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STB TRIBAL CONSULTATION SUMMIT

TONGUE RIVER RAILROAD PROJECT

DAY 2

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Taken at
Holiday Inn, Rushmore Plaza
Rapid City, South Dakota
June 22, 2011

A P P E A R A N C E S

CATHY GLIDDEN

(Surface Transportation Board)

VICTORIA RUTSON

(Surface Transportation Board)

EVELYN KITAY

(Surface Transportation Board)

CONRAD FISHER

(Northern Cheyenne Tribe)

CURLEY YOUPEE

(Ft. Peck Assiniboine and Sioux Tribes)

DOUG MELTON

(Bureau of Land Management)

CHARLENE DWIN VAUGHN

(Advisory Council on Historic Preservation)

JIM WINTERS

(Army Corps of Engineers)

JIM WHITTED

(Sisseton-Wahpeton Oyate Sioux)

GILBERT WHITEDIRT

(Cultural Commission for the Northern Cheyenne Tribe)

GORDEENA WHITING

(Northern Arapaho Tribe)

DARLENE CONRAD

(Northern Arapaho Tribe)

DANA DUPRIS

(Cheyenne River Sioux Tribe)

WASTÉ WIN YOUNG

(Standing Rock Sioux Tribe)

PETE COFFEY

(Three Affiliated Tribes)

A P P E A R A N C E S (Continued)

ALEC SANDCRANE

(Tribal Councilman for the Northern Cheyenne Tribe)

JIM JENKS

(Montana Preservation Alliance)

RUSSELL EAGLE BEAR

(Rosebud Sioux Tribe)

LANA GRAVATT

(Yankton Sioux Tribe)

STEVE BRADY

(Northern Cheyenne Cultural Commission)

JAMES WESTON

(Flandreau Santee Sioux Tribe)

WANDA WELLS

(Crow Creek Sioux Tribe)

P R O C E E D I N G S

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(Tribal Caucus Questions for STB, requested to
be typed in by the court reporter by
Mr. Youpee.)

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Tribal Caucus Questions for STB

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1. The amended PA says consultation has occurred with Tribes. What is the basis for that?
2. The majority of Tribes did not agree to the existing PA. Should STB negotiate a new PA?
3. What happens if the 9th Circuit Court decision is not favorable to Tongue River RR?
4. There is no PA Administrative Record that Tribal Consultation has happened - (25 years).
5. What is STB's protocol to consult with Tribes? What are the changes that have been made since 2005 to the PA?
6. How is STB meeting their Trust Responsibility? How is this reflected in the administrative record?
7. What can Tribes do to help STB develop Tribal Protocols before a new PA is executed?
8. How has STB complied with the requirement in Section 110F regarding the need to minimize adverse impacts to an NHL? How has STB addressed impacts to both the Rosebud and Wolf Mountains NHLs, as well as pending NHLs?
9. What has been established as a Tribal Consultation Budget that would facilitate consultation?

- 1 10. How has STB conducted a holistic assessment of the
2 Area of Potential Effect (APE) to include the entire
3 Tongue River Valley corridor? How does STB intend
4 to evaluate the Cumulative Effects of this project?
5
6 11. Who are all the stakeholders, in addition to the
7 Tribes, for this project? How has STB sought their
8 input in negotiating an amended PA?
9
10 12. What does STB envision as the role of the Tribes on
11 the Task Force established by the Tongue RR and STB
12 (p. 39)?
13
14 13. Does STB consider this meeting as informational or
15 as Tribal consultation?
16
17 14. How do TRRC and STB envision Tribal Consultation for
18 the conditions related to the Section 404 permits
19 and BLM ROW permits?
20

21 * * * * *

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

23 * * * * *

24 MR. FISHER: Well, I guess because of our time
25 constraints and we've got a couple of hours here,
we've caucused, for your information, Cathy, and did
a lot of, had a real good discussion this morning
and this afternoon about the PA, and what we've come
up with is a list of questions from the tribes, the
tribal perspective. And part of the questioning
here is we're trying to play catch-up of 25 years of
this particular railroad project, so if there's
something that you feel that is out of line, it's
probably because these questions should have been
asked a long time ago and we're just now trying to,

1 we're trying to condense three days from the 25
2 years that this has been an issue.

3 So we just want to go down this list of
4 questions, and then if you have any questions, then
5 we can start a discussion here and hopefully a real
6 candid and open discussion about these questions.

7 MS. GLIDDEN: Great.

8 MR. FISHER: So, Jim, why don't you ask the
9 first question.

10 MR. WHITTED: Thank you, Conrad.

11 "The amended PA says consultation has occurred
12 with Tribes. What is the basis for that?" Can you
13 kind of go into what tribes you consulted with,
14 dates and so forth?

15 MS. GLIDDEN: Did you want answers right now,
16 or did you want to go through the questions and
17 then --

18 MR. WHITTED: I think we can hit them one at a
19 time and go down the list, unless you need time to
20 think about it. I don't know.

21 MS. GLIDDEN: Again, my history with this
22 project is quite limited, and it goes back to
23 1983 and three different Tongue River projects.

24 Now, in those EIS documents, there is
25 documentation regarding the contact that occurred.

1 I think in terms of it, we were talking about
2 this -- the definition of consultation that we
3 understand today may not have been the type of
4 consultation that we had been doing in the past, but
5 the EIS documents do have a record of the letters
6 that were sent and the contact that was had and
7 phone calls and so on and so forth.

8 And I believe there was one meeting, correct,
9 Vickie, one actual meeting for Tongue River I?

10 MS. RUTSON: I'm not sure.

11 MS. GLIDDEN: Okay.

12 MS. RUTSON: Go ahead.

13 MS. GLIDDEN: Anyway, I do think that -- I
14 mean, as I understand it, the tribes that were
15 contacted way back when was a very limited group.
16 It didn't include the Sioux Nation.

17 And I think that, Jim, as you had mentioned
18 before, that that was probably because, you know,
19 way back when the concept of, you know, ancestral
20 associations wasn't as developed as it is now. And
21 there wasn't language that was -- you know, before
22 1992, of course, there was nothing regarding tribal
23 consultation and NHPA.

24 But we do have a record, and it's included in
25 the EIS documents, and I can actually pull that up

1 for you because I have those documents on my
2 computer.

3 MR. WHITTED: Maybe simplify it. Out of the
4 tribes that are sitting at the table here, which
5 tribes have you consulted with? I guess that's more
6 of an easier question to answer. Maybe the other
7 one was a little too broad.

8 MS. RUTSON: May I?

9 We did not do a good job in the way we
10 understand consultation today, 25 years ago. This
11 is what I remember, and I have a fairly good memory,
12 but those were early days. What I remember that we
13 did in Tongue River I was that we contacted, not
14 consulted, contacted the Northern Cheyenne, the Crow
15 and the Arapaho.

16 The only names I remember from those days --
17 and, again, this was contacting. I do not believe
18 it was consulting in any form of that word -- were
19 Mr. William Tall Bull and Sherry Devers, I believe
20 in their capacity as owners or people who worked at
21 the company Ethnoscience.

22 And we were very concerned -- the railroad, in
23 those days, didn't have a lot of money and did not,
24 wasn't able to retain a contractor for us in
25 Washington to help us do survey work, so the agency

1 used its own money to hire Ethnoscience to do a
2 study of sacred plants and sacred practices along
3 the Tongue River.

4 MR. WHITTED: So it wasn't actually tribes that
5 you contacted; it was individuals, individual tribal
6 people that work for an engineering firm that you
7 contracted with or the applicant contracted with?

8 MS. RUTSON: It was the agency. We used our
9 own agency money and we contracted with
10 Ethnoscience.

11 MS. KITAY: But there were also letters, is
12 what I remember.

13 MS. RUTSON: We tried to contact members of the
14 Northern Cheyenne leadership of the Northern
15 Cheyenne, the Arapaho and the Crow. We did this by
16 sending letters. In those days, we did not travel,
17 so we sent letters. Did we get responses to those
18 letters, I don't remember, and I don't believe we
19 did.

20 MS. GLIDDEN: Vickie, I'm sorry to interrupt,
21 but I do know when I looked through the document, I
22 did see some letters from the Northern Cheyenne, and
23 I think I can probably pull those up on my computer.
24 And I'm not sure which Tongue River it was for, but
25 I know that there are some letters.

1 MS. KITAY: There's certainly the indication
2 that there was more contact with the Northern
3 Cheyenne than with any other tribe because the name
4 comes up repeatedly in the EIS documents, but
5 exactly the nature of the consultation, I don't
6 think --

7 MS. RUTSON: And, again, "consultation" may be
8 not the right word. Contact.

9 MS. GRAVATT: The PA says that consultation has
10 occurred, and that's really not true then.

11 MS. RUTSON: Please remember that we're talking
12 about an amended PA, so we're talking about now a
13 document that is looking back over what we are doing
14 now, so we are making our best efforts now for
15 consultation.

16 MR. YOUPEE: You have to understand that we're
17 trying to play catch-up here as well, so we have to
18 define the different documents that we have in a
19 whole series of a process between 25 years.

20 MS. RUTSON: I understand that, Curley.

21 MS. KITAY: I think the amended PA was drafted
22 with a view that we would all review it at this
23 meeting and following the meeting. So when it says
24 that consultation has occurred, I think what we
25 meant to say or the way that that was included, to

1 suggest that we're doing consultation now. And that
2 as Charlene said yesterday, we're in 2011. We don't
3 go back to 2005 necessarily. And that's what
4 that -- you know, we view what's gone on here as
5 consultation.

6 MR. YOUPEE: Even that's a misnomer because
7 this is more sharing of information.

8 MS. KITAY: Well, that may be. Once we
9 finish -- the idea is simply that once the
10 consultation process finishes, whether that's today
11 or in the future, then we would move to an amended
12 PA. I think that's the basis for that sentence in
13 the amended PA.

14 MS. GLIDDEN: That's actually true. When I was
15 going through these clauses, that's what I was
16 thinking. I was thinking, What's going to be going
17 on from here on?

18 But, again, all of the language here is open to
19 an amendment if you don't think it appropriately
20 characterizes --

21 MR. FISHER: Well, let's go to 13 since we're
22 talking about consultation, "Does STB consider this
23 meeting as informational or as Tribal consultation?"
24 Because there's supposed to be some interpretation
25 of how we're looking at this particular meeting

1 here. As a federal agency, what is this meeting?
2 What kind of meeting is this?

3 MS. RUTSON: From my point of view, this is
4 tribal consultation. And this is difficult for me
5 to say, and perhaps difficult for you to hear, but I
6 do feel strongly about this: We represent
7 leadership at the agency, and we have done our level
8 best to assemble a great deal of information and
9 provide it to you many weeks ago.

10 Now, I understand reading this stuff is
11 difficult, I understand that, and it's more
12 difficult to access all of this information simply
13 if you're given a big pile of stuff, I understand
14 that. And I also understand if you are not ready to
15 move forward on the PA after listening last
16 afternoon to Mr. Gustafson. I can completely
17 understand that point of view. But we are here to
18 consult on a government-to-government basis. We
19 understand and respect the fact that you are
20 leaders, elders, THPOs, people of great
21 responsibility and integrity with your tribes, and
22 we are also leadership from my agency. And so we
23 are here for government-to-government consultation.

24 There's also been a great exchanging of
25 information. But consultation, as I understand it,

1 seeking, discussing, and considering the viewpoints
2 of the other participants, and that is certainly
3 what I have been doing.

4 MR. YOUPEE: In all fairness, Victoria, you're
5 going to explain some of the changes brought on by
6 your department or agency regarding changes towards
7 tribes and that communication and trust
8 responsibilities. Now, doing your very best, I have
9 to challenge that because I don't believe that was
10 the very best that could have happened with STB. I
11 see some comparisons in two railroads, and I think
12 that those actions reflect some of the activities
13 that has happened with this railroad.

14 Now, as far as consuming 25 years of
15 information, you're right, that's a great deal of
16 information to consume. There should have been an
17 informational setting at that point. You expect us
18 to consume that information of 25 years and start
19 consulting with you regarding the PA? How
20 irresponsible is that in your trust responsibility?

21 (No response.)

22 MR. YOUPEE: I ask you.

23 MS. GLIDDEN: If I can say one thing, Curley.

24 MR. YOUPEE: Let her respond.

25 If there's a response, then respond. If not,

1 then it's a matter of record.

2 MS. RUTSON: I would like to know what can we
3 do then? Did we need more informational meetings
4 first? It would have been helpful to know that.

5 MR. YOUPEE: It would have been good to -- go
6 ahead.

7 MS. RUTSON: We need some guidance, please,
8 from you as well.

9 MS. GLIDDEN: Can I say something?

10 MR. YOUPEE: Anybody can talk.

11 MS. GLIDDEN: The main thing that -- I think
12 that we're in a difficult situation here because we
13 have this expiring PA that's coming up, and we're
14 not at all comfortable with this minimal time we
15 have to do this, and I think that really is the big
16 impediment here is this.

17 Tell me if I'm wrong, Vickie, and Evelyn.

18 MR. WHITTED: Let's talk a minute about why
19 there's such a push here. They had 25 years to sit
20 down and consult with the tribes and come to some
21 agreement that we're all happy with. That didn't
22 happen. We're sitting in front of a PA that's
23 designed by you folks, that was designed without
24 tribal consultation that we're seeing. We don't
25 have any documentation that you actually consulted

1 with anybody, other than those people working for
2 Ethnoscience.

3 We're used to coming to the table to consult on
4 projects where we have the information in front of
5 us. That's how you consult. Then you have a clear
6 picture of what you're getting into, what you're
7 talking about, objectives. None of that is here, no
8 information. It's very important for us to know
9 what's out there.

10 You know, if we're here to consult on cultural
11 resources, all you can tell us is there's a National
12 Historic Landmark there, that's all you can tell us.
13 You can't tell us about any sites that are listed?

14 MS. GLIDDEN: There are other sites that are
15 actually listed in the documents. And I do have --
16 one of the things that we could do is print out the
17 cultural resource sections of the documents and have
18 those, make those available to you.

19 We had sent out an e-mail. And I know this is
20 not the best-case scenario because this is such an
21 old case that we don't have actual copies of some of
22 these documents, but we do have, on our website we
23 have a link to each of the documents and the
24 different sections of those documents, which we did
25 early on in this process, I mean early on in this PA

1 process we did send out a link to those documents.
2 Again, not that that's ideal, but the information
3 has been available at least on-line. But what I
4 could do is print off those sections of the
5 documents for you that deal with cultural resources.

6 MR. YOUPEE: I think that you have to, as an
7 agency, interpret and define those documents with
8 tribes, as well as with the State of Montana SHPO
9 and possibly with the ACHP in attendance. I think
10 collectively, regulatory, I think we need to get on
11 one level here holistically, rather, on one page.

