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Docket Number: 40-8968-LR

ASLBP Number: 26-995-01-MLR-BD01

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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

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4 ATOMIC SAFETY AND LICENSING BOARD PANEL

5 + + + + +

6 HEARING

7 -----x

8 In the Matter of: :

9 NUFUELS, INC. : Docket No.

10 : 40-8968-LR

11 :

12 (Crownpoint Uranium : ASLBP No.

13 Project In-Situ Recovery : 26-995-01-MLR-BD01

14 Facility) :

15 -----x

16
17 Monday, October 5, 2026

18 Videoconference

19
20 BEFORE:

21 MICHAEL M. GIBSON, Chair

22 DR. DAVID A. SMITH, Administrative Judge

23 DR. SUE H. ABREU, Administrative Judge

24

25

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

(10:00 a.m.)

CHAIR GIBSON: We are on the record in the matter of NuFuels, Inc.'s application to renew its license for the Crownpoint Uranium In-Situ Recovery Facility in McKinley County, New Mexico; Docket No. 40-8968-LR

I'm Judge Michael Gibson. With me on this Atomic Safety and Licensing Board are judges Dr. David Smith and Dr. Sue Abreu. Also assisting us today are our administrative assistant Twana Ellis, our IT support Andy Welkie, as well as our law clerks Georgia Rock and Kasey Andrews.

I would now like to have the appearances of counsel, beginning first with the Petitioner, the State of New Mexico.

MR. PARSONS: Thank you, Your Honor. Jeff Parsons on behalf of the State of New Mexico.

MS. JAMISON: Good morning, Your Honor. Esther Jamison on behalf of the State of New Mexico.

CHAIR GIBSON: With the Applicant, NuFuels?

MS. LEIDICH: This is Anne Leidich, from Pillsbury Winthrop Shaw Pittman, on behalf of NuFuels.

MR. WALSH: And also Timothy Walsh, with

1 Pillsbury Winthrop Saw Pittman, on behalf of NuFuels.

2 CHAIR GIBSON: And with the NRC Staff?

3 MS. GAMIN: This is Kayla Gamin
4 representing the NRC Staff.

5 MR. QUINN: Good morning. Seamus Quinn,
6 also representing NRC Staff.

7 CHAIR GIBSON: Thank you. The purpose of
8 today's oral argument is to evaluate whether the State
9 of New Mexico has standing, and whether its
10 contentions are admissible as a result of a September
11 14 joint motion between the NRC Staff and the State of
12 New Mexico.

13 The State of New Mexico's original 13
14 contentions have now been narrowed to 12. As to
15 standing, the Applicant does not dispute that the
16 State of New Mexico has standing.

17 Is that correct, Ms. Leidich?

18 MS. LEIDICH: That is correct.

19 CHAIR GIBSON: Thank you.

20 And NRC Staff, do you, likewise, not
21 dispute that the State of New Mexico has standing?

22 MS. GAMIN: That is correct, Judge Gibson.

23 CHAIR GIBSON: Thank you. Very well.

24 Before we turn to the individual
25 contentions that the State of New Mexico has

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1 proffered, it is important to establish how we got
2 here today, because this dispute concerning plans to
3 undertake in-situ leach mining of uranium in an
4 aquifer in McKinley County, New Mexico, has a long
5 history and goes back nearly 40 years.

6 In 1988, Hydro Resources, Inc., applied
7 for a license to conduct uranium mining in McKinley
8 County, New Mexico. The NRC Staff completed its final
9 environmental impact statement for the project in
10 1997. And it issued an operating license to Hydro
11 Resources in 1998.

12 After which several parties challenged the
13 NRC's issuance of this license.

14 And, counsel for the Applicant, your
15 client, NuFuels, is the successor to Hydro Resources;
16 is that correct?

17 MS. LEIDICH: That's correct.

18 CHAIR GIBSON: Very well.

19 And do I understand correctly that neither
20 Hydro Resources nor NuFuels has actually conducted any
21 uranium mining at any of these four sites that are
22 covered by the 1998 -- 1988 license application?

23 MS. LEIDICH: That is correct.

24 CHAIR GIBSON: Very well.

25 But in January 2025, Ms. Leidich, your

1 client did apply renewal of its license to conduct in-
2 situ leach mining on these four sites that are covered
3 in the 1998 license application. Is that correct?

4 MS. LEIDICH: Yes.

5 CHAIR GIBSON: Very well.

6 Now, in your Answer, you list several
7 Board and Commission decisions that you assert should
8 impact our evaluation of the admissibility of the
9 State of New Mexico's contentions, either under law of
10 the case or some other theory of issue preclusion.

11 And one of the cases that you claim
12 supports your issue preclusion argument is last year's
13 Commission decision in Powertech, CLI-25-05, which
14 involved another planned in-situ leach mining
15 operation where a license had been issued but no
16 mining had commenced.

17 Is that correct?

18 MS. LEIDICH: Yes.

19 CHAIR GIBSON: And the essence of your
20 reliance on this Powertech decision is to assert that
21 the State of New Mexico must offer new information or
22 changed circumstances that have come to light since
23 Hydro Resources' initial license application 1988, and
24 the adjudication of that initial license application
25 that ended in 2006.

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1 Is that right?

2 MS. LEIDICH: Yes, that's right.

3 CHAIR GIBSON: Thank you.

4 And unless the State of New Mexico can
5 show new information or changed circumstances, any
6 claim to the certs now are outside of the permissible
7 scope of this proceeding.

8 Is that a fair summary of your position in
9 this regard?

10 MS. LEIDICH: Yes.

11 CHAIR GIBSON: Thank you, Ms. Leidich.

12 Let's begin with Contention EC-1.

13 Now, Ms. Leidich, in your answer to the
14 petition you cite to License Condition 10.21A.
15 License Condition 10.21A refers both to the secondary
16 goal for groundwater quality, and also to the
17 Environmental Protection Agency's Secondary Drinking
18 Water Regulations.

19 So, before we get into the substance of
20 Contention EC-1 I want to be sure that we keep our
21 nomenclature straight.

22 The word "secondary" comes into play
23 repeatedly in both the pleadings and the underlying
24 documents that they reference. One use of the word
25 "secondary" is to the Secondary Drinking Water Act,

1 the standards that EPA has promulgated at 40 CFR
2 143.3, which you reference on page 7 of your
3 environmental report.

4 Is that correct?

5 MS. LEIDICH: Our understanding of what
6 the -- what we thought the State was referring to as
7 the Secondary Standards was their so-called fallback
8 position, which is the remediation standard if
9 baseline is not met, which would be the EPA standards
10 or, in one case, New Mexico's Drinking Water Standard.

11 CHAIR GIBSON: Yeah, it does get, it does
12 get a little complicated.

13 But, again, I'm just trying to get our
14 nomenclature straight, Ms. Leidich. I'm not asking
15 for your interpretation of the State's contention.
16 Because we promise we'll get into that in a second.

17 What I'm trying to do is make sure we're
18 using the same words for the same terms. And because
19 if we use "secondary" twice, it gets hopelessly
20 confused.

21 If we use "primary," we can also get
22 hopelessly confused.

23 So, I'm just trying to get this straight,
24 this part straight. Okay?

25 Now, you reference 40 CFR 143.3 on page 7

1 of your environmental report. And that's one place
2 where we see it.

3 The second place where we see the word
4 "secondary" is in the fallback goal of aquifer
5 restoration. And this is addressed in License
6 Condition 10.21A insofar as the primary restoration
7 goal can't be met.

8 And we'll get to "primary" momentarily.

9 So, what I'm trying to do is to make sure
10 that we can keep our record from becoming hopelessly
11 muddled. And I suggest that we use the word
12 "fallback" when we're referring to this secondary
13 restoration goal. And that we try to limit our use of
14 the word "secondary" to these 40 CFR 143.3 secondary
15 drinking water standards.

16 Is everybody okay with that?

17 MS. LEIDICH: Yes. That's fine from the
18 Applicant's perspective.

19 CHAIR GIBSON: Okay. Staff?

20 MS. GAMIN: Yes, Your Honor.

21 CHAIR GIBSON: State of New Mexico?

22 MR. PARSONS: Yes, Your Honor. Thank you.

23 CHAIR GIBSON: Okay, great. Okay, thank
24 you.

25 So, with that clarification on

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1 "secondary," let's turn to the word "primary."

2 And, again, our use of the word "primary"
3 in this dispute concerns -- one use, I should say --
4 concerns the Primary Drinking Water Standards that EPA
5 has promulgated under the Safe Drinking Water Act.
6 And these are set forth at 40 CFR 143.62, and which,
7 Ms. Leidich, you reference on page 7 of your
8 environmental report.

9 Correct?

10 MS. LEIDICH: Sorry. I actually lost
11 track of the question. Can you repeat that?

12 CHAIR GIBSON: That's okay, Ms. Leidich.

13 MS. LEIDICH: Specifically "primary."

14 CHAIR GIBSON: Okay. Okay very well.

15 There is another use of the word
16 "primary," and that is in License Condition 10.21A
17 where the Primary Restoration Goal is to -- and I'm
18 quoting here from License Condition 10.21A -- "return
19 all parameters to average pre-lixiviant injection
20 levels."

21 Now, if we could put this in another way
22 just to make sure we can understand what that means,
23 Ms. Leidich, this Primary Restoration Goal in License
24 Condition 10.21A is referring to the level of
25 contaminants that are measured in the subject aquifer

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1 before mining operations take place.

2 Is that correct?

3 MS. LEIDICH: Yes, that's right.

4 CHAIR GIBSON: Okay, very well. Thank
5 you.

6 Now, generally, this Primary Restoration
7 Goal is used interchangeably with the word
8 "baseline.'" So, I would ask if we could please try
9 to confine our use of the word "primary'" to EPA's
10 Primary Drinking Water Standards. And that we use the
11 word "baseline'" when we're discussing the Primary
12 Restoration Goal for the subject aquifer.

13 Is that acceptable to everyone?

14 MS. LEIDICH: That's acceptable to
15 NuFuels.

16 CHAIR GIBSON: Staff?

17 MS. GAMIN: Yes, Your Honor. That's
18 acceptable.

19 CHAIR GIBSON: State of New Mexico?

20 MR. PARSONS: Yes, Your Honor. Thank you.

21 CHAIR GIBSON: Thank you. Okay. However,
22 before we totally abandon the use of the word
23 "primary'" with respect to Restoration Goals, I do
24 have to ask a couple more questions about the
25 Applicant's analysis of this goal on page 225 of the

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1 environmental report.

2 Now, Ms. Leidich, you seem to be saying
3 there that the Primary Restoration Goal for
4 groundwater quality is achieving the background or
5 MCLs, whichever is greater, in Criterion 5.B.5.

6 Is that right?

7 MS. LEIDICH: Yes, I think so.

8 CHAIR GIBSON: Okay.

9 MS. LEIDICH: Yes.

10 CHAIR GIBSON: Now, I take it that
11 "background" and "baseline" are essentially the same
12 thing. Is that right?

13 MS. LEIDICH: I think so in this case.

14 CHAIR GIBSON: Okay. All right.

15 Okay. So, let me ask you if you could
16 please reconcile this Primary -- I hate to use that
17 word but now we have to -- Restoration Goal that
18 you've set out on page 225 of your environmental
19 report with the language in License Condition 10.21
20 that refers to "returning all parameters to average
21 pre-lixiviant injection levels."

22 MS. LEIDICH: My understanding is that
23 that is the baseline. That returning it to the pre-
24 lixiviant level is the baseline. Because we set the
25 baseline number of the site right before the lixiviant

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1 is inserted into the land, essentially.

2 So, I think that those are the same thing.

3 CHAIR GIBSON: So, you're essentially
4 saying they're the same thing; right?

5 MS. LEIDICH: That is my understanding, as
6 an attorney.

7 CHAIR GIBSON: Okay. Now, as for the
8 fallback goal, License Condition 10.21 refers to the
9 EPA's regulations, both primary and secondary.

10 But the environmental report on page 225
11 states that the fallback goal is -- and I'm quoting
12 here -- "returning water quality to the maximum
13 contaminant concentration limits as specified in
14 Section 20.6.2.3103 NMAC, or 40 CFR Part Section
15 141.62 or 143.3.'"

16 All right? That's what it says. Why does
17 the fallback goal described on page 225 of your
18 environmental report use the disjunctive "or'" instead
19 of the conjunctive "and'" with respect to those three
20 standards?

21 MS. LEIDICH: My understanding is that
22 there is a difference between the three standards.
23 So, for example, I think we're meeting the New Mexico
24 standard for uranium but some of the other standards
25 may not match. The EPA standard I think is higher for

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1 uranium.

2 So, it was part of the original licensing
3 proceeding that we would meet the New Mexico standard
4 for uranium but not the EPA standard. So, they may
5 not all be the same standard.

6 CHAIR GIBSON: And insofar as they're
7 different, are you suggesting that you would be
8 meeting the more restrictive standard in each one?

9 MS. LEIDICH: I know particularly for
10 uranium that it happened to be part of the prior
11 licensing proceeding. So, we are meeting that for New
12 Mexico in particular.

13 As to the remaining standards, I don't
14 know on a constituent by constituent analysis what
15 those exact numbers are for each one. I just happen
16 to know for uranium it's going to match with those
17 standards.

18 CHAIR GIBSON: Okay. Because neither 40
19 CFR 141.62 nor 143.3 do mention uranium; right?

20 MS. LEIDICH: We're using the New Mexico
21 standard for uranium.

22 CHAIR GIBSON: I'm sorry. Neither 143.62
23 nor 143.3 of 40 CFR refer to uranium; correct?

24 MS. LEIDICH: I would have to look to
25 confirm.

1 CHAIR GIBSON: Okay.

2 MS. GAMIN: I, I don't know that off the
3 top of my head.

4 CHAIR GIBSON: Okay, very well. Well,
5 let's just, we can put a mark in that, come back to it
6 later. But I will tell you that I'm pretty confident
7 that neither one has it. Okay?

8 Now, the maximum contaminant level for
9 uranium is 0.03 milligrams per liter under this New
10 Mexico standard at 20.6.2.3103; correct?

11 MS. LEIDICH: Yes. That sounds like the
12 right number.

13 CHAIR GIBSON: And this tracks with EPA's
14 Primary Drinking Water Standard for uranium of 0.03
15 milligrams per liter that is set forth in 40 CFR
16 1.66(e). Is that correct?

17 MS. LEIDICH: I would have to look it up.
18 But I can take your word for it.

19 CHAIR GIBSON: Okay. I don't want you to
20 ever take my word for it, Ms. Leidich, but I believe
21 it is correct.

22 I'm curious, when you listed 141.62 or
23 143.3 in your environmental report you did not also
24 list 40 CFR 144.66(e), the one that addresses
25 radionuclides, one of which is uranium.

1 MS. LEIDICH: We will have to get back to
2 our client to ask that question and why that
3 distinction is there. I suspect it's because the
4 radionuclides were set separately. And many of them
5 are expected to meet baseline at the lower constituent
6 level, and because we used uranium specifically from
7 the New Mexico standards. But we can get to our
8 client and ask them that question.

9 CHAIR GIBSON: That would be great. Thank
10 you.

11 Now, EPA's Safe Drinking Water Act
12 regulations do not prescribe any secondary standard
13 for uranium. Is that correct?

14 MS. LEIDICH: Again, I will have to take
15 your word for it.

16 CHAIR GIBSON: Okay. Well, you can take
17 my word for that. I, at least, was unable to find it,
18 Ms. Leidich. But if it's there, please let us know.
19 Okay?

20 So can you explain how license condition
21 10.21A aligns with this passage that appears on page
22 225 of the environmental report about returning water
23 quality -- I'm sorry, about achieving the background
24 or MCLs, whichever is greater, in Criterion 5(B)(5)?

25 MS. LEIDICH: My understanding of the

1 license is that the condition currently requires the
2 NuFuels to set it back to either baseline, which is
3 measured on the day before -- or not the day before,
4 but before they start the injection of lixiviant. And
5 if there is no baseline standard, to go back to the
6 standards that are set forth here, the Drinking Water
7 Standards, essentially.

8 I know that there was a constituent by
9 constituent analysis below in the prior proceeding.
10 I don't have that information available with me. We
11 can get that for you, if that's what you're interested
12 in.

13 And, of course, I know that uranium was
14 set forth in the prior proceeding. I think that was
15 part of Judge Hawkens' decision below in 2005.

16 If you want a more detailed analysis than
17 that, we're happy to provide it. But we are not aware
18 that that would be part of the argument here and are
19 not prepared to provide that information right now.

20 CHAIR GIBSON: Okay. Okay. All right,
21 well, we'll get to Judge Hawkens' decision in 2005 in
22 a bit.

23 I'd like next to turn to page 48 of your
24 environmental report. It states, the -- and I hate to
25 use this word "primary," because we're talking

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1 ultimately about baseline but the language in 10.21A
2 is: "The primary goal for aquifer restoration is to
3 restore the water to the groundwater protection
4 standards presented in 10 CFR Part 40, Appendix A,
5 Criterion B5, on a constituent by constituent bases
6 using BPT.''

7 Now, neither license condition 10.21A, and
8 nor page 225 of the environmental report -- I'm sorry.
9 License Condition 10.21A does not mention this.

10 But on both page 225 of the environmental
11 report and 10 CFR 40, Part 40, Appendix A, mentions
12 Appendix A, Criterion 5B.

13 So, I want to see if we can match up these
14 two things so we're getting apples to apples on the
15 restoration, the fallback restoration standard -- I'm
16 sorry, the Primary Restoration Goal, which is
17 baseline.

18 Now, you describe that on page 48 of the
19 ER as the same thing as the baseline standard that we
20 discussed in License Condition 10.21A on page 225 of
21 the environmental report. But I want to know what is
22 BPT? Is that best practical technology?

23 MS. LEIDICH: That is my understanding.

24 CHAIR GIBSON: Okay. But best practicable
25 technology is mentioned in neither License Condition

1 10.21 nor page 225 of the ER, is it?

2 MS. LEIDICH: I think that's correct.

3 CHAIR GIBSON: Okay.

4 MS. LEIDICH: It's still a condition in
5 the license. I mean, we still have to meet it. This
6 is just saying how we intend to meet it, not that the
7 condition doesn't exist or that we are not going to
8 meet the condition in the license.

9 CHAIR GIBSON: Best practicable technology
10 is not mentioned in 10 CFR Part 40, Appendix A,
11 Criterion 5B, is it?

12 MS. LEIDICH: Probably not. I would not
13 know. I don't have it in front of me. I suspect it's
14 not. But, I mean, Criterion 5 wasn't originally
15 applied to uranium licensing, or uranium in-situ
16 recovery is my understanding. This was all applied to
17 this license later on because originally that entire
18 section of the CFR was not written for mining or for,
19 for this in-situ mining, it was applied later on. It
20 was added to the license conditions. It was put into
21 our licensing documentation.

22 I think all we're saying here is that we
23 intend to use best practicable technology to reach the
24 license condition, but it is still a license condition
25 to find compliant.

1 CHAIR GIBSON: Okay. Well, whatever the
2 etymology of this term "best practicable technology"
3 is, do I understand that what you're suggesting here
4 is that one you apply best practicable technology to
5 your restoration of this aquifer, if you don't reach
6 baseline you then go to the fallback restoration goal?
7 Is that correct?

8 MS. LEIDICH: It doesn't entirely match
9 with that, so we go with whichever is greater. So,
10 it's not necessarily that baseline is then your
11 fallback. The fallback may actually be lower than
12 baseline, in which baseline is the criteria that is
13 applied.

14 If you can't reach baseline and you can't
15 reach whichever criteria is applied, then you have to
16 seek a license amendment to go for an alternative
17 concentration.

18 CHAIR GIBSON: Okay. You have to get a
19 license condition for what? Or an amendment?

20 I didn't understand what the last thing
21 was you just said.

22 MS. LEIDICH: If you deviate from the
23 licensing condition at some future point in time to
24 seek an alternative concentration limit, that is a
25 separate licensing action, the license amendment.

1 CHAIR GIBSON: Okay. And this would be --

2 MS. LEIDICH: The limit is currently --

3 Sorry.

4 CHAIR GIBSON: No, that's okay, Ms.

5 Leidich. I didn't mean to cut you off, Ms. Leidich.

6 MS. LEIDICH: No, it's just the limit is
7 currently set to the limits in Licensing Condition
8 10.21. It's the greater of. So, it's whether or not
9 it's baseline or it's the specific standards from the
10 New Mexico code or the standards from the Safe Water
11 -- or from the EPA standards. That's on a constituent
12 by constituent basis.

13 If they have to deviate from that at some
14 point in the future, that will be a separate NRC
15 licensing action.

16 CHAIR GIBSON: Okay. So, okay, so put
17 this a different way.

18 If restoration activities -- and I think
19 this is what it says in your, I think this is what it
20 says on page 48 of your environmental report -- if the
21 restoration activities are unable to achieve
22 background or MCL, whichever is greater, in Criterion
23 5(B)(5), NuFuels will return water quality to the
24 maximum concentration limits as specified in Section
25 220.6.2.3.103 NMAC, which is the 30 milligrams per

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1 liter of uranium that we talked about before.

2 Or 40 CFR Section 141.62, which are the
3 Secondary Drinking Water Standards. Or 143.3, which
4 as the Secondary Drinking Water Standards. But only
5 after demonstrating that there are no specific
6 hazards, and the restored constituent concentrations
7 are ALARA.

8 Now, I was unable to find a reference to
9 MCL in 10 CFR Part 40, Appendix A, Criteria 5(B). But
10 in the immediately following criterion of Appendix A,
11 which is appendix -- which is Criterion 5(C), there is
12 a reference to maximum values for groundwater
13 protection.

14 Is that what you intended to mean when you
15 made this MCL reference on page 48 of your
16 environmental report?

17 MS. LEIDICH: I suspect that's a reference
18 to maximum contamination limits. But I am going to
19 have to double check that one.

20 CHAIR GIBSON: Okay, thank you.

21 And uranium is not included in the maximum
22 values for groundwater protection in Criterion 5(C).
23 Again, you may not know that off the top of your head.
24 You're welcome to look for it. But I promise you I
25 looked for it, and I could not find it.

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1 So, the fallback standard of page 48 of
2 the environmental report is the maximum concentration
3 limits as specified in these three things that we've
4 already mentioned, but only after demonstrating that
5 there is no specific hazards, and the restored
6 constituent concentrations are ALARA.

7 Now, this sounds similar to the fallback
8 standard in both License Condition 10.21A and on page
9 225 of your environmental report. But on page 48
10 you've added ALARA.

11 Now, I take it ALARA standards for "as low
12 as reasonably achievable.'" Is that correct?

13 MS. LEIDICH: That is correct.

14 CHAIR GIBSON: Okay. And this "as low as
15 reasonably achievable'" approach is set forth in 10
16 CFR Part 40, Appendix A, Criterion 5(B)(6). Is that
17 correct?

18 MS. LEIDICH: I'm sure it is.

19 CHAIR GIBSON: Okay. Once you've achieved
20 a restoration that is as low as reasonably achievable,
21 insofar as there are constituents in the aquifer that
22 are higher than baseline, then you can request the
23 Nuclear Regulatory Commission to approve an
24 alternative standard that you mentioned a few minutes
25 ago. Is that correct?

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1 MS. LEIDICH: The alternative standard and
2 alternative concentration limit would be different
3 than the licensing condition.

4 So, what this has here is consistent with
5 the licensing condition, which is that they will still
6 remediate to either the baseline or the fallback.

7 And, by the way, fallback I believe only
8 comes into play if the fallback or the Drinking Water
9 Standard is actually higher than baseline. I think
10 where baseline is higher than technically either the
11 baseline only.

12 So, although, I'm sure my client will
13 correct me if I'm wrong.

14 So, the secondary occurs if your Drinking
15 Water Standard is above baseline. Otherwise you go to
16 baseline. But this is you go to Drinking Water
17 Standard if you also demonstrate that it's ALARA. The
18 separate licensing action that I was referring to is
19 if you need to deviate from the licensing condition
20 entirely and seek something completely different. As
21 you're aware, when you deviate from the licensing
22 condition it's a licensing amendment request, and
23 that's a separate NRC licensing action.

24 CHAIR GIBSON: So, we're talking, then,
25 about two different things here?

1 MS. LEIDICH: We might be.

2 CHAIR GIBSON: Okay. I'm going to ask you
3 to explain to me what the difference is between these
4 two things, then, because I, I'm having a little bit
5 of trouble tracking what you're saying, Ms. Leidich.

6 One involves the application of "as low as
7 reasonably achievable" standards in 5(B)(6). And one
8 of them has to do with amending the license.

9 Can you explain to me how those are the
10 same and how they're different? Because I'm having a
11 little trouble tracking with what you're saying.

12 MS. LEIDICH: So, the baseline standard in
13 the license condition that we have now and the
14 alternative standard that's set forth there, I think
15 we called them the fallback, the baseline and the fall
16 back. Those are in the license.

17 If the licensee wants to deviate at any
18 point in time in the future from the baseline and the
19 fallback, that is when they need to seek a separate
20 licensing action, which is a license amendment request
21 that goes through the full NRC process for a license
22 amendment.

23 Right now we are held to the baseline and
24 the fallback. And but the fallback doesn't always
25 trigger because sometimes baseline is higher than the

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1 fallback is, and you do the maximum between the two of
2 them.

3 CHAIR GIBSON: Yes.

4 MS. LEIDICH: Sometimes baseline is lower
5 than the fallback.

6 CHAIR GIBSON: Yeah. Yeah, that's one of
7 the anomalies in this. And insofar as you can't meet
8 baseline in your restoration of aquifer, you're then
9 directed to try to meet the fallback standard of EPA's
10 or the State of New Mexico's Primary Drinking Water
11 Standards. And that seems to me it's probably next to
12 impossible, at least for uranium, because the Primary
13 Drinking Water Standard is only 0.03 milligrams per
14 liter. And, presumably, baseline for an aquifer that
15 you're about to mine is likely to be higher than 0.03.
16 Correct?

17 MS. LEIDICH: That's right. And for
18 uranium, in all likelihood the baseline will control.

19 So, when we talk about the fallback
20 standard, realistically that triggers when your
21 baseline is below the Drinking Water Standards, and
22 you're having trouble getting back to a number that is
23 below those standards, which for some of the
24 constituents that is the case. Uranium's not the only
25 constituent we're dealing with here. It's, like, a

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1 list of 20 different constituents.

2 Some of them do have Drinking Water
3 Standards that are going to be higher than what we
4 find in the baseline.

5 CHAIR GIBSON: Right. Okay, very well.
6 Thank you. And, in fact, you mentioned Criterion
7 5(B)(6) in your answer, on page 18, I believe. Is it
8 significant that your environmental report does not
9 address the environmental impacts of restoration that
10 leaves more contaminants in the aquifer than baseline?
11 Which --

12 MS. LEIDICH: We do not --

13 CHAIR GIBSON: Which, presumably, would be
14 what you would get if you applied Criterion 5(B)(6).

15 MS. LEIDICH: I think this goes to the
16 part of New Mexico's contention where New Mexico is
17 essentially asserting that we failed to assess the
18 impacts of remediation to the fallback, what we are
19 calling a fallback position.

20 And it is not clear to me what differing
21 impacts should have been addressed in the
22 environmental report or what the State is alleging the
23 different impacts were. And they have the burden to
24 raise an admissible contention, so it's their burden
25 to assert those impacts.

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1 As we've gone over now in some length, the
2 fallback standards are Drinking Water Standards, so
3 it's not clear to me what harm would come from meeting
4 a fallback standard on remediation, or from meeting
5 the Drinking Water Standards, rather.

6 CHAIR GIBSON: Okay. It just, it does
7 seem to me, though, that the Criterion 5(B)(6)
8 alternative that you just discussed is different than
9 either the baseline or the fallback goals that are in
10 10.21A or on page 225 of your environmental report;
11 aren't they?

12 MS. LEIDICH: Our point in bringing up
13 Criterion 5(B)(6) was to indicate that the NRC does
14 not hold licensees to only baseline standards. When
15 we read the contention as it was stated, we believed
16 that the State was asserting that the NuFuels had to
17 meet only baseline, and that only baseline was
18 acceptable.

19 We were merely pointing out that the NRC
20 does, in fact, allow alternatives to baseline. And
21 that's set forth in the rules. And there is no
22 specific NRC requirement that would require mediation
23 only to baseline.

24 And, of course, this is already in our
25 existing license pre-renewal, so this was all resolved

1 in the prior licensing proceeding.

2 CHAIR GIBSON: Okay. Before I get into,
3 we get into some of the cases you cite, I want to see
4 if Judge Abreu or Judge Smith has any questions about
5 the standards and Criterion 5(B)(6), the application.

6 JUDGE ABREU: None from me.

7 JUDGE SMITH: I do.

8 CHAIR GIBSON: Okay. Judge Smith has some
9 questions.

10 JUDGE SMITH: The way I'll pose my
11 questions is I'll direct it to one of the
12 participants. But after I do that and you address it,
13 then the other participants are free to answer it.

14 So, first, I'd like to ask NuFuels. I
15 think you, Ms. Leidich, you've already addressed this
16 but I just want to make sure I'm clear. And in so
17 much as you can give a close approximation in this,
18 that would be appreciated.

19 But, so, at what point in the process do
20 you expect to determine your baseline values that
21 you're going to use in your restoration goals? You
22 mentioned earlier, you know, it will be just before,
23 a day before, but not actually maybe not a day before
24 but sometime prior. What, what's the plan?

25 MS. LEIDICH: I don't know the exact

1 number of days before. But it would be shortly before
2 they start the injection of lixiviant.

3 I don't know if there's a specific time
4 set. But they would have to be, essentially, the
5 client would have to be mobilized and contemplating
6 getting ready to start the actual mining process
7 before they would go looking for the baselines. I can
8 see if there's a specific number for you, though.

9 JUDGE SMITH: Okay. So, is there not an
10 industry standard for that?

11 MS. LEIDICH: If there is, I'm not aware
12 of it. But it might be within -- I want to say, off
13 the top of my head, that it's within 90 days. But I
14 don't think so. I think it's just generally months
15 before.

16 JUDGE SMITH: Okay. And then I'll ask if
17 any of the other participants if you have any
18 clarifying information on that?

19 MS. GAMIN: Not from the Staff, Your
20 Honor.

21 MR. PARSONS: Also, no, Your Honor.

22 JUDGE SMITH: Okay, thank you. I think
23 I'll hold the rest of my questions.

24 CHAIR GIBSON: Okay. All right. I think,
25 Ms. Leidich, you were having to answer almost all my

1 questions. So, let me ask, let me ask the State of
2 New Mexico if they agree with everything that NuFuels
3 said with regard to the standards that we talked
4 about, 5(B)(5), 5(B)(6), baseline, and the, yeah, the
5 application of those standards?

6 MR. PARSONS: Yeah, with respect to how
7 the -- thank you, Your Honor, Jeff Parsons on behalf
8 of the State of New Mexico.

9 With respect to how those standards
10 operate, I think Ms. Leidich has an accurate
11 description between the baseline and the fallback, and
12 then the future potential for what they call ACL,
13 alternate concentration limit.

14 Obviously, with the premise of this
15 contention is with the extent to which we feel it's
16 lacking, a discussion as to how those interplay and
17 the impacts to the aquifer and the users of that
18 aquifer going forward.

19 CHAIR GIBSON: Yeah. And we'll get to
20 that. Just wanted to try and make sure that we're all
21 on the same page of the same hymnal with respect to
22 these standards.

23 Ms. Gamin, how about you?

24 MS. GAMIN: Thank you, Your Honor. Just
25 to clarify, if the Applicant were to put in a license

1 amendment request and I understand this is purely
2 hypothetical -- the NRC Staff would evaluate that in
3 accordance with our process. We could approve an
4 alternate concentration limit, as described in
5 Criterion 5(B)(6) if the Commission makes the findings
6 also described in Criterion 5(B)(6).

7 CHAIR GIBSON: Okay. And with that one
8 caveat, I take it the rest of our discussion about the
9 baseline standards and the restoration standards you
10 would agree with?

11 MS. GAMIN: Yes, Your Honor. And I
12 wouldn't even say that's a caveat, just a
13 clarification or an addition.

14 CHAIR GIBSON: Thank you. Okay. Okay,
15 Ms. Leidich, back to you.

16 And I'd like to turn to the fourth case
17 that you cite in your answer, which is Hydro
18 Resources, LBP-05-17, 62 NRC 77. I believe this is
19 the case you mentioned earlier that Judge Hawkens was
20 the presiding officer for.

21 Is that correct?

22 MS. LEIDICH: Yes, that's correct.

23 CHAIR GIBSON: After reading the case,
24 which is quite lengthy, and examining your answer, it
25 appears to me that there are three pertinent holdings

1 for purposes of this dispute.

2 And the first of those is that LBP-05-71
3 upheld the NRC Staff's issuance of those licenses.

4 Is that correct?

5 MS. LEIDICH: That's correct.

6 CHAIR GIBSON: And the second holding, I
7 think, that you cite that case for is that it
8 establishes that Hydro Resources' plans provided
9 reasonable assurance that the groundwater would be
10 protected and restored, and that Hydro Resources
11 monitoring and financial assurance requirements were
12 adequate.

13 Is that correct?

14 MS. LEIDICH: I think that the financial
15 assurance may have actually shown up in a number of
16 other decisions that may also be relevant. So, I'm
17 not sure that that was finally resolved in Judge
18 Hawkens' decision, which I know it went back up and
19 forth and down between the Commission a couple of
20 times. But I do think that one was after most of that
21 was resolved. So, I think that is correct.

22 CHAIR GIBSON: And we'll get to financial
23 assurance in a minute when we -- or at the end of our
24 discussion on these contentions. Okay? Because I
25 think that concerns Safety Contention 3.

