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Title: Crow Butte Resources, Inc.

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ASLBP Number: 08-867-02-OLA-BD01

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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HEARING

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In the Matter of: :
CROW BUTTE RESOURCES, : Docket No. 40-8943-OLA
INC. : ASLBP No. 08-867-02-OLA-BD01
:
(License Renewal for :
the In-Situ Leach :
Facility, Crawford, :
Nebraska) :

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Thursday, August 27, 2015

Crawford Community Center
1005 First Street
Crawford, Nebraska

BEFORE:
MICHAEL M. GIBSON, Chair
DR. RICHARD E. WARDWELL, Administrative Judge
BRIAN K. HAJEK, Administrative Judge

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

2 8:41 a.m.

3 CHAIR GIBSON: Before we get into
4 Contention 12 today, I believe we had a couple of
5 pending matters. First of all, I believe we have some
6 new exhibits, Mr. Smith. Could you describe those for
7 us?

8 MR. SMITH: Yes, Your Honor. We had, as
9 our homework assignment last night from Judge Wardwell
10 was to obtain some water level information on a couple
11 of shallow monitoring wells that we discussed
12 yesterday. Mr. Beins is here. He can briefly provide
13 the results of our investigation into those, under two
14 minutes, and if we have any other questions beyond
15 that, Mr. Beins is prepared to answer them.

16 CHAIR GIBSON: Very well. Those have been
17 marked?

18 MR. SMITH: Those have been marked as
19 Exhibits CBR-063 and CBR-064. They've been provided
20 in hard copy and electronic copy to the parties, and
21 they've also been filed via the EIE.

22 CHAIR GIBSON: Is there any objection to
23 these exhibits?

24 MR. BALLANCO: Not from Consolidated
25 Intervenors, Your Honor.

1 MR. REID: Not from the Tribe, Your Honor.

2 MS. SIMON: Not from the Staff, Your
3 Honor.

4 CHAIR GIBSON: Very well, then CBR Exhibit
5 063 and 064 are admitted. Judge Wardwell.

6 JUDGE WARDWELL: Yes, would you describe
7 briefly, Mr. Beins, what we're looking at here?

8 MR. BEINS: Certainly, Your Honor. Our
9 homework last night was to prepare and provide
10 information on the Brule water levels for the shallow
11 monitoring wells SM7-17 and SM7-22. Having looked at
12 that data, we can report back to the Board that the
13 water levels from baseline data beginning back in 1999
14 through the present day in those two wells varies only
15 by about two to three feet. This is consistent with
16 our testimony that we have not seen drawdown in the
17 Brule formation aquifer due to CBR operations.

18 In addition to looking at those wells, we
19 also took a look at the one well that we had quite a
20 bit of discussion around yesterday. It was Well No.
21 11 that it appeared that there was a 40-foot drawdown
22 to the southwest portion of the licensed area, there.
23 It looks like the number on Figure 2.7-3A, that figure
24 is CBR Exhibit No. 11 at 2-172 or Page 222 of the PDF.
25 That particular number for Well No. 11, the elevation

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1 number is in error. The actual elevation should have
2 read 3,832 feet above sea level, while the map shows
3 a number of 3,883. For comparison, you may want to
4 take a look at Table No. 2.9-7. That's CBR Exhibit 11
5 at 2-294, Page 343 of the PDF. That particular table
6 shows water levels for this Well No. 11. It's a
7 private well. It shows water level elevations monthly
8 through all of 1982, and then it also presents a few
9 water levels from 1993.

10 All of those water levels are in that
11 3,830 range, if you want to take a look at that. Then
12 finally, just keep in mind that the purpose of the
13 Brule water levels depicted on Figure 2.7-3A, those
14 are the 1982 levels, were shown to just demonstrate
15 regional flow within the Brule aquifer during that
16 time period, and were not necessarily to assess what
17 potential drawdowns we might have seen due to the
18 mining activity.

19 The better data to take a look at to
20 determine any impacts from mining would be to look at
21 the shallow monitoring well data that we have across
22 the site that is specific to the site. The wells are
23 all constructed in a similar manner across the site
24 and that. That's what we have to report back this
25 morning.

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1 JUDGE WARDWELL: Did you look at the
2 differences in elevations of the subsequent two
3 figures beyond the 1982-83 time frame, the ones that
4 showed -- they were both in 2008, I believe. One was
5 in March, and one was in November for the B and C
6 equivalent figures showing the potentiometric
7 elevations in the Brule for those time frames?

8 MR. BEINS: That's what we've presented on
9 the hydrographs, Exhibit 063 -- CBR Exhibit 063 and
10 064. We show the hydrographs for the two different
11 wells. It actually shows that over a long period of
12 time, rather than just looking at a short April to
13 October time frame. We thought that this would
14 demonstrate more clearly any potential drawdown.

15 JUDGE WARDWELL: Did you take a look at
16 subtracting those potentiometric levels between March
17 and April in regards to assessing any drawdown between
18 that period?

19 MR. BEINS: I did not, Your Honor.

20 JUDGE WARDWELL: Okay, thank you.

21 CHAIR GIBSON: Okay, very well. Dr.
22 Striz, I believe we have something that we wanted to
23 clarify yesterday from your testimony.

24 JUDGE WARDWELL: Then I will just have a
25 quick question for Dr. Kreamer. I was just trying to

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1 decide which order I was going to do it in. That's
2 why I was floundering around with -- good morning.

3 DR. STRIZ: Good morning.

4 JUDGE WARDWELL: Glad you could join us
5 again. Glad you hadn't disappeared, which you were
6 rightfully eligible to do. Pretty foolish, huh? I
7 believe I heard yesterday, or the day before,
8 whatever, you stating, in regards to your analysis of
9 the resolution or the attempts to resolve the presence
10 of the excursion parameters in some of the wells in
11 Mine Units 6 and 8.

12 DR. STRIZ: Correct.

13 JUDGE WARDWELL: At the time, I think I
14 heard you say or allude to either a report that you
15 had prepared or a graph that you had made where you
16 showed the water levels' changes in relationship to
17 the changes in concentrations of these parameters.
18 Did I interpret your statement wrong, or is that
19 somewhat accurate?

20 DR. STRIZ: That is accurate. However, it
21 was not a report that I developed. It's the Excursion
22 Root Cause report, where they show these graphs of how
23 the parameters change with time and how the water
24 levels change with time, so we could correlate that
25 the change in the parameter levels was related to the

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1 change in water level with the precipitation event.

2 JUDGE WARDWELL: Okay, great. That was
3 CBR's Root Cause Analysis report?

4 DR. STRIZ: Yes, they (Simultaneous
5 speaking).

6 JUDGE WARDWELL: Is that in an RAI or any
7 other exhibit in this proceeding, are you aware?

8 DR. STRIZ: No, they're not, but they're
9 publicly available. These are the 60-day reports that
10 they provide to us explaining the excursions and what
11 they think are causing them.

12 JUDGE WARDWELL: By publicly available, do
13 you have an ADAMS number or something like that, that
14 they'd be retrievable, or I'd have to --

15 DR. STRIZ: Absolutely.

16 JUDGE WARDWELL: -- or I'd ask the Chair
17 if there's any other way we --

18 PARTICIPANT: Yes.

19 JUDGE WARDWELL: -- should proceed in
20 order to receive -- get a hold of these documents?

21 CHAIR GIBSON: I believe that's the long
22 way of Dr. Wardwell saying could we please get copies
23 of those, Ms. Simon, and could they possibly be -- we
24 can just make them Board Exhibit 10, just these
25 excursion reports.

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1 MS. SIMON: Could I just clarify? I don't
2 know how many reports there are and how many you're
3 interested in getting?

4 CHAIR GIBSON: We'll let Dr. Striz and Dr.
5 Wardwell try to figure that out.

6 JUDGE WARDWELL: If you can guide your
7 counsel on -- I think you understand what I'm looking
8 for, so that I can --

9 DR. STRIZ: Absolutely. I think that if
10 (Simultaneous speaking).

11 JUDGE WARDWELL: -- receive the big
12 picture of what's going on here, now that we're
13 resolving some water level data, and that brings back
14 the need to look at that a little closer in regards to
15 what you see in those excursion things. I'm
16 interested in seeing those root cause analysis
17 reports, wherever they are.

18 DR. STRIZ: Absolutely. It may be
19 possible to ask CBR if they could provide them. They
20 may be able to expedite it. I will have to go back
21 into ADAMS and extract all of them. They may have
22 some available.

23 JUDGE WARDWELL: I will ask them, but
24 likewise, I don't need it today or tomorrow.

25 DR. STRIZ: All right, thank you, Your

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1 Honor.

2 JUDGE WARDWELL: I probably won't be
3 reading them much tonight, but I will ask. Crow
4 Butte, will you able to provide those documents easier
5 for us than going through the Staff?

6 MR. TEAHON: Yes, sir. We have a file
7 folder on each excursion well. We are required by the
8 NDEQ to submit a report within five days, so when she
9 refers to a 60-day report, they actually get those
10 within five days. Included in that is a set of graphs
11 and the laboratory data leading up to that excursion.

12 JUDGE WARDWELL: These are the root cause
13 analysis reports that she was talking about, or is
14 that a different report?

15 MR. TEAHON: No, that's the same report,
16 sir.

17 JUDGE WARDWELL: Do these reports show
18 changes in ground water elevation and tracking changes
19 in the parameters of the excursions?

20 MR. TEAHON: Yes, sir, you get a graph of
21 the alkalinity, a separate graph of the chloride, a
22 separate of the conductivity, and then a separate one
23 of the water level. There's four different graphs
24 presented in that report.

25 JUDGE WARDWELL: With this report there's

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1 a narrative discussing this, also?

2 MR. TEAHON: Yes, sir.

3 JUDGE WARDWELL: So it would be -- you
4 would be able to provide that to us in electronic form
5 or hard copy? Either way, but in some fashion?

6 MR. TEAHON: Yes, sir, they're already
7 available in our database in a PDF format, so it
8 wouldn't take a very long amount of time for us to
9 gather that information for you.

10 JUDGE WARDWELL: I know you've got a
11 crackerjack librarian that comes to the call whenever
12 we are floundering. I have full confidence we'll able
13 to receive those documents.

14 MR. TEAHON: Sure. The only question I
15 would ask is how far back do you want us to go?

16 JUDGE WARDWELL: I would like to see the
17 -- what I envisioned I would be able to see is
18 whenever those excursion parameters were first
19 detected in those wells, plot of the concentration of
20 those elements as it compares to a plot of the water
21 level readings, probably through today or through your
22 last readings or whenever you prepared that report.

23 MR. TEAHON: Okay, fair enough.

24 JUDGE WARDWELL: It'd be nice to have the
25 narrative with the report, too, and everything, so you

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1 might as well do the whole package. But that defines
2 the time frame of which I'm interested.

3 MR. TEAHON: Yes, sir, it is all --

4 JUDGE WARDWELL: Unless it ends up with
5 documents this thick (Simultaneous speaking).

6 MR. TEAHON: It won't be, but it's all one
7 report. It has the narrative, and then it has the
8 graphs attached and the laboratory results.

9 JUDGE WARDWELL: I think that's what we're
10 interested in. It sounds spot on.

11 PARTICIPANT: Thank you.

12 CHAIR GIBSON: Before we go any further,
13 I just wanted to say I know you all were going to get
14 together, come up with your proposal for one day of
15 trial on this hydrogeology -- these additional
16 matters. We'll just add Board Exhibit 10, which are
17 these excursion reports, to that, as well. Because no
18 one's going to have a chance to review them this week.

19 JUDGE WARDWELL: That's why I was going to
20 turn to Dr. Kreamer and say that same thing. We know
21 you haven't seen any of these things. I don't expect
22 much of a comment from you now because we got to look
23 at it and digest all this information. I just wonder
24 if you have anything right off, immediately, that
25 you'd like to say?

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1 DR. KREAMER: I have four quick comments.
2 The first is it's a well-known hydrologic principle
3 that when you draw down a water table, there's less
4 pressure above. The first map, 1982, was before
5 mining operations, which started in '91. There's no
6 data on these from 1991 to 1998. In 1982, the water
7 level was much higher, not only for that one well that
8 they say was transposed, but for several wells --
9 20-30 feet higher than these levels.

10 The hydrologic principle is that when you
11 draw down the Brule, it's less hydraulic pressure, and
12 you would eventually reach a steady state. This data
13 from 1999 on could be steady state. The major
14 drawdown from the Brule could have occurred from 1991
15 to 1998, when operations were starting. Because
16 that's when you would have higher hydraulic head in
17 the Brule. You would have more of a propensity for
18 water to move downward because of that higher head.

19 Once the head was lowered, by 1999, which
20 is when this data starts, then you would get more of
21 a steady state condition, where you would see
22 something that would look like this. On the second
23 point, if that one data point was transposed, and it
24 was not 3,883, as it says it is, if you go along those
25 contours, you'll see other wells, some right in -- at

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1 least one -- in the pre-mining condition, one right in
2 the middle that also shows a much higher level in
3 1982. So one well alone, if they messed up the
4 numbers, doesn't mean that the argument is done. The
5 other two points are in their excursion analysis in
6 the Brule, they made the statement a couple of times
7 that there's a correlation between water levels. We
8 don't know if that's a statistical correlation with
9 actually a number's in correlation. We haven't seen
10 that data. We don't know if this --

11 JUDGE WARDWELL: You're going to see the
12 data, right? That's what we just asked for.

13 DR. KREAMER: Yes. You said you wanted.
14 Thank you. We would like to see that data for
15 independent peer review.

16 JUDGE WARDWELL: Sure (Simultaneous
17 speaking).

18 DR. KREAMER: Thank you very much.

19 JUDGE WARDWELL: -- part of the
20 proceeding. It's going to be an exhibit.

21 DR. KREAMER: Lastly, it's my
22 understanding at the 18 private wells they do not
23 measure water levels, there's another concern that
24 even -- there are no samples from outside. If this is
25 a cone of depression -- a large cone of depression in

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1 the mining area, we don't have anything far afield to
2 show if those are still at 1982 levels, if you follow
3 what I'm saying there. I'm not sure if we can resolve
4 that issue, but those are the four points I have, Your
5 Honor.

6 JUDGE WARDWELL: Thank you.

7 CHAIR GIBSON: Okay, now I believe the
8 last pending item we had had to do with the modeling.
9 Is everybody happy? Did we reach a -- I just wanted
10 to be sure -- have we got all our modeling results?

11 MS. SIMON: Your Honor, let me report that
12 Mr. Frankel sent a proposal -- a list of item that Dr.
13 Kreamer would like to see the NRC Staff report back
14 on, with the caveat that it's not going to be a report
15 with bells and whistles. Dr. Striz and a colleague
16 are going to spend next week preparing, essentially,
17 that report. My suggestion would be that after
18 counsel have a day to review it, which would have to
19 be the day after Labor Day, we would file it as an
20 exhibit, and then all parties in the Board would
21 receive it.

22 CHAIR GIBSON: That will be great. We're
23 going to -- why don't we just make that Board Exhibit
24 7B.

25 MS. SIMON: Could I actually request that

1 we make it an NRC exhibit, since it's essentially
2 going to (Simultaneous speaking).

3 CHAIR GIBSON: NRC exhibit, that's just
4 fine. We'll call it NRC exhibit. That's fine.

5 MS. SIMON: It'll be NRC-093, I believe.

6 CHAIR GIBSON: That'll be fine. We'll
7 call it NRC Exhibit -- what's our --

8 MS. SIMON: I believe it will be 093.

9 CHAIR GIBSON: 092?

10 MS. SIMON: 093.

11 CHAIR GIBSON: 093, okay. NRC-093 will be
12 the modeling compilation -- I'll just call it that for
13 right now.

14 (Whereupon, the above-referred to document
15 was marked as NRC Exhibit 093 for reference.)

16 MS. SIMON: That's fine.

17 CHAIR GIBSON: You all put a name on it
18 when you do, okay? Very well. Okay, thank you for
19 your efforts in that regard. We are most
20 appreciative.

21 MS. SIMON: Your Honor, if you would like,
22 the parties have come up with a tentative plan for the
23 scheduling of the testimony in the hearing. I don't
24 know if you want to talk about that now, but I just
25 wanted to let you know. I can report on that, if

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1 you'd like.

2 CHAIR GIBSON: I think what I'd like you
3 to do, if you could, is just -- we'll deal with that
4 tomorrow morning. I think we need to get on to
5 Contention 12, at this point, if that's okay?

6 MS. SIMON: Understood. Thank you, Your
7 Honor.

8 CHAIR GIBSON: Is there anything else
9 pending that we need to deal with? Very well. Ms.
10 Striz, unless you were going to talk about Contention
11 12 or 1, I think you really are excused, and thank you
12 so much.

13 DR. STRIZ: Thank you, Your Honors.

14 MS. SIMON: Your Honor, in that regard,
15 could I just ask -- it's not clear to me -- I believe
16 Ms. McLean was the only witness listed on Contention
17 12 for the Intervenors. I wasn't sure if Dr. Kreamer
18 and Mr. Wireman were planning to testify, but given
19 that Dr. Striz, while she may have been foolish enough
20 to show up this morning, did change her flight and is
21 leaving, we would feel that we'd be at a disadvantage
22 if any kind of hydrogeological information comes up
23 with respect to Contention 12.

24 CHAIR GIBSON: She's certainly welcome to
25 stick around, if that's what you want, but I will say

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1 this. I think it would be very hard to say that
2 anybody is constrained, at this point, about a witness
3 possibly talking about another subject. We've got
4 several witnesses that were not listed on these things
5 that have amplified on the answers. I don't expect
6 there to be anything she'd want to talk about. I
7 don't expect there's going to be any hydrogeology
8 issues that are going to come up, but she's welcome to
9 stay. But I don't want you to think that just because
10 somebody hasn't been listed that they may not have
11 something that one of the judges may want to ask them
12 about.

13 MS. SIMON: I understand that, Your Honor.
14 It's just that given that she was excused and wasn't
15 listed as a witness, she did change her flight, so she
16 can't stay. I guess I'll just note an objection that
17 they -- if they talk about anything related to
18 groundwater, we could be at a disadvantage. We will
19 provide -- Dr. Fuhrmann can stay, so perhaps he can
20 address some of that, but just for the record, thank
21 you.

22 CHAIR GIBSON: Very well. Your objection
23 is noted. We will now proceed to Contention 12.

24 JUDGE HAJEK: Good morning.

25 MR. TEAHON: Good morning.

1 JUDGE HAJEK: This morning, we're going to
2 talk about Contention 12, which, as the Board admitted
3 it in LBP15-11, Page 61, states, "The final EA omits
4 a discussion of the impact of tornadoes on the
5 licensed renewal area and inadequately discusses the
6 potential impacts from land application of ISL mining
7 wastewater." Relative to the witnesses that were on
8 the original witness list, I appreciate everyone being
9 out there, filling the tables, but at this point, I
10 will state I have, actually, no questions for Dr.
11 Kreamer, Mr. Wireman, or Dr. LaGarry.

12 If you don't feel a need to provide
13 support or moral support for Ms. McLean, it's okay if
14 you get up and leave at this point. I would like to
15 say thank you, though, to each of you for your
16 testimony over the last three days. It was very
17 enlightening, and I appreciate your help there. It's
18 up to you whether you want to sit there and stare at
19 me, or whether you'd like to go someplace else. Dr.
20 Kreamer?

21 DR. KREAMER: Thank you, Your Honor. I
22 have to go to a funeral, and Mr. Wireman has other
23 things we have to do, so we will be leaving. But
24 before we go, I want to express my great appreciation.
25 You have been fantastic. Your questions have been

1 rigorous, and they've been very well appreciated.
2 It's really a heartfelt thanks for doing such a great
3 job.

4 JUDGE HAJEK: Thank you.

5 CHAIR GIBSON: Be careful; it's going to
6 go to their heads, Dr. Kreamer. Let's see, we have
7 Mr. Goodman and Mr. Teahon.

8 JUDGE HAJEK: Ms. McLean, I've read your
9 testimony, and I just want to assure myself here.
10 I've read your testimony in Exhibit 048, the
11 supporting material in INT-049, and then your rebuttal
12 statement in INT-071. Is that the complete list of
13 your testimony exhibits?

14 MS. MCLEAN: Yes.

15 JUDGE HAJEK: I want to just make sure
16 because these are the exhibits --

17 MS. MCLEAN: I can't hear you very well.

18 JUDGE HAJEK: I'm sorry. Just to make
19 sure -- is that better? Is that better?

20 MS. MCLEAN: A little better.

21 JUDGE HAJEK: You are familiar -- you have
22 read CBR-011, is that correct?

23 MS. MCLEAN: Yes.

24 JUDGE HAJEK: NRC-010.

25 MS. MCLEAN: Yes.

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1 JUDGE HAJEK: You are familiar with the
2 NPDES, that is the National Pollutant Discharge
3 Elimination System permit?

4 MS. MCLEAN: Yes.

5 JUDGE HAJEK: And CBR-042, the Application
6 for Land Waste Disposal?

7 MS. MCLEAN: Yes.

8 JUDGE HAJEK: And the U.S. Fish and
9 Wildlife Service's letter exhibits?

10 MS. MCLEAN: Yes.

11 JUDGE HAJEK: You are also familiar with
12 NRC Exhibits 063, 064 and 065, which are exhibits
13 detailing the MCLs for drinking water (Simultaneous
14 speaking)?

15 MS. MCLEAN: I know those. I have not
16 seen those exhibits, no.

17 JUDGE HAJEK: They are in the --

18 CHAIR GIBSON: You also will need to pull
19 that mic close to you so we can hear you, ma'am.

20 MS. MCLEAN: Okay, can you hear me now?

21 JUDGE HAJEK: That's good. So you have
22 not seen the NRC Exhibits 063 --

23 MS. MCLEAN: No, but I'm familiar with the
24 MCLs for a lot of those things that are federal
25 standards.

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1 JUDGE HAJEK: Okay, thank you. To start,
2 Mr. Deucher, would you please bring up NRC-010, which
3 is the EA, Page 12, and Mr. Goodman, if you would just
4 bear with me for my total list of questions here. The
5 EA, in Section 241, states, "Land application after
6 wet weather events will not be utilized by CBR, since
7 it is not included in the current NPDES Permit No.
8 NE0130613, from the State of Nebraska. CBR has also
9 stated there are no current plans for treating and
10 discharging the pond water under this permit." You
11 reference CBR-2007A. "If there is any land
12 application activity associated with the disposal of
13 the pond water that is not included in this permit,
14 CBR will be required to apply for additional permits
15 from the State of Nebraska." Did I read that
16 correctly?

17 MR. GOODMAN: I believe so, Your Honor.

18 JUDGE HAJEK: Again, I believe the
19 reference, CBR-2007A, is to the LRA, is that correct,
20 Mr. Goodman?

21 MR. GOODMAN: That's correct, Your Honor.

22 JUDGE HAJEK: Mr. Teahon, is that correct?

23 MR. TEAHON: Yes, sir.

24 MS. SIMON: Your Honor, excuse me, Marcia
25 Simon. I just wanted to make clear that the first

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1 sentence that you read in there about land application
2 after wet weather events will not be utilized was
3 corrected by NRC-092, Your Honor.

4 JUDGE HAJEK: I do understand, and I'm
5 getting there. Thank you. On July 23rd, Ms. Simon,
6 my very next question, the Staff submitted an erratum
7 for this paragraph in the EA. Is that correct, Mr.
8 Goodman?

9 MR. GOODMAN: Yes, that's correct, Your
10 Honor.

11 JUDGE HAJEK: It's a one -- NRC-092, Mr.
12 Deucher, I think you can bring that up. Really just
13 go to the bottom of that page. It's a one-page
14 document. It adds four words into the previous
15 paragraph that we read. The words are, "Except during
16 and immediately after land application," is
17 essentially the way that it is going to read. Is that
18 correct, Mr. Goodman?

19 MR. GOODMAN: Yes, Your Honor.

20 JUDGE HAJEK: Mr. Teahon, do you agree
21 with this erratum?

22 MR. TEAHON: Yes, sir.

23 JUDGE HAJEK: This erratum totally
24 corrects the language in the EA, is that correct?

25 MR. TEAHON: Yes, it does.

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1 JUDGE HAJEK: Thank you. Mr. Deucher,
2 please bring up CBR-043, Page 1. Mr. Goodman, as this
3 comes up, is this the NDEQ permit to which you refer
4 in NRC-092 erratum?

5 MR. GOODMAN: Yes, Your Honor.

6 JUDGE HAJEK: Mr. Goodman, on Page 1 here,
7 the site is identified using quite legal descriptions
8 for the permitted location of the land application.
9 We're down in the middle of the page, close to the
10 bottom right here, legal descriptions Site 1 and Site
11 2. Are you familiar with these?

12 MR. GOODMAN: Yes, Your Honor.

13 JUDGE HAJEK: It also, on Page 3, in
14 Paragraph 1, under Section 1B, Bravo, it repeats the
15 legal location, and then references Attachment 1.
16 That is identified in the table of contents. Mr.
17 Deucher, would you scroll up in this, please, for me,
18 to the table of contents? Okay, that's good. Notice
19 at the bottom of the table is Attachment 1, Map of
20 Land Application Sites. I found in the copy that was
21 submitted in this exhibit that map is missing.

22 I'd like to figure out where these sites
23 are located. Mr. Deucher, in picking a map of the
24 site, I chose to select a map out of the EA, if that's
25 okay, NRC-010, Page 7. It's PDF Page 20. Mr.

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1 Goodman, can you identify, using Mr. Deucher's mouse,
2 where these two sites are located on that map?

3 MR. GOODMAN: Your Honor, just to clarify,
4 the two sites being the evaporation ponds?

5 JUDGE HAJEK: No, these would be the areas
6 that are permitted in the NDEQ permit that we're
7 talking about.

8 MR. GOODMAN: For land application, Your
9 Honor?

10 JUDGE HAJEK: That is correct.

11 MR. GOODMAN: No, Your Honor, I'm not
12 going to be able to specifically circle where they
13 are.

14 JUDGE HAJEK: Do you have another map that
15 you feel would be a better reference for you to use,
16 that you may have used in your hard look at this
17 particular land application approval?

18 MR. GOODMAN: Our conclusions, Your Honor,
19 in the EA, were not based on the specific location
20 where they are on the map, so I would not be able to
21 draw those.

22 JUDGE HAJEK: Are these locations on site
23 or off site?

24 MR. GOODMAN: I believe they are on site,
25 Your Honor.

1 JUDGE HAJEK: Mr. Teahon, can you help out
2 on this? Using the mouse --

3 MR. TEAHON: Yes, sir.

4 JUDGE HAJEK: -- show us where these are.
5 Is this (Simultaneous speaking).

6 MR. TEAHON: This'll work.

7 JUDGE HAJEK: This'll work?

8 MR. TEAHON: I can get fairly close.

9 JUDGE HAJEK: You might want to increase
10 the size of the map, Mr. Deucher, when Mr. Teahon gets
11 close to the location.

12 PARTICIPANT: Is that good?

13 MR. TEAHON: The first site's right there
14 -- or one of the sites.

15 JUDGE HAJEK: This is north of Mine Unit
16 8 --

17 MR. TEAHON: Yes, sir.

18 JUDGE HAJEK: -- where I see your hand?
19 Okay (Simultaneous speaking).

20 MR. TEAHON: It's outside the monitor well
21 ring.

22 JUDGE HAJEK: It's outside of --

23 MR. TEAHON: The monitoring well ring of
24 Mine Unit 8.

25 JUDGE HAJEK: Outside of the monitoring

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1 well ring (Simultaneous speaking).

2 MR. TEAHON: Yes, sir, and inside the
3 permit boundary.

4 JUDGE HAJEK: Thank you.

5 MR. TEAHON: The other area's down in
6 here.

7 JUDGE HAJEK: I see you are indicating in
8 the area between Mine Units 2, 4 and 7, is that --

9 MR. TEAHON: Actually, it's right -- these
10 are the research and development ponds. It's actually
11 just east of those, so it would be in this area right
12 here.

13 MS. MONTEITH: Your Honor, Emily Monteith
14 for the NRC Staff. We have Exhibit NRC-062, PDF Page
15 19, which is the 1993 proposal for land application
16 that CBR submitted to the NRC for approval in that
17 year, has a map of these locations.

18 JUDGE HAJEK: Okay. Mr. Deucher, do you
19 have that available to you? I do have that in my
20 notes. Maybe I didn't ask for it. There it is
21 exactly. Mr. Teahon, can you just verify that --

22 MR. TEAHON: Right there, that was the
23 area north of Mine Unit 8, and then down here by the
24 R&D ponds.

25 JUDGE HAJEK: Thank you. Mr. Goodman, you

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1 were not aware of where these were, is that correct?

2 MR. GOODMAN: Your Honor, I've definitely
3 seen NRC exhibit, but no, I did not recall
4 specifically where they were. The location of them
5 did not change any conclusion that we had in the EA.

6 JUDGE HAJEK: Is it correct to say that
7 before the erratum, which came in very late into this
8 process, the Staff was not even aware of when land
9 application might be permitted?

10 MR. GOODMAN: I would disagree with that
11 statement, Your Honor. I would say the Staff was very
12 much aware. The Staff was following the NPDES permit,
13 which has the accurate information. The statement in
14 the EA was just an error.

15 JUDGE HAJEK: Given the potentially
16 significant environmental consequences of land
17 application, wouldn't you say that allowing an error
18 of that nature to pass through is indicative of having
19 taken a hard look at Crow Butte's land application
20 permit?

21 MR. GOODMAN: I would again disagree with
22 that statement, Your Honor. The impacts of the EA are
23 assessed in Chapter 4. That erratum was found from
24 Chapter 2.

25 JUDGE HAJEK: Repeat that again, please.

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1 MR. GOODMAN: The impacts are assessed in
2 Chapter 4.

3 JUDGE HAJEK: Your second part of the
4 statement about Chapter 2?

5 MR. GOODMAN: I believe the erratum was
6 found in Chapter 2, if I'm not mistaken.

7 JUDGE HAJEK: You're discussing the EA?

8 MR. GOODMAN: Correct, Your Honor.

9 JUDGE HAJEK: You're referring to the EA,
10 at this point? Okay. Thank you. Mr. Deucher, if you
11 would go back, please, to CBR-043, which is the
12 permit, and display Page 5 for us? Mr. Teahon, would
13 you please -- let me read at the top here. This is a
14 section identifying Outfall 001. It states, "Outfall
15 001 is defined as treated, processed wastewater that
16 is sampled after all treatment procedures and prior to
17 land application." Are you familiar with this
18 definition?

19 MR. TEAHON: Yes, sir.

20 JUDGE HAJEK: Would you show us, please,
21 the location for Outfall 001 discharge or describe the
22 flow path for us from its source to the land
23 application area previously described?

24 MR. TEAHON: The infrastructure hasn't
25 been installed, as we're not treating water or land

1 applying it. But the outfall would be at the top of
2 those areas where we would be allowed to land apply
3 it. We'd have to install the infrastructure. It'd be
4 the outfall from the treatment plant.

5 JUDGE HAJEK: I'm a little bit confused.
6 You've heard me say that before, and I seem to become
7 confused relatively easily. You said the Outfall 001
8 would be from the treatment plant.

9 MR. TEAHON: Yes.

10 JUDGE HAJEK: As I understand the purpose
11 of land application is specifically disposal of pond
12 water.

13 MR. TEAHON: It's the disposal of
14 wastewater, all of our waste streams. We would have
15 to treat it, in order for it to meet these standards,
16 and then land apply it through a gravity feed from the
17 outfall.

18 JUDGE HAJEK: Let me go back to NRC-010,
19 Page 12, if we can, Mr. Deucher. Sorry, this would be
20 25 in the PDF. This is in a section titled, "Disposal
21 of Pond Water," very specifically. This does not talk
22 about disposal of other wastewater. Can you enlighten
23 me (Simultaneous speaking).

24 MR. TEAHON: The waste stream is our
25 restoration and production flow that automatically can

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1 either go down the deep well or into the pond. So we
2 would treat from the pond to land apply it.

3 JUDGE HAJEK: Your total expected flow
4 path, should you ever do land application, would be to
5 install infrastructure to take water from the ponds
6 back into the treatment facility, treat it again, and
7 then dispose of it by whatever this irrigation system
8 might be, is that (Simultaneous speaking)?

9 MR. TEAHON: Yes, sir. It would be a
10 gravity flow across the area that we're allowed to
11 land apply. Those two areas that are identified have
12 a gradual slope to them, so that there would be a
13 gravity feed across there. The infiltration rates in
14 discharging to a saturated soil would be very slow.

15 JUDGE HAJEK: Let me ask a few more
16 questions about this. I've got to get back down to
17 where I was. I'm sorry. Can we go back, Mr. Deucher,
18 to Page 3 of CBR-043? I would like to look at Section
19 1A1, just a little bit above there. Mr. Goodman, this
20 is essentially the phrase or the sentence out of this
21 permit that was changed in the erratum, which now
22 agrees with this sentence, is that correct?

23 MR. GOODMAN: I believe that's correct,
24 Your Honor. You're asking if this is the sentence
25 that's now changed in the EA because of the erratum?

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1 JUDGE HAJEK: Yes.

2 MR. GOODMAN: Yes, Your Honor.

3 JUDGE HAJEK: This is the source of that
4 change?

5 MR. GOODMAN: It is, Your Honor.

6 JUDGE HAJEK: I need a little bit of help
7 in understanding this sentence. The sentence reads,
8 "Land application of treated process wastewater shall
9 only be permitted during and immediately after wet
10 weather events." What is a wet weather event?

11 MR. GOODMAN: A wet weather event would be
12 -- it could come from a number of things, mostly
13 precipitation.

14 JUDGE HAJEK: Well, let's see, we had
15 precipitation here yesterday, I think. Is there a
16 threshold of how much precipitation is necessary to
17 have a wet weather event?

18 MR. GOODMAN: I don't know, Your Honor.

19 JUDGE HAJEK: The wet weather event, we
20 experienced some rain here yesterday, where I was back
21 at the hotel, I felt a couple of -- I wasn't out at
22 any particular moment when a lot of rain came down,
23 but there was clearly rain in areas off someplace
24 else. Would the wet weather event need to be
25 specifically at the site where the land disposal would

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1 need to take place?

2 MR. GOODMAN: That is my understanding,
3 Your Honor.

4 JUDGE HAJEK: Mr. Teahon, do you have a
5 definition of this wet weather event and where it
6 would have to be?

7 MR. TEAHON: Yes, they don't want the
8 discharge area, the area for application, they don't
9 want it dry, they don't want it frozen, and they don't
10 want it saturated, so that if we had enough moisture
11 to hydrate the top part of the soil, so that it would
12 soak in easier, that's when we would release. It
13 specifically states here they don't want you to do it
14 when it's frozen or when it's saturated. It would run
15 off if it were saturated, so enough moisture in the
16 top to get it to soak in and a lesser amount that
17 would keep it from being totally saturated, to where
18 it'd run off.

19 JUDGE HAJEK: What is immediately -- it
20 says, "During and immediately after." When is that,
21 the term immediately after? I think what I'm
22 understanding you to say -- let me repeat back kind of
23 a paraphrase. You have a need to dispose -- and
24 again, I'm going to go back -- this seems to be
25 related specifically to pond water, but you have a

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1 need to dispose of pond water, so you would have in
2 place, if this should be needed, a system or a process
3 or a procedure to go out and check the moisture
4 content of the soil before you actually performed a
5 land application disposal? Is that what I understood
6 you to say?

7 MR. TEAHON: I'm sure that's what we would
8 have to do, sir.

9 JUDGE HAJEK: But that procedure is not
10 currently (Simultaneous speaking)?

11 MR. TEAHON: No, sir, we have no plans on
12 installing this infrastructure or doing a land
13 application at this point. We do have the permit if
14 situations arise that we need to, but there's a lot of
15 work we'd have to do to put in the infrastructure and
16 the treatment plant in order to actually land apply
17 pond water.

18 JUDGE HAJEK: Thank you. Mr. Deucher,
19 roll this back up to Page 1, if you would, please.
20 Roll it down. That's a good place right there. Mr.
21 Teahon, just above the signature line, I see the
22 effective date of the permit is October 1, 2011, and
23 that it expires on September 30, 2016 --

24 MR. TEAHON: Yes, sir.

25 JUDGE HAJEK: -- roughly a year from now.

1 These are the current and effective expiration dates,
2 is that correct?

3 MR. TEAHON: Yes, sir.

4 JUDGE HAJEK: Given that the permit
5 expires just about a year from now, has Crow Butte
6 resources already applied for a renewal, an extension,
7 or a new permit?

8 MR. TEAHON: No, sir, we would not have to
9 do that until 90 days before the expiration date.

10 JUDGE HAJEK: What is your intent, at this
11 point in time, if you never expect and have no plans
12 and have no infrastructure to --

13 MR. TEAHON: Due to the lengthy time and
14 review to get a permit, it would be our intent to
15 renew this.

16 JUDGE HAJEK: Even though you never intend
17 to use it?

18 MR. TEAHON: Your Honor, it would be less
19 expensive for us to renew it than to go back through
20 the entire process to get a permit, should we need it
21 in the future.

22 JUDGE HAJEK: Thank you. Mr. Goodman, NRC
23 -- Mr. Deucher, if you could display NRC-010, PDF Red
24 Page 25, which is Page 12 of the EA. Mr. Goodman,
25 Section 241 and 242, the EA refers here to this NPDES

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1 permit. It states in the last sentence of the first
2 paragraph, "CBR has also stated there are no current
3 plans for treating and discharging the pond water."
4 Again, Mr. Teahon, I'm noting that this specifically
5 talks about treating and disposing of pond water.

6 MR. TEAHON: Yes, sir.

7 JUDGE HAJEK: Not other water. Let me
8 just get clarification before I come back to you on
9 that from Mr. Teahon. This permit is for pond water,
10 but I thought I heard you explain that it is just part
11 of the overall wastewater disposal process planning.

12 MR. TEAHON: Yes, sir. The pond water is
13 our process and restoration water.

14 JUDGE HAJEK: You would be pulling it out
15 of the pond.

16 MR. TEAHON: Yes, sir.

17 JUDGE HAJEK: That is the only way that
18 land application water would have a source is from the
19 ponds?

20 MR. TEAHON: Yes, sir. The infrastructure
21 that would be installed would have to be pulling out
22 of the ponds, going through the treatment facility,
23 and then through a pipeline that takes it to one of
24 the two discharge areas.

25 JUDGE HAJEK: Thank you. Okay, Mr.

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1 Goodman, getting back to you here, the first paragraph
2 here says, "CBR has also stated that there are no
3 current plans for treating and discharging the pond
4 water under a permit." Can you tell us the exact page
5 reference for the EA having made this statement, page
6 reference in the LRA?

7 MR. GOODMAN: The LRA, I believe, is
8 almost 700 pages. I would have to get back to you on
9 an exact page number. I don't have that offhand, Your
10 Honor.

11 JUDGE HAJEK: Let me help you a little
12 bit.

13 MR. GOODMAN: Sure, thank you.

14 JUDGE HAJEK: You're referring to
15 CBR-2007A. The reference that I found is to Table
16 10.1 of the LRA, which is on PDF 684 -- Page 684 out
17 of the nearly 700 pages. Can you bring that up for us
18 (Simultaneous speaking)?

19 MR. GOODMAN: Thank you, Your Honor.

20 JUDGE HAJEK: I searched the LRA -- let me
21 say I searched CBR-011 for a reference to this permit.
22 The only reference that I found anyplace was in this
23 table. The reference, if you look down on the
24 right-hand column, Box No. 5, National Pollutant
25 Discharge Elimination System Permit, NE0130613. This

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1 really did not enlighten me very much. It is the
2 permit. When I went there, I expected to find a lot
3 of information about what it was that you were
4 approving. I was a little bit disappointed in not
5 having found more than simply a reference to the
6 permit, without any elucidation on the permit. So I
7 have a few questions about the permit.

8 MS. SIMON: Your Honor, could I just
9 interrupt for one second? I'm sorry. I just want to
10 clarify that the land -- Crow Butte's permission to
11 use land application was approved in 1993. It wasn't
12 approved as part of this proceeding. If you look at
13 CBR Exhibit 042, that is the NRC's write-up, where
14 they reviewed the land application. It was a license
15 amendment that was issued in 1993.

16 JUDGE HAJEK: Sorry, you said CBR --

17 MS. SIMON: CBR-042, I believe, is -- I
18 think it's called the Grimm Memo. Mr. Grimm was an
19 NRC employee. That memo is a memorandum evaluating
20 the land application proposal. At the end of that
21 memo, there was a statement indicating that the
22 license would be amended to allow land application.

23 JUDGE HAJEK: Thank you for that
24 clarification. Mr. Goodman, like I said, I didn't
25 find the reference especially informative, though, but

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1 CBR-043 is the permit, is that correct?

2 MR. GOODMAN: I believe that is correct,
3 Your Honor.

4 JUDGE HAJEK: In the EA, if we go back to
5 the EA, Page 12 of the EA, which, again, is PDF Red
6 Page 25, Mr. Deucher.

7 MR. GOODMAN: Your Honor, I have found a
8 place in the LRA that may make you a little less
9 disappointed. It talks about no plans for land
10 application, which I think is what you are after, if
11 I'm not mistaken, Your Honor.

12 JUDGE HAJEK: I actually am interested in
13 that. Who made the plans, then, not to use land
14 application, Mr. Goodman? I am going to assume you're
15 going to say that the plans were made by the licensee,
16 is that correct?

17 MR. GOODMAN: The Applicant currently has
18 chosen not to use land application.

19 JUDGE HAJEK: Let me go back to Mr.
20 Teahon. What would be the need for land application?
21 That is under what specific conditions might a
22 licensee or might Crow Butte turn to land application
23 of wastewater?