12 And so we're trying to assist the STB through
13 the process, and we know that there is a process.
14 And there's certain stipulations or criteria in that
15 process that allow tribes to participate, and that's
16 all we're asking is that we have a process and
17 protocol between STB and a concurring agency such as
18 Army Corps and BLM. We need to know what that
19 communication is and what they're concurring to.

20 MS. GLIDDEN: I'm wondering if you did have a
21 chance to look at the amended PA. Have you had a
22 chance to look at that?

23 MR. FISHER: Let's kind of go back to this
24 first question here, what Jim is asking is that we
25 have a PA in front of us, but at the same time we

1 haven't even been involved in the initiation of this
2 whole process. You know what I'm saying?

3 MS. GLIDDEN: Yeah.

4 MR. FISHER: So the question that is being
5 asked of you is that consultation has occurred under
6 what condition? I mean, where did the consultation
7 occur?

8 MS. GLIDDEN: Basically when -- and I took the
9 first stab. I'm going to take full responsibility
10 to amending this PA. And when I was going through
11 it, I was looking at this is, in a sense, a new
12 document, with using the old PA as a boilerplate, if
13 you will, and so there's been quite a few changes
14 made to this document from the original one.

15 How I -- what I did was I took all of the
16 comments that we received from tribes, the Advisory
17 Council, the National Cert of Landmarks Association
18 and the letter received from Mr. Jenks and basically
19 went through those comments, and based on those
20 comments amended the PA in a draft form so that we
21 would have something to start from, something to
22 work from as a basis for change.

23 So this is definitely -- I mean, this is not an
24 all-final document. It's simply something that we
25 did to try and incorporate the concerns and the

1 changed circumstances into the document.

2 MR. FISHER: Was that consultation in your --

3 MS. GLIDDEN: No. When we're in this
4 particular "whereas" clause where it says that we
5 consulted with, the idea was that we will be
6 consulting and that this is the beginning.

7 MR. FISHER: That's not what it says.

8 MS. KITAY: Because it assumes that.

9 MR. FISHER: It assumes?

10 MS. KITAY: I don't think people will sign it
11 until they're satisfied consultation has taken
12 place, and at this point it was just a draft
13 language because we all recognize that consultation
14 has to take place prior to a final amended PA. So
15 that was -- it's just like a contract where you
16 write up a contract to, you know, buy a house or
17 something and you say that this party will do this
18 and that party will do that even though the sale
19 hasn't necessarily taken place yet, so that's all
20 this was.

21 And part of the problem with this, from my
22 perspective because I have been reading the old
23 EISs, is that none of us in this room were actively
24 involved in this, in these kinds of issues in Tongue
25 River I or Tongue River II, and there's really

1 nobody. All we can do is read a sentence from the
2 EIS, and we can try to figure out what that means
3 and exactly what happened, but the fact is that
4 nobody knows for sure.

5 MS. GRAVATT: Jim, what was your --

6 MS. KITAY: And the facts are just so
7 complicated and unusual because we did have a PA.
8 It was executed. Now, maybe it shouldn't have been
9 executed or whatever, but it was, and we're sitting
10 here today trying to amend something because it
11 expired, and we want to, or think about how to amend
12 it, but there's nothing -- you know, we don't have
13 any kind of action pending before the board. It's
14 just so unusual.

15 MR. FISHER: Having said that, let's go to
16 number 2, "The majority of Tribes did not agree to
17 the existing PA. Should STB negotiate a new PA?"

18 MS. RUTSON: I believe that's what we're trying
19 to do.

20 MR. WHITTED: We're trying to amend an existing
21 PA is what we're trying to do here.

22 MR. YOUPEE: And is tribes included in the
23 public necessity?

24 MS. KITAY: I think in this case they were
25 because there is -- but to the extent that -- well,

1 yes, because the public convenience and necessity
2 involves a weighing in the end of the record before
3 the agency on both the transportation merits and all
4 of the environmental issues, including the tribes or
5 that have been raised before the agency at the time.
6 And so in deciding to approve this project with
7 conditions, the board did, our agency did weigh
8 those concerns.

9 MR. YOUPEE: Did we have a record for that?

10 MS. KITAY: Yes, we have the decisions. We
11 have a whole huge record at the agency in Tongue
12 River I, Tongue River II and Tongue River III,
13 but -- and we have those EISs and whatever
14 correspondence, for example, is attached to those
15 EISs.

16 MR. YOUPEE: You weren't part of those EISs?

17 MS. KITAY: I reviewed sections of those
18 definitely, but I did not particularly work on
19 Native American issues.

20 MR. YOUPEE: Were we excluded as far as part of
21 the public necessity? Because we need that
22 information in a timely fashion as well, preferably
23 in the design stages, and we weren't. But you have
24 to understand that this was taking place
25 consistently with the other railroad.

1 MS. KITAY: What do you mean by "the other
2 railroad"?

3 MR. YOUPEE: The DM&E railroad proceedings.

4 MS. KITAY: Oh, right, uh-huh.

5 MR. YOUPEE: And since we were becoming
6 familiar with that undertaking, we should have been
7 involved, at least communication should have been
8 brought to tribes regarding this as well.

9 MS. KITAY: I think we all feel that the
10 consultation that took place in the old days was not
11 the consultation that will take place today. Again,
12 I think the fact that the board in Tongue River III
13 might not have spent as much time dealing with
14 tribal issues as it might otherwise have is because
15 we had an executed PA in 2005. And it's true that
16 the tribes did not sign that PA, but the necessary
17 parties did sign that PA, so I think that the board
18 in 2007 was reasonable to assume that the process
19 for dealing with Section 106 had been established.

20 And the board did, in Tongue River III, address
21 some of the other issues that were raised by tribes
22 during our process such as employment and
23 socioeconomic issues because those were issues at
24 that time. Historic preservation really wasn't much
25 of an issue in Tongue River III, again because of

1 that executed PA.

2 Once we had that executed PA, then the board's
3 normal practice -- this is exactly what happened in
4 DM&E. In DM&E we had a PA, and we had a condition
5 which says the railroad, DM&E, will have to comply
6 with the executed PA, and that's exactly what we did
7 here in Tongue River III.

8 So where we are -- and I'm not saying we're not
9 sympathetic to your concerns because certainly the
10 three of us are very sympathetic to your concerns --

11 MR. YOUPEE: I need to hear Victoria comment on
12 that comment, I guess, because I certainly want to
13 invest or -- you know, the stake of STB is, their
14 integrity is at stake whether or not we do have a
15 relationship, a trust relationship with STB, you
16 know. And if we do, you know, give us some signs
17 that these things are happening without assuming
18 that things are in place.

19 And, you know, you're an attorney over there,
20 for crying out loud. You don't assume. In a court
21 of law you don't assume. You gotta be factual in a
22 court of law.

23 MS. KITAY: Well, the fact is that there was an
24 executed PA here when the board decided Tongue
25 River III. And I know we'll have problems with that

1 today and all that, but that is a fact.

2 MR. YOUPEE: We'll continue to have those
3 problems because we weren't involved in that, so we
4 have to overcome that. But still --

5 MS. KITAY: That's the question, how best to do
6 that today. I think that is exactly why we are
7 here.

8 MR. BRADY: The other fact is that the Surface
9 Transportation Board completely ignored the
10 expiration date.

11 MS. KITAY: The expiration date?

12 MS. RUTSON: Of the PA.

13 MS. KITAY: Oh.

14 MR. BRADY: Until the Northern Cheyenne Tribe
15 notified the lead federal agency.

16 MS. KITAY: That was very nice that you did.

17 MR. FISHER: But that doesn't -- I mean, what
18 it's saying, what it reflects is STB's neglect on
19 assuring that there's a continued PA in existence
20 without jeopardizing what was in the language. And
21 maybe it was a good thing that there was an
22 oversight on STB's role to ensure that the PA is
23 continually in existence.

24 MS. KITAY: Right. All I can say to you is
25 that we issued a decision in 2007. That was Tongue

1 River III. After that we denied a stay. We
2 recently denied a petition for reconsideration.

3 We've been preparing for the court case in the
4 Ninth Circuit, but there were really no issues until
5 Mr. Brady brought the expired PA to our attention.
6 There were no issues involving tribes or historic
7 preservation that were pending before the agency.

8 MS. WELLS: Because you didn't contact us.

9 MS. GLIDDEN: I think part of the issue, and
10 we've tried to rectify this in this amended PA,
11 which I know you all seem to think that that's --
12 you know, you're very sensitive to that that we've
13 done this, but I do really think that it is a good
14 document in all honesty. And it may not be what you
15 would have done if you had started from scratch, but
16 I really do think you should take a look at it
17 because this amended PA does have now an annual
18 reporting provision, which will basically make sure
19 that this thing never happens again. Because it was
20 an oversight.

21 There should have probably been an annual
22 reporting provision in the PA, but I don't think
23 anybody ever thought that the case would be
24 litigated and for so long. And then the PA was only
25 a five-year term, which is pretty short really, I

1 would think.

2 Right? I mean, Charlene, for a PA?

3 So it was definitely an oversight. But, in
4 essence, it's because there was nothing going on, I
5 mean, aside from the litigation.

6 Correct, Evelyn?

7 MS. KITAY: Yes.

8 MR. FISHER: What would have happened if it
9 would have expired and had gone unnoticed?

10 MS. RUTSON: We would be exactly where we are
11 now. There would have been no difference. The PA
12 would have expired and we wouldn't have had a PA
13 anymore. And because the PA is the foundation of
14 how sites will be identified, impacts assessed and
15 mitigation created --

16 MR. WHITTED: What about avoidance?

17 MS. RUTSON: That's part of the mitigation.

18 MS. GLIDDEN: Yeah, it's in there.

19 MS. RUTSON: Avoidance, minimization and
20 mitigation.

21 MR. WHITTED: How do you avoid -- avoidance is
22 not an issue in this PA. Mitigation is all that's
23 mentioned; you don't avoid anything. That line is
24 set. There's no wiggle room.

25 MS. RUTSON: In the treatment plan, the word

1 "avoidance" is used continually with avoidance,
2 minimization and mitigation. The treatment plan
3 covers that quite thoroughly.

4 MR. EAGLE BEAR: Let me ask this question: You
5 said if the PA expires, you know, what do you have?
6 Where do you start? What do you do? And then my
7 question to you would be: You mentioned
8 consultation was kind of lacking. Do you think it
9 was inadequate as an attorney?

10 MS. KITAY: I think the consultation that took
11 place in the past is not the kind of consultation we
12 would do today.

13 MR. EAGLE BEAR: That's not answering my
14 question. Do you feel it's inadequate?

15 MS. KITAY: It's the way we did things at that
16 time unfortunately. I'm not sure if -- I don't
17 know.

18 MS. GRAVATT: Well, you just make it sound like
19 you didn't have to talk to us then but you have to
20 talk to the Indians now because it's the law.

21 MS. KITAY: Well, it's the law, and also
22 because we're more sensitive to the Indian concerns
23 than we were in the past. I think that would be --
24 and part of this is hiring Cathy who has a lot of
25 expertise in this area.

1 Part of this is the revised regs of the
2 Advisory Council that make it clear that we should
3 pay much more attention to the interests of tribes
4 than we might have in the past, and I think -- I'm
5 not sure that's a bad thing. I mean, we can't go
6 back to the past.

7 MS. GRAVATT: I don't think the federal
8 agencies of themselves would do that. I mean, they
9 had to be directed that you have to consult. I
10 don't think by themselves, not in this region, that
11 the federal agencies by themselves would even
12 consider, Oh, let's bring the tribes in. You know,
13 this was brought on from The Man, you know.

14 So I just don't see your board -- now, you
15 know, like everybody has been saying, you're just
16 playing catch-up. You know, what if we don't want a
17 PA? What if we want an MOU? What if we want to
18 start all over again? We feel like you're trying to
19 get us to come to this meeting so you can just use
20 it to get the project pushed forward because you are
21 under pressure from the company.

22 MR. FISHER: Can you -- I've asked the question
23 on number 2. Do you want to answer? STB, do you
24 want to answer that, yes or no?

25 MS. RUTSON: The question is should the STB

1 negotiate a new PA?

2 MR. FISHER: Uh-huh.

3 MS. RUTSON: I'll say the same thing I did
4 before, I mean, we're calling it an amended PA.
5 Fine, we won't call it an "amended PA". We'll call
6 it whatever. We have completely rewritten that PA.
7 We have spent -- I know you don't want to hear this,
8 but we have spent hours and hours and hours and
9 hours --

10 MS. KITAY: I think it would be weeks.

11 MR. EAGLE BEAR: If you spent that much time,
12 you as an individual, STB, or whatever agency you
13 represent, you know, there's parties to this PA.
14 Shouldn't they come together to be part of this
15 process so that you're not stuck with hours and
16 hours of creating a new PA?

17 MS. RUTSON: We had to have something to offer
18 to you. Are we just going to show up here with
19 nothing?

20 MS. WELLS: If you would have consulted with
21 us, you would have found out that the area of
22 potential effect is far greater than 400 feet beyond
23 the --

24 MS. GLIDDEN: For Wolf Mountains Battlefield
25 site?

1 MS. WELLS: For the whole area.

2 MS. RUTSON: That's wonderful. Tell us that
3 now.

4 MS. KITAY: That's the kind of thing that we're
5 more than happy to negotiate with you.

6 MS. GLIDDEN: This is a draft.

7 MS. KITAY: This is just a draft.

8 MS. GLIDDEN: All it was was an attempt -- you
9 can blame me for this really. What I wanted to do
10 was take the comments that we had received thus far
11 regarding the old PA and try to make this a document
12 that addresses those issues. And if it doesn't do
13 that, then we'll change it and we should change it.

14 MR. YOUPEE: All we need is some truth here.
15 And Russell asked a valid question whether or not
16 that was inadequate, and the answer should have been
17 yes. Then how do we proceed from there?

18 MS. GLIDDEN: Yeah.

19 MR. YOUPEE: Because, you know, these PAs are
20 built on trust, and freedom is built on truth. Now,
21 if we continue -- and we're trying to be
22 non-adversarial about this, but we want it to move
23 along in a manner that's consistent with the regs
24 certainly, but we need the assistance of the federal
25 agencies, as well as the involvement or the

1 engagement of tribes to participate.

2 MS. KITAY: I agree with all of that
3 personally.

4 MS. GLIDDEN: Me, too.

5 MS. KITAY: I think all three of us do.

6 MR. FISHER: Last comment, and then we'll move
7 to number 3.

8 MS. DWIN VAUGHN: I think the fact that we're
9 tied to a heading that says "Amended PA" has a lot
10 of bad blood with it, and we need to ditch the
11 title.

12 MS. KITAY: Let's call it "New PA".

13 MS. DWIN VAUGHN: I can't say what's in it and
14 advocate in that regard, but I can say that as long
15 as you try to tie to tribes a document that they
16 didn't buy into at the outset, you're going to get
17 great resistance, period.

