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UNITED STATES DISTRICT COURT OF THE DISTRICT OF COLUMBIA



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STATE OF NEW MEXICO, ET AL., : DOCKET NO. CV 91-2527
: :
PLAINTIFFS, : :
: :
VS. : : COURTROOM NO. 15
: : WASHINGTON, D.C.
JAMES WATKINS, : :
: : NOVEMBER 15, 1991
DEFENDANT. : : 10:17 A.M.
----- X

TRANSCRIPT OF HEARING ON MOTIONS
BEFORE THE HONORABLE JOHN GARRETT PENN,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

(SEE PAGES 2 AND 3.)

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(COMPUTER-AIDED TRANSCRIPTION FROM STENOTYPE NOTES.)

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ARGUMENTS

FOR PLAINTIFFS:

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P R O C E E D I N G S

1
2 THE DEPUTY CLERK: CIVIL ACTION 91-2527, STATE OF NEW
3 MEXICO, STATE OF TEXAS, NRDC, EDF, ET CETERA, VS. JAMES
4 WATKINS. AND WOULD COUNSEL PLEASE IDENTIFY THEMSELVES AND THE
5 PARTIES THEY REPRESENT.

6 MR. UDALL: TOM UDALL FOR THE STATE OF NEW MEXICO.

7 MR. NATHAN: FRED NATHAN, ASSISTANT ATTORNEY GENERAL,
8 STATE OF NEW MEXICO.

9 MR. REICHER: DAN REICHER, NATURAL RESOURCES DEFENSE
10 COUNCIL.

11 MS. REAMES: DEBORAH REAMES FOR ENVIRONMENTAL
12 CONGRESSIONAL INTERVENORS.

13 MR. BABICH: ADAM BABICH FOR THE ENVIRONMENTAL DEFENSE
14 FUND.

15 MS. OLINGER: NANCY OLINGER, ASSISTANT ATTORNEY
16 GENERAL FOR THE STATE OF TEXAS.

17 MR. LOVEJOY: LINDSAY LOVEJOY, ASSISTANT ATTORNEY
18 GENERAL FOR THE STATE OF NEW MEXICO.

19 MR. WRUBLE: BERNIE WRUBLE, OF COUNSEL, FOR THE STATE
20 OF NEW MEXICO.

21 MR. FOX: HOWARD FOX, ENVIRONMENTAL PLAINTIFF.

22 THE COURT: ON THE DEFENSE.

23 MS. ZANDER: CAROLINE ZANDER, UNITED STATES.

24 MR. REED: MIKE REED, FOR THE FEDERAL DEFENDANTS.

25 MR. FREI: MARK FREI, FEDERAL DEFENDANTS.

26 MR. PINKSTON: DANIEL PINKSTON OF THE JUSTICE

1 DEPARTMENT FOR THE FEDERAL DEFENDANTS.

2 MR. FARLEY: SCOTT FARLEY FOR THE FEDERAL DEFENDANTS.

3 MS. GRIFFITH: KAREN GRIFFITH FOR THE FEDERAL
4 DEFENDANTS.

5 THE COURT: ALL RIGHT, WHO IS GOING TO ARGUE THE CASE
6 ON BEHALF OF THE PLAINTIFFS?

7 MR. UDALL: I AM, YOUR HONOR.

8 THE COURT: ALL RIGHT, NOW, ARE THERE ANY PRELIMINARY
9 MATTERS BEFORE I HEAR THE ARGUMENTS, COUNSEL?

10 MR. UDALL: I THINK THERE'S A TIME MATTER, YOUR HONOR.

11 THE COURT: YES. DO YOU WISH TO ADDRESS THAT?

12 MR. UDALL: I THINK IT'S THE INTERVENORS' MOTION, YOUR
13 HONOR.

14 MR. FOX: FIRST, YOUR HONOR, I'M HOWARD FOX FOR THE
15 PLAINTIFF INTERVENORS. THERE WAS A MOTION TO ADMIT DEBORAH
16 REAMES PRO HAC VICE, AND I'M WONDERING -- IT WAS OUR INTENTION
17 THAT SHE PRESENT THE ARGUMENT ON BEHALF OF THE PLAINTIFF.

18 THE COURT: MOTION IS GRANTED.

19 NOW, HOW MUCH TIME ARE THE -- WELL, I BELIEVE I HAD
20 SET OUT A TIME FOR COUNSEL TO ARGUE THE CASE, AND I BELIEVE THE
21 INTERVENORS HAD ASKED FOR SOME ADDITIONAL TIME; IS THAT
22 CORRECT?

23 MS. REAMES: YES, YOUR HONOR.

24 THE COURT: AND HOW MUCH ADDITIONAL TIME ARE YOU
25 ASKING FOR?

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MS. REAMES: WE ASK FOR ONLY TEN MINUTES.

THE COURT: TEN MINUTES? ALL RIGHT, THAT REQUEST IS GRANTED.

MS. REAMES: THANK YOU.

THE COURT: ANY OTHER PRELIMINARY MATTERS?

MR. BABICH: YOUR HONOR, IF I MAY REQUEST PERMISSION TO ADDRESS THE COURT. I'M NOT A MEMBER OF THE BAR OF THIS COURT. I REPRESENT THE ENVIRONMENTAL DEFENSE FUND AND THE ENVIRONMENTAL INTERVENORS, BUT ALSO THE SAME PARTIES WHO ARE THE ENVIRONMENTAL INTERVENORS HAVE FILED ANOTHER LAWSUIT UNDER THE RESOURCES COMPENSATION RECOVERY ACT, AND THERE IS AN OUTSTANDING MOTION TO CONSOLIDATE AND FOR A HEARING.

THE COURT: ALL RIGHT. WHEN WAS THAT SUIT FILED?

MR. BABICH: THE LAWSUIT WAS FILED ON TUESDAY, YOUR HONOR.

THE COURT: IS THERE ANY OBJECTION TO THAT REQUEST?

MR. PINKSTON: WELL, YOUR HONOR, WE DON'T HAVE ANY OBJECTION TO THE CONSOLIDATION OF THE TWO CASES.

THE COURT: ALL RIGHT, THE MOTION IS GRANTED. COUNSEL.

MR. UDALL: MAY IT PLEASE THE COURT, YOUR HONOR, I'M TOM UDALL, THE ATTORNEY GENERAL FOR THE STATE OF NEW MEXICO. I AT THIS TIME WOULD LIKE TO PASS FORWARD TO YOUR HONOR COPIES OF THESE CHARTS THAT WE HAVE HERE AS EXHIBITS, IF THE COURT WILL ALLOW THAT.

1 THE COURT: YES. HAVE COUNSEL FOR THE DEFENDANTS
2 RECEIVED COPIES OF THESE?

3 MR. UDALL: YES, THEY HAVE, YOUR HONOR.

4 YOUR HONOR, THIS CASE PRESENTS A NARROW ISSUE: CAN
5 THE DEPARTMENT OF ENERGY, THE DOE, ARROGATE TO ITSELF POWERS
6 VESTED IN THE CONGRESS, POWERS WHICH THE CONGRESS AT THIS VERY
7 TIME IS IN THE PROCESS OF EXERCISING FOR THE BENEFIT OF THE
8 PEOPLE OF THE STATE OF NEW MEXICO?

9 THE COURT: WHAT IS THE STATUS OF THE MATTER IN
10 CONGRESS NOW?

11 MR. UDALL: YOUR HONOR, I WAS OVER THERE LAST WEEK.
12 WE HAD A HEARING. THERE HAVE BEEN SEVERAL HEARINGS. THERE'S
13 BEEN ONE ABOUT A MONTH AGO IN THE HOUSE INTERIOR COMMITTEE AND
14 THE BILL PASSED THAT COMMITTEE. LAST WEEK, ON TUESDAY, THERE
15 WAS A HEARING BEFORE THE ENERGY AND POWER SUBCOMMITTEE OF
16 ENERGY AND COMMERCE, AND THEY HAD A MARKUP YESTERDAY, AND THE
17 BILL HAS BEEN MARKED UP AND IS GOING OUT OF THE FULL COMMITTEE.
18 MY UNDERSTANDING IS IT WILL BE ON THE FLOOR OF THE HOUSE OF
19 REPRESENTATIVES NEXT WEEK, YOUR HONOR.

20 THE SENATE HAS NOT PASSED AN IDENTICAL PIECE OF
21 LEGISLATION, BUT THERE IS A PIECE OF LEGISLATION THAT TOLLS THE
22 WIPP ISSUE. IT HAS PASSED THE UNITED STATES SENATE. SO WE'RE
23 PROBABLY, YOUR HONOR, IN A POSITION WHERE, IF THE HOUSE GETS
24 ITS BILL OUT NEXT WEEK, WE'RE TALKING ABOUT A CONFERENCE
25 COMMITTEE, THE PRESIDENT COULD WELL HAVE A BILL ON HIS DESK

1 THAT DEALS WITH THIS ISSUE SOMETIME BEFORE THANKSGIVING.

2 I WILL TELL THE COURT, AND COUNSEL FOR THE DEFENDANTS
3 MAY BE ABLE TO ELUCIDATE AT THEIR TURN MORE ON THIS, BUT
4 SECRETARY WATKINS HAS TOLD THE CONGRESS IN NO UNCERTAIN TERMS
5 THAT IF HE DOESN'T GET CERTAIN PROVISIONS IN THE BILL, HE IS
6 RECOMMENDING A VETO, SO THERE IS A THREAT OF A VETO OF THE
7 PIECE OF LEGISLATION.

8 THE COURT: ALL RIGHT. AND BEFORE YOU GO INTO YOUR
9 ARGUMENT, CAN YOU TELL ME EXACTLY WHERE THIS IS LOCATED?

10 MR. UDALL: SURE, YOUR HONOR.

11 THE COURT: I KNOW IT'S IN NEW MEXICO. I KNOW IT'S
12 NEAR -- I GATHER IT'S NEAR CARLSBAD; IS THAT RIGHT? I'VE BEEN
13 TO NEW MEXICO, AND I'VE BEEN TO CARLSBAD FOR THE OBVIOUS
14 REASON, TO GO TO THE CAVERNS. HOW CLOSE IS THIS TO THE
15 CAVERNS?

16 MR. UDALL: THIS -- OH, I THINK I HAVE -- I WANTED TO
17 GET THE EXACT MILEAGE FOR YOU, YOUR HONOR. IT'S 26 MILES
18 SOUTHEAST OF CARLSBAD, NEW MEXICO, 2100 FEET BELOW THE GROUND
19 IN SOME SALT CAVERNS.

20 THE COURT: AND HOW ARE THE CAVERNS REACHED? I MEAN,
21 THE MINES?

22 MR. UDALL: THERE'S A HUGE SHAFT -- IT'S SET UP LIKE A
23 TYPICAL MINING OPERATION, YOUR HONOR, WITH A SHAFT AND AN
24 ELEVATOR THAT GOES DOWN. YOU'LL SEE THROUGHOUT THE DAY VARIOUS
25 PHOTOGRAPHS. THE ONE OVER HERE ON MY RIGHT, ALL THE WAY TO THE

1 RIGHT IS A PICTURE OF A PART OF THE UNDERGROUND DOWN THERE. I
2 THINK THE GOVERNMENT HAS PROVIDED US WITH SOME PHOTOGRAPHS.

3 THE COURT: ALL RIGHT.

4 MR. UDALL: YOUR HONOR, THE ISSUE, AS I SAID, IS A
5 NARROW ONE, THE POWERS WHICH, IF EXERCISED BY THE DEPARTMENT OF
6 ENERGY, IRREPARABLY INJURE THE INTERESTS AND RIGHTS OF THE
7 STATE OF NEW MEXICO AND ITS 1.5 MILLION CITIZENS.

8 THIS PROCEEDING IS A CASE, NOT A CAUSE. THIS IS A
9 CASE NOT ABOUT AN ANTINUCLEAR ATTITUDE IN NEW MEXICO. IT'S NOT
10 ABOUT THE RECENT ACRONYM THAT'S USED WITH ENVIRONMENTAL
11 OPPOSITION, NIMBY, NOT IN MY BACKYARD. IN FACT, THE NUCLEAR
12 AGE BEGAN IN NEW MEXICO WITH THE MANHATTAN PROJECT IN THE
13 1940'S. THE FIRST TEST OF THE ATOMIC BOMB WAS AT ALAMOGORDO AT
14 THE TRINITY SITE. THE NATIONAL LABORATORIES CONTINUE, YOUR
15 HONOR, TO BE VERY MUCH A PART OF NEW MEXICO, AND IT'S A VERY --
16 I CAN TELL YOU A VERY RARE EVENT, AN UNUSUAL EVENT FOR THE
17 STATE OF NEW MEXICO TO FILE THIS TYPE OF LAWSUIT.

18 THIS CASE IS AN EFFORT BY THE STATE TO STOP THE
19 FEDERAL GOVERNMENT FROM BETRAYING A PROMISE WHICH HAD BEEN KEPT
20 FOR TEN YEARS, BUT ABRUPTLY ABANDONED WHEN FRUSTRATION,
21 INEPTITUDE OR OUTSIDE PRESSURE OR ALL OF THESE CHANGED THE
22 GOVERNMENT'S COURSE.

23 YOUR HONOR, MY ARGUMENT WILL COVER THE EVENTS WHICH
24 LED UP TO THE DEPARTMENT OF INTERIOR'S -- I'LL BE CALLING IT
25 THE DOI -- UNEXPLAINED AND UNJUSTIFIED DECISION; THE ILLEGALITY

1 OF THE GOVERNMENT'S COURSE; WHY THE GOVERNMENT ACTION SHOULD BE
2 ENJOINED; AND THEN, FINALLY, I'LL DEAL WITH THE SUMMARY
3 JUDGMENT ISSUE, AND CONCLUDE MY ARGUMENT.

4 THE CRUX OF THIS CASE INVOLVES A SOLEMN PROMISE BY THE
5 DEPARTMENT OF INTERIOR AND THE DEPARTMENT OF ENERGY TO THE
6 STATE OF NEW MEXICO THAT RADIOACTIVE WASTE WOULD ONLY BE
7 INTRODUCED AT THAT WIPP SITE THROUGH LEGISLATION SOUGHT FROM
8 THE CONGRESS. FROM THE START OF THIS PROJECT, THIS PROMISE WAS
9 CONTAINED IN CONGRESSIONAL TESTIMONY, IN BUDGET DOCUMENTS, IN
10 LETTERS BACK AND FORTH BETWEEN ASSISTANT SECRETARIES AND THE
11 DEPARTMENT OF ENERGY AND THE DEPARTMENT OF INTERIOR, IN VARIOUS
12 PUBLIC LAND ORDERS, WHICH I'LL BE PRESENTING TO YOU IN A
13 MINUTE. AND ALL OF THESE, THE PUBLIC LAND ORDERS, CONTROL THE
14 ACTIVITIES OF THESE TWO DEPARTMENTS.

15 BUT THE PROMISE WAS SOMETHING MORE THAN THIS BROKEN
16 WORD. IT WAS EMBODIED IN THE LAW BY THE ISSUANCE OF A PUBLIC
17 LAND ORDER IN EARLY 1982. THIS DOI ORDER, PURSUANT TO FLPMA,
18 THE FEDERAL LAND POLICY AND MANAGEMENT ACT, WITHDREW
19 APPROXIMATELY 8900 ACRES OF BLM LAND FOR SITE PREPARATION AND
20 PRELIMINARY DESIGN, SITE PREPARATION AND DESIGN. THE LAND
21 ORDER HAD AN ACCOMPANYING MEMORANDUM, WHICH PROHIBITED THE
22 INTRODUCTION OF RADIOACTIVE WASTE.

23 LATER THAT YEAR, DOI ASSISTANT SECRETARY CARRUTHERS
24 WROTE TO DOI ASSISTANT SECRETARY ROSER IN RESPONSE TO DOE'S
25 INTENTION TO BEGIN CONSTRUCTION OF THE FACILITIES IN JULY OF

1 '83. AND I HAVE A HANDOUT AT THIS POINT, BECAUSE THESE ARE TWO
2 CRUCIAL DOCUMENTS, YOUR HONOR, IN THIS PARTICULAR CASE. AND
3 I'D LIKE TO PASS THESE FORWARD WITH THE COURT'S PERMISSION.

4 YOUR HONOR, THE LETTER I'VE SPOKEN ABOUT IS THE FIRST
5 PAGE OF THIS, AND IT'S HIGHLIGHTED FOR YOU. THE LETTER STATES:

6 "MOREOVER, THIS DEPARTMENT WILL NOT AUTHORIZE OR ALLOW
7 THE PROPOSED WIPP SITE AT LOS MEDANOS TO BE USED FOR THE
8 TEMPORARY STORAGE OR PERMANENT BURIAL OF ANY
9 DEFENSE-RELATED NUCLEAR WASTE IN THE ABSENCE OF APPROPRIATE
10 LEGISLATION RESERVING, OR DIRECTING THE SECRETARY OF
11 INTERIOR TO RESERVE, THE SITE FOR THE STORAGE, OR BURIAL OF
12 NUCLEAR WASTE."

13 IN ACCORDANCE WITH THE DOE'S REQUEST TO CONSTRUCT THE
14 SITE, DOI ISSUED ANOTHER PUBLIC LAND ORDER IN JUNE OF 1983,
15 WHICH ALLOWED CONSTRUCTION, BUT SPECIFICALLY STATED -- AND THAT
16 IS AT THE SECOND PAGE OF THE DOCUMENT THAT I JUST GAVE YOU.
17 THAT PUBLIC LAND ORDER STATES, YOUR HONOR, AND THIS IS THE
18 VERSION FROM THE FEDERAL REGISTER, "THIS ORDER DOES NOT
19 AUTHORIZE THE USE OR OCCUPANCY OF THE LANDS HEREBY WITHDRAWN
20 FOR THE TRANSPORTATION, STORAGE OR BURIAL OF ANY RADIOACTIVE
21 MATERIALS," EXCEPT VARIOUS GEOLOGICAL INSTRUMENTS AND
22 RADIOLOGICAL INSTRUMENTS.

23 YOUR HONOR, BOTH PUBLIC LAND ORDERS WERE FOLLOWED BY
24 REPORTS TO CONGRESS, AS IS MANDATED BY FLPMA. THESE PUBLIC
25 LAND ORDERS WERE ISSUED UNDER FLPMA. THIS IS A LAW WHICH

1 TIGHTLY CONSTRAINS THE LIMITS OF THE EXECUTIVE'S POWER TO
2 WITHDRAW LAND, THUS RESERVING FOR CONGRESS ITS CONSTITUTIONAL
3 POWER TO DISPOSE OF THE PUBLIC LANDS. ONE OF THESE LIMITATIONS
4 DIRECTS THE WITHDRAWAL, ONCE MADE, CANNOT BE EXTENDED FOR A
5 PURPOSE DIFFERENT FROM THE PURPOSE OF THE INITIAL WITHDRAWAL.
6 AND THAT SECTION IN FLPMA, YOUR HONOR, INDICATES: "ONLY IF THE
7 SECRETARY DETERMINES THAT THE PURPOSE FOR WHICH THE WITHDRAWAL
8 WAS FIRST MADE REQUIRES THE EXTENSION."

9 THIS LAW, TOGETHER WITH THE RESTRICTIONS IN 1982 AND
10 '83 IN THE PUBLIC LAND ORDERS, WORKED TO ASSURE THE PEOPLE OF
11 NEW MEXICO THAT ANY INTRODUCTION OF RADIOACTIVE WASTE WOULD
12 TAKE PLACE ONLY BY LEGISLATION.

13 LEGISLATION WAS INTRODUCED IN 1987, BUT NO REAL ACTION
14 WAS TAKEN.

15 THE SECRETARY OF ENERGY WAS NO DOUBT FRUSTRATED BY THE
16 LACK OF CONGRESSIONAL ACTION ON ONE OF HIS TOP PRIORITY
17 PROJECTS.

18 ONCE AGAIN, IN APRIL OF 1989, DOI SECRETARY LUJAN
19 FOLLOWED IN THE COURSE OF THREE CABINET SECRETARIES, AND
20 REITERATED TO HIS BLM DIRECTOR THAT HE WAS STICKING WITH THE
21 DEPARTMENT'S POSITION TAKEN IN 1982, NO WASTE UNLESS
22 LEGISLATION.

23 THEN SOMETHING CHANGED. A DECISION WAS MADE NOT TO
24 HONOR THE PROMISE THAT HAD BEEN PUT INTO LAW. A DECISION WAS
25 MADE NOT TO FOLLOW THE LAW. WHY DID THIS HAPPEN? THE

1 ADMINISTRATIVE RECORD, WHICH IS MASSIVE IN THIS CASE, GIVES US
2 VERY, VERY LITTLE INDICATION. WE KNOW THAT THE LEGISLATION WAS
3 NOT MOVING. WE KNOW THAT THE DOE HAD ANNOUNCED IN 1998 THAT IT
4 WANTED TO OPEN THE SITE.

5 WE KNOW THAT DOE'S OWN EXPERT PANEL, A BLUE RIBBON
6 PANEL APPOINTED BY THE SECRETARY, TALKED ABOUT PRESSURES, AND
7 AN OBSESSION FOR GETTING THE WASTE INTO THE SITE, EVEN THOUGH
8 THEY FELT -- THIS SAME PANEL, AND ONE OF THE MEMBERS SAID HE
9 FELT THERE WAS VERY LITTLE SCIENTIFIC VALUE.

10 IN THIS PERIOD WE ALSO KNOW THAT DOE WAS UNDER INTENSE
11 SCRUTINY FROM THE CONGRESSIONAL OFFICE OF TECHNOLOGY
12 ASSESSMENT. IN A WIDELY PUBLISHED REPORT IN FEBRUARY OF 1991,
13 IT INDICATED THAT THE DOE LACKED CREDIBILITY AND CAPABILITY TO
14 CLEAN UP THE CONTAMINATION THAT HAD OCCURRED AT THE WASTE SITES
15 ACROSS -- AT THE NUCLEAR WEAPONS PLANTS ACROSS THE COUNTRY, AND
16 INDICATED A SUBSTANTIAL PUBLIC DISTRUST OF THE METHODS AND
17 MOTIVATIONS OF DOE.

18 THEN, ON OCTOBER 3RD, 1991, THE DOE BROKE THE
19 LONG-KEPT PROMISE BY ISSUING A NOTICE TO PROCEED TO ALLOW THE
20 DOE TO INTRODUCE RADIOACTIVE WASTE TO THE WIPP SITE. THE 1991
21 WITHDRAWAL UNDER WHICH THE DEPARTMENT OF INTERIOR ACTED ON
22 OCTOBER 3RD WAS GRANTED IN RESPONSE TO DOE'S EXPRESS REQUEST TO
23 EXTEND AND CHANGE THE PURPOSE -- CHANGE THE PURPOSE, CONTRARY
24 TO FLPMA. THE DOI SPECIFICALLY STATED THAT THE DOE REQUEST WAS
25 A REQUEST FOR A MODIFICATION TO CHANGE THE PURPOSE AND TO

1 EXTEND THE TERM OF THE PUBLIC LAND ORDER. THE CHANGE OF
2 PURPOSE, YOUR HONOR, WAS TO INTRODUCE THE RADIOACTIVE WASTE.

3 THIS WAS AN UNLAWFUL CHANGE, AND THE SECRETARY OF
4 INTERIOR FAILED TO MAKE THE FINDING CALLED FOR IN FLPMA,
5 BECAUSE HE COULD NOT DO SO. HE FAILED TO MAKE A REPORT TO
6 CONGRESS, ALTHOUGH IT WAS MANDATORY TO DO SO UNDER THE LAW.
7 AND HE HAD DONE SO ON TWO PREVIOUS OCCASIONS.

8 ON THIS RECORD, YOUR HONOR, WE HAVE A SUBSTANTIAL
9 LIKELIHOOD OF SUCCESS ON THE MERITS, WHEN YOUR HONOR GETS TO
10 THE MERITS OF THIS CLAIM.

11 THERE ARE A NUMBER OF OTHER SIGNIFICANT VIOLATIONS, AS
12 ARE INDICATED BY THIS CHART, WHICH I DON'T HAVE TIME TO GO INTO
13 NOW, BUT WHICH ARE JUST AS SERIOUS AS THE ONE THAT I'VE
14 OUTLINED.

15 AT THIS TIME, I NEED THE CHART. MAY I PLEASE HAVE THE
16 CHART ON RETRIEVABILITY AND IRREPARABLE HARM.

17 YOUR HONOR, THE ISSUE BEFORE THIS COURT IS WHETHER OR
18 NOT THE STATE OF NEW MEXICO IS ENTITLED TO AN INJUNCTION. THE
19 STANDARD IS FOUR-FOLD. I WILL ADDRESS EACH OF THESE AND FOCUS
20 MY EFFORTS ON IRREPARABLE HARM, WHICH IS THE AREA THE
21 DEPARTMENT OF ENERGY HAS SO STRONGLY CHALLENGED.

22 LIKELIHOOD OF SUCCESS ON THE MERITS. OPPOSING COUNSEL
23 CITES THE AMOCO CASE, AND SAYS YOU SHOULD NOT GRANT AN
24 INJUNCTION FOR EVERY VIOLATION OF A STATUTE. OF COURSE THAT'S
25 TRUE. THERE ARE NO AUTOMATIC INJUNCTIONS FOR STATUTORY

1 VIOLATIONS.

2 COURTS OF CHANCELLERY, WHERE YOU SIT AS A COURT OF
3 CHANCELLERY, YOU AREN'T MECHANICALLY OBLIGATED TO ISSUE AN
4 INJUNCTION. BUT THE COURT ALSO SAID LOOK, YOUR HONOR, AT THE
5 UNDERLYING SUBSTANTIVE POLICY OF THE LAW. AND THE LAW IN
6 QUESTION, THIS IS FLPMA IN THIS CASE, WAS DESIGNED TO TIGHTLY
7 CONSTRAIN THE EXECUTIVE AND PRESERVE FOR CONGRESS ITS
8 CONSTITUTIONAL POWER, THE RIGHT TO DISPOSE OF PUBLIC LANDS.