24 MR. TEAHON: If our deep disposal wells
25 failed, could lead us to treat water and land apply

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1 it.

2 JUDGE HAJEK: Going back to your
3 testimony, Question No. 13 on Page 4 of your direct
4 testimony, CBR-010, PDF Page 7, "Does CBR use land
5 application as a method of wastewater disposal?" Your
6 answer is, "No, CBR does not use land application as
7 a wastewater disposal method, has not constructed the
8 necessary facilities for land application disposal of
9 wastewater, and has no plans or intentions to start
10 land application." Is that correct?

11 MR. TEAHON: Yes, sir.

12 JUDGE HAJEK: Your testimony that I've
13 read there and other statements related to land
14 application I feel is rather adamant that you have not
15 used land application, have no plans to use it in the
16 future, is that correct?

17 MR. TEAHON: Yes, sir. It'd be very
18 expensive for us to put in the infrastructure at this
19 point in our area. Our production is declining. Our
20 deep disposal well capacity right now, our water
21 balance and the use of the commercial evaporation
22 ponds are adequate to handle our disposal needs. So
23 it would be very expensive for us to go to the next
24 step. There are several things we'd have to do. We'd
25 have to submit to the NRC the design and plan of the

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1 wastewater treatment facility that we're going to put
2 in. We'd have to get a license amendment to do that.
3 We'd have to include all of that additional
4 infrastructure in our surety bond. This would not
5 happen overnight.

6 JUDGE HAJEK: Thank you. Mr. Deucher,
7 would you please display CBR-011, Page 7-63, PDF Page
8 656, the first paragraph under the heading -- can you
9 go up one page? Here it is, 656. The first paragraph
10 under the heading 713, Waste Management Impacts,
11 reads, "Liquid wastes generated from production and
12 restoration activities are handled by one of three
13 methods: solar evaporation ponds, deep well
14 injection, or land application. All three methods are
15 currently being employed at Crow Butte."

16 Then, Mr. D., would you display NRC-010,
17 Page 73, which is Page 86 as the PDF page? This
18 reads, at the top, "The other option is land
19 application, for which the licensee has a permit. The
20 licensee has not used either of these options, and has
21 not indicated they will in the future." I have a
22 conflict in the way these two entries read, one from
23 the EA, one from the LRA. Mr. Teahon, in your
24 testimony and answer to Question 13 on Page 44, you
25 state, "Again, CBR does not use land application as a

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1 wastewater disposal method, has not constructed the
2 necessary facilities, and has no plans or intentions
3 to start land application of wastewater in the
4 future." Gentlemen, how do you resolve this conflict
5 in information?

6 MR. GOODMAN: Gentlemen meaning whoever
7 wants to take it, Your Honor?

8 JUDGE HAJEK: (Simultaneous speaking.)

9 MR. TEAHON: The term probably should say
10 methods have been licensed.

11 JUDGE HAJEK: Say that again, please.

12 MR. TEAHON: It should say methods have
13 been licensed to be used.

14 MR. GOODMAN: That was Staff's
15 interpretation of that statement, as well, Your Honor.
16 The one that said, "All three are being currently
17 used," Staff's interpretation of that was that all
18 three have been currently licensed, but that land
19 application specifically is not currently being used.

20 JUDGE HAJEK: Have you requested a
21 clarification on this out of the LRA?

22 MR. GOODMAN: No, Your Honor, but there
23 are other places in the LRA that state that the
24 Applicant has no plans to use land application.

25 JUDGE HAJEK: Do you concur with that, Mr.

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1 Teahon?

2 MR. TEAHON: Yes, sir. During their
3 annual inspections, they review our method of disposal
4 and know, on an annual basis, that we are not land
5 applying wastewater.

6 JUDGE HAJEK: So this is really a
7 misstatement?

8 MR. TEAHON: Yes, sir. It should say
9 methods have been licensed.

10 JUDGE HAJEK: When we have misstatements
11 of this type, how do they get fixed, Mr. Goodman?

12 MR. GOODMAN: When you combine the series
13 of documents that we have and the records that we
14 have, Your Honor, we come up with an overall
15 conclusion. It has been very clear, through the
16 20-plus years, or nearly 20 years of operation at Crow
17 Butte, the license renewal application, and all of the
18 documents that go into producing a NEPA document, in
19 this case an environmental assessment, it was very,
20 very clear to Staff that land application had not
21 currently been applied, and that the Applicant has no
22 intention. So just a collection of data and a lot of
23 independent analysis all go into drawing these
24 conclusions that we make in the EA.

25 JUDGE HAJEK: In the renewed license to

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1 Crow Butte, it expressly permits land application, is
2 that correct? It's in, I believe, Condition 10.17?

3 MR. GOODMAN: That's correct, Your Honor.
4 If you would like to see that, that is NRC-012 at
5 Pages 9 and 10.

6 JUDGE HAJEK: Mr. Deucher, can you display
7 that for us, please? We need, Mr. Deucher, the very
8 bottom of Page 9 and the top of Page 10 of NRC-012 in
9 order to see that. It's the last -- oh, you're in
10 mode of only displaying one page at a time? Mr.
11 Goodman, and perhaps this goes back to Ms. Simon's
12 contribution a moment ago, this particular paragraph,
13 as I read it, has a lot of history.

14 It does refer to -- there we go. It
15 identifies that, reading from it that, "Liquid
16 effluents from process buildings and other process
17 waste systems, with the exception of sanitary waste,
18 shall be returned to the process circuit, discharged
19 at the solar evaporation ponds, disposed by land
20 irrigation, in accordance with the licensee's proposal
21 submitted on August 3, 1988, modified by its submittal
22 on June 7, 1993, or deep well injected in accordance
23 with the licensee's report submitted on August 24,
24 1993, as modified by submittals dated 1995, 1996 and
25 2000." So we're looking, in this particular license

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1 condition, at a lot of history. Did those get
2 documented in -- did the conditions of those permits
3 get documented in a 1993 NRC EA-type analysis or SER,
4 one or the other?

5 MR. GOODMAN: I was not the project
6 manager on that EA that was completed, so I do not
7 know, Your Honor, if that previous EA had those
8 specific words in it, no.

9 MS. SIMON: Your Honor, there was not an
10 EA performed for the license amendment where the land
11 application was approved. As I mentioned earlier, if
12 you look at CBR Exhibit CBR-042, it explains the
13 reason why there was not an EA performed, I believe.

14 CHAIR GIBSON: We're going to have a
15 ten-minute recess. We'll be back on the record soon
16 as we go to the restroom.

17 (Whereupon, the above-entitled hearing
18 went off the record at 9:42 a.m. and went back on the
19 record at 9:50 a.m.)

20 CHAIR GIBSON: Before we -- I know Judge
21 Hajek has some more questions. I just had a couple of
22 things I wanted to ask. Do you know whether there was
23 any environmental effects documentation that the NRC
24 Staff made at the time of this renewal in 1993?

25 MR. GOODMAN: I'm sorry; can you repeat

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1 the question?

2 CHAIR GIBSON: Yes, was there any
3 environmental effects documentation made at the time
4 of this renewal in 1993, this amendment that -- there
5 was no EA done.

6 MR. GOODMAN: I believe, Your Honor, it
7 was a categorical exclusion, but I'm not 100 percent
8 on that, which would mean there would be some
9 documentation to do a categorical exclusion, but a
10 categorical exclusion is a unique NEPA thing.

11 CHAIR GIBSON: If they did start land
12 application -- I know they don't intend to. I know
13 they don't have the infrastructure. That's fine. But
14 if they did decide to do it, would the Staff
15 supplement the environmental assessment?

16 MR. GOODMAN: The Staff considered land
17 application in the environmental assessment. I had a
18 question the other day from Judge Wardwell about
19 whether the EA included land application and could it
20 have removed that sentence that said that it's not
21 currently being used, would it have changed any of the
22 conclusions in the EA? The answer to that was no. It
23 still is no. The EA is complete based on the fact
24 that they are approved for land application. I would
25 say the fact that they don't use or utilize it

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1 currently and haven't in the past went into factoring
2 in how much information we would put in the EA on land
3 application. If it was currently being used, we might
4 have added another sentence or two. I'm not entirely
5 sure. But I can say with 100 percent assurity it
6 would not change our conclusions. Our conclusions
7 were based on the fact that they are permitted to use
8 land application.

9 CHAIR GIBSON: Would a license amendment
10 be required if they were to start doing land
11 application?

12 MR. GOODMAN: I'm not the expert on
13 license amendment, Your Honor. I believe Mr. Teahon
14 can probably better answer that question. They're
15 approved for land application in their NPDES permit,
16 but I think there's certain infrastructures and things
17 that would require that, although I'm not positive.

18 CHAIR GIBSON: Mr. Teahon, do you know
19 whether a license amendment would be required?

20 MR. TEAHON: Yes, sir. We would be
21 required to submit the plans and, through their review
22 process, would issue us a license amendment, or at
23 least a technical review.

24 CHAIR GIBSON: In the event that did
25 happen, what you're telling me is there would be no

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1 need for any environmental report because you will
2 have already evaluated the impacts, is that correct,
3 Mr. Goodman?

4 MR. GOODMAN: Yes, I believe that is
5 correct, Your Honor.

6 CHAIR GIBSON: Okay, thank you. Those are
7 the questions I had.

8 JUDGE HAJEK: Okay, getting back into this
9 total discussion. Ms. McLean --

10 MS. MCLEAN: Yes.

11 JUDGE HAJEK: -- patiently waiting to be
12 addressed, I'm sure. You state in INT-048, on Page 5,
13 that, "Ion exchange cannot handle concentrated metal
14 solution, as the matrix gets easily fouled by organics
15 and other solids in the wastewater." Is that correct?

16 MS. MCLEAN: That's correct.

17 JUDGE HAJEK: However, you don't discuss
18 reverse osmosis, which is part of the overall
19 wastewater processing process. Did you consider
20 reverse osmosis in your analysis?

21 MS. MCLEAN: No, I did not, but reverse
22 osmosis isn't really great for organics anyway. It's
23 limited by the type of membrane that they use. I'm
24 not familiar with the type of membrane they use. All
25 I'm saying is that the organic forms of uranium have

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1 been found at other mine sites, typically one being
2 studied right now at Smith-Highland that has a
3 ten-mile plume that they can't reel back. They're
4 having troubles with trying to remediate that mine
5 site, even when they've used \$3 million worth
6 resources. The organic stuff just does not react in
7 the same way that the inorganic stuff does. That's
8 the problem.

9 CHAIR GIBSON: Mr. Teahon, would you
10 please expand a little bit on that? Do you find in
11 your waste stream that you have both organic forms of
12 heavy metals, as well as non-organic forms?

13 MR. TEAHON: We only check for the
14 inorganic common metals, the RCRA metals. We're not
15 checking for organic forms, volatile organics,
16 inorganics, synthetic organics. We check for the
17 inorganic metals.

18 CHAIR GIBSON: If I could just add, you're
19 testing, in that regard, in accordance with your
20 Nebraska Department of Environmental Quality permit,
21 is that correct, sir?

22 MR. TEAHON: Yes, sir.

23 CHAIR GIBSON: When you're doing that, you
24 are testing pursuant to the parameters that the
25 Nebraska Department of Environmental Quality required

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1 you to test, correct?

2 MR. TEAHON: Yes, sir. Our disposal wells
3 are non-hazardous disposal wells. So in order to
4 prove that on a monthly basis, we have to do the RCRA
5 metal test and submit that data to them.

6 CHAIR GIBSON: Right. In doing that, you
7 are doing that pursuant -- you're doing that testing
8 pursuant to approved and specified tests by the
9 Environmental Protection Agency that the Nebraska
10 Department of Environmental Quality follows. Is that
11 correct, sir?

12 MR. TEAHON: Yes, sir. It's the same
13 tests that they run on our composite samples.

14 CHAIR GIBSON: They have never tested, nor
15 has EPA prescribed, nor has the Department of
16 Environmental Quality prescribed that you perform any
17 tests for organic versions -- I'll put it that way --
18 of these metals. Is that correct, sir?

19 MR. TEAHON: That's correct, sir.

20 JUDGE HAJEK: Thank you.

21 MS. MCLEAN: Can I comment on that,
22 please?

23 JUDGE HAJEK: Very briefly. Go ahead --
24 25 words.

25 MS. MCLEAN: The organic compounds are the

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1 problematic situation with recovery and remediation in
2 ISL mines that they're having problems with now.

3 JUDGE HAJEK: Thank you. I'm going to
4 come back to that organic concern that you have. Mr.
5 Teahon, there's a number I'm unable to confirm from
6 your exhibits. You state, still in your testimony,
7 CBR-010 on Page 5, that the reverse osmosis equipment
8 is capable of reducing selenium concentrations to less
9 than 0.001 milligrams per liter, referencing again, I
10 believe, CBR-042 at Page 4. Can you please confirm
11 your source for me of this specification, 0.001?

12 MR. TEAHON: The less than limit?

13 JUDGE HAJEK: Yes. Actually, what I'm
14 really interested in, does this reduction to this
15 level require several passes through the RO system?

16 MR. TEAHON: I would say no. That limit
17 is the detection limit -- the minimum detection limit,
18 concentration limit, the .001, to get to less than.

19 JUDGE HAJEK: It's not the production
20 limit. Is that what I understand you to say? By
21 production, I mean it's not the process conditions
22 that actually exist at the discharge of the reverse
23 osmosis equipment. Is that what you're saying?

24 MR. TEAHON: Yes, sir.

25 JUDGE HAJEK: If it is less than 0.001,

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1 you would simply say it's not there?

2 MR. TEAHON: Yes, sir.

3 JUDGE HAJEK: Mr. Deucher, would you
4 please display NRC-062 at Page 13 and 14, which I
5 think is PDF Pages 17 and 18? Mr. Goodman, you site
6 this document Ferret land application proposal in your
7 testimony in NRC-001, Page 104 is the commitment Crow
8 Butte has made for the selenium limit in process
9 wastewater. This says 0.05 milligrams per liter. Is
10 that correct?

11 MR. GOODMAN: Yes, Your Honor.

12 JUDGE HAJEK: Mr. Teahon, is this -- on
13 Page 10 of your testimony, 010, you state the effluent
14 is expected to be less than 0.001 milligrams per
15 liter. Are you actually committing to that level of
16 less than 0.001?

17 MR. TEAHON: We're not committing to that,
18 sir. That would be our expected concentration. We
19 would have to meet the requirements.

20 JUDGE HAJEK: The requirements would be
21 0.05?

22 MR. TEAHON: Yes, sir.

23 JUDGE HAJEK: Your reverse osmosis
24 equipment can clearly achieve less than that, is that
25 your testimony?

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1 MR. TEAHON: Yes, sir. We would have to
2 assess -- if we were to put in a treatment facility,
3 we would have to assess all the options necessary to
4 be installed to meet those discharge limits. It may
5 be a combination of things, but confident that the RO
6 unit would remove the selenium to the level that we
7 need for release.

8 JUDGE HAJEK: Mr. Teahon -- if we can go
9 back, Mr. Deucher, to CBR-043 on Page 3, with the
10 paragraphs in Section B, on Page 3. Mr. Teahon,
11 you've showed us on a map where the approved sites
12 are. Let me just run down through the various
13 requirements for these sites, if you would just
14 confirm that these two sites meet the requirements.
15 I think in Paragraph 3 here, under Section B, on Page
16 3, it says less than a 12 percent slope?

17 MR. TEAHON: Yes, sir. These sites, when
18 proposed, the DEQ staff looked at these sites to make
19 sure that they met the requirements.

20 JUDGE HAJEK: These sites are free of
21 perennial or intermittent streams, ponds, lakes and
22 wetlands?

23 MR. TEAHON: Yes, sir.

24 JUDGE HAJEK: Paragraphs 10 through 14,
25 meeting the separation requirements for a vegetative

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1 buffer, inhabited dwellings, potable water supply
2 wells and community public water and, in particular,
3 waters of the State, is that correct?

4 MR. TEAHON: Yes, sir.

5 JUDGE HAJEK: Mr. Goodman, the EA, NRC-010
6 at 72-73, which is Red Pages 85-86, states, "One
7 option available for CBR is disposal of permeate by
8 discharge to surface water." My question here is
9 since this is in the EA, do you consider this a viable
10 option?

11 MR. GOODMAN: Is there any way, Your
12 Honor, we could pull up that EA, so I can see what
13 you're referencing?

14 JUDGE HAJEK: Yes, Mr. Deucher, can you
15 pull that up, PDF Page 85-86?

16 MR. GOODMAN: I'm sorry, Your Honor, can
17 you now repeat the question?

18 JUDGE HAJEK: The EA here, I believe --
19 and maybe it's right on the next page -- states that
20 there is an option that Crow Butte has for disposal of
21 permeate by discharge to surface water.

22 MR. GOODMAN: I'm sorry; I don't see that.
23 Hang on. Let's just get on the same page. Sorry.

24 JUDGE HAJEK: I'll just find it for
25 certain here in my amended version.

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1 MR. GOODMAN: Are you referring to, Your
2 Honor, the sentence that says, "The other option is
3 land application?"

4 MS. MCLEAN: The very bottom sentence of
5 Page 72 and the top of Page 73.

6 MR. GOODMAN: In accordance? Okay, got
7 it, thank you. Now one more time -- I'm so sorry, sir
8 -- could you repeat the question?

9 JUDGE HAJEK: Yes, I can.

10 MR. GOODMAN: Thank you, Your Honor.

11 JUDGE HAJEK: I'm sorry. The question was
12 the EA here states, "One option available to CBR is
13 disposal of permeate by discharge to surface water."
14 Since this is in the EA, do you consider this a viable
15 option, even though it's apparently denied by
16 Condition B14 on Page 3 of their NDEQ permit? So we
17 have to go back and forth here. Can you bring that
18 page back up, Mr. Deucher? Hold on a second before
19 you -- are you ready with that one?

20 MR. GOODMAN: Yes, go ahead, Your Honor.

21 JUDGE HAJEK: If we can bring back the
22 NDEQ permit, please. Scroll down, please, to B -- the
23 last line in this permit on this page reads, "A
24 200-foot separation shall be maintained between the
25 application site and waters of the State of Nebraska

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1 that includes, but is not limited to, streams and
2 wetlands." I'm a little bit confused by the EA
3 suggesting that there's a permit to dispose of
4 permeate to surface waters, when surface waters are,
5 as I understand, considered to be waters of the State
6 of Nebraska, and they're clearly excluded from where
7 wastewater can be disposed.

8 MR. GOODMAN: I now understand your
9 question, Your Honor. Thank you. The sentence in the
10 EA is stating what License Condition 10.17 allows. It
11 may be -- and I'm not 100 percent sure, but it may be
12 when they refer to surface waters, they could be
13 talking about the evaporation ponds, but I'm not
14 positive about that.

15 JUDGE HAJEK: Okay, thank you. I'm going
16 to return to Ms. McLean. In INT-048, you state,
17 "Bioaccumulation of organified heavy metals rises
18 quickly in the living systems and the environment,
19 rising up the food chain." Do you have an upper limit
20 for that?

21 MS. MCLEAN: No, there's no upper limit
22 that anybody has found. It depends on the
23 concentration at the bottom, depends on the level of
24 microorganism activity and moisture and all that kind
25 of stuff. There's a lot of different factors that

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1 would determine that.

2 JUDGE HAJEK: Okay.

3 MS. MCLEAN: Depends on the metals. The
4 other thing that's heavily dependent is the
5 interaction between metals and nutritional minerals,
6 of which I gave you an example of the mineral wheel
7 and how minerals and metals interact in nature, where
8 a high level of one will suppress the opposite one.
9 Then I gave you the second -- I'll tell you the exact
10 number -- Slide No. 5 shows the mineral wheel as it
11 exists in nature and the balance of nature between
12 heavy metals and nutritional minerals.

13 The second one I overlaid the heavy metals
14 that are freed in ISL mining and how they would
15 further suppress the nutritional minerals in a
16 different type of toxicity. So there's several types
17 of toxicity that go on. One is the imbalance between
18 nutritional minerals and metals. The second is direct
19 toxicity into enzyme systems and hormones.

20 JUDGE HAJEK: I believe I've read that,
21 and I do understand it. What I'm concerned about is
22 specifically the accumulation of -- we're only talking
23 about selenium. We're not going to talk about any of
24 the others. Mr. Teahon, if you would begin land
25 application, would you have a monitoring program in

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1 place to look at bioaccumulation of these heavy
2 metals, including selenium?

3 MR. TEAHON: Sir, we would comply with the
4 conditions of the permit.

5 JUDGE HAJEK: Does the permit require you
6 to monitor the land that you are disposing of your
7 wastewater upon?

8 MR. TEAHON: No, sir. They only require
9 that we submit the water quality that's released to
10 the surface.

11 JUDGE HAJEK: So you would not be going
12 back and analyzing the soil ever?

13 MR. TEAHON: Not unless it's a permit
14 requirement.

15 JUDGE HAJEK: Thank you. I think I'm
16 finished with my land application questions. Thank
17 you, Ms. McLean, Mr. Goodman, and Mr. Teahon.

18 MS. MONTEITH: Your Honor, Emily Monteith
19 for the NRC Staff.

20 CHAIR GIBSON: We've got some -- I'm
21 sorry, what'd you say, ma'am?

22 MS. MONTEITH: Judge Gibson, you asked a
23 question of our witness that was arguably legal in
24 nature earlier, when you asked whether an
25 environmental review would be performed for a license

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1 amendment.

2 CHAIR GIBSON: Yes.

3 MS. MONTEITH: I wanted to clarify that in
4 accordance with NUREG-1748, which is the Staff's
5 guidance for the review of -- our environmental
6 review, environmental review would be required for a
7 license amendment. The Staff would first analyze
8 whether a categorical exclusion does apply, pursuant
9 to 10 CFR 51.22. If not, the Staff would perform an
10 environmental assessment under 51.21. In that
11 process, the Staff would then determine whether a
12 FONSI or an environmental impact statement would be
13 appropriate. I wanted to clarify that would occur.

14 CHAIR GIBSON: Okay, thank you for that
15 clarification.

16 JUDGE HAJEK: I'd like to transition to
17 the question of tornadoes. Let me flip around here
18 and get the right document up. At this point, the
19 issue is that tornadoes were not addressed at all in
20 the EA. Mr. Deucher, to start this for me, please,
21 would you bring up NRC-001, the Staff's direct
22 testimony. Mr. Goodman, in your testimony, A-12.2, on
23 Page 97 of NRC-001, you state the Staff discusses wind
24 characteristics at the Crow Butte site, and this
25 section is titled winds, is that correct?

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1 MR. GOODMAN: Yes, Your Honor.

2 JUDGE HAJEK: But as claimed by
3 Intervenors, tornadoes are not mentioned in the EA.
4 Section 334 only discusses winds and references
5 CBR-2007A. I gather from the references at the end of
6 the EA that this reference was really Volume 1 of what
7 was, at the time, a two-volume LRA at the time of
8 submittal. Is that correct?

9 MR. GOODMAN: Yes, Your Honor.

10 JUDGE HAJEK: I continued my search for a
11 tornado discussion and more information on this
12 reference by reading the SER in NRC-009. Mr. Deucher,
13 can you pull up CBR -- I'm sorry, NRC-009, the SER, at
14 Page 158. I'd like to compliment you, Mr. Deucher.
15 You read right through my error there. Here, in
16 Section 735, natural events are discussed, and a
17 probability for a tornado is stated to be 4.8 times
18 ten to the minus four according to the Applicant. But
19 the reference here, now, is to CBR-2009. Is that
20 correct, Mr. Goodman?

21 MR. GOODMAN: That's correct, Your Honor.

22 JUDGE HAJEK: I determined, then, from
23 these citations to CBR-2007 and CBR-2009 that they're
24 probably citations to the LRA, which has been
25 submitted as Exhibit CBR-011, where the latter

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1 includes all of the updates requested through all the
2 RAIs. Do you agree with that conclusion, Mr. Goodman?

3 MR. GOODMAN: I do, Your Honor.

4 JUDGE HAJEK: Mr. Teahon -- I'm sorry; Mr.
5 Goodman, continuing my interest in the cited EA
6 discussion, I went to the LRA and CBR-011. I found
7 wind discussed extensively in the LRA, Section 255,
8 starting on Page 273. I assume this was the
9 information on which you based your reference in the
10 EA. Is that correct?

11 MR. GOODMAN: I believe that is correct,
12 Your Honor.

13 JUDGE HAJEK: The wind discussion is quite
14 detailed over some 19 to 20 pages and ends with a
15 discussion of tornadoes. Is that right?

16 MR. GOODMAN: To my recollection, yes,
17 Your Honor, that's correct.

18 JUDGE HAJEK: That's fine. Mr. Deucher,
19 can you please bring up Section 2.5.5 of CBR-011,
20 looking at the wind rose figures. These are Figures
21 2.5-4 from Scottsbluff, 2.5-5 for Rapid City, 2.5-6
22 for Crow Butte. Is that correct, Mr. Teahon?

23 MR. TEAHON: Yes, sir.

24 JUDGE HAJEK: It appears to me that these
25 three wind rose diagrams, along with the description

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1 by the licensee, by Crow Butte, on the pages following
2 them that interpret them are the total source of data
3 for the Staff summary in the EA. Am I correct on
4 that, Mr. Goodman?

5 MR. GOODMAN: Certainly, the Staff's
6 discussion on wind events in the EA would include
7 information obtained from the license renewal
8 application, yes. I wouldn't say, Your Honor,
9 exclusively, though. The license renewal application
10 is one of many factors and one of many documents that
11 the EA takes to form its own independent conclusions.

12 JUDGE HAJEK: Do you document those other
13 sources of information, then, relative to coming to
14 your conclusion in the EA?

15 MR. GOODMAN: Sometimes yes, Your Honor,
16 sometimes no. An EA is not designed, under the
17 National Environmental Policy Act, to include
18 everything. They're designed to be readable
19 documents. They're public disclosure documents. So
20 the EA sometimes, to form its own independent
21 conclusions, will not state, sentence-by-sentence,
22 everything.

23 JUDGE HAJEK: Thank you. One of the
24 concerns that I had in looking at these wind rose
25 diagrams is they tend to be quite old. That is,

1 they're not current conditions. Did you look at new
2 data? Did you look at the way that the wind patterns
3 may have changed since these wind rose diagrams were
4 initially created? I believe they're dated -- I can't
5 read this at the bottom. Can you blow that up? Thank
6 you. This one, surface winds from 2004, did you look
7 at newer materials?

8 MR. GOODMAN: Staff, Your Honor, included
9 a look at several of its guidance materials in its
10 generic environmental impact statement, which I
11 believe are all newer than 2004. However, in its wind
12 assessment, it definitely used these documents from
13 the license renewal application, as well.

14 JUDGE HAJEK: Thank you. Relative to
15 tornadoes, Mr. Goodman, since that's really the topic
16 that we're after here, just to clarify the record,
17 your testimony in NRC-001 at 98 references NRC-017 at
18 4.55 to 4.66. I believe this really means -- or
19 should have been 4.4-55 to 4-56. Is that correct?

20 MR. GOODMAN: That may be correct. I
21 have, Your Honor, 4-55 to 4-66, as well, but I
22 could've pulled that from my testimony. If we want to
23 pull up the document, we can look at that information.
24 I know it's NUREG-6733. Those pages discuss tornadoes
25 at ISR facilities generally.

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1 JUDGE HAJEK: I think we can -- Mr.
2 Deucher, do you have that? Is that one I had asked
3 for, NRC-017, 4-55, we see that at the bottom, and
4 then the next page is 4-56. Then we move into a whole
5 different topic.

6 MR. GOODMAN: Yes, it looks like you are
7 correct, Your Honor.

8 JUDGE HAJEK: NRC-017 on Page 456
9 references NUREG-0706, the 1980 GEIS for uranium
10 milling, stating, "This assessment at uranium mills
11 and, by comparison, at uranium ISL facilities, are not
12 designed to withstand tornado winds." The section on
13 tornadoes in NUREG-0706 is essentially identical to
14 the same section in NUREG-0511. In fact, the entire
15 paragraphs are the same.

16 Mr. Goodman, you state in NRC-001 on Page
17 98 that because CBR engages in mitigative practices to
18 address the impacts of wind at the site, citing
19 NRC-010 at 66, which is PDF 79, and because there are
20 no mitigative practices to address the effects of a
21 tornado, the Staff has generically determined that
22 tornadoes do not need to be considered. Is that a
23 fair summary of your testimony?

24 MR. GOODMAN: I believe that's a fair
25 summary of my testimony, with the caveat that was

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1 certainly one of the factors of several factors that
2 went into our decision to not specifically include
3 tornadoes in the EA.

4 JUDGE HAJEK: Thank you. Mitigation is
5 the taking of action before an event occurs to
6 minimize the consequences. Is that correct?

7 MR. GOODMAN: Can you repeat the question?

8 JUDGE HAJEK: Mitigation is the taking of
9 action before an event occurs to minimize the
10 consequences of the event.

11 MR. GOODMAN: For the majority of
12 mitigative measures, I would say that's a correct
13 statement, Your Honor.

14 JUDGE HAJEK: In your direct testimony to
15 Question 12.2, you state, "CBR is able to take
16 mitigative action to reduce the amount of fugitive
17 dust to levels equal to or less than the existing
18 condition." Is that correct?

19 MR. GOODMAN: That's correct, Your Honor.

20 JUDGE HAJEK: In support of that, you
21 reference, again, NRC-010, Page 66 for the proposition
22 that CBR would apply water to unpaved roads to
23 mitigate fugitive dust. Is that correct?

24 MR. GOODMAN: That's correct.

25 JUDGE HAJEK: Relative to tornadoes,

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1 though, did the Staff impose a threshold wind level
2 above which water will be applied to unpaved roads?

3 MR. GOODMAN: Specifically referring to
4 tornadoes now, Your Honor?

5 JUDGE HAJEK: I'm sorry, to wind. If the
6 wind blows hard, does CBR have to go out and apply
7 water or other solution to roads to minimize the wind
8 that -- to minimize the dust that would be blown
9 around by the wind?

10 MR. GOODMAN: Is that one specific
11 mitigation measure that you are referring to, or are
12 you asking just generally?

13 JUDGE HAJEK: I am asking whether there is
14 a requirement to mitigate the effects of wind-blown
15 dust at the site?

16 MR. GOODMAN: No, I don't believe there's
17 a legal requirement, Your Honor.

18 JUDGE HAJEK: Mr. Teahon, do you have a
19 requirement to mitigate the consequences of wind-blown
20 dust at the site?

21 MR. TEAHON: We do. We don't have a
22 written procedure, but when it's real dry seasons --
23 when it's real dry and we're creating a lot of dust,
24 to help protect the neighbors, we will apply water to
25 the roads.

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1 JUDGE HAJEK: What's the source of that
2 water?

3 MR. TEAHON: It's potable water from the
4 drinking water well.

5 JUDGE HAJEK: Mr. Goodman, in your
6 testimony, I believe you reference the EA on Page 66
7 and 67 that PM10 concentrations have been measured in
8 Rapid City and Badlands National Park in South Dakota.
9 Is that correct?

10 MR. GOODMAN: If that's what the EA says,
11 Your Honor, I believe you.

12 JUDGE HAJEK: I'm sorry?

13 MR. GOODMAN: I said if that's what the EA
14 says, Your Honor, on Pages 62 and 63, then I believe
15 you.

16 JUDGE HAJEK: You're maintaining that
17 these two locations are similar to the CBR facility?

18 MR. GOODMAN: Is that a direct statement
19 from the EA, Your Honor?

20 JUDGE HAJEK: I believe it is. Here's
21 where I'm going. Rapid City is a suburban area, and
22 Badlands is a rural area, is that correct?

23 MR. GOODMAN: That's a fair assessment,
24 Your Honor.

25 JUDGE HAJEK: The Staff then concludes --

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1 this is out of the EA, "The CBR facility would
2 probably fall somewhere between the air quality of
3 these two locations." To further support your
4 analysis there, you provide PM10 data from Rapid City.
5 I want to be careful here. You are looking at PM10
6 concentrations, I believe, in the air at the CBR
7 facility. You state that Rapid City and the Badlands
8 is the source of your data that you are looking at and
9 comparing in order to say that CBR is somewhere in
10 between these -- the values at those two locations.

11 Then to further support your analysis, you
12 provide PM10 data, but you provide it from Rapid City
13 and the Black Hills monitoring stations. I don't
14 understand how you are comparing the Black Hills --
15 how you're comparing from Rapid City and the Badlands,
16 but then providing for support data from the Black
17 Hills, rather than from the Badlands. You understand
18 my confusion on this?

19 MR. GOODMAN: I believe I understand your
20 confusion, Your Honor. I am very familiar with the
21 EA, but I haven't memorized all 150 pages. So if
22 there's any chance, could we pull up exactly what
23 you're referring to so I can look at it?

24 JUDGE HAJEK: Mr. Deucher, this would be
25 NRC-010 at 79.

1 MR. GOODMAN: Thank you, Mr. Deucher.

2 JUDGE HAJEK: Increase the size of that
3 window.

4 MR. GOODMAN: I see now, Your Honor, what
5 you referenced. PM concentrations have been measured
6 in Rapid City and Badlands.

7 JUDGE HAJEK: Then Mr. Deucher, if you
8 could scroll down to -- I believe there's a table
9 here. Here we have a table that includes data from
10 the Black Hills, but not from the Badlands.

11 MR. GOODMAN: I now see what you're
12 talking about, Your Honor.

13 JUDGE HAJEK: What was your intent on your
14 reference here?

15 MR. GOODMAN: I'm not an air quality
16 expert, Your Honor. I can certainly get back to you
17 as why that paragraph says Badlands and the table says
18 Black Hills. As not being an air quality expert, I
19 don't want to specifically answer that question, per
20 se.

21 CHAIR GIBSON: I'm just curious. You knew
22 that there was a contention involving tornadoes. It
23 was where it was discussed in the EA. It's strange to
24 me that you wouldn't have prepared to discuss that
25 issue -- some disparity like this, or that someone who

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1 was familiar with it would not have been provided as
2 a witness. I find that a little disturbing.

3 MR. GOODMAN: I'm sorry. Maybe let me
4 clarify, Your Honor. I'm fully prepared to talk about
5 the contention as it specifically relates to
6 tornadoes, and I'm very familiar with the air quality
7 impacts assessment in the EA. I believe that would
8 just be a typo and that the word Badlands should
9 probably say Black Hills, but as not an expert
10 specifically in air quality, I want to give the caveat
11 that that is my assessment that it was a typo in the
12 EA, if that makes sense, Your Honor.

13 CHAIR GIBSON: It does. I think you just
14 got handed a note. Maybe Ms. Simon can help you
15 clarify it there.

16 MR. GOODMAN: It's a reference to the LRA,
17 where it talks about where this information is in and
18 probably where the EA got its information from. So we
19 could pull that up, if you would like.

20 CHAIR GIBSON: What's the cite?

21 MR. GOODMAN: LRA Page 2-92, which is PDF
22 141.

23 CHAIR GIBSON: Thank you.

24 MR. GOODMAN: Of course, Your Honor. It
25 does look, Your Honor, to be just an error, and that

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1 sentence that says, "Measured in Rapid City, South
2 Dakota and Badlands," should probably say measured in
3 Rapid City, South Dakota and Black Hills, South
4 Dakota. Then the sentence, "Both locations are
5 geographically similar to the licensed area," remains
6 accurate.

7 JUDGE HAJEK: So this is a sentence that
8 was just grabbed out of the LRA is what it really
9 looks like to me and inserted into the EA, rather than
10 really being a typo. If it's a typo, Mr. Teahon, is
11 this a typo attributed to the elucidation provided in
12 the LRA?

13 MR. TEAHON: I'm looking at the
14 information on 2.5.6, Air Quality, and it's also
15 repeated again in Section 7.6. The question at hand
16 is the Badland data were collected in an area
17 classified as rural, that's indicating that should be
18 Black Hills data? Is that the question?

19 JUDGE HAJEK: That is the question.

20 MR. TEAHON: It gives the location of
21 where the data was collected two miles west of the
22 city. The tables all reference Black Hills, South
23 Dakota, so it would appear that the verbiage should
24 say Black Hills, South Dakota.

25 JUDGE HAJEK: Mr. Goodman, what's the

1 process for grabbing information of this type out of
2 the LRA and putting it into the NRC document, the
3 environmental analysis?

4 MR. GOODMAN: Certainly the environmental
5 analysis would use information found in the LRA. The
6 license renewal application does a very good job at
7 giving NRC Staff a lot of information about the site
8 characteristics in the site. It's written by people
9 who are out here and local. As you know, headquarters
10 are in Rockville, Maryland. So NEPA documents at NRC,
11 and certainly this EA specifically, uses the license
12 renewal application and cites when it uses the license
13 renewal application to gather information, but in no
14 way, by pulling this information -- this is not a
15 conclusion. Conclusions in the EA are all
16 independently analyzed by our staff of experts.

17 JUDGE HAJEK: I think I understand. Thank
18 you. Let's return to your testimony in NRC-001 on
19 Page 98. You maintain there are no mitigative
20 practices to address potential environmental impacts
21 of tornadoes, and that the NRC has generically
22 considered the potential consequences of tornadoes and
23 determined that there are no changes to an ISR
24 facility or operations would be required to mitigate
25 these consequences. Is that correct?

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1 MR. GOODMAN: Yes, Your Honor.

2 JUDGE HAJEK: In support of your position,
3 you reference NRC-017. The title in this file that
4 you provided us is risk-informed evaluation of ISL
5 mining, Page 4-55. Is that correct?

6 MR. GOODMAN: Yes. I believe we did 4-55
7 to 4-56. We made that --

8 JUDGE HAJEK: At 4-56, it states that,
9 "NUREG-0706 assessment notes the structures at uranium
10 mills and, by comparison, at ISL facilities are not
11 designed to withstand tornado winds." Is that
12 correct?

13 MR. GOODMAN: That is correct, Your Honor.

14 JUDGE HAJEK: NRC-017 on these pages also
15 suggests that one could require the structures to be
16 strengthened to withstand a design-basis tornado could
17 be a potential mitigative action. Is that correct?

18 MR. GOODMAN: Yes, Your Honor.

19 JUDGE HAJEK: These pages also state that
20 one could require additional design changes, like
21 requiring stronger chemical storage tanks. Is that
22 correct?

23 MR. GOODMAN: Yes, Your Honor.

24 JUDGE HAJEK: But you did not address this
25 in your testimony or in the EA.

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1 MR. GOODMAN: We referenced it in our
2 testimony, Your Honor.

3 JUDGE HAJEK: In your testimony you
4 reference it, but you also state, I think, in your
5 testimony, that there really aren't any mitigative
6 actions that could be taken. It seems like there are
7 a few here that are indicated in this reference,
8 NRC-017. You didn't specifically say, "Gee, these
9 could be implemented."

10 MR. GOODMAN: Correct, Your Honor.

11 JUDGE HAJEK: I believe you also indicate
12 that Crow Butte has emergency procedures in place
13 calling for -- I'm sorry, strike that. Mr. Teahon, in
14 your testimony, CBR-010, on Pages 3 and 4, you
15 maintain that CBR does have emergency procedures in
16 place to mitigate the potential consequences of a
17 tornado, is that correct?

18 MR. TEAHON: Yes, sir. We have mitigative
19 procedures in place for all types of emergency
20 response, and we conduct live drills and tabletop
21 exercises on responses to these every two years.

22 JUDGE HAJEK: Thank you. Mr. Goodman, on
23 Pages 98 to 99 of NRC-001, you make a reference to
24 NRC-014, NUREG-1748, environmental review guidance for
25 licensing actions associated with NMSS programs.

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1 Specifically, you take us to Page 6-12, where a list
2 of topics to be covered in an EA or an ER is
3 introduced with the statement, "The following
4 information should be presented in the ER as
5 applicable. It may not be necessary for the
6 evaluation of potential impacts from the proposed
7 action to require all the information requested
8 below." Did I read that correctly?

9 MR. GOODMAN: You did, Your Honor.

10 JUDGE HAJEK: In your testimony you've
11 left out the first sentence from this paragraph, and
12 then you've paraphrased the second sentence, saying it
13 may not be necessary for the evaluation of potential
14 environmental impacts to require a discussion of
15 severe weather phenomenon, such as tornadoes. Did I
16 read that correctly?

17 MR. GOODMAN: You did, Your Honor.

18 JUDGE HAJEK: My interpretation is a
19 little bit different, as you might have guessed since
20 I'm going here. My interpretation is that a
21 discussion of tornadoes "should" be included unless
22 the risk of tornadoes or the probability of their
23 occurrence can be shown to be below some threshold.
24 What's the threshold that your Staff would apply to
25 justify not including a discussion of tornadoes in the

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1 EA?

2 MR. GOODMAN: The threshold, Your Honor,
3 is outlined in my testimony and, sort of as we've been
4 discussing, through these various guidance documents
5 that Staff has available to them, the background
6 information that we have. You put all of that
7 together, and you come to a conclusion that tornadoes
8 are rare at the site. In addition to that, the
9 guidance that you talked about in NUREG-6733 even
10 outlines what would happen if a tornado hit the
11 central processing plant and discussed impacts
12 associated with that. Staff will put all of this
13 information together and formulate its own opinion in
14 that the threshold, to include a specific discussion
15 on tornadoes in the EA, have not been met.

16 JUDGE HAJEK: I'm looking for a number.
17 Let me introduce and look at NUREG-1520, Rev. 2,
18 Standard Review Plan for Fuel Cycle Facilities, and
19 introduce this as Board Exhibit -- I'm not sure of the
20 number that we're up to here.

21 CHAIR GIBSON: Eleven.

22 JUDGE HAJEK: Board Exhibit 11.

23 (Whereupon, the above-referred to document
24 was marked as Board Exhibit 11 for reference.)