1 MS. LEIDICH: Uh-huh.

2 CHAIR GIBSON: Okay. So, hold the
3 financial assurance issue aside for right now, I want
4 to get to the third holding that I think you're citing
5 that case for. And that is that this board directed
6 the license to be revised to address certain secondary
7 uranium restoration standards and certain cost
8 estimates.

9 Is that correct?

10 MS. LEIDICH: Yes. And that was actually
11 not a contested issue, particularly for uranium.
12 Neither the Staff or HRI contested the use of the
13 uranium standard.

14 CHAIR GIBSON: Okay. And you noted that
15 the Commission denied review of this board decision in
16 CLI-06-01.

17 So, let's examine LBP-05-17 a bit. The
18 Board in that case addressed the fallback restoration
19 goal; correct?

20 MS. LEIDICH: For uranium, yes, that's
21 correct.

22 CHAIR GIBSON: And it did so by modifying
23 License Condition 10.21A to require the Applicant,
24 which was then HRI, to meet the Safe Drinking Water
25 Act's maximum contaminant level of uranium, which had

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1 been promulgated in between the issuance of the final
2 environmental impact statement and the decision of
3 this case. I think it was in 2001. And that was the
4 0.3 maximum contaminant level for uranium was set at
5 0.03 milligrams per liter of uranium.

6 And then the State of New Mexico adopted
7 that when it obtained primacy from the Environmental
8 Protection Agency for the Safe Drinking Water Act.
9 And that is codified at the thing that we keep
10 referring to, which is Section 20.6.2.3103 NMAC.

11 Correct?

12 MS. LEIDICH: That's correct, Your Honor.

13 CHAIR GIBSON: Now, counsel for the State
14 of New Mexico, if I understand environmental
15 Contention 1 correctly, you're not challenging the
16 Applicant's use of any of these varying restoration
17 goals per se but, rather, you're challenging what you
18 consider to be the absence of analysis in the
19 environmental report of the use of these fallback
20 goals.

21 Is that correct?

22 MR. PARSONS: That's generally true. Yes,
23 Your Honor.

24 CHAIR GIBSON: Okay. Now, Ms. Gamin, you
25 indicated on page 16 of your Answer that the

1 Applicant, and I'm quoting here, "explicitly
2 acknowledges the possibility of invoking secondary
3 restoration standards, and determines the impact to
4 groundwater to be small.''

5 And you cite the environmental report
6 4.4.2.1.1.2.1 as support for this proposition.

7 Correct?

8 MS. GAMIN: Yes, Your Honor.

9 CHAIR GIBSON: Okay. Okay, in the State's
10 reply, the State argues that the environmental
11 report's treatment of the secondary standard outcome
12 is simply one sentence that concludes the impacts will
13 be small, but contains no analysis in support of this
14 contention. And the State goes on to say that its
15 expert declarant, Dr. Abitz -- I hope that I said that
16 correct -- is that right?

17 MR. PARSONS: Your Honor, I think the
18 emphasis is on the other syllable, so it's Abitz.

19 CHAIR GIBSON: Abitz. Thank you so much,
20 Mr. Parsons.

21 So, Mr. Abitz, Dr. Abitz searched a number
22 of sections of the environmental report for "any
23 analysis of the physical endpoints of restoration
24 shortfall.'" But he was unable to find this analysis.

25 So, is there more analysis than this in

1 the environmental report that Dr. Abitz did not find,
2 Ms. Leidich?

3 MS. LEIDICH: Your Honor, it's not clear
4 to us what additional analysis is needed for meeting
5 a secondary standard that's consistent with the
6 Drinking Water Standards set by the State and the
7 Federal Government otherwise. So, I'm not sure what
8 additional analysis we would even add.

9 And it's not clear to me from the
10 contention or from Dr. Abitz's declaration what
11 additional analysis would even be necessary.

12 CHAIR GIBSON: Okay. So, it would be fair
13 to say, though, that 4.4.2.1.1.2.1 is the extent of
14 your analysis? Is that right?

15 MS. LEIDICH: Based upon -- it's the
16 extent of our analysis based upon the entire licensing
17 proceeding that's come before this one.

18 CHAIR GIBSON: Okay. Now, is there any
19 data that's included in the environmental report that
20 supports that conclusion of it being small?

21 MS. LEIDICH: Well, the environmental
22 report incorporates the Staff's FEIS from the former
23 licensing proceeding. And we've built upon the former
24 licensing proceeding.

25 There is an extensive record in the former

1 licensing proceeding that constituents that occur in
2 the groundwater here essentially dissipates before
3 they reach any of the drinking water in this area.
4 So, that is part of this analysis.

5 But, also, I am -- again, I am not clear
6 what additional analysis is required when you've set
7 a constituent back to a Drinking Water Standard. By
8 its very nature, a Drinking Water Standard is
9 protective of the environment and the groundwater.

10 CHAIR GIBSON: Mr. Parsons?

11 MR. PARSONS: Thank you, Your Honor.

12 I think you've sort of hit the, hit the
13 crux, the conclusion that the impacts will be small is
14 not the analysis that the regulations at 10 CFR 51.45
15 require. It needs to have a complete, a complete
16 analysis saying that, that the conclusion is based on
17 material that's outside of the application is a, is a
18 problem. Because the regulations require that
19 analysis to be within the application. And, you know,
20 looking at what was filed in the environmental report,
21 that analysis is absent.

22 Obviously, there are other components to
23 this that are part of the contention, including the
24 recent history of ISR facility restoration attempts
25 which have been unsuccessful, and demonstrated that

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1 there are significant additional problems that have
2 not been addressed, I think that would be part of this
3 analysis if you were to have a complete environmental
4 report.

5 We also have the NuFuels submission to the
6 Department of Energy which recounts those same
7 problems, and indicating that the technology is
8 demonstrated to be inadequate with respect to
9 fulfilling those restoration obligations. And that's
10 new information since the '97 EIS, of course.

11 And then Dr. Abitz had some opinions about
12 the baseline data collection process, that if not done
13 in a careful manner you, you effectively oxidize the
14 aquifer, that is, effectively mobilizing constituents
15 inside the groundwater as you're doing the baseline
16 sampling. And so, you end up with a skewed result, a
17 skewed baseline. Because once you oxygenate the
18 water, of course, you mobilize constituents within the
19 water table. And then just the length of time since
20 that '97 data was collected.

21 And then, lastly, the New Mexico
22 Environmental Department's letter from July 21st of
23 2026 this year, indicating that discharge permit for
24 the State of New Mexico which would apply to this
25 would require baseline.

1 And so, all of that we believe constitutes
2 new information since the '97 EIS, and even since the
3 last litigation in this case in 2006, that bear on
4 this analysis and, really, the lack of analysis that
5 bear on this conclusion and we would submit a fairly
6 bare conclusion that the impacts will be small.

7 CHAIR GIBSON: Thank you.

8 MR. PARSONS: And, if I may, Your Honor,
9 just to put a point on it, I do think that the debate
10 over whether the analysis is adequate, whether the
11 former material should be used, or whether the, what
12 the basis for that small conclusion are, I mean, it's
13 always sort of an issue in these proceedings of
14 drifting into the merits discussion.

15 Obviously, our burden -- and Ms. Leidich's
16 right, we do have a burden to state the contentions.
17 But the burden is to raise a genuine issue. And I
18 think we've done that based on evidence I've just
19 cited.

20 CHAIR GIBSON: Okay, thank you.

21 Judge Smith, did you want to ask some
22 questions now?

23 JUDGE SMITH: I'll wait until you're
24 finished.

25 CHAIR GIBSON: Okay.

1 Judge Abreu?

2 JUDGE ABREU: Judge, let me go back on
3 that question that Judge Gibson was asking. Where I
4 heard him start was if the fallback is used -- or
5 baseline or fallback, excuse me -- the question was
6 what analysis would be needed when those are already
7 standards that are in place?

8 Let's stick to that topic, not the
9 hypotheticals that you went into. What analysis would
10 you be expecting if it was only that standard you were
11 looking at? Since that's already legislatively, it's
12 been regulatorily established.

13 MR. PARSONS: Thank you, Your Honor. I
14 think the contention is the lack of any analysis. And
15 so, it's a difficult position for a party outside the
16 Applicant to, obviously, to provide that analysis.

17 But the contention is that there's a
18 conclusion in the environmental report that is not
19 substantiated with any discussion or analysis. If
20 that impact is small and if, indeed, it's an easy
21 analysis, then it should be a fairly easy fix. We're
22 not, we're not arguing that these contentions
23 necessarily are, you know, showstoppers. But,
24 certainly, that in order to have a complete
25 application, the environmental report needs to provide

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1 the basis for their conclusions.

2 JUDGE ABREU: I guess I'm still a little
3 confused in that if the standard set is not one
4 they're creating but, in fact, is one already within
5 the regulations, the regulation is established,
6 presumably, because they've decided that is okay.

7 What analysis -- because what I'm thinking
8 is, well, then you could say every number that's in a
9 regulation you could have to write an analysis for why
10 that number is okay. And that's what I'm confused
11 about. Since this is a regulatory -- it's already
12 there, it's not something they've dreamed of.

13 MR. PARSONS: Thank you, Your Honor. I
14 understand.

15 It's not an analysis of why those numbers,
16 we're not asking for an analysis of why those numbers
17 are in the regulations. What we're asking for is an
18 analysis of what the impact to the groundwater and
19 uses of that groundwater will be based on the end
20 result, the end quality of the water that the
21 Applicant expects to be able to, to restore the
22 aquifer to.

23 And, obviously, as we laid out, there are
24 components of that analysis that we think warrant more
25 discussion, including, you know, how that baseline is

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1 determined, how the plan for restoration coincides
2 with the difficulties the agency has had.

3 It's the impacts to the aquifer and the
4 users of that aquifer that needs to be analyzed, not
5 necessarily why those numbers are in the regulations.

6 CHAIR GIBSON: Hold on just one second.
7 You guys are talking over each other and our court
8 reporter is going to have --

9 MR. PARSONS: I apologize.

10 CHAIR GIBSON: You got to be careful. You
11 may not be realizing, Mr. Parsons, but Judge Abreu was
12 trying to ask you a question and you kept talking.
13 And so, the court reporter can't transcribe it.

14 So, if we could back up just a couple of
15 lines, Judge Abreu.

16 JUDGE ABREU: Yes.

17 CHAIR GIBSON: And, Mr. Parsons, please
18 listen to her and then reply. Okay?

19 JUDGE ABREU: So, I understand you have
20 other issues with the determination of the baseline.
21 I understand that. But we're talking about we're
22 narrowing it to a specific topic here.

23 If it's the fallback, and that fallback --
24 or, excuse me, if it's the fallback or baselines,
25 let's just say for argument purposes it's the

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1 baseline, all right, if those baseline standards end
2 up being higher than the fallbacks in all the
3 categories, and they say we're going to meet baseline,
4 what analysis of that baseline are you saying they
5 would have to do?

6 Because if the baseline is what the
7 current water is, I'm not understanding what analysis
8 you're requesting, since that's a legal standard
9 already set up.

10 I understand that you might have concerns
11 that it may be higher than baseline, or the baseline
12 that it should be, for example, if the baseline
13 numbers were determined by a method you find not
14 acceptable. The fact that there's already established
15 regulatory acts on concentration limit, what analysis
16 is expected there.

17 MR. PARSONS: Thank you, Your Honor. I
18 think you got into it a little bit there. What's
19 going to happen is even outside of the contention is
20 even outside of the monitoring ring, outside of the
21 area that's under analysis, you will have changes in
22 the groundwater quality. And that analysis is absent
23 the -- what the impacts to the aquifer, the users of
24 the aquifer will be is absent from the environmental
25 report.

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1 All it says is that it's a --

2 JUDGE ABREU: Go ahead, Mr. Parsons.

3 MR. PARSONS: All it says is that it will
4 be a small impact, but there is literally no basis
5 articulated in the environmental report for that
6 conclusion.

7 JUDGE ABREU: But if the baseline happens
8 to be the answer, that is what the current water is.
9 So, I'm still not understanding how that would create
10 an impact greater than where it is right now.

11 MR. PARSONS: Well, that makes some
12 assumptions about what the standards are and what the
13 baseline is in the aquifer now. And whether they're
14 using the fallback or the baseline is relevant to what
15 the impacts are going to be on the aquifer.

16 And there's no analysis to support that it
17 would be a small impact.

18 JUDGE ABREU: I think we're not getting
19 any further, so.

20 CHAIR GIBSON: Okay. Great.

21 Mr. Parsons, as I read your expert's
22 declaration, paragraph 22 of it identifies five
23 separate aspects of NuFuel's mining and restoration
24 operations that will produce environmental impacts
25 that were not addressed in the environmental report.

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1 And these impacts include water consumption, waste
2 streams, and straining disposal capacity.

3 Now we see mention of this list in your
4 reply, as well on pages 17 to 18. But I, at least,
5 was unable to see any mention of this in your original
6 petition. So, can you please help us connect the dots
7 here as to this information that you list on pages 17
8 to 18 of your reply? How is that addressed in your
9 original petition if at all?

10 MR. PARSONS: Well, thank you, Your Honor.
11 The petition does go through the standards that the
12 environmental report says it's supposed to meet, and
13 the process it will go through, and says that
14 analysis, rather, is inadequate.

15 And so, as soon as that subsides, I think
16 part of the process of, you know, preparing replies is
17 addressing arguments from the other parties. And that
18 material obviously was presented along with the
19 petition. In their view, it was fair ground for
20 reply.

21 Still, I don't see a specific reference to
22 that paragraph within the four corners of the
23 petition.

24 CHAIR GIBSON: Okay. Ms. Gamin, how would
25 the Staff suggest we address additional points like

1 these that are in the declaration filed with the
2 contention, but they are not specifically referenced
3 in the contention itself?

4 MS. GAMIN: Well, Your Honor, the basis
5 for an admissible contention really should be set out
6 in the petition itself. And I think there's some
7 precedent for clarifying the basis for a contention,
8 but a new basis for a contention shouldn't be
9 introduced in a reply brief.

10 CHAIR GIBSON: Right. But my question
11 more had to do with the declaration. That apparently
12 these things are in the declaration, but they weren't
13 specifically mentioned in the contention. So, I just
14 want to make sure I understood what you're saying Ms.
15 Gamin.

16 MS. GAMIN: Yes. As for the declaration
17 specifically, I think the Petitioner does have the
18 burden to point specifically to parts of the
19 declaration that support each contention. Otherwise,
20 we don't want to have expert testimony that is
21 presented in a mess without assisting the Board and
22 the participants to specifically identify which parts
23 of the expert testimony support each contention.

24 CHAIR GIBSON: Okay. Ms. Leidich?

25 MS. LEIDICH: Yes. We believe that the

1 Board should disregard the portions of the expert
2 declaration that are not referred to in the initial
3 petition. It's the Petitioner's obligation to draw
4 the line between their contentions in the declaration
5 and to bring forth the support, and to explain how the
6 expert testimony and the factual support supports the
7 contentions that they have raised in the petition.
8 In failing to do that, they leave us essentially
9 attempting to reply and make arguments on their behalf
10 to arguments that they have not made.

11 CHAIR GIBSON: Mr. Parsons, before we
12 leave this, is there anything else you wanted to say
13 in this regard?

14 MR. PARSONS: No, Your Honor. Just to
15 repeat that in response to you know, a fair ground in
16 reply is response to, I would say, by other parties.

17 CHAIR GIBSON: Thank you, sir. Mr.
18 Parsons, the Applicant says that you're barred from
19 raising these issues because they concern the
20 restoration standards for effected ground water, and
21 that this has already been conclusively resolved
22 forever and ever, amen, in the final environmental
23 impact statement issued in 1977 by the licensed
24 conditions that established the primary and fallback
25 -- let me rephrase that -- the baseline and fallback

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1 restoration goal for the Applicant's uranium mining
2 operations.

3 Specifically, license condition 1021,
4 which addresses baseline measurements, and license
5 condition 1022, which establishes the upper control
6 limits for specified ground water parameters. As
7 well as by the related administrative litigation over
8 the subjects that encompassed the period from 1998, I
9 guess, until 2006.

10 How do you respond?

11 MR. PARSONS: Thank you, Your Honor. I
12 think part of that response relates to the discussion
13 we had moments ago with respect to a list of documents
14 and new information that have come to the floor since
15 the litigation in those cases existed.

16 We understand that there's been a lot of,
17 so to speak, a lot of water under the bridge. But
18 that water effectively stopped in 2006. And so, when
19 we cite the things that are post 2006, and in fact
20 even in some ways post '97 when the EIS that was
21 relied on came out, I think those are fair ground.

22 We are dealing with a 2025 document which
23 is the environmental report. And so, any changed
24 circumstances we argue, and I think it's consistent
25 with the articulation of the standard in the pleading,

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1 in the briefing, that changed circumstances sort of
2 take the argument outside of that, what you might call
3 a collateral estoppel dynamic.

4 CHAIR GIBSON: Okay. I just want to
5 clarify one point. You were talking about things
6 after the final environmental impact statement was
7 issued in, I believe '97. Is that right?

8 MR. PARSONS: That's my understanding.

9 CHAIR GIBSON: Okay. And I take it we
10 need to add a qualification on to that, correct? And
11 that is that in so far as anything that happened after
12 1997 was addressed in these other cases, adjudicating
13 the terms of the license.

14 For example, the one that we've talked
15 about before where Judge Hawkens in the 2005 decision
16 said okay, I'm going to require that the license
17 condition be amended to include the new EPA drinking
18 water standard for uranium that came out in 2001.

19 So, insofar as it was addressed in one of
20 those many pieces of litigation, it would be barred if
21 it happened after '97. But you're suggesting that in
22 so far as it addressed something that was not covered
23 in that litigation then it is fair game for your
24 contention. Is that a fair statement?

25 MR. PARSONS: That's a fair statement,

1 Your Honor. We recognize the case law holds that the
2 administrative proceedings effectively supplement the
3 Staff's environmental review.

4 CHAIR GIBSON: Okay. Thank you for that
5 clarification, Mr. Parsons.

6 Ms. Leidich, in your answer on page 15,
7 you argue that LBP-05-17 held that these two license
8 conditions, 10.21 and 10.22, coupled with the
9 procedural protocol mandated in the Consolidated
10 Operations Plan Section 8.6 provide a highly, and I'm
11 quoting, a highly detailed prescriptive methodology
12 for establishing ground water baselines and upper
13 control limits. Did I read that correctly, Ms.
14 Leidich?

15 MS. LEIDICH: Yes, Your Honor.

16 CHAIR GIBSON: Okay. Now obviously the
17 LBP-05-17 Board could not have made any ruling on the
18 Consolidated Operation Plan, Section 8.6, because that
19 plan did not even come into existence until January
20 2026. Is that correct? January 2025. Is that
21 correct?

22 MS. LEIDICH: I believe it's the
23 predecessor version of the document.

24 CHAIR GIBSON: Pardon?

25 MS. LEIDICH: It's the predecessor version

1 of the document.

2 CHAIR GIBSON: Okay. There's a
3 predecessor -- so, are you suggesting that we should
4 refer to the old Consolidated Operation Plan 8.6 or
5 the new one that's in January 2025?

6 MS. LEIDICH: I suspect very little has
7 changed in those documents. And you can certainly
8 look to the 8.6 Consolidated Operations Plan now,
9 which also addresses these issues, I believe. But
10 it's that the client has not substantially changed
11 their documents.

12 CHAIR GIBSON: Okay. We'll get to,
13 shortly, to how baseline is calculated. I think my
14 technical colleagues have some questions for you about
15 that. But, for present purposes, it seems to me that
16 the State is arguing that NuFuels did not explain the
17 environmental impacts of reaching the fallback
18 restoration standard that you intend to achieve here
19 set forth in license condition 10.21, .22 and the
20 Consolidated Operation Plan.

21 Now, I went back to what I think are the
22 two source documents that you invoked in support of
23 your environmental report, which are the FEIS, and the
24 decision in LBP-05-17. And for the life of me Ms.
25 Leidich, I can't find where the environmental impacts

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1 of restoration are discussed in either one of those
2 documents.

3 MS. LEIDICH: Your Honor, the goal of
4 restoration is to basically put the ground water back
5 to the position of either base line, or to be
6 consistent with the drinking water standards that were
7 put into the license condition. Thus, the impact is,
8 to my knowledge there is no impact, because
9 restoration has occurred.

10 CHAIR GIBSON: Okay. So, the
11 environmental impacts of restoring, restoration are
12 not addressed in either one of those documents, right?
13 In either the environmental report or in the LBP-05-
14 17.

15 MS. LEIDICH: If we are talking about the
16 environmental impacts of having put the water back to
17 a base line condition, or back to a drinking water
18 standard then the environmental report has that one
19 sentence which is -- we are discussing here that the
20 impacts are small and temporary.

21 CHAIR GIBSON: So, it's never been
22 addressed. You're saying it doesn't --

23 MS. LEIDICH: Your Honor, I --

24 CHAIR GIBSON: -- have to be addressed.
25 I understand. But I just want to make clear, it's

1 never been addressed.

2 MS. LEIDICH: Your Honor, I'm not certain
3 what additional impacts we would analyze beyond having
4 restored the ground water to a drinking water standard
5 or the baseline.

6 CHAIR GIBSON: Okay. Mr. Parsons?

7 MR. PARSONS: Thank you, Your Honor. I
8 would just say that the argument was that there are no
9 impacts. However, the document says those impacts are
10 small. I understand that might not be a dramatic
11 difference, but it is unexplained. There are some
12 impacts. If they're small, the point is that they
13 need to be documented and explained.

14 CHAIR GIBSON: Okay. Just to sort of
15 square the circle Ms. Leidich, there's nothing in the
16 Consolidated Operations Plan that addresses the
17 environmental impacts of restoring the aquifer to base
18 line to some other fallback level, right?

19 MS. LEIDICH: No. The Consolidated
20 Operations Plan sets forth the criteria that we used
21 to determine the base line. In my understanding, when
22 we first read the interveners contention, a fair
23 amount of the discussion in the attached declaration
24 went to how base line is calculated. And the intent
25 of the reference to the COP is that it brings forth

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1 those base line calculations right there in the
2 document.

3 CHAIR GIBSON: And when you say COP,
4 you're referring -- it's short for --

5 MS. LEIDICH: Consolidated.

6 CHAIR GIBSON: -- Consolidated Operations
7 Plan, right?

8 MS. LEIDICH: That's correct.

9 CHAIR GIBSON: But just to make clear,
10 there's nothing about environment that addresses the
11 environmental impacts of restoration in the
12 Consolidated Operation Plan, is there?

13 MS. LEIDICH: That's correct, Your Honor.

14 CHAIR GIBSON: Okay. Thank you. Okay.
15 I want to turn to your claim Ms. Leidich that the
16 State of New Mexico is attempting to dress up this
17 contention as a challenge to a NEPA analysis, but in
18 fact it's just a challenge to a closed safety issue
19 that was resolved by the insertion of licensed
20 conditions 10.1 and 10.2.

21 Can you please explain what you mean by
22 that? Because, frankly, I didn't understand it.

23 MS. LEIDICH: Yes, Your Honor. I think
24 that gets to a lot of the discussion that we've had
25 here today, where we are uncertain exactly what the

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1 environmental impacts are that we purportedly have
2 missed from the environmental report. It's not clear
3 to us what that argument really is, and what the
4 environmental impact should have been that should have
5 been addressed.

6 So, from our perspective, it seems to be
7 more that Contention 1 as you read it challenged and
8 said the setting of the base line and the remediation
9 to the actual base line standards, and whether or not
10 those would occur. Which seems to us to be more
11 appropriate for a safety contention.

12 CHAIR GIBSON: And is that because these
13 licensed conditions are in the license? Is that what
14 you're saying?

15 MS. LEIDICH: It would be more appropriate
16 as a safety contention to the extent that the State is
17 not actually arguing about environmental impacts, but
18 instead is attempting to challenge the way in which
19 the license is used.

20 CHAIR GIBSON: Mr. Parsons, are you
21 challenging the way in which the licensed is used?

22 MR. PARSONS: Not in Contention 1. Our
23 position is, Contention 1 is an environmental
24 contention based on a lack of a complete analysis as
25 required by the environmental report regulations.

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1 CHAIR GIBSON: Okay. Okay. Staff, you
2 didn't, as I understand it you didn't say that this
3 should have, this is really a dressed-up safety
4 contention. What is your position, if you have one?

5 MS. GAMIN: Your Honor, I see issue one as
6 making two claims, one of which the Petition has
7 walked back in the reply, that restoration to base
8 line is infeasible. And the second claim that the
9 analysis of the impacts of restoration to fallback
10 standards is inadequate. Both of those seem like
11 environmental contentions.

12 CHAIR GIBSON: Okay. Thank you, Ms.
13 Gamin.

14 Ms. Leidich, it's my understanding that
15 EPA issued an exemption under the Safe Drinking Water
16 Act with respect to this aquifer in 1989. Is that
17 correct?

18 MS. LEIDICH: That is correct.

19 CHAIR GIBSON: And at that time, the State
20 of New Mexico did not have primacy under the Safe
21 Drinking Water Act, correct?

22 MS. LEIDICH: That is my understanding as
23 well.

24 CHAIR GIBSON: And I believe they got it
25 in 2001. Thereabouts?

1 MS. LEIDICH: The State might be better
2 capable of answering that question, but yes that
3 sounds correct.

4 CHAIR GIBSON: Mr. Parsons or Ms. Jamison,
5 do you know when it was that the State got primacy
6 under the Safe Drinking Water Act? If you don't know,
7 it's okay. I'll tell you what we'll do, when we
8 recess you guys can go back and check that out. Okay?

9 MS. JAMISON: Your Honor, I believe that's
10 what NMED wrote in the letter. And I can check that
11 if you're concerned with the accuracy of that date.

12 CHAIR GIBSON: Yeah, let's just see if we
13 can get a date for that, okay? So, my next question
14 is for Mr. Parsons and Ms. Jamison. I don't know
15 which one of you wants to answer this. But now that
16 the State of New Mexico has primacy, have you
17 withdrawn the exemption of this aquifer from the Safe
18 Drinking Water Act?

19 MR. PARSONS: Thank you, Your Honor. I
20 think the process is not quite to straightforward.
21 Yes, the State now has primacy under the Safe Drinking
22 Water Act. If a party wanted to come in for an
23 aquifer exemption today, it would have to go through
24 the State of New Mexico process. Because this aquifer
25 exemption occurred prior to the State taking primacy,

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1 and EPA issued that aquifer exemption, an aquifer
2 exemption essentially is a forever -- is meant to be
3 a long-term decision.

4 However, the State of New Mexico, now with
5 primacy, has indicated their intent to challenge that
6 1989 aquifer exemption. And so, that is an
7 administrative process that is in the offing. And
8 they've indicated their intent to do so. And that's
9 where it stands today.

10 But absent EPA -- absent that process, I
11 don't believe the State can simply revoke it because
12 they have primacy, but there's a process through which
13 EPA and the State will resolve it.

14 CHAIR GIBSON: Thank you.

15 MR. PARSONS: Ms. Jamison may have more.
16 I don't want to exclude her from that discussion.

17 MS. JAMISON: That's my understanding as
18 well.

19 CHAIR GIBSON: Okay. Great. So, Ms.
20 Leidich, at least the state of play right now seems to
21 be that you have an exemption under the Safe Drinking
22 Water Act for this aquifer. What impact does that
23 have on how this aquifer is going to look? Or I guess
24 be tested, or what its constituents are going to be
25 after you complete mining operations in this aquifer

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1 since you have this exemption?

2 MS. LEIDICH: My understanding is that the
3 exemptions really just designates the aquifer as land,
4 or an aquifer that's not used for drinking water right
5 now, or at all. It does not change the license
6 conditions, and the license conditions will be
7 maintained for remediation regardless of whether or
8 not there is an exemption in place.

9 CHAIR GIBSON: So, just to put that in my
10 own words, even though you have an exemption, that
11 exemption only concerns being exempt from the
12 application of the Safe Drinking Water Act, and
13 meaning the NCL's under the Safe Drinking Water Act
14 because it's not a drinking water aquifer. Is that
15 right?

16 MS. LEIDICH: That is my understanding,
17 Your Honor. That it would not change our license
18 conditions. We still have to meet the standards set
19 forth in the license conditions.

20 CHAIR GIBSON: Okay. Thank you. Ms.
21 Leidich, on page 14 of the petition, the State of New
22 Mexico criticizes the environmental report because it
23 affirmatively asserts that the production aquifer has
24 to be exempted by this -- as an underground source of
25 drinking water. And the State maintains that you need

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1 to address the environmental impacts of this dispute.
2 Is that something you need to do, or not do, or have
3 done?

4 MS. LEIDICH: I think that the statement
5 in the environmental report is more intended to
6 indicate that it has been exempted, and as a practical
7 matter it does not weigh on how we will restore the
8 ground water, or the water in this case. We still
9 have to meet our license conditions.

10 CHAIR GIBSON: Because this aquifer will
11 never have to meet drinking water standards,
12 presumably. But it probably couldn't right now
13 anyway, I take it, be a drinking water aquifer. Is
14 that a fair statement?

15 MS. LEIDICH: My understanding of the
16 exemption process is that it's not used as drinking
17 water. And yeah, I think that it does not essentially
18 meet the standards on its own. But again, for our
19 purposes, and for the purposes of this license it
20 doesn't change the way that we are going to act at the
21 site.

22 CHAIR GIBSON: Thank you. Okay. The
23 State claims that your impact analysis conclusion of
24 small is material because it rests on the secondary
25 standards that the environmental report states, not on

1 the one that the license and regulation requires.
2 That's in their reply on page 24.

3 I'm having difficulty squaring this
4 statement with your assertion that this information is
5 not material. Can you please explain to me why the
6 State is wrong, and why you view this contention as
7 not being material?

8 MS. LEIDICH: Again, we're getting back to
9 the same ground. We do not see a material impact to
10 the drinking water from meeting drinking water
11 standards. I don't believe the State has yet asserted
12 what that material impact might be. And it's not
13 clear to us what might change in the analysis of the
14 small determination that's currently in the
15 environmental report, or how it would be greater than
16 small from meeting the secondary restoration
17 standards, or the fallback standards as we call them.

18 CHAIR GIBSON: Ms. Gamin, do you agree,
19 disagree? Is this material? Is it not?

20 MS. GAMIN: I'm sorry, Judge Gibson. Is
21 what material?

22 CHAIR GIBSON: That's okay. The Applicant
23 states that the small impact -- the State claims that
24 the small impact conclusion is material because it
25 rests on the secondary standards that the ER states,

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1 not on the one that the license and regulation
2 requires.

3 Now, do you agree that's material? I
4 mean, it may not be admissible but just purely on the
5 materiality issue. I'm just trying to understand what
6 your view is.

7 MS. GAMIN: Yes. I would say the issue of
8 the impacts of restoration of ground water is
9 material, setting aside whether there is a genuine
10 dispute with the application.

11 CHAIR GIBSON: Thank you.

12 Now, Mr. Parsons did you want to add
13 anything else on materiality?

14 MR. PARSONS: No. Obviously, I think,
15 just to clarify, I think the material test goes to
16 whether it's a required component of the analysis.
17 Just to distinguish that from somehow making an --
18 which I think is a merits, partly a merits
19 determination of whether you know, whether the impact
20 is material or not. That's a different question,
21 right? I mean, the problem is, the analysis is
22 absent. And having that analysis is material to the
23 application.

24 CHAIR GIBSON: Okay. Thank you. Okay.
25 Ms. Leidich, you argue that the State has failed to

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1 support individual elements of its contention. But on
2 pages 15 to 16 of the petition, Section D, the State
3 identifies paragraphs of the Abitz declaration by
4 number, and states what each reference supplies.

5 Why is it that those items are not
6 sufficiently specific support for the issues that are
7 raised by Contention 1?

8 MS. LEIDICH: We don't think it's enough
9 to have a summary reference, a set of summary
10 references to an expert support, or to yeah -- an
11 expert declaration. From our perspective a
12 contention, to meet the admissibility criteria, has to
13 set forth the material dispute on a genuine issue --
14 I'm sorry -- a material dispute on a genuine issue,
15 fact, or law.

16 And those disputes have to be supported.
17 So, the individual dispute has to be supported. So,
18 just as an example, and I think we have a good example
19 here right now. We're talking about the restoration
20 to the fallback standard.

21 And they say, well, you have to analyze
22 the restoration to the fallback standard and the
23 environmental impact of that. But what's the
24 materiality of the restoration to the fallback
25 standard, and the impact when we've already said that

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1 there is a small impact. What else is needed? Where
2 is the dispute here?

3 And the expert support should bring,
4 should essentially work into the remainder of the
5 contention and be explained in the petition. And they
6 should explain how these multiple things relate to one
7 another.

8 From our perspective, EC-1 had a lot of
9 sort of, disparate arguments. Particularly when you
10 take into consideration the expert declaration that
11 didn't hold together in a logical fashion. There was
12 a lot of discussion of the fallback to the secondary
13 standard, but then there was separate discussion in
14 the Abitz declaration of how the baseline is
15 calculated. And many of those arguments, from our
16 perspective, did not make sense in a logical fashion.
17 And the tack that the State has taken in the petition
18 of merely listing sections of the Abitz declaration
19 did not help to provide any clarity on that point, and
20 really didn't draw the line between what the
21 contention was alleging and how the expert support
22 provided support for those individual contentions.

23 CHAIR GIBSON: Ms. Gamin, what is your
24 view?

25 MS. GAMIN: Well, Judge Gibson, I think

1 our view is set forth at pages 17 and 18 of the Staff
2 answer, that the existence of information in the
3 expert declaration, and post-2009 data on ground water
4 restoration isn't enough unless the Petitioner bears
5 that burden of connecting the expert declaration to
6 the specific parts of the environmental report that it
7 disputes, and challenging conclusions on the
8 environmental report.

