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APPEARANCES

Brett Koenecke and Kara Semmler, Dakota Access  
Glenn Boomsma, Intervenors  
Kimberly Craven, Indigenous Environmental Network and  
Dakota Rural Action  
Thomasina Real Bird and Jennifer Baker, Yankton Sioux  
Tribe  
Matt Rappold, Rosebud Sioux Tribe  
Diane Best, City of Sioux Falls  
Margo Northrup, SD Association of Rural Water Systems  
Kristen Edwards and Karen Cremer, PUC Staff

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TRANSCRIPT OF PROCEEDINGS, held in the  
above-entitled matter, at the South Dakota State Capitol  
Building, Room 414, 500 East Capitol Avenue, Pierre,  
South Dakota, on the 9th day of October, 2015.

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1 MS. WIEST: I believe we were in the middle of  
2 cross with Mr. Mahmoud.

3 Before we get started with that, there is one  
4 correction I would like to make from yesterday. And it  
5 has to do with a hearsay objection from Ms. Real Bird on  
6 the statements from Fish & Wildlife. I believed the  
7 exception applied. I don't think it does. And so my  
8 ruling has changed. And on page 248 to 249, to the  
9 extent that Fish & Wildlife was testifying about whether  
10 he told them about requesting that they incorporate those  
11 comments into the document for resubmittal. I will  
12 sustain that hearsay objection on that.

13 I think there are two other issues I'm assuming  
14 I'd like to wrap up today that I would like to take care  
15 of. There was a motion to file a brief filed by Dakota  
16 Access on EIS. I don't know that there's anything that  
17 would prevent them from filing the brief. I will deny  
18 the motion.

19 I would note that other parties are not required  
20 to respond to that brief, and I would assume that this  
21 issue can certainly be presented in the posthearing  
22 briefs by any of the parties.

23 The only other outstanding issue that I have in  
24 my notes is that I did take under advisement Rosebud  
25 Exhibit 11, and there were -- there's an objection as to

1 foundation. I will sustain that objection as to  
2 foundation.

3 Then there was a request to take it under  
4 judicial notice. I will deny judicial notice of that  
5 document as I do not believe it meets the requirements  
6 for such.

7 And with that, I think that we can get started  
8 again.

9 MS. NORTHRUP: Ms. Wiest, I have just two items  
10 on my list that were outstanding.

11 On day one there was an agreement to provide the  
12 corporate guarantee documents under protective seal. And  
13 then on day two there was an agreement to provide the  
14 contractor insurance limits. And I don't see that those  
15 have been filed in the docket.

16 MS. WIEST: What was the first one again?

17 MS. NORTHRUP: It was the corporate guarantees  
18 that identified that the parent company would assume  
19 liability for Dakota Access.

20 MS. WIEST: Do you have a response,  
21 Mr. Koenecke?

22 MR. KOENECKE: We agreed to file those, and we  
23 will.

24 MS. WIEST: You will file those?

25 MR. KOENECKE: Yes.

1 MS. WIEST: Do you have a timeline?

2 MR. KOENECKE: I was anticipating filing them  
3 next week at this point.

4 MS. WIEST: Okay. Is there anything else that  
5 we need to talk about before we go forward?

6 MR. BOOMSMA: I have one thing that I want to  
7 bring up.

8 MS. WIEST: Go ahead, Mr. Boomsma.

9 MR. BOOMSMA: My request is that I be allowed to  
10 give a closing argument at the close of evidence. I  
11 realize that that's typically not how the Commission does  
12 it at the end of the hearing. However, my landowner  
13 clients would like to be heard on that, and they would  
14 like that chance for me to give that closing argument. I  
15 would propose a 10-minute limit on that.

16 MS. WIEST: Let's talk about closing arguments  
17 then.

18 As you probably alluded to a lot of times what  
19 the Commission does is parties waive closing arguments  
20 and instead file written briefs.

21 Does anybody have any comments regarding  
22 Mr. Boomsma's request to make a 10-minute closing  
23 argument?

24 MR. KOENECKE: I do. We've had proceedings such  
25 as this without closing arguments since I started, and

1 it's worked just fine.

2 There's an extraordinary amount of evidence  
3 here. The finders of fact have sat for two weeks long,  
4 or almost two weeks, listening to what amounted to a lot  
5 of argument both from me and I think everybody else.

6 I don't feel the need, after my witnesses have  
7 been here for that two weeks away from home and family,  
8 to listen to closing arguments. I think the briefs are a  
9 better, more contemplated way to sum up the evidence  
10 that's been provided in this hearing.

11 And I think if we start having -- I deplored  
12 having opening statements, and I will deplore having  
13 closing statements. This ought to be about facts and  
14 evidence. As John Adams said, facts are stubborn things,  
15 and it ought to be what we talk about here, and I don't  
16 think argument has any place.

17 That's my personal opinion, and I hope the  
18 Commissioners share it.

19 MS. WIEST: Before I ask other people their  
20 opinions, Mr. Boomsma, was it your intention that you  
21 would be filing a posthearing brief or not?

22 MR. BOOMSMA: Yes, I will.

23 MS. WIEST: Okay. Does anybody else want to  
24 weigh in about the issue of closing arguments?

25 MS. CRAVEN: DRA and IEN, we have no objection

1 to Mr. Boomsma having a closing statement if he would  
2 like to do that on behalf of his clients who are  
3 constituents of the State of South Dakota. And if the  
4 people from Texas and other places want to go home, they  
5 don't want to listen to it. But I think the people of  
6 South Dakota, if they want to be heard, they should be  
7 heard, and I don't think that should preclude him from  
8 also having a closing brief.

9 MS. WIEST: Oh, and I wouldn't say it would  
10 preclude him from having a brief, Ms. Craven.

11 Also when you're making your comments if you  
12 could say whether you -- did you want an opportunity to  
13 do any closing today?

14 MS. CRAVEN: No, I don't.

15 MS. WIEST: Then we can figure out the time  
16 better.

17 MS. CRAVEN: I would not. Thank you.

18 MR. RAPPOLD: I'm not going to do a closing  
19 argument. I advocated it at the last hearing, didn't do  
20 one. But other folks were permitted to do closing  
21 arguments. I don't think it added any additional real  
22 time to what we're dealing with here, and if folks wants  
23 to stay or leave, that's up to them. We'll be filing a  
24 posttrial brief and, you know, I guess I don't think he  
25 should be precluded from doing it. So I'll just leave it

1 at that.

2 MS. WIEST: Yankton Sioux Tribe, did you have  
3 any opinion on the issue?

4 MS. REAL BIRD: We will not be doing a closing  
5 argument, but we don't object to Mr. Boomsma presenting  
6 an oral argument today.

7 MS. WIEST: Ms. Northrup.

8 MS. NORTHRUP: I guess I hadn't decided either  
9 way. I don't know if I'll be filing a posttrial brief.  
10 It will kind of depend on whether our issues are  
11 resolved. I can go either way, and I don't object to  
12 Mr. Boomsma doing his if he wants to.

13 MS. WIEST: Commission Staff.

14 MS. EDWARDS: I had not prepared and will not be  
15 giving a closing argument, even if that opportunity is  
16 afforded. We will obviously be submitting a posthearing  
17 brief. I suppose since it's only one person and 10  
18 minutes, I would not have an objection.

19 MS. WIEST: Unless the Commissioners want to  
20 weigh in on this, since it looks like we're only having  
21 one person that wants to do a closing argument and is  
22 limiting it to 10 minutes, I would allow it.

23 Go ahead.

24 CHAIRMAN NELSON: And I just want to say that I  
25 concur with that.

1 I agree with Mr. Koenecke. I think it's very  
2 important that you all take the time you need to very  
3 contemplatively put your briefs together. That's where  
4 the meat of this is going to come out. But as I have  
5 said before in other proceedings, I enjoy oral argument.  
6 But since it's only going to be 10 minutes, I'm willing  
7 to listen and look forward to it.

8 MR. RAPPOLD: I do have one additional  
9 housecleaning matter, if that's settled. I didn't know  
10 if that was settled or not.

11 MS. WIEST: Yes. We will allow you your closing  
12 argument, Mr. Boomsma.

13 MR. RAPPOLD: Thank you. Throughout the course  
14 of the week, I've had some conversations with primarily  
15 Ms. Wiest about providing paper copies of my exhibits.  
16 This morning Ms. Semmler approached me and indicated that  
17 she would graciously allow me to have her copies of my  
18 exhibits, and at that point I will provide those on the  
19 table over there. And I think that issue will be  
20 settled. I hope that it will.

21 The lack of paper copies for all of my exhibits  
22 hasn't posed a problem to the Commission. I don't think  
23 it's held anything up. Everybody's had the opportunity  
24 to look at them if we needed them. Pulled them all up on  
25 the TV screens.



1 to that point. I'll withdraw my motion for judicial, and  
2 I can lay the appropriate foundation. We'll go with it  
3 down that road if that's permissible?

4 MS. WIEST: Okay.

5 MR. RAPPOLD: Thank you.

6 Q. I'd like to start, Mr. Mahmoud with DAPL Exhibit 52.  
7 That's within these maps. It's a Sioux Falls area  
8 pipeline infrastructure.

9 A. Yes. I have it.

10 Q. Do you have that up there?

11 A. Yes, sir.

12 Q. Now the next question, don't take any offense, do  
13 you wear glasses?

14 A. No.

15 Q. Okay.

16 MR. RAPPOLD: I'm going to approach.

17 Q. Can you take a look at DAPL 52. And in the bottom  
18 right-hand corner there's some really small print. And  
19 that's why I asked you if you wear glasses.

20 Can you read that? Do you see where I'm talking  
21 about? Can you read that?

22 A. I can.

23 Q. Okay. Thank you. Go ahead.

24 A. I think I can get most of it. It says "Note. The  
25 map has been compiled from the best existing sources, but

1 Energy Transfer does not guarantee the accuracy of the  
2 map or information delineated thereon. Nor does Energy  
3 Transfer assume any responsibility or liability for  
4 reliance thereon."

5 Q. Thank you. I think we both passed our eye exams.

6 Now I also want to ask you some questions that came  
7 up in your testimony yesterday afternoon about final  
8 route selection. And it was brought up about an existing  
9 transmission power line. Do you remember that?

10 A. Yes.

11 Q. And I believe your testimony was that the folks over  
12 in the Sioux Falls region and those townships, they  
13 picked the final route. Is that an accurate recollection  
14 of your testimony?

15 A. The city of Tea and Harrisburg, they're the ones  
16 that actually -- we gave the -- or afforded the  
17 opportunity to literally point a finger on a map and pick  
18 the route.

19 The City of Sioux Falls and the City of Hartford, we  
20 presented the result, and they concurred to us with  
21 those -- with that route.

22 Q. Okay. Now look -- this is the first time we've  
23 heard of this power line. Would you agree with that?

24 A. Yes.

25 Q. Over the course of two weeks?

1 A. I do believe that.

2 Q. Okay. Thank you.

3 Can you show me anywhere in the Application where it  
4 references selection of the route along this power line,  
5 power transmission line? Is there any place in the  
6 Application where it says that?

7 A. There is. And I don't recall if the portion that  
8 said May Adams letter, it was DAPL Exhibit 54, the  
9 March 19 letter.

10 Q. Uh-huh.

11 A. That was submitted on the record. I don't recall  
12 the exact date, but a long time ago.

13 In this filing that we made when we submitted it,  
14 there were certain other exhibits that were attached to  
15 it. And it's on the internet or on the South Dakota  
16 docket file.

17 And in there, there are some tables that indicate  
18 the environmental -- or features that the line  
19 paralleled.

20 Q. Uh-huh.

21 A. And it's part of the alternative analysis. And in  
22 there it represents that we parallel the physical line  
23 for 3.1 miles. And I said yesterday that we parallel for  
24 4 miles because the easement actually extends beyond the  
25 3.1 miles, but the power line physically terminates or

1 makes an angle in the middle of the field, but we follow  
2 their actual corridor.

3 So that is in -- obviously I don't think I quoted  
4 this letter exactly, but in general terms that's what was  
5 presented in this thing back in March.

6 Q. Okay. So then if that took place in March, it  
7 wouldn't be in the Application, the Revised Application,  
8 because that was submitted in December; right?

9 A. That's a good point. Yes.

10 Q. Okay. And now on page 7 of the Application it  
11 doesn't really reference the power line there, does it?

12 A. I don't have that in front of me.

13 Q. Oh. Would you like to take a look at it?

14 A. Sure.

15 (Witness examines document)

16 A. Are we ready? I'm sorry.

17 Q. Yeah.

18 A. On page 7, the one point that I guess I would point  
19 out, under 12.1 Route Selection second sentence it says,  
20 "Data sets utilized during the project routing analysis  
21 included" and then "(e.g., existing pipelines, railroads,  
22 karst, and power lines, et cetera), environmental" and  
23 then some more information.

24 So our intent in this description, this generic  
25 description, was to say that during our analysis and

1 routing, we do consider existing utilities when we're  
2 paralleling or routing the pipeline.

3 Q. Right.

4 A. And at the time that -- I don't know if you gave me  
5 the Revised Application.

6 Q. Yeah. It's the revised.

7 A. It is. Okay. So at that time we had submitted the  
8 Revised Application because we had two major reroutes.

9 Q. Uh-huh.

10 A. And one of those was the routing around Sioux Falls.  
11 And I just -- I can't recall if it says in this document  
12 the exact location of the alternative route that we  
13 paralleled, but the description of our process certainly  
14 was meant to indicate that we took those factors into  
15 consideration.

16 Q. And you would have to take those factors into  
17 consideration; correct?

18 A. It's best routing practices, yes, sir.

19 Q. I'd agree with that.

20 You said it parallels -- I didn't hear the point. 3  
21 point something miles. How many does it parallel for?

22 A. The physical lines, the towers and lines, 3.1 miles,  
23 I believe. And the corridor for 4 miles.

24 Q. So it's the distance from the power line to the  
25 pipeline route is 3.1 miles?

1 A. No. The lateral length that we actually parallel.  
2 So if you're going from me to the wall just in a straight  
3 line, the distance that the pipeline would parallel, the  
4 two features side by side, between the two points.

5 Q. Is 3.1 miles?

6 A. The physical lines themselves.

7 The power line owner actually owns a corridor that  
8 extends a little bit longer, about another nine-tenths of  
9 a mile, so we parallel the corridor for over nine-tenths  
10 of a mile.

11 Q. Okay. And then also yesterday in DAPL 54, various  
12 correspondence -- the first one I've got is the letter --  
13 do you have this in front of you?

14 A. Yes, sir.

15 Q. Okay. I've got -- I've got a March 19 letter from  
16 May Adam; right?

17 A. Correct.

18 Q. Then I've got the -- the Sioux Falls, Tea,  
19 Harrisburg, Hartford routing meetings. And then after  
20 that we have a series of what would appear to be  
21 Commissioner notes, the meeting minutes for Minnehaha  
22 County, Sioux Falls. And there's another meeting agenda.

23 Then we have some e-mails, some sign ins.

24 Can you tell me in these documents, where does it  
25 say anything about the power line discussion that you

1 brought up yesterday?

2 A. It does not.

3 Q. It doesn't?

4 A. No.

5 Q. Okay. But you indicated that the folks in Tea and  
6 Harrisburg wanted that route, and Sioux Falls and  
7 Hartford agreed with that route.

8 A. That's correct.

9 Q. But yet there's nothing in the meeting minutes that  
10 would reflect those decisions, is there?

11 A. Our intent --

12 Q. I didn't ask you about your intent.

13 A. Okay.

14 Q. I don't mean to be rude and interrupt you, but  
15 there's nothing in these documents that talks about the  
16 power line and the cities of Tea, Harrisburg, Sioux  
17 Falls, and Hartford wanting it by that power line?

18 A. In the May --

19 Q. It's just a yes or no question. Is there?

20 A. There is, yes.

21 Q. Where?

22 A. In the May 19, 2015, letter, if you go to -- now  
23 it's not in the documents you're looking at in your hand.  
24 And that's why I reference when it was filed there were  
25 multiple exhibits with this letter. We only provided the

1 cover letter.

2 But on the record, in the docket record, with this  
3 filing there's a table that indicates the physical  
4 features of the routes that we selected and that we  
5 analyzed. And in there it discloses the length of the  
6 power line that we paralleled.

7 Q. Okay. But that wasn't my question.

8 A. Okay.

9 Q. My question was: Is there anything in these  
10 documents, DAPL 54, that confirms Tea, Harrisburg,  
11 Sioux Falls, and Hartford wanted this pipeline route to  
12 be along the transmission line?

13 A. Physically, no.

14 Q. Okay.

15 There was some discussion yesterday and throughout  
16 the course of these proceedings actually relating to the  
17 benefits that this project would bring to South Dakota.  
18 Would you agree with that?

19 A. Yes.

20 Q. We've talked about that quite a bit, haven't we?

21 A. Yes. A lot of passion about that.

22 Q. Yes, there is.

23 So let's talk about that a little bit.

24 A. Okay.

25 Q. Gas is obviously a part of our lives; correct?

1 A. Yes, it is.

2 Q. You testified yesterday that -- and I'm going to  
3 paraphrase here, so if I mischaracterize something,  
4 please let me know, and I'm sure you will.

5 You testified that the United States is dependent  
6 on -- is a carbon based economy. Is that what you said?

7 A. I believe so, yes.

8 Q. And I think you also said we may be moving in a  
9 direction where that could be replaced or supplemented.

10 A. Supplemented, yes.

11 Q. That's accurate?

12 A. I believe that.

13 Q. And then you also said, but we're just not there  
14 yet; right?

15 A. That's correct.

16 Q. How does building more infrastructure to keep using  
17 carbon based fuel help us get to the point of  
18 supplementing our dependence on carbon based economy?

19 A. Okay. I think that's actually a great question.

20 You know, as we develop alternate energy sources,  
21 which I believe, you know, deep in my gut that they're  
22 valuable. They have a part in our society and will  
23 continue to grow.

24 But to be able to afford the generation or the  
25 development of those technologies, you have to have

1 income. The government has to have revenue to develop  
2 those technologies or alternate energy companies or the  
3 providers, and a lot of the majors out there that own the  
4 oil and gas reserves have alternate energy divisions.

5 Q. I'm aware of that.

6 A. Okay. So there's only one way to be able to fund  
7 the R and D to develop those resources, and that's to  
8 have an income source to fund the R and D.

9 Most of the funding of the research and development  
10 isn't from farmers. It isn't from other industries.  
11 It's from the oil and gas industry. The oil and gas  
12 industry provides tremendous funding into the development  
13 of not only refining the current uses of carbon based  
14 fuels, but also alternate energy.

15 And in that sense for us to have a bridge until we  
16 can get to a point of some type of alternate energy  
17 source, you have to have a sustainable energy sector and  
18 source to fund and to allow our society to keep ticking.  
19 And if we don't continue to move forward because we all  
20 want to stop and not have crude oil as a fuel, then the  
21 development of those alternate energy sources, they stop  
22 immediately.

23 The future development of communities around this  
24 country, the farming that feeds the world, a lot of that  
25 comes from South Dakota, Iowa, the breadbasket of North

1 America, those things don't happen without crude oil.

2 Because ethanol, and I know this is a big ethanol  
3 state, simply doesn't power a tractor. It's diesel fuel.  
4 Diesel fuel comes from crude oil. So ethanol's  
5 important. You blend it into gasoline that comes from  
6 crude oil.

7 Q. Yeah.

8 A. So for me it's important that we continue to  
9 develop, have access to domestic supplies of crude oil  
10 that support our economy.

11 Because I'll tell you, I'd rather get it from North  
12 Dakota or from Saudi Arabia or some other foreign  
13 country. Because it's more reliable. It's consistent  
14 and it's from our country instead of a third party that  
15 we're dependent upon that our national security is in  
16 jeopardy over.

17 That's my opinion.

18 Q. Sure. Appreciate your opinion.

19 You haven't seen any gas stations that had signs up  
20 on them that said we're out of gas today since you've  
21 been here, have you?

22 A. No. And you won't, as long as we continue to  
23 develop energy infrastructure.

24 Q. And the next question, I don't want to get into  
25 about which way is better to transport it, but the oil

1 that's currently being extracted from the Bakken region,  
2 it's not just sitting there, is it?

3 A. There's quite a bit that is.

4 Q. But it's getting transported out, isn't it?

5 A. As much as they can, but not as much as could be.

6 Q. And we're not running out of gas in this country,  
7 are we?

8 A. Well, like I said --

9 Q. Well, have we run out of gas in this country?

10 A. Well, I mean, I don't know what's going to happen  
11 tomorrow. Today we're not.

12 Q. That would call for speculation, wouldn't it?

13 A. Well, it would call for something that I probably  
14 have a lot of information to say that the development of  
15 our energy resources certainly provide the opportunity  
16 for people like you and I and everybody in this room to  
17 have access to affordable energy and fuels that allow us  
18 to do the things that we do, to sit here and have this  
19 dialogue and be opposed to each other and whatever it is.

20 Q. You're right. We're not here debating that.

21 A. Right.

22 Q. But we're not out of gas, are we?

23 A. Not today.

24 Q. Okay. And there have been some discussion about an  
25 environmental impact statement. And I can certainly

1 understand your resistance from an industry perspective.  
2 I get that.

3 But does your Application -- your Application, it  
4 doesn't contain a no alternatives option, does it?

5 A. No. You know what, you're right. It does not.

6 Q. Okay. Thank you.

7 A. Sure.

8 Q. And if we -- you've looked at the South Dakota rules  
9 on environmental impact statements; right?

10 A. I have.

11 Q. And it does require that a no alternative option is  
12 part of the analysis.

13 A. Actually, you know, it does not. It may infer that,  
14 but if you read the rule, that's not one of the defined  
15 criteria that I recall. I think what it says is you have  
16 to have an alternative analysis.

17 Q. And we don't really have that here, do we?

18 A. Well, we have an alternative analysis --

19 Q. Of routes?

20 A. Of the routes. We don't think there is a no action  
21 alternative that's really viable, in our interpretation.

22 Q. And I can certainly understand that. From your  
23 perspective.

24 You haven't presented any testimony as it relates to  
25 issues that could be encountered when power lines and

1 pipelines are in close proximity to each other, have you?

2 A. You know, I can't answer that with any certainty. I  
3 believe we provided some information on our design is  
4 it's in accordance to 195 which provides certain  
5 parameters for protection for stray voltage or current  
6 that goes across the two.

7 But I can't remember if we put that specifically in  
8 those terms in our materials.

9 Q. Okay.

10 A. It's called AC mitigation, by the way.

11 Q. Yeah. I knew that.

12 A. AC mitigation.

13 Q. That's because of electrical current problems that  
14 can cause catastrophic issues for pipelines.

15 A. They can cause corrosion.

16 Q. Corrosion. Which could lead to a catastrophic  
17 event.

18 A. If not properly mitigated.

19 Q. Correct. And sometimes corrosion is not properly  
20 mitigated. Are you aware?

21 A. Oh, I'm sure. I am.

22 Q. Okay. Are you aware of the hunting industry, I'll  
23 call it, in South Dakota?

24 A. I am.

25 Q. Have you ever heard about that?

1 A. Yes.

2 Q. Have you ever heard of pheasant hunting?

3 A. I have.

4 Q. In South Dakota?

5 A. Yes.

6 Q. Have you ever seen all the guys running around with  
7 the orange caps in the cornfields?

8 A. I have.

9 Q. Have you ever been pheasant hunting here?

10 A. Not in South Dakota.

11 Q. No. Okay.

12 Well, do you know how much economic benefit pheasant  
13 hunting alone brings to the State of South Dakota?

14 A. You know, it's interesting you ask that. Just  
15 yesterday I read the paper. I think it was  
16 \$154.5 million dollars. That's a pretty big number.  
17 80 percent from outside of the state.

18 I may be a little bit off, but I think it was around  
19 there.

20 Q. How much did you say it was?

21 A. It was either 154, 184. It was a lot.

22 Q. I'm looking at the South Dakota Game, Fish & Parks  
23 website, and you're pretty close. The number that they  
24 have is \$154.5 million.

25 A. That's what I said.

1 Q. Yeah. So pheasant hunting alone in South Dakota is  
2 a \$154 million industry.

3 Was there any analysis performed, financial or  
4 otherwise, that would compare cost and benefits of the  
5 pipeline with cost benefits to the pheasant hunting  
6 industry?

7 A. No.

8 Q. Okay. And are you aware that the area where the  
9 pipeline -- where you'd like to put the pipeline is a  
10 considerable amount of pheasant hunting that takes place  
11 over there?

12 A. I'm sure. Yes.

13 Q. So we couldn't really say with any degree of  
14 certainty what the cost benefit analysis would be if we  
15 compared pheasant hunting with the pipeline?

16 A. Well, I don't know how you would do that, other than  
17 without the fuel that eventually comes from this pipe  
18 that is derived from the crude, I don't know how you  
19 would pheasant hunt without the gasoline.

20 Q. Right. But the point is people are coming here from  
21 other states; correct?

22 A. Yes.

23 Q. They've brought in \$154 million; correct?

24 A. Yes.

25 Q. Most of them probably get here in a vehicle that's

1       fueled by gasoline.    Would you agree with that?

2       A.    I would.

3       Q.    And yet they're doing all of that without your  
4       pipeline; right?

5       A.    Today.

6       Q.    Yeah.

7       A.    Uh-huh.

8       Q.    Today.    Okay.

9                So they don't really need your pipeline to get here?

10      A.    Oh, I totally disagree with that.

11      Q.    There's a lot of activities, local folks from  
12      South Dakota like to engage in.

13                You can't swim in this pipeline, can you?

14      A.    I wouldn't recommend it.

15      Q.    You couldn't go fishing on it, could you?

16      A.    I don't think you can.

17      Q.    You couldn't catch a fish.    I just said that.

18      Sorry.

19                It doesn't serve any recreational purpose, does it?

20      A.    Well, it depends.

21      Q.    Directly.

22      A.    I don't know.    I don't know what people are going to  
23      use the right of way for.    Because you could snowmobile  
24      on top of it.    You could run four-wheelers, if the  
25      landowner will let you, use it as a jogging trail.

1 Q. We can do all of those things without your pipeline.

2 A. You can do them with it also.

3 Q. But you sure wouldn't want to be on that right of  
4 way if there was an accident, would you?

5 A. Well, I guess you'd have to define accident.

6 Probably not.

7 Q. A worst-case discharge scenario. You wouldn't want  
8 to be on that right of way jogging, would you?

9 A. I probably would not.

10 Q. Last week we had some additional testimony regarding  
11 cultural resources and the cultural surveys that were  
12 performed. And prior to last Friday those cultural  
13 surveys were not a part of this record.

14 Are you aware of that?

15 A. I'm not. I think they were part of the overall  
16 record that we had submitted to the State Historic  
17 Preservation Office.

18 Q. Right. They were submitted to the State Historic  
19 Preservation Office.

20 A. They were.

21 Q. They were exchanged in discovery; right? That  
22 you're aware of.

23 A. I'm not exactly sure how everybody got them or if  
24 they even have them. I know we provided that to the  
25 state office.

1 Q. Right.

2 A. And we answered questions during the Interrogatory  
3 process.

4 Q. Yeah. Okay. And did you hear -- were you here last  
5 Friday?

6 A. I was not.

7 Q. You probably couldn't listen to the hearing on the  
8 radio.

9 Were you listening to it live, by chance?

10 A. I did not on Friday.

11 Q. Okay. Can you think of any -- is there any reason  
12 you can think of why the five-volume Level III Cultural  
13 Surveys were not submitted as actual exhibits until  
14 Friday?

15 A. No. I mean, I'm not sure about what all the rules  
16 are. I apologize.

17 Q. No. Nothing to be apologetic over.

18 A. Okay.

19 Q. Sometimes we have to figure out the rules.

20 But would you agree that they were not submitted as  
21 evidence until Friday?

22 A. Well, we submitted them to the SHPO. So I don't  
23 know how that qualifies as part of evidence or not. So  
24 I'd have to ask our attorney how that works. I'm not  
25 sure.

1 Q. Not a question you can answer?

2 A. It's not.

3 MR. RAPPOLD: Okay. I have no further  
4 questions. Thank you, Mr. Mahmoud. Sorry.

5 MS. WIEST: Ms. Craven.

6 CROSS-EXAMINATION

7 BY MS. CRAVEN:

8 Q. Good morning. Kim Craven for Indigenous  
9 Environmental Network and Dakota Rural Action.

10 How are you today?

11 A. Great.

12 Q. Does DAPL profit from greater oil consumption in the  
13 United States?

14 A. No.

15 Q. No?

16 A. No.

17 Q. I thought that was what your testimony was about  
18 greater oil consumption was good for DAPL?

19 A. I don't think I ever said that. Those weren't my  
20 words.

21 Q. Okay. You say no. You will not profit from greater  
22 oil consumption?

23 A. No. We have -- we make our money -- it's a take or  
24 pay type contract. So more consumption, less  
25 consumption, our pipeline transports that volume.

1 Q. Are the costs of developing DAPL deducted from  
2 DAPL'S federal tax liability?

3 A. You know, I don't know that answer.

4 Q. Why does DAPL have to report its depreciation to  
5 FERC?

6 A. Without guessing, I know it's part of the standard  
7 methodology, and that's about all I can say.

8 Q. Of FERC regulation?

9 A. Right. It's what's called cost of service  
10 calculation for the rate and tariff.

11 And FERC doesn't necessarily regulate the rate  
12 itself. They regulate what's called the rate structure,  
13 but we have to provide information to the FERC as part of  
14 the FERC accounting.

15 Q. Do you know, are all costs of developing wind energy  
16 sources deductible from federal taxes?

17 A. I don't know. But I know they get a lot of, you  
18 know, grant money.

19 Q. And I'd like to make reference to a couple of these  
20 exhibits that were entered in. Is this one 54? It's one  
21 of the -- the blue dot photo.

