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Title: CROW BUTTE RESOURCES, INC.
In Situ Leach Facility, Crawford, NE
License Renewal Oral Argument

Docket Number: 40-8943

ASLBP Number: 08-867-02- OLA-BD01

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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

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4 ATOMIC SAFETY AND LICENSING BOARD PANEL

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6 TELEPHONIC ORAL ARGUMENT REGARDING LICENSE RENEWAL

7 -----x

8 In the Matter of: : Docket No.

9 CROW BUTTE RESOURCES, INC. : 40-8943

10 (License Renewal for the : ASLBP No.

11 In Situ Leach Facility, : 08-867-02- OLA-BD01

12 Crawford, Nebraska) :

13 -----x

14 Tuesday, February 17, 2015

15
16 Teleconference17
18 BEFORE:

19 MICHAEL M. GIBSON, Chair

20 DR. RICHARD E. WARDWELL, Administrative Judge

21 BRIAN K. HAJEK, Administrative Judge

22 ALAN S. ROSENTHAL, Administrative Judge (Special

23 Assistant to the Board)

24

25

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P R O C E E D I N G S

10:32 a.m.

CHAIR GIBSON: Good morning. We are here for oral argument regarding Crow Butte's application for renewal of its In Situ Leach Mining License, SUA-1534, from the United States Nuclear Regulatory Commission under Rules promulgated in Volume 10 of the Code of Federal Regulations.

We have convened this oral argument because the Oglala Sioux Tribe and Consolidated Intervenor, already parties to this proceeding, recently filed petitions challenging the Nuclear Regulatory Commission's November 6, 2014 renewal of Crow Butte's license.

This renewed license, which will not expire until November 5, 2024, allows Crow Butte to continue its in situ leach mining operation in Dawes County, Nebraska.

Original petitions from the Oglala Sioux Tribe and Consolidated Intervenor challenging Crow Butte's application for renewal of its license were filed in 2008. However, due to a series of delays that we have catalogued elsewhere, it was not until late 2014 that the Nuclear Regulatory Commission's staff completed its environmental assessment of the

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1 project. Regardless, four contingents from those 2008
2 petitions were admitted and remain to be tried in
3 August of this year.

4 Intervenor claim that allowing Crow Butte
5 to continue to operate as it has for the last 24 years
6 poses hazards to Native American historical artifacts
7 and burial mounds as well as to nearby surface waters
8 and the groundwater that reaches as far as
9 Intervenor's residences.

10 They also claim that the Nuclear
11 Regulatory Commission's environmental assessment
12 either failed to address those concerns or did not do
13 so adequately.

14 On the other hand, both Crow Butte and the
15 Nuclear Regulatory Commission's Staff assert that the
16 NRC Staff's environmental assessment completely
17 evaluated these matters and demonstrates that there
18 are no significant hazards posed by Crow Butte's in
19 situ leach mining operation, either to the historical
20 resources or to the environment, and so they claim
21 these contentions should not be admitted.

22 The shorthand for our task today is to
23 decide if the conditions -- contentions recently
24 proffered by the Tribe and Consolidated Intervenor
25 are admissible.

1 If we determine that one or more of them
2 are admissible, then our next task will be to
3 adjudicate them along with the four that were
4 previously admitted in 2008 at our August hearing in
5 this year, which ultimately will result in the
6 acceptance of this license or the conditioning or
7 denying of it.

8 Before we begin, I would like to introduce
9 the Board members. First, Judge Richard Wardwell.
10 Judge Wardwell is an engineer and a full-time member
11 of the Atomic Safety and Licensing Board Panel.

12 The second member of this Board is Judge
13 Brian Hajek. Judge Hajek is a nuclear engineer, a
14 retired professor from Ohio State University, and a
15 part-time member of the Panel.

16 I am Michael Gibson, an attorney and
17 Chairman of this Licensing Board.

18 Also sitting by special designation from
19 the Chief of the Atomic Safety and Licensing Board
20 Panel is Judge Alan Rosenthal. Judge Rosenthal is
21 also a lawyer and a part-time member of the Panel and
22 is serving in the capacity of Special Assistant to the
23 Board.

24 At this point, I would like to have
25 counsel for the various participants identify

1 themselves for the record. I would like lead counsel
2 to introduce yourself, state the name of your client,
3 and introduce as well any counsel who may be
4 participating with you in argument today.

5 Let's start with the Petitioner, Oglala
6 Sioux Tribe.

7 MR. REID: This is Andrew Reid. I am an
8 attorney with the Ved Nanda Center of International
9 and Comparative Law at the Sturm College of Law, and
10 I represent the Oglala Sioux Tribe. I am here by
11 myself.

12 CHAIR GIBSON: Okay. Counsel for
13 Consolidated Intervenors?

14 MR. FRANKEL: This is David Frankel for
15 Consolidated Intervenors, Western Nebraska Resources
16 Council, Owe Aku and Debra White Plume.

17 CHAIR GIBSON: Are there any other
18 Intervenors Counsel that are on the phone today?

19 MR. ELLISON: Yes, this is Bruce Ellison.
20 I am also a Consolidated Intervenors Counsel. And I
21 believe Mr. Ballanco is going to be joining us
22 shortly.

23 MR. BALLANCO: Yes, this is Tom Ballanco.
24 I represent Tom and Loretta Cook and Joe American
25 Horse, all of which are Consolidated Intervenors.

1 CHAIR GIBSON: Counsel for the Applicant,
2 Crow Butte?

3 MR. SMITH: This is Tyson Smith, Counsel
4 for the Applicant, Crow Butte, and Mark McGuire I
5 believe is on the line as well.

6 MR. MCGUIRE: Yes.

7 CHAIR GIBSON: NRC Staff Counsel?

8 MS. SIMON: This is Marcia Simon
9 representing the NRC Staff and David Cylkowski, my Co-
10 Counsel, will also be participating today.

11 CHAIR GIBSON: Very well. Did I miss
12 anyone?

13 (No audible response.)

14 CHAIR GIBSON: Okay. Before we get into
15 the intricacies of the individual contentions, there's
16 a few overarching concerns that I want to address to
17 all of you.

18 First, there are several attorneys
19 appearing today, and our court reporter is a bit
20 hamstrung in that he cannot see who is talking because
21 this oral argument is occurring via teleconference, so
22 please be mindful of that and identify yourself each
23 time before you speak so that the transcript of this
24 proceeding will be clear.

25 Second, per the orders we previously

1 issued in this case, we have designated lead counsel
2 for specific contentions. However, the Board realizes
3 that not all intervenors have identical interests any
4 more than the staff and the applicant have identical
5 interests, and if the designated lead counsel fails to
6 give voice to the unique interest of your client or
7 some concern your client has, then we would consider
8 that to be a material omission that would certainly
9 justify amplification on your part.

10 At the same time, however, keep in mind
11 that we have a lot of ground to cover today, and so
12 please use your best efforts to speak only to those
13 errors and omissions from the lead counsel, and don't
14 merely parrot the same point that lead counsel for
15 that contention has just made.

16 Third, as I'm sure all of you are all
17 aware, on January 26th of this year the United States
18 Environmental Protection Agency issued new proposed
19 standards for uranium and thorium mill tailings. Just
20 in case you've been living under a rock and weren't
21 aware of them, you might want to consult 80 Federal
22 Register 4156.

23 I raise these new standards because I want
24 to make one thing crystal clear: the Board is not
25 going to put off our trial in August because these new

1 standards have been proposed. If the intervenors
2 intend to proffer any new or amended contentions based
3 on these proposed standards, here is how we will
4 proceed: within five business days of this oral
5 argument, which will be I believe next Tuesday,
6 February 24, I want you to alert Mr. Sciretta, our law
7 clerk on this case, via email whether you intend to
8 file a new or amended contention based on these
9 proposed standards.

10 If you don't, fine. If you do, however,
11 we will issue an order with an accelerated briefing
12 schedule so we can determine whether any new or
13 amended contentions based on these standards are
14 admissible, and as part of setting this accelerated
15 schedule, I want all parties to work in good faith to
16 ensure there will be no slippage in any of the dates
17 to which we all agreed on our last call so that we can
18 try all the contentions in August.

19 Finally, we are going to proceed with oral
20 argument a little differently than the approach you
21 may have seen other boards take. This Board has a
22 number of specific questions it intends to ask of
23 counsel for all sides here. Rather than allotting you
24 a specific amount of time for opening remarks or
25 closing or for reply or rebuttal to a specific

1 question, we just need these questions answered so
2 that we can determine the admissibility of these
3 contentions.

4 I want to stress that the purpose of this
5 Board's oral argument is not to have counsel
6 regurgitate what is contained or should have been
7 contained in your written submissions. The Board is
8 familiar with the content of those submissions.
9 Rather, the central purpose of our -- of today's
10 proceeding is to explore with counsel those questions
11 that the Board might have based on the examination of
12 the papers before it.

13 Once the Board is satisfied that it has
14 heard enough on a particular issue to assist it in its
15 determination of that issue, the consideration of that
16 issue will terminate, and -- but frankly, I suspect
17 that by the time we finish today, all parties to this
18 proceeding will feel they have had an ample
19 opportunity to address the issues that should be of
20 concern to the Board.

21 Does everybody understand how we will
22 proceed in this regard?

23 (No audible response.)

24 CHAIR GIBSON: I assume, hearing no
25 objection, we will proceed, and I think we will turn

1 to the Tribe's Contention F.

2 Mr. Reid, Contention F bears a striking
3 resemblance to the contention that the Tribe and the
4 Delegation Treaty Council raised in this case back in
5 2008, that is, that the Fort Laramie treaty conferred
6 aboriginal title in the tribe to the land on which
7 Crow Butte is operating.

8 Now I don't know if you're aware of this,
9 but in a prior order of this Board, we rejected that
10 argument, and based on -- and based our decision on
11 the United States Supreme Court, United States v.
12 Sioux Nation of Indians.

13 We have read your pleadings and understand
14 your claim that this is a matter of international law
15 on which United States v. Sioux Nation of Indians is
16 not binding, but I must tell you that it's not likely
17 that this tribunal could disregard a decision of the
18 United States Supreme Court.

19 Moreover, we are bound by the Commission's
20 rulings, and in CLI-09-09, the Commission cited to
21 Sioux Nation as grounds for not admitting this
22 contention.

23 Is there some way you can suggest that we
24 can ignore their direction?

25 MR. REID: I mean, I am aware of the

1 earlier -- of the earlier submissions of the
2 contention. I don't think it was argued that in light
3 of the Dan ruling or in light of the UN Convention on
4 the Elimination of All Forms of Racial Discrimination,
5 which is part of the domestic law of this country,
6 having been signed and ratified.

7 And I -- and the -- I understand the -- I
8 understand Sioux Nation, but the Commission is also
9 bound by the UN DRIP to the extent that it should be
10 used to interpret the other laws. It is bound by the
11 UN Convention on the Elimination of All Forms of
12 Racial Discrimination, and Sioux Nation was 35 years
13 ago. There has been a number of decisions and other
14 law that's developed, particularly the duties -- the
15 scope of the term "consultation," and if you don't
16 mind, I'll go ahead and mention that as well because
17 it's raised in terms of Contentions 1 and 2 so that
18 maybe we can dispense of that.

19 But the impact of the subsequent
20 international rulings and the growth of international
21 law in regards to the relationship between states and
22 Native nations has developed considerably in the last
23 35 years and I think created new law, and so the
24 submission, the resubmission of this contention was
25 intended to have the Board reconsider -- now I

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1 understand that the Board is restricted by the prior
2 decisions of the U.S. Supreme Court and the 09-09
3 decision, but it's my intent to re-raise that and draw
4 it again to the Commission -- to the Board's attention
5 under the context of the new law that's been
6 developing.

7 The other point I should make is that in
8 order to raise this decision as a matter of
9 international law in the relevant international
10 tribunal, which is the Inter-American Commission on
11 Human Rights, which is the tribunal of the
12 Organization of American States, of which the United
13 States is a party, it requires exhaustion of domestic
14 remedies, and it would require that the Tribe raise
15 this issue with the Board and make sure that it's --
16 that it has received full hearing on this issue before
17 it can bring the issue up before the international
18 tribunal.

19 So I don't know if that addresses your
20 question, but I -- the short of it is that I think
21 there have been a lot of changes in the law, even
22 within the last five or six years, in regards to the
23 obligations of the United States and other states to
24 the Indian nations.

25 CHAIR GIBSON: Thank you, Mr. Reid.

1 Do any other Board members have a question
2 about Contention F?

3 JUDGE WARDWELL: Judge Wardwell, no.

4 CHAIR GIBSON: Okay. Very well. Let's go
5 to Contention -- the rest of the contentions.

6 Oh, one other thing I should add: we have,
7 obviously, a bit of a time lag between you folks out
8 West and us folks back here on the East. What I would
9 propose as a sort of compromise is a late lunch for us
10 and an early lunch for you all, which would be 1
11 o'clock our time, 11 o'clock your time, and is -- is
12 -- does anybody need more than 30 minutes for a lunch
13 break?

14 (No audible response.)

15 CHAIR GIBSON: Hearing none, we will plan
16 on a 30 minute lunch break, then, which would be 1:00
17 to 1:30 Eastern Standard Time, and very well. Thank
18 you.

19 Okay. Before we get to the rest of the
20 contentions, I want to quickly go over migration.
21 This Board has previously admitted Contentions A, C,
22 D, and Technical Contention F. Mr. Smith, I assume
23 you would not dispute that those four contentions
24 migrate now that the environmental assessment has been
25 published?

1 MR. SMITH: This is Tyson Smith. Yes, I
2 agree with that.

3 CHAIR GIBSON: Okay, very well. In your
4 answer, you basically -- we got that out of your
5 answer, and Staff, in your answer, you say that since
6 we admitted Environmental Contentions C and D, we do
7 not need to admit Contention 5, is that correct?

8 MS. SIMON: Your Honor, this is Marcia
9 Simon for the Staff.

10 Contention 5 essentially mirrors -- or, in
11 our view, covers the same ground as Environmental
12 Contentions C and D that were admitted for the Oglala
13 Sioux Tribe, so on behalf of the Oglala Sioux Tribe
14 then we feel that Contention is repetitive and would
15 not need to be admitted.

16 CHAIR GIBSON: Okay, thank you. I -- Mr.
17 Frankel, I want to ask you a few questions, but Mr.
18 Reid, please feel free to speak up if there's
19 something else that needs to be said on migration.

20 It appears that some of these new
21 contentions match pretty closely to the contentions
22 the Board has already admitted. As Ms. Simon says,
23 there's a lot of similarity between C and D and 5.

24 But let's look first at A. This is about
25 radiological health impacts from mining and spills.

1 This seems to come up in Contention 5 where you talk
2 about uranium and radioactive daughters in the White
3 River; in Contention 8, where you talk about airborne
4 radiation exposure; and so if we were to admit 5 and
5 8, I am not saying we will, but if we were to admit 5
6 and 8, is the already-admitted Contention 8 still
7 unique?

8 MR. FRANKEL: Your Honor, David Frankel
9 for Consolidated Intervenors.

10 I have a hard time seeing the equivalency
11 with the NEPA contentions which can only be filed
12 after the NEPA document, in this case the final EA.
13 And Consolidated Intervenors' contentions, except for
14 F, were not admitted in the prior proceeding on the
15 environmental report.

16 The environmental report did not require
17 a hard look, or -- and it's not the Applicant's duty
18 to comply with NEPA the way it is the NRC's duty, so
19 I don't see a complete overlap. I agree that there
20 seem to be overlapping circles here, but it's not 100
21 percent overlap, and I don't -- while those
22 contentions migrate, I don't think it's a substitute
23 for considering the admissibility of the NEPA-based
24 contentions.

25 CHAIR GIBSON: Okay.

1 MR. ELLISON: If I may, Judge, this is
2 Bruce Ellison.

3 I guess this is my contention for
4 substance. I would agree with Mr. Frankel, but I --
5 because many of the bases for Contention 5 have to do
6 with a lot of things around what potentially could
7 cause a radiological spill or incursion, but --
8 excursion, but it really is a lot more in depth, and
9 while I would agree that Technical Contention F would
10 migrate into new Contention 5 as well as new
11 Contention 4, these are much more detailed statements
12 of where we feel that NEPA is not being complied with
13 or has not been complied with in the EA, final EA.

14 CHAIR GIBSON: Okay. All right. Well let
15 me just -- it sounds like -- it sounds like -- I hear
16 what you're saying. Let me just sort of give you what
17 the Board's assessment was because I think your
18 answers to these other questions would be the same.

19 It looks to us like Contention 3 and 5 are
20 very closely related to Contention C. As Ms. Simon
21 says, it appears to us as well that Contention D is
22 closely related to Contentions 3 and 5, and it appears
23 that Contention F is closely related to Contentions 7
24 and 14.

25 So before we go off, is there anything

1 anyone else needs to -- feels that they have to say
2 about migration before we get into the other -- the
3 direct contentions?

4 MR. SMITH: Judge Gibson, this is Tyson
5 Smith for Crow Butte.

6 CHAIR GIBSON: Yes.

7 MR. SMITH: I think ultimately, on these
8 proposed contentions, you have to -- the contentions
9 are -- the scope of the contention is tied to the
10 bases presented for that contention, and I think for
11 each of these contentions, you have to look on a
12 basis-by-basis process, and so whether you're looking
13 at the original contentions or the proposed new
14 contentions now, you've got to look at the bases that
15 are presented for these new environmental contentions
16 versus what was presented originally.

17 And to the extent that they are the same,
18 then I agree that they migrate, but I am not so
19 certain that I see as equivalent in these contentions
20 as some of the remarks here would suggest. I mean, I
21 think there are significant differences in the bases
22 presented and the reasons presented and that the --
23 you know, that the Board should look at those for each
24 contention and determine for each basis whether it is
25 -- the migration tenet is appropriate to apply in that

1 case.

2 CHAIR GIBSON: Okay. Thank you.

3 JUDGE WARDWELL: This is Judge Wardwell,
4 I'd like to interject a question here --

5 CHAIR GIBSON: Please --

6 JUDGE WARDWELL: -- for the --

7 CHAIR GIBSON: Please.

8 JUDGE WARDWELL: I'd like to pursue this
9 a bit further. We admit contentions, isn't that
10 correct, not bases?

11 MR. SMITH: Yes.

12 JUDGE WARDWELL: And if a -- one
13 contention is really general, as the Contention A, C,
14 D, and F, original ones that were admitted, seem to
15 me, if there are other contentions that just get more
16 detailed talking about the same subject area that was
17 supported by the original basis, then in fact isn't it
18 just an elaboration of that basis and would not --
19 would it in fact be a duplication of it? Of the
20 contention, not of the basis.

21 MR. SMITH: This is Tyson Smith. I think
22 that contentions are defined by -- the scope of
23 contentions are defined by the bases presented.

24 So if there is a general contention that's
25 admitted and a more specific subsequent contention

1 falls within that general contention, then I would
2 agree that it would be covered, but I guess I don't
3 believe that's necessarily the case for each of these
4 contentions today. I think they are -- some of them
5 that were just discussed are outside the scope of the
6 earlier-admitted broad bases that you suggested.

7 JUDGE WARDWELL: And this is Judge
8 Wardwell, and that's subjective, right? I mean,
9 there's people who disagree on that, correct?

10 MR. SMITH: Exactly. And that is why --
11 and this is Tyson Smith -- again, that was exactly why
12 my point was that that has to be looked at on a basis-
13 by-basis basis. Rather than saying oh, this
14 contention is broad, and it covers all these
15 activities, you've got to look at what were the bases
16 for that initial contention, what was presented, and
17 see does the -- does the -- under a fair reading of
18 the information that was presented as a basis for the
19 original contention, would that cover the subsequent
20 more specific claim?

21 And again, in my cases, the answer --

22 JUDGE WARDWELL: And by this --

23 MR. SMITH: -- is no.

24 JUDGE WARDWELL: -- and by this statement,
25 you're not implying that any intervenor has to submit

1 all of its information and basic evidence at the
2 contention admissibility stage, isn't that correct?

3 MR. SMITH: Not that they'd have to submit
4 all of their evidence, certainly not, but they do need
5 to submit sufficient information in order for the
6 parties to be on notice as to what the scope of the
7 contention was, and that scope is defined by the bases
8 that were presented.

9 JUDGE WARDWELL: Thank you.

10 MS. SIMON: This is Marcia Simon from the
11 NRC Staff, if I could just make a quick statement.

12 I think a related issue here is the issue
13 of timeliness. So if a contention now raises --
14 provides more information or more bases, but the
15 information that it is based on could've -- if that
16 information or that specificity could've been provided
17 back in 2008 when the original contentions were raised
18 --

19 JUDGE WARDWELL: Yeah, if I could
20 interrupt just quickly, just for --

21 MS. SIMON: Yes.

22 JUDGE WARDWELL: -- expedience, we'll get
23 into timeliness, so we're fully aware of that, and we
24 appreciate --

25 MS. SIMON: Okay.

1 JUDGE WARDWELL: -- that statement.

2 MS. SIMON: Okay, thank you Judge.

3 JUDGE WARDWELL: Thank you, yes.

4 CHAIR GIBSON: Okay, very well. Let's
5 turn to the Contention 1.

6 Now it appears to the Board that the
7 Tribe's Contention 1 and Consolidated Intervenor's
8 Contention 1 are largely the same, save for the first
9 paragraph of the Tribe's Contention 1, which does not
10 appear in the Consolidated Intervenor's Contention 1,
11 as well as a comment in the Tribe's Contention 1 that
12 prior informed consent of the tribe to proceed with
13 Crow Butte's activities was not obtained. Is that
14 correct, Mr. Reid?

15 MR. REID: I think generally. I am not
16 sure if it tracks word-for-word. There may be an
17 additional insert of the -- because there was an issue
18 that I wanted to --

19 CHAIR GIBSON: Right.

20 MR. REID: -- emphasize with the Board,
21 insert the specific spiritual and religious interests
22 of the tribe which may not be wholly reflected in the
23 cultural resource surveys.

24 CHAIR GIBSON: Okay.

25 MR. REID: And so that would include the

1 -- for example, the vision quests and the pilgrimages
2 and so forth to the area for spiritual purposes.

3 CHAIR GIBSON: Okay. It also appears to
4 the Board that the Tribe's Contention 2 and
5 Consolidated Intervenor's Contention 2 are largely the
6 same, except that Consolidated Intervenor has
7 additionally asserted that we should look askance at
8 anything that Crow Butte undertakes with respect to
9 assessing or protecting tribal historical resources.
10 Is that correct, Mr. Frankel?

11 MR. FRANKEL: David Frankel for
12 Consolidated Intervenor, yes, Your Honor.

13 CHAIR GIBSON: Okay. It also appears to
14 the Board that at least with respect to the alleged
15 absence of adequate consultation, that there is
16 considerable overlap between Contentions 1 and 2, and
17 so most of the Board's questions regarding
18 consultations will be directed to both Contentions.

19 Counsel for the NRC Staff, does the NRC
20 Staff recognize the government-to-government
21 relationship between the federal government and Indian
22 tribes?

23 MR. CYLKOWSKI: This is David Cylkowski on
24 behalf of the NRC Staff. Yes, Your Honor.

25 CHAIR GIBSON: Nor would you dispute that

1 the NRC owes trust responsibility to the Tribe, is
2 that correct?

3 MR. CYLKOWSKI: That is correct, Your
4 Honor.

5 CHAIR GIBSON: In our 2008 order, we noted
6 that in the 13 years after the staff had been alerted,
7 that there were historical artifacts of concern to the
8 Tribe. The staff still had not begun consultation
9 with the Tribe about them, and I think that probably
10 was not a particularly positive way to discharge the
11 NRC's trust responsibility to the Tribe, but we are
12 not here to address past shortcomings.

13 I want to know, however, now, in 2015, how
14 the government-to-government relationship and the
15 trust responsibility owed to the Tribe is reflected in
16 the environmental assessment.

17 MR. CYLKOWSKI: Yes, Your Honor. So as a
18 first point, I would say that the trust responsibility
19 is fulfilled by the Agency complying with applicable
20 statutes and regulations, and here, that's what the
21 staff has done, as documented in the EA, in terms of
22 its consultations under the NHPA.

23 The EA documents initial consultation
24 activities between the staff and potentially
25 interested tribes. Consultation was carried out via

1 letters to tribal officers, via meetings with tribal
2 officers, and the Applicant's invitations to
3 participate in cultural consultation -- on how to
4 carry out this consultation.

5 CHAIR GIBSON: Okay. I am curious, since
6 there is this government-to-government relationship
7 between the federal government and federally
8 recognized Indian tribes, why would the views of the
9 State Historic Preservation Officer matter?

10 MR. CYLKOWSKI: Your Honor, my
11 understanding is that the -- unless the Tribal
12 Historic Preservation Officer has been designated to
13 essentially take over consultation responsibilities
14 for the state, then both the Tribe and the state still
15 must be consulted.

16 CHAIR GIBSON: Okay. Mr. Reid, you've
17 heard the Staff's explanation of what it views as the
18 appropriate role of the State Historic Preservation
19 Officer, but you asserted that the involvement of the
20 State Historic Preservation Officer is not relevant in
21 determining if the Tribe has been adequately
22 consulted. Why?

23 MR. REID: There is a -- there is a
24 fundamental difference of approach in terms of -- I am
25 sorry.

1 CHAIR GIBSON: I am sorry, too, it's my
2 dog.

3 (Laughter.)

4 CHAIR GIBSON: I am home, I can't be in
5 the office today, so sorry about that.

6 MR. REID: My -- our concern is that the
7 approach of indigenous nations to these issues is
8 wholly different from that of the Western way of
9 archaeologists and anthropologists in terms of
10 attempting to assess the cultural interests of the
11 public.

12 The indigenous peoples are -- and
13 specifically, the Oglala Lakota -- are a separate and
14 specific part of the public that has different,
15 differing interests that are not necessarily fully
16 addressed in the National Historic Preservation Act or
17 in the consultation provisions that are set out
18 generally for the public and fall short.

19 The one thing I would point out
20 specifically is -- and this is reflected in the Siri
21 Foundation -- S-I-R-I -- Report, of the communications
22 with tribes from November 4, 2011 to August 24, 2012,
23 which is -- I believe is part of the record -- that
24 the tribes had made a number of attempts to engage in
25 more of an equal -- equal relationship in terms of the

1 assessment of these interests.

2 They had specifically asked that they be
3 -- that their rights be respected to develop a scope
4 of work, which meant from the way that the tribes
5 understood it would be that they would develop their
6 own way and their own culturally sensitive way of
7 assessing and determining the scope and nature of the
8 religious and spiritual interests, particularly in --
9 as well as some of the specific hard -- hard cultural
10 artifacts in sites and so forth within the Crow Butte
11 area, that they would do that under their own -- under
12 their own weight, under the respect of their own
13 culture.

14 This -- within indigenous law, it's known
15 essentially as the Burger approach based on an article
16 that was written by a Canadian attorney on the
17 assessment of these interests, and in regards --
18 specifically in regards to consultation, the duty of
19 consultation with indigenous peoples.

20 And it requires -- for example, it
21 requires talking circles. It would require indigenous
22 people not just to go out with the state to walk a
23 site and try to figure out where and whether there are
24 artifacts on the ground or specific places of
25 importance, but it would be -- it would respect the

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1 indigenous way of going out to an area at a certain
2 period of time of the year, during a certain period of
3 day, under certain specific conditions, and with the
4 appropriate people from the tribe who can identify
5 those sites that are of particular religious and
6 spiritual importance and be able to identify, for
7 example, the medicinal herbs.

8 The fact that there are herbs in a
9 location isn't the issue, for example, in regards to
10 the use of herbs in religious practices, but it may
11 involve the way that those herbs are growing, where
12 they're growing, the way that they're taken, and so
13 forth.

14 But there is -- I guess the short of it is
15 that the tribes attempted to interact with the NRC
16 staff and those conducting these surveys, two of which
17 are 30 and 28 years old, and I don't think there was
18 much interaction on those, but in terms of the more
19 recent ones, there was an attempt to participate on an
20 equal level, and that was rebuffed or not respected by
21 the NRC, and it was never accomplished.

22 And so I think if our contention is upheld
23 on this, that we would request that there really be a
24 true government-to-government relationship and that
25 the assessment of these interests be conducted jointly

1 between the Oglala Sioux Tribe and the United States,
2 not by the United States inviting the Oglala Sioux
3 Tribe and conducting the surveys and assessments on
4 its terms according to its laws.

5 CHAIR GIBSON: Okay, thank you. Counsel
6 for the NRC Staff, insofar as there was communication
7 coming from the NRC to the tribe about the National
8 Historic Preservation Act process, did that
9 communication come from the Commissioners themselves?

10 MR. CYLKOWSKI: I believe not, Your Honor,
11 I believe it came from the staff.

12 CHAIR GIBSON: Did it come from a
13 Director-level NRC employee?

14 MR. CYLKOWSKI: I believe that most
15 typically, it came from a Branch Chief level. There
16 may have been a certain level -- certain
17 communications that came from a Director level. I
18 would have to go back and verify that.

19 CHAIR GIBSON: Well, it's my understanding
20 that the NRC's Tribal Protocol Manual requires that
21 the NRC's initial written contact announcing a
22 licensing application and inviting initial written
23 contact and inviting participation of an Indian tribe
24 in consultation should be made by an NRC Division
25 Director or Deputy Director and should be addressed to

1 the leader of the tribal government. Now that was not
2 done here, was it?

3 MR. CYLKOWSKI: Again, I would have to go
4 and verify that, but I believe not.

5 CHAIR GIBSON: Okay. Mr. Reid, I looked
6 at Contention B that the tribe originally asserted,
7 and it seems to me that it largely contains the same
8 claim you are making in these Contentions 1 and 2 that
9 the NRC has not adequately consulted with the tribe on
10 matters related to the National Historic Preservation
11 Act. Is that basically correct?

12 MR. REID: Yes, and it's correct, and also
13 in light of the American Indian Religious Freedom Act,
14 which requires a similar --

15 CHAIR GIBSON: Okay.

16 MR. REID: -- kind of consultation, yes.

17 CHAIR GIBSON: Okay. And although we
18 admitted Contention B in 2008, the Commission reversed
19 the Board, held it to be premature, and certainly a
20 lot of water has run under the bridge in the interim,
21 and I must tell you that had the NRC done absolutely
22 nothing since 2008, you would surely have had them
23 dead to rights on their failure to consult, but at
24 least according to the NRC Staff and the Applicant, as
25 you've just heard Mr. Cylkowski explain, there's been

1 a flurry of activity since 2008, and in their
2 estimation, at least, what has taken place is the very
3 consultation that the Tribe sought in its original
4 Contention B.

5 I think it's pretty clear you don't agree
6 with that. So to find out specifically where we have
7 disputes between the Intervenors and the Staff and
8 Crow Butte, I will list for you the items that the
9 Staff and Crow Butte maintain are adequate
10 consultation, and you can tell us why in your
11 estimation there is a genuine dispute here as to
12 whether that is adequate consultation. Are you with
13 me?

14 MR. REID: Yes.

15 CHAIR GIBSON: Okay. Let's take these in
16 chronological order.

17 First, on January 13, 2011, the Applicant
18 and the Staff claim that the NRC sent a letter to the
19 Tribe along with 17 other tribes and invited your
20 client to a formal consultation under the National
21 Historic Preservation Act, Section 106. You don't
22 deny that the letter was sent, do you?

23 MR. REID: No.

24 CHAIR GIBSON: Okay. Next, the Applicant
25 and the Staff claim that this 2011 letter requested

1 the Tribe to provide all information it had about any
2 areas with religious and cultural significance for
3 your client that were on the Crow Butte site, which
4 was denoted on a map that accompanied this letter.
5 You don't deny that this is what the letter sought, do
6 you?

7 MR. REID: No.

8 CHAIR GIBSON: Okay. Now the Applicant
9 and the Staff maintain that this is at least in part
10 sufficient consultation under the National Historic
11 Preservation Act. Why are they wrong about these
12 specific things?

13 MR. REID: I -- it's our position that it
14 required a more government-to-government-specific
15 inquiry and communication with the tribe itself rather
16 than sending out a mass mailing like this to all the
17 tribes.

18 I mean, I don't think that it's the kind
19 of mailing that would have been sent to the State of
20 South Dakota, or if this had been another government,
21 to the Government of Mexico. You wouldn't send a
22 letter to 17 or 21 different countries, a form letter
23 asking for comments regarding activity that affects
24 them both. We think that the government-to-government
25 relationship requires more.

1 CHAIR GIBSON: Okay.

2 MR. FRANKEL: Your Honor, David Frankel.
3 Can I add to it with a --

4 CHAIR GIBSON: Yes.

5 MR. FRANKEL: -- material view?

6 CHAIR GIBSON: Yes.

7 MR. FRANKEL: David Frankel for
8 Consolidated Intervenors.

9 Your Honor, the notion that a letter
10 asking the Tribe to just go gather up its religious
11 and cultural resources, which tribal members feel are
12 their most precious and sacred things that they pass
13 down through oral tradition, through cultural
14 training, through ceremony, it's not taken lightly,
15 and this is an area where we have a little bit of a
16 disconnect between the cultural views of the Applicant
17 and the NRC Staff as non-Natives on the one hand and
18 the cultural views of the Consolidated Intervenors and
19 tribal members on the other hand, is that for the
20 Tribe to even accommodate such requests, which it's
21 not obligated to do as a government-to-government
22 sovereign in relations, the Tribe would go to various
23 elders and family members and in effect conduct a kind
24 of ethnographic survey to obtain this information,
25 highly detailed and time intensive.

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1 And so a consultation process, for it to
2 be adequate, would have to involve in-person requests,
3 eye-to-eye meetings, face-to-face meetings, and a
4 series of them that goes way, way beyond an initial
5 written letter of contact to start a NEPA 106
6 consultation process. Thank you, Your Honor.

7 CHAIR GIBSON: Okay. Yes. Mr. Reid, Mr.
8 Frankel, I think we have -- we have a very clear idea
9 of your views about the government-to-government
10 consultation that would be -- that should have been
11 undertaken here, and I think we have a clear idea of
12 the notion of the sovereignty of the tribe vis a vis
13 the federal government.

14 So I would only ask you this: as I ask you
15 the rest of these questions, would you please just --
16 if it's, your answer is going to be the same as it was
17 for the previous one, will you just please say we have
18 the same answer for this one as the last? And if
19 there is something else you want to add, do so, but we
20 don't need to repeat exactly what you said because I
21 assure you the Board has heard what you said. Fair
22 enough?

23 MR. REID: Yes.

24 MR. FRANKEL: Your Honor, David Frankel,
25 Consolidated Intervenors. Perhaps we could clarify

1 something at the outset and then we will follow your
2 process, Your Honor.

3 CHAIR GIBSON: Yes sir.

4 MR. FRANKEL: You stated that the Board is
5 well aware of the nature of the government-to-
6 government relation. I thank you for that.

7 I would also suggest that part of my
8 answer had to do with non-governmental cultural views
9 and cultural resources, which is a slightly different
10 thing, a very important distinction between that and
11 sovereignty and government-to-government. The
12 government-to-government, you know, rights and
13 benefits are held by the Government of the Oglala
14 Sioux Tribe, and the cultural resources, information
15 and the religious information, that's held by the
16 tribal members and the tribe as a whole.

17 So I wanted to make that distinction, and
18 with that, I'd be happy to answer "same, same" as much
19 as possible.

20 CHAIR GIBSON: Very well, very well. That
21 -- I thank you for that clarification, Mr. Frankel,
22 and yes, we -- but I do assure you, the Board has
23 heard what you said. I am -- we are just -- we've got
24 a lot to cover, and I want to be sure we cover
25 everything adequately. I just don't want to force you

1 to say the same thing over and over and for us to hear
2 it over and over, fair enough?

3 MR. FRANKEL: Yes sir, Your Honor.

4 CHAIR GIBSON: Okay. Mr. Reid?

5 MR. REID: Yes, Your Honor.

6 CHAIR GIBSON: Okay, great.

7 Okay. Let's go to the next one. The
8 Applicant and the Staff claim that on May 12, 2011,
9 the NRC sent letters to 24 tribes, including your
10 client, inviting them to attend an informal
11 information-gathering meeting and a site visit on June
12 7-9, 2011, at the Pine Ridge Reservation in South
13 Dakota.

14 They also claim that the letter included
15 a CD with publicly available archaeological surveys
16 for the Crow Butte project area and a map of the
17 project area.

18 Now, first of all, Mr. Reid, you don't
19 deny that your client received this letter and
20 enclosures, do you?

21 MR. REID: No.

22 CHAIR GIBSON: Okay. Next, the Applicant
23 and the Staff claim that the tribe, along with five
24 other tribes, attended the June 2011 meeting and site
25 visit. You don't deny that your client attended this

1 meeting and site visit, do you?

2 MR. REID: No.

3 CHAIR GIBSON: Okay. The Applicant and
4 the Staff also claim that the NRC staff met on June 8,
5 2011 with the Tribal Historic Preservation Officers to
6 gather information. Did the Tribe's Historic
7 Preservation Officer participate in this meeting?

8 MR. REID: It's before my time, but I
9 believe he did.

10 CHAIR GIBSON: Okay. Now the Applicant
11 and the Staff maintain that these June 2011 meetings
12 were at least in part sufficient consultation under
13 the National Historic Preservation Act. Why do you
14 maintain they are wrong? Mr. Reid.

15 MR. REID: I have the same answers that I
16 -- same response that I previously gave, with this one
17 addition. And again, I won't repeat myself from what
18 I commented earlier.

19 But I would simply incorporate the
20 previous comments I made regarding the manner in which
21 site visits are conducted that it has to be culturally
22 sensitive and respectful of the ways of the Oglala
23 Lakota in terms of assessing these interests,
24 particularly their spiritual and religious interests,
25 and that might require a site visit on different days,

1 times of the years, and different times of the day,
2 and also involve different people than were there on
3 these site visits.

4 So I think it's incomplete and it's
5 inadequate in regards to the Oglala Sioux Tribe for
6 that reason.

7 CHAIR GIBSON: Mr. Frankel?

8 MR. FRANKEL: I -- David Frankel for
9 Consolidated Intervenors. I also will not repeat my
10 prior answers, but I do have insight into why this is
11 not sufficient.

12 The May 2011 meeting advertised the
13 meeting as an "informal informational meeting." I
14 believe that more than just Crow Butte was there, and
15 it was to discuss uranium mining in the area
16 generally.

17 As for the meeting attended by the THPO,
18 June 2011, to gather information, I think it's
19 important to remember that tribal members and tribal
20 government people tend to take what the United States
21 representatives say literally. They were invited to
22 an informal information meeting, not a formal
23 consultation meeting of any kind.

