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Docket Number: 72-1051-ISFSI

ASLBP Number: 18-958-01-ISFSI-BD01

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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
HOLTEC INTERNATIONAL : 72-1051-ISFSI
: ASLBP No.
(HI-STORE Consolidated : 18-958-01-ISFSI-BD01
Interim Storage Facility):

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Wednesday, August 5, 2020

Teleconference

BEFORE:

PAUL S. RYERSON, Chairman

NICHOLAS G. TRIKOUROS, Administrative Judge

DR. GARY S. ARNOLD, Administrative Judge

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P R O C E E D I N G S

12:58 p.m.

1
2
3 JUDGE RYERSON: So good afternoon. We're
4 here in the matter of Holtec International's
5 application to construct and operate a consolidated
6 interim storage facility for nuclear waste in Lea
7 County, New Mexico.

8 I'm Judge Ryerson. I'm trained as a
9 lawyer, and I chair the particular Atomic Safety
10 Licensing Board that the NRC has assigned to this
11 proceeding. And also on the line and a member of the
12 Board is Judge Trikouros, who is a nuclear engineer.
13 And the third Board member is Judge Arnold. Dr.
14 Arnold is also a nuclear engineer.

15 Before we take formal appearances, I'd
16 like to go over a few ground rules and administrative
17 matters. Most importantly, we would be grateful if
18 everyone would remember to identify yourself before
19 speaking. It will make it easier for all of us, and
20 it will make it much easier for the reporter.

21 This proceeding is being transcribed, and
22 a transcript will be available in a few working days
23 on the NRC website after this proceeding closes today.
24 We've also made available listen-only telephone lines
25 so that interested members of the public and the press

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1 can follow the proceedings in real time if they wish.

2 For anyone who is listening, primarily by
3 way of background, this is an adjudicatory proceeding
4 that was closed on May 7, 2019. Two joint petitioners
5 in the original proceeding, Fasken Land and Minerals
6 Limited and the Permian Basin Land and Royalty Owners,
7 which collectively we're just going to call Fasken, I
8 think, recently moved to reopen the record and for me
9 to file an amended contention that challenges the NRC
10 staff's recent draft environmental impact statement,
11 or DEIS.

12 Both Holtec and the NRC staff have opposed
13 Fasken's motions, and the purpose of today's call is
14 to help the Board to decide Fasken's motions. We have
15 a scheduling order out that indicates how we will
16 proceed, which will be first with opening statement by
17 Fasken, up to 20 minutes. And I should mention to all
18 counsel, perhaps in vain, but you don't really need to
19 use all of your time. We have read your briefs.

20 Second, Holtec will proceed with up to 15
21 minutes, and third, the NRC staff will have up to 10
22 minutes. I think that probably will consume almost an
23 hour, so we'll take a short, very short, break at that
24 point and then begin with the Board's questions. When
25 we get to the questions, we will proceed in a more

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1 structured way than we might otherwise normally do.
2 I will begin with questions. Then Judge Trikouros
3 will ask any questions he has. Judge Arnold will ask
4 any questions he has. And we will go through that
5 order, if need be, more than once to ensure everybody
6 has a chance to ask questions that may come up as the
7 proceeding carries on.

8 In general, when a Judge has a question,
9 he will say which participant or participants he wants
10 to answer the question. But we're going to be
11 relatively informal. If you feel it's important to
12 respond to a question that you are not asked, just say
13 so at an appropriate point, and we will probably
14 recognize you.

15 If the questions go on for more than an
16 hour, and I expect they will not, we will take another
17 short break.

18 Judge Trikouros, anything to add before we
19 take appearances?

20 JUDGE TRIKOUROS: No. I think you've
21 covered it.

22 JUDGE RYERSON: Thank you.

23 Judge -- Judge Arnold, anything to add?

24 JUDGE ARNOLD: Nothing to add, no.

25 JUDGE RYERSON: Okay. Thank you. All

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1 right -

2 MR. TAYLOR: This is -- this is Tommy
3 Taylor. I need to add that we have two more people in
4 the meeting for Fasken. It's Ron Bianco, our --

5 JUDGE RYERSON: Yeah. We'll go -- we'll
6 go through with appearances, actually, right now.
7 What I'd like to do is take the appearances from all
8 parties before we begin the opening statements, and
9 then we'll -- then we'll go to the opening statements.

10 So, first, who -- who will be taking the
11 lead for -- for Fasken?

12 MR. KANNER: This is Allan Kanner. I'll
13 be taking the lead on the argument. We'll work as a
14 team to make sure we can provide full and complete
15 answers to the Panel.

16 JUDGE RYERSON: Okay. And is -- is
17 everyone who's on a speaking line having interferences
18 in this proceeding?

19 MR. KANNER: I think Tommy wanted to
20 introduce a couple of new people who have come in.

21 (Simultaneous speaking.)

22 MR. KANNER: But here in -- in my office,
23 we have Conlee Whiteley and Annemieke Tennis.

24 JUDGE RYERSON: Hello?

25 MR. KANNER: Yes?

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1 JUDGE RYERSON: Hello?

2 MR. KANNER: Can you hear me?

3 JUDGE RYERSON: Now I can. Yes.

4 MR. KANNER: Oh. Okay. So we have Allan
5 Kanner, Conlee Whiteley, and Annemieke Tennis here in
6 New Orleans. And I think Tommy would like to
7 introduce some people who are with him.

8 MR. TAYLOR: Yes. It'd be myself, Monica
9 Perales, Ron Bianco, and Stonnie Pollock.

10 JUDGE RYERSON: Okay. Thank you. Welcome
11 to all of you.

12 And for Holtec, Mr. Silberg, will you be
13 leading the team?

14 MR. SILBERG: Yes, I will. I have with me
15 in Washington Tim Walsh and Anne Leidich. And at
16 Holtec's offices, William Gill, the Vice President and
17 Corporate Counsel; Katherine Perkins, Corporate
18 Counsel and Head of Contracts; Joy Russell, who's the
19 Senior Vice President and Chief Strategy Officer; Ed
20 Mayer, the Program Director for HI-STORE; and Kim
21 Manzione, the licensing manager. And also listening
22 in is John Heaton, a member of the Board and former
23 Chair of the Eddy-Lea Energy Alliance.

24 JUDGE RYERSON: Okay. Thank you. Welcome
25 to all of you.

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1 And, finally, we have the NRC staff. Is
2 that Ms. Susko?

3 MS. SUSKO: Yes. Good afternoon. This is
4 Rebecca Susko on behalf of the NRC staff. Also on a
5 separate speaking line is my co-counsel, Joe
6 Gillespie. And we have several members of the
7 technical review team on listen-only lines.

8 JUDGE RYERSON: Hello? At least on my
9 line, you cut out.

10 MS. SUSKO: Hello? Can you hear me?

11 JUDGE RYERSON: Yes, I can.

12 MS. SUSKO: Okay. This is Rebecca Susko
13 on behalf of the NRC staff, and also on a speaking
14 line is my co-counsel, Joe Gillespie. And we have
15 several members of the technical review team on
16 listen-only lines.

17 JUDGE RYERSON: Okay. Thank you and
18 welcome, again, to all of you.

19 Well, let's begin, then, with Fasken, I
20 take it Mr. Kanner. You have up to 20 minutes.

21 MR. KANNER: May I reserve five?

22 JUDGE RYERSON: Yes, you may.

23 MR. KANNER: Thank you. And thank you for
24 hearing us.

25 Fasken believes we've presented admissible

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1 contentions relating to grave and vital deficiencies
2 in the characterization of regional drilling and
3 mineral extraction activities, seismicity, and the
4 potential for subsidence, sinkholes, and karst
5 development that collectively and cumulatively impact
6 the geology and soils as well as the ongoing land-use
7 impacts now and for 40 and possibly 120 years in the
8 future.

9 Petitioner's contention meets the good-
10 cause standards as well as reopening standards as they
11 relate to serious and important safety and
12 environmental issues that the NRC must consider in its
13 findings and review of Holtec's application pursuant
14 to both NRC regulations and NEPA regulations, which we
15 discussed in our briefs.

16 I think it's important to start with just
17 the magnitude of this project, which I think
18 distinguishes it from almost any other project you've
19 had to look at in the past. What is being proposed
20 here is that the nation's high-level nuclear waste and
21 spent fuel be shipped from around the country to this
22 piece -- to -- to New Mexico, where it will
23 cumulatively be used to store amounts of nuclear waste
24 greater in excess of even what was previously proposed
25 for the permanent repository at Yucca Mountain. And

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1 then there's going to be a second transporting if --
2 if there ever is a permanent repository.

3 So what's important to note is that we are
4 sitting -- how stable is this area? You have to look
5 at issues like both the size of the project but also
6 the geology. You've got to look at subsidence and
7 sinkholes. We've shown that the -- that Holtec in its
8 ER relied on some older studies with respect to
9 subsidence and sinkholes.

10 New information was provided in the DEIS,
11 both using satellite imagery, which was not a part of
12 the Holtec ER, as well as more recent references, such
13 as Zhang in 2018, about subsidence.

14 I would note that both the State of New
15 Mexico has filed comments to the DEIS -- they did that
16 in December. We didn't learn until the publication of
17 the draft EIS that they basically ignored a lot of the
18 concerns raised by the State with respect to the
19 integrity, the site characterization that occurred,
20 and what that means for the integrity and stability of
21 -- of this process.

22 We also raised in an affidavit from
23 Stonnie Pollock a discussion of abandoned wells. Two
24 things are important. We gave a big -- we did a lot
25 of research and put a lot of wells down on the table,

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1 explained where they had been over time. One reason
2 you care about wells, not the only reason, they're a
3 vehicle for transport.

4 Another reason you care about wells is
5 because sinkholes develop in those areas. And that's
6 fairly significant. It also goes to future activities
7 that I'll talk about a little bit later with respect
8 to possible fracking at very shallow levels.

9 But the point is -- so we've also
10 introduced some new evidence about the instability of
11 the site. We also talked about how it's very hard to
12 identify all the abandoned wells just using public
13 record and gave, I thought, a very useful example of
14 that, to give a site in an important location, 50 feet
15 down where we store the nation's hazardous waste,
16 high-level radioactive waste, and there hasn't been a
17 full examination. State of New Mexico gave extensive
18 comments. And just on July 28th, 2020, the Governor
19 of -- wrote to the President of the United States
20 again going through the issues of the -- why this site
21 is geologically unsuitable and why cumulative impacts
22 weren't taken into account.

23 These are -- these are, I think,
24 fundamental issues to be considered. And so there --
25 there's the issue of -- we've updated the information

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1 on subsidence and sinkholes, and we've talked about
2 how abandoned wells can actually turn into sinkholes,
3 which raises the question why they haven't fully
4 characterized that.

5 Second, we've -- there's a lot more
6 information on seismicity. Holtec in the DEIS -- the
7 Holtec DEIS -- I'm sorry -- refers to three
8 earthquakes with magnitude 5.0 or above. The ER talks
9 about two earthquakes. The reality is that four
10 earthquakes with magnitude 5.0 or greater have
11 occurred within 200 miles of the proposed site,
12 including March 2020 earthquake roughly 50 miles away.