22 A. 51.

23 Q. 51.

24 MS. CRAVEN: May I approach the witness?

25 MS. WIEST: Yes.

1 Q. You have that. Okay. Great.

2 So in a line of questioning yesterday it came out  
3 that this woman is living on top of a pipeline and isn't  
4 aware of it.

5 A. I think what I said was adjacent to. And based upon  
6 her testimony -- and I actually wasn't here when she said  
7 it, but from what I've heard and what she testified to,  
8 it's pretty apparent she doesn't know she's next to a  
9 pipeline.

10 Q. Do you know, does this pipeline have a right of way  
11 associated with it?

12 A. I would imagine it does.

13 Q. Why would there be a -- it seems -- okay. So your  
14 right of way, though, with the DAPL has to be 50 feet.

15 Does this appear to be a 50 feet right of way?

16 A. I would have to scale it off of there, but I can see  
17 where the right of way exists, and I can't tell you what  
18 the width is.

19 Q. To my naked eye it looks like the right of way goes  
20 through neighborhoods and houses and things like that,  
21 that the right of way doesn't appear to be that large.

22 A. If you can scale this map to assume 50 foot, I would  
23 be shocked. Now we could probably do it with the mapping  
24 tool to tell you what that is, but there's certainly a  
25 right of way there, and I don't know the exact

1 circumstances around this particular right of way.

2 Q. Do you know, are all these pipelines in Sioux Falls  
3 hazardous liquid pipelines?

4 A. Several of them are. The New Star Energy LP is.  
5 That's a refined products which is a Part 195 pipe.  
6 Magellan Midstream is a 195 pipe. The MidAmerican is a  
7 gas. It's 192. The other MidAmerican's a gas. So those  
8 are the ones listed here.

9 Q. Is your company or any of your parent companies, are  
10 they members of the American Petroleum Institute?

11 A. We are.

12 Q. And does the American Petroleum Institute lobby  
13 against tax credits for renewable energy development?

14 A. I could not tell you.

15 Q. You also handed us a matrix, which I'm not sure what  
16 exhibit this one is.

17 A. 55.

18 Q. Of 171 government meetings. How many of these  
19 meetings have been with Tribes?

20 A. Oh, I'd have to look. I'm not aware of any.

21 Q. And in the August 13, 2015, meeting with  
22 South Dakota republican fundraiser, is that counted as  
23 one of the 171 government meetings?

24 A. It is.

25 Q. Is the August 20, 2015, meeting with the

1 South Dakota House of Representatives republican  
2 fundraiser also one of the 171 government meetings?

3 A. It is.

4 Q. And did you all make contributions to campaigns at  
5 those meetings?

6 A. I couldn't tell you.

7 Q. So DAPL has met with other political party  
8 fundraisers and count them as government meetings, but  
9 didn't meet with affected Tribes; is that correct?

10 A. Well, I couldn't tell you both answers at one time.  
11 So if you'll break that down, I would appreciate it.

12 Q. So let me rephrase it.

13 So DAPL has met with South Dakota political party  
14 fundraisers and counts them as government meetings, but  
15 you haven't met with any affected South Dakota Tribes; is  
16 that correct?

17 A. I don't think that's -- I think that may be correct.  
18 I'm not 100 percent sure.

19 Q. Okay. Are the landowners and family farmers of DRA  
20 and the Indian Tribes of IEN a small group of disaffected  
21 people, in your opinion?

22 A. I don't know that I have an opinion on that.

23 Q. Okay. And I'd like to ask you about some of the  
24 conditions.

25 We've had testimony from Mr. Iles yesterday that

1 DAPL will cross some small aquifers. However, you don't  
2 agree with Condition 35, which is similar about -- which  
3 addresses the protection of shallow aquifers.

4 Why is that?

5 A. Well, I'm going to have to look at Condition 35, if  
6 you don't mind.

7 Q. Okay.

8 A. Well, I'll just read my testimony on line 107. It  
9 says, "Condition 35 is not applicable as it pertains to a  
10 county that is not traversed by the proposed project."  
11 So in an obvious sense that Condition would not apply.

12 Q. Okay.

13 The Condition 35 has to do with crossing an aquifer.  
14 It's not the same aquifer. It's the High Plains Aquifer.  
15 But there are aquifers, shallow aquifers that would be  
16 crossed by the pipeline.

17 Is there a reason you don't want to consider -- you  
18 wouldn't include a similar Condition protecting the  
19 shallow aquifers that are important to the farmers?

20 A. I would have to see the exact Condition, understand  
21 the circumstances around it, the physical considerations,  
22 constraints, topography, all the information. I can't  
23 answer that without having some information to know.

24 Q. What's your opinion on the importance of shallow  
25 aquifers?

1 A. My opinion of shallow aquifers?

2 Q. Uh-huh.

3 A. My opinion of shallow aquifers is they're shallow  
4 aquifers. I don't understand, you want my opinion --

5 Q. Do you know the importance of shallow aquifers?

6 A. Do I know the importance of shallow aquifers?

7 Q. Uh-huh.

8 A. I can assume and guess what the importance could be.

9 Q. What would that be if you were to guess?

10 A. In my personal opinion they could be a water source  
11 for wildlife, people, cattle, sure.

12 Q. That's a good -- that's a very good guess.

13 With regards to Condition 41, DAPL insists it  
14 doesn't need a winter construction plan; is that correct?

15 A. I don't have the Condition in front of me, but my  
16 testimony says, line 96, "Condition 41, this Condition is  
17 specific to Keystone XL in its entirety and does not  
18 apply to Dakota Access." So without seeing the  
19 Condition, I can't answer anything more.

20 Q. Well, what it does is it addresses the -- it  
21 creates -- well, U.S. Fish & Wildlife created a Condition  
22 where the pipeline will not be built in certain areas to  
23 protect nesting species so that there -- in buffer zones  
24 there won't be construction between March 1 and June 15  
25 when those species, which have been identified by U.S.

1 Fish & Wildlife, are nesting.

2 Would DAPL agree to protect nesting species?

3 A. I would have to read what you're looking at to  
4 understand your question.

5 Q. It's Condition 41. It's about creating buffer zones  
6 to protect nesting species.

7 A. And, again, I do not have it in front of me. If you  
8 would like me to read it, I will.

9 Q. Okay. Do you have it right there in front of you?  
10 The conditions? You don't have the conditions?

11 A. No, ma'am. I do not.

12 Q. I thought you did have the conditions.

13 A. No. I have my rebuttal testimony.

14 MS. WIEST: Just for point of clarification,  
15 were those meant to be attached to those testimony?

16 MS. CRAVEN: Yes. They're on the website.

17 MS. WIEST: You need to use the mic.

18 MS. SEMMLER: Yes. They're attached to the  
19 testimony. They were filed that way. But this is one of  
20 those many exhibits that isn't on the table any longer,  
21 so we don't have a copy on the table.

22 If Ms. Craven has a copy with her, maybe she  
23 could show it to him.

24 MS. CRAVEN: Ms. Semmler, did you provide a copy  
25 on your iPad yesterday to Mr. Mahmoud? Could you do that

1 again, please?

2 MS. SEMMLER: I'd be happy to.

3 MS. WIEST: Okay. And then you'll make sure  
4 that those exhibits are proper before we leave today;  
5 right?

6 MS. SEMMLER: Yes.

7 MS. WIEST: Thanks.

8 (Witness examines document)

9 Q. Have you been able to read it?

10 A. I have.

11 Q. Will DAPL protect nesting areas with buffer zones?

12 A. Well, that's not what this says, by the way.

13 So what it says, it says, "In accordance with its  
14 commitments in Application, Section 5.5.2 in Exhibit TC  
15 44, paragraphs 25 and 26, Keystone shall avoid or  
16 restrict construction", et cetera, et cetera.

17 Since I'm not party to the Keystone docket, its  
18 Application, anything about Keystone, absolutely we will  
19 not agree to a Condition that is specific to another  
20 project.

21 As I mentioned yesterday to the Yankton Sioux Tribe,  
22 we do agree to the first sentence of question No. 41,  
23 that if the fish and wildlife or the Game & Fish  
24 Department of South Dakota asked us to comply with  
25 certain conditions based upon information that's

1 pertinent to our docket, DAPL's, then I'm sure we would  
2 accommodate those conditions.

3 Q. Are we looking at the same one? Because my 41 says  
4 something different. It doesn't make any reference to  
5 any numbers. It says Keystone should follow all  
6 protection and mitigation efforts as identified by the  
7 U.S. Fish & Wildlife Service and SDGFP.

8 A. I'm reading from my 41 that starts with, "Keystone  
9 shall follow."

10 Q. Uh-huh.

11 A. "All protection and mitigation efforts as identified  
12 by the U.S. Fish & Wildlife Service in SDGFP".

13 Q. Uh-huh.

14 A. "Keystone shall identify all greater prairie chicken  
15 and greater sage and sharp tailed grouse LECs within the  
16 buffer distance from the construction right of way set  
17 forth for the species in the Application, Section  
18 5.5.2.4, Table 10. In accordance with its commitments in  
19 Application, Section 5.5.2 and Exhibit TC 44, paragraph  
20 symbol 25 and 26, Keystone shall avoid or restrict  
21 construction activities as specified by U.S. Fish &  
22 Wildlife in SDGFP within such buffer zones between March  
23 1 and June 15 and for other species as specified by U.S.  
24 Fish & Wildlife and SDGFP."

25 So as I have said, we will not agree to something we

1 are not party to because it does not apply to our docket.

2 Q. Okay. I'm asking you if there are endangered  
3 species identified by the U.S. Fish & Wildlife Service  
4 and the South Dakota Game & Fish and parks that would be  
5 like the whooping crane and other such endangered  
6 species, whether you all would -- whether DAPL would  
7 agree to not constructing in buffer zones between March 1  
8 and June 15 similarly to Keystone. And I know --

9 A. You lost me, ma'am. I'm sorry. I could not follow  
10 the entire question.

11 Q. Is DAPL committed to protecting the nesting areas of  
12 endangered species?

13 A. If they occur within our right of way, of course we  
14 are.

15 Q. Will you agree to buffer zones during their nesting  
16 times?

17 A. If they are endangered or threatened species that we  
18 have documentation and in accordance with the U.S. Fish &  
19 Wildlife, sure we would.

20 Q. Okay.

21 MS. CRAVEN: No further questions.

22 MS. WIEST: Ms. Northrup, did you have any  
23 questions?

24 MS. NORTHRUP: No. Thank you.

25 MS. WIEST: Mr. Boomsma, do you have any

1 questions?

2 MR. BOOMSMA: Yes, I do. I'm going to move to  
3 the table because the pillar's in my way.

4 MS. WIEST: Yes. Go ahead.

5 MR. KOENECKE: While he's doing that, I'm going  
6 to get my iPad back so I can follow along.

7 CROSS-EXAMINATION

8 BY MR. BOOMSMA:

9 Q. Good morning.

10 A. Good morning.

11 Q. I'm going to ask you some follow-up questions about  
12 your rebuttal testimony. And I heard you say earlier  
13 that you have that in front of you?

14 A. I have it except for the attached Keystone exhibits.

15 Q. On page 12 of your rebuttal document, you offer  
16 testimony about interference with the orderly development  
17 of the area.

18 Do you see that?

19 A. I'm sorry. What line, please?

20 Q. It looks like it's going to be lines 259 through  
21 265. But it's on page 12.

22 A. Yes, sir. I see it.

23 Q. My memory tells me that Jack Edwards testified on  
24 September 30, last week, and I think Chuck Frey testified  
25 that day as well. Were you here for that?

1 A. I was.

2 Q. I thought you were.

3 While we're on this topic of orderly development of  
4 the region, Mr. Edwards was posed a very pointed  
5 question, and I'm going to ask you the same question. In  
6 fact, the question came from Commissioner Hanson, and the  
7 question was, yes or no, are you aware of the need to  
8 route the pipeline near highly populated or growing  
9 cities in South Dakota. I'm looking for a yes or no  
10 answer.

11 A. Can you say it one more time?

12 Q. I can. The question was, and I wrote it down word  
13 for word, but, yes or no to Mr. Edwards, same question to  
14 you, are you aware of the need to route the pipeline near  
15 highly populated and growing cities in South Dakota?

16 A. Yes.

17 Q. You're aware of the need to do that.

18 A. Well, in my opinion.

19 Q. Mr. Edwards said he was not aware of that need. You  
20 disagree with him?

21 A. I do.

22 Q. And so what is the -- the essential requirement or  
23 need to have this pipe in this growth area as opposed to  
24 someplace else that would not be in a growth area?

25 A. Well, number one, we believe, in our opinion, and in

1 consultation with the state governments and local  
2 governments in that area, that we have moved outside of  
3 the area that they consider to be the growth areas  
4 through that region.

5 So when we're routing the pipeline, we squarely  
6 believe that we did move outside of those areas that  
7 there was an initial concern with.

8 Now my role and position within the company is  
9 considerably different than Jack Edwards, so I have a  
10 considerable different opinion than he would on the  
11 topic. His job is to build the thing, not to understand  
12 the mechanics behind the development or the execution of  
13 the project. That's my job, not his, so it was an  
14 inappropriate question to Jack in that regard because  
15 that's not his role on the job, in my opinion.

16 Q. You're not going to take the position, are you, sir,  
17 that you feel where the pipeline is routed right now in  
18 the Tea and Harrisburg area would not be considered a  
19 growth area, are you?

20 A. Well, what I'm saying is, is that we routed the  
21 pipeline and rerouted the pipeline in coordination with  
22 the planners, the engineering departments, the local  
23 officials, and the individuals that would have direct  
24 knowledge to help us route that pipe such that when we  
25 did it would not interfere with the orderly development

1 of that area.

2 We specifically did that in response to feedback  
3 that we received. At the conclusion of that feedback we  
4 were left with the opinion and with the belief that we  
5 would not interfere with that orderly development.  
6 That's why we went through that extensive effort to work  
7 through those considerations and constraints that certain  
8 individuals have pointed out to us in December of 2014.

9 So no. I do not take that position that you are  
10 articulating. I think that we, in fact, are complying  
11 with everybody's wishes through that area.

12 Q. Back to my question about this need. Need.

13 Articulate for me why this pipeline can't be moved  
14 or could not have been moved to a route further west so  
15 that it would not be in the growth area.

16 A. Well, like I said, we already had moved it outside  
17 of the original route to the location outside of the  
18 growth area, and we had that concurred by -- at least in  
19 our opinion, with the local officials and the other  
20 planners and engineers in the area that we were outside  
21 of that area.

22 So we had already added to the project and rerouted  
23 around those areas. So I believe that we've done that.

24 Q. I believe you're playing word games with me, and I  
25 want to be more pointed with my questions.

1 A. Okay.

2 Q. Here's my question: You will agree, will you not,  
3 that the pipeline route goes through a growth area of Tea  
4 and Harrisburg? Yes or no?

5 A. Well, Mr. Boomsma, if we're going to play word  
6 games, please rephrase the question so you're not adding  
7 prefaces or prepositional phrases in front of my answer  
8 because I can't follow it. I'll be happy to answer it,  
9 but you can't ask me a question with a double negative or  
10 positive or whatever it is you've got to help me  
11 understand so I can answer it.

12 Q. I'll try and simplify it.

13 A. Okay. Thank you.

14 Q. Do you agree that the pipeline route as presently  
15 proposed goes through a growth area not only by Tea but  
16 also by Harrisburg and also by Sioux Falls? Yes or no?  
17 This is not trickery.

18 A. No.

19 Q. You don't think the pipeline goes through a growth  
20 area?

21 A. The entire United States is a growth area, so I  
22 guess in general terms, yes. But we moved outside of  
23 what the predetermined growth areas were for these  
24 communities based upon their feedback.

25 Q. That's not --

1 MR. BOOMSMA: Move to strike as nonresponsive.  
2 This was a yes or no question and what he's doing is  
3 sidestepping the question.

4 MS. WIEST: Overruled. He's trying to address  
5 your question.

6 A. I believe you just don't like my answer. I  
7 apologize for that.

8 Q. Before I move on, I need to know that -- that I have  
9 a good understanding of what you're really saying.

10 Your sworn testimony is that you do or do not  
11 believe that that pipeline is going to go through a  
12 growth area by Sioux Falls, Tea, and Harrisburg?

13 MR. KOENECKE: I object. This is asked and  
14 answered several times now and the witness has indicated.  
15 He's clearly badgering the witness and attempting to  
16 couch a yes or no question in a manner that's not  
17 appropriate.

18 MR. BOOMSMA: I've asked it several times, and  
19 yes, I'm getting an evasive answer, and I think we're  
20 entitled to his candid response.

21 MS. WIEST: I will overrule the objection just  
22 because his answer was no at first and then in general  
23 terms yes. So go ahead.

24 A. Okay. So I believe, in my opinion, as best I can  
25 say it, that our pipeline is going through the area that

1 as consulted with the local folks in that area, being  
2 government officials and planners and engineers, that we  
3 are outside of the area that they consider to be growth  
4 areas currently when we were planning this route. That's  
5 what I believe.

6 Q. Yesterday your attorneys moved for admission of a 54  
7 document. Part of it was admitted. I'm going to show  
8 you a portion from a page that has an Exhibit B notation  
9 on it.

10 Do you see that page?

11 A. I do.

12 Q. What's the date on it?

13 A. 2-17-2015.

14 Q. And that is a memo or a letter of sort to Jack  
15 Edwards; am I right?

16 A. It is.

17 Q. Could you read the highlighted section of that memo  
18 or letter, please.

19 A. It says, "I was informed that someone has been  
20 pursuing the possibility of a development in west half of  
21 Section 33-T100N-R51W. I did not see any proposed plans  
22 for this development. I was informed of the proposed  
23 growth areas for the City of Tea and the City of  
24 Harrisburg. It appears the proposed route location  
25 impacts the southwest corner of the City of Tea growth

1 area and impacts the entire south side of the City of  
2 Harrisburg growth area."

3 Q. Do you still take the stance that your proposed  
4 route will not traverse through those growth areas?

5 A. So in response to this memo that you're referring  
6 to, we met with the City of Tea, the City of Harrisburg,  
7 and as part of that we gave them various route  
8 alternatives that you're excluding from the discussion  
9 here where we avoided the clipping of the corner, where  
10 we got 100 percent outside of the growth area.

11 We literally gave those cities and the planners the  
12 opportunity to pick the route that they believed was the  
13 best route, and the route that we ended up with is the  
14 route that they considered would impact that area the  
15 least.

16 So we took that into consideration when we were  
17 doing our final route selection.

18 Q. May I approach again?

19 A. Sure.

20 Q. No. 55 was an exhibit I believe introduced by your  
21 attorneys yesterday. And if I've got it right, No. 55 is  
22 a listing, a long listing of people that you say Dakota  
23 Access met with in terms of trying to figure out where  
24 the route was going to go. Is that correct?

25 A. No.

1 Q. No. Tell me what 55 is.

2 A. 55 is a general listing of all the state and local  
3 government officials in direct response to Commissioner  
4 Hanson's question of did we meet with local and state  
5 officials. And so it's just a simple list of every  
6 government interaction that we've had from a  
7 representative or stakeholder accountability standpoint.

8 Q. What I see on 55 is it looks like there's some  
9 entries made for the dates of September 1 through  
10 September 8, 2015, in Lincoln County. Do you see that?

11 A. I do.

12 Q. First page?

13 A. I do.

14 Q. Is it your testimony that those people agreed with  
15 the pipeline?

16 A. No.

17 Q. No. Do you know which one of these individuals  
18 agreed or which ones did not agree?

19 A. I was not at any of those meetings. I can't say.

20 Q. But what your testimony is is that at a bare  
21 minimum, you or someone from your Staff met with these  
22 people in Lincoln County to obtain their input?

23 A. To obtain their input, to educate them on the  
24 project, to have an open dialogue. It could have been  
25 many things. That's what this list is about.

1 Q. Where are these witnesses at this hearing?

2 A. Who?

3 Q. Why hasn't Dakota Access produced any of these  
4 people to come here?

5 A. I don't understand which people you're referring to.

6 Q. Why should we and the Commission take your word for  
7 it that you sought the input from these people?

8 A. Well, you don't have to.

9 Q. My question is why didn't Dakota Access give this  
10 information earlier or perhaps provide some testimony  
11 from these people?

12 A. Well, plain and simple, it is very, very uncommon  
13 for somebody to ask for a listing of every government  
14 official that we met with along the development of a  
15 project. Like I said, 171 individual meetings.

16 However, Commissioner Hanson asked for that. This  
17 is something we typically would not introduce. We  
18 introduce into the record the meetings that there is some  
19 sort of documentation. We don't usually list state  
20 officials as having correspondence with, with a state  
21 Senator. Sometimes it's considered to be inappropriate  
22 to do such a thing, so we don't do it.

23 We were asked to provide the list. We do track it,  
24 and so we simply were trying to be responsive to the  
25 Commissioner's question.

1 Q. So back to this -- back to these entries about the  
2 meetings with the Lincoln County people.

3 Is there any paperwork, any documentation that you  
4 can show us that these people actually provided  
5 meaningful input on the supposed route that you presented  
6 to them?

7 A. Well, you're putting words in my mouth. I did not  
8 say I presented the route to them. I didn't say that.  
9 And no. These are typical meetings, personal meetings,  
10 handshake, general conversation, educational meetings  
11 with these individuals informing them of the project,  
12 informing them of the route, giving general feedback.  
13 Could have been just a cup of coffee. That's what this  
14 list is about.

15 So you're trying to define what this list is, which  
16 is highly inappropriate for what this was in response to.  
17 And maybe you weren't here when Commissioner Hanson asked  
18 for it so you don't understand the context of it. I  
19 don't know.

20 Q. I listened to the whole thing.

21 A. Okay.

22 Q. So I do know the context.

23 So did you or your Staff ask any of these people  
24 from Lincoln County, number one, whether they were in  
25 favor of the pipeline?

1 A. So not referring to this list, as I previously  
2 testified, I personally met with the City of Sioux Falls,  
3 the Commissioners of Lincoln County and Minnehaha County,  
4 the meeting minutes that are attached in one of these  
5 other exhibits. I personally attended and presented our  
6 route to the City of Tea, the City of Harrisburg and the  
7 City of Hartford. I personally did that. Not one of my  
8 Staff. Me.

9 We went there, and we gave them the opportunity to  
10 provide feedback on the route, and we asked them plain  
11 and simple, is this route okay? We got feedback that it  
12 wasn't okay the first time, but is this one okay?

13 The response back to us was yes. I've already said  
14 that.

15 Q. Did you give them the option of not having the route  
16 at all going through their growth area?

17 A. No. Of course not.

18 Q. Well, what's the deal then? You testified you  
19 wanted to meet with them so you could get some meaningful  
20 input. How do you obtain the meaningful input if they  
21 don't have the options?

22 A. I guess that's called a business conversation where  
23 you present one thing with a particular set of criteria.  
24 You solicit input back. It's called open dialogue, and  
25 that's exactly what we did.

1 Q. All right. So with this open dialogue, as you  
2 describe it, with these Lincoln County government people,  
3 do you happen to remember whether any of them said, hey,  
4 we don't want this pipeline at all?

5 A. Not a single one that I met with, looked in the eye,  
6 shook their hands, talked to, told me they did not want  
7 this pipeline. Not a single one.

8 We can count the number of people I met with in  
9 these lists. Not one person said no.

10 Q. So as far as you know, is it your belief then that  
11 these people listed from Lincoln County supported the  
12 pipeline?

13 A. Well, I can't say that, but they didn't say no.

14 Q. Back to your 55, there's a person listed from  
15 Lincoln County. His name is Edward Fett. Do you see  
16 that?

17 A. No.

18 Q. Okay. Would you look at 55?

19 A. I am.

20 Q. September 1, 2015, meeting, Lincoln County, Edward  
21 Fett, township supervisor.

22 A. I see him.

23 Q. I put in front of you a letter. It's dated  
24 September 11, 2015. Do you see that?

25 A. I do.

1 Q. Do you see how it has a stamp on it showing that it  
2 was received by this Commission?

3 MS. EDWARDS: Could Staff get a copy of that, or  
4 is it on our website? Can you just direct me to it?

5 MR. BOOMSMA: It's on our website, plus I  
6 provided advanced copies for the Commission. Oh, and  
7 Staff. Sorry.

8 MS. EDWARDS: Thank you.

9 Q. Back to my question. Dated September 11, 2015, it's  
10 received by the Commission. Do you see that?

11 A. I see a stamp that says that, yes.

12 Q. And the letter is directed to the Commission;  
13 correct?

14 A. It says Dear Commissioners.

15 Q. And it's also referencing this particular docket?

16 A. Yes.

17 Q. And the letter is addressed to the Commissioners;  
18 correct?

19 A. Yes.

20 Q. And the letter is from Edward Fett?

21 MR. KOENECKE: Mr. Boomsma, don't you think it's  
22 fair to tell the witness Mr. Fett is a landowner on the  
23 route and one of your clients?

24 MR. BOOMSMA: I'm able to ask my questions, and  
25 if he knows the answer, I think it's relevant.

1 MR. KOENECKE: You just asked about bringing  
2 people here to testify. Where is your client?

3 MR. BOOMSMA: You can ask your follow-up  
4 questions, but I'm able to ask my questions now.

5 MS. WIEST: You can proceed, Mr. Boomsma.

6 Q. Do you see how the letter is signed by Edward Fett?  
7 Second page.

8 A. I do.

9 Q. Do you see that last sentence of his letter?

10 A. I do.

11 Q. Read that, please.

12 A. The first sentence of the last paragraph?

13 Q. The last sentence of the letter.

14 A. "I ask that you deny the Permit Application."

15 Q. Clearly Mr. Fett is not in agreement with this  
16 pipeline; fair statement?

17 A. I can't speak for him.

18 Q. Well, in this letter he says he's not in favor;  
19 correct?

20 A. Let me read the letter to see if I agree with that.

21 (Witness examines document)

22 A. So what was your question again, Mr. Boomsma?

23 Q. My question is, and it's not a trick question,  
24 Mr. Fett clearly says in his letter that he is not in  
25 favor of installation of this pipeline; correct?

1 A. In my six, seven second review, I don't think he  
2 used those exact words, but I can get the tone of the  
3 letter pretty quick. Yeah. And I agree that he's not in  
4 support of it.

5 Q. In fact, he thinks that Dakota Access is using  
6 dishonest and unscrupulous practices to obtain easements  
7 and access to land, does he not?

8 MR. KOENECKE: I object to that question.  
9 Mr. Fett should be brought here as a witness.

10 MR. BOOMSMA: I would have brought him here  
11 except I didn't even learn about their list until  
12 yesterday, which I think should have been provided a long  
13 time ago. I'm entitled to some leeway in light of what  
14 we just found out yesterday.

15 MR. KOENECKE: I don't think you're entitled to  
16 leeway your client, Mr. --

17 MR. BOOMSMA: This is not my client, and this is  
18 not a landowner.

19 MS. WIEST: What is your objection? Do you have  
20 an objection, Mr. Koenecke?

21 MR. KOENECKE: Yeah. I object to hearsay. Not  
22 the best evidence. I think counsel's badgering my  
23 client. And I'll rest on that.

24 MS. WIEST: Can you explain why this isn't  
25 hearsay?

1 MR. BOOMSMA: It's not hearsay because I'm using  
2 it for impeachment purposes under evidence rule 612.  
3 Plus, I'm using it to refresh his memory as far as his  
4 testimony about whether people were opposed or not  
5 opposed to this particular route.

6 On top of that, this letter is responsive to  
7 Commissioner Hanson's request that more information be  
8 provided about these county officials that were  
9 supposedly met with and sought input from.

10 MR. KOENECKE: Mr. Fett's not a county official,  
11 if the letter can be believed. He's a township official.  
12 Mr. Mahmoud didn't say he met with Mr. Fett, that  
13 somebody from the project met with him. Counsel's  
14 putting words in my client's mouth.

15 MS. WIEST: At this point I will -- I think  
16 we'll take our 15-minute break right now.

17 Thank you.

18 (A short recess is taken)

19 MS. WIEST: For the reasons stated by  
20 Mr. Koenecke, I will sustain the objection. You may ask  
21 your next question, Mr. Boomsma.

22 MR. KOENECKE: Before we start, I owe everyone  
23 in the room a clarification. I had my Fetts confused.  
24 Edward Fett is not LeRoy Fett. LeRoy, I believe, is one  
25 of Mr. Boomsma's clients, and a landowner.

1 Mr. Edward Fett, who signed the letter, is not. And  
2 everyone deserves that clarification.

3 MS. WIEST: Go ahead.

4 Q. On Exhibit 55 Edward Fett is listed as the township  
5 supervisor in Lincoln County; correct?

6 A. Yes.

7 Q. And when you go to the second page of the September  
8 11 letter, the person signing the letter identifies  
9 himself as the Perry Township supervisor; correct?

10 A. Oh, sorry. Which -- oh, this?

11 Q. That is the September 11, 2015, letter, yes.

12 A. Okay. Edward Fett.

13 Q. And then it says Perry Township supervisor on the  
14 second page by his signature; correct?

15 A. Yes, it does.

16 MR. BOOMSMA: I move for admission of I 50. I  
17 50 is the September 11, 2015, letter. It's admissible  
18 for impeachment purposes. It's also admissible because  
19 it's responsive to the Commission's request for more  
20 information on these county meetings. It's produced at a  
21 late time, but it's produced as quickly as possible after  
22 we received newly produced information in the way of  
23 Exhibit 55 and 54.

24 With that said, I would move for the admission.

25 MR. KOENECKE: I would ask for a clarification.

1 What specifically are you impeaching with this?

2 MR. BOOMSMA: I'm impeaching the testimony of  
3 the meetings and input that this witness says he had with  
4 these township -- not township. County officials. It  
5 goes to credibility.