18 MS. KITAY: We'll call it "New PA". That's not
19 a problem.

20 MS. RUTSON: What would you like it to be
21 called?

22 MS. DWIN VAUGHN: Ask them.

23 MR. EAGLE BEAR: I asked a question earlier,
24 and you never answered me.

25 MS. RUTSON: She was answering you.

1 MR. EAGLE BEAR: It was directed to you. The
2 question I asked you: You said if this PA, you
3 know, if it's, you know, expires, then where are we
4 at? Where will we be at? I guess that was my
5 question.

6 MS. RUTSON: If there is no agreement?

7 MR. EAGLE BEAR: Right.

8 MS. RUTSON: And we attempt to work out a new
9 agreement and that fails, too?

10 MR. EAGLE BEAR: No, no, we're talking about
11 the existing PA right now, it expires when?

12 MS. RUTSON: It's already expired.

13 MS. KITAY: But it's been --

14 MR. EAGLE BEAR: Who does the extensions?

15 MS. RUTSON: I understand now.

16 MR. EAGLE BEAR: Now you tell me, let's say
17 that that expires, what happens next?

18 MS. RUTSON: We see if we can extend it again.
19 The date of September 1st, 2011 we arrived at, in
20 consultation with ACHP.

21 Am I being fair in saying that?

22 MS. DWIN VAUGHN: Right.

23 MS. RUTSON: It seems to me my staff has been
24 telling me that this is ridiculous; we cannot
25 possibly get to people signing this thing. And it

1 seems we can, so you know what, we move the date.

2 MS. KITAY: And construction here is not -- I
3 mean, they could start construction right away
4 because this project has never been stayed, but as a
5 practical matter, the railroad is not starting
6 construction tomorrow.

7 MS. RUTSON: They haven't done anything in 28
8 years.

9 MS. KITAY: Right. And they have to do all of
10 this mitigation.

11 MS. DWIN VAUGHN: I think if we move the date
12 back, it seems -- am I making a wrong assumption --

13 MS. GRAVATT: So instead of 2005 PA, it would
14 be 2011 PA, June 22nd, right, or 23rd, whatever the
15 date is today?

16 MR. FISHER: We have a court reporter here, one
17 at a time.

18 MS. RUTSON: May I say one thing? Shall we
19 agree on we'll call it the 2011 PA, but if we don't
20 get done until 2012, we'll change the name to 2012
21 PA? Does everyone feel comfortable with that rather
22 than "Amended PA"?

23 MS. GLIDDEN: I think the sense I'm getting is
24 that you feel rushed and need more time. Maybe we
25 are making a good faith effort but it's too much and

1 you don't have enough time and we've only got a
2 month or two months left.

3 Right, Russell?

4 MR. EAGLE BEAR: Somebody made the comment
5 earlier that it took 25 years in the making and
6 you're calling the tribes to come here and develop
7 something in two, three days. That just don't cut
8 it.

9 MS. KITAY: We all agree. I have no problem
10 with that.

11 MR. EAGLE BEAR: And it's going to take some
12 time and effort and money to bring these tribes
13 together to come up with a PA that we're all
14 comfortable with, not just your agency or
15 satisfaction of the railroad company or whoever it
16 may be. We need -- it's going to take some time,
17 and you know that for a fact. Look at what happened
18 with DM&E and how long we've been working on that to
19 get to the level where it's at, and it's still in
20 the workings. So for three days you cannot and will
21 not get anything from the tribes. We have to go
22 home and answer to our people, you know, just like
23 you do.

24 And so that brings us to the question of
25 government-to-government consultation. You guys

1 aren't the decision makers. Neither are we. And so
2 Programmatic Agreement and government-to-government
3 consultation, you know, we see it in a different way
4 and you see it in a different way, and it takes a
5 process for us to get agreements ratified by our
6 councils, so you guys should understand that
7 process.

8 MR. FISHER: Lana, did you have something to
9 say?

10 MS. GRAVATT: I was going to say that I think
11 what's happening is, you know, the way that you
12 presented this as an existing PA and then this whole
13 25-year thing, it just makes me, like gives me the
14 impression that, okay, that you guys are just trying
15 to push this PA off on us, that we didn't have any
16 involvement and just to meet the court date that's
17 coming up to say that oh, we consulted with the
18 tribes and we have a PA in the workings. Because
19 honestly I just feel you guys are biased for the
20 company. Sorry.

21 MS. DWIN VAUGHN: The ACHP negotiated an
22 extension with STB based on a couple of factors,
23 three, being particular.

24 The first was that the agreement had expired.
25 And we understood that STB anticipated having the

1 litigation resolved and the agreement was fine. The
2 staff at the ACHP did not negotiate the original PA.
3 So, again, you have a player involved in the process
4 who did not know the history. Having now understood
5 that there was no tribal consultation, the council
6 will go on record saying consultation should take as
7 long as it's appropriate to gather tribal input and
8 that the September deadline was arbitrary and
9 unofficial as you learn the history of this project.

10 And, as Vickie said, if we can all agree that
11 those deadlines are removed and that that amendment
12 is no longer valid, we can still use the information
13 in the original PA, to the extent it's appropriate.

14 And we're making a lot of assumptions that it
15 was appropriate. I'm having a difficult time
16 believing that when all these tribes were left out
17 of that discussion. I think we have to pick it up
18 and change the structure of the agreement that
19 currently exists to have a robust, fully developed
20 tribal protocol and tribal perspective.

21 MS. KITAY: So would we extend this for, just
22 say it's extended, without a date? Would we have a
23 new date?

24 MS. DWIN VAUGHN: But we're still extending
25 something that they don't agree to necessarily.

1 MS. WELLS: I don't want it extended.

2 MS. DWIN VAUGHN: We're being backed in a
3 corner to extend again, and I'm saying that the
4 mind set is wrong.

5 And, Vickie, I understand that the conditions,
6 92 conditions are predicated on the existence of
7 this PA. I have to go back and ask our attorney
8 what this portends for us. Because we can't pull
9 the rug out from under you, per se, but nor can we
10 say with integrity that this existing PA meets the
11 test of what people feel is needed to mitigate this
12 project. And I think everybody here has agreed and
13 there's consensus there's no agreement that they
14 would have set up an agreement or mitigation like
15 this is structured.

16 MS. GLIDDEN: Has anybody -- I mean, I just
17 have a question. Has anybody actually read this PA?

18 MS. KITAY: The amended one?

19 MS. GLIDDEN: The amended one.

20 MS. WELLS: Yes, and it's very inadequate. It
21 doesn't address our concerns.

22 MS. DWIN VAUGHN: They perused it and talked
23 about it this morning.

24 MS. GLIDDEN: We want to do right by the
25 tribes.

1 And, Vickie, I mean, if we need to do more
2 work, we need to do more work.

3 And, I mean, Russell is right, the DM&E, work
4 that we did on that, we've had a lot of meetings.

5 MS. KITAY: Yes, but the PA in DM&E, there was
6 a PA executed, and then you've done all kinds of
7 additional work following the PA.

8 MS. GLIDDEN: Yes.

9 MS. KITAY: But the PA set out the process is
10 exactly the same, except for -- well, I assume there
11 was much more tribal consultation prior to a PA in
12 DM&E.

13 MS. GLIDDEN: That there was consultation?

14 MS. KITAY: Yeah.

15 MS. GLIDDEN: Yeah. But what we did was in
16 DM&E we didn't just consult with the tribes that had
17 been consulted regarding the PA itself. We went
18 much more broadly, so we invited tribes beyond, way
19 beyond the ones that were initially involved in the
20 PA and actually signed it. There were only like
21 three tribes that signed it.

22 MS. KITAY: So after the fact?

23 MS. GLIDDEN: Yeah.

24 MS. DWIN VAUGHN: You raised a good point, and
25 that is: What has been done with this PA? So why

1 are we debating a PA that has not been implemented
2 in six years at all and we're attached to it like
3 you've done half the work? You've done none of the
4 work. So that's not like DM&E at all. That's
5 comparing kind of different things.

6 If this agreement had been executed and STB
7 could illustrate for the record that the work, the
8 mitigation, the stipulations set forth there have
9 been complied with or they were halfway through,
10 that would be one thing, but what the railroad said
11 yesterday by their own admission is they've been
12 waiting for certain things to align before they got
13 started, and that alignment hasn't occurred.

14 MS. RUTSON: That's exactly right.

15 MS. DWIN VAUGHN: So that's truth.

16 MS. KITAY: But the problem that I see with
17 this, and it's not going back to square one with the
18 terms of the PA, because that's fine with us. We've
19 all agreed that we can do that and should do that
20 and have whatever consultation is required, but we
21 have a situation where we have this gap in our
22 compliance with Section 106 at this point, or we
23 will in September if we don't have either some kind
24 of new PA in place or some kind of blessing by the
25 necessary parties to go forward and continue the

1 consultations. That's, you know, what I'm worried
2 about.

3 MR. FISHER: Hang onto that thought right
4 there.

5 Let's go to number 3 and take that into
6 consideration. Number 3, "What happens if the 9th
7 Circuit Court decision is not favorable to Tongue
8 River RR?"

9 MS. KITAY: It's impossible to answer that. I
10 can give you the various scenarios.

11 First of all, there is no issue pending before
12 the court involving tribal issues or historic
13 preservation. It was not appealed. None of that
14 stuff was appealed. So the court is not going to
15 get into those issues.

16 The court, as I think the railroad, you know,
17 told you yesterday, is going to be addressing a
18 variety of NEPA issues and also issues that the,
19 that the statutory, the way we examined the
20 characteristics and the standards of 49-USC-10901
21 were not adequate, and I think that the real
22 challenge is the NEPA challenge.

23 As I think I mentioned yesterday, there's now a
24 presumption that rail construction is to be
25 approved. And sitting as a lawyer, you don't know

1 where the judges are coming from, so I could be
2 totally wrong, but my guess is that the real issues
3 that the court will be looking at are the NEPA
4 issues. Probably -- well, we could -- the court
5 could well affirm the board because it could find
6 that we did multiple EISs here.

7 This is a crazy complicated case like no other
8 that anybody at the board has ever worked on because
9 the case has been pending 25 years, and it was in
10 three parts and all of these complicated issues that
11 we've been talking about.

12 So the court could find that procedurally we
13 complied with NEPA, we did the EISs, we imposed
14 mitigation, we considered the relevant factors that
15 were raised, you know, before us and affirm the
16 whole case; that's the end of the story.

17 Or the court could do what happened in DM&E
18 where we also had -- and that case went to the 8th
19 Circuit instead of the 9th Circuit, and I did
20 litigate that case. And the court found, even
21 though they certainly could have found that our EISs
22 were completely adequate there, too, because we'd
23 exhausted the EIS in DM&E, they remanded four
24 specific issues.

25 So normally what happens when a court remands

1 four specific issues or let's say two issues or
2 something, is that the agency then would -- well, it
3 could void, which is what happened again in DM&E.
4 In DM&E the court voided our approval of the license
5 and, until we had considered the four specific
6 issues that the court remanded. We did consider
7 those in supplemental analysis. The case went back
8 to the 8th Circuit and we were affirmed totally.

9 So probably if we were to get that kind of a
10 limited remand, you know -- because courts, they're
11 not supposed to fly speck. They're supposed to look
12 at the big picture when it comes to environmental
13 review. But if the court doesn't like the project
14 for some reason, the courts often do fly speck. And
15 so, you know, we've got a limited -- I mean, that is
16 the most likely scenario if we don't win totally.

17 If that -- and so that's it. That would not
18 necessarily bring back before the board the
19 questions that you are concerned about because they
20 were never appealed, and the time for seeking
21 judicial review of Tongue River III has long since
22 passed.

23 So one more thing, as we discussed yesterday --
24 and I know this is very complicated, so ask me
25 questions or interrupt if you're not getting this,

1 but NPRC did file a petition to reopen, which the
2 board denied, again nothing to do with tribal
3 interests or issues or historic preservation, but
4 they raised four or five issues, and the board
5 denied that petition on June 15th. In doing so, the
6 board cited to longstanding supreme court cases,
7 which say essentially that yes, you can file a
8 petition to reopen after something is decided, but
9 the longer time has gone, more time has passed, the
10 harder it is to get the agency to reconsider its
11 decisions.

12 And the reason for that is there are always
13 changed circumstances. A lot of times people are
14 unhappy about something that happened five years
15 ago, ten years ago, and if you were to reopen agency
16 decisions all the time and routinely, there would
17 never be an end to the decision-making process.

18 And the board, in that decision, which I have
19 copies upstairs -- I don't want to give you more
20 reading, but I'm happy to -- you know, we can get
21 copies made for you if you want it. The board said,
22 you know, this case was not stayed, and the railroad
23 now has a right to go forward and take the
24 preliminary steps with its project. Now, the board
25 was not considering tribal interests or historic

1 preservation because there were no issues involving
2 those two issues that were before it. Whether the
3 board would react differently in this kind of a
4 case, I don't know.

5 I mean, we're not -- Vickie and I and Cathy are
6 senior board staff, but we are simply board staff.
7 We are not the decision maker, the ultimate decision
8 maker. But there's nothing pending before the
9 agency. So I think there's really no way to know
10 what would happen following the Ninth Circuit.

11 We also don't know when a decision is going to
12 come out of the Ninth Circuit. Sometimes they're
13 very fast and they may decide this case in a month
14 or two. It could also take, though, take two years
15 to decide this case. Neither would be particularly
16 unusual.

17 MR. FISHER: So I guess if -- to me I think
18 there is some reaction whether or not it's in favor
19 or not in favor of the Tongue River Railroad Company
20 or the litigants in this case. The reason I say
21 that, when we're talking about NEPA issues, we're
22 talking about environmental issues. If the, those
23 that are challenging the railroad project, if they
24 lose on the environmental issues, it sort of
25 reflects on the tribes because it sort of -- it may

1 not have a direct impact, but if we're losing
2 challenges after challenges, doesn't it give more
3 confidence to the railroad company to proceed and
4 hence sort of influence this particular PA where the
5 tribes are trying to establish some type of --

6 MS. KITAY: I can't speak for the railroad, but
7 my sense is that the railroad would much like to
8 have an executed new PA, however we call it, and I
9 think that the tribes have a lot of leverage. And I
10 think that if the tribes were to come up with some
11 proposal that might be very far reaching from your
12 point of view, I think that the railroads -- they
13 don't want to have this issue hanging out there
14 about Section 106 and how we're going to deal with
15 this. So I think you have a lot of leverage
16 personally, even though I can't speak for the
17 railroad.

18 MS. GLIDDEN: Yeah. A lot of it is what I said
19 yesterday, this is a moment where you could come up
20 with really whatever ideas you have right now.

21 MS. GRAVATT: The main idea we have is that we
22 don't want it to go through there. That's number
23 one.

24 MR. FISHER: Okay, number 4.

25 MS. GRAVATT: Anything else is compromising our

1 people.

2 MR. FISHER: We can go back and talk a little
3 bit more about that once we kind of get your
4 reaction to these comments, I think.

5 "There is no PA Administrative Record that
6 Tribal Consultation has" occurred. I think we've
7 kind of discussed it a little bit, and you're saying
8 there has been, there's records to indicate, there's
9 letters?

