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2 UNITED STATES OF AMERICA
3 NUCLEAR REGULATORY COMMISSION
4 ATOMIC SAFETY AND LICENSING BOARD HEARING
5

6 In the Matter of
7 U. S. Department of Energy
8 High-Level Waste Repository
9 Docket No. 63-001
10 ASLBP No. 09-892-HLW-CAB04
11 September 14, 2009
12 9:00 a.m. PST
13

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15 TRANSCRIPT OF PROCEEDINGS
16 Pre-Hearing Conference
17 Before the Administrative Judges
18 CAB-04
19

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21 Judge Thomas Moore, Chairman
22 Judge Paul S. Ryerson
23 Judge Richard E. Wardwell
24
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1 APPEARANCES

2 For the Nuclear Regulatory Commission Staff:

3 Margaret Bupp, Esq.

4 Chris Chandler, Esq.

5 For the Nuclear Energy Institute:

6 Michael Bauser, Esq.

7 Rodney J. McCullum, Esq.

8 For the Department of Energy:

9 Thomas A. Schmutz, Esq.

10 Alex S. Polansky, Esq.

11 Michael Shebelskie, Esq.

12 For the State of Nevada:

13 Charles J. Fitzpatrick, Esq.

14 John W. Lawrence, Esq.

15 Martin Malisch, Esq.

16 For the Nevada Counties of Churchill, Esmeralda,
17 Lander and Mineral:

18 Robert F. List, Esq.

19 Jennifer Gores, Esq.

20 For the State of California:

21 Timothy Sullivan, Esq.

22 Kevin W. Bell, Esq.

23 For the Native Community Action Council:

24 Rovianna Leigh, Esq.

25 Scott Williams, Esq.

For the Nevada County of White Pine:

Richard Sears, Esq.

Michael Baughman, Esq.

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APPEARANCES (Continued)

For the Nevada County of Clark:

Alan Robbins, Esq.
Debra D. Roby, Esq.

For the Timbisha Shoshone Tribe:

Darcie Houck, Esq.
Ed Beanan, Esq.

For the Nevada County of Nye:

Robert Anderson, Esq.
Jeffrey VanNiel, Esq.

For the California County of Inyo:

Michael Berger, Esq.
Kevin Bell, Esq.

For the Timbisha Shoshone Yucca Mountain
Oversight Program:

Douglas M. Poland, Esq.

For the Nevada Counties of Lincoln and Eureka:

Diane Curran, Esq.

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

2 >>JUDGE MOORE: If I could have everyone's
3 attention, please, before the hearing begins.

4 We would like to come to order. On behalf
5 of the Nuclear Regulatory Commission, we would like
6 to welcome you for this prehearing conference this
7 morning.

8 Before it begins, I would like to go over a
9 few emergency procedures. In the event that we did
10 have a building evacuation, we would ask that you
11 leave through the emergency exit located here on the
12 west side of the room.

13 You have an emergency exit door immediately
14 to the -- to the rear of the hearing room of the main
15 lobby, as well as through our lobby door.

16 Our restrooms are located on the east side,
17 immediately to your right upon leaving the room.
18 We would ask that you only bring water into this
19 room.

20 Should you have any questions, you can see
21 me, or the facility manager, or our security staff,
22 and we would also ask that you follow the instruction
23 of our security staff while here in the facility.

24 Thank you, and the hearing will begin
25 shortly.

1 >>JUDGE MOORE: Good morning. Please be
2 seated.

3 I'm Judge Thomas Moore. On my left is --
4 is Judge Richard Wardwell. On my right is Judge Paul
5 Ryerson.

6 The Licensing Board has convened this
7 prehearing conference pursuant to our order of
8 August 25th, 2009, to address, among other things,
9 the questions to the parties set forth in that Order.

10 The conference this morning is being
11 recorded, web-streamed and broadcast on the agency's
12 broadband network.

13 In addition, counsel for Eureka County, is
14 participating by video conference from the Rockville,
15 Maryland Hearing Facility.

16 So that the court reporter has some chance
17 of compiling an accurate transcript, I remind counsel
18 to first identify themselves and the party they
19 represent each time they speak. With this number of
20 parties, she has no opportunity to get it right with
21 any other system.

22 So we will start with NCA, clear in the
23 back to my left, and work our way around the well
24 ending with the NRC staff. And if counsel now, would
25 each identify yourself for the record by stating your

1 name, affiliation, and the party they represent, we
2 will start that way.

3 >>MR. WILLIAMS: Scott Williams for the
4 Native Community Action Council.

5 >>MS. LEIGH: Good morning. Rovi anne Leigh
6 on behalf of the Native Community Action Council.

7 >>MR. VANNI EL: Jeff VanNi el on behalf of
8 Nye County.

9 >>MR. ANDERSON: Good morning, Your Honor.
10 My name is Robert Anderson, Akerman Senterfi tt, on
11 behalf of Nye County.

12 >>MR. ROBBI NS: Good morning, Your Honors.
13 Al an Robbi ns on behalf of Cl ark County, and al so
14 accompanied by my partner, Deborah Roby, on behalf of
15 Cl ark County.

16 >>MR. JAMES: Morni ng, Your Honor. Greg
17 James wi th Inyo County.

18 >>MR. BERGER: Morni ng, Your Honor.
19 Mi chael Berger wi th Inyo County.

20 >>MR. POLAND: Good morni ng, Your Honor.
21 Doug Pol and, counsel wi th Shoshone Council.

22 >>MS. HOUCK: Good Morni ng, Your Honors.
23 Darci e Houck. I'm attorney for Joi nt Timbi sha
24 Shoshone Group.

25 >>JUDGE MOORE: Stop right there for a

1 moment.

2 As you can see, if you speak into the
3 microphone, we can all hear. If you don't speak into
4 the microphone, we can't hear. So, please, counsel,
5 speak into the microphone directly when you speak.

6 Please continue.

7 >>MR. BEANAN: Ed Beanan, Shoshone Tribe
8 Council.

9 >>MR. SEARS: Richard Sears, White Pine
10 County.

11 >>MR. BAUGHMAN: Mike Baughman, White Pine
12 County.

13 >>MS. GORES: Jennifer Gores with the Four
14 Nevada Counties.

15 >>MR. LIST: Robert List, Armstrong
16 Tinsdale, on behalf of the Four Nevada Counties.

17 >>MR. BELL: Honors. Kevin Bell, State of
18 California.

19 MR. SULLIVAN: Good morning. Tim Sullivan
20 for the State of California.

21 MR. MALSCH: Martin Malsch, along with
22 Charlie Fitzpatrick and John Lawrence, for State of
23 Nevada.

24 >>MR. POLANSKY: Good morning. Alex
25 Polansky, Department of Energy.

1 >>MR. SCHMUTZ: Good morning, Your Honor.
2 Thomas Schmutz, Department of Energy.

3 >>MR. SHEBELSKIE: Good morning, Your
4 Honors, Michael Shebel ski , Department of Energy.

5 >>MR. BAUSER: Good morning, Your Honors.
6 Mike Bauser on behal f of the Nucl ear Energy
7 Insti tute. I 'm accompanied by Rodney McCul lum, al so
8 of NEI .

9 >> MS. BUPP: Good morning, Your Honors.
10 Margaret Bupp. I 'm accompanied by Chri stopher
11 Chandler wi th the NRC staff.

12 >>JUDGE MOORE: Thank you.

13 We wi ll begi n thi s morni ng wi th addressi ng
14 several questi ons by the Board, then we wi ll turn to
15 the 23 questi ons i n our August 25th Order.

16 We wi ll take at least one short break thi s
17 morni ng, then recess at lunch at a conveni ent time,
18 somewhere between roughl y 11:30 and 12:15 for 90
19 mi nutes because of what i s necessary i n thi s l ocati on
20 for you al l to be able to fi nd a place to obtai n
21 lunch, a 90-mi nute lunch recess i s necessary.

22 Wel l , immedi atel y upon the concl usi on of
23 the lunch recess, we wi ll hear bri ef oral argu ment
24 from the State of Nevada and the NRC staff on the
25 moti on to compel and a moti on to amend pri vi lege

1 logs. And we will then resume immediately thereafter
2 with the remaining -- the 23 questions and any
3 additional questions that the Boards have and address
4 any matters that the parties have for us. We will
5 take at least one brief afternoon break. And after
6 that break, we will be in a position to assess
7 whether we will be able to conclude today or whether
8 it will be necessary to reconvene at 9:00 a.m.
9 tomorrow.

10 Judge Ryerson, do you have anything?

11 >>JUDGE RYERSON: No, thank you, Judge.

12 >>MS. CURRAN: Judge Moore, this is Diane
13 Curran. I was wondering if I should introduce
14 myself --

15 >>JUDGE MOORE: Yes, Ms. Curran --

16 >>MS. CURRAN: -- for the court reporter.

17 >>JUDGE MOORE: -- I apologize. I meant to
18 get to you at the end but my memory is short, and the
19 number of counsel list is long.

20 Please do so now.

21 >>MS. CURRAN: Thank you. My name is Diane
22 Curran. I am here representing Eureka County.

23 JUDGE MOORE: And Ms. Curran, I will try,
24 and probably fail over the course of the day, to call
25 on you. But if I fail, would you please speak up so

1 that you are not left out. I know you are
2 participating by video conference.

3 MS. CURRAN: Thank you. I will.

4 JUDGE MOORE: In the past, groups of
5 parties have agreed among themselves to have one
6 counsel speak for a group where there was consensus
7 on an issue.

8 Recognizing that at the end of last week,
9 only six filings were filed but there did seem to be
10 a general breakdown in agreement and disagreement on
11 the -- on the issues that we had previously posed.
12 But to start, is there -- has there been any further
13 progress and does counsel have anything to report
14 that they will have a spokesman for some group or
15 groups that will limit the number of counsel that
16 will need to respond?

17 Hearing none, then, we will go around the
18 room when we hit the 23 questions, so that all
19 parties will have an opportunity to speak.

20 We would remind counsel to keep their
21 answers brief. Please state your reasons for your
22 position so that we understand why you are taking
23 that position.

24 No counsel, of course, is obliged to
25 respond if they agree with other parties.

1 And I would also remind all counsel that
2 the weather report today is for a hundred degrees,
3 and if we slow this down, we're going to move this
4 proceeding to the courtyard, and I'm sure it will
5 speed up.

6 With that, I would like to ask the Staff,
7 do you have anything further to report from the last
8 time you set a schedule for when the Staff would be
9 issuing the SER serially as to when Volumes I and III
10 will be issued?

11 Previously you informed us of, I believe it
12 was March of 2010 -- 2010 and September of 2010 for
13 Volumes I and III respectively.

14 >> MS. BUPP: At present, we have no change
15 to the schedule, however, depending on what the
16 discovery schedule is set, we may have to notify the
17 Board of a change in schedule.

18 >>JUDGE MOORE: And have you any additional
19 information to shed light on Volumes II, IV, and V of
20 the SER?

21 >> MS. BUPP: Not at this point, Your
22 Honor.

23 >>JUDGE MOORE: Okay. Thank you.

24 There is mention in the various filings of
25 a general agreement that the parties wish to roll up

1 their sleeves and -- and start a briefing schedule
2 for the legal issues, legal issue contentions that
3 were admitted by the Board and by the Commission in
4 their respective decisions this Spring.

5 There was mention, at least in Nevada's
6 pleadings, that DOE may be coming forth with such a
7 schedule after having consulted with the various
8 parties.

9 Is there any movement in that regard and
10 anything you would like to announce?

11 >>MR. SCHMUTZ: We've spoken to Nevada --
12 this morning -- this is Thomas Schmutz from DOE.

13 We've spoken to Nevada this morning. We
14 don't have any agreement on either the schedule or on
15 the -- the way that the English would be described.

16 What we spoke to Nevada about, and it was
17 quite a good one, would be to take time tomorrow for
18 the parties, since we're all here, assuming that we
19 don't have to go too much into tomorrow, and use
20 that possibly to discuss those issues, come up with a
21 schedule and then propose that to the Board.

22 The issues are quite complex in terms of
23 the way they would be described, so I don't think it
24 will serve anybody's purpose to try to go through
25 those with the Board during this two-day period.

1 But we do think we have a process of --
2 assuming the other parties agree -- that will get us
3 there fairly quickly.

4 >>JUDGE MOORE: I have a couple questions
5 that have puzzled me about just the general
6 statements in the filings today.

7 And I'll have to apologize because I don't
8 have the precise numbers in front of me, and won't
9 take the time to dig them out. But there were
10 approximately 29 legal issues at the end of the
11 appeal process. I believe the Commission had a
12 couple of different -- additional ones, call it 30
13 for discussion purposes.

14 In the various charts that you have broken
15 out and provided us, only, I believe, 11 of those
16 legal issues are tied to the SER volumes that the
17 staff will be producing under their current schedule
18 in 2010. The rest of those issues go to volumes that
19 will be issued subsequent.

20 In your approach to this, why is it
21 sensible to brief those legal issues that are tied to
22 SER volumes that are far distant in the future and
23 not just focused on what I believe are 11 issues that
24 are tied to SER Volume III?

25 There are none, I believe, tied to SER

1 Volume I.

2 Would you care to speak to that?

3 MR. SCHMUTZ: Surely Judge Moore. I don't
4 think we are tied to litigating all of them now. We
5 think that they can be, because of the nature of the
6 issues, that they could be litigated now on the paper
7 and they're not -- it isn't necessary, most of those
8 cases, I don't believe, that the SER is going -- to
9 have been issued.

10 Having said that, the Department of Energy
11 certainly would not object to a process that said, we
12 will brief the legal issues relating to SER Volumes I
13 and III initially, and the others as those SERs are
14 issued.

15 So we're not -- we're not tied to that
16 process. What we think -- we think that the
17 Commission -- one of the things that drove us, I'll
18 make this very quick. One of the things that drove
19 us was that the fact that the commission seemed to be
20 saying that the legal issue should be dealt with
21 expeditiously. And so we came up with a process, and
22 we circulated some to the parties that did that. I
23 haven't spoken to any of the parties about the
24 proposition that you just made but I don't think it
25 is one that we would object to.

1 >>JUDGE MOORE: With regard to the language
2 in the Commission decision that preceded the --
3 certainly, the public announcement by the Staff that
4 the SER would be issued serially and that Appendix E
5 would not be followed. And I think that's a very
6 significant fact.

7 And secondly, the language that the
8 Commission chose to use in its decision, if I'm
9 remembering it correctly, was not without some
10 qualification that would take that kind of
11 circumstance into account.

12 So, Mr. Malisch, do you have anything to add
13 to that?

14 >>MR. MALSCH: Yes, Judge Moore.

15 We are in agreement, I think then, to the
16 approach with the brief legal issues associated with
17 SER Volumes I and III, and with the intent to resolve
18 them by early next year. I think our only difficulty
19 would be, as you can see from what we filed, is that
20 Nevada Safety 161, where we think the Commission had
21 signed that past issue dealing with multiple
22 barriers, would need to develop a more complete
23 adjudicatory record before it could be resolved. So
24 we may have a disagreement over that particular one
25 but on the concept, we agree with DOE that it would

1 be a good idea to confine the briefing to legal
2 issues associated with SER Volumes I and III.

3 JUDGE MOORE: Does any other party wish to
4 be heard on this before we move on, recognizing that
5 you all may be conferencing and coming up with a
6 schedule?

7 >> MS. BUPP: This is Margaret Bupp,
8 counsel for the staff.

9 Just to reiterate, in the staff's proposed
10 schedule for the briefings, we assume that we would
11 do all of the briefings serially before doing any
12 discovery on any of the safety issues, regardless of
13 which volume SER they're associated with because of
14 the legal contentions, by their very nature, do not
15 require discovery, and so they could, regardless of
16 when the SER volume is going to be published, could
17 be dealt with now. And that was the reasoning for
18 the past proposal, that we do all of the briefing for
19 all of the legal contentions at the outset.

20 JUDGE MOORE: Ms. Bupp, would you agree
21 with me that, what comes to mind is that old adage
22 that life is uncertain, eat dessert first, but that
23 because of the nature of this proceeding and the
24 enormous uncertainty that surrounds the future of
25 this proceeding, that we have a roadmap that can get

1 us through perhaps the first couple volumes of the
2 SER and that that ought to be the focus as opposed to
3 things that could be markedly different, changed in
4 any number of ways and especially with legal issues,
5 if those changes take place, we will have all spent
6 an enormous amount of time and energy on things that
7 may have to be done in part or in whole again.

8 >> MS. BUPP: I understand your point, Your
9 Honor, and I think it's a good one. However, also
10 weighing on the other side is because these are legal
11 issues and because this is the first time that anyone
12 has ever interpreted many of the regulations that
13 are at issue here. It could give us, give all the
14 parties a good ground work if we were to have to
15 start all over again on another site, that we would
16 have interpretations of regulations that had already
17 been in issue. So, I think, you know, you have to
18 weigh the two questions.

19 >>JUDGE MOORE: Okay.

20 >>JUDGE RYERSON: Just to clarify the
21 staff's position on this: Your position is there
22 should be no discovery, is that correct, until the
23 legal issues are all resolved?

24 >> MS. BUPP: That is our suggestion, yes.

25 >>JUDGE RYERSON: Which would basically

1 mean that discovery would start next year or so.

2 >> MS. BUPP: Early in calendar year 2010,
3 yes.

4 JUDGE RYERSON: Thanks.

5 JUDGE MOORE: Let's then turn to question
6 one of the questions in our August 25th Order and
7 begin to work through those questions to lay the
8 groundwork for a case management order, and then we
9 will, I'm sure, when we get through with all of
10 these, whenever that is, we need to address the areas
11 of agreement and areas of minor disagreement and the
12 previously filed joint proposed case management
13 orders.

14 Question one in our August 25th Order, In
15 light of the NRC staff's plans to issue the SER
16 serially, and associated schedule uncertainties, will
17 it be appropriate to proceed with the adjudication
18 contentions on multiple tracks.

19 That is, for the parties to conduct
20 discovery on certain related groups of contentions
21 while simultaneously participating in hearings on
22 other related groups of contentions that are ready
23 for adjudication.

24 Now, in the six filings that we received at
25 the end of last week, the parties, some of the

1 parties and the groupings of parties have put forth
2 their positions.

3 I think it probably still makes sense for
4 us to plow through this and identify the specific
5 areas of disagreement so that we can iron those out
6 or attempt to reach full consensus.

7 I think the easiest way to start is, let's
8 start with Nevada, DOE, and the staff as the major
9 authors of the filings that were -- that came in,
10 then we will turn to the Four Counties and then go
11 around the room on the rest.

12 Is that acceptable?

13 >>MR. SCHMUTZ: Yes, Your Honor.

14 >> MS. BUPP: Yes, Your Honor.

15 >>MR. MALSCH: Yes, Your Honor.

16 >>JUDGE MOORE: Mr. Malsch, would you
17 start, please.

18 MR. MALSCH: The State of Nevada -- Marty
19 Malsch for the State of Nevada.

20 Nevada's proposal in its Answer was to
21 proceed with discovery on safety issues associated
22 with SER Volumes I and III, and those few deeper
23 questions that are safety related associated with
24 Volumes I and III, and we could begin the discovery
25 process for those promptly after the Board issues its

1 order, which would be around October 1st.

2 And then we would proceed, following
3 completion of discovery and following issues of the
4 staff's SER on Volumes I and III, to discovery
5 against the staff, preparation for hearing and
6 hearing on those issues. And that is basically our
7 proposal to get things going with this proceeding in
8 response to question one.

9 >>JUDGE MOORE: Let's back up just a moment
10 and try to clarify something.

11 In the -- I believe it was March telephone
12 conference, in which CAB-01 had the first prehearing
13 conference with all of the parties, in response to
14 your question, Mr. Malsch, posed as to the Board's
15 enforcement of 2.1018 regarding Interrogatories, it
16 appears that, contrary to my recollection of what was
17 said, that the Board basically said, it is the
18 regulation, it must be complied with, that
19 interrogatories have been, in your thinking, taken
20 off the table.

21 It strikes me that you have all pledged in
22 the filings we've received to date to fully cooperate
23 with the exchange of information, and for that we
24 commend you.

25 That appears to have been happening, and

1 you all profess that you believe it will continue.
2 But would not the use of interrogatories serve a
3 useful purpose in helping narrow these issues in
4 getting out the views of the experts on both sides
5 before depositions?

6 I believe I can speak for the Board that
7 such motions, if cooperation does not provide it
8 voluntarily, which is the premise of the rule, that
9 the Board would look favorably upon granting such
10 motions because we believe it could be an invaluable
11 tool to helping this process along.

12 >>MR. MALSCH: Again, Marty Malsch from the
13 State of Nevada.

14 We would certainly not object to that. I
15 mean, frankly, we had thought that interrogatories
16 would be not usually useful, but they could be useful
17 and so, we certainly would not object to a provision
18 whereby there could be some interrogatories before
19 depositions.

20 I must say, I don't think we feel strongly
21 about it.

22 >>JUDGE MOORE: DOE?

23 >>MR. SCHMUTZ: Having been settled in
24 federal court discovery for about 30 years now, I'm
25 not real happy about interrogatories anyway. I mean,

1 I don't think they serve much purpose to settle
2 district court litigation, and I don't think it will
3 serve much purpose here.

4 I think that, if I'm reading -- hearing you
5 right, you're saying that the interrogatories somehow
6 will serve for expert reports, which we don't agree
7 with. The answers to those interrogatories will be
8 caveated to the point where they're not worth
9 anything until the expert's have -- until discovery's
10 been conducted and DOE's experts fully understand the
11 basis for the contentions that have been proffered.

12 And so I don't think that you would get
13 very much out of interrogatories to our experts with
14 regard to their opinions about contentions until they
15 learn more.

16 >>JUDGE MOORE: But if you jump to
17 depositions, aren't the answers going to be equally
18 qualified and equally restricted for that very same
19 reason?

20 >>MR. MALSCH: It may or may not be so. It
21 depends on the questions. A lot of the questions, I
22 would expect, for example, of our experts, will be
23 about the SER analysis, and the SER, which is,
24 indeed, what the -- the case is about and with the
25 contentions directed, I would expect that our

1 deposition questions would be directed as to learning
2 precisely what the contentions mean in the mind of
3 the experts. So, no, I don't think that's of value.

4 >>JUDGE MOORE: Staff?

5 >> MS. BUPP: Well, the staff certainly
6 appreciates that the Board is open to hearing
7 interrogatories but I agree with the other parties
8 that given the amount of informal information that
9 has already been exchanged and our commitment to
10 continue to exchange such information, they may be
11 of limited use.

12 I would also note that since discovery
13 won't be able to begin against the staff until after
14 each volume of the SER is published and under every
15 schedule, we left approximately two months for
16 discovery against the staff, interrogatories of staff
17 expert witnesses may not be practicable given the
18 time constraints.

19 >>JUDGE MOORE: Well, since the rules for
20 discovery of the staff are totally different, you
21 have a shield to most of this.

22 >> MS. BUPP: Yes.

23 >>JUDGE MOORE: Four Counties? Mr. List.

24 >>MR. LIST: Yes, Your Honor.

25 Our -- our position, I think, is as

1 follows: Our contentions are relatively few and
2 relatively simple compared to many of the more
3 scientifically-driven contentions that are -- that
4 are before you.

5 From our perspective, just on thinking of
6 our contentions alone, I don't believe that
7 interrogatories would be particularly helpful.

8 I think we -- we'd prefer in our case to go
9 straight to the deposition stage. But for the other
10 -- the other parties in more complex contentions, it
11 may very well be that they'd be well-served to
12 proceed with interrogatories.

13 >>JUDGE MOORE: Now, let's just start with
14 NCA in the back.

15 You have any comment on the first question
16 or my questions about interrogatories in response?

17 >>MR. WILLIAMS: No, sir. Thank you.

18 >>MR. LIST: Judge -- Judge Moore?

19 >>JUDGE MOORE: Yes.

20 >>MR. LIST: Over here.

21 I didn't realize you were asking for
22 comments on -- on the first question as well. I
23 thought you were addressing simply the interrogatory
24 issue.

25 If I may, on the first question, we do

1 believe that -- that we ought to proceed
2 simultaneously on the various groups of contentions
3 and as we set forth in our response, our filed
4 response, we particularly urge that the purely NEPA
5 contentions and nonsafety-related contentions ought
6 to be at the -- ought to be taken up in early stages.

7 It appears that question number one is a
8 rather generic one. And I'm prepared to address the
9 NEPA question now or at a later point in time if
10 that's your wish.

11 >>JUDGE MOORE: You raise a very
12 interesting question, Mr. List.

13 With the NEPA contentions, the three
14 Licensing Board's decision issued on May 11th,
15 found it unnecessary to address the standards which
16 would be applicable for adjudicating the NEPA
17 contentions at that time.

18 We are well aware that that question will
19 have to be addressed. We're also well aware of how
20 those NEPA questions, issues, are answered, will
21 determine and shape any litigation and any discovery
22 on those.

23 Should we jump into that at this point?

24 Mr. List, back up and repeat your answer.

25 Let's go ahead and answer Question One and then we'll

1 detour into the subquestion of NEPA.

2 So -- and we'll make sure everyone gets an
3 answer on Question One.

4 >>MR. LIST: Very well.

5 Well, we do believe that the answer to
6 Question Number One is yes.

7 >>JUDGE MOORE: Back to you, Mr. Malsch,
8 because you got detoured as well on answering
9 question one.

10 Do you want to do it, to take them all on
11 for Volumes I and III? Is that fairly stated?

12 >>MR. MALSCH: That's fairly stated. I'm
13 Marty Malsch for the State of Nevada.

14 We would propose that discovery begin this
15 fall, on safety issues associated with SER Volumes I
16 and III, and a subset of NEPA questions that are also
17 associated with safety issues in Volumes I and III.

18 Subject only to a caveat that we still have
19 to hear from the staff about their plans with respect
20 to what was to be DOE's SEIS supplement; I think it's
21 fair to say that the contentions we have related to
22 that, and the NEPA contentions we have related to
23 that are SER Volume III related kinds of contentions.
24 And so, that would be part and parcel of our
25 proposal.

1 But we need to hear from staff about what
2 its plans are first before we get very concrete about
3 those.

4 We don't see any -- any need or benefit and
5 would prefer not to proceed now with discovery and
6 then a hearing on the so-called pure NEPA contentions
7 that have no safety component.

8 >>JUDGE MOORE: Could you say that again,
9 Mr. Malsch. You don't want to proceed on pure NEPA
10 issues, is that what I heard you say?

11 >>MR. MALSCH: That -- that's correct.

12 We -- we -- and I think we have agreement
13 with some of the other parties in this as well. I
14 think these -- these contentions, these NEPA
15 contentions are, we said in response to the question,
16 ripe for discovery and litigation subject only to the
17 staff's announcing its plans with respect to the
18 groundwater questions; but that we would prefer to
19 put those off until a later stage in the proceeding
20 and that is because, from our standpoint, while we
21 think these NEPA contentions, for example,
22 transportation contentions are very important in
23 terms of full disclosure, we're also painfully aware
24 of the limitations under remedies available to us
25 under NEPA. I don't think the staff, the Commission

1 has ever denied a license on NEPA grounds, and so we
2 would prefer to concentrate our resources on what we
3 perceive to be unique and especially important
4 aspects of this proceeding, which are post-closure,
5 which are post-closure questions. And so that is the
6 basis for our proposal to procedure now on SER
7 Volumes I and III, safety and NEPA-related questions.

8 >>JUDGE MOORE: DOE?

9 MR. SCHMUTZ: Thank you, Your Honor.

10 I find myself in violent agreement with
11 Mr. Malsch on this issue.

12 We agree that we ought to limit ourselves
13 to SER Volumes I and III, those issues including
14 NEPA, that encompasses approximately 2/3rds of all
15 the contentions. From our point of view, we think
16 that's a pretty big bite. That's enough.

17 We don't see that we gain very much by
18 taking on another 40 or 50 NEPA contentions, some
19 related perhaps to Volumes I, II, IV, and V, which
20 are going to come out later, if there are any. They
21 ought to be dealt with then. I don't think they're
22 pure NEPA contentions, but precisely the reason
23 Mr. Malsch stated, ought to be put off until then.

24 But the ones that are truly related to the
25 safety issues, post-closure safety issues, we ought

1 to be addressing those now whether they're NEPA or
2 safety, they're related to SER I and III.

