

1 record that he's mischaracterizing the MOA. The MOA
2 does not require the agency to verbally -- to contact
3 the OCC in writing.

4 And when he went back and forth with John, he
5 made a statement: "you were -- you expect us to
6 provide documentation. Well, that's a requirement.
7 But you -- you don't want us to take you for your
8 word."

9 And that's just misconstruing the MOA.

10 THE COURT: Thank you. You may proceed,
11 Mr. Swisher (sic).

12 Q Moving on. The next paragraph on that page, which
13 begins, "The Regional Administrator may take enforcement
14 against any person determined to be in violation,"
15 basically of the UST rules.

16 It goes on to the bottom of that paragraph, the last
17 two sentences say, "with regard to federal enforcement, it
18 is EPA's policy not to take such action where a state has
19 taken appropriate enforcement action."

20 Is it your view, personally, and is it EPA's views,
21 officially, that Oklahoma had not taken appropriate
22 enforcement action with respect to RAM?

23 A It says, "with regard to federal enforcement, it is
24 EPA's policy not to take such action where a state has
25 taken appropriate enforcement action."

1 EPA essentially is saying here, generally speaking,
2 if you, OCC, is going to -- is involved in an enforcement
3 action, EPA normally will not get involved in that to --
4 to double -- to double-team an owner/operator.

5 If the state agency determines they want to take an
6 enforcement action against an owner/operator, normally --
7 this is basically saying EPA will not take the enforcement
8 action, so that the owner and operator is not hit with
9 both state and federal enforcement action.

10 That's my interpretation of what this means.

11 Q My question to you, sir, is -- is -- are you under
12 the belief that the Oklahoma Corporation Commission had
13 failed to take appropriate enforcement action with regard
14 to RAM and its UST facilities?

15 A Well, apparently they -- they didn't find -- they
16 didn't note the violation, so how -- how could we say they
17 had to do appropriate enforcement action?

18 Q I'm simply asking, is it your assessment, or not,
19 that the OCC had not taken appropriate enforcement action?

20 A I really can't answer that.

21 Q So your answer is you have no reason to believe that
22 the OCC failed to take appropriate enforcement action --

23 MS. BEAVER: Objection, Your Honor, counsel is
24 putting words in the mouth of the witness. The
25 witness has already answered that he cannot answer

1 that question and Respondent is testifying for him,
2 putting words in his mouth.

3 MR. SHIPLEY: I want to make the record clear
4 that this gentleman is not able to point out facts
5 that would make this action in concert with the EPA's
6 published policy.

7 MS. BEAVER: If you ask him a question, it's his
8 responsibility to answer your question, not your
9 responsibility to testify on his behalf and put words
10 in his mouth.

11 THE WITNESS: I have -- I don't have the
12 knowledge of what the -- the operation of OCC is with
13 EPA, since I am not involved in the everyday
14 operation; therefore, I can't answer that.

15 I don't know what -- whether OCC failed to take
16 appropriate enforcement action or whether they --
17 they decided they didn't want to take the action, and
18 deferred it to EPA. I don't know what the situation
19 was, so I really can't answer this.

20 THE COURT: Well, Mr. Swisher (sic), is there
21 any evidence that OCC took any action whatsoever?
22 And apparently, their records were that they were in
23 compliance and they had no reason to take action.

24 MR. SHIPLEY: That, sir, is what the record
25 shows.

1 THE WITNESS: Also, I want to interject here
2 that there could be a situation where an inspector
3 has basically approved or given the sign-off on a
4 particular inspection, but verbally provide that
5 owner/operator with some things that need to be done,
6 as an enforcement discretion.

7 So that's why I don't know if an inspector may
8 have come up across some violations and said, "get
9 this thing taken care of, if I'm -- if I come back
10 the next year and it's still here, I will -- I will
11 write you up."

12 So there's a lot of that going on with the -- I
13 say a lot. There's some things going on with
14 inspectors, because one of the -- one of the good
15 things about state inspectors, they have much more
16 discretion, they have much more con -- they are --
17 contact on a regular basis with the regulated
18 community. They can deal with things that we
19 normally, as EPA, cannot deal with.

20 So what I'm saying is that there may have been
21 violations that may have occurred that the state
22 didn't take appropriate action that is now
23 becoming -- is coming to fruition that it is -- it is
24 going beyond those situations. It's -- the
25 enforcement discretion has now gotten to the point --

1 could -- and I'm just -- just speculating here --
2 that the state decided they wanted to do some
3 enforcement action, yeah.

4 Q (By Mr. Shipley:) Well, you don't need to speculate.

5 A Okay.

6 Q But you -- you had Mr. Roberts accompanying you on
7 this inspection. And Mr. Roberts was the inspector for
8 OCC who had passed the very facilities that you and he
9 were inspecting in February '05, right?

10 A Correct.

11 Q And did he suggest to you that he had told RAM
12 employees, or management, something that was inconsistent
13 with what he had written in the inspection and reports for
14 RAM?

15 A I do not recollect -- recollect any -- anything --
16 any conversations like that, no.

17 Q All right. Did you ever ask Mr. Roberts, "gee whiz,
18 Mr. Roberts, you inspected this facility and you passed
19 it. Why did you do that?"

20 A No, I didn't -- I mean to me, it's just the same
21 thing as speeders going down the road. I mean a cop may
22 stop one out of a hundred that speeds, and the other
23 policeman may miss it.

24 It's -- what you are -- what you are saying is
25 that -- well, let me put it this way. I had no

1 indication, at the time I did this -- I didn't want to
2 really know what the previous record was, so that I could
3 have an unbiased approach to doing an inspection.

4 I was trying to do an independent inspection based on
5 the information that I obtained. Whether Mr. Roberts had
6 noticed those violations before or not, really, to me, was
7 irrelevant.

8 I was there to do compliance inspection based on
9 state requirements. If Mr. Roberts had missed some of the
10 violations, well, he missed the violations. It's not
11 unusual -- I'm sure if I did an inspection and another EPA
12 inspector came behind me, they may find some things that I
13 missed.

14 So it's not unusual for an inspector, a state
15 inspector, to miss things, or it may not be unusual for me
16 to miss things that a state inspector may have picked up.

17 Q How many hours were you and Mr. John Roberts together
18 during this inspection of RAM's facilities?

19 A Well, I was there on the 16th, so I would -- that was
20 at least eight hours. And then the next day, we were
21 there most of the day, so I would say roughly two -- two
22 eight-hour days.

23 Q Sixteen hours.

24 A Right.

25 Q And is it your testimony that you never asked him

1 what his experience with the facilities had been in the
2 past, knowing that he had inspected them?

3 A He has indicated that there had been problems, but we
4 didn't get into specifics.

5 Q What did he say?

6 A He just basically said that we have had -- and I
7 don't remember the -- I don't have details as to what he
8 said, I'm just getting the gist of what he said, that we
9 had some problems at certain facilities, and that I was
10 there -- and I told them I was there doing a compliance
11 inspection. I really didn't -- that was not relevant for
12 what I was there for.

13 Q Did you ask him to stop telling you?

14 A No. I mean I -- this is -- you know, I really am not
15 aware of RAM. I have never done an inspection of RAM
16 before. I have no inkling of what RAM represents, how
17 many facilities they had, other than the facilities I was
18 there (sic).

19 Q That's not the question I asked. I'm sorry, I guess
20 I asked you if you asked him about what he knew about the
21 facilities, or did you ask him to stop telling you what he
22 knew about the facilities that he had inspected?

23 A No, I never did -- I never really did get into a
24 conversation with him about the -- the specifics of each
25 facility. He has indicated that he has -- has inspected

1 RAM facilities before, and has had problems with
2 compliance; however, he never did come out and say, "well,
3 you know, I found all these violations," and gave me
4 specifics, because I really didn't care about what he
5 found previous to this. I was more or less trying to
6 determine what the compliance was --

7 Q Okay.

8 A -- at the time I did my inspection.

9 Q Well, let's -- let's shift to your calculation of the
10 penalties. Knowing that this gentleman had, in fact,
11 inspected the very facilities that you were inspecting,
12 when you sat down to calculate the punishment for what you
13 found -- and that's really what we are here to talk
14 about -- is the input to your judgment as to how much you
15 should fine RAM, did you not ask John Roberts what the
16 history of, perhaps, the testing on a particular tank had
17 been?