24 There is some very insightful testimony in
25 the NRC transcript from the Powertech Dewey-Burdock

1 hearing from last August, 2014, when the THPO Mike
2 CatchesEnemy testified as to his understanding as a
3 tribal staff member engaged in lower-level talks with
4 like-level NRC representatives. It does not
5 constitute consultation for purposes of the tribe's
6 understanding, and that they would expect President-
7 to-President or Secretary-of-State-to-President kind
8 of contacts for it to be an official government-to-
9 government consultation, so I think there is an NRC
10 record, and I could look up that cite for you if you
11 need in the ML ADAMS, but it's in the records,
12 clearly, the tribe's THPO testifying as to the tribe's
13 perspective on the distinction between lower-level
14 administrative meetings and upper-level government-to-
15 government consultations. Thank you.

16 CHAIR GIBSON: Okay. Next, on January 19,
17 2012, the NRC Staff sent a letter to the Tribe along
18 with 23 other tribes inviting them to attend a meeting
19 on February 14-15, 2012, to continue ongoing
20 consultation and discuss potential traditional
21 cultural properties, which I think most people call a
22 TCP study.

23 You don't dispute, Mr. Reid, that your
24 client received this letter, do you?

25 MR. REID: No.

1 CHAIR GIBSON: Okay. And the NRC Staff
2 alleges that the Tribe, along with 18 other tribes,
3 attended the February 14-15 2012 meetings. You don't
4 dispute that representatives of the Tribe attended
5 these meetings, do you?

6 MR. REID: Again, it's before my time. I
7 don't have that information. Maybe Mr. Frankel does.
8 But I would think that that's correct.

9 CHAIR GIBSON: The Applicant and the Staff
10 maintain that these February 2012 meetings were at
11 least in part sufficient consultation under the
12 National Historic Preservation Act.

13 Mr. Reid, are there any reasons why you
14 think they're wrong, other than the ones you've
15 previously told us about for these other meetings?

16 MR. REID: Yes, it would be the same
17 response, with the addition that I -- if one of these
18 later meetings, or several of these later meetings --
19 again, they were more general discussions that
20 involved not only the Crow Butte site, but I believe
21 the Dewey-Burdock site. There were tribes that were
22 there that didn't have the specific interest or the
23 degree of interest of the Oglala Sioux.

24 It watered down to processing and
25 confusions, and it's not, again, it's not the

1 government-to-government communication that is
2 expected by the Tribe.

3 CHAIR GIBSON: Thank you. Mr. Frankel?

4 MR. FRANKEL: Your Honor, David Frankel
5 for Consolidated Intervenors.

6 One, I have no information solicited by
7 Mr. Reid concerning the tribal attendance. I do not
8 represent the Tribe in this matter, so I was not
9 privy.

10 Number two, I have no add-ons to my prior
11 comments.

12 CHAIR GIBSON: Thank you.

13 Next, on October 31, 2012, the Staff
14 invited all of these tribes to complete a traditional
15 cultural properties field survey of the Crow Butte
16 facility. Mr. Reid, you don't dispute that this
17 invitation was extended to the Tribe, do you?

18 MR. REID: No.

19 CHAIR GIBSON: Okay. Counsel for the NRC
20 Staff, in your answer, you indicated that the Santee
21 Sioux Nation and the Crow Nation submitted a report to
22 the NRC concluding that there were no eligible sites
23 of cultural or religious significance to the tribes,
24 is that correct?

25 MR. CYLKOWSKI: That is correct, Your

1 Honor.

2 CHAIR GIBSON: Okay.

3 MR. CYLKOWSKI: This is David Cylkowski.

4 CHAIR GIBSON: Thank you, thank you, Mr.
5 Cylkowski.

6 When I read that, it -- I got the
7 impression that these tribes reviewed the currently
8 licensed Crow Butte site and that the tribes found no
9 places of significance there. In fact, however, these
10 tribes did not conduct field investigations at the
11 existing licensed area, did they?

12 MR. CYLKOWSKI: Your Honor, I believe that
13 the survey was conducted over the licensed area and
14 the expansion areas. I can pull up the survey to
15 verify that.

16 CHAIR GIBSON: Okay, very well. Well we
17 -- before the day is up, we would like to have an
18 answer to that.

19 MR. CYLKOWSKI: Of course, Your Honor.

20 MR. FRANKEL: Your Honor, David Frankel
21 for Consolidated Intervenors. I am having a very
22 difficult time making out what Counsel for NRC Staff
23 is saying. I don't know if there's a microphone
24 issue, but Mr. Cylkowski, if you could find a way to
25 be less muffled, it would be helpful.

1 MR. CYLKOWSKI: Is this any better?

2 MR. FRANKEL: Yes, thank you.

3 MR. CYLKOWSKI: Okay, thank you.

4 CHAIR GIBSON: Mr. Cylkowski, we would
5 like to have an answer to that before the day is up.

6 The -- to the extent that the Santee Sioux
7 Nation and the Crow Nation's Traditional Cultural
8 Properties Field Survey opined about the significance
9 of anything, it did not do so with respect to anything
10 that might lie on the specific site where Crow Butte
11 is currently operating, is that correct? Counsel for
12 the NRC Staff?

13 MR. CYLKOWSKI: Your Honor, I am having
14 trouble understanding what -- is this -- this is
15 different from the question you previously asked?

16 CHAIR GIBSON: That had to do with whether
17 they actually went on there. The first one has to do
18 with what did they -- where were they when they looked
19 at the cultural properties? The second one is did
20 they opine about the significance of anything that
21 lies on the area where Crow Butte is currently
22 operating?

23 MR. CYLKOWSKI: Your Honor, I will have to
24 verify that for you at the same --

25 CHAIR GIBSON: Please do.

1 MR. CYLKOWSKI: Of course. I am looking
2 into that now.

3 CHAIR GIBSON: Thank you.

4 Although the Santee Sioux Nation and the
5 Crow Nation found no sites eligible for listing on the
6 National Register, Counsel for the NRC Staff, they did
7 find 13 places of potential religious or cultural
8 tribal significance, is that correct?

9 MR. CYLKOWSKI: Yes, Your Honor.

10 CHAIR GIBSON: 12 of those were in the
11 Marsland Expansion Area, and one was in the Three Crow
12 Expansion Area, is that correct?

13 MR. CYLKOWSKI: That appears to be
14 correct, Your Honor, yes.

15 CHAIR GIBSON: Mr. Reid, I am curious why
16 the Santee Sioux Nation and the Crow Nation studies,
17 which were conducted by different tribes on different
18 land, would have any relevance to your contention in
19 this proceeding. Could you help us with that?

20 MR. REID: Well, the only -- it's -- you
21 could see that in Dr. Redmond's report, for example,
22 the relevance would be that these are areas that were
23 frequented by the -- by numerous tribes, but
24 obviously, the ones that were closer to the area,
25 which would include the Oglala Lakota, were the ones

1 that would have frequented this area the most.

2 The relevance is merely the -- at least
3 the facial indication that there are these sites
4 within the immediate area. I believe Marsland is
5 within 11 miles, and Three Crows is within two miles,
6 maybe, of the Crow Butte site, so I think that it's an
7 indication of the existence of these areas and that --
8 which might have been discovered had they been -- had
9 the survey been done according to the traditions and
10 the ways of the Oglala Sioux Tribe.

11 CHAIR GIBSON: You know, you raise an
12 excellent point. Mr. Smith, just, could you help us
13 out? I realize that you're not too involved in the
14 consultation process, yourself or your client, but
15 could you help us out with the distances here, how far
16 it is from the existing license area that is the
17 subject of this renewal application from the Marsland,
18 the -- I believe it's Three Crows, and the area that
19 you're proposing to do some operation with the
20 amendment --

21 MR. SMITH: Sure, sure. So the -- I am
22 not sure about the miles specifically, but I think Mr.
23 Reid's description of, you know, 11 miles or so from
24 Marsland is right. That is the one that's the
25 farthest away from the current permitting area. It's

1 on the other side of a topographic high.

2 Three Crow is, let's say if you imagine a
3 triangle around the town of Crawford, well in the
4 lower right-hand corner, you've got the current permit
5 area; at the upper point, you've got the North Trend
6 Area; and then at the lower left-hand you've got Three
7 Crow. So they are kind of all a little bit of an
8 equilateral triangle around the town of Crawford
9 within a couple of miles.

10 CHAIR GIBSON: And how about the North
11 Trend Expansion Area?

12 MR. SMITH: That's just a couple of miles
13 away on the other side of the town of Crawford --

14 CHAIR GIBSON: Okay.

15 MR. SMITH: -- from the current permitting
16 area -- current permitted area.

17 CHAIR GIBSON: Thank you. Counsel for the
18 NRC Staff, I am curious why the study of the Santee
19 Sioux Nation and the Crow Nation would be relevant to
20 this proceeding if it turns out that the areas that
21 they studied were not in the current permit area.

22 MR. SMITH: Judge Gibson, this is Tyson
23 Smith --

24 CHAIR GIBSON: Yes.

25 MR. SMITH: If I could just answer your

1 question earlier, I believe at least a part of it was
2 that the Santee Sioux Nation and the Crow Nation, they
3 did a walkthrough of the main Crow Butte project, but
4 because of the construction that had already been
5 there and the area was generally disturbed, they
6 didn't -- it didn't seem as though they did any more
7 detailed studies of the site. So they did have it
8 available and they did take a walkthrough of it, but
9 perhaps they didn't do further additional studies.

10 And again, as noted previously, there had
11 been identified a number of potentially significant
12 sites at the Crow Butte project that were either
13 avoided or subject to other -- or outside the current
14 mining area.

15 CHAIR GIBSON: Mr. Smith, thank you for
16 that clarification. Let me see if I could just put
17 that in my own words.

18 So the Santee Sioux Nation and the Crow
19 Nation, to your understanding, were physically present
20 at the current permit area, but they did not do any
21 sort of in-depth analysis. It was sort of just a
22 rooftop walkthrough because there was construction
23 equipment and other things out there, and it would
24 have been practically extremely difficult for them to
25 do so, but they did a more in-depth analysis of some

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1 of these other areas. Is that a fair assessment?

2 MR. SMITH: Yes, I think I would -- I
3 think that's a fair assessment although I'd
4 characterize it a little bit different in that the
5 other three sites are not currently developed for in
6 situ recovery operations, whereas the current permit
7 area is.

8 So the tribes go out to these other areas
9 that are essentially open fields, some are
10 agricultural, some are unused lands, and there it's
11 easy to go out, walk around, cover the ground, do
12 your, you know, your walkthrough and look for TCPs.

13 At the main site, well, it's obviously an
14 operating facility. There is already not just
15 equipment, but the site has been disturbed, there's
16 roads, et cetera, and so they did not see, apparently,
17 did not see much value in doing the detailed survey
18 there given that there already had been cultural
19 resources and sites identified and they had access to
20 those. That was the reports -- the archaeological
21 surveys done in the '80s and so on. So I think based
22 on that they decided they didn't need to do, or it
23 wasn't warranted to do, an in depth walkthrough of the
24 current permit site.

25 CHAIR GIBSON: Okay, okay.

1 MR. CYLKOWSKI: Your Honor, this is David
2 Cylkowski, Your Honor. That is correct based on my
3 reading right now of the Santee Sioux Nation report,
4 that they did a walkthrough, and then they explain,
5 obviously they detail -- they provide more detail for
6 the results of their surveys of the expected expansion
7 areas, but they do discuss a walkthrough of the main
8 facility area, and they state that given previous
9 disturbance from prior construction, the walkthrough
10 was all that was done.

11 CHAIR GIBSON: Okay.

12 MR. REID: Your Honor, this is Andrew Reid
13 from the Tribe, may I --

14 CHAIR GIBSON: Yes, Mr. Reid.

15 MR. REID: The -- it is my understanding
16 that the expansion areas have had thousands of
17 exploration and development holes drilled. It's not
18 that they're undisturbed.

19 Also, the Crow Butte area, the facility
20 itself, it's my understanding, will remain, but as I
21 understand the representations of Crow Butte, is that
22 that's pretty much mined out and that they're
23 expecting to shut down, or they may have already done
24 so in December of 2014, and certainly in 2015, and
25 begin the restoration, which would also include the

1 surface restoration which would make those areas more
2 available for spiritual and religious practices.

3 The other thing I'd mention is that the --
4 part of the relevance of these other locations is
5 that, like, if you've ever been to Devils Tower or
6 Bear Butte, there are restrictions on traffic and
7 times of visits and so forth because they interfere
8 and inhibit the practices of -- religious practices of
9 the Native people in those areas.

10 The trafficking that's related to these
11 other areas and to Crow Butte specifically would have
12 -- would run a risk of interfering with the religious
13 access and practices of the members of the Oglala
14 Sioux Tribe to these areas for religious purposes.

15 CHAIR GIBSON: Okay.

16 MR. FRANKEL: Your Honor, David Frankel.
17 Might I interject briefly?

18 CHAIR GIBSON: Yes, as long as it's
19 material, Mr. Frankel.

20 MR. FRANKEL: It is material and not
21 duplicative.

22 I just would like to point out that Dr.
23 Redmond has opined that this entire area has not been
24 very well studied, and there's a lack of research,
25 written research, which puts much greater importance

1 and emphasis on in-depth field studies, including
2 subsurface testing that he has referenced in his
3 opinion. Thank you.

4 CHAIR GIBSON: Okay, very well. All
5 right.

6 Counsel for the NRC Staff, I take it
7 you're familiar with Intervenors' argument that the
8 Tribe did not participate in the survey or engage in
9 discussions with the NRC because the regulations
10 associated with these statutes are highly technical,
11 and so it is much too much to expect a non-lawyer
12 tribal representative to be able to do this without
13 the assistance of a trained attorney, and that any
14 consultation that occurred during this time, the tribe
15 was unrepresented by counsel, has to be considered not
16 meaningful as a matter of law. What do you think of
17 that argument, Counsel for the NRC Staff?

18 MR. CYLKOWSKI: Yes, Your Honor, this is
19 David Cylkowski.

20 I am familiar with that argument, but
21 there is no requirement, there is no legal requirement
22 that the NRC ensures that tribes or any other
23 consulting party is represented by an attorney in NHPA
24 consultations or in even NEPA information-gathering
25 activities, and furthermore, the -- the regulations

1 and the guidance that govern consultation activities,
2 the arguments do not show that those are so technical
3 or so complex as to require representation by an
4 attorney.

5 Representation is certainly not universal,
6 and in many cases, requiring every tribe to have -- to
7 be represented by an attorney would actually hinder
8 the consultation process. It would add cost, it would
9 add time, and because the goal of consultation is to
10 -- to discuss the tribal knowledge of cultural and
11 religious resources with the tribal members that have
12 that knowledge, it's not clear how an attorney -- how
13 requiring an attorney would be helpful.

14 CHAIR GIBSON: Mr. Cylkowski, you're
15 cutting out again on us.

16 MR. CYLKOWSKI: I -- why don't I call --
17 I will try to hang up and call back in and see if that
18 makes it any clearer.

19 CHAIR GIBSON: Okay. Ms. Simon, I assume
20 you can handle the argument until he gets on the
21 phone?

22 MS. SIMON: Your Honor, this is Marcia
23 Simon. I will do my best.

24 CHAIR GIBSON: Thank you. I am sure you
25 will.

1 Very well. Mr. Reid, I think that you've
2 heard what Mr. Cylkowski said: NRC rules don't require
3 this, and that, you know, it's not required for
4 meaningful consultation.

5 And while I think we can all appreciate
6 that navigating the federal government's regulations
7 can be a challenge for even the most sophisticated
8 person, even though -- it seems that even though the
9 Tribe was very concerned that there might be eligible
10 sites of cultural or religious significance on the
11 Crow Butte site, that they didn't -- it did not
12 undertake its own traditional cultural properties
13 field survey of the Crow Butte facility.

14 Why -- why was that not done? Was it just
15 money?

16 MR. REID: As I understand it, and again,
17 I was not of counsel at that time, but as I understand
18 it, it was largely money, you know, that the Tribe
19 could not afford to pay the fees of counsel to advise
20 it on that issue.

21 And we've already heard one example from
22 Mr. Frankel as to the result of that, Mike
23 CatchesEnemy, who testified that it was their
24 understanding that these informal meetings or
25 communications with the NRC did not create the

1 obligation of a formal response of the nature that
2 you're stating.

3 I think also that the Tribe really felt
4 that these procedures are alien and that without a
5 counsel who was familiar with the non-Indian way of
6 approaching these issues and familiar with deadlines
7 and legal obligations to respond and so forth, without
8 that kind of counsel, the tribes within their own
9 cultural perspective don't have a full awareness or
10 appreciation of their obligations.

11 I do believe that the -- that the
12 government had a trust response, assumed trust
13 responsibility, to ensure that the Tribe's cultural
14 approaches and that their traditional understandings
15 and so forth of approaching these issues and
16 understanding their obligations, that they had a trust
17 responsibility to convey that, completely convey that,
18 to the Tribe, and that was not done.

19 CHAIR GIBSON: Okay.

20 MR. FRANKEL: David Frankel for
21 Consolidated Intervenors, Your Honor. Might I, with
22 a material addition?

23 CHAIR GIBSON: Yes, Mr. Frankel.

24 MR. FRANKEL: Thank you, Your Honor.
25 David Frankel for Consolidated Intervenors. I have

1 just three succinct points.

2 One is if the Board were to look at the
3 transcript from the Powertech Dewey-Burdock hearing
4 from last August, they would see that the cost of the
5 TCP surveys in that case were said to range from the
6 low end of \$250,000 that the company chose to a high
7 end of over \$1,000,000 if the Tribe's preferred TCP
8 survey had been done, so you can see we're talking
9 about a quantum of money here that goes several
10 factors beyond the stipends that were offered by the
11 company. So there was -- the cost of the TCPs is
12 probably a major factor in why the Tribe did not do
13 it.

14 Number two, you also find out, if you look
15 at that transcript, Mr. CatchesEnemy describes that
16 the THPO Office did not even exist when the tribes
17 were first contacted back in 2007-2008 in connection
18 with the Crow Butte North Trend and Crow Butte
19 renewals, and that their office is a new office at the
20 Tribe, which was only partially funded to start.

21 The transcript details Mr. CatchesEnemy's
22 history with the THPO's Office and how for much of
23 that time, their officers are part-time and not
24 compensated and that they wait for funding, so I think
25 you need to look at the actual functioning of that

1 office for an indication of why the Tribe didn't do
2 its own THP.

3 Third and final point is that the main
4 reason I believe that criminal defense lawyers are
5 appointed to represent defendants in plea bargains,
6 for example, is so that the government can be assured
7 of having a binding agreement, and that whether or not
8 there was an applicable law and regulation that
9 required the NRC to see that its opposition in
10 negotiations towards agreements were represented, the
11 failure of them to do so really undermines their
12 ability to rely on any bindingness on behalf of the
13 Tribe.

14 Binding promises and binding agreements
15 can only be made by a person who had informed consent,
16 and I think the fact that we have somewhere between
17 eight and ten attorneys on this call and no basic
18 agreement on what the nature and extent of the
19 consultation rules are shows that this is an area
20 fraught with legal issues that requires competent
21 counsel for tribes to be held to binding agreements
22 concerning consultations.

23 Thank you.

24 CHAIR GIBSON: Okay. Counsel for the NRC
25 Staff, is your understanding of the cost of a -- one

1 of these TCP studies, does that sound about right to
2 you, somewhere between \$250,000 and \$1,000,000?

3 MS. SIMON: Your Honor, this is Marcia
4 Simon. I just want to check if Mr. Cylkowski is back
5 on the line.

6 MR. CYLKOWSKI: I am, I just joined again.

7 MS. SIMON: Okay. Did you hear the
8 question, Mr. Cylkowski?

9 MR. CYLKOWSKI: I did hear the question.

10 I am not familiar with -- I am not
11 familiar enough with the range of costs of TCP surveys
12 to answer that here, but I can find that answer for
13 you.

14 MS. SIMON: Your Honor, this is Marcia
15 Simon, if I could just --

16 CHAIR GIBSON: Sure.

17 MS. SIMON: -- state that for the purposes
18 of this particular TCP survey, as outlined in our
19 brief, you can see that Camico offered to pay per diem
20 and mileage and also a \$10,000 honorarium to each
21 tribe that participated --

22 CHAIR GIBSON: Yes.

23 MS. SIMON: -- and the actual cost of
24 walking the site, I don't know that there was a lot of
25 cost involved in walking the site as I believe the

1 Santee Sioux and Crow Nations did, and so it's not
2 clear to me why this particular TCP walkthrough would
3 have cost anywhere near those amounts of money.

4 CHAIR GIBSON: Fair enough. Mr. Frankel,
5 Mr. Reid, do either of you have anything that you can
6 help us out with in terms of the cost?

7 MR. FRANKEL: Yes, of course, Your Honor,
8 David Frankel for Consolidated Intervenors.

9 I think you'll find some great testimony
10 by experts for both the mining company and the
11 intervenors in the Powertech case, and I'm sure your
12 clerk can help you find the transcript, but the point
13 of fact is that the kind of TCP surveys that we're
14 talking about that tribal people would expect to
15 protect their interests include ethnographic surveys,
16 it includes talking with elders, as Mr. Reid discussed
17 it includes talking circles, it includes a series of
18 meetings and outreach that are described in what he
19 referred to as a Burger analysis.

20 The point being that it is -- that when
21 Ms. Simon looks at the tip of the iceberg and says
22 it's a small piece of ice, you should be able to cover
23 it quickly, here's a \$10,000 stipend and some gas
24 money, it might seem reasonable to the NRC Staff, but
25 the Natives don't see a tip of the iceberg, they see

1 the whole iceberg, and they think about what it would
2 take to look through their history and family
3 histories looking into where people were buried, where
4 they died, where was there an epidemic in the oral
5 history, looking at those low-lying springs and
6 wetland areas, you know, campsite areas. These are
7 all areas that professional archaeologists and tribal
8 elders will get together on, and so you can see that
9 even the most conservative estimates to do a proper
10 TCP survey by the professionals hired by the mining
11 company come out at the low end of \$250,000, and this
12 is not hard to verify. I'd be happy to submit a post-
13 hearing briefing on the issue if I would be helpful.

14 MR. ELLISON: In addition, this is Bruce
15 Ellison, also for Consolidated Intervenor, just a
16 couple of quick points.

17 I believe that Dr. LaGarry also referenced
18 shallow ground penetrating radar that could be used to
19 find sites that were below the surface, and thus a
20 surface walkthrough would not necessarily reveal.

21 In addition, I think it's also important
22 for the Board to understand that the Santee Sioux and
23 the Crow are probably of the tribes that are being
24 affected, and certainly in relationship to the Oglala
25 Sioux Tribe, have the least contact with this area and

1 significantly less contact than the Lakotas do, the
2 Sioux do.

3 And I think that that's an important point
4 in terms of how a different tribe, or in this case the
5 Oglala Sioux Tribe and its members, would look at what
6 would be needed to really do an adequate survey for
7 basically their history and ceremonies and whatnot in
8 relationship to this particular land.

9 CHAIR GIBSON: Very well, okay.

10 I've just got a few more questions about
11 the -- and then I'd like to take a break for maybe,
12 you know, five or ten minutes, so let's if we can get
13 back to those.

14 Mr. Reid, on September 30, 2013, the NRC
15 Staff posted its Section 106 documentation for the
16 project on its website and requested comment with
17 emails being sent to consulting parties and notices
18 filed in this proceeding.

19 You don't dispute that the Tribe received
20 these emails, do you?

21 MR. REID: If that's a representation of
22 the NRC Staff, no, I do not dispute it.

23 CHAIR GIBSON: Okay. And according to the
24 NRC Staff, it received no comments from the Tribe on
25 the 106 documentation that it posted for the project

1 on its website.

2 Why did the Tribe not provide any
3 comments?

4 MR. REID: I don't have anything further
5 to add to the other responses. It was a lack of
6 counsel, a lack of understanding of the tribal
7 obligations in that regard.

8 In regard -- as Mr. Frankel remarked also,
9 the inexperience of the Tribal Historic Preservation
10 Officer, and I believe that there was also a change in
11 staff about that time.

12 You know, I -- I don't have anything
13 further to say other than what's already been stated
14 in that regard.

15 CHAIR GIBSON: Fair enough.

16 On October 2013, the Tribe as well as
17 other tribes who participated at some level in this
18 process received a copy of the NRC's preliminary
19 documentation of its NHPA review for the Crow Butte
20 license renewal.

21 Mr. Reid, you don't dispute that the Tribe
22 was provided with this documentation, do you?

23 MR. REID: Not if that's a representation
24 of the Staff, the NRC Staff.

25 CHAIR GIBSON: Okay.

1 MR. REID: I do not.

2 CHAIR GIBSON: And again, the Tribe
3 provided no comment to the Staff on its preliminary
4 documentation of its NHPA review for the license
5 renewal. Do you know why?

6 MR. REID: Again, I have no further
7 response other than that the Tribe did not understand
8 the nature of its obligations and that it triggered --
9 and that's in addition, in making these responses, I
10 do mean to incorporate all the previous comments that
11 we made in regards to how the Tribe would have
12 approached this issue and that it was not a method or
13 a process that was familiar with the Tribe and that
14 was culturally sensitive and respectful of the Tribe's
15 way of assessing these interests, and it was also not
16 a government-to-government communication.

17 CHAIR GIBSON: Very well.

18 All right. I would -- let's take a five
19 minute recess, and we will be back on at noon Eastern
20 Standard Time. Thank you.

21 (Whereupon, the above-entitled matter went
22 off the record at 11:54 a.m. and resumed at 12:00
23 p.m.)

24 CHAIR GIBSON: All right. We're back on
25 the record. Judge Hajek, I believe you had a question

1 you wanted to ask. You may not be back on the record.
2 Judge Hajek, are you there? Judge Hajek? Maybe he
3 hit mute and doesn't realize he hit it. Judge Hajek?
4 All right. Very well. We will proceed, and I'll try
5 to get back to him when we can.

6 Counsel for the NRC staff?

7 JUDGE HAJEK: I'm back, Mike.

8 CHAIR GIBSON: Oh, Judge Hajek, you had a
9 question you wanted to ask.

10 JUDGE HAJEK: I do. My questions concern
11 the contact that was made, and Mr. Reid indicated
12 that, as I understand, he was not really on board at
13 the time that some of these communications had gone
14 back and forth. But my first question would be to the
15 staff. Well, no, I'm sorry. My first question would
16 go to Mr. Reid and Mr. Frankel, either one of them,
17 because the comment was made that back in 2007 and
18 2008 the tribe's PO office had not been established.
19 So was this -- or the TCP office had not been
20 established. Had it been established in 2011 - 2012,
21 at the time that these requests went out? And who was
22 designated on the part of the tribe to be responsible
23 for responding to these requests to participate in the
24 survey?

25 MR. FRANKEL: David Frankel for

1 Consolidated Intervenor, your Honor. If I might
2 answer the Judge's question, I believe that the two
3 involved individuals that had been the THPOs since the
4 formation of that office, Mr. Wilmer Mestheth who,
5 unfortunately, passed away recently, but he did
6 testify at the Powertech hearing in August, and also
7 his successor, Mr. Michael Catches Enemy, who's
8 currently the THPO. In that hearing transcript that
9 you can see, Mr. Catches Enemy describes being part-
10 time at a certain point and also that Mr. Mestheth was
11 also either part-time or completely uncompensated and
12 that the functions of that office depended on certain
13 graphs.

14 I am not privy to the exact time line. I
15 do know that the office had been formed, meaning it
16 did exist in the time frame that you asked about, 2011
17 - 2012, but I do not know if it was funded, if it had
18 any employees, or if it was, more or less, a defunct
19 office waiting for financing. And perhaps the tribe
20 could submit that information after the hearing. I'm
21 not sure it's accessible to Mr. Reid, and it's
22 definitely not accessible to myself. Thank you.

23 JUDGE HAJEK: Okay. And then a follow up
24 for the staff. Are these the individuals to whom the
25 requests were sent to participate in the surveys?

1 MR. CYLKOWSKI: Your Honor, I think this
2 also might go back to an earlier question from, I
3 believe it was Judge Gibson. The 2008 -- January 2011
4 invitation to the consultation from us was, that first
5 letter was sent to Teresa Two Bulls, who, I believe,
6 was our president of the tribe at the time. And to go
7 back to a previous question, that letter was sent at
8 the division director level.

9 CHAIR GIBSON: Mr. Cylkowski, you're
10 cutting out on us again.

11 MR. CYLKOWSKI: Teresa Two Bulls, who is
12 listed as the president of the tribe, that was in
13 January 2011. And subsequent letters were sent to
14 Wilmer Mestheth, I see James Waysbad listed as a THPO,
15 and other letters addressed to Tribal Historic
16 Preservation Officer generally.

17 JUDGE HAJEK: Okay, thank you. Did you
18 receive and do you have record of receiving a response
19 to those letters?

20 MR. CYLKOWSKI: Your Honor, I would have
21 to check to see which letters we have record of
22 responses to and who those came from. I don't have
23 that in front of me.

24 CHAIR GIBSON: Would it be possible to put
25 that together, submit it to the Board after this?

1 MR. CYLKOWSKI: Absolutely, your Honor.

2 CHAIR GIBSON: Thank you.

3 JUDGE HAJEK: Okay. And then there's a
4 final follow up. Did they specifically decline to
5 participate in the surveys?

6 MR. CYLKOWSKI: My understanding, your
7 Honor, is that no response was received, not that the
8 staff received a letter declining to participate.

9 JUDGE HAJEK: Okay. And then my final
10 question would be, since they did not decline, nor did
11 they agree, to participate, does that satisfy the
12 staff's requirement for consultation?

13 MR. CYLKOWSKI: Your Honor, what's
14 required for consultation is to give a tribe the
15 reasonable opportunity to participate in consultation.
16 And given, at the point of soliciting participation in
17 the surveys, the consultation had been going on for at
18 least a couple of years, around a couple of years, to
19 continue that process by sending a letter to the
20 Tribal Historic Preservation Office, we submit, does
21 provide that reasonable opportunity and satisfies the
22 requirements.

23 JUDGE HAJEK: Mr. Reid and Mr. Frankel, my
24 understanding is that you would not agree with NRC
25 counsel's statement that that satisfies the

1 requirement for consultation.

2 MR. REID: This is Mr. Reid from the
3 tribe. No, because it gives a reasonable opportunity
4 within the terms set by the NRC, not within the
5 understanding and needs of the tribe to conduct the
6 survey.

7 MR. FRANKEL: David Frankel for
8 Consolidated Intervenors. In addition to what Mr.
9 Reid said, we strongly assert that silence can never
10 equal assent or consent, and it does not signify
11 assent or consent, and that it is a violation of the
12 trust responsibility for the NRC staff to interpret
13 silence as assent or consent. Thank you.

14 MR. CYLKOWSKI: Your Honor, this is David
15 Cylkowski, if I may respond specifically to Mr.
16 Frankel's point. And I know that this issue is a
17 subject of contention, as well, whether consent or
18 assent is required. And we maintain that, under the
19 law, consent is not required as part of the
20 consultation process.

21 The UN Declaration of Rights of Indigenous
22 Persons is not a binding document. The United Nations
23 itself says it's not a binding document. The ACHP
24 guidance on how to fulfill consultation obligations
25 specifically states that consent is not a required

1 element.

2 What is required is that the agency
3 provides a reasonable opportunity to participate in
4 consultation. And we submit that was complied with
5 here.

6 CHAIR GIBSON: Very well. I want to,
7 before we get onto our next line of inquiry, Mr.
8 Frankel, you made specific reference to two or three
9 individuals. And if our court reporter was able to
10 understand how to spell their names, he's certainly
11 much more adept than I. So for the benefit of all of
12 us, could you please spell the names of the
13 individuals to whom you were referring?

14 MR. FRANKEL: Yes. David Frankel from
15 Consolidated Intervenors, your Honor. Mr. Wilmer, W-
16 I-L-M-E-R, Mestheth, M-E-S, like Sam, T-H-E-T-H,
17 Mestheth. Mr. Mestheth, as I said, unfortunately
18 passed away. He testified in the Powertech hearing.

19 (Telephone connection interrupted.)

20 I think it's a very simple and a very
21 straightforward position. The NRC staff notified the
22 parties and the judges and all of the interested
23 consulting parties that they had published their draft
24 Section 106 documentation, made it available to the
25 parties.

1 COURT REPORTER: Your Honor, this is the
2 court reporter. I was disconnected from the call. In
3 the interim, since I've been off, the last thing I had
4 was the spelling of Mr. Mestheth's name. If I could
5 get the spelling of the second individual, that would
6 be very helpful.

7 CHAIR GIBSON: I'm just asking you a
8 simple question, Mr. Smith. Those sections describe
9 cultural resources and impacts, correct?

10 MR. SMITH: Those sections describe
11 impacts to cultural resources, correct.

12 CHAIR GIBSON: And neither section
13 mentions the tribe or the nature and extent of tribal
14 consultations, correct, of your application?

15 MR. SMITH: Of our application you were
16 talking about? That is correct. The consultation,
17 under the National Historic Preservation Act, is an
18 NRC staff or federal agency obligation, not one of the
19 applicant's.

20 CHAIR GIBSON: Okay, thank you.

21 MR. FRANKEL: Your Honor, David Frankel
22 from --

23 CHAIR GIBSON: Yes, Mr. Frankel?

24 MR. FRANKEL: I was surprised that no one
25 cited LBP 1309. It directly contradicts Mr. Smith's

1 argument on timeliness concerning the Section 106
2 documents being published as an interim. So I'm sure
3 the Board is aware of the applicability of LBP 1309,
4 but in that case the Board specifically rejected
5 applicant's arguments identical to the arguments Mr.
6 Smith is making here.

7 JUDGE ROSENTHAL: Very well.

8 JUDGE WARDWELL: Mr. Smith, this is Judge
9 Wardwell, also. Isn't this timeliness a bit trumped
10 by the Commission overturning us and allowing this, in
11 regards to not being right at the time that this
12 contention was initially admitted and stated that it
13 would or at least imply that it would be right once
14 the environmental document was published?

15 MR. SMITH: No, your Honor. The
16 Commission in CLI-09-09 did say that their initial
17 consultation contention was not right because that's
18 a federal agency obligation, not an applicant. But it
19 did note specifically that the issue, a timely NHP
20 contention could be filed upon issuance of a draft
21 document or publication of other agency records
22 documenting the staff's NHPA review. That's exactly
23 what was published by the staff and noticed to the
24 parties earlier in the EA.

25 So I think the NRC staff complied with

1 exactly what the Commission said they should do, and
2 the intervenor party has an obligation consistent with
3 that earlier Commission direction to raise the
4 contentions at that time.

5 JUDGE WARDWELL: Thank you, Mr. Smith.

6 CHAIR GIBSON: Counsel for the NRC staff,
7 in contention two the tribe maintains that it has
8 requested to be involved in the surveys being
9 conducted by Crow Butte and being used by the NRC
10 staff but that it was refused and instead was offered
11 a chance to conduct its own TCP survey at its own
12 expense. Do you disagree with this characterization?

13 MR. CYLKOWSKI: Yes, your Honor. This is
14 David Cylkowski on behalf of the NRC staff. We do
15 disagree that -- that characterization is contrary to
16 the record. It's contrary to the EA's explanation of
17 the consultation process, and there's no citation
18 support to form a basis of that allegation.

19 CHAIR GIBSON: Okay, thank you. Mr. Reid,
20 in contention two, the tribe claims to be the most
21 qualified body to judge the existence and importance
22 of cultural resources on the Crow Butte site but
23 claims that the tribal historic preservation officer
24 has not evaluated the site results recorded by Crow
25 Butte's survey; is that correct?

1 MR. REID: I believe so.

2 CHAIR GIBSON: I think the Board is a bit
3 confused about why the tribal historic preservation
4 officer has not evaluated the site results. First of
5 all, you're not suggesting that he's somehow unwilling
6 to look at them; is that correct?

7 MR. REID: That's correct.

8 CHAIR GIBSON: Okay. So why has the
9 tribal historic preservation officer not evaluated the
10 site results recorded by the Crow Butte surveys? I
11 mean, did he need to be physically present at the time
12 the consultant for Crow Butte conducted the survey?

13 MR. REID: Well, you've asked me two
14 questions. The first one I think we previously
15 addressed, and Mr. Frankel has more knowledge on that
16 than I do. But I think it was a failure to comprehend
17 the obligations and a lack of money, a failure to
18 understand, without the advice of legal counsel,
19 understanding the obligations and deadlines involved,
20 as well as a cultural impasse between the way that the
21 tribe would approach this issue and the way that it
22 was being approached by the NRC staff and Crow Butte.

23 I forgot your second question.

24 CHAIR GIBSON: Did he need to be
25 physically present at the time that Crow Butte's

1 consultants conducted its survey?

2 MR. REID: Well, for it to be legitimate
3 with the tribe, I think so. And it's not the tribal
4 historic preservation officer that necessarily needs
5 to engage in this process. It would be the tribal
6 elders and the spiritual leaders of the tribe that
7 would come out and do that. And I think Mr. Frankel
8 has already addressed the complexity and the extent
9 that that would require a tribe to marshal those
10 assets and get them out to the Crow Butte site to do
11 that. It's not something that the tribal historic
12 preservation officer can handle on his own.

13 CHAIR GIBSON: Okay, very well. Mr.
14 Frankel, Mr. Reid suggested that you may have
15 something material that needs to be added at this
16 point. If you do have something like that, would you
17 please say so?

18 MR. FRANKEL: I believe Mr. Reid was asked
19 if I had knowledge of other facts concerning the
20 operation of that office, and I do not.

21 CHAIR GIBSON: Okay, very well. Thank
22 you. Okay. Counsel for the staff, you've heard Mr.
23 Reid's concerns, Mr. Frankel's concerns. So we need
24 to ascertain whether we have a genuine dispute as to
25 what constitutes a reasonable and good faith effort to

1 seek information from consulting parties, including
2 the tribe, to identify historic properties in an area
3 of concern.

4 In your estimation, has the staff afforded
5 the tribe a reasonable opportunity to identify its
6 concerns about historic properties there?

7 MR. CYLKOWSKI: Absolutely, your Honor.

8 CHAIR GIBSON: Okay. Mr. Reid, in
9 addition to the matters that you have previously
10 identified, are there any other reasons that you
11 maintain the tribe has not been afforded a reasonable
12 opportunity to identify its concerns about historic
13 properties on the site?

14 MR. REID: In addition to the issues of
15 international law that I addressed in my submission,
16 no.

17 CHAIR GIBSON: Thank you. And Mr.
18 Frankel?

19 MR. FRANKEL: I have no additional items.

20 CHAIR GIBSON: Very well. Thank you.
21 Counsel for the NRC staff, in your estimation, has the
22 staff afforded the tribe a reasonable opportunity to
23 advise the NRC on the identification and evaluation of
24 historic properties?

25 MR. CYLKOWSKI: Yes, your Honor.

1 CHAIR GIBSON: Mr. Reid, in addition to
2 the matters you've previously identified, are there
3 any other reasons that you maintain your clients were
4 not afforded a reasonable opportunity to advise the
5 NRC on the identification and evaluation of historic
6 properties?