10 MS. KITAY: There's contact.

11 MS. DWIN VAUGHN: That's not consultation.

12 MR. FISHER: But is that consultation? Is
13 "contact" consultation?

14 MS. KITAY: We don't know, but I think we can
15 all assume that what happened in the '90s is
16 probably not what we would consider consultation
17 today. We can't do anything about that now, go back
18 obviously, but I think we can all recognize that.

19 MR. FISHER: So you're saying there was no
20 consultation?

21 MS. KITAY: I'm saying that it doesn't appear
22 that -- I mean, there's no --

23 MS. RUTSON: We know that we reached out to the
24 Northern Cheyenne Tribe. What I remember about
25 that -- and please remember this, if I'm saying

1 anything to insult anyone, please let me know and
2 I'm being ignorant. But I remember the tribe was
3 deeply divided on the issue of the Tongue River
4 Railroad. There was part of the tribe that
5 absolutely did not want this railroad anywhere,
6 anywhere near where it was going to be, in fact, no
7 railroad at all. Understandable. There was another
8 portion of the tribe that felt differently. Which
9 portions felt which ways, I don't remember.

10 We worked with Mr. Tall Bull. I don't think it
11 was official consultation at all. I think it was in
12 his capacity with Ethnoscience.

13 We reached out to the Arapaho. We reached out
14 to the Crow. I have no recollection of any person
15 we were working with.

16 MS. GRAVATT: When was this? In the '80s?

17 MS. RUTSON: This would have been 1990.

18 MS. KITAY: Did anything happen to that MOA?
19 There was an MOA in Tongue River I.

20 MS. GLIDDEN: It was signed.

21 MS. KITAY: Signed, but I don't know whether --
22 well, there's been no construction, so probably
23 nothing happened.

24 MS. GLIDDEN: The executed PA superseded that.

25 MS. KITAY: Right. I know.

1 MS. DWIN VAUGHN: The 1986 regulations of the
2 council did not really have consultation protocols
3 for tribes. It was vague, at best. And I've looked
4 everywhere. There is no administrative record in
5 our office that documents exchange or any detailed
6 or finalized negotiations between STB and tribes, so
7 unless you all have that, I don't know that it
8 exists in any meaningful way.

9 MS. KITAY: I think it's just these letters
10 that are attached.

11 MS. GLIDDEN: I've read them. There's one from
12 the Northern Cheyenne. And, as I recall, that, one
13 letter in particular did not seem to be concerned
14 about cultural resources. It was mainly the impacts
15 on the lifeways of the Northern Cheyenne and the
16 wildlife and impacts to their economic and basically
17 the effect of the railroad on the landscape.

18 MS. KITAY: There was definitely contact again
19 with the tribes related to socioeconomic impacts and
20 employment. I know that was an issue in I think II
21 and III but definitely in II.

22 MR. FISHER: I'd like to, I guess at this time,
23 to see if Miles City BLM field office has anything
24 to add that would shed some light into this
25 particular consultation record in the early 1990s or

1 late 1980s.

2 MR. BRADY: Or 1800s.

3 MR. MELTON: I haven't been around that long.

4 I'm not sure. I know that we were a
5 cooperating agency in 1990. I don't believe we were
6 involved in the initial -- at least realty staff
7 tells me that BLM, we were not involved in the
8 initial Tongue River I. Because I think at that
9 time there were no plans to cross any BLM lands.
10 I'm not sure if that's the case now. We need to go
11 back and look at the route.

12 In the 1990s we were a cooperating agency
13 because there would be BLM lands crossed in, south
14 of Birney. And I'm not sure what kind of
15 consultation, if any, was done. I think we probably
16 would have relied heavily on the document that
17 Ethnoscience prepared. We were negotiating with
18 Tall Bull at the time.

19 I did work on the III part. I know we have not
20 issued any kind of right-of-way or record of
21 decision for the BLM as an agency for either of
22 those routes, I believe.

23 Does that answer your question?

24 MR. FISHER: Yeah.

25 Anybody else have any questions?

1 MR. YOUPEE: Yeah, I have some comments, and
2 it's regarding moving forward but some of the
3 questions I have as a result of Tongue River folks
4 being here and some of their presentations and
5 comments as well. But I think the technical and
6 feasibility or financial feasibility of alternative
7 site locations and the relative weight given to
8 historic preservation and the analysis of
9 alternatives, I think that has to be upfront, what
10 are they willing to participate? What are they
11 willing to offer to the scope of the effort to
12 identify historic properties; three, the eligibility
13 of land area. We realize there's other sites and
14 possible other NHLs that might be eligible, but the
15 eligibility of that area and cultural landscapes and
16 the natural resources, including fauna and flora as
17 one or more historic properties.

18 Four, the nature of the effects of the eligible
19 NHLs, we need that specifically, the sufficiency of
20 tribal consultation and the potential for effects on
21 historic properties of religious and cultural
22 significance to tribes.

23 And one that was brought up, the cumulative
24 effects that might ensue if other projects are
25 included in the proposed project, we understand that

1 DM&E, there's other projects associated with the
2 railroad project itself. There's other entities
3 that will be part of that project, other
4 constructions that would be another part of that
5 project, so it's not just DM&E Railroad.

6 And the cumulative effects, you know, we have
7 great concern regarding the cumulative effects
8 because these things happen by piecemeal, but -- and
9 we have to address them by piecemeal, but they add
10 up. They certainly add up. In that area, the whole
11 Powder River Basin itself has been largely exploited
12 for minerals, and it's still -- other projects and
13 entities are doing scoping at this time in that
14 area, too, but there has been damages done before
15 this.

16 And I think if we can, you know, answer some of
17 those questions on an administrative level with STB,
18 I think that would bring some assurances that tribes
19 are getting some information or the information that
20 is necessary to provide their council.

21 And the other thing is that this could be
22 seven -- you know, it's necessary to have a site
23 review of the corridor and so tribes have a good
24 understanding of what's at stake here in terms of
25 cultural properties. And so if we can have a site

1 review, I'm not talking about a TCP study but a site
2 review of the corridor itself, I think that would
3 provide tribes with information where they can move
4 forward to development of a TCP study or a
5 prescribed arch study to move forward into a
6 Programmatic Agreement.

7 MS. GLIDDEN: What do you mean by "site
8 review"? And when do you think that would need to
9 be --

10 MR. YOUPEE: I think tribes being able to go
11 out there and look at the area that's going to be in
12 the project area.

13 MS. KITAY: The railroad has said they have had
14 trouble getting onto the land because of landowners.
15 I don't know if you would have trouble or not.

16 MR. YOUPEE: How do you expect me to comment on
17 something that I have no access to?

18 MS. KITAY: Again, I think that -- I mean, my
19 understanding of what a PA is is it sets up the
20 process that will be used prior to construction, and
21 at that time they will have acquired or the railroad
22 will have acquired the property interest, whether
23 under eminent domain law or not, and if the tribes
24 are out there at that time, that would probably be
25 the time.

1 MR. YOUPEE: I'm not asking for a TCP study at
2 this point. I'm asking for a physical examination
3 or assessment of what's at stake. We can drive
4 through there. We can drive through the whole area.

5 MS. GLIDDEN: Sort of like a windshield survey?

6 MR. YOUPEE: Uh-huh.

7 MS. DWIN VAUGHN: But I don't like the concept
8 of a "windshield survey".

9 MS. GLIDDEN: He did say driving, and I was
10 just responding to that.

11 MS. DWIN VAUGHN: Yeah, but driving the site
12 holistically --

13 MS. GLIDDEN: I'm just trying to get a sense of
14 what it means.

15 MS. KITAY: Right now the amended PA has
16 Class I, Class III and windshields, so . . .

17 MS. GLIDDEN: But primarily --

18 MR. YOUPEE: Let's scratch the windshield.

19 MR. EAGLE BEAR: We let the Northern Cheyenne
20 know that we do not condone windshield surveys.

21 MR. FISHER: I guess that, you know, those are
22 good questions that Curley is asking, and so he's
23 asking 5, 7 and then 10 -- or 8. And part of it, is
24 this STB's protocol to consult with tribes, I think
25 a lot of it has to do with what we're talking about

1 here when we're talking about protocol. What kind
2 of a protocol do you envision and that has occurred
3 since '05 PA? I know there's a little blurb in
4 there that says tribal consultation way in the back
5 with safety issues and all that kind of stuff.

6 MS. KITAY: We consider safety very important,
7 so don't --

8 MS. GLIDDEN: Just to answer your question, I
9 think my feeling is that we would need your
10 assistance in developing tribal protocols because we
11 need your expertise, and we need to know what you
12 want.

13 MS. KITAY: I don't think we have any formal
14 tribal protocols at this point.

15 MS. GLIDDEN: This document, which I'm really
16 afraid to refer to it as -- I know what you think of
17 it. But we did basically say the intention would be
18 to work with you to develop these, either as a group
19 or individually.

20 MS. DWIN VAUGHN: But I guess I'm asking or he
21 was trying to understand what's the agency's tribal
22 protocol? You keep putting everything in the
23 context of this PA. This is bigger than that. And
24 I could not answer the question when asked what is
25 STB's tribal protocol.

1 Evelyn, I hear you saying there isn't a formal
2 protocol.

3 MS. KITAY: I don't think there's a formal
4 protocol. I think it's important to recognize that
5 we are a licensing agency, and that the only time
6 the board does environmental review is when we have
7 a request before us to construct a line, to abandon
8 a line or to merge.

9 And the way the board has implemented this in
10 the context of the licensing actions that come
11 before it is that when they are significant in terms
12 of mileage, we try to get either an MOU or a PA.
13 And I've always understood that the consultation
14 process is part of that PA. And in developing the
15 PA, we try to work as closely as possible with the
16 tribes and have as much input as possible with the
17 tribes.

18 And, Cathy, tell me and, Vickie, if I'm wrong.

19 MR. YOUPEE: You're a federal agency and a lead
20 agency, and President Obama, through a memo
21 directive directing federal agencies to enhance
22 their consultation practices with tribes, and we
23 haven't seen a report from STB regarding that
24 enhancement on how they would, I guess, better the
25 procedures of dealing with tribes.

1 MS. RUTSON: We are hoping that our actions are
2 speaking louder than simply words.

3 MR. YOUPEE: We would like to have something on
4 paper because we're dealing with attorneys, for
5 crying out loud.

6 MS. GRAVATT: What is your guys' definition of
7 trust responsibility? You can say it, but can you
8 define it? What does that mean to you? What does
9 your government-to-government consultation mean to
10 you? You can say it, but can you define it? What
11 does it mean to you? We need that language in any
12 agreement that we're going to sign.

13 One more thing, we can't just be concurring
14 parties on this. This is too huge. There are too
15 many sites out there. And I guarantee when we do do
16 the TCP study, there's going to be so much that we
17 will find that I just don't see any way that that
18 railroad will be able to go through there without
19 some serious opposition, not only from the tribes
20 but from the nation, because it's that huge, the
21 sites out there.

22 And to allow a railroad to go through burial
23 grounds, really? How disrespectful. That hurts my
24 feelings so much that this is even on the table, you
25 know. You guys, your board, why didn't you do the

1 history research? Why didn't you -- you know, I'm
2 blaming you guys for not -- you're like, Oh, we
3 didn't have any historical or cultural issues before
4 us. Why didn't you bring them before you? Why
5 didn't you say, You know what, we need to -- is
6 there any -- you know, I just don't understand, you
7 know, why you didn't ask the questions that are
8 around the table now, you know.

9 And there's -- I realize there's a gap between
10 Indians and white people, you know, here. You don't
11 know anything about our culture, our world view, but
12 you're making decisions that hurt us every day, you
13 know. That's all I'm trying to say.

14 MR. FISHER: What is the trust responsibility
15 of STB? How do they meet that for the tribes, and
16 how is it reflected in the administrative record?
17 Or is there a trust responsibility? Maybe it's the
18 BIA we're talking about. I don't know.

19 MS. RUTSON: There absolutely is a trust
20 responsibility.

21 MR. FISHER: Can you tell us what it is?

22 MS. RUTSON: Yes.

23 MR. FISHER: Please.

24 MS. RUTSON: Yes. We must consult in good
25 faith with open minds and open ears to seek, discuss

1 and to consider the views of the tribes.

2 MR. FISHER: Has that occurred?

3 MS. RUTSON: In the past, I think not. In the
4 future, I fervently hope so.

5 MR. FISHER: How do you intend on making it
6 happen?

7 MS. RUTSON: We have our own ideas of how to do
8 that. I thought this meeting was a good start. I
9 am somewhat dismayed when Curley lets me know that
10 this is perhaps not consultation but, in fact, is
11 information.

12 I'm happy to hear guidance about how we can do
13 a better job. I'm eager to continue hearing from
14 you all. What I'm hearing now is the September
15 deadline needs to be washed away.

16 Evelyn says we're not decision makers, but I am
17 delegated as the Director of the board's Office of
18 Environmental Analysis, certain decision-making
19 capability, and that damn deadline is one of them.
20 It is going; the deadline is going. What to do
21 about a new deadline, I don't know. The --

22 MR. FISHER: Do we need a deadline?

23 MS. RUTSON: Well, I don't know. You know, the
24 railroad guy, who I agree was horrible, he made that
25 big point about, Oh, you need a deadline because it

1 focuses everybody. Maybe that's true.

2 MR. EAGLE BEAR: Conrad, could you smile?

3 MR. FISHER: I have my game face on.

4 MR. EAGLE BEAR: That's the lawyer. That's the
5 guy-in-charge look.

6 MS. GLIDDEN: This isn't a bored look. It's a
7 depressed look.

8 MR. EAGLE BEAR: Thank you.

9 MS. RUTSON: So do we need a deadline? I'd
10 love to consult about that. The PA, get rid of the
11 amended PA, maybe get rid of everything we've done
12 and start over with a clean slate.

13 MR. WHITTED: Now you're talking.

14 MS. RUTSON: Is that a good idea? I'm seeing
15 yeses.

16 All right, where is the PA? I'm standing up.
17 I'm doing it. I'm going to Slot No. 5?

18 MR. YOUPEE: Do you need a drumroll?

19 MS. GLIDDEN: Get the camera out.

20 MS. RUTSON: I'm not strong enough to rip it
21 all. I'm still not strong enough to rip it all.
22 You'll have to rip part of it. I still can't do it.
23 Fewer pages.

24 MS. GLIDDEN: Is this going to be a video?

25 (Ms. Rutson rips up the amended PA.)

