

* * * * *

STB TRIBAL CONSULTATION SUMMIT

TONGUE RIVER RAILROAD PROJECT

DAY 1

* * * * *

Taken at
Holiday Inn, Rushmore Plaza
Rapid City, South Dakota
June 21, 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)

DAVID COBURN

(Steptoe and Johnson)

DOUG DAY

(Tongue River Railroad Company)

LARRY PARKER

(Tongue River Railroad Company)

MIKE GUSTAFSON

(Tongue River Railroad Company)

CURLEY YOUPEE

(Ft. Peck Assiniboine and Sioux Tribes)

DOUG MELTON

(Bureau of Land Management)

DEBBIE JOHNSON MORFORD

(Bureau of Land Management)

CHARLENE DWIN VAUGHN

(Advisory Council on Historic Preservation)

JIM WINTERS

(Army Corps of Engineers)

JIM WHITTED

(Sisseton-Wahpeton Oyate Sioux)

DAN HADLEY

(Mission Engineering)

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

TOM LENNON

(Western Cultural Resources Management)

COLLETTE CHAMBELLAN

(Western Cultural Resources Management)

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)

ALEC SANDCRANE

(Tribal Councilman for the Northern Cheyenne Tribe)

LEROY SPANG

(President of the Northern Cheyenne Tribe)

JAMES WESTON

(Flandreau Santee Sioux Tribe)

WANDA WELLS

(Crow Creek Sioux Tribe)

LANA GRAVATT

(Yankton Sioux Tribe)

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

P R O C E E D I N G S

* * * * *

MS. CONRAD: I have been asked to say the morning prayer before we start the meeting today. I want to thank you for asking me to pray this morning.

(Prayer)

MS. GLIDDEN: Thank you so much for that beautiful prayer.

Many of you have come from long distances. Some of you have traveled by car, eight hours.

Jim, I know it took eight hours to get here.

And many of you have traveled just as far. And Charlene has come all the way from Washington, D.C. And, of course, we've come from Washington, D.C. as well.

But I just want to thank all of you so much for being here. We consider this to be a very, very important meeting, and the revision of this PA, we take it very seriously, and we're hoping that we can, through this meeting we can come up with a document that is going to be agreeable to everyone, that we'll have a sensitive solution to the impacts to the Wolf Mountains Battlefield site particularly.

So, again, thank you so much, a heart-felt

1 thanks, and I just want you to know how much we
2 appreciate you all being here today.

3 So I wanted to begin, if it's okay with all of
4 you, by going around the table and having each of
5 you tell who you are, why you're here and what you
6 hope to get out of this meeting. Let's go ahead and
7 take a few minutes because it would be very helpful
8 for us to get to know each other that way.

9 MR. HADLEY: My name is Dan Hadley. I'm with
10 Mission Engineering in Billings. I have been
11 involved with the development of the Tongue River
12 Railroad since its inception many years ago and have
13 been involved with trying to come up with a design
14 that's suitable for its purpose of transporting
15 commodities but as well as a design that would be
16 sensitive to the environment.

17 MR. PARKER: Hi. My name is Larry Parker. I
18 am a retired Burlington Northern Santa Fe. I worked
19 for them for 40 years, they and their predecessors.
20 And I've been asked by the Tongue River Railroad
21 folks to be present at this meeting to talk about
22 some of the safety concerns and issues surrounding
23 some of the proposed alignments with the Tongue
24 River Railroad, and I do so based on my experience
25 in working as a rail consultant for 40 years in the

1 industry.

2 MR. DAY: My name is Doug Day. I'm with Tongue
3 River Railroad Company out of -- live in Billings,
4 Montana. And we've been working on this project for
5 a number of years, and we're hopeful this
6 Programmatic Agreement process will be the next step
7 in that development.

8 MR. COBURN: I'm David Coburn. I'm a lawyer
9 with a law firm in Washington, D.C., Steptoe &
10 Johnson. I've represented the Tongue River Railroad
11 for over 20 years now and, through all aspects of
12 the proposal. And I certainly hope that we can
13 reach an agreement and understanding that will
14 respect the interests of the tribes and at the same
15 time the railroad as well.

16 MR. GUSTAFSON: I'm Mike Gustafson, and I'm
17 with the Tongue River Railroad. And I look forward
18 to today's dialogue, and I'm interested in all of
19 your comments as we move forward to try to find a
20 consensus on the Programmatic Agreement.

21 MR. SANDCRANE: I'm Alec Sandcrane, Tribal
22 Councilman for the Northern Cheyenne Tribe, and I
23 guess I'm here to better understand the Programmatic
24 Agreement and what it contains and also to see that
25 our voice is heard.

1 MR. SPANG: My name is Leroy Spang. I'm the
2 President of the Northern Cheyenne Tribe. I'm here
3 to get an update on what's going on, especially with
4 the Wolf Mountains Battlefield site.

5 MR. WINTERS: Good morning, everyone. My name
6 is Jim Winters. I work for the United States Army
7 Corps of Engineers, the Omaha District. And I first
8 want to say that I'm honored to be here in the
9 presence of tribal elders, presidents, chairmen,
10 chair ladies, council representatives, thank you for
11 allowing me to be here today.

12 I work as a regulator for the Army Corps of
13 Engineers, and I don't normally handle this project.
14 The lady that was to be here could not be here and
15 asked me to step in for her, so I'm here to learn
16 just like you and ask questions as we proceed.

17 Again, I want to thank all the tribal members,
18 and I'm honored to be here in your presence.

19 MS. GLIDDEN: Thanks, Jim.

20 My name is Cathy Glidden. I'm with the Surface
21 Transportation Board. We're the agency that is the
22 lead agency for this Programmatic Agreement. And I
23 work with Vickie Rutson who is my boss at the
24 Surface Transportation Board and Evelyn Kitay who is
25 the general counsel there.

1 Thanks again for being here.

2 MS. DWIN VAUGHN: My name is Charlene
3 Dwin Vaughn. I'm with the Advisory Council on
4 Historic Preservation. I'm the Assistant Director
5 in the Office of Federal Agency Programs. I've been
6 with the council for 33 years.

7 We had a western office who worked on this
8 project, so my familiarity with the intricacies of
9 the earlier consultation isn't that great, but it is
10 worth the time to come and meet with the tribes,
11 introduce myself to all of you whom I don't really
12 know and just understand your issues and
13 perspectives as we try to work with STB in
14 negotiating a Programmatic Agreement.

15 MR. FISHER: Good morning. My name is
16 Conrad Fisher. I'm the Tribal Historic Preservation
17 Officer for the Northern Cheyenne Tribe, and I'm
18 also a little unfamiliar with the PA itself. I
19 haven't been intimately involved in this, but I'd
20 like to learn a lot more about this PA.

21 In addition, I think, you know, as a group we
22 need to come to some common understanding and
23 resolution on the importance and significance of
24 this particular land line. I know there's a lot of
25 interested parties here, and hopefully we will have

1 a real good discussion and come to a resolution that
2 we can all agree on.

3 MR. MELTON: I'm Doug Melton. I'm the lead
4 archeologist for the Miles City Field Office, Bureau
5 of Land Management. We've been a cooperating agency
6 I believe from 1996 to 2006 versions of the
7 railroad. We also manage land that would be
8 affected by the railroad, and part of the Wolf
9 Mountain Battlefield was an area of critical
10 environmental concern for us as well.

11 MS. JOHNSON MORFORD: I'm Debbie Johnson
12 Morford. I'm the manager for the Miles City Field
13 Office in Miles City with the BLM, and I'm glad to
14 be here and anxious to hear what you all might have
15 to say with regard to the Programmatic Agreement.

16 The BLM Miles City Office is also responsible
17 for issuing the right-of-way for the railroad that
18 would cross any of the BLM administered lands.

19 So I'm glad to be here. And I also wanted to
20 thank the folks that put together the information
21 for us before the meeting. I found that very
22 helpful in preparation for today's meeting, so thank
23 you for that as well.

24 MS. WHITING: I'm Gordeena Whiting. I'm a
25 member of the Northern Arapaho Tribe. I just

1 traveled with her.

2 MS. CONRAD: I'm Darlene Conrad from the
3 Northern Arapaho Tribe from the Tribal Historical
4 Preservation Office, and I also came to learn more
5 about this Tongue River Railroad Project, especially
6 since it goes through many tribes' ancestral lands,
7 the Tongue River area.

8 MR. DUPRIS: Good morning. My name is
9 Dana Dupris, and I'm from the Cheyenne River Sioux
10 Tribe, representing our Tribal Historic Preservation
11 Officer who's not able to be here today. And I
12 think mostly I'm here to learn as much as I can and
13 report back to our tribe. I understand there's a
14 lot of cultural resources that need to be addressed
15 or identified and protected, so that's my main
16 interest. Thank you.

17 MR. WHITEDIRT: My name is Gilbert Whitedirt,
18 Northern Cheyenne Cultural Commission. I'm here to
19 see what's going to take place here today, to see
20 good people in here, and I'm glad to be here. Thank
21 you.

22 MR. COFFEY: Good morning, all. My name is
23 Pete Coffey. I'm with the Mandan Hidatsa Arikara
24 Tribal Historic Preservation Office, Chief
25 Compliance Officer.

1 MR. WHITTED: I'm Jim Whitted. I'm with the
2 Sisseton-Wahpeton Oyate Tribal Historic Preservation
3 Office.

4 And I want to thank the Surface Transportation
5 Board for inviting us to participate in this
6 consultation process. This is the first chance
7 we've had to participate, and we have a lot of
8 questions and would like some answers. Thank you.

9 MS. YOUNG: Good morning. My name is Wasté Win
10 Young, and I'm the Tribal Historic Preservation
11 Officer for the Standing Rock Sioux Tribe in North
12 and South Dakota. And it's good to see everybody
13 here. It's good to see Cathy. And I hope that we
14 can work together and try to come to some
15 understanding and resolution. Thank you.

16 MS. KITAY: My name is Evelyn Kitay. I'm the
17 Associate General Counsel at the board. I work in
18 the General Counsel's Office. And normally I'm
19 really a litigator. I review draft decisions for
20 the defensibility, and I defend the board's
21 decisions in court. I'm the most senior attorney at
22 the board that's been doing environmental work. And
23 we have constructions. And I've been involved with
24 this case since the 1980s, but this is the first
25 time I've ever done a tribal consultation, and I'm

1 really happy to be here.

2 And I'm not here in my role as a litigator.
3 I'm here today to try to inform you and to answer
4 your questions to the best of my ability and to
5 discover and consider realistic options that exist
6 for protecting this landmark and hopefully ending up
7 with an amended draft PA that everybody will be
8 happy with.

9 MS. RUTSON: I'm going to stand up because I
10 know you all can't see me.

11 My name is Vickie Rutson. I'm from the Surface
12 Transportation Board. I'm the Director of the
13 Board's Office of Environmental Analysis.

14 Like Jim Winters explained, I feel very honored
15 to be here, and I thank you very much for taking all
16 the time and the trouble to join with us.

17 I've tried to educate myself about
18 consultations so that I am entering into the spirit
19 of it, seeking, discussing and considering other
20 points of view, and I thank you for coming here to
21 help me understand that process and to, I hope,
22 fulfill the goal that we are setting for ourselves
23 throughout this process.

24 In my job at the board, I'm in charge of making
25 sure that the board is complying with the National

1 Environmental Policy Act, the National Historic
2 Preservation Act and other environmental and
3 historic statutes.

4 So thank you again for being here.

5 MS. GLIDDEN: We also have the court reporter,
6 Cindy.

7 Did you want to say a few words about what
8 you'd like us to do as far as how we speak and maybe
9 the kind of things that you may need?

10 (Dialogue by the Court Reporter.)

11 MS. GLIDDEN: Curley, would you like to say a
12 little bit about yourself and what you hope to get
13 out of this meeting?

14 MR. YOUPEE: Yeah.

15 I think it's a good agenda. I think there's a
16 significant amount of expertise in the arena, and
17 what I've heard is to inform and to realistically
18 create something that is viable, but we have to
19 consider mutual benefit. And hopefully we can
20 reform the benefit package here as to tribes giving,
21 giving, giving and giving, perhaps we can see a
22 little more balance as far as the benefit.

23 And I certainly appreciate the attorneys being
24 here. I think it's necessary to understand some of
25 the tribal concepts. I'm not sure of the competency

1 regarding your communication or relationships with
2 tribes thus far, but we'll find that out real
3 quickly. This area of concern has a great deal of
4 significance for tribes in the surrounding tables
5 here, especially for my tribe. We have sites that
6 haven't been divulged yet, and maybe we don't need
7 to do those things.

8 I want to point out to the recorder, is it
9 necessary to say "Off the record" when we are off
10 the record and then "On the record"?

11 THE COURT REPORTER: Yes.

12 MR. YOUPEE: I think with the assembly here
13 with all the different agencies, certainly we can
14 find some synergy amongst us and for that desired
15 benefit. Thank you.

16 MS. GLIDDEN: Thank you so much.

17 The next thing I wanted to do is go through
18 this handout that you all have and just sort of
19 describe to you what we have in this pamphlet, okay?
20 These are the handouts that were actually attached
21 to an e-mail that was sent to you about the meeting.

22 If you open the pamphlet, the first item there
23 is a letter that was sent by Vickie Rutson
24 describing the project. And if you haven't had a
25 chance to read that, that might be helpful for you

1 to read that.

2 Under Bullet 1 is the attendee list, and that
3 has changed a little, and we will update that for
4 you because that's not entirely current any longer.

5 So let's move to the draft agenda. I just want
6 you to all know that this is still a working agenda.
7 We developed this agenda with the intent of possibly
8 having to change some things, depending on how
9 things go, and if tribes feel that, the tribes that
10 are participating feel that there's other things we
11 need to do or you feel like we need to meet at some
12 other time. But just to go through what we have
13 now, that we were going to begin with basically an
14 overview of the Tongue River Project. It's a very
15 complicated project. It's been going on since 1983.
16 That was the year that I joined the military, and
17 that was a long time ago.

18 And then we were going to have a break and then
19 a legal overview. And it's possible that some of
20 these things might actually be combined with the
21 discussion of Evelyn and Vickie. As they're
22 speaking, be aware if you have any questions as
23 they're talking about the project, please ask. You
24 know, they're ready to answer your questions as we
25 go through this. We're hoping this is an open sort

1 of question-and-answer situation.

2 And then at twelve o'clock -- we'll have a
3 break at 10:30 to 11:00. From 12:00 to 1:30 we'll
4 have lunch, and then after lunch the railroad and
5 Mike Gustafson and Dan Hadley and Larry Parker will
6 talk about the Wolf Mountains Avoidance Discussion.
7 And in your packet you do have a report that was
8 developed by Mission Engineering that talks about
9 looking at the avoidance alternatives, the
10 feasibility or infeasibility of that. That's the
11 last tab, Tab 8, so you might want to take a look at
12 that if you haven't. There's also a map in there
13 that shows the Wolf Mountains Battlefield site in
14 there.

15 So, again, that's the first day for the agenda.

16 The second day we were thinking that it might
17 be an opportunity for the tribes to talk about what
18 we've presented today, and so we have scheduled
19 basically for the morning for you to meet alone, and
20 then the court reporter would not, you know,
21 participate in that. It would be your chance to
22 just talk about the project and meet together and
23 talk about that. Again, if this is not something
24 you want to do, that's fine, but we just thought it
25 would be good to have that, the agenda to talk about

1 what we presented.

2 And then after lunch we would have a time
3 between 1:30 and 3:00 for you to basically approach
4 us with suggestions about the Programmatic Agreement
5 and what kinds of things you would like to see in it
6 or what kind of things still need to be done to make
7 it a better document.

8 And on Day 3 we were hoping that that would be
9 the day in which we could actually work together on
10 the actual draft document, have it up on the screen
11 and go through it line by line and make adjustments
12 as needed.

13 So, again, this is a flexible schedule, and if
14 you have any ideas about things that should change
15 or any suggestions, please feel free to say so at
16 any time.

17 In the booklet we have under Tab 4 (sic), this
18 is "Frequently Asked Questions Regarding the Tongue
19 River Railroad [] Project". This document was
20 developed by our --

21 (Interruption.)

22 MS. RUTSON: I asked them to get rid of the
23 music. I just thought it was a little distracting
24 and would be better if we were able to talk without
25 benefit of the theme from Charlie Brown's Christmas

1 Special in the background.

2 MS. GLIDDEN: Well, a little music never hurt
3 anyone, so thanks for that.

4 Those frequently asked questions, it's a typed
5 response, general response to many of the questions
6 that were included in the letters that were sent to
7 us following the comments that we got in receipt
8 from the 2005 Programmatic Agreement, and so based
9 on these questions we've developed these answers.
10 So this is really helpful because it really does
11 provide a lot of history about the Programmatic
12 Agreement and all of the Tongue River cases, Tongue
13 River I, Tongue River II and Tongue River III, so I
14 think it's a really, you know, helpful document to
15 go through that and look at that.

16 And under Tab 4, this is basically a map of the
17 entire approved railroad, and the Advisory Council
18 had asked that we develop a map that basically shows
19 the entire project and attach it to the Programmatic
20 Agreement, which we have done, so that's
21 Attachment A, which is, again, the actual approved
22 alignment, which goes from Miles City down to
23 Decker, basically.

24 And Tab 5 is the original Programmatic
25 Agreement, so the one from 2005 that was executed

1 and that expired.

2 And then under Tab 6, this is the draft
3 Programmatic Agreement, basically our updates and
4 amendments to the Programmatic Agreement based on
5 the comments that we received. This is a draft.
6 This is not a final document. And we're -- you
7 know, we've tried to make some changes to this to
8 really address the comments that we've received from
9 all of the consulting parties thus far. But it is,
10 again, a draft document, and we're hoping to work
11 with you to make it a better document.

12 And, just, the other thing we have in here is a
13 timeline basically for amending the Programmatic
14 Agreement, beginning with November 1st, 2005 and
15 ending essentially September 1, 2011, which is the
16 date at which we have to have a signed document,
17 which obviously is not too far from now, so you
18 might want to take a look at that timeline. The
19 Advisory Council asked for that also just to give
20 you a sense of some of the changes. And we'll go
21 through this in a lot more detail, but it's just to
22 give you some ideas of some of the changes that
23 we've made to the Programmatic Agreement.

24 First of all, we've added Wolf Mountains
25 Battlefield in the whereas clauses, stipulations and

1 ID plan and elsewhere. We've added the National
2 Historic Landmarks Program as a consulting party and
3 a concurring party to the document. We've added 13
4 tribes as concurring parties to this revised PA and
5 also as consulting parties to this Programmatic
6 Agreement.

7 The PA now requires a Class I Inventory for the
8 entire Wolf Mountains Battlefield site, so the
9 entire area within there, as well as a Class III
10 Survey for 400 feet on either side of the
11 right-of-way.

12 We're going to be developing a separate
13 treatment plan for the Wolf Mountains Battlefield
14 site. We're looking at modifying the alignment
15 within the Wolf Mountains Battlefield site to avoid
16 potentially contributing properties that might be
17 identified through this survey.

18 We've also included a research design for data
19 recovery which now includes a requirement in the
20 tribal values of sites be included in that analysis
21 where we've developed tribal protocols, which
22 basically are something that we want to work with
23 you on in laying out precisely how we're going to
24 conduct consultation with you throughout this
25 process.

1 And we've also included the requirement for an
2 Annual Status Report. One of the things that
3 happened, there was a long time that there was
4 nothing that was happening and nobody knew what was
5 going on, so this Annual Status Report will require
6 that you be updated yearly about precisely what's
7 going on.

8 So, anyway, without further ado, I would like
9 to present Vickie Rutson and Evelyn Kitay who will
10 give you a review of the Tongue River Railroad
11 Project.

12 MR. YOUPEE: My question, I guess, is directed
13 at Ms. Dwain Vaughn.

14 MS. DWAIN VAUGHN: Charlene is fine.

15 MR. YOUPEE: Charlene, is this a Section 106
16 Programmatic Agreement, or is this a Programmatic
17 Agreement that includes Section 106?

18 MS. DWAIN VAUGHN: I think it's the Section 106
19 Programmatic Agreement.

20 MR. YOUPEE: And that's not specific in the PA
21 itself?

22 MS. DWAIN VAUGHN: Perhaps it can be clarified,
23 but the purpose of executing this agreement, and
24 Vickie will speak to that, was to comply with the
25 requirements of the National Historic Preservation

1 Act, so it's a Section 106 document.

2 MR. YOUPEE: Thank you.

3 MS. RUTSON: Thank you for that, Curley.

4 There is a whereas clause, but I think it
5 probably can be clearer. It simply says that STB is
6 the lead federal agency responsible for compliance
7 with Section 106 for this undertaking, but it seems
8 like it could certainly be clearer that this
9 document is pursuant to Section 106.

10 Thank you.

11 MR. FISHER: And, Victoria, you may have an
12 update. I know recently that there was a decision
13 made about the rail line itself, and I believe that
14 in that decision, that it was made public that the
15 rail line had jumped another challenge and was going
16 to move forward. Can you give us the latest update
17 on that, or somebody in here, so that we have a
18 better perspective of what it is that we're faced
19 with today as far as the rail lines?

20 MS. RUTSON: Of course, Conrad. That's an
21 excellent point. I will give you a very short
22 explanation now. Evelyn is going to go into that in
23 detail, but you're exactly right, the board had
24 pending before it petition, a petition to reopen on,
25 reopen the case, reopen Tongue II and Tongue III --

1 am I doing this right?

2 MS. KITAY: Yes.

3 MS. RUTSON: -- on various environmental
4 grounds, not NHPA, not 106 but on environmental
5 grounds such as staleness, the way that we had
6 looked at cumulative effects, the consideration of
7 the Otter Creek Mines, issues of that nature.

8 MS. KITAY: Global warming.

9 MS. RUTSON: And global warming.

10 Thank you, Evelyn.

11 You can tell Evelyn is a litigator.

12 The board recently issued a decision --

13 MS. KITAY: June 15th.

14 MS. RUTSON: -- June 15th saying that no, the
15 agency is not going to reopen because the board
16 represented that it had done an adequate job on
17 those issues that the petitioners were raising, but
18 there is -- so that -- does it move the case
19 forward? I guess, but it moves it forward until
20 another giant hurdle, which is the case has been set
21 for oral argument in the Ninth Circuit for
22 July 11th. Evelyn is going to explain all of that
23 and can do a much better job than I can.

24 But that is the short answer, yes, you're
25 exactly right, the board has recently, on June 15th,

1 issued a decision. It denied the petition to reopen
2 the environmental issues in Tongue II and
3 Tongue III, which meant the case can now move
4 forward in the Ninth Circuit for argument.

5 MS. KITAY: That's not entirely -- I mean, just
6 to be a little bit more accurate, petitions for
7 review were filed in the Ninth Circuit after both
8 Tongue River II and Tongue River III, and because
9 Tongue River III was still pending before the
10 agency, the Ninth Circuit held its judicial review
11 proceeding until Tongue River III was decided.

12 Then a petition to reopen was filed by the
13 Northern Plains Resource Council, as Vickie said, on
14 NEPA grounds, and the case, however, went forward
15 with briefing in the Ninth Circuit, notwithstanding
16 the fact that there was a petition to reopen pending
17 at the agency. But that is the last -- the denial
18 of the petition to reopen by the agency is the, is
19 really the end of the process that was before the
20 board.

21 And what the board said in denying the petition
22 was really two-fold. First, it found on the merits
23 that the NEPA review that has taken place under both
24 Tongue River II and Tongue River III was fully
25 adequate. And, secondly, it explained that it's

1 very difficult -- under our statute you can file a
2 petition to reopen, but the longer the time has gone
3 since the board's decision approving a construction
4 has passed, the harder it is to show grounds to
5 reopen, and the reason for that is administrative
6 finality, the need for the parties to be able to go
7 forward. And there's always changed circumstances
8 that come up in any situation, and agencies can't be
9 expected to constantly be reopening their decisions
10 to move forward. So it's kind of a two-fold thing.

11 So there's absolutely nothing right now that's
12 pending before the board, other than this process
13 that we're going into now to come up hopefully with
14 an amended PA that everybody is satisfied with.

15 And it looks like judicial review will really
16 take place on July 11th because the fact that this
17 decision was recently issued doesn't seem to be -- I
18 mean, people could -- the time for seeking judicial
19 review of that decision has not passed yet, and
20 there could be a separate appeal. You can appeal
21 our decisions to the courts of appeal within 60
22 days, but nobody seems to be arguing that the
23 judicial review of Tongue River II and Tongue
24 River III should not go forward and go forward now
25 in the Ninth Circuit. So presumably the argument

1 will take place on July 11th as scheduled, and then
2 there will be a court decision sometime thereafter.