7 MR. REID: None other than what I just
8 said, including the international arguments.

9 CHAIR GIBSON: And Mr. Frankel?

10 MR. FRANKEL: Nothing additional, your
11 Honor.

12 CHAIR GIBSON: Counsel for the NRC staff,
13 in your estimation, has the staff afforded the tribe
14 a reasonable opportunity to advise the NRC on the
15 identification and evaluation of resources of
16 traditional religious and cultural importance to the
17 tribe?

18 MR. CYLKOWSKI: Yes, your Honor.

19 CHAIR GIBSON: Mr. Reid, in addition to
20 the things you've previously identified, is there
21 anything else that relates to the identification and
22 evaluation of resources of traditional religious and
23 cultural importance to the tribe?

24 MR. REID: It's the same response, and I
25 also, you know, we haven't had a discussion of this,

1 but the American Indian Religious Freedom Act also
2 compels a similar consultation. But I think it's
3 pretty much incorporated within the obligations the
4 government already has under the other law. So other
5 than that, no.

6 CHAIR GIBSON: Mr. Frankel?

7 MR. FRANKEL: Nothing additional, your
8 Honor.

9 CHAIR GIBSON: Okay. Counsel for the NRC
10 staff, in your estimation, has the staff afforded the
11 tribe a reasonable opportunity to articulate its views
12 on the effects of Crow Butte's operation on any NHPA
13 resources?

14 MR. FRANKEL: Yes, your Honor.

15 CHAIR GIBSON: Mr. Reid, in addition to
16 the matters you previously identified, is there
17 anything else that you maintain was not afforded your
18 opportunity, a reasonable opportunity?

19 MR. REID: No, it's the same response I
20 just gave.

21 CHAIR GIBSON: And Mr. Frankel?

22 MR. FRANKEL: Nothing additional, your
23 Honor.

24 CHAIR GIBSON: Counsel for the NRC staff,
25 in your estimation, has the staff afforded the tribe

1 a reasonable opportunity to participate in the
2 resolution of any adverse effects that Crow Butte's
3 operations might have on any NHPA resources?

4 MR. CYLKOWSKI: Your Honor, given that no
5 adverse effects were identified -- I don't want to
6 answer your question in a roundabout way, so I hope
7 I'm not doing that. But given that no adverse effects
8 were identified -- providing the tribe a reasonable
9 opportunity to identify adverse effects; and, if
10 adverse effects had been determined, the tribe would
11 have been provided a reasonable opportunity to
12 participate in resolving those adverse effects.

13 CHAIR GIBSON: We heard, I think, about 90
14 percent of what you said, Mr. Cylkowski, but your
15 phone is still cutting out. I don't know what's
16 wrong, but, your Honor, I think we heard what you
17 said. Essentially, what you said was, since there
18 weren't any adverse effects, there was no need to
19 discuss any resolution of them. So counsel for the
20 tribe, is there anything else, in addition to what you
21 previously said, that bears on this point?

22 MR. REID: The answer would be the same
23 with the addition that this raises issues of
24 mitigation measures that were not discussed by the NRC
25 staff and the EA, obviously because they felt that

1 there were no impacts. But we believe -- and would
2 raise the issues of alternatives and punitive impacts,
3 which I assume we'll discuss later.

4 CHAIR GIBSON: We will be discussing those
5 in conjunction with other contentions, yes.

6 MR. REID: All right. The answer would be
7 the same with that understanding that, if there were
8 impacts, then there needed to be special mitigation
9 measures, which was not included in the EA.

10 CHAIR GIBSON: Mr. Frankel?

11 MR. FRANKEL: Your Honor, David Frankel
12 for Consolidated Intervenors. Yes, because this also
13 involves NEPA analysis. And because the NRC staff has
14 admitted that the risk is more than remote and
15 speculative, that it's more than zero, it was required
16 to discuss all the consequences, including the
17 destruction of cultural resources, and it failed to do
18 so. If we're going to handle that later in connection
19 with the NEPA discussion, I'll defer that. But that
20 would be my additional point, and I believe there's a
21 case on point, New York v. NRC, 681 F. 3d. 471, D.C.
22 Circuit 2012. And I'd be happy to provide those jump
23 cites, if the Board is interested. Thank you.

24 CHAIR GIBSON: Thank you. Okay. I think
25 that we have, hopefully, addressed all of the

1 arguments that each party has with respect to the
2 consultation issue itself. And I would like to move
3 away from consultation to the other portions of
4 contentions one and two. Mr. Reid, you have asserted
5 that, separate and apart from consultation, the
6 environmental assessment contains an inadequate
7 description both of the affected environment and of
8 the impacts of the project on NHPA resources; is that
9 correct?

10 MR. REID: I believe that's correct, yes.

11 CHAIR GIBSON: Counsel for the staff,
12 let's look at the cultural resources surveys that are
13 mentioned in the environmental assessment. Again,
14 taking these in chronological order, the first is the
15 1987 publication of the Bozell and Pepperl study of
16 the Nebraska Historical Society.

17 Now, first of all, when you referred to
18 these 1982 and 1987 archaeological studies, you mean
19 the 1987 publication, correct?

20 MR. CYLKOWSKI: Yes, your Honor.

21 CHAIR GIBSON: Okay. You further claim in
22 your answer that intervenors are wrong in their claim
23 that these 1982 and 1987 site surveys were too old
24 and, hence, deficient; is that correct?

25 MR. CYLKOWSKI: Yes, your Honor, that's

1 correct.

2 CHAIR GIBSON: Okay. But you also claim
3 in your answer that the 1982 and 1987 surveys are not
4 the sole source of information regarding cultural
5 properties in the license renewal area; is that
6 correct?

7 MR. CYLKOWSKI: That's right, your Honor.

8 CHAIR GIBSON: Okay. Let's turn to the
9 other sources for your evaluation of cultural
10 properties in the license renewal area. Now, it
11 appears to me that the other sources are a Class III
12 archaeological survey, a TCP survey completed by the
13 Santee Sioux Nation and I guess on the Crow Nation on
14 potential expansion areas, and a completed literature
15 review, and overall tribal consultations; is that
16 correct?

17 MR. CYLKOWSKI: Yes, your Honor.

18 CHAIR GIBSON: As to tribal consultations,
19 I think we've already exhausted that subject, so let's
20 begin with the Class III archeological study for the
21 license renewal area. Now, the Class III
22 archeological study is the 1987 Bozell and Pepperl
23 report that was conducted for Crow Butte; is that
24 correct?

25 MR. CYLKOWSKI: Yes, your Honor.

1 CHAIR GIBSON: Okay. And the TCP survey
2 conducted by the Santee Sioux Nation was published in
3 2013; is that correct?

4 MR. CYLKOWSKI: That's correct. Yes, yes,
5 your Honor.

6 CHAIR GIBSON: Okay. Now, let's turn to
7 the completed literature review. I looked at that
8 part of the environmental assessment and could find no
9 specific listing of literature. To what specific
10 literature are you referring in the EA at 87 and
11 quoted in your answer at 19?

12 MR. CYLKOWSKI: Your Honor, I'm not
13 certain at this moment whether that is referenced
14 elsewhere in the EA. I don't have the documentation
15 of that review in front of me. That's something else
16 that I can provide the Board, if you'd like, in
17 addition to the previously requested information.

18 CHAIR GIBSON: We would very much like to
19 have that.

20 MR. CYLKOWSKI: And I will try to actually
21 get that information more immediately to give you
22 today.

23 CHAIR GIBSON: Thank you, sir. Thank you
24 very much. I'm sorry. My dog is going crazy. Not
25 much I can do about that. Mr. Reid, the applicant and

1 the staff claim that, taken together, these studies
2 represent a reasonable and good faith effort to comply
3 with NEPA and the NHPA. Taking them in chronological
4 order, why do you claim that the environmental
5 assessment's use of this 1987 publication of the
6 Bozell and Pepperl studies resulted in an inadequate
7 description of the NHPA resources at this site in
8 2015?

9 MR. REID: Those are addressed in the
10 submissions, and, without meaning to repeat them in
11 any depth, I'll just try to summarize it. The 30-year
12 passage of time creates changes and conditions. The
13 operations have continued at the site. There was no
14 subsurface survey done that Dr. LaGarry would have
15 been possible and that Dr. Redmond says was needed as
16 an archeological study that's based on western
17 parameters that is not necessarily sensitive to the
18 cultural and historic and spiritual and religious
19 interest of the Oglala Sioux people.

20 So the reasons are pretty much the same as
21 what we said before. In order to -- and if you don't
22 mind, I'll just jump forward to the TCP study, as
23 well, because the criticism is the same.

24 CHAIR GIBSON: Actually, I'd like to get
25 to that in chronological order. I want to cover some

1 other studies in the interim, okay? Fair enough?

2 MR. REID: Right. Then the archeological
3 study is, by nature, deficient because it doesn't
4 engage the oral history of the tribe and the tribal
5 elders, as well as the information and the knowledge
6 of the Oglala Sioux Tribe regarding those sites. It's
7 a scientific physical survey that is deficient by
8 nature and cannot be satisfactory.

9 MR. FRANKEL: David Frankel for
10 Consolidated Intervenor on a material addition to
11 that, your Honor.

12 CHAIR GIBSON: Yes.

13 MR. FRANKEL: I would add to Mr. Reid's
14 reference to the changing nature of the surface area
15 that, over a course of years and decades, there have
16 been several intermittent droughts in the area that
17 reveal resurface features. And so it is highly
18 likely, if not a certainty, that TCPs that would not
19 necessarily have been easily visible in 1987 would be
20 clearly visible in 2015. Thank you, your Honor.

21 CHAIR GIBSON: Okay. Mr. Reid, there was
22 also a 1998 limited study of traditional cultural
23 properties done by Resource Technologies Group. And
24 I'm curious why you claim the environmental
25 assessment's mention on page 55 of this 1998 study

1 resulted in an inadequate description of the NHPA
2 resources at this site in 2015.

3 MR. REID: The answer would be the same.
4 None of these studies involved members of the tribe.
5 They were not done by, as far as I know, indigenous
6 peoples that had any understanding of the ways and
7 histories and oral history and the interest of the
8 tribe, other than from a western scientific
9 perspective. And for the reasons that I've already
10 said. If you want me to, I can go back through them,
11 but you've asked me not to repeat them.

12 CHAIR GIBSON: Yes.

13 MR. REID: These are studies that are not
14 sensitive to the cultural interest and needs of the
15 tribe.

16 CHAIR GIBSON: Okay. Mr. Frankel, do you
17 have anything specific to talk about the Resource
18 Technologies Group study in 1998, other than what
19 you've previously said about the 1987 study?

20 MR. FRANKEL: The only other thing I would
21 add, your Honor -- David Frankel speaking for
22 Consolidated Intervenors -- is that, over the course
23 of time from 1998 to the present, and I don't know if
24 -- the NEPA requirements or NHPA, I believe, was
25 imposed in the late 90s. The standards have changed

1 over the years, as far as what's required in terms of
2 ethnographic studies referred to by Mr. Reid and what
3 the protocols and standards are now and in 2007
4 compared to back in 1998. Thank you, your Honor.

5 CHAIR GIBSON: Okay. Mr. Reid, let's turn
6 to the 2000 Koch study, K-O-C-H, for the Nebraska
7 Historical Society. Why do you claim, other than the
8 other things you've previously said about these other
9 studies, why do you claim the environmental
10 assessment's use of this 2000 study resulted in an
11 inadequate description of NHPA resources at this site
12 in 2015?

13 MR. REID: It's the same. Basically, it's
14 a culturally insensitive study.

15 CHAIR GIBSON: All right. And Mr.
16 Frankel, do you have anything else to add on this?

17 MR. FRANKEL: Nothing additional, your
18 Honor.

19 CHAIR GIBSON: Thank you. Counsel for the
20 NRC staff, let's go to the 2003 Spath and Walth study.
21 This was not referenced in the environmental
22 assessment; is that correct?

23 MR. CYLKOWSKI: I don't see -- I believe
24 you're right, your Honor. I'm doing a search now, and
25 I don't see it referenced in there.

1 CHAIR GIBSON: But it was referenced in
2 the NRC's field documentation report from December
3 2013, correct?

4 MR. CYLKOWSKI: I would have to verify
5 that, your Honor.

6 CHAIR GIBSON: Okay. Well, we would like
7 you to verify that, but, irrespective of whether it
8 was in that field documentation report, this study
9 covers one segment of the license renewal area, which
10 is site 25DW198. Now, is site 25DW198 within the
11 current area where Crow Butte operates?

12 MR. CYLKOWSKI: I'm sorry, your Honor, I'm
13 not sure of the answer to that question. It's
14 possible that counsel for Crow Butte might be more
15 familiar with that answer, but I don't want to --

16 CHAIR GIBSON: I was just going to ask Mr.
17 Smith that. Mr. Smith, could you help us?

18 MR. SMITH: You said that was which item?
19 25DW198?

20 CHAIR GIBSON: Yes, sir.

21 MR. SMITH: I do not know off the top of
22 my head where that site is located within the main
23 project area, whether it's within the project area
24 itself or whether it's within a construction area.

25 CHAIR GIBSON: Okay. Now, what I would

1 suggest is that we -- perhaps at the lunch hour you
2 guys could try to find us the answers to this, and
3 then we can come back to it after lunch. Is that
4 okay? 25DW198.

5 MR. SMITH: Yes, your Honor.

6 CHAIR GIBSON: Very well, very well.

7 MR. SMITH: I'll just add that whether
8 that's located, no matter where that's located, Crow
9 Butte was able to avoid that site, and so it's not
10 impacted by our operations.

11 CHAIR GIBSON: Thank you, Mr. Smith. But
12 we'll come back to that, okay? After lunch, once we
13 know where it is?

14 MR. SMITH: Okay. I guess I'll add a
15 couple of things. One is we're not necessarily privy
16 to all the locations of the cultural resource
17 information. We, as the applicant, aren't always
18 provided with that information, and so the maps and
19 stuff showing the locations of that are not always
20 available to us. But if it was an area that was
21 identified as potentially eligible, which 198 was,
22 that means it's either outside of an area that would
23 be affected or it's been isolated such that it would
24 not be affected by construction.

25 CHAIR GIBSON: Very well. But, hopefully,

1 we'll be able to figure out where it is, Mr. Smith,
2 and then I think we'll all be able to talk about it
3 with the context that we need. Fair enough?

4 MR. SMITH: Sure. I guess I would add to
5 that that the Oglala Sioux Tribe should have a copy of
6 the location of where that is, as well.

7 CHAIR GIBSON: Well, certainly. Is there
8 anything that you can add to that, Mr. Reid and Mr.
9 Frankel?

10 MR. REID: Mr. Reid. No.

11 CHAIR GIBSON: Mr. Frankel?

12 MR. FRANKEL: Your Honor, no. The
13 intervenors are not privy to that kind of information.

14 CHAIR GIBSON: Very well. Okay. Well,
15 hopefully, hopefully someone is going to be able to
16 figure out where 25DW198 is, and then we can talk
17 about this after lunch, okay? Fair enough.

18 Let's go to the 2005 Louis Berger study of
19 historic buildings in Dawes County, Mr. Reid. Why do
20 you claim that the environmental assessment's use of
21 this 2005 study resulted in an inadequate description
22 of NHPA resources at this site in 2015?

23 MR. REID: It was, it was limited in terms
24 of the survey and didn't cover the cultural and
25 spiritual and religious interests of the tribe.

1 CHAIR GIBSON: Very well. Mr. Frankel, do
2 you have anything else to add about the Berger study?

3 MR. FRANKEL: Nothing additional, your
4 Honor.

5 CHAIR GIBSON: Thank you. Okay. Let's go
6 to the first 2007 Spath report that was conducted in
7 2007, and this was conducted for Crow Butte's North
8 Trend Expansion Area. Mr. Reid, why do you claim that
9 the environmental assessment's use of this 2007 study
10 for Crow Butte and its North Trend Expansion Area
11 resulted in an inadequate description of the NHPA
12 resources at the site in 2015?

13 MR. REID: Same answer as given previously
14 in regards to the approach not being culturally
15 sensitive would apply to the North Trend studies, as
16 well.

17 CHAIR GIBSON: Very well. Mr. Frankel, do
18 you have anything else to add to this?

19 MR. FRANKEL: Nothing additional, your
20 Honor.

21 CHAIR GIBSON: Okay. Let's go to the
22 second Spath report, which was conducted in 2007, and
23 this was conducted for the Crow Butte Three Crows
24 Expansion Area. Now, does the staff maintain that
25 this is a Class III archeological study? Staff?

1 MR. CYLKOWSKI: Yes, your Honor, I believe
2 that it is, but I would have to confirm that, and I
3 will do that.

4 CHAIR GIBSON: Good. Please do. Mr.
5 Reid, why do you claim that the environmental
6 assessment's use of this 2007 Spath report for the
7 Crow Butte Three Crows Expansion Area resulted in an
8 inadequate description of the NHPA resources at this
9 site in 2015?

10 MR. REID: Same response as given for the
11 North Trend.

12 CHAIR GIBSON: Thank you. Mr. Frankel, is
13 there anything else you need to add?

14 MR. FRANKEL: Nothing additional, your
15 Honor.

16 CHAIR GIBSON: Thank you. Counsel for the
17 NRC staff, have any federal courts held that a Level
18 III cultural study satisfies NEPA's hard look
19 requirements regarding potentially adverse impacts on
20 places of religious or cultural significance?

21 MR. CYLKOWSKI: Your Honor, I'm not aware
22 of any cases saying that a Class III survey alone
23 satisfies the requirements.

24 CHAIR GIBSON: Okay.

25 MR. CYLKOWSKI: If that answers your

1 question.

2 CHAIR GIBSON: So I guess what you're
3 saying is that there is no federal court ruling that
4 it does satisfy the hard look requirements by itself;
5 is that right?

6 MR. CYLKOWSKI: That's right, your Honor.
7 That's a fair explanation of what my answer was. I
8 mean, to my knowledge, no, there's no bright-line rule
9 regarding this issue. It's the hard look analysis
10 that's applicable to other resource areas, as well.

11 CHAIR GIBSON: Mr. Smith, do you have
12 anything you wish to add to that?

13 MR. SMITH: No, Judge Gibson, I do not.

14 CHAIR GIBSON: Thank you, sir. Mr. Reid,
15 do you have anything you wish to say about whether a
16 Class III cultural survey satisfies NEPA hard look in
17 part or in whole?

18 MR. REID: Yes. The only comment I have
19 is that it needs to be narrow. We're talking about a
20 Level III study within the context of the religious,
21 spiritual, and cultural interest of a tribe, not
22 generically.

23 CHAIR GIBSON: Okay. Mr. Frankel, do you
24 have anything you need to add about that?

25 MR. FRANKEL: Yes, your Honor. David

1 Frankel for Consolidated Intervenors. We have
2 submitted and we maintain, based on our expert opinion
3 from Dr. Redmond, that, number one, a hard look
4 requires subsurface testing throughout the site and in
5 a coordinated fashion to discover under the surface,
6 subsurface, cultural resources, number one. And
7 number two, we reiterate that there's a lack of
8 published resource concerning the cultural resources
9 in this particular area and environment and that we
10 know that, because the tribe was resident there and
11 near there at the Red Cloud Agency, now known over as
12 Fort Robinson, that we actually have had occasion by
13 tens of thousands of native people there for decades,
14 and that requires a certainty of discovering a
15 plethora of cultural resources. And a failure to do
16 so, to us, demonstrates inadequacy and a failure to
17 take a hard look. Thank you.

18 CHAIR GIBSON: Mr. Frankel, I want to just
19 make sure I understand sort of the music behind your
20 words here. Are you saying that subsurface testing is
21 not included in a Class III archeology study?

22 MR. FRANKEL: I'm saying that we have
23 submitted expert opinion that there was either none or
24 insufficient subsurface testing in the entire area.
25 I'm not sufficiently expert in the technicalities of

1 what is in or not in the Class III survey to know if
2 there was some spot checks, for example, subsurface at
3 large distances. I just don't know, so I'm not able
4 to answer your question in that regard.

5 CHAIR GIBSON: Okay. And what is it about
6 the absence of research in this area with respect to
7 aboriginal activity? I understand what you're saying
8 there, but my question is how does that impact whether
9 a Class III study is sufficient?

10 MR. FRANKEL: Thank you, your Honor.
11 David Frankel for Consolidated Intervenors. The
12 reason why it impacts is, in a place that has been
13 heavily studied and for which there's a lot of
14 published research, that would provide some confidence
15 if a Class III survey were to come back showing no or
16 little results or adverse consequences or very few
17 TCPs were covered, whereas where we have a complete
18 unknown as far as research publication or an almost
19 unknown. Then it requires a lot more field study, a
20 lot more intensive testing in order to reach that
21 level of confidence.

22 CHAIR GIBSON: Okay, very well. Now,
23 unless someone speaks up and says they know the answer
24 to this question, I want the staff to advise us before
25 the end of the day whether subsurface testing is

1 included in a Class III survey or not, just that it's
2 always in or it's never in or it sometimes is and it
3 sometimes isn't. We need to know the answer to that
4 question, okay?

5 MR. CYLKOWSKI: Yes, your Honor.

6 CHAIR GIBSON: Thank you. All right.
7 Counsel for the NRC staff, let's turn first to the
8 2011 inventory that was conducted for Crow Butte of
9 the Marsland expansion. Now, that study found zero
10 Native American cultural resources sites at Marsland;
11 is that correct?

12 MR. CYLKOWSKI: I believe that's correct,
13 your Honor, yes.

14 CHAIR GIBSON: In contention two,
15 intervenors maintain that weather reports prove that
16 this survey was conducted while the ground was covered
17 with snow. Can you clarify this about when there was
18 snow out there and whether that affects the validity
19 of the survey?

20 MR. CYLKOWSKI: Yes, your Honor. I will
21 preface this by saying there appear to have been some
22 confusion, at the pleading stage at least, on this
23 issue and whether the intervenors were challenging the
24 surveys really at issue in this case, which is the
25 survey of the main facility area and the expansion

1 areas or whether it seems to have been made more clear
2 on reply that they were addressing the Marsland survey
3 specifically.

4 CHAIR GIBSON: Right.

5 MR. CYLKOWSKI: So what I can say is that
6 Dr. Redmond's opinion in discussing snow cover does
7 not provide specific weather data for the time that
8 the survey was conducted.

9 CHAIR GIBSON: When you say "the survey,"
10 are you referring to the Marsland expansion survey
11 that was conducted in 2010?

12 MR. CYLKOWSKI: That is what I was
13 referring to.

14 CHAIR GIBSON: Okay. I just wanted to be
15 sure that's the study you're talking about because
16 that's the only thing we want to talk about right now.

17 MR. CYLKOWSKI: Okay, okay, your Honor.
18 I'm sorry. Maybe I'm missing the second-half of your
19 question?

20 CHAIR GIBSON: No, I just wanted to be
21 sure, you just said "the survey" and I wanted to be
22 sure we're talking about, because you said there was
23 some confusion, and I want to be sure we're talking
24 about the 2011 inventory conducted for Crow Butte of
25 the Marsland expansion. Now, was there snow on the

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1 ground or not when that was conducted?

2 MR. CYLKOWSKI: I am not, I'm not certain
3 of whether there was snow on the ground during that
4 specific time. The Redmond opinion doesn't have that
5 information in it, I don't believe.

6 MR. SMITH: Judge Gibson, this is Tyson
7 Smith.

8 CHAIR GIBSON: Yes, Tyson? Yes, Mr.
9 Smith? Pardon me.

10 MR. SMITH: I can answer your question.
11 According to the survey report, the Class III cultural
12 resource investigation that was performed for the
13 Marsland site, there was a section there that
14 specifically addresses weather and ground conditions.
15 It notes that the weather was cold and windy. It said
16 that surveys were not conducted when frost or snow
17 exceeded 20-percent ground coverage and notes that,
18 other than delaying the ability to complete inventory
19 before the year-end, the weather and ground conditions
20 did not alter field methods. It notes that
21 note-taking was abbreviated due to extreme cold
22 temperatures, but daily field notes were extended at
23 end of each day.

24 There's also photographs that accompany
25 that report that demonstrate the general absence of

1 snow cover during the investigations.

2 CHAIR GIBSON: Thank you, Mr. Smith. Mr.
3 Reid, have you seen that information in the study that
4 Mr. Smith just referenced?

5 MR. REID: No, I have not. I did not
6 prepare this part of the response. Mr. Frankel might
7 be able to better respond to --

8 CHAIR GIBSON: Very well, very well. Mr.
9 Frankel, have you seen the information to which Mr.
10 Smith just made reference?

11 MR. FRANKEL: David Frankel for
12 Consolidated Intervenors. I'm looking right now at
13 their reply, and it refers to the November 2010 period
14 but not the February 2011 period. And I've submitted
15 Exhibit H-2 in the previous month which showed that
16 there was freezing and snow cover, so I guess I need
17 a clarification from Mr. Smith. Is he suggesting that
18 there was less than 20-percent snow cover on the
19 ground during the February 2011 portion of the field
20 study, as well?

21 CHAIR GIBSON: Mr. Smith?

22 MR. SMITH: There was no snow that
23 prevented application, the conduct of the field
24 surveys.

25 CHAIR GIBSON: And that was a statement

1 that was made by the consultant who made that study;
2 is that correct, Mr. Smith?

3 MR. SMITH: That was a statement made by
4 the qualified archeological contractor.

5 CHAIR GIBSON: Okay. For the Marsland
6 study, and this was in the December to February,
7 December 2010 to February 2011 period; is that
8 correct?

9 MR. SMITH: Correct. The primary survey
10 was done in the November time frame, and this refers
11 specifically to that. But there are some follow-up on
12 specific areas that were looked at later that wouldn't
13 necessarily apply, but it is true that that wouldn't
14 have affected the outcome of the survey.

15 CHAIR GIBSON: Mr. Frankel, are we on the
16 same page of the same hymnal with respect to these
17 facts?

18 MR. FRANKEL: Are we singing Lakota songs
19 with this hymnal? I'm okay with it.

20 CHAIR GIBSON: Okay. I just wanted to be
21 sure. Okay. All right. Now, counsel for the staff,
22 are you maintaining that the 2011 Marsland inventory
23 was not of much use here?

24 MR. FRANKEL: Your Honor, we're
25 maintaining that the most relevant surveys were the

1 ones conducted of the main project facility. Now,
2 since cumulative impacts are a part of the staff
3 assessment, as well, then any survey of an expansion
4 area will be relevant, of course.

5 CHAIR GIBSON: Okay. Mr. Reid or Mr.
6 Frankel, I'm not sure which one of you was responsible
7 for putting this, so, please, whichever one of you it
8 is, speak up. Do I understand correctly that you are
9 claiming that the tribe has neither had the
10 opportunity to evaluate the completeness of the
11 Marsland expansion, nor to evaluate the significance
12 ascribed to any items there?

13 MR. FRANKEL: Hearing silence from Mr.
14 Reid, David Frankel for Consolidated Intervenors.
15 That is our position.

16 CHAIR GIBSON: Okay, okay. Are you
17 claiming that no one from the tribe could accompany
18 the Crow Butte contractor during that inventory and
19 that's why it's not, that's why it's not accurate?

20 MR. FRANKEL: David Frankel for
21 Consolidated Intervenors. Mr. Reid had stated
22 repeatedly a good description of the kinds of
23 differences and approach that the tribe would take
24 culturally. They would walk the land in the
25 summertime. They would look for grave markers, things

1 like that. So all his comments concerning inadequacy
2 and cultural insensitivity would apply here also.

3 CHAIR GIBSON: Okay. Was anyone from the
4 tribe allowed to access the site to look at any
5 historical resources there at any time?

6 MR. FRANKEL: David Frankel for
7 Consolidated Intervenors. Unfortunately, as private
8 intervenors, we're not privy to that information.

9 CHAIR GIBSON: Okay. Mr. Reid, do you
10 know?

11 MR. REID: No, it was before my time, and
12 it's not a question I've asked my clients, no.

13 CHAIR GIBSON: Okay. Mr. Smith, do you
14 have any knowledge at all whether the tribe was
15 afforded an opportunity to physically go on the site
16 and to conduct any kind of an inventory?

17 MR. SMITH: Well, they were given that
18 opportunity, the same opportunity, the same Sioux
19 Nation did when they went and prepared their report.

20 CHAIR GIBSON: Okay, okay. Fair enough,
21 fair enough. Thank you.

22 MR. SMITH: Judge Gibson, this is Tyson
23 Smith. I have additional information on the location
24 and a little bit more on the background on that one
25 particular site, DW198, that you had asked about.

1 CHAIR GIBSON: Very well. Hold on just
2 one second. Okay. That is site 25DW198; is that
3 correct?

4 MR. SMITH: Correct.

5 CHAIR GIBSON: Okay. Does this segment,
6 is this site within the license renewal area?

7 MR. SMITH: Yes, it is.

8 CHAIR GIBSON: Okay. Is it within the
9 current area where Crow Butte operates?

10 MR. SMITH: Yes, it is.

11 CHAIR GIBSON: Okay. In 1987, that was
12 deemed to have potential cultural resources; is that
13 correct?

14 MR. SMITH: That is correct.

15 CHAIR GIBSON: Okay. But by 2003, the
16 study surveyor concluded that the site lacked the
17 potential to yield information important to the
18 region's pre-history and that it was not eligible for
19 listing; is that correct?

20 MR. SMITH: That is my understanding, yes.

21 CHAIR GIBSON: Do you have any
22 understanding, Mr. Smith, about why there was this
23 change in the surveyor's opinion?

24 MR. SMITH: Well, I think one was,
25 initially, the site was identified as potentially

1 eligible. And then when it was determined that this
2 was site was going to be an area that would
3 potentially be impacted by Crow Butte operations as a
4 new mining area, additional field work was done that
5 included a site testing plan. There was an intensive
6 inventory of the previously-mapped site surface and
7 adjacent areas. There were excavations of four
8 subsurface test units. And I guess all this was
9 actually building on some subsurface testing that had
10 been done initially back in the 1980s, and so there
11 was additional, as I said, excavation of four
12 subsurface test pits. And based on the findings of
13 that field effort, it was determined that the site
14 lacked the potential to yield information important to
15 the region's pre-history and that, therefore, it was
16 not eligible for listing on the National Register of
17 Historic Places.

18 CHAIR GIBSON: Okay. Let me ask counsel
19 for the NRC staff why was this report not included in
20 the environmental assessment?

21 MR. CYLKOWSKI: Your Honor, I would need
22 to consult with the staff on this, and I'm happy to do
23 so and get that answer to you.

24 CHAIR GIBSON: Do you know if that study
25 is on ADAMS?

1 MR. CYLKOWSKI: I don't know right now.

2 CHAIR GIBSON: And could you find that out
3 for us, as well?

4 MR. CYLKOWSKI: Yes, your Honor.

5 MR. SMITH: It is on ADAMS. This is Tyson
6 Smith.

7 CHAIR GIBSON: It is on ADAMS?

8 MR. SMITH: Yes.

9 CHAIR GIBSON: Do you have an identifier
10 number, Mr. Smith?

11 MR. SMITH: Sure. There's a number of
12 different places where this information comes from.
13 So the larger summary that I just read comes from a
14 document that's entitled "Field Documentation of
15 Potential Places of Tribal Religious or Cultural
16 Significance" prepared for the NRC. It's a December
17 2013. It has ADAMS number ML14174B378.

18 CHAIR GIBSON: Thank you so much.

19 MR. SMITH: There are a number of other
20 places where this is discussed, including in the
21 initial license application for Crow Butte facility,
22 the initial discovery and summary of the location of
23 the site and the initial subsurface testing. That's
24 in ADAMS number ML080940308.

25 CHAIR GIBSON: Thank you, Mr. Smith. Mr.

1 Reid, have you seen this study?

2 MR. REID: No, I haven't.

3 CHAIR GIBSON: Okay. Mr. Frankel, have
4 you seen this study?

5 MR. FRANKEL: No, I haven't.

6 CHAIR GIBSON: Okay, thank you very much.
7 Okay, fair enough. We will recess now for 30 minutes.
8 We will come back on at 1:35 Eastern Standard Time.
9 And we will stand in recess.

10 (Whereupon, the above-entitled matter
11 went off the record at 1:04 p.m. and went
12 back on the record at 1:35 p.m.)

13 CHAIR GIBSON: This is Judge Gibson.
14 1:35. We're back on the record. Mr. Reid, are you
15 there?

16 MR. REID: Yes, I am.

17 CHAIR GIBSON: Do you happen to know what
18 prevented the tribe from reviewing the Marsland
19 expansion inventory done in 2011?

20 MR. REID: Actually, I don't. The only
21 information I have on that is that there was a
22 cultural contention in the Marsland proceeding, and it
23 was recently or a few months ago, prior to my coming
24 into the case, I entered my appearance in that matter,
25 as well, at a time when it was subject to dismissal

1 for failure to prosecute.

2 The cultural contention which had already
3 been admitted was dismissed because of a failure to
4 prosecute. So all I know is that it was an admitted
5 contention in regards to the Marsland expansion and
6 that it was dismissed for failure to prosecute.

7 CHAIR GIBSON: Okay, fair enough. I
8 wasn't, you know, berating you guys for not replying
9 in that case. I was only trying to understand if you
10 all had, whether there was something that prevented
11 you from reviewing it. That's all. Okay.

12 Now, what about the 2011 Marsland
13 expansion study, in your estimation, Mr. Reid,
14 resulted in an inadequate description of the NHPA
15 resources at the current site in 2015?

16 MR. REID: It would be the same response
17 I gave earlier that the religious and cultural
18 evaluation of the interest of the tribe, the
19 spiritual, religious, and cultural, cover that entire
20 area and they're interrelated in terms of the
21 trafficking and the amount of activity, the access to
22 the site, times of the year, and so forth. Those are
23 interrelated.

24 CHAIR GIBSON: Okay. Mr. Frankel, is
25 there anything else you wish to say about the 2011

1 Marsland study inadequately describing the current
2 conditions on the site in 2015?

3 MR. FRANKEL: David Frankel for
4 Consolidated Intervenor, your Honor. Yes, only that,
5 to us, a finding of zero Native American sites is part
6 of a pattern of failure, we've alleged either
7 intentional or reckless or negligent failure to
8 identify sites because it's contrary to the interest
9 of the applicant.

10 CHAIR GIBSON: Okay. Mr. Reid, next comes
11 the 2013 Santee Sioux Nations traditional cultural
12 property survey report. In your estimation, Mr. Reid,
13 why is the EA's use of this study an inadequate
14 description of NHPA resources at the site?

15 MR. REID: I believe we've already
16 addressed that. The main thing that I would mention
17 on that, besides the fact that I don't believe that
18 there was a full culturally sensitive review of that
19 site done with the tribal elders and religious leaders
20 and so forth, the main thing I would emphasize is that
21 the Santee Sioux and the Crow are both relatively
22 distant tribes that had nowhere near the amount of
23 contact and history with the area as the Oglala
24 Lakota. So their decisions or conclusions as to the
25 area I don't think would be very material as to those

1 of the Oglala Sioux.

2 CHAIR GIBSON: Mr. Frankel, is there
3 anything you wish to add?

4 MR. FRANKEL: Yes, your Honor, David
5 Frankel with Consolidated Intervenors. The only thing
6 I want to add is that the letters referred to in
7 Section 3.9.8 of the final EA and the discussion
8 around page 28 of Consolidated Intervenors' contention
9 filing refers to several tribes that responded to the
10 report by disagreeing with the findings, citing
11 Cheyenne River Sioux, Yankton Sioux, and Standing Rock
12 Sioux. And my statement is that those disagreements
13 stated by other tribes similarly situated to the
14 Oglala Sioux tribe in some ways, in that they're all
15 Sioux tribes, and taken together with the Oglala Sioux
16 tribe's either failure or refusal to participate for
17 whatever reason, which perhaps needs to be explored in
18 a post-hearing affidavit from the people involved,
19 should support our overall position concerning the
20 inadequacies of the final EA.

21 MR. ELLISON: This is Bruce Ellison, if I
22 might just add something to Mr. Reid's comments.

23 CHAIR GIBSON: Yes.

24 MR. ELLISON: It's important for the Board
25 to understand that when you have a tribe that is a

1 different tribe, such as the Santee -- the Santee are
2 not Lakota Sioux, they're Dakota Sioux. And they have
3 different practices and beliefs. Different things are
4 important. Same thing with the Crow.

5 So the mere fact that you have a tribe
6 involved does not mean that one can substitute for the
7 other. Mr. Reid's point, as I had mentioned earlier,
8 is well taken about the distance and use of that area
9 by those two tribes which did participate. But I do
10 think it's important for the Board to not just see a
11 homogeneous tribal response by looking at any one
12 tribe that is not a Lakota. Thank you.

13 CHAIR GIBSON: Thank you. Mr. Reid and
14 Mr. Frankel, I don't know which one of you is the most
15 conversant with the issue of snow cover and doing
16 studies, but whichever one of you is I'd like to come
17 back to this question of snow cover. It appears that
18 the staff said that when the field work for the 2013
19 study by the Santee Sioux was conducted in 2012, the
20 weather was unseasonably warm. Do you have any
21 knowledge or dispute with that statement?

22 MR. FRANKEL: David Frankel for
23 Consolidated Intervenor. Could you point me out to
24 the dates that we're talking about?

25 CHAIR GIBSON: Well, I believe the 2013

1 traditional cultural property survey that the Santee
2 Sioux published was actually, the field work for that
3 was done in 2012. And the staff, I believe the
4 staff's remark was that when the field work for that
5 study was conducted in 2012, the weather was
6 unseasonably warm. Do you know if that's true, or are
7 you disputing that?

8 MR. FRANKEL: Your Honor, what month in
9 2012 are we talking about?

10 CHAIR GIBSON: I do not know when that was
11 conducted. I'm only looking at what the staff said.
12 If they said something about the specific dates, I
13 don't know. Does anyone at all know when the field
14 work in 2012 was conducted for the 2013 Santee Sioux
15 Nations traditional cultural property survey?

16 MR. CYLKOWSKI: Yes, your Honor. This is
17 David Cylkowski for the staff. That survey was
18 conducted in November and December of 2012, mid - late
19 November to early - mid December.

20 CHAIR GIBSON: And you're saying that it
21 was unseasonably warm then?

22 MR. CYLKOWSKI: Yes, your Honor. One of
23 our attached exhibits also has information to that
24 effect, specifically on snow and ice cover on the
25 ground during those days.

1 CHAIR GIBSON: Okay. Now, Mr. Frankel,
2 you're not disputing that, are you?

3 MR. FRANKEL: David Frankel for
4 Consolidated Intervenors, your Honor. Well, we
5 submitted an Exhibit H-1. In November of 2012, there
6 were four inches of snow, and I don't know what days
7 they were out doing the field study and if it was on
8 days when there was four inches of snow or not. I do
9 know that the highest temperature for that month was
10 76 degrees but that the coldest maximum temperature
11 for that month was 33 degrees, and I acknowledged that
12 it was warmer than usual.