18 MS. BEAVER: Objection, Your Honor. These
19 questions have been asked and answered several times.

20 MR. SHIPLEY: I haven't even finished --

21 MS. BEAVER: He asked --

22 MR. SHIPLEY: Don't speak to me. Speak to the
23 Judge.

24 MS. BEAVER: Thank you, Chuck.

25 Your Honor, counsel has asked Mr. Cernero

1 several times the nature of his conversations,
2 whether he asked Mr. Roberts these questions. They
3 are asked and answered.

4 THE COURT: I don't think this question has.
5 Objection overruled. Proceed.

6 Q (By Mr. Shipley:) And I -- it's my error,
7 Mr. Cernero, for not making it clear. Obviously, you were
8 interpreting MRI questions as to what they had to do with
9 compliance as opposed to penalty. In many instances, as
10 you have described for us, you decided to assume that a
11 tank had been out of compliance, that the CP system had
12 not been operative for a year prior to the time when you
13 were there, correct?

14 THE COURT: That one was not --

15 THE WITNESS: No, it was release detection.

16 Q (By Mr. Shipley:) Okay.

17 A It wasn't -- it wasn't for the CP system. I'm not --
18 I'm talking about the release detection, we said it was
19 for a year.

20 Q Okay. During your determination of how long you
21 should fine RAM for the failure which you found on the
22 16th of February, did you ever speak with Mr. Roberts or
23 have any input from him as to how long that system may
24 have been out of compliance?

25 A I think I only remember one time when we were in

1 the -- on the 17th with Ms. Twilah Monroe, that we did not
2 have a specific record of a -- and I can't remember the
3 details -- of a test. And she did not recollect it, and
4 but John did say, "yes, they did do the test, I was
5 there." So I did use part of that to try to at least see
6 that that particular area was not in violation.

7 So he basically gave me testimony saying, "yes, I was
8 there, I know it was done, it was this time." So he
9 basically verified for me that they were not in -- that
10 not -- they were not out of compliance on that particular
11 issue. And I don't remember which facility it was or what
12 the particular issue was.

13 So that's the only thing I could remember that
14 John -- I didn't really ask John for all his records, I
15 didn't ask John what the situation was, other than
16 basically -- I needed John, more or less, basically to
17 give me the -- where those facilities are without me
18 having to go look on a map, you know.

19 I just went with John -- or he went with me, I can't
20 remember which -- we just followed each other.

21 And I mean it was -- his input into it in -- in
22 previous inspections, to me, was irrelevant, as far as
23 history of noncompliance.

24 My history of noncompliance has to do with what did
25 EPA -- did EPA have a problem with -- with RAM,

1 Incorporated? What is the history of noncompliance with
2 us?

3 Because the -- the relationship between the State and
4 RAM is different between the relationship with EPA and
5 RAM, because the state is there as the implementing
6 agency.

7 I wanted to do an independent inspection, regardless
8 of what Mr. Roberts had found in the -- in the past;
9 however, I had enough documentation on the EPA level that
10 indicated they did have a history of noncompliance, so I
11 didn't need further documentation from Mr. Roberts.

12 Q The history of noncompliance that you referred to is
13 the one \$750 fine for one UST violation?

14 A Right.

15 Q And something that had nothing to do with UST, but an
16 aboveground tank, right?

17 A That's correct.

18 Q And you --

19 A But our policy does say that you can consider other
20 violations, EPA violations other than USTs in our policy.

21 Q Is it your testimony that the only reason that you
22 had John Roberts accompany you for these two days was as a
23 pathfinder?

24 A No, I'm not saying that. I'm just saying that
25 that -- that was part of it. The fact is that it is

1 always a good idea to have a state representative with you
2 while you are doing this, to show that we are both
3 committed to the correcting of violations, if found; if
4 there's an enforcement necessary, that we are basically on
5 the same page.

6 It always makes things a lot easier to have a state
7 representative with you. Particularly from the standpoint
8 that he -- he is more familiar with the -- the layout of
9 the facilities; they have been there before.

10 Q He has been there before, he is more familiar, but
11 you didn't allow him to tell you about what he knew, what
12 he had found? Or am I -- you know, or am I
13 misunderstanding your testimony?

14 A My testimony is I really didn't care what he found
15 prior to that. I was doing my -- my inspection. I
16 actually didn't -- would prefer that he didn't tell me, so
17 that I can do an independent inspection without -- without
18 a -- any tainting from what the State had found before.

19 Now, unfortunately, in this situation, you know,
20 maybe I should have. Maybe I should have asked him, "give
21 me all your records, let me see what you found before,"
22 and scrutinized that.

23 But my purpose in that was to do an independent
24 inspection, try to do it without any bias as to whether it
25 was a good -- a good facility, a good owner, or a bad

1 operator and owner.

2 So, you know, my -- my whole purpose in doing that is
3 to not -- not look at past history from the State
4 standpoint.

5 Q All right. But you -- you have indicated that past
6 history was very important to you when you were
7 calculating the penalty. And your testimony is that you
8 didn't go back to Mr. Roberts after spending those two
9 days with him to ask him anything further about the
10 calculation of the \$278,000 penalty that you initially
11 came up with?

12 A Well, the history of noncompliance was -- was
13 established in the fact that we issued a field citation.
14 I did not even use the history of noncompliance as an
15 increase in the penalty policy; I -- I essentially kept it
16 neutral.

17 I could have added -- I could have added up to
18 50 percent more for the fact that there was a previous
19 field citation for RAM, Incorporated, at the Quik Lube. I
20 mean I didn't use it; I had it, I saw that there was a
21 history of noncompliance, but I did not use it in the
22 calculation.

23 Q All right. I think I understand your testimony and
24 your point, sir.

25 If I may ask, please turn to Respondent's Exhibit 49

1 in the book before you.

2 A Okay. I'm there now.

3 Q All right.

4 A Is this the Preamble to the Rules?

5 Q Yes.

6 A Okay.

7 Q One more question before we go through this, and that
8 is: Do you recall telling me that the Oklahoma
9 Corporation Commission asked you to -- you, EPA -- to come
10 do an inspection, enforcement action, inspection, against
11 RAM?

12 MS. DIXON: Your Honor, once again, these
13 discussions were made during settlement.

14 MR. SHIPLEY: This had nothing to do with
15 settlement.

16 THE COURT: Overruled. You may answer the
17 question.

18 THE WITNESS: My understanding was that Oklahoma
19 has -- OCC had invited us to conduct inspections at
20 RAM; that was my understanding.

21 Q (By Mr. Shipley:) All right. So it wasn't you
22 calling -- it wasn't you, EPA, calling OCC saying, "by the
23 way, we want to give you a heads up, pursuant to the MOA,
24 that we're coming."

25 OCC called you and said, "please come inspect RAM,"

1 correct?

2 A They didn't call me. They called -- they --
3 according to Mr. Pashia, he was the one who made the
4 arrangements, so I don't know -- all I was asked was to
5 come up to do these inspections because Greg couldn't do
6 them, or something to that effect.

7 So they knew I was coming. They didn't say, "John,
8 come up here and inspect these people." And I don't know
9 what transpired between OCC and Mister -- Mr. Pashia.
10 Mr. Pashia has been involved with OCC for many years, and
11 whatever arrangements he made with the State, I am not
12 privy to those -- those arrangements.

13 Q My question was do you remember saying to me that the
14 OCC had asked EPA to come enforce against RAM?

15 A I had heard that, yes.

16 Q And then --

17 A The didn't ask me, particularly.

18 COURT REPORTER: I'm sorry?

19 Q (By Mr. Shipley:). Further, at any meeting, do you --

20 COURT REPORTER: Hang on. What was your answer?

21 THE WITNESS: Yes.

22 Q (By Mr. Shipley:) And further, do you recall saying
23 to me that the OCC felt they needed EPA to come in to drop
24 the hammer on RAM, or something to that effect?

25 A I'm not -- I'm not going to say -- I'm going to say

1 that -- my understanding was that OCC wanted input from
2 EPA on these inspections; that was my understanding.

3 Q They -- they wanted more than input, I believe, isn't
4 that the case?

5 A For whatever reason, they wanted EPA to get involved
6 in inspections of those facilities.

7 Q You have said that Mr. Roberts -- John Roberts said
8 to you that OCC had trouble with getting compliance from
9 RAM.

10 A I heard -- I have -- I have heard comments to the
11 effect that he has had problems with compliance from RAM.
12 We didn't go into specifics. That didn't necessarily mean
13 that -- that he did enforcement or he wanted enforcement.
14 I understand that he has had problems with getting
15 compliance. That was all I understood.