3 MR. FISHER: Just one question. Who is the
4 agency, and who is the board?

5 MS. KITAY: We are the lead agency, and the --
6 we are the Surface Transportation Board, which
7 regulates railroads. Vickie and I will go into that
8 in more detail, but we are the parties --

9 MR. FISHER: You were just mentioning in your
10 comments "agency," and --

11 MS. KITAY: When I'm talking about "agency,"
12 I'm talking about the board.

13 MR. FISHER: So "agency" and the "board" is the
14 same thing?

15 MS. KITAY: Yes. We call it either "the board"
16 or STB, but it's the same thing.

17 MR. FISHER: Okay, that's all I needed.

18 MR. YOUPEE: I had one question. I'm kind of
19 unclear, and I think that ruling might be a little
20 premature, and perhaps we can address those at the
21 appeals court, but have you taken into account that
22 tribes have not entered into a NEPA document?

23 MS. KITAY: Well, nobody appealed. None of the
24 issues that were raised on judicial review --

25 MR. YOUPEE: We're in consultation now.

1 MS. KITAY: We're in consultation now, but from
2 the board's perspective, there was an executed PA in
3 2005, and the board addressed historic preservation
4 concerns in both of its decisions in Tongue River II
5 and Tongue River III and imposed mitigation
6 requiring compliance with the Programmatic
7 Agreement. So at the time we issued our decision in
8 Tongue River III, there were no outstanding issues
9 involving historic preservation because there was a
10 fully executed Programmatic Agreement.

11 MR. YOUPEE: One outstanding issue is that you
12 haven't been inclusive of all the tribes involved in
13 that area.

14 MS. KITAY: Well, this is why we're doing this
15 consultation now.

16 MR. YOUPEE: This is consultation?

17 MS. KITAY: Right. So we are hoping that we
18 are going to have a better consultation process at
19 this point.

20 MR. FISHER: Thank you for that update. I
21 appreciate it.

22 MR. YOUPEE: Thank you.

23 MS. RUTSON: Again, I'm Vickie Rutson, one more
24 time. I'm going to give a little overview of -- I
25 know we bandied these words about so quickly, and

1 Evelyn is from New York so she's really quick. It's
2 taken me working with her for 20 years to actually
3 sort of kind of keep up with her. But yes, your
4 questions are excellent. And we forget that, you
5 know, "board, STB," we just toss these terms out;
6 it's all the same thing.

7 So I want to talk for a few minutes. When you
8 say "Surface Transportation Board," you know, what
9 sort of image is conjured? Typically nothing. I
10 mean, what the heck does that mean? So let me spend
11 a little bit, just a little bit talking about what
12 Congress, why Congress created us, what our
13 congressional duty is to uphold, why we accept
14 enormous sums, not our agency so much but as an
15 agency, sums from the federal workforce and from the
16 people of the United States and from every taxpayer,
17 to what duty we are charged with upholding, just so
18 you understand that.

19 It's kind of an odd concept, economic
20 regulation of freight railroads, but let me spend a
21 little bit of time talking about that. Then I'm
22 going to explain our role and how it's different
23 from the role of the railroad.

24 And then Evelyn has got the heavy lifting here.
25 She's going to talk about sort of the history of the

1 Tongue River case before the agency. As Cathy said,
2 it's a 28-year history, and for us, that's a lot of
3 history. So, again, please --

4 Curley?

5 MR. YOUPEE: Can we possibly put that into a
6 context where we can at least understand the
7 relationship, the constitutionality of this
8 department and the trust responsibility to tribes?

9 MS. RUTSON: Yes, Curley, I can answer that in
10 one word, we have a trust responsibility to the
11 tribes. We have a trust responsibility to the
12 tribes; we do. We have the obligation, the duty and
13 the privilege to conduct government-to-government
14 consultation.

15 And I've read the letters that each of you sent
16 on the first round of PA commenting and, boy, you
17 made it very clear that we did not do a good job on
18 our government-to-government consultation earlier in
19 this process. We did not do a good job. Now, I
20 could stand up here and give you all sorts of
21 reasons why we didn't, but that doesn't change the
22 fact that yes, Curley, we have that trust, that duty
23 and that honor.

24 MR. YOUPEE: So if we can stay in that context
25 in how we're going to be connected in that

1 relationship, in that trust relationship, I think
2 that would be beneficial to the tribes as well.

3 MS. RUTSON: Please let me know if I'm not
4 doing that and bring me back to where we need to be
5 if I'm drifting.

6 Please, all of you, I would appreciate that
7 very much. I've done this -- Curley and I met years
8 ago.

9 I don't know if you remember, Curley.

10 MR. YOUPEE: Don't say how long ago.

11 MS. RUTSON: I know, a few years ago. But I
12 was on the Dakota, Minnesota and Eastern case,
13 another very, very difficult railroad case and I
14 learned very much. I had a lot to learn, and I
15 still have a lot to learn. So I will try to do the
16 best job that I can, but please let me know if I am
17 drifting.

18 All right, the Tongue River Railroad Project.
19 I hate Power Point. I'm just dismal at it, but
20 anyway, we're going back to 1887 but I will not stay
21 there long. You're probably thinking, No wonder we
22 need three days.

23 The agency, the Surface Transportation Board,
24 grew out of another agency, the Interstate Commerce
25 Commission. And I didn't realize this until Cathy

1 prepared the slide, but apparently we were created
2 by Grover Cleveland, and that's everything I know
3 about Grover Cleveland.

4 But I can tell you why the agency was created.
5 This was a time, and I suspect you all understand
6 this far better than I do, but it was when railroads
7 were really coming into a tremendous amount of
8 power. The railroad barons, the very wealthy men of
9 the United States were building railroads. They
10 were doing it in a very efficient way from a
11 business perspective, but they were not particularly
12 concerned about the welfare of their workers or
13 about providing service to farmers. That's the
14 Grange, was the Agrarian Movement.

15 Farmers wanted to move their goods for a
16 reasonable rate. Railroads were not offering good
17 service to some shippers. They had a lot of power
18 and a lot of strength. And we all understand from
19 history that when anyone gets a lot of power and
20 strength, abuses typically come from that, and the
21 railroads were no exception to that.

22 So Congress looked at what was happening to
23 shippers and the way railroads were behaving. So
24 Congress created the Interstate Commerce Commission
25 to correct that, to create economic regulation so

1 that railroads had the responsibility of offering
2 service to anyone who needed it for a reasonable
3 rate. The words that the ICC had to abide by were
4 the National Transportation Policy. That was the
5 duty emblazoned by Congress onto the ICC.

6 And this happened for many, many years, a
7 hundred and eight years in total, until we
8 fast forward to the 1970s and '80s. Things had
9 changed very dramatically by then. The railroads
10 were going bankrupt. And one of the reasons the
11 railroads were going bankrupt was because the ICC
12 was regulating the railroads so strenuously that the
13 railroads simply could not make any money and they
14 were in bankruptcy. And the Federal Government had
15 to get them out of bankruptcy to the tune of
16 \$6 billion, which back then was a lot of money, not
17 so much now. But basically the ICC was not doing a
18 good job with the National Transportation Policy.

19 Next slide please.

20 So time went by, and eventually Congress did
21 something that it hardly ever does, it abolished a
22 federal agency. I mean, I think back over my whole
23 life and I can't ever remember an agency being
24 abolished, but this is what Congress did. And out
25 of the ashes of the Interstate Commerce Commission

1 it created the agency that Evelyn and I work for.

2 MR. COFFEY: You mention the fact that ICC was
3 strangling the railroads through regulation. What
4 specifically?

5 MS. RUTSON: That's an excellent question,
6 Pete. Thank you. For example, if a railroad has a
7 rail line and it's not making any money but it still
8 has to keep up that line because a shipper may be
9 located on the line but yet the -- railroads are
10 expensive. It's very expensive to fix up the steel
11 and the right-of-way. It's really expensive. So if
12 a railroad is pouring money in the rail line and the
13 rail line is not generating any profit, the ICC made
14 it very difficult for the railroad to get rid of it,
15 really difficult.

16 MR. COFFEY: So money prevailed?

17 MS. RUTSON: Money prevailed? Well --

18 MR. COFFEY: Please go on. That was just an
19 aside for me.

20 MS. RUTSON: It's an excellent point.

21 MR. COFFEY: Please go on with your
22 presentation. I was just curious what would
23 actually cause them to shut down.

24 MS. RUTSON: Losing money, you're exactly
25 right.

1 MR. COFFEY: Please go ahead.

2 MS. RUTSON: Thank you.

3 So Congress abolishes the ICC and creates the
4 Surface Transportation Board, still with the same
5 congressional duty, economic regulation of freight
6 railroads, still with the National Transportation
7 Policy to uphold. That's no different than it was
8 when it was the ICC. But we're now a much smaller
9 agency. We're 140 people. We're located only in
10 Washington D.C. There aren't any field offices or
11 anything of that nature, and we are still with the
12 obligation of adjudicating economic disputes in
13 constructions and also approving or disapproving
14 constructions, rail abandonments, mergers,
15 acquisitions and operations.

16 So Tongue River has a proposal. It is Tongue
17 River's proposal, not our proposal. But the
18 railroads devise things they want to do, and then
19 it's up to the agency to consider it, both on the
20 merits, which is the economics, but we also have a
21 duty under the environmental statutes and the
22 historic statutes. We have both duties. And, of
23 course, as Curley accurately pointed out, we have
24 the trust responsibility as well.

25 All right, next slide please.

1 My staff is -- well, when you have an agency
2 with 140 people in it, the groups are going to be
3 small. There's ten of us altogether. So the fact
4 that you have two of us here out of ten, plus Evelyn
5 from the General Counsel's Office, our senior
6 environmental attorney in the entire agency, I hope
7 that gives us some sense that we really do want to
8 do a good job here. And we know how things went in
9 the past, but we want to try and do as best a job as
10 we can now.

11 We're still doing economic and historic reviews
12 for all sorts of railroad proposals. There's some
13 proposals in Alaska to build new lines. There was a
14 proposal to build a rail line to Yucca Mountain.
15 There's lots of abandonment cases here. If a
16 railroad is not making money, we consider whether to
17 abandon it. And my office does an environmental
18 review and a historic review because often there's
19 historic structures and sites involved in railroad
20 abandonments. So we continue to do that work.

21 The board, when it makes a decision, can go
22 make one of three decisions. It can either approve
23 the railroad's proposal; it can deny the railroad's
24 proposal, or it can approve the railroad's proposal
25 but only if the railroad abides by certain

1 conditions, such as complying with the terms of a
2 Programmatic Agreement. We use third-party
3 consultants, and we have the help of Tom and
4 Collette from Western Cultural Resources Management
5 here with us today. Thank you for them. Again,
6 when we have such a small staff, having the help of
7 a third-party contractor is invaluable for us. So
8 thank you.

9 Next slide.

10 Now I blissfully turn it over to Evelyn.

11 Does anyone have any --

12 MR. YOUPEE: I have one question. Is STB, in
13 any shape or form, connected or related to commerce
14 itself?

15 MS. RUTSON: To the agency commerce?

16 MR. YOUPEE: Yes.

17 MS. RUTSON: No.

18 MR. YOUPEE: Is STB, in any shape or form, a
19 granting agency for subsidies or otherwise?

20 MS. RUTSON: That's a good question, Curley.
21 No, we have no money -- well, we have a budget, but
22 no, we grant no monies. We are just a regulatory
23 agency that issues licenses that allow economic
24 expansion for railroads. That would be like
25 constructions or mergers or economic withdrawal from

1 the market; that would be the abandonments. So no,
2 we don't grant any money at all.

3 MR. YOUPEE: So does the STB operate on fees
4 and other type of intake?

5 MS. RUTSON: We do have user fees, but they
6 only account for a small amount of -- our budget is,
7 really comes from the American taxpayer. We have a
8 budget of \$35 million a year. We're -- I don't know
9 how relevant this is, and if I'm getting off track,
10 just wave your hand, but we're administratively
11 housed in the Department of Transportation, but
12 honestly, all I think that means is we have a space
13 on their website, and it's not -- we have our own
14 website. But we have our own budget; we have a
15 different building; we have a different
16 decision maker. We certainly have a smaller budget.
17 We're just administratively housed in DOT, but truly
18 we have nothing to do with DOT.

19 Is that clear, do you think?

20 MR. YOUPEE: Yes.

21 MS. DWIN VAUGHN: So how does that relate to
22 your agency's obligation to comply with Statute 4F
23 of the Department of Transportation?

24 MS. RUTSON: Good. We have no 4F obligation
25 because that --

1 Does everyone know what 4F is? I sort of do.
2 It comes from the Federal Transportation Act, I
3 think, but it has to do with an agency, like the
4 Highway Administration, before they build a highway,
5 they have to make sure that there's absolutely no
6 way to -- if there are no other alternatives that
7 wouldn't affect park land, historic resources,
8 there's a -- 4F has a tremendously high burden of
9 proof to show that there is no other way to make
10 this highway get from A to B except through a park
11 or a historic district, so it's a very high duty.

12 MS. DWIN VAUGHN: The concept is reasonable and
13 prudent, I think.

14 MS. KITAY: Right, but it applies to the
15 Secretary of Transportation, and we do not --

16 MS. DWIN VAUGHN: Report to them?

17 MS. KITAY: -- report to the Secretary of
18 Transportation, which is why Section 4F does not
19 apply to the board.

20 MS. GLIDDEN: This is one of the answers that
21 we have in the Q-and-A section.

22 MS. KITAY: Right. It is number 18.

23 MR. YOUPEE: Let me ask this then: Who
24 initiates eminent domain?

25 MS. KITAY: The way it works is we license --

1 it's sort of a chicken-and-the-egg situation, but
2 normally the board issues a license to a railroad to
3 allow them to construct and operate a new rail line.
4 At that point the railroad goes about and acquires
5 the necessary property. The board does not look
6 into that issue, those kind of issues as part of its
7 licensing process.

8 And it tries to -- usually railroads try to
9 negotiate with landowners to acquire the easements
10 or the property rights that they need to construct
11 and operate their rail lines. If that doesn't work,
12 almost every state in the country has eminent domain
13 laws, and once we have issued a license, then those
14 laws apply.

15 Does that answer your question?

16 MR. YOUPEE: I am not sure who initiates
17 eminent domain.

18 MS. KITAY: It would be the railroad, I
19 believe.

20 Is that right?

21 MR. COBURN: Yes, under state law.

22 MS. KITAY: Right. There's no federal eminent
23 domain law. It doesn't exist. So we are just
24 giving the license that then allows the application
25 of state eminent domain law.

1 MR. YOUPEE: Okay.

2 And I guess for ACHP, I'm not sure how your
3 question relates to the eminent domain. We need
4 clarity, I guess, on that issue.

5 MS. KITAY: I don't think the eminent domain
6 has anything particularly to do with ACHP. It's
7 just the way the railroad goes about and executes --

8 MR. YOUPEE: The section -- what was the --

9 MS. KITAY: Section 4F.

10 MR. YOUPEE: Yeah, 4F.

11 MS. KITAY: Right. That involves projects that
12 are approved by the Department of Transportation, by
13 the Secretary of Transportation, and the board is an
14 independent regulatory agency that -- DOT sometimes
15 comes into, the Department of Transportation
16 sometimes will participate in an agency rule making
17 or maybe a merger case or something that they're
18 particularly involved in, but they have no
19 responsibility over the things that the Surface
20 Transportation Board licenses, which is why
21 Section 4F doesn't apply to the board.

22 MR. YOUPEE: So that's the disconnect?

23 MS. KITAY: Right.

24 We do an analysis. This isn't part of the
25 slides. It probably should have been. But our

1 analysis of a rail construction is under the
2 Interstate Commerce Act and specifically Section
3 49-USC-10901 of the Interstate Commerce Act, and
4 that statute has a very liberal economic licensing
5 statute. It basically says that we have to approve
6 rail construction projects unless we find them to be
7 inconsistent with the public convenience and
8 necessity.

9 And in determining whether the project is or is
10 not inconsistent with the public convenience and
11 necessity, we weigh the transportation merits
12 against any environmental harms. And as Vickie
13 said, we end up either granting, denying or almost
14 always granting with environmental conditions.

15 And here we had 92 environmental conditions
16 when we granted authority to construct the Tongue
17 River III railroad line, and so the board found that
18 the transportation merits, the need for this project
19 outweighed the potential environmental harms as
20 mitigated. And the reason is that Tongue River, the
21 Tongue River Railroad line will provide a way to
22 access the coal mines in the Ashland area and will
23 also allow BNSF a shorter route from Wyoming to the
24 Midwest. It's a hundred and thirty to a hundred and
25 sixty miles shorter. And there's a need for coal to

1 implement the Clean Air Act, and this project was
2 considered to be a very valuable one on the
3 transportation merits.

4 And, again, with respect to NEPA, we did, in
5 both Tongue River I -- now I'm getting ahead of
6 myself here, too. But, anyway, we can go into
7 exactly what --

8 MS. RUTSON: This might be a good time to segue
9 into Evelyn's discussion in chief, don't you think?

10 MS. GLIDDEN: I wanted to note that we do have
11 a break on the schedule for now. Do you want to
12 break, or do you want to keep going?

13 MS. KITAY: I think we should keep going.

14 MR. YOUPEE: I guess what's still unclear is
15 that tribes need to understand the regulations
16 clearly, wholly, and be able to utilize those laws
17 and policies to their advantage as well.

18 Now, public convenience and necessity --

19 MS. KITAY: Right.

20 MR. YOUPEE: -- apparently is some ruling at
21 some point.

22 MS. KITAY: It's a term of art. And basically
23 you look at the need for the railroad project, the
24 economic need for the railroad project, does this
25 make sense? Is the railroad in a financial position

1 to build the line, and are there going to be any
2 adverse impacts on existing shippers? And those
3 factors have been traditionally considered by the
4 board since the 1920s when we first received
5 authority over railroad construction projects.

6 MR. YOUPEE: So we have a historical record on
7 that term, that art term itself?

8 MS. KITAY: Yes.

9 MR. YOUPEE: So we have some chronology as far
10 as case law in that term itself?

11 MS. KITAY: Exactly. So here in Tongue
12 River I, in Tongue River II and again in Tongue
13 River III we considered those traditional public
14 convenience and necessity factors.

15 And the board's primary role is interstate
16 commerce. I mean, we want to facilitate new rail
17 lines because by taking, by shipping things by rail
18 instead of by truck, generally speaking it is much
19 better for the environment and it's more efficient
20 and it takes trucks off the highways, and we want to
21 encourage a uniform national rail transportation
22 system.

23 And as a result, Congress, even though this
24 statute under the Interstate Commerce Act
25 49-USC-10901 has existed since 1920, Congress has

1 repeatedly made the test easier. So it used to be
2 that the project had to be consistent with the
3 public convenience and necessity, and under the new
4 statute it has to be inconsistent in order to have
5 the project denied. So there's now a presumption
6 that rail constructions are going to be approved on
7 the transportation merits, and so it is not a
8 difficult test.

9 Now that said, the board also weighs, as Vickie
10 said, the environmental concerns involved in a rail
11 construction, and that's why we do an EIS in
12 virtually every rail construction case to take a
13 hard look at the environmental impacts. And a large
14 part of that is spent developing appropriate
15 mitigation to minimize, to the extent possible, all
16 the potential environmental impacts that are
17 discovered during the course of the environmental
18 review.

19 The board also takes into account reasonable
20 and feasible alternatives, including the No-Build
21 Alternative as part of that. And when it comes to
22 the National Historic Preservation Act review, it's
23 not feasible in cases involving hundreds of miles of
24 new construction to do all the final engineering
25 prior to the time the license is granted. So

1 therefore the board almost always works to get
2 either a Memorandum of Agreement or a Programmatic
3 Agreement to satisfy its responsibilities under
4 Section 106, and that's what happened in this case,
5 in Tongue River I, which is our first case here,
6 that involved the proposed construction of 89 miles
7 of new railroad line from Miles City to Ashland.
8 The purpose of that project was to serve new mines
9 in Ashland. And the board gave final approval for
10 that in 1986, and there was an MOA that was signed
11 by the Advisory Council and the Montana SHPO in that
12 case.

13 Tongue River II involved the proposed
14 construction of 41 miles from Ashland to Decker, and
15 in that case we looked at the Wolf Mountains
16 Battlefield as part of our historic review, but it
17 hadn't been designated a landmark at that time. It
18 hadn't been listed on the National Register of
19 Historic Places. So we tried in that -- and in that
20 case, that's where it was -- the purpose of that
21 project was also to serve new coal mines in Ashland,
22 existing coal mines near Decker and also to shorten
23 BNSF's route from Wyoming to the Midwest. So we
24 granted that, subject to mitigation, tried to work
25 out a PA at that time. There was no executed PA by

1 the end of Tongue River II. But then -- and
2 alternatives was a significant part of our project
3 in Tongue River II because we did not approve the
4 railroad's preferred route. We approved the
5 Four Mile Creek Alternative, which was the only
6 alternative that the railroad had come up with at
7 that time as a potential way to implement this
8 project. And the purpose, the reason we approved
9 the Four Mile Creek Alternative was to avoid the
10 environmentally sensitive Tongue River Canyon.

11 So then the railroad came back in Tongue
12 River III and proposed a new route that would be for
13 the 17-mile southernmost portion of the Four Mile
14 Creek alignment that had been approved in Tongue
15 River II. And we again did a full environmental
16 review, and it was during the comment period on the
17 Draft Supplemental EIS in that case that we got
18 comments asking us to approve an alignment that
19 would be outside of the Wolf Mountains Battlefield.
20 And the railroad, at that point, responded with a
21 letter explaining that it had, there had been a
22 study done by Mission Engineering which showed that
23 avoidance of the battlefield would be unfeasible,
24 primarily for engineering reasons but also for some
25 environmental reasons. And the board, both in the

1 final supplemental EIS and in its final decision
2 approving Tongue River III, adopted that analysis.

3 And then in 2005, prior to the time that we
4 approved Tongue River III while it was still
5 pending, there was an executed PA that set up the
6 process that everybody thought at the time would be
7 used to comply with Section 106 in that case, and it
8 was signed by all the necessary parties. And I
9 don't -- we all feel today that our consultation
10 with tribes was not necessarily adequate, but we did
11 try to reach out at that time to tribes. It was
12 before we had Cathy working with the board who's
13 taught us all how to do this, and Vickie, in a
14 better way, perhaps. But, anyway, that's where we
15 were in 2005.

16 And then in 2001 the battlefield was listed on
17 the National Register, but it was not declared a
18 landmark until 2008, by which point nothing
19 involving historic preservation was pending before
20 the board.

21 So that's kind of, you know, where we are in
22 this case in terms of the chronology.

23 MR. YOUPEE: Then you have to understand that
24 we're still trying to play catch-up here.

25 MS. KITAY: Yes.

1 MR. YOUPEE: You can't talk about spilt milk,
2 something in the past. It doesn't quantify itself
3 towards the rights of tribes. It's more of a --
4 it's more of a mitigation failure.

5 MS. DWIN VAUGHN: Can I say something here?
6 From the council's perspective, we had a western
7 office and an eastern office for approximately 25
8 years. The western office negotiated this
9 agreement, and based on all the records we have been
10 able to assemble, we don't have a good
11 administrative record of outreach to tribes saying
12 that you tried to send them a letter, they didn't
13 respond. For a project of this magnitude it doesn't
14 pass the test. And it's a conundrum to the staff
15 how there was an agreement executed that did not in
16 any way document the myriad of issues which tribes
17 I'm sure had in 2001, 2005 that weren't reflected at
18 all.

19 But, as you say, there's no need in focusing on
20 spilt milk, but be assured that since 2005 the
21 council's outreach to tribes has grown
22 expedientially. They have developed a
23 sophistication in participating in consultation that
24 requires us to try to review missed steps and lack
25 of discretion about things that impact them.

1 When I hear people say or see written that you
2 tried to avoid environmental impacts but there's
3 nothing codified of what that translated to a way of
4 life for people who actively engage day to day in
5 customs, traditions and a project that could
6 directly and indirectly affect reservations and
7 tribal lands, it's inconceivable to us how we would
8 not start over and look at some of these effects in
9 the context of 2011.

