Yeah.

12 MR. SILBERG: -- to show that there's
13 discrimination to raise this issue to the level sufficient
14 to bring it as a contention. That's wholly apart from what
15 the staff --

16 DR. KLINE: Yeah.

17 MR. SILBERG: -- has to do in the environmental
18 impact statement.

19 DR. KLINE: Okay.

20 MR. SILBERG: So we're really talking three
21 issues.

22 DR. KLINE: All right.

23 MR. SILBERG: One, staff hasn't met obligations.
24 Board has to make a legal cut first, is this legally, you
25 know, within the scope. And second, has the State met its

1 burden under 2714 for an admissible contention on the
2 non-legal side of it.

3 DR. LAM: And final, isn't it also true, my
4 reading of the contention, the State is not seeking any
5 relief through the action of the applicant. The State is
6 only seeking to compel the staff to do something. So on its
7 face, the applicant is not involved here, on its face.

8 MS. CHANCELLOR: But the NRC staff says that it
9 is, because if it needs to do anything, it will go back to
10 the applicant.

11 DR. LAM: Sure, sure. But right now, the
12 contention as it reads right now, you're only seeking to
13 compel the staff to do something.

14 MS. CHANCELLOR: That is correct. Because we
15 believe it would be illegal for NRC to put its informata on
16 a site that was chosen that has discriminatory effects.

17 DR. LAM: So maybe it would not even involve the
18 applicant.

19 MR. SILBERG: Yeah. I don't have a problem with
20 the way the contention is phrased as to whether it's the
21 applicant's problem or the staff's problem. I think the two
22 issues that the Board needs to focus on are, one, the legal
23 issue, and second, have they met the 2714 standards.

24 MS. CHANCELLOR: I don't believe you can leave the
25 applicant out of the loop, because we need to look at what

1 the applicant has done, either through discovery or if
2 there's not enough in the application, as to how it chose
3 the site.

4 CHAIRMAN BOLLWERK: That is exactly what the LES
5 board did, to leave it at that.

6 DR. KLINE: Is there any legal clarification?

7 CHAIRMAN BOLLWERK: Yes?

8 MR. TURK: You know, in considering this, the
9 contention, looking back again at State's contention BB,
10 there is a part of it that I should have objected to, and I
11 would note that now.

12 CHAIRMAN BOLLWERK: The -- I'm sorry. Which
13 contention now are you objecting to?

14 MR. TURK: The State's --

15 CHAIRMAN BOLLWERK: We're dealing with O, but
16 you're now back to BB?

17 MR. TURK: Yes. Because we've just been talking
18 about the State's contention --

19 CHAIRMAN BOLLWERK: All right.

20 MR. TURK: -- that deals with environmental
21 justice.

22 CHAIRMAN BOLLWERK: And we haven't forgotten about
23 you, Mr. Kennedy. We're getting -- coming to you. All
24 right.

25 MR. TURK: That's their contention BB.

1 DR. LAM: BB.

2 MR. TURK: The words of the contention itself are
3 partially objectionable, because at the tail end, after
4 saying that the site selection process doesn't satisfy the
5 executive order, they then say, quote, "The NRC staff must
6 be directed to conduct a," I suppose it should say a
7 "thorough and in-depth investigation of the applicant's site
8 selection process." That request for direction from the
9 licensing board is improper here, because there's
10 established case law which says that the licensing board is
11 not to authorize to direct the staff in the conduct of its
12 activities. When we did not object to the contention we
13 overlooked the wording, and considered the substance rather.
14 But I would object to those words. If the contention was
15 admitted, it should exclude those words.

16 CHAIRMAN BOLLWERK: All right. In theory, what
17 the LES board simply said to the staff, the EIS is
18 inadequate. To make it adequate, you have to do something
19 else. And that not a direction as such, it's simply a --

20 MR. TURK: And what's typically done in NEPA cases
21 is to whatever extent the record supports it, the EIS would
22 thereby be supplemented.

23 CHAIRMAN BOLLWERK: Right.

24 MR. TURK: By the decision itself.

25 CHAIRMAN BOLLWERK: Correct. Although in that

1 instance, the Board decided, to my understanding, decided
2 not to make the supplementation itself but left it to the
3 staff to do further, do whatever the staff thought was
4 appropriate.

5 MR. TURK: Yeah. They sort of dropped it back in
6 the staff's lap. But that gets you also to the question of
7 what does NEPA require. We're not required by NEPA to take
8 certain action based upon potential impacts. We're required
9 by NEPA to consider --

10 DR. KLINE: Consider.

11 MR. TURK: -- the costs and benefits and reach a
12 decision after having done that.

13 CHAIRMAN BOLLWERK: All right.

14 MR. TURK: And the balance as to how much
15 quantitatively you assign to one impact versus another,
16 that's not something that NEPA assigns responsibility for us
17 to do.

18 CHAIRMAN BOLLWERK: All right. Anything further
19 in terms of either BB or O that anybody wants to say?

20 All right. Mr. Quintana, I'm sorry.

21 MR. QUINTANA: Well, the only thing that I want to
22 reiterate is we can't even get to that threshold level of
23 decision on this contention because the State does not have
24 standing to bring that. This isn't the State's members.

25 CHAIRMAN BOLLWERK: Anything you want to say about

1 that, Ms. Chancellor?

2 MS. CHANCELLOR: Totally disagree with that sort
3 of analysis.

4 CHAIRMAN BOLLWERK: All right. Mr. Kennedy, this
5 would be Confederated Tribes C.

6 MR. KENNEDY: It's actually just part of C, but I
7 would like to maybe start with the last point. I believe
8 all of the Tribe's members, or at least the vast majority of
9 them, are citizens of the state of Utah. So I'm not quite
10 sure I understand Mr. Quintana's distinction there as to the
11 State's interest.

12 And I think the State started off this proceeding
13 by saying that they recognize the sovereignty of the Skull
14 Valley Band and they didn't wish to challenge that
15 sovereignty. And I assume that extends to my clients and
16 other Indians here in the state. But I think nonetheless,
17 the applicant has come here for the approval of this Board,
18 and Mr. Quintana and his client are of course supporting
19 that.

20 And I think as they participate in this kind of a
21 proceeding it represents an acknowledgement that although a
22 tribe may be a sovereign entity, like any sovereign nation,
23 you are not alone. You have neighbors. And you cannot
24 ignore the interests of your neighbors. And I think that
25 that's the issue that is being discussed here and that's of

1 concern here, in large part.

2 And I think as the Board reviews these issues it's
3 certainly appropriate that the Board carefully and fully
4 consider the impacts on the culture and the community that's
5 involved. I would just call attention to a couple of the
6 things that occurred during our site visit.

7 One was a representation that the majority of the
8 Band members who actually live on the reservation, the
9 majority of those families were opposed to this project.
10 Now I think that's an issue of fact. Maybe true, may not be
11 true, but that's an issue of fact.

12 There was another important representation made at
13 that site visit, and that was that tribal leaders have used
14 financial incentives or disincentives to influence support
15 or non-support of the project. We've heard a lot about, you
16 know, this is what the people want, et cetera. And if
17 that's at all relevant, then I think the question of what
18 kinds of actions are being taken to influence those
19 decisions are entirely relevant. They certainly reflect an
20 impact on the community, if nothing else.

21 And I think, also I think it can be said it
22 reflects an impact on their culture. If our contention is
23 allowed, we would present evidence that would show that
24 grandmothers who are bringing their children to the area
25 now, if this project were approved, would not do that

1 anymore. People who are burying their dead there now would
2 not do that anymore; people who are participating in
3 religious ceremonies there would not do that anymore. And I
4 think those are cultural impacts.

5 Whether the motivation is something that's
6 important or relevant, I don't know. I mean I'm not sure
7 that there has to be a connection. And whether the fear is
8 rationally based, whether it's based on fear or some other
9 concept, I don't know. But I still think that there would
10 be cultural impacts. And whatever the motivation, I think
11 those need to be taken into account.

12 I think the Board ought to be able to verify these
13 things with respect to the representations that have been
14 made, and I think those are legitimate inquiries regardless
15 of the sovereign status of the Skull Valley Band. And I'd
16 leave it at that with the written submission we've already
17 made.

18 CHAIRMAN BOLLWERK: All right, sir.

19 Anything from the applicant?

20 MR. SILBERG: Yes.

21 I think what we've heard just now is perhaps the
22 best example of late filed, late submitted new contentions,
23 new bases, new everything, with no support whatsoever. I
24 think what I just heard reported was not what I heard on the
25 reservation. I heard no one say that a majority of Band

1 members living on the reservation opposed the project. I
2 think that's a flat-out misstatement.

3 The allegation that tribal members used dollars to
4 influence support of a project, first of all, is irrelevant
5 to this contention or to any contention, and I think is an
6 inappropriate subject for this Board even to listen to, let
7 alone to take action on.

8 Whether that discussion that we heard and what we
9 saw on our visit to the reservation reflects an impact on
10 the community I think misstates what the executive order
11 purports to do, which is to look at effects on human health
12 and the environment. Whether or not we heard anything that
13 reflects an impact on culture, I think culture is part of
14 the environment and ought to be considered. But we've had
15 no evidence whatsoever that supports that.

16 To the extent that Confederated Tribes is saying
17 that grandmothers will not bring their children to the
18 project if it's built, I think has just totally wiped out
19 whatever standing this petitioner had hoped to accomplish.
20 Because if indeed the children, the child has been brought
21 to the reservation will no longer be brought to the
22 reservation, then they have no standing. There's no
23 possibility of injury if that child never comes to the
24 reservation.

25 We've heard speculation about burial of people,

1 burying dead, religious ceremonies. Again, statements by
2 counsel, not appropriate as the basis for a contention.

3 I think we've already discussed the fact that the
4 supreme court is the ultimate arbiter of the law of the
5 land. And thus, while Confederated Tribes might say that
6 it's irrelevant that a fear is rationally or irrationally
7 based, supreme court has resolved that in Metropolitan
8 Edison v. People Against Nuclear Energy.

9 And we simply don't have a shred of evidence that
10 supports allowing this contention to come in on the question
11 of disparate impact, even if the legal issues that we've
12 raised are resolved against us. And we would of course urge
13 the Board to consider those legal issues.

14 I would also note that this contention contains
15 five other allegations besides environmental justice. None
16 of them contain a shred of basis. They're merely a sentence
17 or two that alleges a failure to assess, a failure to
18 discuss, issues all of which are discussed in the
19 environmental report. There's no indication that the
20 Confederated Tribes have made any effort to discuss let
21 alone evaluate --

22 MR. KENNEDY: Your Honor, I haven't addressed
23 those issues yet, and I think it's not appropriate to be
24 discussing those now. I think they're coming up.

25 CHAIRMAN BOLLWERK: All right. If he apparently

1 wants to discuss them in, I guess the next portion where we
2 talk about cost benefit. So why don't leave it for that.

3 MR. SILBERG: Oh, I'm sorry.

4 CHAIRMAN BOLLWERK: That's all right. Not a
5 problem.

6 MR. SILBERG: Well, on environmental justice at
7 least, that's all I have to say.

8 CHAIRMAN BOLLWERK: All right. Mr. Quintana.

9 MR. QUINTANA: Well, one, Mr. Kennedy represents
10 the Confederated Goshutes. That is a completely separate
11 reservation. And assuming he has standing, which we do not
12 believe that he does, this is an informed decision by the
13 tribe that has gone to probably greater efforts than any
14 other similar community in the United States.

15 And I think that if this facility is not built, it
16 would be environmental racism. Because when an informed
17 decision is made by a minority group, or any group, on a
18 hard science issue, and after carefully examining that issue
19 other people can throw stones and say they're not smart
20 enough to make their own decisions, that's environmental
21 racism.

22 CHAIRMAN BOLLWERK: All right. Staff?

23 MR. TURK: Your Honor, I'll address only the
24 environmental justice portion of the contention, although
25 I'm going to start with a statement that applies to all of

1 it. The contention lacks specific reference to the
2 environmental report to show you that there's a specific
3 disagreement, there's a genuine dispute of material fact
4 between the Confederated Tribes and the applicant's
5 submissions.

6 In particular, with respect to environmental
7 justice, the only basis that appears in the contention to
8 support that is on page six, where there is a, I believe
9 what's referred to as an ipse dixit type of insertion; that
10 the ISFSI will have a dramatic economic and sociological
11 impact on the minority community residing at the Skull
12 Valley Reservation. And then it concludes by saying no
13 assessment of the impacts upon Indian religious ceremonies
14 or visits by Indians to the Skull Valley burial ground has
15 been made.

16 Well, in fact there is a discussion in the
17 environmental report commencing at page 2.7-7. Section
18 2.7.3 is the entire section that addresses potential
19 environmental justice impacts. We referred to that
20 erroneously in our response at page 130.

21 We stated that the tribes had not addressed the
22 discussion in Chapter 7. That's a title. It should have
23 been Chapter 2 of the environmental report. So we see
24 nothing in the contention or its basis that would support
25 admission of environmental justice issues in this

1 contention.

2 CHAIRMAN BOLLWERK: All right.

3 MR. TURK: And everything that the Confederated
4 Tribes have referred to today as to potential effects of
5 what people may or may not do in the future, there's no
6 evidence for that. There's nothing submitted with the
7 contention to support that.

8 And it's unreliable in any event because given the
9 heated nature of this proceeding and the positions taken by
10 various persons and parties, statements as to what may or
11 may not happen in the future really are unreliable and fail
12 to give you a concrete issue to litigate.

13 CHAIRMAN BOLLWERK: All right, sir.

14 Mr. Kennedy.

15 MR. KENNEDY: Concerning Mr. Silberg's statement
16 that what I said was, quote, "A flat-out misstatement," I
17 just turned to Margene Bullcreek, who is here, who made the
18 statement, and as I said it just a few minutes ago, nodded
19 in agreement. So I would say Mr. Silberg's statement is the
20 flat-out misstatement. And I think there are at least four
21 or five others that are here in the hearing room today that
22 would confirm what I had said.

23 For Indian people, being able to go to a
24 reservation or to their homeland is a benefit. It's a
25 positive thing.

1 Being not able to go is a negative thing. It's an injury.

2 So if you think that we would lack standing
3 because someone would want to stay away because of the
4 contamination, or their vision of the contamination of this
5 area by the construction of something like this, I guess I
6 just have to disagree with you. That's not the way it is
7 seen in Indian culture. And I don't think that in any way
8 diminishes the standing. In fact, if anything, it would
9 increase it.

10 I don't know how to separate the supreme court's
11 comments about fear versus impact on culture. I guess if
12 the supreme court says that an impact on culture that occurs
13 because of fear is to be disregarded, then so be it. But I
14 don't think that's what the supreme court said. And I think
15 cultural impacts are important, and I don't think the
16 motivation or the cause of those, the immediate cause of
17 those impacts is relevant in a situation like this.

18 We would just say that brevity is the soul of wit.
19 And if we can avoid prolonged identification of lack of
20 information, that that's fine. And that's -- that ought not
21 to be discouraged, but ought to be rewarded. And if a
22 contention says there is no information, we ought not to
23 have to go through and say on line six there is no
24 information, on line 10 there is no information, and so
25 forth. And I think again goes back to what Mr. Nelson said

1 earlier. That's all I had to say.

2 CHAIRMAN BOLLWERK: All right. Next contention
3 would be CC, which deals with cost benefit analysis.
4 There's also Castle Rock 15.

5 That's all right. State CC, Castle Rock 15,
6 Confederated Tribes C.

7 MR. LATER: Your Honor, I need to correct the
8 record on an earlier matter.

9 CHAIRMAN BOLLWERK: Okay.

10 MR. LATER: Maybe this is an appropriate time for
11 just a moment, since we're speaking misstatements.

12 Earlier I maintained that we had rejected the
13 applicant's restatement of our contention 13. I was in
14 error in that. We in fact do accept that. I've caused
15 consternation with Mr. Blake in that regard for which I
16 express profound apologies.