13 As for December of that year, for some
14 reason, and I apologize for this, the weather chart
15 that I provided has no records for the month of
16 December 2012. So I don't know, on average, what the
17 weather was like at that time. And I do note that, as
18 for 2013 January, it was back to the usual with a low
19 of minus 10, a highest temperature of 58, but it was
20 a low snowfall year in a drought. So, your Honor,
21 that would be my answer to your question.

22 CHAIR GIBSON: Mr. Smith, do you have
23 anything you can add to this?

24 MR. SMITH: No, your Honor, I do not have
25 anything to add with respect to the surveys done in

1 2012. With respect to the ones that were done for
2 Marsland, there are photographs of the area showing
3 that it was generally free from snow, but I take it
4 that's not what you're talking about now.

5 CHAIR GIBSON: No, we're talking about the
6 Santee Sioux Nation's traditional cultural property
7 survey report, the field work for which was done
8 apparently in November and December of 2012.

9 MR. SMITH: Correct. November 14 through
10 the 21st and November 26th through Friday, December
11 7th.

12 CHAIR GIBSON: There you go. Well, I
13 suspect there's a way to ascertain that weather, what
14 it was like. Mr. Frankel, if there is something else
15 you need to bring to our attention in that specific
16 regard, will you please do so? You can do it in a
17 post-trial submittal. Just, you know, nothing but
18 just the basic information, okay?

19 MR. FRANKEL: David Frankel from
20 Consolidated Intervenors. Yes, your Honor.

21 CHAIR GIBSON: Okay, thank you.

22 MR. CYLKOWSKI: And, your Honor, I'm
23 sorry, this is David Cylkowski on behalf of the staff.
24 You had just mentioned there's likely some way to
25 ascertain this information. Again, I would refer the

1 Board to the exhibit the staff attached to its answer
2 which has daily records not just for snowfall but for
3 snow cover, snow and ice cover, in the area during the
4 dates that the survey was conducted.

5 CHAIR GIBSON: Mr. Frankel, I would
6 suggest that you consult that exhibit, and then you
7 can provide us with some clarification of your
8 position after doing so. Would that be fair enough?

9 MR. FRANKEL: Yes, your Honor.

10 CHAIR GIBSON: Thank you. Okay. I think
11 I just have one more question on these contentions,
12 but other Board members may have some other questions.
13 Counsel for the NRC staff, intervenors maintain in
14 contention two that the NRC staff should have
15 conducted a full-blown environmental impact statement
16 and not merely an environmental assessment. When was
17 the decision made to conduct an environmental
18 assessment rather than an environmental impact
19 statement, and why was that decision reached?

20 MR. CYLKOWSKI: Your Honor, I'm not sure
21 when that decision was made, but I can find that out
22 for you probably today during the argument.

23 CHAIR GIBSON: Great.

24 MR. CYLKOWSKI: And I will get you that
25 information.

1 CHAIR GIBSON: Thank you. Okay. And why
2 was that decision reached?

3 MR. CYLKOWSKI: I would like to confirm
4 with the staff, and I'll get that information
5 together.

6 CHAIR GIBSON: Thank you, thank you. And,
7 hopefully, your phone will start working better, too,
8 Mr. Cylkowski. You're still fading in and out. Do
9 other Board members have any questions about
10 contentions one or two?

11 JUDGE WARDWELL: This is Judge Wardwell.
12 I have none.

13 JUDGE HAJEK: This is Brian Hajek. I do
14 not.

15 CHAIR GIBSON: Okay. So let's turn to
16 contention three. In this contention, intervenors are
17 claiming that the environmental assessment fails to
18 take the requisite hard look at whether re-licensing
19 the Crow Butte facility would cause disproportionate
20 and adverse impacts on minority and low-income
21 populations within the 50-mile environmental impact
22 area around the facility when compared to the impacts
23 on the non-environmental justice, or EJ, population;
24 is that correct, Mr. Reid?

25 MR. REID: Yes, it is.

1 CHAIR GIBSON: Okay. Counsel for the NRC
2 staff, the basis for using a four-mile radius instead
3 of a 50-mile radius for examining environmental
4 justice was Appendix C of NUREG-1748; is that correct?

5 MS. SIMON: Your Honor, this is Marcia
6 Simon for the staff. Yes, that's correct, your Honor.

7 CHAIR GIBSON: Appendix C of NUREG-1748 is
8 merely guidance, correct?

9 MS. SIMON: Yes, your Honor, that's true.

10 CHAIR GIBSON: It's not a duly promulgated
11 regulation that has run the gauntlet of notice and
12 comment rule-making, much less any possible court
13 challenge, correct?

14 MS. SIMON: That's true, but let me point
15 out that it is guidance that was endorsed specifically
16 by the Commission in its 2004 environmental justice
17 policy statement and, as such, as guidance that has
18 been endorsed by the Commission, it is entitled to
19 special weight. But it is not a duly promulgated
20 regulation, as you point out.

21 CHAIR GIBSON: In their reply, the
22 intervenors assert that the license renewal
23 application makes no reference to the Pine Ridge
24 Indian Reservation and Section 4.9 of the
25 environmental assessment does. They're right about

1 that, aren't they, Ms. Simon?

2 MS. SIMON: I believe so, your Honor.

3 CHAIR GIBSON: The NRC staff asserts in
4 Section 4.9 of the environmental assessment that,
5 because of the distance between the Pine Ridge Indian
6 Reservation and the CBR facility, there will be no
7 disproportionate impacts on the reservation; is that
8 correct?

9 MS. SIMON: I believe that's correct.

10 CHAIR GIBSON: We previously admitted
11 Environmental Contention B back in 2008, which alleges
12 that contaminates from the site are entering water
13 that is hydrogeologically connected with water used by
14 people living on the reservation; isn't that correct,
15 Ms. Simon?

16 MS. SIMON: Yes, yes, your Honor.

17 CHAIR GIBSON: Likewise, intervenors argue
18 in their reply that people living very close to the
19 mine have a financial interest in the mine through
20 leases and compensation, but those actually impacted
21 live farther away. Ms. Simon, if we assume, as I
22 think we must at this stage, that Crow Butte's
23 operation affects the environment on the reservation,
24 how can the environmental justice analysis only
25 consider a four-mile radius?

1 MS. SIMON: Your Honor, the four-mile
2 radius has been used in other ISR cases and the
3 potential for impacts that are alleged by the
4 intervenors are the same, are similar for those.
5 Also, the contention that there might be contamination
6 at the reservation is, as you stated, is already
7 covered in an admitted contention, but the issue with
8 environmental justice is is there a disparate impact,
9 a disproportionate effect? And that has not been
10 demonstrated. I believe the Consolidated Intervenors,
11 in their reply, mentioned people who bathe and drink
12 in the waters, but there are plenty of people closer
13 to the facility who have wells who get water which
14 they drink and which they presumably bathe in.

15 And so the key for environmental justice
16 is that you're looking at a disparate impact because
17 of the special nature of the community, and the
18 pleadings have not demonstrated that, your Honor.

19 CHAIR GIBSON: Mr. Reid?

20 MR. REID: Yes?

21 CHAIR GIBSON: Do you wish to respond to
22 Ms. Simon's argument?

23 MR. REID: Well, I think it's
24 fundamentally flawed. The environmental justice
25 analysis is required. It can't be dismissed in the

1 manner that the NRC staff is contending. You have to
2 at least go through the discussion. You have to do
3 the analysis. And if you do the analysis in a four-
4 mile radius and you don't consider the interests of
5 not only people of color but also impoverished areas,
6 because the environmental justice covers not only
7 racial disparity but economic disparity as well, if
8 you don't engage in an analysis that considers that,
9 then you've failed to comply with the environmental
10 justice requirements under the President's executive
11 order. It's a procedural requirement that hasn't been
12 met yet in the EA, and I think that's quite clear from
13 the way it was done. Once you make a four-mile limit
14 on this, then you have some real issues.

15 Also, I don't think that there's been an
16 adequate explanation as to how this four-mile limit
17 should be handled within the context of indigenous
18 peoples lying near or within that 50-mile radius. The
19 four-mile analysis, limit for the analysis may be
20 appropriate in some circumstances, but I can't see
21 where it would be appropriate in all.

22 CHAIR GIBSON: Mr. Reid, you have raised
23 the question of factors that are peculiar to the EJ
24 community and, in particular, to folks that are living
25 on the reservation. And my question is what factors

1 are peculiar to them? Ms. Simon just indicated that,
2 in her estimation, they're affected just the same way
3 people are who live nearby.

4 MR. REID: The specific ones -- I agree
5 that they're affected in terms of the ground and
6 surface water contamination, as to all downstream
7 users. They would not be the same as to persons
8 within the area or communities within the area that
9 are not downstream users from the facility. I agree
10 that that they hold in common.

11 The one big difference that separates or
12 distinguishes the tribe and the Lakota peoples are
13 their attachments or historic cultural and spiritual
14 and religious attachments to the area, and those are
15 impacted in a way in which they don't impact other
16 people because they don't have those characteristics.
17 This is a status, a status determination that creates
18 the burden upon the environment for the NRC staff in
19 order to do the analysis. And their staff says, as
20 Oglala Lakota with a special spiritual, cultural, and
21 historic interest in the area that is impacted in a
22 way that is not impacted, that the larger community
23 doesn't suffer, then that creates this environmental
24 justice requirement.

25 CHAIR GIBSON: Mr. Reid, I can appreciate

1 the way in which the significance of this territory
2 might represent a colorable claim if it were hunting
3 or fishing in the area nearby, something that's been
4 done, I assume, for centuries. But the spiritual
5 significance of the land is one that I wonder how we
6 could, how one could create a colorable claim for that
7 because, I mean, assuming, assume with me, I know you
8 don't want to do this but just assume with me, for the
9 sake of argument, that your Fort Laramie Treaty claim
10 is not one that this tribunal could recognize. How
11 could we then somehow recognize the spiritual
12 significance of the land as something that would
13 represent a colorable claim that we could enforce in
14 some way through an environmental justice contention?

15 MR. REID: Well, the spiritual
16 significance of the land was recognized by the U.S.
17 Supreme Court in the Ling case, L-I-N-G. It's a
18 difficult consideration within a western context, but
19 when you're talking about the land you're talking
20 about the relationship between the Oglala Sioux people
21 with the land, and that relationship includes not only
22 hunting and fishing but it would also include access
23 to the sites to perform their religious ceremonies, to
24 do vision quests, to make pilgrimages, and also in
25 terms of to care for the land because they have a

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1 special cultural relationship and responsibility for
2 the care-taking of this ground that is not shared with
3 other people in the area, and that is impacted, their
4 interference with their access, their interference
5 with their abilities to perform their duties that they
6 feel like they have a cultural responsibility to do.

7 CHAIR GIBSON: I'm sorry, I'm not familiar
8 with the Ling case. You're saying that the Ling case
9 establishes that the spiritual significance of
10 aboriginal land could, land that was, at one time,
11 aboriginal land -- let's just call it that for the
12 sake of so we can all agree on it. I know it has more
13 than that for you right now, but just for the sake or
14 argument. But that that, by itself, would be a
15 colorable claim?

16 MR. REID: The name of the case is Ling,
17 L-I-N-G, versus Northwest Indian Cemetery Protective
18 Association. It's at 485 U.S. 439. It's a 1988 case.
19 The case doesn't hold, doesn't specifically recognize
20 its significance. It's talking about the application
21 of the American Indian Religious Freedom Act and the
22 protection of religious access by indigenous people to
23 religious sites and the interference, first amendment,
24 American Indian Religious Freedom case. And the issue
25 there is whether or not the activities of the

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1 government create a -- and I think, as I recall that
2 case, it's in regards to the government issuing
3 permits for logging. And the issue -- on a sacred
4 site, a sacred mountain. And the issue is whether or
5 not those activities that are being licensed by the
6 government deprive the indigenous people there of
7 their access to these sites in order to engage in
8 their religious activities.

9 The discussion in that case is about the
10 direct relationship and responsibility of indigenous
11 people to their ancestral lands that we, as non-
12 Indians within a European culture, don't recognize and
13 share. So that's a unique aspect of indigenous
14 culture that is impacted by the activities of Crow
15 Butte and by the renewal of the license that was not
16 discussed in the environmental justice section of the
17 EA.

18 MR. FRANKEL: Your Honor, David Frankel.
19 Might I add a material addition?

20 CHAIR GIBSON: Yes, yes, Mr. Frankel.

21 MR. FRANKEL: David Frankel for
22 Consolidated Intervenors. On the basis of the simple
23 fact of Shannon County having such a high unemployment
24 rate, upwards of 90 percent, and the vast majority of
25 its people living below the poverty line, the lack of

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1 money compared to the people living within a four-mile
2 radius, there is a very clear and sharp distinction.
3 For example, the people at Pine Ridge Indian
4 Reservation, my clients have a hard time affording
5 whole-house filtration systems. And even those people
6 who do have filtration systems have a hard time
7 affording replacement filters that are needed to keep
8 them filtering out the material and even bottled water
9 and all these things that are much more accessible to
10 people living in Crawford, Nebraska compared to
11 Shannon County. And those kinds of things would be
12 revealed if the proper environmental justice analysis
13 had been done, as asserted by Consolidated
14 Intervenors, and they need to know here that we're at
15 the contention admissibility stage and not at a merits
16 stage. And so Ms. Simon's comment about what we may
17 have demonstrated or not demonstrated or what needs to
18 be demonstrated are all matters of evidence that need
19 to be brought up at a merits phases, and at this
20 contention admissibility phase it's clear from all NRC
21 regulations and applicable law that we've met the
22 minimal showings required. This is beyond conclusory
23 assertions or bald assertions. Thank you, your Honor.

24 CHAIR GIBSON: Mr. Frankel, I just want
25 to, I appreciate what you're saying. I'm not -- and

1 we are only interested here in contention
2 admissibility. We're not interested in a merits
3 determination. But what I am, I think what the Board
4 is struggling with is the factors that are peculiar to
5 the tribe that would cause the EJ community to be
6 adversely affected in ways that would not affect the
7 other community.

8 And, you know, as Ms. Simon says, if you
9 look at the basis for the claims, somebody within four
10 miles or 50 miles, what she's saying is the water is
11 going to be the same if, in fact, it's through
12 diffusion or whatever, it's probably going to end up
13 being less there.

14 MR. ELLISON: Judge Gibson, if I may
15 respond briefly. This is Bruce Ellison, Consolidated
16 Intervenors.

17 CHAIR GIBSON: You can, Mr. Ellison, but
18 I want Mr. Frankel to have a chance to answer my
19 question, and then we'll be glad to let you add
20 something. Just a second.

21 MR. FRANKEL: Thank you. David Frankel
22 for Consolidated Intervenors. My answer is that the
23 people at Pine Ridge, because of their poverty, are
24 far less equipped to mitigate, you know, through
25 buying bottled water and having filtration of their

1 water than the people within four miles.

2 CHAIR GIBSON: Fair enough. Thank you.
3 Go ahead, Mr. Ellison.

4 MR. ELLISON: Thank you, sir. Just a
5 couple of comments. First of all, in terms of the
6 comparisons between four miles and, for example, our
7 client, 66 miles, I would urge the Board to recall
8 that, prior to this Board's ruling on standing,
9 standing was generally only allowed to someone living
10 within a half mile or a mile downstream of the mine
11 site. And this board, due to its understanding of
12 approximate nexus between the mining of the White
13 River outside of Crawford, White River formation and
14 the White River flowing up through the Pine Ridge
15 Indian Reservation and the fact that the White River
16 recharges the Arikaree formation which is used by 60
17 percent of the population of Pine Ridge, the Board
18 greatly expanded standing. And I would submit a
19 similar analogy, in addition to Mr. Frankel's remarks,
20 would apply here because we're talking about an
21 impacted community that now has been recognized
22 outstanding, how could we not include them in an
23 environmental justice review?

24 And in addition to that, and maybe Ms.
25 Simon can educate me about this, we don't know if the

1 wells she's talking about, are they down flow or are
2 they up flow or are they even connected to the flow of
3 the White River formation being mined? The White
4 River is directly connected to the White River aquifer
5 just north of the renewal site.

6 And so if they're not in the same
7 formation, if they're not in the down flow, they may
8 not be impacted at all, unlike the people of Pine
9 Ridge who depend so much on what the White River does,
10 not only for fishing and other uses of the river
11 itself but for recharging everything for 60 percent of
12 the population using that water for all purposes.

13 CHAIR GIBSON: Well, Ms. Simon, Mr.
14 Ellison would like you to educate him. Are you
15 prepared to do so?

16 MS. SIMON: Your Honor, I am not
17 absolutely certain, but I am reasonably certain that
18 there are at least some, the town of Crawford, I
19 believe, is downstream of the site. And I believe
20 that there are plenty of people living in Crawford who
21 have wells, and it would be hard for me to believe
22 that some of them do not have wells that take water
23 from the aquifer. And if, as the intervenors contend,
24 there is, in fact, any contamination coming from this
25 site, it would impact not only the White River but

1 also those aquifers. And so that would be my
2 response.

3 If I could just respond to a couple of the
4 other points that have been made. As everyone knows,
5 it's the intervenors' burden to provide adequate
6 support and to show a genuine dispute. And so it's
7 not a matter of the staff coming back and responding
8 to everything that they're raising.

9 I do want to mention, again, the staff not
10 only followed the guidance for the review area, but
11 they followed the procedure that was endorsed by the
12 Commission for dealing with environmental justice.
13 The Commission, in the 2004 policy statement, outlined
14 how it intended to meet the goals of the executive
15 order on environmental justice and decided that it was
16 going to do that solely in the context of NEPA. And
17 they specifically endorsed the staff's then in place
18 guidance for materials facilities for both the review
19 area and for the process of determining whether a
20 detailed environmental justice analysis was required.

21 And so the staff's position is that they
22 follow that procedure. We realize it's not a
23 regulation, but it's entitled to special weight. And
24 the intervenors have not demonstrated why the four-
25 mile radius is insufficient in the staff's view.

1 The other point I wanted to make with
2 regard to cultural resources is that I think it's
3 inherent in the separate consideration of cultural
4 resources, and specifically cultural resources,
5 traditional cultural properties, for example, that are
6 of importance to a tribe, that that is given a
7 separate treatment and an extensive treatment in the
8 environmental assessment.

9 And so it's almost inherently, one could
10 argue, an EJ type of assessment where, yes, if there
11 are properties that are important to a tribe, then
12 they're going to get looked at. And so I think the
13 staff would say that the cultural resources section
14 does cover that and it's not necessary to admit an
15 environmental justice contention in that area.

16 CHAIR GIBSON: Is it covered in the
17 environmental justice section?

18 MS. SIMON: Cultural resources?

19 CHAIR GIBSON: Yes.

20 MS. SIMON: Not specifically.

21 CHAIR GIBSON: Thank you. Do any other
22 Board members have any question about contention
23 three? Apparently not.

24 MR. REID: Your Honor, before you move on,
25 could I have a short time for a response?

1 JUDGE WARDWELL: This is Judge Wardwell.
2 He had his mike on mute when he tried to talk before.

3 CHAIR GIBSON: Okay, thanks. Yes, Mr.
4 Reid?

5 MR. REID: On the burden, I understand
6 that the tribe has a burden on these contentions, but
7 the burden that we have in regards to EJ is to show
8 that the EJ analysis wasn't done in regards to the
9 tribe. That's admitted in the, I think it's evident
10 from a discussion in the environmental assessment.
11 There is even a discussion of the cultural impacts in
12 the environmental justice section, and it doesn't
13 mention any of the impacts to the tribe.

14 And in regards to the economic disparity,
15 which I think is what Mr. Frankel was getting at and
16 I didn't have a chance to address that, there's a case
17 on point that's cited in the reply brief. It's the
18 Entergy Nuclear Operations, Inc. It's the Indian
19 Point Nuclear Power Plant. It's an environmental
20 justice decision, and in that decision -- by the way,
21 it's a 2013 case that uses a 50-mile radius. It
22 doesn't use a four-mile radius. And it addresses the
23 situation of economic poverty, economic disparity.
24 That means if there's an incident at the plant, those
25 within the study area who are poor have less access,

1 they have no private vehicles and they have less
2 access to the means to escape the threat from an
3 incident at the power plant.

4 And those are -- what we're talking about
5 here in regards to the tribe, if the water is
6 contaminated, they don't have the -- it's directly on
7 point -- they don't have the economic resources to
8 address contamination. They can't afford the filters
9 or the alternate sources of water. They can't have
10 water piped into them. They don't have the economic
11 resources to purchase other land and to move that
12 other people might have that are not so economically
13 challenged.

14 JUDGE WARDWELL: This is Judge Wardwell.
15 What type of facility was that at Indian Point?

16 MR. REID: It's a nuclear power plant.

17 JUDGE WARDWELL: So it wasn't a mining
18 site?

19 MR. REID: No, it wasn't.

20 JUDGE WARDWELL: And what was the
21 fundamental basis for the decision on that in regards
22 to why environmental justice wasn't met?

23 MR. REID: The Board ruled in that case
24 that the NRC staff had failed to do an adequate
25 environmental analysis because they hadn't done a

1 sufficient consideration in their --

2 JUDGE WARDWELL: Well, let me get a little
3 bit more specific on that. Was it the Board decided
4 that, because the staff compared the wrong
5 populations, rather than any other factor; is that
6 correct? Specifically, did not the staff in that case
7 compare the EJ population before and after license
8 renewal, rather than compare after license renewal
9 environmental justice to those EJ populations compared
10 to the general population? Wasn't that the
11 fundamental reason for the decision?

12 MR. REID: It was a license renewal
13 decision, and I thought that the insufficiency was
14 their failure to consider certain populations of color
15 and economically-challenged populations. There was a
16 prison, as well, that could not be evacuated properly.
17 There were issues about buses not willing to transport
18 prisoners where the prisons were mostly populated by
19 people of color.

20 So I think it was a failure of the
21 environmental justice analysis to sufficiently
22 consider the populations that were put at risk that
23 fell within the environmental justice requirement,
24 which --

25 JUDGE WARDWELL: So it's your opinion that

1 it wasn't a, that the staff did not erred in their
2 comparison of the populations as the basis for that
3 decision?

4 MR. REID: Right. They erred in failing
5 to acquire the information they needed, same as here.

6 JUDGE WARDWELL: Thank you.

7 MS. SIMON: Your Honor, this is Marcia
8 Simon. May I just follow up on that briefly?

9 JUDGE WARDWELL: Yes, yes, you may.

10 MS. SIMON: Thank you. I believe at
11 Indian Point the Board found that the staff's
12 procedure that they followed was sufficient for NEPA,
13 but the staff actually failed to follow the second and
14 third steps of its procedure, which is, once it had
15 identified EJ populations in the 50-mile radius for
16 the reactor, not a materials facility, that it didn't
17 then appropriately follow the supplemental steps. So
18 I believe, in terms of whether they identified
19 populations or not, that I don't think was the issue.

20 JUDGE WARDWELL: That's all I have. Thank
21 you.

22 CHAIR GIBSON: Okay. Any other -- Judge
23 Hajek, did you have any questions on contention three?

24 JUDGE HAJEK: One of the questions that I
25 had was that, in terms of the staff -- I'm sorry. I

1 just need to find my question again here. My question
2 was that, in terms of impact of the use of the land
3 and the waters by the tribe, my understanding
4 previously was that the tribe uses this land and the
5 waters of the White River also for hunting and
6 fishing. Are there records of hunting and fishing
7 permits that show the actual use of the land along the
8 White River by the OST members?

9 MR. REID: This is Andrew Reid for the
10 tribe. I don't have that information.

11 MR. ELLISON: This is Bruce Ellison,
12 Consolidated Intervenors. It is my understanding from
13 my friends on the reservation that, as tribal members,
14 there is no permitting. They don't need a permit to
15 fish, and they don't need a permit to hunt. It's also
16 a treaty right. But there would be no record of who
17 does that. It's just done.

18 CHAIR GIBSON: Fair enough.

19 MR. SMITH: Judge Gibson, this is Tyson
20 Smith. Before we move on, I want to add one note.
21 That is that I believe this contention is also
22 untimely. Crow Butte's license renewal application
23 included an assessment of environmental justice. It
24 did not address impacts at the reservation. It
25 reached the same overall conclusion as the NRC staff;

1 and, therefore, this is untimely, as well.

2 CHAIR GIBSON: Thank you, Mr. Smith.
3 Judge Rosenthal, do you have any questions on
4 contention three? Apparently not.

5 Okay. Let's go to contention four. Mr.
6 Frankel, it appears to me that you are making two
7 separate arguments in contention four: first, that the
8 characterization of baseline groundwater and surface
9 water quality in the environmental assessment is
10 deficient; and, secondly, that the environmental
11 assessment does not demonstrate that groundwater and
12 surface water samples were collected in a
13 scientifically-defensible manner using proper sample
14 methodologies. Is that a fair summary of the two
15 different parts of this contention?

16 MR. FRANKEL: Your Honor, David Frankel
17 for Consolidated Intervenor. I don't mind answering
18 to the best of my ability, but we have co-counsel, Tom
19 Ballanco, on the line who, as among us, agreed to take
20 the lead on contention four. So if there's no
21 objection, your Honor, I'd let Mr. Ballanco answer for
22 Consolidated Intervenor, and I suppose if he misses
23 something I would chime in without being redundant.

24 CHAIR GIBSON: I did not realize Mr.
25 Ballanco was taking the lead on this, but, Mr.

1 Ballanco, is that a fair summary of the two basic
2 points of this contention?

3 MR. BALLANCO: Thank you, your Honor.
4 This is Tom Ballanco. I will speak to this. However,
5 I do want to defer to Mr. Ellison, who I think is, in
6 fact, taking the lead.

7 CHAIR GIBSON: All right.

8 MR. ELLISON: This is Bruce Ellison. Mr.
9 Ballanco is actually correct. We divvied these up,
10 and I believe that is correct.

11 CHAIR GIBSON: Thank you. Okay. Now, the
12 guts of your argument, Mr. Ellison, seems to be that
13 the data on groundwater and surface water was taken in
14 1982 and this is not representative of current
15 conditions; is that a fair statement?

16 MR. ELLISON: That would certainly be part
17 of it, yes.

18 CHAIR GIBSON: Okay. I was having trouble
19 understanding how, in 2015, we could take samples to
20 establish a baseline because Crow Butte has been
21 mining on this site since April of 1991, and you can't
22 unscramble an egg. So, you know, there's already a
23 lot of stuff that's gotten in the ground water out
24 there since 1991.

25 But after I read your reply, it appeared,

1 to me at least, that what you're seeking is for the
2 NRC staff to ascertain what the current conditions at
3 the site are and to use that as a baseline going
4 forward for renewal; is that correct?

5 MR. ELLISON: That is correct and
6 especially when the Board considers the fact that, at
7 least according to the application, as I believe Mr.
8 Reid mentioned earlier, that according to the
9 application Crow Butte said it was going to be
10 switching last year or perhaps this year into
11 reclamation. And so this would give a basis to know
12 where we're at now and where the company would have to
13 go.

14 CHAIR GIBSON: Okay.

15 MR. ELLISON: So, yes, sir, that would be
16 it in the short.

17 CHAIR GIBSON: Thank you. Let's see if we
18 can get Mr. Smith to help us out then. Mr. Smith,
19 intervenors argue in their reply that neither Crow
20 Butte, nor the NRC staff, has cited to any regulation
21 or applicable law that would preclude the taking of
22 such a baseline in connection with each renewal
23 licensing application. Can you cite us to a statute
24 or regulation that will clear this up once and for all
25 that requires the baseline to be the environmental

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1 conditions existing at the time it commenced
2 operation, rather than at the time the license was
3 renewed?

4 MR. SMITH: A specific statute that says
5 that?

6 CHAIR GIBSON: Well, I don't know. I said
7 a statute or regulation, Mr. Smith.

8 MR. SMITH: A statute or regulation? Not
9 off the top of my head. I mean, I think it seems that
10 you're pulling under NEPA. I mean, the NEPA analyses
11 always go the same way: you establish a baseline, you
12 compare what the effects of the project are going to
13 be, and then that's your basis for your impact.

14 I mean, here, this is license renewal, so
15 we have considered what the original pre-operational
16 impacts are, and then we are considering, you know,
17 what those impacts would be going forward relative to
18 those, which has the effect of maximizing the impact,
19 which I would think would be consistent with what the,
20 you know, the other stakeholders would want the NRC
21 staff and applicant to do.

22 But more specifically, if you're talking
23 about what are the requirements for establishing pre-
24 operational baseline conditions, I mean, those are
25 described in 10 CFR Part 40, Appendix A. There are a

1 number of criteria that relate to pre-operational
2 monitoring program. Particularly, Criterion 7 talks
3 about one year prior to any major site construction do
4 a pre-operational monitoring program to provide
5 complete baseline data, and that has been performed at
6 Crow Butte for each mine as they entered operation.

7 CHAIR GIBSON: Okay. Mr. Ellison, do you
8 dispute Mr. Smith's explanation in any way?

9 MR. ELLISON: Well, I think, in a sense,
10 the second part of this issue that we've raised is
11 that the groundwater and surface water samples which
12 were taken initially --

13 CHAIR GIBSON: We'll get to the samples in
14 a minute. Just the concept of baseline. That's all.

15 MR. ELLISON: If there's an adequate
16 sampling or either inadequate or improper methodology
17 in the sampling collection, then that would skew or
18 make less valuable the initial baseline data. And at
19 least if there was a comprehensive baseline study that
20 was done now, we could see, again, how far we have to
21 go to restore this.

22 CHAIR GIBSON: Fair enough. Okay. I
23 think we understand where everybody is coming out on
24 this on that where is the baseline. Now, regardless
25 of what is an appropriate baseline date, Crow Butte

1 and the NRC staff maintain that, because the
2 environmental assessment merely adopted the baseline
3 information in Crow Butte's application, if the
4 intervenors had a beef with this baseline information,
5 under our pleading rules they were obligated to raise
6 it back in 2008. How do you respond to that, Mr.
7 Ellison?

8 MR. ELLISON: Well, the way we would
9 respond, I would submit, would be that the first NEPA
10 document that we got was the EA.

11 CHAIR GIBSON: Yes.

12 MR. ELLISON: And so as far as the NEPA
13 response, we need to get that EA first. And we did --
14 well, let me . . .

15 CHAIR GIBSON: Okay.

16 MR. FRANKEL: Your Honor, David Frankel
17 with Consolidated Intervenor --

18 CHAIR GIBSON: Yes, Mr. Frankel.

19 MR. FRANKEL: -- to supplement Mr.
20 Ellison's -- thank you. I believe that LBP 1309 is
21 directly on point here, as well as the statements in
22 our reply about differing information. There's no way
23 for Consolidated Intervenor to be able to predict
24 what parts of the environmental report will be chosen
25 and what additional analyses will be done until we get

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1 a chance to see the first NEPA document. And so any
2 NEPA-related contentions, as a matter of law, cannot
3 be untimely. Thank you.

4 MR. SMITH: Judge Gibson, this is Tyson
5 Smith for the applicant.

6 CHAIR GIBSON: Yes, Mr. Smith.

7 MR. SMITH: That is contrary to the
8 Commission's rules of practice, 10 CFR 2.309 F2, which
9 says the contentions must be based on information
10 available at the time the application was filed,
11 including environmental report. That's an opportunity
12 to file NEPA-based contentions. You can file them
13 based on NRC staff's final NEPA document if there's
14 information that meets the various criteria: is it
15 materially different than what was previously
16 available and so on.

17 So Mr. Frankel and Mr. Ellison's
18 explanation of the timeliness of those documents is
19 directly contrary to the Commission's rules.

20 CHAIR GIBSON: Okay.

21 MR. FRANKEL: We do respect that that
22 contradicts LBT 1309 at page 20. Thank you. David
23 Frankel.

24 CHAIR GIBSON: Okay, thank you. Mr.
25 Ellison, you wanted to talk next about groundwater and

1 surface water samples and whether they were collected
2 in a scientifically-defensible manner using proper
3 sample methodologies.

4 MR. ELLISON: Yes, sir. According to our
5 expert, Dr. LaGarry, this was not done.

6 CHAIR GIBSON: And when were those samples
7 collected and analyses run? Was that in 2008?

8 MR. ELLISON: I believe it was, at least
9 from what I understand from Mr. Smith, that was done
10 based upon earlier sampling, even earlier than 2008;
11 am I correct, Mr. Smith?

12 MR. SMITH: Which mine unit?

13 MR. ELLISON: Well, we're talking about
14 the expansion, so let's talk about the expansion unit.

15 CHAIR GIBSON: Wait a minute. Are we
16 talking about this side or are we talking about the
17 North Trend Expansion?

18 MR. ELLISON: I'm sorry. The renewal
19 site.

20 CHAIR GIBSON: Okay, thank you.

21 MR. ELLISON: My mistake.

22 CHAIR GIBSON: That's okay.

23 MR. SMITH: So, I'm sorry, what was the
24 question again?

25 CHAIR GIBSON: Mr. Smith, could you just

1 clarify us when were the samples taken and analyzed
2 that went in the license renewal application with
3 respect to establishing a baseline?

4 MR. SMITH: Well, as I mentioned, it
5 depends on the mine unit, consistent with regulations
6 and Part 40 Appendix A that talk about establishing
7 pre-operational groundwater quality. Those are taken
8 at least one year prior to beginning mining operations
9 in a particular well unit. So some operations, some
10 baseline samples were taken, you know, before any
11 activity was done, others were taken close to time as
12 Crow Butte moved on to different mine units within the
13 mining area. So some have been collected much more
14 recently than others.

15 JUDGE WARDWELL: This is Judge Wardwell.
16 Mr. Smith?

17 MR. SMITH: I'm sorry, Judge Wardwell. I
18 couldn't hear the question.

19 JUDGE WARDWELL: And the water quality,
20 this is the water quality data that you included in
21 your application; is that correct?

22 MR. SMITH: Correct, yes.

23 JUDGE WARDWELL: And so it took place
24 prior to 2008 because that's when your license renewal
25 application took place; is that correct?

1 MR. SMITH: That's correct. That's when
2 a lot of that information was provided. We've also
3 collected information subsequent, all of which is
4 available on the NRC's website.

5 JUDGE WARDWELL: And is there any
6 difference between that additional information that
7 you collected between then and now, I assume, that is
8 different from baseline water quality sampling and
9 analyses?

10 MR. SMITH: I'm not being, trying to be
11 obtuse here, but data is collected to establish
12 baseline water quality. That is collected before any
13 mine unit operations begin. That would be information
14 that would have been included and available prior to
15 our license renewal application.

16 We also take samples regularly from
17 monitoring units and from wells. That happens all the
18 time. So there have been samples taken subsequently
19 but not for the purposes of establishing baseline.

20 JUDGE WARDWELL: I understand. But the
21 procedures and the processes that were used to sample
22 those wells throughout time are the same as you use
23 when you establish baseline?

24 MR. SMITH: Yes, your Honor.

25 JUDGE WARDWELL: Thank you. If I might,

1 I have a question for whoever is responding for the
2 Consolidated Intervenors or the OST. I forgot who we
3 finally settled it was responding to that. But I
4 guess I'm still confused on why are you interested in
5 getting, quote/unquote, a new baseline? It would seem
6 to be that it would be to your detriment to have a new
7 baseline because then their restoration criteria would
8 likely be a lot higher because it's been impacted by
9 the mining that's taking place today.

10 MR. ELLISON: Well, we just feel that it's
11 part of a hard look that the agency should take before
12 doing the renewal, which is a significant action on
13 the part of the NRC. And it certainly would give, I
14 would expect it to have much higher levels, but it
15 would give a general sense if, in fact, as I'm
16 understanding from the application -- and, again, this
17 is Bruce Ellison. I'm sorry if I didn't identify
18 myself. From the application -- I lost my train of
19 thought.

20 If, from the application, that Crow Butte
21 is now about to move into restoration, it gives a
22 baseline as to where we're at now in conjunction with
23 the earlier studies that are done. It doesn't elevate
24 the ultimate levels that Crow Butte would have to meet
25 for to be, quote/unquote, restored. We know what the

1 success of that is by the first mine unit that was so-
2 called restored. But it would give us better
3 information now and better information for the Board
4 or for the NRC to make a decision as to whether to
5 allow this renewal to go forward, in other words to
6 the next stages, and at what parameters.

7 JUDGE HAJEK: As I hear you speak, I think
8 it's possibly the use of the term "baseline" for the
9 goals that you're after that's in confusion because I
10 think most people consider baseline to be what was
11 there before any activity took place. As I hear you
12 speaking, is this correct that you are interested in
13 knowing what the status of the water quality is at
14 this point in time so that we can look to see in
15 regards to whether there's any impacts and what level
16 of restoration is really needed? Is that a better
17 assessment.

18 MR. ELLISON: I think it is, and perhaps
19 baseline would be really an incorrect statement. I
20 agree with you, Judge.

21 MR. BALLANCO: Your Honor, this is Tom
22 Ballanco for Consolidated Intervenors, if I could just
23 address that one point. Around this term "baseline,"
24 we're not talking about replacing the baselines that
25 were taken at the major federal action that was the

1 initial licensing. We're talking about the major
2 federal action that is the renewal, establishing a
3 baseline that accompanies that accompanies that
4 federal action.

5 JUDGE WARDWELL: Yes, but does that imply
6 -- this is Judge Wardwell -- again that if that's what
7 you're going to want to call it and designate then,
8 likewise, when the restoration at the end of renewal
9 takes place, that will be the baseline upon which you
10 would judge the clean-up criteria, would it not?

11 MR. FRANKEL: David Frankel for
12 Consolidated Intervenors. I'm sorry, your Honor, no.
13 That would be turn a blind eye to the facts and to
14 prejudice the environment, the people, and the
15 wildlife, and that's clearly contrary to the Atomic
16 Energy Act and NEPA. I don't think anyone is
17 suggesting that the 1982 baseline should be
18 disregarded, but we have clearly argued and we cited
19 the Half Moon Fisherman's case, this Western Watershed
20 Project v. ELM, that there's a reason for NEPA to
21 analyze pre-project environment. And in this case,
22 the pre-renewal environment exists as a thing that
23 should be fully explored and stated, disclosed in the
24 NEPA document, consequences described, including the
25 analysis of comparison between, you know, the 1997 and

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1 the 2007 compared to the 1982 when there's a complete
2 analysis in the NEPA document, as we've stated. Thank
3 you.

4 JUDGE HAJEK: I'll turn to staff, whoever
5 is going to respond for staff. Is baseline defined
6 anywhere, and what is that definition of baseline?

7 MS. SIMON: Your Honor, this is Marcia
8 Simon for the staff. I believe there's been quite a
9 bit of discussion about the definition of baseline in
10 some of the recent ISR hearings that have taken place,
11 and I don't believe there's an official definition of
12 it. I believe that technical staff is listening in on
13 the call, and so I'll ask if they have something to
14 contribute to this that they send me an email and I
15 can let you know further. But I don't think there's
16 an official definition.

