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UNITED STATES OF AMERICA
U.S. NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of: : Docket No. 40-9075-MLA
POWERTECH USA, INC. : ASLBP No. 10-898-02-MLA
(Dewey-Burdock In Situ :
Uranium Recovery :
Facility) :

Wednesday,

June 9, 2010

Custer, South Dakota

BEFORE:

WILLIAM J. FROELICH, Chairman

MARK BARNETT, Administrative Judge

RICHARD F. COLE, Administrative Judge

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1 APPEARANCES:

2 On Behalf of the U.S. Nuclear Regulatory3 Commission:

4 MICHAEL CLARK, ESQ.

5 PATRICIA A. JEHLE, ESQ.

6 U.S. Nuclear Regulatory Commission

7 Office of General Counsel

8 Mail Stop - 0-15 D21

9 Washington, DC 20555

10 (301) 415-8366

11 (301) 415-3725 (fax)

12
13 On Behalf of Powertech:14
15 ANTHONY J. THOMPSON, ESQ.

16 CHRISTOPHER S. PUGSLEY, ESQ.

17 Thompson & Pugsley, PLLC

18 1225 19th Street, N.W.

19 Suite 300

20 Washington, DC 20036

21 (202) 469-0780

22 (202) 496-0783

23
24
25
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1 On Behalf of the Petitioner, Oglala Sioux

2 Tribe:

3 JEFFREY PARSONS, ESQ.

4 Western Mining Action Project

5 P.O. Box 349

6 Lyons, CO 80540

7 (303) 823-5738

8 (303) 823-5732

9
10 On Behalf of the Petitioner, Consolidated

11 Petitioners:

12
13 DAVID FRANKEL, ESQ.

14 BRUCE ELLISON, ESQ.

15 THOMAS BALLANCO, ESQ.

16 P.O. Box 2508

17 Rapid City, SD 57709

18 (605) 348-9458

19
20
21
22
23
24
25
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P R O C E E D I N G S

9:01 a.m.

CHAIR FROELICH: Let's come to order. As I recall, when we concluded yesterday's session, we were discussing the document entitled "The Commission's Strategy For Outreach," and as I recall, the staff and the applicant were going to communicate with their principals and report back on the copies of the application and its dissemination to the public. Counsel?

MR. PUGSLEY: Yes, Your Honor. We communicated with our principals and based on our discussions, there are four locations that were identified to produce copies, the two county locations and two others. That is fine with us.

What we would ask is that we be, if counsel communicate to us a list with addresses of where these documents should go, we'll be happy to make sure they get there.

CHAIR FROELICH: Thank you. Staff, I guess your role was sort of a subsidiary role. You're encouraging the type of communication to continue in the future, on future documents that are produced?

MR. CLARK: That's correct, Your Honor. We do plan to implement the strategy.

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1 CHAIR FROELICH: Thank you very much,
2 counsel. Thank you, Mr. Pugsley. Our modus operandi
3 today will be to move through the contentions filed by
4 the consolidated petitioners, and unless there's any
5 procedural or leftover matter, if there's any issues
6 to raise at this point.

7 MR. PARSONS: Sorry. Your Honor, I have
8 just one matter. With respect to at the beginning of
9 the hearing yesterday, you had asked where the Oglala
10 Sioux Tribe lands are, which in the declaration were
11 indicated were in the proximity, not the most specific
12 terms.

13 But I wanted to clarify. I'm looking at
14 a property ownership map of Fall River County, and the
15 Oglala Sioux Tribe owns three parcels of land that are
16 interspersed amongst the Institute of Range and
17 American Mustang, which is Dayton Hyde's property. So
18 it's -- he indicated yesterday or his counsel
19 indicated that they're approximately 20 miles from the
20 mine site.

21 The Oglala Sioux Tribe lands are just a
22 couple of miles, and one parcel a couple of miles
23 closer. So just approximately 20 miles, and those are
24 lands again that are leased by Mr. Hyde and as
25 indicated in the declaration of the Oglala Sioux Tribe

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1 lands director, should Mr. Hyde's operations be
2 impacted, that his lease on those lands would be
3 affected and thereby the Tribe. So I just wanted to
4 clarify that for you.

5 CHAIR FROELICH: Thank you.

6 JUDGE BARNETT: Yes. I was wondering if
7 it's possible for the -- there was a question the
8 applicant and counsel for Mrs. Henderson had a
9 difference of opinion on how far her land was from the
10 PAA.

11 I was wondering if it was possible during
12 the break to get the applicant and counsel for Mrs.
13 Henderson to get together and stipulate how far her
14 land was, the nearest point of her land to the nearest
15 point in the PAA. Is that possible, see if you can
16 agree on that?

17 If you can't agree, then that's okay..
18 But if you can agree, that would be easier than us
19 trying to straighten that out. Thank you.

20 MR. PUGSLEY: Certainly.

21 CHAIR FROELICH: All right.

22 MR. FRANKEL: A quick question, Your
23 Honor?

24 CHAIR FROELICH: Yes.

25 MR. FRANKEL: Just on a procedural

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1 question, per your instruction, I did take good notes
2 yesterday, and I'm going to attempt to work them into
3 our discussion, if that's okay, rather than treat them
4 as leftover matters.

5 CHAIR FROELICH: Oh absolutely. I think
6 that would make more sense and it will have the
7 arguments dealing with the individual contentions with
8 those contentions.

9 All right. In your pleading, Mr. Frankel,
10 at page five, and this again deals with distance so
11 it's a little bit of a leftover, but it would make a
12 nice transition into our discussion this morning, it
13 says the nearest resident "is .9 miles to the west-
14 southwest of the PAA." Do you see my reference at
15 about the six line of page five?

16 CHAIR FROELICH: Yes. Okay, I see it.
17 All right. Is this nearest resident any of the
18 consolidated petitioners?

19 MR. FRANKEL: Your Honor, I have no way of
20 knowing that, because that information was taken just
21 directly out of the application, with a citation to
22 the application, and there's no identity information.

23 CHAIR FROELICH: Similarly, Petitioner
24 Jarding states that there are 80 drinking water wells
25 within two miles of the project. Do any of those

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1 wells belong to any of the consolidated petitioners?

2 MR. ELLISON: Not as far as any of the
3 petitioners are concerned.

4 MR. FRANKEL: Okay.

5 CHAIR FROELICH: I'd like to ask staff, in
6 your pleadings, at page eight of the response, the
7 staff indicates that the ground water in southwestern
8 South Dakota generally flows away from the
9 petitioners' residences. Is this based solely on the
10 application or is this based on any independent
11 sources?

12 MR. CLARK: Your Honor, this is based on
13 an independent source cited in the application, and
14 that's the United States Geological Survey data, which
15 are cited in Powertech's application.

16 CHAIR FROELICH: Okay.

17 MR. FRANKEL: There's also additional
18 information available on USGS' website relating to the
19 aquifers in that area.

20 MR. ELLISON: Your Honor, I don't want to
21 object to counsel's latest statement. What I would
22 like to do is be able to suggest that as we amplify
23 our arguments and positions today, there may be, just
24 as counsel said, look at the USGS website, and it's
25 not cited necessarily in any piece of paper that has

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1 been submitted.

2 We would like this Board to be able to
3 have available to it all of the available known
4 research and studies, and there's some that we're in
5 the position because we were so, and maybe this is a
6 little premature for me to say this, but we have 60
7 days' notice. We asked for more time. We really got
8 less than 40 days' notice by the time that some of us
9 got electronic copies.

10 It was impossible to find within those 40
11 days everything that exists, and we found more stuff.
12 We feel that it would be best for the Board to just as
13 counsel for the NRC staff said, "Well, it's on the
14 USGS website."

15 That's great. It should be. We want you
16 to consider everything.

17 CHAIR FROELICH: Just so we're clear.

18 MR. ELLISON: Yes sir.

19 CHAIR FROELICH: Okay. We are not in a
20 position at this point, at the contention
21 admissibility stage, to take new evidence. Just like
22 the maps that were on the wall, that's not part of the
23 record in this case. We have to rely on the pleadings
24 and the materials that have heretofore been filed in
25 this docket.

1 So as I understood the answer from staff
2 counsel was that the citation to where I can find the
3 basis for his statement was in the USGS, which has
4 been cited to us and does appear in the applicant's
5 application. Do you understand.

6 MR. CLARK: That's correct, Your Honor,
7 and my reference to the USGS website was simply to
8 state that if the petitioners wish to challenge the
9 information presented in the application, they could
10 have gone to the source cited by Powertech, which is
11 USGS data, and looked for information that might
12 suggest that the directional flows are other than
13 southwestward.

14 CHAIR FROELICH: Okay, thank you counsel.
15 Going back now to the petition at page six, and
16 that's, I believe, at the first -- I'm sorry. It's in
17 the petitioner's reply at six. Okay.

18 In this portion of your pleading, you make
19 reference to the *HRI* case, and you cite that case for
20 the proposition that "The petitioners have
21 demonstrated that to rely on water supplies adjacent
22 to an ISL mining project have the right to a hearing."
23 You cite to *HRI* at 269.

24 I wanted to point out that at page 269,
25 there is no reference to that. I think you meant to

1 page 275 of that case. But how is it -- can you
2 explain to me the facts in that case, and the
3 proximity of the petitioner in that case, vis-a-vis
4 proximity of your clients in this proceeding?

5 MR. FRANKEL: In both cases, petitioners
6 were separated by some number of miles. That number
7 of miles on the surface did not reflect the
8 interconnection of water or the reliance on water
9 resources.

10 In the *Crow Butte* case, the Board decided,
11 based on *HRI*, citing *HRI*, that are, as counsel for the
12 company said yesterday, he quoted the language
13 adjacent, I said. Reasonably contiguous, he said.
14 What do those terms mean, and the Board properly in
15 our view, interpreted those terms to mean that
16 reasonably contiguous includes when both affected
17 water source and the water source being relied on are
18 connected.

19 And the purpose of citing *HRI* was to bring
20 the court's attention back to that in our rebuttal.

21 CHAIR FROELICH: As I re-read that case,
22 that dealt with a Mrs. Yazzi, as I recall, in the *HRI*
23 decision, and if I read correctly, she lived one half
24 mile away from the source, and that was why in that
25 case the Board held that she had standing by the

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1 Commission. Did I read that properly?

2 MR. FRANKEL: In *HRI*, yes, and in applying
3 that principle and looking at the case, I think we
4 have very different facts because we have knowledge
5 that water travels in this particular area of the
6 country in a different way than in with *HRI* was.
7 There's fracturing and faulting. It's different here.
8 We have different geology in this site-specific area.

9 Number two, it's known and it's not
10 something the judges can ignore that water travels
11 greater distances underground, and in unpredictable
12 and unknown ways. So looking at it from the
13 perspective of standing, which while strict is not
14 designed to be an impossible standard to meet, the
15 petitioner has to show that they would be harmed.

16 If they can express a harm associated with
17 their water supply into a believed or probable
18 interconnection of water supply with the affected
19 water supply, then they have shown harm.

20 CHAIR FROELICH: So I think, I'm agreeing
21 with your argument that a petitioner must show that
22 they will suffer a harm, okay. Not as I think your
23 reply seemed to imply to me at least, that the
24 applicant has to show that there won't be any harm.
25 Are we in agreement on the burden here?

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1 MR. FRANKEL: I'm guessing not really,
2 Your Honor. Burdens are very subtle things. Burdens
3 of proof, burdens of persuasion. Fundamentally, they
4 go down to the due process dynamics of the proceeding.
5 If you could help me, Your Honor, are we focusing on
6 the standards and issues related to standing again, or
7 are we going back and are we going forward on --

8 (Simultaneous discussion.)

9 CHAIR FROELICH: We're going forward now
10 on contention admissibility, and what triggered it was
11 a statement in your reply, that the applicant hasn't
12 shown that the rate on, the amount of impact on Susan
13 Henderson or Dayton Hyde, okay.

14 That seemed to imply to me that you had a
15 different theory on the burden at the contention
16 admissibility stage than maybe you just articulated.

17 MR. FRANKEL: Okay. So in this section of
18 the reply, we're speaking about standing. So this is
19 all about standing in my reply, and if you're asking
20 me to amplify or extrapolate these arguments to
21 admissible contentions, I suppose I could, but these
22 are all focused on standing.

23 So either you're looking at the reliance
24 on water supplies, and then in addition, I've stated
25 that exposure to radon is an injury in fact sufficient

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1 to establish standing.

2 CHAIR FROELICH: And you would go one step
3 further and say it's the applicant's burden at this
4 stage to show that they will not impact your clients?

5 MR. FRANKEL: Well, Your Honor, we -- I
6 think we're in general agreement that there are
7 different standards for standing than for admissible
8 contentions.

9 For purposes of standing, we know that
10 once we have demonstrated our showing beyond the mere
11 speculative level, and we have expressed the plausible
12 connection to the injury in fact, I believe the
13 standing inquiry ends.

14 Standing is intended to make sure that
15 this is not a waste of time, and that bald assertions
16 and speculation do not become the subject of
17 litigation. While there are many technical ways of
18 trying to analyze and balance those factors, once we
19 have shown that this is not a bare assertion, this is
20 not a bold assertion, and once we have brought forward
21 some showing, then in light of the principle that you
22 must look at our pleadings in a light most favorable
23 to the petitioners for the purpose of standing -- no,
24 that doesn't apply to admissible contentions, but this
25 is standing -- then that dynamic shifts a burden of

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1 persuasion, yes, to the applicant, to show that our
2 assertions are bald-faced or perhaps lies, if they can
3 show that.

4 In other words, we're not wasting this
5 tribunal's time. So there is standing. There is
6 actual injury. We have real people in the room, not
7 imaginary people. They have real homes in the right
8 counties, and you know, they're not the person who's
9 quote "not miles away," but they're close enough to be
10 really concerned. Their presence here indicates that
11 they feel that they have potential harm.

12 CHAIR FROELICH: Let's move then to their
13 contention. We'll begin with Contention A. All
14 right. I want to focus now, Mr. Frankel, on your
15 burden and Contention A, which I believe appears at
16 page 34 of your petition.

17 Is Contention A that first paragraph
18 labeled Contention A? Is that the entirety of the
19 contention?

20 MR. FRANKEL: Contention A states the
21 contention. Of course, not to be read in a vacuum,
22 you would include the knowledge of the first 33-1/2
23 pages when you read Contention A. But yeah, that's
24 Contention A.

25 CHAIR FROELICH: Okay, and the burden at

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1 this point of the contention, with a contention, any
2 contention, is that it meet the six criteria, six
3 subparts of 10 C.F.R. 2.309(f)(1). Are we in
4 agreement?

5 MR. FRANKEL: Yes sir.

6 CHAIR FROELICH: Please tell me then where
7 in the contention I can find the little V and little
8 VI which is the concise statement of the facts and
9 opinions which support, along with the references and
10 the information which references to the application,
11 and the information that is missing from it, if that's
12 part of that contention.

13 MR. FRANKEL: Sure.

14 CHAIR FROELICH: Thank you.

15 MR. FRANKEL: Just those subsections.

16 CHAIR FROELICH: Well, I note that in the
17 replies from the applicant and the staff, they pointed
18 out to the Board that, verbally that little V and
19 little VI are absent, and therefore it is
20 inadmissible. So I'd like you to point out for the
21 record where those materials exist.

22 MR. FRANKEL: Well number five, provide a
23 concise statement of the alleged facts which support
24 our position on the issue, and on which we intend to
25 rely at the hearing.

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1 Then because it's phrased in the
2 alternative, especially for the members of the public,
3 I'll say four, provide a concise statement -- I'm
4 sorry. Provide a concise statement of the alleged
5 facts or provide expert opinions, in either case,
6 which support the position.

7 And the position is that the application
8 does not accurately describe the environment affected
9 by its proposed mining operations, or the extent of
10 its impact on the environment, as a result of its use
11 and potential contamination of water resources through
12 mixing of contaminated groundwater in the mine aquifer
13 with water and surrounding aquifers and drainage of
14 contaminated water into the Cheyenne River.

15 The alleged facts and expert opinions are
16 found in the petition, starting on page two,
17 Background. The alleged facts go on to talk about the
18 existing mining and detailed citations to the
19 application.

20 The expert opinions referenced and
21 incorporated are beginning on page 27, and the
22 reference to the Torrell study on the market value of
23 water. Those expert opinions and alleged facts
24 support the petitioners' position on the issue, and we
25 intend to rely on those at the hearing.

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1 As regards V little I, this is not a
2 proceeding under 10 C.F.R. 52.103. So that doesn't
3 apply. So we provide sufficient information to show
4 a genuine dispute exists with the applicant on a
5 material issue of fact.

6 Then the information must include
7 references to a specific portions, which it does, and
8 the petitioner disputes -- that the petitioner
9 disputes, and is supporting the reasons for the
10 dispute, or unless the petitioner believes the
11 application fails to contain the information, and we
12 identify that contention of admission.

13 So the information regarding a genuine
14 dispute, to me it's clear that the company would take
15 the position that the application does accurately
16 describe the environment affected by the proposed
17 mining operations; that it does accurately describe
18 the extent of its impact on the environment as a
19 result of the use and the potential contamination of
20 the water resources.

