

# **Attachment 1**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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SIERRA CLUB, a California	)	
nonprofit corporation;	)	
PUGET SOUNDKEEPER ALLIANCE, a	)	CASE NO. C13-00967JCC
Washington nonprofit corporation;	)	
RE SOURCES FOR SUSTAINABLE	)	SEATTLE, WASHINGTON
COMMUNITIES, a Washington	)	November 7, 2016
nonprofit corporation;	)	
COLUMBIA RIVERKEEPER, a	)	BENCH TRIAL, Vol. 1
Washington nonprofit corporation;	)	
FRIENDS OF THE COLUMBIA GORGE,	)	
INC., dba FRIENDS OF THE	)	
COLUMBIA GORGE, an Oregon	)	
nonprofit corporation;	)	
SPOKANE RIVERKEEPER; NATURAL	)	
RESOURCES DEFENSE COUNCIL, a	)	
New York nonprofit corporation,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
BNSF RAILWAY COMPANY,	)	
a Delaware corporation,	)	
	)	
Defendant.	)	
	)	

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VERBATIM REPORT OF PROCEEDINGS  
BEFORE THE HONORABLE JOHN C. COUGHENOUR  
UNITED STATES DISTRICT JUDGE

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1 November 7, 2016

10:08 a.m.

2 PROCEEDINGS

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3 (Opening statements were heard.)

4 THE COURT: All right. Call your first witness.

5 MR. TEBBUTT: Your Honor, at this time I believe we  
6 have to have a few witnesses leave the room. We had an  
7 agreement that witnesses could be here for opening  
8 statements. Let's give them a few moments.

9 Plaintiff's first witness, Your Honor, is Paul Anderson.

10 THE CLERK: Please come this way to be sworn.

11 PAUL ANDERSON, HAVING BEEN FIRST DULY SWORN,  
12 TESTIFIED AS FOLLOWS:

13 THE CLERK: Please state your full name for the  
14 record.

15 THE WITNESS: Paul Kenneth Anderson, A-n-d-e-r-s-o-n.

16 MR. TEBBUTT: Your Honor, while we're playing with  
17 the system a little bit, one housekeeping matter.

18 The parties have stipulated to the admissibility of a  
19 number of documents, and I just wanted to, for the record,  
20 say that we believe that Exhibits 1 through 123, Plaintiff's  
21 Exhibits, are now in evidence, as well as A-1 through A-28,  
22 and A-67 of the defendants. Is that the court's  
23 understanding?

24 MR. WAGNER: We are in agreement with those  
25 designations, you know.

1 THE COURT: Okay. They're admitted.  
2 (Exhibits 1-123 and A-1 through A-28 and A-67 admitted.)

3 DIRECT EXAMINATION

4 BY MR. TEBBUTT:

5 Q Good morning, Mr. Anderson.

6 A Good morning.

7 Q Please state your full name for the record.

8 A Paul Kenneth Anderson.

9 Q And where do you reside, sir?

10 A Bellingham, Washington.

11 Q And how long have you lived in Bellingham?

12 A I believe since 1999.

13 Q And where did you reside prior to that?

14 A I lived in Redmond, Washington.

15 Q For how long?

16 A About ten years.

17 Q And what is your occupation, sir?

18 A I'm retired.

19 Q What did you do prior to retirement?

20 A I worked for the Boeing Company.

21 Q For how long?

22 A Thirty-six years.

23 Q And in what capacity?

24 A I was a tool designer.

25 Q At what facilities?

1 A I worked at multiple facilities. Primarily up in Everett,  
2 and also down in Defense and Space at Plant II  
3 and Thompson site, and I worked at the Renton site.

4 Q So you commuted from Bellingham to Everett most the last  
5 number of years?

6 A The last -- since about '99 I commuted, both driving  
7 myself and also for about ten years or more in a van pool.

8 Q How recently did you retire, sir?

9 A I retired at the end of May 2015.

10 Q Congratulations.

11 A Thank you. I made it.

12 Q Sir, do you have a family?

13 A I do. I have a wife and two children.

14 Q How old are your children?

15 A My son is 22, and my daughter is 20.

16 Q Are you a member of any of the organizations that are  
17 plaintiffs in this case?

18 A I'm a member of the Sierra Club. I'm a member of  
19 Resources for Sustainable Communities. I've supported the  
20 Waterkeepers and the Puget Soundkeepers. And I think  
21 that's -- I'm also a member of the Chuckanut Conservancy.

22 Q All right. With respect to the Sierra Club, have you held  
23 any offices or positions?

24 A Bellingham at the Mount Baker Chapter, I was on the board  
25 of directors, so to speak, of the local Sierra Club.

1 Q Was that for a number of years?

2 A It was just for a few years.

3 Q Okay. Was that relatively recently?

4 A Yeah. It was about three years ago.

5 Q Okay.

6 A I served for a couple of years, at least.

7 Q Okay. And what about Resources for Sustainable  
8 Communities?

9 A Resources for Sustainable Communities, I was on the board  
10 of directors for about a year and a half, and that was back  
11 in 2012 to 2014, '13, somewhere in that range.

12 Q Sir, describe for the court some of your recreational  
13 interests.

14 A Well, over the years I've been a mountain climber, a rock  
15 climber, a boulderer. I've been a -- rode a lot of bicycles.  
16 I'm a prolific hiker. I played rugby for about 25 years.  
17 And photography is a passion of mine.

18 Q How long have you been a photographer?

19 A My father found -- when we moved into a house, up in the  
20 attic my father found an old box camera, a little cardboard  
21 box camera, and he gave it to me. And I was probably about  
22 eight years old, and I just started shooting photographs at  
23 that time.

24 Q Are you still a photographer today?

25 A Yes, I am.

1 Q Are you a rather prolific photographer?

2 A My wife would say so. Yeah, I do a lot of photography.

3 Q All right.

4 A I just returned from a monthlong vacation with my wife,  
5 and I did a lot of photography on that.

6 Q Have you had occasion to photograph coal trains and coal?

7 A I have.

8 Q And will we be talking about some of those photographs  
9 today?

10 A Yes.

11 Q Sir, when did you first become aware of the coal and coal  
12 trains in your community?

13 A I started seeing these coal unit trains starting around, I  
14 think, 2010. I didn't record the exact date when I first saw  
15 it. But I was wondering what the heck was -- I'd never seen  
16 a coal unit train before. So I started seeing them, and, you  
17 know, the activity seemed to pick up, and that piqued my  
18 interest.

19 Q Where did you first recall observing a coal train?

20 A I think probably the first place was -- if I remember  
21 correctly, it was probably from the hang glider launch on  
22 Blanchard Mountain, which is at the south end of Chuckanut  
23 Drive.

24 Q And what stood out in your mind?

25 A Well, the length, and, you know, the fact that it was a

1 unit train.

2 Q When you say "unit train," what do you mean by that?

3 A Every car, other than maybe a cushion car and the engines,  
4 was filled with coal.

5 Q And about how long are those trains, do you know?

6 A I understand they can be up to about a mile and a half.

7 Q Have you ever observed coal falling off trains?

8 A Yes.

9 Q When was the first time you observed coal coming off a  
10 train?

11 A Oh, gosh, probably about 2011.

12 Q And where were you?

13 A 2011, 2012 time frame. There was multiple instances. I  
14 don't recall the first one.

15 One time was in Bellingham. I was on a slope pond called,  
16 I think, Padden Pond, over by the train station in  
17 Bellingham, and I was down along the shore of this pond,  
18 shooting pictures, and a coal train came by, and I got pelted  
19 with small sleet-like particles.

20 Q Where were you standing?

21 A I was standing in a creek, a little creek that runs out of  
22 the pond. And I was probably within about five feet of the  
23 bridge that had the trains go across as they enter Bellingham  
24 proper, the Fairhaven district of Bellingham.

25 Q How close is that track to Puget Sound?

1 A At high tide, the water comes under the bridge, I believe,  
2 the high water mark.

3 Q Were you standing below the bridge?

4 A Yeah. It was low tide.

5 Q But there was water coming from under the bridge --

6 A From the pond --

7 MS. ASHBAUGH: Objection, leading.

8 THE COURT: One moment.

9 MS. ASHBAUGH: Objection, leading.

10 THE COURT: Sustained.

11 Q (By Mr. Tebbutt) Tell us what you observed, if anything,  
12 coming under the bridge that day.

13 A Well, when it is low tide, the pond starts to drain out a  
14 little bit, and it passes underneath the bridge structure and  
15 into the beach area and into Puget Sound, or the Salish Sea,  
16 as we refer to it now.

17 Q Did you photograph anything around that time of that  
18 incident?

19 A I photographed the train coming around the curve.

20 Q That particular day?

21 A That particular day, I believe. I don't know if it  
22 turned -- I don't remember if it turned out. A lot of times  
23 when they don't turn out, I discard them, which is typical  
24 practice for photographers.

25 Q We'll get back to that in a minute, sir.

1           Have you visited any coal facilities in your travels?

2   A   Yes, sir.

3   Q   And what facilities have you visited?

4   A   I did a private tour through the Westshore Coal Terminal  
5   up in -- up near Point Roberts, just north of the Tsawwassen  
6   Ferry.

7   Q   And why did you visit that facility?

8   A   When I started seeing the increase in the number of coal  
9   unit trains and I started hearing about the projected number  
10   of coal unit trains that could be passing through my  
11   community, I decided to take a look. I never seen the inside  
12   of a coal-shipping facility, so I contacted Westshore Coal  
13   Terminal and told them I was a photographer and that I wanted  
14   to see the inside of a coal terminal, and they invited me up  
15   for a private tour. And so I invited a member from Resources  
16   For Sustainable Communities -- I guess you'd call them  
17   scientists or policy people -- to go with me to help me carry  
18   some of my gear, and we had a three-, three-and-a-half-hour  
19   tour through the facility.

20   Q   Sir, would you tell us your educational background,  
21   please?

22   A   I graduated from college in Rock Island, Illinois,  
23   Augustana College. I have a degree in political science, and  
24   then I do have some classes towards a master's, but it  
25   wouldn't have affected my work.

1 Q Okay. Your family history, do you have any family history  
2 with the railroad?

3 A Yes, I do.

4 Q And tell the court, please, what that history is.

5 A I believe my -- well, my father worked for the SF and --

6 Q And what is SF?

7 A "Sante Fe."

8 Q Is that part of Burlington Northern Santa Fe?

9 A Correct.

10 Q How long did he work for them?

11 A He worked for Sante Fe and Amtrak for approximately 40, 45  
12 years.

13 Q So you've been around them all your life?

14 A Oh, I love them.

15 MS. ASHBAUGH: Your Honor, I object as to relevance.

16 THE COURT: Overruled.

17 A I -- yeah, it provided a wonderful living for the family.  
18 And as a child, I can remember taking trips on the Sante Fe,  
19 and, you know, it is a thrill of a lifetime to travel with  
20 your father. And we'd go out from the Midwest to -- from  
21 Chicago to -- my father was always invited to be -- we were  
22 representatives on the Rose Bowl special, so we would come  
23 out and visit the Rose Bowl, and, you know, just coming from  
24 Iowa into California.

25 Q Let me stop you there. What you have in front of you --

1 MS. ASHBAUGH: I object as to relevance. The train  
2 doesn't show any discharging, and under your --

3 THE COURT: Counsel, this is going to be a very long  
4 trial if you're fighting over stuff like this. The objection  
5 is overruled.

6 MS. ASHBAUGH: Okay.

7 Q (By Mr. Tebbutt) Mr. Anderson, showing you what's been  
8 marked as Plaintiff's Exhibit 1391 -- and this is a series of  
9 photographs -- is this one of the photographs that you've  
10 taken?

11 A Yes, it is.

12 Q And is this one of the photographs you referred to earlier  
13 as having been taken on the day that you saw -- you were  
14 standing on -- near the bridge at Bellingham?

15 A It wasn't this particular day that I -- that I was  
16 standing on the shore of the pond.

17 Q Okay. Does this picture accurately depict the similar  
18 train that came by on that -- on the day that you were  
19 talking about?

20 MS. ASHBAUGH: Objection, leading.

21 A Yes, it does.

22 THE COURT: Overruled.

23 Q (By Mr. Tebbutt) And can you describe the picture for the  
24 court, please?

25 A Well, it is a picture of a coal unit train.

1 THE COURT: Counsel, it is a picture of a train.

2 MR. TEBBUTT: Right, but the relevance is to the  
3 place, Your Honor --

4 A And it's going --

5 THE COURT: No.

6 THE WITNESS: Sorry.

7 MR. TEBBUTT: And --

8 THE COURT: I can see it. There is a bridge there,  
9 and I can put two and two together.

10 MR. TEBBUTT: All right.

11 Q (By Mr. Tebbutt) Mr. Anderson, tell us where this picture  
12 was taken.

13 A This is in the Fairhaven district of Bellingham, and I  
14 believe it is called Marine Park. It is just -- I was  
15 probably a quarter mile from the Bellingham train station.

16 Q Is that bridge that you were talking about earlier  
17 depicted in this picture?

18 A Yes, it is.

19 Q Is there a stylus there so you can draw?

20 A Just a Sharpie.

21 Q Just draw a circle and a line.

22 A Okay.

23 Q You testified earlier that water sometimes comes out of  
24 Padden Pond, across the beach there and into Puget Sound; is  
25 that correct?

1 A That's correct.

2 Q Okay. So if you could just draw a straight line from  
3 underneath the bridge, down -- and the direction of the water  
4 flow, please?

5 A Okay.

6 Q Okay. So how --

7 A I'm sorry. There is actually two bridges side by side,  
8 one for each track, I believe.

9 Q All right. And how far is the Puget Sound from the end of  
10 that photograph?

11 A Well, you can see barnacles and marine life right in this  
12 area, and so at high tide it comes underneath this bridge,  
13 and you can see, like, the average height high water line.  
14 And, you know, in this picture it was probably 20 yards to my  
15 right.

16 Q All right. So it was a fairly low tide?

17 A Yeah. It was a very low tide.

18 Q Okay. And the time we talked about earlier when you were  
19 pelted by coal, you said you were standing in that water --

20 A Yes.

21 Q -- did you see the coal hit the water?

22 A I could see -- I could see a few plops.

23 Q In the water at -- around your feet?

24 A No. Well, it was behind me where the water was first  
25 coming out of the pond.

1 Q Okay.

2 A You know, like if somebody threw sand.

3 Q And, sir, the next picture, is that a close-up picture of  
4 the same thing?

5 A Yes, it is, horizontal.

6 Q And the next picture, is that of the same train?

7 A Should I erase that?

8 Q Yes, go ahead. Up on the right side there is an arrow  
9 that says "clear." Just hit "clear."

10 A Sorry.

11 Q I just did it. It's okay.

12 A There we go.

13 Q Is this of the same train?

14 A No. That is a different train, but it is the same  
15 conditions. It was summer conditions. It was clear out.  
16 People were sunbathing.

17 MR. TEBBUTT: Your Honor, I would like to move into  
18 evidence Plaintiffs' Exhibit 1391, and those are Resources  
19 3584 and 3585.

20 MS. ASHBAUGH: Your Honor, there's 12 different  
21 photos under this exhibit, none of which is showing the exact  
22 same thing. We'd object to all 12 photos.

23 THE COURT: The objection will be overruled.

24 MS. ASHBAUGH: Your Honor, I'd like to have a  
25 standing objection -- so I don't have to keep doing this --

1 of any photos that are photos or testimony of something other  
2 than coal coming off of a train and into the water.

3 THE COURT: I don't want a standing objection.

4 MS. ASHBAUGH: You don't want a standing objection?

5 THE COURT: No.

6 MS. ASHBAUGH: Okay.

7 Q (By Mr. Tebbutt) I'm going to go through the series of  
8 photos in this, and we'll just talk about ones that we will  
9 admit, or ask to seek admittance.

10 We will not seek admittance of 3586, Your Honor, which is  
11 the next one.

12 Q (By Mr. Tebbutt) Sir, do you see 3587 in front of you?

13 A Yes.

14 Q And is that a picture of the same area?

15 A Yes. This is the same -- same area.

16 Q And how is the tide in this picture?

17 A The tide is becoming high tide.

18 Q Okay. And is this the same bridge that we discussed in  
19 3584 and 3585?

20 A That's correct.

21 MR. TEBBUTT: Your Honor, I would move into evidence  
22 3587.

23 MS. ASHBAUGH: Notwithstanding my objections, you've  
24 already ruled, Your Honor.

25 THE COURT: It is admitted.

1 (Exhibit 3587 admitted.)

2 Q (By Mr. Tebbutt) Sir, are there other places where you  
3 have observed coal trains adjacent to water?

4 A Yes.

5 Q And Resources 3611, which is also a part of Exhibit 1391,  
6 is that a picture that you took, sir?

7 A Yes, it is.

8 Q And I notice down in the bottom left-hand corner it says,  
9 "Copyright Paul Anderson 2013"?

10 A Yes.

11 Q Does that tell the year that that picture was taken?

12 A It could be. I could have taken it in 2012 or 2011, but I  
13 change the copyright date on it as the years progress.

14 Q Are you also a professional photographer, sir?

15 A Yes.

16 Q And where have your photographs appeared?

17 A *New York Times, National Geographic, The Nation*, hundreds  
18 of newspapers worldwide, a lot of environmental organization  
19 brochures.

20 Q I think that's plenty. Thanks.

21 A Yeah. And I've donated my imagery to organizations that  
22 can't afford it.

23 Q With your camera equipment, does your camera equipment  
24 identify the dates when pictures are taken?

25 A Typically, yes. It's -- there's a process called metadata

1 that will record onto the digital image, and it tells the --  
2 if I have a copyright entered into the camera, it will say  
3 the copyright, and it has the exposure, it has the date that  
4 the photograph was taken, and the time, and a number of other  
5 items.

6 Q And approximately what year did the metadata start  
7 becoming part of the photographic process --

8 A Umm --

9 Q -- with your equipment, sir?

10 A Probably 2011, I think. I'd have to go back and look. I  
11 started using Lightroom, Adobe Lightroom.

12 Q What kind of data --

13 THE COURT: Counsel, this is more than I need.

14 MR. TEBBUTT: Fair enough, Your Honor. I'm just  
15 anticipating objections from counsel.

16 Q (By Mr. Tebbutt) Let's go to the next picture, Resources  
17 3611. What is that a picture of, sir?

18 A That is a picture of a BNSF coal unit train heading north,  
19 and it's crossing -- crossing over the north end of the  
20 Chuckanut Bay, entering the tunnel, and then it would take a  
21 hard right turn and head into the Fairhaven district of  
22 Bellingham. This is -- I'm just off of Chuckanut Drive,  
23 shooting from a viewpoint in Woodstock Farm.

24 Q Sir, can you draw on this map -- circle the area where the  
25 picture depicted in Bates No. 3611 was taken?

1 MS. ASHBAUGH: Your Honor, this is difficult because  
2 I can't see what he is doing.

3 MR. TEBBUTT: Shall we put it on the screen over  
4 here, Your Honor?

5 THE COURT: Okay.

6 THE WITNESS: Should I walk up there?

7 THE COURT: It will come up on your screen here in  
8 just a minute.

9 THE WITNESS: Okay.

10 Q (By Mr. Tebbutt) Sir, can you draw with your finger --  
11 there we go. Draw with your finger. Very good.

12 And I'd like you to draw on the map and circle with the  
13 blue pen what you circled with your finger there, please.

14 A Should I identify the photo number?

15 Q Yes. Write "3611" next to it, please.

16 A (Witness complies.)

17 Q While we're here, the pictures that we discussed, 3584,  
18 3585, can you draw again, first with your finger, on the map  
19 that's in front of you where those pictures were taken?

20 A That's where --

21 Q Marine Park?

22 A Yeah. It was -- it's hard to be real precise with my  
23 stubs, my fingers. It was right in that area.

24 Q And with your blue pen, can you please circle Padden Pond  
25 and where the picture was taken?

1 A Okay.

2 Q And would you write "3584" next to that, please?

3 A (Witness complies.)

4 Q Thank you.

5 The picture at -- is it Chuckanut Bay?

6 A Yes.

7 Q Have you been there before?

8 A Many times.

9 Q And how have you been in Chuckanut Bay? It looks kind of  
10 hard to access.

11 A Well, I've driven by it. Every time I go on Chuckanut  
12 Drive, I've driven down to the -- to -- through the  
13 neighborhoods that border parts of the southern part of  
14 Bellingham Bay. I've kayaked in there, I've sailed in there,  
15 I've photographed in this area. I have a good friend who  
16 lives just north of that causeway that, you know, I've  
17 visited in the past and kayaked from a little park that's at  
18 that shallow bay there.

19 Q Okay. And during what time period have you kayaked there?

20 A 2000 -- I guess when I first started moving up here, I had  
21 friends that had kayaks, and I had a -- I bought a tandem  
22 kayak back in about 2000, 2002, and we -- the family would  
23 kayak in that area because it is relatively sheltered.

24 Q Did you continue to kayak there for many years?

25 A Yes. I have four sit-on kayaks now.

1 Q All right. Let's go back to 3691 -- or 3611, rather.  
2 Can you get into the inside of the bay, inside the  
3 bridge here?

4 A Yes. You go through the -- there is a passage through  
5 here, or out that way.

6 Q Okay. And so getting into the bay, which direction would  
7 that be? Would that be the other way?

8 A Sorry. This is pointed north. So we would go through  
9 this way into the main body of Chuckanut Bay.

10 Q Okay. And have you kayaked under that bridge?

11 A Yes.

12 Q Okay. And have you -- obviously you took a picture of a  
13 coal train going across that bridge that day.

14 When you've kayaked under the bridge, did you see  
15 anything in particular of note to you?

16 A I've seen coal on the riprap when I was crossing through.

17 Q Did you stop and observe that?

18 A Yes.

19 Q And when did you do that?

20 A Oh, multiple times I've stopped and I've looked.

21 Q When was the most recent time you've done that?

22 A A couple of years ago I stopped looking after, you know,  
23 seeing and identifying.

24 Q How do you know it was coal?

25 A Well, I've gathered samples of coal, and I've been in

1 Gillette, Wyoming, and I've seen coal and I've photographed  
2 it. I've done a lot of research on it. I've held coal  
3 before. I grew up in an area in the Midwest where there was  
4 some coal mines nearby, and that was harder coal.

5 Q So coal you've been familiar with for most of your life?

6 A Yes.

7 Q Is there anything in 3611 that sticks out in your mind?

8 A Well, that bridge has been replaced now. There was a fire  
9 on it, evidently, and that's been replaced. And all the ties  
10 that were wooden ties, I believe, have been replaced, and the  
11 ballast, it's been changed or cleaned.

12 Q But you can still access Chuckanut Bay by kayak?

13 A Yeah.

14 Q Is there anything else in the photograph? I mean, can you  
15 see -- you said you saw coal underneath the bridge. Any  
16 other place you can see coal, in your observation, coming  
17 from the trains?

18 A Well, if you look along this area right here, you can see  
19 some darker stripes, and I've picked up small pieces of coal  
20 from that area.

21 Q Where these stripes are?

22 A Yes.

23 Q So you believe those stripes to be coal?

24 A I believe them to be coal.

25 Q Sir, 3612, was that taken -- that picture taken the same

1 day?

2 A Yes, it was. I believe it was the same train.

3 Q And would the metadata tell you when that picture was  
4 taken?

5 A Yes.

6 Q Do you know approximately when that picture was taken?

7 A You know, I rely on the metadata. I don't note the date  
8 unless I research the metadata. It was probably 2012, maybe  
9 2013.

10 MR. TEBBUTT: Your Honor, I'd like to move into  
11 evidence Exhibit 1391, and specifically the sub-photos,  
12 Resources 003611 and 3612.

13 MS. ASHBAUGH: No objection other than previously.

14 THE COURT: They will be admitted.

15 (Exhibits 1391.3611 and 1391.3612 admitted.)

16 MR. TEBBUTT: Thank you.

17 Q (By Mr. Tebbutt) Sir, taking a look at the next  
18 photograph, which is also in Exhibit 1391, Resources 003613,  
19 do you have that on your screen?

20 A I do.

21 Q Did you take this picture?

22 A Yes, I did.

23 Q Do you know approximately when you took this picture?

24 A 2012, 2013, possibly even 2014. I'd have to look at  
25 the -- I stopped at -- I've stopped and photographed here a

1 number of times.

2 Q Again, you believe the metadata that the camera collects  
3 is reliable?

4 A Yes.

5 Q Okay. What is depicted in Photograph 3613, sir?

6 A Well, it was brand-new tracks that had just been installed  
7 in the northwest Everett freight yards, and I believe those  
8 tracks were laid down so the Amtrak and --

9 MS. ASHBAUGH: Objection, Your Honor, calls for  
10 speculation.

11 THE COURT: Sustained.

12 Q (By Mr. Tebbutt) Just describe what you see in that  
13 picture.

14 A Okay. I'm sorry.

15 You see two empty coal trains, and then you see a  
16 loaded one. The two empties were going to be heading back  
17 towards the Powder River Basin, and the middle one was  
18 heading north.

19 Q And where were you standing?

20 A I was standing on a Port of Everett bridge that goes over  
21 the railroad, right alongside -- I think it is the Snohomish  
22 River.

23 Q Sir, what, if anything, is remarkable to you about what  
24 you see in Photograph 3613?

25 A Every car here has fracture areas on the front, and that's

1 where the surface of the coal has flaked off or cracked.

2 Q Is that something that you've observed many times in your  
3 lifetime?

4 A Yes.

5 Q And particularly in the time period of 2010 to present?

6 A Yes. Almost every coal car has the same -- same cracking  
7 or -- you know, you can see where it breaks off.

8 Q Is there anything else -- other than this feature that you  
9 just described, is there anything else that you can see?

10 A Well, you can see in a few of these areas -- well, perhaps  
11 that's not the best. But there is coal that sits on these  
12 rails when its traveling across country.

13 Q When you're referring to the rails, you're talking the top  
14 sills of the cars?

15 A Exactly. I'll refer to them as "sills."

16 Q Thank you.

17 And let's clear the screen here for a moment because we  
18 have another photograph.

19 Is this a photograph taken the same day?

20 A Yes, it is with a longer lens.

21 Q All right. Are there any places where you can see coal on  
22 the sills in this picture?

23 A Just little areas. Right here, you know, around that  
24 area.

25 Q That's just a few examples of coal on sills?

1 A On this picture, yes.

2 THE COURT: All right. Let's take a 15-minute  
3 recess.

4 (Court in recess.)

5 MR. TEBBUTT: Your Honor, I'd like to move in  
6 evidence in Exhibit 1391, Resources 00363 and 364.

7 MS. ASHBAUGH: Objection as to relevance.

8 THE COURT: They'll be admitted.

9 (Exhibits 1391, Resources 003613 and 3614 admitted.)

10 Q (By Mr. Tebbutt) Sir, this is Resources 3615. Do you see  
11 that now in front of you?

12 A I do.

13 Q And where was that taken, sir?

14 A This was taken north of the Mukilteo ferry landing. As  
15 it's approaching, it comes around the corner and then travels  
16 north to downtown Everett.

17 Q And what, if anything, is the significance of this picture  
18 to you?

19 A Well, it shows the proximity of -- to the Salish Sea, and  
20 it shows where there was a mudslide at one point.

21 Q All right. Thank you.

22 And 3616 is a picture in a different place?

23 A No. That's -- well, from that last picture, this is the  
24 northwest Everett's freight yard depicting the two coal  
25 trains and an oil train.

1 MR. TEBBUTT: All right. Your Honor, I'd like to  
2 move into evidence 3616.

3 MS. ASHBAUGH: Same objection.

4 THE COURT: It will be admitted.

5 (Exhibit 3616 admitted.)