25 JUDGE HAJEK: I note in NRC-017, on Page

1 456, that you've referenced NUREG-0706, the 1980 Final
2 Generic Environmental Impact Statement, and extended
3 this for a comparison to ISL facilities. So by
4 similar extension, in this document, NUREG-1520, I'd
5 like to do the same type of extension here that ISL
6 mining and yellowcake refining is part of the fuel
7 cycle. Are you familiar with this document?

8 MR. GOODMAN: Am I familiar with the GEIS,
9 or am I familiar with the standard review plan for
10 fuel cycle facilities license applications?

11 JUDGE HAJEK: Actually both. The one that
12 I'm introducing at this very moment, the 1520.

13 MR. GOODMAN: I'll answer both because the
14 former is absolutely -- I am very familiar with the
15 GEIS. NUREG-1520, I would say I'm not specifically
16 familiar with. I have seen, but I wouldn't call
17 myself familiar.

18 JUDGE HAJEK: Okay, thank you. Do we have
19 it here now? Mr. Deucher, can you display the
20 document for us, please? On the back side, it would
21 be Page 3D-5 that I've included here, and blow it up
22 a little bit so everybody can see. Under wind and
23 tornado loading, it states -- it provides a number,
24 which is really kind of what I'm looking at is whether
25 probabilities are above or below this number. It says

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1 in the last sentence of this first paragraph, under
2 wind and tornado loading, "Depending on the geographic
3 location of the facility, the effects of a tornado
4 with an annual exceedance probability of ten to the
5 minus five or greater may need to be considered." I
6 understand the use of the word may here. Did I read
7 that correctly?

8 MR. GOODMAN: You did, Your Honor.

9 JUDGE HAJEK: Given this threshold, I'd
10 like to look at what the annual exceedance probability
11 for a tornado is at Crow Butte. Has the Staff
12 determined this value, and what is it?

13 MR. GOODMAN: I believe you're now
14 referring to the SER, NRC-009, at Page 158, where it
15 gives the probability of 4.8 times ten to the negative
16 fourth. Is that what you're referring to, Your Honor?

17 JUDGE HAJEK: Yes, it is.

18 MR. GOODMAN: Great.

19 JUDGE HAJEK: Okay, we're on the same
20 page, wonderful. Mr. Teahon, while Mr. Goodman is
21 confirming that number, is that a number that you're
22 able to confirm?

23 MR. TEAHON: Yes, sir.

24 JUDGE HAJEK: Thank you. The reference
25 here -- I'm sorry, let me just read down -- just got

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1 all that -- tornadoes are rare in the licensed area,
2 I believe it says. If you would put up, please, Mr.
3 Deucher, CBR-011, PDF Page 141. The second paragraph
4 from the top up here it says, "Tornadoes are rare in
5 the licensed area. In the USNRC draft GEIS,"
6 USNRC-1979 is the reference here, "the authors
7 calculated a mean annual frequency of 0.6 for
8 tornadoes in intensity Category 1 at Rapid City.

9 The annual probability of occurrence at
10 this location is 4.8 times ten to the minus four. A
11 tornado in intensity Category 1 has the following
12 rotational speeds." I'd like to work through these
13 numbers first. My first question is who owns the 4.8
14 times ten to the minus four calculation? I got
15 confused by the way this is written here. Is it the
16 authors who had done the calculation? Is this an
17 NRC-produced number or a CBR-produced number? Mr.
18 Goodman, do you have an answer for that question?

19 MR. GOODMAN: Sure. I believe the 0.6 is
20 the USNRC-1979 reference. The annual probability of
21 occurrence at this location is 4.8 times ten to the
22 negative fourth. I believe that came from an analysis
23 done by CBR.

24 JUDGE HAJEK: Mr. Teahon?

25 MR. TEAHON: That data comes from the

1 Rapid City data.

2 JUDGE HAJEK: Mr. Teahon, relative to the
3 LRA reference on this page, I feel a need to
4 understand how the probability you provide was
5 determined, and I'd like to do so by looking at the
6 referenced document, specifically the 1979 draft
7 Generic Environmental Impact Statement on uranium
8 mining. I'm just a little bit -- we need to do a
9 little bit of extension on this.

10 The LRA references the draft GEIS. In
11 your reference, you indicate this to be NUREG-0511.
12 The Staff, Mr. Goodman, has repeatedly referenced
13 NUREG-0706. Mr. Deucher, can you please display the
14 cover page for us of NUREG-0706, and then roll forward
15 to Page 2 of the Forward. I would like to distribute
16 this as Board Exhibit -- I lost track of the number.

17 CHAIR GIBSON: The next one would be 12.

18 JUDGE HAJEK: Board Exhibit 12.

19 (Whereupon, the above-referred to document
20 was marked as Board Exhibit 12 for reference.)

21 JUDGE HAJEK: Scrolling down to Page 2.
22 In your handout here, Page 2 is sort of an insert into
23 the handout. Item No. 1 here -- and I'm just trying
24 to establish, for the record, this action -- it says,
25 "For this final," so we're talking about a draft

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1 environmental impact statement, NUREG-0511. This is
2 the final Generic Environmental Impact Statement on
3 uranium milling. The following comments may be made.
4 "This action is taken in response to the intent to
5 prepare Generic Environmental Impact Statement on
6 uranium milling, Federal Registers 1976, and in light
7 of public comments received on the draft GEIS issued
8 as NUREG-0511 in April of 1979." My real purpose here
9 is just to point out the reference to 0511 and 0706 is
10 effectively a reference to the same document. Do you
11 accept that, Mr. Goodman?

12 MR. GOODMAN: I think I can accept that,
13 yes, Your Honor.

14 JUDGE HAJEK: I will also state that I
15 looked at all the additional volumes for 0706, and I
16 assured myself that there are no references, no
17 questions, no issues at all that were brought up that
18 make any changes to the part of 0511 that Mr. Teahon's
19 RA has referenced. Without doing a complete analysis,
20 I just don't think we have time to read through all
21 (Simultaneous speaking).

22 MR. GOODMAN: Seems like your analysis,
23 Your Honor, is pretty complete.

24 JUDGE HAJEK: Thank you.

25 MS. MONTEITH: Your Honor, if I may, Emily

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1 Monteith for the NRC Staff. We'd just like to note an
2 objection, for the record, to the admission of the
3 last two Board exhibits, I believe Board Exhibits 11
4 and 12, if I'm not mistaken. That would be NUREG-1520
5 and this final Generic Environmental Impact Statement
6 on uranium milling. Taking the latter first, that
7 document has been superseded for ISR facilities by the
8 most recent GEIS, NUREG (Simultaneous speaking).

9 JUDGE HAJEK: Thank you for that
10 objection.

11 MS. MONTEITH: I'll just clarify the
12 basis. For 1920, it's not apparent -- I'm sorry, for
13 1520 it's not apparent that it is relevant to an ISR
14 facility.

15 MS. SIMON: Your Honor, Marcia Simon. Let
16 me just add the specific page you provided is from
17 Appendix D --

18 JUDGE HAJEK: I can't hear you, Ms. Simon.

19 MS. SIMON: I'm sorry. The specific page
20 provided is from Appendix D of NUREG-1520, which is
21 guidance for accident sequences in the context of a
22 license request or a license amendment request for
23 Part 70, Subpart H facilities, which are for licenses
24 to possess a critical mass of special nuclear
25 material. I think in a way, it seems to us to be kind

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1 of an apples and oranges when you compare this to an
2 ISR facility.

3 MR. SMITH: This is Tyson Smith, counsel
4 for Crow Butte. I would agree that 1520 does not
5 apply to uranium recovery facilities. The first point
6 it applies in the uranium fuel cycle is at a
7 conversion facility. So it applies to uranium
8 conversation facilities, enrichment, fuel fabrication
9 facilities and so on, but it does not apply to uranium
10 recovery facilities like Crow Butte.

11 JUDGE HAJEK: I believe that in my
12 statement, as I was reading it, I was extending the
13 application in accordance with -- to Crow Butte as
14 part of the fuel cycle in accordance with other
15 extensions that were made. I suggest you just go back
16 and read the transcript, please, in order to go back
17 to that.

18 MR. SMITH: Thank you. I was just noting
19 that for clarity.

20 (Simultaneous speaking.)

21 CHAIR GIBSON: The objections have been
22 duly noted.

23 JUDGE HAJEK: Okay. Mr. Goodman, I
24 believe you're familiar with this document. Is that
25 correct? I think you said you're familiar with 0706

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1 earlier?

2 MR. GOODMAN: If I said that, Your Honor,
3 yes. Which NUREG are you referring to now?

4 JUDGE HAJEK: 0706, NUREG-0706.

5 MR. GOODMAN: Which is the Generic
6 Environmental Impact Statement, but not the Board
7 Exhibit one, the more recent one?

8 JUDGE HAJEK: That is correct.

9 MR. GOODMAN: Yes, I am very familiar with
10 that document, Your Honor. Thank you for clarifying.

11 JUDGE HAJEK: Okay. Mr. Goodman, relative
12 to your familiarity with the document and, I believe,
13 the objection that I just heard in the back, in its
14 historical designation, it's been referenced some 18
15 times in NUREG/CR-6733 that was provided as NRC
16 Exhibit 017. I'm not asking you to go through and
17 confirm my statement that it's been referenced some 18
18 times, but I did go through and find that number.

19 MR. GOODMAN: Your attention to detail is
20 impressive, Your Honor, so I have no reason to doubt
21 you.

22 JUDGE HAJEK: Thank you. Further in
23 NRC-017, on Page 455, that we're really discussing
24 here, it does reference, very specifically, NUREG-0706
25 when discussing structures at uranium mills. Is that

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1 not correct?

2 MR. GOODMAN: Yes, Your Honor.

3 JUDGE HAJEK: Specifically in this
4 NUREG-0706, the references that we're concerned with
5 here are going to be to Page 7-4, and I have provided
6 in Board Exhibit 12 -- is that what we have here?

7 CHAIR GIBSON: Yes.

8 JUDGE HAJEK: It states -- we're going to
9 be looking at two pages here. The discussion on
10 tornadoes begins on Page 7-4, and Page 7-13 is a table
11 with numbers, if you could just check those and
12 confirm that. Mr. Deucher, we'll be moving back and
13 forth between this exhibit and another one. Mr.
14 Teahon, are you familiar with this document, 0706?

15 MR. TEAHON: Yes, sir.

16 JUDGE HAJEK: Thank you. In the LRA that
17 -- you reported in the LRA, on Page 2-92, that the NRC
18 has accepted, as reported in the SER, the number 4.8
19 times ten to the minus four. Is that correct?

20 MR. TEAHON: Yes, sir.

21 MR. GOODMAN: Your Honor, can I make one
22 clarification?

23 JUDGE HAJEK: Yes.

24 MR. GOODMAN: I'm sorry. When I had said
25 I'm very familiar with the GEIS -- the new Generic

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1 Environmental Impact Statement, I was not referring to
2 NUREG-0706. That is the old one that has been
3 superseded by NRC-045, which is the new Generic
4 Environmental Impact Statement. I am a little
5 familiar with NUREG-0706, but I would just change my
6 statement from very familiar to a little familiar.

7 JUDGE HAJEK: Okay.

8 MR. GOODMAN: Thank you, Your Honor.

9 JUDGE HAJEK: I accept that change. I
10 also want to point out, however, that 0706 seems to be
11 referenced extensively in the -- as NUREG-0511. The
12 draft has been referenced in the LRA, and the numbers
13 developed from that draft have been accepted in the
14 SER, as I understand them. What I'm trying to
15 establish here is that the reference to 0511 and the
16 references to 0706 are exactly the same. They're the
17 same document. As far as Chapter 7 here, the chapter
18 I'm interested in on tornadoes is the same in the two
19 versions of the document, if you want to call it
20 versions.

21 MR. GOODMAN: Excellent, Your Honor, thank
22 you.

23 JUDGE HAJEK: I'm a little bit curious,
24 though, Mr. Teahon. This kind of goes back to what we
25 had in our discussion about wind, also. I'm a little

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1 bit curious why an LRA that you submitted in 2007, you
2 still referenced a document from 1979 that was a
3 draft, instead of the final, which was issued in 1980?

4 MR. TEAHON: I have no answer, sir.

5 JUDGE HAJEK: Okay, no idea. Mr. Goodman,
6 we've already established you're somewhat familiar
7 with 0706. Would that include the modeling in this
8 document?

9 MR. GOODMAN: Probably not, Your Honor.

10 JUDGE HAJEK: Mr. Goodman, since
11 NUREG-0706 is referenced in more current NRC
12 documents, such as those that you have included in
13 your exhibit list, such as NRC-017, would you agree
14 that it carries the same weight as the new NRC GEIS?

15 MR. GOODMAN: No, I wouldn't necessarily
16 say that, Your Honor. When I look at NUREG-6733,
17 which is NRC-017, which we have brought up several
18 times, the information in there is what I would say
19 was relied on, so I wouldn't say if it references an
20 older document versus a newer document, when NRC sites
21 NRC-045 in its testimony, which is the newer Generic
22 Environmental Impact Statement, that would be what NRC
23 would hold more weight to.

24 JUDGE HAJEK: Thank you. I've just been
25 informed we need to take a little break. Let's take

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1 a break, and we'll come back in ten minutes.

2 (Whereupon, the above-entitled hearing
3 went off the record at 10:59 a.m. and went back on the
4 record at 11:09 a.m.)

5 CHAIR GIBSON: We're back on the record
6 now.

7 JUDGE HAJEK: Are we ready to be really
8 tedious?

9 MR. GOODMAN: Were you making a joke? I'd
10 love to hear it, Your Honor, but I didn't.

11 JUDGE HAJEK: We're looking at NUREG-0706,
12 Chapter 7. Page 7-13 contains Table 7.5 that compares
13 tornado probabilities from six different locations,
14 with the value calculated from the model that was used
15 and referenced in this particular report. Note the
16 values, please -- and Mr. Deucher, if you could bring
17 up Page 7-13, so that everybody can look at exactly
18 what I'm talking about here.

19 Note the values for the Western Great
20 Plains specified for Rapid City. The values on this
21 line are those reported in the LRA, and in the SER,
22 and in testimony that Mr. Goodman has provided in
23 NRC-001, Page 99, and that Mr. Teahon reported in his
24 testimony, CBR-010, Page 3. Are we together on this
25 so far, Mr. Teahon?

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1 MR. TEAHON: Yes, sir.

2 JUDGE HAJEK: Mr. Goodman?

3 MR. GOODMAN: The numbers certainly match
4 up, Your Honor.

5 JUDGE HAJEK: Okay, thank you. Mr.
6 Teahon, in your testimony, you state, "The annual
7 probability of a tornado at the site is 4.8 times ten
8 to the minus four." Is that correct?

9 MR. TEAHON: Yes, sir.

10 JUDGE HAJEK: But I read in this table, in
11 NUREG-0706, that the data that you've provided is
12 actually for Rapid City. Do you see my confusion?

13 MR. TEAHON: Yes, sir, that's the closest
14 data that we have available.

15 JUDGE HAJEK: Thank you, but that's not
16 what the LRA said. The LRA doesn't say this is the
17 closest data that we have.

18 MR. TEAHON: It says the probability of a
19 tornado in the region near the Crow Butte facility is
20 approximately 4.8 times ten to the minus fourth per
21 year.

22 JUDGE HAJEK: You further go on to say, in
23 your testimony, the probability that a tornado would
24 occur at the site, and that it would occur at a
25 particular location on the site where it could cause

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1 an actual environmental impact, is even lower. Is
2 that correct? Is that your testimony?

3 MR. TEAHON: That's what's stated, sir.

4 JUDGE HAJEK: Mr. Goodman, do you agree
5 with Mr. Teahon's characterization here?

6 MR. GOODMAN: That that's what he said in
7 his testimony?

8 JUDGE HAJEK: Do you agree with his
9 conclusion, let's say, as expressed in his testimony?

10 MR. GOODMAN: Just to clarify, Your Honor,
11 you're not asking if I agree that that's what he said
12 in his testimony, but are you asking if I agree that
13 that's the characterization that the likelihood of a
14 tornado at the site would be lower than 4.8 times ten
15 to the negative fourth?

16 JUDGE HAJEK: Yes, that is what I'm
17 asking.

18 MR. GOODMAN: The latter, got it. Your
19 Honor, when we assessed in the EA, we used the numbers
20 4.8 times ten to the negative fourth. So even if they
21 are more rare at the site, then we used a more
22 conservative number in our own analysis. I don't want
23 to agree or disagree with his specific testimony, but
24 I will say that we used a number that then, if it is
25 indeed more rare, then it is more conservative. That

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1 number was just one of several documents that we used
2 to perform our own independent analysis.

3 JUDGE HAJEK: Thank you. Let me continue
4 with these thoughts. In the paragraph above Table 5,
5 in NUREG-0706, which you can read at the top of the
6 page on your monitors there, it states, "The values in
7 the table were calculated using the method described
8 by Thom," T-H-O-M. Are either of you, Mr. Goodman or
9 Mr. Teahon, are you familiar with this method?

10 MR. TEAHON: No, sir, I am not.

11 JUDGE HAJEK: Well, we're going to take a
12 look at it. Let's take a look at the method, as
13 identified on Page 713. This is Reference No. 9. You
14 notice the little Reference No. 9 in the second line?
15 "Using the method described by Thom, the mean annual
16 frequency and probability of occurrence of tornadoes
17 for the six regions are compared with those for the
18 model." I apologize. This is going to get a little
19 bit tedious, but I feel a strong need to get all the
20 way through this. Mr. Deucher, would you please
21 distribute copies of Board Exhibit 13?

22 MR. GOODMAN: I think we may be on 14,
23 Your Honor.

24 JUDGE HAJEK: 14? Okay.

25 MR. GOODMAN: I thought, Your Honor, you

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1 read 13 before the break.

2 CHAIR GIBSON: GEIS was 12. The
3 NUREG-1520 was 11. Was there something else? I think
4 we're on 13.

5 MR. GOODMAN: I stand corrected.

6 CHAIR GIBSON: I probably could ask Mr.
7 Smith. I'll bet he's kept track of it.

8 MR. SMITH: It looks like we're up to
9 Board 13.

10 CHAIR GIBSON: There you go, 13.

11 MR. GOODMAN: Just like I said, Your
12 Honor, 13.

13 JUDGE HAJEK: Board Exhibit 13 is an
14 article from October through December 1963, the
15 Monthly Weather Review, titled "Tornado
16 Probabilities," by H.C.S. Thom.

17 (Whereupon, the above-referred to document
18 was marked as Board Exhibit 13 for reference.)

19 JUDGE HAJEK: I'm going to make a
20 statement here, and maybe this is kind of an
21 off-the-record statement, but I just feel compelled.
22 In general, I really don't like using really, really
23 old stuff, especially if it's been done better, and if
24 we can verify that it's been done better, but I found
25 this particular analysis quite fascinating because

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1 everything that is brand new is all referring back to
2 this particular article from 1963. Quite frankly, I
3 was really amazed, but the method that was used by
4 Thom is used in the latest USNRC publications. I
5 think I'll be able to follow through that particular
6 statement and demonstrate how it was used.

7 MR. GOODMAN: Can I ask a clarification
8 question, Your Honor?

9 JUDGE HAJEK: Certainly.

10 MR. GOODMAN: You said we're going off the
11 record?

12 JUDGE HAJEK: No, I only said that
13 relative to my comment that generally, I don't really
14 like to use really old stuff.

15 MR. GOODMAN: Got it, Your Honor. So
16 Board Exhibit 13 is on the record?

17 JUDGE HAJEK: We're on the record right
18 now (Simultaneous speaking).

19 MR. GOODMAN: Thank you so much, Your
20 Honor.

21 JUDGE HAJEK: We are going to use this
22 document.

23 MR. GOODMAN: Sorry for the confusion.

24 JUDGE HAJEK: That was strictly an
25 opinion. When I say something's off the record, does

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1 the (Simultaneous speaking)?

2 CHAIR GIBSON: When you say something's
3 off the record, it's on the record, so just keep
4 going, okay?

5 JUDGE HAJEK: Okay, I need to back up just
6 a big because this path that we need to follow is
7 really complex. I need to have another -- a couple
8 more exhibits to complete the path. We already have,
9 on the record now, NUREG-0706, Chapter 7, which refers
10 to the 1963 article by Thom. Note that NUREG-0706, on
11 Page 7-4, which is back -- it also refers to a Reg
12 Guide, Reg Guide 1.76. As I made my comment about
13 historical material, Reg Guide 1.76 that's made
14 reference to here is April 1974. This Reg Guide has
15 a map in it that we'll need to take a look at, so Mr.
16 Deucher, please mark Reg Guide 1.76 from 1974 as Board
17 Exhibit 14.

18 MR. GOODMAN: 14, Your Honor.

19 PARTICIPANT: 14.

20 JUDGE HAJEK: Thank you.

21 (Whereupon, the above-referred to document
22 was marked as Board Exhibit 14 for reference.)

23 JUDGE HAJEK: Okay, so I'm glad we're
24 really together here. This is just a three-page reg
25 guide. If you go back to Page 713 in 0706, in that

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1 table, you'll see for the Western Great Plains, Rapid
2 City, South Dakota, mean annual frequency 0.6, annual
3 probability that was calculated in the article by
4 Thom, 4.8 times ten to the minus four, and at the far
5 right, it says tornado intensity category. Just to
6 clarify exactly what that is, in this reg guide, that
7 shows three different areas on the map on the third
8 page.

9 It says Category 1. That's really a
10 location category. It's not what we're familiar with
11 when we watch the evening news and we hear about a
12 tornado intensity, an F2, or the newest terminology is
13 EF2 or EF3 or whatever. We just have to be a little
14 bit cautious about how we use the categorization here.
15 The article by Thom, now, has all the data in it that
16 we need in order to be able to do our calculation that
17 I would like to do, in order to investigate the 4.8
18 times ten to the minus four, which I became very
19 curious where in the world did that number come from?

20 It states that the reg guide -- let me go
21 on here. Now that I've indicated the age of the Thom
22 article, the age of Reg Guide 1.76, let me also
23 acknowledge I do understand the reg guide categories,
24 let's say, and I do understand that Category 1 is
25 generally nuclear power plants. But the new regs that

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1 refer to uranium mining and milling refer to these reg
2 guides. So there is no separate reg guide on
3 tornadoes for uranium mining and milling that I found
4 in the reg guide category. What I'd like to introduce
5 now is another copy or another version of the reg
6 guide. This, I believe, is the current version, Reg
7 Guide 1.76, Rev. 2, which is going to be Board Exhibit
8 --

9 CHAIR GIBSON: 15.

10 JUDGE HAJEK: -- 15. He's getting quicker
11 at this.

12 (Whereupon, the above-referred to document
13 was marked as Board Exhibit 15 for reference.)

14 JUDGE HAJEK: If we could have that
15 distributed. Reg Guide 1.76, Rev. 2, states that
16 really, by reference, the methods of Thom -- making
17 reference to it, actually, by referring to the methods
18 used in the original reg guide -- should continue to
19 be used. It adds a couple of additional wrinkles.
20 First is that it endorses the enhanced Fujita scale
21 for classifying tornadoes that was proposed in 2004
22 and is currently in use. Second, it states that
23 NUREG/CR-4461, Tornado Climatology of the Contiguous
24 United States, has appropriated updated wind speeds,
25 and also data recorded for more than 46,800 tornadoes

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1 occurring between 1950 and 2003. This document
2 includes maps that have both an updated distribution
3 of tornado events that are not only updated from the
4 maps that are in the Thom article, and I believe that
5 were actually used to calculate the 4.8 times ten to
6 the minus four number, but they're a lot easier for us
7 to read.

8 Again, I'm going to reflect back on my
9 comment about not wanting to use really old data.
10 This is much more recent data that we have available
11 to us, so I'd like to go ahead and use that more
12 recent data. Mr. Deucher, if you could also make
13 available to us the selected pages that I have taken
14 from NUREG/CR-4461 and distribute that, please, we'll
15 be coming into that and referencing that. Page 2.2
16 here --

17 CHAIR GIBSON: This would be Board Exhibit
18 16.

19 (Whereupon, the above-referred to document
20 was marked as Board Exhibit 16 for reference.)

21 JUDGE HAJEK: So we'll have that before
22 us. If you like, you'll notice in this particular
23 exhibit, tornado intensities in the EF and EF2 Fujita
24 scale, wind speed relationships for tornadoes are
25 listed. We're going to be looking at the data for

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1 tornadoes distribution in the contiguous United
2 States, which are Figures 2.1 and 2.2 of this
3 reference. Everybody okay so far with this where I
4 am?

5 CHAIR GIBSON: It doesn't really matter
6 whether they are or not. Let's just get (Simultaneous
7 speaking).

8 JUDGE HAJEK: We have a lot to cover, I
9 guess, this afternoon.

10 CHAIR GIBSON: We do.

11 JUDGE HAJEK: Judge Gibson is putting the
12 pressure on me to do a calculation and get out of
13 here. Relative to the data provided in the LRA and
14 the -- I only have 12 pages left -- the LRA and the
15 SER and in testimony, we only need to look at the
16 frequencies and understand the use of the data.

17 So even though this may be a really
18 interesting bedside material -- I highly recommend it
19 for that purpose -- only a few pages are really of
20 interest. The complete documents are publicly
21 available. The data in calculation is going to get a
22 little bit complex and time consuming, so I hope we
23 can kind of agree to really keep it simple. We're
24 only going to do the simple aspects of the
25 calculation. As a first step, let's look at Page 713

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1 in NUREG-0706. This has the data quoted in the LRA,
2 the SER and in testimony by Staff and by CBR.

3 MR. TEAHON: Yes, sir.

4 JUDGE HAJEK: The LRA, SER, and testimony
5 all quote the data for the Rapid City area. Here, the
6 data represents 0.6 tornadoes per year for Rapid City.
7 Can we agree on that? Is that?

8 MR. TEAHON: Yes, sir.

9 JUDGE HAJEK: Okay, thank you. Mr.
10 Goodman?

11 MR. GOODMAN: Yes, sir.

12 JUDGE HAJEK: Second, the annual
13 probability for tornadoes in any given year occurring
14 in Rapid City is 4.8 times ten to the minus four,
15 which is the number that's been reported extensively,
16 is that correct, Mr. (Simultaneous speaking)?

17 MR. TEAHON: Yes, sir.

18 JUDGE HAJEK: Mr. Goodman?

19 MR. GOODMAN: Yes, Your Honor.

20 JUDGE HAJEK: Now, we may not agree on
21 this, but for now let's agree because this is what it
22 is, as explained in the paragraph above the table.
23 We'll see shortly, but it seems as though we are
24 pretty much in agreement there. Mr. Teahon's
25 testimony, in CBR-010, Page 3, in his answer to A9 is

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1 that this is the probability of a tornado at the site.
2 So now I'm really quoting your testimony here, Mr.
3 Teahon. It does not say near the site, but at the
4 site. The wording in the LRA and the SER, I believe,
5 truly is a little bit unclear (Simultaneous speaking).

6 MR. TEAHON: More accurately near the
7 site. We don't have site-specific data.

8 JUDGE HAJEK: More accurately near the
9 site. So you would change your testimony, then, to
10 say near the site, rather than at the site?

11 MR. TEAHON: Yes, sir.

12 JUDGE HAJEK: If given the opportunity?
13 All right. Finally, in Table 5, the third column, to
14 the far right is unclearly labeled -- I feel in this
15 07 and 06 -- tornado -- it looks like it was cut off
16 intensity site category. This does not -- I just want
17 to make it very clear. This refers to that big map.
18 It does not refer to a Fujita-type categorization of
19 tornadoes. That's the content of these four columns
20 in Table 5. Reg Guide 1.76 from 1974 refers often to
21 the Reg Guide 1.76 -- I'm sorry. Reg Guide 1.76, the
22 more recent version, which we just distributed, refers
23 to Reg Guide 1.76 as the original reg guide. If we
24 look at the map, we see that Crow Butte is in this
25 Region 1. If we turn to the back one page, we see the

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1 tornado wind characteristics for the three regions.
2 We really don't need to dwell on that information at
3 this point. Let's go to the 1963 article by Thom and
4 pick up a few definitions, as well as the method for
5 calculating the probability. We're after the
6 probability of tornadoes at the site. We can also
7 relate the process to the numbers in Table 7-5.

8 The article's quite detailed, and though
9 it makes good reading, again, we don't need to do too
10 much. We've got two goals here. First is to confirm
11 the numbers in NUREG-0706, Table 7-5, and second is to
12 enable us to determine equivalent numbers for the Crow
13 Butte site that enable us to confirm what has been
14 approved in the SER and the EA process, and also to
15 compare appropriate numbers with contemporary data.
16 The results are quite different, and that's the reason
17 for going ahead with this calculation.

18 Let's look at Figure 3 in the article by
19 Thom. This is a very difficult figure to read, but it
20 is what's referenced in the NUREG. We're going to
21 take a look at the equivalent version in it. The way
22 that all of this data is determined is to look at the
23 tornado probabilities based upon actual collected data
24 over a period of years for how many tornadoes have
25 appeared within -- or have occurred, rather, within

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1 one degree latitude and longitude squares across the
2 United States. If you really look -- it's very hard
3 to find. Could I have the mouse, please? This
4 article is really the basis -- do I have a hand?
5 Okay, there we go. On this curve around this -- right
6 here, this little square with the No. 6 in it, this is
7 represents the one degree latitude and longitude
8 square for Rapid City.

9 I have another figure that is in the other
10 handout that we provided, which is NUREG/CR-4461.
11 We'll take a look at that in a little while, but the
12 same squares, they're much easier for us to look at.
13 We'll eventually get to these squares. Right now, I'm
14 just asking you to just bear with me so that we're
15 identifying, really, what it is that -- where the data
16 is. This little square right here that has the No. 6
17 in it, that represents the latitude and longitude
18 coordinates for Rapid City.

19 The latitude and longitude for Crow Butte,
20 where the mine is, is two squares below that. In this
21 particular curve, we're showing a total of six
22 tornadoes for the Rapid City region. If you go two
23 squares below that, you see the square for Rapid City
24 -- I'm sorry, for Crow Butte, and that has a No. 13.
25 There have been twice as many tornadoes in the Dawes

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1 County general area, one degree in both directions.

2 MS. MONTEITH: Your Honor, Emily Monteith
3 for the Staff. I understand that it appears that
4 you're providing this information, not the
5 Intervenors, but what was the basis for the
6 identification of these squares as applicable to Rapid
7 City and the site?

8 JUDGE HAJEK: The basis is the latitude
9 and longitude coordinates. It doesn't show well on
10 this graph, but we're going to go to NUREG/CR-4461 for
11 the actual data that we're going to use. That's in
12 this other handout that I gave you. I'm just looking
13 right now at the historical pathway to this newer
14 data. Bear with me just briefly. I think you'll see
15 that we're getting there. Is that okay?

16 MS. MONTEITH: I'm just going to take the
17 opportunity -- yes, sir. I'm going to take the
18 opportunity to note, though, that the Intervenors
19 provided no expert opinion or evidence supporting this
20 contention, so I understand that this is coming from
21 the Board.

22 CHAIR GIBSON: That is correct. Go ahead,
23 Judge Hajek.

24 JUDGE HAJEK: Now, if you stay in this
25 article by Thom and if we go to the bottom right of

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1 Page 735, which is the next page, it explains what
2 this is. Figure 3 shows a map of the total number of
3 tornadoes occurring in one-degree squares, smoothed by
4 another reference, Hann aerial smoothing, smoothing in
5 both the north/south and east/west directions. In
6 Figure 4, which is on Page 735 here, provides the same
7 data in a frequency per year. This was over a
8 ten-year period, so they divided by ten, in order to
9 get the Figure 4 numbers. It gives a data point that
10 one might use for Crow Butte or the Dawes County area.
11 Are we together on this, Mr. Goodman and Mr. Teahon,
12 so far?

13 MR. TEAHON: Yes, sir.

14 MR. GOODMAN: Yes, Your Honor.

15 JUDGE HAJEK: Okay, next we need to
16 calculate the probability that's presented in Column
17 2 of Table 7.5. That is the 4.8 times ten to the
18 minus four. We need a little more information here.
19 We need a formula. We need a geographical size of the
20 one-degree square, and we need a little bit of
21 knowledge of what we're really calculating because
22 it's related to the size of tornadoes. What we're
23 calculating here is the probability that a tornado
24 will strike a point. If you read in a lot of detail
25 here in the Thom article, you'll see that the meaning

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1 of the number in Column 2 of Table 7-5 -- I meant
2 Column 3 of 7-5, that is the probability that a
3 tornado would strike a point. The formula that we
4 need comes from the Thom article. The size of the
5 one-degree square can come from either the Thom
6 article or NUREG/CR-4461, Page 2-5, which is in the
7 exhibit that I've provided.

8 The third item is critical. Mr. Teahon,
9 I'm hoping you'll follow me closely on this because I
10 have a question for you related to your testimony on
11 this. Let's look at Page 736 of the Thom article,
12 under Item 6, point probability, we find a probability
13 or a calculation for the probability of a tornado
14 striking a point. Using geometry, Thom argues and
15 explains that it's a ratio of the mean path area
16 covered by tornadoes per year to the total area over
17 which the tornadoes may occur -- goes into a lot of
18 detail, but we don't have time to pursue that specific
19 detail.

20 What we're doing here is just taking a
21 hard look at the data to determine the number in that
22 third column of Table 7-5 that has been reported in
23 the LRA and the SER. Thom, earlier in his article,
24 spends considerable mathematical effort calculating a
25 value for the mean path of a tornado. He calls this

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1 mean path, the size of a tornado, z-bar. If you look
2 at the formula for -- Formula No. 14 in the article
3 here, you see z-bar in Formula 14. He does a lot of
4 analysis, and he determines that this physical size is
5 equivalent to 2.8209, big long number, a lot of
6 decimal points or significant figures, 2.8209 square
7 miles.

8 He's basically saying that a typical
9 tornado of a certain physical width is going to
10 typically go a certain distance, and that width times
11 distance is this number of square miles. It's just
12 too complicated for us to go through here in the time
13 of our hearing. It turns out it's a pretty good
14 number. It's endorsed by Reg Guide 1.76, Rev. 1, for
15 a tornado having a radius of 150 feet of maximum wind
16 speed. The formula to calculate the probability is
17 Equation 15 on Page 736. Are we okay still with that?
18 Should I go faster or slower?

19 MR. GOODMAN: You're going at the right
20 pace, sir.

21 MR. TEAHON: Good here, sir.

22 JUDGE HAJEK: So t-bar is simply the value
23 from Column 2 in Table 7.5 of NUREG 0706. That's
24 derived from Figures 3 and 4 that we looked at and
25 that I was asked about what the regulatory basis of

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1 those squares were. That leaves the area over which
2 a tornado can strike in the area of the one-degree
3 square. That is a little bit difficult to really come
4 up with. There's a Table No. 4 in the Thom article,
5 top right-hand page of 736.

6 We have to interpolate between the numbers
7 of this table of the Thom article, or we can use the
8 approximation from NUREG-4461, Page 2-5. I looked at
9 two different ways of doing this. In the location of
10 Rapid City, I found its latitude to be about 44.08
11 degrees north. By comparison, Crow Butte is about
12 42.6 degrees north. Is that about right, Mr. Teahon?

13 MR. TEAHON: Yes, sir.

14 JUDGE HAJEK: Thank you. You see Table 4
15 requires us to look at the latitudes here.
16 Interpolating here, I get about 3,400 square miles for
17 the Rapid City area. From the NUREG, on Page 2-5, I
18 get a more approximate number of 3,600 square miles.
19 The average is about 3,500 square miles. If I put all
20 this together, then, in the formula, No. 15 -- if you
21 want to check this on your smart phones -- P, the
22 probability, is equal to 2.8209 times 0.6, which is
23 out of the map, divided by 3,500, and I get 4.84 times
24 ten to the minus four.

25 (Simultaneous speaking.)

1 MR. GOODMAN: Can you repeat what you got,
2 sir?

3 JUDGE HAJEK: Pardon?

4 MR. GOODMAN: Can you repeat the number
5 that you got, Your Honor?

6 JUDGE HAJEK: Certainly. I'm looking at
7 --

8 MR. GOODMAN: I trust you on the math. I
9 just didn't hear the -- you said 4.8 times ten to the
10 negative fourth, was that correct?

11 JUDGE HAJEK: 4.84 times ten to the minus
12 four.

13 MR. GOODMAN: Thank you, Your Honor.

14 JUDGE HAJEK: I don't want to go too fast.
15 I want to make sure that we're okay. So 4.8 times ten
16 to the minus four is what was reported by Crow Butte;
17 4.8 times ten to the minus four is what was reported
18 -- what was accepted in the SER. Is that correct?

19 MR. GOODMAN: So far, so good, Your Honor.

20 JUDGE HAJEK: I got an extra decimal point
21 in there, but clearly mathematical rounding would take
22 me down to 4.8. I think we're doing okay so far. I'm
23 claiming that this is kind of the start of really
24 taking a hard look at the tornado issue, as far as
25 NEPA is concerned. Would you agree, Mr. Goodman?

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1 MR. GOODMAN: Can you repeat the question?
2 That this specific analysis is required under the
3 National Environmental Policy Act? Is that what
4 you're asking?

5 JUDGE HAJEK: Yes.

6 MR. GOODMAN: No, I would not agree that
7 this specific analysis is required under the National
8 Environmental Policy Act.

9 JUDGE HAJEK: Okay, I understand. For
10 completeness now, without spending a lot of extra
11 time, let's just gather one more number from the Thom
12 article. Mr. Deucher, if you could again -- I think
13 I've already showed this particular number that I
14 want, display Figure 4, the two square positions below
15 the 0.6. Where am I here? This is the same as Figure
16 3 that we just looked at, except it's divided by the
17 No. 10, the number of years. We have 0.6.

18 That's the number in the table. Two
19 squares below that is the square that is associated
20 with the area that we're located in right now for Crow
21 Butte. Note the frequency of tornadoes in this square
22 is 1.3 for the Crow Butte location, and it's more than
23 twice the Rapid City value. Sticking this into the
24 formula, the average area of the squares is
25 essentially the same, and this leads to a probability

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1 of 1.03 times ten to the minus three now. So we're
2 twice the probability using a method endorsed by
3 NUREG/CR-6444 -- I'm sorry, 4461, and also NRC Reg
4 Guide 1.76, most recent version. Mr. Teahon, from
5 what I've done here, can we agree that the value that
6 you've reported in the LRA and agreed with in your
7 testimony is really for near the plant, rather than at
8 the plant, and for Rapid City?

9 MR. TEAHON: Yes, sir, it's the value from
10 Rapid City.

11 JUDGE HAJEK: Okay, thank you. I think
12 you already stated a bit ago that you would then
13 change your testimony statement to be near the plant,
14 and not necessarily at the plant?

15 MR. TEAHON: Yes, sir, that's where we
16 took the value was from Rapid City. Therefore, it
17 would be near the site, not at the site.

18 JUDGE HAJEK: What is the distance between
19 Rapid City and the plant, miles?

20 MR. TEAHON: Driven miles, it's a little
21 over 100. In line, it's less than 100 miles.

22 JUDGE HAJEK: On the order of 100 miles?

23 MR. TEAHON: Yes, sir.

24 JUDGE HAJEK: Okay, thank you. I've got
25 another consideration before leaving this topic, and

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1 that is that the data we've used came from -- is in
2 the Thom article. It came from 1952 to 1963. It's 50
3 years old. I've already stated I'd prefer to use
4 something a lot more recent. There are a lot of other
5 sources, and I'm going to leave the finding of any of
6 that more recent data to the Staff and to Crow Butte,
7 as well.

8 I think you need to work together on
9 looking at more recent data. But one source that we
10 have before us is NUREG/CR-4461, which is endorsed by
11 Reg Guide 1.76, referenced in a very long pathway by
12 NUREG-0706. If we look at Figure 2.1 -- and I think
13 this goes back to the question that I was asked
14 earlier as to how I picked the very specific squares
15 that I picked. I did say they're hard to look at.
16 Mr. Deucher, if you could bring up Figure 2.1,
17 distribution of tornado events, out of 6411, I'd
18 appreciate it.

19 Flip that to the side. Blow it up,
20 please, a couple more times, one more time. I've got
21 the right mouse here. We're looking at Longitude 101
22 to 103, which is right here. Notice it's just a
23 little bit to the left of this dashed line. We're
24 looking at Latitudes 42 and 44. So here are the
25 latitudes over here, on the left-hand side. If we

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1 follow across on this curve over to the right, here's
2 the square for Rapid City. I think that's 56 is what
3 that says. Down below, two blocks below that for the
4 plant is 64.

5 CHAIR GIBSON: That is from Board Exhibit
6 16.

7 JUDGE HAJEK: 16, that is correct.
8 Without belaboring this further, let me just comment
9 that this is for all tornadoes. If you look at the
10 next figure, on the next page, Figure 2-2, that lists
11 the number of F2 or greater tornadoes, and we see
12 there were 12 in Rapid City, six in the Crow Butte
13 square.

14 We subtract the F2 tornadoes or the
15 greater tornadoes from the totals -- by the way,
16 there's another figure in here for F3 and higher, and
17 there's no F3 or higher tornadoes that were reported,
18 so these are all F2 tornadoes in this figure that I've
19 provided. If we subtract the F2 tornadoes, the
20 frequency per year in both cases, all tornadoes or
21 only less than F2, it's greater than indicated in
22 NUREG-0706. Mr. Goodman, I understand the Staff did
23 not look at any of this, is that correct?

24 MR. GOODMAN: Yes, Your Honor.

25 JUDGE HAJEK: I've extended this a bit

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1 from what you've got. If I go back to NUREG-1520 --
2 I have lost track, Mr. Gibson.