17 CHAIRMAN BOLLWERK: Take it you two have been
18 talking about it and he wasn't prepared for that statement,
19 I take it.

20 MR. LATER: He was not prepared for it. He was
21 clearly distraught at this. So I hope that I have remedied
22 this matter.

23 The serious issue though is that clearly through
24 these proceedings there's a profound decline in my mental
25 faculties --

1 [Laughter.]

2 MR. LATER: -- which this panel may need to
3 evaluate as a additional impact in the application.

4 MR. BLAKE: I appreciate very much his statement.
5 I have been working with all the parties on rephrasing and
6 I'll still have my report for the Board.

7 MR. LATER: All right.

8 MR. BLAKE: Maybe 9:00 or whenever we get that to
9 them.

10 CHAIRMAN BOLLWERK: All right. The Board
11 appreciates your efforts, sir.

12 All right. Utah CC.

13 MR. NELSON: Utah CC goes to the issue of whether
14 or not the environmental report meets the requirements of 10
15 C.F.R. 51.45(c). This is the section which requires that a
16 quantification of various factors and environmental impacts
17 be included in the environmental report. And that where
18 there is not an ability to quantify, that the qualitative
19 and qualitative terms of those impacts be assessed.

20 The review of the environmental report by the
21 State focused on Chapter 7 because it was Chapter 7 that we
22 were able to find some quantification of numbers. The
23 applicant, in their response, points to Chapters 4 and 5;
24 not identifying any specific provisions in 4 and 5, but
25 indicating that those sections on environmental effects and

1 accidents constitute part of their meeting this requirement.
2 We have reviewed 4 and 5, do not find the quantification nor
3 an explanation as to why quantification was not done.

4 The applicant also points to the one page
5 description of no build alternative, in which there is no
6 cost quantifications on environmental impacts. In Chapter
7 7, Chapter 7 consists of four pages. And in -- and a table,
8 two tables I guess. And in reviewing those provisions, we
9 do find some quantification.

10 There is a quantification on page 722 which says
11 that recent estimates place the savings to utilities and
12 their customers of a centralized interim storage facility
13 over construction of additional on-site storage facilities
14 for spent fuel at 1.758 billion. We assume that that means
15 that the savings would occur if the federal government, if
16 the Department of Energy were to take responsibility for
17 those wastes.

18 If it does not, we are confused then, because on
19 page 731 the statement is made, under "Costs," and this is
20 the other section that includes a specific cost number. The
21 total life cycle cost for the facility and its operation
22 over its projected 40 year operating life is 1.536 billion.

23 The numbers are somewhat equivalent. And as we
24 read that, what we don't understand in part is why that is
25 considered to be a savings by building this facility if the

1 cost is approximately equivalent to the savings if DOE would
2 have taken it over.

3 The table then that is attached, 731, is the only
4 other place we could find quantitative numbers. And those
5 list generalized numbers for capital cost, interest,
6 expense, operating expenses and environmental costs, saying
7 that the environmental costs are negligible, and just
8 summing all of the rest of the costs. The contention is is
9 that that table and that chapter do not meet the
10 requirements of 5145(c).

11 The common error that is often made under NEPA
12 when you do a cost benefit analysis is you fail to quantify,
13 when you can, environmental costs. And the State has
14 pointed out in several circumstances where those costs could
15 be quantified, and I won't repeat those. They're listed in
16 the State's comments. But I would call attention to one
17 specific request for cost which the applicant replied to.

18 We requested that the costs, emergency response
19 costs, be quantified. And the applicant responded that if
20 you look at Table 731, that they're quantified, because
21 they're included within the operating expenses costs of
22 976,000 and 1,244,000. We do not see in that table any
23 breakdown on that cost number. And it's that kind of
24 limited cost analysis that forms the basis for our
25 contention.

1 CHAIRMAN BOLLWERK: All right, sir.

2 Mr. Gaukler, I see you are up. Is that --

3 MR. GAUKLER: Yes, Your Honor.

4 First of all, I'm confused. The contention as
5 originally drafted did not just talk about quantification.
6 That's how come we referred to other sections of the
7 environmental report which discussed and evaluated the
8 impacts. The contention had stated that the applicant
9 failed to provide an adequate balancing of the costs and
10 benefits of the proposed project, or to quantify factors
11 that are amenable to quantification. They refer to, in this
12 regard, they criticized in their written reply, which I'd
13 like to refer to, the brief discussion of 7.3. But that
14 Section 7.3 just refers to the cost of the facility, and has
15 as its background, the description in 4 and 5 where we
16 evaluate all of the different environmental impacts.

17 Also in terms of the written reply, the State
18 claims that we're trying to shift the burden to them.
19 That's not correct. It's the State's burden to come up with
20 an acceptable contention.

21 In the same vein, in their written reply they go
22 beyond quantification by saying that 5145(c) is not limited
23 to accidents, taking issue with our response and reference
24 in our reply to Chapter 5, which is the environmental
25 effects of accidents. We reference Chapter 5 in our reply

1 because the State's basis was limited to accidents. They
2 referred to their contentions, I believe H through P, which
3 are safety contentions related to accidents or other safety
4 factors.

5 Other parts of the environmental report do address
6 other environmental effects, including radiological effects
7 from normal operation, which is set forth in section at page
8 4.2-9 of the environmental report.

9 Turning to the issue that was focused on in the
10 oral response here, quantification. 5145 does not require
11 quantification in all instances, only to the fullest extent
12 practical. And also, as set forth in the cases that we cite
13 in our reply, quantification is not a ultimate goal or
14 objective of NEPA.

15 The cases that we set forth there says that NEPA
16 requires such information as appears to be reasonably
17 necessary under the circumstances for the evaluation of the
18 project. And we claim that we have set forth that
19 information in the environmental report. We have quantified
20 costs to the extent practicable.

21 With respect to the particular claim on emergency
22 costs that -- emergency planning costs that was referred to
23 just by counsel for the State, if we had broken down that
24 number, they should have asked for more detail. In effect
25 that's a request for discovery and isn't appropriate at the

1 contention phase.

2 I have no further comments.

3 CHAIRMAN BOLLWERK: All right. Mr. Quintana.

4 MR. QUINTANA: No comments.

5 CHAIRMAN BOLLWERK: Staff.

6 MR. TURK: Your Honor, I believe we made an error
7 in our response to this contention. In fact, we would
8 oppose the entire contention.

9 The only thing we did not oppose in our written
10 response was -- well, here's what we stated. We said, "The
11 staff does not oppose the admission of portions of this
12 contention to the extent that the staff does not oppose the
13 admission of Utah contentions H and P" -- I'm sorry -- "H
14 through P." In fact, however, the contention lays out no
15 basis which would support the admission of an environmental
16 contention. And regardless of which of the contentions H
17 through P, we do not oppose separately there that will not
18 give rise to a new contention here in the absence of any
19 basis to support it.

20 So we would oppose the admission of the entire
21 contention, and we would rest on our written response with
22 respect to other matters.

23 CHAIRMAN BOLLWERK: Any questions? No?

24 All right. Mr. Nelson.

25 MR. NELSON: Just a couple of points. Our

1 contention is not limited to H and P. We're very specific
2 that we point those out s part of examples of failures. The
3 case law -- to simply ignore the case law of NEPA requires
4 to the extent practical quantification is not far acting.
5 We disagree with that reading of the law.

6 And finally, to assume that we would ask for more
7 detail because we simply ask for a basic number on what
8 accident emergency response costs are and were refused by
9 not having that environmental report because there is no
10 breakdown, is an assumption that's not part of the record.
11 We think that it's important that at least basic facts be
12 provided to a decision maker in making a decision under
13 NEPA. And those kinds of basic facts are important.

14 We stand in the same position regularly with this
15 Board of having someone continually asking for more
16 information, never being satisfied, not adequate. This is a
17 circumstance we're simply asking for that information. That
18 basic information fits the requirement of adequacy.

19 MR. TURK: Later in the proceeding we may hear the
20 applicant raise the same objection to the staff. We keep
21 asking them for more information without end. We haven't
22 heard that yet.

23 CHAIRMAN BOLLWERK: Is there something you want to
24 say?

25 DR. KLINE: No.

1 CHAIRMAN BOLLWERK: No? All right. Castle Rock
2 15 then, please.

3 MR. GAUKLER: Just give me a second, please.

4 CHAIRMAN BOLLWERK: All right.

5 MR. LATER: I will. Our contention number 15,
6 like the State raises issues regarding cost benefit analysis
7 provided by the applicant, and we agree with the arguments
8 and positions set forth by the State. We have asked to
9 adopt those.

10 Our contention number 15 focuses on a more
11 parochial aspect of the cost benefit analysis, and that is
12 the analysis costs in the area adjacent to the facility,
13 specifically the analysis costs as they affect my clients,
14 Castle Rock petitioners.

15 And let me emphasize again we endorse the State's
16 arguments. When you compare the portions of the cost
17 benefit analysis that are subject to the State's contention
18 with those that are the subject of our contention 15, they
19 are stunning in their detail provided by comparison.

20 The cost benefit analysis or the cost analysis
21 portion of that that relates to near area impacts is as
22 follows: The indirect costs which are derived from
23 socio-economic and environmental impacts of the facility are
24 minimal due to the remote location and small size of the
25 actual storage area, period, end analysis. The analysis is

1 not quantitative.

2 The analysis does not identify specific costs addressed,
3 assessed or considered. One cannot consider it an analysis.

4 In our response we identify what we believe to be
5 the significant costs omitted, the costs that will be
6 impacted on these petitioners. We received of course the
7 objection, "You didn't provide enough detail." Given the
8 analysis that we had to work with, we believe that we met
9 our burden simply pointing out that there was one, no
10 quantification of the costs, two, no identification even of
11 the costs that were to be considered, or analysis of those
12 qualitative or quantitative.

13 But in fact in our reply we went beyond that and
14 did a good portion of the work, or at least a big first step
15 that the applicant should have done, and it was the
16 applicant's burden. Which was providing an identification
17 of the kinds of impacts that the Castle Rock petitioners
18 will suffer and expect to suffer in terms of their
19 economics, their farming operations, potential groundwater
20 impacts, and the limitations on development of that
21 property, none of which were assessed, none of which are set
22 forth in the applicant's cost benefit analysis.

23 To the extent there is any analysis there that
24 alleges those costs are minimal, we dispute that. We
25 believe we've provided a substantial factual basis that

1 creates an issue appropriate for litigation as to the
2 consideration of those costs. Thank you.

3 CHAIRMAN BOLLWERK: All right. Applicant.

4 MR. GAUKLER: Yes. I would note, first of all,
5 that in terms of least effective contention 15, Castle Rock
6 had no reply with respect to our response of Castle Rock 15.
7 I figure he's referring to other parts of his response which
8 we have referred to before, and have pointed out that they
9 lack sufficient bases to set forth a sufficient contention
10 with respect to those other contentions, and by the same
11 token would lack a sufficient basis for contention 15 as
12 well.

13 I would like to briefly make two other points,
14 maybe three.

15 First, again the statement in Section 7.3 of the
16 environmental report on which Castle Rock refers to is
17 backed up by the extensive analysis in chapter four and five
18 of the environmental report where we set forth the analysis
19 that supports the statement that the costs are negligible.
20 There's no reason to quantify costs which are viewed to be
21 negligible, and therefore there's no reason to quantify
22 those costs.

23 Second, I could point out what I think is a
24 generic deficiency with respect to this contention and
25 others. The petitioner Castle Rock ends this contention by

1 saying that, "Petitioners intend to offer evidence with
2 respect to the true costs of the proposed facility." That
3 is an insufficient basis for a contention. The Commission's
4 requirements require to come forth with facts at the
5 contention stage to support your contention. Castle Rock
6 has not done that, and we feel this contention should be
7 dismissed.

8 CHAIRMAN BOLLWERK: All right. Mr. Quintana.

9 MR. QUINTANA: No comment.

10 CHAIRMAN BOLLWERK: Staff.

11 MS. MARCO: The staff opposes this contention,
12 because it does not provide sufficient information, and it
13 does not meet 2714(b) standards. That's set forth in our
14 brief.

15 CHAIRMAN BOLLWERK: All right. Mr. Later.

16 MR. LATER: Thank you, Your Honor. I would expect
17 from the panel and in these proceedings an even-handedness
18 of treatment really as we look at these. And if you look at
19 the portion of chapter 7 that is the point of our criticism
20 here, and compare the adequacy of that statement with the
21 depth of our analysis in our first submission and what we
22 had to work with, I think you need to make that kind of
23 comparison in the problems that we had in coming to grips
24 with an issue and presenting a contention that is
25 appropriate for litigation.

1 And perhaps an even more pointed example, it's
2 true that we simply ran out of time and ability to respond
3 to contentions, and some of them we didn't get the
4 opportunity to draft responses to. We believe in our reply
5 in the letters that we submitted we provided exactly the
6 factual information that is complained about for its absence
7 here.

8 And the answer we get to that is, "Ah, but you
9 didn't reference that in your reply to contention number 15.
10 Therefore, it can't be considered. You have to wipe it out
11 of your mind." But in the very next sentence the applicant
12 says to you, "Well, but if you look at our provision in
13 chapter 7 here, of course that's backed up by chapter 4 of
14 the document. It's not referenced there, but you should
15 incorporate it by reference there." There needs to be an
16 even-handedness of treatment here hopefully in order that
17 this Board can get to the substance of the issues and truly
18 deal with have we presented material in this very
19 accelerated process that now presents a reasonable issue for
20 litigation. I think we've done that.

21 I think we've met the standards, and that the Board should
22 consider the materials that we've presented. Thank you.

23 CHAIRMAN BOLLWERK: All right. Let me have
24 Confederated Tribe C.

25 MR. KENNEDY: Thank you. I think this does --

1 MR. SILBERG: Excuse me. Before we start can we
2 have a little --

3 CHAIRMAN BOLLWERK: Okay. And just let me say,
4 sir, that I recognize your contention C covered a number of
5 different things. If there's anything else you want to say
6 about it, obviously feel free. I'm not trying to -- as I
7 said, this is not an attempt to limit the scope of your
8 contention, but simply to try to organize things.

9 MR. KENNEDY: Thank you.

10 MR. SILBERG: Excuse me. And did we finish the
11 other aspects of contention D, the non-environmental justice
12 aspect?

13 CHAIRMAN BOLLWERK: Of C?

14 MR. SILBERG: Of D.

15 CHAIRMAN BOLLWERK: I think we're dealing with C,
16 aren't we?

17 MR. SILBERG: I know, but we had talked about his
18 contention D that have the environmental justice issue in
19 it.

20 CHAIRMAN BOLLWERK: I think it was C. I think
21 we're dealing with C.

22 MR. SILBERG: Okay, I got it; I got it. Thanks.

23 CHAIRMAN BOLLWERK: Right. And that's I think
24 what I just told him that if he needs to say anything about
25 C, feel free to do so at this time. That's what we would

1 deal with.

2 MR. SILBERG: I'm sorry, late in the day.

3 CHAIRMAN BOLLWERK: All right.

4 MR. KENNEDY: I guess the concern that we have in
5 this cost benefit analysis really arises one step before the
6 beginning of the State's analysis. And that is in order to
7 have a cost benefit analysis that means anything you have to
8 know what the costs are.

9 Our submission here is that there is an
10 inadequate, and in some cases totally lacking application
11 with respect to the costs.

12 For example, the staff says I think at page 128,
13 129 of their response that you don't have to consider the
14 impacts of decommissioning after the expiration of the lease
15 period under the regulations, and then they cite one of the
16 regulations.