13 Significant additionally in the last two
14 months, there have been approximately 20 earthquakes
15 of magnitude 2.5 or greater that have occurred within
16 25 miles of the site. That also is very significant
17 and a disturbing trend because the earthquakes are on
18 a different -- in some cases, different locations on
19 the east versus the west side of the property.

20 That also is new information that's
21 materially significant to -- 40 or 120 years is pretty
22 long-term storage at that location. We also have an
23 issue with the potash mining. We did get information
24 that -- in the DEIS -- that there was a potential
25 subsidence from past and active mining activities, but

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1 that the mining was going to be closed as a practical
2 matter.

3 Interestingly, it ignored the fact that in
4 the ER, they talked about potash and having control of
5 potash and all oil and gas activities in the future.
6 The DEIS does not deal with oil and gas activities,
7 and the omission of that information itself is
8 significant. As was pointed out in the Pollock
9 affidavit, there have been oil and gas at a higher
10 formation. The technology of fracking has evolved
11 dramatically since the '80s, '90s, and currently.

12 There is no control of the mineral rights
13 in this area, and our understanding is that people can
14 still go in and drill. And the land commissioner
15 whose letter, I guess, started this whole thing with
16 us filing our first contention, which is now the
17 amended contention, talked about the fact that she had
18 no information to stop oil and gas activities, which
19 is a powerful economic engine, as well as agriculture,
20 in this part of the state.

21 So that's another area, the potash mining
22 and its past consequences. The oil and gas future
23 operations are totally -- the fact that the staff
24 feels comfortable not having fully buttoned that down
25 is itself troubling. By the way, we have referenced

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1 in our brief the RAIs, you know, the additional
2 requests for additional information that have been
3 unanswered. And we think that they corroborate our
4 concerns.

5 We were told by staff in their brief, oh,
6 that's just safety, has nothing to do with
7 environmental, which -- we believe it's environmental
8 and safety. But to the extent that the staff is now
9 saying, we have concluded that we are not going to
10 consider any of that new information for environmental
11 purposes, is itself a conclusion that warrants
12 additional proceedings.

13 On the mineral resources below the site,
14 there really is very little good information. The
15 Holtec ER at -- talks about -- they say the -- the
16 resources would be unavailable for exploitation during
17 the life of the project. We are told now that there
18 is going to be some limitations within the 330 acres
19 only and no -- as I said before, no -- no discussion
20 of oil and gas exploration, no -- no meaningful
21 discussion of oil and gas.

22 You know, deciding evaluation factors and
23 site characterization and cumulative impact are issues
24 of great concern at both the NRC level and at the NEPA
25 level because of the severe environmental consequences

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1 that can happen if this -- if there was a -- something
2 bad happened at the site, an earthquake or whatever.

3 In addition, I would say -- let's see.
4 Oh, you had asked us four questions, but I think I've
5 used most of my time. Or do I --

6 JUDGE RYERSON: You have -- let me see.
7 You have -- you have a couple minutes still, plus the
8 five.

9 MR. KANNER: Okay. Let me address -- at
10 least start the process of addressing your four
11 questions. As we said, we rely on -- when you say
12 there are five briefs, Calvert Cliffs is really the
13 most important thing to look at -- case to look at.
14 There are two ways in which you can amend contentions
15 under 10 CFR 2.309(f)(2). If you fail in those
16 regards, you may still -- you may still go forward at
17 2.309(c). And we believe we qualify under -- under
18 all of those.

19 But I -- I wanted to say the one -- one
20 big takeaway from Calvert Cliffs and from these
21 different standards for bringing in late contentions
22 is a commitment by the NRC to public participation.
23 And what's deeply troubling to me in this case is that
24 this monumentally significant decision is -- not a
25 single contention has been accepted.

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1 I don't know if that's ever happened
2 before. I've been told that it has never happened
3 before at NRC proceedings. Not a single public
4 contention has come forward. Given our substantial
5 stake in this area, we obviously want to participate,
6 believe we ought to participate.

7 We believe that, as Calvert Cliffs tells
8 us, all we have to show is that the data or
9 conclusions, which are disjunctive, differ
10 significantly from those in the Applicant's licensing
11 documents. I think we've demonstrated that on
12 numerous points and believe that, that warrants our
13 ability to go forward under 2.309(s)(2). There is a
14 good cause -- there's also a showing of good cause,
15 and then there's the 2.309(c) standard.

16 We believe we've been timely with these,
17 primarily because, one, the DEIS came out in March and
18 we timely raised our -- our issues related to that.
19 We provided a lot of new information, and Calvert
20 Cliffs says that after a DEIS comes out, it's
21 perfectly appropriate to raise new contentions.

22 One thing we do know is that the work on
23 this issue has not been done or fully completed. If
24 you look at the RAIs, what's very troubling about the
25 unanswered RAIs, if we just focus on it for a second,

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1 is that staff has now allowed Holtec to not answer
2 until November, well after the time for filing
3 comments on the draft environmental impact statement
4 -- or the environmental impact statement.

5 So there's going to be a whole new set of
6 information coming in down the road. It's -- to the
7 extent we could be allowed to intervene on this issue,
8 I don't see it delaying anything. I see it improving
9 the quality of the decisions ultimately being made
10 here, and it's only fair that the Applicant put all of
11 their information, relevant information, now before
12 the public. They haven't done that before. And
13 they're seeking some benefit from it.

14 As an overview, I believe that we would
15 like the record to be reopened. We'd like to have our
16 amended contention heard. And thank you.

17 JUDGE RYERSON: Okay. Thank you, Mr.
18 Kanner. You're saving five minutes for rebuttal.

19 MR. KANNER: Thank you.

20 JUDGE RYERSON: So we turn to Mr. Silberg
21 for Holtec.

22 MR. SILBERG: Thank you, Mr. Chairman.

23 In order for the amended contention to be
24 admitted, Fasken has to demonstrate that it meets the
25 criteria to reopen the record, the standards to admit

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1 a late file contention, and the contention
2 admissibility requirements.

3 Our June 5 answer describes in detail how
4 Fasken has not met any of these requirements, and we
5 note that the burden for satisfying those requirements
6 rests with Fasken and not with the NRC staff, nor with
7 Holtec.

8 Probably the most obvious shortcomings of
9 Fasken's motions center around their untimeliness.
10 But first I'd like to point out some of the other
11 deficiencies with the motions, any one of which
12 warrants the rejection of the contention.

13 Motions to reopen are an extraordinary
14 action that place an intentionally heavy burden on
15 those who seek to reopen the record. Fasken
16 acknowledges that reopening requires a significant
17 safety or environmental issue, but there's nothing in
18 the motion to support that conclusion.

19 Fasken acknowledges that it must
20 demonstrate that a materially different result likely
21 -- would be likely. But, again, nothing in the motion
22 supports such a finding except stating that as a
23 conclusion. Under well-established Commission
24 precedent, Fasken must show the likelihood that
25 consideration of contention would result in the denial

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1 or conditioning of the application.

2 Fasken concedes that the motion has to be
3 accompanied by an expert affidavit, but it isn't. The
4 affidavit must set forth the factual and technical
5 bases for satisfying the reopening criteria, with each
6 criterion being separately addressed and with a
7 specific explanation of why each has been met. And
8 the affidavit must be by a competent individual with
9 knowledge of the facts alleged or by experts in the
10 disciplines appropriate for the issues raised.

11 With no respect to Fasken's attorneys, his
12 affidavit -- Mr. Kanner's affidavit -- provides only
13 legal argument. He is neither a factual witness nor
14 an expert competent in the issues raised.

15 Even if the Board were to overlook
16 Fasken's failure to meet these opening criteria, the
17 amended contention must be rejected because it's
18 untimely under both the standards for a late-filed
19 contention and those for reopening the record. The
20 amended contention purports to meet the time limit --
21 time limits requiring -- requirements by relying on
22 the March 10 publication of the DEIS.

23 Fasken acknowledged that it was filing
24 these contentions based on the DEIS in its April 2nd
25 motion. But its May 11 filing includes virtually

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1 nothing that's based on the DEIS or could not have
2 been filed in September 2018 when contentions were
3 due.

4 Fasken has failed to point to information
5 in the DEIS that is newer material or to information
6 from other sources that was not readily available to
7 Fasken at least since the time that Holtec filed its
8 application.

9 It's first worth recalling that Fasken
10 filed no contentions when contentions were due in
11 September 2018, but only a motion to dismiss the
12 application on jurisdictional grounds. This standard
13 came despite the fact that the NRC regulations of
14 309(f)(2) require that contentions be filed based on
15 the application and on the other documents and
16 information available to the Petitioner at that time.
17 Specifically, for environmental issues, contentions
18 must be based on the Applicant's environmental report.

19 It was not until August 2019, almost a
20 year after the contention deadline and after the Board
21 had terminated the proceeding, that Fasken first
22 attempted to late-file a contention on the
23 application. That was the initial Contention 2.

24 Contention 2 was initially submitted so as
25 to raise issues concerning control over mineral rights

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1 beneath the site, but as the Board's June 18th
2 decision correctly ruled, Contention 2 was untimely
3 because it was based on information that was
4 previously available in Holtec's environmental report
5 and Holtec's responses to the NRC staff's RAIs long
6 before Fasken moved for leave to file the amended
7 contention.

8 The amended contention should be ruled
9 inadmissible for essentially the same reasons as the
10 Board rejected its first Contention 2. Fasken claims
11 that it filed the amendment contention based on
12 information in the DEIS, but the information that
13 Fasken refers to is not new but was available to
14 Fasken well before the DEIS was published.

15 And to the extent that Fasken refers to
16 issues which were ostensibly omitted, like references
17 to seismology, subsidence, and sinkholes, Fasken is
18 simply incorrect. These topics were not omitted.
19 Rather, Fasken failed to address what the application
20 had to say about them, and all of those issues were
21 described in the application.

22 So, too, are Fasken's claims regarding
23 control and ownership of subsurface mineral rights,
24 status of industry operations, geologic
25 characteristics of the region, largely the same claims

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1 that were previously ruled untimely by the Board.
2 These are not issues that show up in the DEIS for the
3 first time. As the Board had noted, these -- these
4 issues are not new.

5 Given the 70 years that Fasken has been
6 drilling wells in the Permian Basin and the 40-plus
7 years it's been drilling in the vicinity of the Holtec
8 site, it's not credible that Fasken hasn't known for
9 years the information which it now says is new and
10 which it learned only from the DEIS.

11 For example, Fasken presents in the
12 amended Pollock declaration a map of well bores in a
13 six-mile radius of the project area but never tells us
14 when it first learned of the information or where --
15 even where that information came from. None of the
16 information is new, and I doubt that any of it is new
17 to Fasken. In fact, it's available to anybody on the
18 Bureau of Land Management's website and from the State
19 of New Mexico and the information cited in Holtec's
20 SAR.