3 The document is Standard Review Plan for
4 Fuel Cycle Facilities. It's Board Exhibit No. --

5 CHAIR GIBSON: 1520? Board Exhibit 11.

6 JUDGE HAJEK: Board Exhibit 11, where it
7 states, in the last sentence of the first paragraph
8 that I referenced earlier, "The effects of tornadoes
9 with an annual exceedance probability of ten to the
10 minus five or greater may need to be considered."
11 We're two orders of magnitude higher than that. My
12 evaluation is that tornadoes should be considered, and
13 they have not been considered. I recognized that's a
14 Board -- it's my statement.

15 CHAIR GIBSON: Yes, it is.

16 JUDGE HAJEK: My statement.

17 MR. GOODMAN: Would you like me to comment
18 on that, Your Honor?

19 JUDGE HAJEK: Say that again, please?

20 MR. GOODMAN: Would you like me to comment
21 on that?

22 JUDGE HAJEK: Yes.

23 MR. GOODMAN: I would just say that Staff
24 disagrees with your conclusion. Staff combined
25 NRC-017, NUREG-6733, NRC-014, NUREG-1748, NRC-045, the

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1 GEIS, CBR-011, the license renewal application, and
2 also the number 4.8 times ten to the negative fourth
3 which you, in your calculation, if my math is correct,
4 you're saying it's not 0.000484, but rather 0.00103.
5 When you're looking at those two numbers, which is the
6 calculation that you did, plus all of the other
7 factors that NRC considered, NRC would not change its
8 conclusion.

9 JUDGE HAJEK: I understand.

10 MR. GOODMAN: Thank you, Your Honor.

11 CHAIR GIBSON: When you say the NRC would
12 not change its conclusion, does that mean that you
13 would not have discussed the calculations that were
14 just made by Judge Hajek because you would consider
15 them to be insignificant and not relevant to the
16 inquiry of whether there were significant impacts, in
17 terms of making an inquiry?

18 MR. GOODMAN: My statement of conclusion
19 was specific to the contention, which states that a
20 specific discussion of tornadoes was not included in
21 the EA. It is my perspective that these two numbers
22 does not change the opinion of Staff that it would
23 include a specific discussion (Simultaneous speaking).

24 CHAIR GIBSON: I don't want to put words
25 in your mouth, but I want to make sure I understand

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1 what you're saying. I think what you're saying is
2 that you would not have evaluated this in the
3 environmental assessment with the information that has
4 just been supplied.

5 MR. GOODMAN: That's correct, Your Honor.

6 CHAIR GIBSON: Is that correct?

7 MR. GOODMAN: Yes, it is, Your Honor.

8 CHAIR GIBSON: That's what we wanted to
9 know.

10 MR. GOODMAN: Thank you for clarifying.

11 MS. SIMON: Your Honor, I didn't want to
12 interrupt Judge Hajek in his discussion, but the Staff
13 wants to note an objection. Not only, as you
14 mentioned, did the Staff have no time to review this,
15 but we had no notice that any of this discussion was
16 going to take place. We have no witness with
17 meteorology experience to discuss or refute this.
18 Judge Hajek essentially testified for 20 or 30
19 minutes, and we feel that, with all due respect,
20 that's not appropriate, especially in this case, where
21 the Intervenors have provided absolutely no testimony
22 on this issue. So we respectfully object to this
23 entire discussion.

24 CHAIR GIBSON: Your objection is noted.

25 MS. SIMON: I'm sorry, Your Honor. Would

1 it be possible for us to get a ruling on our
2 objection?

3 CHAIR GIBSON: You will, but you won't get
4 it now.

5 MS. SIMON: Okay, thank you.

6 MR. SMITH: This is Tyson Smith for Crow
7 Butte.

8 CHAIR GIBSON: Yes, sir.

9 MR. SMITH: I would just add to the extent
10 Judge Hajek's conclusion was based on the sentence in
11 NUREG-1520 that the risk at fuel cycle facilities is
12 different than the risk at a uranium recovery
13 facility, so I don't believe it would be appropriate
14 to draw a direct correlation between the ten to the
15 minus five mentioned here and the relative risk at a
16 uranium recovery, such as Crow Butte.

17 CHAIR GIBSON: Right. I hear you. Your
18 objection is noted, as well. I believe there was --
19 before we depart from Contention 12 -- are you
20 finished?

21 PARTICIPANT: I'm finished.

22 CHAIR GIBSON: I believe if the counsel
23 for the Staff and for Crow Butte will indulge us, I
24 believe that we had a technical problem on the part of
25 one of the Intervenor experts in trying to comply with

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1 some homework. In order to comply with his homework,
2 as I understand it, Dr. LaGarry needs to use the mouse
3 that Mr. Deucher has over here -- I guess Judge Hajek
4 has appropriated it -- but we'll let him use it so
5 that he can -- we wanted him to identify the sampling
6 locations that were within the oval. He couldn't do
7 it. So we want him to do it now. I thought it would
8 be appropriate to have him go ahead and do it in the
9 presence of counsel, so that they can at least see
10 where it is. You all are okay with that, aren't you?

11 MR. SMITH: Yes, Your Honor, Crow Butte
12 has no issue with that.

13 CHAIR GIBSON: Okay, thank you.

14 MS. SIMON: Yes, Your Honor.

15 DR. LAGARRY: Your Honors, this difficulty
16 stems from my being unable to place equivalent
17 software on a college-issued computer. I didn't have
18 administrative privileges.

19 CHAIR GIBSON: Okay, you'll have to talk
20 with Mr. Deucher about that.

21 PARTICIPANT: We'll have it resolved, Your
22 Honor.

23 CHAIR GIBSON: Okay, thank you. If this
24 is going to take very long, if you want to do the
25 setup over lunch, we can do it, or are you -- is this

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1 just going to take a minute?

2 PARTICIPANT: It shouldn't take five
3 minutes, Your Honor.

4 CHAIR GIBSON: Five minutes is fine.
5 Let's go ahead and do it now. Let me just also ask if
6 there are any -- there probably aren't any proposed
7 questions on Contention 12. There may be some,
8 however, so if you all want to try to draft something
9 up while Dr. LaGarry's putting this together, we can
10 get this addressed now.

11 DR. LAGARRY: Thank you, Your Honors.

12 CHAIR GIBSON: Because it may not be
13 self-evident to all of the parties here what you've
14 just done, if you could please describe briefly the
15 sites that you've denoted on this particular document,
16 which has previously been marked as Board Exhibit --
17 hold on -- 6?

18 DR. LAGARRY: Yes, Your Honors. This is
19 in the context of Ms. White Face's testimony, in which
20 she talked about the sample sites for which she had
21 radionuclide concentrations. She cited five
22 communities. As per the Board's request, I have
23 placed those five communities on this map.

24 Thank you.

25 CHAIR GIBSON: I think just for clarity,

1 we'll just make this Board Exhibit 17, so we'll know
2 that this is the ones that you denoted different from
3 the oval that you drew earlier, okay? Fair enough?

4 (Whereupon, the above-referred to document
5 was marked as Board Exhibit 17 for reference.)

6 DR. LAGARRY: Yes, sir.

7 CHAIR GIBSON: This'll be Board Exhibit --
8 was it 16 or 17, Mr. Smith?

9 MS. SIMON: It's 17, Your Honor.

10 CHAIR GIBSON: It's 17. Okay, thank you.
11 We're on 17, then, thank you. I don't expect --
12 there's not even any hydrogeology witnesses here. I
13 don't expect any reaction to this, unless Judge
14 Wardwell wanted to ask something about it. So what
15 we'll do is this will -- as we did with Board Exhibit
16 6, we'll postpone this until our day of subsequent
17 evidence. If there's nothing else at this point, what
18 I would suggest we do is that we stand in recess for
19 an hour, come back at 1:15. We will look at the
20 questions that you submitted with respect to
21 Contention 12 and see if there's anything we need to
22 ask, and then we'll proceed into Contention 1. Until
23 then, we stand in recess. Thank you.

24 (Whereupon, the above-entitled hearing
25 went off the record at 12:07 p.m. and went back on the

1 record at 1:15 p.m.)

2 CHAIR GIBSON: We're back on the record.
3 A couple of housekeeping matters. We have reviewed
4 the proposed questions for Contention 12 and we've
5 decided that we won't be asking any of them. Either
6 they've already been addressed in testimony, they're
7 outside the scope of the contention, or we
8 satisfactorily addressed them through our examination
9 today.

10 So to the extent there's anybody here who
11 is on a contention other than Contention 1, then they
12 may be dismissed. And to the extent you have -- I
13 assume you have some Contention 1 witnesses, Mr.
14 Ballanco and Mr. Frankel. You might want to get them
15 up so we can get started on Contention 1. Are they
16 not present?

17 MR. BALLANCO: They are, Your Honor.

18 CHAIR GIBSON: Very well. Okay. While
19 you're marshaling your witnesses, I understand that we
20 have a proposed schedule from you all that you all
21 have agreed to. I want to commend you all for
22 reaching an agreement. And under this proposed
23 schedule, the direct testimony will be due on
24 September 18. The rebuttal testimony will be due
25 September 28th. Proposed questions will be due on

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1 October 4 and we will have a hearing date during the
2 week of -- I guess that's October 19 during the 20th,
3 21st, 22nd, and 23rd. We have no idea which of those
4 dates is going to work for the Board because we
5 haven't had a chance to look at our schedules. So
6 we'll have to do that, but it will be that week.

7 MS. SIMON: Your Honor, I just wanted to
8 note that I believe Mr. Wireman is going to be out
9 from October 1st through 18th and he had requested
10 that the hearing not be held the 19th because he's
11 going to be coming back from overseas.

12 CHAIR GIBSON: Okay. It will be held some
13 time during the -- I'm also going to be out the week
14 before so that's fine. But we'll be able to do it the
15 week of the 19th on either the 20th, the 21st, the
16 22nd, or 23rd. Thank you for that clarification, Ms.
17 Simon.

18 Is there anything further before we swear
19 in these witnesses? Hearing none, would you please
20 stand, sir. Raise your right hand. Will you please
21 state your full name for the record into that
22 microphone?

23 MR. CATCHES-ENEMY: Michael Catches-Enemy.

24 CHAIR GIBSON: Michael Catches-Enemy.

25 Now, sir, you do affirm that all the testimony you are

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1 about to give in the case now before this Board will
2 be the truth, the whole truth, and nothing but the
3 truth, this you do affirm under the pains and
4 penalties of perjury?

5 MR. CATCHES-ENEMY: Yes.

6 CHAIR GIBSON: Very well. Sir, would you
7 please state your full name for the record?

8 MR. YELLOW THUNDER: Dennis Yellow
9 Thunder.

10 CHAIR GIBSON: Very well. Will you please
11 raise your right hand, sir? You do affirm that all
12 the testimony you are about to give in the case now
13 before this Board will be the truth, the whole truth,
14 and nothing but the truth, this you do affirm under
15 the pains and penalties of perjury?

16 MR. YELLOW THUNDER: Yes.

17 CHAIR GIBSON: Very well. You may be
18 seated.

19 Sir, would you please state your full name
20 for the record?

21 DR. NICKENS: Paul Nickens.

22 CHAIR GIBSON: Yes, sir. Please raise
23 your right hand. You do affirm that all the testimony
24 you are about to give in the case now before this
25 Board will be the truth, the whole truth, and nothing

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1 but the truth, this you do affirm under the pains and
2 penalties of perjury?

3 DR. NICKENS: I do.

4 CHAIR GIBSON: Very well. We'll now
5 proceed to Contention 1.

6 Mr. Goodman?

7 MR. GOODMAN: Yes, Your Honor.

8 CHAIR GIBSON: According to the staff's
9 procedures, the consultation process is supposed to
10 commence at the very start of the project planning
11 process. Is that correct?

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

13 CHAIR GIBSON: First, you identify tribes
14 with religious or cultural significance to historic
15 properties that may be affected by an NRC licensing.
16 Is that correct?

17 MR. GOODMAN: Also correct, Your Honor.

18 CHAIR GIBSON: And then you contact those
19 tribes. Is that correct?

20 MR. GOODMAN: That's our starting point,
21 Your Honor.

22 CHAIR GIBSON: And that initial contact
23 with the tribes is to come from an NRC Division
24 Director or Deputy Director. Is that correct?

25 MR. GOODMAN: That is our policy

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1 currently, Your Honor, yes.

2 CHAIR GIBSON: When you say "that is our
3 policy currently" when did that start being your
4 policy?

5 MR. GOODMAN: As far as I have been the
6 project manager of this, it has been our policy. I
7 just didn't know if that had changed at any point
8 before.

9 CHAIR GIBSON: So you can speak for the
10 last ten years, is that correct?

11 MR. GOODMAN: No, Your Honor. I've only
12 been the project manager of this project since late
13 2010.

14 CHAIR GIBSON: So you can only speak for
15 that from 2010 forward?

16 MR. GOODMAN: Correct, Your Honor.

17 CHAIR GIBSON: Okay. And the initial
18 contact is to be sent to the leader of the tribal
19 government. Is that correct?

20 MR. GOODMAN: I believe that is correct,
21 Your Honor.

22 CHAIR GIBSON: Subsequent contact between
23 staff level members of the NRC and the tribe is to
24 occur through letters, emails, phone calls, and face-
25 to-face meetings. Is that correct?

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1 MR. GOODMAN: Yes, Your Honor.

2 CHAIR GIBSON: And through those contacts,
3 the NRC solicits the tribe's views on the presence of
4 traditional cultural properties in the subject area.
5 Is that correct?

6 MR. GOODMAN: Yes, Your Honor.

7 CHAIR GIBSON: And you interact with
8 tribes on a case-by-case basis. Is that correct?

9 MR. GOODMAN: Yes, Your Honor.

10 CHAIR GIBSON: Some approaches that work
11 with one tribe might not work with another tribe, is
12 that correct?

13 MR. GOODMAN: That is correct, Your Honor.

14 CHAIR GIBSON: Okay. Now in terms of the
15 communications that occurred in this specific
16 proceeding, even though you've only been involved with
17 it, I assume since 2010, I assume you have
18 familiarized yourself with the communications that
19 happened before you took this office. Is that
20 correct, sir?

21 MR. GOODMAN: It is, Your Honor.

22 CHAIR GIBSON: Good. First, let's go to
23 NRC038. Can you put that up for us, Mr. Deucher?

24 Now Mr. Goodman, I assume you're familiar
25 with this document, sir?

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1 MR. GOODMAN: I am, Your Honor.

2 CHAIR GIBSON: And this purports to be a
3 list of NRC communications with the Oglala Sioux Tribe
4 for the Section 10(c) process for this proceeding. Is
5 that correct?

6 MR. GOODMAN: Yes, Your Honor.

7 CHAIR GIBSON: And in your estimation,
8 this is a comprehensive list, is that correct?

9 MR. GOODMAN: It is, Your Honor.

10 CHAIR GIBSON: Okay. Very well. Now I
11 think I'd like to ask Mr. Catches-Enemy and Mr. Yellow
12 Thunder a few questions.

13 Thank you for joining us today. Before we
14 get into some substantive questions, I need to get a
15 quick clarification from your attorneys. Both of
16 these submissions to this Board, INT031 and 032 are
17 labeled as declarations and it appears to me that your
18 intent was to submit this as direct testimony, but it
19 was called a declaration. I just wanted to make sure
20 that was your intention.

21 Is that correct, Mr. Frankel?

22 MR. FRANKEL: Yes, Your Honor.

23 CHAIR GIBSON: Thank you. Okay. Mr.
24 Catches-Enemy, you served as a representative of the
25 tribe and as the tribe's Natural Resource Director

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1 from May of 2004 to March of 2012. Is that correct?

2 MR. CATCHES-ENEMY: Yes.

3 CHAIR GIBSON: And you served as Tribal
4 Historic Preservation Officer from May 2009 to January
5 2010. Is that correct?

6 MR. CATCHES-ENEMY: Yes.

7 CHAIR GIBSON: And you also served in that
8 capacity from October 2013 to April 2015. Is that
9 correct?

10 MR. CATCHES-ENEMY: Yes.

11 CHAIR GIBSON: Okay. Are you currently
12 serving in that capacity?

13 MR. CATCHES-ENEMY: No, I am not.

14 CHAIR GIBSON: Okay. I just thought maybe
15 that was when it was submitted or something. Okay,
16 thank you.

17 Currently, you serve as Tribal
18 Archaeologist, is that correct?

19 MR. CATCHES-ENEMY: Yes.

20 CHAIR GIBSON: And you state in your
21 testimony which is INT031, if you want to look at it
22 I'm talking about page 4, paragraph 17. There, sir,
23 you state that you are familiar with the consultation
24 process used by the NRC staff and the private
25 contractor, SRI Foundation, employed by the applicant

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1 in regards to this license renewal. Is that correct?

2 MR. CATCHES-ENEMY: Yes.

3 CHAIR GIBSON: Okay. I take it you
4 familiarized yourself with NRC038 which is this
5 communications log that we have here on the -- can you
6 read that? Do you want me to move that so you can see
7 it better?

8 MR. CATCHES-ENEMY: I was just presented
9 it today.

10 CHAIR GIBSON: Okay, so this is the first
11 time you've seen it?

12 MR. CATCHES-ENEMY: Yes.

13 CHAIR GIBSON: Very well. Mr. Goodman
14 with the NRC has represented that this is a
15 comprehensive list of the communications. I don't
16 expect you to review it and to give us an answer right
17 now, but when we do take a break, if you could just
18 make a note to look through it and see if there is
19 anything that is on there that shouldn't be on there
20 or something that should be on there that is not on
21 there. We'd appreciate it. Could you do that for us?

22 MR. CATCHES-ENEMY: Yes.

23 CHAIR GIBSON: You don't need to do that
24 now though. Okay. Since you have not seen it yet,
25 I've got a few questions I want to ask you, but I'm

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1 going to just set that aside for right now and we'll
2 come back to it after you've had a chance to look at
3 it.

4 I would, however, like to try to look at
5 some of the descriptions of the communications that
6 the staff provided in this log and then we can get to
7 some of the specifics.

8 Mr. Goodman.

9 MR. GOODMAN: Yes, Your Honor.

10 CHAIR GIBSON: Am I correct that for
11 purposes of -- this will help Mr. Catches-Enemy and
12 perhaps Mr. Yellow Thunder when they review this, am
13 I correct that the descriptions on this log is not
14 supposed to be a comprehensive account of what
15 happened in each of these communications, but just a
16 summary?

17 MR. GOODMAN: Exactly right, Your Honor.

18 CHAIR GIBSON: Okay. And the descriptions
19 that are in this log are designed to give a general
20 overview of who was on a particular call or email and
21 what was the primary topic discussed, is that fair?

22 MR. GOODMAN: It is fair.

23 CHAIR GIBSON: And for all of these
24 communications that you've recorded or at least the
25 NRC staff has recorded, except for the phone calls,

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1 there is a link to the letter or email so that the
2 Board or one of the parties here can follow that link
3 to examine the communication itself for what happened.
4 Is that correct?

5 MR. GOODMAN: I believe that's correct,
6 Your Honor.

7 CHAIR GIBSON: Okay. So hopefully that
8 will help you all when you review it later.

9 Okay, I would like to talk to you a little
10 bit, Mr. Goodman, about this communications log. If
11 we could go to the first page and the first entry.
12 Might highlight that for him. Am I correct that this
13 first entry, dated January 13, 2011 represents the NRC
14 staff's initial contact with the Oglala Sioux Tribe
15 for the purposes of Section 106 consultation?

16 MR. GOODMAN: Exactly, Your Honor.

17 CHAIR GIBSON: Okay. Now isn't it true
18 that the Crow Butte license application was submitted
19 in November of 2007?

20 MR. GOODMAN: Yes, Your Honor.

21 CHAIR GIBSON: The Tribal Protocol Manual
22 Emphasizes early communication with Indian tribes, is
23 that correct?

24 MR. GOODMAN: It is, Your Honor.

25 CHAIR GIBSON: You're not suggesting that

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1 a delay before the initial consultation between the
2 time of this filing and the initial consultation of
3 more than three years is acceptable, are you?

4 MR. GOODMAN: I would just clarify that
5 the early consultation that you are quoting is a
6 document that came out after 2011, I believe. But in
7 general, it is not the NRC staff's approach to wait as
8 long as was waited to initiate consultation. That's
9 correct.

10 CHAIR GIBSON: Regardless of whether you
11 started as soon as you should have or the NRC staff
12 started as soon as it should have, it's your view now
13 that you eventually got around to doing everything
14 that the law requires you to do. Is that correct?

15 MR. GOODMAN: Absolutely, Your Honor.

16 CHAIR GIBSON: Let's examine that. In the
17 course of gathering information from the tribes and
18 the Applicant, CBR, as well, the staff may conclude
19 that it would be appropriate to conduct a TCP survey.
20 Is that correct?

21 MR. GOODMAN: Yes.

22 CHAIR GIBSON: And if the staff determines
23 in the course of events that it would be appropriate
24 to conduct a TCP survey, the staff puts together a
25 Statement of Work, is that correct?

1 MR. GOODMAN: Your Honor, a Statement of
2 Work is one approach to TCP surveys and identifying
3 sites of cultural and religious significance.

4 CHAIR GIBSON: There is another approach?

5 MR. GOODMAN: There are several
6 approaches, Your Honor.

7 CHAIR GIBSON: What are the other
8 approaches, Mr. Goodman?

9 MR. GOODMAN: What happened in this case
10 was an open site approach which is another approach.
11 And there are other approaches which Dr. Nickens can
12 specifically refer to if you would like additional
13 information. I know that you can do background checks
14 and communications and consultations with the history
15 of the site and talk to Tribal Elders. So there are
16 several ways to get about obtaining that information.

17 CHAIR GIBSON: So you can do a Statement
18 of Work or you can do these other things, but you
19 don't do all of them. You just do one of them? You
20 either talk to Tribal Elders or you do a background
21 check or you do an on-site approach, open site
22 approach.

23 MR. GOODMAN: Sometimes, Your Honor,
24 several of them will go into play. You want to obtain
25 the information and the best way to obtain the

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1 information would be looking at sort of the range of
2 different approaches and choosing the one that works
3 the best for the particular site.

4 CHAIR GIBSON: Okay. Now in this case,
5 both the Applicant here, Crow Butte, and the affected
6 tribe here, the Oglala Sioux Tribe, were invited to
7 proposed Statement of Work to the staff, is that
8 correct?

9 MR. GOODMAN: That is correct, Your Honor.

10 CHAIR GIBSON: Now in the ordinary course
11 of events once these proposed Statements of Work from
12 the interested tribes and from the Applicant have been
13 received, the NRC staff would review those proposals
14 and adopt the final Statement of Work. Is that
15 correct?

16 MR. GOODMAN: If it seemed to staff that
17 the Statement of Work was the best approach, then it
18 would at that point adopt it. Yes, Your Honor.

19 CHAIR GIBSON: And in this case, you
20 determined that the Statement of Work was not the best
21 approach.

22 MR. GOODMAN: We did, Your Honor.

23 CHAIR GIBSON: After receiving input from
24 the tribes and the Applicant, the NRC staff in the
25 ordinary course of events eventually makes a

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1 determination of impact on potential traditional
2 cultural resources on the site. Is that correct?

3 MR. GOODMAN: Yes, Your Honor.

4 CHAIR GIBSON: Okay. Before I forget, Mr.
5 Nickens, while we're on this topic, would you please
6 describe what the other approaches were other than a
7 Statement of Work?

8 DR. NICKENS: I think Mr. Goodman -- can
9 you hear me all right?

10 CHAIR GIBSON: I can hear you fine, Mr.
11 Nickens. Thank you, sir.

12 DR. NICKENS: Mr. Goodman covered it
13 pretty well in sketchy detail. In my experience,
14 probably the best TPC survey approach is to involve
15 Tribal Elders, wherein if it's one tribe or a group of
16 tribes would supply elders of their choice and then
17 there would be a facilitator, something along the
18 lines of a cultural anthropologist who would accompany
19 the elders and provide logistics support,
20 documentation, recording support, report preparation
21 if that were necessary. That's usually been the best
22 approach that I've seen.

23 CHAIR GIBSON: So but are the background
24 check and the open site approach to other approaches
25 than doing the Statement of Work or the consultation

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1 with Tribal Elders?

2 DR. NICKENS: Well, the Statement of Work
3 is the approach. The background check I wouldn't
4 really consider a suitable technique. That's really
5 a literature search usually to identify potential
6 TCPs, but that's usually done outside of tribal
7 effort.

8 CHAIR GIBSON: And that would be something
9 that would sort of augment one of these other
10 approaches, is that right, doing these historical
11 background checks?

12 DR. NICKENS: That's correct. And in my
13 opinion, should be a corollary to any of the studies.

14 CHAIR GIBSON: Now how -- but the open
15 site approach is different than either the Statement
16 of Work or the consultation with the Tribal Elders, is
17 that correct?

18 DR. NICKENS: That would be correct.

19 CHAIR GIBSON: Thank you. I just wanted
20 to be sure we had our nomenclature down. Thank you,
21 sir.

22 Now after receiving input from the tribe,
23 and making a determination of impact on potential
24 traditional cultural sources on the site, Mr. Goodman,
25 that finding can include no historic properties

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1 affected or it can include no adverse effects to
2 historic properties, is that correct?

3 MR. GOODMAN: Just to clarify, once you
4 have identified any potential TCPs you could either
5 have no effect on them or adverse effects on them. Is
6 that -- was that the question?

7 CHAIR GIBSON: Right.

8 MR. GOODMAN: Then yes.

9 CHAIR GIBSON: So you could have no
10 historic properties affected or you could have adverse
11 effects on historic properties. Those would
12 essentially be your two choices. Is that right?

13 MR. GOODMAN: Once you identify that they
14 are present on the site, those are the two choices,
15 Your Honor.

16 CHAIR GIBSON: Correct.

17 MR. GOODMAN: Yes.

18 CHAIR GIBSON: Correct. Let's talk about
19 the specific staff findings that were made in this
20 case. If we could call up NRC010, NRC010, Mr.
21 Deucher? Okay, great.

22 And on page 101 in the red ink version, on
23 that page there is a notation "the staff concluded
24 that there would be no adverse effects on TCPs and
25 cultural resources." Is that correct?

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1 MR. GOODMAN: That impacts would be small,
2 Your Honor. Small doesn't necessarily mean no. So I
3 just wanted to add that as a clarification.

4 CHAIR GIBSON: Okay. Now is there a
5 disparity between what is in the FONSI and what is in
6 the Environmental Assessment?

7 MR. GOODMAN: No, Your Honor.

8 CHAIR GIBSON: If we could go down to this
9 paragraph right here on page 101, right into the
10 table, second sentence, "However, the NRC staff
11 concludes that there will be no adverse effects to
12 these previously known and recorded cultural resource
13 sites if the operating license is renewed." Isn't
14 that a finding that there will be no adverse effects?

15 MR. GOODMAN: Sorry, yes, Your Honor. I
16 was looking at the paragraph below when it said
17 "overall impacts to historic and cultural resources
18 from relicensing." I should have had you clarify
19 which sentence you were referring to.

20 CHAIR GIBSON: So do you have a
21 contradiction in those two paragraphs or do you have
22 some explanation for why it would say no in one place
23 and small in another?

24 MR. GOODMAN: I certainly do, Your Honor.
25 Small is sort of the designation that we use when we

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1 talk about small, moderate, or large impacts. And we
2 do that for each resource area in Chapter 4. And so
3 the last paragraph there identifies that impacts are
4 small, using the guidance outlined in the NUREG. The
5 sentence above is specifically referring to no adverse
6 effects to the previously known and recorded cultural
7 sites and so that sentence is accurate that there's no
8 and no does fall within the designation of small.

9 CHAIR GIBSON: So small, if we do sort of
10 like circles, we have concentric circles, so no is
11 inside of small. Is that right?

12 MR. GOODMAN: Correct, Your Honor. Yes.

13 CHAIR GIBSON: Thank you. Now because the
14 staff made this determination, there was no Section
15 106 agreement document in this case, setting out
16 measures to resolve adverse effects through avoidance,
17 minimization, or mitigation, is that right?

18 MR. GOODMAN: That is correct, Your Honor.

19 CHAIR GIBSON: Okay. But just to be
20 clear, in a situation where the staff determines that
21 there may actually be adverse effects to cultural
22 resources, then in that case the staff must consult
23 and try to enter into a Section 106 agreement
24 document. Is that correct?

25 MR. GOODMAN: Agreement documents are

1 certainly one approach to resolving adverse effects.
2 Not the only approach, Your Honor.

3 CHAIR GIBSON: This is sort of like a
4 Statement of Work. There is sort of a one approach,
5 but there's others.

6 MR. GOODMAN: Yes.

7 CHAIR GIBSON: And what are the other
8 approaches besides a 106 agreement document, Mr.
9 Goodman?

10 MR. GOODMAN: Section 106 of the National
11 Historic Preservation Act, does not require the
12 preservation of sites. It is a consultation effort.
13 It is to identify and, where appropriate, resolve
14 adverse impacts. And so should a lead agency choose
15 not to resolve, that would be an option under the
16 National Historic Preservation Act.

17 CHAIR GIBSON: In your own experience in
18 the -- since 2010, has there ever been a time when
19 you've determined that there were adverse effects, but
20 you didn't enter into a 106 consultation agreement?

21 MR. GOODMAN: Neither for the projects
22 that I've managed, nor for the projects that I had
23 assisted on or my group has done. I do not believe
24 so.

25 CHAIR GIBSON: Okay. Does the staff

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1 follow a different Section 106 process when preparing
2 an Environmental Assessment as compared to preparing
3 an Environmental Impact Statement?

4 MR. GOODMAN: It would be site specific,
5 Your Honor. The Section 106 process would be
6 relatively similar, but there are some unique
7 differences with an EA versus an EIS. So generally,
8 yes, Your Honor.

9 CHAIR GIBSON: Okay. Does the staff
10 follow a different process when renewing a license as
11 opposed to an initial license application?

12 MR. GOODMAN: An initial license
13 application for a new site would be, I believe, goes
14 straight into an Environmental Impact Statement where
15 an expansion area would start with an Environmental
16 Assessment and so are you referring to a new area
17 entirely or an expansion area?

18 CHAIR GIBSON: No, actually, I'm just
19 referring to what is -- what do you do under 106, per
20 your consultation obligations. Are they different
21 where you have a license renewal where you have an
22 initial license application?

23 MR. GOODMAN: Potentially different, Your
24 Honor, but not in all situations.

25 CHAIR GIBSON: Are you aware that in June

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1 8, 2011, Mr. Klukan told the tribes that under Part 40
2 renewal applications are treated exactly as new
3 applications?

4 MR. GOODMAN: 40 Section 106, activities
5 specifically.

6 CHAIR GIBSON: Meaning that we review them
7 exactly as we would an entirely new application under
8 Part 40. We go back and look at everything again as
9 if it were an entirely new application.

10 MR. GOODMAN: Yes, generally, that would
11 make sense. I do know of specific other projects that
12 have followed a slightly different 106. So I believe
13 -- yes, I'm familiar with that and Mr. Klukan is
14 accurate.

15 CHAIR GIBSON: Okay. So we need to
16 measure the NRC staff's consultation process here just
17 as if it were the first time, aside its being built
18 and the tribe is being consulted for the first time.
19 Is that correct?

20 MR. GOODMAN: Certainly in this project,
21 Your Honor, we did a full Section 106 analysis, yes.

22 CHAIR GIBSON: Let's examine how the
23 process got played out here. We'll start by looking
24 at the events that preceded Crow Butte's license
25 renewal application in 2007. I take it that even

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1 though you weren't involved at the time, you have
2 familiarized yourself with the NRC staff's efforts to
3 obtain tribal input for license renewals before 2007?

4 MR. GOODMAN: Before 2007, Your Honor?

5 CHAIR GIBSON: Yes, which is when this
6 license renewal application was filed.

7 MR. GOODMAN: Yes.

8 CHAIR GIBSON: Very well. Now we have two
9 surveys. I think we're not sure how to pronounce
10 their names, but it's Bozell and Pepperl.

11 MR. GOODMAN: I believe it's Pepperl, Your
12 Honor. but Dr. Nickens can correct me if I'm wrong.

13 CHAIR GIBSON: So it's Pepperl?

14 MR. GOODMAN: Pep -- like pep up. And
15 then erl, Pepperl.

16 CHAIR GIBSON: Pepperl.

17 MR. GOODMAN: Let Dr. Nickens help.

18 DR. NICKENS: Pepperl.

19 CHAIR GIBSON: Pepperl. Okay. I probably
20 won't say it right, but you know, that's probably
21 because of the part of the world I come from, so we'll
22 call it Pepperl. Pepperl, we'll call it that. Bozell
23 and Pepperl did a survey in 1982 and 1987 that were
24 conducted by personnel from the University of Nebraska
25 and the Nebraska State Historical Society. You're

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1 familiar with that, correct, sir?

2 MR. GOODMAN: I am, Your Honor.

3 CHAIR GIBSON: And the Bozell and Pepperl
4 report which is CBR027, at least the public version at
5 page 1 does not indicate that they had contact with
6 Indian tribes as part of the field survey process.
7 Did I miss anything?

8 MR. GOODMAN: About that sentence, Your
9 Honor, no.

10 CHAIR GIBSON: No, did I miss anything
11 about whether they had contact with Indian tribes as
12 part of their field survey process? Reviewing it, it
13 didn't appear that they did, but maybe I missed
14 something. Did I miss something?

15 MR. GOODMAN: I do not believe you missed
16 anything, Your Honor.

17 CHAIR GIBSON: Okay, good. You suggest in
18 your direct testimony at pages 69 and 70 that the
19 Bozell and Pepperl report, 1982 and 1987 surveys, did
20 not involve any direct consultation with Indian
21 tribes. So I think we're in agreement.

22 MR. GOODMAN: Yes, we are, Your Honor.

23 CHAIR GIBSON: All right. And in your
24 direct testimony at A.1.23 at the bottom of page 80,
25 got it?

1 MR. GOODMAN: Got it.

2 CHAIR GIBSON: You assert that your review
3 of past TCP identification efforts included a review
4 of CBR029. Is that correct?

5 MR. GOODMAN: That's correct, Your Honor.

6 CHAIR GIBSON: And CBR029 was a survey
7 done in 1998 during Crow Butte's previous license
8 renewal. Is that correct?

9 MR. GOODMAN: Yes, Your Honor.

10 CHAIR GIBSON: On page 1 of CBR029 which
11 is page 5 of the pdf, you may not -- do we have that
12 handy, Mr. Deucher? Just so I don't want to trip Mr.
13 Goodman up with something he hasn't had a chance to
14 see. This is page 1 of CBR029, right? Does that ring
15 a bell with you, Mr. Goodman?

16 MR. GOODMAN: So far, so good, Your Honor.

17 CHAIR GIBSON: Good, good. This survey
18 report states that "it was done to complete the
19 Section 106 requirement related to the Crow Butte
20 license renewal." Is that correct?

21 MR. GOODMAN: Yes, Your Honor.

22 CHAIR GIBSON: CBR029 is a report prepared
23 by a consultant which was Resource Technology Group
24 under contract to the Applicant in this case, Crow
25 Butte. Correct?

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1 MR. GOODMAN: Yes, Your Honor.

2 CHAIR GIBSON: And as part of its work to
3 complete CBR029, Resource Technology Group contacted"
4 according to the study at least "contacted six tribes
5 and three government agencies through letters and
6 phone calls." And if you want to look, this is going
7 to be on page 5, I believe, of this which is going to
8 be page 11 of the -- page 11 of the report which is 14
9 of the pdf. I don't want you to agree with me unless
10 you have a chance to see it, Mr. Goodman. Page 14 of
11 the pdf at 17. There you go, right there. Thank you,
12 Mr. Deucher. And this is 11.

13 And there's some folks listed there with
14 whom Resource Technology Group had contact. By my
15 calculation there were six tribes and three
16 governmental agencies. Does that sound right to you,
17 sir?

18 MR. GOODMAN: Yes, Your Honor.

19 CHAIR GIBSON: And they did that through
20 letters and phone calls?

21 MR. GOODMAN: I believe so, Your Honor.

22 CHAIR GIBSON: It appears that Resource
23 Technology Group received comments from only four
24 tribes. Is that correct?

25 MR. GOODMAN: I think so, Your Honor.

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1 CHAIR GIBSON: Well, I don't want you to
2 agree if you're not sure. So I believe if we actually
3 --

4 MR. GOODMAN: We'd have to scroll up.

5 CHAIR GIBSON: Flesh this out, you'll see
6 in the comments it indicates who returned their phone
7 calls. And I believe that we end up with four of the
8 tribes basically they were able to contact, actual
9 have contact with four of the tribes.

10 MR. GOODMAN: I'm just verifying, Your
11 Honor.

12 CHAIR GIBSON: No problem.

13 MR. GOODMAN: Yes, that's correct.

14 CHAIR GIBSON: Very well. But obviously,
15 the comments were quite minimal.

16 MR. GOODMAN: Yes, Your Honor.

17 CHAIR GIBSON: Obviously. Okay. Now
18 based on my review of this document, it did not appear
19 that Resource Technology Group made any attempt to
20 have a face-to-face meeting with these six tribes.
21 You're not aware of them making that effort are you,
22 sir?

23 MR. GOODMAN: I am not, Your Honor.

24 CHAIR GIBSON: Okay. Putting aside for
25 the moment whether this could have been an effective

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1 consultation strategy on the part of the NRC, it
2 certainly does not meet the current government-to-
3 government consultation requirements, does it?

4 MR. GOODMAN: Certainly wasn't what we did
5 for this current license renewal in meeting our
6 requirements. That seems to be correct, Your Honor.

7 CHAIR GIBSON: Okay. In fact, it didn't
8 even meet the consultation requirements in 1998, did
9 it, to have Applicant's consultant undertake the
10 consultation responsibilities. That's an NRC
11 responsibility, isn't it?

12 MR. GOODMAN: The lead agency which would
13 be in this case the NRC, it is the NRC's
14 responsibility currently. I don't know if the 106 has
15 been adjusted or modified since this document, so I'll
16 say currently, using current documents, yes, that's a
17 correct statement.

18 CHAIR GIBSON: I don't expect you to know
19 this, Mr. Goodman, because you weren't around, but I
20 can tell you that we as a board, actually reviewed
21 this document back in 2008 when this case was just
22 getting started. And in our decision, in that case,
23 when we admitted some of the very same contentions
24 that we're hearing this week, we quoted from NRC
25 staff's statement during the 1998 renewal. At that

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1 time, the staff said it required Crow Butte "to
2 conduct a cultural inventory prior to engaging in any
3 development activity not previously assessed by NRC."

4 And it was the NRC staff requirement,
5 obviously, that led Crow Butte to spend this money on
6 their nickel to hire Resource Technology Group to
7 prepare CBR029.

8 Now the NHPA dates back to 1966. I assume
9 you know that.

10 MR. GOODMAN: I do, Your Honor.

11 CHAIR GIBSON: Good. Good. And it was
12 amended in 1992 to impose consultation duties on
13 federal agencies.

14 MR. GOODMAN: So I got the amendment, just
15 not the correct here.

16 CHAIR GIBSON: Correct. And so this would
17 have been after 1992?

18 MR. GOODMAN: Yes, Your Honor.

19 CHAIR GIBSON: Regardless, there's
20 certainly -- do you need to say something, Mr.
21 Nickens?

22 DR. NICKENS: I just indicated to Mr.
23 Goodman that I could add something to this if he
24 desires.

25 CHAIR GIBSON: Do you need to add

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1 something to it, Mr. Nickens?

2 DR. NICKENS: I can give you a little,
3 just a brief background on how that study came about.

4 CHAIR GIBSON: CBR029?

5 DR. NICKENS: That's the --

6 CHAIR GIBSON: Resource Technology Group
7 study.

8 DR. NICKENS: Yes, sir. Yes, sir.

9 CHAIR GIBSON: Okay. Please tell us.

10 DR. NICKENS: During the course of the
11 license renewal about that time, 1998, it was actually
12 the State Historic Preservation Officer of Nebraska
13 that required in their consultation with the NRC and
14 Crow Butte, it was a State Historic Preservation
15 Officer, SHPO for short, that called for that study to
16 be done. Crow Butte then undertook the study,
17 reported the results to the NRC and Crow Butte and at
18 that time the State Historic Preservation Officer in
19 a letter which I assume is probably a Crow Butte
20 Exhibit 1997 or '98 from this SHPO to NRC, stated that
21 that study at that time fulfilled good-faith effort
22 toward identifying cultural -- traditional cultural
23 properties at the Crow Butte site.

24 MR. SMITH: He's referring to Exhibit
25 CBR031.

1 CHAIR GIBSON: Thank you, Mr. Smith. I
2 know Mr. Nickens appreciates that as do I.

3 MR. GOODMAN: Your Honor, can I make one
4 clarification? This is probably my fault because when
5 I first referred to him I probably said Mr. Nickens.
6 He has earned a Ph.D., so he's Dr. Nickens.

7 CHAIR GIBSON: Dr. Nickens. Very well.

8 MR. GOODMAN: I'll put that blame on
9 myself, Your Honor.

10 CHAIR GIBSON: It's okay. The State
11 Historic Preservation Officer did indicate that in
12 that officer's estimation, it was a good-faith effort
13 to try to make some determination about tribal
14 cultural properties. Is that correct?

15 DR. NICKENS: That is correct, Your Honor.

16 CHAIR GIBSON: But the State Historic
17 Preservation Officer didn't say it was satisfactory
18 for purposes of the consultation requirement of the
19 National Historic Preservation Act?

20 DR. NICKENS: It did not state that.

21 CHAIR GIBSON: Okay. Now -- hold on a
22 second. So you finally did have some communication
23 with the tribe, the Oglala Sioux Tribe at least, after
24 2007. We'll get into the specifics of when all that
25 happened in a minute. But there was -- it was the

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1 first effort to make any communication with the tribe
2 with respect to this site that the NRC had ever made.
3 Is that correct? And it was after 2007.

