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NUCLEAR REGULATORY COMMISSION

Title: Crow Butte Resources, Inc.
Open Session

Docket Number: 40-8943-OLA

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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Friday, August 28, 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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T-A-B-L-E O-F C-O-N-T-E-N-T-S

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22 September 27, 2012 proposal from the
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23 Formal invitation to participate
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of work, 10/3/12 2230

27 2010 Census Bureau map of Indian Tribes in
the United States 2292

28 2013 American Indian Population and
Labor Force Report 2296

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

8:33 a.m.

1
2
3 CHAIR GIBSON: Let's go ahead and get on
4 the record while they're dealing with these technical
5 issues.

6 Got a couple of administrative things we
7 need to handle before we get back to our testimony.
8 First of all, I was wondering if we might talk first
9 of all about Dr. Francis Anders, the veterinarian. I
10 realize Mr. Ballanco is not here, but this is what we
11 will do: I think arguably Dr. Anders' testimony
12 relates to the hydrogeology questions that we'll be
13 taking up in a subsequent day. And so, what we'll do
14 is we will not admit this affidavit at this time, but
15 if the Intervenors wish to have Dr. Anders be a
16 witness in support of their position on the remaining
17 issues that we have, that'll be fine, but I think
18 that's a better way to handle it than try to deal with
19 something at the last minute. When we don't have the
20 witnesses present it's just -- we've already finished
21 that part of the case on those contentions and I don't
22 think we want to get into that. So that's how we're
23 going to handle this. Unfortunately, Mr. Ballanco is
24 not here, but we'll -- you can let him know, Mr. Reid.
25 Okay?

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1 MR. REID: I will. Just one question on
2 that. At these proceedings, these supplemental
3 proceedings I assume Mr. Anders would be essentially
4 a rebuttal witness, but how do you project taking that
5 testimony? It's my understanding it's to be over the
6 telephone.

7 CHAIR GIBSON: It's going to be over the
8 phone. Have you ever taken a telephone deposition?

9 MR. REID: Yes, I have.

10 CHAIR GIBSON: Okay.

11 MR. REID: But I --

12 CHAIR GIBSON: That's the closest thing it
13 is to that.

14 MR. REID: Okay.

15 CHAIR GIBSON: It is imperfect.

16 MR. REID: We'll have to get --

17 CHAIR GIBSON: You certainly miss the
18 nuance of the witnesses. You miss some things. But
19 we have to do the best we can with what we have, and
20 we're going to have to do this by telephone.

21 MR. REID: Right.

22 CHAIR GIBSON: He can't come back out
23 here.

24 MR. REID: I'm just trying to figure out
25 the logistics. So we would have to have somebody down

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1 here to get him set up for a telephone -- would it be
2 like a video, or would it just be audio?

3 CHAIR GIBSON: I think it's just going to
4 be audio. We're going to go back and see what we can
5 do. My suspicion is it's going to have to be audio.

6 MR. REID: All right. Would this be a
7 situation where we could give Mr. Anders a -- Dr.
8 Anders a call-in number and then he could just --

9 CHAIR GIBSON: Yes. Oh, absolutely.

10 MR. REID: Okay.

11 CHAIR GIBSON: Oh, absolutely. I know
12 ideally you're going to be sitting there with your
13 witnesses. You're all going to have them in one
14 place. But that may not be possible. But we can all
15 be hooked up by telephone and we'll be in a virtual
16 courtroom.

17 MR. REID: All right. Thank you.

18 CHAIR GIBSON: Okay. I was passed a note
19 that you had something you wanted to raise, Mr.
20 Smith --

21 MR. SMITH: Yes, Your Honors.

22 CHAIR GIBSON: -- in this regard.

23 MR. SMITH: It's along those lines, yes.
24 I finally had the opportunity last night -- I didn't
25 have any homework, so I was able to reflect on the new

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1 exhibits that have been introduced by the parties in
2 the hearing.

3 CHAIR GIBSON: Yes.

4 MR. SMITH: And having done so we don't
5 believe that it's necessary or appropriate to take
6 further testimony from the parties or hold an
7 additional day of hearings. The record as it stands
8 we believe is more than adequate to resolve the
9 admitted contentions.

10 With respect to the three new aquifer pump
11 test reports, Board Exhibit 2, those were publicly
12 available documents that could have been but were not
13 presented by the Intervenors in their testimony. And
14 while I appreciate that Judge Wardwell would like to
15 review those; and we have no problem providing those
16 and for them being used for that purpose, we don't
17 believe it would be appropriate to allow an
18 opportunity for wholly new testimony on new issues
19 that could have been but were not raised at the outset
20 of this proceeding in the initial time for filing
21 testimony and exhibits.

22 Similarly, with respect to the water level
23 data in the Brule and the Brule aquifer water level
24 generally and the excursion reports that we're going
25 to be submitting, those may be useful to the Board,

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1 and we again are happy to provide them for that
2 purpose, but don't think it's appropriate to give the
3 Intervenors a second or third or even a fourth
4 opportunity to raise new issues having seen the
5 questions that the Judges presented here this week
6 based on Judge Wardwell's questions.

7 With respect to the Terry, LaGarry and
8 Souders abstracts and articles, the question of
9 whether the Chamberlain Pass formation or the Basal
10 Chadron sandstone has been recognized by the USGS or
11 not, what nomenclature should be used, has no bearing
12 on the ultimate environmental safety issues at issue
13 here. It's undisputed that the Basal Chadron
14 sandstone formation or the Chamberlain Pass formation
15 pinches out between here and the Pine Ridge
16 Reservation, so any testimony on those would be
17 irrelevant to the Board's overall conclusion.

18 The last set of documents I think would be
19 the NRC staff's groundwater modeling documents, and
20 those also don't warrant additional testimony. The
21 Intervenors have had actual notice of the existence of
22 those models since at least December of 2012 and
23 should be barred by laches from raising new issues
24 about those at this late date. As an aside, the
25 Terry, LaGarry and Souders articles were never

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1 disclosed to any of the other parties either.

2 But most importantly that groundwater
3 model addresses the White River structural feature,
4 which is located more than two miles away from the
5 licensed area. And while it's an interesting science
6 project, I think, and it may have some relevance to
7 the North Trend Expansion Area, it doesn't affect the
8 groundwater at the current mining area or the licensed
9 area that's the subject of this proceeding. So I
10 don't think there's any need to solicit further
11 testimony from the parties on that.

12 For all of these reasons we don't think
13 there's a need for additional testimony or hearings
14 and believe that there's more than ample information
15 in the record to resolve the contentions.

16 CHAIR GIBSON: Thank you, Mr. Smith.

17 MS. SIMON: Your Honor, may I just say
18 that --

19 CHAIR GIBSON: Yes.

20 MS. SIMON: -- with regard to the Anders
21 testimony, I realize that you're not admitting it at
22 this time, but the staff would object to having Dr.
23 Anders testify at all. The witnesses were supposed to
24 be identified in April for this hearing, and certainly
25 if the Intervenors had wanted to identify Dr. Anders

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1 as a witness, they could have and should have done so
2 at that time, provided his testimony when we provided
3 our initial or rebuttal testimony. So we feel even if
4 we do have an additional hearing that it's
5 inappropriate.

6 CHAIR GIBSON: And certainly you're
7 entitled to move to strike his testimony when it's
8 proffered. I'm just saying at this point we're not
9 going to allow it because of the fact that we're going
10 to have an additional day. That by itself is reason
11 enough with no other witnesses here that could talk
12 about this matter. It just would not be appropriate.

13 Now, what I would suggest you do is when
14 this testimony is proffered, you can object to it, you
15 can move to strike it on the very grounds you said.
16 We can take it up at that point in time. And I
17 suspect that Mr. Smith will be filing a formal motion
18 as well for us not to forward with these proceedings,
19 which is all fine, too. I appreciate it.

20 MR. SMITH: One additional point, Your
21 Honor.

22 CHAIR GIBSON: Yes. Yes, Mr. Smith?

23 MR. SMITH: Thank you. If you do decide
24 to take additional testimony --

25 CHAIR GIBSON: Yes, sir.

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1 MR. SMITH: -- which as I just noted we
2 don't believe is appropriate or necessary --

3 CHAIR GIBSON: Yes.

4 MR. SMITH: -- I do believe it would be
5 important to provide some guidelines to the parties to
6 constrain the scope of that testimony. I don't
7 believe it's appropriate for this to become a free
8 ranging opportunity to raise any new issues that
9 they've thought of since we've been here this week and
10 I think some guidance from the Board in that regard
11 would be very helpful in the order setting the
12 schedule at a minimum.

13 Perhaps one way to address that and keep
14 it focused would be for the Board to pose some
15 specific questions that they have on those exhibits
16 rather than just leaving it wide open. I'm really
17 concerned that we're going to end up with 100 new
18 exhibits.

19 CHAIR GIBSON: Right.

20 MR. SMITH: And then one day is not going
21 to be enough, and then we're going to have to have 100
22 new exhibits, and we have another day, and it's going
23 to get into a never-ending cycle.

24 CHAIR GIBSON: Well, it will not be that,
25 I will tell you that. I think your suggestion might

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1 be a useful one. Once we have had a -- this is how
2 far we've thought this through, okay, just to be fair.
3 We have thought through this far enough to know that
4 the Board was convinced that there were some
5 additional matters that we simply could not address
6 during this week. We decided that we would need to
7 address -- the best way to deal with that was to have
8 a separate day where we'd have a telephone hearing on
9 that and we would need to have testimony submitted and
10 proposed questions submitted.

11 It may be that we can do some narrowing,
12 as you suggested, Mr. Smith, but the Board hasn't
13 really had a chance to focus on that. So I think you
14 can expect to see some kind of pre-trial order from us
15 that will address that. And I suspect it will be made
16 clear that we're not going to be focused -- a rehash
17 of everything we've talked about. It's going to be
18 very narrowly focused on some specific matters. Okay?

19 MR. REID: Your Honor, could I just for
20 the record; this is Andrew Reid from the Tribe --

21 CHAIR GIBSON: Yes, sir.

22 MR. REID: -- make a quick response? It
23 will be very quick. But I think for the record I need
24 to preserve a quick response to the motion of the
25 Applicant.

1 First, the Applicant did not make any of
2 these objections at the time that the Board actually
3 presented these exhibits to them, and I believe that
4 they were admitted without objection.

5 Number two, all of this was sprung on us.
6 There's no written motion or anything for us to reply
7 to.

8 Number three, this is an administrative
9 proceeding, not a judicial proceeding. The Board has
10 broad discretion to look at whatever it thinks it
11 needs to in order to make its decision. It's an
12 administrative decision making proceeding. I think
13 the objections are not appropriate for this kind of
14 proceeding. I think virtually all of them were
15 exhibits that the Board decided it needed to look at.
16 Even though the Applicant is saying that it creates an
17 additional opportunity for the Intervenors, I don't
18 think the issue is whether or not the Intervenors have
19 an opportunity, but whether or not the Board is
20 fulfilling its function, decision making function of
21 looking at what it needs to look at in order to make
22 its decision. That's the issue here.

23 In regards to Dr. Anders, that issue only
24 came up after the testimony of their witness, of the
25 Applicant's witness that he inspected every single one

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1 of the 20,000 or so wells to make sure they were
2 plugged properly. Until that testimony came out Dr.
3 Anders was -- his testimony was unnecessary. And so,
4 it was in direct response to that. Thank you.

5 CHAIR GIBSON: Okay. Very well. We
6 don't --

7 MS. SIMON: Your Honor?

8 CHAIR GIBSON: Okay.

9 MS. SIMON: Sorry. On the part of the
10 staff I'd like to respond to Mr. Smith's point as
11 well.

12 With the exception of the White River
13 modeling, which I realize was not in our disclosure
14 and therefore those files were not available to the
15 Intervenors, this staff would generally echo the
16 thoughts that the Board has these documents and we
17 would be fine if there was no further testimony on
18 them.

19 Our concern is again, as Mr. Smith stated,
20 that this is the second or third or fourth bite at the
21 apple and Sub-part L proceedings are informal, but
22 they do have rules. And so for the record we just
23 want to state our agreement with that.

24 CHAIR GIBSON: Okay. You've made your
25 objection. Now I'm going to just -- Mr. Ballanco and

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1 Mr. Frankel, you all came in late. I just want to let
2 you know we are not going to admit Dr. Anders'
3 statement at this time. What we can do is we're going
4 to postpone this as one of the things that might be
5 considered at our subsequent day of hearing on the
6 telephone.

7 MR. BALLANCO: Understand, Your Honor.

8 CHAIR GIBSON: Okay. So that's where we
9 are on that. Right. I think that's every -- is there
10 anything else that we need to deal with before we get
11 back to Contention 1?

12 MR. SMITH: No, Your Honor.

13 CHAIR GIBSON: Thank you. Very well. I
14 believe this is going to be for Mr. Catches-Enemy, but
15 if you don't know, let me know and Mr. Yellow Thunder
16 may know.

17 We established yesterday that the NRC
18 staff's view was that there was this possibility of
19 conducting a TCP survey on three different sites and
20 that they were hoping to get the involvement of tribes
21 in that TCP survey. On October 31, however, the staff
22 indicated, Mr. Goodman indicated that on October 31
23 they separated them out and began treating them as
24 individual matters.

25 MR. REID: Could we have a year on that,

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1 Your Honor?

2 CHAIR GIBSON: What?

3 MR. REID: October 31 of what year?

4 CHAIR GIBSON: Oh, 2012, I believe.

5 MR. REID: Correct, Your Honor.

6 CHAIR GIBSON: I'm sorry. Thank you, Mr.
7 Reid. 2012.

8 And during that period of time Mr. Yellow
9 Thunder was obviously involved in some discussions
10 with other tribes. Were you also involved in those
11 discussions?

12 MR. CATCHES-ENEMY: Good morning, Panel.

13 CHAIR GIBSON: Yes, sir.

14 MR. CATCHES-ENEMY: During the time that
15 I was not employed with the Oglala Sioux Tribe from
16 March 2012 until February 2014 I was acting in an ex-
17 officio capacity as well. Also as there was a couple
18 of months there where I was acting in a consulting
19 capacity. So I can't really say that I was involved
20 so much in these matters on any of the teleconference
21 calls and not as in depth as the full-time employees
22 that were working there.

23 CHAIR GIBSON: Okay. All right. Then I
24 guess these are going to be for Mr. Yellow Thunder.

25 So, I think we found the proposed

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1 statement of work from the Standing Rock Sioux. I
2 can't pronounce that other name. I'm sorry.

3 Do we have that available, Mr. Deucher?

4 MR. DEUCHER: (Off microphone)

5 CHAIR GIBSON: This was the thing that I
6 think they just sent to you.

7 MR. DEUCHER: (Off microphone)

8 CHAIR GIBSON: Yes, sir. I'm sorry.

9 All right. Now, this may have some
10 information that's been blacked out so we don't
11 disclose anything, but I'm curious if you can tell
12 from this if there is the proposal that was put
13 together, I believe you said in North Dakota. And I
14 believe it is submitted on September 27 of 2012. Does
15 that look like the proposal, or do you need to look at
16 it a little bit?

17 MR. YELLOW THUNDER: Good morning, Your
18 Honor.

19 CHAIR GIBSON: Yes, sir.

20 MR. YELLOW THUNDER: Yes, I believe this
21 is the proposal that was put together in collaboration
22 with what we refer to as the Oceti Sakowin, which is
23 the Seven Council Fires of all of the Sioux Nations,
24 which is Standing Rock, as I mentioned, Yankton, Lower
25 Brule, Sisseton, Cheyenne River, Oglala, Rosebud. I

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1 believe this is the scope of work that was generated
2 in collaboration with all of the tribes and was
3 submitted.

4 CHAIR GIBSON: Okay. You may have to
5 speak into your microphone just a little bit. I can
6 hear you, but when you lean back just a little bit,
7 it's really hard.

8 MR. YELLOW THUNDER: Okay. Sorry.

9 CHAIR GIBSON: Okay. Now, I noticed, it
10 appears to me that this is for Powertech is the way it
11 appeared to me from looking at it, rather than for all
12 three sites. And it was really hard for me to square
13 that with what you said yesterday after looking at the
14 proposal last night. And so I was wondering if you
15 could help us understand that.

16 MR. YELLOW THUNDER: I think our focus at
17 the time that the staff had requested us
18 collaboratively to draw up this cope of work -- I
19 think our focus was Dewey-Burdock. I think they, the
20 staff, had mentioned to us that -- specifically that
21 this scope of work was going to be for the Dewey-
22 Burdock project. I don't recall any mention of the
23 CBR or the NTEA or Marsland projects at that time.

24 CHAIR GIBSON: Okay. So you did
25 understand this to be pretty much limited to Powertech

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1 then, not to all three sites, is that right?

2 MR. YELLOW THUNDER: Right.

3 CHAIR GIBSON: Okay.

4 MR. YELLOW THUNDER: To the best of my
5 knowledge that was the focus.

6 CHAIR GIBSON: Okay. Was there also any
7 kind of proposal put together by these -- is it
8 seven --

9 MR. YELLOW THUNDER: Right.

10 CHAIR GIBSON: -- Sioux Tribes?

11 MR. YELLOW THUNDER: Right. Well, not all
12 seven participated --

13 CHAIR GIBSON: Okay.

14 MR. YELLOW THUNDER: -- but, yes. Yes.

15 CHAIR GIBSON: Okay. By the participating
16 Sioux Tribes, how about that?

17 (Laughter)

18 MR. YELLOW THUNDER: Right. Yes.

19 CHAIR GIBSON: Okay.

20 MR. YELLOW THUNDER: Yes.

21 CHAIR GIBSON: I don't want to be
22 imprecise here. Was there any proposal put together
23 by the participating Sioux Tribes for the Crow Butte
24 sites, or just for the Crow Butte renewal area?

25 MR. YELLOW THUNDER: To the best of my

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1 recollection there was no scope of work that was
2 generated for the other sites. I believe that this
3 was the only one that was put together.

4 CHAIR GIBSON: Okay. You believe one and
5 the staff's records seem to say three calls that you
6 were monitoring, but not actively participating in --

7 MR. YELLOW THUNDER: Right.

8 CHAIR GIBSON: -- that occurred between
9 September 27 when this was submitted and I guess an
10 earlier, which was a meeting in -- when was that, Mr.
11 Goodman, that earlier meeting?

12 MR. GOODMAN: Valentine's Day. Remember,
13 Your Honor?

14 CHAIR GIBSON: On Valentine's Day. Okay.
15 Very good. Between Valentine's Day and September 27.
16 You participated on at least one call. You think it
17 was one. Their records say you were at least listed
18 as being on three. But regardless, do you recall on
19 that call whether the subject was the Powertech site
20 or all three sites?

21 MR. YELLOW THUNDER: The call that we
22 participated on, Your Honor, was specific for a
23 programmatic agreement for the Dewey-Burdock site.

24 CHAIR GIBSON: Okay.

25 MR. YELLOW THUNDER: And to the best of my

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1 recollection there was no dialogue on the other sites.

2 CHAIR GIBSON: Okay.

3 MR. YELLOW THUNDER: It was specific to
4 the Dewey-Burdock.

5 CHAIR GIBSON: Okay. Very well. Thank
6 you. Just for identification purposes we're going --
7 what are we on, Mr. Smith? Board Exhibit -- what will
8 this be, 23?

9 MR. SMITH: Twenty-two.

10 CHAIR GIBSON: Twenty-two.

11 MR. SMITH: Note it's early in the
12 morning. I'm not --

13 CHAIR GIBSON: That's okay. I'm --

14 MR. SMITH: I don't have high confidence
15 in my librarian skills just yet.

16 MR. CYLKOWSKI: I think Mr. Smith is
17 correct. Twenty-two.

18 CHAIR GIBSON: Twenty-two? Okay. We're
19 going to mark this as Board Exhibit 22. And this is
20 the September 27, 2012 proposal from the participating
21 Sioux Tribes, which included the Oglala Sioux Tribe.

22 (Whereupon, the above-referred to
23 document was marked as Board Exhibit No.
24 22 for identification.)

25 CHAIR GIBSON: Got it.

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1 MR. CATCHES-ENEMY: Your Honor?

2 CHAIR GIBSON: Yes, sir? Yes, Mr.
3 Catches-Enemy?

4 MR. CATCHES-ENEMY: If I could interject.

5 CHAIR GIBSON: Yes, sir.

6 MR. CATCHES-ENEMY: As far as when
7 referencing a whole tribe -- Yes, sir.

8 MR. CATCHES-ENEMY: -- the Oglala Sioux
9 Tribe -- and I know for the purposes of correspondence
10 and communications that have occurred between the NRC
11 staff and the Tribal Historic Preservation Offices
12 sometimes that can be misconstrued into communicating
13 with the Oglala Sioux Tribe --

14 CHAIR GIBSON: Yes, sir.

15 MR. CATCHES-ENEMY: -- which is the
16 government. I would ask that we start making those
17 distinctions when there's correspondence or these
18 communications that are occurring that happens between
19 the staff of NRC and the staff of the Tribal Historic
20 Preservation Offices. That way there's no
21 misconception that our tribal government was involved
22 at that point or that they knew about every
23 intricacies that was occurring.

24 CHAIR GIBSON: Okay.

25 MR. CATCHES-ENEMY: Because it's a broader

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1 inclusion when you're talking about a whole tribe.

2 CHAIR GIBSON: Fair enough. So, I will
3 try to be more precise in my language and say
4 communications with the Oglala Sioux Tribe tribal
5 historic preservation officer.

6 MR. CATCHES-ENEMY: Sure.

7 CHAIR GIBSON: Fair enough?

8 MR. CATCHES-ENEMY: And I know a lot of
9 the correspondence states tribes --

10 CHAIR GIBSON: Yes, sir.

11 MR. CATCHES-ENEMY: -- and that's how it's
12 written, but I think it's misleading. Not you
13 specifically, but everything that's been admitted.

14 CHAIR GIBSON: Yes, sir.

15 MR. CATCHES-ENEMY: Thank you.

16 CHAIR GIBSON: Thank you, sir. Let me
17 just ask you, Mr. Yellow Thunder, at this time you
18 were the tribal historic preservation officer, is that
19 correct?

20 MR. YELLOW THUNDER: No, sir.

21 CHAIR GIBSON: No. No, you were --

22 MR. YELLOW THUNDER: I was the natural
23 resources technician for the Oglala Sioux Tribe, but
24 I was also ex officio member of the Tribal Historic
25 Preservation Advisory Council.

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1 CHAIR GIBSON: Okay. Fair enough. In
2 that capacity it sounds like you were not
3 communicating with the NRC. You were monitoring these
4 calls.

5 MR. YELLOW THUNDER: No, I was not
6 communicating directly with the staff.

7 CHAIR GIBSON: Right.

8 MR. YELLOW THUNDER: I was a participant
9 to the one call, conference all that we were on, and
10 also a participant in the various other meetings that
11 the tribes had in regard to the issue at hand.

12 CHAIR GIBSON: And it is that that I would
13 like to focus on. Your testimony indicates that there
14 was a breakdown in communication between the NRC staff
15 and the Oglala Sioux Tribal Historic Preservation
16 Office. We'll just call it that. Okay? And I'm
17 curious, was that one that was in your mind at the
18 time -- had that broken down with other tribes as well
19 with whom you were working, discussing the possibility
20 of doing work at a tribe -- a TCP survey?