6 Q (By Mr. Tebbutt) Sir, this is taken near the Everett  
7 railway yard?

8 A Yes. That's I-5 there and the Snohomish River Bridge.

9 Q What, if anything else, is significant about the coal  
10 trains in this picture?

11 A Well, you can see more of the fracturing.

12 Q Okay. Just give us a few examples.

13 A It's...

14 Q What about coal on the sills? Do you see any of that?

15 A I, actually, don't see a whole lot -- oh, it looks like  
16 maybe there.

17 Q All right.

18 MR. TEBBUTT: Move into evidence 3616, please.

19 MS. ASHBAUGH: Objection.

20 THE COURT: Overruled.

21 (Exhibit 3616 admitted.)

22 MR. TEBBUTT: Your Honor, there has been an issue of  
23 the metadata itself. The metadata behind it lists, for each  
24 exhibit, when the picture was taken. It would seem to be  
25 efficient if we were able to submit that to the court, if the

1 court needs timeframes, because, obviously, for the purposes  
2 of penalties, we're only trying to put photographs in within  
3 the statute of limitations period but want the court to know  
4 those are, indeed, those timeframes, as Mr. Anderson has  
5 testified he can't remember exactly which day he took every  
6 picture. Is that something the court would entertain?

7 THE COURT: Yes.

8 MR. TEBBUTT: Thank you.

9 MS. ASHBAUGH: Your Honor, I'm a bit confused if  
10 you've admitted this exhibit or not.

11 THE COURT: He hasn't offered it yet.

12 MS. ASHBAUGH: Okay.

13 MR. TEBBUTT: Sorry. I would like to offer 3616.

14 MS. ASHBAUGH: And I would object because the witness  
15 has already testified that he has changed copyright dates,  
16 and when copyright dates are changed, metadata is changed as  
17 well.

18 THE COURT: The objection is overruled. It will be  
19 admitted.

20 (Exhibit 3616 admitted.)

21 Q (By Mr. Tebbutt) Sir, have you taken video of trains as  
22 they move as well?

23 A Yes.

24 Q And is the picture on the screen a video you took?

25 A Yes, sir.

1 Q This is Bates No. 137. Tell me to stop if you see  
2 something that you'd like to talk about in this video. Okay?

3 A Okay.

4 (Video is played.)

5 A Stop. Stop. Stop.

6 MR. TEBBUTT: There we go.

7 Q (By Mr. Tebbutt) Did we miss it?

8 A No. This is typical for almost every car.

9 Q Describe for the court what you see in this picture,  
10 please.

11 A On the leading edge of the cars, you'll see the  
12 fracturing, where the harder surface is no longer there.

13 Q Okay. What else is interesting about the coal cars as you  
14 see them there?

15 A Well, I didn't take -- there's just an observation.

16 Q When you say "just an observation" --

17 A Potential coal. I didn't go down and sample it, though.

18 Q It is consistent with what you've seen in other places --

19 MS. ASHBAUGH: Objection; leading.

20 THE COURT: Sustained.

21 A So along the top.

22 THE COURT: He's going to ask another question.

23 Q (By Mr. Tebbutt) Is the material that you're saying is  
24 coal alongside here, have you seen and looked for coal along  
25 tracks in other places?

1 A Yes.

2 Q And is the material that you see here that you circled in  
3 this picture consistent with what you've seen in other places  
4 of coal?

5 A Yes.

6 Q What else about the coal cars is of significance in this  
7 picture?

8 A There's some degree of longitudinal cracking in this area.

9 MS. ASHBAUGH: Objection. This calls for expert  
10 testimony.

11 THE COURT: Overruled.

12 Q (By Mr. Tebbutt) You see lines of cracks going along the  
13 length of the cars?

14 A That's true. Along with what I assume to have been the  
15 compaction back in the mines.

16 Q Okay. Where was this video taken?

17 A This was taken just -- this is downtown Mount Vernon.

18 Q Okay.

19 A Washington.

20 Q You don't own that road there on the highway, do you?

21 A This is I-5 there.

22 Q That's "Anderson Road"?

23 A No.

24 Q I was just checking.

25 A Thankfully.

1 Q I'm going to run the video again, and tell me to stop if  
2 there is anything else that's of consequence. Okay?

3 A Okay.

4 Q And I'll try to stop it a little bit better this time.

5 (Video is played.)

6 MR. TEBBUTT: Your Honor, we'd like to move into  
7 evidence 3617 as part of Exhibit 1391.

8 MS. ASHBAUGH: Objection.

9 THE COURT: Overruled. It will be admitted.

10 (Exhibit 3617-1391 admitted.)

11 Q (By Mr. Tebbutt) Sir, you have in front of you Exhibit  
12 No. 1392, which is Resources 03619. Is that a photograph  
13 that you took, sir?

14 A Yes.

15 Q And the metadata, again, would tell when you took that  
16 picture.

17 A Yes.

18 Q What is that a picture of, sir?

19 A It is a picture from one of the hang glider launches -- I  
20 believe there's two of them -- at Blanchard Mountain.

21 Q And what else do you see in that picture?

22 A There is a coal train passing at the base of Chuckanut  
23 Mountain and heading around Pigeon Point. And this whole  
24 area is near the Taylor Shellfish farms, which is an oyster  
25 farm along Chuckanut Bay, and commercial beds.

1 Q Okay. And the map that you have in front of you, the  
2 colored map, is this area depicted on that map or is it --

3 A No, this is further south.

4 Q Further south. Okay. Thanks.

5 So this photograph shows the proximity of the coal  
6 train to water here in this situation?

7 A The proximity to the water and the topography above it.

8 Q All right.

9 A Above the tracks.

10 MR. TEBBUTT: Your Honor, I'd like to move into  
11 evidence Exhibit 1392.

12 MS. ASHBAUGH: No objection.

13 THE COURT: It will be admitted.

14 (Exhibit 1392 admitted.)

15 Q (By Mr. Tebbutt) Have you observed or sought out coal in  
16 other places in the Northwest area of Washington State?

17 A Yes.

18 Q And tell us a couple of other areas that you've looked.

19 A I've looked along the Columbia River at Horsethief Lake.  
20 And I've -- in this particular instance was under the Skagit  
21 River Bridge in Mount Vernon, Washington.

22 Q And did you take this picture?

23 A I did.

24 Q And there is a series of pictures in this exhibit that  
25 we'll go through, starting with Resources 00357. Were you

1 with anybody when you took these pictures?

2 A I was with a gentleman named Jeff Jacobs.

3 Q And what was the purpose of your outing that day?

4 A We went out to gather coal underneath the Skagit River  
5 railroad bridge.

6 Q So this 1385, the first picture, is one of the photos that  
7 you took?

8 A Yes.

9 Q If you would please circle with your finger what you  
10 believe to be coal material or petcoke material.

11 A (Witness complies.)

12 Q Okay. Those are some examples?

13 A Those are some examples, correct.

14 Q All right. And have you observed both coal and petcoke  
15 trains?

16 A I've observed coal unit trains, and I've observed freight  
17 trains that might have one or two cars that appear to be  
18 petcoke.

19 Q Okay. So with petcoke, have you not seen unit trains of  
20 petcoke?

21 A I may have seen several, but it was going too fast to  
22 really identify it. It was -- it was a slightly different  
23 color than the coal.

24 Q The material that you've circled in 1385, are there some  
25 things that you think are petcoke and some that you think are

1 coal?

2 A In this instance, I believe that this is petcoke and that  
3 the smaller pieces are coal.

4 Q What is the basis for that opinion?

5 A Well, I've done research, observed photographs and, you  
6 know, researched it in Google.

7 Q Okay. The next picture, 3358 -- and I'll clear the screen  
8 here. I've tried to clear the screen. There we go -- what's  
9 depicted in this picture?

10 A Same thing: Coal and petcoke, I believe.

11 Q And you said that this was by the railroad bridge at the  
12 Skagit River?

13 A Yes.

14 Q How close to the Skagit River was this photograph taken?

15 A This was extreme low water condition, and this was maybe  
16 25 feet, 25 feet from the actual water.

17 Q Have you been in this area when the Skagit River has been  
18 high enough that it would cover this area?

19 A I observed the high water during flooding from a safe  
20 location. This would have been covered in a flood condition  
21 or high water condition.

22 Q An unusual flood condition?

23 A No. If it rains hard up in the mountains, it could flood  
24 this out.

25 Q How often from your observations would you think that

1 would occur?

2 A It happens on a regular basis. That's why they have  
3 steelhead reports for the turbidity of the water.

4 Q Okay. I'm going to clear the screen. Let's take a look  
5 at the next picture.

6 Is this picture taken in the vicinity of the other two?

7 A Higher up, yes. Up north near Buckman of the bridge.

8 Q And, again, is there anything you observed?

9 A Yeah. Piece of coal.

10 Q And how far from the water would this picture have been  
11 taken?

12 A This was extreme low water conditions. This was probably  
13 50 feet.

14 Q Okay. And have you seen water higher up at this  
15 particular place?

16 A Yes.

17 Q Next picture, is that just a close-up of something  
18 similar?

19 A Yes.

20 Q Same area?

21 A Same area, just a few feet, maybe, over.

22 Q Same day?

23 A Yes.

24 Q And let me clear here again.

25 And what is -- is that your finger or --

1 A No. That's Mr. Jacobs' finger.

2 Q And do you know what he's pointing at?

3 A He's pointing at a small piece --

4 MS. ASHBAUGH: Objection; calls for speculation.

5 THE COURT: Overruled.

6 Go ahead.

7 A A small piece of coal or petcoke.

8 Q (By Mr. Tebbutt) Okay. Next picture, 3361, is that  
9 Mr. Jacobs?

10 A That is Mr. Jacobs.

11 Q Okay. And what, if anything, is significant about the  
12 picture we're looking at now?

13 A There was some type of, like, grease, or axle grease, and  
14 we saw some pieces of coal embedded in it.

15 Q Where did you find that material?

16 A That was up in the structure above the cement abutment  
17 where the metal of the bridge was -- joined the -- the cement  
18 of the abutment.

19 Q Okay. If you could just circle what you believe to be  
20 pieces of coal in 3361, please.

21 A Well, there's a little piece right there.

22 Q Near Mr. Jacobs' finger?

23 A Yes, right to the left of that. And there's some, up in  
24 this area, there's some embedded just to the left of that  
25 green dot.

1 Q Thank you. We'll go to the next picture.

2 Is this a picture you took as well?

3 A Yes. This shows the structure above where we were  
4 collecting some of the coal.

5 Q And what's depicted -- the nice picture above the track  
6 there. What is that?

7 A Those are Trumpeter swans.

8 Q Next picture, Sierra, et al. 00000102. Are these pictures  
9 taken at the same time and place?

10 A Yes.

11 Q At the train trestle?

12 A Yes. There was an abutment that was actually in the river  
13 that we could walk out to because of the low water, and this  
14 was on that little island in the river.

15 Q And if you could circle with your finger what you believe  
16 to be coal.

17 A (Witness complies.)

18 Q Okay. How far from the water's edge was this?

19 A This was just a couple of feet.

20 Q Next, 00000103, from this series. What is that?

21 A That's a picture of Mr. Jacobs holding a chunk of coal  
22 that we pulled from the crevices that we pulled from the  
23 rocks protected the structure holding the bridge up.

24 Q Was there anything else in this pictures that of  
25 significance?

1 A Well, to me that looks like waterline there, and you can  
2 see moss growing here on the cement, I believe, and where  
3 waterlines reach up higher, the water reaches up higher at  
4 normal flow.

5 Q And the coal in Mr. Jacobs' hand, was that taken from  
6 somewhere in this picture?

7 A It was in this area here.

8 Q Is that muddy area between the rocks?

9 A Yes.

10 MS. ASHBAUGH: Objection; leading. Counsel is  
11 characterizing.

12 THE COURT: Overruled.

13 A That was taken --

14 THE COURT: No, no.

15 MR. TEBBUTT: That's fine.

16 THE WITNESS: Sorry.

17 Q (By Mr. Tebbutt) Next picture, Mr. Anderson, what is that  
18 a picture of?

19 A This shows the understructure of the bridge itself looking  
20 straight up.

21 Q Okay. And where are you standing in relation to the  
22 water's edge that day?

23 A We're right in where the water is.

24 Q Next picture, 105 in the series. Where was this picture  
25 taken?

1 A Approximately right below where that previous picture was  
2 taken.

3 Q Okay. So you're just a matter of feet from the water?

4 A Yes, uh-huh.

5 Q And again --

6 MR. TEBBUTT: At the risk of being tedious, Your  
7 Honor --

8 Q (By Mr. Tebbutt) Please circle with your finger what you  
9 believe to be coal.

10 A (Witness complies.)

11 Q Those four little dots?

12 A Yes, there's a number of pieces.

13 Q All right.

14 Let's look at the next photograph, which is 106 in the  
15 same series. Again these photographs were all taken the same  
16 day, correct?

17 A That's correct.

18 Q And what -- is that Mr. Jacobs' finger?

19 A Yes, I included that, his finger in there just to show the  
20 relative size of the coal that we'd been finding.

21 Q Okay. And then please circle, again, the coal that you  
22 see in that picture?

23 A (Witness complies.)

24 Q Okay. Thank you.

25 A It's -- it's everywhere.

1 Q All right. And then 107, again, picture in the same area?

2 A Correct.

3 Q And, again, just point to what you believe to be coal  
4 there.

5 A (Witness complies.)

6 Q All the little specks all over?

7 A All the little black specks.

8 Q Okay. And again how close to the water is that picture?

9 A Within a foot or two.

10 Q All right. And again, 108, is that the same situation,  
11 the same place?

12 A That's correct.

13 Q And 109, are we talking the same thing?

14 A Correct.

15 Q 110, is that Mr. Jacobs's hands?

16 A Yes.

17 Q And the material in his hands you believe to be coal?

18 A Yes.

19 Q And another picture of Mr. Jacobs. Where is he sitting in  
20 this picture?

21 A We're out in the river on this sand and logs and riprap up  
22 around one of the abutments, and there's an abutment up there  
23 and right behind me to the left is another abutment which  
24 would be almost in the middle of the river.

25 Q Is there anything remarkable on that abutment that you can

1 see?

2 A Well, there's just a -- you know, there's the wood that  
3 collects on the -- you know, the upstream side, and, you  
4 know, the water, this is very low. A lot of times the water  
5 is up in this area.

6 Q Can you just draw a line where you've seen the water?

7 A Yeah, and I've seen the water up in this area. It looks  
8 like waterline to me, and in extreme floods it's much higher.

9 Q And, again, 112, same picture --

10 A Yes.

11 Q -- same area?

12 A Right.

13 Q Okay. And, again, do you see coal in that picture?

14 A Yes.

15 Q Just point to a few of the places where you see it.

16 A (Witness complies.)

17 Q Okay. And again, 113, more coal?

18 A Yes.

19 Q And Mr. Jacobs' hand?

20 A Yes.

21 Q And Mr. Jacobs standing in the water. Do you know where  
22 he collected the coal that's in his hand?

23 A Right at the edge of the river.

24 Q Where --

25 A Under the Skagit River Bridge.

1 Q Right. But where he was standing or on the shore?

2 A I believe it was just right where he was standing.

3 Q And he's standing on a rock in the water?

4 A Yes.

5 Q And again No. 115?

6 A Peppered with coal.

7 Q 116, what is Mr. Jacobs doing there, do you know?

8 A We're looking at coal in the water.

9 Q Could you see coal in the water that day?

10 A Yes, right at the very edge.

11 Q How much?

12 A I don't know. We just -- we didn't take a shovel and  
13 shovel it up. It was, you know, peppered throughout. Bigger  
14 chunks in the water because the smaller ones would float  
15 away.

16 Q Have you visited that site on multiple occasions?

17 A I've been there multiple occasions.

18 Q And have you gone back to look for the same coal that you  
19 saw in these photographs?

20 A Yes, three days later I did.

21 Q And what did you find?

22 A It had rained between the day that I visited and the day  
23 these were taken, and we didn't see any coal -- I didn't see  
24 any coal. It was gone.

25 MR. TEBBUTT: Your Honor, I'd like to move into

1 evidence the entire Plaintiff's Exhibit 1385 series.

2 MS. ASHBAUGH: I have an objection as to relevance.

3 THE COURT: Overruled. It will be admitted.

4 (Exhibit 1385 admitted.)

5 Q (By Mr. Tebbutt) Sir, I'll have you look at Exhibit 1389  
6 series of photos. Did you take these photos?

7 A Yes.

8 Q Resources 350, what is that?

9 A It's a coal train heading north below the Chrysalis Hotel,  
10 and off to the right is Bellingham Bay and the Taylor Street  
11 Dock. And it is a popular park. I walk there a lot.

12 Q The map you have in front of you and on the screen, can  
13 you, sir, circle where that was taken, where the Chrysalis  
14 Hotel is?

15 A It's right on the water there. Where you see the L-shape,  
16 that's the Taylor Street Dock, and the Chrysalis is right  
17 where this green dot is, just on the north side of the start  
18 of the dock.

19 Q Okay. And so the structure we saw out in the water, is  
20 that depicted in this map, too?

21 A Yes. That's this right there.

22 Q All right.

23 A That L-shape.

24 Q We get the general picture, I think.

25 A Okay.

1 Q Can you circle the map that you have in front of you with  
2 your pen, please, and write "1389" on it, please?

3 A (Witness complies.)

4 Q Thank you. What, if anything, is significant about this  
5 picture, sir, 1389, 3570?

6 A That shows there is some coal sitting on that sill, and  
7 this is a trailing edge of the coal car.

8 Q Just stop for a second. The coal car is heading towards  
9 the top of the picture, correct?

10 A Headed in that direction.

11 Q All right. Very good.

12 A And it is showing the slough of some coal there, and the  
13 fracturing along the sides.

14 Q Do you see any other coal sills in that picture?

15 A Right here, and it's getting too far to see the others.

16 Q Have you ever personally observed coal coming off of the  
17 sills?

18 A Yes, I have.

19 Q And where have you observed that?

20 A In this area. This was like a jostle, like the train was  
21 going to stop suddenly, and, you know, a piece fell off --  
22 several pieces fell off, small pieces.

23 Q The next picture, 3571, you took that as well?

24 A Yes.

25 Q And is that the same day?

1 A No, that was a different day.

2 Q Same area?

3 A I was shooting from the same location, only with a  
4 wider-angle lens, and so it showed the structure of the  
5 Chrysalis Hotel and Spa.

6 Q And do you see material on the sills that you believe to  
7 be coal?

8 A Yes.

9 Q Okay. The next picture, 3572, is that taken at the same  
10 place?

11 A That's correct.

12 Q Looking where?

13 A I'm looking southwest from the Taylor Street Bridge over  
14 towards the shipyards in Fairhaven and the train station and  
15 the Alaska shipping -- the Alaska ferry terminal.

16 Q I'm going to switch -- pardon me. Was there something you  
17 wanted to show me on that one?

18 A Just the proximity to the water.

19 Q I think that is fairly obvious.

20 3573, sir, is that a picture taken on the same day?

21 A Correct.

22 Q And do you see coal on the sills there?

23 A Yeah.

24 Q You just put your finger on something else along that.  
25 What is the significance of that, the last marking?

1 A Oh, right here?

2 Q Yes.

3 A The sloughing on the leading edge of the rail cars going  
4 north.

5 Q The sloughing of the coal cars?

6 A Yes, uh-huh, the breaking of the -- there was crust or,  
7 you know, the top layer of the coal.

8 Q Sir, what is 3574 are a picture of?

9 A This is a picture from the hang gliders launch upon  
10 Blanchard Mountain at the south end of the Chuckanut Drive.  
11 This is Chuckanut Drive --

12 Q You say "this." Is that where you just put the green  
13 pencil?

14 A Yes, right here.

15 And this is a creek called Colony Creek. It is a  
16 salmon stream.

17 Q All right.

18 A And this is a friend of mine's house, and he lets the hang  
19 gliders land in this whole field.

20 Q Have you looked for coal in and along Colony Creek?

21 A Yes.

22 Q What was the result of your observations?

23 A Off -- off to the -- off to the right side of the picture,  
24 there is the bridge that crosses Colony Creek, and I've seen  
25 coal similar to the Skagit River Bridge on the abutments and

1 I've seen some amongst the grass but it is on the steep bank  
2 of the stream but it's very difficult to stand there because  
3 the water is too deep.

4 Q And where you've seen coal on Colony Creek, have you seen  
5 the water line come up higher than where you've seen coal?

6 A Yes. This is a tidal area so you can see this whole area,  
7 mud flats, the tied goes up into this area. And this used to  
8 be.

9 Q I just cleared that. Is there something you wanted to  
10 add?

11 A This used to be an old canning plant years ago, so I  
12 assume the water came --

13 MS. ASHBAUGH: Objection; speculation.

14 THE COURT: I'll disregard that last part of the  
15 testimony.

16 Q (By Mr. Tebbutt) Is the last picture back at the  
17 Chrysalis Hotel?

18 A Yes.

19 Q And what is this picture of?

20 A Showing the proximity of an empty car, empty cars comes  
21 southbound.

22 Q Okay. And the next picture, what is that a picture of?

23 A I believes that the same train, and it's empty, returning  
24 from the Westshore Coal Terminal, and it shows the amount of  
25 coal that's -- there's a lot of coal left in the bottom of

1 the coal cars after it's been inverted 180 degrees.

2 Q Okay. Those are what you believe to be rotary dumpers?

3 A Yes, at Westshore.

4 Q Have you seen the rotary dumpers in action at Westshore?

5 A Yes.

6 Q And have you seen more than one method of unloading at  
7 Westshore?

8 MS. ASHBAUGH: Objection, Your Honor.

9 THE COURT: Overruled.

10 A I've only seen rotary dumping at Westshore.

11 Q (By Mr. Tebbutt) Okay. The next picture, 3577, again is  
12 that a picture you took?

13 A Yes.

14 Q Is that of the same train?

15 A Yes.

16 Q Just a different direction?

17 A I was bouncing back and forth from the north side to the  
18 south side of the Taylor Street Bridge.

19 Q And can you see coal in the cars?

20 A No.

21 Q Can you see coal on the sills?

22 A No. I don't see any on the sills, no.

23 Q Okay. What about the material on the left right where you  
24 circled there, 6960 --

25 MS. ASHBAUGH: Objection, Your Honor; leading.

1 THE COURT: Overruled.

2 A That might have been some dust that blew up as the train  
3 was traveling.

4 Q (By Mr. Tebbutt) That dark material -- can you circle  
5 that dark material that you're talking about?

6 A Right there.

7 And sometimes it depends on the time of year, too, on  
8 the moisture content of the coal. But it can stick to the  
9 aluminum of the cars, and if it's wintertime you can get  
10 frozen chunks that I've observed frozen to the rail car  
11 itself.

12 Q Okay. Again, this picture of the same train. What did  
13 you just circle?

14 A The coal dust at the very bottom.

15 Q Okay. Next photo. Same thing?

16 A Correct.

17 Q And 3580 was again the same thing?

18 A Yes, different car. You can see more pockets of the coal.

19 Q All right. And 3581, is that a picture of the engine of  
20 the same train?

21 A The last -- yeah, the pusher engine.

22 Q So that is going south?

23 A This is going south, and this is the Taylor Street Dock.

24 Q All right. That's what you circled earlier and labeled as  
25 1389, correct?

1 A Yes, uh-huh.

2 Q And, sir, looking at 3582, what is that a picture of?

3 A Well, that is another unit train. I -- I couldn't  
4 identify it, whether it was coal, but it had a slightly  
5 different color, so it could have been coke. I just don't  
6 know myself.

7 Q All right.

8 MR. TEBBUTT: Your Honor, with the exception of the  
9 last photograph, which appears to be a duplicate of one we  
10 saw earlier, I move into evidence exhibit -- the photographs  
11 in Exhibit 1389.

12 MS. ASHBAUGH: Objection as to relevance.

13 THE COURT: Overruled. It will be admitted.

14 (Exhibit 1389 admitted.)

15 Q (By Mr. Tebbutt) Sir, you've testified earlier that  
16 you've gone out to observe coal on the Columbia River,  
17 correct?

18 A That's correct.

19 Q And did you take a series of photos and videos while you  
20 were there?

21 A I did.

22 Q And who was present with you when these photographs were  
23 taken?

24 A Counsel.

25 Q Specifically?

1 A Charlie Tebbutt.

2 Q Meaning me?

3 A Yes.

4 Q Okay.

5 A And Andrea Rogers, who is sitting second right at the  
6 table, and my daughter McKenzie Anderson, and a boat driver,  
7 Elmo. I don't know Elmo's last name.

8 Q Okay. And do you remember approximately when you went to  
9 the Columbia River, Horsethief Lake?

10 A It was October of 2014.

11 Q And is Resources 3562 in Exhibit 1388 one of the  
12 photographs you took?

13 A That's correct.

14 Q And what does the photograph in 3562 depict to you, sir?

15 A I see high water marks on the rocks. This is the Columbia  
16 River. On the Columbia River side of the causeway, the top  
17 of the causeway is where the railroad tracks are, and this is  
18 all coal along the bank.

19 Q Can you, with your finger, draw a line indicating where  
20 you believe the high water mark to be?

21 A (Witness complies.)

22 Q All right. Let's look at the next. Sir, what is depicted  
23 in 3565?

24 A Well, you can see coal that's gathered in this area and  
25 here and it -- when it rains, it sloughs downstream -- down

1 hill.

2 Q Okay. Let's take a look at the next photograph. Are you  
3 getting adept at clearing the screen, sir?

4 A Yes.

5 Q Okay. We'll have you do that.

6 A Okay. Thank you.

7 Q So the next series, sir, as part of Exhibit 1388 are video  
8 clips, right?

9 A Yes, the MOV files are video clips.

10 Q Okay. Showing you the first of those video clips, which  
11 is Bates No. 3560. Before we play it, is this also at the  
12 Horsethief Lake causeway?

13 A This is at the Horsethief Lake causeway along the Columbia  
14 River.

15 Q And what is depicted in this photograph?

16 A It shows the expanse of the coal that's amongst the riprap  
17 there. And it had rained the night before, and much of the  
18 coal was still damp. And this just shows some of the  
19 channels that it goes down as it sloughs into -- its way down  
20 into the Columbia River.

21 Q Is this the minuscule coal you heard counsel talk about in  
22 opening argument?

23 MS. ASHBAUGH: Objection; argumentative.

24 THE COURT: Sustained.

25 Q (By Mr. Tebbutt) Let's look at the video here for a sec.



1 Q Okay.

2 A -- into the Columbia River.

3 Q Okay.

4 (Video is played.)

5 Q (By Mr. Tebbutt) Stop right there. Can you see coal in  
6 that --

7 A You can see the small specks of coal right in this area  
8 that are residual from the draining off from the previous  
9 nights rain.

10 Q A trail of coal?

11 A Pardon me.

12 Q A trail of coal?

13 A Yes.

14 MS. ASHBAUGH: Objection; calls for speculation.

15 THE COURT: Overruled.

16 A And you can see what appears to be the high water mark in  
17 this area.

18 (Video is played.)

19 Q (By Mr. Tebbutt) Let's take a look at 3562. Is this in  
20 the same general area?

21 A This is in the same general area, yes.

22 Q Again, what does this video depict?

23 A Well, it just shows how close to the edge of the rocks  
24 this coal slides down to, and the next rain that it comes  
25 washing off the edge of the rocks down into the Columbia.

1 And you can see how it goes into the crevices in this area  
2 and the cracks in there.

3 Q Is this taken the same day?

4 A Yes.

5 Q What does this video depict?

6 A A long slide. It pockets up in this area and you can see  
7 the reflections of the water and you can see little areas of  
8 coal that weren't washed in yet.

