

RAS 19821

ORIGINAL

OFFICIAL TRANSCRIPT OF PROCEEDINGS

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

'98 DEC 18 A10:40

OFFICE OF SEC. 1-  
ADJUDICATIONS STAFF

**Title:** PRIVATE FUEL STORAGE, L.L.C.  
PREHEARING CONFERENCE

**Case No.:** ASLBP No. 97-732-02-ISFSI  
Docket No. 72-22-ISFSI

**Work Order No.:** ASB-300-592

**LOCATION:** Rockville, MD

**DATE:** Friday, December 11, 1998

**PAGES:** 991 - 1167

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Template = SECY-032

SECY-02

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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In the Matter of: :  
PRIVATE FUEL STORAGE, L.L.C. : Docket No. 72-22-ISFSI  
(Independent Spent Fuel : ASLBP No. 97-732-02-ISFSI  
Storage Installation) :

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U.S. Nuclear Regulatory Commission  
Two White Flint  
Room 3-B-51  
Rockville, Maryland  
Friday, December 11, 1998

The above-entitled matter came on for prehearing  
conference, pursuant to notice, at 1:11 p.m.

BEFORE:

THE HONORABLE G. PAUL BOLLWERK, III  
Administrative Judge,  
Atomic Safety & Licensing Board Panel

DR. JERRY R. KLINE,  
Atomic Safety & Licensing Board Panel

DR. PETER S. LAM,  
Atomic Safety & Licensing Board Panel

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## 1 APPEARANCES:

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7 (via videoconference)

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14 JOHN DONNELL

15 Private Fuel Storage Project Manager

16 (Rockville, Maryland audience)

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24 (via videoconference)

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14 PRESENT FOR THE PRIVATE FUEL STORAGE, L.L.C.:

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## 1 PARTICIPANTS: [Continued]

## 2 PRESENT FOR THE U.S. NUCLEAR REGULATORY COMMISSION:

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4 CATHERINE MARCO, Esquire

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

[11:05 a.m.]

JUDGE BOLLWERK: Good morning. Today we are here to conduct another prehearing conference in the Private Fuel Storage, L.L.C. proceeding. For the record I would note that as we did back in May of this year, we are conducting this prehearing by videoconference from the Licensing Board Panel Hearing Room at NRC Headquarters in Rockville, Maryland and from Room 212 of Milton Bennion -- B-e-n-n-i-o-n -- Hall, on the campus of the University of Utah in Salt Lake City, Utah.

This particular proceeding was convened at the request of various petitioners seeking a hearing to challenge the June 20th, 1997 application of Private Fuel Storage, L.L.C. for a license under 10 CFR, Part 72, to possess and store spent nuclear reactor fuel in an independent spent fuel storage installation located on the Skull Valley Goshute Indian Reservation in Skull Valley, Utah.

We scheduled this prehearing conference for two reasons. First, we wish to discuss with the parties the status of informal discovery and future scheduling for the proceeding. In this regard, just prior to Thanksgiving in connection with a joint informal discovery status report, we received from the Staff a letter indicating that the

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1 schedule for its license review efforts had changed, which  
2 could impact the schedule for litigation of admitted  
3 contentions.

4 This was followed by a December 1st, 1998, motion  
5 from Intervenor State of Utah requesting an extension of the  
6 time for informal discovery beyond the existing December  
7 31st, 1998 cutoff date.

8 Most recently, by E-mail yesterday evening, we  
9 received submissions from both Private Fuel Storage and the  
10 Staff that reflect their proposals for changes to the  
11 schedule for litigation of the contentions in Groups I and  
12 II to accommodate the revisions in the Staff's application  
13 review schedule. All this we anticipate discussing in some  
14 detail this morning.

15 In addition, we have before us the November 18th,  
16 1998 late filed request for a hearing and petition for leave  
17 to intervene of the Southern Utah Wilderness Alliance, which  
18 was accompanied by contentions. The focus of the hearing  
19 petition and the contentions is an August, 1998 amendment to  
20 the Private Fuel Storage license application that outlined a  
21 revised proposal to construct a rail spur that would be used  
22 to transport spent fuel shipping casks to the Private Fuel  
23 Storage facility.

24 We received responses to these filings from  
25 Applicant Private Fuel Storage, Intervenor State of Utah,

1 and the Staff and a reply filing from the Alliance and we  
2 will be hearing oral presentations from these participants  
3 regarding the admission of the Alliance as a party.

4 Before we begin examining these matters with the  
5 participants, I would like again to introduce the Board  
6 members.

7 To my left is Dr. Jerry Kline. Dr. Kline, an  
8 environmental scientist, is a full-time member of the Atomic  
9 Safety and Licensing Board Panel.

10 To my right is Dr. Peter Lam. Dr. Lam, who is a  
11 nuclear scientist, also is a full-time member of the panel.

12 My name is Paul Bollwerk. I am an attorney and I  
13 am Chairman of the Licensing Board.

14 At this point I would like to have the  
15 representatives or counsel for the parties identify  
16 themselves for the record. As before, why don't we start  
17 with the representatives for the various Intervenors and  
18 Petitioner SUWA, and then move to counsel for the Applicant,  
19 Private Fuel Storage, and finally to the NRC Staff counsel.  
20 Let's start with those of you that are out in Salt Lake  
21 City, if we could.

22 MS. WALKER: Good morning. This is Joro Walker,  
23 counsel for Southern Utah Wilderness Alliance and OGD.

24 JUDGE BOLLWERK: Good morning, Ms. Walker.

25 MR. ALLEN: This is Bryan Allen on behalf of



1 Castle Rock and Skull Valley Land Companies.

2 MS. NAKAHARA: This is Connie Nakahara, on behalf  
3 of the State.

4 JUDGE BOLLWERK: Anyone else there in Utah  
5 representing any of the parties?

6 [No response.]

7 JUDGE BOLLWERK: All right. Mr. Quintana is not  
8 there. I don't see him anyway, and we -- okay. Then let's  
9 go around the room here, if we could, from the State of  
10 Utah.

11 MS. CHANCELLOR: Denise Chancellor, State of Utah.

12 MS. CURRAN: Diane Curran for the State of Utah.

13 MR. SILBERG: Jay Silberg for Applicant Private  
14 Fuel Storage.

15 MR. GAUKLEAR: Paul Gauklear for Private Fuel  
16 Storage.

17 MR. BARNETT: Sean Barnett for Private Fuel  
18 Storage.

19 MS. MARCO: Catherine Marco, NRC Staff.

20 MR. TURK: Sherwin Turk, NRC Staff -- and with me  
21 at counsel table is Mark Delligatti, the Project Manager for  
22 the PFS application.

23 MR. SILBERG: Also with us in the audience is John  
24 Donnell of Private Fuel Storage, Project Manager.

25 JUDGE BOLLWERK: In connection with party

1 appearances, I would note that in the parties' November  
2 24th, 1998 joint status report it was requested that -- I am  
3 sorry, it was represented that counsel for the Confederated  
4 Tribes of the Goshute Reservation would be unable to attend  
5 today's session, but the Confederated Tribes is waiving its  
6 right to be present.

7 With regard to the items for discussion today,  
8 unless the participants have some other suggested order of  
9 presentation we would like first to hear about the status of  
10 informal discovery, then move to the subject of scheduling  
11 revisions relative to the Staff's revised review schedule  
12 and the State's pending discovery extension motion in this  
13 regard at some point I would appreciate an update from the  
14 Applicant on its proposed construction and operation dates  
15 relative to the PFS facility.

16 At that point, once we finish discussing  
17 scheduling, we are likely going to take a short break before  
18 moving to oral presentations on the Alliance's hearing  
19 request and contentions.

20 I would note that we have placed presentations on  
21 the discovery status and scheduling matters first before  
22 those party representatives who do not intend to make any  
23 presentations regarding the Alliance's pleadings an  
24 opportunity to attend to other matters. In so stating,  
25 however, we wish to make it clear that if at the end of the

1 presentations regarding the Alliance's filings, the Board or  
2 any one of the participants raises additional scheduling or  
3 other matters, the absence of a party representative may  
4 well not provide cause for deferring further discussion on  
5 the matter.

6 Let me also note that we are doing a  
7 videoconference. We may be working with the cameras at some  
8 time, back and forth. Hopefully this is going to work  
9 smoothly but I am not trying to use you all as guinea pigs  
10 but we are still in the early stages of trying to use this  
11 type of technology to conduct these hearings.

12 I would also like to note the lighting in Salt  
13 Lake City is pretty good. Our lighting here is pretty bad.  
14 I hope you can see us all right there. This is supposed to  
15 be upgraded soon, but unfortunately we are about a week  
16 short of that so we are sitting in the shadows but maybe  
17 next time you see us, we will not be.

18 Having said all that, are there any comments on  
19 the suggested order of presentation?

20 [No response.]

21 JUDGE BOLLWERK: All right. If not, then let's  
22 begin with a report on the status of informal discovery, and  
23 I think the order that we'd issued has asked someone, and  
24 has generally been Private Fuel Storage, to step forward and  
25 sort of let us know where everything is.

1 MR. GAUKLEAR: Yes. Paul Gauklear from PFS.

2 Since the November 24th status report, the  
3 following things have happened.

4 The State and the Applicant have exchanged  
5 privileged logs of the documents over which they claim  
6 privilege and we have made copies of those logs available to  
7 the other parties as well.

8 The Applicant has responded to the great majority  
9 of the State's follow-up discovery requests and we will  
10 complete that response next week.

11 The State has copied and sent to us about a box of  
12 documents that we had requested when we were out in Utah and  
13 they're working on copying and producing the rest of those  
14 documents.

15 Also, we have scheduled informal interviews next  
16 week, the State and the Applicant have, on about four or  
17 five of the contentions, so that is where things stand in  
18 terms of what's happened since the last status report and  
19 what is planned in the immediate future.

20 JUDGE BOLLWERK: Have there actually been any  
21 interviews conducted up to this point?

22 MR. GAUKLEAR: We conducted, in the second week of  
23 November the Applicant conducted about five interviews of  
24 State people in Utah.

25 JUDGE BOLLWERK: And I'm sorry, they are -- next

1 week they are going to be talking with your folks or you are  
2 going to be talking with theirs?

3 MR. GAUKLEAR: Both.

4 JUDGE BOLLWERK: Both, okay.

5 All right. Anything any of the other parties want  
6 to say at this point about informal discovery?

7 MR. TURK: I have one request, Your Honor --

8 JUDGE BOLLWERK: Yes.

9 MR. TURK: For the Staff. We have not been  
10 conducting interviews as yet, but I would appreciate it if  
11 Utah and PFS keep us informed as much in advance as possible  
12 in case we can break loose and get out to some of these  
13 interviews -- we would appreciate attending.

14 JUDGE BOLLWERK: All right.

15 MR. GAUKLEAR: No problem with that.

16 JUDGE BOLLWERK: All right. Not that it makes any  
17 difference to the Board necessarily, but are you -- at one  
18 point you talked about the question of whether you were  
19 going to tape record it or simply take notes.

20 What have you decided to do? Just out of  
21 interest --

22 MR. GAUKLEAR: Just decided to take notes. We  
23 decided that the interviews are, quote, of no evidentiary  
24 value in terms of being able to use to impeach people in  
25 future hearings.

1           The purpose of the interviews is basically to  
2 identify the bases for the other person's contentions,  
3 identify any documents that may not have been produced  
4 previously, and to get the big picture of where the other  
5 party is coming from with respect to the contention.

6           JUDGE BOLLWERK: All right. Anything you want to  
7 add with respect to that, Ms. Chancellor?

8           MS. CHANCELLOR: Connie Nakahara was going to  
9 comment on any other issues dealing with the status of  
10 discovery.

11          JUDGE BOLLWERK: All right. Ms. Nakahara, is  
12 there anything you would like to say?

13          MS. NAKAHARA: No -- other than the State will e  
14 forwarding an additional request for documents to PFS either  
15 today or early next week and we will try and finish looking  
16 at the documents that PFS has produced, the additional  
17 documents they produced next week, and that's it -- and we  
18 have no problem coordinating with NRC Staff on our  
19 interviews.

20          JUDGE BOLLWERK: All right. Any of the other  
21 parties out in Utah want to say anything about informal  
22 discovery? Mr. Allen or Ms. Walker?

23          MR. ALLEN: No.

24          MS. WALKER: No -- thank you.

25          JUDGE BOLLWERK: All right.

1 MS. CHANCELLOR: I would just like to offer a  
2 comment. I think that this informal discovery has been very  
3 useful in that we have been able to exchange voluminous  
4 amounts of documents and having been able to do it  
5 cooperatively.

6 JUDGE BOLLWERK: All right. I am glad to hear  
7 things are working as I had hoped, at least up to this point  
8 anyway.

9 Do you have any better sense from doing this where  
10 you're at in terms of formal discovery?

11 I recognize given the schedule that you have  
12 provided it still looks like you are talking about three  
13 months. Is that something that is going to be -- I guess  
14 it's been proposed for three months. It doesn't look like  
15 anybody -- there's some talk about extending informal  
16 discovery but not formal discovery. That still looks like a  
17 viable window, I take it?

18 MR. GAUKLEAR: I believe that we have three months  
19 in our proposed schedule. I believe that's viable.

20 In terms of what we thought about formal  
21 discovery, it's -- we have just done a very gross estimate  
22 of depositions and roughly we estimate maybe one per  
23 contention on average, with some contentions having more and  
24 some being grouped, et cetera, but right now our best  
25 estimate based on what we know of the State's witnesses and

1 people they have identified and what other parties have  
2 identified is roughly one-per contention -- 25, roughly.

3 JUDGE BOLLWERK: So you see yourselves then within  
4 the limits that the Board set on -- at least on depositions?

5 MR. GAUKLEAR: On average.

6 JUDGE BOLLWERK: On average.

7 MR. GAUKLEAR: On average. There should be some,  
8 I know one contention for sure where we want to request  
9 additional, I think we would want to request additional  
10 depositions, just because of the breadth of the contention,  
11 Contention K.

12 JUDGE BOLLWERK: All right. And what about  
13 interrogatories -- I'm sorry, Ms. Nakahara, do you want to  
14 say something on that?

15 MS. NAKAHARA: Just on the formal discovery, that  
16 it is difficult for us to determine right now how much -- I  
17 guess whether it will work within the constraints of the  
18 original order, and the one -- until we get a chance to do  
19 the information interviews, we are not sure of how many  
20 people we want to do depositions on as well as PFS nor have  
21 we identified our experts, so it is really difficult to  
22 identify a number of depositions.

23 We hope -- we plan to have a better feel for that  
24 after we finish the informal interviews and finish this last  
25 set of review documents.



1 JUDGE BOLLWERK: All right -- and I got -- I guess  
2 obviously from the motion--that you filed that if this  
3 informal discovery is extended that you plan on conducting  
4 additional interviews besides the ones that are scheduled  
5 next week?

6 MS. NAKAHARA: Yes. We originally tried to  
7 schedule all of them by the end of December. Due to the  
8 number of people involved and the schedules and the holidays  
9 it was getting extremely difficult, so informal discovery is  
10 extended.

11 We plan to do probably -- I am guessing off the  
12 top of my head -- from five to 10 additional interviews in  
13 January.

14 JUDGE BOLLWERK: All right.

15 MS. CHANCELLOR: I would just like to add  
16 something to that.

17 JUDGE BOLLWERK: Yes.

18 MS. CHANCELLOR: That in terms of being able to  
19 identify how many interrogatories and depositions we are  
20 going to do another question mark is introduced by the fact  
21 that the NRC Staff is issuing another round of RAIs and we  
22 assume that there is going to be a certain volume of  
23 additional information that comes in in response to those  
24 RAIs and we may have more need to resolve questions about  
25 those before we are ready to go ahead and actually get into

1 formal discovery.

2 JUDGE BOLLWERK:-- All right -- and that was one of  
3 the bases of your motion, obviously, if I recall?

4 MS. CHANCELLOR: That's right.

5 JUDGE BOLLWERK: All right. Anything at this  
6 point that anyone wants to say on this topic of formal or  
7 informal discovery before we turn to the general schedule?

8 MR. TURK: Your Honor --

9 JUDGE BOLLWERK: Yes, Mr. Turk.

10 MR. TURK: -- I would like to address Ms. Curran's  
11 last remark but I think I should do it as part of our  
12 discussion of schedule.

13 JUDGE BOLLWERK: All right. Anything from Utah?  
14 And please -- because of the way the camera is set we see  
15 basically one person at a time. If someone wants to talk  
16 that we are not seeing, just hit your microphone and they'll  
17 adjust the camera there, so -- but you are out of our camera  
18 range.

19 For instance, Mr. Allen, I can't see you right  
20 now. If there is something you want to say, I wouldn't know  
21 it so -- all right -- just to make you aware of that  
22 technical limitation.

23 If nothing else on the general subject of  
24 discovery, let's turn then to the schedule, and as I say, I  
25 received last evening I guess E-mails from both Private Fuel

1 Storage and the Staff and I guess the Staff's document sort  
2 of incorporated Private Fuel Storage's changes or  
3 suggestions, I take it?

4 MR. TURK: That's correct.

5 JUDGE BOLLWERK: That was the intention.

6 Is there anyone who has not seen that document  
7 here or in Utah?

8 [No response.]

9 JUDGE BOLLWERK: All right. Hearing nothing and no  
10 objections, I guess -- why don't we go ahead and if there is  
11 no objection, why don't we work off the Staff's version,  
12 given that has everything on it.

13 Do you have enough copies so we can bind them into  
14 the record?

15 THE REPORTER: Three, yes.

16 JUDGE BOLLWERK: The original three. If you  
17 don't, I have some extra ones. Okay. Normally I am not big  
18 on binding things into the record, but I think given -- I  
19 won't say the complexity but certainly the number of things  
20 we are going to be talking about it might be useful if  
21 anybody ever is interested in what happened here to have  
22 this in front of them, so let me just mention that Mr. Turk  
23 also just offered him an original and two and that is the  
24 number of exhibits we always need, and my policy is that I  
25 don't admit exhibits until all the copies are in the hands

1 of the Reporter, so for future reference, you can bear that  
2 in mind.

3 Mr. Reporter, do you have what you need?

4 THE REPORTER: Yes.

5 JUDGE BOLLWERK: All right. Why don't you just go  
6 ahead and mark it as Exhibit 1.

7 [Exhibit No. 1 was marked for  
8 identification.]

9 JUDGE BOLLWERK: All right. Since I guess --  
10 recognizing there are differences in this, I don't know  
11 basically from the State of Utah or any of the other  
12 Intervenor's what their feelings are about either what has  
13 been presented by Private Fuel Storage or what has been  
14 presented by the Staff.

15 Is there anything you want to say about that?

16 MS. CURRAN: Yes.

17 JUDGE BOLLWERK: Before we get into the details?  
18 Okay.

19 MS. CURRAN: In principle we think that the  
20 Staff's schedule, proposed schedule, would work for us  
21 assuming that PFS is able to answer this latest round of  
22 RAIs by mid-February as we understand PFS is anticipating.  
23 As we said in our motion, we are concerned that during the  
24 informal discovery period we want to have an opportunity to  
25 look at whatever documents are filed in response to the RAI,

1 to ask PFS additional questions before we have to get into  
2 the formal discovery period which is going to go very  
3 quickly.

4 That is our main concern, and then we have another  
5 concern about the grouping of the contentions. The Staff and  
6 PFS are proposing to move Contention E, which relates to  
7 financial assurance, and Contention S, which relates to  
8 decommissioning, into Group I.

9 We are very concerned that there's already quite a  
10 few contentions in Group I that as a practical matter it is  
11 going to be extremely difficult for the Staff to prepare and  
12 present testimony on 11 separate issues in one deadline, and  
13 the schedule is already set up so that there are three  
14 groupings of issues to be litigated.

15 We think that a much more reasonable approach  
16 would be to group issues so that there's a number of issues  
17 in each group so that we have time to prepare adequately for  
18 each segment of this case. Since the overall schedule is  
19 governed by the ultimate schedule for the issuance of the  
20 FEIS, which is three years away, putting issues from Group  
21 II into Group I isn't going to make the ultimate decision  
22 happen any quicker in this case, and we are extremely  
23 concerned that that is going to make it very difficult for  
24 us to do a good job of presenting our case.

25 JUDGE BOLLWERK: Okay. Let me just mention that I

1 probably should have given some background on this before we  
2 started talking about it, -but the general approach with this  
3 revision is to move the schedule back and it varies.

4 For instance, the informal discovery would be  
5 moved back approximately two months. It would now end in  
6 February of '99 rather than December 31st. Formal discovery  
7 would begin on the 1st of March and move back -- I guess for  
8 all parties other than the Staff -- back about three months.  
9 The Staff's discovery would move back -- it depends on the  
10 group of issues but anywhere from four and a half months to  
11 as much as 11 and a half months, depending on what group  
12 they fall into.

13 Then there is a different schedule for summary  
14 disposition motions. The hearings that were set would move  
15 back as much as six months, six and a half months in some  
16 cases, from what they were on the original schedule, so  
17 things just kind of shift back generally.

18 MR. TURK: Your Honor, I think I need to give the  
19 background.

20 JUDGE BOLLWERK: Why don't you go ahead, Mr. Turk?

21 MR. TURK: Maybe I should have done this first.

22 JUDGE BOLLWERK: Maybe that was true. I was  
23 trying to maybe jump to the quick here and I shouldn't have  
24 done that.

25 Why don't you go ahead?

1 MR. TURK: Okay. I just want to give a little bit  
2 of a background --

3 JUDGE BOLLWERK: Okay.

4 MR. TURK: -- and understanding of what the  
5 schedule represents.

6 JUDGE BOLLWERK: All right.

7 MR. TURK: As the Board is aware, back in June you  
8 issued an order establishing the schedule for the  
9 proceeding. When you did so, it was based upon a joint  
10 proposal by the parties with some modifications by the  
11 Board.

12 That schedule, as I indicated in my letter of  
13 November 24th of this year, had been based upon the  
14 assumption that only one set of requests for additional  
15 information would be issued to the Applicant. That has not  
16 been what the Staff has encountered or found to be necessary  
17 in its review.

18 As indicated, again in my letter of November 24th,  
19 we have determined that a second round of RAIs is necessary  
20 and in fact that round of RAIs went out yesterday. The  
21 people in Utah may want to know that today at the prehearing  
22 conference I passed out to the Board members and other  
23 parties copies of the RAIs dated December 10, 1998, so all  
24 persons in the hearing room in Maryland now have a copy of  
25 that.

1 Other representatives will be getting their copies  
2 through the regular mailing process -- for instance, OGB and  
3 Castle Rock's attorneys and the other attorneys of record in  
4 the proceeding were served by the Staff directly yesterday  
5 by mail, so you will be seeing those in the mail within a  
6 few days.

7 On the basis of the need for additional  
8 information from the Applicant, we have determined that if  
9 the Applicant gets their responses back to us within 60  
10 days, the normal period of time for Applicants to do so,  
11 i.e., they would be responding to us by February 15th of the  
12 coming year.

13 We would then be able to take a position on the  
14 safety contentions which are subject to those RAIs or  
15 affected by those RAIs four months later, and for that  
16 reason the first and most primary change to the schedule is  
17 shown by the Staff position on contentions date. That  
18 changes from December 31st of this year to June 15th of the  
19 coming year. That is a five and a half month extension of  
20 the schedule.

21 If you go to the bottom line for Group I, you will  
22 see that whereas the Board had originally expected to issue  
23 a decision February 1st of the Year 2000, we are predicting  
24 a decision July 15th of the year 2000. That is the same  
25 five and half month extension that is triggered by the need



1 for additional information from the Applicant. There's a  
2 parallelism between the five and a half months' extension  
3 for the Staff position, and the five and a half month  
4 extension for a board decision.

5 That is reflected throughout the schedule leading  
6 up to the Board's decision.

7 Again, with respect to Group I contentions, you  
8 will see there has been some extension of the discovery  
9 period. That is not because the Staff needs that. That's  
10 because the State of Utah has expressed a need for  
11 additional time for informal discovery and we have been  
12 trying to accommodate that in the schedule we are proposing.

13 JUDGE BOLLWERK: Could you hold one second? We  
14 are picking up some background noise.

15 Can you check your volume in Utah, please? We are  
16 picking up a lot of background noise.

17 [Pause.]

18 JUDGE BOLLWERK: Hold on one second here. I knew  
19 this was going too smoothly.

20 [Pause.]

21 JUDGE BOLLWERK: Why don't you go ahead and  
22 continue, Mr. Turk, and if it gets bad again, we will stop  
23 and correct it, all right? And if anyone in Utah is having  
24 any problems hearing us or if there's any problems, let us  
25 know, all right, because we will obviously want to make --

1 all you all to participate to the maximum extent possible.

2 If you are having audio problems or whatever, let  
3 us know. Okay Mr. Turk, why don't you continue.

4 MR. TURK: Okay. I would like to stay with the  
5 Group I contentions for a minute.

6 JUDGE BOLLWERK: All right.

7 MR. TURK: On the third page of the E-mail  
8 transmission that I sent to the Board and parties yesterday  
9 evening, you will see a Footnote 6 and I think all parties  
10 should focus on this for a minute.

11 The Staff has in progress a number of safety  
12 reviews as well as the environmental review for this  
13 application. We have tried to set out for you what the  
14 expected publication dates are of the various Staff review  
15 documents. As you can tell, it's fairly extensive. It  
16 begins this month with the publication of a notice for  
17 opportunity for comment on the Hi-Star storage cask and it  
18 then proceeds with all of the other review documents for the  
19 Hi-Star storage cask, the transportation cask for Hi-Star,  
20 the Hi-Storm storage cask as well then as the TranStor cask,  
21 both the transportation and storage components of that  
22 review.

23 It is a fairly extensive review. We should be  
24 aware, as the Staff certainly is, that this Applicant is not  
25 proposing the use of any cask that has been certified to

1 date, but rather they are waiting for certification of other  
2 casks through this other process, the TranStor and Hi-Star  
3 and Hi-Storm review process, at which point they will then,  
4 when those reviews are completed or at least some of those  
5 reviews are completed, they will then seek to incorporate  
6 the certified cask for use at their site, so those reviews  
7 are a necessary precondition, predicate for approval of the  
8 PFS application.