9 AS FOR NEPA, THE UNDERLYING POLICY WAS TO INSURE A
10 RIGOROUS EVALUATION OF ENVIRONMENTAL ALTERNATIVES. ALLOWING
11 WASTE INTO THIS SITE COMPLETELY UNDERMINES BOTH LAWS, BECAUSE
12 THE CONGRESS WILL BE PRECLUDED FROM EXERCISING ITS
13 CONSTITUTIONAL DUTY AND CONSTITUTIONAL RIGHT TO DISPOSE OF
14 PUBLIC LANDS.

15 IRREPARABLE HARM? BRINGING WASTE TO THIS SITE, YOUR
16 HONOR, CAUSES ENORMOUS RISKS. GOVERNMENT EXPERTS LOOKED AT THE
17 STABILITY OF THE TEST ROOM, AND CALLED IT QUESTIONABLE. NOBODY
18 GIVES IT MORE THAN SEVERAL YEARS, WITH DECREASING CONFIDENCE
19 AFTER SEVERAL YEARS. AND MIND YOU, THIS IS A ROOM THAT IS
20 HOLLOWED OUT IN A SALT CAVERN THAT THE DESIGN IS BASICALLY FOR
21 FIVE YEARS, AND WE'RE TALKING ABOUT ROOMS THAT ARE MORE THAN
22 FIVE YEARS OLD. THE ROOM FOR THE TEST WASTE IS MORE THAN FIVE
23 YEARS OLD, AND YET, THEY WANT TO DO NINE YEARS OR TEN YEARS OF
24 TESTS IN THAT ROOM.

25 OUR EXPERT SCIENTISTS, EXPERT SCIENTISTS THROUGHOUT

1 THE GOVERNMENT, AND IN PARTICULAR OURS, GIVE A TELLING PICTURE
2 OF WHAT COULD HAPPEN. THEY TALK OF A PRESENT DANGER OF
3 COLLAPSE, IMMINENT DANGER OF COLLAPSE, IRRESPONSIBILITY TO
4 START A SCIENTIFIC PROJECT OF THIS NATURE.

5 IN FACT, ONE SUGGESTION, WHEN THE DOE PULLED TOGETHER
6 A PANEL TO LOOK AT ROOM STABILITY, ONE SUGGESTION, WHICH SEEMED
7 SO SIMPLE AT THE TIME, RECARVED THE ROOM, SO THAT YOU COULD AT
8 LEAST START, START WITH A NEW ROOM, A ROOM THAT WOULD AT LEAST
9 LAST FOR FIVE YEARS. COMPLETELY IGNORED BY THE DEPARTMENT OF
10 ENERGY.

11 THE DECREASING DETERIORATION OF THE ROOMS IS EVIDENCED
12 BY FIVE MAJOR COLLAPSES IN 1991. JUDGE, EVEN SINCE WE WERE
13 LAST HERE IN YOUR COURTROOM, AND WE TALKED ABOUT THESE
14 COLLAPSES, THERE WAS ONE ON OCTOBER 23RD OF 70 TONS.

15 WITH YOUR HONOR'S PERMISSION, I'D LIKE TO JUST
16 APPROACH THIS PHOTO OVER HERE BRIEFLY --

17 THE COURT: YES.

18 MR. UDALL: -- AND GIVE YOU A LITTLE INDICATION OF
19 WHAT YOU'RE LOOKING AT.

20 YOUR HONOR, THIS PHOTOGRAPH SHOWS A ROOM VERY MUCH
21 LIKE THE TEST ROOM, WHERE THIS ROOM HAD A COLLAPSE EARLIER THIS
22 YEAR. THE ROOM SIZE IS 33 FEET WIDE, AND THE LIGHT YOU SEE
23 HERE IN THE BACK IS 300 FEET AWAY.

24 THE HUNK OF ROCK SALT THAT FELL OFF THE ROOF IS 180
25 FEET LONG, THAT'S THE PILE YOU SEE SITTING IN THE MIDDLE OF THE

1 PHOTOGRAPH. ITS WEIGHT IS MORE THAN A THOUSAND TONS. IN
2 LENGTH HALF A FOOTBALL FIELD, MORE THAN HALF A FOOTBALL FIELD.

3 THIS MATERIAL THAT LOOKS LIKE NETTING IS ACTUALLY VERY
4 HEAVY GAUGE STEEL, WHICH WAS SHEARED BY THE FALL.

5 THIS IS EXACTLY THE TYPE OF ROOM THAT THE DEPARTMENT
6 OF ENERGY PROPOSES TO PUT THE RADIOACTIVE WASTE IN TO DO TESTS.

7 OPPOSING COUNSEL WOULD HAVE YOU BELIEVE THE AMOCO CASE
8 PRECLUDES AN INJUNCTION, BECAUSE IRREPARABLE INJURY IS NOT
9 SUFFICIENTLY LIKELY. WHAT THEY DO NOT TELL YOU IS THAT THE
10 DISTRICT COURT IN AMOCO FOUND THAT INJURY WAS NOT PROBABLE. WE
11 ACCEPT THE AMOCO CASE, THAT IF ENVIRONMENTAL HARM IS
12 SUFFICIENTLY LIKELY, THEN AN INJUNCTION SHOULD ISSUE IN AN
13 ENVIRONMENTAL CASE.

14 WHAT MORE DO THEY WANT? WE HAVE FOUR OR FIVE
15 AFFIDAVITS. WE COULD BRING IN FOURTEEN OR FIFTEEN. BUT THE
16 INDICATIONS ARE FROM SCIENTISTS, YOUR HONOR, THAT THIS ROOM IS
17 IN A STATE OF DECAY, IMMINENT COLLAPSE, CLEAR AND PRESENT
18 DANGER. THOSE ARE THE TYPES OF TERMS THAT ARE BEING USED.

19 THE COURT: NOW, ASSUMING THAT THIS WAS USED AS A
20 PERMANENT FACILITY -- THAT WAS SORT OF THE IDEA, WASN'T IT,
21 THAT THE ROOM MAY COLLAPSE, BUT EVERYTHING WOULD BE SEALED IN,
22 I THINK?

23 MR. UDALL: ABSOLUTELY, YOUR HONOR, THE WHOLE -- YOU
24 HIT IT RIGHT ON THE HEAD. THE WHOLE IDEA IS THAT THESE
25 CAVERNS, AFTER YOU HOLLOW THEM OUT, TAKE SALT OUT OF THE

1 MIDDLE, WILL CREEP IN, WILL MOVE IN.

2 ONE THING THEY FOUND OUT IS THAT THEY'RE CREEPING IN
3 AT THREE OR FOUR TIMES THE RATE THAT THEY BELIEVED THEY WOULD
4 IN THE FIRST PLACE. THEY CREEP IN, AND IF YOU HAVE WASTE THERE
5 ON A PERMANENT BASIS, THE IDEA IS IT WOULD MOVE IN, CRUSH THE
6 WASTE, AND ENTOMB IT.

7 THE COURT: WHAT CAUSES THE CAVERN TO "CREEP IN," AS
8 YOU SAY?

9 MR. UDALL: THE PRESSURES, YOUR HONOR. WHEN YOU
10 TAKE -- THE PRESSURES THAT ARE INVOLVED WHEN YOU TAKE A CHUNK
11 OF IT OUT OF THE MIDDLE, THE PRESSURES COMING FROM THE OUTSIDE
12 AND FROM THE EARTH MOVE IT IN.

13 YOUR HONOR, OPPOSING COUNSEL WOULD HAVE YOU BELIEVE
14 THAT ONCE THE WASTE IS IN THE SITE, IT CAN BE RETRIEVED. LET'S
15 LOOK AT THE FACTS.

16 YOUR HONOR, I'D LIKE TO APPROACH THIS CHART OVER HERE
17 ON RETRIEVABILITY. BUT BEFORE I DO THAT, LET ME HAND YOU UP AN
18 EXHIBIT, TWO COPIES OF AN EXHIBIT.

19 THAT EXHIBIT, YOUR HONOR, THAT EXHIBIT IS A
20 SECRETARIAL BRIEFING FOR SECRETARY MANUEL LUJAN. THIS BRIEFING
21 WAS BELIEVED TO HAVE OCCURRED ON JANUARY 22ND OF 1990. AND YOU
22 WILL SEE IN THE BRIEFING THIS IS THE ONLY DISCUSSION IN THE
23 RECORD ABOUT RETRIEVABILITY, ONE OF THE MOST CRUCIAL FACTS TO
24 THE ENTIRE CASE. THIS IS THE ONLY DISCUSSION.

25 AND YOU'LL SEE ON PAGE 2, WHERE THEY TALK ABOUT THE

1 CHRONOLOGY, IN JUNE OF '83, THE ASSUMPTION WAS THAT DOE WOULD
2 GET WIPP LEGISLATION BEFORE THE CONSTRUCTION PHASE WOULD BE
3 COMPLETED.

4 IN APRIL OF '89, THE ASSUMPTION WAS DOE WOULD GET WIPP
5 LEGISLATION BEFORE THE TESTING PHASE WOULD BE COMPLETED.

6 ON PAGE 3, IT TALKS ABOUT THE LIFE OF THE WASTE, A
7 QUARTER OF A MILLION YEARS.

8 AND ON PAGE 6, WHICH IS THE OPTION THAT WAS FOLLOWED,
9 IT SAYS, OPTION NO. 1 -- THIS WAS THE OPTION THAT WAS FOLLOWED
10 BY THE GOVERNMENT -- IT TALKS ABOUT THE PROS, "THE SECRETARY OF
11 ENERGY WOULD BE PLEASED."

12 BUT THE CONS, THE CONS ARE ABSOLUTELY CRUCIAL. WHY
13 DOI CHANGED ITS -- IT WOULD BE DIFFICULT EXPLAINING WHY DOI
14 CHANGED ITS '83 POLICY THAT IT WOULD REQUIRE LEGISLATION. AND
15 THEN THE CRUCIAL LANGUAGE, THE CRUCIAL LANGUAGE ON
16 RETRIEVABILITY:

17 "RETRIEVABILITY ISN'T REALISTIC UNLESS DOE DETERMINES
18 THAT THE SITE IS UNACCEPTABLE. BESIDES COST FACTORS OF
19 RETRIEVABILITY, THERE WOULD BE MUCH CONTROVERSY AND
20 DIFFICULTY IN FINDING A PLACE."

21 THAT'S THE CRUCIAL POINT HERE. THERE'S NO PLACE TO
22 TAKE THIS AFTER IT COMES INTO NEW MEXICO. THE STATE OF IDAHO,
23 WHERE MUCH OF IT SITS, THE GOVERNOR HAS DECLARED WAR ON THE
24 DOE, AND SAYS HE DOESN'T WANT ANY MORE WASTE IN, AND BELIEVE
25 ME, IF WASTE LEAVES THERE, HE'S NOT GOING TO HAVE ANY MORE

1 BACK.

2 YOUR HONOR, ON RETRIEVABILITY, YOU CAN SEE THIS IS THE
3 EXHIBIT WE JUST TALKED ABOUT. ONE OF THE ABSOLUTELY CRUCIAL
4 FACTORS IS THE MOTIVATION FOR THIS ENTIRE TEST PHASE. THE TEST
5 RETRIEVABLE PLAN WAS ONLY CREATED -- THE IDEA OF RETRIEVABILITY
6 WAS BASICALLY ONLY CREATED IN 1988, AFTER A LEGISLATIVE
7 FAILURE. AND DOE'S OWN PANEL, THE SECRETARY'S BLUE RIBBON
8 PANEL, ONE OF THE MEMBERS TALKS ABOUT AN "OBSESSION" AND
9 "OVERZEALOUSNESS IN TRYING TO MOVE THE WASTE INTO THE SITE."

10 AS WE POINTED OUT EARLIER, THE SITE WAS DESIGNED TO
11 COLLAPSE. THE ROOMS ARE COLLAPSING, FIVE OF THEM THIS YEAR.
12 DOE'S OWN PANEL WOULD NOT SAY THAT THE ROOMS WILL SURVIVE FOR
13 THE TESTS, WITH THE YEARS MAYBE WITH DECREASING CONFIDENCE.

14 THEN OPPOSING COUNSEL'S ARGUMENT IS THAT THEY HAVE A
15 WARNING SYSTEM, SO THAT THE WASTE CAN BE RETRIEVED. YOUR
16 HONOR, DOE'S OWN EXPERTS, THEIR OWN EXPERTS SAY THERE'S NO
17 WARNING SYSTEM DEvised TO GIVE DOE THE SIX MONTHS' SAFE ACCESS
18 REQUIRED TO RETRIEVE WASTE.

19 DOE'S OWN BOLT SUPPORT SYSTEM ACTUALLY MASKS THE
20 WARNING. AND EXPERT AFFIDAVITS INDICATE THE TEST ROOMS ARE
21 PRESENTLY IN A PRECOLLAPSE STATE AND WILL COLLAPSE EARLY INTO
22 THE TEST PERIOD.

23 THE TESTS THEMSELVES, YOUR HONOR, HAVE ABSOLUTELY NO
24 SCIENTIFIC VALUE IN TERMS OF DOING THEM IN THE SITE.
25 SCIENTISTS, DOE SCIENTISTS, OUR SCIENTISTS, BECAUSE THESE TESTS

1 ARE IN MOVEABLE SEALED BINS, THE TESTS CAN BE DONE ANY PLACE,
2 ABSOLUTELY ANY PLACE. SO WHAT IS THE REASON FOR MOVING IT 2500
3 MILES, ALL THE WAY DOWN TO NEW MEXICO, TO PUT THOSE BINS IN
4 THERE? I THINK THAT'S -- THAT'S THE QUESTION TO BE ANSWERED.

5 YOUR HONOR, THERE IS NO RETRIEVABILITY PLAN. THE
6 GOVERNMENT'S PLAN IS NOT A REAL PLAN. IT'S JUST A WAY TO GET
7 THE WASTE IN, NOT A WAY TO GET THE WASTE OUT.

8 IN ORDER TO CONVINCING YOU OF RETRIEVABILITY, I THINK
9 YOU NEED TO ASK COUNSEL: WHERE DOES THE WASTE GO? WHO'S GOING
10 TO MOVE IT? WHAT FACILITY DOES IT GO TO?

11 THE BOTTOM LINE IS, THAT ONCE IT COMES IN, YOUR HONOR,
12 IT DOESN'T GO OUT. THE GOVERNMENT AGAIN CITES THE AMOCO CASE.
13 WELL, THERE'S SOME VERY -- VERY, VERY PERSUASIVE LANGUAGE IN
14 THE SUPREME COURT AMOCO CASE. "ENVIRONMENTAL INJURY BY ITS
15 NATURE CAN SELDOM BE ADEQUATELY REMEDIED BY MONEY DAMAGES, AS
16 IT IS OFTEN PERMANENT OR AT LEAST OF LONG DURATION, I.E.,
17 IRREPARABLE. IF SUCH INJURY IS SUFFICIENTLY LIKELY, THEREFORE,
18 THE BALANCE OF HARMS WILL USUALLY FAVOR THE ISSUANCE OF
19 INJUNCTIONS TO PROTECT THE ENVIRONMENT." YOUR HONOR, THAT'S
20 EXACTLY THE CASE THAT WE HAVE HERE.

21 THE THIRD FACTOR, EXTENT OF HARM TO OTHERS AND TO THE
22 DEFENDANTS. THERE IS NO HARM, YOUR HONOR, IF THEY'RE NOT
23 ALLOWED TO PROCEED WITH THE TEST PHASE. THESE TESTS, AS I SAID
24 BEFORE, CAN BE DONE AT OTHER LOCATIONS. THE DATA FROM THEM CAN
25 BE ACHIEVED MORE QUICKLY AND MORE SAFELY.

1 OPPOSING COUNSEL WOULD HAVE YOU BELIEVE THAT THEY WILL
2 LOSE THIRTEEN MILLION DOLLARS A MONTH IF THE TEST PHASE DOESN'T
3 GO FORWARD, BUT THEN THEY ADMIT IN THEIR BRIEF AT PAGE 43,
4 THEY'RE GOING TO CONTINUE, THE COSTS WILL CONTINUE, QUOTE,
5 WHETHER OR NOT -- "CONTINUE WHETHER OR NOT THE TEST PHASE GOES
6 FORWARD."

7 OPPOSING COUNSEL WOULD HAVE YOU BELIEVE THESE TESTS
8 NEED TO PROCEED BECAUSE IT'S A CRITICAL PATH, AND YOU DO THE
9 FIRST TEST, AND THERE'S A BUILDING BLOCK, AND YOU BUILD ON THE
10 SECOND TEST. THE PROBLEM WITH THAT IS THAT WHEN YOU HAVE
11 TESTS, YOUR HONOR, THAT ARE DONE, AND YOU HAVE THE SECRETARY'S
12 OWN BLUE RIBBON PANEL SAYING THEY LACK -- VERY LITTLE
13 SCIENTIFIC VALUE, VERY USEFUL DATA, WHAT ARE THEY GOING DO
14 BUILD ON? THERE'S NO BLOCK TO BUILD ON. THE DRY BIN SCALE
15 TESTS, THE ONLY TESTS THAT ARE PROPOSED, ARE CONSIDERED TO BE
16 VIRTUALLY USELESS IN TERMS OF DOING THEM DOWN IN THE SITE FOR
17 GENERATING INFORMATION ON THE SITE. EMINENT SCIENTISTS SAY
18 THERE'S NOTHING TO BE GAINED BY DOING THESE TESTS ON SITE.
19 THESE SCIENTISTS ALSO SAY THAT THESE TESTS COULD BE DONE
20 ANYWHERE.

21 THE LAST FACTOR, YOUR HONOR, THE PUBLIC INTEREST,
22 OPPOSING COUNSEL WOULD HAVE YOU BELIEVE THAT THE TEST PHASE
23 MUST GO FORWARD TO SOLVE THE NUCLEAR WASTE PROBLEM FOR THE
24 COUNTRY. HOWEVER, THE CONGRESS SEES IT A LITTLE DIFFERENTLY,
25 AND HAS SOMETHING TO SAY ABOUT THE PUBLIC INTEREST. WHEN THE

1 DEPARTMENT OF INTERIOR PUBLISHED ITS PUBLIC LAND ORDER TO GO
2 FORWARD THIS LAST JANUARY, THE HOUSE INTERIOR COMMITTEE, WHICH
3 IS THE COMMITTEE WITH THE MOST EXPERTISE ABOUT PUBLIC LANDS AND
4 WHO THE REPORT GOES TO, THE HOUSE INTERIOR COMMITTEE PASSED A
5 RESOLUTION STATING IT SHOULD DECIDE UNDER WHAT CONDITIONS WASTE
6 WOULD BE INTRODUCED AT THE SITE. CONGRESS STRONGLY INSISTED IN
7 ITS RESOLUTION THAT WASTE SHOULD NOT BE INTRODUCED UNTIL
8 CONGRESS GETS TO ACT.

9 IF OUR SET OF FACTS ARE TRUE, YOUR HONOR, THE WIPP
10 BECOMES A DE FACTO WASTE REPOSITORY. CLEARLY, THIS IS NOT IN
11 THE PUBLIC INTEREST AND DEPRIVES CONGRESS OF ITS CONSTITUTIONAL
12 ROLE TO DISPOSE OF PUBLIC LANDS.

13 YOUR HONOR, LET ME SPEND SEVERAL MINUTES -- LET ME
14 SPEND SEVERAL MINUTES ON THE CONGRESS, BECAUSE IT'S CRUCIAL
15 WHAT'S IN THIS LEGISLATION. AN INJUNCTION IS EXTRAORDINARY AND
16 ONLY ON COMPELLING FACTS SHOULD BE GRANTED. HOW CAN THEY BE
17 MORE COMPELLING THAN WHERE A FEDERAL AGENCY IS FLOUTING
18 CONGRESS WHILE CONGRESS IS AT WORK ON THIS ISSUE AND SEEKING TO
19 PROTECT THE PEOPLE OF NEW MEXICO ON THE VERY HEALTH AND SAFETY
20 MATTERS THAT DOE IS CONSCIOUSLY DISREGARDING? IT IS VITALLY
21 IMPORTANT THAT CONGRESS BE ALLOWED TO ACT. CONGRESS CAN
22 PROTECT THE PUBLIC IN CONCRETE WAYS. THESE ARE NOT MATTERS OF
23 ABSTRACT PRINCIPLE. THE BILLS THAT ARE BEFORE THE CONGRESS
24 TODAY WOULD PROVIDE SUBSTANTIAL HEALTH AND SAFETY PROTECTIONS
25 FOR NEW MEXICO.

1 CONGRESS IS ON THE VERGE OF PASSING LEGISLATION. ONE
2 OF THE PROVISIONS IN THE BILLS, YOUR HONOR, NO WASTE INTO THE
3 SITE UNLESS IT'S FOR THE PURPOSE OF SHOWING YOU COMPLY WITH DOE
4 STANDARDS. IT MUST BE NECESSARY TO SHOW COMPLIANCE -- EXCUSE
5 ME, EPA STANDARDS. IT MUST BE NECESSARY TO SHOW THAT YOU CAN
6 COMPLY WITH ENVIRONMENTAL PROTECTION AGENCY STANDARDS.

7 IT'S DOUBTFUL, YOUR HONOR, UNDER THAT TEST THAT IS
8 BEING -- THAT IS BEING CRAFTED INTO A PIECE OF LEGISLATION,
9 THAT THIS TEST WASTE COULD EVEN COME INTO THE SITE. IF WASTE
10 IS ALLOWED UNDER THIS CONDITION, THEN VERY STRICT LIMITS ARE
11 PUT ON THE WASTE, MUCH STRICTER THAN WHAT THE DOE WOULD BE
12 ALLOWED AT THIS POINT IN TIME.

13 THE WHOLE ISSUE I TALKED TO YOU ABOUT OF STABILITY,
14 THE BUREAU OF MINES WOULD HAVE TO COME IN AND CERTIFY THAT THE
15 ROOM WAS GOING TO BE STABLE FOR THE TEST PERIOD.

16 NEW MEXICO, WHICH HAS LARGE NUMBERS OF RURAL ROADS,
17 SMALL LITTLE COUNTRY ROADS THAT NEED TO BE IMPROVED, WOULD HAVE
18 TO -- WOULD BE ABLE TO GET MONEY AS A RESULT OF THIS
19 LEGISLATION AND IMPROVE THE ROADS.

20 THE HOSPITALS AND THE EMERGENCY RESPONDER SYSTEM IN
21 NEW MEXICO, WHICH IS DEFICIENT NOW, WOULD BE ABLE TO GET MONIES
22 AND IMPROVE THEIR CAPABILITY TO DEAL WITH
23 RADIATION-CONTAMINATED PATIENTS.

24 THE COURT: WELL, AS I UNDERSTAND IT -- I TAKE IT THE
25 ROAD IMPROVEMENT GOES TO THE WEIGHT OF THIS WASTE; IS THAT

1 RIGHT? OR THE CONTAINERS?

2 MR. UDALL: YOUR HONOR, THE ROAD IMPROVEMENT GOES
3 TO -- MOST OF THIS WASTE, WHEN IT TRAVELS IN OTHER STATES, IS
4 ON INTERSTATE HIGHWAYS. WHEN IT COMES INTO NEW MEXICO, THE
5 ROUTES THAT HAVE BEEN DESIGNATED BY THE STATE HIGHWAY
6 DEPARTMENT TAKE IT AWAY FROM POPULATION CENTERS. VIRTUALLY ALL
7 OF THE TRAFFIC, IT'S ON LITTLE RURAL ROADS IN NEW MEXICO.
8 THOSE ROADS, OUR HIGHWAY PEOPLE IN NEW MEXICO FEEL THEY NEED TO
9 BE UPGRADED, THEY AREN'T AT THEIR OPTIMUM TO RECEIVE THESE
10 TYPES OF TRUCKS THAT ARE GOING TO CARRY THIS WASTE, AND THAT'S
11 WHAT THE ROAD MONIES WOULD BE USED FOR, IN ORDER TO IMPROVE
12 THOSE ROADS, IMPROVE THEIR -- AND BRING THEM UP TO THEIR
13 OPTIMUM LEVEL.

14 THE COURT: BUT, AS I RECALL, THE INITIAL TEST THAT
15 THE DEPARTMENT PROPOSES TO UNDERTAKE WOULD ONLY DEAL WITH A
16 CERTAIN TYPE OF WASTE, AND NOT THAT WASTE THAT MUST BE
17 CONTAINED IN LEAD CONTAINERS; IS THAT RIGHT?

18 MR. UDALL: YOUR HONOR, THE FIRST TEST, AND THE ONLY
19 TEST THAT THEY'RE PROPOSING TO GO FORWARD, IS CALLED A DRY BIN
20 SCALE TEST. THEY TAKE A BIN, WHICH WILL HOLD SIX -- FIVE OR
21 SIX FIFTY-FIVE GALLON DRUMS OF RADIOACTIVE WASTE, PUT IT INTO A
22 BIN. THE BIN IS THEN SEALED, AND THE -- IT'S SEALED, AND THE
23 PURPOSE IS TO DETERMINE THE GENERATION OF GAS IN A SEALED
24 ENVIRONMENT.