21 MR. YELLOW THUNDER: I believe it was,
22 Your Honor, because all -- we were in a unified stance
23 together, which is our modus operandi. When it comes
24 to these kinds of issues we defer back and forth
25 amongst our tribes in regard to the issue at hand and

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1 we all concede together that there was a breakdown.

2 CHAIR GIBSON: Okay. Very well. Thank
3 you. And when did that breakdown occur? Before
4 Valentine's Day? Was it between Valentine's Day and
5 the time you all put this proposal together? Was it
6 after you put the proposal together and it wasn't
7 accepted? I mean, I'm just trying to figure out where
8 in that period of time in 2012 do you see that the
9 communications had broken down?

10 MR. YELLOW THUNDER: Your Honor, the
11 communications with the staff and the tribes had began
12 to dissolve long before that.

13 CHAIR GIBSON: Before Valentine's Day in
14 2012?

15 MR. YELLOW THUNDER: It was, yes. To my
16 -- best of my knowledge and our recollection, yes, it
17 was beginning to unravel long before the issue at
18 hand, which resulted in the issue at hand.

19 CHAIR GIBSON: And, Mr. Catches-Enemy, you
20 were at that February meeting, is that correct?

21 MR. CATCHES-ENEMY:

22 (No audible response)

23 CHAIR GIBSON: Was it your sense that
24 things had already broken down by Valentine's Day? I
25 mean, I know you got out of this in March, so I'm just

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1 curious. By the time you left at least had things
2 broken down? Did they break down at the meeting?
3 Before the meeting? I'm trying to understand when
4 this breakdown occurred.

5 MR. CATCHES-ENEMY: When I reflect back on
6 our initial letter of response back on January of
7 2011, when we were first initially contacted to
8 participate in consultation, I'm not sure what the
9 number is for the exhibits, but --

10 CHAIR GIBSON: NRC-038, I believe --

11 MR. YELLOW THUNDER: Okay.

12 CHAIR GIBSON: -- is that list of the
13 communications.

14 MR. YELLOW THUNDER: Okay. What is not on
15 this NRC-038 is a copy of our letter of response dated
16 January 31st, 2011. And from the beginning we had
17 already listed our some of our -- I know we're using
18 the word "contentions" in this administrative hearing,
19 but we had already had contentions at that point.
20 However, we still made it a point to try to work
21 through those through the consultation process. So
22 that was laid out right at the beginning.

23 But as far as your question is concerned
24 with the February 2012 meeting if things were already
25 breaking down before then, I'm not -- if we're talking

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1 about the TCP survey, then there was -- it didn't
2 occur at that time. So it was probably between
3 February and sometime around the same time as the
4 September submittal, this tribal submittal.

5 CHAIR GIBSON: Okay. Very well. Thank
6 you. Mr. Goodman, I'd like to briefly talk about the
7 open site survey that was done in your direct
8 testimony at page 66. And you assert that the staff's
9 invitation for an open site survey went out on October
10 31, 2012. Is that correct?

11 MR. GOODMAN: That is, Your Honor. I
12 also, Your Honor, had a homework assignment to help
13 close the loop on that.

14 CHAIR GIBSON: Yes, sir. Yes, sir.

15 MR. GOODMAN: A lot of it was already
16 covered. The part that talked about any response to
17 a statement of work was indeed specific to Powertech
18 Dewey-Burdock. Additionally, I did not find any
19 communications from Rosebud Sioux or Standing Rock
20 Sioux indicating that they were specifically
21 representing a group of tribes.

22 CHAIR GIBSON: Okay. Mr. Deucher, could
23 you pull up the formal invitation to participate in
24 the TCP survey? And we'll get this marked. This will
25 be 23, Board Exhibit 23.

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1 (Whereupon, the above-referred to
2 document was marked as Board Exhibit No.
3 23 for identification.)

4 CHAIR GIBSON: And this is the October 31,
5 2012 proposal invitation to participate in the TCP
6 survey, is that correct, that you sent out?

7 MR. GOODMAN: Yes, Your Honor.

8 CHAIR GIBSON: And this was sent out to
9 the tribes that you had been having some dialogue with
10 in some cases, not having so much dialogue with, but
11 regardless you were having some dialogue with some of
12 these tribes, had been having it since you started in
13 2011, right?

14 MR. GOODMAN: Yes, Your Honor.

15 CHAIR GIBSON: Okay. And that would
16 include the Oglala Sioux Tribe?

17 MR. GOODMAN: The Oglala Sioux was one of
18 them, yes, Your Honor.

19 CHAIR GIBSON: Okay. Now the staff's
20 proposal to the Tribe was this: The NRC would conduct
21 a TCP survey using an open site approach and would
22 provide a \$10,000 honorarium to each participating
23 tribe as well as a \$125 per diem per representation of
24 a tribe that participates in the TCP survey. Is that
25 essentially correct?

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1 MR. GOODMAN: With the exception that the
2 per diem wasn't per tribe. It was per individual.

3 CHAIR GIBSON: Okay.

4 MR. GOODMAN: The honorarium was per
5 tribe.

6 CHAIR GIBSON: Per representative of a
7 tribe. There could be more than one representative?

8 MR. GOODMAN: Correct, Your Honor.

9 CHAIR GIBSON: And the invitation included
10 the period in which the survey would occur, is that
11 correct?

12 MR. GOODMAN: It did.

13 CHAIR GIBSON: And according to this
14 invitation this period for visiting the site started
15 14 days after the invitation was sent out?

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

17 CHAIR GIBSON: That would have been
18 November 14th, I guess, huh?

19 MR. GOODMAN: Yes, Your Honor.

20 CHAIR GIBSON: As an expert in this field
21 do you know that a Class III survey does not include
22 a TCP survey?

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

24 CHAIR GIBSON: Okay. In this open site
25 approach I didn't see any details on the standards of

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1 the survey, the methodology of the survey or the
2 specific land or sites that were to be surveyed. Is
3 that right?

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

5 CHAIR GIBSON: So it seems to me that what
6 you're maintaining is that the open site approach
7 within the context of this consultation process
8 constituted a hard look at the potential presence of
9 cultural artifacts on the Crow Butte license renewal
10 site under NEPA. Is that correct?

11 MR. GOODMAN: Absolutely, Your Honor.

12 CHAIR GIBSON: Okay. So the informal
13 process of developing the TCP survey had started a
14 year before this, right?

15 MR. GOODMAN: A little more than a year.

16 CHAIR GIBSON: A little more than a year?

17 MR. GOODMAN: Yes. Okay.

18 CHAIR GIBSON: Okay. And when the TCP
19 survey was being designed several methods were
20 discussed with the tribes, including a Tribal
21 statement of work and Applicant statement of work. I
22 think we've already covered that. Correct?

23 MR. GOODMAN: Yes, Your Honor.

24 CHAIR GIBSON: Okay.

25 MR. REID: Your Honor, just for

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1 clarification, I've heard references to scope of work
2 and statement of work. Are they two different things
3 or are we talking about the same thing?

4 CHAIR GIBSON: Well, Mr. Reid, I think
5 we've used both terms. I think it probably means the
6 same thing.

7 MR. REID: Right, I was confused in
8 looking at the exhibits, and so I just wanted to --

9 CHAIR GIBSON: I believe Mr. Goodman uses
10 the term "statement or work." I believe the NRC
11 jargon is "statement of work." I believe Mr. Yellow
12 Thunder uses the word "scope of work." But I think
13 they mean essentially the same thing.

14 MR. REID: The NRC exhibits refer to a
15 scope of work.

16 CHAIR GIBSON: Tell you what: Mr.
17 Goodman, is that your understanding?

18 MR. GOODMAN: My understanding it is the
19 same thing.

20 CHAIR GIBSON: Mr. Yellow Thunder, is that
21 your understanding?

22 MR. YELLOW THUNDER: (No audible response)

23 CHAIR GIBSON: They can't get a nod.

24 MR. YELLOW THUNDER: Yes, sir.

25 CHAIR GIBSON: Thank you so much.

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1 Okay. In your testimony at page 65 you
2 state that when the TCP survey was being designed
3 several methods were discussed with the tribes
4 including a Tribal statement or work and an Applicant
5 statement of work. Is that correct?

6 MR. GOODMAN: Correct, Your Honor.

7 CHAIR GIBSON: Okay. Now I'd like to
8 return to the March 6th, 2012 letter from the staff to
9 the tribal historic preservation officers. And I
10 believe this has already been marked. Let me just
11 ask. Is that correct?

12 This is, yes, Board Exhibit 20. Thank
13 you. Okay. Now, it was in this letter that the NRC
14 staff requested draft statements of work from the
15 tribes and from Crow Butte, correct?

16 MR. GOODMAN: Correct.

17 CHAIR GIBSON: Your letter didn't define
18 what a statement of work was, correct?

19 MR. GOODMAN: This letter did not, no,
20 Your Honor.

21 CHAIR GIBSON: But you were envisioning
22 that the statements of work from the tribes and from
23 Crow Butte would cover the same topics such as
24 compensation, field and scope of survey, is that
25 correct?

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1 MR. GOODMAN: Yes, Your Honor.

2 CHAIR GIBSON: Okay. it also states that
3 the staff plans to review the statements of work
4 submitted by you and the Applicants along with any
5 additional input you or the Applicants provide in the
6 next several weeks and prepare one comprehensive SOW;
7 that's statement of work, right --

8 MR. GOODMAN: Yes, Your Honor.

9 CHAIR GIBSON: -- for each of the proposed
10 projects. Did I read that correctly?

11 MR. GOODMAN: Yes, Your Honor.

12 CHAIR GIBSON: And when we refer to
13 "Applicants" there, we're talking about both Crow
14 Butte and Powertech, correct --

15 MR. GOODMAN: Yes, Your Honor.

16 CHAIR GIBSON: -- for the three sites?

17 MR. GOODMAN: Correct, Your Honor.

18 CHAIR GIBSON: So as of March 6th, 2012
19 you were envisioning that the NRC staff would be
20 making a final decision on what was to be in the final
21 draft statement of work, correct?

22 MR. GOODMAN: Yes, Your Honor.

23 CHAIR GIBSON: I think we've pretty well
24 established that there hasn't been a draft statement
25 of work that was proposed by the Oglala Sioux Tribe at

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1 least for the Crow Butte renewal area. Is that right?

2 MR. GOODMAN: Yes, Your Honor.

3 CHAIR GIBSON: And but there was one
4 proposed by the Applicant Crow Butte, correct?

5 MR. GOODMAN: Correct, Your Honor.

6 CHAIR GIBSON: So let's go to the proposed
7 statements of work which we got from the staff back
8 earlier this week. If I could go to the March 8
9 proposed statement of work from Cameco? Crow Butte?
10 Okay. Could you identify this document, please, sir?

11 MR. GOODMAN: This is the draft statement
12 of work/scope of work/SOW that the Applicant provided
13 us at our request.

14 CHAIR GIBSON: Great. And this is dated
15 March 8, is that correct?

16 MR. GOODMAN: Correct, Your Honor.

17 CHAIR GIBSON: 2012. This will be Board
18 Exhibit 24.

19 (Whereupon, the above-referred to
20 document was marked as Board Exhibit No.
21 24 for identification.)

22 CHAIR GIBSON: If we could go to page 3 of
23 the PDF, Mr. Deucher?

24 There are hourly rates for field work and
25 report presentation, is that correct, listed here?

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1 MR. GOODMAN: It is, Your Honor.

2 CHAIR GIBSON: There was no honorarium or
3 flat fee included in this proposed statement of work,
4 correct?

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

6 CHAIR GIBSON: And this would have covered
7 both the Crow Butte license renewal area and the North
8 Trend Expansion Area, is that correct?

9 MR. GOODMAN: It is, Your Honor.

10 CHAIR GIBSON: Okay. All right. If we
11 could now go to the August 7, 2012 study, Mr. Deucher?

12 Okay. We'll mark this as Board Exhibit
13 25.

14 (Whereupon, the above-referred to
15 document was marked as Board Exhibit No.
16 25 for identification.)

17 CHAIR GIBSON: This is the August 7, 2012
18 statement of work from Crow Butte, correct?

19 MR. GOODMAN: Yes, Your Honor.

20 CHAIR GIBSON: Now, could we go to page 5
21 of this, Mr. Deucher, on the PDF?

22 And here the compensation is still
23 proposed to be done on an hourly basis, is that
24 correct?

25 MR. GOODMAN: Yes, Your Honor.

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1 CHAIR GIBSON: And this covered all four
2 of the Crow Butte properties, right?

3 MR. GOODMAN: I do not --

4 CHAIR GIBSON: The license --

5 MR. GOODMAN: Yes, it did, Your Honor.

6 CHAIR GIBSON: -- renewal area and the
7 three expansions, is that correct?

8 MR. GOODMAN: Correct, Your Honor.

9 CHAIR GIBSON: Okay. Now if we could go
10 to the next one, which is the October 3, 2012?

11 All right. This is going to be Board
12 Exhibit 27.

13 (Whereupon, the above-referred to
14 document was marked as Board Exhibit No.
15 26 for identification.)

16 CHAIR GIBSON: And this is the October 3,
17 2012 statement of work from Crow Butte, is that
18 correct?

19 MS. SIMON: Your Honor, would that be 26,
20 not 27, or am I losing count?

21 CHAIR GIBSON: Yes, it is. Thank you, Ms.
22 Simon.

23 MR. SMITH: Thank you, Ms. Simon.

24 MR. GOODMAN: Your Honor, I've now lost
25 the question that you asked me.

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1 CHAIR GIBSON: That's not a problem. This
2 is the October 3, 2012 proposed statement of work from
3 Crow Butte, is that correct?

4 MR. GOODMAN: I'm sorry. I'm just reading
5 it real quick. Yes, Your Honor. That's correct.

6 CHAIR GIBSON: Okay. And the first line
7 states this is an alternative proposal for the four
8 Cameco ISR properties, correct?

9 MR. GOODMAN: Correct, Your Honor.

10 CHAIR GIBSON: Okay. It appears that this
11 proposal was addressed to the NRC staff, is that
12 correct?

13 MR. REID: Yes, Your Honor.

14 CHAIR GIBSON: And later down on the first
15 page we see a \$125 per diem proposed, is that correct?

16 MR. GOODMAN: Yes, Your Honor.

17 CHAIR GIBSON: As well as a grant of
18 \$5,000 per tribe, correct?

19 MR. GOODMAN: Correct, Your Honor.

20 CHAIR GIBSON: So this is the first time
21 at least we could see in the record where there was a
22 proposed honorarium and a \$125 per diem proposed. Is
23 that your recollection as well?

24 MR. GOODMAN: Yes, Your Honor, that's my
25 recollection.

1 MR. REID: Your Honor, just so that we're
2 clear; this is Andrew Reid from the Tribe, all three
3 of these proposal that you've just mentioned: March 8,
4 2012, August 7, 2012 and October 3, 2013, were
5 prepared by the Applicant.

6 CHAIR GIBSON: Correct.

7 MR. REID: All right. Thank you.

8 CHAIR GIBSON: Correct. Yes. The
9 honorarium seems like a pretty flat number offered to
10 all tribes regardless of how much effort they put
11 forth to assist in the survey. Would that be true?

12 MR. GOODMAN: Can you repeat the question
13 just so that I can --

14 CHAIR GIBSON: Yes, sir.

15 MR. GOODMAN: -- get it right?

16 CHAIR GIBSON: The honorarium seems to be
17 a pretty flat fee offered to all of the tribes
18 regardless of how much effort they put forth to assist
19 in the survey. Is that correct?

20 MR. GOODMAN: With the one exception that
21 -- I want to be clear that it wasn't offered to all
22 the tribes. It's in \$5,000 total to be split up by
23 all the tribes. That would have been a per tribe.

24 CHAIR GIBSON: Okay.

25 MR. GOODMAN: Five thousand dollars to

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1 each tribe. Outside of that statement everything you
2 said is correct, Your Honor.

3 CHAIR GIBSON: Okay. Thank you. So this
4 proposal dated October 3, 2012 -- just trying to get
5 our timeline straight. This would have occurred after
6 all of the teleconferences, correct?

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

8 CHAIR GIBSON: So at this point in time
9 the tribes would not have been aware of this proposal,
10 would they?

11 MR. GOODMAN: The October 3rd?

12 CHAIR GIBSON: Yes, sir.

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

14 CHAIR GIBSON: Okay. Yet it came in just
15 a few days after the proposal was made by the M-A-K-O-
16 C-H-E W-O-W-A-P-I. I just can't say that. I'm
17 sorry. Is that correct?

18 MR. GOODMAN: Yes, Your Honor.

19 CHAIR GIBSON: This compensation proposal
20 differs from the compensation scheme discussed with
21 the tribes previously, correct?

22 MR. GOODMAN: The honorarium approach is
23 different, Your Honor, from what was discussed in the
24 February meetings through phone calls that were had
25 between February 2012 and October 31st, 2012. The

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1 idea of an honorarium was brought up in phone calls,
2 the concept of an honorarium, but you are correct in
3 that the honorarium was different from the statement
4 of work concept with the per hour. That's correct.

5 CHAIR GIBSON: Okay. And when you say it
6 was raised in those phone calls, it was raised on the
7 phone calls -- those three teleconferences. It was --

8 MR. GOODMAN: (No audible response)

9 CHAIR GIBSON: No?

10 MR. GOODMAN: Sorry. No, Your Honor.
11 There were follow-up phone calls with a lot of
12 individual tribes. I'm not -- there were not follow-
13 up phone calls specific with the Oglala Sioux Tribe.
14 We would have reached out. But at that time our phone
15 calls were not getting returned. And so, they -- what
16 I'm talking about, the idea of would an honorarium be
17 an acceptable alternative would have been brought up
18 through those phone calls, individual one-on-one,
19 myself or Dr. Nickens calling a tribal THPO office.

20 CHAIR GIBSON: And that would have
21 happened after October 3, but before October 31? Is
22 that a fair statement?

23 MR. GOODMAN: I believe, Your Honor, it
24 happened before October 3rd --

25 CHAIR GIBSON: Okay.

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1 MR. GOODMAN: -- just as introducing these
2 ideas in that. If we bring up NRC-38 I think there's
3 that list of --

4 CHAIR GIBSON: We can do that. Can we
5 bring that up --

6 MR. GOODMAN: -- phone call ranges so I --

7 CHAIR GIBSON: -- Mr. Deucher? Hold on
8 just a minute. Let's bring it up and then you can
9 show us where you believe that happened. I believe
10 this is -- is this in the August 15 --

11 MR. GOODMAN: August --

12 CHAIR GIBSON: -- to August 16 period?

13 MR. GOODMAN: That's correct, Your Honor.
14 NRC staff at this point was trying to establish the
15 best way for tribes to complete a TCP report that
16 suited what the tribes wanted.

17 CHAIR GIBSON: Okay. Now, it says there
18 were phone calls to several tribes including the
19 Oglala Sioux Tribe. I thought you said that your
20 calls weren't getting returned so you didn't call
21 them?

22 MR. GOODMAN: Oh, calls were made out,
23 Your Honor. They were not returned.

24 CHAIR GIBSON: Okay.

25 MR. GOODMAN: So --

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1 CHAIR GIBSON: So you did make a phone
2 call that wasn't returned. Is that a fair statement?

3 MR. GOODMAN: Correct, Your Honor.

4 CHAIR GIBSON: In this period of time?

5 MR. GOODMAN: Correct, Your Honor.

6 CHAIR GIBSON: Okay. Got it. And these
7 phone calls that happened on August 15 and 16, it was
8 during that period of time that the issue of the
9 honorarium came up with you, is that right?

10 MR. GOODMAN: The concept of --

11 CHAIR GIBSON: Was raised with you?

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

13 CHAIR GIBSON: Okay. Very well.

14 MR. REID: Could I get some clarification,
15 Your Honor, in terms of these references here? They
16 reference a teleconference on August 9th, 2012 and
17 another teleconference on August 21st, 2012, but
18 there's no separate listings that the Oglala Sioux
19 Tribe actually participating in those. And that
20 references transcripts from those teleconferences, but
21 they're not listed as one of the communications
22 between the NRC and the Tribe. So I'm just trying to
23 get some clarification as whether or not it's the
24 NRC's position that the Tribe participated in those
25 two teleconferences.

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1 CHAIR GIBSON: I think it's very clear
2 from their testimony the NRC's position is, the NRC
3 staff's position is that Mr. Yellow Thunder was on all
4 three of the phone calls, the large teleconferences.
5 Mr. Yellow Thunder is convinced that he was only on
6 one of them. And I believe what this shows, Mr. Reid,
7 on August 15 and 16 is simply that they placed a phone
8 call. This is not a teleconference. This is
9 individual calls to individual tribes. I believe
10 that's what Mr. Goodman testified to.

11 MR. REID: Thank you.

12 CHAIR GIBSON: Okay. All right. Can we
13 get the August 7, 2012 draft statement of work, Mr.
14 Deucher?

15 Okay. Mr. Yellow Thunder, I guess the
16 first question is before you just saw this have you
17 ever seen this document before?

18 MR. YELLOW THUNDER: No, I haven't, Your
19 Honor.

20 CHAIR GIBSON: Okay. Recognizing you
21 haven't seen it, do you ever recall being on a
22 telephone conference where something like this was
23 discussed, a statement of work from Crow Butte?

24 MR. YELLOW THUNDER: No, I don't, Your
25 Honor.

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1 CHAIR GIBSON: Okay. Very well. This
2 August 7, 2012 statement of work that you don't recall
3 seeing did significantly raise compensation compared
4 to the March 8, 2012 statement of work, which we've
5 already talked about. Were you aware that Cameco was
6 attempting or Crow Butte was attempting to increase
7 the sums that it might pay for a TCP survey at this
8 time? Even though you weren't on the call, you were
9 in communication with these other tribes.

10 MR. YELLOW THUNDER: There may have been
11 some discussion about this particular scope of work in
12 another setting, but not on an official record --

13 CHAIR GIBSON: Okay.

14 MR. YELLOW THUNDER: -- as to these new
15 and higher amounts.

16 CHAIR GIBSON: Yes.

17 MR. YELLOW THUNDER: But I don't
18 particularly remember that it had any impact at all.

19 CHAIR GIBSON: Okay. Very well. When did
20 you first become aware that the NRC staff was
21 proposing that tribes be paid in honorarium and a per
22 diem amount, a per representative?

23 MR. YELLOW THUNDER: I don't recall being
24 aware of that, Your Honor. As I mentioned before, I
25 was only acting in an ex officio capacity --

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1 CHAIR GIBSON: Yes.

2 MR. YELLOW THUNDER: -- and sometimes a
3 lot of these discussions that were occurring I wasn't
4 a part of because I had other job-related duties that
5 I was performing as the natural resources technician.
6 I may have been in the field. I may have been at a
7 different meeting. So I guess it was kind of a hit
8 and miss thing for me.

9 CHAIR GIBSON: Sure. Very well. Mr.
10 Goodman, if we could turn to the scope of the open
11 site survey adopted by the staff. You testified on
12 page 65 of your direct testimony that the staff's
13 chosen survey method, the open site survey method,
14 would offer the greatest freedom to the tribes to
15 approach the TCP survey as they wished concentrating
16 on areas most important to them. Is that correct?

17 MR. GOODMAN: Yes, Your Honor.

18 CHAIR GIBSON: All right. If we could go
19 to Intervenor's 37. Do you have that, Mr. Deucher?

20 Okay. On February 20, 2013 the tribal
21 historic preservation officer for the Standing Rock
22 Sioux Tribe sent this letter to Kevin Hsueh, who I
23 take it is your boss. Is that correct?