17 JUDGE HAJEK: Okay, thank you. Staff,
18 while I've got you here, on page 28, you state that
19 nothing in NEPA requires to use the most current data,
20 and this is in regards to the 2010 to 2014 data.
21 What's the basis for your position on that?

22 MS. SIMON: Well, your Honor, I believe I
23 cited the Pilgrim case, CLI-10-11, which said that the
24 staff has discretion to draw the line on data
25 collection and move forward with decision-making. And

1 in this case, as I set forth in the answer, the staff
2 had over, I think, 12 years of operational data and I
3 think five years of pre-operational data for the
4 surface water monitoring that is at issue here. And
5 it was reasonable to use that data to establish any
6 trends that were occurring, you know, within those
7 waters, and that was what the staff did. And NEPA has
8 inherently a rule of reason, and the hard look does
9 not require perfection and it does not require all
10 information be implemented. It's just sufficient
11 information to get a reasonable description of the
12 affected environment.

13 JUDGE HAJEK: And why did you terminate it
14 at 2009, if I understand it correctly? I mean --

15 MS. SIMON: I believe the --

16 JUDGE HAJEK: -- length of time has
17 happened since you finally published a document.
18 While you may have lots of data, we also know it's a
19 very temporal affected parameter that seems to me, you
20 know, what is the harm of incorporating the rest of
21 that data, and is that very time consuming?

22 MS. SIMON: I'm not 100-percent sure, your
23 Honor. I believe that the staff may have done this
24 because, in the safety evaluation, that's the extent
25 of the data that was looked at for the safety

1 evaluation, and I believe that they may have stopped
2 at 2010 based on that. I'm not entirely sure, though.

3 MR. SMITH: And this is Tyson Smith for
4 the applicant. I'll just add to that that, even
5 though the data is not specifically cited in the EA,
6 and I think Ms. Simon probably hit upon the likely
7 reason that it's not, that information is publicly
8 available on ADAMS as part of Crow Butte's semi-annual
9 affluent monitoring reports and it's incumbent on the
10 intervenors to identify any information that they
11 think supports their position in this case. And just
12 because there's not a couple years' worth of data
13 isn't specifically called on the EA when that data is
14 available and they haven't taken the time to show that
15 it would lead to a different result. That's not an
16 admissible contention.

17 JUDGE WARDWELL: I have no further
18 questions. This is Judge Wardwell.

19 CHAIR GIBSON: Okay. Mr. Smith,
20 intervenors have alleged that there were several
21 spills or leaks from the site that went undetected for
22 at least three years and that spills and leaks lasting
23 this length of time were not considered in the
24 environmental assessment. I realize you did not draft
25 the environmental assessment, Mr. Smith, but do you

1 dispute this information on spills and leaks at the
2 facility?

3 MR. SMITH: I think, yes, there had been
4 spills and leaks at the facility, as noted by the
5 applicant in documents that we submitted to the NRC.
6 But none of those were found to have had any
7 significant environmental impact. I think there was
8 one that did have some environmental impact but was
9 cleaned up subsequently. So there's no basis for that
10 assertion.

11 CHAIR GIBSON: Were any of the spills or
12 leaks, did any of them go undetected for at least
13 three years, Mr. Smith?

14 MR. SMITH: I'm not sure the basis for
15 that assertion, and so I cannot verify that statement
16 one way or the other.

17 CHAIR GIBSON: I think it's in Exhibit F
18 to their contentions.

19 MR. SMITH: Okay. This is a list of
20 spills and leaks that was prepared in 2008.

21 CHAIR GIBSON: Right.

22 MR. SMITH: Which one is --

23 CHAIR GIBSON: Were any of them, did any
24 of them last at least three years?

25 MR. SMITH: I'm not sure that you can say

1 one way or the other based on the information that's
2 here. I mean, certainly, some of them, some of the
3 items here that were activities that went on for three
4 years. It doesn't necessarily mean that there was a
5 leak or a spill that was going on non-stop for three
6 years.

7 You know, for instance, one of the
8 violations noted on here is releasing well development
9 water on the surface of the ground. Well, that's
10 something that did take place at the plant and it did,
11 at least this note here that this violation continued
12 in 2006. But that doesn't mean the client is
13 consistently out there pumping well development water
14 onto the ground for the entire length of time.

15 CHAIR GIBSON: So you're saying that the
16 Exhibit F does not show that there was a leak of at
17 least three years?

18 MR. SMITH: Correct.

19 CHAIR GIBSON: Okay. Fair enough.

20 MR. SMITH: I mean, maybe Mr. Frankel, you
21 know, this list was prepared by --

22 CHAIR GIBSON: We're going to give them a
23 chance to respond, Mr. Smith. I just wanted to know
24 what you were saying Exhibit F said. Mr. Frankel, are
25 you the one who's going to respond to this, or is Mr.

1 Ellison, Mr. Ballanco?

2 MR. FRANKEL: David Frankel for
3 Consolidated Intervenors.

4 CHAIR GIBSON: Okay. Mr. Frankel, will
5 you please explain to us how you understand this
6 exhibit to demonstrate that there was a leak of at
7 least three years?

8 MR. FRANKEL: Your Honor, my recollection
9 is this July 1st, 2003 entry comes directly from the
10 Nebraska MDEQ citation against Crow Butte for a leaky
11 pipe scenario that resulted in an undetermined amount
12 release over an undetermined amount of time, which
13 they've identified as continuing through March 31st,
14 2006. Those come from facts. I believe there was a
15 \$50,000 fine. And we plead all this in our original
16 2008 petition in connection with some contentions that
17 were not admitted.

18 CHAIR GIBSON: Very well.

19 MR. SMITH: And this is Mr. Smith. If
20 that is Mr. Frankel's event that he's referring to, I
21 can provide an explanation to the Board.

22 CHAIR GIBSON: Well, why don't you just go
23 ahead and do that?

24 MR. SMITH: Sure. What happened was, when
25 Crow Butte was developing new injection wells, they

1 would install those. When you develop the wells, you
2 pump up the water from the well to the surface to
3 clean them out. At some time during this time period
4 in July 2003, Crow Butte was pumping out water and
5 letting it discharge onto the soil at the surface.
6 That was determined to be a violation, and it was
7 found that that water should instead be collected in
8 a water truck tank, which is what current operations
9 are.

10 So during the course of that, it's not as
11 if there was a leak that was leaking undetected onto
12 the ground, some unquantified amount of water, you
13 know, undetected for three years. It was a violation
14 that we, apparently wrongly, did not recognize as a
15 violation at the time, but it has been corrected and
16 there was no determination that there was any
17 environmental impact or contamination as a result of
18 those activities.

19 CHAIR GIBSON: Thank you.

20 MR. FRANKEL: David Frankel for
21 Consolidated Intervenors.

22 CHAIR GIBSON: Yes, sir?

23 MR. FRANKEL: Your Honor, this is not a
24 mystery at all. It's easy for the Board to obtain a
25 copy of the MDEQ findings, and there's three separate

1 charges on here that get resolved, and one of them has
2 to do with failure to properly construct those
3 injection wells and production wells. And so I'm not
4 entirely sure of the accuracy of Mr. Tyson's most
5 recent comments. We strongly disagree with those, and
6 we think that the answers can be found in the actual
7 MDEQ documents themselves, which I believe are a part
8 of the record.

9 CHAIR GIBSON: Okay. Fair enough. Judge
10 Wardwell, did you have anything else about the spills
11 and leaks?

12 JUDGE WARDWELL: Yes, Mr. Smith, do you
13 have any buried piping at the facilities?

14 MR. SMITH: Yes, we do.

15 JUDGE WARDWELL: And how do you detect
16 leaks from buried piping?

17 MR. SMITH: You measure the pressure
18 losses between well heads and the main facility, and
19 there's monitoring equipment. It's all controlled by
20 -- there's a variety of sensors throughout the well
21 field that's used to balance and make sure that there
22 are -- you detect pressure drops if there were
23 changes, if there were leaks or, you know, or bad
24 joints or pipefittings in the pipe. You would detect
25 that and take corrective action.

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1 JUDGE WARDWELL: So buried piping, it
2 would have to be a pretty large leak, wouldn't it, in
3 order to see a pressure drop?

4 MR. SMITH: I don't think so. There's a
5 lot of piping out there. There's also a lot of
6 different monitoring equipment. There's an individual
7 well house, and it goes to a collection point. So
8 you're going to see a drop across that. It doesn't
9 have to be that large for the site to be able to
10 detect it.

11 JUDGE WARDWELL: And then how do you find
12 it?

13 MR. SMITH: Well, there's a couple of
14 different ways. I mean, one, steps are taken
15 initially at the outset when you're installing the
16 piping. You take steps to ensure that they're
17 properly installed. You do pressure tests and leak
18 testing of joints. So that's your first line of
19 defense. Then you've got this monitoring equipment --

20 JUDGE WARDWELL: That's not my question.
21 My question is, if you detect a pressure drop, then
22 how can you isolate where that pressure drop is
23 happening along the pipeline?

24 MR. SMITH: Well, so you know it's going
25 to happen between a well head and between two

1 detection points where we're measuring the pressure.
2 So you can go out there and look. The pipe is not
3 buried that deeply, and you can easily excavate the
4 pipe until you find the source of the leak.

5 JUDGE WARDWELL: Okay, thank you.

6 CHAIR GIBSON: Okay. Ms. Simon, did the
7 environmental assessment discuss any of these spills
8 and leaks that we've just been discussing?

9 MS. SIMON: Your Honor, the environmental
10 assessment discussed impacts from spills and leaks in
11 general, but I do not believe it discussed any of the
12 specific ones on the intervenors' Exhibit F.

13 CHAIR GIBSON: Thank you. Do any other
14 Board members have any other questions about
15 contention four?

16 JUDGE HAJEK: This is Judge Hajek. I do
17 not.

18 CHAIR GIBSON: Okay. Fair enough.

19 MS. SIMON: Your Honor, this is Marcia
20 Simon. Could I just respond to Judge Wardwell's
21 question about baseline briefly?

22 CHAIR GIBSON: Judge Wardwell?

23 JUDGE WARDWELL: Yes?

24 CHAIR GIBSON: I want to be sure you're
25 going to hear this. Go ahead, Ms. Simon. Go ahead.

1 MS. SIMON: Okay. I just wanted to let
2 you know I received a response from the staff, and on
3 page 137 of the staff's safety evaluation report, this
4 is the 2014 revised version, Section 6.1.3.2 discusses
5 baseline water quality. And while baseline is not
6 defined in the regulations, the way the term is used
7 by industry and by the staff refers to pre-operational
8 water quality which is used to establish groundwater
9 protection standards to which a mine unit would be
10 restored under 10 CFR Part 40, Appendix A, Criterion
11 5B5.

12 And in addition, they also refer to
13 baseline water quality in the overlying aquifer and
14 the perimeter monitoring wells in order to establish
15 background concentrations for hazardous constituents
16 for monitoring of excursions. And that, again, is
17 under Appendix A, Criterion 5B5.

18 JUDGE HAJEK: Thank you.

19 MR. SMITH: And this is Tyson Smith. I'll
20 just add that in the EA on page 76 the NRC staff does
21 discuss leaks and spills that have occurred
22 historically at the site. It notes that the licensee
23 has certain threshold reporting requirements under
24 Part 20. We've never exceeded that threshold, but we
25 have had to report several leaks to the state

1 regulators. But Crow Butte investigated the impact
2 and took appropriate corrective actions, and no long-
3 term impact to groundwater is expected or has
4 occurred.

5 CHAIR GIBSON: Mr. Frankel, are you going
6 to be taking the lead on contention five, or is one of
7 your co-counsel going to be taking the lead?

8 MR. FRANKEL: I believe Mr. Ellison, if
9 I'm not mistaken.

10 CHAIR GIBSON: Good. Mr. Ellison,
11 contention five makes the claim that the environmental
12 assessment inadequately describes the site's
13 hydrologic and geologic setting and that, as a
14 consequence, it does not capture the potential effects
15 of the project on the adjacent surface and groundwater
16 resources. Is that a fair summary of contention five?
17 Mr. Ellison, are you there? Oh, dear.

18 MR. ELLISON: Yes, I am. I'm sorry. I
19 had accidentally muted myself. Yes, sir, that is
20 correct. It does not include the faults and joints
21 that are clearly in the area, and the modeling didn't
22 include that at all. It doesn't include artesian
23 springs and, yes, we are concerned about both on-site
24 and adjacent off-site.

25 CHAIR GIBSON: Okay. Fair enough. Now,

1 Mr. Smith, intervenors claim that this contention is
2 supported by a 2015 affidavit from Dr. LaGarry. And,
3 yet, you claim this information was available when the
4 SER was issued and that intervenors had an obligation
5 to raise it then; is that correct?

6 MR. SMITH: Yes.

7 CHAIR GIBSON: To what specific
8 information are you referring, Mr. Smith?

9 MR. SMITH: I'm referring in particular to
10 the NRC staff's independent groundwater modeling
11 effort that they undertook to address the potential
12 for the White River structural feature to be a source
13 of potential groundwater contamination migration.

14 CHAIR GIBSON: Okay. Mr. Ellison?

15 MR. ELLISON: Yes.

16 CHAIR GIBSON: In your reply, you claim
17 that this contention is timely because it was based
18 off of the NRC staff's analysis at EA Section
19 3.5.2.3.3 and that this information is comprised of
20 NRC staff actions, reports, analyses, and activities
21 that are not described previously. And Mr. Smith
22 obviously doesn't agree with you, so how do you
23 respond to him?

24 MR. ELLISON: Well, I would respond that
25 the first NEPA document, since we're doing a NEPA

1 analysis, since the first NEPA document we got was the
2 EA, we're responding to that.

3 JUDGE WARDWELL: This is Judge Wardwell.
4 Can we do the same thing that we did with the historic
5 information that for now on we just abbreviate the
6 answers to whether or not, in regards to timeliness,
7 it was in the EA or not and whether it's a NEPA issue
8 or not. That will help speed this up, I think, for
9 the remaining 11 contentions.

10 MR. ELLISON: Yes, because our argument
11 would be the same, Judge.

12 CHAIR GIBSON: Let me just make sure,
13 though, I understand. Mr. Smith, you're not saying
14 this was in the application. You're saying this was
15 in the SER; is that right?

16 MR. SMITH: Well, the specific information
17 about the staff's independent groundwater modeling?

18 CHAIR GIBSON: Yes.

19 MR. SMITH: That was done for the first
20 time in their 2012 SER. It's also repeated in their
21 2014 SER.

22 CHAIR GIBSON: And so what you're saying
23 is that the intervenors had an obligation to raise it
24 at that point; is that right?

25 MR. SMITH: Absolutely.

1 CHAIR GIBSON: Therefore, it's not timely
2 now?

3 MR. SMITH: Absolutely. And I want to add
4 that, harkening back to an earlier discussion we had
5 about the migration tenet, this is why it does not
6 apply to contention five, and that's because that
7 tenet only applies when the information in the
8 subsequent staff document is essentially the same as
9 what was in the applicant's document. Here, the NRC
10 staff, in response, I assume, to contentions that were
11 raised by the intervenors, went out and performed
12 supplemental groundwater modeling, and that is the
13 basis, or at least a large part of the basis, for
14 their conclusions in the SER and the EA.

15 CHAIR GIBSON: Okay.

16 MR. FRANKEL: David Frankel for
17 Consolidated Intervenors, your Honor. Before we go on
18 to the automatic no more comment, might I just add
19 something?

20 CHAIR GIBSON: Yes, yes, absolutely, as
21 long as it's not the same thing.

22 MR. FRANKEL: I made reference before to
23 the LBP 1309, and I just want to read into the record
24 from page 27 to 28 when the Board says, "The
25 scheduling water, as well as Commission regulation,

1 provide that intervenors and potential intervenors
2 have a period of time to file new or amended
3 contentions in response to a DSEIS," for our case
4 purposes the NEPA document. "They are not required to
5 file their contentions on information or studies that
6 are published in the period between the date for
7 initial contentions and the date that DSEIS is
8 published. The gravamen of this contention is not
9 that an RAI response contains new information but that
10 the DSEIS ignored it. There is no way for an
11 intervenor to know what use, if any, the NRC staff may
12 make of a response to a request for additional
13 information (RAI) or a study in the DSEIS. An
14 intervenor is entitled to see the DSEIS and then file
15 any new or amended contentions based on what appears
16 in the DSEIS because you otherwise would place an
17 impossible burden on the intervenor and an
18 unreasonable requirement that the intervenor divine
19 what use, if any, the NRC staff will make of that
20 information in the DSEIS."

21 So with that, we'll continue to refer back
22 to that rule. We still haven't heard anything from
23 the NRC staff or Crow Butte that any of that is not
24 applicable here, and so all their timeliness arguments
25 with regard to what was published in between must

1 fail. Thank you.

2 MR. SMITH: And this is Tyson Smith for
3 the applicant. Obviously, here, we're not talking
4 just about the draft supplement. We're talking about
5 the SER that was the staff's document that was
6 published in December 2012 and republished in August
7 of 2014. So there were specific staff documents
8 available upon which the intervenors could have made
9 this claim.

10 JUDGE ROSENTHAL: This is Judge Rosenthal.
11 Yes, I've been awake during this period. I don't
12 quite follow this. Are you saying, Mr. Smith, that,
13 over this course of many years since the intervention
14 petition was granted, staff was in the process of
15 coming forth with its environmental and that these
16 intervenors were required to see whether there was
17 some document that might or might not be acknowledged
18 in, eventually, their EA or EIS? It seems to me that
19 the way this scheme operates is the intervenor's
20 intervention petition is granted, then there's a
21 period of time when the staff conducts its
22 environmental investigation, and then there is an EA
23 or a draft environmental impact statement. And at
24 that point, the intervenors have to act.

25 I mean, that's what I thought the scheme

1 was, but you're saying, no, that they've got to keep
2 track of whatever the staff issues. And if they have
3 a problem with that, they've got to move then. They
4 can't wait until the end of the process.

5 MR. SMITH: Two things. One is I think
6 I'm just applying the rule that the Commission has
7 laid out in 2309C1 which talks about what you have to
8 do to file a new or amended contention. You have to
9 demonstrate that the information was not previously
10 available, that the information's basis is materially
11 different than what was previously available, and it's
12 been raised in a timely manner based on the
13 availability of that new information. So that's in
14 the regulations.

15 But here, I don't even need to go to that
16 because what we're talking about here is the staff's
17 completion of their safety review of the license
18 renewal application. This is the culmination of their
19 formal technical review which was a subject of
20 contentions. Our application was just one document.
21 It was a combined ER/SAR, and the staff has published
22 their SER. That's the culmination of their review.
23 That is the appropriate time to raise contentions on
24 issues that are conclusively resolved in that safety
25 evaluation report.

1 JUDGE WARDWELL: This is Judge Wardwell.
2 That's on the safety side of it, though, isn't it?
3 They don't see any issues here.

4 JUDGE ROSENTHAL: Exactly. These are NEPA
5 issues. And, moreover, it seems to me that the
6 regulations do not contemplate that over the lengthy
7 period that staff took in completing its environmental
8 review addressed to environmental issues that the
9 intervenors had to take into account a safety report.

10 MR. SMITH: I respectfully disagree. I
11 mean, the issues here, the safety and environmental
12 issues relating to groundwater and groundwater quality
13 and groundwater contamination are co-extensive the
14 safety and environmental impacts. The intervenors'
15 concern is about contamination. The safety evaluation
16 report was about contamination. There is no
17 difference between the two.

18 JUDGE ROSENTHAL: And I will go back to
19 snoozing.

20 JUDGE WARDWELL: Mr. Smith, so you're
21 saying that we can evaluate these just as if they are
22 safety issues, rather than just NEPA issues?

23 MR. SMITH: I think the way the staff has
24 addressed them is the same in both cases, and so yes,
25 at least in terms of timeliness. The NRC staff

1 completed their review of groundwater impacts in their
2 SER, and there's no excuse for waiting two years to
3 raise contentions based on issues that were
4 conclusively resolved.

5 MS. SIMON: Your Honor, this is Marcia
6 Simon of the staff. Can I make a few comments? First
7 of all, in this case, Mr. Smith is correct. When the
8 staff does the review of the hydrogeology, the staff
9 takes, the safety staff reviews the hydrogeology and
10 the environmental, the information in the
11 environmental assessment, particularly the modeling
12 and the adequate confinement information, essentially
13 derives from the safety review.

14 The other thing I wanted to mention is in
15 response to Mr. Frankel's citations of LBP 1309, which
16 I believe is the Board decision in Powertech. I'd
17 just like to refer the Board to a couple of
18 Commission-level rules and cases. First, of course,
19 is the 2012 Part 2 rule change where the timeliness
20 rules in 2309C1 were adopted, and there's discussion
21 in the statements of consideration for that about
22 previously-available information and what would
23 constitute an acceptable new contention.

24 A recent decision in the Fermi case, CLI-
25 15-01, discusses timeliness and says NEPA contentions

1 must be raised, if possible, in response to an
2 applicant's environmental report and contentions must
3 be raised at the earliest possible opportunity. And,
4 finally, there's the Prairie Island case, CLI-10-27,
5 which is also cited in the statements of consideration
6 for the Part 12 rule change I just referred to. So
7 just to provide some other authority to rebut Mr.
8 Frankel. Thank you.

9 JUDGE WARDWELL: This is Judge Wardwell.
10 Was the modeling done for the SER, or was it done for
11 the EA?

12 MS. SIMON: The modeling was done for the
13 SER, and it was adopted in the EA.

14 JUDGE WARDWELL: Is this the North Trend
15 modeling; is that correct?

16 MS. SIMON: This is the modeling of the
17 White River structural feature, which is located
18 adjacent to the North Trend site. And so that's why
19 --

20 JUDGE WARDWELL: You're using data from
21 the North Trend, as opposed to the current operational
22 area; is that correct?

23 MS. SIMON: That's correct because, again,
24 that's where the structural feature is located.

25 MR. ELLISON: This is Bruce Ellison,

1 Consolidated Intervenor. That's where the large
2 structural defect is present. It's our contention
3 that there are faults intersecting areas that are
4 potential pathways for contamination that were not
5 included in either report but not included in the EA,
6 as Dr. LaGarry points out.

7 MS. SIMON: This is Marcia Simon. Can I
8 just also get back to a comment that was made earlier?
9 Contention five had a number of different assertions
10 made, and the assertions regarding the White River
11 structural feature and that modeling was only one
12 element. And so the other assertions regarding
13 nomenclature and the more general assertions of faults
14 and folds and confinement, as Mr. Ellison just
15 referred to, is another aspect of the contention. And
16 the staff's view anyway with regard to timeliness is
17 that we share Crow Butte's view that the analysis was
18 done in the SER. And so for that reason, a contention
19 could have been raised then.

20 But that was, we do consider that,
21 obviously, materially different information in the EA,
22 as opposed to the environmental report. But with
23 regard to timeliness, the rest of the information in
24 contention five with regard to the hydrogeology, as we
25 pointed out in our answer, nothing is really different

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1 between the LaGarry 2015 opinion and the LaGarry 2008
2 opinion so that that could not have been raised at
3 that time.

4 JUDGE WARDWELL: I have no further
5 questions.

6 CHAIR GIBSON: Okay. Judge Rosenthal?

7 JUDGE ROSENTHAL: No, I'm satisfied.

8 CHAIR GIBSON: Judge Hajek?

9 JUDGE HAJEK: I'm okay.

10 JUDGE WARDWELL: I do have one question.
11 How come every time Judge Hajek comes back off of
12 mute, it sounds like a drop of water, at least in
13 mine. Does anyone else hear that drop of water?

14 MS. SIMON: Yes, your Honor.

15 CHAIR GIBSON: I think it has to do with
16 the hydrogeology where he's living. Okay. Well,
17 whatever it is, I suggest we take a recess for five
18 minutes. We'll be back on in five minutes and take up
19 contention six.

20 (Whereupon, the above-entitled matter
21 went off the record at 3:07 p.m. and went
22 back on the record at 3:13 p.m.)

23 CHAIR GIBSON: All right. This is Judge Gibson. I'd
24 like to turn now to Contention Number 6.

25 Mr. Frankel, is this one that you're

1 taking the lead on, or is Mr. Ellison or Mr. Ballanco
2 taking the lead on this one?

3 MR. FRANKEL: David Frankel.

4 Go ahead, Bruce and Tom. I thought Tom
5 was taking this one.

6 MR. ELLISON: Tom, did you think you were?

7 MR. BALLANCO: No, I thought you were.

8 MR. ELLISON: Okay. That's what I thought.

9 MR. FRANKEL: All right. Go ahead, Bruce.

10 CHAIR GIBSON: Mr. Ellison.

11 MR. ELLISON: Yes, sir.

12 CHAIR GIBSON: Contention 6 claims that the
13 Environmental Assessment analysis of groundwater
14 quantity impacts from the project is faulty; is that
15 correct?

16 MR. ELLISON: That is correct.

17 CHAIR GIBSON: Mr. Smith, if I understand
18 correctly, the staff and the applicant have argued
19 that intervenors should have raised this back in 2008
20 and that there's nothing new in this contention that
21 was not available in 2008; is that correct?

22 MR. SMITH: Yes, sir. This is Tyson Smith.
23 Yes, Your Honor.

24 CHAIR GIBSON: In their reply, intervenors
25 address this argument by asserting that the

1 information in Section 4.6.2.2.1 of the Environmental
2 Assessment concerning the Piezometric surface of the
3 Basal Chadron is not in the license renewal
4 application.

5 And then they highlight some critical
6 information allegedly critical to the contention that
7 it's in the Environmental Assessment, but not in the
8 license renewal application.

9 Are you familiar with that, Mr. Smith?

10 MR. SMITH: I am, yes.

11 CHAIR GIBSON: Okay. Are intervenors still
12 wrong on timeliness?

13 MR. SMITH: Yes, they are.

14 CHAIR GIBSON: Why?

15 MR. SMITH: Because we had reported the
16 drawdown prior to 2009. The information on drawdown
17 was included in the license renewal application.

18 CHAIR GIBSON: Okay.

19 MR. SMITH: And so, the same information
20 was also included in the staff's SER.

21 CHAIR GIBSON: Okay. Mr. Ellison.

22 MR. ELLISON: Yes, sir.

23 JUDGE HAJEK: I'm sorry. This is Judge
24 Hajek. I think I missed the timing on that. I
25 thought I heard Mr. Smith say that the drawdown

1 occurred in 2009, but the LRA was written in a year or
2 two earlier?

3 Can you just clarify that for me, please?

4 MR. SMITH: Sure. The drawdown was - in
5 the Piezometric surface was discussed in the license
6 renewal application. So, that was included in there.

7 We have subsequently provided additional
8 information to the NRC. We've provided updated
9 Piezometric surface contour maps for the basal chadron
10 in spring of 2008, fall of 2008, winter of 2009, but
11 those are just, you know, slight differences in
12 degree, not really differences in magnitude.

13 So, to the extent they're arguing that
14 the, you know, you want to talk about drawdown
15 between, you know, 39 feet and 59 feet as opposed to
16 40 and 60, I don't - that's not a material difference.

17 The fact that there was drawdown occurring
18 was disclosed and discussed in the license renewal
19 application. And it was also disclosed and discussed
20 in the staff's SER.

21 JUDGE HAJEK: Okay. Thank you.

22 CHAIR GIBSON: Mr. Ellison.

23 MR. ELLISON: Yes, sir.

24 CHAIR GIBSON: How do you reply?

25 MR. ELLISON: Well, in much the same way

1 we've replied before. And that is that the first NEPA
2 document which we had to review upon which we could
3 bring contentions was the Environmental Assessment.

4 The SER is not an environmental document,
5 not a NEPA environmental document.

6 CHAIR GIBSON: Okay. Fair enough. Fair
7 enough.

8 Mr. Smith, separate and apart from
9 timeliness, intervenors assert that there is a genuine
10 dispute with the Environmental Assessment and that the
11 NRC staff opines that these issues are no more than of
12 moderate importance while they consider them to be
13 significant.

14 Is there a genuine dispute here, Mr.
15 Smith?

16 MR. SMITH: No.

17 CHAIR GIBSON: Why?

18 MR. SMITH: They haven't explained why the
19 NRC staff's assessment of impacts as moderate is
20 incorrect.

21 I mean, the staff bases that discussion of
22 moderate on the CEQ factors that go into how you
23 determine whether impacts are small, moderate or
24 large. And the staff - they haven't challenged the
25 staff's conclusions that they're moderate, nor have

1 they really challenged the specifics of those impacts.

2 Just that they're not just calling them,
3 characterizing them as significantly greater than
4 moderate, but they haven't characterized them, you
5 know, quantitatively or even qualitatively as larger
6 than those that are discussed and disclosed by the NRC
7 staff in the SER and EA.

8 CHAIR GIBSON: Mr. Ellison.

9 MR. ELLISON: Well, I guess, you know,
10 there's a fundamental issue which arose in Powertech
11 that's now arising here.

12 We've got a fundamental difference of
13 interpretation of volume of water which is considered
14 used. It's volume of water that is used. Is that
15 simply from the bleed? Is that simply from any
16 evaporation?

17 As opposed to since uranium - ISL
18 operations contaminate water supply. Since the water
19 levels even in the so-called restored mine shows that
20 there are elevated levels of heavy metals and arsenic
21 after restoration, to not consider that volume of
22 water to be having been used ignores really the
23 reality that when you contaminate water, it's no
24 longer the same beneficial use it could have been used
25 for, for in the future.

1 And so, it's a fundamental difference of
2 what constitutes use. Is it simply the quantity total
3 volume, or is it the total quantity of volume water
4 affected by the operation, contaminated by the
5 operation? And that's a pretty fundamental
6 difference.

7 MR. SMITH: And this is Tyson Smith.

8 And even accepting that that is a
9 fundamental difference, which we do not, the fact is
10 that argument could have and should have been raised
11 based on the license renewal application.

12 CHAIR GIBSON: Okay. Well, we're not
13 talking about timeliness. We've already talked about
14 that, Mr. Smith. I do want to ask you a question,
15 though.

16 Mr. Ellison just raised a question about
17 this aquifer. Was this a potable aquifer in 1991 when
18 you commenced operation?

19 MR. SMITH: No, it was not.

20 CHAIR GIBSON: Okay.

21 MR. SMITH: And I'll just emphasize, you
22 know, to the extent that those assessments of whether
23 an aquifer is exempted or is - determination is made
24 by NDEQ and is part of an EPA-assumed program.

25 CHAIR GIBSON: Okay. Judge Wardwell, did

1 you have some questions about this contention?

2 (No response.)

3 CHAIR GIBSON: I guess not.

4 MR. FRANKEL: Your Honor, David Frankel for
5 Consolidated Intervenors.

6 Might I add just a small amount to Mr.
7 Ellison's comment?

8 CHAIR GIBSON: Yes.

9 MR. FRANKEL: Okay. Thank you.

10 I would refer the Board to Page 70 of our
11 Consolidated Intervenors contention filing where we
12 specifically raise the issue that Mining Unit 1 was
13 the smallest mining unit.

14 Also, that it's been 12 years and Mining
15 Units 2 through 6 are still consuming the amount of
16 groundwater that that consumption rate has increased.

17 And so, I want to point out that we have
18 stated very specific bases for our dispute with the
19 characterization of moderate in the EA.

20 CHAIR GIBSON: Fair enough. Okay. All
21 right. If we have no other questions with regard to
22 that contention, I suggest we turn to Contention 7.

23 Mr. Frankel, are you taking the lead on
24 this, or is one of your co-counsel?

25 MR. FRANKEL: This one I'm sure about, Your

1 Honor. I'm taking the lead.

2 CHAIR GIBSON: Okay. Mr. Frankel, on
3 Contention 7 as I see it, this contention really has
4 three parts.

5 The first is that the Environmental
6 Assessment fails to present relevant evidence in a
7 clear and concise manner that is readily accessible to
8 the public and other reviewers; is that correct?

9 MR. FRANKEL: Yes, Your Honor.

10 CHAIR GIBSON: Okay. The second part of
11 your contention is that there are some typos in the
12 Environmental Assessment that you caught; is that
13 correct?

14 MR. FRANKEL: Yes, Your Honor.

15 CHAIR GIBSON: And the third is that the
16 Environmental Assessment failed to include relevant
17 information that purportedly supports the conclusion
18 in the Environmental Assessment, and that it likewise
19 failed to include information particularly from Dr.
20 Abitz - is that how you say that? A-B-I-T-Z.

21 MR. FRANKEL: Your Honor, I believe it's
22 Aw-bitz.

23 CHAIR GIBSON: Abitz, that would refute the
24 conclusions in the Environmental Assessment.

25 Is that a fair summary of the third part

1 of your contention?

2 MR. FRANKEL: Yes, Your Honor.

3 CHAIR GIBSON: Thank you. Okay. Mr.
4 Smith, I want to focus on this third point.

5 According to Dr. Abitz, there are no data
6 to support the water quality results in Table 2.2-9 of
7 the license renewal application. All data must be
8 provided to allow an independent reviewer to derive
9 values presented in the table.

10 Now, intervenors are asserting that this
11 table is used to justify surface water quality
12 conclusions in the final Environmental Assessment.

13 Why do you maintain they are wrong?

14 JUDGE WARDWELL: For the record, this is
15 Judge Wardwell interrupting. I've been listening to
16 you, but you couldn't hear me and I finally got it
17 corrected with the operator. So, I wanted to, for the
18 record, know that I'm back online.

19 CHAIR GIBSON: Okay. Did you have any
20 questions about Contention 6?

21 JUDGE WARDWELL: No. That's when I found
22 out you weren't hearing me.

23 (Laughter.)

24 CHAIR GIBSON: Okay. We just thought you
25 didn't find us very interesting, Judge Wardwell.

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1 JUDGE WARDWELL: Well, that's not --
2 they're not mutually exclusive items.

3 CHAIR GIBSON: Okay. Mr. Smith.

4 MR. SMITH: Sure. And what was your - I'm
5 not sure I misunderstood the question. I guess the
6 data that underlies this table is available on the
7 NRC's website and could be viewed and downloaded by
8 Mr. Abitz and others.

9 CHAIR GIBSON: Now, they're saying that
10 it's used to justify surface water, water quality
11 conclusions in the final Environmental Assessment at
12 Section 3.5.1.2.

13 Do you agree?

14 MR. SMITH: Sorry. Let me go look at
15 3.5.1.2.

16 (Reviewing document.)

17 MR. SMITH: I, I mean, off the top of my
18 head I don't see why that would be, because Table 2.2-
19 9 is groundwater quality data where 3.5.1.2 is surface
20 water quality data.

21 CHAIR GIBSON: Fair enough. Mr. Frankel,
22 do you have any explanation for this? Is that
23 groundwater quality data used to justify the surface
24 water quality conclusions in the Environmental
25 Assessment?

1 MR. FRANKEL: Your Honor, I'm going to have
2 to take a look at 3.5.1.2. Can you give me -

3 CHAIR GIBSON: Well, don't feel too badly.
4 So did Mr. Smith. So, it's alright. You're even.

5 MR. FRANKEL: Hang on a second.

6 (Reviewing document.)

7 MR. FRANKEL: Give me a moment here.

8 CHAIR GIBSON: Uh-huh.

9 (Pause.)

10 CHAIR GIBSON: I believe just to help you
11 out a little bit, I'm not trying - this is not a trick
12 question, Mr. Frankel. I'm just trying to understand.

13 I believe what Dr. Abitz is saying, and I
14 don't want to put words in his mouth, is that the NRC
15 in their Environmental Assessment took groundwater
16 quality data and used it as a justification for their
17 conclusions about water, surface water quality and I
18 think it is a criticism he is making of their
19 analysis.

20 Is that your understanding of what he's
21 saying?

22 MR. FRANKEL: Yes.

23 CHAIR GIBSON: Fair enough. Okay.

24 Now, Mr. Smith, do you disagree with him?
25 Do you think that was, I mean, do you have any

1 explanation for this? Is there some connection
2 between the two?

3 MR. SMITH: Not that I can see.

4 CHAIR GIBSON: Okay.

5 MR. SMITH: I don't see any connection
6 between the two. And being fulsome, you know, perhaps
7 he was talking about groundwater, water quality data,
8 but all that data is also available publicly on the
9 NRC's website. So, it is all available.

10 It may not be listed and identified
11 specifically in the EA, but that's not the purpose of
12 an EA which is to be analytic rather than encyclopedic
13 and, you know, the information is available publicly.

14 CHAIR GIBSON: Correct. Correct. And I'm
15 only - I think that the point Mr. Abitz made is that
16 some of these things don't seem to make sense. That's
17 all.

18 And it sounds like we're probably agreeing
19 that that probably doesn't really make sense. Doesn't
20 mean that it's flawed. It's just he's pointing out
21 something that's wrong and maybe it is a fatal flaw.
22 Maybe it's just a, you know, like a typo.

23 But regardless, we're trying to clear this
24 up, Mr. Smith. That's all.

25 MR. SMITH: No, maybe I'm - maybe perhaps

1 I'm misunderstanding you, because I see his comment -
2 I don't see anything in 3.5.1.2 that links back to
3 Table 2.2-9 of the LRA.

4 CHAIR GIBSON: Okay. Okay.

5 MR. SMITH: I don't see how Dr. Abitz' --

6 CHAIR GIBSON: Fair enough.

7 MR. SMITH: -- criticism applies to this
8 section.

9 CHAIR GIBSON: Okay. And, Mr. Frankel, do
10 you - can you provide us with some additional
11 information then?

12 Mr. Smith is saying that there's no
13 connection between 3.5.1.2 and Table 2.2-9 and so Dr.
14 Abitz is just wrong.

15 Do you have any explanation for this?

16 MR. FRANKEL: The explanation can be that
17 Dr. Abitz' overall comment, as you said, Judge, was
18 that there are a whole lot of things, 46 items he
19 identifies that don't quite hang together for an
20 independent public reviewer.

21 CHAIR GIBSON: Okay. Ms. Simon, is Table
22 2.2-9 of the LRA cited or referred to in any way as
23 support for Section 3.5.1.2 of the final Environmental
24 Assessment?

25 And if you don't know, could you find out

1 for us?

2 MR. CYLKOWSKI: Your Honor, this is David
3 Cylkowski on behalf of the staff.

4 CHAIR GIBSON: Yes.

5 MR. CYLKOWSKI: I actually have this
6 contention.

7 CHAIR GIBSON: I'm sorry. Okay.

8 MR. CYLKOWSKI: That's fine, Your Honor.

9 I don't believe that it is. I can confirm
10 that for you, but I think most importantly - more
11 importantly I just want to make clear the Abitz
12 opinion we're discussing was authored in 2008 based on
13 a review of the license renewal application and in no
14 way is based on a review of the Environmental
15 Assessment.