9           The Staff recently issued, and I think all parties  
10 may want to note this, they may want to seek copies from  
11 public document rooms -- the Staff recently issued a set of  
12 requests for additional information to Holtec and that was  
13 dated November 30th. I do have a few copies of that here in  
14 the room if other parties who are present would like to get  
15 a copy or if the Board is interested in seeing it.

16           That was an extensive set of RAIs, even more  
17 extensive than the RAIs that are being transmitted to PFS.

18           We are going to have to get good and timely  
19 responses to those RAIs in order for our review of the  
20 Holtec application to proceed on schedule and I have to note  
21 for the record that if we do not get good quality, timely  
22 responses from any of the Applicants, either for casks or  
23 for this site, then that would affect our review schedule  
24 and would necessarily affect our ability to go to hearing on  
25 this application, but what we have tried to present for you

1 in this last footnote of our proposed schedule is a sense of  
2 what the Staff's review times are going to be and when we  
3 expect to be able to complete reviews.

4 Of particular interest for the Group I contentions  
5 is the date of October 30th, 1999, which is reflected in  
6 that Footnote 6, and that is the date that the Staff intends  
7 to issue the site SER.

8 That SER will be addressing many of the issues  
9 that are raised in the Group I contentions and our ability  
10 to issue that SER on time will affect the litigation of  
11 Group I contentions.

12 Moving over to Group II contentions, at this time  
13 the Staff has proposed at the Applicant's request that the  
14 litigation of financial assurance and decommissioning  
15 contentions move forward into the Group I contentions.

16 We don't have a particular concern one way or the  
17 other. I would leave that to the Applicant and the State to  
18 argue when is the appropriate time for litigation of those  
19 contentions. We believe that we will be able to proceed  
20 with those as Group I contentions and we would be willing to  
21 do so if the Board determines that that is appropriate.

22 The Group II contentions assume, as you will see  
23 in the third box under Group II, that the Staff can issue a  
24 position on contentions there by October 15th, 1999.

25 As we have proposed the schedule, Group II

1 contains only three contentions, and those are the thermal  
2 design, which is Utah H, the cask/pad stability, which is  
3 Utah GG, and the geotechnical contention, which is Utah L.

4 The Staff cannot address those concerns as part of  
5 the Group I contentions because for the most part we have  
6 not yet received the information we need from the Applicant.  
7 The Applicant in January will be giving us their response to  
8 the first round RAIs on geotechnical issues. Only after we  
9 receive that response will we know whether or to what extent  
10 we need to submit additional questions to the Applicant in  
11 order to come to closure on geotechnical issues, and I  
12 believe that is the same with respect to the thermal design.

13 You will notice, by the way, in the RAIs that we  
14 issued yesterday we highlighted in that letter both thermal  
15 and geotechnical concerns -- and if it is not in the letter  
16 it is certainly in the RAIs themselves.

17 That leaves the Group III contentions, which are  
18 the environmental contentions. I haven't tried to disturb  
19 that schedule much. We are hoping that we can go along with  
20 the schedule as written, but because we have these other two  
21 sets of hearings to go through, I felt it's probably best  
22 just to leave things as currently stated for the most part  
23 and wait until later to make sure that we can meet that  
24 schedule.

25 JUDGE BOLLWERK: All right. Let me just note for

1 the record Mr. Quintana -- are you there, sir?

2 MR. QUINTANA: Yes, Your Honor.

3 JUDGE BOLLWERK: We welcome you this morning, and  
4 I take it you are here on behalf of the Skull Valley Band?

5 MR. QUINTANA: Yes, Your Honor. I was late in  
6 getting here because I was ill this morning. I apologize.

7 JUDGE BOLLWERK: Not a problem. I just wanted to  
8 introduce you for the record and make sure that we are aware  
9 of your presence.

10 MR. QUINTANA: Thank you.

11 JUDGE BOLLWERK: Just so I can bring you up to  
12 date, what we have talked about so far is informal  
13 discovery, and we are now talking about a new potential  
14 schedule for the proceeding, okay?

15 Mr. Quintana, just one question. Did you receive  
16 a copy of an E-mail from the Staff that had a new master  
17 schedule on it, proposed master schedule?

18 MR. QUINTANA: Yes, I received all of your  
19 E-mails.

20 JUDGE BOLLWERK: All right, thank you.

21 Okay, Mr. --

22 JUDGE LAM: Mr. Turk, based on reading the  
23 Footnote 6 you were referring to, I see that for both  
24 storage casks, the Hi-Star and Hi-Storm, the schedules are  
25 reasonably tight and you stated now there has been a more

1 comprehensive set of requests for additional information.

2 Just looking at the schedule and reflecting on the  
3 statement you make about this extensive request for  
4 additional information, is it likely then the casks would  
5 not be certified according to this schedule?

6 MR. TURK: No. We are hoping that with good  
7 quality and timely responses we will be able to proceed with  
8 certification.

9 You will notice, by the way, that there are two  
10 storage casks in --

11 MS. NAKAHARA: I'm sorry, we didn't hear that. We  
12 didn't hear the Staff's response.

13 MR. TURK: Judge Lam asked me whether we think it  
14 will be likely or unlikely that we'll be able to meet the  
15 review schedule for Holtec, as I understand your question.

16 JUDGE LAM: That's right.

17 MR. TURK: And we are expecting that we will be  
18 able to meet the schedule as long as we get timely, good  
19 quality responses.

20 We have no reason to think that we won't get those  
21 responses but the burden is on the Applicant, Holtec that  
22 is, to be sure it gives us what we need at the time, and I  
23 wanted to point out that for the Holtec universe of casks  
24 that are at issue in this proceeding, there are two storage  
25 casks. One is the metal Hi-Star cask and one is the --

1 that's Hi-Star -- and other is Hi-Storm, which is the  
2 concrete overpack cask. -

3 For the Hi-Star storage cask we are about to issue  
4 a notice of opportunity for comment. We have completed our  
5 review. We do have a draft SER on that that will be made  
6 available to the public for comment, so that review is  
7 virtually complete but for our analysis of public comments  
8 and for management review in-house.

9 On Hi-Storm, which is the concrete cask, that is  
10 what the large set of RAIs addressed that was sent out on  
11 November 30th. I believe there is a meeting to be held with  
12 Holtec next week, December 14th, to go over the Staff's RAIs  
13 and a response schedule for Holtec, so at least as of this  
14 time we are anticipating that with a good effort Holtec will  
15 be able to satisfy us within this schedule.

16 JUDGE LAM: Thank you, Mr. Turk.

17 JUDGE BOLLWERK: All right. At this point, why  
18 don't we go ahead and hear from Mr. Gauklear, Mr. Silberg --  
19 whoever wants to address this from the Applicant's point of  
20 view.

21 MR. GAUKLEAR: Yes, Your Honor.

22 First of all, I would like to point out, Your  
23 Honor, that the Applicant has proposed a change in the  
24 schedule based on the change in the Staff's review schedule,  
25 and that is the only reason we have opposed it, and we have



1 tried to start from when the Staff thinks it will be ready  
2 on its position, ready to issue its position, and that has  
3 been the basis on which we built our schedule.

4 We have tried to push up as many contentions up  
5 into the first group as possible because we believe that  
6 it's best to get as much done as early as possible in this  
7 case. We are concerned about delay and slippage.

8 Also, ideally we would like to see the FEIS moved  
9 up if possible at some point in time and maybe even  
10 combining Groups II and III, so we oppose what the State  
11 suggests by its trying to make Groups I and II more equal.

12 We want to try to have as many issues as possible  
13 in the first group, particularly if for some reason the  
14 Staff's review based on some of these contentions in that  
15 group then there may be less than what we have at this point  
16 in time. Therefore, we firmly believe that the Board should  
17 push up contentions Utah E and Utah S.

18 Also, we believe that certain of the contentions  
19 will be subject to summary disposition and will need not go  
20 to hearing and where we differ with the Staff is that we  
21 believe that summary disposition can proceed prior to the  
22 completion of the discovery against the Staff.

23 JUDGE BOLLWERK: Let's hold off here one second.  
24 We are getting -- a feedback problem.

25 [Pause.]

1 JUDGE BOLLWERK: Would you check your volume  
2 again? We are beginning to get some feedback here in  
3 Rockville.

4 [Pause.]

5 JUDGE BOLLWERK: All right. That seems to have  
6 taken care of the problem for the time being. Why don't you  
7 go ahead, Mr. Gauklear, and if we need to stop again, we  
8 will.

9 MR. GAUKLEAR: As I was saying, the one point  
10 where we differ, where our schedule differs from the staff,  
11 is in the time you have summary disposition motions. We  
12 believe that summary disposition motions can be handled  
13 prior to the completion of the staff's -- discovery against  
14 the staff. The staff would have the summary disposition  
15 motions key off the end of its discovery -- end of discovery  
16 against it, and have the final date one month after that for  
17 filing of summary disposition.

18 We believe that that date can be pushed up, that  
19 summary disposition can be filed earlier. We would be  
20 prepared to file them earlier. To the extent that a party  
21 claims it needs discovery against the staff to answer  
22 summary disposition, the rules provide a mechanism for that.  
23 And, moreover, under our proposed schedule, you will see  
24 that the final date for filing responses to summary  
25 disposition is, in fact, six weeks after the start of

1 discovery against the staff. So to the extent that would  
2 need some part, some discovery against the staff to answer a  
3 summary disposition motion, they would be able to do that  
4 upon asking the board for a request.

5 So we believe that our schedule is workable and  
6 feasible. It will provide for a hearing this year on a good  
7 part of the issues, and that's the reason we would like to  
8 go forward on that schedule.

9 I would like to respond to one other thing the  
10 state has suggested, which is that somehow the discovery  
11 cut-off, or informal discovery cut-off, should be tied to  
12 responses to RAIs. We disagree with that. We think that  
13 there should be an informal discovery cut-off, regardless if  
14 one or two RAIs may slip beyond -- responses to RAIs may  
15 slip beyond that date. To the extent that they need any  
16 additional discovery with respect to some response, that is  
17 always possible, but that is not a reason to extend the  
18 entire schedule.

19 JUDGE BOLLWERK: Let me just say, in looking at  
20 this, part of this -- I mean it seems to assume, I guess,  
21 that the state will only be responding to summary  
22 disposition motions, not filing any of its own.

23 MR. GAUKLEAR: It is not necessarily assumed that  
24 way, no, Your Honor.

25 JUDGE BOLLWERK: Maybe that was the assumption I

1 drew when I looked at it, and maybe that is, as you say, not  
2 correct.

3 MR. GAUKLEAR: It may be the situation, I don't  
4 know. I know we would be filing. My understanding is the  
5 staff would not be filing summary disposition motions on its  
6 own.

7 MS. CHANCELLOR: Your Honor, it would be unlikely  
8 that we would file summary disposition motions.

9 JUDGE BOLLWERK: All right. Do you want to say  
10 anything about that, Mr. Turk?

11 MR. TURK: Yes. We may file summary disposition  
12 motions, but only where it is very clear that the outcome  
13 would be judgment in our favor. I don't think there is any  
14 use, personally, in filing summary disposition motions on  
15 contested contentions where we know that there are going to  
16 be experts on both sides. We know that you can't get  
17 summary disposition on a motion like that.

18 So what we would reserve our motions for are  
19 instances where, for instance, there is dearth or a failure  
20 of evidence on a contention in the discovery period. And we  
21 should know that when formal discovery closes.

22 And I want to make one other comment in response  
23 to the timing for summary disposition.

24 JUDGE BOLLWERK: Yes.

25 MR. TURK: Again, in footnote 6, you will recall

1 that the staff is expecting to publish its site SER in  
2 October of '99. Because we will be working towards issuance  
3 of that review document, at the same time that the hearing  
4 steps will be going forward, we tried to adjust this  
5 schedule so that we would be able to issue a site SER in  
6 October and then file testimony one month later, November  
7 30th of '99, because we felt we just need to focus our  
8 resources on getting the review document out before we then  
9 go into completion and polishing of testimony. We have  
10 allowed one month after the SER comes out in order to do  
11 that.

12 JUDGE BOLLWERK: All right.

13 MR. TURK: As far as the summary disposition  
14 schedule, in light of the fact that we need that additional  
15 time to finish testimony after issuing the SER, I felt there  
16 was no reason to rush to summary disposition, that that  
17 could be allowed to progress after the close of all  
18 discovery and that would not affect the overall schedule.

19 JUDGE BOLLWERK: All right. Anything further you  
20 want to say on that, Mr. Gauklear or Mr. Silberg, anyone?

21 MR. SILBERG: Well, just the one comment that I  
22 have in general on the schedule is, you know, obviously, the  
23 staff review has skipped, we have been -- has slipped. We  
24 have been disappointed that the RAIs have not come out  
25 sooner, the environment RAIs, we are told, are now going to

1 be coming out in the next week or two, a year-and-a-half  
2 after we filed the environment report.

3 I understand that the workloads are heavy in the  
4 spent fuel project office, however, I think we need a  
5 schedule as a forcing function to make sure that this  
6 hearing stays on track as much as it possibly can. We will  
7 obviously try to get our responses back as promptly as we  
8 can, but it is hard to do that when the questions are late  
9 in coming.

10 We would, therefore, like to see the schedule stay  
11 as tight as it can, if only to act as a prod that all  
12 parties act promptly. We think that that is important if  
13 this process is going to be made to work in an efficient  
14 way.

15 JUDGE BOLLWERK: All right. I had mentioned at  
16 one point, and I don't know if you are the appropriate  
17 person or someone else, but about the Applicant's general  
18 schedule now in terms of the facility construction, if that  
19 has changed any.

20 MR. SILBERG: Our schedule, we really have a two  
21 track schedule. Our Commission regulations, we would not be  
22 able to start construction until the environmental impact  
23 statement is out and we do have a schedule which looks  
24 towards starting construction in October 2000. That would,  
25 obviously, require an exemption request to the Commission.

1 With that schedule, we would be able to start operation  
2 August of 2002. Without an exemption, we are looking at a  
3 schedule which would call for construction to start in  
4 August 2001. That would put operation in September of 2003.

5 JUDGE BOLLWERK: All right.

6 MS. CURRAN: I would like to ask for an  
7 opportunity for the state to respond.

8 JUDGE BOLLWERK: Surely. Go ahead.

9 MS. CURRAN: We think it is important to look at  
10 the overall schedule for the staff's review, that our -- the  
11 litigation here depends very much on when the staff  
12 completes its review, and the state doesn't -- in the  
13 state's experience, the schedule imposed on Intervenor for  
14 litigation does not act as a goad on the NRC staff. The  
15 staff has its own schedule for performing its reviews.

16 As you can see from footnote 6 of Mr. Turk's  
17 presentation, there's quite a few reviews that need to be  
18 done here before the PFS facility can be licensed, and all  
19 those things are related and need to be finished before this  
20 plant can be licensed.

21 We don't see any purpose that is served by  
22 penalizing the Intervenor in the discovery schedule when  
23 the actual schedule for coming up with decisions by the  
24 staff is already set on a different track that has to do  
25 with the staff's own resources for performing technical

1 reviews.

2           October 1999 is an important date when the staff  
3 is going to issue the SER and the draft environmental impact  
4 statement. In arguing that two of the issues, the financial  
5 assurance and decommissioning issues, ought to be put into  
6 Group I, Mr. Gauklear said that PFS is optimistic that the  
7 schedule for the EIS might be changed. It is the state's  
8 view that that is very unlikely. The staff has many issues  
9 that it is reviewing during the course of the next -- it is  
10 less than a year now before this before this environmental  
11 impact statement comes out, and we think that is overly  
12 optimistic to think that somehow the DEIS is going to be  
13 issued earlier than October 1999.

14           In one of the orders setting forth the framework  
15 for this litigation, the board said that the purpose of  
16 informal discovery is to allow the parties to get the big  
17 picture so that we can make efficient use of what is a  
18 relatively short time for formal discovery. We see no  
19 reason why we should not be able to continue with that  
20 approach and have an adequate period for informal discovery  
21 to really get the lay of the land as this exchange of  
22 information goes back and forth, and then use formal  
23 discovery to refine it.

24           With respect to the grouping of the issues, not  
25 only would it be extremely burdensome on the state to have



1 to litigate most of the issues in Group I, there is really  
2 no purpose served by that--considering the fact that there  
3 are -- it is going to be several years before the EIS is  
4 issued and the third group of issues can even be litigated.  
5 It makes sense to us to have three groups of issues,  
6 relatively balanced, so that we can actually do a good job  
7 of working with our experts, of analyzing the issues, of  
8 preparing our testimony. The purpose of this intervention  
9 is to allow members of the public to do an adequate job of  
10 critiquing this application and actually participate in a  
11 meaningful way here.

12 And, finally, I would just point out that the  
13 issues of decommissioning and financial assurance have  
14 financial components to them that will relate to the cost  
15 benefit issues raised in the NEPA case, so that in our view  
16 it is better for the litigation to put those into the second  
17 group so they can be developed more in conjunction with the  
18 NEPA issues.

19 JUDGE BOLLWERK: All right. Anything you want to  
20 add, Ms. Chancellor?

21 MS. CHANCELLOR: No. No, that's fine. Thank you.

22 JUDGE BOLLWERK: All right. Let me then ask  
23 anyone out in our site at Utah if there is anything they  
24 would like to say on this subject. Ms. Nakahara?

25 MS. NAKAHARA: No, thank you, Your Honor.

1 JUDGE BOLLWERK: All right. Ms. Walker?

2 MS. WALKER: No, thank you, Your Honor.

3 JUDGE BOLLWERK: All right. Mr. Allen?

4 MR. ALLEN: No, thank you, Your Honor.

5 JUDGE BOLLWERK: Mr. Quintana?

6 MR. QUINTANA: I would implore upon everyone to  
7 expedite this process as much as possible so that if this  
8 facility is going to be built, that we try to avoid all  
9 litigation delays on frivolous motions and all of the rest.  
10 I think all of us are well adept at litigation games, and I  
11 would implore upon everyone to move this process forward as  
12 fast as possible.

13 JUDGE BOLLWERK: All right.

14 MR. SILBERG: Judge Bollwerk.

15 JUDGE BOLLWERK: Yes.

16 MR. SILBERG: If I could make a few responsive  
17 comments. First, as I think Ms. Curran said, the purpose  
18 here is to critique the application and, yet, the state is  
19 arguing for more delay because of the staff's review and the  
20 staff's position. The application has been on the street  
21 for a long time. The RAIs will have been on the street, and  
22 the responses will have been on the street for a long time.  
23 I don't think it is particularly burdensome for the state to  
24 be a position to litigate those issues based on the  
25 application and what the staff has had to say.

1 Second, with respect to the idea of grouping  
2 contentions, typically, you go to hearing on all the issues  
3 at the same time. It is only because the EIS schedule right  
4 now is somewhat different and all the review schedules are  
5 somewhat different that we came up with the grouping. The  
6 idea of artificially balancing groups of contentions is  
7 really quite foreign, I think, to NRC practice.

8 And, finally, with respect to the idea that we  
9 should delay financial qualifications because it somehow  
10 involved dollars and dollars were also involved in the cost  
11 benefit, the staff is of the view that it will have its  
12 position on financial qualifications this June, and I see no  
13 reason why we should artificially delay that issue, which is  
14 separate from the cost benefit issue, until the EIS  
15 contentions are going to be litigated.

16 JUDGE BOLLWERK: All right, sir.

17 MR. GAUKLEAR: If I could just add one point.

18 JUDGE BOLLWERK: Yes, Mr. Gauklear.

19 MR. GAUKLEAR: Also, under this schedule as  
20 proposed to be changed, the state would have three  
21 additional months over and above what it had previously  
22 under the previous schedule to develop these issues.

23 JUDGE BOLLWERK: All right. Mr. Turk.

24 MR. TURK: I have two comments, Your Honor, in  
25 response to Ms. Curran and Mr. Silberg. First, I don't want

1 to advocate this schedule, I really only want you to see  
2 what we believe is a feasible, fairly expeditious schedule.  
3 I think it is probably the best that the staff can do. I  
4 want to point out, however, that the commencement of formal  
5 discovery on March 1 of '99, for Group I, does reflect the  
6 fact that the Applicant's REI responses are expected back in  
7 February and, in fact, its responses to geotechnical issues  
8 for Group II are due back in January, according to  
9 Applicant's resetting of that date.

10 So that information will be out and available to  
11 the state before we even begin formal discovery. I think  
12 that is certainly a date that should not result in any harm  
13 to the state.

14 And, secondly, there is a comment as to whether or  
15 not the staff expects to advance the date for publication of  
16 the EIS. I would say that is very highly unlikely. We will  
17 be issuing a set of RAIs on environmental issues later this  
18 month, which will then begin the iterative process with the  
19 Applicant for any necessary changes to the environmental  
20 report or submission of additional information to satisfy  
21 staff reviewers' questions. I do not expect that we will be  
22 able to get the draft EIS out any sooner than the October  
23 '99 that we are currently predicting.

24 JUDGE BOLLWERK: I notice in the schedule you also  
25 deleted any reference to any kind of discovery against the

1 staff relating to the draft EIS.

2 MR. TURK: I am--glad you noticed that. Yes, we  
3 don't feel there is a need for that. Also, we looked at the  
4 Commission's policy statement on adjudicatory proceedings  
5 issued very recently, and we noticed there the Commission  
6 had contemplated only one round of discovery against staff  
7 upon publications of its final EIS, and no discovery on the  
8 draft EIS.

9 We didn't see that there is anything to be gained  
10 by putting the staff through two rounds of discovery and,  
11 therefore, eliminated it, and I believe the Applicant has  
12 concurred that they don't see a need for it as well.

13 JUDGE BOLLWERK: Anything you want to say about  
14 that, Ms. Curran?

15 MS. CURRAN: I just want to clarify that the  
16 schedule proposed by the staff is acceptable to the state,  
17 assuming that PFS is able to answer the RAIs by  
18 mid-February, and that was our understanding as well, that  
19 that was what it was based on. We would have a concern if  
20 those answers come in late.

21 The other point I wanted to make was that, in my  
22 experience litigating initial licensing cases before the  
23 NRC, there have been numerous occasions on which safety  
24 issues have been broken up into different phases. The  
25 litigation has been broken up in order to permit the parties

1 a meaningful opportunity to assemble their evidence and  
2 present their case.

3 JUDGE BOLLWERK: All right. Anything either board  
4 member wants to say or any other parties? Let me just --  
5 any other parties, anyone in Utah have anything further they  
6 want to say?

7 [No response.]

8 JUDGE BOLLWERK: All right. Judge Kline.

9 JUDGE KLINE: It does appear from what we have  
10 heard here this morning that the overall pacing items or  
11 critical path items are related to the staff's schedule, its  
12 issuance of RAIs and its cask review, among others. So, my  
13 question is, on the contentions that have been moved from  
14 Group II to Group I, is there anything about them that are  
15 pacing items or critical path items leading or affecting the  
16 overall conclusion of this proceeding? I mean is it really  
17 important to move them to Group I for some scheduling  
18 reason?

19 MR. TURK: Your Honor, I don't see that that  
20 really has an effect on the overall licensing schedule.

21 JUDGE KLINE: Okay.

22 MR. TURK: I would point out that in this last  
23 round of RAIs that we just issued to PFS, there are  
24 questions on financial assurance, but there are no questions  
25 on decommissioning. Now, that's -- the questions that go

1 out on the environmental report, they contain a  
2 decommissioning section, but that relates to the cost  
3 benefit balance rather than to the information submitted to  
4 date by the Applicant.

5 JUDGE KLINE: Does the Applicant want to say  
6 anything?

7 MR. SILBERG: Yes, Judge Kline, if I might. That  
8 logic, I think, may prove a little too much because, if one  
9 takes that approach, you could push all the issues off until  
10 the last stage of the hearings. I think it is in the best  
11 interests of all parties, including the Intervenors, and the  
12 board, that issues be litigated at the earliest possible  
13 time, rather than at the latest possible time.

14 We know that these schedules are not cast in  
15 concrete. We know that things slip, we know it has taken a  
16 lot longer for certain actions to take place than people  
17 thought. Hopefully, in the future, it will take less long  
18 for other actions to take place, but we can't predict how  
19 long any of these things would take. And I think for us to  
20 assume that we can lively push items back and not affect the  
21 ultimate schedule is really making an assumption that isn't  
22 warranted.

23 I think we are much better off litigating things  
24 when they are ready to be litigated, not based on the last  
25 item. We shouldn't operate this hearing on the convoy

1 system.

2 JUDGE KLINE: Well, in this case, the staff didn't  
3 push it back, it sort of promoted it to an earlier  
4 litigation in Group I.

5 JUDGE BOLLWERK: Moved it up in the queue.

6 JUDGE KLINE: Moved it up in the queue.

7 MR. SILBERG: Moved it up in the queue, but all  
8 the schedules, you recognize, had been moved back.

9 JUDGE KLINE: All I am trying to find out, since  
10 we -- and, in fact, we have an objection to doing that,  
11 whether it is essential to do it, or whether it is simply  
12 nice.

13 MR. SILBERG: In my view, I think litigating each  
14 issue when it is ready to be litigated is essential for the  
15 overall schedule of any hearing to be met.

16 JUDGE BOLLWERK: Ms. Curran, do you want to say  
17 something?

18 MS. CURRAN: The question is -- the question of  
19 when something is ready to be litigated also involves  
20 whether or not the parties are capable of addressing all of  
21 the issues in one fell swoop, and we would submit that that  
22 is extremely burdensome and unnecessary in this case, and  
23 the state resents the implication here that we are trying to  
24 put off the litigation as late as possible.

25 We entered into an agreement with the Applicant



1 and the staff some months ago that we would group the issues  
2 in this particular way. If you will notice, most of the  
3 issues are in the first group. We are not trying to delay  
4 this hearing, we are trying to go ahead with it in a way  
5 that it can be done in a meaningful way.

6 JUDGE BOLLWERK: Let me just ask one other  
7 question based on what I see in the schedule. It looks to  
8 me -- well, the Group II issues are set for only, if I am  
9 looking at it correctly, one month of hearing under the  
10 revised schedule, because I guess there are fewer issues  
11 there, is that correct?

12 MR. GAUKLEAR: That is correct, Your Honor.

13 JUDGE BOLLWERK: So if the group -- the issues  
14 that we are talking about now being in Group I, the  
15 potential moves, or move back, does that affect that hearing  
16 date? Then that has to move back to perhaps more than a  
17 month?

