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Title: Rare Element Resources, Inc.

Docket Number: 40-38367-ML

ASLBP Number: 16-945-01-MLA-BD01

Location: teleconference

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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HEARING

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In the Matter of: : Docket No.

RARE ELEMENT : 40-38367-ML

RESOURCES, INC. : ASLBP No.

: 16-945-01-MLA-BD01

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Monday, February 22, 2016

Teleconference

BEFORE:

WILLIAM J. FROEHLICH, Chair

G. PAUL BOLLWERK, Administrative Judge

NICHOLAS G. TRIKOUROS, Administrative Judge

1 APPEARANCES:

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1 ALSO PRESENT:

2 TWANA ELLIS, NRC ASLB

3 KEN KALMAN, NRC NMSS

4 JIM PARK, NRC NMSS

5 JAY PICKARTS, Rare Element Resources

6 JULIE REYNOLDS-ENGEL, NRC ASLBP Law Clerk

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

1:33 p.m.

CHAIRMAN FROEHLICH: Good afternoon to I guess all of you on the East Coast and good morning to those of you on the West Coast.

This is Judge Froehlich in Rockville, and with me are my fellow Board members, Judge Paul Bollwerk and Judge Nicholas Trikouros. With me also here in Rockville is the Board's law clerks, Ms. Julie Reynolds-Engel and Twana Ellis who have instrumental in helping the Board set up today's telephone conference.

This telephone conference was convened pursuant to public notice issued on February 17th to determine the next procedural steps relating to an application filed by Rare Element Resources and a request for hearing filed by the Defenders of the Black Hills.

This case has been docketed as Docket No. 40-38367-ML, ASLBP No. 16-945-01-MLA-BD01.

At this time I'd like to take the formal appearances of the participants to this proceeding.

Is the Applicant Rare Element Resources or its counsel on the line?

MR. SMITH: Yes, this is Tyson Smith,

1 counsel for Rare Element Resources. Also with me on
2 the line is Jay Pickarts, who's the chief operating
3 officer. And I believe that Kelly Cass, the general
4 counsel, was also maybe going to join in and listen to
5 the call.

6 CHAIRMAN FROEHLICH: Okay. Thank you.

7 And for the Petitioner, for the Defenders
8 of the Black Hills?

9 MS. WHITE FACE: Yes, this is Charmaine
10 White Face. I'm the only one on for Defenders.

11 CHAIRMAN FROEHLICH: Thank you, Ms. White
12 Face.

13 And for the NRC staff?

14 MR. CARPENTER: Yes, this is Robert
15 Carpenter with the NRC staff. And I have co-counsel
16 Lorraine Baer and Chris Hair, and also from NMSS we
17 have Ken Kalman, who's a project manager, and Jim
18 Park, who is a project manager.

19 CHAIRMAN FROEHLICH: Thank you. This
20 proceeding begins at the NRC on May 4th, 2015 when
21 Rare Element Resources submitted an application to the
22 NRC for a source materials license under 10 CFR Part
23 40 to possess and process source materials in
24 conjunction with its processing of rare earth elements
25 in Crook and Weston Counties, Wyoming.

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1 The application was noticed in the *Federal*
2 *Register* on November 16th, which provided an
3 opportunity for any person whose interest may be
4 affected by the application to petition to intervene
5 and request a hearing.

6 On January 15th, 2016, the Defenders of
7 the Black Hills filed a petition to intervene and
8 request a hearing. That petition to intervene was
9 opposed by both the NRC staff and Rare Element
10 Resources in responses filed February 9th, 2016.

11 On January 21st Rare Element Resources
12 submitted a request to the NRC staff to temporarily
13 suspend work on the application, including the NRC's
14 technical review. Rare Element Resources stated it
15 had decided to suspend all permitting and licensing
16 efforts and estimated that the suspension will last
17 approximately 12 months. In response to Rare Element
18 Resources' request, the NRC staff suspended its work
19 on the application review.

20 Rare Element Resources also sent a letter
21 to the Commission on January 21st, 2016 requesting it
22 suspend any adjudicatory proceedings related to the
23 project until the NRC staff licensing review process
24 resumes.