3 And I also agree that if a supplement comes
4 out, and they're late file contentions, that will
5 have to be dealt with, again for volumes SER I and
6 III issues, this would be groundwork primarily, that
7 those late file contentions would have to be dealt
8 with as well.

9 >>JUDGE MOORE: Staff?

10 >> MS. BUPP: As we say, in our different
11 views in Nevada's response, we agree with Nevada's
12 proposal, with a rather large caveat, that we would
13 place all of the legal contentions first, have the
14 briefings schedule on those exclusively for the first
15 few months, and then afterward, after that is
16 resolved, we would start discovery with contentions
17 related to SER Volumes I and III. We also agree with
18 Nevada and DOE that we should save the contentions
19 until after SER Volumes I and III have been dealt
20 with. We would do those with SER Volumes II, IV, and
21 V.

22 >>JUDGE RYERSON: Before we go on to the
23 other parties, I have a question for both primarily
24 Nevada and DOE on the scheduling that you propose.

25 You seem to be in agreement on a two-phase

1 process. But under the first phase, you would have
2 hearings starting less than three months after the
3 close of discovery. And in the second phase, you
4 would have hearings starting two months after the
5 close of discovery. And I wonder whether that
6 reflects some consensus on the role or lack of a role
7 for some disposition consensus after discovery?

8 >>MR. SCHMUTZ: I think it's four months,
9 but I could be wrong, at the close of discovery in
10 the first phase. Maybe it was three. I thought it
11 was four. We think four months is the right -- the
12 right period of time after the close of discovery.

13 But on the second -- I just want to make
14 our position clear, on the second schedule for I, II,
15 IV, and V, we don't want to schedule that.

16 We don't think there ought to be any
17 schedule worrying about what we're going to do on the
18 second phase. That can be taken up months from now
19 when we have a schedule for the issuance of those
20 SERs. We don't have that schedule. We want the
21 Board to have a shot at it on one point, sort of an
22 assumed schedule.

23 But we shouldn't be basing hearing
24 preparation on that. The staff is going to let us
25 know at some point when those volumes will come out

1 and we will schedule that at that time. That's our
2 view.

3 What we're going to be talking about today
4 and tomorrow, is schedule for the discovery and
5 hearing process for SER Volumes I and III.

6 >>JUDGE RYERSON: Mr. Malsch, do you have a
7 comment on setting the second stage schedule and
8 also on the rule of summary disposition?

9 >>MR. MALSCH: Marty Malsch for Nevada.
10 We are coming from behind. Our proposed schedule is
11 four months from close of discovery to the start of
12 the hearing is not -- because there was little, if
13 any, summary disposition practice in that time frame,
14 because, frankly, we think four months is ambitious
15 in terms of preparing for witnesses and actually
16 preparing for the hearing. So that was our
17 assumption. In terms of the schedule, in the out
18 years and the SER volumes, so -- I mean, we agreed
19 there's no really need to set any schedule dates at
20 this point. Among other things, we don't have any
21 firm dates for the SER Volumes, so it's all pretty
22 much guess work.

23 >>JUDGE RYERSON: Okay.

24 >>MR. SCHMUTZ: Judge Ryerson, may I answer
25 the question on some of your dispositions?

1 Just a -- we actually would probably have a
2 couple of summary disposition motions that we would
3 file but that isn't what's driving this schedule.

4 We would file those well before what -- I
5 think we would file them well before that four-month
6 period --

7 >>JUDGE RYERSON: Right.

8 >>MR. SCHMUTZ: And they're limited.

9 >>JUDGE RYERSON: But you would still want
10 the ability to file them after discovery, correct?

11 >>MR. SCHMUTZ: Yes.

12 >>JUDGE WARDWELL: How soon after discovery
13 should they be limited to because we can't handle
14 NSDs up to the point of hearing?

15 >>MR. SCHMUTZ: I don't recall what are the
16 intervals, reply intervals. Alex may be able to
17 address those.

18 But I think you would set a schedule
19 perhaps within a month of the closing of discovery of
20 any disposition motion that the parties that are
21 going to file, have to be filed. We wouldn't object
22 to that at all. I don't think we'll have any at that
23 point. It's very unlikely.

24 >>JUDGE MOORE: Have any of you given
25 thought to the lead time for filing prefile direct

1 testimony? You're talking a four-month interval
2 from the close of discovery to the start of a
3 hearing?

4 Speaking only for myself, because of the
5 way in which the scheduling will need to be done so
6 that the requisite expertise on the technical side of
7 this case with the panel -- the Boards that will --
8 from the panel that will be hearing various of these
9 groups of issues, I was always inclined to think that
10 we would -- this case would demand an exceedingly
11 long lead time on prefile direct testimony, so that
12 the Boards would have ample time to prepare as would
13 the parties, so that the hearings could be conducted
14 most efficiently and continue in that vein because it
15 will be broken into manageable numbers of contentions
16 out of this group.

17 You've given us a number and, again, I'm
18 sorry, I'll have to sort through to get your chart,
19 but the overwhelming number of contentions are on
20 Volume III --

21 >>MR. SCHMUTZ: Yes.

22 >>JUDGE MOORE: -- and it's something on
23 the order of 155, if I'm remembering correctly.

24 MR. SCHMUTZ: Not including the related
25 NEPA contentions, I think that's right.

1 JUDGE MOORE: And they cover literally, the
2 spectrum of expertise that's going to be needed in
3 this case. And of course, we have no notion at this
4 point and really won't have a firm notion until we
5 see the profile direct testimony and exhibits, as to
6 how much time -- and this will all be negotiated with
7 the parties for cross examination, et cetera, for
8 this group of contentions and the next group and the
9 next group.

10 So, once the process starts, it's going to
11 be fairly continuous, but work into that, is the lead
12 time on profile direct testimony.

13 And when you say testimony starting four
14 months after close of discovery, that's just about
15 the right amount of time that probably should be
16 needed for profile direct testimony and exhibits on a
17 sensible schedule, so that this can continue a pace.

18 >>MR. SCHMUTZ: I find myself in agreement
19 with you. The four months --

20 >>JUDGE MOORE: Let's not let that be a
21 habit.

22 MR. SCHMUTZ: I promise you it won't.
23 Mr. Silverman will be back soon, and as you know,
24 Judge Moore, he's not the most agreeable guy. I'm
25 just kidding.

1 JUDGE MOORE: And I don't know it.

2 MR. SCHMUTZ: The four months is actually
3 driven by the schedule. It's in the regulations,
4 there's going to be a four-month interval between the
5 close of discovery and the start of the hearing. I
6 mean, that's what it says. And I think all that we
7 were trying to do --

8 JUDGE MOORE: That's Appendix D, that's
9 what you're speaking to?

10 MR. SCHMUTZ: Yes.

11 JUDGE MOORE: Well, from a practical
12 matter, has not the staff rendered under Appendix D
13 by not issuing until next April five volumes of the
14 SER?

15 MR. SCHMUTZ: That may be and I don't think
16 that we are wedded to the four months if the parties
17 and the Board come to the conclusion that that's
18 unworkable, and it may very well be, I think we can
19 work out a different schedule.

20 It may be that the Board will say, we
21 can't possibly get through all that prefile testimony
22 and even if you people can file it on time to start
23 hearings in four months, it's going to be a lot of
24 stuff and it's going to be dense and hard to
25 understand in many cases, I suspect and take a great

1 deal of work. From our point of view, if the Board
2 said we ought to do prefile testimony three months
3 after that and the hearing start a couple months
4 after that, we certainly wouldn't think that was at
5 all unreasonable.

6 JUDGE MOORE: But that would be -- I think
7 we've always envisioned somewhat of a continuing
8 process, working through all 155 plus contentions.
9 And you all know from past experience that if at the
10 end of this marathon we actually want to have people
11 finishing crossing -- crossing the finishing line, we
12 will have to break it into manageable portions of
13 contentions., so that we can put before you, the
14 requisite expertise to hear those that involve
15 volcanism, those that involve seismology, those that
16 involve all of the various expertise --

17 MR. SCHMUTZ: Sure.

18 JUDGE MOORE: -- that are necessary and
19 obvious from the contentions, groupings that we have.

20 MR. SCHMUTZ: You know, it may be that for
21 purposes of where we are now, having a process that
22 gets us through discovery and a schedule for getting
23 us through discovery, at this point, might be where
24 we ought to be, get through some portion of that and
25 then begin talking later on about what the hearing

1 process is going to look at and what the dates are
2 for prefile testimony.

3 We're talking about a process that is --
4 we're now looking out, you know, a year and half. I,
5 quite frankly, half the time don't remember what I
6 did yesterday. I don't know how I'm going to
7 remember a year and a half out.

8 So I'm not sure -- perhaps we're biting off
9 more than we can chew.

10 >>JUDGE RYERSON: It was the intention of
11 the parties that there be a minimum of four months
12 between the close of discovery and the hearing,
13 correct?

14 >>MR. SCHMUTZ: That's our goal.

15 >>JUDGE RYERSON: I know you were asked to
16 try to file something quickly, but as I look at page
17 17 of Nevada's filing, unless I'm reading the chart
18 wrong, it's less than three months for the first
19 phase and two months for the second phase.

20 It says, two months after discovery ends on
21 the chart for SER Volume II. And on first phase,
22 Volume III, it's November 30, with the hearing
23 starting on February 21, which is less than three
24 months. So that was -- I mean, that was not your
25 intent. Your intent was to do at least four months,

1 I think.

2 >>MR. MALSCH: Marty Mal sch for the State
3 of Nevada.

4 I think that's right. But let me say that
5 we, as DOE had said, we felt constrained by the
6 schedule durations in Appendix D. That's really all
7 that went into it.

8 And also, we did not take account of the
9 possibility, which is probably a logical process of
10 proceeding to hearing in chunks of preclusion issues
11 rather than all at once.

12 I mean, Appendix D seems to assume, you go
13 to hearing on everything in three or four months
14 whereas, that really doesn't make a whole lot of
15 sense. And once we bifurcated into Volume I and
16 Volume III issues and other issues, since we have so
17 many contentions in Volume III, especially, it
18 probably makes sense to go to hearing in selected
19 subjects -- subsets of that and then stagger filings
20 of prefile testimony accordingly.

21 But we -- we -- I have to say, we haven't
22 given consideration to that because we felt at this
23 stage, at least, we were restrained by Appendix D.

24 >>JUDGE MOORE: The rest of the parties
25 wish to be heard on this. Let's start in the back

1 and work our way around.

2 >> MS. BUPP: Your Honor, there's something
3 else I wanted to add in response to question one.
4 It's not directly related but I think since other
5 parties have brought it up, it would be helpful if I
6 can give a little bit of information about the
7 groundwater supplement at this point.

8 As we stated in the adoption termination
9 report, as DOE's not completing the groundwater
10 supplement, we will be completing the groundwater
11 supplement. However, it is not part of our budgeted
12 resources for fiscal year 2010 and so at this point,
13 we don't have a schedule for when it will be
14 completed but it will not be completed during 2010
15 fiscal year.

16 >>JUDGE MOORE: So the earliest would be
17 sometime in 2011.

18 >> MS. BUPP: Yes, Your Honor.

19 JUDGE MOORE: And do you see any reason why
20 it can't be completed in a year?

21 >> MS. BUPP: You mean why it couldn't be
22 completed by 2011?

23 >>JUDGE MOORE: No. Regardless of when you
24 start, can it be done in a year or has the staff not
25 faced up to that?

1 >> MS. BUPP: Yes, Your Honor. Once we
2 begin, whenever that is, it could be completed within
3 a year.

4 >>JUDGE MOORE: Okay. So for planning
5 purposes, 2010 is out. Are we talking calendar or
6 fiscal?

7 >> MS. BUPP: Fiscal.

8 >>JUDGE MOORE: And then it needs to be
9 worked into the schedule for NEPA contentions
10 subsequent.

11 >> MS. BUPP: Yes, Your Honor.

12 >>JUDGE MOORE: Okay.

13 >>MR. LIST: Judge Moore, if I may, Bob
14 List. If I may go back for just a moment to the
15 discussion of the timing of the pure NEPA
16 contentions; and I think, first, that Ms. Bupp's
17 comments really lead me to suggest that it's so
18 important that these NEPA contentions, pure NEPA
19 contentions be taken up early because if in fact we
20 prevail on them, if it's determined that the
21 Environmental Impact Statement was faulty in its
22 failure to fully address properly the transportation
23 issues and the public safety and the first responder
24 issues, then it's going to be necessary to go back
25 and supplement the Environmental Impact Statement.

1 We've just heard that that process will
2 take a year. So, this becomes a pacing item. If
3 these --

4 >>JUDGE MOORE: Mr. List, if I might
5 interrupt.

6 It is intricately tied to the question,
7 essentially a legal issue, of what the standard in
8 this very unique proceeding will be for dealing with
9 NEPA issues, quick digression. In the standard
10 Commission case -- make it very clear, this is not
11 that. When there are challenges to the
12 staff-prepared environmental documents under NEPA,
13 whether it be EIS or EA, the challenges are
14 entertained in the hearing process and are -- the
15 documents are deemed amended supplemented, if you
16 will, by the hearing process and the Board's decision
17 on those.

18 So that is, in and of itself, from the
19 evidence that is presented, in and of itself, the
20 supplementation process because the NRC is the only
21 agency that permits litigation at the administrative
22 level of challenges to the validity of NEPA
23 documents.

24 That said, there -- I don't know how that
25 scheme fits in with, on one hand, of DOE, that wrote

1 the EIS on the waste policy act. The staff then
2 determines whether it's acceptable or practicable to
3 adopt. I don't know how that normal NRC scheme fits
4 in with what we have in front of us under the Waste
5 Policy Act.

6 So, your question may well be a pacing item
7 but if the normal NRC adjudicatory process for
8 addressing NEPA issues is in play, then it would not
9 -- I set that out because that's one of the issues
10 that's going to have to be decided and we're going to
11 have to get it correct and probably appealed so that
12 we're not doing it more than once.

13 >>MR. LIST: I understand -- I understand
14 the issue and the question of interpretation. As we
15 read the regulatory's framework, in the event that
16 it's determined that the Environmental Impact
17 Statement in fact failed to address certain matters,
18 as it should have, as we read it, the NRC may then
19 initiate a supplemental process, that is, that -- I
20 suppose is additive to the DOE's Environmental Impact
21 Statement.

22 And it seems to us that that's going to
23 take a considerable amount of time.

24 >>JUDGE MOORE: They might -- if the normal
25 NEPA, NRC environmental adjudicatory process held

1 they could do that through their evidence on those
2 NEPA contentions.

3 I am frank to state, and speaking only for
4 myself, I do not know in the unique circumstances of
5 this proceeding, whether those are the rules.

6 >>MR. LIST: Well, maybe that's a better --

7 >>JUDGE MOORE: And that's why I brought up
8 earlier that that's one of the issues that we need to
9 hear from the parties on, that we side-stepped it
10 deliberately in our contention admission decision but
11 we all recognize that it's lurking and must be
12 decided. And that may be an item that we need to put
13 on the agenda to at least preliminarily hear from you
14 today or tomorrow.

15 >>MR. LIST: I would just finally add that
16 if, in fact, it's determined that there has to be a
17 supplemental process to augment the Environmental
18 Impact Statement, that it does become a pacing item,
19 and if this is put off until the end of the process,
20 that finish line gets pushed out, say, 12 months.
21 And we don't want that to happen. And I should also
22 add that -- that the -- I believe that in addition to
23 the Four Counties, I believe every Nevada County
24 with the possible exception of Clark County, also
25 believes that these matters ought to be taken up

1 early.

2 Transportation is critical to the people
3 who live closest to this repository and we think that
4 special weight should be given to that.

5 >>JUDGE MOORE: Any other comments as we're
6 working around on question one?

7 Yes.

8 >>MR. ROBBINS: Alan Robbins, on behalf of
9 Clark County, Your Honor.

10 Given the discussion this morning, I think
11 it's evident that the process of schedules submitted
12 to the Board was premised on certain assumptions
13 regarding time frames, as Mr. Malsch indicated.

14 If we are no longer bound necessarily by
15 those ground rules that we assumed did govern over
16 us, perhaps with some indication from the Board as to
17 what parameters do or don't apply, it might make
18 sense of the Board going back to the drawing board
19 and take another shot at a schedule, where they may,
20 perhaps, if this is the right way to put it,
21 artificially by parameters that are not applicable.

22 And so that -- that might be a useful way
23 to proceed or for the Board to consider.

24 Second, given the submissions to date,
25 Clark County has been supportive and in agreement

1 with the basic process that the State of Nevada and
2 DOE are generally in agreement upon.

3 We have questioned, however, whether
4 there's really a need to start immediately, given the
5 status of the SER publications.

6 We have a concern, however, about Staff's
7 proposal of deferring discovery and litigation on the
8 safety contentions, in favor of briefing various
9 legal issues. And our principle concern with that is
10 because if we understand it correctly, that
11 four-month period or so that Staff would allot to
12 briefing, would lead into the discovery period
13 otherwise available rather than just push it back.
14 And there's too much to be done to eroding what we
15 think is already too limited a time as it is, and
16 therefore, not supportive of Staff's proposal in that
17 respect.

18 Finally, Your Honors, on the question of
19 interrogatories, we think they are or can be useful
20 devices.

21 I know I prefer not to go into depositions
22 any blinder than necessary and sometimes
23 interrogatories serve somethings, a flashlights to
24 guide the way a little bit before you get in there
25 and you find out that you're asking your questions to

1 the wrong person or, you know, not as well focused as
2 you might have otherwise been if you were given some
3 preliminary information. And given the informal
4 cooperation that we understand has been occurring and
5 all parties continue to profess to, why then should
6 there be any concern about possible use of
7 interrogatories if a party considers them useful
8 under certain circumstances. And we will support
9 that.

10 >>JUDGE MOORE: Inyo County?

11 >>MR. JAMES: Yes, Your Honor, Greg James,
12 Inyo County.

13 Inyo County is basically in agreement with
14 the State of Nevada and DOE's general timing, and we
15 concur with Clark County that if there's going to be
16 hearings on the legal contentions first, it should
17 not shorten the time for the discovery on the ety
18 contentions.

19 And concerning the interrogatories, it --
20 just is a suggestion, it seems like the expert
21 statements and information is going to be exchanged,
22 should be clarified before a decision is made on
23 interrogatories. If there's a small amount of
24 information going to be exchanged, interrogatories
25 may play a very important part in preparing for

1 depositions. On the other hand, if a significant
2 amount of information is exchanged about positions
3 and references and whatnot, it may eliminate some of
4 the need for extensive interrogatory process.

5 >>JUDGE MOORE: JTS?

6 >>MR. POLAND: Thank you, Your Honor.

7 We made a filing last week on Friday where
8 we largely adopted what Nevada had set out. We do
9 have one separate issue, however, and that is, that
10 we have a number of contentions that potentially fall
11 within a couple of the different SER volumes, Volume
12 III and IV. Those apparently, from what the NRC
13 staff has told us, are on different timing tracks.
14 We'd certainly be happy to proceed starting out,
15 having those four contentions go ahead with discovery
16 with Volume III. But our ability then to switch
17 those into the Volume IV SER discovery hearing track,
18 really depends on when that SER Volume IV would be
19 released.

20 We also have contentions that are affected
21 by what would happen with groundwater and what the
22 NRC staff would do with the additional report that
23 the DOE has submitted. And so I do think that the
24 timing at least as to a number of our contentions is
25 affected by the time that the NRC staff is going to

1 release them.

2 As far as the interrogatory issue is
3 concerned, we're not opposed at all to
4 interrogatories, pretty much agree with the
5 statements of the counsel for Inyo County.

6 >>JUDGE MOORE: Thank you.

7 White Pine?

8 >>MR. SEARS: Thank you, Your Honor.

9 White Pine has agreed with Nevada with
10 respect to the --

11 >>JUDGE MOORE: I'm sorry. JTS, sorry.

12 No, wait a minute. No, I'm sorry. Go
13 ahead, White Pine.

14 I keep confusing when we joined the groups.

15 >>MR. SEARS: That's all right, Your Honor.

16 I'm the old gray one over here. We have agreed with
17 Option One as set forth by the State of Nevada, but
18 we have substantial interest in the answer to the
19 subquestion that you posed earlier because our
20 contention straddles Volume III and NEPA in that we
21 are very concerned about the effect on the general
22 environment in our NEPA contention. And so, we are
23 going to be very interested in the answer to that
24 subquestion and would like an opportunity to
25 participate.

1 JUDGE MOORE: Lincoln County?

2 MR. WHIPPLE: Good morning, Judge Moore.
3 Brett Whipple on behalf of Lincoln County. Judge
4 Moore, Lincoln County places a priority on the NEPA
5 issues, and so we join our counties in that -- in
6 that concern. We are concerned that Lincoln County
7 is in the race of the finish line that some of these
8 NEPA issues may be pushed aside, or not, given the
9 full concern, the full issue that we believe we
10 deserve.

11 With regard to the interrogatories, we have
12 no position.

13 >>JUDGE MOORE: Okay, thank you.

14 NRC staff?

15 Yes.

16 MR. DANIEL: Excuse me, Your Honor. Jeff
17 Daniel on behalf of Nye County. I think somehow we
18 got missed in the laundry list of -- in the --

19 JUDGE MOORE: I apologize.

20 MR. DANIEL: Completely okay given how many
21 people are going to be discussing issues this
22 morning.

23 For the Board's benefit, we did -- Nye
24 County did file our own separate and different view
25 with respect to question number one. And it's our

1 opinion that we are in general agreement with the NRC
2 staff, but we differ slightly from what schedule they
3 are offering in that we do believe you can commence
4 some of the briefing earlier, given the fact that --
5 or discovery earlier, given the fact that there's
6 going to be a lag between the time you actually
7 notice depositions and you actually start taking
8 those depositions.

9 We also have in our filings, subdivided the
10 NEPA contentions into three categories that we
11 believe will facilitate and make it more efficient in
12 handling those NEPA contentions, some of which have
13 purely -- what we consider to be purely legal issues
14 and those we believe could be handled upfront.

15 For example, the discussion of res
16 judicata, collateral estoppel issue, conclusion that
17 came up during the earlier prehearing conference with
18 respect to some of those contentions.

19 JUDGE MOORE: What is the advantage of
20 briefing all of the legal issues recognizing that
21 Volumes II, IV, and V, of the SER of which more than
22 half of those legal issues are tied to, are somewhere
23 out in the galaxy?

24 And frankly, we don't know whether they
25 have fuel to ever get home.

1 >>MR. VAN NIEL: Your Honor, to the extent
2 that the Board makes that decision, then we are, NYE
3 County is fine with just briefing the legal
4 contentions that relate to Volumes I and III.

5 JUDGE MOORE: And again, I apologize for
6 overlooking Nye County.

7 Mr. List, you've already spoken. That puts
8 us at California.

9 MR. SULLIVAN: Thank you, Your Honor. Tim
10 Sullivan for California.

11 I'd like to address why we think that the
12 pure NEPA contentions should not be done in the first
13 phase.

14 In general, we agree with Nevada, as we
15 said in our pleading, we agree with Option Two which
16 would create --

17 JUDGE MOORE: Let's interrupt. Where are
18 you with DOE and your -- what sounds like a stand
19 alone agreement, to have all of California -- I'm
20 assuming you were speaking in DOE's favor, for
21 speaking solely to the California NEPA contentions,
22 and have them adjudicated with their counterpart
23 safety issues?

24 MR. SULLIVAN: Yes, Your Honor, I should
25 explain that.

1 DOE and California were discussing a motion
2 that would schedule all of the pure NEPA contentions
3 at the end, after all safety issues were --

4 >>JUDGE MOORE: Are you speaking of just
5 California's or all parties, NEPA contentions?

6 MR. SULLIVAN: We're speaking of all
7 parties. However, California and DOE decided that we
8 would join in Nevada's Option 2 in lieu of filing
9 our motion.

10 So California and DOE are not going to be
11 filing a scheduling motion. Instead, we think that
12 Option 2 accomplishes what we were intending.

13 JUDGE MOORE: Okay. Please -- please go
14 ahead.

15 MR. SULLIVAN: The reason that we don't
16 think that the pure NEPA issue should come first is
17 that there's no good reason to do them first. The
18 parties are going to be busy enough handling the
19 Volume I and Volume III issues.

20 And we, I think, have to come to terms with
21 the fact that there are resource constraints on all
22 of the parties, especially Staff, which are out of
23 Staff's control, but do effect what we can get
24 accomplished in this room.

25 So I think it makes sense to triage the

1 issues that we're going to tackle in this case.

2 The pure NEPA issues, that are 44
3 contentions that will fall into that category as not
4 being related to safety, of those, 38 are
5 transportation specific, and the other 6 are
6 socioeconomic and cultural. So when we're talking
7 about pure NEPA contentions, what we're really
8 talking about, for the most part, is transportation
9 contentions and whether not those should be done in
10 the first phase. And our position is that they are
11 not necessary to litigate in the first phase.

12 They're not related to repository design.
13 They're not related to safety of the repository,
14 integrity of the repository. And they're not going
15 to give us any information about other repositories
16 that might be built sometime in the future, on that
17 level.

18 They talk about procedural failings. So I
19 don't think that they are a priority for doing first.

20 I don't think that resolving those
21 transportation NEPA contentions is going to determine
22 whether or not the Nuclear Waste Policy Act schedule
23 is met by this Board.

24 I think that's going to be determined based
25 on the resources of the parties, especially DOE and

1 NRC, which is out of everyone's control. The --

2 >>JUDGE MOORE: Let me ask: This goes back
3 to the question and the exchange that Mr. List and I
4 had.

5 We have to face up to how NEPA contentions
6 in this unique proceeding will be adjudicated and
7 what, if any, kind of additional supplementation
8 other than what comes out of the adjudicatory process
9 is necessary.

10 Those, what you call pure NEPA contentions,
11 raise that issue and would provide the vehicle for
12 resolving that issue and at least resolving it as far
13 as getting an appeal to the Commission with real
14 contentions, real facts, real records in front of
15 them for decision. Should they disagree with any
16 unlikely event, that they should disagree with our
17 correct analysis of what -- of that issue.

18 Doesn't that give it a very attractive
19 added set of points for at least taking a subset of
20 those and hearing them as quickly as possible so that
21 all the other NEPA contentions can then follow suit
22 and so we'll know how to deal with them if we got it
23 wildly wrong?

24 MR. SULLIVAN: I agree that the standard to
25 be applied and who needs to supplement and what part

1 of the process supplementation needs to be done and
2 whether it's public comment required, but these are
3 -- these are all issues that would need to be
4 resolved ultimately in this case.

5 There are lots of legal issues that are
6 going to need to be resolved in this case. I just
7 don't see that the standard of NEPA adjudication in
8 this case as being something of paramount importance
9 that should be done first.

10 JUDGE MOORE: Okay.

11 MR. SULLIVAN: I mean, our position is, if
12 this proceeding at some point is going to be
13 suspended for lack of resources, that we don't want
14 to spend the money over the next two years dealing
15 with these issues if we don't need to.

16 A lot of the other parties here are -- have
17 funding for fiscal year 2010, so they may not -- they
18 may not care when these NEPA issues are done, but we
19 do care.

20 And I would also note that of the 44
21 transportation or pure NEPA contention issues, the
22 parties that want to put them off to the second phase
23 have -- are proponents for 41 of those. And the
24 parties who want to do those NEPA contentions right
25 now, introduced three of those contentions.

1 On the interrogatory issue, I tend to
2 agree with Mr. Schmutz that, as a general matter,
3 interrogatories don't get you very far.

4 I think that if there were specific narrow
5 issues that the parties were dealing with, they might
6 be more useful.

7 JUDGE MOORE: How about the caveat under
8 2.12.18, subpart J, unique to this proceeding, for
9 interrogatories, where the Board's permission is
10 required for interrogatories, the preface is that the
11 parties are to work out the exchange of information
12 themselves and only if it fails would you request
13 permission to use interrogatories? We have every
14 indication that all the parties are willing to
15 voluntarily exchange as much information as needed,
16 and what I had in mind was when that process of
17 volunteering the information breaks down, for
18 whatever reason, is that not a way to remedy that,
19 that might be useful -- as opposed to blanket
20 interrogatories and the typical interrogatory answers
21 that don't give you the information that you're
22 seeking 'til the third set when you have eliminated
23 every other possibility.