16 Q And you earlier testified that Mr. Roberts said this
17 to you: "Mr. Cernero --

18 A Yes.

19 Q -- we need you, EPA, out here to enforce," right?

20 A No, Mr. Roberts never said that to me.

21 Q I'm sorry. Okay.

22 A He just said -- in the process of doing inspections,
23 he has indicated that at times, he has had problems with
24 getting compliance from RAM. We didn't go into specifics,
25 essentially just saying that we had some problems.

1 And that -- that's not untypical. Inspectors have
2 problems all the time, so it doesn't necessarily mean that
3 that was a -- a green light for us to do enforcement
4 action.

5 Q Why were -- why didn't you ask him what the problems
6 were?

7 A I didn't really care.

8 Q Okay. Did he ever tell you that his boss,
9 Mr. Jeffers -- John Roberts' boss, Mr. Jeffers -- had
10 requested EPA to come in?

11 A No, he never indicated to me that.

12 Q He never said it to you?

13 A No.

14 Q But did you hear it otherwise?

15 A My understanding was that -- that the OCC wanted EPA
16 involvement in those particular inspections, and that's
17 what we did.

18 Q Were you ever told that Mr. Jeffers had been
19 personally annoyed by Mr. Allford, and wanted to teach him
20 a lesson?

21 A I never heard that.

22 Q Never heard that?

23 A No.

24 Q Let's look now, if you would, please, sir to 49,
25 which --

1 A Well, let me make that clear. EPA's job is not to --
2 it is -- our job is not to be the -- the hit man for OCC.
3 We are there to do an enforcement action, if necessary.
4 We are there to cooperate with OCC.

5 If OCC wants to do their own enforcement, they can do
6 their own enforcement. EPA does not -- is not committed
7 to do enforcement for the state if they request it. It
8 has to go on the merits of the inspection.

9 If you do an inspection and there's violations, EPA
10 is obligated to do enforcement. If there's no violations
11 found, obviously, EPA is not going to pursue enforcement
12 action.

13 EPA is not the hit man for any of the states or any
14 of the tribes.

15 Q Were you here during Mr. Pashia's testimony that EPA
16 has found numerous violations in tribal facilities, but
17 never issued any compliance fine ever?

18 A My understanding is that the relationship between EPA
19 and tribes is totally different between the relationships
20 between EPA and the regulated community.

21 A tribe is considered a foreign nation. It is
22 totally a different entity. EPA is -- has issued field
23 citations, has issued orders against facilities on tribal
24 land not necessarily owned by the tribe or operated by the
25 tribe, but we have done enforcement action and are

1 actually in the process of doing enforcement actions
2 against tribes.

3 Q There -- there is no such -- there's no record of any
4 such fine in the fiscal year 2001, 2002, 2003, 2004, 2005
5 in the state of Oklahoma on any tribal-owned or operated
6 UST facility; is that your understanding?

7 A I don't know about Oklahoma. I know we did some in
8 New Mexico.

9 Q Okay. I'm just asking about Oklahoma; I can't cover
10 the whole United States. But you're also aware that
11 within the marketing era -- area of RAM, are you not, sir,
12 there are tribally owned filling stations that compete
13 with RAM?

14 A Well, I'm sure there are.

15 Q All right. And you take -- you took great time
16 telling us that it was EPA's obligation to level the
17 playing field between competitors. You didn't want one
18 competitor to not have to pay for compliance and thereby
19 be able to undercut his neighbor who is selling
20 gasoline --

21 A That's correct.

22 Q -- who did pay for compliance, right?

23 A That's correct; however, our relationship, again,
24 between -- between EPA, the federal government, and
25 tribes, is different than it is between EPA and the

1 regulated community that is not tribal.

2 This is something that has been ongoing in all
3 programs. You know, whether it's good, bad, or
4 indifferent, that is just the way it is. Hopefully, that
5 will be, you know, something that will be taken care of in
6 the future.

7 Essentially, EPA is acting as a state for the tribes.
8 We are more interested in getting compliance assistance at
9 this point, and hopefully somewhere down the road, we will
10 move into the enforcement realm where we would only -- not
11 only do the compliance assistance, but we'll also do the
12 enforcement against tribal entities.

13 That has not occurred yet. We -- we have no
14 authority, at this time, to issue enforcement actions
15 against tribal entities without going through process
16 that's been dictated by Washington.

17 That's my story. Short and sweet, I don't have
18 anything else to say, other than EPA has taken a different
19 approach to tribal entities.

20 Q Nonetheless, it is inconsistent, is it not, sir, with
21 your stated intent to level the playing field and to cause
22 fairness in the market place by avoidance?

23 A Well, let me make this clear. The tribes are not
24 free to violate the law; they still have to get in
25 compliance. Granted, they may not be fined, but they are

1 required to purchase equipment, they are required to do
2 cleanups, they are required to do compliance, just like
3 everyone else is. There's no lenience there, as far as
4 compliance is concerned.

5 Q So has RAM.

6 A I understand what you are saying. I understand you
7 are saying -- I have said we try to level the playing
8 field; however, we are trying to level the playing field
9 along with the regulated community outside of the tribes.

10 Unfortunately, we do not have the authority to do
11 the -- take the enforcement action that we would -- we
12 would normally take that was against a non-tribe.

13 Q EPA is not prevented from enforcement other than by
14 its own choice, unless you have something to show me that
15 shows otherwise, correct?

16 A Again, I am not -- I am not the person to talk to for
17 relationships between EPA and the tribes. I am an
18 inspector, an enforcement officer in the Underground
19 Storage Tank program. I do not make the policies that
20 dictate how we are to treat tribes.

21 THE COURT: I think, Mr. Swisher (sic), you've
22 made your point here, so move on.

23 MR. SHIPLEY: Okay. Thank you, sir.

24 THE COURT: Move on to the next topic.

25 Q (By Mr. Shipley:) All right. Exhibit 49.

1 "Underground Storage Tank, the UST EPA regs Preamble. On
2 the second page --

3 A Okay.

4 Q -- under the "Operating Principles."

5 A Yes, I see it highlighted here.

6 Q All righty. The third factor under "Operating
7 Principles." If you would, read that for the record.

8 A Okay. You are talking about the third bullet there,
9 right?

10 Q The third.

11 A Okay. "The regulations must be kept simple" --

12 Q I'm sorry. "Third, most of the facilities." In that
13 first paragraph under "Operating Principles."

14 A Oh, I'm sorry. Okay. "Third, most of the -- most of
15 the facilities to be regulated are owned and operated by
16 very small businesses, essentially "mom-and-pop"
17 enterprises, and not -- not accustomed to dealing with
18 complex regulatory requirements. Fourth" --

19 Q That's okay.

20 A Is that it?

21 Q Yeah.

22 A Okay.

23 Q Now, if we go below that paragraph, beginning, "in
24 response to the unique aspects of the regulated
25 community," the second bullet, which begins, "the UST

1 regulatory program."

2 A Right.

3 Q Read that.

4 A Okay. "The UST regulatory program must be designed
5 to be implemented at the state and local levels. State
6 and local governments have been and continue to be the
7 authorities most capable of effective oversight of UST
8 systems and response to releases."

9 Q And the bullet following that, please, sir, also.

10 A Okay. The third bullet: "The regulations must be
11 kept simple, understandable, and easily implemented by the
12 owner and operator in order to facilitate voluntary
13 compliance. Section 9003(b), specifically indicates that
14 technical capability can be considered in developing the
15 Subtitle I rules."

16 Q All right, sir. Skip to the bullet two down from
17 that, begins: "The regulations must be designed," and
18 let's read that.

19 A Okay. "The regulations must be designed to retain
20 the flexibility necessary to accommodate, where possible,
21 the special needs of the UST regulated community, which is
22 largely composed of small businesses with limited
23 resources available for capital improvements."

24 Q Turn with me, if you would, please, sir, to the
25 seventh page of this document.

1 A Seventh page?

2 Q The page numbers --

3 A Okay. Seven of eight?

4 Q -- are found --

5 A Yeah, I see it.

6 Q -- in the lower left.

7 A I see it.

8 Q Okey-doke.

9 A I just had to take my glasses off to see it, which is
10 really weird.

11 Q Believe me, I certainly understand that one. Under
12 paragraph Number 7.

13 A Okay.

14 Q Coming down one, two, three paragraphs.

15 A Okay.

16 Q "Given the large number." If you would, read into
17 the record that first sentence.

18 A Okay. "Given the large number of UST -- UST
19 facilities, tank systems, and potential cleanups needed,
20 EPA is convinced that many aspects of this regulatory
21 program will be most effectively cared out at the state
22 level of government."