25 The Commission referred the request for

1 hearing and the associated filings to the Atomic
2 Safety and Licensing Board Panel on February 1st.
3 This licensing board was established by order of the
4 chief administrative judge on February 19th. And on
5 February 11th, this Board suspended the pending
6 procedural dates; that's namely the Petitioner's
7 response to the filings of the NRC staff and Rare
8 Element Resources opposing the request for hearing,
9 and scheduled this telephone conference.

10 Let me begin, I guess, with counsel for
11 Rare Element Resources. Mr. Tyson, does your client
12 still want the adjudicatory proceeding before the
13 Board be suspended until such time as Rare Element
14 Resources requests the NRC staff to continue the
15 processing of the May 4th application?

16 MR. SMITH: Judge Froehlich, this is Tyson
17 Smith for Rare Element Resources. That request to
18 suspend was filed in advance of the NRC staff and Rare
19 Element providing their answers to the request for
20 hearing. And since the parties have filed their
21 initial responses, we believe at this point it would
22 be prudent to resolve the proposed request for hearing
23 and proposed contention and then hold the proceeding
24 in abeyance if necessary at that time since we've
25 already gone fairly far down the path toward

1 addressing the request for hearing.

2 CHAIRMAN FROEHLICH: Okay. And let me ask
3 of the NRC staff, what is the staff's position on the
4 suspension of these adjudicatory proceedings before
5 the Board?

6 MR. CARPENTER: This is Robert Carpenter
7 for the NRC staff. Your Honor, we don't have a problem
8 with going ahead with the proceeding at this time.

9 CHAIRMAN FROEHLICH: Okay. And I guess in
10 fairness I should ask, Ms. White Face, are you
11 prepared to go forward with this proceeding before the
12 Board at this time, or do you have a view on the
13 matter of the timing of these proceedings?

14 MS. WHITE FACE: When we received the
15 notice that they wanted to suspend their application
16 and the adjudicatory proceedings, then we thought
17 everything was moot after that. So we thought today's
18 hearing was only on the procedures to continue in the
19 future, so we thought the whole application was moot
20 right now. And we would hope that the NRC would
21 require Rare Element Resources to begin again anew at
22 some unspecified date and not be captive by a 12-month
23 suspension. To us even this conference call seems to
24 be a waste of resources for everyone, because when
25 they requested the suspension of their application and

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1 their adjudicatory proceedings, then we thought
2 everything was done then.

3 CHAIRMAN FROEHLICH: Okay. So your
4 preference would be that we suspend it as of this
5 point in time at such time as they request the staff
6 to begin again their review that the balance of the
7 particular schedule kick in and that you'd be filing
8 your response at that point in time?

9 MS. WHITE FACE: Right. Right.

10 CHAIRMAN FROEHLICH: All right. Ms. White
11 Face, let me ask you and just make sure --

12 (Phone line beeps.)

13 CHAIRMAN FROEHLICH: -- that we all have
14 a good understanding of what exactly is at stake --
15 oh.

16 PARTICIPANT: Did someone just come on the
17 line?

18 CHAIRMAN FROEHLICH: Yes, did someone just
19 come on the line, may I ask?

20 MR. SMITH: This is Tyson Smith for Rare
21 Element Resources. No, I apologize. I had not joined
22 in Mr. Pickarts yet, and so I just realized my error
23 and joined him in. It's entirely on my line. There
24 were no changes to the NRC line.

25 CHAIRMAN FROEHLICH: Okay. Thank you so

1 much, Mr. Tyson.

2 Ms. White Face, this proceeding before the
3 Board deals with a request to possess and process
4 source material. The actual proposals to mine rare
5 earth elements in Wyoming is the subject of proceeding
6 before the United States Forest Service. Indeed, the
7 proceeding before the Forest Service is the one where
8 the environmental impacts of the project will be
9 studied.

10 Have you participated or do you plan to
11 participate in the proceeding before the Forest
12 Service?

13 MS. WHITE FACE: Yes, we do. We do plan
14 on participating before the Forest Service, but we
15 also wanted to participate in this because this place
16 where they want to mine is a sacred site.

17 CHAIRMAN FROEHLICH: I see. Let me ask at
18 this point the NRC staff what role is it that the NRC
19 staff plays in the environmental assessment of the
20 Rare Element Resources project? Tell me, please, what
21 interaction there is between the NRC staff and its
22 environmental review and the work of the EPA or the
23 Forest Service concerning this project.