21 In fact, Mr. Pollock refers to wells
22 drilled as far back as 1937. He also refers to,
23 quote, recent technological advances in drilling, as
24 if those just recently happened. A similar example is
25 Fasken's criticism of the six-mile radius used in the

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1 DEIS to analyze oil and gas operations, suggesting
2 that a larger radius should be used.

3 But Fasken's filings ignore the fact that
4 it's cited to a five-mile radius in its August 1
5 motion and in Mr. Pollock's July 31, 2019, affidavit
6 to explain -- and fails to explain why a six-mile
7 radius is inappropriate. In fact, Mr. Pollock's
8 amended declaration repeatedly uses a six-mile radius.
9 Nor does Fasken explain why it failed to raise that
10 issue, the issue of the appropriate radius, back in
11 September 2018.

12 Another example of Fasken's claimed new
13 information is the DEIS statement that drilling
14 wouldn't occur closer to the surface than 3,050 feet.
15 Well, the environmental report gives the number as
16 5,000 feet. Fasken's claim seems to be that drilling
17 that dips shallower than 3,050 feet is possible and
18 wasn't analyzed.

19 But Fasken could have and should have
20 raised that issue at the outset of this proceeding.
21 If drilling at depths shallower than 3,050 feet at the
22 site was possible, then drilling shallower than 5,000
23 feet was obviously possible. And if that were the
24 case, Fasken should have raised the issue in September
25 2018 based on the information in the environmental

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1 report.

2 Fasken certainly hasn't alleged, let alone
3 established, that the technological advances that made
4 shallower drilling feasible were developed after
5 September 2018. So the fact that the DEIS and ER may
6 use different minimum depths is neither material nor
7 justifies Fasken's late filing. If the claims on
8 minimal drilling depths on which Fasken relies are
9 true now, they were equally true at the outset of the
10 proceeding, and Fasken should have raised them then.

11 Finally, it's obvious that the DEIS does
12 not provide a basis to justify the amended
13 contention's untimely raising of its many safety-
14 related issues. This includes Fasken's claims related
15 to the staff's pending RAIs, which all pertain to
16 safety issues.

17 The mere existence of an RAI has been
18 established in Commission law as insufficient
19 justification to support a contention in any event,
20 and Fasken's attempt to raise a contention on the
21 subject of RAIs, and even more for an RAI on safety
22 issues, is also extremely and unjustifiably late.

23 The bottom line is that any of the issues
24 Fasken seeks to raise in the amended contention could
25 have been raised at the outset of the proceeding, and

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1 Fasken has failed to provide any justification why it
2 did so at this time.

3 For these reasons and the more detailed
4 explanations that we set out in our answer, we
5 respectfully would ask that the Board reject Fasken's
6 motion to reopen and its motion for leave to file the
7 amended Contention 2.

8 Thank you, and we're happy to answer any
9 questions that the Board may have. And I would ask
10 leave of the Board to allow Mr. Walsh and Ms. Leidich
11 to address the issues as appropriate.

12 JUDGE RYERSON: That would be the
13 questions -- Mr. Silberg, you're going to have
14 questions later?

15 MR. SILBERG: Yes, sir.

16 JUDGE RYERSON: Okay. All right. Thank
17 you.

18 So I think we can move on to the NRC
19 staff. Is that Ms. Susko?

20 MS. SUSKO: Yes. Good afternoon. And,
21 may it please the Board, it's the NRC staff's position
22 that Fasken has not satisfied the criteria for
23 reopening the record, that Fasken has not shown good
24 cause for amending its Contention 2, and that amending
25 Contention 2 does not meet the contention

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1 admissibility requirements.

2 Accordingly, the Board should deny both of
3 Fasken's motions. Arguments supporting the staff's
4 position are explained in detail in the staff's
5 pleading, so I'll not repeat those arguments here.
6 But I would like to briefly address two points.

7 First, I'd like to reiterate what triggers
8 the clock to begin running for the purposes of
9 determining whether a contention is timely if it's
10 filed after the initial deadline, and second I'd like
11 to address the exceptionally grave issue exception to
12 the reopening requirements.

13 On the first point of timeliness, in its
14 reply on page 5, Fasken states that the mere
15 publication of the staff DEIS is the triggering event
16 that starts the clock for determining the timeliness
17 of its filing under the good-cause requirements in 10
18 CFR 2.309(c)(1). But the analysis for timeliness
19 under that regulation is more nuanced than that.

20 In -- in this context, timeliness depends
21 on when the information that supports the basis for
22 amended Contention 2 became available. This,
23 therefore, requires an analysis of the specific issues
24 raised in amended Contention 2 for a determination of
25 whether the facts and information supporting those

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1 specific issues was previously available and, if so,
2 when. The point at which that new information became
3 available is the correct triggering event that begins
4 the clock on timeliness for the purposes of
5 2.309(c) (1).

6 At this stage in the proceedings, when the
7 DEIS has been published, it is Fasken's burden to
8 demonstrate that the DEIS actually contains new data
9 or conclusions in order to satisfy the timeliness
10 requirements. Publication of the DEIS on its own does
11 not provide a blanket opportunity to submit new or
12 amended contentions.

13 And here, as outlined in the staff's
14 pleadings, all of the information on which amended
15 Contention 2 is based is information that was
16 available long before the DEIS was published, meaning
17 that Fasken could have raised these issues earlier in
18 the proceeding as a challenge to Holtec's
19 environmental report, and yet Fasken did not do so.
20 That alone is sufficient reason to reject amended
21 Contention 2.

22 Now, turning to the exceptionally grave
23 issue exception, to reopen a closed record, it is the
24 Petitioner's heavy burden to show that its motion to
25 reopen is timely, that it addresses a significant

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1 safety or environmental issue, and that it
2 demonstrates that a materially different result would
3 have been likely.

4 It's the staff's position that Fasken has
5 not satisfied any of those requirements, and it's
6 particularly relevant here that Fasken has not
7 raised a significant environmental issue.
8 Nevertheless, the reopening standards do include an
9 exception for an untimely file motion to reopen if the
10 Petitioner has raised an exceptionally grave issue.

11 However, it's important to note that under
12 Commission case law, specifically CLI-12-21, the
13 exceptionally grave issue exception is a narrow one,
14 and it should be granted only rarely and in truly
15 extraordinary circumstances. In its pleading, Fasken
16 neither acknowledges this exception nor addresses
17 whether amended Contention 2 raises an exceptionally
18 grave issue.

19 And the statements made by Fasken today in
20 its opening remarks are inadequate to meet this heavy
21 burden of showing that extraordinary circumstances do,
22 in fact, exist here. This is so because Fasken's
23 remarks have not demonstrated that the harms
24 identified are tied to any specific environmental
25 concern related to the proposed facility or that such

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1 harms are reasonably likely to occur.

2 Therefore, Fasken hasn't presented
3 sufficient information either in its pleadings or in
4 its remarks today to support finding that it has
5 raised an exceptionally grave issue. Because Fasken
6 has not raised even a significant environmental issue,
7 let alone an exceptionally grave one, Fasken has not
8 satisfied the requirements for reopening the record
9 and does not otherwise meet the narrow exception for
10 exceptionally grave issues.

11 Accordingly, the motion to reopen should
12 also be denied. That concludes my opening remarks,
13 and I look forward to answering any questions from the
14 Board. Thank you.

15 JUDGE RYERSON: Thank you, Ms. Susko.

16 Mr. Kanner, you have five minutes. And I
17 -- I would suggest that it would be appropriate to --
18 to address in your five minutes this -- this question
19 of whether you are, in fact, asserting an
20 exceptionally grave issue exception to timeliness.

21 You did use the word grave. I caught it
22 earlier in your discussion. But I -- I agree with Ms.
23 Susko. I didn't see that argument in any of your
24 pleadings. So it would be helpful if you could
25 include -- include addressing that in your five

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1 minutes.

2 (Pause.)

3 JUDGE RYERSON: Mr. Kanner?

4 MR. KANNER: Oh. Yes, Your Honor. Sorry.
5 I was on mute. I apologize for that.

6 I'm just going to say -- yes, I will get
7 to grave concerns. Before I -- I get to that, I'd
8 like to just say something about staff's comments and
9 -- and, frankly, comments of Holtec.

10 Their theme seems to be, you could have
11 known this before. Taken to its logical extreme, you
12 would have almost nobody -- no contention would be
13 upheld, as -- as has happened in this case except for
14 this last contention.

15 Did we know about fracking near the
16 surface? Yes. Why did we not comment on it? Because
17 Holtec said they had control of all the mineral
18 extraction under their site. So had we come forward
19 and said, oh, but, you know, people can -- can do
20 fracking within hundreds of feet of the surface, they
21 would have said, well, it's not relevant because we
22 have control.

23 But it turns out that, that was a lie.
24 They didn't have control. I mean, we're -- we're
25 dealing with a moving target, here, frankly, from the

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1 beginning till now. And we are trying to be
2 responsible and acting when we think it's appropriate.

3 Look. Fasken, we're not repeat players
4 in, you know, the NRC licensing process. We're just
5 trying to do what's right for our -- our family, our
6 company, this industry. You're putting all this
7 nuclear waste on top of the Permian Basin, one of the
8 most important natural resources the United States
9 has. And there's a risk of a possible jeopardy there.

10 And if somebody comes in and says, I want
11 to build a facility there but I control everything,
12 you know, that's going to -- to me, I don't think we
13 should be criticized and say, well, you didn't come
14 forward with your relevant information at that time,
15 when -- when it's obvious that it became relevant when
16 the DEIS specifically showed that there was not going
17 to be -- you know, they -- they just were discussing
18 the potash but not mineral rights. And they moved
19 from three to five -- from 5,000 to 3 feet.

20 Yes, it seems like a very relevant thing
21 to bring up, like why 3,000? Because we've already --
22 at that point, they'd given up the control of
23 minerals. And we timely respond to that. I -- I say
24 that as an example because there are so many in this
25 case. But Counsel for Holtec says, oh, this is all

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1 safety. RAI 2-25, justify the basis for the 5,000-
2 foot minimum depth of oil-drilling or fracking
3 activities. That would seem to me to be more than
4 just a safety issue.

5 But turning to the -- the Board has broad
6 discretion because we do value public participation
7 and because not everybody is a repeat player. So,
8 with respect to your questions -- and -- and I'll --
9 I'll get up to the grave issue in a moment -- are we
10 limited to only newly disclosed information? No.

11 Under NRC standards -- in particular,
12 2.309(f)(2) provides that the Petitioner may amend
13 contentions based on an Applicant's environmental
14 report or file new contentions if there are data or
15 conclusions in the NRC draft or final environmental
16 impact statement or assessment that differ
17 significantly from the state or conclusions in the
18 Applicant's documents. And I think we've shown that
19 here on numerous occasions.

20 Calvert Cliffs tells us, quote, this
21 provision tempers the restrictive effect of the
22 Agency's requirement -- tempers the restrictive effect
23 of the Agency's requirement that NEPA contentions be
24 filed based on the ER by allowing petitioners or
25 interveners to challenge significantly different data

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1 or conclusions that appear for the first time in the
2 NRC staff NEPA document.