23 Q Yes, sir. And if you would, turn to the next page,
24 page 8.

25 A Okay.

1 Q And the last sentence in the first full paragraph.
2 The first full paragraph, I believe, begins, "finally, EPA
3 believes."

4 A Okay.

5 Q And then the last --

6 A Last sentence there? Okay.

7 Q -- last sentence, if you would read that.

8 A Okay. "A more -- a more realistic and effective
9 approach is for EPA to provide support, tools, and
10 guidance to the state and local regulators that can be
11 used to improve their programs' compliance performance."

12 Q All right, sir. And that last thing that you read is
13 the essence of what is embodied in the Memorandum of
14 Understanding, the legal document which prescribes the
15 lawful relationship between EPA Region 6 and Oklahoma,
16 does it not?

17 A Yes. The -- actually, the UST program was designed,
18 from the very beginning, to be a franchise approach to --
19 between EPA and the states. It was always meant to be a
20 delegated program.

21 EPA had no interest in maintaining a large presence
22 in the Underground Storage Tank program, because of the
23 large university of facilities that we would have to be
24 responsible for.

25 It was always meant to keep it simple; although a lot

1 of people look at it and say it's nowhere near simple, but
2 it's a whole lot more simpler than RCRA, or Air Quality
3 Rules and Regulations. It was always meant to be a
4 program that was one by the state entity.

5 And -- and it is true, most of -- about probably
6 50 percent of the facilities that we regulate are
7 mom-and-pop; one owner, maybe two owner; however, I
8 wouldn't put RAM in that category of being a mom-and-pop.

9 But that was the approach that EPA took, is to give
10 as much authority and delegation to the state as possible.

11 Q Have you, in your working with RAM employees or
12 managers, ever been treated disrespectfully?

13 A No.

14 Q Have you ever been refused access to records?

15 A No.

16 Q And you mention you have been in the offices of RAM.
17 Do you remember the names of any of the RAM personnel that
18 you dealt with?

19 A The only one I am familiar with or remember was
20 Twilah Monroe.

21 Q And this --

22 A Yeah, that's -- that's why she looks familiar, I
23 guess, yeah.

24 Q And do you recognize Ms. Monroe, I believe?

25 A Yeah.

1 Q Behind me?

2 A Yeah.

3 Q Thank you. And have you found her to be knowledgeable
4 of the applicable facts of what the program, UST program
5 requires?

6 A Generally speaking, yes.

7 Q And you found -- you found her to be knowledgeable of
8 the location of the company records, which the UST program
9 calls them?

10 A Yes.

11 Q All righty. And she's never been uncooperative with
12 you in any way, has she?

13 A No.

14 Q All right. Thank you. The -- continuing in this
15 same exhibit, Respondent's Exhibit 49, if you turn over to
16 the next page, the Final Rules, Preamble, continuing. If
17 you would look at page 2, or -- yeah, page 2 of 26.

18 A Okay.

19 Q In the paragraph which begins on that page, right
20 above the "Summary of the April 17th Proposal," the last
21 sentence in that paragraph, the paragraph that begins, "in
22 Section 9004" --

23 A The last sentence there?

24 Q The last sentence: "Accordingly, EPA."

25 A Okay.

1 Q Read that into the record --

2 A All right.

3 Q -- if you would, sir.

4 A "Accordingly, EPA believes that Congress intended EPA
5 to play an important leadership role by establishing UST
6 criteria, and that, consistent with statutory
7 requirements, the state and local government should carry
8 out the program wherever possible."

9 Q Yes, sir. And that's consistent with where we read
10 the MOA, is it not?

11 A Yes, sir.

12 Q All right. Now, if you would, turn to page 5 of that
13 document.

14 A Okay. I'm there.

15 Q All righty. In -- below Roman Numeral III, entitled,
16 "Today's Rule."

17 A Yes.

18 Q And a "Summary of Today's Rule." If you go down to
19 the third paragraph, if you would, read that paragraph
20 into the record for us, sir. It begins, "in determining."

21 A Okay. "In determining" 'adequate enforcement,' EPA
22 has defined the minimum authorities and procedures a state
23 must have. The state must have authority to inspect
24 records, inspect sites, and require monitoring and testing
25 by the owner. The state must also have procedures for

1 inspecting sites and reviewing records. The state must
2 have legal authority to obtain a temporary restraining
3 order and a preliminary injunction, and to assess or sue
4 to recover penalties. In addition, the state must allow
5 opportunity for the public participation in enforcement
6 actions."

7 Q Do you have any evidence which suggests that the
8 State of Oklahoma does not supply adequate enforcement, as
9 defined here?

10 A Again, I don't have the expertise of Oklahoma to make
11 that a yes or no answer.

12 Q Given --

13 A I'm assuming it does, because they are a delegated
14 program and they still have delegation.

15 Q All right. Given your -- given your -- you describe
16 it, limited knowledge, within your limited knowledge, you
17 have no knowledge that would show that that would be --
18 that the Oklahoma Corporation Commission does not measure
19 up to that standard?

20 A No, I have no indication.

21 Q All right. If you would, turn to page 10 of this
22 document.

23 A Okay.

24 Q All righty. The last -- the last full paragraph on
25 that, which is paragraph C, beginning, "achieving the

1 objective." If you would, read the last sentence of that
2 paragraph into the record, and the first sentence of the
3 second paragraph --

4 A Okay.

5 Q -- or the next following paragraph.

6 A "EPA intends to allow states to choose a number of
7 methods that will establish UST programs with clear,
8 understandable requirements. The three major methods are
9 discussed below.

10 "First, a state may adopt or incorporate, by
11 reference, today's final technical regulations. EPA
12 already has some indication that several states plan to do
13 this."

14 Q All right. Let's do the -- and the paragraph
15 following that begins, "second."

16 A Okay.

17 Q Read that first paragraph --

18 A Okay.

19 Q -- the first sentence there for me, sir.

20 A It's all highlighted, so -- okay. "Second, a state
21 may develop a different regulatory approach that is,
22 however, analogous to the federal program, because it
23 satisfies the performance and objectives for each program
24 element."

25 Q All right. And skipping now to the next one-sentence

1 paragraph. Read that into the record, please, sir.

2 A Okay. "In adopting this second approach, the state
3 may develop different regulations that provide as specific
4 and clear directives for the owners and operators as do
5 the federal requirements. One advantage of this method of
6 rulemaking, that the regulated community will understand
7 their responsibilities and can be held to comply with
8 them."

9 Q All right, sir. Now, if you would, skip down to the
10 paragraph that's a little over midway on that page,
11 begins, "Third."

12 A Okay. "Third, a state can use, for example, a
13 combination of the above approach that copies some
14 elements of the federal program in some elements, and uses
15 a different regulatory approach in other program elements.
16 The state program will -- will have met the no less
17 stringent criteria for state program approval if the
18 regulations within each element achieve the performance
19 objectives of this -- of those elements."

20 Q All righty. Now, if you would, turn to page 23.

21 A Page 23?

22 Q Yes.

23 A Okay.

24 Q And the first paragraph, it's an incomplete paragraph
25 at the top there, but it begins, "for the penalty

1 authority."

2 And if you would, the second full sentence which
3 begins, "states however," if you would, read that one
4 sentence in the record for us.

5 A All right. "States, however, do not necessarily have
6 to have the same penalty level authority to run an
7 adequate UST program."

8 Q And I believe that you have told us that you think
9 the state of Oklahoma has and runs an adequate UST
10 program; is that correct?

11 A Yes.

12 Q All right, sir. And further in that paragraph, one,
13 two, three, four, five lines from the bottom of that
14 paragraph that begins, "under the promulgated Section --

15 A Okay.

16 Q -- 281 --

17 A Okay.

18 Q -- would you read that?

19 A "Under the promulgated Section 281.41(a)(3), states
20 may determine, during specific enforcement actions, that a
21 lower penalty may be sufficient to ensure compliance, and
22 similarly are not restricted to \$5,000 for each tank for
23 each day of violation as a maximum penalty. If additional
24 authority is obtained. Thus, EPA expects that a state
25 will evaluate violations on a case-by-case basis, and

1 enforce fines according to the severity of enforcement --
2 of environmental hazard, the intense -- intentions of the
3 owner and operator, a history of past violations, or other
4 extenuating circumstances."