4 MR. GOODMAN: I don't know, Your Honor, in
5 1998 renewals or any of those, the communications. I
6 believe there were communications with the tribe.

7 CHAIR GIBSON: In 1998 when the license
8 was first renewed, you believe there was communication
9 with the tribe?

10 MR. GOODMAN: Are we specifically talking
11 about the OST tribe here or tribes in general?

12 CHAIR GIBSON: The OST tribe.

13 MR. GOODMAN: I do not believe specific to
14 the OST tribe, no. I'm not 100 percent.

15 CHAIR GIBSON: Thank you. And you're not
16 aware of any communication with the OST tribe back
17 when the initial license application was filed in the
18 1980s, correct?

19 MR. GOODMAN: Your Honor, there may have
20 been some communications, whether it be by the phone
21 or email from the project manager that was the manager
22 at the time when the renewal came in. So I can't say
23 for 100 percent certainty, but I'm fairly certain that
24 the communication started in earnest in early 2011.

25 CHAIR GIBSON: Okay, and we'll get to

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1 that. Back to you guys. I've got a couple of
2 questions.

3 Mr. Goodman just mentioned that in 2011,
4 they did get around to talking to you guys and I'd
5 like to talk about that consultation process that was
6 initiated in 2011 with you.

7 Mr. Catches-Enemy, your lawyers have
8 stated on page 69 of their Tribes Position Statement
9 that "there was never a meeting with the Oglala Sioux
10 Tribe solely devoted to the Crow Butte renewal or the
11 cultural resources that are within the existing Crow
12 Butte license area." You would agree with that, I
13 assume, sir?

14 MR. CATCHES-ENEMY: Yes.

15 CHAIR GIBSON: And your lawyers have also
16 stated on page 78 of their position statement that
17 "Consultation between the Indian tribes and the NRC
18 should proceed according to a nation-to-nation,
19 government-to-government relationship." I assume you
20 would agree with that as well, sir?

21 MR. CATCHES-ENEMY: Yes.

22 CHAIR GIBSON: I want your professional
23 opinion, Mr. Catches-Enemy. Was the NRC staff
24 obligated to undertake consultations solely with
25 Oglala Sioux Tribe for the renewal of Crow Butte's

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1 license?

2 MR. CATCHES-ENEMY: I think the word
3 "solely" is in regards to that project, not to Oglala
4 Sioux Tribe specific only.

5 CHAIR GIBSON: Very well. So let me put
6 that in my own words to make sure I understand it. So
7 essentially what you're saying is you would have been
8 fine with a consultation process that involved other
9 tribes, but whatever the consultation was, it should
10 have been limited to a discussion with those tribes
11 about possible tribal cultural properties within the
12 license renewal area. Is that a fair statement?

13 MR. CATCHES-ENEMY: Yes, because at the
14 beginning of the consultation meetings, we were
15 discussing, I believe, three or more projects. One on
16 Dewey-Burdock and another uranium mine besides Crow
17 Butte here. And we have no objections to be sitting
18 in a consultation meeting with some of our fellow
19 tribes.

20 CHAIR GIBSON: Very well, thank you. Mr.
21 Yellow Thunder, let me just make sure. Do you agree
22 with the statement Mr. Catches-Enemy just made, that
23 that would be the appropriate approach and that was
24 the concern?

25 MR. YELLOW THUNDER: Yes, I do.

1 CHAIR GIBSON: You have to speak into the
2 mic. We really can't hear you. I'm sorry.

3 MR. YELLOW THUNDER: Yes, yes, I do.

4 CHAIR GIBSON: Okay. Thank you. All
5 right, Mr. Catches-Enemy, I'd like to go back to the
6 June 7 to 9, 2011 meeting, if you can remember that.
7 And if it would help, we can go to INT053. You don't
8 have to refer to this if you don't want to, but if you
9 want to, this is a transcript of that meeting.

10 In that -- during the course of that
11 meeting or in that transcript, you stated that you
12 helped initiate the meeting. Is that correct?

13 MR. CATCHES-ENEMY: As far as telephone
14 and email communications come, as far as having
15 reviewed the agenda, as far as I guess playing host
16 because we're the nearest tribe to the facilities, all
17 those projects I was talking about, then we did assist
18 with that.

19 CHAIR GIBSON: Very well. Thank you. And
20 you also wrote some letters during 2010 and early 2011
21 to set up the meeting. Is that correct?

22 MR. CATCHES-ENEMY: Yes.

23 CHAIR GIBSON: And I think you said, and
24 you helped organize the agenda for the meeting, too.
25 Is that right?

1 MR. CATCHES-ENEMY: I believe the agenda
2 that was sent to us was NRC staff driven and in order
3 to play host for a consultation meeting which involved
4 several other tribes, then we needed to have some kind
5 of a culturally appropriate agenda items included.

6 CHAIR GIBSON: Thank you. Just one
7 second, I can delete some of these questions because
8 you just answered them. Thank you.

9 All right, now I can go back to Mr.
10 Goodman. Yes, sir, Mr. Goodman, I would like to look
11 at the regulatory basis that underpins this entire
12 process and specifically Section 106 of the National
13 Historic Preservation Act.

14 It establishes government-to-government
15 consultation and that is to occur so the federal
16 agency can acquire information concerning the
17 existence of potential traditional cultural properties
18 within the subject area, correct?

19 MR. GOODMAN: That's included, yes, Your
20 Honor.

21 CHAIR GIBSON: And there is a regulation
22 of the Advisory Council on Historical Properties which
23 is 36 CFR 800.2(c)(2)(a) which we have copies of and
24 which we'll hand around to you and to counsel. You
25 are probably familiar with this, but you may not have

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1 memorized the regulatory nomenclature. Now that Judge
2 Carlin has left, there aren't too many of us that
3 remember the exact regulations.

4 MR. GOODMAN: If you didn't have copies I
5 would have had the first opportunity to open my CFR,
6 but unfortunately I don't.

7 CHAIR GIBSON: Okay.

8 MR. GOODMAN: But we will gladly make a
9 copy.

10 CHAIR GIBSON: Mr. Desai, could you be
11 sure the witness has a copy. Oh, he's getting one.
12 Never mind.

13 Does that ring a bell for you, sir?

14 MR. GOODMAN: Oh, it rang a bell from the
15 beginning, Your Honor.

16 CHAIR GIBSON: Good.

17 MR. GOODMAN: I just wanted to open CFR.
18 That was all.

19 CHAIR GIBSON: I know, I know you're
20 anxious to do that. We may give you a chance, too, so
21 don't -- just hold your horses.

22 Now as the staff's expert on the Section
23 106 process, you are familiar with this regulation,
24 correct, sir?

25 MR. GOODMAN: Absolutely, Your Honor.

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1 CHAIR GIBSON: Okay, and it states that
2 "The agency official shall ensure that consultation in
3 the Section 106 process provides a reasonable
4 opportunity to identify its concerns about historic
5 properties, advise on the identification and
6 evaluation of historic properties, including those of
7 traditional, religious, and cultural importance,
8 articulate its views on the undertakings effects on
9 such properties, and participate in the resolution of
10 adverse effects." Did I read that correctly?

11 MR. GOODMAN: I think you left out the
12 Hawaiian group, but yes, I mean nothing you said was
13 incorrect.

14 CHAIR GIBSON: Okay. Well, I should have
15 said dot dot dot, but you know, fair enough.

16 Mr. Deucher, could you pull up INT053 on
17 page 1, please?

18 Now this an informal meeting transcript of
19 a meeting that occurred on Wednesday, June 8, 2011.
20 Is that correct, sir?

21 MR. GOODMAN: Yes, Your Honor.

22 CHAIR GIBSON: Okay. And you attended
23 this meeting. Is that correct?

24 MR. GOODMAN: I was present, Your Honor,
25 yes.

1 CHAIR GIBSON: Do you recall an NRC member
2 named Kevin Hsueh also being present?

3 MR. GOODMAN: I hope so. He was my boss
4 for a while.

5 CHAIR GIBSON: Good, good. And he stated
6 that "A purpose of the National Historic Preservation
7 Act is to take into account the effects of our
8 licensing actions on historic properties and that we
9 need to consult with consulting parties and to proceed
10 to identify historic properties." Does that sound
11 like something Mr. Hsueh said?

12 MR. GOODMAN: Yes, Your Honor.

13 CHAIR GIBSON: Okay, great. And I assume
14 you agree with him, that those are the purposes of
15 consultation with tribes, correct?

16 MR. GOODMAN: Certainly. I mean
17 identification is one of the steps in 106, so I
18 wouldn't say it's the only purpose.

19 CHAIR GIBSON: Let me rephrase that. At
20 this stage of your discussions with the Oglala Sioux
21 Tribe, the identification would have been the primary
22 purpose of consultation, is that correct?

23 MR. GOODMAN: Yes, Your Honor.

24 CHAIR GIBSON: Fair enough. And the tribe
25 is a consulting party to the Nuclear Regulatory

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1 Commission, correct?

2 MR. GOODMAN: The tribe is a consulting
3 party for this project, yes, Your Honor.

4 CHAIR GIBSON: All right. Now if we could
5 go back to the EA which is NRC010, Mr. Deucher, at
6 page 69.

7 I assume you're familiar with this, Mr.
8 Goodman?

9 MR. GOODMAN: Yes, Your Honor.

10 CHAIR GIBSON: Good. There is a reference
11 here to a meeting. This is a June 8 meeting.

12 MR. GOODMAN: I'm sorry, did you need to
13 me --

14 CHAIR GIBSON: No, I just wanted you to
15 confirm there is a reference here to a meeting,
16 correct?

17 MR. GOODMAN: Sorry. I was waiting for
18 you, you were waiting for me. I'm sorry, Your Honor.

19 CHAIR GIBSON: Not a problem.

20 MR. GOODMAN: Yes. Confirmed.

21 CHAIR GIBSON: Not a problem. Now the
22 meeting to which this refers, although it says June 8,
23 actually occurred between, there's actually reference
24 to June 7th as well. So there was actually a meeting
25 on June 7, 8, and 9. Is that correct during 2011?

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1 MR. GOODMAN: There was a public meeting
2 on one of the days and there were several site visits.
3 But it took place over that period of time. Yes,
4 Your Honor.

5 CHAIR GIBSON: And the meeting occurred
6 not just with the Oglala Sioux Tribe, but with several
7 tribes, is that correct?

8 MR. GOODMAN: It is correct, Your Honor.

9 CHAIR GIBSON: Okay. And it states on
10 this page that "The purpose of the meeting was to help
11 the NRC staff identify tribal historic sites and
12 cultural resources that may be affected by actions
13 associated with the renewal of the CBR facility." Did
14 I read that correctly?

15 MR. GOODMAN: You did, Your Honor.

16 CHAIR GIBSON: Or as you stated in your
17 direct testimony on page 61, "The purpose of this
18 meeting was to gather and share information with the
19 consulting parties pertaining to Section 106 of the
20 NHPA." Right?

21 MR. GOODMAN: Correct.

22 CHAIR GIBSON: In conjunction with the
23 June meeting specifically, you made a visit to the
24 Crow Butte facility on June 7. Is that correct?

25 MR. GOODMAN: That is correct, Your Honor.

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1 CHAIR GIBSON: And you held an information
2 meeting on June 8. Is that correct?

3 MR. GOODMAN: Yes, Your Honor.

4 CHAIR GIBSON: And you made a visit to
5 Powertech on June 9. Is that correct?

6 MR. GOODMAN: It is, Your Honor.

7 CHAIR GIBSON: Starting with the June 17,
8 2011 tour of Crow Butte, there was no transcript made
9 of that visit, is that correct?

10 MR. GOODMAN: Yes, Your Honor. Your
11 Honor, it was less of a meeting and more of -- and we
12 got into vans.

13 CHAIR GIBSON: Right. But there was as
14 trip report prepared for it, correct?

15 MR. GOODMAN: Yes, Your Honor.

16 CHAIR GIBSON: And that trip report is
17 NRC050. Could we get that, Mr. Deucher? Thank you,
18 sir.

19 If you could turn to page 6 of that,
20 please. These are field notes with respect to the
21 Cameco Resources, Inc. That's the Crow Butte site,
22 correct?

23 MR. GOODMAN: Yes, Your Honor.

24 CHAIR GIBSON: It states that during the
25 June 7, 2011 site visit to Crow Butte, one activity

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1 included a PowerPoint presentation on the site by
2 Cameco which is Crow Butte's parent, correct?

3 MR. GOODMAN: That is correct.

4 CHAIR GIBSON: And Mr. Deucher, if we
5 could go to the next page, sir. There was another
6 activity included was the bus tour you just mentioned,
7 correct?

8 MR. GOODMAN: Yes, Your Honor.

9 CHAIR GIBSON: I take it your intention at
10 the time was for the bus tour to serve as a means by
11 which the tribes could obtain information about
12 possible tribal cultural resources on the Crow Butte
13 site. Is that correct?

14 MR. GOODMAN: With the one exception that
15 NRC certainly did not consider that to be a TCP
16 survey. This meeting was just to gather information.
17 But with that caveat said, your statement is accurate,
18 Your Honor.

19 CHAIR GIBSON: For both sides? Gather
20 information for both sides to be able to gather
21 information, correct?

22 MR. GOODMAN: Oh, yes, Your Honor.

23 CHAIR GIBSON: Okay. Very well.
24 Continuing on down there on page 7. The trip report
25 states "Time to tour to sites was constrained because

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1 the driver got lost and was not available after 4
2 p.m." Is that correct.

3 MR. GOODMAN: I do remember that, Your
4 Honor.

5 CHAIR GIBSON: And you were probably
6 feeling like you were snakebit that day, weren't you?
7 Okay. In fact, on page 7 of the trip report states
8 that "The bus drove to various sites." Is that
9 correct?

10 MR. GOODMAN: Yes.

11 CHAIR GIBSON: So this was not just the
12 Crow Butte license renewal site, correct?

13 MR. GOODMAN: No, Your Honor.

14 CHAIR GIBSON: Okay.

15 MR. GOODMAN: Sorry, no, it was not just
16 license renewal. No as in I'm disagreeing with your
17 statement.

18 CHAIR GIBSON: Okay. Very well. And also
19 on page 7 it states that "The bus tour paused for
20 through-the-window photos." Is that correct?

21 MR. GOODMAN: Yes, Your Honor.

22 CHAIR GIBSON: And through the window to
23 me means you could take pictures from the window of
24 the bus, correct, but not get out?

25 MR. GOODMAN: Yes, Your Honor.

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1 CHAIR GIBSON: Okay. And in fact, there
2 was never a chance for anyone from the tribes to get
3 off the bus at the license area, correct?

4 MR. GOODMAN: At that point in time, I do
5 not believe so, Your Honor.

6 CHAIR GIBSON: Okay, and let me just say
7 gratuitously that that's no reflection adversely on
8 Crow Butte. They have a business to run and you all
9 were taking the bus tour and in order for them to get
10 out it might have required quite a bit of change for
11 them to their operation. So no one is criticizing
12 Crow Butte in this regard. It just was not possible
13 for you to get these people off to take pictures.

14 MR. GOODMAN: That's the case, Your Honor.

15 CHAIR GIBSON: Okay.

16 MR. GOODMAN: And thank you for that
17 clarification.

18 CHAIR GIBSON: Now the upshot of this was
19 as noted on page 7 of the trip report that "The tribes
20 complained that the bus tour focused on European
21 historical sites." Is that correct?

22 MR. GOODMAN: Yes.

23 CHAIR GIBSON: And I take it that European
24 historical sites would be in contradistinction to
25 aboriginal historical sites. Is that correct?

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1 MR. GOODMAN: That's something I can
2 certainly answer, yes, Your Honor. If you want to get
3 into the specific nature of the European sites, I will
4 refer to Dr. Nickens. But your statement, I can
5 confirm, yes.

6 CHAIR GIBSON: Well, you know, let's just
7 -- since Dr. Nickens is here, let's just let him go
8 ahead and advise us about the -- in short, if you can
9 briefly explain the difference a European historical
10 site and an aboriginal historical site, sir.

11 DR. NICKENS: An aboriginal would refer to
12 Native American groups, whether in the prehistoric
13 period or the following period. The other day, on
14 Monday, the testimony included a discussion of
15 prehistoric versus historic. In this region, we would
16 probably prefer or refer to terms such as pre-contact
17 and post-contact. So post-contact would be the period
18 beginning with the fur trade when the Euro-Americans
19 started entering the area, culminating with the
20 homesteading and town building and so forth.

21 CHAIR GIBSON: Okay. Very well. And let
22 me just ask either Mr. Catches-Enemy or Mr. Yellow
23 Thunder, if either one of you agrees or disagrees with
24 Mr. Nickens' characterization of the distinction
25 between a European historical site and an aboriginal

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1 historical site. Are you okay with the way he
2 described it or do you think it's something different
3 you want to amplify in any way? Be sure and speak
4 into the mic now.

5 MR. YELLOW THUNDER: We've always referred
6 our ancestral sites more in relation to our culture
7 being stone features or scatters or hearths or
8 burials, things of that nature. The European type of
9 issues with regards to old homesteads or wagon wheels
10 or old harnesses, linkage to harnesses, try to make a
11 clear distinction between the two.

12 CHAIR GIBSON: And just to be sure, yes,
13 sir, yes, sir. Go ahead.

14 MR. CATCHES-ENEMY: I just wanted to add
15 on that there's no direct like a chronological time
16 period similar to how archeological time periods are
17 conveyed.

18 CHAIR GIBSON: Okay. So what we might
19 call an aboriginal historical site might refer to
20 properties that would be in the soil or whatever after
21 there had been contact with Europeans. Is that
22 correct?

23 MR. CATCHES-ENEMY: Yes, using the word
24 historical.

25 CHAIR GIBSON: So your distinction between

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1 aboriginal and European historical sites really refers
2 more to whether it was something related to European
3 culture or something that was related to aboriginal
4 culture. Is that a fair statement, regardless of when
5 it might have been placed there?

6 MR. CATCHES-ENEMY: Yes. A clear
7 distinction would be that our ancestral artifacts, so
8 to speak or whatever, were before the European because
9 we had been here for centuries, thousands of years
10 before, prior.

11 CHAIR GIBSON: Okay. I think there's
12 probably no question that if there is an historical
13 artifact there before there was European contact, it's
14 definitely going to be aboriginal.

15 What I'm hearing though is a little bit of
16 distinction between what you two guys are saying and
17 maybe it's just my hearing, but I get the impression
18 that you're saying that if it's -- if there's been
19 European contact, then you might not call it
20 aboriginal, but in your case you're saying once
21 regardless of when there was European contact, if it
22 relates to the Oglala Sioux Tribe or the other tribes
23 that might have been there, that would still be
24 considered an aboriginal historical artifact. Are you
25 guys saying the same thing or am I not just hearing

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1 right?

2 MR. CATCHES-ENEMY: Well, I think we're
3 both saying the same thing, except we're just
4 referring to different time periods that ancestral
5 historical artifacts or whatever are the same, whether
6 they are before European or after European contact.

7 CHAIR GIBSON: So it sounds like you are
8 saying the same thing. Okay.

9 Dr. Nickens, hearing their explanation, do
10 you -- are you completely, you guys completely
11 congruent?

12 DR. NICKENS: Yes, Your Honor. No
13 disagreement.

14 CHAIR GIBSON: So all three of you are in
15 agreement. So now Mr. Goodman, we know what a
16 European and aboriginal historical site is. Now, let
17 me ask you, as the presumed author of this or at least
18 the person who supervised the preparation of this, did
19 you prepare this?

20 DR. NICKENS: I can add to that, Your
21 Honor. I was invited to this consultation meeting,
22 but because of a prior commitment was unable to
23 attend. A staff person from our office, SC&A attended
24 the meeting in my stead. And took copious notes which
25 this trip report -- that's where that came from.

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1 Basically, she was taking notes for me, so they're
2 very detailed.

3 CHAIR GIBSON: And so it would be fair to
4 say that this description of European historical sites
5 was completely consistent, however, with what the
6 three of you had been talking about?

7 DR. NICKENS: I see no issue here, Your
8 Honor, in terms of Euro-Americans, the term I prefer.
9 Yes, she's talking about white homesteading, roads,
10 towns, railroads and that sort of thing.

11 Back to your earlier comment, in the
12 historic period or the post-contact period, certainly
13 Native American sites continue up until today, so
14 there would be a distinct difference between a
15 homestead taken out by a Euro-American and even a
16 homestead on the reservation which would be clearly
17 Native American in origin.

18 CHAIR GIBSON: Very well. Thank you.
19 Okay. Let's go to the June 8th meeting. And I
20 believe we have a transcript of that, Mr. Deucher,
21 which is INT053. And we're on page 181 of that
22 exhibit which is 182 of the pdf.

23 There was a Tribal Historic Preservation
24 Officer for the Cheyenne River Sioux Tribe whose last
25 name was Vance. Is that's correct?

1 MR. GOODMAN: That's correct, Your Honor.

2 CHAIR GIBSON: And he was present on this
3 bus tour, is that right?

4 MR. GOODMAN: He was present at the
5 meeting for sure. I believe he was present on the --
6 I'm positive he was present on the bus tour to
7 PowerTech which have me no reason to doubt he was
8 also, but it's been a few years. I can't remember and
9 I don't know if he was specifically on my bus.

10 CHAIR GIBSON: Fair enough. Well, assume
11 with me for the minute that Mr. Vance was telling the
12 truth here. He does say well, like yesterday, we
13 drove around the perimeter of the Crow Butte facility.

14 MR. GOODMAN: I could have read that first
15 and then confirmed that he was on the bus tour. I'm
16 sorry.

17 CHAIR GIBSON: So you wouldn't dispute
18 that Mr. Vance was on that bus tour then.

19 MR. GOODMAN: Certainly not, Your Honor.

20 CHAIR GIBSON: Okay. Thank you. And then
21 he says, "And we didn't really get, you know, an
22 opportunity and the same with North Trend." So
23 essentially he's complaining about the limited scope
24 of the bus tour, is that correct?

25 MR. GOODMAN: Yes, that would be my

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1 assessment, Your Honor.

2 CHAIR GIBSON: So considering that the bus
3 tour had ended at four. The bus driver got lost and
4 no one was allowed to get out of the bus, you can't
5 really say that this tour afforded the tribes a
6 meaningful opportunity to offer their views on
7 cultural resources on the Crow Butte site under the
8 National Historic Preservation Act?

9 MR. GOODMAN: As a unique entity,
10 certainly not, Your Honor. I would agree with that
11 statement. The only caveat I would provide is that
12 that wasn't the only opportunity that we gave.

13 CHAIR GIBSON: Fair enough, but we're only
14 talking about this one, Mr. Goodman. We'll get to the
15 others, I promise you, and you'll have an opportunity
16 to explain how those might have afforded them a
17 meaningful opportunity, fair enough?

18 MR. GOODMAN: Great, Your Honor. We're on
19 the same page.

20 CHAIR GIBSON: Let's continue with the
21 June 8, 2011 meeting itself which is on 053. The
22 meeting took place in a building and was mostly a
23 series of presentations to the tribes about the site.
24 Is that correct?

25 MR. GOODMAN: About the NRC, in general,

1 Your Honor, and about the sites in general. That's
2 correct.

3 CHAIR GIBSON: Yes, the NRC also explained
4 sort of who they were and what they do, correct?

5 MR. GOODMAN: Yes.

6 CHAIR GIBSON: Okay.

7 MR. GOODMAN: Correct, Your Honor, sorry.

8 CHAIR GIBSON: No, that's fine. We
9 reviewed the transcript in detail which is roughly 200
10 pages in length. The first half of the meeting
11 appears mostly to be introductions of the participants
12 and presentations by the NRC staff. You would agree
13 with that, wouldn't you, sir?

14 MR. GOODMAN: Yes, Your Honor.

15 CHAIR GIBSON: Once the introductions of
16 the participants and the presentations by the NRC
17 staff were completed, the second half of the meeting
18 appears to be just general comments by the tribes,
19 followed by additional explanation by the NRC staff
20 about the license application sites, one of which was
21 the Crow Butte license renewal area. Would you agree
22 with that?

23 MR. GOODMAN: I would, Your Honor.

24 CHAIR GIBSON: Okay. Now during the
25 course of this meeting and these discussions at the

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1 meeting, a recurring theme on the part of the tribes
2 was the possibility of conducting a TCP survey. Is
3 that correct?

4 MR. GOODMAN: Yes, Your Honor.

5 CHAIR GIBSON: I have just been handed a
6 note and sometimes it may be hard for the court
7 reporter to follow you. You all weren't here earlier.
8 But if you could try to remember, because I may not
9 ask your name. If you could remember to say your name
10 before you say something. The court reporter will
11 make sure he's getting it because he's trying to make
12 a transcript. He's a very good court reporter, but
13 can't get everything.

14 Now on pages 183 and 185 of the
15 transcript, you're welcome to read this in detail, Mr.
16 Goodman, if you need to, but it appears from my
17 reading of these pages that the tribes indicated they
18 were unable to provide the NRC staff with specific
19 feedback about any cultural sites without first doing
20 a TCP survey. Does that sound right to you, sir?

21 MR. GOODMAN: More than sound right, Your
22 Honor. That's right.

23 CHAIR GIBSON: Okay. And if we could go
24 back to the Environmental Assessment, NRC010 at page
25 69.

1 MR. GOODMAN: 69 red or 69 black?

2 CHAIR GIBSON: I believe we're going to go
3 with 69 in the red version which is a pdf.

4 MR. GOODMAN: I didn't even need to ask,
5 Mr. Deucher had it up.

6 CHAIR GIBSON: He's a mentalist no doubt.
7 It states there that four TCPs were identified as a
8 result of the June 2011 meeting as supplemented by
9 literature searches. Is that correct?

10 MR. GOODMAN: Specifically, which
11 paragraph, just so I'm on the same page as you. Oh,
12 at the bottom.

13 CHAIR GIBSON: Got it.

14 MR. GOODMAN: Got it.

15 CHAIR GIBSON: Fantastic. That's what it
16 says, right?

17 MR. GOODMAN: Yes, Your Honor.

18 CHAIR GIBSON: Very well. The first TCP
19 was the Crow Butte site itself which is described in
20 the EA as the site of a legendary 1849 battle between
21 members of the Lakota and the Crow Tribes. Is that
22 correct?

23 MR. GOODMAN: Yes, Your Honor.

24 CHAIR GIBSON: We could scroll to the next
25 one, Mr. Deucher. Before we do the citation, in the

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1 EA is to literature documents. So this finding was
2 actually based on a literature search, but not on
3 anything that was discussed at the June 2011 meeting,
4 correct?

5 MR. GOODMAN: I'm going to have Dr.
6 Nickens answer that question.

7 CHAIR GIBSON: Yes.

8 DR. NICKENS: That's incorrect, Your
9 Honor. All this information for these -- and let me
10 make a quick correction, if I could.

11 CHAIR GIBSON: Yes, sir.

12 DR. NICKENS: We're using the term, TCP,
13 traditional cultural property. All of these places
14 would be called potential traditional cultural
15 properties.

16 CHAIR GIBSON: Would be called what?

17 DR. NICKENS: Potential --

18 CHAIR GIBSON: Potential.

19 DR. NICKENS: Potential.

20 CHAIR GIBSON: Thank you.

21 DR. NICKENS: Until such a property of
22 special importance to in this case, a Native American
23 group, goes through the entire National Register
24 identification process which includes the proper
25 documentation. Until it's determined either

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1 potentially or eligible for the National Register of
2 Historical Places, it's not a traditional cultural
3 property.

4 In my terminology, it's a place of special
5 importance, religious or cultural importance for
6 Native American groups.

7 CHAIR GIBSON: Okay. Fair enough.

8 MR. SMITH: Judge Gibson, Tyson Smith for
9 Crow Butte. Brief clarification. A moment ago, you
10 said when referring to the first bullet, you said the
11 Crow Butte site. It's, in fact, the Crow Butte, not
12 the site, not the location of the mine unit, just for
13 clarification.

14 CHAIR GIBSON: The Crow Butte.

15 MR. SMITH: Correct.

16 CHAIR GIBSON: Okay. Thank you for that
17 clarification, Mr. Smith. So the Crow Butte --

18 DR. NICKENS: Site, hill.

19 CHAIR GIBSON: I don't want to say the
20 Crow Butte site. I want to say Crow Butte. The Crow
21 Butte, how about that?

22 DR. NICKENS: Yes, sir.

23 MR. SMITH: Crow Butte butte.

24 CHAIR GIBSON: The Crow Butte butte.
25 Okay, fair enough.

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1 DR. NICKENS: Each of these potential
2 traditional cultural properties that are listed in the
3 EA were generated, the list was generated directly
4 from the Oglala experts that were on the bus tour as
5 outlined in the trip report.

6 CHAIR GIBSON: So this particular -- the
7 identification of the Crow Butte butte as being the
8 site of the 1849 battle between members of the Lakota
9 and Crow Tribes was information that the NRC acquired
10 during the course of these June 7, 8, and 9 meetings.
11 Is that what you're saying, sir?

12 DR. NICKENS: That's correct, Your Honor,
13 with the exception of the addition of the information
14 about the event and so forth as a result of the
15 subsequent literature search.

16 CHAIR GIBSON: Okay, but as far as the
17 Crow Butte butte itself being a matter that has
18 significance, that was something that you all learned
19 on either the bus tour or during the meetings. Is
20 that right?

21 DR. NICKENS: That's correct.

22 CHAIR GIBSON: Okay. So the fact that it
23 had significance, historical significance under the
24 National Historic Preservation Act as a battle --
25 place where a battle occurred is something that you

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1 derived not from these meetings, but from a literature
2 search, is that a fair statement?

3 DR. NICKENS: Well, I would say that the
4 place was pointed out by the Oglala experts during the
5 course of the field trip as an important place. I'm
6 not sure exactly what information was imparted from
7 one party to the other at that point. In my role as
8 a technical analyst for the Environmental Assessment,
9 I already knew of the historical value associated with
10 the Crow Butte itself. And I would say here that this
11 is a good example of what I was talking about. Crow
12 Butte is a potential TCP. It's never been recorded,
13 documented, nor has it been evaluated as a TCP.

14 CHAIR GIBSON: Fair enough. Fair enough.
15 But you know, if I understand correctly, Dr. Nickens,
16 at this stage of the investigation that the NRC was
17 undertaking, you were interested in identifying
18 potential sites, is that correct?

19 DR. NICKENS: That is correct, very much
20 so.

21 CHAIR GIBSON: And so that's really what
22 this was about, was identifying potential sites and
23 then ultimately you came and concluded in the EA that
24 they were historical sites, is that correct?

25 DR. NICKENS: Yes, sir. And I would say

1 --

2 CHAIR GIBSON: Fair enough.

3 DR. NICKENS: -- that this is from my
4 interest as a technical analyst in identifying all
5 potential properties including potential TCPs that was
6 my goal through my surrogate in the field to learn
7 information from the tribal experts as we could and
8 we'd take that information, roll it into the EA and
9 learn more about it through the literature searches.

10 CHAIR GIBSON: Fair enough. And just so
11 the record will be complete, who was your surrogate
12 who was there?

13 DR. NICKENS: Dr. Anne Brophy, B-R-O-P-H-
14 Y.

15 CHAIR GIBSON: Thank you. The second of
16 the four items identified is a vision quest site, is
17 that correct?

18 DR. NICKENS: That's correct.

19 CHAIR GIBSON: And the EA states that it
20 is a long ridge adjacent to Crow Butte which was used
21 in earlier years for vision quests about one mile from
22 the project area. Is that right?

23 DR. NICKENS: That's correct, Your Honor.

24 CHAIR GIBSON: Okay. But the exact
25 location of this long ridge, about one mile east of

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1 the project, used for vision quests was not
2 specifically identified during these three June
3 meetings, was it?

4 DR. NICKENS: It's evident from the bus
5 tour and I assume it was pointed out. It's plainly
6 evident on the landscape.

7 CHAIR GIBSON: Okay. Now that actually
8 lies outside the project area, is that correct, sir?

9 DR. NICKENS: That is.

10 CHAIR GIBSON: The EA also indicates that
11 the NRC staff learned about important traditional
12 medicinal herbs in the project area which the tribe
13 maintains do not grow elsewhere. Is that correct?

14 DR. NICKENS: That is correct.

15 CHAIR GIBSON: And did you learn about
16 that during these June 7, 8, and 9 meetings?

17 DR. NICKENS: Yes.

18 CHAIR GIBSON: But you never located the
19 herbs, did you?

20 DR. NICKENS: We located the herbs? In
21 the impact analysis for the EA I did follow up on this
22 and we may want to wait on that, but I did evaluate
23 which herbs from a professional study in the 1990s
24 were important to Lakota people today, compared that
25 list with the plant list at the license site. That's

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1 all in the impact section, cultural resources for the
2 EA.

3 CHAIR GIBSON: But you didn't actually
4 locate them there, correct?

5 DR. NICKENS: No.

6 CHAIR GIBSON: And last, the EA states
7 that the staff learned from its research that the
8 general region in which Crow Butte is located is
9 steeped in history, especially from the time of Fort
10 Robinson and the Great Sioux Wars. Is that correct?

11 DR. NICKENS: That's correct.

12 CHAIR GIBSON: And was that something that
13 you learned during the June 7, 8, and 9, 2011 meeting?

14 DR. NICKENS: It was pointed out by the
15 tribal experts at that time. To me, it was already a
16 known fact.

17 CHAIR GIBSON: Okay. Very well. We've
18 been going at this for about an hour and a half, Mr.
19 Goodman. And I, at least, need to take a short break.
20 So we will stand in recess for ten minutes after we
21 use the rest room. And then we'll come back on the
22 record. We stand in recess.

23 (Whereupon, the above-entitled matter went
24 off the record at 2:40 p.m. and resumed at 2:56 p.m.)

25 CHAIR GIBSON: Okay. Having had a chance

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1 to look at it, Mr. Catches-Enemy, does it appear to
2 you to be an accurate listing of the instances of
3 which you are aware that the staff communicated with
4 the Oglala Sioux Tribe regarding the Crow Butte
5 license renewal?

6 MR. CATCHES-ENEMY: Without having
7 recorded my own chronological order of correspondence,
8 either through email or phone calls, I would hope that
9 that's correct.

10 CHAIR GIBSON: Got it. You don't see any
11 glaring omission or anything that they wrote down
12 there that you don't think happened. Would that be a
13 fair statement?

14 How about if I make that in two separate
15 statements. Do you see any glaring omission,
16 something that you're sure happened that isn't
17 recorded?

18 MR. CATCHES-ENEMY: Just scanning this
19 over, I'm not comfortable answering that.

20 CHAIR GIBSON: Okay, okay, fair enough.
21 Let me ask you of the communications that they did
22 record. Do you have any reason to dispute that that's
23 happened?

24 MR. CATCHES-ENEMY: With my brief scan,
25 no.

1 CHAIR GIBSON: Very well. All right, in
2 order not to delay this further, this is what I would
3 like to propose. You can take that list home with
4 you tonight. You and Mr. Yellow Thunder can both look
5 at it and tomorrow, you can if you don't mind, you can
6 let us know after you've had a chance to look at it,
7 when you don't have any pressure me sitting here
8 pushing you saying is that a glaring omission, you can
9 actually look at it and let us know if it appears to
10 you to be a complete list. And if there's something
11 you think didn't happen that did. Would that be fair?

12 MR. CATCHES-ENEMY: Either way, you know.
13 If I had another some -- I don't know -- amount of
14 time to be able to see all the documents that
15 correlate with each of these dates, you know, I feel
16 like I'm at a disadvantage of what was recorded by the
17 NRC staff.

18 CHAIR GIBSON: Right. I do not know if
19 you have -- would have access to a computer tonight,
20 but as I understand it, you can click on the links
21 that are by each of those entries and when you do that
22 it will call up an email or a phone memo or a letter
23 that was either received or sent.

24 MR. CYLKOWSKI: Your Honor, this is David
25 Cylkowski for the staff. Just to clarify, the ML

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1 numbers in this log are not all web links, so Mr.
2 Catches-Enemy would have to access a public ADAMS to
3 retrieve them.

4 CHAIR GIBSON: Oh. We'd have to access
5 public ADAMS. Okay, so what it is is it's a list of
6 the ADAMS numbers for the documents.

7 MR. CYLKOWSKI: For the documents for
8 which ADAMS numbers are available, yes.

9 CHAIR GIBSON: Okay, very well.

10 MR. REID: Your Honor, this is Andrew Reid
11 from the tribe. I think there's two questions and I
12 don't know if it's confusing Mr. Catches-Enemy, but
13 one is whether or not that contact occurred on that
14 date among those people. And another one is the
15 substance of the description of the contact and I
16 think it's the description that may be the bigger
17 problem because you're receiving the NRC's
18 description. He may have and the tribe may have a
19 different understanding of what occurred.

20 CHAIR GIBSON: All right. This is what
21 I'd like to do, Mr. Reid. I think what we'd like to
22 do is just set this aside. Tomorrow morning when we
23 reconvene, I'd like to just -- I'd like you all to at
24 least make an effort to look at it and perhaps you can
25 let us know if they appear to you to be on further

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1 review if it looks like there's something that should
2 be there that's not there, if there's something that
3 is reported as happening that did not happen or if the
4 descriptions are at odds with what actually happened;
5 any of those things, and if they didn't happen on
6 those days. So there's really four possibilities.
7 We'd just like to know if it appears to be accurate.
8 The staff is representing that it is accurate. But
9 you know, we would certainly like to get some
10 corroboration one way or another. Thank you.

11 MR. CATCHES-ENEMY: Your Honor?

12 CHAIR GIBSON: Yes, sir.

13 MR. CATCHES-ENEMY: This is Mike Catches-
14 Enemy. I have a question about some of the listings
15 on this table.

16 CHAIR GIBSON: Yes, sir.

17 MR. CATCHES-ENEMY: Which have a "not
18 available" or a "not applicable."

19 CHAIR GIBSON: Yes, sir.

20 MR. CATCHES-ENEMY: How would I be able to
21 --

22 CHAIR GIBSON: Tell you what. Let's see
23 if we can get Mr. Goodman to advise us what it is that
24 "not applicable" or "not available" means.

25 Mr. Goodman?

1 MR. GOODMAN: It means that phone calls
2 would have taken place and phone call lots which have
3 not been entered into ADAMS. NRC staff didn't feel
4 that it was specifically necessary to enter those in
5 when it could summarize them in the description.
6 There are also several emails that were not because
7 NRC felt that again it could provide an accurate
8 description of the email. And so when you see N/A it
9 just means there's no ML number associated with that
10 specific entry.

11 CHAIR GIBSON: Okay, very well. So that's
12 what it means. It means that they decided that it was
13 so insignificant that it didn't need further
14 amplification or it was just -- it was just a phone
15 call and they could make a very brief description and
16 that would take care of it. I'm not saying you have
17 to agree that's an acceptable solution. I'm just
18 telling you why it's not there. And that's what it
19 means. Does that make sense to you, sir?

20 MR. CATCHES-ENEMY: Yes.

21 CHAIR GIBSON: Okay, very well. So Mr.
22 Nickens, I realize you were not there, but your
23 surrogate was there. And it sounds to me like from
24 reading her trip notes and it sounds to me like during
25 the course of the bus tour she learned about the --

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1 that the Crow Butte butte had significance and that
2 there were some herbs there -- I'm sorry, that there
3 was a -- not about the Crow Butte butte. She learned
4 about the vision quest site which is off the property,
5 not on the renewal site. And she learned about a
6 claim that some of the tribes made that there were
7 herbs on site. I couldn't find anything else because
8 I took a break and looked at her trip notes and I
9 didn't see any reference to the other two items.

10 DR. NICKENS: To the what, sir?

11 CHAIR GIBSON: I didn't see any reference
12 to the other two items, to the Crow Butte butte or the
13 notion that this area is steeped in history. Perhaps
14 I missed something, but those are the only two things
15 I saw.

16 DR. NICKENS: Let me just review very
17 briefly. I'm pretty sure they're in there.

18 CHAIR GIBSON: Okay, very well.

19 DR. NICKENS: On page 8 of the NRC050
20 which is the 2011 trip report.

21 CHAIR GIBSON: Okay.

22 DR. NICKENS: The site of key treaties,
23 mid-page takes into account the use of the landscape
24 by the Lakota people. And what was the other one
25 besides the landscape?

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1 CHAIR GIBSON: It was that there was a
2 battle, I believe. I didn't see any reference to a
3 battle.

4 DR. NICKENS: At that point, I don't
5 believe the Lakota expert indicated anything about the
6 battle. That's on the basis of my own subsequent
7 research and literature review.

8 CHAIR GIBSON: Okay. Other than that it
9 was steeped in history, I mean that seems rather
10 generic to me, I don't know. You knew that this was
11 a potentially historic site, generally, right?

12 DR. NICKENS: Well, are we referring just
13 to Crow Butte or the entire landscape, sir?

14 CHAIR GIBSON: We're talking about Crow
15 Butte.

16 DR. NICKENS: My understanding from the
17 notes that she provided was that the Oglala expert
18 simply indicated that Crow Butte was an important site
19 culturally to them.

20 CHAIR GIBSON: Okay.

21 DR. NICKENS: I don't believe there's any
22 amplification.

23 CHAIR GIBSON: Okay, very well. Thank
24 you. Was it the butte or the license site?

25 DR. NICKENS: Crow Butte, the site.

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1 Excuse me, the place.

2 CHAIR GIBSON: Crow Butte butte.

3 DR. NICKENS: The thing that sticks up in
4 the air which we got the Crow Butte license area.

5 MR. GOODMAN: Every time we say -- sorry,
6 go ahead.

7 MR. SMITH: This is Tyson Smith, counsel
8 for Crow Butte. Could we perhaps agree on some common
9 nomenclatures so that the record is clear that when we
10 talk about for cultural resources and we're talking
11 about the license area, we refer to it as the license
12 area or Crow Butte Resources or CBR when we're talking
13 about the site and not Crow Butte. I'm concerned that
14 there's been some loose usage of that term and I don't
15 want there to be any confusion when we review the
16 record at a later point.