24 MR. GOODMAN: Correct about Kevin. Can
25 you go to page 3? I just want to make sure that it

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1 was signed by the THPO and not --

2 CHAIR GIBSON: Sure.

3 MR. GOODMAN: So this was not sent by the
4 THPO. At the time it was Waste'Win, I believe, and
5 Terry Clouthier who signed this letter as the tribal
6 archeologist --

7 CHAIR GIBSON: Okay.

8 MR. GOODMAN: -- for the Standing Rock.
9 So I just wanted --

10 CHAIR GIBSON: Sure.

11 MR. GOODMAN: -- the record to be clear on
12 that. Other than that, yes, it was sent from Terry,
13 the tribal archeologist to my boss at the time, Kevin
14 Hsueh.

15 CHAIR GIBSON: Now although the projects
16 had been split out at this time, you were taking
17 essentially the same approach there, correct, with
18 Powertech that you were taking at Crow Butte, an open
19 site approach?

20 MR. GOODMAN: Yes, Your Honor.

21 CHAIR GIBSON: Now, there the tribal
22 archeologist for the Standing Rock Sioux alleges on
23 page 2, about the middle of that page -- can we get
24 there, Mr. Deucher -- that the plan being proposed had
25 no specific methodology as to what was needed to be

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1 recorded or how and with no direction or real
2 accountability as to how they conduct themselves in
3 the field or how they conduct their field studies. Is
4 that correct what I said?

5 MR. GOODMAN: With the one addition that
6 at this point it is staff's opinion that he is talking
7 about Dewey-Burdock specifically, Your Honor.

8 CHAIR GIBSON: Correct. I understand
9 that.

10 MR. GOODMAN: And that Crow Butte had a
11 different sort of TCP survey completed --

12 CHAIR GIBSON: Okay.

13 MR. GOODMAN: -- from that project.

14 CHAIR GIBSON: But his criticism was of an
15 open site survey, correct? Generically.

16 MR. GOODMAN: I think, Your Honor, I would
17 say that his viewpoints were based on things that were
18 discussed for Dewey-Burdock, so I would say it's not
19 as general as maybe it's coming across.

20 CHAIR GIBSON: Okay. You consider the
21 open site approach taken with both the Dewey-Burdock
22 and the Crow Butte site to be adequate for a TCP site,
23 however?

24 MR. GOODMAN: I consider the open site
25 approach to be adequate for the Crow Butte license

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1 renewal site. I don't want to speak on behalf of the
2 project manager for Dewey-Burdock.

3 CHAIR GIBSON: Which approach identifies
4 more actual TCPs, an open site approach, a structured
5 approach as was suggested by the Standing Rock Tribe
6 in this INT-037, or the use of some alternative?

7 MR. GOODMAN: I think, Your Honor, it's
8 more complicated than just a simple two-word answer.
9 Just to expand on it a little bit, the open site
10 approach gives the tribes the most freedom to identify
11 TCPs in the way that they wanted to identify TCPs.
12 Other approaches tribes felt were limiting on not to
13 have a complete access to the site to go where they
14 wanted, when they wanted. And so, I would say open
15 site approach would be the best way that staff felt
16 the tribes had to identify the TCPs.

17 CHAIR GIBSON: Dr. Nickens, do you have
18 anything to add about which approach is most likely to
19 identify more actual TCPs?

20 DR. NICKENS: Your Honor, I'll state at
21 the outset that I was not party to any of these
22 proposals, nor have I seen them to this point, but the
23 way the trajectory of the consultation process between
24 the NRC and the tribes at the time of October 31st
25 when the tribes were notified -- I would support the

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1 open site approach in that instance.

2 CHAIR GIBSON: Mr. Catches-Enemy, do you
3 agree?

4 MR. CATCHES-ENEMY: What I know and my
5 opinion as far as the proposal that's submitted by the
6 tribes on behalf of the tribes and the differences
7 with the Applicant's proposal has a lot to do with
8 what I had mentioned before about tribal development.
9 And I think from what I know at this point that the
10 Applicant's proposal was basically the one that was
11 going to be forced on the tribes to participate or not
12 participate in. So it demonstrated that the
13 negotiations for a proper TCP survey ended. It was
14 not going to appease or compromise with the tribes at
15 that point.

16 So, I know the scope of work proposal that
17 was submitted by the tribes covered only the
18 archeological and historical survey components, and
19 that would satisfy Section 106 of the NHPA, but it did
20 not cover the cultural and spiritual aspects that
21 tribes would deem as significant and meaningful. This
22 is something that's in a broader scope that would
23 probably be covered under NEPA, the National
24 Environmental Policy Act, which has a hard look at
25 cultural resources. It's just the historical

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1 properties that's listed under Section 106 of the
2 NHPA.

3 If the survey was to be done the way the
4 tribes had wanted to, not only would they probably
5 have had the on-the-ground survey cultural resource
6 specialist, they would have conferred with tribal
7 elders, spiritual advisors, spiritual leaders; a lot
8 of people know them as medicine men, medicine women,
9 on the findings that were in the field. A lot of our
10 tribal elders are not able to walk out, you know, in
11 transects to identify some of these special places
12 that haven't -- if you're thinking about any one of
13 these project areas, our people have been displaced
14 from them for a long time, a very long time. So the
15 connection remains regardless of that displacement
16 from having access to these places.

17 I think it's mentioned several times in
18 some of the testimony from some of the tribes that
19 were participating either on the bus tour in June of
20 2011 that a lot of them hadn't ever been to or had
21 access to these places before because of probably the
22 land ownership or the companies that had taken the
23 placement of their companies at these locations.

24 So, to be able to have access for the
25 period that is required to do a proper identification

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1 I think was what the tribes were trying to push. And
2 I think that proposal was rejected maybe for the
3 monetary reasons; I'm not sure, but the know that the
4 tribes were really trying to look at including the
5 spiritual and cultural significance to do a full
6 analysis. So it wasn't just to be limited to the NHPA
7 Section 106 requirements, but also the hard look under
8 NEPA.

9 CHAIR GIBSON: Okay. Thank you. We will
10 stand in recess for 10 minutes and we'll get back on
11 the record then. Thank you.

12 (Whereupon, the above-entitled matter went
13 off the record at 9:42 a.m. and resumed at 9:54 a.m.)

14 CHAIR GIBSON: Very well. Back on the
15 record. Mr. Goodman --

16 MR. GOODMAN: Yes, Your Honor.

17 CHAIR GIBSON: -- go to the March 8, 2012
18 statement of work that was proposed by Crow Butte,
19 which I believe is Board Exhibit 24.

20 Can we get there, Mr. Deucher?

21 That's the Board Exhibit 24, the March 8,
22 2012 proposal. Very well. And go to page 2 of that.
23 It seems to talk about a phased approach first looking
24 at 15 percent of the survey area, is that correct?

25 MR. GOODMAN: Yes, Your Honor.

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1 CHAIR GIBSON: And then if we could go to
2 page 4, Mr. Deucher?

3 It has a pretty detailed listing of work
4 products, correct?

5 MR. GOODMAN: Correct, Your Honor.

6 CHAIR GIBSON: All right. Now let's go to
7 the August 2012 revised statement of work, which I
8 believe is Board Exhibit 25. Thank you.

9 Now, if we could go to the bottom of page
10 3, we see some assumptions listed there. And if we go
11 to 5 and 6, we see work products listed there.
12 There's still a lot of direction and guidance on what
13 would be done for the statement of work, correct?

14 MR. GOODMAN: Yes, Your Honor.

15 CHAIR GIBSON: So at least as of August 7,
16 2012 we're not looking at any kind of an open site
17 approach, are we?

18 MR. GOODMAN: No, Your Honor.

19 CHAIR GIBSON: Now if we could go to the
20 October 3rd, 2012 Crow Butte proposal, which I believe
21 is Board Exhibit 26, middle of page 2. This is the
22 alternative proposal and here Cameco proposes to
23 escort tribal representatives to the project areas,
24 but otherwise let them have free reign, is that
25 correct?

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1 MR. GOODMAN: Yes, Your Honor.

2 CHAIR GIBSON: So this is really the first
3 time, the October 3, 2012, that we see an open site
4 approach, is that correct?

5 MR. GOODMAN: In a formal capacity, yes,
6 Your Honor.

7 CHAIR GIBSON: Okay. When on an informal
8 capacity was that open site approach raised, proposed?

9 MR. GOODMAN: In sort of internal
10 communications between project manager, my boss at the
11 time, it became aware that the statement of work
12 approach was not what the tribes really wanted. We
13 heard a lot of things said several times by tribes:
14 100 percent site access, not being limited, to be able
15 to do the TCP survey where they wanted, when they
16 wanted and to be able to formulate a report sort of
17 more on their time, more in their style. And so,
18 through these communications that NRC staff was having
19 internally we made the conclusion that the statement
20 of work approach was probably not in the best interest
21 of the tribes, and we were really after what was in
22 the best interest of the tribes to conduct a TCP
23 survey. And so, we shifted our direction, asked the
24 Applicant for this that was on October 3rd that they
25 gave us.

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1 And so, it was slightly before October,
2 maybe in the September time frame that NRC staff
3 really shifted sort of its internal decisions that a
4 statement of work may not be in the best interest of
5 the tribes, although an adequate -- staff feels that
6 it was adequate to both take a hard look under NEPA
7 and satisfy 106 responsibilities. It was really after
8 we wanted to make this TCP survey what the tribes
9 wanted as well.

10 CHAIR GIBSON: Okay.

11 MR. REID: Your Honor, this Andrew Reid
12 from the Tribe. Just so that the record is clear,
13 we're talking about an open site approach. The
14 proposal that you're referring to only applies to a
15 two-week period in November.

16 CHAIR GIBSON: Okay. The open site
17 approach --

18 MR. GOODMAN: Can staff have some
19 clarification on Mr. Reid's statement? He's referring
20 that this was only two weeks in November. If that's
21 correct, then staff would actually disagree with that.

22 MR. REID: I'm looking at the draft, the
23 October 3rd, 2012 proposal by Cameco. Free range
24 visitation will be available any time -- I'm looking
25 at the first requirement there -- any time from

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1 Thursday, November 1st through Friday, November 16th
2 during daylight hours.

3 CHAIR GIBSON: Okay.

4 MR. YELLOW THUNDER: Your Honor, if I may
5 interject.

6 CHAIR GIBSON: Yes, Mr. Yellow Thunder.
7 I'm sorry.

8 MR. YELLOW THUNDER: If you recollect we
9 had mentioned that the programmatic agreement had been
10 in the process of being developed. The staff
11 mentioned that there was no programmatic agreement
12 that was being developed. But if you look on the last
13 paragraph of Board Exhibit No. 26 --

14 CHAIR GIBSON: Yes, sir.

15 MR. YELLOW THUNDER: -- it states
16 clearly --

17 CHAIR GIBSON: Just hold on one second.
18 Can we go to the last page of that? And could you
19 sort of -- yes, thank you.

20 Go ahead. I'm sorry.

21 MR. YELLOW THUNDER: -- states clearly
22 that there was a -- it says Cameco will entertain
23 specific proposals to carry out recordation and
24 evaluation and will fund these activities under the
25 terms of a Section 106 program agreement for the

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1 license renewal or expansion area in question.

2 CHAIR GIBSON: And this is only for
3 obviously the Crow Butte area, right, not for
4 Powertech, because this is a proposal from Crow Butte.
5 I'm sure they wouldn't be proposing that for the
6 Powertech area.

7 MR. YELLOW THUNDER: No, but the
8 programmatic agreement that we had discussed was for
9 Dewey-Burdock.

10 CHAIR GIBSON: Right.

11 MR. YELLOW THUNDER: And it says there's
12 a programmatic agreement for the Crow Butte proposal
13 also.

14 CHAIR GIBSON: Correct. Thank you for
15 bringing that to our attention, Mr. Yellow Thunder.

16 MR. CYLKOWSKI: Your Honor, I believe that
17 that paragraph is referring -- and perhaps you could
18 ask the witnesses to clarify -- if TCPs were
19 identified that those could then be dealt with through
20 a programmatic agreement in the future, the CBR areas,
21 not to any programmatic agreement currently underway
22 involving any of the CBR areas.

23 CHAIR GIBSON: Okay. Well, there may be
24 some ambiguity there about the terms and conditions
25 under which it might occur. So, very well.

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1 MR. CYLKOWSKI: Yes, Your Honor. If so,
2 then perhaps it's best for a witness to clarify who's
3 familiar with this.

4 CHAIR GIBSON: Well, we had testimony
5 yesterday from Mr. Yellow Thunder that there was a
6 programmatic agreement discussed; he was sure of that,
7 on the call that he attended. And Mr. Goodman said it
8 was only for Dewey-Burdock. This last sentence of
9 this Crow Butte proposal does mention that something
10 would be done under a programmatic agreement. I think
11 the only point of that is that there is some ambiguity
12 here. That's all. Nothing more.

13 MR. CYLKOWSI: Very well, Your Honor.

14 CHAIR GIBSON: Thank you. I know that it
15 was your state of mind at the time and that an open
16 site approach would be best for the tribes, and that
17 appears to have been the view that was shared by your
18 management as well. And ultimately that was the
19 decision that was made, Mr. Goodman. And yet when we
20 read the concern that was expressed by the tribal
21 archeologist for the Standing Rock Sioux Tribe
22 previously in that letter in February about Powertech
23 and we hear what Mr. Catches-Enemy says, it sounds
24 like there were some tribes that didn't think that was
25 the best approach.

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1 So I'm wondering why you reached the
2 conclusion that that was the best approach for the
3 tribes at that time. I mean, that clearly was your
4 state of mind. I'm not disputing that. But I guess
5 I'm confused about how you reached that conclusion
6 that it was the best for the tribes.

7 MR. GOODMAN: Your Honor, time and time
8 again staff was made aware of tribal concerns focused
9 around two years: one, that the tribes wanted to be in
10 charge of their own TCP survey; and two, that the
11 tribes did not want a phased approach. Both of those
12 were made very clear to NRC staff, and NRC staff
13 wanted to accommodate both of those requests. And the
14 open site approach accommodates both of those
15 requests.

16 It gives them access to 100 percent of the
17 site without the restrictions of a phased approach and
18 it lets them control the TCP survey, which staff was
19 also told a TCP survey can only be conducted by tribal
20 members. A TCP survey that's run by an archeologist
21 or a project manager like myself would not be an
22 accurate way of doing a TCP survey. And so this was
23 a direct result of requests that we had heard from the
24 tribes to honor what the tribes thought was the best
25 way to do the TCP survey.

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1 CHAIR GIBSON: As of September 27, which
2 was about the time this alternative proposal was made
3 by Cameco; all this occurred within a week, you had
4 received a different kind of proposal, that certainly
5 wasn't an open site approach, from the name I can
6 never pronounce, the -- could you say it for us, Mr.
7 Catches-Enemy?

8 MR. CATCHES-ENEMY: Makoche Wowapi.

9 CHAIR GIBSON: Okay.

10 MR. CATCHES-ENEMY: You can almost sound
11 it out except for the C. Well, it's almost -- or,
12 yes, Makoche Wowapi.

13 CHAIR GIBSON: And I may just start
14 referring to that as the September 27, 2012 proposal
15 because I don't think I'll ever be able to say that.
16 I'm not even going to try. So that certainly wasn't
17 an open site approach that they were proposing.

18 MR. GOODMAN: So when you say that we were
19 aware, staff was aware, but as the project manager of
20 Crow Butte license renewal, that September 27th
21 proposal was not -- that was not my project. And so,
22 I was aware because the project manager at the time,
23 Hiamanot Yilma, was in my group. And so, I was aware
24 that that proposal came in, but that was not my focus
25 because that proposal was specific to Dewey-Burdock

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1 and did not have anything to do with Crow Butte
2 license renewal.

3 CHAIR GIBSON: Sure. But you ultimately
4 took an open site approach there as well because you
5 thought that was best for the tribes. And you see,
6 what I'm trying to understand is it sounds like from
7 these criticisms that -- I mean, I guess the other
8 suggestion that we've heard, it's just hard for me to
9 understand how you reached the conclusion that an open
10 site approach was best.

11 MR. GOODMAN: Yes, Your Honor. Several of
12 sort of the things that I had previously mentioned.
13 Additionally when you say staff reached that ultimate
14 conclusion for Dewey-Burdock as well --

15 CHAIR GIBSON: Yes.

16 MR. GOODMAN: -- I believe that Oglala
17 Sioux Tribe had originally accepted the open site
18 approach for the Dewey-Burdock and then backed out.
19 And so, when I say that the open site approach was in
20 the best interest of the tribes, it was also for
21 Dewey-Burdock now, not for Crow Butte license renewal.
22 But the tribe also -- the Oglala Sioux Tribe also, you
23 know, liked the open site approach. It was what the
24 staff thought at the time to really be the best
25 approach and the most accommodating to the tribes that

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1 satisfied both the hard look under NEPA and the
2 requirements under Section 106.

3 CHAIR GIBSON: Fair enough.

4 MR. CATCHES-ENEMY: Your Honor?

5 CHAIR GIBSON: Yes, Mr. Catches-Enemy?

6 MR. CATCHES-ENEMY: I'd like to make a
7 comment about Goodman's comment about the Oglala Sioux
8 Tribe --

9 CHAIR GIBSON: Accepting?

10 MR. CATCHES-ENEMY: -- like or accepting
11 the open site.

12 CHAIR GIBSON: Yes, sir.

13 MR. CATCHES-ENEMY: Under that premise is
14 the acceptance or the participation by the Oglala
15 Sioux Tribe with the Makoche Wowapi survey approach.
16 That's what we were informed by NRC that the tribes
17 within our Lakota Nations were on board. That's what
18 we were informed. When we had gotten contact with the
19 other tribes, they conferred that they did not -- they
20 were not on board. So we had to not participate. We
21 didn't understand what was going on with this proposal
22 at that time, the full understanding. So we did not
23 participate under that premise that -- we thought
24 negotiations for the scope of work was finalized. We
25 were going through with the Makoche Wowapi approach,

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1 and that was where it was at. And we were misled.

2 CHAIR GIBSON: Okay. Thank you for that
3 clarification. Now, Mr. Goodman, I understand that
4 you were not -- had a different role in this. You did
5 not have the same role in Powertech that you did here.
6 Someone else essentially was doing your duties in
7 Powertech. But I thought you said that you were
8 running all three of these projects as one package
9 deal until you came up with this proposal October 31,
10 2012. I don't understand that.

11 MR. GOODMAN: Let me clarify, Your Honor.
12 The package deal represents that -- you are correct
13 that these three projects were being discussed
14 individually as individual entities all together. It
15 was a way that we could get face-to-face meetings
16 where we could discuss several projects together that
17 would save both time for the tribes, time for the
18 staff. We had heard many times that it's very hard to
19 get two, three days a week, and in matter of the TCP
20 surveys several weeks -- it's hard to get that time
21 from the tribes. The tribes indicated to us that they
22 were very busy, that they had a lot of other things
23 going on. Staff wanted to accommodate that.

24 We didn't want to inundate them with lots
25 of different telecons, with lots of different letters,

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1 and we wanted to try and make it a little less
2 confusing to them and a little easier on their time.
3 So that was why we combined the -- sort of the
4 projects into these lump meetings and telecons. But
5 at no point did NRC staff say that the projects were
6 not unique entities themselves.

7 MR. CATCHES-ENEMY: Your Honor?

8 CHAIR GIBSON: Yes, sir?

9 MR. CATCHES-ENEMY: If you put that into
10 context as far as maybe a teleconference or even a
11 face-to-face meeting with three different projects,
12 you have one tribal historic preservation officer
13 staff or one of his designees and three project
14 managers, maybe two, but talking about three to five
15 different sites, because there's three different --
16 four different projects here on Crow Butte alone. At
17 first a lot of the discussions were focused around the
18 renewal and slowly Three Crow, Marsland, North Trend,
19 those started getting added on.

20 And so to say that it was to appease the
21 tribes to not get confusing, I would contradict that
22 and say it was very confusing for the Tribal Historic
23 Preservation Office, namely for our office who has a
24 one staff person at the time trying to handle not only
25 these projects, but I would say anywhere from 50 to 75

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1 other federal agency projects asking for comments or
2 participation in Section 106 and all the other duties
3 that we take on under cultural affairs. I was trying
4 to find a better word, but we're responsible for a lot
5 more than Section 106 alone. So, I just wanted to
6 interject that. Thank you.

7 CHAIR GIBSON: Thank you, sir.

8 MR. YELLOW THUNDER: Your Honor?

9 CHAIR GIBSON: Yes?

10 MR. YELLOW THUNDER: If I may add --

11 CHAIR GIBSON: Yes, sir.

12 MR. YELLOW THUNDER: -- briefly to that.
13 I agree with Mr. Catches-Enemy's comment on that and
14 also would like to add that not only were the tribes
15 often in a state of confusion trying to address this
16 combination of the different projects, but they're
17 also very -- they were not happy with it, and they had
18 voiced that concern. We had voiced that concern
19 amongst ourselves and probably had relayed that
20 information to either of the project managers at that
21 time with whom we had dialogue that we were not
22 pleased with the method that they were using of
23 lumping these all together or putting all your eggs in
24 one basket, so to speak. And it made it difficult for
25 us to try to address those particular projects. It

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1 was sort of -- it was like confusing because you
2 couldn't get all the tribes together at one time
3 amongst ourselves to discuss these issues either. So
4 imagine trying to get us all together to discuss these
5 with the staff.

6 CHAIR GIBSON: Yes, sir.

7 MR. YELLOW THUNDER: Thank you.

8 CHAIR GIBSON: Okay. Mr. Goodman, I got
9 a few questions for you. And again, I want to provide
10 you all with the admonition that we're going to be
11 talking about some material that is in a non-public
12 document. Again, I believe all of my questions do not
13 implicate any information that is non-public or should
14 stay non-public, but if for some reason you think that
15 you need to -- in order to give me a full and complete
16 answer you need to talk about something that is non-
17 public, that should not be disclosed to the public,
18 then please just make a note of that and we'll have a
19 closed session at the end of the day that we'll
20 address that issue. Okay?

21 Mr. Goodman, in your rebuttal testimony at
22 page 52 you claim that the SRI Foundation was
23 responsible for none of the consultation activities
24 and instead was to assist only with data collection.
25 Is that correct?

1 MR. GOODMAN: Yes, Your Honor.

2 CHAIR GIBSON: Your rebuttal was in
3 response to Intervenor's claim that the consultation
4 process was delegated to SRI Foundation, is that
5 correct?

6 MR. GOODMAN: That is, Your Honor.

7 CHAIR GIBSON: You also claim that the SRI
8 Foundation had no role in the staff's decision, but
9 instead was brought in to assist the Applicant in data
10 collections, license application preparation and
11 advisement to the Applicant as a consulting party in
12 Section 106, correct?

13 MR. GOODMAN: Correct, Your Honor.

14 CHAIR GIBSON: And that SRI was not hired
15 or employed as a contractor for the NRC, is that
16 correct?

17 MR. GOODMAN: Yes, Your Honor.

18 CHAIR GIBSON: You also state at page 53
19 that the SRI Foundation did not hold any special
20 influence over any decision the staff made pertaining
21 to consultation.

22 MR. GOODMAN: Absolutely, Your Honor.

23 CHAIR GIBSON: Mr. Teahon, I know you've
24 been anxiously awaiting a chance to say something. I
25 take it that you would agree with Mr. Goodman's

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1 testimony that the SRI Foundation merely assisted in
2 data collection and advising the Applicant?