5 Q All right, sir.

6 MR. SHIPLEY: Your Honor, we have been going for
7 two hours. Could we have a five-minute break?

8 THE COURT: Yes.

9 MR. SHIPLEY: Thank you, sir.

10 THE COURT: Yes. I will say one thing in this
11 general area. Under the basic RCRA program, the --
12 and that's Subtitle C that allows EPA to delegate
13 that enforcement authority to the states, but it
14 nevertheless -- the -- a violation of the state
15 regulation is nevertheless regarded as a violation of
16 the Subtitle C, RCRA; and therefore, the EPA penalty
17 policies are thought determined generally applied,
18 rather than the state policies.

19 Now, whether that same rule applies here, that's
20 something that may be subject to argument. But the
21 language is a little different, although the ultimate
22 outcome may be -- may be the same.

23 So thank you. We'll take a short recess.
24
25

1 *****

2 (A break was taken, after which the following
3 continued:)

4 THE COURT: The hearing will be in order. You
5 may proceed, Mr. Swisher (sic). Approximately how
6 much longer do you have with Mr. Cernero?

7 MR. SHIPLEY: Your Honor, I believe that we will
8 finish before lunch, before noon.

9 THE COURT: Okay. Thank you.

10 MR. SHIPLEY: That is my goal and my intent to
11 do so.

12 Q (By Mr. Shipley:) I'm going to ask you, please, sir,
13 to turn to Respondent's Exhibit 57.

14 And for the Court's information, this is a document
15 which has not yet been admitted. I want to see if the
16 witness can identify it for us, and then we can discuss
17 with counsel as to the basis for their objections. I
18 won't ask him anything other than identification questions
19 until we decide whether it's admissible or not.

20 A What did you want me to do?

21 Q Do you have -- you have turned to 57, sir?

22 A Yes, I have got it.

23 Q All right. Respondent's 57 is entitled, "In The
24 News: Underground Storage Tanks," US EPA Region 6.

25 Can you tell us what this document is, sir?

1 A Let me read this real quickly.

2 Q Surely.

3 A Well, to kind of summarize, it was an article that
4 Region 6 put out where I had talked about the fact that,
5 you know, even though the regulated community has
6 installed a lot of equipment and that type of thing, we
7 are still having releases because of the operation and
8 maintenance of that equipment, and that we were trying to
9 solve the problem by having the states buy into what we
10 call the Significant Operational Compliance.

11 It was a -- okay. We have a program that's called
12 Significant Operational Compliance. But essentially, what
13 we tried to do is get all the states to buy into
14 determining if a facility is in significant operational
15 compliance, so that we could better report those findings
16 to the -- to the headquarters.

17 It was a checklist that EPA developed in con -- in
18 joint effort with our -- some state people; it was kind of
19 a task force. So that states, when they report their
20 compliance rates, hopefully, their compliant -- we get
21 those rates on an apples-to-apples basis, where, you know,
22 some states may look at certain items and say, "yes, we're
23 in 100 percent compliance," where some states say, "we are
24 60 percent compliance," but everybody was kind of using
25 their own gauge as to what was significant operational

1 compliance.

2 And again, there was no regulation saying what's
3 significant operational compliance, it was a -- just a way
4 that EPA wanted to be able to report to headquarters; we
5 had the states buy into it.

6 So when an inspector goes out and does their
7 inspection, they use a little checklist called
8 "Significant Operational Compliance" so that we could
9 report it to headquarters.

10 That's been ongoing for another -- a couple of years
11 now. Again, just because a facility is in significant
12 operational compliance doesn't mean there's -- there's not
13 violations; it's just we are trying to find those big
14 areas to make sure those facilities are in compliance, at
15 least in those areas.

16 If they were not, if they just -- just to give you a
17 real quick summary, we looked at two different areas; one
18 of them was the prevention side, the other one was release
19 detection side.

20 There was about or -- seven or eight questions on the
21 release detection side and eight questions on the
22 prevention side. When they answered those questions and
23 everything was a "yes," everything was in compliance, that
24 particular facility was in significant operational
25 compliance.

1 If there was just one "no" on either side of those
2 areas, then it would be -- they would be not in
3 significant operational compliance, and it would be
4 reported to Washington as not being in compliance.

5 Q All right, sir. This document quotes you, an
6 enforcement officer. And I would gather this is an EPA
7 news release?

8 A Yes.

9 Q Yes. You're discussing enforcement of UST within
10 Region 6, specifically focusing on some things that you,
11 Mr. John Cernero, have said, correct?

12 A Correct.

13 MR. SHIPLEY: Your Honor, this gives us
14 information with regard to -- this is only a two-page
15 document; I only have one point to make here. I
16 would like to move the admission of Respondent's 57.

17 MS. BEAVER: And Your Honor, Complainant
18 objects, based on there's information in this
19 document that is both irrelevant and immaterial.

20 The -- we don't know the basis of the factual
21 bases of the information that's in this document.
22 And -- and it's not clear to me what specifically
23 Respondent's counsel wants to bring out in this
24 document. And so we object to the -- admitting this
25 into evidence, this document into evidence.

1 THE COURT: Well, I think it's an EPA public
2 document, so I'm going to overrule the objection and
3 allow it into evidence. Exhibit 57 is admitted into
4 evidence.

5 MR. SHIPLEY: Thank you, sir, and we'll be
6 brief.

7 Q (By Mr. Shipley:) On the second page of this
8 document, the second paragraph which begins, "in 2002";
9 would you read that one sentence for us, sir?

10 A Yes. "In 2002, EPA-Dallas issued 43 field citations
11 during 111 inspections in Arkansas, Louisiana, New Mexico,
12 Oklahoma and Texas. Field citation penalties averaged
13 \$1,094 per facility, and totalled 47,050."

14 Q Thank you, sir. And as far as you know, that's an
15 accurate statement?

16 A Yes.

17 Q All right.

18 A It probably is accurate.

19 Q Thank you. Turning to Respondent's Exhibit 58,
20 another U.S. EPA document entitled, "Enforcement and
21 Compliance History Online, which -- with the acronym
22 "ECHO."

23 Are you familiar with the ECHO system that EPA puts
24 on the website, on its website?

25 A Actually, I have heard of it, but I am not really ~

1 familiar with it; I never even saw it on our website or
2 anything. It's -- but I mean I have heard of it.

3 Q All right.

4 A I don't know -- even know where they get the -- I got
5 the information from, I'm sure, our enforcement people.

6 Q I'm sorry?

7 A I'm sure they got this -- this information is -- is
8 put out by EPA so that the regulated community or the
9 general public can see what type of enforcement that EPA
10 does.

11 Q Right, sir. The purpose, then, is to advise the
12 public of the potential responses by EPA if members of the
13 public decided to violate the UST regulations, correct?

14 A Yes.

15 Q Thank you, sir. And as far as you know, the document
16 the EPA publishes and puts on its website under the
17 "Enforcement and Compliance History Online" system are
18 true and accurate?

19 A I would hope so.

20 MR. SHIPLEY: All right, sir. We would move for
21 the admission of Respondent's Exhibit 58.

22 MS. BEAVER: And Your Honor, just for the
23 record, the Complainant objects to the use of this
24 document. It appears to be a summary. It appears
25 to -- I don't -- we don't know how complete this

1 summary is. It appears to go across all media, and
2 just not UST. It also is unclear to what the factual
3 bases are for each action, and it also refers to
4 settlements document -- settlements which are not --
5 which do not accurately reflect penalty amounts that
6 would be assessed in a hearing process such as this
7 one.

8 THE COURT: Well --

9 MS. BEAVER: And --

10 THE COURT: -- let me be clear that this does
11 cover enforcement actions or activities in addition
12 to UST; is that correct, Mr. Swisher (sic)?

13 MR. SHIPLEY: Your Honor, this, in my
14 understanding, covers judicial, but it will tell us,
15 Your Honor, what -- what kinds of actions there are.

16 And what -- what this does is this pulls all of
17 Region 6 Indian Country enforcement, in what is
18 roughly the middle of the page, there is a box
19 checked, "Indian Country." They -- EPA posts this on
20 the Web. They don't discriminate between the UST in
21 Indian Country, so you have to look at all the
22 enforcement from Indian Country, and then can
23 determine from that which are UST enforcements, if
24 any.