17 MR. TURK: Could you --

18 MR. KENNEDY: 128, 129, bottom of 128 and 129, top
19 of 129. Well, the lease here actually deals with
20 decommissioning and requires decommissioning. The lease has
21 to be approved by the Bureau of Indian Affairs. That's
22 because it's on trust property, and it's part of the
23 requirements of the federal regulations under 25 C.F.R.
24 Approving the lease by the Bureau of Indian Affairs is a
25 federal action, and that triggers NEPA.

1 So it is a federal action in this instance that
2 requires -- or that invokes NEPA at least in part with the
3 approval of this decommissioning process. NEPA requires
4 consideration of reasonably foreseeable consequences of the
5 federal action, and under this lease decommissioning is a
6 reasonable consequence. So regardless of what the
7 regulation the staff has cited, NEPA still requires that the
8 decommissioning costs be evaluated. They haven't been. It
9 hasn't been done.

10 In fact, because of the withholding or maybe even
11 the lack of information on costs, there just can't be a
12 reliable cost benefit analysis. And we're in a position
13 here and ultimately the Board and the staff will be in the
14 position where they just don't have the information that's
15 essential for this analysis.

16 They have argued that they have presented the
17 costs.

18 But we would submit that the basic cost of the lease has not
19 been presented. It's certainly a very essential part of the
20 project. What is the cost of the lease? Nobody knows what
21 the cost of the lease is.

22 We have suggested that with the lack of this
23 information that decommissioning costs have been under
24 estimated, because that component isn't included.

25 I think there's a yiddish proverb, and I modify it

1 slightly, that says, "They have given us air. Now give us
2 money, or give us some of that financial detail." And then
3 I would just like to make a note on the record of one matter
4 relating to a number of objections that the staff have made,
5 and I just want to have the record reflect that we don't
6 agree with this point. And that is that they challenge or
7 object to a number of the contentions on the basis that the
8 various contentions, and I think almost all of the
9 petitioners have raised these points and they've made this
10 argument for virtually everybody, that certain objections
11 constitute impermissible challenges to the regulations.

12 And I would just note that if a regulation is
13 contrary to law, that it ought to be challenged at the
14 various earliest part of the proceeding. And if we have
15 done that, if staff thinks it's impermissible, I would
16 suggest that we still ought to be able to make those
17 challenges and preserve the record on it, which we do.

18 That's all I have to say.

19 CHAIRMAN BOLLWERK: All right. Applicant, any
20 response?

21 MR. SILBERG: Yes. I guess I'm not sure what I
22 said about this before. So with your leave I'll probably
23 say --

24 CHAIRMAN BOLLWERK: You basically said it had no
25 basis, if I remember correctly.

1 MR. SILBERG: I'm going to say it has no basis. I
2 don't think I've changed my mind on that.

3 CHAIRMAN BOLLWERK: I think you listed it
4 categorically said this has, but that it was all the same
5 point I think.

6 MR. SILBERG: Well, I won't go down through them
7 again, but if you'll read them you'll see none of them have
8 a basis.

9 With respect to the lease approval by the BIA, BIA
10 does need to agree with the lease. In fact, it has approved
11 the lease subject to the NRC NEPA review to which BIA will
12 be a cooperating agency. That's simply not an issue here or
13 relevant at all to this contention.

14 The statement by Confederated Tribes that NEPA is
15 supposed to deal with the reasonably foreseeable
16 consequences, we would agree. In fact many of our
17 objections to other contentions were that they were trying
18 to deal with the unreasonably unforeseeable consequences.
19 But in any event, decontamination costs, decommissioning
20 costs which counsel said have not been evaluated, are
21 evaluated. They're laid out in Appendix B to the license
22 application, chapter 4, and the environmental report 4.6.3.
23 And this contention does not reflect -- does not refer to
24 them, nor did the oral presentation by counsel refer to
25 them.

1 Whether the basic cost of the lease hasn't been
2 presented, the lease is a commercial document which is not
3 relevant. This project is being evaluated. It is the
4 applicant's project, and it's the cost benefit of the
5 applicant's project which is being evaluated here, not the
6 lease which has already been looked at by the Bureau of
7 Indian Affairs whose job it is to make sure that the
8 interests of the Skull Valley Band are protected.

9 With respect to Mr. Kennedy's yiddish proverb, I
10 was in the courtroom when Judge Ginsberg stated that yiddish
11 proverb, and to borrow a phrase from Senator Lloyd Bentson,
12 "I know Judge Ginsberg, Mr. Kennedy, and you're no --"

13 MR. KENNEDY: Thank goodness.

14 MR. SILBERG: I have nothing further.

15 MS. MARCO: First of all --

16 CHAIRMAN BOLLWERK: All right. Mr. --

17 MS. MARCO: Oh.

18 CHAIRMAN BOLLWERK: Mr. Quintana.

19 MR. QUINTANA: The contention of the Confederated
20 Goshutes who do not have standing does not meet the
21 requirements of 2.71422. How much money are the Skull
22 Valley Band of Goshutes getting? Well, I'm not going to
23 tell you.

24 CHAIRMAN BOLLWERK: I think that's become clear.

25 Anything else? No?

1 Staff, please.

2 MS. MARCO: First of all, the staff contends that
3 this contention does not meet the 2714(b) requirements.

4 And in addition, if the Confederated Tribes wish
5 to challenge the Commission's regulation, the proper vehicle
6 to do that is through 2758(b) petition.

7 In addition -- that's it. We stand on our
8 pleading.

9 CHAIRMAN BOLLWERK: All right.

10 MR. TURK: May we confer for a minute?

11 CHAIRMAN BOLLWERK: Yes, certainly.

12 MR. TURK: I just want to add one thing, Your
13 Honor. I don't mean to double team this, but rather than
14 take the time to explain to Ms. Marco what my thought are, I
15 thought I would address it directly.

16 When I heard Mr. Kennedy say that the staff is not
17 considering decommissioning costs on the basis of 10 C.F.R.
18 51.61, I thought to myself what a terrible omission and
19 error we must be making, because we should consider
20 decommissioning costs. But if you look at our pleading, the
21 reference to 51.61 was made with respect to sub-part 1 of
22 the basis of the contention, which addressed the need to
23 consider long-term storage beyond the life of the facility.

24 In fact, later in the basis for the contention
25 there was an assertion that decommissioning costs had not

1 been properly evaluated. We oppose that on the grounds that
2 insufficient basis has been shown to support that issue.

3 I would note that I'm not going to argue to the
4 merits or whether the applicant has adequately considered
5 decommissioning costs, but I would note that Mr. Silberg has
6 referred to Section 4.6 of the environmental report which
7 discussed decommissioning costs.

8 And I would then point out that in the
9 environmental report, chapter 7, a table is presented, table
10 7.3-1, which indicates the various costs of the facility in
11 a note number two, that operating expenses which are set
12 forth, quote, include decommissioning costs, close quote.

13 So with respect to decommissioning costs, the
14 contention lacks basis and it fails to address the
15 environmental report, there's explicit discussion. Adequate
16 or not I'm not going to say here, but the contention fails
17 to present the basis needed to support its admission.

18 CHAIRMAN BOLLWERK: All right. Let's see.
19 Mr. Kennedy.

20 MR. KENNEDY: Page 128 at the bottom of their
21 response to contentions, the staff says: "The staff opposes
22 this basis, because it constitutes an impermissible attack
23 upon the Commission's regulations which provide in part
24 that, quote, no discussion of the environmental impact of
25 the storage of spent fuel at an ISFSI beyond the term of the

1 license is required in an environmental report submitted by
2 an applicant."

3 My point is that NEPA requires that the
4 foreseeable event that is part of the government's action
5 here, namely approval of a lease that's going to end and has
6 a provision in it that requires decommissioning, has to be
7 evaluated.

8 That cost has to be evaluated under NEPA. And I don't know
9 what -- you know -- irrespective of what the regulations say
10 that you've cited --

11 MR. TURK: We're not hearing each other. I'm not
12 disputing the need to consider decommissioning costs. What
13 we meant and what we stated in our response, if you look on
14 page 128, at the bottom it says: "Confederated Tribes make
15 six separate assertions in support of this contention. The
16 tribes first assert that the applicant fails to discuss the
17 environmental impacts caused by storage of a large amount of
18 radioactive waste in which no realistic disposal options
19 currently exist."

20 And then we said the staff opposes this, and let
21 me underline this basis, because it constitutes an attack by
22 Commission regulations in 51 --

23 MR. KENNEDY: Okay, and I'm saying we're not
24 attacking the regulations. What we're saying is that
25 regardless of what the regulations say, you still need to

1 consider the costs of the long-term storage. We're not
2 saying that you have to disregard the regulations. We're
3 saying that NEPA requires you have to consider the long-term
4 costs, and that has not been done.

5 MR. SILBERG: Mr. Chairman --

6 CHAIRMAN BOLLWERK: Let Mr. Kennedy finish.

7 MR. KENNEDY: I've got a number of other points
8 here that I'd like to make, and then, Jay, you can go unless
9 you want to jump in.

10 MR. SILBERG: Please finish.

11 MR. KENNEDY: Okay. We think that -- they say
12 they have evaluated those, but it has been demonstrated
13 during this hearing that they have not, and in fact cannot,
14 because there is no where that they can say that these
15 items, this waste is going to go. So how are they going to
16 calculate the costs to do it?

17 And we talked about whether it's going to be
18 Southern Nevada or Tim Buck Two. There would be a big
19 difference in the cost. That has not been done.

20 In addition, as I've pointed out, the lease is a
21 cost.

22 And we don't know what the decommissioning costs in the
23 lease are going to be, because we don't have that before us.
24 That's one of the things that's been withheld or hidden from
25 all of us.

1 Now, Mr. Quintana says, "Don't tell me" -- or he
2 says, "I'm not going to tell you, Mr. Kennedy, what this
3 cost is." And I guess my answer is, "Don't tell me, but tell
4 the people because they don't know either. They have no
5 idea.

6 That has been withheld from their own people." Finally, I
7 guess it really doesn't make a lot of sense to have to have
8 a separate proceeding to challenge if there is an improper
9 regulation or something that is invalid. It doesn't make
10 sense to have a separate proceeding to challenge it when
11 we're all here. It's just not judicial economy.

12 MR. TURK: May I respond very briefly? I'm sorry.

13 CHAIRMAN BOLLWERK: Yes.

14 MR. TURK: In addition to 51.61, I would call the
15 Board's attention to 10 C.F.R. 51.23(b) which says,
16 "Accordingly as provided in," and I'll skip over to the
17 51.61: "No discussion of any environmental impact of spent
18 fuel storage in an ISFSI" -- And I'm skipping the irrelevant
19 words.

20 "...for the period following the term of the
21 reactor, operating license or amendment, or initial ISFSI
22 license or amendment for which application is made is
23 required in any environmental report, environmental impact
24 statement," et cetera. So I believe our assertion that
25 there is a challenge to the regulations is correct. And

1 that aspect of the basis for the contention should be
2 rejected accordingly.

3 CHAIRMAN BOLLWERK: All right. Anything further,
4 Mr. Kennedy?

5 MR. KENNEDY: No.

6 MR. SILBERG: If I could make three very brief
7 points.

8 First, long-term storage as a NEPA issue is
9 governed by the NRC's NEPA regulation on the waste
10 confidence rule.

11 That's an NRC ruling, and NRC is allowed to make generic
12 rules that govern its NEPA performance. Decommissioning
13 costs not being in the lease, decommissioning costs are in
14 the environmental report and the license application for all
15 to see. The lease costs are included in the direct costs of
16 the facility. We say that in the environmental report page
17 7.3-1. It's in there.

18 CHAIRMAN BOLLWERK: All right. Anything further,
19 Mr. Quintana?

20 MR. QUINTANA: I believe there is continuing NRC
21 jurisdiction over this facility, including up to the time of
22 decommissioning, and if the decommissioning costs change I
23 suppose that the NRC can impose its will and say that those
24 decommissioning costs will be taken care of. Therefore, we
25 would again object to this contention.

1 CHAIRMAN BOLLWERK: All right. Mr. Kennedy, last
2 word.

3 MR. KENNEDY: I guess I'm confused on Mr.
4 Silberg's argument, and maybe even the staff's argument with
5 respect t the scope of the NEPA review that's required here.
6 Are you both saying that because this is an NRC proceeding
7 that you don't have to consider costs that are incurred
8 after the term of the lease or after the term of the license
9 expires?

10 MR. SILBERG: The NRC rules are what they are, Mr.
11 Kennedy.

12 MR. KENNEDY: Well, I'm asking what your argument
13 is.

14 MR. SILBERG: I've explained it. I mean I'll be
15 happy to talk with you off the record about it, but I think
16 --

17 MR. KENNEDY: Well, if that's what you're saying,
18 then I would assert that because the Bureau of Indian
19 Affairs is involved here, and the Bureau of Indian Affairs
20 is the one that is taking federal action in approving the
21 lease, that their action may be subject to ultimate approval
22 by this Commission, but it doesn't change their obligation
23 to comply with NEPA, which I think requires them to consider
24 those long-term costs which the information is not in front
25 of us.

1 CHAIRMAN BOLLWERK: All right. Mr. Turk.

2 MR. TURK: Very briefly, NEPA requires us to
3 consider reasonably foreseeable impacts. The Commission has
4 determined generically that there is reason to believe that
5 there will be a facility available for storage of fuel in
6 the future. It has established by rule in 51.23, also 51.61
7 that in NRC licensing proceedings that generic determination
8 that such storage will be available -- I'm sorry -- such
9 disposal will be available is not subject to attack.

10 And that's all I can say.

11 CHAIRMAN BOLLWERK: All right. Anything further?

12 MR. KENNEDY: Well, if it is available then could
13 you please tell me what the costs are going to be, because
14 that's what we're talking about here is costs. And I don't
15 think you can, because no one knows, including the generic
16 determination, where it is.

17 CHAIRMAN BOLLWERK: All right. Anything further?

18 Just let me say I've let this discussion go on,
19 but I hope in the future you'll kind of direct your comments
20 to the Board and not to each other; all right?

21 MR. TURK: Apologize, sorry. There was a question
22 as to whether the Board is --

23 CHAIRMAN BOLLWERK: Well, I think in this context
24 it's valuable that he have an understanding of at least your
25 position on what these matters are, and I don't have a

1 problem with that, but remember we are up here on occasion.

2 Let's -- just so you know, we're about to take a
3 break.

4 By my count we have four -- excuse me -- five contentions
5 left, two dealing with the general matter of ecology and
6 endangered species, Utah DD and Castle Rock 16. We could
7 also I think put in there the Confederated Tribes' E which
8 talks about impacts on the historic district, sort of a
9 related one.

10 Then I think that concludes our discussion of
11 environmental contentions, and we then would move onto
12 emergency planning. We have two there, Utah R and OGD B.

13 Let me also say that if parties ought to take a
14 final look over their contentions. If for some reason we've
15 grouped something in a position where it was discussed, but
16 there's some portion of your contention you feel you didn't
17 get an adequate opportunity to say something about because
18 of the way we grouped it, let us know now because we're
19 coming it looks like to the end of this, and it's sort of
20 speak now or forever hold your peace. All right?

21 But again if you feel we grouped it wrongly and
22 you didn't get a chance to discuss something, let us know.

23 Okay, why don't we take a 10-minute break till
24 about 5:30.

25 [Recess.]

1 CHAIRMAN BOLLWERK: Let me just also mention or
2 amend my statement, as well as if we've forgotten a portion
3 of anybody's contention, if we've forgotten somebody's
4 contention entirely, let me know that as well, although I
5 think we've kept -- I've kept pretty careful records, and I
6 think we've gotten -- by the time we finish this list we'll
7 have gotten everybody. But if you find that you think we've
8 omitted one of your contentions, let us know that as well.
9 Obviously we don't want to do that.