3 MR. TEAHON: Yes, Your Honor, they were
4 hired as our consultant for this process.

5 CHAIR GIBSON: Thank you, sir. Mr.
6 Goodman, looking back at the communications log, which
7 was NRC-038 -- thank you, Mr. Deucher -- there were
8 teleconferences in April and August 2012 that are
9 listed here. See that?

10 MR. GOODMAN: Yes, Your Honor.

11 CHAIR GIBSON: And these teleconferences
12 concerned the development of the TCP survey, correct?

13 MR. GOODMAN: Yes, Your Honor.

14 CHAIR GIBSON: These teleconferences
15 discussed the statements of work for both the
16 Powertech and the Crow Butte TCP surveys, correct?

17 MR. GOODMAN: Correct, Your Honor.

18 CHAIR GIBSON: So these teleconferences
19 combined discussion of the Powertech and Crow Butte
20 projects because the TCP surveys for both areas were
21 to be similar in concept, correct?

22 MR. GOODMAN: That was the hope at the
23 time, Your Honor, yes.

24 CHAIR GIBSON: And you attended the
25 teleconference that was held on April 24?

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1 MR. GOODMAN: I did, Your Honor.

2 CHAIR GIBSON: 2012.

3 MR. GOODMAN: Yes.

4 CHAIR GIBSON: And there was someone there
5 from the SRI Foundation named Martha Graham, is that
6 correct?

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

8 CHAIR GIBSON: And another person from the
9 SRI Foundation present was Lynne Sebastian, is that
10 correct?

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

12 CHAIR GIBSON: Now, if as you stated the
13 SRI Foundation was mainly doing data collection and
14 advising the Applicant, there shouldn't be anything in
15 the transcript indicating that Ms. Graham or Ms.
16 Sebastian took a lead in the conversations about the
17 TCP survey, correct?

18 MR. GOODMAN: They may have on behalf of
19 the Applicant said things specific to the TCP survey.
20 I'm not -- I don't -- haven't it memorized the
21 transcript. If they did, Your Honor, say something
22 specific to that, NRC staff would have not used that
23 in its own independent analysis or 106 review.

24 CHAIR GIBSON: Doing data collection and
25 advising the Applicant certainly would not have

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1 involved mediating the design of the TCP survey
2 between the tribal members and the staff, correct?

3 MR. GOODMAN: I wouldn't say 100 percent
4 correct, Your Honor. Staff at the time was trying to
5 collect statements of work from not only the tribes,
6 but also the Applicant. As we've seen through these
7 Board exhibits the Applicant did. And so, SRI
8 Foundation was assisting the Applicant in the
9 development of the TCP -- of the statement of work;
10 sorry, Your Honor, from the Applicant's side. And so,
11 they may have had some questions to help their own
12 process of developing the statement of work.

13 CHAIR GIBSON: You wouldn't call that
14 mediating the design of the TCP survey then?

15 MR. GOODMAN: No, I would not, Your Honor.

16 CHAIR GIBSON: And by doing data
17 collection and advising the Applicant were the tribes
18 to propose a change to the statement of work prepared
19 by the Applicant we would not see representatives of
20 the SRI Foundation being the ones responding, is that
21 correct?

22 MR. GOODMAN: Can you repeat the question,
23 Your Honor?

24 CHAIR GIBSON: Yes, sir.

25 MR. GOODMAN: Thank you.

1 CHAIR GIBSON: SRI was doing mainly data
2 collection and advising the Applicant, and so if the
3 tribes were to propose a change to the statement of
4 work prepared by the Applicant, we would not see those
5 representatives being the ones responding to the
6 tribes, would we?

7 MR. GOODMAN: Well, they could be, Your
8 Honor. If they are representing the Applicant and
9 only the Applicant and the tribes are commenting on
10 the Applicant's statement of work, I would see that
11 SRI Foundation could respond to the tribes about the
12 Applicant's statement of work, not at the time from
13 the letter in 2012 where NRC requested that it wanted
14 the statements of work, and then would put them
15 together and create its own independent statement of
16 work through the different statements of work that it
17 received. On the Applicant's side SRI Foundation
18 could have responded to the tribes at the time for
19 clarification or questions to get the Applicant's
20 statement of work, correct. Did that answer your
21 question?

22 CHAIR GIBSON: It was the SRI Foundation
23 that wrote the Applicant's statement of work for the
24 April 24, 2012 call, correct?

25 MR. GOODMAN: You'll have to ask Mr.

1 Teahon, but I believe that that is correct, that SRI
2 Foundation --

3 CHAIR GIBSON: Let me rephrase that. It
4 was your understanding --

5 MR. GOODMAN: It was, Your Honor.

6 CHAIR GIBSON: -- that the SRI Foundation
7 wrote the Applicant's statement of work for the April
8 2012 call?

9 MR. GOODMAN: Correct, Your Honor.

10 CHAIR GIBSON: And you would agree with
11 that, correct, Mr. Teahon?

12 MR. TEAHON: Yes, Your Honor, that's
13 correct.

14 CHAIR GIBSON: Thank you. See, we finally
15 got to ask you some questions.

16 Now, let me ask you this, Mr. Goodman: If
17 the Board were to review the transcript and find that
18 it was not only the Applicant's statement of work
19 written by the SRI Foundation, but that the SRI
20 Foundation representatives fielded a large portion of
21 the questions about the design of the TCP survey and
22 did act as mediators for the tribe's concerns, don't
23 you think the Board could reasonably conclude that in
24 fact SRI Foundation did play a significant role in the
25 consultation process?

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1 MR. GOODMAN: I would not agree with that,
2 Your Honor. I would agree that SRI Foundation placed
3 -- had a significant role in developing the
4 Applicant's statement of work. And as an important
5 member of the consultation insofar as it is their
6 site, we needed to do this with the Applicant present.
7 And so, the Applicant was present, which meant SRI
8 Foundation was present. So, I wouldn't agree with
9 that assessment that then in turn had any NRC staff
10 authority or delegation from the NRC staff on their
11 own 106 responsibilities.

12 CHAIR GIBSON: Mr. Goodman, you were not
13 present for the August 9 or the August 21 phone calls,
14 is that correct?

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

16 CHAIR GIBSON: And, Dr. Nickens, you were
17 not present on those calls either, is that correct?

18 DR. NICKENS: I was not, Your Honor.

19 CHAIR GIBSON: But, Mr. Teahon, you were
20 there, weren't you, for the August 9, 2012 call?

21 MR. TEAHON: Yes, sir.

22 CHAIR GIBSON: Did SRI Foundation take a
23 back seat in that conference call or did its
24 representatives take an active role in the discussion
25 and field a number of questions about the TCP survey

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1 design?

2 MR. TEAHON: From memory, sir, my
3 recollection of that is that they were trying to set
4 up the scope of work, the SOW, for us. And that's
5 what they were hired for is to provide their expertise
6 back to us in the 106 consultation, not to set up or
7 design a TCP.

8 CHAIR GIBSON: Okay. Thank you, sir.
9 Now, Mr. Goodman, since the no tribes put together a
10 proposed statement of work, the statement of work that
11 was put forward by the Applicant became the de facto
12 statement of work for everyone that was working off of
13 it, didn't it?

14 MR. GOODMAN: As the only statement of
15 work received, yes, Your Honor.

16 CHAIR GIBSON: And the SRI Foundation,
17 having put together this statement of work, was
18 certainly more knowledgeable than the staff about it,
19 correct?

20 MR. GOODMAN: About the --

21 CHAIR GIBSON: Statement of work.

22 MR. GOODMAN: Yes, Your Honor.

23 CHAIR GIBSON: And the staff even asked
24 the SRI Foundation to describe -- Mr. Teahon, this is
25 for you. I'm sorry. And the staff even asked the SRI

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1 Foundation to describe the statement of work as the
2 basis of the discussion for that day, didn't they?

3 MR. TEAHON: Yes, Your Honor.

4 CHAIR GIBSON: Okay. And since they
5 obviously were the ones who knew the statement of work
6 the best, they fielded many of the questions about the
7 statement of work, didn't they?

8 MR. TEAHON: Yes, Your Honor.

9 CHAIR GIBSON: And sometimes the staff
10 even deferred to the SRI Foundation representatives to
11 answer questions about the statement of work, didn't
12 they?

13 MR. TEAHON: Yes, Your Honor.

14 CHAIR GIBSON: Very well. Mr. Catches-
15 Enemy, let's talk about some activities outside the
16 TCP survey for a minute. In paragraph 14 of your
17 declaration, which is INT-031, you say that the Crow
18 Butte license area is located within an area used by
19 the U.S. as a forced removal encampment of the Sioux
20 as a part of its mid to late-1800s sign or starve
21 government treaty tactics. Is that correct?

22 MR. CATCHES-ENEMY: Yes.

23 CHAIR GIBSON: Given this, you claim that
24 it is reasonable to presume that there are sites of
25 significant historic or cultural importance in the

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1 Crow Butte license area. Is that correct?

2 MR. CATCHES-ENEMY: Yes.

3 CHAIR GIBSON: And these areas were
4 surveyed during the 1980s, I think we previously
5 established, by Bozell and Pepperl. And you've
6 testified that you're familiar with those studies.

7 MR. CATCHES-ENEMY: Yes.

8 CHAIR GIBSON: First of all, these surveys
9 by Bozell and Pepperl in the 1980s did not find
10 significant sites of historic or archeological
11 significance in the license area. Is that correct?

12 MR. CATCHES-ENEMY: I believe in
13 recollection of a map there was a known burial site in
14 the center of the project area, along with other
15 archeological sites.

16 CHAIR GIBSON: Okay. I hope that's public
17 information, but it is now.

18 (Laughter)

19 CHAIR GIBSON: So I think we're okay,
20 but --

21 MR. FRANKEL: Your Honor, David Frankel.
22 I did notice that reference on one of the public
23 exhibits, so --

24 CHAIR GIBSON: Okay. So it is a published
25 public -- thank you. I just wanted to be sure.

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1 MR. CATCHES-ENEMY: Certainly.

2 CHAIR GIBSON: I know this a sensitive
3 matter, so I don't want to divulge anything that we
4 don't have to.

5 MR. REID: Your Honor, and I also believe
6 Dr. LaGarry testified to -- he didn't testify as to
7 the exact location, but he testified as to that one
8 site.

9 CHAIR GIBSON: Right. Okay. Very well.
10 Thank you.

11 MR. REID: I'm sorry. Dr. Redmond. In
12 Dr. Redmond's testimony, which was out of order, he
13 testified to some extent regarding that burial site,
14 I believe.

15 CHAIR GIBSON: Okay.

16 MR. REID: Thank you.

17 CHAIR GIBSON: Okay.

18 MR. TEAHON: Sir, may I make one
19 correction to that statement?

20 CHAIR GIBSON: Yes, sir, Mr. Teahon.

21 MR. TEAHON: He indicated that that was in
22 the center of the property. It is not. It's outside
23 the impact zone.

24 CHAIR GIBSON: Okay.

25 MR. TEAHON: The identified --

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1 CHAIR GIBSON: Bozell and Pepperl?

2 MR. TEAHON: Yes, sir.

3 CHAIR GIBSON: And when you say "outside
4 the impact zone" --

5 MR. TEAHON: That's the monitor well ring.
6 Anything inside the monitor well ring would be the
7 impact zone. Anything outside that we have not
8 disturbed.

9 CHAIR GIBSON: Okay. Very well. Okay.
10 Thank you for that clarification. And, Mr. Catches-
11 Enemy, you would have no reason to --

12 MR. FRANKEL: Your Honor, David Frankel
13 for Consolidated Intervenors.

14 CHAIR GIBSON: Yes, sir.

15 MR. FRANKEL: I believe in the closed
16 session and --

17 CHAIR GIBSON: Right, that's what I was
18 worried about.

19 MR. FRANKEL: -- that --

20 CHAIR GIBSON: Right.

21 MR. FRANKEL: -- there was some testimony
22 that may have to be readdressed in closed session in
23 order to address --

24 CHAIR GIBSON: Right.

25 MR. FRANKEL: -- Mr. Teahon's point.

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1 CHAIR GIBSON: Correct. Very well. For
2 what it's worth, Mr. Catches-Enemy, you wouldn't have
3 any reason to dispute what Mr. Teahon just said about
4 where the monitoring wells are and where the area of
5 disturbance or the area that hasn't been disturbed,
6 would you? And I know you've haven't been on there,
7 so -- but --

8 MR. CATCHES-ENEMY: I'll leave that for
9 the closed session then.

10 CHAIR GIBSON: Okay. Great. Well, thank
11 you, sir. We'll do that. We will need to be sure and
12 have a closed session at least for one question.
13 Okay?

14 MR. CATCHES-ENEMY: Your Honor?

15 CHAIR GIBSON: Yes, sir?

16 MR. CATCHES-ENEMY: In that same train of
17 thought with your previous question about cultural
18 resources in the vicinity of renewal area --

19 CHAIR GIBSON: Yes, sir.

20 MR. CATCHES-ENEMY: -- in my experience
21 and knowledge we -- you know, you cited 14 of my
22 declaration, No. 14. That was limited to a certain
23 time period in the, you know, mid to late-1800s.

24 CHAIR GIBSON: Yes, sir.

25 MR. CATCHES-ENEMY: However, known in the

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1 cultural landscape around the area there are sites as
2 close as what's known as the Hudson-Meng. I'm not
3 sure how many miles away that is. Some of the sites
4 that are around there are probably 11,000-plus years
5 old.

6 CHAIR GIBSON: Yes, sir.

7 MR. CATCHES-ENEMY: So there's no definite
8 time period for what has been identified in those
9 1980s studies --

10 CHAIR GIBSON: Yes, sir.

11 MR. CATCHES-ENEMY: -- on the surface,
12 that there is not a lot more material underneath or
13 that has already been disturbed or destroyed. I just
14 wanted to interject that --

15 CHAIR GIBSON: Okay.

16 MR. CATCHES-ENEMY: -- that that's what
17 we're concerned about.

18 CHAIR GIBSON: Yes, sir.

19 MR. CATCHES-ENEMY: Yes.

20 CHAIR GIBSON: Yes, sir. Thank you.
21 Okay. I want you to assume with me, Mr. Catches-
22 Enemy, that we were starting with a clean slate in
23 this matter, which we are not. We are far along the
24 path here. The license has already been renewed, the
25 environmental assessment has already been issued. But

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1 just assume with me for right now that we were
2 starting with a clean slate and the Oglala Sioux Tribe
3 were afforded an opportunity to conduct an reasonable
4 thorough TCP survey of the license area. Roughly how
5 long do you think it would take?

6 MR. CATCHES-ENEMY: Again, that discussion
7 would have to be reexamined with the other Tribal
8 Historic Preservation Offices, their advisory council
9 members as well as any of their elders and spiritual
10 advisors. So as far as putting a time frame on how
11 long a reasonable TCP survey could occur, I wouldn't
12 want to lock myself into stating that.

13 CHAIR GIBSON: Recognizing that you would
14 need to coordinate with the tribal historic
15 preservation officers for the other Lakota peoples,
16 and recognizing that you can't give us a precise
17 amount of time, can you say is it a matter of days?
18 Is it a matter of weeks? Is it a matter of months?
19 Is a matter of years? We're just trying to get a feel
20 for how long. There's a range here we're trying to
21 shoot for. How long would it actually take to get
22 that accomplished to do it the way that you believe a
23 proper TCP survey should be done?

24 MR. CATCHES-ENEMY: If you're asking about
25 those kind of parameters as far as days or weeks or

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1 months --

2 CHAIR GIBSON: Yes, sir. I'm just trying
3 to get a rough --

4 MR. CATCHES-ENEMY: -- I'll go --

5 CHAIR GIBSON: -- estimate. You're an
6 expert in this. You know in a general way what is
7 involved in doing this to do it right.

8 MR. CATCHES-ENEMY: I'll go with years.

9 CHAIR GIBSON: A matter of years?

10 MR. CATCHES-ENEMY: Yes.

11 CHAIR GIBSON: Okay. Thank you. Okay.
12 And I take it that would not be what was done with the
13 Bozell and Pepperl study. That was a much more
14 attenuated brief survey, correct?

15 MR. CATCHES-ENEMY: Yes, based on
16 archeological training and methodologies TCP surveys
17 have a different aspect which don't typically follow
18 those same guidelines, still trying to perform under
19 NHPA, Section 106 parameters, however there's a huge
20 cultural component that I mentioned before that we
21 keep in mind with NEPA, the hard look with NEPA, that
22 involves a broader context than just maybe material
23 items or tangible items that are identified or that
24 can be touched.

25 When we start talking about the spiritual

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1 components, that's something that an archeologist
2 would never document. They will not document
3 something that's intangible, something that's specific
4 to practices, beliefs, mores of a tribe or an
5 indigenous group. So a TCP survey is quite extensive,
6 and that's why I didn't want to limit to maybe even
7 just one year. I would say a couple years.

8 When you're talking about that large of an
9 audience, as far as that many tribes to be involved,
10 to get a good feel for the area, maybe in different
11 seasons -- maybe they want to be out there during
12 different seasons, maybe they want to be out there
13 when the ground visibility is the best, or maybe there
14 are ceremonies to be performed during that time at the
15 elders' discretion. That's something you'll never see
16 with an archeological survey.

17 CHAIR GIBSON: Yes, sir.

18 MR. CATCHES-ENEMY: You're going to get
19 out and do the transects, do the recording, the
20 reporting and it'll be a final product made on --
21 based on a different cultural mind set.

22 CHAIR GIBSON: Okay. Dr. Nickens, do you
23 think Mr. Catches-Enemy is being overly conservative
24 or overly aggressive in how long he believes this
25 would take to do a realistic TCP survey involving all

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1 these tribes?

2 DR. NICKENS: It's difficult to respond to
3 that, Your Honor.

4 CHAIR GIBSON: Yes, sir.

5 DR. NICKENS: It totally depends on the
6 scope of work as Mr. Catches-Enemy has just mentioned,
7 the involvement of elders, which based on my reading
8 of the proposals leading up to this point that have
9 been offered, I don't see elder involvement in any of
10 those. So it's kind of apple and oranges here as to
11 what Mr. Catches-Enemy is talking about.

12 He is absolutely correct in the way that
13 the tribal people, particularly the elders and
14 religious leaders, would look at the resource compared
15 to the way I as an archeologist would. We can
16 identify the tangible resource on the ground. If we
17 used the Crow Butte butte as an example, I can
18 document it, I can record it, I can do a literature
19 search, but in no way could I ascribe the cultural
20 meaning to that that the Lakota people would.

21 Now back to the basic question, in my
22 experience with various project areas in the Western
23 United States and the involvement of tribal elders and
24 groups and the entire process, taking the elders to
25 the field as possible, identifying resources,

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1 documenting those resources, recording and then
2 transcribing in to a report that would be used by the
3 parties in the long run, I would guess -- and I would
4 put it in a matter of months. Maybe in this case; and
5 this is just a wild stab, I'd say eight to nine
6 months.

7 CHAIR GIBSON: Okay. Very well. Thank
8 you.

9 MR. YELLOW THUNDER: Your Honor, if I may
10 add a little bit to --

11 CHAIR GIBSON: Oh, yes, Mr. Yellow
12 Thunder.

13 MR. YELLOW THUNDER: -- what my colleague
14 Mr. Catches-Enemy has previously discussed. I'd just
15 like to put it on the record that throughout this
16 entire process from beginning to end to this point the
17 staff, the Applicant, consultants have used different
18 tactics, ploys and maneuverings in which there's
19 almost a total disregard for our customs, our beliefs
20 and our way of life. Often we have been pushed into
21 a corner. An example is we want this scope of work
22 tomorrow. Another example is we want this survey TCP
23 completed yesterday. And if you don't, we're going to
24 go ahead and do it our way.

25 So in regards to the timeline, time frame

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1 in which this work is conducted in our way, we always
2 have deferred to our elders because they have the
3 wealth of knowledge that we do not possess, and we
4 would not dishonor them in any way. So we have always
5 taken the time to be certain that what we are looking
6 at is what we are looking at, because what is out
7 there and the things that have been uncovered by the
8 consultants and archeologists that they have found is
9 often -- the numbers are often very different. They
10 have discovered 20 sites. We have gone out and
11 discovered 200 sites. And in that time period we have
12 allowed prayer and ceremony and spirituality to guide
13 us. So it is very important that we don't rush into
14 these things.

15 CHAIR GIBSON: Yes, sir.

16 MR. YELLOW THUNDER: And we often will
17 take the time to, like I was saying, defer to our
18 elders. We didn't get to where we are today by
19 rushing into things.

20 CHAIR GIBSON: Yes.

21 MR. YELLOW THUNDER: But thank you. I
22 just wanted to add that.

23 CHAIR GIBSON: Thank you, sir. We will
24 stand in recess for 10 minutes. Thank you.

25 (Whereupon, the above-entitled matter went

1 off the record at 10:46 a.m. and resumed at 11:01
2 a.m.)

3 CHAIR GIBSON: Okay. I think we can
4 probably, if we can take our seats, get back on the
5 record.

6 DR. NICKENS: Your Honor, could I make a
7 point of clarification?

8 CHAIR GIBSON: In a second you can. Let's
9 wait until everybody's seated.

10 CHAIR GIBSON: Okay. We're back on the
11 record. Dr. Nickens needed to clarify something he
12 said.

13 DR. NICKENS: Yes, Your Honor. Counsel
14 has asked that I expand my comment on the amount of
15 time that it would take for the TCP survey.

16 CHAIR GIBSON: Yes, sir.

17 DR. NICKENS: Following Mr. Catches-
18 Enemy's comments about what a proper TCP survey would
19 consist of, that was my line of thought. And I agree
20 with him that a proper TCP survey, as I've stated
21 previously, involves elders and bringing the elders to
22 the field as possible and so forth.

23 So the point of clarification, there was
24 some question about whether I meant the field work
25 would take eight months or the entire project would

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1 take eight months, and it's the latter. The planning,
2 conduct of the filed work in the license renewals
3 area, transcription of tapes made of elders' comments
4 in the field, the preparation of a written report,
5 then going back with the elders to make sure that
6 they're happy with the results of the documentation,
7 that would be the estimated eight months that I was
8 talking about.

9 CHAIR GIBSON: All right. Thank you.

10 Mr. Goodman?

11 MR. GOODMAN: Yes, Your Honor?

12 CHAIR GIBSON: I'd like to turn to your
13 direct testimony, NRC-001 at page 60. You discussed
14 there the location of the 19th Century tribal
15 encampments. So it seems to me you agree with Mr.
16 Catches-Enemy that tribes may have been encamped in
17 the license renewal area. Is that correct?

18 MR. GOODMAN: Yes, Your Honor.

19 CHAIR GIBSON: Now to reach this
20 conclusion that tribes may have been encamped in the
21 license renewal area, the NRC staff reviewed
22 historical literature and maps, is that correct?

23 MR. GOODMAN: Yes, Your Honor.

24 CHAIR GIBSON: And the EA on page 70
25 refers to the fact that there were 19th Century

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1 encampments in the general Crow Butte area and that
2 tribes were brought to and occupied in this area,
3 correct?

4 MR. GOODMAN: Yes, Your Honor.

5 CHAIR GIBSON: And on page 69 of the
6 Environmental Assessment it says some of this
7 information was supplemented by literature searches,
8 is that correct?

9 MR. GOODMAN: Yes, Your Honor.

10 CHAIR GIBSON: And on page 100 of the
11 Environmental Assessment in its Historical and
12 Cultural Resources section a completed literature
13 review is again mentioned, is that correct?

