

Official Transcript of Proceedings
NUCLEAR REGULATORY COMMISSION

Title: Powertech USA, Inc.
Dewey-Burdock in Situ Uranium
Recovery Facility

Docket Number: 40-9075-MLA

ASLBP Number: 10-898-02-MLA-BD01

Location: Rapid City, South Dakota

Date: Wednesday, August 28, 2019

Work Order No.: NRC-0524

Pages 1674-1923

NEAL R. GROSS AND CO., INC.
Court Reporters and Transcribers
1323 Rhode Island Avenue, N.W.
Washington, D.C. 20005
(202) 234-4433

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

+ + + + +

ATOMIC SAFETY AND LICENSING BOARD PANEL

+ + + + +

HEARING

-----x

In the Matter of: : Docket No.
Powertech USA, Inc. : 40-9075-MLA
(Dewey-Burdock in Situ: ASLBP No.
Uranium Recovery : 10-898-02-MLA-BD01
Facility) :

-----x

Wednesday, August 28, 2019

The Hotel Alex Johnson

Ballroom

523 Sixth Street

Rapid City, South Dakota

BEFORE:

WILLIAM J. FROEHLICH, Chair

MARK O. BARNETT, Administrative Judge

G. PAUL BOLLWERK, III, Administrative Judge

1 APPEARANCES:

2 On Behalf of the Applicant

3 Christopher S. Pugsley, Esq.

4 Anthony J. Thompson, Esq.*

5 of: Thompson & Pugsley, PLLC

6 1225 19th Street, N.W.

7 Suite 300

8 Washington, DC 20036

9 202-496-0780

10 cpugsley@athompsonlaw.com

11 ajthompson@athompsonlaw.com

12

13 On Behalf of the Nuclear Regulatory Commission

14 Lorraine Baer, Esq.

15 Robert Carpenter, Esq.

16 of: U.S. Nuclear Regulatory Commission

17 Office of the General Counsel

18 Mail Stop O-15 D21

19 Washington, DC 20555-0001

20 301-287-9111

21 lorraine.baer@nrc.gov

22 Robert.carpenter@nrc.gov

23

24

25

1 On Behalf of the Oglala Sioux Tribe

2 Jeffrey C. Parsons, Esq.

3 of: Western Mining Action Project

4 P.O. Box 349

5 Lyons, CO 80540

6 303-823-5738

7 wmap@igc.org

8

9 Travis E. Stills, Esq.

10 of: Energy & Conservation Law

11 1911 Main Avenue

12 Suite 238

13 Durango, CO 81301

14 970-375-9231

15 stills@frontier.net

16

17 On Behalf of the Consolidated Intervenors

18 Thomas J. Ballanco, Esq.

19 945 Traval Street

20 #186

21 San Francisco, CA 94116

22 650-296-9782

23 harmonicengineering@gmail.com

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Bruce Ellison, Esq.
Law Office of Bruce Ellison
P.O. Box 2508
Rapid City, SD 57709
605-348-9458
belli4law@aol.com

*Present via telephone

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C-O-N-T-E-N-T-S

OPENING STATEMENTS

NRC staff	1699
Oglala Sioux Tribe	1701
Consolidated Interveners	1705
Powertech	1708

WITNESS

PAGE

Diana Diaz-Toro	1712
Jerry Spangler	1794
Kyle White	1805
Kelly Morgan	1820
Craig Howe	1840

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

10:05 a.m.

1
2
3 JUDGE FROEHLICH: Good morning. My name
4 is William Froehlich, Chairman of the Atomic Safety
5 and Licensing Board. I've been designated to hear
6 this matter and decide the contested issues relating
7 to the license issued to Powertech for the
8 construction and operation of an in situ uranium
9 recovery operation called the Dewey Burdock in situ
10 leach recovery or ISR project near Edgemont, South
11 Dakota.

12 We're here today to conduct an evidentiary
13 hearing potentially lasting through the balance of the
14 week on the efforts of the Nuclear Regulatory staff to
15 resolve Contention 1A. Contention 1A is a NEPA,
16 National Environmental Policy Act contention that
17 challenges the NRC staff's analysis of the impacts of
18 the Powertech project on the Lakota Sioux cultural
19 resources and mitigation of those impacts.

20 This matter was originally docketed by the
21 Nuclear Regulatory Commission as Docket No. 40-9075-
22 MLA in 2009. MLA stands for materials license
23 application. The Atomic Safety and Licensing Board
24 Panel number for this case is 10-898-02-MLA.

25 Today's proceeding was publicly noticed by

1 Board order on April 29th, 2019 and published in the
2 *Federal Register* on May 9th, 2019 at 88 *Federal*
3 *Register* 20436.

4 Let me introduce the Atomic Safety and
5 Licensing Board. To my right is Judge Paul Bollwerk.
6 Judge Bollwerk is a full-time legal member of the
7 Licensing Board Panel and has been an NRC
8 administrative judge since 1989 and was designated to
9 serve on this Board on June 9th, 2015 after the death
10 of Board member Judge Richard Cole.

11 JUDGE BOLLWERK: And if I could interrupt
12 you one second, I need to apologize to the parties and
13 the members of the public that are here. This is not
14 East Coast business dress. You might have noticed I
15 had a walking boot on my foot. I actually fractured
16 my ankle back in May and I thought it would make it
17 easier to get here by shipping my luggage I had. And
18 I'm not -- I've also already found out the UPS next
19 day service for yesterday doesn't mean by 10:30, and
20 it may not be by 10:30 today. So maybe by this
21 afternoon I'll have the appropriate dress on. But in
22 any event I apologize and I ask your indulgence. And
23 hopefully my -- you don't have to sit quite that far
24 away, but -- I did take a shower this morning, but
25 most of my other toiletries are still in transit.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 (Laughter.)

2 JUDGE BOLLWERK: So thank you.

3 JUDGE FROEHLICH: To my left my well-
4 dressed colleague --

5 (Laughter.)

6 JUDGE FROEHLICH: -- is Judge Mark
7 Barnett. Judge Barnett holds a bachelor of science
8 and a master's of science from the University of
9 Tennessee and a Ph.D. from the University of North
10 Carolina. He's currently the Malcolm Pirnie professor
11 of environmental engineering at Auburn University and
12 he is a part-time technical judge with the Licensing
13 Board Panel.

14 As I mentioned earlier my name is William
15 Froehlich and I was designated Chairman of this
16 licensing board shortly after Powertech's application
17 was set for hearing in 2010. I'm a lawyer by training
18 and I've had about 40 years in federal administrative
19 and regulatory law practice.

20 I'd also like to introduce a few other
21 people who are here today at this point. To my far
22 right are the Board's law clerks, Taylor Mayhall and
23 Molly Madison. The parties have been receiving emails
24 from them over the past few months as we were
25 preparing for this hearing.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Our clerk of record and master of
2 everything electronic in this hearing room, Mr. Andrew
3 Welkie at the far side. He'll make sure that the
4 screens, the computers, the microphones and all the
5 other electronics are working properly for our hearing
6 today.

7 JUDGE BOLLWERK: He also lent me the coat
8 I'm wearing, so I appreciate that as well.

9 JUDGE FROEHLICH: It is tasteful.

10 JUDGE BOLLWERK: Well, it was either that
11 or Michael's Menswear and rent a tux, but I don't
12 think that would have worked either.

13 (Laughter.)

14 JUDGE FROEHLICH: Our court reporter
15 contract is with Neal R. Gross & Company and our court
16 reporter today is Allegra Chilstrom. There will be a
17 verbatim transcript made of this proceeding. Copies
18 of the transcript will be available to the parties in
19 about a week and will be posted in the electronic
20 hearing docket on the NRC's website at that time.

21 I'd like now to ask the parties to
22 introduce themselves. For each party I'd like their
23 lead counsel to introduce him or herself, stating your
24 name, the name of your client and the name of any
25 counsel who might be with you today participating in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the evidentiary hearing.

2 Let's start with the NRC staff.

3 MS. BAER: Good morning, Your Honor. My
4 name is Lorraine Baer. I'm counsel for the NRC staff.

5 JUDGE FROEHLICH: Thank you, Ms. Baer.

6 MR. CARPENTER: Are you introducing me or
7 am I introducing --

8 MS. BAER: And my co-counsel Rob
9 Carpenter.

10 JUDGE FROEHLICH: Thank you. For the
11 Oglala Sioux Tribe?

12 MR. PARSONS: Thank you, Your Honor. Jeff
13 Parsons on behalf of the Oglala Sioux Tribe. With me
14 at counsel table is Travis Stills.

15 JUDGE FROEHLICH: Thank you. For the
16 Consolidated Interveners?

17 MR. BALLANCO: Good morning, Your Honor.
18 Tom Ballanco for the Consolidated Interveners who are
19 Susan Henderson, Aligning for Responsible Mining, and
20 Dayton Hyde who is with us in spirit only. And with
21 me at counsel table is Bruce Ellison.

22 JUDGE FROEHLICH: Thank you, Mr. Ballanco.
23 And finally for Powertech?

24 MR. PUGSLEY: Thank you, Your Honor.
25 Christopher Pugsley, Thompson & Pugsley, Washington,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 D.C. for Powertech. On a listen-only line on my cell
2 phone is Anthony Thompson, my co-counsel.

3 JUDGE FROEHLICH: Thank you.

4 I should note, as you may have discovered,
5 the microphones are always live. So if you're
6 conferring with your co-counsel or with your parties
7 or with your witnesses, you must hold that pause
8 button which is directly in front of the microphone to
9 mute it so your conversation is not picked up by the
10 very sensitive sound system in this room.

11 At this point I would ask everyone to
12 please turn off their cell phones; except for you, Mr.
13 Pugsley, or set them to vibrate. If you need to have
14 a conversation, please take it out in the hallway.

15 Members of the public are free and welcome
16 to observe our proceedings today, as well as all NRC
17 proceedings, but only counsel for the parties for the
18 witnesses who will be testifying will be heard by the
19 Board. Questioning will be primarily by the Board
20 with periodic opportunities for the parties to submit
21 follow-up -- proposed follow-up questions for the
22 Board to pose to the witnesses.

23 I'd also like to introduce Jonathan
24 Downey, security specialist, who has a few brief
25 announcements.

1 MR. DOWNEY: Just a few administrative
2 issues. If there's an emergency and we have to
3 evacuate, there is an emergency exit here that goes
4 down to the street from a ladder. And exit through
5 the back doors, these doors, which will be unlocked,
6 you go out and exit outside. Follow any hotel staff
7 directions or Rapid City Police Department
8 instructions if we have to evacuate.

9 Members of the public, please don't come
10 forward to the first row of chairs unless you're
11 called to the bench by the attorneys -- or the judges.
12 And if you want to record with your phone or audio
13 from your seats, you're welcome to, but you can't move
14 around from seat to seat or come forward. If you want
15 to move around and take pictures or record, you'll
16 have to go to the mezzanine level. Thank you.

17 JUDGE FROEHLICH: Okay. Before we get
18 started with opening statements and hear from the
19 parties' witnesses, let me give a little background to
20 this now-10-year-old case.

21 On February 24th, 2019, as resubmitted on
22 August 10th, 2009, Powertech filed an application for
23 a combined source and 11e2 byproduct materials license
24 to construct and operate the proposed Dewey Burdock
25 ISR project in South Dakota.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 January 5th, 2010 the NRC issued a *Federal*
2 *Register* notice providing interested parties,
3 stakeholders and concerned members of the public with
4 an opportunity to request a hearing on that
5 application. Several groups and individuals
6 petitioned to intervene and to participate in the
7 process, among them the Consolidated Interveners and
8 the Oglala Sioux Tribe.

9 This Board was created to hear the case,
10 and after an oral argument in Custer, South Dakota in
11 June 2010, the Board granted the hearing requests of
12 Consolidated Interveners and the Oglala Sioux Tribe
13 and admitted them as parties to the proceeding.

14 The Board admitted four contentions
15 proposed by the Oglala Sioux Tribe and three of the
16 contentions proffered by Consolidated Interveners.
17 And that was Board Decision LBP-10-16.

18 On November 15th, 2012 the NRC staff
19 notified the Board of the public availability of the
20 Draft Supplemental Environmental Impact Statement, the
21 DSEIS, prepared pursuant to the Environmental Policy
22 Act, National Environmental Policy Act, NEPA, and the
23 NRC's implementing regulations. The environmental
24 review contains analysis that considers and weighs the
25 environmental effects of the proposed action, the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 environmental impacts of alternatives to the proposed
2 action and mitigation measures to either reduce or
3 avoid adverse effects.

4 The Oglala Sioux Tribe and Consolidated
5 Interveners both filed additional proposed contentions
6 related to the DSEIS which Powertech and the NRC staff
7 opposed.

8 On January 29th, 2014 the NRC staff issued
9 its Final Supplemental Environmental Impact Statement,
10 the FSEIS. This final statement memorialized the
11 staff's environmental impact review and contained a
12 recommendation that the license be issued to
13 Powertech.

14 April 8th, 2014 the NRC staff issued NRC
15 Source License No. SUA-1600 to Powertech. This
16 license allows Powertech to possess and use source and
17 byproduct material in connection with the Dewey
18 Burdock project.

19 On August 19th, 20th, 21st, 2014 the Board
20 held an evidentiary hearing in this same hotel
21 conference room concerning the Oglala Sioux Tribe and
22 the Consolidated Interveners' seven active contentions
23 regarding groundwater quality, mitigation measures,
24 consideration of cumulative impacts and cultural
25 resource issues.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 At that evidentiary hearing the Board
2 heard argument from counsel and testimony from
3 multiple witnesses for each party and admitted party
4 exhibits into the evidentiary record. That
5 evidentiary record includes the testimony of the NRC
6 staff's then-environmental project manager Haimanot
7 Yilma. That was NRC 001. And then-environmental
8 review branch chief, Dr. Kevin Hsueh, NRC Exhibit 151,
9 as well as the testimony of the then-tribal historic
10 preservation officer, the THPO, Wilmer Mesteth,
11 Intervener Exhibit 006, and Oglala Sioux Tribe Exhibit
12 015, as well as Michael Catches Enemy. His testimony
13 was Exhibit OST-014.

14 On April 30th, 2015 the Board issued a
15 partial initial decision regarding the merits of the
16 contentions that were the subject of that evidentiary
17 hearing. That partial decision, LBP-15-16, resolved
18 all contentions in favor of the NRC staff and
19 Powertech except for Contentions 1A and 1B on which
20 the Oglala Sioux Tribe and the Consolidated
21 Interveners prevailed.

22 As to Contention 1A, the Board concluded
23 that the NRC staff had not satisfied its National
24 Environmental Policy Act responsibilities because the
25 Final Supplemental Environmental Impact Statement did

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 not adequately address the Oglala Sioux Tribe's
2 cultural, religious and historic resources. The Board
3 stated that the NRC staff could remedy these
4 deficiencies if they initiated government-to-
5 government consultations with the tribe and took the
6 steps necessary to ensure that an adequate analysis of
7 tribal cultural resources was included in the FSEIS
8 and the record of decision in this case.

9 After nearly 18 months with essentially no
10 substantive progress between the parties towards
11 resolving Contention 1A, the Oglala Sioux Tribe and
12 the NRC staff participated in a teleconference with
13 the Board on January 31st, 2017. The NRC staff
14 proposed an open-site survey with a per diem and
15 mileage reimbursement for those conducting the survey
16 and a \$10,000 honorarium to be paid to the Oglala
17 Sioux Tribe by Powertech.

18 The NRC also requested information from
19 the tribe on any known cultural and/or historic
20 resources that could be impacted and asked for input
21 regarding an alternative survey approach, a proposed
22 time frame and projects costs.

23 On April 14th, 2017, after the required
24 information was not forthcoming, the NRC staff sent a
25 letter to the Oglala Sioux Tribe's Tribal Historic

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Preservation Office reiterating the terms of the two-
2 week open-site survey proposal and requesting that the
3 Oglala Sioux Tribe accept or reject that survey offer
4 by May 5th, 2017.

5 The Oglala Sioux Tribe responded to the
6 staff's April 2017 request on May 31st, 2017 voicing
7 several concerns about the methodology, the engagement
8 of a qualified contractor, allowance for multiple site
9 trips and the need to involve other Sioux tribes and
10 tribal elders. Following the Oglala Sioux Tribe's May
11 31st letter the NRC staff terminated its consultation
12 efforts.

13 On August 3rd, 2017 the NRC staff moved
14 for summary disposition of Contentions 1A and 1B. In
15 Board Order LBP-17-9 issued October 19th, 2017 the
16 Board granted the NRC staff's motion as to Contention
17 1B concluding that over the past two years the
18 combination of multiple attempts at direct
19 correspondence, a May 19th, 2016 face-to-face meeting
20 and the January 31st, 2017 teleconference between the
21 Oglala Sioux Tribe and the NRC staff satisfied at a
22 bare minimum the National Historic Preservations
23 Act's; that's NHPA's, requirement that the NRC staff
24 consult with the Oglala Sioux Tribe.

25 However, the Board denied the NRC staff's

1 motion as to Contention 1A concluding that the NRC
2 staff had failed to establish that there were no
3 material factual disputes relative to the NRC staff
4 having fulfilled its NEPA burden to adequately address
5 the impact of the Dewey Burdock project on tribal
6 cultural resources.

7 After LBP-17-9 the Board held
8 teleconferences with the party to monitor the progress
9 on resolving Contention 1A. On December 6th, 2017 the
10 NRC staff sent out a draft proposed approach to
11 identify the Lakota Sioux Tribe historical, cultural
12 and religious resources. The parties expressed
13 tentative approval to the NRC staff in written
14 responses on January 19th, 2018.

15 On March 16th, 2018 the NRC staff
16 presented the parties with its selected approach,
17 which has come to be known as the March 2018 Approach
18 to Resolve Contention 1A.

19 That approach involved five elements: (1)
20 Hiring a qualified contractor; (2) involving other
21 Lakota Sioux Tribes; (3) providing iterative
22 opportunities for a site survey; (4) involving tribal
23 elders; and (5) conducting a site survey using a
24 scientific methodology determined by the contractor in
25 collaboration with the tribes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 During the week before the site survey was
2 scheduled to start the parties once again failed to
3 reach an agreement on the methodology to be used. The
4 Oglala Sioux Tribe sent a new alternative
5 methodological proposal to the NRC staff on June 12th
6 and June 15th, 2018 at that time announcing that there
7 was no longer a reasonable expectation of agreement on
8 the March 2018 Approach. The NRC staff terminated its
9 consultation efforts in emails between Staff Counsel
10 Monteith and Mr. Stills, counsel for the Oglala Sioux
11 Tribe; that's Exhibit OST-059, as well as a letter to
12 Kyle White in care of the Oglala Sioux Tribe, Natural
13 Resources Regulatory Agency dated July 2nd, 2018.
14 Exhibit NRC-200.

15 The NRC staff asked the Board to resolve
16 Contention 1A with an evidentiary hearing. The
17 hearing today will create a record to enable the Board
18 to resolve the disputed issues of fact as to: (1) the
19 reasonableness of the NRC staff's proposed draft
20 methodology for the conduct of a site survey to
21 identify sites of historic, cultural and religious
22 significance to the Oglala Sioux Tribe; and (2) the
23 reasonableness of the NRC staff's determination that
24 the information it seeks to obtain from the site
25 survey is unavailable, looking to the criteria in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 pertinent CEQ Implementing Regulations found at 40
2 CFR, Section 1502.22.

3 Both the NRC staff and the Oglala Sioux
4 Tribe have provided a panel of witnesses who will
5 address the Board's questions regarding the Contention
6 1A claim that there has been a failure to meet
7 applicable legal requirements regarding the protection
8 of cultural and historic resources.

9 Now that we've reviewed the background of
10 the case, let's turn to some preliminary matters,
11 first as to exhibits.

12 Have all the parties had an opportunity to
13 review the list of pre-filed exhibits that was
14 attached as a six-page Appendix A to the Board's order
15 of August 22nd, 2019?

16 MR. PUGSLEY: Yes.

17 JUDGE FROEHLICH: NRC staff?

18 MS. BAER: Yes.

19 JUDGE FROEHLICH: Powertech?

20 MR. PUGSLEY: Yes.

21 JUDGE FROEHLICH: Okay. And from the
22 Oglala Sioux Tribe and Consolidated Interveners?

23 MR. PARSONS: Yes, Your Honor.

24 JUDGE FROEHLICH: And from the --

25 MR. BALLANCO: Yes, Your Honor.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE FROEHLICH: Thank you. Do any of
2 the parties have any changes or corrections to their
3 exhibit or exhibit list at this point?

4 (No audible response.)

5 JUDGE FROEHLICH: Hearing none.

6 Now let's swear in our witnesses, if we
7 could.

8 Counsel, are all your witnesses present --
9 who are scheduled to appear in our evidentiary hearing
10 present at the hearing room this morning?

11 MS. BAER: Yes, Your Honor.

12 JUDGE FROEHLICH: Thank you.

13 And --

14 MR. PARSONS: Yes, Your Honor.

15 JUDGE FROEHLICH: And Consolidated
16 Interveners?

17 MR. BALLANCO: Yes, Your Honor.

18 JUDGE FROEHLICH: Okay. I will swear all
19 witnesses who are scheduled to testify. I would ask
20 that the witnesses who have submitted pre-filed
21 testimony please stand, raise your right hand and each
22 respond verbally to the following question:

23 (Witnesses sworn.)

24 Thank you. You may be seated.

25 Okay. Now are there any objections to the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 admission of the parties' pre-filed exhibits as
2 reflected in the exhibit list mentioned earlier?

3 (No audible response.)

4 JUDGE FROEHLICH: Any objections?

5 MS. BAER: Your Honor, we do not object to
6 the Board exhibits, however, since we don't have the
7 context for those we would like to reserve the right
8 to object to the line of questioning related to them.

9 JUDGE FROEHLICH: Okay. So noted.

10 Are there any other objections to the
11 exhibits that have been pre-filed?

12 MR. PUGSLEY: No objections at this time,
13 Your Honor.

14 MR. PARSONS: Your Honor, Jeff Parsons for
15 the tribe. Just to preserve the arguments made in the
16 motion in limine but that has been resolved by the
17 Board, no further objection absent preserving those in
18 that motion.

19 JUDGE FROEHLICH: Okay. With those
20 remarks those exhibits will be admitted into evidence.

21 Additionally, are there any objections I
22 guess beyond what Ms. Baer has stated, to the Board-
23 sponsored exhibits as reflected in the exhibit list?

24 (No audible response.)

25 JUDGE FROEHLICH: Okay.

1 MR. PUGSLEY: No, Your Honor.

2 JUDGE FROEHLICH: Okay. Hearing none,
3 those exhibits will be admitted at this point subject
4 to the questions or objections that may be
5 forthcoming.

6 Okay. Finally, we'll instruct the Board
7 -- the court reporter to bind the exhibits that I
8 mentioned earlier as they might be amended during the
9 hearing into the transcript of the last day of these
10 proceedings.

11 And before we move to opening statement by
12 counsel for the parties, are there any other
13 procedural matters that counsel wishes to raise?

14 (No audible response.)

15 JUDGE FROEHLICH: Hearing none.

16 JUDGE BOLLWERK: I would just note for the
17 record that they made it by 15 minutes. My clothes
18 are here, so maybe at lunch time I'll come back
19 dressed appropriately.

20 JUDGE FROEHLICH: Thank you, Judge
21 Bollwerk.

22 MR. PUGSLEY: Your Honor, I'm sorry to
23 interrupt. As we -- as Powertech raised on the
24 previous hearing call with respect to travel
25 arrangements for the hearing, if the Board deems it

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 appropriate to carry this hearing into the third day
2 substantially past the noon hour, could it please
3 provide us with some notice so we could change our
4 arrangements?

5 JUDGE FROEHLICH: So noted. We'll try to
6 move things along so that people will be out for the
7 holiday weekend. Thank you, Mr. Pugsley.

8 At this point I'd like to move to opening
9 statements if the parties wish to make them beginning
10 with the NRC staff.

11 Ms. Baer?

12 MS. BAER: Good morning, Your Honors. The
13 NRC staff appreciates this opportunity to appear
14 before the Board.

15 For the reasons discussed in the staff's
16 pre-filed testimony and statements of position the
17 staff has fully complied with the National
18 Environmental Policy Act. The staff's documented
19 efforts provide the necessary hard look at impacts to
20 cultural, historic and religious resources of
21 importance to the Oglala Sioux Tribe. In doing so the
22 staff has met its burden with respect to each of the
23 two issues the Board has found remain to be resolved
24 in this hearing on Contention 1A, therefore the
25 contention should be resolved in the staff's favor.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 On the first issue the staff developed an
2 objectively reasonable proposed draft methodology for
3 obtaining additional information on the relevant
4 tribal resources. The record demonstrates that the
5 staff and its contractor are fully qualified to design
6 such a methodology. As acknowledged in the recent
7 D.C. Circuit Court of Appeals decision in United
8 Keetoowah Band of Cherokee Indians v. FCC, that is a
9 permissible way for an agency to fulfill its statutory
10 obligations.

11 The staff developed the methodology to
12 facilitate what we've referred to in this proceeding
13 as the March 2018 Approach, an integrated strategy
14 which all parties and the Board agreed was reasonable,
15 and to respond to the tribe's concerns regarding what
16 such a methodology should entail.

17 In particular, the staff's proposed draft
18 methodology intentionally and appropriately balances
19 scientific principles with traditional cultural
20 knowledge by drawing from methodologies that have been
21 used successfully by other federal agencies and
22 elements of a Lakota-specific methodology that the
23 tribe itself suggested the staff consider.

24 Further, not only did the staff seek and
25 incorporate the tribe's input via webinars,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 teleconferences and face-to-face meetings throughout
2 the development of the March 2018 Approach, but the
3 methodology itself also provides flexibility for
4 tribal input at every stage. In sum, when evaluated
5 in the light of NEPA's Rule of Reason, the staff's
6 proposed draft methodology is demonstrably reasonable.

7 On the second issue, based on the tribe's
8 repudiation of the March 2018 Approach which the tribe
9 itself previously characterized as reasonable, the
10 staff reasonably determined that the additional
11 information it has been seeking from the tribe is not
12 available. The staff has thereby met its NEPA duty
13 because through the evidentiary record of this
14 proceeding the staff has fully explained the basis for
15 that determination and has met the requirements of 40
16 CFR 1502.22.

17 The only two alternatives that the tribe
18 has proposed illustrate why the costs of obtaining the
19 information are exorbitant in terms of both time and
20 expense. Namely, the cost of the first was already
21 characterized by the Board as patently unreasonable
22 and the second proposal would cost over twice that
23 amount. The tribe also appears to criticize the NRC
24 staff for not separately proceeding with oral
25 interviews, however, such a piecemeal approach would

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 be inconsistent with the agreed upon parameters of the
2 integrated March 2018 Approach, would present
3 significant practical challenges as well as further
4 delays and still would not resolve the asserted NEPA
5 deficiency given the tribe's longstanding position
6 that a site survey is necessary.

7 In any event, the tribe's repudiation of
8 the March 2018 Approach provides sufficient basis to
9 conclude that the information cannot be obtained.

10 Through its documented efforts over
11 several years to accommodate the tribe and address its
12 concerns, the staff has satisfied its NEPA duty.

13 For these reasons Contention 1A should be
14 resolved in favor of the staff. Thank you and we look
15 forward to answering the Board's questions.

16 JUDGE FROEHLICH: Thank you, Ms. Baer.

17 Mr. Parsons for the Oglala Sioux Tribe?

18 PARSONS: Thank you, Your Honor. As the
19 Board has framed the issues for this hearing it seeks
20 to determine whether the March 2018 Approach and the
21 draft methodology were reasonable, whether the staff's
22 decision to abandon all efforts to conduct a cultural
23 resources survey was reasonable, and whether NRC staff
24 has met its burden to demonstrate the applicability of
25 40 CFR 1502.22.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 As to the March 2018 Approach, the record
2 and testimony show that this approach was the first
3 time that NRC staff had offered a framework that was
4 responsive to the tribe's concerns to ensure a
5 scientifically-based and culturally-relevant survey
6 approach that would yield meaningful results and allow
7 the public to participate through the NEPA process.

8 Of course that approach left significant
9 components unresolved; namely, the development of the
10 methodology in order to conduct that survey approach.
11 Nevertheless, the tribe was encouraged by this change
12 in position by NRC staff and was willing to put in the
13 time and resources to negotiate an approach, a
14 methodology that would work. Unfortunately NRC
15 staff's refusal to negotiate or even discuss actually
16 paying for the professional staff to conduct the on-
17 the-ground survey or allow the on-the-ground
18 methodology to be designed before cementing in time
19 frames rendered that approach unreasonable.

20 The same unreasonable positions were
21 carried forward into the draft methodology prepared in
22 February of 2019. That approach unreasonably refuses
23 to pay for the professional staff to conduct the on-
24 the-ground work and unreasonably limits the time span
25 despite not having an on-the-ground survey methodology

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 presented.

2 NRC staff was also unreasonable in
3 terminating discussions before any on-the-ground
4 methodology could be negotiated and without having
5 contractors with the relevant cultural knowledge and
6 experience to conduct the survey. Contrary to
7 Powertech and NRC staff's arguments the tribe has and
8 remains willing to work to put a cultural resources
9 survey in place.

10 Now NRC staff claims that the information
11 is unavailable. This is not true. NRC staff has
12 provided no information to the Board as to what the
13 cost of the survey would actually be or how those
14 costs are exorbitant. They merely point to discussion
15 drafts presented by the tribe to get the conversation
16 going after NRC staff came with no information to the
17 table in 2018 and relied on the tribe to provide a
18 discussion draft, which it did.

19 NRC staff has refused to negotiate with
20 the tribe to contract for the survey work and also
21 refused to seek out other qualified contractors. This
22 relates to the recent D.C. Circuit Keetoowah Band of
23 Cherokee versus FCC case which the Board invited the
24 parties to address. Although that was in the context
25 of the National Historic Preservation Act the court

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 clearly articulated that where identification and
2 evaluation of cultural resources is required, as it is
3 here through NEPA, independent agencies must either
4 contract directly with the tribe or find qualified
5 non-tribal government contractors to conduct the work.
6 NRC staff has done neither.

7 The tribe has brought in significant
8 expertise to this hearing of the kind NRC staff should
9 have engaged to carry out their NEPA duties. NRC
10 staff cannot credibly claim that the information is
11 unavailable.

12 NRC staff cites to the testimony of Wilmer
13 Mesteth who testified in this proceeding in 2014. His
14 testimony was not that only the tribal government
15 holds all of the cultural resource information, but
16 rather that the Lakota people and cultural
17 practitioners hold that information. NRC staff made
18 no effort to reach out and obtain that information.
19 As a result NRC staff has failed to obtain the
20 existing information necessary to satisfy 1502.22.

21 It has failed to conduct oral interviews
22 or prepare literature reviews or research -- or
23 conduct the research by qualified contractors, nor has
24 it provided an analysis using acceptable methodologies
25 of the impacts to cultural resources based on this

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 available information in a NEPA document as required
2 by 1502.22. As a result NRC staff has failed to carry
3 its burden to demonstrate that it's complied with the
4 National Environmental Policy Act in order to resolve
5 this contention in favor of NRC staff.

6 The tribe looks forward to having its
7 witnesses present, and hopefully our witnesses can
8 help clarify the issues and answer all the questions
9 by the Board to provide the basis for a reasoned
10 decision. Thank you very much.

11 JUDGE FROEHLICH: Thank you, Mr. Parsons.

12 Mr. Ballanco for the Consolidated
13 Interveners.

14 MR. BALLANCO: Thank you, Your Honor. The
15 Consolidated Interveners would like to point out that
16 the land that we are discussing in this case is not
17 just your average ground out there anywhere in the
18 country. This is the southern gateway to the Black
19 Hills. There is no question that the Black Hills had
20 tremendous spiritual, cultural significance to the
21 Lakota people. That has been demonstrated for over a
22 century since initial contact between the United
23 States and the Lakota Nations. This is precisely the
24 kind of unique and sacred historic property that is
25 discussed in the Keetoowah case.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Furthermore, if you talk to any
2 traditional Lakota person who is -- speaks the Lakota
3 language, they will explain that the language is the
4 land, a difficult concept when -- until you think
5 about it. Essentially what that means is without
6 understanding the Lakota language, the traditional
7 cultural ties to the land can't be fully appreciated.

8 This is not something you can learn about
9 in an academic environment. This is cultural
10 knowledge that is in possession of traditional tribal
11 members, elders, spiritual leaders. That does include
12 to a certain extent the Oglala Sioux Tribal
13 Government. It also includes many tribal members who
14 are not affiliated with the government, are simply
15 common men and women possessed of traditional
16 knowledge. It's this kind of knowledge that has to be
17 accessed and evaluated.