1 MS. GLIDDEN: And it's taken us how many days
2 to get to that?

3 MS. RUTSON: I understand this is nothing but a
4 start.

5 MS. YOUNG: That's a first.

6 MS. GLIDDEN: You haven't seen that before?

7 MR. FISHER: How can we help to do the tribal
8 protocol before a new PA is executed?

9 MS. DWIN VAUGHN: Question 7 is really
10 important, how do the tribes engage with you?

11 MS. GLIDDEN: What do you recommend? We're
12 open to any suggestions that you have regarding
13 that.

14 MR. WHITTED: You know, let me interject here.
15 We need information. And I know it's hard to get
16 information now because they don't have access to
17 the property, but it's important. We have to know
18 what's there. We have to know what we're commenting
19 on. Otherwise we're just going through the motions,
20 you know, and we don't know what's realistic and
21 what's not. We're just dealing with words. We have
22 nothing to base it on.

23 These guys have some real issues. We all have
24 some real issues about the environmental issues.
25 Tribal concerns weren't taken into consideration

1 here. There's pictographs and rock art all over
2 this area. What effects is the diesel fumes going
3 to have on that? It's all limestone. A lot of it
4 is already --

5 MR. MELTON: It's actually sandstone, even
6 more pliable.

7 MR. WHITTED: Yeah. What's going to happen to
8 those sites? And they're all over this area.
9 That's an effect that concerns us.

10 The water, what's going to happen to the water
11 when you get trains going through there every 15
12 minutes, diesel smoke or diesel exhaust settling to
13 the ground, coal dust coming off of the coal trains
14 settling into the river systems? I think that's an
15 issue that tribes need input into as well that they
16 did not get. They did not have the opportunity; we
17 didn't have the opportunity.

18 We need to start with a clean slate here and
19 let's do this right. I mean, we have run into
20 federal agencies before that wanted to push things
21 down our throats and it don't work, you know. We
22 need to come to the table and everybody lays their
23 cards on the table and are honest and upfront with
24 each other, not holding anything back, not having
25 ulterior motives, just doing what needs to be done

1 and it's a lot simpler process, no hard feelings,
2 walk away friends at the end of it. That's what we
3 need to do.

4 But we need information first. We can't
5 just -- DM&E, good example, look at the information
6 that was available there. Of course it was after
7 the PA had been signed, but that was during tribal
8 involvement. Tribes got involved at that point.
9 Information was there.

10 MS. KITAY: It was after --

11 MR. WHITTED: It can happen, yep.

12 MS. RUTSON: May I ask a question? Information
13 is needed, I understand that. Is that different
14 than -- any PA, not this PA, not the ripped up PA,
15 not a new PA, any PA, I always thought that a PA
16 meant it's such a big project, the first thing
17 that's going to be done is identification. Isn't
18 that when all that information comes out? Or am I
19 off base?

20 MR. WHITTED: I'd like to go into a project
21 knowing what's going to happen at the outcome,
22 knowing there's a chance to avoid sites, you know,
23 plan a route around sites to avoid them to the best
24 possible scenario. Obviously there are going to be
25 situations where you can't, but we need that

1 opportunity to try to avoid those. If it's all cut
2 and dried and say, No, this is the route that's
3 going to happen; anything within that route is going
4 to get destroyed, then I don't have time for this.

5 MR. YOUPEE: On the same line, you know, it's
6 highly contextual. There is a well-established set
7 of written values consistently as essential to
8 meeting tribal protection standards with regards to
9 a successful consultation to accomplish a
10 Programmatic Agreement. Viewed holistically, these
11 concepts form a basis of tribal values and
12 management systems.

13 We're talking about tribal protocol. Although
14 they may vary in application or names, some of the
15 concepts are -- and for the feds, the obligation of
16 the U.S. Government is to protect the physical and
17 spiritual wellbeing of tangible and intangible,
18 worlds of tribes for future generations. Everything
19 that we do is for our community and futuristic
20 systems.

21 In reference to the cultural environment, the
22 lead agency, federal agency certainly must assert
23 its authority for the exercise of stewardship
24 obligations as to arriving from treaties and
25 confirmed by written trust responsibilities.

1 Those contents we asked for, Victoria,
2 yesterday.

3 On the other hand, tribes are born with the
4 obligation to provide guests with care and kindness
5 and the knowledge that some day that care and
6 kindness will be reciprocated, you know, it will
7 spill over into the way you talk to tribes in the
8 future.

9 There is a life force and unique personality of
10 all things. It is a divine force that is the
11 creation process giving them a life force.
12 Everything has substance in our world. The natural
13 world binds all things to their spiritual source.

14 A key consideration of resource management
15 practices is the maintenance and protection of
16 tribal rights. We get caught up on policy.
17 However, the rights of tribes are not discussed or
18 how those are being trampled.

19 We have civil rights divisions in almost every
20 department within the federal, the U.S. Federal
21 Government. However, STB has attorneys on staff
22 that seem to overcome obstacles, which seems to be
23 tribal participation, I'm afraid. You know, that's
24 what has happened and, you know, that's what I see.

25 So if we're going to move forward, then we

1 revamp that PA. If we're moving forward, we're
2 having tribes involved in the process. But I think
3 at this point Tongue River Railroad personnel would
4 only complicate what we need to do as
5 government-to-government consultation at this point
6 because we need clarity from STB; we need guidance
7 from the ACHP, and we need consistency from the
8 Corps of Engineers, as well as the BLM agencies and
9 the like. We need to understand where the State of
10 Montana is in this undertaking, and we certainly
11 need the participation in face-to-face dialogue,
12 too.

13 That's where I'm at with this project, and
14 that's where I think we need to be or we need to
15 start.

16 MR. FISHER: Let's -- and Curley said it
17 eloquently, and I think that goes to 8 and 10. And
18 if we could go ahead and jump there, because I think
19 what we're really talking about is that whole Tongue
20 River Valley and the cultural landscapes of that
21 area that, from Miles City all the way to Decker,
22 talking about one huge cultural landscape and the
23 significance of that to the tribes and also to the
24 Northern Cheyenne.

25 I mean, the rock art that was talked about, the

1 burial sites, the oral history, all that is embedded
2 in that place. We're inherently tied to that area.
3 You cannot separate the tribes from this valley,
4 this cultural landscape. This is going to be who we
5 are through time immemorial, and we're looking at
6 this project that's going to impact, not only the
7 physical, physicality of that area but also the
8 cultural heritage of the people that deemed this to
9 be sacred to them.

10 So let's go to number 8, "How has STB complied
11 with the requirement in Section 110F regarding the
12 need to minimize adverse impacts to an NHL? How has
13 STB addressed impacts to both the Rosebud and Wolf
14 Mountain NHLs, as well as pending NHLs?" Number 10,
15 "How has STB conducted a holistic assessment of the
16 Area of Potential Effect to include the entire
17 Tongue River Valley corridor? How does STB intend
18 to evaluate the Cumulative Effects of this project?"
19 Now, I know those are a lot of questions, but it's
20 certainly -- I think they apply to what Curley was
21 saying and the rest of the group, Jim. Everybody
22 has this huge concern about this area.

23 MS. RUTSON: I'll take a stab at some of this.
24 Some of these questions, particularly the one about
25 cumulative effects, how good a job did we do in

1 considering cumulative effects, that's one of the
2 issues that is sitting right before the Ninth
3 Circuit, so we'll find out how good a job we did.
4 If we did a good job, the Ninth Circuit will tell us
5 that. If we did a crappy job, the Ninth Circuit
6 will certainly tell us that, too, and remand that
7 issue, send that issue back to us for us to do it
8 properly if they found, if they find that we didn't
9 do an adequate job. So that question isn't decided
10 yet by that court.

11 You know, we could, we the agency could sit
12 here and give you all the reasons why we think we
13 did a great job, but really the Ninth Circuit is
14 going to make that decision. It'll look at our
15 arguments, and it'll look at the arguments of the
16 people who are suing us and make its decision.

17 MS. GRAVATT: Everybody knows that in court the
18 judges see half truths of both sides and makes a
19 decision on that, and if there's no preservation
20 issues on the table or cultural issues and none of
21 the concerns from the tribes on the table, how is
22 that judge going to make a truly informed decision?

23 MS. RUTSON: You probably don't need a lecture
24 from me on the legal system, but you're right, Lana,
25 of course the judge only makes a decision on the

1 stuff that's in front of them. There's three of
2 them. That's exactly right, Lana.

3 MR. FISHER: And it's not necessarily the best
4 interests of the tribes. The litigants in this case
5 were what, the preservation --

6 MS. KITAY: It's the Northern Plains Resource
7 Council.

8 MR. FISHER: They have their own interests
9 there, not necessarily the tribal interests.

10 MS. KITAY: Yes. Native Action was a
11 petitioner. I'm not sure who Native Action is
12 exactly. I think it's a consortium of some kind of
13 tribal interests. Who, I don't exactly know. Maybe
14 one of you does, ranchers and environmentalists, but
15 they did not file a separate brief in this case.

16 MR. FISHER: Was it the same issues?

17 MS. KITAY: Well, any issue that was decided --
18 the way our system works -- and I know. I've tried
19 to say this, you know, yesterday, but unfortunately
20 we've --

21 MR. FISHER: Were they cultural issues like
22 this where --

23 MS. KITAY: Right. When we issued this 2007
24 decision, which, you know, it was served October 9,
25 2007, anybody who was a party before the agency

1 could file a petition for review within 60 days
2 challenging any aspect of that decision, and that's
3 the way the Hobbs Act, which is the way our cases go
4 to court, works.

5 In this case we did get petitions for review by
6 the Northern Plains Resource Council, by I think
7 Native Action. I'm almost sure that they at least
8 appealed Tongue River II. And then that was held in
9 abeyance until Tongue River III was decided. And
10 the United Transportation Union that was, raised the
11 merits issues, and they didn't raise any of these
12 kinds of issues. I don't know why but they didn't.

13 MS. DWIN VAUGHN: So when you say "cumulative
14 effects," what does that mean in an environmental
15 context?

16 MS. KITAY: It is projects that are happening
17 at the same time. It's things like the Otter Creek
18 leases. And I'd have to look at the brief because
19 I'm not arguing the case in two weeks, but it's not
20 these kinds of issues.

21 So cumulative effects is very definitely, as
22 Vickie said, an issue before the court, but it's
23 unlikely or I can't imagine a situation where the
24 kind of issues that you are concerned about is going
25 to come up because it's never been briefed and it

1 was never raised to the court.

2 And when you ask about the landmark, the reason
3 we didn't consider the landmark is because we
4 decided Tongue River III in 2007, and Wolf Mountains
5 was not declared a national landmark until 2008, and
6 so we only consider what's raised before us.

7 And the board has 140 people in Washington, and
8 we have Vickie and her environmental staff of ten,
9 do the very best that they can to do as thorough an
10 environmental and historic review as we can, using
11 third-party contractors and historic preservation
12 consultants and things like that, but basically we
13 have to rely on the arguments that are raised to the
14 agency and that's how we frame the issues.

15 You know, obviously we do scoping. I mean,
16 there were lots of EISs in this case. We did
17 scoping, and we went out and did the best we could
18 at doing an EIS.

19 And then this issue of Wolf Mountains
20 Battlefield, we knew it existed in Tongue River II,
21 and we did consider it in Tongue River II but just
22 as one of many historic sites in the area.

23 And in Tongue River III we got a comment on the
24 draft supplemental EIS about whether it would be
25 possible to move this line outside the battlefield,

1 and the railroad said, explained that it was
2 infeasible really from an engineering standpoint to
3 do that.

4 The final supplemental EIS bought that
5 position, and the board specifically addressed it in
6 a paragraph of its 2007 decision. So from the --
7 you know, I hate to keep -- I'm not trying to play
8 lawyer or anything. I'm just trying to explain to
9 you how the board's processes, how the
10 administrative process functions. But as far as the
11 board is concerned, it's kind of the end of the
12 story on that.

13 Now, we do have this PA process, and that's
14 very important and all of that, but in terms of the
15 merits, so to speak, of these kinds of issues,
16 that's the way the administrative process functions,
17 it relies on people to raise their arguments
18 forcibly before the agency at the right time.

19 MS. GRAVATT: Don't you have the authority --
20 you issued the -- do you have the authority to
21 revoke it?

22 MS. KITAY: You can file a petition to reopen,
23 just as Northern Plains Resource Council did.

24 MS. GRAVATT: But does the board have the
25 authority, by themselves without somebody coming in

1 and trying to make you do it, have that authority to
2 simply revoke it because of the change? The change
3 is significant. It did happen the year before, but
4 it was only a year before. Then you have this
5 nomination. And considering everything that's going
6 to follow in the next couple of years, you know, is
7 that something you guys would consider?

8 MS. KITAY: The board almost never reopens a
9 decision on its own.

10 MS. GRAVATT: But they have the authority?

11 MS. KITAY: I think we might. I'd have to look
12 at the statute, which I don't have in front of me.
13 I don't want to give you a definitive answer, but
14 it's not unusual for parties to file petitions to
15 reopen.

16 MS. DWIN VAUGHN: Evelyn, with the resource
17 designation of Wolf Mountains and the tribes saying
18 that they need to consult, should they or could they
19 file an amicus before the court that would be put
20 before the judge --

21 MS. KITAY: No.

22 MS. DWIN VAUGHN: It's too late?

23 MS. KITAY: It's much too late. That is not an
24 option.

25 MS. WELLS: If Wolf Mountain had never become a

1 National Historic Landmark, would you have ever
2 consulted with us?

3 MS. KITAY: Yes, we did consult with the
4 tribes -- well, sorry, I don't want to use that
5 word. I'm not using that word. We did contact the
6 tribes early on, and that is our process.

7 MS. GRAVATT: When you say "tribes," you can't
8 say tribes. You need to say the two tribes.

9 MS. KITAY: Okay, the two tribes, the tribes we
10 thought at that time -- you know, I'm not -- you
11 know, there were three, we think. Right.

12 Again, we are here -- well, we did -- I mean,
13 the historic review that took place at the board,
14 which led to the 2005 PA, had nothing to do with the
15 landmark designation because it all occurred before
16 this was a landmark, so the answer is yes, we did
17 contact the tribes at that time.

18 MR. YOUPEE: Do you think STB will ever
19 establish a tribal consultation protocol? Because
20 we need clear procedure, clear established
21 standards, and what is the standards established by
22 STB at this point?

23 MS. KITAY: I think that Vickie is in the best
24 position to answer that.

25 MS. RUTSON: I very much want to do that,

1 Curley. I've been reading the protocols established
2 by other agencies starting with the Department of
3 Transportation because we're administratively
4 housed. I didn't think their protocol was exactly
5 what we needed.

6 MR. YOUPEE: But it appears that -- you've said
7 you're the delegated appointee or appointment, on
8 and on. You said it, but it appears that you're in
9 a position to formalize review tracks, and that
10 would be across the board for agency staff, as well
11 as training and for project assessment, but if you
12 have these type of review tracks and the tribes are
13 plugged in in some way, that could be a standard
14 established for tribes in part of the protocol. But
15 we need to be able to predict something from STB,
16 but right now there isn't that sense of partnership
17 or that sense of trust responsibility that is
18 delegated from the relationships to tribes in that
19 trust responsibility.