3 The use of data conclusions means it's
4 sufficient that it's either data or conclusions.
5 Likewise, Petitioner may file a contention to
6 challenge significantly different conclusion in the
7 DEIS even though it is based on the same information
8 or data cited in the Applicant's licensing documents.

9 And as far as I understand, Calvert's
10 still a good law, or you've got the good cause issue,
11 10 CFR 2.309(f)(2), which we believe we -- we also
12 meet for the filed contention requirement. We show
13 that the information is new, or we -- we showed that
14 the information of our amended contention is based on
15 not previously available information. Such
16 information is materially different than information
17 previously available, and the amended or new
18 contention has been submitted in a timely fashion
19 based on the availability of subsequent information at
20 that point out.

21 We -- we timely answered -- filed the
22 amendment within 30 days of the release, and we do
23 believe it's a grave concern. And it runs throughout
24 our -- with respect to the grave concern issue, I --
25 I have already suggested that -- sorry. Let's see.

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1 Okay. So, on -- on the grave concern issue, we've
2 outlined the hazard, all the nation's high-level
3 nuclear waste -- I mean, that's a pretty grave matter.
4 The threat could be greater than any threat that --
5 that the Agency would have to deal with.

6 The danger is profound. Since the
7 beginning of time, and including the International
8 Atomic Energy Commission -- has always talked about
9 storage in terms of, you know, put it deep in the
10 ground. No seismic activity. Bury it places like
11 Yucca Mountain, though I understand Yucca Mountain
12 didn't qualify for permanent repository.

13 So the concept -- there are not even
14 regulations for ISPs, though there -- there are for --
15 for certain types of interim storage. But most of
16 those are associated with an existing nuclear power
17 plant.

18 Here, you cannot -- you know, there's got
19 to be some higher standard for making sure that this
20 site, the cumulative impact of this site, will not
21 jeopardize that amount of radiation on top of one of
22 the nation's most precious natural resources, the
23 brown water that the agricultural industry relies upon
24 and the Permian Basin.

25 I mean, if all that oil and gas becomes

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1 radioactive, you know, it would impact national
2 defense. The Department of Defense and Department of
3 Energy recognize Permian Basin is essential for energy
4 security. So, to that extent -- and I believe it's
5 very grave, Your Honor.

6 JUDGE RYERSON: Okay. We'll -- we'll get
7 to questions later. But just -- just so I'm clear
8 what you're saying, you are arguing that amended
9 Contention 2 raises an exceptionally grave issue as
10 that term is used in 10 CFR 2.326(a)(1)? Is that
11 correct?

12 MR. KANNER: Yes, Your Honor.

13 JUDGE RYERSON: Okay. But you -- you
14 acknowledge that you did not make that argument
15 explicitly in your pleadings. Is that also correct?

16 MR. KANNER: That is correct, Your Honor.

17 JUDGE RYERSON: Okay. All right. Well,
18 unless you have something further, why don't we take
19 a five-minute break? And we'll go through the
20 questions. Let's plan to reconvene promptly at 1:50.

21 (Whereupon, the above-entitled matter went
22 off the record at 1:46 p.m. and resumed at 1:50 p.m.)

23 JUDGE RYERSON: This is Judge Ryerson.
24 We're back on the record. I think we have everyone.

25 Let me just suggest, too, at least for me,

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1 the discussion was breaking up from time to time. If
2 anyone is rustling papers near a speakerphone, that
3 sometimes cuts you out. So we should try to watch for
4 that.

5 Let me make sure we have our other Board
6 members.

7 Judge Arnold, are you on?

8 JUDGE ARNOLD: I'm on.

9 JUDGE RYERSON: And Judge Trikouros?

10 JUDGE TRIKOUROS: I'm on as well.

11 JUDGE RYERSON: Excellent. Excellent. We
12 have several parties, so I assume that someone will
13 let us know if a -- a necessary lawyer is not on.

14 Let me begin, Mr. Kanner, with some
15 questions for you.

16 MR. WALSH: Judge, excuse me. Judge
17 Ryerson? Pardon for the interruption. This is Tim
18 Walsh from Pillsbury. Mr. Silberg and Ms. Leidich got
19 disconnected, so they are dialing back in, if you
20 could pause for one moment.

21 JUDGE RYERSON: Okay. We'll wait a
22 moment, then. Thank you.

23 MR. WALSH: Sorry about that.

24 MR. SILBERG: Yeah. We've dialed back in.
25 Sorry. We had a technical issue here.

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1 MR. WALSH: Okay. We're good to go, then.

2 JUDGE RYERSON: Okay. You're back in?

3 MR. SILBERG: Yes.

4 JUDGE RYERSON: Okay. And I -- I said
5 earlier, just for your benefit as well, at least for
6 me, occasionally the discussion was cutting out. And
7 sometimes that happens when someone rustles papers
8 near a sensitive speakerphone. So that's something to
9 -- to be alert to as we proceed.

10 The -- the first question I have is -- is
11 for Mr. Kanner, and that's actually what your
12 contention says. Your contention is obviously in
13 response to the DEIS, but you set it forth in your
14 words on page 10 of the motion for relieve -- for
15 leave. And what does it say? It says Holtec's
16 application fails to adequately, accurately,
17 completely, and consistently describe the control and
18 so forth.

19 It doesn't say anything about the DEIS.
20 And was that intentional, or was that an oversight?

21 MR. KANNER: It was probably -- we
22 probably should have mentioned the DEIS at that time,
23 but I think our brief is abundantly clear on the
24 issue.

25 JUDGE RYERSON: Oh, yeah, it's clear that

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1 you were addressing the DEIS. I was just curious when
2 you formulated the actual contention in response to
3 2.309(f)(1)(I). You didn't mention it. It just
4 struck me, but no, clearly your supporting documents
5 refer to the DEIS.

6 One other thing that confused me is on the
7 very next page, page 11 of your motion, footnote 38,
8 you say inaccurate and misleading statements in the
9 Holtec DIS further violate NRC regulations requiring
10 an applicant provide information to the Commission
11 that is quote, complete and accurate in all material
12 respects, closed quote, citing 10 CFR 72.11(a).

13 I mean obviously the DEIS is a product of
14 the government. It's prepared by the NRC staff, and
15 so I'm a little confused when you say that misleading
16 statements in the DEIS violate NRC regulations
17 requiring an applicant to provide information. Could
18 you clarify what you mean there?

19 MR. KANNER: I agree that 10 CFR 72.11(a)
20 refers to the obligation of the applicant to provide
21 the Commission with information that's complete and
22 accurate in all material respects, not for the
23 Commission, but -- and maybe the reference should have
24 just been to the applicant, but it is the job of the
25 Commission to make sure that it is complete and

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1 accurate in all material respects, and I think that's
2 why they issued the RAI that we've been talking about
3 today.

4 JUDGE RYERSON: Okay.

5 MR. KANNER: But yes, it refers to the
6 license applicant, not to ---

7 JUDGE RYERSON: Right.

8 MR. KANNER: -- the NRC.

9 JUDGE RYERSON: Not to the staff, okay.

10 MR. KANNER: Correct.

11 JUDGE RYERSON: Now you ---

12 MR. KANNER: The staff has obligations,
13 obviously, under NRC regulations, but not as it
14 relates to that point.

15 JUDGE RYERSON: Right, but I mean the
16 general way this works is that the purpose -- and this
17 I think is spelled out in Calvert Cliffs. The purpose
18 of the environmental report that the applicant must
19 file is to assist the NRC, and initially the NRC
20 staff, in preparing a document that complies with
21 NEPA, but the document is ultimately the
22 responsibility of the NRC staff. Do you agree with
23 that?

24 MR. KANNER: Yes, the DEIS, yes.

25 JUDGE RYERSON: Okay, now I think you

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1 filed both of these motions, what, maybe 11, the
2 motion to reopen and the motion for leave, and that
3 was in advance of our decision. It must have been in
4 June in LBP-20-06, and I daresay perhaps you didn't
5 anticipate that decision.

6 What is your view --- and let's assume for
7 the sake of argument that that decision is correct and
8 the Commission will ultimately perhaps tell us whether
9 it is or not, but for the moment, assuming that's
10 correct, what is the effect of LBP-20-06 on the
11 motions that are in front of us right now?

12 MR. KANNER: Well that was the April 23
13 order, the April 23 --

14 JUDGE RYERSON: No.

15 MR. KANNER: -- 2020?

16 JUDGE RYERSON: No, that's the CLI.
17 That's the Commission decision, I believe.

18 MR. KANNER: Okay.

19 JUDGE RYERSON: Subsequent to the
20 Commission decision, the Commission remanded a few
21 things to us, including your original contention two,
22 which we rejected.

23 MR. KANNER: Yes.

24 JUDGE RYERSON: And so you have filed the
25 pending motions. You filed them prior to our

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1 rejecting the original contention two, and I just
2 wondered if you would like to comment on the
3 significance of any of that on the pending motions?

4 In other words, when you wrote these
5 motions, you had not presumably anticipated that we
6 would reject the original contention two. We had not
7 done that yet, and so --

8 MR. KANNER: Yes.

9 JUDGE RYERSON: -- I'm asking what is your
10 position on the significance of your pending motions
11 in light of LBP-20-06?

12 MR. KANNER: I think the issue today is
13 the amended contention.

14 JUDGE RYERSON: I agree with you on that.
15 (Simultaneous speaking.)

16 JUDGE RYERSON: But you, at one point in
17 your papers, for example, you rely on the Richard
18 letter in support of the original contention two as
19 one of the indicia of new information, and we have
20 ruled in LBP-20-06 that it was not materially new
21 because it repeated information that was in Holtec's
22 application and in its response to an RAI.

23 And I think Holtec has even more recently
24 pointed out some additional information that frankly,
25 we may have been aware of, but didn't recite in that

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1 decision to the effect that I believe Mr. Taylor had
2 written to the NRC at one point a year ago with
3 information that was similar to Ms. Richard's letter.

4 So I take it that, at least assuming we
5 are right in our decision, that that is kind of off
6 the table as an indication of new information. Would
7 you agree with that?

8 MR. KANNER: Standing alone as new
9 information, yes, but here, it occurs -- we referenced
10 it in the context of identifying differences between
11 the DEIS and the ER, which Calvert Cliffs says would
12 be appropriate.

13 The fact that it corroborates what we saw
14 in the argument that it was helpful because there, you
15 know, we did mention it, and ultimately, I think that
16 one of the reasons that the staff in the DEIS
17 concluded that they should not just not talk about the
18 oil and gas issues was because of that letter and the
19 high level of uncertainty associated with that.

20 And indeed, they don't even affirmatively
21 state that there is a done deal for the life of this
22 project or what its parameters are with respect to the
23 potash, which is very significant in terms of the
24 overall understanding of the cumulative impact issues
25 as it relates to this site, and especially the

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1 engineering significance of all of those issues.