21 I believe the company also disputes that
22 our position that there's a mixing of groundwater,
23 such that if the groundwater became contaminated in
24 the mine aquifer, there will be a mixing of
25 surrounding aquifers and drainage of contaminated

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1 water into the Cheyenne River.

2 In order for this proceeding, in order for
3 this Board to issue this license, you have to find
4 that it's not inimical to public health and safety,
5 Section 40.32. So it's a material issue of law or
6 fact.

7 The material issue of fact has to do with
8 whether there could be a mixing of contaminated ground
9 water in the mine aquifer with water in surrounding
10 aquifers and drainage of contaminated water into the
11 Cheyenne River, and the disputed issue of law that's
12 material is whether the application is required to
13 describe more.

14 We make the citation to the applicable law
15 section, to all the regulations that we think are
16 applicable, and frankly if we had restated all those
17 dates for each paragraph of contention, our 57 page
18 pleading would be 570 pages long. So we've employed
19 standard, modern litigation techniques of pleading,
20 none of which are prohibited by NRC regulations.

21 CHAIR FROELICH: Thank you. I'd might
22 only react in this manner. I guess there have been
23 criticisms of the organization and the referencing and
24 the cross-jumping between the application and the TR
25 and the EA.

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1 It is somewhat difficult for this Board to
2 jump back and forth through the 57 page and the
3 exhibits and the declarations that go with it, to try
4 to ferret out the elements which we're charged with
5 using as the benchmark to determine admissibility.

6 In pleading this, I might make a
7 suggestion as attorney to attorney, that there be some
8 sort of cross reference or some kind of designation
9 for each individual contention, where each of the
10 required elements can be found.

11 MR. FRANKEL: Thank you, Your Honor. When
12 I first came to a hearing like this, it was my first
13 experience, it was about 2-1/2 years ago. I had been
14 schooled by a couple of judges to improve my
15 pleadings, and I feel I'm getting better at it.

16 But maybe not everybody shares that
17 opinion. I will offer, if the judges find it
18 convenient and if it's ordered or there are no
19 objections, that if after the hearing, you're having
20 trouble finding those cross-references, if you want me
21 to submit a graph, so to speak, a table simply cross-
22 referencing existing pleading to existing pleading, I
23 would do so if it would serve the court.

24 CHAIR FROELICH: That's likely to cause
25 objection, and I think at this point we'll try to work

1 through it with your guidance today.

2 MR. FRANKEL: In that case, next time, who
3 knows when that will be, I'll be sure to cross-
4 reference and I apologize for --

5 CHAIR FROELICH: No apology necessary. I
6 might only suggest better than cross-referencing is
7 that for each contention, state the contention and
8 then 2.309(f)(1), one, specific statement. Next
9 paragraph, next page, 2.309(f)(1), double little i.
10 That would make it easier if I were on that Board
11 reviewing those contentions.

12 MR. FRANKEL: Thank you, Your Honor.

13 CHAIR FROELICH: Okay.

14 JUDGE BARNETT: I have a question of the
15 staff. That may not be optimal to be cross-
16 referencing, but is that acceptable to cross-
17 reference?

18 MR. CLARK: It is acceptable, Your Honor.
19 Of course, there's no particular format for
20 contentions. They have to meet all criteria, but that
21 -- Your Honor, the Board is ultimately the judge of
22 what's acceptable for a contention. So I hesitate.
23 For the staff, it would be kind of helpful for that
24 sort of organization to be presented to us. Of
25 course, we're just another litigant in the proceeding.

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1 JUDGE BARNETT: Well, we'd like to have
2 the staff's advice.

3 MR. CLARK: Well, the staff's view is that
4 that is an approach followed in a lot of other
5 proceedings, reactor licensing proceedings and others
6 materials cases. So we're familiar with that. I
7 believe that applicants and licensees are also
8 familiar, and I'd suggest that the Board and the
9 Commission is likewise familiar with that approach.

10 JUDGE BARNETT: When you were looking at
11 these contentions, did you take into account the
12 cross-referencing, or did you just look at the
13 sentence in the contention itself?

14 MR. CLARK: Where there is cross-
15 referencing, we look at the references.

16 JUDGE BARNETT: Well, it's implicit
17 cross-referencing and not explicit cross-referencing?

18 MR. CLARK: We find it very difficult to
19 engage in some kind of -- to follow implicit cross-
20 referencing, simply because it's unclear to us what --
21 for example, Mr. Franklin mentioned that the facts are
22 set forth in the introduction.

23 However, the introduction is 32 or 33
24 pages long, and cites numerous sections. I don't know
25 how many footnotes. I think there are approximately 40

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1 footnotes. Numerous sections of the applicant's
2 technical and environmental reports.

3 So we simply don't have the time or the
4 ability to guess at what sections might be referenced.
5 So implicit cross-referencing is just guesswork for
6 the staff, and we expect, because of the Commission's
7 contention and pleading rules, we expect to see
8 specific cross-referencing, if that's what's planned
9 to be done.

10 CHAIR FROELICH: Do you think it violates
11 regulations to do the implicit cross-referencing?

12 MR. CLARK: I do, Your Honor. I think it
13 violates specifically 2.309(f)(1)(vi).

14 CHAIR FROELICH: Thank you. Okay. Mr.
15 Frankel, still on Contention A. Isn't this either the
16 exact or a very similar contention to the one that was
17 denominated Environmental Contention A in the Crow
18 Butte case?

19 MR. FRANKEL: Yes.

20 CHAIR FROELICH: Okay.

21 MR. FRANKEL: It's our lucky contention,
22 Your Honor. I had to go with one like that. Lucky
23 contention.

24 CHAIR FROELICH: The Board, as I recall,
25 in LBP-08-24, denied the admission of this contention,

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1 am I correct?

2 MR. FRANKEL: I believe, Your Honor, that
3 it was -- sorry, Your Honor. I thought that that
4 contention ran into problems on a pleading level, and
5 not -- I thought that that was the contention that the
6 Board reformulated and that was rejected by the NRC
7 Commission itself. I could be wrong. I apologize.
8 I'll refresh my recollection at the break if you'd
9 like.

10 CHAIR FROELICH: One moment. Yeah. You
11 can do that on the break. It appears that, I believe
12 that page 731 of -- huh? Of the LBP-08-24 decision.

13 MR. FRANKEL: I'm sorry, Your Honor. I'm
14 confused, because I believe that was the contention
15 that was allowed and made up from our contentions.
16 But I'm happy to be corrected.

17 JUDGE COLE: It was a long time ago.

18 CHAIR FROELICH: Give us a moment. Judge
19 Cole has some familiarity with the Crow Butte cases.

20 (Pause.)

21 JUDGE COLE: I think it was one that the
22 Board did not admit.

23 CHAIR FROELICH: To what extent, if any,
24 is your Contention A a contention of omission? Is
25 there any part of Contention A where the consolidated

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1 petitioners say that there are items missing from the
2 application that are required to be there?

3 MR. FRANKEL: Well, any part? It includes
4 a contention of omission, but it is not solely a
5 contention of omission, okay. We've alleged failure
6 to adequately describe the environment as required by
7 Section 51.5 of Appendix A in Part 40.

8 CHAIR FROELICH: All right, and going back
9 now then to 2.309(f)(1)(vi), if a petitioner believes
10 that the application fails to contain information on
11 a relevant matter as required by law, the
12 identification of such failure and the supporting
13 reasons for the petitioner's belief have to be shown.

14 Can you direct me to that, to that
15 response or that portion of little I or six, VI, in
16 your petition or reply? You see, what I'm asking you
17 to do is what this Board has to do in analyzing your
18 contention.

19 MR. FRANKEL: I understand, Your Honor.
20 As I said, Contention A includes failure for the
21 application to comply with the sections on here noted,
22 and that, okay it's in addition to contention of
23 omission.

24 The problem that the public, my
25 petitioners have with the contention of omission is we

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1 spend all this time litigating it, get through that
2 procedural morass and then the company can amend its
3 application, add one line and moot it out.

4 JUDGE COLE: But doesn't that mean that
5 you won, that what you said, it was missing?

6 MR. FRANKEL: It means that we did the
7 company's work for them, and it cost us a lot of time
8 and money to do it, because they should have been
9 complete to begin with, and the public had to bear
10 that cost. To me, that's what it means.

11 JUDGE COLE: I understand your position.

12 MR. FRANKEL: Thank you, sir. As it
13 pertains to the contention of omission, application
14 omits an accurate description of the environment
15 affected, because it fails to properly -- because it
16 fails to disclose any information concerning the
17 mixing of aquifers in the event that the groundwater
18 and the mine aquifer is contaminated.

19 It omits any description of the risk, the
20 probabilities of harm, contamination, etcetera as are
21 specifically required by 5145 and by Appendix A, those
22 criterion that apply. So there's -- if the omission
23 were to be cured, it could be cured with data,
24 research and analysis that's current, site-specific
25 and applicable.

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1 CHAIR FROELICH: Mr. Pugsley, are there
2 sections of the application which address the
3 omissions alleged by petitioners?

4 MR. PUGSLEY: Yes, there are, Your Honor.

5 CHAIR FROELICH: Where would I find them?

6 MR. PUGSLEY: I will -- if you'll give me
7 one moment, I'll be able to tell you.

8 CHAIR FROELICH: Thank you.

9 (Pause.)

10 MR. PUGSLEY: Okay. Your Honor, I would
11 refer you to -- there were some contentions in the
12 Tribe's pleading that go directly to this issue. I
13 would refer you to our brief in response to the
14 Tribe's Contention 3, starting on page 42.

15 There are sections referenced in Sections
16 -- I mean on page 43, the top of that page, there's
17 Sections 3.3.1.1 and there's a list. There's a number
18 of them. But as you can tell from the responses by
19 both the staff and the applicant, it was impossible to
20 tell from the language of the contention what exactly,
21 whether it was a contention of omission or what.

22 So we pleaded the way we did in response
23 to that. But if you do want, would like references to
24 that, our response to the Tribe's pleading has several
25 references. That one page I just cited to you was one

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1 of them.

2 CHAIR FROELICH: Does staff have anything
3 to add on this point?

4 MR. CLARK: Your Honor, the staff believes
5 this issue is squarely addressed in LBP-08-24, the
6 Crow Butte renewal decision that the Board was
7 referring to, and that the staff's position is that
8 Contention A merely provides notice of the issue that
9 the petitioners are raised, and under Commission
10 rules, notice pleading is not sufficient.

11 CHAIR FROELICH: Your response.

12 MR. FRANKEL: Thank you, Your Honor.
13 Obviously this is not mere notice pleading. It's
14 replete with hundreds of footnotes and citations to
15 the applicant's application. But I would draw the
16 Board's attention to page 13 of the petition,
17 footnotes 96, 97, 98 and then continuing to the next
18 page.

19 This is a reference to specific sections
20 of the technical report, okay. TR 2.7.2.1.7; TR
21 2.7.2.1.7. This is a discussion that is a very gloss
22 over kind of discussion. We're put -- the public is
23 put on notice that the company knows that it is
24 difficult to ascertain hydraulic connection between
25 aquifers, that the interconnection between aquifers

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1 results from a thinning or absence of confining units
2 between the aquifers, and they have a citation.

3 That analysis of the regional aquifer
4 tests provide evidence of aquifer interconnection.
5 Well, they make those statements, but they don't say
6 how that would apply in our situation if we have a mine
7 aquifer with solutions in it that are mobilizing
8 uranium, arsenic, thorium, selenium, all that stuff,
9 how.

10 If you say well, we know that there's a
11 connection of some kind, interconnection results from
12 thinning or absence. Analyses show that there's
13 interconnection, and then if you get into the breccia
14 pipes and the discussions of those, and what it never
15 says is if we, quote "the company," go ahead and do
16 this, there will be chemicals that are injected and
17 mobilized, and those chemicals aren't just going to
18 sit there. The interconnections will play dynamics on
19 those.

20 Now if they don't know what's going to
21 happen, they should just say "We really don't know
22 what's going to happen," and then the public can say
23 "Okay, the company knows some things; it doesn't know
24 other things."

25 But what's not okay is to tell us a bunch

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1 of facts that if you take those facts and you add them
2 to our factual situation on the ground, lead to a
3 conclusion that should have been disclosed. That's
4 the omission. They could have said "Public of Fall
5 River County and Custer County. We know about some
6 interconnections. We really don't know where they go.
7 We're going to -- if we get the license, we're going
8 to do a bunch of stuff in the mine aquifer. It's
9 going to release a bunch of chemicals, and we really
10 don't know if it will be adequately confined."

11 Then you all can say "Well, that might be
12 inimical to public health and safety," and I have a
13 note from yesterday, a good time to go back to, where
14 I heard counsel for the other side, company counsel,
15 I believe it was Mr. Pugsley, said something to the
16 effect that there's no NRC regulation that requires --
17 there's no issue related to lack of confinement, that
18 that's --

19 There's no regulation that requires them
20 to show that. But I believe the whole Atomic Energy
21 Act and the inimicality standard, public health and
22 safety, requires that no license be issued if
23 confinement can't be shown, and adequate confinement
24 is a technical term that goes to the merits.

25 So I feel that's where we're at, and so we

1 have obviously dispute that you can -- we believe you
2 can't issue a license under 40.32 or under the AEA if
3 you do not find adequate confinement. We believe the
4 application talks about problems to finding adequate
5 confinement, but it draws no conclusions and makes no
6 statements following that.

7 So what I did was go through the
8 application and pull out their own words and cite to
9 them, and they ought to be able to match their words
10 from their application with my footnotes and
11 references to the law and to the contention.

12 JUDGE COLE: I remember those statements,
13 the statement that Mr. Pugsley made yesterday. I
14 guess I was surprised too, because I thought
15 confinement was an issue. I'd like to ask the staff
16 what it thinks of that statements.

17 MR. CLARK: Your Honor, I do not have the
18 statement fresh in my memory, so I'm going off what --

19 JUDGE COLE: He said that confinement is
20 not a requirement for an ISL license, confinement of
21 the aquifer you're mining.

22 MR. CLARK: There need not be complete
23 confinement in the sense of geological confinement.
24 The NRC staff does not require that there be
25 absolutely geological confinement of the mine aquifer.

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1 The NRC relies on ground water monitoring
2 and other measures under Appendix A, to ensure that
3 there's no -- there aren't excursions of leach
4 solution. But there need not be absolute geological
5 confinement of the mine operation.

6 JUDGE COLE: Is there any requirement
7 that they keep the water they're using to get the
8 uranium out of the mine, keep that from other aquifers
9 that are used for drinking water?

10 MR. CLARK: There is. Under criterion
11 seven establishes monitoring programs, and thus the
12 monitoring wells that will ring or surround the
13 production levels. I should mention also that Section
14 5145 does require an adequate description of the
15 affected environment.

16 So I want to make sure what I'm saying.
17 We do require issues such as confinement to be
18 addressed. But that's a separate point from the issue
19 of whether there needs to be perfect confinement.

20 JUDGE COLE: Mr. Pugsley, would you like
21 to comment on that?

22 MR. PUGSLEY: All I can say, Your Honor,
23 is that what the staff has articulated is what I said
24 yesterday, which is there is no regulation that say it
25 has to -- you have to have complete confinement or you

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1 can't have a project. The point is it's confinement
2 but I did not say confinement is not an issue that's
3 not evaluated.

4 Of course it is. It's part of the
5 application, part of our application and it's looked
6 at. But as staff counsel stated, there are other
7 regulatory controls employed, and I would like to add
8 on your statement, Your Honor, about the are there
9 requirements to prevent recovery solutions from
10 migrating to other adjacent non-exempt underground
11 sources of drinking water.

12 They're not just NRC requirements.
13 They're EPA requirements under the Safe Drinking Water
14 Act as well.

15 JUDGE COLE: So that accomplishes the
16 same purposes of isolation of the aquifer?

17 MR. PUGSLEY: Yes sir --.

18 MR. THOMPSON: Confinement is fairly
19 typical at these ISL deposits, because the water flows
20 between the less permeable aquifers through sandstone,
21 where the reducing conditions exist, and confinement
22 is more or less perfect, depending on where you are at
23 any given ISL site.

24 In some cases, confinement is, you know,
25 goes all the way across the site and you can say it's

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1 -- if we're really worried about horizontal controls
2 and not vertical controls because of the confinement
3 above and below, and the application contains a great
4 deal of information regarding the confinement at this
5 site.

6 So yes. Confinement is an issue that the
7 staff evaluates, and if confinement is imperfect, then
8 the licensee has to say how through a combination of
9 monitor wells around monitor wells above and below,
10 and well field balance and the bleed, they can prevent
11 these fluids from moving out of the recovery.

12 JUDGE COLE: Hopefully to minimize or
13 eliminate excursions.

14 MR. THOMPSON: To minimize or eliminate
15 excursion, and excursions, by the way, is something I
16 think that isn't always well understood. Excursions,
17 you pick UCLs. You pick parameters and constituents
18 that move the fastest, and not the radioactive ones.
19 Things like chlorides and things that are part of the
20 process, because they get to the monitor well ring
21 faster.

22 JUDGE COLE: Yes, thorium excursion.

23 MR. THOMPSON: Thorium excursion, and
24 excursion tells you that maybe a pump is down. So you
25 have specific license conditions about what you have

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1 to do to correct that excursion within certain time
2 frames, and if you can't control it, you've got to
3 shut --.