9 CHAIR GIBSON: And, for that reason, this
10 is not sufficiently specific support. Is that a fair
11 statement?

12 MS. GAMIN: Yes, Your Honor.

13 CHAIR GIBSON: Mr. Parsons.

14 MR. PARSONS: Thank you, Your Honor.
15 Sorry, will you repeat that?

16 CHAIR GIBSON: Yes. I'm sorry. My
17 question was, is this sufficiently specific support?

18 MR. PARSONS: Yes, Your Honor. Our
19 position certainly that it is. And we cite to
20 specific -- we go into a discussion of the basis for
21 the contention, and then have citations to specific
22 paragraphs in the declaration as well as the documents
23 that support the contention.

24 It's not just the expert declaration but,
25 for instance the New Mexico letter, the NuFuel's DOE

1 application. The record in the other cases of aquifer
2 restoration problems all provide a detailed account
3 and description of the basis for the contention.

4 And I suppose I would just close on that
5 part to say that the pleading standards require a
6 concise explanation. It seems like we've got a
7 situation where it almost doesn't matter what's pled.
8 Of course, we could always go into more detail. But
9 that's not what a contention pleading exercise is
10 supposed to do. That's resolved through the merits.
11 Our job here is to demonstrate that it's material to
12 the application, and that there's a genuine dispute.
13 And I think we've done that amply with respect to
14 EC-1.

15 CHAIR GIBSON: Okay. Thank you.

16 Ms. Leidich, one of the questions that's
17 been raised in Contention 1 relates to whether your
18 environmental report complies with 40 CFR -- I'm sorry
19 -- with 10 CFR 51.54(d), which is an obligation on the
20 part of an applicant to discuss applicable state and
21 tribal water quality standards.

22 And also, whether it complies with 10 CFR
23 51.60, which is the applicant's obligation to discuss
24 any significant change in those standards as they
25 apply to your planned operations or decommissioning

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1 activities.

2 Judge Abreu just corrected me.
3 Apparently, I said the wrong thing with respect to
4 applicable tribal and state water quality standards.
5 And that is, I should have said 51.45(d), and
6 apparently, I said 51.54. Sorry. I had a little
7 dyslexia there. Okay.

8 Anyway, so since our pleading rules do not
9 offer you an opportunity to answer the State of New
10 Mexico's reply would you please explain why any such
11 new state or tribal rules that post-date the issuance
12 of the final environmental impact statement are not
13 the kind of new information or changed circumstances
14 that need to be addressed in your environmental
15 report?

16 MS. LEIDICH: Your Honor, thank you for
17 the question. I'm actually going to turn this one
18 over to my colleague Tim Walsh, as he has that
19 contention.

20 CHAIR GIBSON: Mr. Walsh.

21 MR. WALSH: Yes. Hello, sir.

22 CHAIR GIBSON: Thank you. You finally get
23 a chance to speak here.

24 MR. WALSH: Long awaited. Your Honor, the
25 client's position is that the environmental report

1 identifies the permits that are needed to operate the
2 actual ISR mining operation. And you'll see the list
3 in there that identifies you know, injection well
4 authorizations or NPDES permits, et cetera.

5 I know the State has mentioned in its
6 petition that it does not list the enactment of an act
7 that would prohibit transportation of materials across
8 different Navajo Nation roads. But we don't view
9 those, my client's position is that we don't view
10 those as relevant to the actual operation of the site
11 itself.

12 CHAIR GIBSON: And I think that's
13 actually, that specific question of access is actually
14 addressed in another contention, isn't it sir?

15 MR. WALSH: That is correct.

16 CHAIR GIBSON: Okay. Very well. We
17 better stay on one, or we'll never get through it.

18 MR. WALSH: Okay.

19 CHAIR GIBSON: Because I want to make sure
20 that you, in your estimation then you have listed all
21 of those relevant state and tribal water quality
22 standards or significant changes in those standards
23 that would apply to your operation decommissioning
24 activities. Is that a fair statement, Mr. Walsh?

25 MR. WALSH: Yes, Your Honor.

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1 CHAIR GIBSON: Mr. Parsons.

2 MR. PARSONS: Thank you, Your Honor. I
3 would just say, it is difficult in my mind at least to
4 square what appears to be a narrowing of the
5 definition or of the regulation in that response for
6 NuFuels with the actual language of the regulation
7 which speaks in terms of all federal permits, license
8 approvals, or other entitlements which must be
9 obtained in connection with the proposed action.

10 And so, I think it's -- I don't see the
11 support for an argument that the only things that have
12 to be disclosed are those that are necessary for the
13 specific mining operation itself. But it says, in
14 connection with the proposed action.

15 And, certainly, things like, as we'll get
16 to, transportation, et cetera, are necessary in
17 connection with the proposed action. How else would
18 the material be transported? But I think with
19 specific respect to this contention, that NMED letter
20 talks about how their ground water discharge permit
21 requirements will mandate restoration to base line.
22 And so, there's a distinction between what the State
23 require permit or will mandate based on the State's
24 letter which is not discussed in the environmental
25 report by way of example.

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1 CHAIR GIBSON: Mr. Walsh.

2 MS. LEIDICH: Your Honor, I'll take that
3 one. Sorry, it's a little confusing over here.

4 CHAIR GIBSON: It's okay.

5 MS. LEIDICH: To the extent that this is
6 about the State's requirements for other permits that
7 are necessary for the potential for the State to
8 change its standards, or to have differing standards
9 I think we'll go back to what we said before which is
10 that if the permit does not issue, then it does not
11 issue and the project does not move forward. So, that
12 does not change the impacts to -- that are assessed in
13 the environmental report.

14 CHAIR GIBSON: And that argument, if I
15 recall, Ms. Leidich, is that it is either go or no-go.

16 MS. LEIDICH: Correct.

17 CHAIR GIBSON: If you go forward with the
18 project, you've addressed everything. If you don't go
19 forward with the project there won't be any impacts,
20 and so there's nothing for you to address about that.
21 Is that a fair statement?

22 MS. LEIDICH: Correct, Your Honor.

23 CHAIR GIBSON: Okay. Very well. Thank
24 you. Now I assume this is for Ms. Leidich but it
25 might be for Mr. Walsh. I think it's for Ms. Leidich

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1 here regarding the restoration schedule.

2 You list the timelines for completing
3 production, and then completing restoration for each
4 of the four sites on page 18 of the environmental
5 report. How did you analyze the adequacy of these
6 years of production and the years of restoration?

7 As we, you know, say back in high school,
8 you didn't show your work. You know, I couldn't quite
9 understand that. Maybe you did, I just didn't see it.
10 Could you help us understand that, Ms. Leidich?

11 MS. LEIDICH: Your Honor, we might have to
12 take that one back to our client. I suspect it was
13 based on the prior FEIS and the analysis that
14 underpinned the prior FEIS with an assumption of mine
15 pore volumes. Of course, it may be revised in the
16 future if there is going to be a demonstration project
17 for restoration that happens when the mining actually
18 starts to commence. So, the restoration timelines may
19 be revised at that time. But that's my expectation
20 of the underpinning information was in the FEIS, and
21 also based on the mine pore volume estimate. But we
22 can check with the client, specific numbers.

23 CHAIR GIBSON: Okay. Now, in this regard,
24 Mr. Parsons you have argued that Mobil Section 9 is a
25 good analog for this restoration timeline situation

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1 with a ratio of the restoration periods of Mobil
2 Section 9 where Mobil had six years of restoration
3 compared to one year of pilot mining. Is that correct
4 Mr. Parsons?

5 MR. PARSONS: That is accurate, what we
6 stated in the petition. I think we obviously
7 supplement that with sort of, the restoration record
8 since 2009 elsewhere as well.

9 CHAIR GIBSON: All right.

10 Ms. Leidich, is Mobil 9 a good analog for
11 your proposed operations here?

12 MS. LEIDICH: Yes, Your Honor. Mobil 9 is
13 actually what the mine pore volume's estimate is based
14 on. There was an extensive discussion of this in some
15 of the previous adjudicatory decisions. Judge Bloch's
16 decision, which is LBP-99-30, running around pages 102
17 to I think 106, goes into some level of detail about
18 why Section 9 is a good analog for the projects here.
19 And that's where the mine pore volume came from.

20 CHAIR GIBSON: On page 61 of your answer,
21 you state that the only potentially site raised by Dr.
22 Abitz is Mobil Section 9 regarding financial
23 assurances. And I don't want to get into SC-3 at this
24 stage, but what makes this potentially relevant with
25 respect to financials?

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1 MS. LEIDICH: The mine pore -- I'm sorry.

2 CHAIR GIBSON: Why is Mr. Abitz wrong
3 about restoration?

4 MS. LEIDICH: So, the restoration estimate
5 is based upon a mine pore volume estimate which was
6 adjudicated as part of the former licensing
7 proceeding. That mine pore volume came from a
8 relatively detailed expert report in the prior
9 licensing proceeding that was based on information
10 taken from, and tests taken from the Mobil 9 site and
11 then applied to tests that had been taken from the
12 sites at issue here.

13 So, our restoration standard's actually
14 based on Mobil 9. It went through a bunch of expert
15 analysis, and expert reports to underpin why mine port
16 volume's applied and how that became the restoration
17 standard here and the restoration estimate as well.
18 But we do actually use Mobil 9 in the underlying
19 licensing proceeding. And it's applicable because
20 it's very close by.

21 CHAIR GIBSON: So, it's still a good
22 analysis then?

23 MS. LEIDICH: Yes, but it supports the
24 analysis that's in the environmental report.

25 CHAIR GIBSON: Okay. Which is supported

1 by the '99 decision and the FEIS. Is that a fair
2 statement?

3 MS. LEIDICH: That's correct. And a
4 couple of the other decisions along the way. Mine
5 pore volume shows up repeatedly in the underlying
6 adjudication.

7 CHAIR GIBSON: Okay.

8 MS. LEIDICH: I think maybe Judge Hawkens
9 mentioned it as well, although I'm not certain.

10 CHAIR GIBSON: Now I assume that the
11 length of time needed to restore this aquifer to
12 baseline or to some other fallback standard would
13 impact the amount of water that you would have to use
14 in order to remove sufficient contaminants from mining
15 operations so that you would be able to reach that
16 standard, the fallback standards.

17 While you discuss this in terms of
18 acre-feet needed to do this on an annual level, I at
19 least saw no mention of the environmental impacts of
20 doing that. Did I miss something?

21 MS. LEIDICH: My recollection is that they
22 are trucking in water, but we can confirm that for
23 you, and that that's actually how this will proceed.
24 I think that may show up in the prior FEIS. Again,
25 because a lot of this was covered in there and in the

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1 prior proceeding. But we can get that information for
2 you.

3 CHAIR GIBSON: Okay.

4 Mr. Parsons? Do you have anything to add
5 about Mobil 9 and the length of time needed to restore
6 the aquifer or the water that would be required to do
7 so?

8 MR. PARSONS: Sure, Your Honor. I mean
9 obviously, our point in raising Mobil 9 is that it
10 demonstrates a disparity between the estimates that
11 are presented in the application documents that assign
12 a number of years for restoration that are unsupported
13 by any analysis. And again, that trend of sort of
14 increasing time for restoration is evident in the post
15 2009 record, industry record which we point to as
16 well. So, Mobil 9 is certainly a good example, but
17 it's not the only one.

18 CHAIR GIBSON: Okay. Well, my technical
19 colleagues will probably have some other questions on
20 this. But I just want to make sure I understand, are
21 you saying that Mobil 9 -- I mean, I assume you
22 concede Mobil 9 has been addressed in the FEIS, in the
23 '99 decision that Judge Bloch was involved with.

24 Is there something that has happened since
25 then that materially changes whether or not that is a,

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1 that analysis was valid? And if so, where is that in
2 your pleadings? I'm just, I'm trying to understand
3 your point Mr. Parsons, that's all.

4 MR. PARSONS: Sure. And I think what we
5 use Mobil 9, point to Mobil 9 as an example of where
6 restoration required significantly more time and
7 effort based on the production time than the estimates
8 laid out in the environmental report which, again, we
9 think lack support, lack analysis.

10 And then we point to the additional, you
11 know, Wyoming examples where they had significant
12 trouble restoring those aquifers. And then, while
13 true, not at the same site as Mobil 9 is. Certainly
14 relevant, our contention relevant evidence that should
15 be assessed as to how these assumptions continue to
16 hold since 1997 when the record demonstrates that
17 they're questionable at best.

18 And then in addition, there's the NuFuels'
19 document with respect to the Los Alamos National
20 Laboratory combined study which says it in pretty
21 stark terms, that the industry has had a lot of
22 trouble. And particularly in New Mexico. And that
23 these things are becoming longer and drawn out.

24 And so, we think that effectively is an
25 admission that the evidence that was used in '97, or

1 even through the adjudication in this prior litigation
2 is outdated and requires additional review in order to
3 give us an actual -- a supportable assumption as to
4 how long the restoration is going to be and the
5 impacts of that restoration, including higher water
6 use and et cetera as you mentioned.

7 CHAIR GIBSON: Okay. Okay. Thank you.
8 I just didn't quite understand how that worked, but I
9 do now see your point. Okay. Thank you.

10 Now, Mr. Parsons, on page 24 of your
11 reply, I believe, as Ms. Gamin noted earlier, you
12 state that you are not challenging feasibility. Is
13 that correct? And that's the feasibility of getting
14 to baseline. Is that right?

15 MR. PARSONS: I think it's more or less
16 the --

17 CHAIR GIBSON: Is it something else that
18 you're not, about feasibility you're not challenging?

19 MR. PARSONS: Yes. I think it's more or
20 less the feasibility of the project. You know, our
21 job is not to tell NuFuels whether they can do this
22 project or not, but to make sure that all of the
23 analysis supporting their assumptions is included in
24 the relevant documents.

25 And so, we're not challenging feasibility

1 per se, but certainly we believe the regulations
2 require that where there are assumptions made, that
3 this -- for instance, the restoration will happen, and
4 will happen on the timeframe stated -- that that has
5 to be supported by an analysis that's defensible.

6 CHAIR GIBSON: Okay.

7 MR. PARSONS: And our position here is
8 that that analysis is lacking.

9 CHAIR GIBSON: Okay. And again, just to
10 be sure that we're all on the same page of the same
11 hymnal. So, you're challenging -- you're not
12 challenging the feasibility of the project as a whole.
13 What you're challenging is however, with respect to
14 the restoration, is whether or not the restoration as
15 discussed in the 1999 decision, and as basically
16 adopted in this ER is outdated. And so that
17 feasibility, in that sense it is infeasible.

18 I just want to be sure. Is that what
19 you're saying? Or are you saying whether it's
20 feasible needs to be addressed? I'm just trying to
21 understand what you're saying.

22 MR. PARSONS: Again, I think we're saying
23 that the lack of -- given the new information, it
24 requires a more robust analysis to demonstrate that
25 it's possible, particularly on the time frames that

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1 have been assessed.

2 If the timeframes don't hold, then the
3 impacts from the project can change dramatically. If
4 it's going to require 15 years of restoration, that's
5 a whole lot more water and a whole lot more time that
6 these impacts continue to have on the ground. And so,
7 that's the analysis that's required in the application
8 documents.

9 And, again, I want to shy away a little
10 bit from the issue of feasibility because you know, if
11 they can make the demonstration and do the analysis
12 that's required to show that they can accomplish, then
13 I suppose the project is feasible.

14 But, absent that information there's no
15 basis upon which to make that determination, and
16 there's no basis for compliance with the regulations
17 that require the complete description of the project
18 and complete analysis of the impacts.

19 CHAIR GIBSON: Okay. Okay.

20 Now, Ms. Leidich -- first of all, let me
21 go back to Mr. Parsons. One more thing. Is it
22 correct to say that you're not challenging the outcome
23 of the project not commencing unless the Applicant
24 obtains the permits they need?

25 MR. PARSONS: That is correct.

1 CHAIR GIBSON: Okay.

2 MR. PARSONS: We argue that, of course,
3 all those permits -- and you know, apparently there's
4 a dispute, a genuine dispute as to what all is
5 required. But our argument based on the regulations
6 is that -- and again, getting into some of these later
7 contentions.

8 CHAIR GIBSON: Right.

9 MR. PARSONS: The list of all of those
10 permits is, that are required to be discussed and
11 addressed in the application is longer than is
12 currently in the application material.

13 CHAIR GIBSON: Okay. Thank you. What
14 you're arguing about then is that the ER does not
15 accurately describe the permits. Is that a fair
16 statement?

17 MR. PARSONS: That is a fair statement.

18 CHAIR GIBSON: Okay. So, I think this
19 may go to you, Mr. Walsh. But Ms. Leidich if I'm
20 wrong, you're the one that needs to answer it. Where
21 are these permits described in the environmental
22 report?

23 MS. LEIDICH: Thank you, Judge. Just, I
24 want to jump in with one thing before I turn to Mr.
25 Walsh.

1 CHAIR GIBSON: Sure.

2 MS. LEIDICH: While he finds what he is
3 looking for. There is a discussion of ground water
4 restoration in the prior FEIS. You'll find that
5 starting around page 4-45. It lasts for a couple of
6 pages, and addresses both the primary and the
7 secondary, or so-called fallback standards as well.
8 And now, I will turn it to Mr. Walsh.

9 CHAIR GIBSON: Where is that? Where is --

10 MS. LEIDICH: It starts at -- yes. It's
11 NUREG-1508 starting at page 4-45.

12 CHAIR GIBSON: Great. Okay. Before we
13 get to you then, Mr. Walsh, Mr. Parsons, do you want
14 to -- if you don't have an answer to what Ms. Leidich
15 just said, we're probably going to recess when we
16 finish with Contention 1. You can look at this and
17 give me an answer then. But at this point, do you
18 know about the discussion that she just mentioned in
19 the FEIS?

20 MR. PARSONS: Not offhand, Your Honor.
21 Obviously, a very voluminous record.

22 CHAIR GIBSON: Right.

23 MR. PARSONS: But I would only clarify
24 that that discussion is not present in the 2025
25 application material.

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1 CHAIR GIBSON: Okay. Fair enough. We
2 don't have to get into that. Okay. What I would like
3 to suggest Mr. Parsons is, when we recess at the end
4 of Contention 1, I'd like you to go back and see if
5 you can find those. I think Ms. Leidich's got to
6 confer with her client about a couple of things too.
7 When we recess you all can go that. We'll come back
8 on the record before we start with Contention 2a, and
9 we can address those matters. Okay. So, we'll
10 hopefully have a complete, relatively complete record
11 on Contention 1.

12 All right. Now, Mr. Walsh, I believe the
13 pending question was, where are the permits described
14 in the environmental report?

15 MR. WALSH: Thank you, Your Honor.
16 Section 1.3 discusses the applicable regulatory permits
17 and requirements. And Table 1.3.1 identifies them as
18 my client has put forward in the environmental report.

19 CHAIR GIBSON: Now, is there anything in
20 those lists of permits about obtaining an underground
21 injection permit?

22 MR. WALSH: Yes. One of the permits
23 required is the EPA Class III underground injection
24 control permit. It says approved in 1989 for Church
25 Rock Section 8 project area.

1 CHAIR GIBSON: Okay.

2 MR. WALSH: To be prepared for all of the
3 project areas.

4 CHAIR GIBSON: Okay. And now that the
5 State has primacy, I assume that includes for the
6 underground injection control program as well under
7 the Safe Drinking Water Act Mr. Walsh? If you don't
8 know, it's okay.

9 MR. WALSH: I understand the underground
10 injection control permit is related to the State's
11 discharge permit. But the State can correct me
12 certainly if I have that incorrect.

13 CHAIR GIBSON: Okay. Okay. Fair enough.
14 Okay.

15 Mr. Parsons, in your estimation is the
16 State's underground injection control permit for these
17 mining operations of this aquifer included in the list
18 in the environmental report in the section that Mr.
19 Walsh just referred to? And if you don't know, it's
20 okay. That's another thing you can look at when we
21 recess.

22 MR. PARSONS: Yeah, I would prefer to take
23 a look at that.

24 CHAIR GIBSON: Okay. That's great. You
25 can confer with Ms. Jamison and let us know. Okay.

1 We'll put a pin in that one as well. Okay. Now on
2 page 29 to 30 of your reply, Mr. Parsons, you state
3 that if we admit Contention 1 you do not object if
4 something that you raised in Contention 7 resides in
5 Contention 1 because Contention 7 is now incorporated
6 into Contention 2. Is this duplication still a
7 concern of yours?

8 MR. PARSONS: It is not.

9 CHAIR GIBSON: Okay. Fair enough. Okay.
10 That's great to know because I was completely confused
11 about that. Thank you. Okay. That will help. Okay.

12 MS. GAMIN: Judge Gibson?

13 CHAIR GIBSON: Yes?

14 MS. GAMIN: Excuse me for speaking out of
15 turn, but --

16 CHAIR GIBSON: You're not speaking out of
17 turn, Ms. Gamin.

18 MS. GAMIN: -- the Staff would like to
19 address --

20 CHAIR GIBSON: It's fine. Thank you for
21 jumping in here. Yes, ma'am.

22 MS. GAMIN: Yeah. So, on this issue of
23 listing required primal permits and the status of
24 those permits as required by 10 CFR 51.45(d), I
25 noticed that the original EC-1 starting on page 21 of

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1 the petition doesn't actually list 51.45(d) delta.
2 Although it lists other provisions of 51.45.

3 It seems to me that 51.45(d) as a basis
4 for admission of EC-1 specifically is a new legal
5 theory introduced in the reply. And I see in the case
6 of CLI-06-9, American Centrifuge Plant, that the
7 Commission will not permit in a reply, the filing of
8 new legal theories that opposing parties have not had
9 an opportunity to address.

10 So, as had been pointed out, there are a
11 couple of different strands of EC-1. But as far as it
12 relies on the theory of violation of 51.45(d), I think
13 that is a new theory introduced in the reply.

14 CHAIR GIBSON: Okay. Thank you.

15 Mr. Parsons, do you want to reply to what
16 Ms. Gamin just said?

17 MS. PARSONS: She is correct that (d) is
18 not cited in that portion of the petition. It is
19 again I think fair ground in the reply because of the
20 way the answers were made. I would also say however
21 that because these permits represent potential adverse
22 information, the substance of those requirements are
23 encompassed in 51.45(c) analysis, and 51.45(e) adverse
24 information.

25 And so, while (d), less so about actually

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1 in this contention anyway, mentioning the specific
2 permits. But mentioning the fact that there are
3 requirements out there which we would consider adverse
4 information that were not addressed.

5 CHAIR GIBSON: Okay.

6 MR. PARSONS: And so, I think it falls
7 squarely in the 51.45(c) and (e).

8 CHAIR GIBSON: Okay. Thank you. I think
9 at this point my colleagues may have some questions.
10 And I know in particular Judge Smith has some.

11 Judge Abreu, do you have any? Okay. You
12 may have some after you listen to Judge Smith though.
13 Judge Smith.

14 JUDGE SMITH: All right. So, this
15 question is going to be directed initially to NuFuels
16 and Staff. State argues in their petition on page 13
17 that, I quote, Restoration target inflated by
18 non-representative sampling ensures that contamination
19 remains in the aquifer above true base line even where
20 restoration nominally succeeds.

21 So, my question is, what analytical or
22 sampling methodology for collecting and analyzing
23 these samples will be followed?

24 MS. LEIDICH: Thank you, Your Honor.
25 There is an entire section of the COP that addresses

1 base line water quality determination. It is Section
2 8.6. It goes into a significant level of detail on
3 how base line water quality is determined.

4 There is an entire page of text. In fact,
5 or more than one page of text. So, I'm not sure you
6 want me to read it to you. But, just to provide some
7 examples --

8 JUDGE SMITH: Okay. Thank you.

9 MS. LEIDICH: Okay. You don't want me to
10 read it.

11 JUDGE SMITH: I do not. I just want to
12 make sure that's what I'm seeing there. And really my
13 point here was, it's as described in the COP, there's
14 not a standard methodology you're following. It's
15 what is described here.

16 MS. LEIDICH: That is correct. The
17 NuFuels will use what is set forth in their licensing
18 documentation. They don't intend to follow some vague
19 and nebulous industry standard that's asserted in the
20 Abitz declaration. We will follow the COP and the
21 license condition as well.

22 JUDGE SMITH: And, Ms. Gamin, as far as
23 you're aware, Staff is okay with this? Because it
24 appears to me at this point that that was from the
25 original COP back in the '80s, '90s timeframe. That

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1 hasn't been changed.

2 MS. GAMIN: Judge Smith, Staff hasn't made
3 any determinations on that but you're correct, there's
4 a lot of overlap of what was in the original COP.

5 JUDGE SMITH: Okay. Thank you. I
6 appreciate that.

7 This next question is also for Ms.
8 Leidich. NuFuels states they are committed to
9 following the statistical analysis of ground water
10 monitoring data at Recur facilities interim guidance.
11 And then it's in the environmental report Section
12 6.2.1.1 at page 304. Is that still what you intend to
13 follow?

14 MS. LEIDICH: I believe that is still the
15 case, yes.

16 JUDGE SMITH: I'll follow up then, are you
17 aware of any newer guidance that might be available?

18 MS. LEIDICH: I am not, but we can
19 certainly follow up with that.

20 JUDGE SMITH: I would appreciate that.
21 Thank you.

22 MS. LEIDICH: Thank you.

23 JUDGE SMITH: Next question. Licensee
24 cites that collection analysis requirements of license
25 conditions 10.21 and 10.22 reads in part, shall be

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1 collected a minimum of 14 days apart. And that's
2 referring to operations control's limits and
3 restrictions.

4 In license condition 11.3 referring to
5 monitoring, recording, and bookkeeping requirements,
6 formation of water for monitoring wells, the well
7 fields undergoing uranium extraction. It specifies at
8 least 14 days. So, my question is, what is the
9 significance of 14 days?

10 MS. LEIDICH: I believe that there is, the
11 intent is just to get a measurement that has some
12 separation in time. So that, if there is sort of a
13 temporary issue that would result in an unusual
14 measurement that that's taken care of. And so, that
15 there's some separation in time between when the first
16 measurement is taken and the second measurement.

17 JUDGE SMITH: Okay. Now, is that based on
18 an industry standard or based on the hydrogeology of
19 the site? I mean, I just --

20 MS. LEIDICH: I would have to ask the
21 client, but we can certainly ask.

22 JUDGE SMITH: Okay. I'm just curious. I
23 can't find any reference to 14 days, and I just am
24 interested in that timeline.

25 MS. LEIDICH: I've been told in real time

1 a few times -- sorry. I have been told in real time
2 that two times a month is considered the industry
3 standard.

4 JUDGE SMITH: Okay. Yeah, because I
5 noticed in the '97 FEIS it does say, it says every two
6 weeks. So, that would be like -- okay. All right.

7 In the environmental report Section
8 6.2.2.1.1, excursion monitoring and UCLs the stated
9 sampling protocol seems to be very similar if not
10 identical to the '97 FEIS. But I think we've
11 established that much of this is duplicative of that.
12 Is that correct?

13 MS. LEIDICH: That is correct. The
14 licensing actions are -- yeah.

15 JUDGE SMITH: Okay.

16 MS. LEIDICH: That's correct.

17 JUDGE SMITH: Also, in referencing Table
18 6.2-1 of the environmental report, secondary
19 restoration goals listed for uranium. The goal is
20 0.03 milligrams per liter which we've noted several
21 times. But it has a footnote referencing 10 CFR 20 in
22 Index B, Table 2. Does that footnote indicate that
23 this value is listed, or provided after converting
24 from microcuries per milliliter to milligrams per
25 liter?

1 MS. LEIDICH: I am not --

2 JUDGE SMITH: I'd like to see the math on
3 that, if that's the case because it doesn't math.

4 MS. LEIDICH: Well, that standard was
5 actually set forth in the prior adjudication on this
6 license. So, it comes from the previous licensing
7 decisions. And I don't believe it's directly tied to
8 10 CFR Part 20, but we will take that under advisement
9 to check the footnote.

10 JUDGE SMITH: Okay. Thanks. I appreciate
11 it. Also, in Section 4.4.2.1.1.2.1 of the
12 environmental report, and it's at page 225 it states
13 in part, if the restoration activities are unable to
14 achieve background or maximum contaminate levels,
15 whichever is greater, in criterion 5.b.5 NuFuels will
16 return water quality to the maximum concentration.
17 And it goes on and on and on.

18 And we've talked about this a little bit,
19 and we've talked about the analysis, or the lack of
20 analysis according to Petitioner. The one thing I'm
21 curious about is, we've talked about whether or not
22 it's small, but the word temporary. I didn't see any
23 analysis, and if you could point to what analysis led
24 to a temporary impact.

25 MS. LEIDICH: I think that the word

1 temporary is just intended to be that it will be
2 restored eventually. That it's not a permanent impact
3 but rather, that it will go back. I mean, the entire
4 point of restoration is to take the constituents back
5 to a prior level.

6 So, I think that the intent here is --
7 because it's referring to ISR operations that the
8 impacts from operations will be temporary because they
9 will be restored. And thus, they will not be
10 permanent.

11 JUDGE SMITH: Okay. I'm going to give Mr.
12 Parsons the chance to reply to that if he'd like.

13 MR. PARSONS: Sure, Your Honor. Thank
14 you. I think Ms. Leidich's right. I think that the
15 impacts during mining obviously are significant
16 because you're intentionally mobilizing all the
17 constituents. And then restoration occurs.

18 One aspect that we do reference in our
19 contention is what's known as the rebound effect.
20 Which is, even once the screening is done, the
21 flushing so to speak of the aquifer, you end up with,
22 over time as the aquifer sort of resettles you see
23 those, the evidence shows that those values come up
24 over time.

25 So that, a sample taken immediately after

1 a ground water sweep for instance, may not and is
2 likely is not representative of the long-term water
3 quality. And I think that's an issue that goes
4 unaddressed as well.

5 JUDGE SMITH: Thank you. That's the end
6 of my questions, but I would like to see if any of the
7 participants have anything to address anything I've
8 brought up. If you'd like to, please go ahead.

9 MS. GAMIN: Nothing from the Staff, thank
10 you.

11 MS. LEIDICH: Nothing from NuFuels, thank
12 you.

13 JUDGE SMITH: Okay.

14 MR. PARSONS: And nothing from the State,
15 thank you.

16 JUDGE SMITH: Thank you.

17 CHAIR GIBSON: Okay. You all have got a
18 little bit of homework on Contention 1 before we come
19 back on the record. I would suggest, what do we need?
20 Do you want to come back at 1:15, that's in an hour?
21 Do you want to come back at 1:30? What do you all
22 need?

23 Mr. Parsons, let me start with you.

24 MR. PARSONS: I think we can accommodate
25 the shortest amount of time that the Board deems as

1 necessary.

2 CHAIR GIBSON: Ms. Gamin?

3 MS. GAMIN: I agree with that.

4 CHAIR GIBSON: Ms. Leidich.

5 MS. LEIDICH: We agree with that as well.

6 With the qualification that it may take ten minutes to
7 get technology up and running, we may want to start a
8 little bit early for the technology aspect.

9 CHAIR GIBSON: Okay. Great. Okay. Then
10 let's make it 1:15 EDT.

11 (Whereupon, the above-entitled matter went
12 off the record at 12:19 p.m. and resumed at 1:14 p.m.)

13 CHAIR GIBSON: Perfect, thank you. When
14 we recessed, we gave you all a little bit of homework.
15 I don't know if you all had an opportunity in the
16 short amount of time we had to get answers to it, but
17 let's start with you, Ms. Leidich. You were going to
18 confer with your client about a couple of things. I
19 don't know if we're able to ascertain the answers to
20 what we asked, but let us know what you found out.

21 MS. LEIDICH: Yes, Your Honor, thank you.
22 I think I'll start with the RCRA guidance. There was
23 a reference to RCRA guidance that is mentioned on page
24 304 of the environmental report. It looks like there
25 may be an update to that guidance after the original

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1 estimate that was published in 2009. NuFuels will
2 comply with the most recent guidance and not just the
3 interim guidance. So I think that answers one of the
4 questions.

5 Another question that we had, rather a
6 general discussion, was on restoration and the
7 analysis of restoration. We just wanted to clarify
8 one point. The restoration that happens in the 9 pore
9 volumes, what's really happening is water is being
10 taken out of the ground. It's run through a reverse
11 osmosis system and then it is put back into the
12 ground. So the consumption of water is relatively
13 limited there. It's what's referred to as the bleed,
14 is my understanding.

15 But it is not -- we are not just taking
16 water and pumping it into the ground. We are taking
17 it out and then re-entering the water back into the
18 groundwater. So it's not a complete consumption of
19 the groundwater. Just to clarify that point. And I
20 think that is all I had. Tim, did you have anything
21 else?

22 MR. WALSH: Just to confirm, Your Honor,
23 our understanding is that you asked about the
24 underground injection control discharge. I confirmed
25 that it is in the state discharge permit that is

1 currently pending before the State.

2 CHAIR GIBSON: Okay. Thank you, Mr.
3 Walsh. And, Mr. Parsons, I believe you were going to
4 look at a couple of things. One of which was the 4-45
5 in the FEIS about the extent to which restoration --
6 the environmental impacts of restoration are addressed
7 there.

8 MR. PARSONS: Yes. Thank you, Your Honor.
9 I did have a chance to look at that section. There is
10 some discussion of restoration impacts. I was not
11 able to spend enough time with it to assess its
12 completeness. I would note that it obviously is
13 approximately 30 years old at this point. It does
14 appear to have inaccurate standards addressed. And
15 so, to the extent, it is out of date. So I did not
16 see a reference to that in the environmental report or
17 the answer for that matter.

18 And so, I think the State's position would
19 be, to the extent that that is a relevant discussion,
20 it should have been incorporated at least specifically
21 if not directly into the environmental report.
22 Obviously, we understand our standard in this
23 proceeding to not just point to whole documents or the
24 underlying record as support. And so, we would hope
25 that to the extent that the Applicant was going to

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1 rely on a discussion from a 29-year-old document, it
2 would point to that specifically instead of requiring
3 us to anticipate that and address it in that way.
4 But, yes, it has some discussion.