25 THE BIN COULD BE ANY PLACE. IT COULD BE IN IDAHO AT

1 THE LABORATORY -- AT THE INEL LABORATORY UP THERE, WHICH IS
2 WHERE MOST OF THIS -- 60 PERCENT OF THIS WASTE IS SITTING. IT
3 COULD BE AT LOS ALAMOS. IT COULD BE ANY PLACE. SO YOU DO NOT
4 NEED THE INTERACTION BETWEEN THE SALT CAVERNS AND THIS
5 PARTICULAR BIN. THE BIN SCALE TEST CAN BE DONE ALMOST
6 ANYWHERE. AND THAT'S THE ONLY TEST THAT THEY'RE PROPOSING TO
7 MOVE FORWARD.

8 THE OTHER SIGNIFICANT THING THAT SHOWS YOU THE HURRY
9 THEY'RE IN, YOUR HONOR, WITH REGARD TO THESE BINS AND THE
10 TRUCKS THAT YOU'VE BEEN ASKING ABOUT, IS THEY ONLY HAVE A SIXTH
11 OF A TRUCKLOAD RIGHT NOW LOADED UP, AND EVERYBODY KNOWS EVERY
12 TIME YOU BRING ONE OF THOSE TRUCKS DOWN THE HIGHWAY INCREASES
13 THE RISK. WHY AREN'T THEY LOADING UP A FULL TRUCKLOAD BEFORE
14 THEY COME DOWN? THE HURRIEDNESS, AS THE DOE PANEL MEMBER SAYS,
15 THE "OBSESSION," THE "OVERZEALOUSNESS," IT'S MYSTIFYING, IT'S
16 MYSTIFYING.

17 THE COURT: HAS A DATE BEEN SET AT THIS POINT FOR THE
18 SHIPMENT OF THESE WASTES?

19 MR. UDALL: YOUR HONOR, YOUR INTERVENTION, OUR FILING
20 OF THE LAWSUIT AND THE FACT THAT YOU BECAME INVOLVED IN THIS,
21 THEY DECIDED TO NOT SHIP ANY WASTE, AND WE HOPE THAT THEY WILL
22 AGREE TO THAT THROUGH THE PERIOD THAT YOU'RE CONSIDERING THIS
23 CASE. THEY HAVEN'T DONE SO.

24 THE COURT: BUT YOU ARE ENTITLED TO SEVEN DAYS NOTICE;
25 IS THAT RIGHT?

1 MR. UDALL: YES, THAT'S CORRECT, UNDER OUR
2 CONSULTATION AGREEMENT, AND WE HAVEN'T BEEN NOTIFIED. EXCUSE
3 ME, I DIDN'T GET EXACTLY WHAT YOU WERE ASKING, BUT YES, WE'RE
4 ENTITLED TO SEVEN DAYS' NOTICE. WE HAVE NOT BEEN NOTIFIED AT
5 THIS POINT THAT THERE IS A SHIPMENT.

6 YOUR HONOR, I'D LIKE TO JUST SPEND A FEW WORDS ON
7 SUMMARY JUDGMENT, AND THEN RESERVE THE REMAINDER OF MY TIME FOR
8 REBUTTAL. FRANKLY, YOUR HONOR, IT DISTURBS ME THAT ANY FEDERAL
9 AGENCY WOULD ASK A COURT TO DISMISS A CASE OF THIS PUBLIC
10 IMPORTANCE BEFORE THEY EVEN FILE AN ANSWER OR PROVIDE ANY
11 DISCOVERY.

12 THERE ARE AT LEAST THREE BASIC REASONS THIS COURT
13 CANNOT GRANT SUMMARY JUDGMENT AT THIS STAGE. FIRST, THE
14 ADMINISTRATIVE RECORD IS INCOMPLETE. WHEN AN AGENCY'S ACTION
15 IS CHALLENGED AS ARBITRARY AND CAPRICIOUS, THIS COURT MUST
16 DECIDE THAT CLAIM ON THE BASIS OF THE WHOLE RECORD. THAT
17 INCLUDES ANY RELEVANT MATERIALS THAT WERE BEFORE THE AGENCY
18 WHEN THE DECISION WAS MADE, INCLUDING MATERIALS THAT DO NOT
19 SUPPORT THE AGENCY'S DECISION.

20 THE VOLUME OF THE ADMINISTRATIVE RECORD FILED WITH
21 THIS COURT IS DECEPTIVE. THE BOXES OF DOCUMENTS THAT THE
22 GOVERNMENT HAS FILED ACTUALLY DO NOT CONSTITUTE THE COMPLETE
23 RECORD OF DECISION UNDER REVIEW. ONE OF THE ACTIONS UNDER
24 REVIEW IS THE INTERIOR DEPARTMENT'S ADMINISTRATIVE LAND
25 WITHDRAWAL. THE DEFENDANTS HAVE GIVEN YOU A SIX-INCH STACK OF

1 DOCUMENTS, CALLING THEM THE FILE OF THE DEPARTMENT OF THE
2 INTERIOR.

3 WELL, IN FACT, THE BUREAU OF LAND MANAGEMENT, WHICH
4 WAS THE AGENCY OUT IN NEW MEXICO RECEIVING COMMENTS, WE WENT
5 OVER TO THEM AND GOT THEIR DOCUMENTS. THEY AREN'T EVEN IN YOUR
6 FILE. AND THAT'S THE DEPARTMENT THAT WE'RE LOOKING AT TO SEE
7 IF THEY ACTED ARBITRARILY OR NOT.

8 CASES IN THIS CIRCUIT HOLD THAT IT IS REVERSIBLE ERROR
9 TO PROCEED TO JUDGMENT WITHOUT THE FULL ADMINISTRATIVE RECORD.

10 WE HAVE A DOCUMENT REQUEST TO OBTAIN THE RELEVANT
11 RECORDS. WE HAVE NOT RECEIVED A RESPONSE. AND WE'VE OUTLINED
12 THAT SITUATION IN A RULE 56(F) AFFIDAVIT. WITHOUT -- WITH AN
13 INCOMPLETE RECORD, YOUR HONOR, I BELIEVE IT'S WRONG AT THIS
14 POINT TO PROCEED TO SUMMARY JUDGMENT.

15 THE SECOND REASON, WE NEED TO COMPLETE OTHER DISCOVERY
16 ABOUT THE ACTIONS OF THE AGENCIES. THE RECORD, AS IT STANDS,
17 INVOLVES A SERIES OF REVERSALS OF AGENCY POSITION, WHICH ARE
18 COMPLETELY UNEXPLAINED BY THE DOCUMENTS THAT WE HAVE. I
19 HIGHLIGHTED THAT WITH THAT SECRETARIAL BRIEFING MEMORANDUM.

20 THE DEPARTMENT OF INTERIOR CHANGED ITS MIND ABOUT THE
21 NEED FOR LEGISLATION TO BRING WASTE -- ABOUT THE NEED TO HAVE
22 ALL ENVIRONMENTAL PERMITS; ABOUT WHETHER THE WASTE WAS TO BE
23 REMOVED BY THE END OF THE WITHDRAWAL; ABOUT WHETHER THE
24 ENVIRONMENTAL IMPACT STATEMENT WAS TO ANALYZE LEGISLATIVE
25 WITHDRAWAL; ABOUT WHETHER TO REPORT TO CONGRESS. AND, FINALLY,

1 THE DOI MADE AN EXTENSION WITHOUT EVEN FINDING THAT THE PURPOSE
2 OF THE ORIGINAL WITHDRAWAL REQUIRED THE EXTENSION.

3 CONCLUSORY ACTIONS LIKE THESE ARE UNREVIEWABLE
4 STANDING ALONE. WITH THIS KIND OF UNEXPLAINED AGENCY BEHAVIOR
5 IN ISSUE, THE CASES HOLD THAT WE ARE ENTITLED TO DISCOVERY TO
6 FIND OUT WHAT THE AGENCY WAS THINKING, THE FACTS IT'S FOUND,
7 THE RATIONALE FOR ITS ACTIONS.

8 RECENT CASES IN THIS CIRCUIT, YOUR HONOR, HOLD THAT IN
9 THE REVIEW OF AN ADMINISTRATIVE RECORD DECISION, IN THAT TYPE
10 OF REVIEW, THE COURT MUST CONSIDER EXTRA-RECORD EVIDENCE WHERE
11 THE AGENCY ACTION IS NOT ADEQUATELY EXPLAINED IN THE RECORD
12 BEFORE THE COURT.

13 THAT'S OBVIOUSLY WHAT WE HAVE HERE. WE'VE PROPOUNDED
14 INTERROGATORIES. WE'RE TRYING TO DO DISCOVERY. WHO ARE THE
15 DECISION-MAKERS? WHAT DOCUMENTS DID THEY CONSIDER? WHAT
16 MATERIALS DID THEY LOOK AT? WE'RE BEING STONEWALLED. THE
17 GOVERNMENT HAS TOLD US THEY'RE OPPOSING ALL DISCOVERY.

18 THE THIRD REASON NOT TO GRANT SUMMARY JUDGMENT. WE
19 CAN SHOW ON THE RECORD WE HAVE NOW THAT THE INTERIOR DEPARTMENT
20 GRANTED AN EXTENSION OF A WITHDRAWAL AND DID NOT AND COULD NOT
21 DETERMINE THAT THE PURPOSE FOR WHICH THE WITHDRAWAL WAS FIRST
22 MADE REQUIRES THE EXTENSION. THAT IS A SUBSTANTIVE BREACH OF
23 THE LIMITS THAT CONGRESS HAS PLACED ON THE INTERIOR
24 DEPARTMENT'S DEALINGS WITH PUBLIC LAND.

25 THIS COURT DOES NOT HAVE TO MAKE A DETAILED REVIEW OF

1 THE ADMINISTRATIVE RECORD TO FIND A VIOLATION. IT'S ON THE
2 FACE OF THE PUBLIC LAND ORDERS AND THE RECORD OF DECISION, YOUR
3 HONOR, WHICH WE DISCUSSED EARLIER. ON THE PRESENT RECORD, A
4 VIOLATION HAS OCCURRED.

5 YOUR HONOR, IN CONCLUSION, IT IS A COMPELLING CASE, A
6 COMPELLING ENVIRONMENTAL CASE FOR AN INJUNCTION. SUMMARY
7 JUDGMENT SHOULD BE DENIED TO THE GOVERNMENT.

8 I WOULD RESERVE ANY OF MY TIME THAT'S REMAINING FOR
9 REBUTTAL. THANK YOU, YOUR HONOR.

10 THE COURT: ALL RIGHT. THANK YOU, MR. UDALL.

11 MS. REAMES: YOUR HONOR, I AM GOING TO SPEND A FEW
12 MINUTES HERE THIS MORNING ADDRESSING WHAT THE INTERVENORS
13 CONSIDER TO BE THE MOST CRITICAL ISSUE IN THIS LITIGATION,
14 WHICH IS WHETHER THE ADMINISTRATION HAS EXCEEDED ITS AUTHORITY
15 TO WITHDRAW THE PUBLIC LANDS UNDER SECTION 204. WE BELIEVE
16 THIS ISSUE ALONE IS DISPOSITIVE OF THIS LITIGATION.

17 I'M HERE TODAY REPRESENTING TWO NATIONAL ENVIRONMENTAL
18 GROUPS, TWO NEW MEXICO ENVIRONMENTAL GROUPS, AND PERHAPS MOST
19 SIGNIFICANTLY TO THIS ACTION, THREE MEMBERS OF CONGRESS, MR.
20 BILL RICHARDSON OF NEW MEXICO AND, ALSO, MR. PETER KOSTMAYER OF
21 PENNSYLVANIA AND MR. WAYNE OWENS OF UTAH. ALL THREE OF THESE
22 CONGRESSMEN ARE MEMBERS OF THE INTERIOR HOUSE COMMITTEE, WHICH
23 HAS JURISDICTION OVER PUBLIC LAND WITHDRAWALS, AND WHICH IN
24 THIS CASE, AS ILLUSTRATED BY MR. UDALL, HAS ALREADY MADE A
25 DECISION AS TO HOW A WIPP WITHDRAWAL SHOULD OCCUR

1. LEGISLATIVELY, AND UNDER PROTECTIVE CONDITIONS AND RESTRICTIONS
2. THAT ARE ENTIRELY ABSENT FROM THE SECRETARY'S WITHDRAWAL.

3. NOW, WHY IS THERE SUCH VITAL INTEREST ON THE PART OF
4. CONGRESS IN THIS MATTER, AND WHY HAVE THESE THREE CONGRESSMEN
5. TAKEN THE TIME TO BECOME PERSONALLY INVOLVED IN THIS
6. LITIGATION? THERE'S QUITE A HISTORY TO THIS, YOUR HONOR.

7. PRIOR TO THE ENACTMENT OF FLPMA IN 1976, THE
8. ADMINISTRATION HAD BEEN MAKING LIBERAL USE OF BOTH IMPLIED AND
9. STATUTORY WITHDRAWAL MECHANISM TO DEVOTE PUBLIC LANDS TO A
10. SINGLE USE, EXCLUDING OTHER PUBLIC USES. OVER AND OVER IN THE
11. LEGISLATIVE HISTORY IN FLPMA, CONGRESS EXPRESSED ITS CONCERN,
12. AND I QUOTE HERE, "ONE OF THE MOST IMPORTANT REASONS FOR
13. ADOPTING THIS BILL IS THAT IT PROVIDES FOR CONGRESSIONAL
14. OVERSIGHT AND CONTROL OVER AN EXECUTIVE AGENCY WHICH AT PRESENT
15. IS FREE TO ACT MOSTLY OF ITS OWN ACCORD." CONGRESS CONTINUED.
16. "THE MANAGEMENT AND WITHDRAWAL OF FEDERAL LANDS IS AN EXTREMELY
17. IMPORTANT MATTER, A MATTER WHICH MUST NOT BE LEFT SOLELY IN THE
18. HANDS OF AN OFTEN UNRESPONSIVE AND UNYIELDING BUREAUCRACY."

19. WELL, YOUR HONOR, WE SUBMIT THE ADMINISTRATION'S
20. ATTITUDE IN THIS CASE IS ABOUT AS UNYIELDING AND UNRESPONSIVE
21. TO CONGRESSIONAL CONCERNS AS YOU CAN GET. CONGRESS ADOPTED
22. SECTION 204 PRECISELY IN ORDER TO PREVENT THIS SITUATION, TO
23. REASSERT ITS CONTROL OVER THE PUBLIC LANDS. CONGRESS DECIDED
24. TO TAKE BACK THE POWER RESERVED TO IT UNDER THE PROPERTY CLAUSE
25. OF THE CONSTITUTION TO ULTIMATELY CONTROL THE DISPOSITION OF

1 THE PUBLIC LANDS.

2 TO ACCOMPLISH THIS IN FLPMA, CONGRESS DID TWO THINGS.
3 THE FIRST, IN SECTION 701, IT REPEALED TWENTY-NINE EXISTING
4 STATUTORY AUTHORIZATIONS FOR ADMINISTRATIVE WITHDRAWALS. AND
5 IT EXPLICITLY REPEALED ANY IMPLIED AUTHORITY ON THE PART OF THE
6 ADMINISTRATION TO WITHDRAW PUBLIC LANDS.

7 IT THEN, HAVING WIPED THE SLATE CLEAN, STARTED OVER
8 AGAIN WITH SECTION 204, DELEGATING ONLY EXTREMELY LIMITED
9 WITHDRAWAL AUTHORITY TO THE SECRETARY OF THE INTERIOR, AND EVEN
10 THEN, ONLY TO MAKE TEMPORARY WITHDRAWALS, AND EVEN THEN ONLY
11 WITH AN INFORMED REVIEW AND ULTIMATE VETO POWER BY CONGRESS.

12 THIS IS A HIGHLY UNUSUAL SITUATION, YOUR HONOR, FOR
13 CONGRESS TO DELEGATE DECISION-MAKING AUTHORITY TO AN AGENCY,
14 AND AT THE SAME TIME RESERVE TO ITSELF NOT ONLY OVERSIGHT POWER
15 OVER THAT DECISION-MAKING PROCESS, BUT THE AUTHORITY TO MAKE
16 THE ULTIMATE DECISION ITSELF, TO UNDO THE ADMINISTRATION'S
17 ACTION.

18 I BELIEVE THAT WE FIND THIS IN FLPMA OUT OF A REACTION
19 BY CONGRESS TO WHAT IT CONSIDERED A HIGH DEGREE OF ABUSE BY THE
20 ADMINISTRATION OF ITS WITHDRAWAL POWERS. AND, AGAIN, IN THE
21 LEGISLATIVE HISTORY, WE SEE CONGRESS ASSERTING, IN CONGRESS'S
22 WORDS, "WE MUST END WHAT HAS OFTEN BEEN AN HISTORIC PATTERN OF
23 CASUAL OR EVEN RECKLESS WITHDRAWAL OF PUBLIC LAND. IT IS
24 ESSENTIAL THAT CONGRESS BE INFORMED OF AND BE ABLE TO OPPOSE,
25 IF NECESSARY, WITHDRAWALS WHICH IT DETERMINES NOT TO BE IN THE

1 BEST INTERESTS OF ALL THE PEOPLE."

2 YOUR HONOR, SECTION 204 IS ALL ABOUT CONGRESS SAYING
3 TO THE ADMINISTRATION, "YOU'RE OUT OF CONTROL, WE'RE REINING
4 YOU IN." AND, CONVERSELY, THIS LITIGATION IS ALL ABOUT THE
5 ADMINISTRATION SAYING BACK TO CONGRESS, "IF YOU DON'T DO
6 EXACTLY WHAT WE WANT YOU TO DO, AND EXACTLY WHEN WE WANT YOU TO
7 DO IT, THEN FLPMA OR NO FLPMA, WE'RE GOING TO DO IT OURSELVES."

8 THE THREE CONGRESSIONAL INTERVENORS IN THIS CASE ARE
9 ANGRY. THEY'RE ANGRY AND THEY'RE FRUSTRATED. THEY'VE STATED
10 IN A DECLARATION SUBMITTED TO THIS COURT IN SUPPORT OF OUR
11 MOTION TO INTERVENE THAT THIS IS A BLATANT ATTEMPT BY THE
12 ADMINISTRATION TO BYPASS CONGRESS, THAT IT'S AN INVASION OF THE
13 LEGISLATIVE PROCESS ENTRUSTED BY THE CONSTITUTION TO CONGRESS.
14 THE ADMINISTRATION'S ACTIONS ARE PREVENTING THEM FROM DOING
15 THEIR JOBS TO SEE THAT BOTH PUBLIC LANDS AND NUCLEAR WASTES ARE
16 MANAGED PROPERLY.

17 AS GRAPHICALLY ILLUSTRATED BY THE PLAINTIFF'S CHART,
18 WHICH WAS UP EARLIER, ON PRESENT CONGRESSIONAL ACTION, CONGRESS
19 IS RIGHT NOW VERY ACTIVELY CONSIDERING THE WIPP SITUATION. WE
20 ASK THIS COURT TO PREVENT THE ADMINISTRATION FROM PULLING THE
21 RUG OUT FROM UNDER CONGRESS. IF THE ADMINISTRATION PROCEEDS TO
22 MOVE NUCLEAR WASTE INTO WIPP, CONGRESS AND ULTIMATELY THE
23 AMERICAN PEOPLE, WHO RELY ON CONGRESS FOR INFORMED AND
24 OBJECTIVE PUBLIC LAND OVERSIGHT, WILL BE IRREPARABLY HARMED.

25 YOUR HONOR, THE D.C. DISTRICT COURT HAS FOUND JUST

1 SUCH HARM IN A VERY SIMILAR SITUATION IN A 1983 CASE, NATIONAL
2 WILDLIFE FEDERATION V. MORTON. THAT'S AT 571 F.SUPP. 1145,
3 WITH THE RELEVANT DISCUSSION AT PAGE 1159. IN THAT CASE, AS IN
4 THIS CASE, THE ADMINISTRATION IGNORED THE SECTION 204
5 LIMITATIONS ON ITS WITHDRAWAL POWER, AND IN THAT CASE, AS IN
6 THIS CASE, IF THE ADMINISTRATION WERE ALLOWED TO PROCEED, IN
7 THE COURT'S WORDS IN THAT OPINION, "DEFENDANT COULD ALTER
8 RIGHTS OR PERMIT DAMAGE TO THE LAND IN A WAY THAT WOULD
9 CONFRONT THE COURTS WITH A FAIT ACCOMPLI BEFORE THEY COULD
10 RESOLVE THE IMPASSE." THERE, THEY'RE SPEAKING OF THE IMPASSE
11 BETWEEN CONGRESS AND THE ADMINISTRATION.

12 IN THIS CASE, YOUR HONOR, THE D.C. COURT STATED
13 SPECIFICALLY, AND AGAIN I QUOTE, "BECAUSE OF THE SECRETARY'S
14 DISREGARD OF THE WITHDRAWAL MECHANISM OF SECTION 204(E), UNLESS
15 HE IS RESTRAINED, CONGRESS WOULD NOT BE ABLE TO ACT UNDER THE
16 SAME CIRCUMSTANCES AS WHEN THE HOUSE COMMITTEE PASSED ITS
17 RESOLUTION AND, IN FACT, MIGHT NOT HAVE AN OPPORTUNITY TO ACT
18 AT ALL."

19 THUS, IN THE NATIONAL WILDLIFE CASE, THE COURT FOUND
20 THAT THE PUBLIC INTEREST REQUIRED MAINTAINING THE STATUS QUO,
21 AT LEAST IN THE WORDS OF THE COURT, "UNTIL THERE CAN BE
22 ADEQUATE CONSIDERATION OF THE SERIOUS CONSTITUTIONAL PROBLEM
23 UNDERLYING THIS CONTROVERSY." THE COURT GRANTED A PRELIMINARY
24 INJUNCTION IN THAT CASE, AND WE RESPECTFULLY ASK THAT IT DO THE
25 SAME HERE.

1 YOUR HONOR, COUNSEL FOR THE STATE OF TEXAS WOULD LIKE
2 TO OFFER YOU A FEW WORDS HERE.

3 MS. OLINGER: YOUR HONOR, I'M AN ASSISTANT ATTORNEY
4 GENERAL FOR THE STATE OF TEXAS, AND TEXAS FINDS ITSELF IN AN
5 EXTREMELY UNUSUAL SITUATION HERE, BECAUSE IT IS NOT OFTEN THAT
6 YOU'RE GOING TO FIND US ON THE SAME SIDE AS NEW MEXICO.

7 FOR YEARS, WE HAVE BEEN --

8 THE COURT: I'M NOT SURE HOW TO TAKE THAT (LAUGHTER).

9 MS. OLINGER: FOR YEARS WE HAVE BEEN BATTLING WITH NEW
10 MEXICO OVER THE RIGHTS TO THE WATER IN THE PECOS RIVER. AND
11 THE PECOS RIVER RUNS JUST FIFTEEN MILES FROM WIPP AS IT FLOWS
12 SOUTHWARD THROUGH TEXAS TO THE RIO GRANDE AND THEN TO THE GULF
13 OF MEXICO.

14 THE PECOS RIVER WILL MOST LIKELY BE CONTAMINATED, AND
15 THIS WATER FROM THE PECOS IS THE LIFE'S BLOOD OF THE
16 AGRICULTURAL INDUSTRY IN WEST TEXAS. IT'S TEXAS'S CONCERN OVER
17 THE WATER IN THE PECOS, WHICH WE'VE FOUGHT SO HARD IN THE PAST
18 TO GET FROM MEXICO, AND THE WATER CONTAINED IN THE RUSTLER
19 UNDERGROUND AQUIFER, WHICH IS SHARED BY TEXAS AND THE WIPP
20 SITE, AND WHICH IS CURRENTLY USED FOR OIL AND GAS PRODUCTION IN
21 TEXAS, AND, GIVEN THE SITUATION OF DWINDLING WATER SUPPLIES IN
22 WEST TEXAS, IT COULD BE USED FOR OTHER PURPOSES IN THE FUTURE;
23 AND TEXAS'S CONCERN OVER THE TRANSPORTATION OF RADIOACTIVE
24 WASTES ACROSS TEXAS THROUGH MAJOR CITIES SUCH AS DALLAS, FORT
25 WORTH, AMARILLO, ABILENE, MIDLAND, ODESSA, THAT HAS COMPELLED
26 TEXAS TO MONITOR WIPP FROM ITS VERY INCEPTION.

1 TEXAS SHARES NEW MEXICO'S BELIEF THAT THE WASTE THAT
2 DOE WANTS TO PLACE IN WIPP WILL NOT BE RETRIEVABLE. TEXAS
3 SHARES NEW MEXICO'S CONCERNS ABOUT WIPP'S TECHNICAL SUITABILITY
4 AS A DISPOSAL FACILITY.

5 TO DOE'S ARGUMENT THAT WASTE EMPLACEMENT SHOULD BEGIN
6 NOW BECAUSE OF THE MONEY INVESTED IN WIPP, TEXAS RESPONDS THAT
7 THESE COSTS WILL BE DWARFED BY THE ECONOMIC DEVASTATION THAT
8 WILL BE VISITED ON TEXAS IF THERE IS A BREACH IN THE
9 CONTAINMENT AT WIPP.

10 THERE IS NO NEED TO RUSH INTO WIPP WHILE THERE ARE SO
11 MANY QUESTIONS REGARDING WIPP'S SUITABILITY THAT REMAIN TO BE
12 ANSWERED, AND THERE ARE SO MANY PROTECTIVE PROVISIONS THAT
13 SHOULD BE FOLLOWED BEFORE ONE BARREL OF WASTE IS PLACED THERE,
14 FOREMOST OF WHICH IS THE INFORMED CONGRESSIONAL REVIEW MANDATED
15 BY THE FEDERAL LAND MANAGEMENT AND POLICY (SIC) ACT.