18 MR. GAUKLEAR: Perhaps, but I think four weeks  
19 would still be sufficient.

20 JUDGE BOLLWERK: To do Group II, whether it was as  
21 has been proposed now, or as it was originally proposed?

22 MR. GAUKLEAR: Yes, Your Honor. It would take  
23 some additional time, but I think there is probably enough  
24 extra time in there that it would accommodate that.

25 JUDGE BOLLWERK: Anybody else want to speak to

1 that subject? Mr. Turk?

2 MR. TURK: I would only point out that the Group  
3 II contentions that remain in this proposal involve cask  
4 issues, which, in turn, depend upon which casks are going to  
5 be used at the site. That is the thermal design contention,  
6 the geotechnical, and the cask pad stability issues. It is  
7 difficult to predict at this time to what extent those  
8 hearings will be extended because we will be using certified  
9 casks.

10 As the board is aware, the process for commenting  
11 upon and objecting to any parts of the cask design are going  
12 to be subject to rulemaking. It would not be subject to  
13 litigation in this proceeding. That would tend to speed  
14 things up in our proceeding.

15 So, my own conclusion is I believe four weeks  
16 should be sufficient time for litigation of those cask  
17 issues. I don't see financial assurance and decommissioning  
18 as being very time-consuming hearings, not for this type of  
19 application. I could be wrong, but I don't see a need for  
20 more than four weeks in either event.

21 JUDGE BOLLWERK: Whether the issues are in Group  
22 I, as they were originally grouped, or if they were moved to  
23 Group -- I'm sorry, originally Group II, as they were  
24 originally grouped, or moved to Group I?

25 MR. TURK: Yes. I think that the original

1 allocation of two months for hearings on five contentions  
2 was a little excessive. It could be proven wrong, it depends  
3 upon the testimony and the cross-examination. If parties  
4 choose not to cross-examine, the time would go very quickly,  
5 we would be done in a day. But that is not going to happen.  
6 On the other hand, I don't think we need two months for  
7 those five contentions.

8 JUDGE BOLLWERK: I will certainly encourage the  
9 idea, though.

10 MR. SILBERG: I just would not want to be overly  
11 optimistic. If you look at the financial assurance  
12 contention, one can read into that many subissues, and it  
13 may not be quite as simple as some would suggest. I would  
14 not want to assume that that would be a day's worth of  
15 testimony.

16 JUDGE BOLLWERK: Let me just ask one other, I  
17 guess, related question. I notice there was a slight  
18 amount, I think two weeks additional time that was provided  
19 for the proposed filings -- for proposed findings, excuse  
20 me, for Group I. Did that reflect the fact that additional  
21 issues were put into that group?

22 MR. TURK: No. That was based on my own  
23 assessment that allowing only 30 days for that number of  
24 contentions was really squeezing a bit too much. And if  
25 will you give me one second, I want to see if there is a

1 review issue raised by that as well.

2 JUDGE BOLLWERK: What I am talking about is at the  
3 bottom of the first page.

4 MR. TURK: Right. No, that's correct, Your Honor.  
5 I think that 45 days would be an appropriate amount of time  
6 for that first set of proposed findings on such a large  
7 number of contentions. If the board holds to the original  
8 schedule of 30 days, we would abide by it as well.

9 JUDGE BOLLWERK: All right. Anything further  
10 anyone wants to say? Yes, Ms. Curran.

11 MS. CURRAN: This is a really minor comment.

12 JUDGE BOLLWERK: All right.

13 MS. CURRAN: But we did not notice that the  
14 hearing on Group I is scheduled to begin the 2nd of January,  
15 which we think may be a little unrealistic.

16 MR. SILBERG: Make it the 3rd.

17 MS. CURRAN: Okay, Jay.

18 JUDGE LAM: What is the story about a Y2K problem?

19 [Laughter.]

20 MS. CURRAN: It is thinking more about the problem  
21 of getting expert witnesses to work over the holidays.

22 MR. TURK: And we would have difficulty flying  
23 into Utah at the end of the Christmas week with all the ski  
24 vacations that take place, so there may be some practical  
25 need to move that date a little bit.

1 JUDGE BOLLWERK: All right. I would also note,  
2 not that it is a big matter either, but the schedule as it  
3 now was, has been revised, has us issuing an initial  
4 decision in the middle of trying the Group III issues, which  
5 I don't know that you all would want me typing necessarily  
6 while I am listening to evidence -- but maybe that doesn't  
7 -- anyway, I take it the Group III issues, you really  
8 weren't focusing on.

9 MR. TURK: That's correct. I think it is  
10 important that we proceed with safety issues and recognize  
11 that there will be a time in the future when we have to  
12 focus more closely on the environmental schedule.

13 JUDGE BOLLWERK: All right. Anything further  
14 either of the board members has on this subject?

15 JUDGE LAM: No.

16 JUDGE KLINE: No.

17 JUDGE BOLLWERK: All right. Anything further  
18 anyone from the Utah wants to say with respect to the  
19 schedule? Mr. Allen?

20 MR. ALLEN: No. Nothing, thanks.

21 JUDGE BOLLWERK: Ms. Walker?

22 MS. WALKER: I have a question about no discovery  
23 on the draft EIS. I was thinking that the opportunity for  
24 discovery might mean that we would comment more effectively  
25 on the draft. And my experience is that effective comments

1 at the draft stage can be very helpful in resolving issues,  
2 so I was wondering if maybe we could revisit that question.

3 MR. SILBERG: The issue of commenting on the DEIS  
4 is totally different, totally separate from the licensing  
5 proceeding, and, obviously, everyone will be putting in  
6 comments and the more thoughtful and well documented the  
7 comments, obviously, the better. But I don't think that  
8 affects, or ought to affect, the discovery process.

9 JUDGE BOLLWERK: Anything you want to say on that  
10 subject, Mr. Turk?

11 MR. TURK: Yes. The reason for publishing the  
12 draft EIS is to permit other federal agencies, state  
13 agencies and members of the public to comment on the draft  
14 EIS, and there is an established method for doing that. The  
15 staff then takes those comments into consideration when we  
16 issue the final EIS. I don't see that you need discovery in  
17 order to submit comments on the EIS. In fact, most agencies  
18 are not even involved in the discovery process at all when  
19 they prepare draft or final environmental impact statements,  
20 so I don't see a need for discovery for that purpose.

21 JUDGE BOLLWERK: All right. Ms. Walker, anything  
22 further you want to say on the subject? Or anyone else?

23 MS. WALKER: No, thank you.

24 JUDGE BOLLWERK: All right. Ms. Nakahara,  
25 anything you would like to add?

1 MS. NAKAHARA: No, thank you, Your Honor.

2 JUDGE BOLLWERK: All right. Mr. Quintana?

3 MR. QUINTANA: Because I am new to this process --  
4 Your Honor?

5 JUDGE BOLLWERK: Yes. We can hear.

6 MR. QUINTANA: Because I am new to this process, I  
7 am curious at what point I will be able to call expert  
8 witnesses on behalf of the Skull Valley Band of Goshutes.

9 JUDGE BOLLWERK: Well, in terms of calling them, I  
10 mean the appropriate point, that is something you need to  
11 talk with, I guess, Mr. Silberg or Mr. Gauklear about, since  
12 I think they are the lead counsel for all the issues that  
13 you would have -- have some impact on you. That may be  
14 something you all need to work out together.

15 MR. QUINTANA: Thank you.

16 JUDGE BOLLWERK: All right. Does that --

17 MR. QUINTANA: Okay. That answers my question.

18 MR. SILBERG: Yes, Your Honor.

19 JUDGE BOLLWERK: Okay. Let me just make -- this  
20 is something I would say the board is going to have to take  
21 under advisement. There is a lot here and I think,  
22 certainly, before -- within the next week, I am sure, will  
23 come out. There are obviously some interviews that are  
24 going on, and we will try to give you an answer, certainly  
25 within the week, so that you will know what the situation

1 is.

2 I just wanted to make one other observation, I  
3 guess, with respect to this whole process, and that is, if  
4 we were to move things, would there be, in terms of moving  
5 the hearing dates back to some degree, whether we adopt the  
6 Applicant's or the staff's suggestions, going forward with  
7 limited appearance statements by the board in the spring or  
8 summer, to begin that process. Does anyone have any  
9 thoughts on that or problems with it?

10 MR. SILBERG: I don't have any problems. I don't  
11 know that it is worth the resources for everyone to come out  
12 to Utah just to hear limited appearance statements. I  
13 think, from our standpoint, we would rather wait until the  
14 beginning of the evidentiary hearings, as is more typical.  
15 We don't have any grand objection to that, I just don't know  
16 whether it is necessary, unless there is some other reason  
17 that we would all find ourselves in Utah.

18 JUDGE BOLLWERK: For instance, we have a  
19 prehearing conference or a summary disposition argument,  
20 that might be --

21 MR. SILBERG: Yes. That could be possible.

22 JUDGE BOLLWERK: All right. Staff have any  
23 thoughts on that, any preferences one way or the other?  
24 Don't care?

25 MS. MARCO: I believe we would be able to support



1 it either way.

2 JUDGE BOLLWERK: All right. Anything the State  
3 wants to say in that regard? No comments?

4 [No response.]

5 JUDGE BOLLWERK: Anybody from the Utah side have  
6 any thoughts about that?

7 [No response.]

8 JUDGE BOLLWERK: All right. That's something we  
9 can think about, then.

10 MR. TURK: May I have just one minute, Your Honor?

11 JUDGE BOLLWERK: Yes.

12 MR. TURK: I was just checking 10 CFR 2.715, and I  
13 agree that at any prehearing conference or hearing, the  
14 Board may commence the taking of limited appearance  
15 statements.

16 JUDGE BOLLWERK: All right.

17 MR. TURK: We wouldn't object if the Board  
18 determines that that would be useful.

19 JUDGE BOLLWERK: All right. That's something we  
20 can consider as well, I guess, in the course of all this.

21 I think, unless someone else has some comments,  
22 that about wraps it up for the scheduling portion and status  
23 portion of this part of the proceeding.

24 Let me just make one other comment about a related  
25 matted. Up to this point, you all have been sending us your

1 documents for the most part electronically. I think we have  
2 a fairly complete database. And I'm hoping we've finally  
3 gotten our Office of -- or Information Resource Management  
4 Office to perhaps begin putting some of those up on a  
5 Website. I don't know how quickly it's going to happen,  
6 what the access to it will be.

7 Also, we're trying to work with them to begin an  
8 electronic filing project where we would use this case  
9 actually as a way to get documents into the case. We were  
10 all sending them by E-mail but actually to file them  
11 electronically. That may be something we'll be getting back  
12 to you on to talk with you more about sort of as an  
13 administrative matter.

14 Yes.

15 MS. CURRAN: Pardon my ignorance, but what's the  
16 difference?

17 JUDGE BOLLWERK: Well, this would actually be,  
18 perhaps, if it went far enough, actually doing away with the  
19 paper copies, where everybody would simply get -- there  
20 would be an electronic copy and that would be it.

21 MS. CURRAN: That's a frightening --

22 JUDGE BOLLWERK: There's going to be back-up for  
23 all -- this whole process a while, but --

24 MR. SILBERG: That's what they said in San  
25 Francisco a few days ago, too.

1 JUDGE BOLLWERK: We're actually probably farther  
2 along in that process than I think just about any other  
3 proceeding, certainly that this panel has, and that's a good  
4 thing, I think. E-mail has made a big difference, it seems  
5 to me, in just the way that things are exchanged.

6 MR. SILBERG: We trust the Board to drag us all  
7 into the 21st Century.

8 [Laughter.]

9 JUDGE BOLLWERK: I'm just sort of feeling my way  
10 along as well. But one of the things I have always wanted  
11 to do is get an electronic database of some kind up if we  
12 could on the Website, and I'm hoping that may, in fact,  
13 happen.

14 That's something you had mentioned at one point,  
15 Ms. Chancellor, to us. You were sending all this in --  
16 where was it? Maybe at one point, it will be on the  
17 Website. It's not clear to me yet, but we're still working  
18 on it. So I just wanted to let everybody know that.

19 MS. CHANCELLOR: Well, send us your address when  
20 you get it.

21 JUDGE BOLLWERK: All right.

22 [Laughter.]

23 JUDGE BOLLWERK: At this point, we're almost to  
24 12:30.

25 Ms. Walker, can I ask you a question?

1 MS. WALKER: Certainly.

2 JUDGE BOLLWERK: If you can move the -- you can't  
3 move the camera over in that direction.

4 How long do you see your presentation taking? And  
5 what I would contemplate --

6 MS. WALKER: Five to ten --

7 JUDGE BOLLWERK: Let me let you comment on this as  
8 well. I would contemplate perhaps dividing it into two  
9 segments: one to talk about the intervention itself and one  
10 to talk about the contentions.

11 If you have a different way you want to present  
12 it, I'm certainly willing to entertain that. And then sort  
13 of how long you see -- I'm not trying to hold you to a  
14 specific time; I'm just trying to get some sense of how long  
15 you think you might need.

16 MS. WALKER: Right. It's fine to divide it up  
17 that way. I'm much more concerned about responsive time  
18 than the initial presentation. So I'm more concerned about  
19 having the opportunity to respond to the staff and the  
20 applicant.

21 JUDGE BOLLWERK: Right. And you will definitely  
22 have that. The question I'm trying -- do you think your  
23 initial presentation is going to take ten minutes, 15  
24 minutes total or longer than that?

25 MS. WALKER: Sorry. Five to ten minutes.

1 JUDGE BOLLWERK: All right. We probably should go  
2 ahead. Let's at least take a five-minute break here and let  
3 everybody get an opportunity to go out and use the  
4 facilities if they need to or whatever. Should we say ten  
5 minutes? Is that sufficient? We'll come back at 12:30  
6 here, which would be 10:30 there, and let's proceed with  
7 your presentation, see how far we can get. If we can do the  
8 whole thing before a lunch break, we'll do that; if not,  
9 we'll see where we are, and if we need a break, we'll do  
10 that, all right?

11 So let's take ten minutes. We'll come back at  
12 12:30, 10:30 in Utah.

13 [Recess.]

14 JUDGE BOLLWERK: Why don't we go on the record.

15 All right. Ms. Walker, we're back on the record.  
16 If you would like to go ahead and present your presentation  
17 about the Alliance's intervention petition. Let's talk  
18 about that first. We'll get responses here with respect to  
19 that, then you'll have an opportunity to give us a reply.

20 Let's focus this at this point, though, on the  
21 admissibility of the intervention petition, and then, when  
22 we're done with that, we'll look at the contentions, all  
23 right? And you're on.

24 MS. WALKER: Okay. The context of SUWA -- that's  
25 the Southern Utah Wilderness Alliance; we term the SUWA --

1 amend license application as an amendment to PFS's  
2 application which proposes for the first time a low rail  
3 spur, and it's going to be on the west side of Skull Valley.

4 SUWA immediately identified that this proposed  
5 rail line would threaten the wilderness character of the  
6 North Cedar Mountains road-less area, and on the basis of  
7 that, SUWA filed its petition to intervene and request for  
8 hearing and contentions.

9 Now, the considerations for a late-filed petition  
10 is -- there's five factors. The first of those are good  
11 cause for failure to file on time -- for failure to file on  
12 time. SUWA responded as quickly as it could to the license  
13 amendment, and because it wasn't participating in this  
14 process initially, so that it was new to the process, it  
15 took a little bit of time, but given the amount of work that  
16 SUWA had to do, their petition was filed as quickly as  
17 possible.

18 In addition, because SUWA received absolutely no  
19 notice, nor did any other members of the public other than  
20 the people already involved in the proceeding of this  
21 amendment, I would suggest that they have met the good cause  
22 requirement as a matter of law because they received no  
23 notice.

24 In our reply, we were more specific as to what  
25 SUWA had to do in order to file its petition, and I think if

1 the Board takes a look at those series of steps that they  
2 had to take, they will agree that SUWA acted promptly.

3 The second factor is the other means. So, in  
4 other words, is there any other way that SUWA could have its  
5 interests seen to other than this proceeding. And there  
6 aren't.

7 As the board mentioned in the context of the  
8 State's late-filed contentions with regard to the low rail  
9 spur, there were no other means for the State at that point  
10 to safeguard its interests, and for similar reasons if not  
11 even more so, there's no way that SUWA could safeguard its  
12 interest other than participation in this proceeding.

13 No one in this proceeding has identified the North  
14 Cedar Mountain road-less area as possessing wilderness  
15 characteristics and no one has sought to protect those  
16 wilderness characteristics.

17 The third factor is the development of the record.  
18 Again in our reply on page 5, we set forth in more detail  
19 just exactly what SUWA would plan to add to the record.  
20 Now, these issues deal with the wilderness character of the  
21 North Cedar Mountain road-less area and what constitutes  
22 wilderness under the Wilderness Act, how those criteria were  
23 applied to the area at issue, and the impacts that the  
24 proposed rail spur would have on these characteristics.

25 We would also have our biologist talk to the

1 importance of preserving large tracts of land for wilderness  
2 designation, the need to prevent habitat fragmentation and  
3 ecosystem management gradients to preserve bio-diversity  
4 along elevation gradients, and the importance of foothills  
5 and benches in this notion of gradients and large tracts of  
6 road-less areas, and the impacts that the proposed facility  
7 would have on these values.

8           The fourth factor is the existing parties won't  
9 represent SUWA's interest, and there's no other party that  
10 has identified, as I said before, the wilderness  
11 characteristics of the area and no one has sought to protect  
12 those characteristics.

13           The fifth factor is, will intervention -- or will  
14 consideration, I guess, of the late-filed petition unduly  
15 broaden or delay.

16           We just witnessed that at least both the staff and  
17 PFS have agreed to postpone the end of informal discovery.  
18 We haven't gotten to formal discovery yet. Not only that,  
19 that SUWA's contentions would probably be grouped in the  
20 very last group, which is the furthest away, and so everyone  
21 would have plenty of time to deal with SUWA's issues, which  
22 are rather narrow and probably wouldn't be that burdensome  
23 to deal with.

24           So after the Board determines that SUWA's  
25 late-filed petition should be considered, then they have to



1 address standing. Standing comes from the case of  
2 controversial -- controversy provision of Article 3.

3 Although the tests vary, typically you have to show injury  
4 in fact, which is an injury that's concrete and actual and  
5 not conjectural.

6 SUWA has established through the affidavit of Dr.  
7 Caitlin that the injury that they stand to suffer if they  
8 are not allowed to participate in this proceeding is  
9 concrete. The proposed project will harm the wilderness  
10 characteristics of the North Cedar Mountain road-less area,  
11 and that will harm the interest of SUWA and Dr. Caitlin.

12 And it's actual. The important thing is to view  
13 not necessarily SUWA's interest, although their ultimate  
14 interest in this issue is to protect the road-less area as a  
15 wilderness area, and that does depend on Congressional  
16 action. But they definitely have a legitimate interim goal,  
17 which is to preserve the area in its current state and  
18 thereby preserving the wilderness characteristics.

19 Now, this interest exists regardless of what  
20 Congress does because it exists now. And the fact that the  
21 proposed project threatens these characteristics therefore  
22 is an actual and impending harm.

23 The next part of the standing test is the causal  
24 connection or the traceability. So, in other words, is the  
25 harm traceable to the actions in this case of the NRC?

1 Now, the NRC ultimately has the decision to  
2 approve or reject a proposed rail spur. If it is rejected  
3 and -- and I know this sounds like the redressability  
4 argument, but they tend to be pretty much the same as far as  
5 I can tell.

6 So there is a causal connection between the harm  
7 that SUWA envisions and the activities of the agency, which  
8 is the NRC in this case. And again, the redressability,  
9 which is quite similar, is if the low rail spur is rejected  
10 or somehow realigned so that it doesn't impact or impact to  
11 the degree that it stands to impact at this point the  
12 wilderness characteristics of the area, then SUWA will not  
13 be harmed because the area will remain in its current state  
14 and leave open the option that Congress can declare it a  
15 wilderness area.

16 So if the board isn't convinced, as I think it  
17 should be, that SUWA has standing for the purposes of this  
18 proceeding, the Board also has the opportunity to grant  
19 discretionary standing.

20 Now, the factors addressed in discretionary  
21 standing are some combination of the late-filed petition  
22 factors and the normal standing factors and essentially have  
23 been addressed already, but I'll review them.

24 The sound record issue comes up. One of the  
25 important things -- so that to the extent that SUWA will

1 contribute to a sound record that speaks in favor of  
2 discretionary standing; I think that it's clear that the  
3 issues of the potential environmental impacts of the low  
4 rail spur need to be addressed as part of the NRC's  
5 obligations under its regulations, and the low rail spur  
6 brought up new issues and these issues should be addressed.

7 For the decision regarding the low rail spur and  
8 the facility to be sound, it needs to address these issues  
9 as required by the NRC regulations.

10 SUWA's interest -- the interest being the second  
11 factor that favors discretionary standing -- is very  
12 profound. I think that we established in our motion to  
13 intervene that SUWA has been deeply involved in the  
14 management decisions affecting public lands, particularly  
15 those possessing wilderness characteristics.

16 They were interested in this long before NRC -- I  
17 mean the low rail spur was ever suggested. They have had  
18 members who care about these areas inventory them, suggest  
19 that this -- the results of these inventories be placed in  
20 litigation and also become the subject of SUWA's protective  
21 scheme or strategy.

22 So in other words, once these areas are identified  
23 as possessing wilderness character, SUWA then adopts them,  
24 so to speak, and does everything within its power to protect  
25 that wilderness character until Congress has the opportunity

1 to act on their potential for wilderness designation.

2 The redressability factor again favors  
3 discretionary standing for SUWA. If the low rail spur is  
4 rejected or realigned in such a way that it protects or at  
5 least helps protect the wilderness character of the North  
6 Cedar Mountains, SUWA will be less harmed, and also the area  
7 will maintain its wilderness character at least until future  
8 management decisions impact it.

9 But the important thing is that the baseline of  
10 future management decisions will be the state of the area in  
11 its -- well, the current state of the area in its relatively  
12 pristine state. So if, for example, NEPA were conducted on  
13 any future management decisions, the no-action alternative  
14 would be preserve it in its current state. If the proposed  
15 rail spur were built, this would no longer be an option.

16 Factors weighing against discretionary standing  
17 are availability of other means. As I suggested before,  
18 there aren't any other available means other than this  
19 proceeding in which SUWA could protect the wilderness  
20 character of the North Cedar Mountains from the development  
21 of the low rail spur. No other group has brought up the  
22 issue, and so representation by others is not -- will not  
23 work against SUWA's potential as a discretionary intervenor.  
24 And again, SUWA's intervention wouldn't unduly broaden or  
25 delay the proceedings since Group 3 contentions have been

1 delayed a bit. The draft EIS won't be out until October 30,  
2 1999 and informal discovery has yet to cease.

3 So I think that all the factors weigh in favor of  
4 SUWA's petition to intervene and request for hearing. They  
5 have met the late-filed contention requirements, and so  
6 their petition should be considered. They meet the standing  
7 test. And even if they don't meet the standing as a right  
8 test, they meet the discretionary standing test.

9 Thank you.

10 JUDGE BOLLWERK: All right. In terms of the order  
11 of presentations, the State made a filing in this regard.  
12 If you all want to -- since you're supporting the petition,  
13 if you would like to say something at this point and then  
14 we'll move to the applicant and then to the staff.

15 Let me just check. My understanding is that there  
16 is not anyone else other than Ms. Walker and Utah that's  
17 going to be speaking to this subject; is that correct?

18 MR. QUINTANA: The Skull Valley Band of Goshute is  
19 opposed to this intervention and would like just two minutes  
20 to address it at the end of everybody's presentation.

21 JUDGE BOLLWERK: All right. What I will do is  
22 allow you an opportunity after -- and Mr. Gauklear, you want  
23 to speak for the applicant? -- after the applicant has  
24 spoken, and then we'll allow the staff to speak, and then  
25 Ms. Walker, after the staff has had their opportunity, we'll

1 go back to you for any reply comments you want to make.

2 Is that clear to everyone? All right.

3 Ms. Chancellor, then.

4 MS. CHANCELLOR: The State stands by the petition,  
5 the response that it filed. We believe that the low rail  
6 spur is a significant license amendment, it's a significant  
7 change from what was initially proposed whereby there was  
8 potentially a rail spur that would have paralleled Skull  
9 Valley Road in an existing disturbed area and a  
10 right-of-way. I might add, PFS did not have the permission  
11 to build the rail spur in that area.

12 So whether a rail spur was actually a viable  
13 option or not at the time that PFS submitted its application  
14 was very much up in the air. So I don't believe that there  
15 is any way in which SUWA could have anticipated that there  
16 would be a rail spur in the middle of Skull Valley that  
17 would affect the wilderness area of the North Cedar  
18 Mountains.

19 In addition, we have seen in this proceeding that  
20 even parties admitted weren't aware of the license  
21 amendment, so that also goes to the no notice.

22 Finally, even if the State were involved and even  
23 if the Board did admit the State's contentions with respect  
24 to the low rail spur amendment, the State is in a  
25 substantially different position than SUWA in terms of

1 advocating wilderness status for lands under the BLM --  
2 what's called FLMPA. I don't know if Judge Kline knows that  
3 acronym, but it's the Federal Land Management Policy Act.  
4 And SUWA has been involved in those issues for many, many  
5 years. This is not a new issue, and it's something that the  
6 State believes that it cannot represent SUWA's interests on.

7 So I believe that Ms. Walker has laid out for you  
8 adequately and sufficiently why SUWA meets the standing,  
9 either standing as a right or discretionary standing, and we  
10 urge the Board to look favorably on their petition.

11 JUDGE BOLLWERK: All right. Thank you.

12 Mr. Gauklear.

13 MR. GAUKLEAR: Yes, Your Honor.

14 Applicant opposes SUWA's intervention in this case  
15 on several basis. First, we believe that SUWA has not met  
16 the standards for late-filed petitions. We've heard talk  
17 this morning about claimed lack of notice. The license  
18 amendment was not published in the Federal Register because  
19 it was not required to be.

20 But I wanted to point out that as part of the EIS  
21 scoping process at the meeting held in June, this past  
22 summer, PFS alerted the public to the fact that it was  
23 considering a rail spur alternative on the west side of the  
24 Cedar Mountains, west side of Skull Valley.