4 CHAIR FROELICH: Mr. Thompson, just for
5 the benefit of the court reporter and the record,
6 would you define UCLs?

7 MR. THOMPSON: Upper control limits.

8 CHAIR FROELICH: Thank you.

9 MR. THOMPSON: Sorry.

10 CHAIR FROELICH: Mr. Frankel, I'm sorry.

11 MR. FRANKEL: The reason why the NRC can
12 reach possibly, with regard to some ISL projects, a
13 conclusion that it can be licensed in accordance with
14 the ADA under the 4032 and the inimicality, is because
15 if there's a scientific conclusion that there is, and
16 it's a technical term on the merits, adequate
17 confinement, adequate meaning the geology is
18 sufficient, in light of fractures, faulting, breccia
19 pipes, etcetera, usually the absence of those things,
20 the geology would theoretically be sufficient to
21 contain that migration of excursions, such that in
22 combination with an understanding, a complete
23 understanding of that geology, as to that level of
24 confinement, there is a tolerance of risk associated
25 with that.

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1 It's adequate but not complete, and
2 suppose there's a ten percent chance of migration.
3 The thought is those monitoring rings will find the
4 problem, because there's been a scientific geologic-
5 based determination that there's fairly good
6 containment. It's adequate. It might not be 100
7 percent, but it's way more than 30, 40, 50, 60, 70, 80
8 percent.

9 That is to the part that's not full, but
10 yet is found sufficient to be adequate. There are
11 other procedures, prophylactic procedures, monitoring
12 procedures and cleanup procedures that try to truncate
13 that risk, so that the ultimate risk to the public has
14 been narrowed down and minimized, so that a finding of
15 inimicality can be reached.

16 You cannot reach that finding, even with
17 the monitoring wells and all that, if you're only at
18 30 percent confidence of confinement, 40 percent, 50
19 percent. At some point, the scientists and judges
20 will say it's enough. But it is an issue. If you go
21 back and look at the record. I'm glad we got to talk
22 about it again.

23 It's an issue in material dispute. It's
24 a genuine dispute, and obviously to the people who
25 live around the proposed project area, it's the

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1 biggest issue we have. Lack of confinement means
2 contamination and destruction of our way of life.

3 MR. ELLISON: If I may add, for example in
4 Dr. LaGarry's affidavit in his opinion, he points to
5 the fact that at 3.3.2.1 of the application, the
6 applicant states that there's no known faults within
7 the project area, and what Dr. LaGarry says in his
8 opinion is between faults, fractures, artesian
9 pressure, thinning of the confining layers, that
10 there's all kinds of movement that's going on.

11 We would submit that if the applicant's
12 taking the position that there's no known faults, that
13 part of the problem is a lack of information in this
14 particular area. There's faults and fracturing
15 everywhere else in the Black Hills except for this
16 particular location, according to the company.

17 Dr. LaGarry cites some studies. We also
18 have some other studies that were cited with Dr.
19 Jarding's report, and such as -- that are stated in
20 her geological summary. There's also, a part of the
21 application, 13.1 of their April 2009, they talk about
22 six contamination pathways. That's on page 13.1, dash
23 1. None of them involve faults or fractures.

24 So it just -- it seems to me that we need
25 this contention. I mean if we're talking about

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1 omissions, if we're talking about available studies
2 that are out there that suggest there are fractures
3 and faults in this area, and that the way the water
4 flows creates problems of potential intermixing,
5 especially when, because this process ejects under
6 pressure water into the ground, and Therefore, as Dr.
7 LaGarry points out, you have horizontal as well as
8 vertical pathways that may open up as a result of this
9 additional pressure.

10 Dr. LaGarry also points out, and so does
11 our other expert, that you know, you have all of these
12 unexplored exploration holes, and there's so many
13 unknowns that aren't really dealt with. As a matter
14 of fact, the company says well, there's 4,000 or so
15 unexplored exploration holes right at the site.

16 Okay, we mentioned it. No, I'm sorry.
17 There's too many unknowns, and that's really what this
18 first contention goes to. So we would submit there's
19 a lot of literature, and there is additional
20 literature.

21 I will try my best at some point to make
22 a formal motion, because one of the things that's part
23 of 10 C.F.R. 2.309(c) is that if the untimely filing
24 would be reasonably expected to assist in developing
25 in sound record, broaden the issues, make available

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1 information that would help in your decision-making,
2 it seems to me that's exactly what some of the
3 additional information --.

4 Well, we do that properly. We have cited
5 stuff in our pleadings and the attachments, that go
6 right to these issues, including specific regulations
7 for parts of the application.

8 MR. CLARK: Your Honor, I'm a little
9 confused, in part because what Mr. Frankel said seemed
10 to refer to Contention B. What Mr. Ellison said seems
11 to be jumping ahead to Contention D. I just don't
12 know if we're addressing Contention A or if we're
13 moving forward here.

14 CHAIR FROELICH: It's my intention to move
15 through the contentions one by one.

16 MR. CLARK: The staff would say just none
17 of what was just stated, although I'd agree that some
18 of that is repeated in Contentions D and E, none of
19 that is stated in Contention A. So I suggest that it
20 not be used as support for Contention A.

21 CHAIR FROELICH: Staff counsel, I'd like
22 to leave Contention A at this point. But could you
23 take a look at the citation to the *Crow Butte* case on
24 page 20 of your response?

25 Just because there was some confusion on

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1 whether it was the new license or the extension, and
2 at the break, if you could report back if that's
3 accurate or not, the citation that appears on the
4 first full paragraph on page 20? Thank you. Let's
5 move --

6 MR. CLARK: I can address that now, if
7 you'd prefer. I mean we apologize for any -- we did
8 not cite to the LBP number. That would be LBP-08-24
9 that we were referring to.

10 Maybe I should clarify, because it was not
11 LBP. It was the other lower decision. It was on the
12 -- let me clarify.

13 CHAIR FROELICH: Would you take a look at
14 that and just thank you. Could we take, please, a
15 five minute break, and then we'll pick up with
16 Contention B. Thank you.

17 (Whereupon, a short recess was taken.)

18 CHAIR FROELICH: All right. Let's address
19 Contention B at this point. This contention also
20 looks familiar to me. Is this the contention that was
21 denominated Environmental Contention B in the Crow
22 Butte case?

23 MR. FRANKEL: Yes, Your Honor.

24 CHAIR FROELICH: Okay, and just to make
25 sure I'm on the right track, does this contention, as

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1 reviewed by that Board in LBP-08-24, this contention
2 was not admitted?

3 MR. FRANKEL: Your Honor, refresh my
4 recollection on that, and these were contentions that
5 were admitted in the expansion, and they were not
6 admitted in the renewal, I suspect as they weren't
7 properly pled in the renewal.

8 But I do not believe that 08-24 has *stare*
9 *decisis* effect concerning this Contention B.

10 CHAIR FROELICH: No. It's not done. I
11 was only looking to see the differences in the
12 applicability from that case and this.

13 MR. FRANKEL: Thank you, Your Honor.

14 CHAIR FROELICH: I'm fine.

15 MR. FRANKEL: And as a comment, this one
16 focuses on use and contamination, not the
17 application's compliance with the regulations required
18 to describe those things. This goes straight to use
19 of contamination and inimicality under 40.32.

20 CHAIR FROELICH: And I don't want to put
21 words in your mouth, but am I correct that in order to
22 find the six elements required by 2.309(f)(1), I need
23 to go back through the declarations and the
24 introductory material, the first 32 pages of the
25 petition?

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1 MR. FRANKEL: Yes. Would you like me to
2 sort of focus you? I mean I couldn't go through 6,000
3 pages and pull out non-relevant material. Everything
4 in here is relevant to our contentions. That's why
5 it's there.

6 CHAIR FROELICH: Let's move to Contention
7 C please. Now Contention C presents a little bit of
8 an issue for us. This is a contention that was
9 similar to the one that was denominated Environmental
10 Contention E in the Crow Butte case?

11 MR. FRANKEL: Yes, Your Honor.

12 CHAIR FROELICH: Okay, and in that case,
13 if I recall correctly, the Board admitted it, but the
14 Commission, which is binding precedent on this Board
15 in CLI-09-09, rejected it?

16 MR. FRANKEL: Yes, Your Honor, due to
17 failure to provide the adequate supporting
18 information, which I believe is cured in this
19 expression of a similar contention.

20 CHAIR FROELICH: Okay, all right. In
21 Contention C, would you provide for me a specific
22 statement -- would you provide for me, for the record,
23 the 10 C.F.R. 2.309(f)(1), provide a specific
24 statement of the issue of law or fact to be raised or
25 controverted, for Contention C?

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1 MR. FRANKEL: Yes, Your Honor. The
2 specific issue of law reads, uncontroverted, is that
3 Section 5145(c) requires, to the extent that there are
4 important qualitative considerations or factors that
5 cannot be quantified, those considerations or factors
6 shall be discussed in qualitative terms.

7 Yet the application doesn't contain any
8 qualitative or quantitative analysis of the negative
9 impacts predicted and estimated by the applicant and
10 include it, such as the value of the millions of
11 gallons of water.

12 So the specific statement, issue of law or
13 fact raised is the application does not fulfill
14 5145(c), because it fails to include either
15 qualitative or quantitative considerations having to
16 do with the value of the water that is going to be
17 taken from the Inyan and the Madison and the loss of
18 the property values.

19 JUDGE COLE: In your contention, you
20 refer to th drawdown of aquifers and the problems
21 associated with it. What's the basis for your saying
22 that there are problems associated with the drawdown
23 of the aquifer?

24 MR. FRANKEL: The Torrell study, for one,
25 expressly describes the loss of real property value

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1 from aquifer drawdowns. With reference to the Oglala
2 aquifer, some of the formations involved in the PAA
3 are part of the Oglala aquifer.

4 So while there are many common sense
5 aspects that go with a drawdown, the negative effect
6 of a drawdown. For example, my client Susan Henderson
7 told me that when her water table went down, correct
8 me if I'm wrong, you had to lower your well -- lower
9 your pump 250 feet in a 1,300 foot well?

10 MS. HENDERSON: No. It's 1,700 foot well,
11 1,710 feet, and I lowered it about 210 feet.

12 MR. FRANKEL: 1,700 foot well that she had
13 to lower 210 feet. Just the sheer going out there and
14 putting it down 210 feet is a negative impact. It
15 costs money. So when there's a drawdown, it affects
16 people.

17 MS. HENDERSON: Well, you get less
18 production.

19 JUDGE COLE: The applicant apparently
20 made estimates of the drawdown from an aquifer that's
21 in Section 4.6 under Potential Water Resource Impacts.
22 I don't know how they calculated that, but it would be
23 going too much to the merits to ask them to do that.

24 But what sort of numbers are involved in
25 the estimated drawdown of the aquifer during

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1 operation?

2 MR. PUGSLEY: You have an adequate -- one
3 moment, please sir.

4 MR. THOMPSON: Twelve feet in the Inyan
5 Kara at the site boundary. That doesn't -- and then
6 you're dealing with somebody 18 miles away.

7 MR. PUGSLEY: Plus there is another thing
8 to know for the record, Your Honor, is the reference
9 we made yesterday to the issue of water rights, to
10 conduct this project, and that we have to satisfy
11 criteria regarding drawdown for that as well.

12 JUDGE COLE: What criteria is that sir?

13 MR. PUGSLEY: The state of South Dakota.

14 JUDGE COLE: Oh, South Dakota water
15 rights.

16 MR. PUGSLEY: Water rights.

17 MR. FRANKEL: Your Honor, would I be able
18 to comment to that? So I would draw the Board's
19 attention to page 20 of the petition, the footnoted
20 language. It says "Applicant states that the
21 consumption of groundwater and short and long-term
22 changes to groundwater are some of the groundwater
23 impacts related to the proposed project.

24 "As for consumption, applicant estimates
25 that the drawdown of the Fall River aquifer at the

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1 nearest domestic level be at a low of 9.9 feet, and a
2 high of 42.8 feet during the first eight years under
3 the ten-year license." Another estimate of drawdown
4 of the Lakota Formation, between a low of 4.9 feet and
5 a high of 12.6 feet.

6 There's no statement, as far as I know,
7 about an estimated drawdown for the Minnelusa or the
8 Madison, which are planned to be sources of water for
9 this project. So it's clear to me that to simply say
10 it's 12 feet in one place is an incomplete answer, in
11 my view.

12 JUDGE COLE: But that's in the aquifer
13 that's mined?

14 MR. FRANKEL: The Fall River aquifer and
15 the Lakota Formation are part of the, I believe, mined
16 aquifer, but the references are to the nearest
17 domestic well, and so I use that to do --

18 CHAIR FROELICH: What page are you reading
19 from?

20 MR. FRANKEL: That's page 20 of our
21 petition, Your Honor, footnotes 159 through 161 and
22 the associated text.

23 JUDGE COLE: But we do not have any
24 information about any drawdown of the other aquifers,
25 the non-mined aquifers.

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1 MR. FRANKEL: As far as I know, I believe
2 that information is not stated in the application.

3 JUDGE COLE: And do we know if they're
4 going to be using any water from the aquifers?

5 MR. FRANKEL: We do.

6 JUDGE COLE: The Madison, for example.

7 MR. FRANKEL: It's stated in the
8 application that they might draw substantial water
9 resources from the Madison, and it's also stated that
10 they might draw either from the Minnelusa.

11 I believe it was Dr. Jarding that said
12 that since the Minnelusa and the Madison are clearly
13 connected, a draw from the Madison would affect the
14 Minnelusa. But so there is an indication in the
15 application that those water resources are going to be
16 drawn on, and there's no indication of a drawdown
17 amount.

18 JUDGE COLE: These are considerably
19 deeper than the Lakota aquifer and the Fall River
20 aquifer?

21 MR. FRANKEL: Yes, Your Honor.

22 MR. ELLISON: But there are breccia pipes
23 that it connects the Minnelusa.

24 JUDGE COLE: Well, I think there's
25 information to indicate that the breccia pipes are

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1 nowhere near the area that's going to be mined; is
2 that correct?

3 MR. ELLISON: Well, they're around the
4 area, and that's what Dr. LaGarry talked about, the
5 breccia pipes being along the faults and the
6 fractures, and they're huge fractures into the south,
7 and this is a recharge area.

8 MR. THOMPSON: May I just clarify that the
9 wells that you're referring to are the wells that we
10 pointed out that are inside the permit boundary
11 yesterday? And we are not going to draw any water
12 from the Madison during operations. The only thing we
13 said was we might draw water from the Madison for
14 restoration.

15 MR. FRANKEL: Excuse me. If I understand
16 correctly, if the applications says they might do
17 something, and if the license is issued based on the
18 application, you give them the ability to do that,
19 unless there's a new amendment or public hearing
20 associated with that. Them saying they might do for
21 our purposes means they are going to do it, and their
22 failure to properly specify how much water they plan
23 to take and our inability to find that information is
24 indicative of their failure to comply with Section
25 5145 and --.

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1 MR. PUGSLEY: Which is the exact reason,
2 Your Honor, that we addressed consumption and drawdown
3 in our application for that option.

4 JUDGE BARNETT: Is there anywhere in the
5 application where it's stated the radius of effect of
6 the drawdowns?

7 MR. PUGSLEY: We believe so. I can
8 certainly find the section for you discussing that.
9 But as noted earlier, the analysis, impact analysis
10 associated with drawdowns in section 4.6.2.6 and 7 of
11 the environmental report, that's cited in our
12 pleadings. "

13 MR. THOMPSON: Give me that again. Four
14 point --

15 MR. PUGSLEY: 4.6.2.6 and 7.

16 JUDGE BARNETT: 4.6.2.6?

17 MR. PUGSLEY: No. 4.6.2.6 and .7. It's
18 a mouthful of numbers.

19 JUDGE COLE: The numbers are on page 23
20 of the NRC staff response to hearing request. Found
21 on page 23, footnote 15 and 16.

22 MR. THOMPSON: Right.

23 MR. PUGSLEY: Yes sir. Yes.

24 JUDGE COLE: Drawdown test. You had some
25 information in there about drawdown and the amount of

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1 drawdown. How was that test conducted? Do you know?

2 MR. PUGSLEY: Allow me, if I may.

3 (Pause.)

4 MR. FRANKEL: Your Honors, if I might ask

5 --

6 CHAIR FROELICH: Sure.

7 MR. FRANKEL: I note that these exact same
8 sections and references are also discussed in
9 Contention I, subparts 46, again to about 51. Are you
10 interested and are we going to cover later and refer
11 back to here?

12 JUDGE COLE: We have read through those
13 100 items.

14 MR. FRANKEL: Thank you.

15 CHAIR FROELICH: Every one of them.

16 MR. PUGSLEY: In response to your
17 question, Your Honor, we've been advised that we used
18 a combination of data. One was historic data, old TBA
19 data from pump tests, to stress the aquifer, as well
20 as we did our own independent, two independent pump
21 tests to -- in the same manner to get the data.

22 JUDGE COLE: Now the term "drawdown,"
23 that refers to the drop down of the water level in the
24 pipe after so many hours of pumping at a certain rate?

25 MR. PUGSLEY: Yes.

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1 JUDGE COLE: Now that does not say that
2 the aquifer level over its expanse has dropped that
3 amount?