10 MS. KITAY: I think we're all trying to do
11 that. That's exactly why we're here and why we're
12 having a three-day meeting at this point.

13 MS. DWIN VAUGHN: But we need to go on record
14 and it needs to be part of a transcript that that's
15 the council's position, that in 2005 I can't look at
16 a record and understand why the tribes were
17 perceived as not having any more to input in this
18 project than they did with the PA that currently
19 exists.

20 MS. KITAY: Do you want to address that any
21 further? I don't know what else we can really say
22 about that.

23 MS. RUTSON: I think we're listening.

24 MS. DWIN VAUGHN: It's just to go on record and
25 I think every tribe in here needs to understand the

1 council's perspective on this. They don't need to
2 be confused about where we're coming from, that
3 there needs to be a conversation and collaboration
4 in 2011.

5 MS. GLIDDEN: Just to add to what you were
6 saying, we did, in Tongue River II we did have an
7 analysis and we did do a study on the effects on the
8 Northern Cheyenne Tribe. I wasn't here at the time.
9 But just so you know, there was a study done by a
10 consulting firm, and I can't recall the name of it.
11 I think it was Ethnoscience. So there was some work
12 that was done. I mean, obviously could have done
13 more, but just so you know that in these documents
14 there is a discussion regarding impacts to the
15 Northern Cheyenne, to the Crow Tribe and to
16 gathering areas and so on and so forth. And it's
17 actually a pretty good study. Not to say that we
18 couldn't have done more, but there are summaries of
19 the studies that were done in the Tongue River II
20 and also Tongue River III.

21 MS. DWIN VAUGHN: And I don't minimize that,
22 but I'm just saying they have a voice and they're
23 very articulate and they function as people who
24 convey and participate in studies in today's
25 environmental reviews and historic preservation

1 reviews. So I'm not minimizing that study. I
2 question whether or not it's indicative of their
3 voice and their views and their sentiments, and I
4 will say that that's the position our office takes
5 on that.

6 MS. RUTSON: Understood, Charlene. Thank you.

7 MS. KITAY: Thank you.

8 Did you have a question?

9 MR. WHITTED: She covered quite a bit of it
10 there, but the tribes' input into these three
11 phases, now apparently I was a little -- I was
12 wondering about the wordage here. On Tongue River I
13 it says "administratively final". There's no more
14 work to be done on that?

15 MS. KITAY: No, that case, not only is it
16 completed at the board, but there was a petition for
17 review of Tongue River I that was filed.

18 MR. WHITTED: So does that have a separate PA?

19 MS. KITAY: Well, there was an MOA at the time,
20 but the PA that we entered into in 2005 in Tongue
21 River III applies to the entire line.

22 MR. WHITTED: But in '86 it was deemed final.

23 MS. DWIN VAUGHN: What does that mean,
24 "administratively final"?

25 MS. KITAY: It means that there's no judicial

1 review pending. There was a court case filed in the
2 Ninth Circuit in that case involving mineral leases,
3 and the Ninth Circuit dismissed the petition for
4 review, so it's not part of the lawsuit that's going
5 on.

6 MR. COBURN: Just a point of clarification that
7 in Tongue River III, the board, in the Environmental
8 Impact Statement in Tongue River III, the board took
9 a fresh look at the mitigation measures that had
10 been imposed in Tongue River I, because by that time
11 they were, what, more than 20, about 20 years old,
12 and the idea was things may have changed; let's find
13 out what's changed; let's modify the mitigation to
14 the extent we need to. And they did exactly that in
15 the Tongue River III EIS, and that included
16 mitigation with respect to cultural resources.

17 MS. KITAY: Right, and the Programmatic applies
18 to the entire line.

19 MR. COBURN: Yes, exactly. So the Programmatic
20 Agreement that was entered into at the time of
21 Tongue River III applies to Tongue River I, II and
22 III, applies to the entire Miles City to Decker.

23 MS. KITAY: So for your purposes, I would just
24 ignore the wording "administratively final" because
25 I don't think it is particularly useful in this

1 context.

2 MR. WHITTED: But there's an MOA out there
3 somewhere that --

4 MS. KITAY: There was an MOA out there
5 executed, and I --

6 MS. DWIN VAUGHN: Was it superseded, the first
7 agreement for Tongue I?

8 MR. COBURN: It was superseded by the PA.
9 Now, I don't argue with the words
10 "administratively final". I think that is correct.

11 MS. KITAY: Oh, it is correct, but --

12 MR. COBURN: The case itself --

13 MS. KITAY: Right.

14 MR. COBURN: -- the decision of the board to
15 allow the construction of that first 89 miles of
16 Tongue River I is a final decision. It's not
17 subject to judicial review today. There was a
18 judicial review proceeding initiated in the Ninth
19 Circuit. The Ninth Circuit dismissed it. The
20 Supreme Court granted cert.

21 MS. KITAY: Denied cert.

22 MR. COBURN: I'm sorry, did I say "granted
23 cert"? Denied cert and it's over.

24 But my point about the mitigation being updated
25 in Tongue River III is also --

1 MS. KITAY: Right. We also in Tongue River III
2 in the EIS, we took into account changed
3 circumstances in the entire environmental review
4 process, so it's one of these strange situations
5 where these cases are separate and the same at the
6 same time kind of.

7 MR. WHITTED: Let's talk a little bit about
8 tribal involvement then. Was there any involvement
9 in the first Tongue River I? Was there any tribal
10 involvement at all?

11 MS. RUTSON: Yes, there was. I first joined
12 the section in 1990, and my very first meeting when
13 I joined back then the Environmental Section was a
14 meeting with the woman who, Dana White. I don't
15 know if you remember her, but she was reporting on a
16 consultation with Mr. William Tall Bull on Tongue
17 River I. He has since passed, but he was a tribal
18 member of great veneration and worked closely with
19 Dana for years. In those blissful days I was just a
20 junior and just sort of tagged along, but there was
21 some consultation.

22 There was no consultation with tribes of the
23 Great Sioux Nation. Back in those days we were
24 focusing solely on the Northern Cheyenne, and I
25 can't tell you why that was the case. I'm not sure

1 if we reached out to the Crow. And I know for a
2 fact that in those days we did not reach out to the
3 Great Sioux Nation. I'm not sure if it's because we
4 didn't understand the idea of Traditional Cultural
5 Properties and ties. That might have been it. Does
6 that answer your question at all?

7 MR. WHITTED: Well, I think back in that time
8 all you looked for was who was the closest
9 reservation.

10 MS. RUTSON: I think you're right.

11 MR. WHITTED: The problem there is that one
12 reservation doesn't include all of the tribes that
13 had that as a part of their original homelands.

14 MS. RUTSON: Exactly.

15 MR. WHITTED: They have burials there. They've
16 got sites there. They've got a concern there about
17 these sites being destroyed, about the environment
18 being destroyed in these areas. There should have
19 been involvement I, II and III, but very little,
20 so --

21 MS. GLIDDEN: And, Jim, when I went through
22 this, I did a lot of research on this entire line
23 and tried to look at any tribe that could possibly
24 have an interest in this project, and it was clear
25 to me that the Sioux Nation obviously had to be

1 involved in this, particularly because of the
2 significance of the Wolf Mountains Battlefield site
3 and the involvement of the Sioux Nation, part of the
4 Great Sioux war.

5 So, anyway, I'm hopeful that now at this point
6 we do have everyone that needs to be involved,
7 involved in this project.

8 At any rate, that is a good point, though.

9 MR. WHITTED: I guess one other question
10 before, what about during the arch surveys and have
11 there been any Traditional Cultural Properties
12 surveys done on this project at all? Has there been
13 tribal involvement in the arch surveys as far as
14 identifying sites that are concerned culturally
15 sensitive or significant?

16 MS. GLIDDEN: I have to say that I was not here
17 during the time that those surveys were done, but as
18 far as I know I don't think that there were tribal
19 surveys done.

20 Vickie, I don't know if you know the answer to
21 that.

22 But I think it was just basic identification of
23 historic properties. However, just to be clear,
24 because it's been quite awhile, this updated PA or
25 amended PA does require that an updated survey is

1 going to be done for the entire line, and it is
2 going to include tribal involvement. So it's going
3 to be -- it's going to be redone. Phase I survey is
4 going to be redone, and --

5 MR. WHITTED: That even goes back to, again,
6 Phase I. And I hate to be harping on the issue, but
7 in that time frame, from '83, the archeology
8 community was quite different than it is today.
9 They've learned a whole lot more. They've taken
10 into consideration tribal values, tribal concerns,
11 how tribes identify sites. I think that whole
12 survey should actually be done.

13 You know, to bring the tribes in at this point
14 and expect us to utilize something that's outdated,
15 1983, about 28 years ago, that's a long time ago.
16 Environmental issues have changed. Archeological
17 surveys have changed. The introduction of
18 Traditional Cultural Property surveys by the tribes
19 are now a big factor in these consultation
20 processes. I think we almost need to go back to the
21 beginning and do this properly.

22 MR. YOUPEE: I have a question. You know, as I
23 review the draft PA, I fail to see the terminology
24 "Traditional Cultural Properties". However, I did
25 see something that replaced that. And I'm not going

1 to attempt to read this, because I need my reading
2 glasses, but it doesn't describe -- it describes
3 something else, another terminology.

4 MS. GLIDDEN: We can change the terminology.
5 That's one of the things that we'd like to hear from
6 you. If you see anywhere that you think some
7 language should change, then --

8 MR. YOUPEE: It was called some survey, I
9 think, of sorts.

10 The other thing is that, you know, we realize
11 that Mr. Tall Bull, you know, was in his own rights
12 and really talked on behalf of the Northern Cheyenne
13 people, and so he was utilized for the region almost
14 because he was an elder. And that really excluded a
15 lot of other folks because no one was as old as him,
16 and -- but his history goes way back. But I'm just
17 wondering, you know, some people call the Northern
18 Cheyenne stingy. I never call them stingy, but how
19 many horses did you give those folks to keep it
20 quiet?

21 MR. FISHER: I just -- I guess, you know, in
22 that Tongue River I, you mentioned that there was
23 some consultation, and you mentioned Mr. Tall Bull,
24 you know, a well-respected elder among the Cheyenne
25 Tribe, but besides consulting with him -- and I

1 don't know the history of that back in '86. That
2 was a long time ago, you know, for a lot of us. Was
3 he a representative of the tribe? Do you have
4 documentation that he was a representative? Was
5 there formal consultation? Do you have that
6 documentation? Because I know he did a lot of work
7 for different entities, not necessarily federal
8 agencies but just had his own outfit, his own shop
9 and that sort of thing. So, you know, I don't
10 really know the history of that, but can you tell
11 us, was he a representative of the Northern Cheyenne
12 Tribe in both I and II?

13 MS. RUTSON: Conrad, I can't answer that
14 question for you. I don't know that. I don't know
15 that answer.

16 MR. FISHER: You just said that you consulted
17 with Mr. Tall Bull. When you say "consult,"
18 that's -- that, to me, is formal consultation. Now,
19 he either represented the Northern Cheyenne Tribe or
20 he didn't. Now I'm asking you that question.

21 MS. RUTSON: I can answer by saying I attended
22 my very first meeting in the environmental shop was
23 a meeting on --

24 MR. FISHER: So you don't know?

25 MS. RUTSON: I don't know. I can try and find

1 out --

2 MR. FISHER: Why did you say he consulted?

3 MS. RUTSON: -- but it's rather difficult.

4 MR. FISHER: You're implying the Northern
5 Cheyenne as being consulted in Tongue River I.

6 MS. RUTSON: The meeting was about consultation
7 with William Tall Bull, because I still have my
8 little --

9 MR. FISHER: Not necessarily the Northern
10 Cheyenne Tribe?

11 MS. RUTSON: Remember, it was my first day. I
12 had my first little file folder, and I wrote on it
13 Ton River, T-o-n. This is the quality of
14 understanding I had at that time, but I can tell
15 you, Conrad, I will go back to Washington and see if
16 we have any records.

17 MR. FISHER: I sympathize with your first day,
18 but we're not here to discuss what mood you were in
19 that first day. We're here to discuss this very
20 important issue, and you're implicating the Northern
21 Cheyenne as being a consulting party, and I want to
22 verify that.

23 MS. RUTSON: I do not know, but I will try and
24 find out.

25 MS. GLIDDEN: Conrad, I'm linked to this

1 project myself. I mean, I wasn't around when --

2 MR. FISHER: Not to cry over spilled milk, but
3 we need to have an understanding of what went on.

4 MS. GLIDDEN: Tongue River II does include a
5 summary of tribal consultation. I'll try to pull
6 that up and print that out so that you can look into
7 that.

8 MS. KITAY: I think part of the problem is what
9 we mean by "consultation". And I think what the
10 board -- I mean, the board -- if you read the EISs,
11 which I did read to prepare for this meeting,
12 there's a lot of language in there about how we
13 attempted to do consultation with Native American
14 Tribes, but I think that what we thought we were
15 doing when we said, talked about "consultation" then
16 was not, just as Charlene said, not the kind of
17 consultation that we're doing here in this room.
18 And I think that in those days we had very limited
19 resources. We did not send people out much to any
20 kind of meeting, maybe one site visit per case.

21 None of us were really around in Tongue
22 River I. It was before we had, you know, things on
23 the computer. It's hard to try and go back.

24 MR. FISHER: You've convinced me. You've
25 twisted my arm.

1 MS. KITAY: And we will try to get you more
2 information, but really I think that it just is not
3 the same kind of consultation that we would do today
4 and that we're doing right now with you.

5 MS. GLIDDEN: There were definitely limited
6 meetings, correct?

7 MS. KITAY: Correct. I mean, it was just
8 unheard of to have this kind of thing, as far as I
9 know.

10 MR. YOUPEE: You have to understand during
11 those times it was like --

12 MS. RUTSON: Pete, please.

13 We're not controlling this.

14 Please.

15 MR. COFFEY: Yeah, you know, I guess maybe what
16 I got to say isn't really all that important in
17 regard to this particular, how would you say it,
18 scenario that happened when you first came in and
19 all that, but I guess what I'd like to do is simply
20 reiterate what has been said here earlier, you know,
21 like you can't go back and undo all of this. Tribes
22 should have been consulted at that time. Despite
23 our small numbers, you know, the Mandan, Arikara,
24 Hidatsa, which of course was due to Smallpox, but
25 even despite our small numbers, you know, that whole

1 area is with an aborigine homeland.

2 I mean, just to give you an example,
3 Sacajawea -- you know, the Mandans and Hidatsa used
4 to raid all the way up to the foothills of the
5 Rockies in Montana. Sacajawea was captured near
6 present day Three Forks, Montana, and we are way out
7 in North Dakota.

8 So all of the tribes here, all of the tribes
9 here need -- I guess we're just trying to impress on
10 you the need for consultation and how, again, you
11 know, the term has been used here, and I'll use it
12 again, we can't cry over spilled milk but just in
13 looking at all of these, I'm not so sure if we can
14 arrive at anything.

15 Because there's a sentence in here, and I'm
16 sure maybe the gentleman from the railroad here
17 might be able to comment on this, but when I turn to
18 this, all I see is "no feasible alternative". You
19 know, that implies a mindset that's set. Why are we
20 consulting if there's no feasible alternative?
21 Maybe I'm getting ahead of myself here, but how can
22 you consult when it seems like there's a closed mind
23 here, "no feasible alternative"?

24 Thank you.

25 MS. RUTSON: Thank you, Pete.

1 That, of course, is from the railroad's report
2 from Mission Engineering, and that, I guess, is no
3 stunner that that's the railroad's point of view,
4 but we are not the railroad. We have a different
5 role. And that is their position. I believe there
6 are alternatives. Are there alternatives that will
7 completely avoid the National Historic Landmark,
8 that I am not sure about, but I am confident that
9 there is, and this term is the one that keeps on
10 going through my mind, there's wiggle room; there is
11 room.

12 I mean, the railroad already moved the line
13 that goes through the National Historic Landmark a
14 thousand feet to the south, so we know there's at
15 least a thousand feet of wiggle room there. Who's
16 to say there isn't more? And I'm very interested to
17 hear what you all would like to see, what you all
18 think. We know the railroad's position, "no
19 feasible alternative".

20 I think I understand what you all would like to
21 see, but I would feel much better having the
22 opportunity to hear from all of you, obviously, to
23 really be able to understand that, to seek, discuss
24 and consider your viewpoints about this.

25 Does that answer your question?

1 MS. GLIDDEN: I think it's really important
2 that you all know that we are trying really hard to
3 consult with you in the appropriate way. We want
4 this to be an open discussion. We want your ideas.
5 We want you to look at the documents and provide us
6 with recommendations and provide us with
7 recommendations on how we can make it a better
8 document.

9 And I think at this point we do need to move
10 forward and understand that what we're trying to do
11 is consultation and that we are here ever present,
12 ready to do what we need to do.

13 MR. YOUPEE: I think we're at a defining point
14 because, you know, the tribes need greater clarity
15 to much of this. And what Conrad has brought up was
16 a good point, and he redeemed himself certainly.
17 Because, you know, they're not aware that this was
18 actual government-to-government consultation. You
19 know, they had maybe someone out there by themselves
20 doing -- and we've had them, too, tokenship out
21 there, and it wasn't real across-the-board benefit
22 to the tribes.

23 But if you're looking at the wiggle room now --
24 and I've seen construction with the railroads in
25 many different areas, and I've seen the size of

1 bridges that can be constructed, which is gigantic
2 in some measure. So if we're looking at wiggle
3 room, we shouldn't just be looking from side to
4 side, we should be looking up as well or even under
5 it. They've made great passages, tunnels and, you
6 know, those could be some considerations as well.
7 That's speaking of wiggle room.

8 MR. COBURN: Evelyn, I hear what Pete and
9 Curley are saying, and I think the question that
10 both Pete and Curley are raising about avoidance at
11 the Wolf Mountains Battlefield, I think that's an
12 important discussion for us to have. I think it's
13 one of the reasons we're here. I think, though, it
14 would be best to have that discussion this afternoon
15 when we scheduled to have that discussion this
16 afternoon after our engineering experts who are here
17 can present all of the facts and we can have the
18 discussion in light of those facts.

19 MR. COFFEY: I'm really glad that that's going
20 to be discussed this afternoon, you know, and
21 perhaps I might have been a bit more, a bit too
22 zealous or too passionate in regard to that, but I
23 guess I'm pleading *mea culpa* here simply because I
24 just came from a meeting with the oil companies, and
25 those guys are trying to run us into the ground on

1 our own land. And so whenever I see some sort of an
2 outside entity that comes in and it seems that the
3 wishes of the indigenous people are not really being
4 looked at, you know, that really raises a sense of
5 indignation within myself. You know, because,
6 again, as I say here again, I just came from a
7 meeting with them, the oil companies up north on our
8 reservation, and they're -- it'll be discussed this
9 afternoon. Thank you.

10 MS. KITAY: I think that's a good idea also.

11 MS. RUTSON: Thank you, Pete. And you have
12 nothing to apologize for whatsoever, no *mea culpa*
13 needed at all.

14 MR. COFFEY: Sorry. The oil companies still
15 got my feathers ruffled, you know.

16 MR. FISHER: Can we just go to TR II and TR
17 III, and can you clarify the Four Mile Creek
18 Alternative? I realize it goes through mountains.
19 And then it says that there was a proposed
20 construction of a 17.3-mile western alignment in
21 lieu of the --

22 MS. KITAY: Right, but that does not impact the
23 portion of the line that goes --

24 MS. GLIDDEN: Can we look at the slide that
25 shows the actual alignment? I think that might be

1 helpful.

2 MR. FISHER: Just to show it doesn't impact --

3 MS. KITAY: As far as I know -- people from the
4 railroad tell me if I'm wrong, but as far as I know
5 the western alignment does not change or alter the
6 portion of the line that goes through the Wolf
7 Mountains Battlefield. So what it is is just --
8 it's the 17-mile southern portion.

9 MR. FISHER: We need to see a visual of this.

10 MS. GLIDDEN: The next one.

11 MR. FISHER: Can you explain how it's not going
12 to impact --

13 MR. HADLEY: This shows the Four Mile
14 Alternative.

15 MS. KITAY: Where is the battlefield?

16 Maybe you can do this, because I don't think
17 that it's very clear from this still.

18 MS. GLIDDEN: Everybody wants to have a break.
19 Can we just break? Everyone wants to break, so we
20 should probably break.

21 MS. RUTSON: Ten minutes, please. So we'll try
22 to be back in at, how about five after 11:00.

23 (Recess taken from 10:56 a.m. to 11:22 a.m.)

24 MR. WHITTED: I had a comment, and I wanted to
25 direct it at Mr. Day. What type of archeological

1 survey has been performed to date on this entire
2 route?

3 MR. DAY: A class -- I believe the correct
4 terminology is a Class I survey has been done, which
5 is a literature review and documentation review.

6 There was -- again, going back to Tongue
7 River I, and I'd have to go back in the record, but
8 I think there was some, I'll call them visitations
9 with I think the Northern Cheyenne, as I recall. I
10 don't know that that was a "consultation" in, you
11 know, as we're talking here, but I think there was
12 as part of the Ethnoscience study that was done
13 associated with Class I there was, again I'm going
14 to say visitations with tribal members to supplement
15 the Class I.

16 MR. WHITTED: A Class I survey is just a file
17 search. It only tells you what surveys have been
18 performed in the past in the area. If there were no
19 surveys in a particular area, it will show zero. So
20 that's the push that I think needs to happen here.
21 There needs to be an on-the-ground pedestrian survey
22 with tribal involvement on the entire route.

23 MS. GLIDDEN: Jim, just to be clear, we totally
24 agree, and the amended PA does call for that. There
25 is going to be basically a Phase I survey done for

1 the entire line, 1,500 feet out, and then there's
2 also going to be the Phase III survey or Class III
3 survey that's going to be done for -- you know, it's
4 all outlined in there, but I believe it's 200 feet
5 on either side of the right-of-way for the direct
6 impacts.

7 And also there's going to be -- the way the PA
8 is currently written, there would also be
9 on-the-ground tribal participation. And there's
10 also provision in there for payment and so on.

11 But, you know, the language that's in there --
12 because Lana had mentioned to me that she thinks
13 that maybe some of the language might, needs to be
14 more homogenous of the tribal etiology. And so I
15 hope you take a look at the amended PA document and
16 look at it and see if there's anything you think
17 should change there, if the language is not
18 appropriate in the way it describes the tribal
19 involvement on the grounds and so forth or the way
20 it describes, you know, properties of traditional
21 cultural significance.

22 But we do intend to have it. We know that some
23 of this stuff is very out of date, and it has to be
24 redone and it's going to be redone, with tribal
25 involvement.

1 MR. COBURN: Cathy, can I just add that the
2 existing PA requires a Class III survey as well.

3 MS. GLIDDEN: Right, 2005.

4 MR. COBURN: 2005 PA. So a PA is -- and I'm
5 telling you things probably you all know, but a PA
6 is entered as a way of deferring the, this work, to
7 the point when the railroad is closer to being
8 constructed. Because at that point you have access
9 to the land and you can bring your archeological
10 experts and tribal experts onto the property to do
11 the careful review that we all agree needs to be
12 done before anybody breaks ground, so to speak.

13 So that's really the reason, as I see it, that
14 we're here is to discuss this PA and to discuss the
15 process. And there's no debate that a Class III, a
16 more intensive Class III survey was not done, and we
17 entered the PA because of that. We entered the PA
18 in 2005 because it wasn't done and needed to be done
19 before we actually started construction. So I think
20 we're all agreed it needs to be done.

21 MS. GRAVATT: Well, since the project all
22 started, I mean, it's gotten recognition as, I know
23 on the list of National Register of Historic Places
24 and Historic Landmarks, and I just feel like --
25 because we just went through this big historic issue

1 with Bear Butte recently, if tribes allow this, you
2 know, it's going to be detrimental in the future to
3 our other sites.

4 And I think -- I just don't think the companies
5 that come in, I don't think they, that you guys
6 realize the significance of our sites and our
7 relationship to them and the relationship they have
8 to the landscape and to the natural environment.

9 So I just don't understand how, you know,
10 even -- and then if you do allow us to do a TCP
11 study, that is by no means saying that we're going
12 to concur at the end. You know, it's already on the
13 list to be protected. So, if anything, you know,
14 we'll do a study; we'll find the sites and define
15 the landscape more, but I just don't see us actually
16 in the end saying, Okay, you know, we're concurring
17 and going to go through with this project. Are you
18 prepared for that?