10 Let's go in to the final then environmental area,
11 which I'm calling "ecology" based on Utah contention DD,
12 Castle Rock 16, and why don't we also hear about
13 Confederated Tribes E which deals with impacts on historic
14 district. So Utah DD, please.

15 MS. NAKAHARA: This contention is another
16 contention that we assert the applicant failed to adequately
17 assess, and adequately assess the ecology and species in the
18 region as required by 72.100(b), 72.100(a) and NEPA.

19 Inasmuch as the environmental report generally
20 identifies the flora and fauna for species known to have
21 existed at Skull Valley from literature searches and
22 provided to show characteristics on some of those species,
23 the applicant makes some analysis to activities and
24 generally concludes that there's a minimal or no impacts by
25 this proposed licensing action.

1 However, there was no discussion on -- there's no
2 detailed discussion on how the applicant reaches that
3 conclusion, nor is there a discussion on cumulative impacts.
4 In this sense I mean impacts in the ecological system. Like
5 if there's an impact on one species, but what do other
6 predators or preys up and down the -- prey up and down the
7 chain, what kind of impact does that address for them?

8 And it does not address long-term impacts. And in
9 this sense I don't mean beyond the licensing period but even
10 within the licensing period up to 40 years.

11 For example, on page 4-1-6 and -7 the
12 environmental report states that peregrine falcons are
13 nesting in the Timpie Springs water fowl -- in the Timpie
14 Springs protected area. Sorry. And that the peregrine
15 falcons typically hunt in an area in a small radius but may
16 travel up to 18 miles.

17 The proposed ISFSI is 24 miles away from the
18 facility, but it does not address any issues that would draw
19 the peregrine falcons outside of the typical area into the
20 ISFSI area. For example, on page five of Appendix 2B, the
21 environmental report lists typical prey for the peregrine
22 falcons, which include song birds, shore birds and ducks.

23 And also in the environmental report on page 4-2-2
24 the applicant indicates that certain species, in particular
25 birds, could be attracted to the casks during colder months

1 because of the heat dissipated. And because of the
2 attraction of the birds that may nest in the ISFSI area,
3 whether additional birds -- the accumulation of birds in
4 that area would attract peregrine falcons out of their
5 normal hunting range should at least be considered. I mean
6 this is just an example, and this is using the data that
7 they've provided.

8 And one thing I'd like to submit is that NEPA
9 requires a balancing of reasonably foreseeable impacts and
10 not to separate the impacts out in assessing whether there's
11 a substantial impact or not. And that's one of the
12 assertions we have in this contention is that there is no
13 comprehensive look or accumulation of impacts that's
14 addressed. And that they need to look at how impacts are --
15 what kind of impacts apply to the facility or are caused by
16 the facility, and what type of inter-dependent impacts would
17 be a result of initial impacts.

18 And that's all I have. Thank you.

19 CHAIRMAN BOLLWERK: Anything further?

20 MS. NAKAHARA: No.

21 CHAIRMAN BOLLWERK: Is that it? All right.

22 Mr. Blake.

23 MR. BLAKE: I want to know what happened to our
24 deal of we stand, you stand, which was I thought --

25 CHAIRMAN BOLLWERK: The Board is certainly not

1 standing in your way, so if you can --

2 MR. BLAKE: I don't think I heard anything new. I
3 think we have coped with each of the points she made with
4 one exception. And she may have misstated or I may have
5 misheard. She talked about an 18-mile hunting terrain for
6 the peregrine falcon. I think our environmental report
7 we've heard 10. And I frankly can't remember the 18 or
8 where it came up from.

9 MS. NAKAHARA: You did say a smaller radius and I
10 couldn't remember what that was.

11 MR. BLAKE: Okay, 10 miles was what it was.

12 MS. NAKAHARA: And you said they may go outside 18
13 miles.

14 MR. BLAKE: So you'll need to take that into
15 account in her argument as you read it, if you would please.

16 The only thing I feel I need to respond to are
17 some points made in their written reply which were not
18 necessarily covered here, and otherwise I just can't let
19 them lie.

20 The first had to do with a concern that we were
21 inconsistent in our environmental report with regard to our
22 language about temporarily disturbing wildlife species for
23 the construction activities, and then referring to a 20-year
24 construction period.

25 What I want the Board to understand is that both

1 of those are accurate, and there's obviously a substantial
2 difference between the amount of construction which has to
3 go on initially at this facility with what goes on
4 thereafter with adding pads on a periodic basis, these 30-
5 by-60-foot concrete pads, which is the extent of
6 construction as years go on. The environmental report
7 clearly distinguishes between the impacts associated with
8 those different kinds of activities.

9 The State in its written reply then went on to
10 contend that there was a significant issue of potential for
11 contaminated ground or surface water. I don't know what
12 bite this is out of the poor apple but it's about gone. We
13 simply don't agree that the State has addressed a credible
14 scenario, and therefore no basis.

15 With regard to the peregrine falcon -- Mr. Gaukler
16 has pointed out to me that you may indeed remember
17 correctly, because on page 416 the statements made in our
18 environmental report that the falcons may travel more than
19 18 miles to hunt for food. However, a 10-mile radius around
20 the nest is an average hunting area. So you're 18 miles was
21 not your wrong doings; it was ours.

22 The complaint that the State had in their written
23 reply with regard to our look at the peregrine falcon was a
24 characterization that the one nesting area that we were
25 aware of up near the intermodal facility was in the Timpie

1 Springs water fowl management area. And we have said it
2 wasn't located in the vicinity of the transfer station.

3 They point out that, "Gee, that management area is
4 right next to it, and therefore it certainly sounds like
5 that's going to be" -- I guess it's just words. The one
6 station, nesting area that we were alerted to by BLM
7 documentation, no one had seen it, would place it
8 approximately a mile away. And so it's a question of
9 whether or not it's in the vicinity or it isn't.

10 Finally in their written response they talk about
11 the potential impact of spills or discharges on the Great
12 Salt Lake. Again there's no credible mechanism that has
13 been described to us that would lead to that kind of
14 contamination, and we don't think therefore it's an
15 appropriate basis for admissibility of the contention.

16 That's it.

17 CHAIRMAN BOLLWERK: All right. Mr. Quintana.

18 MR. QUINTANA: Once again the State's contention
19 has no basis in science and is not properly before this
20 Licensing Board as required by the rules. But more
21 importantly, they have another judicial remedy available to
22 them.

23 Let's assume that what they're saying in fact was
24 true.

25 Let's assume the facility was built, and then after the fact

1 you find that birds are nesting on the casks and it's
2 causing some long-term effects because there was some basic
3 science at that point to support their contention. Then at
4 that point I think that they would be eligible to file an
5 independent action in a court of law to seek injunctive
6 relief. But I don't think now is the proper time to get
7 pre-injunctive relief on total speculative facts.

8 And on that basis we would object to this
9 contention.

10 CHAIRMAN BOLLWERK: All right. Staff.

11 MS. MARCO: The staff, we did not oppose two
12 aspects of this contention, the issue pertaining to the
13 peregrine falcon or the livestock, but the rest of it we did
14 oppose and we'll rest on our brief for that.

15 CHAIRMAN BOLLWERK: All right. I'm sort of
16 interested why is the peregrine falcon different from some
17 of the rest of the things in here or the -- what were the
18 other things?

19 I'm trying to see here.

20 DR. KLINE: High-interest plants.

21 CHAIRMAN BOLLWERK: High-interest plants.

22 MR. TURK: I'm sorry. I didn't hear your
23 question.

24 CHAIRMAN BOLLWERK: I guess we're trying -- there
25 were a number of things that were mentioned in here. And

1 the staff sort of -- for instance, pocket gopher mounds and
2 different things. The staff looks I guess at the peregrine
3 falcons and also the high-interest plants as being
4 admissible. I don't want -- am I misstating that? I want
5 to make sure -- I guess you do not feel, at least to this
6 contention, that the high-interest plants was admissible,
7 although you did say that with respect I think to the next
8 contention. Am I correct about that?

9 MR. TURK: I'm looking at pages 71 through 75.

10 CHAIRMAN BOLLWERK: Right. Let me clarify. I've
11 confused things here. You said two things are admissible
12 here: the peregrine falcon and I guess questions about
13 private domestic animals, livestock and farm produce. Am I
14 correct in that?

15 MR. TURK: Livestock and farm animals.

16 CHAIRMAN BOLLWERK: Yes.

17 MR. TURK: Not true. The contention --

18 DR. LAM: It's livestock and farm animals in the
19 staff's brief.

20 CHAIRMAN BOLLWERK: Okay, not domestic farm
21 produce?

22 DR. LAM: No. Page 71 of the staff's brief.

23 CHAIRMAN BOLLWERK: That's my fault.

24 MR. TURK: No. This related to domestic species
25 of the sub-section of the contention, on page 184 of the

1 contention.

2 CHAIRMAN BOLLWERK: But only livestock, not
3 domestic produce.

4 MR. TURK: I'm trying to find it.

5 CHAIRMAN BOLLWERK: Farm animals. Okay. No
6 problem.
7 I see.

8 DR. LAM: I found it for you, Mr. Chairman.

9 CHAIRMAN BOLLWERK: He's got it. It was my fault.
10 Okay. The question I guess is: Why do you find
11 those different than, for instance, the high-interest plants
12 that are talked about, at least with respect to this
13 contention?

14 MR. TURK: It must be late. I'm trying to find --

15 CHAIRMAN BOLLWERK: It is that, but --

16 MR. TURK: I don't believe we addressed the
17 domestic produce at any other point in our response. So I
18 would have to say that our response meant to include produce
19 within what we did not oppose.

20 CHAIRMAN BOLLWERK: You want to look at that and
21 come back to me? I don't want -- I just want to get things
22 clear here.

23 MR. TURK: Thank you. We'll do that next.

24 CHAIRMAN BOLLWERK: All right. We'll come back to
25 that perhaps after we've spoken with Ms. Nakahara.

1 MS. NAKAHARA: Brief response. In regards to the
2 contaminated groundwater, surface water and contamination of
3 the Great Salt Lake, we would submit that to the extent that
4 you admit contention O which we adopted by reference here
5 and found that we adequately described a genuine dispute,
6 that you would admit that portion in this contention, also.

7 And in response to Mr. Quintana's remarks, one of
8 the purposes for licensing, a licensing procedure and a NEPA
9 assessment is to assess the impacts to prevent detrimental
10 actions. And in that sense the assessment is critical up
11 front before you issue the license.

12 And not knowing what Mr. Turk's response would be,
13 I would just draw the Board's attention to our original
14 contention at page 181 and -82 which cites NRC Guide 4.2,
15 and it describes species as important that should be
16 considered in an assessment, and it goes beyond federally
17 threatened or endangered species.

18 And that's all I have. Thank you.

19 CHAIRMAN BOLLWERK: And in part maybe the
20 confusion here is coming over the fact I put this under a
21 category that the applicant had listed as "private domestic
22 animals and farm produce." And maybe that's why I'm putting
23 words in your mouth. I'm not trying to do that. I just
24 want to make sure that --

25 MR. BLAKE: If there's a mistake there it was not

1 Mr. Silberg's.

2 CHAIRMAN BOLLWERK: I notice you going around from
3 table to table, Mr. Silberg. If you're taking up a
4 collection for the Board we still can't accept it, even if
5 it's from all the parties.

6 MR. SILBERG: Flowers are on the way.

7 CHAIRMAN BOLLWERK: Well, leave them with the
8 school.

9 DR. KLINE: My question for the State is that in
10 looking at the paragraph related to important species, it's
11 prefaced by a statement referring to a specific causal link.
12 Now, this is -- the species is important if it meets all
13 these criteria and there is a specific causal link between
14 the project and the species.

15 Now, it doesn't appear to me that you've asserted
16 the specific causal link. I mean, you know, the fact that
17 there's an endangered species somewhere around Rowley
18 Junction is only part of the assertion that's needed. What
19 impact are you asserting? How does Rowley Junction reach
20 out and touch the peregrine falcon is what we need to know
21 if we're going to have an admissible contention.

22 MS. NAKAHARA: That's where we get back to -- we
23 would assert that that's the applicant's burden is to show
24 that there is no causal link. I mean they're proposing the
25 action that it could possibly bring impacts to the ecology

1 or the species.

2 DR. KLINE: Let me point out when we, you know,
3 finally go to work on these contentions, we are going to
4 have to study the underlying documents and determine if they
5 support the contention. That's one of the tasks that we'll
6 have to perform. And the question is: If we then go to the
7 environmental report, are we going to find there that the
8 applicant has briefly said, "We looked at it and didn't find
9 anything"?

10 MS. NAKAHARA: Yes.

11 DR. KLINE: Is that what we're going to find?
12 Isn't it -- I think -- I don't know. I haven't seen it, but
13 the problem I'm having is the continual assertion that you
14 have to find impacts. Now, it's impermissible I mean just
15 generally under NEPA to look and not find. That is to say
16 that you say, "I looked for an impact and I didn't find
17 any." Now, if you disagree with that, you got to give us
18 something.

19 MS. NAKAHARA: We wouldn't disagree that there's
20 any problem with looking and not finding anything, but when
21 they reach a conclusion without describing a basis --

22 For example, I can't say the page, but the
23 applicant describes road kill that may increase because of
24 the increased traffic on Skull Valley Road. They make the
25 assertion that the impacts will be minimal, because the

1 animals or the species in the area will change their habits
2 and they won't frequent the road. Typically that's not what
3 happens.

4 And I don't know if we needed a biological expert
5 to say that, but most people that live by wildlife know that
6 when deer like to cross, regardless of inhabitation, they
7 continue to cross those roads.

8 And in another statement they made that it may
9 increase the population of carrion-eating predators, but it
10 doesn't say anything about whether the carrion are
11 contaminated or they're expected to be contaminated and
12 whether that has any impact on these carrion-eating wildlife
13 and what impact that would have. I mean what we're trying
14 to assess or assert is that the results could be that there
15 is no impact, but we don't believe that there's an adequate
16 assessment here that satisfied NEPA.

17 DR. KLINE: Well, I understand that you disagree,
18 and that's why we're setting an adversarial proceeding here.
19 But I think the requirements of 2714 are that if you do
20 disagree you set forth the factual basis or expert opinion
21 that leads us to believe there's a dispute of a material
22 fact.

23 And it's not impermissible in NEPA to look and not
24 find, if that's what they did. I don't know. And if you do
25 disagree, here's your chance to tell us what the factual

1 basis for that disagreement is.

2 Let's focus, for example, on the peregrine falcon
3 which I understand is on the endangered species list. What
4 is the causal link between that species and the facility at
5 Rowley Junction?

6 MS. NAKAHARA: In my example I used the data that
7 they provided that said that there could be an increase of
8 birds that would inhabit the area of the ISFSI casks. And
9 if that was true there could be -- I mean they didn't say
10 this part.

11 We would assert that there could be an impact if the small
12 birds continued to live next to the casks.

13 There is a permissible amount of radiation that's
14 allowed to radiate from the casks. And whether these birds
15 accumulated it into their system, and the large accumulation
16 -- I shouldn't say large, but if there's a larger
17 accumulation of birds over this area because of the warmth,
18 would that attract the peregrine falcons down to the ISFSI
19 area?

20 And these are just -- we would assert our facts
21 that would question the adequacy of their assessment.

22 DR. LAM: Are these assertions supported by
23 experts, or are you asserting they are facts?

24 MS. NAKAHARA: No. I mean we're relying on their
25 facts that they provided in their literature search, and

1 we're providing scenarios that would question the adequacy
2 of their assessment. We did not get to see how they came to
3 the conclusion that there are no impacts, as well as they
4 did not address any cumulative impacts or comprehensive
5 impacts of how the entire ecological chain is impacted off
6 of one species.