25 MS. BEAVER: Also, Your Honor, in response to

1 that, the majority of -- actually, on the first
2 several pages, there is no reference to Subtitle I of
3 RCRA; it just says Sections 9002 through 9004.

4 These are some -- they are -- there are some
5 RCRA cases noted here, but they are different
6 sections; they are not UST programming.

7 Additionally, it's irrelevant what the national
8 enforcement on Indian territory is across the board
9 of EPA statutes, when this case is specific to UST,
10 it has specific facts regarding specific violations
11 of specific UST requirements.

12 MR. SHIPLEY: Your Honor, this is a Region 6
13 document in the middle of the page. This is -- this
14 is -- this is only Region 6, only Indian Country.

15 And within it, we can look at about midway back,
16 it breaks out, under the -- under the report, under
17 the statement, "for public release, unrestricted
18 dissemination." And it shows case number, case name,
19 and that this is a UST RCRA penalty, "federal penalty
20 sought: \$600."

21 MS. BEAVER: Can you -- and I'm sorry; may I
22 interject? Can you help us to be on the same page
23 that you are on?

24 MR. SHIPLEY: Sure, sure.

25 MS. BEAVER: Because all the pages I am looking

1 at do not say what you are saying.

2 MR. SHIPLEY: Okey-doke. Let's see.

3 MS. BEAVER: Because there are documents --
4 there are documents, apparently, in the back that --
5 that deal with expedited settlements and field
6 citations, but none of those deal with penalty
7 amounts that have been alleged in the Complaint that
8 have been brought to hearing. There is a distinction
9 that has been testified to regarding expedited
10 settlements through the use of field citations.

11 So this information is irrelevant for the
12 purposes of demonstrating any inconsistency of
13 application of EPA's penalty.

14 MR. SHIPLEY: Your Honor, this -- the
15 document -- the most -- admittedly, the most relevant
16 portion of this document are the final one, two,
17 three, four, five, six pages which are individual
18 case reports showing where UST violations have
19 been -- anywhere within Region 6 have been asserted
20 by Region 6 for UST violations in Indian Country,
21 what those were. And --

22 THE COURT: This is -- these are restricted to
23 Indian Country?

24 MR. SHIPLEY: Yes, sir.

25 MS. BEAVER: And again, Your Honor, I must add

1 that the information -- we object to it as being
2 misleading, as well, because the specific facts of
3 each specific case are not here, are not present in
4 these summaries. They are summaries.

5 Yes, they are made available to the public;
6 nevertheless, that does not mean that they get to
7 ipso facto be admitted into evidence and used in this
8 hearing.

9 THE COURT: Well, the arguments are there on
10 the -- whether it's relevant or not, and whether
11 under Board precedent I can give any consideration to
12 it. But I am going to admit Exhibit 58, to the
13 extent it deals with USTs.

14 MR. SHIPLEY: Thank you, Your Honor.

15 Q (By Mr. Shipley:) If you would, Mr. Cernero --

16 A Yes.

17 Q -- turn to the last six pages of this document. At
18 the top of this, the page which I am again on, speaks
19 about Case Number 09-2005-0002, the Tohatchi Chevron
20 Station.

21 COURT REPORTER: The what? I'm sorry.

22 MR. SHIPLEY: The Tohatchi -- T-O-H-A-T-C-H-I --
23 Chevron station.

24 Q (By Mr. Shipley:) Do you see that, sir?

25 A Yes, I see that.

1 Q Okay. This is, as the case summary shows, is a field
2 citation case for UST violation, correct?

3 A Yes.

4 Q And it goes on to describe, in the case summary, that
5 this is "for failure to provide adequate line leak
6 detector system for UST piping system, failure to have an
7 annual line tightness test on pressurized piping, and
8 failure to install adequate overfill" -- I can't
9 understand this word -- prenation -- "prenation
10 equipment"; probably "preconnection" equipment in a new
11 tank.

12 Do you see that?

13 A Yes.

14 Q And what is the total federal penalty sought for
15 those UST violations?

16 A Well, according to this, under the field citation
17 program, it was a \$600 fine.

18 Q All right, sir. And turning the page to Case Number
19 09-2005-2003 (sic), the Alamo Navajo School Board, that
20 shows a UST field citation for "failure to provide release
21 detection method for tanks, failure to provide adequate
22 line leak detector system for UST piping, failure to use
23 spill prevention for the existing system." And what was
24 the total penalties sought under that field citation?

25 A Based on the field citation, which does not involve

1 any type of court proceedings or attorney's fees or
2 anything like that, was \$1,050.

3 Q Thank you, sir. Turn the page to the next one, the
4 Pinehill Fina Market, another UST. This is an
5 Administrative Penalty Action using a field citation for
6 UST, involving a failure to use spill prevention for an
7 existing UST system.

8 MS. BEAVER: I'd like to make an objection, Your
9 Honor, to the characterization. This is not
10 considered an Administrative Penalty Action. An
11 Administrative Penalty Action is what is going on
12 right now. An expedited settlement for field
13 citation is not an Administrative Penalty Action.

14 THE COURT: That requires a Complaint; is that
15 correct?

16 MS. BEAVER: Yes. Yes, Your Honor.

17 MR. SHIPLEY: I am just reading the EPA
18 document. It speaks for itself.

19 THE COURT: Proceed. Let's expedite this thing.

20 MR. SHIPLEY: "Utilizing expedited settlement,
21 field citation."

22 I'm sorry. I gather we're through with
23 objections?

24 Q (By Mr. Shipley:) On the Pinehill Fina Marketing
25 case, given the violations, they are to use "spill

1 prevention for existing UST system, failure to ensure
2 proper operations of cathodic protections system."

3 What was the total federal penalty sought and
4 assessed in that action, sir?

5 A It was \$450, which does not consider the number of
6 tanks, days of violations, sensitivities. It's just a
7 flat \$450.

8 Q Thank you, sir. Turn the page to Thoreau High
9 School, a UST violation. This was an "Administrative
10 Penalty Action -- action utilizing an expedited
11 settlement, field citation, pursuant to RCRA Subtitle I,"
12 et cetera.

13 "The violation involves failure to maintain records
14 of release detection for unleaded tank, failure to provide
15 adequate line leak detector system for UST piping system,
16 failure to have annual line tightness test on pressurized
17 piping."

18 And what was the total federal penalty sought and
19 assessed in this instance, sir?

20 A Six hundred dollars.

21 Q All righty. Turn the page to the Newcomb Bus Barn, a
22 UST violation. "Administrative penalty action utilizing
23 the Expedited Settlement Procedures pursuant to RCRA
24 Subtitle I. Violation involves failure to maintain
25 records for release detection monitoring to Underground

1 Storage Tanks, and failure to provide an adequate line
2 leak detector system for UST piping." And what was the
3 total federal penalty sought and assessed here, sir?

4 A Three hundred dollars.

5 Q Three hundred dollars? Turn the page. This is the
6 final page in this document. The Shiprock Trading
7 Company. "And Administrative Penalty Action using the
8 Expedited Settlement Procedures pursuant to RCRA
9 Subtitle I" for UST violations.

10 The violation involves failure to maintain records of
11 release detection monitoring to Underground Storage Tanks.
12 And the order directs the facility to show how they will
13 provide cathodic protection.

14 They didn't have cathodic protection at the time, but
15 they weren't cited for that. What is the total federal
16 penalty sought and assessed in that action, sir?

17 A One hundred fifty dollars.

18 Q Thank you. Turning to Respondent's Exhibit 59.
19 This, again, is the Enforcement and Compliance History
20 Online EPA website document. The -- the document states
21 in this case that this document is covering the state of
22 Oklahoma, and this is in Indian Country.

23 MS. BEAVER: Your Honor, I must interject and
24 object on behalf of the Complainant for this --
25 Respondent's Exhibit 59 for the same reasons that

1 Your Honor excluded the same portion of Respondent's
2 Exhibit 58.

3 Again, this appears to be a summary of no -- of
4 all violation -- of all EPA statutes across the
5 board, from The Clean Water Act to Safe Tribute Water
6 Act, and none of these violations appear to be for
7 UST violations; in fact, I'm skimming through, and I
8 don't see one reference to -- anywhere of Sections
9 9002 to 9004 on this document.

10 MR. SHIPLEY: The point is that these are all of
11 the enforcement actions brought, and there weren't
12 any in Oklahoma for this time period. That is the
13 point, Your Honor.