24 But because of the parties willingness to
25 cooperate and the premise 1018, it struck -- it's

1 possibly a useful tool that only in rare instances,
2 if you're all going to cooperate and turn over, what
3 would be standard in litigation, the type of
4 information that you'd all be entitled to, that the
5 Board would entertain favorably interrogatory motions
6 to get that information.

7 MR. SULLIVAN: I don't see any problem with
8 that approach.

9 What I was thinking of was -- specifically
10 was dealing with experts, expert disclosures and
11 preparing for depositions. I think that
12 interrogatories are -- will be a somewhat clumsy way
13 of getting at the expert's opinions and wouldn't
14 really be substantive, it's more along the lines of a
15 statement of opinions or supported bases.

16 If we're doing interrogatories on experts,
17 my first set of interrogatories would say, for each
18 of your experts, state the experts' opinions, state
19 the bases of that opinion, describe each document
20 that the expert relied on, and that's a much more
21 cumbersome way of doing that than us just all
22 agreeing that that's the kind of exchange we're going
23 to have on experts.

24 >>JUDGE MOORE: Well, that's what I had in
25 mind because of your willingness to cooperate and

1 that's the premise of 2.1018 and subpart J.

2 NEI?

3 >>MR. BAUSER: NEI filed a joint response
4 with the Department of Energy to the 23 questions and
5 agrees with NEI and with DOE with respect to question
6 one. But we also agree with DOE with respect to
7 interrogatories.

8 Finally, recalling the Chairman's
9 admonition this morning, NEI is somewhat concerned we
10 might be heading for hearings outside in the
11 courtyard this afternoon and we are hoping we're not.

12 >>JUDGE WARDWELL: In the last dialogue
13 with Mr. Sullivan from California, Judge Moore
14 alluded to a broad definition of a pure NEPA
15 contention and I think I would like to explore that a
16 little bit. I need some help in understanding that.

17 And maybe I'll start with the staff on
18 this.

19 Have you used that phrase, and, if so,
20 what's your definition of this?

21 >> MS. BUPP: I believe other parties
22 actually coined the phrase, and since it's been
23 coined, we've been using it internally. And our
24 definition is a contention raised under NEPA that is
25 not related to SER and is not related to the

1 groundwater supplement.

2 >>JUDGE WARDWELL: And for future
3 expeditious use of time, I think as we move forward,
4 I think we all can agree that we don't have to caveat
5 the groundwater issues. Those are going to be a
6 supplement. That's going to be handled completely
7 separate once that's issued.

8 >> MS. BUPP: Yes.

9 >>JUDGE WARDWELL: So, let's talk only
10 about those NEPA contentions. When we use the phrase
11 from here on in, I think it would be faster if we
12 just use the phrase NEPA contentions recognizing we
13 all kind of eliminate those that deal with the
14 groundwater issues and we'll handle by a supplement.

15 Why aren't all the NEPA contentions,
16 exclusive to the undwater, which I don't want to use
17 that phrase anymore, not stand alone as they are?

18 You, the staff has adopted DOE's FEIS.
19 They've done it prior to issuing and doing the safety
20 analysis. Can't those be litigated on their own, and
21 should they not be litigated on their own, regardless
22 of when they are litigated. But shouldn't that be --
23 shouldn't they be litigated on their own exclusive of
24 the SER because the decisions were reached without
25 that information?

1 >> MS. BUPP: It's true that the decisions
2 in the EIS were reached without the information from
3 the SER. However, from a hearing standpoint, because
4 some of the contentions are very similar as being
5 raised in safety space and FEIS space, from sort of a
6 practical standpoint and an efficiency standpoint,
7 they're -- on the subject matter, they would
8 presumably involve similar if not the same experts
9 and so it does seem from an efficiency standpoint to
10 make sense to tie the SER and the NEPA contentions
11 that are related to the SER together.

12 JUDGE WARDWELL: Doesn't that run the risk
13 though of entering in evidence that wasn't used in
14 your adoption of the FEIS that had been generated
15 later on during the SER preparation?

16 >> MS. BUPP: I think that we would still
17 have to have separate hearings or at least separate
18 sessions of hearings of the contentions because they
19 do require different evidence. However, in terms of
20 bringing witnesses to hearings, bringing witnesses to
21 depositions, to make sure that witnesses don't have
22 to be deposed multiple times, make sure that the
23 hearings can be scheduled conveniently for them, it
24 would make sense just from a scheduling standpoint,
25 not from an evidence standpoint, to tie those issues

1 together.

2 >>JUDGE WARDWELL: DOE, would you like to
3 respond to some of the questions I've raised that
4 comes from the definition of pure NEPA.

5 >>MR. SCHMUTZ: Sure. I -- frankly, I
6 agree with the definition as it's been used here. I
7 think we're just talking about the NEPA contentions
8 that aren't related to SER, any SER, let me put it
9 that way, and we're talking about transportation, is
10 the best example of that.

11 So, I -- I -- that's what I understand, we
12 haven't used that phrase, I don't believe, but that's
13 what I understand it to mean, and I agree with it.
14 If that's what it means, you know, that's fine;
15 doesn't cause me any problem.

16 >>JUDGE WARDWELL: But the connotations
17 are, with that definition is that they can now be, if
18 people desire to, to be litigated at this point in
19 time.

20 And the heart of my question is, why aren't
21 all NEPA conditions -- contentions suitable for
22 litigation at this time because a decision has been
23 reached by the staff and DOE in regards to the NEPA
24 issues.

25 >>MR. SCHMUTZ: Sure. I think, Your Honor,

1 it comes from -- stems from DOE. I think it's
2 precisely what Ms. Bupp says, it's an efficiency
3 issue.

4 What will happen will be there are
5 contentions. For example, there are contentions,
6 volcanic contentions that are NEPA contentions. They
7 are quite similar to some safety contentions.

8 The analysis to defeat those may not be in
9 the NEPA documents we have because they -- we did a
10 different type of analysis. We are going to explain
11 why the analysis that's being used is wrong. That
12 will be different evidence than is in the EIS, of
13 course it will, as it would be in any hearing on the
14 EIS and before this agency. You know, we're entitled
15 to show that the analysis that's being taught is
16 wrong and that the analysis in the EIS is correct.

17 That would -- may very well involve
18 different evidence. There's no reason not to have it
19 in. We have the same experts, we have similar safety
20 contentions that are volcanic. We ought to get them
21 all on together. I, frankly, don't agree with Ms.
22 Bupp that we have kind of separate NEPA panels for
23 those. If we have a panel, it's going to address a
24 variety or a large group of volcanic contentions, we
25 ought to get it done, put them on, put their evidence

1 on, address the contentions, make your case and move
2 to the next group.

3 >>JUDGE WARDWELL: And you see no danger in
4 entering evidence that was generated during the
5 preparation of the SER into discussions associated
6 with evaluating the NEPA contentions.

7 >>MR. SCHMUTZ: No, I don't. And as a
8 matter of fact, I mean, from the Department of
9 Energy's point of view, much of the evidence that we
10 used is in the SAR. I mean, we are -- our EIS wasn't
11 prepared in a vacuum. There's analyses in our SAR,
12 that's going to be litigated, that was used to
13 develop the analysis in the EIS, and we have the same
14 experts.

15 So from our point of view, it makes
16 eminently good sense to put all that on at the same
17 time.

18 JUDGE WARDWELL: So you would agree that in
19 fact the existing NEPA contentions could move forward
20 at this point in time, separate from any efficiencies
21 that may or may not occur.

22 We have all the information we need.

23 MR. SCHMUTZ: There's no technical barrier.

24 JUDGE WARDWELL: There's no technical
25 barrier to proceed with the NEPA contentions.

1 MR. SCHMUTZ: No.

2 JUDGE WARDWELL: So we'll allude that these
3 other pure NEPA contentions are somewhat different is
4 really a -- a artificial line from a technical
5 evidence type of standpoint.

6 MR. SCHMUTZ: No, I wouldn't say that at
7 all. I think there's evidence that --

8 JUDGE WARDWELL: Why?

9 MR. SCHMUTZ: I would say that it's related
10 to the -- they are related intimately and
11 inextricably related, for example, to the SER Volume
12 I issues and the SER Volume III issues, what will be
13 in that, and are included from the analysis that
14 supports them included in our SAR.

15 JUDGE WARDWELL: Well, how can you
16 relate --

17 MR. SCHMUTZ: That is not true. They are
18 not related. Those are transportation issues are not
19 related to that.

20 JUDGE WARDWELL: But how can they be
21 related to what the information in the SER is because
22 that hasn't been issued yet and a decision's been
23 reached on the EIS?

24 MR. SCHMUTZ: We know, for example, right
25 now that the SER is going to take on volcanic issues.

1 It's a very large issue in this case, and these
2 issues are big.

3 We have safety contentions that are out
4 there, and we have NEPA contentions that are very
5 similar that are out there, that it's inconceivable
6 that they will not be dealt with in the SER.

7 I don't know how else to answer that
8 question. That's what I think is going to happen.

9 You could say the same thing about any of
10 the safety contentions. How do you know the SER is
11 even going to address any of those safety
12 contentions?

13 I mean, we haven't seen the document.

14 JUDGE WARDWELL: Oh, yeah. Yeah. It's not
15 that I believe that they will issue it. What I'm
16 concerned about is, is that it may reach or augment
17 information in the SER through the regulatory process
18 of RAIs, et cetera, that will be in the SER that
19 will reach and be the basis for a conclusion of the
20 safety evaluation that they must perform, that was
21 not considered in the NEPA issue.

22 MR. SCHMUTZ: Well, if under NEPA there's a
23 different -- if we go outside of the process, and
24 determination is made that supplementation is needed,
25 then you supplement that evidence.

1 I mean, if that's the -- if the conclusion
2 is that the EIS is inadequate for that reason, it has
3 to be supplemented.

4 JUDGE WARDWELL: Thank you.

5 Nevada?

6 MR. MALSCH: Marty Malsch, the State of
7 Nevada.

8 We agree with the staff's definition of a
9 pure NEPA question. And just to give you an example
10 of a NEPA contention that is not a pure NEPA
11 contention, we have Nevada safety -- Nevada -- NEPA
12 23 that deals with airplane crashes on the aging
13 facility. And a major piece of the litigation of
14 that contention would involve the probability of an
15 airplane crash, which is in turn a subject of a
16 collection of pure safety contention.

17 So, more simply, it makes sense to litigate
18 that particular NEPA contention so -- along with
19 contentions associated with SER Volume II. There
20 is -- there is a very substantial overlap. In fact,
21 we have the contention that actually expresses that
22 concept that there is the overlap and that is for a
23 huge part of the entire environmental impact
24 statement, the assessment of environmental impact is
25 dependent upon a total system performance assessment.

1 It was a performance assessment that
2 predated the license application, but basically it's
3 the same concept. So there you have an absolute
4 overlap between a large part of the DOE environmental
5 impact statement and the SAR. So there is that
6 overlap and we have to deal with it.

7 I think that it is a little odd that the
8 staff found it -- was able to adopt large parts of
9 the DOE environmental impact statement, including
10 those parts that deal with post-closure impacts prior
11 to completion of its safety evaluation on those same
12 impacts. I can't -- frankly, I cannot explain that
13 position of the staff. I think that that's an oddity
14 associated with the staff's position in this
15 proceeding.

16 JUDGE WARDWELL: Do all of your -- I'm
17 sorry, strike that. I was thinking of a
18 subparagraph.

19 Thank you.

20 Other parties.

21 MR. ANDERSON: Your Honor, Bob Anderson
22 from NYE County.

23 JUDGE WARDWELL: Yes.

24 MR. ANDERSON: I would back up to what
25 Judge Moore said at the beginning, is this is a

1 proceeding that's relatively unique. I've been
2 litigating these issues 30-some years and this is
3 certainly a unique setting of -- set of circumstances
4 for which the setting of down of standards and
5 process is -- is extremely important in the
6 expeditious resolution of those issues. But I might
7 suggest in response to your question that a better
8 way to look at this, whether the pure NEPA or other
9 NEPA, are NEPA questions that require discovery and
10 NEPA questions which do not.

11 And in that regard, I think we agree with
12 perhaps no one, but would suggest that the record has
13 been set on certain issues, such as transportation,
14 and it's ripe for adjudication without further
15 discovery. And we think that that's the better way
16 to look at it.

17 Separate NEPA contentions into those which
18 should be deferred until the appropriate SER is
19 issued and go forward with the contentions that are
20 related, as we do the safety contentions, in that
21 regard, recognizing that they believe there's
22 discovery that needs to be had and it will be crossed
23 over in discovery, such as with the ground water.
24 And those NEPA contentions that are ripe for
25 adjudication, because we believe they're unrelated to

1 any SER and they're ripe for adjudication based on
2 the record.

3 And perhaps a third party -- third group
4 that has been discussed principally in the private,
5 the four of them, counsels, that's ones where there's
6 litigation ongoing where the deferral makes sense
7 where the litigation might be dispositive of the NEPA
8 contention.

9 JUDGE WARDWELL: I understand the arguments
10 brought up in regards to efficiencies of the hearing
11 and that's still a valid input parameter in my mind
12 in regards to citing the schedules and moving
13 forward.

14 Your arguments seem to say to me that it
15 supports the concept, if you will, that NEPA could
16 proceed at this time because we could -- the issue of
17 whether a NEPA requires discovery or not is not
18 really the question. Those -- if those that do
19 require discovery, those could proceed ahead, and
20 there are no applicable SERs that are required for
21 litigating the NEPA issues because the NEPA issue has
22 been decided and there is no SER out there. So any
23 discovery would not need to start looking into the
24 SER for a NEPA issue.

25 Isn't that a reasonable conclusion to

1 reach?

2 MR. ANDERSON: I think that's a better way
3 of saying what we said in our filings.

4 JUDGE WARDWELL: Rather than go around the
5 room, would anyone else like to respond to this
6 issue?

7 Thanks for your input.

8 Yes. California, Mr. Sullivan.

9 MR. SULLIVAN: Your Honor, we would, I
10 think, have a strong disagreement on which pure NEPA
11 contentions require discovery and which ones don't.

12 It seems to us that all of our
13 transportation contentions would require discovery,
14 so I think that -- that would be a threshold
15 difference between California and NYE County.

16 JUDGE WARDWELL: Anyone else?

17 Thank you for that.

18 Next.

19 >>JUDGE RYERSON: Right. On questions two
20 through -- through five, inclusive, I think we can
21 probably handle these as a group and just ask if any
22 party has anything that they really want to add in
23 addition to what has appeared in the filings thus
24 far.

25 And again, if we can start with Nevada.

1 Mr. Mal sch.

2 >>MR. MALSCH: Marty Mal sch, State of
3 Nevada.

4 No, at thi s point we have nothing to add
5 beyond what we' ve said in our filing.

6 >>JUDGE RYERSON: Okay. DOE?

7 MR. SCHMUTZ: We think our filing is
8 adequate. It' s fine.

9 JUDGE MOORE: And the staff.

10 >> MS. BUPP: The staff has nothing to add
11 on these questi ons.

12 JUDGE RYERSON: Okay. Does anyone el se?
13 Just raise your hand if you have anythi ng -- if you
14 have anythi ng on those contenti ons -- or rather,
15 those questi ons.

16 Yes, Mr. Sul l i van?

17 MR. SULLI VAN: We' re addressi ng questi ons
18 four through fi ve at thi s poi nt al so?

19 JUDGE RYERSON: Four through fi ve, yes.
20 Two through fi ve.

21 MR. SULLI VAN: Two through fi ve. Two
22 through fi ve.

23 On four and fi ve, Cal i forni a' s taken the
24 posi ti on that there shoul d be li mi ts on the number of
25 deposi ti ons of non-testi fyi ng wi tnesses al ong the

1 lines of what was proposed a couple of months ago in
2 the proposed joint discovery schedule.

3 And that's primarily on the basis of, we
4 don't have a lot of depositions we would like to take
5 of non-testifying witnesses. And we don't -- we've
6 got a big state, and we don't feel like having to
7 defend 50 depositions that we don't think are
8 particularly relevant of non-testifying witnesses.

9 JUDGE RYERSON: Would you agree it's a
10 little difficult to predict the exact number of
11 appropriate depositions at this stage? I mean, can't
12 we rely on the good faith of counsel to -- to try to
13 be reasonable on that?

14 MR. SULLIVAN: I -- I would agree that it's
15 very hard to predict at this point, and I hope that
16 everyone would notice depositions in good faith.

17 JUDGE RYERSON: Hearing no other comments.

18 JUDGE MOORE: I think this is a good time
19 for a brief break.

20 We -- it is now 10:30.

21 We will reconvene precisely at 10:45.

22 We stand in recess.

23 (recess held from 10:30 A.M. to 10:45 A.M.)

24 JUDGE MOORE: We're on the record and we'll
25 proceed.

1 Let's turn to Question Six.

2 Do any of the parties have anything to add
3 in addition to their filings last week on question
4 six?

5 Starting with Mr. Malsch.

6 MR. MALSCH: Judge Moore, this is Marty
7 Malsch with the State of Nevada; we have nothing to
8 add.

9 MR. SCHMUTZ: Your Honor, this is Tom
10 Schmutz. We have nothing to add to our papers.

11 >> MS. BUPP: Your Honor, this is Margaret
12 Bupp from the NRC staff. We have nothing to add.

13 JUDGE MOORE: Mr. List?

14 MR. LIST: Nothing to add, Your Honor.

15 JUDGE MOORE: Back in the corner with NCA.

16 MR. WILLIAMS: Your Honor, for the sake of
17 efficiency, our suggestion is -- is this: We've
18 joined with Nevada in its proposals to the Boards and
19 we will be spare with our comments today.

20 If we have something to add, we will do
21 whatever it takes to get your attention and we will
22 add it.

23 JUDGE MOORE: Thank you.

24 MR. WILLIAMS: Thank you.

25 JUDGE MOORE: NYE County?

1 MR. VAN NIEL: Jeff Van Niel on behalf of
2 Nye County, Your Honor. Nye County has joined with
3 the proposal from DOE on this question.

4 JUDGE MOORE: Clark County.

5 MR. ROBBINS: We'd like -- Alan Robbins,
6 I'm sorry.

7 We likewise join in the State's proposal
8 and have nothing to add. Thank you.

9 JUDGE MOORE: Inyo.

10 MR. JAMES: Yes, Your Honor. Greg James
11 for Inyo County. Inyo County also joined in Nevada's
12 proposal and have nothing further.

13 JUDGE MOORE: JTS?

14 MS. HOUCK: Darci e Houck for JTS, and we
15 also joined with Nevada's proposal and also have
16 nothing further to add to number six.

17 JUDGE MOORE: White Pine?

18 MR. SEARS: Sears, White Pine County. We
19 join the State of Nevada.

20 >>JUDGE MOORE: And Lincoln County?

21 >>MR. WHIPPLE: We joined with Nevada.

22 >>JUDGE MOORE: California?

23 >>MR. SULLIVAN: We also joined Nevada. We
24 have nothing to add.

25 >>JUDGE MOORE: And Eureka County, I have

1 been forgetful .

2 Have you anything on the questions one
3 through six now that you would like to add,
4 Ms. Curran?

5 >>MS. CURRAN: Eureka County has nothing to
6 add.

7 >>JUDGE MOORE: Thank you.

8 Moving on to seven, if not, what time
9 limits do the parties now propose? That one is wide
10 open in light of things that were earlier said, but,
11 Mr. Malsch, for State of Nevada, do you have anything
12 different from what is in your paper at this point?

13 >>MR. MALSCH: No, Judge Moore, we do not.

14 >>JUDGE MOORE: DOE?

15 >>MR. SCHMUTZ: This is Tom Schmutz. No,
16 we do not, Your Honor.

17 >>JUDGE MOORE: The staff?

18 >> MS. BUPP: No, we do not, Your Honor.

19 >>JUDGE MOORE: Mr. List?

20 >>MR. LIST: No, Honor, we do not.

21 JUDGE MOORE: Do any of the other counties
22 or parties? (No response)

23 Moving on to eight.

24 You have expressed differing views in the
25 filings.

1 Mr. Malsch, do you have anything in
2 addition to what you've already stated in your
3 filings?

4 >>MR. MALSCH: No, Judge Moore, we would
5 not.

6 I would just add that -- that, you know,
7 with unknown dates for the outlier SER Volumes, to
8 some extent this is -- this is a theoretical
9 question.

10 >>JUDGE MOORE: We understand.

11 How burdensome is it going to be on any and
12 all of you to have -- be in the situation of having
13 to have some of your experts deposed more than once?

14 Because, frankly, the situation we find
15 ourselves in, I think that's a given.

16 >>MR. BAUSER: Excuse me, Judge Moore.

17 >>JUDGE MOORE: Yes.

18 >>MR. BAUSER: Mike Bauser from NEI. From
19 our own perspective, there is clearly additional
20 burden for having an individual deposed more than
21 once, particularly with respect to some parties and
22 their resource constraints. But having said that --
23 and these are real. But having said that, we have
24 joined with -- with DOE in answering this question
25 and we agree with their deposition as well as that of

1 Nevada.

2 >>JUDGE MOORE: Thank you.

3 DOE?

4 >>MR. SCHMUTZ: We have -- we have nothing
5 to add to what's already been said.

6 >>JUDGE MOORE: Staff?

7 >> MS. BUPP: We have nothing to add.

8 JUDGE MOORE: Mr. List?

9 MR. LIST: Nothing to add, Your Honor.

10 JUDGE MOORE: Do any of the other counties,
11 governmental entities wish to add anything further?

12 (No response)

13 Then let's move on to Question 9.

14 Both of these have essentially just been
15 answered by you unless I've missed something. Do any
16 of you wish to speak to those questions?

17 If not, we'll move on to Question 11.

18 In light of what's in your filings starting
19 with the State of Nevada, Mr. Malsch, do have you
20 anything you'd like to add?

21 MR. MALSCH: No, Judge Moore. We think our
22 position is pretty well spelled out in the answers to
23 the Board's questions.

24 JUDGE MOORE: DOE?

25 MR. SCHMUTZ: No, we have nothing to add,

1 Your Honor. We also think our position is well
2 spelled out.

3 JUDGE RYERSON: I have a question for DOE
4 about your position, though.

5 You made the point that depositions can't
6 be really meaningful of DOE witnesses until, I take
7 it, the witnesses see prefiled testimony.

8 MR. SCHMUTZ: No.

9 JUDGE RYERSON: No, okay.

10 MR. SCHMUTZ: I don't think I said that. I
11 never would have --

12 JUDGE RYERSON: By your point, I mean --

13 MR. SCHMUTZ: I didn't say that.

14 JUDGE RYERSON: You're not -- you're not
15 proposing that DOE witnesses not be deposed until
16 there's pre-filings? All right.

17 MR. SCHMUTZ: No.

18 No, what we said was, there was a
19 sequencing issue of who would be deposed first.
20 Not -- having nothing to do with expert reports.

21 And what we said was, we don't think that
22 the -- that a good -- a strong argument could be made
23 that DOE witnesses -- experts should be deposed
24 first.

25 We made a stronger argument that it should

1 be made, although we don't even agree with that, that
2 interview witnesses should be deposed first so our
3 DOE experts understand the contentions. They, after
4 all, know what they're contentions are about. We'd
5 like to know about them and then draw conclusions
6 based on those depositions. But none of it has ever
7 been context with reports, no?

8 JUDGE MOORE: Staff?

9 >> MS. BUPP: Are we still on Question 11?

10 JUDGE MOORE: Yes.

11 >> MS. BUPP: Okay. Questions 11 and 12
12 are quite closely related and I think the staff's
13 position is laid out in its pleading, unless the
14 Board had any questions.

15 JUDGE MOORE: Thank you.

16 Mr. List?

17 MR. LIST: Your Honor, we had indicated in
18 response to Question 11 that it might be make more
19 sense to follow the federal rules of civil procedure.

20 I've had second thoughts about that, and we
21 certainly do feel strongly about it. It may in fact
22 be excessive to require that kind of advanced
23 disclosure.

24 JUDGE MOORE: Thank you.

25 Any other parties wish to be heard?

1 Let's move on, in spite of what I just
2 said, to 12, just for completeness sake.

3 You've all stated a position in your
4 written filings and joined your filings.

5 Anyone have anything to add?

6 Mr. Malsch?

7 MR. MALSCH: Just one thing, Judge Moore.
8 I just wanted to point out that we had make a point
9 that we wanted the DOE witnesses to be deposed first,
10 because, in many instances, we weren't exactly sure
11 what their position was based upon the documents that
12 have been filed so far, whereas from Nevada, it was
13 very clear, because our intentions are very specific.

14 I still think it is true that, for DOE and
15 Staff to file an expert report with DOE would greatly
16 expedite the deposition process, because we have more
17 information upon which to prepare for depositions.
18 But if reports -- as we said, if reports were to be
19 filed, we -- we could discuss the sequencing of
20 depositions. If they're not filed, as we said, we
21 still feel strongly that we should depose the DOE
22 experts first.

23 JUDGE MOORE: All right, that moves right
24 into 14, but let's finish with 12.

25 DOE?

1 MR. SCHMUTZ: And we vigorously oppose any
2 notion that Rule 26 expert reports should be provided
3 or not provided in the rules.

4 They are nearly impossible, in my view, for
5 DOE experts, in any brief period of time, to prepare
6 expert reports. We don't know all the bases. We
7 have four or five statements about these very
8 involved contentions and now we're supposed to come
9 up with our answers to those. It will lead to
10 endless battles, endless battles, over the adequacy
11 of our expert reports, over the duty to supplement.
12 None of those issues should be before this Board, but
13 that's -- that's where we'll be, and we think it
14 would be an incredibly bad idea.

15 JUDGE MOORE: In your filings, you've
16 indicated a willingness and a past history of full
17 cooperation in exchange of information when it has
18 been asked.

19 Where the rubber meets the road, of course,
20 is when you get requests for information that deals
21 with this kind of information.

22 Do you think that there's a reasonable
23 opportunity and chance that you and the requesting
24 party will be able to exchange information that deals
25 with which experts, what their opinion is on specific

1 subjects, and provide that, and if not, is that where
2 interrogatories might come into play?

3 MR. SCHMUTZ: Well, whether the DOE expert
4 will be able to provide that kind of opinion depends
5 upon how much he understands about the contention.

6 If he doesn't understand the bases for the
7 contention, he doesn't understand the underlying
8 calculations and analysis that he needs in discovery,
9 then he won't be able --

10 JUDGE MOORE: But won't that all be
11 preferenced by the request for information spelling
12 out what they need, what is wanted, and then the
13 question is, obviously, you know, why do you need it.
14 But assuming there's legitimacy behind the request,
15 is there a likelihood that voluntarily that kind of
16 information can be exchanged?

17 MR. SCHMUTZ: We will not -- well, of
18 course if the information exists at the time, if the
19 expert feels as though --

20 Let's assume the question, Your Honor, is,
21 I want your opinion about this portion of a
22 contention. I want to know what you think about it.

23 The answer may be, I don't know enough
24 about it to answer that.

25 JUDGE MOORE: But obviously --

1 MR. SCHMUTZ: If -- if the information is
2 in existence and if the expert does have an opinion
3 that he's willing to share without caveat, yes, we'll
4 give it.

5 JUDGE MOORE: I do not know, only you know
6 what went into the preparation of the SER -- SAR and
7 all of its underlying documentation.

8 I can assume that probably over the course
9 of many years in which DOE's been working on this
10 problem, a plethora of contractors have had their
11 fingers in the pie, if you will, on any particular
12 issue.

13 If, for instance, which would be standard
14 in litigation, you got a request for information as
15 to who are all the individuals that worked on this,
16 who are the experts, who are the -- and who are going
17 to testify on this issue and what is the information
18 that they gathered and relied upon to reach
19 conclusion X in the SAR; is that the kind of thing
20 that there's a likelihood voluntarily that DOE would
21 disclose?

22 MR. SCHMUTZ: Yes, Your Honor. As a matter
23 of fact, I think much of that information, I'm not
24 going to say all of it, what you just described, much
25 we've already said we would provide. It is

1 information required in the proposed joint discovery
2 schedule and we sent the three bullets or four
3 bullets in that that we would provide at the outset.

4 JUDGE MOORE: Okay. Staff?

5 >> MS. BUPP: I think that the Staff's
6 position with regard to Question 12 is outlined in
7 our filing, unless the Board had any particular
8 questions on it.

9 JUDGE MOORE: And recognizing staff that
10 the rules are unique to you.

11 >> MS. BUPP: Yes, Your Honor.