17 CHAIR GIBSON: Fair enough. How about the
18 Crow Butte butte? If we're referring to that, we know
19 we are not talking about the license area or to your
20 client. Is that fair enough?

21 MR. SMITH: Of course.

22 CHAIR GIBSON: Okay, fair enough. So
23 let's just limit ourselves to the Crow Butte butte
24 right now. Was that mentioned in her trip report?

25 DR. NICKENS: Yes, sir.

1 CHAIR GIBSON: As being a place where a
2 battle was fought?

3 DR. NICKENS: Yes, on page 50, excuse me,
4 NRC050, page 8.

5 CHAIR GIBSON: Yes.

6 DR. NICKENS: At the top where it says
7 "origin of name."

8 CHAIR GIBSON: Yes.

9 DR. NICKENS: There it talks about the
10 Crow Butte butte and the battle is mentioned there.

11 CHAIR GIBSON: Very well. Thank you.

12 MR. SMITH: Your Honor, Tyson Smith for
13 Crow Butte. Minor clarification just to make sure
14 we're clear that the butte itself is not located
15 within the license area.

16 CHAIR GIBSON: Thank you. Thank you very
17 much. So neither of the view quest or the Crow Butte
18 butte are within the license area?

19 DR. NICKENS: That's correct. The vision
20 quest ridge, it's located adjacent to the butte
21 itself.

22 CHAIR GIBSON: Okay. And the Crow Butte
23 license area was specifically identified, not the
24 entire Crow Butte potential area, but just the Crow
25 Butte license area that is the subject of this

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1 evidentiary hearing. Was that identified by her, to
2 her as being of historical significance?

3 DR. NICKENS: It was not within the
4 boundaries. The only thing was the potential presence
5 of some medicinal plants could be growing there.

6 CHAIR GIBSON: Medicine herbs. So if I
7 could sort of summarize that then, it sounds like the
8 thing that was present on site, on the Crow Butte, the
9 Crow Butte license area, potentially, were herbs?

10 DR. NICKENS: That is correct, Your Honor.

11 CHAIR GIBSON: And those medicinal herbs
12 were never found by you when you conducted some
13 further investigation, is that correct?

14 DR. NICKENS: I did not conduct field
15 botanical investigations. I did compare plant lists,
16 Lakota plant lists versus the site plant lists.

17 CHAIR GIBSON: And based on the site plant
18 list, you found nothing, is that a fair statement?

19 DR. NICKENS: I found -- in the ER, I
20 don't remember the exact number, about six plants that
21 were important to Lakota people according to Lakota
22 elders and were from the plant site list. And those
23 are -- there's a table in the affected environment
24 section of the EA, excuse me, the impact section that
25 lists those plants.

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1 CHAIR GIBSON: Thank you. So these are
2 the four things, the origin -- I'm sorry, I wasn't
3 speaking into the mic. The origin of name, the sacred
4 site, the medicinal herbs, and the site of key trees
5 and access were the things that were addressed during
6 the bus tour of the Crow Butte license area and other
7 Crow Butte areas. Is that a fair statement?

8 DR. NICKENS: And North Trend was my
9 understanding.

10 CHAIR GIBSON: And North Trend.

11 DR. NICKENS: My understanding is the
12 actual conversation from which these notes were
13 generated took place at the North Trend site wherein
14 the Lakota or Oglala experts pointed out in the
15 distance and discussed these places.

16 CHAIR GIBSON: And do you recall who those
17 experts were?

18 DR. NICKENS: Yes, sir. The late Wilmer
19 Mesteth who was then the Tribal Historic Preservation
20 Officer; Joyce Whiting, and Jackie Big Crow.

21 CHAIR GIBSON: Who was the last one?

22 DR. NICKENS: Jackie Big Crow.

23 CHAIR GIBSON: Thank you.

24 DR. NICKENS: Let me double check that I
25 didn't mess up those names. That's correct, Your

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1 Honor.

2 CHAIR GIBSON: Very well. Thank you. Mr.
3 Goodman, you were present.

4 MR. GOODMAN: I was, Your Honor.

5 CHAIR GIBSON: And on this June 7, 8, and
6 9 event.

7 MR. GOODMAN: Yes.

8 CHAIR GIBSON: And after the meeting now,
9 the predominant concern that was expressed by the
10 tribes was that it was necessary to take a TCP survey
11 of the license renewal area. Is that a fair
12 statement?

13 MR. GOODMAN: That's a fair statement.
14 application.

15 CHAIR GIBSON: And at that time, did the
16 NRC staff view that as critical to fulfilling the
17 NRC's Section 106 government-to-government
18 consultation process?

19 MR. GOODMAN: I would say very important
20 to necessary, maybe somewhere in those lines, but yes,
21 Your Honor. That's a fair statement.

22 CHAIR GIBSON: So you would say it might
23 not have been necessary, but it was very important?

24 MR. GOODMAN: Identification --

25 CHAIR GIBSON: You say necessary, but not

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1 very important. I'm --

2 MR. GOODMAN: Sorry, Your Honor,
3 identification of sites, I would say was necessary,
4 Your Honor. The specific method of identification of
5 those sites at that point, NRC staff felt a TCP survey
6 conducted by the tribes was very important, but I
7 would not say that specific at that point in time was
8 necessary. Does that make sense?

9 CHAIR GIBSON: So that time you did not
10 view it as necessary, but the tribes did.

11 MR. GOODMAN: The tribes felt the TCP
12 survey was a necessary way to identify historic
13 properties. In consultation, the NRC staff takes what
14 the tribes say very seriously and certainly took that
15 into their account of identification of historic
16 properties which I agree is a necessary step. And in
17 the end, NRC staff did opt for the TCP survey.

18 CHAIR GIBSON: Okay. Do you view the June
19 7 and June 8, 2011 meetings as in themselves
20 satisfying the government-to-government consultation
21 requirement under the National Historic Preservation
22 Act?

23 MR. GOODMAN: Yes, Your Honor.

24 CHAIR GIBSON: So when you conducted the
25 June 8th meeting, it was called an informal session,

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1 correct?

2 MR. GOODMAN: Correct, Your Honor.

3 CHAIR GIBSON: And in fact, that's what it
4 says on the first page of the transcript.

5 MR. GOODMAN: Informal information
6 gathering. Yes, Your Honor.

7 CHAIR GIBSON: And this was just the first
8 step in the whole 106 process. Is that correct?

9 MR. GOODMAN: I wouldn't say, Your Honor,
10 that it's the first step in the 106 process. That was
11 started when the initial consultation letters were
12 sent out. It certainly was one of the early steps in
13 the step one of identification of historic properties.

14 CHAIR GIBSON: Could we call up INT053,
15 pdf page 103? We could go back to page 101. Are we
16 on 101? There you go.

17 Mr. Goodman, at the bottom of that page,
18 on page 101, I'm reading, it says "The very same way
19 that sort of Brett and I have been talking about, we
20 are going to continue to gather information from a
21 whole lot of different sources and the information we
22 get from the tribes is a part of that and so
23 information provided by the tribes as to the location
24 and necessity of needing to do a survey, that is all
25 included and will all be included in our analysis."

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1 Next page. And as Brett said, "We are not
2 stopping tribal consultation here. This is just the
3 first step in the whole 106 process."

4 Doesn't that sound like the first step in
5 the 106 process is what you said it was?

6 MR. GOODMAN: That's what I said, yes,
7 Your Honor.

8 CHAIR GIBSON: Those transcripts are hell,
9 aren't they? Okay. On page 110 of the transcript you
10 also noted, "We're early on the 106 consultation
11 process." Do you want to see that?

12 MR. GOODMAN: I see it on the screen, yes.

13 CHAIR GIBSON: And on NRC050, the trip
14 report, apparently at this information gathering
15 meeting, you were at least recorded as saying that the
16 NRC staff repeatedly stated that "The week's
17 activities were only the start of consultation with
18 the tribes." Is that correct?

19 MR. GOODMAN: It is certainly correct what
20 I said, Your Honor.

21 CHAIR GIBSON: Okay. So at that point in
22 time, you had not fulfilled your government-to-
23 government consultation process, had you? This was
24 just the start?

25 MR. GOODMAN: This was the start -- it was

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1 our first face-to-face meeting. That is why I called
2 it the start in the legal of Section 106 following the
3 law, the first step would be the letters that were
4 sent. And so, instead of remaining very formal, I
5 think what I was trying to do is to be informal and to
6 let all of the tribes know that this was not going to
7 be the only time we were going to communicate with
8 them and that this would be continuing. But I did say
9 that this is the first step in the 106 process. That
10 was what I said and that is not entirely correct.

11 CHAIR GIBSON: And there was a subsequent
12 meeting in February of 2012, correct?

13 MR. GOODMAN: Yes, Your Honor.

14 CHAIR GIBSON: But there were no meetings
15 held between June 2011 and February 2012, correct?

16 MR. GOODMAN: With the caveat that you're
17 talking about face-to-face meetings, yes, Your Honor.

18 CHAIR GIBSON: So there was some
19 communication going on?

20 MR. GOODMAN: Yes, Your Honor.

21 CHAIR GIBSON: In that period of time, but
22 there was no face-to-face meeting until February 2012,
23 is that right?

24 MR. GOODMAN: Exactly, Your Honor. Yes.

25 CHAIR GIBSON: Now in your direct

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1 testimony, you have stated that the February 14 and 15
2 meeting was an official government-to-government
3 consultation meeting, correct?

4 MR. GOODMAN: Yes, Your Honor.

5 CHAIR GIBSON: And you've also testified
6 at page 62 of your testimony that this February 14 and
7 15 meeting, at this meeting, the tribes were given an
8 opportunity to share their ideas for identifying
9 properties and approaches that have worked in the
10 past, correct?

11 MR. GOODMAN: That's right, Your Honor.

12 CHAIR GIBSON: The Board was able to
13 locate only two staff documents about the meeting and
14 the record provided by the parties, a redacted
15 attendance sheet which is NRC042 and the OST
16 communications log kept by the contractor which
17 provides ML numbers for an attendance sheet, an
18 invitation and an agenda. Is that correct?

19 MR. GOODMAN: Yes, Your Honor.

20 CHAIR GIBSON: As we subsequently learned,
21 a transcript of the meeting is available, but it has
22 been classified as being SUNSI and so it not publicly
23 available. Is that correct?

24 MR. GOODMAN: That is correct, Your Honor.

25 CHAIR GIBSON: Let's look at the

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1 invitation and meeting agenda distributed by the
2 staff. The OST communications log 038 at page 3,
3 could we get that Mr. Deucher? It cites at page 3, it
4 cites ADAMS numbers for invitations to the meeting.
5 Is that right?

6 MR. GOODMAN: Yes, Your Honor.

7 CHAIR GIBSON: I'd like to make another --
8 I'd like for you to see something here. We'll call
9 this for identification purposes, we'll call this
10 Board Exhibit 18.

11 (Whereupon, the above-referred to
12 document was marked as Board Exhibit 18
13 for identification.)

14 Will you please distribute that, Mr.
15 Desai?.

16 Is the invitation up, Mr. Deucher? Very
17 well. Now in this invitation, you requested --- which
18 is Board Exhibit 18, you requested the tribes to come
19 to the meeting. Is that right?

20 MR. GOODMAN: Yes, Your Honor.

21 CHAIR GIBSON: And the NRC notes that
22 "Certain items are critical to its evaluation of the
23 Crow Butte license renewal site." Correct?

24 MR. GOODMAN: Yes, Your Honor.

25 CHAIR GIBSON: "These things include the

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1 types and descriptions of cultural resources on the
2 site significant to the tribes as well as the tribes'
3 views and approach on how best to identify and
4 document these potential places among other things."

5 Is that correct?

6 MR. GOODMAN: Yes, Your Honor.

7 CHAIR GIBSON: And the site again is the
8 Crow Butte renewal site, correct?

9 MR. GOODMAN: Or license area, yes, Your
10 Honor.

11 CHAIR GIBSON: But it also includes the
12 Crow Butte's North Trend expansion area and the
13 PowerTech site, correct?

14 MR. GOODMAN: It does.

15 CHAIR GIBSON: Now at page 62 of your
16 direct testimony, you testified that "in response to
17 this invitation over 15 tribes attended this February
18 14 and 15 meeting." Is that correct?

19 MR. GOODMAN: Yes, Your Honor.

20 CHAIR GIBSON: All right. Let's get out
21 the agenda. Could we distribute that? And we'll make
22 this Board Exhibit 19.

23 (Whereupon, the above-referred to
24 document was marked as Board Exhibit 19
25 for identification.)

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1 Now Mr. Goodman, you've been handed a
2 document that has been marked as Board Exhibit 19.
3 This is the agenda for the February 2012 meeting. Is
4 that correct?

5 MR. GOODMAN: Yes, Your Honor.

6 CHAIR GIBSON: The first item on the
7 agenda outside of the introductions was not set to
8 take place until 10:45. Is that correct?

9 MR. GOODMAN: Yes, Your Honor.

10 CHAIR GIBSON: Effectively, you have an
11 introduction, review of the agenda, and a break, okay?

12 MR. GOODMAN: I should have said I was
13 looking at it and then got back to you, but yes, Your
14 Honor. That's correct.

15 CHAIR GIBSON: Okay, fair enough. So at
16 10:45 we get into something substantive and that is
17 the presentation about PowerTech, right?

18 MR. GOODMAN: Correct, Your Honor.

19 CHAIR GIBSON: Also on the agenda are a
20 couple of hours set aside for a tribal caucus. Is
21 that correct?

22 MR. GOODMAN: Yes, Your Honor.

23 CHAIR GIBSON: And as you envisioned it,
24 this tribal caucus would be a time for the tribes to
25 talk among themselves, right?

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1 MR. GOODMAN: Yes, Your Honor.

2 CHAIR GIBSON: And then from 2:45 to 4:45,
3 you had set time aside to discuss the actual topics of
4 the meeting. Right?

5 MR. GOODMAN: Correct.

6 CHAIR GIBSON: Okay, on the second page or
7 second day which I guess is on page 3, beginning on
8 February 15, got it there?

9 MR. GOODMAN: Yes, Your Honor.

10 CHAIR GIBSON: Very well. The morning
11 appears to be presentations again by the Applicant or
12 its contractor which I take it is the SRI Foundation,
13 is that right?

14 MR. GOODMAN: SRI was the Applicant's
15 contractor.

16 CHAIR GIBSON: Is this what you are
17 referring to in your direct testimony at page 62 when
18 you state that "A tribal member and independent
19 contractor hired to identify historic properties make
20 a presentation about the specific approaches that have
21 been used"?

22 MR. GOODMAN: It is not, Your Honor.

23 CHAIR GIBSON: It is not. What is that?
24 What were you referring to?

25 MR. GOODMAN: Your Honor, what I'm

1 referring to is actually not on the agenda. It was a
2 presentation given by a tribal member about the
3 identification of historic properties.

4 CHAIR GIBSON: Do you recall who that
5 tribal member was?

6 MR. GOODMAN: I'm 99 percent sure it was
7 Tim Mentz, Your Honor.

8 CHAIR GIBSON: Who is with?

9 MR. GOODMAN: Can you refer to Mr.
10 Catches-Enemy? I think he will know.

11 CHAIR GIBSON: I'll tell you what, why
12 don't you hold on. I'll bet you Mr. Catches-Enemy
13 knows.

14 MR. GOODMAN: I bet he does.

15 CHAIR GIBSON: Mr. Catches-Enemy, could
16 you help Mr. Goodman out about the entity with which
17 this gentleman works or is a member of the tribe?

18 MR. CATCHES-ENEMY: He is a member of the
19 Standing Rock Sioux Tribe. He is -- I'm not sure if
20 he was at the time the Tribal Historic Preservation
21 Officer or not. And he had his own private consulting
22 company.

23 MR. GOODMAN: Thank you, Mr. Catches-
24 Enemy.

25 CHAIR GIBSON: Now, could you say his name

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1 one more time?

2 MR. GOODMAN: Tim Mentz.

3 CHAIR GIBSON: Mentz?

4 MR. GOODMAN: M-E-N-T-Z. I believe.

5 CHAIR GIBSON: H-E-M-T-Z?

6 MR. GOODMAN: M-E-N-T-Z.

7 CHAIR GIBSON: It sounds like Mentz to me.

8 MR. GOODMAN: Correct, Your Honor.

9 CHAIR GIBSON: Is that right, Mentz?

10 MR. GOODMAN: Yes, yes.

11 CHAIR GIBSON: Okay. So when we say it
12 was Mr. Mentz and his -- and a contractor, were you
13 referring to Mr. Mentz and his consulting company or
14 was this another contractor for an applicant that was
15 making a presentation?

16 MR. GOODMAN: The presentation that I was
17 referring to in my direct testimony was done by Tim
18 Mentz and he was representing how to identify historic
19 properties based on his expertise as the head of a
20 consulting company in which they do identify TCPs.
21 Does that make sense?

22 CHAIR GIBSON: Yes, it does.

23 MR. GOODMAN: Great.

24 CHAIR GIBSON: And so that's the person
25 and that would be the tribal member and independent

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1 contractor to whom you were referring?

2 MR. GOODMAN: Yes, Your Honor.

3 CHAIR GIBSON: Very well. Thank you. Now
4 the purpose of Mr. Mentz' presentation was to identify
5 -- was to make a presentation about the specific
6 approaches that have been used to identify historic
7 properties. Is that correct?

8 MR. GOODMAN: Yes, Your Honor.

9 CHAIR GIBSON: Do you know who hired him
10 to make that presentation or did he just do it gratis
11 or how did that come about?

12 MR. GOODMAN: Your Honor, as a tribal
13 member, he was invited to the meeting and participated
14 in the meeting and it came out during the meeting that
15 it was very important to the tribes to give staff some
16 background knowledge of how they identify TCPs and it
17 was done on good faith by Tim Mentz' part because he
18 said all of this information is confidential and we're
19 reluctant to share with government agencies. He did
20 out of good faith share this presentation with us. We
21 did receive it. All legal counsel for NRC had to
22 leave the room and the legal counsel that was present
23 at the meeting, the OST tribe had two lawyers, I
24 believe, that were present at the meeting. They also
25 both left and then the Applicant also left. So it was

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1 just the tribe -- it was Tim Mentz, tribal members and
2 NRC staff. And NRC staff agreed that what it was
3 receiving was confidential information on how unique
4 and information is gathered to identify TCPs.

5 CHAIR GIBSON: So your understanding was
6 that Mr. Mentz made this presentation gratis, but in
7 behalf of the -- all of the tribes to try to describe
8 how one would identify these historical properties,
9 what's worked and what hasn't sort of approach and
10 what to watch for and what not to watch for?

11 MR. GOODMAN: That was exactly my
12 understanding, except I don't want to speak, I think
13 you said, on behalf of all the tribes. There could be
14 some tribes that may not have appreciated that. I
15 can't speak for those tribes individually. Other than
16 that, yes.

17 CHAIR GIBSON: So it wasn't like the
18 tribes hired them and said you need to make this
19 presentation. It was like he said I'll make the
20 presentation and this is what we look for as native
21 peoples?

22 MR. GOODMAN: Yes, exactly, Your Honor.

23 CHAIR GIBSON: Fair enough?

24 MR. GOODMAN: Yes.

25 CHAIR GIBSON: Okay. And some of them may

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1 like them and some of them may like them, but
2 regardless, he made the presentation in order to try
3 to explain what really needs to happen.

4 MR. GOODMAN: Just like Judge Wardwell,
5 from what I remember, he's a very likeable guy.

6 CHAIR GIBSON: You guys are going to give
7 him such a big head. I'll tell you.

8 JUDGE WARDWELL: Can we highlight the
9 transcript on that last comment?

10 CHAIR GIBSON: Derailed my train of
11 thought. So did you learn a great deal at that
12 meeting yourself, Mr. Goodman?

13 MR. GOODMAN: Absolutely, Your Honor.

14 CHAIR GIBSON: About how to conduct a TCP
15 survey?

16 MR. GOODMAN: No, Your Honor. I'm in no
17 way qualified as an expert to identify specific sites
18 and I'm not a tribal member, so I certainly would not
19 be able to identify so I did not learn on how to
20 identify sites specifically. My knowledge that I
21 learned from that meeting was extensive in that just
22 sort of the approach of the tribes, how the tribes
23 feel about these sites and I'll leave it general
24 because I do want to honor his request that the
25 specifics are not included.

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1 CHAIR GIBSON: Absolutely. I do not want
2 you to divulge the substance of this meeting. In
3 fact, some of the things we're going to get into today
4 we may actually have to take in closed session. So
5 that's fine, that's fine. I just want to know whether
6 or not the information -- you said you didn't learn
7 how to do a TCP survey. Did the people who are more
8 knowledgeable from you on the staff learn how to do
9 one?

10 MR. GOODMAN: No, I would not say that,
11 Your Honor. I would say one of the big take aways
12 from that meeting is that TCP surveys are -- the
13 tribes have a unique expertise to identify these
14 surveys. So one of the big take aways was that staff
15 felt that it was very important to have a TCP
16 conducted by the tribes.

17 CHAIR GIBSON: Okay. To have a TCP
18 conducted by the tribes.

19 MR. GOODMAN: Correct, Your Honor.

20 CHAIR GIBSON: Great. Now recognizing
21 that it was very useful information that you acquired
22 that the other staff members acquired, developing some
23 sensitivity, probably, to some of the concerns that
24 the native peoples have, itself did not actually
25 identify any TCPs, did it?

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1 MR. GOODMAN: Exactly, Your Honor.

2 CHAIR GIBSON: Okay, very well. Now then
3 there's a couple of hours for tribal discussion and
4 input in the afternoon among all 15 tribes and that's
5 listed on page 4, correct?

6 MR. GOODMAN: Yes, Your Honor.

7 CHAIR GIBSON: Great. So if we boil this
8 down, you've got quite a lot of presentations which
9 may have been very useful. You have some consultation
10 among the tribes themselves. But it doesn't sound
11 like you have more than a couple of hours for
12 discussion and input from the tribes during this
13 February meeting.

14 MR. GOODMAN: I would disagree with that
15 slightly, Your Honor.

16 CHAIR GIBSON: About TCPs.

17 MR. GOODMAN: Yes. I would still disagree
18 with that slightly, Your Honor. The meeting did go
19 off agenda frequently and so there was a lot of time
20 over the course of those two days that ended up being
21 very helpful for the staff in gathering how the tribes
22 would like a TCP survey conducted.

23 CHAIR GIBSON: Was this meeting a
24 government-to-government meeting in which the tribes
25 were able to offer significant input?

1 MR. GOODMAN: I believe so, Your Honor.

2 CHAIR GIBSON: Was OST afforded an
3 opportunity to provide significant input at this
4 meeting?

5 MR. GOODMAN: Yes, Your Honor. Yes.

6 CHAIR GIBSON: For the license renewal
7 site?

8 MR. GOODMAN: Yes, Your Honor.

9 CHAIR GIBSON: So could you have stopped
10 at this point and met your consultation obligations
11 under 106?

12 MR. GOODMAN: No, I don't believe we --
13 well, we didn't stop at that point, but I would say
14 that under my read of the regulations that that was
15 not the last stab in identifying historic properties.

16 CHAIR GIBSON: And that is because the TCP
17 survey would have to be completed first. Is that
18 correct?

19 MR. GOODMAN: Depending if the staff at
20 that point was that a TCP survey should be conducted.

21 CHAIR GIBSON: Mr. Deucher, could you
22 please display Mr. Catches-Enemy's testimony which is
23 INT031 and on page 5?

24 MS. WHITE PLUME: I'd like to comment.

25 CHAIR GIBSON: Well, ma'am, I tell you

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1 what. We'll be glad to take comments from witnesses.
2 I don't think that you've been sworn in as a witness.

3 MS. WHITE PLUME: I have.

4 CHAIR GIBSON: You have been sworn in as
5 a witness? I'm terribly sorry.

6 MS. WHITE PLUME: That's with sacred
7 water.

8 CHAIR GIBSON: And we have already sworn
9 you in.

10 MS. WHITE PLUME: Yes.

11 CHAIR GIBSON: We've already sworn you in.
12 I will afford you an opportunity to speak in just a
13 minute, okay?

14 MS. WHITE PLUME: Yes.

15 MR. CYLKOWSKI: Your Honor, this is David
16 Cylkowski for the staff. To clarify, I don't believe
17 that Ms. White Plume has provided any testimony on
18 Contention 1 today.

19 CHAIR GIBSON: Okay. Fair enough. I'll
20 tell you what we'll do. Let me just finish this line
21 of questioning and then we'll take a brief recess and
22 try to resolve this issue because I don't want to go
23 off the rails here, but I don't want you to not be
24 able to testify if you can. So let's just hold it a
25 minute, okay?

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1 All right, Mr. Catches-Enemy. I think
2 we've got your testimony here, sir, on page 5. Now
3 you assert that the NRC requested a Statement of Work
4 from you, the Oglala Sioux Tribe at the February 14
5 and 15 meeting. Is that correct?

6 MR. CATCHES-ENEMY: I believe so.

7 CHAIR GIBSON: Did you know that the NRC
8 wanted a Statement of Work from you before that
9 meeting was held or did you learn about it during the
10 meeting or after the meeting?

11 MR. CATCHES-ENEMY: Based on what I
12 recall, it was during the meeting.

13 CHAIR GIBSON: During the meeting, you
14 were asked to submit a Statement of Work?

15 MR. CATCHES-ENEMY: Develop discussions
16 that developed through that meeting, came up with the
17 development of a scope of work of some type.

18 CHAIR GIBSON: All right. So before that
19 meeting, you didn't know that they wanted one. Is
20 that a fair statement?

21 MR. CATCHES-ENEMY: Yes.

22 CHAIR GIBSON: Okay. Now paragraph 18
23 here, you indicated that you objected to the roles
24 that the Applicant and its contractor, SRI, were
25 taking in the Section 106 process. Is that right?

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1 MR. CATCHES-ENEMY: Yes.

2 CHAIR GIBSON: And what was the objections
3 that was raised -- that were raised about the roles of
4 the Applicant and its contractor, SRI?

5 MR. CATCHES-ENEMY: That the development
6 of any type of survey to be conducted with the tribes
7 was going to be led by the Applicant and the
8 consultant and not the tribes.

9 CHAIR GIBSON: Very well. Thank you. And
10 did you raise those objections at the February --
11 well, let me just rephrase it. At what point in time
12 did you raise those objections about the role of the
13 Applicant and the contractor, SRI? Was it before this
14 February 14-15, 2012 meeting? Was it at the meeting?
15 Was it after the meeting? I'm just trying to get a
16 time frame for when you raised those objections, sir.

17 MR. CATCHES-ENEMY: Well, based on my
18 recollection of that meeting, because we were just
19 talking about the development of the survey at that
20 time, this is when these objections came up.

21 CHAIR GIBSON: And did you express those
22 objections at the time, at the February meeting or was
23 it after the meeting?

24 MR. CATCHES-ENEMY: I believe it was
25 during.

1 CHAIR GIBSON: During it. Okay. Mr.
2 Goodman, do you agree with Mr. Catches-Enemy's
3 characterization about the objections that he raised
4 at the meeting?

5 MR. GOODMAN: I can speak to the former,
6 Your Honor. I don't specifically remember. I don't
7 have that transcript memorized.

8 CHAIR GIBSON: Okay.

9 MR. GOODMAN: So I don't know if that
10 objection was made at that time. But it was made very
11 clear to the tribes before that meeting, during that
12 meeting, and after that meeting that Section 106
13 consultation would be performed by the NRC staff and
14 that at no point would a TCP survey be administered or
15 led by the Applicant or their subcontractor.

16 CHAIR GIBSON: Okay.

17 MR. GOODMAN: In essence, if an objection
18 had occurred at that meeting, that is what staff would
19 have said.

20 CHAIR GIBSON: Okay. Let me ask you this.
21 So there were several -- so regardless of who raised
22 it, there was a concern raised, is that correct, by
23 one or more tribes at this meeting or during this --
24 roughly this point in time, that the Applicant and its
25 contractor were involved in the process and they

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1 shouldn't be. And -- is that right?

2 MR. GOODMAN: Again, I wouldn't agree to
3 that entirely. I think the concern by the tribes that
4 we received was not that the Applicant was there at
5 all. The Applicant was there and providing background
6 information.

7 CHAIR GIBSON: Sure.

8 MR. GOODMAN: On the sites. And I believe
9 that once that was explained to the tribes, the tribes
10 were okay with that, but the rest of your statement is
11 true, Your Honor. The tribes were concerned that the
12 Applicant would control and run those activities.

13 CHAIR GIBSON: So it certainly wouldn't
14 surprise you if Mr. Catches-Enemy had said that at the
15 meeting because that was a concern expressed by
16 people, by folks from these tribes that the Applicant
17 and its contractor were involved?

18 MR. GOODMAN: Had that been brought up at
19 the meeting? No, it wouldn't have surprised me at
20 all.

21 CHAIR GIBSON: Very well.

22 MR. GOODMAN: And that sounds reasonable.

23 CHAIR GIBSON: Very well. And you
24 provided, you attempted to provide assurances to these
25 tribes who were present that the Applicant and its

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1 contractor were not involved in this consultation
2 process, but they were only there to provide
3 background information. Is that true?

4 MR. GOODMAN: I would say not the word
5 attempted, but the rest is true, Your Honor.

6 CHAIR GIBSON: You would say what?

7 MR. GOODMAN: I would say I didn't attempt
8 to do it. I would say I did do it, Your Honor. But
9 the statement is true.

10 CHAIR GIBSON: All right, well, that's
11 just lawyer talk. You attempted to communicate and it
12 may not have been communicated effectively, but that's
13 okay. You communicated that the Applicant and its
14 contractor were not involved in this process, but were
15 there to provide assistance.

16 MR. GOODMAN: Correct, Your Honor.

17 CHAIR GIBSON: And let me ask you, did you
18 -- does that square with your recollection, Mr.
19 Catches-Enemy, that there was -- concern was raised by
20 you and others that the Applicant and its contractor
21 were involved in this process and that Mr. Goodman
22 assured you that no, that as not the case, that the
23 Applicant and its contractor were only there to
24 provide information. I'm not saying you bought his
25 assurance, but I'm just saying do you recall that

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1 happening?

2 MR. GOODMAN: No, I don't.

3 CHAIR GIBSON: Okay, you don't recall
4 that. Very well. At this point, what I would like to
5 do is take a ten-minute break and we will go back on
6 the record. We need to resolve this other matter.

7 MR. CYLKOWSKI: Your Honor, if I may
8 quickly. Ms. White Plume is listed as a witness. I
9 apologize. I withdraw the earlier comment.

10 CHAIR GIBSON: Okay, very well. I think
11 the simplest thing to do then is we can -- we don't
12 have to go off the record. Good.

13 Ms. White Plume, you've previously been
14 sworn.

15 MS. WHITE PLUME: Yes.

16 CHAIR GIBSON: And you know that you're
17 still under oath. Let me ask you, you've been listed
18 as an expert in cultural resources and you have
19 provided testimony in this case.

20 Let me ask you first of all because you
21 sort of caught me off guard here. I was focusing on
22 some other things. Were you present at the meetings
23 in January of 2011?

24 MR. GOODMAN: June, Your Honor.

25 CHAIR GIBSON: I'm sorry, June 2011.

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1 MR. GOODMAN: Sorry to interrupt.

2 MS. WHITE PLUME: I'm commenting on the
3 February meeting --

4 CHAIR GIBSON: And we'll get to that in a
5 minute. I just want to know. You weren't present at
6 the June meeting though, correct?

7 MS. WHITE PLUME: No.

8 CHAIR GIBSON: Okay. And then there were
9 these meetings in February 14 and --

10 MS. WHITE PLUME: I'm sorry. I was at the
11 meeting that was held on the Pine Ridge Reservation,
12 but I did not go on the tours.

13 CHAIR GIBSON: Okay.

14 MS. WHITE PLUME: Yes.

15 CHAIR GIBSON: So you were present at the
16 meeting in June, but you weren't present at the
17 meeting in February?

18 MS. WHITE PLUME: I was present at the
19 meeting in February.

20 CHAIR GIBSON: You were present at both?

21 MS. WHITE PLUME: I just did not go on the
22 tours in June.

23 CHAIR GIBSON: And when we say tours, you
24 mean those bus tours?

25 MS. WHITE PLUME: Yes.

1 CHAIR GIBSON: Where you weren't able to
2 get off the bus.

3 MS. WHITE PLUME: I chose not to.

4 CHAIR GIBSON: Very well. Okay, now let
5 me ask you since you were present, do you recall a
6 concern being expressed, whether it was, generally,
7 that the Applicant and its contractor were actually
8 involved in the process and shouldn't be, a concern on
9 the part of the tribes. Do you recall that concern?

10 MS. WHITE PLUME: I recall that, but
11 that's not what I want to comment on.

12 CHAIR GIBSON: I know it's not. I know
13 it's not.

14 MS. WHITE PLUME: Okay.

15 CHAIR GIBSON: But I figured since you
16 were here I'm going to try to kill two birds with one
17 stone.

18 MS. WHITE PLUME: Okay.

19 CHAIR GIBSON: We got that. And do you
20 recall that being a concern?

21 MS. WHITE PLUME: Yes.

22 CHAIR GIBSON: And Mr. Goodman believes
23 that he provided assurances to the tribes that, in
24 fact, the contractor, the Applicant and its contractor
25 were not involved in the consultation process. And

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1 Mr. Catches-Enemy does not recall that. Do you have
2 any recollection about whether Mr. Goodman made some
3 kind of statement like that?

4 MS. WHITE PLUME: I don't recall that.

5 CHAIR GIBSON: You don't recall that
6 either.

7 MS. WHITE PLUME: No, I don't recall that.

8 CHAIR GIBSON: Okay. Very well. There
9 was a specific matter that piqued your interest and I
10 frankly don't know what it is, so I'm just going to
11 ask you. What piqued your curiosity, ma'am?

12 MS. WHITE PLUME: What I want to comment
13 on is the statement that the meeting in February was
14 a government-to-government consultation.

15 CHAIR GIBSON: Very well.

16 MS. WHITE PLUME: It was not. It was a
17 meeting with tribal THPO workers. There were no
18 government officials there. And as a matter of fact,
19 our tribal president made a statement that it was not
20 a government-to-government consultation and he left so
21 that it could not be considered a government-to-
22 government consultation.

23 CHAIR GIBSON: Very well. Thank you,
24 ma'am. Thank you for that.

25 MR. GOODMAN: Your Honor?

1 CHAIR GIBSON: Yes.

2 MR. GOODMAN: Can I make one small
3 correction?

4 CHAIR GIBSON: You can make a correction,
5 yes, sir.

6 MR. GOODMAN: All right, the president of
7 the Oglala-Sioux Tribe was never present at that
8 February meeting. I was a member of the board that
9 was present at that February meeting and then I
10 believe that she is correct, in that he did leave.

11 CHAIR GIBSON: Very well. Thank you.
12 Okay, all right, I think this actually will be a good
13 place to stop, so let's recess for ten minutes and
14 then we'll get back on the record.

15 (Whereupon, the above-entitled matter went
16 off the record at 3:51 p.m. and resumed at 4:05 p.m.)

17 CHAIR GIBSON: Back on the record now.

18 MR. GOODMAN: Your Honor.

19 CHAIR GIBSON: Yes, sir.

20 MR. GOODMAN: Mr. Goodman. Can I make a
21 clarification to a statement I made a little earlier?

22 CHAIR GIBSON: You can. I just want to
23 wait until Mr. Reid gets back.

24 MR. GOODMAN: Fair enough.

25 CHAIR GIBSON: Are we okay to proceed

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1 without Mr. Reid, Mr. Ballanco?

2 MR. BALLANCO: Yes, Your Honor.

3 CHAIR GIBSON: Here he comes. Very well.

4 Okay. You have a clarification to make.

5 Yes, sir.

6 MR. GOODMAN: You had asked the question
7 about the June meeting being government to government
8 and you had used the words "satisfied government to
9 government."

10 CHAIR GIBSON: Yes, sir.

11 MR. GOODMAN: And I had yes.

12 CHAIR GIBSON: Yes, sir.

13 MR. GOODMAN: That is not correct. I did
14 not hear the word "satisfied." I heard what I
15 interpreted to mean whether it was a government to
16 government meeting. NRC does consider it to be a
17 government to government meeting, but in no way does
18 that meeting satisfy consultation.

19 CHAIR GIBSON: Good. Well, thank you,
20 sir.

21 MR. GOODMAN: Yes.

22 CHAIR GIBSON: While we're on the topic of
23 government to government consultation, it's my
24 understanding that the chief or some high officer at
25 least of the Oglala Sioux Tribe was present at this

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1 meeting in February and then left. Is that what you
2 said?

3 MR. GOODMAN: A member of their tribal
4 council, Your Honor.

5 CHAIR GIBSON: A member of their tribal
6 council.

7 MR. GOODMAN: And I do not believe that
8 was the president at the time.

9 CHAIR GIBSON: A member of the tribal
10 council was present and left. Did he or she provide
11 you with -- Do you remember the name of the person?

12 MR. GOODMAN: I don't, Your Honor.

13 CHAIR GIBSON: It's okay. I'll bet Ms.
14 White Plume knows the name of the person. Could you
15 tell us, Ms. White Plume?

16 MS. WHITE PLUME: President John Yellow
17 Bird Steele.

18 CHAIR GIBSON: Okay. There you go. It
19 was a president, okay.

20 When the president left, did he apprise
21 you of any -- Did he give you any reasons why he was
22 vacating or you or anyone who worked with you for the
23 staff?

24 MR. GOODMAN: Not me specifically, Your
25 Honor.

1 CHAIR GIBSON: Yes, sir.

2 MR. GOODMAN: The feeling that I got from
3 talking with the other staff is that he was
4 frustrated, Your Honor.

5 CHAIR GIBSON: He was frustrated. And do
6 you know what the source of his frustration was or did
7 you have any understanding of what the source of his
8 frustration was? I realize you're not a mind reader.
9 Did you have any understanding about what the source
10 of his frustration was?

11 MR. GOODMAN: I can extrapolate, again not
12 specifically talking for him. At the beginning of the
13 meeting as we have sort of gone back and forth on,
14 there was some concern as to the role of the
15 Applicant. And there was a member of Crow Butte that
16 has since retired and his name was John Schmuck. And
17 there was a conversation between one of the tribes, at
18 least one of the tribes, and John Schmuck about the
19 role of the Applicant. It involved funding.

20 The Applicant did provide funding for the
21 tribes for this meeting. And so in essence it was a
22 concern that the funding would in turn complete
23 consultation. And staff completely disagreed with
24 that. The Applicant completely disagreed with that.
25 I believe the frustration was around that.

1 CHAIR GIBSON: And this is a variation of
2 the Golden Rule. He who has the gold makes the rules.
3 Therefore if somebody's providing you with money
4 you're going to be beholden to them. Is that
5 essentially the concern that you were hearing
6 expressed? I know you don't agree with it, but was
7 that the concern?

8 MR. GOODMAN: One of the concerns, yes
9 Your Honor.

10 CHAIR GIBSON: There was another concern?

11 MR. GOODMAN: There was another concern
12 that I believe was raised at the beginning. We had
13 brought in some security, some officers, there to
14 maintain that it would be a nonpublic government to
15 government meeting.

16 And tribes noted to us that they did not
17 appreciate that. So we ended up having them leave.
18 And they did not return to that meeting. But that was
19 another concern that I can recall.

20 CHAIR GIBSON: Okay.

21 Ms. White Plume, you have raised the
22 concern that the tribal president had left. Mr.
23 Goodman has explained his understanding of why he
24 left. Is Mr. Goodman correct? Was there anything
25 going on that caused the tribal president to leave the

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1 February 2012 meeting?

2 MS. WHITE PLUME: Yes.

3 CHAIR GIBSON: And what was that, ma'am?

4 MS. WHITE PLUME: To begin with, it was a
5 closed meeting and Nuclear Regulatory Commission
6 security tried to keep me from entering the meeting.
7 I entered anyway.

8 CHAIR GIBSON: Okay.

9 MS. WHITE PLUME: President Steele
10 informed them that I was accompanying him to represent
11 the voice of the people and that he wanted me to
12 speak. So the officials permitted me to stay without
13 throwing me out.

14 And President Steele expressed his concern
15 that it was being construed as a government to
16 government consultation and that that was not a
17 correct opinion and that it was not a government to
18 government consultation because for one thing he was
19 the only tribal president there and that he has no
20 authority. It has to be the tribal council has the
21 authority in our nation. His presence there may be
22 misinterpreted. He would leave the meeting in order
23 to make it perfectly clear that it was not a
24 government to government consultation.

25 The second part to that was that there

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1 were other tribal historic preservation officers at
2 the meeting like Mike said from Standing Rock and
3 Santee and different nations. And none of their
4 presidents were in the room. He did not want to
5 create the situation where people may interpret that
6 he was representing all of the Sioux tribes. He
7 doesn't. He only represents the Oglala Lakota.

8 He said for those reasons he was going to
9 leave because it was not government to government
10 consultation.

11 CHAIR GIBSON: Very well.

12 Now, Mr. Goodman, Ms. White Plume has
13 provided her explanation which is largely I think an
14 amplification of what you said. You would not dispute
15 what she said in any way, would you, sir?

16 MR. GOODMAN: No, Your Honor.

17 CHAIR GIBSON: Okay. Very well. Thank
18 you.

19 Now we're going to get into --

20 MR. GOODMAN: Sorry, Your Honor.

21 CHAIR GIBSON: Yes.

22 MR. GOODMAN: I would only dispute that it
23 was not a government to government meeting.

24 CHAIR GIBSON: I understand that you
25 viewed it as a government to government. I don't mean

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1 that at all. I just mean the view of the president
2 was that it could be construed as a government to
3 government. He didn't think it was a government to
4 government and he left for that reason.