24 MR. CARPENTER: This is Robert Carpenter
25 for the NRC staff. Your Honor, my understanding is

1 that there are two separate sites that we're dealing
2 with with this project. One of them is the Bull Hill
3 site north of Sundance, Wyoming in Crook County and
4 the other site is the Upton site, which is some 40
5 miles south of that site in Weston County. The Bull
6 Hill site is located on U.S. Forest Service lands, so
7 the Forest Service is conducting the EIS for that
8 site.

9 The application that RER submitted to the
10 NRC deals predominantly with the Upton site and the
11 staff will be conducting an environmental -- or the
12 staff intended to conduct an environmental assessment
13 that would cover NRC's work on both sites, but the
14 only part of the Bull Hill site, again which is on
15 U.S. Forest Service lands, that requires NRC license
16 is the PUG plant, which is the processing plant for
17 the ore after it's mined, which is located adjacent to
18 Bull Hill.

19 CHAIRMAN FROEHLICH: Okay. And, Ms. White
20 Face, your concern and your petition to intervene
21 concerned primarily the land in the area of the Bull
22 Hill land area?

23 MS. WHITE FACE: Yes.

24 CHAIRMAN FROEHLICH: Okay.

25 MS. WHITE FACE: Yes, the Bull Hill site.

1 But there could be no -- nothing going to the Upton
2 site or anything because they're going to be pulling
3 it out of the Bull Hill site. That's why we have
4 participated -- we're participating in everything,
5 because the Bull Hill site should not be disturbed.

6 JUDGE BOLLWERK: Can I ask two questions?

7 JUDGE FROEHLICH: Please. Judge Bollwerk?

8 JUDGE BOLLWERK: I have two questions for
9 the staff. This is Judge Bollwerk. The first one is
10 you mentioned for the Upton site an environmental
11 assessment. The Forest Service is doing a Draft
12 Environmental Impact Statement for the mining site.
13 Are you all going to do an EA, or are you thinking
14 about doing an EIS

15 MR. CARPENTER: This is Robert Carpenter
16 for the staff. Your Honor, the EA that the staff
17 intends to conduct would cover the Upton site as well
18 as the radiological portion of the work that's to be
19 done at the Bull Hill site. And then I assume the
20 decision on whether to do a full-blown EIS would come
21 after the EA.

22 JUDGE BOLLWERK: Okay. And so in terms of
23 the mining site, the PUG, as it's called, you all have
24 already requested that the Forest Service become I
25 guess the main player for the National Historic

1 Preservation Act Section 106 process, right?

2 MR. CARPENTER: That's correct. This is
3 Robert Carpenter. That's correct.

4 JUDGE BOLLWERK: So any cultural resources
5 information relative to the mining site, at least in
6 terms of the PUG, you would be looking to the Forest
7 Service for that?

8 MR. CARPENTER: This is Robert Carpenter,
9 Your Honor. That is correct.

10 JUDGE BOLLWERK: And how does that
11 interrelate then with what you do with the EA for the
12 Upton site, or the Environmental Impact Statement, if
13 you did one?

14 MR. CARPENTER: Well, I imagine that the
15 EA would cover -- again, it would cover our Part 20
16 and Part 40 safety requirements, but it would not
17 address the NEPA or NHPA aspects.

18 JUDGE BOLLWERK: For the mining site or
19 the Upton site, or both?

20 MR. CARPENTER: For the Bull Hill site.

21 JUDGE BOLLWERK: Okay.

22 MR. CARPENTER: The mining site.

23 JUDGE BOLLWERK: Okay. Thank you.

24 CHAIRMAN FROEHLICH: Okay. Just so that
25 we address I guess all of the motions and issues that

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1 are outstanding at this point, at this point in time,
2 Ms. White Face, are you comfortable using the EIE, the
3 electronic information exchange? I notice that we
4 have in this docket a request for an exemption. Has
5 that exemption request become moot?

6 MS. WHITE FACE: Yes, it's moot.

7 CHAIRMAN FROEHLICH: Okay.

8 MS. WHITE FACE: We have a certificate,
9 yes.

10 CHAIRMAN FROEHLICH: Okay. Great.

11 MS. WHITE FACE: And thank you to the NRC
12 staff who helped us.

13 JUDGE BOLLWERK: This is Judge Bollwerk.
14 Thank you for working with us, because that's
15 something that's important to us in terms of trying to
16 get that established. So we appreciate your efforts.