4 MR. PUGSLEY: That's correct, sir.

5 JUDGE COLE: There could be a zone of
6 influence that might go out a couple of hundred feet
7 or so. So you just made -- that's what you mean by
8 drawdown. It does not indicate the level of water and
9 the average level of water in the aquifer?

10 MR. THOMPSON: Correct.

11 (Off the record comments.)

12 MR. PUGSLEY: We've been advised we
13 modeled it to the boundary, the site boundary.

14 JUDGE COLE: Okay.

15 MR. PUGSLEY: To get a full picture of the
16 proposed permit area, which is larger obviously than
17 the recovery zone, the mining zone.

18 JUDGE COLE: Okay. So when you get a
19 drawdown figure, what number are you talking about?
20 The number at the outer edge?

21 MR. PUGSLEY: At the edge of the site
22 boundary.

23 JUDGE COLE: And that's how you impacted
24 it to people outside?

25 MR. PUGSLEY: Correct.

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1 JUDGE COLE: All right, thank you. I
2 understand.

3 MR. ELLISON: May I do a point of
4 clarification? Powertech in its application at Table
5 2.7-18 describes how Madison, Inyan Kara and Madison
6 River waters would be used, Madison aquifer waters
7 would be used during the process, not just
8 restoration.

9 So I wanted to just clarify that in the
10 application, it talks about that. I think we talked
11 a little bit about that yesterday, that if there would
12 be a loss of about 100 gallons per minute total, and
13 that it would be from both the Inyan Kara and the
14 Madison based upon their application.

15 CHAIR FROELICH: I think we understand
16 that.

17 MR. ELLISON: Okay, thank you.

18 JUDGE BARNETT: So let me try and
19 understand. So you only did the modeling for the
20 radius of influence out to the site boundary, or you
21 did it -- that was the extent of the pump test, and
22 you did the modeling out further than that?

23 (Pause.)

24 MR. PUGSLEY: I'm going to answer, and my
25 colleague will hit me in the back of the head if I say

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1 something wrong. We modeled it to the site boundary,
2 proposed site boundary, to ensure that it would not
3 have adverse impacts on the potential to achieve the
4 water rights which we referenced previously, because
5 those requirements are they can't have adverse impacts
6 on, to nearby wells at a certain distance.

7 So that's what -- when we determined that
8 at the intended site boundary there wouldn't be
9 adverse impacts, that's why we modeled it there. Is
10 that correct?

11 VOICE: Yes, I believe so.

12 MR. PUGSLEY: Okay.

13 JUDGE BARNETT: Thank you.

14 JUDGE COLE: And the amount of water that
15 you do the test was the amount that you estimated you
16 would be drawing at the maximum?

17 MR. PUGSLEY: The amount of water we use
18 in the pump test is modeled on what we would use
19 during operations.

20 (Off record comments.)

21 CHAIR FROELICH: I think we might be
22 getting a little too much into the merits of the case
23 here.

24 JUDGE BARNETT: Do you think we're
25 getting into the merits of the case here?

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1 MR. PUGSLEY: Do I think we're getting
2 into the merits?

3 JUDGE BARNETT: Yes.

4 MR. PUGSLEY: Well, we're trying to answer
5 your questions, because we thought you were trying to
6 find out where in the application we had the data. So
7 I don't see that as a merits issue, because we're just
8 trying to find out where the data is.

9 JUDGE BARNETT: Right. You said, and
10 again I just want to make sure I understand. You said
11 that, if I understand, you went to the site boundary
12 because you determined or someone determined that
13 there was no effect, no adverse effect at the site
14 boundary. So then you didn't worry about anything
15 outside of the site boundary; is that correct?

16 MR. ELLISON: That's correct.

17 JUDGE BARNETT: Who made the
18 determination that there was no effect at the site
19 boundary, you or the state of South Dakota or who made
20 that determination?

21 MR. ELLISON: We made that determination,
22 but we have to submit information to the state of
23 South Dakota for the water rights, and they looked at
24 the data and say okay --

25 JUDGE BARNETT: Did they agree with you

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1 at this point?

2 MR. ELLISON: We haven't --

3 JUDGE BARNETT: So does the petitioner
4 say they disagree with you, that this would -- do they
5 disagree with you at this point? Would that be a
6 valid contention?

7 MR. ELLISON: Well, if they could show
8 some basis for disagreeing with us.

9 MR. FRANKEL: Well again, I would renew my
10 request for a late filing of the April 19th, 2010
11 opinion of the Department of Environment and Natural
12 Resources of South Dakota, that says that the
13 application lacks sufficient detail to address the
14 fundamental questions related to whether Powertech can
15 conduct the project in a controlled manner to protect
16 groundwater resources.

17 MR. THOMPSON: Okay. Now we're -- if I
18 may, I would strenuously object to that for two
19 reasons. One, we're again falling into the trap of
20 confusing drawdown impacts with contamination impacts,
21 and the language that is being cited here is dealing
22 with control, which means contamination. That's not
23 what we're talking about here when we talk about
24 drawdown.

25 The second thing is, I would point the

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1 Board to when the transcript is issued, to my
2 statement yesterday regarding why this letter is,
3 while submitted as an exhibit by the Tribe, is not
4 relevant.

5 CHAIR FROELICH: This won't help us at
6 this point. Should Mr. Ellison file his motion, we
7 will answer.

8 MR. PUGSLEY: Yes sir.

9 JUDGE BARNETT: I know I keep saying
10 this, but can I ask one more question?

11 CHAIR FROELICH: Yes.

12 JUDGE BARNETT: So is drawdown a
13 legitimate impact to consider?

14 MR. THOMPSON: Not if it doesn't affect
15 anybody outside the site boundary.

16 JUDGE BARNETT: Well, that's the
17 contention.

18 MR. THOMPSON: Now but where do they show
19 evidence contesting the pump test, that they were
20 invalid and that they didn't show that? Don't they
21 have to show that?

22 JUDGE BARNETT: Well, that's the
23 contention, okay. That's what we have to decide. But
24 is drawdown a legitimate basis for a contention to
25 assume adequate -- assuming adequate showing?

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1 MR. PUGSLEY: Well, considering that the
2 Atomic Energy Act's mandate for NRC is to protect
3 public health and safety in the environment, I don't
4 know -- unless they can show some particular health
5 and safety impact, I don't think that falls under the
6 ambit of an NRC review.

7 It may fall, it certainly would fall under
8 the ambit of a state of South Dakota water rights
9 issue without question, I would think, because that is
10 the main criteria, the threshold criteria for getting
11 the water rights in question. So that's what I would
12 say.

13 JUDGE BARNETT: Okay, thank you.

14 MR. FRANKEL: One clarifying comment. Mr.
15 Thompson, I believe, criticized us for not bringing
16 forward evidence. I just want to remind everyone
17 evidence is not required. Five little V says a
18 concise statement of alleged facts or expert opinions,
19 and evidence is not required at this stage.

20 CHAIR FROELICH: Let's move then to
21 Contention D, and this is reminiscent of, I guess, I
22 had yesterday with Mr. Parsons. Is the crux of this
23 contention that because the application is somewhat
24 disorganized, it's therefore technically deficient?
25 Is that the -- would that be a fair characterization

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1 of Contention D?

2 MR. FRANKEL: Not for me, Your Honor. But
3 I feel like we're pretty close, but I want to express
4 that the focus, the very first line, 5145(e) says
5 "Applicant must disclose adverse information." Even
6 though it doesn't make them look good, if they
7 disclose it, it gives the public more confidence that
8 they're disclosing everything they need to.

9 Section 40.9 deals with all materials
10 facts being required in an application. The
11 application need to be complete, and so -- and 5145(c)
12 requires analytical content. Now you know, there's a
13 lot of -- we're throwing these words around, how much
14 data, how much detail.

15 So I just, you know, wanted to focus us on
16 5145(c) which is called analysis, and the definition
17 of analysis is a statement giving details of all the
18 constituent elements of something, the data, and how
19 they relate to each other. That's not in the
20 application the way we want it.

21 Or another definition of analysis, the
22 examination of something in detail, in order to
23 understand it better or draw conclusions from it.
24 When I compare the definition of the word "analysis"
25 with Dr. Moran's opinion, I find it impossible to not

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1 -- I mean when he says he finds it's not possible to
2 provide a meaningful expert review on the adequacy,
3 because they're disorganized.

4 Then when he says the information's
5 interpretations are presented in a technically
6 inadequate manner, and then later when he makes
7 criticisms, what that shows me is that 5145(c) has
8 been violated due to lack of analysis, lack of
9 description of how things that are disclosed in the
10 application relate to each other and to the people on
11 the ground and the water that they rely on.

12 CHAIR FROELICH: Dr. Moran cites to the
13 NUREG 1569. What is it in 1569 that he, I guess,
14 wants us to focus on, on what the staff requires as it
15 deals with water quality?

16 MR. FRANKEL: That there be statistically
17 sound data sets for all the baseline water quality.
18 I know he cites to page 2-14 and 2-15 of the technical
19 report, which says that at the project site, baseline
20 groundwater sampling was conducted in general, in
21 accordance with NRC Reg Guide 4.14 from 1980. That is
22 Summary of the Results and Methods for Groundwater
23 Quality Monitoring and TBA Data is presented.

24 But when the reader goes on, there are no
25 tables to summarize those statistically. There are

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1 the appendix, that Powertech failed to include
2 qualified values, and I'm not a statistician.

3 That's why we have an expert here, but I
4 rely on his opinion to say that by deleting the less
5 than values, Powertech has severely biased the data
6 set, and therefore the data set doesn't comply with
7 5145 and as far as the NUREG goes, it just shows us
8 that the company didn't -- chose not to use one of the
9 alternatives they could have, but nonetheless failed
10 to comply with the regulation.

11 CHAIR FROELICH: And Dr. Moran goes
12 further to say that "The application fails to
13 adequately describe the confinement in the host
14 aquifer, and fails to analyze properly secondary
15 porosity in the form of faults and joints, artesian
16 flows and the horizontal flow of water in the uranium
17 bearing strata" in this petition, in the petition at
18 37-38.

19 MR. FRANKEL: I believe that Your Honor is
20 referring to Dr. LaGarry or to Dr. Moran? The
21 porosity issues were opined on by Dr. LaGarry. Page
22 38 of the petition.

23 CHAIR FROELICH: On page 36 it says, in
24 the middle of the page, "Dr. Moran continues in his
25 opinion that," and I don't see a transition to Dr.

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1 LaGarry.

2 MR. FRANKEL: On the next page, Dr.
3 LaGarry echoes that same opinion.

4 CHAIR FROELICH: I'm sorry. Counsel,
5 where is that Dr. LaGarry?

6 MR. FRANKEL: On page 38.

7 CHAIR FROELICH: On 38.

8 MR. FRANKEL: Again, it's Dr. LaGarry
9 opinion that this creates a violation of 5145 and
10 criterion 5(b), by failure to adequately describe the
11 confinement of the host aquifer and porosity.

12 CHAIR FROELICH: Okay, here. Thank you,
13 counsel. You're correct. Okay. Now these issues
14 that Dr. LaGarry addresses, applicant aren't these
15 issues that an application should contain and must
16 contain for this type of license?

17 MR. PUGSLEY: Well, I mean I think the
18 applicant's position is clear from its pleadings, that
19 you know, we can reiterate the arguments on 5145 from
20 yesterday. I think the Board is pretty clear on where
21 the applicant stands on that. I mean for to make a
22 bald-faced assertion that an application is
23 disorganized, it's no different from the contention
24 raised by the Tribe yesterday, and you obviously have
25 heard our arguments on that.

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1 And 5145 is just, again we stated before,
2 it's not an adequacy requirement. It just says this
3 is what an environmental report should contain. As we
4 state in our pleadings, you know, for example, on the
5 issue of adverse information, it's adverse information
6 known to the applicant, and indeed, what we know was
7 in the application.

8 To say otherwise I think is incorrect. I
9 guess other than that, we'll just rest on our
10 pleadings, and we provide information that deals with
11 impacts, you know, potential impacts on Section 4 of
12 the environmental report.

13 CHAIR FROELICH: Okay. But to the extent
14 that Dr. LaGarry or an expert that the petitioner
15 would bring forth, comes to an alternative conclusion
16 looking at the data or looking at the filing, doesn't
17 that give rise to an admissible contention?

18 MR. PUGSLEY: Only in the event that they
19 can demonstrate that the regulation requires it.

20 CHAIR FROELICH: Staff, do you care to --

21 MR. THOMPSON: And there's a difference,
22 it seems to me, between saying that he disagrees with
23 it and saying that it isn't there. I mean there is
24 information in the application with respect to
25 confining layers, etcetera.

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1 CHAIR. FROELICH: Staff, do you care to be
2 heard?

3 MR. CLARK: Your Honor, in our answer, we
4 tried to break down this Contention D into three
5 parts, because we thought it had three distinct
6 claims, the first being the organizational claim. I'd
7 agree with Mr. Pugsley that this issue was addressed
8 yesterday, and the staff's position stated what we
9 believe clearly on that issue.

10 The other two sections of Contention D
11 address baseline water quality and then
12 hydrogeological connectivity, I guess, is the way to
13 put it. As stated in our answer, although Dr. Moran
14 makes claims in his affidavit, even an expert, even
15 the claims of an expert must be supported by some
16 reference to the facts.

17 Merely a bald assertion even by an expert
18 is not enough support to admit a contention, and in
19 many cases, that's what Dr. Moran offers. He doesn't
20 offer anything more than just a bare assertion of his
21 view. In other cases, as we go through, there's
22 numerous instances and we, staff addressed each of Dr.
23 Moran's claims individually, because that's how they
24 were presented, or because, and also because we do not
25 see that they formed a cohesive whole.

1 We thought they were just claims raised
2 in Contention D. So we addressed them individually,
3 not to try to breakdown a contention, but simply
4 because again, that's how it was presented to us.

5 CHAIR FROELICH: And counsel, that would
6 be pages 26 to 32 of your pleading?

7 MR. CLARK: Correct, Your Honor. I'd be
8 happy to discuss any particular claims Dr. Moran
9 raises. I don't know if the Board wants me to simply
10 go through our answer. The Board has it, and we'd be
11 happy to answer any questions.

12 CHAIR FROELICH: I have it, I think, for
13 now. I'm good. Mr. Frankel.

14 MR. FRANKEL: Two quick points. One is
15 apparently the NRC staff thinks our experts need to
16 have an expert opinion to support their expert
17 opinion. The point of an expert is they have a
18 resume, and the resume shows their experience. At the
19 merits, if the NRC wants to challenge the competence
20 of an expert, they can do that.

21 But it's beyond any standard I've ever
22 seen to not accept an expert's expert opinion as it's
23 being relied on by the plaintiff or petitioner. You
24 can attack the expert's credibility, the expert's
25 competence. But to say that you don't believe the

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1 expert is not enough.

2 CHAIR FROELICH: Well let me ask then, Mr.
3 Frankel, where is it or what issue does Dr. LaGarry,
4 in his declaration, challenge the accuracy of
5 statements in the application?

6 MR. FRANKEL: Dr. LaGarry describes issues
7 associated with the natural flow of water through the
8 geologic region, including secondary porosity, false
9 fractures, artesian flow, etcetera.

10 CHAIR FROELICH: And he relies on what in
11 rendering that opinion, that expert opinion?

12 MR. FRANKEL: In rendering his expert
13 opinion, he relies on his knowledge, experience and
14 research that he's aware of as an expert, concerning
15 artesian flows and underground water flows, and the
16 stratigraphy of the area. There's a list of
17 references he attaches to his opinion letter.

18 CHAIR FROELICH: He makes reference also
19 to some more recent scientific literature that he says
20 should have been considered. What scientific
21 literature is he referring to in that part of his
22 declaration?

23 MR. FRANKEL: Dr. LaGarry makes an overall
24 statement that in the -- that in his concluding
25 remarks of his opinion letter, on page four of his

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1 opinion letter, just before the references, Dr.
2 LaGarry states that much of the Great Plains region
3 was studied prior to the 1980's, and there was a
4 general acceptance of both plate tectonics theory, and
5 therefore misrepresents the geological setting of the
6 region.

7 He goes on to say that "It is incumbent
8 upon the potential ISL operators, as with any natural
9 resource consumer, to seek out the most recent
10 research and expert opinions on the geologic setting."
11 He cites these more recent studies, the 2007 Swinehart
12 study; his own studies, his lithographic and
13 redescription of the Brule; his 1997 study; the
14 nineteen --

15 Well, he does cite old material too. It's
16 not clear that this is cited in the application. I
17 don't recognize these references from the application.
18 But 1948 "Structures in Fall River County" from the
19 South Dakota Geological Survey before its
20 investigations;
21 the Swinehart 1985 Cenozoic paleogeography of the
22 Western Central U.S. --

23 CHAIR FROELICH: These are the more recent
24 documents that should have been consulted?

25 MR. FRANKEL: With regard to Dr. LaGarry,

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1 as you know, Dr. Jarding also listed studies in her
2 report, and made the assertion that there should have
3 been more local, more recent studies cited.

4 MR. THOMPSON: What is Dr. Jarding's Ph.D.
5 in?

6 CHAIR FROELICH: Counsel, you need not
7 answer. It's in the pleadings. I'm not going to go
8 there. Okay. And so the references in the petitions
9 to the newer studies, are those things that are just
10 listed as references at the conclusion of Dr.
11 LaGarry's declaration?