18 I think one of the important things that
19 we saw the D.C. circuit's ruling reflect when this
20 case went was that these cultural resources are not
21 valuable just to the tribes asserting it. They are
22 valuable to the American people in general. And
23 that's an important consideration because we think,
24 oh, it's difficult to work with the tribes here.
25 We've got to just get past this. These cultural

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 resources have a value beyond just their value to the
2 individual tribal members of the tribe itself. They
3 are valuable as part of the richness of the land where
4 we are all living. And the process for identifying
5 and protecting those resources has to be followed.

6 There's no question that the region has
7 been heavily populated, trafficked for millennia.
8 There are resources in the vicinity of the Dewey
9 Burdock project. That is not a question. Where they
10 are, what they are and how they can be protected are
11 questions that remain to be answered. NEPA requires
12 that. We have to see a methodology that allows us to
13 identify those things.

14 And again the Keetoowah case points out
15 that unless an archaeologist is specifically
16 authorized by the tribe to speak on its behalf, it
17 cannot be assumed that that archaeologist is possessed
18 of the knowledge of these unique and historic cultural
19 properties. That is certainly the case here. The
20 tribe has to be involved. Tribal elders who go beyond
21 the tribal government have to be involved, have to be
22 consulted.

23 Consolidated Interveners have produced
24 just a small list of the many tribal members that have
25 information. This is the kind of traditional

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 knowledge that needs to go into any kind of
2 comprehensive study, and we'd like to see that
3 process.

4 The tribe's position in this case has not
5 changed over the years, so calling time into a
6 question, the time is really on the side of staff and
7 the applicant. The tribe's position remains clear.
8 It still is today. We need to see a viable
9 methodology. And I hope that's the result of this
10 hearing. Thank you.

11 JUDGE FROEHLICH: Thank you, Mr. Ballanco.
12 Counsel for Powertech?

13 MR. PUGSLEY: Thank you, Your Honor.
14 While Powertech recognizes that the scope of this
15 contention is the National Environmental Policy Act
16 and is purely an agency function, it does believe it's
17 in a position to offer some additional comment on this
18 proceeding.

19 First of all, the -- as we have made clear
20 in the past, the Atomic Energy Act or the NRC's
21 empowering statute charges NRC with a reactive
22 function which is basically it is not permitted by
23 statute to promote the use of nuclear power materials.
24 It is charged with the duty of regulating such
25 licensed activities.

1 As such, this agency must receive
2 applications and is only allowed to do one of three
3 things: to grant in full, to grant in part with
4 condition, or to deny. As such, within the scope of
5 NEPA NRC is an independent regulatory agency and is
6 subject to the procedural requirements of NEPA. And
7 to the extent that the Council on Environmental
8 Quality's regulations can serve as guidance to the
9 Commission, the Commission has stated repeatedly it
10 will use its best efforts to use those as guidance.

11 With that said, Powertech's simple
12 position in this matter is it concurs with the NRC
13 staff that they have satisfied their requirements
14 under NEPA to take a hard look at these historic and
15 cultural resources.

16 One thing that is important to note is
17 because NEPA is an agency function, one would think
18 that the process itself procedurally starts with the
19 agency. It actually substantively does not. It
20 starts with the submission of an application by an
21 applicant, because that is the initial moving action
22 that causes the agency to, as stated before, react to
23 a proposal.

24 NRC has made clear to the industry through
25 the construction of its programmatic or as they call

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 it, Generic Environmental Impact Statement or NUREG-
2 1910, that it will only perform a detailed
3 environmental review of an application if it passes an
4 acceptance review. In other words, it is pointless to
5 waste resources if there isn't adequate information.
6 So that -- this process, if we're talking about time,
7 started when the application was submitted and not
8 when the SEIS process was initiated.

9 Secondly, this proceeding, as stated
10 before by Your Honor -- that this has been going on
11 for at least a decade now and involved multiple steps
12 in the process starting with the Programmatic
13 Environmental Impact Statement which it is clear is
14 not tribal-specific. It is not and was never intended
15 to be. But it does provide for a baseline analysis
16 from which a NEPA review of historic and cultural
17 resources, along with other designated resource areas,
18 can be evaluated.

19 These site-specific steps that are
20 specific in this case to the Dewey Burdock project
21 involved multiple layers: sharing of sensitive
22 information, multiple litigation proceedings,
23 publication of the Draft SEIS for public comment,
24 consultation through the National Historic
25 Preservation Act, site surveys by other tribes,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 accounting for those in the review, publication --
2 public comment on the Draft SEIS, Final SEIS
3 publication and final license publication, as well as
4 all of the related administrative litigation
5 proceedings associated with this license itself.

6 The current record in total over a
7 several-year period includes sites -- accounting for
8 site surveys performed by multiple tribes with four
9 separate opportunities for the Oglala Sioux Tribe to
10 participate in this process. And Powertech is already
11 on record as having agreed to the March 2018 Approach,
12 as the Board is aware.

13 With respect to the legal standard which
14 we believe is the proper scope of this proceeding, in
15 terms of the information being unavailable, we believe
16 that while it is clear from a legal perspective that
17 the National Historic Preservation Act and the
18 National Environmental Policy Act are two separate and
19 distinct statutes and two separate and distinct sets
20 of requirements. The fact that the information
21 typically obtained through site identification under
22 the National Historic Preservation Act is used as part
23 of the NEPA review and has not been obtained is
24 further evidence that this information is not
25 available and meets the legal standard for

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 unavailability.

2 In addition, we also believe that in terms
3 of cost exorbitance the United States Bureau of Land
4 Management, that is a cooperating agency on the Final
5 Supplemental Environmental Impact Statement in this
6 proceeding, has, albeit persuasive, requirements for
7 cost exorbitance that includes costs associated with
8 time, delays to other agency evaluations, depriving
9 communities of income streams, other types of issues
10 similar to that. We do not argue that this is binding
11 on the Board. We simply say that it is worth
12 consideration.

13 And then after the conclusion of the
14 hearing in 2015, I mean the issuance of the partial
15 initial decision in 2015, we have now gone four
16 additional years and we are still not at the end of
17 this process. We believe that the staff has
18 adequately shown that they have satisfied their legal
19 requirements under NEPA, that they have satisfied the
20 procedural requirements that the Commission is subject
21 to under that federal statute and we believe that the
22 staff's expert testimony shows that this is indeed the
23 case.

24 So with that said, we would like to note
25 for the record as the licensee that we fully support

1 NRC staff's position in this hearing and that in the
2 event that there are questions that Powertech can --
3 to the extent of its limited participation in this
4 part of the proceeding can answer, we're happy to do
5 so. Thank you.

6 JUDGE FROEHLICH: Thank you, Mr. Pugsley.

7 I think I'd like to get right into it and
8 get started with questions for the staff witnesses,
9 and I'll start with Ms. Diaz, if I may.

10 Your role in this proceeding I guess is
11 the current project manager for this proposal.

12 MS. DIAZ-TORO: Yes.

13 JUDGE FROEHLICH: Is that correct? Can
14 you tell me your view of what the responsibilities of
15 the project manager is as it relates to this case?

16 MS. DIAZ-TORO: So the -- good morning.
17 The role of the project manager for this project is to
18 coordinate, plan and carry out the activities
19 necessary to comply with the National Environmental
20 Policy Act as well as the NRC's NEPA-implementing
21 regulations in 10 CFR Part 51.

22 JUDGE FROEHLICH: That's an awesome
23 responsibility. Are there multiple project managers
24 associated with this case?

25 MS. DIAZ-TORO: Currently I am the project

1 manager, the lead project manager. Previously we did
2 have other backup project managers, so co-project
3 managers, and there were two. And previous to that
4 Ms. Haimanot Yilma was the lead project manager for
5 the Dewey Burdock uranium recovery project.

6 JUDGE FROEHLICH: All right. So I guess
7 your -- so tell me now a little bit about your role as
8 you I guess inherited or assumed the responsibilities
9 as project manager for this case.

10 MS. DIAZ-TORO: So the -- when I became
11 the lead project manager was, along with Ms. Kellee
12 Jamerson, shortly after the Board's partial initial
13 decision in April 2015. The role and the assignment
14 that I was given was to develop -- to review the
15 record, develop a plan, coordinate the plan and
16 execute a plan for resolving the then two admitted
17 contentions, Contention 1A and Contention 1B.

18 In that role we developed a -- a plan for
19 identifying the steps necessary to coordinate and
20 consult with the Oglala Sioux Tribe to reach an
21 agreement on a methodology, an approach and a
22 methodology for identifying and evaluating tribal
23 cultural resources of significance to the Oglala Sioux
24 Tribe.

25 That coordination took several forms in

1 forms of letters to the Oglala Sioux Tribe, in the
2 form of phone calls and in the form of emails to the
3 Oglala Sioux Tribe.

4 JUDGE FROEHLICH: So can you tell me if
5 when you assumed responsibilities as the lead project
6 manager did you prepare a budget, assume a budget, and
7 how did you go about or what did you do to harness the
8 financial as well as the human resources to take -- to
9 address the Contention 1A and the issues that were
10 left open after LBP -- the LBP?

11 MS. DIAZ-TORO: Yes. So in addition to me
12 and the then-co-project manager that was working with
13 me, we understood the -- the need to bring on board a
14 contractor with the experience necessary to develop
15 cultural resources -- cultural resource surveys
16 methodologies with the appropriate experience on
17 facilitation for development of such surveys, reaching
18 consensus among different groups. And so that -- the
19 estimate of what the contractor cost would be, you
20 know, became part of the funding needs, if I may use
21 that word, within the project along with the staff's
22 time and resources.

23 JUDGE FROEHLICH: All right. And in your
24 capacity as the project manager for this case do you
25 also work or serve as a project manager for any other

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 projects, or especially ISR cases?

2 MS. DIAZ-TORO: Currently I'm -- don't
3 have any other responsibilities or working on other
4 ISR projects.

5 JUDGE FROEHLICH: All right. And have you
6 had previous experience in addressing NEPA issues
7 similar to or of the type you inherited in this case?

8 MS. DIAZ-TORO: Yes, I do have experience
9 with working with tribes on NEPA matters, on other NRC
10 projects, collaborating and consulting with them to
11 identify tribal cultural resources, evaluate tribal
12 cultural resources and document them in our -- the
13 NRC's NEPA document.

14 JUDGE FROEHLICH: Could you tell me a
15 little bit about those other projects that involve
16 NEPA issues and tribal matters?

17 MS. DIAZ-TORO: Thank you. The -- I'll
18 talk briefly about a case that -- a project that I had
19 with the Prairie Island Indian Community and the
20 independent spent fuel storage cask. In that matter
21 the Prairie Island Indian Community was concerned with
22 the renewal of the independent spent fuel storage
23 cask, the ISFSI for short acronym, specifically with
24 the evaluation of the impacts of the license renewal
25 on the -- on the tribe's -- on the tribe's lands.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 The -- there were four areas in that project in NEPA
2 that the tribe was interested in. It was historic and
3 cultural resources, land use, environmental justice
4 and socioeconomics.

5 And so in that role I consulted with and
6 collaborated with the Prairie Island Indian Community
7 to gather the necessary information for us to review,
8 evaluate and document in the -- in our NEPA document.
9 The document was an environmental assessment in
10 support of the license renewal. The environmental
11 assessment included direct input from the Prairie
12 Island Indian Community that they provided directly to
13 the NRC staff on those four areas. And the NRC was
14 able to satisfy its NEPA contention. Sorry, it's NEPA
15 responsibilities. And there was also a -- a hearing
16 associated with that case.

17 JUDGE FROEHLICH: So the -- let's talk for
18 a little bit about that Prairie Island ISFSI case, if
19 we could.

20 That was as license renewal?

21 MS. DIAZ-TORO: Yes.

22 JUDGE FROEHLICH: Okay. And is that there
23 were cultural resource issues that the staff had to
24 gather from the Prairie Island Tribe?

25 MS. DIAZ-TORO: Yes.

1 JUDGE FROEHLICH: Is that correct? And
2 how did you go about doing that? I mean was this a
3 series of letters back and forth? Were there
4 interviews at the plant or at the reservation? How
5 did you gather the cultural resources data that you
6 needed to do the NEPA review?

7 MS. DIAZ-TORO: So during the course of
8 the NEPA review the NRC staff gathered the information
9 via exchange of letters. We asked for information via
10 letter to the Prairie Island Community. They provided
11 information back via -- in written form. The NRC also
12 met with the Prairie Island Indian Community in
13 meetings, face-to-face meetings to discuss the
14 information at hand, gather information, discuss the
15 evaluation of the impacts and then document the
16 conclusions and determinations.

17 The -- the licensee for the Prairie Island
18 Nuclear Generation Plant also agreed to conduct a
19 survey of the areas around the ISFSI for potential
20 expansion of the ISFSI. And that was carried about
21 between the licensee and the Prairie Island Indian
22 Community.

23 JUDGE FROEHLICH: And did the NRC staff
24 have a cultural resources consultant in that case?

25 MS. DIAZ-TORO: We did not.

1 JUDGE FROEHLICH: Did not? And did the
2 NRC staff compensate the tribe for their information
3 that they provided?

4 MS. DIAZ-TORO: I -- I apologize. We did
5 have a consultant.

6 JUDGE FROEHLICH: You did have a
7 consultant?

8 MS. DIAZ-TORO: I apologize. Yes.

9 JUDGE FROEHLICH: You had a -- there was
10 a consultant?

11 MS. DIAZ-TORO: We had -- we had a
12 contractor, yes.

13 JUDGE FROEHLICH: Contractor? Okay. Was
14 that contractor a contractor that the staff had
15 contracted with through a bidding process, some kind
16 of public opportunity to submit proposals? How did
17 you I guess find a consultant and was that consultant
18 acceptable to the tribe or suggested by the tribe?
19 How did that case develop?

20 MS. DIAZ-TORO: So we hired -- well, we
21 procured a contractor through the -- following the
22 Federal Acquisition Regulations and the NRC's
23 contracting process. The contractor at that time was
24 the Center for Nuclear Regulatory Waste. We
25 contracted with them. There was a series of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 requirements, not just historic and cultural
2 resources. We were conducting the entire, you know,
3 NEPA review for the license renewal, so that also
4 consisted of hydrogeologists, a hydrogeologist,
5 meteorologists, individuals with expertise in
6 atmospheric dispersion, on hydrology for water
7 resources.

8 So it was an interdisciplinary procurement
9 and the contractor would provide that
10 interdisciplinary expertise to address the different
11 impacts for the different environmental resource areas
12 that we addressed. One of them was the historic and
13 cultural resources.

14 JUDGE BOLLWERK: Okay. So that was the
15 Center for Nuclear Waste?

16 MS. DIAZ-TORO: Yes.

17 JUDGE BOLLWERK: Can you give me the whole
18 title again? I'm sorry.

19 MS. DIAZ-TORO: Center for Nuclear
20 Regulatory Waste Analyses.

21 JUDGE BOLLWERK: And that is an ongoing
22 contracting relationship the NRC has had with that --

23 MS. DIAZ-TORO: My understanding is that
24 the NRC staff has an -- I want to say I'm not an
25 acquisitions expert --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE BOLLWERK: Yes.

2 MS. DIAZ-TORO: -- but my understanding is
3 that we have with the -- we have a -- what they call
4 an umbrella contract of -- of -- overall contract
5 where the NRC staff can procure the services of the
6 Center for Nuclear Regulatory Waste Analyses if the
7 expertise meets the project needs.

8 JUDGE BOLLWERK: Right. So that center
9 was originally brought on to deal with high-level
10 waste matters, correct --

11 MS. DIAZ-TORO: Correct.

12 JUDGE BOLLWERK: -- with Yucca Mountain?

13 MS. DIAZ-TORO: Yes.

14 JUDGE BOLLWERK: And they've subsequently
15 been doing other work for the Agency as the Yucca
16 Mountain proceeding has kind of petered out?

17 MS. DIAZ-TORO: That it's not related to
18 the High-Level Waste Program, that's correct.

19 JUDGE BOLLWERK: Okay. And they also
20 provided you archaeological expertise then as well
21 as --

22 MS. DIAZ-TORO: The -- the center
23 subcontracts with the -- with archaeological companies
24 that provide that service.

25 JUDGE BOLLWERK: So it's basically an

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 umbrella contract? It just happens to be that there's
2 a relationship between this center down in -- I
3 believe it's in San Antonio --

4 MS. DIAZ-TORO: Yes.

5 JUDGE BOLLWERK: -- and the NRC?

6 MS. DIAZ-TORO: Yes.

7 JUDGE BOLLWERK: And in Prairie Island was
8 there any kind of a survey, a ground truthing survey
9 that we're talking about in this case or was it -- how
10 -- what was the issue there?

11 MS. DIAZ-TORO: So there was a survey.
12 The survey was conducted by the -- between the
13 licensee and the licensee's archaeological company
14 that they brought in and the Prairie Island Indian
15 Community. One thing that we understood up front and
16 recognized up front was that the Prairie Island
17 Community were the experts on their land, on tribal
18 cultural resources and they wanted to be participants,
19 active participants in the survey.

20 JUDGE BOLLWERK: And so did they walk the
21 property as well as the -- how did -- in terms of how
22 who did the ground work?

23 MS. DIAZ-TORO: Both the survey company
24 that the licensee hired and the tribe.

25 JUDGE BOLLWERK: Then the center sort of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 was your sort of -- I won't managed the project.
2 Maybe not the right word. They were basically your
3 liaison with the contractor that was hired by the
4 licensee and with the tribe then?

5 MS. DIAZ-TORO: No, that was --

6 JUDGE BOLLWERK: No?

7 MS. DIAZ-TORO: -- that -- no. The -- in
8 Prairie Island the licensee collaborated directly with
9 the tribe --

10 JUDGE BOLLWERK: So the two of them --

11 MS. DIAZ-TORO: -- to conduct --

12 JUDGE BOLLWERK: -- worked together --

13 MS. DIAZ-TORO: -- that survey.

14 JUDGE BOLLWERK: Oh, go ahead.

15 MS. DIAZ-TORO: I apologize. So the
16 licensee collaborated directly. We -- the NRC staff
17 was not a facilitator or a mediator or --

18 JUDGE BOLLWERK: Okay. And so what was
19 the center's role then in relationship to the
20 licensee --

21 MS. DIAZ-TORO: So --

22 JUDGE BOLLWERK: -- and the tribe?

23 MS. DIAZ-TORO: -- the information then
24 was provided to the NRC. We did look at the
25 information, review the information and used it to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 support to our NEPA document.

2 JUDGE BOLLWERK: So they were sort of the
3 compiler as it were? They compiled the information
4 that was provided by the licensee which they obtained
5 working with the tribe?

6 MS. DIAZ-TORO: In addition to the
7 information that the tribe provided themselves
8 separately from what the licensee provided.

9 JUDGE BOLLWERK: Okay. They -- and they
10 -- the tribe provided that information directly to
11 your contractor?

12 MS. DIAZ-TORO: Right, and to the NRC
13 staff. Correct.

14 JUDGE BOLLWERK: Okay.

15 JUDGE BARNETT: I have a follow-up
16 question. So you mentioned the center was your
17 primary contractor?

18 MS. DIAZ-TORO: Correct.

19 JUDGE BARNETT: They hired a subcontractor
20 for doing the cultural studies. Is that --

21 MS. DIAZ-TORO: They typically do.

22 JUDGE BARNETT: Okay. So when you hire
23 the primary contractor, you have to go by NRC
24 Commission rules about how you hire this contractor?

25 MS. DIAZ-TORO: Correct.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE BARNETT: Are those rules then
2 binding on the contractor to hire the subcontractor or
3 can the contractor -- they have their own rules? They
4 can hire however they want?

5 MS. DIAZ-TORO: There are rules that the
6 contractor has to follow because it -- it's federal --
7 we're -- we're hiring the contractor. The Federal
8 Government's hired the contractor, so there are -- my
9 understanding is that there are certain rules that the
10 contractor has to follow with respect to the
11 subcontractor; for example, potential conflict of
12 interest.

13 JUDGE BARNETT: Are there requirements in
14 place that they would be for you hiring the primary
15 contractor?

16 MS. DIAZ-TORO: I don't know the answer.
17 If -- if are the same. I -- but I expect that they
18 would be, yes.

19 JUDGE BARNETT: Thank you.

20 JUDGE BOLLWERK: I guess Judge Froehlich
21 didn't ask you -- I mean besides Prairie Island that
22 you've been involved with and sort of similar to this
23 case?

24 MS. DIAZ-TORO: I think in -- I am -- I
25 have -- yes, with -- in implementing the programmatic

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 agreement for the Strata Ross Uranium Recovery
2 Facility I also worked with a -- a colleague of mine
3 to carry out and close -- carry out and implement the
4 programmatic agreement, and the programmatic agreement
5 was related to the National Historic Preservation Act,
6 Section 106 for that project. In that respect we did
7 work with the -- you know, with the tribes directly to
8 carry out the steps that are identified in that
9 programmatic agreement for identification of tribal
10 resources and evaluation of their -- of impacts.

11 JUDGE BOLLWERK: So generally when the
12 staff does license reviews -- and whether it's on the
13 material side or the reactor side, isn't it the
14 protocol the staff normally follows is that the staff
15 does not generally; and qualify this if you need to,
16 do independent research? They in fact -- if they need
17 information, they will turn to the applicant and say
18 we need the -- we need to know X. In theory X is
19 either provided by the application or it's provided
20 later by a request for additional information. But
21 the staff as a general rule; and if I'm wrong, clarify
22 this, does not necessarily go out and do research on
23 its own to fill that -- fill in any blanks that might
24 exist. You're not the Office of Research, for
25 instance. You're the folks dealing with the licensing

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 process.

2 MS. DIAZ-TORO: So I think it depends --

3 JUDGE BOLLWERK: Okay.

4 MS. DIAZ-TORO: -- on the -- what is the
5 nature and the context of the information that we're
6 seeking. If it's related to the design of the
7 facility, for example, we would seek that information
8 from the license applicant to ensure that they're
9 going to meet the -- you know, the -- the regulations
10 or -- or regulatory requirements. If it's, for
11 example, something that we're -- for example, some --
12 a -- a matter that -- like the one that we're dealing
13 with, which is the NRC staff's obligations to satisfy
14 NEPA, which is a Federal Government obligation or a
15 National Historic Preservation Act, the NRC does go
16 out on its own independently to reach out to different
17 organizations and seek information independently and
18 conduct its review independently.

19 JUDGE BOLLWERK: Okay.

20 MS. DIAZ-TORO: And this is -- is a
21 general matter.

22 JUDGE BOLLWERK: Although in this instance
23 as with -- well, with Prairie Island, I mean you had
24 the same responsibility with Prairie Island, yet you
25 -- the staff certainly didn't go -- staff doesn't have

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 archaeologists or doesn't have people that run out --
2 go out and do surveys. They look to someone else to
3 do that work for them, someone that the applicant
4 hires or -- generally it's someone that the applicant
5 hires or works with an Indian tribe to provide the
6 information.

7 MS. DIAZ-TORO: Yes, so if -- yes. If
8 it's a matter that the NRC staff does not have the
9 expertise in house, certainly we would seek to bring
10 a contractor to provide that expertise to the NRC
11 staff.

12 JUDGE BOLLWERK: You know if any instances
13 where the NRC staff has hired a cultural resources
14 management firm to go out and do an archaeological
15 survey directly?

16 MS. DIAZ-TORO: In this instant -- well --

17 JUDGE BOLLWERK: In any instance you're
18 aware of.

19 MS. DIAZ-TORO: That I can think off the
20 top of -- of my head, we have hired a -- see, I think
21 that for -- again, I don't know all the projects at
22 the NRC. We did for -- to implement --

23 JUDGE BOLLWERK: Yes, it's what you know.
24 I'm not asking --

25 (Simultaneous speaking.)

1 MS. DIAZ-TORO: Right. So to implement
2 the programmatic agreement for the Strata Ross uranium
3 recovery project we did seek a contractor and -- that
4 had both the NEPA and NHPA expertise. My
5 understanding is that that contractor in turn hire
6 cultural resource management company as a
7 subcontractor to provide the
8 archaeological/anthropological expertise for the NRC.

9 JUDGE BARNETT: When you say seek
10 contractor, what do you mean? What does that mean?

11 MS. DIAZ-TORO: Oh, procure. Procure a
12 contractor.

13 JUDGE BARNETT: How do you do that? You
14 have a specific person --

15 MS. DIAZ-TORO: Oh, so -- yes.

16 JUDGE BARNETT: -- you send to or --

17 MS. DIAZ-TORO: Oh --

18 (Simultaneous speaking.)

19 JUDGE BARNETT: -- for bid or how does
20 that work?

21 MS. DIAZ-TORO: Yes. So I would draw up
22 a request for procurement of my -- what I need, what
23 I'm seeking along with the qualifications to satisfy
24 those needs. I submit that to the -- our Office of
25 Acquisitions in our Office of Administration. They --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 then there are several ways that we can -- that the
2 NRC or the Acquisitions Office can go about it.

3 The NRC staff has, for example, a contract
4 with the Center -- the Center for Nuclear Regulatory
5 Waste Analyses. It's a commercial contractor. There
6 are also indefinite delivery/indefinite quantities,
7 IDIQ contracts that the Office of Administration has
8 also established within the indefinite
9 delivery/indefinite quantity contracts. There are
10 several commercial contractors. One specifically that
11 I'm -- I'm -- well, that I'm aware is the one with
12 small businesses. There are several of them.

13 So I would first review the qualifications
14 and the expertise under those multiple umbrella
15 contracts, if I may call them, use that term here
16 loosely, to understand if any of those contractors do
17 have the expertise and the technical needs that I'm
18 seeking. If they do, I develop the request for
19 proposal. It is provided to those companies under
20 those umbrella contracts.

21 They come back to us, to the NRC with
22 proposals which they -- which then I as the project
23 manager evaluate based on a -- a criteria that the
24 Acquisitions Office has provided to me, both technical
25 and cost criteria. And then based on the conclusion

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 of that evaluation one contractor is selected and then
2 the contract is awarded.

3 JUDGE BARNETT: You start with this list
4 of available contractors from the Acquisition Office?
5 Is that --

6 MS. DIAZ-TORO: Correct.

7 JUDGE BARNETT: Is that right?

8 MS. DIAZ-TORO: Yes.

9 JUDGE BARNETT: You have to pick one of
10 those? Could you take advice on -- if someone said,
11 hey, this is a good firm, could you take a look at
12 that firm in particular or --

13 MS. DIAZ-TORO: So the answer is -- is no.
14 External -- externally the Federal Acquisitions
15 Regulation do not allow for involvement of external
16 stakeholders in the procurement process, in the
17 selection of the contractor process to maintain
18 objectivity and independence and transparency.

19 JUDGE BARNETT: I understand they don't
20 get to pick them, but can they suggest someone?

21 MS. DIAZ-TORO: For -- for the NRC staff
22 to consider?

23 JUDGE BARNETT: Correct.

24 MS. DIAZ-TORO: They can -- they can
25 suggest companies. The NRC, regardless of their

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 suggestion, has to follow an independent and objective
2 process.

3 JUDGE BARNETT: I understand. One of the
4 things the tribe has raised a lot is about this --
5 over the years is they don't think you picked a
6 qualified contractor. So did you ever ask the tribe
7 for a list of who they thought were qualified
8 contractors?

9 MS. DIAZ-TORO: I have not asked for the
10 tribe a list of contractors. What the NRC staff -- or
11 what I did in -- certainly in the procurement for this
12 contract was to consider the needs and the technical
13 needs specifically. So if I'm talking about the
14 contract that -- where I brought Mr. Spangler with me
15 specifically, I did consider the needs for someone
16 with the --

17 JUDGE BARNETT: I understand that.

18 MS. DIAZ-TORO: Right.

19 JUDGE BARNETT: You did consider needs.
20 I understand that.

21 MS. DIAZ-TORO: Right.

22 JUDGE BARNETT: But could you have
23 considered other firms that would have been suggested
24 to see if they also met those qualifications is my
25 question. Would you have been allowed to take some

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 input from the tribe about potential contractors? It
2 doesn't mean you have to pick them.

3 MS. DIAZ-TORO: My understanding is that
4 I -- I'm not allowed to take information from external
5 stakeholders in order to procure the contractor.

6 JUDGE BOLLWERK: So let's try to tie what
7 you talked about with Prairie Island and with this
8 case now since we've come that way.

9 So with Prairie Island you were using the
10 center and the center had -- the NRC staff had already
11 set up the center for another purpose, but nonetheless
12 within the scope of that the work that, the center was
13 allowed to do, you could contract with them to provide
14 you services. And the Board has put in Board Exhibit
15 4, which is an excerpt from the enterprise-wide
16 contract for technical assistance that the NRC staff
17 has.

18 That contract is sort of the equivalent,
19 if I'm understanding it, of what the center does, what
20 you had -- the relationship you had with the center
21 where you -- when that contract was bid, certain
22 companies -- I believe there were six of them, I think
23 -- had come in and bid with the NRC staff under that
24 contract to provide you services in a number of
25 different areas: environmental, other areas. So am I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 on the right track? I mean --

2 MS. DIAZ-TORO: Yes.

3 JUDGE BOLLWERK: -- you're shaking your --

4 MS. DIAZ-TORO: Yes.

5 JUDGE BOLLWERK: -- you're nodding your
6 head. I'm sorry.

7 MS. DIAZ-TORO: Yes.

8 JUDGE BOLLWERK: Okay. So the center and
9 the contractor are sort of the equivalent of each
10 other. And these are essentially pre-bid service
11 contracts where you've now entered into a contractual
12 relationship with those folks. You put out a order
13 and then they provide you the services under that work
14 order, or they -- the firms can actually bid on the
15 work orders to see who is going to get the work. Is
16 that correct?

17 MS. DIAZ-TORO: Yes.

18 JUDGE BOLLWERK: And because of the fact
19 that these are all pre-bid in theory you can't -- at
20 least when you're in your relationship with the
21 contractors that are under that umbrella contract, you
22 can't bring in other people directly under the
23 umbrella contract because they've already bid for the
24 work. You can't find -- if there are three of these
25 firms or six of them, whatever there are, you can't

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 find a seventh firm? These folks have already bid for
2 this work --

3 MS. DIAZ-TORO: Correct.

4 JUDGE BOLLWERK: -- and they have the
5 first opportunity to provide those services?

6 MS. DIAZ-TORO: They -- yes.

7 JUDGE BOLLWERK: In fact it's probably an
8 exclusive opportunity to provide the services given
9 the way the contract is. Is that more or less? I
10 don't want to put words in your mouth. I'm sorry.

11 And so given that relationship if you were
12 to bring someone else in to be a contractor or wanted
13 to, you'd actually have to do an open and -- a fair
14 and open competition?

15 MS. DIAZ-TORO: Yes.

16 JUDGE BOLLWERK: Is that correct? And how
17 long does that generally take?

18 MS. DIAZ-TORO: Typically I think it would
19 take between -- the minimum six months. Probably it
20 would take 8 to 10 months.

21 JUDGE BOLLWERK: So maybe as long as a
22 year sometimes?

23 MS. DIAZ-TORO: Sometimes it has taken
24 that long, yes.

25 JUDGE BOLLWERK: All right. Now having

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 said that, the folks who'd have these -- that are
2 under the umbrella contract, they can bring in
3 subcontractors. And we've actually heard about that
4 already, correct?

5 MS. DIAZ-TORO: Yes.

6 JUDGE BOLLWERK: So they can -- you put
7 out a work order and say we need the following thing
8 done. They can then say we have this person that's
9 going to do it and maybe we'll hire some additional
10 subcontractors to do the work. Is that correct?

11 MS. DIAZ-TORO: Yes. They still have to
12 follow -- well, they still have to meet certain
13 requirements, the same ones that the contractor is
14 abiding to with the NRC -- with the NRC.

15 JUDGE BOLLWERK: Right. But it's their
16 responsibility then to find the people that will do
17 the work under the work order that you've put out and
18 satisfy the staff that in fact they have the -- the
19 people that they're proposing to do the work under the
20 work order have the expertise that you need?

21 MS. DIAZ-TORO: Yes. They would -- with
22 their proposal -- when they provide the proposal to
23 the NRC, the proposal would come in or does come in,
24 has to come in with the identification of the
25 subcontractors that they are going to use and what

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 expertise the contractor -- the subcontractors will
2 provide.

3 JUDGE BOLLWERK: And so -- and I think if
4 I heard you respond to Judge Barnett's questions, can
5 the staff suggest to that your -- to the folks that
6 are under the umbrella contract you might want to look
7 at the following for subs?