9 Q And, again, this video taken the same day?

10 A That's correct.

11 Q And, again, at Horsethief Lake?

12 A That's correct.

13 Q On the Columbia River side?

14 A Yes.

15 THE COURT: Where is Horsethief Lake in relation to  
16 The Dalles?

17 MR. TEBBUTT: Somebody help me.

18 MR. BAKER: Your Honor, Nathan Baker with --

19 MR. TEBBUTT: Just tell me.

20 Mr. Baker informed me it was approximately ten miles to  
21 the east of The Dalles.

22 THE COURT: Near Biggs Crossing?

23 MR. BAKER: No Biggs is further east.

24 MR. TEBBUTT: Biggs is further east.

25 THE COURT: All right.

1           MR. TEBBUTT: This is also known as Columbia Hills  
2 State Park, I believe.

3 Q    (By Mr. Tebbutt) Sir, were you in a boat on the Columbia  
4 River that day?

5 A    I was in a boat.

6 Q    Is that when you testified about myself and Ms. Rodgers  
7 and your daughter?

8 A    Yes.

9 Q    Good field trip for your daughter.

10 A    Yeah, it was.

11 Q    How old is your daughter?

12 A    She's 20 now.

13           And this is just depicting the expanse of the coal along  
14 the area. And I, obviously, was -- we didn't hear the train  
15 coming until it was right over head, otherwise we would have  
16 retreated from the edge of the...

17           And it was an oil unit train and you could really smell  
18 it.

19 Q    What do you see right there on that rock, sir?

20 A    There is a good, little drop-off where the coal has washed  
21 off down into the lower area down there, and, you know, just  
22 pockets of coal everywhere sloughing down.

23 Q    All right.

24 A    And you can see how close you are by the reflections of  
25 the water.

1 Q Okay.

2 MR. TEBBUTT: I'd like to move into evidence the  
3 series Exhibit 1388.

4 MS. ASHBAUGH: Your Honor, counsel correctly muted  
5 those videos because four of the videos have hearsay in it,  
6 so we'd object on those grounds and relevance.

7 MR. TEBBUTT: And the audio part.

8 THE COURT: The audio is excluded; otherwise, they  
9 are admitted.

10 MR. TEBBUTT: Thank you.

11 (Exhibit 1388 admitted.)

12 THE COURT: Let's break for lunch. We'll start again  
13 at one o'clock.

14 (Court in recess.)

15 MR. TEBBUTT: Mr. Anderson and everyone in the  
16 courtroom, welcome back from lunch.

17 Just one quick housekeeping matter. I wanted to make sure  
18 plaintiffs have moved 1388 into evidence.

19 THE COURT: Yes.

20 MR. TEBBUTT: Thank you.

21 Q (By Mr. Tebbutt) Sir, we're going to talk now about  
22 Plaintiffs' Exhibit 1393, a series of photographs.

23 Did you take this first photograph?

24 A Yes.

25 Q Okay. And we're just going to go through -- there is a

1 number of photographs in this series. I'm only going to  
2 question you about some of them and move them into evidence.

3 The first one in this series is Resources 007343. Did  
4 you take this picture, sir?

5 A Yes.

6 Q And that was when you visited the Horsethief Lake area,  
7 October 18th, 2014?

8 A That's correct.

9 Q And what is this a picture of?

10 A That's a picture of a camera that we saw sitting up in the  
11 tree as we were approaching.

12 Q All right. And, sir, is 7345 a picture of the same tree?

13 A That's correct.

14 Q And can you circle, if you can, and identify for the court  
15 where the camera is, if you can see it there?

16 A It might be right there. I can't totally see.

17 Q Next picture.

18 Sir, again, these are all pictures you took, correct?

19 A That's correct.

20 Q All right. And what is significant about the scene  
21 depicted in 7346?

22 A Well, you can see the high water mark pretty much right  
23 along through here. And then there are various channels that  
24 the coal is washed down, and it goes right -- like on this  
25 one, it goes right up to the edge, and if it was running, it

1 probably would slip -- it would be going off the edge to the  
2 Columbia River.

3 Q And you could see coal in those crevices when you were  
4 there that day?

5 A Yes. We could see coal in every crevice in this whole  
6 stretch of the river.

7 Q And 7347, is that --

8 A That is a close-up of the boulder we were looking at, and  
9 it's showing how much coal is piled up on that before it goes  
10 over the edge.

11 Q Thank you.

12 Sir, 7353, do you see that?

13 A Yes.

14 Q And what is significant about that picture?

15 A Well, you can see the detritus there. You've got wood  
16 that's floated into that area at the high water mark.

17 MS. ASHBAUGH: Objection; calls for speculation as to  
18 how that wood got there.

19 THE COURT: Overruled.

20 Go ahead.

21 A And -- and you can see some of the other areas of the coal  
22 slipping down, and you can see coal on the boulder here  
23 that's come off of these areas, and up here is -- there is a  
24 lot of places like this where it is very sharp and it gets  
25 built backed up between several rocks, and then when it rains

1 it just flushes down.

2 Q (By Mr. Tebbutt) And 7360, sir, what is significant about  
3 this picture?

4 A The high water mark, you can see in this area how it  
5 accumulates. And then there is a main slope right here that  
6 it starts to drip down, kind of a double fall line, like when  
7 you're skiing. It will go both directions, this way and down  
8 towards the river.

9 Q Would that be what you'd call a black diamond slope, sir?

10 A Yes, sir, with enough pressure and time.

11 Q Sir, 7366, what is significant about that area?

12 A This is a plastic cup that was sitting in the crevice, and  
13 it is stopping the coal from going into the river.

14 Q And where was the river relative to this cup?

15 A Just -- just off the edge of the screen, I believe, you  
16 know, a foot maybe, at most, two feet.

17 Q All right.

18 A And...

19 Q Do you want to add something?

20 A Well, I just wanted to show what -- this is -- this is  
21 similar to the small specks of coal we saw up on the Skagit  
22 River.

23 Q Okay. Thank you.

24 And this picture is what?

25 A That is landscape -- sorry it's overexposed. That is a

1 landscape of the Columbia. The Columbia River, in that area,  
2 we're looking across, towards the Oregon side.

3 Q What direction are we looking there?

4 A We're looking southeast.

5 Q Sir, 7368, what is that a picture of?

6 A This is a backwater area of the state park. And one of  
7 the reasons it was named a state park was because of the  
8 pictographs in the area.

9 Q And the next picture, is that one of the pictographs that  
10 you were just referring to?

11 A That's correct.

12 Q And what's significant about that picture and its setting,  
13 in your mind?

14 A Well, it just shows what a special place this area is.  
15 These -- these are rather sacred sites to the Native  
16 Americans and the Columbia River salmon people. They're very  
17 special sites. And the befalling of the water by any kind of  
18 pollution just is -- it's horrible for them.

19 Q Is that a picture of the same thing, just --

20 A Yeah, that's a better picture.

21 Q Okay. And where is that? Do you remember approximately  
22 where that was in location to where we launched the boat?

23 A I -- I believe it was 50 to 100 yards down the stream,  
24 maybe a little bit more.

25 Q And this picture here, sir?

1 A That's just upstream from that previous picture, and it is  
2 hidden by some of the shrubbery. But we saw pictographs all  
3 over the area.

4 Q And, sir, 7381, that was -- pardon me. Just for the  
5 record, that was 7379 that we were looking at with that last  
6 pictograph. What is significant about 7381?

7 A Just that this is a hunting area, and, you know,  
8 sportsmen -- sportsmen really appreciate that.

9 MS. ASHBAUGH: Your Honor, I object as to relevance,  
10 and he is speculating as to what other people think.

11 THE COURT: The objection is sustained.

12 Q (By Mr. Tebbutt) Did you see people recreating there that  
13 day when you were there?

14 A Yes. There were a lot of fishermen and hunters.

15 Q Sir, you also took Picture 7383?

16 A Yes.

17 Q And what is that a picture of?

18 A That is looking upstream, east of where we're standing.  
19 And the causeway, you can see the lake on the left and the  
20 Columbia on the right and the causeway.

21 Q When you say "the lake on the left," are you referring to  
22 Horsethief Lake?

23 A Correct.

24 Q Okay. And -- go ahead.

25 A Further dark-colored coal or...

1 Q The material that you said is consistent with the coal  
2 you've observed at other places?

3 A Correct.

4 Q And this is a same picture, just a little closer up?

5 A Yes.

6 MR. TEBBUTT: Your Honor, I would like to move into  
7 evidence from the Exhibit 1393 series the following  
8 Bates-numbered documents: 7343, 7345, 7346, 7347, 7353,  
9 7360, 7366, 7367, 7368, 7372, 7379, 7381, 7383, and 7384, all  
10 pictures that we just discussed on the record.

11 MS. ASHBAUGH: And I would object.

12 THE COURT: Overruled. They'll be admitted.

13 (Exhibits 7343, 7345, 7346, 7347, 7353, 7360, 7366, 7367,  
14 7368, 7372, 7379, 7381, 7383, and 7384 admitted.)

15 Q (By Mr. Tebbutt) Sir, you also took a number of video  
16 clips that day; is that correct?

17 A That's correct.

18 Q And some of these are redundant of some of the still shots  
19 we've seen?

20 A That's correct.

21 Q Why did you take the videos and not just the still shots?

22 A Well, taking videos gives a different perspective, you  
23 know, because you can move the camera and show a much wider  
24 area, or you can -- you know, people are just so movement  
25 oriented that sometimes videos help more than stills.

1 Q Okay. We're going to play a few of these in this series  
2 1394. This is Exhibit 1394.

3 And what is significant in this photograph?

4 A That's that one boulder that we saw in the still shot  
5 where the wet coal is sitting on top of the rock. And you  
6 can see how steep it is there where it's sloughed off. And  
7 this is looking upstream.

8 Q Okay. Let's clear that, and let's move to 7387. This is  
9 another video clip, and we saw a still shot of that earlier,  
10 correct?

11 A Yes.

12 Q What's significant about this video?

13 A Well, it shows a little bit more. You can see, as you  
14 move up, the coal that wedges into the cracks and piles up.

15 Q And 7392 is the next in the series. What is significant  
16 in this picture, sir?

17 A It shows the relationship with the water line to the slope  
18 above, and how most of the -- most of the coal has been  
19 washed away from -- because the river fluctuates over -- it  
20 can fluctuate overnight several feet as they release water to  
21 produce electricity.

22 Q How do you know that?

23 A Oh, it's just that I've been to the tours a number of  
24 times, I've talked to engineers over there, and, yeah, they  
25 produce more electricity at night.

1 Q All right. Let's finish that video.

2 What is significant, if anything, about this shot?

3 A Well, it's just showing down near the water line how moist  
4 the coal is, and when it dries out, the wind can sweep it out  
5 of that area or the rain will wash it down.

6 MS. ASHBAUGH: Your Honor, I'm going to object to  
7 this testimony. It's speculation as to what may happen.

8 THE COURT: Overruled.

9 Counsel, we don't have a jury here. It is a nonjury case.  
10 I can sort through this stuff. I don't need a lot of  
11 guidance.

12 Q (By Mr. Tebbutt) Sir, showing you 7394, again, this looks  
13 similar. Is it a slightly different place than the prior  
14 one?

15 A Yes.

16 Q What is significant about this picture?

17 A Just more this -- area right there is coal.

18 Q Let's stop the frame. When you say "right there"?

19 A Right there. The rock serves sort of as a dam, but when  
20 it reaches a certain point, the balance is tipped, and the  
21 coal will come sliding off there in the first rain.

22 You can see how the moisture itself is leeching out of  
23 the coal.

24 Q Point to that, please.

25 A Right here.

1 Q Okay. Very good.

2 The next video, sir, is 7395.

3 THE COURT: How much more of this do you have,  
4 Mr. Tebbutt?

5 MR. TEBBUTT: This is the last two, Your Honor.

6 THE COURT: Let's pick up the pace.

7 MR. TEBBUTT: I'm trying.

8 THE COURT: You're not succeeding.

9 A Just coal clinging onto the rock, waiting to be released.

10 Q (By Mr. Tebbutt) All right. And the last one in the  
11 series, 7397. More of the same?

12 A More of the same.

13 MR. TEBBUTT: Your Honor, I'd like to moved into  
14 evidence, in Exhibit 1394, the Resources numbers by Bates,  
15 the last four numbers 7385, 7387, 7392, 7394, 7395, and 7397.

16 MR. WAGNER: Same objection, Your Honor.

17 THE COURT: They will be admitted.

18 (Exhibits 7385, 7387, 7392, 7394, 7395, and 7397 admitted.)

19 MR. TEBBUTT: Thank you.

20 Q (By Mr. Tebbutt) The last video I want to show you, sir,  
21 is Exhibit 1395.

22 While we're working on the logistics of that, sir, I have  
23 a couple of questions for you.

24 MR. TEBBUTT: Actually, I'd like to move into  
25 evidence -- it is our last exhibit number. Your Honor, I'd

1 like to move into evidence the map that Mr. Anderson has  
2 written on as Plaintiffs' Exhibit 1517.

3 MS. ASHBAUGH: No objection.

4 THE COURT: It's admitted.

5 (Exhibit 1517 admitted.)

6 Q (By Mr. Tebbutt) Sir, Exhibit 1395, is this a video you  
7 took, sir?

8 A Yes.

9 Q Again, Horsethief Lake October of 2015?

10 A Yes.

11 Q Okay.

12 MR. TEBBUTT: If the court will just indulge me, it's  
13 a little under three minutes, and it has some information in  
14 it.

15 (Video is played.)

16 Q (By Mr. Tebbutt) We've discussed the contents of much of  
17 the smaller clips in this video, correct?

18 A That's correct. This is more of a -- it was a broader  
19 view of one area of this area, of the whole -- of the  
20 contamination.

21 (Video is played.)

22 Q (By Mr. Tebbutt) And where are you right now, sir?

23 A We're partway out in the middle of the river, and we're  
24 heading to shore.

25 Q Towards the --

1 A Towards the causeway, and, you know, just this part, you  
2 can see all the coal, and it extends much further on either  
3 side.

4 (Video is played.)

5 A And it --

6 MR. TEBBUTT: Sorry. There is no question yet.

7 (Video is played.)

8 Q (By Mr. Tebbutt) Can you see the water line in this  
9 picture, sir?

10 A Yes, sir. It is this area here.

11 Q All right. Hit "clear," please.

12 And let's stop right there. And what is this picture?

13 A This is looking out by the highway, and it goes through  
14 the state park, and this is a causeway we were photographing  
15 on the other side. And the boat launch, I believe, is right  
16 in this area on the other side.

17 Q All right. So this was taken from, I'm sorry, where?

18 A This is elevated by the state highway that goes through  
19 the state park.

20 Q And are those the Oregon hills you're looking at?

21 A Yes. That is the Oregon side of the Columbia River we're  
22 looking at.

23 Q In the background?

24 A In the background.

25 Q Taken from the Washington side?

1 A Correct.

2 MR. TEBBUTT: Okay. Go ahead and run it.

3 (Video is played.)

4 MR. TEBBUTT: Your Honor, I'd like to move into  
5 evidence Exhibit 1395.

6 MS. ASHBAUGH: Same objection, Your Honor.

7 THE COURT: It's admitted.

8 (Exhibit 1395 admitted.)

9 Q (By Mr. Tebbutt) Sir, you documented what you see is coal  
10 in a lot of different places in the Puget Sound area,  
11 correct?

12 A Correct.

13 Q Have you seen coal discharge from a train into water,  
14 ever?

15 A Yes.

16 Q Where?

17 A I've seen --

18 Q Other than what you've discussed earlier, other than the  
19 place at Marine Park.

20 A Correct.

21 I've seen coal come off of a coal train crossing over  
22 the -- below the Chittenden Locks. As the train went across,  
23 it was rough and things were bouncing a little bit, and you  
24 could see numerous plops in the water below.

25 Q And the Chittenden Locks are here in Seattle?

1 A Yes.

2 Q Is that where the salmon pass through?

3 A Yeah, from Lake Washington Ship Canal, through Salmon Bay,  
4 down into the Salish Sea.

5 Q And do you recall approximately when that was?

6 A I don't have a date with me. It was at least '12 or '13.  
7 2012.

8 Q Or 2013?

9 A Or 2013, yes.

10 Q Any other time you've seen coal discharging directly into  
11 the water from a coal train?

12 A I would -- my mind is -- I'm slipping right now.

13 I've -- I've seen coal come off where -- you know,  
14 where it's like a sandblast when a train went by me at that  
15 Padden Pond.

16 Q And you testified about that earlier.

17 A I testified about that already.

18 Q What are your concerns, if any, about the coal pollution  
19 that you've seen?

20 A Well, there's several. Number one is health and safety  
21 issues. From the health perspective, there are a number of  
22 different -- you know, lead, mercury, a number of different  
23 compounds in the coal itself. And -- and so in isolated  
24 cases where, you know, like -- with one train going over, it  
25 may not be that noticeable or damaging. But it's -- you

1 know, it's like -- it's like an injury through a thousand  
2 paper cuts. It accumulates over time.

3 And when you have pollution from any entity, coupled with  
4 the pollution that we already have out in Puget Sound, then  
5 it -- it just magnifies.

6 And then the other issue that I'm concerned about is  
7 safety.

8 Q And what kind of safety concerns are you concerned about?

9 A Well, I'm concerned -- you know, you saw that one picture  
10 of the hang glider or the para sailer coming off of Blanchard  
11 Mountain, and you saw the train running along Chuckanut Drive  
12 along Chuckanut Bay, and the sheer weight of the trains  
13 causes a lot of maintenance problems.

14 Q How do you know that?

15 A Well, I've seen it.

16 Q Tell us what you've seen.

17 THE COURT: That's not what this case is about,  
18 counsel. Let's move on.

19 MR. TEBBUTT: Fair enough.

20 Thank you. Mr. Anderson, for your testimony.

21 THE COURT: All right. Cross?

22 CROSS-EXAMINATION

23 BY MS. ASHBAUGH:

24 Q Good afternoon, Mr. Anderson.

25 A Good afternoon, ma'am.

1 Q You testified earlier, Mr. Anderson, that you believe you  
2 had seen material while you were kayaking near Chuckanut Bay,  
3 or in Chuckanut Bay?

4 A At the north end of Chuckanut Bay there is a very shallow  
5 area, and when the tide goes out, it's mud flats. And  
6 there's a -- there's a bridge that the trains pass over, and  
7 when we do kayak, we pass underneath that bridge.

8 Q Right. And as you were kayaking, you testified that you  
9 had seen coal, or what you believed to be coal or petcoke, in  
10 the bay, correct?

11 A I think I said it was -- I believe I saw it on the  
12 ballast.

13 Q Okay. So you have not seen it in Chuckanut Bay, correct?

14 A I did not see it at that -- at that particular point in  
15 the bay itself because I haven't kayaked right there when a  
16 train came across.

17 Q Have you ever seen coal or petcoke in Chuckanut Bay?

18 A No, I haven't seen coal.

19 Q Have you ever collected any samples of material that you  
20 believe to be coal or petcoke near Chuckanut Bay?

21 A No, I didn't collect any because there was no reason at  
22 that time to collect it.

23 Q I believe you also said or testified that you had seen and  
24 circled a place on a map near the Bellingham Bay -- that you  
25 had seen material you believe to be coal or petcoke in

1 Bellingham Bay, correct?

2 A On the -- on the ballast --

3 Q Okay --

4 A -- and --

5 Q Sorry. Go ahead.

6 A But I don't believe I said that I saw it in the bay right  
7 there.

8 What I did said is that at Padden Pond, where you have a  
9 double bridge -- a very short bridge, I was underneath it,  
10 photographing, not directly underneath the bridge but on the  
11 edge of the pond, and a coal train came around the corner,  
12 and I was hit by small pieces of coal.

13 Q I'm going to go back to Bellingham Bay.

14 Is it your testimony that you have never seen coal  
15 and/or petcoke in Bellingham Bay?

16 A Not directly dropping directly into the bay.

17 Q And you ever seen it in the water at Bellingham Bay?

18 A No, I haven't.

19 Q And you've never tested any material that you found that  
20 you believe to be coal or petcoke that was near Bellingham  
21 Bay, have you?

22 A I haven't sent it off, but there may be other people that  
23 have gathered it and sent it off.

24 Q But you haven't, correct?

25 A I haven't myself, no.

1 Q And is Padden Pond the same thing as Padden Creek?

2 A No. And in the deposition, I think I was a little bit  
3 confused, because Padden Creek is over about 3- or 400 yards  
4 to the east of that little Padden Pond.

5 Q And so you testified that you were standing near a rail  
6 train that turned the corner, and you got pelted with some  
7 coal coming off of the train?

8 A Yeah. I mean, it wasn't like a brick hitting me, but it  
9 was -- you know, small particles came across.

10 Q Right.

11 And you testified that you believe some material fell  
12 behind you into the water?

13 A Yeah, I mean, I could feel it, you know?

14 Q Could you see behind you if it fell into the water?

15 A Well, I was more interested in getting out of there.

16 Q So you couldn't see it?

17 A I didn't -- I didn't look at that time.

18 Q And you didn't take any photos of --

19 A No.

20 Q -- material coming off of the train and into the water?

21 A Not right there, no.

22 Q You had your camera there, though, right?

23 A Yeah. But, I mean, I was taken by surprise by the train,  
24 so I mean...

25 Q And when you walked off, did you stand by the side and

1 take any photos of material coming off of the train and into  
2 the water?

3 A Not of material coming off of the train and into the  
4 water.

5 Q And you also have never seen coal and/or petcoke in the  
6 water at Padden Creek, have you, Mr. Anderson?

7 A I'm sorry. What creek?

8 Q Padden Creek.

9 A Padden Creek? Well, I haven't seen it in the water, but  
10 I've seen small pieces that I took to be coal in the ballast  
11 of the train tracks.

12 Q And have you ever collected any samples of that material  
13 that you believe to be coal and/or petcoke from that area?

14 A I haven't.

15 Q I think you also testified with regards to Colony Creek.  
16 Do you believe you've seen any coal and/or petcoke in Colony  
17 Creek?

18 A No, because it's very deep right there.

19 Q And have you --

20 A And a very steep embankment.

21 Q So you've never seen coal in the water there?

22 A Not in the water. On the --

23 Q Okay. Sorry. Go ahead.

24 A On the abutments.

25 Q Have you ever collected any samples of material that you

1 have seen at Colony Creek?

2 A I believe we did. I was with a gentleman name Jeff Jacobs  
3 on one occasion --

4 Q And do you --

5 A -- I believe -- I believe we gathered some and put it  
6 into a plastic bag and sealed it. But I may be confused  
7 because we gathered at some different locations.

8 Q You've testified with regards to your observations at  
9 Puget Sound.

10 Have you ever seen material that you believe to be coal  
11 or petcoke in the water of the Golden Gardens area?

12 A I -- north of the Golden Gardens. It may have been  
13 Carkeek Park further north.

14 There's -- the tracks run fairly close to the water there,  
15 and I've observed what I thought was coal on the tracks.

16 Q Have you ever seen it go into the water from those tracks?

17 A No.

18 Q And have you ever seen material that you believe to be  
19 coal or petcoke leave any of those places where you've seen  
20 and go into the water?

21 A At --

22 MR. TEBBUTT: Objection.

23 Q (By Ms. Ashbaugh) Padden Creek?

24 MR. TEBBUTT: If it is limited to Padden Creek.

25 MS. ASHBAUGH: Sure.

1 Q (By Ms. Ashbaugh) Did you see any of the material that  
2 you saw at Padden Creek leave from where you saw it and go  
3 into the water?

4 A Padden Pond, I believe I testified. That that's where  
5 it --

6 Q Right.

7 A -- came off.

8 Q But what about Padden Creek? You said you've seen  
9 material near the banks. Have you ever seen it go from the  
10 banks into the water?

11 A No, I haven't.

12 Q Do you know when that material would have been near Padden  
13 Creek? How long had it been there?

14 A Oh, this was probably four or five years ago, when we  
15 first started hearing about -- you know, about -- when I  
16 first started observing more than, you know, the coal unit  
17 trains.

18 Q Okay. And do you know how long that material had been  
19 there?

20 A Oh, no. But it --

21 Q Could have been there dozens of years, correct?

22 A I doubt that because of the rain here in the Northwest.

23 Q You haven't seen rain wash it into the water, have you?

24 A Along the Columbia River, it was a pretty good --

25 Q Did you see it in the rain?

1 A -- estimate, but I did not see it -- I was not out there  
2 that night when it had that big rainstorm.

3 Q So you didn't see rain wash it into the water?

4 A No, uh-uh.

5 Q Mr. Anderson, you've talked about Horsethief Lake, and you  
6 went to Horsethief Lake specifically in October of 2014 to  
7 look for coal and/or petcoke, correct?

8 A Yes.

9 Q And you were hired by Mr. Tebbutt to shoot photographs at  
10 Horsethief Lake, correct?

11 A He asked me to shoot photographs for him.

12 Q And you were paid for these photographs, weren't you?

13 A No, not yet. I was given some expense money at the time.

14 Q And when you were out at Horsethief Lake in October of  
15 2014, you didn't take any samples of the material you  
16 believed to be coal, did you?

17 A My job was to shoot photographs.

18 Q You didn't take any samples, did you?

19 A At Horsethief Lake that day?

20 Q Right.

21 A No, I did not.

22 Q Did anyone take samples of Horsethief Lake on that  
23 occasion?

24 A During the day, I don't believe any of us took samples.

25 Q And you don't know when the material that you thought was

1 coal or petcoke actually got to that location, do you?

2 A I would have to say that I couldn't pinpoint when the coal  
3 got there. But if you make repeated trips, like I've  
4 heard -- well, that's -- it changes.

5 Q You didn't see the material actually get to the location  
6 that you saw it, did you?

7 A No, I didn't see it.

8 Q You don't actually know how long the material had been  
9 there, do you?

10 A No.

11 Q You actually never saw rain flush that material into the  
12 water, did you?

13 A I saw some material, but I didn't get a photograph, small  
14 pieces of coal in the water at the very end of the day, and  
15 so, you know, deductive reasoning, I --

16 Q No, that's not my question, Mr. Anderson. My question --

17 THE COURT: No. You can go ahead and finish your  
18 answer.

19 A Deductive reasoning, common sense would dictate that --  
20 tell me that there is a causal effect, a relationship between  
21 coal trains and coal coming down the embankments on the side  
22 of railroad tracks. And then with the weather, the rain and  
23 the high wind, blowing it into the water.

24 Q (By Ms. Ashbaugh) Mr. Anderson, you didn't see the  
25 material actually leave land and go into the water?

1 A No. I believe I already told you.

2 Q And you didn't see any material at the time in October of  
3 2014, when you went out looking for it at Horsethief Lake,  
4 you didn't actually see any material come off of a coal train  
5 and go into the water, did you?

6 A I would say no because there was no coal train that went  
7 by at the time.

8 Q Right. So there was no coal train on your trip out to  
9 Horsethief Lake to look for coal and/or petcoke, correct?

10 A My goal wasn't to shoot pictures of coal coming off of  
11 coal trains, because it is very serendipity for coal trains  
12 to come through an area, since none of the dates or times are  
13 published by the railroad. So it would be very difficult for  
14 me collect and connect like that, because I don't live down  
15 there.

16 Q Mr. Anderson, during your testimony you talked a little  
17 bit about the high water mark. Do you recall that?

18 A I do.

19 Q Have you ever undertaken any work on the high water mark  
20 delineation that has been approved by a regulatory entity?

21 A So I used to be a sailor, and I know about high water  
22 marks from tide books, and I know the effect high and low  
23 water can have on boats.

24 And the same is true when there is rainstorms or releases  
25 from the dams in the Columbia River Basin. You know, that's

1 why they give warning to boaters. Just like up at the Skagit  
2 River, at the headwaters of the Skagit, higher up, Ross Lake,  
3 they always call down and -- they have alarms, you know, to  
4 signal when water is going to be released, because it  
5 suddenly becomes a new high water from what it was.

6 Q Mr. Anderson, have you ever undertaken an ordinary high  
7 water mark delineation that has been approved by a regulatory  
8 entity?

9 A No.

10 Q Have you ever undertaken an ordinary high water mark  
11 delineation at all?

12 A Could you repeat that last part?

13 Q Have you ever undertaken an ordinary high water  
14 delineation at all?

15 A No, I have not.

16 Q Mr. Anderson, you testified with regards to some photos  
17 that you had taken of overhead, looking down at coal trains.  
18 Do you recall that?