16 THE COURT: ALL RIGHT. BEFORE THE COURT HEARS THE
17 ARGUMENTS ON BEHALF OF THE DEFENDANTS, WE'LL TAKE A FIVE-MINUTE
18 RECESS.

19 (11:12 RECESS 11:20)

20 THE COURT: ALL RIGHT, THE GOVERNMENT.

21 MS. ZANDER: GOOD MORNING, YOUR HONOR, MY NAME IS --

22 THE COURT: GOOD MORNING. LET ME JUST UNDERSTAND
23 WHERE WE STAND. I ASKED COUNSEL FOR THE PLAINTIFF THE SAME
24 QUESTION, BUT I GATHER THAT AT THIS POINT, NOTHING HAS HAPPENED
25 AND NO NOTICES HAVE BEEN SENT; IS THAT RIGHT?

1 MS. ZANDER: NO NOTICES HAVE BEEN SENT.

2 THE COURT: SO EVERYTHING IS STILL ON HOLD?

3 MS. ZANDER: THAT'S CORRECT, YOUR HONOR.

4 I'M REPRESENTING THE FEDERAL DEFENDANTS IN THIS
5 MATTER, AND I'LL BE PRESENTING THE GOVERNMENT'S POSITION
6 OPPOSING THE PRELIMINARY INJUNCTION MOTION BEFORE THIS COURT.

7 OUR DISCUSSION OF THE LIKELIHOOD OF SUCCESS ON THE
8 MERITS WILL BE COMBINED WITH OUR ARGUMENT IN SUPPORT OF OUR
9 MOTION FOR SUMMARY JUDGMENT AND WILL BE PRESENTED BY MICHAEL
10 REED, AND THE ISSUES CONCERNING RCRA WILL BE PRESENTED BY
11 DANIEL PINKSTON.

12 WE WOULD ALSO LIKE TO RESERVE TEN MINUTES FOR REBUTTAL
13 CONCERNING THE SUMMARY JUDGMENT MOTION.

14 I'D ALSO LIKE TO INFORM THE COURT, GIVEN THE TECHNICAL
15 NATURE OF THIS CASE AND THE VOLUMINOUS ADMINISTRATIVE RECORD,
16 THE DEPARTMENT OF ENERGY'S OFFICE DIRECTOR OF WASTE MANAGEMENT
17 PROJECTS AND CHAIRMAN OF THE WIPP TASK FORCE, MR. MARK FREI, IS
18 SITTING AT COUNSEL TABLE, AND HE WILL BE MORE THAN HAPPY TO
19 EXPLAIN ANY TECHNICAL DETAILS TO THE COURT OR ANSWER ANY
20 APPROPRIATE QUESTIONS OF A TECHNICAL NATURE, IF YOU SO DESIRE.

21 I'D LIKE TO BEGIN THIS MORNING WITH A FEW CRITICAL
22 FACTS. BY DEFINITION, THE WASTE ISOLATION PILOT PLANT, OF
23 COURSE WIPP, IS A RESEARCH FACILITY, NOT A PERMANENT
24 REPOSITORY. CONGRESS, IN PUBLIC LAW 96-164, MANDATED THE
25 DEPARTMENT OF ENERGY IN 1979 TO DETERMINE WHETHER LONG-TERM

1 DISPOSAL OF TRANSURANIC WASTE IN THICK 200-MILLION-YEAR-OLD
2 SALT BEDS LOCATED ONE-HALF MILE DEEP INTO THE EARTH IS
3 APPROPRIATE. I WOULD LIKE TO EMPHASIZE THAT WIPP IS LOCATED IN
4 SALT MINES, NOT CAVERNS.

5 WIPP, AFTER EXTENSIVE EVALUATIONS AND STUDIES
6 CONDUCTED BY SOME OF THIS COUNTRY'S MOST PROMINENT SCIENTISTS,
7 IS NOW READY TO BEGIN THE TEST PHASE OF THE PROJECT.

8 THE TEST PHASE ENTAILS THE INTRODUCTION OF TRANSURANIC
9 WASTE INTO WIPP FOR THE PURPOSE OF EVALUATING WHETHER WIPP WILL
10 SOME DAY BE AN APPROPRIATE LONG-TERM STORAGE FACILITY. THE
11 TRANSURANIC OR TRU WASTE THAT WILL BE INTRODUCED TO WIPP IS
12 RELATIVELY LOW-LEVEL WASTE THAT CONSISTS OF GLASSWARE, RAGS,
13 CLOTHING, TOWELS AND THE LIKE THAT WERE USED DURING VARIOUS
14 DEFENSE PROGRAM LABORATORY AND MANUFACTURING PROCESSES.

15 THE WASTE TO BE USED DURING THE TEST PHASE IS WHAT IS
16 TERMED "CONTACT HANDLED" WASTE. CONTACT HANDLED WASTE EMITS
17 PRIMARILY ALPHA RADIATION, WHICH MAY BE BLOCKED BY A SINGLE
18 SHEET OF PAPER. SINCE THE WASTE IS PACKAGED IN STEEL DRUMS, IT
19 CAN BE HANDLED DIRECTLY BY WORKERS WITH ESSENTIALLY NO RISK.

20 TRU WASTE WILL BE SHIPPED TO WIPP DURING THE TEST
21 PHASE IN THE AMOUNT OF ONE BIN PER MONTH FOR THE FIRST SEVERAL
22 MONTHS. A BIN CONTAINS THE EQUIVALENT OF APPROXIMATELY FIVE
23 55-GALLON DRUMS.

24 THE TEST PHASE IS EXPECTED TO CONTINUE FOR A PERIOD
25 BETWEEN TWO AND FIVE YEARS. THE TOTAL NUMBER OF BINS TO BE

1 SHIPPED TO WIPP DURING THE TEST PHASE IS APPROXIMATELY 135.

2 IN 1983, SEVERAL EXPERIMENTAL ROOMS WERE EXCAVATED TO
3 DETERMINE THE BEHAVIOR OF SALT IN PREPARATION FOR THE TEST
4 PHASE.

5 AT THIS POINT, I'D LIKE TO DIRECT YOUR ATTENTION TO
6 THIS PICTURE THAT WAS PROVIDED. THIS IS -- I'D LIKE TO DIRECT
7 YOUR ATTENTION TO HERE, THE NORTH END OF THE MINE. IT'S IN
8 RED.

9 THE COURT: YES.

10 MS. ZANDER: THIS IS WHERE THE ROOMS THAT WERE
11 EXCAVATED TO TEST SALT BEHAVIOR ARE LOCATED.

12 THERE ARE THREE ROOMS ON THE EAST WING, RIGHT OVER
13 HERE, OF THE NORTH END, AND THEY WERE HEATED TO TEST THE EFFECT
14 OF HEAT ON SALT. NO ROOF SUPPORT SYSTEMS WERE INSTALLED IN
15 THESE THREE ROOMS.

16 ON THE WEST WING OF THE NORTH END, EXPERIMENTAL ROOMS
17 WERE ALSO DEVELOPED TO TEST THE NATURAL BEHAVIOR OF SALT
18 WITHOUT ANY ADDITIONAL SUPPORT SYSTEM. HOWEVER, THESE ROOMS
19 OVER HERE ON THE WEST WING WERE NOT HEATED.

20 NOT SURPRISINGLY, THESE ROOMS HAVE EXPERIENCED FALLS
21 IN THE LAST FEW YEARS.

22 THE COURT: HAVE EXPERIENCED WHAT?

23 MS. ZANDER: FALLS, COLLAPSES. IN FACT, THE
24 PHOTOGRAPH EXHIBITED BY THE STATE OF NEW MEXICO IN ITS ARGUMENT
25 IN FACT DEPICTS ONE OF THE ROOMS IN THE WEST WING WHICH LACKS

1 ANY ROOF SUPPORT SYSTEM. THE ROOM IS LOCATED RIGHT THERE.

2 THE NATURAL MOVEMENT OF THE SALT DEMONSTRATED BY THE
3 ROOM COLLAPSE CONFIRMED SCIENTIFIC EXPECTATIONS ABOUT THE
4 BEHAVIOR OF SALT. IT IS THIS CHARACTERISTIC OF SALT THAT FIRST
5 ATTRACTED THE NATIONAL ACADEMY OF SCIENCES TO CONSIDER SALT
6 BEDS FOR POTENTIAL WASTE DISPOSAL BACK IN 1957.

7 THE WEST WING OF THE NORTH END OF WIPP ALSO HOUSES AN
8 EXPERIMENTAL UNHEATED ROOM WHICH DOES HAVE AN ADDITIONAL ROOF
9 SUPPORT SYSTEM. ALTHOUGH EXCAVATED IN 1983, THIS ROOM STILL
10 REMAINS STABLE TODAY.

11 THE COURT: WHEN WAS IT EXCAVATED, '83?

12 MS. ZANDER: 1983.

13 BASED UPON THE INFORMATION LEARNED ABOUT THE
14 EXPERIMENTAL ROOMS IN THE NORTH END, THE DEPARTMENT OF ENERGY
15 CONVENED A GEOTECHNICAL PANEL OF EXPERTS TO EVALUATE ROOM
16 STABILITY, AND TO IDENTIFY AND DESIGN A SUPPORT SYSTEM TO
17 INSURE STABILITY. THESE RECOMMENDATIONS RESULTED IN THE DESIGN
18 WHICH IS DEPICTED BY THESE TWO PHOTOGRAPHS. THIS IS A CLOSEUP
19 OF THE CEILING, AND THIS IS THE FULL ROOM. THESE ARE PICTURES,
20 BY THE WAY, OF THE TEST ROOM THAT THE WASTE WILL BE IN PLACE IN
21 FOR THE TEST PHASE. THIS DESIGN --

22 THE COURT: HOW LONG ARE THESE ROOMS EXPECTED TO LAST?

23 MS. ZANDER: SEVEN YEARS AT LEAST. ONCE THESE EXTRA
24 SUPPORT SYSTEMS HAVE BEEN INSTALLED, AN ADDITIONAL SEVEN YEARS
25 OF LIFE.

1 THE COURT: WELL, IS THAT A TOTAL OF SEVEN YEARS OR AN
2 ADDITIONAL SEVEN?

3 MS. ZANDER: AN ADDITIONAL. IF THEY WERE EXCAVATED,
4 LET'S SAY, TWO YEARS AGO, AND AS SOON AS THESE ARE INSTALLED,
5 YOU CAN ADD THE ADDITIONAL SEVEN YEARS ONTO IT.

6 THE COURT: AND HOW HAS THAT BEEN TESTED, HOW DO WE
7 KNOW IT'S SEVEN YEARS?

8 MS. ZANDER: THIS WAS REVIEWED BY THE WIPP DESIGN
9 REVIEW PANEL, CONSISTING OF SIX GEOTECHNICAL EXPERTS
10 REPRESENTING INDUSTRY, ACADEMIA, THE U.S. BUREAU OF MINES,
11 RESEARCH AND SAFETY GROUPS, AND THE PANEL EVALUATED THE
12 ADEQUACY OF THE ROOM DESIGN, AND IT DETERMINED THAT THE ROOM
13 DESIGN ADOPTED FOR THE TEST PHASE WOULD ENSURE STABILITY FOR AT
14 LEAST SEVEN YEARS FROM THE DATE OF INSTALLATION OF THE SUPPORT
15 SYSTEM.

16 THIS SUPPORT SYSTEM -- I CAN GIVE YOU DETAILS ON WHAT
17 EXACTLY THIS IS. IT INCLUDES THE USE OF 300 THIRTEEN-FOOT-LONG
18 ROCK BOLTS, WHICH HAVE RESIN TO HELP SECURE THE BOLTS. THESE
19 ARE THE BOLTS HERE. YOU CAN SEE ONE FOOT IS BENEATH THE
20 SURFACE OF THE CEILING.

21 IN ADDITION, THESE BOLTS ARE INSTALLED TO ALLOW FOR
22 FLEXIBILITY TO ACCOMMODATE THE NATURAL FLOW OF SALT. IN
23 ADDITION, THE CEILINGS ARE COVERED WITH WIRE MESH AND LACING TO
24 FURTHER SUPPORT THE ROOF AND TO CATCH ANY SMALL SALT DEBRIS
25 THAT MIGHT COME LOOSE. YOU CAN SEE THAT OVER THERE.

1 THIS ELABORATE SUPPORT SYSTEM IS SO STRONG THAT IT CAN
2 EVEN SUSTAIN THE DETACHMENT OF A SEVEN-FOOT-THICK SALT SLAB
3 FROM THE ROOM'S CEILING, THE SIZE OF A FOOTBALL FIELD -- THAT'S
4 THE ENTIRE SIZE OF THE ROOM -- WITHOUT CAUSING A ROOM COLLAPSE.

5 IN ADDITION, THE DEPARTMENT OF ENERGY HAS INSTALLED AN
6 EXTENSIVE STATE-OF-THE-ART MONITORING SYSTEM. AS CAN BE SEEN
7 FROM THIS PICTURE, THE CABLES ARE ATTACHED TO EACH OF THE 300
8 BOLTS AND RUN TO A COMPUTER, WHICH PROVIDES INSTANTANEOUS DATA
9 ON THE STABILITY OF EACH SECTION OF THE CEILING. THIS ROOF
10 SUPPORT SYSTEM WILL NOT ALLOW FOR A ROOF FALL. HOWEVER, ANY
11 INDICATION OF INSTABILITY WILL BE DETECTED BY THE SYSTEM SIX
12 MONTHS IN ADVANCE.

13 THEREFORE, PLAINTIFF'S --

14 THE COURT: HOW DO YOU CONCLUDE IT WOULD BE DETECTED
15 SIX MONTHS IN ADVANCE?

16 MS. ZANDER: THAT QUESTION MIGHT BE BETTER DIRECTED,
17 IF YOU WISH, TO OUR EXPERT OVER HERE.

18 THE COURT: ALL RIGHT. WELL, I WILL LET HIM ANSWER IT
19 AT A LATER POINT.

20 MS. ZANDER: OKAY.

21 GIVEN THE STRENGTH OF THE SUPPORT SYSTEM AND THE
22 ABILITY OF THE MONITORING SYSTEM TO PREDICT ANY POTENTIAL ROOM
23 INSTABILITY, IT IS UNQUESTIONABLE THAT THE WASTE WILL BE ABLE
24 TO BE RETRIEVED IF THAT BECOMES NECESSARY. THE DEPARTMENT OF
25 ENERGY HAS ALWAYS MAINTAINED ITS COMMITMENT TO RETRIEVE WASTE

1 IF A PROBLEM OCCURS.

2 THE BINS CAN BE RETRIEVED WITHIN SIX WEEKS AFTER
3 EMPLACEMENT DURING THE BIN TESTING PHASE, AND THIS SIX-WEEK
4 FIGURE TAKES INTO CONSIDERATION RETRIEVAL OF THE FULL CAPACITY
5 OF WASTE DURING THE TEST PHASE OR 135 BINS.

6 DURING ALCOVE TESTING, WASTE CAN BE RETRIEVED FROM
7 EACH ALCOVE WITHIN EIGHT WEEKS. THIS FIGURE AGAIN ASSUMES THAT
8 THE TEST PHASE IS AT ITS FULL CAPACITY.

9 THEREFORE, RETRIEVAL OF WASTE DURING THE TEST PHASE IS
10 NOT AN "UTTERLY FANCIFUL" CONCEPT, AS THE STATEMENT OF NEW
11 MEXICO WOULD LIKE TO PORTRAY. RATHER, THE EXTENSIVE TESTING
12 AND STUDIES AS WELL AS THE ADMINISTRATIVE RECORD DOCUMENT THAT
13 THE RETRIEVAL OF WASTE IS A VERY REALISTIC OPTION, IF IT
14 BECOMES NECESSARY.

15 THE BOTTOM LINE HERE IS THAT NOTHING DURING THE TEST
16 PHASE IS IRREVERSIBLE. PLAINTIFFS-INTERVENORS ALSO HAVE FAILED
17 TO DEMONSTRATE A LIKELIHOOD OF IRREPARABLE HARM. THE BURDEN OF
18 PROVING SUCH HARM RESTS SQUARELY WITH PLAINTIFFS-INTERVENORS.
19 RATHER, THEIR DRAMATIC ALLEGATIONS OF IRREPARABLE HARM ARE
20 BASED ON MERE CONJECTURE AND SPECULATION.

21 THEY ASSERT THAT A HYPOTHETICAL PARADE OF HORRIBLES
22 WILL OCCUR IF WIPP'S TEST PHASE IS ALLOWED TO BEGIN. THESE
23 THEATRICAL SCENARIOS WHICH PLAINTIFFS-INTERVENORS PORTRAY
24 SIMPLY HAVE NO CREDIBLE SCIENTIFIC BASIS. NEITHER THE
25 EXTENSIVE RESEARCH NOR THE ADMINISTRATIVE RECORD SUPPORTS ANY

1 SIGNIFICANT POSSIBILITY OF OCCURRENCES SUCH AS EXPLODING GAS,
2 CASES OF PLUTONIUM-INDUCED CANCER, HIGHWAY DISASTERS AND THE
3 LIKE FROM HAPPENING. RATHER, THE STUDIES AND THE
4 ADMINISTRATIVE RECORD CLEARLY DEMONSTRATE THAT THE TEST PHASE
5 IS READY TO BEGIN FROM A SAFETY STANDPOINT.

6 AS THIS COURT IS AWARE, THE LAW REQUIRES THAT
7 PLAINTIFFS-INTERVENORS MUST SHOW THAT THEY WILL SUFFER ACTUAL
8 AND CERTAIN IRREPARABLE HARM IF PRELIMINARY INJUNCTIVE RELIEF IS
9 NOT GRANTED. THE HARM THEY DO ALLEGE IS THEORETICAL AT BEST,
10 AND THEREFORE IT IS NOT THE TYPE THAT PRELIMINARY INJUNCTIVE
11 RELIEF WAS DESIGNED TO PREVENT.

12 FURTHERMORE, PLAINTIFFS-INTERVENORS' CONTENTION THAT
13 THE ALLEGED VIOLATION OF NEPA IS PER SE IRREPARABLE INJURY IS
14 SIMPLY INCORRECT. EVEN ASSUMING, ARGUENDO, THAT DEFENDANTS
15 HAVE SOMEHOW FAILED TO COMPLY WITH NEPA OR FLPMA, IRREPARABLE
16 INJURY CANNOT AS A MATTER OF LAW BE PRESUMED FROM SUCH A
17 STATUORY VIOLATION. THE SUPREME COURT REJECTED JUST THIS
18 PRESUMPTION OF IRREPARABLE HARM IN BOTH AMOCO PRODUCTION
19 COMPANY VS. VILLAGE OF GAMBELL, AND WEINBERGER VS.
20 ROMERO-BARCELO.

21 IT SHOULD ALSO BE NOTED THAT PLAINTIFFS-INTERVENORS
22 ALLEGE THAT THE TRANSPORTATION OF TRU WASTE TO WIPP WILL CAUSE
23 THEM IRREPARABLE INJURY IN THE FORM OF CIVIC ANXIETY AND
24 CONCERN. THIS ALLEGATION IS NOT ONLY THEORETICAL, BUT IS ALSO
25 UNJUSTIFIED. THE TRU WASTE THAT IS TO BE SHIPPED TO WIPP FOR

1 THE TEST PHRASE WILL BE TRANSPORTED IN LEAK-TIGHT STEEL BINS
2 THAT ARE ENCASED WITHIN STEEL STANDARD WASTE BOXES. THESE
3 BOXES ARE THEN PLACED IN A DOUBLE-SHELLED CONTAINER CALLED THE
4 "TRUPACT II." THEY ARE HIGHLY ADVANCED CONTAINERS THAT TESTS
5 HAVE SHOWN CAN WITHSTAND SEVERE ACCIDENT CONDITIONS. THESE
6 CONTAINERS COST AN AVERAGE OF \$300,000 EACH, AND HAVE BEEN
7 CERTIFIED BY THE UNITED STATES NUCLEAR REGULATORY COMMISSION AS
8 MEETING APPLICABLE SAFETY REQUIREMENTS FOR SHIPMENT OF TRU
9 WASTE.

10 FURTHER, THE DEPARTMENT OF ENERGY HAS SPONSORED
11 EXTENSIVE TRAINING OF EMERGENCY RESPONSE AND MEDICAL PERSONNEL
12 TO PREPARE FOR ANY POTENTIAL TRANSPORTATION-RELATED INCIDENTS.
13 THEREFORE, PLAINTIFFS-INTERVENORS' ASSERTION IS WHOLLY WITHOUT
14 MERIT.

15 PLAINTIFFS-INTERVENORS ALLEGE THAT FEDERAL DEFENDANTS
16 WILL NOT SUFFER ANY HARDSHIP IF PRELIMINARY INJUNCTIVE RELIEF
17 IS GRANTED. CLEARLY, BLOCKING A \$1.1 BILLION PROJECT FROM
18 GOING FORWARD CREATES A SIGNIFICANT HARDSHIP, AND PREVENTS THE
19 DEPARTMENT OF ENERGY FROM FULFILLING ITS
20 CONGRESSIONALLY-MANDATED MISSION TO RESEARCH AND DEVELOP A
21 SOLUTION TO THE LONG-TERM DISPOSAL OF TRU WASTE.

22 THE COURT: WHY DON'T YOU JUST WAIT FOR CONGRESSIONAL
23 ACTION?

24 MS. ZANDER: SEVERAL REASONS FOR THAT. FIRST OF ALL,
25 AS MENTIONED IN THE PRIOR HEARING, THERE IS A THIRTEEN MILLION

1 DOLLAR PER MONTH AMOUNT OF MONEY THAT TAXPAYERS MUST PAY JUST
2 TO MAINTAIN WIPP IN A STATE OF READINESS, AND THEY WILL DERIVE
3 NO BENEFIT FROM DELAYING THIS PROJECT.

4 THE COURT: WELL, THEY'RE GOING TO PAY THAT ANYWAY,
5 AREN'T THEY?

6 MS. ZANDER: HOWEVER, THAT WILL BE TACKED ONTO THE END
7 OF THE PROJECT. EVERY MONTH THAT WE WAIT NOW WILL THEN HAVE TO
8 WAIT FOR THE END OF THE TEST PHASE TO BE COMPLETED, AND THAT
9 WILL BE THIRTEEN MILLION DOLLARS EVERY MONTH.

10 IN ADDITION, WIPP'S CAREFULLY DESIGNED CRITICAL --

11 THE COURT: DO YOU FEEL IT'S UNLIKELY THAT CONGRESS IS
12 GOING TO ADDRESS THIS MATTER IN THE NEAR FUTURE?

13 MS. ZANDER: I KNOW CONGRESS IS CONSIDERING IT. IT IS
14 IMPOSSIBLE FOR US TO USE A CRYSTAL BALL TO PREDICT WHAT
15 CONGRESS WILL DETERMINE.

16 THE COURT: WHEN DID THEY BEGIN ADDRESSING THE MATTER
17 THIS TIME, WAS IT BACK IN APRIL?

18 MS. ZANDER: AGAIN, I BELIEVE THAT WILL BE --

19 MR. REED: EIGHTY-SEVEN.

20 MS. ZANDER: EIGHTY-SEVEN? 1987.

21 THE COURT: BUT IS THE CONCERN THAT YOU JUST DO NOT
22 WANT TO WAIT FOR CONGRESS TO ADDRESS IT?

23 MS. ZANDER: WELL, FIRST OF ALL --

24 THE COURT: I TAKE IT, IT'S PREFERABLE IF CONGRESS --
25 IT WOULD HAVE BEEN PREFERABLE IF CONGRESS HAD ADDRESSED IT; IS

1 THAT CORRECT?

2 MS. ZANDER: IT WOULD HAVE BEEN PREFERABLE, BUT
3 UNDER -- WE ARE AUTHORIZED UNDER FLPMA TO GO AHEAD.

4 THE COURT: WELL, THAT'S ONE OF THE QUESTIONS.

5 MS. ZANDER: PARDON ME?

6 THE COURT: ISN'T THAT ONE OF THE QUESTIONS?

7 MS. ZANDER: THAT IS ONE OF THE QUESTIONS. I BELIEVE
8 THAT WILL BE MORE FULLY DISCUSSED BY MICHAEL REED IN HIS
9 DISCUSSION OF THE MERITS.

10 THE COURT: BUT IF IT IS PREFERABLE FOR CONGRESS TO
11 ADDRESS THE ISSUE, WHY NOT HOLD THIS MATTER IN ABEYANCE AND
12 ALLOW THEM TO ADDRESS IT?

13 MS. ZANDER: BECAUSE WE'VE BEEN WAITING NOW FOR FOUR
14 YEARS, AND THERE DOESN'T SEEM TO BE A RESOLUTION IN THE NEAR
15 FUTURE.

16 IN ADDITION, WIPP'S CAREFULLY DESIGNED CRITICAL
17 SCIENTIFIC --

18 THE COURT: YOU HAVE NO CONFIDENCE THAT CONGRESS WILL
19 ADDRESS IT ANYTIME SOON?

20 MS. ZANDER: WE'RE NOT AWARE OF ANY UPCOMING
21 RESOLUTION.

22 WIPP'S CAREFULLY DESIGNED CRITICAL SCIENTIFIC PATH
23 WILL BE UNNECESSARILY DERAILED. WITH TIME, THE LIFE SPAN OF
24 THE TEST ROOMS WILL ALSO BE REDUCED.