16 CHAIR GIBSON: Okay. You're saying that
17 this is the - this is based on work he did in 2008,
18 not 2015?

19 MR. CYLKOWSKI: Your Honor, I believe -

20 MR. FRANKEL: That's correct, Your Honor.

21 CHAIR GIBSON: Mr. Frankel.

22 MR. FRANKEL: Yes, that's correct, Your
23 Honor.

24 CHAIR GIBSON: Okay. How could he opine
25 about Table 2.2-9 affecting the final Environmental

1 Assessment? He could not have seen it in 2008.

2 MR. FRANKEL: Your Honor, what we said was
3 that he noted all these issues that required a more
4 detailed evaluation where we didn't see any of that
5 more detailed evaluation.

6 An example of that is in 3.5.1.2 where
7 there are some conclusions provided, but the data
8 necessary for an independent reviewer to derive the
9 values of the conclusions is not presented.

10 CHAIR GIBSON: Okay. Okay. So, Mr.
11 Frankel, just I misunderstood this and it's, you know,
12 I probably - it's my fault, I guess, for not reading
13 this more closely, but I thought Dr. Abitz had done a
14 2015 affidavit.

15 MR. FRANKEL: No, Your Honor. He did not.

16 CHAIR GIBSON: He only did one in 2008 and
17 he's never done one since.

18 MR. FRANKEL: Well, he's very expensive,
19 Your Honor. We weren't able to get him.

20 (Laughter.)

21 CHAIR GIBSON: I appreciate that. I used
22 to work with experts myself. So, okay.

23 MR. FRANKEL: But if you look at the first
24 sentence, Your Honor, of 3.5.1.2, there's a conclusory
25 sentence that says that there's water data provided by

1 NDEQ.

2 And then there's a conclusory sentence
3 that CBR concluded that these trends are likely
4 associated with increased amounts like agricultural
5 warmup.

6 So, these are examples of conclusions
7 without a statement of sufficient underlying data for
8 an independent reviewer along the lines of what Mr.
9 Abitz - Dr. Abitz, I should say, identified in his
10 earlier opinion.

11 CHAIR GIBSON: Okay. All right. Let's -
12 Judge Wardwell, do you have some questions about
13 earthquakes at this point?

14 (No response.)

15 CHAIR GIBSON: Uh-oh. We're having some
16 technological problems, it sounds like. Judge
17 Wardwell, we cannot hear you.

18 MR. FRANKEL: David Frankel for
19 Consolidated Intervenors.

20 You cited several examples besides the
21 ones that we just talked about having to do with the
22 final EA 4.6.2.2.4 related to the paleochannel.

23 CHAIR GIBSON: Right.

24 MR. FRANKEL: So, it's not only 3.5.1.2,
25 but we looked for examples of where Dr. Abitz'

1 criticisms we felt were defects that had been carried
2 forward.

3 And I can cite the other sections for you
4 if -

5 CHAIR GIBSON: Yeah, those are in
6 4.6.2.2.4.

7 MR. FRANKEL: Right.

8 CHAIR GIBSON: You talked about the
9 discussion on upper control limits and excursion
10 monitoring did not cite statistically valid methods
11 for establishing upper control limits, correct?

12 MR. FRANKEL: Yes.

13 CHAIR GIBSON: Okay. And so, you took his
14 criticism and then said, okay, this has something to
15 do with -

16 MR. FRANKEL: This or that.

17 CHAIR GIBSON: This defect, if you will, in
18 the environmental report was then carried forward in
19 the Environmental Assessment.

20 Is that a fair statement?

21 MR. FRANKEL: Yes, Your Honor. Also
22 3.5.2.3.1 and 4.6.2.3. And so, yes, I -

23 CHAIR GIBSON: Okay.

24 (Simultaneous speaking.)

25 MR. FRANKEL: -- that analysis without the

1 benefit of the doctor at one side.

2 CHAIR GIBSON: Okay. Okay. Fair enough.

3 Now, let's talk about the - I can't seem to get Judge
4 Wardwell.

5 So, Mr. Smith, was this - Judge Wardwell,
6 are you there?

7 JUDGE WARDWELL: I am back.

8 CHAIR GIBSON: Okay. Good.

9 JUDGE WARDWELL: Someone just tried to call
10 me and that cut me off.

11 CHAIR GIBSON: Ah, that's what it is.
12 Okay. Well, you may have some questions about this
13 contention, but I had a pending question with Mr.
14 Smith.

15 JUDGE WARDWELL: Okay. And we were
16 finishing off - you asked me whether I had any
17 questions on Seven, and I said I didn't. And you
18 didn't hear me. And that's how I knew again -

19 CHAIR GIBSON: Fair enough.

20 JUDGE WARDWELL: Are we on Eight, or are we
21 still on Seven?

22 CHAIR GIBSON: Okay. Great. All right.

23 Now -

24 JUDGE WARDWELL: Are we on Seven, or are we
25 on -

1 CHAIR GIBSON: We are still on Seven.

2 JUDGE WARDWELL: Okay.

3 CHAIR GIBSON: Mr. Smith.

4 MR. SMITH: Yes, sir.

5 CHAIR GIBSON: So, this was the criticism
6 that Dr. Abitz launched in 2008 about the
7 environmental report as part of the license renewal
8 application.

9 And then he - Mr. Frankel then is arguing
10 that that criticism was valid and was then carried
11 forward. That same mistake was made by the staff in
12 the Environmental Assessment at 4.6.2.2.4.

13 Do you maintain that the intervenors are
14 wrong in that regard?

15 MR. SMITH: A couple of things. Yes, I
16 think we maintained the intervenors are wrong in that
17 regard.

18 To phrase it a little bit differently,
19 there's two issues that - both of which show that this
20 does not support an admissible contention.

21 First, to the extent they're talking about
22 errors that were carried forward into the EA, those
23 are untimely.

24 And then to the extent you're talking
25 about defects, they haven't identified what those

1 defects are.

2 And I think their defect, it sounds to me
3 like it is, you didn't include in the body of the EA
4 itself all of the supporting data that you needed to
5 reach your conclusion. And I think that's - there's
6 no basis for that contention.

7 The NRC staff in the EA, and Crowe Butte
8 in its LRA, cited the sources of those documents which
9 are available publicly in most cases. And, therefore,
10 would have been available to the intervenors to go and
11 review.

12 There's no regulatory or statutory
13 requirement that you include every piece of data in an
14 Environmental Assessment. In fact, that would be
15 contrary to the purpose of the Environment Assessment
16 which is, as noted earlier, is to be analytic rather
17 than encyclopedic.

18 CHAIR GIBSON: Okay. Mr. Frankel.

19 MR. FRANKEL: Yes.

20 CHAIR GIBSON: Do you have a response to
21 what Mr. Smith just said?

22 MR. FRANKEL: Well, of course. We picked
23 out the ones that we feel should have been included in
24 the staff's NEPA document.

25 As described before and the same argument

1 applies, this is the first NEPA document that we've
2 seen. So, timeliness is not an issue. Number one.

3 Number two, this defect, this failure to
4 discuss the potential for a paleochannel between
5 monitoring wells that results or can result in
6 undiscovered excursions, we've noted specifically this
7 issue with the braided stream systems and we've raised
8 this as issues and they've not been responded to or
9 analyzed by the staff. So, we continue to assert that
10 this is a violation in NEPA and is an admissible
11 contention.

12 CHAIR GIBSON: Okay. Let's focus on the
13 question of timeliness. Now, the - these are
14 criticisms that Dr. Abitz had with the original
15 environmental report that was conducted by Crowe Butte
16 in conjunction with its license renewal application.

17 Those - now, we're saying the staff has
18 basically adopted those same things that were in the
19 environmental report. And if I understand it
20 correctly, the applicant and the staff are saying
21 they're not timely.

22 How do you respond to that?

23 MR. FRANKEL: Well, as we've responded, I
24 understand that LBP 1309, you know, is only guidance,
25 but that that board made the correct decision.

1 There's the Duke Power case in CLI 8319.

2 There's no way for us to know until the
3 NEPA document comes out exactly what the staff will
4 use, how they will use it, how they'll describe it and
5 whether they'll describe consequences adequately.

6 Dr. Abitz put in hundreds and hundreds of
7 criticisms and, you know, we're talking here about a
8 handful of those. Yes, those are an important
9 handful, but that right there shows that there's a
10 very big difference, differing information
11 significantly differing between the LRA and the final
12 EA.

13 The final EA, you know, does not state the
14 methods for setting the upper control limits, in our
15 view, any differently than the LRA.

16 It could have. There could have been
17 different descriptions and it was not until the NEPA
18 document became available to the public that we had an
19 opportunity to see exactly what was in it.

20 So, as it concerns the timeliness
21 argument, that's our response is that we get a bite at
22 the apple here. And if you don't want to give it to
23 us, I understand.

24 You've already described the Procrustean
25 bed in prior rulings. And obviously the NRC staff and

1 Crowe Butte's counsel are experts at creating that
2 bed.

3 Well, we're not having it. If we can,
4 we're objecting to that.

5 CHAIR GIBSON: Fair enough.

6 MR. SMITH: This is Tyson Smith for the
7 applicant.

8 I'll just quote from 2309F2. On issues
9 arising under the national environmental policy, a
10 participant shall file contentions based on the
11 applicant's environmental report.

12 CHAIR GIBSON: Yes. Okay. Okay. Do any
13 board members have any other questions about
14 Contention Number 7?

15 JUDGE WARDWELL: If you can hear me, Judge
16 Wardwell does not have anymore.

17 CHAIR GIBSON: We can hear you, Judge
18 Wardwell.

19 JUDGE WARDWELL: Hot-diggity.

20 CHAIR GIBSON: Judge Rosenthal.

21 JUDGE ROSENTHAL: No, I have no questions.

22 CHAIR GIBSON: Judge Hajek.

23 JUDGE HAJEK: I have no questions.

24 CHAIR GIBSON: Okay. Let's go to
25 Contention 8. This contention concerns air emissions

1 from Crowe Butte's operations.

2 Is that correct, Mr. Frankel?

3 MR. FRANKEL: Yes, Your Honor.

4 CHAIR GIBSON: Okay. First of all, I'm
5 curious about the way this contention is phrased. At
6 the end it states the final EA similarly fails to
7 provide sufficient information to establish potential
8 effects of the project on the adjacent surface and
9 groundwater resources.

10 Now, my question for you is, is this a
11 typo and you intended to address air quality, or is
12 your claim here that the air emissions from Crowe
13 Butte's operation add to contaminants in the surface
14 water, and then the surface water carries these
15 contaminants to your clients, or something else?

16 MR. FRANKEL: Okay. First of all, the bulk
17 of our contention is spent on this issue of the radon
18 being the only as compared to the other radioactive
19 impacts identified by Dr. Abitz and also the
20 particulate's data not being taken site-specifically.

21 And then at the very - I'm having trouble
22 finding in our contention where you're referring to,
23 Your Honor.

24 CHAIR GIBSON: The very - it says, the
25 final EA similarly fails to provide sufficient

1 information to establish potential effects of the
2 project on the adjacent surface and groundwater
3 resources.

4 MR. FRANKEL: What page is that, Your
5 Honor?

6 CHAIR GIBSON: That's in Contention 8,
7 isn't it?

8 MR. FRANKEL: I'm sorry, but are you
9 looking at our contention filing and the -

10 CHAIR GIBSON: Yes.

11 MR. FRANKEL: Can you tell me what the page
12 number is?

13 CHAIR GIBSON: Yeah, I probably could. I
14 just clipped that out and quoted it.

15 MR. FRANKEL: Okay.

16 CHAIR GIBSON: And maybe I wrote it wrong.
17 It may be my fault.

18 MR. FRANKEL: I'm just searching, Your
19 Honor, diligently and I just can't find that.

20 MR. SMITH: Mr. Frankel, it's on Page 79.
21 It's the bottom of the first paragraph under your - it
22 says, EA Contention 8. The second sentence of the
23 text.

24 MR. FRANKEL: Oh, I see. It says, final EA
25 fails to provide sufficient information regarding --

1 final EA similarly fails to provide sufficient
2 information on the adjacent surface water.

3 It's a cut and paste typo.

4 CHAIR GIBSON: Okay. It is a cut and paste
5 typo. That's just fine, Mr. Frankel. It's really
6 okay. It's just that when I looked at it, I couldn't
7 figure out where you were going with the contention.

8 So, it is an air quality contention. Your
9 concern, I assume, is primarily about radionuclides,
10 but it's not really about surface water, correct?

11 MR. FRANKEL: I'm sorry, Your Honor. Not
12 at all about surface water.

13 CHAIR GIBSON: Fair enough. Okay. I just
14 wanted to be sure. We all do cut and paste sometimes.
15 It's just fine.

16 Now, the applicant and the staff maintain,
17 Mr. Frankel, that you are six years late in proffering
18 this contention because all of the information you
19 submit in support of it was available to you in 2008.

20 Why do you maintain they are wrong?

21 MR. FRANKEL: Well, Your Honor, first of
22 all I believe we argued this back in 2008. And at
23 that time, it was premature because the applicant had
24 no duties under NEPA, no obligations under NEPA, and
25 we were limited to an inquiry as to whether the

1 environmental report complied with the requirements
2 for the information required to be stated in the
3 environmental report.

4 And now, the staff has issued a NEPA
5 document. And under NEPA, they are supposed to
6 accurately describe the impacts and take a hard look
7 and provide analyses of consequences even if those
8 consequences are not likely, but as long as the
9 probability is more than zero as referred to in the
10 New York versus NRC case, and we've now done that.

11 They've chosen to use terminology that is
12 not in the environmental report such as final EA
13 3.11.2 which implies that radon 222 emissions are
14 routine; 4.12.2 which implies that the only
15 radioactive emission is radon.

16 These implications and conclusions are not
17 found in the LRA, in the environmental report. And
18 so, it would have been impossible for us to raise
19 those at that time.

20 CHAIR GIBSON: Okay. Mr. Smith, did you
21 address radon in the environmental report you
22 submitted in conjunction with your license renewal
23 application?

24 MR. SMITH: Yes. This is Tyson Smith.

25 Yes, we did. And, for instance, on Page

1 4.1 of the LRA we state the only radioactive airborne
2 effluent at Crowe Butte facility is radon 222 gas.

3 CHAIR GIBSON: Okay. Mr. Frankel, were you
4 aware of that?

5 MR. FRANKEL: And in our Page 8 of our Dr.
6 Abitz opinion back from 2008, we pointed out the other
7 radioactive gases involved and the particulates issue,
8 both of which show up again in the final EA as a NEPA
9 conclusion.

10 CHAIR GIBSON: Great. Great. And we'll
11 get to that in a second. But just with respect to
12 radon, you were aware that there was radon in the
13 original environmental report, correct?

14 MR. FRANKEL: Yes.

15 CHAIR GIBSON: Okay. Now, Mr. Smith, you
16 indicate that it is sufficient for the Environmental
17 Assessment to address only radon and that there is no
18 need to address other radionuclides.

19 Why is only radon necessary to be
20 addressed?

21 MR. SMITH: Well, because a strange
22 assumption in that question that I don't necessarily
23 agree with. One is we do address other radionuclides
24 in terms of gas emissions. The only emission from the
25 process is radon, but we do look at the radon

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1 daughters that occur as that radon breaks down.

2 For instance, in our LRA we mentioned that
3 the air in the plant is sampled for radon daughters to
4 ensure that concentration levels of radon and radon
5 daughters are maintained as low as reasonably
6 achievable.

7 So, the fact that, you know, radon is the
8 effluent, but that doesn't mean that's all we look at
9 and all we consider. Our dose calculations at the
10 plant take into account radon and its daughter
11 products.

12 CHAIR GIBSON: Mr. Frankel, how do you
13 respond to that?

14 MR. FRANKEL: If they're monitoring for the
15 radon daughter elements, then why isn't that
16 information described in the final EA?

17 CHAIR GIBSON: Separate and apart from the
18 EA, though, did you know it was addressed in the
19 environmental report, the radon daughters?

20 MR. FRANKEL: The radon daughters being
21 described as a part of a monitoring program, but not
22 being described as an airborne effluent, yes.

23 CHAIR GIBSON: Okay.

24 MR. SMITH: This is Tyson Smith for the
25 applicant.

1 I'll add that the EA also discusses, for
2 instance, at Page 8 you'll notice that the plant is
3 sampled for radon and radon daughters. So, it's also
4 in the EA.

5 CHAIR GIBSON: Mr. Frankel.

6 MR. FRANKEL: The EA implies that these are
7 routine and, therefore, not harmful. And states the
8 only radioactive emission is radon, which is
9 contradicted by the statement that Mr. Tyson just
10 made.

11 CHAIR GIBSON: Okay. And Mr. Smith -

12 MR. FRANKEL: I'm sorry. Mr. Smith.

13 CHAIR GIBSON: That's okay.

14 Mr. Smith, do you see a contradiction
15 there?

16 MR. SMITH: I do not.

17 CHAIR GIBSON: Okay. Do any other board
18 members have any questions about Contention 8?

19 JUDGE WARDWELL: Judge Wardwell doesn't.

20 CHAIR GIBSON: Judge Rosenthal.

21 JUDGE ROSENTHAL: No.

22 CHAIR GIBSON: Judge Hajek.

23 JUDGE HAJEK: No.

24 CHAIR GIBSON: Okay. Great. All right.

25 Let's go to Contention 9. Mr. Frankel, by this

1 contention you are challenging the mitigation measures
2 in the Environmental Assessment; is that correct?

3 MR. FRANKEL: Yes, and I believe Mr.
4 Ballanco will take the lead on this.

5 CHAIR GIBSON: Mr. Ballanco, are you
6 planning on taking the lead on this one?

7 MR. BALLANCO: Yes, Your Honor. This is
8 Tom Ballanco and I'll take the Board's questions on
9 the next three contentions.

10 CHAIR GIBSON: Okay. Great. Okay. Thank
11 you so much.

12 PARTICIPANT: Oh, God.

13 CHAIR GIBSON: Did I hear an "Oh, God"?
14 Did something bad happen? Okay. Is something wrong?

15 (No response.)

16 CHAIR GIBSON: Okay. Well, anyway, okay.
17 Counsel for the NRC staff, it seems to me that
18 intervenors are claiming that the staff's reliance on
19 Nebraska permits for NEPA purposes is improper.

20 And specifically, they allege that NEPA
21 requires four conditions for a state document to
22 qualify for NEPA tiering. None of which have been
23 alleged here.

24 Are you familiar with that argument, NRC
25 staff?

1 MR. CYLKOWSKI: Yes, Your Honor. This is
2 David Cylkowski.

3 CHAIR GIBSON: Okay. Great. Now, they
4 cite to Southfork Bend Council versus Bureau of Land
5 Management, Ninth Circuit in 2009, for the proposition
6 that a non-NEPA document, let alone one prepared and
7 adopted by a state government, cannot satisfy a
8 federal agency's obligations under NEPA.

9 Is it the staff's position that it
10 complied with the four conditions for a state document
11 to qualify for NEPA tiering?

12 MR. CYLKOWSKI: Your Honor, I apologize.
13 Could you - if you have the page reference or if
14 someone has the page reference for this in the
15 contentions, that would be helpful.

16 CHAIR GIBSON: Mr. Ballanco, can you help
17 him out?

18 MR. BALLANCO: Yes, Your Honor. I'm
19 looking for the page you're referring to.

20 (Pause.)

21 CHAIR GIBSON: I believe it is in the reply
22 at Pages 15 to 16.

23 MR. CYLKOWSKI: Thank you, Your Honor.

24 CHAIR GIBSON: Mr. Cylkowski, you got that?

25 MR. CYLKOWSKI: I do.

1 CHAIR GIBSON: Okay. Great.

2 MR. CYLKOWSKI: So, first, Your Honor, I
3 would say the way that the staff is utilizing the
4 state permits in this discussion of mitigation,
5 essentially what the EA is doing is where it
6 identifies mitigation measures that inform its
7 conclusion that impacts will be small or not
8 significant, i.e., when it has a mitigated FONSI at
9 least with regard to those impacts, what it needs to
10 do is discuss the effectiveness of that mitigation.

11 And so, the staff uses the state's permits
12 and the mitigation requirements in those permits both
13 to identify what the mitigation measures have been so
14 far and will continue to be, but also to discuss that
15 effectiveness.

16 So, for example, in several of the
17 sections that the intervenors take issue with, what
18 the staff is actually explaining is that Crowe Butte
19 has been under certain restrictions from state permits
20 or certain mitigation requirements.

21 And what we've seen during the previous
22 period of operation is that that has effectively
23 mitigated impacts. And there's no reason to think
24 that that won't continue to be the case. And this is
25 an entirely appropriate use of state requirements or

1 even NRC requirements.

2 The Commission does not - it's well-
3 established that the Commission does not assume that
4 applicants or licensees are going to violate the
5 restrictions in either the NRC license or state
6 permits.

7 CHAIR GIBSON: Well, I don't want to put
8 words in Mr. Ballanco's mouth, Mr. Cylkowski, but I
9 don't believe that's what Mr. Ballanco is arguing
10 here.

11 He's saying that there's four conditions.
12 And let's just go through the conditions. For any
13 major federal action funded under a program of grants
14 to states shall not be deemed to be legally
15 insufficient solely by reason of having been prepared
16 by a state agency or official if; one, the state
17 agency or official has statewide jurisdiction and has
18 responsibility for such action.

19 Now, does the State of Nebraska have
20 responsibility for environmental impacts on an Indian
21 reservation outside of the State of Nebraska?

22 MR. SMITH: No, not on the impacts to an
23 Indian reservation outside of the state, no.

24 CHAIR GIBSON: Okay.

25 MR. CYLKOWSKI: But they do - they do

1 certainly have responsibility for permitting
2 requirements and mitigation of impacts from a facility
3 within their state.

4 CHAIR GIBSON: Okay. Let's go to the next
5 one. For any major federal action funded under a
6 program of grants to states shall not be deemed to be
7 legally insufficient solely by reason of having been
8 prepared by a state agency or official if; two, the
9 responsible federal official furnishes guidance and
10 participates in such preparation.

11 Did the staff assist the State of Nebraska
12 with the preparation of its permits?

13 MR. CYLKOWSKI: I don't believe so, Your
14 Honor, no.

15 CHAIR GIBSON: Okay. Did the staff provide
16 comments to the State of Nebraska as to whether the
17 state's permits complied with NRC standards?

18 MR. CYLKOWSKI: They may have, Your Honor.
19 I can find that for you.

20 CHAIR GIBSON: Okay.

21 MR. SMITH: This is Tyson Smith, the
22 applicant.

23 I'm sorry. Maybe I can truncate this, but
24 this is for the staff, these four criteria - and I
25 apologize - are for the staff to be able to tier off

1 of?

2 CHAIR GIBSON: Yes. It's 42 U.S.C. Section
3 43322(d), Mr. Smith.

4 MR. SMITH: Okay, but the staff isn't
5 tiering off of the state's Environmental Assessment --

6 CHAIR GIBSON: The state is relying on its
7 - the NRC is relying on the state permit. He just
8 said they did, Mr. Smith.

9 MR. SMITH: They're not tiering off of it.
10 That has a different meaning. He's relying on it -
11 the staff is relying on it for purposes of
12 understanding what the potential environmental impacts
13 are.

14 They're not relying on that permit as a
15 basis for their Environmental Assessment. It's not
16 substituting for an Environmental Assessment. This is
17 not a tiering situation.

18 CHAIR GIBSON: Mr. Ballanco.

19 MR. BALLANCO: Your Honor, this is Tom
20 Ballanco for Consolidated Intervenors.

21 I would disagree with Mr. Smith. I think
22 this is a tiering to a state permitting document. And
23 whether - I don't know if the EA specifically uses the
24 term "tiering."

25 I believe "reliance" can be used

1 interchangeably in this case.

2 CHAIR GIBSON: Okay. Why don't we do this,
3 Mr. Smith. Let me finish asking these questions about
4 tiering, and then we can go back and try to figure out
5 whether we're talking about tiering or not, but at
6 least we'll have the information in the record. Okay?

7 MR. SMITH: Great.

8 CHAIR GIBSON: Thank you. Did the - there
9 is no discussion in the Environmental Assessment about
10 the staff providing comments to the State of Nebraska
11 on its permits it issued as to whether they complied
12 with NRC standards, correct?

13 MR. CYLKOWSKI: I believe that's correct.

14 MS. SIMON: Your Honor, I'm sorry. This is
15 Marcia Simon.

16 Can I just make a statement? I'm sorry.
17 My phone went on mute and I didn't realize it. The
18 discussion on Page 15 and 16 of the reply has to do
19 with approval of restoration of Mine Unit 1 based on
20 restoration standards that are based on that UIC
21 permit.

22 Mine Unit 1 was - the approval was in 2003
23 and it's really not related to this license renewal.
24 And the adoption of restoration standards is something
25 that's, you know, an alternating concentration limit

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1 is something that's allowed in the regulations.

2 So, I'm not sure that the discussion of
3 tiering is even necessary, because I'm not sure it's
4 relevant.

5 CHAIR GIBSON: Alternative, I thought
6 alternative concentration standards had to do with
7 another contention, Ms. Simon.

8 MS. SIMON: They might, Your Honor. But
9 I'm just saying in the context of the latest as
10 written in the reply, it says NRC approved the
11 restoration of Mine Unit 1 based on CBR's achieving
12 standards acceptable to its UIC permit issued by the
13 State of Nebraska.

14 As I just mentioned, that relates to NRC's
15 approval of the restoration of Mine Unit 1, which I
16 believe occurred in 2003. And, again, it approved it
17 based on achieving certain standards that were in the
18 UIC permit, if I understand that correctly.

19 CHAIR GIBSON: Mr. --

20 MS. SIMON: So, I'm not sure -

21 CHAIR GIBSON: Just a minute. Mr.
22 Ballanco, are we only talking here about this one 2003
23 permit?

24 I got the impression from your reply that
25 you were talking about the state permits to Crowe

1 Butte.

2 MR. BALLANCO: Thank you, Your Honor. Tom
3 Ballanco for Consolidated Intervenors.

4 In the reply, we do specifically address
5 the reliance on the state permitting for the signing
6 off on the restoration of Mine Unit 1 as an example of
7 the mitigation measures that are being applied under
8 the license in this situation in that we have
9 reasonable expectations based on what happened with
10 Mine Unit 1 that we're going to see a repeat on Mine
11 Unit 2, 3, 4 through 11.

12 This is not limited specifically to Mine
13 Unit 1. That is the only case we have where the NRC
14 had signed off on restoration.

15 And in doing so, the reliance on these
16 Nebraska permit standards, we reasonably expect that
17 to be repeated with the other mines.

18 CHAIR GIBSON: Okay. But we're not talking
19 about any specific permits that have been issued to
20 this point in time; is that correct, Mr. Ballanco?
21 Other than the one in 2003.

22 MR. BALLANCO: Well, as I understand it,
23 the Nebraska UIC permit continues as long as the
24 operation is continuing. And so, those standards will
25 apply as long as that permit is active.

1 This - the relevance to this contention
2 regarding mitigation is that we expect to see that
3 reliance repeated in the mitigation.

4 CHAIR GIBSON: Okay. And are those - and
5 how do you think the staff should address that in the
6 Environmental Assessment, Mr. Ballanco?

7 MR. BALLANCO: Thank you, Your Honor. This
8 is Tom Ballanco.

9 I do want to say at the outset here I
10 think, you know, without prejudicing our case, and I
11 don't think it does, we are really talking about the
12 gold standard of in situ mining activities here.

13 I don't think anyone in the world conducts
14 these operations better than CBR. And I accept that
15 they are using their good faith effort to try and
16 restore the impacts of this mining activity.

17 And we still have after more than a decade
18 of those best efforts in the case of Mine Unit 1, an
19 aquifer far in excess of its baseline levels for
20 uranium and arsenic and this is signed off on. So,
21 that is declared restored by the NRC.

22 That - if that repeats itself as we expect
23 that it will through all the other mine units, we're
24 left with a condition of the aquifer that differs
25 significantly, in our opinion, from the baseline.

1 While the restoration standards may be
2 signed off on, and, again, these are based upon the
3 Nebraska UIC permit, we are left with a fundamental
4 change to the natural resource. And that is where we
5 feel like the discussion about mitigation needs to be
6 far more thorough, far more involved and address this
7 fact head on that baseline seems like an unattainable
8 goal.

9 What we are doing is best case scenario.
10 And that is something - and that's why we feel EIS is
11 necessary to deeply explore that undeniable reality.

12 CHAIR GIBSON: Okay.

13 MR. CYLKOWSKI: Your Honor, this is David
14 Cylkowski on behalf of the staff.

15 As we discussed in our brief, restoration
16 to background is not the sole option or the only
17 benchmark possible for compliant restoration.

18 Criterion 5(b)5 lays out three options.
19 One of which is background. One of which is alternate
20 concentration limits. And that's - to the extent that
21 that's determined to be the attainable, appropriate
22 standard and that's complied with, the regulations are
23 complied with.

24 And if the contention - if the contention
25 intervenors are arguing that background must always be

1 the sole benchmark for determining compliance,
2 essentially this is an attack on the Commission's
3 regulations, which is not appropriate for an
4 adjudicatory Part 2 proceeding.

5 CHAIR GIBSON: Mr. Ballanco.

6 MR. BALLANCO: Your Honor, I do accept
7 that. I acknowledge this is not necessarily an all-
8 out assault on the NRC regulations.

9 However, if those regulations lead to a
10 situation that does not comply with NEPA requirements,
11 then those regulations, notwithstanding, we are left
12 with a situation here that is relevant to our NEPA
13 analysis that sufficient study has not been done,
14 sufficient opportunity for the public to be involved
15 in the decision-making has not been done, because
16 there's not an appropriate analysis of the factors
17 involved in the use and damage of this resource.

18 We have a situation now where you can't
19 rely on the mitigation that accompanies the initial
20 licensing of this bond.

21 We know that that will not work based on
22 it not having worked and that aquifer being signed off
23 on.

24 So, if that continues, we've got a new
25 state of affairs under the ground there and that is

1 something that merits its own consideration and NEIS
2 to comply with NEPA regardless of the staff's
3 interpretations of what NRC regulations may be.

4 CHAIR GIBSON: Okay. Well, I guess my
5 question, Mr. Ballanco, has to do with 42 U.S.C.
6 43322(d).

7 And your claim is -- there is a lot of
8 other things in this contention which we'll get to in
9 a minute, but I want to focus on that which has to do
10 with the State of Nebraska and its issuance of a
11 permit and the extent to which the staff has relied on
12 that or tiered off that or whatever it is.

13 And it sounds to me like the only thing
14 that we really have before us is something that it did
15 in 2003; is that right?

16 MR. BALLANCO: Yes, Your Honor. Tom
17 Ballanco.

18 We have what the staff did in 2003 and
19 based on the EA, what we expect to be done as early as
20 this year, perhaps 2016 whenever Mine Units 2 and 3
21 move to the restoration process.

22 The SER demonstrates, I think, the
23 readings in 2011 or 2012 at those mine units still
24 dramatically elevated over baseline for uranium.

25 So, based on what the staff did with Mine

1 Unit 1, we expect based on how the EA treats the
2 restoration program that that is going to be repeated
3 on the other mine units.

4 So, has it been done yet? No. Only one
5 aquifer - or one mine unit has reached restoration
6 status and that was in 2003.

7 CHAIR GIBSON: Okay. Now, Mr. Smith, if,
8 for the sake of argument, I can anticipate that the -
9 a new permit might be issued a year or two from now by
10 the State of Nebraska, it would not have been
11 addressed in the Environmental Assessment.

12 What would be the intervenor's remedy at
13 that point? This adjudicatory hearing had already
14 been resolved.

15 Would they need to then - how could they
16 challenge that?

17 MR. SMITH: A new permit? What kind of -

18 CHAIR GIBSON: From the State of Nebraska.
19 They issued one in 2003. Is there going to be another
20 one issued?

21 MS. SIMON: Your Honor, this is Marcia
22 Simon. I think -

23 CHAIR GIBSON: I'm asking Mr. Smith, Ms.
24 Simon.

25 MS. SIMON: I'm sorry.

1 MR. SMITH: I'm not sure I understand what
2 permit the state issued in 2003. Do they approve
3 restoration? I guess I wouldn't call that issuing a
4 permit.

5 A permit, to me, means something that, you
6 know, permits some activities that previously were not
7 allowed.

8 CHAIR GIBSON: Well, you know, you - I
9 suppose my language wasn't quite as precise as it
10 might have been, Mr. Smith, but the state approved a
11 restoration in 2003.

12 MR. SMITH: Okay.

13 CHAIR GIBSON: Is that what you're saying
14 they did?

15 MR. SMITH: That is my understanding, yes.

16 CHAIR GIBSON: Okay. Now, my question is,
17 is the staff going to be - I'm sorry. Is the State of
18 Nebraska going to be doing something like that over
19 the next few years with respect to your operation
20 there on the Crowe Butte site?

21 MR. SMITH: Presumably as the site goes
22 forward and it enters into decommissioning restoration
23 when it meets the criteria that are laid out for
24 establishing that it's completed its restoration
25 efforts, it would seek a similar approval from the

1 state that it had met those restoration standards.

2 CHAIR GIBSON: Okay. And would there be
3 anything that you needed to do, Crowe Butte needed to
4 do to report to the NRC with respect to that
5 restoration, or would that be something that was only
6 between you and the state of Nebraska at that time?

7 MR. SMITH: I mean, I don't - at that time,
8 I think the NRC also has a license they've issued to
9 Crowe Butte. And in order for Crowe Butte to
10 terminate that license, I assume they would have to
11 demonstrate that they had satisfied the state as, you
12 know, part of the roll-up of restoration and license
13 termination at the overall site.

14 CHAIR GIBSON: Okay. So, what would the
15 NRC's action be at that point in time, Mr. --

16 MR. SMITH: I don't know at that specific
17 point in time, but ultimately the NRC does have to
18 terminate Crowe Butte's license and they wouldn't
19 allow Crowe Butte to - wouldn't allow to terminate the
20 license and relinquish regulatory control over the
21 site until it had been demonstrated that the site was
22 appropriately decommissioned.

23 CHAIR GIBSON: Okay. So, what Mr. Ballanco
24 is saying is that even though nothing is ever - has
25 actually happened with respect to restoration, it is

1 - there is going to be restoration that's going to be
2 needed. And the only opportunity that he has to
3 challenge that is now.

4 How do you respond to that, Mr. Smith?

5 MR. SMITH: Well, two ways - a couple of
6 ways. One is when restoration is complete, it's
7 demonstrated by compliance with regulations.

8 And so, if Crowe Butte meets the
9 regulations, I don't see why there would need to be
10 any opportunity for anyone to challenge that.

11 I mean, the point is if Crowe Butte meets
12 the regulations, that's it.

13 CHAIR GIBSON: Okay.

14 MR. SMITH: On the other hand, there are
15 licensing actions associated with that. For instance,
16 when the state makes - approves the restoration
17 standard or the NRC terminates the license, there are
18 opportunities for public participation.

19 Not sure exactly what the State of
20 Nebraska's opportunities for perhaps filing, you know,
21 a court claim or a litigation are, but certainly the
22 NRC there are opportunities for interested parties to
23 file contentions at appropriate points in that
24 decommissioning process.

25 CHAIR GIBSON: Thank you, Mr. Smith.

1 Now, Ms. Simon, you started to say
2 something a minute ago. Was there something you want
3 to add to what Mr. Smith just said?

4 MS. SIMON: Yes, Your Honor.

5 What the intervenors are referring to on
6 Page 15 of the reply is specifically the NRC approval
7 of the Mine Unit 1. And that's based on achieving
8 standards acceptable in the underground injection
9 control permit that was issued by the State of
10 Nebraska.

11 My understanding is that the state and the
12 NRC separately - I'm sorry. I'm actually trying to
13 read an email from the staff here - separately
14 approved the restoration. And so, what the
15 intervenors are referring to here specifically is
16 NRC's approval.

17 And NRC no longer uses the class-of-use
18 standards that were used for restoring Mine Unit 1.
19 So, the same thing is not going to happen with the
20 other mine units.

21 And I would just refer the Board to Pages
22 136 and 137 of the SER where this is explained in more
23 detail. So, I just wanted to point that out.

24 CHAIR GIBSON: Okay. Thank you.

25 Now, Mr. Ballanco, what is your response

1 to what Mr. Smith and Ms. Simon just said? Is this -
2 is your point that you - this is your only opportunity
3 to challenge whether the restoration that the State of
4 Nebraska will approve is sufficient?

5 MR. BALLANCO: Thank you, Your Honor. Tom
6 Ballanco for Consolidated Intervenors.

7 It is our contention, Your Honor, that
8 this Environmental Assessment being a NEPA document is
9 our opportunity to comment on the action that is
10 taking place, which is the renewal of this license.

11 And it is our contention that this
12 document which essentially in its hundred and so many
13 pages finds no significant impact to the environment
14 by the renewal of this license, neglects to fully
15 consider what is known about the mitigation plan in
16 both the SER and referred to in the EA from CBR's real
17 world experience with Mine Unit 1 that the restoration
18 standards will be far and away different from the
19 baseline condition.

20 And that this is our opportunity to say
21 that the entire process that staff is relying on for
22 mitigation because it is so far removed from
23 effectiveness, merits an Environmental Impact
24 statement to both assess what that difference might
25 have on the environment, and, importantly, to allow

1 the public to participate in that decision-making.

2 Whatever happens on the restoration is a
3 different stage of process than this NEPA-driven
4 process involving the Environmental Assessment.

5 CHAIR GIBSON: Okay. So, what you're
6 saying -- I have to put this in my own words. I don't
7 want to misspeak, but I want to make sure I understand
8 it.

9 So, essentially the mitigation that you're
10 concerned with here has to do with restoration
11 pursuant to a permit that the State of Nebraska will
12 issue or series of permits they will issue.

13 And that you, it is your position that
14 that needs to be addressed in the Environmental
15 Assessment and that it was not.

16 Is that a fair summary?

17 MR. BALLANCO: More or less, Your Honor.

18 CHAIR GIBSON: Well, I don't want it to be
19 more or less. You tell me what else needs to be
20 there. I want to make sure I understand what you're
21 saying here.

22 MR. BALLANCO: Thanks, Your Honor. Tom
23 Ballanco for Consolidated Intervenors.

24 It is our contention that the staff based
25 on what it summarizes in the EA, will continue to use

1 reliance on the state standards to achieve restoration
2 of subsequent mine units that become eligible for
3 restoration. And that that violates the NEPA process
4 by improperly tiering or relying on a state document
5 that does not meet those four characteristics.

6 CHAIR GIBSON: Okay. This is under
7 43322(d), right? Those four criteria you're talking
8 about, okay. All right.

9 MR. BALLANCO: And it is actually the staff
10 action that concerns us, not what the State of
11 Nebraska may or may not do.

12 It is that we expect the staff to continue
13 to rely on the state permitting standards as they have
14 in the past.

15 CHAIR GIBSON: Right.

16 MR. BALLANCO: Because that is essentially
17 what the state is going to be their mitigation measure
18 for aquifer restoration in the EA.