12 JUDGE MOORE: And so I'm assuming that
13 other than protecting your own turf, that that's
14 going to be the point of all your comments.

15 >> MS. BUPP: Yes, Your Honor.

16 JUDGE MOORE: Okay. Does anyone else wish
17 to be heard?

18 Then let's move to --

19 JUDGE WARDWELL: I've got a question for
20 the State of Nevada, Mr. Mal sch, or whoever you wish
21 to answer.

22 In your reply to 12, you seem to imply that
23 most of the testimony that is going to be presented
24 by you has been presented by you in your contenti on
25 submi ssi ons.

1 Have I interpreted your writing wrong as I
2 read that?

3 MR. MALSCH: I think that's substantially
4 correct.

5 I mean things are obviously going to
6 develop as the proceeding progresses and I don't
7 think we'd feel bound by the basis for every one of
8 our contentions, absolutely, but at least in terms of
9 the way things stand now, we think we've made a very
10 full disclosure of our positions and the basis for
11 our positions, and then in some cases, there's been
12 less of a disclosure on the part of the staff in DOE.

13 So, that's why we felt that expert reports
14 would be useful or failing those, that the DOE
15 experts ought to be deposed first.

16 JUDGE WARDWELL: So as it stands right now,
17 you know of no other additional information that you
18 would provide on any of the contentions at this point
19 of the hearings process? Or nothing comes to
20 mind about --

21 MR. MALSCH: Well, nothing comes to mind
22 except I have to say, we haven't filed in the DOE
23 responses to the RAIs and a lot of those are directly
24 relevant and I -- I -- in terms of specifics, I
25 couldn't be very specific with you. I think we would

1 expect that as the proceeding progresses, we would
2 add to the bases for our contentions, things like DOE
3 responses to RAIs as they are developing.

4 JUDGE WARDWELL: DOE. Mr. Schmutz.

5 MR. SCHMUTZ: It's tough.

6 JUDGE WARDWELL: That seems to me to be
7 quite different than the normal types of hearings we
8 have that where the contentions themselves are not as
9 specific and not as single issue as these are here.
10 Other hearings, the contentions are more broadly
11 worded off at times and there's only a vague
12 indication of the bases of which support that.

13 Having heard what they just said, I assume
14 that doesn't change your position. Would you like to
15 elaborate on that?

16 MR. SCHMUTZ: Sure, it doesn't. Sure, Your
17 Honor. The notion that the two or three pages, or
18 four pages supporting each contention is somehow the
19 sum total of the analysis that our experts would have
20 to know in order to address this is simply fanciful.
21 That is simply not enough information. Nor have I
22 ever seen prefile testimony out of a contention that
23 was three or four pages long.

24 There are a lot of -- what we have are
25 fairly conclusory statements with regard to expert

1 opinions reached, and fairly conclusory statements
2 that are the basis for those, the underlying
3 calculations, their analysis that go into that that
4 have been supplied. And that all has to be the
5 subject of discovery before our experts are going to
6 be willing to render an opinion.

7 What will happen will be, we will get on
8 every one of these contentions, I can assure you, 10s
9 and 10s of pages of prefile testimony from Nevada on
10 these contentions and from us, that go far beyond
11 what is contained in the three or four pages of
12 actual description of the contentions. They are no
13 more illuminating for our experts than the kinds of
14 contentions that you're talking about that can be
15 seen in other proceedings.

16 JUDGE WARDWELL: Mr. Malsch, doesn't
17 Mr. Schmutz have a pretty good point there?

18 MR. MALSCH: Marty Malsch, the State of
19 Nevada.

20 Your Honor, I think that is true, but my
21 point would be in terms of relative disclosures. At
22 this point, we have been more specific than the other
23 parties in terms of that. So that in terms of going
24 into the deposition process, in many cases, DOE knows
25 more about our position than we know about theirs.

1 Let me just give you an illustration, and I think one
2 contention, we have a contention to of Safety 17,
3 which deals with the calibration and qualification of
4 data for infiltration model. Our contention is
5 fairly specific. It's backed up by expert opinions
6 and DOE's answer is largely legal. So we don't
7 exactly know, using that contention as an example,
8 exactly what would be the basis for DOE's position on
9 that contention other than we can infer they don't
10 agree with it, is the bottom line.

11 So I wouldn't pretend that our contentions
12 at the present -- in their present state, will be the
13 sum total of a direct case Nevada would present.

14 All I would say is, is in terms of relative
15 disclosures by the parties at this point, in many
16 cases, our contentions are more specific and offer
17 more of a disclosure than DOE's SAR and was for that
18 reason, that we suggested that either this should be
19 expert reports or we should be able -- we should be
20 deposing DOE's experts first.

21 JUDGE WARDWELL: That was going to be my
22 next question. You touched upon it. You don't
23 believe -- you believe your four pages or so, what
24 generally would be in your contentions, are more
25 detailed than what's in the application in the SAR?

1 MR. MALSCH: In many cases, yes.

2 JUDGE WARDWELL: Thank you.

3 JUDGE MOORE: Let's move to Question 14.

4 And would you -- we've just been touching
5 upon as to whose witnesses should be deposed first.

6 Just so the record is clear, starting with
7 DOE and then Mr. Malsch, any chance you two gentlemen
8 could reach agreement on this issue?

9 MR. SCHMUTZ: Here's what I think should
10 happen -- I'm sorry, this is Tom Schmutz. And here's
11 what I think ought to happen, and is indeed our --
12 our proposal.

13 We are not -- we did not affirmatively
14 state that our preferred position is we depose all
15 theirs and then they depose all of ours.

16 What we propose is, is that the parties
17 negotiate, as you always do in litigation, a schedule
18 for taking depositions, including experts.

19 If there are certain depositions that it
20 makes sense for them to take ours first, that should
21 be worked out. What we object to is a per se rule.

22 This is litigation. This is good faith
23 litigation, and the parties have evidence, mind you,
24 that they can act in good faith and with reasonable
25 accommodations. That's what ought to go on here,

1 rather than a per se rule that all of ours go first
2 or all of his -- or all of Mr. Malsch's go first.

3 We ought to talk about it. If they have --
4 either contention where he thinks there's inadequate
5 information in the SER and there's good reasons to
6 depose our guys, our experts first. If it makes
7 sense to us, we will do that.

8 And I would hope that in those instances
9 where we talk and it's evident that Mr. Malsch's
10 experts ought to be deposed first, he will agree to
11 that.

12 JUDGE MOORE: Mr. Malsch?

13 MR. MALSCH: Well, perhaps it could be
14 worked out.

15 But I think I'm a bit skeptical because we
16 have a kind of fundamental disagreement over the
17 nature of our relative disclosures, and I'm concerned
18 that it would be a lot easier in terms of scheduling
19 depositions if we, in fact, did have some kind of a
20 per se rule or at least a presumption.

21 MR. SCHMUTZ: Your Honor, the idea that
22 there's a -- there's a -- if there's a discrepancy in
23 the amount of information known about one party's
24 case or the other, it surely must fall in favor of
25 DOE, which filed an 8000-page application, has

1 millions of pages of information on -- on the LSN. I
2 can't imagine anyone having more information about
3 our case and what we're doing than they have, in the
4 face of three, or four, five pages of material on
5 each contention. You simply can't make that
6 argument. It's not right. It's wrong.

7 If there's a discrepancy in the amount of
8 information, it's the fact they have orders of
9 magnitude, more information about our case than we
10 have of theirs. And if we're going to have a per se
11 rule, then the per se rule we ought to be, we go
12 first.

13 But I still think the parties ought to try
14 to work this out and should do it in normal
15 litigation. There is no secrecy in normal
16 litigation.

17 JUDGE MOORE: Assume for the moment that a
18 case management order directed that DOE would first
19 depose the testifying experts of Nevada.

20 What, in your view, prejudice does that --
21 is there any prejudice to Nevada from such an order?

22 MR. SCHMUTZ: I don't think so, Your Honor.

23 I don't think it's the preferable way to
24 go, but I don't think so.

25 JUDGE MOORE: The reverse of it, if the

1 order were the other way, what would be the prejudice
2 to you?

3 MR. SCHMUTZ: Our experts don't know the
4 bases for the contentions. They know the bases for
5 their contentions. They know what they think is
6 wrong with the SAR. They think they -- they
7 presumably have done analysis and have thought about
8 it a great deal, what's wrong with it. We ought to
9 know that first before our experts have to render
10 opinions.

11 JUDGE MOORE: And likely your experts would
12 couch any opinions they gave very narrowly.

13 MR. SCHMUTZ: I -- I think what you might
14 see them saying is, I can't answer that question
15 until I fully understand what your -- your contention
16 means and I've studied all the analysis and heard
17 from your expert.

18 JUDGE MOORE: Mr. Malsch, same two
19 questions.

20 MR. MALSCH: You know, Judge Moore, I
21 wouldn't talk about prejudice. I just think it deals
22 with the efficiency with which we do the deposition
23 process. I mean, if -- if -- if we don't know in
24 some respects what DOE's position, technical position
25 is on one of our contentions, then we end up with the

1 same problem that DOE just cited, which is we end up
2 with a very incomplete deposition of our expert
3 because it isn't entirely clear on what DOE's position
4 in fact is.

5 So I think in terms of doing the balancing,
6 it comes down to, I think, who knows the most about
7 the parties' technical position on the very specific
8 contentions that we filed.

9 JUDGE MOORE: What part, realistically, can
10 admissions play in narrowing the knowledge gap
11 between your DOE and Nevada for Nevada's contentions?

12 MR. SCHMUTZ: For the same reason that our
13 experts would have great difficulty. You know the
14 standard answer to an admission that you don't know,
15 can you admit or deny, and then state the reasons
16 why. So that's what you would get from all those --
17 those admissions.

18 If our experts have not -- we didn't feel
19 as though they were comfortable, and had a complete
20 understanding of the bases for the contentions,
21 that's the answer you will get. It's a perfectly
22 legitimate answer.

23 JUDGE RYERSON: Are there two kinds of
24 experts for DOE, Mr. Schmutz?

25 It seems to me that obviously Nevada's

1 experts are all testifying experts. They were
2 retained for purposes of supporting a contention.
3 And I don't really know, in DOE's instance, there
4 must be technical people who were involved in the
5 creation of the SAR, who are, in a sense, while they
6 have expertise, are not what some of us would
7 consider to be experts. They would really be fact
8 witnesses with respect to technical matter.

9 Do you have both types of witnesses?

10 Do you have or will you be retaining
11 testifying experts that were not involved in the
12 preparation of the application somewhat?

13 MR. SCHMUTZ: I don't believe so, Your
14 Honor.

15 And I also don't believe that we would have
16 people testifying as -- as fact witnesses with regard
17 to the SAR. I think we would have -- yeah, those are
18 going to be ex -- those are expert issues and to be
19 dealt with by experts.

20 Their bases will be factual but they will
21 be providing them as experts in the way experts
22 gather facts to support their -- their analysis.

23 JUDGE RYERSON: Okay.

24 MR. SCHMUTZ: But we're not going -- I
25 don't think anybody envisions putting on a whole lot

1 of fact testimony to sort of support the SAR, the
2 SER.

3 JUDGE RYERSON: Maybe -- maybe I'm -- we
4 may be talking about slightly different things. When
5 you -- when you speak of a fact witness, I'm just
6 saying that someone who has prior knowledge of the
7 development of the application is, to me, not quite
8 the same as an expert that would be brought in for
9 purposes of, in effect, countering an expert brought
10 in by Nevada.

11 So when Nevada takes the deposition of one
12 of your witnesses, if the witness had no prior
13 involvement in the relevant of the SAR, then I would
14 completely agree with your point that, well, until
15 that expert witness knows what Nevada's witness has
16 to say, Mr. Malsch's deposition will be essentially
17 useless.

18 I mean, the witness will quite properly
19 say, I don't know what I'm responding to, I don't
20 know what I'm going to be asked to talk about.

21 But if -- if the expert is also a factual
22 witness in the sense that the expert was himself or
23 herself involved in the development of the SAR, don't
24 we have a different type of situation?

25 MR. SCHMUTZ: I don't -- I don't think so,

1 Your Honor, not in terms of understanding the
2 contentions and the analysis that went into those
3 contentions, which are not associated necessarily
4 with a -- something that's in the SAR.

5 I mean, in other words, we don't know
6 whether they've taken an analysis in the SER and
7 marked it up and then run -- computer runs and
8 discovered errors that we can go and take a look at
9 and see if they're right or not.

10 So, no, I don't see any -- any difference.
11 We do indeed -- I don't think of our experts are
12 people that were involved in the process. We're
13 not -- I don't believe we're bringing in -- I could
14 be wrong but I don't believe at this point we're
15 intending to bring outsiders in to be involved.

16 JUDGE MOORE: I'm sorry. Could you repeat?
17 I didn't understand what you said.

18 Did you say that your experts are not those
19 that were involved and you said the process. I'm
20 assuming writing the SAR?

21 MR. SCHMUTZ: Our experts, I believe, will
22 either -- yeah, they might have had oversight over it
23 rather than actually putting pen to paper, but I
24 believe, I could be wrong, I can check this as a
25 matter of fact -- nonetheless with caveats, but I

1 believe all of the people that we will brought
2 forward as experts were involved in the SAR
3 preparation analysis and so on.

4 JUDGE MOORE: You all have a far better
5 understanding of the process because you've been
6 involved with it, than we.

7 That said, is there a problem in this case
8 with DOE and its experts, either fact experts or --
9 or those that will be testifying experts, factual
10 witnesses or those that will be testifying as
11 experts, because of the length of this project and
12 what I can only imagine, the vast numbers of
13 contractors that have come and gone and passed things
14 on to future generations that worked on it, of
15 getting to the bottom of who knows -- who really
16 knows what or none of those kinds of issues are
17 involved here?

18 MR. SCHMUTZ: I don't think any of those
19 kinds of issues are involved here. We're not --
20 we're not worried about being able to put on our
21 technical case to what we believe are extraordinarily
22 accomplished experts who will know and do know the
23 SAR analysis backwards and forwards.

24 JUDGE MOORE: Even though they didn't, one,
25 gather the information, and two, do the analysis of

1 the information, but rather we're relying totally on
2 the work of others and coming forth with the end
3 result, if you will?

4 MR. SCHMUTZ: I don't know if there ever
5 will be a case where somebody was sort of
6 disassociated with the process to the degree you're
7 suggesting.

8 You know, the experts we have are -- are
9 the lead -- many times the technical needs for
10 various areas in the SAR.

11 We're giving -- you know, we've given our
12 best we got, and they're not going to be people that
13 were -- are divorced from the process and really
14 didn't know what was going on. They support the SAR.

15 JUDGE MOORE: Mr. Malsch, do you have
16 anything to add to this discussion?

17 MR. MALSCH: No, Judge Moore. I mean, the
18 process would be just as it's described. It strikes
19 me as the typical process for preparation of an
20 application in use of expertise.

21 JUDGE MOORE: You've each, with regard to
22 Question 14, made a proposal. If we were to proceed,
23 having you negotiate, as is the typical case in
24 litigation, a deposition schedule by contention and
25 find yourselves at loggerheads, what is the mechanism

1 for resolution of that?

2 MR. SCHMUTZ: I would hope that we not
3 engage in motions practice, and instead, we call the
4 Board up and the Board be available, if necessary,
5 and this will be, I hope -- I think extraordinarily
6 rare, I don't want to file a lot of paper. I think
7 we could get on the phone with the Board, have a
8 conference call and resolve the issue. I don't
9 expect it to happen often though.

10 JUDGE MOORE: Mr. Malsch, do you agree with
11 that?

12 MR. MALSCH: I'm not interested in filing
13 mountains of papers, and so --

14 JUDGE MOORE: Yeah, well, rest assured,
15 we're not interested in reading mountains of paper.

16 MR. MALSCH: You know, if we were at
17 loggerheads, for example, who should go first to be
18 deposed on Nevada contention, you know, 17, then, I
19 think an informal conference with the Board or a
20 member of the Board would be fine with us.

21 JUDGE MOORE: And between the lines, it's
22 apparent that you're both willing to sit down in good
23 faith and there's going to be give and take.

24 DOE, one of your witnesses, you -- you may
25 not prevail and -- and be willing to say, all right,

1 we'll offer our -- under this schedule, our witness
2 will be deposed first, recognizing three witnesses
3 down on the other side, that's going to go first.

4 So, you see that as part of the give and
5 take in working it out, right?

6 MR. SCHMUTZ: I see it as a -- as a great
7 deal of compromise on both parties.

8 JUDGE MOORE: Does anyone else feel that
9 there will be a problem in the deposing of witnesses
10 as to whose witnesses will go first and whether or
11 not it can be worked out, that would like to be heard
12 on this issue?

13 MR. BAUSER: Mr. Chairman, Mike Bauser, for
14 NEI. I would just remind everyone that the
15 affidavits that were offered by Nevada in support of
16 its contentions were extremely thin.

17 Essentially, what they did was -- well, the
18 contentions set forth a number of positions and
19 assertions. And what the affidavits typically did
20 was, say, I agree with paragraphs so on and so forth,
21 of what was stated in the contentions, and that --
22 that was it.

23 So NEI doesn't envision the kind of
24 difficulties that the Department of Energy has
25 expressed in -- in proceeding.

1 JUDGE MOORE: I'm sorry, Mr. Bauser, I
2 missed NEI and I missed your word.

3 MR. BAUSER: Does agree with DOE concerning
4 the types of difficulties that might pertain to
5 proceeding without any additional information from --
6 from Nevada.

7 JUDGE MOORE: Anyone else wish to be heard
8 on this?

9 If not, let's look at Question 15, which,
10 in some degree, we've already covered.

11 Does anyone wish to add to what's already
12 been put forth in their writings to us?

13 Mr. Malsch?

14 MR. MALSCH: No, Judge Moore, we -- we have
15 nothing to add.

16 JUDGE MOORE: DOE?

17 MR. SCHMUTZ: This is Thomas Schmutz. No,
18 we have nothing to add.

19 JUDGE MOORE: Staff?

20 Since no one will get around to deposing
21 your witnesses in my lifetime...

22 >> MS. BUPP: We are assuming that the
23 Staff witnesses will go toward the end of any
24 discovery period, Your Honor.

25 JUDGE MOORE: Thank you.

1 All right, Mr. List?

2 MR. LIST: I would simply note that the --
3 with respect to the NEPA contentions, that what we're
4 talking about here is, is a void in the -- by --
5 according to our contentions, if we're -- if we're
6 correct, a void in the Environmental Impact Statement
7 analysis in that certain matters were simply not
8 addressed, interoperability of communications, the
9 need for road improvements, those kinds of things,
10 and first responders, the costs of all those things.

11 So far as we know, DOE has never produced
12 any witnesses, there's no evidence in their -- any of
13 their documentation, as to why those matters were not
14 addressed.

15 So -- and at the same time, they have all
16 of our information. They have complete access to our
17 affidavits and the materials we presented. So I
18 would just simply note for the Board's consideration
19 that -- that the NEPA contentions are slightly
20 different when it comes to the discovery process.

21 The ultimate legal determination of whether
22 the -- their failure to incorporate those matters in
23 the Environmental Impact Statement rises to the level
24 of their having overlooked significant matters
25 under -- under the NEPA law and, thereby, they have

1 to go back and do it again or NRC has to do it or
2 it's deemed to be done during the course of the
3 presentation of the hearing. Those ultimate legal
4 decisions turn on the factual aspect.

5 So we have sort of a one-sided discovery
6 process.

7 JUDGE MOORE: But that's not unique in
8 litigation, and -- and you may be seeking to depose
9 any number of DOE fact or expert witnesses, and they
10 may not reciprocate and wish to depose any of yours,
11 thereby, resolving that. Is -- is there any reason
12 why that can't be negotiated?

13 MR. LIST: No. No, there's not. I just
14 simply note for the record that the process is a bit
15 different in this instance and they're basically --
16 their burden is sort of to prove a negative need,
17 while ours is different and I do believe it can be
18 negotiated.

19 JUDGE MOORE: Let's then -- anyone else
20 wish to be heard on 15?

21 Let's move to 16.

22 Does anyone wish to add to what was already
23 filed?

24 Hearing none, then we can skip over 17.

25 Eighteen.

1 We briefly spoke earlier of
2 interrogatories. I think we've already discussed
3 this issue, but for the sake of completeness, does
4 anyone, after having now a few more moments to
5 contemplate on it, think that interrogatories may
6 play a useful part because, very frankly, if we have
7 the full cooperation of all parties, as we have seen
8 and have expressed that they're willing, in exchange
9 of information, I think the Board is very favorably
10 inclined to entertain such motions if that will help
11 the process forward when any particular negotiation
12 breaks down.

13 And very frankly, we would not see that
14 as a time-consuming process under the rules where a
15 motion's filed, 10 days to respond. We would shorten
16 those times to 24, 26 hours to respond and get
17 answers immediately, so that it would be something
18 that could be done with -- with great alacrity.

19 Yes.

20 MR. ROBBINS: Alan Robbins on behalf of
21 Clark County.

22 Not only with respect to interrogatories
23 specifically, but there's further discussion, the
24 concern that's formulating in my mind, as I listen to
25 this, is that we may get stuck in a quagmire of very

1 uninformative depositions.

2 JUDGE MOORE: Of?

3 MR. ROBBINS: Very uninformative
4 depositions.

5 And so that it's not necessarily that we
6 need to seek relief from the Board, because we're --
7 we're deadlocked over who goes first, but rather, we
8 go to deposition only to find out that, you know,
9 Dr. So and So has just been brought in by DOE, or
10 didn't get involved in this, or hasn't had an
11 opportunity to evaluate the contention. Or, you
12 know, that witness supported the contention hasn't
13 been deposed, so, he's been well-groomed to say, I
14 don't have an opinion yet, I don't know when I'm
15 going to have a opinion, I don't know what I'm going
16 to see.

17 And so I suspect that, among other
18 things, we're going to run into depositions that are
19 not completed, they're suspended and to be continued
20 and take another shot later when some of these
21 conditions that caused the witness to claim that he
22 knows -- he or she knows nothing, and has no
23 opinions, and yet this is all in support of -- I find
24 it hard to believe that that's going to be the case.

25 If we're talking about volcanism, for

1 example, and different analyses over how exposed this
2 repository site is to volcanic activity and what the
3 likelihood of it is; while there's an aspect to that
4 that goes directly -- a DOE witness trying to
5 directly rebut a Clark County, Nevada witness that
6 supports the contention, in other respects, they have
7 already conducted their own analysis about volcanism
8 and so they're not completely in the dark until they
9 have fully vetted and deposed the witness supporting
10 that contention.

11 And all we're hearing from DOE counsel
12 today is that their witnesses aren't going to know
13 anything because the contentions don't tell them
14 hardly anything. And until they conduct depositions
15 and everything else, they're not going to know
16 anything. And yet, they don't want to give us
17 anything but an identification of the witness' name
18 and contact information, maybe a one-line sentence
19 about the subject matter that they're going to
20 address or the contention number. They don't want
21 interrogatories. They don't want admissions. They
22 don't want to go first.

23 I am -- I don't know what else to do about
24 it, if everything else can be rejected. But I'm
25 going on record as predicting that these are the

1 problems we're going to run into, and it's going to
2 be very frustrating and very unproductive but it --
3 it seems to be moving very clearly.

4 JUDGE RYERSON: Mr. Robbins, I -- if we go
5 back to the -- the first filing before the Staff
6 indicated that the SER would be done serially, I
7 thought there was agreement that at that stage,
8 depositions would be one day, seven hours, and that
9 would be it.

10 So if -- if you're suggesting a remedy of
11 suspending depositions where a witness is not
12 sufficiently forthcoming or knowledgeable as to the
13 answers you would like to get, I didn't understand
14 that was a remedy that any of the other parties were
15 contemplating.

16 Am I wrong on that?

17 MR. ROBBINS: Well --

18 JUDGE RYERSON: I mean, I had the
19 impression depositions would be done in one day, as a
20 general rule.

21 MR. ROBBINS: The -- the -- I'm sorry.

22 Yes, the proposal did contemplate that a
23 deposition will not last more than one day. What I'm
24 suggesting now is certainly not that I'm saying
25 reflects any consensus of the parties at the moment,

1 going to prevail and we're going to make an attempt
2 that this basic information is all exchanged upon
3 reasonable request, that won't that alleviate to a
4 large extent that problem?

5 MR. ROBBINS: I hope so.

6 In theory, yes. Hopefully in practice,
7 yes. Time will tell.

8 JUDGE MOORE: If in practice it doesn't,
9 what do you propose should be the immediate remedy?

10 MR. ROBBINS: Well, I think we'd have no
11 choice but to seek recourse to the Board or a member
12 of the Board, depending on -- and that, in part, I
13 think, is why the notion of a discovery master or a
14 function of a discovery master could have served, if
15 you know, to somebody either from the Board or
16 represent the Board, to deal with these matters.

17 What I'm simply doing, Your Honors, is,
18 this is not by way of -- it is by way of -- of
19 underscoring the earnest voice for other tools to get
20 this disclosure, because I think I'm hearing some
21 degree of resistance to that from DOE, while at the
22 same time DOE is talking about good faith
23 cooperation. So I think I may be hearing two
24 different things there.

25 JUDGE MOORE: Clark County and DOE, has

1 Clark yet sought information from DOE? One.

2 Two, any sought information been rejected?

3 And three, what did you do about it, if
4 that was the case?

5 MR. ROBBINS: None of the above has
6 occurred yet, Your Honors.

7 I'm -- I'm expressing forward-looking
8 concern that I hope is never realized.

9 But, you know, we -- we -- I guess we
10 should not be naive as we formulate the process.

11 JUDGE MOORE: DOE, are we being naive --

12 MR. SCHMUTZ: Well --

13 JUDGE MOORE: -- since you are the fountain
14 of most of the information?

15 MR. SCHMUTZ: I know.

16 If -- if -- if my remarks earlier today
17 suggested that we're going to put on experts, and
18 submit them to depositions, and their answer is going
19 to be, we don't know anything about anything, that is
20 not going to happen in one instance.

21 We will put on experts. Since the process
22 is envisioned, we will be identifying the experts.
23 We will be identifying the portions of the SAR about
24 which they will testify. We will be identifying the
25 contentions that they will be addressing ultimately

1 in their profile testimony.

2 There will be -- there will never be an
3 instance, I can assure the Board, where our witness
4 will be put on as the spokesperson for the Department
5 of Energy, on a portion for the SER, and claim that
6 he doesn't know the analysis. That will not happen.
7 And if -- if my remarks earlier today gave Clark
8 County the impression that that was my position, then
9 I apologize for that. That is not my position nor is
10 it the Department.

11 JUDGE RYERSON: I -- I don't think you have
12 to assure us that that would be the case, because I
13 think it's a self-help here.

14 If -- if I understand your point,
15 Mr. Robbins, that if -- if a witness gets on the
16 stand at an appropriate point in the litigation for
17 deposition and simply knows nothing, you have two
18 choices: You can try to continue the deposition, if
19 you -- if you really want that information or you can
20 end the deposition right there and you have that for
21 purposes of the hearing on the merits -- I mean, that
22 wouldn't leave that witness in a particularly good
23 position for a hearing on the merits, so I -- I
24 completely agree with DOE's position.

25 I don't think they would ever do that. But

1 there is a practical question of how much information
2 do they have at particular points so that they can --
3 can testify in a meaningful way.

4 MR. ROBBINS: If I'm -- not to belabor,
5 but, first of all, counsel's clarification is
6 helpful.

7 I am confused by one part of it, in that,
8 if I heard correctly, Mr. Schmutz, your -- your
9 response included a statement to the effect that the
10 witness' profile testimony would describe -- well,
11 would include their testimony essentially, whatever
12 it was -- I didn't understand the reference to
13 profile testimony.

14 MR. SCHMUTZ: Okay. Oh, I didn't mean to
15 make one, I don't think.

16 I mean, what I -- what I was saying was,
17 will be the initial disclosures that are required for
18 each in order to kick off the discovery process. The
19 experts at that point in time will be knowledgeable
20 about the SAR analysis. They will answer any
21 questions that you have and you will know what
22 portions of the SAR analysis they will be responsible
23 for.

24 You will also know, ultimately, the
25 contentions to which have been assigned to that

1 person, who will ultimately file prefile testimony.