19 MR. COBURN: The board is the final decision
20 maker as to whether the line can be built, and the
21 board has -- I know you missed part of this
22 morning's discussion, but the board has already
23 approved the construction of the line. That's being
24 challenged in court by some parties, and there's an
25 oral argument July 11, and the court will ultimately

1 decide whether the --

2 MS. GRAVATT: What board is that?

3 MR. COBURN: The Surface Transportation Board.

4 MS. GRAVATT: They've already approved the
5 project?

6 MR. COBURN: Yes.

7 MS. GRAVATT: How do you approve the project
8 without tribal consultation?

9 MS. KITAY: Well, we approved the project in
10 2007, and at the time there was an executed PA,
11 which expired, by its terms, after five years, but
12 there were no issues.

13 MS. GRAVATT: Well, I think now because of the
14 mandates put on your agency by the President, you
15 have to -- you cannot -- you have to go back because
16 if you didn't do, you know, proper tribal
17 consultation then because you didn't have to but now
18 you have to, you know.

19 And we're just now -- I mean, the Cheyenne
20 also, we're just now getting the information about
21 the whole project approval and where it's at and the
22 impacts and --

23 MS. GRAVATT: I mean, like, who is from BLM
24 here?

25 MS. JOHNSON MORFORD: I am.

1 MS. GRAVATT: Okay, right here when it says
2 "BLM," okay, first there was an area of critical
3 environmental concern, you know, that was in 1997.
4 "BLM defined a portion of the Wolf Mountains
5 Battlefield as the area of critical environmental
6 concern." And then later after that in 2001, 2008
7 then it got listed to be protected. Now that it's
8 protected -- I mean, the project isn't in motion
9 yet. Even though you might have approved it then,
10 it's still -- I mean, the whole definition of the
11 site changed now, so really, you know, you have to
12 go through this whole process.

13 And we should be -- you know, without the TCP,
14 I just don't see any of the tribes -- and I just
15 don't think -- you cannot just pull, you know, one
16 tribal chairman or a couple of THPOs to sign an
17 agreement to get your project through. I don't
18 think that's going to happen.

19 So what are you guys -- do you understand where
20 I'm coming from? Do you understand what I'm saying?

21 MR. COBURN: I certainly understand your
22 position. And we're all sensitive to the interests
23 of the tribes, and we're trying to work out a PA
24 here. I think we have a good draft what the board
25 has given us that respects the opportunity, gives

1 the opportunity to the tribes to work with us to
2 identify the specific areas of greatest concern and
3 do our best to deal with them in the way the PA
4 does.

5 So we're trying to be very respectful, and I
6 think the agreement is the way to handle your
7 concerns and the railroad's interests as well.

8 MS. GRAVATT: It says the entire site is listed
9 on the National Register of Historic Places. So how
10 many acres are we talking about? And then where at
11 are you guys trying to go through that site at?

12 MS. RUTSON: If I may, we've had a number of
13 questions during the break about where the rail line
14 goes, so would this be a good time to segue into --
15 I thought, This is the railroad's project. Let them
16 explain where the thing goes. Is this a good time
17 for that? Does everyone think that's appropriate?

18 MR. HADLEY: We will get into that in depth
19 right after lunch this afternoon as far as where it
20 goes through the Wolf Mountain National Historic
21 Landmark Site, but I guess there was also questions
22 about where the alignment is in relationship to the
23 Tongue River with respect to the Northern Cheyenne
24 Reservation.

25 MS. KITAY: Can you address that for everybody?

1 MR. HADLEY: I can address that.

2 MR. GUSTAFSON: Do you want to make the
3 presentation now?

4 MS. RUTSON: No. Just explain where the rail
5 line goes.

6 MS. GLIDDEN: We have a couple of slides here
7 that may be helpful.

8 MR. HADLEY: In the handout there is a map.

9 MS. GLIDDEN: Let me help out here. If I could
10 just sit there for a second, Collette.

11 MS. CHAMBELLAN: Sure.

12 MR. FISHER: May I add that the question that I
13 had before the break was with reference to TR I --
14 or TR II and -- that one there, and the question was
15 the Four Mile Creek and also the 17 point something
16 mile, just the clarification on where those are
17 within that.

18 MR. HADLEY: All right. This doesn't show the
19 Four Mile Alternative, but I can --

20 MS. GLIDDEN: I can show you that one.

21 MR. HADLEY: Basically -- here's Birney, and
22 the National Historic Landmark is right here.

23 The Four Mile Creek Alternative --

24 MS. GLIDDEN: You want me to show that in the
25 other slide?

1 MR. HADLEY: Sure, that would be great.

2 In this particular photo, here's Birney, and
3 here's where the county road crosses the Tongue
4 River, so the National Historic Landmark is right
5 here.

6 The Four Mile, this is the, it's called
7 Four Mile Alternative because this is Four Mile
8 Creek. This is for the county road. Secondary 566
9 leads the Tongue River Valley, comes up, comes over
10 and comes back down by the Tongue River Reservoir.

11 And so basically because of engineering and
12 operating aspects of very steep grades through
13 Four Mile Creek, this was very difficult to try to
14 design and build and operate a railroad over it, and
15 that's why Tongue River III came in. We came up
16 with an approved alignment, comes down here and ties
17 in along the west side of Tongue River Reservoir.
18 There's an existing railroad here. It comes into
19 the Spring Creek Mine. It called Spring Creek Spur.
20 So this is what that ties into.

21 Going back to Tongue River I, basically the
22 railroad --

23 MS. GLIDDEN: Do you want me to go back to that
24 slide?

25 MR. HADLEY: No, this is good.

1 Now, here's Miles City. This is the existing
2 Burlington Northern Santa Fe line in Miles City.
3 This is where we looked at many different
4 alternatives of either side of the Tongue River, as
5 well as this Moon Creek Alternative that came in.

6 This is Colstrip. In the very beginning before
7 Tongue River was proposed there were rail alignments
8 that were looked at to try to go over to Colstrip,
9 but because of very steep grades climbing out of the
10 Tongue River Valley dropping down into Rosebud Creek
11 and then climbing back up to Colstrip, those were
12 very difficult, plus the amount of cut and fill
13 affected many acres of right-of-way.

14 With respect to tribal lands, this is the
15 Northern Cheyenne Indian Reservation boundary here.
16 The river itself is the eastern boundary of the
17 reservation, and it goes over to approximately here,
18 and then the Crow Reservation is just immediately
19 west of that.

20 So Tongue River I came from Miles City,
21 progressed down the west side of the valley, west
22 side of the river, and at approximately 10 miles
23 north of Ashland it crosses the river at this point
24 and comes down on the east side of the Tongue River,
25 and the spur that splits comes down here to Otter

1 Creek.

2 And then the alignment, we'd had actually to
3 approve the alignments for around Ashland, but
4 because of this additional growth, this is still the
5 best easterly alignment around Ashland that comes
6 down. And Tongue River I terminated here
7 approximately 5 miles south of Ashland, so that was
8 Tongue River I. So with respect to the nearest
9 reservations, this is the Northern Cheyenne boundary
10 again, and then immediately west of that is the Crow
11 Reservation.

12 Can you go to the next slide, the one that had
13 the whole alignment?

14 MS. GLIDDEN: (Ms. Glidden complied.)

15 MR. HADLEY: There we go.

16 So Tongue River I terminated here and here with
17 Water Creek Spur and this terminus point.

18 Tongue River II proceeded down and actually had
19 many more crossings in the narrow part of the Tongue
20 River Valley at this point.

21 And then with the approval of the Four Mile
22 Alternative, which was very difficult again from an
23 engineering construction and operating aspect,
24 Tongue River III was planned and moved the alignment
25 further away from the valley. Did have much more

1 cut and fill, but the grade characteristics or the
2 operating characteristics were very acceptable, and
3 that particular portion was approved at the most
4 recent period of time.

5 In either case, Tongue River II or III, the
6 alignment was the same until approximately this
7 point right here. So the alignment through the
8 National Historic Landmark boundary was basically,
9 essentially the same alignment in Tongue River II
10 and III. It didn't change.

11 MS. KITAY: And where are the reservations on
12 that?

13 MR. HADLEY: In this particular case, here's
14 Ashland, so the Northern Cheyenne Reservation
15 boundary would be about like this, with the Tongue
16 River being the eastern boundary, and it would
17 proceed over to approximately here, and then from
18 here west would be the Crow Reservation.

19 Is that clear to everyone or any other
20 questions?

21 MR. YOUPEE: I think we can probably do a
22 better job as far as mapping the jurisdictions and
23 the areas of impact. If you can layer those, color
24 code layer those so we can have one page instead of
25 multiple pages, it becomes easier to read and easier

1 to work with.

2 MR. HADLEY: Well, this shows the entire
3 approved alignment. The only reason we had those
4 other slides were just to show how, the difference
5 between Tongue River I, II and III. The green
6 alignment, what you see here now is the approved
7 alignment.

8 MR. YOUPEE: Perhaps we can put the
9 reservation, Northern Cheyenne Reservation on there
10 because, you know, there's other issues when it's a
11 tribal jurisdiction.

12 MR. HADLEY: I have a slide that I would
13 present possibly this afternoon, but I will show it
14 this afternoon. It's part of my presentation. It
15 shows the reservation boundaries, as well as the
16 approved alignments.

17 MS. GLIDDEN: Yeah. And Michael also has some
18 excellent slides that's going to show in better
19 detail and a better map.

20 You know, it's up to you all. We can just
21 continue on with this presentation, but it's going
22 to take some time. And I think it might be best
23 just to take a break and then after lunch we can
24 come back and get this full presentation on the
25 alternatives.

1 MS. GRAVATT: Is the Montana State Historical
2 Society here?

3 MS. GLIDDEN: No, they're not, and we couldn't
4 get them by phone.

5 MS. RUTSON: We invited the SHPO, Montana SHPO,
6 but they're not allowed to spend money to travel out
7 of state. So we had to make a decision about to
8 have the meeting in Rapid City, which would make it
9 more possible for the Great Sioux Nation to attend,
10 which was very important to us, or move it to
11 Billings, which would make it possible for SHPO to
12 attend.

13 MS. GRAVATT: At least hooked them up through a
14 teleconference call --

15 MS. RUTSON: We made the offer, but they --

16 MS. KITAY: They didn't call in.

17 MS. GRAVATT: Have you heard anything from
18 them? What was their response to this?

19 MS. GLIDDEN: I mean, they actually asked for a
20 list of which tribes were going to be attending.
21 And they apparently had to have some internal
22 justification for traveling out of state and
23 apparently didn't get it.

24 MS. GRAVATT: So you really haven't heard from
25 them on this project?

1 MS. GLIDDEN: We've heard from them as far as
2 we've received a number of comment letters on the
3 Programmatic Agreement. Apparently they were unable
4 to attend. And we did offer to have them
5 participate by phone, and they did not take us up on
6 that.

7 The other person who was unable to come was
8 Christine Whitacre, and she said she was going to
9 call in but didn't. We do have Charlene Dwin Vaughn
10 from the Advisory Council, and she's come all the
11 way from Washington, D.C. to participate, so we're
12 very pleased that we have her here.

13 MS. DWIN VAUGHN: And as we understood, this is
14 tribal consultation. The SHPO will participate in
15 the call next week, as will the National Park
16 Service, and both of them conveyed to me that this
17 meeting was all about the tribes and that was what
18 they wanted to have.

19 MS. GRAVATT: They wanted it separate?

20 MS. DWIN VAUGHN: They thought that many of the
21 discussions should be separate, yes.

22 MS. GRAVATT: Why?

23 MS. DWIN VAUGHN: Because I think they weighed
24 in and will weigh in on the 7th, but the tribes had
25 not caucused collectively as a group. And you all

1 have issues that need to be (unintelligible) with
2 you all. They would not be in a caucus meeting, the
3 SHPO nor the park service. So in getting
4 justification to travel here, half the time would
5 not be utilized because --

6 MS. GRAVATT: Would we be able to patch in on
7 that meeting, the tribes?

8 MS. GLIDDEN: Yes. Next week we're going to be
9 having, we're having, at one o'clock eastern we're
10 having a call-in regarding this meeting and the PA,
11 and anybody who wants to participate can
12 participate. We're going to give a summary of what
13 occurred during this meeting. And then, you know,
14 anybody else, any other PA consulting party is
15 invited to participate in that, including the SHPO.

16 MS. GRAVATT: I would like to hear what the
17 SHPO says.

18 MS. GLIDDEN: Obviously we're having the
19 meeting recorded by a court reporter, and every
20 PA consulting party is going to get a copy of that,
21 so will be privy to the entire record of this
22 meeting, aside from anything that the tribes don't
23 want recorded. For instance, when you caucus you
24 may not want that recorded. So they'll have an
25 entire record of what happened.

1 MS. GRAVATT: Okay, thank you.

2 MS. GLIDDEN: So, you know, do you all agree
3 that we should break for lunch and then afterwards
4 we'll have Doug and Larry and Dan and Mike give
5 their presentation on the alternatives analysis?

6 MS. CONRAD: I'd like to get some information
7 on the National Historic Landmark.

8 MS. GLIDDEN: I do have actually a copy of the
9 landmark designation. Would you like me to make you
10 a copy?

11 MS. CONRAD: Yeah. I don't know if anybody
12 else --

13 MS. GLIDDEN: Does anybody else want a copy of
14 that?

15 MR. WHITTED: I would.

16 MS. GLIDDEN: Is there any way --

17 MR. LENNON: I'll take care of it.

18 MS. DWIN VAUGHN: Can I ask that they get the
19 one for Wolf Mountain and Rosebud? Do you have both
20 of them?

21 MS. GLIDDEN: I don't have Rosebud. Do you
22 have Rosebud?

23 MS. DWIN VAUGHN: I think I do.

24 MS. GLIDDEN: Any other questions before we
25 break for lunch?

1 MR. YOUPEE: Yeah. Can we get into a tribal
2 caucus before the other presentation?

3 MS. GLIDDEN: I think that would work out.
4 It's just apparently these gentlemen are leaving in
5 the morning, so that's the only concern that we
6 have.

7 How long is your presentation going to last?

8 MR. GUSTAFSON: Probably an hour.

9 MS. GLIDDEN: I'm just trying to figure out --
10 who's got a copy of the agenda?

11 MR. YOUPEE: Well, if we did the caucus, I'm
12 not sure if --

13 MS. GLIDDEN: All right. So what we have right
14 now is from 12:00 to 1:30 lunch, so at 1:30 you
15 could caucus until, what, 1:30 to 2:30?

16 MR. YOUPEE: Okay.

17 MS. GLIDDEN: So we'll start your presentation
18 at 2:30. Will that work?

19 MR. COBURN: Because Mike and Dan are actually
20 leaving today.

21 MS. GLIDDEN: What time?

22 MR. GUSTAFSON: Earlier is better for us.

23 MR. COBURN: They're flying their own planes.

24 MS. GLIDDEN: At what time? Could you start
25 your presentation at 2:30? Would that work?

1 MR. COBURN: It would, I suppose. It might be
2 better if they do their presentation first.

3 MS. GLIDDEN: But Curley had wanted to caucus.

4 MR. YOUPEE: I think we need to align
5 ourselves -- for tribes, I think we need to align
6 ourselves on some certain issues here, and I think
7 that would be more beneficial for tribes. Then we
8 can hear your presentation.

9 MS. GLIDDEN: Would the tribes like to caucus
10 after lunch?

11 MR. WHITTED: Yes.

12 MS. GLIDDEN: I think we're going to have to
13 provide time for the tribes to do that, but I did
14 mention that we may have to push the meeting until
15 possibly the morning.

16 Curley, you mentioned an hour would be
17 sufficient, so let's come back here at 2:30. I
18 think the weather is going to hold up for you.
19 Okay?

20 MR. COFFEY: The big question, is lunch on our
21 own?

22 MS. GLIDDEN: Yeah, I believe so.

23 MS. KITAY: Can they caucus in this room?

24 MS. GLIDDEN: Yes, you can come here and
25 caucus, if you'd like.

1 So we won't come back until 2:30, all right?

2 So the tribes come back here, all right?

3 Thanks so much.

4 (Lunch recess from 11:49 a.m. to 1:30 p.m.)

5 (Tribal caucus from 1:30 p.m. to 2:30 p.m.)

6 MR. GUSTAFSON: First of all, I want to thank
7 all of you for being here today and giving us the
8 opportunity to visit with you a little bit about our
9 project. It's been mentioned by Evelyn and Victoria
10 and Cathy for some years. It's actually spanned the
11 ICC and the formation of the STB.

12 I want to echo the opening remarks that I heard
13 this morning as we were going around the room and
14 introduced ourselves. I heard a desire to reach a
15 consensus. I heard a desire to reach resolution. I
16 heard the desire that we want to address the
17 archeological and the cultural and historical
18 aspects, particularly the Wolf Mountains site. And
19 I want to make it very clear to all of you here
20 today and on the record that the Tongue River
21 Railroad's objectives are exactly that.

22 We appreciate the STB, the Surface
23 Transportation Board, for providing this opportunity
24 for us to sit down collectively in a collaborative
25 form and see if we can't reach an understanding.

1 And the purpose of what I'm going to speak to
2 is really, as Dan and Larry will speak to, the
3 methodology we used and the criteria we used as we
4 went through the Wolf Mountain site. We looked at
5 how to design that particular rail alignment and
6 looked at the various options and how ultimately the
7 Surface Transportation Board came to a resolution on
8 the approved alignment that is there today.

9 I've heard a lot of conversation about history
10 here and looking back and why didn't we do that or
11 why didn't we do that, and I think we all have to
12 put this in perspective that when we started this
13 project, the ICC was in existence and then the
14 Surface Transportation Board.

15 From Tongue River Railroad's point of view, we
16 felt like we crossed the Ts and dotted all the Is.
17 As we went through the very comprehensive NEPA
18 process, which obviously Evelyn and Victoria are
19 able to explain that process to you very clearly,
20 there is a record out there, and I would encourage
21 you as you go through your deliberations that you
22 take the time to look at that record and to see
23 what's in that record, because a lot of the issues,
24 it's all been a matter of public record. You should
25 take a look at that record and examine it very

1 clearly. Obviously the Surface Transportation Board
2 had felt that we met the criteria, and we believe we
3 have, too, but we're here in 2011 looking forward
4 and trying to address the issues here and put
5 together a revised PA.

6 The issue is not whether or not we have an
7 approved alignment or not. We do have an approved
8 alignment, which we'll talk about later, from Miles
9 City to Decker, Spring Creek Mines.

10 Tongue River II and III, as you heard earlier
11 today, is subject to an appeal before the Ninth
12 Circuit, and those oral arguments will be heard on
13 the 11th of July.

14 Again, as you go through the record, you will
15 see there was a very extensive public participation
16 process. Many people chose to use that public
17 process, and many people chose not to use that
18 public process but, nevertheless, that is the
19 process that we went through.

20 So with that, I'd just like to cover a couple
21 of things. Some of it could be duplicative of what
22 was talked about earlier this morning, but I want
23 to -- in the spirit of Darlene who is not sitting
24 here right now, in her prayer this morning she made
25 it very clear that we need to find that sense of

1 spirit in cooperation and collaboration, so let's go
2 there, and that's where we're trying to go from
3 Tongue River Railroad's point of view.

4 Okay, we've had some discussions about the
5 Tongue River Railroad, as approved, goes from Miles
6 City, Montana down to the Otter Creek tracks.

7 Am I standing in front of somebody? Let me
8 get -- no matter where I'm standing here, I'm
9 standing in front of someone.

10 Miles City, Montana sits right here. Otter
11 Creek track sits right here. Just for all of your
12 benefit, the Otter Creek tracks were owned by
13 Great Northern Properties, half the minerals, and
14 half the minerals were owned by the State of
15 Montana. There is approximately 1.2 billion tons of
16 coal lining those tracks.

17 Tongue River I went from Miles City to a
18 terminus point right here and into Otter Creek, a
19 spur of about 8 miles to serve these three tracks.

20 The State of Montana has leased that coal to
21 Arch Coal, and Great Northern Properties has also
22 leased the coal in that area to Arch Coal. And Arch
23 Coal is now moving forward under NEPA, under the
24 Montana Environmental Protection Act to permit those
25 reserves for a coal mine.

1 Over just -- this is the Northern Cheyenne
2 Reservation here. That's the north boundary. The
3 east boundary is the Tongue River.

4 MS. GRAVATT: Mike, could you make the map
5 bigger a little bit on the computer?

6 MR. GUSTAFSON: I don't know.

7 MR. HADLEY: I'd have to go to a different
8 exhibit.

9 MS. GRAVATT: Never mind. Sorry.

10 MS. RUTSON: We have maps in the handout.

11 MS. KITAY: She sees it now.

12 MS. RUTSON: Okay.

13 MR. GUSTAFSON: By the way, I should have said
14 that these are all in the handout.

15 This is the Northern Cheyenne, north boundary,
16 of course their west boundary, their southern
17 boundary. Their east boundary is the Tongue River
18 along this area.

19 The Northern Cheyenne have extensive coal
20 reserves along the eastern edge of the Cheyenne
21 Reservation. The most notable one is Logging Creek,
22 which is approximately 1.2 billion tons, comparable
23 to the Otter Creek reserves here.

24 I think Leroy and Alex know that over the years
25 that I've talked to the Northern Cheyenne people

1 about this railroad, I've always put it this way:
2 This railroad provides an option to the Northern
3 Cheyenne people. Whether they choose to do it or
4 not, that's their prerogative, but this rail will
5 provide the option to the Northern Cheyenne people
6 if they choose, on their own, to develop their
7 assets. But the Tongue River Railroad will serve
8 Otter Creek.

9 And then as you go down Tongue River II and
10 III, it'll serve Spring Creek Mine and the two west
11 Decker Mines, or the west Decker and the east Decker
12 Mines. And you heard, I believe either Evelyn or
13 Victoria mentioned earlier that this provides about
14 a hundred and, roughly about 160 miles' savings in
15 transportation. Because currently the coal coming
16 out of this area here now goes south down to
17 Sheridan, comes up through this route through
18 Hardin, just east of Billings or just east of
19 Huntley and comes out this way. So by being able to
20 cut a triangle here, they're able to save 160 miles
21 one way or 320 miles round trip. And as for the
22 producers, these are producing mines right now at
23 Spring Creek and Decker.

24 Next slide.

25 By the way, interrupt me at any time.

1 MS. GLIDDEN: Are there any other mines along
2 that that are being developed along that --

3 MR. GUSTAFSON: Let's go back to this slide.
4 To answer your question, Cathy, yes, there are some
5 efforts in this area right here called Young's Creek
6 that are being looked at in the Montana side of the
7 basin, and that is Chevron Oil or Pittsburgh Midway
8 Coal Company or -- and Consol, and that's the other
9 possible development that could take place in this
10 area that would utilize this if the coal was moving
11 to the upper Midwest.

12 MS. GLIDDEN: Any others along the actual --

13 MR. GUSTAFSON: No, but I should point out --
14 just watch this little red circle right there.
15 There's 4.8 billion tons of coal lying there between
16 the Northern Cheyenne Reservation and in Otter
17 Creek, north of Otter Creek, north of Ashland, off
18 the reservation and then south of Ashland coming
19 down along this area right here, O'Dell Creek, King
20 Creek and so forth. In that whole area right there
21 you've got -- so these only represent about half of
22 the total coal that's available in that area that
23 would be served by the Tongue River Railroad.

24 MR. YUPEE: So you made an assessment of that
25 particular area. Have you also made an assessment

1 throughout that southeast Montana?

2 MR. GUSTAFSON: Curley, I'm not quite sure I
3 understand the question.

4 MR. YOUPEE: You were very specific in this
5 assessment regarding Cheyenne coal.

6 MR. GUSTAFSON: Well, actually I'm sure
7 Mr. Spang or others can, but I am aware of all of
8 the early drilling that took place in the 1970s on
9 the Northern Cheyenne Reservation with regard to
10 this area right here, so the numbers I'm giving you
11 are based on drillable data and reserve calculation
12 that have been made as a result of that database.

13 MR. YOUPEE: I'm interested beyond those areas
14 that you've been --

15 MR. GUSTAFSON: Beyond that, I can provide you
16 another map, but right here is a place called Cook
17 Mountain which is north of Ashland.

18 And what is it, Doug, there? About
19 484 million?

20 MR. DAY: Yeah.

21 MR. GUSTAFSON: There's about 484 million.
22 Again, Curley, that's all based on growing. It's
23 all based on (unintelligible).