7 CHAIRMAN BOLLWERK: Anything further?

8 DR. KLINE: Nothing further.

9 MR. BLAKE: I want to add another problem at this
10 juncture, and that is we're here today at the end of
11 January, and the contention's and its bases were due
12 November, and there's no good cause for showing even the
13 statements today couldn't have been raised then.

14 DR. KLINE: I understand. That's a separate
15 problem.

16 CHAIRMAN BOLLWERK: Right. Let me go back to Mr.
17 Turk a second here. Maybe I can be clear. My question to
18 you before was considerably less than clear, and let me try
19 to clarify what I meant.

20 On page 184 of the contention, one of the basis
21 talks about domestic species, and it mentions both livestock
22 and domestic plants, farm produce. And there is a
23 discussion then about some calves, and there's also a
24 discussion about crops, and then it indicates that there may
25 be adverse impacts on livestock and plants from several

1 different pollutants or different items.

2 And I guess your response to the contention
3 indicated that you had no problem with it in terms of the
4 livestock.

5 And I'm wondering why you would draw a distinction between
6 the livestock and the plants. That's my question.

7 MR. TURK: I think that's just an easy way of
8 characterizing that subsection of the contention.

9 CHAIRMAN BOLLWERK: Okay.

10 MR. TURK: If we -- and what I was doing in the
11 interim while you were discussing the contention with the
12 other parties, I was looking at the environmental report. I
13 could not find there a discussion of domestic livestock on
14 private lands, which I understand to be what is raised in
15 this subsection of the contention.

16 CHAIRMAN BOLLWERK: Okay.

17 MR. TURK: It seems to be based upon the Castle
18 Rock petition intervene in which statements are made
19 concerning the private uses of land in the area involving
20 grazing as well as crops.

21 Now, my own understanding of that crop production,
22 based on statements made during our site tour, was that that
23 is for the purposing of feeding the livestock. But I do not
24 find in the environmental report a discussion of that
25 private land use in detail.

1 CHAIRMAN BOLLWERK: So I guess my question is:
2 Are you now making a distinction between livestock and
3 crops, or are you simply saying that this basis is
4 sufficient as it's stated here?

5 MR. TURK: Yes, as stated. It would include the
6 crop production within that private land.

7 CHAIRMAN BOLLWERK: All right. Probably a minor
8 matter, but I thought we ought to clarify that and make
9 sure.

10 MR. TURK: May I have just a minute?

11 What I find in the environmental report is a
12 discussion on page 2.2-3 which talks about land use outside
13 the boundaries of the Skull Valley Indian Reservation which
14 is regulated by Tooele County zoning. That indicates that
15 there are some multiple-use districts for human habitation,
16 and the remainder of the privately-owned land is
17 agricultural.

18 Mr. Silberg is providing me with some other page
19 references. Mr. Silberg is pointing out to me discussions
20 at pages 2.3-3 to 2.3-4 of the environmental report which
21 talks about grazing.

22 CHAIRMAN BOLLWERK: My purpose here is not to get
23 you to change your position, but simply to find out what it
24 is.

25 That's all I'm trying to do. Or to find out the scope of

1 it. I'll put it that way.

2 MR. TURK: Our non-opposition would include
3 domestic produce for purposes of feeding the --

4 CHAIRMAN BOLLWERK: Okay, very good.

5 MR. TURK: It's a sub-contention.

6 CHAIRMAN BOLLWERK: Anything else, Ms. Nakahara?

7 MS. NAKAHARA: Just one statement. We have a
8 factual dispute on the peregrine falcon in our reply, which
9 the applicant indicates that they're not located in the
10 vicinity. And we already discussed this, but we just want
11 to point that out.

12 CHAIRMAN BOLLWERK: All right.

13 MS. NAKAHARA: Thank you.

14 CHAIRMAN BOLLWERK: All right. Then the other one
15 we have on ecology is Castle Rock 16. And I think one of
16 the questions the Board has is: What is a high-interest
17 plant?

18 I'll tell you that up front. So how is that different from
19 what we understand are generally I mean the things to look
20 for under the Endangered Species Act?

21 MR. LATER: You may be talking to the wrong person
22 on that particular question.

23 CHAIRMAN BOLLWERK: Well, maybe we'll ask Mr.
24 Silberg then I guess.

25 MR. LATER: And I will look forward to his answer.

1 MR. SILBERG: Anything above five percent.

2 MR. LATER: When we received the applicant's
3 responses to our contention in this matter I discovered that
4 the applicant had objected to every sub-part of every
5 contention that we proposed, and therefore found that there
6 were no questions we had raised that the applicant deemed
7 worthy of answering in these proceedings. This disappointed
8 me.

9 I have used all reason and rhetoric I can over the
10 past three days to try and change the applicant's mind
11 somewhere along the way and have failed at each juncture.
12 So this is my last contention, and I'm under enormous
13 pressure.

14 The staff accepts our contention on ecological
15 impacts with respect to the polls melt batch (phonetic
16 spelling).
17 I'd like to speak up here as well for the peregrine falcon,
18 pocket gopher and high-interest plants, whatever they may
19 be, as well.

20 I think the analysis in many respects in this
21 portion of the application as we read it, has proceeded
22 along the assumption of determining the location of
23 endangered species, high-impact plants in terms of the
24 proximity in which those can be located to the facility.
25 And determining if they cannot be located within a certain

1 proximity, which appears to be somewhat arbitrarily chosen,
2 that they don't warrant further consideration because there
3 is unlikely to be an impact.

4 And I think our response to what appears to be
5 that approach is to challenge the conclusion that the
6 species cannot be identified within that proximity or to
7 challenge the assumption of the range of proximity chosen by
8 the applicant, since it appears to be the applicant's
9 approach that if a species can't be identified within a
10 certain zone of the facility, an impact will not be
11 presumed.

12 And so I really think in part that may be an
13 answer to Judge Kline's question about how do you show an
14 impact. I think that both the stages I understand it, and
15 certainly we have followed for the period to be the
16 applicant's methodology in saying if it's within a certain
17 zone it merits further consideration. If it's outside a
18 certain zone, then our approach has been to attack the
19 assumption or the showing in the application as to whether
20 or not species exist in that zone.

21 I think my comments I would like to limit to a
22 [articular point which is that the transportation corridor
23 for this facility remains a matter of substantial mystery as
24 to its ultimate location, its ultimate size, its ultimate
25 nature. I believe that issue creates a substantial question

1 in the application as to where it will be, and therefore
2 places the burden on the applicant to treat a sizeable area
3 and the areas surrounding the facility, anywhere that may
4 potentially be impacted by the transportation corridor,
5 wherever that may be, to the assessment of impact on
6 endangered species, protected plants.

7 The fact that that may create a substantial burden
8 and require the applicant to assess a significant area isn't
9 a matter that Castle Rock has created, State of Utah has
10 created. It's a matter of the applicant's choice. The
11 applicant has chosen not to specify what its transportation
12 corridor is and commit to that. And in the failure of
13 having done that, the applicant should be required to make
14 the required assessment throughout the entire region.

15 Thank you.

16 CHAIRMAN BOLLWERK: All right. Mr. Blake.

17 MR. BLAKE: First, I agree generally with Later's
18 remarks regarding the fact that we do take a keener interest
19 and analyze and evaluate more closely with those things
20 where we think we might have some impact. And I would hope
21 that that's viewed as a logical approach.

22 I can't agree with the second one though. The
23 fact that we are studying transportation alternatives, that
24 we would be penalized into considering now all of
25 northwestern Utah I hope will not be the outcome. I hope

1 there's some lesser and again more logical and sensible
2 approach.

3 We have described a couple of alternatives to
4 date. We have assessed those alternatives, not in all
5 parties' views sufficiently, but in our view sufficiently.
6 And if those -- as those transportation plans progress, we
7 will alert the Board and parties to our planning. And if in
8 the event -- if that requires additional consideration of
9 some area that we haven't put that adequately to date, we'll
10 take that look.

11 All of these things will progress, but I would
12 hope that for the state of disclosure that we've been able
13 to make so far based on our planning, our penalty would not
14 be that indeed we need to do all of the northwestern Utah or
15 greater because we haven't yet told you for sure where we'll
16 run the fuel.

17 We do suffer a risk in not having identified that
18 yet, and I understand that risk. And that risk is that
19 later on as we do progress, and as we do have more
20 information, and as we make that available, somebody will
21 say, "You should have done it earlier, and here's our
22 contention." And I understand that risk. But the risk is
23 not the one hopefully that Mr. Later has laid out.

24 Incidentally, I think high interest is a Utah
25 state designation of some of its -- of its interest in

1 certain fauna, flora.

2 DR. KLINE: Well, I would just observe that I was
3 the author of the passage cited for reg. guide 4.2 some 25
4 years ago, and I fear that I left something out at this late
5 date.

6 CHAIRMAN BOLLWERK: All right. Anything else, Mr.
7 Blake?

8 Mr. Quintana?

9 MR. QUINTANA: The contention as cited is asking
10 the applicant to prove a negative on the facts. It is not
11 supported by -- and because of that it fails, but it is not
12 supported by expert opinion. Now, there's been ample
13 opportunity to obtain expert opinions in these areas and
14 submit those expert opinions of simply a biologist or an
15 ecologist or someone of that nature.

16 Using this standard I don't think any facility
17 could be built. So I'd ask the contention fail.

18 CHAIRMAN BOLLWERK: All right. Staff.

19 MS. MARCO: Staff does not oppose the admission of
20 this contention limited to the discussion regarding the
21 polls melt batch (phonetic spelling).

22 And the staff would also like to state that if
23 there's a selection of a transportation corridor that's not
24 identified in the environmental report, that would create
25 grounds for a late-filed contention.

1 CHAIRMAN BOLLWERK: All right. Mr. Later,
2 anything further?

3 MR. LATER: A quick response comment. I will
4 acknowledge that perhaps the requirement of an examination
5 throughout northwestern Utah may be a bit exuberant. I
6 don't think that undercuts the fundamental point.

7 And there is I believe a serious problem in this
8 kind of promise of a blank check, "Let us go ahead. We'll
9 get back to you on that one when we decide what we're going
10 to do on transportation." As I understand this process, it
11 involves issuance of a license for construction and a
12 subsequent license for operation. And I don't think that
13 kind of open-ended promise, "We'll get back to you on that
14 one" should be acceptable in this circumstance to allow an
15 applicant to proceed, subsequently change its transportation
16 corridor, and then do the required ecological analysis.

17 I think that where the applicant has created this
18 kind of problem by leaving that uncertainty in the areas in
19 which it will create impact, it simply has created that
20 burden on itself to assess all of those areas that may be
21 potentially impacted. It has clearly not done that. Thank
22 you.

23 CHAIRMAN BOLLWERK: Do you want to find anything
24 about high-interest plants?

25 DR. KLINE: No, I found out --

1 CHAIRMAN BOLLWERK: Is there anything Ms. Nakahara
2 wants to tell us if it's a State's designation?

3 MS. NAKAHARA: It is a State's designation.

4 CHAIRMAN BOLLWERK: Okay. Go ahead.

5 DR. KLINE: What is the significance of it? Does
6 that entitle them to any special protection?

7 MS. NAKAHARA: It's not a specifically protected
8 plant -- or species, but I guess it's an identification that
9 alerts people that it may move to a higher protected area.
10 I guess I said that wrong. If it's not protected, that
11 would move it to a protected area. And so the State is
12 concerned with types of activities that would impact these
13 species that would move it to a protected area.

14 CHAIRMAN BOLLWERK: Is it sort of like a
15 threatened -- is it less than -- I mean there's generally
16 endangered, threatened, and then I don't know if there's
17 anything under that in the federal statute, but is there --

18 MS. NAKAHARA: And that's basically where it
19 falls, after the threatened.

20 CHAIRMAN BOLLWERK: After threatened. So it's a
21 State designation. All right.

22 MS. NAKAHARA: Yes.

23 CHAIRMAN BOLLWERK: All right. I guess then we
24 have Confederated Tribes E which deals with historic --
25 impact on historic sites.

1 MR. KENNEDY: I don't have anything to add other
2 than to just note sort of I guess in response to the staff's
3 comment about the distance, 10 miles being too great to be
4 of concern. I think our site trip showed that 10 miles out
5 there is really not very much, and that you can easily see
6 across that valley which is probably more than 10 miles.
7 And I think the location of the Pony Express route being
8 within 10 miles approximately certainly is impacted.

9 That's all I'd say.

10 CHAIRMAN BOLLWERK: All right. Mr. Blake.

11 I guess I have a question here. Why is the Pony
12 Express Trail not a regional site and wasn't considered? I
13 guess that's my -- that's a note I had to myself.

14 MR. BLAKE: Well, there is a reference to the Pony
15 Express Trail as the basis for Confederated Tribes'
16 contention E. And as we described already in our answer, my
17 understanding is it's some 10 miles south of the facility,
18 without any impact that we're aware of by the site of this
19 facility here, or even any of the transfer routes, all of
20 which would be north of the facility to the main rail line.
21 So that's the reason. We didn't see any impact. Although
22 our application and the environmental report did in fact
23 discuss this topic of historic sites.

24 CHAIRMAN BOLLWERK: All right. Mr. Quintana,
25 anything?

1 MR. QUINTANA: No comment.

2 CHAIRMAN BOLLWERK: Staff.

3 MR. TURK: We'll have to rest on our pleading. I
4 would just note, however, that although the contention
5 appears to be broad, the only specific basis provided for in
6 the contention is the Pony Express Trail. And our response
7 would indicate that no basis was provided to show that there
8 is a reason to think it would be impacted at that location.

9 CHAIRMAN BOLLWERK: All right. Is there anything
10 further, Mr. Kennedy?

11 MR. KENNEDY: No. I think I made the point.

12 CHAIRMAN BOLLWERK: All right. We're finished
13 then with the environmental contentions unless anybody has
14 any others they want to discuss that we haven't talked about
15 adequately.

16 Let's move lastly to emergency planning. We have
17 two contentions, Utah R and OGD B.

18 MS. CHANCELLOR: This is our last contention.

19 CHAIRMAN BOLLWERK: Did you save the best for
20 last?

21 MS. CHANCELLOR: The NRC staff opposes this
22 contention primarily based on the conception that our
23 contention deals with off-site emergency planning, and that
24 we rely on inapplicable regulatory requirements. And we do
25 admit that we initially cited the wrong regulation, but in

1 the main discussion of the contention we do refer to 72.32.

2 However, the staff says reg. guide 3.67 is not
3 applicable to ISFSIs. However, that belies what nureg 1567,
4 Appendix C1, which is what NRC says is applicable. If you
5 go to nureg 1567, Appendix C1, it states: "Reg. guide 3.67,
6 standard format of content for emergency plans and fuel
7 cycles and materials facilities constitutes the principle
8 (sic)guidance on the preparation of emergency plans for an
9 ISFSI or MRS installations."

10 We'd note that this is a P-R-I-N-C-I-P-L-E, and
11 we're glad to see that NRC does have some principles.

12 CHAIRMAN BOLLWERK: Well, that's the problem with
13 Spell Check sometimes.

14 MS. CHANCELLOR: They have no principles.

15 The State's contention does deal with actual
16 activities that do occur at the facility, and that's under
17 basis one of our contention.

18 I guess our main gripe with the applicant on this
19 one is that they have total reliance on Tooele County. That
20 they feel that they are the only resources that they will
21 need in case of as response that they can't handle.

22 You've seen the site out there, and you know the
23 activities that occur around the site. We're wondering if
24 the applicant is in a little over its head on this one. To
25 think that Tooele County is the only response organization

1 that would be able to -- that the applicant would call on in
2 the case of an emergency is I believe short sighted to see,
3 to put it kindly.