12 MR. FRANKEL: With regard to Dr. LaGarry's
13 and at the conclusion of Dr. Jarding's summary with
14 regard to Dr. Jarding's comments.

15 CHAIR FROELICH: Maybe referring to Dr.
16 Jarding's declaration, which are the most recent
17 studies or expert opinions that should have been
18 considered that weren't?

19 MR. ELLISON: One of them that she cites -
20 - she cites a number that are not only older studies
21 that were omitted by Powertech, but one that -- a more
22 recent one would be U.S. Department of Interior Carter
23 Driscoll and Williamson 2007, *The Atlas of Water*
24 *Resources in the Black Hills Area* was one of the
25 documents that she cited.

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1 MR. FRANKEL: And also in 1986, *The Water*
2 *Quality Impacts from Mining in the Black Hills,*
3 *Environmental Geology.*

4 CHAIR FROELICH: Okay. You need more than
5 to cite to a study. You need to point to the study on
6 what it contradicts, how it differs from, what facts
7 or what statements within those studies support the
8 position. You can't just cite to a study and say hey,
9 there's a study out there that wasn't looked at.

10 You know, what is it that should have been
11 contained from these additional studies that has not
12 been addressed by the applicant? You know, that's
13 relevant to the issues that you contest?

14 MR. ELLISON: As Dr. Jarding points out in
15 her affidavit, for example, the geology of the Birdat
16 Quadrangle, Fall River and Custer Counties, USGS
17 Bulletin 106 D3-F had to do with faults, fractures and
18 structural zones. Also there's Probst, P-R-O-B-S-T
19 *Geology of the Dewey Quadrangle, Wyoming-South Dakota*
20 *Border*, USGS Bulletin 1063-B, again on the same
21 subject, having to do with breccia pipes and pathways.

22 Well, first of all, breccia pipes and
23 interconnections and the structural collapse of the
24 Minnelusa and the Madison Formation, and the
25 interconnection due to some of these breccia pipes

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1 between the Minnelusa and the Inyan Kara.

2 She cites Gott, Walcott and Bowles (ph),
3 which is a study that the applicant cited,
4 *Stratigraphy of the Inyan Kara Group and Localization*
5 *of Uranium Deposits in the Southern Black Hills of*
6 *South Dakota and Wyoming.*

7 And then, in addition to the atlas study
8 that I just referenced, there is a 2002 study by
9 Bardos, Halbert and Mueller, *Potentiometric Surfaces,*
10 etcetera. That's in the pleadings.

11 CHAIR FROELICH: Okay, in the pleadings.
12 Now where in the pleadings or in this contention does
13 Dr. Jarding's affidavit cite these? You see, not only
14 do I have to cross-reference between the contention
15 and the citations within it; I have to go to all of
16 the other declarations as well to find the supports?

17 MR. FRANKEL: Absolutely, Your Honor.
18 There's hundreds of exhibits we have to cross-
19 reference in the company's application. It wasn't
20 done to be spiteful in any way. It wasn't done to
21 frustrate anybody. But we submitted a whole package.
22 Whatever got filed, yeah.

23 CHAIR FROELICH: Because in this
24 contention, it refers me to the declaration and
25 attachments to Dr. LaGarry's declaration, in support

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1 of this contention. I think what I'm hearing you say
2 now, I must go beyond that and look at Dr. Jarding's
3 elsewhere for the support for Contention D?

4 MR. FRANKEL: Your Honor, I would not
5 personally be endorsing that characterization. So
6 with due respect, I don't concur with that
7 characterization. But what I do know is okay, in this
8 contention, we raise the issue with a specific focus
9 on Dr. LaGarry's opinion.

10 CHAIR FROELICH: Right.

11 MR. FRANKEL: Later, similar identical
12 issues come up in Contention J, and those parts, and
13 I relied on Dr. Jarding's materials for the
14 contention. So while -- it's a little bit shocking to
15 me that, you know, we submitted you know, not that
16 many affidavits, and that they wouldn't all apply to
17 all the contentions.

18 I don't believe that there's a legal basis
19 for refusing that. So even if it's a slight burden on
20 anybody, all the information that was submitted is to
21 be read as a whole.

22 JUDGE BARNETT: Quickly for the
23 applicant. On page 36 of the petition, it says "Dr.
24 Moran opines that the applicant, application presents
25 information and interpretations in a technically

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1 inadequate manner."

2 On here, your response, the bottom of 51
3 and top of 52, you state "Part 5145(b) to (d) provides
4 the parameters for information that should be
5 submitted in an environmental report, but do not
6 prescribe any sort of quote 'technical adequacy'
7 unquote requirements. Parameters in this subsection
8 only describe the categories of potential impacts that
9 a licensed applicant should address in an
10 environmental report."

11 So I want to know is it your position that
12 as long as the parameters and categories of potential
13 impacts prescribed by 5145(b) to (d), which includes
14 the impacts of proposed action on the environment and
15 any adverse environmental impacts, as long as those
16 things are addressed, the categories or parameters are
17 addressed, they don't have to be technically adequate?

18 MR. PUGSLEY: Well, it depends on what --
19 the reference is vague in that it says that it's
20 presented in a technically inadequate manner, which
21 seems to go to the front end of the contention that
22 it's a disorganized application.

23 Well again, we made our position clear,
24 that even in *HRI* in 1998, that wasn't allowed as
25 germane, let alone an admissible contention. But it

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1 is our position that 5145 presents categories of
2 information that is to be provided by a licensed
3 applicant, and that if you're going to use that
4 regulation as a basis for a claim, then yes, that's
5 our position, and --

6 JUDGE BARNETT: --can't say that it's
7 technical inadequate? That's not an adequate basis
8 for a contention?

9 MR. PUGSLEY: Well, you would have to
10 substantiate that statement by showing --

11 JUDGE BARNETT: Well even, as I
12 understood it, you said even if he substantiates it,
13 that's not an adequate basis --

14 MR. PUGSLEY: Based on 5145, yes. That is
15 not a regulation that you can use in our opinion as a
16 basis for that claim. In addition, if you're saying
17 it's presented in a technically inadequate manner,
18 then you're going back to the staffs' comment
19 yesterday about the acceptance review, and saying that
20 they didn't deem it "incomprehensible" and it was
21 docketed for detailed technical review.

22 We have a citation in our brief from NRC's
23 enforcement policy on that very page, Your Honor,
24 footnote 11, that quotes a federal case, saying that
25 the completeness of an application is not a matter

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1 which the Board will or can decide.

2 MR. THOMPSON: Well, and I was just going
3 to say, we would say that we have presented it in a
4 technically adequate manner, and if we don't, the
5 staff is going to tell us why it isn't. There's
6 guidance that says how they want you to sample and
7 what QA/QC procedures.

8 There's guidance addressing various
9 aspects of a license application and how the staff
10 wants you to go about it, and we follow that guidance.
11 If we don't follow it, when they look at it for
12 detailed technical review, they'll say "Great, that's
13 not clear."

14 JUDGE BARNETT: I understand that. But
15 from what I understood your response to say, is that
16 this doesn't -- that 5145(b) and (d) doesn't require
17 it to be technically adequate.

18 MR. THOMPSON: What he's saying is you
19 can't base a contention on 5145 for technical
20 adequacy. It just says the type of data that you have
21 to have. If you want to raise a contention that says
22 that the information on groundwater was not
23 technically sound for these reasons, it wouldn't be
24 based on 5145.

25 JUDGE BARNETT: But 5145, one of the

1 categories is the impact of the proposed action on the
2 environment, or any adverse environmental effects?

3 MR. PUGSLEY: Yes sir, and we address that
4 in our impact analysis. This is again the sin of
5 omission argument here, is that we did that. It's not
6 an adequacy requirement. It is "is it there?" I can
7 tell the God's honest truth. If it wasn't there, we
8 would never have been docketed, and we wouldn't be
9 sitting here.

10 JUDGE BARNETT: Thank you.

11 CHAIR FROELICH: I think I might have
12 asked th is yesterday, but I'd maybe like to hear it
13 again.

14 MR. PUGSLEY: Yes sir.

15 CHAIR FROELICH: If we take out the
16 reference to 5145 and we just have a contention where
17 we have an expert who says that in his expert opinion,
18 or her expert opinion, that the application or the
19 discussion of a particular topic is inadequate,
20 doesn't meet the standard that this expert, based on
21 his or her background, believes is necessary.

22 Can we not have an admissible contention
23 based on an expert reaching a contrary conclusion, as
24 to adequacy?

25 MR. THOMPSON: You could have an expert

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1 and say I'm an expert on this. I don't know whether
2 LaGarry is a statistician or not, right. I
3 understand. So what I would say is I'm not aware of
4 any situation that I've seen, and certainly not in the
5 HRI case, where an expert could just say I think it's
6 technically inadequate, without saying why.

7 That the sampling methodology doesn't meet
8 with EPA sampling this, or that the statistical
9 methodology is not consistent with standard
10 statistical analytical requirements in this or that.
11 You just don't make a blanket statement.

12 CHAIR FROELICH: And if he said I don't
13 think it's valid because it didn't consider A, B or C,
14 or it didn't go into sufficient detail on A, B or C,
15 would that be an admissible contention, if raised by
16 an expert in the field?

17 MR. PUGSLEY: Your Honor, there are the
18 six admissibility requirements, as well as case law
19 interpreting those requirements, and they're cited not
20 only in our pleadings but also in NRC staff's
21 pleadings. Basically, I'll give you an example.

22 We did not just simply rest on our
23 interpretation of 5145 in our pleadings, you know.
24 For example, we basically stated that if you have them
25 point to a specified impact that's going to happen,

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1 you haven't -- and again, this is an extension of a
2 plausible pathway theory, that you haven't pointed to
3 how an event, as a result of a licensed operation,
4 will create some source of harm, and it will reach an
5 allegedly affected person.

6 You have to do that too, and I think
7 that's what Mr. Thompson is getting at, that you can't
8 just say it's technically inadequate, and even if you
9 say it's technically inadequate because it didn't
10 account for this, you have to show how not accounting
11 for that is going to result in a specified harm.

12 That also goes to the 5145 argument,
13 because if you want to take it to where you have taken
14 it, Your Honor, fine, and we've addressed that in our
15 pleadings and so has the staff. But if you're simply
16 talking about 5145 as a legal basis for this
17 contention, we would say no, you can't do that.

18 MR. FRANKEL: Thank you, Your Honor. I
19 believe that counsel for the company was just talking
20 about standing standards, the harms issues. We're in
21 admissible contention, so I don't think any of that is
22 relevant to what we're talking about.

23 I want to note that Mr. Thompson, just a
24 minute ago said something along the lines of we
25 followed the guidance. If you have an expert that

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1 says that we didn't -- well, we did. Dr. Moran says
2 they didn't follow the guidance.

3 Now NRC staff may say well they didn't
4 have to follow the guidance, but it's got to be one or
5 the other. In other words, if they say they followed
6 the guidance and our expert says they didn't, then we
7 have a dispute over that.

8 On page 37, Dr. Moran says, "No sound data
9 set for all water, baseline water quality, both
10 surface and groundwater, is presented in these
11 documents, as is required in NUREG 1569." So if Mr.
12 Thompson can point out where in the application the
13 full data set is presented in accordance with NUREG
14 1569, maybe the staff knows.

15 But our expert says that TR 2.2.3.2.2 is
16 not, doesn't say that. He goes through his entire
17 analysis. So I'll let Dr. Moran's expert opinion
18 speak for itself. But I think that based on his
19 discussion, we've demonstrated the dispute.

20 MR. THOMPSON: Very quickly. This goes
21 back to the point that I made yesterday several times
22 in an opening argument. 1569 addresses in Chapter 2
23 the general site characterization data that is
24 required, which includes data from within the well
25 field, data from outside the well field, outside the

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1 proposed aquifer exemption.

2 It does not include all of the detailed
3 water quality data that is developed. We were not
4 allowed to get that. We gave NRC what they asked for
5 and they've accepted it, and they're reviewing it.

6 MR. FRANKEL: Your Honor, I believe that
7 Mr. Thompson's characterization of 40.32(e), I'm not
8 sure if he has a citation for this proposition that
9 they're not allowed to take this kind of data, because
10 the last sentence of Section 40.32(e) is very clear
11 and on point.

12 The penultimate sentence of that section
13 says "As used in this paragraph, the term
14 'commencement of construction' means any clearing of
15 land, excavation or other substantial action, that
16 would adversely affect the environment of the site."

17 Well, the monitoring, testing and those
18 kind of holes, because they were already done on a
19 pre-operational level, is clearly not one that would -
20 - I mean according to these regulations, would
21 adversely affect the environment of a site.

22 But then the last sentence further
23 clarifies. "The term, meaning commencement of
24 construction, this barrier that counsel for the
25 company is worried about, "that term does not mean

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1 site exploration, roads necessary for site
2 exploration, borings to determine foundation
3 conditions, pre-construction monitoring, pre-
4 construction testing to establish background
5 information related to the suitability of the site, or
6 pre-construction monitoring or testing to establish
7 background information related to protection of
8 environmental values."

9 There's no way you can read this section,
10 in my view, for the proposition that the company is
11 somehow barred from acquiring this basic data and
12 reporting it at this stage of the proceeding.

13 MR. THOMPSON: We rest on the point we
14 made, that we followed Chapter 2, site
15 characterization requirements. The staff has accepted
16 the application. If the Board would like materials
17 from the NRC staff that relate to what you can and
18 can't do pre-licensing, it is available.

19 CHAIR FROELICH: Thank you. Let's move to
20 Contention F please. This deals with --

21 MR. FRANKEL: Your Honor, did we do
22 Contention E?

23 CHAIR FROELICH: I had no questions on E.

24 MR. FRANKEL: Thank you, Your Honor.

25 CHAIR FROELICH: Moving to F, in

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1 Contention F, could you concisely state for me the
2 harm that's being alleged to your clients?

3 MR. FRANKEL: Are we back to a standing
4 inquiry, Your Honor?

5 CHAIR FROELICH: Well, we may have to a
6 little bit.

7 MR. FRANKEL: Is there a particular
8 petitioner, s to who the standing analysis is being
9 directed?

10 CHAIR FROELICH: Let me go right to it.
11 How will the use of these quantities of water harm the
12 petitioners? I guess I'm looking at the quantities?

13 MR. FRANKEL: It doesn't matter, Your
14 Honor, because the regulation speaks for itself.
15 Section 5145 is clear. It says in (e)(5), have to
16 disclose any irreversible or irretrievable commitment
17 of resources which would be involved in the proposed
18 action should it be implemented.

19 Well, according to the application itself,
20 a certain amount of water is going to be permanently
21 removed from the hydrological cycle in a deep disposal
22 well. Now whatever that amount is, even if it's only
23 five gallons, it should be reported under -- it's an
24 irreversible and irretrievable commitment of water
25 resources, because it can't be taken back.

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1 The company has not described it as such.
2 It's described it as a temporary commitment of
3 resources, and our issue is that it's a permanent and
4 irretrievable commitment of resources in the form of
5 the bleed that goes out of the hydrological cycle.

6 JUDGE COLE: You're not really serious
7 that it goes out of the hydrological cycle?

8 MR. FRANKEL: What happens when you put it
9 5,000 feet down in the ground? How does it get back?

10 JUDGE COLE: It gets back much slower.
11 It moves very slowly.

12 MR. FRANKEL: But if that time period is,
13 you know, more than human lifetimes, how can it -- I'm
14 sorry. Perhaps I just don't understand the issue well
15 enough. But to me it seems a removal from the
16 hydrological cycle, we can't access it within our
17 generation.

18 CHAIR FROELICH: This contention is based
19 on the allegation that the applicant didn't describe
20 the use, the amount or the disposition of certain
21 water quantities? Is that the contention?

22 MR. FRANKEL: Yes. This boils down to a
23 contention of omission, the failure to describe a
24 piece of information. 320 gallons per minute and
25 whatever number of gallons per minute from the Madison

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1 is able to be calculated into a total volume, and in
2 fact their bleed goes between one and three percent.
3 So that's a factor of 3X.

4 So it could be as much as three percent of
5 a bleed, and we're talking that's, you know.

6 CHAIR FROELICH: Quantified.

7 MR. FRANKEL: That can be quantified.

8 CHAIR FROELICH: As I understand the
9 pleadings, the applicant and the staff say that this
10 information is indeed contained within the
11 application.

12 MR. FRANKEL: It is not in the application
13 as a correct description of what it is, an
14 irreversible and irretrievable commitment of
15 resources. When you put water that could have been
16 drinking water into a well that's five or six thousand
17 feet deep, and it's called a disposal well because
18 it's not supposed to reach the surface, that is an
19 irretrievable commitment of resources.

20 So if it's not a contention of omission,
21 then it's a contention on whether their interpretation
22 is correct, that it's a temporary commitment of
23 resources and whether our interpretation is correct,
24 that it's a irretrievable commitment of resources.

25 MR. PUGSLEY: Your Honor, a question and

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1 a response. I'll give you the response first.

2 CHAIR FROELICH: Okay.

3 MR. PUGSLEY: Whether you want -- whether
4 petitioners would like to call this an irretrievable
5 and irreversible commitment of resources, or as they
6 alleged, Powertech calls it a temporary, it's in the
7 application. So and we've cited to it, the staff has
8 cited to it.