5 CHAIR GIBSON: Okay, thank you.

6 MS. LEIDICH: Your Honor, can I respond to
7 that?

8 CHAIR GIBSON: What?

9 MS. LEIDICH: Can I respond to the
10 argument just made by the State?

11 CHAIR GIBSON: Sure. Mr. Parsons, I know
12 you were going to make another point. Let's let Ms.
13 Leidich respond to the specific thing you said and
14 then we will come back to what you were getting ready
15 to say, okay? Yes, Ms. Leidich.

16 MS. LEIDICH: Yes, I just want to say that
17 it is the State's obligation when it is bringing forth
18 a contention to put it within the scope of this
19 proceeding. And the scope of this proceeding is
20 limited to license renewal and it doesn't address
21 matters in the original proceeding. Those are outside
22 of scope. So it was the State's obligation to make
23 sure that the issues that it was raising are within
24 the scope of renewal and are based on new and changed
25 circumstances.

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1 CHAIR GIBSON: Okay, great. Yes, Mr.
2 Parsons.

3 MR. PARSONS: Just in terms of the UIC
4 program, there were some questions about that. We are
5 still pinning down -- the issue with the UIC program
6 is that primacy is delegated sort of in parts. There
7 are five different types of classes of UIC wells. And
8 so, those are all -- primacy, to the extent it is
9 granted from the EPA to the State, occurs sort of
10 piece by piece. And so, we are still trying to pin
11 down when the exact date was. What we can tell you is
12 that the 2001 date referenced in the NMED letter from
13 July of this year, 2001 is when the applicable
14 regulations were finalized at NMED from the State.
15 And so, that's sort of the operative date with respect
16 to those regulations.

17 Then with respect to the aquifer
18 exemptions, currently the only one in place, my
19 understanding, is in Section 8. That one was the one
20 issued by EPA in 87. That would now be the State's
21 purview if it was applied for today. The other
22 sections, I understand, are Navajo land. And as a
23 result, the EPA retains primacy for the aquifer
24 exemption on those lands.

25 And so, because it has that differing land

1 tenure, EPA would still have a role. So the list of
2 permits generally references other aquifer exemptions
3 from EPA, and I think that that intends to represent
4 that EPA would be issuing those additional aquifer
5 exemptions for the other sections because they are
6 Navajo lands.

7 CHAIR GIBSON: Okay, good. Let me just
8 confirm this with Ms. Leidich. Section 8 is the --
9 the aquifer underlying site 8 is the only one that is
10 covered by the 1989 exemption. Is that your
11 understanding as well?

12 MS. LEIDICH: That is our understanding as
13 well.

14 CHAIR GIBSON: Okay, great. And so, to
15 make sure we're saying the same thing, Mr. Parsons,
16 insofar as EPA were to grant an exemption for the
17 other sites because they underlie Navajo Treaty or
18 allotted land, that would be a matter in EPA's purview
19 or the Navajo's purview, their relationship, but it
20 wouldn't have anything to do with the State or with
21 the initial aquifer exemption. Do I understand that
22 correctly?

23 MR. PARSONS: That's my understanding.

24 CHAIR GIBSON: Okay. And, Ms. Leidich, is
25 that your understanding as well?

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1 MS. LEIDICH: That sounds accurate to us
2 as well.

3 CHAIR GIBSON: Okay, great. Now, I think
4 that covers all our homework for Environmental
5 Contention 1. Any more questions? We have Judge
6 Abreu. Judge Smith?

7 JUDGE SMITH: I just have the one
8 follow-up on the reference to 10 CFR Part 20, Appendix
9 B. I just want to make sure I clearly understand what
10 you said before the break. So refresh my memory on
11 what that argument was.

12 MS. LEIDICH: I think we will have to
13 modify that reference to point instead back to the
14 adjudicatory record in this case.

15 JUDGE SMITH: There you go. I was going
16 to say, because it was mentioned earlier, it had the
17 same value. It just didn't have that reference, so it
18 was odd that that reference was there.

19 CHAIR GIBSON: I think that --

20 MS. LEIDICH: This --

21 CHAIR GIBSON: I'm sorry, Ms. Leidich. I
22 didn't mean to interrupt you.

23 MS. LEIDICH: No, that's okay. I was just
24 going to say that I think the -- it was established in
25 the adjudicatory proceeding below, and we can

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1 certainly just cross-reference to that.

2 JUDGE SMITH: Okay, thank you.

3 CHAIR GIBSON: Okay. I think there may
4 have been one other piece of homework for you, Ms.
5 Leidich, and that had to do with the years of aquifer
6 restoration compared to production years. And you
7 said you weren't sure exactly where those numbers came
8 from in your ER, but you were going to confer with
9 your client. Am I mistaken? Were you going to do
10 that?

11 MS. LEIDICH: Yes, I think I had
12 originally said that it was based on the FEIS and the
13 pore volume estimate, and that's still the case.

14 CHAIR GIBSON: Okay, great. Thank you so
15 much. Okay. With that, I believe we're ready to get
16 started on Contention 2. Now, Contention EC-2 and
17 EC-7 are now narrowed and consolidated under one
18 heading of deficient characterization of groundwater
19 conditions and its analysis of impacts to the
20 Crownpoint community water supply. We'll start with
21 new Contention 2A, or narrowed Contention 2A.

22 Now, Ms. Gamin, the Applicant's answer at
23 footnote 9 states, a presiding officer already
24 determined that the intervenor's characterization of
25 the wastewater aquifer as a heterogeneous environment

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1 containing lengthy channels of high permeability was
2 without basis, and that later boards refused to
3 relitigate this issue. Is this part of the narrowed
4 Contention 2A, or is this outside the scope of
5 materiality that you envision?

6 MS. GAMIN: I would say that I agree that
7 that issue has been previously litigated and would be
8 outside the scope of an admissible contention.

9 CHAIR GIBSON: Okay. And, Mr. Parsons,
10 are you familiar with that footnote 9?

11 MR. PARSONS: I am familiar with that.

12 CHAIR GIBSON: Okay.

13 MR. PARSONS: From the State's
14 perspective, the contention does reference outdated
15 hydrogeologic information, and we rely on the
16 declaration to address that. I understand that there
17 were some components of that that were addressed in a
18 prior proceeding. Our position would be that while
19 that analysis is certainly relevant to this board's
20 consideration, it is not preclusive to the extent that
21 the State identifies additional information that is
22 relevant to how the data is stale, so to speak,
23 outdated. And that's the basis of the contention. Of
24 course, obviously, it is the outdated nature of the
25 information.

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1 CHAIR GIBSON: Sure. And I think I
2 understand what you are saying, but I want to make
3 sure that you are saying this based on the notion that
4 there is new information or changed circumstances that
5 would fit within the Powertech decision that the
6 Applicant cited earlier.

7 MR. PARSONS: Yes, Your Honor. So with
8 respect to EC-2 and EC-7, I think there is new
9 information -- relevant new information that includes
10 the Staff's statements that it needs current
11 information about groundwater levels. NuFuels'
12 promise to bring additional measurements and data that
13 it is committed to do so in 2005. Obviously, that has
14 been postponed a little bit, but we think that the
15 lack of that identification of that sampling going
16 forward yet not being produced is new information.
17 And certainly, the analysis that we have in our -- of
18 those points in our pleadings.

19 CHAIR GIBSON: Okay. Now, Ms. Gamin, the
20 Staff has indicated that it does not oppose the
21 admission of narrowed Contention 2A, but my question
22 on this count is the material that Mr. Parsons just
23 referenced, are those matters that you think are
24 legitimately part of Contention 2A, or are these
25 matters that are outside of the scope of the narrowed

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1 Contention 2A that you are agreeing can be admitted?

2 MS. GAMIN: I believe the matters Mr.
3 Parsons just addressed are inside the scope of the
4 narrowed Contention 2, whose admissibility NRC doesn't
5 oppose. I would like to speak to the specific
6 reference that Mr. Parsons made to the request for
7 supplemental information that the Staff issued on
8 April 10, 2025. And one of those requests for
9 supplemental information states that, the NRC Staff
10 needs current information about groundwater levels to
11 conduct an analysis of the impacts of ISR, in-situ
12 recovery operations on groundwater.

13 That language was infelicitously chosen.
14 It is not the Staff's position that we necessarily
15 need current information on groundwater levels to
16 conduct a NEPA environmental review. Rather, it would
17 be more correct to state that we either need current
18 information on groundwater levels or we need something
19 else to satisfy the Applicant's obligation under NEPA
20 to provide enough information to allow the Staff to
21 conduct its environmental review and identify
22 reasonably foreseeable environmental effects.

23 So in this case, if current groundwater
24 level data isn't available, NEPA allows the use of
25 representative or bounding groundwater levels. The

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1 reason that that caveat doesn't change the Staff's
2 position on admissibility is that we don't have in the
3 record either current groundwater level data as
4 described in EC-2 or assessment of representative or
5 bounding levels.

6 CHAIR GIBSON: That's very helpful. Thank
7 you so much. It was just important for us to try to
8 make sure that we know what you have agreed is
9 admissible in EC-2, that Mr. Parsons is agreeable to
10 that, and that we know what we're dealing with.
11 That's all. It's not quite like secondary and
12 primary, but it's important that we understand what we
13 really have on our plate. Okay, thank you.

14 Okay. Ms. Leidich, you state on page 24
15 of your answer that there is no discernible risk that
16 ISR activities, that's in-situ leach mining operations
17 activities, will adversely affect groundwater
18 allocated for the Navajo-Gallup Water Supply Project,
19 and that the existing Gallup, Fort Wingate, Rehoboth,
20 and Navajo Nation water wells will not be impacted by
21 Church Rock Section 8 ISR activities. You go on to
22 say that analysis and the updated well information in
23 Section 3.4.3.3.3 remain undisputed.

24 Now, are the Navajo-Gallup Water Supply
25 Project the same study as the 2012 collaborative study

1 with the Navajo Nation in the city of Gallup?

2 MS. LEIDICH: It does sound like the same
3 study.

4 CHAIR GIBSON: It is the same study?

5 MS. LEIDICH: I believe so, yes.

6 CHAIR GIBSON: Okay. I don't believe
7 anything to the contrary. It's just that I wanted to
8 be sure because it wasn't described exactly the same
9 way and we thought there might have been two studies.

10 Okay. All right. Now, I need a little
11 bit more help in understanding, Ms. Leidich, what
12 you're asserting in your critique of Environmental
13 Contention 2A. Are you asserting that the issue of
14 restoration to secondary standards was already
15 resolved, not as a result of the prior administrative
16 litigation, but as a result of this collaborative
17 study?

18 MS. LEIDICH: We believe that those are
19 two separate issues, Your Honor. I think that we felt
20 that there was, again, some mixing of concepts in the
21 various -- in Contention 1 and Contention 2 and in the
22 Abitz Declaration. I do not understand or we don't
23 understand how the restoration standards play into the
24 analysis of the Navajo water supply pipeline. It
25 seemed to us that Contention 2 was more of a

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1 contention of omission, even though it did not say it
2 was, but that Contention 2 was more of a contention of
3 omission in terms of the pipeline itself, where the
4 contention was asserting that water development were
5 unexamined.

6 In fact, the contention itself literally
7 states that 15 years of regional drought water
8 development, including the Navajo-Gallup water supply
9 project and changed water use, are unexamined. Our
10 point is that that project was examined. It's
11 discussed in the environmental report, and the State
12 has not disputed the discussion -- the specific
13 discussion that is included in the environmental
14 report.

15 CHAIR GIBSON: Mr. Parsons, is Ms. Leidich
16 wrong? And if so, why?

17 MR. PARSONS: Yes, Your Honor. I think
18 the point is that the data comprising all of these --
19 all this information is, you know, from 1993 and some
20 from 2011, and those characterizations are outdated.
21 And I think the materiality of this contention to this
22 proceeding is amplified by the Staff's statement that
23 they need that current information about groundwater
24 wells -- levels, rather, to assess those impacts.

25 CHAIR GIBSON: Okay. Now, requests for

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1 information, according to the Staff answer at page 5,
2 are a mechanism that the Staff uses for obtaining
3 additional information needed to make a regulatory
4 decision, and such information is asked because,
5 according to the Staff's answer at page 6, the Staff
6 has determined that additional information on the
7 license renewal application is needed. Is that a fair
8 assessment of what an RAI is, Ms. Gamin?

9 MS. GAMIN: Yes, Judge Gibson.

10 CHAIR GIBSON: Good. Now, you quote from
11 the Oconee case CLI-99-11, 49 NRC 328 on page 6 of
12 your answer, and state that NRC's issuance of RAIs
13 does not alone establish deficiencies in an
14 application. Did I read that correctly?

15 MS. GAMIN: Yes, sir.

16 CHAIR GIBSON: Okay. And, Mr. Parsons,
17 you mentioned this as well in footnote 12 of the
18 petition, correct?

19 MR. PARSONS: Correct, Your Honor.

20 CHAIR GIBSON: And, Ms. Leidich, you also
21 cite this in footnote 76 on page 23 of your answer,
22 correct?

23 MS. LEIDICH: Correct, Your Honor.

24 CHAIR GIBSON: So it sounds like we're all
25 in agreement that the Oconee decision may be useful

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1 here. Now, at the end of the first full paragraph on
2 page 49, NRC 337 of the Oconee decision, the
3 Commission stated that it is the Petitioner's job to
4 review the application and to identify what
5 deficiencies exist and to explain why the deficiencies
6 raise material concerns.

7 But, Ms. Leidich, you claim in your answer
8 on page 23 that requests for additional information
9 issued by the Staff are off limits as support for
10 Petitioner's contentions here because these
11 contentions are merely repackaged requests for
12 additional information without additional
13 justification. Is that right, Ms. Leidich?

14 MS. LEIDICH: I think that's correct. Our
15 position is that the Petitioner, much like what you
16 just quoted from the Oconee decision, the Petitioner
17 needs to look at the environmental report, needs to
18 assess what the deficiencies are on its own, and needs
19 to explain those deficiencies. Merely copying and
20 pasting or repeating information from an NRC Staff RAI
21 is not good enough.

22 I mean, I think an example here, of
23 course, is what we were just discussing, the
24 Navajo-Gallup Water Supply Project, where there is an
25 analysis that's included in the environmental report.

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1 Simply saying we need more on that because the Staff
2 said that they need more on that is not enough. The
3 Petitioner needs to look to what is stated in the
4 environmental report, the paragraphs that are about
5 that particular project and that analysis, and say why
6 that's not good enough.

7 CHAIR GIBSON: Is there a case that you
8 can cite us to that says a request for additional
9 information cannot form the basis for a contention?

10 MS. LEIDICH: We think the Oconee case
11 does go to the proposition that an RAI alone is
12 insufficient to form the basis for a contention and
13 that there needs to be more analysis.

14 CHAIR GIBSON: Okay, thank you. Mr.
15 Parsons, on page 17 of the petition and page 26 of
16 your reply, you point to sections of the ER, you cite
17 ML numbers and you note other sources separate from
18 the RAIs for this contention. Is that correct?

19 MR. PARSONS: That's correct, Your Honor.

20 CHAIR GIBSON: Why is that not enough, Ms.
21 Leidich, here?

22 MS. LEIDICH: Because we think there needs
23 to be an analysis of the ER instead of just bare
24 citations. Again, I can go back to the Navajo Water
25 Supply Project and the paragraphs that are included in

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1 the environmental report, but the State merely stated
2 that that that was unexamined in its contention. It
3 was not unexamined. There is a discussion of it in
4 the environmental report, and the State had the
5 obligation to specifically address that discussion.

6 The State also has the obligation to say
7 why missing information is material to the findings
8 that the NRC must make. That's part of the contention
9 and miscibility standards. They can't simply refer to
10 an RAI or a Staff RSI and say, this is enough to meet
11 the standards. There needs to be an explanation for
12 how each of the individual standards is met.

13 CHAIR GIBSON: Ms. Gamin, what is your
14 reading of this?

15 MS. GAMIN: Thank you, Your Honor. So I
16 agree with some of the language from Ocone that Ms.
17 Leidich has cited, that merely referencing RAIs,
18 merely cutting and pasting RAIs, is not enough to
19 provide the basis for an admissible contention. RAIs
20 are a routine part of NRC licensing actions and they
21 don't represent in themselves any regulatory findings.
22 They're an information-gathering mechanism. I do not
23 think that RAIs are illegitimate as part of the basis
24 for a contention.

25 In general, the Staff is not going to go

1 to the effort of issuing a request for additional
2 information on an issue that we believe is trivial.
3 RAIs are directed towards meeting NRC's legal
4 obligations and fulfilling our safety and security
5 mission. So I believe the existence of RAIs is
6 evidence that the issue described in the RAIs is
7 material. Does that answer your question, Judge
8 Gibson, or would you like me to go on?

9 CHAIR GIBSON: No, no, that's just fine.
10 Thank you.

11 MS. GAMIN: Okay.

12 CHAIR GIBSON: Thank you very much. The
13 next thing I want to address is the Applicant's answer
14 on pages 25 to 26, that they don't need to resample
15 the aquifer's groundwater levels until, quote, prior
16 to operations. And the Applicant points to license
17 conditions 10.21 and 10.23 for that claim. So Ms.
18 Leidich, is your assertion that NEPA does not require
19 updated groundwater data to complete this review?

20 MS. LEIDICH: Your Honor, our
21 understanding of the contention, and I think this is
22 more particularly directed towards the declaration
23 itself, was that a number of the claims in the
24 declaration were once again incorporating the
25 commentary in EC-1 and about how the baseline values

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1 are set. We are pointing out that the baseline values
2 are not set at this point. The baseline values will
3 be set prior to operation, but they're not
4 specifically a part of this licensing action. We do
5 that in the future in accordance with the license
6 conditions set forth.

7 CHAIR GIBSON: Okay. Mr. Parsons?

8 MR. PARSONS: Thank you, Your Honor. I
9 think the information is necessary for the complete
10 description of the project as required in 10 CFR
11 51.45. It may also be true that information is
12 necessary to be gathered at the point of injection of
13 lixiviant, but that does not eliminate the
14 responsibility to have complete information on the
15 front end. While it may be more refined when they do
16 it right before injection, it still is a necessary
17 component of the assessment of impacts.

18 CHAIR GIBSON: Okay. Ms. Gamin, I don't
19 want to put words in your mouth, but I assume that the
20 NRC Staff cannot complete their NEPA analysis without
21 obtaining this groundwater data. Is that correct?

22 MS. GAMIN: I do not precisely agree with
23 that, Judge Gibson. I think, as I said before, there
24 could be either the specific groundwater data we have
25 asked for in the RAIs or RSI's, or there could be a

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1 demonstration that the existing groundwater data that
2 is a little bit older is representative or bounding.

3 CHAIR GIBSON: Okay. I was not precise
4 enough in my use of the language, I'm sorry. When I
5 said this groundwater data, I was referring to either
6 the one with respect to this specific site or some
7 similar site that would provide that information.
8 With that --

9 MS. GAMIN: Yes.

10 CHAIR GIBSON: -- I take the Staff needs
11 that in order to complete its NEPA analysis. Is that
12 a fair statement?

13 MS. GAMIN: You know, I hesitate to agree
14 with that because, you know, in general, NEPA doesn't
15 require complete certainty about environmental
16 effects. There might be several ways to meet the
17 Applicant's NEPA and NRC's NEPA environmental review
18 obligations. So I don't want to foreclose the
19 universe of ways in which those NEPA obligations could
20 be met.

21 CHAIR GIBSON: There could be a door
22 number three out there. We just don't know what would
23 be behind it, you're saying. But of the two doors we
24 know about, one of these others should work. There
25 might be a third one that someone could come up with.

1 Is that what you're saying, Ms. Gamin?

2 MS. GAMIN: Yes. Yes, Judge Gibson.

3 CHAIR GIBSON: Great, okay. Excuse me,
4 just a second. Judge Smith's got a question.

5 JUDGE SMITH: But just to follow up with
6 that, Ms. Gamin, didn't you just previously say that
7 the request for additional information, while just
8 citing that, could not be the foundation of the
9 contention, but it could be part of the basis for the
10 contention? And you indicated that you'd need that
11 information in that RAI, correct?

12 MS. GAMIN: I would say we don't -- the
13 Staff doesn't necessarily need the exact information
14 asked for in the RAI. Sometimes we get answers to
15 RAIs that say, well, we don't have this information,
16 but we have this other information, or we don't think
17 you need this information because it's oftentimes
18 something of a dialogue between the Staff and the
19 Applicant.

20 JUDGE SMITH: Okay, thank you.

21 CHAIR GIBSON: Now, in terms of what the
22 Staff needs, whether it is actual data or whether it
23 is data from a sufficiently similar project that you
24 could draw inferences that it was essentially the same
25 or from something behind door number three, would this

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1 be the case with respect to all four project areas?
2 Do you have groundwater data for any of them that
3 meets your needs?

4 MS. GAMIN: I would have to look at the
5 exact text of the RAIs to remind myself whether it
6 goes to all of the project areas, Your Honor.

7 CHAIR GIBSON: Okay. Well, when we
8 persist, maybe you can check that out. I don't want
9 to --

10 MS. GAMIN: Yes, sir.

11 CHAIR GIBSON: -- stop right now, but
12 please make a note of that if you could. Okay. I
13 want to turn to the petition on page 17 where the
14 State cites to the Abitz Declaration paragraph 27.
15 And there's a footnote 2 referenced for that paragraph
16 in which Dr. Abitz asserts it is probable that the
17 water level has decreased at Crownpoint because of an
18 aquifer five miles northwest.

19 Now, Mr. Parsons, I was really confused
20 about that. And I want to know, is the State
21 asserting that this deficiency raises a concern
22 because there's a relationship between the Crownpoint
23 aquifer and an aquifer five miles away, or is it just
24 being offered as this other aquifer is analogous to
25 the groundwater conditions at Crownpoint? I'm not

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1 asking you to tell me -- guarantee that's true. I'm
2 just trying to understand why Dr. Abitz made that
3 statement, and it made no sense.

4 MR. PARSONS: I believe it's the latter,
5 Your Honor.

6 CHAIR GIBSON: There's something similar
7 in the conditions between one and the other, is that
8 right?

9 MR. PARSONS: That is my understanding.

10 CHAIR GIBSON: Okay, good. That's good to
11 know. Okay. You have any more questions about 2B?
12 You got any more questions about 2B? Okay. Well,
13 except for the homework for you, Ms. Gamin, I think
14 that concludes our questions about 2B --

15 MS. LEIDICH: Your Honor --

16 CHAIR GIBSON: -- 2A. Oh, I'm sorry, Ms.
17 Leidich. You wanted to say something. I'm terribly
18 sorry. I didn't realize you did. I'm sorry.

19 MS. LEIDICH: Yeah, I apologize. In
20 reference to footnote 2, we just wanted to make sure
21 that the board was aware that those numbers are
22 incorrect, that there is no decrease of 100 feet.

23 CHAIR GIBSON: Okay.

24 MS. LEIDICH: We pointed that out in our
25 answer, but just wanted to make sure that you were

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1 aware that that's not factually accurate.

2 CHAIR GIBSON: I did not catch that in
3 your answer. So, Mr. Parsons, you might check in with
4 Dr. Abitz. If you want to give us some clarification
5 on that before the end of the day, feel free, but I
6 think that that helps in both cases that we have that
7 additional information. Thank you.

8 Okay. With respect to 2B, this is largely
9 what used to be Contention 7 with some narrowing and
10 twisting around, but let's -- I would like for, Ms.
11 Leidich, I would like to turn to the third case that
12 you list at the beginning of your answer, which is the
13 Hydro Resources, Inc., LBP-99-30, 50 NRC 77, a 1999
14 decision.

15 Now, if I understand your basic argument,
16 it is that this case has two holdings that are
17 pertinent for this dispute. First, with respect to
18 Church Rock Section 8, you are maintaining that Hydro
19 Resources, Inc.'s plan for mining provided reasonable
20 assurance that groundwater and drinking water would be
21 protected via the site geology monitoring restoration
22 requirements, and that this reasonable assurance was
23 addressed in the license conditions that were included
24 in the initial license. Is that correct?

25 MS. LEIDICH: That is correct.

1 CHAIR GIBSON: And secondly, you maintain
2 that the NRC's final environmental impact statement in
3 1997 complied with NEPA by adequately addressing this
4 reasonable assurance finding. Is that right?

5 MS. LEIDICH: Yes.

6 CHAIR GIBSON: You also note that the
7 board decision in that case was affirmed in part by
8 the Commission in CLI-01-04, 53 NRC 31. And I assume
9 you maintain that these two holdings were not
10 disturbed in any way by that partial affirmance, is
11 that correct?

12 MS. LEIDICH: I think that's correct.

13 CHAIR GIBSON: Okay. So what specifically
14 about this contention is impacted by this case, this
15 1999 decision?

16 MS. LEIDICH: So I would have to go back
17 to the report -- oh, the issue here is that it's the
18 references to Wallace and Lucas that show up. And
19 actually, wait a minute, that Wallace and Lucas shows
20 up in Judge Hawkens' decision.

21 CHAIR GIBSON: Judge Hawkens, 2005. I
22 think this was Judge Bloch, 1999.

23 MS. LEIDICH: Right. So I think the issue
24 here is that Judge Bloch decided, essentially, that
25 the wells would be protected from constituents in the

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1 water that may dissipate. Essentially, they would
2 dissipate before they ever reach the wells. Generally
3 speaking, I think that goes to the contention because
4 of just the general assertions by Abitz that there's
5 a potential impact on water quality.

6 It's not clear to us where the assertions
7 on water quality came from or how they came about in
8 this proceeding. I don't think he really explains
9 what the impact is to water quality. But to the
10 extent that there is any issue there, Judge Bloch
11 already decided that the water, when it's at this
12 site, is not going to reach the wells. In addition,
13 we have to -- the client has to drill new wells for
14 Crownpoint as well, and that's the license condition.
15 So to the extent that there is any allegation of an
16 impact to the wells for Crownpoint itself, we are
17 going to drill new wells, and those wells have to be
18 adequate at the time that they are drilled.

19 CHAIR GIBSON: Okay, thank you. Mr.
20 Parsons, do you agree that with Ms. Leidich that this
21 1999 decision precludes you from going forward with
22 Contention 2B? And if not, why is she wrong?

23 MR. PARSONS: Again, our contention is
24 that it revolves around the outdated nature of the
25 data. 30-year-old data or older data, as described by

1 Dr. Abitz, is not scientifically defensible to base an
2 impacts analysis, given the potential for change in
3 groundwater levels and flows, et cetera. So that's
4 the central premise.

5 CHAIR GIBSON: Okay, very well. And, Ms.
6 Gamin, you are okay with this contention being
7 admitted. You don't oppose it. What is your view of
8 this?

9 MS. GAMIN: So license condition 10.27
10 goes to replacement of the community wells. But the
11 license condition, which I believe is set to trigger
12 prior to lixiviant injection, i.e., at an undetermined
13 future time, is not enough to meet the environmental
14 review obligations which apply to the Applicant and
15 the NRC at this time. That's why we think more data
16 is needed on the impacts of water quality or of the
17 proposed action on water quality for these community
18 wells at this time, in addition to the existence of
19 license condition 10.27.

20 CHAIR GIBSON: Thank you. Ms. Leidich,
21 you also cite LBP-99-30 in your discussion related to
22 mitigation measures and feasibility, is that right?

23 MS. LEIDICH: That does sound right.

24 CHAIR GIBSON: Okay. Mr. Parsons, in your
25 reply on page 30, you say that contention is not

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1 focused on well replacement feasibility. Is that
2 correct?

3 MR. PARSONS: We do say that, Your Honor.

4 CHAIR GIBSON: Oh, you do say it. Okay.

5 MR. PARSONS: Well, it's not -- I'm sorry,
6 will you repeat the question?

7 CHAIR GIBSON: That's okay. I'm sorry.
8 You say that the Contention 2B is not focused on well
9 replacement feasibility. Is that correct?

10 MR. PARSONS: That's right.

11 CHAIR GIBSON: Okay.

12 MR. PARSONS: It's focused on the impacts.
13 I think we say in there that well replacement is not
14 a substitute for an assessment of the impact.

15 CHAIR GIBSON: Very well, thank you. Now,
16 Ms. Leidich, you also list the Hydro Resources
17 LBP-06-19, 64 NRC 53, case and state that the
18 pertinent holding of that case is that the board
19 rejected the Petitioner's remaining challenges to the
20 adequacy of the FEIS that concerned the three other
21 uranium mining areas. And that would be, the three
22 other ones were Section 17, Unit 1, and Crownpoint.
23 Do I understand that correctly?

24 MS. LEIDICH: I think that was the final
25 decision from the licensing board.

1 CHAIR GIBSON: Right.

2 MS. LEIDICH: Yes. There are other
3 decisions as well.

4 CHAIR GIBSON: But with respect to this
5 specific thing in 2B, I just want to -- we're on 2B
6 right now, that holding.

7 MS. LEIDICH: Yes.

8 CHAIR GIBSON: Thank you. And again, in
9 your estimation, this includes barring Petitioners
10 claims that the final environmental impact statement
11 did not adequately consider cumulative effects on
12 groundwater. Is that right?

13 MS. LEIDICH: We think it bars claims that
14 the Petitioner -- we think it bars claims that the
15 wells would not be good enough. Your Honor, can I get
16 a repeat of that question?

17 CHAIR GIBSON: Absolutely you can. I'm
18 sorry. In your estimation, this would include -- this
19 is the LBP-06-19 case. Bars Petitioner's claims that
20 the final environmental impact statement did not
21 adequately consider the cumulative effects on
22 groundwater. Isn't that what you cited it for?

23 MS. LEIDICH: Correct.

24 CHAIR GIBSON: Thank you. Okay. And you
25 note that the Commission denied review of this board

1 decision in Hydro Resources CLI-06-29, 64 NRC 417, as
2 well as rejecting a claim by Petitioners that the
3 presiding officer had failed to consider groundwater
4 migration through mine workings. Is that right?

5 MS. LEIDICH: Okay, yes.

6 CHAIR GIBSON: So what specifically about
7 this Contention 2B is impacted by this case?

8 MS. LEIDICH: I think that what we were
9 going for is that there has been no, again, that
10 there's been no demonstration of an impact on the
11 drinking water wells. The drinking water wells are
12 going to be replaced. To the extent that the
13 Petitioners are challenging and saying that there
14 needs to be a greater than small impact here or saying
15 that the small impact is not bounding, that it's
16 already been determined that these wells will be
17 replaced. The previous adjudication also already
18 determined that there were long times for transport
19 from these materials to get to the wells, and that
20 most of the constituents would actually dissipate
21 before ever reaching any groundwater wells.

22 So, from our perspective, an impact to the
23 drinking water has been resolved in the prior
24 decisions in this case. There was no demonstration
25 that the affluence and their constituents, rather,

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1 would transfer into the drinking water wells. This
2 also shows up in the Judge Hawkens' decision as well.
3 And these, the transport times were on the more -- the
4 order of hundreds of years. And there was also, you
5 know, there's an exclusion detection system, there's
6 monitoring wells that will determine if there are
7 excursions. There's a separate analysis of excursions
8 in the environmental report that Petitioners never
9 even address.

10 But, from our perspective, the broader
11 issue here is the impact on the wells. What is the
12 impact on the wells that's being asserted? Well, the
13 water the constituents are going to dissipate, they
14 won't make it there. It's we're on the order of
15 hundreds of years' worth of time before they do make
16 it to the wells. There's excursion monitoring. The
17 excursion monitoring is going to take care of it. To
18 the extent that there is a challenge to draw down,
19 they don't address the drawdown numbers that are in
20 the documents.

21 It's not clear to me what the impact here
22 that is that is being asserted by the State. Aside
23 from generalized claims and the fact that the NRC
24 needs the information for an RAI, what is the impact
25 here that wasn't previously resolved in the prior

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1 case? And to the extent that it's an impact on
2 Crownpoint drinking water wells, those will be
3 replaced.

4 CHAIR GIBSON: Okay. Mr. Parsons?

5 MR. PARSONS: Your Honor, I think it's a
6 similar refrain that the data that those decisions
7 relied on were 30 years old. The new data is -- there
8 is new sampling and data that's forthcoming. NRC has
9 said that it needs it to assess impacts. We agree
10 based on the declaration of Dr. Abitz. And again, a
11 well replacement plan is not a substitute for analysis
12 of what the impacts will be. And so, it is a changed
13 circumstance because it's been 30 years and we have
14 new data on its way.

15 CHAIR GIBSON: Okay.

16 MS. LEIDICH: Your Honor, can I respond to
17 that?

18 CHAIR GIBSON: Sure.

19 MS. LEIDICH: I'd just like to address one
20 thing that, it appears repeatedly in the Abitz
21 Declaration and it's sort of being implied by the
22 State here, that a large portion of the Abitz
23 Declaration is based on a claim that there is
24 heterogeneous aquifer here and shorter containment
25 travel times. You can find that in paragraph 31,

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1 which is directly on point for EC-7. Specifically
2 states that the heterogeneous aquifer modeling
3 described in paragraph 30 indicates greater drawdown
4 and shorter containment travel times to the town
5 wells. That's not supported.

6 And there's no reason here to believe that
7 the geology has changed. Regardless of the passage of
8 time, the ground is not changing within the -- it's
9 not changing in 30 years. We're not going from a
10 homogeneous aquifer to a heterogeneous aquifer. We're
11 not losing our confinement layers between the
12 aquifers. We still have aquitards. They still exist.
13 They're still there. The State hasn't brought forth
14 a reason to revisit these bigger, broader issues,
15 aside from just plainly asserting them in the Abitz
16 Declaration as if they are some sort of a fact. But
17 that's not good enough.