5 MR. GOODMAN: I have no reason to disagree
6 with that.

7 CHAIR GIBSON: Okay. Fair enough. We're
8 good. I think we're good on this. Now I need to tell
9 you all that we are -- As Bill Murray said when he
10 looked in Dustin Hoffman's closet in Tootsie, I think
11 we're getting into a weird area here.

12 We are going to be talking about some
13 information that is in the transcript of the February
14 14, 2012 meeting. It is not a public document. And
15 we want to do everything we can to make sure it stays
16 not a public document.

17 But there are some -- So I am going to ask
18 you questions and I assure you that I'm not going to
19 ask you a question that would implicate any nonpublic
20 information. But I need to admonish you that in the
21 event there is anything about any nonpublic
22 information that you would have to disclose in order
23 to answer my question I would ask that you please let
24 me know that and we'll set that question aside and
25 cover it in a closed session where only we'll be

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1 talking. Do you all understand that?

2 (No verbal response)

3 Okay.

4 MR. REID: Your Honor.

5 CHAIR GIBSON: Yes.

6 MR. REID: This is Andrew Reid.

7 CHAIR GIBSON: Yes, Mr. Reid.

8 MR. REID: Two things. As we previously
9 asked that the transcript be admitted as an exhibit,
10 I'll renew that request.

11 CHAIR GIBSON: Very well.

12 MR. REID: And actually I think it's
13 necessary for the record at this point. The other
14 thing is just so the record is clear when you covered
15 the objections I think that the tribe was objecting
16 not only to the presence of the Applicant and their
17 contractor, but also to the NRC taking the lead in the
18 TCP. And I think that was not covered in your
19 questioning. But I just want to make sure there
20 wasn't any misunderstanding as to that.

21 CHAIR GIBSON: Okay.

22 MR. CYLKOWSKI: Your Honor, I would at the
23 very least ask that the Board makes sure a witness
24 confirms that statement because I don't believe that
25 was testified to.

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1 CHAIR GIBSON: No, it actually hasn't been
2 testified to. And just to be sure before we get into
3 this other thing, I'm going to ask that very question.

4 Mr. Reid, your last point was that -- His
5 objection completely threw me off. What was your last
6 statement that was not covered?

7 MR. REID: The way I understood Mr.
8 Catches-Enemy I think had responded to you that they
9 objected to the Applicant, the contractor and the NRC
10 taking the lead in the TCP.

11 CHAIR GIBSON: Right. Very well. Okay.

12 So, Mr. Goodman.

13 MR. GOODMAN: Yes.

14 CHAIR GIBSON: Mr. Catches-Enemy testified
15 and I did not pick up on his last point that the NRC
16 was taking the lead in this TCP and that that was
17 improper. Did you hear that from anybody, from Mr.
18 Catches-Enemy or anybody else with these tribes at
19 this meeting?

20 MR. REID: No. That was not what I heard.
21 In fact, I heard the opposite that the NRC was the
22 government entity and should be taking the lead on
23 finding out how to identify historic properties. If
24 what Mr. Catches-Enemy is saying that the NRC would
25 actually complete the TCP survey and that was his

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1 concern and that was his objection, I would disagree
2 with that statement altogether.

3 CHAIR GIBSON: Okay.

4 MR. REID: At no point did NRC say that
5 the TCP survey would be completed by its own staff.

6 CHAIR GIBSON: Very well.

7 Mr. Catches-Enemy, were you concerned at
8 this meeting that the NRC was actually going to do the
9 TCP survey? Was that a concern of yours?

10 MR. CATCHES-ENEMY: Not that they were
11 going to do the TCP survey, but that they would be for
12 lack of a better term paternal over the development of
13 it and the completion of it. It wasn't going to be
14 something that was going to be led by the tribes.

15 CHAIR GIBSON: So they should be more in
16 the role of a facilitator that actually the heavy
17 lifting should be done by the tribe. They should be
18 in the lead and that sort of thing. Is that a fair
19 statement?

20 MR. CATCHES-ENEMY: That is.

21 CHAIR GIBSON: So you weren't really
22 concerned that they were going to do the TCP survey,
23 but that there would be inadequate involvement of the
24 tribe in making sure that the TCP survey was done
25 right. Is that a fair statement?

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1 MR. CATCHES-ENEMY: To make sure that
2 tribal parameters of how the study was going to be
3 completed would be by the tribes, not by NRC.

4 CHAIR GIBSON: Very well. Thank you, sir.

5 And you heard that I assume at the
6 meeting.

7 MR. GOODMAN: Your Honor, we had heard
8 that all along that the tribes wanted to conduct their
9 own TCP survey.

10 CHAIR GIBSON: Okay.

11 MR. GOODMAN: And that is why we were
12 doing this consultation. I don't disagree, but I
13 think that we had been clear on that all along.

14 CHAIR GIBSON: All right. I think we've
15 closed the circle and I apparently didn't mishear it
16 in the beginning. But that's okay. We took care of
17 that problem. So we're okay.

18 Now getting back to the questions I have,
19 I really don't think I'm going to -- I'm sure not
20 going to implicate nonpublic information. I don't
21 think I'm asking you anything that's going to
22 implicate nonpublic information.

23 But if for some reason anything I say you
24 feel you can't give me a complete answer without
25 disclosing something that's nonpublic information,

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1 please stop me. We'll take this up in a closed
2 session so that nothing is disclosed that shouldn't be
3 disclosed to the public.

4 MR. GOODMAN: Your Honor, to add some
5 comfort to that, Tim Mentz when he gave his
6 presentation was not recorded. And so any information
7 that you obtain in that transcript that does not
8 include Tim Mentz's 90 minute to two hour
9 presentation.

10 That information is not in the transcript
11 and you have not seen it. If you do need information
12 about that, we can go off record and I will attempt to
13 say what I can without getting into the fact that I
14 would really like to honor what Mr. Mentz had
15 requested.

16 CHAIR GIBSON: It will surprise me greatly
17 if I need to ask you about what Mr. Mentz said.

18 MR. GOODMAN: Thank you.

19 CHAIR GIBSON: Or ask anybody about what
20 Mr. Mentz said.

21 MR. GOODMAN: Okay.

22 CHAIR GIBSON: First of all, Mr. Catches-
23 Enemy, in your opinion, was the February 14, 2012
24 meeting a government to government meeting?

25 MR. CATCHES-ENEMY: No.

1 CHAIR GIBSON: Okay. And you attended the
2 meeting as the Natural Resources Director, correct?

3 MR. CATCHES-ENEMY: Yes.

4 CHAIR GIBSON: And Mr. Yellow Beard Steele
5 I believe we've already established attended the
6 meeting, although left. Is that correct?

7 MR. CATCHES-ENEMY: Yes.

8 CHAIR GIBSON: Okay. And Mr. Gonzales, an
9 attorney for the Oglala Sioux Tribe was also present
10 at least for part of the presentation, although
11 apparently he had to leave for awhile while this
12 presentation was being made, correct?

13 MR. CATCHES-ENEMY: Yes.

14 CHAIR GIBSON: Mr. Big Crow from the Fifth
15 Members Office was also in attendance. Is that
16 correct?

17 MR. CATCHES-ENEMY: It might be Ms. I'm
18 not sure. What's the first name on it?

19 CHAIR GIBSON: Big Crow?

20 MR. CATCHES-ENEMY: Jackie. If it's
21 Jackie, then it's Ms.

22 CHAIR GIBSON: Okay. We have written this
23 -- Maybe we looked at the transcript and it was wrong
24 or maybe I wrote it down wrong. Can you just give me
25 that name one more time?

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1 MR. CATCHES-ENEMY: Jackie, J-A-C-K-I-E.

2 CHAIR GIBSON: Yes, sir.

3 MR. CATCHES-ENEMY: Big Crow.

4 CHAIR GIBSON: Jackie Big Crow. Okay,
5 great. And that is a female.

6 MR. CATCHES-ENEMY: Yes.

7 CHAIR GIBSON: Ah-ha. So it would be Ms.
8 Big Crow then. Fair enough. Okay. That was the
9 problem. Jackie is one of those sort of names that
10 can go either way. Okay.

11 What is the Fifth Members Office?

12 MR. CATCHES-ENEMY: The Fifth Members
13 Office is part of the Indian Reorganization Act
14 Constitutional Executive Officers. We have a tribal
15 president, vice president, secretary, treasurer and I
16 believe there was a sergeant at arms. I don't know if
17 that changed names. But it became Fifth Member.

18 CHAIR GIBSON: Okay. It would seem to me
19 as an outsider that the Oglala Sioux Tribe was well
20 represented there. So it's a little confusing to me
21 about why this would not be government to government
22 consultation. Could you tell me why it's not in your
23 opinion?

24 MR. CATCHES-ENEMY: In my opinion, our
25 tribal council which is 19 elected tribal officers

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1 from nine different districts comprise of the
2 governing body of the Oglala Sioux Tribe. And none of
3 them were present at this meeting. And Jackie Big
4 Crow working in the Fifth Members Office, if I'm
5 correct, her position title was Administrative
6 Assistant. So she was not an elected officer.

7 CHAIR GIBSON: Very well.

8 We've already talked about who was in
9 attendance from Oglala Sioux Tribe, although the
10 president left. And although it's not listed here,
11 apparently Ms. White Plume was there as well. You
12 don't dispute that she was there I take it.

13 MR. GOODMAN: No, we don't, Your Honor.

14 CHAIR GIBSON: Okay. I forgot to mention
15 her and I'm sorry about that, Ms. White Plume.

16 Now the highest ranking members of the NRC
17 staff in attendance were yourself, Kevin Hsueh who is
18 Chief of the Environmental Review Branch or was at the
19 time I guess, and Mr. Turttil. Is that right?

20 MR. GOODMAN: Turttil.

21 CHAIR GIBSON: Who is Branch Chief for
22 Intergovernmental Liaison. Did I say his name
23 incorrectly?

24 MR. GOODMAN: You did, Your Honor.

25 CHAIR GIBSON: Okay. I did say it wrong?

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1 MR. GOODMAN: Yes.

2 CHAIR GIBSON: How do you say his name?

3 MR. GOODMAN: Turttil.

4 CHAIR GIBSON: Turttil.

5 MR. GOODMAN: Turttil.

6 CHAIR GIBSON: Turttil.

7 MR. GOODMAN: Turttil works just fine, Your
8 Honor.

9 CHAIR GIBSON: I don't know. I kind of
10 liked Turttil.

11 MR. GOODMAN: It's easy to go. Let's go
12 with it. Rich isn't here. I'm sure he won't object.

13 CHAIR GIBSON: Well, I don't want to
14 offend him any more than I want to offend anyone else
15 for misspeaking their name. So it is Turttil.

16 MR. GOODMAN: Correct, Your Honor.

17 CHAIR GIBSON: Turttil, okay. Maybe we
18 reverse the u and the r. I know how it happened. The
19 transcript says T-U-R-T-I-L. Very well.

20 Did I miss anyone higher up in the NRC
21 organization?

22 MR. GOODMAN: I would only say that I'm
23 not part of those highest ranking officials. Those
24 two are branch chiefs. I am not a branch chief. So
25 I'm more on the working side as a project manager. I

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1 would take myself off highest ranking. Other than
2 that, I agree with that statement, Your Honor.

3 CHAIR GIBSON: Now the actual license
4 granted to Crow Butte on the last page in NRC 012 has
5 a signature from Larry Camper who is Director of the
6 Division of Decommissioning Uranium Recovery and Waste
7 Programs, Office of Nuclear Materials Safety and
8 Safeguards. Is that correct?

9 MR. GOODMAN: That's correct, Your Honor.

10 CHAIR GIBSON: Now Mr. Camper did not
11 attend this meeting. Is that correct?

12 MR. GOODMAN: He did not, Your Honor.

13 CHAIR GIBSON: Okay. You're not
14 authorized to speak for the Commission I assume.

15 MR. GOODMAN: No, Your Honor.

16 CHAIR GIBSON: And apart from sending the
17 initial invitation letter back in 2011, how was Mr.
18 Camper personally involved in consultations from 2011
19 to 2013?

20 MR. GOODMAN: Significantly involved, Your
21 Honor. And would you like the reasons why?

22 CHAIR GIBSON: Please.

23 MR. GOODMAN: Certainly. As the Division
24 Director, Mr. Camper spoke with staff with relative
25 frequency about all of these projects including Crow

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1 Butte, including the Section 106 activities. So he
2 was very aware of everything that was going.

3 And certainly when we were at headquarters
4 he was approving all of these meetings and approaches
5 and all of that. So he was aware of the entire
6 process.

7 Additionally, before each meeting that he
8 as not in attendance for, he would designate a
9 decision maker and that was in his authority under the
10 National Historic Preservation Act. He could
11 designate the authority over to someone. And so we
12 had a decision maker at these face to face meetings.

13 CHAIR GIBSON: Okay.

14 MR. GOODMAN: And that decision maker was
15 not me. That would have been Kevin at the time.

16 CHAIR GIBSON: That would be Mr. Hsueh or.

17 MR. GOODMAN: Correct, Your Honor.

18 CHAIR GIBSON: Or Mr. Turtill?

19 MR. GOODMAN: He could have been a
20 decision maker, but Larry Camper would have designated
21 Mr. Hsueh to be the decision maker for those February
22 meetings.

23 CHAIR GIBSON: Okay. So I take it that
24 Mr. Camper is designated as the person responsible for
25 the National Historic Preservation Act consultation.

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1 MR. GOODMAN: He's the agency's person.
2 Yes, Your Honor.

3 CHAIR GIBSON: Okay.

4 MR. GOODMAN: The designated agency
5 decision maker under the National Historic
6 Preservation Act. Each agency has to designate a
7 decision maker. In that case, it is Larry Camper, Mr.
8 Camper, Your Honor.

9 CHAIR GIBSON: Okay. Did he ever come to
10 any meetings?

11 MR. GOODMAN: No, there was a tribal
12 leaders meeting that we had in May. His deputy was in
13 attendance at that meeting.

14 CHAIR GIBSON: Okay.

15 MR. GOODMAN: But he himself was not
16 present at the meeting, Your Honor.

17 CHAIR GIBSON: Very well. And that
18 meeting, did that meeting have anything to do with the
19 Crow Butte license renewal site?

20 MR. GOODMAN: It did, Your Honor.

21 CHAIR GIBSON: And how did it have a
22 relationship to that?

23 MR. GOODMAN: As sort of we noted over the
24 last few hours, it was a concern of the tribes that
25 the tribal leaders also be involved as part of the

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1 overall government to government consultation. And so
2 in addition to these working meetings that we were
3 having with the THPOs and the staff like myself as in
4 the February meeting for one example and then several
5 of the phone calls we had, we also wanted to honor the
6 tribe's request to have a tribal leaders meeting. And
7 we would frequently hear from the tribes that there
8 were big G to big G meetings and little G to little G
9 meetings. And I believe what they were saying is
10 little G to little G meetings could be something like
11 a staff to THPO communication or meeting similar to
12 the one in February where big G to big G would be
13 tribal leaders.

14 The NRC staff explained that sending
15 someone we had requests for even the President of the
16 United States. And had we had the authority to send
17 the President of the United States out to a tribal
18 leaders meeting which we did not, it actually wouldn't
19 have been less useful than sending out a deputy
20 director or a division director. They're so much more
21 familiar with the Crow Butte project that they can
22 talk on behalf of the Crow Butte project which would
23 help with the decision making process.

24 CHAIR GIBSON: And that's the May 2013
25 meeting.

1 MR. GOODMAN: It is, Your Honor.

2 CHAIR GIBSON: Let's hold off on that.
3 We'll get to that later. I'm trying to take these in
4 chronological order.

5 MR. GOODMAN: Sorry, Your Honor.

6 CHAIR GIBSON: Okay.

7 Mr. Catches-Enemy, in your declaration in
8 paragraph 23, you testified that in late May 2013 the
9 NRC staff finally conducted government to government
10 consultations in Rapid City with the Oglala Sioux
11 Tribe. Correct?

12 MR. GRIFFIN: Yes.

13 CHAIR GIBSON: From your viewpoint, it is
14 at this moment in time, May 2013, that you maintain
15 government to government consultation began with the
16 NRC and your tribe. Is that correct?

17 MR. CATCHES-ENEMY: I was not present at
18 this meeting. I don't know who the attendees were.
19 I know it's in my statement here.

20 CHAIR GIBSON: I know. And I'm not asking
21 you, sir, whether you were present. I'm not going to
22 ask you anything about the meeting since you weren't
23 there.

24 But I am asking you, sir, is you have an
25 opinion. And I'm just curious. Your opinion, your

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1 expert opinion, that has been proffered in this case
2 is that at the moment in time, May 2013, that you
3 maintain that government to government consultations
4 began with the NRC and your tribe. I'm just
5 wondering. Is that your testimony, sir?

6 MR. CATCHES-ENEMY: Can I have a second?

7 CHAIR GIBSON: Yes, sir.

8 (Pause)

9 MR. CATCHES-ENEMY: Okay.

10 CHAIR GIBSON: Yes, sir.

11 MR. CATCHES-ENEMY: Thank you.

12 CHAIR GIBSON: That's fine. No problem.

13 MR. CATCHES-ENEMY: It's really difficult
14 for me to give a yes/no on something that I'm not too
15 sure about.

16 CHAIR GIBSON: Okay. That's fine. Would
17 it be fair to say that you're not sure of what your
18 opinion is about the May 2013 meeting. Is that
19 correct?

20 MR. CATCHES-ENEMY: Yes.

21 CHAIR GIBSON: Very well. Let me ask you
22 this, sir. Do you see any -- Again, in your
23 professional opinion, I know you didn't attend the May
24 2013 meeting, but you're familiar with it I'm sure or
25 you wouldn't be testifying here about this.

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1 Are you saying that there is any real
2 difference between the NRC's communications with the
3 tribe in May 2013 versus the communication that the
4 staff and the tribe had during 2012? I'm trying to
5 figure out what is it that's different. What it is
6 that's changed between in your professional opinion
7 February of 2012 and May of 2013?

8 MR. CATCHES-ENEMY: In my opinion, it
9 would have been if there was an elected official
10 present with a high level official from the NRC at
11 that meeting in May 2013.

12 CHAIR GIBSON: And you earlier testified
13 that the February meeting was not government to
14 government consultation and you were there.

15 MR. CATCHES-ENEMY: Yes.

16 CHAIR GIBSON: And you're saying that this
17 one was because there were high level officials of the
18 NRC and of the tribe.

19 MR. CATCHES-ENEMY: If there was.

20 CHAIR GIBSON: If there was because you
21 weren't there.

22 MR. CATCHES-ENEMY: I'm not comfortable
23 testifying to something that I wasn't present at. But
24 I know it's included in the record here.

25 CHAIR GIBSON: That's fine. Very well.

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1 In paragraph 16 of your declaration, you state that
2 "consultation is a step toward gaining necessary free,
3 prior and informed consent of the tribe." Correct?

4 MR. CATCHES-ENEMY: Yes.

5 CHAIR GIBSON: I think we have to
6 recognize that the staff has a different view of
7 consultation than you do. But I'm interested in what
8 you see as the tribe's duty to consult with the
9 Federal Government. Is it your position that the
10 tribe is obligated to consult whenever an agency of
11 the government wishes to consult with it?

12 MR. CATCHES-ENEMY: Under the National
13 Historic Preservation Act 36 CFR Part 800, with our
14 tribe taking on the responsibilities of the SHPO in
15 2009, one of the stipulations was to consult and help
16 Federal agencies perform and fulfill their Section 106
17 responsibilities. To me that is very limited on
18 discussions specific to cultural resources and
19 historic preservation and nothing beyond that.

20 CHAIR GIBSON: Okay. This may be a
21 completely crazy question. I'm sorry I don't really
22 know a whole lot about how SHPOs function. SHPO
23 stands for State Historic Preservation Officer, right?

24 MR. CATCHES-ENEMY: Yes.

25 CHAIR GIBSON: Now in South Dakota where

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1 the reservation is, what is the relationship, if any,
2 between the State Historic Preservation Officer and
3 the Tribal Historic Preservation Officer?

4 MR. CATCHES-ENEMY: Part of the
5 responsibilities or the functions that we assumed from
6 the State Historic Preservation Office were retained
7 by the state. We as a tribe elected to only take on
8 a number of those functions. The rest remained with
9 the state.

10 As far as our relationship with the State
11 Historic Preservation Office, it's more of a
12 cooperating agency. We use each other as a reference.
13 And we try to keep each other apprised of different
14 projects.

15 CHAIR GIBSON: Okay. Now the reason I ask
16 this question is it seems a little weird that you all
17 have the State Historic Preservation Office function
18 there. I don't mean it's weird you have it. It's
19 great. I don't mean that.

20 But I mean that you are then dealing with
21 something in another state. And I'm wondering if you
22 have a similar relationship with the Nebraska State
23 Historic Preservation Officer like you do in South
24 Dakota. I'm just curious how that works.

25 MR. CATCHES-ENEMY: When we wrote the

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1 memorandum of agreement between the Oglala Sioux Tribe
2 and the National Park Service, actually it was the
3 National Park memorandum of agreement. If you're
4 going to take on these functions, you take on that MOA
5 and whatever functions you're going to assume.

6 As part of the tribal lands that we had to
7 depict in order historic preservation plan, part of it
8 goes into the State of Nebraska right around
9 Whiteclay, Nebraska. We did list Nebraska State
10 Historic Preservation Office as one of the other
11 offices that we would confirm with and to have a
12 similar relationship with South Dakota.

13 CHAIR GIBSON: Very well. Thank you. I'm
14 sure you've read the testimony of the Nuclear
15 Regulatory Commission witnesses here and I have as
16 well. And after I read that testimony, I came away
17 with the impression that the staff portrays the Oglala
18 Sioux Tribe as refusing to engage in consultation. Do
19 you think that's an accurate characterization?

20 MR. CATCHES-ENEMY: That is very
21 inaccurate.

22 CHAIR GIBSON: And why is it inaccurate?
23 Why would it be inaccurate to say that the Oglala
24 Sioux Tribe was refusing to engage in conversation?
25 Why would that be a wrong statement?

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1 MR. CATCHES-ENEMY: From the time if we're
2 looking or referring back to the exhibit that you're
3 having me review --

4 CHAIR GIBSON: These are the lists of all
5 those items, your homework for tonight.

6 MR. CATCHES-ENEMY: Yes.

7 CHAIR GIBSON: Yes.

8 MR. CATCHES-ENEMY: I would say that we've
9 been open to communicating and having the dialogue and
10 being even willing to sit at the table and assist the
11 NRC with their Section 106 responsibility. So we've
12 been more than willing to be a consulting party.

13 When you are going to consult in our
14 definition of consulting, it's an equal partnership.
15 It's a two-way street. I think when the
16 communications started to break down after the TCP --
17 I don't mean to jump ahead -- survey negotiations were
18 breaking down the trust responsibility was also broken
19 down as well from the NRC for the Oglala Sioux Tribe.
20 I cannot speak for the other tribes if they believe
21 the same. But I know for the Oglala Sioux Tribe that
22 trust responsibility was broken.

23 CHAIR GIBSON: I'm hearing you say trust
24 responsibility and I know that has a special meaning.
25 The Federal Government owes a trust responsibility to

1 the tribe.

2 I'm also hearing you say something like
3 trust broke down. Are those essentially the same? I
4 know those aren't exactly the same thing. But are you
5 saying both of those things happened?

6 MR. CATCHES-ENEMY: Yes. It's difficult
7 to engage in further consultations when that has been
8 changed.

9 CHAIR GIBSON: And in fact in your
10 testimony you talk about their being a complete
11 breakdown that occurred. And I'm wondering if you can
12 sort of pinpoint for us the moment in time that you
13 believe there was a complete breakdown between the
14 tribe and the Nuclear Regulatory Commission staff.

15 MR. CATCHES-ENEMY: I know a lot of it has
16 to do with that TCP survey.

17 CHAIR GIBSON: TCP survey.

18 MR. CATCHES-ENEMY: And who was going to
19 be taking the lead and which proposal or scope of work
20 would be followed.

21 CHAIR GIBSON: Now let's set aside for
22 just a moment that because we'll be coming back to
23 those, the TCP survey itself. Okay. I just want to
24 set that aside for a moment. I promise you we'll come
25 back to it because I want to understand what your

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1 opinion is, sir.

2 But is any of your opinion about the
3 failure to discharge the trust responsibility in any
4 way related to the level of personnel that the Nuclear
5 Regulatory Commission provided for you to consult
6 with? I mean they had a certain level of people who
7 were there to communicate with the tribe. Does any of
8 your concern have to do with the level of people that
9 the Nuclear Regulatory Commission was providing to do
10 that consultation?

11 MR. CATCHES-ENEMY: The level of people.
12 Can you clarify that? The level.

13 CHAIR GIBSON: Yes. There were like we
14 had Mr. Goodman here who said he doesn't have
15 authority. And we have a Mr. Hsueh who I believe was
16 delegated responsibility from this division director
17 who has responsibility as the Historic Preservation
18 officer or the Historic Preservation 106 Consultation
19 responsibility for the Nuclear Regulatory Commission.

20 MR. CATCHES-ENEMY: Okay.

21 CHAIR GIBSON: And he apparently had
22 delegated it to this Mr. Hsueh who apparently was at
23 some of these meetings. I'm just curious. I'm trying
24 to understand what the concern is here. And I just
25 want to know.

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1 Does any of it have to do with who was
2 there? What level of commitment were they willing to
3 make in terms of sending a high level enough person?

4 MR. CATCHES-ENEMY: If we're going to be
5 asked as a tribe or a tribal government to sit in a
6 government to government then my answer would be no.
7 It was an inappropriate level to send and visit with
8 our government officials. If it's just for discussing
9 the TCP survey, protection of cultural and historic
10 properties, then the staff that was sent is at the
11 appropriate level as our office was.

12 CHAIR GIBSON: It is your view though that
13 it was fine to have this contact and this
14 communication between the tribe, Historic Preservation
15 people and the Nuclear Regulatory Commission personnel
16 about the identification process. But when it
17 actually got down to the 106 consultation process, the
18 government to government contact, that needed to be at
19 a higher level than the people with whom you were
20 speaking. Is that a fair statement?

21 MR. CATCHES-ENEMY: Yes.

22 CHAIR GIBSON: Okay. And before this May
23 2013 meeting when the president expressed his concern
24 and left, was that --

25 MR. CATCHES-ENEMY: February.

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1 CHAIR GIBSON: Pardon?

2 MR. CATCHES-ENEMY: February.

3 CHAIR GIBSON: I'm sorry. Was it February
4 2000?

5 MR. CATCHES-ENEMY: Twelve.

6 CHAIR GIBSON: Twelve, my mistake. I'm
7 sorry.

8 MR. GOODMAN: Your Honor, it was on
9 Valentine's Day. That's an easy day to remember when
10 the February meetings were.

11 CHAIR GIBSON: Okay. Good. Thanks.

12 February 2012. At this February 2012
13 meeting where the president left, okay. I take it
14 before that point in time in your estimation there was
15 no government to government consultation.

16 MR. CATCHES-ENEMY: No.

17 CHAIR GIBSON: Okay. And in fact from the
18 Oglala Sioux Tribe's standpoint, there was not the
19 proper people there to have government to government
20 consultation even at this February 2012 meeting. Is
21 that right? And the president left in order to make
22 sure that no one would ever get the impression that
23 there was. Is that a fair statement?

24 MR. CATCHES-ENEMY: Yes.

25 CHAIR GIBSON: Okay. So you don't think

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1 that you ever gave the impression to the Nuclear
2 Regulatory Commission staff that you weren't willing
3 to work with them on the identification of possible
4 TCP properties.

5 MR. CATCHES-ENEMY: No, we'd been a good
6 consulting party.

7 CHAIR GIBSON: But you don't think you
8 ever gave the staff the impression that you were
9 involved in government to government consultation at
10 that point in time. Is that a fair statement?

11 MR. CATCHES-ENEMY: I don't believe I've
12 ever given them the impression we've ever been in
13 government to government.

14 CHAIR GIBSON: Very well. Thank you. Now
15 we talked a little bit about the level of person who
16 was involved. Is any of your concern based on the
17 method of communication whether it was by letters or
18 calls, that sort of thing? Is any of that of concern
19 to you, sir?

20 MR. CATCHES-ENEMY: Yes, it is.

21 CHAIR GIBSON: And could you please
22 describe for us what that concern is?

23 MR. CATCHES-ENEMY: This document that
24 we're having to review I'm not sure what I referenced

25 --

1 CHAIR GIBSON: You know, when we keep
2 saying this document we ought to review, let's just
3 make sure we know. What was that? What do we call
4 that, Mr. Smith?

5 MR. CYLKOWSKI: Your Honor, that's NRC
6 038.

7 MR. SMITH: Thank you for filling in for
8 me.

9 CHAIR GIBSON: Okay.

10 MR. GRIFFIN: By the end of the week,
11 we're going to try to be Mr. Smith. That's our goal.

12 CHAIR GIBSON: All right. NRC 038.

13 MR. CATCHES-ENEMY: Okay.

14 CHAIR GIBSON: That's what we're talking
15 about. Thank you, Mr. Catches-Enemy.

16 MR. CATCHES-ENEMY: At the beginning of
17 receipt of said letter on -- let's just go with the
18 first one dated January 13, 2011. Had we known an
19 administrative record such as this was being
20 established in what we believe was to be the start of
21 information gathering or the Section 106 process,
22 maybe things would have been a little bit different.
23 Maybe we wouldn't have believed that we were both
24 working in good faith. We were both trying to
25 accomplish the same goal of protecting historic

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1 properties, whether they be of aboriginal descent or
2 Euro American descent. I don't agree with that, with
3 the question that you had asked.

4 CHAIR GIBSON: I just want to make sure.
5 I heard what you said about you were concerned that
6 you all were in your view -- the NRC staff and the
7 Oglala Sioux were sort of operating in two different
8 tracks. You thought one thing and you're not sure
9 what they thought, but it wasn't the same thing you
10 were thinking. Fair enough?

11 MR. CATCHES-ENEMY: Yes.

12 CHAIR GIBSON: Now I appreciate that and
13 I'm not disputing it in any way. But I want to try to
14 focus just -- I know it's a little disturbing to you
15 to see this list of all these communications as if
16 someone was documenting what you were doing without
17 your knowledge.

18 MR. CATCHES-ENEMY: Yes.

19 CHAIR GIBSON: I know you're kind of
20 feeling like something was going on that wasn't right.
21 I understand that. But I would like to see if we
22 could just step back from that a little bit and focus
23 on the question of the letters and calls, methods of
24 communication, that were going on. Is there anything
25 about that that leads to your opinion that there was

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1 not government to government consultation or that it
2 was improper?

3 MR. CATCHES-ENEMY: I feel that it is very
4 misleading that an administrative record is being kept
5 on every phone call. I would assume emails are
6 something that we would all know that could hit the
7 record. Letters obviously, those are part of
8 something that would be recorded.

9 But every type of communication in that
10 sense I do not believe was made or wasn't disclosed to
11 us or at least to me that this was part of what they
12 believed, NRC, was Section 106 consultation. Just to
13 make a simple call or just to send a simple email,
14 that was not clear from the get-go that this was what
15 they were establishing as an administrative record.

16 I thought we were still trying to get to
17 the goal of having our tribe and whether it be
18 knowledgeable elders or spiritual leaders come to
19 these project sites to identify what we believe is
20 culturally and spiritually significant. That was the
21 goal, not their goal.

22 CHAIR GIBSON: So I hear what you're
23 saying. I just want to close the loop on this. It
24 sounds to me like what you're saying is the mere fact
25 that people were taking notes of their phone calls or

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1 sending letters or putting emails in files or whatever
2 by itself doesn't upset up.

3 It was more that you thought the purpose
4 of your whole dialogue with them was to establish
5 where there might be tribal cultural properties out
6 there. And you're sort of feeling now looking at this
7 like the purpose of this document was to try to
8 establish that there was government to government
9 consultation which you say did not happen at that
10 point in time.

11 MR. CATCHES-ENEMY: Yes.

12 CHAIR GIBSON: Fair enough? Okay. I just
13 wanted to be sure I knew what you were saying.

14 MR. CYLKOWSKI: Your Honor, if I could
15 make clear for the record that Exhibit NRC 038 was
16 created by Mr. Goodman and by counsel for the staff in
17 response to a Board request at the oral argument in
18 February 2015 and was provided to all parties on
19 February 23, 2015.

20 CHAIR GIBSON: That is an excellent point.
21 Thank you for bringing that up.

22 Mr. Catches-Enemy, before you're left with
23 the conclusion that the staff was trying to document
24 this, this is actually something we asked them to do
25 earlier this year when we were asking for some

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1 specific information about the communication that
2 happened because we had not gotten -- these documents
3 had not been provided.

4 MR. REID: Andrew Reid for the Tribe. But
5 I think also the document then has subsequently been
6 used by the NRC as evidence of its satisfaction of its
7 consultation obligation. Even though it may have been
8 created for one purpose, it's actually be used in this
9 proceeding for a different purpose.

10 CHAIR GIBSON: Mr. Reid, you're entitled
11 to your views. I just want to make sure I know that
12 Mr. Catches-Enemy knows that the reason that this
13 particular listing of this stuff happened in this way
14 is that we asked them to do this for this hearing.

15 Now the fact that they were recording your
16 phone calls, I mean, that they were recording the
17 results of phone calls or whatever, that just happens.
18 And that upsets you, that's fine.

19 But I do want you to at least know that
20 this report did come about because we asked them to
21 make a list of this stuff because we didn't know what
22 happened. We wanted to know what consultation had
23 happened whether it was government to government
24 consultation or just informal phone calls. I hope you
25 do appreciate that.

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1 MR. CATCHES-ENEMY: I do appreciate the
2 clarification and the title on page one does say "As
3 part of Section 106 consultation."

4 CHAIR GIBSON: Yes, they did happen to
5 drop that in, didn't they? But we asked them to
6 provide us the list of all the things that they had
7 done to communicate with you guys. So we did want
8 that.

9 Just for my edification, was this
10 particular document NRC 039 -- I assume it was
11 compiled from something else. You all had a file of
12 some kind.

13 MR. GOODMAN: 038.

14 CHAIR GIBSON: 038, I'm sorry.

15 MR. GOODMAN: Yes. Okay, Your Honor. We
16 certainly had this information which enabled us to
17 compile it. But our EA had been issued. Our Section
18 106 was complete prior to February 23, 2015. No, this
19 specific document was not used to conclude our 106
20 analysis.

21 With that said, we did take call logs,
22 although I'm careful with the word recorded. No phone
23 calls were actually recorded. But we did make a log
24 of the calls that we made. That we did, Your Honor.

25 CHAIR GIBSON: Recorded is a nasty word

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1 because it makes you sound like you've got some kind
2 of a listening device on. But if you're just writing
3 down what the substance of the phone call is that can
4 also be recording.

5 MR. GOODMAN: And it ruffles feathers when
6 you say record.

7 CHAIR GIBSON: Yes.

8 MR. GOODMAN: They don't want to know. So
9 it was not being recorded, the calls, Your Honor.

10 CHAIR GIBSON: Right. Okay. That's a
11 good thing.

12 The initial NRC communication in this case
13 that I could find was sent to Tribal President Theresa
14 Two Bulls and then Tribal Preservation Officer Wilmer
15 Mesteth. Were they the correct addressees for
16 communication from this NRC staff? Or should that
17 have gone to someone else?

18 MR. CATCHES-ENEMY: That is the correct
19 addresses.

20 CHAIR GIBSON: Very well. Thank you. At
21 point in time -- Mr. Catches-Enemy, I'm just curious.
22 At what point in time did the lightbulb go on for you
23 that the NRC staff was seeking -- had the impression,
24 rightly or wrongly, that they had been engaged in
25 government to government consultation with the tribe

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1 and you had thought you all were engaged in a sort of
2 joint effort to try to find tribal cultural properties
3 that might have been on the license renewal area?

4 MR. CATCHES-ENEMY: I'm going to answer
5 with just an example from other Federal agencies that
6 our offices required to work with. They're specific
7 about their designation of consultation and they just
8 call it Section 106 consultation. There is not the
9 mention of government to government unless that
10 Section 106 consultation starts to break. Then it
11 goes to a higher level. And then the other agreements
12 under the NHPA are implemented. ACHP is brought,
13 Advisory Council on Historic Preservation. So we're
14 looking at it as Section 106 consultation.

15 CHAIR GIBSON: So your experience with
16 agencies other than the Nuclear Regulatory Commission
17 is that you as Tribal Historic Preservation officer
18 will engage in 106 consultation about tribal historic
19 properties, tribal cultural properties, but that
20 doesn't amount to government to government
21 consultation. That doesn't happen until it is later
22 elevated either because you all have got some kind of
23 disagreement or because there's a need to formalize it
24 in some kind of a more formal document. Is that a
25 fair statement?

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1 MR. CATCHES-ENEMY: Yes.

2 CHAIR GIBSON: Okay.

3 MR. CATCHES-ENEMY: I had a question about
4 a statement made earlier by Mr. Goodman as far as when
5 the Section 106 consultation was complete. I don't
6 know when that is. If we're referring to NRC 038 and
7 Mr. Goodman has stated that by the time this February
8 23, 2015 letter or this compilation of communication
9 was completed, the Section 106 consultation was
10 already complete. I'd like to know when that was. To
11 this date, I don't know when.

12 CHAIR GIBSON: I think you have a good
13 question. I'll let Mr. Goodman answer it.

14 Mr. Goodman, when was the 106 consultation
15 complete with respect to the Oglala Sioux Tribe, with
16 respect to the Crow Butte license renewal site?

17 MR. GOODMAN: The Section 106 consultation
18 was complete in about the spring of 2014 I believe.

19 CHAIR GIBSON: Spring of 2014.

20 MR. GOODMAN: Yes.

21 CHAIR GIBSON: Okay. Well, you just got
22 your answer, Mr. Catches-Enemy.

23 MR. CATCHES-ENEMY: Yes.

24 (Off record discussion)

25 CHAIR GIBSON: So let's talk about how

1 that was documented by the way, Mr. Goodman, the
2 spring of 2014?

3 MR. GOODMAN: A series of sort of
4 communications that happened toward the end. NRC put
5 on a website the TCP survey and requested comments.
6 And then we also sent a letter to the SHPO, received
7 the letter from the SHPO, collected all that
8 information together and then concluded that Section
9 106 was complete.

10 CHAIR GIBSON: And when you say the SHPO
11 you're referring to the Nebraska State Historic
12 Preservation Officer.

13 MR. GOODMAN: Yes, Your Honor.

14 CHAIR GIBSON: So you provided it to the
15 Nebraska State Historic Preservation Officer and you
16 posted it on the web. How did you go about providing
17 that to the Oglala Sioux Tribe?

18 MR. GOODMAN: Provide the website?

19 CHAIR GIBSON: On the website, very well.

20 Now, Mr. Catches-Enemy, you just got your
21 answer. When they posted it on the website in the
22 spring of 2014.

23 MR. GOODMAN: Sorry, Your Honor. I was
24 asking for a clarification about the website. The
25 website that I'm referring to was when we put

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1 information on the website for the tribes and members
2 of the public to comment on.

3 CHAIR GIBSON: Okay.

4 MR. GOODMAN: It was after that that staff
5 concluded its 106. When it didn't receive any
6 comments, when it had closed that matter and then also
7 closed -- and I believe that the website was open for
8 about 30 days. So that would have taken us to
9 November of 2013. And then it extended that a little
10 bit to sort of make sure that it had covered all of
11 its bases and all of its concerns.

12 CHAIR GIBSON: Okay. Very well. I just
13 want to be clear though. What you did is you took the
14 information. You sent it to the Nebraska State
15 Historic Preservation Officer. You posted it on the
16 web for like 30 days. And then you finalized it.

17 MR. GOODMAN: Yes, Your Honor. There's a
18 bit more that went into what we posted on the website.
19 It had the letter that we sent to the SHPO and the
20 letter that we received from the SHPO. Also we
21 provided the draft sections of the EA pertaining to
22 cultural resources. We provide that on the website.

23 The EA as you know was not published for
24 public comment. The NHPA has its own set of
25 guidelines which we'll probably get into later. So

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1 I'll stop.

2 CHAIR GIBSON: We absolutely will.
3 Actually, we'll be getting into all these things
4 later. But I wanted to sort of jump ahead for a
5 second because I really do like to go chronologically.

6 But I wanted to get Mr. Catches-Enemy an
7 answer because he wanted to know when that was and
8 that's apparently when it was. In November 2013,
9 they completed the study and posted it on the website.
10 Allowed comments. Sent it to the State Historic
11 Preservation Officer Nebraska. And then 30 days
12 later, essentially it was finalized. That's your
13 answer.

14 MR. CATCHES-ENEMY: Yes.

15 CHAIR GIBSON: In their estimation, that's
16 when it was complete.

17 MR. CATCHES-ENEMY: Okay. Thank you for
18 assisting with that response.

19 CHAIR GIBSON: Yes, sir.

20 MR. CATCHES-ENEMY: In regards to
21 disclosure from the NRC to the Oglala Sioux Tribe or
22 any other tribe, it seems implied by saying that it's
23 posted on the website. There wasn't a formal closure
24 of that Section 106. So when we're talking about a
25 level of -- I can't remember how we used the term --

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1 the NRC staff person I don't think that the Oglala
2 Sioux Tribe -- I don't ever recall that the Oglala
3 Sioux Tribe talking about full disclosure was notified
4 that Kevin Hsueh --

5 CHAIR GIBSON: Hsueh.

6 MR. CATCHES-ENEMY: -- was that level of
7 decision maker at the time.

8 CHAIR GIBSON: Very well. I hear you and
9 I promise you we will be getting into this information
10 as we proceed over the rest of the day and tomorrow.