25 I refer the Board to a letter from applicant's

1 counsel dated June 8th, 1998, where we summarized Mr.  
2 Donnell's presentation at that EIS scoping meeting. So  
3 there was, in terms of notice of a potential rail spur,  
4 there was notice of that fact.

5 They also claim that even once they found notice,  
6 they acted diligently to file timely. However, as the Board  
7 itself has noted, the delay depends on the complexity of the  
8 issues involved. You noted that in your last decision with  
9 respect to the low rail corridor.

10 In this case, the complexity of the issues with  
11 respect to SUWA's intervention are not that involved. It  
12 involves the location of the rail spur, which is evident  
13 from the amendment application, and there's approximately  
14 ten to 20 pages in the ER that describe the rail spur, its  
15 effects, et cetera.

16 So the complexity of the issues were not that  
17 great, and we believe they were late in filing their  
18 petition.

19 With respect to the second factor for late-filed  
20 petitions, there are other means by which SUWA can protect  
21 its interest.

22 One, it can provide comments on the draft EIS to  
23 the NRC.

24 Second, SUWA itself has noted that it can go to  
25 Congress. It has gone to Congress in the past, in fact,



1 trying to get this area designated as wilderness.

2 With respect to the third factor in terms of what  
3 SUWA would add to this proceeding, in their reply, for the  
4 first item, they do list witnesses and areas of testimony  
5 that these witnesses would provide. But if you look at what  
6 they provide there, it is less than David Schen's affidavit  
7 that was filed in support of the State's late-filed  
8 contentions on the low rail corridor. And this Board found  
9 with respect to David Schen's affidavit that it falls  
10 considerably short of the specificity required regarding  
11 witness identification and testimony summaries. For the  
12 same reason, we would believe that what SUWA has provided  
13 here falls considerably short of that required by the NRC.

14 SUWA says that its participation will not delay  
15 this proceeding because discovery has been extended, because  
16 discovery is ongoing. But as the Board has pointed out and  
17 with respect to its decision again on the low rail corridor  
18 contentions of the State and the other parties, the other  
19 part of this factor is whether it will broaden the issues in  
20 this proceeding.

21 SUWA's participation will broaden issues. In  
22 fact, it could lead to delay as a result. It may lead to  
23 subsequent REIs by the staff. We don't know. But it will  
24 definitely broaden the issues in this proceeding.

25 Therefore, we believe, on the balancing, we

1 believe that SUWA has not met the factors for late-filed  
2 intervention here, and its intervention petition should be  
3 denied on that basis alone.

4 We also believe that SUWA has not met the  
5 requirements for standing. We have discussed that at length  
6 in our brief. We believe that the interests that SUWA seeks  
7 to protect here, the designation of this as wilderness area,  
8 is legally non-existing or alternatively way too conjectural  
9 to be part of this proceeding.

10 BLM made a decision with respect to this precise  
11 parcel of land 18 years ago that it did not possess the  
12 wilderness characteristics necessary to be designated as a  
13 wilderness area. It did not even designate it as a  
14 wilderness study area, as it did to the area to the south.

15 BLM is the responsible federal agency in this area  
16 and the NRC is not to second-question the responsible  
17 federal agency in terms of the decision made, and that's the  
18 Hydro Resources case, a case that we cited in our brief and  
19 which SUWA does not refer to at all in its reply.

20 Now, SUWA does argue in its reply that BLM might  
21 reconsider and reevaluate whether this area should be  
22 wilderness. But although BLM is undertaking a reinventory  
23 of its land right now, that reinventory, as we pointed out  
24 in our brief, does not include this area. So BLM would have  
25 to change its mind to take a look at this area again.

Moreover, BLM would have to change its mind with respect to its original decision back in 1908 and determine that this area was -- did qualify for wilderness characteristics.

If we look at what BLM said in 1980 when they made this finding, they found that, and I quote, "Man's imprints are substantially noticeable within the unit. Sightseeing is incumbered by many outside activities and interior impacts of man. Natural screening contributes little to hide or enclose man and his contrasting influence. Recreational opportunities are all incumbered by man's development." These are all findings that BLM made in 1980 and were not challenged at the time by anybody, and SUWA has not come forward with any information here to suggest that BLM was wrong other than this broad, vague generalization.

SUWA has also suggested that Congress might approve this area as wilderness, but this area is not in the bill that's before Congress for designation of wilderness area in Utah, and in fact, the bill that is before Congress has been introduced every year since 1989 and has not been reported out of the committee yet.

Further, SUWA's own director has said that its 8.5 million acre inventory that it just released this past summer is but a starting point for negotiations with Congress in terms of what it believes to be designated as

1 wilderness.

2 So we believe when you take all these factors into  
3 account that you have exactly what the court said in Babbit.  
4 You have speculation based upon conjecture based upon  
5 surmise. This is wholly too speculative an interest to  
6 support standing in this case.

7 Now, in the reply, SUWA does refer to a case,  
8 Idaho Conservation League versus Mumma, which it claims  
9 supports its position. That case, however, is unlike ours.  
10 In that case, the plaintiff was challenging the agency  
11 directly responsible for making the designation of  
12 wilderness area, the Forest Service in that case.

13 Here, the agency responsible for making the  
14 designation was BLM. They made that 18 years ago. It has  
15 never been challenged. As I said, under the Commission's  
16 Hydro Resources decision, this board should not revisit or  
17 question BLM's decision.

18 JUDGE BOLLWERK: Putting aside the designation of  
19 the wilderness, as a NEPA matter, don't they have an  
20 interest whether this falls within the definition as the  
21 statute has set it up or not in preserving the character of  
22 this land in terms of an alternative whether it's  
23 "wilderness" land under the statute?

24 Doesn't NEPA -- I mean, for instance, to draw an  
25 analogy, we look at endangered species, but there are also

1 animals that aren't endangered species that nonetheless have  
2 to be considered as well.

3 MR. GAUKLEAR: Your Honor, they did not argue that  
4 in their initial brief. You look at their initial pleading,  
5 their interest as it was represented in that initial  
6 pleading was preservation of this area to allow Congress  
7 time to designate it as wilderness, and that lists the  
8 interest that they asserted.

9 They have attempted to raise a new interest here  
10 in claiming that they have an interest wholly apart from  
11 Congress' designation to try to preserve this as a  
12 wilderness area, but they provided no legal basis for that  
13 interest to say that they -- that that should be protected.

14 Moreover, you're talking about this area here,  
15 it's two square miles, it's within a couple miles of  
16 Interstate 80, the main Pacific rail line. Roads are near  
17 it, cross-by roads at two points, a road parallels it a half  
18 mile to three-quarters of a mile away. They've set forth no  
19 basis to support an interest, particularly here also where  
20 the contacts that they try to have with this area are  
21 insufficient.

22 They rely upon the affidavit of Dr. Caitlin to  
23 provide their claimed contact with the area. In the second  
24 declaration of Dr. Caitlin, he refers to -- he says he  
25 frequently visits the area, but he doesn't define how often

1 frequent is. He doesn't define how often he has been there  
2 in the past. He doesn't define how long he stays there.  
3 That's too vague of a basis to provide them contact with  
4 this area of land to provide standing.

5 I would point the Board to the Houston Lighting &  
6 Power case that we cite in our brief. In that case, the  
7 Board found that the presence on about a monthly basis  
8 within approximately 40 miles of a nuclear power plant for  
9 fishing was insufficient to provide standing even though the  
10 Commission normally has used a 50-mile radius or limit for a  
11 nuclear power plant standing.

12 If you apply this logic here with this type of  
13 statement that they have given, it would supply SUWA with  
14 standing anywhere in the world. You have a situation here  
15 where he has not stated how long he has been there, how  
16 often he has been there. He claims a bond with the land,  
17 but the bond that he claims to the land may be no different  
18 than the other 8.5 million acres that the SUWA seeks to have  
19 claimed as a wilderness area in the State of Utah.

20 The cases that SUWA cites are inapposite. The  
21 Georgia Tech case referred to a person driving daily by a  
22 plant.

23 The Virginia Electric Power case was a situation  
24 where the applicant there wanted immediate intervention, so  
25 therefore the appeal board in the case, instead of sending

1 it back to the licensing board, decided to rule in favor of  
2 intervention and get the proceeding going forward.

3 Even there, the organization in that case had two  
4 members who lived within the 50-mile radius, one of whom  
5 happened to canoe close to the plant. So that case i think  
6 is also inapposite to what we have here.

7 The Commission's recent decision in PFS with  
8 respect to Federated Tribes talked about the nature or  
9 length of the visit and the bond. It referred to in that  
10 decision the fact that the child would visit on occasion up  
11 to two weeks. As I have said, here, we have no indication  
12 of how long Dr. Caitlin visits this two-square-mile area of  
13 land.

14 In fact, if you look at the affidavit, the second  
15 affidavit, he refers to the fact that other members of SUWA  
16 visit the North Cedar Mountain areas on occasion -- days on  
17 occasion. You know, they spend days there. He does not  
18 specify with respect to himself that he spends days there.  
19 The affidavit cannot support -- or the other members cannot  
20 provide a basis here for standing because they have not  
21 filed declarations to support SUWA's standing.

22 So we believe that SUWA has not met the test  
23 required for standing. We think that the contact that they  
24 claim is too vague and ambiguous, that the interests that  
25 they seek to protect are speculative, far too speculate, and

1 if standing were allowed in this situation here, SUWA would  
2 be able to claim standing any place in the world as a  
3 practical matter, any place in Utah certainly, based upon  
4 similar type of vague assertions, and for that reason, we  
5 think that their intervention petition should be dismissed.

6 JUDGE BOLLWERK: All right. Anything further?

7 All right. Mr. Quintana.

8 MR. QUINTANA: Thank you, Your Honor.

9 First, directly on the other side of the Cedar  
10 Mountains is the Envirocare low-level waste facility which  
11 has a rail spur leading to it, if I remember correctly.

12 Second, the real motivation of SUWA, an  
13 organization I fully support in every other respect except  
14 this one, is they are adamantly opposed to nuclear power,  
15 and if their members are closely examined, their opposition  
16 to nuclear power means that they are opposed to this  
17 particular facility as proposed here.

18 Finally, it is very, very much resented in the  
19 minority communities when white environmental groups decide  
20 they know best what's in the best interest of those minority  
21 groups, especially since these minority groups have made  
22 extensive efforts, as we've discussed in previous hearings,  
23 to meet with experts worldwide.

24 There will not be any impact on this area that  
25 would be adverse to the wildlife and its natural



1 surroundings. It is not designated as wilderness and we are  
2 adamantly opposed to SUWA's intervention in this proceeding  
3 for the sole purpose of defeating this project because of  
4 their blatant knowledge of what's best for the Skull Valley  
5 Goshutes and because of their blatant hatred of nuclear  
6 power.

7 JUDGE BOLLWERK: Mr. Turk?

8 MS. MARCO: Actually, I'm --

9 JUDGE BOLLWERK: I'm sorry. Ms. Marco.

10 MS. MARCO: -- going to deliver the argument.

11 The staff opposes SUWA's intervention petition for  
12 failure to satisfy the requirements for late-filed  
13 petitions, for not demonstrating that it has standing as a  
14 matter of right, and for not demonstrating that it should be  
15 allowed to participate as a matter of discretion.

16 On Tuesday, SUWA responded to the staff's and  
17 applicant's response to its petition and addressed several  
18 areas where the staff at least said the petition was  
19 deficient. Well, the staff has reviewed SUWA's response;  
20 however, the staff continues to believe that SUWA has not  
21 satisfied the various requirements for intervention.

22 First, I would like to address SUWA's assertion  
23 that it has satisfied the standards for late-filed  
24 petitions.

25 The first and most important factor in this

1 inquiry is the good cause for the lateness, and we in our  
2 response stated that SUWA had not demonstrated good cause  
3 for filing its petition late because it did not say when it  
4 first learned of the information needed to submit its  
5 contentions. Without this information, it was impossible  
6 for SUWA to demonstrate that it had good cause.

7 If SUWA was aware of the information earlier, it  
8 could have been more vigilant regarding the application and  
9 regarding the submittal on August 28th which was then made  
10 public on -- and put in the public document room in  
11 September.

12 It's interesting that the State says that they  
13 didn't have information regarding the future submittal when  
14 there's a letter in the docket on July 2nd from J. Silberg  
15 to the judges indicating that there would be this proposed  
16 rail spur along the western side of Skull Valley beginning  
17 from a point on the main railroad line approximately 15  
18 miles west of Raleigh Junction as a primary option, and that  
19 following this, there would be an amendment to the  
20 application submitted by late summer and early fall.

21 At least the parties here would have this  
22 information. This was made public. An entity that is  
23 interested so much as SUWA had said in the land long before  
24 the rail spur, they would be aware of general large projects  
25 in the area, and it would seem to me that they would be

1 aware of these kinds of things.

2 So SUWA in its reply again has failed to state  
3 when it had availability of this information, and it has not  
4 demonstrated good cause for the lateness. However, if SUWA  
5 had learned of the information and it was completely unaware  
6 of the information, six weeks, the staff considers, is not  
7 an overwhelmingly unreasonable time to file the intervention  
8 and the two contentions, although because, as Mr. Gauklear  
9 said, they are very -- there are just two contentions, this  
10 factor does not, even if you were to give it good cause, it  
11 really doesn't amount to a high level of showing here.

12 SUWA has not shown any good cause regarding the  
13 new information it contains in its contentions. They have  
14 set forth new material and there's no discussion as to why  
15 that could not have been submitted earlier.

16 On balance, the other factors also weigh against  
17 SUWA. Although the other parties would not be available to  
18 protect SUWA's interest in this proceeding, SUWA could  
19 protect its own interest by continuing its pursuit of  
20 legislative goals.

21 Unlike the general public's access to the  
22 political process, SUWA has shown success in at least having  
23 its views aired before Congress, and as mentioned in the  
24 staff's pleading and mentioned here, SUWA was able to  
25 present its views before a Congressional subcommittee on the

1 subject of wilderness designation in Utah.

2 Now, SUWA asserts in its reply that the Board in  
3 exactly the same situation found that the State of Utah had  
4 no other means to protect its interest. However, it's not  
5 the exact same situation because unlike here, the State did  
6 not assert any legislated interest with respect to its  
7 contentions. They only set forth contentions relating to  
8 the factual matters contained in the submittal, and there  
9 was no information to suggest the State could protect its  
10 interests elsewhere.

11 Thus, the first of these two factors weighs in  
12 SUWA's favor, although the second doesn't. These two  
13 factors, however, are accorded the least weight of the whole  
14 set.

15 Regarding the extent to which SUWA's participation  
16 would lead to the development of a sound record, SUWA's  
17 petition in this regard was deficient. SUWA did not  
18 identify who its experts were and didn't summarize their  
19 testimony.

20 SUWA set forth the declaration of Dr. Caitlin. He  
21 was an individual who participated in the land reinventory,  
22 and SUWA also asserted other unnamed individual experts  
23 would assist them. This Board rejected a similar showing  
24 from the State of Utah earlier when it submitted an  
25 affidavit of a forestry manager and asserted various unnamed

1 people.

2 SUWA's reply does not adequately correct this  
3 deficiency. SUWA lists three people, but it doesn't  
4 identify what these people would testify to beyond what is  
5 mentioned in Contention A -- forget Contention B --  
6 Contention A itself. SUWA again refers to the declaration  
7 of Dr. Caitlin, but he doesn't address what he would say in  
8 support of the contention beyond his overall assertion

9 SUWA lists its legal director, but for the first  
10 two matters that she would testify to, legal expertise in  
11 general is not sufficient to make a showing on this factor.  
12 It is difficult to see also how a person with a legal  
13 background would be able to assist in determining impacts of  
14 the rail spur on the wilderness character of the land.  
15 Also, she also says she's going to discuss the topic of  
16 understanding SUWA's organizational mandate, but it's hard  
17 to see how this will aid in the development of a sound  
18 record.

19 Finally, SUWA sets forth Allison Jones, and what  
20 she plans to say is repeated almost verbatim in the  
21 contention, and there's nothing that -- there's nothing to  
22 expand upon to show how these matters would be developed and  
23 how this would assist in the sound record.

24 Also, I'll just mention again that none of these  
25 experts say how they'll address alternatives, which is the

1 subject of Contention B.

2 Thus, the information provided by SUWA regarding  
3 these experts is even less than what the State said in its  
4 submittal, and we don't have any information about how they  
5 will address the matters actually relevant to the  
6 contentions.

7 Finally, SUWA's -- we agree that SUWA's  
8 participation would not delay the proceeding, at least not  
9 so as to affect this factor, but SUWA has raised several  
10 issues regarding the wilderness character of the land and  
11 the wilderness designation, and none of the other parties  
12 have raised these matters. In fact, all of the low rail  
13 contentions have been rejected, that if -- there are no --  
14 there are no contentions relating to the rail spur, so any  
15 contention that does is going to expand the issues in the  
16 proceeding at least that far.

17 Now, SUWA states that the issues in the  
18 contentions that it set forth are similar to the issues  
19 concerning its standing, but the issues to be litigated, of  
20 course, at the hearing will not be covering standing, it  
21 will be concerning the contentions. So this -- SUWA's  
22 assertion here really doesn't help it in this regard.

23 On the balance, all the factors, it does not  
24 appear that SUWA has met the late-filed showing, and its  
25 petition should be rejected on this basis alone.

1           Next I would like to get into SUWA's assertion  
2       it's established standing as a matter of right. The staff  
3       has three concerns. We think that SUWA has not met the  
4       standard for three reasons.

5           First, SUWA does not show that it would suffer a  
6       personal harm, and second, SUWA has not set forth an injury  
7       in fact that is concrete or palpable, and third, SUWA does  
8       not show that it's likely -- that the injury is likely to be  
9       redressed by a favorable decision in the proceeding.

10          In applying the criteria, whether Petitioner has  
11       met this requirement, it's important to keep in mind exactly  
12       what the Petitioner is defining its injury in fact, because  
13       based on what they say the injury in fact is, that's how you  
14       assess all three items: the injury in fact, traceability  
15       and redressability.

16          In its petition, SUWA defined its injury as the  
17       threat of the low rail spur on the wilderness character of  
18       the North Cedar Mountains and the threat that the area would  
19       be disqualified for wilderness designation, the last part of  
20       that being the ultimate end of its injury as it's set forth.

21          SUWA's stated injury was not sufficient to support  
22       standing because, first of all, SUWA does not show how it as  
23       an entity would be personally injured. The Supreme Court  
24       said in Sierra Club versus Morton that a mere interest in  
25       the problem is not sufficient. You would have to show that

1 you were actually among the injured, and SUWA didn't do  
2 this.

3 In its reply, SUWA takes issue with the staff's  
4 assertion and complains that no organization would ever be  
5 able to meet this -- anything more than what SUWA has  
6 already done here. But the Supreme Court recognized the  
7 difficulty with this. In Lujan versus Defenders of Wild  
8 Life, the Supreme Court said that yes, we know that it's  
9 substantially more difficult to show this kind of  
10 third-party injury, but nevertheless, the factors have to be  
11 met.

12 SUWA claims it's distinguished from the Sierra  
13 Club. SUWA states that it relies on its members' use of the  
14 land and also its own intense and longstanding involvement.  
15 But these are the same -- well, as far as members' use of  
16 land, I will get into Dr. Caitlin -- it's essentially what  
17 the applicant has suggested -- but with regard to the  
18 intense and longstanding involvement in the area, this is  
19 the same interest that was advanced by the Sierra Club in  
20 the Sierra Club versus Morton and it was rejected by the  
21 Supreme Court.

22 The Sierra Club said that it had a special  
23 interest in conservation and it said that one of its  
24 principal purposes was to protect and conserve the natural  
25 resources of the Sierra Nevada mountains. Therefore, the



1 general interest advanced by the Sierra Club is similar to  
2 what SUWA has here.

3 Now, regarding Dr. Caitlin, SUWA did not  
4 demonstrate injury in fact through its member, and Dr.  
5 Caitlin submitted a declaration that talked about the  
6 reinventory process, talked about wilderness designation,  
7 members' activities, and his past activities in the North  
8 Cedar Mountains. He did not demonstrate a concrete, ongoing  
9 connection and presence at the location of the proposed  
10 action, so that he could not show that the injury would  
11 actually affect him personally.

12 His new declaration states that he has developed a  
13 bond with the land which he will continue to cultivate in  
14 the future. He says: I frequently enjoyed and will in the  
15 future with some frequency enjoy hiking and other  
16 activities. This assertion is deficient because Dr. Caitlin  
17 gives no indication of the frequency or duration of the  
18 visits or explains what his future plans are for visiting  
19 the area.

20 In Lujan, the Supreme Court said that an intent to  
21 return to the place where you once were is not sufficient  
22 for standing. The Court said that such someday intentions  
23 without description of concrete plans or, indeed, any  
24 specification of when the someday will take place do not  
25 support a finding of actual injury.

1 SUWA cites the Commission's Georgia Tech case, but  
2 even in Georgia Tech, the Petitioner drove daily by the  
3 reactor, the operative word being "daily." The Commission,  
4 based on that, could presume that the Petitioner frequented  
5 that area on an ongoing, continual basis.

6 SUWA also cites the 1979 Appeal Board North Anna  
7 decision where a canoer was found to have standing. Now,  
8 the Commission in PFS has recently stated that the length of  
9 the contact as well as the nature that establish a bond with  
10 the land. And the staff does not take issue with the nature  
11 of Dr. Caitlin's involvement with the land. He doesn't  
12 show, however, like we're saying, a current connection to  
13 the location of the proposed action, which is required.  
14 Therefore, the Board could find on this factor alone that  
15 SUWA has not demonstrated the standing to intervene.

16 One of the things that the staff also said in our  
17 response was that Dr. Caitlin did not say that he authorized  
18 SUWA to represent him in the proceeding, but we see from the  
19 reply that he has done this and we no longer have this  
20 objection. We're satisfied with what was said in that  
21 regard.

22 Now I would like to discuss the staff's concern  
23 that they have not raised an issue -- an injury that is  
24 concrete.

25 SUWA's injury as it was presented related to the

1 legal status of the BLM land and its wilderness character,  
2 and SUWA needs to state, at least regarding wilderness  
3 character -- I'll get into the legal status of BLM later,  
4 but let's separate -- let's take it with regard to injury.

5 They do not say exactly what their injury is.  
6 Wilderness character is a generalized term subject to a  
7 number of interpretations, and SUWA does not show how its  
8 intended behavior would be injured as a direct or indirect  
9 result of the action.

10 The Commission has recognized that concrete  
11 injuries in environmental cases can occur when you allege  
12 adverse health effects, loss of aesthetic enjoyment, and  
13 diminished property values for those who frequent the area.

14 The Commission addresses these typical injuries  
15 again in its October Yankee Atomic decision and SUWA's claim  
16 that a harm to the wilderness character does not relate to  
17 an injury that is sufficiently concrete for standing.

18 In its reply, SUWA argues that its injury is  
19 concrete. It relies on the 9th Circuit's Mumma decision.  
20 SUWA asserts that the Conservation League's interest in  
21 Mumma was less concrete than that of SUWA, but of course the  
22 inquiry is the concreteness of the injury, not the interest,  
23 and I think that may be a source of confusion.

24 In Mumma, the challenged action was the Forest  
25 Service plan, and it didn't authorize specific development

1 proposal. The Mumma court found that the future harm was  
2 the concrete effects at the project level that will occur,  
3 the effects of future development. The Mumma court did not  
4 rest its finding of injury in fact on a more particular harm  
5 exactly because the actual development could not be  
6 ascertained and specifically -- and was unknowable. So the  
7 court stated that because no development has yet to be  
8 authorized, the plaintiffs cannot provide any more detail  
9 than they have.

10 Well, here PFS submitted -- submittal contains a  
11 description of the specific action, the specific place where  
12 that action will take place, and unlike the Petitioners in  
13 Mumma, there is no excuse for SUWA not to have provided a  
14 more concrete showing of injury.

15 Finally, regarding the injury that the land will  
16 lose its eligibility to be designated as wilderness, this  
17 also is not sufficiently concrete. SUWA needs to assert  
18 some future attendant harm, which it didn't do. Even the  
19 Mumma court recognized that.

20 So for these reasons, SUWA has not set forth a  
21 concrete injury required to demonstrate injury in fact.

22 JUDGE BOLLWERK: Certainly if you look at their  
23 affidavit, Mr. Caitlin's affidavit, or Dr. Caitlin's  
24 affidavit, I mean, he mentions health, recreation,  
25 scientific, spiritual, educational, aesthetic. I mean, he's

1 clearly, at least in terms of saying it, touched all the  
2 bases. But your point is that he hasn't shown enough --

3 MS. MARCO: I look to the injury where they have  
4 pled the injury, and they had set forth the injury not even  
5 in the first -- in the initial petition, they did not say  
6 it.

7 JUDGE BOLLWERK: All right. I'm talking about his  
8 second affidavit.

9 MS. MARCO: The second affidavit.

10 JUDGE BOLLWERK: Yes.

11 MS. MARCO: But even still, that wasn't set forth  
12 as the injury. They didn't base their causation on that.  
13 They did not show their chain of causation that would end at  
14 that injury. It's deficient in that regard. Further, he  
15 hasn't met that individual personal showing.

16 JUDGE BOLLWERK: Because of the problem with  
17 frequency?

18 MS. MARCO: Yes.

19 JUDGE BOLLWERK: I mean, he basically says he does  
20 it frequently, but he doesn't say --

21 MS. MARCO: When or how long, yes.

22 JUDGE BOLLWERK: He hasn't given you specific  
23 dates, he hasn't mentioned -- I don't know -- once a week,  
24 once -- I don't know -- once every two weeks --

25 MS. MARCO: Correct.

1 JUDGE BOLLWERK: -- whatever.

2 MS. MARCO: Yes.

3 JUDGE LAM: How specific does it have to be, in  
4 your mind?

5 MS. MARCO: It's a blend. It depends on how much  
6 time you're going to be there, plus how often, and it really  
7 -- it's a factor of the two. It doesn't require a whole  
8 lot, I don't believe, but it does require at least a  
9 showing.

10 He has to -- the problem really is he hasn't shown  
11 specific facts. It's just more of a general assertion, just  
12 a plain assertion without anything more to support it.