19 A I do.

20 Q And you testified about seeing some cracking and streaking  
21 in the surfaces of some of those coal cars, correct?

22 A The longitudinal cracking and the cracking on the leading  
23 and trailing edge, yes, I do recall that.

24 Q Mr. Anderson, you have no specialized knowledge regarding  
25 the performance of dust suppression membranes, right?

1 A Could you repeat that? I have no knowledge of what?

2 Q You have no specialized knowledge regarding the  
3 performance of dust suppression membranes, correct?

4 A No.

5 Q You have no education in that topic, do you?

6 A Not in that specific field.

7 Q You don't have any training --

8 A Although I worked for Boeing for 36 years.

9 Q And at Boeing did you do any education with regards to the  
10 performance of dust suppression membranes?

11 A Not specifically that.

12 Q And have you done any research other than your Internet  
13 research on this stuff -- on this topic? Sorry.

14 A I've talked with some experts.

15 Q And you have no specialized knowledge interpreting the  
16 appearance of dust suppression membranes, do you?

17 A I think -- could you repeat that, please? I'm a little  
18 bit hard of hearing.

19 Q Sorry if I'm not speaking up. Let me know.

20 A Yeah.

21 Q Mr. Anderson, you have no specialized knowledge  
22 interpreting dust suppression membranes, do you?

23 A I don't have specific knowledge on that, no.

24 Q Mr. Anderson, you began purposely looking for coal in  
25 2011, correct?

1 A Yes, out of curiosity.

2 Q And you started looking for coal because of the  
3 announcement of the coal terminal that was going to be built  
4 in Bellingham, correct?

5 A No, not specifically for that.

6 And I thought about that, and what I noticed as a  
7 member of the board of directors of the Chuckanut Conservancy  
8 was that there was an increase in the amount of unit trains  
9 that I had never seen before. And I have two children, and  
10 so I wanted to find out what was going on with that, because  
11 I believe it's a health risk.

12 Q Mr. Anderson, prior to 2011, were you aware of issues of  
13 coal leaving uncovered rail cars?

14 A There was a discussion of it from studies that I had read  
15 from South Africa, I believe, and Australia, about coal being  
16 covered over there, especially Australia. It was --

17 Q You -- sorry? Go ahead.

18 A So I had read reports about it, and I'm a technical  
19 person, and -- but as far as prior to 2008, or 2010?

20 Q 2011.

21 A 2011?

22 Well, just through the Chuckanut Conservancy, we started  
23 observing the amount of unit trains that were increasing as  
24 they came through the area.

25 Q The first time you became concerned or aware of potential

1 coal pollution from uncovered rail trains began in 2011,  
2 correct?

3 A You know, I would have to look, because I think I wrote  
4 something about it in a blog that I used to write for the  
5 Chuckanut Conservancy. So I'm not really good on dates  
6 unless I see the metadata or...

7 Q Mr. Anderson, you remember submitting a declaration in  
8 support of the motion to dismiss in this case?

9 A Yes, uh-huh.

10 Q And do you recall that you stated in that declaration, "I  
11 first became aware of the threat of coal pollution caused by  
12 uncovered rail cars in the early winter of 2011"?

13 A I believe I said that, but that was referring to  
14 specifically Bellingham.

15 Q And how long have you lived in Bellingham, Mr. Anderson?

16 A I moved there in 1999, I believe.

17 Q And so it's 16, 17 years, if I'm doing my math correct,  
18 correct?

19 A Correct.

20 Q Okay.

21 And coal trains have been passing through Washington  
22 State for decades; isn't that correct?

23 A No, I disagree.

24 Q You don't believe that there have been coal trains passing  
25 through Washington State for decades?

1 A Not for decades, no, because it's -- it was sporadic  
2 before that.

3 Q Is it your testimony, Mr. Anderson, that coal trains have  
4 not been going through Bellingham prior to 2011?

5 A I believe there was a contract with Westshore before 2011  
6 to export coal. But in the early 2000s to mid-2000s, if you  
7 looked at the -- I forget what it is called. It is the  
8 federal energy export data -- there would be years there  
9 where hardly any coal went across the border or through  
10 Bellingham, you know, if it went across the border.

11 There were, however, quantities that would suggest that it  
12 might be one or two cars of petcoke, because they kind of  
13 lumped it together, I believe.

14 There would be, like, several cars, based on the gross  
15 tonnage of the amount of coal exported, that came out of --  
16 that were in, maybe, the middle of freight trains.

17 Q So coal trains have passed through Bellingham before 2011?

18 A Well, I believe there may have been, yeah.

19 Q Mr. Anderson, you've testified on direct to a number of  
20 photos of material that you believed to be coal. We went  
21 through them --

22 A Yes, ma'am.

23 Q -- in grave detail.

24 And the way you went about finding that material is  
25 you normally went out looking for it, correct?

1 A I normally went out looking for it, yes.

2 Q And, Mr. Anderson, you have no specialized training at all  
3 with regards to the identification of coal, do you?

4 A I don't have specialized training to look for coal.

5 Q And you have no expertise in geology, correct?

6 A I love geology, but I don't -- I've taken classes in  
7 college, but I don't have a degree in geology.

8 Q Right. And you took two classes in --

9 A Yeah, I think I said I took a couple.

10 Q And when did you go to college, Mr. Anderson?

11 A Oh, a long time ago.

12 Q And --

13 A I graduated from college in 1973.

14 Q And you've never analyzed the components of coal, have  
15 you, Mr. Anderson?

16 A No, I haven't broken down -- I haven't done a chemical  
17 analysis.

18 Q And --

19 A But --

20 Q Go ahead.

21 A But like in your profession, you rely on experts to  
22 provide the knowledge that you don't have in certain areas.

23 Q And when you were out looking for material that you  
24 believed to be coal or petcoke, were experts with you?

25 A No.

1 Q And there are other rocks out in that environment that are  
2 black in color, correct?

3 A I would say so. Obsidian, certain types of obsidian.

4 Q And you believe the material that you found to be coal, I  
5 think you testified, was due to its color and the way it  
6 breaks under pressure?

7 A That's one of the tests that I looked at.

8 Q And of that --

9 A Because --

10 Q Sorry. Go ahead.

11 A No, that's okay.

12 Q And of the many photos that you testified about, did you  
13 pick up and touch one of those materials?

14 A If I had gloves on.

15 Q So --

16 A But there was a lot of times I didn't pick it up.

17 Q Okay. So all of the photos that you took, you didn't  
18 always have gloves on where you picked up every piece that  
19 you pointed out or circled on the screen, you didn't --

20 A I tried to have gloves on.

21 Q Did you pick up and touch each one of those that you  
22 circled?

23 A Oh, no. Heavens no. I'd be picking up stuff for a year.

24 Q And you didn't test or sample -- strike that. Let me try  
25 again.

1           You didn't sample all of the materials that we just  
2 looked at through photos, did you?

3   A    Every single one?  No.

4   Q    And you did take some samples, correct?

5   A    I did.

6   Q    And do you believe they were tested?

7   A    I believe I sent them off.

8   Q    And --

9   A    Between Jeff Jacobs and I, we sent samples off.

10   Q   And prior to your deposition in this case, you never had  
11 seen the laboratory analysis of the samples, had you?

12   A    You know, I didn't ask for the results of the test.  I --  
13 I just -- the actual report, because that was in the hands of  
14 our -- of the lawyers, and so I was told that it was coal and  
15 coke in many of the cases.

16   Q    Mr. Anderson --

17   A    But that -- that was it.  So...

18   Q    Mr. Anderson, you can't be certain that every piece of  
19 material that you sampled and sent off for testing actually  
20 was coal, can you?

21   A    I can't be certain, no.

22   Q    And, Mr. Anderson, you're aware that, for the witnesses  
23 like yourself that go out and look for this material, the  
24 material that was tested as part of this case was only about  
25 50 percent proved to be coal, correct?

1 A From what I heard today --

2 MR. TEBBUTT: Objection, mischaracterizes the record.

3 THE COURT: Overruled.

4 Go ahead.

5 A From what I heard today, I didn't know that it was 50  
6 percent.

7 Q (By Ms. Ashbaugh) So there is a 50 percent chance of the  
8 witnesses, like yourself, the material that they thought was  
9 coal and they collected and sampled, actually was not?

10 MR. TEBBUTT: Objection, calls for speculation.

11 THE COURT: Overruled.

12 A It would make the mathematical -- mathematics work on  
13 that.

14 Q (By Mr. Wagner) Mr. Anderson, you testified about  
15 concerns that you have about health, correct?

16 A About?

17 Q Health concerns.

18 A Yes, uh-huh.

19 Q You don't have any specialized expertise in biology, do  
20 you?

21 A Oh, of course not.

22 Q And, Mr. Anderson, after --

23 A Can I -- sorry.

24 Q After your career in Boeing, you became a photographer?

25 A I've been doing photography since I was a young man, a

1 young child.

2 Q And I think we've already talked about you get paid for  
3 some of your photos?

4 A Some, yeah, yeah. I've worked for the *New York Times*  
5 about four or five times. A number of publications, national  
6 and international publications. *The Economist*, they used  
7 images of mine, *The Nation*, *US Today*, hundreds of newspapers.

8 Q And you get paid for some of your photos of coal trains,  
9 correct?

10 A Some of them, yeah.

11 Q And you have a website with regards to your photography?

12 A Yes, uh-huh.

13 Q And on that website, that contains some photos of coal  
14 trains, correct?

15 A It does.

16 Q And, Mr. Anderson, you've testified that you have had a  
17 number of organization publicize your photos, correct?

18 A Published?

19 Q Uh-huh.

20 A Yeah.

21 Q And in addition to the ones that you've stated, you've  
22 also had the *Sierra* magazine publish, correct?

23 A Yes.

24 Q The *Sierra Club*, correct?

25 A Yeah. It's a -- it's a -- I believe it's a separate

1 entity within the umbrella of the Sierra Club.

2 Q Okay. And I'm going to list a couple just so --

3 A Yeah, yeah, sure.

4 Q Green Peace, Waterkeepers Alliance --

5 A Yes.

6 Q -- Resources, Climate Solutions. Those are some?

7 A Correct, uh-huh.

8 Q And as a professional photographer, you often make  
9 modifications to your photos, correct?

10 A I crop sometimes.

11 Q Uh-huh.

12 A I make modifications, as just about every photographer in  
13 the world. There are some modifications that are made,  
14 because I shoot everything in raw. And raw, the images don't  
15 come out looking like what they are in real life.

16 Q And part of that --

17 A That's --

18 Q Go ahead.

19 A And so I try to make it look as natural as possible.

20 Q And part of those modifications, you make stronger  
21 contrasts sometimes in colors?

22 A Yeah. I believe I stated that in my deposition.

23 Q And sharper lines and different things like that, correct?

24 A Well, you apply sharpening, because with raw conversion it  
25 doesn't come out, you know, ultra -- you know, very sharp.

1 You have to apply a certain amount of sharpening.

2 Q And when you make those modifications to the photos,  
3 Mr. Anderson, do you know what happened what happens to the  
4 metadata?

5 A There is a section in there where it shows a history of  
6 the -- and it's part of the Lightroom catalog, and it sets --  
7 it's kinds of like a sidecar that -- of instructions that go  
8 with the data. And so you -- I don't want to get too  
9 technical here. But every time -- like with JPEGs, every  
10 time you make an adjustment, you lose some of the quality of  
11 the data. With raw data, you're making adjustments to an  
12 instruction sheet for each photograph. And then when you go  
13 to use that photograph again, you can go back and, through  
14 Lightroom, get the same look that you had five years ago,  
15 without any loss.

16 Q Right. But when you have the modified photo, the metadata  
17 for that modified photo indicates when you modified it, not  
18 the original photo, correct?

19 A It should, yes. And also when I modify it, it should --  
20 if I don't change the name of the photograph, each time I  
21 modify it by -- like, by using a program to sharpen it or to  
22 apply -- get rid of some of the artifacts, then it will put  
23 "edit." And so some photographs will be edited. It will  
24 show the name, like, five times.

25 Q Mr. Anderson, you also testified in your direct that

1 you've deleted some photos as well, correct?

2 A Typically what happens with photographers is, they do a  
3 quick screening of all the images that were shot at a  
4 particular time, and you'll often get rid of the ones that  
5 are overexposed. Obviously, I didn't do that on some of  
6 those images that you saw today. But you would delete the  
7 ones that were overexposed or blurry or things like that.

8 Q So you have deleted photos?

9 A Yeah. Every photographer has, professional.

10 Q Have you deleted any photos after you had been paid for  
11 photographs in this case?

12 A Typically, what you'll do is, you'll present -- and it  
13 depends on the situation and the client, because you'll  
14 present your best images. You know, so, like, if I'm going  
15 to do like -- well, say, like, I'm flying over Yellowstone  
16 and shooting photographs for a magazine article, some areas  
17 you shoot and the pictures are just -- they're bland. But if  
18 I flew over Grand Prismatic Spring, like you see on my  
19 website, yeah, I'll save those because it is more dramatic.  
20 But, I mean, if I'm just shooting a picture of fir trees,  
21 and, you know, Ponderosa pine in Yellowstone, a lot of times  
22 you get rid of that stuff.

23 Q Mr. Anderson, I think my question got lost in that.

24 A Sorry.

25 Q So have you deleted any photos after the time you've been

1 paid for photographs in this case?

2 A I've lost some.

3 Q Have you deleted any?

4 A Not on purpose.

5 Q Okay. And, Mr. Anderson, when you were taking photos out  
6 of Horsethief Lake --

7 A Uh-huh.

8 Q -- plaintiffs' counsel was with you, correct?

9 A Could you repeat that? At Horsethief Lake what?

10 Q Plaintiffs' counsel was with you, correct?

11 A Yes, uh-huh.

12 Q And he was telling you what photos to take, correct?

13 A In certain circumstances.

14 Q And he also was informing you of what he personally  
15 believed was material, that was coal or petcoke, correct?

16 MR. TEBBUTT: Objection, calls for hearsay.

17 THE COURT: Overruled.

18 THE WITNESS: Do I respond?

19 MS. ASHBAUGH: Yes.

20 THE COURT: Yes.

21 A He pretty much left me alone to use my photographer's eye.  
22 He told me what some of the expectations were as far as, you  
23 know, I need a series of photographs showing the coal on the  
24 rocks, and show -- just show what the reality of the  
25 situation is here. And so I photographed what I thought was

1 documentary-style photographs of that broad, expansive coal.

2 Q (By Ms. Ashbaugh) Mr. Anderson, you recall the video  
3 where Mr. Tebbutt said, "Oops, I was in that one," and he was  
4 down and he was pointing to material --

5 A Right, uh-huh.

6 Q That's a time when Mr. Tebbutt actually was telling you  
7 what he believed was material to --

8 A Well, yeah, that was, you know, onesies, twosies.

9 Now, if I'm looking left and he sees something right,  
10 he'd say, "Hey, Paul, get that, would you?"

11 Q Okay.

12 A But it wasn't like he was directing over my shoulder every  
13 image. It wasn't that way at all.

14 Q Mr. Anderson, you've also testified with regards to a  
15 single occasion when you believe you saw material fall into  
16 the water near the Ballard Locks, correct?

17 A Correct, uh-huh.

18 Q And you saw in this observation what it was like when the  
19 train was hitting a bump, correct?

20 A You know, when you go across these drawbridges,  
21 drawbridges, when they come together --

22 Q Uh-huh.

23 A -- and I've seen this on multiple bridges like that, there  
24 will be a clang, you know, and there will be some -- there  
25 will be some vibration, unless they balance it all out. And

1 at that time, you -- you come to look for that kind of stuff  
2 if you start hearing the -- you know, the train hitting, you  
3 know, clanging, then you -- then I started looking for...

4 Q And you were on the shore when you --

5 A That's correct, uh-huh.

6 Q And you were a couple hundred yards away from --

7 A No. I testified -- I think I was in ere if I said it was  
8 a couple of hundred yards.

9 If you look on Google Maps, it can be -- just upstream  
10 from the railroad bridge crossing over, below the Chittenden  
11 Locks, there is a car turnoff, and I would say it's maybe  
12 only 50 yards from the --

13 Q You testified in your testimony in deposition, under oath,  
14 that you believed you were a couple of yards away.

15 MR. TEBBUTT: Improper impeachment. Objection.

16 THE COURT: Overruled.

17 A And what I did say was that I believed I was wrong in that  
18 testimony because I didn't have a map in front of me.

19 Now, if I lived down here, I could have gone out and  
20 measured that, but I live in Bellingham, and, you know, it  
21 just...

22 Q (Ms. Ashbaugh) Mr. Anderson, when you were under oath in  
23 your deposition, 200 yards, you'd agree with me that is  
24 approximately two football fields away, correct?

25 A Yeah, and I believe that would be difficult to see.

1 Q Do you recall what month this happened?

2 A I believe there was a lot of boaters out there, because I  
3 was shooting some pictures of the boats going through the  
4 Chittenden Locks, so it might have been June, July.

5 Q Do you recall what date exactly?

6 A No.

7 Q Do you recall what time of day you were there?

8 A Let's see. I had a doctor's appointment, and that was  
9 over around noon, so it was probably one or two o'clock in  
10 the afternoon.

11 Q Was it sunny or was it overcast?

12 A It was sunny.

13 Q And did you have your camera with you at the time?

14 A I think I had my iPhone with me.

15 Q So you had your phone with you?

16 A Yeah.

17 Q And your iPhone has a camera on it, right?

18 A Yes.

19 Q And does it have video on it?

20 A Yes.

21 Q And you didn't record anything when you saw this material  
22 that you believed to be coal or petcoke coming off the train,  
23 into the water, did you?

24 A I didn't record it because I didn't have time.

25 Q Were you just looking at the train at the very tail end of

1 it?

2 A It was fairly close to the tail of the train. It was  
3 probably about two-thirds of the way through it when I was  
4 able to get out to the overlook.

5 Q So two-thirds of the train had come by, and you didn't  
6 have time to take your phone and put a video on it?

7 A No.

8 Q And you didn't have time to take the phone out of your  
9 pocket and take a picture of it?

10 A No. Might have been because of my phone battery was dead.

11 Q Do you recall your phone battery being dead?

12 A I don't know. I believe I have some pictures.

13 THE COURT: No, no, no.

14 THE WITNESS: Oh, I'm sorry, Your Honor.

15 THE COURT: Move on.

16 Q (By Ms. Ashbaugh) You never collected any material from  
17 the water once you believed you saw it come off the train and  
18 into the water, did you?

19 A No.

20 Q And you're not aware of any analysis of any such material  
21 being done that would indicate whether it was coal or  
22 petcoke, are you?

23 A I'm not aware of any studies.

24 Q And I think you just testified that you never saw the  
25 entire train pass?

1 A I'm pretty confident that I didn't see the whole train.

2 Q So you weren't able to count the number of cars on the  
3 train?

4 A Well, I don't usually count the number of cars on a train.  
5 I'm calculating exposures and shutter speeds, and, you know,  
6 I just -- you know, if I have videotaped full trains, then,  
7 yeah, I can count the cars pretty easy.

8 Q You didn't count the cars on this occasion?

9 A Not on that one, no.

10 Q And you didn't call the Department of Ecology when you saw  
11 this alleged event happen?

12 A No.

13 Q Mr. Anderson, you've seen coal and/or petcoke trains that  
14 have not dusted, correct?

15 A I'm sorry. That have what?

16 Q That have not had dust coming off of them, correct?

17 A Correct, uh-huh.

18 MS. ASHBAUGH: I have no further questions.

19 THE COURT: Any redirect?

20 MR. TEBBUTT: Just a couple of things.

21 REDIRECT EXAMINATION

22 BY MR. TEBBUTT:

23 Q Mr. Anderson, Ms. Ashbaugh asked you some questions about  
24 Chuckanut, and I believe she testified that you didn't see  
25 coal on the banks or under the bridge of Chuckanut Bay.

1 That's not correct, is it? You did see --

2 A I said I saw coal on the banks and up -- higher up.

3 Q And when you were --

4 A Along the -- along the edge, you know, where you get the  
5 tracks, and then you get about a foot on either side of the  
6 tracks, and I've seen coal along that area.

7 Q Right. And I believe on direct you testified that when  
8 you were kayaking, you saw some coal under the bridge as  
9 well?

10 A Or was that on Padden Pond?

11 Q I'm asking you.

12 Well, let's try it this way: When you kayaked under  
13 the bridge at Chuckanut Bay, did you ever see coal under the  
14 bridge or along the banks right where --

15 A Along the banks were the bridge -- where the bridge is.

16 Q Okay. You were asked some questions about photo  
17 modifications.

18 A Yes.

19 Q You don't Photoshop your photos and splice images from --

20 A Oh --

21 Q Wait until I'm finished.

22 You don't Photoshop one photo into another do you?

23 A No.

24 Q You just make changes in the exposure and --

25 A Yes.

1 Q -- croppings?

2 A Yes.

3 Q When we were at Horsethief Lake and the pictures we took  
4 that day, it wasn't raining while we were there, correct?

5 A No.

6 Q But it had rained the night before?

7 A Yes.

8 Q And you testified that the coal paths -- you followed coal  
9 paths of wet coal going down the rocks into the river,  
10 correct?

11 A Correct.

12 MS. ASHBAUGH: Objection, misstating the testimony.

13 THE COURT: Overruled.

14 MR. TEBBUTT: That's all I have, Your Honor. Thank  
15 you.

16 THE COURT: Recross?

17 MS. ASHBAUGH: I have nothing further.

18 THE COURT: You may step down. Thank you, sir.

19 MR. TEBBUTT: Your Honor, the plaintiffs call the  
20 next witness, Peter Cornelison.

21 PETER CORNELISON,

HAVING BEEN FIRST DULY SWORN,  
TESTIFIED AS FOLLOWS:

22

23 THE CLERK: Please state your full name, and state  
24 your last name for the record.

25 THE WITNESS: Peter Cornelison; middle initial B,

1 last name is C-o-r-n-e-l-i-s-o-n.

2 DIRECT EXAMINATION

3 BY MR. TEBBUTT:

4 Q Good afternoon, Mr. Corelison.

5 Sir, where do you live now?

6 A I live in Hood River, Oregon.

7 Q Are you presently employed?

8 A I am.

9 Q And who are you employed with?

10 A I work for Friends of Columbia the Gorge as a field  
11 representative.

12 Q Okay. And is that -- field representative, is that  
13 something like an organizer?

14 A It is, yes.

15 Q Okay. And how long have you worked for Friends of the  
16 Columbia Gorge?

17 A Since 2003.

18 Q And full-time or part-time?

19 A Part-time.

20 Q Please describe for the court your educational background.

21 A I have a bachelor of science degree from the University of  
22 Oregon in community service and public affairs.

23 Q What year did you graduate?

24 A 1976.

25 THE COURT: Do they have a football team?

1 THE WITNESS: Yes, sir, sort of.

2 MR. TEBBUTT: They sort of did then. This year is  
3 another question.

4 Q (By Mr. Tebbutt) Sir, tell us a little bit about your  
5 work history after college.

6 A I worked in Portland, Oregon, for about six years after  
7 college, and then went back to work in a family business. We  
8 had a business making thermometers for wood-burning stoves.  
9 I'll say that again because it is kind of unusual.  
10 Thermometers for wood-burning stoves. These were little  
11 thermometers that went on the stovepipe that had three  
12 different colorings.

13 Q To make sure they weren't too hot?

14 A Exactly, or too cold, because if it's too cold, the  
15 creasote condenses in a stovepipe.

16 Q All right. You ran that family business?

17 A I did. I was the president, and I sold it in 1996.

18 Q And where did you move after 1996?

19 A I moved to Colorado, and then to Oregon in 1999.

20 Q Do you hold any public offices?

21 A I'm a city counsel member for the city of Hood River.

22 Q And how long have you been a city council member?

23 A About two years -- two and a half years.

24 Q Have you held any other elected positions?

25 A Prior to that I was an elected official, a city council

1 member in Hiram, Ohio, where I used to reside.

2 Q Sir, have you been involved in investigating coal coming  
3 off the coal trains in the Columbia Gorge?

4 A Yes, I have.

5 Q Are you married, sir?

6 A Yes.

7 Q Have you lived in Hood River since 1999?

8 A Yes, I have.

9 Q I'm going to jump right into it.

10 Are you a member of Friends of Columbia Gorge as well?

11 A Yes, I am.

12 Q I'm going to show you some photographs today and some  
13 videos and ask you about them.

14 Exhibit 1261, is this a photograph that you took?

15 A Yes, it is.

16 Q And do you know approximately when you took this photo?

17 A It would have been around 2012.

18 Q And what is this a photo a representative of?

19 A This is Washington Highway 14 near the community of White  
20 Salmon and Underwood. And to the left you see Cook-Underwood  
21 Road. To the right is Burlington Northern main line, and  
22 further right is the Columbia River.

23 Q Okay. And is there a bridge in the picture?

24 A There is. You can see just over the top of the chain link  
25 fence, that is the bridge that goes across the White Salmon

1 River.

2 Q All right. And just so you know, sir, you can actually  
3 draw with your finger on the screen, if there is anything you  
4 want to specifically point to as we discuss your testimony  
5 today.

6 A All right. Thank you.

7 Q Okay. So, again, this is where the confluence of the  
8 White Salmon River and Columbia River occurs, correct?

9 A That is correct.

10 Q Okay. The next picture is -- the first one is F0CG  
11 003483. The next picture, 3484, is that a picture of that  
12 same bridge from a different angle?

13 A It is. That -- that is the White Salmon Bridge, both the  
14 Highway 14 bridge and the railroad bridge at -- you're  
15 standing in Klickitat County, about to enter Skamania. This  
16 is the view looking west. The previous view was looking  
17 east.

18 Q Okay.

19 MR. TEBBUTT: And, Your Honor, just for background,  
20 I'd like to move into evidence Exhibit 1261, both the  
21 photographs.

22 MR. SULLIVAN: Objection on relevance grounds.

23 THE COURT: Overruled. It will be admitted.

24 (Exhibit 1261 admitted.)

25 Q (By Mr. Tebbutt) Sir, you have in front of you Exhibit

1 1398, which is FOCG 001379. Is this an email that you wrote?

2 A Yes, it is.

3 Q To Friends of the Columbia Gorge staff?

4 A Yes.

5 Q And what is the email about?

6 A The email is about a friend of mine, Eric Strid, who is  
7 also a Friends of the Columbia Gorge member. He was about to  
8 go out on a windsurfing expedition, and he got showered by  
9 coal pellets from a passing coal train at the location we  
10 just saw.

11 MR. SULLIVAN: Your Honor, I'm going to object on  
12 hearsay grounds.

13 MR. TEBBUTT: Foundation will be laid here in just a  
14 moment.

15 THE COURT: That objection is overruled to what the  
16 question was. I haven't heard the next question.

17 Q (By Mr. Tebbutt) And did Mr. Strid come to you after this  
18 happened?

19 A He called me on his cell phone once it occurred and wanted  
20 to let me know, and I asked him to come up to my house, which  
21 is about four miles away, and show me what had happened.