18 CHAIR GIBSON: Thank you. Just a
19 clean-up. One thing you said, Mr. Parsons, so I want
20 to elicit another comment from Ms. Gamin. When you
21 said there's going to be more data that's going to
22 tell us that they're going to sample out there, she
23 said it could be more sampling. It could be analogous
24 sampling data. It could be something behind door
25 number three, right? So, okay.

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1 MR. PARSONS: I understand that. I think
2 our point is there's information that's necessary to
3 conduct a contemporaneous analysis.

4 CHAIR GIBSON: Okay, great. Okay. You're
5 okay with that, Ms. Gamin?

6 MS. GAMIN: Yes, Your Honor.

7 CHAIR GIBSON: Okay. Ms. Leidich, on page
8 41 of your answer, you state that the issues raised by
9 what is now Contention 2B largely concern restoration
10 to secondary standards, and that those were already
11 litigated. I could not find a footnote for this
12 assertion, and I just want to make sure, did you
13 intend to reference CLI-06-29 for that proposition?

14 MS. LEIDICH: I suspect so, and I'm sure
15 we intended to point back to the prior portion of our
16 brief as well.

17 CHAIR GIBSON: Okay, thank you. So if the
18 Staff needs additional information to establish
19 groundwater levels, either through sampling or
20 analogous data or door number three, but these are
21 referenced in license condition 1021 and 1023. Why
22 should that not be included in the ER?

23 MS. LEIDICH: Are you asking me why the
24 license conditions aren't included in the ER?

25 CHAIR GIBSON: Why wasn't the groundwater

1 level issue put in the ER? That's what I'm trying to
2 find out.

3 MS. LEIDICH: Groundwater is analyzed in
4 the ER. The Staff is just asking for an update to the
5 particular data that's already currently referenced in
6 the ER.

7 CHAIR GIBSON: Let me rephrase that. Why
8 wasn't the update to those levels included in the ER
9 or some analogous data or some door number three data?

10 MS. LEIDICH: Your Honor, my understanding
11 is that the Applicant was not -- that NuFuels was not
12 able to obtain the information in time for the
13 environmental report submittal. I suspect that they
14 may be doing an analysis now to confirm that the
15 current analysis is, in fact, still bounding, and that
16 that may be the supplementary response.

17 CHAIR GIBSON: Thank you. Okay. Mr.
18 Parsons, as part of this narrowing of this contention,
19 in your reply, you say you're not pressing for
20 specific details about the replacement well
21 implementation, but that it still must be present in
22 the environmental report in general terms. Is that
23 correct?

24 MR. PARSONS: That sounds accurate, Your
25 Honor.

1 CHAIR GIBSON: Okay, thank you. And on
2 page 24 of your petition, you point to the ER on page
3 108, which states that well samples around Crownpoint
4 and Unit 1 were collected in the early 1990s.
5 Further, continuing on the environmental report page
6 108, the various tables cited in table 3.4 are using
7 estimated values. Is that right?

8 MR. PARSONS: That sounds right. I'm not
9 finding that specific reference on page 24, but that
10 does track.

11 CHAIR GIBSON: In the ER on page 108,
12 there were some tables that cite that.

13 MR. PARSONS: Oh, I see that. Yes, Your
14 Honor.

15 CHAIR GIBSON: Okay. So that's just
16 basically where we are, right, Ms. Gamin, in terms of
17 we don't have the data or similar data or data behind
18 door number three?

19 MS. GAMIN: That's my understanding, Your
20 Honor.

21 CHAIR GIBSON: Okay, right. Okay. Mr.
22 Parsons, in your reply on page 31, I'm going to quote
23 this, the prospect that a failed mitigation measure
24 would halt the project is not a substitute for
25 analyzing the impact that mitigation was meant to

1 address. NEPA requires the impact to be disclosed and
2 analyzed whether or not the mitigation ultimately
3 succeeds. Did I read that correctly?

4 MR. PARSONS: That's accurate, Your Honor.

5 CHAIR GIBSON: And the impact that you're
6 referring to in that sentence is license condition
7 10.27 and the water quality of the aquifer. Is that
8 correct?

9 MR. PARSONS: Yes, Your Honor. I think
10 there's probably some water level issues as well. I
11 think in our petition, we talk about the three decades
12 of pumping from those wells on Navajo and there's been
13 no assessment over the last 30 years of how that may
14 have altered the dynamics of the system. So I think
15 that is an additional component.

16 CHAIR GIBSON: Okay. Ms. Leidich, I
17 assume your answer to that is going to be, well, we've
18 already, you know, we already said things are the
19 same. They're going to be the same. Have you
20 actually put that in your environmental report?

21 MS. LEIDICH: Your Honor, there are
22 actually a number of RAI responses that are on the
23 docket that address some of this updated information.
24 So there is -- and I believe that some of the tables
25 that are in the environmental report are being amended

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1 as part of that. I don't know if the environmental
2 report itself was reissued yet, but it will be.

3 CHAIR GIBSON: Okay, thank you. Do you
4 have any questions on 2B? Do you have any questions
5 on 2B? Okay. It is -- we've been going at this for
6 two hours, is that -- for an hour, right? Are we
7 okay? Okay. So I believe we're ready to turn to
8 Contention 3, and I believe Judge Abreu has got some
9 questions about that.

10 JUDGE ABREU: I do. Thank you, Judge
11 Gibson. Mr. Parsons, when looking at Contention 3, if
12 we separate out the groundwater issues that were
13 included there, let's look at the climate-related
14 topics. And is it a fair summary to say that,
15 basically, then Contention 3 is focused on how
16 NuFuels' ER determine that no significant change in
17 the area's climate occurred between the time of the
18 FEIS and the new ER? Is that the essence of your
19 contention?

20 MR. PARSONS: That's accurate, Your Honor.
21 There were some additional data, as NuFuels points out
22 in their response, some additional data running
23 through 2024 that was not accounted for in the
24 petition. So as we stated in our reply, we've
25 withdrawn that argument with respect to those tables

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1 that run through 2024.

2 JUDGE ABREU: Okay. So there is
3 information in the ER about temperature and
4 precipitation in the area, because those connect with
5 your concerns about drought and water resources. So
6 to you, is this just a simple omission that they did
7 not include an analysis to support the conclusion that
8 there's no significant change in those climate-related
9 items?

10 MR. PARSONS: Yes, Your Honor.

11 JUDGE ABREU: Okay. So, Ms. Gamin, so the
12 Staff, in your response, said that you did think --
13 you thought this was not an admissible contention. So
14 what does the Staff point to that they think is the
15 analysis that supports the conclusion that there's no
16 significant change in, let's just say, temperature and
17 precipitation?

18 MS. GAMIN: Well, Judge Abreu, I see in
19 the ER a description of recent temperature and
20 precipitation data, going up to a fairly recent date.
21 I believe it was 2024. And I also see a statement
22 that the meteorology and climatology in the region has
23 not changed since 1997. It's at the ER in 361. And,
24 you know, if it is the Petitioner's view that that
25 conclusion is not adequately supported, the Petitioner

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1 needs to explain why the conclusion is not adequately
2 supported or provide some facts or expert testimony
3 questioning that conclusion. And the Staff didn't see
4 a lot of support in the petition or the accompanying
5 exhibits for that claim.

6 JUDGE ABREU: Well, if it's a contention
7 strictly of omission, if they're just saying it's not
8 there, one would think you could point to, oh, but it
9 is there. Here's where the analysis is. Do you have
10 a sense of where that analysis is?

11 MS. GAMIN: I guess I don't see this
12 strictly as a contention of omission because, as I've
13 stated, there is a statement about whether the climate
14 has changed and there is, in the ER, descriptions of
15 climate data. And to the extent one could say that
16 something is omitted, there's not a discussion in the
17 ER of something labeled climate change. But it's not
18 clear to me there's a requirement for a discussion
19 specifically labeled climate change to exist in the
20 ER.

21 JUDGE ABREU: Well, if we just take the
22 topic of temperature and precipitation, which were two
23 topics within the ER, do you believe there is an
24 analysis that says, the data from the time of the FEIS
25 and the data they present now, here's why we say it's

1 not changed. Did you believe that analysis was
2 present somewhere in the ER?

3 MS. GAMIN: I think the data is there and
4 the conclusion is there. There's not a specific
5 analysis bridging the data to the conclusion. But I'm
6 not convinced there is a requirement for that specific
7 analysis to be there.

8 JUDGE ABREU: And why is that?

9 MS. GAMIN: Well, and I would have to look
10 up the specific page of the ER that has the
11 temperature data, but if you have enough data by
12 looking at the temperature data, you can draw a
13 conclusion about whether the temperature has changed.

14 JUDGE ABREU: So you're saying it's
15 basically apparent by the data?

16 MS. GAMIN: Yes.

17 JUDGE ABREU: Okay. All right. Ms.
18 Leidich, what's your opinion on the idea that this is
19 just a simple omission and where the analysis is?
20 Let's just stick to temperature and precipitation,
21 just to keep things simple for the moment.

22 MR. WALSH: Thank you, Your Honor. This
23 is Mr. Walsh. I'll be handling the discussion on this
24 contention. So I think it's first and foremost worth
25 pointing out that the ER appropriately relies on the

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1 FEIS. Section 3.6 of the ER refers back to Section
2 3.1 of the FEIS, and there is temperature and
3 meteorology data in the FEIS.

4 And in fact, you know, when they make that
5 statement that the meteorology and climatology in the
6 region have not changed since the publication, they
7 are relying on the information that's already
8 contained in Section 3.1. And so, there's a table,
9 3.1, in the FEIS that contains temperature and
10 climatology -- monthly and annual precipitation and
11 temperature data, 3.1 and 3.2. And the data in those
12 tables are easily comparable to the data that is
13 provided in the ER.

14 JUDGE ABREU: All right, so let's look at
15 that data. Let's look at the precipitation data.
16 That's the ER 149 and 3.6.1.2 and table 3.6-2 on the
17 ER page 153. So you feel that basically the data
18 speaks for itself if you compare it with the FEIS
19 data. Is that essentially what you're saying to me?

20 MR. WALSH: That is correct, Your Honor.

21 JUDGE ABREU: Okay. So when you look
22 directly at the ER, where does the ER tell me what
23 years this new data spans?

24 MR. WALSH: Table 3.6.1 contains regional,
25 annual, and monthly temperature statistics for 1981 to

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1 2024.

2 JUDGE ABREU: So you have to make sure you
3 go read the other section. It's not really in the
4 section devoted to precipitation. You got to look
5 back, right?

6 MR. WALSH: Well, I'm sorry, Your Honor.
7 I was speaking to the temperature data. The FEIS has
8 data in 3.1 and 3.2 that span from 1931 to 1960.

9 JUDGE ABREU: Mm-hmm. But the ER, if you
10 look at 3.6.1.2, does it say what years that data
11 spans? What I'm looking at is in 3.6.1.2, you have to
12 look back -- you have to figure out for yourself to
13 look back at 3.6.1, right?

14 MR. WALSH: Yeah, I think you're correct,
15 Your Honor. And that this particular section on
16 precipitation does refer back to 1931 and 1960, but
17 does not mention in this particular paragraph the
18 years of the precipitation covered.

19 JUDGE ABREU: Okay. And if you look at
20 table 3.6-2, that also does not say what years this
21 data comes from. It has a citation to NOAA data in
22 '24, but it doesn't really tell us what years this
23 data spans, does it?

24 MR. WALSH: On the face of this table, no,
25 Your Honor, it does not. It does have the citation to

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1 NOAA 2024b as a reference, but you would have to go
2 look at that reference, I guess.

3 JUDGE ABREU: Right. So that's, you know,
4 if we're talking about the data stands for itself, if
5 I'm looking at the data in the chart, it makes it a
6 little challenging to know what I'm comparing. So if
7 we look at that a little more in the ER section
8 3.6.1.2, the narrative, the ER says that the FEIS data
9 for 1931 to 1960 is used, and it's for average annual
10 precipitation for Crownpoint, and it mostly resembles
11 Gallup. But it doesn't tell us on what that
12 conclusion is based. Is that somewhere else that I've
13 missed it?

14 MR. WALSH: To the best of my knowledge,
15 Your Honor, there's no other discussion on this point
16 other than what's in this discussion. It says here
17 these values are within the range of the three
18 regional sites and most closely resemble those for
19 Gallup.

20 JUDGE ABREU: All right. Because if I
21 look at the annual average precipitation at
22 Crownpoint, it was 26 cm. And here, Grants is the one
23 that's closest to 26, not Gallup. So if I was just
24 looking at precipitation and not snowfall, I might
25 wonder, well, why did you pick Gallup?

1 And then if I do look at the table 3.2 in
2 the FEIS on page 3-2, and the narrative that goes with
3 it on 3-1 to 3-3, the FEIS tells me that the data the
4 ER stated was for Crownpoint -- that the data stated
5 for Crownpoint is based on nearby locations, including
6 Crownpoint and on actual 1975 snowfall amounts for
7 Gallup and Chaco Canyon National Monument. So
8 according to the FEIS, it's not Crownpoint data. It's
9 Crownpoint plus some other things to give me the
10 snowfall data.

11 And we do notice in the data in the ER for
12 precipitation where it talks about snowfall, Gallup
13 gets a whole lot more snowfall than the other two
14 comparative sites, Grants and Farmington. So it makes
15 me wonder if the previous data has snowfall including
16 Gallup's data, that that's skewed away from what
17 Crownpoint might have actually been. I don't really
18 know what Crownpoint data is in comparison. Is that
19 making sense?

20 MR. WALSH: I believe I understand what
21 you're saying, that there might be some discrepancies
22 in the data here. But at the end of the day, Your
23 Honor, this is a contention that the State of New
24 Mexico proffered, and the State of New Mexico
25 challenged none of this in their contention. Their --

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1 JUDGE ABREU: I understand they point out
2 data, but I've heard that the analysis basically
3 stands on its own based on the data. They said, the
4 State said, hey, there's no analysis here. And I'm
5 hearing from other sources that the analysis is just
6 because we've given you the data and it looks good.
7 So that's why I'm wondering, is the data, does it
8 stand on its own to back up the brief well or
9 non-existent analysis that there's no change?

10 MR. WALSH: Well, there may be some
11 discrepancies in the data, Your Honor, but the
12 environmental report relied on, appropriately so, the
13 FEIS that was conducted. And if there were any errors
14 in the data, it was the burden of the State of New
15 Mexico to come forward and point those out as to form
16 the basis of their contention. They did not do that.
17 This contention alleges that there was no analysis of
18 climate change. They did not dig any deeper than
19 that.

20 JUDGE ABREU: But are you going to still
21 stand on the fact that we don't need an analysis? If
22 they're saying analysis was missing and you're saying,
23 well, we don't need one because the data is clear, you
24 believe the data clearly supports the decision that
25 there is no significant change?

1 MR. WALSH: Your Honor, I did not mean to
2 suggest that the data was unimpeachable, but there are
3 comparable tables that do include a lot of information
4 on climatology and meteorology. And if there were
5 discrepancies in the data that could have formed the
6 basis of the State's contention, they did not raise
7 it.

8 JUDGE ABREU: Okay. One other side note,
9 for those that haven't read all the details, the
10 reason there's no data for Crownpoint is because that
11 monitoring station, something happened to it. So
12 there is no data from Crownpoint. You guys have made
13 that clear in the ER, is that correct?

14 MR. WALSH: It's my understanding, Your
15 Honor, yes.

16 JUDGE ABREU: Okay. But you have given us
17 new data from Grants, Gallup, and Farmington, which
18 are areas -- which are towns in the general ballpark
19 in that northwest corner of the state that are in the
20 area of Crownpoint. Was there any thought given to
21 the idea of if we don't have new Crownpoint data, we
22 can give you these other sites and the old data so
23 that I can compare apples to apples? Was that a
24 consideration at any point so that I could say, oh,
25 old Grants looks like old Crownpoint or old Farmington

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1 looks like old Crownpoint so that I can connect the
2 dots, so to speak, between the old data and new data?

3 MR. WALSH: Your Honor, I don't have any
4 information to respond to your question here. I don't
5 know what was considered at the time.

6 JUDGE ABREU: All right. Let's look at --
7 let's just go ahead and look at temperature briefly.
8 That's on, yeah, figure 3.6-1 on ER page 159, and the
9 narrative -- and the table on page 152. And it's your
10 contention that these -- well, I shouldn't use the
11 word contention. So you believe this supports the no
12 change conclusion?

13 MR. WALSH: Yes, Your Honor.

14 JUDGE ABREU: Okay. So if you look at
15 that, the curves on figure 3.6-1, there's no years
16 presented in that. If I just look at this chart, it
17 does show that all the lines overlap each other, but
18 it doesn't have what years each are presented. Is it
19 correct that the data for Grands, Gallup and
20 Farmington are the new data and Crownpoint is the old
21 data, even though it doesn't show it on your chart?

22 MR. WALSH: One second, Your Honor. I'm
23 flipping to that page.

24 JUDGE ABREU: The graph.

25 MR. WALSH: The graph, sorry. Can you

1 repeat the question again, Your Honor?

2 JUDGE ABREU: So the graph doesn't have
3 any -- doesn't show anything about years in the title
4 or in the legend of the graph.

5 MR. WALSH: That's correct, Your Honor.

6 JUDGE ABREU: So based on the narrative,
7 it seems that what you're doing is comparing old
8 Crownpoint to new of the other three towns, even
9 though it's not shown there. That seems to be what
10 the graph is doing.

11 MR. WALSH: I believe that is correct,
12 Your Honor. Again, the chart says regional average
13 monthly temperature. So it's obviously an average of
14 data here, but I do not have the specific years
15 involved.

16 JUDGE ABREU: Okay, because it wasn't
17 apparent to me that that was presented with that
18 graph. And the data in table 361, which is the
19 monthly and annual temperature data, which does say
20 from '81 to 2024. But again, we don't have
21 comparative data in this table. We only have new
22 data. So the reader has to go look in the FEIS to
23 find the comparative data, and you're still going to
24 use the Crownpoint data for comparison, even though
25 that's a different site than these three sites. Is

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1 that correct?

2 MR. WALSH: That is my understanding, Your
3 Honor.

4 JUDGE ABREU: Okay. And we've already
5 talked about the fact that we don't really have apples
6 and apples here to compare to. So I do understand
7 your point about the fact that the State of New Mexico
8 did not point out these differences, but since we are
9 relying on the data to speak for itself, that's why I
10 wanted to explore it a little more to see if there was
11 something I was missing within that section or might
12 have been presented elsewhere in the ER that we had
13 missed. So do anybody else have any questions on
14 three? Yes, Chair.

15 CHAIR GIBSON: I think I've got some,
16 yeah. Just got a couple. I just want to make sure,
17 Mr. Parsons, that you're not -- you're disputing the
18 Staff's characterization of this data as hydrogeologic
19 and instead claim it actually concerns climate-driven
20 changes in recharge, regional demand, or baseline
21 water levels over a 20-year operating period that
22 projects substantial consumptive use from a single
23 aquifer system in an arid basin. Did I read that
24 correctly?

25 MR. PARSONS: You did, Your Honor. And

1 just for clarification, I do understand, obviously,
2 the burdens the State has in contention pleading, and
3 this is a contention of omission. And I will note
4 that the regulation at 51.45c is labeled analysis and
5 requires the environmental report must include an
6 analysis that considers and balances the environmental
7 effects. And so, with respect, a raft of data, while
8 potentially helpful, is not what's called for in the
9 regulation.

10 CHAIR GIBSON: Okay, thank you. Anything
11 else? Anything else? No, okay. I think that takes
12 care of Contention 3. And we'll move to Contention 4.

13 MS. GAMIN: Your Honor, may I go back and
14 answer the question you asked about EC-2A?

15 CHAIR GIBSON: Yes.

16 MS. GAMIN: Yes. So the homework the
17 Staff was given was whether our RAI -- it's actually
18 RSI request for supplemental information asks for
19 groundwater data on all four project areas, and the
20 answer is yes. The most recent data we have for any
21 of those is from 2011.

22 CHAIR GIBSON: Thank you so much, Ms.
23 Gamin. Appreciate that.

24 MS. GAMIN: You're welcome.

25 CHAIR GIBSON: All right. Ms. Leidich,

1 with respect to Contention 4, you have cited the board
2 decision we previously talked about, LBP-99-30, which
3 was affirmed in part by the Commission in Hydro
4 Resources, CLI-01-04, 53 NRC 31, as well as the NRC's
5 April 30, 2025, rescission of its environmental
6 justice policy statement as precluding the issues that
7 are raised by Contention 4. Is that right?

8 MR. WALSH: Yes, Your Honor. Mr. Walsh
9 here. I'll be handling Contention 4 as well.

10 CHAIR GIBSON: Sorry, Mr. Walsh.

11 MR. WALSH: No worries.

12 CHAIR GIBSON: I wasn't supposed to be so
13 presumptuous. Okay, go ahead. Please answer.

14 MR. WALSH: I believe I did when I went
15 off mute, but yes, that is correct. The 2025
16 rescission of the Commission's policy on environmental
17 justice takes these issues out of scope. And these
18 issues were, as the licensing board said previously,
19 or maybe it's the Commission, I apologize, but
20 environmental justice issues were infused throughout
21 the final environmental impact statement. And of
22 course, you know, so there's no longer any requirement
23 to have a standalone environmental justice analysis.

24 But obviously, our environmental report
25 was prepared before the rescission of that policy, and

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1 we are relying on the earlier work on this topic as
2 well too, so that's why the environmental report
3 contained updated population information up through
4 2024. So there we are --

5 CHAIR GIBSON: Just one second, please.
6 Are we okay? We had some kind of a technical glitch,
7 I'm sorry. Is everything okay, Mr. Welkie? Okay,
8 sorry. I don't know what happened. For this 1999
9 case, what specifically about that case impacts this
10 contention, Mr. Walsh?

11 MR. WALSH: Which decision are you
12 referring to, Your Honor? I'm just looking back at
13 our --

14 CHAIR GIBSON: The 1999 decision,
15 LBP-99-30, which was affirmed by the Commission in
16 CLI-01-4, and you can pick either one or both of those
17 if you want to talk about. I just want to understand
18 what is it about that decision that affects the
19 admissibility of this contention here?

20 MR. WALSH: Again, so the -- in this case,
21 I would rely on the Commission decision, of course,
22 affirming it. But, essentially, the environmental
23 justice of the project was previously litigated as
24 part of the Phase 1 1999 proceedings, and the
25 licensing board and the Commission addressed the

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1 environmental impact, environmental justice impacts to
2 the community.

3 So again, this is one of those situations
4 where it was decided previously, and the burden is on
5 the State to come forward with new information or
6 change circumstances in order to disturb those prior
7 decisions, separate and apart from the fact that
8 Commission policy no longer requires an environmental
9 justice analysis.

10 CHAIR GIBSON: Thank you. Ms. Gamin, in
11 your answer, you suggest that the, and I'm going to
12 quote you here, the NRC will continue to ensure that
13 it fully meets its obligations under NEPA, but no
14 specific analysis labeled environmental justice is
15 required. What are the obligations under NEPA as they
16 relate to environmental justice now?

17 MS. GAMIN: Thank you, Your Honor. I'm
18 going to ask my co-counsel to address that with your
19 permission.

20 CHAIR GIBSON: Sure. Mr. Quinn?

21 MR. QUINN: Good afternoon, all. Good
22 afternoon, Judge Gibson. As you stated, as has been
23 stated, NRC no longer maintains any policy that
24 mandates environmental justice analysis. In licensing
25 proceedings, however, consistent with NEPA

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1 obligations, the Staff will continue to evaluate
2 applications and to craft its analyses consistent with
3 its obligations under NEPA, as stated in 51.45 and
4 51.6a.

5 CHAIR GIBSON: Of 10 --

6 MR. QUINN: Of 10 CFR, yes, sir.

7 CHAIR GIBSON: Very well, thank you.
8 Okay. And so, in this case, you're maintaining that
9 the Staff's analysis of environmental justice in the
10 '97 FEIS is sufficient and does not need to be updated
11 because the demographic profile of that part of the
12 world is basically the same as it was in 1997, is that
13 right?

14 MR. QUINN: Well, I think what we're
15 stating is that the 1997 FEIS is incorporated into
16 this license renewal application and has been -- and
17 its conclusion, not conclusion, that statement, Your
18 Honor, hasn't been put into contention by New Mexico.

19 CHAIR GIBSON: Mr. Parsons, in your reply
20 on page 36, you state that this is a contention of
21 omission because a current conditions analysis of
22 disproportionately high and adverse effects, I guess,
23 on the indigenous population must be included. Can
24 you explain why you see this as a current requirement?

25 MR. PARSONS: Sure, Your Honor. Again,

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1 we're dealing with a 30-year-old analysis and while
2 the State acknowledges that the demographic profile is
3 similar, that the impacts of a project like this -- it
4 does not follow that the impacts of a project like
5 this remain static as well. All kinds of uses of
6 water and land and the environment can change in that
7 30 years. And to rely entirely on a 1997 analysis is
8 not consistent with the regulations that require a
9 complete review of the environmental impacts.

10 It does seem to me that some of the case
11 law was -- previous case law was not so clear cut. My
12 reading, for instance, of CLI-01-4 found the '97
13 analysis adequate, at least insofar as Section 8 was
14 concerned. And then 04 -- CLI-04-39 discussed a
15 housing development near Section 8 and 17, but nothing
16 about Unit 1 or Crownpoint.

17 And so, I think that there's a legitimate
18 question to the extent that the previous litigation
19 actually found, for all four units of this proposal,
20 that the '97 analysis specifically satisfy the
21 requirements there. But in any case, this is a
22 contention of omission with respect to an analysis
23 that addresses current conditions.

24 CHAIR GIBSON: Okay, fair enough. Mr.
25 Quinn, do you have anything you want to add in reply

1 to what Mr. Parsons just said?

2 MR. QUINN: No, sir.

3 CHAIR GIBSON: Great, okay. Any questions
4 about four? Let's go to Contention 5. Staff, Ms.
5 Gamin or Mr. Quinn, I don't know which one of you is
6 doing this contention, you cite to Hydro Resources
7 98-16, 48 NRC 119, a 1998 Commission decision
8 regarding narrowing Contention 5 to avoid litigation
9 of legal issues that fall under tribal jurisdiction.
10 Has narrowed Contention 5 resolved your concern?

11 MS. GAMIN: Yes, Your Honor.

12 CHAIR GIBSON: Okay, good. Thank you.
13 And so, at this point, you have no objection to the
14 contention as it's been narrowed. Is that correct?

15 MS. GAMIN: That's correct, Your Honor.
16 I think based on the pleadings and the joint motion to
17 narrow and consolidate contentions, we are on the same
18 page with that.

19 CHAIR GIBSON: Thank you. Mr. Parsons, do
20 you have any comments you want to make about the
21 narrowing or you're fine with it just the way it is?

22 MR. PARSONS: I would defer to my
23 co-counsel. She was in charge of this contention.

24 CHAIR GIBSON: Ms. Jamison? Sorry, I did
25 not mean. I've overlooked you in.

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1 MS. JAMISON: No worries.

2 CHAIR GIBSON: Mr. Walsh, I'm sorry.

3 MS. JAMISON: It's understandable. I
4 don't have any additional comments on the contention.
5 We do have other points we might raise in response to
6 other questions, but about the narrowing, nothing as
7 yet.

8 CHAIR GIBSON: Thank you. Applicant,
9 whichever one of you is going to take this?

10 MR. WALSH: Me again, Your Honor.

11 CHAIR GIBSON: It's you. Okay, good.
12 Okay. Mr. Walsh, great. After putting Ms. Leidich
13 through Contention 1, I suspect -- Thompson. Yeah, so
14 the central facet of your position is that if Navajo
15 laws and regulations prevent you from mining, that is
16 already addressed in the no action alternative, and so
17 there is no need to address these three Navajo
18 enactments that are set forth on pages 20 to 21 of the
19 petition. Is that correct?

20 MR. WALSH: It's essentially correct, Your
21 Honor, yes.

22 CHAIR GIBSON: Okay. Now, two of these
23 enactments actually post-date the 2006 LBP, correct?

24 MR. WALSH: That is correct.

25 CHAIR GIBSON: Okay. On pages 35 and 36

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1 of your answer, you further cite to Hydro Resources,
2 LBP-06-19, 64 NRC 53 with respect to the Dine, I hope
3 I said that right, Natural Resources Protection Act.
4 This is a Navajo, I believe, nation action. That case
5 was focused on FEIS supplementation. Specifically,
6 how does that case relate to the admissibility of this
7 contention, Mr. Walsh?

8 MR. WALSH: We cited it for support for
9 the statement you just mentioned in the beginning
10 here, that our position is that if we do not obtain
11 the appropriate agreements or easements or whatever,
12 whatever the case may be, the project cannot go
13 forward. And so, those environmental -- the
14 environmental impacts of that scenario is already
15 bounded by the no action alternative.

16 So there were various statements in that
17 decision and they're quoted in our answer here. But
18 just to repeat one, if -- well, actually this is a
19 Commission decision, but we cited that case as it
20 being analogous to the requirement that an EPA permit
21 would be needed for underground injection controls,
22 again substantively not relevant here, but if we don't
23 have the appropriate permit then we can't do the
24 project and then no environmental impacts will occur.

25 And then later, the Commission said that

1 if Hydro Resources, our predecessor, cannot proceed or
2 chooses not to proceed with the proposed project
3 because of the DNRPA, there would be no project
4 impacts or benefits at all, equivalent to the no
5 action alternative. So our position remains the same,
6 that if for some reason we can't go forward with the
7 project, then that circumstance is bounded in the
8 existing analysis.

9 CHAIR GIBSON: Okay. And, Mr. Parsons,
10 your position is that those issues still needed to be
11 included in the environmental report. Is that right?

12 MR. PARSONS: I would defer to Ms.
13 Jamison.

14 CHAIR GIBSON: Sorry. I'm sorry, Ms.
15 Jamison. My bad.

16 MS. JAMISON: No worries. No worries at
17 all. Yes, that's exactly right, Your Honor. If these
18 permits and approvals are indeed analogous to UAC
19 permits, then why aren't they not listed in a table of
20 two, 1.3-1, along with the EPA permits listed there
21 pursuant to section, you know, 10 CFR Section 51.45d,
22 which requires, you know, listing of all permits
23 approvals necessary, whether that's federal, state, or
24 local, and also the status of compliance with each.
25 We believe that information should be there as well.

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1 The Staff, I think, agrees with us on that point, and
2 then also pursuant to 45E, which is the requirement
3 that the Applicant produce adverse information.

4 And if I may, I'd like to make a point
5 about LBP-06-19. If you look at footnote 40, it's
6 sort of the very end of the opinion there. The
7 presiding -- so the Commission knows the presiding
8 officer states that, resolution of whether the sites
9 on which HRI proposes to conduct NRC licensed mining
10 operations are in Indian country may affect HRI's
11 ability to mine.

12 So one of the disclosive issues in 2006
13 was whether the mine sites were in Indian country.
14 And then, of course, since then, we've had the 2012
15 Temporary Access Agreement in which NuFuels or rather
16 HRI's predecessor acknowledged that Church Rock
17 Section 17 and 9 are tribal trust lands and that
18 needed Navajo Nation consent to cross those lands to
19 access Section 8. So I would just note that the 2012
20 Access Agreement is a change circumstance that also
21 should be disclosed and analyzed in the ER pursuant
22 to, I think, it's 51.16.

23 CHAIR GIBSON: Thank you, Ms. Jamison.
24 Now, I think this is you, Ms. Gamin, but if not, Mr.
25 Quinn. And I take it this is why you don't -- you're

1 not opposed to admitting this contention, because this
2 is something that needs to be added to the ER is the
3 list one -- this is one of the permits that needs to
4 be listed. Is that correct?

5 MS. GAMIN: Yes.

6 CHAIR GIBSON: Or licenses or enactments
7 or whatever the proper term is for authorization to go
8 forward.

9 MS. GAMIN: Yes, Judge Gibson. I'm not
10 sure permit is the right category, but it is. And
11 these are illegal enactments directly bearing on the
12 project that should be included in the ER. And the
13 decisions that have been cited at LBP-06-19 and
14 CLI-06-29 did not fully litigate this issue because
15 only one of the Navajo legal enactments at issue was
16 in existence at the time these decisions were made and
17 because these decisions focus on the standards for
18 supplementation of an existing FEIS.

19 CHAIR GIBSON: Okay, very well. Okay,
20 thank you. Now, I think that may have -- Ms. Jamison,
21 I believe, made a reference to one of the non-NRC
22 license conditions would include transportation access
23 that crosses Navajo territory. Is that right, Ms.
24 Jamison? Is that one of the things that you're
25 looking for as well, Ms. Gamin?

1 MS. GAMIN: I'm sorry. Could you repeat
2 that, Your Honor?

3 CHAIR GIBSON: Absolutely. One of the
4 non-NRC licenses that Ms. Jamison referenced was
5 transportation access that crosses a territory, either
6 Navajo Nation or Navajo allotted land territory. Are
7 you looking to see that included as well?

8 MS. GAMIN: Yes, Your Honor.

9 CHAIR GIBSON: Okay, thank you. Okay.
10 Got anything on there?

11 MR. WALSH: Your Honor, may I respond to
12 the transportation issue, please?

13 CHAIR GIBSON: Yes, Mr. Walsh.
14 Absolutely.

15 MR. WALSH: Thank you. I wanted to point
16 out a couple of things. First, you know, ER section
17 3.2 discusses the transportation analysis and other
18 subsequent sections of the ER discussed potential
19 impacts from transportation. And none of that is
20 challenged by the State. The actual substantive
21 analysis of transportation impacts is not discussed.
22 What Section 3.2.2 of the ER does say is that the
23 following discussion relies on representative
24 transportation routes.

25 So while it may be the case that because

1 of the enactments that are in place today, there may
2 not be permission to cross over those routes. We
3 still, in NEPA space, are allowed to provide an
4 estimate of environmental impacts and to base the
5 ultimate decision on that reasonable estimate. And
6 that's specifically what the application does here.
7 It specifically says it's using these as
8 representative routes.