6 MR. KOENECKE: How is a township supervisor a  
7 county official? I'm confused with that.

8 MR. BOOMSMA: Well, then you're confused with  
9 your own list. Because Mr. Fett is on your list as  
10 someone you met with at the county level.

11 MR. KOENECKE: Are you saying that Mr. Mahmoud  
12 didn't meet with Mr. Fett?

13 MR. BOOMSMA: I'm not saying that. But this  
14 witness testified that he sought the input from these  
15 county people, and to the best of his memory, nobody  
16 objected. Nobody opposed the pipeline. This is an  
17 impeachment document, and it's relevant. It's responsive  
18 as well.

19 MR. KOENECKE: I don't think that's what the  
20 witness said. I think he said he met with the people on  
21 the matrix that's -- what became Exhibit 54. That's how  
22 I understood it.

23 MR. BOOMSMA: I've been asking him questions for  
24 about 30 minutes about Exhibit 55. And Mr. Fett is on  
25 No. 55. And this was a follow up, i.e., impeachment to

1 the testimony from the witness.

2 MR. KOENECKE: I don't recall any testimony that  
3 55 was anything other than a list of the people who have  
4 been consulted with by the project.

5 MR. BOOMSMA: The testimony, I said.

6 Enough back and forth. I move for admission of  
7 I 50.

8 MR. KOENECKE: We object on that basis.

9 MS. WIEST: My question is whether -- what  
10 exactly did Mr. Mahmoud say that would contradict what  
11 you're trying to put in here? You're not saying that he  
12 didn't meet with him?

13 MR. BOOMSMA: That's correct.

14 MS. WIEST: You're not saying that Mr. Fett told  
15 him at this meeting that he was against the pipeline;  
16 right?

17 MR. BOOMSMA: It's to impeach the testimony  
18 about how this witness says to the best of his memory,  
19 nobody from this county level opposed this pipeline or  
20 the pipeline route. And that's clearly not what's going  
21 on in I 50.

22 MR. KOENECKE: I think the counsel is misleading  
23 the Commission. I don't think that's what the witness  
24 said.

25 MR. BOOMSMA: I still think it's impeachment.

1 MS. WIEST: And I am going to deny admission.

2 Q. Again, back to September 30, 2015. Jack Edwards  
3 testified and Chuck Frey testified, and what I remember  
4 being asked of them, sir, is why the pipeline was located  
5 so close to high growth and highly populated areas, and  
6 the response I heard, if I got it right, was that they  
7 were motivated by the most direct and shortest route for  
8 the pipeline.

9 Do you remember that testimony?

10 A. I don't remember the exact words.

11 Q. Do you remember testimony to that effect?

12 A. I remember that was certainly one of the criteria we  
13 looked at.

14 Q. Well, that's the criteria that your own employees  
15 testified to on September 30. Are they mistaken or are  
16 you wrong?

17 A. Well, if we go back to the record we can --

18 MR. KOENECKE: I object. Counsel is testifying.  
19 Mr. Mahmoud said he didn't recall that.

20 MS. WIEST: He did say he didn't recall it. Can  
21 you rephrase the question somehow.

22 MR. BOOMSMA: I will. Thank you.

23 Q. So I'll rephrase it. I'll ask you the same  
24 question: Isn't it true that Dakota Access is motivated  
25 by the most direct and shortest route in terms of their

1 proposed route for this pipeline in the Sioux Falls, Tea,  
2 and Harrisburg area?

3 A. That's one of the criteria we look at.

4 Q. And that's the only --

5 A. That's not what I said.

6 Q. And that's the only criteria identified by your  
7 employs Jack Edwards and Chuck Frey?

8 A. That's not what I said, and I don't think that's  
9 what they said either. So we can go back to the  
10 testimony and read it, but that's not what we said, not  
11 one of my employees.

12 Q. So it's one of the things you looked at?

13 A. It's one of the criteria. We've said that from the  
14 beginning.

15 Q. And let's not kid anybody. If you did route the  
16 pipe further to the west of the growth areas, it would be  
17 more expensive for Dakota Access; correct?

18 A. We've already done that once. And we've already  
19 admitted we've added cost to the project to route outside  
20 those areas, so it only makes logical sense when you add  
21 length, you add cost, but that's not the only  
22 consideration, and we've said that time and time again.

23 Q. I'll move on, but I'm hearing -- well, strike that.  
24 What I'm hearing is that, yes, indeed, if you moved  
25 the pipeline further west out of the growth areas, it

1 would be more expensive for that pipe; correct?

2 A. I missed the first part of your question. I was  
3 coughing.

4 MR. BOOMSMA: Read it back, please.

5 (Reporter reads back the last question.)

6 A. In theory, yes. It could be.

7 Q. Why not in reality? Why do you say in theory?

8 Either it is or is not more expensive if you rerouted it  
9 further to the west.

10 A. I would assume it probably would be, but that's a  
11 theoretical conclusion because I haven't done it. So I  
12 don't know what the cost would be other than a factored  
13 estimate which I'm not going to sit here and do.

14 Q. I put in front of you a compilation of photos. It  
15 has a sticker on it, I 46J. Do you see that?

16 A. I do.

17 Q. It's been admitted into evidence, and testimony was  
18 offered on October 6 in relation to that exhibit.

19 Did you hear any of that testimony?

20 A. I don't believe I did.

21 Q. The testimony was that those pictures represented  
22 areas that the pipeline was going to be in close  
23 proximity to.

24 A. I have no idea what these pictures are.

25 Q. Okay. That was my next question. By looking at

1 those pictures, sir, are you able to discern whether  
2 indeed those pictures do depict the close proximity of  
3 this proposed pipeline to developments, houses, and farm  
4 sites?

5 A. I have no idea what anything on here is. To me this  
6 is just somebody taking pictures of something. And no, I  
7 have no idea.

8 Q. So you can't offer any facts to dispute not only the  
9 exhibit but the testimony from Joy Hohn in respect to  
10 that exhibit?

11 A. All I can say is you have some pictures here of  
12 something. And I wouldn't give them any credibility  
13 whatsoever.

14 Q. Are you going to argue with me if I tell you that  
15 the pipeline comes within a quarter mile of a housing  
16 development by Tea?

17 MR. KOENECKE: I object. That question is  
18 argumentative by its very definition. He invited  
19 argument.

20 MS. WIEST: Can you rephrase?

21 Q. Are you going to dispute that this proposed pipeline  
22 will come within a quarter mile of at least one, if not  
23 more, housing developments in the growth area by Tea and  
24 Harrisburg?

25 A. We would have to look at a map, but I probably would

1 say -- I would agree with that. We'd have to look at the  
2 map, though, to tell you exactly.

3 Q. You knew as early as January of 2015 that your  
4 proposed route through a growth area was going to be  
5 controversial, did you not?

6 A. As I have said more times than I can count at this  
7 point, we got feedback in December from local officials  
8 and from various people that we had routed the initial  
9 route too close for comfort for some individuals.

10 So we said okay. We understand.

11 So we met with county officials, city engineers,  
12 city planners. Ms. Diane Best, the county attorney for  
13 Sioux Falls; the city administrator for Hartford, Teresa  
14 Sidel. We met with all of those people to determine a  
15 route that would minimize impacts to their growth areas  
16 and where they had proposed development.

17 And then further, when we routed it, we gave them  
18 multiple alternatives. One of those happened to follow a  
19 power line transmission line through the area that they  
20 were concerned about. And we said we'd put a route  
21 through there. And they said, hey, that's the one we  
22 want you to be on. I don't know how to be any more clear  
23 about that particular part of the routing through the  
24 Sioux Falls area.

25 Q. I get it, that's how you feel, sir, but you didn't

1 present the option of entirely avoiding the growth areas  
2 all together, did you?

3 MR. KOENECKE: This entire line of questioning  
4 has been asked and answered. I feel like I've déjà vu'd  
5 before the break. We've been down this path with the  
6 witness. It's asked and answered and should be  
7 sustained.

8 MR. BOOMSMA: And I feel like my questions are  
9 being evaded, and that he's sidestepping my questions.  
10 This is cross on rebuttal, and he's not going to get  
11 friendly softball questions at this point in the game.

12 MS. WIEST: I will allow it. I don't remember  
13 that exact question.

14 A. Well, so we did provide for routes that 100 percent  
15 missed all areas that were depicted upon the growth areas  
16 or economic development areas. I don't remember the  
17 exact term, provided for by those cities. We had that  
18 example, and we had that route.

19 When we provided that to the City of Tea and the  
20 City of Harrisburg, as well as Hartford and Sioux Falls  
21 and the City of Tea and Harrisburg because that was the  
22 area that was a little bit under dispute for where to be  
23 because their boundary was a little bit skewed. There's  
24 two different versions of their growth area, they said,  
25 hey, get off of that county line, that section line. We

1 want you off of that. Move to the power transmission  
2 line because that's not going to be a developed area  
3 anyway. That's what we did.

4 So we absolutely, unequivocally, 100 percent  
5 provided a route that avoided those areas, and they moved  
6 us to the power line. I've already said it.

7 Q. No. I hear you. And, but the truth of the matter  
8 is is that when you changed the route in that Tea and  
9 Harrisburg area, the route actually was moved closer to  
10 their growth areas. Yes or no?

11 A. That's based upon their desire.

12 Q. According to you.

13 A. Oh, no. No. It's not according to me. It's  
14 according to them.

15 Q. Well, where are they? They're not here today?

16 A. Call them.

17 Q. It's according to you?

18 A. Call them.

19 Q. And you have no paperwork to substantiate what  
20 you're saying?

21 A. I've already answered this.

22 MR. KOENECKE: Counsel's answered this. I  
23 object. Counsel could have called them himself. A lot  
24 of them are parties to this docket, and they're not here.  
25 In some cases they went home because they have got no

1 more objection to this routing.

2 Counsel doesn't like it. His clients don't like  
3 it. They're the only ones left. But to be trying to  
4 drag the city officials that were met with -- he's  
5 essentially calling my client a liar on the stand when  
6 those people are parties to the docket and could have  
7 been here. Lincoln County is a party. They've been  
8 getting all the documents and have left.

9 Counsel doesn't like the answers. I understand  
10 that. But this line of questioning produces nothing  
11 different. Every time the question is asked in a little  
12 different way, the answer comes out a little different  
13 and it is the same.

14 I object to this line of questioning.

15 MR. BOOMSMA: My response is that under  
16 SDCL 49-41B-22, Applicant has the burden. I don't have  
17 to prove anything. And that burden that they must show  
18 is that they gave due consideration to the views of the  
19 governing bodies of the local units of government. I  
20 don't have to bring any witnesses here for that. And  
21 that was his job. We just heard about that yesterday.

22 My line of questioning I think is proper then.

23 MS. WIEST: What was the last question?

24 (Reporter reads back the last question.)

25 MS. WIEST: Okay. He can answer that question,

1 but I think we have explored this area enough. Go ahead.

2 A. I have paperwork that I've presented as part of  
3 evidence.

4 Q. What's the exhibit number on it? Again, we're  
5 talking about exact documents showing that county  
6 officials approved or gave input to your proposed route.

7 A. That's a different question and, no, I do not.

8 Q. Do you remember attending a public input hearing  
9 January 22, 2015, in Sioux Falls, South Dakota?

10 A. I have to look to see when I gave that presentation.  
11 The joint meeting?

12 My stuff's all out of order. So it's whatever the  
13 meeting was on that secondary list was the date.

14 Q. I didn't mean to cut you off. Do you remember being  
15 asked questions at that time from landowners and  
16 Commissioners about why the route was chosen through a  
17 growth area?

18 A. The meeting I attended first was on January 13, not  
19 the 22nd.

20 Q. I've got a transcript here for a meeting January 22,  
21 2015, in Sioux Falls.

22 MR. KOENECKE: Which Commissioners are you  
23 asking about, Counsel?

24 MR. BOOMSMA: I'll get there. But first he's  
25 got to establish that he even remembers being at that

1 meeting.

2 A. No. The one that I recall being at that I presented  
3 was January 13.

4 MR. KOENECKE: And, again, I say which  
5 Commissioners? Is it the PUC Commissioners meeting in  
6 Sioux Falls or the Lincoln County and Minnehaha County  
7 Commissioners meeting in Sioux Falls? There were two  
8 meetings in January of '15, if I recall.

9 Q. Are you telling me that you did not meet January 22,  
10 2015, in Sioux Falls or you don't remember about it?

11 A. We had our public meeting.

12 Q. Okay.

13 A. But that's -- I don't know if that's the -- I don't  
14 know what meeting you're referring to. The one I recall  
15 presenting to the City of Sioux Falls was January the  
16 13th. The public meeting was January 22.

17 Q. January 22 at the Ramkota hotel in Sioux Falls on  
18 January 22.

19 A. Okay. Absolutely I gave a presentation there as  
20 well.

21 Q. Okay. Do you remember giving answers or responses  
22 to concerns from landowners and also Commissioner Gary  
23 Hanson as far as why the proposed pipe was going through  
24 a growth area?

25 A. I do.

1 Q. Do you remember receiving a response from  
2 Commissioner Hanson at that time that, "I have a great  
3 deal of difficulty with that answer and with the history  
4 of my experience with the area here. This is a very fast  
5 developing area in the State of South Dakota"?

6 Do you remember that?

7 A. I'm sure -- if you're quoting it exactly, I can't  
8 confirm it. But, yes, that is exactly what derived all  
9 the filings for the March submittal, the meetings I had  
10 with the various cities and the additional work that we  
11 did with the city planners was that comment and his  
12 questions so that we could prove and demonstrate that we  
13 did, in fact, meet with the people that were interested  
14 and would provide comments to us.

15 Q. My follow-up question, and then I'll move on, is  
16 despite having been told that January 22 and despite  
17 receiving information in this Exhibit B page of  
18 Exhibit 54 about the growth areas of Tea and Harrisburg,  
19 you still decide to forge ahead and go through the growth  
20 areas.

21 Why is that?

22 A. You know, clearly understand you do not like my  
23 answer. I do. And I apologize that we're having to  
24 reiterate this time and time again. But what I'm going  
25 to tell you is the exact same thing. We met with these

1 individuals. We met with the cities. They told us they  
2 were okay with it. After Mr. Hanson asked us to, you  
3 know, make sure we knew what we were doing here because  
4 he had concerns, we went through those motions. We did  
5 the consultations. We did the communication. And after  
6 we were done, that's the result of what everybody told us  
7 to do.

8 And I can't speak for them 100 percent, but what I  
9 can tell you is I looked every one of them in the eye. I  
10 had the direct conversation myself so I could sit here  
11 and say this on the stand, that I personally made sure  
12 that the route through the Sioux Falls area met the  
13 expectation of the city officials in that area. And that  
14 is the indication they gave me.

15 Q. How about respecting all the views of the landowners  
16 who spoke up at this January 22 meeting and point blank  
17 told you that they had trouble with your proposed route?

18 MR. KOENECKE: That question assumes facts not  
19 in evidence and is argumentative.

20 MR. BOOMSMA: This is cross-examination, and we  
21 are, again, at the rebuttal phase.

22 MS. WIEST: Overruled.

23 A. Well, what I can tell you is we take everything into  
24 consideration. We do. And we have almost 90 percent of  
25 survey -- of easements acquired in the State of South

1 Dakota.

2 That's no small feat. That's more than any other  
3 states. So of all the states, North Dakota,  
4 South Dakota, Iowa, and Illinois, the citizens, the  
5 people of South Dakota, the 852,000, the ones that we  
6 cross, the ones that we cross, 90 percent have given us  
7 easements. That's not by my mistake or that they're  
8 opposed to us. They accepted the pipeline.

9 So you always have a few that are always against the  
10 pipeline. I understand that, and we try our best. We've  
11 been working at it for over a year to accommodate the  
12 people that do not want this pipeline. We get it. We  
13 understand not-in-my-backyard syndrome. We get it  
14 everywhere.

15 I build lots of pipes all over this country. But  
16 the fact is we can't just transfer the pipeline from one  
17 person to the other. It's called transference of  
18 impacts, just because one can afford an attorney and the  
19 other one can't. That's called environmental justice.  
20 And we can't go through and just do those arbitrary  
21 motions because somebody doesn't like it. That's not  
22 fair to the other individual.

23 So it's a balancing act that we have to go through.  
24 We take into account the constraints from, I mean, every  
25 stakeholder. There's thousands of things we look at.

1 And at the end of the day, we end up with a route, and  
2 that route, we believe, marries up with the least amount  
3 of impacts to the most amount of stakeholders. That's  
4 what we have here.

5 And I know there's certain people that are against  
6 this pipe. I accept it. I respect it. And we try to  
7 make sure that we're as least offensive to the people  
8 that are against us so we can work through an agreeable  
9 situation. And it's not always pleasant. And I know  
10 these are tough questions, and that's why I'm sitting  
11 here.

12 Q. And you brought up this whole notion of fairness and  
13 landowners who oppose and landowners who agree, but isn't  
14 it the cold hard fact that the landowners that oppose you  
15 on this pipeline have been retaliated against?

16 A. Absolutely not.

17 Q. Absolutely not. But they've been hit with two  
18 lawsuits; correct?

19 A. That's the law, and you know that.

20 Q. And, in fact, if you count the appeal lawsuit that  
21 your company filed yesterday, that would make three  
22 lawsuits?

23 A. And, again, you know the law better than I do.  
24 That's the process and the law that we are abided to  
25 follow in the State of South Dakota. Nothing I can do

1 about that but follow the law.

2 Q. You made the decision to sue these landowners;  
3 correct?

4 A. Yes, I did.

5 Q. You told me last time the buck stops with you. You  
6 made the decision?

7 A. It does.

8 MR. KOENECKE: We're repetitive and  
9 argumentative here. Please, please put a stop to this.

10 MS. WIEST: Mr. Boomsma, I thought you were  
11 moving on from this line of questioning a few questions  
12 ago.

13 Q. I'll move on to your rebuttal testimony and pages 11  
14 and 12 where you talk about agricultural activities.

15 Do you see that?

16 A. No. I have to get it out of my stack again.

17 Okay. I have it in front of me.

18 Q. All right. You offer testimony on how you think  
19 you're going to minimize the impact on agricultural  
20 activities; correct?

21 A. Where are you reading?

22 Q. Well, it's on pages 11 and 12, and it spans over  
23 several lines. It starts on 11, and the line it starts  
24 with is 245.

25 A. Okay.

1 Q. The truth of the matter -- and I'm not looking for a  
2 longwinded answer. This is a yes or no question. Have  
3 you or your staff ever worked with the older clay or  
4 concrete tile systems in South Dakota?

5 A. Well, the truth of the matter, since you prefaced  
6 the question with that, it's going to derive a longwinded  
7 answer.

8 Because the fact is our company absolutely has dealt  
9 with this issue countless times.

10 Q. In South Dakota?

11 A. Not in South Dakota.

12 Q. So testimony then was presented from people who have  
13 had direct involvement in the way of repair and  
14 replacement of tile systems in South Dakota. So what can  
15 you tell me in the way of facts, not beliefs, but facts  
16 as to why those people are wrong?

17 MR. KOENECKE: Counsel's testifying. His  
18 question is argumentative. The witness -- I don't think  
19 the word tile is in Mr. Mahmoud's testimony. You know,  
20 he missed the tile discussion, and I can't help that.  
21 That was his choice, apparently. But his question is  
22 argumentative and is outside the scope.

23 MR. BOOMSMA: The testimony is about how  
24 agricultural activities will be affected. And this falls  
25 under that topic.

1 MS. WIEST: Yes. He does talk about  
2 agricultural mitigation plans, so I'll allow the  
3 question.

4 THE WITNESS: Can you repeat the question,  
5 please.

6 (Reporter reads back the last question.)

7 MR. KOENECKE: So which client's testimony does  
8 that refer to? Some clients said it couldn't be fixed.  
9 Some clients said it could but only by them. I'd like to  
10 know exactly which testimony the question refers to.

11 MS. WIEST: Yes. Could you be more specific,  
12 Mr. Boomsma?

13 Q. Witnesses such as Brian Top, Tom Stofferahn, and Ron  
14 Stofferahn gave testimony in terms of the repair and/or  
15 replacement of old tile systems. Did you catch any of  
16 their testimony?

17 A. I did not.

18 Q. So are you able to offer anything in the way of  
19 facts to refute anything that was said about that  
20 testimony?

21 MR. KOENECKE: I object. I'd like to have the  
22 record as to what those witnesses said read so that my  
23 client knows exactly what he's being asked to object to.  
24 I think it's highly unfair for Mr. Boomsma to be the only  
25 person in the room knowing what he's talking about and

1 asking my client to respond to it.

2 Let's get the daily copy out and see what his  
3 witnesses said about that and then ask Mr. Mahmoud for a  
4 response. That's the fair way to go about it here.

5 MS. WIEST: Yes. He did testify he did not  
6 listen to any of that testimony, so you need to  
7 specifically state what statements that you're relying on  
8 in your question.

9 Q. Testimony was presented by people such as Brian Top,  
10 Tom Stofferahn and Ron Stofferahn as to how it would be  
11 very difficult, if not impossible, to repair old clay  
12 and/or concrete tile systems. That's what I'm purporting  
13 to you.

14 And my question then to you is whether you have any  
15 facts to contradict or dispute that testimony?

16 MR. KOENECKE: Counsel needs to read the  
17 testimony. They had extensive testimony on tiling  
18 systems, and for him to boil down the testimony of three  
19 witnesses in which they contradicted themselves several  
20 times and asked my client for response is just patently  
21 unfair.

22 MR. BOOMSMA: If he doesn't know the answer, he  
23 can say that. But if he knows, he could also testify to  
24 that. That's my response.

25 MS. WIEST: And wouldn't there be a better

1 witness for this also, I believe?

2 MR. BOOMSMA: This is their last witness. This  
3 is their rebuttal, and he's offering rebuttal testimony  
4 on impact on agricultural activities. Again, if he  
5 doesn't know, he can say that.

6 MS. WIEST: Do you know, Mr. Mahmoud?

7 THE WITNESS: I have no idea what they said.

8 MS. WIEST: Objection overruled. You can move  
9 on.

10 MR. BOOMSMA: That's all I have for questions.

11 MS. WIEST: Staff, did you have any questions?

12 MS. EDWARDS: I do. Thank you.

13 CROSS-EXAMINATION

14 BY MS. EDWARDS:

15 Q. Mr. Mahmoud, on page 6 of your rebuttal testimony  
16 you reference Condition 7 from the Keystone XL Permit.  
17 Do you know what I'm talking about?

18 A. Yes. I don't have the -- the Condition.

19 Q. Okay.

20 A. In front of me.

21 Q. I'm just going to ask a general question. That's  
22 fine. When you say that your company would agree to a  
23 liaison, would that liaison then be approved by the PUC?

24 A. Sure.

25 Q. So you guys would make a motion then subsequent to

1 this and let us know who you wanted, and then in this  
2 docket we'd decide if that was --

3 A. Absolutely.

4 Q. Thank you.

5 You had also referenced linear facilities, I  
6 believe, in the Tea area; correct?

7 A. Yes, ma'am.

8 Q. And you had said that would be a electric high line;  
9 right?

10 A. Yes.

11 Q. Do you know if the right of way or easement for  
12 those linear facilities would be the same size as your  
13 easement?

14 A. No. I do not.

15 Q. Okay. Would it be possible that the easement would  
16 have to be extended to accommodate the pipeline?

17 A. Yes. Yes, ma'am. It would. We would abut the  
18 existing easement.

19 Q. Okay. Thank you.

20 Also yesterday I had asked a question of a previous  
21 witness that was directed -- or I was told it would be  
22 more appropriate for you. Do you recall that?

23 A. I think to Micah Rorie. I think that's right.

24 Q. Okay. Thank you.

25 Do you know if Dakota Access intends to use

1 subcontractors to handle the construction and reclamation  
2 process?

3 A. I do remember that question.

4 The way that we do the contracting, we contract to  
5 the prime, which in this case is going to be Michels  
6 Corporation. Michels Corporation then hires -- they  
7 either do it internally with their own contracts or their  
8 own employees and with their own equipment, or they  
9 subcontract out, and we have the right to approve or  
10 disapprove of their subcontracts.

11 But the contract is actually direct to Michels, and  
12 then they do the subcontracting. We do not subcontract  
13 directly.

14 Q. So what contractors would staff the environmental  
15 inspectors?

16 A. Okay. That's a different type than maybe my  
17 understanding of what you're asking.

18 I was thinking you were talking about restoration,  
19 physical contractors, meaning construction.

20 And so for the environmental inspection, which is  
21 people that we would hire, those would be direct  
22 contracts to Energy Transfer or Dakota Access. And we  
23 don't consider those subcontracts. Those are direct  
24 contracts.

25 Q. Based on your experience, what teeth to the

1 environmental inspectors have to make sure the contractor  
2 follows the Ag Mitigation Plan?

3 A. That's a great question. So when we set out the Ag  
4 Mitigation Plan and we when we hire our environmental  
5 inspectors, we give them the tools, obviously, of what  
6 they are supposed to be reviewing with the contractor.

7 When they notice a -- a situation that the  
8 contractor's not conforming to the plan, their first  
9 recourse is to go back to the construction chief, or it  
10 could be the construction inspector, who then would  
11 report to the chief. Right there on the spot.

12 And we have construction inspectors that are out  
13 there concurrent with the environmental inspectors.

14 If, for whatever reason, that environmental  
15 inspector doesn't feel like his concern or her concern is  
16 addressed immediately, then they have an elevation  
17 process. And the elevation process then goes directly  
18 from the chief to what we call a super chief. And then a  
19 super chief to Jack Edwards. And then from Jack  
20 Edwards -- actually to Tom Siguaw, and from Tom Siguaw to  
21 me. So throughout that process, there's multiple steps.  
22 So the environmental inspector can take the corrective  
23 action that they need to take.

24 If for whatever reason that there's going to be  
25 immediate harm to the environment, significant immediate

1 harm, I mean, a stream, filling it in with dirt, for  
2 example, that environmental inspector can stop that work  
3 immediately. But the normal course of action is for them  
4 to work with the construction inspector to make sure that  
5 it conforms with the construction plan and procedures.

6 Because the environmental inspector, they may or may  
7 not understand 100 percent of the construction that's  
8 going on at that particular time.

9 Q. Thank you. You just mentioned that they have the  
10 authority to stop the construction. Would they be  
11 independent from the company then so there would be no  
12 motivation not to do so?

13 A. That is true. Yeah. It's not -- it's something  
14 that we afford to the environmental inspector in a  
15 limited circumstance obviously, but at the same time it  
16 is something that they have the ability to do if it's  
17 going to impact the environment to the point of  
18 detrimental impacts.

19 MS. EDWARDS: Thank you, Mr. Mahmoud. I have no  
20 further questions.

21 MS. WIEST: Commissioners.

22 CHAIRMAN NELSON: As I have listened to  
23 questions from your attorneys and some of the responses  
24 from some of your other witnesses, I've got the  
25 impression that your company believes that the

1 Stofferahns should choose a different location on their  
2 property for that portion of their business that they've  
3 designated as research plots, test plots, et cetera. Is  
4 that correct?

5 THE WITNESS: That's what I understand from our  
6 agronomist. Yes, sir.

7 CHAIRMAN NELSON: Do you believe it's fair for  
8 your company to tell a different business where they  
9 ought to locate their facility?

10 THE WITNESS: I don't. I don't. Unfortunate  
11 circumstance, and I don't know if this is true or not,  
12 but this is how we evaluate situations like that, is we  
13 often have people tell us things that when they're  
14 against our project -- and the Stofferahns have made it  
15 very clear that they do not concur with our project, that  
16 they will come up with a lot of things to intentionally  
17 throw roadblocks.

18 Now from what I understand talking to our  
19 agronomist and talking to our right of way folks, is that  
20 they believe that's exactly what's happening in this  
21 case. And they believe that the location they picked,  
22 and we heard that from Aaron yesterday, is not a good  
23 location for a test plot.

24 So we believe that it's a stall or a tactic to  
25 try to block the pipeline. And we don't want to impact

1 somebody's business or development or whatever they're  
2 doing. We just would like to reach a settlement with the  
3 individual to negotiate.

4 If it truly is an impact, we do have the  
5 flexibility to move the pipeline to avoid their test  
6 plot. But they haven't even given us or afforded us the  
7 opportunity to work through that at this time.

8 CHAIRMAN NELSON: Have they signed an easement  
9 yet?

10 THE WITNESS: They have not. They never even  
11 let us survey.

12 CHAIRMAN NELSON: As I have looked at the map of  
13 their situation, it appears to me that with a fairly  
14 slight modification of the pipeline route, you could, in  
15 fact, run the pipeline down their eastern fence line; is  
16 that correct?

17 THE WITNESS: Yes, sir. And again, we haven't  
18 even been able to survey to be able to have that  
19 conversation. We've contacted them -- and this is coming  
20 from memory, but I believe 11 times, 11 different  
21 occasions to request survey permission. Each time has  
22 been met with a no. So we can't even get to that point.  
23 So we're left with making assumptions that we believe are  
24 true and correct, but we don't have a way to resolve that  
25 other than going through the condemnation proceeding and

1 let the court figure out if that's the best place or not.

2 And we agree, that's not the best situation.

3 CHAIRMAN NELSON: Let me just visit a little bit  
4 about -- and I think you probably heard my earlier  
5 questions regarding -- or did you hear my earlier  
6 questions regarding a third-party independent monitor?

7 THE WITNESS: Yes, sir. I did.

8 CHAIRMAN NELSON: Would the PUC's employment of  
9 an independent third-party monitor, do you believe would  
10 that give us a better understanding, number one, of  
11 actually what's happening on the construction and  
12 reclamation route and, number two -- answer that first.  
13 Would that give us a better understanding?