24 Now, as you move north up here, the northern
25 edge of the Powder River Basin is gone. There is no

1 coal when you get to about this area right here.

2 This is Colstrip, Western Energy where you have
3 three power plants and you still have operations
4 going on. This is where Peabody's operation is at
5 Big Sky, which is currently shut down.

6 This is the Sarpy Creek Mine in the Absaloka
7 which is mining Crow coal. In fact, this is a
8 project --

9 Vickie and Evelyn, you'll be interested in
10 this.

11 We put this project together in the early '70s.
12 Took us six months to get approval for that 39 miles
13 of spur in the Absaloka in the good old days.

14 Any other questions?

15 Again, this one here, we just talked about it,
16 and you've seen it earlier. Again, this is the
17 approved alignment, and here is where the Wolf
18 Mountain Battlefield is. And you're going to see a
19 more detailed map on that in terms of the design of
20 the alignment through there by Dan Hadley.

21 One thing I want to point out here: When we
22 designed this railroad, one of the main things we
23 looked at was the impact to agriculture. And as we
24 designed this, and I'll have a slide here in just a
25 second, but we tried to mitigate and minimize impact

1 to the agriculture operations.

2 Next slide.

3 So we've been through this today. Tongue
4 River I was approved in '86. Tongue River II was
5 approved in '96 with a Four Mile Alignment. Tongue
6 River III was approved in 2007, and that's exactly
7 the alignment. The total alignment is 121.10 miles.
8 The total right-of-way with the Otter Creek Spur is
9 2,675 acres total for the whole 121 miles, and we
10 only impact about 14 acres of irrigated property in
11 the total alignment.

12 The markets for this coal coming out of the
13 Northern Powder River Basin will move into the Great
14 Lakes area where we have numerous coal-fire
15 generation of facilities. A lot of these will be
16 converting to new boilers and so forth utilizing
17 coal.

18 And also there is beginning to be a westward
19 movement of the coal. Right now there is out in
20 Boardman in Oregon and out to Centralia in
21 Washington and right out of Spring Creek that we
22 talked about a little earlier that's operated by
23 Cloud Peak, there's about 6 million that's moving up
24 to Roberts Bank as being exported to Asia.

25 MR. COFFEY: Are those -- you know, on your map

1 here it says "power companies". Have they committed
2 to using this product from here?

3 MR. GUSTAFSON: Yeah. They're using it now.

4 MR. COFFEY: They are using it now?

5 MR. GUSTAFSON: Yes. This data is all being
6 provided by Global Resources. Global Resources in
7 Boulder, Colorado is who we've utilized on all the
8 marketing data and so forth. And, again, I believe
9 most of this is part of the record. But anyway, to
10 answer your question --

11 MR. COFFEY: Yeah. I was just curious about
12 that.

13 MR. GUSTAFSON: No, that's exactly what's
14 happening. And a lot of these boilers will be
15 changed out.

16 MR. COFFEY: Because they've got their own
17 lines there, you know, by these power plants --

18 MR. GUSTAFSON: You're talking about the
19 Illinois Basin?

20 MR. COFFEY: The what? No. I'm from North
21 Dakota.

22 MR. GUSTAFSON: Oh, you're talking about North
23 Dakota?

24 MR. COFFEY: Yeah. They've got their own mines
25 there already.

1 MR. GUSTAFSON: Interesting question. Let me
2 just -- the first place is Lignite which is the very
3 low BTU coal, high in moisture, and they've had a
4 lot of problems dealing with that in boilers in this
5 particular area. There's a reason they're going
6 past North Dakota and coming into the southern
7 Powder River Basin and into the northern Powder
8 River Basin to fuel their plants because it's more
9 efficient for them, it's more cost effective.
10 Because fuel is basically priced on cost-per-million
11 BTU.

12 MR. COFFEY: EPA regulation --

13 MR. GUSTAFSON: Well, let me point out
14 something, you know why the Powder River Basin
15 started? It was the environmental movement in this
16 country in 1970. The Clean Air Act of 1970 started
17 the whole development of the Powder River Basin in
18 this area. You wouldn't have Wyoming producing 400
19 and 500 million tons of coal or people looking at
20 Montana had it not been for the environmental
21 movement in this country and the desire to deal with
22 clean air, and that moved all these utilities who
23 were using, you know, Appalachian coal, Illinois
24 basin coal, higher in sulfur and higher in other
25 impurities, to move to the Powder River Basin of

1 Montana and Wyoming.

2 MR. COFFEY: Yeah, just a cleaner coal.

3 MR. GUSTAFSON: Yeah. And that's what -- I
4 tell that to people all the time it was the
5 environmental movement that created the development
6 of western coal.

7 Okay, these are -- I mean, there might be other
8 stakeholders here. I don't mean to offend anybody,
9 but I'm looking at this from the standpoint of the
10 economics of it. Let me just go through them. The
11 State of Montana obviously I told you owns half of
12 the minerals in Otter Creek, and the Northern
13 Cheyennes have a settlement agreement with the State
14 of Montana. It provides them jobs and opportunities
15 and so forth as a result of that.

16 In addition, when that exchange took place
17 under President Clinton's presidency, and Governor
18 Mark Racicot and I were personally involved in that
19 exchange, and anyway, these properties, the
20 royalties that come from the properties out of Otter
21 Creek, all of them go to K through 12 education in
22 the State of Montana. Obviously southeastern
23 Montana communities over the years have been very
24 supportive of this development. They're like a lot
25 of rural areas in this country, not a lot of

1 employment opportunities and obviously the tax base
2 is going down and they can't provide the municipal
3 services and so forth.

4 And so when you're talking Miles City, you're
5 talking Colstrip; you're talking Broadus; you're
6 Ashland; you're talking about a lot of these
7 southeastern communities that will be beneficiaries
8 of the economics of this project.

9 The Northern Cheyenne Tribe, I won't try to
10 speak to that issue. You have people here from the
11 Northern Cheyenne that can speak to that in terms of
12 how they see their benefits from this. I've always
13 just put it on the basis, as I've said earlier, the
14 railroad provides an option to them that they don't
15 now have. They can either decide to develop their
16 asset, or they can decide not to do it. That's
17 their call.

18 You've got Great Northern Properties, we talked
19 about them. What they did is they bought the old
20 NP Burlington Northern checkerboard, which was the
21 land grant railroad throughout southeastern Montana
22 and parts of the Dakotas, and so they own half of
23 the properties in Otter Creek, and so therefore
24 they're a beneficiary. And, of course, as I've said
25 earlier, Arch leased those properties.

1 Burlington Northern Santa Fe, they are a
2 significant player in this, and they will recognize,
3 as well as their customers, as well as the mining
4 companies such as Cloud Peak, Decker and maybe
5 Chevron and Pittsburgh Midway and Consol, they will
6 enjoy the shorter transportation route.

7 Tongue River Railroad obviously, that's obvious
8 that we are a beneficiary. Arch Coal is the one
9 that has acquired the leases at Otter Creek both
10 from GNP and from the State of Montana.

11 And then we spoke about Cloud Peak, Cloud Peak
12 and Decker Coal, which are the two that are located
13 right down by the Tongue River Reservoir at the
14 termination point of Tongue River Railroad.

15 And I think with that -- I'll take any
16 questions right now. But I'm just hopeful -- I'll
17 leave you with this thought: You have a couple more
18 days of deliberation, and I guess from my
19 perspective, from the Tongue River Railroad's
20 perspective, we have an approved alignment. We're
21 subject to some litigation in the Ninth Circuit on
22 Tongue River II and III. We will have oral
23 arguments on July 11th with regard to that. We went
24 through the same process on Tongue River I and we
25 prevailed with the Ninth Circuit, and certiorari was

1 denied at the supreme court level.

2 But what I'm saying is: We went through this
3 process litigation on Tongue River I and that's
4 done. Tongue River II, July 11th, and we're hopeful
5 that our arguments, that we did cross the Ts and dot
6 the Is and that the Ninth Circuit will find that we
7 complied with the NEPA requirements established
8 basically by the Surface Transportation Board.

9 The issue before all of us here today is to
10 focus on the Programmatic Agreement to reach a
11 consensus about what Tongue River Railroad needs to
12 do to meet the needs of this group in terms of its
13 cultural historical analysis and so forth.

14 I don't want to look backwards. I want to look
15 forward, and so one of the things I hope to hear
16 when this meeting is over is that we have clarity
17 from Tongue River Railroad's point of view as to
18 what those requirements are. And that will be
19 embodied, I gather, in a revised Programmatic
20 Agreement.

21 With that, I'll shut up.

22 MS. DWIN VAUGHN: I have a question. Context
23 is everything, and at the outset you suggested that
24 the tribes look through the documentation which is
25 extensive on these projects. Being fair to them and

1 I think fair to everyone, give us a context for the
2 25-year planning of this project, what's changed
3 from 1986 when you first started, to 2011? What's
4 in it for the tribal community now that you all
5 hadn't anticipated back in 1986?

6 And I think what I'm trying to hear is: Why
7 should they work hard to develop a compromise and to
8 determine or assess how this project can be melded
9 with cultural values? I'm not there intellectually.
10 I'm trying to see what's in it for them at the end
11 of the day. They are not just a stakeholder, they
12 are people, indigenous people who are invested in
13 the land, so stakeholder kind of offends my
14 sensibility. So kind of move us into what's in it
15 for them.

16 MR. GUSTAFSON: Well, number one, first, Tongue
17 River Railroad's vision in 1983, or whatever it was,
18 was to provide rail transportation to the coal
19 producers in Decker, Spring Creek, as well as the
20 coal reserves in the Northern Cheyenne and in Otter
21 Creek area, Cook Mountain and the Montco area.

22 Those are some areas that I talked about when
23 you asked the question, Curley, about what are the
24 reserves in the area.

25 So that was our objective to provide rail

1 transportation.

2 MS. DWIN VAUGHN: Okay.

3 MR. GUSTAFSON: So what's the next step for
4 someone who has that objective? We went to the ICC.
5 The ICC said, "This is the process. These are the
6 hoops you have to jump through." We jumped through
7 them, but we had opposition along the way,
8 obviously, from various people, and some have
9 changed over the years as to what the opposition
10 might be. I don't get into that. That's one of the
11 reasons I say to look at the record because I think
12 it helps you get a perspective.

13 History is important because that's what we're
14 talking about here, history. We're talking about
15 history. We're talking about the archeological,
16 cultural things that are happening over the years in
17 this area, and we're trying to address them with
18 you.

19 But, again, you started with our objective, and
20 that is to provide transportation to these assets.
21 So in the process -- we don't define that process.
22 What happens is we went to the ICC and we went to
23 them and said, "Tell us what we need to do to meet
24 the environmental requirements" in those years, and
25 they went through a process. We had public

1 hearings, numerous public hearings. They were open
2 to the public. Notices were given and so forth and
3 so on. Some people chose to use that; some people
4 chose not to, but the point is -- and then an
5 administrative law judge came in, and finally a
6 decision was made. It was appealed in the Ninth
7 Circuit. They did not -- the opponents were not
8 able to carry the weight or burden, and therefore
9 the Ninth Circuit ruled in favor of the STB's
10 decision. And then they appealed to the Supreme
11 Court of the United States and cert was denied. So
12 then we got that far.

13 Now we're to Otter Creek and we're to the
14 Northern Cheyenne Reservation, and now we start
15 talking with BNSF, Burlington Northern Santa Fe, and
16 we start talking with Cloud Peak, but it wasn't
17 Cloud Peak at that time. Cloud Peak was owned by
18 Kennecot or Riotinto. They were the operators of
19 Spring Creek. Cloud Peak was spun off from Kennecot
20 into a private company, and they now operate in
21 southern Powder River Basin, as well as Spring
22 Creek.

23 The issue was -- then Peter Kiewit was at
24 Decker. And so we had a lot of discussions on that,
25 and we talked with Burlington Northern Santa Fe

1 about it. We conducted some feasibility studies,
2 and we looked at the coal that was -- remember when
3 I showed you we were going around the horn.

4 Go back to that map real quick.

5 You remember I said all the coal was coming out
6 of this area, was coming down to Sheridan and going
7 through the Crow Reservation up to Huntley and this
8 way? So we did the economics from here down to here
9 and took a look at the tonnage that was already --
10 there's over -- well today I think there's about
11 32 million tons of coal that's being transported
12 right now on this rail through the Crow Reservation
13 up to Huntley and then on up to the Great Lakes area
14 and so forth.

15 So we did a lot of economics. We looked at
16 that very carefully and decided that the savings,
17 remember I said 320 miles round trip. Now, we're
18 talking about crew times; we're talking about fuel;
19 we're talking about train sets, how quick they turn
20 and so forth, it was those that motivated us to go
21 to the STB and ask them, "Could we do Tongue
22 River II?" I wondered about whether I should have
23 done that but we did. And, nevertheless, we did.
24 And then Tongue River II came out. And to have the
25 -- remember the Four Mile Alignment we saw on

1 another map earlier this morning? And then we said
2 that didn't work from an operational or from a
3 safety point of view.

4 And so then we came back and did Tongue
5 River III to correct those problems with the
6 Four Mile Alignment and also to correct some of the
7 environmental issues that were involved with why the
8 Four Mile Alignment was accepted. That's why Tongue
9 River Railroad did what it did.

10 MS. DWIN VAUGHN: So if I heard you correctly,
11 everything you've done was to improve access to a
12 resource and to establish efficiencies in travel
13 times?

14 MR. GUSTAFSON: That's part of it. But in
15 order for us to do that, we had to comply with the
16 regulatory framework that was established in this
17 country, now the Surface Transportation Board and
18 NEPA. And obviously based on the recent decisions
19 and so forth, it appears that we have done that, but
20 we now come before us a decision on dealing with the
21 issues that I think are before all of us here and
22 that's dealing with the cultural heritage and
23 archeological issues that are involved here. And
24 I'm here to say we want to work with you, but you
25 know what, just like when we went to the STB and we

1 said, "How do you" -- "What's the permit process,"
2 they designed it, not us, and we went through that
3 process.

4 Now what we're looking for from this group is
5 some guidance and clarity so we know what we need to
6 do as we build this.

7 MS. DWIN VAUGHN: That's really good, but I
8 would say in 25 years what improvements have there
9 been in technology, in transportation? You gave me
10 the history, but in 25 years this nation has evolved
11 in many ways, and I'm not clear on how this has
12 evolved, this project has evolved during that time.
13 So you do an analysis of how rail cars with 150 cars
14 can navigate certain landscapes or whatever. I'm
15 thinking, In all this time, has the railroad
16 industry grown and been more modernized to not need
17 to do the things the same way? I'm looking for
18 efficiencies. Because what I fear is you're still
19 trying to do what you proposed in 1986 in 2011, and
20 that baffles me when changes in just the evolution
21 of all technologies is paramount in what companies
22 pay executives big money for.

23 MR. GUSTAFSON: I think Dan and Larry both can
24 respond to the technological changes in the rail
25 industry that have built in efficiencies relative to

1 the rail operations and so forth and certainly have
2 taken place.

3 Let me tell you that I think David Coburn made
4 it clear this morning that when we did Tongue
5 River III, we went back and took a fresh look at
6 Tongue River I, II and III.

7 Now, that was in 2007, correct? Am I right?

8 MR. HADLEY: 2006.

9 MR. GUSTAFSON: So that's about as close as I
10 can get to today.

11 MS. KITAY: Also, Charlene, we have the Clean
12 Air Act, and there's been a lot of push to coal as a
13 source of energy when other energy has dried up.
14 And, generally speaking, coal moves best by rail,
15 and so -- and there is now this impetus to move coal
16 to Asia and other markets, particularly after what's
17 happened, for example, in Japan. All of this is
18 related and really does make this project arguably
19 more and more viable as time has gone on.

20 MS. DWIN VAUGHN: But I think that's, that has
21 to be articulated to the tribal community, and I
22 don't feel they need to read to figure it out.

23 MS. KITAY: No, but hopefully we have made that
24 clearer.

25 The other thing somebody had asked me earlier,

1 Pete, I think, what did the denial -- "cert," that
2 word has come up, and I just want everybody to
3 understand that our cases go directly to the courts
4 of appeal, like the Ninth Circuit when somebody
5 files a petition for review of our decision, and if
6 somebody is not satisfied with the ruling of the
7 circuit court, they can ask the Supreme Court to
8 take the case by filing what's known as a Petition
9 for Certiorari, and if the court denies cert, there
10 is no supreme court review and the court of appeals'
11 decision stands.

12 MR. GUSTAFSON: What I mean by -- I'm just
13 saying that I've been in a lot of meetings over the
14 years with regard to this railroad, and it's always
15 a difficult process to try to explain where you are.
16 It's not just with a group like this, but it's with
17 public routes and communities and all that to try to
18 have them understand a very, very complex -- and
19 obviously we have a bias from the Tongue River
20 Railroad's point of view, but we try to lay this out
21 as factually as we can.

22 I didn't mean to put it on you that you have to
23 read five volumes of this.

24 MS. DWIN VAUGHN: I think this has been
25 helpful. Context, again, is helpful.

1 MR. GUSTAFSON: I understand. I don't know the
2 fast track of how to get people who basically,
3 because this has been around so long, how we get a
4 context, to use your word, in terms of understanding
5 this, understanding that, number one, there has been
6 approval for this all the way from Miles City to
7 Spring Creek; two, that Tongue River II and III are
8 under appeal and we will have oral arguments on
9 July 11th, and the gods in the Ninth Circuit will
10 decide the outcome. It's on the environmental
11 aspects of this thing, did we or did we not. We
12 will argue that, and we will argue that we did.

13 I want you all to know that I probably won't
14 have a chance to talk to you tomorrow or the next
15 day, but I just want you to understand that what
16 this is all about is trying to come to some kind of
17 today's version of a PA that gives us the definition
18 that we need to know, just like we got from the STB
19 when we started the NEPA process, with regard to the
20 environmental requirements to meet the archeological
21 and cultural needs of this site.

22 Now, Dan and Larry will get into this in terms
23 of the gymnastics we had to go through to try and
24 find a route that made sense from all of our design
25 and operating criteria. And I just want you to

1 know, there's 92 mitigation measures placed on this
2 Tongue River, and they do address cultural and
3 archeological, maybe not sufficiently for the people
4 in this room, but they do address a lot of those
5 kinds of issues, and that's where it's important as
6 we look forward in trying to redesign this PA that
7 we do have at least a knowledge of what --

8 MR. YOUPEE: You know, I tried to sift through
9 the information and jargon and rhetoric to get to
10 the real position of the company, but to stay in
11 context, I think it is important in examining, in
12 examining the chronology of wanting to do things
13 better, making some changes within policy to address
14 certain concerns of tribes and having consideration
15 for tribal data, resource knowledge that would be
16 provided by tribal representatives, not
17 representative.

18 And your information continues from I, II and
19 going into III coming from the same source. Now, it
20 would seem because the 1992 amendments to the NHPA
21 were specific in identifying tribes who had
22 significance, historical significance, cultural
23 significance, spiritual significance, religious
24 significance to the area, that might be impacted.
25 In consideration for tribal concerns and suggestions

1 during decision making, there has been a lot of work
2 done by your company and STB in regards to moving
3 this project forward. Now we're at a pressure
4 point, I'm going to say, to respond in your
5 timelines, so I think it's necessary that you
6 consider and understand that tribes need to have
7 space and time with this project in order to get
8 more informed and have an informed position.

9 Now, the notion that certain actions have been
10 taken to court, which is true, and being exhausted
11 in the judicial arena, but tribes are not against
12 litigation. We would go to court as quick as you
13 would. I want you to know that. I've sued the
14 government four times and won.

15 MR. GUSTAFSON: That's a good record.

16 MR. YOUPEE: Now, what you have explained to us
17 as far as building on change, I haven't heard
18 change. I haven't heard change. Regarding a
19 benefit package for tribes, I haven't heard change
20 at all.

21 MR. GUSTAFSON: Curley, could I ask you a
22 question?

23 MR. YOUPEE: I don't know. If it's a personal
24 question, probably not.

25 MR. GUSTAFSON: Okay. What are your

1 expectations?

2 MR. YOUPEE: I think that as we continue to go
3 through the whole package here, I think having some
4 expectations, but I think right now that honesty is
5 probably the foremost as far as expectation. And I
6 think that if we can be upfront, there's clarity and
7 certainly transparency regarding everything that's
8 taken place here.

9 MR. GUSTAFSON: Curley, let me go on the record
10 for Tongue River Railroad. I agree with honesty,
11 transparency, and I agree with alignment between the
12 tribes on this issue. What I'm looking for is
13 definition in terms of your concerns that can be
14 embodied in a PA so that we have the knowledge and
15 the certainty of knowing what we have, what is the
16 margin we have to chip, okay? Now, isn't that fair?

17 MR. YOUPEE: Well, you know, you have been
18 pushed to the end gate to even express yourself like
19 that. We're at the bottom of the ninth in the PA
20 development. We have not been at the table
21 discussing these issues with you, nor have we been
22 invited prior to this to discuss these issues with
23 you. That's what I'm saying, it's kind of a
24 pressure point for us.

25 MR. GUSTAFSON: I understand.

1 MR. YOUPEE: You have to understand that.

2 MR. GUSTAFSON: I understand it perfectly. We
3 both have pressure points, don't we?

4 MR. YOUPEE: Was that a question? Was it
5 rhetorical?

6 MR. GUSTAFSON: We both have pressure points,
7 don't we?

8 MR. YOUPEE: I guess we do.

9 MR. GUSTAFSON: I don't want to get into a
10 debate. What I'm trying to suggest to you is,
11 listen, we have done everything we believe is
12 correct. We've done what we've been asked to do.
13 We have met the regulatory requirements established
14 by NEPA, and the administrative agency has made a
15 decision and has approved this alignment subject to
16 the litigation that's going on on Tongue River II
17 and III.

18 Now, I'm not trying to cram it down. I'm not
19 suggesting more litigation. I'm here to try to find
20 a way -- because you have a concern because you
21 weren't at the table during certain parts of this,
22 but you are at the table now, and so I'd like to
23 move beyond that and I'd like to see this meeting
24 produce a product that basically takes into account
25 the reality that there is an approved alignment from

1 Miles City to Decker, Spring Creek.

2 We do have some cultural and historical issues
3 that we must address with the tribe. And I've said
4 we're starting at 2011 on, June of 2011. I didn't
5 establish the September 11th date, the 2011 date or
6 whatever it is, to try to get this done, but I do
7 think in all fairness to the STB and to Tongue River
8 Railroad, it's always good to have a deadline. It's
9 always good to have a target because people move
10 toward that target. That's how decisions are made.

11 It is a complex thing for you all to deal with
12 collectively because tribes here have direct
13 economic benefits in this, and there are tribes that
14 don't have direct economic benefits in it.

15 So I'm saying to you today that I want this
16 process to work. I can't put it any clearer than
17 that. And I'm not trying to put a gun to your head.
18 I'm not trying to do anything. I'm just simply
19 saying that we've got a decision to make here, and
20 we've all got to make it, and I think we can work
21 through it.

22 And remember every one of the comments that
23 went around this room when we started and Darlene's
24 prayer, it was all about trying to find consensus.
25 It was about trying to find collaboration, the

1 spirit of working together and in trying to deal
2 with the historical and cultural aspects that your
3 people want to have protected when this railroad is
4 built, and that's what I'm here to tell you is we're
5 prepared to do that. I can't make it any clearer
6 than that.

7 MS. GRAVATT: Charlene, is it common for a
8 federal agency to be able to have the authority to
9 approve a project to go through a national landmark?

10 MS. DWIN VAUGHN: It really depends. Some part
11 of the National Historic Preservation Act
12 establishes a higher bar whenever NHLs are impacted
13 and says that the agency has to conduct planning
14 that to the maximum extent feasible can avoid
15 effects, and that's for many reasons.

16 And I wish the lady from NPS was on the phone.
17 The goal is not to compromise the integrity of the
18 National Historic Landmark so that its designation
19 remains intact. If anybody could do anything to a
20 NHL, there would be integrity issues, and many of
21 them would no longer meet the definition of historic
22 significance that made them worthy of designation.
23 I think that has a Q and A on that.

24 But I think that the issue of NHLs is something
25 that you need to consult with STB about during these

1 meetings because I guess the question becomes now
2 that there are designated NHLs, and how does STB and
3 how do the tribes really define maximum planning?
4 What more do you think the railroad needs to do in
5 terms of planning and analysis as it relates to the
6 NHLs that would put on the table justification for
7 any impacts that would occur.