25 ALSO, TO REQUIRE THE DEPARTMENT OF ENERGY TO PERFORM

1 THE BIN TESTS ELSEWHERE WOULD REQUIRE ONE TO TWO YEARS OF
2 PREPARATION AT THAT NEW FACILITY AT A COST OF BETWEEN TEN AND
3 TWENTY MILLION TAXPAYER DOLLARS.

4 THE COURT: LET ME ASK YOU SOMETHING, MA'AM.

5 MS. ZANDER: MM-HMM.

6 THE COURT: THESE ARE TESTS -- AND PERHAPS THIS IS
7 SUPPOSED TO BE ADDRESSED BY SOMEONE ELSE -- BUT THIS IS A TEST;
8 IS THAT RIGHT?

9 MS. ZANDER: THAT'S RIGHT.

10 THE COURT: THIS IS NOT A PERMANENT PLACEMENT OF THIS
11 WASTE?

12 MS. ZANDER: EXACTLY, THAT'S BEEN OUR POSITION.

13 THE COURT: AND YOU ANTICIPATE THAT IF YOUR SENSORS OR
14 WHATEVER INDICATE THAT THESE WALLS ARE BEGINNING TO COLLAPSE,
15 THAT YOU WILL HAVE SUFFICIENT TIME TO REMOVE THE WASTE?

16 MS. ZANDER: ABSOLUTELY.

17 THE COURT: WHERE DOES THE WASTE GO THEN?

18 MS. ZANDER: WELL, THE WASTE -- IT IS POSSIBLE --
19 THERE WAS A STUDY DONE, AND THIS OPTION WAS REVIEWED, AND
20 THERE -- IT IS POSSIBLE THAT IT CAN BE MOVED TO ANY ONE OF
21 SEVEN LOCATIONS ACROSS THE COUNTRY. IT DEPENDS WHAT THE REASON
22 BEHIND THE NEED TO RETRIEVE IS. IF THERE'S A PROBLEM WITH THE
23 WASTE OR IF IT'S DUE TO ROOM COLLAPSE OR WHAT HAVE YOU, BASED
24 UPON THE REASON FOR THE NEED FOR RETRIEVAL, IT WILL BE
25 DETERMINED AS TO WHERE IT WILL GO.

1 THE COURT: WELL, LET'S JUST ASSUME THAT YOUR
2 EXPECTATIONS OF A MINE DO NOT COME TRUE, AND THERE'S A PROBLEM,
3 AND THE WASTE HAS TO BE REMOVED, WHAT HAPPENS TO IT AT THAT
4 POINT?

5 MS. ZANDER: WELL, I BELIEVE THAT THIS ISSUE WAS
6 DISCUSSED IN THE ADMINISTRATIVE RECORD, AND THERE IS A PLAN SET
7 OUT TO DECIDE -- TO DETERMINE HOW TO DECIDE THAT ISSUE, AND
8 AGAIN, IT WOULD BE BETWEEN ONE OF THESE SEVEN FACILITIES, AND
9 PERHAPS MR. FREI --

10 THE COURT: BUT IS IT CLEAR THAT IF, LET'S SAY, PLAN 3
11 IS DECIDED UPON, THAT THE WASTE CAN BE REMOVED OR ARE WE GOING
12 TO HAVE A CASE OF STATE OF IDAHO VS. UNITED STATES BEFORE US?

13 MS. ZANDER: ACTUALLY, I WAS AT A CONGRESSIONAL
14 HEARING RECENTLY, WHERE A REPRESENTATIVE OF IDAHO HAD MENTIONED
15 THAT THERE IS A POSSIBILITY TO RETURN IT BACK TO IDAHO.

16 THE COURT: THERE IS A POSSIBILITY?

17 MS. ZANDER: HE SAID IT WAS AN OPTION.

18 THE COURT: IT WAS AN OPTION?

19 MS. ZANDER: THAT'S RIGHT.

20 PLAINTIFFS-INTERVENORS FURTHER ASSERT THAT THE PUBLIC
21 INTEREST WILL BE SERVED BY PREVENTING THE COMMENCEMENT OF THE
22 TEST PHASE. WE ASSERT THAT THE PUBLIC INTEREST DICTATES THAT
23 THE TEST GO FORWARD.

24 THE TRU WASTE IS CURRENTLY BEING STORED IN
25 ABOVE-GROUND TEMPORARY FACILITIES IN METAL DRUMS. A LONG-TERM

1 DISPOSAL SOLUTION MUST BE FOUND. THIS IS PRECISELY THE POLICY
2 BEHIND THE ENACTMENT OF PUBLIC LAW 96-164, WHICH AUTHORIZED
3 WIPP.

4 TO HALT THE TEST PHASE WILL UNNECESSARILY DELAY THE
5 PUBLIC FROM FINDING A SOLUTION TO THIS SEVERE NATIONAL PROBLEM.
6 THE WASTE EXISTS WHETHER OR NOT WE WANT TO ADMIT IT, AND
7 SOMETHING MUST BE DONE. WIPP'S TEST PHASE WILL PROVIDE THE
8 PUBLIC WITH INVALUABLE INFORMATION TO DETERMINE WHETHER THAT
9 SOLUTION HAS BEEN FOUND. AN INJUNCTION MUST THEREFORE NOT
10 ISSUE.

11 PLAINTIFFS-INTERVENORS HAVE ALSO FAILED TO SHOW A
12 LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS.

13 I WILL NOW DEFER TO MICHAEL REED AND DANIEL PINKSTON
14 TO DISCUSS THE MERITS OF THIS LAWSUIT IN THE CONTEXT OF
15 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

16 THE COURT: THANK YOU.

17 WHY SHOULDN'T THE COURT ISSUE AN INJUNCTION, SINCE, AT
18 LEAST BASED UPON THE ARGUMENTS I'VE HEARD, CONGRESS APPEARS TO
19 BE ADDRESSING THE ISSUE NOW?

20 MS. ZANDER: BASICALLY --

21 THE COURT: IF I ISSUED AN INJUNCTION IN THE CASE, AND
22 IF IT APPEARED THAT CONGRESS JUST DID NOT REACH THE ISSUE OR IT
23 APPEARS THAT THEY'RE JUST NOT GOING TO ADDRESS IT, THEN OF
24 COURSE THE GOVERNMENT CAN ALWAYS COME IN AND SEEK RELIEF.

25 MS. ZANDER: WELL, THERE DOESN'T -- WE ARE AUTHORIZED

1 UNDER FLPMA TO GO AHEAD WITH THIS. WHAT WE ARE DOING IS
2 SOMETHING THAT IS WITHIN THE POWER OF THE ADMINISTRATION TO DO.

3 THE COURT: WELL, THAT'S THE CONCLUSION THAT YOU MAKE,
4 BUT I GUESS THAT'S WHAT I HAVE TO DECIDE, ISN'T IT, WHETHER YOU
5 ARE AUTHORIZED?

6 MS. ZANDER: THAT'S BEFORE THE COURT.

7 THE COURT: I'M NOT ADDRESSING AT THIS POINT THE
8 MATTER OF THE SUMMARY JUDGMENT, BUT I'M JUST LOOKING AT THE
9 INJUNCTION PHASE OF IT, WHICH YOU'RE ADDRESSING.

10 MS. ZANDER: MM-HMM. OUR POSITION IS WE HAVE BEEN
11 WAITING NOW SINCE 1987 FOR SOME CONGRESSIONAL RESOLUTION ON
12 THIS ISSUE. NONE IS IN SIGHT.

13 THERE HAVE BEEN COUNTLESS BATTLES OVER WHAT IS GOING
14 TO HAPPEN HERE, AND TO WAIT FOR JUST THE TEST PHASE TO BE
15 COMMENCED, WHEN ALL OF THIS TIME, EFFORT, ENERGY, RESEARCH,
16 DEVELOPMENT HAS GONE FORWARD, IT DOESN'T MAKE SENSE TO SIMPLY
17 STOP IT AT THIS POINT. THIS IS THE TEST PHASE, THIS IS NOT THE
18 PERMANENT STORAGE OF WASTE AT WIPP, AND THAT'S WHY THIS TEST
19 PHASE SHOULD GO FORWARD.

20 IF CONGRESS COMES IN TWO MONTHS FROM NOW, AND SAYS,
21 "OKAY, YOU CAN GO," IT'S NOT GOING TO AFFECT IT RIGHT NOW, WHAT
22 WE PLAN ON DOING.

23 THE COURT: COULD CONGRESS COME IN TWO MONTHS FROM NOW
24 AND SAY, "OKAY, YOU CAN'T GO"?

25 MS. ZANDER: I DON'T THINK THEY WOULD SAY YOU CAN'T

1 GO.

2 THE COURT: WELL, WE DON'T KNOW WHAT THEY MIGHT SAY.
3 BUT SUPPOSE CONGRESS HAS A CHANGE OF MIND, IF YOU WISH TO PUT
4 IT THAT WAY, AND THEY INDICATE THAT THEY DON'T WANT THIS MATTER
5 TO GO FORWARD, THEN WHAT?

6 MS. ZANDER: WELL, THAT WOULD BE INTERESTING TO ME,
7 GIVEN THAT PUBLIC LAW 96-164 AUTHORIZED WIPP, AND AUTHORIZED IT
8 FOR A RESEARCH AND DEVELOPMENT FACILITY, WHICH IS THE PRIMARY
9 PURPOSE BEHIND THE TEST PHASE, AND THAT WOULD BE A CHANGE IN
10 POLICY.

11 THE COURT: BUT I'M NOT SURE YOU'VE ANSWERED MY
12 QUESTION. YOU SAID IT WOULD BE INTERESTING TO YOU, BUT WHAT'S
13 THE ANSWER TO THE QUESTION?

14 MS. ZANDER: I'M NOT AWARE OF ANY DECISION UP ON THE
15 HILL RIGHT NOW OR ANY POTENTIAL DECISION THAT THEY'RE GOING TO
16 HALT WIPP ENTIRELY. I'M NOT AWARE OF THAT. IT'S OVER DETAILS
17 OF HOW IT'S GOING TO GO FORWARD. IN FACT --

18 THE COURT: WHY IS IT NECESSARY -- IF THIS IS NOT AN
19 AREA THAT YOU ARE PREPARED TO ADDRESS, WHY I'LL HEAR FROM ONE
20 OF THE OTHER COUNSEL. WHY IS IT NECESSARY TO CONDUCT THESE
21 TESTS? I THINK PLAINTIFFS HAVE ARGUED THAT THE TESTS CAN BE
22 CONDUCTED WITHOUT ACTUALLY PUTTING THE NUCLEAR WASTE IN AMONG
23 THEM. AND I DON'T KNOW IF THAT'S SOMETHING ONE OF THE OTHER
24 COUNSEL CAN ADDRESS OR NOT.

25 MS. ZANDER: PERHAPS I CAN SHED SOME LIGHT ON THAT.

1 THE COURT: ALL RIGHT.

2 MS. ZANDER: THEY'RE SUGGESTING THAT THE BIN TESTS,
3 THE FIRST TESTS CAN BE PERFORMED ELSEWHERE, AND WE'RE SAYING
4 THAT IT'S IMPORTANT TO KEEP IT IN WIPP, BECAUSE WIPP IS
5 PREPARED, WIPP IS READY FOR THESE TESTS. THERE'S NO OTHER
6 FACILITY IN THE NATION RIGHT NOW TO PERFORM THESE TESTS. TO DO
7 SO WOULD REQUIRE ONE --

8 THE COURT: WHAT EXACTLY IS THE BIN TEST? THIS IS A
9 DRY BIN TEST?

10 MS. ZANDER: THAT'S RIGHT, IT TESTS THE EMISSION OF
11 GASES, AND PERHAPS MR. FREI COULD ELABORATE ON THE PARTICULARS.

12 THE COURT: BUT THE EMISSION OF GASES FROM THE BINS?

13 MS. ZANDER: MM-HMM.

14 THE COURT: OR IN THE MINE? WHICH -- I'M NOT SURE I
15 QUITE UNDERSTAND THIS.

16 MS. ZANDER: FROM THE BINS, FROM THE BINS.

17 THE COURT: FROM THE BIN. SO YOU REALLY DON'T NEED
18 THE MINE TO TEST THAT, DO YOU?

19 MS. ZANDER: WELL, THE MINES ARE SET UP TO DEAL WITH
20 THIS, AND OTHER FACILITIES ARE NOT, AND FURTHERMORE, IT WOULD
21 TAKE ONE TO TWO YEARS TO PREPARE A DIFFERENT FACILITY TO DO
22 THIS, AND TEN TO TWENTY MILLION DOLLARS EXTRA, AND IT DOESN'T
23 SEEM TO BE REASONABLE TO REQUIRE THAT TO BE DONE WHEN WIPP IS
24 ALREADY READY.

25 THE COURT: BUT ARE YOU SAYING, THEN, THAT THE TEST

1 COULD BE PERFORMED SOMEPLACE ELSE (--)

2 MS. ZANDER: THEORETICALLY.

3 THE COURT: -- IF YOU HAD THE FACILITY?

4 MS. ZANDER: IF THERE WAS A FACILITY, IF IT WAS
5 DEVELOPED, THE MONEY TO PROVIDE FOR THAT.

6 THE COURT: ARE YOU SAYING IT IS NOT NECESSARY THAT
7 THE TESTS BE PERFORMED IN A MINE?

8 MS. ZANDER: IN THE MINE -- IT'S VERY IMPORTANT --
9 IT'S HELPFUL -- VERY IMPORTANT TO DO IT AS PART OF THE CRITICAL
10 SCIENTIFIC PATH IN THIS TESTING PHASE, THAT IT WILL -- THE
11 INFORMATION FROM THE DRY BIN TEST WILL THEN GO TO A WET BIN
12 TEST AND THEN TO THE ALCOVE TESTING, AND IT'S JUST A
13 STREAMLINED APPROACH FOR FIGURING OUT THE INFORMATION WE NEED
14 TO DETERMINE WHETHER OR NOT WIPP IS APPROPRIATE FOR LONG-TERM
15 STORAGE.

16 THE COURT: BUT MUST THOSE TESTS -- AND I'M JUST
17 TRYING TO UNDERSTAND, I'M NOT QUARRELING WITH YOU -- MUST THESE
18 TESTS BE PERFORMED IN THE MINE?

19 MS. ZANDER: THE DRY BIN TESTS DO NOT NEED TO BE
20 PERFORMED IN THE MINE ITSELF.

21 THE COURT: HOW LONG DO YOU ANTICIPATE THE DRY BIN
22 TEST IS GOING TO TAKE?

23 MR. FREI: TWO TO FIVE YEARS.

24 MS. ZANDER: TWO TO FIVE YEARS.

25 THE COURT: AND THEN WE REACH THE POINT OF THE -- IS

1 IT THE WET BIN TEST?

2 MS. ZANDER: THAT'S RIGHT.

3 THE COURT: WELL, IF IT'S NOT NECESSARY TO PERFORM THE
4 DRY BIN TEST IN THE MINE, THEN WHY THE RUSH TO DO SO? WHY NOT
5 PERFORM IT SOMEPLACE ELSE?

6 MS. ZANDER: AGAIN, I'D LIKE TO POINT OUT THAT WIPP IS
7 PREPARED, WIPP IS THE ONLY PLACE THAT IS PREPARED AT THIS POINT
8 TO PERFORM THESE TESTS.

9 THE COURT: WHAT TYPE OF PREPARATION DOES IT TAKE TO
10 PERFORM THE DRY BIN TEST?

11 MS. ZANDER: I'M SORRY, YOU'RE GETTING BEYOND MY
12 TECHNICAL KNOWLEDGE.

13 THE COURT: ALL RIGHT. BECAUSE I'M JUST TRYING TO
14 UNDERSTAND EXACTLY WHAT -- AND PERHAPS ONE OF THE OTHER
15 ATTORNEYS CAN ADDRESS THIS, BUT I'M JUST TRYING TO UNDERSTAND
16 EXACTLY WHAT IS INVOLVED IN THE DRY BIN TEST. I HAVEN'T HAD A
17 CHANCE TO GO THROUGH THE ENTIRE ADMINISTRATIVE RECORD, ALTHOUGH
18 I THINK YOUR SCHEDULING ARRANGEMENT THAT YOU GAVE ME A FEW
19 WEEKS AGO, I THINK YOU GIVE ME ABOUT FOUR DAYS TO GO THROUGH
20 THAT RECORD; ISN'T THAT RIGHT?

21 MS. ZANDER: WELL, SINCE OCTOBER 28TH.

22 THE COURT: WELL, I HAVEN'T HAD IT SINCE -- HAVE I HAD
23 IT SINCE OCTOBER 28?

24 MS. ZANDER: YES.

25 THE COURT: ALL RIGHT.

1 MS. ZANDER: BUT PERHAPS SOME OF THOSE TECHNICAL
2 QUESTIONS MIGHT BE BETTER ANSWERED BY MARK FREI.

3 THE COURT: ALL RIGHT.

4 MS. ZANDER: THANK YOU, YOUR HONOR.

5 MR. REED: YOUR HONOR, I'M MIKE REED FROM THE JUSTICE
6 DEPARTMENT. I'M HERE TO SPEAK TO THE SUMMARY JUDGMENT ISSUES.
7 IF YOU WOULD PREFER TO DIRECT QUESTIONS DIRECTLY TO MR. FREI
8 FIRST, AND GET THOSE SCIENTIFIC THINGS OUT OF THE WAY, WE
9 CERTAINLY CAN DO THAT.

10 THE COURT: WELL, MR. FREI IS YOUR EXPERT; IS THAT
11 RIGHT?

12 MR. REED: YES, SIR.

13 THE COURT: HE'S NOT COUNSEL.

14 MR. REED: THAT'S VERY TRUE.

15 THE COURT: I'LL ADDRESS MY QUESTIONS TO COUNSEL.

16 MR. REED: VERY WELL, SIR, THANK YOU.

17 THE COURT: MR. FREI, IF YOU WOULD LIKE TO SUBMIT
18 SOMETHING IN RESPONSE TO ANY QUESTIONS THAT I MAY ASK, I
19 CERTAINLY WOULD APPRECIATE THAT. I DO -- I WOULD LIKE TO
20 UNDERSTAND THE NATURE OF THE TEST, AND I'LL SAY THAT TO MR.
21 FREI, AND WHY IT IS NECESSARY THAT THE TEST BE CONDUCTED IN THE
22 MINE.

23 MR. REED: RIGHT. LET ME PASS ON AS MUCH AS MR. FREI
24 WAS ABLE TO SAY IN MY EAR AS YOU WERE ASKING THOSE QUESTIONS OF
25 MS. ZANDER. I THINK THE BOTTOM LINE QUESTION IS NOT -- THE

1 ANSWER IS THAT IT IS NOT NECESSARY --

2 THE COURT: NOT NECESSARY TO?

3 MR. REED: NOT NECESSARY TO CONDUCT THE DRY BIN TESTS
4 IN THE MINE.

5 THE COURT: AND THAT TEST IS FOR TWO TO FIVE YEARS?

6 MR. REED: YES, SIR.

7 NOW, THERE IS A SECOND SYSTEM OF TESTINGS, CALLED THE
8 ALCOVE TEST, WHICH IS A LATER PART OF THE PROCESS, AND THEY DO
9 HAVE TO BE CONDUCTED THERE, BUT THAT -- THE ROOMS HAVEN'T EVEN
10 BEEN EXCAVATED FOR THAT TESTING YET, SO WE'RE JUST TALKING
11 ABOUT THE DRY BIN TEST THAT YOUR HONOR RAISED A QUESTION ABOUT.

12 NOW, WHY IS IT BETTER TO DO IT AT WIPP IS REALLY THE
13 WAY WE HAVE TO APPROACH IT. THEY COULD BE DONE OTHER PLACES.
14 TO DO THEM OTHER PLACES, WE WOULD HAVE TO SPEND A COUPLE OF
15 YEARS PREPARING SUCH PLACES, DOING THE NEPA WORK, SPENDING WHAT
16 I AM TOLD WOULD BE ANOTHER TWENTY MILLION DOLLARS TO PROVIDE
17 ANOTHER PLACE, AND WITH NO REASON TO BELIEVE THAT THAT PLACE, I
18 ASSUME, WOULD BE ANY SAFER, BETTER THAN WIPP.

19 THIS IS WHAT WIPP HAS BEEN BUILT TO DO, TO PROVIDE A
20 DEMONSTRATION PROJECT -- CONGRESSIONAL LANGUAGE, NOT OURS --
21 FOR THE DISPOSAL OF LOW-LEVEL NUCLEAR WASTE.

22 IF WE'RE CONCERNED ABOUT BEING SUED BY OTHER PLACES, I
23 CAN IMAGINE WHAT THEY WOULD SAY, OR MAYBE THEY'D COME BACK TO
24 THIS COURT AND SAY, "WHAT DO YOU MEAN, HAVING THE TESTS DONE
25 ABOVEGROUND AND IN OUR STATE, WHEN WIPP WAS PUT TOGETHER FOR

1 THIS PURPOSE?"

2 IT'S A PRACTICAL ANSWER, A TIME ANSWER, MONEY ANSWER,
3 AND THERE'S A LOT TO BE SAID FOR PERFORMING TESTS WHERE THE
4 STUFF IS GOING TO BE EVENTUALLY. IMAGINE HOW WE'D BE SUBJECT
5 TO CRITICISM IF WE PERFORMED THESE TESTS AT THE OTHER END OF
6 THE COUNTRY, AND PEOPLE WOULD COME IN AND SAY, "HOW CAN YOU
7 LEARN EVERYTHING YOU NEED TO KNOW ABOUT HOW THEY'LL RESPOND IN
8 WIPP IF YOU'RE DOING IT SOMEWHERE ELSE?"

9 BUT THE REAL SHORT ANSWER IS THAT IT ISN'T NECESSARY
10 TO CONDUCT THE DRY BIN TESTS DOWN THERE. WE DON'T SEE ANY
11 REASON NOT TO. IT WAS BUILT FOR THAT PURPOSE PARTIALLY. IT'S
12 READY TO GO AHEAD.

13 THE COURT: WHEN YOU SAY IT MAY COST ANOTHER TWENTY
14 MILLION DOLLARS TO DESIGN ANOTHER PLACE TO PERFORM THE TEST --
15 AND AGAIN I'M JUST TRYING TO UNDERSTAND -- IS THAT BECAUSE YOU
16 HAVE TO CONTAIN WHATEVER THIS WASTE MAY BE GIVING OFF, THE
17 GASES, OR WHAT IS IT?

18 MR. REED: I'LL SLIP AROUND AND SEE IF MR. FREI CAN
19 GIVE ME A HINT.

20 (DISCUSSION OFF THE RECORD.)

21 MR. REED: THAT, HE SAYS, IS PART OF IT, THE
22 OBLIGATIONS THAT ARISE UNDER RCRA FOR CONTAINING THE EMISSIONS.

23 I WOULD ALSO LIKE TO MAKE A COUPLE OF COMMENTS ABOUT
24 THE QUESTIONS YOU ASKED MS. ZANDER ABOUT THE CONGRESSIONAL
25 INVOLVEMENT. I THINK WE HAVE TO KEEP IN MIND CONGRESS HAS BEEN

1 SINCE 1987 WORKING ON A PERMANENT WITHDRAWAL.

2 WE'RE NOT REALLY TALKING HERE ABOUT TWO ALTERNATIVES,
3 AND THE EXECUTIVE BRANCH IS TRYING TO RUSH OUT AND BEAT
4 CONGRESS TO THE ACT HERE. CONGRESS IS WORKING ON THE PERMANENT
5 WITHDRAWAL, WHICH THE SECRETARY OF ENERGY RECOGNIZES IS
6 ESSENTIAL, IT'S PART OF THE PROGRAM. IF IT DOESN'T COME, THE
7 WHOLE THING IS OVER EVENTUALLY.

8 SO THEY'RE NOT REALLY ALTERNATIVES. CONGRESS IS
9 LOOKING AT DIFFERENT THINGS. THERE IS, OF COURSE, NO WAY TO BE
10 SURE WHEN THEY'LL ACT. THE SECRETARY HAD HOPED IT WOULD BE
11 DONE BY NOW, THAT AN EXTENSION OF THE PREVIOUS LAND WITHDRAWAL
12 WOULDN'T BE NECESSARY. THAT DIDN'T TURN OUT TO BE THE CASE.

13 YOU ASKED WHY NOT ENJOIN THIS ACTIVITY UNTIL CONGRESS
14 ACTS? I THINK OUR ANSWER TO THAT HAS TO BE, BECAUSE THERE ARE
15 MEANS BY WHICH THIS COURT MUST ISSUE INJUNCTIONS, IT HAS TO
16 MAKE CERTAIN FINDINGS FIRST, AND WE SIMPLY DON'T THINK ANY OF
17 THOSE ARE AVAILABLE. AS BAD AS THAT PICTURE LOOKS, WHEN
18 EXPLAINED, A LOT OF THE EMPHASIS IS TAKEN AWAY, I THINK.

19 THE ADMINISTRATION, THE AGENCY, IS CONVINCED THAT
20 THESE TESTS CAN BE RUN, THAT THE WASTE CAN BE RETRIEVED IF, AT
21 THE END OF THE DAY, THEY DECIDE THAT THIS FACILITY ISN'T RIGHT
22 FOR THEM. AND THAT TAKES ME TO WHERE I THINK WE ALL SHOULD
23 HAVE BEGUN AND DIDN'T. WHAT IS THE ISSUE BEFORE THIS COURT?