2 I mean what if those storage packs started
3 to collapse because of potash activity that was going
4 on or had gone on in the past?

5 JUDGE RYERSON: Okay, I think I lost the
6 end of that.

7 MR. KANNER: I believe that it's relevant
8 to our claims in the DEIS to talk about it. I mean if
9 -- yeah, had I had your decision, I probably, I might
10 have written that passage a little bit differently,
11 but I still believe, even after your decision, that
12 it's certainly appropriate.

13 And it also underscores something I said
14 in my opening comments, which is, you know, the
15 Governor is now writing to the President talking about
16 the grave situation out there.

17 You know, we finally get the New Mexico
18 comments on the DEIS, which we didn't know at the time
19 in December would be basically ignored by staff in the
20 DEIS. I mean I think what New Mexico has been
21 communicating is significant.

22 JUDGE RYERSON: Yeah, of course. Now the
23 comments on the DEIS, that's a separate process, and
24 clearly the communications between the Governor or the
25 President are not within our chain of command as it

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1 were.

2 MR. KANNER: Let me put it this way. I
3 believe you can rule in favor of reopening the record
4 and allowing our contention despite your earlier
5 decision, despite you finding that one letter not to
6 be materially new.

7 (Simultaneous speaking.)

8 JUDGE RYERSON: I think I understand your
9 position. Let me ask you though -- let me get to your
10 affidavit in support of the motion to reopen, and
11 first, this is going to be really, kind of sound like
12 almost a nitpicking comment because no one has raised
13 it but me, but is this a proper affidavit under
14 Louisiana law?

15 You state that you're under oath, but I
16 don't see any indication of anybody giving you an
17 oath. There's no indication that a notary was giving
18 you an oath or anything like that.

19 MR. KANNER: Well actually in Louisiana,
20 if you get a bar card, you're automatically a notary
21 public, but I was relying on the fact that, you know,
22 I'm an officer of the court, whether it's
23 administrative, or civil, or --

24 JUDGE RYERSON: I'm sorry, that cut out.
25 I didn't hear that.

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1 MR. KANNER: Yes, in Louisiana, you
2 actually get -- you become a notary -- well it costs
3 another \$5. At least it did 40 years ago. I haven't
4 looked at what they charge now -- when you pass your
5 bar exam and get sworn in.

6 But I was relying on the practice of a
7 lawyer in filing anything with a court, which is an
8 affidavit by an attorney of record. It's presumed to
9 be honest. I mean --

10 JUDGE RYERSON: Okay --

11 (Simultaneous speaking.)

12 MR. KANNER: -- the bar for making a false
13 representation to the court, not that I'm suggesting
14 anything like that.

15 JUDGE RYERSON: No, I was wondering
16 whether you were relying on 28 USC 17.46, which this
17 doesn't really seem to comply with, but in any event,
18 no one has raised it.

19 So there were other concerns about the
20 appropriateness of a lawyer's affidavit in these
21 circumstances, but no one challenged the technical
22 sufficiency of your affidavit, but in any event, let
23 me get to --

24 MR. KANNER: We have non-lawyer affidavits
25 also, I mean that we have attached to our brief.

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1 JUDGE RYERSON: No, I understand that.
2 I'll get to that. Those are styled declarations, not
3 affidavits, but anyway, let me get to the substantive
4 point.

5 MR. KANNER: Okay.

6 JUDGE RYERSON: You say in your affidavit
7 the information forming the basis of amended
8 contention two was not available prior to the
9 publication of the Holtec DEIS. So that is your flat-
10 out statement, that the basis for amended contention
11 two was not available to you until the DEIS came out,
12 and then let me find your pleading.

13 Page 15 of your motion for leave, you say
14 Holtec's application fundamentally misrepresents past,
15 present, and potential for future oil and gas
16 operations in the six-mile region and flat-out ignores
17 operation at any further increments of distance.

18 And I guess I'm asking, are you
19 representing to me, to us, to the NRC, that prior to
20 the DEIS, Fasken was not in a position to make that
21 statement, in other words, based on the environmental
22 report or other aspects of the original application?
23 Fasken knows a little bit about drilling in the
24 Permian Basin, correct?

25 MR. KANNER: They know a lot about

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1 drilling in the Permian Basin.

2 JUDGE RYERSON: They know a lot about it.
3 They've been drilling there, at least collectively,
4 the whole group has been drilling there for 80 years.

5 MR. KANNER: Right, but --

6 JUDGE RYERSON: They've been drilling near
7 this facility for 40 years.

8 MR. KANNER: But what was different with
9 the DEIS is the shift to the six-mile radius and the
10 focus on that, and we then went out and got new
11 information about the locations of all of the wells
12 that we could find, attached that new information
13 which was not publicly available, and we submitted it,
14 as well as with Stonnie Pollock's affidavit to
15 illustrate, based on our own actual experience, that
16 it's even more complicated than that.

17 That is both new information to us that we
18 affirmatively had to seek out that was not publicly
19 available, and we added information because for the
20 first time in the DEIS, Holtec -- the staff was
21 saying, okay, that's our area of concern, so at least
22 we were trying to be responsive to that.

23 So I believe that my affidavit and my
24 statement at page 15 are consistent, especially given
25 that I think my mindset at the time was really sort of

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1 Calvert Cliffs, and okay, the DEIS significantly
2 raises new information.

3 You know, from minimal impact to moderate
4 impact was a big change. The drop down to a six-mile
5 radius was a big change, and new information, as I
6 said earlier, sort of the avoidance of oil and gas.

7 Because the ER said everything was under
8 control, so would it have been appropriate to file
9 stuff relative to the ER when they've already
10 represented, presumably under oath as well, that they
11 have it all under control?

12 I think we were attempting to focus on,
13 focus our comments on the lead that the NRC has been
14 giving us, and I think the comments were appropriate.

15 JUDGE RYERSON: Okay, let me ask you about
16 Mr. Pollack's affidavit, and again, I'm going to be a
17 stickler here because it's not called an affidavit.

18 It's called a declaration, which suggests
19 to me that it is purporting to rely on 28 USC 17.46,
20 but there's magical language in that statute that says
21 instead of an affidavit, you can submit a declaration
22 under penalty of perjury. Those are the magic words,
23 and I don't see that in this declaration. Am I
24 correct there is no such statement in this
25 declaration?

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1 MR. KANNER: That is correct. The
2 omission, I apologize, would be inadvertent. We
3 probably should have caught that, Your Honor, but if
4 you want it to be re-executed, I'm happy to do that.

5 JUDGE RYERSON: Okay, I don't think --
6 that won't be necessary, but I just was curious about
7 that. Let me again get to more substance. Now Mr.
8 Pollock works for Fasken. He's not an independent
9 consultant. Is that correct?

10 MR. KANNER: Mr. Pollock is a very
11 accomplished senior geologist, but yes, he does work
12 for Fasken, and probably is more knowledgeable about
13 this area than any other human being.

14 JUDGE RYERSON: Okay, well that's sort of
15 my point, that -- I'm looking at his resume as
16 attached to his declaration, and it appears that Mr.
17 Pollock is employed by Fasken as a senior geologist,
18 and he has been for about 17 years, which appears to
19 be, based on his school record, virtually his entire
20 professional career.

21 And I'm not suggesting a bias at all.
22 What I'm suggesting, and tell me if I'm wrong, is that
23 don't we need to ascribe to Fasken all of Mr.
24 Pollock's knowledge, because he has knowledge clearly
25 and he works for Fasken, and has worked for them for

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1 17 years? And so if he has information about wells in
2 the Permian Basin, isn't that information we have to
3 ascribe to Fasken?

4 MR. KANNER: I think that you would have
5 to ascribe that information to Fasken, but in this
6 context, we were responding to an ER that says all of
7 the mineral issues were under control. So why would
8 Fasken then say, oh, we have a contention that there
9 is all of these wells everywhere, and here is our
10 analysis?

11 And again, for purposes of the attached
12 map, which is really the essence of this submittal,
13 that was not information that he had. This would be
14 precise. That was information that he purchased for
15 this specific project.

16 So I don't know that you could say he's
17 walking around with all of this knowledge in his head,
18 or the Fasken organization had all of this knowledge
19 in this chart that we've attached.

20 But I would ask, had we submitted the
21 contention that -- had we submitted this as part of a
22 contention when there was just an ER, they would have
23 said what's the point of this?

24 JUDGE RYERSON: All right, does Mr.
25 Pollock's declaration identify anywhere when he

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1 acquired the information that's in the declaration?

2 MR. KANNER: No, my understanding is we
3 asked him to put this together as we were drafting the
4 brief that it's attached to, and that during the
5 drafting period, likely 30 days before or possibly two
6 weeks before is probably -- oh, it says May 11, 2020.
7 I guess it would have been shortly before that.

8 JUDGE RYERSON: Yeah, the date of the
9 declaration is the same as your filing date, I think.

10 MR. KANNER: Yeah, I know that this was
11 something, you know, this was something that I
12 requested one of the lawyers in my office to speak to
13 him about, putting a declaration together about that
14 specific piece of information.

15 JUDGE RYERSON: Okay, so that would have
16 been subsequent to the publication of the DEIS. Is
17 that correct?

18 MR. KANNER: Yeah, that's the prompt, as
19 I've been trying to say. I mean once we got that, we
20 had to sit down, look at the material differences that
21 we thought would be recognized as material
22 differences, and we had to think what information
23 could we add relative to those areas, and in that
24 context --

25 Because now it seemed like oil and gas was

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1 up for grabs, or there was a jump ball about control
2 there, which also, I mean you know, that ties back
3 into the land commissioner's letter obviously, but it
4 didn't reiterate it. I think that that would be the
5 time to do it under NRC rules.

6 JUDGE RYERSON: All right, let me simplify
7 some things. At least, I hope it simplifies them,
8 just so I understand your position and give you a
9 couple of hypotheticals.

10 Suppose you, Mr. Kanner, lived one mile
11 from Holtec's proposed facility in New Mexico, and the
12 environmental report comes out and it says the nearest
13 residence is five miles, and maybe you weren't reading
14 the Federal Register that day.

15 I don't know. The reason doesn't matter,
16 but you didn't challenge that, okay? You are an
17 individual who lives a mile away, and you don't
18 challenge the ER where it says nobody lives within
19 five miles.

20 Next, the DEIS comes out, and you still
21 live a mile away. No facts have changed, but the DEIS
22 says, oh, there's no residence within three miles.
23 Does that allow you to challenge that statement when
24 you didn't challenge the five-mile statement?

25 MR. KANNER: Yes, I think it would. It's

1 a material difference between the DEIS and the ER, and
2 I think that to add at that point that you're at one
3 mile would be appropriate.

4 JUDGE RYERSON: Okay, even though it's,
5 from your standpoint, not as wrong as the
6 environmental report was?

7 MR. KANNER: Well it would also -- you
8 know, when you -- I love hypotheticals, by the way,
9 okay? I taught law for 19 years, so I like
10 hypotheticals, but you always have to remember the
11 context.