19 CHAIR GIBSON: Right. Right.

20 MR. CYLKOWSKI: Your Honor, if I can, this
21 is David Cylkowski for the staff.

22 As Ms. Simon just explained, we've
23 confirmed with staff and explained in the SER the
24 staff going forward will not - is not using state
25 standards for mine unit - for approving mine unit

1 restoration.

2 And so, the - while we understand the
3 intervenor's concerns with restoration of Mine Unit 1,
4 the restoration of subsequent mine units will be - the
5 cause for that concern is essentially mooted at this
6 point or at least the cause is something fundamentally
7 different.

8 CHAIR GIBSON: And is that discussed in the
9 Environmental Assessment, Mr. Cylkowski?

10 MR. CYLKOWSKI: I don't -

11 CHAIR GIBSON: The email you just got from
12 the staff?

13 MR. CYLKOWSKI: I don't see that in the
14 Environmental Assessment right now, Your Honor.

15 CHAIR GIBSON: Right.

16 MR. CYLKOWSKI: But I can -

17 MR. SMITH: This is Tyson Smith.

18 This is discussed in the SER. As Ms.
19 Simon pointed out, the August 2014 version. It's on
20 Page 136 and 137 in that a requirement that they're no
21 longer using class-of-use is specifically addressed as
22 a license condition on Crowe Butte's license.

23 CHAIR GIBSON: And when you say it's
24 included in Crowe Butte's license, you're saying in
25 the one that was just issued in November?

1 MR. SMITH: Yeah. And this would actually
2 refer to what Ms. Simon mentioned back when we talked
3 about the state motion is that the new license
4 actually imposes more stringent requirements than did
5 the earlier one. So, this would be an example of
6 that.

7 CHAIR GIBSON: Okay. And this specific
8 question of restoration is addressed there in this
9 license, Mr. Smith?

10 MR. SMITH: Yeah, it says the staff is
11 imposing a license condition to ensure implementation
12 of Appendix A, Criterion 5(b)5 and 5(b)6 regulations
13 because the NRC no longer accepts the class-of-use
14 restoration standard that's set by NDEQ in the UIC
15 permit.

16 CHAIR GIBSON: Okay. Mr. Ballanco.

17 MR. BALLANCO: Yes, Your Honor.

18 CHAIR GIBSON: How do you respond to Mr.
19 Smith?

20 MR. BALLANCO: Tom Ballanco for -

21 CHAIR GIBSON: This has already been
22 resolved by this provision in the license.

23 MR. BALLANCO: I think what we are talking
24 about, I think we generally agree that the staff is
25 going to use this Criterion 5(b)5 and 5(b)6

1 regulation. I don't think that that is in dispute.

2 Based on their reliance previously on
3 Nebraska standards to inform that if that is not going
4 to happen, then I stand corrected on that issue.

5 CHAIR GIBSON: Okay. Okay.

6 JUDGE HAJEK: I'm sorry. This is Judge
7 Hajek. I don't find the reference that Mr. Smith was
8 just reading.

9 MR. SMITH: This is Tyson Smith.

10 I'm looking at the August 2014 SER.

11 JUDGE HAJEK: Yes, I'm looking at that.

12 MR. SMITH: Okay. Page 136 and 137
13 discusses restoration standards in Section 6.1.3.1.

14 JUDGE HAJEK: Yes.

15 MR. SMITH: And the text that I was quoting
16 earlier is from the last paragraph of that section on
17 Page 137.

18 JUDGE HAJEK: Okay. What is the specific
19 license condition - this must be in Section 11 of the
20 license then?

21 (Pause.)

22 CHAIR GIBSON: Was that question addressed
23 to Mr. Smith, Judge Hajek?

24 JUDGE HAJEK: Yes.

25 MR. SMITH: Yeah, I'm sorry. I'm looking

1 for the specific reference.

2 (Pause.)

3 MR. SMITH: I believe it's under License
4 Condition 10.6 which is discussed at the - yes,
5 correct. License Condition 10.6, which is on Page 167
6 and 168 of that same SER.

7 JUDGE HAJEK: Okay. I'll make note of
8 that. I'll have to find it later.

9 CHAIR GIBSON: Okay. Do you have anything
10 else, Judge Hajek?

11 JUDGE HAJEK: No, that's all.

12 CHAIR GIBSON: Mr. Ballanco, I want to
13 focus on the deficiencies the staff sees in your
14 argument.

15 Let's start with EA Section 4.6.1.1. The
16 staff claims that this provision of the Environmental
17 Assessment addresses your client's concerns about
18 pollutant discharges because it describes the
19 mitigation measures that Crowe Butte has implemented
20 to date in accordance with its pollutant discharge
21 permits under the Environmental Protection Agency and
22 the State of Nebraska, the old NPDS program.

23 Why do you claim the staff is wrong?

24 MR. BALLANCO: Your Honor, Tom Ballanco for
25 Consolidated Intervenors.

1 Did I hear you correctly, 4.6.1.1?

2 CHAIR GIBSON: Yes, I believe that's what
3 they said. And they said that this provision
4 addresses your client's concern about pollutant
5 discharges because it describes the mitigation
6 measures that Crowe Butte has implemented to date in
7 accordance with its pollutant discharge permits.

8 MR. BALLANCO: Thank you, Your Honor. On
9 that section, I think specifically what we were
10 referring to is what we contend was an inadequate
11 discussion of the levels in the creeks that run
12 through the mine area as being English Creek and Squaw
13 Creek each experiencing a spike in their background
14 radiation levels for uranium. And I think that's on
15 the EA, Page 71 and 72.

16 And that spike was attributed to the
17 possibility of increased precipitation in the area,
18 but to us it looks like after that spike there is a
19 general trend of slightly elevated levels in both
20 those creeks. And there's no discussion of what might
21 be done to address that other than we'll continue to
22 licensing conditions and applying reasonable discharge
23 standards.

24 What it looks to us is that these charts
25 are showing a trend that may be resulting in

1 increasing background levels in these two creeks.

2 CHAIR GIBSON: Mr. Cylkowski.

3 MR. CYLKOWSKI: Yes, Your Honor. Can you
4 hear me? I got kicked off the call a little bit ago
5 and I called back in.

6 Can everybody hear me?

7 CHAIR GIBSON: We can hear you better than
8 we've been able to hear you all day right now.

9 MR. CYLKOWSKI: Oh, wonderful. Okay.

10 Your Honor, first I'll say based on the
11 contention submitted by the intervenors, I don't see
12 this reference to figure - I assume Mr. Ballanco is
13 talking about Figure 4.1 and Figure 4.2. These were
14 not submitted in support of the challenge to Section
15 4.6.1.1 in Contention 9.

16 The way the staff read this contention,
17 and we believe we read correctly, was that the
18 overarching concern for each of these sections listed
19 is that the intervenors believe that the staff either
20 did not discuss the existence of mitigation measures,
21 or more importantly did not discuss the effectiveness
22 of mitigation measures.

23 As Your Honor pointed out in reference to
24 our brief and response, we believe that in all of
25 these sections, but specifically now Section 4.6.1.1,

1 the staff has, as necessary, discussed the
2 effectiveness of these measures.

3 Here, for example, the staff can point to
4 measures that have been in place during the previous
5 period of operation, can point to their effectiveness.
6 And without a reason to think that things are going to
7 change in the future, there is - that suffices to - as
8 a discussion of the effectiveness of those measures.

9 CHAIR GIBSON: Mr. Ballanco.

10 MR. BALLANCO: Thanks, Your Honor. Tom
11 Ballanco for Consolidated Intervenor.

12 I certainly don't dispute that we did not
13 plead that in this contention of omission. I thought
14 you were asking me why it was we brought up that
15 section. And I believe that is why.

16 Again, our contention is that the staff
17 does not take a hard look at these mitigation measures
18 in that Section 4.6.1.1. The reason was because of
19 what we deduced to be seemingly elevated levels in
20 these surface waters and there's no discussion or
21 address of how those potential impacts are being
22 mitigated or might be mitigated other than reference
23 to other permitting and licensing standards, but here
24 we, in our view, we see it elevated. We see an effect
25 that's not being addressed.

1 MR. CYLKOWSKI: Your Honor, this is David
2 Cylkowski.

3 Just to be clear of what sort of
4 discussion of mitigation effectiveness is required,
5 when the staff chooses to complete an Environmental
6 Assessment and comes to a finding of no significant
7 impact and that finding relies at least in part on
8 mitigation measures, that is when the effectiveness of
9 those measures needs to be discussed because that is
10 - essentially is fundamental to the FONSI the staff to
11 discuss the effectiveness of those measures.

12 My understanding of what I'm hearing now
13 is that the intervenors believe that impacts could be
14 further mitigated and the staff should have discussed
15 potential further mitigation, and failed to do so.

16 If that is what the intervenors are
17 arguing, first, I think that's not fully congruous
18 with the submitted contentions, but; second, we would
19 maintain that that wouldn't support an admissible
20 contention based on when the staff is actually
21 required to discuss mitigation effectiveness.

22 CHAIR GIBSON: Well, I'm going to say I
23 have a different impression, a somewhat different
24 impression.

25 I thought the - the impression I had was

1 that the intervenors were criticizing the staff for
2 unduly relying on state pollutant discharge permits
3 for mitigation of the effects and were saying
4 essentially that you can't do that. That you have to
5 address the environmental impacts and you can't just
6 simply defer to whatever the state is doing.

7 You have to make an independent
8 assessment. Is that what you're saying, Mr. Ballanco?

9 MR. BALLANCO: Yes, Your Honor.

10 CHAIR GIBSON: Okay. Okay.

11 MR. BALLANCO: Tom Ballanco.

12 We're saying all of it, Your Honor. No,
13 you can't defer to the state on these issues. And,
14 yes, we need to see actual mitigation plan and
15 discussion. And the lack of that makes this finding
16 of no significant impact accompanying this EA
17 insufficient.

18 CHAIR GIBSON: Okay. Fair enough. I think
19 we understand what both of you all are saying. So,
20 let's go to stormwater control and spillage.

21 JUDGE WARDWELL: Yes, Judge Gibson, should
22 we take a break here shortly?

23 CHAIR GIBSON: Oh, yes. We should be doing
24 that. We'll take a break right now and we'll come
25 back at 4:45.

1 JUDGE WARDWELL: Can we talk offline?

2 CHAIR GIBSON: Yes, we can. I'll call you
3 right now, Rich.

4 JUDGE WARDWELL: Okay.

5 CHAIR GIBSON: Okay. Let's take a recess
6 for 10 minutes.

7 (Whereupon, the above-entitled matter went
8 off the record at 4:39 p.m. and resumed at 4:47 p.m.)

9 CHAIR GIBSON: This is Judge Gibson. Do
10 any other board members have any questions about
11 Contention 9?

12 JUDGE WARDWELL: This is Judge Wardwell.
13 I do not have any.

14 CHAIR GIBSON: Judge Hajek?

15 JUDGE Hajek: I have none.

16 CHAIR GIBSON: Okay, let's turn to
17 Contention 9?

18 JUDGE WARDWELL: This is Judge Wardwell.
19 I do not have any.

20 CHAIR GIBSON: Judge Hajek?

21 JUDGE Hajek: I have none.

22 CHAIR GIBSON: Okay, let's turn to
23 Contention 10. Mr. Ballanco, by this contention you
24 are challenging the cumulative impact section of the
25 environmental assessment, is that correct?

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1 MR. BALLANCO: Tom Ballanco for
2 Consolidated Intervenors. Yes, Your Honor, that is
3 correct.

4 CHAIR GIBSON: And specifically, you claim
5 that the environmental assessment does not adequately
6 analyze or quantify the cumulative impacts of proposed
7 expansions on nearby uranium mining areas including
8 the North Trend Expansion Area, the Marsland Expansion
9 Area, and the Three Crows Expansion Area. Is that
10 correct?

11 MR. BALLANCO: That is correct, Your
12 Honor.

13 CHAIR GIBSON: Now the staff and the
14 Applicant dispute your claim and assert that the
15 environmental assessment specifically discusses all
16 three of them in the context of cumulative impacts and
17 covers impacts on multiple resource types. Why do you
18 claim that the Applicant and the staff are wrong?

19 MR. BALLANCO: Thank you, Your Honor. Tom
20 Ballanco. It is our contention that while the words
21 cumulative impact are used and various sections
22 mention the cumulative impact, what we don't have is
23 the hard look index analysis required under NEPA,
24 particularly as regards the current state of
25 information. This being renewal application, we're

1 not operating in a data vacuum here. We have real
2 world data we can look at. We can see what
3 restoration activities look like. We can see what
4 excursion history looks like. We can see issues
5 related to evaporation time, the ponds, deep injection
6 wells, these various things.

7 Now, each of those is addressed in the EA,
8 but our contention is that that examination is cursory
9 and does not take the look at what the cumulative
10 impacts are particularly in regards how increasing the
11 mining area might impact this site, how restoration
12 standards that will almost certainly be ACL will lead
13 to future impacts on this site, and how particularly
14 water quantity impacts will vary significantly from
15 what was initially predicted, and how that might
16 impact the mine going forward and restoration going
17 forward.

18 So we do not dispute that the words are
19 used and that they are addressed. What we are
20 disputing is the thoroughness, sufficiency, the
21 genuine hard look that is required of these cumulative
22 impact analyses.

23 CHAIR GIBSON: So Mr. Cylkowski, was this
24 too cursory an examination or was this just the right
25 amount?

1 MR. CYLKOWSKI: Your Honor, of course, we
2 maintain that this was a sufficient cumulative impact
3 discussion. But if I can step back for a moment. To
4 me, Mr. Ballanco's description of Contention 10 again
5 isn't totally congruous with the Contention 10 that
6 was submitted. The Intervenor submitted a Contention
7 10 that explicitly said this is a contention of
8 omission and said -- the contention said that while
9 the analysis of impacts was expanded to include the
10 expansion areas with regard to cultural resources,
11 although it was not elsewhere it seems --

12 CHAIR GIBSON: Mr. Cylkowski, your phone
13 is cutting out again.

14 MR. CYLKOWSKI: I apologize, Your Honor.
15 Could you hear me up to a certain point or should I
16 repeat?

17 CHAIR GIBSON: We can hear you now.

18 MR. CYLKOWSKI: Okay. I'll summarize what
19 I was saying, Your Honor. The Contention 10 that was
20 submitted was submitted as a contention of omission.
21 The Intervenor label it a contention of omission and
22 state that the only place that the EA discusses
23 cumulative impacts is with respect to cultural
24 resources. The Intervenor state that the EA does not
25 discuss cumulative impacts with respect to other

1 resource areas. There's no allegations of deficiency
2 in the analysis in Contention 10. There's no specific
3 issues that Intervenor are taking with the analysis
4 in the EA. Frankly, it's simply a contention of
5 omission that does not square with the actual text of
6 the EA.

7 CHAIR GIBSON: Mr. Ballanco, a rose by any
8 other name?

9 MR. BALLANCO: Thank you, Your Honor. Tom
10 Ballanco for Consolidated Intervenor. I think we do
11 detail in our briefing reference to specifically the
12 groundwater restoration programs going on
13 insufficiently addressed as a cumulative impact in
14 that what we're going to see is ACLs. And that the
15 real world experience tells us where the EA predicts
16 11 pore volumes being required for restoration of a
17 mine unit, when mine unit 1 was restored, it required
18 more than 36 pore volumes. That's not discussed.
19 That is a three time greater use of water in the real
20 world than the predicted amount in the EA.

21 We assert that that is an example of a
22 failure to consider the cumulative impacts and it is
23 our contention that the EA is replete with failure to
24 consider cumulative impacts of this continued
25 operation and that's -- again, informs why we feel

1 like the finding of no significant impact here is
2 inaccurate and that an EIS is necessary to take the
3 hard look at these cumulative impacts. We're going to
4 be left with a significantly changed environment than
5 when operations started here.

6 CHAIR GIBSON: Mr. Ballanco, I don't want
7 to -- I hear what you're saying. I just want to see
8 are you saying that this is a contention of omission
9 and that while there is a section that says cumulative
10 impacts, it fails to address several cumulative
11 impacts that you believe need to be addressed?

12 MR. BALLANCO: Yes, Your Honor. Tom
13 Ballanco.

14 CHAIR GIBSON: Okay. So we're sort of
15 focusing on is this an omission or an inadequacy
16 contention and what you're saying is sure, they have
17 a section that says cumulative impacts, but in fact
18 they don't address several cumulative impacts that
19 they should address. And in that sense, it's an
20 omission. Is that a fair summary?

21 MR. BALLANCO: Yes, Your Honor. Tom
22 Ballanco. We are essentially saying the discussion is
23 so inadequate as to effectively omit any meaningful
24 discussion of cumulative impacts.

25 CHAIR GIBSON: Okay. Fine. Judge

1 Wardwell, do you have some questions on this
2 contention? Oh, dear. Did we miss Judge Wardwell
3 again? I have to apologize for him. He told me that
4 he's having trouble with his phone because somebody
5 keeps calling him about moving some snow in front of
6 his house in Lake George and that ends up causing his
7 phone to go off. Well anyway, hopefully, we'll get
8 him back.

9 Judge Wardwell, are you there by chance?
10 Okay.

11 Judge Hajek, do you have any questions
12 about Contention 10?

13 JUDGE Hajek: I do not, but I think that
14 it's important that we come back to Judge Wardwell.

15 CHAIR GIBSON: And we will when he gets
16 back on the phone.

17 Judge Rosenthal?

18 JUDGE ROSENTHAL: No questions.

19 CHAIR GIBSON: Okay. We will turn to
20 Contention 11 until Judge Wardwell gets back on the
21 phone.

22 Mr. Ballanco, you are asserting in this
23 contention that the environmental assessment fails to
24 adequately analyze all reasonable alternatives. Is
25 that correct?

1 MR. BALLANCO: Yes, Your Honor. Tom
2 Ballanco for the Consolidated Intervenors. That is
3 correct.

4 CHAIR GIBSON: And specifically, you focus
5 on the absence of two things in the environmental
6 assessment. One is an alternative that precludes
7 adoption of any alternative concentration limits for
8 groundwater restoration.

9 And this is where it's located, Ms. Simon,
10 in Contention 11.

11 And secondly, an alternative that
12 obligates Crowe Butte to complete the restoration of
13 the groundwater and surface waters to limits that make
14 it acceptable for domestic and agricultural uses, is
15 that correct?

16 MR. BALLANCO: Yes, Your Honor.

17 CHAIR GIBSON: Okay. With respect to the
18 second one, I want to ask you a question. Mr. Smith
19 indicated earlier that when operations commenced in
20 1991, the aquifer into which they have been -- that
21 they've been mining, if you will, was not potable at
22 that time.

23 Now are you suggesting that they return --
24 that they clean up the water back before it was
25 whenever they measured baseline in 1991?

1 JUDGE WARDWELL: This is Judge Wardwell.
2 Can you hear me now?

3 CHAIR GIBSON: Yes, we can.

4 JUDGE WARDWELL: Thank you. Those are the
5 questions I had.

6 CHAIR GIBSON: Okay, great.

7 JUDGE WARDWELL: It's the beeping that
8 kicks me out of the speaker's role.

9 CHAIR GIBSON: Sorry, Judge. Mr.
10 Ballanco?

11 MR. BALLANCO: Thank you, Your Honor. I
12 think this is an important consideration and I think
13 it goes to an important point we're trying to raise in
14 this case. The aquifer not being potable ought not be
15 considered as a blanket assessment to say oh, so
16 therefore it just doesn't matter what happens to this
17 water.

18 CHAIR GIBSON: Right.

19 MR. BALLANCO: Particularly in terms of if
20 we're talking total dissolved solids condition versus
21 a condition with extraordinarily high levels of
22 arsenic or uranium. And so just because, and I do
23 agree with that statement, that the water was not
24 potable, does not mean that we don't want to see a
25 discussion of what the water will actually be when

1 this is completed.

2 CHAIR GIBSON: Mr. Ballanco, I appreciate
3 that fact and I'm not -- but that was not what I
4 asked. I'm just trying to make sure if water were
5 acceptable for domestic and agricultural uses, would
6 that be -- would that not need to be potable? If not,
7 that's fine. Just tell me that.

8 MR. FRANKEL: This is David Frankel for
9 Consolidated Intervenors --

10 CHAIR GIBSON: Wait a minute. I asked Mr.
11 Ballanco first and then you can answer, Mr. Frankel.

12 MR. FRANKEL: Thank you.

13 CHAIR GIBSON: Yes, Mr. Ballanco?

14 MR. BALLANCO: Your Honor, I do believe
15 certainly for domestic purposes, nonpotable water is
16 not useful for domestic purposes. For agricultural,
17 I can't exactly comment on that one.

18 CHAIR GIBSON: Okay, that's fine. Now you
19 can speak, Mr. Frankel.

20 MR. FRANKEL: David Frankel for
21 Consolidated Intervenors. Thank you, Your Honor.
22 What's lost here in the discussion I think is that the
23 definition of potable under U.S. drinking water
24 standards related to high salinity and TDS as well as
25 the cost efficiency of filtration techniques that have

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1 evolved over time are on the one hand two separate
2 issues.

3 We have Dr. Anders who is, in fact, the
4 person for Western Nebraska Resources Council upon
5 which we have standing and he testified that he uses
6 the water in his house for domestic purposes and they
7 use it for showering and gardening. And so he doesn't
8 care that it's not consistent with U.S. drinking water
9 standards. So when we say potable, from a legal
10 standpoint the aquifer commenced in a state that was
11 high TDS and high salinity and a bunch of other
12 things, but whether or not those meeting U.S. drinking
13 water standards they were and are being used for
14 domestic and agricultural purposes. So I think we
15 need to have that clarification and not put too much
16 emphasis and say oh, it wasn't being used for drinking
17 then so we can write it off as --

18 CHAIR GIBSON: Fair enough. I'm fine with
19 that. I was trying to get some clarification of what
20 that meant and I think we just got it, okay?

21 Now let's turn to the first part of this
22 contention, Mr. Ballanco. The Applicant and the staff
23 claim that alternative concentration limits are
24 allowable under 10 CFR Part 30, Appendix A, Criterion
25 5(b) (5). And so considering an alternative that

1 prevents their use is an impermissible attack on the
2 regulations of the Nuclear Regulatory Commission.

3 Why do you claim that the Applicant and
4 the staff are wrong about this?

5 MR. BALLANCO: Thank you, Your Honor. Tom
6 Ballanco for Consolidated Intervenors. It remains our
7 contention that the discussion of alternative is being
8 framed in a manner that is too narrow. And to say
9 okay, we're not maybe going to achieve baseline
10 standards as regards uranium. We've got a regulation
11 for that and we need to achieve ACL.

12 What we expect to see in the discussion of
13 reasonable alternatives, rather than okay, we cannot
14 mine, we can do an open pit mine or we can do it like
15 this. Well, maybe we want to see we can do it like
16 this broken down a little bit. Perhaps it means
17 slowing down the flow rate. Perhaps it means
18 implementing other procedures for restoration knowing
19 full well that the ones in place now do not
20 successfully remove particularly uranium and arsenic.
21 There are other alternatives beyond we can do it like
22 this or we just can't do it or we dig a hole.

23 So we want to see a discussion that uses
24 the real-world data we've accumulated over the years
25 of operation and explores what might be some

1 alternative to maybe avoid some of the impacts we seem
2 certain to have inflicted on this aquifer.

3 CHAIR GIBSON: Mr. Cylkowski, is that an
4 attack on the NRC regulations?

5 MR. CYLKOWSKI: Your Honor, what I would
6 maintain is that what is submitted in the contention,
7 not at this point, but perhaps new arguments are being
8 raised. But what's submitted in the contention
9 misunderstands the purpose of ACLs is an infamous bold
10 attack on regulations and is identical to a proposed
11 alternative that form the basis of an identical
12 contention in the recent Powertech proceeding. And as
13 that board explained, that cannot support an
14 admissible contention for the exact same reasons said
15 here.

16 CHAIR GIBSON: Mr. Ballanco?

17 MR. BALLANCO: Thanks, Your Honor. Tom
18 Ballanco for Consolidated Intervenors. Again, I guess
19 I'll be the first one to say -- I'm going to say the
20 same thing I said before as regards Commission
21 regulation.

22 CHAIR GIBSON: If you're going to say the
23 same thing as you did before, don't say it again. You
24 can just say I have nothing more to say than I did the
25 first time. And that's okay.

1 MR. BALLANCO: Exactly, Your Honor. And
2 what I'm referring to is that the regulation can stand
3 and if compliance with the regulation violates NEPA,
4 that doesn't relieve the Agency of compliance with
5 NEPA.

6 CHAIR GIBSON: Okay. Fair enough. As to
7 the second point, Mr. Ballanco, first of all, as to
8 restoration of the surface and groundwater into which
9 Crowe Butte discharges, the position of Crowe Butte
10 and the NRC staff is that Intervenors essentially
11 argue that if this level of restoration were feasible
12 and effective, then it would be a reasonable
13 alternative, but Intervenors provide no support or
14 explanation for the implied premise that such levels
15 of restoration are feasible and effective in the first
16 place.

17 Why do you claim that the staff is wrong
18 in this regard?

19 MR. BALLANCO: Thank you, Your Honor. Tom
20 Ballanco for Consolidated Intervenors. Certainly we
21 have seen -- I'm referring particularly now to
22 California which is under a severe drought, taking
23 water that was previously designated as underground
24 injection wells for the oil industry and regretting
25 those decisions because now that water based on modern

1 filtration techniques could be used and would be used,
2 but it's been contamination beyond recovery at this
3 point under current filtration techniques.

4 So without looking at what some
5 alternatives might be here, do these ACLs relate to
6 filtration technology that maybe this water might
7 reenter the biosphere at some point or are we saying
8 that it just has to be gone? That's the kind of
9 discussion we say --

10 CHAIR GIBSON: Tom Ballanco, I think you
11 just cut out.

12 MR. BALLANCO: I'm sorry, I don't know
13 exactly when that happened.

14 CHAIR GIBSON: Just at the end.

15 MR. BALLANCO: Did you hear anything?

16 CHAIR GIBSON: Yes, we could hear almost
17 all of it, just you cut out there for a minute, very
18 end.

19 MR. BALLANCO: Again, we're just -- we
20 contend that the discussion of the alternatives
21 doesn't consider other options involving mining other
22 than continuing as it is. There might be
23 considerations that we can achieve that might later be
24 able to be filtered or be restored and we believe that
25 this kind of action should consider those and

1 incorporate alternatives to the same way we've always
2 done.

3 CHAIR GIBSON: Okay. Counsel for the NRC
4 staff, in their reply, Intervenor attempt to link the
5 discussion of cumulative impacts with their
6 restoration claims from Contention 9 and they say that
7 because the NRC staff has approved the restoration of
8 the first of ten active mine units at Crowe Butte
9 without a restoration to the status quo ante in 1991,
10 it is only reasonable to assume that the other mine
11 units will likewise be approved without being restored
12 to that level.

13 Is that a fair criticism?

14 MR. CYLKOWSKI: Your Honor, as Ms. Simon
15 brought up earlier and as we confirmed with the staff,
16 and as explained in the SER, the staff no longer uses
17 state class of use standards for approving mine unit
18 restoration. So to the extent that forms the concern
19 over the restoration of mine unit one, that does not
20 form a basis for a concern of restoration of remaining
21 mine units.

22 CHAIR GIBSON: Okay. Mr. Ballanco, does
23 that resolve your concern?

24 MR. BALLANCO: Thank you, Your Honor. Tom
25 Ballanco for Consolidated Intervenor. No, Your

1 Honor. Our concern is that essentially all roads lead
2 to ACL and that absent a discussion of the cumulative
3 impact of ACLs, a mitigation standard that is far in
4 excess of baseline levels, we can't look at
5 alternatives to being left with the condition that is
6 going to be significantly different than the condition
7 we started with. And that's -- these all inform our
8 assertion that the EA is an incomplete document as it
9 does not fit this scenario that requires an EIS.

10 CHAIR GIBSON: Okay. I think we
11 understand your arguments, gentlemen. Are there any
12 other board members that have any other questions with
13 respect to Contention 11?

14 Judge Wardwell?

15 JUDGE WARDWELL: Judge Wardwell, no.

16 CHAIR GIBSON: Judge Rosenthal. Okay.
17 Let's go to Contention 12.

18 Tom Ballanco, are you handling Contention
19 12?

20 MR. REID: Your Honor, this is Andrew Reid
21 from the Tribe.

22 CHAIR GIBSON: You're handling Contention
23 12?

24 MR. REID: No, I've been trying to jump
25 in.

1 CHAIR GIBSON: Oh, I'm terribly sorry,
2 sir. I'm sorry. What did you want to say?

3 MR. REID: Well, you said you were going
4 to come back to Contention 10 on cumulative impacts
5 and I had a comment that I wanted to get in.

6 CHAIR GIBSON: Please do. Please do, Mr.
7 Reid. I'm sorry, I did not realize you wanted to say
8 something.

9 MR. REID: All right. Thank you.

10 CHAIR GIBSON: Please accept my apology.
11 I did not realize you were there.

12 MR. REID: That's all right. It's after
13 5 your time anyway.

14 CHAIR GIBSON: It is.

15 MR. REID: I'll be quick. One of the main
16 concerns I have in regards to the cumulative impact
17 and the discussion of that in the environmental
18 assessment is in reviewing the plans of Crowe Butte
19 for the site, they indicate, and I haven't heard any
20 clarity on this on their representations in their
21 submissions that they were intending to complete their
22 production in December of 2014 which means that would
23 have been concluded and that it would enter into a
24 restoration period for the next five years with
25 restoration, as I understand it, to be completed no

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1 later than 2023. And that they would then, in that
2 time, between -- on the time period of their license,
3 would continue to operate the facility, the processing
4 facility on the Crowe Butte site to process production
5 from the other three satellite sites, the Three Crows
6 site, North Trend and the Marsland site.

7 Now the Marsland site is 11 miles away,
8 and as I understand it, it's their intent to pipe, to
9 put in pipelines and pipe, I would assume, solution to
10 the processing facility at Crowe Butte as well as pipe
11 solution from the North Trend site to Crowe Butte. It
12 has to cross a major highway. And also to pipe, I
13 assume, to have pipes to the Three Crows Expansion
14 Area which is also, as I understand their description,
15 is to have another processing facility that will be
16 used in conjunction with the one at Crowe Butte.

17 I don't see any discussion of this
18 anywhere in this cumulative impacts. There's no
19 discussions about the impacts or having obtained the
20 right of ways for the pipelines. There's a Montana
21 Wilderness Association v. Fry case that dealt
22 specifically with this, 310 Fed. Supp. 2d 1127, 1153,
23 the District of Montana 2004, holding that an
24 environmental assessment must include -- must analyze
25 connected actions. And what I see is in the

1 environmental assessment it's describing the
2 activities as if they're continuing to produce when
3 actually at the time that the assessment was issued,
4 they were on the verge of not producing. And it
5 really should be an environmental assessment on the
6 restoration and the continuing use of the facility as
7 a main facility for the processing of production from
8 the three expansion areas. And I don't see that
9 anywhere in the analysis of cumulative impacts.

10 CHAIR GIBSON: Very well. Thank you, Mr.
11 Reid. Without getting into anything else, Mr. Smith,
12 could you just tell us generally if the activity that
13 Mr. Reid just described is likely to be what's going
14 to be happening at the site in terms of its
15 relationship with the three expansion areas?

16 MR. SMITH: This is Tyson Smith for the
17 Applicant. I don't believe it is. I don't think
18 there's any plans to construct a piping from Marsland
19 to the main processing facility. I believe the
20 proposal is to take the IX column resins and truck
21 them to the main processing facility which is the
22 current permit area that would remain and be used to
23 process the resins and then the resins are sent back
24 to the satellite facilities where they're reused
25 there. So I don't believe that Mr. Reid's description

1 of the planned activities is accurate.

2 CHAIR GIBSON: Insofar as there would be
3 a pipeline -- there would not be a pipeline and still
4 you would use trucks to take the ion exchange rosins
5 to the facility there where you operate now, is that
6 correct?

7 MR. SMITH: Correct.

8 CHAIR GIBSON: In other respects, however,
9 is the description he had essentially accurate, that
10 you're going to be phasing out operations where you
11 are there, where you're getting the renewal for, and
12 you'll be doing the mining in these other places and
13 then you'll be bringing the product there to be
14 refined further? Is that basically what the plan is?

15 MR. SMITH: Yes.

16 CHAIR GIBSON: Okay.

17 MR. SMITH: That is correct.

18 CHAIR GIBSON: Thank you.

19 MR. REID: May I just respond to that real
20 quickly?

21 CHAIR GIBSON: Yes, yes, absolutely, Mr.
22 Reid.

23 MR. REID: Then there's no discussion in
24 regards to the impacts of the trucking of radioactive
25 and hazardous materials between the expansion areas.

1 In addition, I am more than happy to submit to the
2 board the specific references to the pipeline between
3 the expansion areas that are contained in the
4 descriptions that are on file with the board.

5 I think that Crowe Butte's Council is
6 apparently not aware of that description, but there
7 have been several descriptions in which they discuss
8 pipelines being constructed between the expansion
9 areas and the main facility. I can submit that
10 without argument. I can just submit that with
11 references to the record.

12 CHAIR GIBSON: Okay. Well, you know, it's
13 very possible that you know something that Mr. Smith's
14 client hasn't told him, but it sounds like he's under
15 the impression that they're not planning on doing
16 pipeline, but that's okay. I'm sure we'll get this
17 clarified. Fair enough, Mr. Smith?

18 MR. SMITH: Yes, certainly. I was just
19 reading from the Marsland and North Trend
20 applications, so that was the basis.

21 CHAIR GIBSON: Fair enough. We'll get
22 that one resolved. Thank you for bringing that to my
23 attention. And again, Mr. Reid, I apologize for not
24 letting you speak earlier. I just didn't realize you
25 wanted to. I'm sorry.

1 MR. SMITH: This is Tyson Smith and I'll
2 just follow up on one last item that Mr. Reid raised.

3 CHAIR GIBSON: Yes.

4 MR. SMITH: Which is that the impacts from
5 transportation of resin from the satellite facilities
6 to Crowe Butte is discussed in the staff's EA in the
7 discussion of accumulative and passive transportation.

8 CHAIR GIBSON: Okay, very well. Thank
9 you. If no other board members have any questions on
10 Contention 11, we're going to turn to Contention 12.

11 Now Mr. Frankel, Mr. Ballanco, Mr.
12 Ellison, Mr. Reid, which one of you is going to handle
13 this one?

14 MR. ELLISON: This is Bruce Ellison. I
15 think this one is mine.

16 CHAIR GIBSON: Okay, great. Mr. Ellison.

17 MR. ELLISON: Yes, sir.

18 CHAIR GIBSON: In this contention, you
19 maintain that the environmental assessment does not
20 adequately address air emissions, liquid waste
21 disposal, selenium discharges and the impact of these
22 on receptors which you describe as plants, animals,
23 people, soil, water, and parks, especially during
24 tornadoes and wind storms. Is that a fair statement?

25 MR. ELLISON: Yes. But certainly it also

1 includes land application of selenium --

2 CHAIR GIBSON: Then selenium application
3 to land and discharges, would that be fair?

4 MR. ELLISON: Yes. I mean the discharge
5 contains selenium and that seems to be what the
6 problem is.

7 CHAIR GIBSON: Great. Okay. And it's
8 clear this contention involves selenium, but setting
9 aside selenium for the moment, are there any
10 contaminants of concern to your clients with respect
11 to this specific Contention 12? Anything other than
12 selenium? I just want to be sure we get that.

13 MR. ELLISON: Well, there's also air
14 emissions. Part of the difficulty is that it's hard
15 to know the -- I would say any of the liquid
16 discharges that would contain heavy metals or toxic or
17 carcinogenic substances would also fit within this.
18 Selenium seems to be the one that most readily
19 identified.

20 CHAIR GIBSON: Okay.

21 MR. ELLISON: But in terms of air
22 emissions, I think we've had some previous discussions
23 about radon. I think Mr. Smith gave us some
24 information and we also had a position and I don't
25 know if that would -- there may be some similarity in

1 the contention.

2 CHAIR GIBSON: Okay.

3 MR. ELLISON: With the air emissions.

4 CHAIR GIBSON: Okay. Other than the
5 discussion that we previously had about radon and
6 radon daughters, are there -- and selenium, is there
7 anything else?

8 MR. ELLISON: No, sir. Other than heavy
9 metals --

10 CHAIR GIBSON: With respect to Contention
11 12.

12 MR. ELLISON: Right. There may be. If
13 there were other heavy metals or carcinogenics or
14 toxic substances that are in any of them that could
15 release it, then that would be included.

16 CHAIR GIBSON: Okay. Fair enough, fair
17 enough. Okay. Well, Judge Wardwell, I believe you
18 have some questions with respect to this contention?

19 JUDGE WARDWELL: Yes, can I stay with --
20 my head is getting foggy now. Is it Mr. Frankel that
21 I'm dealing with on this?

22 CHAIR GIBSON: This is Mr. Ellison.

23 JUDGE WARDWELL: Mr. Ellison. Sorry.

24 MR. ELLISON: Yes, sir.

25 JUDGE WARDWELL: In regards to selenium,

1 do you notice any test results from Crowe Butte that
2 present any data to indicate that selenium is at
3 detectable levels within the liquid waste discharge?

4 MR. ELLISON: Well, it seems to be a
5 fairly standard one. It's my understanding that part
6 of our contention is the fact that there is not the
7 detailed nature of descriptions of the liquid waste,
8 but my understanding is that it does contain selenium
9 and that's fairly standard for these kinds of
10 operations.

11 JUDGE WARDWELL: But you haven't been able
12 to point to any test results that specifically state
13 that?

14 MR. ELLISON: Not for Crowe Butte, no,
15 sir.

16 JUDGE WARDWELL: Okay.

17 MR. ELLISON: But I don't know if my other
18 counsel are aware of any.

19 MR. FRANKEL: David Frankel for
20 Consolidated Intervenors. I don't believe -- I could
21 be wrong, but I don't believe that monitoring includes
22 selenium.

23 JUDGE WARDWELL: Okay, thank you. Crowe
24 Butte and staff maintain that concerns of selenium
25 should have been raised back in 2008 because no new

1 information has surfaced since that. What's your
2 reaction to that?

3 MR. ELLISON: The same as what we've done
4 previously. This is the first environmental document
5 that we've had. We are responding to it with proposed
6 new contentions.

7 JUDGE WARDWELL: Thank you for that. On
8 page 60 of 61 NRC stated that Crowe Butte is committed
9 to monitoring waste soils for selenium. Why doesn't
10 this cure part of this contention with regards to
11 selenium?

12 MR. ELLISON: Part of our concern is that
13 it doesn't fully address the potential environmental
14 impacts of what selenium being sprayed on the ground,
15 getting into grasses, other plants, being eaten by
16 animals, those animals possibly being eaten by humans
17 in terms of hunting. In other words, it doesn't
18 really address some of the full bio-accumulation cycle
19 that has been problematic with selenium increases in
20 the environment.