14 Region 6 issues this showing all of the other
15 enforcement actions they take in this -- in Indian
16 Country in Oklahoma, and they have three pages of
17 cases where they have brought actions under the
18 solid -- I mean pardon me -- The Safe Drinking Water
19 Act, The Clean Air Act, Clean Water Act, but there is
20 nothing under RCRA UST.

21 MS. BEAVER: And Your Honor, we would object to
22 this as misleading. We do not know that this is a
23 comprehensive list of every single case across media
24 that's been -- that was filed in whatever time period
25 this represents.

1 The ECHO system is not for the purposes of
2 guidance, as much as it is a -- it is a reporting
3 system, kind of a reporting system. It's not -- we
4 don't know that it's comprehensive.

5 We feel like this particular exhibit may be
6 misleading, and we object to its relevance and its
7 materiality, as far as the facts of this case and
8 applicability in this case.

9 THE COURT: Well, I'm going to sustain that
10 objection, Mr. Swisher (sic). I think that's -- this
11 is trying to prove -- well, prove a negative, I
12 guess, by proving a lot of other things. So that
13 objection is sustained at this time.

14 MR. SHIPLEY: All right. Your Honor. Let me,
15 if I may, approach the witness. I want to show him a
16 document that's been marked as Respondent's
17 Exhibit 67 and ask if he can identify that.

18 THE COURT: Yes, you may do so.

19 Q (By Mr. Shipley:) The -- before we get to 67, the
20 record will reflect that what we would have offered in
21 59 -- Exhibit 59 is consistent with Mr. Pashia's testimony
22 that there were no UST enforcement actions in Oklahoma by
23 Region 6.

24 And I should ask the witness if the witness is aware
25 of any UST actions by EPA in Oklahoma against Indian

1 Country UST facilities, from fiscal year 2001 to today.

2 A Are you asking me that question?

3 Q Yes, sir.

4 A I'm -- I'm not really sure exactly what has been done
5 on Indian lands, because I'm not really keeping up with
6 that.

7 Q Okey-doke.

8 A So I don't know, I mean, what they are doing. I know
9 that we have not taken any type of complaint, other than
10 field citations in Oklahoma in the last five years. Other
11 than, well, Tinker Air Force Base; that was '98, though.

12 Q And Tinker Air Force Base, as we know, is not an
13 Indian --

14 A Right, not Indian land, yeah.

15 Q -- tribal-owned facility.

16 A Yeah, right.

17 Q All right. Thank you, sir.

18 A Uh-huh.

19 Q And that was, as I believe we've earlier established,
20 in 1998 --

21 A In '98, right.

22 Q Thank you. If I may, sir, turn your attention to
23 Respondent's Exhibit 67, which has not yet been stipulated
24 to for admission. This describes the reason why the
25 Enforcement and Compliance History Online is maintained by

1 EPA. And you have testified already that one of the
2 reasons is -- why EPA goes to this trouble is that they
3 wish to have the dissemination to the public generally,
4 and to the UST community specifically, of what happens if
5 people do not follow the EPA and the OCC regulations and
6 laws. Is that your understanding?

7 A Yes.

8 Q Yes, sir.

9 A Again, I'm not that familiar with ECHO. I mean
10 it's -- I learn more about EPA from other people than I do
11 my own agency.

12 Q Pardon me, yes, I understand.

13 THE COURT: My book, Mr. Swisher (sic) doesn't
14 have a copy of proposed Exhibit 67 in it.

15 MR. SHIPLEY: Yes, sir.

16 THE WITNESS: Yeah, this one didn't either.

17 MR. SHIPLEY: I just handed --

18 THE WITNESS: Okay.

19 MR. SHIPLEY: -- one to the reporter, Your
20 Honor.

21 THE COURT: Thank you.

22 (The reporter handed the exhibit to the Court.)

23 MR. SHIPLEY: Thank you, Ms. Reporter. And this
24 was -- this was not in the book.

25 All of the exhibits in the book have, of course,

1 been exchanged for days, if not weeks. But
2 anticipating that the question about what ECHO is, we
3 pulled this from the EPA site the night before last,
4 thinking that perhaps that the summary by EPA about
5 the ECHO site would be of interest to the Court and
6 for the record.

7 Q (By Mr. Shipley:) Have you had a moment,
8 Mr. Cernero, to examine Respondent's Exhibit 67?

9 A I just scanned it, basically.

10 Q Sure.

11 MR. SHIPLEY: We believe that it would be
12 appropriate, Your Honor, to enter into the record
13 Respondent's Exhibit 67 regarding the -- describing
14 the ECHO system and why EPA takes the trouble to
15 disseminate and make public these particular records
16 on its website. So we move the admission of
17 Respondent's Exhibit 67.

18 MS. BEAVER: And again, Your Honor, the
19 Complainant objects to relevance, materiality. EPA
20 makes public a myriad of records. There is no
21 relevance to this matter of a sheet that explains one
22 of EPA's many databases where there's information
23 housed.

24 THE COURT: Well, I'm going to overrule the
25 objection, and Exhibit 67 is admitted.

1 MR. SHIPLEY: Thank you, sir.

2 Q (By Mr. Shipley:) If you would, Mr. Cerner, read
3 the first line and the site.

4 A The first --

5 Q "EPA is committed."

6 A Okay. The whole paragraph, or just --

7 Q No, just the first --

8 A Okay.

9 Q -- sentence; I'm sorry.

10 A Okay. "EPA is committed to public access to
11 environmental information, and has worked with states to
12 develop a format for providing Internet access to
13 information contained in core EPA data systems."

14 Q Thank you. And the first sentence of the second
15 paragraph, please, sir.

16 A Okay. "EPA has worked with state governments to
17 develop the content of the site and ensure accurate data."

18 Q All righty, and I appreciate your time.

19 And let's move now, if we may, to Respondent's
20 Exhibit 60; again, an ECHO document.

21 This document focuses on cases filed by EPA generally
22 in Indian Country, and this focuses on all Underground
23 Storage Tanks across the country for fiscal year 2001 to
24 the present.

25 A Is this 60, did you say?

1 Q Yes, Respondent's Exhibit 60.

2 A The Indian Country is not checked.

3 this right?

4 Q I'm sorry?

5 A The -- on 60, page one of two, doe

6 Indian Country was checked, or maybe I'm mistaken. It

7 says Oklahoma, but it doesn't say that Indian Country was

8 checked. You said it was Indian Country?

9 Q Just a moment and let me check and make sure -- I

10 think that was my understanding.

11 A I think this is for everything.

12 Q Thank you very much. This shows all of the UST

13 non-Indian --

14 A Okay.

15 Q -- in Oklahoma, UST violations --

16 A Okay.

17 Q -- for the period of time of 2001 through the

18 present. And only RCRA, Subtitle I, UST violations,

19 non-tribal, by Oklahoma.

20 A This one does have Tinker Air Force Base in there.

21 Q I can't hear you, sir.

22 A This one does have Tinker Air Force Base in there. I

23 don't know why it would have it if it was going from 2001.

24 Q I can't tell you, either, but it's the first one up,

25 because it's 1998 Tinker Air Force Base, as you testified.

1 A Yeah.

2 Q For \$51,000 in 1998, UST. For some reason, that is
3 the one exception. And everything else that you will find
4 is 2001 to the present.

5 A Could have been that it settled in 2001. It started
6 in '98 and settled. Maybe that's why it's in there.

7 MR. SHIPLEY: Perhaps. Okay. It doesn't allow
8 for that discrimination, but Your Honor, we'd move
9 the admission of Respondent's Exhibit 60.

10 MS. BEAVER: And Complainant, Your Honor, would
11 have the same objections to this document as with the
12 other documents.

13 We object to the document as irrelevant and
14 immaterial. That the document does not provide the
15 facts -- the specific factual bases for the
16 violations, and neither does -- do any of these
17 documents compare with what we are doing here today,
18 as far as proceeding through hearing for alleged
19 violations and associated penalties in a complaint,
20 as opposed to a settlement for field citation.

21 MR. SHIPLEY: Well, in fact, it does. We have
22 RAM listed in here; it's one of the documents
23 shows up, Your Honor, in this field.

24 MS. BEAVER: And my understand
25 was still -- the previous RAM viola.

1 citation was the result of a field -- was a field
2 citation.

3 MR. SHIPLEY: This -- this is the case that we
4 have before us, listing the total federal penalties
5 sought of \$279,752.