12 And for example, following up on your
13 question earlier, I mean somebody who is one mile from
14 the facility is that you would probably say, well that
15 comes pretty close to being exceptionally grave, at
16 least for you and your family, depending on the
17 associated risks that are also identified at that
18 point in time.

19 And so you want to put it in context, but
20 I absolutely could see that information being allowed.
21 I think it would -- I would think that the --

22 JUDGE RYERSON: Okay, you're complicating
23 my --

24 (Simultaneous speaking.)

25 MR. KANNER: -- have to be considered.

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1 JUDGE RYERSON: You're complicating my
2 hypothetical, which I was trying to strip from some of
3 the related issues. Let me give you a third and last
4 hypothetical.

5 You're still one mile from the facility,
6 but the DEIS says just as the ER did. The DEIS says
7 there's no one living within five miles. Now can you
8 come in then? Isn't that exactly what the Commission
9 says you can't do?

10 MR. KANNER: That's wrong. Remember, the
11 law is facts or conclusions. If they're relying on
12 different facts and reach the same conclusion, or
13 relying on the same facts, different conclusion, I
14 mean I think the case law -- I think Calvert Cliffs
15 addressed that in great detail. So my answer is it
16 would depend.

17 JUDGE RYERSON: Let me turn to Mr. Silberg
18 for a second. What about this facts versus conclusion
19 distinction? Do you agree with that?

20 MR. SILBERG: Well I don't think he's
21 shown either one. Putting that aside, there aren't
22 any conclusions in the DEIS that are different from
23 those in the environmental report, point one.

24 Second, I think the examples you gave are
25 quite apt, and I think by switching over to this so-

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1 called exceptionally grave, we're moving away from the
2 question that you're trying to pose, but I don't think
3 that there are any conclusions in the DEIS that are
4 significantly different or different in any material
5 respect from the conclusions in the environmental
6 report.

7 If, for instance, the environmental report
8 said the sky is blue and that's a minimal impact, and
9 the DEIS said the sky is blue and that's a grave
10 impact, that would be a significant difference in the
11 conclusions, and if that were a relevant issue, then,
12 you know, you could use that as the basis for a
13 contention, but there ain't none of those here.

14 JUDGE RYERSON: Okay, all right, thank
15 you, Mr. Silberg. Back to you, Mr. Kanner, you have
16 an Exhibit 2 to the motion for leave that lists
17 various statements that you challenge, and some of
18 those statements are in the DEIS and then some are in
19 the SAR, and are you challenging SAR statements based
20 on information that you couldn't have had available to
21 you when the SAR was initially filed?

22 MR. KANNER: As I said earlier, we are --
23 just one -- before I answer that question, I just
24 wanted to note I think it's significantly different to
25 say a moderate impact instead of a minimal impact of

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1 cumulative activity. I don't think that that's small
2 potatoes.

3 It indicates a conclusion that's different
4 than the applicant. It indicates that there are
5 reasons for that different conclusion. I guess we're
6 saying they didn't go far enough in looking at the
7 impacts and characterizing the site conditions.

8 JUDGE RYERSON: Yeah, actually I think the
9 difference is between minimal and small, and then once
10 you get to small, then you get to cumulative and
11 moderate, but I think that's set out in the briefs in
12 any event.

13 MR. KANNER: Yeah, we -- with respect to
14 the attachment in Exhibit 2, it is -- you know, our
15 goal there is to just show -- well we have a number of
16 goals, but one of them is to show the materiality of
17 different issues. Is there something about the SAR
18 references that are different than the ER point that
19 was made?

20 I'm happy to answer a specific question
21 about that, but I believe that Holtec, while it did
22 have a change in story over time and this has been
23 kind of a moving target, this is designed primarily to
24 support our arguments on admissibility.

25 JUDGE RYERSON: Okay, all right, well I

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1 think those are all of the questions I have for the
2 moment. Judge Trikouros, do you have some questions?
3 Hello?

4 JUDGE TRIKOUROS: Pardon me, I was muted.
5 Can you hear me now?

6 JUDGE RYERSON: Yes.

7 JUDGE TRIKOUROS: I do have one question.
8 It's a bit long perhaps, but --

9 MR. SILBERG: Excuse me, Your Honor. This
10 is Jay Silberg. I'm having trouble hearing Judge
11 Trikouros. Could you possibly speak up?

12 JUDGE TRIKOUROS: I can try.

13 JUDGE RYERSON: Judge Trikouros, I'm
14 having difficulty too. Are you close to a speaker?

15 JUDGE TRIKOUROS: I am. I am right next
16 to one actually. Can you hear me now?

17 JUDGE RYERSON: You're kind of faint, but
18 I can make you out.

19 JUDGE TRIKOUROS: Is that any better?

20 JUDGE RYERSON: That is better, at least
21 for me.

22 JUDGE TRIKOUROS: Okay, I increased your
23 volume. Yes, I didn't think it would affect mine.
24 Can everybody hear me now?

25 JUDGE RYERSON: Yes.

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1 MR. SILBERG: Yes, Your Honor.

2 JUDGE RYERSON: Yes, that's better.

3 JUDGE TRIKOUROS: All right, well I guess
4 it worked. All right, I was saying that I basically
5 had one question that might have a couple of parts,
6 but it's essentially the same question, and it relates
7 to the issue of drilling depth.

8 And in the Fasken motion on I believe it
9 was page 17, it pointed out that there are
10 inconsistencies in, you know, acceptable drilling
11 depths to fundamentally avoid issues of subsidence
12 being one of them, between the SAR, the ER, and the
13 DEIS.

14 I pulled all of those out and looked at
15 them, and indeed, without reading from them right now,
16 it appears that the DEIS does, in fact, identify 3,050
17 feet and below as acceptable, whereas the SAR and the
18 ER both seem to just make the same exact statement.

19 It's one paragraph, and it's exactly the
20 same between the ER and the SAR indicating that with
21 respect to an agreement they have with the Intrepid
22 Mining Company, they will only -- there will be
23 restrictions on drilling beneath the actual site such
24 that the drilling or the extraction activities would
25 occur below 5,000 feet, and they say that that's in

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1 order to avoid subsidence.

2 It isn't entirely clear to me that the
3 3,050 feet identified in the DEIS relates to beneath
4 the site. That is not clear. It says project area.
5 Can someone explain if that means beneath the site as
6 well as around the site, or just around the site? How
7 about I'll ask Holtec first and then we can go on from
8 there?

9 MR. SILBERG: Yeah, Anne Leidich will
10 address that.

11 MS. LEIDICH: Yes, I think there were
12 several parts to that question, but I'll try and go
13 through sort of in a series that makes sense to me.
14 The question in terms of where drilling would occur in
15 the area is in regards to the depths of the Salado
16 formation.

17 So the Salado formation beneath the site
18 in that geologic area is where the potash is located,
19 and the oil and gas is beneath the Salado formation.
20 So it's not a question of -- the restriction related
21 to Intrepid Mining is that Intrepid has the rights for
22 the potash, not for oil and gas.

23 So the restriction is related to whether
24 or not anyone is going to be taking potash from the
25 site, and that's an agreement between the parties, and

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1 that's specifically related to the potash formation,
2 but the question then is at depths below the potash
3 formation, where might oil and gas drilling occur, if
4 that answers your question. So it's a question of
5 geologic formations. There's actually --

6 JUDGE TRIKOUROS: Well it doesn't quite
7 answer my question. The 3,059 feet, does that --
8 could there be drilling beneath the site in the depths
9 from 3,050 and below?

10 MS. LEIDICH: Yes.

11 JUDGE TRIKOUROS: So the conclusion in the
12 DEIS that below 3,050 feet, you're safe with respect
13 to subsidence concerns seems to directly contradict
14 the ER and the SAR, which would state explicitly that
15 5,000 feet would be necessary to avoid subsidence
16 concerns. Am I reading that correctly?

17 MS. LEIDICH: I would say that the -- it's
18 not quite as simple a link between the depths of
19 drilling and subsidence.

20 The ER analysis for subsidence is actually
21 based on a detailed analysis that was performed in the
22 ELEA 2007 report which is referenced in the ER, and
23 that incorporated the historical drilling that
24 occurred in the area.

25 So it wasn't specifically limited to a

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1 depth of 5,000 feet or a depth of 3,050. There was an
2 analysis of whether or not subsidence had occurred
3 given the drilling that had previously occurred in
4 that area, and it was a conclusion that subsidence had
5 not occurred and that there was no evidence of
6 subsidence in that area. Again, that's in the ELEA
7 2007 report, and that was referenced in the ER.

8 So the reference to 5,000 in the ER was a
9 reference to where they thought drilling would occur.
10 We are going to change that in the future. It's going
11 to be changed to 3,050, but in terms of subsidence,
12 the ELEA analysis still stands and it's regardless of
13 what that specific number is.

14 JUDGE TRIKOUROS: I understood the
15 subsidence analysis that was done. It was historical,
16 and I believe that the contention on page 17 is
17 looking at future activities, so I took those as two
18 separate items. Is that incorrect?

19 MS. LEIDICH: I don't believe that Fasken
20 addressed the existing subsidence analysis. I believe
21 they simply said that there might be future subsidence
22 without actually addressing or otherwise dealing with
23 the existing subsidence analysis that was referenced
24 in the application.

25 MR. SILBERG: One other point, Judge

1 Trikouros, if I might. This is Jay Silberg. Just to
2 note that if drilling was only to be tolerated below
3 5,000 feet under the surface and that was okay, then
4 by definition drilling that's 3,050 feet below the
5 surface ipso facto is going to be okay.

6 And therefore, if Fasken wanted to
7 challenge the depth of drilling, they should have
8 challenged it with the greater number because if that
9 wasn't a risk, then, you know, why didn't they
10 challenge it earlier?

11 JUDGE TRIKOUROS: Well maybe I'm reading
12 this wrong, but it seems to me that if I were to drill
13 at 3,200 feet, that there might be a subsidence issue
14 there, but not if I drilled below 5,000 feet. Is that
15 correct, or am I looking at this upside-down?

16 MS. LEIDICH: Your Honor, if you look at
17 the ELEA report, there is reference to wells that are,
18 at the shallowest, approximately 3,000 feet, and those
19 were historical wells, and they would have been
20 incorporated within the historical subsidence
21 analysis.

22 JUDGE TRIKOUROS: So if the -- hang on.
23 Let me get the reference. I guess it would be the
24 state land office. If the state land office were to
25 issue a lease to someone to do drilling, what depth

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1 would they tell them they have to drill below, or
2 would they not even specify?

3 MS. LEIDICH: Is this for oil and gas?

4 JUDGE TRIKOUROS: For oil and gas or
5 potash, but let's say oil and gas.

6 MS. LEIDICH: Hold on a second. I have a
7 question that I'm trying to -- in that area, oil and
8 gas drilling typically actually happens through the
9 BLM on drill islands, of which there are several in
10 the area, and that's because it's a special potash
11 area and they're trying to make sure that the oil and
12 gas does not interfere with the potash.