8 I think that we all are under a time deadline,
9 but we cannot continue to amend a PA that does not
10 have a record of adequate tribal involvement. So
11 STB is really at the point, we have to decide if
12 this agreement can be amended to ensure adequate
13 tribal consultation, or they have to make a call
14 about what the next step is in the context of 106.

15 I feel that everybody is pressured, but that's
16 the reality we have. But I'd rather see pressure on
17 this end than to execute or amend an agreement and
18 extend it more when we know it's inadequate.

19 So I commend the STB for taking this move. And
20 it's a hard move to take. They're trying to work
21 within the time frame that just a lot of factors
22 exist that say that they have to make a decision,
23 but that does not at all preclude the fact that
24 meaningful consultation has to occur. I can't put a
25 timeline on that.

1 MR. GUSTAFSON: I concur with what Charlene
2 said. I think it was very clear.

3 Secondly, I don't know if you were here earlier
4 this morning when we discussed that this was not an
5 NHL when the Tongue River, when Tongue River II was
6 approved.

7 MS. KITAY: And III.

8 MS. GRAVATT: It is now, though. That's all
9 that matters.

10 MR. GUSTAFSON: Yeah, I know that, but I'm not
11 here to defend the STB, but I'm here to make sure
12 the record is clear.

13 MS. GRAVATT: Isn't there a trust
14 responsibility here, though, by the federal agency
15 to protect that?

16 MS. GLIDDEN: Lana, I handed this out for a
17 reason, this National Landmarks question and answer,
18 and if you could take a look --

19 Do all tribal individuals have a copy of this?

20 So the National Landmarks is, it basically --
21 the designation of a National Historic Landmark
22 basically raised the level of its importance to a
23 national level of significance, and some national
24 registered properties are at that national level of
25 significance.

1 And what this does, the designation is still,
2 is still evaluated under Section 106. It's just
3 that it has a higher threshold, but it still is
4 subject to 106 and, you know, 106 to minimize harm
5 to the greatest extent possible.

6 And if you look at Page 6 of this Q and A, it
7 says that if federal activity will directly and
8 adversely affect a landmark, Section 1F of the act
9 calls for federal agencies to undertake such
10 planning and action as may be necessary to minimize
11 harm to such landmark. It doesn't say that you have
12 to avoid it. That you have to minimize harm to such
13 landmark. I'm just saying, read this. That's the
14 law.

15 MS. GRAVATT: It has significance by itself on
16 its own right now, and this is without tribal
17 consultation; this is without a survey. So how can
18 you, you know, say -- you know, for the tribes, the
19 significance is more, you know.

20 MS. GLIDDEN: This is only one westernized view
21 of value, and I certainly understand that. It's
22 not --

23 MS. GRAVATT: And without the TCP study, I just
24 don't feel that we've had adequate involvement.

25 MS. GLIDDEN: One of the things that we really

1 want to do in this, at least in the amended PA --
2 and I don't know if you've had a chance to take a
3 look at this, but I would ask you take a look at it
4 and compare it to the other document -- is to get
5 the tribes on the ground at this battlefield site so
6 you can actually go out there and decide for
7 yourself what's there and evaluate the entire
8 battlefield site and --

9 MR. WHITTED: It's not just the battlefield
10 site we're concerned with. We're concerned with the
11 whole corridor.

12 MS. GLIDDEN: She was talking about the
13 battlefield site, but yes, we have the Phase I and
14 Phase III that's going to be done for the entire
15 alignment, Tongue I, Tongue II and Tongue III, so
16 this PA covers the entire alignment.

17 MR. GUSTAFSON: Exactly right.

18 MR. WHITTED: I have a real problem with -- and
19 I didn't want to get into this, but how can you
20 approve for them to build a railroad without knowing
21 what's there? And that's essentially what you did
22 when you approved all three of these sites without
23 any archeological survey that tells you what's
24 there. So how are you going to avoid? You're going
25 to destroy is what you're going to do. Every site

1 you come across you're going to destroy because the
2 alignment is in place. We know very well you can't
3 shift or adjust very much because of the, the slope.
4 We all understand that. So it's kind of a bad time
5 to be bringing the tribes in because, like Curley
6 said, it's the bottom of the ninth. You know, the
7 game is almost over. How do we consult in good
8 faith? How do you ask us to consult in good faith?

9 MS. KITAY: That is what a PA is. It's meant
10 for, under the ACHP regulations --

11 Charlene, tell me when I'm wrong.

12 -- to deal with projects that are long in
13 mileage like this one where it's impossible to do
14 all the final engineering when there's still
15 something that's pending before the agency. And the
16 idea is that you set up a process so that before you
17 actually go and construct any portion of the line,
18 you do the final engineering, and then you do all of
19 the surveys and, that are required.

20 MS. GLIDDEN: And please correct me if I'm
21 wrong in terms of the engineering of the railroad.
22 I mean, we do have built into the PA avoidance as a,
23 as something that we need to look at following the
24 Phase I and phase, particularly the Phase III
25 surveys within the direct impact APEs. So that

1 although it is difficult to move a railroad, it's
2 not impossible to move a railroad for certain sites
3 that are particularly significant.

4 MR. HADLEY: It becomes a balance. If you move
5 the railroad, you end up affecting at least a mile
6 in either direction. The point being is --

7 MS. GLIDDEN: But it's not set in stone.

8 MR. HADLEY: No, it's not set in stone. The
9 point being is if you move from this location to
10 this location, you're affecting the alignment for
11 approximately a mile in either direction, depending
12 upon the cut and fill. And in this case since we're
13 parallel with Tongue River Valley, it's either going
14 to throw us into the Tongue River flood plain or
15 into a much higher terrain.

16 As you will see when we look at the battlefield
17 alignment itself, the approved alignment and
18 alternatives, when you try to take an alternative
19 from where the alignment is now which parallels the
20 existing transportation corridor, then by trying to
21 avoid those, you end up putting impacts on other
22 areas.

23 MS. DWIN VAUGHN: Well, what I heard Jim say is
24 they're being asked to make decisions and advise
25 with limited data. And you're right, a Programmatic

1 Agreement does establish a process and a process
2 whereby the railroad and STB will ensure that the
3 resolution -- well, three steps: The assessment of
4 effects and -- no, three identifications:
5 Evaluation of historic properties, assessment of
6 effects, and resolution.

7 MR. WHITTED: And none of it has been done.

8 MS. DWIN VAUGHN: So it's really the
9 consultation that will occur, but I think what I'm
10 concerned about is built into the current drafts and
11 everything, I think it's still a question about the
12 adequacy of tribal, the railroad and the tribe being
13 able to sit down and consult. To throw out concepts
14 of avoid, whatever, if you don't know what's there,
15 you have to have a conversation when you get that
16 information, and everybody, all the tribal
17 representatives want to know that at such time as
18 information data becomes available, they have the
19 opportunity to consult in a meaningful way, which
20 they can't really do now.

21 MS. YOUNG: Yeah, it's very disconcerting to
22 sit here and listen to the railroad company.

23 Of course, just like you said, Mike, you guys
24 have your own interests. You guys generate money,
25 and the tribes here, that's not what we are in the

1 business of. We are here to protect this way of
2 life, our cultural resources, our spirituality, our
3 religion. You guys come here, you fly here, however
4 you get here, and then you leave. This is our
5 homeland. This is very sacred to us. And if you
6 don't understand that or you don't have that
7 concept, it's something that's in your heart, and if
8 you didn't grow up with that or you weren't raised
9 with that, then you don't have it. It's just really
10 upsetting.

11 MR. GUSTAFSON: Well, Curley said it was about
12 change, didn't he? He said, I haven't heard any
13 change. This is about change right here, isn't it?
14 The way I look at it.

15 MR. YOUPEE: I have --

16 MR. GUSTAFSON: Excuse me, I'll just respond to
17 this.

18 There's probably no way that I can internalize
19 personally, okay, the cultural and archeological and
20 historical aspects of the various Indian tribes that
21 are involved here. I'm not one of you in that
22 sense, but what I'm trying to convey to you, even
23 though I'm not one of you and I didn't grow up as a
24 Sioux or one of the various Cheyenne or what have
25 you, I just grew up in eastern Montana out in the

1 prairie, the point is we had a process that we had
2 to follow and we followed it.

3 And what I'm hearing all around this table is
4 the bottom line was that everybody wasn't fully
5 engaged in this process. And this is about what
6 Curley said, this is about change, and we're here in
7 good faith because we need to understand what those
8 things are as we move forward.

9 And I agree with Jim, we've got to look at the
10 entire alignment as it relates to cultural and
11 archeological issues and other historical issues.

12 Listen, this is not my first rodeo on this kind
13 of stuff, and it isn't -- and I can tell you we've
14 been able to deal with this kind of issue. And I
15 think in fairness to the STB, this wasn't a National
16 Historical Landmark at the time, so therefore the
17 criteria might have been a little different when
18 they set forth the guidelines for us.

19 But now we're here because, one, the PA needs
20 to be revised. And, two, it's a National Historical
21 Landmark. And we all need to figure out how to work
22 this out, not only with regard to that site but also
23 to --

24 MS. YOUNG: I think -- I think a lot of what it
25 boils down to is respect. And you have used -- you

1 know, the tribes came here this morning. In a good
2 way we come to our meetings. And this isn't, to use
3 your terminology, it isn't our first powwow. We sit
4 at the table --

5 MR. GUSTAFSON: I like that better.

6 MS. YOUNG: Many times we sit at the table,
7 these same tribes, and we deal with all kinds of
8 agencies monthly. We'll see each other in Montana,
9 South Dakota, Montana. We have a lot on our plate
10 also, but -- and we come to consultation. We get
11 offered tobacco, sweet grass. And we do, we come
12 with open hearts, but then we hear the same
13 rhetoric.

14 And these laws, regulations that help protect
15 our resources, we're using them to the best ability
16 that we can, and, you know, we're driven by totally
17 opposite things. And I know we're sitting here at
18 the table and we said we want resolution and we want
19 to work together and it's a hard process, but what
20 we don't need over and over repeatedly, like you
21 said, I'm not putting a gun to your head or not
22 trying to jam this down your throat, saying this has
23 been approved. You know, you said that like five
24 times in the past. And that's a fact, but we don't
25 need to hear it over and over again. And the manner

1 in which you engage with people, that's the first
2 step in meaningful consultation.

3 MR. GUSTAFSON: Fair enough.

4 MS. GLIDDEN: I totally agree with you, and I
5 think that's -- we're here to reopen the book. I
6 mean, we're here to try to get input from you and
7 ideas and to tell us what you want and to look, even
8 if you would, look at the amended PA and see if it's
9 anything you can work with.

10 MS. YOUNG: Cathy, I appreciate the work you
11 do.

12 She does a good job. We've called on Cathy and
13 Randy. And you guys have come, flown in to see us
14 and work with the tribes, so it is good to see you.
15 And I feel that you really do put forth the effort
16 to work with the tribes and that it's noted and
17 appreciated.

18 MS. GLIDDEN: I appreciate that. And this is a
19 difficult situation, but we really do want -- and we
20 do have these laws and we have these regulations
21 that we have to work with, but we also have an open
22 mind regarding the tribes and what they care about
23 and what you care about, and we want to make sure
24 that we incorporate that, that we have your help in
25 doing it. And I know it is late, and I'm so sorry

1 about that. I mean, it's an unusual set of
2 circumstances that's brought us to this table.

3 MS. KITAY: We've never had a case like this
4 before, so it's horribly complicated.

5 MS. GLIDDEN: And the pressure we have put you
6 under with a complicated case and so little time, we
7 don't feel good about that. I certainly don't. We
8 want to do everything we can to try to bring you in
9 and try to really involve you, and we want to do the
10 best we can, and I hope you realize that and --

11 MR. YOUPEE: I want to comment. I want to
12 comment what Larry -- is this Larry?

13 MR. GUSTAFSON: This is Dan.

14 MR. FISHER: He's not one of us.

15 MR. YOUPEE: I wanted to comment on what he
16 said. As you were talking about a mile this way and
17 a mile that way and we fell into wetland and we fell
18 into I guess elevation on the other hand so actually
19 we're looking at the least resistance in this path,
20 and -- let me finish. And so that's been egging on
21 me in my mind.

22 And we realize that, you know, agencies have
23 the ability to provide real protection to Indian
24 sacred sites such as STB. Now, you know, their only
25 legal obligation is to consult with affected tribes.

1 That's the only legal obligation.

2 Now, we've been involved with other federal
3 agencies who ran the full mile with us in developing
4 a Programmatic Agreement that addressed all the
5 tribal concerns, and, you know, we gave a little and
6 then took a little and all the way down the line,
7 but we had time to do so, time to examine those
8 areas of impact, and I think that even shifted the
9 corridor somewhat here and there, but, again, we had
10 time to do so.

11 Now, if we're looking at change and we're
12 trying to find some synergy about this process here,
13 I guess we really have to, and the tribes and STB
14 really have to, well, ACHP as well, really have to
15 come together and iron some of these things out if
16 they're not going to be ironed out between Tongue
17 River Railroad and tribes themselves. I don't see
18 that happening. There's too much policy involved,
19 regulations involved that we have to overcome.

20 You know, we have had shortcomings in the past,
21 but, you know, we don't have to go back to those
22 faults. You know, there has to be some change
23 necessary. And I agree with other folks saying that
24 we can develop a model program here if our heart is
25 in it, or we can just fall through the policies and

1 let the, what do they call that, the ball fall where
2 it may, you know. But there are some real issues
3 here, and I'm not sure we can get this done in three
4 days to tackle all of this.

5 But I certainly appreciate Tongue River's
6 presentation, and I understand a little more about
7 them. You guys are pretty top heavy, though,
8 regarding STB and Tongue River because you have your
9 attorneys here. You know, had I known we were going
10 to have attorneys here, then maybe I should have
11 brought mine as well.

12 MS. GRAVATT: Exactly.

13 MR. YOUPEE: But it's always, I guess, a scary,
14 risky position to bring attorneys into the initial
15 ground stages of discussion regarding tribal
16 consultation because it's, it's a power statement.

17 MR. GUSTAFSON: I sort of agree with you,
18 Curley.

19 MR. YOUPEE: Thank you. But seriously --
20 Conrad, I think you had a comment.

21 MR. FISHER: I think Curley has already
22 commented on that this isn't something that we're
23 going to be able to resolve in this type of scenario
24 that debates are going on. Certainly they're worth
25 commenting about. And you mentioned one thing,

1 engaged, but I also heard that you're leaving us
2 here real soon, so I guess "engage" goes out the
3 window if you're not going to be here for the full
4 three days like we are. We're going to be here
5 three days. Certainly you're a big part of this PA,
6 and it's kind of disappointing to know somebody
7 that's pretty much been involved for the last 30 or
8 40 years is leaving within a couple, a matter of
9 hours.

10 And I also feel like, you know, as we're going
11 through this process right now that I don't see
12 anybody taking the lead in terms of coordinating a
13 discussion here. I mean, it seems like we're sort
14 of, everybody is having their own. We need to see
15 some organization, some structure here where --
16 you're beginning to impose your influence and your
17 power as part of this Tongue River Railroad, and I
18 don't really think that that should be the case.

19 MS. GLIDDEN: Well, I have to say, Conrad, you
20 know, in our viewpoint, we had intended that they
21 would provide a presentation, and things kind of
22 morphed and changed.

23 MR. FISHER: We're having this metamorphosis.

24 And as far as pressure, everybody has pressure.
25 I have pressure. Collectively we have. You have

1 pressure. But they're different types of pressures.
2 We're comparing apples and oranges. So yours might
3 be economic pressures; they might be political
4 pressures; they might be other pressures.

5 And certainly I don't have an attorney here
6 either. All I've got is the medicine man, but he's
7 having women problems.

8 So I just want to make those comments that I
9 think we need to -- with the amount of time that we
10 have, I certainly appreciate doing what you're
11 doing, but, you know, as Curley said, maybe this
12 debate, this discussion is for another time, that
13 our focus should be with, in a different light right
14 now.

15 MR. GUSTAFSON: Let me respond that when I
16 heard several people say that this is a matter that
17 really needs to be discussed between the STB and the
18 representatives with respect to tribes, Cathy just
19 got through characterizing what our role here is,
20 and that was to give information. I was a bit
21 engaging. I was. I didn't intend to, you know, get
22 the blood pressure up.

23 The reason I'm going home, I have an elder in
24 my family that's 92 years old, my mother, that I
25 have to make sure I take good care of.

1 MR. FISHER: Certainly that's worth --

2 MR. GUSTAFSON: So the bottom line is that
3 Tongue River Railroad -- let me leave it here: I
4 hope that you all have productive discussions and
5 you reach a resolution in a comfortable time frame;
6 that you people feel that you can then articulate or
7 the STB can articulate to the Tongue River Railroad
8 so we know the wishes of this group.

9 You've been around long enough, Conrad, to know
10 how difficult it is to reach consensus with a lot of
11 different interests. You talk about our interest,
12 and I can look around this room and see all
13 different kinds of interests here, too.

14 MR. FISHER: Sure.

15 MR. GUSTAFSON: I'm simply saying that I hope
16 you engage in productive discussion. To the extent
17 that I can be helpful and Tongue River Railroad can
18 be helpful, I'll make the time to be available
19 within my personal commitment.

20 MS. GLIDDEN: I would ask that we try to move
21 on, in the spirit of trying to take control.

22 Are you finished?

23 MR. GUSTAFSON: I was just taking questions.

24 MS. GLIDDEN: I thought you were going to talk
25 about the alternatives.

1 MS. RUTSON: Dan and Larry are going to.

2 MR. YOUPEE: One question, because I know
3 you've got to get to your mom or your mom will spank
4 you.

5 MR. GUSTAFSON: She's done that many times.

6 MR. YOUPEE: I'll bet she has. But my question
7 is: Are you prepared to do a logistics and
8 accommodation study or assessment on a Traditional
9 Cultural Property survey or study and archeological
10 survey within that corridor?

11 MR. GUSTAFSON: Curley, if you could help
12 define that, what you're saying, because I'm not
13 sure -- I want to make sure you and I are
14 communicating. I want to make sure you and I are
15 communicating on that issue. But if you and your
16 folks can, in collaboration, can define that, I can
17 give you a quick answer on that. I'm not dodging
18 your question. I just need more specificity. But I
19 understand generally what you said. And we've done
20 this before, but I'm not sure how comprehensive you
21 want it and to what extent. And I think that's part
22 of what is going on here in trying to do a PA.

23 MS. GLIDDEN: Ultimately, Curley, it is part of
24 the consultative process and our discussion. It's
25 not up to any one individual. I mean, ultimately

1 it's up to the STB obviously, but we want your input
2 in deciding what's appropriate.

3 MS. JOHNSON MORFORD: I would just like to
4 offer one thing. And I'm Debbie with the BLM in
5 Miles City. And I hope I don't misspeak, but I
6 offer this for everybody because I sense that we're
7 kind of at an impasse, and it's a lot to do with the
8 timing of things.

9 And what this PA seems to focus on is
10 fulfilling the requirement of Section 106 in
11 consultation with the tribes in completing the
12 Class III inventory, and that's where I think the
13 tribes are saying they want to be involved in that
14 so that they actually know and can then provide to
15 the STBA and the other --

16 MS. GLIDDEN: Well --

17 MS. JOHNSON MORFORD: Let me finish.

18 MS. GLIDDEN: Is in the PA, and there's also a
19 Class I survey. I just wanted to correct you. Have
20 you read the PA?

21 MS. JOHNSON MORFORD: Yes, I have.

22 MS. GLIDDEN: The revised one?

23 MS. JOHNSON MORFORD: I've read everything that
24 you've provided this morning before coming to this
25 meeting. And I would like to finish my thoughts.

1 I'm actually trying to offer this to help,
2 because I'm hearing several different things. And I
3 think the tribes are wanting to be involved in the
4 Class III inventory so they can actually provide the
5 information that's being requested of them today
6 because they don't necessarily have all of that
7 information.

8 MR. GUSTAFSON: That's what I'm hearing.

9 MS. JOHNSON MORFORD: And I think in the same
10 vein, I think Tongue River Railroad may want to be
11 willing to consider if something was to come up, if
12 the railroad needed to be realigned or moved, yes,
13 it would require additional surveys, but there may
14 be something you're not aware of that the tribes may
15 bring forward as a result of your Class III.

16 So I think when you say that the line has been
17 approved, that's for the license that's been issued
18 from STB. Well maybe there's something out there
19 that we all don't know that might require it to
20 move. And I know politically that's a really scary
21 thing, but I think that's where, people are wanting
22 to hear that. You know, there could be something.
23 We might want to look at it, consider it. Or if we
24 can't, that's where we have to revise either another
25 PA or revise the PA to come to some agreement on how

1 to mitigate those adverse effects to those sites.

2 MR. GUSTAFSON: You're suggesting that in the
3 context of this PA, it has to be sort of a living
4 document, if I can use that word? And what you're
5 suggesting is -- once Dan and Larry get done, you'll
6 see that what you have, I hate to use this word
7 "approval," but once we have the certificate or
8 whatever, the authority to move forward, there's a
9 whole process that goes on in engineering and all
10 that.

11 And you're absolutely right, there are going to
12 be issues as you come along that we're going to have
13 to address. And you're suggesting a form of the PA
14 needs to embody the spirit of more collaboration; is
15 that true, or --

16 MS. JOHNSON MORFORD: You know, and it goes
17 beyond that, that I think you're asking tribes for
18 input.

19 MR. GUSTAFSON: Yep.

20 MS. JOHNSON MORFORD: They can't provide you
21 everything that you're asking for right now, and
22 they want to hear a willingness from the company to
23 work with them if something is discovered or brought
24 forward with regard to alignment or some type of
25 mitigation or data recovery or something. So I

1 think instead of getting positioned, I think there's
2 opportunity and there needs to be a willingness to
3 know where we're at in the game and where the tribes
4 need to be engaged.

5 MR. GUSTAFSON: Let me leave you with this
6 thought, and then I'll sit down. The point is --
7 it's a good suggestion. The point is I didn't
8 mean -- I know there's probably some adversarial
9 feelings and opinions about companies, you know,
10 that they do things for profit and things like that.
11 I understand all that, but my point I'm trying to
12 make here is that I have no problem with a process
13 that works, that, in other words, you know, it isn't
14 a typical process that facilitates the timing,
15 construction of this rail and addresses the concerns
16 in this room. And if that's really --

17 And back to Conrad's point, I really don't know
18 if I have anything to add to that, but certainly the
19 STB and the group here can put that outline
20 together, that framework together, and I'm saying
21 there's a willingness on the part of the Tongue
22 River Railroad to work in that spirit, okay?

23 MS. JOHNSON MORFORD: I understand.

24 MR. GUSTAFSON: Because it's to our advantage
25 to do this, and we want to do it. We want to do it

1 right. I've said this a lot of times in public, we
2 want to do it right. So I'll leave it with that.

3 Dan, it's your show.

4 MR. HADLEY: There was some discussions earlier
5 about why railroads have a difficulty of being
6 realigned, so to speak. These standards that are
7 shown, these design criteria in front of you, the
8 3-degree curve, railroads, because their curvature
9 is so gradual, they talk in degrees in terms of the
10 radius of the curve.

11 A 3-degree curve is roughly 1,900 feet in
12 radius. And the reason being is when you talk about
13 these trains of 125 to 150 cars and a coal car
14 weighing over, having a hundred tons of coal in the
15 car, you're talking about a tremendous amount of
16 weight. So to change the direction of that train in
17 a very sharp curve, then you end up with the high
18 probability of rail failure or wheel failure, so the
19 idea is to try to keep the curvature to a minimum.

20 The distance between curves is a minimum of
21 200 feet. So when you're coming out of a left-hand
22 turn going into a right one, you have to have some
23 tangent distance between those curves.

24 Maximum grade against empties is 1 percent,
25 which is 1 foot in a hundred feet, compensated for

1 curvature, because as you go into a curve there's
2 more friction. As a result you have to lessen that
3 grade. So for a 3-degree curve, instead of having a
4 maximum of 1 percent grade, you have to back that
5 off to about .85 percent.

6 Maximum grade against loads is a half a
7 percent, so basically one half of a foot per hundred
8 feet.

9 And vertical curvature is basically defined on
10 how sharp your vertical curve can be. As you drive
11 some of the older two-lane highways in Montana, you
12 come over a hill and you say, I wonder if there's
13 someone in an old buggy in front of me and you're
14 worried about sight distance. Well, with railroads
15 it's not so much sight distance as it is against the
16 change of the weight of those cars going over those
17 curves, which then causes more stress on the rail
18 and more likelihood for derailments.