14 THE WITNESS: I personally do not think so. And  
15 I can give you my opinion, if you want.

16 CHAIRMAN NELSON: Please.

17 THE WITNESS: So in my capacity at Energy  
18 Transfer, I oversee all of our capital development  
19 projects, FERC regulated, non-FERC regulated.

20 We agree to do certain things with the FERC  
21 because we have certain authorities that are granted to  
22 us under a Section 7 docket or Section 7 certificate that  
23 as part of that certificate there's benefits that are  
24 granted by doing that that are not necessarily granted as  
25 part of the process in the PUC.

1           So there's a cost benefit analysis. I can  
2 guarantee you the same level of data, the same from  
3 similar type people without having a third-party  
4 inspection by giving you access to our environmental  
5 inspectors. We have no problem doing that. As a matter  
6 of fact, I mean, we were very open. We would encourage  
7 the Staff to come out to our construction all the time.

8           So having a third party provide the same  
9 function that we already have. People there that are  
10 essentially third parties to our company anyway I think  
11 is duplicative. Because the benefits of that third party  
12 as -- I can't remember the gentleman's name who was  
13 articulating route variances, automatic approval, those  
14 things, that I don't assume would be a part of the  
15 process under the PUC. I don't think y'all have the  
16 ability to do that. So it's just a cost item.

17           And I think we can get the same level of benefit  
18 that I believe, if I'm understanding your intent, I think  
19 you can get the same level of benefit by us giving you  
20 access to our current environmental inspectors. And I  
21 would commit today that we would do that.

22           CHAIRMAN NELSON: So I'm understanding from you  
23 that you would commit for those folks to  
24 contemporaneously report to us any item that they saw  
25 during construction or reclamation that would not live up

1 to the plan.

2 THE WITNESS: Yes, sir. I would.

3 CHAIRMAN NELSON: This is not going to be a  
4 question but maybe more just a little bit of commentary.

5 Obviously I experienced a great deal of  
6 frustration when I hear testimony from the folks like the  
7 Sibsons or Mr. Moeckly. And I don't know what really  
8 happened. Okay. We've got different stories, and I  
9 don't like that.

10 If this pipeline happens, I want to do  
11 everything I can to make sure we don't have stories like  
12 that and that the land is taken care of. And that's the  
13 impetus of my interest in this area.

14 THE WITNESS: Yes, sir.

15 CHAIRMAN NELSON: I think I'll let it go at  
16 that.

17 COMMISSIONER SATTGAST: Good morning. I think  
18 Commissioner Nelson hit upon the same area that I was  
19 going to go toward a little bit, and that is, you know,  
20 yesterday when Mr. DeJoia was visiting and we were  
21 talking about the reclamation part and whether or not a  
22 landowner can deviate from the plan of, you know,  
23 separating the topsoil from it.

24 And I have the same concerns. I just want to  
25 ensure that if there is a deviation from the plan, that

1 the landowner is aware of that, and the landowner has  
2 signed off on that.

3 Is that something that is going to be committed  
4 to on this?

5 THE WITNESS: 100 percent. Yes, sir.

6 COMMISSIONER SATTGAST: Okay. Can you explain  
7 the process that you went through to estimate your first  
8 year of taxes that we have been discussing?

9 THE WITNESS: I'll do my best.

10 COMMISSIONER SATTGAST: Okay.

11 THE WITNESS: And I can't give you the formula,  
12 but what I can tell you is I had four different people do  
13 it. I had two external people do it, and I had two  
14 internal people do it. I had our director of tax, her  
15 name is Megan McKavanagh, if I said that right, I  
16 probably really butchered it. She would appreciate that.  
17 And I had another person, his name's Aaron -- I just  
18 forgot Aaron's last name. I'm looking at Keegan. It  
19 doesn't matter what his name is.

20 Anyway, I had two internal individuals perform  
21 the tax calculation for us. Then a third party called  
22 KPMG, which is a national firm. Then I had SEG, which is  
23 a local firm out of Des Moines, Iowa, perform the tax  
24 calculation.

25 I will tell you they all came up with a

1 different valuation between \$12.3 million and 14.1. And  
2 the reason I did that is I have to budget for this money  
3 as part of my operating expense. And it would be  
4 imprudent of me to not plan properly for that big of a  
5 dollar amount.

6 So I'll tell you in my budget for first year  
7 taxes I fully intend to pay the amount, the \$13.4 million  
8 that we have disclosed.

9 We did squarely based upon the cost approach.  
10 There is no other approach to do it. I had them call,  
11 and I forgot the gentleman's name who testified that he  
12 did in fact remember those phone calls. And it was  
13 actually four different calls, not two.

14 And we had him talk to the Department of Revenue  
15 to determine what is the base approach. That's how we  
16 did it. Again, three different numbers, still all three  
17 big numbers. I picked the one in the middle, and that's  
18 what we're planning on. That's in our budget for 2016  
19 for the first year of taxes.

20 COMMISSIONER SATTGAST: Then my final question  
21 here is that -- well, this weekend is early resident  
22 pheasant season. We've been discussing that here a  
23 little bit here. And, unfortunately, I'm happy that it's  
24 going to be warm, but I'm not happy because I probably  
25 won't be hunting because it's not good for dogs.

1           But in South Dakota we have a little over  
2 500,000 acres of public or leased land for hunting  
3 purposes. My calculations.

4           I'd just like to ask you, because I'm not sure  
5 if my calculations are correct, do you have an acre  
6 amount of the land including the right of way -- and I  
7 realize it's not public land that is the vast majority,  
8 but do you have an overall acreage that we're looking at  
9 here?

10           THE WITNESS: That would be disturbed during  
11 construction?

12           COMMISSIONER SATTGAST: Yeah.

13           THE WITNESS: We do. Monica could probably  
14 answer that directly.

15           COMMISSIONER SATTGAST: I can ask her.

16           THE WITNESS: Sure. We'll be preparing for  
17 that. I would say just kind of on the side here, our  
18 intent is to be done with construction and in the  
19 restoration phase by the time pheasant season begins. We  
20 have 100 percent tried to contemplate hunting season up  
21 here. Not only for pheasant, but for ducks and goose as  
22 well.

23           COMMISSIONER SATTGAST: Okay. Thank you very  
24 much.

25           COMMISSIONER HANSON: Good morning, Mr. Mahmoud.

1 THE WITNESS: Good morning. Can I ask for  
2 leniency?

3 COMMISSIONER HANSON: I heard my name mentioned  
4 a few times. The good news is that some of the questions  
5 that I was going to ask have been asked. The bad news is  
6 I only have about seven or eight pages of questions to  
7 ask.

8 And I want to start out before we get in  
9 somewhat of an adversarial role to state that I really  
10 appreciate your testimony. It's been very interesting  
11 and informative, and I do look forward to the rest of it.

12 You said there were five trains. Probably don't  
13 need to go over all of that -- of petroleum that would  
14 be -- that could be eliminated. Or let me put it this  
15 way: I believe you said there were five trains would  
16 equal the amount of petroleum that's going through the  
17 pipe -- that would go through the pipeline.

18 THE WITNESS: Yes, sir. Five unit trains.

19 COMMISSIONER HANSON: You didn't say they would  
20 be eliminated. So do you know how many trains are  
21 presently moving oil?

22 THE WITNESS: You know, I did. It's a statistic  
23 that is on the EIA's web page.

24 COMMISSIONER HANSON: Okay. And do you know how  
25 many unit trains DAPL would actually free up?

1           THE WITNESS: It would be five. I guess let me  
2 try to answer that because I think I understand where  
3 you're going.

4           There's been a shortage of rail capacity because  
5 of the Bakken. And grain cars here in South Dakota,  
6 Iowa, North Dakota, have sat idle because there's not  
7 enough engines to move the trains.

8           So I don't know that I think that the train  
9 reduction is going to occur personally. I don't. I  
10 think that there's going to be just as many trains  
11 moving, in theory, that could move. Because what I do  
12 believe's going to happen, there's shut-in production.  
13 So when you have shut-in production, you add another  
14 avenue for movement that that production becomes unshut  
15 in.

16           So I think the current rail capacity is going to  
17 remain constant. Or if anything, the rail will remain  
18 constant, and instead of crude carrying cars, there will  
19 be grain carrying cars. So I don't know that there's  
20 really going to be a net reduction in crude carrying  
21 trains because of this project. That's just the  
22 displacement of value.

23           I do believe there's going to be a reduction of  
24 trucks, though. I think that's -- trucking is very  
25 expensive, and I think it's 2,250 trucks that would be

1 displaced, if my math's right. I do believe that's going  
2 to occur, but I don't think that the rail will happen.  
3 My opinion.

4 COMMISSIONER HANSON: Well, that's bad news. My  
5 youngest daughter and her husband own a trucking company.  
6 So you need to do your homework.

7 THE WITNESS: Truth.

8 COMMISSIONER HANSON: That will not affect my  
9 decision.

10 You said that South Dakota's the eighth largest  
11 consumer with 60,000 barrels a day, and then you said  
12 South Dakota produces five.

13 THE WITNESS: Yes, sir.

14 COMMISSIONER HANSON: You did say if it was  
15 5,000 or --

16 THE WITNESS: 5,000.

17 COMMISSIONER HANSON: 5,000. All right. Thank  
18 you. I should know that, but I figured as long as you  
19 knew it, I would ask you.

20 Who makes the decision to sue for access to  
21 properties?

22 THE WITNESS: Ultimately I do.

23 COMMISSIONER HANSON: Okay. And do you refer to  
24 this as a condemnation?

25 THE WITNESS: Yes, sir.

1           COMMISSIONER HANSON:  If the route is changed,  
2 do you have a standard operating procedure for  
3 reimbursement to the landowners who were sued and  
4 incurred costs and are no longer on the route?

5           THE WITNESS:  Honestly I can't recall that  
6 happening.  I'll give you one example that I think is  
7 applicable that may be responsive to your question.

8           We abandoned a project, a pipeline where we had  
9 to condemn for the pipeline.  And when we did leave -- or  
10 we didn't build the project for whatever reason we did  
11 release those easements via the court because we had to  
12 go back to court to do that.

13           And the opposing attorneys did seek for  
14 reimbursement of their expenses.  And I'll tell you, we  
15 did litigate that, and that's still unresolved.  That's  
16 the only answer I'm aware.

17           I think as a general practical sense, we would  
18 not necessarily reimburse for the legal expense simply  
19 because the need for the litigation was not a one-way  
20 decision.  It's a two-way decision by the landowner as  
21 well as by the company.  There was an alternate means of  
22 settlement.

23           COMMISSIONER HANSON:  I appreciate you sharing  
24 that with us since we don't work with condemnation.

25           There's a couple of maps that were shared with

1 us. One we've been referring to as a blue dot, and I  
2 guess the other one was the green star map. Those -- I  
3 don't think you have to refer to them, but it shows --  
4 the purpose was to show a number of pipelines that are  
5 inside the city limits of Sioux Falls, as if to say that  
6 there's pipelines close to developed areas, therefore,  
7 it's okay to have additional ones.

8 Are all of these pipelines in service presently?

9 THE WITNESS: As far as I'm aware of, yes, sir.  
10 But I'm not 100 percent sure of that.

11 COMMISSIONER HANSON: Do you believe that these  
12 pipelines would be built in the same location or the  
13 proximity to Sioux Falls if they were being built today?

14 THE WITNESS: I don't think that we -- that  
15 these pipelines would have been routed through this  
16 neighborhood. But I'm pretty sure, and I'm pretty  
17 positive on this, that the pipeline -- the community  
18 built around the pipelines. But, no, I do not think --  
19 nor would we put a pipeline through a residential area.

20 COMMISSIONER HANSON: So do you know the ages of  
21 any of these pipelines?

22 THE WITNESS: I know the Northern Natural stuff  
23 on the DAPL 52, the bigger map, those were put in in the  
24 '50s, late '50s and '60s. I'm not sure about the  
25 Magellan and the New Star.

1 COMMISSIONER HANSON: Thank you.

2 And you stated that you anticipated that your  
3 pipeline would last for well over 100 plus years. Would  
4 you anticipate that the growth of Hartford, Humboldt,  
5 Tea, Harrisburg, Lennox, all of those towns will be  
6 growing over and around this pipeline if it is built?

7 THE WITNESS: I do. Yes, sir.

8 COMMISSIONER HANSON: I think we got one page  
9 out of the way.

10 THE WITNESS: We may have to take a break if  
11 it's really seven.

12 COMMISSIONER HANSON: Just raise your fingers.  
13 You stated that you had 171 meetings.

14 THE WITNESS: I believe that's what I counted.  
15 Yes, sir.

16 COMMISSIONER HANSON: Would you agree with me  
17 that you counted on this matrix -- and I don't know what  
18 exhibit number we gave to this, but it's the list --

19 THE WITNESS: Yes.

20 COMMISSIONER HANSON: -- of all of the folks  
21 that you met with.

22 THE WITNESS: That's -- yes. That's how it was  
23 done.

24 COMMISSIONER HANSON: I assume you simply  
25 counted line by line and counted all of those lines up?

1 THE WITNESS: That's what I did, yes.

2 COMMISSIONER HANSON: All right. Just bring  
3 your attention to the fact that a number of those are  
4 inclusive of one meeting. For instance, you don't have  
5 page numbers on this, but one of them, for instance, the  
6 largest one that I could see shows a legislator reception  
7 and forum, and that was with 43 persons, and that was  
8 counted then as 43 meetings. It was actually one  
9 meeting. That's on January 26, 2015.

10 I can't imagine you met individually with 43 --  
11 had 43 meetings on that day.

12 THE WITNESS: Yeah. I don't think that's right,  
13 Mr. Hanson. Because there's another meeting where there  
14 were 30 members present, so that would mean that there  
15 were 73 at two meetings. And this list is longer than  
16 that. I don't know, though. I will admit I just counted  
17 the number, and we could probably recount and come up  
18 with a different number, unfortunately, because I did it  
19 pretty quick that morning.

20 COMMISSIONER HANSON: I just bring that to your  
21 attention.

22 THE WITNESS: Sure.

23 COMMISSIONER HANSON: Because I don't think you  
24 were trying to misrepresent the number of meetings you  
25 had.

1 THE WITNESS: No, sir.

2 COMMISSIONER HANSON: If you look at that you  
3 can easily see there's an entire page, plus there's a  
4 half a page more persons on just that one meeting. So I  
5 just want to bring that to your attention.

6 The type of meetings were interesting to me.  
7 Were some of these meetings with persons who were hired  
8 to lobby on behalf of the pipeline?

9 THE WITNESS: Right. This list we were trying  
10 just to answer your question, have we met with -- and if  
11 we misinterpreted your question -- but we were just  
12 trying to demonstrate that we have touched -- I guess we  
13 got the impression from your question that we had not  
14 talked to public officials. And so this was in response  
15 to demonstrating that we have tried to, and, in fact,  
16 touched public officials throughout this process.

17 And 100 percent of these were lobby meeting  
18 types. These were handshake meetings. They were just  
19 general informative meetings. And that's why I was very  
20 specific to separate out the meetings that I personally  
21 had on physical routing studies versus this generic list  
22 of just meetings that we had as touches to the public  
23 officials.

24 I was never trying to represent this as being,  
25 you know, for or against type of approvals or

1 nonapprovals of the pipeline.

2 COMMISSIONER HANSON: Thank you. I appreciate  
3 that explanation. Because I had asked to know the number  
4 of officials that you had met with at these different  
5 counties and the different towns in regard to  
6 decision-making with policymakers. And you'd agree with  
7 me, then, that this list is not of 171 meetings. It's  
8 approximately 56 meetings, subject to you counting, and  
9 it's meetings with -- well, receptions and fundraisers  
10 and some developers, land developers, and some persons  
11 who it appears were lobbying on behalf of DAPL?

12 THE WITNESS: That's correct.

13 COMMISSIONER HANSON: That's all I wanted. I  
14 just want to make certain that the evidence was clear  
15 there.

16 THE WITNESS: Yes, sir.

17 COMMISSIONER HANSON: Thank you.

18 On Exhibit A 1. I believe it's Dakota Access's.  
19 It's a map showing -- I don't know that you have to refer  
20 to it, but it's a map showing -- and I may refer to it on  
21 some other questions, showing the original route and --  
22 that was presented at open houses, and then the one that  
23 was filed with us -- with the PUC, excuse me, in December  
24 of '14, December 15 of 2014, and then the one that was  
25 filed with us on December 23, '14, and the proposed

1 alternatives.

2 And on that route it snakes through the  
3 communities, I had made a statement at the meeting in  
4 Sioux Falls that I was very concerned with the route, the  
5 routing. And subsequently it has been moved.

6 If you look at that map -- and I understand this  
7 is not for the purposes of measurement -- you did agree  
8 that it was skirting very close to Tea, and it's within  
9 about a mile of Hartford, I believe, and it does go  
10 within the quarter mile of the city limits of Harrisburg.  
11 It goes through the proposed development area.

12 I'm curious, is that the location where the  
13 power line is? I'm familiar with the area. It seems  
14 like there's a power line right there.

15 THE WITNESS: I believe that's 100 percent  
16 correct. And I don't have the map in front of me. And  
17 actually I really would like to have a quick break, we  
18 can get the map so I can answer your questions correctly.

19 COMMISSIONER HANSON: That would be fine with  
20 me, if it's all right with others.

21 MS. WIEST: We'll take a 10-minute break. Be  
22 back at 5 after.

23 (A short recess is taken)

24 MS. WIEST: Commissioner Hanson.

25 COMMISSIONER HANSON: Thank you. Were you able

1 to find a copy of the map that I had been referring to,  
2 Mr. Mahmoud?

3 THE WITNESS: Yes, sir.

4 COMMISSIONER HANSON: Would you agree that from  
5 the look of that map, the route is approximately one  
6 quarter from the city limits of Harrisburg and it is  
7 within the growth area?

8 THE WITNESS: I do.

9 COMMISSIONER HANSON: And did you have an  
10 opportunity to discuss the power line, electric power  
11 line?

12 THE WITNESS: With?

13 COMMISSIONER HANSON: With any of your -- let me  
14 rephrase.

15 Do you understand that the route south of  
16 Harrisburg follows the electric power line that you had  
17 discussed previously?

18 THE WITNESS: Yes, sir. That's correct.

19 COMMISSIONER HANSON: How far does that electric  
20 power line extend? And does the new route follow a power  
21 line all the way to Hartford or do you have any idea?

22 THE WITNESS: It ends prior to the end of -- so  
23 where the line -- the blue line and the red line come  
24 back together, the power line ends just about, you know,  
25 a little bit in that area.

1           So when we were meeting with the folks in  
2 Harrisburg, they have, I guess it's a future waterline  
3 and some connectivity that they wanted to put in. I  
4 can't remember if it was water or sewer tying into their  
5 system. And they wanted us to be in this -- I know I  
6 didn't mention that earlier, but part of the reasoning  
7 for us being in that location was because of the existing  
8 utilities and their future plans for that area. And so  
9 that's a couple of reasons why they preferred us to be on  
10 the red dashed line as opposed to one of the alternative  
11 lines.

12           COMMISSIONER HANSON: All right. You said where  
13 the blue line and the red line come together. They come  
14 together at the landfill, and they come together at  
15 Harrisburg. Were you referring to the Harrisburg?

16           THE WITNESS: Yes, sir.

17           COMMISSIONER HANSON: And my question is, again,  
18 do you know how far the electric power line extends then  
19 along the route where they are routed together?

20           THE WITNESS: It extends almost to the point  
21 where if you look directly south of where the word the  
22 Harrisburg is, where the S is, from that point looking  
23 west, that's about where that power line ends from what  
24 my recollection is.

25           COMMISSIONER HANSON: About how far west?

1           THE WITNESS: It goes four miles from that point  
2 to the west. So it would go -- I believe these are  
3 one-mile sections.

4           COMMISSIONER HANSON: Correct.

5           THE WITNESS: So you'd just have to count over  
6 four. So just in front of where you enter into the  
7 Harrisburg location. I believe that's correct.

8           COMMISSIONER HANSON: It's west almost to the  
9 interstate? Is that --

10          THE WITNESS: No. No.

11          COMMISSIONER HANSON: Just from that point that  
12 you're referring to 4 miles west?

13          THE WITNESS: Right.

14          COMMISSIONER HANSON: Okay. So it's a couple of  
15 miles from the interstate?

16          THE WITNESS: Yeah. It's between the interstate  
17 and that point. Yes, sir. That's correct.

18          COMMISSIONER HANSON: Thank you. That's close  
19 enough. Appreciate it.

20                 So when you met with the folks from Sioux Falls,  
21 looking at the previous line and the reroute line, it  
22 appears that they chose the route that was 4 to 5 miles  
23 farther away from the city; correct?

24          THE WITNESS: Yes, sir.

25          COMMISSIONER HANSON: And so you stated that you

1 pointed to multiple alternatives. I'm assuming that  
2 those multiple alternatives are the lines that are on  
3 this map?

4 THE WITNESS: Yes, sir.

5 COMMISSIONER HANSON: So they pointed to the  
6 route that was basically the farthest away except for the  
7 lines that were -- or let me not assume that.

8 Did they point to this line, the red line?

9 THE WITNESS: The City of Sioux Falls did not,  
10 but Harrisburg and Tea absolutely did.

11 COMMISSIONER HANSON: All right. Thank you.

12 Which line did the folks in Sioux Falls point  
13 to? Or you said they pointed to --

14 THE WITNESS: They actually just confirmed that  
15 they were okay with the route as we relocated it.

16 COMMISSIONER HANSON: Okay with the red line?

17 THE WITNESS: Yes, sir.

18 COMMISSIONER HANSON: Okay. Thank you.

19 You made a number of great points regarding the  
20 need for a pipeline, including it's better shipping oil  
21 by rail, and we have an important need for petroleum.

22 Would you agree, though, that we need to build a  
23 pipeline the right way and the right location?

24 THE WITNESS: Yes, sir.

25 COMMISSIONER HANSON: I asked -- well, let me

1 ask you this. Mr. Frey is an engineer for the company;  
2 correct?

3 THE WITNESS: Yes, sir.

4 COMMISSIONER HANSON: And he's one of the  
5 principal persons for design of the project, isn't he?

6 THE WITNESS: Yes.

7 COMMISSIONER HANSON: And Mr. Edwards is a  
8 project manager; correct?

9 THE WITNESS: Yes.

10 COMMISSIONER HANSON: And his principal  
11 responsibility is to make certain that the pipeline is  
12 built properly; correct?

13 THE WITNESS: Yes, sir.

14 COMMISSIONER HANSON: So do they have an  
15 interest in the routing? Do they have a say in the  
16 routing of the pipeline? Do they discuss that as part  
17 of --

18 THE WITNESS: They do.

19 COMMISSIONER HANSON: I asked both of them -- I  
20 asked you a question regarding the highest economic  
21 growth and construction areas of South Dakota and the  
22 need for -- I didn't use the word need with you. I did  
23 with both Mr. Frey and Mr. Edwards.

24 And I'll ask you the same question I asked them.  
25 And the word need is very important. I need a yes or a

1 no. We've all heard your excellent articulation of the  
2 need for a pipeline.

3 I don't disagree. I want you to know. I don't  
4 disagree that there's a need for pipelines.

5 Are you aware if there is a need for routing the  
6 pipeline so close to the highest populated and highest  
7 economic growth area of South Dakota?

8 THE WITNESS: I believe there is.

9 COMMISSIONER HANSON: There is a need?

10 THE WITNESS: Yes.

11 COMMISSIONER HANSON: What is that need?

12 THE WITNESS: Okay. Now --

13 COMMISSIONER HANSON: Now you get to get into  
14 your --

15 THE WITNESS: Good. Okay.

16 COMMISSIONER HANSON: But I want you to confine  
17 it to telling us what the need is for placing it so close  
18 to that populated area. Such as there's rail in that  
19 location, and we want to offload some petroleum to that  
20 rail or something of that nature.

21 THE WITNESS: And I don't know -- I mean, Sioux  
22 Falls -- or the State of South Dakota doesn't have any  
23 refineries to produce gasoline or refined products for  
24 that matter, and gasoline is a refined product.

25 So having that ability at some point, sure,

1 that's a great example of a need for the use of the  
2 pipeline within a populated area, or a higher density  
3 area where there could be some type of industrial  
4 activity such as a future refinery or production or some  
5 type of activity that would consume crude oil.

6 And crude oil, when we say consumption of crude  
7 oil, crude oil is consumed into the process of refining  
8 it into other products. So when I say consumption, it  
9 would be a lot of different things.

10 So in my opinion and when I look at the big  
11 picture of things, and when I balance these things out in  
12 my head and how we're routing these pipes, the need to me  
13 broaches more than the need of the City of Sioux Falls to  
14 place this pipeline in an area that currently is  
15 agricultural today.

16 I don't doubt it's going to be some type of  
17 residential area at some point in the future. I just  
18 don't know when that future is.

19 But without the pipeline, without the basic  
20 premise of the pipeline, there is no future growth. So  
21 to me this pipeline is critical to the development and  
22 growth of Sioux Falls, South Dakota, the United States.  
23 I've already been through that. So to me that's the  
24 need.

25 The need is to minimize the environmental

1 footprint as well. So it's a balance of the need for the  
2 purposes I've already stated, but also the need to  
3 minimize impacts to the environment, the footprint that  
4 this pipeline will take up.

5 So we've already extended it once to get outside  
6 the City of Sioux Falls, which we've agreed to do. I  
7 know I've said this a lot. We think we did the right  
8 thing by moving it to where we did, and we got it kind of  
9 signed off on in our mind.

10 So when I look at need, does the need to move it  
11 further outside the City of Sioux Falls justify the  
12 additional environmental impacts, the additional impacts  
13 to landowners, the additional impacts to wetlands,  
14 potential threatened and endangered species.

15 The risk profile. For every inch of additional  
16 pipeline in the ground, you have an increased risk factor  
17 that you don't necessarily have to have. So the longer  
18 the pipe, the more chances the interaction with third  
19 parties or other people or farm implements, whatever it  
20 may be. So you do have a need.

21 And we believe we have a responsibility to  
22 minimize the length as much as we can to balance that  
23 against the economic development areas, the other  
24 constraints out there for environmental considerations  
25 and demographics and all those fun things.

1           So to me there is a need to keep it as short as  
2 we can and route it through an area that does appear to  
3 be within a growth area, but also is in an area that  
4 we're following an existing utility. And the city  
5 officials that we contemplated this line with gave us the  
6 green light that it's okay.

7           I don't know what else we can do to minimize  
8 that without increasing the environmental footprint of  
9 the project. And so to me that justifies the need to be  
10 where we're at.

11           COMMISSIONER HANSON: So do you believe that  
12 there's -- you mentioned refinery. You don't believe  
13 there's going to be a refinery around Sioux Falls, do  
14 you?

15           THE WITNESS: I don't know. I just said that  
16 could be a future need in definitional terms.

17           COMMISSIONER HANSON: But you certainly wouldn't  
18 advocate that as having a reason for a pipeline there.

19           THE WITNESS: Me personally, no, sir.

20           COMMISSIONER HANSON: So basically your argument  
21 is that there's a need for a pipeline, and it boils down  
22 to the specific location to my question. The answer is,  
23 again, shortest distance affects the fewest landowners.  
24 And the environment.

25           THE WITNESS: And the environment and everything

1 else I just went through.

2 COMMISSIONER HANSON: Well, summarizing your  
3 argument, shortest distance -- I'm not worried about  
4 Sioux Falls. It's far enough outside the city of Sioux  
5 Falls. It's Tea and Harrisburg and Hartford and Humboldt  
6 and all of that area that's in the growth area.

7 But thank you for answering that question.

8 THE WITNESS: I may add, the City of Hartford  
9 approached us to put our office there to -- I mean,  
10 they're actually pretty excited with coming through their  
11 community. They approached me to put our office in their  
12 community, with our pipeline.

13 So I just wanted you to be aware of that because  
14 I think it's important to know that these communities --  
15 and I can't speak for all of them, but we certainly have  
16 gotten some positive indications from them that they're  
17 okay.

18 COMMISSIONER HANSON: I think we've all worked  
19 with economic folks, and they look for those  
20 opportunities, don't they?

21 THE WITNESS: Sure.

22 COMMISSIONER HANSON: Sort of making lemonade  
23 out of lemons for some?

24 THE WITNESS: It is.

25 COMMISSIONER HANSON: I'm finding some of the

1 questions I've written down. I'll have to do some of  
2 them by memory, if that's all right.

3 THE WITNESS: Yes, sir.

4 COMMISSIONER HANSON: Did you hear the  
5 discussion pertaining to the leaks around Sioux Falls,  
6 the different degradation that took place around Sioux  
7 Falls?

8 THE WITNESS: No, I did not. No, sir.

9 COMMISSIONER HANSON: Well, I won't ask you  
10 questions on that. I'll just encourage you to take a  
11 look at that testimony because of the four completely  
12 different types of degradation created by petroleum  
13 products and the challenges, all except one were within  
14 the city limits. One was within a mile of the city  
15 limits. So we've had those challenges. So a little bit  
16 gun shy on some of those things. And now I'm gun shy for  
17 the other communities.

18 Ms. Howard answered a number of questions. I'm  
19 wondering if you agree with some of the answers that were  
20 given. I was surprised by some of the answers.

21 Would a further routing of the pipeline farther  
22 away from the highly populated areas further decrease  
23 community impact?

24 You touched on that a little bit.

25 THE WITNESS: Would it decrease? I'm sorry.

1           COMMISSIONER HANSON:  Would a further routing of  
2 the pipeline farther away from the highly populated areas  
3 further decrease community impact?