13 So I'm not certain and I'm trying to -- we
14 could answer this question in writing potentially, but
15 I'm trying to confirm if the state land office has the
16 ability to even approve an oil and gas well. Yes, all
17 oil and gas islands in that area are on drill islands
18 through BLM.

19 JUDGE TRIKOUROS: Well let me then ask the
20 question with respect to these drill islands. I guess
21 the drill islands are there to coordinate potash and
22 oil and gas interference, right? Is that the idea?

23 MS. LEIDICH: That's correct, because the
24 Salado formation is where the potash is located.

25 JUDGE TRIKOUROS: What would be the drill

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1 depth that would be specified for drilling in one of
2 these drill islands?

3 MS. LEIDICH: It would have to be, at the
4 very least, at a location where oil and gas exist, so
5 not in the Salado formation, and I don't know if we
6 can specifically get a depth for you, but it would
7 have to be at least below the Salado formation.

8 MR. KANNER: Judge, this is Allan Kenner
9 for Fasken. I just want to add that there are these
10 drilling islands, but you drill laterally into this
11 area from those islands.

12 And we submitted an affidavit from Mr.
13 Pollock who said that the historical wells were not
14 even 3,000 feet, indicating that there was
15 petrochemicals at a higher level, and if you want,
16 we're happy to amplify that in writing.

17 But with respect to the potash, what the
18 DEIS also did was ignore the impact of that oil and
19 gas activity on the stability of the potash and what
20 its ecological or ecosystem effects might be.

21 JUDGE TRIKOUROS: The inconsistency that's
22 identified is what I'm trying to understand. The
23 3,050 number appears to be associated with the project
24 area, which I assume would include these islands, the
25 drill islands and the Salado formation, but not the

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1 site necessarily itself, whereas the 5,000 feet in
2 both the SAR and the ER seems to be more related to
3 potash and more related to beneath the site.

4 So I was just trying to understand how
5 those relate to each other and how that integrates in
6 with either the Bureau of Land Management or the state
7 land office issuing a lease to someone to do drilling.
8 It's not clear to me what the safe drilling depth is,
9 and I'm just trying to understand what that is.

10 MR. KANNER: This is Allan Kanner. And
11 related to that very legitimate concern is that
12 Holtec, today at least, hasn't really explained what
13 potash rights it, in fact, controls or doesn't
14 control, and what that means today, tomorrow, 40
15 years, 120 years in the future. Thank you.

16 JUDGE TRIKOUROS: Yeah, if you look, for
17 example, at Holtec's answer on, I believe it's page
18 43, it says in the middle of the first full paragraph,
19 it says, however, it says, regardless of the depth
20 that is listed, Fasken has not challenged the ultimate
21 conclusion that drilling will occur at sufficient
22 depth to avoid subsidence issues, and that's very
23 nebulous. I mean it doesn't say what that depth is,
24 and I couldn't find anything that does.

25 MS. LEIDICH: Your Honor, this is Anne

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1 Leidich representing Holtec. I think we would say
2 that there has been no evidence of subsidence at this
3 site, even with all of the drilling activity that has
4 occurred for the last 70-plus years, I believe, up to,
5 in fact, since the 1940s as is described in the ELEA
6 report.

7 This includes some drills that were
8 roughly just above 3,000 feet, and we don't -- there
9 is no evidence, and Fasken has not provided any
10 evidence that drilling for oil and gas produces
11 subsidence in this area, and they have not --

12 (Simultaneous speaking.)

13 MS. LEIDICH: -- challenged the existing
14 analysis.

15 MR. KANNER: Allan Kanner for Fasken. I
16 believe that we have challenged some characterization,
17 but I would refer Your Honor to the Holtec DEIS at 3-
18 27 entitled subsidence and sinkholes.

19 And it relies on recent studies imploring
20 satellite imagery citing a 2016 article by Kim and SMU
21 Research of 2018, identifying movement of ground
22 surface across approximately 4,000 square miles in
23 west Texas experiencing as much as 40 inches of
24 subsidence over a 2.5 year time frame. So just think
25 about what that would do to a concrete slab, and so

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1 we're relying on data they came up with.

2 They also mentioned the Zhang, Z-H-A-N-G,
3 2018 study about significant subsidence within potash
4 mining areas close to this site. So I think that
5 there is evidence in the record for us to raise these
6 concerns.

7 JUDGE TRIKOUROS: Yes, my issue is not
8 with respect to historical, but more with respect to
9 this, and there seems to be some contradiction and I'm
10 trying to get it resolved.

11 For example, what I just read you with
12 this ---

13 (Telephonic interference.)

14 JUDGE TRIKOUROS: -- which Holtec
15 dismissed the question of 3,050 versus 5,000 by saying
16 what I just read you, that regardless of that
17 controversy, drilling will occur at sufficient depths
18 to avoid subsidence issues, but that is not -- I
19 couldn't understand what that was from the file. All
20 right, well --

21 MS. LEIDICH: Your Honor, this is Anne
22 Leidich again from Holtec. I mean I think we would
23 say that there has been no evidence of subsidence from
24 oil and gas drilling, and the oil and gas drilling
25 would occur below a depth of 3,000 feet or -- we

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1 initially stated 5,000 feet, but we intend to revise
2 that in the environmental report.

3 The subsidence that petitioners have
4 referenced, I believe, and I wasn't able to turn to
5 the page of the DEIS quickly enough, but it was from
6 potash mining.

7 Potash mining is very different than oil
8 and gas drilling, and the potash mining in that area
9 at this point, due to the presence of BLM drill
10 islands near this site, actually cannot occur for most
11 of the CISF facility site.

12 JUDGE TRIKOUROS: Okay, all right.

13 MR. KANNER: Your Honor, this is Allan
14 Kanner. I just wanted to -- two things if I might.
15 I think everybody agrees that the subsurface of this
16 area is complex and interconnected, and for them to
17 take one fact and say that that explains everything or
18 they make one change, they would have to really tie it
19 into everything else.

20 But if I might, with the indulgence of the
21 court, I think Mr. Pollock is available and would like
22 to address this issue. He's a geologist knowledgeable
23 in the area.

24 JUDGE RYERSON: Yeah, if he hasn't entered
25 an appearance as counsel, I'm afraid we don't really

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1 allow that.

2 MR. KANNER: Okay, well if there's an
3 opportunity to submit something in writing, we would
4 like that opportunity as well.

5 JUDGE RYERSON: At the end, we've had at
6 least two offers for some further filings. I think it
7 will depend on whether Judge Trikouros wants to pursue
8 his questions or not, so why don't we deal at the very
9 end with what, if any, additional filings will take
10 place?

11 MR. KANNER: Thank you.

12 JUDGE RYERSON: Judge Trikouros, did you
13 have more questions?

14 JUDGE TRIKOUROS: Well I guess a little
15 more follow up. You're saying -- Holtec is saying
16 that basically they will be amending the environmental
17 report or updating this environmental report to change
18 the 5,000 to 3,050? Is that what I heard?

19 MS. LEIDICH: That is correct.

20 JUDGE TRIKOUROS: When is that happening?

21 MS. LEIDICH: I believe it will happen
22 after the RAI responses.

23 JUDGE TRIKOUROS: All right, well I'm
24 going to end my questioning at that point.

25 JUDGE RYERSON: Thank you, Judge

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1 Trikouros. Judge Arnold?

2 JUDGE ARNOLD: Yes, this is Judge Arnold
3 and I do have questions. My first question is for
4 Fasken. Now on page 5 of your motion to file amended
5 contention, you argue that you fill the requirements
6 for good cause stating, quote, the information forming
7 the basis for amending contention two was not
8 available prior to publication of the Holtec DEIS, and
9 "Holtec DEIS significantly varies in material respects
10 from information contained in Holtec's license
11 application documents."

12 That's a good start. What I looked for
13 and I didn't see anywhere in either of your motions
14 was when -- I was looking to see where you identified
15 new material upon which the contention is based,
16 identified any related old information, identified the
17 difference between the new information and the old
18 information and show how that difference is material,
19 and then finally, show that your contention was based
20 on that difference.

21 Now there's no strict requirement for you
22 to be that explicit in your motions, but we have to
23 see in order to find that the good cause has been
24 satisfied. So could you take me through one example
25 of where you've identified new information, compared

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1 it to the old, shown that the difference was material,
2 and showed that your contention is based upon that
3 difference?

4 MR. KANNER: Yes, I can give you more than
5 one example. Wait, hang on. Let me just find -- I'm
6 just looking in my notes for a second for that
7 example.

8 Okay, so cumulatively, there's the minimal
9 to moderate risk under the cumulative impact I thought
10 was significant, but there are a number of building
11 blocks.

12 So for example, under subsidence and
13 sinkholes, the Holtec ER at 3-19, Section 3.3.3
14 entitled salt dissolution and sinkholes, it relies on
15 a 2007 study.

16 The DEIS at 3-27, the section entitled
17 subsidence and sinkholes relies on different, more
18 current information that I mentioned earlier, the
19 satellite imagery for example, the Kim study, the SMU
20 Research, and the Zhang 2018 study, I think, is one
21 good example.

22 But then we also go into seismicity, you
23 know, in terms of the risk of earthquakes. You have
24 the DEIS at 3-23, that's the Section 3.44 where they
25 talk about the number of earthquakes, and you know,

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1 that's different from the ER at 3-17, Section 3.3.2.1
2 on earthquake activity, and as we noted, in the last
3 60 days, there have been 20 more earthquakes in the
4 broader area.

5 The updated information on the potash
6 mining, that's the DEIS at 5-24 versus the Holtec ER
7 at 3-2, and we have updated information or different
8 -- I say updated, different information on mineral
9 resources, and we spoke to that both in the Pollock
10 affidavit, but the DEIS 9-2, Table 9-1, the summary of
11 environmental impact for land use, Holtec's ER at 7-6,
12 Section 8.1.3, unavoidable adverse environmental
13 impacts.

14 I think there are a lot of places that
15 we've identified differences, and I think that those
16 are material issues, and we talk about that in our
17 brief. That is the brief and the reply brief that we
18 ultimately submitted to the panel. Is that responsive
19 to your question, Your Honor?

20 JUDGE ARNOLD: I was looking for one
21 example, and let's go back to the first one, the salt
22 dissolution. How was the new information different,
23 materially different than the previous information?
24 Did it come up with the same conclusion, or did it
25 lead to a different conclusion?

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1 MR. KANNER: I think it led to -- well it
2 led to a different conclusion. The problem is more
3 pervasive than acknowledged in the ER, which is
4 probably one of the reasons they went from limited
5 impact to moderate overall impact on the location.

6 JUDGE ARNOLD: But where did they change
7 that impact? Can you cite to that?

8 MR. KANNER: Yeah, yeah, I'm going to just
9 -- I have -- I'm just -- yes, I can cite to it. I
10 just need to flip through my documents, just one
11 second. Hang on. Okay, I'm sorry.