13 Can I continue?

14 JUDGE BOLLWERK: Sure. Yes.

15 MS. MARCO: All right. Also, SUWA does not  
16 explain in either its petition or its reply why construction  
17 of the rail spur would cause the North Cedar Mountains,  
18 which is, of course, a large -- several-thousand-acre area,  
19 to be ineligible for inclusion in the Wilderness Act beyond  
20 just saying that it would. So for these reasons, it hasn't  
21 demonstrated an injury in fact.

22 On causation, the staff agreed that they had set  
23 forth causation, but that was related to the injury that  
24 they had set forth in their petition. SUWA has not set  
25 forth causation regarding any other asserted injury,

1 including the harm to the wilderness character of the land.

2           Regarding redressability, SUWA didn't demonstrate  
3 that a favorable decision would likely redress its injury,  
4 at least as that injury pertains to the failure of the land  
5 to be designated as wilderness. And even if they were to  
6 complete that in, say, future development, they have not  
7 shown how redressability would be met there. Other  
8 entities, like the BLM or any BLM permittee, could construct  
9 a larger, more invasive project regardless of the outcome of  
10 this proceeding.

11           For these reasons, redressability has not been  
12 met. Even in Mumma, the court quoted Sierra Club versus  
13 Watt, stating that the intervening event must not be only a  
14 cause, but the only cause of the injury. And because SUWA  
15 has not demonstrated injury in fact or redressability, it  
16 should not --

17           MS. WALKER: Excuse me. Can you repeat about your  
18 last minute? I missed it. The audio went wild.

19           MS. MARCO: Oh.

20           JUDGE BOLLWERK: Can you give us some idea of what  
21 the last thing you heard was?

22           MS. MARCO: Probably redressability.

23           MS. WALKER: She was talking about Idaho  
24 Conservation League or Mumma, and some -- I can't say  
25 exactly where it went out, but something -- just the last

1 minute.

2 MS. MARCO: Okay.

3 MS. WALKER: I got the part about causation with  
4 regard to wilderness character.

5 MS. MARCO: Okay.

6 MS. WALKER: And then after that.

7 MS. MARCO: All right. Sorry.

8 MS. WALKER: Thank you.

9 MS. MARCO: That was towards the end. Right. I  
10 just mentioned that even in Mumma, that court recognized --  
11 that court quoted Sierra Club versus Watt and realized that  
12 the intervening event must not only be a cause, but must be  
13 the only cause, and I just wanted to explain that Mumma  
14 would also agree on redressability, and that's how I ended.

15 I just want to mention on discretionary, I really  
16 don't have to get a whole lot into discretionary because the  
17 factors that I would feed in have not been changed. Nothing  
18 in the reply, nothing in the argument here would change what  
19 I would plug in and I would still get the same outcome, that  
20 discretionary intervention has not been satisfied.

21 That's all I have.

22 JUDGE BOLLWERK: Ms. Walker, it is 1:30 here, it  
23 is 11:30 there. How long do you think you need to respond  
24 to these arguments?

25 [Pause.]



1 JUDGE BOLLWERK: That's feedback in a major way.

2 [Laughter.] -- --

3 MS. WALKER: Are we okay? Can you hear me?

4 JUDGE BOLLWERK: Yes, I can. Are you hearing us  
5 all right?

6 MS. WALKER: Okay. How long? I would say 20  
7 minutes.

8 JUDGE BOLLWERK: Okay. Probably it would be a  
9 good idea then for us to break at this point, because if we  
10 start in on the contentions, we are probably looking at  
11 least another 45 minutes to an hour, I would say.

12 Let me put it this way, I think the board can take  
13 that, but I am not going to impose that on you all. It is  
14 1:30, so if you feel a need to take a luncheon break, we  
15 probably ought to do that now if we are going to do it.

16 MR. SILBERG: We wouldn't mind. We wouldn't  
17 oppose continuing to proceed. We don't want to impose that  
18 on folks whose stomachs may not be as cast iron as ours.

19 JUDGE BOLLWERK: This is not -- speak your mind  
20 here, I am not trying to impose this one way or the other.  
21 You tell me what you want to do.

22 MR. SILBERG: I think we would just as soon go  
23 ahead, unless someone objects.

24 MS. MARCO: I would really like to eat, Your  
25 Honor.

1 JUDGE BOLLWERK: All right. That is a perfectly  
2 acceptable answer. All right.

3 Ms. Walker, then, why don't we say -- it is now  
4 11:30 there, and you all, I know -- you all have to, I know,  
5 leave the building to go somewhere else to get something to  
6 eat. Would an hour be enough for a lunch break, to come  
7 back and start at what would be 12:30 there?

8 MS. WALKER: I could do it in less.

9 JUDGE BOLLWERK: We can certainly do it in less  
10 here. Again, I am concerned about you all having enough of  
11 a break where you can get someplace to get something for  
12 lunch.

13 MR. QUINTANA: Well, how much total time do you  
14 think the entire hearing will take?

15 JUDGE BOLLWERK: I suspect we are probably looking  
16 at another hour, I am going to anticipate, given the  
17 arguments that have gone on already.

18 MR. QUINTANA: Is there any way everybody could  
19 just suck it up and go straight for an hour and call it a  
20 day?

21 JUDGE BOLLWERK: We just had that discussion here,  
22 and someone -- the problem is it is 1:30 here. I recognize  
23 it is only 11:30 there. I think we can probably shorten the  
24 lunch break if that is something people want to do. There  
25 is a cafeteria in this building. I think 45 minutes

1 probably folks could get something to eat and come back.  
2 But the problem there in Utah is you have to leave that  
3 building, that's my concern.

4 MS. WALKER: Right. But we have access to food.

5 JUDGE BOLLWERK: All right.

6 MS. WALKER: That's fine. We can do it fast.

7 JUDGE BOLLWERK: Do you want 45 minutes, half an  
8 hour? You tell me what it is going to take.

9 MS. WALKER: Half an hour.

10 JUDGE BOLLWERK: Half an hour? Half an hour?

11 MS. MARCO: Yes.

12 JUDGE BOLLWERK: All right. Why don't we then --  
13 it is now, as I say, 1:30 here, 11:30 there. Why don't we  
14 convene at 2:00 here and that would be noontime there. Is  
15 that acceptable, is that okay with the technician that we  
16 are dealing with as well? I want to make sure -- all right?

17 MS. WALKER: Right. I forgot about your food.

18 MS. CHANCELLOR: Judge Bollwerk.

19 JUDGE BOLLWERK: Yes.

20 MS. CHANCELLOR: I may have to leave, and if I do,  
21 Ms. Cowan will take over for the state.

22 JUDGE BOLLWERK: All right. All right. Very  
23 good.

24 Let's say then we will take a break now, reconvene  
25 at 2:00, noontime in Utah, and we will see you at that

1 point.

2 [Whereupon, at 1:29 p.m., the prehearing  
3 conference was recessed, to reconvene at 2:00 p.m., this  
4 same day.]  
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## A F T E R N O O N   S E S S I O N

[2:04 p.m.]

JUDGE BOLLWERK: We are back to begin the afternoon session, or the late afternoon session, and Ms. Walker is going to be making her presentation in a second.

Mr. Turk would like to say something before we start, though.

MR. TURK: Yes, Your Honor. I just wanted to introduce to the board a new attorney with the staff, who has not been actively working on this proceeding, but has been observing today. And I would just like to introduce her to you and ask her to identify herself at this time.

JUDGE BOLLWERK: Okay.

MS. MARTZ: My name is Stephanie Martz.

JUDGE BOLLWERK: Ms. Martz, we welcome you. You have seen some good lawyering here I hope today.

MS. MARTZ: Yes, I have.

JUDGE BOLLWERK: It is something you can take with you.

All right. Any questions from the board at this point before we -- I just had one, I had asked Mr. Gauklear a question, Ms. Marco, about the interest of the Intervenor, or the Petitioner, irrespective -- or respective -- regardless of whether or not this land has been designated as wilderness land under the appropriate Act. I mean,

1 arguably, under NEPA, it seems that they have some interest  
2 in preservation of the land and the status, and whether it  
3 has been defined or not under the statute as wilderness. I  
4 just wondered if you had any comments on that.

5 Hold on one second. Let's see if we can get the  
6 audio -- we have problems again, Utah, you are coming in  
7 very hot, as it were.

8 [Pause.]

9 JUDGE BOLLWERK: All right. Ms. Marco.

10 MS. MARCO: Yes. We believe that SUWA has  
11 demonstrated an interest that is within the zone of interest  
12 of NEPA. We don't have any objection with that.

13 JUDGE BOLLWERK: So you have no problem with that  
14 argument or that assertion then?

15 MS. MARCO: That's right. That is right.

16 JUDGE BOLLWERK: All right. Any other questions  
17 from any board member?

18 [No response.]

19 JUDGE BOLLWERK: All right. Ms. Walker then,  
20 please.

21 MS. WALKER: Thank you. I am going to try to  
22 address the issues in sequence, but if I skip anything, I  
23 hope the board will ask me to clarify any points.

24 With regard to PFS's arguments, the first argument  
25 they made was that we didn't need the late-filed petition

1 factors, and one of the reasons they gave to that is because  
2 at the scoping hearing, PFS indicated that it was going to  
3 try out this new alignment. The problem is that SUWA needed  
4 the exact alignment of the rail spur before it could  
5 determine whether its interests were involved, otherwise, it  
6 wouldn't have standing.

7 So perhaps SUWA would have been alerted to be on  
8 the lookout, but wouldn't have been aware that its interests  
9 were in peril.

10 Also, this idea of Congress -- oops, I am skipping  
11 down, sorry. And then the other argument that PFS made was  
12 that it wasn't published because it wasn't necessary, but I  
13 am afraid that due process requirements trump any sort of  
14 regulation. And in this case, because there was a  
15 substantial change in that amendment, that maybe publishing  
16 would have been the best way to serve people's due process  
17 requirements.

18 Okay. The next PFS argument was that there are  
19 other means for SUWA to have its issues addressed. First is  
20 comment on the draft EIS, but if I understand correctly, it  
21 is the NRC position that, while the public can comment on  
22 the NR -- I mean on NEPA, that in order to be -- in order to  
23 challenge a NEPA document in court, you have to be part of  
24 the adjudication, meaning this proceeding. So, in other  
25 words, while SUWA may be free to comment, that if they

1 eventually determine that the NEPA document was  
2 insufficient, they wouldn't have any judicial remedy.

3 And then this Congressional argument that the  
4 staff makes as well. I think, first of all, they don't cite  
5 any case law that anybody considers legislation an  
6 alternative to an adjudication in terms of making sure your  
7 interests are protected. And the other thing is, is that at  
8 any time Congress could rule that this whole project was  
9 invalid for whatever reason. They could declare the whole  
10 place a monument and -- I guess not a monument, that is only  
11 the President, but they could declare it a park and all  
12 these issues would be addressed that way, and I really don't  
13 see that as a practical alternative.

14 Now, the idea that SUWA may have legislation  
15 pending, although currently the legislation doesn't cover  
16 the North Cedar Mountain wilderness area, it is too abstract  
17 an idea to take the place of this proceeding where we have a  
18 proposed project that has the potential to impact one of  
19 these areas right now.

20 The next argument is that there is a different  
21 basis for the state -- I am not sure I understand my own  
22 notes, so I can't address that. I'm sorry.

23 The next comment -- I mean objection they brought  
24 up, that we will unduly delay the proceedings here, but it  
25 is actually the Applicant -- or admission or SUWA's petition



1 would unduly delay the proceedings, but it is actually the  
2 Applicant that has broadened the issues at this late date,  
3 not SUWA. It was the Applicant that decided that this was  
4 the alternative it wanted to pursue in terms of  
5 transportation and it did not have the exact alignment of  
6 the proposed rail corridor until relatively recently, and I  
7 don't think that potential Intervenor should be somehow  
8 punished for -- well, that is not the right word -- that  
9 they should somehow suffer because the Applicant, who  
10 apparently is free to amend their application at any time,  
11 chose to do it when they did.

12 Okay. So I would suggest that PFS's arguments are  
13 weak and aren't sufficient to overcome SUWA's showing with  
14 regard to those late-filed petition factors.

15 With regard to standing, PFS argued that, I  
16 believe that SUWA stated its interest was solely to  
17 designate the land as wilderness, and this is too  
18 contingent, but, actually, they have maintained all along  
19 that their interest is to protect the wilderness character  
20 of the land, and as the board seems to be implying by its  
21 questioning, that this is a legitimate interest under NEPA  
22 and under the regulations of the NRC which require it to  
23 look at the environmental impacts of its proposed projects.

24 We have called attention to this Idaho.  
25 Conservation League case in which Plaintiffs,

1 environmentalists, had standing to challenge a decision by  
2 the Forest Service not to designate an area as wilderness  
3 and, based on the fact that that would open these areas for  
4 development, and even though no development was proposed at  
5 the time, and even though any development would have to go  
6 under NEPA review, the Court determined that Plaintiffs in  
7 that case had standing on the basis of imminent injury.

8 PFS also brings up this notion that BLM rejected a  
9 wilderness designation a long time ago and, therefore, the  
10 chances that BLM will change its mind with regard to this  
11 particular area is -- I don't know, negligent, if at all.  
12 But Babbitt -- or State of Utah vs. Babbitt tells us that  
13 under FLMPA Section, I think it is 201, that BLM has an  
14 ongoing duty to reinventory all the public lands under its  
15 jurisdiction for characteristics such as wilderness  
16 character, and that this can happen at any time and,  
17 therefore, the idea that BLM could designate this area, or  
18 at least determine that it possessed wilderness character is  
19 not out of the question, particularly given the changes of  
20 administration.

21 But if you look at SUWA's interest in this case as  
22 preserving the wilderness character of the area, that  
23 doesn't really matter, because, again, the point is to  
24 preserve it in its current state.

25 Now, this -- it seems to me that there is a bit of

1 misunderstanding, too, what this means to preserve something  
2 in its current state. --It--is not meaningless. I mentioned  
3 that the no action alternative in any NEPA review, the  
4 baseline would be the preserved state. In State of Utah vs.  
5 Babbitt, they suggest the Bureau -- I mean the Department of  
6 Interior, or the Secretary of the Interior actually had a  
7 different attitude towards areas that were roadless than  
8 those that weren't. Now, even though that issue wasn't  
9 solved, at least there is the implication that the agencies  
10 managing roadless areas take a different view towards them,  
11 so that it is not meaningless to be in a pristine state, to  
12 be roadless, but not to be designated wilderness.

13 This is also true with regard to the Forest  
14 Service. There was a recent moratorium on road building in  
15 roadless areas. In Utah -- I mean in the Idaho Conservation  
16 League case, there was also reference to the fact that the  
17 Forest Service there would take a different look in its NEPA  
18 review of roadless areas and that could be the reason for  
19 refusing development in a particular area, the fact that it  
20 was roadless, even though it had been rejected for  
21 wilderness designation. So this isn't a meaningless notion.

22 So that the reason I am saying that is to  
23 underline the fact that SUWA has an interest in maintaining  
24 the status quo in the roadless area, whether or not Congress  
25 eventually acts or whether or not BLM acts. And it is also

1 interesting to note that BLM has the proposal right now, the  
2 wilderness study areas----and I have to explain that,  
3 because PFS, I think, doesn't quite get it. A wilderness  
4 study area is all the areas that the agency has determined  
5 to be of wilderness value or proper for wilderness  
6 designation.

7 Currently, in Utah, I think there's -- I can't  
8 remember, it is 2.1 million acres, I think, of wilderness  
9 study areas on BLM land. So, there is no difference between  
10 wilderness and wilderness study areas from that point of  
11 view of the agency. Then when Congress designates the areas  
12 as wilderness, they become wilderness. So in the interim,  
13 they are managed as though they are wilderness areas.

14 But the point is, is that even though the BLM had  
15 only identified 2.1 or 3.2, I can't remember, million acres  
16 of wilderness study areas, the bill in front of Congress is  
17 5.7. So just because the BLM doesn't recognize it as  
18 wilderness doesn't mean that it won't be designated as  
19 wilderness, so that's another issue that PFS brought up.

20 Okay. Then, there is also the point that BLM was  
21 wrong in their designation. PFS alluded to the fact that we  
22 haven't provided enough evidence that this area does have  
23 wilderness character, but I think that, you know, certainly,  
24 for the pleading stage, we have done that sufficiently. We  
25 have said that SUWA was very careful, SUWA and the Utah

1 Wilderness Coalition was very careful about what criteria  
2 you used. They used -- they erred on the side of keeping  
3 areas out that didn't qualify as wilderness and they had all  
4 kinds of oversight and were very careful in determining that  
5 the area possessed wilderness character.

6 Then PFS said that, unlike in Idaho Conservation,  
7 or what the staff is calling MUMMA, Plaintiff was  
8 challenging the agency directly. So in that case, it was  
9 the Plaintiffs were challenging the Forest Service, who  
10 makes the ultimate recommendation to Congress with regard to  
11 wilderness area. And SUWA is challenging the NRC. But, of  
12 course, the NRC has direct authority to allow the  
13 construction of a proposed rail spur, which is the proposal  
14 that threatens the wilderness character of the study -- I  
15 mean of the roadless area.

16 Okay. Another issue that PFS seems to confuse.  
17 They made reference -- oh, I think, actually, this was --  
18 I'm sorry. Mr. Quintana said that there is -- and maybe PFS  
19 as well -- there is a site on the other side of the mountain  
20 that is ugly or intrudes upon the wilderness values or  
21 something like -- some implication to that effect.

22 Now, wilderness doesn't have to be in the middle  
23 of nowhere. For example, in Salt Lake City, within less --  
24 within a mile of, you know, a major urban center, we have  
25 some significant wilderness areas and Forest Service land

1 that do overlook the city. So just the fact that things are  
2 down there doesn't mean that a place disqualifies as  
3 wilderness.

4 But then the flip side of that is, why do we  
5 object to the proposed rail spur? It is going to cross area  
6 that has been considered roadless. It is going to cross a  
7 section of it. The next question is, well, you know, why  
8 don't you just let that section go and move the wilderness  
9 boundary back a little? The problem with that approach is  
10 that, you know, any project in any wilderness area, unless  
11 it went right down the middle of it, but then you could  
12 divide the wilderness area otherwise, wouldn't be  
13 objectionable because it is just an incremental step.

14 And the other important thing to realize is that  
15 incremental steps have a lot of impact. When you put a  
16 right of way or an access point through a wilderness area,  
17 that brings in more traffic. That brings in more use and  
18 then the roadbed can expand, people can make little  
19 off-shoots and things like that. So the idea that somehow  
20 that a project just crosses a corner of it, you know, in a  
21 sense, you say, well, you know, it is not a huge impact.  
22 But you have -- because all projects, almost all of them  
23 occur incrementally, you have to make a stand with regard to  
24 those incremental steps.

25 Okay. Now, moving on to standing. I wanted to

1 point out that in Lujan, which is the case that had to do  
2 with the Secretary of Interior dealing with the Endangered  
3 Species Act and its implications abroad, so the issues there  
4 were off the United States soil. The question, you know,  
5 the core question, the affidavits, you know, that Plaintiffs  
6 presented in that case -- well, I guess it was Defendants  
7 actually -- well, Plaintiffs, I'm sorry -- or Appellees or  
8 Appellants or whatever -- but, anyway, the environmental  
9 organizational provided, you know, they weren't concrete  
10 enough.

11 But it is important to note that the court, that  
12 at this case -- it was the final stages of the case, and  
13 that the court noted at the pleading stage, which is where  
14 we are -- General factual allegations and inquiry resulting  
15 from Defendants' conduct may suffice, for on motion to  
16 dismiss, we presume, which is essentially what is going on  
17 here, that general allegations embrace those specific facts  
18 that are necessary to support the claim.

19 So, in other words, what they saying is that at  
20 the pleading stage, the standard is not quite as strict as  
21 at the summary -- motion for summary judgment or at the  
22 trial stage. And so that Dr. Catlin said frequently, but  
23 didn't say the next time he was going to go to the Cedar  
24 Mountains, would suffice at this stage.

25 Further, in Lujan you did not have the inventory

1 and the participation of SUWA in the inventory, including  
2 sending its members out to inventory this area, going around  
3 the whole circumference of the area, looking at all the  
4 impacts, spending a lot of time on the maps and the aerial  
5 photographs of the area, going back to review it again,  
6 going back again, including it on a proposal. All these  
7 sorts of things certainly go to show the interest of SUWA  
8 and SUWA members in the inventory and the particular piece  
9 of land at issue, and also the bond between those  
10 individuals and the land, which is going to be emphasized by  
11 this care they have taken to define the boundaries and move  
12 to protect it.

13           There was a suggestion that SUWA, if it were  
14 granted wilderness -- I mean standing in this case, could  
15 have standing with regard to any wilderness area that it has  
16 defined in its reinventory, and I would say that that it  
17 true, that SUWA should have standing with regard -- I mean,  
18 certainly, they would have to submit the affidavits and  
19 whatnot, but they have an interest and they have shown an  
20 interest, and they would have members that have gone there  
21 with regard to every single parcel of land within the  
22 inventory. And so that the idea that somehow that would  
23 show that SUWA can't have standing in this situation is I  
24 don't think a valid argument.

25           Another thing is about the overnight business.



1 How many days has Dr. Catlin been there? Now, this area is  
2 not that far away. And when you are talking about spending  
3 the night in the areas, typically, the way these things are  
4 approached is, if you don't want to spend the night, you go  
5 back home. And just because the area is close by and people  
6 haven't spent the night there doesn't mean -- or at least  
7 that Dr. Catlin hasn't spent the night there, doesn't mean  
8 that he somehow is excluded from having an interest in the  
9 area. Just because of the nature of it, it is close,  
10 relatively close to Salt Lake and he doesn't choose to spend  
11 the night there. But if he goes back for day visits, I  
12 don't see that that necessarily means that he has a lesser  
13 interest as a result.

14 So I think I have addressed all of PFS's  
15 arguments. And, again, if the board has anything that they  
16 think that I need to address, if they could bring it to my  
17 attention, I would appreciate it.

18 JUDGE BOLLWERK: This is Judge Bollwerk. I have a  
19 question about your survey argument that you just made. It  
20 strikes me that perhaps the idea that you have done a survey  
21 certainly shows at least your interest in the proceeding is  
22 less academic, for instance, that the group of individuals  
23 that we had that tried to intervene earlier, that basically  
24 were a group of very distinguished Nobel scientists and  
25 atomic people with an interest in nuclear power, but,

1 nonetheless, really didn't have -- I guess hadn't really  
2 done anything concrete in this proceeding.

3 But can simply going out and making a survey be  
4 enough to, you know, give you an interest in the proceeding?  
5 I mean that gives you pretty broad latitude to go any place  
6 you want, put down some scientific increments, declare it a  
7 wilderness and you can intervene in proceedings. I guess I  
8 am a little concerned about that argument.

9 MS. WALKER: Right. I don't think alone that that  
10 would be enough. But we are taking the accumulation of all  
11 these considerations. It is the concern for the land in the  
12 first place that led these people to go out and inventory  
13 it. And then the fact that they did inventory it, which  
14 means they visited it several times, and then they want to  
15 protect it, and, also, that they will visit it in the  
16 future. All those taken together are enough to establish  
17 standing.

18 And Dr. Catlin did say that he will go there with  
19 some frequency in the future. And although he didn't say  
20 when exactly, he certainly can. And, you know, at a later  
21 stage in the proceeding, maybe that would be appropriate,  
22 but at the preliminary stages, where we are just at the  
23 pleadings, then, you know, I don't think that he is required  
24 to make a more specific indication of when exactly he will  
25 go back.

1 But, yeah, so inventory alone, I don't think, but  
2 when you take that in combination with all the other  
3 interests and visits that SUWA has alleged, I think it is  
4 enough.

5 JUDGE BOLLWERK: All right. One other question.  
6 There are obviously -- I mean there are different ways for  
7 an organization to intervene. One is by itself or on its  
8 own. One is as the representative of an individual, and I  
9 take it you are doing both, or are you only acting as Dr.  
10 Catlin's representative? I mean Mr. Catlin's  
11 representative. Excuse me.

12 MS. WALKER: We are definitely trying to do both.

13 JUDGE BOLLWERK: All right.

14 MS. WALKER: So we are trying to meet both  
15 requirements.

16 JUDGE BOLLWERK: All right. Anything from other  
17 board members?

18 I interrupted you. If you had something else you  
19 were going to say, go ahead.

20 MS. WALKER: No, that's it.

21 JUDGE BOLLWERK: All right. You have nothing  
22 further to say on the subject then of the intervention  
23 petition in terms of lateness or anything?

24 MS. WALKER: Oh, no, no. I'm sorry. I just  
25 finished with PFS, now I will move on to the staff.

1 JUDGE BOLLWERK: I thought there was something  
2 else. Go ahead. -- --

3 MS. WALKER: The Staff's arguments -- they talked  
4 about a letter between -- I am not sure I understood this  
5 completely, but a letter between the State and the Applicant  
6 talking about the expectation on this railroad spur. I  
7 would suggest that letter isn't public.

8 They also talked about -- I'm sorry, this goes  
9 with -- we are back to the beginning again. We are talking  
10 about whether SUWA had good cause to file late. I want to  
11 stress again that SUWA needed the exact alignment on the  
12 rail spur before it could determine whether its interests  
13 would be impacted or not.

14 The Staff made reference to a suggestion that the  
15 new alignment would come out in late Summer, late Fall --  
16 early Fall, late Fall, something like that, and it did come  
17 out in the Fall and SUWA acted as promptly as possible.

18 The Staff I believe thinks that SUWA has yet to  
19 tell them when they learned about the alignment, and I did  
20 put that in the reply. When I talked to them, they weren't  
21 quite sure, but they said the first full week in October,  
22 which is just a little bit after some of the Intervenor  
23 that didn't learn about it immediately learned about it so  
24 that --

25 JUDGE BOLLWERK: I'd like to say something. I

1 think implication of what I took from that -- this is Judge  
2 Bollwerk -- was that they somehow learned of it from you  
3 because you found out about it as one of the representatives  
4 of OGD.

5 Is that true or not or does it make any  
6 difference?

7 MS. WALKER: Did they learn of it from me?

8 JUDGE BOLLWERK: Well, because you were OGD's  
9 representative, you became aware of it -- I guess as part of  
10 a prehearing conference that we had -- but was that just a  
11 fortuity or is that -- maybe it doesn't make any difference.  
12 I am just trying to sort of, I have a factual question, I  
13 guess.