20 MS. RUTSON: The thing that worries me is, and
21 this is not obviously your concern, but starting
22 October 1 we're going to have no money, and how are
23 we going to do face-to-face meetings with no money?
24 I don't know.

25 MR. YOUPEE: Again, your review tracks can

1 require fees for that assessment in projects.

2 MS. RUTSON: Can't do it.

3 MR. YOUPEE: Department of Energy does it.
4 WAPA does it. And I don't know what other agencies
5 do it, but --

6 MS. RUTSON: I wish we could do it, Curley, but
7 we can't. I've looked into that. We cannot.
8 Legally we don't have the --

9 MR. YOUPEE: Well, I can't help you there.

10 MS. RUTSON: I know you can't.

11 MR. FISHER: Can give you advice.

12 MS. RUTSON: What can we do other than a
13 meeting?

14 MR. DUPRIS: I'd like to add, for the benefit
15 of our hosts, there's a time in the past when tribes
16 could not afford to travel to meetings and they had
17 what you call a representative from one specific
18 tribe that was allowed the proxy vote to -- when it
19 came time to a decision-making period, that person
20 would vote for several, several of our Sioux tribes.

21 And my aunt, her name is Eunice
22 Lariby (phonetic), and she was one person that went
23 to many meetings, in Washington, D.C., anywhere in
24 the United States. And prior to leaving or
25 attending a meeting, she would consult with the

1 other tribal chairmen. And she never was a
2 chairperson. She was a tribal council rep, but they
3 had enough confidence in her leadership that they
4 would give them, give her their proxy vote. And
5 when it came down to settling an issue, she voted
6 for -- when they said Oglalas, she would say yes or
7 no; Rosebud, yes, no; or she would say, you know,
8 whatever tribe. And at the end it was just one
9 person making that vote, voicing, being the voice
10 for all the tribes. And if you think back 25 years
11 ago, you know, that could have been still in effect,
12 you know.

13 When the government, federal agencies contacted
14 or called a meeting, we don't know, because as THPOs
15 we're still new in these positions. Because of the
16 federal law in that, we have to research our history
17 to find out when that period ended, when we had
18 enough money, maybe when the casinos were built or
19 bingo halls or whatever, tobacco shops or whatever,
20 when did they start getting enough money to send all
21 of our tribal chairmen to a certain important
22 meeting or all meetings?

23 And so those are things that I just wanted to
24 share because as a representative from the THPO for
25 Cheyenne River Sioux Tribe, we don't represent one

1 tribe; we represent four tribes, okay? So when we
2 go back, when I go back, I have to talk to four
3 bands of our people, four tribes on our reservation.
4 And there's going to be some discussion; there's
5 going to be questions; there's going to be comments.
6 And, again, it all goes back to, you know, timeline,
7 you know, how are we going to respond to timelines?

8 I know Curley mentioned that there was
9 involvement of all tribes here, and maybe it should
10 be re-worded that there was tribes in attendance and
11 maybe not all tribes were involved in this document,
12 because I haven't heard all the voices here. I've
13 only heard a few, and that's usually what happens at
14 meetings like this.

15 And I've been involved since the middle '80s,
16 and so I kind of feel for the people that are
17 hosting this. And, again, we want to be respectful
18 to the elders here so that we can at least do our
19 part and sharing, you know, information that we have
20 in our histories, tribal history. So that, you
21 know, we're not saying, you know, that we have to
22 have a paper that, you know, provides us all these
23 answers, because we got to do our share, too.

24 I looked at these packets here. I left the
25 tribal caucus, and I went and looked at all these

1 documents, all these documents that were sent prior
2 to this meeting, and there's letters, responses from
3 our tribal leadership in regards to an amended PA in
4 March, all the way to the end of April. Our tribal
5 leaders responded to the amended PA, and we're
6 acting like we don't know what it is; we never read
7 it; we don't know. In reality, it's already been
8 responded to. And maybe that's how the agenda was
9 created, but those are things that we have to put
10 out on record. You know, those things happen. You
11 know, it's not that they didn't make an effort.

12 MS. KITAY: I think we have two issues here,
13 which I guess is similar to what you're saying. I
14 think one thing is how to finish the historic review
15 process or the tribal process for this case where
16 the facts -- I mean, it's such an old case, and we
17 had this PA, and there's nothing pending before the
18 agency. And maybe we would do things differently,
19 but that's one issue.

20 And I think the second issue is coming up with
21 perhaps a protocol or some sort of a process to go
22 forward in the future where we have a new case where
23 we don't already have the board having issued a
24 decision. And I think that's perhaps where we're --
25 you know, there's a problem here, and I'm hopeful

1 that we can, throwing out the PA, but come up with
2 something that will finish the process for this
3 case.

4 And I think we have all heard the concerns
5 about the lack of the protocol and so forth, and we
6 can certainly move forward, but I don't see how we
7 can even remotely hope to accomplish making these,
8 you know, setting up some process that we're going
9 to use for the next 50 years before dealing with
10 this case that's already in court.

11 And it's awfully late in the day, and I just
12 want to make sure everybody understands that it's
13 very, very, very late in the day.

14 MR. YOUPEE: We all have homework, and all
15 we're asking for is a conceptual framework needed
16 for the performance measurement. We're not saying
17 we're going to be watchdogs, but we need to work
18 with you in a partnership manner.

19 MS. KITAY: And we would welcome that.

20 MR. FISHER: Speaking of partners, who others
21 are there? Who are all the stakeholders in addition
22 to the tribes for this project, and how has STB
23 sought their input in negotiating this amended PA?

24 MS. RUTSON: We have a number of stakeholders,
25 and we received --

1 How many comments did we receive?

2 MS. GLIDDEN: I think 13 comment letters.

3 And one of the things that, responses to Q and
4 As, which we have in here and which we did send out
5 previously, does is respond to all of the letters
6 that we've received. And, again, when we did send
7 out the PA and we did have an, we had a federal
8 register notice that went out, and so we received
9 comments that way. We tried to make it as available
10 as we possibly could in order to make sure we did
11 get the broadest degree of comments possible. And
12 we did receive many comments from the tribes and
13 also from the National Historic Landmark, the
14 Montana SHPO, from the Advisory Council and from
15 the --

16 MS. RUTSON: Montana Preservation.

17 MS. GLIDDEN: Montana Preservation. And, you
18 know, also from -- you know, as I mentioned, many of
19 the tribes responded. Some did not; some did; some
20 that are here did.

21 And so what we tried to do as part of this
22 draft was simply incorporate the comments, to the
23 degree that we could, you know, based on that. And,
24 for instance, we did receive comments from the BLM
25 and the Army Corps. And some were very specific and

1 said, "You should do this" and "Add this whereas
2 clause." And from the Advisory Council we had very
3 specific suggestions, and in other cases it was very
4 broad, very broad comments, and it was difficult
5 somewhat to incorporate those sorts of things into
6 changes.

7 But there was never ever any intention in doing
8 this document to make this a final document. It was
9 just simply our attempt to try to, as best we could,
10 make a document that incorporated the comments that
11 we had received to date on that, you know, on the
12 2005 document.

13 So I feel actually upset about this because I
14 do think that we have made an attempt, and obviously
15 we haven't done a good enough job, but there
16 certainly has been an attempt on our part to try to
17 incorporate the comments that we've received thus
18 far and --

19 MS. DWIN VAUGHN: I don't think that STB should
20 feel bad. I think that this experience has been a
21 gathering where tribes took the time to travel to
22 speak directly. For those who represent multiple
23 tribes, I can't address that, but I can say for
24 those that are sitting around the table, they have
25 spoken. They have engaged, and I think they've been

1 forthright.

2 For the council who oversees this process, this
3 is the 106 process regulated, administered by the
4 council, I think that I can say with comfort that
5 everybody who has spoken has a perspective that has
6 not been to be an obstructionist at all but to
7 figure out what is needed to establish a foundation
8 to negotiate in good faith and move forward in some
9 form or fashion on a project that's of importance to
10 a lot of people.

11 So I don't think anybody is sitting in judgment
12 of STB. I don't think, when Curley asked questions
13 about protocols, that he's trying to say and plan
14 for the next 50 years. What we're saying is that
15 when someone stands before us and makes a
16 presentation and says that yes, this is the 11th
17 hour, sorry, but this is what we have to do, this is
18 where we're likely to put it, they have a right to
19 weigh in. That's called Section 106 consultation.

20 MS. GLIDDEN: Of course, but I would also like
21 to say for the record that at the very beginning of
22 this meeting we did say that everything was on the
23 table and that this was a draft, and I just want --
24 and we have the record and I know I did say that at
25 the beginning, and I just want to make that

1 statement.

2 MR. FISHER: Having said that, what does STB
3 envision as a role of the tribe on the task force on
4 Page 39 established by the Tongue River Railroad and
5 STB?

6 MS. GLIDDEN: Page 39?

7 MS. DWIN VAUGHN: Of the 92 conditions.

8 MS. RUTSON: That task force -- that task
9 force, I think, was developed in Tongue I, I think,
10 and it was designed specific -- and I know I'm
11 not -- I should start -- sorry, I'm not being, not
12 being clear. The way that condition is written
13 right now, it does not anticipate or consider tribal
14 interaction, consultation, participation, it does
15 not. Maybe we need to change that.

16 That condition was developed because there was
17 all sorts of issues with fencing and antelopes, and
18 there was desperate concern from my staff member who
19 was working on this case that this railroad would
20 create a barrier that was going to make it
21 impossible for migrating animals to be able to have
22 free flow through the land they needed to live, and
23 so she designed this task force to bring together
24 the agencies that worked on animal issues to be able
25 to design fencing that was going to allow free

1 access of the animals.

2 The task force was designed to consider
3 terrestrial, the animals moving over the land and
4 aquatic. I think that's when there may be impacts
5 to fish, resources, but not the Tongue River Fish
6 Hatchery. That's a whole other dismal ball of wax.

7 So the quick answer is when we wrote that
8 condition, we were not considering tribal
9 participation at all. It's not that we sat there
10 and said, Oh, we're going to intentionally exclude
11 the tribes. We weren't thinking in that direction.
12 We were just thinking about how to protect the
13 antelope and keep the fencing safe in such a way
14 that we weren't going to see thousands of
15 slaughtered animals all over the place as a result
16 of this railroad.

17 MR. BRADY: It's happened before.

18 MS. RUTSON: It sounds to me as though you
19 would like to be involved with this task force? Is
20 that --

21 MR. FISHER: Of course. We'd like to be
22 involved in the, in every aspect of it.

23 MR. YOUPEE: Yeah. We've seen the other
24 railroad. We've experienced firsthand the other
25 railroad as far as consultation. We understand the

1 mitigations that were taken or approved for separate
2 non-Indian issues, and there's a disparity between
3 what is ruled for compensation. And as tribes, you
4 know, we rarely got in there because of the MOA that
5 was also ruled in favor of tribes.

6 But, you know, every department needs a clear
7 and cohesive performance measurement framework that
8 is understood by all levels of the organization that
9 supports objectives and the collection of results.
10 We have mutual desired expectations, and I think
11 that pulls us together as people, not as agencies,
12 governments, but as people alike. And we have
13 expectations.

14 And I think that it's probably important, I
15 guess, for STB to construct a protocol or say that
16 you're going to construct. Inform the tribes that
17 one is going to be in place that we can have
18 something based on a measuring system or device that
19 things are moving forward on behalf of tribes. Or
20 all stakeholders are participating parties, but it's
21 necessary to predict something, as far as I'm
22 concerned, as far as my tribe is concerned.

23 And we're trying to be consistent with the
24 laws, but when we're outside of those laws, we get
25 confused. And it's been explained that this project

1 is very complicated, and it is, but tribes have to
2 play catch-up again within the system in trying to
3 make heads or tails regarding which laws are being
4 applied here. And if we're excluded, then there is
5 noncompliance. There is no penalties for
6 noncompliance, it appears, for Indian people. You
7 know, there is no compensation for noncompliance.
8 Those things happen. That's the reality that we
9 face.

10 But in order for us to create a meaningful
11 relationship with STB, I think those things that are
12 proposed need to happen. And I think as a positive
13 measure, I think that we can move forward in saying
14 those things will happen and then we can count on
15 those things, but that reflects trust
16 responsibility, written trust responsibility from
17 the Federal Government.

18 MR. FISHER: Let's take a five-minute break.

19 (Brief recess.)

20 MR. FISHER: We'd like to go to number 14,
21 Question 14. And we have Mr. Jim Winters here. And
22 this certainly applies to the complex project that
23 we have in front of us and certainly the PA, and we
24 have a number of federal agencies here that have
25 their own permitting process and regulatory

1 responsibilities, and certainly number 14 applies in
2 this case. So the question is, "How do Tongue River
3 Railroad Company and STB envision Tribal
4 consultation for the conditions related to the
5 Section 404 permit and BLM right-of-way Permits?"

6 So with that, I'd like to ask Jim for his input
7 into this very important project.

8 MR. WINTERS: You bet. I certainly can do
9 that.

10 Just as a bit of a background, if you recall
11 yesterday, I mentioned that I was only recently
12 brought into this case. And I don't have a
13 substantial amount of background on this particular
14 case, but what I do know is that the Army Corps of
15 Engineers, the Omaha District, has been involved in
16 this for some time, in context with the NEPA
17 process.

18 What we, as a cooperating agency, like to do
19 with the lead agency like the STB, is to inculcate
20 or include the actual 404 process that Mr. Fisher
21 was alluding to as its own mutually exclusive
22 process for discharges of film material in waters of
23 the United States. Now, I don't believe there's any
24 Section 10 waters involved here, but there are
25 Section 404 waters. That is its own complex

1 detailed process, decision-making process. And the
2 Tongue River Railroad needs a Section 404 permit.
3 Without that 404 permit this project will not
4 proceed.

5 Do remember that in terms of NEPA, NEPA is
6 disclosing the impacts only. It is not a
7 decision-making document. It just discloses the
8 impacts, and it discloses the direct, the indirect
9 and the cumulative impacts.

10 Now, in concert with this complex NEPA process
11 that has been going for some time, and I wasn't
12 involved in that process, but ideally what we like
13 to see in the corps is that that EIS or supplemental
14 draft or final supplemental draft that is ultimately
15 released to the public includes or inculcates all
16 the necessary things for a 404 decision and 404-B1
17 analysis.

18 Now, do remember that the U.S. Environmental
19 Protection Agency, Region 8 has a big player also.
20 We share that 404 Program with Region 8. I noticed
21 that Region 8 is not here today, and I don't know if
22 they're a cooperating agency or not, but they will
23 have a big bite of the apple here once the corps
24 engages in the 404 process, which we have during the
25 NEPA process, but we haven't issued public notice.

1 As a matter of fact, the applicant indicated to me
2 yesterday or this morning that they're about in the
3 process of preparing that permit application for the
4 corps. That will be a whole separate process.