24 YOU WOULD THINK WITH THE FLOOD OF AFFIDAVITS THAT WE
25 WERE HAVING EITHER A TRIAL DE NOVO OR A TRIAL BY AFFIDAVIT

1 ABOUT WHETHER THIS PROJECT SHOULD GO FORWARD. GENERAL UDALL
2 DIDN'T MENTION THE FACT THAT THE ISSUE BEFORE THIS COURT IS
3 WHETHER THE ADMINISTRATIVE RECORD THAT EXISTS, WHICH WAS RELIED
4 UPON BY THE SECRETARIES, SUPPORTS THESE FINDINGS.

5 YOUR HONOR MAY HAVE LOOKED AT THESE SAME THINGS,
6 REACHED A DIFFERENT CONCLUSION, CONGRESS MIGHT HAVE, I MIGHT
7 HAVE, BUT THAT, AS YOU KNOW -- I DON'T NEED TO TALK TO THIS
8 COURT ABOUT THOSE TESTS -- THAT, AS YOU KNOW, IS NOT WHAT WE'RE
9 HERE ABOUT TODAY. YOU'RE GIVEN MORE OF AN APPELLATE COURT KIND
10 OF REVIEW IN AN APA CASE LIKE THIS.

11 WHEN GENERAL UDALL BEGAN HIS ARGUMENT WITH THIS IS A
12 CASE, NOT A CAUSE, I WAS HEARTENED. I HOPED THAT'S WHAT WE
13 WERE GOING TO HEAR ABOUT. I HOPED WE WERE GOING TO HEAR
14 SOMETHING ABOUT VIOLATIONS OF LAW WHICH JUSTIFY A PRELIMINARY
15 INJUNCTION AND RESPOND TO OUR ARGUMENTS ABOUT SUMMARY JUDGMENT.

16 WE DIDN'T. WE HEARD MAYBE SIXTY SECONDS OF CONCLUSORY
17 EXPLANATIONS THAT MIGHT HAVE BEEN SAID TO BE VIOLATIONS OF LAW.

18 THE COURT: BUT HE DID SUGGEST IN HIS ARGUMENT THAT I
19 MAY NOT HAVE THE COMPLETE ADMINISTRATIVE RECORD BEFORE ME.

20 MR. REED: HE DID, INDEED, AND YOU MAY RECALL HE SAID,
21 JUST BEFORE HE SAT DOWN, THAT DOESN'T MAKE ANY DIFFERENCE. WE
22 HAVE VERY CLEAR, CONCISE LEGAL ISSUES BEFORE YOU, WHICH REALLY
23 DON'T REQUIRE MUCH OF AN ADMINISTRATIVE RECORD AT ALL.

24 THE NEPA QUESTIONS DO. THEY DON'T CHALLENGE THE NEPA
25 ADMINISTRATIVE RECORD. WHETHER FLPMA WAS VIOLATED, THIS COURT

1 WILL BE ABLE TO DECIDE BY LOOKING AT THE LANGUAGE OF FLPMA.

2 IF PLAINTIFFS BELIEVE THAT THERE'S SOME RECORD
3 MISSING, WE HAVEN'T OBJECTED TO ALL THAT THEY'VE FILED ADDING
4 TO THIS RECORD. WE WANT TO GET IT IN HERE, GET IT BEFORE YOUR
5 HONOR, GET THE PROGRAM ON ITS WAY. THEY CAN PUT IN WHATEVER
6 THEY THINK IS PART OF THE RECORD.

7 WE ASKED THE BLM PEOPLE IN SANTA FE FOR THEIR RECORDS.
8 WE THOUGHT WE HAD GOTTEN THEM ALL. WE INCLUDED THEM WITH WHAT
9 WE GAVE YOU. IF WE DIDN'T, WE IMPORE PLAINTIFFS TO INCLUDE
10 THEM WITHIN THE RECORD. WE HAVE NOTHING TO HIDE.

11 AS THE COURT HAS SEEN, THE RECORD INCLUDES PLUSES AND
12 MINUSES, THINGS THAT SUPPORT THE SECRETARY'S DECISION AND
13 THINGS WHICH MAY BE SAID TO GO THE OTHER WAY. THAT ONLY MAKES
14 THE RECORD BETTER AS FAR AS I'M CONCERNED. WE HAVEN'T LIMITED
15 THIS RECORD IN A WAY TO SUPPORT THE DECISION.

16 I THINK, HOWEVER, THAT WE CAN'T IGNORE THE FACT THAT
17 THAT'S WHAT WE'RE REQUIRED TO LOOK AT ON THIS SUMMARY JUDGMENT
18 MOTION AND ON THE LIKELIHOOD OF SUCCESS ON THE MERITS IN THE PI
19 ARGUMENTS.

20 NOW, HAVING SAID THAT THIS IS A CASE AND NOT A CAUSE,
21 GENERAL UDALL THEN WENT IMMEDIATELY INTO THE REAL THESIS OF
22 PLAINTIFFS' ACTION, AND THAT IS, THAT WE ARE TRYING TO AVOID
23 CONGRESS, WE'RE TRYING TO BYPASS CONGRESSIONAL AUTHORITY, WE'RE
24 TRYING TO INPINGE ON CONGRESS'S CONSTITUTIONAL AUTHORITY.

25 THAT SIMPLY ISN'T THE CASE. BOTH SECRETARIES WHO ARE

1 DEFENDANTS HERE HAVE PLEADED WITH CONGRESS, HAVE FOR FOUR YEARS
2 TRIED TO GET THE BILL OUT OF CONGRESS TO GET THIS THING
3 PERMANENTLY WITHDRAWN. AS PLAINTIFFS POINT OUT OVER AND OVER
4 AGAIN, THAT'S ALWAYS BEEN THE SECRETARY OF INTERIOR'S POSITION,
5 "I WOULD RATHER HAVE A PERMANENT WITHDRAWAL." BUT HOW LONG CAN
6 ONE WAIT?

7 THE SECRETARY OF ENERGY, OF COURSE, RECOGNIZES THAT A
8 PERMANENT WITHDRAWAL IS NECESSARY. THERE'S SIMPLY NO WAY TO
9 KNOW WHEN THAT MAY COME.

10 WE ARE CERTAINLY NOT TRYING TO BYPASS CONGRESS, AND AS
11 MS. ZANDER SAID, NOTHING THAT'S DONE AS PART OF THE TEST PHASE
12 CAN'T BE UNDONE BY CONGRESS. YOUR HONOR ASKED HER, COULDN'T
13 CONGRESS PUT A STOP TO THE WHOLE THING TODAY? OF COURSE IT
14 COULD. IT COULD, IF IT FELT AS STRONGLY AS PLAINTIFFS DO, IT
15 COULD COME IN AND SAY, "STOP, SECRETARY OF ENERGY, WE'LL WAIT
16 UNTIL CONGRESS DECIDES HOW TO APPROACH THIS." THEY HAVEN'T
17 SEEN FIT TO DO THAT, AND THERE'S NO INDICATION THAT THEY WILL.

18 THEY UNDERSTAND -- MR. FREI SPENDS MOST OF HIS LIFE ON
19 THE HILL, KEEPING THEM UP TO DATE ABOUT WHAT'S GOING ON IN THIS
20 PROJECT. THEY KNOW WHAT'S GOING ON, THEY KNOW THEIR ROLE IN
21 IT, THAT IS, PREPARING FOR THE PERMANENT WITHDRAWAL, AND THEY
22 KNOW THE SECRETARY'S ROLE, THAT'S DOING THE TESTING IN THE
23 MEANTIME. NOTHING HERE UNDERMINES CONGRESS'S ULTIMATE ABILITY
24 TO DEAL WITH THIS.

25 IF CONGRESS EVENTUALLY DOES SOMETHING WHICH IS

1 INCONSISTENT WITH WHAT THE SECRETARY HAS DONE, THERE IS NOTHING
2 HERE THAT CAN'T BE UNDONE. THAT IS ONE OF THE REAL UNUSUAL
3 THINGS ABOUT THIS AS AN ENVIRONMENTAL CASE. USUALLY, WE'RE
4 FACED WITH CASES IN WHICH SOMETHING IS ABOUT TO HAPPEN, AND IT
5 EITHER WILL OR WON'T, AND THE COURT IS REQUIRED TO DECIDE DO I
6 TAKE A CHANCE AND LET THIS GO FORWARD OR NOT.

7 THAT SIMPLY ISN'T GOING TO BE THE CASE HERE. THE
8 ADMINISTRATIVE RECORD IS SO STRONGLY SUPPORTIVE OF THE
9 PROPOSITION THAT THE TEST STUFF GOES DOWN THERE, AND IT'S GOING
10 TO BE RETRIEVABLE.

11 ANOTHER COMMENT ABOUT AVOIDING CONGRESS. THERE ARE
12 SIX PENDING BILLS, ONE OF WHICH IS SPONSORED BY THE SENATOR
13 FROM NEW MEXICO, DOMENICI. THE SECRETARY HAS TAKEN UPON
14 HIMSELF TO TELL HIS PEOPLE, "COMPLY WITH THE PROVISION OF THAT
15 BILL. IT'S NOT A LAW YET, BUT WE CAN SEE WHAT THE SENATOR FROM
16 NEW MEXICO IS LOOKING FOR HERE, AND WE'LL ABIDE BY IT." THAT
17 IS NOT AN ATTEMPT TO SIDESTEP CONGRESSIONAL ACTION.

18 WHEN THE SECRETARIES HAVE SAID -- ONE FINAL POINT ON
19 THAT. WHEN THE SECRETARIES HAVE SAID THAT IT'S PREFERABLE TO
20 WAIT FOR CONGRESS, THAT, I THINK, DOES NOT REFER TO ANY
21 ENVIRONMENTAL CONSEQUENCE AT ALL. THERE HAS TO BE EVENTUALLY A
22 PERMANENT WITHDRAWAL, THAT'S WHAT FLPMA SAYS, BOTH SECRETARIES
23 RECOGNIZE THAT. IT WOULD BE NICE IF CONGRESS HAD DONE THAT IN
24 TIME TO KEEP THE PROCESS MOVING ALONG THE TRACK IT WAS ON, BUT
25 THAT DOESN'T MEAN IT'S ILLEGAL TO HAVE THE TEST PHASE CONDUCTED

1 UNDER AN EXTENSION OF THE TEMPORARY WITHDRAWAL. WE'VE HEARD
2 VERY LITTLE TODAY ABOUT THAT, BUT I'M GOING TO SAY A LITTLE
3 MORE IN THE TIME THAT I HAVE.

4 LET'S LOOK AT THE ALLEGED VIOLATIONS. INTERVENORS ARE
5 RIGHT IN THEIR BRIEF WHEN THEY SAY THE FEDS AND THE STATE HAVE
6 THROWN A KITCHEN SINK AT THE COURT, AND WE THINK IT CAN BE
7 FOCUSED MUCH BETTER. I THINK THEY DID, AND I SINCERELY SAY
8 THAT WE SHOULD ALL THANK THEM FOR THEIR WILLINGNESS TO DO THAT.
9 IN THEIR SHORTER BRIEF, IN THEIR FOCUSING OF THE ISSUES, I
10 THINK THEY DID THE RIGHT JOB.

11 THEY POINTED OUT, AS NEW MEXICO DID IN A MUCH LONGER
12 PIECE, AND WE RESPONDED TO IN AN ALL-TOO-LONG PIECE, THE FIRST
13 QUESTION IS WHETHER THIS IS A PERMANENT WITHDRAWAL. CONGRESS
14 HAS TO MAKE PERMANENT WITHDRAWALS, NOT THE SECRETARY. FLPMA
15 SAYS THAT, THE ADMINISTRATION RECOGNIZES THAT.

16 PLAINTIFFS SAY THIS IS PERMANENT, BUT THEIR ONLY
17 RATIONALE IS THAT THE TEST WASTE IS GOING TO BE STUCK DOWN
18 THERE. NOW, THAT EITHER IS OR ISN'T TRUE. THE SECRETARY IS
19 THE ONE DELEGATED BY CONGRESS TO DECIDE THAT. THIS COURT
20 DECIDES WHETHER IT WAS ARBITRARY, CAPRICIOUS, BASED ON THE
21 RECORD. BUT ONE MUST RECOGNIZE THAT THAT'S THE ONLY
22 EXPLANATION, THE ONLY WAY TO REACH THE PERMANENT WITHDRAWAL
23 ARGUMENT.

24 MS. ZANDER, I THINK, EXPLAINED COMPLETELY, AND THE
25 PICTURES EXPLAIN VERY WELL, THIS IS NOT THE KIND OF ROOM THAT

1 WILL BE USED FOR THE TESTS. THIS IS A SORT OF TEST IN ITSELF,
2 AS THE COURT POINTED OUT, THIS IS HOW IT WILL ALL WORK
3 EVENTUALLY, BUT THE ACTUAL TEST ROOMS ARE BUTTRESSED AND
4 MONITORED AND WILL BE SAFE. CERTAINLY, THE SECRETARY IS
5 ASSURED OF THAT.

6 NEW MEXICO IN ITS PAPERS -- AND I BORROW HERE FROM ONE
7 OF THEIR -- A LEGAL TERM FROM ONE OF THEIR BRIEFS. THEY ALLEGE
8 THAT THE SECRETARY WOULD BE HAPPY TO HAVE THE COLLAPSE OCCUR
9 DURING THE TEST PHASE, THAT WOULD SOLVE HIS PROBLEM. HE'S
10 RUSHED, GOT THIS STUFF DOWN THERE, AND IT'S BURIED, AND HE
11 CAN'T GET IT OUT. TO USE NEW MEXICO'S TERM FROM THE BRIEF,
12 THAT'S PURE HOKUM.

13 WHAT DOES THE SECRETARY GAIN FROM DOING THAT? HE'S
14 GOT LESS THAN ONE PERCENT OF HIS TOTAL WASTE TO DISPOSE OF NOW
15 UNDERGROUND. THEY SUGGEST HE'S GOING TO WALK AWAY FROM THE
16 SITE AND LEAVE THE PROBLEMS TO NEW MEXICO. THAT'S OUTLANDISH,
17 EVEN TO SUGGEST TO THIS COURT. OF COURSE THE SECRETARY IS NOT
18 GOING TO DO THAT, AND HE DOESN'T BENEFIT FROM IT EVEN IF HE
19 DOES.

20 NOW, LET'S TALK ABOUT WHAT THEY ALLEGE IS A VIOLATION.
21 FLPMA PERMITS THE EXTENSION OF WITHDRAWALS IF THE PURPOSE OF
22 THE ORIGINAL WITHDRAWAL IS NOT YET ACCOMPLISHED. WE ALL
23 RECOGNIZE THAT.

24 THERE WAS THE ORIGINAL WITHDRAWAL HERE, PUBLIC LAND
25 ORDER 6403. PLAINTIFFS LOOK AT THAT PUBLIC LAND ORDER. THEY

1 SEE, AMONG OTHER THINGS, THAT IT WAS -- THE LAND WAS WITHDRAWN
2 FOR THE CONSTRUCTION OF THE WIPP FACILITY. THEY SAY THAT
3 CONSTRUCTION IS NOW COMPLETE. THEY CONCLUDE FROM THAT THAT
4 THAT PUBLIC LAND ORDER CAN'T BE EXTENDED, AND THEY SAY THAT
5 THIS ATTEMPTED EXTENSION IS THEREFORE A VIOLATION OF FLPMA.

6 WHAT THEY IGNORE IN THAT WHOLE PROCESS IS THE OTHER
7 HALF OF THE PURPOSE FROM THE ORIGINAL PUBLIC LAND ORDER. AND
8 WITH THE INDULGENCE OF THE COURT, I WILL READ THAT, IT'S VERY
9 SHORT. THE LAND ORDER SAYS, "FOR THE PURPOSE OF THE
10 CONSTRUCTION OF FULL FACILITIES FOR THE WASTE ISOLATION PILOT
11 PROJECT PLANT, PLANT PROJECT" -- THAT'S WIPP -- "OF THE
12 DEPARTMENT OF ENERGY, AND" -- AND -- "TO PROTECT THE LANDS
13 PENDING A LEGISLATIVE WITHDRAWAL, IF APPROPRIATE."

14 TO PROTECT THE LANDS PENDING A LEGISLATIVE WITHDRAWAL.
15 THIS WITHDRAWAL RAN OUT JUNE 1991 OR WOULD HAVE RUN OUT, HAD IT
16 NOT BEEN EXTENDED. IT IS PATENTLY CLEAR THAT THAT OBJECT HAD
17 NOT BEEN ACCOMPLISHED BY THAT TIME. IT HADN'T BEEN
18 ACCOMPLISHED YET. THERE HAS BEEN NO LEGISLATIVE LAND
19 WITHDRAWAL. THIS PURPOSE OF 6403 HAD NOT BEEN ACCOMPLISHED.
20 IT WAS ALREADY EXTENDED THROUGH PUBLIC LAND ORDER 6826.

21 AND AT THE SAME TIME THERE WERE MODIFICATIONS MADE.
22 THEY NOW CAN BRING IN THE WASTE FOR TESTING PURPOSES. THEY
23 HAVE TO MAKE SURE THAT THEY CAN BE RETRIEVED AND SO ON.

24 BUT IT'S THIS SLIM REED THAT PLAINTIFFS SEEM TO RELY
25 ON IN ARGUING THAT THIS IS AN ILLEGAL EXTENSION. THE PURPOSE

1 HAS BEEN ACCOMPLISHED. YOU CAN'T HAVE AN EXTENSION, IF THE
2 PURPOSE HAS BEEN. VERY CLEARLY, THIS PURPOSE WASN'T
3 ACCOMPLISHED.

4 AND IT'S NO SMALL THING. IT'S EXTREMELY IMPORTANT
5 THAT THIS LAND BE WITHDRAWN, IF THIS PROJECT IS GOING TO
6 CONTINUE AT ALL. IF THE EXTENSION HADN'T BEEN MADE, WHAT WOULD
7 HAVE HAPPENED IN LATE JUNE 1991? THIS LAND WOULD HAVE RETURNED
8 TO THE PUBLIC DOMAIN. YOU OR I COULD GO OUT THERE ON OUR
9 BURROWS, DO SOME MINING, GET A PATENT, AND HAVE TITLE TO SOME
10 LAND IN THE MIDDLE OF THE WIPP FACILITY. WHAT PROBLEMS THAT
11 CREATES. WHY FORCE THE AGENCY TO SUCH FOOLISHNESS?

12 AT THE SAME TIME, MAYBE MORE IMPORTANT, THE SECRETARY
13 OF ENERGY WOULD HAVE LOST HIS JURISDICTION TO EVEN PROTECT HIS
14 PROPERTY AT THE TOP OF THAT FACILITY. WHY SHOULD THE
15 GOVERNMENT BE FORCED TO SUCH THINGS? IT MAKES NO SENSE AT ALL.

16 THE EXTENSION WAS CLEARLY NECESSARY TO PROTECT THAT
17 PURPOSE OF THE ORIGINAL PUBLIC LAND ORDER. IF IT HAD BEEN
18 ALLOWED TO LAPSE, ALL MEASURE OF MISCHIEF COULD HAVE BEEN DONE.

19 AND, AS A MATTER OF FACT, I'VE BEEN TOLD BY THE PEOPLE
20 AT INTERIOR THAT SOMETHING VERY SIMILAR TO THAT HAPPENED ON A
21 NEVADA PROPERTY THAT WAS BEING LOOKED AT BY THE DEPARTMENT OF
22 ENERGY FOR A SIMILAR DISPOSAL SITE FOR MORE HIGH-LEVEL ENERGY.
23 WHILE THEY WERE LOOKING AT IT, SOMEONE GOES IN, GETS A PATENT,
24 AND HAS TO BE BOUGHT OUT, BECAUSE HE NOW HAS AN INTEREST IN THE
25 LAND. WHICH IS COMPLETELY NON-DISCRETIONARY FOR INTERIOR. IT

1 IS REQUIRED TO GIVE US THESE LAND PATENTS, IF WE HAVE A MINING
2 CLAIM.

3 THAT SORT OF THING COULD HAPPEN HERE, COULD WELL HAVE
4 HAPPENED IF THE THING HAD BEEN ALLOWED TO LAPSE. THE POINT
5 BEING, OF COURSE, GETTING BACK TO THE POINT, THE PURPOSE OF THE
6 ORIGINAL PUBLIC LAND ORDER HAD NOT BEEN ACCOMPLISHED, AND AN
7 EXTENSION WAS NECESSARY TO DO THAT.

8 THEIR SECOND POINT IS THAT CONGRESS WAS NOT GIVEN
9 ADEQUATE NOTICE, THE NOTICE REQUIRED BY FLPMA. FLPMA HAS TWO
10 SEPARATE KINDS OF NOTICE, ONE REQUIRED FOR THE ORIGINAL
11 WITHDRAWAL, WHICH HAS A MORE EXTENSIVE LIST OF THINGS WHICH
12 CONGRESS HAS TO BE TOLD; ANOTHER FOR MODIFICATIONS IN THE
13 EXTENSION. IT WAS THE LATTER KIND OF NOTICE WHICH WAS GIVEN.

14 THERE'S A LETTER -- TWO LETTERS IN THE RECORD, ONE TO
15 CONGRESSMAN UDALL'S COMMITTEE, TO THE CONGRESSMAN HIMSELF,
16 TELLING THE COMMITTEE WHAT HAD BEEN DONE, JUST AS WAS REQUIRED
17 BY FLPMA. THERE'S NO DOUBT THAT CONGRESS KNEW. CONGRESS
18 APPARENTLY AGREED THAT THAT WAS SUFFICIENT. THERE WAS NO
19 RESPONSE THAT NO, YOU NEED A DIFFERENT REPORT OR NO, WE DON'T
20 WANT YOU TO GO AHEAD WITH THIS.

21 FLPMA ALSO HAS A PROVISION BY WHICH CONGRESS MAY STEP
22 IN AND SAY NO TO THE WITHDRAWAL. THAT WASN'T DONE.
23 APPARENTLY, CONGRESS WAS NOT DISSATISFIED, AND WE HAVE NO
24 INDICATION TO BELIEVE THAT THEY ARE.

25 A FINAL POINT THERE, OF COURSE, IS THAT CONGRESS HAS

1 DECIDED WITH RESPECT TO THESE REPORTS, WHETHER -- HOW IT WILL
2 DEAL WITH THE EXECUTIVE, AND IT HAS SAID THAT IT WILL DO SO
3 DIRECTLY, THAT THE CONTENTS OF SUCH REPORTS ARE NOT JUDICIALLY
4 REVIEWABLE. A FAIRLY UNUSUAL PROVISION, BUT NOT UNHEARD OF.

5 SO THERE'S NO DOUBT CONGRESSMAN UDALL WAS INFORMED.
6 THERE WAS A REPORT. WHETHER OR NOT IT WAS ADEQUATE, WE THINK
7 IT'S CLEAR THAT IT WAS. BUT IF IT WASN'T, IT'S NOT A CAUSE OF
8 ACTION.

9 IN A NUTSHELL, FLPMA WASN'T VIOLATED, BECAUSE THE
10 PURPOSES OF THE ORIGINAL PUBLIC LAND ORDER HAD NOT BEEN MET BY
11 THE TIME THERE WAS A NEED FOR A SECOND, AND REQUIREMENTS FOR
12 CONGRESSIONAL NOTICE WERE MET.

13 A COUPLE OF POINTS ABOUT NEPA. THEY WEREN'T RAISED
14 THIS MORNING BY THE STATE, BUT THEY CERTAINLY ARE IN THEIR
15 BRIEF, AND I WANT TO NOT OVERLOOK THEM. NEPA, OF COURSE,
16 REQUIRES A LOOK AT ENVIRONMENTAL CONSEQUENCES OF FEDERAL
17 ACTIONS, WHICH INCLUDES ALTERNATIVES TO THE PROPOSED ACTION.
18 NEW MEXICO CLAIMS THAT THE DEFENDANTS HERE DID NOT LOOK AT THE
19 ALTERNATIVE OF CONGRESSIONAL WITHDRAWAL AS OPPOSED TO
20 ADMINISTRATIVE WITHDRAWAL. IN FACT, IT CLEARLY DID.

21 HAVE I RUN OUT OF TIME?

22 THE COURT: NO, THAT'S ALL RIGHT. JUST ONE MOMENT.

23 (DISCUSSION OFF THE RECORD.)

24 THE COURT: I'M SORRY, COUNSEL.

25 MR. REED: THANK YOU, YOUR HONOR.

26 THE COURT: WE HAVE TWO JURIES WE'RE ALSO DEALING WITH

1 AT THIS POINT, SO GO AHEAD.

2 MR. REED: THANK YOU. JUST A COUPLE OF POINTS ON
3 NEPA. PLAINTIFFS ALLEGE THAT THE ALTERNATIVE OF CONGRESSIONAL
4 WITHDRAWAL WASN'T CONSIDERED. IT CERTAINLY WAS.

5 THE POSSIBILITY OF CONGRESSIONAL WITHDRAWAL, THE
6 DESIRE FOR IT, IS DISCUSSED THROUGHOUT THE DOCUMENT. THAT IS
7 STILL PART, OF COURSE, OF THE ENERGY DEPARTMENT PLAN. IT'S
8 CAUSED A TWO-TRACK APPROACH NOW, THE CONGRESSIONAL WITHDRAWAL
9 FOR PERMANENCE AND THE TEMPORARY WITHDRAWAL FOR THE TEST PHASE.
10 IT WAS DISCUSSED.