4           THE WITNESS:  Well, it would certainly decrease  
5 community impacts to the community you're moving away  
6 from.  But it certainly increases the impacts to the  
7 community you're moving closer to.  So, again, I call  
8 that transference of impacts.  And I don't believe in --

9           Unfortunately, when we're balancing out the  
10 different constraints, and we do, very carefully consider  
11 those considerations because we've certainly been  
12 challenged on routing decisions for environmental justice  
13 claims for moving pipelines to either poor or different  
14 demographic, away from a certain demographic.  So we're  
15 very sensitive to that argument.

16           COMMISSIONER HANSON:  Would future growth of  
17 these communities increase community impact of the  
18 expected inhabitants and the economic development -- and  
19 the economic impact?  Excuse me.

20           THE WITNESS:  It certainly could.  Sure.

21           COMMISSIONER HANSON:  Will the pipeline's close  
22 proximity to communities have anything but positive  
23 effect on the community?

24           THE WITNESS:  You kind of asked that in a --

25           COMMISSIONER HANSON:  In a tight situation,

1 isn't it?

2 THE WITNESS: Yeah. I think there certainly  
3 could be the potential for a negative impact outside of  
4 just all positive. But I also believe there's a lot of  
5 positives that they kind of balance each other out. But,  
6 no, certainly there could be negatives.

7 COMMISSIONER HANSON: I don't disagree with any  
8 of your answers to any great extent. I don't disagree  
9 with that answer, but don't agree with your employee who  
10 testified.

11 Are you aware of any environmental reason why  
12 the route of the pipeline cannot be moved farther away  
13 from the Harrisburg -- high growth areas of Harrisburg  
14 and Tea?

15 THE WITNESS: I would have to look. No, sir.  
16 I'm not.

17 COMMISSIONER HANSON: You're not aware of any,  
18 though?

19 THE WITNESS: Other than the obvious increase of  
20 the environmental footprint by adding length. So you  
21 would have additional wetland, potential of additional  
22 cultural sites, additional impacts to soil and  
23 agricultural areas.

24 COMMISSIONER HANSON: Your discussion, I think  
25 you've answered a few other questions, but I am actually

1 going to give you a break and not ask you any more.

2 Thank you.

3 CHAIRMAN NELSON: I'm going to go back to the  
4 same two topics I began with.

5 Regarding the Stofferahn property, has Dakota  
6 Access commenced condemnation proceedings on that  
7 property?

8 THE WITNESS: Yes, sir. I believe we have.

9 CHAIRMAN NELSON: Does that foreclose the  
10 opportunity for negotiation of the location of the route  
11 on their property if they so chose to attempt that  
12 negotiation?

13 THE WITNESS: No. As a matter of fact, we  
14 encourage it. We will negotiate up until the day that  
15 the judge makes a decision.

16 CHAIRMAN NELSON: In regard to the third-party  
17 monitor, if the three Commissioners in their  
18 decision-making capacity felt that we needed that type of  
19 a situation to assure that the construction activities  
20 and the ultimate reclamation was done properly, is that  
21 something that Dakota Access would support?

22 THE WITNESS: In general terms, as I think I  
23 mentioned earlier, I'm not adverse to giving you guys  
24 immediate access to our environmental inspection.

25 I think it would be -- if we could negotiate a

1 pro and con or a pluses on each side. I don't think  
2 there's a con, but if there was pluses for you for  
3 comfort for open access and disclosure, and if there  
4 could also be some leeway for whatever corrective things  
5 that needed to be done, I think we could probably reach a  
6 pretty quick resolution on that, similar to the FERC  
7 situation.

8 CHAIRMAN NELSON: You know, and I wish that we  
9 could sit down over a cup of coffee and come up with that  
10 ideal situation. Unfortunately, that's not how this  
11 works. And as I have said before, at the end of the day,  
12 if this pipeline is approved, if it's built, I don't care  
13 how we get to the ultimate point of perfect reclamation.  
14 I don't care how we get there. I don't care who oversees  
15 it, but we've got to make sure we get there.

16 THE WITNESS: Yes, sir.

17 CHAIRMAN NELSON: Thank you.

18 THE WITNESS: May I add -- this is a question.  
19 Can we work that out with Staff and propose something?

20 CHAIRMAN NELSON: Under the laws of the state  
21 you are welcome to negotiate anything with Staff.

22 THE WITNESS: Okay.

23 COMMISSIONER SATTGAST: I just had some  
24 follow-up questions.

25 Going back to Exhibit 55, the meeting with

1 Edward Fett, was that you and met with --

2 THE WITNESS: No, sir. I wasn't part of -- I  
3 believe I would have to study it 100 percent, but I don't  
4 think I was at any of these meetings.

5 COMMISSIONER SATTGAST: Okay. So I don't have  
6 that one in front of me since Commissioner Hanson and I  
7 are sharing, I think, the same Exhibit 54. Those are the  
8 Commissioners that you met with, I believe, the counter  
9 Commissioners?

10 THE WITNESS: Yes, sir. The table that listed  
11 the four or five meetings?

12 COMMISSIONER SATTGAST: Yes.

13 THE WITNESS: Yes. Those are the ones I  
14 personally attended.

15 COMMISSIONER SATTGAST: Okay. I think that's --  
16 Then I think it was -- you explained that there  
17 would be approximately 2,200 trucks that would be  
18 displaced by the -- do you have an identifier of what  
19 routes those trucks would be -- that those trucks  
20 probably currently are using or --

21 THE WITNESS: I don't. No.

22 So those are the number of trucks, if you take  
23 the number of barrels in the pipeline, which is 450,000  
24 is our generic statement, quantity or volume, divided by  
25 200 barrels per truck, that equals 2,250 trucks.



1 the plan.

2 And just as a quick example that's been talked about  
3 is not topsoil segregating. That would be a landowner  
4 request. So we would document that as part of the  
5 conditions of construction on their property.

6 Q. So regarding the deviations that DAPL could propose,  
7 what would happen in that instance if a landowner does  
8 not agree with those deviations?

9 A. Well, that's an interesting question. We provide  
10 the base template, the Ag Mitigation Plan. And that's  
11 the starting point.

12 So if we propose something that we believe would be  
13 in excess of the Ag Mitigation Plan or a reduction of, we  
14 would propose that to the landowner, that the landowner  
15 said, no, we really want you to do this, chances are, we  
16 would do that.

17 If they said absolutely, we want you to do something  
18 and we didn't agree, then we would talk through it, and  
19 most times we'd probably agree.

20 So I think the general answer is we try not to leave  
21 any of those type of issues unresolved prior to going to  
22 construction, but when it does occur -- well, I'll tell  
23 you this: We have to resolve it before construction  
24 begins. And so either the landowner relents or we relent  
25 and then we move on. But it's not left unresolved when

1 we go to construction.

2 Q. But you would agree, wouldn't you, that there are  
3 unresolved issues that force the company and landowners  
4 into court?

5 A. That's prior to construction, yes, ma'am.

6 Q. Is it your testimony that the company will relent if  
7 the landowner refuses to?

8 A. No. No. That's not it. In the unfortunate event  
9 if we have to go to condemnation, then the court would  
10 decide on what those conditions would be.

11 Q. And the deviation would be addressed in the  
12 condemnation proceeding?

13 A. Yes, ma'am.

14 MS. REAL BIRD: Okay. That's my question.  
15 Thank you.

16 MS. WIEST: Any other questions? Mr. Rappold?

17 MR. RAPPOLD: I just have a few.

18 RECROSS-EXAMINATION

19 BY MR. RAPPOLD:

20 Q. Following up to Commissioner Hanson's questions.  
21 You testified you didn't think that building the pipeline  
22 would actually free up any rail -- any trains; right?

23 A. I don't believe that the reduction -- that this  
24 pipeline will have a five-train impact with the number of  
25 trains. I don't think that that's going to happen. I

1 think they will still be on the rails.

2 Q. Okay. You think that the same number -- the same  
3 amount of crude oil that's being currently shipped from  
4 the Bakken by train will remain the same if your  
5 pipeline's constructed; right?

6 A. I think it will actually be a little bit more.  
7 Because I think what I was trying to say in that  
8 circumstance, or I did say is that because of the shut-in  
9 production, that our pipeline will transport those  
10 barrels. And if the rail capacity exists and it's  
11 competitively priced -- now I'm adding a little bit from  
12 what I said before.

13 Q. Yeah. You are.

14 A. -- that the number of trains would probably still be  
15 the same.

16 Q. Okay. We've heard testimony, I believe we have  
17 anyway, that part of the rationale for this pipeline is  
18 to decrease the amount of oil that's shipped by rail.  
19 But yet your testimony doesn't line up with that general  
20 proposition, does it?

21 A. If all factors --

22 Q. It's just a yes or no. It just requires a yes or  
23 no.

24 A. Well, then, I'm going to have to say no.

25 Q. Okay. Do you know if any of the trucking companies

1 that are currently shipping Bakken crude oil are  
2 South Dakota trucking companies?

3 A. No, I do not.

4 Q. So you can't tell us -- you also said that you  
5 thought there was going to be a decrease in the amount of  
6 trucks that are shipping Bakken crude; right?

7 A. I believe that.

8 Q. Okay. So you can't tell us if the construction and  
9 operation of your pipeline is going to impact any  
10 South Dakota trucking companies that may be shipping  
11 crude oil currently?

12 A. No, I cannot.

13 Q. Okay. You would agree that it's possible that there  
14 are South Dakota companies that currently perform that  
15 service; right?

16 A. I would imagine, yes.

17 Q. It's possible?

18 A. Sure.

19 Q. We don't know because no one put that evidence on.

20 A. That's correct.

21 Q. That's correct.

22 So -- and then you also testified that without your  
23 pipeline, there is no future growth for the City of Sioux  
24 Falls and its surrounding communities.

25 Is that what you testified to?

1 A. I don't think I played it that strong.

2 Q. No. You didn't make it that strong, but is that  
3 what you said?

4 A. Sorry?

5 Q. Is that what you -- did you say without this  
6 pipeline there is no future growth for Sioux Falls and  
7 the surrounding communities?

8 A. No. I don't think that's exactly what I said.

9 Q. Tell us what you said because I obviously  
10 misunderstood or I didn't hear you properly.

11 MR. KOENECKE: I think I'm going to object. The  
12 question, telling us what he said, there's no need to  
13 regurgitate that evidence. It's already in the record  
14 once.

15 MS. WIEST: Are you withdrawing?

16 MR. RAPPOLD: Uh-huh. Let's have a ruling.

17 MS. WIEST: Objection sustained.

18 MR. RAPPOLD: The testimony of what he said's on  
19 the record.

20 Q. Are you aware that Sioux Falls and the surrounding  
21 communities have been growing for the last I don't know  
22 how many years?

23 MR. KOENECKE: Asked and answered.

24 MR. RAPPOLD: I didn't ask that question.

25 MR. KOENECKE: Somebody did.

1 MR. RAPPOLD: Doesn't matter. I didn't ask that  
2 question. I still have a right and opportunity to ask  
3 this question because I did not ask this question.

4 MR. KOENECKE: No, you don't. It's repetitive  
5 and argumentative. You don't have a right to reask a  
6 question that's argumentative --

7 MS. WIEST: As far as repetitive, I would agree.  
8 Objection sustained.

9 MR. RAPPOLD: I'll rest.

10 MS. WIEST: Ms. Craven?

11 MS. CRAVEN: No further questions. Thank you.

12 MS. WIEST: Ms. Northrup?

13 MS. NORTHRUP: Nothing further.

14 MS. WIEST: Mr. Boomsma.

15 REXCROSS-EXAMINATION

16 BY MR. BOOMSMA:

17 Q. One question. Barely can see you. I'll try and  
18 make it short. A yes or no question.

19 Is there more growth on the east side of the  
20 proposed pipeline or on the west side of the proposed  
21 pipeline in the context of the Sioux Falls, Harrisburg,  
22 and Tea areas?

23 A. I don't have an answer for you.

24 MR. KOENECKE: I think the pipeline in the Tea  
25 and Harrisburg areas runs east and west and so isn't

1 it -- I don't want to put words in the questioner's  
2 mouth, but I don't understand east and west in that  
3 context in those areas.

4 MS. WIEST: I think he said he didn't know.  
5 A. I don't know.

6 MR. BOOMSMA: That's all I have.

7 MS. WIEST: Staff, did you have any further  
8 cross?

9 MS. EDWARDS: I have no additional questions.  
10 Thank you.

11 MS. WIEST: Do you have any redirect?

12 MR. KOENECKE: No, I do not. Thank you.

13 MS. WIEST: Thank you.

14 THE WITNESS: Thank you.

15 MS. WIEST: You may call your next witness.

16 MR. KOENECKE: We call Chuck Frey.

17 DIRECT EXAMINATION

18 BY MR. KOENECKE:

19 Q. Mr. Frey, are you aware that you're still under  
20 oath?

21 A. Yes.

22 Q. Did you prepare Prefiled Rebuttal Testimony in this  
23 matter?

24 A. Yes.

25 Q. Is that in front of you with an exhibit number on

1 it?

2 A. It is.

3 Q. What's the number?

4 A. DAPL 37.

5 Q. Did you prepare that testimony?

6 A. Yes.

7 Q. And if I asked you all those questions today, would  
8 you answer them the same way?

9 A. Yes.

10 MR. KOENECKE: I would move DAPL 37.

11 MS. WIEST: Just for clarification, there's an  
12 Exhibit A and an Exhibit B. Are those with that  
13 testimony?

14 MR. KOENECKE: Yes. I intend them to be  
15 included all in the same.

16 MS. WIEST: Are they in that testimony?

17 THE WITNESS: Yes, they are.

18 MS. WIEST: Okay. I just wanted to make sure  
19 what we were all ruling on.

20 Is there any objection to Mr. Frey's rebuttal  
21 testimony Exhibit 37?

22 MS. REAL BIRD: The Yankton Sioux Tribe would  
23 like to examine the witness for the purposes of an  
24 objection.

25 MS. WIEST: Go ahead.

1 MS. REAL BIRD: Mr. Frey, good afternoon. Good  
2 morning.

3 THE WITNESS: Good morning.

4 MS. REAL BIRD: My name is Thomasina Real Bird.  
5 I'm an attorney for the Yankton Sioux Tribe.

6 Mr. Frey, would you turn to Exhibit A.

7 THE WITNESS: Yes.

8 MS. REAL BIRD: Mr. Frey, did you author  
9 Exhibit A?

10 THE WITNESS: No. It was prepared by the vendor  
11 for the coating.

12 MS. REAL BIRD: Does Exhibit A bear your  
13 signature?

14 THE WITNESS: No, it does not.

15 MS. REAL BIRD: Are you an authorized  
16 representative of Valspar?

17 THE WITNESS: I am not.

18 MS. REAL BIRD: The Yankton Sioux Tribe objects  
19 to the admission of Exhibit A and its reference in the  
20 prefiled testimony. It cannot be authenticated. The  
21 author and signer is not offered to authenticate the  
22 letter and signature. Valspar is not offered a  
23 representative to authenticate and, moreover, because the  
24 witness did not author Exhibit A it is hearsay.

25 MS. WIEST: Any response?

1 Q. Mr. Frey, did you obtain those letters in the  
2 ordinary course of business?

3 A. Yes.

4 Q. And did you maintain those letters on file at your  
5 office?

6 A. They were maintained by other members of the project  
7 team, yes.

8 Q. They're maintained by the project.

9 MR. KOENECKE: Then they're admissible under  
10 business records exception.

11 MS. REAL BIRD: They're not business records.

12 MR. KOENECKE: He just testified they were.

13 MS. WIEST: Let her speak.

14 MS. REAL BIRD: I guess my response is that it  
15 concerns -- the authenticity of whether it's a Valspar  
16 letter and their author is not present, and so whether  
17 they're retained in Mr. Frey's office, that's not the  
18 issue. We have to look at the letter's origin.

19 MS. WIEST: I will sustain the objection, and I  
20 will not admit the Exhibit A attached to Exhibit 37.

21 MS. REAL BIRD: And may I conduct further  
22 examination of the witness for the purposes of a second  
23 objection?

24 MS. WIEST: Yes.

25 MS. REAL BIRD: Mr. Frey, would you turn to

1 Exhibit B.

2 THE WITNESS: Yes.

3 MS. REAL BIRD: Mr. Frey, did you author  
4 Exhibit B?

5 THE WITNESS: I did not.

6 MS. REAL BIRD: Does Exhibit B bear your name?

7 THE WITNESS: It does not.

8 MS. REAL BIRD: Are you an author of any of the  
9 studies cited in Exhibit B?

10 THE WITNESS: I am not.

11 MS. REAL BIRD: Are you a representative of 3M?

12 THE WITNESS: I am not.

13 MS. REAL BIRD: The Yankton Sioux Tribe objects  
14 to the admission of Exhibit B and the reference in the  
15 prefiled testimony. It cannot authenticated. 3M is not  
16 present. Mr. Frey not a representative of 3M. Moreover,  
17 it contains double hearsay.

18 MS. WIEST: Any response?

19 MR. KOENECKE: Our response is exactly the same.  
20 Mr. Frey went out and obtained this information as part  
21 of preparing for this docket and providing information to  
22 both the Commissioners and the parties and is now being  
23 made out to being some sort of a villain for having done  
24 so.

25 It's a business record, as he testified to,

1 that's been maintained by the project. It's specifically  
2 for this hearing which is specifically the business of  
3 Dakota Access.

4 It's clearly an exception to the hearsay rule  
5 and provides a much greater understanding for everybody  
6 as to what the situation is with the pipe sitting outside  
7 that's been at issue during this hearing.

8 MS. REAL BIRD: May I briefly respond?

9 MS. WIEST: Yes.

10 MS. REAL BIRD: The prefiled testimony was filed  
11 prior to those questions coming up. And so it seems  
12 disingenuous that they're directly in response to what  
13 was asked during the hearing because it was filed prior  
14 to the existence of the hearing.

15 And I would also take exception with counsel's  
16 characterization of my question as an attempt to vilify  
17 the witness. And I would ask that that be stricken from  
18 the record.

19 MS. WIEST: I will grant that being stricken  
20 from the record.

21 And I would also note that I'm not sure where  
22 this -- I mean, 3M is stamped on it, but it's not dated  
23 and there's -- I'm not even sure who the author is. And  
24 I will grant their motion to not admit Exhibit B.

25 Q. Mr. Frey --

1 MR. KOENECKE: Shall I continue?

2 MS. WIEST: Yes.

3 Q. Mr. Frey, as part of your responsibilities to the  
4 project, did you investigate the effects of sunlight or  
5 UV rays on pipe coatings?

6 A. I did.

7 Q. What did you learn?

8 A. I learned that under the storage without protection  
9 from the atmosphere for a short period of time, less than  
10 a year, such as what we are doing, does not have any  
11 measurable effect on the efficiency or effectiveness of  
12 the coating.

13 Q. Do you recall the photographs of pipe storage yards  
14 that were presented previously?

15 A. I do.

16 Q. Do you recall discussion about different colored  
17 coatings on the pipe?

18 A. I do.

19 Q. Can you explain why there are two different color  
20 coatings on the pipe?

21 A. Yes. The lighter greenish colored coating is the  
22 pipe with fusion bonded epoxy applied, and that is the  
23 color of the fusion bonded epoxy that was applied to this  
24 pipe.

25 The darker colored coating is an abrasion resistant

1 coating that is applied on top of the fusion bonded  
2 epoxy. The purpose of the abrasion resistant coating is  
3 to protect the fusion bonded epoxy coating from  
4 degradation, mechanical damage for drills and bores and  
5 so that pipe that's planned to be used in drills and  
6 bores does have that additional protective coating placed  
7 on it.

8 Q. Mr. Frey, will all of the pipeline welds be  
9 nondestructively tested?

10 A. Yes. 100 percent of the welds will be  
11 nondestructively tested. The manual welds will be  
12 nondestructively tested by x-ray. The automatic machine  
13 welds will be nondestructively tested ultrasonically.

14 Q. And so when you were asked about ultrasonic testing  
15 last week, your answer then was incorrect?

16 A. It was.

17 Q. Did you oversee the determination of the unusually  
18 sensitive areas and high consequence areas for the  
19 project?

20 A. Yes.

21 Q. Does the project cross USAs or HCAs --

22 MS. CRAVEN: Objection. This is beyond the  
23 scope of the pipeline coating. How do we get to USAs?

24 MS. WIEST: Can you respond?

25 MR. KOENECKE: USAs and HCAs have been brought

1 up every day of this hearing, and Mr. Frey is testifying  
2 as to what he knows about those determinations and his  
3 position in that determination process.

4 It's completely relevant and completely  
5 appropriate for rebuttal in my opinion.

6 MS. CRAVEN: He's the vice president of  
7 engineering.

8 MS. WIEST: Objection overruled.

9 MR. KOENECKE: Can you read the question back,  
10 please.

11 (Reporter reads back the last question.)

12 Q. So I'd ask the witness to answer the question.

13 A. In my opinion, no.

14 Q. Was other review of that determination performed?

15 A. It was. Monica Howard led that effort, and she can  
16 best describe the other investigations that were  
17 performed.

18 Q. In your opinion, is Dakota Access -- or has Dakota  
19 Access designed this pipeline above and beyond what's  
20 required by DOT Part 195?

21 MR. BOOMSMA: I'm going to object. This is  
22 beyond what I see in his rebuttal testimony. I just  
23 don't see mention of this made in there. We're straying.

24 MS. WIEST: I believe in most cases that people  
25 have been able to go beyond their testimony, especially

1 to respond to what has happened during the hearing, so  
2 objection overruled.

3 A. Yes. Dakota Access Pipeline has performed and will  
4 perform a number of steps that are in excess of those  
5 required by the code.

6 These include DAPL performed quality control  
7 inspections of the mills prior to any mills being allowed  
8 to bid on supplying pipe for the pipeline. DAPL placed  
9 an inspector in each of the mills for the duration of the  
10 time that pipe was being rolled and produced for DAPL.

11 DAPL ordered all of the mill pipe to API 5L PLS2,  
12 which is a more stringent -- or a specification that has  
13 more stringent testing and recordkeeping requirements  
14 than are established in the code.

15 As was mentioned previously, DAPL will  
16 nondestructively test 100 percent of the welds on this  
17 pipeline project, whereas only 10 percent of each day's  
18 production of welds is required to be nondestructively  
19 tested.

20 DAPL will provide a minimum cover of 48 inches in  
21 cultivated lands in South Dakota, and the code  
22 requirement is 36 inches.

23 MS. CRAVEN: Objection. Now he's testifying  
24 about re-vegetation?

25 THE WITNESS: No. I'm testifying about what the

1 code is.

2 MS. WIEST: Objection overruled.

3 A. DAPL's going to provide a minimum of 60 inches of  
4 cover at road ditches where the applicable codes require  
5 36 inches of cover.

6 DAPL will provide 60 inches of cover at all water  
7 crossings where the code requires 48 inches of cover. If  
8 the water crossing is in excess of 100 feet and 36 inches  
9 of cover, if it's less than 100 feet.

10 DAPL is providing, will provide a minimum separation  
11 of 24 inches between its pipeline and tile. The code  
12 requires only 2 inches of separation between the pipeline  
13 and tile.

14 DAPL's performed a very proactive investigation of  
15 the pipeline routing and need for valves and has  
16 committed to installing 40 main line block valves, has  
17 also committed to providing actuators on each of those  
18 valves with the ability for those valves to be monitored  
19 and controlled, closed from our control center. That's  
20 far in excess of any code requirement.

21 DAPL's going to use heavier wall, thicker pipe at  
22 all drills and bores and at all crossings where there's  
23 presence of Topeka shiner.

24 DAPL has made no requests for an alternate maximum  
25 operating pressure or any other special conditions.

1           DAPL performs its aerial patrols generally scheduled  
2 weekly, and those patrols are only required to be done 26  
3 times per year. And has prepared a Spill Response Plan  
4 in accordance with a new API recommended practice 1174.

5           So those are a number of things that I was able to  
6 come up with here in the hearing to demonstrate that DAPL  
7 is not trying to do this as inexpensively as possible.  
8 A number of these steps we're taking, they cost money  
9 and -- but we feel that they provide protection to the  
10 citizens of South Dakota and provide for a safer and more  
11 efficient pipeline operation.

12           MR. KOENECKE: Ms. Wiest, was Mr. Frey's written  
13 testimony accepted?

14           MS. WIEST: Yeah. I was going to bring that up.  
15 We did have those objections. I believe you did offer  
16 it; correct?

17           MR. KOENECKE: I did.

18           MS. WIEST: And so with those two -- we  
19 sustained the objections to it, the attached Exhibit A  
20 and B. With that understanding then, we will admit the  
21 prefiled written testimony.

22           MR. KOENECKE: Thank you. I have nothing  
23 further.

24           MS. WIEST: We'll go to cross.

25           Ms. Real Bird, did you have any questions?

1 MS. REAL BIRD: I do have questions, and I just  
2 have a clarification point on the admission of the  
3 prefiled.

4 My objection was also to the references in the  
5 prefiled to both exhibits. So would those references be  
6 admitted or not?

7 MS. WIEST: Yes. We can strike those  
8 references. You can go to your questioning.

9 MS. REAL BIRD: Thank you for the clarification.

10 CROSS-EXAMINATION

11 BY MS. REAL BIRD:

12 Q. Mr. Frey, you previously testified about the  
13 chalking effect; is that correct?

14 A. Yes.

15 Q. And this is a yes or no question. Is the chalking  
16 effect the result of polymer degradation?

17 A. I would need to refer to my testimony.

18 Q. Please.

19 A. Yes. The chalking is part of the degradation  
20 effect.

21 Q. Thank you. Do the fusion bonded epoxy coatings  
22 include epoxy resins?

23 A. I guess I don't understand the question.

24 Q. You don't know what epoxy resins are, or you don't  
25 understand the question?

1 A. I don't know specifically what this fusion bonded  
2 epoxy consists of.

3 Q. Okay. If you don't know what the fusion bonded  
4 epoxy or companies using consist of -- is that your  
5 answer?

6 A. No. We're using the Valspar product and applied in  
7 the basis of their recommendation.

8 Q. Okay. And my question is do you know whether epoxy  
9 resins are an ingredient or a part of the fusion bonded  
10 epoxy you use?

11 A. I am not sure of the composition of the material  
12 applied.

13 Q. Okay. Are you familiar with epoxy resins?

14 A. I'm familiar with fusion bonded epoxy as used to  
15 protect pipelines.

16 Q. Are you familiar with aromatic epoxy resins?

17 A. I'm not familiar with that term.

18 Q. Thank you.

19 MS. REAL BIRD: No further questions.

20 MS. WIEST: Rosebud.

21 CROSS-EXAMINATION

22 BY MR. RAPPOLD:

23 Q. Good morning, Mr. Frey.

24 A. Good morning.

25 Q. Is it your understanding that the federal

1 regulations regarding high consequence areas, which  
2 includes the USAs, require higher integrity management  
3 standards than non-HCAs?

4 A. I understand that the Integrity Management Plan has  
5 to account for HCAs.

6 Q. And is it your understanding that the requirements  
7 in those areas are more stringent than the areas where  
8 they don't exist?

9 A. Yes.

10 Q. Thank you. So then if you make the determination  
11 that there are no HCAs along the pipeline route, you'll  
12 be legally permitted to have lower higher integrity  
13 management standards in those areas? Is that also your  
14 understanding?

15 A. Could you repeat the question?

16 Q. Yes. If you make the determination that there are  
17 no -- let me back up. Strike that.

18 There's two -- is it your understanding that there  
19 would be two sets of integrity management standards based  
20 on where the pipeline is located?

21 A. There are different requirements for integrity  
22 management plans, depending on the -- whether the  
23 pipeline is crossing an HCA or not.

24 Q. Okay. So in the HCA areas, integrity management  
25 standards are higher; correct?

1 A. They're -- there are different requirements if  
2 you're within an HCA, correct.

3 Q. And would you agree that those requirements are more  
4 stringent than areas that are not HCAs?

5 A. They are intended to provide additional protection.

6 Q. And does that mean they're more stringent?

7 A. Yes.

8 Q. Okay. Thank you.

9 So if a determination is made that the pipeline is  
10 traversing through non-HCA areas, then you get to apply  
11 lower standards for integrity management; correct?

12 A. There would be different requirements for the  
13 Integrity Management Plan that would be not as stringent  
14 as required in the HCA.

15 MR. RAPPOLD: Thank you. I have no further  
16 questions.

17 MS. WIEST: Ms. Craven, do you have any  
18 questions?

19 CROSS-EXAMINATION

20 BY MS. CRAVEN:

21 Q. I just have one question regarding HCAs. Could you  
22 give me the definition of HCAs, please.

23 A. It's a high consequence area. I would need to refer  
24 to the code if you want a verbatim definition.

25 Q. Just kind of generally what constitutes an HCA? You

1 said we have none in South Dakota. What's an HCA?

2 MR. KOENECKE: This has been asked and answered  
3 several times.

4 MS. CRAVEN: I haven't asked him.

5 MR. KOENECKE: It's repetitive.

6 MS. WIEST: I will sustain on repetition.

7 MS. CRAVEN: Well, he's testified we don't have  
8 any, and I don't even think he knows what an HCA is.

9 No further questions.

10 MS. WIEST: Ms. Northrup, did you have any  
11 questions?

12 MS. NORTHRUP: No, thanks.

13 MR. KOENECKE: I'm going to ask to have that  
14 stricken from the record -- counsel's comment about what  
15 she thinks my witness doesn't know stricken from the  
16 record.

17 MS. WIEST: Did you have a response?

18 MS. CRAVEN: Yes. I asked a question. He just  
19 testified that there are no HCAs or USAs in the State of  
20 South Dakota that the pipeline's crossing. I asked him  
21 for a definition of that.

22 Then Mr. Koenecke objected and would not allow  
23 him to answer because he didn't seem to know.

24 MR. KOENECKE: The objection was sustained.

25 MS. WIEST: Yes. I will allow the -- I will

1 grant the comments be stricken.