19 These criteria have been developed over many
20 years, partly reviewed or seriously reviewed by the
21 Federal Railroad Administration, but more times than
22 not have gotten consensus among the main railroad
23 haulers, the Burlington Northern Santa Fe, the
24 Denver Rio Grande and so on because they have found
25 by sticking with these criteria they have less

1 derailments, less wheel failure, less rail failure.

2 Cut and fill slope ratio information has to do
3 with how often you'd have to go back in and maintain
4 slopes. Because if you get a big rainstorm or a
5 snowfall, the slopes are too steep. They slump
6 anyway. That has a lot to do with the type of
7 material you're in. Obviously if you have granite
8 rock you pretty much have vertical cut-and-fill
9 slopes.

10 Unfortunately, the types of soils that we deal
11 with along the Tongue River Valley are very
12 sedimentary. There are some sandstones, but a lot
13 of it is clinkerburn or what's called scoria and a
14 lot of clay. So as a result to have stable slopes
15 in those conditions, we have to lay the cut slopes
16 back further at two to one and maybe even sometimes
17 greater than that. There are some areas along the
18 alignment from Miles City down to Spring Creek where
19 you get into some fairly stiff sandstones, and you
20 can steepen up those side slopes.

21 Environmental criteria, besides trying to have
22 a straight alignment, obviously we're following a
23 river valley and it turns, and it's basically
24 something like the Tongue River that is fairly low
25 in profile, it causes lots of sinuosity or a lot of

1 oxbow in the river, and so it makes for a fairly
2 wide flood plain.

3 And so besides trying to meet those engineering
4 criteria we looked at earlier, we then look to avoid
5 as much as we can the Tongue River flood plain,
6 prime farmland and cropland, and more times than not
7 those prime farmlands and croplands are in the
8 bottom lands outside the flood plain or adjacent to
9 it but what areas used to be the flood plain. So if
10 you get a hundred-year flood, more times than not
11 those prime farmlands and croplands are flooded, and
12 those types of soils and foundations are not
13 conducive to heavy rail haulage. You want to be up
14 on solid ground as much as possible.

15 MS. GRAVATT: Excuse me. Those oral arguments
16 on the 11th, are those environmental arguments, or
17 is that -- who are they?

18 MR. COBURN: I can answer that. Two sets of
19 petitioners, one, the Northern Plains Resource
20 Council and one of its members, and the other, the
21 UTU and the City of Forsyth and Native Action have
22 brought challenges to the STB's decisions in
23 Tongue River II and III, and those challenges -- one
24 set of challenges, the Northern Plains challenges
25 are based on whether or not the STB complied with

1 NEPA, whether the EISs were sufficient.

2 And the other set of challenges has to do with
3 a different set of issues that is not on the table
4 here today. It's whether they complied with the law
5 in dealing with the transportation merits of the
6 project, essentially.

7 MS. GRAVATT: Will those be available to us?

8 MR. COBURN: Well, those cases -- this is an
9 appeal at court, so it's not a situation where
10 there's going to be witnesses being cross-examined
11 or anything like that. The cases have been fully
12 briefed. Each party submitted, including the Tongue
13 River Railroad and of course the STB and the other
14 parties, submitted their briefs to the court.
15 There's going to be a total of 40 minutes of oral
16 argument, 20 minutes a side, before three appellate
17 judges who will ask questions of the attorneys.

18 MS. KITAY: Is the transcript available in the
19 Ninth Circuit? I'm not sure.

20 MR. COBURN: A recording will be available
21 on-line. A transcript parties would have to pay
22 for.

23 MS. KITAY: But can people listen right away or
24 a few days later?

25 MR. COBURN: A day or two later on-line, you

1 can go on-line to the Ninth Circuit's website and
2 listen to the oral argument. The briefs are
3 available, and I'd be happy to get electronic copies
4 or hard copies of the briefs to anybody who wants to
5 see them. The environmental issues that were raised
6 in the case, though, don't go to the cultural
7 resource issues. Those are not the issues.

8 MS. GRAVATT: They're not that deep, right?

9 MR. COBURN: Those aren't the issues that were
10 raised by the Northern Plains Resource Council.
11 They raised a different set of issues.

12 MS. GRAVATT: Like what?

13 MR. COBURN: Well, for example, they claimed --
14 we disagree obviously, but they claimed that the
15 board didn't do a sufficient job in assessing the
16 cumulative impacts of building the railroad together
17 with the Coal Bed Methane Development in the area.
18 There are some CBM wells in the area, and they said
19 the board should have done a more elaborate analysis
20 of the railroad and the CBM wells together to assess
21 the cumulative impacts.

22 Likewise, the cumulative impacts of the
23 railroad and the coal mining that will take place at
24 Otter Creek, they said the board didn't do an
25 adequate job on that. We disagree. That's what the

1 case is about.

2 MS. GRAVATT: Okay.

3 MR. COBURN: The judges will decide.

4 MS. GRAVATT: Okay, thank you.

5 MR. YOUPEE: On your criteria and your other
6 findings regarding shifting one to the other, have
7 you done a cost analysis to where we're at the table
8 now looking at the impacts against a NHL? Have you
9 done a cost analysis to other alternatives?

10 MR. HADLEY: I'll get to that. We have two
11 other alternatives we looked at about avoiding the
12 NHL and the amount of impact as far as acreage,
13 amount of cut and fill, additional length, the
14 height of crossing the Tongue River up in the north
15 alignment. The south alignment around the NHL would
16 be the same river crossing -- so I'll get to that.

17 Here's a slide that some of you have seen that
18 shows the NHL boundary, and the dark line -- well,
19 let's go back. The magenta line here that you see
20 is the existing Tongue River county road. And I'll
21 zoom in on this with a different program here in a
22 minute. I just want to get you kind of oriented.

23 Each one of these red squares is one square
24 mile. This is a state section up here. These light
25 brown outlines are Bureau of Land Management

1 ownership. Here's another state section.

2 The rest of this property here is privately
3 owned by a ranching family that's been there since
4 the late 1800s. Actually, I'll switch over here
5 real quick and zoom in. I highlighted Battle Butte
6 Creek here. This is the north fork. This is the
7 main fork. This is Battle Butte Creek as it enters
8 the Tongue River here.

9 For those of you who are familiar with USGS 7.5
10 quadrangles, this is where they have Battle Butte
11 labeled right here, which is incorrect. Battle
12 Butte is actually -- Battle Butte is right here.
13 It's kind of a little knob right here. You can't
14 see it because you don't have the topo map. This is
15 an area from a satellite photo from a land stat.

16 And then you can see this is agricultural land
17 here in the bottom lands. These annotations here
18 were taken from a national historic, a Montana --

19 I'm trying to remember the quote on that,
20 Doug.

21 Montana Natural Heritage Program had this on
22 their website as to the different positions of the
23 cavalry and of the different Indian positions and
24 their movements.

25 This magenta line again is the existing county

1 road. This yellow line is the Tongue River Electric
2 Association's power line as it progresses from the
3 northeast to the southwest down the valley, and it's
4 obvious where the Tongue River is itself.

5 MR. COBURN: And the rail.

6 MR. HADLEY: Well, yes.

7 And then the approved alignment -- just one
8 moment here. Three different -- would be the north
9 alternative, the south alternative and the approved
10 alignment all come to a common point right here.
11 The town of Birney is just about a mile further
12 downstream right about where this little, I'll use
13 my laser pointer, right about here.

14 And so this is the alignment that has been
15 approved. We cross the Tongue River. This is the
16 south Tongue River crossing. This is one of two
17 river crossings in the entire alignment from Miles
18 City to Decker. The other crossing is ten miles
19 north of Ashland.

20 The commonality of the south alignment and the
21 approved alignment become the same here, so they're
22 at the same grade and the same horizontal alignment,
23 so the bridge crossing and the crossing of the
24 Tongue River would be the same for the south
25 alignment and the approved alignment. However, the

1 north alignment would cross, and we'd have a very
2 high -- I'll get to a profile here in a minute -- of
3 fill of at least a hundred and forty feet, and the
4 bridge that would be required to be across the
5 Tongue River at that point would be that high a
6 bridge. Mr. Parker will give us a visual
7 demonstration a little bit later about how we can
8 picture the size of these cuts and fills.

9 These are profiles just as if you were standing
10 and actually could take a slice and look sideways
11 into the railroad of what the profile of the
12 alignments would look like. This is -- again, this
13 is the north alignment, and the profile for that
14 north alignment is right here.

15 So this is the commonality point. This is
16 where we start to cross the Tongue River, and we'd
17 have a 150-foot high bridge. And the flood plain is
18 approximately at this elevation 3,200 feet above sea
19 level, and so we'd be crossing this entire length.
20 This is a thousand feet for every one of these
21 squares, so you've got one, two, three, four and a
22 half thousand feet, almost a mile of crossing the
23 Tongue River Valley at that point.

24 And then we go on to fairly high cuts. The
25 vertical scale is exaggerated the same in each one

1 of these profiles. It helps you to see the
2 topography. There's a hundred foot elevation
3 difference here, so it's a ten-to-one exaggeration.
4 It's a thousand foot horizontal for each square, but
5 it's a hundred foot vertical for the elevation
6 difference.

7 This is where we'd cross Whitten Creek with
8 approximately a hundred, a little more than a
9 hundred-foot fill. We'd get into a 280-foot cut at
10 this particular point. And then where we cross Bull
11 Creek we would have about 150-foot fill at that,
12 151-foot fill. And notice the grades are .7 percent
13 and .9 percent, which exceeds the normal operating
14 criteria that I talked about earlier. And then we
15 have a fairly good size across Prairie Dog Creek.

16 In comparison, looking at the approved
17 alignment, just for visual impact from an aerial
18 view, this is the actual, the way the red is going
19 in and out, that's the actual extents of the cut or
20 fill in a planimetric view, so you can see we're
21 impacting much fewer acres, and our cuts and fills
22 are much less with the approved alignment.
23 Basically have grades that are a half a percent,
24 .2 percent, .019 percent.

25 This is where we cross the Tongue River Valley,

1 and this is where the bridge would be, the 40-foot
2 high bridge, and we're looking about fills of, would
3 still be about a thousand foot of fill on this side,
4 or the length of the fill would be a thousand feet
5 on approximately either side of that. Again, this
6 crossing of the Tongue River, 40-foot high bridge is
7 the same as what we would have if we took the south
8 alignment.

9 The south alignment has even higher cuts and
10 fills, with grades approaching 1.8 percent.
11 Downhill the trains would actually be running from
12 Spring Creek towards Miles City, so the trains would
13 be going down, which would be a real braking
14 problem, not only a braking problem but as you come
15 downhill, if there were derailment or runaway train,
16 you'd end up most likely dumping a lot of cars and
17 trains right here in the Tongue River Valley as you
18 came down that grade.

19 We barely -- when I designed this, we were
20 trying to keep the slopes to a minimum.
21 Theoretically you could pull this down, but if we
22 pulled the grade down, we'd actually undercut Battle
23 Butte Creek and the south fork of Battle Butte
24 Creek. We just barely have enough fill across these
25 points to have enough normal stream flow without

1 undercutting those drainages, so that was part of
2 the criteria of why we had the grades where we had
3 them.

4 And again here, against loads, trains coming
5 from Spring Creek going to Miles City would have
6 almost a 2 and a half percent adverse rate. In here
7 it's over 1 percent grade, so it's operationally not
8 good but from a safety standpoint not very good as
9 well.

10 Taking into account that this is the location
11 of Battle Butte but realizing there was activity and
12 different movements going on around for a mile in
13 either direction essentially, to try to avoid the
14 National Historic Landmark completely, this was the
15 closest I could stay to the river valley and lessen
16 the cuts and fills. The further you go away from
17 this point, the topography just gets higher and
18 steeper. You can see down here it gets higher and
19 steeper.

20 And we found that for the most part with the
21 private end of public lands that we crossed, if we
22 tried to parallel the existing -- we tried to
23 parallel the existing transportation corridors,
24 which historically have been straightened out a
25 little bit, but that's where the main traffic, more

1 or less where the main impacts are. And you see if
2 we pulled ourselves away from some of these
3 particular Indian position sites that are designated
4 with the Xs and tried to move the alignment on the
5 other side or parallel to the county road, we'd
6 actually be into the Tongue River flood plain. In
7 fact, right here the county road is right on the
8 oxbow in the river.

9 MR. GUSTAFSON: Dan, excuse me. Vickie
10 commented that you made some adjustments.

11 MR. HADLEY: Yeah, early on from the
12 preliminary alignments we tried to actually just
13 parallel the road completely, and in review from
14 construction experts in mainline railroad companies
15 like the Burlington Northern Santa Fe, they said by
16 putting that much curvature in there, if you're
17 going to just try to parallel that Tongue River
18 road, the curvature is going to be too sharp.
19 You're going to have continual maintenance and a
20 much higher risk for derailments.

21 And, as a result, again we're mimicking that
22 alignment, but we're not obviously paralleling it
23 exactly. And, again, these are the kind of curves
24 that through long-term operational use, especially
25 with the type of tonnage and trains that would be

1 utilizing this alignment, that's the type of
2 curvature that they have found prevents the least
3 amount of maintenance, plus in the long term a safer
4 alignment.

5 MR. YOUPEE: They maintain those periodically
6 anyway, don't they?

7 MR. HADLEY: There's always maintenance needed.
8 They have to replace ties; they have to replace
9 rail. I mean, that just wears out. In this case
10 though, by putting additional curvature in there, it
11 expedientially increases the amount of wear and
12 tear, not only on the rail and possibly rail
13 breakage but also on the wheels on the cars, the
14 tracks, and so that's higher maintenance for
15 replacing the wheels as well as the main rails, so
16 it's just wear and tear on equipment.

17 MR. YOUPEE: So there's no happy medium?

18 MR. HADLEY: Well, there is a happy medium in
19 the fact that if you wanted a most efficient
20 railroad, you'd just have a straight line from
21 Point A to Point B with no curves. We've tried to
22 parallel, again, the existing transportation
23 corridor that's there instead of just going from
24 Point A to Point B.

25 This next -- going back to this next slide,

1 that's the profile. Here's the two again. These
2 are the criteria that I was just talking about with
3 those profiles. The overall increased length for
4 the north alignment was almost 4,600 feet. There's
5 a 4,700 foot long fill across the river valley. The
6 fill heights exceed 150 feet. There was a minimum
7 of eight bridges. Maximum cut links were almost a
8 mile long, exceeding 280 feet in depth.

9 The southern alignment had an additional length
10 of 6,300 feet, seven ridges and valleys, with cuts,
11 cut lengths, the length of the cut up to 5,100 feet,
12 almost a mile, exceeding 414 feet. It's got more
13 curvature. The grades don't meet the design
14 criteria, significant increase in land, and I'll get
15 to a table that shows the acreage difference, much
16 higher construction costs in the tens of millions of
17 dollars, but that's a money issue; that's not an
18 environmental impact issue. Higher operating
19 maintenance costs on a daily basis and greater
20 impacts to the Tongue River flood plain, and again
21 the safety aspects of higher incident of derailment.

22 So here's the mileage difference between the
23 approved alignment, the north alignment and the
24 south. Here's the biggest significant difference is
25 the yardage. The approved alignment has about, a

1 little over one and a half million yards of
2 excavation. The north alignment is
3 13 million yards, and the south alignment has 22 and
4 a half million yards.

5 This is the amount of fill required when we
6 talk about embankment is an 8,000 yard difference
7 between the cut and fill for the approved alignment.
8 Amazingly enough, the north assignment is within
9 410,000 yards, 13 million yards for cut and fill.
10 However, the south alignment is 22 million yards of
11 cut and only 4 million yards of fill, which would
12 leave an excess of 18 million yards. And to get an
13 idea of how much 18 million yards is, if you took a
14 football field and had, filled it to a depth of a
15 hundred feet, it would take almost 300 football
16 fields to handle all that dirt.

17 And, of course, there's the argument that we're
18 only looking at a section of the alignment; we could
19 utilize that excess material up and down the
20 alignment, but then you end up with excess haul
21 distances. The whole idea, when you're constructing
22 something, is to keep your cut and fill fairly close
23 together to where you don't have long haul distances
24 of borrowing material.

25 Disturbed acres, 101 acres of actual disturbed.

1 This doesn't include right-of-ways, which is usually
2 at least another 50 feet either side from the top of
3 the cut to the total of fills. 280 acres for the
4 north, 251 acres for the south alignment.

5 Again, here's the maximum cuts, the maximum
6 fills, comparison of the grades of half a percent
7 against loads .41 percent for the improved,
8 .7 percent against loads and 2.4 percent on the
9 south alignment.

10 And this is the length. This is -- the
11 approved alignment has a little over 4,000 feet of
12 that adverse grade. Whereas the north alignment is
13 over 4 miles of adverse grade. The south alignment
14 has got a mile and a half of adverse grade.

15 And with the loads going downhill with a loaded
16 train, you're looking at almost eight-tenths of a
17 percent for the approved, .9 percent for the north
18 and 1.78 for the south. And, again, here's the
19 lengths of those grades.

20 MS. GRAVATT: Excuse me. How deep are you
21 cutting into the earth?

22 MR. HADLEY: That's what this cut is, these
23 maximum cuts. You'd actually be cutting 414 feet
24 in -- let me go back to this. In the north
25 alignment this is a 280-foot cut right here and

1 that's the ending. On the south alignment there's a
2 414-foot cut. Again, Mr. Parker will have a good
3 frame of mind about what that really represents.

4 So unless you guys have some questions about
5 the design process, I'll let Mr. Parker talk about
6 the operational maintenance issues.

7 MR. PARKER: I'm going to do two things.

8 I'm going to apologize to you right off the bat
9 because I'm going to do something a little different
10 here.

11 But, you know, we've all sat and listened to
12 Dan talk about the construction criteria that's gone
13 into the north, south alignment versus the approved
14 alignment. And I don't know if you guys are like
15 me, but I can sit here and I can look at a map and I
16 can hear somebody talk about a 400-foot fill or a
17 cut or a 150-foot fill and, you know, it's all talk.
18 I visualize things a little better.

19 So excuse me. I'd like everybody to get up.
20 We all need to stretch our legs anyway. Let's go to
21 the lobby just a second so we can talk about this
22 just a little more.

23 And we're off the record.

24 (Meeting in the lobby off the record.)

25 MR. PARKER: The question is what's the, you

1 know, is it feasible to think about tunneling
2 through a situation like I described out there
3 versus opening a fill or opening up a cut like that,
4 and the answer is yes, it is. The reasons why you
5 would or you wouldn't would get into a number of
6 things. Economics is one thing. Obviously
7 tunneling is a very, very expensive operation, and
8 it's an operation that becomes even more expensive
9 depending on, again, the type of soil conditions
10 that you're dealing with. If that was all rock out
11 there, there wouldn't even be a question; that's
12 exactly what they would do. They'd bring a machine,
13 and you'd bore a tunnel and it would virtually stand
14 on its own. You'd never deal with any kind of
15 problems.

16 You know, I railroaded for 40 years, and I was
17 always, for the most part, in the engineering or the
18 maintenance end, and we always hated tunnels because
19 any time you have a tunnel you got really limited
20 work space, you have a hard time maintaining
21 drainage, all of those issues that make it hard to
22 keep your track in good condition. You deal with
23 them all the time, so you didn't like tunnels, but
24 we have tunnels all over.

25 But, again, if that were rock, we'd bore the

1 tunnel, but that's not the kind of soil conditions
2 that you have in this area. So the only way you
3 could build a tunnel in there, it would all have to
4 be steel and concrete lined, and it becomes a very
5 expensive operation. Is it feasible, yes. I can't
6 tell you what the cost differential would be, move
7 the mountain, put in the tunnel. Those are options,
8 but --

9 MR. YOUPEE: Do you have a study?

10 MR. PARKER: I do not. I don't.

11 More questions later. Let me get through this
12 quickly.

13 You know, there are two issues I want to talk
14 about. One is safety, most importantly safety of
15 the various proposals out there for routes. And,
16 secondly, what are the maintenance issues.

17 Safety, again, we talked about the extreme
18 slopes or the extreme cuts and fills that are in
19 that area, and with them comes issues. With the
20 kind of fills or the cuts we talked about and the
21 slopes, even in the best of designs you're going to
22 deal with issues of possible rock slides, possible
23 slope failures when you get heavy rains, unexpected
24 rains, whatever the case may be, and all of those
25 then become potential blockages of the track.

1 There are things you can do. If you go look at
2 railroads, you'll find that many railroads put in,
3 for instance, either slide detectors or rock sliding
4 fences, and they work. They help notify you that a
5 rock slide or a, there's been kind of some slope
6 failure that has happened in the area ahead of your
7 train, okay? And so trains know through a signal
8 system not to enter that. But what that can't do is
9 prevent one of those slides from occurring into the
10 side of a train that's already passing through the
11 site. And unfortunately the nature of the beast of
12 train operations is you're moving very heavy
13 material, and you get a certain amount of ground
14 vibration when it happens or when they're traveling.
15 And the truth is, more often than not, large slides
16 or rock slides tend to happen into the side of
17 trains because that's the vibration that sets them
18 off. So unfortunately you can't put up a detector
19 or something that would guarantee you would never
20 have a slide into the side of a train out there and
21 cause a derailment. I wish you could, but you
22 couldn't.

23 The other issue that you get with cuts that are
24 of the depth out there, it's snow issues. Now, I
25 realize you're not in the Cascades, at the top of

1 the Rockies out there and we're not talking that
2 kind of depth of snow, but I know any time you do
3 get snow in that country, I can guarantee what it
4 does do, it blows. And when you start getting cuts
5 of that nature, that, as a maintenance person that
6 would be one of my big issues is how am I going to
7 deal with the snow issues that are going to crop up
8 in the wintertime? More than likely I'm going to
9 have to put on some kind of snowplow operation to
10 keep the track open, and that, of itself, becomes a
11 safety hazard for the people operating the snowplows
12 trying to clear that among trains. It's just an
13 issue. So it has some safety implications. It's
14 probably primarily a maintenance implication.

15 Last but not least, if you have blowing snow
16 and it drifts up like that, you tend to get issues
17 of where you always have, during the wintertime you
18 get snow that covers you to at least probably the
19 top of the rail, so you go through a significant
20 period of time from an inspection basis you can't
21 see your railroad very well, and you have a hard
22 time inspecting it to ensure that all the fastenings
23 are in place and in fact that railroad is safe for
24 on-track equipment. So railroads do a great job of
25 making sure their track is safe. Snow makes it more

1 difficult to ensure that it is and ensure that
2 you're not prone to a derailment out there.

3 Dan mentioned about the curvature issues out
4 there. Both the proposed alternative routes
5 increase curvature out there, not a great deal but
6 they do. And he mentioned a little bit about train
7 operations. Ideally from a train standpoint, a
8 track could be straight from one end to the other,
9 or tangent, as we call it. It's the best of all
10 worlds. Wheels tend to find the center of the rail
11 and track. They don't start hunting, as we might
12 call it, looking for gauge corners of the rail. The
13 force is directed straight down to the top of the
14 rail. But as far as you get to a curve, now them
15 forces all change. Now you're talking about
16 centrifugal force, throwing loads against the high
17 rail, okay? So it's wearing out that high rail.
18 It's throwing unbalanced loads onto that low rail
19 trying to flatten it out. Because of those
20 unbalanced loads, it's throwing forces that tend to
21 drive your surface. And I'm talking about cross
22 level and alignment of the railroad, it tends to
23 degrade that quicker.

24 And, again, those are all maintenance issues,
25 but they relegate themselves into being safety

1 issues at times when something happens quicker than
2 you as the maintainer of that railroad might expect
3 it to happen.

4 And I didn't talk about the extreme fills.
5 That 150-foot fill that's in the one proposal, I
6 think it's the south proposal, or is it the north?

7 MR. HADLEY: It's the north proposal.

8 MR. PARKER: North proposal, you know, again,
9 even using some of the best engineering methods,
10 construction methods and technology that happens
11 today, again, I've got 150-foot high fill. I'm
12 sloping it away on maybe a two to one if you can
13 hold that. I'm not sure that he can. And you've
14 got a huge area out there. You just do the math on
15 that, of this huge amount of area on slope that's
16 susceptible to slippage. Some of the huge rains
17 that you've had in Montana this year that are very
18 unusual, but I can tell you that had you had those
19 kind of rains on that 150-foot fill out there,
20 somebody would be dealing with it right now trying
21 to repair that fill and hope that you didn't get,
22 the whole toll of that slope didn't give way, and
23 suddenly again under the movement of a passing
24 train, have some huge slippage and that fill drop
25 out.