8 MS. DIAZ-TORO: I -- no.

9 JUDGE BOLLWERK: So it's not -- it's
10 really up to the companies that have pre-bid under
11 this umbrella contract to find their own -- the subs,
12 whoever they think is --

13 MS. DIAZ-TORO: Remain objective.

14 JUDGE BOLLWERK: -- appropriate?

15 MS. DIAZ-TORO: For the NRC staff to
16 remain objective and independent. And then we
17 evaluate -- we also can -- we also have the decision
18 to make whether the subcontractor is acceptable or
19 not.

20 JUDGE BOLLWERK: Right. So you don't tell
21 them who to hire? You simply evaluate -- they come to
22 you with a proposal and if you accept it, you do. If
23 you don't, you reject it to say --

24 MS. DIAZ-TORO: Correct.

25 JUDGE BOLLWERK: -- no, these folks aren't

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 appropriate? Is that --

2 MS. DIAZ-TORO: That's correct.

3 JUDGE BOLLWERK: All right.

4 MS. DIAZ-TORO: Yes.

5 JUDGE BARNETT: Do you know who the tribe
6 would suggest as qualified contractors?

7 MS. DIAZ-TORO: I'm -- I'm sorry. Can you
8 repeat that?

9 JUDGE BARNETT: Do you have a list of --
10 do you know somewhere the -- a list of people who you
11 think -- who the tribe thinks would be qualified
12 contractors? Have you ever asked them that?

13 MS. DIAZ-TORO: I haven't personally asked
14 them that. Throughout the -- the Dewey Burdock
15 project this tribe has identified a contractor, one
16 contractor that I am aware of.

17 JUDGE BARNETT: So a specific --

18 MS. DIAZ-TORO: Back in --

19 JUDGE BARNETT: -- name?

20 MS. DIAZ-TORO: The Makoche Wowapi.

21 JUDGE BARNETT: Oh, okay.

22 JUDGE BOLLWERK: If I could go back to the
23 question you were talking about before, you had
24 mentioned the Strata case. And the Board put in
25 Exhibit 002, Board 02, which is an excerpt from the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Environmental Impact Statement for the Ross ISR
2 project. And in that, the excerpt we have is
3 basically a description of how the cultural resources
4 process was undertaken in the Strata case.

5 And if you need to look at that, take a
6 second. I'm not trying to rely on your memory because
7 it's pretty lengthy.

8 And you'd mentioned that there was a staff
9 -- if I understood correctly, there was a staff
10 attempt there or a -- to actually hire a CRM firm
11 under Strata. And I'm sort of wondering where within
12 that discussion how that jives with what you told me,
13 if I understood.

14 MS. DIAZ-TORO: Right. So my
15 understanding is that the Exhibit BRDD -- no, BRD-002
16 -- right? That's the one that you're --

17 JUDGE BOLLWERK: Yes.

18 MS. DIAZ-TORO: -- Your Honor, that you're
19 looking at?

20 JUDGE BOLLWERK: Yes.

21 MS. DIAZ-TORO: That -- my understanding
22 that's an excerpt from the Environmental Impact
23 Statement.

24 JUDGE BOLLWERK: Yes.

25 MS. DIAZ-TORO: Right. So the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 programmatic agreements that I was talking about for
2 Strata was a -- was a step taken -- or an activity I
3 should say, taken after the Environmental Impact
4 Statement was finalized and the license for Strata was
5 issued. So --

6 JUDGE BOLLWERK: Ah, so this is something
7 -- so I know the Strata license has been amended at
8 least once, maybe more. So it was something for a
9 subsequent amendment then?

10 MS. DIAZ-TORO: No. So the -- so I -- I
11 want to caveat that I was not part of the development
12 of the Environmental Impact Statement.

13 JUDGE BOLLWERK: Okay.

14 MS. DIAZ-TORO: I do -- for Strata Ross I
15 was involved with the implementation of the
16 programmatic agreement, but a programmatic agreement
17 in the Strata Ross project was completed to satisfy
18 the need of the National Historic Preservation Act
19 Section 106 process. By the -- by signing that
20 programmatic agreement the NRC staff satisfied its
21 Section 106 obligations, however, that -- in order to
22 continue to remain in compliance the NRC staff had to
23 carry out, implement the actual programmatic
24 agreement, which is the part that I was involved with.

25 JUDGE BOLLWERK: Okay.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MS. DIAZ-TORO: And there were two
2 different contractors, one for the EIS and a different
3 contractor for the programmatic agreement.

4 JUDGE BOLLWERK: Okay. So the staff
5 actually -- to carry out their responsibilities under
6 the programmatic agreement and then hired a CRM firm
7 to do some work for you?

8 MS. DIAZ-TORO: That project has
9 concluded.

10 JUDGE BOLLWERK: Yes.

11 MS. DIAZ-TORO: We procure the services
12 through the process that I explained. The contractor
13 -- and I'm sorry, I -- I forgot the name right now.
14 I can look it up if all want to. They brought in a
15 subcontractor.

16 JUDGE BOLLWERK: Okay.

17 MS. DIAZ-TORO: And that subcontractor was
18 the cultural resource management --

19 JUDGE BOLLWERK: Okay.

20 MS. DIAZ-TORO: -- organization.

21 JUDGE BOLLWERK: So was -- the initial
22 contractor, was that under -- someone you hired under
23 an umbrella agreement or was it --

24 MS. DIAZ-TORO: Yes, it was an indefinite
25 -- IDIQ --

1 JUDGE BOLLWERK: Indefinite requirements?
2 Right. Okay.

3 MS. DIAZ-TORO: -- indefinite
4 delivery/indefinite quantity contract.

5 JUDGE BOLLWERK: Okay.

6 MS. DIAZ-TORO: Yes.

7 JUDGE BOLLWERK: Did you -- was the way
8 the statement of work written, or the request for
9 proposal written; I'm sorry, indicate that the
10 contractor probably needed to bring in a CRM firm?
11 Did you state it -- if you -- to the -- I mean was
12 that their decision to bring in the CRM firm or was
13 that something the staff made clear from what they put
14 out looking for the work to be done?

15 MS. DIAZ-TORO: For the programmatic
16 agreement?

17 JUDGE BOLLWERK: Yes.

18 MS. DIAZ-TORO: It was something that the
19 NRC staff identified.

20 JUDGE BOLLWERK: So you basically told
21 them under the umbrella contract we want you to do the
22 following work and you -- we want you to hire a CRM
23 firm?

24 MS. DIAZ-TORO: We need the expertise of
25 individuals that have the technical capabilities for

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 developing and implementing programmatic agreements,
2 in this case specific to the identification and
3 evaluation of tribal cultural resources.

4 JUDGE BOLLWERK: Okay. And I should -- I
5 guess we maybe -- CRM firms, cultural resource
6 management firms are firms that in the area of
7 archaeology specialize in doing all kinds of survey,
8 excavation, any kind of work that needs to be done in
9 terms of carrying out their -- archaeologists
10 basically go out and survey property for the
11 government or for private entities to make sure that
12 anything is identified that needs to be seen before
13 there's some kind of destruction or problems with the
14 property. Is that correct?

15 MS. DIAZ-TORO: Yes.

16 JUDGE BOLLWERK: Okay.

17 JUDGE FROEHLICH: We got a little ahead of
18 sort of the way I was planning to approach this
19 subject, so let me just back up a little bit and we'll
20 get to questions like this in a moment.

21 How do you determine what agency or
22 contract resources are necessary in any particular
23 case that you manage?

24 MS. DIAZ-TORO: Yes, based on the scope of
25 the -- of the project the -- for example whether it's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 a new license application, whether it's a license
2 renewal, whether it's a license amendment. And then
3 the scope of that specific licensing action, its
4 complexity, what it's requiring, what it's requesting
5 -- I apologize. Not requiring. What it's requesting
6 to be done at the site.

7 Then we would develop -- we would be able
8 to understand what are the staff resources needs in
9 terms of hours as well as whether we need contractor
10 support and the estimates of what that contract --
11 contractor would cost.

12 JUDGE FROEHLICH: So the project manager
13 has to evaluate in a particular case what is necessary
14 to satisfy either NEPA or National Historic
15 Preservation Act and then will look first in house, I
16 guess to -- whether the resources are within the NRC
17 to accomplish that. And if they're not available,
18 they'll draw up a contract or proceed to bring someone
19 as a -- a contractor board to fill in a gap that
20 didn't exist within the staff?

21 MS. DIAZ-TORO: Correct. When it's
22 project-specific. I -- I want to be a little -- I
23 want to clarify a little bit. When I talk about
24 funding and I want to talk about cost, I'm talking
25 about the project-specific. The Federal Government or

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the NRC conducts its, you know, budget formulation in
2 a different manner. So that's a little bit different.

3 JUDGE FROEHLICH: Sorry. Could you repeat
4 that? I missed --

5 MS. DIAZ-TORO: I apologize. So when I'm
6 talking about funding and cost estimates, I'm talking
7 about the specific project at hand. The NRC also
8 conducts its own budget formulation process to
9 identify the -- the budget for each -- for -- per
10 fiscal year. That is done by the Office of the Chief
11 Financial Officer. And those budget formulations are
12 done two years in advance. We use -- you know, we
13 anticipate what might be coming in two years. And
14 that's a little bit different than what I'm -- I'm
15 discussing about here with respect to the -- you know,
16 the -- my estimates for what it would cost the
17 contractor or the hours the NRC staff.

18 JUDGE FROEHLICH: So in your role as
19 project manager you must come up with a budget I guess
20 to satisfy or to answer the questions in the cases
21 that are assigned to you, right?

22 MS. DIAZ-TORO: Yes, I do identify the
23 staff FTE, the contractor needs cost.

24 JUDGE FROEHLICH: All right. And does the
25 cost part of this -- is that something also that the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 project manager sort of determines? I mean, do you
2 have to come up with an initial estimate of amount
3 that would be necessary to answer a specific question
4 or to prepare a response in a particular area?

5 MS. DIAZ-TORO: Yes.

6 JUDGE FROEHLICH: Okay. And in your
7 experience in gathering cultural resources information
8 have you had other cases where you've had to put
9 together a budget to get those answers or resources in
10 cases that you're assigned to or that you lead?

11 MS. DIAZ-TORO: Yes.

12 JUDGE FROEHLICH: Okay. And is that the
13 Strata case that you mentioned, the ISFSI case?

14 MS. DIAZ-TORO: Yes.

15 JUDGE FROEHLICH: Are there any others?

16 MS. DIAZ-TORO: I was involved in the --
17 I wasn't involved throughout the entire, but I was
18 involved in the procurement process for seeking
19 technical expertise on historic and cultural resources
20 for the Crow Butte license renewal. Crow Butte
21 uranium recovery license renewal as well.

22 JUDGE FROEHLICH: How do you create the
23 budget? How do you know I guess how much to budget
24 for the particular types of information that might be
25 missing in a case or that you need to have in a case

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 where you're the project manager?

2 MS. DIAZ-TORO: Yes. So based on -- well,
3 it's based on experience and past contractor also
4 performance, past hours that the NRC has spent on
5 projects of similar -- or scope and complexity. So I
6 do know how much the staff has spent on other
7 projects. I can seek that information. I cannot --
8 I can seek and I can understand how much was spent on
9 different projects if a contractor was -- was used and
10 how much it was -- the contractor spent.

11 JUDGE FROEHLICH: And in this case what
12 information did you gather to put together the budget
13 to satisfy Contention 1A?

14 MS. DIAZ-TORO: So the -- I think there is
15 an exhibit, Board-submitted exhibit. It's the
16 contracted -- the contract-awarded to SC&A. I
17 developed the objectives. I then developed the
18 necessary steps to accomplish that objective. In this
19 case it's -- and I'm -- sorry, if I can read here just
20 to find it quickly.

21 (Pause.)

22 MS. DIAZ-TORO: I think it's BRD-004 that
23 I'm referring to. I'm just looking just to confirm.

24 JUDGE FROEHLICH: Please take your time.

25 (Pause.)

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MS. DIAZ-TORO: Yes, it's the contract
2 awarded to SC&A, title task order, statement of work,
3 technical assistance for the National Environmental
4 Policy Act of 1969, review of historic, cultural and
5 religious resources for the Dewey Burdock project in
6 situ uranium recovery.

7 I identify -- I know the objective, what
8 I want to accomplish or what we need to accomplish.
9 Then I develop the steps necessary to accomplish that.
10 In the case the first step was for the contractor to
11 become familiar with the project and what -- the
12 document and the activities and what has been
13 documented.

14 The second step would have been to develop
15 a literature review report and so on. Develop the --
16 collaborate with the tribes, develop the methodology,
17 implement the methodology, develop the survey report,
18 and then conduct a supplemental analysis to supplement
19 our NEPA record.

20 So I divide the -- I identify the steps
21 necessary and the activities to take. Then I scope
22 out those activities, identify the hours and
23 contractor costs that it would take to accomplish that
24 activity. And then we can identify the -- an estimate
25 of what the contractor cost would be.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE FROEHLICH: And as part of that you
2 looked at other NRC cases that I guess were similar or
3 had similar issues to get a range so that you had an
4 expectation of what the bid should approximately come
5 in at?

6 MS. DIAZ-TORO: Yes.

7 JUDGE FROEHLICH: Do you -- I'm sorry?

8 MS. DIAZ-TORO: Well, I'm sorry. I
9 apologize. I want to clarify. So along with my
10 request for procurement I do have to develop an
11 independent government cost estimate. And so that is
12 where I document my -- my estimates.

13 JUDGE BOLLWERK: Part of that you look for
14 comparables, right?

15 MS. DIAZ-TORO: Yes.

16 JUDGE BOLLWERK: So those would be the
17 things that have happened before that may be similar
18 to this and you can use those as examples in your
19 independent cost estimate to say here's what happened
20 before; here's what we expect this time. Is that --

21 MS. DIAZ-TORO: Right, and each case is
22 different, but certainly I -- you know, if there is
23 information that is similar to a project that I'm
24 working on, then you know, it -- past -- previous
25 information is used.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE FROEHLICH: Just so I'm clear on --
2 of the process, now the contract that was let that
3 went to SC&A, SC&A was not the contractor who did the
4 original EIS or the supplement to it, was it?

5 MS. DIAZ-TORO: Correct. It -- they were
6 not.

7 JUDGE FROEHLICH: Okay. Is consideration
8 given to the people who worked on the previous EIS in
9 this case? Do they fit into the contracting process
10 that you described a moment ago?

11 MS. DIAZ-TORO: They did not.

12 JUDGE FROEHLICH: They do not? Okay.

13 JUDGE BOLLWERK: So what -- so I think
14 BRD-005 is this -- if I remember, it's a little
15 misleading given the title, but that's actually the
16 statement of work that you put out, correct, for the
17 particular bids that you were trying to get?

18 MS. DIAZ-TORO: No, it's the --

19 JUDGE BOLLWERK: Or that's actually what
20 was awarded.

21 MS. DIAZ-TORO: -- the award.

22 JUDGE BOLLWERK: That's the award?

23 MS. DIAZ-TORO: Correct.

24 JUDGE BOLLWERK: And you then -- you --
25 but you put bids out to get that award?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MS. DIAZ-TORO: Correct.

2 JUDGE BOLLWERK: And I think what you're
3 saying is that the folks that did the original EIS
4 didn't bid or they didn't get the award?

5 MS. DIAZ-TORO: The contractor that
6 produces EIS was the Center for Nuclear Waste
7 Regulatory Analyses.

8 JUDGE BOLLWERK: Ah, okay. Then they're
9 not under the umbrella contract?

10 MS. DIAZ-TORO: Under the -- under IDIQ,
11 no.

12 JUDGE BOLLWERK: Right. Okay.

13 JUDGE FROEHLICH: Now is it the project
14 manager who decides or chooses the consultant to be
15 hired on any individual case when you get the
16 responses to the request for proposal or the bids that
17 go out?

18 MS. DIAZ-TORO: Yes.

19 JUDGE FROEHLICH: So you -- okay. And
20 it's also the project manager who decides what skill
21 sets or level of experience is necessary for any of
22 the consultants that are hired by the staff?

23 MS. DIAZ-TORO: Yes.

24 JUDGE FROEHLICH: Just so I have a good
25 feel of how the project manager runs these cases, is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 it the project manager who decides when discussions
2 among the parties reach an impasse and that it doesn't
3 pay to go on any further? Is that a decision made by
4 the project manager to the case?

5 MS. DIAZ-TORO: No.

6 JUDGE FROEHLICH: No? Okay. While we're
7 here, how is that decision made?

8 MS. DIAZ-TORO: All -- it -- it depends on
9 the individuals involved. If there is a contractor
10 involved who has the expertise in that area, I -- I do
11 consult with the contractor to understanding --
12 receive their input. Then I evaluate the situation
13 and I discuss it with my management. And then
14 management would make an informed decision.

15 JUDGE FROEHLICH: And management -- does
16 that -- excuse me for --

17 MS. DIAZ-TORO: Yes.

18 JUDGE FROEHLICH: -- does management mean
19 the branch chief? Is that the person who makes the
20 decision or is it somewhere higher up the chain?

21 MS. DIAZ-TORO: It depends on the project
22 and it varies. It's sort of case by case. It could
23 be the -- a branch chief or it could be a division
24 director, or it could be a -- an office director if
25 that --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE FROEHLICH: Okay.

2 MS. DIAZ-TORO: -- was warranted.

3 JUDGE FROEHLICH: Okay.

4 JUDGE BARNETT: So I think the record is
5 clear on this, but let me just make sure that -- so
6 the reason that the staff enters into contracts like
7 what we've marked as BRD-004 is that it gives the
8 staff -- and not only your particular part of the
9 staff, but the staff as a whole access to expertise on
10 a number of companies and they can then use that as
11 they see fit without having to go through a fair --
12 without having to go through separate fair and open
13 competition exercises for each one of the contracts if
14 they want to let, for each one the -- each instance
15 where they need some work done?

16 MS. DIAZ-TORO: That's correct.

17 JUDGE BOLLWERK: And do you know what the
18 ceiling is on that contract, on that --

19 MS. DIAZ-TORO: I do not.

20 JUDGE BOLLWERK: But it's large, I would
21 suspect.

22 MS. DIAZ-TORO: I think so. I don't -- I
23 don't know if it was in the -- I don't know if it's in
24 here, but I don't know, like I really don't.

25 JUDGE BOLLWERK: And again you're not the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 only one drawing against that contract. There are
2 other people about the -- probably people in the -- on
3 the reactor side that draw against it as well?

4 MS. DIAZ-TORO: Yes, it's available to --
5 to all of -- agency-wide.

6 JUDGE BOLLWERK: Right.

7 Judge Barnett needed to leave?

8 JUDGE FROEHLICH: He'll be back
9 momentarily and --

10 (Simultaneous speaking.)

11 JUDGE BOLLWERK: And let me go back for
12 one second.

13 MR. ELLISON: Excuse me. Can I raise an
14 objection on the fact that Mr. Barnett is not here to
15 hear this testimony and evaluate the credibility of
16 the witness?

17 JUDGE BOLLWERK: Okay. Let's stop.

18 MR. ELLISON: Because I would ask for a
19 recess until --

20 JUDGE BOLLWERK: Sure.

21 MR. ELLISON: -- he's available.

22 JUDGE FROEHLICH: All right. Although we
23 were getting close to the lunch hour and I thought
24 we'd push through until noon and then take our
25 break --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. ELLISON: I understand that, sir.

2 JUDGE FROEHLICH: -- at your suggestion
3 we'll take a 10-minute recess now and then sort of
4 delay our lunch some.

5 JUDGE BOLLWERK: Probably a good time for
6 a bathroom break in any event, so --

7 JUDGE FROEHLICH: Ten-minute recess,
8 please.

9 (Whereupon, the above-entitled matter went
10 off the record at 11:41 a.m. and resumed
11 at 11:57 a.m.)

12 JUDGE FROEHLICH: Back on the record.

13 JUDGE BOLLWERK: I hate to plow the same
14 ground again, Ms. Diaz, but when Judge Barnett got up,
15 I made a boo-boo. I should have not asked any
16 questions. Counsel had a very good point, I
17 appreciate you bringing that up.

18 Let's just review really briefly. We had
19 a brief discussion about what the Board has marked as
20 BRD-004, which is the excerpt from the enterprise-wide
21 contract. And that's actually, the IDIQ part of that
22 is indefinite delivery, indefinite quantity. In fact,
23 that says a lot about those sorts of umbrella
24 contracts, doesn't it, in terms of the staff's ability
25 to draw on them across the Agency. Is that true?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Because basically the contract is there
2 for a broad range of services, and any part of the
3 staff, whether it's from the reactor side or on the
4 materials side, can pull from that contract and get
5 the services they need.

6 MS. DIAZ-TORO: Yes, if the technical
7 expertise of those, that those contractors provide
8 meets the project needs.

9 JUDGE BOLLWERK: And again, it allows the
10 staff to get the services without having to go through
11 a fair and open competition for each one of those
12 service needs, which as you pointed out, would take
13 some time for each one.

14 MS. DIAZ-TORO: Right. The IDIQs did go
15 through an open, fair bid.

16 JUDGE BOLLWERK: They did, right, so
17 that's why the umbrella is granted. And then the work
18 orders or the request for proposals come under that.

19 MS. DIAZ-TORO: Right.

20 JUDGE BOLLWERK: Let me just ask you one
21 other question about the programmatic agreement for
22 Strata that you mentioned. So my understanding is
23 that the Strata facility is now under the jurisdiction
24 of the state of Wyoming because they're now an
25 Agreement State.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MS. DIAZ-TORO: Yes.

2 JUDGE BOLLWERK: So this was something
3 that the staff did before Wyoming took over
4 responsibility for regulation of Strata as an
5 Agreement State.

6 MS. DIAZ-TORO: Yes.

7 JUDGE BOLLWERK: And it was something you
8 needed to do to complete your responsibilities under
9 the then-NRC license?

10 MS. DIAZ-TORO: Yes, and to continue to
11 comply with our Section 106 obligations.

12 JUDGE BOLLWERK: All right. And so the
13 state of Wyoming had exclusive jurisdiction now for
14 the programmatic agreement for Strata, or does the
15 staff still have some continued responsibility?

16 MS. DIAZ-TORO: No, Wyoming has full
17 responsibility over Strata.

18 JUDGE BOLLWERK: Okay. And what was the
19 particular work that you needed done that you felt the
20 need to use the contract to find a CRM firm?

21 MS. DIAZ-TORO: The work under the
22 programmatic agreement for the Strata Ross included
23 the evaluation of the identified tribal resources to
24 determine eligibility of the sites with respect to the
25 National Register of Historic Places.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 And the next step would have been, well,
2 was to assess the impacts or the effects of the
3 construction operation of the facility on those
4 eligible sites and identify measures for either
5 avoiding or mitigating effects identified.

6 JUDGE BOLLWERK: And how is that different
7 then from what was under the original NEPA statement?

8 MS. DIAZ-TORO: For the Strata Ross EIS?

9 JUDGE BOLLWERK: Yes.

10 MS. DIAZ-TORO: In the Strata Ross EIS,
11 the NRC staff documented all, you know, the identified
12 sites of historic and cultural significance to tribes,
13 as well as archaeological sites. And the NRC staff
14 determined impact ranges, because not all sites had
15 been evaluated for eligibility determinations.

16 Nonetheless, the NRC staff did address
17 impact determinations, which, you know, we provided a
18 range from small to large and identified mitigation
19 measures to the extent possible at that time.

20 JUDGE BOLLWERK: So this was essentially
21 finishing up some unfinished business under the
22 original EIS, if I'm understanding what you're saying.

23 MS. DIAZ-TORO: Under Section 106.

24 JUDGE BOLLWERK: Of the?

25 MS. DIAZ-TORO: Of the Section 106

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 process.

2 JUDGE BOLLWERK: Okay, all right.

3 JUDGE BARNETT: Just getting back to that
4 question again about the hiring of a qualified
5 contractor. And I'm not in any way impugning the
6 qualifications of your contractor, I'm just trying to
7 address the staff's concerns. So I look back on page,
8 this is from the partial initial decision LBP-15-16.

9 You don't have to pull this up
10 specifically, but I notice on page 27 it says, this is
11 following the September 5, 2012 meeting where the
12 staff met with representatives of various tribes. The
13 staff asked the participants from the September 5,
14 2012 meeting in Bismarck, ND to designate a required
15 contractor, a preferred contractor to submit a
16 proposal to conduct the survey on their behalf.

17 So, but your position is that you can't do
18 that now, is that? I'm confused, I guess.

19 MS. DIAZ-TORO: So yes. So back in 2012,
20 the NRC staff was not going to, was not the party or
21 the organization hiring the cultural resource
22 management organization or the contractor in that
23 case. It was the license applicant, Powertech, would
24 be hiring the contractor in, during those discussions.

25 So therefore because Powertech was going

1 to be the organization doing the hiring, they're not,
2 the federal acquisition regulations do not apply to
3 Powertech.

4 Now, in this case, which is, you know,
5 after the initial, this partial initial decision from
6 the Board, the NRC staff is the one hiring the
7 contractor, bringing on board. And therefore the
8 federal acquisition regulations apply. So there are
9 differences between 2012 and now.

10 JUDGE BARNETT: But you don't think there
11 was any way you could have even consider a contractor
12 that the tribe though was qualified?

13 MS. DIAZ-TORO: My understanding is I'm
14 not allowed to consider external input in order to
15 maintain the objectivity and independent nature of the
16 contract, of the procurement process.

17 JUDGE BARNETT: Okay, when you select a
18 contractor, do you have to go by the lowest bid, or do
19 you have some leeway on who you pick?

20 MS. DIAZ-TORO: No, it doesn't have to be
21 the lowest bid. I look at the technical capabilities
22 of the contractor to ensure that it will meet the
23 needs for the project. And I also conduct a cost
24 evaluation.

25 JUDGE BARNETT: What if one of the firms

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that the Tribe suggested were on your list of people
2 that submitted a bid? You could have picked them in
3 that case, correct?

4 MS. DIAZ-TORO: If the evaluation
5 determined that that would have been the organization,
6 yes.

7 JUDGE BARNETT: But in this case you
8 couldn't do that because you didn't know who the Tribe
9 thought was a qualified contractor, is that correct?

10 MS. DIAZ-TORO: I'm sorry, can you repeat
11 that?

12 JUDGE BARNETT: You couldn't do that if
13 you didn't know who the Tribe thought was a qualified
14 contractor to begin with. You couldn't have picked
15 one that they thought was qualified, even had they
16 submitted a bid.

17 MS. DIAZ-TORO: Yes. So the other thing
18 is that I, for this particular contract, the objective
19 was not to, you know, hire someone to substitute for
20 the Tribe's participation and the Tribe's expertise.

21 So it was, I wanted to look for, we wanted
22 to bring someone that had cultural resource
23 methodology experience development and implementation,
24 that had experience in collaboration bringing groups
25 together to the table, experience with tribes,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 collaborating with tribes in order to together develop
2 the methodology and implement the methodology.

3 JUDGE BARNETT: I understand that, you did
4 have to pick someone that was qualified, right.

5 MS. DIAZ-TORO: Correct.

6 JUDGE BARNETT: My question is if the
7 Tribe had picked the one that was qualified that was
8 on your list, if they had told one that, you could
9 have picked that one, right? But you couldn't do that
10 if you don't know who the Tribe thought was qualified.

11 MS. DIAZ-TORO: I think in theory, yes.

12 JUDGE BARNETT: Judge Barnett's question
13 just raised one final thought before I let you off the
14 hook and turn to Mr. Sprangler.

15 JUDGE BOLLWERK: I'm not quite done yet.

16 JUDGE FROEHLICH: All right. In 2012, you
17 had said that because the NRC wasn't doing the hiring,
18 it was Powertech that was doing the hiring, Powertech
19 would negotiate the cost or whatever and select the
20 person to do the work, that's correct?

21 MS. DIAZ-TORO: Yes.

22 JUDGE FROEHLICH: And in subsequent
23 contracts after the issuance of the EIS, the follow-on
24 contracts would come from the umbrella and those
25 people, is that correct?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MS. DIAZ-TORO: Yes.

2 JUDGE FROEHLICH: And when it comes down
3 to it, those expenses that are incurred when you hire
4 the contractor, those are fee-recoverable from
5 Powertech, is that correct?

6 MS. DIAZ-TORO: To resolve the contention?

7 JUDGE FROEHLICH: Yes.

8 MS. DIAZ-TORO: Resolve the contention,
9 yes, they are fee-recoverable.

10 JUDGE FROEHLICH: So in the instance that
11 Judge Barnett was asking about, Powertech did the
12 hiring and paid for it. In the subsequent actions,
13 the staff did the hiring, but through the fee schedule
14 Powertech ultimately paid for it.

15 MS. DIAZ-TORO: Yes.

16 JUDGE BOLLWERK: So just to tie the record
17 together perhaps, maybe, we'll see, so the passage
18 from the LBP that Judge Barnett referenced, can you
19 take a look at Board 13, BRD-013? Is that the
20 contracting, I'm sorry, is that the process you were
21 talking about, where the staff's basically said we'd
22 like you to go out and find somebody that Powertech
23 can hire?

24 And you may need to go down further. Not
25 the email itself but a little further. Right there is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the letter.

2 MS. DIAZ-TORO: (No audible response.)

3 JUDGE BOLLWERK: Can you take a second to
4 look at it?

5 MS. DIAZ-TORO: Oh, I see, okay. No, I do
6 know, I'm sorry, your Honor. One second, here it is,
7 BRD-013, yes. Yes?

8 JUDGE BOLLWERK: So this is kind of one of
9 the things that sort of memorializes that process
10 you're talking about, where the staff said, I guess in
11 your role as trying to get the information, basically
12 someone needs to do this work. And you encouraged the
13 tribes to go out and find somebody that would be
14 acceptable to them and to Powertech.

15 Is that essentially what was going on? I
16 don't want to put words in your mouth, but --

17 MS. DIAZ-TORO: At the time, yes. At the
18 time, yes.

19 JUDGE BOLLWERK: All right, okay. And
20 just to tie again this, so when we talk, we're talking
21 a little about Prairie Island, we staff at that
22 instance was hiring someone to be basically an
23 information compiler for them.

24 MS. DIAZ-TORO: Correct.

25 JUDGE BOLLWERK: So was that what you were

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 looking for her as well in terms of that you wanted
2 someone to compile information for you?

3 MS. DIAZ-TORO: No, not, it's a little bit
4 different.

5 JUDGE BOLLWERK: In what way was it
6 different?

7 MS. DIAZ-TORO: So when we brought in the
8 contractor, we brought in the contractor to facilitate
9 development of the survey methodology and facilitate
10 implementation of the survey methodology. So to
11 collaborate with the Tribe and develop those documents
12 and those processes, which is different than what was
13 done for Prairie Island Indian Community. Prairie
14 Island is the license renewal.

15 JUDGE BOLLWERK: So this was, in this
16 instance you were trying to get someone, you were
17 looking for services that had somewhat of a broader
18 responsibility, if I'm?

19 MS. DIAZ-TORO: Correct.

20 JUDGE BOLLWERK: Or different, maybe I --

21 MS. DIAZ-TORO: Yeah, I would say
22 different.

23 JUDGE BOLLWERK: All right. All right,
24 thank you.

25 MS. DIAZ-TORO: You're welcome.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE FROEHLICH: I'm going to shift the
2 focus now to Mr. Sprangler, give you a break. Tell me
3 a little bit, if you would, about the company SC&A and
4 what kind of work they do and what kind of work they
5 are qualified to do under the umbrella contract that
6 was referred to by Ms. Diaz.

7 MR. SPRANGLER: I will provide as much
8 answer as I can. I'm a recent new addition to SC&A.
9 There, this is a company based out of Maryland that is
10 comprised of associates in all areas of environmental
11 planning, where the experts are not full-time
12 employees of the organization, but we are associates
13 that are contracted as needed for specific projects.

14 I joined SC&A last fall specifically to
15 help with this project. I have known the principal at
16 SC&A for many years, and he called me and says I need
17 your help, can you help me. And I says I will do the
18 best I can.

19 JUDGE FROEHLICH: And you succeeded, I
20 guess, Dr. Nickens at this work?

21 MR. SPRANGLER: That's correct.

22 JUDGE FROEHLICH: All right. What
23 happened to him?

24 MR. SPRANGLER: I can't speak directly.
25 I understand there was some family issues that he was

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 dealing with.

2 JUDGE FROEHLICH: Okay, and in order to
3 substitute your efforts and your background for Dr.
4 Nickens, what actions did the staff have to take to
5 substitute a Mr. Sprangler for Dr. Nickens>?