9 And then there's been other case law out
10 there that talks about this, that in NRC licensing
11 proceedings, it's a well-established regulatory
12 approach to rely on representative transportation
13 routes. That was decided in the Holtec proceeding
14 CLI-20-04 in 2024, and that was also affirmed by the
15 D.C. Circuit. So to the extent that the State is
16 challenging the actual transportation analysis that's
17 provided, they don't do that at all.

18 The issue here is whether or not we will
19 have access to the site based on some existing Navajo
20 Nation requirements. And as we stated in our answer,
21 if we reach agreement with the Navajo and can get
22 access to the site, then perhaps the project will
23 proceed, it can proceed. If we don't, then the
24 project cannot. And so, the environmental impact
25 analysis that is in there covers both those extremes,

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1 you know, no-go and full operation, and we are
2 permitted to do so.

3 CHAIR GIBSON: Thank you, Mr. Walsh. You
4 cited to this, I take it, Commission decision? Is
5 that 20-04 that was --

6 MR. WALSH: Yes, CLI-20-04. Sorry, Your
7 Honor. I did not mean to speak over you.

8 CHAIR GIBSON: No, that's okay. That's
9 the least of my problems right now. I assure you.
10 Okay, good. Okay, that's good. Thank you so much.
11 And that was affirmed by the D.C. Circuit?

12 MR. WALSH: Yes, Beyond Nuclear v. NRC.
13 The citation there is 113 F.4th 956.

14 CHAIR GIBSON: Okay. I'm going to take a
15 break here in just a minute. I just want to ask one
16 more question in that regard. Ms. Jamison or Mr.
17 Parsons, do you have an opinion about the application
18 of this 20-04 CLI that was affirmed by the D.C.
19 Circuit?

20 MS. JAMISON: If I could take the recess
21 to look at that. For some reason, I have a different
22 whole case in my case file that was referenced. If
23 this is the Beyond Nuclear case --

24 CHAIR GIBSON: It is the Beyond Nuclear
25 case, yes.

1 MS. JAMISON: And so, I'm unclear about --
2 so that's being cited for the proposition that
3 representative transportation routes may be used, is
4 that?

5 MR. WALSH: That is correct.

6 MS. JAMISON: Well, I would just say, I
7 mean, I would like to take a look at that case if it's
8 okay, in the recess. But I would just say that we do
9 dispute and contribute the transportation analysis on
10 page 21 of our petition. And I think that, you know,
11 importantly, the Navajo Nation, the Transportation Act
12 of 2012 does provide for the potential for
13 transportation, but that does have to be consented by
14 the Navajo Nation. That does have to be federal
15 easements involved. And so, that should be listed in
16 the table as well.

17 But, of course, however, these issues are
18 resolved is going to affect the transportation
19 analysis. It is going to affect the access analysis
20 that is in the environmental report. So I would like
21 to refer everyone to page 21 of the petition and the
22 first sentence.

23 CHAIR GIBSON: Okay, great. And lastly,
24 Ms. Gamin, I take it you don't share the view that
25 this decision, the Beyond Nuclear decision, prevents

1 them from having to submit this information?

2 MS. GAMIN: Your Honor, the use of
3 representative transportation routes in general is a
4 viable way of meeting NEPA obligations, but there
5 needs to be enough information in the record to
6 determine they are representative.

7 CHAIR GIBSON: Fair enough. And you're
8 saying it wasn't there, right?

9 MS. GAMIN: Yes, sir.

10 CHAIR GIBSON: Okay. Thank you so much.
11 Okay, we will stay in recess. You want to come back
12 at 3:20. Will that be okay?

13 MS. LEIDICH: Yes, Your Honor.

14 CHAIR GIBSON: Okay. All right.

15 (Whereupon, the above-entitled matter went
16 off the record at 2:59 p.m. and resumed at 3:20 p.m.)

17 CHAIR GIBSON: We're back on the record.
18 Is the court reporter with us? Very good, thank you.

19 I believe we're going to start with
20 Contention 6 now. Ms. Leidich or Mr. Walsh, I want to
21 start with the second case that you list in your
22 answer, Hydro Resources, LBP-99-949, NRC 136. You
23 state there that the pertinent holding of that case
24 for purposes of this dispute is that the Nuclear
25 Regulatory Commission's phased National Historic

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1 Preservation Act review was lawful and adequate for
2 Church Rock Section 8. Is that correct?

3 MR. WALSH: Yeah, just to make sure I'm
4 looking at the right citation, which footnote were you
5 looking at, sir?

6 CHAIR GIBSON: I've got Hydro Resources,
7 LBP-99-949, NRC 136. Maybe I wrote it down wrong, I
8 transferred --

9 MR. WALSH: I'm sure you did not, but I'll
10 answer the question, Your Honor. I mean, the issue
11 was that they--it was agreed back at the time to do
12 the cultural resources analysis for the first section.
13 It's a very large project area, and that was ruled
14 appropriate.

15 CHAIR GIBSON: Okay, and from this claim,
16 you're saying that the NRC's cultural resources
17 analysis in the late 1990s was sufficient for any and
18 all obligations that the NRC owed under NEPA for
19 purposes of complying with the National Historic
20 Preservation Act; is that correct?

21 MR. WALSH: We are -- my client is relying
22 on the cultural resources evaluation that was done
23 previously, yes. That is correct, sir.

24 CHAIR GIBSON: Okay. What specifically
25 about this contention is impacted by this case? Now,

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1 I'm having a little trouble understanding that. I
2 mean, a lot's happened in 27 years. I assume on the
3 106 front. Maybe I'm wrong.

4 MR. WALSH: So, Your Honor, let me step
5 back for a moment. This is a situation where we have
6 done an environmental analysis in the prior licensing
7 proceedings, and we're here to renew the license. And
8 the State has come forward with the contention
9 purporting to challenge the cultural resources
10 analysis, but the controlling case law here says that
11 in order to submit -- support an admissible
12 contention, the State needs to come forward with some
13 evidence, some showing that there are cultural
14 artifacts within the project area that are not
15 accounted for in the prior analysis. So if you look
16 back at the prior licensing proceedings, and again, I
17 know 27 years have passed, but the then Applicant,
18 HRI, and subsequent licensee, the NRC Staff, and the
19 licensing boards involved all looked at these issues
20 and found that the cultural resources analysis was
21 more than satisfactory. And so today, in 2026, for
22 the State to challenge that, they've got to come up
23 with something that calls that into question. And
24 based on the contention as submitted, they have not.

25 CHAIR GIBSON: Okay. Mr. Parsons, do you

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1 agree? And if not, why not?

2 MR. PARSONS: No, Your Honor, we do not
3 agree. The record in this case demonstrates that
4 there are cultural resources out at the site. There
5 was a survey of at least two of the sections
6 previously.

7 CHAIR GIBSON: Can you hold on just a
8 second, Mr. Parsons? I am pretty confident that you
9 all will be very careful in how you describe this, but
10 I remember when we tried the Crow Butte case in
11 Crawford, Nebraska, we had to be very careful to make
12 sure that we did not identify the location of any, you
13 know, artifacts, relics, whatever there might be. So
14 it probably will never happen, I'm sure you all are
15 totally sensitized to that, but just keep it in the
16 back of your mind, and if for some reason we actually
17 have to talk about a specific relic artifact location
18 with that much specificity, please let us know and we
19 can deal with that subsequently. But right now we
20 have an open proceeding, and I want to be sure that
21 none of that ever comes out. Okay? Okay. I'm sorry
22 to interrupt you, Mr. Parsons. I just wanted to be
23 sure and make that notation.

24 MR. PARSONS: No, no problem. That's
25 wholly appropriate, and I do not anticipate that

1 anything I will say will relate to any specific
2 location of any particular artifact, except that there
3 are cultural resources on these sites. That's
4 established, I think, in the record. Again, you know,
5 this is a cultural resources survey that's pushing 30
6 years old. Not only have there been, as we assert and
7 as the NRC has stated in the record, there are new
8 standards and new protocols for surveying, and that
9 has changed in the 30 plus years, or approximately 30
10 years. In addition, there's evidence in the record
11 that the company is in the process of gathering
12 additional information, acknowledging that there's
13 more data coming and needs to be included in the
14 cultural resources analysis in order for it to give
15 the Staff sufficient basis to perform its NEPA
16 analysis, as well as its National Historic
17 Preservation Act analysis.

18 I think we made it very clear that we are
19 not raising an NHPA argument here. That's a Staff
20 duty, but nevertheless, the environmental report does
21 require an evaluation of environmental impacts, and
22 cultural resources are squarely within that realm.
23 And there's, again, no dispute that as to the age of
24 the previous analyses and that additional data is
25 forthcoming, which demonstrates as we plead that the

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1 current analysis is incomplete.

2 CHAIR GIBSON: Okay. Thank you, Mr.
3 Parsons. Just one point. You mentioned NHPA. You're
4 referring to the National Historic Preservation Act,
5 correct?

6 MR. PARSONS: Yes, Your Honor. Thank you.

7 CHAIR GIBSON: Okay. Ms. Gamin, I take it
8 the Staff is not opposed to the admission of this
9 contention either, is that correct?

10 MS. GAMIN: That's correct, and Mr. Quinn
11 will be addressing this with your permission.

12 CHAIR GIBSON: Oh, good. Mr. Quinn,
13 fantastic. So we'll give you a chance to talk about
14 it in a minute, okay? Let me ask you, is there
15 anything about Mr. Parsons that you wish to dispute or
16 amplify what he just said?

17 MR. QUINN: No, sir. There's nothing
18 additional from the Staff.

19 CHAIR GIBSON: Thank you. Mr. Walsh, I'd
20 like next to turn to the fifth case that you list in
21 your answer, the Hydro Resources 0526, LBP-05-26 62
22 NRC 442 case. And for that, you cite two pertinent
23 holdings that you deem relevant for this contention.
24 First, you maintain that the LBP-05-26 Board rejected
25 certain cultural resource challenges that were raised

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1 under the National Historic Preservation Act and NEPA;
2 is that correct?

3 MR. WALSH: Yes, Your Honor.

4 CHAIR GIBSON: And secondly, you maintain
5 that under the rules applicable in 1998, when the NRC
6 licensed this mining operation, the LBP-05-26 Board
7 accepted a phased Section 106 review, and as a
8 corollary of this, that the NRC's cultural resource
9 discussion in its final environmental impact statement
10 was adequate; is that right?

11 MR. WALSH: Yes, Your Honor.

12 CHAIR GIBSON: Okay. You note that the
13 Commission denied review of this board decision in
14 Hydro Resources CLI-06-1L, 63 NRC 483, 2006; is that
15 right?

16 MR. WALSH: I'm having a little difficulty
17 following the citations, Your Honor, but my
18 understanding is that yes, the Commission affirmed
19 that.

20 CHAIR GIBSON: In 2006. Okay. What
21 specifically about this contention is impacted by that
22 case?

23 MR. WALSH: Your Honor, the phased
24 approach essentially means that we're permitted to
25 conduct the cultural resources review in phases, that

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1 it's a large area and that the project will be coming
2 into operation in phases, and so that we can stagger
3 the review to make sure that we don't have to go, you
4 know, cover everything all up front all at once.
5 That's my understanding of those rulings, Your Honor.

6 CHAIR GIBSON: All right, thank you. Mr.
7 Parsons, what is your view?

8 MR. PARSONS: The State's view is that
9 there's a critical distinction between the NHPA, the
10 National Historic Preservation Act, and the National
11 Environmental Policy Act. While the National Historic
12 Preservation Act does allow for a phased approach, the
13 scope of analysis is different. The NHPA has a
14 consultation requirement. That is the principal
15 procedural operation under the NHPA. The consultation
16 involves identification of sites, evaluation of sites
17 for potential listing on the National Register of
18 Historic Places, and mitigation of any potentially
19 listed or eligible sites. And so a phased listing, a
20 phased approach to the NHPA is not the same as a NEPA
21 analysis which requires, prior to the license being
22 issued, that there be sufficient information. And I
23 understand that it's possible that there are, you
24 know, impacts or cultural resources that won't be
25 identified, even a good cultural resources survey

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1 might miss something. But that doesn't negate the
2 legal requirement that that information be provided on
3 the front end. And here again, I mean, it's just a
4 reality that after 30 years have passed, it's -- given
5 the advances in cultural resources survey and even how
6 those tribes and peoples identify and handle their
7 cultural resources, it's necessary for a complete NEPA
8 analysis to have an updated survey.

9 CHAIR GIBSON: Thank you, Mr. Parsons.
10 Mr. Quinn, do you have anything else to add on that
11 count to what Mr. Parsons just said?

12 MR. QUINN: No, Your Honor.

13 CHAIR GIBSON: Okay. Now, Mr. Quinn, as
14 best as I can tell, the last documented 106
15 consultation in this matter was addressed in the
16 Commission's decisions in 1998 and 1999. And I can
17 cite you to those two. One of them -- I'll try to
18 make my citation better, Mr. Walsh -- one of them is
19 CLI-98-8 and the other one is CLI-99-22. Are you
20 aware of any documented 106 consultation that has been
21 addressed since then with regard to this site?

22 MR. QUINN: I'm not, Your Honor.

23 CHAIR GIBSON: Okay, thank you.

24 MS. GAMIN: Could I add to that, Your
25 Honor, that the Staff is currently in the process of

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1 pursuing its section 106 consultation obligations. If
2 you're asking has that been addressed in court after
3 the decisions you mentioned, then no, not that I'm
4 aware.

5 CHAIR GIBSON: Let me ask you this, Ms.
6 Gamin. Recognizing that, and Mr. Quinn, whichever one
7 of you should answer me, recognizing that there is
8 currently a 106 consultation going on right now, is
9 there anything that has been documented, anything at
10 all that would show up in any record with respect to
11 this site since these Commission decisions were
12 issued?

13 MS. GAMIN: Yes, Judge Gibson, we have
14 issued consultation letters to a number of tribes and
15 pueblos in the area. We had a public meeting with the
16 Navajo Nation and also a meeting with the Advisory
17 Council on Historic Preservation.

18 CHAIR GIBSON: And are those -- when did
19 those take place, Ms. Gamin?

20 MS. GAMIN: They were, I believe, 2026 to
21 late 2025. I would have to look up the exact dates,
22 but I believe within the past year.

23 CHAIR GIBSON: Okay, and are those public
24 documents?

25 MS. GAMIN: Yes, Your Honor.

1 CHAIR GIBSON: Okay, very well, thank you.
2 Now, on page 23 of the State of New Mexico's petition,
3 it lists, among other things, missing cultural
4 resources investigation, outdated or incomplete
5 inventories, traditional cultural places inventories,
6 no cultural resources management plan or comprehensive
7 site inventory. Now, what were you referring to
8 there, Mr. Parsons, that's missing? Can you give us
9 something a little more specific than that?

10 MR. PARSONS: Well, I'm sure, Your Honor.
11 My understanding is that two of the sites are
12 undergoing data collection in the coming time period.
13 It appears to be a bit fluid in terms of when that is
14 scheduled to occur, but that data is incoming.
15 There's some question about the tribes that have been
16 engaged, that were engaged in the last round. It
17 should not be surprising that over time, a tribe's
18 capacity with respect to the Tribal Historic
19 Preservation Office might ebb and flow. And so, an
20 opportunity for those tribes to engage, even if they
21 didn't engage the first time, in all likelihood, there
22 are additional participants in this process that will
23 be interested in identifying and engaging on the
24 cultural resources front. And so, that is a change,
25 as well, sort of a lack of involvement of all the

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1 necessary tribes. I think last time the cultural
2 resources survey efforts were limited to what are
3 referred to as Navajo traditionalists. And I think
4 that list has likely, given my experience in
5 representing tribes around the West, is that there is
6 an intensely renewed interest in these proceedings.

7 CHAIR GIBSON: Okay. Ms. Gamin, is there
8 anything you'd like to add in that regard?

9 MS. GAMIN: No, Your Honor. Thank you.

10 CHAIR GIBSON: All right. Good. Now you
11 -- this might be a good place to ask this, when are
12 you expecting to have your environmental and safety
13 documents completed?

14 MS. GAMIN: The Staff has a target date of
15 February 2026. I believe the exact date was February
16 2027. And we are trying to get those documents
17 available before that target date, but I would not
18 want to give you an earlier target.

19 CHAIR GIBSON: That's okay. And that
20 would be for -- will that include all of the 106
21 consultation matters?

22 MS. GAMIN: I believe so. I don't think
23 -- I have not discussed with the Staff a specific
24 date for section 106 consultation, but February 2027
25 is the -- and I think I said this right, I think I

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1 said February 2026, but I mean to say next year,
2 February 2027 would be the target date for the
3 completion of the licensing action as a whole.

4 CHAIR GIBSON: Okay. Thank you. Yes.

5 JUDGE ABREU: I just have a question for
6 Ms. Leidich or Mr. Walsh. Earlier, you mentioned
7 something about ER that there, and I didn't catch the
8 whole thing as either there was some kind of maybe
9 supplement or revised version that might be coming.
10 Is that -- did I hear you correctly?

11 MS. LEIDICH: There have been a number of
12 responses to RAIs that have been transmitted on the
13 docket, and some of that may be wrapped into a
14 revision to the ER as is normal licensing practice.

15 JUDGE ABREU: Okay, so there might be a
16 revision, but no definite plan at this point; is that
17 fair?

18 MS. LEIDICH: I can't commit to a specific
19 date, but I suspect there will be one at some point.

20 JUDGE ABREU: Okay. Thank you.

21 CHAIR GIBSON: Okay. Mr. Walsh, on page
22 39 of your answer, you discussed the Crow Butte case
23 and how, and I'm going to quote now, "that licensing
24 board admitted a cultural resources contention
25 supported by an expert declaration because the

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1 Petitioner in that case had pointed to specific
2 factual information indicating that cultural resource
3 artifacts were bound to be there even though
4 Petitioner had not had the opportunity to look for
5 itself.' ' Now, then you state that the State has not
6 supported its contention with any expert declaration
7 or any specific factual information indicating that
8 cultural resource artifacts are bound to be in any
9 project area not already accounted for. So --

10 MR. WALSH: That is correct.

11 CHAIR GIBSON: -- is your statement that
12 artifacts are bound to be there not enough to make
13 this an admissible contention?

14 MR. WALSH: It is the State of New Mexico
15 that needs to come forward with information showing
16 that there are artifacts bound to be there not
17 accounted for in the application. That is the purpose
18 of the citation for that case law.

19 CHAIR GIBSON: Okay.

20 MR. WALSH: And they have not come forward
21 with any information indicating that there is cultural
22 resource artifacts or other information not accounted
23 for. A couple of points there if you don't mind, Your
24 Honor.

25 CHAIR GIBSON: Yes, sir. No, absolutely.

1 MR. WALSH: The State has, again, relied
2 on the Staff RAIs to support, purportedly support its
3 contention here. I did want to point out a couple of
4 things. They make much about a statement in one of
5 the Staff RAIs that a couple of tribes allegedly were
6 not consulted; that is simply not true. The FEIS,
7 which we are entitled to rely on, and the prior
8 licensing board decision in this case, LBP-05-26,
9 makes clear that the Zuni and Hopi tribes were
10 consulted at the time. So regardless of what may be
11 in the Staff request for additional information, it's
12 clear that those tribes were consulted at the time.
13 And similarly, they also make mention in both their
14 petition and in reply; I would say their reply hinges
15 on these two issues, the Staff RAIs, about the
16 reference to five burials in the area. That was
17 information that was discussed in 1996. So that is
18 certainly not new information or changed circumstances
19 that would warrant admitting this contention today.

20 CHAIR GIBSON: There were what in the
21 area? I'm sorry, I didn't hear your words, phrase
22 that you just used.

23 MR. WALSH Yeah, one of the Staff RAIs
24 makes reference to a statement in the ER, a discussion
25 of five burials.

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1 CHAIR GIBSON: Five burials.

2 MR. PARSONS: Yes. Pardon me if I slurred
3 that word.

4 CHAIR GIBSON: No, I'm sure it's on my
5 end, not yours. Okay.

6 MR. WALSH: Again, the point being that
7 this information was not not considered previously.
8 So, just wanted to make sure it's well documented both
9 in the FEIS and in the ER.

10 CHAIR GIBSON: Thank you, Mr. Walsh. Mr.
11 Parsons, do you wish to reply to that?

12 MR. PARSONS: Sure. I will say that the
13 ER discloses that they're -- unlike in Crow Butte,
14 which relied on an expert declaration to substantiate
15 the fact that there would be cultural resources on the
16 site. Here, that's not necessary because the ER, as
17 we cite in 17576, discusses that there are cultural
18 resources on the site. So it's an established record
19 fact that those are there. I think the contention we
20 plead has to do with the length of time since those
21 surveys and the development of the survey protocols
22 over the years, the increased engagement of different
23 tribes and their capacities, and the fact that there
24 is acknowledged additional data necessary and
25 presumably on the way.

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1 CHAIR GIBSON: Okay, thank you. Now, you
2 may have said this earlier, Mr. Parsons, and I
3 apologize if I'm repeating myself, but I want to make
4 sure I get this clear. On page 24 of your petition,
5 you state that the ER lacks a current inventory for
6 two of the four project areas entirely. Now, just to
7 be sure we're clear, the two sites that you're
8 referring to on page 24 of your petition that lack
9 cultural surveys are Crownpoint and Unit 1; is that
10 correct?

11 MR. PARSONS: That is my understanding,
12 and that there are surveys proposed for Sections 8 and
13 17.

14 CHAIR GIBSON: Okay. Now, were Crownpoint
15 and Unit 1 ever surveyed based on your understanding?

16 MR. PARSONS: Not to my understanding.

17 CHAIR GIBSON: Okay. Mr. Walsh, do you
18 happen to know if Crownpoint and Unit 1 were ever
19 surveyed?

20 MR. WALSH: Let me check with my client,
21 Your Honor, and I will find out.

22 CHAIR GIBSON: Sure. If we need to put a
23 pin in it, we can come back to that, okay?

24 MR. WALSH: You know, Your Honor, I will
25 note one thing though, that LBP-05-26 does say that

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1 the Staff at the time, the Staff had the benefit of
2 all archaeological and traditional cultural property
3 surveys from all of the proposed mining sites. So it
4 does appear from the underlying record that these
5 issues were considered. I can't say specifically
6 whether or not, you know, people went on to those
7 sites to do the survey, but they certainly did ask
8 about all project areas in the consultation process.

9 CHAIR GIBSON: Sure. And there may have
10 been a protocol that was utilized in the 1990s that
11 may have been superseded by a new protocol that would
12 have encompassed a more intensive or whatever review
13 than you had then. Is that a fair statement, Mr.
14 Walsh?

15 MR. WALSH: It's possible there may have
16 been something different or might be something
17 different done, yes.

18 CHAIR GIBSON: I don't know what the
19 protocol was in the 1990s, it may not -- it may be
20 exactly where it is right now. I'm just throwing that
21 out. Mr. Parsons, do you happen to know?

22 MR. PARSONS: I don't. I know there was
23 reference to a traditional cultural property
24 assessment and those -- my understanding is that those
25 are less granular and more of sort of a landscape type

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1 assessment. So that may explain some of the
2 difference, but I have no reason to dispute Mr.
3 Walsh's statement.

4 CHAIR GIBSON: Okay, great. Well,
5 hopefully we can get that resolved before we recess
6 for the day. So Church Rock Section 8 and Section 17,
7 do we have current cultural survey information for
8 them, Mr. Walsh?

9 MR. WALSH: Your Honor, my understanding
10 is that, again, the Navajo Nation has agreed to
11 provide access and that there will be additional
12 cultural resource surveys conducted in 8 and 17.

13 CHAIR GIBSON: Okay.

14 MR. WALSH: That's my present
15 understanding.

16 CHAIR GIBSON: Okay, thank you. Ms.
17 Gamin, do you have any knowledge about that one way or
18 another, or Mr. Quinn? Do either of you know
19 anything?

20 MS. GAMIN: We do not, Your Honor.

21 CHAIR GIBSON: Okay. All right, well, it
22 would be nice if we could get a, if you can send an
23 email or text to your colleagues and Staff and see if
24 we can get an answer to that. Hopefully by the end of
25 the day. Yes, Mr. Walsh.

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1 MR. WALSH: Sorry, I apologize. I was
2 able to get a reference as we were talking here. So
3 on page 171 of the ER, this is in Section 3.8.1, page
4 171, the fourth bullet point says, "in 1995, HRA
5 identified Ernest Becenti, Sr., a traditional
6 practitioner for both the Church Rock and Crownpoint
7 Chapter areas. Mr. Becenti is well known as a Navajo
8 medicine man with 30 years of experience. Mr. Becenti
9 completed an inventory of potential sacred and TCPs
10 within the Crownpoint, Unit 1, Church Rock, Sections
11 8 and 17 project areas. During the investigation, he
12 walked each of the project areas looking for sacred
13 plants in traditional places and interviewed nearby
14 residents. Mr. Becenti reported that there were no
15 significant sacred and traditional sites within the
16 project areas. In addition, he interviewed four
17 individuals who all indicated the majority of sacred
18 sites and herb gathering practices are in the
19 mountains or along the mountain ridges.'" So, that is
20 what the ER says.

21 CHAIR GIBSON: Thank you, Mr. Walsh. Mr.
22 Parsons, does this sound like the tribal cultural
23 survey that would not include -- that would be more
24 granular, or is this not?

25 MR. PARSONS: Yeah, thank you, Your Honor.

1 It does appear to be what's referred to as a
2 pedestrian survey, which is someone walking on the
3 land. However, I think it's still the State's
4 position that that degree of information is
5 insufficient to base a cultural resources survey on.
6 One individual from one tribe conducting the survey is
7 not -- the position would be that that is not
8 sufficient to form an entire cultural resources survey
9 analysis.

10 CHAIR GIBSON: Okay, thank you. Thank you
11 Okay, very well. Now, the Applicant has made
12 reference to the phased review that I think was
13 actually followed in a D.C. Circuit decision, Oglala
14 Sioux v. NRC. Now is it -- do I understand correctly,
15 Mr. Parsons, that you're not disputing that a phased
16 review can be appropriate?

17 MR. PARSONS: I believe you're referencing
18 the National Historic Preservation Act component, and
19 I am aware of provisions within the National Historic
20 Preservation Act regulations that allow for a phased
21 review. There are specific criteria that must be met
22 in order for that to be allowable, and again, the
23 State is not raising any National Historic
24 Preservation Act claims at this time.

25 CHAIR GIBSON: Okay, so if I can put that

1 in my own words, phased review under the National
2 Historic Preservation Act is not something that is
3 encompassed by Contention 7; is that right?

4 MR. PARSONS: That is correct.

5 CHAIR GIBSON: Or actually, Contention 8
6 I guess, or 6, or whatever we're talking about. I
7 guess we're talking about 6. Is that right?

8 MR. PARSONS: Yes, Your Honor.

9 CHAIR GIBSON: Okay.

10 MR. PARSONS: This is purely a NEPA-based
11 contention, so to speak.

12 CHAIR GIBSON: Okay, great. So purely --
13 okay, that helps. I think that will help our review
14 of this material. Thank you.

15 MS. GAMIN: May I address that, Judge
16 Gibson?

17 CHAIR GIBSON: Yes, absolutely.

18 MS. GAMIN: Thank you. In our earlier
19 discussion of NRC's NEPA consultation activities, I
20 mentioned three categories of documents going to that
21 consultation. One is the letters NRC issues to tribes
22 and pueblos initiating consultation; another is the
23 notes of our meeting with the Navajo Nation; and a
24 third is the notes of our meeting with the Advisory
25 Council on Historic Preservation. I told you those

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1 documents were public, but my clients have corrected
2 me. Actually, only two of those categories of
3 documents are public. The notes of our meeting with
4 the Advisory Council on Historic Preservation are not
5 public because that was an internal federal government
6 meeting. And as I think we all are aware at this
7 point, NHPA consultation is outside the scope of this
8 contention, but I just wanted to mention it since we
9 did discuss that, and I don't want any inaccuracy in
10 the record. So, thank you for allowing me to mention
11 that.

12 CHAIR GIBSON: Thank you, Ms. Gamin. I
13 appreciate that. Do you have any more questions about
14 this?

15 JUDGE ABREU: No.

16 CHAIR GIBSON: Okay, I think we can turn
17 to Contention 8. Ms. Gamin, previously, in
18 conjunction with narrowing of these other contentions,
19 you cited to the Commission's decision in Hydro
20 Resources CLI-98-16, 48 NRC 119, a 1998 Commission
21 decision, in order to avoid potential overlap with the
22 Navajo Nation's CERCLA or the Navajo Nation's
23 regulatory jurisdiction. As this contention has been
24 narrowed now, has this resolved your concern with
25 whether you're going to oppose this contention's

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1 admission?

2 MS. GAMIN: Yes, Judge Gibson. As
3 narrowed to exclude consideration of tribal
4 jurisdiction or the feasibility of the proposed
5 action, that resolves our concern.

6 CHAIR GIBSON: Okay, good. And it is now
7 -- as you understand it at least, Ms. Gamin, this is
8 a contention of omission regarding the failure of the
9 environmental report to discuss the impacts of
10 foreseeable pre-operational remediation; is that
11 correct?

12 MS. GAMIN: Yes, Your Honor.

13 CHAIR GIBSON: Okay, good. So I'm going
14 to ask Ms. Leidich and Mr. Walsh this question. What
15 exactly is foreseeable pre-operational remediation?
16 Can one of you give me a definition of that?

17 MR. WALSH: Well, it's not our contention,
18 Your Honor. However, we understand that the -- some
19 remediation activities will be undertaken to remove
20 existing contaminated materials from the Section 17
21 project area. And that might involve scraping the
22 land and removal of impacted soils and other
23 materials, moving them out of the site or a different
24 location of the site, et cetera.

25 CHAIR GIBSON: Okay. Even though it's

1 your contention, Mr. Parsons, are you happy with Mr.
2 Walsh's description of what a foreseeable
3 pre-operational remediation is?

4 MR. PARSONS: Ms. Jamison is on point for
5 this contention, Your Honor.

6 CHAIR GIBSON: Ms. Jamison, are you
7 satisfied with the description that Mr. Walsh just
8 gave of what foreseeable pre-operational remediation
9 is?

10 MS. JAMISON: I think I would like a
11 little bit more specificity, as we noted in our
12 Contention 8. When we first filed that contention,
13 the remediation we had in mind was the provision in
14 the 2012 Temporary Access Agreement that basically
15 conditions access to Section 8 on cleanup of Section
16 17. And our contention at that point is the ER does
17 not disclose that that is a pre-operational condition
18 to everything else in the operation. That's going to
19 have to precede sampling, it's going to have to
20 precede construction, and so we wanted to see that
21 disclosed and analyzed in terms of the project
22 sequencing and environmental impacts.

23 What I believe Mr. Walsh was referring to
24 was what we've recently discovered to be an EPA
25 removal action, and I'm not sure if Your Honor had a

1 chance to look at our conditional motion for an
2 amended contention, because we recently discovered the
3 revised environmental report revised last month, and
4 we recently saw the RAI responses. And those
5 reference the EPA, the settlement that NuFuels reached
6 with the EPA, I think it was the beginning of April
7 around that time, in which some cleanup of Section 7
8 of the Old Church Rock Minings was described. And so
9 I think I would throw it back to Mr. Walsh to describe
10 whether -- so depending on whether an argument of
11 mootness is going to be asserted today, we would
12 either discuss that in terms of pre-operational
13 remediation, or we would stick to our original
14 contention, if that makes sense.

15 CHAIR GIBSON: A little bit, I guess. I
16 don't want to force you, Mr. Walsh, to try to explain
17 to us what their contention is about. But just this
18 term, okay, this term, foreseeable pre-operational
19 remediation, I want to make sure I understand what
20 that means. If it just said pre-operational
21 remediation, I would assume it's getting the --
22 cleaning up that old site, right?

23 MR. WALSH: Yeah. Section 3.12.2.2 says
24 that they will remove or remediate spoilage with
25 elevated radium-226 to applicable Navajo Nation

1 standards, and the standards are at levels that do not
2 pose a public or occupational health risk. So I think
3 implicit there is that there is some material on that
4 site that needs to be either remediated or removed.
5 And so that's what they have committed to do.

6 CHAIR GIBSON: Okay. Okay. That's great.
7 And when you say they, you're talking about your
8 client?

9 MR. WALSH: Yes. NuFuels, yes.

10 CHAIR GIBSON: Okay. Good. All right.
11 So I guess, Ms. Jamison, I guess you're handling this.
12 Your new Contention 8, as narrowed, setting aside for
13 a moment the conditional motion, which we'll get to,
14 I promise, at the end of our day today. Your new
15 Contention 8 includes your assertion that the
16 Applicant is obligated to remediate contamination from
17 previous mining activities at Church Rock 17 before it
18 may commence mining at Church Rock 8; is that right,
19 Ms. Jamison?

20 MS. JAMISON: That is correct, Your Honor.

21 CHAIR GIBSON: Okay. And this obligation
22 to do this pre-remediation, pre-operational
23 remediation, I guess, is owed to the Navajo Nation; is
24 that correct?

25 MS. JAMISON: Yes, Your Honor.

1 CHAIR GIBSON: The Applicant, if I
2 understand you correctly, Mr. Walsh, is asserting that
3 under the Supreme Court Seven County decision, the NRC
4 need not analyze the environmental impacts of
5 obligations required by a separate governmental
6 entity, which in this case, I guess, would be the
7 Navajo Nation. Do you dispute this, Ms. Jamison? And
8 if you do, please tell me.