4 PFS refers to a Northern States Power case on page
5 228 of its answer. I believe this case was a 2.206 petition
6 for an ISFSI at Florence Township in Goodhue County in
7 Minnesota. There the -- quite frankly we're puzzled why NRC
8 actually made this decision. The license application was
9 suspended and then revoked and withdrawn, officially
10 withdrawn. After it was withdrawn this 2.206 petition was
11 decided.

12 And in that decision the applicant asserts that
13 whoever they decide should be the response organization that
14 they need to call on, that's all that the NRC staff
15 basically needs to consider.

16 First of all, this decision is guidance, and is
17 not binding on the Board.

18 Secondly, we believe that it would be
19 inappropriate of NRC staff to take the applicant's assertion
20 of face value that the only response that they need is from
21 Tooele County.

22 When you consider that 43 percent of the nation's
23 stockpile of chemical weapons is in that area, and all the
24 other activities that occur, and the sophisticated emergency
25 response system that the State has coordinated through its

1 comprehensive emergency management department public safety
2 with the Army, for the applicant to not even have approached
3 the State at any stage until they put the application on our
4 desk when they submitted it to NRC certainly gives us cause
5 for concern as to what sort of coordination is going to
6 occur in that area in the event of an emergency.

7 Another area that we address in our reply is cask
8 tip over and the ability to get a capable crane to the site.
9 And I won't belabor this point, but just to -- you've been
10 up there. The idea of actually getting a crane out there
11 within 48 hours, which is part of the design of the casks,
12 the passive ventilation system, and currently they need to
13 be up righted within 48 hours, this is an area where casks
14 -- or cranes are not readily available in that area.
15 And to actually get one out there within 48 hours we believe
16 is something that cannot be left to procedures that they're
17 going to develop later on. We think that this goes to
18 whether the plan can be implemented.

19 Another area that we have concern about is the
20 availability of water for fighting fires. I think the
21 discussion on permits required and the sufficiency of water
22 to fight fires was brought to your attention during that
23 discussion. What PFS intends to have is two bright new
24 shiny fire trucks. However, if there's no water to satisfy
25 the needs for fire fighting, a fire truck is not going to be

1 very useful.

2 I won't get into the doctrine and reserve water
3 rights, and whether the quantification of water to the tribe
4 suffice to say that there's a legitimate concern about water
5 needs.

6 And quite frankly, we don't understand why the
7 staff opposed some of these contentions. I don't believe
8 that they oppose the ability to fight fires that the
9 Confederated Band introduced. Maybe they just over looked
10 this one. I don't know. But I'd certainly be interested to
11 know why the staff opposes this portion of our contention.

12 I believe that's all I have.

13 CHAIRMAN BOLLWERK: All right. Applicant?

14 MR. BLAKE: Just a couple comments.

15 One with regard to Tooele County reliance,
16 obviously we believed that that was sufficient, that's the
17 reason, and that's the only people that we had to go to
18 before, as laid out in our answer.

19 A number of arguments were made about whether or
20 not it is adequate, whether or not we'll have adequate fire
21 fighting or responsive capability. They sounded to me
22 frankly like merits rather than providing a basis for a
23 contention at this point.

24 On the question of the crane and the cask tip, I
25 think there may be a fairly obvious reason why we didn't

1 address the crane or the availability of the crane. We
2 don't think the casks are going to tip, and all of our
3 analyses say it's not going to tip. Now, to the extent
4 ultimately we are wrong or ultimately somebody shows us in
5 some analysis that we should have that capability --

6 We all drove down there from Salt Lake City which
7 is a very large city with a lot of equipment available.
8 That's where the cranes would come from on that point. And
9 I'm told that it's not such a trick to get a large crane to
10 a site from a major city like that.

11 With regard to water availability, it's been
12 touched upon before.

13 And that's the end of my comments.

14 CHAIRMAN BOLLWERK: All right, sir. Mr. Quintana.

15 MR. QUINTANA: Very briefly, we would object to
16 this contention as not having a basis in fact or in science.
17 It is purely speculative. And if there was a force of such
18 sufficient magnitude, namely an earthquake, as to knock over
19 one of these very, very heavy casks, I think that the last
20 thing we would be concerned about is picking the cask up,
21 since most of Salt Lake Valley and Tooele would be
22 destroyed.

23 The water has already been touched upon.

24 And I think that will do it.

25 CHAIRMAN BOLLWERK: Staff.

1 MR. TURK: There is a significant difference in
2 the requirements for emergency planning for ISFSIs that are
3 located away from a reactor and reactors. There are
4 differences between the emergency planning requirements for
5 an ISFSI such as this which do not plan to handle spent fuel
6 apart from the cask, and ISFSIs that do plan to do that.
7 And those differences are laid out in Commission regulations
8 dealing with emergency planning.

9 I need to make a correction at page 42 of our
10 response.
11 Somehow we messed up the citation to 10 C.F.R. 72.32. This
12 appears about 11 lines down. We say rather 73.22. That
13 should be of course reference to 72.32.

14 And again on the next page, on page 43, 10 lines
15 down there's a citation that says, "Compare 10 C.F.R. §
16 70.32" with another regulation. That citation should have
17 been, "Compare 10 C.F.R. § 72.32." That is the regulation
18 that applies here, and that is what we rely upon.

19 With respect to the State's reliance on the reg.
20 guide, we're aware of the statement in Appendix C of nureg
21 1567 which states that reg. guide 3.67 constitute the
22 principal guidance on preparation of emergency plans for
23 ISFSI and MRS installations.

24 Nonetheless, what we pointed out in our response
25 to the State is all they did was cite to Section -- to reg.

1 guide 3.67. They ignored the lengthy discussion, the
2 lengthy guidance provided in Appendix C of nureg 1567. And
3 that is the more appropriate citation.

4 Except for one reference to the nureg document, no
5 other mention is made of Appendix C, and that was something
6 that we pointed out in our response.

7 Also, in the State's written reply to our paper,
8 at page 68 of their reply they contest the staff's assertion
9 that there's no requirement for description of equipment
10 necessary to restore the site to a safe condition. I would
11 point out that when the Commission adopted the regulations
12 in 72.32 they omitted the comparable requirement in the Part
13 70 emergency planning regulations which have required a
14 description of equipment.

15 And as the Board may be aware, when 72.32 was
16 adopted it was adopted by comparison with emergency planning
17 requirements in Part 70. And a determination was then made
18 as to exactly what has to be specified for emergency
19 planning by an ISFSI. And that's how 72.32 evolved. That
20 reference to the description of equipment was specifically
21 omitted in Part 72.

22 That's all I have, Your Honor.

23 CHAIRMAN BOLLWERK: All right.

24 DR. LAM: So, Mr. Turk, so the essence of the
25 staff's objection to this contention is that the Commission

1 had imposed no requirements on emergency planning?

2 MR. TURK: Not at all. The Commission does impose
3 emergency planning requirements on ISFSIs. But there's no
4 off-site component, unlike reactors, or even ISFSIs that
5 plan to handle spent fuel. ISFSIs such as this which are
6 merely intended to store spent fuel do not have to include
7 an off-site component.

8 DR. LAM: So the key word here is off-site?

9 MR. TURK: That's right. There must be an on-site
10 emergency plan. And the requirements for that are set out
11 in Part 72, Section 72.32, but there is no off-site
12 component.

13 DR. LAM: Thank you.

14 MR. TURK: And we addressed the reasons for that
15 in our written response.

16 CHAIRMAN BOLLWERK: All right. Ms. Chancellor.

17 MS. CHANCELLOR: The applicant maintains that a
18 crane would be readily available from Salt Lake. All we're
19 asking is show me. I mean weather conditions out there may
20 change that factor. We don't know whether a crane is
21 available in Salt Lake City or not.

22 And with respect to the Mr. Turk's point that
23 there's no need for a description of equipment on the site,
24 the reg guide that he has worded to, 1567, at C.4.5.3 says
25 "The emergency plan should describe the on-site equipment

1 and facilities designated for use during emergencies."
2 However, what we're after is whether a crane can -- is
3 capable of getting out there and uprighting the casks within
4 a 48 hour period, because that's part of the applicant's
5 design basis for these casks. This passive design system
6 for dissipating heat breaks down after they have been tipped
7 over for a 48 hour period. So we think that that is a
8 legitimate safety concern.

9 Oh, all of Mr. Turk's corrections to his reply
10 just points out the fact how easily it is to make mistakes
11 when you're trying to put together these voluminous
12 pleadings.

13 And we note that we need to correct one of the references in
14 our reply.

15 CHAIRMAN BOLLWERK: I should note that the Board
16 understands that there's been a lot of paper filed here and
17 people under time deadlines. And I think I can speak for
18 all of us and say that overall, the quality of the work here
19 has been very good and we really appreciate your efforts in
20 that regard. And we understand obviously the pressures you
21 were under.

22 MS. CHANCELLOR: Thank you.

23 We've actually gone through and done a redline
24 version and compared reg guide 1567 with 3.67. And except
25 for one or two areas, they're very, very similar.

1 Last point. And I won't belabor you with going
2 through point by point to show you where they are different,
3 especially at this hour at the night.

4 Last point deals with the firefighting capability
5 and the availability of water. Mr. Blake seems to suggest
6 that that goes to the merits. We maintain that there is
7 sufficient information in our contention to show that there
8 is a factual dispute; that we have shown sufficient basis
9 for admittance of this, certainly of this portion of the
10 contention. We showed that the rainfall was low in the
11 area, the risk of fire is serious, that the firefighting
12 capability that they're going to rely on is on-site, and
13 that -- and quote to the relevant portions of the emergency
14 plan.

15 Also, there are substantial other water needs that
16 the applicant is going to call on: potable water, water for
17 the concrete batch plant, water for the asphalt plant, water
18 for construction activities. So it's not just firefighting
19 water needs that they need to rely on.

20 So we believe that there is a sufficient basis for
21 admittance of this portion of the contention and the
22 contention as a whole. That's all I have.

23 CHAIRMAN BOLLWERK: Anything further on this
24 point, this contention?

25 MR. TURK: I may want to come back to the

1 equipment issue quickly, but I'd rather just pass to the
2 next contention.

3 CHAIRMAN BOLLWERK: All right. Why don't we go to
4 Ms. Belille and then we'll come back if there's something
5 you want to say about that. OGD --

6 MR. KENNEDY: Before we do that, Your Honor, could
7 I just drop a footnote quickly to the endangered crane
8 problem that you've been discussing.

9 [Laughter.]

10 MR. KENNEDY: Just noting if Mr. Quintana's
11 scenario is correct, that those casks won't fall over unless
12 there's a major earthquake, which would impact Salt Lake
13 City. I think that would definitely create a problem in
14 getting a problem from Salt Lake City to this site. Those
15 cranes are going to be used here locally, as opposed to
16 being carried out to the reservation.

17 So I don't think that solves the problem. I think
18 it increases or enhances the problem of this endangered
19 species here.

20 MR. BLAKE: The footnote to the footnote is there
21 is -- that's a beyond design basis accident, the tip-over.
22 That's the starting point.

23 CHAIRMAN BOLLWERK: All right. Anything further
24 about State Utah R?

25 Move on to I think the last contention, OGD B.

1 MS. BELILLE: We just have a few brief comments,
2 Your Honor.

3 In this subcontention, PFS has said that "This is
4 an impermissible collateral attack on the Commission's rules
5 for abdicating stricter requirements than those imposed by
6 the regulations." OGD argues that the license application,
7 specifically the emergency plan submitted with the license
8 application, fails to address the safety provisions made for
9 the individuals living outside of the facility within a five
10 mile radius of the facility. The emergency plan does not
11 address a warning system such as would be implemented to put
12 the residents on notice of an accident.

13 PFS cites Northern States Power Company for the
14 proposition that an applicant such as PFS' proposed site is
15 not required to have an off-site component to its emergency
16 plan. I think Northern States Power can be distinguished
17 from the instant situation because Northern States Power was
18 only storing 1,920 spent fuel assemblies, and was held by
19 the Minnesota legislature to only forecast the possibility
20 of four additional casks if they reached certain other
21 requirements.

22 In the emergency planning license requirements for
23 independent spent fuel storage facilities and monitored
24 retrievable storage facilities found at 60 Federal Reg.
25 32430, the NRC, in the supplemental information, makes a

1 distinction between normal ISFSI sites and those with a
2 broader scope of activities.

3 As one example cited in the supplementary
4 information, the NRC, or the Commission speaks of an ISFSI
5 site that may be a large industrial facility equipped to
6 handle the loading and unloading and decontamination of a
7 large number of spent fuel shipping containers arriving by
8 both truck and rail.

9 The Commission goes on to say that storage
10 canisters have increased in capacity; and that given the
11 uncertainties in the design, the Commission believes it
12 prudent to plan and provide for an enhanced level of
13 off-site emergency planning at an MRS or as well as an ISFSI
14 that conducts similar operations because of the broader
15 scope of the activities which could be performed at such
16 facility.

17 Because of the unique nature of the facility
18 proposal, OGD would urge that this Board require off-site
19 planning that would notify members of OGD of an accident so
20 that they might take action to minimize any possible harmful
21 consequences. Thank you.

22 CHAIRMAN BOLLWERK: All right. Applicant.

23 MR. BLAKE: Let me react quickly to a couple
24 things.

25 One, I don't want to be distracted by the Northern

1 States case, which we also think is supportive. The more
2 important determination is that by the Commission with
3 regard to ISFSIs and whether or not there's a need for off-
4 site emergency planning. It's the Commission determination,
5 and we've cited it in our answer, which is more important
6 and applies to this facility.

7 There is a distinction between facilities, but the
8 distinction is not with how many casks. The distinction is
9 with the kind of business which is done at these facilities.
10 And therefore, the kind of risk in operations; and
11 therefore, the potential for the need for off-site emergency
12 planning.

13 Our facility is not of the higher risk type. The
14 higher risk types are those where there's processing or
15 repackaging of spent fuel; where there are activities which
16 could have a greater potential for some off-site
17 consequence. That's not true here. Our application makes
18 that clear. And therefore, there's not a need technically.

19 Nevertheless, we have outlined in our emergency
20 plan the kinds of off-site notifications we'd make even if
21 we got into an alert situation. Not requiring off-site
22 emergency level response, but nevertheless alerting people
23 off-site so that there'd be no doubt about any higher level
24 of concern on-site. I'll leave it at that.

25 CHAIRMAN BOLLWERK: All right. Mr. Quintana.

1 MR. QUINTANA: I think we've probably killed
2 enough trees and beat enough horses. No more.

3 CHAIRMAN BOLLWERK: All right. Staff?

4 MR. TURK: We have nothing to add beyond our
5 written response.

6 CHAIRMAN BOLLWERK: All right.

7 MR. TURK: And I want to note that I've been
8 looking for something in the statement of consideration for
9 the emergency planning rules in Part 72 that would address
10 the equipment issue. I cannot find it as I sit here now.

11 CHAIRMAN BOLLWERK: Okay.

12 MR. TURK: And I recognize that the Nureg 1567
13 description of equipment that should be set forth in the
14 plan does differ from my representation that that regulation
15 was specifically omitted from Part 72.

16 CHAIRMAN BOLLWERK: Okay.

17 MR. TURK: The omission of the regulation is
18 clear.

19 One compares Part 70 with Part 72, you'll find that the
20 specific equipment requirement that's stated in Part 70 is
21 not stated in Part 72. But I cannot find, as I sit here
22 today, that the -- a statement explaining that omission as
23 compared to what Nureg 1567 suggests should be in an
24 emergency plan.

25 DR. LAM: It's not really an omission, isn't it?

1 It's the Commission's deliberate decision to delete that
2 requirement.

3 MR. TURK: Yes. I was looking for a specific
4 discussion. The Commission stated when it dropped the Part
5 72 regulations for emergency planning that it did so based
6 upon a comparison of what was in Part 70 with what it
7 believed to be necessary for an ISFSI under Part 72. So it
8 took most of the Part 70 requirements for emergency planning
9 and incorporated them into Part 72, Section 72.32. But that
10 specific one, equipment, was omitted. And as I sit here, I
11 was looking for the rationale to explain that, and I cannot
12 find it as I sit here.