12 Okay, page 12 of our brief, the original
13 brief, Your Honor, we cite to Holtec's ER found
14 minimal potential for any cumulative impact to geology
15 and soils from the proposed Holtec CISF project, and
16 then the cite is footnote 42, the Holtec ER at 5-3.

17 Quote, impacts to geology and soils would
18 be minimal, and it goes on to say that, and then we go
19 back to the text. By contrast, the Holtec DEIS
20 recently concluded that the project would have a small
21 cumulative impact to geology and soils, which when
22 combined with regional activity, would result in
23 overall moderate cumulative impact.

24 This constitutes new and material
25 information that is significantly different. It also

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1 raises a question about whether enough study has been
2 done.

3 JUDGE ARNOLD: Okay, let me ask staff,
4 since this is your DEIS, do you agree with that
5 assessment, that there is a significant difference in
6 the cumulative impact going from minimal to moderate?

7 MS. SUSKO: This is Rebecca Susko. No,
8 Your Honor. I would not agree with that
9 characterization. The ER states that facility would
10 have a minimal impact on geology and soil. And the
11 staff equally determined that the incremental impact
12 to the proposed facility would be small.

13 Fasken hasn't shown how that information
14 and the conclusion differs at all from what was in the
15 ER. The determination of a moderate impact that
16 Fasken has pointed to relates to the overall
17 cumulative impact determination.

18 The ER did not present an overall
19 cumulative impact determination. So to the extent
20 that Fasken believes that this overall cumulative
21 impact determination, which is based on other past,
22 present and reasonably foreseeable future actions
23 surrounding the proposed facility, speaks to that. If
24 Fasken believes that should have been included in the
25 ER, Fasken could have raised that argument at the

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1 outset of the proceeding.

2 MR. KANNER: Your Honor, this is Allan
3 Kanner. I just want to note we believe the
4 conclusions are different. But also for completeness,
5 they are each relying on different data, which goes to
6 our concern about the integrity of the overall study.

7 JUDGE ARNOLD: Okay. I think I
8 understand. Another question for Fasken. On page 13
9 of your Motion to File Amended Contention, you state:
10 "Contrary to statements in Holtec's application
11 documents and the most recent Holtec DEIS and
12 previously highlighted by Petitioners, Holtec does not
13 own the mineral rights below the site."

14 Now can you tell me where in the DEIS it
15 is stated that Holtec does own the mineral rights
16 below the site?

17 MR. KANNER: I think what I had said
18 earlier was that Holtec represented they controlled
19 the mineral rights in their ER, which was a false
20 statement in the DEIS. I don't think staff accepted
21 that.

22 JUDGE ARNOLD: Well I'm not interested in
23 control. I'm wondering why you say that the Holtec
24 DEIS says that they own the mineral rights below the
25 site because I could not find that in the DEIS.

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1 MR. KANNER: I'm just taking a look at the
2 DEIS for a second, Your Honor.

3 JUDGE ARNOLD: Okay.

4 MR. KANNER: All right. Yes. First, the
5 footnote goes to the land -- footnote 45 goes to the
6 land and refers to the land commissioner letter. What
7 I was intending to say in that sentence was they had
8 made this false representation in the ER. And we
9 believe it's false, and that nobody subsequently has
10 agreed with them on their position relative to the
11 control of all the mineral rights.

12 Maybe I could have said it better for Your
13 Honor. But I was not suggesting that there was an
14 affirmative statement in the DEIS, but rather you
15 couldn't go to it to corroborate what was said in the
16 ER, which frankly I think that they couldn't reach a
17 conclusion on that speaks volumes.

18 JUDGE ARNOLD: Okay. Next question. Mr.
19 Pollock in his declaration provided a count of 527
20 well bores within six miles of the facility. And he,
21 you know, gave numbers for the different types of
22 bores. He concludes the DEIS fails to accurately
23 describe past, present and ongoing oil and gas
24 production.

25 Well I'm looking at Figure 3.2-7 and

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1 that's on DEIS page 3-6. And let's see. Current and
2 past wells are in that figure. And it shows an awful
3 lot of wells. It shows the oil, gas, saltwater and
4 injection wells, both active and plugged in the area
5 around the Holtec site.

6 Is it your contention that this map is
7 incorrect, that it contains wrong information or is
8 missing some information?

9 MR. KANNER: You're on 3-6 of the DEIS?

10 JUDGE ARNOLD: Yes.

11 MR. KANNER: Okay. What we're saying is
12 that it is not comprehensive. So it is missing
13 information. I don't think we spoke to -- I don't
14 think the affidavit specifically says if they were
15 wrong except impliedly to say they were incomplete.

16 JUDGE ARNOLD: Okay. Do you have an
17 instance of a missing well on this figure?

18 MR. KANNER: Do you want me to tell you
19 whether the wells that were identified by Mr. Pollock
20 -- what?

21 JUDGE ARNOLD: I'm wondering if you have
22 a factual evidence that there's something missing here
23 rather than just a belief.

24 MR. KANNER: Give me one second. I just
25 want to take a look at that. Yes. Could I have the

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1 question again please?

2 JUDGE ARNOLD: I would like to know if you
3 have factual support in the form of an example of a
4 well missing from that figure?

5 MR. KANNER: I would have to ask my
6 technical expert that exact question. I believe that
7 -- we believe that Fasken believes this is a more
8 comprehensive list than appears there. But I was told
9 I couldn't really ask him that question or ask him to
10 speak to that question earlier.

11 JUDGE ARNOLD: Okay. That satisfies me.
12 Now I have some questions for Holtec having to do with
13 DEIS Figure 2.2-2 on page 2-4. Who is going to answer
14 that? Would that be Mr. Silberg?

15 MR. SILBERG: It depends what the question
16 is, sir.

17 JUDGE ARNOLD: Do you have the figure?

18 MR. SILBERG: Yes, we do.

19 JUDGE ARNOLD: I just want to make sure
20 that I understand it correctly. The little black
21 rectangles, are those the actual concrete pads that --

22 MR. SILBERG: Yes, sir.

23 JUDGE ARNOLD: Okay. Is that the final
24 configuration or just this license?

25 MR. SILBERG: I think that includes the

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1 entire build-out.

2 JUDGE ARNOLD: Okay. And there's a
3 rectangle that surrounds the pads. It's close to the
4 pads. Is that like a fence there?

5 MR. SILBERG: I believe that's correct.

6 JUDGE ARNOLD: And that looks to be about
7 300 feet from the pads?

8 MR. SILBERG: 400 feet.

9 JUDGE ARNOLD: 400, okay. And then the
10 site boundary looks like it's another 600 feet out?

11 MR. SILBERG: It depends which direction.

12 JUDGE ARNOLD: Right, right. But the
13 closest would be?

14 MR. SILBERG: Let me see if I can get that
15 answer.

16 JUDGE ARNOLD: I don't need an exact
17 answer.

18 MR. SILBERG: Okay.

19 JUDGE ARNOLD: But it's 500 to 600 feet.
20 So when Mr. Pollock says the drilling could occur as
21 close to 300 feet from the property boundary, that
22 would then put it on the order of 1,200 to 1,300 feet
23 from any stored fuel?

24 MR. SILBERG: I think that would be about
25 right.

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1 JUDGE ARNOLD: Okay. I just wanted to
2 make sure that I understood the picture. That ends my
3 questions.

4 JUDGE RYERSON: Thank you, Judge Arnold.
5 I really don't have any more questions at this point.
6 I think at the end we should discuss again what if,
7 any, supplemental filings are necessary.

8 I think it was really you, Judge -- first
9 of all, Judge Trikouros, are you going to have some
10 further questions now or not?

11 JUDGE TRIKOUROS: No, I don't.

12 JUDGE RYERSON: Judge Trikouros, are you
13 on mute?

14 JUDGE TRIKOUROS: I am not on mute. Can
15 you hear me?

16 JUDGE RYERSON: I can hear you now.

17 JUDGE TRIKOUROS: Okay.

18 JUDGE RYERSON: Do you expect to have
19 further questions at this point?

20 JUDGE TRIKOUROS: No. I don't think so.

21 JUDGE RYERSON: Okay. Well then the
22 question I have for -- really I think it's primarily
23 for you, although Judge Arnold, if you think something
24 further is required by all means weigh in. Do any of
25 the questions that you raised, Judge Trikouros,

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1 require further filings by either party?

2 JUDGE TRIKOUROS: Well the fact that the
3 ER is starting to be updated adds a bit of confusion
4 to the process. And I'm not sure what we can do about
5 that. Would it be possible for the Board to think
6 about that and issue an Order regarding any
7 supplemental information?

8 JUDGE RYERSON: We can do that. We can
9 decide whether we need any further information. And
10 if so, we can issue an Order and obviously invite both
11 sides to comment.

12 So let's leave it at that. Nobody is
13 under an obligation to do anything further at this
14 point until we decide if we do that we want to direct
15 a few further questions to folks in an Order.

16 Okay. And Judge Arnold, I take it you are
17 satisfied at this point?

18 JUDGE ARNOLD: Yes, I am.

19 JUDGE RYERSON: Okay. Well I guess I
20 should take a moment just -- I did say at an
21 appropriate point if anyone felt they needed to
22 respond to a question they weren't asked. Does anyone
23 feel that need right now or is everyone pretty much
24 done?

25 MR. SILBERG: For Holtec, I think we're

1 pretty much done, Your Honor.

2 JUDGE RYERSON: Okay. And I think,
3 Fasken, we're the ones who asked you the most
4 questions so I assume that you're done.

5 MR. KANNER: Yes. I'm ready to go for
6 another hour, Your Honor. What's the hold-up? Thank
7 you for your -- listen, I want to thank the entire
8 panel. You guys were very thorough and asked a lot of
9 questions, you know, and we appreciate your attention
10 to this vitally important matter.

11 JUDGE RYERSON: Okay. Thank you. And
12 again, the NRC staff, do you have anything further?

13 MS. SUSKO: Nothing further. Thank you.

14 JUDGE RYERSON: Okay. Thank you. All
15 right. So I guess that concludes what we hoped to
16 accomplish today. And our job now is to take the
17 information we've learned today as well as, of course,
18 the pleadings, and reach a decision on Fasken's
19 motions.

20 The Commission has some milestones for us
21 for things like that. And we're expected to issue a
22 decision within 45 days, which I think takes us to
23 September 21. If we're not going to meet that, we
24 would have to, or should issue, an Order saying when
25 we will issue a decision. I expect that we would be

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1 able to issue a decision by September 21.

2 I think on behalf of the Board, I'd like
3 to thank all counsel for their presentations today.
4 They've been very helpful, and they were all done very
5 professionally.

6 Judge Trikouros, anything else before we
7 adjourn?

8 JUDGE TRIKOUROS: No. Thank you.

9 JUDGE RYERSON: Judge Arnold?

10 JUDGE ARNOLD: No. I have nothing
11 further.

12 JUDGE RYERSON: Okay. Well we stand
13 adjourned. Everyone stay safe.

14 (Whereupon, the above-entitled matter went
15 off the record at 3:08 p.m.)

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