9 So that -- the sin of omission issue is
10 put to bed. The question I'd like to ask is I have
11 heard counsel say that this is water that could have
12 been drinking water. Are you saying that the water in
13 the mining zone where the uranium is is drinking
14 water?

15 MR. FRANKEL: No. I'm referring to parts
16 of the Inyan Kara that people use for drinking, that
17 you're not planning to bring off site. I'm also
18 talking about application ER 7.4.3, says "The use of
19 groundwater supplies for operation will be a temporary
20 commitment of water resources." That's not an
21 allegation. That's a quote from your application.

22 MR. PUGSLEY: Okay, we don't quarrel.
23 Okay, we're not disputing. But pulled from the
24 application --

25 MR. FRANKEL: I'm a member of the public.

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1 If I read these people and scientists say that it's a
2 temporary commitment of water resources, I'm going to
3 react differently as a member of the public, than if
4 I read that it's a permanent and irretrievable
5 commitment of resources.

6 Now if they want to go ahead and say but
7 it's only blank gallons, and there's this many gallons
8 in the aquifer. Well then I can say "Well, maybe it's
9 not such a big deal." But don't call it temporary
10 when it is not temporary.

11 MR. PUGSLEY: And Your Honor, I apologize.
12 I did not mean to drag us off on a tangent. The only
13 question I asked was whether consolidated petitioners
14 thought the water in the mining zone is drinking
15 water. They gave me an answer. I appreciate your
16 answer and --

17 MR. FRANKEL: I did not give you an
18 answer.

19 MR. PUGSLEY: Well someone gave me an
20 answer.

21 CHAIR FROELICH: Let Dr. Stouts give you
22 an answer.

23 MR. ELLISON: DENR asked Powertech about
24 the limits of their aquifer exemption, how much did
25 they want. The reason why they did that is because

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1 they said there are portions of the Inyan Kara that
2 will not be mined, and may be suitable as sources of
3 drinking water within the PPA, PAA.

4 MR. PUGSLEY: Okay, that's fine.

5 MR. THOMPSON: So that means that at least
6 the DENR thinks that there's some drinkable water in
7 the Inyan Kara within that. So I was just responding
8 to counsel's questions.

9 JUDGE BARNETT: But there are wells that
10 might be tracked within the PAA.

11 MR. PUGSLEY: Yes, there are. Yes sir.
12 But I -- again, I don't want to belabor this point.
13 My question was, is it being said that the water in
14 the mining zone is drinking water? That's all I
15 asked. I was given an answer. I appreciate your
16 answer and let's move on.

17 MR. THOMPSON: We're talking about the
18 aquifer exemption area. There is no drinking water in
19 the aquifer exemption area, or it wouldn't be an
20 aquifer exemption.

21 JUDGE BARNETT: Yes, aquifer exemption,
22 and I realize that this is somewhat of a tangent. But
23 again, this goes back -- I've asked several questions
24 about the site, and it's helpful to me to try to
25 understand the site. I think the aquifer exemption

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1 area must be pretty small, right, because there are
2 wells within it, what a quarter of a mile or three-
3 quarters of a mile, something like that?

4 MR. PUGSLEY: Okay. That's a fair
5 question, Your Honor, and you want to take this or me?
6 All right. The PAA or, as the proposed site boundary;
7 we've got tons of terms for this, is not the same as
8 the aquifer exemption boundary, for obvious reasons.

9 JUDGE BARNETT: Okay.

10 MR. PUGSLEY: So yes, yes sir. You are
11 right, and as we showed yesterday in the references we
12 provided to you yesterday, there are wells within the
13 proposed permit boundary.

14 But EPA regulation, and that is who's
15 dealing with the aquifer exemption, because whether
16 you're in a primacy state or not, EPA has to sign off
17 on any aquifer exemption per the Safe Drinking Water
18 Act.

19 It says one of the requirements is it
20 cannot now, nor can it ever in the future, serve as a
21 public source of drinking water. I hope that answers
22 your question.

23 JUDGE BARNETT: Okay, and so the idea is
24 that South Dakota or EPA would not grant a well permit
25 in this area?

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1 MR. PUGSLEY: They would not grant the
2 aquifer exemption, because it would fail the criteria.

3 JUDGE BARNETT: Okay. But it would
4 operationally keep somebody from putting a well there
5 until they get permit; is that --

6 MR. THOMPSON: Right, yes. Within the
7 PAA, you have an aquifer exemption boundary. Inside
8 of that, you have monitor well ring boundaries around
9 the well fields. So there are --

10 MR. PUGSLEY: I hope that answers your
11 question.

12 MR. ELLISON: According to Powertech,
13 they're going to -- the aquifer exemption is 7,055
14 acres of the 10,580 acres within their boundary. In
15 terms of monitoring wells doing much of anything, it
16 depends on where you put them, because it's dependent
17 on how they're spaced --

18 (Simultaneous discussion.)

19 MR. ELLISON: Yes sir, I understand. All
20 right.

21 CHAIR FROELICH: Move to Contention G.
22 What I think we're -- I think this contention arises
23 on a controversy as to the scope of this proceeding.
24 Maybe you could start with the applicant giving us a
25 definition or defining the scope of this proceeding.

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1 MR. PUGSLEY: Yes sir. The scope of the
2 proceeding is, as Powertech defined it in its reports
3 on the proposed action, and as well as the case law
4 says it's defined by the *Federal Register* notice that
5 is issued.

6 What we would simply say is we think that
7 this is a contention of misunderstanding of language,
8 that we basically said it is in the future plan that
9 perhaps this site would serve as a -- to receive
10 resins from other satellite well field facilities that
11 Powertech owns or others maybe. But that is not part
12 of this proposed action.

13 CHAIR FROELICH: The applicant in this
14 case is not requesting authorization to receive or
15 process uranium from other projects?

16 MR. PUGSLEY: No sir.

17 MR. THOMPSON: No sir. It is merely
18 forward-looking --

19 MR. PUGSLEY: A forward-looking statement.
20 I would also like to note for the record that we
21 firmly understand that NRC's policy is if we were to
22 seek that authorization, it would be a license
23 amendment subject to another opportunity for a public
24 hearing.

25 CHAIR FROELICH: Is that a fair comment?

1 MR. CLARK: That's correct, Your Honor.
2 They would need to seek a license and the only license
3 request we're considering at this time is for Dewey-
4 Burdock.

5 MR. FRANKEL: Thank you, Your Honor.
6 Okay, so in the real world, it seems to me that what
7 happens is a little line like this, through some
8 misunderstanding, makes its way into the application.
9 Let's say there's some the application license is
10 issued, and let's say that operations start, and even
11 though another mill comes up.

12 Let's say it's over in Johnson County,
13 there's some other project that comes up. It's not
14 owned by Powertech but maybe some other people through
15 a corporation. What if they want to mill that in
16 their CBP?

17 So they may go to the project manager and
18 they said, you know, what's it going to take? He says
19 well, it was in your application and you got a license
20 on your application.

21 If we hadn't mentioned this and this
22 hadn't come to be described as a misunderstanding,
23 would it require an amendment? Because it was in
24 there.

25 CHAIR FROELICH: What's wrong with the

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1 statement?

2 MR. CLARK: Well, there will be license
3 conditions in Powertech's application. If they were
4 to receive material from other sites, they'd be in
5 violation of those license conditions and subject to
6 enforcement action, which could include revoking the
7 license.

8 MR. FRANKEL: But why would it be a
9 license condition? If I hadn't raised this issue,
10 what would make it a licensed condition?

11 MR. PUGSLEY: As was stated yesterday in
12 our opening statement, the licensee has the primary
13 responsibility of Atomic Energy Act materials. NRC
14 reviews the proposal, grants, grants with conditions
15 or denies.

16 The point is if we didn't ask for it, NRC
17 is not going to unilaterally say "Oh, by the way, go
18 ahead and do that." That's not what we asked for. So
19 I agree with Your Honor. It's not within the scope of
20 this proceeding. So that's where we rest on
21 extension.

22 CHAIR FROELICH: So the license permit
23 would contain conditions that will permit them to
24 receive uranium in a certain amount, in a certain
25 place?

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1 MR. PUGSLEY: Yes sir. There are several
2 aspects to a license that address your question.
3 First is there is a production capacity limit, you
4 know, a million pounds a year, 500,000 pounds a year.
5 There is basically -- I go back again to the point
6 that if we didn't ask for it, we're not going to be
7 allowed to do it.

8 MR. FRANKEL: I mean isn't this an active
9 issue with one of the mines in Wyoming that started
10 processing --

11 CHAIR FROELICH: I disposed of it.

12 MR. FRANKEL: Okay. Sorry, Your Honor.
13 So the license condition would, if this issue hadn't
14 been raised by us, what would have led to a license
15 condition by the NRC staff that deals with this issue?
16 Would it, as a matter of course, have been automatic
17 that you can only process uranium from your site?

18 Or, in the absence of any condition, would
19 the lack of a condition plus the issuance of the
20 license, plus this sentence in the application give
21 them legal authority to do that activity, and then
22 someone would have to complain about it and then maybe
23 bring an enforcement action, which is not an easy way
24 to go at the NRC level.

25 So what I'm trying to figure out is was

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1 this a back door way of expanding the breadth of the
2 license so the CBP could work on other people's
3 uranium as much as they wanted until it became an
4 issue, and then they could go seek an amendment?

5 CHAIR FROELICH: Mr. Clark?

6 MR. CLARK: Your Honor, I believe first
7 I'd like to clarify that although the environmental
8 report refers to potential receipt of resins from
9 other locations, the technical report does not make
10 the same statement. It says that Burdock could
11 possibly process resins from other locations.

12 Thus, we would issue the license based on
13 the statements in the technical report, and those do
14 not cover the receipt of resins from other locations.

15 MR. PUGSLEY: And then plus it is -- oh,
16 go ahead. I'm sorry.

17 MR. CLARK: Could I just add, from Mr.
18 Franklin's comment, it is a standard license condition
19 for ISRs.

20 CHAIR FROELICH: Could you put it in
21 there, whether or not it was raised as Contention G,
22 a condition would have shown up?

23 MR. CLARK: We would typically. It's
24 consistent with standard practice and, as Judge Cole
25 mentioned, the license conditions also will describe,

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1 or the license itself will describe, the license
2 facility, which would exclude any other sites.

3 MR. PUGSLEY: And the licenses I am
4 familiar with, Your Honor, have basically they're like
5 almost stage-setting license conditions that say the
6 licensee is authorized to receive, dah dah dah. But
7 that's not where it stops in our opinion.

8 There is also the safety, the SER from the
9 technical review, and the supplemental environmental
10 impact statement from the environmental review, that
11 will also define the scope of what we're allowed to
12 do.

13 MR. THOMPSON: Now let me just say that
14 there are ISL operations that begin with well fields
15 that are right and close. If they plan to have
16 satellite operations, they have to ask for that in the
17 license application, or to have a satellite operation
18 in the future removed from the fundamental. They will
19 have to get a licensing.

20 In order to take resins from another
21 producer, they will have to get a license and then
22 they'll have to be an EA done on it.

23 MR. PUGSLEY: Or from any of their own
24 operations.

25 MR. THOMPSON: Or from their satellite

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1 operations, if they don't request it in the
2 application.

3 CHAIR FROELICH: Mr. Frankel, do you have
4 anything else you'd like to raise or state having to
5 do with the scope of the project and the scope of the
6 license that's being applied for here today?

7 MR. ELLISON: I guess I'm really confused,
8 because counsel for the company just said if it's in
9 the application, that's what has to be considered.
10 Well, it's in the application.

11 MR. THOMPSON: It's not in the
12 application.

13 MR. PUGSLEY: That's not what we said.

14 MR. ELLISON: They're building a main
15 processing -- they want to build a main processing
16 mill and a satellite mill.

17 CHAIR FROELICH: They're seeking a
18 license.

19 MR. ELLISON: Yes.

20 CHAIR FROELICH: To establish a facility,
21 with certain -- to handle a certain capacity from a
22 certain area. Staff will review this and the license
23 will be limited to what was applied for here. As I
24 understand the applicant, they are not seeking an
25 application permit to receive or process the uranium

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1 from other projects.

2 MR. ELLISON: So if the license
3 application specifically said -- or not the
4 application, the license would specifically say you
5 cannot process any source material from any other
6 facility other than your satellite or within the PAA.
7 Is that what it's going to say?

8 CHAIR FROELICH: Mr. Clark --

9 MR. CLARK: I don't know if it will use
10 exactly those words, but that will be in essence. I
11 can point you to other license conditions for other
12 facilities.

13 JUDGE COLE: I think it's usually more
14 active in what you can do, not what you can't do.

15 MR. PUGSLEY: Yes.

16 MR. FRANKEL: And we have heard in other
17 proceedings from other uranium companies, if it's not
18 prohibited, you can do it. So where does that leave
19 us?

20 MR. PUGSLEY: Those are other uranium
21 companies. That's not in the scope of this proceeding.

22 MR. CLARK: Well, I mean I don't mind
23 stating the staff's position that if Powertech were to
24 go ahead, if we license them on the basis of
25 information we have and they were to go ahead, we

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1 would find that to be in violation of the license.

2 MR. PUGSLEY: And also we've cited in our
3 pleadings that interested stakeholders have a
4 regulatory mechanism called a 2206 petition, that they
5 can file if that happens. That would be a basis for
6 that.

7 CHAIR FROELICH: All right. Let's move to
8 Contention H please. Okay. Perhaps I heard this
9 answer to this earlier, Mr. Frankel. The local
10 studies that the applicant should have used in their
11 application are which studies?

12 MR. FRANKEL: The ones that Mr. Ellison
13 read into the record earlier.

14 MR. ELLISON: Well, they were attached.
15 There were additional ones, but they're attached to
16 Dr. Jarding's geological summary of published studies,
17 and we will be attempting to submit additional ones
18 that we have found that are very localized as an
19 untimely filing, which we didn't have time to file in
20 the period of time that we had for the application was
21 filed.

22 CHAIR FROELICH: Staff, is there any
23 specific regulation or any requirement as to the local
24 studies, the type of studies that are required to be
25 contained or made a part of an application?

1 MS. JEHL: Not that the staff is aware
2 of, and the petitioners did not cite to any particular
3 regulatory requirement.

4 CHAIR FROELICH: From the petition, I
5 guess I would ask, are there any specific regulation
6 or cases that describe the scope of the studies, where
7 the focus has to be somewhat finer than the studies
8 that were attached to the application?

9 MR. FRANKEL: Just give me one minute,
10 Your Honor.

11 CHAIR FROELICH: Sure.

12 (Pause.)

13 MR. FRANKEL: Your Honor, I believe that
14 this comes, in our view, from the analysis requirement
15 in 5145(c), and from the adverse information
16 requirement, 5145(e), and from the completeness
17 requirement, 40.9(a) and also 40.9(b).

18 CHAIR FROELICH: All right. Let's move to
19 I. From the perspective of the petitioners, is this
20 a single contention, or are these 100 separate
21 contentions the Board must address?

22 MR. FRANKEL: From our perspective, these
23 are broken down into three contentions. I gave you
24 these headings, the ones that are more focused on say
25 misrepresentation, you know. So it's not 100 separate

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1 contentions.

2 CHAIR FROELICH: Now from the three
3 contentions I would find and the three specific
4 statements, whatever, of the three contentions I would
5 find where?

6 MR. FRANKEL: Overall, the beginning of
7 Contention I with the reference to 5145(c), analysis
8 5145(e), material adverse information, and Part 40.
9 And then that's -- so that's the first one that
10 includes some --

11 CHAIR FROELICH: And what does that one
12 contain --?

13 MR. FRANKEL: It contains Subparts 1
14 through 68. The second part of this contention,
15 misrepresentation, a violation of 40.9(a) and 40.9(b).
16 That is Subpart 69 through 90. The third is
17 unacceptable environmental impacts, which make issue
18 of the license inimical under Section 40.32(d), and
19 that includes Subparts 91 through 100.

20 (Pause.)

21 MR. FRANKEL: Your Honor, could I ask for
22 a bathroom break?

23 CHAIR FROELICH: Yes. Why don't we take -
24 - at this point, why don't we take a ten minute break?
25 We'll come back and finish up with I, J and a summary

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1 of contentions. Okay. Ten minutes please.

2 (Whereupon, a short recess was taken.)

3 CHAIR FROELICH: Okay. Let's go back on
4 the record. We're at Contention I. Contention I is
5 a unique form of contention, at least in my
6 experience, and the Board will have to decide on
7 whether this is a single contention with 100 bases to
8 support it, whether it's three contentions contained
9 as they're broken down, as Mr. Frankel articulated for
10 us and as contained in the pleading, or whether these
11 points or items are merely repetitions of things that
12 had been contained in earlier contentions, are somehow
13 amplified or are intended to support those conditions
14 that we've discussed prior.

15 The closest guidance I've been able to
16 find for approaching Contention I is in the Progress
17 Energy case, *Levy County*, where there's a Commission
18 CLI opinion 10-2 recently issued, where they upheld a
19 licensing Board that went through and looked at each
20 of the individual contentions, individual bases and
21 treated it as a single contention.

22 I wondered if the parties would each give
23 the Board their recommendation, not on the merits of
24 the individual bases, but the approach to take with
25 a contention, Contention I. Let's start with the

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1 petitioners.