2 We were at Mr. Boomsma.

3 MR. BOOMSMA: No questions.

4 MS. WIEST: Staff.

5 MS. EDWARDS: Thank you. Just a couple.

6 CROSS-EXAMINATION

7 BY MS. EDWARDS:

8 Q. Per your understanding under the code, who is  
9 responsible for the determination of USAs, if you know?

10 A. Monica Howard would be better able -- she's going to  
11 discuss the USAs and their determinations.

12 Q. Okay. If there was to be a USA or HCA designated  
13 along the route, would you be willing to notify the  
14 Commission of such?

15 A. Yes.

16 MS. EDWARDS: Thank you. No further questions.

17 MS. WIEST: Commissioners.

18 Any redirect?

19 MR. KOENECKE: None.

20 MS. WIEST: Okay. Thank you.

21 As we stated earlier, the plan is to go until  
22 12:45 until our lunch break. I guess my only question  
23 now, did anybody need a short break before 12:45?

24 MR. BOOMSMA: I do. I think a five-minute break  
25 is appropriate.

1 MS. WIEST: Okay. Let's take five minutes.

2 (A short recess is taken)

3 MS. WIEST: Dakota Access, you may call your  
4 next witness.

5 MS. SEMMLER: I call Monica Howard.

6 DIRECT EXAMINATION

7 BY MS. SEMMLER:

8 Q. Monica, please state your name for the record.

9 A. Monica Howard.

10 Q. Have you previously testified in this proceeding?

11 A. I have.

12 Q. Were you put under oath at that time?

13 A. I was.

14 Q. And you're aware you're still under oath?

15 A. Yes.

16 Q. Do you see a document sitting in front of you  
17 labeled DAPL 38?

18 A. I do.

19 Q. What is it?

20 A. My rebuttal testimony that was previously filed.

21 Q. Did you write that?

22 A. I did.

23 Q. Do you have any changes to make?

24 A. I do not.

25 Q. If I asked you those questions today, would you

1 answer them the same?

2 A. I believe so, yes.

3 Q. Do you adopt that as your sworn testimony?

4 A. I do.

5 MS. SEMMLER: Move to admit DAPL 38.

6 MS. CRAVEN: IEN and DRA, we object.

7 MS. WIEST: To what?

8 MS. CRAVEN: The prefiled rebuttal goes beyond  
9 the scope of direct. We would like to have anything  
10 beyond page 9 line 81 to the end stricken.

11 South Dakota Codified Law 15-14-1 governs the  
12 order in proceedings such as this in Subsection 6, limits  
13 rebuttal to the scope of adversary's direct.

14 MS. SEMMLER: We believe it's responsive to what  
15 came up in direct. This is purely for rebuttal purposes.  
16 I disagree.

17 MS. WIEST: Objection overruled. I will admit  
18 the document.

19 A. I'm sorry. The only clarification. I've updated  
20 percentages on the percent survey complete. At this  
21 time it was reported as 89 percent. And it's currently  
22 98.4 percent, I believe.

23 Q. Okay. And I'll ask you to talk about that in more  
24 detail in just a bit.

25 A. Okay.

1 Q. Thank you for that clarification. I'm going to  
2 start with a couple real easy ones to clear up a few  
3 things that came up these past couple of weeks.

4 There was a recommendation that the reclamation  
5 measure be at 70 percent, if I'm using the right  
6 terminology. Do you know what I'm talking about?

7 A. Right. Re-vegetation and the storm water plan, yes.

8 Q. Do you agree with that?

9 A. Yes. And that's already in our plan.

10 Q. There's been some testimony regarding a  
11 recommendation that there be a winter reclamation plan  
12 should it be necessary because of a change in seasons.  
13 Do you agree to that?

14 A. Yes. For winter stabilization, yes.

15 Q. Are you aware of the various documents that  
16 Mr. Rappold asked Tom Kirschenmann to look at?

17 A. Yes. Regarding the protected species and the  
18 assessments.

19 Q. I'm just going to read through them to be sure that  
20 we address all of them. Okay?

21 A. Okay.

22 Q. So there was RST 11, which I show as a U.S. Fish &  
23 Wildlife Service species assessment and listing priority  
24 assessment form?

25 MR. RAPPOLD: RST 11 was not admitted.

1 MS. WIEST: That is correct.

2 Q. And I'm going to look at RST 16, the Topeka shiner  
3 Management Plan for the State of South Dakota. RST 17  
4 was the U.S. Fish & Wildlife Service Revised Recovery  
5 Plan for the Pallid Sturgeon. RST 18 was the Pallid  
6 Sturgeon Five-Year Recovery Summary and Evaluation, which  
7 was written by the U.S. Fish & Wildlife Service.

8 RST 22 was a chapter 2 from a document. And I'm  
9 just going to show it to you because I don't quite know  
10 how to explain it for you to recognize it. Okay?

11 A. Okay. Thank you.

12 (Witness examines document)

13 A. Wildlife management, yes.

14 Q. RST 26, western prairie fringed orchid, Five-Year  
15 Review Summary and Evaluation. And RST 12, the Sprague's  
16 Pipit Conservation Plan.

17 Did you or someone that you have direct super --  
18 that you directly supervise review those documents?

19 A. Yes. In the course of T and E impact assessments  
20 those are routinely looked at, and they were for this  
21 project as well. In addition to others.

22 Q. So let's get back to that percentage of the route  
23 that you started to talk about.

24 What percentage of the route has been surveyed  
25 today?

1 A. Everything with the exception of 12 tracts where  
2 access has not been granted or obtained.

3 Q. So tell us that percentage again. I'm sorry.

4 A. I apologize. It's 98.4, I believe. Or 6. I know I  
5 offered it earlier.

6 Q. So the reason you're not at 100 percent is because  
7 of denied access?

8 A. Correct.

9 Q. How about does that include any ancillary facilities  
10 that have been identified to date?

11 A. It does. All the aboveground facilities for the  
12 project have been surveyed, including the 10 acre pump  
13 station, the valves, the launchers, receivers, as well as  
14 all of the access roads that are not currently roads.  
15 All the access roads that have been proposed for  
16 construction have also been surveyed.

17 Q. Is it possible there could be other ancillary  
18 facilities that will be identified in the future should  
19 the Permit be granted?

20 A. Yeah. The potential for maybe additional access  
21 roads and definitely contractor yards, those are often  
22 selected once the contractor's present on the project and  
23 comes and starts siting locations for their yards. Those  
24 will also be surveyed as they are identified.

25 Q. Was the Addendum 2 to the Level III Survey -- when

1 was that Addendum 2 submitted to South Dakota SHPO?

2 A. September 21.

3 Q. You have an unanticipated discovery plan; right?

4 A. Yes.

5 Q. Is it your understanding that Paige Olson with the  
6 South Dakota SHPO had a few concerns with it?

7 A. She did in her direct testimony. We finally got  
8 feedback on -- somewhat on the report as well as the  
9 plan.

10 Q. Did you address all of those concerns?

11 A. Yes. Verbatim. There were recommendations for  
12 additions and clarifications, and all of those were made,  
13 and it was resubmitted along with the Level III Report  
14 with some of the clarifications and questions she had.  
15 All of that was addressed and resubmitted in a  
16 five-volume package to her.

17 Q. You'll see in front of you an exhibit which was  
18 marked DAPL 9.

19 A. Yes.

20 Q. What is that?

21 A. It's the unanticipated discoveries plan with  
22 cultural resources, human remains, paleontological and  
23 contaminated media.

24 Q. And is that the revised plan?

25 A. I believe so, yes.

1 Q. And do you know what volume of the five volumes, do  
2 you know what volume of that Level III Survey Report that  
3 can also be found?

4 A. This would be in Volume V.

5 Q. Were there any of Paige's concerns that she  
6 expressed in testimony that you failed to respond to?

7 A. No. In fact, we received a concurrence letter from  
8 her stating that she concurred with the findings of that  
9 five volume report, which included the original Level III  
10 Report and the first addendum, which also included the  
11 access roads and the aboveground facilities.

12 Q. The Application that was filed with this Commission?

13 A. Yes.

14 Q. Are you aware of what Exhibit A to that Application  
15 is?

16 A. The general maps for the route, the project.

17 Q. And there were also maps submitted with the  
18 Level III Cultural Survey Reports; right?

19 A. Correct.

20 Q. Is there anything on those Level III Survey maps  
21 that is not on the Exhibit A maps provided to the  
22 Commission?

23 A. Absolutely. The protective cultural resource  
24 information is on those, and those are rarely -- those  
25 are not made public. Those are held confidential for

1 protection of the resource. So those are filed with the  
2 SHPO's office only.

3 Q. Are you sensitive to the Tribe's concerns regarding  
4 confidentiality?

5 A. Absolutely.

6 Q. Is that why you didn't file those maps publicly?

7 A. Correct. And why they were filed under Protective  
8 Order for this docket after they were requested.

9 Q. When you say filed, do you mean changed in discovery  
10 maybe?

11 A. I do. Sorry.

12 Q. So now let's look to what's in front of you marked  
13 Exhibit 49. It will be in a binder.

14 A. Yes. Got it.

15 Q. Can you tell me what that binder is?

16 A. This is the Revised Class III Report that was  
17 submitted to the SHPO's office.

18 Q. And which volume is that?

19 A. V.

20 Q. So at the end of that Volume V, do you see the  
21 unanticipated discoveries plan?

22 A. I do.

23 Q. Are you aware of eight maps in particular out of  
24 that Volume V that Mr. Rappold for the Rosebud Sioux  
25 Tribe examined Paige Olson about?

1 A. Yes, I am.

2 Q. Were you on the phone that day?

3 A. I was.

4 Q. So you heard that testimony?

5 A. I did.

6 Q. Now you need to stop me, Monica, if I get into  
7 something that's confidential. Okay?

8 A. Okay.

9 Q. One of the questions that came up that day I  
10 remember, Paige was asked if the mounds or other such  
11 features that are shown, are they to scale.

12 Do you know the answer to that?

13 A. Yes. They are to scale. They were captured with  
14 sub meter accuracy GPS units.

15 Q. Let's look at there's a -- I put a tab in that just  
16 for easy reference.

17 A. Yes.

18 Q. And it's No. 1. And would you open to that and then  
19 identify what that is without getting into any  
20 confidential information so everyone else here will be  
21 able to follow along?

22 A. Yeah. This is a large cultural resource site that  
23 was previously documented and expanded on by our  
24 surveyors along the route.

25 Q. And are you aware that this was one of those maps

1 that Mr. Rappold asked Paige Olson about?

2 A. Yes. With respect to the HDD at this location.

3 Q. Okay. So I think that gets into my next question  
4 then.

5 Are you going to avoid this site?

6 A. Yes. It will be avoided by no excavation, no  
7 trenching, no vehicle equipment, traffic. There will be  
8 no impact to this site.

9 Q. And so how are you going to do that construction  
10 wise?

11 A. The pipeline will be drilled -- it will go into the  
12 ground at one end and come out on the other.

13 Q. I'm showing -- why don't you take a look at the  
14 exhibit in front of you marked 53.

15 A. Yes.

16 Q. Do you see that?

17 A. Yes.

18 Q. What is that?

19 A. That is the drill plan for this location.

20 Q. Beyond just providing the Commission with the  
21 assurance that this has been considered, do you need to  
22 point anything out in particular on this map?

23 A. The absence of any workspace between the two drill  
24 boxes, which are the larger squares on either side of the  
25 first page of that map, demonstrates that there is no --

1 that we have -- not seeking any workspace, any place for  
2 equipment to travel or anything else between the drill  
3 boxes along the sensitive area.

4 Q. And is this the sort of site plan that is  
5 customarily and usually prepared on construction projects  
6 such as this?

7 A. Yes. Absolutely.

8 Q. Is this the sort of map or product that your company  
9 keeps in the -- that Dakota Access keeps in the regular  
10 course of business?

11 A. Yes.

12 Q. And to the best of your knowledge, this accurately  
13 reflects how you're going to be addressing this first  
14 site we're discussing; right?

15 A. Yes.

16 MS. SEMMLER: I move to admit DAPL 53.

17 MS. WIEST: Is there any objection?

18 MS. BAKER: The Yankton Sioux Tribe objects on  
19 the grounds that this was not listed as an exhibit in the  
20 witness and exhibit list that was required to be filed  
21 pursuant to the Commission's order.

22 MS. WIEST: Do you have a response, Ms. Semmler?

23 MS. SEMMLER: Yeah. This came up in the course  
24 of Ms. Olson's testimony when Mr. Rappold looked at these  
25 eight specific sites of particular concern to him. And

1 just want to provide the Commission with assurance that  
2 we understand the sensitive nature of that site, and  
3 Dakota Access planned for it. I think this came up  
4 during the course of direct, and we're just providing you  
5 with the rebuttal.

6 MR. RAPPOLD: And if I could briefly chime in  
7 since this is about us. The information contained on  
8 these maps with the HDD drilling locations is information  
9 that's contained on the maps that we were discussing with  
10 Ms. Olson in that session.

11 So there's no new additional information that  
12 the Commission benefits from by seeing, you know, a  
13 different map. It's in the other information, in the  
14 Level III Report that we were looking at.

15 MS. WIEST: Can you respond to that,  
16 Ms. Semmler?

17 MS. SEMMLER: Sure. I think this is new  
18 information in that it confirms that the company is  
19 drilling this site to avoid any impact.

20 MR. RAPPOLD: Additionally, the company may be  
21 taking this approach, but it does nothing to alleviate  
22 their responsibility under 106 National Historic  
23 Preservation Act, if that's what its intended purpose is  
24 to be.

25 MS. SEMMLER: That's not the purpose of the

1 exhibit.

2 MS. WIEST: Yes. And I will overrule the  
3 objections and allow Exhibit 53. Or do you have a  
4 question, Commissioner Nelson?

5 CHAIRMAN NELSON: I don't. And I concur with  
6 your ruling. My question is on confidentiality. Given  
7 the public testimony that we've just had, I think a  
8 person listening, should they have access to this map  
9 could put two and two together and come up with some  
10 sensitive locations, so we may want to address that  
11 issue.

12 MS. WIEST: Yes. Should this map be considered  
13 confidential?

14 MS. SEMMLER: Thank you. Yes.

15 MS. WIEST: Okay. We are going to mark this as  
16 confidential, and it will be put in the docket as  
17 confidential.

18 And for the record, I'm not sure if I can --  
19 will be able to figure out just reading through the  
20 transcript. Was there a particular page cite to that  
21 that you were looking at there, or did I miss that?

22 THE WITNESS: It's Figure D33.

23 MS. WIEST: D33. Okay. Thank you. You may  
24 proceed.

25 Q. On Figure D33, is that private property?

1 A. It is.

2 Q. Do you have any 106 consultation obligations on that  
3 area?

4 A. I don't. The Army Corps would, with respect to a  
5 particular crossing there that's highlighted and  
6 hatching on D33.

7 Q. Thank you for that correction.

8 So the army Corps has some obligation to consult on  
9 that area?

10 A. Yep.

11 Q. Has that consultation begun?

12 A. Yes.

13 Q. Could you go to Tab No. 2 and provide that same  
14 maybe figure number so everyone can follow along.

15 A. D4.

16 Q. And you're aware that this was one of those sites of  
17 particular concern to the Rosebud Sioux Tribe?

18 A. Yes. Yes.

19 Q. Does that map, that figure, show the proximity of  
20 that -- that culturally sensitive area to the  
21 construction path?

22 A. It does. The construction is -- the right of way  
23 that would be impacted for traffic and whatnot for  
24 construction is highlighted in a different color. And  
25 the sensitive location is clearly outside of that. But

1 there's another corridor shown on here which is our  
2 survey corridor, and it's within the survey corridor but  
3 outside of the construction corridor.

4 Q. So it's within your survey corridor, so that's a  
5 good thing. You found it; right?

6 A. Right.

7 Q. So just to be sure the record's very clear, that  
8 site's going to be avoided?

9 A. Yes.

10 Q. Is this private property?

11 A. It is.

12 Q. Is the Corps obligated to do a 106 consultation on  
13 that site?

14 A. No one is obligated for 106 here.

15 Q. Could you go to No. 3 and give us the figure number?

16 A. D8.

17 Q. Same questions there. Is this in the, you know,  
18 right of way?

19 A. So this is in a former survey corridor. As we find  
20 things and it's discussed in the Application about our  
21 micro routing, our tweaking of the line -- so this is  
22 very far outside of the construction corridor. There's a  
23 map inset in the upper right-hand corner that shows the  
24 relationship of the drawing to the actual centerline.  
25 And it's quite a ways south and will be avoided.

1 Q. Is this private property?

2 A. Correct.

3 Q. Does the Corps have any 106 consultation obligation  
4 at this area?

5 A. There are no 106 obligations here.

6 Q. No. 5, please. Provide us with the figure number.

7 A. 4?

8 Q. No. 4.

9 A. Is D9.

10 Q. Same question. Where is this in relation to the  
11 right of way?

12 A. It is south of the right of way in the survey  
13 corridor, and, again, the inset map further clarifies or  
14 demonstrates that. And there is also no 106 consultation  
15 here as this is private property as well.

16 Q. Okay. You see where I'm going.

17 A. I do.

18 Q. No. 5. Please provide the same testimony for No. 5.  
19 Identify it and then --

20 A. So this is again in a former corridor. The current  
21 alignment is quite a ways outside of it as depicted in  
22 the inset --

23 MR. RAPPOLD: Excuse me. What figure number are  
24 you referring to?

25 THE WITNESS: Sorry. D10.

1 A. The centerline is a ways west of this site, and this  
2 site will be wholly avoided. And there's private  
3 property and no 106 requirements.

4 Q. No. 6?

5 A. Is Figure D11. Oh, I'm sorry. D12. It is on  
6 private property south of the current alignment and will  
7 be avoided by construction, and there's no 106  
8 requirements.

9 Q. No. 7, please.

10 A. D13. Is on private property south of the  
11 construction corridor, will be avoided, and there are no  
12 106 consultation requirements.

13 Q. Finally, No. 8.

14 A. This is on private property. It is north of the  
15 construction corridor and will not be impacted by  
16 construction. On private property with no 106  
17 consultation.

18 MR. RAPPOLD: And again, I might have missed the  
19 figure number.

20 THE WITNESS: I'm sorry. D50.

21 MR. RAPPOLD: Thank you.

22 Q. So just to sum it up, is Dakota Access avoiding all  
23 of these sites?

24 A. We are. And a multitude of the information in this  
25 report is not required for compliance with state and

1 National Historic Preservation Acts much less than the  
2 efforts we've gone through on this project in this state  
3 and along the alignment.

4 Q. If you know, so I'm not asking for you to give a  
5 legal conclusion here, but if you know, based on your  
6 experience, does South Dakota Law require that you  
7 provide information on previously identified sites or  
8 those with potential to be listed?

9 A. State law is previously identified. Anything that  
10 is listed on the state or federal list.

11 Q. And you did more than that; right?

12 A. Right. The federal law in areas where that applies  
13 includes potentially eligible sites, and we went much  
14 further than that and did our surveys as if it were a  
15 federal project. We did that level of survey along the  
16 entire alignment everywhere we had access.

17 Q. So you identified sites potentially eligible for  
18 listing on the whole route?

19 A. And that is the bulk of what's identified in here.

20 Q. You indicated that all of those sites were on  
21 private property; right?

22 A. Correct.

23 Q. So based on your experience, in your opinion, just  
24 asking for something general here, do landowners approve  
25 of the Native American Tribes going on to their private

1 properties to search for cultural resources?

2 MR. RAPPOLD: Objection. Lack of foundation.  
3 And it calls for hearsay.

4 MS. WIEST: Any response?

5 MS. SEMMLER: Just asking for in her experience  
6 in doing this sort of work for a lot of years whether she  
7 believes landowners would approve of Native American  
8 Tribes searching across private property for these  
9 cultural resources.

10 MR. RAPPOLD: And still the objection's the  
11 same.

12 MS. WIEST: Sustained.

13 Q. Are you able to bring Native American Tribes on to  
14 private property when you do these surveys?

15 A. Not without expressed consent. We need consent for  
16 all crews that go on all lands with a detailed  
17 description of what we're looking for and how we're going  
18 to look for it. And we obtain those expressed writings  
19 where it's granted as demonstrated by our 1 and a half  
20 percent or so. It's not always granted, even for the  
21 surveys that are required by law.

22 Q. So it would essentially require a whole -- another  
23 level of approval from the landowner; right?

24 A. Yes, it would.

25 Q. So I want to be sure we've got a very clear record

1 on this.

2 What triggers the federal 106 Corps consultation  
3 process?

4 A. They establish a permit review area for areas within  
5 their jurisdiction. We worked with them to define that  
6 and completed the surveys in those locations, and that's  
7 what they will review internally to come up with a  
8 conclusion on. And then they would consult with the  
9 respective parties under that act.

10 Q. Is there a Special Permit Application Condition  
11 under the Nationwide Permit that requires this?

12 A. Yeah. The Nationwide Permit gives automatic use of  
13 Permit approvals with general conditions that are  
14 assigned to it. I believe it's general Condition 20 that  
15 requires if there is the potential impact to eligible or  
16 recorded sites, that a preconstruction notification must  
17 be submitted. Without those potentials, there's no  
18 requirement and the projects are automatically approved.

19 Q. So is that occurring on this project?

20 A. Yes. Absolutely.

21 Q. So you said areas within the Corps's jurisdiction?

22 A. Correct.

23 Q. Let's say again so we've got a real clear record.  
24 What are those areas within the jurisdiction?

25 MR. RAPPOLD: Objection. Asked and answered.

1 MS. WIEST: I believe you've already asked that  
2 question, haven't you?

3 MS. SEMMLER: No. I'm asking for clarification  
4 on her answer. She says the areas within Corps's  
5 jurisdiction have to do that consultation, but what is  
6 the Corps's jurisdiction. That's my follow-up question.

7 MS. WIEST: Okay. Overruled.

8 A. The Corps has jurisdiction over waters of the U.S.  
9 which include rivers, lakes, wetlands, and things of that  
10 nature.

11 Q. You didn't list private property, did you?

12 A. No. Waters of the U.S.

13 Q. Just if you're aware, again, based on your  
14 professional experience and your review of this, is there  
15 a state law that requires a tribal consultation?

16 A. No. There's no reference of tribal consultation in  
17 the State Historic Act.

18 MS. WIEST: Ms. Semmler, do you have many more  
19 questions? I'm only asking for the purposes of break.  
20 Two?

21 Go ahead.

22 Q. There was some testimony -- there has been some  
23 testimony about compliance with U.S. Fish & Wildlife  
24 Service, you know, recommendations.

25 A. Yes.

1 Q. First, do you agree to consult?

2 A. Absolutely.

3 Q. And you'll follow recommendations?

4 A. Correct.

5 Q. Now let's talk about the Topeka shiner. And this is  
6 where I'm going to end.

7 Tell us how you're addressing the Topeka shiner.

8 A. In the State of South Dakota the Topeka shiner  
9 incidental take of the Topeka shiner is covered under a  
10 biological opinion for the type of project we're doing,  
11 nationwide 12 is in that automatic approval.

12 So with certain measures that we are implementing as  
13 best management practices basically at all stream  
14 crossings should take, which is broadly defined, occur at  
15 those streams, it is allowable under that biological  
16 opinion that already exists.

17 Q. So as a result of that programatic opinion --

18 A. Programatic biological opinion. Sorry.

19 Q. So as a result of that -- which was issued by U.S.  
20 Fish & Wildlife; right?

21 A. Correct. With the Corps.

22 Q. Then does that, therefore, meet the definition of  
23 a -- of an HCA, in your opinion?

24 A. Not in our opinion.

25 MS. SEMMLER: Nothing further.

1 MS. WIEST: Okay. At this time we will take our  
2 break, and we will resume at 2 o'clock.

3 (A short recess is taken)

4 MS. WIEST: Let's go back on the record.

5 MS. SEMMLER: Ms. Wiest, as a cleanup matter, I  
6 think I failed to move admit Exhibit 9, which was the  
7 revised unanticipated discovery plan. So I would just  
8 move to admit that before we move to cross.

9 MS. WIEST: Is there any objection to that?  
10 If not, it's been admitted.

11 Okay. I believe we can move to cross. Yankton  
12 Sioux Tribe.

13 MS. BAKER: Thank you.

14 CROSS-EXAMINATION

15 BY MS. BAKER:

16 Q. My name is Jennifer Baker, attorney for the Yankton  
17 Sioux Tribe.

18 A. Hi.

19 Q. Touching on something that you just mentioned, could  
20 waters of the United States flow through private  
21 property?

22 A. Yes. The waters of the U.S. are more often than not  
23 on private property, yes.

24 Q. Thank you. And then in that instance would the  
25 Corps have jurisdiction over waters of the United States

1 that flow through private property?

2 A. Right. So it's the waters of the U.S. plus the  
3 Permit review area they establish for each crossing on  
4 each project. So it does encompass private property  
5 limited to that federal review area.

6 Q. Okay. So federal review and federal jurisdiction  
7 will apply to some private property?

8 A. Yes.

9 Q. Okay.

10 A. Very limited, but yes.

11 Q. And you mentioned that impact assessments on all  
12 federally protect species are being coordinated.

13 Do you think that the PUC should make a decision on  
14 the Permit without having this information?

15 A. Can you say that again, please?

16 Q. Your testimony mentions that impact assessments on  
17 all federally protected species are being coordinated.

18 A. Correct.

19 Q. Do you think that the PUC should make a decision on  
20 the Permit without having that information?

21 A. I don't see how it's material. It goes to the fact  
22 that we'd be -- we wouldn't be able to do it without  
23 complying with the laws that represent threatened and  
24 endangered species. So I think it only makes sense that  
25 it's a Condition, which is often what happens in linear

1 projection.

2 Q. Are impact assessments going to result in new  
3 information?

4 A. No. They're largely done. We're just waiting for  
5 responses from -- we're waiting for the process between  
6 the two federal agencies to be complete. We've given our  
7 preliminary determination and what we feel is appropriate  
8 as it affects determination across the board for all  
9 1,168 already.

10 Q. Your testimony states that four of the nine water  
11 body crossings will use horizontal directional drilling  
12 and as a result impacts will be avoided.

13 Does this mean that there will be impacts with  
14 respect to the other five crossings?

15 A. Yes. And I apologize. That probably should have  
16 been another clarification.

17 So there are a total of nine water bodies, four of  
18 which are drilled. The other five, one of them is in the  
19 headwaters of the stream, so it's not in habitat for the  
20 Shiner, so there's no effect there.

21 The four other will be open cut, and those are  
22 locations where the Programmatic Biological Opinion for  
23 Nationwide Permit applies and incidental take is allowed.

24 Q. And can you tell us why the Topeka shiner is  
25 considered potentially present in two of the water bodies

1 if those water bodies lack suitable habitat?

2 A. They lack spawning habitat.

3 Q. So it's impossible for the Topeka shiner to exist  
4 there?

5 A. I'm sorry. I'm not sure which two streams you're  
6 talking about. If I could --

7 Q. Let's take a look at line 94 of your testimony.

8 A. Okay. So this is the clarification that I was  
9 mentioning. This mentioned that two of the water bodies  
10 lacked habitat. What I was just trying to clarify was  
11 one was upstream where there's no perennial flow, so  
12 there's no way for the fish species to be there. It's in  
13 the headwaters of the stream where the fish is located,  
14 so there is no effect because there's not habitat there.  
15 We're upstream of the habitat.

16 But the creek name, or the water body name, was  
17 identified as having a potential presence of the species.

18 Q. Okay.

19 A. Sorry.

20 Q. And you stated that Dakota Access intends to utilize  
21 these existing programmatic biological opinion to address  
22 impacts to the Topeka shiner. Will this entirely  
23 eliminate impacts?

24 A. No. It authorize the impacts. It says the impacts  
25 are so small that it's not going to affect the

1 continued -- not going to jeopardize the continued  
2 existence of the species, that it should be such a minor  
3 impact that it is allowable under the authority of the  
4 Fish & Wildlife. They've determined that these types of  
5 impacts are small enough that it's okay.

6 Q. Okay. And you've stated that Dakota Access has  
7 retained an agricultural consultant to develop specific  
8 measures for work with respect to saline, sodic, and  
9 saline sodic soils.

10 Does this mean that those measures haven't been  
11 developed yet?

12 A. The consultant we hired was Aaron who was on the  
13 stand talking about agricultural mitigation and drain  
14 tiles the other day. He is in the process of developing  
15 all of those.

16 Q. You stated in your testimony that the western  
17 prairie fringed orchid was not observed during surveys.  
18 Is it, nonetheless, possible that that plant does exist  
19 along the corridor?

20 A. We did not find habitat of -- we did not find  
21 sufficient habitat where it would be located, in addition  
22 to not specifically siting it.

23 Q. Since Dakota Access is confident that impacts to  
24 sensitive cultural resources will be avoided, how can it  
25 be sure that there will be no unanticipated discoveries?

1 A. That's why we have an Unanticipated Discoveries  
2 Plan. We're not completely -- the off chance that there  
3 is something that we haven't found during our intensive  
4 Level III Surveys already, we have that Unanticipated  
5 Discoveries Plan, all known impacts will be avoided -- or  
6 impacts to all known sites, previously documented and  
7 then documented by us will absolutely be avoided.

8 Q. Okay. So does that mean that your statement on  
9 lines 200 to 202 is not accurate?

10 A. It's still accurate.

11 Q. Okay. So you're confident there won't be any  
12 unanticipated discoveries?

13 A. I'm confident that negative impacts to cultural  
14 resources have and will be successfully avoided.

15 MS. BAKER: I have no further questions. Thank  
16 you.

17 MS. WIEST: Rosebud.

18 CROSS-EXAMINATION

19 BY MR. RAPPOLD:

20 Q. Good afternoon, Ms. Howard.

21 A. Hello.

22 Q. Earlier -- last week is what I mean by earlier --  
23 when you and I were visiting about your testimony and  
24 your opinions here, we discussed the materials that you  
25 reviewed in making your determination regarding effect on

1 species.