14 MS. WALKER: No, I don't think it makes any  
15 difference because --

16 JUDGE BOLLWERK: Other than the time element --

17 MS. WALKER: -- I don't think I am obligated to go  
18 around and drum up, you know, to let people know how actions  
19 of an agency are going to implicate their interests, but I  
20 did -- the way it happened was I was discussing what I had  
21 done at work today with a friend and that is how the whole  
22 issue came up, so I didn't even do it on purpose really.

23 JUDGE BOLLWERK: Well --

24 MS. WALKER: I don't think it matters.

25 JUDGE BOLLWERK: -- let me say, this is a question

1 of timing, not a question of culpability in any way or  
2 whatever you might want to -- but obviously they found out  
3 about it from you, that you knew about it as a result of  
4 this prehearing conference, that was my understanding, so  
5 that begins to put more of a timeframe onto this, but you  
6 said six weeks --

7 MS. WALKER: Right, and see --

8 JUDGE BOLLWERK: -- that's my --

9 MS. WALKER: I'm sorry.

10 JUDGE BOLLWERK: That is approximately the  
11 beginning of October so it looks like these dates are  
12 approximately consistent. I don't see anything here that  
13 is --

14 MR. SILBERG: I believe SUWA's pleadings says the  
15 second week in October is when they learned about it in  
16 their reply pleading.

17 JUDGE BOLLWERK: All right.

18 MS. WALKER: Yes, so I went back to them and asked  
19 then when they found out, and it's an approximation because  
20 they don't remember for sure.

21 JUDGE BOLLWERK: All right.

22 MS. WALKER: But I think that six weeks is  
23 reasonable, particularly because, you know, we are getting  
24 sort of -- and I understand it has to be this way, but we  
25 are sort of getting hammered on both ends, you know, we

1 didn't do enough, we didn't do it fast enough, or we're  
2 doing too much because we are going to broaden the  
3 proceedings.

4 But given that, you know, they weren't involved  
5 before and they had to find an attorney and get permission  
6 to be involved in this proceeding and all this kind of  
7 stuff, I think six weeks is a very reasonable amount of  
8 time, and get their experts in line and see what they are  
9 going to testify and of course they can't afford experts so  
10 they have to be free.

11 All those kind of things are difficult.

12 I think the next argument that the Staff brought  
13 up is again this legislative issue that somehow SUWA can  
14 make sure everything is fine by -- or make sure its  
15 interests are protected by appealing to Congress. You know,  
16 SUWA doesn't have that avenue open to it any more than  
17 anybody else does.

18 I really don't think that that is the sort of  
19 thing that anyone had in mind when they said any other means  
20 for protecting their interests.

21 It is my understanding that that would be some  
22 other proceeding.

23 The sound record -- the issue which the Staff  
24 brought up -- is a lot like the issues that we are going to  
25 deal with with regard to contentions but they said that with

1 regard to Contention B, which is basically our argument that  
2 they don't consider a full-range of alternatives under NEPA,  
3 I think that is basically a legal argument and we don't need  
4 a whole lot of facts other than the alternatives that they  
5 have considered don't represent a full range of  
6 alternatives, and I think that we have done that. The road  
7 and the rail spur right next to it, as the State has pointed  
8 out, are basically unworkable, so we have the "no action"  
9 alternative and then the current alignment, and it seems to  
10 me within that range of alternatives an alternative that an  
11 alignment that didn't impact this area would be reasonable  
12 to study.

13 In Dr. Catlin's affidavit he puts that forward as  
14 a reasonable alternative, so because Contention B is  
15 essentially a legal issue and you are allowed to point out  
16 legal deficiencies in the application, then I don't know  
17 that a whole lot of facts are necessary to support that.

18 With regard to the first contention, I guess we'll  
19 address that later in terms of -- and this goes to the  
20 question of would we add to the scope -- well, not the scope  
21 but the information before the Board -- so they could make a  
22 well-reasoned decision, and again I say that the Board and  
23 NRC has an obligation to study potential environmental  
24 impacts, and this is one of the issues, preserving the  
25 wilderness character or the character of this are that



1 should be addressed.

2 So the Staff's arguments with regard to standing,  
3 they take issue with our statement that an interim goal is  
4 to preserve the area in its current state.

5 They somehow imply that maybe since we didn't say  
6 it in our initial petition that we can't say it in our  
7 reply, but that is just clarification and I apologize if it  
8 wasn't clear, but certainly an interim goal that is an end  
9 in and of itself, because I think that if you ask SUWA, you  
10 know, if an area can't be declared wilderness, if it is  
11 managed like wilderness or if the wilderness characteristics  
12 of it are somehow preserved, is that good enough? I am not  
13 sure it would be the ultimate goal, but it is certainly one  
14 of their goals, to have sort of de facto, as they say in the  
15 State of Utah vs. Babbitt, wilderness designation or  
16 wilderness management or just preserving the land in and of  
17 itself is a legitimate goal that SUWA definitely has.

18 Moving on to Sierra Club vs. Morton, I think if  
19 you take a look at that case, it doesn't mean -- it is not  
20 really telling in the situation because there they had not  
21 alleged any specific use of the land at issue or specific  
22 harm, and we have done that.

23 Again, I want to point out that Lujan, you know,  
24 it's speaking of when and how long these visits are going to  
25 be, is with regard to a proceeding that is further along

1 than the pleading stage, which is the case here, and that we  
2 can certainly get Dr. Catlin to say when he plans to go back  
3 there, in subsequent stages, if that is necessary.

4 I think the Staff took issue with our statement of  
5 the injury, saying that our notion of wilderness character  
6 was too generalized, I think.

7 I am not sure I understood this argument, but we  
8 look the characteristics of wilderness from the Wilderness  
9 Act itself and pointed out that each of those  
10 characteristics, the opportunities for solitude, the  
11 imprints of man substantially unnoticeable, the biological  
12 status of the area, and those sorts of issues we addressed  
13 each of those in sequence and said how the proposed rail  
14 spur would impact those, so I think that we are actually  
15 being quite specific with regard to the injury and with  
16 regard to what wilderness character means.

17 I think that that is similar to the injury found  
18 in Idaho Conservation League, which was even more attenuated  
19 than the impact we have here.

20 The Staff also said that we didn't personalize  
21 injury but I believe in Dr. Catlin's first and second  
22 affidavits that he said essentially that if these values are  
23 harmed, if these wilderness values are harmed, I will be  
24 harmed, and that is because I won't be able to partake in  
25 the activities that I had there before, because of the

1 impacts of the proposed rail spur and in addition, that I  
2 have a deep bond with the land and this bond would be  
3 inhibited by the development.

4 In addition, it is clear that SUWA's legitimate  
5 goal, that the area be preserved in its current state, would  
6 be harmed by the development, because then it would no  
7 longer be the case and back to those arguments about -- that  
8 being in a wilderness or being a roadless area in and of  
9 itself actually offers some protection and is not a  
10 meaningless notion.

11 I think the Staff's other arguments were that how  
12 does construction of this particular project impact the  
13 area.

14 Again I think we address that in the affidavit and  
15 this idea that incremental development is something to be  
16 avoided as well, and that if you took the position that  
17 unless a particular development harmed the whole area, then  
18 you didn't have standing, then essentially you would never  
19 be able to oppose any development because developmental  
20 impacts are incremental, almost necessary -- not always but  
21 almost necessarily.

22 Then causation -- the Staff argued that we failed  
23 to show causation, and I believe this means that the  
24 agency's decision, NRC decision, will cause impacts --  
25 please correct me if I am wrong about this argument -- so in

1 other words, we failed to show that what the NRC does will  
2 cause the harm. The harm is that the area will be developed  
3 and will no longer possess its wilderness character and  
4 clearly the NRC's approval of the low rail spur will cause  
5 that to happen.

6 They also said that -- the Staff also suggested  
7 that it must be the only cause, and I am not quite sure if  
8 this means that subsequently other development could ruin  
9 the wilderness area or not, but I doubt that that is a  
10 legitimate claim because in any case future management of  
11 land, future management decisions can impact the land use,  
12 and, you know, Congress can also, if we are going to  
13 consider wilderness designation sort of the end-all,  
14 Congress can also change its mind and un-designate an area  
15 "wilderness" and so if the idea that Congress could do that  
16 could defeat standing then no one would have standing with  
17 regard to wilderness anywhere.

18 So I hope I have addressed all the issues, all the  
19 arguments, and if there are any I left out that the Board  
20 thinks are particularly convincing, I would like to address  
21 them.

22 JUDGE BOLLWERK: Thank you.

23 Any questions from either of the Board members?

24 Yes?

25 JUDGE LAM: Ms. Walker, are you saying your

1 organization's interests or Dr. Catlin's interests will be  
2 harmed if the rail is build with or without the wilderness  
3 designation?

4 MS. WALKER: I'm sorry, would you repeat the  
5 question?

6 JUDGE LAM: Can you hear me better?

7 MS. WALKER: Yes, thank you.

8 JUDGE LAM: Yes? The question is are you saying  
9 your organizational interests or Dr. Catlin's interests will  
10 be harmed by the rail with or without the designation of  
11 wilderness area?

12 MS. WALKER: Yes.

13 JUDGE LAM: With or without? Either?

14 MS. WALKER: So they have two goals. The ultimate  
15 goal is to have the area designated as wilderness.

16 The construction of the proposed rail will  
17 disqualify the area for designation as wilderness, but in  
18 the interim before Congress acts, SUWA has an interest in  
19 preserving the area in its current state to preserve the  
20 opportunity for Congress to act on it, but also to preserve  
21 the land in its wilderness state as a goal in and of itself.

22 JUDGE LAM: But assuming Congress never acts --  
23 assuming -- would your interests still be harmed?

24 MS. WALKER: Yes, because SUWA has an interest in  
25 seeing that these lands have wilderness character.

1 JUDGE LAM: Thank you.

2 JUDGE BOLLWERK:— Anything else from the Board?

3 [No response.]

4 JUDGE BOLLWERK: Mr. Gauklear, I see you moving  
5 toward the microphone.

6 MR. GAUKLEAR: Yes. I would like to make a few  
7 points.

8 JUDGE BOLLWERK: And you know the one rule we have  
9 here is that if you say something, then Ms. Walker obviously  
10 gets a chance to respond.

11 MR. GAUKLEAR: I understand that completely.

12 JUDGE BOLLWERK: All right.

13 MR. GAUKLEAR: I would just like to make a few  
14 points --

15 JUDGE BOLLWERK: Ms. Walker, can you hear him all  
16 right?

17 MS. WALKER: I think so.

18 JUDGE BOLLWERK: Let's go ahead and see what  
19 happens here.

20 MR. GAUKLEAR: I would like to make several points

21 First, I would like to pick up on the last point  
22 that she made, which is that construction of the rail spur  
23 will disqualify this land for designation as wilderness  
24 area.

25 I want the Board to be clear that the land we are

1 talking about is no more than about two square miles, not  
2 the entire Cedar Mountains wilderness areas that they claim  
3 should be designated as wilderness. That is the area that is  
4 at issue in this case.

5 I would like to also point out that they say they  
6 needed to know the precise location of the rail spur to know  
7 whether they had any claims or not. I would point the Board  
8 to assertions in their pleadings where they say that the  
9 rail spur would have a deep intrusion into the North Cedar  
10 Mountains area, therefore they claim at least something  
11 beyond the precise location.

12 They talk about facts in terms of what they would  
13 present at and the factor three, okay? -- the third factor  
14 for late filing, and they claim they don't need to present  
15 any facts with respect to alternatives, but the alternatives  
16 still need to be credible alternatives, and they have  
17 presented no facts with respect to credible alternatives.

18 With respect to the Mumma case or Idaho  
19 Conservation League, in that case the Forest Service was an  
20 integral part of the process of designating wilderness area  
21 and that is how come -- a major reason why the court in that  
22 case found standing.

23 Also, I would like to point out that the Eighth  
24 Circuit in Sierra Club v. Forest Service, 28 F. 3d, 753,  
25 rejected the line of cases the Ninth Circuit relies upon and

1 rejected it including citing the Mumma case.

2 They talk about--I missed the point in terms of  
3 saying that BLM is always under a continuous duty to  
4 re-evaluate its lands. I recognize that BLM has that duty,  
5 but the point is that whether they will re-evaluate this  
6 portion of land is very speculative and SUWA has not come  
7 forward with any information to show that it is not  
8 speculative.

9 In a similar vein, they claim that because BLM  
10 does not designate this land as wilderness does not mean  
11 that Congress can't do it but earlier in her argument she,  
12 herself, said that what Congress does is too abstract to  
13 really have any meaning, and I would say that it applies to  
14 that as well, whether the Congress will designate land as  
15 wilderness is abstract.

16 They raise again what I think is another issue or  
17 new issue where they talk about preserving wilderness in its  
18 current state is not meaningless. That either is a -- I  
19 think it's a new issue but it may be very close to what they  
20 said in the reply brief, but the point is that under the  
21 statute, under the statutory scheme, Congress has given  
22 agencies like BLM to make the determination of whether areas  
23 should be preserved as wilderness or the same  
24 characteristics pending what Congress does. In other words,  
25 when BLM decides that something should be stated as a



1 wilderness area, it then puts in use restrictions in terms  
2 of precluding growth in the area, et cetera, so BLM is the  
3 agency or the entity that is given the legal right or legal  
4 interest for that interest and SUWA keeps on mentioning that  
5 interest but it applies to no basis that gives it a legally  
6 protected interest in that area.

7           They refer to NEPA but NEPA isn't an environmental  
8 impact in terms of looking at impacts and they keep on  
9 coming back and saying it's our preservation of the  
10 wilderness -- that is our interest and that is given to BLM  
11 under the statute that we are talking about here.

12           They talk about -- they claim that they have given  
13 enough facts for Dr. Catlin's standing here, at least at  
14 this stage of the proceeding. As a practical matter, once  
15 standing is decided, that will be it, and moreover the cases  
16 that we cited I believe are dismissal cases. They were all  
17 cases at the stage of dismissal, the Limerick case, the  
18 South Texas case, and there the Boards required more than  
19 just vague generalization of frequent use. Matter of  
20 fact -- and they looked to specific times, how often.

21           She also in the same vein says that the issue is  
22 not whether he says out there over the night, but issue is  
23 has he identified sufficient contract with that area in line  
24 with these cases and we submit that he has not.

25           I don't believe that I have anything else. Thank

1 you.

2 JUDGE BOLLWERK:— All right.

3 MS. MARCO: I have a question.

4 JUDGE BOLLWERK: Surely.

5 MS. MARCO: I just -- I have a question. I want  
6 to make sure I responded directly to the question that you  
7 asked, actually, Judge Bollwerk.

8 JUDGE BOLLWERK: Okay.

9 MS. MARCO: Did you ask me whether I thought there  
10 interest was within the zone to be protected under NEPA?  
11 Was that the question?

12 JUDGE BOLLWERK: Well, I mean as my discussion  
13 with Mr. Gauklear I think I guess the -- what I am trying to  
14 express is that there is arguably an idea that just because  
15 this land, regardless of whether it is designated as  
16 wilderness area, it is land that there may be alternatives  
17 to that it should be protected for one reason or another,  
18 whether it is designated or not.

19 A route might go this way or that way just to  
20 retain the character of this land, it somehow should be  
21 protected, just like you would protect animals arguably  
22 whether they were on the endangered species list or not,  
23 depending on what the impact on them was.

24 That was my question. Is that an interest  
25 regardless of whether the land is designated as wilderness

1 area under the statute.

2 MS. MARCO: Okay. Interest, yes. Injury, no --  
3 because they haven't satisfied the injury to them. That is  
4 my position.

5 JUDGE LAM: Did you say interest, yes, injury, no?

6 MS. MARCO: Right.

7 JUDGE BOLLWERK: Okay.

8 MS. MARCO: All right, yes. I would like to go  
9 ahead and respond to points that have not been addressed yet  
10 that SUWA raises.

11 First of all, the letter was made public actually.  
12 It was on the docket for this proceeding, just to clarify  
13 that.

14 Regarding Lujan, speaking about when and how long  
15 these contacts need to be made, we do believe that is  
16 applicable here, and in fact the Commission does frequently  
17 refer to Lujan in its standing decisions, so we do think  
18 that that is appropriate.

19 With respect to whether she can get Dr. Catlin to  
20 say when he goes back and where, that was exactly what kind  
21 of thing was missing from the filings and what we would have  
22 liked to have seen for this demonstration.

23 Injury -- the issues about whether it is the  
24 wilderness character -- the problem is that we do not know,  
25 we don't have an injury to SUWA, and that is really where it

comes down to. That is an interest, and we need to know what about that interest--is concrete, relates to the land and is something that is being impacted and how is that being impacted, and that was not set forth as the injury, and that is a deficiency.

Then in regard to causation, what I was trying to express hopefully with the causation was that the injury that they had -- they had their chain of causation. They had set that out in their initial petition, but that was based on the injury that was defined and if you are going to start changing in the injury around, then that chain of causation has to be met.

You need -- all three items need to be met in order to have standing. You need the injury in fact. You need the causation for that injury and you need redressability, and so if they are going to come up with different injuries they have to plug that back into the equation to get standing.

Then with respect to the case I mentioned, which was cited in Mumma by the Mumma court, what we are really saying, what they were really saying was that the intervening cause has to be -- and they called it a "but for" cause, that development would not go forward but for the action. In the case of Mumma, the court recognized that there would be no possible development on this land if that

1 action, which was wilderness designation, if that --  
2 non-wilderness designation, if that was revoked or somehow  
3 taken back, redressed, so that there would be wilderness  
4 designation, there would be no development at all because  
5 BLM was before that court and we don't have BLM before this  
6 Board, so they could go ahead and do whatever they wanted  
7 later.

8 JUDGE BOLLWERK: Well, they couldn't --

9 MS. MARCO: Wait -- we have Mr. Turk --

10 JUDGE BOLLWERK: All right, although if this Board  
11 were to say don't build a railroad there, they are not going  
12 to build a railroad there.

13 MS. MARCO: That's correct.

14 JUDGE BOLLWERK: All right.

15 MS. MARCO: That is correct but then the problem  
16 with that is that -- I'm sorry. That is correct but then  
17 you would have to take that injury, which is -- what is the  
18 end result, what is the injury then you are looking for that  
19 redressability? It's building the railroad? How would that  
20 be redress -- you may have redressability but you need to  
21 have it all for the injury that you are talking about.

22 JUDGE BOLLWERK: All right. Mr. Turk, did you  
23 want to say something?

24 MR. TURK: I want to come back to that question  
25 you had asked about, whether they have an interest apart

1 from the wilderness designation.

2 I am not sure that we were clear in the answer.  
3 Any member of the public that likes nature would have that  
4 same kind of an interest, all right? Any member of the  
5 public who likes to see land unaffected by human beings,  
6 unpopulated, has the same generalized interest, but unless  
7 they can show that they somehow are injured, they wouldn't  
8 be able to make out a case for standing and I think that is  
9 the point we want to make.

10 If you put aside the Wilderness Act designation  
11 questions and SUWA comes in and says we like land that has a  
12 wilderness character, well that may be true of many people.  
13 That doesn't give them standing. Although they are  
14 interested in a generalized sense in preserving land in that  
15 nature, that does not give them standing.

16 JUDGE BOLLWERK: Anything further from any of the  
17 Board members on that point?

18 JUDGE LAM: Oh, yes. Mr. Turk, in their  
19 supplemental filing they mentioned something about a loss of  
20 enjoinderment. Would you consider that injury?

21 MR. TURK: They haven't shown an injury. Even if  
22 they say you put this rail line through here, that land will  
23 no longer have that remote quality that we like so much. In  
24 the absence of any showing that they themselves have a  
25 specific injury, they won't be able to establish standing

1 and they have not shown that. They haven't given me the  
2 specifics to show that they have anything more than a  
3 generalized interest in preserving that character of the  
4 land.

5 MS. CURRAN: The State would like to make some  
6 comments on this part.

7 JUDGE BOLLWERK: All right.

8 MS. CURRAN: Whenever it is appropriate.

9 MR. QUINTANA: As would counsel for Skull Valley.

10 JUDGE BOLLWERK: All right. Let's see. Do you  
11 think we can wrap this up, this part of it, in about 15  
12 minutes? That is probably being very generous but I think  
13 we need to do that so we can move on.

14 Why don't you go ahead Ms. Curran?

15 MS. CURRAN: Okay -- just a few.

16 With respect to that letter that was written back  
17 in June or July, I think we wanted to just point out that  
18 that letter did not give the precise location of the spur.  
19 It also, although it was a matter of public record, it  
20 wasn't something that SUWA was going to run into, and the  
21 standard practice by the NRC to let members of the public  
22 what is going on is to put a notice in the Federal Register  
23 and that wasn't done in this case, and I think that is the  
24 thing that should be focused on here.

25 A second point is I believe at some point Mr.

1 Gauklear said that SUWA's intervention is relatively  
2 straightforward and not complex and therefore it could have  
3 been prepared earlier. That argument would also support the  
4 simplicity of the issue with respect to broadening the  
5 record. I would just like to point out that fact.

6 He also suggested that the wilderness issue may  
7 lead to additional RAIs by the NRC Staff. It is the NRC  
8 that is the lead agency in this case, not the Bureau of Land  
9 Management, so of course it would be the NRC's  
10 responsibility to evaluate the impacts of this rail spur on  
11 the wilderness area, taking whatever comments from the BLM,  
12 and so we think that if this does lead to additional  
13 questions by the NRC they should be asked and this thing  
14 should be, the issues should be brought for public hearing.

15 That was the State's comments.

16 JUDGE BOLLWERK: All right, well, now that  
17 question's come up, Mr. Turk, is NRC the lead agency here?

18 MR. TURK: Yes.

19 JUDGE BOLLWERK: So it is not BLM. Well, to the  
20 degree they need a right-of-way they don't have to go to BLM  
21 or BLM doesn't have to prepare an Environmental Impact  
22 Statement?

23 MR. TURK: NRC is the lead agency for purposes of  
24 granting a license and allowing the use of a rail spur to  
25 get to the PFS site.



1 JUDGE BOLLWERK: Okay.

2 MR. TURK: Over-whatever land is designated. BLM  
3 has to make its own determination as to whether or not they  
4 will grant the right-of-way. NRC is not involved in that  
5 determination, so we are lead in the action for your  
6 purposes, but BLM will have made its own determination,  
7 which we will then simply rely upon if we ultimately decide  
8 that, yes, we'll allow you to use the rail spur and here is  
9 our EIS that evaluates the impacts of use of that rail spur  
10 and anything else associated with this facility.

11 JUDGE KLINE: I understand from that then, correct  
12 me if I'm wrong, that it is the NRC final Environmental  
13 Impact Statement that will perform the alternatives analysis  
14 on the routing of the railroad and not BLM final  
15 Environmental Impact Statement? Is that correct?

16 MR. TURK: It's correct, but I should point out  
17 two things. One, BLM will be a -- I believe it is a  
18 participating agency --

19 JUDGE KLINE: Okay, yes.

20 MR. TURK: -- either commenting or participating.  
21 They will be involved in the preparation of the EIS at least  
22 through the review and comment process, and also in their  
23 own determination as to whether or not to give a  
24 right-of-way.

25 I am sure they must go through some independent

1 evaluation of their own.

2 JUDGE KLINE:-- Perhaps they do, but I am asking  
3 specifically with respect to the Environmental Impact  
4 Statement, that it will be an NRC Environmental Impact  
5 Statement, not a BLM statement, is that correct?

6 MR. TURK: For purposes of your decision --

7 JUDGE KLINE: Yes.

8 MR. TURK: -- yes. You will be looking at the NRC  
9 document.

10 JUDGE KLINE: Right, okay.

11 MR. TURK: I want to make a response to Ms. Curran  
12 on one other point and I am sorry we are getting down into  
13 back and forths here.

14 The Staff does not typical notice in the Federal  
15 Register revisions to applications. We do notice revisions  
16 to licenses which come in through application, but while an  
17 application is still in the pre-licensing stage, we do not  
18 send out notices about all the changes that come in to that  
19 application that is under review.

20 JUDGE BOLLWERK: All right. Mr. Quintana, you  
21 said you wanted to say something?

22 MR. QUINTANA: Just very briefly, first --

23 JUDGE BOLLWERK: And let me just point out that,  
24 Ms. Walker, you will have a chance to wrap up.

25 MR. QUINTANA: -- so that we have a proper

1 understanding of the land that we are talking about, this is  
2 alkali soil. There is very, very little vegetation. There  
3 is a great deal of sagebrush. That's one.

4 Two, it's located right next to Dugway Proving  
5 Grounds, which tested radiological, chemical, biological and  
6 nerve agents, so we are not talking about an area like the  
7 Redwood Forest. We are not talking about like Muir Woods or  
8 Yellowstone National Park or Deseret Peak or the wilderness  
9 areas which are already in existence.

10 Everybody is familiar with this area and it would  
11 have been designated as a wilderness area if it was somehow  
12 unique in character or pristine, so please take that into  
13 account.

14 Second, the Skull Valley Goshutes tried to have  
15 the assistance of Scientists for Secure Waste Storage  
16 because their expertise, being of Nobel Laureate calibre, we  
17 believed was necessary for assistance with these  
18 proceedings, and for reasons which are well documented, they  
19 were not allowed in. However, we can call them as experts.  
20 If there are issues of magnitude of which the opponents of  
21 this project are keenly interested in, they certainly have  
22 the right to call their experts and their experts could  
23 certainly include Dr. Catlin and whoever else is out there  
24 to try to save the Skull Valley Goshutes from themselves, so  
25 I don't think in the interests of fairness, given that Nobel

1 Laureates were not allowed in to support this -- well, to  
2 explain their interest in this project, and they were not  
3 allowed standing, I think just as a matter of sheer judicial  
4 fairness the opponents should not be allowed to cry  
5 "environmental racism" through the likes of Dr. Catlin and  
6 others.

7 JUDGE BOLLWERK: All right. Ms. Walker then, why  
8 don't you wrap up? If you can do so in about five minutes,  
9 that would be great.