5 But I want to underscore what I'm about to say:
6 The lead agency is STB, Surface Transportation
7 Board. They are responsible, as cooperating
8 agencies are, for this NEPA process. I'm hopeful,
9 I'm not sure but I'm hopeful that that document is
10 going to have the necessary things that we need that
11 my boss, Colonel Robert Ruch, needs to make a
12 decision ultimately on the 404 permit, and that
13 would include the aquatics.

14 And I don't want to get too long-winded here,
15 but let me talk about that for a moment. I looked
16 at the 92 special conditions that STB has put
17 together, very good detailed conditions, but I
18 noticed some things that we're going to need. And I
19 don't know if this is in the EIS process now on the
20 aquatics that are not there, just as the tribe
21 needs, various tribes need true consultation. And
22 that information data, we still don't have it. I
23 haven't seen that also, so that's something that we
24 need in the Army Corps of Engineers. And hopefully
25 that isn't within the context of the NEPA process

1 and it's there presently.

2 One thing I want to mention, and I want to
3 compliment the STB, the Surface Transportation Board
4 with what I'm about to say, and that is I thought
5 they had some very good conditions here, general but
6 still good, covering a lot of areas, but one of the
7 words, one of the things that they've added in here,
8 which you're seeing federal agencies do at this
9 time, is we talk about the concept of adaptive
10 management. And I've seen that -- it's not the
11 words in here, but I've seen that they've added some
12 conditions for adaptive management. In other words,
13 because some things in life are very complex, it's
14 only through lessons learned as we proceed
15 collectively in a cooperative spirit that we learn
16 on good science and other aspects, and we're able to
17 incorporate that just as we go down the pipe.
18 Because we can't, at least I can't visualize the
19 future or what impacts could ultimately be
20 cumulative wise or indirect wise. We just don't
21 know. And so I would compliment the Surface
22 Transportation Board in this respect that they have
23 actually inculcated, at least within our process,
24 the concept of adaptive management. And you're
25 going to see that more and more in the permitting in

1 federal agencies dealing with that. So that's why
2 I'd like to mention that just in passing.

3 And finally I would say, Conrad, that the
4 office that will handle the 404 permitting of this
5 is going to be the Billings office of the Army Corps
6 of Engineers. Shannon Johnson is the chief up
7 there, and she'll be handling this case from a 404
8 point of view.

9 And please don't hesitate from here on out if
10 there's any questions about the 404 process, if the
11 applicant has questions, they can come to us,
12 particularly the tribes. We have a special -- the
13 Corps of Engineers has a unique relationship with
14 the tribes, and the U.S. Army has a unique
15 partnership with the tribes, and we take that very
16 seriously, so if you have questions with regards to
17 the protocols and the process and the outreach that
18 we want to have with you all so you understand our
19 process.

20 As a matter of fact, with many of the tribes
21 here -- I just want to say this in passing, in
22 closing, I have been doing presentations with many
23 of the tribes in the Omaha District on the
24 reissuance of the nationwide permits, and what I've
25 learned is that, in my many hours of presentation,

1 is tribes were hungry for understanding the
2 regulatory process. So at any time should you need
3 to understand what that process is, feel free to
4 contact that office in Billings, or you're going to
5 have a listing of my name, you can call me any time
6 and I'll be happy, happy to provide any type of
7 guidance or consultation or even visit your
8 reservation and meet with you and share information
9 with you on the regulatory process so you can better
10 understand how you can better participate in that
11 process, which is a reflection of this process.

12 So, Conrad, I hope I've answered your question.

13 MR. FISHER: Any questions for Mr. Winters?

14 MS. GRAVATT: When we talked as our agency, you
15 had mentioned, correct me if I'm wrong, but that you
16 guys are, you don't consider landscapes and that,
17 you know, you just go by just the site itself, and
18 if the project is not -- is -- if it's -- what is
19 that buffer zone between that site? And, you know,
20 if you're not considering the whole landscape if
21 there's like multiple sites, it's just site by site,
22 right? Is that what you were saying that you guys
23 kind of like have the authority not to consider, you
24 know, the other impacts from -- you know, kind of
25 like the site is there and if it's not impacting

1 right there, then it's okay?

2 MR. WINTERS: That's a really good question,
3 Lana. Let me answer in this context. Let me say
4 two things. First of all in preface, the regulatory
5 of the nation and the Corps of Engineers does not
6 exactly follow regulations. We follow Appendix C.

7 But let me just underscore this, that the corps
8 is trying very hard in the regulatory arena of the
9 Army Corps of Engineers to apply the regulations
10 fully, and they're working in Washington on that.
11 And that goes to the permit area opposed to the APE.
12 And I won't go into that right now, but just let me
13 say I know our folks in the Pentagon and Advisory
14 Council -- Charlene is shaking her head because
15 she's probably been involved in some of this, but
16 we're getting closer to that.

17 Now, the other thing, Lana, that you've
18 mentioned was, and I want to make this very clear,
19 is the 404 process is really an aquatic process.
20 The concerns that we have in our mission in the
21 regulatory process is with the aquatics, in other
22 words, not the entire alignment on the terrestrial,
23 but there is what we call -- we define our permit
24 area for cultural resource and our permit area for
25 the process itself, and that usually is centered

1 around the aquatics themselves, the waters, for
2 example the perennial streams, the intermittent
3 streams, the ephemeral streams and all the other
4 special aquatics like wetlands. And then there's
5 usually small buffer zones. And if the site is
6 located within there, that's something that we are
7 very concerned about. We're going to protect those
8 sites.

9 But when we talk about the larger landscape,
10 for example this is a lineal transportation project
11 that covers -- the aquatics here are minor in terms
12 of the land, the impacts, but the impacts to the
13 aquatics are, because they are aquatics and they're
14 very special. Those areas we don't regulate, we
15 don't regulate terrestrial areas. It's only the
16 aquatics and the --

17 So we can't protect all those sites, Lana.

18 But within the context of the NEPA process,
19 Section 106 of the National Historic Preservation
20 Act they can be protected but may not be protected
21 exclusively under 404 if solely in the terrestrial
22 area because the 404 deals with aquatics and the
23 defined permit area under Appendix C.

24 MS. DWIN VAUGHN: And we don't agree with their
25 interpretation, and therefore there is a lot of

1 negotiation, and each of the districts have found a
2 way to accommodate these issues, so --

3 MR. WHITTED: Jim, does that include endangered
4 species and aquatic plant life?

5 MR. WINTERS: It does. It's a full range.
6 Everything that's covered in the NEPA process is
7 covered in the 404 process and maybe then some.
8 It's just a very full range of the environment, yes.

9 MR. WHITTED: Could you tell us if there are
10 anything endangered in this area within the Tongue
11 River system that could possibly be an issue as far
12 as fish, amphibians?

13 MR. WINTERS: You bet. There's another agency,
14 a sister agency, the United States Fish & Wildlife
15 Service, and I'm sure they've been instrumental thus
16 far in the NEPA process, and that NEPA process will
17 disclose any types of endangered or threatened
18 species in both plants and animals, and we would tap
19 into that in terms of that NEPA process.

20 MS. WELLS: I have something.

21 MR. WHITTED: One more question, there are some
22 medicinal plants that tribes use that are found in
23 river systems, in lakes, in the slue areas,
24 wetlands. Those would qualify as well as a
25 gathering site? Does that tie into -- I guess,

1 would that be NEPA, or would that -- well, they're
2 actually a cultural resource is what they are.
3 Would that be covered under NEPA or NHPA?

4 MR. WINTERS: That could be covered under NEPA.
5 And many times tribes ask me, "Has an ethnobiologist
6 been involved?" And, again, I don't know. I
7 haven't been involved in this process with STB on
8 this, but my guess is the biologists that have
9 worked on this within the framework of the federal
10 and state agencies out there, the U.S. Fish &
11 Wildlife Service, Montana folks, and they're very
12 competent expert biologists, they could provide that
13 information.

14 But yeah, those types of things, medicinal
15 plants, traditional plants, plant gathering areas,
16 that should be identified probably under the NEPA
17 process and certainly under the 106 process, too.

18 MS. WELLS: That brings me to my question under
19 Mitigation Measure 18, "Plant Species of Concern,"
20 TRRC gets to do the field research and all of that
21 to identify plant species of concerns, federal and
22 state. So you can guarantee me that in that NEPA
23 document the traditional medicinal plants that will
24 be impacted have been identified in that, during an
25 EIS process?

1 MS. RUTSON: That's what the Ethnoscience
2 report that was done years ago did.

3 MS. WELLS: But that didn't include the tribes
4 being involved in the development of the document
5 from Ethnoscience, right?

6 MS. GLIDDEN: Well, I think one of the things
7 I'd like to say about, you know, properties of
8 traditional, religious and cultural significance
9 would certainly include plant gathering areas, and
10 any kind of Programmatic Agreement would include
11 that. And, in fact, this one does. But, you know,
12 and you've got the landscapes, too, so that concept
13 as well, so -- and when you're looking at
14 landscapes, you're looking at a broader set of
15 resources that includes these sorts of things. So,
16 yeah, I mean, definitely. I mean, certainly, you
17 know, those are the sorts of things that we'd want
18 to look at and specifically we'd want your input on
19 in identifying.

20 MR. WINTERS: Because I think one of the things
21 that was brought to our attention yesterday during
22 our caucus was there's a traditional gathering site
23 right near the Tongue River that Northern Cheyenne
24 utilized which will be affected by the diesel fumes
25 from the trains that are going to be going right

1 next to it.

2 I know the Dakota Lakota have a lot of plants
3 that grow in the water systems that they utilize for
4 herbal remedies, and that's something that they need
5 to look into, too, but that is an issue. And I
6 don't know whether it's going to be covered under
7 NEPA or NHPA, or does that even address --

8 Conrad, maybe you would know.

9 -- that particular gathering site?

10 MS. KITAY: Seems to me that if you want to be
11 sure that it is covered, that's something that
12 should be included in a PA.

13 MS. GLIDDEN: Yeah, I agree.

14 MS. DWIN VAUGHN: I think it's related to
15 culture and tradition.

16 MS. KITAY: Right. It certainly could be
17 covered.

18 MS. GLIDDEN: It makes sense to include it.

19 MR. FISHER: And I think it was mentioned.

20 Thank you very much. That was really
21 informative. I think I learned a lot about the,
22 what 404 is all about, aquatic resources and that
23 sort of thing. And I'm sure you've got a lot more
24 to share, but because of the amount of information
25 that's going around, we just certainly appreciate

1 you being here to share.

2 I'd like to see if Doug had anything to say
3 about the role permits, anything that he hasn't
4 already mentioned.

5 MR. MELTON: Well, BLM would have to issue a
6 right-of-way for the portions of the rail line that
7 would cross federal lands managed by the BLM. That
8 would be done under the Federal Land Policy &
9 Management Act. It's a requirement that we would do
10 that.

11 We would have to initiate -- we would probably
12 have to do it -- since we have not signed the Record
13 of Decision or approved right-of-way for this, we
14 would probably have to go back and look at our own
15 NEPA documentation as well, particularly if we have
16 any land involved in the first segment of Tongue
17 River of the proposed railroad. We would have to --
18 that would require us to comply with Section 106
19 independently of this as well.

20 Normally we work under implementing protocol
21 for a national PA, but because of the potential
22 impacts to the Wolf Mountains Battlefield, as well
23 as the fact this is considered a highly
24 controversial project, we would fall back under the
25 case-by-case provisions. So we would go through the

1 regulations.

2 MS. GRAVATT: So would we be doing a separate
3 TCP for you guys?

4 MR. MELTON: Well, we would probably
5 participate in -- we'd probably have you do a single
6 one, but we would incorporate that information. I
7 don't see how we could issue a right-of-way without
8 a Class III inventory since we don't know what kinds
9 of historic properties would be involved, at least
10 minimally on BLM portions.

11 MS. GRAVATT: I mean, so you guys are fresh,
12 and so at this time is the appropriate time for you
13 to be consulting, bringing us in, and then we would
14 be fresh with you from the start, which is good?

15 MR. MELTON: Yeah. That would be our process
16 for this. Probably look at the PA again, mostly in
17 terms of what it does for the federal lands, but we
18 would probably still have to comply with our own
19 internal regulations.

20 MR. WHITTED: Doug, would BLM be open to
21 archeological surveys so that the tribes could get
22 an idea of what's in the area at this time?

23 MR. MELTON: We'd actually have to do that.
24 Minimally we would have to do it on federal lands,
25 but I think our preference would be to do the whole

1 thing simply because that way we would know the
2 impacts to historic properties beyond just -- well,
3 we know there's some historic properties anyways
4 from previous inventories.

5 In 2006 we did a cultural landscape global
6 overview for parts of this, not necessarily related
7 to Tongue River. It was more related for Coal Bed
8 Methane development. That looked at landscapes.
9 And there's a couple of proposed historic districts
10 that we need to figure out boundaries with. One is
11 a potential TCP district that -- the consultant
12 said, "This is possibly a TCP district. But if
13 we're going to pursue that, we need to bring the
14 tribes in to actually figure out where that would
15 be."

16 MR. WHITTED: So you'd be open to that even
17 before they requested the easement through?

18 MR. MELTON: They filed a right-of-way
19 application. They have to because that's the only
20 way we can work on --

21 MS. DWIN VAUGHN: But have they to date?

22 MR. MELTON: Yes, they have. They have filed a
23 right-of-way application, but that doesn't really
24 necessarily mean we've approved anything.

25 MS. GLIDDEN: When did they file it?

1 MR. MELTON: They must have filed it somewhere
2 in about 2004 when the first, when Tongue River III
3 came up, because that's the only way we can actually
4 work on it because we actually charge for
5 right-of-way, for people crossing federal lands.

6 MS. DWIN VAUGHN: So it takes this long to
7 process an application?

8 MR. MELTON: Well, one was some question --
9 normally it does not.

10 MS. DWIN VAUGHN: Okay.

11 MR. MELTON: This is a little rare because we
12 have not, we have not determined if we needed to do
13 a separate environmental document from the one that
14 STB did. Debbie has basically told us a few times,
15 Johnson, who was here yesterday, she's the field
16 office manager, said we need to come to some
17 resolution on this, but we need to gather some more
18 information as well.

19 MR. WHITTED: So this would be a way for us to
20 get some information as to what's in this corridor?

21 MR. MELTON: Some of it, yeah. The initial
22 Tongue River Railroad EIS has the results of the
23 Class I file search for the two or three routes, but
24 that was done -- I think actually I remember running
25 a file search for the state archeological records in

1 1980 or '81, and so there's been other things that
2 have been done since, of course.

3 MR. WHITTED: Was it roughly four or five
4 sections, I believe she mentioned yesterday? Is
5 that --

6 MR. MELTON: Well, it's a linear corridor, so
7 it's actually much longer. Probably be about
8 130 miles, but they did -- I think the initial file
9 search was a mile on either side. So it's about 130
10 miles of, about a hundred and thirty sections all
11 total just to see what was done. And they also did
12 two alternatives, one I believe of Colstrip which
13 had some, has other sites in it, and then also to
14 Moon Creek which is another seasonal --

15 MR. WHITTED: But in miles of the BLM land --

16 MR. MELTON: The BLM land is very limited. I
17 know south of it it's mostly small 40-acre and
18 80-acre chunks they go through.