14 MR. GOODMAN: Yes, Your Honor.

15 CHAIR GIBSON: Let's look at page 69 of
16 your direct testimony. At A-114 you testify that the
17 NRC staff's literature review consisted of: (1)
18 identification of pertinent published and unpublished
19 documents and other sources with specific relevance to
20 the project area; and (2) on-site visits and
21 interviews with local, federal and state government
22 offices, societies, museums, archives and
23 knowledgeable persons. Did I read that correctly?

24 MR. GOODMAN: You did, Your Honor.

25 CHAIR GIBSON: And in conjunction with

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1 your direct testimony at A-114 you reference NRC
2 Exhibits NRC-50 and 5A, B and C, is that correct?

3 MR. GOODMAN: Five-one A, B and C, I
4 believe.

5 CHAIR GIBSON: Five-one A, B and C?

6 MR. GOODMAN: And 50. Not 50A, though.
7 We on the same page? Maybe that's what you said and
8 I just misheard.

9 CHAIR GIBSON: So NRC 50 and NRC-51A, B
10 and C. Is that right?

11 MR. GOODMAN: We're now on the same page,
12 Your Honor.

13 CHAIR GIBSON: Did I say it right? I'm
14 sure I misspoke. And you referenced NRC-50 and 51
15 because they memorialized the site visits and
16 interviews conducted by the contractors, is that
17 correct?

18 MR. GOODMAN: Yes, Your Honor.

19 CHAIR GIBSON: Dr. Nickens, let's look at
20 NRC-51C. It reports on the visits and interviews that
21 you conducted, is that correct?

22 DR. NICKENS: That's correct, Your Honor.

23 CHAIR GIBSON: Who in the NRC directed
24 what type of information should be gathered here?

25 DR. NICKENS: I would say the NUREG-17 is

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1 the only guidance I have. I didn't have specific
2 guidance from the staff.

3 MR. GOODMAN: To clarify, Your Honor, he's
4 talking about NUREG-1748.

5 CHAIR GIBSON: Is that the NUREG?

6 DR. NICKENS: Yes, sir.

7 CHAIR GIBSON: So NUREG-1748 was
8 essentially what you used in order to determine what
9 type of information should be gathered, is that
10 correct?

11 DR. NICKENS: Yes, Your Honor, that
12 regulatory guidance.

13 CHAIR GIBSON: And this trip gathered
14 materials for the license renewal environmental
15 assessment, is that correct?

16 DR. NICKENS: That's correct. We were
17 also here to visit the Marsland Expansion Area at the
18 same time.

19 CHAIR GIBSON: Okay. Now it appears from
20 NRC-51C that you spent roughly two days on these
21 visits and interviews. Is that correct?

22 DR. NICKENS: We were here a week, sir.

23 CHAIR GIBSON: Oh, really?

24 DR. NICKENS: There's an agenda in the --
25 on page 2 of that document.

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1 CHAIR GIBSON: Okay.

2 DR. NICKENS: Which actually, you're
3 correct, it's Tuesday through Thursday.

4 CHAIR GIBSON: It was two days?

5 DR. NICKENS: Yes, it was.

6 CHAIR GIBSON: Okay. Very well. Thank
7 you.

8 DR. NICKENS: Considering the travel time
9 as well.

10 CHAIR GIBSON: Okay. Sure, that adds on.
11 But in terms of your actually on the ground time it
12 was two days?

13 DR. NICKENS: It was two days, yes, sir.

14 CHAIR GIBSON: Is that correct? Okay.
15 Now, after looking at the trip report exhibits I could
16 not glean what type of literature review you conducted
17 before going out on the site visits and interviews.

18 DR. NICKENS: That would not be actually
19 documented. It involves identifying literature
20 pertinent to the resource area and the general history
21 of the area. Much of that would involve an Internet
22 search, library search and so forth. That would have
23 been done prior to the trip.

24 CHAIR GIBSON: Okay. Did you look at any
25 published articles?

1 DR. NICKENS: Yes, Your Honor.

2 CHAIR GIBSON: Okay. Are they listed
3 anywhere and I just missed them?

4 DR. NICKENS: They would be listed as
5 references as necessary in the EA, and I think there
6 are some in there, yes, sir.

7 CHAIR GIBSON: Do you recall what specific
8 published articles you reviewed?

9 DR. NICKENS: I don't recall the titles
10 and dates and authors, but they had to do with the
11 history of the area. There were articles pertaining
12 to historic trails and roads in the area. Then the
13 extensive literature related to what we might call the
14 treaty-making era, Fort Robinson, the tribes being
15 here in the area, biographies of Lakota and other
16 chiefs; for example, Red Cloud. Quite an extensive
17 list. But I actually don't have an entire list of
18 every document that I looked at. Every document that
19 I actually used in my analysis would be referenced one
20 place or another.

21 CHAIR GIBSON: So it would be fair to say,
22 putting that in my own words, you did some literature
23 searches and you looked on the Internet for some
24 things and you ended up with some deep background
25 material to acquaint you with the area, but there was

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1 nothing -- the only things which you relied on for
2 purposes of anything that's in the Environmental
3 Assessment -- those things would be documented in the
4 Environmental Assessment? Is that a fair statement?

5 DR. NICKENS: That's correct, Your Honor.
6 And I might say -- just one add-on to the purpose of
7 the site visit here. When I went to visit each of the
8 offices and individuals that it's listed in this trip
9 report, I also inquired at that time if there was
10 additional information that I hadn't already uncovered
11 that I should be aware of.

12 CHAIR GIBSON: Okay. Thank you. Did you
13 look at any maps?

14 DR. NICKENS: Yes, Your Honor.

15 CHAIR GIBSON: And again, if the maps are
16 ones on which you relied, they would be cited in the
17 Environmental Assessment, but otherwise they're not
18 memorialized anywhere in a list?

19 DR. NICKENS: That would be a correct
20 statement, but I don't recall that there are any maps
21 per se that were referenced.

22 CHAIR GIBSON: Okay. And were there any
23 pamphlets that you reviewed before you came out here?

24 DR. NICKENS: Not that I recall.

25 CHAIR GIBSON: Okay. Now in your direct

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1 testimony at page 69, Dr. Nickens, you state that
2 there were other sources with specific relevance to
3 the project area, correct?

4 DR. NICKENS: Could I get a reference to
5 that?

6 CHAIR GIBSON: Yes, sir. It's A-114 on
7 page 69.

8 DR. NICKENS: And where are we on the
9 page?

10 CHAIR GIBSON: Yes, that you state that
11 there were other sources with specific relevance to
12 the project area. That was the phrase that you used
13 in your testimony?

14 DR. NICKENS: I'm sorry, sir, but I'm not
15 locating it right off.

16 CHAIR GIBSON: Okay.

17 DR. NICKENS: Oh, I -- at the beginning of
18 the second paragraph?

19 CHAIR GIBSON: Are we there? Good. Okay.
20 I didn't think it was particularly controversial.

21 DR. NICKENS: No, I was just having
22 trouble locating those words.

23 CHAIR GIBSON: That's okay. It just has
24 to do with the phrase "other sources with specific
25 relevance to the project area." I'm wondering if

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1 those are listed somewhere and I just missed them.

2 DR. NICKENS: I think there I'm referring
3 to the results of the trip, the visits with local
4 experts and local societies, other federal agencies.

5 CHAIR GIBSON: Okay. But the extent to
6 which those are memorialized in the Environmental
7 Assessment is just by saying other sources?

8 DR. NICKENS: That wording would not be in
9 the Environmental Assessment.

10 CHAIR GIBSON: I'm sorry, that's in your
11 testimony.

12 DR. NICKENS: Yes, sir.

13 CHAIR GIBSON: But they're not
14 memorialized anywhere in the Environmental Assessment?

15 DR. NICKENS: It would be in the document
16 we were just referring to, NRC-051.

17 CHAIR GIBSON: Okay. Very well. Thank
18 you. Did you determine from your literature review
19 that you conducted before you went out to this site
20 the individuals that you selected, who would be
21 knowledgeable about the site?

22 DR. NICKENS: Yes, sir.

23 CHAIR GIBSON: Okay. And were your visits
24 to both the Crow Butte facility and with knowledgeable
25 individuals in the area helpful in preparing the

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1 Environmental Assessment?

2 DR. NICKENS: Very helpful, yes, sir.

3 CHAIR GIBSON: After looking at the EA I
4 cannot locate any place where you or anyone else with
5 the NRC staff recorded the results of these visits and
6 interviews. Did I miss something?

7 DR. NICKENS: In the EA document?

8 CHAIR GIBSON: Yes, sir.

9 DR. NICKENS: The trip report is
10 referenced in the EA document, the trip report that
11 we're discussing, 051.

12 CHAIR GIBSON: So you mentioned the people
13 in the trip report. Is the trip report part of the
14 Environmental Assessment?

15 DR. NICKENS: No, sir.

16 CHAIR GIBSON: Okay. So if we wanted to
17 go find that out, we'd have to look at the trip
18 report?

19 DR. NICKENS: You'd have to look, and it
20 would be referenced in the text in the Affected
21 Environment section in the list of references. You
22 would then have to go to that document, which is on
23 ADAMS.

24 CHAIR GIBSON: And this review was done in
25 2012, is that correct?

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1 DR. NICKENS: That's correct. October.

2 CHAIR GIBSON: Now in the reference
3 section to the Environmental Assessment there were
4 some general references to a few documents regarding
5 historical and cultural significance, but I was unable
6 to locate any specific citations. Did I miss
7 anything?

8 DR. NICKENS: You'd have to be more
9 specific, sir.

10 CHAIR GIBSON: Yes. Well, you reviewed
11 some documents regarding historical and cultural
12 significance and you used them in concluding there
13 would be no adverse harm to items of historical
14 significance. Now I just couldn't find them
15 specifically referred to in the Environmental
16 Assessment.

17 DR. NICKENS: I'm having trouble following
18 your question. If you could give me a specific
19 example, I could discuss that.

20 CHAIR GIBSON: I'll tell you what, rather
21 than spend time, at the lunch break I'll try to find
22 it specifically and then we can find where that is in
23 the EA, and then that way we won't waste time right
24 now. We'll come back to that --

25 DR. NICKENS: Great.

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1 CHAIR GIBSON: -- so I can try to find out
2 what you were talking about.

3 Mr. Goodman, how many tribes did you
4 communicate with in developing the TCP survey?

5 MR. GOODMAN: I believe at the time of the
6 development of the TCP survey, meaning sort of
7 everything that went into and then through the actual
8 survey that was conducted, through that process I
9 believe 21 tribes would have been in consultation.

10 CHAIR GIBSON: Okay. Thank you.

11 MR. GOODMAN: Yes, Your Honor.

12 CHAIR GIBSON: In the end there were only
13 two tribes that participated in the TCP survey.

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

15 CHAIR GIBSON: The Santee Sioux and the
16 Crow Nation, is that correct?

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

18 CHAIR GIBSON: Could we get the Census
19 Bureau document? Mr. Smith, am I going to be on Board
20 Exhibit 27?

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

22 CHAIR GIBSON: Thank you.

23 (Whereupon, the above-referred to
24 document was marked as Board Exhibit No.
25 27 for identification.)

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1 CHAIR GIBSON: Mr. Goodman, you've
2 probably seen something like this. This is a census
3 map of the Indian Tribes of the United States that the
4 Census Bureau created for the 2010 census. We've got
5 a web site we can give you if you're interested in
6 finding it, but I will represent to you that from that
7 map that the Census Bureau took we excerpted this part
8 because otherwise it would have been completely
9 indecipherable if we had tried to put the entire map
10 of the United States on it.

11 MR. GOODMAN: Having seen many similar
12 maps, Your Honor, I am perfectly fine with this
13 exhibit.

14 CHAIR GIBSON: Okay. Thank you. I
15 appreciate that. Now the one that we've got here in
16 front of you that's also displayed on the screen is an
17 excerpt and it shows the estimated position of Crow
18 Butte that the Board has marked. Do you see where it
19 says Crow Butte mine sort of in the center?

20 MR. GOODMAN: I do, Your Honor.

21 CHAIR GIBSON: Thank you, sir. And Crow
22 Butte mine, for purposes of Mr. Smith's concern
23 earlier, is that this is the Crow Butte renewal site
24 location. Okay? You would agree that this is a
25 relatively accurate representation of the tribes in

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1 this region, is that correct, sir?

2 MR. GOODMAN: Absolutely, Your Honor.

3 CHAIR GIBSON: Okay. And you would agree
4 that about where the Crow Butte license renewal area
5 is located is correct on this map?

6 MR. GOODMAN: Yes, Your Honor.

7 CHAIR GIBSON: Okay. Thank you. All
8 right. Now over the past few days the staff has
9 referred to the Crow Butte license renewal area as
10 being about 30 miles from the Pine Ridge Reservation.
11 Is that correct?

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

13 CHAIR GIBSON: And I see that the Santee
14 Sioux Reservation, whose representatives participated
15 in the Crow Butte TCP survey, is over in Northeast
16 Nebraska. Do you agree where that reservation is
17 depicted on this map?

18 MR. GOODMAN: Yes, Your Honor.

19 CHAIR GIBSON: And I see that the Crow
20 Nation Reservation, whose representatives also
21 participated in the Crow Butte TCP survey, is over in
22 Southern Montana. Do you agree with where that
23 reservation is depicted on this map?

24 MR. GOODMAN: I do, Your Honor.

25 CHAIR GIBSON: Which reservation is

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1 closest to the Crow Butte license renewal area?

2 MR. GOODMAN: The Oglala Sioux Tribe at
3 the Pine Ridge Reservation, Your Honor.

4 CHAIR GIBSON: Okay. Thank you. Mr.
5 Yellow Thunder, you state in your declaration that the
6 Oglala Sioux Tribe has a territory of over 4,700
7 square miles, is that correct?

8 MR. YELLOW THUNDER: Yes, Your Honor.

9 CHAIR GIBSON: And is this the total
10 extent of the Pine Ridge Reservation, or does the
11 4,700-square-mile figure include land that is not part
12 of the Pine Ridge Reservation?

13 MR. YELLOW THUNDER: It includes land that
14 is -- could you repeat your question, please?

15 CHAIR GIBSON: Sure. Well, either the
16 4,700 square miles is either the Pine Ridge
17 Reservation or it's the Pine Ridge Reservation plus
18 some area. And I'm just trying to figure out is the
19 Pine Ridge Reservation itself 4,700 square miles, or
20 --

21 MR. YELLOW THUNDER: It is the Pine Ridge
22 Reservation plus the area surrounding it.

23 CHAIR GIBSON: And where is that area
24 around it? Is that in a particular state or --

25 MR. YELLOW THUNDER: Our ancestral

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1 homelands include the states of South Dakota, Wyoming,
2 Montana, Nebraska, Kansas.

3 CHAIR GIBSON: Okay.

4 MR. YELLOW THUNDER: And some other areas
5 also.

6 CHAIR GIBSON: Thank you. You would agree
7 with Mr. Goodman that the Pine Ridge Reservation is
8 the closest reservation to the Crow Butte mine,
9 however, correct?

10 MR. YELLOW THUNDER: Yes, sir.

11 CHAIR GIBSON: Okay. Mr. Deucher, if you
12 could pull up the 2013 American Indian Population and
13 Labor Force Report? This will be Board Exhibit 28.

14 (Whereupon, the above-referred to
15 document was marked as Board Exhibit No.
16 28 for identification.)

17 CHAIR GIBSON: Mr. Yellow Thunder, if we
18 could look at table 4 of this particular document.
19 Mr. Yellow Thunder, this I will represent to you is
20 the population indicators for federally-recognized
21 tribes in cases where data by tribes were available.
22 And on page 27 of this report the Oglala Sioux Tribe
23 is listed, correct? See that? T34800?

24 MR. YELLOW THUNDER: Correct, Your Honor.

25 CHAIR GIBSON: And it states that the

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1 service area population is 32,152 as of 2010. Is that
2 correct?

3 MR. YELLOW THUNDER: That's correct, Your
4 Honor.

5 CHAIR GIBSON: You state in your testimony
6 that the Oglala Sioux Tribe is composed of
7 approximately 41,000 citizens. Where are the rest
8 located if they're not in Pine Ridge?

9 MR. YELLOW THUNDER: Well, Your Honor,
10 that probably stems back in history, in our more
11 recent history of what was known as the relocation era
12 in which the Government, I guess I would say, forcibly
13 took some families and placed them in some of the
14 major cities throughout the country, that being in
15 Denver, San Francisco, New York. So that --
16 historically that's probably the cause of that.

17 CHAIR GIBSON: Okay.

18 MR. YELLOW THUNDER: That there are --

19 CHAIR GIBSON: That difference of 10,000
20 or so?

21 MR. YELLOW THUNDER: Right. Yes.

22 CHAIR GIBSON: Okay.

23 MR. YELLOW THUNDER: That would
24 accommodate for that.

25 CHAIR GIBSON: Okay. Now I believe, Mr.

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1 Catches-Enemy, you indicated earlier that the Oglala
2 Sioux Tribe represents one of the seven Lakota Bands,
3 is that correct?

4 MR. CATCHES-ENEMY: Yes.

5 CHAIR GIBSON: And it is the largest of
6 the seven Lakota Bands, is that correct?

7 MR. CATCHES-ENEMY: Yes.

8 CHAIR GIBSON: The Brule, I guess is the
9 next largest Lakota Band. Is that correct? The Brule
10 is the second largest Lakota Band, is that correct,
11 population-wise?

12 MR. CATCHES-ENEMY: I believe so.

13 CHAIR GIBSON: Do you have any idea about
14 what the population is of the Brule?

15 MR. CATCHES-ENEMY: I know they reside on
16 two different reservations, the Rosebud Reservation,
17 as well as the Lower Brule Reservation, so I'm not
18 sure combined what their population is. And they
19 probably face the same relocation statistics.

20 CHAIR GIBSON: Okay. Mr. Yellow Thunder,
21 do you have any idea about what their population is?

22 MR. YELLOW THUNDER: It wouldn't be
23 precise, Your Honor.

24 CHAIR GIBSON: Okay. Is it half the size
25 or a fourth of the size, or whatever, of the Oglala

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1 Sioux?

2 MR. YELLOW THUNDER: I would say probably
3 half.

4 CHAIR GIBSON: About half? Okay. Thank
5 you. Mr. Yellow Thunder, you state in your
6 declaration that the two tribes involved in the 2012
7 survey, the Santee Sioux and the Crow, were not among
8 the tribes closest to the area and having the greatest
9 historical contact with the area, is that correct?

10 MR. YELLOW THUNDER: Yes, it is.

11 CHAIR GIBSON: And you testify that as a
12 consequence of this those two groups would not be able
13 to identify items of importance to the Oglala Sioux
14 Tribe, is that correct?

15 MR. YELLOW THUNDER: Yes, sir.

16 CHAIR GIBSON: The Santee Sioux is not a
17 Lakota Tribe, correct?

18 MR. YELLOW THUNDER: Yes, they are.

19 CHAIR GIBSON: Okay. And the Crow Nation
20 is not a Sioux Nation either, correct?

21 MR. YELLOW THUNDER: No, the Crow Nation
22 is not.

23 CHAIR GIBSON: Okay. The Santee Sioux is
24 a Dakota Tribe, is that correct?

25 MR. YELLOW THUNDER: Actually, I think the

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1 Santee Sioux is a Dakota. Dakota Tribe.

2 CHAIR GIBSON: Not a Lakota, but a --

3 (Simultaneous speaking)

4 MR. YELLOW THUNDER: Not a Lakota.

5 CHAIR GIBSON: Thank you. Mr. Goodman, in
6 the Environmental Assessment, NRC-10, at page 61, it
7 states that along with the Dakota the Lakota were a
8 historically predominant tribe in the region. Is that
9 correct?

10 MR. GOODMAN: Yes, Your Honor.

11 CHAIR GIBSON: And the Bozell and Pepperl
12 report, which is CBR-027, which we've agreed the EA
13 often relies on, states on page 6 that the principal
14 Native American group occupying or utilizing the study
15 area throughout at least much of the 19th Century was
16 the Teton Sioux Tribe or Lakota, is that correct?

17 MR. GOODMAN: Yes, Your Honor.

18 CHAIR GIBSON: Okay. I can't see any
19 reason to doubt that the Lakota were the primary group
20 occupying the region where the Crow Butte license
21 renewal area is located, or at least where they were
22 resettled. Are we in agreement on that?

23 MR. GOODMAN: We are, Your Honor.

24 CHAIR GIBSON: Okay. I take it you would
25 not dispute anything that Mr. Yellow Thunder just

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1 stated, or Mr. Catches-Enemy, about the Oglala Sioux
2 Tribe being one of the seven Lakota Tribes, and being
3 the largest. Is that correct?

4 MR. GOODMAN: No, I would not disagree
5 with any of that.

6 CHAIR GIBSON: And you would not disagree
7 that the two tribes that were involved in the 2012 TCP
8 survey were not among those tribes that were closest
9 to the area and having the greatest historical contact
10 with it, correct?

11 MR. GOODMAN: They're not a Lakota. They
12 are a Sioux Nation Tribe. But, yes, that's correct.

13 CHAIR GIBSON: And they're significantly
14 distant, correct?

15 MR. GOODMAN: Compared to the Oglala Sioux
16 Tribe, yes, that's correct.

17 MR. SMITH: And, Your Honor, what time
18 frame are you referring to?

19 CHAIR GIBSON: Mr. Catches-Enemy, I have
20 a question for you. Mr. Smith has raised a question
21 and I think we'll just go ahead and try to get it
22 addressed, and that was what time frame are we
23 speaking about in terms of whether the Santee Sioux or
24 the Crow Nation were involved with this particular
25 area where the Crow Butte license renewal area is?

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1 MR. CATCHES-ENEMY: For the Crow and
2 Santee Tribes?

3 CHAIR GIBSON: Yes, sir.

4 MR. CATCHES-ENEMY: I would not be able to
5 speak to that. I can speak to the Lakotas. And as
6 far as our oral traditions go and our teachings go,
7 this is the region -- the Southern Black Hills is
8 where we originated, so everywhere around the Black
9 Hills within the Great Plains Region is our ancestral
10 homeland. So as far as some of the other tribes that
11 have inhabited this area, I couldn't put a time frame
12 on that. I just know that the Lakotas have been here
13 since -- according to our beliefs since time
14 immemorial.

15 CHAIR GIBSON: Dr. Nickens, would you have
16 any disagreement with that, what Mr. Catches-Enemy
17 just said?

18 DR. NICKENS: Not with respect to the
19 Lakota, sir.

20 CHAIR GIBSON: Okay. And with respect to
21 the Crow Nation what historical association did they
22 have with the Crow Butte license renewal area?

23 DR. NICKENS: In my understanding; and
24 it's not a complete review of literature, but it was
25 mostly incursions, raiding and so forth, which in fact

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1 is the story of the Crow Butte Battle.

2 CHAIR GIBSON: Okay. And the Santee
3 Sioux?

4 DR. NICKENS: The Santee Sioux, again
5 according to my limited knowledge, were originally
6 located in Minnesota, and approximately 1870s I
7 believe moved westward.

8 CHAIR GIBSON: But not into this Crow
9 Butte license renewal area, is that correct?

10 DR. NICKENS: My knowledge, Santee Sioux
11 did not have a physical presence in the area, but
12 that's a limited knowledge.