6 MS. DIAZ-TORO: Yes, Dr. Nickens tendered
7 his resignation for, from SC&A for personal reasons.
8 Just to ensure when we became aware, we are still in
9 a contractual obligation, SC&A's still under
10 contractual obligation, so they needed to identify
11 someone with the same qualifications to meet the
12 project needs.

13 So what they do is that our Acquisitions
14 Office requests SC&A to provide someone with the same
15 or more technical expertise to meet the contractual
16 obligations. They submit basically the CV with the
17 individual's qualifications. The NRC staff reviews
18 that against what we originally intended to seek, and
19 I'm sorry, there's like a --

20 JUDGE FROEHLICH: Yeah.

21 MS. DIAZ-TORO: And we, based on that, we
22 determine whether it's acceptable or not.

23 JUDGE FROEHLICH: and the Project Manager
24 has to approve the substitution.

25 MS. DIAZ-TORO: The Project Manager has to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 approve them, yes.

2 JUDGE FROEHLICH: Okay. In your, on part
3 of your onboarding process, did you have personal
4 interactions with Dr. Nickens, your predecessor on
5 this case and the work that he had done up until the
6 time of his departure?

7 MR. SPRANGLER: I've known Dr. Nickens for
8 close to 30 years, but I did not have communication
9 with him after his departure.

10 JUDGE FROEHLICH: Could you describe a
11 little bit of the experience that you've referenced in
12 NRC-178, that's your vitae, where it refers to the
13 Lakota Oglala Sioux Tribes, I guess work that you had
14 done in the 1990s and early 2000s.

15 MR. SPRANGLER: I'm having a hard time
16 hearing the questions from the judges, there's kind of
17 a dead spot here. Could I have the question --

18 JUDGE FROEHLICH: Let me repeat that.
19 Could you elaborate or explain a little more about the
20 experience that you referenced in NRC-178, page 1 in
21 your vitae, about the work that you had done with the
22 Lakota Oglala Sioux Tribes in the 1990s and 2000s.

23 MR. SPRANGLER: Yes, that was a research
24 project that I was involved with, along with many
25 other researchers, where we were trying to, we were

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 identifying a research problem which was, had to do
2 with storage. Under what conditions will indigenous
3 groups store food resources and then leave them
4 abandoned while they went and hunted, and how those
5 strategies would be effective if people were raiding
6 those food supplies.

7 And so what we did is we looked at
8 ethnohistoric accounts of groups that practice similar
9 lifeways. And we identified several of them here in
10 this region, the Hidatsa, the Mandan, the Arikara, and
11 the Dakota, that did construct subsurface storage
12 features, lined them with bark, and then camouflaged
13 the tops while they went and did their buffalo hunts.

14 And then they would come back to a
15 residential base for the winter, and their domestic
16 food resources would be preserved in those
17 subterranean chambers.

18 That research was reported in several,
19 there were several of us involved in the research, and
20 we all did separate papers. But my portion was
21 reported in *Paradigms and Perspectives*, the 2002
22 version.

23 JUDGE FROEHLICH: And what you just
24 described is the ethnographic research that was
25 conducted with the Tribe?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. SPRANGLER: It involved interviews
2 with the tribal cultural specialists, mostly at the
3 college level.

4 JUDGE FROEHLICH: Tell me a little more
5 about the ethnographic research that was conducted
6 with the Tribe as part of that project.

7 MR. SPRANGLER: It was very
8 straightforward at that time. We wanted to know what
9 types of facilities, and whether there was still a
10 tradition among the cultural groups of storage of food
11 resources and coming back to the same location over
12 and over.

13 So it involved a very -- they were formal
14 telephone interviews with tribal specialists where we
15 had a list of specific questions that we wanted to
16 ask. And most of the questions were open-ended to try
17 to elicit more detail that we might not have thought
18 to ask.

19 And so I spoke with tribal specialists in
20 North Dakota that, for the combined Hidatsa and Mandan
21 peoples, and to an individual in Minnesota at the
22 Minnesota State. I can't remember his name, I'm
23 sorry. And he referred me to the community college
24 here in South Dakota, said I should at least talk to
25 the Lakota and see if they had any traditions. And I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 made that phone call, and they did not have a
2 tradition of storage and returning to the same
3 location.

4 So it, my experience with the Plains
5 groups is more focused towards the sedentary groups
6 that used to practice agriculture to a greater or
7 lesser degree. And that tradition is not found among
8 the Lakota. They were buffalo hunters, first and
9 foremost.

10 JUDGE FROEHLICH: I believe you said in
11 the beginning of your answer that we wanted to know.
12 So were these interviews conducted by, solely by you,
13 or were there others from your firm or the group?

14 MR. SPRANGLER: It was researchers at
15 Brigham Young University.

16 JUDGE FROEHLICH: Say it again, please.

17 MR. SPRANGLER: They were researchers at
18 Brigham Young University.

19 JUDGE FROEHLICH: And they worked for you,
20 with you, what was that connection?

21 MR. SPRANGLER: I worked with them.

22 JUDGE FROEHLICH: You worked with them to
23 gather the information.

24 MR. SPRANGLER: It was their research
25 project, and I was helping them with it at the time.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE FROEHLICH: Okay. And as part of
2 that project, did you interview tribal elders and the
3 tribal historians as part of that research?

4 MR. SPRANGLER: No, I did not.

5 JUDGE FROEHLICH: And the interviews that
6 were conducted, they were all done by telephone, is
7 that?

8 MR. SPRANGLER: Yes, they were.

9 JUDGE FROEHLICH: And were any of those
10 interviews in the native language, Native American
11 languages?

12 MR. SPRANGLER: No, it was not.

13 JUDGE FROEHLICH: In those interviews, did
14 the company that you worked for or did Brigham Young
15 employ a tribal liaison, was there some kind of
16 interface between you and the researchers and the
17 Tribe?

18 MR. SPRANGLER: No. Let me clarify that
19 the research, the interviews that were conducted were
20 to augment archaeological research that was ongoing in
21 Utah with a prehistoric culture called the Fremont
22 culture. And what we were looking for was
23 ethnohistoric analogs to what we were seeing
24 archaeologically.

25 And so the research was not exclusive to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Plains storage strategy. The research was focused on
2 acquiring information that could enhance what we were
3 seeing archaeologically among the prehistoric of the
4 Intermountain West.

5 JUDGE FROEHLICH: You also state in the
6 listing there that you had done work with the Hopi
7 Tribe on resource and travel management plans. How
8 was input received from the tribe in that project for
9 the 106 analysis that you mention in here?

10 MR. SPRANGLER: I work with the Hopi Tribe
11 frequently. Can you, is there a specific project you
12 want details on, or just a general?

13 JUDGE FROEHLICH: Well, you did work, I
14 think, on page 1 of Exhibit 178 said that you had done
15 work with the Hopi Tribe on resource and travel
16 management plans.

17 MR. SPRANGLER: Okay. In the West, most
18 of the lands are out there are public lands managed by
19 the Park Service, BLM, the military, different federal
20 agencies. The government, the federal agencies are
21 required to do management plans for vehicle use of
22 those roads. There are tens of thousands of miles of
23 dirt roads on these public lands.

24 And through the NGO that I managed at that
25 time, we took issue that the federal government said

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 because they were existing dirt roads, that they
2 didn't need to do a 106 on them. And we took issue
3 with that as an NGO.

4 And along with the tribes and conservation
5 groups we challenged that determination and got, and
6 we won in the District Court in Utah on that issue.
7 And that would have been, I don't know, four or five
8 years ago that the BLM is currently implementing the
9 court's order even now.

10 JUDGE FROEHLICH: That same exhibit, NRC-
11 178, refers to information that was collected from
12 Hopi, Ute, the Zuni Tribe, and the Navajo Nation
13 related to the Grand Staircase-Escalante National
14 Monument Project. There, you did baseline inventories
15 and assessments of adverse anthropologic impacts, is
16 that correct?

17 MR. SPRANGLER: That's correct.

18 JUDGE FROEHLICH: What is that? Could you
19 explain what you did or how you did it?

20 MR. SPRANGLER: Well, one of my
21 specialties in my career has been to evaluate to
22 quantify an anthropogenic impact to archaeological
23 sites, anthropogenic meaning anything introduced by a
24 human element, either the humans directly or their
25 livestock or their vehicles. All of those would be

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 considered anthropogenic impacts.

2 And I developed a baseline that's used
3 throughout much of Utah now to actually quantify those
4 and measure them and be able to monitor them through
5 time. And Grand Staircase was one of the first places
6 we implemented it on a large regional scale of 1.9
7 million acres.

8 And so I've been involved with Grand
9 Staircase since 1998, but I became very involved after
10 2006 and am still working with them even today on
11 various projects to identify strategies to avoid
12 impacts to cultural resources.

13 JUDGE FROEHLICH: I guess I need a little
14 bit of help on the archaeological side. The baseline
15 inventories, inventories of what, what is it that you
16 inventory?

17 MR. SPRANGLER: I've very fond of saying
18 that you can't protect what you don't know is there.
19 And a baseline inventory is a process of going into an
20 area where nothing is known about the resources that
21 might be there. And so we identify an area, and based
22 on certain environmental variables, we think that
23 there is probably a lot there, but we haven't ever
24 looked.

25 And so over the last ten years we've done

1 a bunch of these, but three in particular that were
2 being heavily impacted by recreation, by visitation,
3 or by vandalism. And we've focused on those three
4 areas and established the baseline from which managers
5 can now implement strategies to protect the resources.

6 JUDGE FROEHLICH: And to recognize those
7 resources, was this a situation where you had to have
8 input from the Native American tribes that were
9 mentioned in there to sort of point out, tell you,
10 sensitize to what existed in the area?

11 MR. SPRANGLER: It's not required. It's
12 always been my practice to invite tribal members to
13 participate in our inventories. And one of the, one
14 member of the Ute Tribe is a member of my board of
15 directors. He always goes on these projects, and it's
16 always good to have his perspective on what this
17 means.

18 But there are probably between 20 and 30
19 different tribes that claim cultural roots in this
20 area, and it's not real reasonable to have
21 representatives of all 30 tribes come and do a
22 pedestrian survey. And quite frankly, they're not
23 interested in the survey itself, they're interested in
24 what we find, which we do share with them.

25 JUDGE FROEHLICH: Wouldn't the objects or

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 materials be different between, among the tribes?

2 MR. SPRANGLER: Absolutely.

3 JUDGE FROEHLICH: I mean, they don't all
4 have the same thing.

5 MR. SPRANGLER: Each tribe sees different
6 resources.

7 JUDGE FROEHLICH: So the more tribes that
8 you interacted with or that you involved in the
9 project, the greater chance you'd be able to recognize
10 those objects or those features that were important to
11 the individual tribes.

12 MR. SPRANGLER: Yes, that's correct.

13 JUDGE FROEHLICH: You also reference in
14 your vitae the 2014 publication, Devil's Due, A Class
15 III Cultural Resources Inventory in the Devil's Canyon
16 area. What types of cultural resources were studied
17 in that project?

18 MR. SPRANGLER: In the Devil's Canyon
19 project?

20 JUDGE FROEHLICH: Yes.

21 MR. SPRANGLER: The Devil's Canyon project
22 involved some very large and impressive pre-Columbian
23 architectural sites located on pinnacles and the tops
24 of cliffs with dropoffs of a hundred feet to the
25 valley floor. It was pretty impressive.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 We documented I want to say around 50
2 unknown architectural sites in that area, and just
3 last year we got most of those all nominated to the
4 National Register of Historic Places.

5 So with my research, we go in and we do
6 the documentation of the resource that's there, then
7 we evaluate it as to its significance in the overall
8 cultural history of that area, and then we nominate it
9 to the National Register. We do have a, in that
10 particular area we do have an agreement in place, it's
11 called the multiple property listing, in which new
12 sites can be added to an existing nomination. So it's
13 a much easier process.

14 JUDGE FROEHLICH: Were any Native American
15 cultural resources inventoried as part of that
16 project?

17 MR. SPRANGLER: These were all prehistoric
18 Native American resources.

19 JUDGE FROEHLICH: Prehistoric. And does
20 that mean that they're not tribe-specific or how does
21 that play in?

22 MR. SPRANGLER: Again, the Ute Tribe of
23 northeastern Utah and the Hopi Tribe of Arizona both
24 claim a cultural heritage to this area. The research
25 that's been done to date is equivocal as to who has a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 cultural claim to it. I'm trying to be sensitive in
2 how I say.

3 We don't know who the modern descendants
4 of these prehistoric people were. The DNA that's been
5 done is inconclusive, and we have two groups that
6 speak different languages and have completely
7 different world views both claiming affinity to the
8 same area.

9 And so when we do a project in these
10 areas, we don't make the judgment as whether it's
11 ancestral Ute or ancestral Hopi. We present it to
12 them and say this is what we found, this is what we
13 observed.

14 JUDGE FROEHLICH: Well then, how is the
15 information obtained? Is it through interviews with
16 existing members of the tribe, is it through a
17 pedestrian survey? What techniques do you use to
18 gather the information in that project?

19 MR. SPRANGLER: This information's
20 gathered through a archaeological survey. The survey
21 methodologies are informed by our previous experience
22 in the same area, as well as input from tribal members
23 who participate. Because they are prehistoric
24 resources, there, we have yet to find any Native
25 American informant that can speak to a specific site

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 on the landscape, because these sites typically date
2 to around a thousand years ago.

3 And one of the maybe -- sorry, I caught it
4 with my hands, I'm very sorry. One of the things that
5 is specific to the documentations that we did in
6 Devil's Canyon and elsewhere in that same drainage is
7 we are documenting what's visible, and it's very
8 obviously visible what we're documenting.

9 The rock art on the canyon walls. There's
10 more rock art in this area than anywhere else in North
11 America. There's these big stone structures on the
12 cliff tops that are impossible to miss. You know,
13 stone cairns that are three meters high.

14 All of these things are visible, and we
15 can document, photograph, sketch them in such a way
16 that it's, you know, it's documentation based on
17 observation.

18 JUDGE FROEHLICH: Okay, and does that
19 observation have to be informed by the specific tribes
20 or peoples that placed them there, that had a
21 connection with the things that you're surveying?

22 MR. SPRANGLER: No.

23 JUDGE FROEHLICH: And as you did this
24 survey, did you have members of Native American tribes
25 to inform your observations? Or did that come slowly

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 through other research or a literature search?

2 MR. SPRANGLER: I can't say that 100% of
3 our pedestrian surveys have tribal representation, but
4 most of them had at least one.

5 JUDGE FROEHLICH: Okay, but they all
6 involved a survey of some sort?

7 MR. SPRANGLER: Yes.

8 JUDGE FROEHLICH: And these surveys I
9 guess were conducted by other archaeologists such as
10 yourself?

11 MR. SPRANGLER: With my NGO, we rely
12 heavily on volunteers. We don't have a lot of money
13 in our little budget, and so we solicit the help of
14 archaeologists, either federal archaeologists or
15 private archaeologists to come volunteer their time.
16 And so I'm the project director, I'm responsible for
17 the project as a whole. But each week of the project
18 there may be different professionals that are moving
19 in and out of our volunteer pool.

20 JUDGE FROEHLICH: But is it among your
21 responsibilities to gather the pool of people
22 necessary to conduct the survey?

23 MR. SPRANGLER: Absolutely, and that's one
24 of my strengths is I'm able to talk people into
25 helping me out and contributing their time and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 expertise. And then at the end of the day, it's my
2 responsibility to take all of the information and
3 synthesize it and make sense of it, and then present
4 it to the different entities that are, you know, the
5 federal agencies that are responsible for the.

6 JUDGE FROEHLICH: What other work have you
7 done involving the inventory of Native American
8 cultural resources?

9 MR. SPRANGLER: Wow, about 30 years' worth
10 of inventory work. My graduate work was an inventory
11 of 13, well it was 11 miles, 13 kilometers of
12 unsurveyed, it's not a river by your sense, but we
13 call them rivers out west. It's a little tiny stream,
14 but it was a unsurveyed area in the desert west, water
15 is so rare that you find prehistorically the
16 indigenous groups would settle in close proximity to
17 the water.

18 And so most archaeological research in the
19 past has focused along water sources. But my master's
20 thesis involved a pedestrian survey of 11 miles of
21 this river corridor that had never been surveyed
22 before. And that was, I started that in 1989, and I
23 developed the methodology for it. And that
24 methodology actually won a national award and started
25 me on my career in writing methodologies.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE FROEHLICH: Were Native American
2 tribes involved in that process or what tribes were in
3 that area or?

4 MR. SPRANGLER: No, at that time it was
5 not customary to invite tribes to participate in these
6 type of projects. And in academia, I think it's,
7 there's still a general lack of involving tribes. I
8 think it's getting somewhat better, but it's still
9 lacking.

10 JUDGE FROEHLICH: But those inventories
11 were of Native American cultural resources?

12 MR. SPRANGLER: Yes, they were.

13 JUDGE FROEHLICH: With what other federal
14 agencies have you prepared or participated in tribal
15 cultural resource surveys?

16 MR. SPRANGLER: Army Corps of Engineers,
17 Bureau of Reclamation, Bureau of Land Management,
18 Forest Service, various small projects for the Forest
19 Service. Department of Defense, I've done projects
20 for them.

21 JUDGE FROEHLICH: Okay, and these were all
22 tribal cultural resource surveys.

23 MR. SPRANGLER: Yes, they were, all
24 historic resources.

25 JUDGE FROEHLICH: Okay.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE BOLLWERK: Just a couple questions.
2 In your prefiled, in part of the NRC's prefiled
3 testimony, NRC-176-R at page 3, you indicated you have
4 exhaustive experience in literature reviews,
5 pedestrian surveys and eligibility testing methods,
6 and in limited circumstances data recovery with,
7 meaning I guess excavation.

8 What do you mean by eligibility testing
9 methods?

10 MR. SPRANGLER: There are different
11 processes we use to determine whether a site is
12 eligible for the National Register. And these involve
13 measurements of site integrity. There's a four-prong
14 test that's involved about whether a site is eligible
15 or not. In some instances, we not know if a site is
16 eligible, just based on the surface evidence alone.
17 So we will do testing, which for lack of a better term
18 we call a trowel test.

19 We take a trowel and we scrape the surface
20 down, you know, maybe six, seven centimeters and see
21 if there's any charcoal. The minute there's charcoal
22 we stop and say yes, it's eligible. Because there are
23 subsurface deposits that can contribute important
24 information to our nation's history. And so when you
25 do an eligibility testing, you're scraping to see is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 it just a sterile surface, or is there something
2 below.

3 JUDGE BOLLWERK: So from what you
4 described, I guess you really don't do much excavation
5 then.

6 MR. SPRANGLER: I do not like to do
7 excavation, I don't --

8 JUDGE BOLLWERK: You don't put in units.

9 MR. SPRANGLER: I am fundamentally opposed
10 to excavation. I think we should we leave things the
11 way they are.

12 JUDGE BOLLWERK: Some people say
13 archaeology is a destructive science, so that's --

14 MR. SPRANGLER: It is very destructive,
15 and.

16 JUDGE BOLLWERK: Have you been a principal
17 investigator on any archaeological projects?

18 MR. SPRANGLER: Yes, I've been a principal
19 investigator on archaeological projects since, I want
20 to say 1998. There are probably, just going to guess,
21 maybe 100 projects.

22 JUDGE BOLLWERK: So the survey projects
23 that you talked about, you're the PI, is that the term
24 that's usually used, right?

25 MR. SPRANGLER: Yes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE BOLLWERK: Okay. And have you been
2 the PI on any projects in dealing with excavation?
3 Sounds like you really don't think much of that, so.

4 MR. SPRANGLER: I don't like to excavate,
5 but yes, I have. There's been a couple where sites
6 were going to be lost, either through the sale of
7 public land to private ownership so that they could
8 build things. And I have helped recover data where it
9 was going to be lost.

10 JUDGE BOLLWERK: Basically some kind of
11 rescue archaeology situation?

12 MR. SPRANGLER: It was, exactly.

13 JUDGE BOLLWERK: All right. Have you ever
14 worked for a cultural resources management firm, a CRM
15 firm?

16 MR. SPRANGLER: I'm going to say no. But
17 yes, I have. Back in college, you kind of put
18 yourself, you got food money, you know, working for a
19 week at a time. I don't really consider that full-
20 time employment.

21 JUDGE BOLLWERK: Many young students
22 obviously do that experience, right.

23 MR. SPRANGLER: Yes, as part of job
24 experience.

25 JUDGE BOLLWERK: Okay. A more general

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 question, based on your experience, do you know how
2 CRM firms work generally?

3 MR. SPRANGLER: Yes, I do, I work closely
4 with them.

5 JUDGE BOLLWERK: Mostly with CRM firms?

6 MR. SPRANGLER: Yes.

7 JUDGE BOLLWERK: Okay. Have, one of the
8 terms that's been used is the term cultural resource
9 surveyors and monitoring specialists. And there's I
10 guess certification of some folks that have that
11 title. Have you had any involvement in training folks
12 for those types of certification?

13 MR. SPRANGLER: There's no real
14 certification that you hang on your wall. It's more
15 of a certification or a authorization or recognition
16 by the federal agency that you're qualified to do
17 those kind of things.

18 JUDGE BOLLWERK: And is that something
19 that's generally done with tribal members or non-
20 tribal members? Is it that sort of certification or?

21 MR. SPRANGLER: It depends on the agency
22 and the area. I mean, each region of the country
23 implements these processes different. Usually for
24 monitoring, tribal members are not involved in
25 monitoring. But data recovery, they would be

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 involved.

2 JUDGE BOLLWERK: And again, have you ever
3 trained tribal members to have these certification
4 roles?

5 MR. SPRANGLER: Trained tribal members to
6 be certified? The answer's no. Have I worked with
7 tribal members to teach them how, you know, how to
8 record sites and that kind of thing? Yes, I have.

9 JUDGE BOLLWERK: And how much, how much of
10 that kind of work have you done?

11 MR. SPRANGLER: Well, I for two or three
12 years had a Navajo woman working for me, and so I
13 worked with her closely for two or three years. And
14 then she went off and got a full-time job working for
15 a CRM company.

16 The, our Board member, Rick Japus
17 (phonetic), he started off not knowing anything about
18 archaeology, became fascinated with it. I worked with
19 him starting almost ten years ago. He's now a very
20 competent archaeologist.

21 He has, I don't know if he ever finished
22 his degree, but he was a master's candidate at the
23 University of Utah and actually taught students
24 indigenous perspectives that they should be looking
25 for when they do archaeology. And Mr. Japus is still

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 involved with me on my projects to this day.

2 JUDGE BOLLWERK: Your curriculum vitae,
3 which is Exhibit NRC-178, indicates that you're a
4 professional, a registered professional archaeologist.
5 What does that mean, and how do you obtain such a
6 designation?

7 MR. SPRANGLER: The Register of
8 Professional Archaeologists, based out of Baltimore,
9 MD. It's a sister organization to the Society for
10 American Archaeology, which is the largest
11 archaeological organization in the United States,
12 maybe in the world. The Register is, you sign up for
13 the Register as a professional archaeologist.

14 What it means is you adhere to a code of
15 professional conduct and ethics that's a very high
16 standard that we should all, in our professions,
17 should all try to attain. It's not required to be a
18 professional archaeologist, but they, by being a
19 member of the Register, it says that you are willing
20 to hold yourself to the very highest professional and
21 ethical standards.

22 JUDGE BOLLWERK: So it's a question of
23 standards compliance, it's not any kind of special
24 training or?

25 MR. SPRANGLER: They have training courses

1 during the year, and it's, and they change from year
2 to year as to what courses are being offered. I mean,
3 in the past year the courses have been almost all
4 focused on hiring practice and workplace sexual
5 harassment. So it can really, the training can be
6 anywhere.

7 JUDGE BOLLWERK: I take it there, to
8 maintain your certification of the designation you're
9 required to take courses, is that?

10 MR. SPRANGLER: You're not required to.
11 They're, you pay extra to take them and you can always
12 put them on your vitae and say I've taken this course
13 and whatever. But if you're a large company and
14 you're having personnel problems in a certain, then
15 those classes, you may want your HR person to go take
16 those classes. And as a member of the Register, you
17 can send your people to go do that.

18 JUDGE BOLLWERK: Your curriculum vitae
19 also mentions, I guess, that you're, have, you hold
20 statewide archaeological permits issued by the state
21 of Utah and the US Bureau of Land Management, the BLM.
22 What does that involve?

23 MR. SPRANGLER: The archaeological permits
24 are issued by the Department of Interior as a process
25 of application where you have to demonstrate

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 competence. You have to have a minimum educational
2 requirements and you have to also have adequate
3 research and laboratory analysis facilities.

4 JUDGE BOLLWERK: And are the state and
5 federal requirements similar, different?

6 MR. SPRANGLER: The state requirements are
7 much more lax than the federal requirements.

8 JUDGE BOLLWERK: And once you meet those
9 requirements, what does that give you authorization or
10 opportunity to do?

11 MR. SPRANGLER: It just means you're
12 qualified to do the research. With each research
13 project, you submit a proposal to the federal agencies
14 called a Request for Fieldwork Authorization.

15 And that request includes where it is you
16 want to work, what dates you want to work there,
17 what's the purpose for the project, and you have six
18 months to actually deliver a project. And they want
19 to know your client. You have to submit one of those
20 for each and every project that you do involving
21 public land.

22 JUDGE BOLLWERK: And if you're not
23 certified, I take it they're not going to give you a
24 permit?

25 MR. SPRANGLER: They're not going to give

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 you a permit.

2 JUDGE BOLLWERK: Take your project on or
3 they won't allow you to do the project?

4 MR. SPRANGLER: If you were to do a
5 project without the authorization, you'd be in
6 violation of the Archaeological Resource Protection
7 Act, and they could come after you civilly or
8 criminally.

9 JUDGE BOLLWERK: All right, okay.

10 JUDGE FROEHLICH: Mr. Sprangler, I believe
11 I heard in response to your questions -- to the
12 questions of Judge Bollwerk that you work closely with
13 CRM firms?

14 MR. SPRANGLER: Yes, I do.

15 JUDGE FROEHLICH: Could you put that in
16 context for me? What do you mean by work closely?
17 What do they do, what do you do, and how did that
18 arise?

19 MR. SPRANGLER: Well, CRM firms are in the
20 business of making money, that's what they do with
21 their projects. But they are also very supportive of
22 the nonprofit activities that I do to enhance public
23 education and preservation. And it's very common that
24 they will make regular donations to my nonprofit to
25 further those objectives, which are not prioritized in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 their for-profit business.

2 Currently involved with a project
3 involving Montgomery Archaeological Consultants where
4 they are providing -- it's an educational project with
5 Arizona State, this private company, and myself, my
6 NGO, where we're working together. They, the CRM
7 firm, is providing all the equipment, and my NGO
8 provides volunteers and we'll be doing the write-up,
9 the report, on their behalf. That's just one example.

10 JUDGE FROEHLICH: Just clarify for me,
11 what is it that the CRM firms do vis-a-vis what you or
12 your NGO does?

13 JUDGE FROEHLICH: Our goals are different.
14 With the NGO, we're about preserving the past. We're
15 focused on working with companies to go around
16 cultural resources rather than through it. We
17 sometimes can say things publically that the CRM firms
18 can't because the CRM firms, they work for oil
19 companies, mining companies. In the West it's mostly
20 resource extraction, timber, a little bit of timber
21 left, not much.

22 But they're focused on working for their
23 client, and my NGO is focused on working for cultural
24 resources and their protection. So when I say we work
25 with them, those archaeologists have the same love for

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the resource that we do, and they will assist us with
2 equipment, sometimes they will assign personnel to
3 come help us with a project.

4 We've got a project coming up this winter
5 which will be done through the NGO, but it will be
6 staffed probably 50% by private CRM firms.

7 JUDGE FROEHLICH: I would propose that we
8 take a luncheon break at this point. And I would
9 suggest that we resume at 2:00 p.m., a little over an
10 hour for lunch, if that's satisfactory to the parties.

11 And I think that's all we have for the
12 morning session. We will get to you, witnesses for
13 OST, and I want to set the foundation and the
14 understanding of what the staff has been doing or
15 trying to do over the past four years. So we'll
16 probably pick it up with this side of the room at 2:00
17 p.m. Thank you.

18 (Whereupon, the above-entitled matter
19 went off the record at 12:53 p.m. and
20 resumed at 2:08 p.m.)

21 JUDGE FROEHLICH: We will be on the
22 record. I'll note that Judge Bollwerk is
23 appropriately attired and looking quite dapper.

24 JUDGE BOLLWERK: I got the memo about the
25 dark suitcase, so I figured I'd put that one on.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE FROEHLICH: Let the record so
2 reflect.

3 Judge Barnett, did you want to follow up
4 with staff witnesses before we --

5 JUDGE BARNETT: Yes, I did want to --

6 I said that I wasn't going to forget to
7 put the mic around and then I did forget to put the
8 mic around, sorry about that.

9 I do have some questions for Ms. Diaz-Toro
10 and Mr. Spangler since you all submitted your
11 testimony together originally. So, Mr. Spangler, you
12 testified that the tribal cultural resources survey
13 could not be conducted without the involvement of
14 relevant tribes. And you give -- you cite several
15 examples that involve tribes. Are you aware of other
16 surveys that can't -- that have been conducted without
17 the involvement of tribes?

18 MR. SPANGLER: No, I'm not.

19 JUDGE BARNETT: Okay. And to both of you,
20 you proposed a February 2019 approach. You talk about
21 it's a two-pronged approach, right? One is scientific
22 based on observable things, and the other is based on
23 an observable characteristics that only other tribal
24 members can recognize?

25 MR. SPANGLER: That's correct.

1 JUDGE BARNETT: Is that correct? Okay,
2 Mr. Spangler, what field activities have you done at
3 this site?

4 MR. SPANGLER: At this particular site?

5 JUDGE BARNETT: Yes.

6 MR. SPANGLER: I have not done any field
7 activities. I visited the site, but I've not done any
8 research activities there.

9 JUDGE BARNETT: When you visited the site,
10 were you looking for observable things, or are you
11 just visiting the site?

12 MR. SPANGLER: I was familiarizing myself
13 with the site location.

14 JUDGE BARNETT: So when you talk about
15 needing the tribal participation, but tribal
16 participation wouldn't in terms of the scientific
17 method and the observable things that you could find,
18 you could have done that without the tribes? Is that
19 correct?

20 MR. SPANGLER: Those locations that are
21 visible could be partially documented by a non-Lakota
22 individual that's trained in how to recognize those
23 resources, but they probably wouldn't capture the
24 context, the environmental context beyond those
25 physical remains.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 That would be something that would also
2 require Lakota participation.

3 JUDGE BARNETT: Okay. Now, you talked a
4 little bit about the kind of Western scientific
5 tradition and talked about scientific methods. Do you
6 consider cultural anthropology within the Western
7 scientific tradition?

8 MR. SPANGLER: Most cultural
9 anthropologists have been trained within the context
10 of the Western scientific tradition.

11 JUDGE BARNETT: What about interviews that
12 a cultural anthropologist might do with an indigenous
13 member -- an indigenous person? Would that be within
14 the confines of the Western scientific tradition?

15 MR. SPANGLER: Well, cultural anthropology
16 is fundamentally rooted in working with indigenous
17 peoples. The criticism of cultural anthropology, of
18 course, is that we tend to view indigenous cultures
19 from the prism of our own training and our own
20 Euro-American backgrounds, which is different from the
21 way indigenous people see their own culture and their
22 own background.

23 So they're criticisms with all of the
24 disciplines, but it's all rooted in the perspectives
25 that we have as Euro-Americans and trained in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Western tradition of scientific thought.

2 JUDGE BARNETT: Yes. I agree with that.
3 You're talking about -- this is your two-pronged
4 approach, right?

5 MR. SPANGLER: Exactly.

6 JUDGE BARNETT: Yeah. My question is, is
7 because you couldn't use the second prong, the contact
8 with the tribe, could you not have -- were there not
9 things that you could have done with the first prong,
10 the scientific method without the involvement of the
11 tribe?

12 MR. SPANGLER: To a limited degree, yes,
13 we could. Any resources that are visible on the
14 ground can be described, and that is a form of
15 measurement. But the question is, being a non-Lakota,
16 would we recognize all of the resources on the ground
17 or just a portion of them?

18 Would it be a robust picture of what that
19 location actually is without the input of the Lakota?

20 JUDGE BARNETT: Presumably if you had
21 talked to -- well, in the form of a question, if you
22 had talked to a tribal elder, and they said, yes, when
23 I was a child I heard about this area out at Dewey
24 Burdock, and this is where we -- where the camping --
25 that could have given you some information about where

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 you might go look for some observable evidence. Is
2 that correct?