19 MR. WHITTED: Total how many miles?

20 MR. MELTON: It's probably about four miles
21 total.

22 MR. WHITTED: Okay. That's a start.

23 MS. GRAVATT: So will you be contacting or
24 giving us invitations to meet to discuss more on how
25 we want to proceed with reviewing the BLM lands?

1 MR. MELTON: I would think so. I would think
2 when we get ready to do our, a decision, we would be
3 contacting the tribes, even through the proposed
4 protocol, the regional protocol that we're working
5 on or through a specific --

6 MR. YOUPEE: Have you folks got GPS overlays on
7 that?

8 MR. MELTON: Actually we do. We actually have
9 just finished a contract with the Montana SHPO that
10 we have done the surveys based on all of the sites
11 in southeast Montana, the Miles City District, to
12 get a better idea, because of all the development
13 we're facing, just to get a better idea of what's
14 been done where and --

15 MR. WHITTED: Is that just on BLM land or all
16 of --

17 MR. MELTON: That's actually all.

18 MR. WHITTED: So you have an idea of what's out
19 there along this corridor?

20 MR. MELTON: Some. There's not been a whole
21 lot done on the west side of the Tongue River going
22 north from Ashland.

23 MR. YOUPEE: It's a starting point.

24 MR. WHITTED: It's a starting point, yeah.

25 And you've made that accessible to the STB?

1 MR. MELTON: Oh, yeah, we would. I know we've
2 done some of it with the Preservation Alliance
3 and --

4 MR. FISHER: Before we ask the last question, I
5 think tomorrow -- we probably should have another
6 day.

7 What time, Cathy?

8 I think we probably need to meet tomorrow,
9 tomorrow morning at least, and tomorrow morning's
10 session should be focused on what we've discussed
11 today, some of the questions and the responses that
12 we've had and also the consensus from STB. For
13 example, we'll leave that there for the Tongue River
14 Railroad Company to see.

15 (Ms. Rutson throwing shredded amended PA on the
16 floor.)

17 MR. FISHER: But need to have the Tongue River
18 Railroad here tomorrow so that they can actually
19 participate in what we're about to, or the
20 discussion that we've had here and the conclusion
21 that we've reached so that they have an idea of what
22 the tribes feel is important, what we'd like to see
23 with this project and the PA itself. So tomorrow
24 morning's session would focus on that.

25 MR. WHITTED: One other request, is there any

1 information that National Park Service has on that
2 Historic Landmark issue? Have they made any
3 determinations? Has there been any correspondence
4 with them as far as their concern about crossing
5 that National Historic Landmark?

6 MS. GLIDDEN: Yeah, we do have a letter. I'm
7 quite certain that these letters, we did forward all
8 the letters that we received to all the tribes.

9 MR. WHITTED: I don't recall seeing -- I may
10 have but I don't recall seeing it.

11 MS. GLIDDEN: What I can do is if that's
12 helpful for you is I can probably -- yeah, we can
13 probably make copies of all these letters, and that
14 way you'll have them here. And we probably should
15 have done that, actually. So we'll go ahead and do
16 that tonight before the meeting tomorrow.

17 MR. FISHER: Let's ask the last question right
18 now: What has been established as a tribal
19 consultation budget that would facilitate
20 consultation? Because we know in Indian Country,
21 you know, Cathy, that the tribes, if we were to
22 respond to every 106 request, and we all know as
23 THPOs here that there's, everyday there's at least
24 five or six 106 requests, and if we are to respond
25 and go to these meetings, we'd need a million-dollar

1 budget to attend these and so we need help. We're
2 not wealthy tribes here in the Northern Plains,
3 financially, that is, and --

4 MR. YOUPEE: Rosebud has got a casino.

5 MS. GLIDDEN: Well, Northern Cheyenne has a
6 casino, right?

7 MR. FISHER: What remedy do we have? Do you
8 have any suggestions, STB, on tribal consultation?

9 MS. RUTSON: We signed a Memorandum of --

10 MS. KITAY: Understanding.

11 MS. RUTSON: -- Understanding with Tongue River
12 Railroad to set forth protocols about payment for
13 tribal meetings.

14 MS. KITAY: Well, it was "meeting(s)," is what
15 I remember.

16 MS. RUTSON: We argued for a long time about
17 that "(s)," but we were anticipating that "meeting"
18 may not suffice, so.

19 MS. GLIDDEN: We added in the "(s)" and they
20 agreed to the "(s)".

21 MS. DWIN VAUGHN: You're saying they agreed to
22 the "(s)"?

23 MS. KITAY: Yes. They signed it.

24 MS. RUTSON: Not happily, but they did sign the
25 protocol.

1 MR. YOUPEE: So let me understand this then,
2 the meetings means consultation?

3 MS. RUTSON: I hope so.

4 MS. GLIDDEN: Tell us what you think we need to
5 do.

6 MR. YOUPEE: Because consultation is a lot
7 of -- if we get that far in mitigation --

8 MS. GLIDDEN: We certainly want to work with
9 you, and whatever ideas you have regarding how we
10 can do our job better, we want to hear that.

11 MS. GRAVATT: You guys put it as a part of the
12 permit or part of approval process, or did you ask
13 them later saying, We need this much; you're going
14 to need this much money for tribal meeting or
15 consultation? Or did you make it a part of the
16 approval process saying that we can't approve your
17 project unless you recognize that we're going to
18 have to consult with the tribes and this is how much
19 we need?

20 MS. KITAY: Don't forget when we started this
21 process, it was after there was -- there's no
22 decision pending before the board, so we did this
23 when we extended the PA and when we, you know,
24 extended the other PA in order to come up with a PA
25 following the consultation process that everybody

1 was satisfied with.

2 MS. GRAVATT: So in the future then you figure
3 out a way to do that from the beginning as part of
4 the permitting process or their approval process is
5 that you need to tell these companies from there,
6 not afterwards, from now on that this is a part of
7 the whole process, that this is going to be
8 something that you're going to have to foot.

9 MS. GLIDDEN: Actually, in the 2005 PA there
10 was a provision in there for the railroad to pay for
11 consultation. It's in a footnote but it is there.

12 MS. GRAVATT: But not just a railroad, all the
13 projects of this magnitude at least for now.

14 MS. GLIDDEN: So as a general thing.

15 MS. GRAVATT: Yeah.

16 MS. GLIDDEN: I see what you're saying.

17 MS. GRAVATT: And then, I guess, what I wanted
18 to know before: In the responses that you have, you
19 have a response from the landowner of, that lives
20 within the national historic landmark? Do you have
21 any response from them?

22 MS. GLIDDEN: No.

23 MS. GRAVATT: Are they opposing this, okay with
24 it?

25 MS. KITAY: I don't think we've heard. That's

1 something you might ask David Coburn tomorrow
2 because I think somebody --

3 Who was talking to us about that?

4 MS. RUTSON: The only words I've ever heard
5 about them speaking to the ranch owners has come
6 from the railroad, and we have nothing in writing.

7 MS. GRAVATT: Okay. Well, I just found out
8 that she is opposing this, that she supports
9 preserving the landmark, and that's important
10 information for the tribes to know.

11 MS. RUTSON: Good to hear. Nice if we had
12 something in writing.

13 MR. FISHER: Speaking of writing, can we have a
14 copy of the MOU that --

15 MS. KITAY: Yeah. We might have to send that.
16 Vickie, do you have that here?

17 We could get it to you next week anyway. I
18 don't know if we could get it to you before that.

19 MR. FISHER: I'd just like to know the content.

20 MS. KITAY: The railroad could have that. I
21 don't know.

22 MS. GLIDDEN: I might be able to pull it off
23 the Internet. I'll check.

24 MR. EAGLE BEAR: Tomorrow I'm not going to sit
25 here and listen to responses or re-hashing all this

1 again. I think we need to set up a process of where
2 are we going to go from here, and I think we need to
3 set some goals down the road.

4 Money is always going to be an issue. We
5 fought with DM&E. This is like squeezing water out
6 of a turnip, but we did it. And I think these
7 people need to know.

8 And I don't feel sorry, like my colleague over
9 there feeling sorry for the company. You know, if
10 they really want this deal, they can put money
11 upfront and bring us to the table so we can have a
12 working group and get something done.

13 And tell them I said thank you for paying my
14 way over here yesterday and today, but I think --

15 MS. GLIDDEN: I kind of agree that tomorrow,
16 it's really up to us. It's up to us. And we know
17 what you want. And I just think re-hashing all of
18 this tomorrow is somewhat pointless. And I think, I
19 really do feel that what we should do is be goal
20 oriented and tell us what you want, and then we'll
21 go forward.

22 MS. DWIN VAUGHN: But does that tell you what
23 you want, next steps? Because ultimately it's the
24 STB who's going to have to tell the railroad these
25 things are required. The tribes can't negotiate

1 with the railroad.

2 MS. GLIDDEN: Exactly.

3 MS. DWIN VAUGHN: So you all have to tell them
4 that these are the requests of the tribes and how
5 you're responding.

6 MR. YOUPEE: We want to be in attendance when
7 you articulate --

8 MS. KITAY: But we have to have specific
9 requests.

10 MR. WHITTED: And we don't want to get involved
11 in debates with them.

12 MS. GLIDDEN: And we will end up getting into
13 debates, and I think it's pointless and that's not
14 tribal consultation, and it just mucks things up.
15 And when we had the railroad representative up here
16 sort of talking, it was not helpful at all, in my
17 opinion.

18 MR. EAGLE BEAR: We still remember Herb.

19 MS. KITAY: I heard about that and I wasn't
20 even there.

21 MS. DWIN VAUGHN: Do you need some time to talk
22 to them?

23 MS. RUTSON: This is my concern: I'll bet you
24 dollars to donuts that they're going to be huddled
25 right on the other side of this door and snag us, me

1 probably, when we come out.

2 Do you all feel comfortable if I say that the
3 tribe articulated strongly and I personally have
4 made a commitment that we need to obliterate the
5 September 1st, 2011 deadline, that we need to begin
6 on a new PA, that the amended PA is history?

7 MS. DWIN VAUGHN: That's what everybody said.

8 MS. GLIDDEN: Three, we need to look at funding
9 as an issue?

10 MS. KITAY: Well, we have the MOU.

11 Vickie, do you remember, does the MOU have a
12 date by which when it expires? It goes beyond
13 September 1st.

14 MS. GLIDDEN: I think we took that out because
15 we were --

16 MS. KITAY: I think we did, too, but I just
17 don't quite remember.

18 MS. GLIDDEN: Because we were concerned --

19 MR. FISHER: Might have to amend it.

20 MS. GLIDDEN: No, but I do think -- when I was
21 looking at it, I was, you know --

22 MR. FISHER: Is this still on record? Are we
23 still on record?

24 MS. DWIN VAUGHN: Yes.

25 MR. FISHER: Okay. I was just checking.

1 MR. EAGLE BEAR: Is everybody agreeable to the
2 points?

3 MR. YOUPEE: I agree, but behind closed doors
4 other things are happening. I'd like to have STB
5 again articulate that in front of the tribes with
6 Tongue River.

7 MS. RUTSON: Agreed.

8 MR. YOUPEE: Whatever that response is, we're
9 not in a debate. We're just listening to a
10 response.

11 MS. RUTSON: Agreed.

12 MR. YOUPEE: I want a xerox copy of that torn
13 document so I can have a before and after, xerox of
14 that torn one, I said.

15 MS. DWIN VAUGHN: It's in the book.

16 MR. YOUPEE: No, the torn one.

17 MS. RUTSON: Yes, I commit to making the same
18 statement tomorrow morning on the record that I will
19 make when Tongue River drags me into the corner of
20 the lobby this evening.

21 MS. GLIDDEN: Can we also promise that we're
22 not going to let them drag out the whole process in
23 the morning or take over?

24 MS. RUTSON: I, the STB, with Catherine and
25 Evelyn --

1 MS. KITAY: I won't be here tomorrow.

2 MS. RUTSON: I, Victoria, and Catherine commit
3 to not allowing Tongue River to attempt to debate
4 these issues that we as a group have committed to.

5 MS. GLIDDEN: Because they're going to try.

6 MR. YOUPEE: If you need help with that,
7 Northern Cheyenne --

8 MS. YOUNG: We need a sergeant at arms.

9 MS. GLIDDEN: How about you?

10 MR. FISHER: Now, Russell's question is we need
11 to have an agenda. What are we going to do as far
12 as strategies? Are we going to have another
13 meeting, or are we going to wait for their response?
14 Where are we going with this down the road?

15 MR. YOUPEE: I think it's necessary to listen
16 to what the response is before we can move forward.

17 MR. FISHER: Okay.

18 MR. YOUPEE: And we can develop that agenda
19 after we've heard and caucused.

20 MS. DWIN VAUGHN: I will be late in the
21 morning, Vickie.

22 MR. EAGLE BEAR: I'm not going to sit here all
23 day tomorrow, but don't let the railroad dictate.
24 I'm giving you a directive, don't let them do that
25 to you.

1 MR. FISHER: Gotcha.

2 MS. WELLS: And I don't want to hear anything
3 about having a limited amount of money. There's
4 billions and billions of dollars.

5 MR. YOUPEE: They have additional investors.

6 MS. KITAY: I'll just reiterate one more time,
7 I really think that if you have specific things that
8 you want -- I don't think money is -- I mean, they
9 may say that, but honestly I don't think that's the
10 issue. I mean, you know, it's fairly reasonable. I
11 think you should really think about what it is you
12 want. And I think the railroad is very motivated to
13 try to come to a new PA, so if you have specific
14 things that you think are important, you should, you
15 know, tell us and we can negotiate it with the
16 railroad, however we're going to proceed, but I
17 think the ball is in your court to make sure that we
18 are aware of exactly what it is you want and how
19 best --

20 MS. DWIN VAUGHN: For those people leaving,
21 what is going to happen Monday with the
22 teleconference? How do we proceed with that?

23 MS. RUTSON: Is it appropriate to dismiss our
24 court reporter now? Do we need this on the record?

25 MS. DWIN VAUGHN: No, this is not on the

1 record.

2 MS. RUTSON: Then the official record is closed
3 for the day.

4 (The proceedings adjourned at 6:15 p.m.,
5 June 22, 2011.)
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1 STATE OF SOUTH DAKOTA)

2) ss.

3 COUNTY OF PENNINGTON)

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6 I, CINDY K. PFINGSTON, hereby certify that
7 the foregoing pages numbered from 190 to 305, inclusive,
8 constitute a full, true and accurate record of the
9 proceedings had in the above matter, all done to the best
10 of my skill and ability.

11 DATED this 11th day of July, 2011.

12

13

14

15 CINDY K. PFINGSTON
16 Registered Professional Reporter

17

18

19 My commission expires:

20 February 4, 2016

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