22 Q Okay.

23 MR. SULLIVAN: Same objection; hearsay.

24 THE COURT: Overruled.

25 Q (By Mr. Tebbutt) What did you do at that point when he

1     **came to you?**

2     **A    Well, I -- I took a picture of his scalp.  As you can see**  
3     **there, that's what's shown.  And then we used a comb to comb**  
4     **through his hair.**

5     **Q    And so this is your picture?**

6     **A    That is my picture.**

7     **Q    Showing you the next two pictures in Exhibit 1398.  Is**  
8     **this a picture, the top one on the page of 1380 -- that's**  
9     **FOCG 1380 -- did you take a picture, that picture?**

10    **A    I did take that picture.**

11    **Q    And what is that a picture of?**

12    **A    That is the coal that came off of Mr. Strid's scalp.**

13    **Q    Did you comb it out?**

14    **A    He did, and I held the paper.**

15    **Q    And did you take a picture or any pictures of the area**  
16    **where Mr. Strid had the experience?**

17    **A    It was the very first photo that -- that you showed me.**  
18    **It was at that -- that sailing site along the White River**  
19    **where there had been numerous reports of coal dust blow-offs.**

20           **MR. SULLIVAN:  Objection, speculation.**

21           **THE COURT:  The last portion of the answer will be**  
22    **stricken.**

23    **Q    (By Mr. Tebbutt)  Okay.  As to the first portion, you said**  
24    **that that was the Exhibit 1261 that we talked about, those**  
25    **first two photographs of the bridge --**

1 A Yes.

2 Q -- at the White Salmon River?

3 A Yes.

4 Q Okay.

5 So the event, did it occur on the east side of the  
6 bridge, or the west side of the bridge?

7 A It occurred on the west side of the bridge.

8 Q Is that area depicted in the picture in 1261?

9 A I'll -- I'll take this opportunity to draw.

10 Cars park along this chain link fence, and that's  
11 where these events have happened in the past.

12 Q Okay.

13 MR. SULLIVAN: Objection. That's speculation.

14 THE COURT: Sustained. The last portion of the  
15 answer will be stricken.

16 Q The second picture in 1261-3484, is that area depicted in  
17 this picture as well?

18 A It's harder to see it, but if you -- I'll circle this. Do  
19 you see that car that I just circled? That's a car parked in  
20 that area.

21 Q All right. The picture at the bottom of the page in F0CG  
22 1380. What does that show?

23 A That is a picture of the Columbia River Gorge. And in  
24 particular, the Columbia River. It doesn't look like that  
25 much, but if you look closely, you can see there is white

1 caps on the waves, signifying that it is a strong wind day.

2 Q Okay. We'll just kind of skip through a few of these.

3 Your email was a contemporaneous recording of what you  
4 heard described to you that day; is that correct?

5 A That's correct.

6 MR. TEBBUTT: Your Honor, I move into evidence  
7 Exhibit 1398, just FOCG 1379, and the top half of 1380.

8 MR. SULLIVAN: I'll object on relevance grounds and  
9 on hearsay grounds.

10 THE COURT: Hearsay grounds are sustained as to the  
11 verbiage that are on, but the photos can come in.

12 MR. TEBBUTT: Okay.

13 (Exhibit 1398 FOCG 1379 admitted.)

14 Q (By Mr. Tebbutt) Sir, we have in front of you Exhibit  
15 1399. Who is depicted in that picture?

16 A That is my smiling face.

17 Q I guess it is, isn't it?

18 A It is.

19 Q Is that a selfie?

20 A It is, yes.

21 Q What is it showing?

22 A This is a spot along the Columbia River called Dalton  
23 Point. It's very easy river access, and more importantly it  
24 is directly across from Cape Horn. And I'm kind of happy  
25 there because I get to paddle across the Columbia River,

1 about a mile across.

2 Q You're starting on the Oregon side?

3 A Starting on the Oregon side, heading over to Washington.

4 Q All right.

5 And you mentioned Cape Horn. Looking at Photo 3399,  
6 was that your destination that day?

7 A Yes, it was.

8 Q And what is that a picture of?

9 A That is the Burlington Northern Santa Fe main line tunnel  
10 at Cape Horn in Washington.

11 Q Why were you heading there that day?

12 A I had heard rumors of coal dust there, and I wanted to go  
13 and investigate.

14 Q Okay. And what did you do to investigate?

15 A I took some sample bags to collect samples, and I walked  
16 up and looked at the entrance to this tunnel.

17 Q And did you take more photographs?

18 A Yes, I did.

19 Q And is 3400 one of the photographs you took?

20 A Yes, it is.

21 Q And what does it depict?

22 A A massive amount of coal on the ground just inside the  
23 entrance to the tunnel.

24 Q How far is the tunnel from the river?

25 A Approximately 50 feet.

1 Q And Picture 3401, what does that show?

2 A This is looking westward into the dark tunnel, and,  
3 obviously, on the right-hand side there is a large amount of  
4 coal dust.

5 Q Picture 3402, is that the same?

6 A Yes.

7 Q And Picture 3403, what is that?

8 A This is a drainage culvert that comes off of the tracks  
9 that you saw in the previous photos and leads down to the  
10 Columbia River. You can see beyond the trees, there is the  
11 bank and the Columbia River.

12 Q And did you go down and look in that drainageway?

13 A I did.

14 Q And what did you find?

15 A I found some coal.

16 Q Had you been to that location before?

17 A This was the first time.

18 Q Have you been there since?

19 A No.

20 Q Did it -- the place where you were, the culvert, was there  
21 any water coming out of it?

22 A At that time, no.

23 Q And what time of year was that?

24 A Fall.

25 Q Was there evidence that water had flowed through that area

1 before?

2 A Very definitely. You can see the way the water makes its  
3 way down to the river --

4 Q Okay.

5 A -- through that channel.

6 Q And is the Columbia River right there through the trees?

7 A Yes.

8 Q Picture 3404, what does that show?

9 A I believe it shows coal, but it also shows debris that  
10 might have been coal. I'm not sure. I think it's -- it's a  
11 little hard to say.

12 Q And that is in the drainageway by Cape Horn?

13 A Yes.

14 MR. TEBBUTT: Your Honor, I'd like to move into  
15 evidence Exhibit 1399, 3269 just for the sheer joy of the  
16 picture, 3399, 3400, 3401, and 3403 out of that series.

17 MR. SULLIVAN: Objection on relevance grounds.

18 THE COURT: Overruled. They'll be admitted.

19 (Exhibits 1399, 3269, 3399, 3400, 3401, and 3403 admitted.)

20 Q (By Mr. Tebbutt) 1402, sir, is a document that was used  
21 in your deposition, correct?

22 A Yes.

23 Q And did you visit these sites that are listed with your  
24 name?

25 A Yes, I did.

1 Q And was that for the purpose of seeing if coal was  
2 present?

3 A Yes.

4 Q And with the seven entries that include your name, did you  
5 find coal in any of those locations?

6 A We found coal in every location.

7 Q What you believed to be coal through observation, or did  
8 you sample?

9 A I believe we took samples in each case.

10 Q Okay. So the White Salmon River at the Columbia River  
11 confluence, that's the picture we saw in Exhibit 1261,  
12 correct? It's the picture of the bridge at White Salmon?

13 A That's correct, yes.

14 MR. TEBBUTT: Your Honor, we move into evidence  
15 Exhibit 1402.

16 MR. SULLIVAN: I'll object on hearsay grounds.

17 THE COURT: Sustained.

18 Q (By Mr. Tebbutt) Sir, did you undertake any other  
19 investigative methods at Horsethief Lake?

20 A Yes, I did.

21 Q What investigative methods did you undertake?

22 A I installed a motion-sensitive camera there. It's  
23 depicted in this photograph.

24 Q Was this an actual picture of the camera that you  
25 installed, or was this from a website, or what?

1 A This is from a website.

2 Q Okay. Is this the type of camera that you installed?

3 A Yes.

4 Q And you did that at Horsethief Lake; is that correct?

5 A That is correct, yes.

6 Q Did you -- did you apply for a permit to install that  
7 camera?

8 A Yes. I applied for a permit from Washington State Parks  
9 for a research permit.

10 Q And did you receive the permit?

11 A I did.

12 Q And looking at Exhibit 1408, is that a copy of the permit?

13 A Yes, it is.

14 MR. TEBBUTT: Your Honor, I move into evidence  
15 Exhibit 1408.

16 MR. SULLIVAN: No objection.

17 THE COURT: Admitted.

18 (Exhibit 1408 admitted.)

19 MR. TEBBUTT: I also move into evidence Exhibit 1404.

20 THE COURT: That's the picture of the camera?

21 MR. TEBBUTT: Yes.

22 MR. SULLIVAN: No objection.

23 THE COURT: Admitted.

24 (Exhibit 1404 admitted.)

25 Q (By Mr. Tebbutt) Sir, showing you Exhibit 1405, which is

1 F0CG 003035, did you take that picture?

2 A Yes, I did.

3 Q And what is it a picture of?

4 A This is a picture of the camera enclosed in a security  
5 case with a lock and mounted to a tree branch.

6 Q Okay. And is 3306 just the same camera from a slightly  
7 different angle?

8 A Yes.

9 Q And what does 3307 depict?

10 A That is the view the camera saw looking east. I put a  
11 camera -- my portable camera on top of the metal housing and  
12 took this picture. The rock outcropping closest to us on the  
13 left is Horsethief Butte.

14 Q So you climbed up in the tree?

15 A Yes, I did.

16 Q How did you get to the tree?

17 A I kayaked from the public boat access at Horsethief Lake  
18 State Park.

19 Q And the same with 3308? It's just another variant of the  
20 same picture?

21 A Yes.

22 Q And 3309, what is that picture of?

23 A Same view, just a close-up.

24 Q 3301, another picture of the camera?

25 A Yes.

1 Q What was the purpose of the camera?

2 A I wanted to record coal train dust blow-offs to prove that  
3 it was happening.

4 Q What was the purpose of collecting that proof?

5 A I wanted to show people in the Gorge that this was a real  
6 occurrence. I'd been to a number of hearings, and people  
7 have objected and have said -- in fact, a week and a half ago  
8 I heard it again; that these coal dust blow-offs are a fluke.  
9 That clearly is not the case.

10 Q 3311, 3312, other angles of the camera?

11 A Yes.

12 Q And 3313, what is that?

13 A This is a picture of my two kayaks and a friend who went  
14 out with me to help install the camera. We're looking down  
15 on the Columbia River there.

16 Q Okay. 3314, another angle looking back up?

17 A Yes.

18 Q Same again with 3315?

19 A Yes.

20 Q 3316, same?

21 A Yes.

22 Q And 3317 is that a picture of the tree. Were you in your  
23 kayak when you took that?

24 A Yes. You can see the bow of the boat right there, and the  
25 camera is in that second circle.

1 Q When did you install that camera?

2 A June of 2014.

3 Q The last picture in a series, I'm not sure it is the last,  
4 but 3321, is that a picture from the same tree from a little  
5 further out in the river?

6 A It is. And at that point I'm to the west of the tree,  
7 looking east.

8 Q And a close-up of the same thing?

9 A Yes.

10 Q Again, another angle, 3323?

11 A Yes.

12 Q All right. Was the camera pointed -- well, how did you  
13 situate the camera, and why did you situate the camera?

14 A The loaded coal trains are traveling east to west, so in  
15 order to capture the loaded coal trains, I needed the camera  
16 pointed east.

17 Q The camera that you mounted, how did it record  
18 information?

19 A It recorded onto a SD card, a high-capacity SD card.

20 Q So a card that was in the camera itself?

21 A Yes.

22 Q You didn't have any fancy transmission from satellite to  
23 your office?

24 A That might have been nice and the high-tech way to do it,  
25 but, no, I had to physically go out and remove the card,

1 download the information. I recorded the information in my  
2 computer, erased the card, and put it back into the tree.

3 Q How did you get to the camera each time you went out  
4 there?

5 A I would -- every two to three weeks I would kayak out to  
6 the tree, climb it, remove the SD card, sit in my kayak with  
7 my portable laptop computer, and scroll through the images to  
8 see if there were any worth saving.

9 The big problem with this kind of methodology was that I  
10 got a lot of very -- a large number of false signals from  
11 moving tree branches, and so....

12 Q So what would happen from the false signals from the tree  
13 branches?

14 A I'd end up with reams of unusable data, just blank images  
15 or images with tree branches moving.

16 Q What was the memory of the camera? How long would the  
17 memory of the card last, approximately, for you?

18 A It would be about two to three weeks. I had a 16-gigabyte  
19 card and a 32-gigabyte card, and just as a -- as for  
20 instance, during the -- we had one card that malfunctioned,  
21 so I couldn't erase the images. And there were -- let's see.  
22 There were 19 gigabytes worth of data within about three days  
23 that had been recorded, and during that period there were no  
24 coal trains that appeared in the data.

25 Q On the video?

1 A On the videos, or it was -- it was still images as well as  
2 video.

3 Q Right. So you don't know actually whether coal trains  
4 came through or not. It's just that the camera did not  
5 record them, correct?

6 A That's correct. Our best information is that there are  
7 two to three coal trains per day through the Columbia Gorge.

8 Q 3350, where was that?

9 A From the boat launch at Horsethief Lake State Park. I'm  
10 looking east at an oncoming coal train.

11 Q And can you approximate where on that causeway the camera  
12 was located, with your finger on the screen?

13 A Yeah. It's -- it's beyond the place you can see. It  
14 would be beyond the bushes.

15 Q On the other side of those bushes, further upriver?

16 A Further upriver, yes.

17 Q All right. I'm going to clear that for now.

18 Other than the coal train going by, is there anything  
19 that is significant to you?

20 A The -- this is -- this is -- this is a replica, basically,  
21 of a view I had on September 4th when I was showered with  
22 coal -- coal debris from a passing coal train.

23 Q September 4th of what year?

24 A 2014.

25 Q How do you know it was September 4th of 2014?

1 A Further in the evidence deck, there are some photos that  
2 show that happening.

3 Q And when -- you said you were showered by coal?

4 A I was.

5 Q Where were you standing when you were showered?

6 A I moved around some, but approximately in this general  
7 area.

8 Q Okay. And what did you observe that day while you were  
9 being showered with coal?

10 A I saw -- I saw coal blowing off the top of every car, and  
11 the coal was -- was landing in the water. I could see  
12 droplets of coal hitting the surface of the water, and the  
13 view was obscured, not greatly, but was obscured by the coal  
14 dust falling out of the air.

15 Q So, again, the coal was hitting the water that's depicted  
16 in the picture in 3350?

17 A Yes, and the land.

18 Q Do you remember how far out the coal was hitting the  
19 water?

20 A I would say right about in that area.

21 Q Okay. Go ahead and clear that.

22 In the right-hand corner, there is a little arrow.

23 THE COURT: Let's take a 15-minute recess .

24 (Court in recess.)

25 Q (By Mr. Tebbutt) Welcome back, Mr. Cornelison. We'll

1 resume.

2 I had you look at 3323 at one point. That is the picture  
3 of the tree where the camera is mounted, correct?

4 A Yes.

5 Q And about how far over the water was the camera mounted  
6 out past the shoreline?

7 A Ten to fifteen feet.

8 Q And about how high up?

9 A Approximately the same height as well: Ten to fifteen  
10 feet.

11 Q 3352 is that a picture of the same train as 3351 but just  
12 looking the other direction?

13 A Yes, it is looking west.

14 Q And what is that where the person is standing on the left  
15 side?

16 A That is the public boat launch at Horsethief Lake where I  
17 would launch my kayak from.

18 Q 3353, what does that show?

19 A It is a picture of a coal train and the Columbia River.

20 Q Same area that was in 3351, just a little -- just a  
21 slightly different version?

22 A Yes.

23 Q 3354?

24 A Same with a close-up of Horsethief State -- Horsethief  
25 Butte in the background.

1 Q And 3355?

2 A Same.

3 THE COURT: Why is it called Horsethief Butte?

4 THE WITNESS: Well, the legend has it that some horse  
5 thieves hid horses in there and hung out to escape the law in  
6 the early 1900s. So that's how they say it got its name,  
7 Your Honor.

8 MR. TEBBUTT: Historic Western significance.

9 A Yes.

10 Q (By Mr. Tebbutt) And 3356, is that in approximately the  
11 same location?

12 A Yes, it is.

13 Q Is that the railroad crossing that goes down to the boat  
14 launch?

15 A Yes, it is.

16 Q And 3357, tell us what that is.

17 A That's looking west. That's my friend and I, David, you  
18 can see in the kayak here, paddling back after having mounted  
19 the camera.

20 Q All right. 3358, what does that show?

21 A This shows the coal that was deposited along the railroad  
22 causeway. This is on the Columbia River side of the  
23 causeway.

24 Q Okay.

25 A You can see the black coal sloughing off the rocks.

1 Q And that's a picture you took the same day you mounted the  
2 cameras?

3 A Yes. As far as I know. Without the metadata, I can't be  
4 sure of the date.

5 Q And 3359 -- F0CG 3359, is that a close-up of the same  
6 rock?

7 A Yes, it is.

8 Q And 3360, the same rock but from a different angle?

9 A Yes.

10 Q I'm getting to know this rock.

11 MR. TEBBUTT: I would like to move into evidence the  
12 Exhibit 1405 series of pictures.

13 MR. SULLIVAN: I'm going to object on relevance  
14 grounds with respect to the photos of the material on the  
15 ground. No objection with respect of the photos of the  
16 installation of the camera.

17 THE COURT: Overruled.

18 I'm having difficulty understanding this relevance  
19 objection. I mean, we're talking about coal debris alongside  
20 the river. Why isn't it relevant?

21 MR. SULLIVAN: Well, Your Honor, in light of Your  
22 Honor's ruling on summary judgment, we believe that how the  
23 coal got there matters as a legal matter, and the coal on the  
24 ground itself is not indicative of any mechanism as to how it  
25 got there.

1 THE COURT: Okay. Go ahead.

2 Q (By Mr. Tebbutt) Sir, Exhibit 1406, F0CG 3327, do you see  
3 that?

4 A Yes, I do.

5 Q And did you take these pictures?

6 A Yes, I did.

7 Q And do you know where these pictures were taken?

8 A Again, at Horsethief Butte State Park.

9 Q And do you know approximately the time they were taken?

10 A This would have been in the fall of 2012, to the best of  
11 my recollection.

12 Q And why do you think it was fall 2012?

13 A You can see the leaves on the ground, and this is about  
14 the time that -- I think this might have been my first visit  
15 after Horsethief, and we had been getting reports of coal on  
16 the ground there, and I finally made my way out to  
17 investigate.

18 Q 3329, same area at Horsethief?

19 A Same area, yes.

20 Q And we had a prior witness and you weren't able to see  
21 that testimony, and for the court it might be a little  
22 redundant, but I would just like for you to circle with your  
23 finger the things you believe are coal on 3329.

24 A Sure. (Witness complies.)

25 Q Okay. And you're familiar with the high water mark on the

1 Columbia River?

2 A Yes, I am. I've been a whitewater kayaker for 30 years,  
3 and I'm familiar with waterlines and water marks.

4 Q Does it take any special expertise to recognize a high  
5 water mark?

6 A If -- if -- I would say it would take some experience.

7 Q And do you believe you have that experience?

8 A Yes, I do.

9 Q Okay. You've spent, what, about 17 years on the Columbia  
10 River?

11 A Yes, that's correct.

12 Q And you recognize what the high water is along the  
13 Columbia River?

14 A Yes.

15 Q And what are the kinds of indications of the high water  
16 mark that are indicative of a high water mark?

17 A The level on each of the Columbia River pools, which is  
18 what they are called, is graduated by the Columbia River  
19 dams, depending on fish needs and power needs, etc. So the  
20 levels rise up and down as much as a foot to two feet, and  
21 typically there is a bathtub ring that shows what would be  
22 the ordinary high water mark.

23 MR. TEBBUTT: Move in evidence Plaintiff's Exhibit  
24 1406, Your Honor. Oh, wait a minute. I thought there were  
25 more, and for some reason they're not going forward, so there

1 are some more, so I'll hold off.

2 Q (By Mr. Tebbutt) So 3330, sir, is that again Horsethief  
3 Lake pictures?

4 A Yes, it is.

5 Q And I will spare the court the redundancy. But just  
6 quickly, do you see coal in 3330?

7 A Yes, in this area right here.

8 Q All right. Next picture, please. Do you see coal on  
9 3331?

10 A Yes. This is the Columbia River. My back is towards it.  
11 You can see what typically happens. In this photograph you  
12 don't see coal, but when you take the rocks -- the larger  
13 rocks away, you can see it gets stuck in the crevices here.

14 Q Is that what you did? You took a rock away?

15 A Yes. As you can see, I exposed this area and found coal.

16 Q Do you know if that was at or below the high water mark?

17 A I suspect it was because it's still wet, but that could  
18 have been the rainfall as well.

19 Q It is hard to tell from that photo where the high water  
20 mark is?

21 A Yes, it is.

22 Q 3364, is that more coal?

23 A More coal, yes, a close-up.

24 Q And is that on the embankment?

25 A It's hard to say. I can't tell.

1 Q Okay. Next picture. Again, same area, 3365?

2 A This is at Horsethief. This is on a plateau that's close  
3 to the tracks.

4 Q All right. Next picture, please, 3363, same thing, same  
5 area?

6 A Yes. 66.

7 Q 3366. Thank you.

8 Next?

9 3367, do you know where this picture was taken?

10 A This is the post -- on the right-hand top corner is the  
11 stop sign that was at the rail crossing just as the boat --  
12 as boat ramp appeared.

13 Q Top left?

14 A Top left. Excuse me.

15 Q And the baggie there, did you collect something in that,  
16 or was that there?

17 A I collected coal samples in that location, yes.

18 Q Is that the scuffed area down below?

19 A Yes.

20 Q Next?

21 And is this the same general area here, Horsethief  
22 Lake?

23 A Yes, it is.

24 Q Next.

25 And 3369, where is that taken?

1 A Again, this is the causeway, and you can see coal down  
2 towards the water there.

3 Q The bank -- the embankment is a 45-degree angle so it runs  
4 off quickly here?

5 MR. TEBBUTT: Your Honor, move in Exhibit 1406.

6 MR. SULLIVAN: Same relevance: Objection.

7 THE COURT: Overruled. It will be admitted.

8 (Exhibit 3369 admitted.)

9 Q (By Mr. Tebbutt) You now have on your screen  
10 Exhibit 1409. Is this a document you created?

11 A Yes. It is off of a Google map.

12 Q And did you get the Google map off of the Internet?

13 A Yes, I did.

14 Q And what -- let's start with where it says Sample 1. Was  
15 that the little baggie that we just saw in the previous  
16 picture?

17 A Yes, I'm sure it was.

18 Q And No. 2, what is that?

19 A That is the boat ramp that I keep referring to at  
20 Horsethief State Park.

21 Q And No. 3?

22 A This is where a lot of previous photos of coal were taken,  
23 in this area.

24 Q Okay. The ones we just talked about in Exhibit 1406?

25 A The plateau that I referred to, yes.

1 Q And No. 5, what is significant about that, showing?

2 A I believe I would have taken another sample there, but  
3 it's not -- it's not labeled, so I'm not a hundred percent  
4 sure. But up at the top right-hand corner where I have the  
5 dashed red line --

6 Q Yes.

7 A -- the difficulty with sampling coal in water at a  
8 location is the causeway is made up of very rough angular  
9 rock, and so coal seeps into crevices and you can't see it.  
10 It's not as exposed as easily.

11 Q All right.

12 MR. TEBBUTT: Your Honor, I move 1409 into evidence.

13 MR. SULLIVAN: No objection to the photo. The text  
14 in the photo is hearsay.

15 THE COURT: The photo will be admitted. The text  
16 will not be considered part of the record.

17 (Exhibit 1409 admitted.)

18 Q (By Mr. Tebbutt) Sir, you have in front of you Exhibit  
19 No. 10, two different photos. Did you take these pictures?

20 A Yes, I did.

21 Q And did you take these pictures while you were visiting  
22 your camera site?

23 A Yes. The tree that I mounted the camera on is down here  
24 where I circled, and I paddled up to check out this floating  
25 container.

1 Q Did you know whose container it was when you took this  
2 picture?

3 A I suspected it belonged in Columbia Riverkeeper.

4 Q The second photo, what is that a picture of?

5 A That is the interior of the container showing coal dust  
6 inside.

7 Q And do you know approximately when those photos were  
8 taken?

9 A I would say the 2013, 2014 range. I'm not sure.

10 Q Did you do anything to that tub while you were there?

11 A No.

12 Q Looked in it?

13 A Just looked in it and took photos.

14 MR. TEBBUTT: Your Honor, I moved into evidence 1410.

15 MR. WAGNER: No objection.

16 THE COURT: It will be admitted.

17 (Exhibit 1410 admitted.)

18 Q (By Mr. Tebbutt) Sir, you have in front of you  
19 Plaintiff's Exhibit 14 and 15, which is a series of  
20 photographs. Is that your hand depicted?

21 A Yes, it is.

22 Q And what are you holding in your hand?

23 A This is coal from -- that was near the tracks. It is a  
24 little bit wet, and so it was quite friable.

25 Q And do you know approximately where this photo was taken?

1 A It was taken in Murdoch, Washington.

2 Q Where is Murdoch in relation to Horsethief Lake?

3 A It's a little bit west. It's between Lyle and Dalles  
4 Port, near The Dalles Port area.

5 Q West of The Dalles?

6 A West of Dalles.

7 Q Is it west of Horsethief Lake?

8 A It is west of Horsethief Lake as well by about eight  
9 miles, ten miles.

10 Q Second photograph, 3449, what is that picture of?

11 A This is a shot of railroad tracks in that location.  
12 Excuse me. It is a shot of the railroad ballast in that  
13 relation.

14 Q Where is the track in relation to this picture?

15 A It would be running along here.

16 Q All right. And 3450, what is that a picture of?

17 A This is unnamed drainage, a little spring that comes out  
18 of the hillside there, and we're walking down to investigate  
19 because we saw coal debris washing downhill here.

20 Q Is that you in that drainage?

21 A This is Don Murdoch, the property owner, and John Wood, a  
22 friend of mine.

23 Q And is that a drainageway?

24 A That's a drainage underneath the railroad. The railroad  
25 is running up here, and the coal that I showed in my hand

1       there was coal that came from this drainage.

2       Q     That area where you pick up the coal depicted in this  
3       picture?

4       A     Well, I don't see any coal in this picture. I mean, it's  
5       too far.

6       Q     I mean, where you picked --

7       A     Yes.

8       Q     -- is it depicted in that general area?

9       A     Yes.

10      Q     And can you circle where you picked up that coal.

11      A     It would have been in this area.

12      Q     All right. Thank you.

13                 And is this a picture again in that drainage area?

14      A     No. This would have been up closer to the tracks.

15      Q     But in that same general vicinity?

16      A     Yes.

17      Q     Same day?

18      A     Yes.

19      Q     And is this picture of the track?

20      A     It is, and The Dalles is up in this area.

21      Q     And when I say is this a picture of the track, is this a  
22      picture of the track where we were just talking about?

23      A     Yes.

24                 THE COURT: What is the meaning of the word "The  
25      Dalles"?

1 THE WITNESS: It is a French word, and it means  
2 gutter, and it refers to the original condition of the river  
3 there.

4 Celilo Falls happened, and then it went through a great  
5 narrows, and then there was a big kind of eddy in The Dalles,  
6 and I think that's how it got its name by the French trappers  
7 and traders.

8 THE COURT: Okay.

9 MR. TEBBUTT: Your Honor, I move into evidence  
10 Exhibit 1415.

11 MR. SULLIVAN: Relevance objection.

12 THE COURT: Overruled. It will be admitted.

13 (Exhibit 1415 admitted.)

14 Q (By Mr. Tebbutt) Sir, before you is 1416. Is this your  
15 hand in the photo?

16 A No. That is my friend's hand, John Wood.

17 Q And what do you believe he has in his hand?

18 A He has a piece of coal.

19 Q Did you take that picture?

20 A I did.

21 Q And do you know approximately when you took that picture?

22 A This would have been around 2013. I believe the metadata  
23 would show the exact date.

24 Q Where was this picture taken?

25 A This was near Skamania County near the Columbia River.

1 Q Is that the same general area?

2 A It is the same general area. We had to walk over a lot of  
3 ground like this to get there.

4 Q Okay. And is this again the same area that you walked to?

5 A It is the same area, but this beach is actually off the  
6 photo this direction.

7 Q Okay. Where you picked up the coal?

8 A Yeah, that's the place.

9 Q 3394 is the beach where you picked up the coal?

10 A Yes.

11 Q And how close to that is the track?

12 A The track would be approximately 50 feet away on an  
13 embankment above the water there.

14 Q And what were you doing there?

15 A We were looking for coal.

16 Q And did you find some?

17 A We did find it.

18 Q And 3395, is that a picture along the same beach?

19 A Yes, it is.

20 Q And you have the empty hand, the Adams family hand there  
21 pointing to something. What it's pointing to?

22 A It's pointing to the subject material to another chunk of  
23 coal that we found.

24 Q Did you sample that that day?

25 A We took samples, and I took the samples to our office in

1 Portland, and they were sent off to the Sierra Club. I never  
2 saw the results.

3 Q All right. And, again --

4 A This is a fuzzy close-up.

5 Q Do you believe that to be coal?

6 A Yes.

7 Q And this picture, sir, where was this taken?

8 A This is along Highway 14, very close to Wind Mountain, and  
9 it's sort of a contrasting photo between what's mapping on  
10 the ground and what the aspirations are of Skamania County.