10 MS. WALKER: Is there any issue in particular that  
11 you would like me to address?

12 JUDGE BOLLWERK: It is really entirely up to you.  
13 You have heard a number of things from the Staff, from PFS.  
14 Ms. Curran had some comments, Mr. Quintana. If you have  
15 anything you want to say on any of that, this is the time to  
16 do so. If not, we will move on.

17 MS. WALKER: Okay. I guess one important thing is  
18 again Lujan. Somebody -- I can't remember -- Staff or PFS  
19 said that most of the cases decided were motion to dismiss  
20 cases, but Lujan, which is the one that states you have to  
21 say when and that is relied upon by the Staff in terms of  
22 establishing interest specifically says, "In response to a  
23 summary judgment motion, however, the plaintiff can no  
24 longer rest on mere allegations, but must set forth by  
25 affidavit or other evidence specific facts."

1 So Lujan was a summary judgment case that is a  
2 case being relied upon, so I think it is relevant to this  
3 case that that be understood and that we are at the pleading  
4 stage.

5 The NRC itself has relied upon a test specific to  
6 the pleading stage of the proceeding.

7 Also with regard to again Sierra Club vs. -- is it  
8 Sierra Club vs. Morton? If you take a look at that case,  
9 what the court found important, and this goes to PFS'  
10 argument that our injury is not substantial enough or that  
11 our use isn't substantial enough, but in that case they  
12 didn't allege that they used the area at all and it was some  
13 generalized interest, and I do believe that if you relied on  
14 PFS's characterization of what is required for standing that  
15 no environmental organization would have standing with  
16 regard to any environmental harms because Sierra Club vs.  
17 Morton and Lujan do not rule out the possibility that  
18 environmental organizations can have standing, just that  
19 they have to be specifically involved in the area because  
20 they want -- the purpose of that test is to have the people  
21 who are most able to sort of protect those interests in the  
22 proceeding, not just anybody, and I would submit that SUWA  
23 is in the best position to protect the interests at issue  
24 here.

25 I don't think that our experts would be called by

1 anybody else. Unfortunately, on this issue of wilderness,  
2 the State tends to be on the other side and SUWA and the  
3 State I doubt are in a position to sort of share presenting  
4 evidence to the Board even in this proceeding because of the  
5 political reality of it.

6 The State does not recognize the roadless area  
7 there.

8 Mr. Quintana brought up the fact that the area may  
9 not be all that beautiful. I am not sure that for the  
10 purposes of standing that we can go into issues such as how  
11 beautiful is it -- you know, how impacted are the areas  
12 around it. Deseret Peak is closer to Dugway Proving Ground  
13 that this area is, and Deseret Peak is a wilderness area.

14 I really don't think that for the purposes of  
15 standing you can sort of look to facts like that at this  
16 stage -- you know, how beautiful is it. I think that Dr.  
17 Catlin alleged that it possesses wilderness character, that  
18 these will be impacted in a number of specific ways like he  
19 did, that that is sufficient at this stage.

20 Now remember, we are not going to the merits but  
21 is this enough for standing. That relates to an argument  
22 PFS made in terms of I think it was again what is the area  
23 really like, so I think that that is all I wanted to say at  
24 this point.

25 JUDGE BOLLWERK: All right. At this point then

1 let's turn to the contentions.

2 There are two. --I believe they are A and B. Is  
3 that the way they are designated? Do you want to argue them  
4 separately or do you simply want to deal with them together?

5 MS. WALKER: Together is fine.

6 JUDGE BOLLWERK: All right, then why don't you go  
7 ahead and present your argument. We will use basically the  
8 same order of presentation as we did before.

9 You are good to go, Ms. Walker.

10 MS. WALKER: Thank you. The first contention  
11 suggests that the ER is insufficient because it fails to  
12 deal with the impacts on the wilderness character of the  
13 North Cedar Mountain wilderness area, and I think in our  
14 reply we set forth the specific limitations of the ER with  
15 regard to impacts on recreation, impacts on solitude,  
16 impacts on ecosystem management.

17 They are listed there. I think we showed a  
18 familiarity with the application, at least with regard to  
19 our issue, so in that way we differ from the Scientists for  
20 Secure Waste.

21 I think that we provided for this stage sufficient  
22 information that will support what we have to say when you  
23 look at what we are trying to say, that this area possesses  
24 wilderness character, and that the proposed rail spur will  
25 impact that. We have said, put forth experts that are going

1 to address those issues.

2 Now because the issues are relatively simple  
3 doesn't mean that they shouldn't be addressed, and I think  
4 because they are relatively simple, it is not that hard to  
5 show and so we don't have lists and lists of things that  
6 people are going to say because it is not a technical issue  
7 really, so maybe the Staff is used to highly technical  
8 issues where you have to have pages and pages of  
9 descriptions as to what is going on, but I think that if you  
10 look at what we are trying to show that we have presented  
11 experts that are going to demonstrate what is at issue and  
12 take up and contest the ER's coverage of wilderness  
13 character and impacts of the railroad spur on that  
14 character.

15 With regard to contention 2, the alternatives --  
16 again I think it is basically a legal argument. I think  
17 that Dr. Catlin had proposed a reasonable alternative. That  
18 is not to say that the alternative won't be ultimately  
19 rejected, but it is worth looking at. It is worth  
20 questioning whether another alignment at least or portion of  
21 the alignment of the railroad spur wouldn't help preserve  
22 the wilderness character of the area, so I eagerly await  
23 what the Staff and PFS have to say to that.

24 JUDGE BOLLWERK: I would like to ask you one  
25 question before we go to that.



1 The affidavit -- we are having a technical  
2 problem.

3 [Discussion off the record.]

4 JUDGE BOLLWERK: We are getting some feedback or  
5 sort of some computer noise here. I don't know if you all  
6 are having the same thing?

7 MS. WALKER: Yes.

8 JUDGE BOLLWERK: All right. Well, maybe we will  
9 just go on then. It may be a problem with the line.

10 The question I had --

11 [Pause.]

12 JUDGE BOLLWERK: That's better. The question I  
13 had was the affidavit mentioned something about wetlands,  
14 which is the first I'd heard that brought into this.

15 Can you tell me what that is about or what that  
16 refers to?

17 MS. WALKER: Can you tell which affidavit?

18 JUDGE BOLLWERK: Sure. Let me -- I will give you  
19 a paragraph number here, because the paragraph numbers may  
20 have changed given this was done over e-mail.

21 MS. WALKER: Is this the first or second  
22 affidavit?

23 JUDGE BOLLWERK: It's on paragraph 9. Paragraph 9  
24 of the second affidavit, and it talks about the alternative  
25 alignment, moving it, I guess, two miles to the east, and

1 then it says avoiding sensitive wetlands. And I guess I  
2 wasn't -- that's the first I had heard of that, the  
3 designation of wetlands, reference to wetlands.

4 MS. WALKER: What I mean by that is that -- what  
5 is the name of the spring in the middle of the valley?  
6 Horseshoe Spring. I would hate to see some alignment, and I  
7 am sure SUWA would, too, as well, that ran right through the  
8 middle of Horseshoe Spring.

9 JUDGE BOLLWERK: All right.

10 MS. WALKER: So, in other words, we are suggesting  
11 an alignment that would avoid impacts on this roadless area  
12 but not adversely impact something as sensitive as wetlands  
13 like Horseshoe Springs.

14 JUDGE BOLLWERK: All right. But you weren't  
15 suggesting with that, that the present alignment does go  
16 near wetlands? That's what I -- I guess when I read that, I  
17 thought that was what it was referring to.

18 MS. WALKER: No, I am sorry for the confusion. I  
19 didn't mean that at all.

20 JUDGE BOLLWERK: All right. Okay. That clears it  
21 up for me then.

22 Ms. Curran, I guess, if you would like -- since  
23 you are supporting her position, if you have anything to  
24 say?

25 MS. CURRAN: I don't have anything at the moment.

1 JUDGE BOLLWERK: Okay. Then Applicant, please.

2 MR. GAUKLEAR: Yes. SUWA, in this contention,  
3 made three assertions. One was alleged failure to consider  
4 the impacts of the rail spur on the wilderness character, or  
5 the potential wilderness designation of the area. And the  
6 third was the assertion that the area should be preserved in  
7 its current natural state until Congress has the opportunity  
8 to act.

9 Particularly with respect to the last two, we have  
10 addressed in our brief that those should be dismissed for  
11 the same basis as we have talked about earlier, speculative  
12 claims. Particularly the last one is one where they ask the  
13 NRC basically to make this -- preserve this land for  
14 wilderness pending Congress' designation and that, as we  
15 have said, is a function of BLM, not the NRC.

16 With respect to the reply brief, they seem to  
17 shift gears in the reply brief and focus on the alleged  
18 deficiencies in the environmental report. In their original  
19 contention, they only made vague assertions to the  
20 environmental report such as the ER failed to analyze the  
21 construction and operation of North Cedar Mountain -- the  
22 impact of the construction and operation of the rail spur on  
23 the North Cedar Mountains roadless area, or that it did not  
24 adequately address the impacts on the ecology of the area.

25 Two or three very broad general sentences, no

1 specific identification of deficiencies with respect to the  
2 analysis in the ER. No acknowledgement that we had  
3 addressed these impacts in the ER. And, as we argued in our  
4 brief, clearly, the contention as set forth does not meet  
5 the standards for admissibility as this board has enunciated  
6 in this case already.

7 In an attempt to overcome this deficiency, they  
8 have come now forward with three pages of lawyerly argument  
9 in their brief. Still, no facts to support. Moreover, to  
10 the extent that these three pages could be construed as new  
11 bases, they are late and must be rejected. Replies are not  
12 the opportunity to provide new bases, it is the time to  
13 provide clarification or explanation, and I would refer the  
14 board to the CI case, the case involving CI, Perry Nuclear  
15 Power Plant, LBP-82-89, 16 NRC 1355.

16 Moreover, the Commission itself has specifically  
17 stated that late-filed bases are subject to the same test as  
18 for late-filed contentions, and that is the Yankee Atomic  
19 case, CLI-96-7, 43 NRC 235.

20 SUWA has made no attempt here to show that the  
21 five factors are satisfied with the new bases it attempts to  
22 provide in its reply brief and, therefore, it should be  
23 rejected on that basis alone.

24 Moreover, even if you go forward and look at what  
25 they now put forth in the reply brief, they don't provide a

1 factual basis to support the contention. For example, they  
2 argue that we don't address noise as it applies to  
3 recreationists and wildlife in the areas above the rail  
4 spur. But we did identify in the ER the maximum noise  
5 levels that would occur at various distances from the rail  
6 spur down wind. SUWA has not identified in its reply why  
7 this is inadequate in terms of an analysis of impacts on  
8 recreation users or wildlife in the area. They have  
9 provided no basis for that.

10 SUWA acknowledges in the same vein that we do  
11 address visual impacts, but now they claim that we have  
12 failed to address the impacts on the wild character of the  
13 foothills and peaks. That is purely an argument without  
14 basis. We address the visual impacts which we say that will  
15 be seen from the top of the Cedar Mountain areas and from  
16 developed areas near I-80. There is clearly no -- we have  
17 addressed it. Moreover, we noted that our use of the land,  
18 the rail spur, will be in accordance with BLM visual  
19 resource classification for that area. So we have addressed  
20 visual impacts.

21 Similarly, they take issue with a statement in the  
22 ER that, because of low level recreation use, the low  
23 corridor rail line is not expected to be significant -- have  
24 significant impact to the scenic environment, and SUWA  
25 claims that this improperly assumes that visual impacts are

1 measured by number of people who view them, but, again, they  
2 provide no basis in law or fact for that statement, or show  
3 why our visual analysis is inadequate.

4 They claim that we provide no analysis of impacts  
5 on recreational users as opposed to people who drive  
6 vehicles off the road. But, again, we have discussed scenic  
7 impacts, we have discussed noise impacts, and SUWA has come  
8 forward with no basis to say why our analysis of that is  
9 inadequate with respect to recreational users.

10 SUWA does acknowledge that the ER discusses  
11 impacts on animal species, habitat, but they claim that our  
12 mitigation techniques, we haven't provided sufficient basis  
13 for mitigation techniques. We are going to do a survey  
14 before construction within a half mile and move animals out  
15 of the area before construction. They claim we haven't  
16 provided any basis why the .5 miles is sufficient. But they  
17 have shown no basis why our .5 miles is not sufficient. We  
18 have identified an area that we think is -- that we need to  
19 take action on and we have done it, will do it, and they  
20 have come forward with no facts to show why what we propose  
21 to do is inadequate.

22 Similarly, SUWA claims that we don't analyze  
23 maintenance impacts on species, but they provide no bases to  
24 come forward to show what type of maintenance impacts would  
25 have impact on species. Moreover, they ignore the fact that

1 we are talking about maintenance on a 40 foot rail spur  
2 which is going to be 155 acres for the entire 32 miles, and  
3 they have not shown how this will have an adverse impact,  
4 not basis to show why this would have adverse impact on the  
5 environment.

6 In their reply, SUWA does -- also says that the ER  
7 fails to address various needs, and they refer to needs to  
8 preserve the roadless area, need for primitive areas to  
9 preserve bio-diversity, the need to prevent habitat  
10 fragmentation, need for gradient bench areas, et cetera.  
11 Unlike SUWA's other new assertions in this reply brief, this  
12 one does find support in Dr. Catlin's affidavit, and a  
13 matter of fact, is drawn directly from Dr. Catlin's  
14 affidavit. But, again, there is no attempt to meet the five  
15 factors with respect to a late-filed basis with respect to  
16 Dr. Catlin's affidavit and what he says and, therefore, it  
17 should be rejected.

18 Moreover, SUWA has not provided any legal basis  
19 for such requirements with respect to the environmental  
20 report. These are, again, essentially the same requirements  
21 that are tied to the Wilderness Act for wilderness  
22 designation and, as we have indicated, that is BLM's scope,  
23 not the NRC's.

24 Also, this argument, they ignore in the ER,  
25 environmental report, the ER's statement that there is

1 nothing unique about the vegetation habitat in this area,  
2 that the entire 32 miles result in a minor loss of 155  
3 acres, I believe, of greasewood and desert shrub/soft brush,  
4 and this is 155 acres, according to the ER, according to the  
5 environmental report, out of over 1 million acres of such  
6 habitat in Tuella County. They have provided no basis to  
7 show that this taking of 155 acres out of more than a  
8 million is anything but a minor impact on the environment.

9 With respect to contention B, the alternatives, in  
10 their contention, SUWA ignored completely the fact that we  
11 did analyze different alternatives. We analyzed the two  
12 alternatives along Skull Valley Road, the rail spur along  
13 Skull Valley Road and use of the road itself, and there are  
14 environmental impacts that we analyzed with respect to those  
15 two alternatives.

16 They now argue in their reply that the  
17 alternatives we addressed are not meaningful because they  
18 are essentially unworkable, but they provide no basis for  
19 that whatsoever, except they cite to the state's low rail  
20 contentions, which the board itself has already rejected.  
21 So that provides no basis for their claim.

22 They also point to an alternative proposed by Dr.  
23 Catlin for the first time. Again, this is a new basis  
24 provided as part of the reply, and they have not shown --  
25 and failed to make any showing under the five factors that



1 this board should admit this late-filed basis and,  
2 therefore, it must be rejected.

3 Moreover, if you look at the map that is Exhibit 2  
4 to SUWA, you will see that Dr. Catlin suggests moving the  
5 rail spur to the right, or to Skull Valley, and if you look  
6 up at the top, you will see there are several black squares  
7 there, Exhibit 2 to SUWA's petition. Those black squares  
8 are state-owned lands, if you look down, and as a practical  
9 matter, given the state's opposition in this proceeding,  
10 they would not grant us the right to go over their lands,  
11 and there is no factual basis that is a credible  
12 alternative. They must show a factual basis for it being a  
13 credible alternative and they have not done so.

14 Moreover, as we pointed out in our brief, this  
15 entire contention is again based on the same speculative  
16 realms as contention A, and their standing. We pointed out  
17 the Rancho Seco case in our brief. In Rancho Seco, the  
18 Commission rejected an argument that the EIS had to consider  
19 restart of Rancho Seco as an alternative, and the Commission  
20 said that was too speculative because, first, SMUD would  
21 have to make a decision to restart the plant. Second, have  
22 to go through a new referendum, the shutdown took place  
23 because of a referendum initially. They would have to go  
24 through a new referendum, and then through a series of NRC  
25 steps. And the Commission, in Rancho Seco, we don't need to

1 consider a speculative alternative of that nature. So this  
2 whole contention is based-upon speculation that Congress or  
3 BLM may act to make this area wilderness, and, as we have  
4 shown, that is entirely speculative.

5 So, for those reasons, we believe that both SUWA's  
6 contentions do not meet the standards for admission and the  
7 board should deny them.

8 JUDGE BOLLWERK: All right. Anything from either  
9 board member at this point? All right. Staff then?

10 MS. MARCO: We did recognize before, we stated  
11 that the information provided, the new information provided,  
12 there is no information regarding late-filed standards, and  
13 there is no showing of good cause for filing this new  
14 information late.

15 SUWA has substantially rewritten contention A and  
16 I would like to address the new information contained in  
17 that contention. The staff --

18 JUDGE BOLLWERK: When you say rewrote, excuse me,  
19 you mean in their reply?

20 MS. MARCO: That is correct.

21 JUDGE BOLLWERK: All right.

22 MS. MARCO: The staff believes that except for one  
23 small portion of this, SUWA has not set forth any part of it  
24 that should be admitted as a good contention. SUWA asserts  
25 the application is defective because it doesn't address

1 impacts of the low rail spur on wildlife and recreational  
2 opportunities in the North Cedar Mountain areas.

3 First, SUWA states that the environmental report  
4 does not address impacts in the area above the rail spur  
5 which are particularly vulnerable to noise. But this  
6 assertion is without any support that the upper areas are  
7 particularly vulnerable to noise, or that noise would even  
8 travel up that far.

9 Dr. Catlin's new declaration does not provide any  
10 real support for SUWA. In paragraph 8, if you look, he says  
11 the impacts will intrude into North Cedar Mountains, the  
12 impacts will not be confined. They will have far-reaching  
13 effects. But beyond these blanket assertions, there is no  
14 factual support.

15 Next, SUWA asserts that the environmental report  
16 does not address the visual impacts of the rail spur on the  
17 wild character of the foothills and the peaks of the area.  
18 But it is very difficult to see how this differs from what  
19 SUWA says was addressed, which was the visual alteration  
20 will be evident from the benches and higher elevations of  
21 the North Cedar Mountains. Thus, SUWA has not really shown  
22 a material dispute with the Applicant in that regard.

23 SUWA also asserts that impacts to recreational  
24 users seeking solitude has not been addressed. However, the  
25 Applicant has addressed noise, has addressed the visual

1 intrusion and NEPA does not require that an impact be  
2 analyzed from every conceivable angle. Thus, SUWA has not  
3 shown that the Applicant failed to include an injury -- an  
4 impact required to be analyzed under NEPA.

5 In this regard, SUWA takes issue with the  
6 Applicant's statement that because -- they say because of  
7 the low level of recreational use in the area, the rail spur  
8 is not expected to be a significant impact to the scenic  
9 environment. SUWA states that this statement improperly  
10 assumes that visual impacts are measured by the number of  
11 people who view them, but SUWA does not provide any support  
12 for its assertion why this Applicant's view is improper.

13 In fact, in licensing decision for Three Mile  
14 Island Unit 2, the licensing board specifically found that  
15 the site, Unit 2, was sufficiently remote and rural so that  
16 its unusual impact is limited to a relatively small amount  
17 of people. And that is LBP-7770. Also, the Appeal Board in  
18 1977 Seabrook decision, that would be ALAB 422, discussed  
19 visual impacts on transmission lines in terms of the amount  
20 of visitors to the area.

21 SUWA also refers to the Applicant's plan to  
22 conduct a comprehensive wildlife survey to assure that  
23 certain animals are not located near the rail spur. SUWA  
24 states that the Applicant has not addressed the impacts to  
25 animals. But SUWA didn't demonstrate that the Applicant's

1 plan for determining the existence, this survey, at the time  
2 of construction, or moving the animals is defective.

3 SUWA also states that the Applicant hasn't  
4 addressed noise impacts on these animals, although the  
5 Applicant does say that construction activities will  
6 temporarily disturb resident wildlife and the impact to the  
7 local population from both construction and operation would  
8 be minimal.

9 Now, there is an area where I do believe that SUWA  
10 has shown a particular conflict with the application so that  
11 there is a material dispute. It is a small matter. There  
12 are four animals. Four animals, the kit fox, burrowing owl,  
13 northern harrier, and ferruginous hawk, that SUWA sets forth  
14 in its reply.

15 If you look in the application, the Applicant  
16 recognizes the presence of two of those species during a  
17 1998 survey, that would be the northern harrier and the  
18 burrowing owl. And since the Applicant does say that the  
19 maintenance may affect -- the Applicant does say that there  
20 will be maintenance on this fire barrier, I believe that  
21 SUWA has shown that, with respect to the two animals, that  
22 the Applicant says will likely be there, that they have  
23 shown that there is a conflict.

24 However, I don't think that should be admitted for  
25 the other two animals because SUWA hasn't shown that they --

1 any indication that they would be there and I don't think  
2 that this issue should be covering the Applicant's -- they  
3 say the Applicant failed to guarantee that surveys will be  
4 conducted each time the fire barrier is cleared and graded,  
5 as a mitigation measure, SUWA hasn't shown that that kind of  
6 thing is required, so even though the PFS may choose to do  
7 this. Though it should be limited just to the maintenance  
8 of the rail spur on those two animals.

9           Regarding the assertions that are based on the  
10 matters pertaining to bio-diversity, habitat fragmentation  
11 and the ecosystem approach to land, these matters are not  
12 explained in any detail and they don't adequately point to any  
13 defect in the Applicant's submittal. SUWA has not explained  
14 why they are required to be considered under NEPA and,  
15 therefore, this basis statement should be rejected.

16           Now, SUWA claims that the Application is deficient  
17 because, apart from the wilderness values, it does not  
18 discuss the potential wilderness designation of the land.  
19 And the staff objected to this part of the contention in  
20 which SUWA would have the potential for wilderness  
21 designation be included as an impact that would have to be  
22 analyzed. SUWA's argument is too speculative to demonstrate  
23 that a material dispute exists with the Applicant. Also,  
24 SUWA does not show that the Applicant has failed to consider  
25 a matter required by law, because NEPA does not require that

1 speculative matters that are not reasonably foreseeable be  
2 addressed.

3 The First Circuit, in a 1992 decision of Sierra  
4 Club vs. Marsh, said foreseeability means that the impact is  
5 sufficiently likely to occur that a person of ordinary  
6 prudence would take it into account in reaching a decision.  
7 SUWA does not dispute that the land is not currently  
8 protected by the Wilderness Act. Further, as we pointed out  
9 in our brief, the issue of the designation of land in Utah  
10 is a highly controversial matter and bills have been  
11 introduced every year in the Congress, all have failed. And  
12 it is mere speculation that Congress will pass legislation  
13 regarding the land in question, especially since, as PFS  
14 observed, BLM has determined it should not be declared  
15 wilderness.

16 Thus, SUWA's basis is too speculative, not  
17 foreseeable as an impact required to be considered under  
18 NEPA and doesn't show a material dispute that the Applicant  
19 has failed to do something they are required to do.

20 Regarding Contention B, SUWA's second contention  
21 states that the Applicant has failed to analyze meaningful  
22 alternatives to the low rail spur that would preserve the  
23 wilderness character and wilderness designation.

24 The Commission's regulations at Section 51.45  
25 states the Applicant must describe alternatives to the

1 proposed action and alternatives available for reducing or  
2 avoiding adverse environmental effects.

3           Regarding alternatives to the proposed action,  
4 SUWA has not set forth any reasons for its belief that the  
5 Applicant's discussion of siting or the no build alternative  
6 is not valid, hasn't shown a material dispute with the  
7 Applicant by stating what alternatives it would have  
8 considered in that regard.

9           Now regarding alternatives available for reducing  
10 environmental effects, for the reasons basically in the  
11 first contention SUWA has not shown that a material dispute  
12 exists with the Applicant regarding adverse environmental  
13 effects.

14           [Pause.]

15           JUDGE BOLLWERK: Do you think you can backtrack  
16 for about maybe 10, 15 seconds? I think that's all. I  
17 don't think there was any more interruption than that.

18           MS. MARCO: Yes, I think I can do that.

19           JUDGE BOLLWERK: You just started talking about  
20 Contention B, so --

21           MS. MARCO: All right.

22           JUDGE BOLLWERK: Why don't we go back on the  
23 record, by the way?

24           MS. MARCO: All right. Regarding the requirement  
25 that the Applicant consider alternatives available for



1 reducing environmental effects, I mentioned in the first  
2 part, in response to the first contention that SUWA has not  
3 shown a material dispute exists with the Applicant regarding  
4 have to show alternatives for environmental effects.

5 The one aspect that we did consider sufficient we  
6 didn't think that they had set forth any reason to show that  
7 the Applicant's mitigation alternative was invalid.

8 If NEPA does not require inclusions of speculative  
9 matters and the loss of wilderness preservation status  
10 underneath those too speculative to be concluded under NEPA.  
11 Also, SUWA has not set forth with specificity what  
12 alternatives it would have considered and has not explained  
13 why the Applicant's discussions of alternatives such as  
14 heavy haul route is deficient.

15 In its reply SUWA claims that the PFS alternatives  
16 are unworkable. SUWA relies on its support for its  
17 assertion in the State's filing but offers no facts, no  
18 expert opinions for this assertion, and finally SUWA states  
19 that Dr. Catlin's alternative presents itself as a viable  
20 option.

21 Dr. Catlin however merely asserts that running the  
22 railroad two miles to the east would have less impact, but  
23 he doesn't provide any support for this assertion other than  
24 to say it avoids sensitive wetlands, as Judge Bollwerk had  
25 noted, but this is not sufficient for a material dispute.

1 The Applicant stated in its environmental report that there  
2 are no known wetlands or other environmentally sensitive  
3 areas along the entire 32-mile rail spur. Thus SUWA has not  
4 provided any basis for including this alternative and has  
5 not shown a material dispute exists with the Applicant, and  
6 for these reasons -- except for that small part of  
7 Contention A, these contentions should be rejected.

8 JUDGE BOLLWERK: All right. Mr. Quintana, before  
9 I guess I skipped you, you hadn't said you wanted to say  
10 anything but if you want to say something, now is the time.