9 MS. JAMISON: Yes, we dispute that Seven
10 County could be applied here to say that the
11 pre-operational remediation is separate in time and
12 place from the mining operation. It is in the same
13 place; we know that the remediation needs to happen at
14 Section 17, which is one of the licensed areas. It's
15 separate, it's connected in time, it has to happen
16 before mining happens. And I think, you know, Seven
17 County says that the agency isn't required to consider
18 environmental effects of upstream or downstream
19 projects that are separate in time and place. But
20 just to be clear, that's about the agency's
21 discretion, and right at this stage, we're at the
22 Applicant's requirements under the federal regulation.
23 So just to clarify that.

24 But I would say that an analogous
25 factual, you know, to what was happening in Seven

1 County, where it was the railway board, and they were
2 being asked to consider the environmental impacts of
3 speculative upstream oil drilling and downstream oil
4 refining. I mean, this is not what we're talking
5 about here. That would be as if we were to say, oh,
6 this is going to create, you know, increased demand
7 for need for enrichment facilities in New Mexico. And
8 why don't you go ahead and analyze the environmental
9 impacts of that? That would be an analogy under Seven
10 County. We're not asking for that; we're asking for
11 an analysis of the environmental impacts of what is
12 necessary remediation at the same place that's going
13 to be a requirement that the application has to
14 fulfill before commencing operations. And one more
15 note on Seven County. Part of Seven County's analysis
16 is explaining that a separate project is one that
17 breaks the chain of proximate causation between the
18 project at hand and the environmental effects of a
19 separate project. But here, there is a closely
20 related proximate cause. The Applicant's promise to
21 remediate is proximately related to the licensed
22 project. And therefore, they're not separate in time
23 and place under Seven County.

24 CHAIR GIBSON: Okay. Thank you.

25 MR. PARSONS: If I might add one

1 clarifying. Seven County was based on a deferring to
2 an agency's determination of where that scope should
3 occur. And so, I think we're in a different posture
4 here. It's not that NEPA never requires these
5 upstream or downstream effects, it's that in that
6 case, the court ruled that the courts should -- the
7 High Court ruled that courts should defer to agencies'
8 determinations. And so, I think we're sort of in a
9 pre-Seven County's realm, if that makes sense.

10 CHAIR GIBSON: Pre-Seven County regime.

11 MR. PARSONS: Only because Seven County's
12 deferred to a determination made by the agency as to
13 how far it should take its NEPA analysis, and we don't
14 have a NEPA analysis at this point for the agency to
15 have achieved that deference.

16 CHAIR GIBSON: Okay. Well, Ms. Gamin or
17 Mr. Quinn, you all do not oppose the admission of this
18 contention as narrowed. Is that correct?

19 MS. GAMIN: That's correct, Your Honor.

20 CHAIR GIBSON: Okay. And what is your
21 view about Seven County not generally, specifically as
22 it applies to this contention?

23 MS. GAMIN: Generally, Seven County is an
24 extremely important case in general for environmental
25 law and for this contention. I would echo some of

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1 what Ms. Jamison said, that this is not a contention
2 about hypothetical future downstream actions. It's a
3 remediation action being taken on some of the same
4 project area by the same Applicant as for this
5 proposed action. And Seven County does also mention
6 that projects that are interrelated and close in time
7 and place to the proposed action may be something that
8 an agency would need to consider as part of its
9 environmental review.

10 CHAIR GIBSON: Okay. Thank you. Ms.
11 Jamison or Mr. Parsons, on page 45 of its answer,
12 NuFuels cites to the environmental report, and I'm
13 going to have to quote here, I'm sorry about that.
14 "NuFuels has committed to the Navajo Nation to
15 characterize the Church Rock Section 17 site and
16 remove or remediate spoilage with elevated radium-226
17 down to acceptable Navajo Nation standards that will
18 not pose a public or occupational health risk.'" And
19 then they assert in their answer that you have not
20 disputed this statement, nor have you come forward
21 with factual support for significant environmental
22 impacts that were not considered in the environmental
23 report. Is NuFuels wrong, and if so, why?

24 MS. JAMISON: Yes, NuFuels is wrong
25 because we do -- we dispute several things. One is

1 the whole project time schedule, the whole sequencing
2 of the project depends on this action and affects the
3 environmental impacts of this project. The schedule
4 that's, I think in table 2.1-1, the environmental
5 report at 38 to 39, does not show that remediation
6 phase that's necessary. So again, this is a
7 contention of omission. And instead, the schedule
8 shows that initial construction is the first license
9 activity. Also missing from table 1.3-1 is the
10 parameter approval needed, all the standards that the
11 Applicant needs to meet under Navajo Nation CERCLA to
12 get Navajo Nation approval for presumably saying that
13 this area has been remediated to their satisfaction
14 under the temporary access agreement.

15 The waste management analysis in section
16 2.1.3.7 and 4.13 doesn't address the volumes,
17 characterization, transport, or disposal destination
18 of any remediated spoil. The transportation analysis
19 doesn't address how and where the spoiled material is
20 going to be, what access routes, what haulage routes
21 are going to be used for this remediation project.
22 There's a lack of analysis of financial assurance and
23 how that is impacted by a remediation project. And
24 there's more, and I would -- there's more I'd refer to
25 it to the petition, the basis in the petition on this.

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1 CHAIR GIBSON: Okay, fair enough. Mr.
2 Walsh, I'm going to let you have the last word on this
3 before we turn to Contention 9. If you think Ms.
4 Jamison is wrong, please tell us why.

5 MR. WALSH: Your Honor, the issue here
6 really stems from the fact that this is a separate
7 project that will be complete before operations at
8 NuFuels site starts. There's no telling when, how
9 much time will elapse between the two actions, but
10 yes, NuFuels has committed to remediate the section 17
11 area. And then at some point in time thereafter, it
12 will, presumably assuming it has all the other permits
13 it needs, move forward with operations. These two
14 situations, that the waste, the spoilage, is not
15 connected with the actual injection of lixiviant into
16 the underground to retrieve uranium from the site.
17 The State claims that there's items missing from our
18 analysis, but they don't say exactly how that would
19 impact the overall analysis, particularly when the
20 application is clear that it will be remediated to
21 Navajo Nation standards, which will be protective of
22 the public health and safety.

23 It basically boils down to a claim that we
24 need to do a full-fledged NEPA analysis of something
25 else in addition to what we're doing. And with

1 respect to the schedule, if you look at table or
2 figure 2.1-1, it doesn't give specific time frames on
3 there. It talks about year one, year two, year three,
4 year four. And so yes, construction for section 8 is
5 scheduled to commence in year one. It's not clear yet
6 when year one is going to be, but I can say that the
7 remediation will be completed per the agreement before
8 that occurs. I understand from my client that they
9 anticipate starting that project this month, but the
10 one action will be done before the next one commences.

11 I also understand that the remediation
12 area is separated by some distance from where the
13 actual mining will occur. So there does not seem to
14 be any connection between these two things at all,
15 other than the fact that my client has reached an
16 agreement with the Navajo Nation to conduct a
17 remediation effort to clean up the site. Separately,
18 and counsel for the State mentioned about the
19 remediation is not on the schedule for the licensing
20 action. Well, this remediation is not being licensed
21 by the NRC. The remediation is not being done under
22 the authority of the NRC, and will not be done in
23 accordance with NRC requirements. It is separate and
24 distinct.

25 CHAIR GIBSON: Thank you, Mr. Walsh. Any

1 questions about 8? Okay, let's turn to Contention 9.
2 Mr. Walsh or Ms. Leidich, in opposing Contention 9,
3 your answer lists Hydro Resources, CLI-98-1648, NRC
4 119, a 1998 Commission decision, stating -- and you
5 state here that the pertinent holding of this case
6 with respect to this contention is that permitting
7 disputes arising from the Navajo Nation's permitting
8 authority should be resolved by the Navajo Nation
9 rather than by the Nuclear Regulatory Commission; is
10 that a fair statement?

11 MR. WALSH: Yes, Your Honor, it's a fair
12 statement. And again, similar to with Contention 5,
13 the issue here is the environmental analysis assumes
14 that the project will go forward. We would certainly
15 be remiss if we didn't analyze the impacts of the
16 project under an assumption that some portions may not
17 go forward. The environmental analysis attempted to
18 be all inclusive and is based on the assumption that
19 the appropriate approvals will be received by the
20 Navajo Nation to access the site and to use their
21 roads. So whether or not the Navajo Nation grants
22 that is separate and distinct from the action in here.

23 CHAIR GIBSON: Thank you. And the reason
24 for this is because the aquifer in question that
25 you're seeking to mine is either located under or

1 immediately proximate to reservation or allotted lands
2 of the Navajo Nation; is that correct?

3 MR. WALSH: That is correct, Your Honor.

4 CHAIR GIBSON: Okay. Now what
5 specifically about this decision, Commission decision
6 in 1998, impacts the admissibility of the contention
7 as it's been proffered by the State of New Mexico
8 here?

9 MR. WALSH: Well, Your Honor, when this
10 contention was first proffered, it was primarily a
11 contention of feasibility. You know, they were
12 challenging whether or not the project would go
13 forward. And on reply, as I understand things, they
14 have abandoned that claim. So, we cited to that to
15 basically say, you know, whether or not we get the
16 approval, here is our environmental analysis of the
17 likely environmental impacts from the operation of
18 this site. And that's what we're basing our
19 environmental report on.

20 CHAIR GIBSON: Okay. Thank you. Mr.
21 Quinn or Ms. Gamin, on page 29 of your answer, you
22 state that the Staff does not oppose admission of
23 Contention EC9 insofar as it challenges the accuracy
24 of the environmental report's description of access to
25 the site, including an asserted failure to disclose a

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1 required right-of-way that would need to be obtained
2 from the Navajo Nation under 25 U.S.C. 323-28 and 25
3 CFR Part 169; is that correct?

4 MS. GAMIN: Yes, Your Honor.

5 CHAIR GIBSON: Okay. Is the newly
6 narrowed Contention 9 consistent with your suggestion?

7 MS. GAMIN: Yes. My understanding is that
8 the contention was narrowed to take off the table the
9 issue of feasibility of the project. As Mr. Walsh was
10 saying, we don't see whether the project is feasible
11 as being an issue that needs to be addressed for a
12 NEPA environmental review.

13 CHAIR GIBSON: Okay. Now, the Applicant's
14 answer suggests that right-of-way simply is or is not.
15 If it's not, it's a sort of no-go thing. If it's not,
16 then the project won't go forward, and that's covered
17 by the no-action alternative. If right-of-way is
18 obtained, then that hurdle to the project is
19 eliminated. And the Applicant continues, it's
20 addressed one route in its ER, and the State of New
21 Mexico has not substantively challenged the
22 transportation analysis associated with that route.
23 Do you agree with the Applicant in this regard?

24 MS. GAMIN: No, I do not, Judge Gibson.
25 So, the Applicant has stated they can assume that,

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1 before operation, they will get appropriate approvals.
2 And there are, in this proposed action, as in many,
3 there are legal permissions that the Applicant will
4 need to operate that are outside NRC's jurisdiction
5 and that NRC licensing doesn't need to wait for.

6 However, the information about site access
7 present in the license renewal application needs to be
8 accurate. So if there is a need to obtain a
9 right-of-way as described in the petition, then it is
10 the Staff's position that the Applicant needs to
11 disclose the need to obtain this right-of-way. And
12 there also seems to be a disagreement of fact between
13 the Applicant and the Petitioner about whether the
14 description of site access in the current license
15 renewal application is accurate, which goes to the
16 merits.

17 CHAIR GIBSON: Thank you, Ms. Gamin. Mr.
18 Walsh, on page 46 of your answer, you assert that it
19 is entirely reasonable for your environmental report
20 to assume that you'll reach an agreement with the
21 Navajo Nation and obtain access to Section 8 because
22 NuFuels is actively working with the Navajo Nation to
23 secure access. And I'm quoting here, even if it is
24 uncertain how or where that access will be
25 established, the uncertainty does not invalidate the

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1 environmental impact analysis.

2 My question is, is it an undisputed fact
3 that you're going to get this right-of-way?

4 MR. WALSH: I think it's undisputed that
5 we either will or we won't. I'm not trying to be
6 clever, Your Honor. I'm just saying my understanding
7 of the circumstances is that there's one way to access
8 the areas, and either an agreement will be reached or
9 it will not be reached.

10 CHAIR GIBSON: Okay, thank you. Can you
11 share with us what the main uncertainty regarding
12 getting this right-of-way is?

13 MR. WALSH: I can check with my client,
14 sir. I am not prepared to discuss that today.

15 CHAIR GIBSON: No, that's fine. I don't
16 want you to have to disclose information that you
17 shouldn't, but yeah, if you could consult with your
18 client and there's a way we can clean that up in the
19 record, we'd appreciate it, okay Mr. Walsh?

20 MR. WALSH: Let me just understand what
21 the question is, what is holding up the --

22 CHAIR GIBSON: Yes, the question is, can
23 you tell us what the main uncertainty is regarding
24 getting this right-of-way? And if you can tell us,
25 please let us know what it is.

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1 MR. WALSH: I will follow up with my
2 client.

3 CHAIR GIBSON: Thank you, Mr. Walsh. Now,
4 you also cite Baltimore Gas in your answer on page 47,
5 and the State responds to it on page 48 to 49. How do
6 you respond to the State's distinction, and if you
7 can't respond, I'm going to ask them what they mean,
8 of an undisclosed uncertainty being different from an
9 identified uncertainty?

10 MR. WALSH: I don't understand what the
11 difference might be.

12 CHAIR GIBSON: Okay, well, let's see if
13 the State can explain to us the difference between an
14 undisclosed uncertainty and an identified uncertainty?

15 MS. JAMISON: Yes, Your Honor. I mean,
16 for starters, I think it's clear that NuFuels needs to
17 obtain the Federal right-of-way with the Navajo
18 Nation's consent in order to access Section 8 because
19 access goes across tribal lands, and that was conceded
20 in the 2012 Temporary Access Agreement.

21 So, again, our contention, in part, is
22 that Table 1.3-1 needs to disclose that permission,
23 approval, permit, whatever it's going to be called,
24 needs to be disclosed in that, and that the ER has a
25 material misstatement, and I think that's the material

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1 dispute that Ms. Gamin was referring to.

2 With regard to Baltimore Gas, I mean, that
3 was about a generic assumption that the permanent
4 storage of nuclear waste would have no significant
5 environmental impact at the individual license level,
6 and that's why it shouldn't, you know, effect,
7 therefore, with individual licensing, the decision
8 that this is not a generic rulemaking, and this is an
9 adjudicative proceeding where, you know, there's a
10 specific set of facts, laws, and contractual
11 obligations that are the contractual legal reality for
12 this Applicant, and that just wasn't so Baltimore
13 Gas is just like a slightly inapposite case for that
14 proposition.

15 CHAIR GIBSON: Okay. This is what I'd
16 like you to do before we close the transcript. I'd
17 like for you to explain to us in a paragraph or
18 whatever it takes you to explain what the difference
19 is between an undisclosed uncertainty and an
20 identified uncertainty and how it applies to this
21 because I still don't understand it, okay?

22 MR. PARSONS: Your Honor, if I may?

23 CHAIR GIBSON: Yes, Mr. Parsons.

24 MR. PARSONS: I think the point of that
25 argument was that it's okay to have some uncertainty

1 with respect to aspects of a project, but that
2 uncertainty has to be disclosed and discussed.

3 Here, we have an undisclosed uncertainty,
4 where they say, well, it's not certain what we're
5 going to do, and we don't have to talk about it. And
6 that's what Baltimore Gas doesn't allow. It allows
7 the uncertainty to be just recognizing the reality
8 that sometimes things are going to be a little
9 uncertain, but that has to be disclosed and discussed.
10 And here, we've got a permit that's -- if they say
11 it's uncertain whether we're going to get it, that
12 uncertainty needs to be identified and discussed. And
13 so, I think that's all we meant in that

14 (Simultaneous speaking.)

15 CHAIR GIBSON: That's actually very
16 helpful. But I guess, now going back to the
17 environmental report, they basically, I think they
18 basically said it's uncertain if we're going to get
19 this. If we are, we'll go forward with the project.
20 If we don't, we won't. I mean, isn't that -- is there
21 more that they have to disclose than that?

22 MR. PARSONS: Well, they certainly have to
23 disclose the existence of the requirement. There's no
24 reference in the tables as to an obligation, so I
25 think that that's sort of a separate point. And it

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1 puts us in a difficult position to fill in that
2 analysis, I think.

3 I mean, my understanding of a right-of-way
4 is it can be conditional. It can have temporal or
5 other restrictions that might apply. And those are
6 some of the uncertainties that I think, in order to
7 just rely on an uncertainty, they have to be disclosed
8 and assessed. And so, I think that's where we're
9 coming from in that regard.

10 CHAIR GIBSON: Well, I --

11 MR. PARSONS: Hopefully that's responsive.

12 CHAIR GIBSON: Okay. Well, I think that's
13 helpful, so I guess we'll -- you don't have to do any
14 more homework, Ms. Jamison, on that point.

15 Thank you, Mr. Parsons.

16 Do you have any questions currently?

17 (No audible response.)

18 CHAIR GIBSON: Okay. Let's turn to
19 Environmental Contention 10.

20 MR. WALSH: Your Honor, I just wanted --
21 pardon me, Your Honor.

22 CHAIR GIBSON: Yes, Mr. Walsh?

23 MR. WALSH: I didn't want to interrupt.

24 CHAIR GIBSON: No problem.

25 MR. WALSH: Just so we're clear, I've

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1 learned from my client -- and it's consistent with
2 what Ms. Jamison said -- it's a Bureau of Indian
3 Affairs approval that requires Navajo consent. That
4 is what is -- that is what we are waiting for.

5 CHAIR GIBSON: Thank you so much, Mr.
6 Walsh. That's helpful. Okay.

7 MR. WALSH: Thank you.

8 CHAIR GIBSON: Okay. Contention 10, so
9 Ms. Leidich or Mr. Walsh, referring again to the
10 Commission's affirmed in part decision in Hydro
11 Resources, which was CLI-01-4, 53 NRC 31, the -- what
12 specific -- what specific portion of that case impacts
13 whether we admit Contention 10 or not?

14 MR. WALSH: So we cited to that case, Your
15 Honor, for on the proposition of what needs to go in
16 an alternatives analysis.

17 Here in this case, the State's contention
18 as proffered was demanding that -- or was alleging
19 that we had inappropriately failed to analyze various
20 different formulations of the project: one section
21 versus the other, or in a different sequencing. And
22 we cited to that clear case law to say that, you know,
23 we only need to discuss those alternatives that will
24 bring about the ends of the proposed action.

25 CHAIR GIBSON: Fair enough. And so, your

1 -- so you've essentially addressed two options, which
2 is the go/no-go, and basically what you're saying is
3 you don't need to evaluate anything more.

4 And State, you guys are arguing that the
5 this Applicant should have considered gradations in
6 between going forward with the project or not going
7 forward with the project, but other things.

8 It seems to me that this Hydro Resources
9 decision is dispositive of that point. Is there -- am
10 I miss -- did I miss something about that case?

11 MR. PARSONS: I think so, Your Honor. I
12 understand the Applicant's argument to be one of
13 bounding, that they say we've looked at no action.
14 We've looked at all four units. Any conceivable
15 iteration has to be covered within that range. And I
16 think that that misstates the test. If that were the
17 case, every single environmental impact statement
18 would do the same thing: have one no action, and a
19 full, built-out action, and then just say we're -- we
20 have -- there's nothing more to consider. That's
21 clearly not the case.

22 And I think what we pointed to, or what
23 happened in those previous cases, is there was an
24 argument that they had to consider not mining certain
25 units. And the Board and the Commission upheld, I

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1 believe, the argument that, well, if we just take away
2 one of the units, the analysis still holds because
3 everything else stays the same with the units that do
4 go forward. And what we're arguing is something
5 different.

6 We're saying that there are conditions on
7 the license and permit requirements that could change
8 the nature of the operation in such that it would
9 change the sequence and the scope and the timing,
10 including making it a much longer project than it
11 might be just taking away one of the units. And those
12 are the gradations that you referred to that we
13 believe require additional analysis. So it's not just
14 that we're taking away one of the units, and
15 everything else remains the same.

16 We referenced the License Condition 10-28
17 on the restoration demonstration. That could affect
18 the length and which units go forward at what times,
19 and those are the kinds of alternatives that would
20 indeed change the environmental impact because they
21 would change, potentially change the, not just the
22 scale, but also the duration and the sequencing,
23 which, in turn, would have a different, a different
24 environmental effect, so not just within that bounded
25 range, but actually would change the duration and

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1 nature of the effects. And so, that's the argument.

2 CHAIR GIBSON: Thank you, Mr. Parsons.

3 Ms. Gamin or Mr. Quinn, do you have any
4 views about this, addressing gradations in between or
5 just go/no-go as being adequate?

6 MS. GAMIN: Yeah, you know, Judge Gibson,
7 as we said in our answer, the ER at 2.1 incorporates
8 by reference some of the discussion of alternatives in
9 the 1997 FEIS. And so, and that incorporation by
10 reference is permitted by 10 CFR 51.60. So I think
11 there is already in the record a consideration of
12 alternatives between do all of the proposed action and
13 do nothing.

14 CHAIR GIBSON: Okay. So just to make sure
15 I understand your position, you're not saying then
16 that it's adequate only to consider go/no-go, but
17 you're saying that in 1997, when the FEIS was done,
18 there was an evaluation of the sum of these gradations
19 and that is sufficient. Is that a fair statement?

20 MS. GAMIN: That's correct, Your Honor,
21 and I would also point to, you know, going back to
22 Seven County, Seven County establishes that courts
23 should have substantial deference for agency's
24 identification of the range of alternatives that they
25 considered. Now, as we know, this is not an agency

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1 environmental review document; it's an Applicant one,
2 but it is -- a similar principle might apply.

3 CHAIR GIBSON: Okay. All right. Do you
4 have anything on -- okay. Let's turn to Safety
5 Contention 1.

6 Mr. Parsons or Ms. Jamison, as we
7 discussed previously, the Applicant's answer cites
8 several times to the 1999 LBP, Hydro Resources
9 LBP-99-30, 50 NRC 77, as a bar to admitting the
10 State's Safety Contention 1. Why in your estimation
11 is NuFuels wrong about this?

12 MR. PARSONS: Thank you, Your Honor. My
13 understanding is that that case dealt with the
14 preferential pathways within the historic sand
15 aquifer, you know, essentially, historic river beds.
16 And we're talking here about the flooded mine and the
17 interconnected drifts and workings, and whether the
18 assessment that's been done for identifying the
19 confinement ability with respect to this mine, that
20 mine has been established or demonstrated in the
21 application materials.

22 CHAIR GIBSON: Okay. Now, you fault the
23 application for its analysis of confinement and
24 excursion detection at the Old Church Rock Mine; is
25 that correct?

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1 MR. PARSONS: That's correct.

2 CHAIR GIBSON: And your chief concern in
3 this regard is that the prior mining activity at the
4 Old Church Rock Mine created preferential pathways for
5 contaminants from that mining activity to migrate from
6 that area and to go undetected. Is that a fair
7 assessment, Mr. Parsons?

8 MR. PARSONS: Yes, Your Honor. I think it
9 also -- and getting into some of the technical
10 aspects, which sometimes lawyers make poor scientists,
11 but I will try -- it also deals with how that mine
12 working is -- those mine workings are treated with
13 respect to how the -- how the mining operation will
14 control the flow within that. The analysis of how
15 those mine workings will affect the ability to control
16 the hydrologic environment during mining, I think, is
17 also an aspect.

18 CHAIR GIBSON: Ms. Leidich, Mr. Walsh, you
19 claim that the water at issue is not potable. And so,
20 any impact to drinking water is purely hypothetical.
21 Is that right?

22 MS. LEIDICH: That is correct, Judge.
23 Judge Bloch found that in his decision in 1999. He
24 found that their water essentially was toxic in the
25 old mine workings, but that the natural mechanisms of

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1 precipitation and dilution were helping to protect the
2 quality of water in the aquifer as a whole from
3 toxicity contained in small areas. Judge Hawkens
4 repeated this later in his decision in 2005 and
5 independently found that there was natural attenuation
6 as well.

7 CHAIR GIBSON: How, if at all, does New
8 Mexico Administrative Code 20.6.2.3103, which are the
9 standards for groundwater of 10,000 milligrams TDS --
10 I think that's total dissolved solids -- concentration
11 or less, come into play here?

12 MS. LEIDICH: Your Honor, I don't believe
13 it comes into play at all here. I think this is just
14 a question of groundwater flow and groundwater
15 modeling.

16 And this, the State, here, and
17 particularly the State's expert, relies extensively on
18 allegations that the ground is -- the modeling is
19 incorrect. The transmission will occur faster than it
20 did -- than it did in the previous models. And that
21 is primarily the thrust of the State's arguments here.
22 I don't believe that the New Mexico groundwater
23 standards come into play in the State's contention at
24 all.

25 CHAIR GIBSON: State of New Mexico, do you

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1 agree?

2 MR. PARSONS: With respect to this
3 contention, it's based on Appendix A, Criterion 7 and
4 5(B), which require the Applicant to have a monitoring
5 program adequate to detect excursions and that seepage
6 of hazardous constituents into the groundwater be
7 controlled.

8 And the nature of that, the hydraulic
9 effect of those mine workings acting as preferential
10 flow paths, and we described at 34, 35 in our
11 petition: preferential pathways, storage zones,
12 hydraulic sinks or sources, vertical migration
13 pathways, lateral migration pathways, subsidence
14 features and restoration challenges. And that quotes
15 the RAI, which Staff asked for as well. So I think,
16 in terms of materiality, there is support from the
17 Staff's RAI.

18 Understanding that we have an obligation
19 beyond just quoting an RAI for contention
20 admissibility, but we believe that the fact that
21 there's likely additional information coming, whether
22 it be additional data or, as Ms. Gamin mentioned
23 earlier, some explanation as to why that information
24 is not necessary, is certainly relevant. And Dr.
25 Abitz, you know, addressed this issue extensively in

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1 his declaration, which we cite as well.

2 CHAIR GIBSON: Ms. Gamin or Mr. Quinn,
3 what is your position in this regard?

4 MS. GAMIN: The Staff has nothing to add
5 beyond our pleadings, Your Honor.

6 CHAIR GIBSON: I didn't hear what you
7 said. I'm sorry, Ms. Gamin. Must be getting long in
8 the day here. I'm sorry.

9 MS. GAMIN: I said we have nothing to add
10 beyond our pleadings, Your Honor.

11 CHAIR GIBSON: Okay. Thank you.

12 Ms. Leidich, to support your claim that
13 this matter has already been conclusively resolved,
14 you cite to page 50 in your answer to this Judge Bloch
15 1999 decision finding that a drinking water aquifer
16 may have small toxic areas, like Section 17's old mine
17 workings, but still provide high-quality drinking
18 water. Is that right?

19 MS. LEIDICH: Yes, that's correct. This
20 goes back to the same idea that precipitation and
21 dilution are what is essentially working to resolve
22 the constituents in the groundwater before it reaches
23 drinking water wells, and as was decided by Judge
24 Bloch and later by Judge Hawkens.

25 CHAIR GIBSON: Okay. And they based that

1 decision on -- Judge Bloch based that decision on the
2 1997 FEIS and affidavits that were submitted by the
3 NRC Staff and the Applicant, correct?

4 MS. LEIDICH: That is correct.

5 CHAIR GIBSON: Do you know if there's been
6 any additional characterization of the Church Rock 17
7 Aquifer since this finding by Judge Bloch in 1999?

8 MS. LEIDICH: Your Honor, there was
9 extensive discussion of these topics leading up to the
10 decision by Judge Hawkens in his 2005 decision. That
11 is where the Lucas and Wallace testimony came from,
12 and that was rebutted by experts on our side, and
13 Judge Hawkens ultimately found in favor of the
14 arguments made by both the Staff and HRI that the --
15 that this -- these issues would not occur at the site.
16 So there is extensive further analysis on
17 transmissivity and the flow of groundwater in this
18 area from 2005 as well.

19 CHAIR GIBSON: The Lucas and Wallace
20 testimony, declarations, affidavits, whatever they
21 were, report, this was done in for the 2005 decision
22 that Judge Hawkens presided over; is that correct?

23 MS. LEIDICH: That is correct, and Judge
24 Hawkens found that none of that testimony was
25 compelling and did not find -- did not follow it in

1 his decision.

2 CHAIR GIBSON: Thank you. Now, I think
3 there have been some revisions of the groundwater
4 standards both by the State and the Navajo Nation
5 since then. Do those have any impact at all on the
6 issues that arise in Safety Contention 1, Ms. Leidich?

7 MS. LEIDICH: Your Honor, there's no
8 reason that those should have an impact on this
9 particular issue. Again, this is about the,
10 basically, the movement of constituents from the
11 mining area over into the area where drinking water --
12 or drinking water is drawn from.

13 This was adjudged at length in -- or
14 addressed at length in Judge Hawkens' decision. It's
15 on the order of hundreds of years or thousands of
16 years, depending on which section of the site you are
17 looking at. That's how long it takes the water to
18 traverse the area. There is precipitation. There is
19 dilution, which was found by the prior judges.

20 There is no reason any of that should have
21 changed. Geology does not change in this matter of 20
22 years since the last analysis took place, and I don't
23 think there is any reason that the drinking water
24 standards would have changed.

25 I mean, we still have monitoring wells.

1 We have an excursion program. We have methods in
2 place to deal if an excursion does occur. There's no
3 reason to believe that there have been any changes,
4 and the State has not raised a single difference from
5 the prior record.

6 CHAIR GIBSON: Okay. Thank you. The
7 State asserts in its petition that there is no
8 analysis in the environmental report for the
9 conclusion that, quote, the detection of potential
10 horizontal excursions will not be influenced by the
11 presence of mine workings.

12 Does that need to be addressed in the
13 environmental report, Ms. Leidich?

14 MS. LEIDICH: No. That would be a matter
15 for the safety analysis.

16 And the way that we address the
17 constituents at the site and their influence on
18 monitoring wells is why you take your, basically, your
19 values from the monitoring wells, and you set your
20 baselines, and you set your analytical capabilities
21 there. Upper control limits, I think, is actually
22 what they're called in this circumstance. So, once
23 you set the upper control limits from those wells,
24 that's how you resolve the fact that there are
25 differences between the various wells and their local

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1 constituents.

2 But none of that would be in the
3 environmental report because it's a safety issue.

4 CHAIR GIBSON: Okay. Mr. Parsons, would
5 you like to respond to that?

6 MR. PARSONS: I will just briefly and
7 point the Board to the declarations and the discussion
8 of the 400-foot spacing. And I think the analysis was
9 that and the basis of the contention was that the
10 spacing is not designed sufficiently to detect those
11 excursions, that you have these preferential flow
12 paths within the mine workings, and that having wells
13 spaced that far apart, Ms. Leidich is relying on that
14 spacing to be essentially a foolproof method of
15 detecting these excursions, but there is no connection
16 be -- there's no connection made.

17 The contention asserts there is no
18 connection made between that 400-foot spacing and the
19 ability to detect excursions that derive from the mine
20 workings.

21 CHAIR GIBSON: Okay. Thank you.

22 MS. LEIDICH: Your Honor, can I respond to
23 that?

24 CHAIR GIBSON: Sure. Go ahead.

25 MS. LEIDICH: I will just note that Judge

1 Bloch found little chance that monitor wells spaced
2 400 feet apart would miss an excursion in the
3 environment at the site, and Judge Hawkens again
4 reiterated that and quoted it in his later decision in
5 2005.

6 CHAIR GIBSON: Okay. Thank you.

7 MR. PARSONS: I think that proved those
8 passages require careful scrutiny to determine how
9 specific they were to the mine workings issue, but
10 that's all I'll say. Thank you.

11 CHAIR GIBSON: Thank you, Mr. Parsons.

12 Judge Smith?

13 JUDGE SMITH: Yeah, I just have a couple
14 questions. This question is for each of you, but I'd
15 like to hear from Ms. Gamin or Mr. Quinn first on it.

16 To what extent does the current license
17 condition apply in this case?

18 MS. GAMIN: Is this a question about a
19 specific license condition or all the applicable
20 license conditions?

21 JUDGE SMITH: You can answer it either
22 way.

23 (No audible response.)

24 JUDGE SMITH: I'll get to a specific, but

25 --

1 MS. GAMIN: Okay. Well, I believe this
2 issue is outside the scope of this proceeding based on
3 what has been previously litigated. The Staff's
4 position is not dependent on the existence of license
5 conditions.

6 JUDGE SMITH: Okay. Ms. Leidich or Mr.
7 Walsh?

8 MS. LEIDICH: Yes. We agree
9 wholeheartedly with the Staff that this is outside the
10 scope of this proceeding. However, there are a number
11 of license conditions that do address this particular
12 issue.

13 NuFuels has a license condition -- it's
14 10-23 that is pump testing to confirm that there is
15 no vertical confinement at the site. There is another
16 license condition which is a fracture test. That's LC
17 10:31. Again, it's an aquifer fracture test again to
18 confirm that there is adequate confinement. And
19 there's another one: 10-32, again, is also for
20 vertical confinement with between the Westwater
21 Aquifer and the Cow Springs Aquifer.

22 JUDGE SMITH: Okay. Thank you. Mr.
23 Parsons or Ms. Jamison?

24 MR. PARSONS: I would only say that the
25 basis of the contention is that, you know, those

1 license conditions aside, if they're based on a
2 400-foot spacing of wells -- and there's an argument
3 that we've made in the contention in the supporting
4 declaration that that is not a sufficient basis to be
5 able to detect those excursions -- then a license
6 condition would have, on paper, would have very
7 little, or at least would not resolve that concern.

8 JUDGE SMITH: Okay. Thank you. Then my
9 follow-up is: License Condition 10.17 to the current
10 license stipulates the monitoring well spacing at 400
11 feet. Since this is not new information, how is it
12 germane to the current action? This again is for each
13 of you. So let's go in the same order.