13 CHAIR GIBSON: Okay. And other than some
14 warfare that may have gone on between the Crow Nation
15 and the Lakota peoples perhaps in this area, do you
16 know of any other involvement of the Crow Nation in
17 this area?

18 DR. NICKENS: I do not.

19 CHAIR GIBSON: Okay. Very well. Thank
20 you.

21 Mr. Goodman, I take it the staff's
22 preference -- you started off hoping to have 21 tribes
23 involved in your process and you only got 2. I take
24 it your preference would have been to have more tribes
25 involved. Is that a fair statement?

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1 MR. GOODMAN: That's a fair statement,
2 Your Honor.

3 CHAIR GIBSON: Okay. I would like to turn
4 next to the Environmental Assessment, Mr. Goodman,
5 NRC-10 at page 60. It states that the staff considers
6 the area of interest in the license renewal to be the
7 area within the 2,560-acre CBR facility boundary. Is
8 that correct?

9 MR. GOODMAN: Yes, Your Honor.

10 CHAIR GIBSON: Then on page 70 of the
11 Environmental Assessment it states that a TCP field
12 survey was completed by the Santee Sioux Nation and
13 the Crow Nation and that their report concluded that
14 there were no eligible sites of cultural or religious
15 significance to the tribes at the CBR facility, as
16 well as the expansion areas. Is that correct?

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

18 CHAIR GIBSON: In your direct testimony at
19 A-118, which is on red numbered 74, I understand you
20 to state that the Crow Nation and the Santee Sioux
21 Nations told the NRC staff that the license area had
22 been disturbed to such an extent that neither tribe
23 would survey the area. Is that correct?

24 MR. GOODMAN: No, that's not specifically
25 correct in that a survey of the area was done and

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1 completed, just not to the level that say the Marsland
2 Expansion Area was done. And so, they did do an on-
3 the-ground survey in which they felt was sufficient to
4 get all the information that they needed. And
5 certainly someone who is not an expert in identifying
6 TCPS I had no reason to doubt that. So they did do
7 that. It wasn't as extensive as some of the other TCP
8 surveys at their discretion. Certainly not mine.

9 CHAIR GIBSON: Okay. I guess what was
10 your understanding of the concerns that were expressed
11 about whether the areas had been disturbed to a large
12 extent? What was your understanding of what they told
13 you?

14 MR. GOODMAN: My understanding was that
15 the areas that were disturbed came from sort of two
16 different items. Number one is that a lot of this
17 region has been previously disturbed with ag land and
18 pasture land. And number two, the areas that have the
19 mine units, which we've discussed all week, would also
20 add to disturbance.

21 CHAIR GIBSON: Okay. Very well. Thank
22 you. And when they concluded their examination of the
23 site, their TCP survey -- let me rephrase it. When
24 they concluded their examination of the Crow Butte
25 license renewal area site, Mr. Smith, what was it, Mr.

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1 Goodman, that they concluded? Did they conclude in
2 behalf of all tribes, or only in behalf of their own
3 individual tribes?

4 MR. GOODMAN: My understanding from
5 talking with them -- I was the individual that
6 represented the NRC when we did the TCP survey
7 specific to Crow Butte license renewal. My
8 understanding was that they could identify traditional
9 cultural properties. And so, my interpretation of
10 that would be that they could identify traditional
11 cultural properties that would include more than just
12 the Santee Sioux Nation and the Crow Nation.

13 CHAIR GIBSON: That was your
14 understanding?

15 MR. GOODMAN: That was my understanding,
16 Your Honor.

17 CHAIR GIBSON: Yes. Dr. Nickens, would
18 that be your understanding? I realize you didn't have
19 a conversation with them, but would that be your
20 understanding that if the --

21 DR. NICKENS: Actually I did have --

22 CHAIR GIBSON: -- Santee Sioux and the
23 Crow Nation could come and look and determine whether
24 there were tribal cultural properties there?

25 DR. NICKENS: I'm sorry to interrupt, Your

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1 Honor. I did have conversations with them at
2 approximately midpoint during the course --

3 CHAIR GIBSON: Oh, you did? I'm sorry.
4 I'm sorry. I didn't --

5 (Simultaneous speaking)

6 DR. NICKENS: -- of field work. I
7 replaced Mr. Goodman as the field representative.

8 CHAIR GIBSON: Okay.

9 DR. NICKENS: On the subject of the
10 license area and the decisions there, I was -- when I
11 arrived on the scene the decision had already been
12 made by the tribes that they didn't need to conduct
13 intensive level field coverage of the license renewal
14 site. So from the technical analyst point of view for
15 the EA I was interested in that decision, so did
16 follow up with them a little bit on why they made
17 their decisions. And I support Mr. Goodman's
18 assessment. They just felt that the land within the
19 license renewal area was too disturbed by past
20 disturbance. There was -- in each of the expansion
21 areas that they dealt with and the license renewal
22 area their primary interest seemed to be undisturbed
23 ground, or light-disturbed ground. So in the license
24 renewal area everything was just disturbed to the
25 extent that they felt there was no need for on-the-

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1 ground surveying.

2 Now, to the other part of your question
3 about the Santee Sioux and the Crow Tribe identifying
4 resources that may have significance for other tribes,
5 I would disagree a little bit and I would say from a
6 personal point of view that those two tribes would
7 only identify and assign cultural importance from the
8 perspective of their two tribes. I can't speak in
9 their behalf, but I would --

10 CHAIR GIBSON: Sure.

11 DR. NICKENS: -- say that they would
12 answer we're not speaking for other tribes.

13 CHAIR GIBSON: Thank you, sir. Now, I
14 just want to be sure that I understand what you said.
15 It was their conclusion from looking at the Crow Butte
16 license renewal area site that the land was so
17 disturbed that they could not really reach any
18 conclusions about what might be tribal cultural
19 properties on there. Is that correct? It was just
20 too disturbed?

21 DR. NICKENS: Yes, sir.

22 CHAIR GIBSON: Okay. Thank you, sir. So
23 really there wasn't a tribal cultural property survey
24 of the license renewal area, was there, because they
25 looked at it and said it was too disturbed to conduct

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1 one?

2 DR. NICKENS: Depends on your definition
3 of "survey." I hate to become Clinton here, but --

4 CHAIR GIBSON: Yes. Sure.

5 DR. NICKENS: -- I mean, the steps that
6 they went through, professionally I was satisfied.

7 CHAIR GIBSON: Sure.

8 DR. NICKENS: They had aerial photos. As
9 I understand it, they drove around, they got out in
10 some spots. Mr. Goodman can speak to that. But the
11 steps they went through to determine that an intensive
12 walk-through with the specified swaths and so forth
13 was not necessary in those grounds.

14 CHAIR GIBSON: Thank you, sir. One more
15 thing. When you said "would not be necessary on those
16 grounds," necessary for what? Necessary in order
17 to --

18 DR. NICKENS: Well, my interpretation
19 would be from their point of view they felt that on-
20 the-ground survey would not produce any results
21 because of the disturbance. So they decided to
22 dedicate their efforts elsewhere in the expansion
23 areas.

24 CHAIR GIBSON: Thank you, sir.

25 MR. REID: Your Honor, this is from the

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1 Tribe, Andrew Reid. Just so we're clear, it's my
2 understanding they're referring to a Class III survey
3 and not to a full TCP survey where they're surveying
4 for spiritual and cultural sites.

5 CHAIR GIBSON: Okay. Thank you, sir.

6 MR. GOODMAN: That is an inaccurate
7 understanding, Your Honor.

8 CHAIR GIBSON: You know, lawyers say a lot
9 of things in behalf of their client. They need to
10 make objections. You don't have to agree with what he
11 says, Mr. Goodman.

12 MR. GOODMAN: Sorry, Your Honor.

13 CHAIR GIBSON: No, it's okay. I'll tell
14 you just as a practical matter when one of these
15 lawyers says something that I think you really need to
16 address on the record so we can clean it up, I'll ask
17 it of you.

18 MR. GOODMAN: And you have done that, Your
19 Honor.

20 CHAIR GIBSON: Okay?

21 MR. GOODMAN: I'm so sorry.

22 CHAIR GIBSON: No, it's okay. It's okay.
23 Mr. Reid just needs to make an objection or note
24 something for the record. It's fine.

25 Okay. If we could turn to the 2012 survey

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1 report, which is NRC-052, pages 4 and 5. This the
2 Santee Sioux Nation Tribal Historic Preservation
3 Report. And at pages 4 and 5 it discusses walk-
4 throughs only at Marsland and Three Crow. I guess I
5 should ask you of this, Dr. Nickens, since you were
6 the one who took over. So they actually did do a
7 walk-through at these other ones, at these other
8 sites, is that correct? It just wasn't -- or
9 whichever one of you knows, they actually did do some
10 walk-throughs because they thought it might be
11 productive, is that correct?

12 DR. NICKENS: We both know the answer is
13 yes, sir.

14 CHAIR GIBSON: Okay. Great. Thank you.

15 Okay. Mr. Catches-Enemy, in your direct
16 testimony, which is INT-031, at page 5, at paragraph
17 21, you state that in December 2012 and January 2013
18 the staff sent out new Section 106 consultation
19 letters to the Oglala Sioux Tribe, is that correct?

20 MR. CATCHES-ENEMY: Which document are you
21 referring to?

22 CHAIR GIBSON: Your testimony, INT-031 at
23 page 5, paragraph 21.

24 MR. CATCHES-ENEMY: I'm looking at INT-
25 031, and No. 21 talks about Mr. Terry Clouthier. Is

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1 that the same one?

2 CHAIR GIBSON: Yes.

3 MR. CATCHES-ENEMY: You said that the
4 staff sent out some new Section 106 consultation
5 letters to the tribe, is that correct? January of
6 2013 and December 2012.

7 MR. CATCHES-ENEMY: I believe so.

8 CHAIR GIBSON: Okay. Great. Maybe I've
9 got the wrong cite there. I believe that's where it
10 was. On page 5? It's really not a terribly
11 complicated question. Wherever you see it.

12 MS. SIMON: Your Honor, I think it's in
13 paragraph 20.

14 CHAIR GIBSON: It's in paragraph 20?
15 Okay. I think -- look in paragraph 20. Ms. Simon
16 helped us out.

17 Thank you, ma'am.

18 MR. CATCHES-ENEMY: Okay. Paragraph 20.

19 CHAIR GIBSON: Yes, it was my mistake.
20 I'm sorry about that.

21 MR. CATCHES-ENEMY: Okay. Yes.

22 CHAIR GIBSON: Yes, sir. You state that
23 in December of 2012 and January of 2013 the staff sent
24 out new Section 106 consultation letters to the Oglala
25 Sioux Tribe, is that correct?

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1 MR. CATCHES-ENEMY: Yes.

2 CHAIR GIBSON: Mr. Deucher, could you pull
3 up NRC-043?

4 Now, this is a March 12th, 2013 letter
5 from Larry Camper, who is with the NRC, to Bryan
6 Brewster, who at that time was president of the Oglala
7 Sioux Tribe, is that correct?

8 MR. CATCHES-ENEMY: Yes. Brewer.

9 CHAIR GIBSON: Did I say -- Brewer?

10 MR. CATCHES-ENEMY: Brewer.

11 CHAIR GIBSON: And I said Brewster?

12 MR. CATCHES-ENEMY: Brewer.

13 CHAIR GIBSON: Yes, I'm terribly sorry.
14 You think I'd be able to pronounce that one right.
15 Okay. Now, in this letter the NRC staff invites the
16 Oglala Sioux Tribe, along with other tribes, to
17 Government meeting on the licensing of uranium
18 products. And that meeting was to occur in May of
19 2013. Are you even familiar with this letter? Let me
20 ask you that first?

21 MR. CATCHES-ENEMY: No.

22 CHAIR GIBSON: Okay. You're not familiar
23 with this letter. Okay. Well, in your testimony you
24 said that the staff had sent out a new Section 106
25 consultation letter, and I was just trying to find out

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1 if this is what you were talking about, if this is the
2 106 consultation letter.

3 MR. CATCHES-ENEMY: I believe in my
4 testimony it was talking about December of '12 and
5 early two-thousand -- January '13.

6 CHAIR GIBSON: Right. And I will --

7 MR. CATCHES-ENEMY: No the March.

8 CHAIR GIBSON: I looked through the
9 documents and this was the closest thing I could find.

10 MR. CATCHES-ENEMY: Okay.

11 CHAIR GIBSON: I'll tell you what, let me
12 ask Mr. Goodman.

13 Mr. Goodman, do you recall any previous
14 letters on 106 consultation to the Oglala Sioux Tribe
15 before this one in March?

16 MR. GOODMAN: I don't, Your Honor. And
17 just to clarify; I don't want to speak on behalf of
18 Mr. Catches-Enemy, but later in that paragraph 20 he
19 starts referring to the \$10,000 honorarium. So he may
20 be referring to that October 31st, letter, which is
21 the TCP invitation survey letter.

22 CHAIR GIBSON: Right.

23 MR. GOODMAN: I think that's what he may
24 be referring to when he says late 2012 or early 2013.

25 CHAIR GIBSON: And you say that because is

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1 there no reference to an honorarium in this letter?

2 MR. GOODMAN: I believe this letters is
3 the tribal leaders invitation meeting, so there would
4 not be a reference to an honorarium in this letter.
5 That's correct, Your Honor.

6 CHAIR GIBSON: Okay. Very well. All
7 right. Okay. It's almost noon. This is probably a
8 good stopping place. So let's stop here and --

9 MR. BALLANCO: Your Honor?

10 CHAIR GIBSON: Yes?

11 MR. BALLANCO: Tom Ballanco for
12 Consolidated Intervenors.

13 CHAIR GIBSON: Yes, sir?

14 MR. BALLANCO: Conveniently, since we have
15 a few moments before noon, if we could, when these
16 proceedings began, as you know, I represented the
17 Black Hills Sioux Nation Treaty Council --

18 CHAIR GIBSON: Yes, sir.

19 MR. BALLANCO: -- that was granted
20 observational status and chose to participate through
21 representation by the Oglala Sioux Tribe and by Joe
22 American Horse who is a Consolidated Intervenor.
23 Chief American Horse is here and would like just a few
24 moments if he could to address yourselves, which in
25 the interest of time, if there is going to be

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1 summation, we'd happily deduct his time from ours at
2 the end, if that's possible.

3 CHAIR GIBSON: I think that would be just
4 fine.

5 MR. BALLANCO: Thank you, Your Honor.

6 CHAIR GIBSON: A couple of minutes?

7 MR. BALLANCO: Yes, Your Honor, very
8 short.

9 CHAIR GIBSON: That's just fine. We'd all
10 love to hear from him.

11 MR. CYLKOWSKI: Your Honor, can we just
12 make clear for the record that the statement we're
13 about to here is not testimony that the Board is
14 taking.

15 CHAIR GIBSON: He's not sworn.

16 MR. CYLKOWSKI: Okay. Thank you.

17 CHAIR GIBSON: He's not a witness. He
18 needs to make a statement. We'll let him make a
19 statement. Okay?

20 CHIEF AMERICAN HORSE: Good morning.

21 CHAIR GIBSON: Good morning, sir.

22 CHIEF AMERICAN HORSE: Good morning and I
23 want to thank the Judges. Thank you for taking time
24 out to listen to other concerns. My name is Joe
25 American Horse and I'm from Pine Ridge Indian

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1 Reservation here. My dad's the youngest son of Chief
2 American Horse. He's the one that signed the 1868
3 Fort Laramie Treaty. That Fort Laramie Treaty was
4 given the settlers not to bother them that when they
5 call Indian Country and also to define the Indian
6 Country.

7 I'm trying to remember Lakota names. Like
8 Nebraska means flat water, like the Platte River. And
9 of course there's two Dakotas. And Missouri.
10 Minisoshka means that the water is diluted. And then
11 Minneota, Minnesota, those are all Sioux Indian names
12 that they have after the state.

13 My dad's name is Charlie. He's the
14 youngest son. He lost his whole family to some kind
15 of sickness, so he had a second family and he married
16 my mother Louise Kilsko American Horse. And there's
17 seven of us. The oldest one is a girl and the others
18 are boys.

19 I was looking around and I saw that
20 American flag and I remember that we were all in the
21 military since World War II to the end of the Korean
22 War. My sister's name is Martha. She was in the
23 Army. My brother's named Bird. He was in the Army.
24 My brother named Bill, he was in the Marines. And my
25 brother Dave was in the Army. And my brother Scott

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1 was in the Navy. And I was in the Marines. And my
2 younger brother Forest was in the Air Force. And we
3 also have grandchildren are in the military. So we're
4 from Pine Ridge Indian Reservation. You know, we're
5 like that.

6 I'm interested this Chairman of the Land
7 Use because the water, when you're talking about the
8 White River, it goes through Pine Ridge Indian
9 Reservation and Rosebud Indian Reservation and onto
10 the farmlands and to Missouri River. My main concern
11 is that we can't even use that water. It's diluted or
12 something like that. But significant.

13 One of the landmarks we have on Lakota
14 Nation or Indian Country is like Chimney Rock in
15 Nebraska. Crow Butte, Fair Butte, Devil's Tower are
16 all landmark for Lakota people to travel.

17 I myself is a -- my -- I got -- I was --
18 I like to run, so I got a scholarship to go to
19 University of Nebraska. So I went down to Nebraska
20 for three years running. And one of the things that
21 I do is these -- Crow Butte is mentioned Crow Butte
22 because Crow Butte just -- the chased is Lakota
23 people. The Crow Tribe chases Lakota people up to
24 that butte, and there's only way of going in and
25 coming out. So the Crow Tribe can't be little --

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1 waiting to starve it out or something. There is --
2 Lakota are on top of the butte. They all cut up their
3 rawhide and make it into a rope and then they crawl
4 out from the other side of the butte but leaving one
5 person behind to make noise so that, you know, they're
6 all up there.

7 And that's why one of our leaders was
8 Crazy Horse. He was killed here in Fort Robinson and
9 I think he was buried somewhere east of here. And one
10 of the significant I have is that I do what they call
11 vision quests. I'm trying to find out how to -- not
12 to get people sick all the time. So we do this vision
13 quest and then we do sun dance. And I did my vision
14 quest at Crow Butte, but I don't know, nobody knows
15 about the radiation. You can't see radiation. You
16 can't smell radiation, you know?

17 So my thing is that I did the vision quest
18 at Crow Butte and one of the -- north of Crawford
19 here, those big hills over there, those cliffs, I
20 don't know where the terminology comes in. There's a
21 young warrior who was going to marry this young girl
22 and they went into a war party and he never come back.
23 He got killed. So this young girl, they lost him and
24 she was up there on top of that cliff and she was
25 singing and she was dancing backwards and she fell off

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1 from the cliffs, what we call it Lover's Leap, I
2 guess, you know, that -- anyway, there's significant.

3 There's Indian Reservation. They put us
4 on reservations so we had to -- in 1889 the Wounded
5 Knee Massacre, they make people stop using our pipe,
6 using our sweat lodge, using our sun dance, using our
7 -- the vision quest. It wasn't until later, like 18
8 -- 1986 or somewhere in '85 when they give us a chance
9 to use our -- the way we pray.

10 So I'd like to thank you for taking the
11 time out and the Panel and the people that are here
12 for -- the last four days you've been here. And thank
13 you very much for your kind attention from Pine Ridge
14 Indian Reservation. Thank you very much.

15 CHAIR GIBSON: Thank you, sir. All right.
16 With that, we will stand in recess and we will come
17 back on the record at 1:00. Thank you so much.

18 (Whereupon, the above-entitled matter went
19 off the record at 11:57 a.m. to reconvene at 1:00 p.m.
20 this same day.)

21 CHAIR GIBSON: All right. We're back on
22 the record. I think that just to give you all some
23 advance notice, I think that we will be able to
24 dispense with any closing arguments.

25 Believe it or not, we've heard an awful

1 lot. I think we know pretty much everything we need
2 to know that we could have heard in a closing.

3 I will say this, however: There won't be
4 any proposed findings and conclusions submitted,
5 obviously, until we've finished our additional day of
6 hearing in October.

7 However, one thing that we would like to
8 see, I think, in those conclusions of law would be
9 some legal analysis of how -- what other agencies
10 consider government-to-government consultations. I
11 think that would be helpful.

12 And that would be much more -- your time
13 would be spent much better researching that than
14 giving a closing argument.

15 Okay. Mr. Catches-Enemy, do you know
16 approximately when the Oglala Sioux Tribe learned
17 about the survey that the Santee Sioux and the Crow
18 Nation conducted in the Crow Butte license renewal
19 area?

20 MR. CATCHES-ENEMY: To the best of my
21 knowledge, I would say right at the end of 2012 or the
22 beginning of 2013.

23 CHAIR GIBSON: Thank you. Mr. Goodman, I
24 would like to refer to the March 29, 2013 letter that
25 I believe we had displayed earlier, Mr. Deucher.

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1 INT040.

2 This is the March 29 letter from the
3 Oglala Sioux Tribe.

4 MR. REID: You said INT040?

5 CHAIR GIBSON: No, it's not -- INT040, not
6 NRC040. That's NRC043. Wanted to get to INT040. May
7 also be NRC044. Here we go. Thank you.

8 This is a March 29, 2013 letter from the
9 Oglala Sioux Tribe to Mr. Camper with the NRC; is that
10 correct, Mr. Goodman?

11 MR. GOODMAN: Yes, Your Honor.

12 CHAIR GIBSON: I assume you're familiar
13 with this letter?

14 MR. GOODMAN: I am.

15 CHAIR GIBSON: Good. This letter was
16 signed by Bryan Brewer, the president of the Oglala
17 Sioux Tribe, and it accepts the NRC's invitation to
18 attend a meeting in May 2013 and, I quote, for
19 government-to-government consultation; is that
20 correct?

21 MR. GOODMAN: Yes, Your Honor.

22 CHAIR GIBSON: Now, on Page 2 this letter
23 states again that the Oglala Sioux Tribe accepts the
24 invitation for formal government-to-government
25 consultation, correct?

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1 MR. GOODMAN: Correct, Your Honor.

2 CHAIR GIBSON: It is my understanding,
3 however, that no one from the Oglala Sioux Tribe
4 attended; is that correct?

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

6 CHAIR GIBSON: This May 2013 meeting.

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

8 CHAIR GIBSON: Do you have any
9 understanding as to why they did not attend after
10 accepting an invitation to attend?

11 MR. GOODMAN: I do not, Your Honor.

12 CHAIR GIBSON: And to this day, you have
13 never learned.

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

15 CHAIR GIBSON: Okay. Mr. Catches-Enemy,
16 do you know why after accepting the invitation for
17 formal government-to-government consultation the tribe
18 did not attend this May 29, 2013 meeting?

19 MR. CATECHES-ENEMY: No, I do not.

20 CHAIR GIBSON: Mr. Yellow Thunder, do you
21 know?

22 MR. YELLOW THUNDER: No, I do not, Your
23 Honor.

24 CHAIR GIBSON: Very well. Thank you.

25 MR. CATCHES-ENEMY: Your Honor.

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1 CHAIR GIBSON: Yes.

2 MR. CATCHES-ENEMY: If I could add?

3 CHAIR GIBSON: Yes, sir. Sure.

4 MR. CATCHES-ENEMY: Okay. It was just a
5 previous statement that I have made about the
6 difference between consultation in Section 106 and
7 government-to-government. I think I made that
8 yesterday.