11 Q Can you explain that a little more?

12 A Well, the idea is keeping Skamania County green, and the  
13 coal is basically pollution that doesn't belong in the Gorge.  
14 It is from hundreds of miles -- thousands of miles away. It  
15 doesn't belong in the Gorge. It's not a natural feature.

16 MR. TEBBUTT: Your Honor, I move into evidence 1416  
17 minus the last photo, 3398, which is a duplicate.

18 MR. SULLIVAN: Objection; relevance.

19 THE COURT: Overruled. It will be admitted.

20 (Exhibit 3398 admitted.)

21 Q (By Mr. Tebbutt) Sir, you have 1417, F0CG 3407, what is  
22 that a picture of?

23 A This is a coal train going through The Dalles, Washington,  
24 taking it from the Oregon shore.

25 Q So is that a zoomed shot?

1 A Yes, it is.

2 Q And how far are you away?

3 A Approximately -- what is a football field? 500 yards?

4 THE COURT: 100.

5 A So I'm guessing.

6 THE COURT: Do you know what that building is there,  
7 do you know?

8 THE WITNESS: I think that is a water intake, Your  
9 Honor, but I'm not exactly sure. It's kind of -- there is a  
10 lot of interesting history around here. There was a ferry  
11 that came down to -- across the river before the bridge was  
12 in.

13 THE COURT: From Dalles Port to Dalles?

14 THE WITNESS: Yes.

15 MR. TEBBUTT: Your Honor, move into evidence 1417.

16 MR. SULLIVAN: Same objection.

17 THE COURT: Overruled.

18 (Exhibit 1417 admitted.)

19 Q (By Mr. Tebbutt) Sir, you have a series of photographs  
20 starting with 3409, FOC 0033409. What is that a picture of?

21 A That is that a creek near Stevenson, Washington. It's  
22 called Kanaka Creek.

23 Q Did you investigate to see if there was coal there?

24 A Yes, we did. We found coal along the side of this creek,  
25 and that is a railroad overpass overhead.

1 Q And is 3410 taken in the same general area?

2 A This is a ways away. This is close to a place called the  
3 hatchery, and you can see a fire occurred up there in the  
4 upper slopes a year or two earlier.

5 Q Okay. And 3411, what's that a picture of?

6 A This is the -- showing the railroad overpass at Kanaka  
7 Creek. It is the same location as I believe the first photo  
8 you showed me, and it is a loaded coal train going by.

9 Q 3412, is that the Kanaka Creek going under the bridge?

10 A Yes, it is.

11 Q Again, it looks very similar to the first picture we saw,  
12 correct?

13 A Uh-huh.

14 MR. TEBBUTT: Your Honor, I move into evidence the  
15 series of photos in Plaintiff Exhibit 1418.

16 MR. SULLIVAN: Same objection.

17 THE COURT: Same ruling. It will be admitted.

18 (Exhibit 1418 admitted.)

19 Q (By Mr. Tebbutt) Sir, in front of you is Plaintiffs'  
20 Exhibit 1508, which is a map -- a Google map that was used in  
21 your deposition by BNSF's lawyers, correct?

22 A That's correct.

23 Q What is the X marking the spot?

24 A That is the location that was depicted in those earlier  
25 photographs, Stevenson -- let's see. Stevenson is over here.

1 Q Okay. And that is Kanaka Creek that runs where your X is?

2 A Yes, it is.

3 Q And that's where your pictures are?

4 A Yes.

5 MR. TEBBUTT: Moving into evidence.

6 MR. SULLIVAN: Objection on hearsay grounds.

7 THE COURT: Overruled.

8 MR. TEBBUTT: I've just got to mark it.

9 (Exhibit 1508 admitted.)

10 Q (By Mr. Tebbutt) Sir, you have in front of you a series  
11 of photographs marked Plaintiffs' Exhibit 1419. Where is  
12 this located?

13 A This is White Salmon where it enters the Columbia River.  
14 To the left is -- it enters a lake call Drano Lake. Very  
15 popular with fisherman.

16 Q Is that because the fishery is right nearby?

17 A Exactly. That is Highway 14, and then on the other side  
18 BNSF mainline bridge.

19 Q And did you take these photographs?

20 A Yes, I did.

21 Q And 3419, the second in the series, what is that a picture  
22 of?

23 A That is a picture of the bridge, and in particular, this  
24 is coal dust and wood chips that blew off the train.

25 Q Do you see there in the concrete pieces? Are those

1 continuous pieces or not?

2 A I don't quite understand. Can you rephrase?

3 Q Yeah. The concrete abutment there, the tall one, is that  
4 one solid wall, or does it have cracks in it?

5 A There's a crack here, and, of course, the coal is going  
6 out that crack.

7 Q The concrete --

8 A It is two separate jersey barriers.

9 Q So it's intended to drain?

10 A Yes.

11 Q And 3420, what's that a picture of?

12 A This is a parking area that fishermen typically use in the  
13 same area. It's just a little bit further east, and all this  
14 area is littered with coal debris.

15 Q And 3421?

16 A Same.

17 Q More coal?

18 A Yeah.

19 Q Where the foot is?

20 A Yes.

21 Q 3422?

22 A This is looking west. That jersey barrier that we had  
23 talked about earlier, the seam was right about here, and this  
24 is a path that the fishermen take to reach the river and all  
25 this on the side here is coal debris.

1 Q So again you saw coal on the other side of the barrier on  
2 the highway side, correct?

3 A Yes, it was over in that area.

4 Q There had been reports of little people taking shovels  
5 full of coal out of coal trains and dumping them on the  
6 highway?

7 MR. SULLIVAN: Objection.

8 THE COURT: Sustained.

9 A Yes.

10 Q (By Mr. Tebbutt) That barrier there, the breaks in the  
11 area right over the Little White Salmon River, aren't they?

12 A Yes, they are.

13 Q And what is 3423?

14 A This is the picture of two BNSF locomotives heading east.

15 Q Not necessarily coal trains, but heading east?

16 A Yes.

17 Q And this one?

18 A Same place, just a little wider view looking west.

19 Q And can you circle what you believe to be coal?

20 A All this on here, and it's over in here, too. It's just  
21 this photo doesn't show it.

22 Q All right. And the coal that we saw out on the highway  
23 before?

24 A It's up in --

25 Q That area?

1 A -- this area. There may be a better photo of it here  
2 coming up.

3 Q Okay. And where was this picture taken, 3425?

4 A The same location. It's over the depth of my first  
5 knuckle, as you can see.

6 Q And you believe that all to be coal?

7 A I do.

8 Q And there is a wider shot, FOCG 327, is that the same  
9 general area?

10 A Yes, it is.

11 Q And 3428?

12 A Same.

13 Q And is that your car there?

14 A It is.

15 Q And is that coal right behind it?

16 A Yes, and that's me taking the photo.

17 Q Okay. 3429, more coal on the road, that's correct?

18 A Yes. This right here, this over here.

19 Q Okay. Was it taken the same day, a different day, do you  
20 know?

21 A Same day.

22 Q And the key and the quarters are there for perspective?

23 A Yes, it is. It shows kind of the granular nature of these  
24 coal pellets and why they blow off. They're light. They're  
25 not that big. They're about the tip of a pencil or maybe a

1 grain of rice.

2 Q And 3431, is that what you were referring to earlier?

3 A Yes. This shows the coal better. I was able to fill a  
4 five-gallon bucket, scraping just a little bit of this  
5 causeway, in about a minute, two minutes.

6 Q You were in the wood-stove heating business. Did you use  
7 it in any of your wood stoves?

8 A I wouldn't want to pollute with that stuff, no.

9 But I want to point out this blew off from the bridge, and  
10 this landed -- this blew off the railroad bridge and landed  
11 on the roadway bridge. How much would have fallen directly  
12 into the water --

13 MR. SULLIVAN: Objection; calls for speculation.

14 THE COURT: Overruled.

15 Q (By Mr. Tebbutt) And same thing with 3432, just a  
16 closer-up shot?

17 A Yes.

18 Q And 3432, is that one of the breaks in the cement above  
19 it?

20 A Yes.

21 Q Is the coal heading towards the water?

22 A Yes, the coal is heading towards the water.

23 Q And the cracks are designed to filter stuff out?

24 MR. SULLIVAN: Objection; speculation.

25 THE COURT: Sustained. It is also leading.

1 Q (By Mr. Tebbutt) 3435, what is that a photo of?

2 A A picture of my foot depicting the depth of the coal  
3 there.

4 Q And it is right on the roadway?

5 A Yes.

6 Q And 3436 we've seen. Actually, tell us, is there anything  
7 different than we've discussed in any other photographs in  
8 3436?

9 A It just shows the path the fishermen take a little better  
10 down the divide between the sloped ground.

11 Q You haven't talked about that. What are you referring to?

12 A Well, in addition to being a path, it is a drainage ditch,  
13 basically, leading downhill to the water.

14 Q Fishermen use that path?

15 A They do.

16 Q And any coal in that path?

17 A It's littered the whole way.

18 Q Did you follow it all the way down to the water?

19 A Yes, yes.

20 Q And same thing just a slightly different perspective with  
21 3437?

22 A Yes. That's looking up -- uphill, back down towards my  
23 car.

24 Q Back toward the other direction we were looking at in  
25 3438?

1 A Yes.

2 MR. TEBBUTT: Your Honor, I move into evidence  
3 Exhibit 1419.

4 MR. SULLIVAN: Objection; relevance.

5 THE COURT: Overruled. It will be admitted.

6 (Exhibit 1419 admitted.)

7 Q (By Mr. Tebbutt) Sir, you have in front of you  
8 Plaintiffs' Exhibit 1421 FOCG 3461. What is that a picture  
9 of?

10 A This is a picture of a coal train passing through the  
11 Gorge near Stevenson, Washington.

12 Q And is this the same train?

13 A Yes, it is.

14 Q What do you see depicted in Photograph 3462?

15 A There is a bunch of new concrete ties that Burlington  
16 Northern Santa Fe is getting ready to install.

17 MR. SULLIVAN: Objection; speculation.

18 THE COURT: Sustained.

19 Q (By Mr. Tebbutt) What is the relation to the coal?  
20 What's relevant to the coal?

21 A The coal, when it leaves the mine, it's supposed to be  
22 shaped in a bread-loaf shaped pattern. And you can see on  
23 the tops of the coal here, some of this -- some of that coal  
24 has been winded away by the wind.

25 Q And can you show your finger to show the erosion of being

1     **blown away by the wind?**

2     A    **Yes.**

3     Q    **And fairly consistent patterns in --**

4     A    **Yes.**

5                 **MR. SULLIVAN:  Objection; leading.**

6     Q    **(By Mr. Tebbutt)  What are your observations about the**  
7     **wind-blown patterns?**

8     A    **Well, they're similar in each car as far as the eye can**  
9     **see, and it seems to be a repeating pattern.**

10    Q    **And is this 3463 a close-up of what you were just talking**  
11    **about?**

12    A    **Yes, it is.**

13    Q    **Is there anything else that's -- that you'd like to**  
14    **discuss regarding this photograph?**

15    A    **This is kind of a typical coal car.  They're not the**  
16    **prettiest cars on the railroad.**

17    Q    **Okay.  And then the last photo just in the same series,**  
18    **correct?**

19    A    **Yes.**

20    Q    **Again --**

21    A    **I would point out one thing here.  This bottom hopper here**  
22    **is to allow the coal to exit the train.  It's how the train**  
23    **is emptied.**

24                 **MR. SULLIVAN:  Objection; speculation.**

25                 **THE COURT:  Am I correct in understanding the pusher**

1 engine in generally radio controlled? There's no engineer or  
2 firemen in the pusher engine? You guys represent them. You  
3 ought to know. I'm asking you, Mr. Wagner.

4 MR. WAGNER: No, I don't have any specific  
5 information. I'll defer to my client on that question.

6 THE COURT: What is the answer?

7 DEFENDANT REPRESENTATIVE: It's generally in the  
8 back.

9 THE COURT: That's what I thought. It has nothing to  
10 do with the case.

11 MR. TEBBUTT: Another form of black lung.

12 (Off-the-record discussion not pertaining to the case.)

13 THE COURT: Let's stop there for the day. I'm  
14 exhausted.

15 MR. TEBBUTT: May I clean this one exhibit up and get  
16 it in and we'll call it good?

17 THE COURT: That's fine.

18 MR. TEBBUTT: Sorry to exhaust you.

19 THE COURT: I came up from Whidbey Island today, and  
20 it was a long haul.

21 Q (By Mr. Tebbutt) So, again, the picture depicted in 1421  
22 including 3466 is near Stevenson, Washington.

23 A Yes.

24 Q And again 3467, is that near Stevenson?

25 A This is -- this is closer to White Salmon.

1 Q All right.

2 A Same.

3 Q All right. I'm just going to run through these. You've  
4 seen that, that, that?

5 MR. TEBBUTT: Your Honor, just as a matter of not  
6 cluttering the record, I'm just going to move in all the  
7 exhibits in 1421 up through 3464, and the rest of them we'll  
8 exclude.

9 MR. SULLIVAN: No objection, Your Honor.

10 THE COURT: All right. They'll be admitted. All  
11 right.

12 Let's start up tomorrow morning at 9:30.

13

14 (Proceedings adjourned at 3:43 p.m.)

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## C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 9th day of November 2016.

/S/ Nancy L. Bauer

Nancy L. Bauer, CCR, RPR  
Official Court Reporter

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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SIERRA CLUB, a California	)	
nonprofit corporation;	)	
PUGET SOUNDKEEPER ALLIANCE, a	)	CASE NO. C13-00967JCC
Washington nonprofit corporation;	)	
RE SOURCES FOR SUSTAINABLE	)	SEATTLE, WASHINGTON
COMMUNITIES, a Washington	)	November 8, 2016
nonprofit corporation;	)	
COLUMBIA RIVERKEEPER, a	)	BENCH TRIAL, Vol. 2
Washington nonprofit corporation;	)	
FRIENDS OF THE COLUMBIA GORGE,	)	
INC., dba FRIENDS OF THE	)	
COLUMBIA GORGE, an Oregon	)	
nonprofit corporation;	)	
SPOKANE RIVERKEEPER; NATURAL	)	
RESOURCES DEFENSE COUNCIL, a	)	
New York nonprofit corporation,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
BNSF RAILWAY COMPANY,	)	
a Delaware corporation,	)	
	)	
Defendant.	)	
	)	

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VERBATIM REPORT OF PROCEEDINGS  
BEFORE THE HONORABLE JOHN C. COUGHENOUR  
UNITED STATES DISTRICT JUDGE

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1 November 8, 2016

9:30 a.m.

2 PROCEEDINGS

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3 MR. WAGNER: Your Honor, if I may. Your Honor, at  
4 the pretrial conference you urged counsel to report to you  
5 any time we had concerns about timing of the trial and  
6 consistency with initial estimates. Perhaps this is  
7 something we should revisit at the conclusion of today to see  
8 if the pace picks up a bit.

9 But based on one-and-a-half witnesses and only  
10 approximately 20 exhibits and another 1,500 remaining, it  
11 does give me some concern that the initial estimate of ten  
12 days is, perhaps, optimistic, and certainly we don't want to  
13 be in a position, as Your Honor indicated, that our case in  
14 chief is squeezed somewhat.

15 THE COURT: I'm not going to hold you to the ten  
16 days, and if it goes longer than that, then we'll deal with  
17 it. However, it's been my experience, and I've been at this  
18 since I was a little kid, there is a phenomenon known as  
19 first-day-itis. And lawyers tend to really drag stuff out on  
20 the first day.

21 It's not uncommon that we've consumed the entire first day  
22 with one witness. But with a little help from me, usually  
23 the pace will pick up as we move along. Don't worry about me  
24 telling you you don't have time.

25 MR. WAGNER: Thank you for your patience, Your Honor.

1 We appreciate it.

2 THE COURT: All right.

3 MR. TEBBUTT: Good morning, Your Honor. And  
4 Mr. Cornelison is still on the stand.

5 We'll pick up right where we left off yesterday.

6 PETER CORNELISON, HAVING BEEN PREVIOUSLY SWORN,  
7 TESTIFIED AS FOLLOWS:

8 DIRECT EXAMINATION continued

9 BY MR. TEBBUTT:

10 Q Mr. Cornelison, I'm going to show you -- I guess I still  
11 couldn't figure out how to run it. I still need help.

12 Sir, you have in front of you Plaintiffs' Exhibit 1422.

13 Is this a picture you took, sir?

14 A Yes, it is.

15 Q And whose hand is in the picture?

16 A That's my hand.

17 Q And were you alone that day?

18 A No. I was with John Wood.

19 Q And where is this a picture of?

20 A This is in Skamania County, looking down at the Wind River  
21 as it enters the Columbia River. This is Highway 14 to the  
22 right, and the BNSF mainline bridge.

23 Q Okay. The material that's in your hand, what is that?

24 A That is coal we found down along the side of the river.

25 Q Is the place where you got that coal depicted in the

1 picture, 3485?

2 A Yes, it is.

3 Q Can you circle that area where you picked that coal up?

4 A In general, it was down here along the bank.

5 Q All right. Thank you.

6 And do you know the timeframe of when this picture was  
7 taken?

8 A I believe that was 2012.

9 Q And the next picture, 3486, is that in the same area?

10 A The same area, and you can see coal throughout the ballast  
11 track here. This is next to a railroad bridge piling, from  
12 the looks.

13 Q And was that piling also, again, in that same general area  
14 of the first picture, 3485?

15 A Yes, it was.

16 Q Third picture, 3487, is that in the same area?

17 A Yes, it is. It's coal debris that's wet that's draining  
18 down as the rain hits it.

19 MR. SULLIVAN: Objection, speculation.

20 THE COURT: Overruled.

21 Q (By Mr. Tebbutt) How close to the water is that little  
22 mass of coal?

23 A It is, perhaps, five feet.

24 Q And, sir, 3488, what is that a picture of?

25 A Again, this is the Wind River-Columbia River confluence

1 and the bridge pilings. You can see one here and, obviously,  
2 the one on this shore.

3 Q Right. And the bridge that we saw to the left was the  
4 bridge that was depicted in the first picture in  
5 Exhibit 1422?

6 A Yes, it was.

7 Q And where are you now, sir, in 3489?

8 A This is directly under the railroad bridge. I think we're  
9 looking east, and I'm holding coal that we found along the  
10 bank over in this vicinity.

11 Q Very good. If you'll clear that, please.

12 And, again, the same picture that's looking, is that --  
13 tell us what that is.

14 A Again, this is the Wind River. We're looking north, and  
15 it's high water. I think the rains had started. This was in  
16 the fall.

17 Q And that's -- 3490 is that picture, correct?

18 A Yes. I take it back. It might be spring. You can see  
19 the --

20 Q Were these all taken the same day?

21 A Yes.

22 Q And 3492, what is that picture of?

23 A This is high water flood debris that's caught in a little  
24 crevice, and there is some coal in there.

25 Q Is that in the same vicinity as where these other pictures

1 were taken?

2 A Yes, it is.

3 Q And circle the coal, if you will, please, quickly.

4 A (Witness complies.)

5 Q 3493, is that the same area, just taken from an upward or  
6 a different perspective?

7 A Yes, it is.

8 Q So looking down towards the water?

9 A Yes.

10 Q 3494 -- we'll skip that -- taken the same place?

11 A Same place. You can see kind of the high water mark there  
12 on the bridge piling.

13 Q Very good.

14 And 3495?

15 A Coal that we found in that location.

16 Q Okay. Same with 3496?

17 A Yes.

18 Q And 3497?

19 A Same.

20 MR. SULLIVAN: Objection, leading.

21 THE COURT: Overruled.

22 Q (By Mr. Tebbutt) And that's on the Columbia River side of  
23 the train trestle?

24 A Yes, it is.

25 Q Is that where the coal was picked up?

1 A Yes.

2 Q That's in your hand there?

3 A Yeah.

4 Q Same thing with 3498?

5 A Yes.

6 MR. TEBBUTT: Your Honor, I move into evidence  
7 Exhibit 1422 and all the pictures contained therein.

8 MR. SULLIVAN: Your Honor, it's the same relevance  
9 objection.

10 THE COURT: Overruled. They'll be admitted.

11 (Exhibit 1422 admitted.)

12 Q (By Mr. Tebbutt) Sir, you have in front of you  
13 Plaintiffs' Exhibit 1425. Can you describe what this is,  
14 please?

15 A Yes. This is a map of many of the locations that I had  
16 found coal along the Columbia River Gorge.

17 Q When did you create this map?

18 A It would have been approximately 2013, 2014.

19 Q And was this a map that you created as part of your work  
20 for Friends of Columbia Gorge?

21 A Yes, it was.

22 Q And is this a document that was kept in the ordinary  
23 course of your business as a staff member of the Friends of  
24 Columbia Gorge?

25 A Yes, it was.

1 MR. TEBBUTT: Your Honor, I move into evidence 1425.

2 MR. SULLIVAN: Objection. This is hearsay.

3 THE COURT: Overruled. It will be admitted for  
4 illustrative purposes.

5 (Exhibit 1425 admitted.)

6 Q (By Mr. Tebbutt) Sir, you have in front of you a series  
7 of photographs that are identified as Plaintiffs' Exhibit  
8 1424. Is the picture that's identified as F0CG 003658 a  
9 picture you took, sir?

10 A Yes, it is.

11 Q And when did you take that picture?

12 A It would have been in April of 2016.

13 Q So just about six, seven months ago?

14 A Yes.

15 Q And where was this picture taken?

16 A This is Horsethief Butte State Park. It is the area that  
17 previously was covered several inches deep in coal debris  
18 that's now been, basically, vacuumed up.

19 MR. SULLIVAN: Objection. This is speculation.

20 THE COURT: Sustained.

21 Q (By Mr. Tebbutt) We've been discussing the Horsethief  
22 Lake area throughout your testimony and others. Is this the  
23 Horsethief Lake area, as we've generally been calling it?

24 A Yes, it is.

25 Q Is that right near the boat launch and the public access

1 across the railroad that goes to the boat launch?

2 MR. SULLIVAN: Objection, leading.

3 A Yes. Yes, it is.

4 Q (By Mr. Tebbutt) And the second picture in this area,  
5 does that identify that area even further?

6 A Yes. It is the location we've seen previously. That stop  
7 sign is where I sampled coal.

8 Q Sir, why is it that you believe that the area had been  
9 cleaned up?

10 A The next -- it was a bit of a mystery to me, but the next  
11 photo or two shows a giant vacuum truck. That is the picture  
12 I took. And when I went online to determine the nameplate on  
13 the side of the truck, I found it is a company that's there  
14 to service railroad debris fields.

15 Q Do you remember the name of the company?

16 A I don't.

17 Q Okay. What's depicted in the picture, 3660?

18 A This is some drainage pipe that's along the northern side  
19 of the BNSF main line at Horsethief Butte. I think they must  
20 have been preparing to bury this to improve the drainage.

21 MR. SULLIVAN: Objection. It's speculation.

22 THE COURT: The last portion of the answer will be  
23 stricken.

24 Q (By Mr. Tebbutt) Let's take a look at the next picture.

25 The next picture, at 3661, is this the same area where

1 this picture was taken?

2 A Same area. This is the north side of the tracks. The  
3 drainage pipe that we saw earlier would have been over in  
4 this direction.

5 Q You're not certain that what you saw were drainage pipes,  
6 are you?

7 A I don't know for sure what that was.

8 Q Okay. The next picture, is that a picture -- well, tell  
9 us what that is, Picture 3662.

10 A So that's the truck that I photographed. And the name on  
11 the door is Hulcher.

12 Q Hulcher, H-u-l-c-h-e-r?

13 A Yes.

14 Q And is that what you went online to determine, whether  
15 that company did work for the railroad?

16 A Yes.

17 Q And you found something on the Internet that said that  
18 they did?

19 A Yes.

20 MR. SULLIVAN: Objection.

21 THE COURT: Sustained.

22 Q (By Mr. Tebbutt) What did you find on the Internet about  
23 Hulcher?

24 A That it's a company that specializes in cleaning up  
25 railroad messes, grain, coal, other things that are left on

1 the tracks.

2 MR. SULLIVAN: Object on hearsay grounds.

3 THE COURT: The objection is not timely.

4 MR. SULLIVAN: Pardon me?

5 THE COURT: The objection is not timely. It is  
6 overruled.

7 Q (By Mr. Tebbutt) Sir, at the beginning Plaintiffs'  
8 Exhibit 1424, FOCG 003653, what is that a picture of?

9 A This is a picture of the Horsethief Lake causeway that  
10 separates the lake, which is the body of water that's closest  
11 to us and the main stem of the Columbia. And we're looking  
12 at two different vacuum trucks at work.

13 Q And when were these pictures taken?

14 A These would have been approximately a week after I took  
15 the other photos.

16 Q Okay. And the same thing as 3654, pictures of -- just a  
17 close-up of the area, same time?

18 A Yes.

19 Q And, again, 3655, the close-up, is that the same truck  
20 that you saw in the pictures that we talked about just a  
21 little while ago, the Hulcher truck?

22 A It's the same or a similar truck, yes.

23 Q And, again, the close-up of 3656 is just another close-up  
24 of the same truck?

25 A Yes.

1 Q And 3657 is the other truck that was depicted in the  
2 earlier picture?

3 A Yes.

4 MR. TEBBUTT: Your Honor, I move into evidence  
5 Exhibit 1424.

6 MR. SULLIVAN: Object on relevance grounds.

7 THE COURT: Overruled. They'll be admitted.

8 (Exhibit 1424 admitted.)

9 Q (By Mr. Tebbutt) Sir, you have in front of you  
10 Plaintiffs' Exhibit 1432, which is labeled Sierra, et al.,  
11 00000237. Did you take that picture?

12 A Yes, I did.

13 Q And do you know approximately when you took that picture?

14 A I believe that would have been 2012, 2013.

15 Q Sir, does your camera record metadata, too?

16 A Yes, it does.

17 Q So if the metadata -- the metadata would have the  
18 specificity about when the picture was taken?

19 A Yes, it does.

20 Q Thank you.

21 And what is this picture of, sir?

22 A This is the first float the Columbia Riverkeeper put out  
23 on the river to collect coal dust.

24 MR. SULLIVAN: Objection as to speculation.

25 THE COURT: Overruled.

1 Q (By Mr. Tebbutt) And the next picture in the series, 238,  
2 same thing, just a close-up?

3 A Yes.

4 Q And 239, is that the same bucket?

5 A Yes, it is.

6 Q From a different perspective?

7 A Yes.

8 Q And is this along the Horsethief Lake causeway on the  
9 Columbia River side?

10 A Yes, it is.

11 Q Same thing with 240?

12 A Same -- same, yeah.

13 Q Okay. So those pictures are related to what we just  
14 discussed: The Columbia Riverkeeper, the buckets in the  
15 Columbia River at Horsethief Lake, correct?

16 MR. SULLIVAN: Objection, leading.

17 THE COURT: Overruled.

18 MR. TEBBUTT: Your Honor, I'd like to move into  
19 evidence those first four pictures, 237 through 240.

20 MR. SULLIVAN: Objection on relevance grounds.

21 THE COURT: Overruled. They'll be admitted.

22 (Exhibit 1432.237-240 admitted.)