3 MR. SPANGLER: Our methodology was
4 designed with that very concept in mind -- is that
5 tribal Elders would go out and talk about what they're
6 observing and what they remember. And whether, you
7 know, they have personal recollections or they're
8 inspired, you know, with remembrance of what used to
9 occur there.

10 JUDGE BARNETT: Okay. So would these
11 interviews have had value then other than this
12 pedestrian survey? This pedestrian survey is going to
13 be usually expensive -- unreasonably expensive. But
14 could the interviews with the tribal elders have not
15 contributed something above and beyond -- have given
16 some value using the scientific method?

17 MR. SPANGLER: I'm not sure I understand
18 your question. Could the oral interviews have
19 occurred separate from the pedestrian surveys? Is
20 that the correct question?

21 JUDGE BARNETT: Would have there been
22 information that you could have scientific information
23 that you could have gathered from the oral interviews
24 that did not depend upon actually physically surveying
25 the site with the tribe?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. SPANGLER: Well, the oral interviews
2 would have enhanced or augmented the observations on
3 the ground, where the physical remains that are
4 present there might not have the same context they
5 would have without the oral interview to enhance what
6 is known about that particular location.

7 JUDGE BARNETT: Yeah, but the oral
8 interview could have identified -- directed you to a
9 site that you had not identified previously, correct?
10 And then you could go out there, and maybe you could
11 observe the --

12 MR. SPANGLER: And you bring up a
13 fantastic point because in most instances when we go
14 to look for a TCP, it is the tribal elders that are
15 taking us to show us that location.

16 JUDGE BARNETT: So in that case, again,
17 back -- then that would have not required to try to
18 participate in the pedestrian survey for that --

19 MR. SPANGLER: That's correct.

20 JUDGE BARNETT: Is that correct?

21 Okay.

22 Ms. Diaz-Toro, Mr. White testifies that
23 the staff maintains a kind of a vague position that
24 cultural resources will be subject to quote, small or
25 large impacts.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 And this conclusion -- this is Mr. White's
2 testimony. This conclusion provides for such a broad
3 range is to render the assessment meaningless and that
4 he is accustomed to reviewing and relying on reports
5 that contain detailed specificity as to the impacts
6 and the means to avoid them.

7 So do you agree that when you say there's
8 a range of impacts out there from small to large, is
9 that -- there's a lot of information within that.
10 That encompasses a lot of things, right?

11 MS. DIAZ-TORO: So at the NRC, we use
12 small, moderate, and large to describe the impact
13 significance for the National Environmental Policy
14 Act. And it's in those terms that we use those -- in
15 that context that we use that terminology. So it is
16 appropriate to use small, moderate, and large.

17 We have been -- the NRC has been using it.
18 It's been codified in the regulations.

19 JUDGE BARNETT: So given that you have
20 identified that the impacts range from small to large,
21 if you had done this additional pedestrian survey and
22 had identified other sides, it would not have impacted
23 your NEPA analysis? Is that correct?

24 MS. DIAZ-TORO: The range of impacts from
25 small to large would not have been changed in the EIS.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 We also identify each individual site that has been
2 identified. And also discuss the, you know, direct
3 impact, if it's going to be directly impacted by
4 construction and whether it can be avoided, which is
5 the preferred method of mitigation measure.

6 JUDGE BARNETT: Okay, so I think I
7 understand your answer, but so what you're saying is
8 that it would not have changed your assessment of the
9 impacts at the site, but it could influence your
10 mitigation measures. Did I restate your answer
11 correctly?

12 MS. DIAZ-TORO: Yes, you did.

13 JUDGE BARNETT: Okay. And, also, Dr. Howe
14 made some comments on the Nickens report, that there
15 were some mistakes in there, and, you know, based on
16 -- he had a drawing I think, that Dr. Nickens had
17 incorporated in his thing. And he thought there were
18 some objective mistakes that Dr. Nickens had made.
19 And when you write in a large document like that,
20 there are mistakes. But the point he was making is,
21 if that had been put out for public comment, he could
22 have helped flag that.

23 And so is there no value then -- I know
24 that this evidence is -- the argument you're making
25 this as part of the NEPA record, right? But that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Nickens report is not out for public comment, correct?

2 MS. DIAZ-TORO: The document is publicly
3 available.

4 JUDGE BARNETT: It is publicly available?

5 MS. DIAZ-TORO: Right, it's out for public
6 inspection. The document was one of the first steps
7 in our efforts to supplement the NEPA record. So it
8 was not just the one document to supplement the
9 record. So it was meant to be used along with the
10 results of the pedestrian site survey.

11 All of that information would have been
12 used to supplement the NEPA record. And all of that
13 information would have been put out for public review
14 and comment at that point.

15 JUDGE BARNETT: If you were going to
16 revise the impact statement, you mean? If you're
17 going to --

18 MS. DIAZ-TORO: The environmental -- so
19 the goal -- the effort completely was -- well, the end
20 goal was to supplement the analysis, the historic and
21 cultural analysis in our EIS.

22 JUDGE BARNETT: Correct.

23 MS. DIAZ-TORO: So that supplemental
24 analysis that would have occurred in the future, we
25 would have put that -- all of that out for public

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 review and comment. That public review and comment
2 would encompass the literature review report that Dr.
3 Nickens prepared.

4 Nonetheless, when we did hear from the
5 Oglala Sioux Tribe that they have concerns about the
6 content of the literature review report, we did ask
7 the Oglala Sioux Tribe, you know, to provide us with
8 the information at that point.

9 JUDGE BARNETT: Well, at what point do you
10 decide we have information that needs to go in the
11 EIS, and we have information that doesn't -- that's
12 just going to be on the record. It doesn't need to
13 result in a revised EIS.

14 How do you decide that? I mean, you said
15 that if you'd done the pedestrian survey, you would
16 have put them Nickens reported in the EIS, right? But
17 without the pedestrian report, you're not going to put
18 it in the revised EIS. So how do you decide when you
19 need to revise the EIS and when you don't?

20 MS. DIAZ-TORO: When the information is of
21 new and significant information to supplement the
22 analysis. So, in this case, the information was new
23 information. It's a new document that was put out.
24 It was meant to be coupled with the pedestrian survey
25 and then put out for public review and comment because

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 we didn't -- at that point, the information that we
2 would have expected would have gathered would have
3 been new and significant because we would have
4 gathered either identified new tribal sites of
5 significance to the Oglala Sioux Tribe or no -- or
6 they would have identified significance of known
7 tribal sites already there.

8 So that information would have been placed
9 -- would have been put out for public review and
10 comment per our NEPA process.

11 JUDGE BARNETT: Roughly speaking, how much
12 time would that have taken to revise the EIS? Once
13 you get the EIS revised, how long would it have taken
14 to put that out for public comment and then finalized?
15 Just roughly --

16 MS. DIAZ-TORO: So we would have put out
17 the analysis -- supplemental analysis for I think a
18 45-day public review comment period. Then depending
19 on the number and complexity of the comments, you
20 know, I can give you a range, you know, it could be,
21 you know, between a couple of months, three months,
22 four months, up to six months, probably.

23 JUDGE BARNETT: Okay.

24 MS. DIAZ-TORO: That's on the, you know,
25 more larger-scale type.

1 JUDGE BARNETT: So six months or less?

2 MS. DIAZ-TORO: Three to six months,
3 probably.

4 JUDGE BARNETT: Okay. Thank you.

5 JUDGE FROEHLICH: Okay. I'd like to begin
6 a few questions of Mr. White and your role in
7 testifying today. I'm not clear of the distinctions
8 among the technical staff of the tribe or as a member
9 of the tribe or tribal leadership. Can you elaborate
10 on your role and what you testify to?

11 MR. WHITE: Háu, mitákuyepi. Čhaŋtéwaštewa
12 napé čhiyúzapeló. Kyle White emáčiyapi na Lak?ól čhaže
13 T?ašúnke Waŋblí emáčiyapi.

14 Good afternoon, everybody. I greet you
15 with a warm heart a good handshake. My name is Kyle
16 White. I was the Director for the Oglala Sioux Tribe
17 Natural Resources Regulatory Agency during this time
18 that we're talking about. My role as the Director was
19 to oversee our Cultural Affairs and Historic
20 Preservation Office.

21 And so we had a change in our THPO, and so
22 I had to fill that role during that time. And so
23 having to get myself caught up to speed with what was
24 going on, I had some questions about what was
25 happening as far as the March 2018 approach.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 And so my role was to continue to
2 facilitate the negotiations with NRC staff. There
3 were some issues brought up within the lack of
4 methodology from Dr. Nickens, and also concerning the
5 oral interviews of our elders.

6 I did immediately let them know that we do
7 have a consultation ordinance -- OST Ordinance 11-10,
8 which outlines those procedures for actual government
9 to government meetings.

10 And so my role was to facilitate and come
11 to an initial agreement. And then from there, it
12 would be up to our tribal leadership overall to agree
13 or disagree as to whether or not our proposed
14 methodology was good enough.

15 And the other issue was, of course, with
16 the elder interviews. We did provide them with our
17 research and review board policy that outlines the
18 process for obtaining permission to seek that
19 information.

20 And so my role isn't as a leader, it would
21 be more as a middle management, you know, in that type
22 of role within the tribe.

23 JUDGE FROEHLICH: Mr. White, I wanted to
24 comment and let you know that I assume the first part
25 of your answer was in Lakota?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. WHITE: Yes.

2 JUDGE FROEHLICH: Okay. I want you to
3 know that the Board has made arrangements with the
4 court reporting system to provide a transcription of
5 what you said with people who are able to translate
6 from Lakota and with the correct fonts and language in
7 the transcript.

8 I don't know if you or your counsel want
9 a translation of that in the record. And if you do,
10 I would ask that you or your counsel provide that, and
11 I will have that copied into the record.

12 MR. WHITE: Yes, I think that's a good
13 idea, and I certainly appreciate that.

14 JUDGE FROEHLICH: Mr. Parsons, would you
15 provide for the record the translation of what Mr.
16 White began his answer with?

17 MR. PARSONS: I will do so Your Honor.

18 JUDGE FROEHLICH: Okay, thank you. I'd
19 like follow-up now with that. Okay.

20 So you are currently the Tribal Historic
21 Preservation Officer?

22 MR. WHITE: No, I am the former Director
23 for the Oglala Sioux Natural Resources Regulatory
24 Agency. And I no longer serve in the capacity as a
25 THPO.

1 JUDGE FROEHLICH: Okay. When did the
2 Natural Resources Regulatory Agency come into
3 existence? I don't recall reference to that
4 organization in the hearings that we had in 2014.

5 MR. WHITE: So the Natural Resources
6 Regulatory Agency was established in the mid-80s as an
7 umbrella for all other environmental areas that we
8 deal with. And the Cultural Affairs and Historic
9 Preservation Office was originally established as a
10 separate entity -- as a cabinet office as you would
11 consider it, as part of the Oglala Sioux Tribe.

12 And so, it really wasn't -- there wouldn't
13 be any record of it, the Natural Resource Regulatory
14 Agency because of that. And I believe it was in -- I
15 want to say around 2017 is when our tribal council
16 decided to move the Cultural Affairs Office underneath
17 the Natural Resources Regulatory Agency.

18 JUDGE FROEHLICH: All right. And can you
19 give me an approximation of how large the regulatory
20 agency is? How many members or employees it has and
21 compare that to the size of the Cultural Affairs
22 Office?

23 MR. WHITE: So our agency employs six
24 people. One of those people is our THPO. And so,
25 that office is a one-man office.

1 JUDGE FROEHLICH: And the Cultural Affairs
2 office, how's that? That's a separate unit from --

3 MR. WHITE: Yes, it would be considered
4 like the department or office underneath.

5 JUDGE FROEHLICH: An office under the
6 agency?

7 MR. WHITE: Yes.

8 JUDGE FROEHLICH: And the agency had six
9 employees, and then the Cultural Affairs Office is --

10 MR. WHITE: Is considered --

11 JUDGE FROEHLICH: --some subset of those
12 same six or are there separate employees?--

13 MR. WHITE: Yes, within the six, it can be
14 considered one of the six employees of the Natural
15 Resources Regulatory Agency.

16 JUDGE FROEHLICH: Okay, and the THPO, is
17 it within the NRRA?

18 MR. WHITE: Yes.

19 JUDGE FROEHLICH: Okay. All right. And
20 how does the NRRA interact with the tribal chiefs or
21 the tribal council or the tribal president? What are
22 the lines or dotted lines between them?

23 MR. WHITE: So the NRRA is an IRA function
24 of the Oglala Sioux tribal government. So we have a
25 procedure that we follow where we are underneath a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 standing committee comprised of tribal council
2 representatives, which is the Land and Natural
3 Resources Committee.

4 From there is where we talked and were
5 able to discuss things. And if issues arise from
6 there, then we would ask to move to the council floor
7 to bring those issues about. And so, that's that that
8 side of it.

9 The other side is being able to work with
10 our tribal members, our elders, our people, the common
11 people, grassroots communities are through our
12 Cultural Affairs and Historic Preservation Office.

13 And so, it's through that -- through that
14 office is where we're able to interact quite
15 frequently on a day-to-day basis with our tribal
16 members and governing and overseeing that as an
17 advisor to that office is our Tribal Historic and
18 Preservation Advisory Council, which is composed of,
19 right now, four tribal elders who serve in an official
20 capacity for the tribe.

21 JUDGE FROEHLICH: And the avenue or the
22 route for the staff or its consultant to gather
23 information or to be in touch with the right people
24 moves through the THPO and then into the agency and
25 then within the agency to whomever in the Cultural

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Affairs Office or whatever would have expertise or
2 have that type of knowledge that was sought by the
3 staff or its consultant?

4 MR. WHITE: Yes. So that would be the
5 avenue that the NRC would take would be to work with
6 our THPO. Because we don't have the funds to employ
7 a qualified staff, we have to contract out. And so we
8 have a licensed contractor who does all of our
9 cultural resource surveys within the exterior
10 boundaries of the Pine Ridge Indian Reservation.

11 And so, we do rely on them for their
12 expertise and work. And so, through that
13 relationship, we would be able to, you know, bring
14 meaningful insight into some of the methodologies.
15 And then from there is where it would shift from the
16 grassroots community into IRA government and then up
17 the chain.

18 JUDGE FROEHLICH: Let me see if I
19 understand. So if the staff or a party wanted
20 information, knowledge, the background, they would go
21 through the THPO. And then the THPO would contract or
22 with a TCP firm to gather that information, report
23 back, as opposed to going to the tribal historic
24 preservation officer and having the officer go within
25 the tribe, within the elders, and providing like a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 list of people qualified to respond to the inquiry?
2 Is that is that correct?

3 MR. WHITE: That would be the fundamental
4 basis for it. Of course, everything has to be
5 approved through our advisory council as far as the
6 information, which is detailed within those specific
7 projects.

8 JUDGE FROEHLICH: And then, just so I have
9 this, the contractor that the tribal historic
10 preservation officer or within the tribe would come
11 back to the tribe or would, I mean -- where would the
12 contractor get the individuals' responses to the
13 questions or the inquiries from, let's say, a
14 contractor or the staff?

15 MR. WHITE: So, as far as I know, the
16 people that we work with do employ Lakota people. And
17 so those people then do their internal controls and
18 whatever else it is that they do to go seek additional
19 information. And then that is all approved through
20 our THPO prior to anything being reported.

21 JUDGE FROEHLICH: Okay. Among the
22 regulations within the tribal government and
23 organization are there specific requirements to be the
24 tribe's THPO?

25 MR. WHITE: A minimum qualification for a

1 THPO is to have a Bachelors with Native American
2 studies or Lakota studies. And so those are the
3 qualifications that need to be met.

4 JUDGE FROEHLICH: Are there any additional
5 qualifications other than, let's say, the educational
6 requirement that you just referred to be the tribal
7 THPO?

8 MR. WHITE: No. It's the view of our
9 tribe that we work to employ our own, and to build our
10 people up, whether that's through training or
11 attending various workshops, also continuing education
12 those sorts of things.

13 JUDGE FROEHLICH: Okay. Can I use you to
14 refresh my recollection of the chain of historic
15 preservation -- the tribal historic preservation
16 officers picking up from 2014? 2014 was Mr. Catches
17 Enemy, who was the THPO?

18 MR. WHITE: Yes.

19 JUDGE FROEHLICH: Okay, and then who
20 succeeded him?

21 MR. WHITE: I believe it was Trina Lone
22 Hill.

23 JUDGE FROEHLICH: Trina Lone Hill, okay,
24 got it. And then, she was succeeded by Mr. Yellow
25 Thunder, did I get that right?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. WHITE: You know, I'm not too sure on
2 that. That was before my time. I believe it may have
3 been Yellow Thunder and then Lone Hill. I believe
4 that's how it went.

5 JUDGE FROEHLICH: So you succeeded as Lone
6 Hill?

7 MR. WHITE: Yeah, I came after Ms. Lone
8 Hill for a brief time.

9 JUDGE FROEHLICH: Okay. When LBP-15-16
10 was issued, what was your role within the tribal --
11 either an NRR Agency or within the Cultural Affairs
12 Office or did that miss each other on the timing
13 because you said that was created in 2017?

14 So what was your role in --

15 MR. WHITE: Again, can you show me that
16 document?

17 JUDGE FROEHLICH: It's actually the date
18 is what I was really going for. At the time that the
19 Board's partial initial decision was issued, which had
20 aspects of cultural questions. I was trying to get a
21 feel for what your role was at that point in time.

22 And then from that, I was going to ask,
23 you know, how was the tribe's response or development
24 within --

25 JUDGE BOLLWERK: Let me pull out that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 date. Was that August the 24 or 15? I'm trying to
2 remember the date.

3 JUDGE FROEHLICH: I can pull it up. April
4 30th, 2015.

5 JUDGE BOLLWERK: Right, I had a month with
6 a name, but the wrong one.

7 JUDGE FROEHLICH: Okay. So to refresh, in
8 April 2015, what was your role within, I guess, that
9 the NRR Agency?

10 MR. WHITE: I did not have a role at that
11 time.

12 JUDGE FROEHLICH: Okay. Did not have a
13 role at the agency. Okay. All right.

14 Now have you personally participated or
15 conducted a cultural resources survey or inventory?

16 MR. WHITE: No.

17 JUDGE FROEHLICH: Okay. All right. In
18 your declaration, which is OST-42, you criticize the
19 staff witness Diaz for what you called, her failure to
20 understand cultural distinctions among members of the
21 tribe.

22 And you criticized Mr. Spangler for not
23 being aware of distinctions between tribal members,
24 tribal staff members, and others affiliated with the
25 Lakota culture.

1 And my question would be in going forward
2 with what has come to be called the March 2018
3 approach, would it be the tribe or the tribe's
4 contractor that would be selecting and identifying
5 members to participate in the resource survey?

6 MR. WHITE: Can you repeat that question?

7 JUDGE FROEHLICH: The question is that in
8 the implementation of what's come to be known as the
9 March 2018 approach, it's not the tribe that would
10 select or make members available to identify cultural
11 resources. Is that right?

12 (No audible response.)

13 JUDGE FROEHLICH: That's what you were
14 going -- that's what you contemplated contracting with
15 a CRM firm. Am I understanding how the tribe was
16 going to respond to or implement that March approach
17 -- March 2018 approach?

18 MR. WHITE: So I can't say what it is now,
19 but our approach was that we would have a working
20 input with the contractor to identify people within
21 the tribe.

22 JUDGE FROEHLICH: With your contractor?
23 With your CRM contractor? Okay. All right.

24 JUDGE BOLLWERK: You several times mention
25 a contractor, who is the contractor? Is that a firm,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 or is it an individual?

2 MR. WHITE: Quality Services --

3 JUDGE BOLLWERK: Quality Services.

4 MR. WHITE: -- Incorporated.

5 JUDGE BOLLWERK: And I think your
6 testimony you mentioned, Mr. Rom, have I got the name,
7 right?

8 MR. WHITE: Yes. He's the principal for
9 Quality Services.

10 JUDGE BOLLWERK: And he's the individual
11 you generally -- I mean, he's the principal, and you
12 deal with him and his firm?

13 MR. WHITE: Yes.

14 JUDGE BOLLWERK: You mentioned Trina Lone
15 Hill, who I -- for instance, there's an NRC staff
16 letter, one of the exhibits, NRC-191, that refers to
17 her as the Director of the Cultural Affairs and
18 Historic Preservation Office.

19 MR. WHITE: Yes.

20 JUDGE BOLLWERK: Was that her proper
21 title?

22 MR. WHITE: At that time, it was. Prior
23 to I believe it was is March 2017 when the council
24 moved cultural affairs back underneath the NRRA. That
25 director title was then removed, and then she became

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 an officer.

2 JUDGE BOLLWERK: An officer?

3 And she was also the Tribal Historic
4 Preservation Officer at the time?

5 MR. WHITE: Yes. That's often the case
6 within the tribe. We serve multiple roles due to
7 budget constraints.

8 JUDGE BOLLWERK: And is she still involved
9 with the tribe in terms of cultural affairs, cultural
10 resources?

11 MR. WHITE: No, she's not.

12 JUDGE BOLLWERK: And did that stop in
13 March 2017, or was there another date after that where
14 she --

15 MR. WHITE: I believe it was early 2018.

16 JUDGE BOLLWERK: So I mentioned before in
17 talking with Mr. Spangler about certified or trained
18 cultural resource surveyors or monitoring specialists,
19 is that -- do you have any tribal members that have
20 that training or that certification?

21 MR. WHITE: We do have tribal members who
22 are trained to be cultural monitors. Many of them do
23 work for Quality Services.

24 JUDGE BOLLWERK: Would those have been the
25 sorts of folks that you would probably have planned to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 use on this project if it had gone forward?

2 MR. WHITE: Yes, we would have reached out
3 to them.

4 JUDGE BOLLWERK: When you say reached out
5 to them, would it have been through quality services,
6 or would you reach out to them individually to get
7 them involved?

8 MR. WHITE: I can't say to what that
9 process is now.

10 JUDGE BOLLWERK: Do you know how many you
11 have approximately?

12 MR. WHITE: I can't say. It's been some
13 time since I've been employed for natural resources.

14 JUDGE BOLLWERK: You think it's more than
15 a dozen?

16 MR. WHITE: I would say, yeah, at least
17 that. I know that there were others who were trained
18 through FEMA for some projects that happened within
19 the reservation.

20 JUDGE BOLLWERK: Okay. Hold on one second
21 here.

22 And I may have misunderstood your answer.
23 You said there were qualifications for the Tribal
24 Historic Preservation Officer. It has to have a
25 bachelor's degree in a cultural science. Do they need

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 to be a tribal member as well?

2 MR. WHITE: That is a preference. If the
3 applicants who are applying for the position meet the
4 minimum qualifications, if they aren't -- if any of
5 the applicants aren't tribal members, then they would
6 most likely have opportunity, but we do have Indian
7 preference.

8 JUDGE BOLLWERK: Is the preference then
9 for someone who is a tribal member.

10 MR. WHITE: Yes.

11 JUDGE BOLLWERK: All right. Thank you.

12 JUDGE FROEHLICH: All right, Dr. Morgan,
13 can you -- what are the courses that you teach or have
14 taught that relate to cultural resources?

15 DR. MORGAN: Háŋ, mitákuyepi. Čhaŋtéwašte
16 nape čhiyúzapi. Wačhíŋyaŋpi Wíŋ miyé.

17 I greet you with a good heart and
18 handshake, and they call me The Dependable One.

19 I have taught for over a decade at various
20 institutions of higher ed in the Midwest. And I
21 wouldn't call it the East Coast, but, certainly Ohio's
22 definitely not North Dakota. But I have taught
23 several courses that have elements and pieces of the
24 information that would be included in cultural
25 anthropology and Native American studies, and I have

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 an interdisciplinary Ph.D. in American Indian studies.
2 And that background has both American Indian
3 literature, American history, American Indian history,
4 American Indian women's literature, and anthropology
5 and some sociology.

6 And so I have taught those courses. I've
7 taught at tribal colleges, and I have taught at major
8 institutions of higher ed. And so, yes, I have.

9 JUDGE FROEHLICH: And are students who
10 take the courses that you just enumerated, are they
11 prepared to conduct or participate in TCP studies?

12 DR. MORGAN: The courses that I've taught
13 have -- the only courses that I've taught that would
14 have culturally specific specialized information like
15 this would be in the language courses that I have
16 taught and the culturally-based courses where there's
17 Native students involved where I would be giving out
18 certain aspects of information but certainly not
19 information that is information that you wouldn't --
20 you wouldn't utilize within a classroom.

21 You know, you have to be careful what you
22 teach and what you don't teach from a cultural
23 perspective. And so the -- each class is unique and
24 in each class I've taught certain things. But I have
25 not taught at any institution a specific course on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 traditional cultural properties because that would be
2 inappropriate from a cultural standpoint.

3 So in terms of the teaching experience
4 that I have, I have not taught a course that was a TCP
5 course. I have taught many courses where I've talked
6 about specific cultural things that include
7 information that's culturally specific in almost every
8 class I've taught but not -- the sensitive information
9 is just not something that -- we are taught to not
10 discuss those things. And so it's a very -- it's a
11 very sensitive area and it's something that you have
12 to be careful with.

13 JUDGE FROEHLICH: I was curious as to what
14 role the students of yours could participate in a
15 cultural -- a TCP study.

16 DR. MORGAN: What role would students --

17 JUDGE FROEHLICH: What role would your
18 students be prepared to participate in -- conduct in
19 what capacity after having taken your courses?

20 DR. MORGAN: None, because it was at --
21 these were courses -- when I was teaching at
22 institutions of higher ed these were courses that were
23 based in Native studies, Native literature, English
24 composition -- these sorts of things.

25 These weren't -- there was -- there was no

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 context within which this sensitive information
2 specific to traditional cultural properties that would
3 be included in a discussion other than just to a
4 small degree and, say, and description of He Sapa, the
5 Bear Butte and, you know, the importance to us -- the
6 significance of it to us culturally.

7 And so there would be some information
8 about, okay, the degree to which the Black Hills are
9 sacred to us and within our cosmology, discussing our
10 cultural life ways and our cosmology to students.

11 But it's really -- my teaching experience
12 is really in a different category than the
13 archeological cultural resource management and
14 traditional cultural properties experience and
15 application. I hope that answers your question.

16 JUDGE FROEHLICH: It is, but it leads to
17 another. Have you participated or conducted a TCP
18 study or what is your involvement in TCP studies?

19 DR. MORGAN: Yes, sir. I have
20 participated in many CRM surveys or, specifically,
21 archeological surveys. I have participated in many
22 aspects of traditional cultural properties and survey
23 on Standing Rock, where I am a former tribal
24 archeologist at Standing Rock Sioux tribe. And so
25 yes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE FROEHLICH: And in what role did you
2 participate in these CRM studies? The leader?

3 DR. MORGAN: I've been -- I've
4 participated. I've worked for Kadrmas Lee & Jackson
5 -- KLJ -- Metcalf Archeology, 106 Group. I've worked
6 for several CRM firms. I've been a field tech,
7 primarily -- a tribal liaison at Kadrmas Lee & Jackson
8 and I've got -- yes, I've got the experience that you
9 are asking about in terms of doing archeology and
10 cultural resource management.

11 JUDGE FROEHLICH: And in those roles and
12 in those capacities you were -- you would be sensitive
13 and be addressing articles that are of significance to
14 the Standing Rock tribe?

15 DR. MORGAN: I've never -- I am not --
16 when I've worked for the CRM firms I am working for
17 the CRM firm and I am out on the project, and we have
18 traditional cultural specialists, previously known as
19 tribal monitors, where they work with us directly and
20 so when I've done the CRM work I am working for a CRM
21 company. I am not working for a tribe.

22 When I worked at the tribe, I was doing
23 all of the above and all of the below. I was doing
24 all of it. And so it's -- I really have to separate
25 things out in terms of both the field work experience

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that I have whether or not I am working for a cultural
2 resource management firm versus the position I had at
3 the tribe as the tribal archeologist.

4 JUDGE FROEHLICH: How transferrable are
5 the skills and expertise that you would bring to this
6 either, I guess, as an employee of the -- of the CRM
7 firm from tribe to tribe?

8 DR. MORGAN: Each tribe has their own
9 cultural life ways, their own cosmology. There's some
10 overlap in terms of the physical place such as the
11 Black Hills, where there's been many different tribes
12 that associate cultural affiliation to the location.

13 And so each tribe has their own way of
14 knowing and doing, and you learn from one another and
15 you learn a little bit each time you go out in the
16 field and you're interacting with someone from another
17 tribe.

18 They will discuss their tribal way of
19 knowing and doing with you and so you learn from them.
20 But that's not your way. And so there's really a
21 distinction made between each and every nation in how
22 they conduct their TCP work and I hope that answers
23 your question.

24 JUDGE FROEHLICH: I was really going
25 towards, as a member of the Standing Rock tribe

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 affiliation with that, how helpful is that to, let's
2 say, someone who is contracting for a survey of items
3 that are of significance to, let's say, the Oglalas --
4 the Oglala Sioux tribes.

5 DR. MORGAN: Well, you have to realize
6 that the Oceti Sakowin -- the members of the Oceti
7 Sakowins are --

8 JUDGE FROEHLICH: So Seven?

9 DR. MORGAN: Of the Seven Council Fires,
10 all of the different tribal groups within they do
11 things their own way, especially per their codes --
12 their tribal codes today.

13 But you have that if you call it the
14 history of the tribes and the interactions together
15 and the -- we were all one people at one point.

16 And so you have to look at it as to who
17 are those practitioners out there that have that
18 cultural knowledge that one person from Standing Rock,
19 and I can name a few, have the knowledge of the
20 relationships with their relatives from Oglala or
21 Sicangu or Lower Brule.

22 So yes, individuals who have been raised
23 with that cultural knowledge certainly have that
24 ability to interact with and know and understand what
25 another group -- another member of the Oceti Sakowin

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 -- their cultural life ways -- because some of them
2 are very closely related biologically and interact
3 with their relatives, and yet we always say that we
4 defer to that group of people that that's their --
5 that's their area.

6 And so we always try to pay and give
7 respect to that this -- they would take the lead, if
8 you will. So I know it's a long drawn out answer, but
9 it's a -- it's kind of a -- it's very specific but you
10 have to almost be a member to understand the way that
11 this works and some people have that
12 interconnectedness with their relatives and, yes, can
13 do that.

14 JUDGE FROEHLICH: And you mentioned a
15 firm. I think it was KLJ --

16 DR. MORGAN: Yes, sir.

17 JUDGE FROEHLICH: Is that a respected firm
18 in the area of TCPs?

19 DR. MORGAN: Wow, what a question.

20 (Laughter.)

21 DR. MORGAN: Kadrmas Lee & Jackson has a
22 very sordid history with Indian Nations and I would
23 not want to disparage the work that they do in
24 cultural resource management.

25 Yet, they have had a history that is a

1 difficult one when it comes to interacting with tribal
2 nations and the -- you know, the fact that I've worked
3 for them and I've been on both sides and so I know a
4 lot more than what I feel comfortable with discussing
5 here.

6 Yet, I have to say that yes, their -- they
7 have had their good moments and they've had their bad
8 moments when it comes to dealing with tribes. And so
9 if you -- if you'd repeat your question I'd appreciate
10 it. Kind of caught me off guard.

11 JUDGE FROEHLICH: Let me pull up your
12 vitae and --

13 DR. MORGAN: I can say this, sir. At any
14 given point, all CRM firms have had difficulties with
15 tribes.

16 JUDGE FROEHLICH: Oh.

17 DR. MORGAN: It's a -- it's a unique world
18 and there's been a lot of improvement over the last
19 several years.

20 Yet it is a difficult path that both the
21 CRM firms and the TCP firms and the tribal nations and
22 those individuals, whether they are THPO officers or
23 tribal monitors -- tribal cultural specialists -- and
24 how they have interacted with one another in some of
25 the issues that have come up.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 It's a -- it's a unique -- it's a unique
2 field. It's a unique discipline.

3 JUDGE FROEHLICH: Is that because of the
4 personnel that they hire or the methodologies that
5 they espouse? I mean, what is it that is --

6 DR. MORGAN: I would say both, and I'll
7 say this. Those firms that are engineering firms that
8 are strictly engineering firms that then hire CRM
9 firms and/or -- those -- so there's -- it's a
10 difficult answer to give because engineering firms
11 really don't understand Indians and Indians don't
12 understand them.

13 It's like -- it's a very difficult space
14 in between. Some engineering firms have CRM firms as
15 a part of their company that they've incorporated.
16 They bought out firms such as what KLJ has done with
17 Earthworks, I believe it's called, and it's a
18 difficult -- it's a difficult thing to try to work out
19 these things.