9 CHAIR GIBSON: Consultation, yes, sir.

10 MR. CATCHES-ENEMY: Okay.

11 CHAIR GIBSON: There's two different types
12 of consultation.

13 MR. CATCHES-ENEMY: Yes. And so --

14 CHAIR GIBSON: One occurs at the Tribal
15 Historic Preservation Officer level, and one occurs at
16 the level of the executive of the tribe.

17 MR. CATCHES-ENEMY: Yes, sir.

18 CHAIR GIBSON: Okay.

19 MR. CATCHES-ENEMY: So, I'm thinking that
20 based on our lack of knowledge of why somebody from
21 the government did not attend is because it no longer
22 was in the Section 106 realm.

23 CHAIR GIBSON: Okay.

24 MR. CATCHES-ENEMY: And that's why maybe
25 some of these letters are not addressed to the THPO's

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1 offices.

2 CHAIR GIBSON: And that would be sort of
3 your supposition, but you don't know for yourself,
4 correct?

5 MR. CATCHES-ENEMY: Yes.

6 CHAIR GIBSON: Okay. Thank you.

7 Mr. Goodman, recognizing that you don't
8 know why they didn't attend, do you recall if the NRC
9 received any further communication from the tribe?

10 MR. GOODMAN: Specific to --

11 CHAIR GIBSON: With regard to this May
12 2013 meeting --

13 MR. GOODMAN: -- the attendance.

14 CHAIR GIBSON: -- other than this letter.

15 MR. GOODMAN: No, and NRC staff did
16 several reach-outs sort of that the morning of we
17 contacted the president's office and we just could not
18 get a hold of him and we were left with no choice but
19 to proceed with the meeting without him.

20 CHAIR GIBSON: Thank you. Mr. Catches-
21 Enemy -- oh, Mr. Yellow Thunder, did you need to just
22 have a --

23 MR. YELLOW THUNDER: If I may, Your Honor.
24 I just had a quick question in regard to Mr. Goodman's
25 remark.

1 I was just going to inquire if it was
2 common practice for the staff to proceed with a
3 government-to-government consultation meeting when one
4 of the parties that had accepted --

5 CHAIR GIBSON: When what?

6 MR. YELLOW THUNDER: When one of the
7 parties that accepted the invitation for one reason or
8 another wasn't able to make it.

9 Is it just --

10 CHAIR GIBSON: Sure.

11 MR. YELLOW THUNDER: -- common practice
12 for them to go ahead and proceed with a --

13 CHAIR GIBSON: Right.

14 MR. YELLOW THUNDER: -- government-to-
15 government consultation?

16 CHAIR GIBSON: Okay. My understanding,
17 Mr. Goodman, is that there were several tribes who did
18 attend this May 2013 meeting; is that correct?

19 MR. GOODMAN: Several tribes did attend,
20 yes, Your Honor.

21 CHAIR GIBSON: Okay. Very well.

22 Mr. Catches-Enemy, in your direct
23 testimony, I hope I have the cite this time right, on
24 Page 6, Paragraph 23 --

25 MR. CATCHES-ENEMY: Okay.

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1 CHAIR GIBSON: -- I believe in that you
2 refer to this May 2013 meeting and say that
3 consultations were unsuccessful in resolving the
4 differences between the tribes and the NRC staff over
5 the process being employed to determine the impact of
6 the Crow Butte activities and two other proposed
7 projects on the tribal historic, cultural, religious
8 and spiritual interests.

9 Now, just to make sure, were you referring
10 to this May 2013 meeting in that statement?

11 MR. CATCHES-ENEMY: Yes.

12 CHAIR GIBSON: It appeared that you were.

13 MR. CATCHES-ENEMY: Yes.

14 CHAIR GIBSON: Okay. And I take it since
15 you didn't attend that meeting and no one from, in
16 fact, no one from the Oglala Sioux Tribe attended that
17 meeting, I take it that what you know about that
18 meeting is the result of consultations with other
19 members of other tribes who did attend the meeting.

20 Is that a fair statement?

21 MR. CATCHES-ENEMY: Yes.

22 CHAIR GIBSON: Okay. Mr. Goodman, would
23 you agree with Mr. Catches-Enemy that consultations
24 were unsuccessful in resolving the differences between
25 the tribe and the NRC staff over the process being

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1 employed to determine the impact of the Crow Butte
2 activities and the two other proposed projects on the
3 tribal historic, cultural, religious and spiritual
4 interests?

5 MR. GOODMAN: I would not, Your Honor.

6 CHAIR GIBSON: Any why would you say those
7 consultations were successful?

8 MR. GOODMAN: Your Honor, the purpose of
9 this meeting was a tribal leaders meeting to satisfy
10 the tribe's request to have the, as I'm calling it,
11 Big G to Big G government consultation, the one
12 between leaders of the tribes and decision-makers.

13 And that was the meeting that we did have
14 a member of our division director staff -- or deputy
15 division director.

16 CHAIR GIBSON: Deputy division director,
17 correct.

18 MR. GOODMAN: That's correct.

19 CHAIR GIBSON: What is the deputy division
20 director's name?

21 MR. GOODMAN: At the time, it was Aby
22 Moheni.

23 CHAIR GIBSON: Okay.

24 MR. GOODMAN: And then maybe the court
25 reporter can meet with me after and I'll get his email

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1 and then we can get the spelling of his last name,
2 because I'm not going to get it here.

3 CHAIR GIBSON: There are some names I
4 haven't been able to pronounce either. So, don't feel
5 bad, Mr. Goodman.

6 MR. GOODMAN: So, continuing on, that was
7 -- the purpose was a tribal leaders meeting and it was
8 to discuss several projects on a tribal leader to
9 decision-maker division level basis. And that was the
10 purpose of the meeting. And that is exactly what
11 occurred.

12 We were able to give and answer questions
13 on the status of projects. One of those projects
14 being Crow Butte license renewal. And that's what we
15 accomplished at that meeting.

16 CHAIR GIBSON: So, with respect to at
17 least some of the tribes who were in attendance, you
18 were able to achieve Big G to Big G consultation.

19 Is that a fair statement?

20 MR. GOODMAN: According to the NRC, yes.

21 CHAIR GIBSON: And subsequent to that
22 time, do you know whether the tribes in attendance
23 shared that view that the staff had that that Big G to
24 Big G consultation was successful?

25 MR. GOODMAN: One of the members of a

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1 tribe in attendance said on the record that he
2 represents the Tribal Council and accepts
3 responsibility on behalf of the Tribal Council. And
4 he can authorize the making of decisions agreeing that
5 this is a formal Big G to Big G, government-to-
6 government meeting.

7 CHAIR GIBSON: Do you recall the tribe?

8 MR. GOODMAN: Off the top of my head, no.
9 I can certainly get that. I can get the name and the
10 tribe.

11 CHAIR GIBSON: That would be splendid.
12 Thank you, sir.

13 MR. GOODMAN: At the first break, I will
14 do that, Your Honor.

15 CHAIR GIBSON: That would be great. First
16 opportunity, just we'll fill in the record.

17 MR. GOODMAN: Great.

18 CHAIR GIBSON: We still have to do a
19 closed session at the end of this. A brief closed
20 session. And so when we do, we can -- perhaps you can
21 have it -- you can find it out by the time we get
22 there. Okay?

23 MR. GOODMAN: Okay.

24 CHAIR GIBSON: Thank you, sir. Okay. We
25 can go back to NRC043, Mr. Deucher. I think this

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1 question is for you, Mr. Goodman. So, maybe you can
2 multitask better than I, but I find that if I'm trying
3 to write something, I normally can't hear at the same
4 time.

5 MR. GOODMAN: I'm ready for the question,
6 Your Honor.

7 CHAIR GIBSON: Okay. I'd like to turn
8 back to NRC043, which was the March 12, 2013
9 invitation to attend this meeting.

10 The invitation states that the meeting was
11 to be about licensing actions associated with proposed
12 uranium recovery projects, correct?

13 MR. GOODMAN: Yes, Your Honor.

14 CHAIR GIBSON: And that invitation
15 included an enclosure which is titled "Enclosure 2."
16 And I believe on the last page it lists all uranium
17 sites under review; is that correct?

18 MR. GOODMAN: Yes, Your Honor.

19 CHAIR GIBSON: And by implication at
20 least, it would have been permissible to have
21 undertaken government-to-government consultation about
22 all of these sites at the meeting; is that correct?

23 MR. GOODMAN: That was the intent, yes,
24 Your Honor.

25 CHAIR GIBSON: I'm sorry, what did you

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1 say?

2 MR. GOODMAN: Yes, Your Honor.

3 CHAIR GIBSON: Okay. Thank you. Okay.
4 Looking at Enclosure 2, the list of these sites, after
5 having been involved in the February 2012 meeting, the
6 one that covered three sites, which was the Crow Butte
7 renewal site, the North Trend Expansion Area and the
8 Powertech Dewey-Burdock site, wasn't it abundantly
9 clear to the staff that there would not be a lot of
10 time for the tribes to actually offer feedback to the
11 staff about cultural resources?

12 MR. GOODMAN: I wouldn't agree with that,
13 Your Honor.

14 CHAIR GIBSON: But you had three sites
15 before and we know about how much feedback you got at
16 the one in February, and this is one involving nine
17 sites, but you think there was enough time, huh?

18 MR. GOODMAN: Your Honor, less tribal
19 members there.

20 CHAIR GIBSON: That's true.

21 MR. GOODMAN: So, the February meeting was
22 mostly FPOs (phonetic) and staff. A lot of tribes
23 were in attendance and there was a real dialog back
24 and forth on sort of the creation of the process of
25 identifying historic and cultural properties.

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1 This meeting was more on a sort of
2 official status, the tribal leaders and our
3 leadership.

4 And so, the schedule of being able to
5 cover all of those and express concerns with the
6 number of people that had committed to attending, I do
7 feel that there was enough time in there.

8 CHAIR GIBSON: Were any tribal cultural
9 resources identified at this meeting?

10 MR. GOODMAN: Specific TCPs identified at
11 the meeting?

12 CHAIR GIBSON: Yes, sir.

13 MR. GOODMAN: No, Your Honor.

14 CHAIR GIBSON: Okay. Okay. Very good.
15 Thank you. Okay. Just see if I can get my chronology
16 straight here.

17 We have the TCP survey happens in November
18 and December of 2012, correct?

19 MR. GOODMAN: Yes, Your Honor.

20 CHAIR GIBSON: And then the May of 2013
21 meeting with some tribes, and then unsuccessfully not
22 with the Oglala Sioux Tribe, correct?

23 MR. GOODMAN: Correct, Your Honor.

24 CHAIR GIBSON: Okay. Can we go back to
25 NRC038, the communications log with the Oglala Sioux

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1 Tribe?

2 And if we could go to Page 5, Mr. Deucher,
3 there is a letter again inviting the Oglala Sioux
4 Tribe to another government-to-government consultation
5 which we spoke about before.

6 This is the one for the May meeting,
7 correct?

8 MR. GOODMAN: Yes, Your Honor.

9 CHAIR GIBSON: And then there is a couple
10 of notices in April and May of 2013 where the staff
11 informs the tribes of their progress in the Section
12 106 process, correct?

13 MR. GOODMAN: Yes, Your Honor.

14 CHAIR GIBSON: Now, if we go to Page 6,
15 NRC staff publishes its Section 106 findings and
16 survey report in October of 2013, correct?

17 MR. GOODMAN: Yes, Your Honor.

18 CHAIR GIBSON: And then sends an
19 additional letter to the tribe about this in 2014; is
20 that correct?

21 MR. GOODMAN: Yes, Your Honor.

22 CHAIR GIBSON: So, once the TCP survey was
23 conducted at least regarding the Crow Butte license
24 renewal site, there really wasn't much more dialog
25 after that, was there, with the tribes.

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1 MR. GOODMAN: Sorry. Can you repeat the
2 question?

3 CHAIR GIBSON: Sure. Once the TCP survey
4 was conducted at least with regard to the Crow Butte
5 renewal site, there wasn't very much dialog after
6 that, correct?

7 MR. GOODMAN: Specific to the Oglala Sioux
8 Tribe?

9 CHAIR GIBSON: Yes, sir.

10 MR. GOODMAN: There was less dialog, if by
11 dialog you mean like communication going both
12 directions.

13 CHAIR GIBSON: Sure.

14 MR. GOODMAN: Yes, Your Honor.

15 CHAIR GIBSON: Okay. Could we go to
16 INT038, please, Mr. Deucher?

17 Okay. Now, this is an intervenor exhibit
18 and I understand this to be an email chain between the
19 NRC staff and the Oglala Sioux Tribe about a TCP
20 survey for the Powertech site.

21 Are you familiar with this?

22 MR. GOODMAN: I am, Your Honor.

23 CHAIR GIBSON: Okay. And this
24 communication is in March of 2013, correct?

25 MR. GOODMAN: Yes, Your Honor.

1 CHAIR GIBSON: On Page 1 in the email
2 chain, it is apparent that the NRC staff is looking to
3 conduct a TCP survey for the Powertech site, correct?

4 MR. GOODMAN: That's correct.

5 CHAIR GIBSON: And based on communication
6 between the Oglala Sioux Tribe and the NRC staff, it
7 was your understanding at the time that the Oglala
8 Sioux Tribe was considering participating, correct?

9 MR. GOODMAN: It was, Your Honor.

10 CHAIR GIBSON: So, during the very period
11 that the staff is talking to the Oglala Sioux Tribe
12 about conducting a TCP survey for the Powertech site
13 in 2013, I could find no effort on the part of the
14 State to attempt to get them to reconsider visiting
15 the Crow Butte renewal site.

16 Was there?

17 MR. GOODMAN: I'm sorry, can you repeat
18 the question? You said "state" and I didn't know if
19 are referring to a state, or if you meant staff, or I
20 just had misheard you altogether.

21 CHAIR GIBSON: You know, I probably
22 misspoke. So, let's try again.

23 So, during the very period that the staff
24 is talking to the Oglala Sioux Tribe about conducting
25 a TCP survey for the Powertech site in 2013, I could

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1 find no attempt on the part of the staff to get the
2 Oglala Sioux Tribe to reconsider visiting the Crow
3 Butte renewal site.

4 Was there?

5 MR. GOODMAN: Once the Crow Butte license
6 renewal TCP survey between the two tribes that we've
7 talked about occurred, no, we did not reach out at
8 that point after.

9 We did reach out between October 31st and
10 November, I think, 14th when the survey started, on
11 several occasions.

12 CHAIR GIBSON: In addition to sending a
13 notice in 14 days, you have 14 days to make a
14 decision, that was what happened from October 31 to
15 November 14. That's what you're talking about, right?

16 MR. GOODMAN: I'm talking about in those
17 14 days we reached out by the phone -- by phone to try
18 and get tribe's interest that had not responded by
19 letter.

20 CHAIR GIBSON: And your recollection is
21 that you were unsuccessful in that attempt, correct?

22 MR. GOODMAN: My recollection is that two
23 phone calls were made specifically to the Oglala Sioux
24 Tribe that were not returned.

25 CHAIR GIBSON: Mr. Yellow Thunder, did the

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1 Oglala Sioux Tribe express interest in conducting a
2 TCP survey of the Crow Butte license renewal area in
3 2013?

4 MR. YELLOW THUNDER: I don't believe we
5 did, Your Honor.

6 CHAIR GIBSON: Very well. Thank you.

7 Mr. Goodman, let's turn to the NRC staff's
8 response to comments that followed the NRC staff's
9 making public the Section 106 documentation for the
10 Crow Butte license renewal site.

11 A TCP survey report by the Santee Sioux
12 Nation and the Crow Nation was placed on ADAMS in
13 March of 2013; is that correct?

14 MR. GOODMAN: Yes, Your Honor.

15 CHAIR GIBSON: Now, according to the EA at
16 Page 70, three tribes objected to the survey; is that
17 correct?

18 MR. GOODMAN: Yes, Your Honor.

19 CHAIR GIBSON: Which is more tribes than
20 actually participated, I noticed.

21 MR. GOODMAN: Three is more than two.

22 CHAIR GIBSON: It is. It is. The EA
23 states that in October 2013 the tribes were sent a
24 copy of the staff's preliminary documentation of its
25 National Historic Preservation Act review for the

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1 license renewal; is that correct?

2 MR. GOODMAN: What was the date?

3 CHAIR GIBSON: October of 2013. The
4 tribes were sent a copy of the staff's preliminary
5 documentation of its NHPA review.

6 MR. GOODMAN: Yes, Your Honor.

7 CHAIR GIBSON: Okay. And it is the
8 position that you take that this consultation process
9 effectively came to an end in 2014; is that correct?

10 MR. GOODMAN: Yes, early 2014, Your Honor.

11 CHAIR GIBSON: Now, the environmental
12 assessment on red-numbered Page 70, if you can get
13 that, Mr. Deucher -- I believe that's NRC010, isn't
14 it, on Page 70?

15 Got it. It states that after the tribes
16 were sent a copy of the staff's preliminary
17 documentation of its NHPA review for the license
18 renewal, the only comments that the NRC staff received
19 were general in nature pertaining to NRC staff's
20 overall NHPA consultation.

21 Did I read that correctly?

22 MR. GOODMAN: You did, Your Honor.

23 CHAIR GIBSON: We looked through the
24 exhibits that the NRC staff offered here and we were
25 not able to find any response the NRC staff made to

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1 these tribal comments that were described as "general
2 in nature pertaining to NRC staff's overall NHPA
3 consultation."

4 Did we miss something?

5 MR. GOODMAN: Your Honor, are you asking
6 if you received the comments that are general in
7 nature, or any responses by the NRC --

8 CHAIR GIBSON: Response by the NRC. We
9 were unable to find any.

10 MR. GOODMAN: My recollection is that we
11 did not respond to those comments specifically, Your
12 Honor.

13 CHAIR GIBSON: Okay. Thank you. Do you
14 -- were these general comments ever memorialized in
15 some document?

16 MR. GOODMAN: I do not believe so, Your
17 Honor.

18 CHAIR GIBSON: What did the comments say
19 that were general in nature pertaining to NRC staff's
20 overall NHPA consultation?

21 MR. GOODMAN: The general comments were
22 frustrations with the NRC as an agency and NRC staff's
23 NHPA consultation process.

24 CHAIR GIBSON: And do you recall which
25 tribes made those comments?

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1 MR. GOODMAN: I do not, Your Honor.

2 CHAIR GIBSON: Okay. As the NRC staff's
3 expert on tribal consultation, you recognize that
4 under the National Historic Preservation Act the point
5 of consultation is not just to obtain general
6 comments, don't you?

7 MR. GOODMAN: Absolutely, Your Honor.

8 CHAIR GIBSON: Instead when consulting
9 with tribes on a draft document, wouldn't it be
10 reasonable to modify the document in response to any
11 comments you received?

12 MR. GOODMAN: Which draft document are you
13 referring to?

14 CHAIR GIBSON: Well, we've got the draft
15 -- was this the final EA?

16 MR. GOODMAN: This was the final EA, Your
17 Honor.

18 CHAIR GIBSON: There was no draft EA, was
19 there?

20 MR. GOODMAN: There was a draft that -- of
21 just the cultural sections that were put on the
22 website. The actual environmental assessment was not
23 issued for public comment.

24 CHAIR GIBSON: Right. What did these
25 tribes review if there wasn't a draft document? They

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1 didn't review a final document, did they?

2 MR. GOODMAN: They reviewed the draft
3 sections pertaining to cultural resources.

4 CHAIR GIBSON: This is the draft 106
5 document?

6 MR. GOODMAN: Yes, Your Honor.

7 CHAIR GIBSON: Okay. Okay. Very well.

8 MR. GOODMAN: Part of that -- part of the
9 106 process was to -- for staff to allow for the
10 tribes to comment on its cultural resources sections.

11 CHAIR GIBSON: Fair enough. So, do you
12 think it would be reasonable to modify the draft 106
13 document in response to the comments you received?

14 MR. GOODMAN: Because the -- no, Your
15 Honor, because the comments that we received were
16 general in nature and so far out of scope of the
17 overall NEPA process and the specific Section 106
18 review pertaining to Crow Butte license renewal, that
19 staff did not feel that that was necessary nor
20 ignoring any obligations it had in any of the
21 regulations.

22 CHAIR GIBSON: Okay. I got ahead of
23 myself when I said draft EA. So, I was on the draft
24 106. I'm sorry about that.

25 MR. GOODMAN: No problem.

1 CHAIR GIBSON: Let's go to the
2 environmental assessment. It's my understanding that
3 the NRC staff looks at the level of public interest
4 and the contentious nature of a proposed action in
5 determining whether to publish a draft environmental
6 assessment for public comment; is that correct?

7 MR. GOODMAN: Can you repeat that just so
8 that I get it word by word --

9 CHAIR GIBSON: Glad to.

10 MR. GOODMAN: -- so that I can answer
11 correctly?

12 CHAIR GIBSON: It's my understanding that
13 the NRC staff looks at the level of public interest
14 and the contentious nature of a proposed action in
15 determining whether to publish a draft environmental
16 assessment for public comment; do you agree?

17 MR. GOODMAN: Not necessarily agree. I
18 would say that the standard for an environmental
19 assessment, which is what we did here, would not be to
20 publish the draft for public comment.

21 For unique circumstances, draft EAs have
22 been in the past -- I think there has been maybe one
23 or two, I don't know the number, that have been
24 published for draft comment.

25 And one of the factors would be what you

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1 mentioned, but certainly not the only factor that
2 would go into that, Your Honor.

3 CHAIR GIBSON: Mr. Deucher, could we get
4 NUREG-1910, please? And this will be Board Exhibit
5 29, Mr. Smith?

6 MR. GOODMAN: Your Honor, can I make one
7 clarification?

8 CHAIR GIBSON: Is that correct?

9 MR. SMITH: Yes.

10 CHAIR GIBSON: Oh, I'm sorry. I didn't
11 hear what you said.

12 MR. SMITH: You weren't looking at me. I
13 was nodding. Yes, that's correct. Board Exhibit 29.

14 MR. GOODMAN: Your Honor, while we're
15 distributing that, can I make one clarification?

16 CHAIR GIBSON: Sure.

17 MR. GOODMAN: In case I wasn't clear, part
18 of the 106 website that included the 106 sections, the
19 draft sections of the EA pertaining to cultural
20 resources were published on that website.

21 CHAIR GIBSON: Um-hmm.

22 MR. GOODMAN: Great.

23 CHAIR GIBSON: Okay. So, you took the --
24 we'll get to that in a second.

25 MR. GOODMAN: Okay.

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1 CHAIR GIBSON: First of all, let's go to
2 the public participation section on Page 1-29, if we
3 could.

4 Right there. Okay. In the third
5 paragraph under 1.8.4, public participation
6 activities, in the middle of that third paragraph it
7 says --

8 MR. GOODMAN: I think you're talking about
9 additionally. Is that the sentence you --

10 CHAIR GIBSON: Additionally, NRC may
11 consider the level of public interest and the
12 contentious nature of the proposed action in
13 determining whether to publish a draft environmental
14 assessment or finding of no significant impact for
15 public comment, correct?

16 MR. GOODMAN: Correct, Your Honor.

17 CHAIR GIBSON: You would not disagree with
18 this NUREG, I assume?

19 MR. GOODMAN: Absolutely not, Your Honor.

20 CHAIR GIBSON: Good. Would you agree that
21 the proposed action in this case was contentious?

22 MR. GOODMAN: Yes, I would agree with
23 that, Your Honor.

24 CHAIR GIBSON: Doesn't it seem, then, then
25 there might be good reason to publish a draft

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1 environmental assessment or finding of no significant
2 impact so as to encourage public discussion?