11 MR. CATCHES-ENEMY: Thank you.

12 CHAIR GIBSON: What I would like to do at
13 this point is take a ten minute recess and then we'll
14 get back on the record and try to keep moving along.
15 Thank you. Off the record.

16 (Whereupon, the above-entitled matter went
17 off the record at 5:07 p.m. and resumed at 5:19 p.m.)

18 CHAIR GIBSON: On the record. You all may
19 have noticed we have been taking more breaks today.
20 I've not been at the whim and caprice of Judge
21 Wardwell and Judge Hajek. So I can take breaks
22 whenever I need to. And that's a lot more frequency
23 than they're willing to accommodate me.

24 Anyway, I'm a lot happier. And if I'm a
25 lot happier, I know the witnesses are happier.

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1 I'd like to turn if we could to TCP survey
2 development and design. I'd like to turn to the TCP
3 survey that was conducted by the Santee Sioux Tribe
4 and Crow Nations starting November 14, 2012.

5 Mr. Yellow Thunder, I have some questions
6 for you about the staff and tribe communications that
7 led up to the design of this TCP study. And be sure
8 and talk into the microphone because I know it's sort
9 of out there faraway from you, but you might want to
10 pull it closer because they work really well if you're
11 close to them. But then when you get faraway they're
12 kind of hard to hear. Okay?

13 MR. YELLOW THUNDER: I understand.

14 CHAIR GIBSON: Fair enough. Okay.
15 Earlier today, we talked about this Exhibit 038 that
16 I emphasize again the Board asked the staff to create.
17 They weren't documenting things to use against you.
18 But this is something I asked them to do because we
19 wanted to understand what the consultation was.

20 And I want to look at some specific
21 communication between the NRC staff and the tribe that
22 happened between October 2011 and October 2012. Now
23 I counted them and you're welcome to check my math if
24 you wish. But on pages three and four of this log I
25 found 14 separate communications between the NRC staff

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1 and the tribes listed during this period of time.
2 Does that sound about right to you? You're welcome to
3 count them if you want, but I found 14.

4 MR. YELLOW THUNDER: Just give me one
5 minute.

6 CHAIR GIBSON: Yes, sir.

7 MR. YELLOW THUNDER: I agree.

8 CHAIR GIBSON: Okay. Great. The first
9 entry on page three states that "the staff invited the
10 tribes to a February 2012 face to face meeting." Do
11 you know whether that invitation was -- You all got
12 that invitation to attend that meeting? And by you
13 all I should have said the Oglala Sioux Tribe got that
14 invitation?

15 MR. YELLOW THUNDER: I think there are
16 several letters, three, there. Particularly which are
17 you referring to?

18 CHAIR GIBSON: Let's see. February 2012.

19 MR. YELLOW THUNDER: I have 01/28/10. You
20 have February 1 of 2012.

21 CHAIR GIBSON: Yes.

22 MR. YELLOW THUNDER: February 28, 2012.

23 CHAIR GIBSON: Yes.

24 MR. YELLOW THUNDER: And February 10,
25 2012.

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1 CHAIR GIBSON: You're right. And I
2 misspoke. And good catch. I'm sorry. I'm actually
3 referring to the January 19 letter from Kevin Hsueh
4 who is the NRC -- did I say that right, Hsueh --
5 branch chief and Mr. Deucher is going to post that up.

6 This letter right here is what I was
7 referring to. And this letter in January invited the
8 tribes to whom it was addressed to attend a February
9 2012 face to face meeting. You don't dispute that
10 this was received by the tribe, do you, that you all
11 got this letter?

12 MR. YELLOW THUNDER: I wouldn't dispute
13 that we didn't get the letter.

14 CHAIR GIBSON: Okay. Very well.

15 MR. YELLOW THUNDER: Although I would like
16 to mention that these letters don't often hit the
17 Tribal Historic Preservation Office directly.

18 CHAIR GIBSON: Okay. Very well.

19 MR. YELLOW THUNDER: They are generally
20 sent to the president's office.

21 CHAIR GIBSON: Okay.

22 MR. YELLOW THUNDER: Where they may lay
23 for a few days before they come directly to us.

24 CHAIR GIBSON: Yes. In fact, if we could
25 go back to NRC 038. According to this, the way that

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1 they've described it here in NRC 038, this is a letter
2 from them and it was sent out to several tribes. But
3 they list the people that purportedly it was sent to
4 with the OST tribe. And this is Wilmer Mesteth who is
5 Tribal Historic Preservation Office, a copy to Michael
6 Catches-Enemy who was at the time Natural and Cultural
7 Resources Director and that letter invited you guys to
8 go to a meeting February 14 and 15, 2012.

9 MR. YELLOW THUNDER: Yes.

10 CHAIR GIBSON: Okay. Very well. Now if
11 we could go to -- I need to get another document up.
12 This is going to be the March 6, 2012 letter. Could
13 we get that?

14 MR. REID: Your Honor, this is Andrew Reid
15 from the tribe. Are these letters in the record or
16 did they ever get numbers?

17 CHAIR GIBSON: Thank you, Mr. Reid. I'm
18 hoping that I'm on -- Is this Board Exhibit 18 now?
19 No, this is going to be -- Board Exhibit 18 was the
20 invitation to the February 2012 meeting, okay. This
21 is a new one though and we're going to make this Board
22 Exhibit 20.

23 And this is the March 6, 2012 letter from
24 the Nuclear Regulatory Commission to Tribal Historic
25 Preservation Officers.

1 (Whereupon, the above-referred
2 to document was marked as Board
3 Exhibit 20 for identification.)

4 Do you have a copy of this? Or you're
5 getting a copy from your counsel. Obviously, since
6 this is a March letter and it follows that February
7 2012 meeting we talked about earlier, presumably this
8 letter followed the meeting. I think we can agree to
9 that, correct?

10 MR. YELLOW THUNDER: Correct.

11 CHAIR GIBSON: Okay. This letter requests
12 a draft statement of work from the tribes. And to my
13 understanding they also call it an SOW which I guess
14 is shorthand for Statement of Work. To my
15 understanding, such a Statement of Work would outline
16 the scope and structure of a TCP survey proposal to
17 examine the Crow Butte license renewal site. Is that
18 your understanding as well, sir?

19 MR. YELLOW THUNDER: Yes, sir.

20 CHAIR GIBSON: Now I'm sorry we have to
21 keep jumping back and forth between these exhibits,
22 but if you'll pull out NRC 038 and if we could get
23 that up, Mr. Deucher, and go to pages three and four
24 of that. There is a series of emails listed here
25 during March and April that at least purport to be

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1 from the NRC staff to the Tribal Historic Preservation
2 Officers.

3 I think I'd like to get out another
4 document and that would be our next Board exhibit, Mr.
5 Desai. That is ML 1230A067. And that is April 5,
6 2012 letter. Could we get that out? This is going to
7 be Board Exhibit 21. And this is the April 5, 2012
8 letter from the NRC to Tribal Historic Preservation
9 Officers.

10 (Whereupon, the above-referred
11 to document was marked as Board
12 Exhibit 21 for identification.)

13 Now again, Mr. Yellow Thunder, this letter
14 purports to request a statement of work from the
15 tribes and it also forwarded the Applicant's statement
16 of work for comments. Do you recall receiving this
17 letter and the Applicant's statement of work so that
18 you could comment on it?

19 MR. YELLOW THUNDER: Before I answer.

20 CHAIR GIBSON: Yes, sir.

21 MR. YELLOW THUNDER: I'd just like to make
22 a clarification that during this time frame to which
23 you are referring which was at the Natural Resources
24 Regulatory Agency offices in Pine Ridge, South Dakota
25 where what was known then as the Tribal Historic

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1 Preservation Office was located which was under the
2 umbrella of the Natural Resources Regulatory Agency
3 along with several other departments. It was the
4 Water Department.

5 Yes, the Water Department. And there was
6 the Forestry Department, a Minerals Department, the
7 Badlands Bombing Range Department and the Tribal
8 Historic Preservation Office.

9 These offices were under the umbrella of
10 the Natural Resources Regulatory Agency during which
11 time frame to which we're referring I was the Natural
12 Resources Technician for the Oglala Sioux Tribe. But
13 I was also acting under the ex officio capacity under
14 the Tribal Historic Preservation Advisory Council to
15 participate at some level in these meetings so to
16 speak or in these issues.

17 So I did have participation to some point
18 and some knowledge to some point of the chronology
19 that you're putting forth here or your time frame in
20 regard to the scope of work that the NRC had presented
21 to our tribe and not only our tribe. The scope of
22 work that NRC that we're talking about or discussing
23 here was presented by the NRC to us in regard to these
24 different areas of potential effect.

25 The survey was also presented to or should

1 have been presented to all of our neighboring tribes
2 which is the Standing Rock, Sisseton, Cheyenne River,
3 Lower Brule, Yankton. We were all in alliance at that
4 time, looking at the scope of work, this April 5
5 letter document that was sent to us in regard to the
6 scope of work.

7 We received that scope of work through
8 tribal caucus and conference calls. And through
9 tribal caucus and conference calls, we were able to
10 determine that this scope of work that was submitted
11 that you're referring to here that was sent to the
12 tribes really had no I would say merit in regards to
13 what would be a competitive scope of work in a field
14 of archeology so to speak and what would be the
15 competitive rate that would be submitted for a job in
16 particular to the amount of acreage that might have to
17 be covered, the field work that might have to be done,
18 the recording and the data.

19 Now this scope of work that we received,
20 the tribes were able to discuss amongst each other.
21 We refused this scope of work and I had knowledge. I
22 was privy to this information because I was there
23 participating with the other THPO officers, cultural
24 resource specialists, project review officers that
25 were also privy to the information that we're

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1 discussing now as far as the scope of work.

2 If I may continue.

3 CHAIR GIBSON: Yes.

4 MR. YELLOW THUNDER: Some of the reasons
5 for our declination of this scope of work to which we
6 are referring in this letter, it says right on here
7 "the scope of work was the starting point to identify
8 elements essential for developing a comprehensive
9 scope of work." We declined that because of the, like
10 I was saying, competitive rates that would normally
11 have been allowable for this type of work.

12 It just wasn't the rate that we were
13 comfortable with in regards to the dollar amount per
14 hour for the field work, the boots on the ground, the
15 limited amount of field work, the supplies that might
16 be brought forth underneath the value of the scope of
17 work, the limited per diem. It just wasn't conducive
18 to what a normal archeological survey scope of work
19 would be in the competitive world. It was actually
20 below. Those are some of the reasons why we refused
21 that.

22 CHAIR GIBSON: Thank you. I need to ask
23 you some follow-up because I want to make sure that
24 the record is clear here. And what I heard from you
25 is that the Oglala Sioux Tribe and some other tribes

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1 in the area received the Applicant's statement of work
2 from the NRC for comment. And the statement of work
3 was not competitive, would not have paid you, the
4 tribal members who were going to be participating in
5 any kind of TCP survey, did not have adequate rates
6 and did not have adequate per diem. And there was an
7 unwillingness on the part of the Oglala Sioux Tribe
8 and these other tribes with whom you were consulting
9 at that time to participate in this TCP survey.

10 Is that a fair statement?

11 MR. YELLOW THUNDER: Yes.

12 CHAIR GIBSON: Okay. And I'm curious.
13 How was it that the Oglala Sioux Tribe or these other
14 tribes with whom you were working at that time on this
15 issue you communicated back to the Nuclear Regulatory
16 Commission that the proposal, the Applicant's
17 statement of work, at least, was not sufficient? Do
18 you know how that got communicated back?

19 MR. YELLOW THUNDER: To the best of my
20 knowledge and the best of my recollection, after we
21 had had our initial tribal conference calls amongst
22 ourselves, we sort of delegated so to speak or
23 requested that the Rosebud Sioux Tribal archeologists
24 at that time respond to the NRC and the Applicant that
25 that wasn't sufficient. And that was how to my

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1 recollection that step was completed.

2 CHAIR GIBSON: Okay. Now do you know how
3 the Rosebud Sioux communicated and archeologists
4 communicated that information to the NRC? Do you know
5 if it was in a letter in behalf of all the tribes? If
6 it was a phone call, if it was an email of just how
7 that happened?

8 MR. YELLOW THUNDER: I believe that the
9 Rosebud Sioux Tribe conveyed that information back to
10 the NRC electronically through a letter that might
11 have been written and sent to the NRC electronically.

12 CHAIR GIBSON: Like in a PDF they made a
13 letter and then sent a PDF by email or something like
14 that.

15 MR. YELLOW THUNDER: Yes.

16 CHAIR GIBSON: That was your
17 understanding.

18 MR. YELLOW THUNDER: Yes.

19 CHAIR GIBSON: Okay. Hold on just a
20 minute. I want to go to Mr. Goodman and see if he has
21 any recollection of anything like that being received
22 by the NRC.

23 Mr. Goodman, you've just heard Mr. Yellow
24 Thunder describe a sort of consensus that had been
25 reached on behalf of a number of tribes including the

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1 Oglala Sioux Tribe and the Rosebud Sioux Tribe in
2 which the archeologist for the Rosebud Sioux was to
3 communicate to the NRC that the Applicant's statement
4 of work was not going to cut the mustard for these
5 reasons. It didn't provide enough money, it was at
6 competitive rates and it didn't provide per diem.

7 Did you receive any kind of communication
8 like that?

9 MR. GOODMAN: Your Honor, because we were
10 consulting with so many tribes simultaneously and this
11 was specific to the OST Tribe, I can't --

12 CHAIR GIBSON: Right.

13 MR. GOODMAN: I can get that information
14 for you whether we did receive an official letter from
15 the Rosebud Sioux Tribe THPO or the Rosebud Sioux
16 Tribe at all.

17 I can get that information fairly easily
18 with our ADAMS system maybe tonight.

19 CHAIR GIBSON: Sure.

20 MR. GOODMAN: Then I can provide tomorrow.

21 CHAIR GIBSON: You know that would be just
22 splendid. Thank you.

23 MR. GOODMAN: But if we didn't, I'm not
24 going to be able to get you that information if we
25 didn't receive it. So I can say I will check for a

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1 letter specific from Rosebud Sioux to NRC staff.

2 CHAIR GIBSON: And it could have been by
3 email or it could have been something else. But as I
4 understand it, I will bet you that Mr. Yellow Thunder
5 will also look tonight to see if he can find anything.
6 Hopefully, between the two of you, we can get to the
7 bottom of whether this letter that was supposed to
8 have been sent or emailed or whatever was actually
9 sent.

10 MR. GOODMAN: That's fine.

11 CHAIR GIBSON: But at this point in time
12 independent of any letter or email, do you have any
13 independent recollection of a communication from the
14 Rosebud Sioux on behalf of the Oglala Sioux Tribe and
15 some other tribes that what was in the Applicant's
16 statement of work was not competitive and was not
17 something they were interested in doing because they
18 just couldn't. It was just too cheap essentially.

19 MR. GOODMAN: I'll answer that in parts.
20 A specific letter from Rosebud Sioux Tribe that
21 declared themselves on behalf of Oglala Sioux Tribe I
22 do not remember that specific letter coming across my
23 way.

24 CHAIR GIBSON: Okay.

25 MR. GOODMAN: Generally, there were

1 through these teleconferences which we'll probably get
2 into in August --

3 CHAIR GIBSON: We will.

4 MR. GOODMAN: -- it did become apparent
5 that tribes did not like the statement of work. And
6 one of the concerns I do recollect being about several
7 of the finances and things of that nature. So some of
8 the things he says do sound familiar in nature. The
9 specifics I can't recall certainly not from another
10 tribe. And those all were factored into why we opted
11 for the open site approach.

12 CHAIR GIBSON: Sure. And I know that
13 we'll -- I would appreciate it by the way, Mr. Yellow
14 Thunder, if you could possibly try to come up with --
15 I don't want you to do this off the top of your head.
16 But when you've had a chance to think about it, if you
17 could just let us know the names of the tribes that
18 you believe were involved in this group along with the
19 Rosebud Sioux and the Oglala Sioux Tribe so we can
20 help this out. Maybe we can get to the bottom of how
21 that information was communicated if at all. That
22 would be helpful. At this point, we don't seem to
23 have anything.

24 MR. GOODMAN: The one thing I can confirm,
25 Your Honor, is that Rosebud Sioux Tribe was a

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1 consulting tribe for Crow Butte license renewal.

2 CHAIR GIBSON: Yes.

3 MR. GOODMAN: So that I can confirm. The
4 specifics I will get back to you, Your Honor.

5 CHAIR GIBSON: Okay. Very well.

6 Let's just take the next thing that you
7 recall that happened. You recall that you were
8 involved in some meetings or telephone calls,
9 conference calls, with this group of tribes. They
10 included at least the Oglala Sioux Tribe and the
11 Rosebud Sioux Tribe.

12 MR. YELLOW THUNDER: And the Standing Rock
13 and the Cheyenne River Sioux Tribes, yes. At least
14 four.

15 CHAIR GIBSON: So you think there were at
16 least four and possibly more.

17 MR. YELLOW THUNDER: More, yes. Maybe
18 even the Northern Cheyenne at some point.

19 CHAIR GIBSON: Okay.

20 MR. YELLOW THUNDER: So there was at least
21 five or six tribes that were involved. They were
22 involved.

23 CHAIR GIBSON: Very well. There were some
24 tribes involved. You all had this -- You all received
25 the Applicant's statement of work. You all talked

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1 among yourselves and delegated the -- You understood
2 at least the Rosebud Sioux had been delegated
3 responsibility for communicating with the NRC. And
4 we'll get to how that happened or whatever.

5 Now after that, there were some conference
6 calls that occurred at least according to this OST 038
7 about the TCP survey. And you attended one of them on
8 April 24. Is that right? I believe at least
9 according to the NRC 038 you were on this call on
10 April 24. Does that sound right to you, sir?

11 Unfortunately, we don't have a transcript
12 of that. So we'd have to go into a nonpublic session
13 to talk about it. But I'm just curious if you recall
14 attending a call on April 24.

15 MR. YELLOW THUNDER: We may have, Your
16 Honor. But to the best of my recollection, we began
17 to sort of pull back on our participation in some of
18 these conference calls because as you mentioned before
19 that's not face to face.

20 CHAIR GIBSON: That's what?

21 MR. YELLOW THUNDER: Face to face
22 consultation.

23 CHAIR GIBSON: Oh, face to face. Okay.

24 MR. YELLOW THUNDER: We would rather have
25 face to face dialogue. That was not just the view of

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1 our tribe, but a view of Cheyenne River Tribe and
2 Rosebud and all of the other tribes that were involved
3 in this.

4 But I'd like to further add that we began
5 to pull back from participating in conference calls.
6 So we may not have been on this conference call
7 because at some point we did participate in a
8 conference in regards to a programmatic agreement that
9 was trying to be developed.

10 CHAIR GIBSON: Okay.

11 MR. YELLOW THUNDER: It was also that
12 conference call we weren't fully engaged. We were not
13 participating in the development of that programmatic
14 agreement. We were merely listening. We were merely
15 listening and not participating to develop it.

16 But the NRC -- and I'm not going to say
17 any names -- came back with further documentation in
18 regards to that conference call stating that we were
19 fully engaged in the dialogue for the development of
20 the PA which we were not.

21 CHAIR GIBSON: Okay.

22 MR. YELLOW THUNDER: Based on that kind of
23 what I would say it's not done in good faith, but the
24 implication of us participating fully in the dialogue
25 for the development of that programmatic agreement was

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1 related onto the other tribes as a guise to pull them
2 in.

3 CHAIR GIBSON: Okay.

4 MR. YELLOW THUNDER: Based on that because
5 we got calls from other tribes stating that "Hey, the
6 Oglalas are on board, fully on board, with this PA.
7 We're thinking about getting on board," we had to
8 retract that. We said, "No, we're not."

9 CHAIR GIBSON: Sure.

10 MR. YELLOW THUNDER: That was something
11 that was created by the people that were hosting the
12 conference call to get you guys to believe that we
13 were fully engaged when we were not. We were opposed
14 to the PA in this development anyway.

15 We just wanted to know what they were
16 saying, what they were talking about, in the progress
17 of the development of this PA. Therefore, we refused
18 to participate in any more conference calls.

19 MR. CYLKOWSKI: Your Honor.

20 CHAIR GIBSON: Hold on just one second.

21 Yes, what your --

22 MR. CYLKOWSKI: Your Honor, I wanted to
23 clarify that. There is no programmatic agreement.

24 CHAIR GIBSON: I was just going to ask Mr.
25 Goodman about that.

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1 MR. CYLKOWSKI: All right.

2 CHAIR GIBSON: So we'll let him testify
3 instead of you since he's sworn.

4 Mr. Goodman, Mr. Yellow Thunder made
5 reference to an effort to try to put together a
6 programmatic agreement. Was there a programmatic
7 agreement or something that people referred to as a
8 programmatic agreement during this period of time,
9 2012, in the spring and summer of 2012?

10 MR. GOODMAN: For Crow Butte license
11 renewal.

12 CHAIR GIBSON: Yes.

13 MR. GOODMAN: No, Your Honor.

14 CHAIR GIBSON: There was none.

15 MR. GOODMAN: No.

16 CHAIR GIBSON: Was there for anything that
17 you were talking to the tribes about? I mean I'm just
18 wondering where the term programmatic agreement might
19 have come about.

20 MR. GOODMAN: You would have to ask
21 counsel. I don't want to speak for him, Your Honor.
22 But my guess is the programmatic agreement that he's
23 referring to was probably associated with Power Tech.

24 CHAIR GIBSON: Okay.

25 MR. GOODMAN: And Dewey Burdock at one

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1 point, well, several points, they were considering a
2 programmatic agreement. That would be my guess, Your
3 Honor.

4 CHAIR GIBSON: That's okay. Just again,
5 could you give me a rough time frame of when there was
6 discussion about the possibility of a programmatic
7 agreement for Power Tech/Dewey Burdock?

8 MR. GOODMAN: I don't believe it was until
9 2013 time frame, Your Honor.

10 CHAIR GIBSON: That's okay. We're not
11 going to hold you to that. We're just trying to get
12 a time frame so we can understand what's going on.

13 Now there was an interest on the part of
14 the NRC to have some dialogue with the tribes about
15 not merely the Crow Butte renewal license site, but as
16 well about the North Trend Expansion Area and about
17 the Power Tech/Dewey Burdock site. Is that correct?

18 MR. GOODMAN: Until the letter that was
19 sent on October 31, 2012, that answer is correct, Your
20 Honor.

21 CHAIR GIBSON: Right.

22 MR. GOODMAN: After that date, license
23 renewal was separated out and was unique.

24 CHAIR GIBSON: Okay. That's very useful
25 to know.

1 Now, Mr. Yellow Thunder, we've already had
2 some discussion about this bus tour and the bus tour
3 was not just of the license renewal site. It was also
4 about the North Trend Expansion Area and about the
5 Power Tech site. And there was also some discussion
6 at that meeting about those. And as Mr. Goodman said,
7 the Crow Butte license renewal site was sort of
8 detached from that process until October/November of
9 2012.

10 MR. GOODMAN: The letter that was sent out
11 on October 31, 2012 was specifically referring to the
12 Crow Butte projects. It's separated from Power Tech
13 at that point in time and was separate for the
14 remainder of its 106 analysis.

15 CHAIR GIBSON: Very well. So October 31,
16 2012.

17 It's very possible that there were a lot
18 of things being discussed at that time. They were
19 talking about three sites. But clearly one of the
20 things and the programmatic agreement, that word, that
21 phrase, may have come up in terms of the Power
22 Tech/Dewey Burdock site.

23 MR. YELLOW THUNDER: I was merely using it
24 as an example of the methodology that NRC often
25 employed to try to get the other tribes to acquiesce

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1 so to speak. If we acquiesce, the other tribes are
2 going to acquiesce.

3 CHAIR GIBSON: Yes.

4 MR. YELLOW THUNDER: So that was a ploy
5 that they had going at that time. And I was just
6 referring to it in that manner.

7 CHAIR GIBSON: So you didn't mean to say
8 that there was a programmatic agreement for the Crow
9 Butte license renewal site, but merely that that was
10 a mechanism that you would call a ploy.

11 MR. YELLOW THUNDER: Correct.

12 CHAIR GIBSON: To get them to --

13 MR. YELLOW THUNDER: Yes, exactly that.
14 And I was referring --

15 CHAIR GIBSON: To get more tribes involved
16 in the process.

17 MR. YELLOW THUNDER: Right.

18 CHAIR GIBSON: To get more buy-in.

19 MR. YELLOW THUNDER: If we signed, the
20 rest of the tribes are going to sign basically.

21 CHAIR GIBSON: Yes.

22 MR. YELLOW THUNDER: So I was just
23 referring to some of the ploys, the tactics, that
24 might have been employed at that time.

25 CHAIR GIBSON: Just to try to put your

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1 head back into this time frame now, the first
2 communication comes out in January. The meeting
3 happens in February. There's more communication in
4 March and in April.

5 And then there's a conference call.
6 There's one on April 24. There's one on August 9.
7 And then there's one on August 21. You can look at
8 the 038 to see, but I think you'll agree with me that
9 at least shows that you were on the call.

10 Now what it sounds to me like, Mr. Yellow
11 Thunder, is that you're saying that, yes, you were on
12 the call. But you weren't actively participating,
13 arguing for your position because the terms that you
14 were confronted with inadequate. Is that correct?

15 MR. YELLOW THUNDER: Yes. That's correct.
16 And if I also may add to my recollection Mike and I
17 were only on one conference call.

18 CHAIR GIBSON: You believe you were only
19 on one.

20 MR. YELLOW THUNDER: We were only on one
21 conference call. I recollect being on only one
22 conference call. So if representatives from our
23 office or what have you were on these calls, we
24 weren't a part of it.

25 CHAIR GIBSON: That's okay. You were at

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1 least on one. We don't know if you were on all of
2 them. The NRC thinks you were on all. You think you
3 were only on one. But the important thing is you were
4 at least on one call.

5 MR. YELLOW THUNDER: We only were on one
6 call.

7 CHAIR GIBSON: And the subject was
8 discussed, but your view was you were participating as
9 almost an observer. You were not actively involved in
10 trying to argue for the position of your tribe. Is
11 that a fair statement?

12 MR. YELLOW THUNDER: That's fair.

13 CHAIR GIBSON: Okay.

14 MR. YELLOW THUNDER: And we were never on
15 a conference call in regards to the Crow Butte, the
16 CBR renewal. The conference call that we were on was
17 like I was saying specific to the PA for the Dewey
18 Burdock site.

19 CHAIR GIBSON: Okay. Now I've just got a
20 couple more things I want to get to. Then we may just
21 recess for the evening. In your testimony when you
22 claim that the tribes were not involved in the
23 creation of the TCP surveys, what you're saying is
24 that you were participating only as an observer to try
25 to find out what was going on. You were not actively

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1 arguing for your side because the terms that you were
2 being offered were insufficient. Is that a fair
3 statement?

4 MR. YELLOW THUNDER: Right.

5 CHAIR GIBSON: Okay.

6 MR. YELLOW THUNDER: We did, in regard to
7 that question, provide a scope to NRC and the
8 Applicant at their request.

9 CHAIR GIBSON: Okay.

10 MR. YELLOW THUNDER: Yes. Which at that
11 point we implemented our own tribal rates, our own
12 days for being in the field, our own length of field
13 work, our recordation, our own data, our own writing
14 time, everything that is required in a good scope of
15 work. And we submitted that back to NRC and the
16 Applicant. That was at their request.

17 CHAIR GIBSON: And did you ever get a
18 response?

19 MR. YELLOW THUNDER: It was rejected, Your
20 Honor.

21 CHAIR GIBSON: It was rejected.

22 MR. YELLOW THUNDER: Yes. That's what
23 stalled the TCP work. That was one of the major
24 factors that stalled the TCP study because we went
25 around and around and around on this particular scope

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1 of work was to be developed which led if I may add
2 just briefly, Your Honor, to some instances that came
3 up. And the Applicant I believe or the NRC in lieu of
4 the scope of work, so to speak, made the offer of
5 \$10,000 for the tribes that would do a TCP survey out
6 there. And that is how a couple of the tribes managed
7 to go and do a TCP survey for the entire area of
8 potential effect.

9 CHAIR GIBSON: Right. And we'll probably
10 get to that tomorrow.

11 MR. YELLOW THUNDER: Okay.

12 CHAIR GIBSON: But I want to close the
13 loop here. Mr. Goodman, I don't think that I've seen
14 a sort of counterproposal like this from the Oglala
15 Sioux Tribe. Was that communicated to you personally?

16 MR. GOODMAN: If we're referring to a
17 statement of work by the Oglala Sioux Tribe to NRC
18 staff specifically pertaining to Crow Butte license
19 renewal, no, Your Honor. I would agree with you in
20 that I also have not seen such a document.

21 CHAIR GIBSON: Okay. And did you receive
22 any communication at all directly from the Oglala
23 Sioux Tribe that said, "We've got a counterproposal.
24 If you'll do it for something like this, we'd sign up
25 or we might sign up." Did you get anything like that?

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1 You don't recall anything like that?

2 MR. GOODMAN: No, Your Honor.

3 CHAIR GIBSON: Okay.

4 Mr. Yellow Thunder, Mr. Goodman says he
5 never got anything like this and he has no
6 recollection. Can you help us. Do you have a copy of
7 what you sent or do you have any way that we can
8 refresh Mr. Goodman's recollection? He seems to not
9 remember anything like that.

10 MR. YELLOW THUNDER: For which proposal?

11 CHAIR GIBSON: I think we're talking about
12 -- I don't know what we're talking about. I was
13 assuming that was for the Crow Butte license renewal
14 area. But maybe you were talking about one of these
15 other areas.

16 MR. YELLOW THUNDER: The scope of work
17 that requested us to be redrafted was for the proposed
18 Crow Butte license renewal, Crow Butte, North Trend
19 and Dewey Burdock projects, all three.

20 CHAIR GIBSON: So it was for all three.

21 MR. YELLOW THUNDER: Right.

22 CHAIR GIBSON: And this counterproposal
23 was intended for all three.

24 MR. YELLOW THUNDER: Right.

25 CHAIR GIBSON: Maybe it got filed in North

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1 Trend Expansion or Power Tech and didn't get filed
2 here. I mean that's certainly possible.

3 Mr. Catches-Enemy, perhaps you can help us
4 out here. Yes, sir.

5 MR. CATCHES-ENEMY: I wanted to add an
6 opinion as far as a scope of work that came from the
7 tribes. I wasn't involved in that so much. But I
8 would have enough experience to know that enough of
9 those tribes that could come together to agree on a
10 scope of work that was somewhat sufficient, there are
11 some compromises that had to be made between the
12 tribes. Some tribes wanted more. Some wanted less.
13 Some wanted other methodologies to be employed.

14 To get to that point to submit that scope
15 of work to the NRC was quite a feat in itself.
16 Without a lot of resources, it's just more or less a
17 commonality amongst the tribes. I just wanted to
18 bring that to your attention that it wasn't an easy
19 feat to accomplish that scope for all three projects.

20 CHAIR GIBSON: Thank you.

21 And, Mr. Yellow Thunder, now I'm thinking
22 I may have gotten the wrong impression. I thought
23 that it was something that the Oglala Sioux Tribe had
24 done by itself. But I take it this was something that
25 was done by several tribes.

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1 MR. YELLOW THUNDER: Yes. Your Honor, if
2 you can recall in the beginning I initially said that
3 we had a tribal caucus or a conference call in which
4 several of the tribes, Standing Rock, Cheyenne River
5 --

6 CHAIR GIBSON: Yes.

7 MR. YELLOW THUNDER: -- Oglalas and
8 Rosebud and Northern Cheyenne were all involved in the
9 development of the scope of work that the staff
10 requested of us.

11 CHAIR GIBSON: Right.

12 MR. YELLOW THUNDER: So altogether we
13 developed this. And like Mr. Catches-Enemy was
14 saying, that took some work to develop that.

15 CHAIR GIBSON: I'm sure it did.

16 MR. YELLOW THUNDER: And we submitted --
17 we sent that scope of work too. And I may be wrong,
18 but the best of my recollection we sent that scope of
19 work to Rosebud. We sort of like took a vote which
20 tribes is going to submit this for us.

21 CHAIR GIBSON: Right.

22 MR. YELLOW THUNDER: And I believe we
23 decided on having the Rosebud Sioux Tribe
24 archeologist, Mr. Rod, submit that scope of work to
25 the staff with our rates, with our recommendations.

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1 And we never heard back.

2 CHAIR GIBSON: Is it possible that that
3 was done on September 27, 2012 on at least the
4 letterhead of the M-A-K-O-C-H-E W-O-W-A-P-I? Was it
5 possible that that group Makoche Wowapi or something
6 -- I don't know how to say that. I'm sorry.

7 MR. YELLOW THUNDER: Yes.

8 CHAIR GIBSON: Is it possible that that is
9 proposal to which you are referring?

10 MR. YELLOW THUNDER: Yes, it was.

11 CHAIR GIBSON: Bingo. There we go.

12 MR. YELLOW THUNDER: Yes, it was.

13 CHAIR GIBSON: And we do know that that
14 happened. So that was a proposal that Mr. Yellow
15 Thunder understands. Let me just ask first. Is this
16 the same thing you understood with the Rosebud Sioux
17 would be submitting? Or was this a different thing?

18 MR. YELLOW THUNDER: No, that's the one.
19 I believe that we had selected Rosebud to draft this
20 up and then Rosebud -- That's Standing Rock.

21 CHAIR GIBSON: That's Standing Rock.

22 MR. YELLOW THUNDER: Yes.

23 CHAIR GIBSON: Bingo, okay.

24 Now you're familiar with that, right, Mr.
25 Goodman?

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1 MR. GOODMAN: I am familiar with that,
2 yes. That was specific to Dewey Burdock. So that did
3 not have anything to do with Crow Butte license
4 renewal.

5 CHAIR GIBSON: That was specific to Dewey
6 Burdock.

7 MR. GOODMAN: It was, Your Honor.

8 CHAIR GIBSON: And what I'm hearing you
9 say, Mr. Yellow Thunder, is that you thought it was
10 for all three sites. Is that a fair statement?

11 MR. YELLOW THUNDER: That was the request
12 that was made by the staff.

13 CHAIR GIBSON: All three of them.

14 MR. YELLOW THUNDER: So I was under the
15 impression that it was, yes.

16 CHAIR GIBSON: Okay. Very good. With
17 that, I think we actually got to the bottom of
18 something. We finally figured out what we were
19 talking about. Okay.

20 What I would like to do is it is after
21 6:00 p.m. I would like to recess at this point. And
22 we will come back at 8:30 a.m. I believe we have one
23 other matter we need to attend to.

24 (Off record discussion)

25 I understand we have an exhibit that has

1 been marked as INT 078 that has been provided to
2 counsel. You've received this, Mr. Smith.

3 MR. SMITH: Yes, we have.

4 CHAIR GIBSON: And you've received this,
5 Ms. Simon.

6 MS. SIMON: Yes, Your Honor.

7 CHAIR GIBSON: I don't expect you all to
8 react to it. It just got dropped here. What I would
9 suggest we do is -- We haven't had a chance to look at
10 it either. We'll take this up in the morning and
11 figure out what we're going to do with it. Okay?

12 MR. BALLANCO: Your Honor, just one point
13 on this.

14 CHAIR GIBSON: Yes, Mr. Ballanco.

15 MR. BALLANCO: This is the affidavit.
16 This is the entirety of this factual statement.
17 However, if you want to examine Dr. Anders related to
18 this, like so many of us he's a terribly busy man.

19 CHAIR GIBSON: Sure.

20 MR. BALLANCO: If we want him to come, I
21 would have to give him some advanced warning.

22 CHAIR GIBSON: Fair enough.

23 MR. BALLANCO: Either in the beginning of
24 the day or at the end of the day tomorrow would be
25 sufficient.

1 CHAIR GIBSON: Fair enough. It will not
2 be the beginning of the day. So you can let him know
3 that he can see all the cows and dogs or whatever he
4 wants to see.

5 MR. BALLANCO: Many cows in Crawford.

6 CHAIR GIBSON: And he doesn't have to keep
7 any patients waiting for right now.

8 MR. BALLANCO: Thank you.

9 CHAIR GIBSON: And then we'll figure out
10 what to do with this after that.

11 MR. BALLANCO: Thank you.

12 MR. REID: Your Honor, Andrew Reid from
13 the tribe.

14 CHAIR GIBSON: Yes, Mr. Reid.

15 MR. REID: There were those two meeting
16 transcripts that again I've asked that we offered and
17 asked that they be made part of the record. One would
18 be the June 8, 2011 transcript and the other one is
19 the February 14-15, 2012 transcript.

20 CHAIR GIBSON: You've made your record,
21 Mr. Reid. Thank you, sir.

22 MS. SIMON: Your Honor, Marcia Simon. I
23 think the June 8th one is already an INT exhibit,
24 isn't it? Didn't you show that as an exhibit? INT
25 053 maybe.

1 MR. REID: If it is I apologize. Then I
2 would ask that -- I would move that the other one be
3 admitted.

4 CHAIR GIBSON: Okay. Very well.

5 MR. GOODMAN: Your Honor.

6 CHAIR GIBSON: Yes.

7 MR. GOODMAN: Nathan Goodman here, right
8 in front of you.

9 CHAIR GIBSON: Yes, sir. Mr. Goodman.

10 MR. GOODMAN: Sorry. I like getting my
11 homework assignment straight.

12 CHAIR GIBSON: Yes.

13 MR. GOODMAN: And my homework assignment
14 is to look what communications possibly came from the
15 Rosebud Sioux Tribe to me during that year time frame.
16 However, it seems as though we've figured out that it
17 may actually be Standing Rock Sioux Tribe that I
18 should be looking for if they became the
19 representation.

20 I just want to make sure I don't look for
21 Rosebud and then it turns out I should be looking for
22 Standing Rock. If I could get some clarification on
23 my homework assignment, that would be great.

24 CHAIR GIBSON: Yes. And if you don't have
25 a homework assignment, then Mr. Yellow Thunder doesn't

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1 have a homework assignment. I just want to be sure.

2 You're satisfied, sir, that what we're
3 really talking about is a communication from the
4 Standing Rock Sioux on September 27, 2012. And that's
5 what you were referring to that everybody got together
6 and agreed on. Is that correct?

7 MR. YELLOW THUNDER: Yes, it is. And I
8 would also like to add that I believe to the best of
9 my recollection that decision was made in North Dakota
10 at a meeting that I attended at the North Dakota
11 Federal Highways Tribal Communications consultation
12 meeting. That's where that decision was made to have
13 Makoche Wowapi do that.

14 CHAIR GIBSON: Okay.

15 MR. YELLOW THUNDER: And I would also like
16 to add that although the staff had asked for that
17 scope of work for those three projects, the only one
18 that we did was that one that was for Dewey Burdock.
19 I don't believe we had put together a scope of work
20 for this, for the Crow Butte.

21 CHAIR GIBSON: Now that would be
22 consistent with Mr. Goodman's recollection.

23 MR. YELLOW THUNDER: Right.

24 CHAIR GIBSON: That it was only for the
25 Power Tech/Dewey-Burdock site.

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1 MR. YELLOW THUNDER: Right.

2 CHAIR GIBSON: I guess we're going to hold
3 on just one more minute because I really want to try
4 to close this. Do you have any explanation for why
5 there was nothing submitted with respect to the other
6 two sites?

7 MR. YELLOW THUNDER: No, I don't.

8 CHAIR GIBSON: Okay. Very well.

9 MR. REID: Your Honor, there is an
10 exhibit. This is Andrew Reid for the tribe. It's INT
11 037.

12 CHAIR GIBSON: Yes.

13 MR. REID: Which is the February 2013
14 letter that discusses that submission by the Standing
15 Rock Sioux Tribe if that may assist. There's also a
16 discussion in that same exhibit, INT 037, of the
17 dispute over the financing of the survey that Mr.
18 Yellow Thunder testified to. That may help.

19 CHAIR GIBSON: Thank you. Thank you for
20 pointing that out, Mr. Reid. We may come to that in
21 the morning.

22 In the interim, if everyone is okay, I
23 would like to --

24 MR. GOODMAN: Your Honor, one more.
25 Sorry.

1 CHAIR GIBSON: Yes, sir.

2 MR. GOODMAN: If my homework assignment
3 includes looking for communications between OST and
4 Federal Highways, I'm certainly not going to be able
5 to accommodate that.

6 CHAIR GIBSON: No, you don't have to worry
7 about that.

8 MR. YELLOW THUNDER: That's not necessary.

9 MR. GOODMAN: Thank you.

10 CHAIR GIBSON: I think Mr. Goodman's just
11 pulling our leg here. With that, we will stand
12 recessed --

13 MS. SIMON: Your Honor. I'm sorry.

14 CHAIR GIBSON: Oh boy. Ms. Simon.

15 MS. SIMON: I want to get my two cents in.
16 I just was wondering if the Board has been able to
17 determine in terms of scheduling. I know Dr. Nickens
18 was supposed to leave Saturday.

19 CHAIR GIBSON: We're going to be done by
20 the end of the day tomorrow. Okay?

21 MS. SIMON: Yes. Thank you very much.

22 CHAIR GIBSON: I can't tell you when, but
23 we will be done by the end of day tomorrow.

24 MS. SIMON: Great. Thank you.

25 CHAIR GIBSON: We will get started at 8:30

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1 a.m. to do that. Very well. Have a pleasant evening
2 and we'll see you at 8:30 a.m. Off the record.

3 (Whereupon, at 6:15 p.m., the above-
4 entitled matter was recessed to convene at 8:30 a.m.
5 on Friday, August 28, 2015.)
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