2           There was a chart, and then there was a resource  
3 list. Do you remember that conversation?

4 A. I do. We didn't discuss what went into our facts  
5 determination. We used what was used to draft that  
6 table.

7 Q. Right. And at that time you indicated that the  
8 resources that you listed was a complete and accurate  
9 accounting of what you consulted; correct?

10 A. It was a complete list of references in developing  
11 that table. That is correct.

12 Q. Okay. But your testimony here today is that all of  
13 the exhibits, Rosebud Sioux Tribe 16, 17, 18, 22, 26, and  
14 12, were, in fact, reviewed by someone under your  
15 direction?

16 A. That's absolutely true.

17 Q. Okay.

18 A. And there's no conflict there. The references  
19 you're talking about are to apples and oranges. One is  
20 for the impact assessment, and one is for the table.

21 Q. Someone other than us will decide if that's apples  
22 and oranges.

23           Regarding the cultural surveys, it is your  
24 understanding, if I understood your testimony to be  
25 correct, there is a federal connection regarding some of

1 the identified sites, cultural sites; correct?

2 A. I don't understand the question.

3 Q. Based on your testimony earlier this afternoon, it's  
4 your understanding that there is a federal connection  
5 that would require 106 consultation; correct?

6 A. Right. The federal undertaking of issuing or  
7 verifying the nationwide 12 applicability, PCNs were  
8 triggered as a result of those cultural resources at a  
9 few locations. That is true.

10 Q. Right. Okay. And that is going to and, in fact,  
11 has triggered the Section 106 consultation requirements;  
12 right?

13 A. Correct.

14 Q. Okay. And are you aware at this point in time of  
15 any communications taking place between the army Corps of  
16 Engineer and any Tribe that is entitled to consultation  
17 under 106?

18 A. Yes. As recently as today. They sent out a  
19 consultation request letters, a bunch went back out last  
20 February.

21 Q. Uh-huh.

22 A. And additionally, a new round was sent out, the  
23 exact date escapes me, but earlier in September.

24 Q. Okay. And so that process is still ongoing?

25 A. Right. And the latest development is we're

1 coordinating a tribal consultation meeting on behalf of  
2 the Corps with their presence inviting all the Tribes.

3 Q. Can you tell us a little bit about that meeting that  
4 you're coordinating?

5 A. I just got the request to set it up this morning  
6 from the Corps.

7 Q. Okay. Is there anything else that you can share  
8 about that?

9 A. Just that a specific location, date, and time will  
10 be proposed and agreed on, and an invitation sent to all  
11 the consulting Tribes to attend.

12 Q. Okay. Do you plan on participating and attending  
13 that?

14 A. I do.

15 Q. Good. There's been some discussion regarding sites  
16 that are close to the project route. And when I say  
17 sites, I'm still --

18 A. Right.

19 Q. -- talking about the cultural sites. Okay.  
20 Sites that are close?

21 A. Uh-huh.

22 Q. Potentially impactable?

23 A. No.

24 Q. What are your thoughts on having tribal members,  
25 tribal people involved in surveying those areas?

1 A. The areas are outside where we're purchasing the  
2 easements and agreements to, so I don't know that we have  
3 access to those locations any longer.

4 Q. So if you were required to, by the Commission, to  
5 have tribal involvement in some of those sites, how would  
6 you feel about that?

7 A. I would have no feelings about that. I just don't  
8 know that the Commission can order us on to private  
9 property where we have no access.

10 Q. Can you think of any reason why the -- I believe  
11 it's Exhibit 49, DAPL Exhibit 49. Can you think of any  
12 reason why that wasn't presented to the Commission as an  
13 exhibit and made part of the record prior to last Friday?

14 A. I don't know when it was submitted or the thoughts  
15 behind it. I think I've testified to the high  
16 confidentiality of the document, and I know it's been  
17 submitted to the appropriate agencies within the state.

18 And that my understanding of how that typically  
19 works is the agencies with authority over that give their  
20 opinions and decisions. They make that public record so  
21 that the Commission has confidence that the applicable  
22 rules and regulations have been followed. I don't know  
23 that I've ever been part of a proceeding where it's been  
24 submitted it a State Commission.

25 Q. Okay. You testified that -- earlier that you

1 listened to the proceedings from last Friday on the  
2 phone?

3 A. I did.

4 Q. And you heard Ms. Olson testify; correct?

5 A. I did.

6 Q. That she was very surprised by the lack of the  
7 Class III -- or Level III, rather, survey not being  
8 submitted. Do you recall hearing that?

9 A. Not at all.

10 Q. You don't recall hearing that?

11 A. No. The Level III information that's been submitted  
12 represents 99 percent of the project. 98 percent part of  
13 the route, plus the access roads, plus off line  
14 facilities. So that anybody could judge that as a lack  
15 of anything is absurd.

16 Q. So you don't recall hearing Ms. Olson testify that  
17 she was surprised that it wasn't made part of this  
18 record?

19 A. That's a very different question than what you asked  
20 me.

21 Q. Can you tell us the difference between a Class III  
22 and a Level III Survey?

23 A. I think this has been over ad nauseam. Sorry.

24 MS. SEMMLER: I'm just going to object. I think  
25 this is now getting repetitive. This was all part of a

1 conversation that occurred in direct.

2 MS. WIEST: Yes. I believe it has been asked  
3 and answered already. Objection sustained.

4 MR. RAPPOLD: I'm trying to get back on the  
5 internet.

6 Q. Are you familiar with the Migratory Bird Treaty Act,  
7 I believe it is?

8 A. Very much so.

9 Q. Okay. And would you agree that birds that are  
10 listed under the Migratory Bird Treaty Act are entitled  
11 to protection?

12 A. In certain circumstances, yes.

13 Q. And would you agree that -- well, what are those  
14 circumstances?

15 A. The circumstances where it potentially doesn't  
16 apply, as in this project, is incidental take of  
17 migratory birds under otherwise lawful acts is not  
18 precluded.

19 Q. Are you familiar with the requirements of the treaty  
20 that require nations to protect habitat of birds that are  
21 protected under the treaty act?

22 A. I'm confident that there's no part of the regulation  
23 that protects the habitat or requires any sort of  
24 compensation of mitigation for migratory bird habitat.

25 MR. RAPPOLD: Thank you. I have no further

1 questions.

2 MS. WIEST: Ms. Craven.

3 MS. CRAVEN: Yes.

4 CROSS-EXAMINATION

5 BY MS. CRAVEN:

6 Q. Kimberly Craven for the Indigenous Environmental  
7 Network and Dakota Rural Action.

8 How are you today?

9 A. Hi. Good. Thank you.

10 Q. Your testimony states that only the Fish & Wildlife  
11 Service easements and land up to 275 feet on either side  
12 of certain waters fall under federal jurisdiction.

13 Does this mean that Section 106 of the National  
14 Historic Preservation Act applies to no other land along  
15 the pipeline route?

16 A. Correct. Unless it's related to a federal  
17 undertaking there is no 106.

18 Q. What percentage of the APE falls under federal  
19 jurisdiction?

20 A. Oh, off the top of my head I don't know. I'm sorry.

21 Q. And is it fair to say that an EIS encompassing the  
22 entire route in South Dakota would necessarily include  
23 information not available under the pending EA?

24 A. It wouldn't require any information that we don't  
25 have, and that had it ever been asked we could have

1 provided.

2 So I would say an EIS analysis was done on our end.  
3 Whether it's part of the record or not, that's part of  
4 our everyday practice of gathering information and making  
5 informed decisions about routing and impacts.

6 Q. Is it your role to convince regulators to impose the  
7 absolute minimum mitigation and environmental protection  
8 for your employer's projects?

9 MS. SEMMLER: I object. That's an argumentative  
10 question. I think it could be reworded probably.

11 MS. WIEST: Could you rephrase that.

12 Q. What is your role when you meet with regulators  
13 about imposing -- or negotiating standards for mitigation  
14 and environmental protection?

15 MS. SEMMLER: I'm going to object because it  
16 assumes facts not in evidence. We don't know if this  
17 witness ever met with regulators.

18 MS. CRAVEN: Well, she's been talking to the  
19 Fish & Wildlife. She's been talking to Army Corps of  
20 Engineers. She's testified to that.

21 MS. WIEST: Would you rephrase and be more  
22 specific.

23 Q. When you meet with the U.S. Fish & Wildlife Service,  
24 is it your job to convince them that the mitigation  
25 efforts that the whooping crane -- whooping crane will

1 move is sufficient mitigation for the whooping crane?

2 A. No. That's common knowledge and agreed upon by the  
3 Fish & Wildlife Service is that there's no impact to the  
4 whooping crane in South Dakota. So I haven't had to  
5 convince them of anything.

6 Q. If FERC requirements are more protective of the  
7 environment than state law requirements, even if FERC  
8 requirements do not technically apply, why are you so  
9 aggressive in resisting them?

10 MS. SEMMLER: I'm going to object to the  
11 depiction of aggression. I'd ask that be stricken.

12 MS. WIEST: Can you rephrase?

13 MS. CRAVEN: Yeah.

14 Q. And I'm looking at page 2 of the rebuttal testimony,  
15 line 30.

16 A. Okay. Page 2 line 30?

17 Q. Uh-huh. And it's referencing Mr. Ledin's -- Mr. --  
18 do you have any comments -- I'll read his statement. "Do  
19 you have any comments on Ryan Ledin's statement regarding  
20 perceived deficiencies in the SWPPP? Yes. Throughout  
21 his testimony Mr. Ledin referenced Federal Energy  
22 Regulatory Commission, FERC, procedures. However, this  
23 project is not regulated by FERC. Nor is the pipeline  
24 construction subject to NPDES permitting as it has been  
25 expressly exempted by the EPA."

1 A. What was the question? I don't understand the  
2 statement.

3 Q. The question is if the FERC requirements are more  
4 protective of the environment --

5 A. I don't know that they are.

6 Q. Okay. You state also, the next paragraph,  
7 "Mr. Ledin's testimony repeatedly expressed concern  
8 regarding consistency in applying best management  
9 practices. However, consistency is not the measure of a  
10 success SWPPP."

11 A. Correct.

12 Q. Is it your testimony that inconsistency is a  
13 successful measure of a storm water plan?

14 MS. SEMMLER: Objection. Argumentative  
15 question.

16 MS. WIEST: Sustained.

17 Q. You testified that the crossing method for all other  
18 features will be determined by the contractor. Why is  
19 DAPL leaving important decisions that affect the waters  
20 of South Dakota and the Great Sioux Nation to a  
21 contractor that has proven an inability to implement best  
22 management practices?

23 A. I don't know that that's accurate either.

24 Q. And mitigation --

25 MS. SEMMLER: I would object. Sorry to

1 interrupt. I would ask that Ms. Craven could identify  
2 where it is that Ms. Howard testified that the decisions  
3 would be left up to contractors so we can all follow  
4 along what she's referencing.

5 MS. CRAVEN: Okay. Go to page 3, line 58. It  
6 starts on line 57.

7 Q. "The crossing method for all other features will be  
8 determined by the contractor, with advice as necessary  
9 from the chief inspector and the environmental inspector  
10 to ensure compliance with applicable regulations."

11 A. Okay. I understand what you read. What was the  
12 question, please?

13 Q. So why is DAPL leaving important decisions about  
14 these crossings that affect the waters of South Dakota  
15 and the Great Sioux Nation to a contractor --

16 MS. SEMMLER: I'm going to object.

17 MS. WIEST: Could you just wait until she's  
18 finished with the question.

19 Q. Why is DAPL leaving these important decisions to a  
20 contractor?

21 A. Well, the truth is -- it's hard for people to handle  
22 the truth -- the contractor has the most experience with  
23 crossings those water bodies at that time.

24 It would be inappropriate for me to tell them how to  
25 cross a water body today based on our surveys that we had

1 done over the last year when the present -- the  
2 conditions present at the time of construction may be  
3 different. Maybe it's during a large rain event. And  
4 when I said they could open cut and dry cut, now they've  
5 got to account for water flow and other measures.

6 So it's really up to them at the time looking at the  
7 present conditions whether they would implement a flume  
8 or a dam and pump or whether it was so flooded out of its  
9 bounds maybe they would go ahead and drill it. Them  
10 being the folks that do it on a regular basis  
11 professionally, that's the best person to make that  
12 decision.

13 Q. All right. You responded to Tom Kirschenmann's  
14 concerns with the indirect impacts of state game  
15 production areas which are near the pipeline?

16 A. What page are you on, ma'am?

17 Q. Same page. Page 3 about game production areas.

18 A. Okay.

19 Q. If you were concerned with wildlife, why do you  
20 downplay the potential impacts on the nearby game  
21 production areas?

22 A. I absolutely did not downplay anything.

23 Q. Do you know what executive order 13007 is?

24 A. If you gave me more information, I'm sure I might be  
25 familiar with it.

1 Q. It's a presidential federal -- it's regarding agency  
2 protection of sacred sites on federal lands.

3 A. Okay.

4 Q. Since you don't know about this base requirements of  
5 protection of culturally significant sites --

6 A. Why do I not?

7 Q. Do you know what this executive order is?

8 A. I'm familiar with it.

9 Q. What is it? I thought you said you didn't know what  
10 it was?

11 A. I said I needed more information. I don't know  
12 executive orders by their number.

13 Q. So how would you apply it to DAPL?

14 MS. SEMMLER: I'm going to object. She just  
15 indicated that she would need more information. None of  
16 us have it. It's not going to make for a very clear  
17 record, I don't think. I object.

18 MS. WIEST: Do you know what executive order  
19 she's referring to?

20 THE WITNESS: I have read it at some point in my  
21 career.

22 MS. WIEST: So you know what she's referring to?

23 THE WITNESS: Generally, yes.

24 Q. How would you apply it to DAPL then?

25 A. Based on my recollection, it's applicable to federal

1 undertakings as well that federal agencies are required  
2 to do so. So I'm not a federal agency, so it would be  
3 applicable under those circumstances.

4 Q. So DAPL has made it clear that they have a copy of a  
5 letter supposedly sent to the Standing Rock Sioux Tribe.  
6 How did you get that letter?

7 A. I requested it from the Army Corps of Engineers.

8 Q. And who in the Army Corps of Engineers provided it  
9 to you?

10 A. Director of regulatory. Chief of regulatory. I'm  
11 sorry.

12 Q. Did you get it from the Pierre office?

13 A. No.

14 Q. Did you get it from the Omaha office?

15 A. Yes.

16 Q. Do you know if the letter was actually sent to the  
17 Tribe?

18 A. I do.

19 Q. And do you know if the Tribes received it?

20 A. I don't. It was sent certified, so I'm sure there's  
21 record of it. I just don't have that.

22 Q. Would it surprise you to know that the Tribe had not  
23 received it?

24 A. Yes. That would surprise me very much.

25 Q. Would it surprise you to know that it was actually

1 received by the Tribe's attorney who obtained it from the  
2 office of the assistant secretary of the army in the  
3 pentagon and not from the local office?

4 MS. SEMMLER: I'm just going to object as to  
5 relevancy. I don't think any of this was relevant. That  
6 exhibit was not admitted. I object.

7 MS. WIEST: Can you explain the relevance?

8 MS. CRAVEN: Well, they've been talking about a  
9 letter that they have to the Standing Rock Sioux Tribe  
10 that I'm trying to get some clarification on that they  
11 kind of showed around here and they gathered it back up.  
12 And Ms. Semmler made reference to it in questions that  
13 they had this letter, and I'm just trying to get some  
14 clarification on this mysterious letter.

15 MS. SEMMLER: It sounds to me like it's just a  
16 general inquiry that maybe we could have off line between  
17 the two parties after this proceeding, but I don't think  
18 it's relevant to this proceeding. I asked a prior  
19 witness if she knew of the letter. She said no. Subject  
20 was over.

21 MS. WIEST: Objection sustained.

22 Q. If DAPL's contractor digs up human remains with  
23 funerary objects that indicate they are of Hunkpapa  
24 origin, what will the contractor do?

25 A. It is very expressly spelled out in our

1 Unanticipated Discoveries Plan. If you'd like it, I can  
2 read it for you.

3 Q. The Hunkpapa? Okay. Go ahead.

4 A. The what?

5 Q. The Hunkpapa.

6 If they find funerary objects that are Hunkpapa,  
7 what will the contractor do?

8 A. So there's a process for when something that's  
9 unanticipated is unearthed, and that process will be  
10 followed, which includes bringing principal investigators  
11 of archeologists out, contacting SHPO offices, contacting  
12 appropriate THPO offices through consultation with the  
13 SHPOs and so forth.

14 Q. What Hunkpapa THPO officer will be contacted?

15 MS. SEMMLER: I object. I'm not sure what point  
16 she's trying to prove here, but there's an Unanticipated  
17 Discoveries Plan, and it will be followed, so asked and  
18 answered.

19 It doesn't matter whose cultural resource it may  
20 or may not be. The process will be followed.

21 MS. WIEST: She can ask about the plan.

22 Objection overruled.

23 Q. And I'm trying to figure out whether there's  
24 sufficient information with Ms. Howard who's the -- who's  
25 devising these plans --

1 MS. SEMMLER: You know, I think it was  
2 overruled, so how about we just go on.

3 MS. CRAVEN: Okay.

4 MS. WIEST: Try not to interrupt when people are  
5 talking. Thank you.

6 Q. What if the funerary objects indicate they are  
7 Sicangu origin? What Sicangu officer will be contacted?

8 A. All the THPO contacts will be coordinated with the  
9 SHPO's office.

10 Q. Are you familiar with the common tribal terms in  
11 South Dakota, the Tribes?

12 A. I'm not sure that I am or am not. I don't know.

13 Q. Do you know what the bands of the Lakota are?

14 MS. SEMMLER: I'm going to object as to  
15 relevancy.

16 MS. WIEST: Yes. Can you explain the relevancy  
17 of this line of questioning now?

18 MS. CRAVEN: We're talking about a document for  
19 unanticipated discovery of cultural -- they could be  
20 skeletal remains, funerary objects, and they're going to  
21 have to know who to contact with the different Tribes.

22 And it doesn't seem to be any familiarity. I'm  
23 just trying to see if she's familiar. This is a  
24 important part of this Section 106 consultation, knowing  
25 the bands, knowing the Lakota, and doesn't seem to be

1 any --

2 MS. WIEST: Objection overruled. If you can  
3 answer, go ahead.

4 A. Sure. Once again, 106 pertains to federal agencies,  
5 so where it was obtained -- and we've agreed to go beyond  
6 that in this plan. So if any unanticipated discoveries  
7 were found, they would be coordinated again through the  
8 SHPO's office in the state where it occurs which they  
9 would have the knowledge and the expertise to carry it  
10 along further, as well as the archeologist and  
11 consultants that we hire for this. I personally do not  
12 have that information.

13 Q. Well, if you don't know and you're the expert and  
14 you're the boss of this project in these areas, how will  
15 the contractor's inspectors know?

16 MS. SEMMLER: I think I'm going to object to  
17 evidence -- it's not on the record who the boss is or  
18 who's going to be there when these things may or may not  
19 be found. So I think some foundation needs to be laid  
20 first.

21 MS. WIEST: Yes. Or maybe you could just  
22 rephrase it to be a more specific question.

23 Q. Did you write the unanticipated discovery plan?

24 A. Not most of it.

25 Q. Who wrote it?

1 A. Our lead archeologist on the projects.

2 Q. What's his name or her name?

3 A. Abby Peyton is one of them. There's three.

4 Q. And is she an archeologist?

5 A. She is.

6 Q. She wrote the plan?

7 A. Along with her sub consultant archeologists as well.

8 Q. Okay.

9 A. We go through great lengths to hire and retain the  
10 services of professional people that know what to do and  
11 how to do it. That's my job.

12 Q. And the contractor's inspectors that are on the  
13 ground on the site doing the digging, how will they be  
14 trained to --

15 A. We go through pre -- prior to construction, we go  
16 through an environmental training program as well as a  
17 safety program and other trainings. And in that we go  
18 through training on what to do if anything foreign is  
19 found in the trench, period.

20 Q. When you were doing the survey or when the survey  
21 was being conducted, were there cultural items that were  
22 found?

23 A. Yes.

24 Q. Were those items removed to Ohio or Illinois where  
25 the company is located?

1 A. Yes, they would have been removed for -- for  
2 analysis as necessary. Some of them were; some of them  
3 were not.

4 Q. Will those items be coming back to South Dakota?

5 A. Yes.

6 Q. One of the things that causes some confusion is the  
7 difference between proper identification and evaluation  
8 of cultural resources and artifacts on one hand, and  
9 sacred sites on the other.

10 Do you know the different protocols to be used for  
11 unanticipated discoveries and for avoidance of sacred  
12 sites?

13 MS. SEMMLER: I'm going to object as to the  
14 compound question. I'm not sure how many questions were  
15 involved there. And I think it was prefaced with there's  
16 confusion. I'm not sure who's confused. I just don't  
17 understand the question.

18 MS. WIEST: Can you rephrase that and make it a  
19 simple --

20 MS. CRAVEN: Sure. So we have --

21 Q. We have the cultural resources, and we have sacred  
22 sites. Do you know the protocols that will be used for  
23 unanticipated discoveries of these two different things?

24 A. For cultural resources I do. We've never been  
25 offered anything in the way of sacred sites, whether to

1 know how to avoid them, where they are, what we can do  
2 with respect to them so I've got no way of addressing  
3 them.

4 Q. So you don't know how to avoid sacred sites then?

5 A. No. No one's told me where they are.

6 Q. Okay. And that kind of leads into my last question.

7 There is an e-mail on the record. It's in Waste Win  
8 Young's testimony regarding an e-mail that she got from  
9 you. And she found it baffling, as did other native  
10 people who read it. They were shocked by the tone and  
11 the substance of the testimony regarding cultural  
12 resources. One witness used the term indifferent and  
13 hurtful to describe it. Another said he thought it was a  
14 weird approach, asking for a list of sacred sites.

15 A. That's not what the e-mail asks for.

16 Q. Pardon me?

17 A. That is not what the e-mail asks for.

18 MS. SEMMLER: Ms. Wiest, I don't want to  
19 interrupt. You asked me to please not do that, but I  
20 don't know how else to stop counsel when counsel's  
21 testifying.

22 MS. CRAVEN: I'm asking a question.

23 MS. SEMMLER: So I don't know how to handle it.  
24 But I do object. Counsel was testifying. There's,  
25 again, multiple questions. If we could handle it

1 differently.

2 MS. WIEST: Yes. Could you ask the question --

3 MS. CRAVEN: Yes.

4 Q. In a November 13, 2014, e-mail to Ms. Young you  
5 said, "Please review this information and let us know if  
6 Standing Rock has any known sacred or documented sites  
7 along this route."

8 A. Correct. We did not request a list.

9 Q. So what were you requesting then?

10 A. I had an in-person meeting with Waste Win at the  
11 standing -- or at the reservation in the THPO office. It  
12 was a very cordial exchange of information about the  
13 project.

14 We originally went there in discussions about our  
15 Lake Oahe crossing, which was in North Dakota with  
16 respect to its very close proximity to their reservation.  
17 And there she actually did share some information about  
18 locations of sacred sites and how we were avoiding them  
19 in certain locations. They asked for the opportunity to  
20 see the alignment so that they could determine if there  
21 were any others.

22 That e-mail is a follow up to that. So it was in  
23 direct response to her request that I send them the  
24 information so they could review it for locations of  
25 their known sacred sites. So I was simply following up

1 on that.

2 There was no intent to be insulting or rude. And we  
3 deal with privileged information on a very regular basis  
4 in the industry, so to assume we would do anything  
5 differently with one set of privileged, confidential  
6 information over another is not accurate.

7 Q. Are you aware the Tribe straddles both North Dakota  
8 and South Dakota?

9 A. Very well-aware.

10 MS. CRAVEN: No more questions.

11 MS. WIEST: Ms. Northrup.

12 MS. NORTHRUP: I have no questions.

13 MS. WIEST: Mr. Boomsma.

14 CROSS-EXAMINATION

15 BY MR. BOOMSMA:

16 Q. Ms. Howard, good afternoon.

17 A. Hello.

18 Q. I have a few questions, and they cover about three  
19 different topics in your rebuttal testimony.

20 First topic, Ms. Howard, deals with noxious weed  
21 management. And I think that's found on pages 2 and 3 of  
22 your rebuttal document. It starts with line 45 on page  
23 2, and then it goes to the top of page 3.

24 Do you see that section?

25 A. I do.

1 Q. I've heard testimony from witnesses during the  
2 course of this hearing about what is the best way to  
3 prevent noxious weed growth.

4 So my question to you is this: From the standpoint  
5 of preventing noxious weed growth, would you agree that  
6 it's preferable that the soil never be disrupted in the  
7 first place?

8 A. I'm really sorry. Can you say that one more time?

9 Q. I can. From the standpoint of preventing noxious  
10 weed growth, would you agree that it's preferable in the  
11 first place that the soil never be disrupted?

12 A. The same way preventing a car accident is to never  
13 get into a car, yes.

14 Q. There was also testimony that related to native  
15 prairie grass. I see that you offered testimony on that  
16 on page 4 of your rebuttal document.

17 A. Yes.

18 Q. I heard testimony earlier this week from landowners  
19 who have made conscious efforts to not break their native  
20 grassland.

21 So my question is this: From the standpoint of  
22 preserving native grassland, would it be preferable or  
23 better not to disturb that soil in the first place?

24 A. Again I'm going to ask you to repeat the question.  
25 I'm sorry.

1 MR. BOOMSMA: Could you read that back, please.

2 (Reporter reads back the last question.)

3 A. To preserve native prairies -- to not disturb them?

4 Q. Let me go at it a different way. I can tell you're  
5 confused.

6 A. I'm sorry.

7 Q. So it's a poor question. I'll rephrase it.

8 You offered testimony about your efforts to restore  
9 native prairie in the disturbed areas; correct?

10 A. Yes. You're talking about my testimony?

11 Q. Yes.

12 A. Yes.

13 Q. Okay. So here's my question: When you look at this  
14 whole topic or issue of preserving grassland, would it be  
15 preferable that that grassland not be broken in the first  
16 place so as to ensure the continuity of that grassland?  
17 I.e., is it preferable not to break that grassland as  
18 opposed to breaking it for the purposes of putting in  
19 this pipeline?

20 A. In my experience restoration and successful  
21 re-vegetation is very attainable. So I'm not sure  
22 that -- I'm not sure that that's a concern.

23 Q. What I heard in the way of testimony, and maybe I  
24 have it wrong, is that in many instances this grassland,  
25 native grassland, took thousands of years to build up

1 because of microbes in the soil, plant mixtures, et  
2 cetera.

3 From that standpoint and with that information,  
4 wouldn't it be better not to disturb that grassland?

5 A. No. That's the whole reason we do topsoil  
6 segregation is to preserve that topsoil in that Condition  
7 with that organic matter and everything else that's in  
8 it. That's why it's stored separately and prevented from  
9 mixing with the subsoils that don't offer those benefits  
10 to the habitat.

11 Q. So the witnesses that testified to the contrary are  
12 wrong?

13 MS. SEMMLER: I'm going to object. If counsel  
14 could specify which witnesses and which testimony we're  
15 talking about. And I think it's argumentative.

16 MS. WIEST: Yes. You'd have to be more specific  
17 in that. It's argumentative.

18 Q. I'll ask it a different way.

19 So if there was testimony to the contrary, do you  
20 feel that that testimony is wrong or mistaken?

21 MS. SEMMLER: I object again. To the contrary  
22 of what? I'm not sure what the question's asking.

23 MR. BOOMSMA: To the contrary of what she's  
24 testifying to.

25 MS. WIEST: Overruled.

1 A. I think I just voiced my opinion about how grassland  
2 restoration and prairie restoration is done and how we do  
3 it. So the concerns about topsoil are addressed by  
4 segregating it.

5 Q. Okay. Page 6 of your rebuttal document I see that  
6 you offer testimony in terms of seed mixtures and  
7 restoration of grasslands and pastureland.

8 Do you see that?

9 A. It will take me a minute to read the page to find  
10 where you are.

11 Q. Ms. Howard, it's toward the bottom of the page, and  
12 it starts with line 135, I believe.

13 A. Okay.

14 (Witness examines document)

15 A. Okay. I've read the question.

16 Q. Okay. I'll pose a question.

17 Would you agree that there are many variables  
18 involved in determining whether a proper seed mixture is  
19 obtained, and also whether the original plant growth will  
20 ever return to that area?

21 A. I'm really sorry. I need you to slow down the  
22 questions. I'm not sure --

23 MS. SEMMLER: I want to object. I think it was  
24 a compound question. If we can do one at a time it might  
25 be helpful for Monica.

1 MS. WIEST: Yes. That would be helpful.

2 Q. I'll try and break it down.

3 Would you agree that there are many variables  
4 involved in restoration of pasture/rangeland and also  
5 native prairie?

6 A. Yes. It's complicated in a number of occasions.

7 Q. Would you agree that some of those variables  
8 include, number one, making sure you get the seed mixture  
9 correct?

10 A. Absolutely.

11 Q. Number two, making sure that the topsoil isn't  
12 overly disturbed?

13 A. Making sure it's preserved, yes.

14 Q. Number three, making sure that the topsoil is  
15 adequately restored?

16 A. Yes.

17 Q. Number four, making sure that compaction doesn't  
18 occur?

19 A. Yes.

20 Q. Number five, making sure that noxious weeds are  
21 controlled?

22 A. Correct.

23 Q. Number six, making sure the contractor follows the  
24 rules?

25 A. Right.

1 Q. Seven, making sure that water, drainage to the soil  
2 isn't altered?

3 A. Correct.

4 Q. Number seven, making sure an oil pipeline doesn't  
5 leak?

6 A. Okay.

7 Q. Do you agree?

8 A. Yes.

9 Q. And lastly, making sure that the soil temperatures  
10 don't change as a result of installation of the pipeline?

11 A. Sure. Could be. All of which, by the way, are  
12 measures in our restoration plans.

13 Q. I understand that's your position.

14 What assurances do we have -- what assurances can I  
15 tell the landowners that all of these variables are going  
16 to be met and that their land is going to be restored to  
17 the original condition?