2 At that point in time, that witness may or
3 may not, more often than not will not have answers
4 and analyzed every contention and understand the
5 bases for all the contentions because we don't have
6 that information, they can't possibly be in that
7 position.

8 But you will go in and presumably you have
9 taken issue with analyses and the SAR and you'll have
10 questions about that analysis.

11 Our witnesses will be able to answer all --
12 all of your questions, I -- I can assure you, to your
13 satisfaction.

14 JUDGE MOORE: And Mr. Robbins, if you had
15 not participated in an NRC formal adjudication such
16 as this, once prefilled direct testimony is filed with
17 half a library of exhibits, which is the normal case,
18 and your experts have had time to sift through that,
19 that is a marked difference from either a jury trial
20 or most civil litigation where there's not prefilled
21 direct testimony, where you're hearing it for the
22 first time on the stand and out of the witness'
23 mouth.

24 And that also fills in an enormous number
25 of what otherwise might be legitimate questions or

1 blanks or certainly areas in which you wish to pursue
2 on cross examination.

3 So, that's the ultimate goal, to get this
4 case to the point where there's prefilled direct
5 testimony and then all sides have to file their
6 prefilled direct testimony.

7 If I were designing a new system of
8 litigation from a clean slate, I'd make you all start
9 with your prefilled direct testimony, and we could cut
10 out an awful lot of this, but that's not the way the
11 system works.

12 MR. ROBBINS: And Your Honor, that's --
13 that's very much a part of what underlies my concern,
14 because I do practice with prefilled testimony quite a
15 bit. However, I have more experience with the
16 prefilled testimony. It's filed earlier in the
17 process, such as you would propose, and there are
18 discovery opportunities, including depositions,
19 following the filing of the prefilled testimony,
20 whereas, you know, that's a significance difference
21 here and that's part of what drives concern. But I
22 think this -- this -- it's been a helpful discussion
23 from our standpoint and -- and counsel's
24 clarifications and assurances help address some of
25 the concerns.

1 JUDGE MOORE: All right. Does anyone else
2 have anything they'd like to be heard upon with
3 respect to Question 18?

4 Hearing none, let's move on to 19, which is
5 mooted because no one has anything to add to 18.

6 Twenty?

7 Mr. Malsch, do have you anything you would
8 like to add from what's in your written last week's
9 statement?

10 MR. MALSCH: No, Judge Moore, we have
11 nothing to add at this point.

12 JUDGE MOORE: DOE?

13 MR. SCHMUTZ: We have nothing to add, Your
14 Honor.

15 JUDGE MOORE: Staff?

16 >> MS. BUPP: We have nothing to add, Your
17 Honor.

18 JUDGE MOORE: Mr. List?

19 MR. LIST: Nothing to add, Your Honor.

20 JUDGE MOORE: Do any of the other entities?
21 Thank you.

22 We can skip over 21. Twenty two?

23 Mr. Malsch?

24 MR. MALSCH: I -- Judge, we have nothing to
25 add. I just wanted to point out we do have this

1 little chart with the schedule attached to our
2 answer, and it was not to suggest that one should be
3 setting six schedules now with SER Volumes II, you
4 know, IV, and V, but just to sort of paint a broader
5 picture of where the proceeding might be going.

6 And so, you know, we hope the Board doesn't
7 take every one of these dates actually literally as a
8 proposed schedule for the parts of the proceeding
9 that will be taking place in the distant future.

10 JUDGE MOORE: Now, on scheduling, since the
11 filing last week, in response to our questions, have
12 the parties had any further opportunity to consult,
13 and do you have any more realistic numbers for the
14 number of depositions that you think are in reality
15 going to be taken on those contentions that are
16 associated with SER Volume III, recognizing that
17 there's 24 in dispute, which could be some number of
18 depositions, in and of themselves, but likely those
19 would be highly repetitive?

20 MR. SCHMUTZ: Your Honor, I think -- I
21 think that what we've done is tried to rack up how
22 many experts we think are going to be out there and
23 then assume that all of them will be deposed.

24 And I would guess that Nevada has been
25 thinking about it, and you start with the assumption

1 of if he's an expert and he's going to testify, so we
2 may --

3 JUDGE MOORE: These are outside numbers.

4 MR. SCHMUTZ: These are outside numbers.
5 And we may have as many as 70 expert witnesses that
6 we have to address the couple hundred contentions.
7 I'm sure Nevada has -- we assume Nevada would have
8 about half that, maybe a little more. Staff would
9 have a large number, you know, ultimately on the SER.
10 Other parties would have them. So, you know, and
11 then you add on to that, this limit with what's been
12 proposed as the limitless number of other depositions
13 of people that are not identified experts and you get
14 a pretty large number.

15 All those numbers you have seen are outside
16 numbers, in my view. Maybe we won't have to depose
17 every expert, that we will use some of Nevada's
18 experts, may be duplicative. I don't know.

19 JUDGE MOORE: What struck me in your
20 original filings that were previously alluded to by
21 Judge Ryerson, was when you had all seemingly agreed
22 in the joint proposal that each deponent would be
23 essentially limited to one day.

24 MR. SCHMUTZ: Yes, Your Honor. I hope that
25 still holds.

1 JUDGE MOORE: Well, it struck me that for
2 witnesses that will be testifying with regard to
3 multiple-related contentions and the DOE's case, I
4 suspect that there will be a similar core group of
5 witnesses that will be testifying to the counterpart
6 of what Nevada has proposed, witnesses will be
7 testifying to, that -- how that would happen, that
8 you could limit those depositions to one day. It
9 also struck me that many of these depositions, I
10 would think, are two and three-hour depositions.

11 MR. SCHMUTZ: I think the answer to that at
12 least in my experience, in Federal District Court,
13 it's limited to a day now, at the outset. I don't
14 know how many times I've gone to the other side and
15 said, we can't do this in a day. This is silly.
16 We've worked it out. So all things that ought to be
17 worked out fairly easily among the parties that for
18 a particular witness if we are going to cover all
19 the subject matters, that the witness is going to
20 cover, that it's going to take more than a day.

21 I can't imagine that that will lead to any
22 significant disputes.

23 JUDGE MOORE: So again, you're proposing
24 that no ironclad rule be put into effect?

25 MR. SCHMUTZ: I would say that the

1 presumption ought to be a day but that the parties --
2 I believe the proposal earlier was it ought to be a
3 day, but if there's reasons to go beyond the day,
4 we'd negotiate it and failing negotiating, we'd come
5 to the Board. I would say that that process should
6 remain, and I don't think that should be a problem.

7 JUDGE MOORE: Mr. Malsch, are you in accord
8 with that?

9 MR. MALSCH: Yes, Judge Moore, we would
10 agree with that. I think in our proposal we
11 indicated that there may need to be depositions going
12 on for more than one day for an expert, if for
13 example, that expert would be testifying about more
14 than one contention. So I think that could very
15 well be the case, and I think we can work that out.

16 JUDGE MOORE: While we're on the subject of
17 depositions, there is still apparent to me
18 disagreement especially between DOE and Nevada on how
19 many depositions can be taken in a day, and in a
20 week, and over how continuously. This is from the
21 Board's perspective. We see the difference in
22 resources of the parties and we think that's
23 reflected in the positions of the parties.

24 Realistically, do you think, Mr. Malsch,
25 that you can, like these other issues, come to a

1 reasonable accommodation since you're going to both
2 have the bulk of witnesses that will be deposed and
3 have to take -- and witnesses that have to be
4 defended in depositions, as to how many, over what
5 stretch of time and appropriate breaks, or you think
6 that that is something that's going to have to be
7 dictated?

8 MR. SCHMUTZ: Oh, you know, I -- in almost
9 all the cases I work on, these are kind of routine
10 matters of counsel. They work out.

11 I can't imagine that -- we're not going to
12 suggest, for example, that somebody, Mr. Malsch's
13 witness is being deposed in Albuquerque and that the
14 next day he be in New York to take a deposition of
15 somebody else. We understand there are limits.

16 But to start off with a presumed number of
17 depositions, whether you could do four or five a week
18 without any trouble, because there are multiple
19 parties, we have to deal with more than just Nevada.
20 We have a lot of people to deal with. If it was
21 just Nevada and the Department of Energy, maybe
22 those limits would be fine, but we think we can
23 structure a system, maybe we'll take depositions
24 every day but they won't involve Nevada.

25 JUDGE MOORE: So your answer is, you see no

1 reason at this point that this is not something that
2 can be reasonably worked out with accommodation of
3 counsel?

4 MR. SCHMUTZ: Absolutely, Your Honor.

5 JUDGE MOORE: And the appropriate language
6 in case management to that effect.

7 MR. SCHMUTZ: We hope it will never occur
8 but if it had to, we will come to the Board again.

9 You know, I think built into the case
10 management, there should be this strong flavor that
11 if the parties can reconcile an issue that we solve
12 or we go to the Board orally, we have a conference
13 and we get it resolved immediately and not waste time
14 or paper.

15 JUDGE MOORE: Before we take a lunch
16 recess, do any of the other parties have matters that
17 they wish to bring before us right now or that you
18 wish to have us address later this afternoon
19 immediately after the luncheon recess? We will be
20 hearing an argument from Nevada and the Staff on a
21 motion to compel and a motion to amend privilege
22 logs. And then we will address additional matters
23 that the Board has going back to your original
24 filings. And if you have matters, we'd like to hear
25 about them.

1 Yes?

2 MS. HOUCK: Thank you, Your Honor.

3 Darci e Houck for JTS. We would like to
4 just briefly respond on the Court's August 25th
5 order. On page three, the Board did reject the
6 language proposed by JTS concerning entry to land.

7 JTS does have some alternative language
8 that we intend to submit to the parties that we
9 believe addresses the concerns raised by NRC staff
10 and the Board. We just request leave to submit that
11 alternate language to the Board.

12 JUDGE MOORE: On that issue, since we have
13 no idea whether any of the other parties, staff, DOE
14 or anyone else, wishes to make such entry, does it
15 make sense to just leave it to be dealt with on a
16 case-by-case basis and bring it before the Board, as
17 opposed to trying to set a rule which invariably
18 someone will disagree with and bring it back before
19 the Board in any event?

20 MS. HOUCK: One second, Your Honor.

21 Your Honor, I think that would work for
22 this situation, however we would want to have
23 notification prior to anybody or Staff if they
24 needed to --

25 JUDGE MOORE: I should know the answer. I

1 don't. Under subpart J -- I can't remember the rule
2 that allows entry on land as one of the prescribed
3 discovery techniques.

4 Is notice required?

5 MS. HOUCK: I -- I would need to check
6 that.

7 Our concern is just that we would want to
8 make sure that other federal laws involving the
9 cultural -- if there was cultural sensitivity to the
10 specific sites, that if certain provisions needed to
11 be in place prior to entry that there was some
12 consultation.

13 JUDGE MOORE: Right.

14 DOE's, I suspect, just a wild guess, that
15 if anyone falls in the position of seeking entry for
16 purposes, it would be DOE or possibly the Staff. Is
17 there any reason why counsel can't reach an accord on
18 notice for such things? Or anyone that has such an
19 interest as part of a case management Order?

20 MR. SCHMUTZ: None, whatsoever, Your Honor.

21 JUDGE MOORE: Staff, do you agree with
22 that?

23 >> MS. BUPP: Yes, we're perfectly amenable
24 to working out a notice agreement with the tribe.

25 JUDGE MOORE: Then, I think that may be

1 something we want to keep in mind for dealing with
2 that issue. Is that true?

3 MS. HOUCK: Yes, Your Honor, I believe that
4 will address our concerns. Thank you.

5 JUDGE MOORE: Are there any matters that
6 the parties would like to address this afternoon?
7 Inyo.

8 MR. JAMES: Yes, Your Honor. Thank you.

9 Greg James, Inyo County. In the joint
10 filing that was made indicates that within 40 days of
11 the NRC staff decision on how it responds to DOE's
12 recent decision not to prepare a supplemental
13 Environmental Impact Statement, there would be a
14 litigation schedule filed.

15 And also in response to a motion Inyo
16 County filed for an extension of time, the parties
17 have 30 days to file a formal announcement by NRC
18 staff as to how they would proceed with the
19 supplemental groundwater document to file new or
20 amended contentions. I think the question that I
21 have is, in view of the counsel representation from
22 the NRC staff, has that been a formal announcement?

23 Are those times triggered and do we need to
24 be moving in the next 30 to 40 days to file
25 litigation schedules, particularly in view of the

1 fact that it appears now the groundwater document may
2 be delayed for two years or more?

3 JUDGE MOORE: I don't believe I fully
4 understood the first part of the question. The Staff
5 has announced today that there will be no Staff
6 supplementation on groundwater issues until fiscal --
7 after fiscal year 2010.

8 Is that correct, Staff?

9 >> MS. BUPP: Yes, there will be some
10 undetermined time after fiscal year 2010.

11 JUDGE MOORE: Does the Staff have any plans
12 to issue anything in regard to groundwater issues
13 that would impact any of these parties' rights,
14 trigger any of these parties' obligations to file
15 contentions prior to the Staff's disbursement of the
16 document after 2010?

17 >> MS. BUPP: The staff doesn't intend to
18 issue any document until the actual groundwater
19 supplementation. However, I would reiterate our
20 position in response to Inyo's County's motion that
21 the parties can and should file contentions based on
22 DOE's groundwater analysis now, and then would have
23 an opportunity to either amend their contentions or
24 file new contentions based on the NRC's groundwater
25 supplement.

1 JUDGE RYERSON: That Ms. Bupp is the same
2 position we rejected by our last Order, isn't that
3 correct? We have ruled that the obligation to file
4 new contentions will arise from 30 days after the
5 Staff's statement of position and the Staff's
6 position really will not be clear until 2011,
7 correct?

8 >> MS. BUPP: If that is what the Board
9 intended. We read the Order as saying that the
10 parties would file the contentions 30 days after the
11 staff stated what they were going to do with regard
12 to DOE's groundwater supplement which is that we are
13 going to prepare the supplement which DOE has not
14 prepared it.

15 JUDGE RYERSON: We should probably move on.

16 JUDGE MOORE: We will take that view under
17 consideration and study over the lunch recess, our
18 language and I will leave it at that.

19 Does anyone else have a matter that they
20 would like to us to address this afternoon?

21 MR. JAMES: Greg James with Inyo County; an
22 additional question with concerning the applicability
23 of the NRC regulations for augmenting NEPA documents
24 during litigation. If I heard you correctly, you
25 indicated there was some questions to whether that

1 procedure applies in this proceedings. If that is in
2 fact the case, it would seem like it may be an issue
3 that should be briefed sooner rather than later by
4 parties because it affects how litigation would
5 proceed.

6 >>JUDGE MOORE: It will certainly affect
7 how the litigation will proceed with regard to NEPA
8 issues.

9 And that is one of the matters that I
10 believe we will be taking up this afternoon to at
11 least get the preliminary thoughts on all of the
12 parties to restate so we know clearly what the issue
13 is.

14 Under normal NRC litigative adjudicatory
15 practices, Staff NEPA documents may be challenged.
16 The challenge generally starts with the filing of
17 contentions on the applicant's environmental report.

18 As you all know in this case, there is no
19 environmental report.

20 The EISs were written by the Department of
21 Energy through the full process of draft, comment and
22 final, and then submitted as part of the license
23 application process and the NRC and the Nuclear Waste
24 Policy Act, made the determination of whether those
25 documents were acceptable or must be supplemented.

1 In the normal non-Yucca mountain case, you
2 have contentions filed on the environmental report,
3 then either contentions are amended and supplemented
4 depending on the graph supplemental EIS, and the same
5 process with the final EIS.

6 And those matters are adjudicated, the
7 issues raised and any -- in most instances, the
8 deficient, alleged deficiencies in the staff
9 environmental documents to the extent there are found
10 to be deficiencies, are getting corrected through the
11 adjudicatory process, the hearing record as reflected
12 in any Licensing Board decision or appellate
13 commission decision, then our deamendments to the
14 Staff NEPA documents, the agency NEPA documents and
15 those then are the final agency NEPA documents.

16 This case has many wrinkles in it because
17 of what the Nuclear Waste Policy Act says, and I'm
18 sorry, I didn't review it this morning. But, if
19 memory serves, it has -- the Nuclear Waste Policy Act
20 has language in it that once DOE issues the EISs and
21 staff makes its determination of it's practical to
22 accept those or it's -- it must be supplemented, it's
23 done both here, I believe there's language in the
24 Waste Policy Act, that there's not further challenge.

25 It's complicated by what went on here as

1 was laid out in the contention admission decision
2 where we specifically put off, deciding, okay, we
3 admitted the decisions under the rules as we found
4 them for contention admissibility for NEPA issues in
5 the unique circumstances we were faced with, under
6 Commission rules that were written for one purpose
7 and now apply with a totally different set of
8 circumstances, spell all that out in the decision.
9 And, frankly, I don't have any answer to what the
10 standard is that we will apply and whether the
11 traditional adjudicatory NRC practice applies for
12 NEPA contentions.

13 We won't have to find an answer to that in
14 dealing with the 50-something NEPA contentions we
15 have pending before us.

16 And that's one of the issues that will need
17 to be addressed by the parties. And it's one thing
18 to get your preliminary views. It's another thing to
19 have a brief, and not have it briefed in the context
20 of a contention that's actually being litigated. And
21 I'm not sure that it can be resolved without a test
22 vehicle, but I'm speaking solely for myself.

23 It's always dangerous ground to make
24 pronouncements in non-actual situations. So, from my
25 perspective, that's the issue that we face with those

1 50 something NEPA contentions that will have to be
2 addressed. And part of the problem is how we
3 schedule them and do we pick out a test case or agree
4 on a test case and get it litigated and have it
5 briefed and deal with it.

6 Well, if there are no other issues that you
7 have for us.

8 We will now at 12:05 break for lunch until
9 1:35, at which time we will commence the argument on
10 the motion to compel for the State of Nevada and then
11 the Staff motion. We stand in recess until 1:35.

12 (Whereupon, lunch recess was taken)

13 AFTERNOON SESSION

14 >>JUDGE MOORE: We will now hear a brief
15 argument from the State of Nevada and on to the first
16 one. Nevada's motion to compel. Would you address
17 us from the podium, please.

18 >> MR. FITZPATRICK: Your Honor, may it
19 please the Board, Charles Fitzpatrick representing
20 the State of Nevada. I'll be very brief and I guess
21 I'll roll two motions together for purposes of
22 discussion since they are tied together.

23 >>JUDGE MOORE: You may reserve a few
24 moments for rebuttal but it must be rebuttal.

25 >>MR. FITZPATRICK: All right, Sir.

1 Initially, Staff filed a supplement to their LSN on
2 July 30th and that included the privilege log which
3 all 29 documents purported to be a deliberative
4 process although the PAPO rules require
5 certification that the log is accurate and privilege
6 claimed and truthful. There was no certification.
7 Nevada contacted Staff about having the consultation
8 because Nevada believed that the log was inaccurate
9 in claiming the privilege.

10 >>JUDGE MOORE: First question, you cite
11 and rely upon the revised second case management by
12 PAPO, subsequently adopted by the case management for
13 the -- after the contentions were filed.

14 I do agree that that motion is at
15 least in part applicable to resolving your motion.

16 >>MR. FITZPATRICK: That case management
17 Order is probably the critical document.

18 >>JUDGE MOORE: And will you also agree
19 that the -- to the extent applicable, if any, that
20 the 3rd, 4th and 5th case management Orders are
21 equally applicable to resolving your motion?

22 >>MR. FITZPATRICK: Yes, Your Honor,
23 particularly, the 5th which also talks about
24 deliberative process documents. That revised second
25 case management Order that you speak of does provide

1 at Page 6 that the claimant of deliberative process
2 privilege does bears the truth on it and it contains
3 in Appendix C which sets out what are the requisite
4 14 bits of information that must be supplied by
5 deliberative process privilege claimant to establish
6 that privilege.

7 Items 9 and 10 refer to the specific
8 decision on the deliberation including the date of
9 the decision and 10 is the specific explanation why
10 the document was deliberative.

11 I believed when I contacted Staff, I made
12 the point that I thought that the discussion could
13 take place in two parts because the 29 documents fell
14 into two categories. Twelve of the 29 were claims
15 by the Staff that the documents in question discussed
16 their decision to adopt the DOE DIS and 12 of them
17 were on that subject.

18 I conceded for the sake of argument that
19 those 12 probably were deliberative provided they
20 were being truthful -- I assume they were -- but they
21 specified that that was the decision that was at
22 issue in those documents. But I claim that those
23 were dilatory because this was a July 2009 filing of
24 the log, and the EIS adoption took place in
25 September, '08. And all these documents that were

1 listed regarding the decision were authored before
2 September, '08.

3 So, Staff has supplemented their LSN on a
4 monthly basis since then. So with that group, I
5 asserted that they were untimely even if
6 deliberative and the privilege had been waived.

7 With respect to the other 17, I said
8 there were two problems: One was that they were not
9 timely because in the case of those 17 documents,
10 some of them were as old as 2001 but mostly, 2005 and
11 2007, and again, not submitted until here in July,
12 2009.

13 And the second problem with respect to
14 those 17 was that the deliberative process
15 explanation or component listing was insufficient
16 because it didn't identify any specific decision, or
17 an explanation why the document was deliberative.
18 And in addition as with the first 12, all of those
19 were way untimely.

20 >>JUDGE MOORE: Now, so the substantive
21 challenge that you're raising with regard to the July
22 30th supplementation of the Staff's deliberative
23 process privilege log is that the log does not
24 establish on its face, a prima facie case for the
25 privilege; is that fair?

1 >>MR. FITZPATRICK: Right. The advice
2 case management Order Number 2 specified certain
3 criteria that must be dealt with, accounted for and
4 they were not.

5 >>JUDGE MOORE: And the purpose of those
6 was on its face, to show there was a prima facie case
7 of the deliberative process?

8 >>MR. FITZPATRICK: The PAPO Board spent
9 quite a bit of time deciding with respect to each of
10 the different primary privileges what the component
11 parts required to establish a claim.

12 >>JUDGE MOORE: You agreed with me that the
13 revised second case management Order was fully
14 applicable for deciding your motion. I'm curious, in
15 Paragraph 3 F(3) of that motion, states, "If a motion
16 to compel challenges" -- "If a motion to compel
17 challenges only whether the privilege log
18 establishes a prima facie case to the claimed
19 privilege, the motion shall clearly so state in the
20 first paragraph of the motion."

21 Why didn't you comply with that?

22 >>MR. FITZPATRICK: Because the motion did
23 not only claim that it didn't make a prima facie
24 case --

25 >>JUDGE MOORE: Timeliness and that?

1 >>MR. FITZPATRICK: And that it was
2 untimely. As a matter of fact, it only claimed the
3 prima facie thing as to 12 -- 17 of the 29 parts,
4 whereas that other claim, the untimely waiver was
5 made as to all 29. So that's why it wasn't referred.

6 >>JUDGE MOORE: You also agreed with me
7 that the 4th case management Order was
8 applicable. Paragraph B of that Order, entitled
9 "Motions To Compel," last sentence says "Any motion
10 to compel production of documents that fails to
11 include an Appendix A containing the listing of LSN
12 extension numbers and claimed privileges will be
13 denied." And that was put in there as an self
14 enforcing mechanism.

15 Did you attach an Appendix A to your
16 motion, and if not, why not?

17 >>MR. FITZPATRICK: I didn't attach an
18 appendix -- well, other than an e-mail that had been
19 sent by Staff. I incorporated the text, a list of
20 the complained of portions. I did not attach an
21 appendix.

22 >>JUDGE MOORE: But if you read the purpose
23 of that appendix, which is spelled out in that 4th
24 case management Order, that was so that all of these
25 motions to compel can be tracked automatically and

1 kept track of over the long history of this process
2 with the EDMS and that language says, "Any motion to
3 compel the production of documents that fails to
4 include an Appendix A" and it's spelled out in detail
5 in here how the appendix must be put together and
6 what's in it, "Listing the LSN extension number and
7 claimed privileges, will be denied."

8 Do we have any choice since those motions
9 are -- case management Orders are fully applicable
10 but they deny your motion on that ground?

11 >>MR. FITZPATRICK: I think you have the
12 discretion to consider that the text of the motion
13 contains the specifics and ultimate details of what
14 the complaint was.

15 >>JUDGE MOORE: Go ahead.

16 >>MR. FITZPATRICK: In any event, we
17 discussed the matter and I filed a motion to compel
18 and set up those two categories of documents.
19 Staff's answer, said "Staff's assertion of the
20 deliberative process was appropriate and timely of
21 the 29 documents." And they went on to say, the
22 reason they were timely, even though the documents
23 were very old, conceivably was because they had
24 changed in character and the first time they were
25 reviewed, certainly this is something we all are

1 comfortable with, we should re-review documents and
2 if they should change in character, to where they are
3 LSN worthy, you should incorporate them.

4 But this was an after-the-fact assertion
5 that they had just decided that they were now LSN.
6 In looking at the subject matter of the documents
7 themselves such as, this document relates to
8 discussion on tad canisters, this document relates to
9 discussion on technical data for models and the TSPA
10 and the waste package and so on; I fail to understand
11 why they would be -- why they would have been LSN
12 worthy from the beginning and why they became so.
13 And in the motion, I urged that -- in the response
14 that that be dealt with, and an explanation given if
15 the claim were made that they changed in character.

16 Why were they not LSN worthy when created?
17 Why were they suddenly, now? And in the response,
18 Staff simply said that they re-reviewed them, that
19 they had changed in character. They didn't explain
20 with respect to any document why it had changed in
21 character, why the discussion of tad was not relevant
22 before but was now.

23 In my view, the only defense between simply
24 saying we forgot to include documents that were four
25 years old and saying that we decided now they are

1 relevant, is the explanation of why they were not
2 relevant before they are now. And that has not been
3 provided.

4 Staff responded to our argument that they
5 were LSN relevant by suggesting that since they had
6 not made a decision on -- in the licensing
7 proceeding, there were no documents that were really
8 supportive of their position or non-supportive of
9 their position but that wouldn't explain either why
10 they certified LSN 25,000 documents, when they did
11 certify, why they up-dated it with additional ones
12 and why these documents have suddenly become
13 documentary material as they don't have a position.

14 Finally, the response they listed four or
15 five decisions. They said license application
16 decision itself, the SER is not the only decision.
17 We make lots of decisions. I certainly agree they
18 do.

19 They listed several decisions that they
20 make that are not LA decisions, but they didn't tie
21 any one of those decisions to any one of the
22 documents that were criticized as not specifying a
23 decision.

24 So, still as we stand here today, there has
25 been no correlation, no statement as to those

1 documents that are enumerated in the motion and don't
2 give them a specific decision. Well, what is the
3 decision? There still is no answer to that question.
4 After we filed the motion, they filed the response,
5 Staff filed the motion for leave to change or correct
6 their privilege log. And I called to meet to confer
7 about that.

8 They would not provide me a copy of the
9 corrected privilege log. They had not attached it to
10 the motion either provided to the CAB.. They would
11 not identify the corrections they proposed to make.

12 They would not represent the changes they
13 were supposed to make were different from the changes
14 that I had asked them to make in connection with the
15 motion to compel. And which they had taken the
16 position, don't need to make any changes. It is
17 timely, proper in accordance with the PAPO Order.

18 And as a matter of fact, in their motion
19 for leave to correct the privilege log, the Page 3
20 Footnote 3, staff's notes says that it maintains its
21 privilege log, properly asserts the due process
22 privilege, and satisfies the requirements of the PAPO
23 Board, revised case management 2. If that's the
24 case, then, the ruling should be simply, they
25 shouldn't have filed the motion and it should be

1 deni ed.

2 In other words, their position is in both
3 the response motion to compel and follow-up motion
4 for leave to change it, we don't really need to
5 change it because it is perfectly okay. Then, there
6 is no need for a motion.

7 Finally, they ask that the
8 motion -- their motion though it was filed subsequent
9 to the motion to compel, be decided before the Board
10 considers the motion to compel. And the only reason
11 suggested for that is that it might help clarify the
12 issues in the motion to compel. And frankly, our
13 feeling is that the only reason to urge that the
14 motion to correct their privilege log be considered
15 first is so that they can fix the problems that they
16 claimed, both in the response in the new motion and
17 in the consultation do not exist because at all
18 times, they claim that it is perfectly correct and
19 proper in accordance with the PAPO Board.

20 So I think the motion shouldn't have been
21 filed and shouldn't be considered first.

22 >>JUDGE MOORE: Thank you. Ms. Bupp.