17 MS. WHITE FACE: Thank you.

18 JUDGE TRIKOUROS: Yes, this is Judge
19 Trikouros. Can the PUG facility be constructed at all
20 without NRC approval?

21 MR. CARPENTER: This is Robert Carpenter
22 for the NRC staff. No, Your Honor, the PUG plant --
23 well, processing the raw ore in the PUG plant raises
24 the source material content above the statutory
25 requirements, so --

1 JUDGE TRIKOUROS: I'm not talking about
2 operating the PUG plant. I'm talking about
3 constructing the PUG plant.

4 MR. CARPENTER: Your Honor, this is Robert
5 Carpenter. They could construct it without the NRC,
6 but they couldn't operate it.

7 JUDGE TRIKOUROS: All right.
8 So is it actually on the mining site? I thought I
9 read something that suggested it might be moved away
10 from the mining site some way, some direction. Is
11 that still the case or not?

12 MR. SMITH: This is Tyson Smith for Rare
13 Element Resources. I guess I'm not sure, Judge
14 Bollwerk, that I have information at that level of
15 detail. As I understand it, the physical upgrade
16 plant or the PUG plant would be built or would be
17 constructed adjacent to the Bull Hill mine. My
18 understanding is that's still the current proposal
19 pending before the Forest Service. And I can't really
20 comment on whether there's some other considerations
21 of moving it at present.

22 JUDGE TRIKOUROS: All right.

23 CHAIRMAN FROEHLICH: This is Judge
24 Froehlich. I guess at this point the Board would be
25 interested in hearing from any of the participants on

1 the benefits or detriments to proceeding with the
2 petition to intervene at this point versus suspending
3 it and just picking this up exactly from where we left
4 off a year from now. I wonder if I could hear from
5 each of the parties, not only your views, but the
6 reasons supporting those views on why we should either
7 go forward and decide the intervention at this point
8 or hold it in abeyance or suspension until the project
9 is resumed?

10 I guess we should start with Mr. Tyson.

11 MR. SMITH: Yes, this is Tyson Smith for
12 Rare Element Resources. As I mentioned at the outset,
13 Rare Element had initially requested suspension of the
14 adjudicatory proceeding prior to the NRC staff or Rare
15 Element filing its responses. At that time we thought
16 it would have been savings of everyone's resources to
17 just hold the entire proceeding in abeyance and
18 restart it at the appropriate time. But since there
19 was no movement prior to the deadline for filing
20 responses to the petition, both the NRC staff and Rare
21 Element invested resources in preparing those
22 responses. And now the only thing remaining is for
23 the reply from Ms. White Face followed by a decision
24 from the Judges.

25 Given that we've -- much of the sort of

1 resources that would be invested in responding to the
2 initial request for hearing, at least from the
3 parties' perspective, have already taken place. At
4 this point we believe it would be more efficient for
5 the Judges to finish their review of the request for
6 hearing, issue a decision, and then if necessary
7 suspend the proceeding at that time. And at that
8 point we would be able to restart it when Rare Element
9 restarts the licensing process and we would have a
10 defined fixed point in the process.

11 We would have one admitted contention if
12 one was admitted, or there would be no proceeding if
13 no contentions were admitted. It seems that that
14 would be more efficient for all the parties, bring
15 more certainty to all the parties for that point in
16 time in light of the resources that have already been
17 invested. It doesn't appear to make a lot of sense
18 for us to just hold off on filing the reply and the
19 Judge's decision for 12 months and hold that open when
20 I think we could move relative quickly to a decision
21 and have clarity on what the next steps would be when
22 the licensing process is restarted.

23 CHAIRMAN FROEHLICH: Thank you, Mr. Tyson.

24 Could I hear next from the NRC staff?

25 MR. CARPENTER: Your Honor, this is Robert

1 Carpenter. I would note that at this point in time
2 there's no plan to re-notice the application, so
3 really at this point it would be prudent, I think, to
4 go ahead and disposition this petition. And really,
5 that's our only consideration beyond what Mr. Smith
6 already illustrated.

7 CHAIRMAN FROEHLICH: Is thee any clue that
8 this Board should have drawn from the fact that the
9 Commission didn't act on the motion to suspend review
10 and instead referred it to the Board? As I understand
11 the initial request to suspend these proceedings was
12 made to the Commission and for whatever reason the
13 Commission didn't suspend it and referred it to the
14 Board instead. In NRC practice and in your experience
15 is that significant?