13 CHAIRMAN BOLLWERK: You think such a rationale
14 exists, or you just can't find it right now, or you're not
15 sure?

16 MR. TURK: I'm not sure at this point, but I'll
17 undertake to look for that. And if I find something, I'll
18 bring it to your attention then, as well as the attention of
19 the parties.

20 CHAIRMAN BOLLWERK: All right.

21 MS. CHANCELLOR: If I could just have one final
22 word.

23 I'd just like to note that the Part 72 emergency plan
24 regulations were amended in June of '95. Nureg guide 1567
25 manuscript completed October 1996, which is after the date

1 that the Part 72 rules were amended.

2 CHAIRMAN BOLLWERK: All right. Anything further,
3 Ms. Belille?

4 MS. BELILLE: No.

5 CHAIRMAN BOLLWERK: No?

6 All right. We've come to the end of our
7 discussion of contentions. And I guess there's one further
8 subpart we need to deal with in terms of our agenda, which
9 was scheduling and administrative matters. And we hope to
10 have us out of here by 7:00, so let's be -- we'll be quick
11 about this.

12 MR. SILBERG: If I could address the scheduling
13 issue quickly.

14 CHAIRMAN BOLLWERK: All right.

15 MR. SILBERG: We have talked -- I've talked with
16 all the parties. The parties believe that the best way to
17 proceed at this point in terms of future schedules is to
18 wait until the Board issues the prehearing conference order.
19 The parties will then, within a week or so after that,
20 consult amongst each other to try to develop an agreed
21 schedule.

22 If we do that, if we can do that, we will present
23 it to the Board. If we're unable to do that, we'll let the
24 Board know, and request that the Board promptly schedule a
25 teleconference at which we can present our views and the

1 Board can make a determination.

2 CHAIRMAN BOLLWERK: All right. And in terms of
3 that schedule, what might it include, just so I'll have some
4 idea.

5 MR. SILBERG: I wouldn't want to guess at that
6 right now.

7 CHAIRMAN BOLLWERK: All right.

8 MR. SILBERG: Certainly, you know, the next phase
9 is discovery, but I don't know how far out we would go.

10 CHAIRMAN BOLLWERK: All right. Let me just
11 reiterate for everyone that I appreciate your efforts in
12 that respect.

13 Was that what you were circulating about? All right. I
14 appreciate that. Something we needed to know.

15 Just to reiterate, we have some dates that we set.
16 And I'll probably issue an order on Monday when we get back
17 into the office. But just so you know: Monday, February
18 2nd, Mr. Wilson's and the Atlantic Legal Foundation's
19 amended petition is due.

20 Wednesday, February 11th, to accompany the
21 security contention admissibility reply that the State has
22 due is a pleading addressing the use of proprietary
23 information to prepare contentions EE and GG, and also a
24 time line for contentions EE and FF.

25 Friday, February 13th, any responses to the --

1 MS. CHANCELLOR: EE and GG; right? Not EE and FF.

2 CHAIRMAN BOLLWERK: I believe there's already a
3 time line for GG. I could --

4 MS. CHANCELLOR: Oh, that's right. You're right,
5 you're right. Beg your pardon.

6 CHAIRMAN BOLLWERK: If I'm wrong about that --

7 MS. CHANCELLOR: No. No, there is no.

8 CHAIRMAN BOLLWERK: It was a time line Ms.
9 Nakahara promised us.

10 Friday, February 13th, responses to the Wilson
11 Atlantic Legal Foundation amended petition.

12 Wednesday, February 18th, responses to Castle
13 Rock's rule waiver petition that's pending.

14 Monday, February 23rd, PFS and the staff are going
15 to be filing responses to the State's February 11th filing
16 regarding use of proprietary information and time line.

17 And all those should be same day filings. By that
18 I mean simply provided us by e-mail or fax except for the
19 security and proprietary information, which is next day
20 mail, next business day.

21 Okay? Any questions about any of that? As I say,
22 I'll memorialize that in an order when I return to the
23 office.

24 In terms of future scheduling, as you'd mentioned,
25 I think we were working off the same page, we probably would

1 have a video conference if there's some problem in terms of
2 scheduling. I think that's maybe the best way to handle it.

3 One thing I will express the Board's concern
4 about. I guess we've been talking as well about the filings
5 that were made, about scheduling. One thing that wasn't
6 clear to me from the filings was, the staff was saying that
7 they generally wouldn't present witnesses and, or the
8 witnesses and the SER would -- it sounded to me like they
9 would be one -- they'd come at the same time. But I take it
10 if we began to do the contentions, the witnesses might be
11 available before that. Is that correct?

12 MR. TURK: Yes. And I need to distinguish between
13 the SER and the EIS.

14 CHAIRMAN BOLLWERK: Okay.

15 MR. TURK: We would not be able to present
16 witnesses on environmental contentions until the EIS is out.

17 CHAIRMAN BOLLWERK: All right.

18 MR. TURK: With respect to the SER, I don't see
19 any reason why, if the staff's review of an item is
20 sufficient, is complete to the point where they can come and
21 testify, why we couldn't do that before the SER is out.
22 There is no restriction on that, unlike the environmental
23 area.

24 CHAIRMAN BOLLWERK: All right.

25 MR. TURK: So I would imagine that we could go to

1 hearing prior to issuance of the SER. And if the SER
2 differs from what the staff says in the hearing, then that -
3 - CHAIRMAN BOLLWERK: That's a problem, potentially,
4 or not.

5 MR. TURK: Then we'd have to examine whether that
6 gives rise to additional rights.

7 CHAIRMAN BOLLWERK: Right. In any event, it would
8 be dealt with. That'd have to be dealt with.

9 All right. One question I guess the applicant had
10 raised, what is the possibility of issuing the SER in parts?
11 And I know it's supplemented from time -- there generally is
12 one major document with supplements. Is there anything in
13 terms of issuing it as particular sections are finished as
14 opposed to waiting and bringing out one big document?

15 MR. TURK: I don't know that that's ever been
16 done.

17 There are instances where certain limited areas are still
18 left open and those are the subject of supplementation.

19 CHAIRMAN BOLLWERK: Right.

20 MR. TURK: But I would expect that the bulk of the
21 staff's review would have to be complete before they issue
22 their first document.

23 CHAIRMAN BOLLWERK: All right. Well, again, the
24 applicant made that suggestion. That's a staff matter, but
25 might be something you might consider.

1 MR. TURK: We'd want to be sure that there's no
2 inter- relationship that's been overlooked.

3 CHAIRMAN BOLLWERK: I can understand that. But to
4 the degree there was something that was separate and that
5 was finished, think about issuing it. I mean it certainly
6 would let -- give everybody here an idea where the staff
7 stood, and that's going to be important I suspect.

8 MR. TURK: All right. Incidentally, your order
9 inquired as to whether you could issue a final decision in
10 the case prior to those documents being issued.

11 CHAIRMAN BOLLWERK: Yes.

12 MR. TURK: And that's what we addressed
13 specifically.
14 That's a different question before they even start going
15 into hearing.

16 CHAIRMAN BOLLWERK: I recognize that. There's --

17 MR. TURK: And even with respect to environmental
18 issues, other parties could conceivably go to hearing before
19 the staff document is out. I'm not recommending that as an
20 approach, but that's not legally prohibited.

21 CHAIRMAN BOLLWERK: Right. Well, obviously, I
22 mean the problem is, I think we probably all would
23 recognize, is that the staff documents come out. If they've
24 already been hearings, then we face late file contentions,
25 motions to reopen depending on what's the status of the

1 record, all kinds of things. So that's something we prefer
2 to avoid, but we'll have to deal with it as it comes up.

3 All right. I just wanted to clarify that, and
4 make sure I understood what you were saying. And I take it
5 that's something that will be taken care -- taken into
6 account as you plan your, or you have your discussions.

7 All right. Let me tell you now that in terms of
8 discovery, you may all want to take a look at the Yankee
9 Rail case that we did several, about a year ago, 44 NRC at
10 38 and 41. There will undoubtedly be some provisions in any
11 discovery orders we issue. We will expect folks to have
12 informal discovery conferences before they begin formal
13 requests.

14 This is part of the federal rules. I think it's a
15 useful thing to do, to sit down and talk to each other,
16 exchange as many documents as you can, even let individuals
17 talk to people who are potential witnesses without having a
18 deposition to get information. And let's focus the
19 discovery, the formal discovery that we need.

20 The process seemed to work relatively well there.
21 I -- it's something you can just about count on seeing. All
22 right? And you may want to take that into account in terms
23 of any plans that you make in terms of schedules.

24 In light of that, there will undoubtedly -- there
25 will likely be a limitation on interrogatories and

1 depositions, so that's why, another reason why the informal
2 discovery becomes important. And the Board expects the
3 informal discovery to be extensive and to be open. If
4 there's no objection to a document, let's exchange it among
5 another -- among one another informally rather than having
6 to file interrogatories or production requests for it. All
7 right?

8 I will also expect that with respect to discovery
9 motions, that before filing a discovery motion, by that I
10 mean a motion to compel or a motion protective order, that
11 there will be a presubmission conference between counsel to
12 talk about what the problems are. If that motion -- if that
13 conference hasn't happened and the motion is filed, we will
14 simply reject it.

15 So you need to talk about it, critical question
16 being what do you really want. Again, counsel should talk
17 to each other before they begin filing motions.

18 And again, we'll talk about this a little more
19 when we get -- as things come along. I'm assuming that
20 there will probably be, well, we'll see. We haven't done
21 anything yet.

22 But assuming there are parties admitted and their
23 contentions admitted, all this will obviously go into effect
24 then. And we'll set that out in more detail.

25 Also, be aware that from henceforth, there is a 10

1 page limitation on motions and responses, absent preapproval
2 of the Board. That does not apply to any documents that
3 we've already discussed or filings that have already been
4 agreed upon to be due.

5 So that would be any new motions, 10 page. And we
6 need to know 48 hours beforehand if you're going to need to
7 file more than 10 pages, and that you've talked to the other
8 parties and they have no objection or they do object. All
9 right?

10 Also, same day courtesy service will continue to
11 keep in effect.

12 MR. SILBERG: And this does not apply to the
13 response to 2758?

14 CHAIRMAN BOLLWERK: No. Anything that's been
15 scheduled up to this point, in terms of the dates that I
16 just gave you, those are not subject to this limitation.
17 Any future motions that are filed or future responses that
18 come in, we'd like to see them 10 pages or less. All right?

19 And again, if you have a problem with that, let us
20 know and we'll look at it. But I'm hoping we can keep
21 things, keep the paper down somewhat on both sides. All
22 right?

23 In terms of settlement, just let me say I think
24 there's been some already movement back and forth. The
25 Board encourages any settlement you can reach on any

1 contention, any issue. If we can help you in that, we're
2 more than happy to do so, although the Commission's policy
3 generally makes us unavailable to get too deeply involved in
4 those sorts of things. But if you feel that in particular
5 instance we can help, or we can -- the appointment of a
6 settlement judge would help, we'll be glad to approach Chief
7 Administrative Judge Cotter and get him to appoint someone
8 that can sit down and talk with you about any given
9 individual, any individual issue, or range of issues.

10 I think it's important that you talk to one
11 another.

12 There are things here that may well be able to be worked
13 out, there may well be some things that cannot. Generally
14 sounds to me like there are some fundamental issues here
15 that people have fairly strong views about, but maybe even
16 those can be worked on.

17 So at this point I'm not going to require any
18 formal, kind of formal settlement discussions or anything
19 like that, but I just want to up front encourage that and
20 let you know that we'll be talking about that from time to
21 time. And if there's anything we can do to help you in that
22 respect, you should let us know immediately.

23 Anything the other two Board members want to add?

24 I just want to say that I -- we, you know, we've
25 been here for three days. Everyone has worked extremely

1 hard and the Board appreciates that. I think quality of, as
2 I said, of the written presentations and the oral
3 presentations under difficult circumstances with time
4 deadlines has been over -- been uniformly excellent. The
5 Board appreciates your efforts. We've gotten good input.
6 We have a lot of work to do now. All this paper now has to
7 be funneled through and something has to come out on the
8 other end.

9 I do want to thank again the State for providing
10 the bus for the site tour. I think it made the experience a
11 much better one for all of us.

12 The Skull Valley Band again for luncheon. We
13 appreciated that out at the site. It made things much
14 easier, and it was a very good lunch I should say.

15 Also, the University of Utah. I don't know if
16 there's anybody here from the school, but they've been very
17 kind to us, providing us what we needed to do to pull this
18 off in the best, I think, under some difficult circumstances
19 with the number of parties we have.

20 Whether we'll be meeting here again I have no
21 idea.

22 We've been looking at other places in the area. It's a
23 possibility there may be some others, and we'll let you know
24 as that comes up. And we do hope to use some
25 teleconferencing from time to time. All right?

1 MS. CHANCELLOR: Judge Bollwerk?

2 CHAIRMAN BOLLWERK: Yes.

3 MS. CHANCELLOR: I have a couple of housekeeping
4 things.

5 CHAIRMAN BOLLWERK: Sure, absolutely.

6 MS. CHANCELLOR: Mr. Blake and I got together and
7 agreed on rewriting some contentions, what ones we accepted.
8 And either we accepted the rewrite in our reply as the
9 applicant wrote it or noted a distinction, or else we
10 addressed it at -- during the conference. Those ones that
11 we could reach agreement on, and I can't be specific as to
12 which ones we accepted as-is, which ones we didn't, but the
13 ones that we have reached agreement on --

14 CHAIRMAN BOLLWERK: Okay.

15 MS. CHANCELLOR: -- State B, C, H, M, O, P, S, T,
16 V, W, CC, D, DD --

17 CHAIRMAN BOLLWERK: D. D or --

18 MS. CHANCELLOR: No, sorry.

19 CHAIRMAN BOLLWERK: DD?

20 MS. CHANCELLOR: Not D, DD.

21 CHAIRMAN BOLLWERK: All right.

22 MS. CHANCELLOR: Did I say R?

23 CHAIRMAN BOLLWERK: You did not. You said B.

24 MR. BLAKE: I think you said --

25 MS. CHANCELLOR: R.

1 MR. BLAKE: -- S rather than R.

2 CHAIRMAN BOLLWERK: That's --

3 MR. BLAKE: R was correct.

4 MS. CHANCELLOR: Let me go through them again.

5 CHAIRMAN BOLLWERK: All right. That's fine. Go
6 ahead.

7 No problem.

8 MR. BLAKE: Would you let me do it, maybe?

9 MS. CHANCELLOR: Yes, absolutely.

10 MR. BLAKE: Okay.

11 MS. CHANCELLOR: And I'll --

12 [Laughter.]

13 CHAIRMAN BOLLWERK: Then it's your problem.

14 MS. CHANCELLOR: I'll check you.

15 MR. KENNEDY: Wouldn't it be better just to do
16 this in writing, so that --

17 MR. BLAKE: Frankly, you were the only one that I
18 didn't reach any agreements with. And I'd like to put it on
19 the record with respect to the others in one spot here.

20 MR. KENNEDY: Okay.

21 MR. BLAKE: I think I can do it fairly quickly.

22 CHAIRMAN BOLLWERK: Go ahead. Real quick.

23 MR. BLAKE: With respect to State, Utah B, where
24 the State accepted our rewrite on it; Utah C, where we
25 accepted the State edit in our rephrasing. This is all in

1 the paperwork.