23 >> MS. BUPP: Good afternoon, Your Honors.
24 I'd like to first start with an issue that the State
25 of Nevada raised for the first time in response to

1 our motion for leave to correct the privilege log.
2 That was that there was no certification attached to
3 staff's original privilege log.

4 First of all, that if that were an issue
5 that Nevada would like the Staff's privilege log to
6 be overturned on, they should have raised it in the
7 original motion to compel and therefore, that
8 argument is waived.

9 However, even if that argument was not
10 waived, there was no need for Staff to provide a
11 separate certification as the revised second case
12 management Order, clearly states that the signature
13 of an attorney is a certification that the filing has
14 been subscribed during the capacity with full
15 authority, that he or she has read it, knows the
16 content and that to the best of his or her
17 knowledge, information and belief, formed after a
18 reasonable period, the filing is consistent with
19 Part 2, consistent with the Second Case Management
20 Order, not interposed for any proper purpose and not
21 unreasonably or undue burdensome --

22 >>JUDGE MOORE: Ms. Bupp, do you agree the
23 revised Second Case Management Order is applicable in
24 this case and is controlling?

25 >> MS. BUPP: Yes, Your Honor.

1 >>JUDGE MOORE: You also agree that the
2 3rd, 4th and 5th case management Orders are
3 equally applicable and controlling in deciding your
4 case?

5 >> MS. BUPP: Yes, Your Honor.

6 >>JUDGE MOORE: All right. Would you care
7 to look at Paragraph B of the 5th Case Management
8 Order which directly contradicts the argument you
9 just made; B entitled "Due diligence, Accuracy and
10 Care."

11 And I quote, " Potential parties and their
12 attorneys and representatives, must exercise due
13 diligence and care in preparing and filing their
14 privilege log, As with all pleadings and discovery
15 filings, each time a log is submitted or supplemented
16 or corrected, it must be accompanied by a
17 certification by the attorney or other representative
18 that quote to the best of the signer's knowledge,
19 information and belief, formed after a reasonable
20 inquiry, that the information on the privilege log
21 and claimed privilege for the document is
22 inter-alia." Correct?

23 Now, you just said it didn't have to be
24 done but once and that the signature is sufficient.
25 I would suggest to you that Paragraph B of that 5th

1 Case Management Order, directly contradicts what you
2 said. How am I wrong?

3 >> MS. BUPP: I believe that while there is
4 a certification required, I believe that both the 2nd
5 case management Order and 10 CFR, Section 2.705(g)
6 that states that the signature of an attorney or
7 party constitutes a certification, that to the best
8 of the signer's knowledge, information and belief,
9 the disclosure is simply incorrect at the time that
10 it is made, that that also indicates signature stands
11 in for the certification.

12 >>JUDGE MOORE: That's fine. Please answer
13 my question. My question is, does not Paragraph B of
14 the 5th Case Management Order which you have
15 conceded is applicable here require you to have
16 signed each supplement to the privilege log
17 with your -- with a certification?

18 >> MS. BUPP: You mean, sign each
19 individual entry?

20 >>JUDGE MOORE: No. I don't believe that
21 any of the case management orders required you to do
22 a line by line certification. But when you filed the
23 log or the supplement to the log, that you certified
24 that pursuant to what it says here in Paragraph B
25 which was of the 5th Case Management Order which I

1 might add was entitled, "Supplementation Correction
2 and Changing of Privilege Logs." And was necessary
3 because of the filings of the Department of Energy
4 after their filing of original privilege logs
5 requires that privilege logs are to be taken
6 seriously and that the attorney is to certify each
7 supplementation that they have read it, acknowledge
8 it, to the best of their knowledge and belief, after
9 reasonable investigation, it is accurate and true.

10 It's a simple matter that cites back to the
11 revised 2nd Case Management Order. I don't see that
12 there is any room for suggesting that that is not
13 required. Where was your signature?

14 >> MS. BUPP: Our signature was on the --

15 >>JUDGE MOORE: Where is your
16 certification? And furthermore, where was your
17 signature on the log? There was a letter and as an
18 afterthought, there is a sentence with that letter
19 that says the equivalent provided by, attached are
20 the privilege logs.

21 >> MS. BUPP: I think that it was the
22 Staff's interpretation that when we filed as we have
23 filed in the past, privilege logs with the statement
24 that here is our privilege log, here is the signature
25 of the attorney that is submitting the privilege log

1 and here is the privilege log, that that taken
2 together, is the certification. If that is not the
3 case, then that is not the case. But that was the
4 staff's interpretation of the requirements of the
5 case management orders.

6 >>JUDGE MOORE: Well, I would call your
7 attention the 5th Case Management Order, paragraph
8 B, entitled "Due Diligence, Accuracy and Care," and I
9 quite frankly don't see how in light of that, your
10 argument stands. But, be that as it may, I commend
11 that you read that and see if that;s Staff
12 interpretation for the future is accurate..
13 Go ahead.

14 MS. BUFF: With respect to the claims made
15 in the Motion to Compel: In the first place, I would
16 like to address the claims of lateness together
17 although counsel for Nevada has denied those two
18 categories, environmental and safety-related
19 contention. He claims that both are late and Staff
20 holds that both -- that the claim of privilege for
21 both types of documents is timely for the same
22 reason.

23 That being that the Commission has made it
24 clear that all of the parties are to go back and
25 continuously re-evaluate their claims of privilege to

1 re-evaluate their LSN certification to make sure that
2 they are -- continue to be accurate and most
3 importantly, they are to do so after contentions are
4 filed and admitted.

5 This was very important from Staff's point
6 of view because as we have not yet finished our SER
7 with the exception of our document determination
8 report, we have not reached any regulatory
9 conclusion.

10 Therefore, our Class 1 and Class 2
11 documentary material is quite limited. However, once
12 we have rulings on the contentions, we were able to
13 ascertain the positions of the other parties. And
14 therefore, we have gone back and re-reviewed
15 documents that we had not placed on the LSN
16 previously to determine whether they may be
17 supportive or non-supportive of somebody's else's
18 position with regard to the license application, or
19 with regard to the EIS. That is what we did in this
20 case and we believe that our doing so was not only
21 timely, it was required by the Commission.

22 With respect to the claim that the
23 safety-related documents do not assert a decision on
24 which a claim of privilege can be based, we would
25 argue that the privilege logs as filed are adequate

1 and do if you read the totality of information in the
2 privilege logs; that the totality of information
3 points to several pre-license application decisions
4 that were influenced by --

5 >>JUDGE MOORE: Let's back up.

6 >> MS. BUPP: Okay.

7 >>JUDGE MOORE: Page 7 of your answer, you
8 state under C -1, the last sentence on page 7, when
9 the staff made its adoption determination file,
10 December 1st 2008, certification of LSN
11 supplementation, however, the staff was unaware of
12 the position of any potential party might take with
13 regard to the EIS.

14 Why is there the position of another party
15 relevant to the Staff's ADR position with respect to
16 its Class 1 or Class 2 documentary material under 10
17 CFR 2.1001? I'm missing something in your argument.

18 I understand your argument when you have a
19 party- that brief is argued and has been decided. I
20 understand the DOE's position.

21 But the staff is in a unique position.
22 They don't file contentions. And so, what is the
23 importance to the Staff in determining whether
24 there's supporting or non-supporting documentary
25 material Class 1 or Class 2 with regard to its ADR

1 decision, what any of these other parties' position
2 is on any contention?

3 >> MS. BUPP: Well, taking just what we
4 were doing at the time that we reached our ADR
5 decision, we were then going and putting information
6 on the LSN that related to the ADR decision. We had
7 a wide range of documents that were related to DOE's
8 EIS, to Staff's discussion, DOE's EIS and they fell
9 into basically three categories: One, documents that
10 were supportive of the Staff's adoption,
11 determination report. The second were documents that
12 were not supportive of the Staff's position with
13 respect to the adoption of determination report.

14 Those documents were either placed on the
15 LSN or re-asserted a claim of privilege for those
16 documents. However, there was a third group of
17 documents that were neither supportive or
18 non-supportive of the Staff's determination report,
19 but do have information related to DOE's EIS.
20 Therefore, once contentions were filed on DOE's EIS,
21 we were able to ascertain what the positions of the
22 other parties were with regard to DOE's EIS and then
23 go back and re-look at that third group of documents
24 and determine if there were any documents among those
25 that were either supportive or not supportive of

1 another party's position.

2 >>JUDGE MOORE: For the Staff's ADR
3 decision, though, I'm still missing the point. Isn't
4 Nevada's position or California's position or the
5 Four Counties position, irrelevant for determining
6 whether your information is supportive or
7 non-supportive of your ADR position, not theirs?

8 >> MS. BUPP: It is definitely, but we
9 were releasing information that is not only relevant
10 to Staff's position, but could be useful to other
11 parties, either supporting their position or to a
12 third party and stating somebody else's position is
13 wrong because it doesn't support their position.

14 So in that sense, we are perhaps being a
15 little bit broader with our LSN disclosures.

16 >>JUDGE MOORE: All right, continue.

17 >> MS. BUPP: With respect to the
18 safety-related contentions, the non-EIS related
19 documents, Nevada seemed to claim at least in its
20 initial motion to compel, that only decisions made
21 after the point of the license application being
22 filed could possibly be deliberative process with
23 regard to the Staff. But the only deliberative
24 process was a determination of whether or not to
25 issue a construction authorization. And that is

1 simply not the case.

2 Staff and every government agency
3 undergoes a series of deliberative processes every
4 day. We make a number of decisions. Some of them
5 may actually resolve a regulatory action. Some a
6 policy decision. Some of them never actually reach a
7 decision stage because at some point during the
8 decisionmaking process, we decide not to take
9 whatever action it was that we were considering.

10 However, all of these activities go on all
11 the time and we -- it's not improper to claim the
12 deliberative process privilege for a decision that
13 does not actually reach the level of a regulatory
14 decision.

15 With respect to the documents in the July
16 log, they included documents that were related to our
17 determination of what to go into our TPA code which we
18 are using for confirmatory analysis for our license
19 application. But the decision of what should be
20 included in that TPA code was a staff decision that
21 had to be considered. They included decisions --

22 >>JUDGE MOORE: Ms. Bupp, I apologize for
23 beating a dead horse but in looking at 10 CSR,
24 2.1001 which is the definition section, definition
25 of documentary material which you have supporting --

1 or we have in the past supporting and nonsupporting
2 issues. For supporting material , it says "Any
3 information upon which a party, potential party or
4 interested government official intends to rely and or
5 cite in support of its decision;" so, for supporting
6 material , it's your position, that is the NRC's staff
7 position for its ADR determination.

8 Likewi se, for nonsupporting deci si ons,
9 which is 10 CFR, 2. 1001(2), any information known to
10 and in the possessi on of or develo ped by a party",
11 that's you, "that is relevant to but does not support
12 that information or that party's posi ti on." It's
13 your posi ti on, not the posi ti on of the State of
14 Nevada or DOE or any one else.

15 So what I'm havi ng trouble wi th is what you
16 call your third category of material that you set
17 aside as not being supporti ve or non-supporti ve of
18 your posi ti on. And it became clear after contentions
19 were filed, strikes me as irrel evant.

20 Now, that material ei ther was upfront
21 supporti ng or upfront not supporti ng because it was
22 your ADR deci si on, only you knew what it was, and
23 only you knew what documents did or did not support
24 or were rel evant to that deci si on.

25 I may be mi ssi ng somethi ng, certai nly

1 often do but try to explain so I can understand how a
2 third party's position is relevant to your ADR
3 decision with respect to the definition of
4 documentary material under 10 CFR 2.1001?

5 >> MS. BUPP: The staff's understanding and
6 the reason why the Staff undertook the secondary
7 review in considering all the party's positions as
8 laid out in the contentions, was found in the
9 Commission's Statements of Consideration for 10 CFR
10 Part 2 that was published in Federal Register on June
11 14, 2004. Specifically on Page 32,843 of the Federal
12 Register, the Commission urged that all the parties
13 should re-review their Class 1 and Class 2
14 documentary material after filing contentions. And
15 the wording the Commission used didn't specify that
16 they should re-review their own documentary material
17 to see if their own position had changed with regard
18 to contentions.

19 They were to review their documentary
20 material to see if anyone's contentions had changed
21 their view of what their Class 1 and Class 2
22 documentary material was. So the staff took that to
23 heart and decided to re-review the material they
24 decided not to place on the LSN because it was not
25 supportive or non-supportive of the staff's ADR --

1 >>JUDGE MOORE: Can you tell me Ms Bupp,
2 let's take your document, the very first one in your
3 deliberative process, July 30th, the LSN header
4 number ending in 280.

5 >> MS. BUPP: Yes.

6 >>JUDGE MOORE: That document which had a
7 document date of April 4th, -- I'm sorry, April
8 11th, 2005. When did the Staff first review that
9 document for -- and it's an e-mail -- review that
10 e-mail for determination of compliance with LSN?

11 >> MS. BUPP: That I do not have at my
12 fingertips. I don't know, Your Honor.

13 >>JUDGE MOORE: Do you know when the Staff
14 reviewed all its backlog of e-mails? And do you
15 know whether -- when -- how long that process took
16 and do you know whether that process preceded or post
17 dated the Staff's date for certification of its
18 document collection?

19 >> MS. BUPP: I believe it post dated the
20 certification of the document collection.

21 >>JUDGE MOORE: If that's the case, isn't
22 that the reason why these documents are now showing
23 up?

24 >> MS. BUPP: No, because most of the
25 documents have been reviewed more than once. So even

1 if the initial review happened after the initial
2 certification, if we had to say we were late, could
3 we please insert the privilege for it, we would have
4 done so at the time we thought it was documentary
5 material.

6 The most recent time that we reviewed these
7 was after the filing of contentions where from our
8 point of view, if we are just dealing with the Class
9 1 and Class 2 documentary material and narrowly
10 defining it as only that material that either support
11 or does not support Staff's position, we would have
12 no Class 1 or Class 2 documentary material because
13 Staff has no position with regard to the licensed
14 application.

15 >>JUDGE MOORE: But you do with the ADR
16 decision.

17 >> MS. BUPP: No, but this document itself
18 is not related to the EIS.

19 >>JUDGE MOORE: I was -- perhaps that was a
20 bad example.

21 >> MS. BUPP: Perhaps the next document.
22 We can discuss that one. The very next document that
23 LSN had their --

24 >>JUDGE MOORE: So none of the ADR
25 documents fell into the answer to your question of

1 when the Staff did its e-mail reviews in this case,
2 for its backlog of e-mails that came after its
3 document certification?

4 >> MS. BUPP: The EIS related document were
5 all actually created after the initial certification
6 of the LSN.

7 >>JUDGE MOORE: Turn for a moment to your
8 motion to correct.

9 >> MS. BUPP: Yes.

10 >>JUDGE MOORE: And the statement of
11 Nevada's answer. State of Nevada states -- the State
12 of Nevada states that they asked to see your proposed
13 corrections to the log and that you did not respond
14 by turning them over.

15 Is that accurate?

16 >> MS. BUPP: Narrowly, that is accurate.
17 We did not have a complete corrected privilege log
18 to turn over to them. I believe that we probably
19 could have been a bit more forthcoming, perhaps to
20 giving them some excerpts that were completely
21 corrected and that might have given them a better
22 idea of what the corrections were going to look like.

23 However, since we were specifically barred
24 from attaching the corrections to the motion, we had
25 not perfected the corrections at the time of

1 consulting of the parties. So we could not have
2 given them a corrected log to look at.

3 But we probably could have given them some
4 more concrete examples.

5 >>JUDGE MOORE: Does not the 5th Case
6 Management Order tell you that only material,
7 corrections should be made after the time in which
8 you could make them without a motion?

9 >> MS. BUPP: I'm sorry, I don't quite
10 follow.

11 >>JUDGE MOORE: Laying my hands on the
12 5th Case Management Order; the general rule says,
13 Paragraph D (1) under 5th Case Management, are rules
14 regarding corrections: "The general rule, prompts
15 corrections require. If a potential party realizes
16 that one of its privilege logs contains materially
17 incorrect or misleading information;" does that not
18 set the standard for when such a motion should be
19 filed and the time periods and says within -- the
20 corrections can be done without the Board's leave if
21 they are done within 20 days of initial filing or 10
22 days within -- after a supplemental filing?

23 And the reason for that was so that one
24 party could rely upon them and deal with them. And
25 secondly, it made no sense to be wasting anyone's

1 time with either any material or non-misleading
2 information.

3 Now, you have given 3 examples in your
4 motion of the types of changes you neither benefited
5 the State of Nevada with what those changes were but
6 wanted them to under 10 CFR 2.323(b) to essentially
7 give you a blank check in an agreement and you've
8 given this Board nothing by way of a full corrected
9 privilege log attached to your motion so that we can
10 see the point of what you now wish to change which
11 might be indicative of whether or not the motion to
12 compel of the State of Nevada is valid.

13 >> MS. BUPP: Well, Your Honor, I have to
14 apologize because we in good faith read the 5th Case
15 Management Order as requiring an affirmative
16 motion -- an affirmative ruling from the Board that
17 such corrections would be entertained before we could
18 file the corrections. That is why we did not file
19 the corrections with the motion.

20 >>JUDGE MOORE: So you read the 5th Case
21 Management Order to -- as being a blank check to
22 make any changes you want. You can't tell me what
23 they are going to be but we are moving with good
24 cause because good cause is the standard for filing
25 this motion.

1 How can you ever establish good cause
2 without pointing to each and every one of the changes
3 you wish to make and why you wish to make them?

4 >> MS. BUPP: It was actually challenging
5 writing the motion for leave to suppress. .

6 >>JUDGE MOORE: Well, it should have been.
7 Doesn't that suggest you might not have been reading
8 the 5th Case Management Order correctly?

9 >> MS. BUPP: Well, I can see we were
10 clearly reading it incorrectly.

11 >>JUDGE MOORE: I frankly find also in
12 challenge by the State of Nevada, asking for the
13 changes and your not giving them to them.

14 How does that comply with the language of
15 323 to make a sincere effort which I believe is the
16 language of the regulation to resolve the conflict so
17 you don't have to be standing here listening to me
18 now?

19 >> MS. BUPP: We did try consulting with
20 them to explain the nature of the changes, to
21 explain why we wish to make the changes. And it is
22 not been the practice of all of the parties to these
23 proceeding to always amend a -- to always append a
24 draft of a motion to any request for consultation.

25

1 We have often, Nevada included, contacted
2 the parties --

3 >>JUDGE MOORE: Ms. Bupp, how many motions
4 have there been to correct privilege logs filed in
5 this case?

6 >> MS. BUPP: I don't believe there have
7 many, if any, Your Honor.

8 >>JUDGE MOORE: So there is not much of a
9 precedent to rely on for motions to correct privilege
10 logs in that regard. I'm troubled that your conduct
11 with regard to both this Board as well as the State
12 of Nevada by expecting a blank check on a motion,
13 that they would agree to it without them knowing what
14 they were agreeing to, and asking us to grant a
15 motion without knowing what on earth you -- what
16 changes you were seeking. The incredulity of that
17 really amazes me, frankly.

18 Secondly, the point and I would emphasize
19 this to all parties, the process that was set up in
20 those case management orders was so that you would
21 not be standing here today trying to defend the
22 indefensible. And I would hope you would take that
23 to heart.

24 Now, while we're on the subject of
25 privilege log, the Staff has been out of compliance

1 and it was not a system that was set up that was to
2 be policed by the Boards. It was only when someone
3 would bring it to our attention that we would do it.
4 But while we are on the subject, those case
5 management orders spell out that when you file a
6 privilege log, you file one with the EIE, secondly,
7 after having made arrangements with the LSNA
8 Administrator, the LSNA who is the administrator, as
9 to the form and context and all the fancy lingo that
10 goes with it, file a second data set with them.

11 All the other parties have been doing that
12 and complying with that except the Staff of the
13 Nuclear Regulatory Commission. The LSNA has perhaps
14 because he's been in a Santa Clause mood has taken
15 his staff and his time and his budget to fix what the
16 Staff should have been doing correct. He is out of
17 the Santa Clause business.

18 The Staff will pay heed or pay the
19 consequences.

20 >> MS. BUPP: Yes, Your Honor.

21 >>JUDGE MOORE: Continue.

22 >> MS. BUPP: With respect to the decision
23 of the deliberative process that was involved in the
24 safety-related contentions, it is the Staff's
25 position that the deliberative privilege can be

1 asserted for a number of decisions that may or may
2 not relate to a regulatory decision, i.e., in this
3 case whether or not to bring a construction
4 authorization.

5 The decisions that are related to the
6 documents that were asserted in the July deliberative
7 process log, are all pre-license application
8 activities that did involve a staff decisionmaking.
9 We believe that these documents ought to be protected
10 under the deliberative process privilege both to
11 protect the Staff's ability to continue to engage in
12 frank open discussion as it reviews the LSN and as
13 the entire agency continues to review other license
14 applications.

15 And also that because there was such a long
16 prelicense application period in this case, there is
17 a greater risk than usual for there to be public
18 confusion if Staff documents that do not constitute a
19 final regulatory decision but may look like a final
20 regulatory decision are released publicly before any
21 agency decision was made.

22 So for those two reasons in particular, we
23 believe that the deliberative process privilege was
24 correctly asserted with regard to these documents and
25 ought to be protected.

1 >>JUDGE MOORE: Let's just state the first
2 document 280 in the LSN header number.
3 Your column number that corresponds to 9 which is 10
4 in your column, the specific decision, partial
5 potential decision or decisionmaking process to which
6 the document relates. Now, that covers the
7 waterfront as you read and I believe correctly,
8 deliberative process log, privilege log, that it does
9 not have to relate to a specific decision. That
10 these elements make that clear.

11 But your statement that is supposed to
12 establish a prima facia so that these matters aren't
13 before us, merely states that this document relates
14 to a discussion on technical information regarding
15 models. I work very hard trying to figure out how
16 on earth that establishes a prima facia case, which
17 I might add is even defined for you in your revised
18 2nd Case Management in the definition section.

19 And furthermore, it places their revised
20 2nd Case Management Order contrary to your brief or
21 your motion places the burden on you to establish
22 that prima facia case.

23 Can you help me in how this statement that this
24 document relates to a discussion on technical
25 information regarding models establishes a prima

1 faci a case for the proposi ti on that the speci fic
2 deci si on and potenti al deci si on or deci si onmaki ng
3 process to which the document relates?

4 >> MS. BUPP: We woul d look at the headers
5 in their totali ty for thi s document. The subject
6 matter instructi on for thi s document is that it was a
7 di scussi on regardi ng DOE' s license applicati on
8 descripti on on model s, the prelicense informati on
9 that DOE made avai lable regardi ng the model s they
10 had used in their TSPA code.

11 This is a document that if we were allowed,
12 perhaps we woul d correct entry number 10 to clari fy
13 that it was model s -- the TSPA model s and the
14 Staff' s determi nati on wi th regard to its own TPA
15 based on our correspondence and consi derati on.

16 >>JUDGE MOORE: Wasn' t that as much of an
17 admissi on that currentl y, it is not and onl y as
18 clari fi ed, it is?

19 >> MS. BUPP: We do believe if you look at
20 the totali ty of informati on rather than looking at
21 entry number 10 that it is clear that the staff was
22 engaged in pre-license applicati on di scussi ons of
23 informati on that was avai lable in the pre-license
24 applicati on phase, and that therefore, the Staff was
25 undergoi ng some deli berati on at the time.

1 But we would like to clarify that it did go to in
2 this case an actual decision because we developed the
3 TPA and it did go to development of that TPA.

4 >>JUDGE MOORE: Thank you. Your time is
5 up. Rebuttal?

6 >>MR. FITZPATRICK: No rebuttal at this
7 time.

8 >>JUDGE MOORE: We will move right on then
9 to -- Judge Ryerson has a couple of points.

10 >>JUDGE RYERSON: Yes. One issue as we
11 were breaking for lunch is the interpretation of our
12 August 26th Order dealt with the DOE analysis, post
13 closure groundwater impact. We ruled in that Order
14 on August 26th, new or amended contentions relating
15 to the DOE analysis shall be deemed timely if filed
16 within 30 days after the NRC staff publicly announces
17 or otherwise advises the party how it will proceed
18 with respect to the DOE analysis.

19 And this morning, Ms. Bupp announced that
20 the NRC staff will have at the earliest, its own
21 supplementation decision no earlier than 2011. We
22 re-read the order, talked about it over lunch and
23 it's the Board's view that that statement does not
24 constitute a public announcement or other advice as
25 to how the staff is going to proceed with the DOE

1 analysis.

2 The point of the motion that we granted
3 with all parties except the staff agreed to, DOE
4 agreed to was simply to not require entire sets of
5 new contentions be filed immediately in response to
6 the DOE analysis that might or might not become part
7 of the ultimate supplemental supplement by the Staff.
8 And I believe Ms. Bupp indicated there would be no
9 further pronouncements from the Staff on the point
10 until 2011.

11 So it sounds like that will be the time
12 that new or amended contentions would be due.
13 Is that clear to everyone? Yes.

14 >>MR. FITZPATRICK: I would like to ask one
15 clarifying question. This morning when the
16 announcement was made by the Staff regarding -- the
17 suggestion was made that that was the announcement
18 which is this Order, 30 day filed contention.
19 Hopefully, that's been clarified as not applicable.

20 >>JUDGE RYERSON: I thought that's what I
21 was just rejecting. In other words, that statement
22 is not the sort of statement that we were
23 contemplating as trigger.

24 >>MR. FITZPATRICK: Is there a statement
25 that we can take home with respect to what is the

1 intent with respect to doing SCIS or submitting for
2 public comment?

3 >>JUDGE RYERSON: Well, I think -- Ms.
4 Bupp, if I understood your statements this morning,
5 you basically said there would be no further action
6 of any kind by the Staff until 2011 at the earliest;
7 is that correct?

8 >> MS. BUPP: Yes. We intend to do the
9 supplemental that we requested DOE to do.
10 We will do everything that we requested of DOE.
11 However, we're not going to be able to begin that in
12 the coming fiscal year because we had not budgeted
13 for that activity.

14 >>JUDGE RYERSON: So would you agree under
15 the Board's clarification of the Board's Order, would
16 you agree Ms. Bupp, that the earliest that the
17 deadline for new contentions would be triggered would
18 be in 2011 at some point?

19 >> MS. BUPP: Yes, and they would be
20 triggered I presume by some sort of staff document or
21 rather draft supplemental.

22 >>JUDGE RYERSON: Thank you. Does that
23 clarify?

24 >>MR. FITZPATRICK: That's something
25 submitted for public comment?

1 >> MS. BUPP: We have not exactly clarified
2 how we are going to do that yet. But it will be a
3 supplemental EIS. In terms of -- we are not
4 intending to do scoping because we feel that the
5 scope of the supplement was pretty clearly laid out
6 in our document determination report. Could you give
7 me just a minute?

8 >>MS. CURRAN: Judge Ryerson, this is Diane
9 Curran. While Ms. Bupp is consulting, I can't hear
10 anything that Mr. Fitzpatrick was saying.
11 Can you use the mic Mr. Fitzpatrick? Could you put
12 your face closer to the microphone --

13 >>MR. FITZPATRICK: I'm sorry Diane. I was
14 pushing the on button but I had to push another
15 button called a push button. I missed it. I'm
16 sorry.

17 >>MS. CURRAN: I think I got from the
18 dialogue what's happening but thanks.

19 >> MS. BUPP: As I said, previously, we do
20 not intend to hold a new scoping for the supplemented
21 because we believe it's scoped in the ADR. But we
22 intend to follow the NRC's policies in the
23 regulations for supplementing an EIS.

24 >>JUDGE RYERSON: My suggestion to the
25 parties would be in 2011 if there is any doubt you

1 can either file contentions at that point or come
2 back, ask for clarifications whether the contentions
3 have been triggered. But for the moment, nothing
4 until at least, 2011. We're in agreement on that.

5 While we're on the subject of
6 clarification, Ms. Bupp, I wanted to clarify the
7 Staff's position as stated this morning. Your
8 position in your papers was I think two-fold. One,
9 initially your papers you urge a briefing of all
10 legal issue contentions at one time in conjunction
11 with essentially a stay of discovery until that
12 process was completed.