20 I mean, there's such cultural differences
21 and it's really about a lack of respect for tribal
22 nations and their cultural life ways and their
23 cultural world view and their cosmology.

24 And so it's something that -- in my
25 professional opinion it has taken a number of years

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 for firms -- CRM firms, engineering firms, to really
2 start to get it and apparently there's still a long
3 way to go.

4 JUDGE FROEHLICH: The more you explain the
5 more questions it seems to raise, and I apologize.

6 Are you saying that KLJ firm is primarily
7 an engineering firm that does CRM work?

8 DR. MORGAN: Yes.

9 JUDGE FROEHLICH: Okay.

10 DR. MORGAN: They are an engineering firm
11 that has - back in I think it was the late -- it was
12 either -- it might have been the early 2000s. I don't
13 recall. It might have been the late '90s.

14 I don't remember exactly what year it was
15 but KLJ bought out Earthworks and so they bought a
16 small archeology firm, and so some engineering firms
17 have within their companies a segment that is a CRM
18 part of the company. And then many CRM firms are just
19 stand-alone CRM firms. Sometimes it's just an
20 individual and sometimes they have a large staff.

21 JUDGE FROEHLICH: And the quality services
22 organization that Mr. White referred to, is that an
23 example of a sole CRM or is it -- does that have the
24 engineering baggage that you described of the KLJ
25 firm?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 DR. MORGAN: Lance Rom and Quality
2 Services is a -- I would still characterize it as a
3 small firm, certainly not a large firm. They have --
4 and some of these firms are firms that, okay, they
5 hire seasonal work. And so you have junior staff.

6 You have a very - so there's -- Lance Rom
7 was the principal investigator and then he has a few
8 key staff and he may even at some point have had
9 several key staff.

10 But I don't know the exact number of
11 employees that Quality Services has. But I do know
12 that during -- the standard is in the industry and the
13 CRM world and archeology world there's a lot of
14 individuals who are called shovel bums and they are
15 individuals who have the BA in archeology and they go
16 from place to place trying to build their career and
17 doing their work, working for different companies.
18 And so firms will hire on.

19 In the summer time, depending on the
20 number of projects they get, how large these projects
21 are, they will hire a few field techs or several field
22 techs, and the field techs are at the very bottom
23 level.

24 And then just above that is the crew chief
25 and then just above that is sometimes the project

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 manager and then above that is the principal
2 investigator, and then the -- of course, the
3 administrative and CEOs or -- I don't know if I am
4 describing it very well.

5 I think I am. But that's kind of how it
6 works, and it's seasonal and so once the field season
7 is -- it's all dependent upon when the field season
8 opens up and when it closes and they will let them go
9 or lay them off in the late fall when the first snow
10 falls or just prior to that when they know it's about
11 -- the season's going to change.

12 JUDGE FROEHLICH: And in the hierarchy of,
13 I guess, positions within those firms, going from
14 field tech through the principal investigator, how or
15 where do the cultural liaisons fit in with the people
16 with that title?

17 DR. MORGAN: Many companies have no
18 cultural liaison because they are too small. They
19 don't -- it's similar to what Kyle has described in
20 reference to the tribe.

21 There's not -- there's no funds for it.
22 There's no resources to hire a cultural liaison. It's
23 unique and it's something that has developed over the
24 last decade to hire in a cultural liaison or a tribal
25 liaison into a firm.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 And it's the old school archeology versus
2 the new school archeology. Old school archeology,
3 it's a particular kind of in a framework -- in a set
4 way of knowing and doing and the new archeology is is
5 that to incorporate more and more of the cultural
6 knowledge from the tribes, to respect it more, to do
7 more ethnographic work, and in essence that's what I
8 -- and why I was hired at KLJ, to be a tribal liaison
9 and to provide that assistance in the in between --
10 between the CRM and the archeologists and the tribes.

11 JUDGE FROEHLICH: So the middle person,
12 the buffer between the engineering archeological
13 aspects and the tribe? Is that where the cultural
14 liaison fits?

15 I was trying to tie this in to your
16 distinctions before the engineering firms and --

17 DR. MORGAN: Right. The engineers really
18 -- you hardly ever see them. There's really no
19 interaction between them and the CRM folks in the
20 lower levels of the -- a organization.

21 It's really the PMs -- the project
22 managers and the principal investigators that
23 primarily interact with the upper level management, if
24 you will, and the engineering. So they are different
25 areas and they keep themselves in their own little

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 boxes mostly.

2 JUDGE FROEHLICH: And when did you first
3 become aware of the Powertech license application and
4 the proceedings before the NRC?

5 DR. MORGAN: I remember first hearing
6 about it early on when it first was started up and
7 shortly after that actually, and mostly --
8 specifically from Terry Clouthier and Waste'Win Young.

9 Waste'Win Young was the THPO officer at
10 Standing Rock Sioux Tribe for several years -- many
11 years and Mr. Clouthier -- Terry Clouthier, while he
12 was the archeologist at Standing Rock Sioux Tribe, I
13 remember the conversations and more specifically when
14 I was hired as the tribal archeologist having many
15 conversations with Waste'Win Young, who was my
16 supervisor under -- in the THPO office.

17 And when the documents would come in I'd
18 be the one to house them and put them in their proper
19 folder and keep track of all of the documents that
20 were coming in. So I hope that answers your question.

21 JUDGE FROEHLICH: That does, and puts it
22 in perspective. Also leads to my next question. When
23 were you hired or came on board in relation to this
24 case and the Oglala Sioux contention in the Powertech
25 case?

1 DR. MORGAN: I have -- I have not been
2 hired.

3 JUDGE FROEHLICH: You haven't been hired?

4 DR. MORGAN: No. I have my own company,
5 Lakota Consulting, LLC. I do not speak for or on
6 behalf of the Oglala Sioux Tribe. I am giving my
7 expertise as I know it in the field of CRM and
8 traditional cultural properties as I know it.

9 So I am not an employee. I am not under
10 contract.

11 JUDGE FROEHLICH: Thank you.

12 JUDGE BOLLWERK: Just a couple questions.
13 So it looks like you had a lot of field tech work back
14 in 2011, 2013. You were out in the field pretty much
15 all the time, if I have the dates right.

16 DR. MORGAN: Yeah. Yeah.

17 JUDGE BOLLWERK: And more recently you've
18 been a principal investigator on a couple projects?

19 DR. MORGAN: I have never been -- as I've
20 worked for any CRM firm I've never been a principal
21 investigator.

22 JUDGE BOLLWERK: Did I misread your CV
23 maybe? I don't --

24 DR. MORGAN: Under my own company as the
25 owner --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE BOLLWERK: Okay.

2 DR. MORGAN: I would essentially be the
3 principal investigator.

4 JUDGE BOLLWERK: Oh, I see. So --

5 DR. MORGAN: And that was in reference to
6 the work that I've done in South Dakota in Brule
7 County and in Harding County for the Bureau of Land
8 Management.

9 JUDGE BOLLWERK: Okay. So you do not
10 consider yourself a CRM firm. You were a consultant
11 that --

12 DR. MORGAN: I am a -- I am a CRM and TCP
13 consultant.

14 JUDGE BOLLWERK: Okay.

15 DR. MORGAN: I can do both.

16 JUDGE BOLLWERK: Okay. But you don't --
17 for instance, we talked about KLJ, if I got the
18 acronym right, and so they have this sort of range of
19 individuals from the field techs to the PIs on their
20 staff. You don't have any of those folks? You simply
21 --

22 DR. MORGAN: No. It's just me.

23 JUDGE BOLLWERK: It's just you. Okay.
24 And are a professional -- a registered professional
25 archeologist?

1 DR. MORGAN: I am not registered under the
2 RPA. I've considered doing it. I certainly meet the
3 qualifications under the Department of Interior -- the
4 secretary of the interior -- and I've thought about
5 it.

6 I've thought about it, and I should apply.
7 You know, being registered with the RPA is really a
8 prestige thing and being a member of a group. There's
9 a lot of archeologists out there that are not
10 registered with the RPA and, you know, it's -- when I
11 -- when I have thought about it it's really about the
12 costs involved and paying the fee.

13 And so, you know, if I did apply I know
14 that -- I would hope that they would accept me. I do
15 meet the secretary of interior qualifications.

16 JUDGE BOLLWERK: Nothing with SAA is
17 cheap, is it?

18 MR. SPANGLER: Pardon me?

19 JUDGE BOLLWERK: Nothing with SAA is
20 cheap, is it?

21 MR. SPANGLER: No.

22 (Laughter.)

23 DR. MORGAN: I am a member of the SAA. I
24 have presented at the SAA. I've presented at the --
25 at the - I call it AAA. It's not AAA. What the heck

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 is it?

2 Anyway, so I have presented professional
3 papers, both been on panels and professional papers at
4 these professional organizations.

5 JUDGE BOLLWERK: And I take it given what
6 you just described with your -- as your work for the
7 federal government, and we talked -- I talked to Mr.
8 Spangler about this -- are you certified? Do you have
9 permits for doing federal work like he described? Or
10 is that the --

11 DR. MORGAN: Yes. Yes, sir.

12 JUDGE BOLLWERK: Okay.

13 DR. MORGAN: I have a permit under the
14 Bureau of Land Management. I don't have any permits
15 with any other agencies because I've done much work
16 with them as the tribal archeologist of the tribe. I
17 worked with all of the federal agencies.

18 I don't -- except for, like, the oceanic
19 one. I've worked with several of them but I haven't
20 had contracts under my own company. I started --
21 after I left the tribe I started my company in 2017.

22 JUDGE BOLLWERK: And is part of your --
23 the work that you do with your company -- I guess you
24 are the company -- do you -- you mentioned you talked
25 with Judge Froehlich about I guess the academic work.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Do you actually do -- train to certify cultural
2 resource surveyors or monitoring specialists? Is that
3 --

4 DR. MORGAN: I certainly could, and before
5 I left the tribe we had certainly planned it. We had
6 many, many meetings on the process that we would go
7 through to do that. But I left the tribe and so I
8 didn't actually get that opportunity to train
9 individuals in a TCP course to get the monitors
10 qualified to do the work, and there's really two
11 pieces to it.

12 It's the archeology piece and the TCP
13 piece. You have to give both. And so it's -- but I
14 certainly qualified to do that.

15 JUDGE BOLLWERK: When you said the tribe
16 you meant Standing Rock? Do I have the right -- do I
17 have the right --

18 DR. MORGAN: I am sorry?

19 JUDGE BOLLWERK: The tribe you mentioned,
20 is it Standing Rock Sioux?

21 DR. MORGAN: That I work for, yes. I am
22 the former tribal archeologist at Standing Rock Sioux
23 Tribe.

24 JUDGE BOLLWERK: Okay. Have you had any
25 involvement with the Oglala Sioux in terms of training

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 their folks at all?

2 DR. MORGAN: No, I have not.

3 JUDGE BOLLWERK: All right.

4 JUDGE FROEHLICH: All right. Dr. Howe,
5 what is the role or purpose in your testimony today or
6 here in this case?

7 DR. HOWE: Háu, mitákuyepi. Anpétu kiŋ lé
8 mičháŋte etáŋhaŋ wówaglake. My role is to -- deals
9 with the literature review.

10 JUDGE FROEHLICH: Okay. Before I get
11 into, I guess, the question I had for you, I wanted to
12 offer both Dr. Morgan and yourself those words that
13 you uttered in, I assume, Dakota? Yes?

14 Will be transcribed as you uttered them in
15 the record. Should you want a translation of them,
16 which I think the record would benefit from, would you
17 provide that through your counsel?

18 DR. MORGAN: Yes, sir.

19 JUDGE FROEHLICH: Mr. Parsons, is that
20 agreeable?

21 MR. PARSONS: Yes, your Honor. Thank you.

22 JUDGE FROEHLICH: Thank you. All right.

23 The nonprofit that you run, Dr. Howe --
24 the Center for American Indian Research and Native
25 Studies -- that's here in South Dakota?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 DR. HOWE: Yes.

2 JUDGE FROEHLICH: Okay. And what is their
3 charter? What is it that they do? What are its
4 goals?

5 DR. HOWE: Its goals are to raise
6 awareness and knowledge of issues important to
7 American Indians and Indian tribes.

8 JUDGE FROEHLICH: Okay. And have you any
9 background in conducting or participating in TCP
10 studies?

11 DR. HOWE: No.

12 JUDGE FROEHLICH: And your background is
13 not in archeology. It's in architecture and
14 anthropology. Is that correct?

15 DR. HOWE: Yes. It's a degree in
16 architecture and anthropology at University of
17 Michigan and anthropology is a core field there so I
18 did study a lot of archeology.

19 JUDGE FROEHLICH: Oh, you did? Okay. Are
20 you a registered professional archeologist, an RPA?

21 DR. HOWE: No.

22 JUDGE FROEHLICH: No? Okay.

23 (Pause.)

24 JUDGE FROEHLICH: So your testimony in
25 this proceeding is a critique or a review of the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 research materials that have been gathered by Dr.
2 Nickens and Mr. Spangler as part of the literature
3 review phase in this proceeding?

4 DR. HOWE: I believe just what Dr. Nickens
5 had provided.

6 JUDGE FROEHLICH: Okay. All right. And
7 could you give a few examples of the -- of the most
8 glaring defects or your most harsh criticisms of the
9 literature review conducted by Dr. Nickens?

10 DR. HOWE: I think they are spelled out in
11 the -- in that document but I think some just factual
12 errors, I guess, would be one problem.

13 JUDGE FROEHLICH: And from your
14 perspective, there were many factual errors or two or
15 three glaring ones or tell me a little bit about, you
16 know, your professional review of the work that was
17 submitted as an exhibit in this case.

18 DR. HOWE: So yeah, it says factual errors
19 on historical dates and then there's just omissions of
20 core document or core references dealing with Lakota
21 history and culture.

22 JUDGE FROEHLICH: And those documents,
23 they -- they reside in the public domain or are they
24 within the archive of the tribe? Is it things that he
25 overlooked? Please explain your perspective on his

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 research.

2 DR. HOWE: Well, these are core documents.
3 I mean, these are the books by the first
4 anthropologists and ethnologists and people that know
5 Lakota history and culture. These are there. These
6 are the ones that are -- everyone knows and they are
7 absent from the lit review.

8 JUDGE FROEHLICH: All right.

9 JUDGE BARNETT: Can I follow up, Dr.
10 Froehlich?

11 JUDGE FROEHLICH: Sure.

12 JUDGE BARNETT: What were the -- describe
13 a little bit about the race track and the map. You
14 had that in your testimony. Could you briefly just
15 talk about that?

16 DR. HOWE: So that reference is a map.
17 There's this famous map by Amos Bad Heart Bull that he
18 drew and it shows clearly this race track and then
19 these important Lakota sites in and near the race
20 track.

21 And this is -- that was used as an
22 example. I mean, that was used in this lit review,
23 and there's always been an issue from -- at scholars
24 as to where this -- the representation of the map with
25 particular reference to one site, Matho Thipila --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Devil's Tower in English -- and this is within the
2 race track, according to Amos Bad Heart Bull's
3 drawing.

4 And most scholars or all that I know of
5 will say the race track is inside or the Matho Thipila
6 is outside the race track. And this is just the basis
7 that people have used and so they excuse away Amos Bad
8 Heart Bull's map by saying that it's inaccurate or
9 mythological and from -- I think that we know Amos Bad
10 Heart Bull was a very accurate representer of people
11 and of places.

12 So I think the default should be the map
13 is accurate and we then have to figure out where is
14 that race track versus here's where we think the race
15 track is so his map is wrong.

16 JUDGE BARNETT: Okay. Aside from -- well,
17 thank you for that clarification. Aside from the
18 criticism of Dr. Nickens' report, how does that factor
19 into the Dewey Burdock site or where the race track
20 is? Does that -- what relevance does that have to
21 Dewey Burdock?

22 DR. HOWE: As I've seen in lit review they
23 say that the race track is four miles from the Dewey
24 Burdock site and what I think, based on just -- never
25 had the opportunity to do the research.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 But it just looks to me like the Dewey
2 Burdock is directly on the racetrack -- that they
3 misidentified where the race track was in the lit
4 review.

5 JUDGE BARNETT: And so the -- if it was on
6 the race track that means it haven't -- wouldn't be
7 expected to have a higher density of cultural
8 significance -- significant sites? Is that -- is that
9 what it means to be on the race track?

10 DR. HOWE: Well -- well, if it's on the
11 race track then the race track itself is one of these
12 very important sites. So it might not have physical
13 evidence. It's just that it is on that race track.
14 It's not four miles from it.

15 JUDGE BARNETT: Okay. Thank you.

16 JUDGE FROEHLICH: Would a site survey
17 reveal whether the race track or any other artifact
18 were or were not within the area of the space of the
19 Dewey Burdock project?

20 Is that something that when you actually
21 surveyed the area that you could definitively state it
22 is or isn't there?

23 DR. HOWE: No.

24 JUDGE FROEHLICH: No. Okay. Why don't we
25 take a 10-minute break so all can stretch and then we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 will come back and continue?

2 Ten minute, please.

3 (Whereupon, the above-entitled matter
4 went off the record at 3:28 p.m. and
5 resumed at 3:44 p.m.)

6 JUDGE BOLLWERK: All right. I think we
7 are going to change focus slightly here and talk about
8 traditional cultural properties -- TCP, as we have
9 been referring to it -- and to try to get some sense
10 from the parties as how you see that term being
11 defined or applied in the context that we are looking
12 at here with the Oglala Sioux and the survey that
13 might be -- that was being looked at to be done.

14 So let me just do -- read a couple
15 background things. For instance, the staff's SGEIS,
16 which is NRC 008-A at 119 indicates that while the
17 term TCP does not appear in the NEPA and the NHPA --
18 the National Historic Preservation Act -- for its
19 implementing regulations the tribes apply this term to
20 restored properties of religious and cultural
21 significance to Indian tribes that may be affected by
22 an undertaking. The NRC uses the term in this
23 context.

24 And then the NRC staff put in an article
25 by Parker from 1993, NRC 222, on what a traditional

1 cultural property is and that sort of raises the
2 question of how the National Park Service, Bulletin
3 38, TCP definition is associated with the National
4 Historic Preservation Act applies to Native American
5 cultural resources.

6 And then in Dr. LeBeau's dissertation,
7 which is NRC 206 Page 8, he distinguishes between a
8 Lakota TCP and a national register of historic
9 properties, NRHP TCP, at 26 and defines a Lakota TCP
10 as based on understanding how land is used as an
11 integral component of performing cultural significant
12 activities, activities that may place and help us
13 maintain and continue our cultural identity as a
14 distinct group and places Lakota TCPs into three
15 general categories -- prayer places, offering places,
16 and gathering places.

17 And then I'd just make note that in the
18 February 2019 draft culture resources survey
19 methodology, which is NRC 214 and five and six, it
20 provides a description of traditional properties that
21 includes a discussion about traditional cultural
22 landscape, traditional cultural property, traditional
23 cultural property site, traditional cultural
24 knowledge, and traditional cultural significance. So
25 there's a lot of terms being used here.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 And finally, I guess what we'd like to do
2 is to talk with the different parties about how they
3 see TCPs being defined in this context and what the
4 relationship is between, for instance, Bulletin 38 in
5 terms of its use as a tool to evaluate a TCP and what
6 insight the tribal representatives bring in terms of
7 defining a TCP relative to the national historic --
8 the National Historic Properties Registry and the
9 definitions that go with that.

10 It gets very complicated, and so we are
11 hoping to get a little bit of, if we can, help from
12 you all so that we understand exactly what we are
13 talking about in this context, which I think is
14 slightly different than what you would normally do on
15 a site, particularly with historic properties, i.e.,
16 those that came after, in this country anyway,
17 contact.

18 So who would you like to start with? Me
19 or --

20 JUDGE FROEHLICH: Yes.

21 JUDGE BOLLWERK: Okay. Let me turn to the
22 staff first and then we will go to the -- go to the
23 tribe. Any -- either Ms. Diaz or Mr. Spangler,
24 anything you want to say about that? It's a pretty
25 broad question, I recognize. So do the best you can.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. SPANGLER: Let's start with your first
2 one, traditional cultural property, sometimes
3 increasingly referred to in the literature as
4 traditional cultural places.

5 Legally, the term is traditional cultural
6 properties and that term is define legally in Bulletin
7 38, and it's an awkward fit, to be honest, because we
8 are taking federal standards and imposing them on a
9 Native American view of the world.

10 But to qualify as a traditional cultural
11 property under Bulletin 38 the property must be
12 eligible, and to be eligible it must meet with one of
13 the four criteria, which I can go through them with
14 you if you'd like or they are in the record.

15 But the TCP definition is tied
16 specifically to a location or a property referent. It
17 specifically does not apply to intangible values. So
18 if there is a location without a property reference
19 but it's important to Lakotas' sense of who they are
20 as a people but there's no property reference, it
21 wouldn't -- it wouldn't be eligible under Bulletin 38
22 and that's where the disconnect comes in between the
23 way Native Americans look at their traditional
24 cultural properties and the way the federal
25 regulations are set up to actually apply the standard

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 to TCPs.

2 The -- it was Dr. King, the other half of
3 the Parker and King, that wrote separately that it
4 boggles the mind that a federal bureaucrat in
5 Washington, D.C., the keeper of the national register,
6 is sitting in judgment as to what is significant and
7 what is not significant to an indigenous group.

8 It's just craziness that, you know, the
9 Western culture that define these federal regulations
10 would be dictating what is and is not eligible in
11 terms of a TCP. But that is what we have to work
12 with, and there's not a lot of flexibility in the
13 current regulations as to what a TCP is and how it's
14 defined, only that it has to be associated with a
15 location and it has to meet one of the four criteria
16 for National Register eligibility.

17 Now, in recent years there has been a
18 distinct shift in federal thinking about TCPs to
19 encompass what we refer to as a traditional cultural
20 landscape and that is the much broader context.

21 It's not individual site driven like a TCP
22 is. It is the landscape on where these sites are
23 found and the significance of that landscape. And
24 there's been a definite shift among some but not all
25 federal agencies to incorporate landscape planning as

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 part of both NHPA and NEPA.

2 These projects -- these landscape projects
3 -- the ones that we were able to identify in our
4 research are few and far between. But they show some
5 promise and Department of Interior has informal
6 guidance now that recommends the landscape approach
7 early in the process when planning for the specific
8 undertakings -- that you consider the entire cultural
9 landscape as part of your planning process.

10 And so in what we were trying to do with
11 our methodology with the traditional cultural
12 landscape is say this location is important within the
13 context of the broader cultural landscape, which is
14 the Black Hills.

15 The Black Hills is the cultural landscape.
16 The Dewey Burdock project area is a small location
17 within the Black Hills. Those locations with property
18 reference within the project area could be considered
19 TCPs and you have -- within that subcontext you have
20 individual site locations or feature -- in the
21 vernacular of an archeologist, a feature description
22 of specific activities that occurred at each place and
23 that -- and the remnants of those activities.

24 JUDGE BOLLWERK: And the feature is
25 generally considered something that human beings have

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 put on the land or touched the land and done
2 something?

3 MR. SPANGLER: Or modified the land, yes.
4 Yes. Either left something there or modified the land
5 in a manner that it's recognizable -- visually
6 recognizable.

7 JUDGE BOLLWERK: As distinguished from an
8 artifact, which is perhaps a point or something that's
9 -- you find that's on the ground?

10 MR. SPANGLER: It's on the ground. It's
11 -- an artifact is visible and it's documentable.
12 Other examples would be rock alignments or cairns,
13 remnants of structures like sweat lodges, teepee
14 rings. Those kind of things would all be, you know,
15 individual feature locations within the TCP.

16 JUDGE BOLLWERK: Okay. Anything further
17 you want to say on the subject at this point?

18 MR. SPANGLER: I am happy to answer any
19 more questions you have.

20 JUDGE BOLLWERK: Let's return to the tribe
21 and see what -- if Mr. White, Dr. Morgan, Dr. Howe --
22 anyone wants to take a shot at it.

23 DR. MORGAN: Yes, sir. With the -- I can
24 agree with a number of things that Mr. Spangler has
25 stated. The proposed document of the so-called

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 methodology that's been put forth, in it I notice that
2 the reference to traditional cultural survey and then
3 put in parentheses TCP after that which, to me,
4 certainly is a misnomer because a traditional cultural
5 survey is not a TCP.

6 That would be -- you know, the
7 nomenclature is quite cumbersome in some ways. The --
8 I would be in agreement with the way in which the
9 Bulletin 38 really does limit things under the law.
10 However, in terms of a traditional cultural
11 properties, I wouldn't say -- I would pluralize it
12 because when we have this notion of a landscape that
13 within that landscape we have the potential for TCPs,
14 yes, that's true and those landscapes are very
15 important and they are very sacred to us.

16 Within that notion of what would be
17 considered a traditional cultural property --
18 properties -- there's -- it's a very broad thing
19 because there's a number of things, and there's not
20 always agreement on all of this.

21 But there's certain things that would be
22 considered TCPs and there's certain things that
23 wouldn't be considered TCPs. And as the discipline
24 has developed and it's been around for some time now,
25 and yet there's what archeologists say and then

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 there's the practitioners and the people who are --
2 the tribal peoples.

3 And so there's a clear disconnect in a lot
4 of ways. But when we say that we have -- the term --
5 the phrase I would put to it is the marks that are
6 left on the ground that comes from one of our true
7 experts in this area of TCPs -- those marks that are
8 old ones left on the ground and whether they are
9 visible on the surface or if they are subsurface along
10 with the -- along with the points, the artifacts,
11 oftentimes we will say with stone rings -- the teepee
12 rings -- the stone rings, they say, oh, there's no --
13 there's no artifacts associated with it so how do we
14 -- how do we define this? How do we interpret this?

15 Well, we have our interpretations. We
16 have our knowledge -- our traditional cultural
17 knowledge that is associated with whether or not their
18 hembleciya sites, small rings, vision quest sites, or
19 whether they are ceremonial in another aspect.

20 We can tie specific individuals to these
21 sites and locations. And so the nomenclature is kind
22 of cumbersome, as I said, and we have to take a look
23 at each part of it and there is certainly a divide
24 between what the Native nations each interpret these
25 to be versus what the stripped archeological

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 definition that's been -- that's been given.

2 But it's not -- it's not something that we
3 really participated in to a large degree. And the
4 terminology is oftentimes very general and so when we
5 look at Mr. LeBeau's work we have to -- the tribes are
6 very critical of his work, one.

7 But when we look at the three uses that he
8 gives, there's far more than just that. He
9 generalizes too much and so, you know, you have to
10 understand that when it comes to these notions of
11 sacred places and sacred sites, whether they are
12 burials, whether they are ceremonial sites, we have
13 to realize that because of the development of the
14 Western scientific methodologies that the Native
15 peoples have this closed way of we don't want to give
16 out that information.

17 It's not something that we are supposed to
18 give out, and anthropologists and archeologists, from
19 Elsie Clews Parsons forward have really done us wrong
20 in many instances.

21 And so we have to be very careful as
22 Native people and what our elders and what our --
23 those that are the advisory groups that are associated
24 with the THPO offices we have to be very careful with
25 what we -- what we discuss and how we discuss it.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 And so we really haven't been given that
2 opportunity to play a role in the definition or
3 creating the terminology and we really have had to fit
4 inside the box of the disciplines or they've shoved us
5 into those boxes, I should say.

6 And so we have to understand that when we
7 look at the physical world around us and those places
8 where our peoples inhabited, realize that in reference
9 to the Black Hills, certainly outside of the Black
10 Hills, we had encampments both inside and outside of
11 the Black Hills, and especially in those landscapes
12 where it's a nice field -- oh, isn't that a nice place
13 to put a teepee.

14 And we would -- we would do what's called
15 STPs -- shovel test probes -- in the CRM end of
16 things. When there's no ground surface visibility you
17 put in a shovel test. While on our end of things, we
18 don't like testing. We don't like excavation. We
19 want the Earth left alone.

20 We don't want those sacred places to be
21 disturbed any more than they already have been,
22 especially when they are a TCP area or a traditional
23 cultural landscape.

24 And our -- what is now called the
25 traditional ecological knowledge -- the TEKs -- that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 is something that -- these things are being written
2 without us and certainly there's been some movement in
3 some arenas in which that knowledge and that
4 information has been shared and yet we have to be very
5 careful in what we share and how we share it and who
6 we share it with.

7 And so I think that out of that arises
8 both some of the ways in which the scientific
9 disciplines have created and started -- done it on
10 their own without input and then there's now that new
11 archeology that I discussed earlier, that there's been
12 movement where there's been an opening up and more
13 participation based upon those individual CRM firms
14 that are respectful of our ways and have built
15 relationships with us as Native nations.

16 And so there's potential there. But until
17 there's more inclusion and given equal status and
18 expression -- equal expression and value placed in our
19 knowledge -- in the past there's been very few who
20 have in some of these disciplines that have placed
21 significance that is our way of looking at it -- our
22 traditional ways of knowing and doing and our cultural
23 life ways and cosmologies included in on the
24 professional work.

25 I am not saying that there -- it's

1 completely absent of that within the disciplines. But
2 it's been a long road that we have come down to try
3 and find ways to work with outsiders. And that
4 nomenclature has been developed to a large degree
5 without any input from Native nations.

6 JUDGE BOLLWERK: All right. Thank you.

7 She mentioned Dr. LeBeau. Is it all right
8 to talk about that now or do you want to put that off
9 until later?

10 JUDGE FROEHLICH: Seems logical because he
11 had --

12 JUDGE BOLLWERK: All right. And we will
13 come back to you, Mr. Spangler, because I want to give
14 you an opportunity to say what you want. That was --
15 obviously, you said something and I want to hear what
16 -- Dr. Morgan had some things to say.

17 I want to hear what you have to say about
18 what she said. But let me -- let me deal with that
19 one, though. Talk with Dr. Morgan for a second.

20 So I know that Dr. LeBeau's dissertation
21 and the information he provided is somewhat
22 controversial it sounds like, when I heard your
23 statements earlier -- your testimony -- I thought that
24 you were going to say something about perhaps he
25 revealed too much information because you seem

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 concerned that certain things be kept to the -- kept
2 to the tribe.

3 It's yours to hold and to use. But then
4 you said -- but he was -- what he said was too
5 generalized, which made me think, well, are you saying
6 he didn't give enough information.

7 So I am sort of wondering where -- I mean,
8 what is your problem with Dr. LeBeau? I guess that's
9 what I am trying to figure out?

10 DR. MORGAN: Well, I don't -- I don't
11 specifically have a problem with Dr. LeBeau. Realize
12 that his dissertation is -- what year was it? It's a
13 couple decades ago now. It's at least, if not longer.

14 JUDGE BOLLWERK: 2009.

15 DR. MORGAN: Almost.

16 JUDGE BOLLWERK: It's NRC 206 that we are
17 talking about.

18 DR. MORGAN: So how many years is it? A
19 decade. I thought -- I thought it was older than
20 that. Maybe I am just getting older.

21 The issue with Dr. LeBeau's dissertation
22 is that there were many that felt that he should not
23 have put that information out there and there were
24 several that felt that he actually gave out too much
25 information.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 I read the dissertation. It's -- you
2 know, it's too generalized in a lot of ways. But
3 then, you know, I might get some argument from my
4 elders saying, what are you talking about -- we don't
5 want any of that discussed.

6 And this is -- you know, this is our
7 elders and our people saying we can't trust them with
8 that information. And so when he did that he pissed
9 off a lot of people and so, you know, I do not think
10 that Dr. LeBeau's dissertation was the best thing to
11 use as a reference, from my professional opinion, for
12 several reasons.

13 And, you know, it's -- you know, and
14 looking at the document again, going back to the
15 proposed -- supposed methodology you look at, okay,
16 there's just a brief thing on NDDOT.

17 Well, really, the field -- the discipline
18 of those who are doing TCP work is very well
19 developed. It's been very well developed for quite
20 some time now.

21 And so there's this brief description on
22 NDDOT and what they do when there should be a much
23 fuller description because that's where the heart of
24 what's going on on the Northern Plains -- on the Great
25 Plains, the really -- the really good work that's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 being done and the -- in terms of the development of
2 the criteria under the Park Service, the ABCD, many of
3 us will say, well, we can meet all of those
4 requirements, and today there's a development of even
5 a criteria on E that's coming out of NDDOT.

6 And so there's a lot that is missing and
7 to use an older document like Dr. LeBeau's just shows
8 that we haven't done our homework. And so, you know,
9 I am sure Dr. LeBeau is a -- is a good man. I am sure
10 he worked very hard on his dissertation.

11 But his dissertation is lacking, in my
12 professional opinion.

13 JUDGE BOLLWERK: And just for record
14 purposes, NDDOT is the Nebraska Department of
15 Transportation? North Dakota Department of
16 Transportation. Okay.