1 MS. GLIDDEN: I think it would be helpful for
2 everyone to have a sense of the cost for doing these
3 or these alternatives to the north and south, maybe
4 not just the actual physical cost of doing this but
5 also over the course of the railroad in terms of
6 maintenance and so on. I think that would be very
7 helpful to put it in perspective and perhaps even a
8 comparison between the cost of that and the cost of
9 the project overall, you know, how much would this
10 add to the operational expense.

11 MR. PARKER: If you didn't hold Dan and I to
12 the figures, if we did the best we could, he and I
13 could probably brainstorm between the two of us and
14 come up with an idea that at least you could chew on
15 in this meeting. I wouldn't want to be held to them
16 because every day unit costs change, but we could
17 give you a ballpark figure of what the increased
18 maintenance costs would be, what the increased
19 construction costs were.

20 I guess from my perspective that's news, but
21 for what you all are concerned with, I don't know
22 that you're concerned with the -- my main driver is
23 what are the safety issues.

24 MS. GRAVATT: How are you guys going to know --
25 like because of the historic rainfall amounts and

1 flooding going on in Montana right now, how are you
2 going to know if the ground is even stable enough to
3 do the project?

4 MR. HADLEY: The final design goes to technical
5 testing and check all the soil types. They take
6 core holes along the proposed alignment and
7 determine the soil types and if there is any
8 sandstones or harder rock, they can provide a
9 foundation, and all that -- and that geotechnical
10 investigation can be done for the whole -- in fact,
11 it has been done, to a certain extent, but for the
12 final fine tuning of the design, that boring would
13 be done and tests would be done, because that
14 information is needed to find out what kind of
15 foundation is going to be there for the railroad,
16 whether it's all silky type material so that may
17 have to be stripped out and select that fill to be
18 brought in to provide a good foundation, and also
19 provides the economics of trying to figure out how
20 to balance, where to take the cut material and how
21 far you're going to have to haul it for compaction
22 in a fill situation.

23 And one of the big aspects is of, during the
24 construction, you have to have water to add to dry
25 material you may have taken out of a proposed cut

1 area. You have to take and add water to that
2 material to get good compaction to where you're
3 going to have it put into a fill situation, you want
4 to have a compacted fill situation for the
5 embankment, so finding whether materials are
6 suitable.

7 And then secondly to find out how you're going
8 to have to add water or mix that material when you
9 do put it in place, it's going to be put in in an
10 appropriate manner, it's going to be to the density
11 that's needed for the railroad. So it will be
12 probably every, at a minimum of every hundred yards
13 or so soil taken to find out.

14 MS. GRAVATT: How often are you going to do
15 that?

16 MR. HADLEY: At least --

17 MS. GRAVATT: A one-time thing?

18 MR. HADLEY: It'll be done prior to and during
19 construction.

20 MR. YOUPEE: How would you develop this cost
21 analysis for Alternative A and B and probably C?

22 MR. HADLEY: In the table that we've already
23 shown, right there that indicates how much cut and
24 fill. That tells us how much yardage there is. And
25 by going back to major highway contracts or similar

1 rail projects, recent ones so we could have these
2 numbers, we know from those contracts how much it
3 costs to move a cubic yard of material from a cut to
4 a fill situation. And so we go through that and we
5 have a spreadsheet, and we fill in the costs.

6 MR. YOUPEE: Are you an engineer yourself?

7 MR. HADLEY: Yes.

8 MS. WELLS: I have a question for the railroad
9 and the Surface Transportation Board: What are your
10 future plans for this? Because the coal will
11 eventually all be taken from there. What is the
12 future plans of the railroad after the coal is all
13 gone? What else is there that you're not telling
14 us? I mean, because this is a big effort to put
15 into, you know, a hundred and some miles of railway
16 for however much coal you expect to be there.
17 Northern Cheyenne will probably get rich on it,
18 hopefully, but what else is there that you're not
19 telling us? Because I've never known white people
20 to put so much effort and invest so much into
21 something unless there's something else there to be
22 gained.

23 MR. COBURN: We're not hiding anything.

24 Earlier on I indicated this rail would serve as
25 existing lines, a new project in the Decker, Spring

1 Creek area, as well as it would serve approximately
2 4.8 billion tons of coal that lie in the vicinity of
3 Ashland, Montana.

4 MS. WELLS: How long is that coal expected to
5 last?

6 MR. COBURN: I can tell you Arch's plans. I
7 can tell you Arch's plans are to try to open a mine
8 at 20 million tons per year and increase it to
9 around 40. So, I mean, you can do the math as well
10 as I can. It's going to take awhile before that
11 coal -- I mean, we're talking -- you know, we're
12 talking over 150 years of reserves there at certain
13 levels, depending on production level. Take the
14 south Powder River Basin, they're producing around
15 480 million tons per year, and that started in 1973,
16 and they probably have the ability to go on another
17 30, 40, 50 years.

18 MS. KITAY: It's very lucrative traffic,
19 traffic for railroads. It's their most lucrative
20 traffic that there is.

21 And part of this project, as we said earlier, I
22 don't know if you were here, is to give a shorter
23 route for, it's not just for the northern Powder
24 River Basin coal for Montana, but also it will
25 shorten the route from the southern Powder River

1 Basin also. So it will really help BNSF because
2 their transportation cost and their shippers in the
3 Midwest will have to pay less for the coal.

4 So I think this is pretty -- I don't think
5 there have ever been other commodities really
6 considered --

7 MR. COBURN: No.

8 MS. KITAY: -- for this line. But this coal
9 traffic in general on other lines that are existing
10 has really been very, very profitable.

11 MS. DWIN VAUGHN: So recognizing that the life
12 span of this project is long-term, far reaching, how
13 are you all factoring in what an adequate price
14 would be to mitigate this or to address tribal
15 issues, or how -- are you waiting for a proposal to
16 be put forth before you then assess whether or not
17 it was deemed feasible? Because you all are making
18 a substantial investment. This will have an
19 economic generating potential for decades, and yet
20 we equivocate and debate over TCP studies,
21 Archeological Class III, and it's totally out of
22 proportion.

23 So, you know, I just want the tribes to hear
24 from the railroad as they caucus and come back to
25 you about what it is they need to understand and

1 what it is they want. Is it likely that they will
2 get pushed back or be discouraged from, as far as
3 I'm concerned, putting forth any proposal? Is
4 everything on the table as far as culture,
5 archeology and whatever concepts they come up with?
6 Because we don't have any data. We don't have any
7 foundational information.

8 So, again, you're asking them to tell you how
9 they want to engage in a decision-making process,
10 but the parameters aren't clear.

11 MR. GUSTAFSON: Well, Charlene, are you asking
12 the railroad to define the archeological cultural
13 parameters?

14 MS. DWIN VAUGHN: I'm asking as the tribes
15 caucus in having to assess what tradeoffs they have
16 to consider for culture and history, TCPs or
17 whatever, what are the parameters that they have to
18 operate under?

19 And I think I bring this up because oftentimes
20 the response to tribal proposals is, Well, we have
21 to assess the costs. We're not sure we can do that.
22 Right now they're coming in at the 11th hour,
23 technically, the 11th hour. You're moving into a
24 court hearing on July 11th, which you are assuming
25 will establish the economic viability and

1 feasibility of going forward, so how do you want
2 them to come back to you?

3 Because I keep hearing, We're here in good
4 faith. Tell us what you want, but everybody has
5 parameters. That's just life. What are their
6 parameters, given what you just said about --

7 And, Wanda, your question was right on, what's
8 the life cycle? What are you getting out of this?
9 What's the long-term contribution this is making to
10 a corporation? What's the net benefit to the
11 tribes?

12 MS. WELLS: I guess it's just that we have
13 sacrificed everything for this country, our people
14 have, and now here you go taking the coal and
15 everything else. And, you know, you're hell bent on
16 destroying a site because it's more economically
17 feasible for these companies and things like that,
18 but, you know, what do you -- what are you willing
19 to -- you know, how are you willing to work with us
20 on this?

21 MR. YOUPEE: Let me interject just one more
22 thing. You have to understand that we're not just
23 talking about one site. We're talking about
24 hundreds of sites. We're talking -- we're focusing
25 on an NHL for the most part. And STB, in their

1 trust relationship, we haven't gone to the STB to
2 get their focus on their trust regarding the whole
3 scenario here yet, but we're looking at additional
4 sites, many which could be religious in nature, and
5 so that brings a lot of other risk to the table.
6 But I thought I'd include that so we don't get just
7 caught up on just one NHL.

8 MS. WELLS: Yeah, that whole area.

9 MR. FISHER: I agree.

10 And I think, Charlene, we need to set the
11 parameters as a tribe. I think we need to -- if
12 we're engaging in good faith efforts, that we need
13 to -- this is about resolution. And, you know, we
14 can't have Mike or Tongue River Railroad tell us
15 what the parameters are. I think we need to set the
16 parameters on what we want to do in this particular
17 case.

18 Having said that, the other issue that I have
19 with the safety issues and the maintenance issues
20 and if we look at this Table 1, my feeling is that
21 the current rail line, the corridor, you're making a
22 pitch for not moving the line in any direction
23 because you have all these maintenance issues,
24 safety issues, and you're trying to make a pitch for
25 this is the only way, that this is the only line,

1 that we can't move it this way, we can't move it
2 that way because of all these issues that you're
3 bringing forth. Is that not the case?

4 MR. PARKER: Exactly. I mean, to totally avoid
5 the NHL is what Dan did, to totally avoid that site,
6 these are the two routes, the two best routes that
7 are available. If he goes further north or further
8 south, the issues related to these routes get even
9 more significant because the valley continues to
10 rise against, away from you. So his cuts and his
11 fills and his grades will only cut worse.

12 We tried to look if you go south to miss the
13 NHL or north to miss the NHL, here's what you deal
14 with and here's how those compare to the current
15 approved route. So that's what we tried to show the
16 STB. That's what we're trying to explain to you
17 that to totally miss the NHL site, that's what you
18 deal with. And you can't mitigate it anymore.

19 Now, can you stay within the NHL, do things
20 that would mitigate issues that you all might have,
21 are there things that can be done there, I can't
22 answer that. Probably. But this dog and pony show
23 was only to show you if you were to miss the entire
24 site, here's what you deal with.

25 MR. FISHER: But also, in addition, not just

1 that NHL but the whole line, the whole line it seems
2 like you're talking about, you know, the, you know,
3 high risk areas that if you were to move that line
4 because of cultural sites, that there would be
5 additional risks and additional maintenance; you'd
6 have to move certain types of soils.

7 MR. PARKER: It could be, but you'd have to
8 look at each one individually, Conrad.

9 MR. YOUPEE: Exactly right. We haven't
10 identified those sites. We're nowhere near a
11 mitigation plan.

12 MR. COBURN: That is the purpose of the PA.
13 And when we get to the point in this meeting, and I
14 hope we get there soon, probably not today, of going
15 through the PA and focusing on where the tribes can
16 be active, actively engaged in working with the
17 railroad's engineering to study the right-of-way
18 from beginning to end, not just in the NHL in
19 helping us identify important sites that, cultural
20 sites that need to be addressed so that the line has
21 a minimal impact, that's really I think the key to
22 what we can do to work with you and your colleagues
23 to address your concerns.

24 The coal is where it is. I guess in a perfect
25 world we'd all wish it were elsewhere, or maybe the

1 Cheyenne wish it weren't elsewhere. But it is where
2 it is, and to get to the coal, you have to build the
3 railroad from the existing railroad to the coal
4 fields. I mean, that's just a given.

5 But can we work with you to identify, as a
6 careful study is done of the entire line, to
7 mitigate the effects to the maximum extent possible?
8 The answer is absolutely yes. And I think what
9 you're hearing from Mike and what you'll hear from
10 Doug who is going to be here for the rest of the
11 meeting and for me is that that's really why we're
12 here is to work with you and the board and the
13 agencies to come to a really good PA that addresses
14 your concerns.

15 MR. YOUPEE: That's exactly what we said. Mike
16 had definition problems with it. You know, he
17 needed more definition to it. You explained exactly
18 what we're after. Perhaps you guys can sit down and
19 draft a proposal regarding that and we can take a
20 look at it.

21 MR. COBURN: I think it's done. When we look
22 at the words of this PA, I think the board has done
23 a good job in taking a good PA to begin with, I
24 think we had a good PA in 2005, and making it better
25 and bringing the tribes more into the process. And

1 maybe there's more we could do to improve in the
2 next day or two, I'm not sure, but that's why we're
3 here. That's why we're here.

4 MR. GUSTAFSON: Conrad, I'm with you on this.
5 I know you have a lot better information base. What
6 we have is a PA that operates for five years, and
7 everybody in this room is here because we want to
8 revise that PA appropriately. And I think the input
9 really has to come from this crew in working with
10 the STB. I've indicated we'll do everything we can
11 from Tongue River's point of view to provide you
12 with any information you need in that
13 decision-making process, but I really agree with you
14 a hundred percent, take the draft and modifications
15 that the STB has already made, and then you all do
16 some architectural work on it because you understand
17 these issues much better than I do.

18 What we need as Tongue River Railroad is we
19 need definition and we need clarity. Once we have
20 that definition and clarity, we can then address how
21 we put the resources to deal with those issues and
22 how we govern that process, in other words, in terms
23 of the tribal representation on it as well as Tongue
24 River.

25 We need definition. As we say in our world, we

1 need a business plan. I don't think we should be
2 putting a business plan together for you. I think
3 we're dealing with a PA, and that is the instrument
4 that will define our relationship, will define the
5 expectations of this group of Tongue River Railroad
6 and therefore better define what has to go on
7 between the STB and Tongue River Railroad.

8 MR. FISHER: We need to make that clear to the
9 STB.

10 MR. GUSTAFSON: Doug will be here the whole
11 time, but I'm just saying to you: If there's
12 anything we need to talk about in terms of what
13 we're able to do, we're willing to work with you.

14 MS. GLIDDEN: It's almost five o'clock. I
15 think we should end soon, but I wanted to ask if we
16 have the agenda for tomorrow, if this is, if people
17 are comfortable with what we have set up for
18 tomorrow.

19 MR. WHITTED: I think we're going to want to
20 caucus right away in the morning.

21 MS. GLIDDEN: Do you have the agenda, Jim?

22 MR. WHITTED: Yeah.

23 MS. GLIDDEN: Breakfast from 8:30 to 9:00 and
24 going to have an opening prayer and talk about an
25 overview and then have the tribal caucus from

1 9:30 to 12:00 in the morning. We can modify that
2 and change it any way you like. And then what we
3 had is lunch on your own from 12:00 to 1:30, and
4 after that you'd be approaching us with what your
5 proposal is.

6 MR. WHITTED: Would you be available, Charlene,
7 in the morning to caucus with the tribes for a brief
8 portion?

9 MS. DWIN VAUGHN: Yes.

10 MS. GLIDDEN: Is that okay with everybody?

11 MR. COBURN: Can I ask: Right now the agenda
12 is set up so there's tribal caucus basically all
13 morning and we don't really get to the PA until
14 1:30, and I'm wondering -- and obviously it's for
15 you all to decide, but I'm wondering, so we cut to
16 the chase sooner rather than later, because I think
17 the key part of this meeting is to discuss the PA,
18 if -- do you need all morning to caucus?

19 MR. WHITTED: The tribes need to discuss some
20 issues and get clarification, and the PA is not of
21 real importance right now. We need to know where
22 we're at, where we're headed with this before we
23 even sit down and start talking PA.

24 MS. GLIDDEN: I'm very sympathetic to that
25 because this is a complicated project, and we have

1 dumped a lot on you in one day. So I think leaving
2 it the way it is I think is appropriate, unless you
3 think otherwise.

4 MR. WHITTED: I have one other question for
5 Mr. Winters over there. I noticed the corps was
6 here. Is the reason for the corps' involvement the
7 404 permit? Is that correct?

8 MR. WINTERS: Correct, yes.

9 MR. WHITTED: Where are we at with that 404
10 permit? Has it been issued, signed?

11 MR. WINTERS: Let me just say that I'm here
12 filling in for one of our state supervisors based
13 out of Billings. It would be the Billings office,
14 the Helena office. Todd Tillinger is the supervisor
15 for Montana, so his staff, he's got an office in
16 Billings and one in Helena and Missoula, but his
17 staff will handle the 404 permit application in the
18 future. I'm sitting in for Shannon Johnson who is
19 actually going to be handling this project.

20 To the best of my knowledge, Tongue River III,
21 I guess it is, there is no permit application for
22 engineering 43 and 45 application for this project.
23 Let me just say, though, that's another whole issue
24 out there.

25 There's other issues associated with the

1 environment that would need to be looked at,
2 particularly specifically the aquatics and special
3 aquatics that may be involved, and those are issues
4 within itself in terms of flood plain.

5 But to answer your question, Jim, I don't think
6 we have an application at the present time, but
7 that's going to be a whole different process.
8 Again, the NEPA process is something that we will
9 build on from the STB, but that's own decision
10 making at that point.

11 And let me just say this: Although this
12 three-day consultation is just for the 106 process,
13 if anyone would like to talk to me after in the
14 evenings or before about the 404 process and the
15 details of what we're going to go into on this, you
16 can certainly talk with me.

17 MR. WHITTED: Okay.

18 MR. COFFEY: You know, I'm not asking you to
19 foretell the future, but you got an idea how long
20 does that permitting process take, ballpark figure?
21 I'm sure it depends on circumstances and everything,
22 but in your estimation.

23 MR. WINTERS: Let me just say that in the
24 regulatory arena, I handle the high end real big
25 kind of projects, the NEPA projects, and what we try

1 to do in the Army Corps of Engineers is when -- and,
2 again, I don't even know if we're a cooperating
3 agency on the STB's NEPA process or a consulting
4 agency. I don't know that right now.

5 MS. RUTSON: Cooperating.

6 MR. WINTERS: Cooperating agency, okay.

7 What we try to do is -- and, again, I don't
8 know if there's a final supplemental draft EIS that
9 is going to be hitting the streets soon.

10 MR. COBURN: No, it's not.

11 MS. KITAY: Everything is done.

12 MR. COBURN: It's done. It's finished.

13 MR. WINTERS: Well, based on that, then we will
14 try to dovetail into that. But let me just say
15 this, and I would underscore this for everyone, if
16 there are Section 404 issues that haven't been
17 adequately addressed within the framework of the
18 NEPA process, the entire framework of the NEPA
19 process, we will have to deal with it.

20 What we'd like to do in the corps -- I've got
21 cases now that we try to dovetail with other
22 agencies. When we're a cooperating agency or a lead
23 agency, we try to dovetail the issuance, the
24 protocols and process of the NEPA process for the
25 final supplemental draft, with the publication of

1 the public notice and then start that process. So
2 it's a unique mutually exclusive process to that.
3 But in this case if there's a final supplemental EIS
4 that's out there, we will try to dovetail that when
5 we do get an application from Tongue River Railroad
6 at that point.

7 MR. WHITTED: Thank you.

8 MR. YOUPEE: We've got the PAs with BLM in
9 other areas. I'm wondering if BLM is going to
10 dovetail in the same manner with the corps. And I
11 know we're trying to establish a regional type of PA
12 as well, so how are we going to work with the BLM?

13 MS. JOHNSON MORFORD: Well, the BLM in the
14 first segment was not a cooperating agency, and so
15 we will likely have to do some type of environmental
16 review tied to what was done by the STB.

17 We have not issued any decisions on granting a
18 right-of-way. I don't know the status of an
19 application for a right-of-way, and I have not seen
20 a decision on Segments 2 and 3. We were a
21 cooperating agency on those, but I don't think we've
22 issued a decision on that, so there's still going to
23 be some level of public participation that the BLM
24 will likely have to do before granting a
25 right-of-way to the railroad across BLM lands.

1 And maybe you guys can recall how many miles
2 across the BLM.

3 MR. HADLEY: Probably at least from Miles City
4 to Decker there's at least four, if not five or so
5 BLM sections where we cross. The total acreage
6 we've got tallied up, but --

7 MS. JOHNSON MORFORD: We have that information,
8 too. I just couldn't recall it.

9 On Segment 1, I don't know how many miles it
10 crosses, but certainly reopening the public
11 participation and addressing any new environmental
12 issues -- you know, we're going to have to use
13 what's been done by STB, but it's still going to
14 take a little time.

15 MS. DWIN VAUGHN: I have a question. How will
16 the tribal consultation done by STB affect or
17 influence the 404 permitting process and the BLM
18 right-of-way?

19 MS. JOHNSON MORFORD: We're a cooperating
20 agency on Segments 2 and 3, so the lead agency is
21 STB.

22 But the first one, I don't know what our role
23 was there.

24 Do you know what our role was there?

25 MR. MELTON: I'm not sure because I think at

1 one point they weren't considering any BLM property
2 in that first section. I'm not sure that is the
3 case now. I think for the first section, if I
4 remember correctly, there was not any BLM --

5 MR. COBURN: I don't have a personal
6 recollection because I wasn't involved in Tongue
7 River I.

8 MR. HADLEY: That may be correct.

9 MS. KITAY: And I don't know what happened in
10 Tongue River I either, but generally, you know, when
11 we finish our process, we impose the 92
12 environmental conditions, and some of those
13 conditions require that they would need a 404 permit
14 anyway, I'm sure.

15 But one of our conditions will say that they
16 have to get a 404 permit or a BLM permit or whatever
17 it is. And when the railroad -- prior to
18 construction, the railroad goes out and does that
19 permitting process, and it is totally separate from
20 the STB process. They hopefully tier on, as Debbie
21 and everybody have said, and use what has already
22 been done and supplement it to the extent possible.
23 And then we require reports once they go forward
24 with the project so that the board is made aware of
25 what's going on, but basically they're separate

1 processes that happen after our process is over.

2 MR. GUSTAFSON: As the tribes deliberate on
3 what might be the contents of a PA, they really need
4 to understand what Tongue River Railroad stipulated
5 to in terms of the 92 mitigation issues and their
6 operative effect because I think that's a foundation
7 that needs to be fully understood as you're drafting
8 the PA.

9 MS. DWIN VAUGHN: I think that that information
10 should be made available so that the tribes
11 understand.

12 MR. GUSTAFSON: I understand.

13 MS. KITAY: All of that would be in our
14 decision, which we can make copies of. Our decision
15 in Tongue River III attaches all of the
16 environmental mitigation. And there is mitigation.
17 It's not just comply with the PA. I mean, that's
18 one of them, but there's also guaranteed employment
19 and I believe other conditions that deal with
20 historic preservation and cultural resource issues
21 as part of that.

22 MR. YOUPEE: You're looking at all the impacts,
23 including the socioeconomic impacts?

24 MR. COBURN: The 92 conditions address
25 everything from A to Z, so to speak, wetlands

1 issues, wildlife issues and water issues and
2 socioeconomic issues. We'll make sure you all get a
3 copy.

4 MR. YOUPEE: Can we get a copy by tomorrow?

5 MS. KITAY: Yes, I have a decision here. It's
6 long, but we can make copies. And the 92 mitigation
7 measures are attached, and you can look at them, and
8 they are broken down by subject matter so you can
9 see what's of interest. We can get that.

10 MS. RUTSON: We'll have them first thing
11 tomorrow morning for everyone.

12 MS. KITAY: They'll be here by 8:30, if that's
13 okay. You don't need them before, do you?

14 MS. DWIN VAUGHN: No. That's okay.

15 MS. KITAY: I think we've had a long enough
16 day. There's a lot of mitigation and it's
17 expensive. And it's just a huge process to try to
18 build a railroad, unfortunately, or fortunately, as
19 the case may be.

20 MS. GLIDDEN: Thanks so much.

21 (The proceedings adjourned at 5:07 p.m.,
22 June 21, 2011.)
23
24
25

1 STATE OF SOUTH DAKOTA)
2) ss.
3 COUNTY OF PENNINGTON)
4

5 I, CINDY K. PFINGSTON, hereby certify that
6 the foregoing pages numbered from 1 to 188, inclusive,
7 constitute a full, true and accurate record of the
8 proceedings had in the above matter, all done to the best
9 of my skill and ability.

10 DATED this 11th day of July, 2011.
11

12 _____
13 CINDY K. PFINGSTON
14 Registered Professional Reporter
15
16

17 My commission expires:
18 February 4, 2016
19
20
21
22
23
24
25