13 And this morning, I heard you say that it
14 would make sense perhaps to begin with briefing the
15 legal issue contentions that are in some ways
16 associated with SER Volume, I and III what I will
17 call the phase one of this proceeding. But it wasn't
18 clear to me what your view was on discovery if the
19 briefing were so limited.

20 Or is it still the Staff's position that
21 discovery should not commence or not?

22 >> MS. BUPP: It's still Staff's position
23 as we stated in our papers that we would do briefing
24 on all legal contentions first and stay the
25 beginning of discovery, at least the start of

1 depositions until after the closing of all of the
2 briefing issues.

3 >>JUDGE RYERSON: Okay, and that would be
4 your position even with the more limited briefing of
5 only 11?

6 >> MS. BUPP: Yes.

7 >>JUDGE RYERSON: Eleven or 12 or whatever
8 it's associated with. But that's your position. And
9 there is no other party that is in favor of the stay
10 of discovery; is that correct? Anybody who is, put
11 your hand up. Thank you.

12 >> MS. BUPP: If I could just add, we did
13 talk briefly with counsel for Nevada. We haven't
14 reached a clear conclusion but that the Staff would
15 be willing as long as the start of the actual
16 depositions were stayed until the end of the legal
17 briefing, for the other parties to go ahead and do
18 the exchange of the list of witnesses, start actually
19 noticing the depositions and the depositions would
20 not take place until after the end of all the legal
21 briefings. But because we already built in a 60 day
22 time period, if we didn't even start depositions
23 until after the end of the legal briefing, that would
24 be an additional 60 days.

25 So we would be willing to let every one

1 start noticing contentions -- start noticing
2 depositions just as long as the depositions were not
3 actually held until after the close of the legal
4 briefing and maybe two weeks after the end of legal
5 briefing or some period of time.

6 >>JUDGE RYERSON: Okay, thank you.

7 >>JUDGE MOORE: We will turn now to the
8 number of issues that from the initial filings of the
9 parties in response to the first case management
10 Board's Order in which the contentions were grouped.
11 Judge Wardwell, you had a number of questions.

12 I think they were aimed primarily at
13 Nevada and DOE.

14 >>MR. SCHMUTZ: Your Honor, you're talking
15 about the six questions? That's what we will be
16 discussing. For the record, Mr. Polansky is going to
17 handle those, any questions on those for DOE.

18 >>JUDGE WARDWELL: That is the plan, to go
19 through the six questions pretty much in order from
20 our July 21st '09 Order. The first one dealt with
21 asking parties to submit what they think the various
22 submitted contentions should be categorized in the
23 various SER volumes.

24 And I think before we get into that in too
25 much depth, I was curious about an aspect that

1 crossed my mind as I went through some of these
2 submittals. And I think I'll start with Staff, if I
3 might. Ms. Bupp, since we have been focusing most of
4 our afternoon with you, we will continue on. I was
5 curious if you could provide any insight on why you
6 are scheduling the issuance of Volume III ahead of
7 Volume II? And the reason I say that is, in my
8 simplistic mind, it seems to me that a person would
9 want to from a technical basis go through the design
10 and operational types of issues and pre-closure
11 issues associated with Volume II before addressing
12 post closure issues in Volume III.

13 And that by necessity would have to do that
14 also. So I was curious about what was the motivation
15 for issuing Volume III ahead of Volume II and are
16 there any impracticalities of doing that?

17 >> MS. BUPP: First of all, let me caveat
18 these answers by saying that it was always the
19 Staff's intention to develop a single integrated SER.
20 Given the proper resources, we would continue to do
21 so because we think a single cohesive SER will
22 provide the greatest benefit to the Board, to the
23 other parties, to the public. However, budget cuts
24 being what they are, we had to issue it serially.
25 And when we sat down and looked at all the volumes

1 and issues, we decided to go with Volumes I and III
2 first; volume I simply because of the general
3 information. It gives an overview of the project.
4 Volume III, we evaluated post-closure. It evaluates
5 the post-closure performance of the repository, and
6 post-closure performance is predicated on the
7 performance of both natural and engineering barriers.

8 If the performance of the natural barrier
9 system does not contribute to safety in the way that
10 DOE's analysis in the LA assumes, DOE must either
11 change its LA or licensing basis and Staff would have
12 to recommend against granting a construction
13 authorization or impose license conditions. And it
14 is a lot harder to change natural barriers than
15 engineered barriers.

16 So we wanted to make sure that either the
17 LA could be changed if necessary or Staff could put
18 appropriate license conditions in place if necessary
19 sort of from the outside, because if that were not
20 possible, you can't change them out. If you can't
21 fix things, if the natural barriers aren't behaving
22 in the way they are predicted to, if you can't put an
23 engineer barrier to fix that, then, you know, you are
24 kind of stuck.

25 So we wanted to do Volume III first.

1 JUDGE WARDWELL: Does that -- by doing so,
2 are there any constraints in regards to your
3 evaluation of Volume III by not assessing the design
4 and construction of the engineered barrier systems,
5 though?

6 >> MS. BUPP: We are considering
7 engineer barrier system. We are considering both the
8 natural and the engineer barriers as part of Volume
9 III. Any changes to the engineered barrier systems
10 as a result of our analysis to Volume III would
11 actually impact Volume II to a great deal and also
12 Volume IV because we would have to make any changes
13 to the design and create closure operations that
14 would affect that.

15 Also, to the extent that if we were
16 developing a fully integrated SER that was going to
17 be published all at once, there will be many places
18 and different volumes that would refer back and forth
19 to other volumes. If that's the case, we would need
20 to refer to another volume. We are not referring to
21 that other volume but do the analysis as part of
22 Volume III. So that Volume III will have all the
23 information you need to analyze Volume III.

24 JUDGE WARDWELL: But I assume, you're not
25 changing the engineered barrier systems. You're

1 taking what was presented in the application as the
2 design of those systems and those will be designed
3 and constructed in the pre-closure period. And
4 how -- are you saying that you in fact are
5 considering the effectiveness of that design as you
6 evaluate Volume III, or are you taking it as a given,
7 or what constraints are there associated with the
8 considerations associated with those design and
9 construction aspects that take place in the
10 pre-closure period?

11 >> MS. BUPP: We are considering how the
12 design and the construction aspects in the
13 pre-closure period, what affects long term
14 post-closure performance.

15 >> JUDGE WARDWELL: What's left over from
16 Volume II then?

17 >> MS. BUPP: All the grower is obviously
18 that's actually left over, that takes place outside
19 pre-closure. All of the the grower operations are
20 included in that and so that's all part of Volume II.

21 JUDGE WARDWELL: Thank you. Mr. Malsch, no
22 fair switching seats on me. It didn't say so here.
23 This is supposed to change automatically, my little
24 cheat sheet here. Fortunately, I recognize you
25 though.

1 Do you see any constraints with doing
2 Volume III before Volume II, or do you feel
3 comfortable that those aspects of the design will be
4 evaluated as part of Volume III as I interpreted what
5 I just heard?

6 >>MR. MALSCH: This is Marty Malsch from
7 Nevada. It's of some considerable concern to us
8 because as you look at our contentions, particularly
9 those in which we didn't disagree as to whether
10 they are Volume II or Volume III related, they deal
11 with design engineered systems. And if -- which
12 would be engineered, designed and installed in the
13 pre-closure period. And we are really concerned that
14 if they are not addressed as a part of Volume III,
15 then Staff will in effect have prejudged a whole
16 collection of contentions, and ignored a whole area
17 that really ought to be part of post-closure.

18 So I'm heartened to hear what the Staff
19 says. I just wonder how thrilled it's going to be. It
20 is a concern that you have, that there is this
21 overlap between Volume II and Volume III.

22 And I guess if the staff is diligent in
23 addresses every aspect of what they would call
24 pre-closure that affect post-closure in Volume III,
25 I think that's terrific. I just hope that's the

1 case.

2 MS. BUPP: Your Honor, if I could just
3 respond briefly. We will do our best to be diligent
4 in analyzing everything in Volume III that we need to
5 support the conclusion of Volume III. However,
6 because there is some overlap between Volume II and
7 Volume III, as the parties were discussing at the
8 grouping of the contentions, it's been the Staff's
9 proposal that we err on the side of caution and every
10 contention that is related to Volume III and Volume
11 II, that we delay at least the hearings on that
12 contention until Volume II has been published just to
13 make sure.

14 JUDGE WARDWELL: And what is your reaction
15 to that Mr. Malsch, that suggestion or maybe that's
16 already been adopted by all parties? That's the
17 first that I heard of it, because I had that down as
18 one of my questions.

19 >>MR. MALSCH: Excuse me just a minute.
20 I think our position was that we should go forward
21 with all those TSPA special and Volume III
22 contentions.

23 If it turns out despite everyone's best
24 intentions that there is some aspect of those that
25 would not be addressed until SER, Volume II, there is

1 no reason we can't do discovery now as we had
2 proposed with respect to those contentions. It's
3 just that we couldn't complete discovery on those
4 until the Staff's SER was out, SER Volume I and II
5 and we couldn't go to hearing with those until SER
6 Volume II is out.

7 But there's no reason we can't begin
8 discovery on those and hopefully, there won't be this
9 glitch if the staff is very thorough about including
10 everything in the pleading, they should.

11 JUDGE WARDWELL: Back to you, Ms. Bupp. I
12 know you don't agree with this proposed schedule for
13 discovery, that you would rather brief legal issues.
14 But under the possibility that we move forward with
15 some form of discovery, do you see any reason why the
16 discovery associated with all the contentions that
17 have some aspect of post-closure could not move
18 forward bearing in mind that they may have to be
19 supplemented later on depending upon what actually is
20 in the thoroughness of that analysis in the SER
21 Volume III when it's issued.

22 MS. BUPP: Your Honor, I'm sorry I wasn't
23 clear earlier. That was my intention. My suggestion
24 either way that we delay the hearing for those
25 contentions.

1 JUDGE WARDWELL: Thank you.
2 DOE, Mr. Polansky, would you like to comment?
3 I don't want to start through all my questions again,
4 see if you got any comments?

5 >>MR. POLANSKY: No, I think we are in
6 general agreement with Nevada and Staff on this. And
7 discovery can proceed. The number of contentions
8 that are -- shall I say cross pollinated between SER
9 volumes is small and the parties will realize in
10 discovery whether SER Volume II issues are coming up
11 and the parties can agree that those are the
12 contentions that need to be put on hearing but
13 certainly no reason to move forward on discovery on
14 those.

15 JUDGE WARDWELL: Would you agree that in a
16 perfect world if this were issued as a complete SER I
17 think like we all desire, we wish it would have been
18 but it isn't but if it was, would you agree that
19 would make sense to start with Volume 1? But after
20 that, you would go to Volume II in the hearing
21 process or as far as discovery, make logical sense to
22 go to Volume II and then, to Volume III rather than
23 vice versa, in that order?

24 >>MR. POLANSKY: Yes, Your Honor, we would
25 agree with that. And frankly, that is the reason why

1 we have been so confident that we need these 20 plus
2 contentions associated with SER Volume II because we
3 intend or expect that we will be raising essentially
4 pre-closure defenses for these contentions such that
5 if the pre-closure aspect were ruled in DOE's favor,
6 we would never get to the post-closure aspect.

7 For example, all the retrieval contentions,
8 and whether or not DOE can retrieve waste. Well,
9 that is a predicate to whether the waste would end up
10 being placed in some configuration in Nevada that we
11 have not analyzed. But if DOE prevails on those
12 contentions on retrieval, then, there would be no
13 need for the Board to look at the post-closure aspect
14 of those contentions.

15 JUDGE WARDWELL: Mr. Malsch, in this perfect
16 world, would you agree that the Order would be in
17 this sequential order of the number designations
18 rather than addressing anything with post-closure? I
19 think I heard you say that. I just wanted to make
20 sure that I haven't heard wrong.

21 Mr. MALSCH: Yes, we agree in a perfect
22 world, that would be—that would be preferred. I
23 think the way it would work, let me just point out
24 that the parties' apparent agreement to proceed with
25 early discovery on post-closure contentions, Volume

1 III contentions, I largely aviates a dispute between us
2 and DOE as to whether certain contentions are Volume
3 II or other volume, Volume III because if we go
4 forward with all of those that we say are Volume III
5 with early discovery, the only possibly glitch would
6 then be if some of them turned out to have because
7 of DOE's defense, a Volume II aspect. We may not
8 then simply be able to close discovery against Staff
9 and go to hearing. But there is no reason we can't
10 commence discovery between ourselves and DOE.

11 JUDGE WARDWELL: Mr. Polansky, do you have
12 a problem with proceeding with discovery on all
13 those that border between or have some aspect with
14 Volume II and Volume III and then to go forward with
15 it under Volume III recognizing issues like you
16 brought up may arise such that it is better to wait
17 until Volume II is out for the hearing?

18 >>MR. POLANSKY: We have no concerns
19 proceeding that way. We did have conversation with
20 counsel for Nevada this morning and agreed that as
21 long as we would not be barred from raising
22 post-closure defense as Mr. Malsch described, it
23 could postpone the close of discovery on those small
24 set of contentions. We would be amenable to
25 starting discovery on those contentions.

1 >>JUDGE MOORE: Mr. Mal sch, help me
2 understand somethi ng here. You're making the
3 disti ncti on wi th goi ng forward on di scovery and after
4 di scovery, it wi ll be known whether or not they are
5 properly categorized as to Vol ume II as opposed to
6 III?

7 Or are you sayi ng that di scovery and
8 heari ng?

9 >>MR. MALSCH: Judge Moore, our posi ti on i s
10 that all of the contentions that we thi nk are Vol ume
11 III contentions are properly Vol ume III contentions
12 and there i s no change i n our posi ti on i n that
13 respect.

14 The nuance i s that DOE has refined i ts
15 posi ti on. I don't thi nk DOE i s necessari ly clai mi ng
16 that i n the overall scheme of thi ngs i n Vol ume III,
17 the contentions i n di spute must be Vol ume II as
18 opposed to Vol ume III. They j ust want to reserve the
19 right to raise a Vol ume II type defense, i n what we
20 woul d say i s a post-cl osure Vol ume III contention.
21 I thi nk we worked out how that woul d happen. I thi nk
22 that eli mi nates the need for any ki nd of a fi ne and
23 el aborate argument over whi ch of these contentions
24 properly belong i n Vol ume II or Vol ume III.

25 We woul d proceed as i f they were Vol ume

1 III. If there is a Volume II defense, we would
2 simply recognize that you couldn't complete
3 discovery on them and we may have to delay the
4 hearings on them.

5 >>JUDGE MOORE: Okay, if you can't complete
6 discovery, you can't go to hearing which then
7 eliminates my concern because what I saw lurking here
8 was a nightmare of motions to reopen.

9 And would the reopening motion requirements
10 apply? But that would be obviated by the way you are
11 going to deal with this.

12 >>MR. MALSCH: That's our hope. We agree
13 with you that the constant diversions of motions
14 reopened would be kind of a nightmare. I'm hopeful
15 further that if the Staff is as inclusive in its
16 Volume III as they say they are, many of what DOE now
17 thinks would be Volume II defenses would be addressed
18 in fact in Volume III SER and the issue will go away.
19 But we will have to see.

20 >>JUDGE MOORE: Mr. Polansky, Did I raise
21 any problems for you? My concern was with your
22 motions to reopen if it went to hearing would be a
23 nightmare in such a situation.

24 >>MR. POLANSKY: I think in this case, the
25 DOE and Nevada would save you from that nightmare.

1 >>JUDGE WARDWELL: And we thank you for
2 saving us from any and all nightmares that we have.

3 >>MR. POLANSKY: If I might, Your Honor,
4 there are a subset of these contentions that DOE
5 believes should be properly within SER Volume IV and
6 on Nevada suggested as SER Volume III. We would
7 treat those contentions in exactly the same way we
8 just described but we would proceed on discovery of
9 those as if they were SER Volume III under the
10 schedule we have all been discussing today.. And
11 again, we would make a determination somewhere down
12 the road whether SER Volume IV truly needed to be
13 invoked for those contentions.

14 >>JUDGE WARDWELL: And hearing both of
15 that, I was prepared to go through talking a little
16 bit more details of individual groupings of
17 contentions -- I'll start getting confused if I use
18 that phrase a lot. But I was going to go through
19 your spreadsheets in a little more detail to resolve
20 some differences between the two parties in regards
21 to II and III and III and IV.

22 I think it still may be useful to do that.
23 But let me just fix the point here; That if I hear
24 you correctly, Mr. Polansky, that you would have no
25 problem with leaving all of them in III for sake of

1 discovery at this point in time; is that correct?

2 >>MR. POLANSKY: Correct. And hopefully,
3 we may get through the hearing today and avoid going
4 through each of these serially but we can certainly
5 do that if you would like, Your Honor.

6 JUDGE WARDWELL: I'm weighing whether I
7 should take it -- it would be probably about a half
8 hour to go through the details of these just to
9 discuss, to get a little discussion on the individual
10 ones that were of interest. But I'm not sure it
11 really matters, whether -- the two parties that are
12 involved with this is mostly DOE and Nevada's
13 differences dealing with II and III and III and IV.

14 Do you think it might be useful?
15 I'm hesitate now that I got you here to let you go
16 and not at least get some feedback on this in case,
17 once we get running in this order, we need this
18 information or not.

19 >>MR. MALSCH: This is Marty Malsch for
20 Nevada. I think at this point, it isn't necessary.
21 I think the issue is effectively mooted for the time
22 being and for the proceeding future.

23 >>MR. POLANSKY: This is Mr. Polansky. And
24 I would urge that whatever you do with this issue,
25 that it be broad and not necessarily ruled to these

1 particular contentions at issue.

2 The other parties have identified one
3 contention here, one contention there that they think
4 ought to be put in both. The NRC staff suggest that
5 they are a whole host maybe in both. And so, I think
6 we ought to just move forward with them as is and the
7 parties can discuss professionally, as discovery
8 proceeds whether they truly do have aspects of
9 pre-closure or problematic aspects. Thank you.

10 JUDGE WARDWELL: Thank you.
11 I think that's just what we will do, move forward to
12 Question 2 which dealt with legal issues and really
13 was addressed by your Spreadsheet 2. I'm not sure
14 some of the things we've talked about here won't
15 preempt some of this but let's move forward with it.

16 I'll start with Mr. Malsch from Nevada:
17 You labeled several of your contentions as legal
18 contentions. And reading those, there didn't appear
19 to be any factual issue associated with those.
20 It seemed to be strictly a legal question.

21 Was that your intent when you labeled them
22 such as that?

23 >>MR. MALSCH: Yes, when we legally drafted
24 our contention, that was our concept.

25 JUDGE WARDWELL: Having said that, are

1 there any other contentions or do you disagree with
2 the rest of the contentions that are -- strike that.
3 Back up a bit. Spreadsheet 2 contains a list of
4 DOE's supposedly, mutual agreement to some degree of
5 legal contentions that include more of your
6 contentions, more of Nevada's contentions than those
7 that are listed as legal contentions.

8 Do you disagree that any of those that are
9 listed on Spreadsheet 2 have at least some legal
10 issue associated with the factual issue of those that
11 you're haven't listed as a designated legal
12 contention already?

13 >>MR. MALSCH: When we drafted our
14 contentions, we were thinking affirmatively of a
15 legal argument that would dispose of the application.
16 As the answers came in, you would see defenses raised
17 in the nature of legal defenses.

18 I suppose that's what the Board -- I
19 believe that's what the Board probably had in mind in
20 categorizing a bunch of contentions as legal
21 contentions that we hadn't labeled as such.
22 Now, our thought was that was the exclusive list,
23 that was all the contentions the Board thought, were
24 legal contentions.

25 DOE has since then, added some additional

1 ones which it thinks also raise legal issues. Our
2 principle concern along those lines was that for
3 purposes of this hearing today, we just weren't
4 prepared to address those but I think it would
5 recognize that along the road, it is certainly
6 possible for DOE to raise legal defenses to some of
7 our contentions which made those contentions at least
8 in part, a legal issue contention even though it was
9 not solicited by the -- solicited by the Board.

10 I think our intention would be to get
11 together and compile a list of SER Volume III related
12 legal contentions and hit those off the bat with the
13 idea of resolving just that collection before
14 priority next year.

15 >>JUDGE WARDWELL: The ones I have listed
16 here that you didn't comment on were Nevada Safety
17 172, 193, and 196, Nevada Miscellaneous 4 and Nevada
18 Miscellaneous 5. These were ones that were not
19 labeled by you as legal issues, and yet, the
20 descriptions seem to imply some legal questions and
21 DOE has listed them as that.

22 Are you saying that you're not prepared to
23 agree or disagree on whether or not that is an
24 appropriate designation as having some sort of legal
25 issue but will leave it for the time being and

1 address it as we move forward with consideration of
2 that as a legal issue associated with it?

3 >>MR. MALSCH: That was our intention
4 although with respect to legal issues associated with
5 SER Volume III, we've discussed it with DOE and we
6 plan to get together tomorrow, possibly, and work out
7 an agreement as to what that list is scheduled for
8 briefing and specification for legal issues
9 concerned.

10 So hopefully, that will resolve that issue
11 for the near term leaving other legal issues
12 associated with other SER volumes off into the
13 future. So I'm hoping we can reach agreement on what
14 legal issues need to be resolved early on to proceed
15 with discovery as we had proposed it.

16 >>JUDGE WARDWELL: I guess my next two,
17 you -- DOE stated that -- sure

18 >>JUDGE MOORE: Mr. Malsch, when you are
19 speaking of a schedule for briefing legal issues, and
20 especially the ones DOE has added to the list, you
21 and the Board designated either with the party's
22 designation or its own designation, legal issues. We
23 saw those as issues that could stand or fall on the
24 facts as stated in that contention, not as requiring
25 any of the accouterments for motions for summary

1 di sposi ti on.

2 Is that what you had in mind or are you
3 talking about motions for summary di sposi ti on?

4 >>MR. MALSCH: No, we have in mind, pure
5 legal briefing of legal issues not akin to summary
6 di sposi ti on --

7 >>JUDGE MOORE: Mr. Polansky, is that your
8 view also?

9 >>MR. POLANSKY: Yes, we agree.

10 >>JUDGE MOORE: And while we're on the
11 subject, does anyone else have a contrary view to
12 that expressed with DOE and Nevada?

13 >>JUDGE WARDWELL: Mr. Malsch, DOE stated
14 that you disagree with Safety 199 and 200, but those
15 are Volume IV issues so I assume we can table any
16 discussion of that. But I would be curious if you
17 would elaborate a little more on Safety 161 that you
18 mentioned this morning as one that you had some
19 comments on in regards to the legal issue raised by
20 that.

21 Could you elaborate more on that, what your
22 position is on that particular contention, if you
23 can?

24 >>MR. MALSCH: If I remember correctly, 161
25 is the contention that deals with the drip shields

1 and multiple barriers.

2 >>JUDGE WARDWELL: "Critical Role of Drip
3 Shields" is what's the title of it.

4 >>MR. MALSCH: Correct. To the extent
5 legal issues about that contention could be raised
6 and briefed, especially before the Commission itself,
7 the Commission itself made its decision, basically
8 deferring on the issue because it said the
9 developments were more complete to the adjudicatory
10 record.

11 That can't mean more complete legal
12 briefing because the matter has been completely
13 briefed, all the legal issues were thoroughly vetted
14 before the Commission.

15 So we think it follows what the Commission
16 had in mind was a more complete factual record, in
17 particular, the role of the drip shield in the TSPA
18 before that issue could actually be intelligently
19 briefed and argued.

20 So that's one we actually don't think we
21 could settle on the basis of just pure briefing as a
22 part of because of the volume for legal issues. We
23 suspect that's going to have to be put off until
24 perhaps the post findings, perhaps a little bit
25 earlier but certainly not before there is more of a

1 development in the factual record on the role of drip
2 shields.

3 >>JUDGE WARDWELL: Mr. Polansky, what is
4 your position on this?

5 >>MR. POLANSKY: We disagree on that
6 interpretation of the Commission's decision and
7 CLI-0914. The page that Nevada is citing which is
8 Page 28, does end from a sentence saying, "from the
9 development of of a more complete adjudicatory
10 record." That's what they are citing from but that's
11 primarily a discussion of NEI Safety 6. Although it
12 does mention Nevada Safety 161.

13 The full discussion of Nevada 161 is found
14 on page 37 to 39. And it concludes with the
15 statement that says, "As is the case for many of the
16 appealed legal issue contentions, we recognize that
17 perhaps because of tight deadlines, the Boards did
18 not provide a full legal analysis of each and every
19 contention raised in this extraordinary complex
20 proceeding. We affirm we have a disability ruling on
21 the drip shield issue, so that the parties may have
22 an opportunity to develop their positions on these
23 disputed issues in briefing and arguments before the
24 Boards. And the Boards will have the opportunity to
25 make a reasoned decision."

1 So we interpret any briefing argument
2 before the Boards to have been a reference and I
3 guess I disagree with Mr. Malsch's characterization
4 that they were fully briefed because as you know,
5 DOE did not file any briefs on this and the standard
6 that the Commission would have used in reviewing
7 these decisions may not have been the same as the
8 Boards would have used.

9 >>JUDGE MOORE: Mr. Malsch, how do you
10 respond to Mr. Polansky's arguments?

11 >>MR. POLANSKY: Well, we think the
12 Commission's discussion opinion about the need for a
13 full record fully applies to this contention. The
14 difficulty we have here is that if attorneys brief
15 the issues now, we would need to make assumptions
16 about the role of the drip shield and DOE's TSPA and
17 its relation to the other barriers.

18 And I suppose we could develop some sort of
19 complicated stipulation as a set of facts but until
20 the record has been more fully developed, there is no
21 assurance that that set of facts coming from a legal
22 briefing would turn out to be correct.

23 >>JUDGE WARDWELL: But as I hear your
24 comment now, it's more of a practicality of
25 addressing some of the legal issues that might be

1 resolved with 161 or rather the fact that it has been
2 fully briefed. Did I hear you correctly in your
3 last statement? Did I interpret it correctly?

4 >>MR. MALSCH: Yes, this is Marty Malsch
5 from Nevada. I think that's what the Commission had
6 in mind. The legal issue, the abstract about undue
7 reliance in any one barrier has been fully briefed
8 and argued. But the question is what exactly
9 does that -- what would the conclusion based upon
10 just those legal arguments and decisions mean in
11 reality to DOE's TSPA and drip shields?

12 And I think I came away from the
13 Commission's decision, with the idea that the
14 Commission recognized that maybe they could opine in
15 some abstract theoretical basis for what the standard
16 should be for undue reliance in any one barrier. But
17 they didn't feel that that was necessary or even
18 appropriate until they knew exactly what the role was
19 of the drip shield following discovery if not a
20 hearing, on drip shield questions.

21 So I think we can -- if we were to now
22 brief and argue an issue, end up with pretty much the
23 same briefs and same argument the Commission had.
24 The most we would expect would be some decision
25 perhaps that said, there are going to be no undue

1 reliance on any one barrier, but then, it wouldn't be
2 exactly clear perhaps what that meant for DOE's TSPA
3 unless we had some stipulations as to what the role
4 was of the drip shield and TSPA.

5 I mean, just hypothetically, if DOE were to
6 concede that the application fails and they cannot
7 comply with the EPA standards without a drip shield,
8 then, the issue could be briefed but I'm not sure
9 they are willing to make that concession.

10 >>JUDGE WARDWELL: One final thing for Mr.
11 Polansky, and then I'll get to Ms. Bupp for any
12 comments she might have on this one or any of the
13 other ones we talked about so far. One last followup,
14 on Rule 161. Are you wedded to addressing the legal
15 issues at this time necessarily? And certainly I
16 think tomorrow you will have opportunities to work
17 with the parties to develop that schedule and talk a
18 lot more, but is there a necessity to address those
19 legal issues that you think are there in 161 in the
20 immediate future, i.e., fiscal year 2010?

21 >>MR. POLANSKY: This is Mr. Polansky. In
22 direct answer to your question, no, there is no
23 immediate need to address that issue. Merely
24 responding to the suggestion that briefing all of
25 Volume I and II at the same time this was in SER

1 Volume III and we should move forward.

2 Tomorrow during our discussions or later
3 on, DOE and Nevada decide this is not something we
4 should come to the Board, would respond favorably to
5 the parties or postpone reasonable issues.

6 >>JUDGE WARDWELL: Thank you.