21 JUDGE WARDWELL: How does this tie in with
22 your wind and tornado aspect of this contention or
23 does it not in regards to selenium? And we can say
24 also any other heavy metals that might be in that
25 liquid waste.

1 MR. ELLISON: Yes, sir. I don't know if
2 it addresses those. Of course, there's a problem of
3 if there's a heavy up flooding, for example. That
4 could certainly spread it further, at least on the
5 surface.

6 JUDGE WARDWELL: If you don't have any
7 results from -- test results showing that selenium is
8 in the waste water, what prompted your concern about
9 selenium here at this particular site?

10 MR. ELLISON: Well, it's just that in the
11 other sites where I have looked at land application,
12 surface land disposal, this has been a problem. And
13 it's a potential problem down in the mine that
14 Powertech hasn't even started yet, but we've raised
15 that issue there with evidence that, in fact, it has
16 become a problem. And that needs to be addressed.

17 While Crowe Butte is going to monitor
18 these results, that's not quite the same thing as
19 really doing a study of what it would mean if at
20 various levels which will increase over time.

21 JUDGE WARDWELL: Thank you.

22 MR. ELLISON: We're saying it was not an
23 adequate analysis that was done. It was more of the
24 details that were given and just a promise to monitor
25 is not the same thing as doing a study of what the

1 impacts would be should there be an increase of
2 selenium content.

3 JUDGE WARDWELL: That last statement
4 brings to mind another general question that I had.
5 You stated that this was a contention of omission as
6 you did several of these contentions. Then you talk
7 about inadequacy. Aren't those two separate things?

8 MR. ELLISON: Well, if something is
9 omitted or not addressed, I understand what you're
10 saying and I don't want to play semantics. I can see
11 where that position could be taken, however, something
12 that's omitted, if it's not there and should be there,
13 then it's also a deficiency, so it could be arguably
14 both.

15 JUDGE WARDWELL: Sorry, you lost me on
16 that. I'm not sure how it could be both. In other
17 words, if it's not there how could it be inadequate?

18 MR. ELLISON: If it's not there and it
19 should be there, then it's --

20 JUDGE WARDWELL: It's an omission.

21 MR. ELLISON: It's an omission, but it
22 also, we would feel makes the study inadequate because
23 it should be there. So as I said, I don't want to
24 play semantics. It's essentially the same thing.

25 JUDGE WARDWELL: Mr. Smith, do you have

1 any comments in regards to the statements that were
2 just made?

3 MR. SMITH: There's nothing other than
4 Crowe Butte is not currently conducting land
5 application at its site. Nothing has changed from our
6 license renewal application with respect to that. And
7 then in terms of support for the contention, the
8 Consolidated Intervenors and the Tribe have not put
9 forth any expert support or any factual support to
10 show that would be a concern in light of the wastes
11 that are present at Crowe Butte.

12 JUDGE WARDWELL: So you may have answered
13 the next question I was going to just ask and that is
14 given that your basic answer to these contentions was
15 silent on selenium, I believe, and so my question is
16 were the impacts of selenium discussed in your LRA or
17 the EA or let's say the ER or the EA, and if not, why
18 not?

19 MR. SMITH: Selenium is mentioned as a
20 hazardous constituent of the groundwater at the site,
21 so it's not that the application is silent on
22 selenium. We're talking particularly here about land
23 application of waste. Crowe Butte doesn't plan and
24 has no current plans to apply waste water through land
25 application. So that's not something that we

1 discussed in great deal in our LRA because that's not
2 within our plans to do so. That said, it is noted
3 that we do have a permit for that and that the permit
4 does include conditions which we've committed to limit
5 our selenium releases among other heavy metals in such
6 releases if that were to happen. But like I said,
7 that's not something we have any plans to do at the
8 present.

9 JUDGE WARDWELL: Thank you, Mr. Smith.
10 Staff, if I might, whoever wants to take this. On
11 page 60, you state that it is not required to "examine
12 every aspect of a project in its EPA document or a
13 NEPA document and to take a hard look. The standard
14 requires a reasonably thorough discussion of
15 significant aspects of the probable environmental
16 consequences."

17 Is that the impact from selenium a
18 surprise impact for uranium be it an in situ mine or
19 a regular hard rock mine? Isn't it fairly common,
20 heavy metal, that's an issue at most of these sites?

21 MS. SIMON: Your Honor, this is Marcia
22 Simon for the staff. As I also noted, as we also
23 noted in our answer on page 60, the issue of selenium
24 and specifically for land application was addressed in
25 the generic environmental impact statement. In fact,

1 one of the documents that the Intervenor provided in
2 support was a letter from the Fish and Wildlife
3 Service that was a comment on that environmental
4 impact statement draft.

5 And so even though this particular EA does
6 not cure off the GEIS, the NRC did consider the
7 generic issue of selenium and land application. I'm
8 just looking at the -- on page 4.2-62 of the GEIS,
9 it's discussed. And for the reasons that are
10 mentioned in our answer, the GEIS cites requirements
11 to monitor, control irrigation areas, to maintain
12 levels within the allowable release standards.

13 And as you noted earlier, there's
14 monitoring. And so for those reasons, the NRC and the
15 GEIS found that this issue, in general, would have a
16 small impact. And so -- and that just illustrates
17 that the issue has been considered and is not
18 considered a significant impact.

19 JUDGE WARDWELL: Thank you. Wrapping up
20 with Consolidated Intervenor, any rebuttal comments
21 you'd like to make on the answers you heard to those
22 questions?

23 MR. ELLISON: The only additional thing,
24 this is Bruce Ellison for Consolidated Intervenor,
25 the only thing that I might add would be --

1 JUDGE WARDWELL: This is Mr. Ellison I
2 take it?

3 MR. ELLISON: Yes, sir.

4 JUDGE WARDWELL: Good.

5 MR. ELLISON: I'm sorry, I thought I --

6 JUDGE WARDWELL: No, I just want to be
7 sure the court reporter knew.

8 MR. ELLISON: Okay, I thought I identified
9 myself, but thank you, sir.

10 CHAIR GIBSON: You did identify yourself.
11 Mr. Wardwell is a little fuzzy right now.

12 MR. ELLISON: All right. It's been a long
13 day. You know, one of the other things that with the
14 acknowledgment that selenium is part of the processes
15 and is found within -- with other heavy metals that
16 are released by this process, there's also the
17 question of spills and leaks, and the impact of
18 selenium both on the surface and possibly subsurface,
19 but certainly on the surface.

20 JUDGE WARDWELL: But that's really another
21 contention, isn't it? You didn't raise that here in
22 this contention.

23 MR. ELLISON: We raised it as a liquid
24 waste issue. And a liquid waste would seem to me
25 there's either proper disposal or there's also some

1 excursions of spills and leaks.

2 JUDGE WARDWELL: I don't think we looked
3 too highly on it being considered a liquid waste if it
4 was inadvertent. Would we?

5 MR. ELLISON: Well, as a consumer of
6 water, I would hope you would.

7 JUDGE WARDWELL: In regards to that it
8 would be more serious than that, like designated a
9 liquid --

10 MR. ELLISON: I see the point you're
11 raising.

12 JUDGE WARDWELL: Philosophical stuff.

13 MR. ELLISON: Yes, sir. I have nothing
14 further.

15 JUDGE WARDWELL: And I have nothing
16 further either, Judge Gibson.

17 CHAIR GIBSON: Judge Hajek, do you have
18 any questions about Contention 12?

19 JUDGE Hajek: I do not.

20 CHAIR GIBSON: Judge Rosenthal?

21 JUDGE ROSENTHAL: No, I do not.

22 CHAIR GIBSON: Very well. Let's go to
23 Contention 13. Which one of you is going to be
24 handling Contention 13?

25 MR. FRANKEL: David Frankel for

1 Consolidated Intervenors, Your Honor.

2 CHAIR GIBSON: Mr. Frankel, you assert
3 that the NRC staff failed to consult with the U.S.
4 Fish and Wildlife Service concerning the potential
5 impacts on several species including the switch fox,
6 the bald eagle, the black-footed ferret, the whooping
7 crane and the sharp-tailed grouse. Is that correct?

8 MR. FRANKEL: Yes, Your Honor, and that
9 such failure constituted a failure to conduct the
10 required hard look.

11 CHAIR GIBSON: Very well. Let's talk
12 about the sharp-tailed grouse. Do you know if it is
13 entitled to any special protection under state or
14 federal law?

15 MR. FRANKEL: I do not.

16 CHAIR GIBSON: Mr. Smith, regardless of
17 whether we grant or deny the NRC staff's motion to
18 amend its answer to Contention 13, it is my
19 understanding that Crowe Butte maintains that the NRC
20 staff need not consult with Fish and Wildlife here, is
21 that correct?

22 MR. SMITH: That is correct. The NRC
23 staff, as the action agency, makes a may affect or no
24 effect determination and that they conclude no effect,
25 no consultation is required.

1 CHAIR GIBSON: Okay. That's basically if
2 they determine there's no effect, then there's no
3 obligation to consult. Is that your position?

4 MR. SMITH: That's correct, under the
5 federal ESA.

6 CHAIR GIBSON: Okay. Well, you know,
7 there aren't any polar bears or snail darters here.
8 They're in Dawes County, at least to my knowledge.
9 And so we can probably stipulate that this project
10 would have no effect on those species. And while I
11 can't really speak to the bald eagle or the swift fox,
12 it seems clear that everyone in this case is in
13 agreement that both the whooping crane and black-
14 footed ferret are present in this area. And that is
15 where I have difficulty following your argument.

16 It would seem to me that where protected
17 species are present in the area where Crowe Butte's
18 operation lies, it would make a lot of sense to
19 consult with the U.S. Fish and Wildlife Service who,
20 I assume, are the pros from Dover on wildlife, just to
21 confirm that no problems are posed to these species.
22 But instead, it looks to a casual observer like the
23 staff approached this backwards, deciding there were
24 no effects on these species and once it reached that
25 conclusion then it had no obligation to confirm its

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1 analysis with the U.S. Fish and Wildlife Service.

2 Why am I wrong, Mr. Smith?

3 MR. SMITH: Well, the staff, as the action
4 agency, gets to decide in the first place whether --
5 they are most familiar with the action that's being
6 proposed. And I think, in fact, you'll see that they
7 didn't say the whooping crane has been seen on the
8 site or the swift fox is present at the site. So
9 there is no -- staff could conclude based on the lack
10 of known presence at the site; knowledge, staff has
11 biologists on staff and consultants who can advise on
12 these things; based on the understanding of those two
13 species, habit requirements, feeding requirements,
14 life cycle, etcetera, the full host of biological
15 conditions to which they are exposed, that the action
16 will, the proposed action renewing this license will
17 have no effect. And the staff made that determination
18 here.

19 And that's a determination, I'd add, that
20 the NRC staff makes for a variety of species for all
21 the different types of licensing actions that the
22 Agency undertakes including reactor construction
23 licenses where there are species in the area, but not
24 present at the site and no effect determination is not
25 unusual at all.

1 CHAIR GIBSON: Well, I can tell you that
2 I was involved at -- a few years ago, with regard to
3 the Victoria Station plant that was planned in
4 Victoria, Texas. An early site permit. It was
5 shelved. I don't know if abandonment is the right
6 word, but it was at least shelved for the time being.
7 It was very close to the Aransas National Wildlife
8 Refuge, which as you know, probably know is where
9 whooping cranes go South when the weather gets cold up
10 there. That largely, you know, changed the whole
11 nature of that case. I'm sure some of the financing
12 affected it as well, but regardless, that really
13 seemed to turn the case significantly.

14 And it certainly was a big impact on this
15 case, on that case. And it doesn't seem to be one
16 here. And so I was sort of mystified that there was
17 a no effects determination and no consultation. But
18 you know, that's just again, a casual observer. I'm
19 not an expert in these matters.

20 Do any other board members have any
21 questions about Contention 13?

22 JUDGE ROSENTHAL: No, not Rosenthal.

23 JUDGE WARDWELL: Not Wardwell.

24 CHAIR GIBSON: Judge Hajek?

25 JUDGE Hajek: No, not Hajek.

1 CHAIR GIBSON: Okay, let's turn to
2 Contention 14.

3 Mr. Frankel, are you handling this one?

4 MR. FRANKEL: Yes, Your Honor.

5 CHAIR GIBSON: With this contention,
6 you're claiming that the environmental assessment
7 fails to analyze the impacts of two earthquakes on the
8 project, especially as it concerns secondary porosity
9 and adequate confinement. Is that correct?

10 MR. FRANKEL: Yes, Your Honor.

11 CHAIR GIBSON: Now the staff claims that
12 there have been over 1100 earthquakes in this area and
13 that these two earthquakes of magnitude 3.7 and 3.3
14 are not significant. Why do you claim that the
15 Applicant and the staff are wrong?

16 MR. FRANKEL: Thank you, Your Honor.
17 David Frankel for Consolidated Intervenor. Your
18 Honor, in preparing my pleading on the new
19 contentions, I did a Google search to verify whether
20 there had been any earthquakes and I found the
21 newspaper article that was attached as the exhibit to
22 the pleadings that talked about the 3.3 and the 3.7,
23 and as of Thursday morning, three people in Crawford
24 and two in Chadron have reported feeling the
25 earthquake.

1 And the reason why I feel it's important
2 to separate this from the 1100 minor earthquakes is
3 that these were felt by the people in Crawford where
4 the mine is located and it was reported in the local
5 newspaper three years before the environmental
6 assessment was prepared. And the failure to describe
7 earthquakes that take place in and around the licensed
8 area in a magnitude that can be felt by the residents
9 and is newsworthy constitutes a failure by the NRC to
10 include it in the environmental assessment.

11 CHAIR GIBSON: Now you say this happened
12 in 2012?

13 MR. FRANKEL: No, Your Honor, 2011,
14 November 15th.

15 CHAIR GIBSON: 2011. Okay. Because the
16 staff and the Applicant claimed that you should have
17 raised these concerns in 2008 because these
18 earthquakes happened with some frequency and were
19 known at that time. Is it your claim that yes, but
20 some of them happened three years later or yes, but
21 these three were really significant and they happened
22 three years later?

23 MR. FRANKEL: No, Your Honor. Our
24 contention is that based on Dr. LaGarry's 2015 opinion
25 concerning how even small earthquakes can represent

1 the shifting and flexing of the earth's crust,
2 continually creating, closing, and redistributing
3 secondary porosity and changing the flow pathways of
4 the region's groundwater and that that should have
5 triggered the NEPA analysis. It should have provided
6 -- the Agency should have provided sufficient data for
7 the scientifically defensible review of the
8 environmental impacts and independent analysis and
9 they didn't do that. So Your Honor, we're saying that
10 this NEPA document did not exist before and these NEPA
11 claims could not have been raised in 2008 as we
12 previously argued.

13 CHAIR GIBSON: Was necessary for Dr.
14 LaGarry to submit his 2015 affidavit and that is
15 really the basis on which you're making your claims.
16 Is that right?

17 MR. FRANKEL: Concerning the impact of
18 even smaller earthquakes and secondary porosity and
19 the failure of the Agency to take a hard look. The
20 Agency could have written a couple of sentences that
21 said we've looked at these earthquakes, we've looked
22 at the secondary porosity issue. It may impact on
23 confinement, but we don't think so. None of that
24 analysis is reflected in the environmental assessment.

25 CHAIR GIBSON: Okay. So staff, why is it

1 or Mr. Smith, whichever one of you has the lead on
2 this, why is this -- why do you claim that Dr.
3 LaGarry's affidavit is not new information and this
4 was something that should have been raised in 2008?

5 MS. SIMON: This is Marcia Simon. I think
6 Mr. Smith has the lead on this.

7 CHAIR GIBSON: Okay, Mr. Smith.

8 MR. SMITH: Sure. This is Tyson Smith
9 for Crowe Butte.

10 CHAIR GIBSON: Good.

11 MR. SMITH: A couple of things, first, the
12 suggestion that we didn't consider -- the secondary
13 porosity hasn't been considered is just not correct.
14 It was addressed in the license renewal application
15 which notes that small faults have been identified in
16 the area of review which have offsets of a few feet.
17 However, these faults do not affect the confinement of
18 the Chadron sandstone based on hydrologic testing of
19 the area.

20 So I think we have addressed that, that
21 faults are considered and if you go look at the
22 staff's EA, they considered the risk of earthquakes
23 and seismology at the site. They look at the impacts
24 of it over time, what's ahead on the plant, on the
25 site in the area surrounding the plant. And based on

1 that, they determined it wasn't likely to affect the
2 plant's ability to control its operations. So I think
3 the consideration of seismology and hydrogeology is
4 fundamental to the Applicant, Crowe Butte's safety
5 basis for its plant, and it's obviously a fundamental
6 aspect of the NRC's staff's review of the application.

7 MS. SIMON: Your Honor, this is Marcia
8 Simon. If I could just make one comment.

9 CHAIR GIBSON: Yes.

10 MS. SIMON: Our position on the LaGarry
11 2015 opinion is that it doesn't really provide
12 materially different information about this topic than
13 the 2008 one because the 2008 opinion identified this
14 area as tectonically active and it raised concerns
15 about secondary porosity. So as we stated in our
16 answer, the idea that small earthquakes can cause
17 changes in groundwater paths and so forth is not
18 something that's a recent discovery. And so there's
19 no reason in my mind why that couldn't have been
20 brought up earlier.

21 CHAIR GIBSON: Mr. Frankel? You've heard
22 Mr. Smith and Ms. Simon's claim now. Is there
23 anything else you need to see about it that you
24 haven't already said before?

25 MR. FRANKEL: Yes, Your Honor.

1 CHAIR GIBSON: Please do so.

2 MR. FRANKEL: David Frankel. When the LRA
3 was done, it was impossible to know what Section 3.4.3
4 of the final EA would say. In 2014, it became
5 possible to know that it would say that the most
6 recent earthquake was in 2007, even though that was a
7 misstatement of fact. The NRC staff in that statement
8 also picks 3.0 magnitude and says it's not felt at
9 Crawford. And we identified specific earthquakes that
10 were greater than -- were in the 3.0, 3.7 that were
11 felt.

12 Concerning the secondary porosity and Dr.
13 LaGarry's 2008 more generalized concerns regarding the
14 faults, we do have a technical contention of
15 migrating. If the parties want to agree that it
16 migrates to include this Contention 14, that would be
17 acceptable to us.

18 And finally, the more specific notation in
19 the 2015 LaGarry opinion is that these earthquakes
20 represent a shifting and flexing and even describes
21 exactly how this relates to the pathways, the flow of
22 the pathways and that goes directly to the adequacy of
23 confinement. And all of this was supposed to be the
24 subject of a hard look and analysis and discussion of
25 consequences under the New York versus NRC case.

1 Those consequences, even if remote, because they're
2 more than zero, should have been described and
3 discussed. So the NRC failed to do that as a NEPA
4 document. It was impossible for us to see that in
5 LRA.

6 CHAIR GIBSON: Very well. Judge Wardwell,
7 did you have some questions about this contention?

8 JUDGE WARDWELL: Just a quick one. For
9 your last answer you just heard, is greater than zero
10 the criteria for when something has to be addressed in
11 NEPA?

12 MR. FRANKEL: Yes, Your Honor. David
13 Frankel for Consolidated Intervenors. I point you to
14 the case New York versus NRC, 681 F.3d 471 (D.C. Cir.
15 2012) at 477 and again at 478 to 479 and 480 and 481,
16 at 481 to 482. It talks about that the standard for
17 deference to the NRC staff in choosing not to discuss
18 consequences that the harm in question must be so
19 remote and speculative as to reduce the effective
20 probability of its occurrence to zero. And that in
21 those cases, an agency may dispense with the
22 consequences portion of the analysis. And here, we
23 have probability of more than zero and therefore the
24 consequences should have been discussed.

25 JUDGE WARDWELL: Staff, what's your

1 reaction?

2 MS. SIMON: Your Honor, I have not read
3 that case, so I'd have to look at it before I comment
4 on it. But I would say that that is in conflict with
5 other authority that says a reasonably thorough
6 discussion of significant impacts is required.
7 There's no need to discuss remote and highly
8 speculative consequences. A NEPA document need not be
9 an encyclopedia and need not analyze every conceivable
10 aspect of a project.

11 These are all standards that I believe are
12 noted in our answer in the legal standards section.
13 But again, I mean if the board would like my opinion
14 on that particular case, I would need to provide a
15 post-argument argument briefing on it.

16 JUDGE WARDWELL: We'll let you know if we
17 do. Thank you for your answer. That's all for me,
18 Judge Gibson.

19 CHAIR GIBSON: Judge Hajek?

20 JUDGE Hajek: Yes, I have a question about
21 the earthquakes that were considered. I read the RA,
22 the NCR, and the EA and the wording in all three of
23 them in the references were identical. So I didn't
24 see that there was any extension of the analysis that
25 was done between the time of the writing of the LRA

1 and the time of the writing of the EA. But in the
2 references, what struck me in particular was that the
3 earthquakes that were cited, the 1100 since 1699, my
4 first reading of it gave me the impression that the
5 expectation of the reader would be that he would
6 determine that oh, gee, these are extremely common.
7 And so they happen all the time. There hasn't been
8 any since the mine began to operate that has caused
9 any additional fissures, that would cause any greater
10 or any at all communication between the aquifers. But
11 that's since 1699, that's three or four a year. So my
12 eventual consideration was, well, that's not very
13 many.

14 And then the RA, SER, and the EA all state
15 that gee, the most recent one was in 2007 and that was
16 180 miles away. And as the Intervenors pointed out,
17 there have been two that were -- that occurred in
18 2011. And in looking at how far away the epicenter of
19 those two were, a lot closer than 180 miles, about
20 maybe 30 miles or so.

21 And then I realized that in the context of
22 the analysis that was provided in the LRA and word for
23 word repeated in the SER and the EA. These two
24 earthquakes would not have been considered anyway
25 because those two earthquakes did not occur in the

1 State of Nebraska. They indeed occurred in South
2 Dakota. And so I wonder why earthquakes that are not
3 in the State of Nebraska are not to be considered in
4 SER or the EA? So that's my question to either Mr.
5 Smith or the NRC staff.

6 MS. SIMON: Your Honor, this is Marcia
7 Simon from the staff. I don't think the intent is
8 necessarily that earthquakes outside of Nebraska not
9 be considered, but I think the purpose of this section
10 as we explained in our answer is to describe the
11 seismic environment, so to speak, of the area and so
12 it's not to catalog each and every earthquake that
13 occurs. It's to give a sense of the seismic risk and
14 the tectonic activity. And so our -- from our
15 perspective, that is what was required for this
16 section and that's what was done.

17 MR. SMITH: And I'll just add from the
18 Applicant's, this is Tyson Smith, I'll just add from
19 the Applicant's perspective, our objective is to
20 maintain control of mining fluids and if an earthquake
21 had effect on our ability to control operations,
22 that's something that we would notify the NRC. We
23 would have to address and deal with. If it led to
24 excursions or monitoring wells, you know, showing some
25 impact from that, we would, of course, take action

1 relative to that. But just to say oh, there's been an
2 earthquake, therefore, you've got to add some
3 additional analysis to your EA and that's just not
4 supported in this case. There's no evidence that it's
5 caused or could cause any impacts to operations at
6 Crowe Butte at this magnitude. And it's just frankly
7 a speculation that it could impact the site without
8 actually any recognition of how that might, in fact,
9 occur.

10 JUDGE Hajek: Mr. Smith, in fairness, I
11 have the impression that this contention is focused
12 less on the site causing the earthquakes and more on
13 the impacts of earthquakes on the project.

14 MR. SMITH: That's my understanding as
15 well.

16 JUDGE Hajek: Okay, fair enough. Fair
17 enough. Okay, I just wanted to be sure we weren't --
18 again, on the same page of the same hymnal.

19 MR. SMITH: Correct. And just to make
20 sure I understand what you're saying is that our
21 activities were causing earthquakes. I don't think
22 there's any indication of that whatsoever, and I did
23 not read the contention to be alleging that.

24 JUDGE Hajek: Fair enough.

25 CHAIR GIBSON: Judge Rosenthal, did you

1 have any questions about this contention?

2 JUDGE ROSENTHAL: No, I don't.

3 CHAIR GIBSON: Okay. I believe that we
4 have concluded our evaluation of all of the
5 contentions. Let me just ask, I'll go around to each
6 attorney here and just ask to make certain that
7 there's not something material that we did not hear
8 about that's not in the pleadings that we need to hear
9 about. If there's not, please just say you don't, so
10 we can go on. But let me just start with Mr. Smith.
11 Is there anything that we needed to hear about that we
12 did not address today, Mr. Smith?

13 MR. SMITH: No, Your Honor.

14 CHAIR GIBSON: Ms. Simon?

15 MS. SIMON: Your Honor, I just have to
16 make two points on Contention 13. The first is in the
17 event that you deny my motion I do want to state for
18 the record that the staff has changed its position and
19 believes Contention 13 is entirely inadmissible, that
20 we initially misread the regulations, and on a proper
21 reading, we believe that the way Mr. Smith described
22 it is correct. That's all I'll say about that.

23 The other thing is I just want to let
24 everyone know that we did receive concurrence letters
25 from both Fish and Wildlife and the State of Nebraska.

1 Those are available on ADAMS and I'll give you the
2 accession numbers. They were placed on ADAMS on
3 Friday, I believe. The Fish and Wildlife letter is
4 ML15044A080. And the Nebraska letter is ML15044A131.

5 CHAIR GIBSON: Okay, very well. Now with
6 that new information, I am going to ask that the
7 Intervenors follow the same procedure they do with
8 respect to these two documents to which Ms. Simon just
9 made reference. And that if you are going -- if you
10 feel that they raise any new matter that would be the
11 basis for a new or amended contention, I want you to
12 be sure and alert Mr. Sciretta about that within five
13 working days of today so that if you're going to file
14 a new contention, we'll know about it, we can prepare
15 a briefing schedule, and we're not going to monkey
16 with our trial setting in August. Do Intervenors
17 understand that?

18 MR. ELLISON: Yes, Your Honor.

19 CHAIR GIBSON: Okay. Very well.

20 MR. FRANKEL: David Frankel for
21 Consolidated Intervenors, since we're set for that
22 right now and since Ms. Simon seems to have the
23 document in hand, would it be possible to have that
24 emailed to all the parties' counsel so that we all can
25 see that without going over to ADAMS right away?

1 CHAIR GIBSON: That certainly seems like
2 a reasonable request, Ms. Simon. Could you PDF those
3 letters to all the parties?

4 MS. SIMON: Yes, Your Honor. They're
5 already in PDF format in ADAMS, so I'll just have to
6 download them and I will email them to everybody.

7 CHAIR GIBSON: Thank you.

8 MR. ELLISON: This is Bruce Ellison --

9 CHAIR GIBSON: Just a minute, Mr. Ellison.
10 Hold on just one second. Well, okay, we'll start with
11 you, Mr. Ellison. Is there anything else that we
12 covered today that you need to bring to the board's
13 attention that is material and that is not covered in
14 your pleadings?

15 MR. ELLISON: I don't believe so, but I
16 was going to make a comment about the just disclosed
17 documents, concurrences.

18 CHAIR GIBSON: Okay.

19 MR. ELLISON: That would be that I would
20 hope that there would be any requesting documents by
21 either Crowe Butte or the NRC staff for such letters,
22 the timing is just kind of interesting. So many years
23 after all this was done that these concurrences come.
24 And so I'd like to request disclosure orally, if I
25 may, of any requesting documents to those agencies

1 that these letters be prepared or any consultation
2 disclosures.

3 MS. SIMON: Your Honor, this is Marcia
4 Simon. If I can just -- I think I can explain that
5 and I'm also happy to provide those letters which were
6 sent out in January. And the reason that they were
7 sent out was because based on our initial position on
8 the contention, the staff thought that it needed to
9 get concurrence and therefore they sent out the
10 letters. But then after -- for the reasons outlined
11 in my motion and in our explanation of our changed
12 position, that was no longer necessary in our view,
13 but it had already been done, so we do have the
14 letters now.

15 CHAIR GIBSON: Very well, please provide
16 those, the letters requesting those as well as the
17 responses. And since you'll be getting those today,
18 gentlemen, you should be able to form your answer
19 within five working days to Mr. Sciretta which is next
20 Tuesday. We need to get an email to him to let him
21 know if you're going to amending your contention or
22 filing a new contention based on this information.

23 Our trial setting was very difficult to
24 set and I don't want to do anything to mess with that,
25 okay?

1 All right, let me -- I've already asked
2 Mr. Ellison, Mr. Ballanco, is there anything that you
3 feel is material you did not get to the board's
4 attention that you feel we need to know that is not in
5 your pleadings?

6 MR. BALLANCO: Thank you, Your Honor. Tom
7 Ballanco for Consolidated Intervenors. I want to make
8 this brief, Your Honor. I do feel compelled on behalf
9 of my client, Joe American Horse, who is one of these
10 elders who has specific ties to the region around Fort
11 Robinson and Crawford, Nebraska. He routinely visits
12 what was the birthplace of his father while the Oglala
13 Tribe was confined to the area immediately around Fort
14 Robinson.

15 There is no mystery, there is no dispute
16 that the Oglala Sioux Tribe before it was removed to
17 Pine Ridge was camped in that region. He certainly
18 feels strongly about cultural and spiritual ties to
19 the area and in that understands that while certain
20 efforts have been made that the Oglala were entitled
21 to specific consultation based on their recent
22 historical occupation there and very significant
23 events in Oglala history that took place in that
24 immediate vicinity, not the least of which was the
25 assassination of Mr. American Horse's grandfather's

1 friend, Crazy Horse, and also the treaty surrounding
2 the Black Hills including the Stellar Star policy, all
3 existing in the immediate vicinity of the Crowe Butte
4 facility. And I just wanted to express that on his
5 behalf, Your Honor. Otherwise, I think we have
6 thoroughly considered all the other concerns I have.

7 CHAIR GIBSON: Thank you. I'm sure we
8 will be looking forward to reading this Ling case with
9 respect to a colorable claim with respect to the
10 aboriginal spiritual ties to the land and to the
11 extent to which that's a colorable claim. But thank
12 you, thank you.

13 Now, I believe we go next to you, Mr.
14 Reid. Is there anything else that you need to bring
15 to our attention that is material to this case, that
16 is not in your pleadings.

17 MR. REID: Yes. While we were discussing
18 the other contentions, I located the reference to the
19 pipelines.

20 CHAIR GIBSON: Yes.

21 MR. REID: Perhaps I can put that in the
22 record and maybe get a clarification from counsel for
23 Crowe Butte and maybe the NRC staff counsel. It's in
24 the Marsland Expansion Area technical report, Volume
25 1 of May of 2012, ADAMS accession number ML12160A527

1 and it's at Section 1.7.3 and it's short, so I'll just
2 read it. It says that in 2011 CBR advised the NDEQ,
3 which is Nebraska Department of Environmental Quality,
4 and the NRC of a possible change from a full satellite
5 facility (production of impregnated resin for
6 transport to the main CCF which is the Crowe Butte
7 site) to use of pipelines to transport all processed
8 fluids from the TCEA, which is the Three Crows
9 Expansion Area, to the CBA, which is the Crowe Butte
10 Area. If feasible, the revised license would allow
11 for construction and operation of these processed
12 pipelines. The CBR requested that the NRC and NDEQ
13 suspend review of the respective TCEA application so
14 that CBR could supplement the applications with the
15 alternate approach.

16 So I don't see any of that being discussed
17 in regards to the Crowe Butte facility processing of
18 fluids delivered to it by pipeline from the Three
19 Crows facility.

20 CHAIR GIBSON: Very well, thank you, Mr.
21 Reid.

22 MR. SMITH: This is Tyson Smith and thank
23 you, Mr. Reid, for pointing that out. I was not aware
24 of that. I'll note that earlier when I mentioned
25 specific applications were under review I referred

1 only to North Trend and to Marsland which are ones
2 that have been accepted and are currently under review
3 by the NRC staff. So thank you for pointing that out.
4 I was not aware of that, but I don't think that
5 changes my earlier answer with respect to the other
6 two satellite facilities or the adequacy of the EA
7 transportation impacts.

8 CHAIR GIBSON: Thank you, thank you. Mr.
9 Reid, is there anything else?

10 MR. REID: No, Your Honor.

11 CHAIR GIBSON: Mr. Frankel, is there
12 anything else you need to bring to our attention that
13 we did not hear today that is material and that is not
14 in your pleadings?

15 MR. FRANKEL: No, Your Honor.

16 CHAIR GIBSON: Very well. I believe with
17 that we stand adjourned and --

18 MR. CYLKOWSKI: Your Honor?

19 CHAIR GIBSON: Yes.

20 MR. CYLKOWSKI: This is David Cylkowski.
21 There were a few questions that I had promised to get
22 you answers to.

23 CHAIR GIBSON: Yes, thank you, Mr.
24 Cylkowski.

25 MR. CYLKOWSKI: Sure, of course. You had

1 asked, and please correct me if I'm wrong, in
2 restating any of these questions, but you had asked
3 whether the 2007 survey at Three Crows was a Class 3
4 survey.

5 CHAIR GIBSON: Yes.

6 MR. CYLKOWSKI: I confirmed with the staff
7 that it was a Class 3 survey.

8 CHAIR GIBSON: Okay.

9 MR. CYLKOWSKI: You asked whether Class 3
10 surveys -- whether there's something about Class 3
11 surveys that always include or do not include
12 subsurface testing.

13 CHAIR GIBSON: Yes.

14 MR. CYLKOWSKI: The staff has let me know
15 that subsurface testing is not normally parts of the
16 Class 3 survey itself. If it is conducted, it's
17 usually done as part of a second phase effort based on
18 something that was identified during the Class 3
19 survey.

20 CHAIR GIBSON: Very well, thank you.

21 MR. CYLKOWSKI: And you had also asked
22 when the decision and why the decision was made to
23 conduct an EA instead of an EIS. Under 10 CFR 51.21,
24 the staff is to conduct an EA unless there is --
25 unless the project under review falls within 51.20(b)

1 which would require an EIS. So in this case, like in
2 most cases, the staff followed its regulations and
3 process and its initial decision was to do an EA.

4 CHAIR GIBSON: Okay. And it never changed
5 that because it never flagged the significant
6 environmental impacts that would be necessary to do an
7 environmental impact statement in its view. is that
8 correct?

9 MR. CYLKOWSKI: Correct, Your Honor,
10 because they found no significant impacts, there was
11 no need to do an EIS.

12 CHAIR GIBSON: I appreciate that. So you
13 sort of start off with the assumption you're not going
14 to do an EIS and then if something comes along, you do
15 one, fair enough? And that just didn't happen here.

16 MR. CYLKOWSKI: Can you repeat that last
17 sentence? I'm sorry.

18 CHAIR GIBSON: Yes, and so because nothing
19 that like that was flagged, you went ahead and
20 proceeded along the EA route?

21 MR. CYLKOWSKI: Exactly, because no
22 significant impacts were found.

23 CHAIR GIBSON: Fair enough. Fair enough.
24 Okay. Is there anything else I asked you to do, Mr.
25 Cylkowski. I'm sorry I had forgotten about this.

1 MR. CYLKOWSKI: That's fine. You had
2 asked why, I believe it was the December 2013
3 documentation of -- the field documentation of
4 potential places of tribal or cultural significance,
5 whether that is referenced in the EA.

6 CHAIR GIBSON: Yes.

7 MR. CYLKOWSKI: There is a reference for
8 that in the EA. It's -- let me grab it -- it's SDNA
9 2013. It appears in the references section. I do not
10 see a reference to it in the text of the EA based on
11 my search.

12 CHAIR GIBSON: Okay.

13 MR. CYLKOWSKI: And the final request was
14 to compile a list of consultation letters to the
15 tribes and the responses received and of course, we'll
16 get those out as soon as we can.

17 CHAIR GIBSON: Very well. While Mr.
18 Cylkowski was talking, someone started to say
19 something.

20 MR. REID: Yes, Your Honor. This is
21 Andrew from the Tribe.

22 CHAIR GIBSON: Yes.

23 MR. REID: You had also asked him to see
24 if he could find out the date in which the decision
25 was made to prepare an EA instead of an EIS.

1 CHAIR GIBSON: Mr. Reid, I believe the
2 answer is this. The assumption is made, rightly or
3 wrongly, this is the way the NRC operates, okay? It
4 assumes that an EA is the only thing that needs to be
5 done, the basically, there will be no significant
6 impacts. As they proceed along, in the event they
7 flag significant environmental impacts that would
8 require an environmental impact statement, they then
9 proceed on those lines. But their assumption, their
10 default assumption and where they start at the very
11 beginning is that only an environmental assessment is
12 necessary.

13 So I don't think it would be fair to say
14 that there was a date when they decided an EA was
15 going to be done. That was their default. That was
16 the way they started from the very beginning.

17 MR. REID: Thank you.

18 CHAIR GIBSON: Is that okay?

19 MR. REID: Yes, well, I think --

20 CHAIR GIBSON: You may not like it, but I
21 think that's the answer.

22 MR. REID: Well, I think it could be
23 looked at in the reverse when they decided not to do
24 an EIS. In other words, when they completed their
25 assessment and started actually preparing the EA and

1 they made that decision.

2 CHAIR GIBSON: Sure. And I think what
3 happens is they just go along as an EA always and only
4 if they find significant environmental impacts do they
5 change that.

6 MR. REID: Right, thank you.

7 CHAIR GIBSON: So it's not like they go --
8 there's not like some date at which they decide not to
9 do an EIS. They always assume they won't need to do
10 it.

11 MR. REID: Thank you.

12 CHAIR GIBSON: Whether you like it or not,
13 that's the way they do it. I don't think there's
14 anything, any day that we need to find though.

15 MR. CYLKOWSKI: This is David Cylkowski.
16 If I could just clarify.

17 CHAIR GIBSON: Yes.

18 MR. CYLKOWSKI: This isn't based just on
19 an assumption that the staff is making for itself.

20 CHAIR GIBSON: Yes.

21 MR. CYLKOWSKI: But before it initiates
22 its environmental investigation. This is the other
23 tier in regulations in 10 CFR 51.21. This is the
24 normal process under the regulations, and given that
25 the EA is the vehicle to determine whether significant

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1 impacts exist, of course, if a significant impact is
2 found, the staff will have to do an EIS and will do an
3 EIS.

4 CHAIR GIBSON: Okay. Right. So it's in
5 the regulations, Mr. Reid.

6 MR. REID: Yes, Your Honor.

7 CHAIR GIBSON: Okay. Fair enough. Okay,
8 I believe hearing nothing else, we are ready to
9 adjourn this proceeding. I remind you all you -- the
10 Intervenors, you need to get an email to Mr. Sciretta
11 within five working days about any new or amended
12 contentions that are arising over any of the things
13 that have come up today. Fair enough?

14 MR. ELLISON: Yes, sir.

15 CHAIR GIBSON: Okay. Good day and we will
16 be talking with you soon.

17 (Whereupon, the above-entitled matter went
18 off the record at 6:15 p.m.)
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