17 DR. MORGAN: North Dakota Department of
18 Transportation, and the -- specifically, the TCC, the
19 Tribal -- Tribal -- help me out here -- Communicate --
20 no, TCC. What does TCC represent again?

21 Why is it escaping me? The Tribal
22 Communications Committee, and that's a -- that's where
23 the heart of some of the information that in terms of
24 the hard work that's been done over the last -- since
25 it was created and certainly since some of those work

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 back to 1985 and forward with the work that's been
2 done out there on the burial law in North Dakota and
3 the hard work done by different individuals who are
4 really the true experts on TCPs on the Northern
5 Plains.

6 This is where we should have gathered
7 information from. And so there's a lot missing, and
8 to rely specifically just on Dr. LeBeau's dissertation
9 is certainly a mistake, in my professional viewpoint.

10 JUDGE BOLLWERK: And just for record
11 purposes, we have NRC staff 183, which I think may be
12 the document or one of the documents you're referring
13 to. It's North Dakota Department of Transportation
14 Design Manual, revised March 6, 2017.

15 DR. MORGAN: Yes, and I -- and I find that
16 the use of that document and then to only put a small
17 paragraph in when it's talking about the tribal
18 monitors really that document in full -- how they do
19 their work, how they developed their relationships
20 with the agencies and the work that they are doing --
21 it's really federal highways and then NDDOT is
22 contracted.

23 It's been delegated to NDDOT to do a lot
24 of the work. But it's really federal highways. So
25 you've got a major agency that's doing really solid

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 work in the Northern Plains in reference to the
2 identification and when necessary, when there's no
3 other things -- the mitigation when it comes to that.

4 There's really solid work that's being
5 done out there and this discipline of doing work in
6 traditional culture properties is very well defined.
7 And so to say that it's not is just inaccurate, in my
8 professional viewpoint, and that document is a
9 document that other agencies and other states besides
10 North Dakota have looked at and it really should be
11 taken and used at the national level.

12 And so those relationships that are built
13 between tribal nations and THPO offices and the
14 federal agencies in the way -- the work that they've
15 done certainly inform the TCP and the CRM work that's
16 going on out there far better than a document that's
17 an older dissertation that -- it has its values. It
18 certainly, in terms of the terminology and the Lakota
19 language, it's very valuable on very -- on several
20 levels.

21 But it's far too -- and I'll say this and
22 maybe upset some elders that would say, well, what are
23 you saying, Kelly. But I would say we have to define
24 things further. But that's my professional viewpoint
25 and it might not make some happy.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 But we have to, like Mr. Spangler said
2 early on, we really -- in order to -- in order to save
3 something we have to define it and my professional
4 opinion is is that it's our job in both the CRM world
5 and in the TCP world and the THPO world and in the
6 agency world to save as many of these sites as
7 possible because they are finite.

8 They are finite. Once they are gone --
9 and they are a map and they tell a story and they are
10 ours. Those are the marks left on the ground by our
11 relatives, by those who came before us. And so it's
12 very personal. It's not just a professional thing.
13 It's a very -- it's a very sensitive personal thing to
14 us as Lakota people.

15 JUDGE BOLLWERK: Great. Thank you. I
16 appreciate that -- your insight. And one thing I
17 guess -- it seems like you and Dr. -- you and Mr.
18 Spangler are in agreement that less digging is better.
19 I think there's something -- I heard that from both of
20 you that you think it's better to preserve it, to
21 leave it as it is rather than to be messing around,
22 putting in units and doing that sort of thing.

23 Let me turn to --

24 MR. SPANGLER: I do. I do indeed and --

25 JUDGE BOLLWERK: Mr. Spangler, I'll let

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 you respond to what we heard.

2 MR. SPANGLER: Just a couple of
3 clarifications. I agree with most of what Dr. Morgan
4 had to say here, but a couple clarifications. One is
5 I don't believe that we conflated traditional cultural
6 properties with traditional cultural surveys. It's
7 two different concepts.

8 A traditional cultural survey is a means
9 to go out and identify traditional properties, places
10 of significance to the tribe. But it can identify
11 sites of significance to the tribe that may not be a
12 traditional cultural property under the -- under the
13 current definition we have. So I wanted to make sure
14 that that point is clear.

15 MS. BAER: Could I jump in for one moment?
16 I just wanted to clarify there is a typographical
17 error on Page 2 of NRC Exhibit 214.

18 We did say TCPs in parentheses after
19 the phrase tribal cultural surveys but that was purely
20 a typographic error.

21 JUDGE BOLLWERK: Okay. Thank you.

22 MR. SPANGLER: Solved that problem.

23 JUDGE BOLLWERK: Right.

24 MR. SPANGLER: The other point I want to
25 make is regarding Dr. LeBeau. Dr. LeBeau's -- at

1 least one of his intents that he -- that he
2 articulates in his thesis is to try to make Lakota
3 sacred sites understandable to non-Lakota individuals
4 and that's particularly relevant to this hearing and
5 why we are here is because this is a -- this is a NEPA
6 contention and the people that make the NEPA decisions
7 have to be able to understand what that site is and
8 why it's important.

9 And so part of the structuring of our
10 methodology was to create a mechanism whereby NRC
11 decision makers could understand why these sites are
12 important and worthy of protection. And so in using
13 -- LeBeau is the only one that I found in my research
14 that actually offered definitions of what Lakota sites
15 are and it was a hierarchical scheme that was
16 structured in a way that those of us steeped in the
17 Western scientific method could understand the
18 structure.

19 And so by using his definitions, we are
20 able -- and if we were able to elicit the information
21 that we needed, it would have been structured in such
22 a way that a non-Lakota decision maker could
23 understand that information and the importance of it.

24 There was a third point.

25 (Laughter.)

1 MR. SPANGLER: I'll let it go since I
2 can't remember what it is.

3 JUDGE BOLLWERK: All right. If you think
4 about it, we will come back to it. We certainly can
5 do that. Anything further you want to say, Dr.
6 Morgan?

7 DR. MORGAN: Well, yes. Dr. LeBeau's
8 Master's thesis -- dissertation --

9 JUDGE BOLLWERK: Doctoral pieces, I think.
10 Yeah.

11 DR. MORGAN: Doctoral pieces. Certainly
12 is useful and we can say it's useful in several ways.
13 However, it's a document.

14 It's a piece of writing that we can take
15 and look to and -- and look to -- like I said, pull
16 all of that information out of there that's the Lakota
17 language. It's very useful.

18 However, we have living breathing people
19 and experts and traditional cultural properties work.
20 We have companies that do this. We have elders.

21 We have individuals within our tribal
22 peoples and our grassroots peoples, our spiritual
23 practitioners and our THPO offices that are more able
24 to give a fuller context, if you will, than a
25 dissertation that, to me, is quite generalized.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 And, again, I say this -- I mean no
2 disrespect to him as a human being. But the
3 dissertation by Dr. LeBeau is insufficient, in my
4 professional opinion.

5 JUDGE BOLLWERK: All right. Thank you.
6 I appreciate it. Anything further you want to say,
7 Mr. Spangler, on this topic?

8 MR. SPANGLER: No, sir.

9 JUDGE BOLLWERK: All right. Anything from
10 -- turn it back to the other board members?

11 JUDGE FROEHLICH: My only question,
12 NRC-183, which is something called a design manual, a
13 design manual is not the same as a methodology; is it?

14 DR. MORGAN: No.

15 JUDGE FROEHLICH: No. And in the design
16 manual, there is not sort of a guide to putting
17 together a methodology either.

18 DR. MORGAN: No. It's lacking several
19 things, and it's just not -- it's just not a proper
20 methodology.

21 JUDGE FROEHLICH: In order to find a
22 proper methodology, where must one look? I think I'm
23 hearing that LeBeau for various reasons is probably
24 not the best place to look from the perspective of the
25 tribe. Okay. Where then should the staff or an

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 agency or a consultant look to find a methodology that
2 would capture the concerns, and the cultural artifacts
3 as well as the scapes, in order to go forward?

4 DR. MORGAN: You would confer with those
5 who are the experts on traditional cultural properties
6 on the Northern Plains. And there are individuals and
7 there are companies that have this expertise, and you
8 would bring them into the fold and talk with them and
9 contract with them. And that's the one piece that is
10 missing. You look and it says, okay, we're going to
11 pay the per diem and we're going to -- we're going to
12 do those four points, and then, you know, we're going
13 to -- we're going to give an honorarium to the tribe.

14 Well, where is the consultant contract
15 with the experts in the field of traditional cultural
16 properties that are native, that have the ability to
17 inform all sides? They're out there. Why are they
18 not included? Why is that not a piece of it? Why
19 were they not consulted on developing the methodology?
20 Because they are the true experts.

21 JUDGE BARNETT: So it's not the reliance
22 on the LeBeau itself that is your issue. The issue is
23 with the contractor; is that correct?

24 DR. MORGAN: Yes. And LeBeau is more of
25 a -- part of the background research. It's a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 document, and it's something that certainly informs,
2 but it's not -- it's only a small piece. And so I
3 would think that of all of those documents, where is
4 the piece -- of all of the different things that they
5 mention in terms of NDDOT and these companies that can
6 inform, along with the LeBeau dissertation, where is
7 the section on we can have a consultant firm that
8 informs this in a much larger context. It's just
9 lacking, and it's certainly not a methodology.

10 JUDGE BARNETT: Thank you.

11 JUDGE FROEHLICH: Dr. Morgan, you had
12 stated that there's a well-developed body of work on
13 TCPs.

14 DR. MORGAN: Yes.

15 JUDGE FROEHLICH: Okay. And where or what
16 is that body of work? I mean, the methodology I guess
17 that everyone is seeking, okay, is not within the
18 NDDOT manual.

19 DR. MORGAN: No.

20 JUDGE FROEHLICH: Where is it that -- what
21 is it that you refer to when you say there's a well-
22 developed body of law on TCPs that hopefully would
23 include a methodology that the tribe, for example,
24 would deem acceptable?

25 DR. MORGAN: No, I didn't say "body of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 law."

2 JUDGE FROEHLICH: No, no, a well-developed
3 body of work.

4 DR. MORGAN: It can -- yeah, body of work.
5 Yes. And there is a number of locations. With any
6 standard background research that is done, whether
7 it's a literary background research, you would include
8 going to the North Dakota SHPO and looking through
9 their files and looking through their files from their
10 site room. And you have a whole roomful of
11 information along with the cultural heritage forms,
12 which are very controversial, and have been, but
13 they're there.

14 That information is there. It's up at the
15 state SHPO in Bismarck, North Dakota. You have a lot
16 of information right here just around the corner at
17 SARC, at the state South Dakota -- the State
18 Archaeological Research Center. You have information
19 up in Pierre at the state SHPO, in Nebraska, in
20 Montana, in Wyoming.

21 You have the Western History Collection at
22 the University of Oklahoma, which has an immense
23 amount of material from the very period from those
24 elders who have long passed, not just from my mother's
25 generation or my grandmother's generation, but that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 which came just before, those who were interviewed by
2 Walker and others during that time period where they
3 were giving -- taking down those original
4 anthropological studies that were done.

5 There is a lot of information. There is
6 144 boxes in the Western History Collection, and each
7 of these places -- and I just named a few -- there is
8 a lot of places where you can go to. You can go to
9 the museum that has -- that are run by Native people,
10 and there is lots of places you can go to find more
11 literature that will inform much better than the
12 LeBeau dissertation and/or any other document. There
13 is a lot more out there.

14 And the homework was not done properly.
15 The homework to inform this was not done properly. It
16 was just skimmed right off the top, and it's like it
17 should have been much more in-depth. And I don't mean
18 anyone, including Mr. Spangler or Mr. Nickens or
19 anyone, disrespect.

20 I just -- I know that this information is
21 out there. It's also in our living and breathing
22 people, our practitioners and our people who are
23 traditional cultural properties' experts that live and
24 do the work as we speak.

25 JUDGE FROEHLICH: Mr. Spangler.

1 MR. SPANGLER: Yes, I do have a comment.
2 A couple of them, actually. I did remember my earlier
3 point I wanted to make. I think it has been that the
4 February draft methodology has been mischaracterized
5 as relying exclusively on LeBeau, and that's simply
6 not the case.

7 The structure of our methodology relies on
8 the Bureau of Oceanic Energy Management study, which
9 in the documentation is referred to as Ball et al.,
10 which is the --

11 JUDGE FROEHLICH: Exhibit NRC-184?

12 MR. SPANGLER: Yes, that's correct.

13 JUDGE FROEHLICH: Okay.

14 MR. SPANGLER: Which is currently the
15 preferred guidance for the Department of Interior.
16 That particular study outlines the process by which
17 traditional cultural landscapes should be investigated
18 and the steps that federal agencies should go through
19 to -- the recommended steps that agencies should go
20 through to satisfy a tribal cultural survey.

21 And I want to emphasize that the term
22 "tribal cultural survey" has no definition in the
23 federal guidance. It means different things to
24 different tribes, and so the term should be used
25 carefully. But what I did is I used the structure

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that Ball et al. offered us, and in using that
2 structure I added in or merged the LeBeau definitions.

3 So the methodology is not LeBeau's -- it
4 does not reflect LeBeau's methodology. It reflects
5 Ball et al. with LeBeau's definitions added in. So I
6 want to make that point clear.

7 I also want to emphasize that TCP
8 information is, by and large, confidential information
9 that I would not have access to, nor any other
10 contractor, nor the NRC would have access to without
11 specific agreement of the tribes that assigned TCP
12 significance to those. So those documents are not
13 readily available. They are very difficult to obtain.

14 Those are the two points I'd make.

15 JUDGE FROEHLICH: Dr. Morgan, I would like
16 to hear your response. And also, to your evaluation
17 of the Ball document, Exhibit NRC-184, and its
18 discussion of methodologies.

19 DR. MORGAN: Yes. Exhibit 184 is -- it
20 does inform us, and it is quite useful. However, each
21 and every agency does things differently. Each and
22 every agency has their own set of criteria that they
23 use to work with tribes and to do tribal consultation.

24 And so I applaud you on the use of
25 something that certainly can inform a document, but it

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 shouldn't be the centerpiece. That centerpiece should
2 come from those with the expertise, and it's lacking.

3 And in terms of the TCP and the
4 confidentiality of them, yes. And as we well know,
5 there is a reason for that. And as I have somewhat
6 described, probably not too well, but the tribes don't
7 want this information out there to a large degree, yet
8 there is a -- I'll put it to you this way.

9 Those who I know who are the experts in
10 the area say that -- and I would agree with them as a
11 professional -- that there is a need to talk about
12 these things now because the energy industry and other
13 industries are demolishing our sacred sites. And so
14 we have to take some drastic steps to better
15 understand how it is that we protect our sites and
16 protect both the archaeological sites and those which
17 are defined as the traditional cultural properties.

18 JUDGE FROEHLICH: To what extent are there
19 materials at the South Dakota SHPO's office specific
20 or related to -- directly to the area where the Dewey
21 Burdock project is proposed? Because, I mean, this
22 information would be very site-specific and of people,
23 tribes, Native American members, in this area. Do you
24 know if such documentation exists at the South Dakota
25 SHPO?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 DR. MORGAN: Yes. And that is in any
2 archaeological report -- and this is -- this is
3 something that professionals on either side can agree
4 with me or disagree with me on, but my professional
5 opinion is that you go into any SHPO office, into
6 their site room, and you can go on the shelf and you
7 can pull any file and you can open that file and you
8 can find data.

9 And so in North Dakota there has been --
10 I'm going to use North Dakota as a reference. In
11 North Dakota there -- you know, and in all states
12 probably, there is really a huge argument over the
13 revealing of this information or not, and tribes don't
14 want it revealed.

15 Well, archaeologists have been doing a lot
16 of work out there for a number of years. And whether
17 we like it or they like it or not, you go into the
18 general section of any site room and you pull that
19 information, and there is protected information in
20 there. And you have to sign off -- you have to sign
21 on the dotted line saying, "I will not release this
22 confidential information."

23 CRM firms hold a lot of confidential
24 information in their forms, in their files. And they
25 sign on the dotted line with the SHPO saying that they

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 will not disclose this information. And so recently,
2 within the last 10 years, there has been a huge fight
3 in North Dakota over the keeping of those site forms
4 that are the traditional cultural properties aspect,
5 the work that the traditional cultural properties
6 firms, the work that they're doing, where it's going
7 to be kept and that it should be kept out of -- well,
8 out of sight.

9 Well, the North Dakota state SHPO kept it
10 from everyone. Well, if you keep it from everyone,
11 how are you going to know where something is located
12 at? And it's going to get blown through if there is
13 a project that occurs, and no one -- archaeologists or
14 anyone else -- can see that information.

15 And so there was a significant number of
16 meetings that occurred, and that information -- they
17 are called cultural heritage forms -- that information
18 is now readily available to any archaeologist or
19 individual, a biologist, someone who is going to go
20 into the North Dakota state SHPO office, into their
21 file room, and sign on the dotted line saying they are
22 going to hold everything confidential and go in there
23 and you can go straight to the cultural heritage forms
24 and there it is.

25 I will tell you that those cultural

1 heritage forms and what is included in them. How much
2 different is it from the standard archaeological
3 report? Does it have the ethnographic information?
4 No. And it should. But what it has is specific data
5 -- location, GEIS information. And they are not
6 labeling them TCPs. Well, this is a stone circle,
7 used to be called a teepee ring.

8 This is a cairn. Well, what do you think
9 those are? What are they? So that's a whole area
10 where this new archaeology has been developing and
11 needs to be pushed, in my way of looking at it from a
12 professional opinion, both with the CRM firms and with
13 the tribes and with the TCP companies. We have to
14 move in this direction in order to save the sites.

15 What is my job? Why am I in this
16 business? To protect the sites. They are finite.

17 JUDGE FROEHLICH: Could you take your last
18 answer, which referred to the operations in North
19 Dakota, to how things are done in South Dakota?

20 DR. MORGAN: Each state does things very
21 differently, and I don't know -- I would have to
22 check. I don't know that they -- I'm certain they
23 don't collect it the same way that they do in North
24 Dakota. I don't know that there is a special place
25 that they put any of this, or where they keep it. I'm

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 certain they keep it quite confidential and out of --
2 it's probably in a specific area. I don't know. I'd
3 have -- that is an unknown because I have never asked.
4 I have been there. I have seen their site area. It
5 is -- every state does things differently. In
6 Wyoming, you can't -- you can't even do the file
7 searches yourself. They do it for you. That's how
8 protected it is there.

9 But, you know, so it varies. It depends
10 on which state you are going in, what their state law
11 is, and what they -- how they apply the federal laws
12 and how restricted or unrestricted they are in terms
13 of giving access even to the archaeologists.

14 JUDGE FROEHLICH: Do you, Mr. White, Mr.
15 Spangler, have any information or knowledge as to how
16 these materials are held or catalogued in South
17 Dakota?

18 MR. SPANGLER: Only generally, sir. Just
19 generally. The South Dakota SHPO, they have their --
20 like Dr. Morgan says, they have their own standards
21 here, a different site form that is used for
22 documenting sites here. They have no requirements in
23 South Dakota that have -- that I have identified that
24 North Dakota does that requires proactive tribal
25 involvement in surveys.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 The actual curation of the collected
2 information by federal law, under NHPA, it's mandatory
3 that it's kept confidential and accessible only to
4 permitted or qualified researchers.

5 JUDGE FROEHLICH: Mr. White, do you have
6 any insights on how this is handled in South Dakota?

7 MR. WHITE: No.

8 JUDGE FROEHLICH: Dr. Morgan?

9 DR. MORGAN: All of the tribes in South
10 Dakota participate with the North Dakota TCC, the
11 Tribal Consultation Committee. That's what it --
12 that's what -- consultation.

13 And in South Dakota, I do know that Paige
14 Olson at the South Dakota SHPO and others that are
15 working right here at SARC are certainly working
16 towards developing these things. And they are a
17 little -- they have been a little bit slower to move
18 forward as every state and every SHPO does it in their
19 own way.

20 I currently -- I'm working with SARC on a
21 multi-component site form for the state of South
22 Dakota that will be somewhat inclusive of that Section
23 E and the expansion of this notion of including the
24 tribal viewpoint more. So that's -- it's being done,
25 but it's being done in a different vein if you will.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 And so these are all things that across
2 the country in the different states each THPO and each
3 SHPO and the -- they are working towards these things,
4 of developing these things as they build on their
5 relationships together.

6 JUDGE FROEHLICH: I hadn't planned to get
7 to this at this point in time, but since we are
8 discussing, NRC Exhibit 184, the Ball study, Andy,
9 could you throw up page 12, specifically footnote 7,
10 on the screen, please.

11 And I'd like to have the reaction from the
12 staff witnesses to I guess the second half of footnote
13 7, and the I guess suggestion or approach from the
14 Ball study, Exhibit 184, Staff 184.

15 DR. MORGAN: Sir, do you mean the
16 footnote, or do you mean --

17 JUDGE FROEHLICH: The footnote.
18 Footnote 7, the second half, actually beginning with
19 the quotation, "One way to engage." Right. Take it
20 right to the end. Yeah.

21 Okay. To what extent did the staff or its
22 contractor turn to, look at, consider this footnote
23 from NRC-184?

24 MS. DIAZ-TORO: So the -- when looking at
25 the footnote and how it was considered for this case

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 specifically, taking into consideration the
2 limitations in the Atomic Energy Act regarding the NRC
3 hiring an intervenor for their services, that did put
4 a limit on how the NRC hires or would hire the
5 services of the Oglala Sioux Tribe, because of the
6 potential conflict of interest, given in the
7 adjudicatory proceeding that we are right now.

8 Now, nonetheless, the NRC staff, in
9 developing -- in the discussions that led to the March
10 2018 approach, the NRC staff multiple times reached
11 out to the license applicant to -- or the licensee,
12 Powertech, to understand their willingness to provide
13 reimbursement for tribal representatives to
14 participate in the development and the implementation
15 of the survey methodology as well as an honoraria,
16 which the licensee did agree to provide. And that was
17 incorporated into the March 2018 approach.

18 JUDGE FROEHLICH: I think I understand the
19 prohibition that you related about hiring or using
20 what's suggested here in footnote 7 to the tribe. How
21 would that apply to an independent contractor such as
22 KLJ or the Quality Services Group that was mentioned
23 earlier?

24 MS. DIAZ-TORO: So during the -- with
25 respect to KLJ and the discussions and negotiations

1 with the tribe during 2012 to 2013, the NRC staff
2 provided the proposal, the KLJ proposal, to the tribes
3 for consideration. The NRC looked at it, found it
4 reasonable, and provided for it.

5 The Oglala Sioux Tribe provided a written
6 response back rejecting the KLJ proposal. So,
7 therefore, the NRC staff did not move forward with the
8 KLJ proposal.

9 With respect to Mr. Rom's Quality Services
10 Company, we -- I became aware of the company and how
11 it was the tribe's contractor when Dr. Nickens and I
12 came to the -- to South Dakota, to Rapid City, well,
13 to the Pine Ridge Reservation, back in June 2018, and
14 at that point Quality Services was working with the
15 Oglala Sioux Tribe as their contractor, in that
16 capacity.

17 JUDGE FROEHLICH: Were there any other TCP
18 firms that were not under contract with the tribe that
19 were considered or investigated?

20 MS. DIAZ-TORO: During this procurement
21 process, no. During the 2012 discussions with the
22 tribe, it was the KLJ and the Makoche Wowapi Company.

23 JUDGE FROEHLICH: Okay. Mr. Spangler, as
24 part of your contract, I guess with the NRC, had you
25 considered any of these -- any TCP firms, preferably

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 ones that were, let's say, independent of a
2 contractual relationship with the Oglala Sioux?

3 MR. SPANGLER: I would -- if we had been
4 able to reach agreement to move forward, I would have
5 envisioned using specialists, a Lakota specialist, as
6 part of the process of moving forward, but we never
7 made it that far.

8 Have I considered hiring any of their
9 specialists? I can't answer that question. It's kind
10 of a hypothetical. We never got to the point of
11 negotiating at all.

12 JUDGE FROEHLICH: Did not the methodology
13 that I guess the staff was proceeding with envision a
14 site survey and collection of ethnographic data as
15 part of your either proposal or in the contract? Was
16 it considered that there would be a subcontract or a
17 portion or some arrangement made similar to what I see
18 here in footnote 7 with a TCP firm to allow you to
19 satisfy the terms of your contract with the NRC staff?

20 MR. SPANGLER: Right. I was brought on
21 board specifically to address the Board's concern with
22 scientific integrity of the previous methodology, and
23 in structuring the methodology the way that I did was
24 to address that specific concern. The financial
25 components had already been resolved by that point.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 At least the staff was under the impression that the
2 March 18 approach was in place and that all we needed
3 to do -- the only issue left to be resolved was the
4 scientific integrity component.

5 So in terms of the actual budget and who
6 was going to hire whom, we never got to that point.
7 It was so -- I mean, the draft methodology -- the
8 February 2019 draft methodology was rejected before I
9 could even explain it.

10 JUDGE FROEHLICH: I think we'll get to
11 that series of events and that week in history a
12 little bit later. All right.

13 JUDGE BOLLWERK: So I'm sort of interested
14 in this line of analysis. It's clear -- and the staff
15 has said this -- that you have to have the knowledge
16 that the Oglala Sioux have. I mean, that's a premise
17 of the methodology.

18 But I'm now hearing the argument that the
19 staff could not obtain that knowledge directly from
20 the Oglala Sioux because they were an intervenor in
21 this case. Is that true?

22 MS. DIAZ-TORO: No.

23 JUDGE BOLLWERK: No?

24 MS. DIAZ-TORO: No. I'm sorry if I --

25 JUDGE BOLLWERK: I misunderstood? Okay.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MS. DIAZ-TORO: -- if I didn't speak
2 correctly. The methodology and the NRC's discussions
3 and negotiations have been based -- or our efforts
4 have been focused on developing a methodology for a
5 pedestrian site survey that would -- where the
6 information, the knowledge, would come directly from
7 the tribes themselves as they are the experts and the
8 only ones that can provide that information.

9 So all of our -- based on the assertions
10 from the tribe that the only avenue to identify and
11 evaluate and ascribe significance to tribal cultural
12 resources would be a pedestrian on-the-ground survey
13 conducted by tribal personnel.

14 Based on those assertions, the March 2018
15 approach, as well as the proposed methodology,
16 incorporated tribal self-determination/tribal
17 participation, meaning that the tribe themselves would
18 go with us to the site once we have, you know, agreed
19 on the methodology, and then themselves would identify
20 it and would evaluate tribal sites.

21 The methodology provides the process, the
22 framework, and the steps based -- and inform a
23 scientific method. But equally important is the
24 input, the information from the tribe itself, so that
25 we can document the significance of the site and then

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 we can proceed to understand what the impact of the
2 construction and operation of the facility would be
3 based on the significance of the site.

4 Without that information, which comes from
5 the tribe themselves, or my understanding is that
6 would come from the tribe itself as that's what they
7 have indicated throughout this many years to us, the
8 NRC could not conduct the impact assessment, and,
9 therefore, conduct a mitigation assessment.

10 So it's not that we cannot hire them and
11 we cannot -- it's that they would be coming with us,
12 along with us, to participate in the tribal site
13 survey.

14 JUDGE BOLLWERK: May I ask this a
15 different way? So what's the conflict that I heard
16 about? Then maybe I'll -- let me ask it that way.
17 You described there was a conflict that kept you from
18 doing certain activities with the tribe. What's the
19 conflict? Again, because they're an intervenor.

20 MS. DIAZ-TORO: From hiring them -- hiring
21 the tribe as a contractor to the NRC to provide those
22 -- to provide services.

23 MR. CARPENTER: Your Honor, given that
24 this line of questioning calls for a bit of a legal
25 determination, can we provide a little context?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE BOLLWERK: I'll turn to the Board
2 Chair. I don't --

3 JUDGE FROEHLICH: I think that probably
4 would be helpful, but I'd like to take a quick
5 10-minute break and then we'll come back with the
6 legal context.

7 MR. CARPENTER: Thank you, Your Honor.

8 JUDGE FROEHLICH: All right. We'll take
9 10 minutes, please.

10 (Whereupon, the above-entitled matter went off the
11 record at 4:55 p.m. and resumed at 5:08 p.m.)

12 JUDGE FROEHLICH: Okay. We'll come to
13 order, please.

14 Staff Counsel Carpenter?

15 MR. CARPENTER: My co-counsel is going to
16 -- is going to go through the -- thank you. Ms. Baer?

17 MS. BAER: Thank you, Your Honor. So I'd
18 like to point out that the footnote that you directed
19 our attention to earlier, first of all, is about
20 Section 106 guidance, and we are here to talk about a
21 NEPA contention. It also notes that this is -- hiring
22 the tribe would be one way to resolve a contention,
23 and it also says that it would happen early in the
24 planning process.

25 However, the contract that we're talking

1 about today happened when we were already in an active
2 litigation with the tribe. So we were already
3 negotiating an approach with them, and they were
4 already an intervenor in this proceeding.

5 Section 170A of the Atomic Energy Act, as
6 we have noted on previous teleconference calls,
7 prohibits the NRC from entering a contract that may
8 present a conflict of interest.

9 And, additionally, there is no requirement
10 that the agency hire the tribe to resolve this NEPA
11 contention. There are many ways of doing so, but NEPA
12 only requires that the staff choose a way that is
13 reasonable. And so here the staff acted reasonably by
14 incorporating the various concerns from the tribe
15 throughout the process.

16 I would also like to note that some of the
17 questions earlier in the day were about ways that the
18 staff have contracted in the past in different
19 proceedings under different facts and different points
20 in the proceeding. But because of the fact that the
21 tribe was an active litigant in this proceeding, we
22 were unable to hire them.

23 JUDGE FROEHLICH: Okay.

24 JUDGE BOLLWERK: So let me jump back, and
25 Steve has mentioned this about the -- what was going

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 on in 2012, so what was contemplated then in terms of
2 who might be hired and who would pay for it.

3 MS. DIAZ-TORO: The license applicant.

4 JUDGE BOLLWERK: They would pay for it,
5 and then -- then there was going to be -- then hired
6 a CRM firm to do the work?

7 MS. DIAZ-TORO: Yes.

8 JUDGE BOLLWERK: Okay. And the difference
9 now is that although -- so there was some
10 contemplation, again, of hiring a CRM firm, my
11 understanding. But the problem here is this time --
12 and I take it that it -- the staff -- would Powertech
13 have paid for that, too? Indirectly? Directly? I
14 don't -- but the conflict prevented it? I --

15 MS. DIAZ-TORO: I'm sorry. I'm not sure
16 I understand the question. Can you repeat it?

17 JUDGE BOLLWERK: You try it. I'm not --

18 JUDGE FROEHLICH: I think what Judge
19 Bollwerk is -- and you'll correct me if I didn't get
20 it right -- that in the early stages that Ms. Baer
21 contemplated there was consideration given to hiring
22 a CRM firm -- hiring a CRM firm, and Powertech would
23 pay whatever costs were involved in having that CRM
24 firm provide the cultural survey data or conduct a
25 cultural survey -- TCP. Is that correct, Ms. Baer?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Did I understand that part of it correctly?

2 MS. BAER: Yes.

3 JUDGE FROEHLICH: That's 2012.

4 MR. CARPENTER: Can I -- one
5 clarification. I think in 2012 Ms. Diaz-Toro was
6 saying that Powertech was going to hire --

7 MS. DIAZ-TORO: Right.

8 MR. CARPENTER: -- directly.

9 JUDGE FROEHLICH: Powertech was going to
10 hire directly and pay directly for its CRM firm to
11 provide cultural TCP material to the staff.

12 MR. CARPENTER: And then we responded
13 specifically with respect to the footnote that -- and
14 the footnote contemplated hiring the tribe directly,
15 which is why we pointed out that at the point in time
16 that this contract was let it was -- we were -- this
17 contract was conceived as part of the March 2018
18 approach, because I believe it was one of the ways
19 that the staff was responsive to the tribe.

20 The tribe said, "You need to hire a
21 contractor." By the time we put that contract in
22 place, we were in active litigation, which means that
23 we couldn't even consider the tribe at that point as
24 there would have been an organizational conflict of
25 interest. That was the point we were making with

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 respect to the footnote.