11 NOW, IF NOTHING WERE DONE AWAITING THE CONGRESSIONAL
12 WITHDRAWAL, THAT WOULD BE SIMILAR TO A NO-ACTION ALTERNATIVE,
13 WHICH, OF COURSE, IS INCLUDED, AS IN ALL EIS'S, AND THERE'S AN
14 ALTERNATIVE ACTION ALSO CONSIDERED, AND THAT'S TESTING OF
15 WASTES SOMEWHERE ELSE, AS THE COURT HAS ASKED ABOUT. THAT'S
16 SOMETHING THAT COULD LEGALLY BE DONE, WHETHER PRACTICAL OR NOT,
17 AND WAS CONSIDERED AS ONE OF THE ALTERNATIVES. AS I SAID
18 BEFORE, THAT WOULD INVOLVE DELAY, ADDITIONAL COST, AND SO ON.

19 NOW, WHAT WASN'T CONSIDERED, POSSIBLY, TO PLAINTIFFS'
20 SATISFACTION IS THE ENVIRONMENTAL CONSEQUENCES OF THE
21 FEDERAL -- OF THE CONGRESSIONAL WITHDRAWAL AND HOW THAT MIGHT
22 DIFFER. BUT THAT IS SO SPECULATIVE THAT I DON'T THINK ANYONE
23 WOULD SAY THAT IT SHOULD BE INCLUDED IN AN EIS. THERE ARE SIX
24 BILLS, AS I SAY, NOW PENDING. IT'S HARD TO GUESS HOW MANY
25 OTHER COMBINATIONS MIGHT COME OUT EVENTUALLY. I DON'T THINK

1 NEPA REQUIRES, AND I DON'T SEE ANY CITATION IN THEIR BRIEFS,
2 THAT KIND OF SPECULATION AND GUESSING AS TO WHETHER
3 ENVIRONMENTAL CONSEQUENCES MIGHT BE DIFFERENT. AS I SAY, THERE
4 IS ONE BILL SPONSORED BY THE SENATOR FROM NEW MEXICO WHICH THE
5 SECRETARY HAS INSTRUCTED HIS PEOPLE TO ABIDE BY IN ANY CASE.

6 IT'S ALSO ALLEGED THAT A SUPPLEMENTAL EIS SHOULD HAVE
7 BEEN WRITTEN TO COVER THE QUESTIONS ARISING -- OR THE NEW
8 INFORMATION ARISING FROM ROOF COLLAPSE. THAT, HOWEVER, IS --
9 ROOF COLLAPSE IS DISCUSSED SIGNIFICANTLY IN THE EIS. THE NEW
10 ROOF COLLAPSE IS NOTHING SIGNIFICANTLY NEW, NOTHING THERE TO BE
11 ADDED. IT'S PART OF THE DATA THAT CONTINUES TO BE COLLECTED,
12 AND WILL BE TAKEN INTO CONSIDERATION IN PROVIDING PROTECTION
13 FOR THE PROJECT BOTH NOW AND EVENTUALLY.

14 IT ALSO WILL BE HANDLED IN AN EIS WHICH HAS BEEN
15 PROMISED SUBSEQUENT TO THE TEST PHASE, THERE WILL BE ANOTHER
16 FULL-BLOWN ENVIRONMENTAL IMPACT STATEMENT. THE COURT HAS SEEN
17 THE ONES THAT HAVE ALREADY BEEN DONE, I THINK LITERALLY FOUR
18 FEET HIGH, PROBABLY.

19 A FINAL NEPA POINT IS RAISED IN THE BRIEFS, ALTHOUGH I
20 DON'T THINK IN THE COMPLAINT, AND THAT IS THAT COMMENTS ON THE
21 EIS RECEIVED BY INTERIOR WERE NOT INCLUDED WITHIN IT OR
22 CONSIDERED BY THE DEPARTMENT OF ENERGY. THAT SIMPLY IS NOT THE
23 CASE, AND PROBABLY JUST RESULTS FROM THE DIFFICULTY IN READING
24 SUCH A HUGE DOCUMENT.

25 BUT ALL OF THE COMMENTS RECEIVED BY INTERIOR ARE

1 INCLUDED IN THE JOINT EIS. EACH OF THOSE INCLUDES NUMBERS TO
2 SHOW WHERE THE RESPONSES WILL BE, SO ONE CAN FIND BOTH THE
3 COMMENTS AND THE RESPONSES IN THE EIS, THEY'RE ALL THERE.

4 TO CLOSE, I WOULD EMPHASIS THAT WE AREN'T HERE DEALING
5 JUST WITH WOULD IT BE BETTER TO WAIT TILL CONGRESS ACTS,
6 PARTICULARLY SINCE WE DON'T KNOW WHEN THEY WILL. BOTH
7 SECRETARIES HAD HOPED THEY WILL BY NOW.

8 WE THINK THAT NONE OF THE ELEMENTS NECESSARY FOR A
9 PRELIMINARY INJUNCTION OR FOR THEIR SUCCESS ON THE MERITS HAVE
10 BEEN SHOWN HERE.

11 MOREOVER, HAVE WE SEEN ANYTHING IN THE RECORD OR EVEN
12 OUTSIDE, WITH ALL THAT'S BEEN ADDED, WHICH SUGGESTS THAT THE
13 SECRETARY CANNOT SAFELY DO WHAT HE SAID HE WILL DO?

14 HE'S LOOKED AT THIS FOR YEARS. CONGRESS FIRST
15 AUTHORIZED THIS FIFTEEN YEARS AGO. IT'S GOING AHEAD STEP BY
16 STEP. THERE IS NO TRAUMA ABOUT TO OCCUR. THIS WASTE IS ALL
17 OUT THERE SOMEPLACE. WIPP IS PROBABLY THE SAFEST PLACE FOR IT,
18 WHILE WE'RE WAITING FOR CONGRESS TO ACT. AT LEAST THAT'S WHAT
19 THE RECORD SHOWS, AND THAT'S WHAT WE OUGHT TO BE LOOKING AT.
20 THANK YOU, YOUR HONOR.

21 THE COURT: ALL RIGHT.

22 MR. PINKSTON: GOOD AFTERNOON, YOUR HONOR. THIS MAY
23 BE ONE OF THE PARADE OF HORRIBLES, I DON'T KNOW. I'M GOING TO
24 TRY AND TURN THE PAGE HERE AND TALK FOR A FEW MOMENTS ABOUT THE
25 RCRA MATTER.

1 THE COURT: VERY BRIEFLY.

2 MR. PINKSTON: I KNOW THAT THE EYES GENERALLY GLAZE
3 OVER WHEN RCRA IS MENTIONED, FOR SOME GOOD REASONS, ACTUALLY.

4 THIS CASE, AS IN MOST RCRA CASES, IT IS GOING TO
5 DEPEND IN LARGE PART ON A FAIRLY CLOSE PARSING OF THE STATUTES
6 AND REGULATIONS UNDER BOTH RCRA ITSELF AND EPA'S REGULATIONS
7 AND THE NEW MEXICO HAZARDOUS WASTE ACT.

8 WHAT I'D LIKE TO DO, SINCE I THINK THIS MATTER IS
9 BRIEFED PRETTY THOROUGHLY BY THE PARTIES, IS GIVE A SORT OF AN
10 OVERVIEW SKETCH AND HIT THE HIGHLIGHTS. I WOULD ALSO ASK THE
11 COURT'S INDULGENCE TO ALLOW US TO FILE A VERY SHORT REPLY BRIEF
12 TO THE BRIEF FILED BY THE INTERVENORS IN THIS CASE, WHICH WE
13 RECEIVED ON TUESDAY, AFTER THE CLOSE OF BUSINESS. I WOULD
14 PROPOSE THAT THIS REPLY BRIEF BE PERHAPS NO -- CERTAINLY NO
15 MORE THAN TEN PAGES, AND TO BE FILED BY WEDNESDAY OF NEXT WEEK.

16 THE COURT: WEDNESDAY OF NEXT WEEK?

17 MR. PINKSTON: IF THE COURT WILL ALLOW US TO DO THAT.
18 I THINK IT WOULD BE HELPFUL TO HAVE SOME OF THIS ARGUMENT IN
19 WRITING TO DEAL WITH.

20 RCRA WAS PASSED IN 1976 TO DEAL WITH SOLID WASTES AND
21 A SUBSET OF SOLID WASTES, HAZARDOUS WASTES. IT'S BEEN AMENDED
22 IN 1980 AND IN 1984.

23 RCRA HAS MANY PROVISIONS, BUT ESSENTIALLY, RCRA
24 PROVIDES THAT A FACILITY WHICH TREATS, DISPOSES OF OR STORES
25 HAZARDOUS WASTES MUST EITHER HAVE A PERMIT UNDER RCRA, OR IT

1 MUST HAVE WHAT'S CALLED INTERIM STATUS.

2 NOW, RCRA HAS AN EXCEPTION IN ITS DEFINITION OF SOLID
3 WASTE FOR WHAT'S CALLED SOURCE SPECIAL NUCLEAR OR BYPRODUCT
4 MATERIAL AS DEFINED BY THE ATOMIC ENERGY ACT.

5 NOW, THE REASON THAT'S OF ANY RELEVANCE HERE IS
6 BECAUSE WHAT WE'RE TALKING ABOUT IS RADIOACTIVE MIXED WASTE,
7 WHICH IS SOME RADIOACTIVE MATERIAL WHICH IS REGULATED UNDER THE
8 ATOMIC ENERGY ACT, AND SOME NON-RADIOACTIVE HAZARDOUS WASTE
9 UNDER RCRA OR THE NEW MEXICO HAZARDOUS WASTE ACT.

10 NOW, THIS EXCEPTION FOR RADIOACTIVE MATERIALS
11 ENGENDERED LOTS OF CONFUSION IN THE EARLY YEARS OF THE 1980'S,
12 AND AS I'LL EXPLAIN IN A MINUTE, IT WAS RESOLVED BY EPA IN '86
13 AND '88.

14 NOW, RCRA, AS I MENTIONED, REQUIRES EITHER THAT A
15 FACILITY HAVE EITHER A PERMIT OR INTERIM STATUS. NOW, SECTION
16 42 U.S.C. SECTION 6925 IS THE PROVISION OF THE FEDERAL RCRA
17 STATUTE WHICH DEALS WITH INTERIM STATUS. IT SAYS THAT A
18 FACILITY WHICH IS IN EXISTENCE ON THE EFFECTIVE DATE OF
19 STATUTORY OR REGULATORY CHANGES UNDER THIS CHAPTER THAT RENDER
20 THE FACILITY SUBJECT TO THE REQUIREMENT TO HAVE A PERMIT, AND
21 IF THE FACILITY GIVES CERTAIN NOTICES, IF REQUIRED, AND IF IT
22 HAS MADE AN APPLICATION FOR A PERMIT UNDER RCRA, THEN THAT
23 FACILITY HAS INTERIM STATUS. BASICALLY, INTERIM STATUS GIVES A
24 FACILITY THE ABILITY TO OPERATE WHILE ITS PERMIT APPLICATION IS
25 PENDING.

1 NOW, INTERIM STATUS UNDER RCRA IS NOT GRANTED BY ANY
2 AGENCY. IT IS A CREATURE OF STATUTE AND REGULATION.

3 NOW, IT'S NECESSARY TO TALK ABOUT RCRA HERE, BECAUSE,
4 AS I'LL EXPLAIN IN A MINUTE, THE NEW MEXICO HAZARDOUS WASTE
5 ACT, WHICH IS THE STATUTE WE'RE CONCERNED WITH HERE, HAS A
6 WHOLESALE INCORPORATION OF THE INTERIM STATUS STATUTE AND
7 REGULATIONS UNDER RCRA.

8 SO WHILE WE ARE TALKING ABOUT STATE LAW, THE NEW
9 MEXICO HAZARDOUS WASTE ACT, WE HAVE TO DETERMINE -- TO SEE IF
10 WE HAVE INTERIM STATUS UNDER THAT STATUTE, WE HAVE TO FIRST SEE
11 IF WE WOULD HAVE INTERIM STATUS UNDER RCRA, BECAUSE IF WE HAVE
12 INTERIM STATUS UNDER THE FEDERAL STATUTE, RCRA, THEN BY TERMS
13 OF THE NEW MEXICO STATUTE, WE HAVE INTERIM STATUS FOR STATE AND
14 REGULATORY PURPOSES.

15 NOW, SECTION 3006(B) OF RCRA PROVIDES THAT THE EPA CAN
16 AUTHORIZE STATES TO CARRY OUT THEIR OWN HAZARDOUS WASTE PLANS
17 IN LIEU OF THE FEDERAL PROGRAM. THAT IS THE LANGUAGE, IN LIEU
18 OF THE FEDERAL PROGRAM. WHEN THE STATE OBTAINS THAT
19 AUTHORIZATION, THEN IT'S COMMONLY CALLED AN AUTHORIZED STATE,
20 AND THERE ARE VARIOUS LEVELS OF AUTHORIZATION.

21 NOW, A STATE PROGRAM NEED NOT BE IDENTICAL TO RCRA AND
22 THE REGULATIONS WHICH IMPLEMENT RCRA, BUT IT MUST BE AT LEAST
23 AS STRINGENT AS THE PROVISIONS OF RCRA. IT CAN BE MORE
24 STRINGENT.

25 NOW, EVEN IF THE STATE HAS -- IS AUTHORIZED, EVEN IF

1 EPA HAS SAID TO THE STATE YOU CAN RUN YOUR HAZARDOUS WASTE
2 PROGRAM IN LIEU OF THE FEDERAL PROGRAM, STATE LAW HAS
3 APPLICATION IN AND OF ITSELF, WHETHER OR NOT THERE'S AN
4 AUTHORIZATION BY EPA TO THE STATE, SO YOU CAN HAVE AN
5 UNAUTHORIZED STATE, AND IT CAN BE APPLYING ITS OWN STATE LAW,
6 AND AS I MENTIONED, STATE LAW CAN BE MORE STRINGENT THAN THE
7 FEDERAL LAW.

8 NOW, HERE, AS I MENTIONED, THE NEW MEXICO HAZARDOUS
9 WASTE ACT LARGELY INCORPORATES RCRA IN ITS REGULATIONS. THE
10 KEY PROVISION OF THE HAZARDOUS WASTE ACT HERE IS SECTION
11 74-4-9. IT'S VERY SHORT, AND WHAT IT SAYS IS THIS. "ANY
12 PERSON OWNING OR OPERATING A HAZARDOUS WASTE FACILITY WHO HAS
13 MET THE REQUIREMENTS FOR INTERIM STATUS UNDER 42 U.S.C. 6925
14 SHALL BE DEEMED TO HAVE INTERIM STATUS UNDER THE HAZARDOUS
15 WASTE ACT." SO, IF YOU'VE GOT IT UNDER RCRA, YOU'VE GOT IT
16 UNDER THE NEW MEXICO SCHEME.

17 NOW, THIS PROVISION IS WHY THE INTERPRETATION OF
18 FEDERAL RCRA LAW ON INTERIM STATUS IS IMPORTANT IN THIS
19 CONTEXT, AND THAT'S WHY THAT'S THE FOCUS OF WHAT'S BEFORE YOU
20 IN THE BRIEFS.

21 NOW, MEXICO HAS NO INDEPENDENT PROVISIONS REGARDING
22 INTERIM STATUS. IF YOU HAVE IT UNDER FEDERAL LAW, YOU HAVE IT
23 UNDER STATE LAW, BECAUSE STATE LAW BY ITS TERMS SAYS SO. NOT
24 ONLY HAS NEW MEXICO SAID IN ITS STATUTES THAT IF YOU HAVE
25 INTERIM STATUS UNDER RCRA, YOU'VE GOT IT WITH US, TOO, THE NEW

1 MEXICO HAZARDOUS WASTE REGULATIONS COMPLETELY INCORPORATE THE
2 FEDERAL REGULATIONS ON INTERIM STATUS AS THE STATE REGULATIONS,
3 WITH NO CHANGES WHATSOEVER.

4 NOW, NEW MEXICO RECEIVED BASIC AUTHORIZATION FOR ITS
5 HAZARDOUS WASTE PROGRAM IN 1985. AS I SAID, THERE HAD BEEN A
6 LOT OF CONFUSION ABOUT WHETHER RCRA COVERED MIXED WASTE BECAUSE
7 OF THIS EXEMPTION FOR RADIOACTIVE MATERIALS UNDER RCRA.

8 NOW, DOE, WHICH HAD ADMINISTERED THE ATOMIC ENERGY
9 ACT, HAD NOT REACHED THE CONCLUSION THAT RCRA COVERED MIXED
10 WASTE THAT DOE GENERATED IN ITS WEAPONS PLANTS. NOW, BECAUSE
11 OF THIS CONFUSION, IN JULY 1986, THE EPA ISSUED A NOTICE IN THE
12 FEDERAL REGISTER THAT WAS CALLED STATE AUTHORIZATION TO
13 REGULATE HAZARDOUS COMPONENTS OF RADIOACTIVE MIXED WASTES UNDER
14 RCRA.

15 BASICALLY, WHAT EPA SAID IS THAT BECAUSE OF THIS
16 CONFUSION ABOUT WHETHER MIXED WASTE WAS REGULATED UNDER RCRA,
17 IT HAD NOT REQUIRED AS A CONDITION OF STATE AUTHORIZATION THAT
18 THE STATES HAVE REGULATORY AUTHORITY OVER MIXED WASTE. SO EPA
19 THEN SAID, "CURRENTLY AUTHORIZED STATE PROGRAMS DO NOT APPLY TO
20 RADIOACTIVE MIXED WASTES. THUS, RADIOACTIVE MIXED WASTES ARE
21 NOT CURRENTLY SUBJECT TO SUBTITLE (C) REGULATIONS IN AUTHORIZED
22 STATES."

23 NOW, WHAT THAT MEANS IS THAT TO THE EXTENT THE
24 REGULATION IN NEW MEXICO CAME FROM AUTHORIZED STATE PROGRAMS
25 BEFORE '86 AND '88, MIXED WASTE WASN'T REGULATED.

1 NOW, EPA DID LEAVE OPEN THE QUESTION OF, IF THE STATE
2 HAD SOME INDEPENDENT REGULATION OF MIXED WASTE, THAT WOULD BE
3 APPLICABLE.

4 NOW, THE NEXT YEAR, 1987, NEW MEXICO ENACTED A
5 PROVISION IN ITS HAZARDOUS WASTE ACT WHICH SPECIFICALLY
6 EXEMPTED THE WASTE WHICH WAS TO BE PLACED IN WIPP BY NAME.

7 IN '88, THE NEXT YEAR, EPA ISSUED A CLARIFICATION OF
8 THIS QUESTION -- THE RELATIONSHIP BETWEEN REGULATION OF MIXED
9 WASTE AND INTERIM STATUS, ALL RIGHT? IN THE PRIOR FEDERAL
10 REGISTER NOTICE, EPA HAD SAID, BECAUSE OF THIS CONFUSION, WE
11 HAD NOT MADE STATES SUBMIT PROOF THAT THEY CAN REGULATE MIXED
12 WASTES. WE'RE GOING TO DO THAT NOW, BECAUSE EPA HAS DETERMINED
13 THAT MIXED WASTE IS REGULATED BY RCRA.

14 SO IN 19 -- IN 1988, NOTING ALL THIS CONFUSION, EPA
15 ISSUED A CLARIFICATION IN THE FEDERAL REGISTER, WHICH SAID THAT
16 THE EFFECTIVE DATE OF THE STATE'S RECEIPT OF REGULATORY
17 AUTHORIZATION, THAT IS, WHEN THE STATE IS AUTHORIZED UNDER THE
18 RCRA PROGRAM TO REGULATE MIXED WASTE, THAT DATE WHEN THE STATE
19 GETS AUTHORIZATION WILL BE THE REGULATORY CHANGE THAT SUBJECTS
20 THESE FACILITIES TO RCRA PERMITTING REQUIREMENTS. SO, IF THE
21 STATE DIDN'T HAVE SOME INDEPENDENT REGULATION OF MIXED WASTES,
22 THEN THE TRIGGER DATE FOR WHEN THESE FACILITIES HAD TO GET
23 INTERIM STATUS WAS WHEN THE STATE WAS AUTHORIZED BY EPA TO
24 REGULATE MIXED WASTES.

25 NOW, WHAT THIS ALL MEANS IS THAT UNDER RCRA AND THE

1 STATE AUTHORIZED PROGRAM, THE WIPP HAD TO SUBMIT WHAT WAS
2 CALLED A PART A OF THE RCRA PERMIT APPLICATION TO THE STATE
3 WITHIN SIX MONTHS OF THE REGULATORY CHANGE WHICH MADE WIPP
4 SUBJECT TO RCRA PERMIT REQUIREMENTS. AND UNDER FEDERAL LAW,
5 THE TRIGGER DATE WAS WHEN THE STATE BECAME AUTHORIZED TO
6 REGULATE MIXED WASTES.

7 NOW, THAT DATE WAS IN JUNE OF 1990. WHAT THE STATE
8 AND THE INTERVENORS SAY IS THAT THE TRIGGER DATE IS NOT JUNE OF
9 1990, BUT IN FEBRUARY OF 1989, WHEN NEW MEXICO REPEALED ITS
10 EXEMPTION FOR THE WIPP PROJECT FROM ITS HAZARDOUS WASTE ACT.

11 NOW, NEW MEXICO'S STATUTE SAYS IF YOU HAVE INTERIM
12 STATUS UNDER RCRA, YOU HAVE IT FOR PURPOSES OF THE NEW MEXICO
13 HAZARDOUS WASTE ACT. AS I MENTIONED, THE NEW MEXICO
14 REGULATIONS INCORPORATE WITHOUT ANY CHANGES THE EPA REGULATIONS
15 ON INTERIM STATUS, THAT'S 40 C.F.R., PART 270.

16 NOW, SECTION 270.10 (E)(1) SMALL (I) OF THE
17 REGULATIONS STATES THAT TO OBTAIN INTERIM STATUS, A FACILITY
18 MUST SUBMIT A PART A APPLICATION WITHIN SIX MONTHS OF THE DATE
19 OF PUBLICATION OF THE REGS WHICH FIRST REQUIRED COMPLIANCE. WE
20 SAY THAT TRIGGER DATE WAS JUNE OF 1990, THEY SAY IT WAS
21 FEBRUARY OF 1989.

22 THE COURT: COUNSEL, I'M GOING TO HAVE TO ASK YOU TO
23 BRING YOUR ARGUMENT TO A CLOSE AT THIS POINT.

24 MR. PINKSTON: OKAY.

25 THE COURT: I'LL GIVE YOU ONE MINUTE.

1 MR. PINKSTON: ALL RIGHT.

2 WELL, TO MAKE A LONG STORY SHORT, WHICH I HAVEN'T BEEN
3 SUCCESSFUL IN DOING SO FAR, NEW MEXICO HAS INCORPORATED THE
4 FEDERAL RCRA REQUIREMENTS ON INTERIM STATUS, SPECIFICALLY IN
5 THE STATUTE -- SPECIFICALLY IN THE REGULATIONS. IF YOU LOOK AT
6 THE FEDERAL RCRA REQUIREMENTS, WIPP HAS INTERIM STATUS, BECAUSE
7 WE FILED A PART A WITHIN THE TIME PERIOD WE WERE REQUIRED, AND
8 WE FILED THE PART B OF THE APPLICATION WITHIN THE TIME WE WERE
9 REQUIRED UNDER THE FEDERAL REGULATIONS.

10 IN ADDITION, WE RECEIVED A LETTER FROM NEW MEXICO
11 WHICH INDICATED THAT WE HAD TO SUBMIT THE PART A AND PART B
12 WITHIN A CERTAIN TIME PERIOD TO KEEP INTERIM STATUS, AND WE DID
13 THAT. WE'RE IN COMPLETE COMPLIANCE, AND THEREFORE, BECAUSE WE
14 WOULD BE IN COMPLIANCE UNDER RCRA, WE ARE IN COMPLIANCE FOR
15 PURPOSES OF THE NEW MEXICO HAZARDOUS WASTE ACT.

16 THERE ARE NO FACTS IN CONTROVERSY. THIS IS A LEGAL
17 ISSUE. AND FOR THAT REASON, I'D ASK THAT THE COURT, AS I KNOW
18 IT WILL, REVIEW THE BRIEFS VERY CAREFULLY, AND ALLOW ME TO
19 SUBMIT THE SUPPLEMENTAL BRIEF NEXT WEEK. THANK YOU.

20 THE COURT: I GRANT THAT REQUEST. IT SHOULD BE
21 SUBMITTED ON OR BEFORE NOVEMBER 20.

22 ALL RIGHT, MR. UDALL, DO YOU HAVE ANYTHING ELSE?

23 MR. UDALL: YOUR HONOR, JUST A COUPLE OF THINGS HERE.
24 YOUR HONOR, FIRST OF ALL, I'D LIKE TO POINT OUT THAT THERE ARE
25 NUMEROUS FACTUAL STATEMENTS THAT HAVE BEEN MADE HERE TODAY BY

1 COUNSEL THAT AREN'T SUBSTANTIATED BY THE RECORD, AND THEY
2 AREN'T IN THEIR BRIEF.

3 WE'VE TRIED AS MUCH AS POSSIBLE TO MAKE THIS CASE EASY
4 FOR THE COURT. WE HAVE CITES TO THE RECORD. WE HAVE -- WE'VE
5 DONE EVERYTHING WE CAN TO DOCUMENT ALL THE STATEMENTS THAT
6 WE'VE MADE. AND I THINK THAT IF YOU COMPARE THE STATEMENTS AND
7 YOUR NOTES OF THE STATEMENTS THAT HAVE BEEN MADE HERE WITH
8 THEIR BRIEF, YOU'LL SEE A RADICAL DIFFERENCE. THESE STATEMENTS
9 THEY MAKE HERE AREN'T DOCUMENTED EVEN IN THE ADMINISTRATIVE
10 RECORD.