23 Q (By Mr. Tebbutt) And starting with Sierra, et al.,  
24 00000241, what is that a picture of, sir?

25 A This is a picture of Highway 14, looking east, and cars

1 parked along the side of the road. This is typically where  
2 the fishermen park.

3 MR. SULLIVAN: Objection to speculation.

4 A And coal --

5 THE COURT: Sustained. I'll strike the portion about  
6 the fishermen part.

7 Go ahead.

8 A Coal is shown in the area that I drew.

9 Q (By Mr. Tebbutt) Do you typically park there for any  
10 reason?

11 A The only time I park there is when I'm investigating coal  
12 or debris that's fallen off the railroad.

13 MR. SULLIVAN: Objection, again, as to speculation.

14 THE COURT: He's speculating about whether he parks  
15 there and why?

16 MR. SULLIVAN: About how the material got there.

17 THE COURT: Overruled.

18 Q (By Mr. Tebbutt) And yesterday we discussed -- didn't we  
19 discuss this same area yesterday?

20 A Yes. I think this is a repeat photo.

21 Q Okay. Picture 245, is that your foot?

22 A That is, yes.

23 Q And where is that picture taken?

24 A This is at Horsethief Butte State Park.

25 Q So we're back to Horsethief.

1                   And do you remember the time frame when those were  
2 taken?

3     A    2013, approximately.

4     Q    Okay. And does the next picture tell you approximately  
5 where your foot picture was taken?

6     A    Yes. This is the railway causeway at the very beginning.  
7 Down here is the tree that I mounted the camera on.

8     Q    All right. And 247 was taken around the same time frame?

9     A    Yes.

10    Q    Same day?

11    A    Yes.

12    Q    248, same area?

13    A    Same area.

14    Q    249, same area?

15    A    Yes.

16    Q    And 250, same area?

17    A    Same area.

18    Q    Same day?

19    A    Yes.

20                   MR. TEBBUTT: Your Honor, I move into evidence 245,  
21 246, 247, 248, 249, and 250.

22                   MR. SULLIVAN: Your Honor, I'm going to object on  
23 relevance grounds and also the grounds that these photos are  
24 cumulative of other photos we've already seen.

25                   THE COURT: The last objection is sustained. And,

1 counsel, evidence is not like a mountain. Just because it is  
2 there doesn't mean you have to put it in.

3 MR. TEBBUTT: Understood, Your Honor. They're  
4 different days, and the time frames do matter in this case  
5 because of the activities that have taken place at this  
6 particular area. So I understand Your Honor's concerns, and  
7 I'll try to cull those as much as possible moving forward.

8 THE COURT: All right.

9 Q (By Mr. Tebbutt) Sir, in Exhibit 1432, Sierra, et al.,  
10 0000251, what is this a picture of?

11 A This is a photo of the Klickitat River and Columbia River  
12 confluence in Lyle, Washington. It's the railroad bridge  
13 there.

14 Q And is this a picture of the same bridge from a different  
15 angle?

16 A Yes, it is.

17 Q And, again, the same bridge from a different angle?

18 A Yes. And behind it, you can see the Highway 14 bridge.

19 Q Okay. Have you investigated whether coal is in place near  
20 this trestle at the Klickitat River?

21 MR. SULLIVAN: I'm going to object. The question is  
22 leading.

23 THE COURT: Overruled.

24 A Yes, I have.

25 Q (By Mr. Tebbutt) And have you found coal there?

1 A Yes.

2 Q And is this a picture taken near the trestle at the  
3 Klickitat River?

4 A Yes, it is.

5 Q How close to the trestle?

6 A It's within three to four feet.

7 Q Okay. And this is Bates No. 254. You said just a few  
8 feet from the trestle. How far is that from the water there?

9 A There's -- the water is very close, as well. It is about  
10 two feet away, but it goes down a steep cliff that's perhaps  
11 15 to 20 feet.

12 Q And is that cliff depicted in Picture 255?

13 A Yes. The cliff would be down this -- this, and where my  
14 foot was, was in this area.

15 Q All right.

16 MR. TEBBUTT: If you'll clear that, please.

17 Your Honor, I would like to move into evidence  
18 Exhibit 1432, Bates Nos. Sierra, et al., 00000251 through  
19 255.

20 MR. SULLIVAN: Objection on relevance grounds.

21 THE COURT: Overruled. They'll be admitted.

22 (Exhibit 1432.00000251-255 admitted.)

23 Q (By Mr. Tebbutt) Sir, I have in front of you  
24 Exhibit 1429. Is this a picture you took?

25 A Yes, it is.

1 Q And do you know approximately when you took this picture?

2 A This was September 4th of 2014.

3 Q Okay. What's significant about this picture?

4 A This is the incident in which I was showered with coal  
5 debris from a passing coal train. You can see --

6 Q Let me stop you there for just a second, if I may.

7 A Okay.

8 Q Were you standing -- where you're taking the picture from  
9 right now -- were you hit with coal where you were standing  
10 taking this picture?

11 A Yes, I was.

12 Q And how far from the track were you?

13 A At least 50 feet.

14 Q And was there something else you wanted to say about the  
15 picture?

16 MR. SULLIVAN: Objection, leading.

17 THE COURT: Overruled.

18 A You can see in the atmosphere the coal dust clouding the  
19 view.

20 Q (By Mr. Tebbutt) And the day when you were viewing this,  
21 could you see that clouding as well?

22 A Yes. It was -- it was much more visible to the naked eye  
23 than to the camera.

24 Q Can you describe a little bit more in depth what you saw  
25 that day?

1 A I saw coal debris coming off the top of each car. And as  
2 the train got closer, I was showered with coal dust in my  
3 hair and clothing. It was bouncing off the car. I could see  
4 the water strikes starting to happen kind of in this area,  
5 closer to me where the pellets of coal were entering the  
6 water.

7 Q Okay. What side -- how could you tell they were hitting  
8 the water?

9 A They make little impacts, just like dropping a pebble into  
10 a waterbody.

11 Q One pebble, or multiple?

12 A Multiple. Many, many.

13 Q And the next picture, 7120, is that just the same area?

14 A Yes.

15 Q And those are the two pictures you took that day?

16 A I think there is a third one. I guess not. Okay.

17 Q How could you tell -- you said -- you testified coal was  
18 coming off of each car?

19 A Yes.

20 Q How could you tell coal was coming off of each car?

21 A We could see it visibly. If you looked at the top of each  
22 car, there was a plume leaving the car. And as far as you  
23 could see down the line of railcars there, it was happening.

24 Q And, again, where is this picture taken?

25 A This is at Horsethief Butte State Park. I was -- I was

1 pulling my kayak out of the water at that point, and I had it  
2 loaded into the car. And I heard this train coming, and I  
3 looked up, and I could see it was a coal train, and then I  
4 started seeing -- I saw the dust debris.

5 Q Did you watch the whole train as it went by?

6 A Yes, I did.

7 Q Did you move from the spot where you were taking the  
8 picture while you were watching the train?

9 A Yes. I moved closer to the train.

10 Q Okay. But stayed -- did you always stay looking at the  
11 angle that you're looking at it from now?

12 A Yes.

13 Q Okay. And could you see -- how long did you see coal  
14 hitting the water?

15 A It was the entire length of the train. Well, I -- as it  
16 moved, I lost this view of the water. So it was, perhaps --  
17 if the train was four minutes in length, I probably watched  
18 it enter the water for two minutes.

19 Q Okay. But the entire time that you were in the area  
20 looking at the water, could you see it hitting the water?

21 A Yes.

22 MR. SULLIVAN: Objection, leading.

23 THE COURT: Sustained.

24 Q (By Mr. Tebbutt) Okay. Over what time, while you were  
25 looking, could you see coal hitting the water?

1 MR. SULLIVAN: Objection. It's been asked and  
2 answered.

3 THE COURT: Overruled.

4 A If the entire train was four-minutes long, I saw coal  
5 hitting the water for two minutes.

6 MR. TEBBUTT: Okay. Your Honor, I'd like to move  
7 into evidence Exhibit 1429.

8 MR. SULLIVAN: No objection.

9 THE COURT: It will be admitted.

10 (Exhibit 1429 admitted.)

11 THE COURT: Excuse me a minute. The Gorge is  
12 notorious for high winds. What were the winds like that day?

13 THE WITNESS: The wind were up. Not as windy as I've  
14 seen it, but it was a windy day.

15 THE COURT: So 30, 40 miles an hour, or what?

16 THE WITNESS: Probably more like 30, 25 to 30.

17 THE COURT: All right.

18 Q (By Mr. Tebbutt) Now, you testified earlier yesterday  
19 about the fact that you mounted a camera in a tree at  
20 Horsethief Butte, and yesterday we talked a little bit about  
21 how you recorded -- or the camera recorded information.

22 If you could just explain for the court again, just  
23 briefly -- well, let's try this.

24 Were there certain videos that you kept for any particular  
25 reason?

1 A Yes. My -- I -- I wanted to have videos because the coal  
2 dust was actually coming out the trains, so I kept videos of  
3 trains that were emitting coal dust. I also kept videos of  
4 other trains, coal trains as well that were not dusting.

5 Q Okay. And during the entire time that your camera was  
6 functioning, about how many coal trains did you document on  
7 the video that you saw on the videos, whether or not you  
8 stored them?

9 A Yeah. I think it would have been 10 to 12. It was very  
10 frustrating because we know that there are approximately two  
11 to two-and-a-half coal trains a day that travel that way  
12 to -- to service power plants, et cetera, and I -- there were  
13 days -- in fact, a week where I wouldn't get a single coal  
14 train. That's why we added a second camera, to try and get  
15 better results.

16 Q All right. And was there a particular video that you kept  
17 that you believed was -- was good evidence?

18 MR. SULLIVAN: Objection, leading.

19 THE COURT: Overruled.

20 A Yes, there was.

21 Q (By Mr. Tebbutt) We're going to show a video, which is  
22 identified as Plaintiffs' Exhibit 1423.

23 Is this a video from the camera that you downloaded to  
24 your computer?

25 A Yes, it is.

1 Q And what was the date of this video?

2 A It's date and time stamped down at the bottom. That was  
3 July 3rd, 2014.

4 Q All right. Sir, I'm going to stop you at a couple of  
5 points along the way here.

6 Is this a coal train?

7 A Yes, it is.

8 Q Is there anything that is evidenced in this frame right  
9 here that you'd like to discuss?

10 MR. SULLIVAN: Objection, leading.

11 THE COURT: Overruled.

12 A You can see down in this area the visibility is  
13 diminished. That tells me there is an oncoming coal cloud.

14 Q (By Mr. Tebbutt) Okay.

15 MR. SULLIVAN: Your Honor, I object to the narrative.  
16 The video speaks for itself.

17 THE COURT: Overruled.

18 Q (By Mr. Tebbutt) Anything else in this clip of  
19 significance?

20 A Yeah. You can start to see the surface of the water being  
21 roiled, and that's what I'm able to determine from this  
22 image.

23 Q All right.

24 (Video is played.)

25 Q (By Mr. Tebbutt) Is there anything in this screenshot

1 that's of consequence?

2 A Well, here is when you start to see the actual particles  
3 falling out of the sky. Here, here, here, here, here, here.  
4 Too many to really....

5 Q Right. When you were personally pelted with coal, is that  
6 similar to what you see here on this screen?

7 MR. SULLIVAN: Objection. That calls for  
8 speculation.

9 THE COURT: Overruled.

10 A Yes.

11 Q (By Mr. Tebbutt) So this is the same phenomenon you  
12 experienced with your eyewitness account as what you see on  
13 the video?

14 A Yes.

15 Q Okay.

16 (Video is played.)

17 Q (By Mr. Tebbutt) And again you're seeing the particles  
18 continue to fall?

19 A Yes.

20 Q Can you see them hitting the water in this video?

21 A I can, yes. Down this -- actually, probably more like  
22 this area.

23 Q We're getting near the end of the train here.

24 Do you see anything else in this particular series of  
25 still shots?

1 MR. TEBBUTT: Let's just roll that, please. Right  
2 there.

3 A The particles are continuing. I see the evidence in the  
4 water. That's what I see.

5 Q (By Mr. Tebbutt) And the particles are continuing?

6 A Continuing. They're suspended in the air and continue to  
7 fall out.

8 Q Even though the train has passed?

9 A Yes.

10 Q Did you experience anything similar to that when you  
11 personally were pelted with coal?

12 A It was the same, yes.

13 MR. TEBBUTT: I move in -- sorry?

14 A They're still falling out.

15 MR. TEBBUTT: Your Honor, I'd like to move into  
16 evidence Plaintiffs' Exhibit 1423.

17 MR. SULLIVAN: No objection.

18 THE COURT: It will be admitted. And continue to run  
19 it till the end, please.

20 (Exhibit 1423 admitted.)

21 THE WITNESS: Can you turn on the sound?

22 MR. TEBBUTT: Your Honor, actually, we forgot to turn  
23 on the sound. We would like to admit the audio in this.  
24 Would Your Honor like to have it rerun with the audio?

25 THE COURT: No.

1 A The significance of the sound at this point is the  
2 particles were hitting the metal housing of the camera and  
3 you just hear the sound, "ting, ting, ting."

4 Q (By Mr. Tebbutt) If the audio was on, you'd hear that  
5 "ting" sound?

6 MR. SULLIVAN: I'm going to object to entering it  
7 with the audio and the characterization, because when you --  
8 at the beginning of the video, that pinging sound happens  
9 before you even see the train.

10 THE COURT: Play it again with sound.

11 THE WITNESS: It's loud.

12 (Video is played.)

13 THE COURT: All right.

14 MR. TEBBUTT: Move into evidence the whole video with  
15 the audio, please.

16 MR. SULLIVAN: No objection.

17 THE COURT: It will be admitted.

18 MR. TEBBUTT: Thank you, Mr. Cornelison.

19 THE COURT: All right. Cross?

20 CROSS-EXAMINATION

21 BY MR. SULLIVAN:

22 Q Good morning. I want to start first by talking about some  
23 of the testimony from yesterday. And right at the end of the  
24 day, counsel showed you what was Exhibit 1421, and it was  
25 some photos of a loaded coal train near Stevenson. Do you

1 recall that testimony?

2 A I can't be sure exactly which train you're referring to  
3 but, yes, I recall that testimony.

4 Q Your testimony involved some observations about what  
5 you -- state what you saw were patterns on the tops of some  
6 of the coal in some of the cars. Do you recall that?

7 A Yes, I do.

8 Q And I believe you testified that these patterns were  
9 indicative somehow of something coming off a train at some  
10 point prior to the time you saw the cars themselves; is that  
11 correct?

12 A Yes.

13 Q Do you have any specialized knowledge or training  
14 regarding the performance of dust suppression membranes?

15 A I do not.

16 Q Do you have any specialized knowledge or training  
17 regarding interpreting the appearance of dust suppression  
18 membranes?

19 A I do not.

20 Q Thank you.

21 And you testified at length over the past couple days  
22 about your job duties with the Friends of Columbia Gorge,  
23 which includes going to collect material you believe to be  
24 coal; isn't that correct?

25 A Yes.

1 Q And the way you go about finding those materials is to go  
2 out and look for it, correct?

3 A Yes.

4 Q And when you're looking for these materials out in the  
5 Gorge, you need to be careful. There are risks out there,  
6 are there not, physical risks when you're going down to the  
7 water, so you need to be careful, correct?

8 A Yes.

9 Q And you also need to be careful to respect private  
10 property rights when you're out collecting these materials,  
11 correct?

12 A That's true.

13 Q And the materials you collected, you don't personally know  
14 when they got to be to the location where you saw them; isn't  
15 that correct?

16 A Not necessarily. I witnessed it myself, and I've talked  
17 to many people that have had coal fall on their heads.

18 Q Your own personal knowledge, but the materials you've  
19 actually collected, you don't know when those materials came  
20 to be located at the locations where you collected them;  
21 isn't that correct?

22 A That's true.

23 Q And you don't have any personal knowledge as to how those  
24 materials got to those locations? And, again, this is  
25 materials you collected.

1 A Well, based on having it happen to me, I have a pretty  
2 good suspicion of where that came from.

3 Q But you don't know personally how they got -- these  
4 materials you collected, how they got to be there, right?

5 A No. I was not there when they were deposited.

6 Q Okay. And you don't have a degree in a scientific field;  
7 isn't that right?

8 A A bachelor of science degree, but community service in  
9 public affairs, no.

10 Q And you don't have any specialized expertise in geology?

11 A I do not.

12 Q No specialized expertise in hydrology?

13 A No. Although I've been a kayaker for 30 years or more,  
14 and I think that counts when it comes to water-based matters.

15 Q But no formal training or expertise, education --

16 A No.

17 Q -- in hydrology?

18 A No.

19 Q And no specialized expertise or training or experience in  
20 fate and transport?

21 A No.

22 Q You don't have any specialized training regarding  
23 identification of coal, correct?

24 A That's correct.

25 Q And you've never analyzed the chemical components of coal;

1 isn't that right?

2 A I have not.

3 Q And you are aware, because you've been in the Gorge many,  
4 many times over the years, that there are black rocks  
5 naturally occurring in the Gorge, correct?

6 A The rocks we see occurring in the Gorge are mostly basalt.

7 Q That's a dark rock, is it not?

8 A That's a dark rock but with a much different composition  
9 than coal.

10 Q But you've never analyzed the chemical components of the  
11 materials you found, I believe you said?

12 A I have not.

13 Q Okay. And I believe you've testified that you did take  
14 some samples of materials you found. You collected some  
15 samples, correct?

16 A I did.

17 Q And you sent some of those samples off to be tested; isn't  
18 that right?

19 A Yes.

20 Q But I believe yesterday you testified about a material you  
21 scooped up into a five-gallon bucket. Do you recall that?

22 A I do.

23 Q And that was near the bridge at Drano Lake; is that right?

24 A Correct. Yes.

25 Q But you've never had those materials tested, have you?

1 A No, I have not.

2 Q Okay. And as you sit here today, you don't have personal  
3 knowledge of the results of the test of the samples you sent  
4 off to be sampled -- I'm sorry -- to be tested?

5 A That's correct.

6 Q Thank you.

7 And you've testified that you've found materials that  
8 you believe to be the ordinary high water mark, at least in  
9 the Columbia River, I recall; is that right?

10 A Yes.

11 Q And you testified, I believe, that you could recognize the  
12 ordinary high water mark because there was a visible bathtub  
13 ring; is that correct?

14 A Yes.

15 Q And that's the primary factor that you considered in  
16 determining the ordinary high water mark; is that right?

17 A That and debris. If you're familiar with high water  
18 debris, it lodges in crevices and cracks, and that's another  
19 marker.

20 Q Okay. Have you ever undertaken an ordinary high water  
21 mark delineation that's been approved by any regulatory body?

22 A I have not.

23 Q Have you ever actually undertaken an ordinary high water  
24 mark delineation?

25 A I have not.

1 Q Okay. Yesterday you testified regarding the materials  
2 that you found near a creek near Murdoch, Washington. Do you  
3 recall that?

4 A Yes.

5 Q And I believe you also showed us -- you showed us a figure  
6 today that set out some other locations where you collected  
7 materials that included the causeway at Horsethief Lake;  
8 isn't that right?

9 A Yes.

10 Q And you have, in fact, collected materials from up here at  
11 the tracks; have you not?

12 A Yes.

13 Q And you also yesterday testified, I believe, that you had  
14 collected materials at a tunnel near Cape Horn, the Cape Horn  
15 Tunnel?

16 A Yes.

17 Q And we saw some pictures of some of the material you  
18 collected right along the tracks there?

19 A Yes.

20 Q When you visited each of these areas to collect materials,  
21 right next to the tracks near Murdoch and the Cape Horn  
22 Tunnel and up near the tracks on the causeway, you knew you  
23 were on BNSF property, did you not?

24 A I did. And it was a calculated risk that I took, because  
25 when you're faced with somebody littering and polluting a

1 national city treasure, which is our Columbia River Gorge, I  
2 take offense to that.

3 Q So you made a conscience decision to access this property  
4 without permission to do so; isn't that right?

5 A That's correct.

6 Q Because, to you, the benefits of obtaining the evidence  
7 that you were gathering for this case outweighed the risk of  
8 either getting caught or any other risks that you might run  
9 into in being on the tracks?

10 A In order to stop this behavior, yes.

11 Q And you've also, at times -- I believe I saw the phrase,  
12 you "hopped the closed gate at Columbia Hills State Park" to  
13 go obtain evidence for this case, too; isn't that right?

14 A The gate at Columbia Hills State Park is to prevent access  
15 to the petroglyphs, which are down in the same location. I  
16 had permission to go through the gate at Columbia Hills State  
17 Park.

18 Q You had permission, but you still had to hop the gate  
19 there, the closed gate?

20 A There's a way to open it, I found out later. But the  
21 first time, I went underneath it, yes.

22 Q And as part of your job with Friends of the Columbia  
23 Gorge, starting at least as far back as 2012, one of your  
24 tasks was to try to document video footage of dusting trains,  
25 trains emitting dust, correct?

1 A Yes, yes.

2 Q And back in July of 2012, you started to try to capture  
3 some footage of a dusting train; isn't that right?

4 A That's correct.

5 Q And by August of 2012, you still hadn't found a dusting  
6 train; isn't that right, that you could catch on video?

7 A Yes.

8 Q That's right.

9 And so -- but you did take video of trains during that  
10 month of July 2012, correct?

11 A You know, I can't be sure of that. I don't remember,  
12 frankly.

13 Q And if you testified that you did in a prior deposition,  
14 would that have been a correct observation, do you believe?

15 A I believe that would have been correct, yes.

16 Q And --

17 MR. SULLIVAN: I'm sorry. Go ahead.

18 THE COURT: He's answered the question.

19 Q (By Mr. Sullivan) But you deleted videos that you had  
20 taken back in July of 2012 that were non-dusting trains;  
21 isn't that right?

22 A I don't know that to be correct.

23 Q But if you had testified to that in your deposition, that  
24 would have been a correct observation?

25 A You know, frankly, I can't remember. I'm sorry.

1 Q No, that's fine.

2 How many trains would you say -- at least July -- or at  
3 least 2012 to the present, how many coal trains do you  
4 estimate that you've seen?

5 A It's a rough guess, but I'm guessing perhaps 30.

6 Q Thirty total?

7 A Twenty-five to thirty.

8 Q And I'm asking you personally, not the cameras, but just  
9 you personally have seen.

10 A Yeah.

11 Q And of all those trains that you've seen, there's been one  
12 that you've seen material coming off of, isn't that correct,  
13 that you believe to be coal or petcoke?

14 A Yes.

15 Q And that's the one that you just described, September 2nd,  
16 2014, at Horsethief Lake, correct?

17 A I think it was September 4th.

18 Q I stand corrected, sir.

19 And on that occasion, you were by yourself, correct?

20 A That's correct.

21 Q Okay. Thank you.

22 I want to talk a little bit about the cameras that you  
23 set up. There was a lot of discussion about one camera, but  
24 I believe there were two ultimately that were set up,  
25 correct?

1 A There were.

2 Q And these were set up in a tree on the causeway at  
3 Horsethief Lake, correct?

4 A Yes.

5 Q And you understood the causeway to be BNSF property,  
6 correct?

7 A Yes, although I was careful to avoid trespass by staying  
8 in the water and climbing onto the tree without getting onto  
9 the bank.

10 Q And you discussed with your boss -- Michael Lang was your  
11 boss at the time; is that right?

12 A Yes.

13 Q And you discussed with him whether to receive permission  
14 from BNSF to install a camera in the tree, did you not?

15 A I discussed placing it in the tree. I don't know that we  
16 discussed talking to BNSF about it.

17 Q Okay. And you -- you believe that your authority to put  
18 the cameras in the tree was the -- I don't want to read  
19 this -- a scientific research permit from the Washington  
20 State Parks and Recreation Commission --

21 A Yes.

22 Q -- isn't that right?

23 MR. SULLIVAN: Let's take a look at that permit, if I  
24 can.

25 Q (By Mr. Sullivan) And in front of you you've got

1 **Plaintiffs' Exhibit 1408?**

2 A **Yes.**

3 Q **And that's the permit, correct?**

4 A **It is.**

5 Q **And if we can take a look at the third page, you signed**  
6 **this as permittee, correct?**

7 A **Yes.**

8 Q **And then in paragraph 10, right above there, this says**  
9 **that the permit expired on September 25th, 2015, correct?**

10 A **Yes.**

11 Q **When you signed this permit as permittee, you were giving**  
12 **your assurance you were going to comply with the terms and**  
13 **conditions of the permit, correct?**

14 A **Yes.**

15 Q **Let's take a look at page 1, paragraph 2, down at the**  
16 **bottom.**

17 **Do you see that?**

18 A **Yes.**

19 Q **Okay. And this -- it's pretty straightforward. It**  
20 **requires you to notify and coordinate visits and research**  
21 **site locations in advance with Andy Kallinen; isn't that**  
22 **correct?**

23 A **Yes.**

24 Q **Did you notify Mr. Kallinen that you had put a camera in**  
25 **the tree on the causeway?**

1 A I did not.

2 Q You did not?

3 Okay. Let's take a look at page 2, paragraph 8, here.

4 THE WITNESS: Can I amend my previous answer?

5 THE COURT: Yes.

6 A Ranger Kallinen and I had a conference to determine how  
7 best to place a camera at the site. And he didn't want me  
8 disturbing any evidence because it's an archaeological site.  
9 It was the site of a large Indian village. And the island  
10 that you saw in the pictures was -- actually, it's a known  
11 feature, Wahkia Mount [ph], where there is a midden for the  
12 village and those that live there.

13 So he wanted me to put the camera on a pole secured by a  
14 tire filled with concrete, placed on the bottom of the  
15 Columbia River with this pole sticking up with a camera  
16 attached to it. I worked for five months to create that, and  
17 I built one. And when we went out to try and set it up, the  
18 bank sloped too much and the rocks out there were just too  
19 big, so it just was a completely unworkable situation.

20 So I ended up with the tree as the only other solution  
21 that would work. We had to consider vandalism. We had to  
22 consider property location, mainly facing east. So that's  
23 how we came up with a tree.

24 And the tree was at a 45-degree angle. I don't know if  
25 you saw that, but it allowed me to get up the tree without

1 trespass, in my view.

2 Q (By Mr. Sullivan) Okay. Let's go to take a look at  
3 paragraph 8 on the second page of the permit.

4 And this paragraph required you, as permittee, to submit  
5 two reports to the Parks and Recreation Commission, correct?

6 A Yes.

7 Q And did you submit either report?

8 A I did not.

9 Q And you were aware of this requirement, correct?

10 A I was. And, frankly -- I forget. That was -- yeah.

11 Q And you discussed this requirement and whether to submit a  
12 report with a staff member from Friends of the Columbia Gorge  
13 lawyer Nathan Baker, did you not?

14 A Sometime after -- I mean, quite a bit after, but, yes.

15 Q Okay. And the first camera you installed, you  
16 installed --

17 MR. SULLIVAN: I'm sorry. You can take down....

18 Q (By Mr. Sullivan) The first camera you install was June  
19 2014, correct?

20 A Yes.

21 Q And then the second, I believe, was July 2014; is that  
22 correct?

23 A Yes.

24 Q And I believe you took them down in September of 2014; is  
25 that right?

1 A It was either -- yes, it was September.

2 Q Okay. And by the time you'd installed these cameras, you  
3 had already submitted a declaration in support of this  
4 lawsuit for Friends of the Columbia Gorge; isn't that right?