2 MR. FRANKEL: Your Honor, frankly we would
3 be okay with it as one contention. That would be our
4 recommendation.

5 CHAIR FROELICH: That would be to follow
6 the Commission's guidance and they're addressing this
7 in the most recent opinion, that CLI 10-2.

8 MR. FRANKEL: Yes. I haven't read that
9 opinion regrettably yet, but it sounds like it would
10 be consistent for us.

11 CHAIR FROELICH: Staff?

12 MR. CLARK: Your Honor, the staff would
13 suggest that the Board is bound to look at each
14 subpart offered in the contention, to decide whether
15 that subpart meets the contention admissibility
16 requirements. Although subparts -- I point the Board
17 to -- unfortunately, I only have the slip opinion in
18 *Levy County*.

19 But pages four and ten of the slip
20 opinion, where the Commission said the Board -- in
21 *Levy County*, I believe, there were 16 bases or
22 subparts to the contention. There were 16 subparts to
23 the contention of *Levy County*.

24 As reflected in the Commission decision,
25 what the Board did was, and I'm quoting from the

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1 Commission decision on page four, "The Board then
2 turned its analysis to each subpart, finding that some
3 were adequately supported while others were not."

4 Then on page ten of the slip opinion, the
5 Commission says, at the end of the paragraph that
6 carries over, "Thus, it is clear that the Board
7 considered the admissibility factors with respect to
8 each subpart of Contention 4."

9 My understanding is what the Board did in
10 *Levy County* is it looked at each subpart by the
11 contention admissibility factors, found in fact that
12 several subparts were admissible, and that as a result
13 the contention could be admitted, and the Commission
14 affirmed that finding.

15 What we discussed yesterday in the context
16 of the Tribe's Contention 3 is that when we're
17 presented with a contention broken up into separate
18 subparts, it's appropriate for us to respond to those
19 subparts as they were presented to us.

20 It's also appropriate, and consistent with
21 the Board in *Levy County* to look at each subpart.
22 That does not mean that every subpart has to meet the
23 contention admissibility criteria. But at least one
24 subpart has to. In other words, the Board can
25 aggregate admissible subparts.

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1 But if no subpart is admissible, I see
2 nothing in Levy County to suggest that the Board can
3 combine inadmissible subparts to form the whole
4 admissible contention.

5 CHAIR FROELICH: As to your reference to
6 page ten, I guess the operative line is that in
7 addition where a single contention has many subparts,
8 the arguments for each of the 2.309(f) factors
9 logically may apply to more than one subpart.

10 The Board was not required to read each
11 section of the contention in a vacuum, nor was it
12 required to discuss each subpart as if it is own
13 proceeding or finding had not been set forth.

14 MR. CLARK: Your Honor, I understand that
15 to mean that a subpart can refer to say supporting
16 documentation. Not every subpart has to state forth
17 the support in detail. If multiple subparts rely on
18 the same supporting documentation, expert opinion or
19 facts, they can refer to it generally.

20 But each subpart must in fact at least
21 refer to some support. So you don't need to restate
22 the contention in each subpart. However, each subpart
23 has to meet certain requirements, chiefly those stated
24 in 2.309(f)(1).

25 CHAIR FROELICH: Each subpart. The last

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1 part I'd just like to explore a little bit on. Each
2 subpart, each point, each numbered item must meet one,
3 some or all of the six elements of 2.309?

4 MR. CLARK: To be admitted as a
5 contention, each subpart has to meet all requirements.
6 But that does not mean that -- the Board can of course
7 read the subpart with reference to other information
8 in the contention.

9 For example, if at the beginning of the
10 contention, the petitioner identifies a material
11 issue, then they don't need to restate the material
12 issue in each subpart.

13 If they're relying in say six subparts, if
14 they're relying on the same expert report, they don't
15 need to set forth in each subpart the expert report in
16 detail, or possibly even make clear that they're
17 relying on the report.

18 As long as -- if there's some overarching
19 analysis at the beginning of the contention that makes
20 clear how the contention admissibility criteria are
21 met in each subpart, that may be sufficient. But
22 still, each subpart has to -- when the Board looks at
23 it, my understanding is the Board has to look at the
24 subpart and see how in the contention each of the
25 factors in 2.309(1) are met.

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1 Maybe those factors aren't met in the
2 subpart itself, but it has to be somewhere in the
3 contention, where the Board can find the necessary
4 support.

5 CHAIR FROELICH: Thank you. Just so I'm
6 clear on the staff view on this, if within the 100
7 subparts, each of the six 2.309(f)(1) elements are
8 there, we would then have an admissible contention; is
9 that correct?

10 MR. CLARK: No, Your Honor. I'm trying to
11 state the opposite. If in any subpart somewhere in
12 Contention I all of the 2.309(f)(1) factors are met,
13 then it could be an admissible contention. In other
14 words, if you look at any of the 100 bases and we
15 have.

16 The staff and Powertech largely went
17 through and looked at each one. If you look at one,
18 and maybe a subpart doesn't provide a description of
19 the issue and support, but it doesn't identify
20 portions of the application.

21 Well, if it's sufficiently clear elsewhere
22 in the contention what that subpart is referring to,
23 what portions of the application, then although the
24 staff of course opposed all those contentions, of the
25 Board were to disagree, we would understand why you're

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1 admitting the contention.

2 But it has to be sufficiently clear in a
3 subpart what portions of the application it's
4 disputing, what facts or expert opinion the subpart is
5 relying on, and what issue is raised in that. So I'm
6 trying to focus on it. Again, I'd say in *Levy County*
7 what the Board did in fact, it did apply the criteria
8 to each of those subparts.

9 I do not know whether each of the subparts
10 stated, as you suggested earlier, one possible
11 approach for petitioners is to go through the six
12 admissibility criteria in the contention. I don't
13 think that's necessary for each subpart of the 16
14 subpart contention. My sense is that was not done in
15 *Levy County*.

16 However, that does not mean that the Board
17 still looked to see whether somewhere in the
18 contention for each basis, those contention
19 admissibility requirements were met. And note that in
20 *Levy County* the Board actually rejected a number of
21 bases and they admitted some.

22 That's all I think the staff is asking the
23 Board to do here, both for the Tribe's Contention 3,
24 for Contention I, for Contention D and E of the
25 consolidated petitioners, to look at each individual

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1 claim and see, make sure that that claim meets the
2 requirements.

3 Maybe you have to look beyond the subpart
4 to find those requirements. We'd suggest that you
5 shouldn't look far. You shouldn't have to look far.
6 But at the very least, we believe that consistent with
7 Commission precedent, the Board needs to make sure
8 that each requirement is met.

9 CHAIR FROELICH: Is the staff aware of any
10 other Commission precedent that the Board should be
11 aware of, that deals with single contention with
12 multiple subparts beyond the *Levy* case?

13 MR. CLARK: Your Honor, other than the
14 general Commission precedent concerning contention
15 admissibility, I don't have anything off the top of my
16 head.

17 CHAIR FROELICH: Thank you, counsel.
18 Applicant?

19 MR. PUGSLEY: We agree with the staff.
20 Make it easy.

21 CHAIR FROELICH: Thank you.

22 MR. FRANKEL: Your Honor, I just want to
23 say not having read the case, and Mr. Clark is an
24 excellent lawyer, because I feel like I'm convinced.
25 So I would -- and you know, I hesitate to say on the

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1 record I agree with the staff, but maybe to a certain
2 extent I might. Is it possible? You know, I haven't
3 read the case. I'm not sure when it came out, 2010 in
4 the second decision.

5 CHAIR FROELICH: I believe I can cite it
6 for the record, so that -- well, I have the slip
7 opinion as well. It's CLI-10-02, and it was issued on
8 the 7th of January of this year.

9 MR. FRANKEL: I have to admit, Your Honor,
10 not having read the case, and in light of the
11 extremely technical discussion that came from the NRC
12 staff, I feel unprepared to commit my client to a
13 position on this.

14 I realize it came out January 7th. I feel
15 like I may not be the only person in the room who is
16 unaware of the case prior to this proceeding. So
17 perhaps might it be possible to have a short form of
18 post-hearing brief on this case, not to exceed say ten
19 pages or something, just so that I could read it and
20 reply intelligently.

21 CHAIR FROELICH: That's not necessary
22 counsel, only because this contention is going to be
23 treated like any other filed contention. The
24 Commission's regulations at 2.309 will be applied to
25 it. This case merely speaks to -- speaks in brief

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1 parts, in only two or three passages, on how to handle
2 one that has multiple contentions. We'll read the
3 case and take our guidance from the Commission order.

4 MR. FRANKEL: Well thank you, Your Honor.
5 In that case, might I withdraw my initial
6 recommendation as to what the Board should do, not
7 really understanding the case? I don't want to be
8 bound to a position.

9 CHAIR FROELICH: What we're going to do,
10 and in fact if you'd like, you may avail yourself.
11 We're going to go through the last two contentions,
12 and then I'm going to give each of the parties ten
13 minutes to do a closing, closing statement, and I'll
14 take a short break before those closing statements.

15 I'd like to give you my copy of it, and if
16 you care to incorporate in your closing statements any
17 comment on the Commission's order, you can do so at
18 that time.

19 MR. FRANKEL: Thank you, Your Honor.

20 CHAIR FROELICH: Thank you, all right.
21 Moving to Contention J, counsel my sole question on
22 Contention J was how does this contention differ from
23 Contentions A and E?

24 MR. FRANKEL: Other than the expressed
25 reference to the thorium radium 2 through 6 grade,

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1 arsenic and the heavy metal, substantially the same.

2 CHAIR FROELICH: Okay, thank you. All
3 right. We have one last contention to review and
4 only a handful of questions on that. Just
5 procedurally counsel, in the record of this case, we
6 have the initial contention. I have the answers of
7 the staff and the applicant. Was there a final reply
8 filed?

9 MR. FRANKEL: No, Your Honor. I thought
10 you might have enough papers to look at.

11 CHAIR FROELICH: You're entitled to the
12 last word, and I wanted to make sure I had it if you
13 indeed filed it. All right. Also so I have
14 everything. There were a number of attachments
15 attached to this contention, and only one of them was
16 a new attachment or a new piece of pleading, is that
17 right? The other three were contained in the original
18 petition?

19 MR. FRANKEL: I need to check. I believe
20 we submitted Dr. Redmond's -- we have two opinions
21 from Dr. Redmond on his CV. That's all that there is.

22 CHAIR FROELICH: Okay, and I'm sorry, was
23 there any previously filed from Dr. Redmond?

24 MR. FRANKEL: When we earlier in the case
25 sought access to the SUNSI documents, in support of

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1 that and prior, I believe it's prior to the formation
2 of the Board but I'm not sure about that, we submitted
3 Dr. Redmond's January letter in support. Because we
4 were rejected on that, we didn't file an appeal on
5 that, it was unclear to me whether that was considered
6 part of the record. So I resubmitted.

7 CHAIR FROELICH: Okay, all right, and then
8 the April 21st letter was the one missing that I had -

9 -
10 MR. FRANKEL: Yes sir.

11 CHAIR FROELICH: Okay, great. I have it
12 right here. Okay, and I guess the concerns that were
13 raised in the Tribe's contention having to do with
14 cultural and historic resources, this contention, how
15 is this one different from or different than the
16 Tribe's contention on historic and cultural -- I'm
17 sorry. I have my notes confused.

18 (Pause.)

19 CHAIR FROELICH: Well, that was my
20 question. How is this contention different, or is it
21 basically the same as the contention raised by the
22 Tribe, having to do with the archaeological sites
23 within the PAA?

24 MR. FRANKEL: Your Honor, it can't be the
25 same, because we don't have any similarity of the

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1 rights of the Tribe.

2 CHAIR FROELICH: Right.

3 MR. FRANKEL: What we have to go on are
4 what the regulations require. So that's the focus of
5 this contention. But the Tribe's contention, I
6 hesitate to comment on because it's based on all of
7 that that goes with the Tribe as a sovereign.

8 We focused this contention specifically on
9 the inadequacy of the Augustanna report, due to it
10 being inventoried, lacking the analytical content and
11 without results of what we understand are the standard
12 subsurface testing protocols. In light of the
13 regulations cited, we feel that we have a potential
14 contention.

15 CHAIR FROELICH: All right. What I would
16 propose at this point is for us to take perhaps a ten
17 minute break, give the parties that time to prepare a
18 closing statement as to those points that we should
19 keep foremost in our minds. Ultimately, what
20 arguments came forth in this oral argument that should
21 guide our decision in this case.

22 I'll point out that the time line for this
23 case will be, that we'll have a transcript of this
24 proceeding in about a week. We'll notice that and get
25 it out, and we'll provide a period of perhaps ten days

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1 for transcript corrections. Then within 45 days of
2 that date, this Board will issue a decision on the
3 admissibility of the 21 contentions that were proposed
4 and the standing of each of the petitioners.

5 Anyone who disagrees with that opinion of
6 ours has the right to appeal that to the Commission,
7 in accordance with the Commission's regulations. Are
8 there any other procedural matters that we had?

9 MR. FRANKEL: Your Honor, I just have one
10 point, and I'm happy to do the supplemental filing.
11 It just came to my attention yesterday, when we were
12 discussing the USGS report attached to the Jarding
13 summary I believe, that mentioned the migration in the
14 Inyan Kara that, contrary to the normal expected
15 southwestern flow of water, there was evidence of the
16 flow from the Edgemont area to Cascade Springs, which
17 is boiled hot springs. I mentioned that it was a few
18 miles, about three miles from the edge of Dayton
19 Hyde's property.

20 Mr. Hyde was in the audience while I was
21 discussing that, and told me after the hearing that in
22 addition to the property, where the wild horse
23 sanctuary is, he maintains several acres where he
24 grows hay for the horses and some of his cattle that
25 has water rights from 1885 on Cascade Springs, or the

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1 stream that flows out of Cascade Springs.

2 That's new information to me. I think
3 it's speaks to expanding, and I'm happy to submit
4 that. I don't know if there's any objection from the
5 applicants.

6 CHAIR FROELICH: It's likely to be
7 objected to, and it does not fall within the
8 Commission's definition of new evidence. You're
9 certainly free to take such a filing, but I wouldn't
10 count on agreement by the applicant or the staff to
11 such a motion.

12 But the question and the concern reminds
13 me that Judge Barnett has asked if the parties were
14 able to stipulate as to distances. I wonder if you've
15 had a chance to talk about that, or is that something
16 we should expect later?

17 MR. FRANKEL: To be honest, we didn't our
18 homework, Your Honor.

19 MR. ELLISON: We've had some discussion.
20 We need a geometry-capable person to do a crow flies.

21 MS. HENDERSON: No, no. We do not. What
22 we need is a ruler on a map, and we're going to do
23 this in a couple of minutes.

24 CHAIR FROELICH: Then may I suggest a ten
25 minute break. I will have the good people of Custer

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1 provide you with a ruler and a paper, and perhaps as
2 part of the closing statements, we can enter a
3 stipulation into the record as to the distances
4 between the project and the individual petitioners.
5 Okay. So we'll take ten minutes. Ten minutes after,
6 we'll begin.

7 (Whereupon, a short recess was taken.)

8 CHAIR FROELICH: Were the parties able to
9 stipulate as to distances?

10 MR. PUGSLEY: I believe so.

11 MR. ELLISON: For Susan Henderson's well,
12 between 20 and 21 miles.

13 CHAIR FROELICH: Okay.

14 MR. ELLISON: As the crow flies, south-
15 southeast.

16 JUDGE BARNETT: You said wells?

17 MR. ELLISON: That would include wells.

18 JUDGE BARNETT: Okay. It's the property

19 --

20 MR. ELLISON: For Susan Henderson.

21 JUDGE BARNETT: Henderson's property?

22 MR. ELLISON: Property and wells.

23 JUDGE BARNETT: Property and wells, okay.

24 MR. BALLANCO: And Your Honor, I need to
25 discuss this with you guys, but applying the same

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1 ruler and map technique, it appears Dayton Hyde's
2 property picked up a few miles. So he's 16 miles from
3 the project site.

4 JUDGE BARNETT: Southeast or where?

5 MR. BALLANCO: East.

6 MR. THOMPSON: We agree.

7 (Simultaneous discussion.)

8 CHAIR FROELICH: All right. Ms. Wright,
9 do you have your two minute warning? All right. Each
10 party will have ten minutes. We'll start with the
11 applicant, followed by the staff, followed by the
12 Tribe, and concluding with the consolidated
13 petitioners.

14 MR. PUGSLEY: Your Honors, I'd first like
15 to, on behalf of Powertech, extend our thanks to the
16 Board and counsel for all parties for attending. We
17 believe that it's very meaningful to have this
18 hearing, and that all parties have the right to be
19 heard on their pleadings.

20 Powertech is, in our opinion, has gone out
21 of its way to try and present the most comprehensive
22 application it can for the Dewey Burdock site,
23 including consulting with entities such as the USGS
24 and the South Dakota School of Mines in the process of
25 preparing it, in an effort to comply with the

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1 Commission's regulations for proposed ISL facilities
2 at this stage of the game.