6 MS. BEAVER: Could you show me where that is in
7 this? Because there are a million documents here.

8 MR. SHIPLEY: Yes. It is -- from -- from the
9 back --

10 THE WITNESS: I found it.

11 MR. SHIPLEY: -- three, four, five. It is the
12 fifth page from the back of the document. And again,
13 you guys have had this for days, if not weeks.

14 MS. BEAVER: Again, Your Honor, with the
15 exception of that one page, this is not a case that
16 has been settled. This -- this particular case is
17 in -- has proceeded to hearing. We are dealing with
18 a non-settled case, and we are pursuing the
19 violations and associated penalties for this case.
20 The other documents in here are not on par with this
21 case.

22 MR. SHIPLEY: The case summaries, Your Honor, in
23 each instance show that the violations were all of
24 the same nature, UST violations. And if there were
25 any other cases during this five-year period of time

1 that EPA had filed in Oklahoma, they would be here.
2 This is the entire summary of UST for the past five
3 years.

4 MS. BEAVER: And again, the challenge is that
5 these are case summaries. These are not all of the
6 specific alleged facts, how many tanks were involved,
7 what would the specific facts -- what -- was it a
8 first-time violator, was it a violator with a
9 compliance history. None of those facts are present
10 in these documents.

11 THE COURT: Well, that's always a question when
12 you try to compare, you bring in the -- the
13 collateral issues of really how similar are the
14 cases, and are the violations really the same.

15 So those are always objections that can be made
16 for this. And that's the basis, as I understand it,
17 for the -- one of the bases for the Board to rule
18 that settlements are not -- not relevant.

19 But I'm going to admit this document. It is
20 limited to USTs, but that's cross country,
21 Mr. Swisher (sic)?

22 MR. SHIPLEY: I'm sorry, it's limited to UST and
23 what, sir?

24 THE COURT: Across country? The whole country?

25 MR. SHIPLEY: No, sir, this is Oklahoma only.

1 THE COURT: Only Oklahoma?

2 MR. SHIPLEY: This is only Oklahoma, only UST,
3 non-tribal, for the period of 2001 to the present;
4 although, as the witness has pointed out, for some
5 reason, the one case of Tinker, which was a 1998
6 case, is within the document on the website; I can't
7 explain why. But anyway --

8 THE COURT: Well, I'm going to admit it. So you
9 can make your -- your arguments.

10 MR. SHIPLEY: Thank you, Your Honor.

11 Q (By Mr. Shipley:) You may know, and it may take
12 examining -- well, let me just ask you to, over the lunch
13 period, Mr. Cerner, look at this document, and I will ask
14 you what the highest penalty during this
15 five-and-a-half-year period of all the cases filed that
16 are UST violations in Oklahoma were, outside of Tinker at
17 51, RAM at 276, and I think you will find the next largest
18 is \$5,000 and something.

19 But take -- I will just ask you to do that, and we
20 will take that up briefly.

21 MS. BEAVER: Your Honor, may I object to the
22 instruction by Respondent's counsel that my -- our --
23 the complainant's witness take lunch hour to review
24 documents. And there -- all these documents -- there
25 are numerous documents here.

1 Number one, that the witness needs to have
2 lunch, and then we also have things that we need to
3 discuss with our witness.

4 So we object to this instruction, and that it be
5 something that the witness has to do.

6 If -- if the Respondent's counsel wants to take his
7 cross examination time to go page-by-page through this
8 exhibit, then we can do that, if Your Honor would like to
9 do that, in the hearing.

10 MR. SHIPLEY: I realize I do not and cannot
11 instruct, nor did I intend to sound like I was trying
12 to instruct.

13 I was going to request that; but again, if the
14 witness doesn't wish to do that, that's fine. The
15 document will speak for itself, and we have a summary
16 here which we will go through after lunch.

17 Thank you, Your Honor.

18 We are at a stopping point. And while I haven't
19 completely finished, because I have got three more
20 documents that I hope that this witness will be able
21 to identify and we can admit through him, because
22 there are three more that we have not reached
23 agreement on the admission of that are in our book.

24 So with that, if I may, Your Honor, I would
25 suggest that we take our lunch break.

1 THE COURT: That's satisfactory. We'll take a
2 one-hour lunch and recess.

3 MR. SHIPLEY: Thank you, sir.

4 *****

5 (A lunch break was taken, after which the
6 following continued:)

7 THE COURT: The hearing will be in order.
8 You may proceed, Mr. Shipley.

9 MR. SHIPLEY: Thank you, Your Honor.
10 We have -- if I may approach, Your Honor.

11 THE COURT: Yes.

12 MR. SHIPLEY: Thank you. We have marked for
13 identification a summary of EPA non-Indian UST
14 enforcement in Oklahoma, which is a -- for fiscal
15 year 2001 through the present, which is a summary of
16 the Respondent's Exhibit 60, which was admitted
17 shortly before lunch.

18 This document, we gave to the EPA yesterday
19 morning to look at. I'm going to hand the witness --
20 there's one with it -- and one to the witness, and
21 one for the Court.

22 This document, Your Honor, is simply a
23 demonstrative exhibit which is a summary of the
24 penalties set out in Respondent's Exhibit 60. They
25 are in chronological, I believe.

1 MR. KELLOGG: Yes.

2 MR. SHIPLEY: Chronological order showing --
3 starting off with the one penalty, which is, for
4 reasons which we don't know, outside of the fiscal
5 year 2001 to present; that being the Tinker Air Force
6 Base, a \$51,000 fine through the present, as I say.

7 And we have subtracted from the total of all of
8 these penalties, the \$279,752, which was originally
9 assessed against RAM, showing that all of the other
10 penalties total \$82,000, of the 37 facilities other
11 than RAM. And we want to move the admission of this
12 demonstrative Exhibit 68.

13 MS. BEAVER: Your Honor, Complainant would
14 object for several reasons; again, as for irrelevant,
15 immaterial, misleading. We do not -- this document
16 was apparently a summary prepared by the Respondent.

17 We believe that the exhibits that Your Honor has
18 already admitted speak for themselves, and there
19 doesn't need to be a summary of a summary.

20 We are not familiar with the accuracy of this
21 particular document, and so that would be our
22 objection as to the admission of this document.

23 MR. SHIPLEY: It is what it is, Your Honor. We
24 gave it to them yesterday. If they wish to compare
25 it to the Respondent's Exhibit 60, which they had for

1 over a week, whatever. It's simply --

2 THE COURT: Well, I gather this document wasn't
3 previously presented to EPA counsel; is that correct?

4 MR. SHIPLEY: This document, 68, was given to
5 them yesterday morning shortly after we finished the
6 preparation of it.

7 It's simply, as I said, a summary of the
8 penalties assessed and the facility against which the
9 facility -- a penalty was assessed for the fiscal
10 year 2001 to present, derived from this Respondent's
11 Exhibit 60.

12 THE COURT: Well, is this information in the
13 other exhibit, like Exhibit 60?

14 MR. SHIPLEY: I'm sorry, what was the question?

15 THE COURT: Is this information in the other
16 exhibits, other Respondent's exhibits; for example,
17 Exhibit 60, I believe?

18 MR. SHIPLEY: This is exactly that. It's a
19 summary of the information which is in 60. The only
20 additional information is we have calculated a total
21 on the fourth page, and we calculated a total on the
22 first page.

23 THE COURT: Okay.

24 MR. SHIPLEY: Those were the only --

25 MS. BEAVER: Your Honor, if I may object, as

1 well. It was my understanding when I received this
2 it was for demonstrative purposes not to be admitted
3 into evidence.

4 Also, this summary of the summary does not
5 include the other factors that are included in the
6 previously admitted exhibits; i.e., what -- whether
7 it was a settlement or field citation.

8 And what the -- well, it's -- I mean it -- it
9 appears to be just listing certain bits of
10 information out of what was previously offered. And
11 so it appears to be misleading for us when the --
12 when the information in the previous exhibits is
13 sufficient to communicate the information that is
14 presented in this Exhibit 68.

15 MR. SHIPLEY: It's simply for ease of reviewing,
16 Your Honor.

17 THE COURT: Well, I'm going to admit it. I mean
18 it's --

19 MR. SHIPLEY: All right.

20 THE COURT: It's beyond the normal rule for the
21 exchange of exhibits, but I'll admit it on the bases
22 that it's strictly to facilitate the information
23 that's already in other exhibits.

24 MR. SHIPLEY: Thank you, Your Honor.

25 THE COURT: So 68 is admitted.