7 >> MS. BUPP: Briefly, with respect to
8 Nevada Safety 161: The Staff concurs with counsel
9 for DOE's reading of the Commission Order which would
10 argue for legal briefing before we had discovery for
11 that contention in particular. With respect to the
12 question I think you just asked DOE as to whether we
13 should brief all legal issues at once; the Staff
14 believes we should brief all the legal contentions
15 first before beginning discovery although some of
16 them there are related to SER and we just had a
17 discussion a few minutes ago about what's in Volume
18 III and what's in Volume II. And as much as the
19 Staff would endeavor to create separate distinct
20 volumes and volumes that can stand alone, there is
21 some bleed over amongst the volumes.

22 We may have to delay hearings to make sure
23 the later volumes come out, and to the extent we can
24 do legal briefing first at the outset before we start
25 any discovery on anything, the result of that legal

1 briefing may help to inform discovery, narrow the
2 scope of the discovery, make sure the discovery
3 overall and the hearings overall are more efficient
4 and focused at the outset. So we would argue for
5 doing all those briefings at the outset.

6 >>JUDGE WARDWELL: Judge Wardwell: Thank
7 you.

8 >>JUDGE MOORE: Ms. Bupp, you've stated
9 the Staff's position and I believe what you just
10 stated was that the closest you have come to the
11 reason for the Staff position.

12 Would you be so kind as to enlighten me as
13 to why the Staff wants to go ahead and have legal
14 issues briefed on volumes -- legal issues associated
15 with Volumes in the SER when the Staff does not have
16 any handle at this time as to when those volumes of
17 the SER are going to be undertaken and then,
18 promulgated?

19 >> MS. BUPP: I think Your Honor as I just
20 stated although we will endeavor when we publish each
21 serial volume of the SER to make sure that each
22 volume in the SER is a stand alone document. There
23 is bleed over amongst them.

24 So it seems that the outcome of this
25 meeting that if we set aside some time to brief all

1 the legal issues, we would then have at least those
2 legal issues determined and we can then focus on
3 discovery and make sure that we knew exactly what
4 questions were being addressed during discovery and
5 hearings that would lead to a more focused proceeding
6 overall.

7 >>JUDGE MOORE: I'm sorry for being so flip
8 but what does that have to do with legal issues that
9 have nothing to do with Volumes III and 1 of the SER?
10 If those legal issues don't pertain to those issues,
11 that is, Volume I and III, what's the relevance of
12 them for doing them now? To me, it seems because of
13 the total uncertainty downstream, that very frankly,
14 that's a subterfuge for something else. What is the
15 something else?

16 >> MS. BUPP: As we stated in our comment
17 that we filed last week on Nevada's response to your
18 questions, if we have a schedule that requires us to
19 start discovery immediately, it may -- the Staff may
20 have difficulty completing Volumes I and III of SER
21 on the schedule that we made up previously.

22 >>JUDGE MOORE: Why?

23 >> MS. BUPP: Because even though the Staff
24 at this point and time, intends to notice few, very
25 few if any depositions where we would be the main

1 party deposing a witness from DOE or from the State
2 of Nevada, we do intend to participate in those
3 depositions to the extent that all the parties agreed
4 in our previous June joint schedule, that other
5 parties could participate in the depositions. They
6 could attend depositions, they could ask questions at
7 the close of the depositions.

8 I think we reserved two hours at the close
9 of every deposition for parties other than the party
10 that noticed the deposition, to ask questions.

11 And if the Staff were participating in
12 discovery on Volume III, we would use the same staff
13 experts to support our participation in discovery
14 that we are using to write the SER. And we can't be
15 in two places at once, and it would severely limit
16 our ability to complete the SER on time.

17 And so we thought that as we said, if we do
18 the legal briefings, first, it would allow the Staff
19 to participate more fully in discovery and complete
20 the SER at least, Volumes I and III on the schedule
21 we've already given, and it has the added benefit of
22 clarifying issues for the other parties. That's what
23 we stated last week and that remains the Staff
24 position.

25 >>JUDGE MOORE: On resources?

1 >> MS. BUPP: Yes.

2 >>JUDGE MOORE: Your argument strikes me as
3 robbing Peter to pay Paul. You still got to pay.
4 If that's the case, how does it delay the SER? If
5 all of the legal issues are briefed and decided by
6 December, how on earth does that allow you to meet
7 the schedule as opposed to if we're only dealing with
8 those that deal with Volume SER III and I, which
9 presumably are the issues on which your experts are
10 working on the SER?

11 >> MS. BUPP: Well, although the parties
12 have not agreed to the schedule yet, just by way of
13 example, DOE's proposed schedule sent to all the
14 parties, on that legal proposed schedule, we would
15 be doing legal briefings until February -- through
16 February of next calendar year, 2010.
17 Briefing on the legal issues because they are legal
18 issues, they do not have a strong technical component
19 and so it would keep all counsel occupied during the
20 briefings but would require much less effort on the
21 part of Staff than participation of discovery would.
22 Does that answer your question?

23 >>JUDGE MOORE: I really don't understand
24 how working on issues that have nothing to do with
25 what your lawyer and technical people are going to be

1 tied up on can impact the schedule on Volumes I and
2 III.

3 >> MS. BUPP: It's because if we don't do
4 the legal briefing for all of the contentions, all
5 the legal contentions, even the ones that are
6 related to Volumes II, IV and V now, we would have
7 to start discovery on Volumes, I and III earlier.

8 It is doing discovery simultaneously while
9 the Staff is trying to finish the SER that is causing
10 the staff problems. It has nothing to do with
11 briefing legal issues. Briefing the legal issues is
12 a legal activity that would require the attorneys to
13 work very hard to be able to support both reviewing
14 the SER and briefing the legal issues, but would not
15 require the technical staff to do as much work as
16 would be required for the technical staff to help
17 support depositions. Because by their very nature,
18 the legal contention part are legal issues, not
19 technical issues requiring technical expertise?

20 >>JUDGE RYERSON: Your point, Ms. Bupp as I
21 understand it, the longer the discovery can be
22 deferred, the longer period that your technical
23 people are not distracted by discovery and they can
24 work on the SER volumes.

25 >> MS. BUPP: Exactly.

1 >>JUDGE RYERSON: So from your standpoint,
2 the legal briefing is kind of a mis-direction. From
3 the point that you're talking about only relates to
4 keeping your technical people free to work on the SER
5 volumes?

6 >> MS. BUPP: The Staff suggested doing the
7 legal briefing first so that everybody wouldn't be
8 sitting on their hands while they are waiting for the
9 Staff to get a little bit further in writing the SER,
10 but it is something that could be of benefit to all
11 the parties that we can do in the meantime.

12 >>JUDGE RYERSON: But to the extent that
13 the consensus of the parties seems to be that it
14 would be useful to begin with discovery, that's
15 simply inconsistent with your view?

16 >> MS. BUPP: Because Staff would like to
17 at least, participate in discovery because through
18 discovery, we could gain insights that could be
19 useful in writing the SER. And so it's not like we
20 could just set out and let them all go on and have
21 their discussions.

22 We do need to put some resources into at
23 least, reading the transcripts and depositions, if
24 not attending depositions and asking questions
25 because while we can ask RAIs to DOE, to the extent

1 that the other parties have raised issues that we're
2 also trying to address in the SER, we can't really
3 ask them questions about the technical bases for
4 those issues. And we would like to have the benefit
5 of that, while we are writing SERs so that we can
6 come up with the best document possible.

7 But we can't have experts attending
8 depositions or even reading transcripts from
9 depositions while they are supposed to be writing
10 SERs. There just aren't enough resources to go
11 around and we don't have the fiscal year, 2010
12 budget. Based on what we're seeing coming from
13 Capitol Hill, the proposed budgets, it's just not
14 going to be feasible.

15 >>JUDGE MOORE: Can you tell us that if we
16 move forward in the context of what all the other
17 parties wish to do, how much delay in you issuing
18 Volume 1 and Volume III of the SER will be -- entail?

19 >> MS. BUPP: It really depends on what our
20 budget is for fiscal year, 2010 and also whether
21 there is a continuing resolution.

22 >>JUDGE MOORE: What was the last part of
23 that?

24 >> MS. BUPP: The 2010 appropriation and
25 also whether there is a continuing resolution, if

1 the budget appropriation is not issued by October
2 1st.

3 >>MR. POLANSKY: Your Honors, if I may.
4 One way to alleviate the Staff's concern is maybe
5 have the parties get together with NRC staff and
6 within SER Volume III, if the Staff has for example,
7 if they have completed the igneous section of the
8 SER, then, perhaps that is something that we from a
9 subject matter could proceed on first and therefore,
10 not affect the Staff resources from a technical
11 perspective.

12 And we can work in series that way.
13 I don't know if we can promise to do that but we can
14 certainly work together to try to alleviate that
15 concern.

16 >>JUDGE MOORE: Ms. Bupp, are you in a
17 position to be able to tell us whether there are any
18 portions, especially with relation to Volume III, of
19 the SER, that you might conclude are completed or
20 nearly so or give us a percentage figure of the 1,000
21 issues that are involved in Volume III, how many
22 have been completed? Or how many that relate to
23 contentions here with relation to Volume III have
24 been completed?

25 >> MS. BUPP: I would have to consult with

1 the technical side but the appropriate people to
2 consult with are here.

3 >>JUDGE MOORE: It is now, 3:00.
4 It is an excellent time for a brief 15 minute break.
5 Ms. Bupp, start consulting. We will reconvene in 15
6 minutes.

7 (Whereupon, a short break was taken)

8 >>JUDGE MOORE: Please be seated.

9 >>MR. MALSCH: Judge Moore, I had a possible
10 suggestion that may shortcut this whole discussion
11 and that is if we agree that no actual depositions
12 will be conducted until I say February of next year,
13 but between now and then we do notice the
14 consultation and so forth, I think that takes care of
15 the Staff's problem and DOE has no problem with that
16 either.

17 So Staff's objective here was to get some months
18 down time before actual depositions are conducted, then
19 that's the solution to the problem. And I think we, indeed,
20 have an agreement postponing depositions until around February 1
21 is fine.

22 >> JUDGE WARDWELL: As will become clear very
23 shortly with what we ask of the parties, that is something
24 that you should fully explore and reach consensus on, or may
25 wish to do that. That -- I'm just curious; for the record,

1 Ms. Bupp, did you have an opportunity to consult and can you
2 give us a progress report? Or if it's not appropriate for
3 to you do so, just say so.

4 >> MS. BUPP: Sure, we can answer the Board's
5 question. I want to clarify back to the Judge's questions
6 about what was in Volume III and what was in Volume II. I
7 think a clear way to describe the difference between the
8 two of them is that, while they're both concerned with the
9 -- that Volume II is concerned with compliance of 63.204,
10 and Volume III is concerned with 63.311 in compliance with
11 that. So to the extent that we're looking at design and
12 fabrication issues, construction issues, in Volume III, we
13 will be looking at whether or not they can comply with
14 63.311 which looks at post-performance. So any sort of
15 design defects we would look to see if there was a
16 post-closure performance impact to that.

17

18 In the old world, when we were creating one big
19 SER, we would only look at post-closure performance. In
20 this new world, where we're trying to develop a very
21 complete Volume III that could stand on its own, we will
22 have to look at some issues of design so that will have the
23 background and be the context for discussing the
24 post-closure performance. So I hope that's a little bit
25 clearer as to what's going to be in Volume III. With

1 regard to Volume III in its completion, all chapters of
2 Volume III are a work in progress and while we appreciate
3 the offer to maybe try to stagger discovery to relate to
4 only certain issues of Volume III, the way the staff is
5 designing Volume III to be an integrated volume. Each
6 chapter of Volume III builds upon the other, and so it won't
7 be until Volume III is complete that any one issue within
8 Volume III is, you know, sort of complete and done. We need
9 to be able to continuously go through it and look at the
10 integrated processes that are considered in Volume III.

11 >>JUDGE MOORE: Well, thank you for that
12 answer. You did clear something up. You used the
13 phrase, "new world" and "old world " and I'm living
14 in the old one and you may be living in the new one,
15 and now I can understand.

16 Judge Wardwell?

17 >>JUDGE WARDWELL: I just have a few more
18 questions on the response to our July 21st Order.
19 And first let's just go back to Spreadsheet 2 to talk
20 about a couple of little technocrat -- if you will --
21 issues with that to make sure I understand what the
22 issue was and Mr. Polansky, if you have a copy of the
23 spreadsheet there.

24 Under your third column, in what's
25 designated as a legal issue, you have many

1 contentions that are attributed to the Board as being
2 the one designated, designating that particular
3 contention as a legal issue. Many of them, I believe
4 were designated by the party and not the Board.
5 So it wouldn't be LBP, but it would be party. And do
6 you agree with that in retrospect? Or if not, I can
7 quickly tell you which ones I think are the only ones
8 that were the Board ones of those LBPs from my
9 reading out those contentions.

10 >>MR. POLANSKY: This is Mr. Polansky. I
11 think what we tried to capture in Spreadsheet 2 was
12 whether the contention was discussed as a legal
13 issue, whether raised by an adjudicatory body or
14 either party, whether it was discussed on the
15 Commission's decision on appeal or LBP0906 or whether
16 it was truly raised by, you know, the parties.

17 >>JUDGE WARDWELL: I see. That clarifies
18 it. And then one last issue under Nevada Safety
19 196 -- and someone else brought this up also -- but I
20 believe the Volume is I, not IV. I think that's a
21 typo, if you agree with that? I think previously you
22 designated it as a "I" and it will affect what we're
23 dealing with now.

24 >>MR. POLANSKY: Correct. The NRC was
25 correct in pointing out that was a typo and it was

1 inconsistent with Spreadsheet 1 and Spreadsheet 2 and
2 this identifies this contention as SER Volume 1 and
3 SER Spreadsheet 2 had it wrong.

4 >>JUDGE WARDWELL: Okay, good.
5 In regards to Question three, I had no additional
6 questions from that. On four, I think we covered the
7 questions that I did have on that. On Question five,
8 which stated, which of any NEPA contentions, in
9 addition to NEPA 001, involves matters of subject --
10 of pending supplementation of DOE's environmental
11 impact. I think I just want to verify with Nevada,
12 Mr. Malsch, that you agree that those 15 contentions
13 listed by DOE in Spreadsheet 6 are the ones and only
14 ones that are involved with groundwater matters from
15 your perspective? They start on the bottom of page
16 one and go to the top of page two.

17 >>MR. MALSCH: This is Marty Malsch of
18 Nevada. That sounds right to us, although we haven't
19 focused on other parties contentions. But the list
20 does include the two of ours that are related to
21 groundwater.

22 >>JUDGE WARDWELL: Who do we have in
23 California? Mr. Sullivan, for California. Do you
24 agree that those are the ones from your perspective
25 that are groundwater issues?

1 >>MR. SULLIVAN: Yes.

2 >>JUDGE RYERSON: And Mr. Jones from Inyo.

3 >>MR. JAMES: Yes. Greg James, from Inyo
4 County.

5 >>JUDGE WARDWELL: Sorry, Greg James.

6 >>MR. JAMES: Yes, we agree with that
7 characteri zati on.

8 >>JUDGE WARDWELL: And JTS, we have NEPA
9 199. Do you agree those are the ones that deal with
10 ground water and only the ones they do?

11 >>MR. POLAND: Yes, Your Honor, we do.

12 >>JUDGE WARDWELL: And NYE.

13 >>MR. ANDERSON: Your Honor, Rob Anderson
14 for Nye County. It was included both in your
15 question and in the Spreadsheet correctly.

16 >>JUDGE WARDWELL: That's right. So we're
17 here at the agency of redundancy. Question six,
18 which if any of the contentions identified in
19 response to Question four, but not response to
20 question five, require discovery before being right
21 for adjudication and describe the general nature of
22 any such discovery. And I think I would like to
23 verify with Nevada and the other parties that they
24 agree that the discovery needs presented by DOE in
25 Spreadsheet 3 are reasonable and appropriate and do

1 not need any augmentation and if so, what
2 augmentation?

3 >>MR. MALSCH: Yes, that's correct.

4 >>JUDGE WARDWELL: Without going through
5 all the parties again that's involved now, with
6 Spreadsheet 3 because there's even more now, would
7 any of the other parties like to augment any
8 discovery needs not already presented by DOE in their
9 Spreadsheet 3?

10 >>MR. ANDERSON: Rob Anderson for NYE
11 County. I think we filed and so stated that we
12 believe that within that subgroup that you're dealing
13 with, there are some NEPA contentions, particularly
14 those with respect to transportation that if dealt
15 with upfront as we have suggested, may not require
16 discovery. In other words, it's the opposite.

17 >>JUDGE WARDWELL: Right.
18 Okay. I was more concerned to make sure if there is
19 more, I want get them in. If there's less, that's
20 fine but if there's more -- but I appreciate your
21 responding. Anyone else feel there should be other
22 contentions not listed that require discovery?
23 Hearing none from here or in our Rockville Hearing
24 Room, then we'll proceed and I am finished with my
25 questions.

1 >>MR. MALSCH: The next order of business
2 will be taken up by Judge Ryerson and we think that
3 this is now the way the Board would like to conclude.

4 >>JUDGE RYERSON: Yeah, here's what we'd
5 like to do and Ms. Curran, this may present
6 logistical issues involving you that we can get to at
7 the end. But, for the group that's here, we'd like
8 to proceed as follows: First, I want to say, I think
9 all of us discussing it at the break were impressed
10 by what seems like the degree of agreement among most
11 of the parties, not on all issues, but really when
12 you look back at the filings that we've received and
13 you look at what's said today and the suggestions of
14 cooperation, it's very encouraging. And we'd like to
15 continue in that useful endeavor while we have
16 everybody today and tomorrow and suggest we proceed
17 as follows:

18 We would like everyone here to -- we'll
19 probably break about 4:00 today to use some time
20 today, and then tomorrow to continue to work on the
21 issues that you've been talking about and to try
22 before the close of business tomorrow to come up with
23 as much of a consensus case management order as
24 possible. And, you know, I think our hope and
25 expectation is that you'll be able to at least do

1 that in outline form by the close of business
2 tomorrow, and that thereafter, and I'll get around
3 some specific dates on this, that you'll be able to
4 come up with a draft case management order that we
5 can look at and as appropriate, perhaps modify an
6 issue or a conflict.

7 It seemed to me, or it seemed to the Board
8 that there are a number of consensus issues and I'm
9 not going to hit on all of them, but certainly the
10 Board's sense was that the majority view seems to be
11 that proceedings should begin promptly on matters
12 related to SER Volume I and SER Volume III. And that
13 would include discovery in some form. I just heard
14 about the suggestion of actually deferring
15 depositions a little further than they've originally
16 been contemplated.

17 But it would include discovery of some
18 form. It would include discovery related to NEPA
19 contentions, legal issues, safety contingents,
20 anything related to SER I and III. And I think
21 that's what most parties seem to be contemplating at
22 this point. Someone made the point earlier, we think
23 it's a very realistic one, that the target ought to
24 be through the close of discovery in phase one.
25 That is everything, as I've said, that relates to SER

1 I and III including the NEPA contentions that relate
2 to SER I and III, the legal issues and so forth,
3 that we need not at this point go beyond that. I
4 believe under the chart that was circulated for that,
5 phase one discovery would have completed November 30,
6 2010. That may or may not be the fixed date that
7 you agree upon as you talk it through but that takes
8 us for the next 15 months or so. So our view is that
9 we need not probably be worrying a whole lot today or
10 in the next couple of months about the time between
11 the close of discovery and the beginning of a hearing
12 and the like.

13 So that's sort of the second point that at
14 least we heard some agreement on. A third point that
15 and this may reflect my personal views, maybe even
16 more than the rest of the Board's but a suggestion
17 was made that as a general guiding principle, it is
18 better rather than trying to carve out specific
19 limitations on depositions or other kind of arbitrary
20 rules that may or may not make sense as we move
21 forward, to instead of that, proceed with a spirit of
22 professional cooperation and when cooperation in some
23 hopefully rare instances cannot be achieved, usually
24 the best route will be to try to initiate a
25 conference call with the Board rather than firing off

1 motions that deal with discovery. At least my own
2 experience is that motions dealing with discovery are
3 too easily written and often not terribly productive.
4 And that parties are more likely to convene a
5 conference call only when there is a serious dispute
6 and it usually can be resolved more efficiently that
7 way. Procedurally again, we hope what we can do is
8 have you meet as long as you find it productive
9 today. I think you can use this facility till 5:00
10 or 5:30. We will plan to -- that is we, the Board,
11 will plan to be here at 9:00 tomorrow as originally
12 scheduled. You may or may not have any progress to
13 report at that point, but we might as well just touch
14 base then and see where you are. The expectation is
15 that you would then continue through the day as
16 necessary.

17 We plan to come back on the bench at 1:00
18 and if need be at 5:00 to hear where you are. And
19 we're going to be back here ready to come out on the
20 bench, if with or without a reporter if we you find
21 it more helpful one way or another at any point
22 during the day. If there's a particular issue, that
23 if for some reason the Board participation would be
24 useful.

25

1 Again, our hope is that you can reach a
2 consensus on the principle points of an outline of a
3 case management order with the thought that you would
4 then, one party, would presumably have to take this
5 responsibility, go back and draft it up, ideally, in
6 the form of a proposed order and circulate to the
7 others and get in shape for filing with us with the
8 EIE system, filing actually with the Secretary's
9 office as a proposed order by Wednesday, September 23
10 which we would then look at. And as I said, modify
11 as we felt appropriate, but issue no later than the
12 end of this month. That's our hope and expectation.
13 I think, at least as we've looked at the filings,
14 they're really three principle groups of filings that
15 you have to reconcile in that, in that order and you
16 probably all know what they are.
17 There's the May -- the June 10 group that was
18 originally filed in response to construction
19 authorization for one's order. And as I recall,
20 there was a principle filing on June 10 or a few
21 individual party filings and there were responses to
22 the six questions filed August 17. Again, there were
23 some individual responses on that and most recently,
24 the September 10 filings of the individual responses.
25 But I think it's the Board's view that in light of

1 the conversations today, I think you're probably in a
2 position to try to reconcile all those and hopefully
3 reach agreement on the timing and the principle rules
4 for operating and try to do that by close of business
5 tomorrow. Am I missing something, ask my colleague,
6 Judge Moore?

7 >>JUDGE MOORE: If need be after we receive
8 your joint proposed draft case management order that
9 under which we'll be operating on what we're calling
10 Phase One on all the contentions associated with
11 volumes I and III of the SER, if we think we have
12 any additional pressing questions that we think
13 consultation with you would be in line, I would do it
14 on the telephone with a telephone conference but it
15 will be done expeditiously, so that we can get a
16 start on this massive case and get you all working on
17 it and off of these procedural matters and back on to
18 subject matter.

19 >> : JUDGE RYERSON: I did I don't want to forget the
20 point about Ms. Curran. Logistically, this may
21 present difficulties for you or maybe it doesn't
22 really.

23 One option would be that you would work by
24 telephone with one or more groups, that is they're
25 talking about this?

1 Or simply participate when we come back on the bench
2 and hear a report on where things stand? Do have you
3 any views as to the best way for to you participate
4 Ms. Curran?

5 >>MS. CURRAN: I think I can do it by
6 telephone. Right now, if people are staying to talk,
7 I would need to get a telephone number of someone
8 there that I could call because I--I don't have
9 telephone numbers for the participants. I do have a
10 cell phone with me.

11 >> : >>JUDGE MOORE: Ms. Curran, one moment.
12 The plan is we will essentially since this is your
13 conference, the courtroom will be made available to
14 you if you wish to use this facility, this room, and
15 bar everyone else from it except yourselves, the same
16 way if you were meeting at one of your offices. We
17 will stand at your call. If we can be helpful, plus
18 the times Judge Ryerson noted. If that's the way you
19 wish to proceed and do it in here, then Ms. Curran,
20 we can have you participate the same way you're now,
21 by video conference right there, tomorrow, it can be
22 done from chambers there, so you don't have to be in
23 a big room by yourself, you can be in a small room by
24 yourself. If that would make you more comfortable.
25 If that is not the way the parties wish to proceed

1 and you wish to break into groups or subgroups and
2 use the conference rooms, then, whatever group miss
3 Curran is broken into, we can make arrangements so
4 that you can participate by at least telephone
5 conference and then back to video conference when
6 we're all in here. I just spoke to Andy and he said
7 it can be arranged.

8 So that is your choice. If you wish to use
9 this facility, then we will clear it of all except
10 those lawyers that are involved in the negotiated
11 process of those that they wish to have here as part
12 of their team. And and how do you wish to proceed?

13 >>MR. SCHMUTZ: DOE would like to have it
14 here immediately after the Board adjourns. I'd ask
15 one question of the Board with regard to what Judge
16 Ryerson said. There may be one or two -- as I look
17 sort out over what happened today, I think we're in
18 agreement among most of the parties on most things
19 and I don't think of -- I think we're going to come
20 up with two sticking points. I'm not going to raise
21 them to the Board now but I would hope that the Board
22 would be available tomorrow to give us on this, any
23 sticking points, kind of the Board sense of where
24 they're coming out.

25

1 >>JUDGE MOORE: We would be pleased to do
2 that and we will have a system in place in the
3 morning so that we will be here in the building at
4 your beck and call. We will come to the bench and
5 attempt to answer your questions. Or, take the
6 question and cogitate and then then come back and
7 give you our sense. If that's the way -- is everyone
8 in agreement that that's the way you would like to
9 proceed? Then it's now your facility. I would ask
10 all those who are not participating, and it's up to
11 you all to determine, because I don't know who's in
12 the audience, some of them may be your people. You
13 identify those that you want to participate and
14 everyone else will be -- the room will be closed and
15 sealed and it is yours. And we will send a message
16 in as to what time we must cease activities this
17 evening because I don't know at this point whether
18 it's 5:00, 5:30 or -- I can have an answer? One
19 moment. Talk about a short memory, 5:30 is when we
20 will -- because of security, we'll have to turnover the
21 room and then we'll reconvene at 9:00 in the morning.
22 And so, we stand adjourned. Would you like to start
23 earlier than 9:00 in the morning?

24 >>MR. SCHMUTZ: This is Tom Schmutz from
25 DOE. No.

1 >>JUDGE MOORE: I was just going to say,
2 with that overwhelming response -- so, we will be
3 here until 5:30 if you have any questions you wish to
4 send to us, we'll work out a system on how to contact
5 us.

6 Ms. Curran, I would suggest you just stay
7 right where where you are and participate by video
8 conference and we will contact you directly as to
9 where the video conferencing will be tomorrow at
10 9:00 a.m. which is 12:00 your time because I think it
11 can be moved to chambers and that will be probably a
12 little more convenient for you.

13 >>MS. CURRAN: Just so I understand, I am
14 going to be able to participate by video conferencing
15 right now, after the Board --

16 >>>>>>JUDGE MOORE: Correct.

17 >>MS. CURRAN: -- ends its session?
18 And tomorrow. All right. I'd like to make one
19 request, because I feel a little mistrustful of
20 technology. I'd like to ask for one telephone number
21 before you leave. Could I have a telephone number
22 for Deborah Roby, that would be wonderful.

23 >>JUDGE MOORE: We have someone there, Ms.
24 Curran who has all the requisite numbers and there
25 will be full coverage for you tomorrow so that should

1 there be any disconnection, they can hopefully fix
2 the glitch or we'll work around it.

3 >>MS. CURRAN: Okay, and then I just have
4 one more request, one more comment. I just want to
5 thank the Board for making it possible for me to
6 participate remotely. It's helped Eureka County save
7 its resources and I also want to thank you so much
8 for the effort you've gone to webstream this
9 conference. I think it's helpful to a lot of
10 people. Thank you.

11 >>JUDGE MOORE: With regard to the video
12 conferencing to Ms. Curran back to the Rockville
13 Hearing facility, which Andy, you take care of making
14 sure that it's now sealed too so that it's only Ms.
15 Curran. The webstreaming will cease, and will not
16 be--as will the broadcast. Also, there will be no
17 more real time court reporting. If you want it on the
18 record, when you meet with us, we will just turn the
19 DDMS on, so it will be videotaped and then a
20 transcript can be made of it. If you wish it not to
21 be on the record, we don't have to have it on the
22 record. We will leave it up to your request. Is
23 there anything else? Then we stand adjourned.

24 (Whereupon, Proceeding were concluded)

25

CERTIFICATE OF REPORTER

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2 This is to certify that the attached proceedings
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4 the matter of U. S. Department of Energy High-Level Waste
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