3 On that note, it's important -- we'd like
4 to reiterate a few points. First, with respect to the
5 comments made yesterday regarding reading contentions
6 in light of the Commission's and 10th Circuit's
7 endorsed phase approach of ISL operations, and the
8 Commission's current and staff's current viewpoint of
9 10 C.F.R. 40.32(e), we believe it's critical that the
10 Board read the contentions in light of those
11 requirements, because the failure to do so in our
12 opinion would require holding any proposed ISL
13 operator, Powertech or otherwise, to a standard that
14 none of them can satisfy at this stage of the game,
15 based on the Commission's current view of its
16 regulations.

17 The second point we'd like to reiterate is
18 regarding consolidated petitioners' Contention 7, I
19 believe, regarding receipt of loaded resins from other
20 sites not identified in the application.

21 We just would -- we understand the
22 concerns of the consolidated petitioners, and we would
23 like to once again note for the record receipt of
24 loaded resins from sites other than the Dewey and
25 Burdock's proposed sites has not been requested by

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1 Powertech, and because it has not been requested, it
2 will not be granted, cannot be granted by NRC staff,
3 because NRC has to react under the Atomic Energy Act,
4 to a proposal.

5 That is not part of our proposal. So we
6 just would like the Board to take notice of that.

7 The other point, specific point before I
8 conclude is we would like the Board to be aware of the
9 fact that when Powertech resubmitted its application
10 in August of 2009, that there was a supplement
11 associated with it, and we have provided you citations
12 to aspects of that during the response to questions.

13 The reason that we note that is because as
14 we have gone through the contentions of both parties,
15 there have been issues, what we've called sins of
16 omission here in terms of contents of an application.
17 We just would like the Board to be aware of that
18 supplement when reviewing the contentions, and that it
19 is indeed part of the application.

20 CHAIR FROELICH: That supplement was
21 provided in the disk that you provided?

22 (Simultaneous discussion.)

23 MR. PUGSLEY: Yes sir, yes sir, yes sir.
24 If I remember correctly sir, it was the technical
25 report, the environmental report and the supplement.

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1 But to sum up here in a general way, we would like
2 everyone, including the Board, to take notice of the
3 fact that we -- our license application did not simply
4 provide data and analyses regarding generalities or
5 simply regional analyses.

6 To say that our application did not
7 contain site-specific data and analyses would be
8 incorrect, that we have performed extensive site-
9 specific analysis under the Commission's current
10 interpretation of its regulations, and in accordance
11 with NRC requirements for those.

12 So we believe that there may be a
13 misunderstanding as to when we characterize the phased
14 approach of this project, that we're simply saying
15 we're doing regional studies, and that is not the
16 case.

17 Our application does have site-specific
18 data analyses in accordance with the Commission's
19 requirements, as well as historic data as we noted
20 earlier with respect to the pump test we performed.
21 So we did take into account historic data.

22 But we also took into account current
23 data, because the most current data on the site is
24 performed by us, because we've done the work. So we
25 would just like the Board to take notice of that, and

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1 also just as a word to all counsel here, we stand
2 available if there are things that need to be
3 addressed procedurally or substantively in this
4 proceeding.

5 We encourage, we keep the lines of
6 communication open, and if there are things that need
7 to be addressed outside of directing it to the Board,
8 please do not hesitate to consult us. Thank you.

9 CHAIR FROELICH: Thank you. Staff?

10 MS. JEHLE: The staff thanks the Board for
11 providing us the opportunity to further explain our
12 views regarding the hearing requests, and as the Board
13 has heard, the staff's position is that both hearing
14 requests should be denied.

15 The Board should deny the hearing request
16 because neither petitioner has offered a contention
17 that meets the deliberately strict requirements in the
18 NRC contention pleading rules. Further, in the case
19 of the consolidated petitioners, none of the
20 petitioners has described a flawed pathway by which
21 operations at Dewey Burdock might injure him or her.

22 The staff would like to emphasize that
23 even if the hearing requests, the requests are denied,
24 Powertech's application will be reviewed carefully
25 and thoroughly, regardless of whether or not a hearing

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1 request is granted. The staff will continue its
2 safety and technical or environmental reviews of the
3 Powertech application.

4 The staff will document its safety and
5 environmental findings in written reports, and these
6 reports will be made publicly available. Further,
7 before releasing the final environmental document, a
8 supplemental environmental impact statement, the SEIS
9 for the Dewey Burdock site, the staff will circulate
10 a draft SEIS for public comment.

11 The staff will also seek input from tribal
12 and other governmental entities as it prepares the
13 final EIS. The staff will keep up the public with the
14 progress on the safety and environmental reviews.

15 There would be publicly available
16 documents relating to Powertech's application, and
17 these will be placed in NRC's agency-wide documents
18 access management system, also known as ADAMS, and the
19 public may reach ADAMS through the NRC's website, and
20 it can locate documents relating to Powertech's
21 application by searching ADAMS under the docket number
22 04-00-9075. Thank you very much.

23 CHAIR FROELICH: Thank you. Mr. Parsons?

24 MR. PARSONS: Thank you. Jeff Parsons on
25 behalf of the Oglala Sioux Tribe. We would reiterate

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1 the thanks for the Board's patience and obvious
2 interest and desire to fully understand these issues.
3 It's very clear to us that you're very engaged and
4 willing to give every benefit to the parties to make
5 their case, and that's very much appreciated.

6 I'll start with my closing statement,
7 pretty much where we started with reference to the
8 standard of review. NRC staff during the discussion
9 just now, but also in the discussion yesterday, speaks
10 of a deliberately strict and a strict standard, and I
11 think it's important to keep those -- and that
12 language does appear in NRC decisions.

13 But again, we think it's very important to
14 keep that in context, that prior to the changes in the
15 rules in 1989, there were very few standards with
16 respect to bases for raising contentions.

17 So although the standard post-1989 and as
18 incorporated in the 2004 changes is stricter than it
19 was in pre-1989, it is still, as demonstrated by the
20 *Federal Register* notices, drafted at the time when
21 they raised that bar, to only require a minimal
22 showing.

23 NRC staff disputed that, but what they
24 can't dispute is that in the *Federal Register* notices,
25 it uses that precise language, and in the *Duke Energy*

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1 case, it uses that language. Literally after 1989,
2 they required some basis for contentions.

3 So as far as keeping things in the
4 forefront of your mind, I think that that's an
5 important aspect. With respect to the contentions, we
6 understand the issues in the *Crow Butte* case with
7 respect to ripeness, and frankly we raised each claim
8 that we thought was important and relevant and
9 meaningful.

10 We understand, and in part out of an
11 abundance of caution, to make sure that those issues
12 were on the table, and make sure that in this
13 proceeding, we weren't going to get caught in a
14 position of failing to raise things early.

15 So we understand that this Board, you
16 know, may find with respect to the NHPA claims that
17 some ripeness issues exist, and you know, our
18 arguments on the record yesterday, I think, speak to
19 that. I won't reiterate those.

20 I will single out the NHPA contention. As
21 was debated yesterday, we would really encourage the
22 Board to carefully consider the arguments we laid out
23 that distinguish the arguments made here in this case
24 from those made in *Crow Butte*.

25 With respect to the argument we're making

1 that the legal duty, the legal violation, as we see
2 it, is ongoing, that the NHPA does require
3 consultation at the earliest possible time, and I
4 think that there can be little dispute that that has
5 not occurred as this application was initially
6 submitted in February of 2009.

7 So we would hope that the Board would
8 carefully consider that claim and the unique aspects
9 that we raised here that were not present in Crow
10 Butte. Otherwise, the issues that we raised in our
11 contentions we feel are truly significant with respect
12 to the protection of the public health, welfare, the
13 environment, particularly with respect to water
14 quality.

15 As you know, in South Dakota and elsewhere
16 in the west, in a semi-arid environment, there is no
17 more precious resource than water. Whether it be
18 uranium or gold otherwise, water is the top resource
19 in the region, on par with the human resources out
20 here, which equally impressive.

21 Overall, as discussed in the *Duke Energy*
22 case, and again 49 NRC 328, 335, the court, excuse me,
23 the Commission set the standard, and we believe the
24 Tribe has set forth, in accordance with that standard,
25 contentions that are material and supported by

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1 reasonably specific factual and legal allegations.

2 The Board, we would hope, would resist, as
3 the NRC admonished, resist turning the contention
4 standard into a fortress to deny intervention. Thank
5 you very much.

6 CHAIR FROELICH: Thank you, Mr. Parsons.
7 Mr. Franklin?

8 MR. FRANKEL: Thank you, Your Honor. I'll
9 take about, if it's okay with the Board, I'll take
10 about three or four minutes. My co-counsel will take
11 a couple of minutes, and my other co-counsel, Mr.
12 Hyde, will use the remainder.

13 Starting -- I have very few points. It
14 might not even take all my time. Yes, this is an NRC
15 regulatory proceeding, and yet the due process clause
16 still applies. The due process clause requires, among
17 other things, fundamental fairness and substantive
18 fairness and procedural fairness.

19 Procedural fairness includes an
20 opportunity to be heard after proper notice, and
21 general fairness in the participation in the
22 proceedings. So when we hear about certain things
23 only being available online, and we've now made formal
24 notification to the NRC that several of our people
25 have no access to that online, due process is

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1 implicated.

2 When the staff and/or the company take
3 positions that push the boundaries to the point where
4 we find ourselves using phrases like Catch-22, again
5 due process, the limits of due process are strained.
6 So that's my first point. I would ask the Board to be
7 guided in these proceedings by the fundamental due
8 process that y'all are duty-bound to enforce.

9 Second, citizen participation is a core
10 NRC value, according to its website. I do have
11 Internet access, so I did find that, and yet that
12 citizen participation requires citizens. We haven't
13 come up with here with fictional people who live in a
14 fictional place.

15 These are real people with real issues who
16 really drink the water, who live nearby. We read the
17 application. That's what we're supposed to do. We
18 cited to specific portions of it what we were supposed
19 to do. We stated our issue. We stated how it was
20 genuine and material. We've done our part.

21 These real people, they've been here a
22 while. They're not going anywhere. They're not the
23 newcomers in this room. It's y'all's obligation to
24 satisfy them, because they're here and they're -- they
25 have a will of their own, as do all Americans, and we

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1 are not going to allow, and the will of the people are
2 not going to allow anything to happen here unless
3 they're satisfied.

4 I mean they'll be protests, they'll be
5 marches, whatever. So it's really in the best
6 interest of those people who want to get the project
7 going to satisfy the people, to remove those
8 frictions. These are common sense people. We are
9 common sense.

10 You know, the legalities have to match the
11 common sense, or it doesn't hold water with the
12 people. So that's your challenge, and I ask that you
13 let it guide you in your discussions and decision-
14 making.

15 We've had a lot of discussion, my third
16 point, on technical inadequacy, disorganized
17 application. Our expert says that it was
18 incomprehensible, couldn't really do a good job
19 because of the application. And yet we've also heard
20 a lot of argument about how well -- that might not be
21 a violation.

22 We have to say, though, it doesn't instill
23 a great degree of confidence around here if the
24 application had to be resubmitted in the form of this
25 supplement. By the way, that supplement, it was the

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1 choice after the rejection of the application, it was
2 the choice of the company to either resubmit a whole
3 new one or do a supplement.

4 Then I'm just going to wrap up there and
5 thank everyone for coming and for giving us an
6 opportunity to argue these issues.

7 MR. ELLISON: I just want to briefly urge
8 the Board to understand that our major concern
9 throughout these contentions is secondary porosity.
10 As Dr. Malone and Dr. LaGarry have set out, there's a
11 lot of inadequacies in the application that don't
12 address likely real world conditions within the PAA.

13 And the secondary porosity issues are
14 real, in terms of potential contamination not only by
15 horizontal flow but also a vertical flow through false
16 and fractures and other means. There is the Cascade
17 Anticline, which is the Cascade, goes to the Cascade
18 Springs area. There is a direct hydrological
19 connection.

20 We urge the Board to look at the three
21 sources that were cited in Dr. Jarding's geological
22 summary regarding the flow, some of the flow to the
23 south and then to the east, which would cover Susan
24 Henderson's ranch area, which would cover Dayton
25 Hyde's area.

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1 Susan Henderson is very concerned about
2 water quality, drawdown and overall contamination of
3 the aquifer. This is her life, her livelihood and it
4 has been for some time. There is a plausible
5 connection. There is potential harm, and this Board
6 is in a position to take an action by denying the
7 license to protect Ms. Henderson's and other -- Mr.
8 Hyde's and other petitions, or people who live in that
9 area and work in that area, protect their water.

10 We're very concerned about the phased
11 approach that the company wants to urge upon this
12 Board. It's as though they say "Give us a license for
13 the whole area." But as we do a little piece, we'll
14 just keep giving more information.

15 Well, the Dewey area and the Burdock area
16 really needs to be looked at, because is that geology
17 really the same specifically in those areas? Is the
18 hydrology really the same in those areas? Are the
19 fracturing and the faults really the same in those
20 particular areas?

21 Doing a phased approach means give us a
22 license and we'll tell you about it sort of, but there
23 will be no ability for us to realistically challenge
24 anything that might come on.

25 Anyway, just one final point. I

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1 appreciate the fact that the DEIS and SEIS will be on
2 the ADAMS. I live in a deep canyon. I sometimes
3 don't have Internet for a week. With a very limited
4 period of time, I don't understand why, if we are made
5 part -- if any of our petitioners are made parties, we
6 respectfully ask that anything like this not just be
7 put on ADAMS, but be sent to counsel for the parties
8 at least. Thank you.

9 MR. BALLANCO: I want to echo what
10 everyone said, and thank the Board for coming out here
11 and hearing what to us are very important issues, and
12 I know the applicant are important issues. As far as
13 my client, Dayton Hyde goes, he lives, uses, works,
14 drinks from the Inyan Kara, the very aquifer proposed
15 to be the subject of this mining activity.

16 We've shown that from a neutral source,
17 the USGS, there's migration that goes under his
18 property and surfaces east of his property from the
19 proposed mine area. This is dramatically concerning
20 to him. He left work to come to this hearing
21 yesterday. He's 84 or 85 years old. He's a busy man.

22 He's not here to raise frivolous concerns.
23 He is concerned about his life's work. He spent more
24 time researching the west to find a place to put this
25 wild horse sanctuary than the company has been here in

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1 the Black Hills. He found the wild horse sanctuary
2 with the help of the governor of South Dakota, and he
3 needs the water that he uses to maintain the horses
4 that he maintains there.

5 If something happens to that water, that's
6 going to be gone, and that's his life's work. It
7 can't be replaced with money. I know we talked about
8 reclamation and things like that, but you can't buy
9 what he built there. If that guy doesn't have
10 standing, then there's something wrong with these
11 regulations, because he stands to be affected. It's
12 the water he drinks, it's the water he needs and he
13 was using it first.

14 He's got a lot of neighbors like that, and
15 let's not forget, even though this is routine for most
16 people in the room, this is an inherently dangerous
17 activity that we're talking about here, not to mention
18 that the surface flows like the Cheyenne River that
19 flows through his property and the properties around
20 here.

21 So, I know the Board understands the
22 gravity of the decisions you make, and I appreciate
23 that. I urge you to consider Dayton and the other
24 people who live here, who maybe aren't as aware or
25 with enough time to come and participate.

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1 But people are concerned, and at this
2 point we're relying on you to look after their
3 interests. Again, thank you for being here and thank
4 you for the effort you're going to continue putting on
5 in this case.

6 CHAIR FROELICH: At this point, I would
7 like to express my thanks and appreciation to a number
8 of folks. To Mr. Crane, our reporter; to Mayor
9 Stickney, the Council and the city staff of Custer,
10 for making their council chambers available to us.

11 So it's important to the ASLBP to have
12 these proceedings in the area that's most affected,
13 and closest to the parties who are affected by the
14 actions taken by the agency. So we're grateful to the
15 city for making this available.

16 I'd also like to at this point express the
17 appreciation of the Board to the Council and to the
18 parties in this case for their argument, and their
19 assistance in explaining the issues and clarifying the
20 pleadings that have been filed in this case.

21 I'd like to echo just at the conclusion,
22 that I'd like to thank Mr. Pugsley in his closing for
23 his recommendation that we keep lines of
24 communications open. I think that's very important.

25 I hope that the staff and the applicant

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1 will make every effort to make sure that there's
2 wideness and dissemination of the pleadings and the
3 papers that are prepared in this case, taking into
4 consideration the geography and the availability of
5 the Internet.

6 I hope the agency would be committed to
7 the strategy which they put in place, and post it on
8 the Internet. With that, we will stand in
9 adjournment, and I thank you all for your
10 participation.

11 (Whereupon, at 12:41 p.m., the hearing was
12 concluded.)
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CERTIFICATE

This is to certify that the attached proceedings
before the United States Nuclear Regulatory Commission
in the matter of: Powertech USA, Inc.

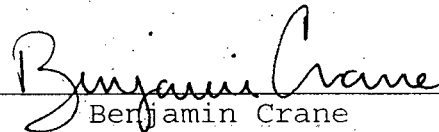
Name of Proceeding: License Application

Docket Number: 40-9075-MLA

ASLBP Number: 10-898-02-MLA

Location: Custer, South Dakota

were held as herein appears, and that this is the
original transcript thereof for the file of the United
States Nuclear Regulatory Commission taken by me and,
thereafter reduced to typewriting by me or under the
direction of the court reporting company, and that the
transcript is a true and accurate record of the
foregoing proceedings.



Benjamin Crane
Official Reporter
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