14 MR. PARSONS: Was that Staff first, or
15 would you like me to start?

16 JUDGE SMITH: Staff, then Applicant.

17 MS. GAMIN: Could you repeat the question,
18 Judge Smith?

19 JUDGE SMITH: You bet.

20 MS. GAMIN: Please.

21 JUDGE SMITH: License Condition 10.17
22 stipulates the monitoring well spacing at 400 feet.
23 Since this is not new information, how is it germane
24 to the current action?

25 MS. GAMIN: It's not.

1 JUDGE SMITH: Okay.

2 MS. LEIDICH: We agree that it's outside
3 of scope.

4 JUDGE SMITH: Okay. Mr. Parsons?

5 MR. PARSONS: Your Honor, I would point
6 you to the RAIs which were issued in this -- on the
7 record in this case that demonstrate questions from
8 Staff about explaining whether the historic mine
9 workings and other subsurface penetrations could
10 affect those water flows. So, I think, based on that,
11 there's -- that's evidence of materiality.

12 And then, in addition, we cite some
13 reference in the ER at 112, which talks about water
14 levels rising in the old mine wells. And so, there is
15 some evidence of a change in the hydrologic setting
16 that we believe is new information that warrants
17 additional attention to these concerns.

18 JUDGE SMITH: Okay. Thank you. I have
19 one more, but I think you've all addressed it. Thank
20 you. That's all.

21 CHAIR GIBSON: Okay. Let's turn to -- do
22 you have anything? Would you turn to Safety
23 Contention 2?

24 Ms. Leidich or Mr. Walsh previously
25 discussed LBP-99-30, 50 NRC 77, decision that

1 addresses vertical excursions, correct?

2 MS. LEIDICH: I think that we -- there's
3 a number of decisions that address vertical
4 excursions, but I think that probably the best
5 information actually comes from the Bloch decision and
6 the Hawkens decision that have been referenced as well
7 for Safety Contention 1.

8 CHAIR GIBSON: All right. Well, we're
9 fine. So the Bloch and the Hawkens decision is what
10 we'll limit ourselves to.

11 I think we'll -- I don't know if Judge
12 Hawkens would be happy with me calling it his
13 decision, the Hawkens decision, but you know, we'll
14 leave it at that, right?

15 MS. LEIDICH: The Chief Judge Hawkens
16 decision.

17 (Laughter.)

18 CHAIR GIBSON: What specific issues were
19 resolved in these two Board decisions that you claim
20 bar the admission of the State of New Mexico's Safety
21 Contention 2?

22 MS. LEIDICH: Yes. So, in Judge Bloch's
23 decision from 1999, he has a reference in that
24 decision to the -- we've mentioned it's the 174
25 boreholes. But he talks about how HRI had data on all

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1 the boreholes and used them to construct -- I'm going
2 to mess this up -- stratigraphic cross-sections at the
3 site. And he also found that the Staff had assessed
4 the risk that boreholes may be conduits and found them
5 small -- found those -- that risk to be small.

6 And Judge Bloch, in making that decision,
7 he also refers back to the FEIS, specifically page
8 4-55 of the FEIS, which is an analysis of a part of
9 the site where the wells -- the well plugging is older
10 versus some other parts of the site where it's more
11 modern and in accordance with modern standards.

12 And so, there is a Staff analysis in that
13 section of the FEIS regarding the old well plugs and
14 what would happen if a plug were to fail. And the
15 Staff essentially -- and basically analyzes a number
16 of factors that would go into minimizing further
17 issues from, you know, the recapture aquitards and the
18 other aquitards that are in between the various
19 layers, so the fact that the wells would essentially
20 collapse and also prevent further distribution of
21 solids or distribution of contaminants.

22 Beyond the FEIS and the Bloch analysis --
23 oh, and Judge Bloch also has some discussion of how
24 pump tests will be conducted at the site to confirm
25 that there is confinement in accordance with the

1 license conditions.

2 Judge Hawkens, in his analysis, talks
3 about the various pump tests that occurred at each
4 site to support the existence of confinement. And
5 Judge Hawkens is the one who found that the Lucas and
6 Wallace testimony was not persuasive and did not agree
7 with that testimony when it was first set forth in
8 2005.

9 CHAIR GIBSON: Okay. On page 59 of the
10 State's reply, Ms. Leidich, it asserts that the early
11 phase of Church Rock exploration, during the period of
12 time from 1958 to 1962, was essentially unregulated
13 and that it left the location of boreholes unknown.
14 Were the location of unknown boreholes addressed in
15 any of these board decisions?

16 MS. LEIDICH: The Old Church Rock
17 boreholes that were unregulated is the topic of the
18 Staff discussion in the FEIS at page 4-55, and that is
19 the exact section that Judge Bloch is referring to
20 when he refers to the 174 boreholes and the potential
21 risk for excursions from those boreholes.

22 CHAIR GIBSON: Okay. Since the Church
23 Rock exploration during the '58 to '62 period, have
24 there been new boreholes that have been dug?

25 MS. LEIDICH: There's further analysis on

1 that in the FEIS beyond just the old boreholes, but
2 essentially, the analysis in the FEIS, past a certain
3 point, discusses the fact that boreholes are drilled
4 with modern mining standards and that plugging is done
5 in conformance with state standards. So there is even
6 less of a risk at the modern boreholes, where plugging
7 was done in accordance with state standards, that
8 there would be an issue there.

9 CHAIR GIBSON: Okay. Thank you.

10 Mr. Parsons or Ms. Jamison, your Safety
11 Contention 2 alleges that the environmental report
12 does not adequately address production zone
13 confinement, and in particular, that legacy boreholes
14 may pose an additional risk of contamination
15 migration. Now, what do you mean by that?

16 MR. PARSONS: I think the reference had to
17 do with the historic boreholes being conduits for
18 contaminants, for excursions, for contaminants to flow
19 between aquifers, if I understand your question
20 correctly.

21 CHAIR GIBSON: Okay. Now, Ms. Gamin or
22 Mr. Quinn, I understand correctly that the Staff does
23 not oppose admission of this contention. Is that
24 correct?

25 MS. GAMIN: That's correct, Your Honor.

1 CHAIR GIBSON: In the Applicant's answer,
2 they make a reference to 40 CFR, Appendix A, Criterion
3 5(B)(2), and Criterion 7. Ms. Leidich, what is the
4 significance of that reference?

5 MS. LEIDICH: I believe the State actually
6 first raises those as the basis for its contention,
7 and on our answer, we were responding to that
8 reference in the State's contention, and we were
9 explaining that we don't see how those criteria
10 support the need to go out and verify plugging at
11 every single well that has been drilled at the site,
12 which seems to be the thrust of the contention SC-2.

13 CHAIR GIBSON: Okay. Is that the thrust
14 of your contention, Mr. Parsons?

15 MR. PARSONS: I think the thrust is that
16 there are known -- there are more well hole --
17 boreholes drilled out there than the competent
18 evidence demonstrates have been addressed or plugged.
19 And so, you have a gap, a knowledge gap, with respect
20 to what exists on a site with respect to these
21 historic boreholes, and as discussed, many of them pre
22 -- sort of pre-law with respect to plugging and
23 abandonment procedures.

24 And the criteria mentioned require a
25 demonstration of an ability to control seepage as well

1 as monitoring to be able to determine -- detect
2 excursions, and if you don't know where these wells
3 are or the status of their abandonment, that fails to
4 meet the requirements of that criteria.

5 CHAIR GIBSON: Okay. Thank you. Any
6 questions? Got any questions -- okay. Let's turn to
7 Safety Contention 3.

8 Ms. Leidich or Mr. Walsh, we previously
9 discussed LBP-05-17, 62 NRC 77, 2005, which I will
10 refer to as the Hydro Resources case, but we skipped
11 over that case's holding on financial assurance
12 requirements. And so, the question is: Is this an
13 issue that may not be litigated here? Is that your
14 contention, Ms. Leidich or Mr. Walsh?

15 MR. WALSH: It's Mr. Walsh here, Your
16 Honor. The issue here is the State has not come
17 forward with an admissible contention. You know, the
18 issue was litigated and, ultimately, concluding in a
19 Commission decision that was very explicit as to what
20 the licensee then Hydro Resources -- was supposed
21 to do to address these concerns.

22 And so, you know, the State hasn't come
23 forward with any new information since those decisions
24 or since the preparation of the Restoration Action
25 Plans in 2010 and 2011 and also since the

1 establishment of License Condition 9.5 that would
2 warrant reopening those issues.

3 CHAIR GIBSON: You just made reference to
4 a restoration action plan, Mr. Walsh.

5 MR. WALSH: Yes.

6 CHAIR GIBSON: Is that -- did I hear you
7 correctly?

8 MR. WALSH: Correct, yes.

9 CHAIR GIBSON: Could you just tell me, you
10 know, in 40 words or less, what is a restoration
11 action plan?

12 MR. WALSH: Yes. It sets forth the plan,
13 to use the word in the title, that summarizes the
14 activities that will be necessary to restore the
15 groundwater in a particular section, complete plugging
16 and abandonment of wells, removing any additional
17 structures or anything, and completing surface
18 reclamation and decommissioning of the site. So it is
19 the plan. There's four of them, one for each of the
20 sections, and they are referenced in the underlying
21 environmental report and the COP.

22 CHAIR GIBSON: Okay. Great. And the COP
23 is the Consolidated Operation Plan, right?

24 MR. WALSH: Yes. And I know, too, that
25 the Restoration Action Plans were referenced in the

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1 contention themselves.

2 CHAIR GIBSON: Okay. Great. Okay. Thank
3 you.

4 So, NRC Staff, I don't know which of you
5 wants to say this, but you don't oppose the admission
6 of this Safety Contention 3; is that correct?

7 MR. QUINN: Your Honor, the Staff
8 initially did not oppose the admission of this
9 contention. However, based on information provided in
10 the pleadings, the Staff has changed its position, and
11 we now believe SC-3 is inadmissible.

12 CHAIR GIBSON: And have you provided this
13 rationale to us, I mean, before just now?

14 MR. QUINN: No, sir.

15 CHAIR GIBSON: Okay. Great. Okay, just
16 wanted to be sure. Do you -- will you -- do you
17 intend to be doing so?

18 MR. QUINN: Yes, sir.

19 CHAIR GIBSON: Okay. Great. And when can
20 we expect to see that?

21 MR. QUINN: We'll have it for you as soon
22 as possible, sir.

23 CHAIR GIBSON: Okay. I won't hold you to
24 that, but I will hold you to giving us an answer on
25 when you're going to get it to us, okay?

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1 MR. QUINN: Very good. Yes, sir.

2 CHAIR GIBSON: Can you tell me, in 40
3 words or less, what the reason for your change of
4 heart is, Mr. Quinn?

5 MR. QUINN: Yes, sir. The Applicant has
6 provided a decommissioning plan in conjunction with
7 the ER, and in accordance with Criterion 9 and License
8 Condition 9.5, the Applicant must provide an
9 NRC-approved financial surety arrangement as a
10 prerequisite to operating, but that does not
11 necessarily mean right now, at this stage.

12 Because the information that is currently
13 required is present in the application -- that is the
14 environmental report and the COP -- the contention
15 does not demonstrate a genuine and material dispute
16 with the application and is therefore inadmissible.

17 CHAIR GIBSON: Okay. Okay. Well, Mr.
18 Parsons or Ms. Jamison, at least the Applicant is
19 maintaining that your petition is in error and
20 asserting that financial assurance is only addressed
21 in three sentences of the ER Section 2.1.3.8.
22 Instead, the Applicant says it has addressed financial
23 assurance in several parts of the environmental report
24 that are listed on page 57. Is the Applicant wrong?

25 MR. PARSONS: Thank you, Your Honor. I am

1 -- on page 57 of the ER, is that what you're referring
2 to?

3 CHAIR GIBSON: I believe so.

4 MR. PARSONS: I'm having a hard time
5 corresponding that. Maybe I'm looking at the wrong
6 document.

7 CHAIR GIBSON: Okay.

8 MR. PARSONS: Just so I can give you --

9 CHAIR GIBSON: Hold on just one second.
10 Mr. Walsh, Ms. Leidich, can one of you all -- was it
11 page 57 where you listed the financial assurance, or
12 is it somewhere else? It may have been my mistake.

13 MR. PARSONS: I see a map on page 57.

14 MR. WALSH: Yes, yes, I see a map as well,
15 too.

16 CHAIR GIBSON: Okay.

17 MR. WALSH: Our answer cites to several
18 sections of the COP and the ER that reference
19 discussed financial assurance issues.

20 CHAIR GIBSON: Okay. Okay.

21 MS. LEIDICH: Page 38, though, was the
22 citation in the State's contention itself.

23 CHAIR GIBSON: Okay. Okay. Well, her --
24 how about 57 of the answer? Maybe that would do, Mr.
25 Parsons. Maybe that will be 57 of the Applicant's

1 answer. Maybe that would be it. Would that work?

2 MR. PARSONS: I also do see, as Ms.
3 Leidich indicates, I do see a discussion on page 38.

4 CHAIR GIBSON: Okay.

5 MR. PARSONS: And I think I can -- I mean,
6 I don't know if the Staff is referring to something
7 new that came out, or just a new, a fresh look at what
8 already existed. I'm just wanting to clarify whether
9 there was a new document with respect to financial
10 assurance or just sort of a renewed sort of look at
11 what is existing?

12 MR. QUINN: Yeah, a renewed look at what
13 is existing after the pleadings came through, answer
14 and replies.

15 MR. PARSONS: Wonderful. Appreciate that
16 clarification.

17 Our argument on financial assurance is
18 that the -- since 2011, there's evidence that -- and
19 this is discussed in Abitz's declaration. The
20 reference I have is paragraph 47. It talks about how
21 the -- these restoration projects take longer and are
22 much more involved than proposed. And so, a financial
23 assurance calculation that relies on a restoration
24 effort that doesn't account for the track record of
25 these facilities across the country is not

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1 sufficiently explained, but the basis -- the basis for
2 that financial assurance is inadequate.

3 We also would say that, since 2011,
4 there's that 2012 mandatory agreement with the Navajo
5 Nation for the cleanup -- for the cleanup of portions
6 of the site that we discussed earlier. And I know
7 that the Applicant's argument is that somehow that is
8 entirely disconnected from this operation, but we
9 argue that it is part and parcel and that because that
10 is a necessary predicate to the operations occurring,
11 that it needs to also be accounted for in the
12 financial assurance instrument.

13 We understand. To clarify, we understand
14 that the actual placing of the financial assurance
15 comes later. We're not arguing that they have to
16 place that financial assurance vehicle now, but they
17 are under an obligation, as we describe in our
18 petition, to perform the cost -- an accurate cost
19 estimate, and that's what we say is lacking.

20 CHAIR GIBSON: Okay. On page 36 of your
21 petition, in that regard, you say the missing elements
22 are no current cost estimate, surety amount, or cost
23 basis, right?

24 MR. PARSONS: That is what it reads, yes,
25 and it discusses the --

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1 (Simultaneous speaking.)

2 MR. PARSONS: -- the basis, therefore, and
3 Abitz declaration is there. Thank you.

4 CHAIR GIBSON: Okay. I'm sorry. I
5 interrupted you, Mr. Parsons. I didn't mean to
6 finish. I didn't mean to cut you off there.

7 MR. PARSONS: No problem.

8 CHAIR GIBSON: On page 63 of your reply,
9 you note that there are no costs associated with the
10 third-party cost of decommissioning, reclamation, and
11 groundwater restoration. Is that correct?

12 MR. PARSONS: Which page are you referring
13 to, Your Honor?

14 CHAIR GIBSON: Page 63 of your reply.

15 MR. PARSONS: Thank you. That is what's
16 stated.

17 CHAIR GIBSON: Okay. Now, Ms. Leidich or
18 Mr. Walsh, are these costs somewhere in the ER and we
19 just didn't see them, or do you not need to put them
20 in there?

21 MR. WALSH: Thank you, Your Honor. There
22 are cost estimates provided in the Restoration Action
23 Plans, and per the license condition, they will be
24 updated prior to operation, when we go for the surety
25 amount.

1 CHAIR GIBSON: And that restoration
2 operation plan is part of the ER; is that -- did I
3 hear you correct, Mr. Walsh?

4 MR. WALSH: The Restoration Action Plan is
5 referenced -- the Restoration Action Plans, plural, are
6 referenced in the ER, and they are referenced in the
7 COP.

8 CHAIR GIBSON: Okay. They're referenced,
9 but they're not part of it the ER; is that a fair
10 statement?

11 MR. WALSH: That is a fair statement.

12 CHAIR GIBSON: Okay. Thank you. Now, Mr.
13 Walsh, you point to 10 CFR, Appendix A, Criterion 9,
14 which states that the operative date for providing
15 financial assurance is simply before commencement, but
16 then you also say you're committed to providing cost
17 estimates prior to operations. Do those mean the same
18 thing? Before --

19 (Simultaneous speaking.)

20 CHAIR GIBSON: Do those mean the same
21 thing?

22 MR. WALSH: Yes, Your Honor. I don't
23 think any difference was intended. Criterion 9 says
24 before the commencement of operations, and then our
25 license condition, if you give me a moment, says, as

1 a prerequisite to operating under its license, the
2 licensee shall submit an NRC-approved surety
3 arrangement to cover the estimated cost of
4 decommissioning, reclamation, et cetera.

5 CHAIR GIBSON: Okay. Okay. Right. Okay.
6 Well, I like this a lot better than undisclosed
7 uncertainty and identified uncertainty that we had
8 earlier. So I think we can go with these two being
9 essentially the same thing.

10 Mr. Parsons, the Applicant says it's
11 committed to give the cost estimation at that time,
12 before commencement, prior to operations. So, is
13 NuFuels right about only needing to give these
14 estimates at some point in the future, and if not, why
15 not?

16 MR. PARSONS: Our position is that
17 Criterion 9 requires those assumptions to be detailed
18 prior to the -- as part of the licensing. While we
19 understand, again, that the actual placement of the
20 instrument does not have to be in place prior to
21 operations, the criteria -- we cite Criterion 9(B)(1),
22 that the Applicant must have identification of and
23 justification for using the key assumptions contained
24 in a bond estimate.

25 And again, we argue that the reliance on

1 the current plan for remediation is outdated and
2 unsubstantiated given the track record of the
3 industry, given the problems that are evident in
4 restoration. And again, this is -- you know, NuFuels'
5 own document talks about the problems associated with
6 -- their DOE grant application talk about the problems
7 with restoration success. And our position is that
8 those, at least those estimates, need to be
9 supportable at the application stage.

10 CHAIR GIBSON: Okay. Thank you. Now, on
11 page 37 of your petition, you reference the annual
12 update license condition. What is that?

13 MR. PARSONS: My understanding is that the
14 financial assurance instrument is updated annually to
15 account for, you know, inflation or other costs that
16 might occur. And while we recognize that that is
17 something that we have no reason to believe will not
18 occur, it does not in itself negate the need to have
19 a rational and supportable estimate in the first
20 instance.

21 The fact that it will be updated yearly as
22 the operations occur is comforting in some respect,
23 but if the assumptions underlying it are not
24 supported, then it does not resolve the contention.

25 CHAIR GIBSON: Okay. Now, I'm not asking

1 you to agree with Mr. Parsons's description of the
2 need to do these things and why, but I just want to
3 know, Mr. Walsh, is his description of the annual
4 update license condition itself accurate?

5 MR. WALSH: Yes, Your Honor, it sounds
6 adequate. The information that the financial surety
7 needed will be updated based on operational experience
8 and other circumstances, such as inflation.

9 You know, they make this claim that the
10 financial surety should not rely on 9 pore volumes of
11 restoration. That's one of the main components of the
12 financial surety instrument. But they don't come
13 forward with any information suggesting that that
14 basis would be insufficient. Mr. Parsons has cited to
15 Dr. Abitz's declaration a couple of times now about
16 industry-wide experience, but the declaration fails to
17 make any ties as to why those geographic locations
18 have any relevance or bearing on the Crownpoint.

19 And then there is one case cited in the
20 declaration that says, you know, when they were doing
21 it turns out you needed 9 pore volumes rather than 6
22 as originally estimated; well, the current plan is to
23 base the financial surety on 9 pore volumes. That is
24 what is in our license condition, and that's what it
25 will be on for the initial financial assurance

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1 demonstration.

2 CHAIR GIBSON: Okay. Thank you. Now, Mr.
3 Parsons, I understand that you're not challenging the
4 annual update license condition, but the question is,
5 do annual adjustments allow NuFuels to add the claimed
6 missing assurance categories whenever they are closer
7 to operations?

8 MR. PARSONS: Again, our position is that
9 the at least a reasonable estimate needs to be
10 included in the licensing materials -- in the
11 application materials. We assume -- we have no reason
12 to dispute the -- that the annual update, as Mr. Walsh
13 indicated, would take account of operational
14 experience. But again, it does not negate the lack of
15 a support -- what we see as a lack of a supportable
16 assumptions going into the cost estimate at the start.

17 CHAIR GIBSON: Okay. Thank you. Now, we
18 talked a little bit about the 9 pore volumes chosen
19 over a larger number, and I'm curious where in the
20 environmental report, Mr. Walsh, do you analyze or
21 support why 9 pore volumes were chosen over a larger
22 number?

23 MR. WALSH: I'll have to look that up,
24 Your Honor, but again, this was something that was
25 litigated previously and made a condition of the

1 license. Let me see if I can --

2 CHAIR GIBSON: So would it be fair to say
3 then that you're saying that was previously litigated;
4 you're just going with the either the '05 or the '99
5 LBP, and that's what you're relying on for the 9 pore
6 volumes?

7 MR. WALSH: Yes. This is -- if I recall
8 the history correctly, originally, it was proposed to
9 be -- the financial assurance was originally proposed
10 to be on something less than 9 pore volumes, but after
11 it was litigated, it was determined to be on 9 pore
12 volumes.

13 CHAIR GIBSON: Okay. Thank you. Mr.
14 Parsons, do you dispute that?

15 MR. PARSONS: No. I think that was part,
16 and it is a license condition. There was a range of
17 pore volumes discussed in the EIS, as I recall, as
18 well as in the prior, somewhere between 3 and 28 pore
19 volumes, I believe, and 9 was settled on. It's not
20 clear to me that there was anything other than sort of
21 that sounded like a good, round number, but I would
22 have to look and -- look back at that.

23 But I do believe, as I discovered
24 preparing for the argument, that the EIS does discuss
25 a range between, I believe, it's between 3 and 28 pore

1 volumes that might be needed. And the license says,
2 my understanding is, that the requirement is at least
3 9, or 9 would be the presumptive, but subject to
4 alteration.

5 CHAIR GIBSON: Okay. Thank you.

6 MR. PARSONS: But --

7 MR. WALSH: Your Honor, may I -- sorry.
8 Sorry, Your Honor. Sorry, Mr. Parsons. I wanted to
9 follow up on one -- with one thing, Your Honor, if I
10 may.

11 CHAIR GIBSON: Yes, that's okay, Mr.
12 Walsh.

13 MR. WALSH: The environmental report does
14 discuss 9 pore volumes, but only in one section, and
15 it doesn't pertain to financial assurance, but it does
16 describe the restoration activities. That's on page
17 227 of the environmental report. In section
18 4.4.2.1.1.3, it does discuss 9 pore volumes.

19 But more importantly here, I think -- and
20 again, this is a safety contention that the State has
21 proffered -- financial assurance for the -- the COP at
22 page 171 states that financial assurance for
23 groundwater restoration of these initial well fields
24 will be based on 9 pore volumes. Financial assurance
25 will be maintained at this level until NuFuels can

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1 demonstrate the number of pore volumes in order to
2 restore the production-scale well field.

3 So it's an initial estimate based on prior
4 litigation, and it is subject to adjustment, as stated
5 in the license condition and in the COP.

6 CHAIR GIBSON: Okay. Thank you. Do you
7 have any questions for 3? Got any questions from 3?

8 JUDGE SMITH: I just have one follow-up.

9 Mr. Walsh, I think I heard you say that
10 the financial assurance or cost estimate was
11 referenced in the environmental report but not part of
12 the environmental report. Was that correct?

13 MR. WALSH: The Restoration Action Plans
14 are referenced in the ER and the COP.

15 JUDGE SMITH: And those include financial
16 information, the restoration action?

17 MR. WALSH: Yes, they do. If I can pull
18 up one, for example, but for example, the Section 8
19 Restoration Action Plan puts the estimate -- estimates
20 the cost of restoration by an independent contractor
21 at \$9,939,072 over a five-year period, which is a
22 conservative assumption, according to the document,
23 for various reasons.

24 Each one is different, and if I can tell
25 you that different sections have different estimates

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1 provided: Section 17 has an approximately 5 million
2 dollar estimate, Unit 1 is 13 million, and Crownpoint
3 is 18 million. Altogether, they total approximately
4 47 million dollars.

5 JUDGE SMITH: Okay.

6 MR. WALSH: So those are the 2011
7 Restoration Action Plans.

8 JUDGE SMITH: Okay. But what I really
9 want -- and maybe you can clarify this for me. So, in
10 Criterion 9 of 10 CFR, Part 40, Appendix A, Part C
11 says the licensee shall submit this plan in
12 conjunction with the environmental report. So, by
13 referencing it, does that mean that's in conjunction
14 with it?

15 MR. WALSH: No, Your Honor. The
16 decommissioning cost estimate in Criterion 9(C) is
17 different. The Restoration Action Plans are more
18 inclusive. I would suggest that these estimates are
19 inclusive of the decommissioning cost estimates, but
20 these are documents that are on the record or on the
21 docket and are referenced in both reports.

22 JUDGE SMITH: Okay. So the plan that's
23 referenced in Part C is the decommissioning plan; is
24 that what you're saying?

25 MR. WALSH: That is. Criterion 9(C)

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1 refers to a decommissioning cost estimate, and that is
2 something that the Criterion 9(C) says should go in
3 the environmental report. Yes, you are correct.

4 JUDGE SMITH: Okay. All right. Thank
5 you. That's all I have.

6 CHAIR GIBSON: Okay. Now, I believe that
7 concludes our questions with respect to these
8 contentions. We've got a few little housekeeping
9 matters we need to take care of before we adjourn.

10 MR. QUINN: Judge Gibson?

11 CHAIR GIBSON: What?

12 MR. QUINN: Judge Gibson, may I?

13 CHAIR GIBSON: Yes. Yes, you may, Mr.
14 Quinn.

15 MR. QUINN: Yes. Just before we get off
16 Safety Contention 3, you asked that we get you -- the
17 Staff gets you information about its position, its
18 updated position, to yourself and the parties, to the
19 Board and the parties. Any direction regarding the
20 form you would like that to take, Your Honor?

21 CHAIR GIBSON: I would suggest that you
22 file an amended answer in which you address this -- or
23 supplemental answer. I don't know which one would be
24 the proper term, but one or the other with respect to
25 Safety Contention 3. And I suspect that we'll

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1 probably need to afford the parties an opportunity to
2 reply to that.

3 So, at least, Mister -- I'm not sure that
4 NuFuels is going to care about it, but they're going
5 to be happy, but I suspect that the State is going to
6 want to reply. So we'll need to afford them an
7 opportunity to reply in the same amount of time that
8 they would normally reply to answer. So what I would
9 suggest is that you go ahead and get your answer in
10 within the week, and that the State of New Mexico will
11 then reply to that within a week thereafter, okay?

12 MR. QUINN: Very good, Your Honor. Thank
13 you.

14 CHAIR GIBSON: And if the NuFuels wants to
15 say anything, they can, I guess, file a support or
16 something, I don't know. I've never really had this
17 happen before, but that's okay. Okay? Will that
18 work?

19 MR. QUINN: It will. Thank you, Your
20 Honor.

21 CHAIR GIBSON: And get that within the
22 week, Mr. Quinn?

23 MR. QUINN: Yes, sir.

24 CHAIR GIBSON: And Mr. Parsons, you can
25 get that in within a week thereafter?

1 MR. PARSONS: Yes, Your Honor.

2 CHAIR GIBSON: Well, I thank you. Now,
3 the State of New Mexico has filed a conditional motion
4 on Environmental Contention 8. So let me ask the
5 Staff if it has a view about when the due date for
6 answers to that conditional motion would be due.

7 It appears to me that it is in the nature
8 of almost new and amended contentions or a
9 supplemental -- I mean, it's all very confusing
10 because it's apparently based on new information, new
11 developments that happened after we had set this
12 matter for oral argument. So let me ask you: does the
13 Staff have a view about when an answer should be filed
14 to that conditional motion?

15 MS. GAMIN: Well, Your Honor, though, the
16 way I read that motion is that it's conditional on a
17 participant arguing or the Board's finding that the
18 State's Contention EC-8 is moot. I'm just reading off
19 the first page there. So I'm not clear -- I have not
20 heard NuFuels argue that that contention is moot.

21 So I guess my view is that if the
22 conditional motion -- if it's a conditional motion and
23 the condition hasn't occurred, then the timeline for
24 answering has not been triggered.

25 CHAIR GIBSON: Okay. NuFuels, do you have

1 a view on that?

2 MS. LEIDICH: Your Honor, we've argued
3 that all of the contentions are inadmissible in their
4 current form, so we would anticipate that the Board
5 will not be admitting any contentions, and therefore,
6 we won't need to move for any contentions to be moot.
7 So it seems there are multiple conditions present that
8 haven't been achieved here.

9 In light of that, I am not certain what
10 the timeline should be. I think we are some agreement
11 with the Staff that there are conditions that have not
12 yet occurred that to make the pleading relevant in
13 this case.

14 CHAIR GIBSON: Well, I'm glad that we're
15 not the -- we're not the only ones that are stumped
16 then.

17 MR. PARSONS: Your Honor?

18 CHAIR GIBSON: Yes?

19 MR. PARSONS: If I may, I just wanted to
20 the intent was not to confuse the proceedings, but
21 reading the -- and we all know that the NRC process
22 takes deadlines very seriously, and especially the
23 good cause demonstration, and so -- and timeliness.

24 And so, we were sort of between a rock and
25 a hard place, so to speak, with knowing that

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1 information had come in, and the timing of this
2 hearing being as it was, we figured the safest route
3 was to put something on the record just to make sure
4 that if the eventuality occurred, we would sort of be
5 protecting our interests. So apologize for the
6 confusion, but we were just trying to make sure we
7 didn't miss, you know, sort of have to backtrack and
8 re-plead something that was out of time.

9 CHAIR GIBSON: I appreciate your concern,
10 Mr. Parsons.

11 How about -- you know, you all did a
12 really good job getting together and talking after we
13 had our -- among yourselves. Why don't you all get
14 together, talk among yourselves, and tell us how you
15 would like the Board to proceed on this matter? And
16 if you can't, if you can't resolve how we should
17 proceed on this, then we can hold a hearing on that,
18 okay?

19 But I -- or we can issue an order without,
20 but at least -- how about you got a week to reply to
21 the -- to get your new answer in, Mr. Quinn. How
22 about when those answers are due -- I mean, when Mr.
23 Parsons's reply is due, can we -- can you all get
24 together and talk so that we'll have something to deal
25 with within the next two weeks? Would that be

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1 acceptable to you all?

2 MR. WALSH: Yes, Your Honor.

3 MS. LEIDICH: Yes, Your Honor.

4 MS. GAMIN: Yes.

5 CHAIR GIBSON: Great. Okay. Then we're
6 going to postpone trying to figure out what to do with
7 a conditional motion for right now, okay?

8 Now, with respect to the updates, you
9 indicated, Ms. Gamin, that, I believe, by February
10 2027, the Staff is hoping to have its final safety and
11 environmental documents, including the 106
12 consultation issues, addressed. Will there be a draft
13 of that, or will it just be a final?

14 MS. GAMIN: I believe the only draft
15 document we're planning to publish for public comment
16 is the EA, Environmental Assessment.

17 CHAIR GIBSON: Okay. And the -- do you
18 have a projected date for that, at least month, when
19 that will happen?

20 MS. GAMIN: We are planning for the draft
21 EA to be available November, so pretty soon now,
22 November 2026.

23 CHAIR GIBSON: And will new and amended
24 contentions need to be filed with respect to that
25 draft EA if the State has any?

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1 MS. GAMIN: Yes. If a participant wishes
2 to file new and amended contentions, the availability
3 of the draft EA would trigger that.

4 CHAIR GIBSON: Okay. And do you
5 understand that, State of New Mexico?

6 MR. PARSONS: Yes, Your Honor.

7 CHAIR GIBSON: Okay. So we don't have any
8 misunderstanding about that. Okay. Very well.

9 All right. So --

10 MR. PARSONS: And just to clarify, Your
11 Honor, the standard 30-day rule would apply, I assume.

12 CHAIR GIBSON: Ms. Gamin?

13 MS. GAMIN: Yes. I believe there is a
14 footnote to that effect in the Board's initial
15 prehearing order that sets that 30-day timeline.

16 CHAIR GIBSON: Okay.

17 MR. PARSONS: Thank you.

18 CHAIR GIBSON: Thank you. Okay. Okay.
19 I believe that concludes what we have. Is there
20 anything that you all need to bring up with us before
21 we adjourn for the day?

22 MR. PARSONS: Nothing from the State, Your
23 Honor.

24 MS. LEIDICH: Nothing from the Applicant.

25 CHAIR GIBSON: Staff?

1 MS. GAMIN: Nothing from the Staff. Thank
2 you.

3 CHAIR GIBSON: Okay. Very well. All
4 right. I would like you all to stay on. The court
5 reporter may have things that they need -- she needs
6 to do in order to make sure the transcript is
7 complete. And we'll look forward to seeing your
8 amended or supplemental answer and your reply, Mr.
9 Parsons, as well as your report on what we're going to
10 do about the conditional motion. Okay?

11 Thank you so much. It's been a pleasure
12 being with you all today. You did a very good job.
13 I can't believe we got it done in one day, but good
14 job. Thank you.

15 (Whereupon, the above-entitled matter went
16 off the record at 5:40 p.m.)

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