11 THE COURT: I ASSUME COUNSEL ARE GOING TO ORDER A
12 TRANSCRIPT; IS THAT RIGHT?

13 MR. UDALL: WELL, THAT I THINK WOULD HELP YOU A LOT,
14 BUT I DON'T -- YOUR HONOR, WE LIKE THIS ADMINISTRATIVE RECORD.
15 WE'RE NOT RUNNING THE OTHER WAY FROM THE ADMINISTRATIVE RECORD.

16 FOR EXAMPLE, THE DEPARTMENT OF INTERIOR, THE WHOLE
17 ISSUE ON RETRIEVABILITY, OUR BIG THING OVER HERE,
18 RETRIEVABILITY WON'T WASH. THE DEPARTMENT OF INTERIOR, YOUR
19 HONOR, DIDN'T MAKE ANY FINDING. THAT'S THE DECISION-MAKER.
20 THE DEPARTMENT OF THE INTERIOR DIDN'T MAKE ANY FINDING ON
21 RETRIEVABILITY.

22 THAT'S A CRUCIAL FACT, BECAUSE IF WASTE GOES IN AND IT
23 NEVER COMES OUT, YOU HAVE A FAIT ACCOMPLI, GOT A DEFAC TO
24 NUCLEAR REPOSITORY. CONGRESS'S POWER HAS BEEN USURPED, RUN
25 OVER, TRAMPLED ON.

1 ASK THEM TO GIVE YOU A CITE IN THE RECORD WHERE DOE
2 MADE A FINDING ON RETRIEVABILITY. THEY CAN'T. THEY DON'T IN
3 THEIR BRIEF, THEY CAN'T HERE TODAY.

4 MR. WRUBLE: DOI.

5 MR. UDALL: DOI, DOI, PARDON ME.

6 THE REASON IS, IF YOU UNDERSTAND THE FEDERAL
7 BUREAUCRACY, HERE'S THE DEPARTMENT OF THE INTERIOR SITTING OVER
8 HERE, THEY DON'T KNOW ABOUT RADIOACTIVITY, THEY DON'T KNOW
9 ABOUT NUCLEAR WASTE DUMPS. THEY'RE BEING RAILROADED BY THE
10 DEPARTMENT OF ENERGY.

11 AND THEY THROW UP, THEY INVENT THIS THING OF
12 RETRIEVABILITY IN 1988. AND THE FIRST THING THE DEPARTMENT OF
13 INTERIOR SAYS, "WHOA, WAIT A MINUTE, THIS DOESN'T LOOK LIKE
14 IT'S GOING TO BE RETRIEAVABLE. IT'S GOING TO GO BEYOND THE
15 DATE. THIS IS GOING TO BE AN INDEFINITE WITHDRAWAL." SO
16 THAT'S WHY THEY DON'T MAKE ANY FINDING, AND I DON'T THINK
17 THERE'S ANYPLACE THAT THEY CAN POINT TO YOU IN THE RECORD THAT
18 THEY'VE MADE A FINDING.

19 YOUR HONOR, YOU ASKED EARLIER, AND I HAD UNDERSTOOD
20 YOUR QUESTION ABOUT THE KIND OF WASTE AND ABOUT ITS BEING
21 LEAD-LINED. IT'S IMPORTANT TO NOTE, AND I THINK IT WAS
22 DOWNPLAYED BY GOVERNMENT COUNSEL, THIS IS A VERY, VERY TOXIC
23 FORM OF WASTE. THIS IS PLUTONIUM-LADEN WASTE.

24 SECRETARY WATKINS HIMSELF ON MCNEIL-LEHRER JUST THE
25 OTHER DAY SAID IN SOME TERM LIKE, AND I'M PARAPHRASING, THIS IS

1 THE MOST POISONOUS SUBSTANCE, PLUTONIUM HE'S TALKING ABOUT,
2 KNOWN TO MAN. AND TO SHOW YOU HOW DANGEROUS IT IS, IF IT'S
3 INGESTED, IF IT'S BREATHED IN OR IF IT COMES IN THROUGH A CUT
4 IN AN ACCIDENT, THE AMOUNT OF PLUTONIUM THAT IS PERMISSIBLE FOR
5 PEOPLE THAT WORK IN WEAPONS PLANTS IS WHAT'S CALLED POINT 6 OF
6 A NANOCURIE -- A NANOCURIE -- THAT'S THE PERMISSIBLE BURDEN FOR
7 AN ENTIRE YEAR. IF I PUT A FINGERPRINT ON THE CORNER OF THIS
8 LECTERN, THE WEIGHT OF THAT FINGERPRINT IS TEN TIMES THE
9 PERMISSIBLE BURDEN FOR THE BODY. IN EACH OF THESE BARRELS THAT
10 ARE COMING DOWN HERE, THERE'S ONE CURIE. THAT'S TWENTY-FIVE
11 MILLION, TWENTY-FIVE MILLION ALLOWABLE DOSES. SO WE'RE TALKING
12 ABOUT A SUBSTANCE, YOUR HONOR, THAT'S TOXIC, AND IT'S SOMETHING
13 THAT HAS TO BE HANDLED CAREFULLY.

14 THEY HAVE USED THE TERM HERE, AND I AM INCREDULOUS
15 THAT THEY USED THE TERM "LOW-LEVEL WASTE." I MEAN, THE
16 DEPARTMENT OF ENERGY INVENTED THE TERM "TRANSURANIC WASTE."

17 THE ONLY DIFFERENCE, REALLY, BETWEEN TRANSURANIC
18 WASTE, WHICH THIS WASTE IS, IT IS NOT LOW-LEVEL WASTE, IS THAT
19 THIS WASTE HAS A LITTLE LESS PLUTONIUM THAN HIGH-LEVEL WASTE.
20 THE HIGH-LEVEL WASTE HAS MORE PLUTONIUM, IT'S HOTTER, IT HAS TO
21 BE PROTECTED A LITTLE BIT MORE.

22 SO YOU'RE DEALING WITH SOMETHING THAT IS VERY
23 DANGEROUS AND SOMETHING THAT, IF IT'S CONTAMINATED -- IF YOU
24 HAVE OUR SCENARIO, WHAT ALL OF OUR EXPERTS, WHAT MANY OF THEIR
25 EXPERTS CONCEDE, THE NO RETRIEVABILITY, IF YOU HAVE THE ROOF

1 COLLAPSE ON ALL THESE BINS, THAT SITE IS PROBABLY CONTAMINATED
2 FOR AN AWFUL LONG TIME. THE LIFE OF PLUTONIUM, AS YOU KNOW, IS
3 200 -- IT'S A QUARTER OF A MILLION YEARS, A QUARTER OF A
4 MILLION YEARS.

5 YOUR HONOR, LET ME TALK JUST A LITTLE BIT ABOUT RCRA.
6 IT IS A PROGRAM THAT THE STATE OF NEW MEXICO TOOK OVER, THE
7 RCRA PROGRAM. THE FEDS ALLOWED THEM TO TAKE THE PROGRAM OVER.

8 OUR SECRETARY FOR ENVIRONMENT HAS ALREADY MADE A
9 FINDING -- SHE CALLS IT A PRELIMINARY FINDING, BUT I BELIEVE
10 SHE DID IT ON MY ADVICE -- THAT THEY DO NOT HAVE INTERIM
11 STATUS, AND SHE'S IN THE PROCESS OF MAKING A FINAL DECISION.
12 IT'S A SEPARATE LAWSUIT, THE ENVIRONMENTAL DEFENSE FUND,
13 THEY'LL BE CONSOLIDATED HERE, YOU'LL BE TRYING THAT ISSUE.

14 BUT THE THING THAT THE RCRA ISSUE SHOWS, YOUR HONOR,
15 ARE THE HUGE GAPS IN THE RECORD, THE HUGE GAPS IN THIS
16 ADMINISTRATIVE RECORD. IF YOU TAKE THE RCRA ISSUE, DOES DOE
17 HAVE ALL THE PERMITS, INCLUDING RCRA, DO THEY HAVE THE PERMITS?

18 WELL, THE DOI FIRST REQUIRED THEY GET A PERMIT, THEN
19 IT ALLOWED THEM TO CERTIFY THEY GET A PERMIT. IN JULY 1 OF
20 1991, I WROTE TO THE BUREAU OF LAND MANAGEMENT IN SANTA FE, AS
21 THE STATE'S CHIEF LEGAL OFFICER, AND I TOLD THE BLM THEY DO NOT
22 HAVE A RCRA PERMIT, THEY DO NOT HAVE INTERIM STATUS. DO YOU
23 THINK THAT THAT LETTER IS IN THE SIX INCHES OF DOCUMENTS THAT
24 THEY GAVE YOU OF WHAT THE SECRETARY OF INTERIOR HAD AS THE
25 ADMINISTRATIVE RECORD? IT ISN'T, IT ISN'T.

1 YOUR HONOR, YOUR QUESTION -- YOUR QUESTION ABOUT AN
2 INJUNCTION AND PRESERVING THE STATUS QUO AND YOUR INSTINCTS
3 WERE RIGHT IN LINE WITH WHAT THE JUDGE DID IN NATIONAL WILDLIFE
4 FEDERATION VS. WATT, BECAUSE IN THAT CASE, YOU HAD A FLPMA
5 VIOLATION, YOU HAD CONGRESS AND THE EXECUTIVE GOING HEAD TO
6 HEAD, AND THE LANGUAGE IN THERE JUST COMES RIGHT OUT, JUST HITS
7 YOU WITH THIS SAME KIND OF SITUATION, WHERE IT SAYS, "IT WOULD
8 BE -- IT WOULD BE BEST SERVED BY MAINTAINING THE STATUS QUO AT
9 LEAST UNTIL THERE CAN BE ADEQUATE CONSIDERATION OF THE SERIOUS
10 CONSTITUTIONAL PROBLEM UNDERLYING THIS CONTROVERSY. YET, IF
11 UNRESTRAINED, DEFENDANT COULD ALTER RIGHTS OR PERMIT DAMAGE" --
12 COULD, COULD ALTER RIGHTS OR PERMIT DAMAGE -- "TO THE LAND IN A
13 WAY THAT WOULD CONFRONT THE COURTS WITH A FAIT ACCOMPLI BEFORE
14 THEY COULD RESOLVE THE IMPASSE."

15 THAT'S WHAT WE HAVE HERE. IF YOU DO NOT HAVE
16 RETRIEVABILITY, IF YOU HAVE A COLLAPSE, IT'S A FAIT ACCOMPLI.
17 YOUR HONOR, YOU MAY GET TO THE MERITS OF THIS CASE, BUT I
18 SUBMIT TO YOU THAT YOU WILL NEVER BE ABLE TO GET THAT WASTE, IF
19 YOU HAVE THAT KIND OF COLLAPSE.

20 THE COURT: WELL, LET ME ASK YOU ONE QUESTION ON THAT.
21 AND THAT IS, COUNSEL FOR THE DEFENDANTS HAVE GIVEN ME PICTURES
22 OF WHAT THE FACILITY WOULD ACTUALLY LOOK LIKE, AND AS I
23 UNDERSTAND THEIR ARGUMENT, IT WOULD NOT BE WHAT IS DEPICTED
24 HERE, NOT FULLY PROTECTED, BUT SOMETHING THAT LOOKS LIKE THE

1 PICTURE HANDED TO THE COURT. DO YOU HAVE ANY RESPONSE TO THAT?

2 MR. UDALL: ABSOLUTELY. FIRST OF ALL, YOUR HONOR,
3 THIS ROOM HAD A BOLT SYSTEM. THIS ROOM THAT YOU'RE LOOKING AT
4 HERE HAD A BOLT SYSTEM THAT'S LIKE THE TEST ROOM. IT'S GOT A
5 BOLT SYSTEM. THE MESS YOU SEE ON THE TOP, THAT'S WHAT THIS
6 LOOKS LIKE. THIS LOOKS LIKE -- YOU SEE STEEL GAUGE STEEL ON
7 THE TOP, THAT'S WHAT THIS IS HERE. IT'S A PROTECTIVE COVER.

8 THESE ARE -- THESE ROOMS ARE UNDERGROUND. THE GEOLOGY
9 IS A LITTLE BIT DIFFERENT IN EVERY ROOM, BUT I THINK THE
10 SCIENTISTS ARE GOING TO TELL YOU, IF YOU EXPLORE OUR RECORD AND
11 LOOK AT OUR BRIEF AND SEE WHAT THESE EXPERTS SAY, THAT THE LIFE
12 OF THE ROOM THAT THEY'RE TALKING ABOUT DOING TESTS IN IS OVER
13 FIVE YEARS OLD, AND THE SCIENTISTS SAY THAT ROOM IS IN A STATE
14 OF PRECOLLAPSE. IT'S -- THE ONE INDICATION, YOUR HONOR, THE
15 ONE INDICATION THAT THIS STRUCTURE IS GOING TO COLLAPSE IS THAT
16 YOU HAVE THIS, WHAT'S CALLED ACCELERATION OF CLOSURE, AND YOU
17 CAN TELL IT STARTS CLOSING IN FASTER BEFORE YOU GET A BIG
18 COLLAPSE, AND EVERYBODY IS IN AGREEMENT IN THIS CASE THAT THE
19 ROOM THEY'RE TALKING ABOUT DOING THE TEST IN IS EXPERIENCING
20 ACCELERATION OF CLOSURE.

21 THE COURT: ARE WE REFERRING TO THE ROOM THAT'S AT
22 ISSUE?

23 MR. UDALL: THAT'S RIGHT, I'M REFERRING TO THAT ROOM.
24 AND I THINK -- THE OTHER POINT THAT SHOULD BE MADE, AND YOU ARE
25 ABSOLUTELY RIGHT TO LOOK OUTSIDE THIS RECORD, YOUR HONOR,

1 BECAUSE YOU'RE ENTITLED TO DO THAT IN A PRELIMINARY INJUNCTION.
2 THEY WOULD HAVE YOU LOOK -- JUST LOOK AT THE ADMINISTRATIVE
3 RECORD, YOU CAN'T GO OUTSIDE. THE EXTRA-RECORD RULE
4 SPECIFICALLY ALLOWS YOU OUTSIDE THE RECORD RULE FOR
5 ADMINISTRATIVE -- THESE TYPES OF ACTIONS, ALLOWS YOU IN AN
6 INJUNCTION TO GO OUTSIDE THE RECORD. OTHERWISE, WE WOULDN'T
7 HAVE BOTHERED TO BRING TWENTY SCIENTISTS AND ECONOMISTS AND
8 PEOPLE LIKE THAT BEFORE YOU TO STATE THESE SERIOUS MATTERS THAT
9 THEY DO.

10 YOUR HONOR, UNLESS -- UNLESS YOU HAVE ANY OTHER
11 QUESTIONS AT THIS POINT, IT'S BEEN A PLEASURE TO BE BEFORE YOUR
12 COURT. I WOULD JUST ASK THAT YOU KEEP ASKING THE SAME
13 SEARCHING QUESTIONS YOU'VE BEEN ASKING HERE, AND ASKING FOR
14 DOCUMENTATION, AND ASKING WHERE IT IS IN THE RECORD, BECAUSE I
15 THINK YOU'RE GOING TO FIND OUT THAT MANY OF THESE ASSERTIONS
16 THAT HAVE BEEN MADE HERE ARE NOT SUPPORTED IN THE RECORD, AND
17 YOU'VE BEEN GIVEN DIFFERENT ANSWERS HERE THAN YOU WERE GIVEN IN
18 THE BRIEFS.

19 THE COURT: ALL RIGHT. DO THE PLAINTIFFS, ANY OF THE
20 PLAINTIFFS CARE TO SUBMIT ANYTHING ELSE IN THIS CASE? I HAVE
21 GIVEN THE DEFENDANTS UNTIL THURSDAY TO MAKE A SUBMISSION.

22 MR. BABICH: YOUR HONOR, FOR THE PLAINTIFFS IN CASE
23 2929, THE RCRA CASE, WE WOULD APPRECIATE THE OPPORTUNITY TO
24 RESPOND TO MR. PINKSTON'S BRIEF, AND ALSO APPRECIATE THE
25 OPPORTUNITY TO MAKE A VERY BRIEF STATEMENT IN RESPONSE TO HIS

1 ARGUMENT.

2 THE COURT: I'LL GIVE YOU TWO MINUTES.

3 MR. BABICH: OKAY, THANK YOU, YOUR HONOR.

4 YOUR HONOR, THERE ARE THREE WAYS A FEDERAL FACILITY
5 CAN STORE OR DISPOSE OF HAZARDOUS WASTE UNDER RCRA. THEY CAN
6 HAVE A PERMIT, THE PRESIDENT CAN EXEMPT THE FACILITY, OR THERE
7 IS A GRANDFATHERING PROVISION CALLED INTERIM STATUS, WHICH IS
8 WHAT DOE IS RELYING ON HERE.

9 THE WASTE THAT DOE -- THE GRANDFATHERING PROVISION
10 INTERIM STATUS STATES IN A FACILITY IN EXISTENCE ON THE DATE
11 THAT THE WASTE IT'S GOING TO HANDLE BECAME REGULATED MAY
12 CONTINUE TO OPERATE. SO IT'S A LIMITED GRANDFATHERING
13 PROVISION FOR EXISTING FACILITIES.

14 THIS FACILITY -- DOE DECIDED TO BUILD IT IN 1981. THE
15 WASTE THAT DOE WANTS TO MANAGE IN THE FACILITY BECAME SUBJECT
16 TO THE RCRA IN 1980. THEREFORE, IT WAS NEVER IN EXISTENCE WHEN
17 THE WASTE BECAME SUBJECT TO REGULATION, IT WAS NOT AN EXISTING
18 FACILITY.

19 REGARDLESS OF HOW MUCH CONFUSION THERE MAY OR MAY NOT
20 HAVE BEEN ABOUT WHETHER MIXED WASTE WAS SUBJECT TO RCRA,
21 CONFUSION OR NOT, THERE IS NO WAY THAT DOE WOULD EVER HAVE HAD
22 THE OPPORTUNITY TO GET INTERIM STATUS FOR A NEW FACILITY.
23 INTERIM STATUS WAS INTENDED BY CONGRESS TO PREVENT THE SHUTDOWN
24 OF ONGOING OPERATIONS, AND THE JUSTICE DEPARTMENT -- AND
25 THEY'RE QUOTED ON PAGE 19 OF OUR BRIEF -- CONCEDES THAT THIS

1 WASTE HAS BEEN SUBJECT TO RCRA SINCE 1980.

2 THE JUSTICE DEPARTMENT IS RELYING NOW ON AN EPA NOTICE
3 AND CLARIFICATION THAT INDEED THE WASTE IS SUBJECT TO RCRA IN
4 1986. THAT WAS NOT A REGULATION, IT DIDN'T CHANGE THE LAW AT
5 ALL. IT SIMPLY PROVIDED NOTICE. AND AS OUR BRIEF ESTABLISHES,
6 AND AS MR. PINKSTON JUST CONCEDED, EPA DID NOT CONFER INTERIM
7 STATUS WHERE IT WAS NOT AVAILABLE UNDER THE STATUTE.

8 SO THE RCRA ISSUE HERE IS ACTUALLY VERY SHORT AND VERY
9 SIMPLE, AND THAT IS: DOES THE FACILITY HAVE A PERMIT? NO.
10 DOES IT HAVE A PRECEDENCE EXEMPTION? NO. WAS IT IN EXISTENCE
11 WHEN THE WASTE THAT'S LISTED ON THE PART A APPLICATION BECAME
12 SUBJECT TO REGULATION? AND THIS WASTE BECAME SUBJECT TO
13 REGULATION BY REGULATION 46 -- FEDERAL REGISTER 4614, PUBLISHED
14 JANUARY 16TH, 1981. ACTUALLY, BEFORE THAT, IN 1980. THANK
15 YOU, YOUR HONOR.

16 THE COURT: ALL RIGHT. NOW, YOU'VE ASKED TO RESPOND
17 TO THE PAPERS GOING TO BE SUBMITTED BY THE GOVERNMENT NEXT
18 WEDNESDAY --

19 MR. BABICH: RIGHT.

20 THE COURT: -- IS THAT RIGHT? HOW MUCH TIME WOULD YOU
21 LIKE?

22 MR. BABICH: IF I CAN GET THOSE PAPERS FAXED OR
23 FEDERAL EXPRESSED TO ME, I CAN RESPOND ON MONDAY.

24 THE COURT: MONDAY --

25 MR. BABICH: SO THAT WOULD BE --

1 THE COURT: -- THE 25TH.

2 MR. BABICH: I HOPE THAT'S NOT THANKSGIVING.

3 THE COURT: NOVEMBER 25TH.

4 MR. BABICH: IS THAT THANKSGIVING, YOUR HONOR?

5 THE COURT: NOVEMBER 25TH; IS THAT RIGHT?

6 MR. BABICH: YES.

7 THE COURT: ALL RIGHT.

8 MR. BABICH: THANK YOU.

9 MR. UDALL: YOUR HONOR --

10 THE COURT: DOES EITHER SIDE WISH TO SUBMIT ANYTHING
11 ELSE IN THE CASE? I WILL HEAR NO FURTHER ARGUMENT. EITHER
12 SIDE WISH TO SUBMIT ANYTHING ELSE? IF THERE IS SOMETHING THAT
13 YOU WISH TO ADDRESS THAT YOU FEEL HAS NOT BEEN ADDRESSED, WHY
14 CERTAINLY, YOU MAY FILE YOUR PAPERS, AND --

15 MR. UDALL: YOUR HONOR, COULD WE HAVE THE OPPORTUNITY
16 TO FILE SOMETHING IN LIGHT OF THE NEW FACTS THAT THEY'VE RAISED
17 TODAY IN THEIR ARGUMENT, AND ALSO RESPOND TO WHATEVER THEY
18 FILE?

19 THE COURT: WELL, IF YOU FEEL THAT THERE ARE NEW FACTS
20 THAT THEY'VE RAISED IN THEIR ARGUMENTS, I THINK IT WOULD BE
21 MUCH MORE HELPFUL TO ME IF COUNSEL WOULD RESPOND IN WRITING,
22 RATHER THAN AT THIS TIME.

23 MR. UDALL: THAT'S EXCELLENT.

24 THE COURT: WHEN MAY I HAVE THAT?

25 MR. UDALL: HOW SOON WOULD YOU LIKE IT, YOUR HONOR?

1 WE'RE TALKING ABOUT GETTING THE TRANSCRIPT OF THE GOVERNMENT
2 ARGUMENT AND -- AS SOON AS YOU CAN GET US THE TRANSCRIPT, WE
3 CAN HAVE IT WITHIN A WEEK.

4 THE COURT: WELL, WHEN YOU COME TO TRANSCRIPTS, THAT'S
5 MY BOSS RIGHT THERE.

6 (DISCUSSION OFF THE RECORD.)

7 THE COURT: I UNDERSTAND THE TRANSCRIPT WOULD BE READY
8 BY MONDAY OR TUESDAY.

9 MR. UDALL: WE COULD HAVE IT A WEEK FROM THEN. WOULD
10 THAT BE ACCEPTABLE?

11 THE COURT: THAT WOULD BE -- WELL, EITHER MONDAY OR
12 TUESDAY OF THE FOLLOWING WEEK. YOU WANT SEVEN DAYS?

13 MR. UDALL: YES, YOUR HONOR.

14 THE COURT: ALL RIGHT, COUNSEL HAVE ANYTHING ELSE?

15 MR. UDALL: YOUR HONOR, COULD I JUST ADD TWO MORE
16 THINGS ABOUT THE ROOM?

17 THE COURT: NO.

18 MR. UDALL: OKAY.

19 THE COURT: IF THERE'S ANYTHING ELSE YOU WISH TO SAY
20 ABOUT THE ROOM, WHY YOU MAY PUT IT IN WRITING.

21 MR. UDALL: OKAY. THANK YOU.

22 THE COURT: ALL RIGHT.

23 MR. REED: YOUR HONOR, HAVING BEEN ACCUSED OF MAKING
24 MISSTATEMENTS TO THE COURT, COULD WE ALSO COMMENT DURING THE
25 SAME TIME PERIOD?

1 THE COURT: THAT WOULD BE BY WEDNESDAY -- I MEAN,
2 MONDAY OR TUESDAY OF THE FOLLOWING WEEK.

3 MR. REED: YES, SIR.

4 THE COURT: SEVEN DAYS AFTER THE TRANSCRIPT.

5 MR. REED: YES.

6 THE COURT: YES, YOU MAY DO SO.

7 MR. REED: THANK YOU, YOUR HONOR.

8 THE COURT: AS I UNDERSTAND, EVERYTHING IS ON HOLD AT
9 THIS POINT, AND I UNDERSTAND IF THERE IS ANY CHANGE IN THAT OR
10 IF THERE IS A NOTICE THAT IS ISSUED, THE COURT WILL BE ADVISED
11 IMMEDIATELY.

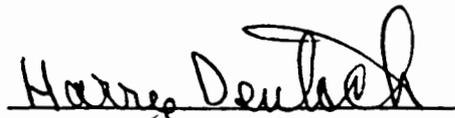
12 ALL RIGHT, WE'LL STAND IN RECESS. THE MATTER IS
13 SUBMITTED.

14 (PROCEEDINGS CONCLUDED 12:42 P.M.)

15 -000-

16
17 CERTIFICATE OF REPORTER

18 I HEREBY CERTIFY THAT THE FOREGOING IS THE OFFICIAL
19 TRANSCRIPT OF PROCEEDINGS IN THE HEREINBEFORE-CAPTIONED MATTER,
20 AND THAT IT IS COMPLETE AND ACCURATE TO THE BEST OF MY
21 KNOWLEDGE AND ABILITY.
22

23
24 
25 HARRY DEUTSCH
OFFICIAL COURT REPORTER