16 MR. CARPENTER: Your Honor, this is Robert
17 Carpenter. I really can't draw any conclusion from
18 the Commission's lack of response. I'm not really
19 sure if that signifies anything or not, to be honest
20 with you.

21 CHAIRMAN FROEHLICH: Okay. Thank you.

22 All right. Now to you, Ms. White Face.
23 The advantages of suspending it now rather than having
24 the Board await your responsive pleading and then
25 deciding whether we have a contention or not going

1 forward. What is the detriment to that from your
2 perspective or what are the reasons that you see that
3 we should suspend this until the application is
4 reworked on by the staff?

5 MS. WHITE FACE: I think, as I stated
6 earlier, that I think that it should be totally
7 suspended right now, because a year is quite a long
8 time and many things can happen within that year. I'm
9 an elder. I might not even be here a year from now.
10 So this might be moot whenever they want to restart,
11 if they choose to restart, if they have the ability to
12 restart in 12 months. I think it should be suspended
13 until they do have the ability. Maybe it might be 18
14 months. Maybe it might be six months. We don't know.
15 But to continue it now as it is, again when they ask
16 for a suspension of both the application and the
17 adjudicatory proceedings, then we thought, okay, fine,
18 it's moot.

19 When they want to restart, then it will
20 restart. But to hold everybody to 12 months, no,
21 there's too many things can happen in 12 months. So
22 I think it should be suspended right now and either
23 started clean and fresh whenever they want to, or pick
24 it up whenever they want to restart it again, even if
25 it's two years from now. Pick it up then and we can

1 send in our reply brief then.

2 CHAIRMAN FROEHLICH: Okay. Thank you.

3 JUDGE BOLLWERK: This is Judge Bollwerk.
4 So what I've heard is there's some question about the
5 suspension request and the timing of the replies, and
6 I think that probably has to simply do with the
7 fortuity of how this played out. I mean, the
8 Commission sent it over here. It took a week for the
9 Board to get established. If we'd had the Board
10 established before the reply filings of the responses
11 of the staff and applicant to come in, maybe we would
12 have suspended it. I don't know. We didn't have that
13 in front of us, so there was nothing we could do about
14 it.

15 Having said all that, let me just -- one
16 of the things obviously that I know with talking to
17 Judge Froehlich and Judge Trikouros we always want the
18 parties to consider is the possibility of settlement.
19 I've heard some different views on the suspension.
20 There certainly is precedent out there for some kind
21 of a settlement which would basically in one sense put
22 this in suspension, although not quite that in terms
23 of -- it would actually result in the case being re-
24 noticed.

25 Maybe the staff and applicant counsel are

1 aware of the Callaway COL, a combined license case
2 back in 2009, a situation somewhat similar to this,
3 not exactly the same, where the parties actually went
4 off and had a discussion among themselves and decided
5 to go ahead and, with the agreement of the staff and
6 the applicant, have the proceeding re-noticed, or to
7 try to have the proceeding re-noticed when the
8 suspension that the applicant had asked for in terms
9 of the licensing review by the staff was lifted.

10 Now that case is LBP-09-23, found at 70
11 NRC 659 back in 2009. And again, the staff at that
12 point -- one thing to understand in a case like this,
13 the proceeding is actually noticed by the Commission.
14 So what the staff agreed in the settlement was that
15 they would go to the Commission when the suspension
16 was lifted by the applicant, or the request to suspend
17 was lifted by the applicant and basically asked the
18 Commission to re-notice the proceeding, which would
19 have the impact generally of restarting the
20 adjudicatory process.

21 And there was; and it's a little hard to
22 find, but the Commission in a November 2nd, 2009 Staff
23 Requirements Memo, ADAMS Accession No. ML-093070128 --
24 issued a Staff Requirements Memo to the Executive
25 Director for Operations indicating that the staff

1 should inform the Commission promptly if the applicant
2 or any other entity requests that the staff reactivate
3 its review of the Callaway COL application. So it
4 seemed that the Commission was aware of what the
5 settlement was based on the review of the Board's
6 order, the sua sponte review, and was willing to move
7 forward on that basis.