18 A. Every landowner we cross has a contract, easement  
19 agreement where all of that can be very clearly spelled  
20 out and held accountable to.

21 Q. Were you here when people like Sue Sibson or Kent  
22 Moeckly testified?

23 A. I was not.

24 MS. SEMMLER: For the record I just want to  
25 object again, the same objection we've made all along to

1 that stuff as to relevancy. Different pipeline,  
2 different project, different area.

3 MS. WIEST: Okay. Overruled.

4 Q. You were not here when they testified?

5 A. I was not.

6 Q. Are you familiar with what their testimony was?

7 A. I don't know who they are.

8 Q. You didn't hear them testify live audio?

9 A. No. I logged in as often as I could.

10 MR. BOOMSMA: That's all the questions I have.

11 MS. WIEST: Did Staff have any questions?

12 MS. EDWARDS: Just a handful. Thank you.

13 CROSS-EXAMINATION

14 BY MS. EDWARDS:

15 Q. I believe the last witness directed some of my  
16 questions on unusually sensitive areas to you.

17 In regard to those USAs, the company used the PHMSA  
18 ecological USA GIS data to determine the pipeline route  
19 didn't cross in the USAs; right?

20 A. Right. PHMSA maintains an HCA database that  
21 operators have access to only. It's confidential  
22 information, and that HCA category does include the USAs  
23 as identified by PHMSA.

24 Q. Would you agree that PHMSA identifies that there may  
25 be limitations to this data?

1 A. Yes. They strongly encourage and require us to do  
2 our own assessments as well.

3 Q. If the U.S. Fish & Wildlife Service, Game, Fish &  
4 Parks or the DENR identified that the pipeline crosses a  
5 habitat of critical or threatened -- I'm sorry. Critical  
6 or threatened or endangered species, and that such areas  
7 should be designated as USAs, will DAPL designate those  
8 areas as high consequence areas?

9 A. Absolutely.

10 Q. In your routing analysis, did you give greater  
11 weight to the avoidance of PHMSA defined USAs than to the  
12 avoidance of future growth areas?

13 A. I can't say that.

14 MS. EDWARDS: Okay. Thank you. No further  
15 questions.

16 MS. WIEST: Commissioners.

17 CHAIRMAN NELSON: When Ms. Semmler was  
18 questioning you there was one area that left me with some  
19 confusion. She was asking you about the allowance of  
20 tribal members to join a crew in surveying.

21 THE WITNESS: Yes.

22 CHAIRMAN NELSON: And I thought I heard you say  
23 that you would need specific landowner permission for  
24 that to occur; is that correct?

25 THE WITNESS: So before we go out into the field

1 and do any surveys, whether engineering, biological,  
2 cultural, anything, we have to seek that from the  
3 landowner. And in doing so, we give a very good  
4 description of what we're doing, what we're looking for  
5 and how we're going to do it.

6 So oftentimes when it's been requested of us in  
7 a past, if a Tribe has expressed interest in coming along  
8 on those surveys, you know, that gets added to the list  
9 of who's going to be on your property. Sometimes that  
10 gets stricken. Sometimes other surveys I'm doing -- I  
11 can only do one survey on my property instead of all  
12 three because that's all the landowner will allow.

13 CHAIRMAN NELSON: So I need to relate that to  
14 the language of the easements that landowners have  
15 signed.

16 Typically an easement will require the landowner  
17 to allow the project to do whatever surveys need to be  
18 done for the project. Are you telling me that your  
19 easements don't contain that kind of broad language?

20 THE WITNESS: So the survey permissions are  
21 sought before the easements are. Our policy is not to  
22 buy the easement before we know if we can construct on  
23 it. So we perform these surveys before that part so we  
24 know if it's constructible from an engineering standpoint  
25 and all of those other reasons. So it's done before

1 there's any easement.

2 CHAIRMAN NELSON: Once the easement is signed,  
3 does it contain language that would allow the project to  
4 continue to do surveying without specific permission?

5 THE WITNESS: That's not my understanding.  
6 They're very detailed as to what we can and cannot do.  
7 The easements -- well, there's construction easements  
8 which allows us access for equipment and such in order to  
9 construct it, and then there's the permitting easement  
10 which is for an operations and maintenance standpoint.  
11 So those types of surveys aren't a part of our operations  
12 and maintenance.

13 CHAIRMAN NELSON: Thank you. The last question,  
14 and I'm going to refer to this map. And I apologize.  
15 I've lost track of the number.

16 THE WITNESS: Okay. It's DAPL 53.

17 CHAIRMAN NELSON: Okay. Thank you. DAPL 53.

18 Am I understanding this correctly that in the  
19 sensitive area.

20 THE WITNESS: Yes.

21 CHAIRMAN NELSON: We'll just leave it at that.  
22 That the pipeline is going to be somewhere between maybe  
23 80 and 95 feet below the surface of the ground in that  
24 area?

25 THE WITNESS: Exactly.

1           CHAIRMAN NELSON: Thank you.

2           COMMISSIONER SATTGAST: Yes. Good afternoon. I  
3 guess Chairman Nelson's question raised another one that  
4 I had.

5           How comfortable are you in speaking about  
6 easements then?

7           THE WITNESS: I will definitely let you know if  
8 I can't.

9           COMMISSIONER SATTGAST: Okay. Because we had  
10 heard earlier testimony from one of Mr. Boomsma's clients  
11 with concerns about the easement of land. And I believe  
12 the statement in the record is their easement gives them  
13 the right to enter anywhere on our land any time for  
14 whatever purpose they claim.

15           Do you have any understanding on that portion of  
16 it?

17           THE WITNESS: You would never find that in our  
18 easements.

19           COMMISSIONER SATTGAST: Okay. Okay. Then I had  
20 asked -- I had asked a question earlier also about the  
21 acreage. Did you have --

22           THE WITNESS: I did.

23           COMMISSIONER SATTGAST: -- how much acreage the  
24 pipeline or the row in South Dakota --

25           THE WITNESS: The total disturbed acreage is

1 just shy of 5,100 acres. It's 5,096, I believe.

2 COMMISSIONER SATTGAST: Okay. And then going  
3 back to the e-mail exchange with Ms. Young dated  
4 November 13, 2014. I see in the subject line it states  
5 DAPL North Dakota and South Dakota pipeline route.

6 THE WITNESS: Uh-huh.

7 COMMISSIONER SATTGAST: So that does include the  
8 route in South Dakota as well?

9 THE WITNESS: Yes. Our initial meeting was  
10 North Dakota, and then she expressed desire to review  
11 both states.

12 COMMISSIONER SATTGAST: Okay. So in the  
13 paragraph it states, "Please review this information and  
14 let us know if Standing Rock has any known sacred or  
15 documented sites along this route."

16 We heard that you weren't requesting a list of  
17 the locations, if I'm correct on that.

18 THE WITNESS: Correct.

19 COMMISSIONER SATTGAST: What is it you were  
20 requesting from them then?

21 THE WITNESS: So in our circumstances they would  
22 express an area of concern to us. They may come out to  
23 the right of way and actually show us what it is that  
24 they want avoided or could possibly be less descriptive  
25 and just say if this is avoided that addresses our

1 concerns. They don't necessarily tell us what it is, why  
2 it's important or sacred. And that's not what we need to  
3 know. All we need to know is where do you not want us so  
4 that it doesn't conflict with what your interests are.

5 COMMISSIONER SATTGAST: Okay. Did anyone  
6 contact you?

7 THE WITNESS: No.

8 COMMISSIONER SATTGAST: If they had -- I guess  
9 you already explained that.

10 THE WITNESS: Yeah. You go down that process,  
11 and we weigh it against other things. If it's on a  
12 hilltop, we can't always construct on the side of a hill,  
13 so we do work --

14 COMMISSIONER SATTGAST: Thank you. You said  
15 that was 5,100 about.

16 THE WITNESS: Yeah 5,096.

17 COMMISSIONER HANSON: No questions.

18 MS. WIEST: Any further cross based on  
19 Commissioner questions?

20 Ms. Craven.

21 RE-CROSS-EXAMINATION

22 BY MS. CRAVEN:

23 Q. I'd like to ask a question about that e-mail too.

24 In the very last paragraph it says, "We understand  
25 that you would like to have Tribal representation during

1 these sampling events, and we will communicate that  
2 schedule with you."

3 Did you ever communicate that schedule to Ms. Young?

4 A. When I returned to the office in following up on the  
5 e-mail I had -- or found out that the surveys had  
6 actually happened the day before, and the day I was at  
7 her office. And through no intended slight, I did not  
8 follow up with her. It was an oversight, and it was just  
9 that it had already happened. There was no coordination  
10 to be done, and it was a busy time of the year, and it  
11 fell through the cracks, and I'm embarrassed by it.

12 Q. And you didn't communicate with her any further  
13 after this e-mail, did you?

14 A. No.

15 MS. CRAVEN: Okay. Thank you.

16 MS. WIEST: Okay. Any other questions? Any  
17 redirect.

18 REDIRECT EXAMINATION

19 BY MS. SEMMLER:

20 Q. What you were just asked about, that paragraph of  
21 that e-mail where you say I'll get a schedule to her, the  
22 schedule for what?

23 What's that specifically referring to?

24 A. So in order to design the HDD at Lake Oahe or any  
25 HDD, a geotechnical engineering firm needs to go out and

1 collect boring samples to evaluate the geology so that  
2 they can design the alignment and the angles so that it's  
3 a safe installation.

4 So we were going through the process with the Army  
5 Corps, since it would require -- they have fee owned  
6 property there as well as it being a Corps project, the  
7 Lake itself, which required a significant approval  
8 process. What she had wanted to coordinate with was on  
9 land closer to the boring entry and exit points. We also  
10 do the geotechnical there. That's where they wanted to  
11 be present with. It would give them an opportunity to  
12 get to the west bank.

13 Q. So it was just for that one particular boring;  
14 right? And that's in North Dakota; right?

15 A. Yes.

16 Q. So I'll use your words. You said fall through the  
17 cracks. To the extent anything fell through the cracks,  
18 it's for that situation in a different state; right?

19 A. Absolutely.

20 Q. So I just want to be sure I understand your  
21 position.

22 Is it your position that Dakota Access consulted  
23 with all parties it was required to under federal and  
24 state law and that -- I'll stop there.

25 A. Absolutely.

1 Q. Is it your position you'll continue to do so if so  
2 required?

3 A. Absolutely.

4 Q. So I think you testified earlier that as far as  
5 identification of USAs, you would consult or listen to  
6 U.S. Fish & Wildlife; right?

7 A. Yes.

8 Q. And I think you also said Game, Fish & Parks and  
9 DENR. I think that was part of the question asked.

10 Do all of those agencies -- or could you clarify for  
11 us what agencies assist with that determination?

12 A. It's my understanding of the regulation is it's  
13 intended for federal compliance.

14 Q. So South Dakota Game & Fish and DENR, that wasn't  
15 what you were referring to; right?

16 A. Not in my understanding, no.

17 Q. So it was just U.S. Fish & Wildlife?

18 A. Correct.

19 Q. And if they would make a recommendation, you'd  
20 follow it?

21 A. Yes. Or PHMSA.

22 Q. And if recommendations change, as the environment  
23 changes, would you incorporate those into your  
24 classifications of HCAs?

25 A. Absolutely. We check the PHMSA GIS database

1 routinely throughout the year to see if it changes and  
2 incorporate those as necessary.

3 Q. And then from a practical -- from a practical  
4 purpose, how does that affect Dakota Access Pipeline?

5 A. All operators have Integrity Management Plans. So  
6 based on the design and how this project is being -- how  
7 it's being designed and constructed and operated, it  
8 would, by and large, be adding that information to the  
9 map set because our Integrity Management Plan is above  
10 and beyond the minimum standards of it anyway for when  
11 the HCAs were even developed for regulation and their  
12 purpose and why.

13 MS. SEMMLER: Nothing further. Thanks.

14 MS. WIEST: Is there any recross based on  
15 redirect? Ms. Craven.

16 RECROSS-EXAMINATION

17 BY MS. CRAVEN:

18 Q. So the consultation you did with Ms. Young was for  
19 North Dakota?

20 A. The purpose of my meeting and her outreach to us was  
21 regarding the sensitivities at Lake Oahe. That's where  
22 the conversation started.

23 Q. So you haven't had any consultation regarding  
24 South Dakota?

25 A. Well, at that meeting that I had in her offices with

1 our archeologist, and she had a representative consultant  
2 there as well, they expressed interest in reviewing the  
3 alignment for both states. So I sent her a centerline  
4 file identifying the path that the project was going to  
5 take, that they were going to look and get back to us on  
6 any expressed concerns that they had.

7 Q. Have you had any contact with any other Tribes in  
8 South Dakota?

9 A. No. And she reached out to me, called me. We had  
10 public open houses throughout the state in addition to  
11 newspaper articles, radio advertisements, things of that  
12 nature about the project and about how to contact us.  
13 And she contacted me through that, and that's how we  
14 followed up.

15 Q. Was that for North Dakota?

16 A. Across the whole project we did that in all states.

17 Q. Did she reach out to you at a North Dakota open  
18 house or a South Dakota open house?

19 A. It was a phone call. So it was after the open  
20 houses. I didn't meet her at an open house.

21 MS. CRAVEN: Okay. Thank you.

22 MS. WIEST: Any other recross? Any further  
23 redirect?

24 Okay. Thank you.

25 Mr. Koenecke.

1 MR. KOENECKE: Thank you, Ms. Wiest. We had  
2 reserved Stacie Gerard until now, the retired PHMSA  
3 official. She's had a death in the family. I understand  
4 that her father's wife, not her mother, but her father's  
5 wife has passed away, and she's now headed back to the  
6 East Coast to deal with that.

7 I would ask whether the parties would consider  
8 stipulating her written testimony into the record knowing  
9 that she will not be available for cross-examination?

10 MS. WIEST: And I will ask the parties if  
11 they're willing to stipulate her testimony into the  
12 record.

13 MS. CRAVEN: No.

14 MS. WIEST: Ms. Craven says no.

15 MR. RAPPOLD: Short answer is no.

16 MS. REAL BIRD: We do have compassion for the  
17 situation, but we had many planned cross-examination  
18 questions that we can't waive, so no.

19 MS. WIEST: Well, under those circumstances  
20 since the parties cannot -- will not stipulate for  
21 understandable reasons for the admission of her written  
22 testimony then, no, I don't believe it can come in.

23 MR. KOENECKE: Thank you. With that then the  
24 Applicant rests.

25 MS. WIEST: Okay. At this time I believe we

1 were going to have closing arguments from Mr. Boomsma.

2 Closing.

3 MR. BOOMSMA: Thank you. I appreciate the  
4 opportunity to be heard. My clients appreciate it. I  
5 asked to give this closing argument on their behalf. I  
6 did so because this case has taken quite a toll on them.  
7 They're passionate about their beliefs. They're  
8 emotionally charged about the case, and I wanted to be  
9 heard on their behalf.

10 I gave my opening statement back on September  
11 29. I gave you a summary of the testimony, at least from  
12 my vantage point. And how I feel now is that I believe I  
13 have proven or shown you through evidence, through  
14 exhibits, through testimony what I laid out in that  
15 opening statement.

16 What I've shown the Commission is that my  
17 landowner clients, they've owned their land, most of them  
18 have owned their land for decades, and some -- some have  
19 owned their land for over a century. One of my landowner  
20 clients has owned their land going back to 1882 when it  
21 was homesteaded.

22 Testimony was is that they are good stewards of  
23 the land. They're active conservationists. I think they  
24 fit the definition, too, of being brave. It took a lot  
25 of bravery, a lot of guts to come to Pierre, testify.

1 They're very proud people.

2 I've shown the Commission unique land  
3 characteristics as they related to my landowner clients.  
4 I think Dakota Access did not anticipate hearing about a  
5 lot of those unique land characteristics. What you heard  
6 in the way of testimony was that many of the parcels of  
7 land are serviced by old clay and concrete tile systems.  
8 The testimony, too, was that those systems are very  
9 fragile, but they work, and they're doing a good job.

10 Some of the land had modern tiling on it. I  
11 heard about how all the land was very fertile. Some of  
12 the land had native grassland on it. Some had research  
13 seed test plots. Others had hoped that their parcels  
14 would be used for development property.

15 What was uncontradicted, undisputed was that  
16 this pipeline, if approved, is going to have a huge  
17 impact on these landowners. Huge impact.

18 What I heard in the way of testimony is that  
19 it's going to lower their land values. It's going to  
20 lower their crop productivity. It will affect their  
21 ability to expand, affect their ability to develop in  
22 many instances.

23 It's also going to make some of their housing  
24 eligibilities basically worthless. Some are questioning  
25 whether their livelihood is going to be affected.

1           The witness that comes to mind best on this  
2 topic is probably Orrin Geide when he testified about his  
3 organic Buffalo and how they're on native grassland he  
4 was very proud. I could see a twinkle in his eye, and I  
5 could tell that he was very, very happy about that. That  
6 is something that he was very passionate about.

7           Had roughly 40, 45 Buffalo on a quarter of  
8 ground. Talked about the extreme measures that he went  
9 through to make sure that there were no pesticides used,  
10 no medicines, no fertilizers. Every, everything was so  
11 that the Buffalo would remain organic, as he described  
12 it.

13           The Stofferahns. The Stofferahns. What I heard  
14 Dakota Access do yesterday was criticize the Stofferahns.  
15 Also today. Criticize them. Well, you know, you really  
16 don't have your test plots in the right place anyway.  
17 Well, you're really kind of ill advised as to why you did  
18 that. Are you serious?

19           And then I hear testimony about really this oil  
20 company, this oil pipeline rather trumps the business  
21 interest of the Stofferahns. I've got to admit, that's  
22 offensive. That's offensive. Who are the Stofferahns  
23 anyway? They're South Dakota citizens, and we're talking  
24 about a pipeline with its origins in Texas. That doesn't  
25 sit well with me.

1 I also have shown you through evidence that this  
2 route is ill planned. It's disingenuous. It's motivated  
3 by the desire to save money.

4 When I was approached by this group of  
5 landowners, my first half-hour of learning about this  
6 pipeline, it became very evident to me why is this going  
7 through a growth area? I mean, it's not as though I had  
8 to do a lot of checking or research. It's not as though  
9 I'm a genius.

10 My position on this is that anybody with common  
11 sense would really scratch their head and say, are you  
12 kidding me?

13 I've shown you exhibits. I think probably the  
14 most telling exhibits would be this I 46J. These were  
15 pictures taken by Joy Hohn. Joy went through each  
16 picture, put an address on each picture, and then talked  
17 about how this pipeline is going to come extremely close  
18 to houses, developments, farm sites, et cetera.

19 If I had to pick my favorite picture out of  
20 here, it would have to be this one. I mean, take a good  
21 hard look at this. Right across the road, right across  
22 the road is a housing foundation. You've got the rafters  
23 there. You've got the trusses. It looks like they just  
24 started to break ground.

25 Next picture, there's a development -- excuse

1 me. There's a housing foundation. The foundation is in.  
2 Again, trusses and foundations. Trusses and rafters.  
3 That's the word I'm looking for. Trusses and rafters are  
4 there. They're all ready to start sticking the house.  
5 But I even wondered, do these homeowners know that this  
6 pipeline is going to be what looks to be within about 75  
7 feet of this house? That's incredible. I mean, it's  
8 just astounding. And, again, you don't have to be an  
9 incredibly smart person to see this.

10 A lot was said about the element of fairness to  
11 the landowners. I described them as brave, and I did so  
12 because of all the expense and trouble and problems that  
13 they've gone through just to be heard.

14 You know, comments were made throughout the  
15 course of this hearing about, well, why is this room not  
16 full of more people objecting? I'll tell you why. I'll  
17 tell you why. How would you like to be the landowner  
18 who's already been hit with two lawsuits? How would you  
19 like to be the landowner who won a case in front of a  
20 judge and thought, wow, okay, that's the end of it. And  
21 then you get hit with another lawsuit right after that  
22 once the judge dismissed the first one. And now if  
23 you're lucky enough, you're going to fall into this  
24 category of landowners where they actually were hit with  
25 a third lawsuit in the way of an appeal filed yesterday.

1           That's outrageous. I think it is outrageous and  
2 offensive.

3           I heard testimony from Mr. Mahmoud, how we're a  
4 company with millions and millions of dollars to back us.  
5 I'm sure he's right. But is that how the Commission is  
6 going to let this company treat people who oppose the  
7 pipeline?

8           This Commission entered an order for and notice  
9 of evidentiary hearing, and on page 2 of that order it  
10 laid out many of the burdens that have to be met by  
11 Dakota Access. In other words, what must they prove up?

12           And what I see from that order is that this  
13 Commission can look at whether there have been any  
14 deliberate misstatements of material fact made by the  
15 Applicant.

16           I urge you to go back and consider the  
17 testimony. What I heard was a lot of self-serving  
18 statements, a lot of conflicting testimony, a lot of feel  
19 good statements.

20           Number three. Number three says, "Will the  
21 project comply with all applicable laws and rules?" I'll  
22 candidly admit that's a issue that's got to be briefed.  
23 A person probably could spend a couple of hours arguing  
24 whether this statute or this rule or this procedure was  
25 met. I can't do that now. That will be briefed.

1           But I can talk about the next burden, and that  
2 is, does this project pose an unacceptable risk to the  
3 health, safety, and economic condition of the  
4 inhabitants? I submit it does. Again, it's about the  
5 evidence.

6           Go back. Consider the testimony about the high  
7 growth area. It's telling. There is absolutely no need  
8 that this pipeline go through that growth area.

9           Two of the Dakota Access witnesses freely  
10 admitted that, and the third one today sidestepped that  
11 question. There absolutely is no need. There is no  
12 unacceptable risk. We don't need this pipeline close to  
13 a water drinking source by Sioux Falls, by Skunk Creek,  
14 by the Wall Lake aquifer.

15           That burden has not been met.

16           MR. KOENECKE: Commissioners, by my watch,  
17 10 minutes has expired.

18           MR. BOOMSMA: I will wrap it up.

19           It does not fit within the orderly development  
20 to the region. That element has woefully not been met.

21           I ask that you deny this Permit. There's been a  
22 good deal of evidence that Dakota Access intends or hopes  
23 that this Commission will rubber stamp their Application.

24           Why do I say that? I say that because, number  
25 one, for months and months they've been stockpiling.

1           MR. KOENECKE: It doesn't sound like counsel's  
2 wrapping up. When we start doing new numbers on new  
3 lists, that's not wrapping up.

4           MR. BOOMSMA: I will wrap it up, Brett, and it  
5 will be within one minute.

6           Stockpiling hundreds and hundreds and thousands  
7 and thousands of pipes. Number two, they're suing  
8 landowners well in advance of getting this Permit so that  
9 they can acquire access to the land. Number three, from  
10 my perspective they're skipping critical steps in this  
11 process, such as the EIS. We heard testimony, credible  
12 testimony, that that would have been helpful.

13           They've also been obtaining and paying  
14 landowners for easements well, well in advance of this.  
15 There's lots of signs that they view this as just a  
16 rubber stamp process.

17           I don't. And I hope you don't either. Hold  
18 them to their burden. I don't think they've met that  
19 burden. This is a controversial case, and you're  
20 affecting a lot of people. You've got to think about  
21 these growth areas.

22           Last sentence: Please take the time to go  
23 actually look at this route. Go look at Sioux Falls,  
24 Tea, Harrisburg, Hartford, Humboldt. Follow the route of  
25 that path, and it's telling.

1           Thank you for letting me speak. I'm sorry I  
2 went over, but, again, my landowners thank you as well.

3           MS. WIEST: Thank you, Mr. Boomsma.

4           Before we conclude, was there anything else?  
5 The last thing I was going to talk about was the schedule  
6 going forward as far as briefing and possible oral  
7 decision date.

8           My understanding from Cheri is that she would  
9 hopefully be able to get out this transcript in two  
10 weeks. That's correct, Cheri, by the 23rd?

11           And, of course, we do have our deadline of the  
12 middle of December. And I'll just throw out some --  
13 possible dates.

14           I have November 6 as initial briefs, November 20  
15 as reply briefs, and November 30 as the oral decision  
16 date of the Commission, and then the written decision  
17 would follow that.

18           If anybody has any comments on that, let me  
19 know.

20           MR. BOOMSMA: Could you give me those deadlines  
21 one more time, please. I'm slow in writing.

22           MS. WIEST: Yes. November 6 would be the  
23 initial briefs, November 20 would be reply briefs, and  
24 the Commission could hold an Ad Hoc Meeting on  
25 November 30 to make its oral decision.

1 MR. KOENECKE: That's acceptable. Thank you.

2 MS. WIEST: Anybody have any problems?

3 MR. RAPPOLD: I'm still looking at the calendar  
4 and stuff. So thank you.

5 MS. WIEST: I'll let you guys look at your  
6 calendars.

7 Anyone?

8 MS. REAL BIRD: Some of us are involved in  
9 another docket, and the deadline is October 30 for reply  
10 briefs, and there's informal discussions amongst parties  
11 involved in both as to whether we were going -- including  
12 Staff, as to whether we would seek an extension in that  
13 other docket for a week extension, so that would fall on  
14 the 6th as well. So we're just trying to figure out how  
15 we can --

16 MS. WIEST: I understand. It's just, you know,  
17 in this case I have that deadline, and so it's --

18 MR. RAPPOLD: I'm sorry. I didn't mean to  
19 interrupt you.

20 MS. WIEST: You need to use your mic.

21 MR. RAPPOLD: Sorry. I thought I would just  
22 talk loud. Can we get the drop dead deadline for a  
23 decision?

24 MS. WIEST: It was filed on the 15th. I can't  
25 tell you exactly if it's one year. So if it's the

1 14th --

2 MR. RAPPOLD: It's the 14th.

3 MS. WIEST: It's around there. Without  
4 double-checking the statute.

5 MR. RAPPOLD: It's one year.

6 MS. REAL BIRD: So could we propose to push back  
7 all of your dates one week? Would that still meet your  
8 deadline?

9 MS. WIEST: I don't see how I can -- you mean  
10 the decision deadline and everything?

11 MS. REAL BIRD: Not the statutory deadline.

12 MS. WIEST: No. But -- the problem is is that  
13 the November 30 for an oral decision. I mean, there has  
14 to be time after that to actually write the written  
15 order. That's my problem.

16 MR. RAPPOLD: And --

17 MS. WIEST: And that's already down to two  
18 weeks.

19 MR. RAPPOLD: That's what I was going to ask.  
20 Is it being contemplated we would be able to submit  
21 proposed Findings of Fact and Conclusions of Law? Where  
22 does that fit into this process?

23 MS. WIEST: I guess I would ask people if that's  
24 what they are asking for, to submit proposed findings and  
25 conclusions or not.

1 MR. KOENECKE: As the Applicant I'm expecting  
2 to. I don't know that that's incumbent upon anybody  
3 else, but I'm expecting to do that.

4 We've been getting daily copy throughout the  
5 hearing. We're going to start on our brief next week.  
6 We'll have to do some things once we get the final clean  
7 copy, but we can get started, and we intend to.

8 MS. WIEST: Okay. Proposed findings and  
9 conclusions are optional. No one is required to do it.

10 MR. RAPPOLD: Okay. Thank you.

11 MS. WIEST: So I don't know if anybody has a  
12 better idea at this point.

13 MR. BOOMSMA: Will you send out an order to that  
14 effect, setting the deadline?

15 MS. WIEST: Yes. There will be an order setting  
16 that.

17 CHAIRMAN NELSON: I think the only thing I could  
18 add to this, and Ms. Real Bird indicated a possible  
19 request coming our direction. And all I can say is  
20 there's no guarantee that that would be granted.

21 MS. WIEST: Well, I think at this point we'll go  
22 with the schedule.

23 Anything else to come before us?

24 If not, thank you.

25 CHAIRMAN NELSON: If not, you know, this has not

1     been easy for any of us.  And I greatly appreciate each  
2     of you coming here and being a part of this, helping the  
3     three of us to make the decision that we ultimately have  
4     to make, and so thank you.

5             And with that, is there a motion?

6             COMMISSIONER SATTGAST:  Adjourn.

7             CHAIRMAN NELSON:  Move to adjourn.

8             All those in favor will vote aye; those opposed,  
9     nay.

10            Commissioner Sattgast.

11            COMMISSIONER SATTGAST:  Aye.

12            CHAIRMAN NELSON:  Commissioner Hanson.

13            COMMISSIONER HANSON:  Aye.

14            CHAIRMAN NELSON:  And Nelson says aye.  We are  
15     adjourned.

16            (The hearing is concluded at 3:39 p.m.)

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STATE OF SOUTH DAKOTA)

:SS

CERTIFICATE

COUNTY OF SULLY )

I, CHERI MCCOMSEY WITTLER, a Registered Professional Reporter, Certified Realtime Reporter and Notary Public in and for the State of South Dakota:

DO HEREBY CERTIFY that as the duly-appointed shorthand reporter, I took in shorthand the proceedings had in the above-entitled matter on the 9th day of October, 2015, and that the attached is a true and correct transcription of the proceedings so taken.

Dated at Onida, South Dakota this 23rd day of October, 2015.

\_\_\_\_\_  
Cheri McComsey Wittler,  
Notary Public and  
Registered Professional Reporter  
Certified Realtime Reporter

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