2 CHAIRMAN BOLLWERK: All right.

3 MR. BLAKE: Utah H, where the State did not object
4 to our rephrasing of the contention; Utah M and O, which
5 earlier Ms. Chancellor read into the record the exact
6 wording of those. So that's already a matter of record.
7 Utah P, where we accepted the State's rewording of the
8 contention; Utah R, where the State accepted our rewrite;
9 Utah T, where the State did some editing on our rewrite and
10 we've accepted that; Utah V, Victor, where the State edited
11 a portion of our rephrased contention and we've accepted it;
12 and Utah W, where the State accepted our rewrite; Utah CC,
13 where the State accepted our rewrite; and Utah DD, where the
14 State revised -- provided some editing of our rephrase and
15 we've accepted it.

16 CHAIRMAN BOLLWERK: All right.

17 MR. TURK: I'm not sure I heard what happened with
18 Utah P as in Paul.

19 CHAIRMAN BOLLWERK: They accepted the State. Have
20 I got that right?

21 MR. TURK: Is that right?

22 MR. BLAKE: On --

23 MR. TURK: Thank you.

24 MR. BLAKE: On V.

25 MR. TURK: As in as in Victor?

1 MR. BLAKE: Yes.

2 MR. TURK: All right.

3 MR. BLAKE: The -- there is a rewrite which
4 doesn't appear in any of the wording yet, so I want to
5 articulate what, on the record here, what that is. It's
6 simply a numbering.

7 MR. TURK: Okay.

8 MR. BLAKE: In subcontention D of our rewrite,
9 which appeared at page 293 in our answer. I've agreed with
10 the State that in that subcontention, little d, after the
11 first sentence, which reads "New information shows that
12 Table S-4 grossly underestimates transportation impacts."
13 That would be the end of the lead-in to a long list of Roman
14 numerals, beginning little Roman numeral i with the language
15 "Wash 1238," which is the basis for S-4, et cetera.

16 All of the rest of the paragraphs in that
17 subcontention which were previously numbered little Roman
18 numeral i to little Roman numeral ix, nine, one through
19 nine, would now be renumbered to be little Roman numeral ii,
20 two, through x, ten.

21 CHAIRMAN BOLLWERK: All right. And if for some
22 reason I get back to Washington and that's not clear, I'll
23 let you know.

24 MR. BLAKE: Yeah.

25 CHAIRMAN BOLLWERK: But --

1 DR. LAM: Now, Mr. Blake, you intend to resubmit
2 all these to the Board; right?

3 MR. BLAKE: No. All of the language is precisely
4 available to you now, Dr. Lam, from the preceding
5 submittals.

6 CHAIRMAN BOLLWERK: Right.

7 MR. BLAKE: Where it isn't, I'll try to make that
8 very clear.

9 DR. LAM: That's fine, that's fine.

10 MR. BLAKE: Let me say with respect to Castle
11 Rock, we reached agreement on a large number of the
12 rephrased contentions. Castle Rock has agreed to the PFS
13 rephrasing which appeared in our answer to numbers 2, 10,
14 11, 12, the infamous 13, 14, 15, 18, 19, 20, 21 and 23.

15 We have agreed to Castle Rock's rewrite in their
16 reply to our answer with respect to contentions 5, 7, 9, 16
17 and 17. That leaves no agreement between us where the Board
18 will have to decide what the contention is, 1 3, 4, 6, 8,
19 22, and 24.

20 With respect to OGD's contentions, the starting
21 point was OGD's redraft which appeared in their reply to our
22 answer.

23 CHAIRMAN BOLLWERK: All right.

24 MR. BLAKE: We have agreement on OGD A, with one
25 inserted word, the word "accident" before the word "impacts"

1 in basis number two.

2 We have agreement on their rewrite of OGD B; We
3 have agreement on OGD C, again, their rewrite, with the
4 following changes in the wording: In subcontention two, in
5 the second line insert the word "shipping" before the word
6 "casks."

7 In subcontention four, in the second line, after
8 the word "information," insert the words "about the
9 radiological characteristics of the spent fuel to be
10 shipped."

11 We have agreement on OGD E, echo, with the
12 following insert, which appears in subcontention one. At
13 the end of one you would add the words "that may leak or
14 become contaminated."

15 We have agreement -- we accept OGD's rewrite of
16 their contention F; we accept their rewrite of contention G.
17 They dropped H. We accepted their rewrite of contention I.

18 We have agreement on OGD L. And I'm going to read
19 it to you.

20 "The contention as redrafted by OGD is acceptable
21 to us with the subbasis one reading as follows: 'The license
22 application does not meet the requirements of 10 C.F.R.
23 72.327, in that persons being trained on the job will not be
24 able to carry out their responsibilities under 10 C.F.R.
25 72.32(a)(7).'"

1 MR. TURK: Your Honor, I appreciate the effort to
2 put on the record all the agreements. I think it's a good
3 idea.

4 But I think it's also a good idea that after all this is
5 done, the applicant submits it in writing, just so we're not
6 confused.

7 CHAIRMAN BOLLWERK: Right.

8 MR. TURK: But I think it's a good idea to put it
9 on the record now so there's no disagreement later.

10 CHAIRMAN BOLLWERK: Right. Well, let me put it
11 this way. When you look at the -- take a look at the
12 transcript and make sure the transcript is accurate. If the
13 transcript isn't accurate --

14 MR. BLAKE: Certainly we will.

15 CHAIRMAN BOLLWERK: -- let me know that.

16 MR. BLAKE: And I'm looking at my compatriots with
17 the hope that if I've misspoken --

18 CHAIRMAN BOLLWERK: Right.

19 MR. BLAKE: -- they'll speak up now.

20 CHAIRMAN BOLLWERK: Yeah. I suspect everybody
21 better review the transcript and make sure there's no
22 mistakes in it.

23 How many more of these do we have, just out of
24 interest?

25 MR. BLAKE: I think there's only one more, but I

1 have lost my place.

2 CHAIRMAN BOLLWERK: Oh, sorry.

3 MR. TURK: Be glad to assist any time.

4 CHAIRMAN BOLLWERK: The last one you did was L, if
5 that helps any.

6 MR. BLAKE: We have agreement on OGD M with simply
7 an insert of "a" in parentheses in the subcontention one.
8 So that the citation to the C.F.R. would read 10 C.F.R.
9 72.32(a), the insert, (2).

10 I say, I was not able to reach agreement, Mr.
11 Kennedy did not want to reach agreement on any of them --

12 CHAIRMAN BOLLWERK: All right.

13 MR. BLAKE: -- for the Confederated Tribe.

14 CHAIRMAN BOLLWERK: All right. We --

15 MR. BLAKE: And I appreciate the indulgence of the
16 Board, and I'm sorry that it took us a couple minutes past
17 7.

18 CHAIRMAN BOLLWERK: Not a problem. I appreciate
19 the efforts of the parties because it's obviously important
20 to us to have the language in front of us of the contention
21 as you have agreed to it.

22 All right. Anything further?

23 MS. CHANCELLOR: Yes.

24 CHAIRMAN BOLLWERK: Ms. Chancellor, go ahead.

25 MS. CHANCELLOR: Just a quick thing to get it on

1 the record.

2 We would like to understand the process by which
3 the staff is going to keep everybody apprised of what's
4 going on. For example, the status of the staff safety
5 review and copies of correspondence that go, and questions
6 that go back and forth to the -- between the applicant and
7 staff. Will such correspondence be served on the parties?

8 The same question for NEPA review. Has that begun
9 yet and when will scoping start, schedule for the same.
10 Also, the correspondence.

11 Another area -- do you want me to go through all
12 of these all at once, or do you want me to pause between
13 each one?

14 CHAIRMAN BOLLWERK: I don't know. Is the staff
15 going to answer any of these questions or not?

16 MS. CHANCELLOR: I have about -- I have four.

17 MR. TURK: Sure. There's a simple answer. That
18 is that the parties to the proceeding, once there's a ruling
19 on who the parties are, they'll be placed on the staff's
20 technical service list. I say that as opposed to the legal
21 service list. So that correspondence between the staff and
22 the applicant concerning the safety evaluation and the
23 environmental report and staff's impact statement, you'll be
24 receiving copies of that.

25 The staff does not routinely serve that kind of

1 information on the Board, however. We only serve the Board
2 with that kind of information when something is -- rises to
3 the level of Board notification.

4 MS. CHANCELLOR: So that will be any
5 correspondence.

6 And questions and answers going back and forth once a person
7 is admitted as a party, would that --

8 MR. TURK: Correspondence between the staff and
9 the applicant --

10 MS. CHANCELLOR: Okay.

11 MR. TURK: -- will be served upon you.

12 MS. CHANCELLOR: What about cask manufacturers,
13 such as Holtec and representatives of the applicant? Is
14 that --

15 MR. TURK: I don't believe that would go to you,
16 because that's part of the rule making. However, that
17 material would be subject to your review in the public
18 document room.

19 MS. CHANCELLOR: Right. What we're trying to
20 avoid is late filed contentions. If we have to rely on the
21 public document room, frequently there's at least a two week
22 delay, and maybe even longer, coming here to Utah. So
23 that's what we're trying to avoid.

24 MR. TURK: Well, we have established a local
25 public document room here in Salt Lake, as you know.

1 MS. CHANCELLOR: Right.

2 MR. TURK: The rule making on the cask, that is
3 something which has generic applicability. Although you're
4 a party in this proceeding, there may be numerous other
5 proceedings at some time in the future. And we don't put
6 parties to individual licensing proceedings on our generic
7 rule making.

8 MS. CHANCELLOR: Okay. Well, we'll --

9 MR. TURK: But it wouldn't be a bad idea for you
10 just to routinely check the LPDR.

11 MS. CHANCELLOR: We'll make a diligent effort, but
12 realize that if something is delayed getting to the PDR, it
13 may result in late filed contentions.

14 MR. TURK: And I have to say I'm not sure at this
15 point whether the rule making dockets on those cask
16 certification requests are in the LPDR as of yet. But when
17 we go back to Washington we'll ascertain whether or not they
18 are and we'll try to get them in.

19 MS. CHANCELLOR: Well, if there's any way for you
20 --

21 MR. TURK: And I would expect we'll be able to.

22 MS. CHANCELLOR: If there's any way for you to
23 expedite what goes into the PDR and LPDR, we'd certainly
24 appreciate that.

25 CHAIRMAN BOLLWERK: All right. Anything further?

1 MR. SILBERG: We will also --

2 CHAIRMAN BOLLWERK: Go ahead, sir.

3 MR. SILBERG: We will also put parties, after
4 people are designated as parties, on service lists for all
5 of our correspondence from PFS to the NRC staff.

6 MS. CHANCELLOR: Okay.

7 MR. SILBERG: Of course to the extent that it
8 doesn't involve proprietary information.

9 CHAIRMAN BOLLWERK: And I guess I should have been
10 clear on that. The staff does not serve upon you
11 correspondence received from the applicant. We serve upon
12 you the staff's outgoing correspondence. So Mr. Silberg's
13 clarification of his intent in the future should give you a
14 complete set of correspondence.

15 Something else?

16 MS. CHANCELLOR: Just a couple.

17 With respect to (laughs), with respect to any
18 meetings between the staff and the applicant, is it possible
19 to get a week's notice, say by e-mail or fax of those
20 meetings, so that, if necessary, we could have somebody
21 attend? Assume they're open to the public.

22 MR. TURK: I understand that meetings between the
23 staff and the applicant will be the subject of
24 correspondence or notice, which is issued approximately two
25 weeks before the meeting.

1 MS. CHANCELLOR: Oh, two weeks. Good. In the
2 Federal Register, or --

3 MR. TURK: Not -- no, usually not in the Federal
4 Register, usually just in the correspondence of the docket.

5 MS. CHANCELLOR: Would that be sent to the
6 parties?

7 CHAIRMAN BOLLWERK: My understanding is once
8 you're designated as a party, then it goes to you. Is that
9 -- am I correct?

10 MR. TURK: You'd be a recipient of the staff's
11 correspondence.

12 CHAIRMAN BOLLWERK: Right.

13 MR. TURK: I'm told that there's also a list of
14 such meetings in the -- on the Internet, but I don't want
15 you to rely on that necessarily. I think the better
16 reliance would be upon correspondence. Meetings of a very
17 significant nature would be in the Federal Register.

18 MS. CHANCELLOR: Okay. And I'm not sure how long
19 the panel will take to decide when people will be --

20 MR. TURK: And I have - I'm sorry.

21 MS. CHANCELLOR: -- admitted as parties.

22 MR. TURK: I'm sorry I cut you off. When I said
23 that, what I was thinking of is if there is something that
24 has general public applicability, such as if there is a
25 public meeting held with the applicant that we consider to

1 be of great public interest, we would do that. We would put
2 that notice in the Federal Register. Most meetings would
3 not be noticed, however.

4 MS. CHANCELLOR: But there would be a two week
5 notice on the -- on your home page?

6 MR. TURK: That's the general procedure.

7 MS. CHANCELLOR: Okay.

8 MR. TURK: Now there may be times when that's not
9 possible, but the staff will do whatever it can to make sure
10 that you get timely notice.

11 MS. CHANCELLOR: Okay. Just very, very quickly.
12 We have in the application a conceptual description of the
13 facility. Can you give us any idea of when there will be a
14 detailed design that will be submitted to you? That
15 question is either for the applicant or the staff.

16 MR. SILBERG: I don't know if we need to take this
17 time now, and I don't know the answer to that.

18 CHAIRMAN BOLLWERK: All right. Anything else?

19 MR. SILBERG: Depends in part on what additional
20 information the staff needs.

21 MS. CHANCELLOR: I think I better quit.

22 CHAIRMAN BOLLWERK: Okay. Just let me ask one --
23 although there's no -- the application is not, quote
24 unquote, before us as an exhibit, I guess at this point the
25 Board would be interested in getting an electronic copy or a

1 hard copy. Can someone give us a hand with that? We have
2 actually one that's on microfiche I think, but --

3 MR. TURK: You're asking about the application, or
4 the --

5 CHAIRMAN BOLLWERK: The application itself.

6 MR. TURK: -- safety analysis report, the
7 environmental report?

8 CHAIRMAN BOLLWERK: We've, up to this point, have,
9 I shouldn't say resisted, but we just haven't wanted to put,
10 you know, blow back 2,000 pages of fiche, or however long it
11 is, I don't know. But --

12 MR. TURK: I'm not sure that we have extra copies.
13 I would see if the applicant can make those available.

14 MR. SILBERG: Well, if the staff doesn't, we will
15 get you a copy.

16 CHAIRMAN BOLLWERK: All right. And we could take
17 an electronic version if you had that. I don't know how you
18 -- what you have it in, but whatever is convenient for you.

19 DR. KLINE: You have something that was
20 searchable, it would be --

21 CHAIRMAN BOLLWERK: Right, yeah. If we had
22 something searchable, that's even better, as Judge Kline
23 points out.

24 So --

25 All right. Anything else then?

1 All right. Again, we've done a good job. We got
2 done a half day early. And the reward for those of you that
3 live in Salt Lake City is you have to go to the office
4 tomorrow.

5 For those of us from Washington, I guess we'll be
6 traveling back.

7 Again, I appreciate your efforts. You'll be
8 hearing from us. And we stand adjourned. Thank you.

9 [Whereupon, at 7:10 p.m., the prehearing
10 conference was concluded.]
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REPORTER'S CERTIFICATE

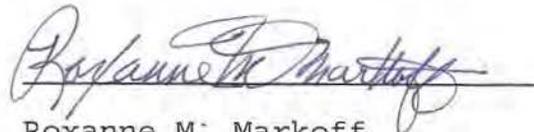
This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

NAME OF PROCEEDING: PRIVATE FUEL STORAGE, L.L.C. --
PREHEARING CONFERENCE

DOCKET NUMBER: 72-22-ISFSI

PLACE OF PROCEEDING: Salt Lake City, Utah

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.



Roxanne M. Markoff

Official Reporter

Ann Riley & Associates, Ltd.