8 Again, that would be something the parties
9 could discuss in this instance. It would be a form of
10 a settlement. And if the parties felt they needed it,
11 we could certainly go -- if they ask us for it; it
12 would have to be a joint request, we could certainly
13 go to the chief administrative judge and ask him to
14 appoint a settlement judge if that's something the
15 parties would like to talk about further. That maybe
16 something offline you all need to discuss at some
17 point in the near future. But that would be one
18 possibility.

19 I should say to Ms. White Face that having
20 license applications suspended, the review suspended
21 is not unusual in the Agency. I've dealt with several
22 of them, the Callaway case being one of them. As it
23 turns out, actually you're correct, a lot of time can
24 go on before one of these actually is resolved. To
25 that degree, the Callaway case suspended in 2009 and

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1 the application was actually just withdrawn by the
2 applicant last summer.

3 Another case, the Bellefonte case, was
4 suspended in 2011, another combined license case. The
5 applicant actually the beginning of this month just
6 asked to withdraw the application. So it can be five
7 or six years before they get back to these. Those are
8 COL cases, combined license for a nuclear plant, not
9 the same as what we're looking at here, but
10 nonetheless my experience is that once one of these
11 suspensions starts, it can stretch out beyond what the
12 applicant necessarily envisions in the beginning.

13 So I guess what I'm putting and the Board
14 is putting in front of you is the possibility that you
15 may want to think about settling this case and
16 potentially just re-noticing it when that becomes
17 appropriate. I mean, it's still open to either of the
18 other Board members that want to say anything at this
19 point.

20 CHAIRMAN FROEHLICH: This is Judge
21 Froehlich. I think that the law always favors a
22 settlement, an agreement that the participants to a
23 case reach among themselves as opposed to throwing it
24 to a board to decide based on the pleadings and this
25 telephone conference. I would certainly encourage the

1 participants here to explore at least the possibility
2 of resolving this in a manner without the Board's
3 intervention, if that's possible.

4 JUDGE TRIKOUROS: I have no comments.

5 CHAIRMAN FROEHLICH: Do the participants
6 here feel that a small amount of time might be useful
7 to approach a negotiated settlement to this
8 proceeding? Is that something that the participants
9 would consider?

10 MR. SMITH: This is Tyson Smith for Rare
11 Element Resources. At this time I don't think that's
12 something that we would be interested in pursuing. I
13 don't see a need to re-notice an application that has
14 already been available for members of the public to
15 request a hearing on on their issues associated with
16 that application. The parties, at least the NRC staff
17 and Rare Element, have filed their responses to the
18 initial request for a hearing and it seems that -- and
19 then this is of course obviously up to the Judges'
20 decision, but we judge it unlikely that the hearing
21 request will be granted and think there's no reason to
22 re-notice the hearing and give interveners a second
23 bite at the apple for the entire application a year
24 down the road.

25 JUDGE BOLLWERK: The only thing I'll say;

1 this is Judge Bollwerk, about the Callaway case, is
2 that in fact everything has been briefed in that case
3 and the parties still settled the case. So that
4 doesn't preclude it, but nonetheless it's up to --
5 obviously the parties have to decide that for
6 themselves in terms of whether they're willing to
7 talk.

8 MR. SMITH: And this is Tyson Smith. And
9 I agree with that, Judge Bollwerk, and I think part of
10 the calculus for the parties in deciding whether
11 settlement made sense is the likelihood of balancing
12 the likelihood of an issue being admitted or the
13 additional cost associated with discovery, or whatever
14 that might be in those cases. And I guess Rare
15 Element's view is that we judge those to be unlikely
16 in this case and think that the best course of action
17 that's most likely to lead to the near-term resolution
18 of this case once and for all is for Defenders to file
19 the reply brief and move forward to a decision in this
20 case.

21 CHAIRMAN FROEHLICH: Judge Trikouros?

22 JUDGE TRIKOUROS: Can we put it on mute
23 for a second?

24 CHAIRMAN FROEHLICH: Before we do that,
25 Judge Trikouros, would the NRC staff or Ms. White Face

1 care to be heard on their interest in settling this?

2 MS. WHITE FACE: This is Charmaine White
3 Face. Before I could make that decision I would have
4 to go to my board and ask them if they would consider
5 wanting to settle. I highly doubt that they would,
6 but --

7 CHAIRMAN FROEHLICH: Okay.

8 MS. WHITE FACE: -- because our assumption
9 was already that it was already finished.

10 CHAIRMAN FROEHLICH: Ms. White Face,
11 again, I'm not trying to make a legal ruling here, but
12 you need to understand that this is not unusual in
13 these situations. So things get suspended on a
14 regular basis around here. It's a procedural matter,
15 an administrative matter. That's not uncommon. Now,
16 in terms of the adjudicatory process it may be
17 something different.