11 MR. QUINTANA: Enough said.

12 JUDGE BOLLWERK: All right. Ms. Walker, how long  
13 do you think you are going to need?

14 MS. WALKER: Oh, not too long.

15 JUDGE BOLLWERK: All right. Why don't you go ahead  
16 then.

17 MS. WALKER: Okay. PFS's first argument was that  
18 we're providing new bases for our contention, and I suggest  
19 it's just a clarification. The groundwork for it is in our  
20 motion to intervene. We say the ER is insufficient and then  
21 we go on to explain that and -- I'm sorry, petition to  
22 intervene.

23 We go on to explain that in detail in our reply.

24 He says that the Applicant has sufficiently dealt  
25 with noise. The noise levels are described with regard to

1 the road and the ranches and not with regard to the uplands,  
2 and I refer to NRC regulations which talk about how to give  
3 your contentions, and it says, "If the petitioner believes  
4 that the application fails to contain information on a  
5 relevant matter as required by law, the identification of  
6 each failure and supporting reasons for the petitioner's  
7 belief must be included."

8 So it says "reasons" -- which doesn't say  
9 "facts" -- which means that if I understand that correctly,  
10 you just point out the deficiencies. I think that if you  
11 require a stronger showing of facts than SUWA has included  
12 in its reply that you are basically imposing a double  
13 standard, so then the Applicant gets to say this, this and  
14 this -- for example, that there will be no impact on  
15 recreation without further support -- and yet the Intervenor  
16 or the potential Intervenor doesn't get to say that without  
17 further support, to the extent that you feel that SUWA  
18 didn't provide further support.

19 For example, the notion that sound travels upward  
20 and that the linear miles between the rail spur and the  
21 upland would be different, I think that that is sufficient  
22 to establish that the noise analysis does not adequately  
23 consider noise travelling upward and westward. They just  
24 don't address.

25 The PFS repeatedly talks about there's loss to

1 such a small area, why should any of this really matter?  
2 That is conceivably true when you look at the whole valley,  
3 but again SUWA's interest is concentrated on a smaller  
4 portion of the whole valley where the impacts will be more  
5 significant.

6 With regard to recreation, the only recreational  
7 impact that they really address is recreational impacts on  
8 ORV use. They don't talk about hiking. They don't talk  
9 about people trying to get some relief from the city and  
10 search out opportunities for solitude.

11 They suggest that this analysis is enough but if  
12 your underlying understanding of the sort of baseline  
13 situation is that it's an area that no one really cares  
14 about or if they do it is used only by ORV users then your  
15 analysis isn't going to address these other values that SUWA  
16 puts forward.

17 So in other words, the license application starts  
18 from certain notions and then conducts its analysis, and  
19 this baseline assumption had no sort of correlation to  
20 recreational use or opportunities for solitude or ecosystem  
21 management -- those kinds of things -- and that is why they  
22 are not addressed.

23 The Staff suggested that the impact on wilderness  
24 designation is too speculative, but in the context of  
25 standing and then again in the context of bringing NEPA

1 allegations, which is what is at issue at Idaho Conservation  
2 League, the court there thought that a decision not to  
3 consider something wilderness was not too speculative even  
4 though Congress had to add there was no proposed development  
5 and NEPA would occur again so Ms. Marco says the possibility  
6 that this area would be designated wilderness is too  
7 speculative under NEPA but the Ninth Circuit thought that  
8 NEPA issues had to be addressed and they did address  
9 alternatives in that case, deciding ultimately that the  
10 Forest Service had and analyzed a range of alternatives but  
11 that the issue was not so attenuated that they didn't need  
12 to consider alternatives for impacts on roadless area.

13 With regard to alternatives, I think that it is  
14 essentially a legal argument -- NEPA requires analysis of a  
15 meaningful range of alternatives to the proposed project --  
16 and our meaningful alternative to this proposed project  
17 would be one that has fewer impacts or no impacts on this  
18 roadless area.

19 Excuse me again for being unclear but we are not  
20 suggesting that there are any wetlands along the current  
21 route. The suggestion that Dr. Catlin made was that if  
22 another -- if an alternative route were analyzed that it  
23 shouldn't go through wetlands that are in the center of the  
24 valley, and please excuse that lack of clarity.

25 So I think that unless the Board has further

1 questions -- and I appreciate the Staff's supporting SUWA's  
2 contentions in that narrow area that they suggested we were  
3 entitled to.

4 JUDGE BOLLWERK: All right, just one second.

5 All right. Does anyone else have anything they  
6 wish to say with respect to these contentions? Mr.  
7 Gauklear?

8 MR. GAUKLEAR: I would like to say a few points.

9 JUDGE BOLLWERK: All right. Hold on, Ms. Walker.  
10 You are going to be up one more time, if you want to be.

11 MR. GAUKLEAR: I would like to make several  
12 points.

13 First, Ms. Walker claimed that SUWA has shown that  
14 the environmental impacts on this area would be greater than  
15 in other areas through which to route rail spur passes. I  
16 don't believe they have set forth any basis to support any  
17 such assertion like that.

18 Staff refers to maintenance activities on two  
19 species. I would point out that generally the environmental  
20 report does discuss construction operation of the rail line  
21 and concludes that construction operation on the rail line  
22 will have minimal impact on species in the area, at page  
23 4.4-3 and 4.4-4.

24 Also SUWA refers to noise. Again we have  
25 identified the maximum noise levels. We have discussed it

1 with respect to Skull Valley but a maximum noise level is a  
2 maximum noise level and they have shown no basis to show why  
3 that is inadequate with respect to the area in general.

4 Beyond that, I believe I have nothing else to add,  
5 Your Honor.

6 JUDGE BOLLWERK: All right. Let me just ask -- I  
7 just want to make sure this is clear in my mind.

8 In terms of the lead agency again here, this  
9 agency is clearly the lead agency with respect to this rail  
10 spur, in terms of the NEPA analysis, excuse me -- yes?

11 MR. TURK: Your Honor, I can't answer that any  
12 more clearly than I did before.

13 JUDGE BOLLWERK: Okay.

14 MR. TURK: For our purposes, for licensing here,  
15 yes, but again the lead agency for determining whether or  
16 not to grant the right-of-way --

17 JUDGE BOLLWERK: Is BLM.

18 MR. TURK: -- is BLM, right -- and they have their  
19 own review process and will have to make their own  
20 determinations.

21 Now whether or not they prepare an EIS as part of  
22 that, I don't know, but they decide whether or not to give  
23 the right-of-way.

24 JUDGE BOLLWERK: Well, now I am confused.

25 JUDGE KLINE: Well, now I'm confused.

1 JUDGE BOLLWERK: Well, I asked the question then,  
2 not to confuse things but--to make sure it's clear.

3 JUDGE KLINE: The fact -- isn't it true that BLM  
4 is a federal agency --

5 MR. TURK: Yes.

6 JUDGE KLINE: Yes, and as such it has a duty to  
7 prepare an Environmental Impact Statement on any action  
8 it -- on a major federal action that it takes. Now unless  
9 there is some reason for exempting it from that, it would  
10 ordinarily do that, wouldn't it?

11 MR. TURK: If it was a major federal action with  
12 significant environmental impacts, they would have to do the  
13 EIS. If they determine that it has insignificant impacts or  
14 that it is not a major federal action, they may do what we  
15 do, which is an environmental assessment --

16 JUDGE KLINE: Yes, I understand.

17 MR. TURK: -- not a full-blown EIS.

18 JUDGE KLINE: I understand. I am still trying to  
19 get the issue of jurisdiction settled though.

20 MR. TURK: I guess I would turn to the Applicant  
21 at this point since they have submitted the application for  
22 the right-of-way. Perhaps BLM has indicated to them what  
23 their review process entails.

24 JUDGE KLINE: See, there is a project before us  
25 and we are a federal agency, so we also have a duty to do a



1 complete Environmental Impact Statement which says as things  
2 stand now without further explanation, two federal agencies  
3 have some role in preparing an Environmental Impact  
4 Statement unless there is an agreement as to a lead agency.

5 MR. SILBERG: Actually there are three because the  
6 Bureau of Indian Affairs is also involved.

7 JUDGE KLINE: Oh, okay -- but still the question  
8 stands, how is this jurisdictional question resolved?

9 MR. SILBERG: The agencies, typically agencies  
10 agree amongst themselves if they are --

11 JUDGE KLINE: Ah.

12 MR. SILBERG: -- are going to play lead agency or  
13 they are going to use a tiering process. There are a number  
14 of procedural devices that agencies can use to handle it.

15 Clearly it was Congress's intent -- the CEQ's  
16 intent that not every agency has to prepare an EIS for major  
17 federal actions.

18 JUDGE KLINE: That is my understanding, so what  
19 has been done in this instance?

20 MR. SILBERG: Well, clearly with respect to the  
21 Bureau of Indian Affairs they will be a cooperating agency  
22 with respect to the NRC's Environmental Impact Statement.

23 I cannot say the same thing for BLM. I suspect  
24 that issue has been discussed. I don't know if it has been  
25 resolved. My guess is that BLM would also be a cooperating

1 agency although --

2 JUDGE KLINE:-- Because in a sense it matters  
3 because if a party wants to set a NEPA contention before us,  
4 and in fact some other agency is going to do the NEPA  
5 assessment, then one might surmise that it should be before  
6 them.

7 MR. SILBERG: Well, you could certainly have a  
8 case where the same impact, two different aspects of a  
9 project, is looked at by two agencies, so I don't think it  
10 necessarily follows that because NRC looks at the impact  
11 should BLM choose to do an Environmental Impact Statement  
12 that they would not also look at the impact.

13 I think both agencies would and it is for that  
14 reason that you have the lead agency process.

15 JUDGE KLINE: We are still trying to deduce who  
16 will do the alternative routes analysis in a Environmental  
17 Impact Statement.

18 MR. SILBERG: I think the NRC has an obligation to  
19 look at alternative routes analysis, and we have certainly  
20 filed our application -- our environmental report presented  
21 alternatives analysis.

22 One of the problems with the alternatives analysis  
23 suggested as a contention here is (A), the initial  
24 contention, suggested no alternatives, but just said we  
25 hadn't looked at them when in fact we had. Now they come

1 back with a very vague suggestion of well, let's move the  
2 right-of-way two and a half miles without any indication  
3 that such a move would even be feasible and I believe as Mr.  
4 Gauklear indicated it isn't because that would involve lands  
5 that are owned by or controlled by the State and unless Ms.  
6 Curran is willing to stipulate that the Sate will allow us  
7 right-of-way over those lands, I think you can assume that  
8 that is not a reasonable alternative. NEPA does not require  
9 the consideration of --

10 JUDGE KLINE: I don't want to know the merits of  
11 it now. I just want to know who is going to do the job.

12 MR. TURK: May I ask permission to supplement the  
13 record? Early next week I will find out what BLM's  
14 intentions are.

15 JUDGE KLINE: All right.

16 MR. TURK: And I can provide that information  
17 through a letter to the Board and parties.

18 JUDGE BOLLWERK: Okay. Why don't we -- if no one  
19 has any objection, I would like to -- I think that needs to  
20 be clear here, because one of our concerns is, when we were  
21 talking about this, is are we going to be -- if we accept a  
22 contention here or as we look at this we don't accept a  
23 contention, are we stepping on someone else's toes, because  
24 as you have cited a case, we are supposed to stay out of  
25 other people's jurisdictions, so does that suggest an answer

1 to this contention or not? I don't know, but I think at  
2 least what we would like is whatever clarification is  
3 possible on that point, if you understand what I am saying.

4 MR. TURK: Yes, and I think what I can simply do  
5 is provide the facts to you as to what BLM will be doing and  
6 how they will play into the Staff's EIS as we perceive it

7 JUDGE BOLLWERK: All right. Anything else you  
8 want to say, Mr. Silberg? You are looking like -- no? All  
9 right.

10 MR. TURK: I would ask, and perhaps Mr. Silberg  
11 knows the answer, whether BLM has indicated that they intend  
12 to conduct an EIS scoping process or to prepare an EIS on  
13 this.

14 MR. SILBERG: I don't know that answer. I could  
15 certainly find it out early next week.

16 JUDGE BOLLWERK: I'm sorry, go ahead.

17 MR. SILBERG: No, I can certainly work with Mr.  
18 Turk and we'll figure out what the facts are. I just don't  
19 know them off the top of my head.

20 JUDGE BOLLWERK: Let me ask one question, if you  
21 know the answer to this, and I don't want you to speculate  
22 on it obviously.

23 If BLM were to prepare an Environmental Impact  
24 Statement, is that something if they were the lead agency  
25 the NRC would simply take, look at, accept, or would it be

1 something that they would reanalyze? I guess that --

2 MR. TURK: I don't know how we would handle it,  
3 Your Honor.

4 JUDGE BOLLWERK: All right. Well --

5 MR. TURK: I have a feeling, I mean intuitively I  
6 know that I would recommend we not re-do what BLM has done,  
7 but I would expect that nonetheless we would incorporate  
8 into our EIS the results of their findings.

9 JUDGE BOLLWERK: All right, and if that were the  
10 case, that at least to us raises the question where is the  
11 point at which you -- who do you object to? Is it to us or  
12 is it to BLM, given they are the ones preparing the  
13 Statement if NRC is simply going to incorporate that  
14 document into its Environmental Impact Statement?

15 Obviously if BLM is the lead I would think, if  
16 they are the lead agency they make a ruling of some kind.  
17 Depending on how it comes out, obviously you can take them  
18 to court if you don't agree with it, but is that something  
19 we should be getting into? I guess that is the question I  
20 have.

21 Is that clear or unclear or irrelevant? You can  
22 tell me -- tell me it is irrelevant if it is. We are just  
23 trying to get an answer here because as you all pointed out  
24 with the -- I can't remember the case off the top of my  
25 head -- but the Commission has said --

1 MR. SILBERG: Idaho Resources --

2 JUDGE BOLLWERK: -- in the Idaho Resources case to  
3 stay out of the other agency's business, obviously, so --

4 MS. MARCO: Your Honor, actually if I just may  
5 mention one thing?

6 JUDGE BOLLWERK: Sure.

7 MS. MARCO: I would just caution against relying  
8 too heavily on that case because in the final footnote the  
9 Commission did say that the decision was quite narrowly  
10 limited --

11 JUDGE BOLLWERK: By?

12 MS. MARCO: -- permitting authority.

13 JUDGE BOLLWERK: Okay. What timeframe do you  
14 think you are in, Mr. Turk? Mid-week?

15 MR. TURK: Mid-week.

16 JUDGE BOLLWERK: Mid-week next week? That gives  
17 about three or four -- let's say -- I haven't got, is there  
18 a calendar over there?

19 Well, once we receive the document I will set a  
20 response date for, let's see, we are talking about perhaps,  
21 say, the 16th or 17th, that is Wednesday or Thursday?

22 MR. TURK: For us to provide the information?

23 JUDGE BOLLWERK: Yes.

24 MR. TURK: That sounds fine.

25 JUDGE BOLLWERK: All right.

1 MR. SILBERG: I wonder if whether any response is  
2 necessary. I mean at that point we are providing -- the  
3 staff is going to provide, in essence, fact information --

4 JUDGE BOLLWERK: Right.

5 MR. SILBERG: -- as another data point for the  
6 board to reach its decision one way of the other.

7 JUDGE BOLLWERK: Right. Again, I don't know what  
8 it is going to say, so that's why -- I mean I don't want to  
9 cut -- let me do this. Let's see what it says, and if we  
10 believe that it needs a response, or one of the parties  
11 believes they would like to respond to it, they can let us  
12 know and we can set a date accordingly.

13 MR. SILBERG: None of the parties tend to be  
14 reluctant to do that.

15 JUDGE BOLLWERK: That is -- I have noticed that.

16 MR. TURK: I assume, Your Honor, as long as we  
17 don't make argument in that paper, there is nothing to  
18 respond to, it would simply be a statement of fact.

19 JUDGE BOLLWERK: That's correct. All right.

20 Let's see, Ms. Walker, I think you have an  
21 opportunity at this point, since I interjected a question.  
22 Anything you want to say on any of these subjects?

23 MS. WALKER: Well, I do think we would want the  
24 opportunity to respond to whatever factual -- whatever facts  
25 are raised. I certainly wouldn't want to waive that

1 opportunity.

2 MR. TURK: Actually, we could have argument now in  
3 the alternative and dispose of any more filings.

4 MS. WALKER: You want to know what it says first.

5 MR. TURK: Well, either BLM is going to be doing  
6 NEIS separately or they are not, and why don't we have  
7 argument now over how that would affect your decision and  
8 then we will have the facts come in. Rather than get into  
9 another trail of papers and responses.

10 JUDGE BOLLWERK: I don't have a problem with that  
11 if people feel they are ready to address that issue. I  
12 suspect that may involve some --

13 MS. CURRAN: The state would have a problem with  
14 that. We would rather than an opportunity to prepare for  
15 such an argument.

16 JUDGE BOLLWERK: All right. Let's see what Mr.  
17 Turk's document says and then let's proceed from there. If  
18 it appears that this affects the admissibility of the  
19 contention in some way, we may need another round of  
20 filings. I hate to start that, but I think, again, I am  
21 concerned that this question -- we not begin down a path one  
22 way or the other where we can't -- we simply have no  
23 authority to complete something.

24 So, do you want to say anything, Mr. Silberg? You  
25 are bending forward.



1 MR. SILBERG: No.

2 JUDGE BOLLWERK: If not, I will move on.

3 MR. SILBERG: I was just bending forward.

4 JUDGE BOLLWERK: You are just bending forward.

5 Okay.

6 Ms. Walker, anything else you want to say on this  
7 subject?

8 MS. WALKER: No, thank you.

9 JUDGE BOLLWERK: All right. Be aware that if we  
10 do look at the staff document and decide to set a response  
11 date, it probably will not be more than week or so, taking  
12 into account there is a holiday in there. So, you know, be  
13 prepared to give us something back rather rapidly.

14 Anything at this point? Do the board members have  
15 any questions?

16 [No response.]

17 JUDGE BOLLWERK: I guess at this point, if there  
18 is nothing else -- anything on any other subject anyone  
19 wants to bring to the board's attention while you have us  
20 here?

21 MR. SILBERG: Well, since I believe this may be  
22 the last time we all have the chance to, in person, appear  
23 before Judge Kline, I just wanted to extend Applicant's best  
24 wishes and wish him good luck and thank him for his  
25 participation.

1 JUDGE KLINE: I appreciate your best wishes and  
2 wishes of good luck, but I might observe that they may be  
3 premature, because I am working on a part-time assignment  
4 which may keep me on the case.

5 JUDGE BOLLWERK: I am not sure how being on this  
6 case can be part-time.

7 [Laughter.]

8 MR. SILBERG: Well, in that case, I take it all  
9 back.

10 JUDGE KLINE: I accept your good wishes. It is  
11 too late to take it back.

12 JUDGE LAM: You think you won't have him around to  
13 kick around anymore.

14 [Laughter.]

15 JUDGE BOLLWERK: All right. If there is nothing  
16 else, then I would wish all of you a good holiday. No one  
17 here is traveling, fortunately. I guess for those -- is it  
18 snowing in Utah today or is the weather good. Ms. Walker?

19 MS. WALKER: Snow.

20 JUDGE BOLLWERK: All right. In any event.  
21 Everyone have a good holiday and we stand adjourned.

22 [Whereupon, at 4:02 p.m., the prehearing  
23 conference was concluded.]

24

25

REPORTER'S CERTIFICATE

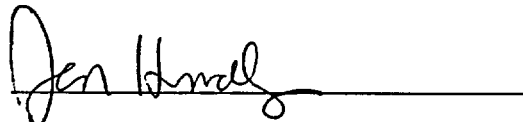
This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

NAME OF PROCEEDING: PRIVATE FUEL STORAGE, L.L.C.  
PREHEARING CONFERENCE

DOCKET NUMBER: 72-22-ISFSI  
ASLBP No. 97-732-02-ISFSI

PLACE OF PROCEEDING: Rockville, MD

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



Jon Hundley

Official Reporter

Ann Riley & Associates, Ltd.



PRIVATE FUEL STORAGE PROCEEDING

NRC STAFF'S SUGGESTED SCHEDULE REVISION (DECEMBER 1998)

EVENT	GROUP I <sup>1</sup>	GROUP II <sup>2</sup>	GROUP III <sup>3</sup>
Informal Discovery Begins -- All Parties	May 19, 1998	May 19, 1998	May 19, 1998
Informal Discovery Closes -- All Parties	<del>2/28/99</del> <del>December 31, 1998</del>	<del>2/28/99</del> <del>December 31, 1998</del>	<del>2/28/99</del> <del>December 31, 1998</del>
Staff Position on Contentions	<del>6/15/99</del> <del>December 31, 1998</del>	<del>10/15/99</del> <del>April 30, 1999</del>	DEIS -- Oct. <del>30,</del> 1999 FEIS -- Sept. <del>30,</del> 2000
Formal Discovery Begins -- All Parties	<del>3/1/99</del> <del>January 1, 1999</del>	<del>3/1/99</del> <del>January 1, 1999</del>	<del>3/1/99</del> <del>January 1, 1999</del> , except <del>DEIS</del> / FEIS-related discovery against Staff, which begins on <del>DEIS</del> /FEIS issuance date
Formal Discovery Ends - - All Parties Except Against Staff	<del>5/28/99</del> <del>March 1, 1999</del>	<del>5/28/99</del> <del>March 1, 1999</del>	<del>5/28/99</del> <del>March 1, 1999</del>
Formal Discovery Ends - - Against Staff	<del>8/15/99</del> <del>March 1, 1999</del>	<del>6/15/00</del> <del>4/15/00</del> <del>June 30, 1999</del>	<del>DEIS -- 4/15/00</del> <del>December 31, 1999</del> FEIS -- <del>11/30/00</del> <del>November 1, 2000</del>
Summary Disposition Motions Final Filing Date	<del>8/15/99</del> <del>6/30/99</del> <del>March 31, 1999</del>	<del>6/15/00</del> <del>5/30/00</del> <del>December 31, 1999</del>	December 1, 2000
Summary Disposition Motion Responses Final Filing Date	<del>9/15/99</del> <del>7/30/99</del> <del>April 30, 1999</del>	<del>7/15/00</del> <del>4/30/00</del> <del>January 31, 2000</del>	January 2, 2001

Exhibit 1

12-11-98

Board Summary Disposition Decision	10/15/99 <del>9/1/99</del> <del>June 1, 1999</del>	8/15/00 <del>5/31/00</del> <del>March 1, 2000</del>	February 2, 2001
Pre-filed Testimony Submitted	11/30/99 <del>10/1/99</del> <del>July 1, 1999</del>	10/15/00 <del>6/30/00</del> <del>March 31, 2000</del>	March 2, 2001
In Limine Motions Due	12/15/99 <del>10/15/99</del> <del>July 15, 1999</del>	10/30/00 <del>7/15/00</del> <del>April 14, 2000</del>	March 16, 2001
Hearings (including limited appearance sessions as appropriate)	1/2/00 - 2/28/00 <del>11/2 - 12/24/99</del> <del>August 1 - September 30 1999</del>	11/15 - 12/15/00 <del>8/1 - 31/00</del> <del>May 1 - June 30, 2000</del>	April 1 - May 31, 2001
Findings of Fact (Simultaneous filings)	4/15/00 <del>2/15/00</del> <del>November 1, 1999</del>	1/15/00 <del>0/</del> <del>10/3/00</del> <del>August 1, 2000</del>	July 2, 2001
Findings of Fact Responses (Simultaneous filings)	5/15/00 <del>3/15/00</del> <del>December 1, 1999</del>	2/15/00 <del>0/</del> <del>11/1/00</del> <del>September 1, 2000</del>	August 1, 2001
Initial Decision	7/15/00 <del>5/15/00</del> <del>February 1, 2000</del>	4/15/01 <del>12/29/00</del> <del>November 1, 2000</del>	October 1, 2001

<sup>1</sup> The contentions in Group I include Utah B; Utah C; ~~Utah E/Castle Rock 7/Confederated Tribes F;~~ Utah F/Utah P; Utah G; Utah K/Castle Rock 6/Confederated Tribes B; Utah M; Utah N; Utah R; ~~Utah S/Castle Rock 7;~~ and Security ~~A-C.~~

<sup>2</sup> The contentions in Group II include ~~Utah E/Castle Rock 7/Confederated Tribes F;~~ Utah H; Utah L; ~~Utah S/Castle Rock 7;~~ and Utah GG.

<sup>3</sup> The contentions in Group III include Utah O/Castle Rock 8 and 10; Utah T/Castle Rock 10, 12, and 22; Utah U; Utah V; Utah W; Utah Z; Utah AA/Castle Rock 13; Utah DD/Castle Rock 16; Castle Rock 17; Castle Rock 20; Castle Rock 21; and OGD O.

<sup>4</sup> The litigation of Group II contentions could be affected if there is a need for extensive second round RAIs or other information on geotechnical issues -- which cannot be known until the Staff receives and reviews PFS's responses to first-round RAIs (for which the submission date has changed to 1/15/99).

<sup>5</sup> Apart from the elimination of DEIS discovery and a few other revisions, the schedule for litigation of environmental contentions is generally left undisturbed at this time; however, this could change depending upon the actual completion dates of the Staff's review and other tasks in the proceeding.

<sup>6</sup> The following Staff publication dates affect this schedule:

12/31/98	Issuance of draft SER and notice of opportunity for comment on the Hi-Star storage cask.
5/31/99	Issuance of Hi-Star transportation SER and certificate.
7/30/99	Draft SER on Hi-Storm storage cask goes to NRC management; Federal Register notice of opportunity for comment to be issued 1-2 months later.
7/30/99	Draft SER on TranStor cask (storage) goes to NRC management; Federal Register notice of opportunity for comment to be issued 1-2 months later.
9/15/99	Issuance of SER and COC for TranStor cask (transportation).
9/30/99	Issuance of Hi-Star Storage Cask final SER and Certificate of Compliance (COC).
10/30/99	Issuance of Draft EIS for PFS site.
10/30/99	Issuance of Draft SER for PFS site.
7/30/00	Issuance of Hi-Storm storage cask final SER and COC.
9/30/00	Issuance of final SER for PFS.
9/30/00	Issuance of Final EIS for PFS site.