3 MR. GOODMAN: Again, I just -- I wouldn't
4 specifically say that just because of that one, the
5 one part referring to contentious if you satisfy just
6 that, which I agree with you it is contentious, I
7 wouldn't -- it would -- I wouldn't say that
8 automatically puts you into publishing the draft
9 alone.

10 I think that's one of the factors that
11 goes into the decision that's made whether or not to
12 publish an EA for public comment.

13 MS. SIMON; Your Honor, Marcia Simon. Can
14 I just point out that the -- although NUREG's 1910
15 does say that, the regulation 5133 defines two
16 circumstances when a draft FONSI and draft EA might be
17 distributed for public comment. And so, there's no
18 regulatory requirement.

19 The NUREG merely says the NRC may consider
20 the circumstances.

21 MR. SMITH: And this is counsel -- Tyson
22 Smith, counsel for Crow Butte. I note that the
23 Commission in their recent decision expressly noted
24 that the staff is not required to prepare a draft
25 environmental assessment.

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1 CHAIR GIBSON: I don't think that -- well,
2 that's just fine, Mr. Smith and Ms. Simon. I
3 appreciate that.

4 I do find it rather ironic, however, to
5 have somebody from the staff put some distance between
6 themselves and a NUREG. It's usually they're
7 embracing it. So, anyway, we'll just go on.

8 MR. CYLKOWSKI: Your Honor, to be clear,
9 those factors are listed in that same paragraph in the
10 NUREG.

11 CHAIR GIBSON: Right. Okay. At the time
12 that the final environmental assessment was issued in
13 Crow Butte, there were a number of contentions in this
14 particular proceeding on which we are now having
15 hearing that were still open and on the table, weren't
16 there?

17 MR. GOODMAN: I believe there were four,
18 Your Honor.

19 CHAIR GIBSON: Okay. You did indicate
20 that the 106 section was put on the website, correct?

21 MR. GOODMAN: The entire Cultural
22 Resources section of the EA was put on the website.

23 CHAIR GIBSON: Which would include the
24 106, correct?

25 MR. GOODMAN: It would, Your Honor.

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1 CHAIR GIBSON: Okay. Just to be sure, the
2 entire what section?

3 MR. GOODMAN: Cultural resources.

4 CHAIR GIBSON: Cultural resources, okay.
5 I'm sorry.

6 MR. GOODMAN: The EA is set up that it's
7 done resource area by resource area. One of the
8 resource areas is cultural resources. And the Section
9 106 consultation is included within that broader
10 section.

11 CHAIR GIBSON: Yes.

12 MR. GOODMAN: That entire broader section
13 is what was made available to the public and the
14 tribes, Your Honor.

15 CHAIR GIBSON: And is it specifically
16 labeled that way?

17 MR. GOODMAN: It is, Your Honor.

18 CHAIR GIBSON: Okay. Apart from the
19 Section 106 section that you did, cultural resources
20 that you did send out for this, what factors
21 outweighed public participation in this case to not
22 publish a draft EA, in your estimation?

23 MR. GOODMAN: In my estimation, Your
24 Honor, the fact that 1910 said May and the fact that
25 our other new regulation, the default is an EA, that

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1 we just didn't receive enough to sort of overturn that
2 issuing the EA draft for public comment.

3 MR. CYLKOWSKI: Your Honor, the staff
4 would like to note its objection to the line of
5 questioning regarding the publishing of a draft EA not
6 pertaining to the cultural resources sections.

7 We don't believe this pertains to any
8 admitted contention as long as we're outside the scope
9 of cultural resources.

10 CHAIR GIBSON: That's interesting. You're
11 saying that nothing in EA with respect to the admitted
12 contentions related to things other than cultural
13 resources?

14 MR. CYLKOWSKI: No, Your Honor. I'm
15 saying that whether the staff should have published
16 draft EA sections outside of the cultural resources
17 sections is not within the scope of any admitted
18 contention.

19 CHAIR GIBSON: Okay. Your objection is
20 noted.

21 MR. CYLKOWSKI: Thank you.

22 CHAIR GIBSON: Mr. Catches-Enemy, in your
23 various capacities as a representative of the tribe,
24 you've been involved in other NRC licensing
25 proceedings; is that correct?

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1 MR. CATCHES-ENEMY: Yes, the Dewey-
2 Burdock.

3 CHAIR GIBSON: In any other of those NRC
4 licensing proceedings in which you've been involved,
5 has the NRC prepared a NEPA document, either an
6 environmental assessment or an environmental impact
7 statement?

8 MR. CATCHES-ENEMY: Not that I can recall.

9 CHAIR GIBSON: Okay. Very well. In
10 Paragraph 24 of your declaration -- oh, wait a minute.
11 In this case involving Crow Butte license renewal
12 project, you've stated in Paragraph 24 of your
13 declaration that no draft EA was circulated to the
14 tribes.

15 MR. CATCHES-ENEMY: Correct.

16 CHAIR GIBSON: And when you say "draft
17 environmental assessment," you're referring to the
18 entire environmental assessment draft form; is that
19 correct?

20 MR. CATCHES-ENEMY: Correct.

21 CHAIR GIBSON: Now, it appeared to me that
22 the previously published online draft section 106
23 consultation document that we've talked about before
24 was turned into Section 3.9 of the final environmental
25 assessment, the section that deals with cultural

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1 resources.

2 Is that your understanding as well?

3 MR. CATCHES-ENEMY: Sorry.

4 CHAIR GIBSON: Yes, sir.

5 MR. CATCHES-ENEMY: Yes, 3.9.

6 CHAIR GIBSON: Okay. Thank you. In
7 September 2013 when the Draft 106 documentation review
8 seems to have been completed regardless of whether
9 this information was shared with the tribe or not, was
10 the tribe otherwise involved in government-to-
11 government consultation with the NRC at that point on
12 any matter?

13 MR. CATCHES-ENEMY: That, I'm not fully
14 aware of.

15 CHAIR GIBSON: September 2013. Maybe I'm
16 not being very clear, Mr. Catches-Enemy. I'm sorry,
17 it's getting a little late in the day here. Been at
18 this a long time.

19 In September 2013, that's when the draft
20 106 documentation review, according to the NRC, was
21 completed. Okay?

22 MR. CATCHES-ENEMY: Okay.

23 CHAIR GIBSON: Now, regardless of whether
24 this information was shared with you or not, and it
25 appears it was put on a website, but you didn't like

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1 get hand-delivered a copy or something, was the tribe
2 otherwise involved in government-to-government
3 consultation with the NRC at that point in time on
4 anything else?

5 MR. CATCHES-ENEMY: Not that I'm aware of.

6 CHAIR GIBSON: Okay. In Paragraph 23 of
7 your testimony you blame differences between the tribe
8 and the NRC staff over the process being employed to
9 determine the impact of Crow Butte activities on the
10 tribal cultural, religious and spiritual interests for
11 the breakdown; is that correct?

12 MR. CATCHES-ENEMY: Yes.

13 CHAIR GIBSON: Okay. Is it your opinion
14 that the tribe was willing to enter into negotiations
15 over these differences, but that the process broke
16 down over NRC staff unwillingness to do so?

17 MR. CATCHES-ENEMY: Yes.

18 CHAIR GIBSON: Mr. Teahon.

19 MR. TEAHON: Yes, sir.

20 CHAIR GIBSON: In your rebuttal testimony
21 CBR051 in Paragraph A(11), you say that the Section
22 106 documentation draft review was posted online and
23 that the tribe was alerted to this; is that correct?

24 MR. TEAHON: Via the public posting, sir.

25 CHAIR GIBSON: You say that emails were

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1 sent notifying the consulting parties, including the
2 Oglala Sioux Tribe, of the website.

3 Do you know if these emails were sent by
4 the NRC staff, or by Crow Butte?

5 MR. TEAHON: Sir, they would have been by
6 the NRC staff. Crow Butte would not have participated
7 in that.

8 CHAIR GIBSON: Right. Then I take it this
9 email sent notifying the consulting parties, including
10 the Oglala Sioux Tribe, of the website was sent by the
11 NRC.

12 Is that correct, Mr. Goodman?

13 MR. GOODMAN: Yes, Your Honor.

14 CHAIR GIBSON: Okay. Were you responsible
15 for sending that correspondence to the tribe?

16 MR. GOODMAN: That would have fallen on my
17 shoulders, Your Honor.

18 CHAIR GIBSON: I'm sorry, I couldn't hear
19 what you said.

20 MR. GOODMAN: Yes, Your Honor.

21 CHAIR GIBSON: Okay. Let's look at
22 NRC038. Can we get that, Mr. Deucher? Let's go to
23 Page 5 and top of Page 6.

24 Okay. I did not see any notice of an
25 email sent to the tribe about the Section 106

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1 documentation.

2 I do see there was a notice of a phone
3 call made to all tribes on October 1st, but I didn't
4 see any notice of an email being sent to the tribe.

5 MR. GOODMAN: It may have been phone
6 calls, Your Honor.

7 CHAIR GIBSON: May have been a phone call
8 instead of an email?

9 MR. GOODMAN: It may have been, Your
10 Honor. Likely was a phone call.

11 CHAIR GIBSON: Now, you've indicated that
12 on previous occasions phone calls were made to the
13 Oglala Sioux Tribe, but were not returned.

14 Here, there is no record of whether the
15 NRC actually made contact with the tribe or whether a
16 tribal government member was actually made aware of
17 this information; is that correct?

18 MR. GOODMAN: Yes, Your Honor.

19 CHAIR GIBSON: The staff submitted a
20 letter to the other parties and the Board through EIE
21 -- that's the electronic filing system we use here --
22 on October 1, 2013; is that correct?

23 MR. GOODMAN: Yes, Your Honor.

24 CHAIR GIBSON: You don't want to suggest
25 that that was a way to satisfy the staff's

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1 consultation duties with the Oglala Sioux Tribe, do
2 you?

3 MR. GOODMAN: I'm sorry, can you repeat
4 the question?

5 CHAIR GIBSON: Yes. The notification that
6 was sent, posted in the EIE on October 1, 2013, you're
7 not suggesting that that was effective consultation
8 with the Oglala Sioux Tribe, are you?

9 MR. GOODMAN: In itself, certainly not,
10 Your Honor.

11 CHAIR GIBSON: Yeah. You never actually
12 spoke with anyone with the Oglala Sioux Tribe about
13 this, did you?

14 MR. GOODMAN: I do not believe I did
15 specifically, Your Honor.

16 CHAIR GIBSON: No one on your staff did
17 either; is that correct?

18 MR. GOODMAN: Not that I'm aware of, Your
19 Honor.

20 CHAIR GIBSON: Mr. Catches-Enemy, with
21 respect to this communication, attempted phone call,
22 are you saying that the tribe never received this
23 phone call, or are you saying that the NRC failed to
24 provide adequate NRC Section 106 documentation draft
25 review for the tribe in a proper manner, or both?

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1 (Laughter.)

2 MR. CATCHES-ENEMY: I'm stating both.

3 CHAIR GIBSON: You're stating both. Thank
4 you. So, Mr. Goodman, can you say that the Oglala
5 Sioux Tribe was aware of the draft 106 information?

6 MR. GOODMAN: I believe Mr. Catches-Enemy
7 earlier just, you know, ten minutes ago or so said
8 that he was aware that 3.9 and 4.8 of the EA, the
9 cultural resources sections of EA were on the website.

10 CHAIR GIBSON: I don't think he said that.
11 I think I was asking him a question about that's what
12 the staff was asserting that that's when you posted it
13 on the website.

14 MR. GOODMAN: Okay.

15 CHAIR GIBSON: I think, but let's make
16 sure to be sure the record is absolutely crystal
17 clear.

18 MR. GOODMAN: Okay.

19 CHAIR GIBSON: Mr. Catches-Enemy, could
20 you make sure we understand what you're saying, sir?

21 MR. CATCHES-ENEMY: Yes. I believe I was
22 confirming your question that the draft Section 106
23 information was placed into the final EA as 3.9.

24 CHAIR GIBSON: Okay. Not that you
25 received it.

1 MR. CATCHES-ENEMY: Not that I received
2 it.

3 CHAIR GIBSON: Okay. Fair enough?

4 MR. GOODMAN: Fair enough, Your Honor.

5 CHAIR GIBSON: Okay. Good.

6 MR. GOODMAN: Thank you.

7 CHAIR GIBSON: In your estimation, was
8 posting the draft 106 document on September 30, 2013,
9 part of the staff's consultation with the tribal
10 government?

11 MR. GOODMAN: Absolutely, Your Honor.

12 CHAIR GIBSON: But if they never saw it,
13 how could you be -- how could you consult with them?

14 MR. GOODMAN: Under 106, Your Honor, staff
15 is supposed to make a good faith and reasonable effort
16 to -- for consultation, posting something on a
17 website, following it, you know, on its publicly
18 available website.

19 In addition, I think we sent out
20 notifications on our twitter feed and reached out by
21 phone to attempt to contact the office, because they
22 were, you know, that was one of the methods of
23 communication, phone, that they were not always
24 opposed to.

25 And so, doing all of those things, I would

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1 say that does more than a good faith and reasonable
2 effort. So, yes, I would say that satisfies that
3 portion of our 106 consultation.

4 CHAIR GIBSON: Okay. And the final EA,
5 NRC010 at Page 142, can we get that, Mr. Deucher?

6 This is entitled "Agencies and Persons
7 Consulted." And on Page 142 it states that the, I
8 assume, a draft of the environmental assessment was
9 sent to the State of Nebraska for comment; is that
10 correct?

11 MR. GOODMAN: That's correct. And just to
12 clarify, the state received the entire EA, not just
13 the cultural resources section.

14 CHAIR GIBSON: The entire draft of the EA,
15 correct?

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

17 CHAIR GIBSON: And the staff considered
18 the State of Nebraska to have valuable input to this
19 licensing process and that's why it sent it there,
20 correct?

21 MR. GOODMAN: Yes, Your Honor.

22 CHAIR GIBSON: But despite the tribe's
23 involvement in the consultation process, its input was
24 not considered valuable enough to be given a copy of
25 the draft EA, was it?

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1 MR. GOODMAN: I would only correct you in
2 that staff found consultation with tribes to be
3 important input for its NEPA process and its 106
4 process. So, that part I would like to clarify.

5 With that said, no, staff did not send the
6 Oglala Sioux Tribe a complete copy of the EA. Did
7 that answer your question?

8 CHAIR GIBSON: It did.

9 MR. GOODMAN: Great. Thank you.

10 CHAIR GIBSON: Okay. If we could take a
11 ten-minute recess, I believe I need to confer with the
12 other judges. They may have some additional
13 questions. And we will either go back on and ask a
14 few more questions, or we will go into a closed
15 session. So, just bear with us. Thank you.

16 (Whereupon, the proceedings went off the
17 record at 1:58 p.m. for a brief recess and went back
18 on the record at 2:18 p.m.)

19 CHAIR GIBSON: Very well. I think we can
20 go back on the record. We've got just a couple of
21 questions here.

22 I appreciate you all putting together your
23 questions. We went through and figured them out. In
24 between the testimony we've already got and the
25 additional testimony that we induced here, I think

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1 we've gotten most of these.

2 This question is for Mr. Catches-Enemy or
3 Mr. Yellow Thunder. I don't know if one of you has
4 any knowledge of this, but during the period of time
5 2012-2013, who was the designated decision-maker for
6 the Oglala Sioux Tribe with respect to national
7 historic preservation matters?

8 MR. YELLOW THUNDER: Your Honor.

9 CHAIR GIBSON: Sir.

10 MR. YELLOW THUNDER: That would have been
11 the late Mr. Wilmer Mesteth. He was the Tribal
12 Historic Preservation Officer during that period.

13 CHAIR GIBSON: Okay. Very well. Thank
14 you. And was he identified as the person responsible
15 to the Nuclear Regulatory Commission staff?

16 I mean, did you all say this is our guy
17 who is responsible for making decisions about National
18 Historic Preservation Act matters?

19 MR. CATCHES-ENEMY: Your Honor, the tribal
20 president usually appoints the Tribal Historic
21 Preservation Officer. And since the letter of
22 appointment to the National Park Service, who keeps a
23 record of all the tribes that have a THPO officer, and
24 from there the other Federal agencies refer to the
25 Park Service on who those designated THPOs are.

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1 CHAIR GIBSON: So, it would be incumbent
2 upon the Nuclear Regulatory Commission to check with
3 the --

4 MR. CATCHES-ENEMY: National Park Service.

5 CHAIR GIBSON: -- National Park Service
6 about who the person was with whom they should have
7 made contact with the Oglala Sioux Tribe.

8 Is that a fair statement?

9 MR. CATCHES-ENEMY: Yes.

10 CHAIR GIBSON: And presumably they could
11 have done the same thing for the other tribes; is that
12 correct?

13 MR. CATCHES-ENEMY: Yes.

14 CHAIR GIBSON: Okay. Very well. Thank
15 you.

16 Mr. Goodman, I believe you've indicated
17 that you all had sent out some information via
18 twitter.

19 I'm wondering if you know whether the
20 Tribal Historic Preservation Officer or the President
21 of the Oglala Sioux Tribe has a Twitter account.

22 MR. GOODMAN: I -- Your Honor, I cannot
23 speak for either of them and I do not know if either
24 of the have a Twitter account.

25 If they do have access to the public

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1 website, I believe that we do stream our -- NRC staff
2 streams its Twitter feeds that you could get from the
3 public website without an individual Twitter account.

4 CHAIR GIBSON: Twitter account.

5 MR. GOODMAN: But I don't know if they
6 have access to the NRC public website either.

7 CHAIR GIBSON: You don't know if they're
8 Twitter followers, certainly.

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

10 CHAIR GIBSON: Okay. Fair enough.

11 MR. GOODMAN: I also, Your Honor, I had an
12 assignment to come up with the name and the tribe.

13 CHAIR GIBSON: Yes. Thank you.

14 MR. GOODMAN: And I did that.

15 CHAIR GIBSON: Thank you, sir.

16 MR. GOODMAN: His name is Conrad Fisher,
17 spelled just like it's pronounced in this case. So,
18 that one is easy. And he's of the Northern Cheyenne
19 Tribe.

20 CHAIR GIBSON: Okay. And refresh my
21 recollection. Mr. Fisher --

22 MR. GOODMAN: Was the Tribal -- was the
23 individual who represented the Tribal leadership at
24 the Tribal Leaders meeting so that --

25 CHAIR GIBSON: For that tribe.

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1 MR. GOODMAN: For that tribe so that --

2 CHAIR GIBSON: Got it.

3 MR. GOODMAN: -- NRC was able to continue
4 and proceed with its, as I have been calling it, Big
5 G to Big G tribal leaders and NRC staff management
6 meeting.

7 CHAIR GIBSON: Thank you. Okay. I
8 believe that is going to conclude our hearing except
9 for the closed session, which we'll take up in just a
10 second.

11 While we're on the record, though, before
12 everyone leaves, I want everyone to know that the
13 Board has certainly enjoyed our time here.

14 We've learned a lot. You all have been
15 incredibly good witnesses. It's good to appear before
16 counsel that are prepared and who prepare their
17 witnesses well.

18 And we've gotten a bit of flavor for the
19 local culture as well and we appreciate that. So,
20 thank you very much and we will stand in recess for
21 about two minutes until we can get set up over here.

22 And then I will need Mr. Yellow Thunder,
23 Mr. Catches-Enemy to come over. We're going to talk
24 a little bit about the matters that we'll be talking
25 about in closed session. I'll need counsel there as

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1 well.

2 MS. SIMON: Your Honor, may I just ask a
3 quick question? Will we be going back on the record
4 after the closed session?

5 CHAIR GIBSON: No.

6 MS. SIMON: Okay. Then may I just make a
7 quick statement? I wanted to clarify my understanding
8 was that all of the exhibits that have been presented
9 and identified during the hearing were identified, but
10 not admitted; is that correct?

11 CHAIR GIBSON: Yes.

12 MS. SIMON: So, when will the decision be
13 made on --

14 CHAIR GIBSON: You'll be receiving a
15 notice of that very quickly. This is what I would
16 like to do. We're going to be issuing a pre-trial or
17 a -- yeah -- well, I won't say -- I guess a -- we
18 can't call it a pre-trial order anymore, can we?

19 We'll be issuing an order. And that order
20 will address several things. And it will include the
21 very question you raise, Ms. Simon.

22 It will also include the scope of the
23 inquiry that we will be having during the week of
24 October 19, but not on October 19 and -- pursuant to
25 someone's -- Mr. Kreamer's schedule, I believe, or Mr.

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1 Wireman's schedule.

2 So, we'll be doing it then, but we will be
3 providing that shortly. The Board just needs to have
4 a chance to collect its thoughts and try to come up
5 with that, but we'll be doing -- we'll be issuing all
6 of that next week.

7 MS. SIMON: Okay. And so if we have any
8 objection to admission of any exhibits, we would raise
9 it after that order is issued.

10 CHAIR GIBSON: Yes. Yes.

11 MS. SIMON: Thank you, Your Honor.

12 CHAIR GIBSON: That will be fine.

13 MR. FRANKEL: Your Honor, David Frankel
14 for Consolidated Intervenors.

15 CHAIR GIBSON: Yes, sir.

16 MR. FRANKEL: We had one item that we feel
17 was a conflict between Mr. Teahon's testimony today
18 and the testimony of Dr. Redman, but we're not able to
19 bring that up in open session.

20 CHAIR GIBSON: Well, you can bring it up
21 in closed session in just a minute, Mr. Frankel.

22 MR. FRANKEL: But you mentioned that he
23 wouldn't -- he wasn't being brought over to the closed
24 session.

25 Could you ask him to come over in addition

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1 to Mr. Catches-Enemy and Mr. Yellow Thunder?

2 CHAIR GIBSON: Yes. I'll tell you what.
3 Why don't you just -- I bet Mr. Smith and you can work
4 whatever it is out.

5 MR. SMITH: Well, that was my comment was
6 in light of what we discussed earlier I would like to
7 have Mr. Teahon --

8 CHAIR GIBSON: I would like to have Mr.
9 Teahon there as well.

10 MR. FRANKEL: Perfect.

11 CHAIR GIBSON: Okay.

12 MR. FRANKEL: Thank you, sir.

13 CHAIR GIBSON: I mean, actually I think
14 Mr. Teahon's presence there is quite important.

15 MR. FRANKEL: Thank you.

16 MS. SIMON: And, Your Honor, would Mr.
17 Goodman and Dr. Nickens be invited as well, or not?

18 MR. SMITH: Dr. Nickens likely should be
19 invited.

20 CHAIR GIBSON: Dr. Nickens certainly needs
21 to be there. And Mr. Goodman can be there, too. I
22 mean, you know, we're talking about things that
23 they've heard about.

24 It's not -- it's just that these are
25 important matters that need to be in closed session,

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1 because they're going to be part of the non-public
2 record.

3 MS. SIMON: Okay.

4 CHAIR GIBSON: And I don't want any
5 testimony about those to leak out.

6 MS. SIMON: Sure.

7 CHAIR GIBSON: Fair enough?

8 MS. SIMON: Thank you, Your Honor.

9 CHAIR GIBSON: Okay. Okay. Now, we're
10 set. Thank you. All right. With that, we will stand
11 in recess. And, again, thank you all for coming.

12 (Whereupon, the above-entitled matter went
13 into closed session at 2:27 p.m.)

14 [THE FOLLOWING PAGES HAVE BEEN REDACTED.]

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(Whereupon, at 2:38 p.m. the above-entitled matter was adjourned.)