18 MS. WHITE FACE: Yes, I understand.

19 CHAIRMAN FROEHLICH: Okay. Thank you.

20 Well, unless there's anything else that
21 the parties wish to raise with the Board at this point
22 in time --

23 JUDGE BOLLWERK: Did we hear from the
24 staff on settlement? I don't think we have.

25 CHAIRMAN FROEHLICH: I'm sorry. I didn't

1 mean to --

2 JUDGE BOLLWERK: Sure.

3 CHAIRMAN FROEHLICH: -- cut off staff.

4 Mr. Carpenter?

5 MR. CARPENTER: This is Robert Carpenter.
6 Your Honor, can we have just one minute to confer
7 here?

8 CHAIRMAN FROEHLICH: Sure.

9 MR. CARPENTER: Thank you very much.

10 (Pause.)

11 MR. CARPENTER: Your Honor, this is Robert
12 Carpenter for the staff. The staff is open to
13 settlement talks, however, our interest mainly at this
14 time is just to stay in our usual process.

15 CHAIRMAN FROEHLICH: Okay. Thank you, Mr.
16 Carpenter.

17 JUDGE TRIKOUROS: This is Judge Trikouros.
18 What's the current status of the Department of Fish
19 and Wildlife proceeding?

20 MR. SMITH: The Forest Service?

21 JUDGE BOLLWERK: I'm sorry, the Forest
22 Service proceeding.

23 MR. CARPENTER: Your Honor, this is Robert
24 Carpenter. At this point in time my understanding is
25 that the Forest Service has also suspended their

1 actions at this time.

2 JUDGE TRIKOUROS: So I'd like to
3 understand the same question that I asked earlier
4 regarding the PUG facility. How would that apply to
5 the Upton facility? In other words, could the Upton
6 facility be constructed while we're in suspension?

7 JUDGE BOLLWERK: This is Judge Bollwerk.
8 I think what Judge Trikouros is asking about is under
9 40.4, which is the definition that talks about
10 construction -- and then there's also pre-construction
11 activities that can be undertaken. And generally it's
12 my understanding construction activities don't start,
13 but pre-construction can. But maybe with respect to
14 these facilities -- and I'm not understanding what's
15 going on, so I'll listen to what the staff has to say.

16 MR. SMITH: This is Tyson Smith from Rare
17 Element. Perhaps I can sort of resolve that as a
18 practical matter. Rare Element is not going to build
19 the Upton plant unless the Bull Hill mine is open and
20 operating. So there will be no construction at the
21 Upton site until there is some certainty that the
22 necessary permits and approvals will be issued for the
23 mine itself. So for that reason I find it highly
24 unlikely that there would be any construction at the
25 Upton site while both the Forest Service and the NRC

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1 proceedings are in suspension.

2 JUDGE BOLLWERK: Does that include pre-
3 construction activities? Land preparation, for
4 example.

5 MR. SMITH: I mean, the short answer is
6 yes, Rare Element is winding down its operations
7 because of a lack of funds right now. And so that
8 would include pre-construction at that site, at either
9 of the sites that are under consideration.

10 JUDGE BOLLWERK: So just so I understand;
11 this is Judge Bollwerk, what you said, you mentioned
12 the Upton facility, but I take it you wouldn't really
13 construct the PUG facility until you received these
14 approvals, right?

15 MR. SMITH: Correct. Correct. I mean, no
16 construction can start on the Forest Service property
17 until we receive authorization from the Forest
18 Service. And as Mr. Carpenter noted, that process is
19 presently in suspension as well.

20 JUDGE BOLLWERK: I guess I have one last
21 question I guess having to do with the suspensions.
22 I know that if this proceeding were decided, the staff
23 has no plans to re-notice the application. Is there
24 some sort of a notice procedure that goes into effect
25 when the Forest Service resumes its review or when the

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1 staff resumes its review? And I don't mean
2 necessarily a *Federal Register* notice, but is there
3 notice to the public when these projects restart or
4 when the suspension is lifted? From the staff or Rare
5 Element.