2 JUDGE FROEHLICH: Mr. Carpenter, the
3 conflict that you allude to is the -- would have been
4 the hiring of the tribe or --

5 MR. CARPENTER: I think the tribe or I
6 believe it would have been a conflict hiring the
7 tribe, hiring a firm that had a contractual
8 relationship with the tribe, perhaps even a firm that
9 had tribal members as employees. We don't have a
10 contract attorney here, so --

11 JUDGE FROEHLICH: Okay.

12 MR. CARPENTER: -- can't go too far into
13 that.

14 JUDGE FROEHLICH: All right.

15 JUDGE BOLLWERK: But if Powertech were to
16 do that, that would remove the conflict, if they did
17 it directly.

18 MR. CARPENTER: Potentially, but we're
19 talking about -- at this point, we're talking about a
20 contract specifically to develop the methodology to
21 satisfy a NEPA contention, which is the NRC staff's
22 burden.

23 JUDGE FROEHLICH: And to satisfy that
24 burden, the staff entered into a contract with the
25 SC&A outfit?

1 MS. DIAZ-TORO: Correct.

2 MR. CARPENTER: Correct.

3 MS. DIAZ-TORO: Yes.

4 JUDGE FROEHLICH: And one further point is
5 that also the staff believed reasonably that SC&A had
6 the qualifications that we required, and I think
7 that's true. And I think Mr. Spangler demonstrates
8 that.

9 So there wouldn't necessarily have been a
10 reason to explore other options at that point.

11 JUDGE BARNETT: Can I follow up? Could
12 the staff have even considered a contractor that the
13 tribe recommended? It's not the tribe, it's not
14 tribal members, but they recommend some companies that
15 could do this? Could the staff have even considered
16 those firms?

17 MR. CARPENTER: Is that a question for us?
18 Counsel?

19 JUDGE BARNETT: Yes, counsel. Yes.

20 MR. CARPENTER: Your Honor, I believe at
21 this point the answer to your question is, could the
22 staff have considered -- I think Ms. Diaz-Toro already
23 answered the question that she does not believe that's
24 the case. Again, I'm not a contract attorney. That's
25 something that we could delve further into if we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 needed to.

2 JUDGE BARNETT: Understood.

3 MR. ELLISON: Can I ask a question if I
4 may? I mean, I don't understand the government -- the
5 NRC's position. I mean, they seem to be -- are they
6 saying, then, that when you checked with this firm
7 that's currently being hired, you made sure they had
8 no -- never had -- have no contracts at all with any
9 mining companies, and had not -- not doing any work at
10 all for any mining companies, because if they are
11 what's the difference then, or any member of any -- of
12 that firm has ever done work for a mining company.

13 You're saying that because a person is a
14 tribal member and has their own independent firm that
15 they would not qualify, and yet they would have the
16 best information, is that the NRC staff's position?

17 MR. CARPENTER: We did not say that. We
18 said that may present a conflict of interest, but,
19 again, we're not contract attorneys so we can't answer
20 that.

21 MR. ELLISON: So it's not a conflict if
22 the company hires its own people or if the -- who the
23 NRC hires has worked regularly for mining companies,
24 that's not a conflict.

25 MR. CARPENTER: I'm sorry. I may be out

1 of order, and I'm sorry, Chairman Froehlich. But I --
2 I just didn't understand this.

3 MR. ELLISON: Is the Board clear on the
4 prohibition in the Atomic Energy Act?

5 JUDGE FROEHLICH: I understand I think
6 what you said about the difference in the timing, that
7 one was before the case went into litigation.

8 At that point, firms could have been
9 considered by the staff, and that once the -- once the
10 proceeding moved to the 2017/2018 era, at that point,
11 under statute, you say that that presents a conflict
12 in the staff entering into a contract with the tribe
13 or the tribe's contractor for a TCP study. That's
14 what I understood your answer to be.

15 MR. CARPENTER: Correct.

16 JUDGE FROEHLICH: I hope I captured it.

17 MR. CARPENTER: That's correct, Your
18 Honor.

19 JUDGE BOLLWERK: Let me ask one other
20 question. I guess relative background, we talked
21 about TCPs many moons ago. So my impression -- and
22 this goes to the point that was being I guess talked
23 about a little bit about programmatic agreements and
24 how they are implemented, that -- and correct me if
25 I'm wrong, and don't let me put words in your mouth.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 But the staff's approach relative to TCPs
2 that might be identified was not going to be
3 necessarily to apply the National Register of Historic
4 Places' criteria strictly.

5 But if something was identified by a
6 tribal -- carrying out the methodology, something was
7 identified by the tribe as being significant, that the
8 -- those criteria wouldn't necessarily -- we've talked
9 about E, wouldn't necessarily preclude the staff from
10 saying it needed to be protected under the
11 programmatic agreement. They wouldn't have to be put
12 as a part of the register? No? Yes? No? Don't
13 know?

14 MS. DIAZ-TORO: Can you repeat -- I'm
15 sorry. Can you repeat the question?

16 JUDGE BOLLWERK: So doesn't -- normally
17 something gets the best protection if it's designated
18 as part of the register. Is that -- have I got that
19 correct? All right. But there seems to be some
20 wiggle room here or some uncertainty. And one of the
21 things I keep hearing is, if the tribe says it's
22 important, you need to treat it that way, even if
23 maybe it doesn't fall strictly within the confines of
24 any of the criteria.

25 And I got -- it was my impression that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that would be something the staff would give serious
2 consideration to relative to any programming agreement
3 in terms of the protection, the mitigation of impacts
4 on sites that the tribe may have identified, whether
5 it's this tribe or any other tribe, frankly.

6 MR. SPANGLER: That's correct. The whole
7 concept of eligibility is an NHPA issue. And under
8 NEPA there is no -- NEPA defers to NHPA on
9 eligibility-type issues. And so when we're talking
10 about a NEPA contention here, what we are trying to
11 get at is information about the importance or
12 significance of a traditional cultural property.
13 Sorry, my brain is moving slower.

14 JUDGE BOLLWERK: It's getting later in the
15 afternoon.

16 MR. SPANGLER: So that they can be
17 protected, NEPA allows more flexibility than NHPA in
18 terms of protecting ineligible sites. And so if there
19 are tribal sites with intangible values that might not
20 meet the definition of both in 38, under NEPA you
21 could devise strategies for avoidance, mitigation, and
22 data recovery that could protect an ineligible site
23 under both in 38.

24 MS. DIAZ-TORO: If I may add, Mr. Spangler
25 and Your Honor, in our NEPA documents, we do identify

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 any and all tribal sites that have been encountered.
2 We document them. We work with the tribes to
3 understand their significance, document that
4 significance, whether they're eligible or not.

5 Now, eligibility, when we -- because we do
6 have to meet our NEPA -- our Section 101 obligations
7 proceeds, but when we talk about NEPA we do identify
8 any and all. And if they are significant to the
9 tribe, we note it. We document it that way.

10 JUDGE BOLLWERK: And that would have
11 significance relative to the programmatic agreement as
12 well in terms of how --

13 MS. DIAZ-TORO: In my past experience --
14 I'm not going to talk -- relate it to this project
15 specifically, but in other projects we do work very
16 closely with the tribe to ensure that when we are
17 ineligibility space, in Section 106 space, we have
18 worked very close with the tribes to document the
19 eligibility and submit our eligibility determinations
20 to the SHPO for -- the State Historic Preservation
21 Officer for their concurrence. So we work hand in
22 hand with the tribes to make sure that we have
23 documented it correctly, that it is -- that they are
24 in agreement with the documentation, so that then we
25 can proceed to provide it to the SHPO.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE BOLLWERK: All right. Dr. Morgan,
2 anything you want to say about that? You look like
3 you're -- I won't say chomping at the bit, but you
4 might have something to say. I don't know.

5 DR. MORGAN: Well, in reference to
6 eligibility and the criteria A through D, and the work
7 that is being done, as I said previously, that there
8 is work being done out there to expand the criteria
9 and take that up to the keeper.

10 The eligibility definitions requirements,
11 what meets eligibility, this is a very considerable
12 bone of contention between how CRM firms identify
13 something as eligible or ineligible or some will put
14 undocumented or -- or what are some of the other
15 terms? There's another term I'm forgetting. There's
16 how does someone identify a site?

17 A CRM firm does not have the technical
18 expertise that a TCP firm has. And so there is a
19 difference between -- now, a CRM firm can bring on a
20 tribal monitor with that specific specialized
21 expertise, but that in and of itself, as a CRM firm
22 being hired to do that, is not the same as the
23 expertise that a traditional cultural properties firm
24 will have.

25 There is a distinct difference between

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 what I will refer to as two separate disciplines.
2 They interact. They interplay. There is a lot of
3 contention between yet they are not the same. So the
4 eligibility issue is quite controversial in and of
5 itself.

6 JUDGE BOLLWERK: All right. Anything
7 further the staff wants to say on this subject?

8 MR. SPANGLER: I just have one comment.
9 There has been several references to a Criterion E.
10 The bottom line is there is no Criterion E. There are
11 people out there advocating for Criterion E, but it
12 doesn't exist for right now.

13 JUDGE BOLLWERK: Appreciate you clarifying
14 that.

15 MS. DIAZ-TORO: I would like to add, Your
16 Honor, that our March 2018 approach and our February
17 draft -- February 2019 draft proposed methodology do
18 have up front and central a fundamental component,
19 which is tribal participation. The tribes themselves
20 participate. We do rely on them to come to the table,
21 you know, when we are at the table, when we are at the
22 survey, because they are the ones that have the
23 knowledge for identifying that. And so that's central
24 to both our March 2018 methodology and our -- sorry,
25 March 2018 approach and our February 2019 methodology.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 And that is because we have heard from the
2 tribes for many, many, many years that they are the
3 only ones, that they are the experts. And so we are
4 not relying on a CRM company. We are relying on the
5 tribes themselves, on the tribal representatives that
6 would participate in the methodology.

7 And those tribal representatives that will
8 participate in the development of the methodology and
9 in the implementation of the methodology, the NRC
10 staff was deferring to the tribes themselves to
11 identify those individuals. The NRC staff was not --
12 would not limit or put any prohibition on who the
13 tribe themselves identify to bring to the table to
14 developing -- for developing the methodology and
15 implementing the methodology.

16 JUDGE BARNETT: I'm going to ask one
17 question, just because you brought it up, a quick
18 segue. Has Powertech posed any impediment to the
19 March 2018 approach?

20 MS. DIAZ-TORO: I'm sorry?

21 JUDGE BARNETT: Has Powertech posed any
22 impediment to the March 2018 approach?

23 MS. DIAZ-TORO: No. And when we finalized
24 the March 2018 approach, it was our -- it is our
25 understanding based on several assertions that all

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 parties, including Powertech, found the March 2018
2 approach reasonable, and, therefore, the NRC started
3 to move forward.

4 JUDGE BARNETT: Thank you.

5 JUDGE BOLLWERK: Anything further? Okay.

6 Let me change to a slightly different
7 subject. We talked about Dr. LeBeau and the issues
8 that you had with his discussion of the methodology.
9 And OST also, it's my understanding, identified
10 Dr. Stoffle -- if I'm mispronouncing -- if I'm
11 pronouncing that correctly -- his methodologies were
12 in consideration in their -- in its letter of
13 January 11, 2019, which is NRC-203 at 3, which was as
14 described by Dr. Nickens in his June 2018 report,
15 which is NRC-224 at 11 and 13.

16 And I guess there seemed to be some issues
17 with Dr. Stoffle's methodology as well. And can the
18 tribe give me any insight into what your issue with
19 that is? If you need to look at the document, you
20 certainly can.

21 MR. WHITE: I don't recall Dr. Stoffle's
22 methodology. It has been some time.

23 JUDGE BOLLWERK: And I need to turn to the
24 staff. Wasn't that one of the ones that was
25 mentioned, I believe, in one of the methodologies,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 along with Dr. LeBeau that you were -- you were --

2 MR. SPANGLER: Yes. We reviewed Dr.
3 Stoffle's methodology as well as Dr. Toupal's
4 methodology. They are both very similar, and the two
5 researchers worked closely together.

6 The methodology involves taking tribal
7 elders out to a project area and interviewing the
8 tribal elders at the -- at a specific location to
9 evoke memories of TCP locations and importance, and
10 then using geospatial analysis to map the
11 interrelatedness of TCP locations on a given
12 landscape.

13 JUDGE FROEHLICH: Just so the record is
14 clear, I believe that Dr. Stoffle's study that Judge
15 Bollwerk was referring to is NRC-181, and the Toupal
16 study that you mentioned in your last answer is
17 NRC-182.

18 MR. SPANGLER: That's correct.

19 JUDGE FROEHLICH: Thank you.

20 JUDGE BOLLWERK: Okay. And so maybe I
21 misunderstood. So the tribe doesn't have any problems
22 with Dr. Stoffle? None that you can recall?

23 MR. WHITE: I believe there were some
24 issues regarding confidentiality. There were some
25 issues as far as some of the forms that he was using.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 After the attorney did some research, I guess they
2 were tied to the University of Arizona, I believe, and
3 the attorneys reached out shortly after that. Dr.
4 Stoffle was never heard from again.

5 JUDGE BOLLWERK: So maybe that's a
6 slightly different issue. That -- I guess your
7 pre-filed testimony that's OST-42-R at paragraph 53
8 indicated there were some issues with Dr. Stoffle
9 during June of 2018. That was at the time where I
10 guess the -- there were some meetings down at the site
11 actually. Was Dr. Stoffle actually there? Was he
12 doing something?

13 MS. DIAZ-TORO: No. It was Dr. Nickens
14 and myself who went to meet with the Oglala Sioux
15 Tribe at the Pine Ridge Reservation.

16 JUDGE BOLLWERK: I guess I got the
17 impression from reading the testimony, was there some
18 question about Dr. Stoffle doing some training on oral
19 histories, or am I -- am I totally --

20 MR. WHITE: Yeah. That's one of the
21 things that we talked about after we had worked with
22 Quality Services to further the one pager that
23 Dr. Nickens put together for us.

24 JUDGE BOLLWERK: Okay.

25 MR. WHITE: The issue that we had was

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 wanting to have our own people trained in -- to be
2 able to go through a series of guided questions, or
3 whatever it was, for the interview process, just
4 because we felt that it was more appropriate and we
5 felt our elders would feel more comfortable going
6 through that process rather than having an outsider
7 try and elicit that information.

8 JUDGE BOLLWERK: Okay. So I guess the
9 staff really didn't get into the oral interview part
10 of this. What did you contemplate in terms of oral
11 interviews? What process -- what thoughts had you
12 given to that process you -- as you were going to
13 implement it potentially?

14 MR. SPANGLER: It was always our intention
15 to have the oral interviews conducted by a Lakota
16 tribal member in the Lakota language.

17 JUDGE BOLLWERK: So a member of the Lakota
18 tribe would actually be talking with the elder or
19 whoever that might be?

20 MR. SPANGLER: That's correct.

21 JUDGE BOLLWERK: And what guidance would
22 they have? How would that be?

23 MR. SPANGLER: We would structure the
24 types of questions to be specific to the project area.
25 My own experience with oral histories is don't

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 structure the questions too tightly, because if you're
2 looking -- if you've only got a couple of very tightly
3 worded questions, you're not going to get at the more
4 robust information that they might have, so you use
5 open-ended questions to elicit responses to topics
6 that you might not have thought to ask yourself.

7 JUDGE BOLLWERK: All right. Does the
8 tribe have any comments on what Mr. Spangler just
9 said? In terms of what was --

10 MR. WHITE: I believe that would be just
11 like a general framework with some other methods
12 within that.

13 JUDGE BOLLWERK: All right. Anything
14 further?

15 JUDGE FROEHLICH: I'd like to ask Mr.
16 Spangler, in your CV on page 1, it's NRC-178, you
17 state that you did archaeological and ethnographic
18 research on maize farming by mobile bison hunters.
19 Can you tell me a little bit about that project?
20 Especially the part of it where there was interviews
21 of tribal elders and members for the project?

22 MR. SPANGLER: I'm sorry. I couldn't hear
23 the first part of the question.

24 JUDGE BOLLWERK: I'm sorry.

25 MR. SPANGLER: Which project are you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 referring to?

2 JUDGE BOLLWERK: I believe in your -- in
3 your CV, NRC-178, you said that you did archaeological
4 and ethnographic research on maize farming by mobile
5 bison hunters?

6 MR. SPANGLER: On mobile bison hunters.
7 Yes, that was the -- that was the project that we
8 discussed earlier. There was a second project that
9 was just completed last year that also was -- had an
10 ethnographic component that involved interviews with
11 Southern Paiute ranchers, livestock operators, that
12 was kind of similar in nature.

13 JUDGE FROEHLICH: And in both of those
14 projects you say you interviewed tribal elders,
15 historians, and tribal members. Is that correct?

16 MR. SPANGLER: That's correct.

17 JUDGE FROEHLICH: Okay. Did you do these
18 interviews yourself, or was there a team of
19 researchers with you? How was that conducted?

20 MR. SPANGLER: The first one that you're
21 referring to, that was a team of researchers. The
22 second one that I was referring to I -- for the oral
23 history project on grazing in Arizona and Utah, I had
24 a colleague who did most of the actual oral histories
25 herself. And I managed the project and structured the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 types of questions that would be asked.

2 JUDGE FROEHLICH: And these researchers,
3 these people who collected the data, and I did the
4 oral histories, were they employed by you or by BLM or
5 someone else?

6 MR. SPANGLER: We had federal grants
7 through the Bureau of Land Management, through a
8 cooperative assistance agreement.

9 JUDGE FROEHLICH: And were these tribal
10 elders, tribal members, were they interviewed in their
11 Native language or in English?

12 MR. SPANGLER: They were interviewed in
13 English.

14 JUDGE FROEHLICH: All right. And were
15 those tribal members compensated for their time and
16 for their contributions to your research?

17 MR. SPANGLER: No, they were not.

18 JUDGE BOLLWERK: What is your experience
19 with compensating people for oral histories? Has it
20 happened?

21 MR. SPANGLER: I have never heard of --

22 JUDGE BOLLWERK: Participating --

23 MR. SPANGLER: -- it happening for oral
24 histories.

25 JUDGE BOLLWERK: Dr. Morgan, do you have

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 any insight you can offer us on that?

2 DR. MORGAN: There are some where there
3 are stipends, if you will, or honorariums, if you
4 will, when elders are -- you might refer to it as a
5 focus group to frame it in some ways or you have a
6 group of people come together and you talk to them as
7 a group, or there may be individuals who are
8 individually interviewed in person, not on the phone,
9 and it's usually done by another tribal member.

10 And, yes, this is very common with THPO
11 offices to compensate their elders when they are
12 giving something of themselves that if you don't mind
13 me referring to the other individual, Stoffle -- I
14 forget how to pronounce his name --

15 JUDGE BOLLWERK: S-T-O-F-F-L-E. I don't
16 know how you'd pronounce it, but that's how it's
17 spelled.

18 JUDGE FROEHLICH: NRC-181.

19 JUDGE BOLLWERK: All right. That will
20 work, too.

21 DR. MORGAN: Our people are very sensitive
22 and very wary of those who are outsiders who come in
23 and try to take information from us and then disappear
24 and then write books and/or literally steal our
25 information and build their academic careers off of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 it. And that's a well-established known fact from
2 examples that we have that we can refer to that have
3 occurred with the Oglala.

4 And everything from Elsie Clews Parsons in
5 the -- very early on, early years, to recent times.
6 It is common for those who are trying to come in -- I
7 know HDR has done some work where they do -- like I
8 said, the new archaeology, they have ethnographers and
9 archaeologists who are sent out to try and gather
10 information as best they can to inform their projects.

11 And so although it's not, you know, widely
12 known, there are instances. And certainly within the
13 -- within Indian country itself, there are examples
14 that we can point to. So I hope that answers your
15 question.

16 JUDGE FROEHLICH: Dr. Morgan, what was the
17 HDR that you referred to? That's a new -- that's a
18 new acronym for me.

19 DR. MORGAN: So it's a very large
20 engineering firm in this country. I don't even know
21 what -- how -- I should know it, but --

22 JUDGE BARNETT: I think it stands for HDR.

23 DR. MORGAN: It stands for HDR.

24 JUDGE FROEHLICH: That's what I've always
25 heard it called, HDR.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 DR. MORGAN: Yeah. And so like KLJ, it's
2 just a -- it's an acronym that they just -- they
3 change it to their trademark. That's it now. That's
4 all you refer to.

5 Anyhow, I know -- I can't remember her
6 name, but she was an ethnographer, and they have done
7 some work. And I don't remember the specific project
8 name at this point, but there are instances where both
9 CRM firms are working with people and doing
10 ethnographic research, whether it's in-house or done
11 via contract.

12 And there is one called -- actually,
13 literally I think it's called Traditional Cultural
14 Properties that's out there that no one is supposed to
15 have access to, really, but I think it's out there in
16 the -- in the Ethernet now because somebody took the
17 CD and put it out there.

18 But those elders from the -- I don't know
19 if it was Standing Rock that did it or if it was a
20 group of tribes that came together and did it, but
21 they interviewed folks that were elders to -- who are
22 -- very few of them are left. And so they wanted to
23 capture that information, that oral knowledge and
24 history that they know and knew to save it for future
25 generations.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 So, yes, this is something that is common
2 within our own, and certainly is a growing area of
3 this discipline, if you will, of trying to hold on to
4 that which remains of our oral knowledge and history.

5 JUDGE BOLLWERK: All right. Thank you.

6 Mr. Spangler, do you see anything wrong
7 with compensating people for doing oral histories,
8 giving information?

9 MR. SPANGLER: Is there anything wrong
10 with that? I suppose not. I have never had to do it.
11 I have always had willing informants that wanted to
12 spend time with me and share their stories with me.
13 And the issue of compensation has just simply never
14 come up.

15 JUDGE BOLLWERK: All right. Thank you.

16 DR. MORGAN: And, sir, I would like to
17 further point out that early on in the beginning of
18 our anthropology with Papa Franz, Franz Boas, Ella
19 Cara Deloria, who is from Standing Rock, she was given
20 miniscule amounts of money here and there to pay for
21 her costs, and she would go out and interview all of
22 the people that she could. And this is early on.

23 And she would do the traditional thing of
24 bringing a gift, because that was our traditional way
25 of knowing and doing, and so like they'd bring some

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 meat or some type of food goods or -- or give them a
2 small amount of money. And if you look to the old
3 documents, that's what it states.

4 And so it has actually been done since the
5 beginning, but it's those individuals who are
6 consultants. We don't use the word "informant" any
7 longer. And certainly there are those who are willing
8 to give freely of their information because they feel
9 that's what they should do.

10 And then the other instances of those who
11 -- where there is projects, where it's actually a
12 grant that is allowing for -- to give a small honorary
13 stipend or honorarium.

14 MR. WHITE: I'd also like to elaborate a
15 little bit more on the cultural aspect of gifting.
16 You know, it's ingrained in our culture. It's one of
17 the things that we do when we go to seek information,
18 like Dr. Morgan talked about, you know, their giving
19 of themselves, you know, and a lot of times they don't
20 ask for anything in return because we're humble
21 people.

22 And so it's a customary thing that we do
23 as Lakota people to be good relatives to one another,
24 is we take them a gift or an offering to show that
25 respect and gratitude for the information and the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 knowledge that they have.

2 JUDGE BOLLWERK: All right. Thank you.

3 JUDGE FROEHLICH: What I'm hearing I
4 guess, Dr. Morgan, as well as Mr. White, is that there
5 is two elements here that are working against or in
6 foul with the gathering of information from elders;
7 one being the compensation or the gifts that you
8 referred to, and the other -- the compensation, and
9 the other being the concerns about confidentiality.

10 How has the tribe handled the
11 confidentiality aspects? I mean, there must be some
12 mechanisms or some manner that when the elders or
13 whatever are compensated or given gifts that they are
14 imparting the information, what -- how -- what
15 mechanisms are in place from the tribe's perspective
16 to keep it confidential, so that you get that balance
17 between, you know, being able to identify and
18 catalogue the materials and at the same time keep it
19 confidential, so it doesn't end up out on the internet
20 somewhere.

21 DR. MORGAN: Yes, sir. One, first and
22 foremost, I would never say that I could ever speak on
23 behalf of a tribe, unless that tribe gives me that
24 honor of doing so. So I only speak on behalf of
25 Kelly, and Kelly's knowledge on this is -- and my

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 experience and knowledge on it is that tribes are
2 subject to follow the federal laws just like CRM firms
3 or any firm.

4 And so when they have confidential data,
5 they are to keep it protected. Any THPO office has to
6 do the same exact thing, because there is requirements
7 under being established as a THPO office that you must
8 keep that data confidential that's confidential data.

9 And so you have to house it properly. You
10 have to make sure that it's protected within the
11 confines of your office space. So it can't be in an
12 open space area. It has to be under lock and key, so
13 they have -- just like at a state SHPO, the THPO
14 office, they're under the same grant. And so they
15 have the same requirements, and so they have to do the
16 same exact things per the law, per the regulations.

17 And that is keep those site files and that
18 confidential information under lock and key. How each
19 and every individual tribe does it, I only have the
20 experience of knowing what I have experienced at
21 Standing Rock.

22 JUDGE FROEHLICH: I wanted to take it one
23 step further. The information that the staff in this
24 case, or an agency or a licensee, needs to identify
25 areas that should be protected or artifacts or things

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that are -- that have to be protected, should be
2 protected, should be catalogued, okay, they have to be
3 able to locate and identify them.

4 And I'm understanding that much of this
5 information is confidential information held tightly
6 by the tribes. How do we bridge the gap and get that
7 information to the federal agency, or to the staff in
8 this case, so that they can assess the number and
9 nature of items out there, and then take the proper
10 mitigation steps to protect them, which is I think
11 what everyone is after.

12 DR. MORGAN: Well, those are all very
13 specific items that would be covered under the
14 methodology. You would put into your methodology that
15 confidentiality section. You would put into -- there
16 may be a separate document that is within either a
17 programmatic agreement or there may be -- it depends
18 on how they make arrangement to do it.

19 But they're in the methodology. It should
20 be very clearly spelled out how you're going to
21 proceed, who is going to be doing it, what are the
22 elements involved. And so each project is different,
23 whether -- you know, which agency it is, which tribe
24 you're working with, and which CRM firms are involved,
25 who the client is, and so it's all in a matter of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 making sure that you come -- all come to the table and
2 hash it out and come up with all of these different
3 factors involved that are put into -- whether it's a
4 programmatic agreement or a memorandum of agreement,
5 all of these things, it's doable.

6 There is a way to get to that, and if
7 I'm --

8 MR. WHITE: So one of my -- one of the
9 things that we did with our draft methodology is we
10 did identify elder groups, societies within the tribe
11 who would be able to offer information. We did also
12 provide a lot of the other aspects they try to talk
13 about as far as confidentiality, going through our
14 research and review board process that we shared. We
15 shared that ordinance with the NRC staff.

16 You know, so the specifics within how the
17 research and review board operates would have to be
18 taken up with them to delve into some of the more
19 specifics as far as how they handle confidentiality
20 and information on retention.

21 JUDGE FROEHLICH: Was there or has there
22 been discussion within your office or within the tribe
23 on the types of confidentiality requirements or
24 standards that would be necessary for the tribe to
25 share with, in this case, the NRC staff information

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 about this project and this area?

2 MR. WHITE: One of the things, you know,
3 when you're trying to -- trying to do intercultural
4 research is being able to bring the people or the
5 grass-roots community to the forefront and to be able
6 to be -- and part of that process from the beginning
7 of project development through the end, so that way
8 they have the chance to review a lot of that
9 information.

10 So, really, it takes a collective effort
11 from grass-roots people who are interested in the
12 project to give their insight and the things that they
13 are comfortable or uncomfortable with sharing.

14 JUDGE FROEHLICH: Did you get to that
15 stage in discussions with members of the tribe, people
16 who have the information that the NRC staff was
17 seeking?

18 MR. WHITE: No. We never formally got to
19 that point.

20 JUDGE FROEHLICH: And I assume, and you'll
21 correct me if I'm wrong, that if it didn't get to the
22 discussions or the requirements among the tribes, that
23 the requirements on the staff or the staff's
24 consultant, that never made it across the aisle.

25 MR. WHITE: Yeah. We never got -- we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 never got to that point. We only had a very short
2 time together in person to discuss.

3 JUDGE FROEHLICH: Dr. Morgan?

4 DR. MORGAN: Yes, sir. Many tribes -- I
5 don't know about all, but many tribes have
6 institutional research boards, IRB boards or maybe
7 they call them -- maybe there is an acronym or a
8 different term that different -- the various tribes
9 use, but they -- just like you would at an institution
10 of higher ed that's similar, that when you're going to
11 do -- when you have human subjects, and especially
12 with the sensitivity that we have in telling about our
13 cultural lifeways, you have these boards that are
14 responsible, and they have their own set of criteria.

15 And so there's an advisory board at some
16 tribes, an elder advisory board, and then the IRB
17 boards, and so some of them are housed within the
18 tribe itself, some are housed within the community
19 colleges, and they work as a charter of the tribe in
20 making sure that when there is any type of interviews
21 going on with their people on the reservation that
22 they're -- they try to make sure that they're aware of
23 it and that it goes through this.

24 Now, it's not always possible to -- there
25 is researchers all the time coming out to the tribes

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 and doing things, and some inappropriate and some
2 appropriate. And so it's all -- in terms of the
3 confidentiality of it, it's a difficult.

4 But you -- there is a lot of work that
5 goes into trying to make sure that the additional
6 information, that oral knowledge, that oral history,
7 is not only kept intact and protected. And when there
8 is projects like this, it is a complex process both
9 internally, I'm sure within the agencies, and also
10 within the tribes to try and make sure that the
11 information that is disclosed is protected, and
12 especially the most sensitive of sensitive
13 information, such as where a burial site may be,
14 because of the history of grave robbers, and so forth.

15 JUDGE FROEHLICH: I understand.

16 Mr. White, in this case, the March 2018
17 proposal involved a surveyor coming on to look and to
18 have tribal members or individuals point out and
19 catalogue, recognize, convey, what items had cultural
20 significance to the tribe. And the March 2018 also
21 had a provision that provided for the ethnographic
22 aspects and interviews with the elder.

23 What procedures, what work was done within
24 the tribe, to put together the protections of
25 confidentiality, so that those two elements would

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 protect the sites and the history of the tribe, yet
2 also provide access to the agency staff, so that they
3 can carry forward their NEPA responsibilities?

4 MR. WHITE: Well, as far as I know, there
5 was -- there was very little work done with that,
6 especially because there wasn't an informed
7 methodology as far as, you know, how those interviews
8 are going to be conducted.

9 I know that we -- our attorneys did
10 discuss that. But as far as I know, no information
11 has come out.

12 JUDGE FROEHLICH: Has the tribe been
13 approached by other agencies or other entities for the
14 collection of similar data, archaeological-type things
15 as well as ethnographic-type things, before?

16 MR. WHITE: Yes. There had been an
17 instance while I was director of NRRRA where an
18 individual did reach out through email asking us about
19 our processes, and so we responded with our ordinances
20 and then we never heard back.

21 JUDGE FROEHLICH: I see we're coming up
22 right at -- up against 6:00, and we basically lose the
23 room at that time. So I think we'll have to stop at
24 this point.

25 MR. CARPENTER: Your Honor?

1 MS. DIAZ-TORO: Your Honor, can I have --

2 MR. CARPENTER: Would you permit us a
3 brief --

4 MS. DIAZ-TORO: Can I respond with respect
5 to -- or provide additional information?

6 JUDGE FROEHLICH: I don't want to rush
7 you. I don't want to rush you, but we are coming up
8 on 6:00, so please --

9 MS. DIAZ-TORO: Oh. I just wanted to just
10 share NRC staff's efforts with respect to protecting
11 sensitive information. The NRC staff has conducted
12 tribal surveys previously, and we do keep that
13 information protected, out of the public reach.

14 It is non-publically available information
15 for this project. The NRC staff is aware that it
16 needs to protect that type of information in
17 accordance with federal laws, which Section 106 --
18 sorry, Section 304 of the NHPA is one. NACRA is
19 another one, for example.

20 But in addition to any response to the
21 concerns of the tribe raised with respect to
22 confidentiality, the NRC staff also provided proposed
23 amendments to the protective order, which provides
24 additional protections in these proceedings.

25 And so we did move forward -- we did take

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the positive step forward to providing those proposed
2 amendments back in I think June of 2018. The NRC,
3 unfortunately, had not -- has not heard from the tribe
4 with respect to those proposed amendments to the
5 protective order.

6 JUDGE FROEHLICH: Thank you. This may not
7 be the perfect place to stop, but since it is just
8 about 6:00, we'll have to adjourn for this evening.
9 But we will reconvene tomorrow morning at 9:00 a.m.,
10 so that we can have a full day and try to move through
11 the balance of the Board's questions.

12 Thank you. I'll see you all at 9:00.
13 (Whereupon, the above-entitled matter went off the
14 record at 6:00 p.m.)

15
16
17
18
19
20
21
22
23
24
25