6 MR. CARPENTER: Your Honor, this is Robert
7 Carpenter for the staff. We would not re-notice once
8 we've resumed review unless RER submitted an amendment
9 request for the application. I can't speak to the
10 Forest Service.

11 JUDGE BOLLWERK: So RER sent you a letter,
12 said we want to suspend our application review. They
13 send you another letter in a year, or however long it
14 takes, saying we're not ready to start again. So what
15 the staff would do is send RER a letter saying, okay,
16 we're going to start X time, or we're going to resume?

17 MR. CARPENTER: This is Robert Carpenter.
18 That's correct, Your Honor.

19 JUDGE BOLLWERK: And then that wouldn't
20 necessarily go in the *Federal Register*, but it would
21 be a publicly available document?

22 MR. CARPENTER: It would not go in the
23 *Federal Register*, but it would be publicly available,
24 correct.

25 JUDGE BOLLWERK: All right. Thank you.

1 CHAIRMAN FROEHLICH: Okay. All right. I
2 think the Board has asked all of the questions it has
3 of the participants at this point in time. Is there
4 anything that any of the participants wish to state
5 for the record at this point before the Board will
6 terminate today's conference call and get together to
7 discuss this matter and come out with our decision on
8 whether we suspend or not?

9 First of all, is there anything from
10 either of my colleagues on the Board? Any questions
11 you need answered?

12 JUDGE TRIKOUROS: No.

13 JUDGE BOLLWERK: No.

14 CHAIRMAN FROEHLICH: Okay. Anything final
15 that the participants wish to state at this point
16 before we conclude today's conference?

17 MR. SMITH: This is Tyson Smith for Rare
18 Element Resources. First I'd like to apologize a
19 little bit for the confusion caused by the request for
20 suspension and the fact that -- and I understand the
21 time of you all's participation in that. And so I
22 apologize for any confusion caused by that not being
23 addressed prior to the submittals being filed. And I
24 appreciate your consideration of the position that
25 we've put forward today. And beyond that, we have no

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1 other questions or comments to make at this time.
2 Thank you.

3 CHAIRMAN FROEHLICH: Thank you, Mr. Tyson.
4 Staff or Ms. White Face?

5 MS. WHITE FACE: This is Charmaine White
6 Face. I just hope that -- well, from our perspective
7 we do this so we could protect that sacred little
8 hill, that sacred place. There are many, many places
9 that are destroyed we don't talk about, we don't even
10 participate in because of the exploitation of sacred
11 sites, just like Bear Lodge, which you guys know also
12 as Devil's Tower. That is another sacred place. So
13 I'm glad that we were able to participate in this and
14 we will keep watching and hope that we get notified if
15 Rare Earth does decide to plan on going ahead with
16 their application. Thank you.

17 JUDGE BOLLWERK: Ms. White Face, this is
18 Judge Bollwerk. Just so you're not confused in any
19 way, procedurally what could happen now, depending on
20 what the Board decides, is that if we were move or to
21 act on what Mr. Smith has told us and the staff and
22 decide not to have the case continue in suspension,
23 the next step may well be a request or an order that
24 says that the Intervener -- the Petitioner, excuse me,
25 has X number of days to file the reply. And I guess

1 I just want to make sure. Do you know what that would
2 require from you then in terms of what you need to do?

3 MS. WHITE FACE: Yes. Yes, I do.

4 JUDGE BOLLWERK: And so you understand you
5 would need to address the points that were made in
6 both the staff and the Applicant pleadings about both
7 your standing as well as the admissibility of the
8 contention that you filed?

9 MS. WHITE FACE: Right, I understand.

10 JUDGE BOLLWERK: Very good.

11 CHAIRMAN FROEHLICH: Okay.

12 MS. WHITE FACE: Thank you.

13 CHAIRMAN FROEHLICH: Thank you, Ms. White
14 Face. Any final comments from the NRC staff?

15 MR. CARPENTER: This is Robert Carpenter.
16 Nothing else from the staff, Your Honor.

17 CHAIRMAN FROEHLICH: Okay. Then I'd like
18 to thank all the participants for their comments, for
19 their arguments at this telephone conference. The
20 Board will meet quickly and issue an order addressing
21 the issues in this conference and setting forth the
22 steps thereafter. Again, I thank you all and we'll
23 stand adjourned.

24 (Whereupon, the above-entitled matter went
25 off the record at 2:13 p.m.)