5 A That is correct.

6 Q And the cameras that you installed on the causeway  
7 collected many, many video clips, correct?

8 A Yes.

9 Q And I believe you testified you didn't save all the  
10 footage from the cameras, correct?

11 A That's correct.

12 Q And you, in fact, erased certain footage captured by the  
13 cameras?

14 A Yes. Although I explained why that was in testimony  
15 yesterday, but I'll be glad to repeat that.

16 Q And you made an affirmative decision about which footage  
17 to delete, correct?

18 A Yes. I didn't have enough storage capacity on my hard  
19 drive. I was getting hundreds of images that weren't  
20 relevant, of tree branches moving in the wind. I sometimes  
21 got videos. Sometimes I got photographs only. I had set the  
22 cameras only to take photographs, not videos. Other reasons,  
23 as well.

24 Q And the criteria that you used for whether or not to  
25 preserve the footage from these cameras was whether it would

1 be useful as evidence at the coal deposition; isn't that  
2 right?

3 A That's true. But I included, in the evidence that we  
4 provided to you, evidence of trains going by that were not  
5 dusting.

6 Q And -- but you did preserve all the footage that you  
7 believed to be useful as evidence in a coal deposition,  
8 right?

9 A Yes.

10 Q Okay. And you also believe that footage would be  
11 advantageous to Friends of the Columbia Gorge in this  
12 litigation, correct?

13 A Yes. Although my primary -- I -- I admit that I really  
14 wasn't thinking about the litigation as much as I was proving  
15 that this was happening in order to get it to stop.

16 Q And the cameras also -- they captured videos of coal cars  
17 with no apparent dusting passing through the area, correct?

18 A That's true.

19 Q And I believe you said you produced some of those in  
20 discovery?

21 A Yes.

22 Q But it's also true that you erased videos of coal cars  
23 without apparent dusting; isn't that right?

24 A I thought about this and thought about this. I think  
25 there were, perhaps, maybe ten -- eight to ten videos of coal

1 cars -- of coal trains during the entire three- to four-month  
2 period. And I think we produced four to five to you. But,  
3 yes, I did erase some.

4 Q And by erasing those videos, you -- because you erased  
5 them, BNSF hasn't had a chance to review those, correct?

6 A That's correct.

7 Q And by deleting those videos, you've also -- the court  
8 hasn't had an opportunity to review those either; isn't that  
9 correct?

10 MR. TEBBUTT: Objection, argumentative.

11 THE COURT: Overruled.

12 MR. SULLIVAN: Thank you, Mr. Cornelison.

13 THE WITNESS: Thank you.

14 THE COURT: Any redirect?

15 REDIRECT EXAMINATION

16 BY MR. TEBBUTT:

17 Q With respect to the high water mark, have you personally  
18 seen the river rise -- you've been on the river a lot in your  
19 17 years living there?

20 A Yes, I have.

21 Q And driven along the river a lot?

22 A Yes.

23 Q And do you see the river fluctuates in level?

24 A It fluctuates quite a bit. I know the salmon recovery is  
25 a critical aspect, and the dams are regulated to produce the

1 best effects for salmon as well as, to some extent, flood  
2 control.

3 Q So how much does the water level fluctuate in the river,  
4 would you say?

5 A It's easily a foot, and maybe two feet.

6 Q And what about behind certain dams?

7 A Yeah. Each -- each -- the area behind each dam is  
8 actually called a pool. It's a reservoir. And the  
9 Bonneville pool is kept at a specific height up and down, and  
10 the same with the pool behind the Dalles Dam.

11 Q And can that fluctuate by many feet?

12 A Yes, it can.

13 Q Looking at Exhibit 1416, F0CG 003394, you testified  
14 earlier that you found coal in this location; is that  
15 correct?

16 A That is.

17 Q Can you circle where you found coal in this location?

18 A It would have been in this general vicinity, but you can  
19 see the wave patterns here on this -- this ridge. Obviously,  
20 the water has been up above that.

21 Q Sir, Mr. Sullivan asked you some questions about when the  
22 camera was taken down. Could it have been that the camera  
23 that you put in the tree was taken down a little later than  
24 September of 2014?

25 MR. SULLIVAN: Objection, leading.

1 A I --

2 THE COURT: No, no. He's going to ask another  
3 question.

4 THE WITNESS: Okay.

5 Q (By Mr. Tebbutt) Are you sure of your answer that it was  
6 September of 2014 that it was taken down?

7 A I'm not sure.

8 Q How many times have you met Ranger Kallinen?

9 A Approximately three or four. He is a very busy guy. Due  
10 to a funding shortfall, Washington State parks have spread  
11 their personnel very thin.

12 Q When was the last time you saw Ranger Kallinen?

13 A It would have been about nine months ago.

14 Q Did you discuss the results of your placement of the  
15 camera at Horsethief Lake?

16 MR. SULLIVAN: I'm going to object to this line of  
17 questioning on relevance grounds.

18 THE COURT: Overruled.

19 A I didn't discuss the placement, but I told him we had  
20 videos of coal.

21 Q (By Mr. Tebbutt) Did he ask you for a report, a written  
22 report, based on the permit?

23 A He did not.

24 MR. SULLIVAN: Objection, calls for hearsay.

25 THE COURT: Overruled.

1 A He did not.

2 MR. TEBBUTT: Thank you. Nothing further, Your  
3 Honor.

4 THE COURT: Anything further?

5 MR. SULLIVAN: No.

6 THE COURT: You may step down. Call your next  
7 witness.

8 MR. SNYDER: Your Honor, plaintiffs call Matthew  
9 Ryan.

10 THE CLERK: Please come forward.

11 MATTHEW RYAN, HAVING BEEN FIRST DULY SWORN,  
12 TESTIFIED AS FOLLOWS:

13 THE CLERK: Please state your name, and spell your  
14 last name for the record.

15 THE WITNESS: Matthew J. Ryan, R-y-a-n.

16 DIRECT EXAMINATION

17 BY MR. SNYDER:

18 Q Good morning, Mr. Ryan. Could you tell the court where  
19 you live?

20 A I live in Underwood, Washington.

21 Q How long have you lived there, sir?

22 A About 25 years.

23 Q Do you live in Underwood full-time?

24 A I do not.

25 Q Where do you live the other part of the time?

1 A My wife and I met in Utah, and we have lived in Underwood  
2 full-time for a number of years, but in the past about eight  
3 years now, we've been spending time back in Utah. I work for  
4 a medical clinic there, and for the last four years I've  
5 worked for a nonprofit that was in Utah.

6 Q How many months out of the year do you live in Utah, sir?

7 A About four-and-a-half to five.

8 Q And the rest of the time do you live in Underwood?

9 A Correct.

10 Q And how far away is your house from the railroad tracks,  
11 sir?

12 A I can see the railroad tracks from my house. But I live  
13 on the bluff on the edge of the Columbia River Gorge, so I'm  
14 probably about 1,200 feet above the railroad tracks. A  
15 direct line, I would say approximately half a mile.

16 Q Do you see coal trains travel on the tracks from your  
17 house?

18 A Yes, quite frequently.

19 Q Are those BNSF trains, sir?

20 A As far as I can tell, exclusively or almost exclusively.  
21 I don't remember seeing any other trains but the orange and  
22 black BNSF locomotives.

23 Q And, sir, are you employed?

24 A Not currently.

25 Q Are you retired?

1 A I'm semi-retired from nursing. In the winter, I'll be  
2 working for a nonprofit in Utah.

3 Q Are you a member of any of the plaintiff nonprofit groups,  
4 sir?

5 A Yes, I am member.

6 Q Which member -- or what groups?

7 A Friends of the Columbia Gorge and Columbia Riverkeepers  
8 and Sierra Club.

9 Q Which of those groups is your testimony on behalf of here  
10 today?

11 A Friends of the Columbia Gorge.

12 Q Sir, you mentioned earlier you've lived in the Gorge for  
13 approximately 25 years. Do you make use of any of the  
14 waterways in the Columbia River Gorge area?

15 A Yes, I do, quite frequently.

16 Q Could you tell us which ones, please?

17 A Primarily the Columbia River, but also the White Salmon  
18 River, the Klickitat, the Little White Salmon River, the  
19 section of the Little White Salmon River known as Drano Lake,  
20 and occasionally the Wind River. And that's all I can think  
21 of. Oh, the Lewis River, occasionally, once in a while.

22 Q Let's start at the beginning, sir, with the Columbia  
23 River. Can you tell me what activities you do on the  
24 Columbia?

25 A I initially visit the Columbia Gorge to windsurf, and that

1 was the first activity I did. I've since done some canoeing,  
2 kayaking, standup paddle boarding and kiteboarding. So I  
3 recreate on the river quite a bit.

4 Q And how about the White Salmon River, sir?

5 A The White Salmon River, primarily whitewater kayaking, and  
6 I've done a little bit of standup paddle boarding also on the  
7 White Salmon River.

8 Q The Little White Salmon River and Drano Lake?

9 A Standup paddle boarding, primarily.

10 Q How about the Wind River?

11 A The Wind River? Generally, hiking and swimming in the  
12 Wind River drainage.

13 Q And I believe you also mentioned the Klickitat River?

14 A Correct.

15 Q What activities do you do on the Klickitat River, sir?

16 A Primarily whitewater kayaking.

17 Q What would you say is the frequency that you do these  
18 activities on these waterways?

19 A Boy, in the summertime, you know, June through August,  
20 almost daily, when my schedule permits.

21 Q Do you have plans to continue doing these activities in  
22 the future, sir?

23 A I do.

24 Q How often, sir, do you see BNSF coal trains traveling  
25 through the Gorge?

1 A Generally, at least once a day.

2 Q Have you ever witnessed, sir, a BNSF coal train losing  
3 coal in transit while traveling through the Gorge?

4 A Yes, I have.

5 Q How many times has that happened?

6 A Three times that I've obviously been able to see it.  
7 There's other times when maybe, maybe not. It was too far  
8 away. You know, I think if I would have been closer, I might  
9 have seen it, but I can definitely say I've witnessed it  
10 three times.

11 Q Do you recall, sir, when the first time was that you saw a  
12 BNSF coal train that was traveling through the Gorge?

13 A Approximately mid to late summer of 2012, I believe, was  
14 my first experience with the coal coming out of the cars of  
15 the coal train.

16 Q Do you know where that location was that you witnessed  
17 that, sir?

18 A Yes. Very near the mouth of the White Salmon River where  
19 it enters the Columbia, at the bottom -- at the east end of  
20 Cook-Underwood Road, where it meets Washington State Highway  
21 14.

22 Q Showing you what's been marked for identification as  
23 Plaintiffs' Exhibit 1502, do you recognize this map, sir?

24 A Yes, I do.

25 Q Was this a map that was presented to you at your

1 deposition in this case?

2 A Yes, sir.

3 Q And is this your handwriting, the red handwriting at the  
4 bottom of the page?

5 A Yes, it is. Oh, there's a red mark on the screen. Is  
6 that what you were referring to?

7 Q No. I'll put it up, sir. I was referring to the red  
8 asterisk or star and then the red "P" on the page.

9 A Yes, those are my marks.

10 MR. SNYDER: Your Honor, can I move Exhibit 1502 into  
11 evidence?

12 MR. TEBBUTT: No objection, your Honor.

13 THE COURT: Admitted.

14 Q (By Mr. Snyder) Tell me, sir, about the incident in 2012  
15 that you had with this coal coming off a BNSF coal train.

16 A Where the asterisks or star is an area where I'll  
17 generally pull over to look at the conditions. If I'm going  
18 windsurfing or kiteboarding, it's somewhat condition-specific.  
19 If the wind is fluky or not strong enough, I may choose to  
20 not go and spend my time and effort trying to pursue  
21 something that's not very viable.

22 So that's a typical spot, where that asterisk is, where  
23 I'll stop. The first time I come down the road that goes to  
24 the top of that photo near the asterisks, I come down that  
25 road from my home to access the river. I pull over there

1 and stop and check out the conditions. Looked pretty good,  
2 so I started grabbing some of my gear, getting ready to go,  
3 and as I'm pulling my gear out of my car, the train comes by.  
4 The train tracks are very, very close to the highway there  
5 where we park, and we're outside a chain link fence, and just  
6 on the other side of the chain link fence is where the  
7 railroad tracks go by.

8 And as I'm getting my gear out, I hear the train go by,  
9 and I start hearing kind of pinging or a pitter-patter on the  
10 hood of my car, and then I start feeling small things hitting  
11 me on the top of the head. So I look up and I can see many,  
12 many dark, dark particles flying off open -- what looked to  
13 me to be open coal cars.

14 And, you know, I heard them bouncing off my car. I felt  
15 them hit me in the top of my head. I had to take a comb to  
16 clean the chunks out of my hair. And I watched the coal  
17 debris as it came out. It hit the windshield of my car, and  
18 it piled up on the windshield above the windshield wipers  
19 approximately two and a half or three inches just from the  
20 time it took for the train to go by.

21 Once the train passed, there was a little bit more debris  
22 showering out of the air, and within probably five to ten  
23 seconds, that all calmed down. The train was gone, clear  
24 blue sky, nothing coming out of the sky anymore. So it  
25 seemed pretty apparent to me that I was getting dusted by

1 what looked to me to be coal particles coming out coal cars  
2 of the train.

3 Q Sir, could you describe for us how big or tall the plumes  
4 were that were coming out of the coal car?

5 A I couldn't really see the plumes very well because I was  
6 almost too close to be able to see that. I have a -- there  
7 were two later incidents where I could see plumes, and I can  
8 discuss that now if you'd like. But I couldn't see any  
9 plumes at that time. I was too close. I was inside of the  
10 plumes, basically.

11 Q We'll get to those two other incidents in a moment. I  
12 want to focus on this for now.

13 I'm showing you what's been previously admitted as  
14 Plaintiffs' Exhibit 1261. Do you recognize this image, sir?

15 A Yes, I do.

16 Q Is this about the location where you were standing when  
17 you were checking the conditions during the 2012 incident?

18 A Yes, it is. I was -- if you see the car that's driving  
19 away from us, there is a telephone pole and a green sign that  
20 says "Underwood," and then there's that car and then there's  
21 a blue and white traffic information sign. Between the green  
22 Underwood sign and the blue and white sign is approximately  
23 where I was parked. Probably on the shoulder, right where  
24 the car is driving away.

25 Q If you could mark on the screen there, could you show us

1     how far you saw the coal traveling perpendicular to the  
2     train, away from the train?

3     A    You want me to draw it on the picture?

4     Q    Yes, please, sir.

5     A    This is where it first came from.  It came out probably  
6     right about to the white fog line of the road.  It could have  
7     gone farther, but I didn't see any there.  There's a fair  
8     amount of traffic on that highway, so I don't know if the  
9     coal got blown off there.  It may have gone farther; it may  
10    have not.  I don't know.

11    Q    Was the coal all traveling in that one direction, or was  
12    it also going the other way?

13    A    I couldn't see the other way.  Because the train was  
14    between me and the other side, I couldn't see if any debris  
15    was going the other way.

16    Q    Sir, the bridge that's depicted underneath where you  
17    started drawing, is that the bridge that crosses the White  
18    Salmon River?

19    A    Correct.  That's the railroad bridge that crosses it, and  
20    then as we're looking at this view, just to the left of that  
21    is the main highway bridge.

22    Q    During this first incident, sir, did you see coal cars the  
23    whole way back toward that bridge losing coal, as you've  
24    depicted on the page?

25    A    Yes, I did.

1 Q Did you physically see, sir, any coal entering the White  
2 Salmon River at this time?

3 A I did not. I was too far away to see the water of the  
4 White Salmon.

5 Q Is this also the same bridge?

6 A Correct.

7 Q From your observations that day, sir, do you have any  
8 reason to believe that the coal did not enter the White  
9 Salmon River?

10 A No, I have no reason to believe that.

11 Q Why not?

12 A When I looked both to the west and to the east, the debris  
13 coming off looked pretty uniform from all the cars. When I  
14 looked back to the east, which is the direction looking  
15 towards the bridge, you know, as far as I could see, I could  
16 see coal coming off the cars. And I can only assume, because  
17 of gravity, when it went over that bridge, it fell down and  
18 didn't hit my head, it hit water. I don't see how it could  
19 be any other way.

20 Q Do you remember how long the duration was that you were  
21 hit by coal at this first incident?

22 A Probably 90 to 120 seconds, something like that. A minute  
23 and a half to two minutes.

24 Q Was it the duration of the train passing the entire time?

25 A Yes, directly correlated.

1 Q Sir, did you ever go back to collect material that you  
2 believed to be coal from this location?

3 A I did collect some coal there at one point.

4 Q Do you remember when you went back to do that, sir?

5 A You know, I've never really gone looking for any of this  
6 stuff. All my interactions with coal have been incidental to  
7 just my normal activities. I think when I did collect coal,  
8 it was probably within a week or two weeks of that first  
9 incident when I experienced the coal coming off the cars.

10 And so I looked down and, again, I was in the same area  
11 getting ready to go up and recreate on the river, and I saw  
12 this material and I wanted to show my wife. And I had an  
13 empty bag from lunch, from my sandwich, and I scooped a  
14 little bit up and brought it home. And I thought -- and I  
15 had a Frisbee. I just dumped it in there and threw some  
16 change in to give it a sense of scale, because the chunk  
17 seemed pretty big, bigger than dust, what I consider dust.  
18 So I mainly did this just kind of to show my wife what was  
19 going on and --

20 THE COURT: Let's take our morning recess for 15  
21 minutes.

22 (Court in recess.)

23 Q (By Mr. Snyder) Mr. Ryan, on the screen is what's been  
24 marked for identification as Plaintiffs' Exhibit 1260.

25 Earlier you testified about how you went out and

1 collected coal from underneath the White Salmon bridge area;  
2 is that correct?

3 A Yes, that's correct.

4 Q And you mentioned a Frisbee. Is this the Frisbee that you  
5 were talking about?

6 A Yes, it is.

7 Q And is this the material that you collected from the area?

8 A Yes, it is.

9 Q I'm going to show you a couple more photos from this  
10 exhibit, sir.

11 Same Frisbee? Same material?

12 A Yes, sir.

13 Q The same?

14 A Yes, sir.

15 Q Is that the same as well?

16 A Yes, it is.

17 Q Is that your foot in the photo, sir?

18 A Yes, it is.

19 MR. SNYDER: Your Honor, plaintiffs move into  
20 evidence Exhibit 1260.

21 MR. WAGNER: No objection.

22 THE COURT: Admitted.

23 (Exhibit 1260 admitted.)

24 Q (By Mr. Snyder) Sir, is this the same type of material  
25 that you saw build up on your car windshield when the coal

1 was leaving the train during that first incident?

2 A Yes, it is.

3 Q Is this the same type of material you brushed out of your  
4 hair?

5 A Correct.

6 Q What do you believe this material to be?

7 A I believe it to be coal. It looks like coal that came off  
8 the coal cars.

9 Q Is there anything in particular that you makes you think  
10 it's coal besides the fact that it came out of a coal car?

11 A The shape, the color, the texture, and that's what I base  
12 it on.

13 Q I want to show you Exhibit 1261 one more time, sir, and  
14 I'm going to ask, can you mark on the map about how far away  
15 you were from the tracks when you were pelted?

16 A Yes. Probably right about there.

17 Q Do you know about how far that was in feet from the  
18 tracks?

19 A Approximately 15, maybe 20 feet.

20 Q And earlier, sir, you testified that there was three  
21 incidents where you've been -- you've seen an incident like  
22 this. When was the second time?

23 A The second time was when I was out riding my road bicycle  
24 along Highway 14 near Drano Lake, and I'd already had this  
25 first experience, and I was riding along and I happened to

1 glance down. I mean, I'm riding right next to the shoulder  
2 on my road bicycle, and I saw very large quantities of this  
3 same type of material that I had in the Frisbee.

4 And since I was already kind of aware of what I thought  
5 where that coal had come from, I stopped to take a look at  
6 it, and it was up and down the road as far as I rode in that  
7 area near Drano Lake.

8 And when I got out to take a look at it, I was surprised  
9 how deep it was. My tire went down in probably two or three  
10 inches into the gravel underneath it. It went very deep into  
11 this black coal-like looking substance.

12 Q Sir, I show you what's been previously identified as  
13 Plaintiffs' Exhibit 1503. Do you recognize this map, sir?

14 A Yes, I do.

15 Q Is this the map that depicts the area you were just  
16 talking about near Drano Lake?

17 A Yes, it is.

18 Q And were you shown this map during your deposition?

19 A Yes, I was.

20 Q Are the red markings on this map your handwriting, sir?

21 A They are.

22 MR. SNYDER: Your Honor, plaintiffs move into  
23 evidence Plaintiffs' Exhibit 1503.

24 MR. WAGNER: No objection.

25 THE COURT: Admitted.

1 (Exhibit 1503 admitted.)

2 Q (By Mr. Snyder) Sir, the markings on this page, can you  
3 tell us what were you trying to show with them?

4 A Where the asterisks or star is is the place where I  
5 noticed and then pulled over to stop on my bike. And the  
6 arrow is going east, which is to the right in this picture.  
7 And west, which is left in the picture, are the areas where I  
8 left my bike and walked along the shoulder to see how  
9 prevalent these deposits were. And the solid vertical lines  
10 are where I stopped and turned around and went back to my  
11 bicycle.

12 Q Between those two lines, sir, did you see coal the entire  
13 way?

14 A Yes, I did.

15 Q And is that on the south side of the road, or the north  
16 side?

17 A Primarily on the south side.

18 But out of curiosity, I crossed the highway and walked  
19 around, and I did see the same type of coal debris on the  
20 north side of the highway right where the Drano Lake overramp  
21 is there.

22 Q And on this map, do you know where the railroad track is?

23 A Yes, I do.

24 Q Can you show us with your finger, please?

25 A Yes.

1 (Witness complies.)

2 Q Sir, is that the south side of the Lewis and Clark  
3 Highway?

4 A Yes, it is, sir.

5 Q Earlier, sir, you mentioned that you were on your road  
6 bike when you made this observation. I'm showing you what's  
7 been previously marked as Plaintiffs' Exhibit 1498.

8 Do you recognize this image, sir?

9 A Yes, I do.

10 Q Is that your bike tire?

11 A Yes, it is.

12 Q So is this material that you've taken a photograph of? Is  
13 this what you believe to be coal?

14 A Yes, it is.

15 Q Could you please circle on this image where you see coal?

16 A (Witness complies.)

17 No coal in this area, but inside the screen and to the  
18 left of the other green line, those all appear to be coal  
19 debris to me.

20 Q This is the second image of this exhibit, sir. There's  
21 two what appear to be gouges. Could you please explain to  
22 us, why did you take a photo of this?

23 A When I first stopped to inspect this area, got off my  
24 bike, moved off the highway proper onto the shoulder, and I  
25 was surprised how deep my wheel went down in -- or my tire

1 went down into the coal-like debris here, and I was surprised  
2 how deep it was. Wow, that was a lot more than I expected.  
3 So, again, I had my phone with me, so I pulled my camera out  
4 and took a picture.

5 Q Is this the same photo of the same area?

6 A Yes, it is.

7 Q That's your shoe?

8 A Correct.

9 Q And the cup?

10 A That's a piece of litter I found on the side of the road,  
11 and I also put it there for a sense of scale.

12 MR. SNYDER: Your Honor, plaintiffs move into  
13 evidence Exhibit 1498.

14 MR. WAGNER: No objection.

15 THE COURT: Admitted.

16 (Exhibit 1498 admitted.)

17 Q (By Mr. Snyder) Sir, when you were observing the coal at  
18 this time, do you remember how far down the embankment the  
19 coal went?

20 A I'm not sure if I understand your question. The  
21 embankment between the railroad tracks and where I was  
22 standing?

23 Q Sure. Let's start there.

24 A It appeared to be debris from the tracks, all the way over  
25 to where I was and beyond.

1 Q Did you see any debris down towards the water's edge as  
2 well?

3 A I did not. The causeway to the railroad is elevated above  
4 the level of the highway there by maybe ten feet vertical  
5 distance, so I couldn't see on the other side. It was like I  
6 was inside the levee, and I couldn't see the outside of the  
7 levee.

8 Q So you didn't investigate it?

9 A I did not.

10 Q And earlier, sir, you testified about incidents where  
11 you'd been pelted by coal. We talked about the first  
12 incident at Cook-Underwood Road. Were there other incidents  
13 where you had been pelted by coal?

14 A That's the only time I actually physically had the  
15 particles come out and hit me.

16 Q Is there another time that you've seen coal leave a coal  
17 train at that location at Cook-Underwood Road?

18 A Yes, two other times.

19 Q Could you describe those times? Let's start with the  
20 second one.

21 A The second one was, to the best of my recollection, the  
22 next season I was coming down the Cook-Underwood Road, and I  
23 was at the stop sign waiting to take a left-hand turn onto  
24 the highway, and there was a fair amount of cross traffic so  
25 I was at the stop sign for a bit, waiting for my

1 right-of-way. And at that time --

2 Q Sir?

3 A Excuse me.

4 Q Where you were stopped, is that the same location as where  
5 the vehicle, the dark Volvo SUV is parked?

6 A That vehicle?

7 Q Yes.

8 A Yes. That's right where I was sitting at the stop sign.

9 Q Please continue.

10 A Thank you.

11 As I was waiting for the right-of-way to clear on the  
12 highway so I could enter the highway, a coal train came by  
13 westbound. And it was very obvious. I could see very  
14 uniform plumes coming off the front of each car and streaming  
15 back. Every car that went by -- and, like I said, I had to  
16 wait quite a while for the traffic to clear -- and very  
17 uniform and every car that went by had a dust cloud over it  
18 or a debris cloud over it.

19 Q Does that include the cars that were crossing over the  
20 bridge at the time?

21 A It sure appeared so from where I was. I didn't have very  
22 good resolution because I was approximately 150 yards from  
23 there. And the particles, as small as they are, I couldn't  
24 really see. I could only -- or I -- it seemed it had to be  
25 coming off the cars and falling into the water. I don't see

1     how it could not.

2     Q     The third time, describe that for us.

3     A     The third time was very, very similar to the second time.  
4     I was also just coming down the road from my home, sitting at  
5     the stop sign.  Again, a train went by, and I saw basically  
6     the same thing:  Very uniform plumes once again coming off  
7     each and every car.

8     Q     What years were those second and third observations made?

9     A     The second and third were 2013.

10    Q     Do you remember what the conditions for that day, weather  
11    conditions, sir?

12                 MR. WAGNER:  Objection.  Please you clarify which of  
13    the observations, counsel.

14    Q     (By Mr. Snyder)  Why don't we start with the second one in  
15    2013.

16    A     The second one?  You know, I don't recall if it was very  
17    windy or not.

18    Q     And is that the same for the third event in 2013?

19    A     That is correct.

20    Q     Are those the sum total of events where you've seen coal  
21    leaving a coal train as it travels through the Gorge?

22    A     Yes, those are the three times when I've positively  
23    witnessed coal coming out of the cars.

24    Q     Earlier you were testifying about the ways that you make  
25    use of the Columbia River Gorge waterways.  I'd like to ask

1 you, sir, does your knowledge of coal leaving the car, your  
2 observations, does that lessen your enjoyment of those  
3 activities?

4 MR. WAGNER: Your Honor, at this point I'll raise an  
5 objection to try to speed the trial along. Standing has been  
6 established. We're not disputing at this point in time the  
7 use and enjoyment. We don't think it is relevant at this  
8 time.

9 THE COURT: Mr. Wagner, you never cease to amaze me.  
10 Your obvious experience as a trial lawyer. Go ahead.

11 MR. SNYDER: Okay. That's all I have. Thank you,  
12 sir.

13 THE COURT: I assume this isn't your first trial.

14 MR. WAGNER: No.

15 CROSS-EXAMINATION

16 BY MR. WAGNER:

17 Q Just a few questions. The only time that you've observed  
18 the coal coming off the cars is at that location near the  
19 little White Salmon Drano Lake you've described, correct?

20 A Actually the White Salmon and Drano Lake, so two  
21 locations.

22 Q You also mentioned other waterbodies that you use. The  
23 Lewis River was one?

24 A Lewis River.

25 Q No observation there, correct?

1 A No.

2 Q The Wind River you mentioned, no observations there?

3 A The areas where I recreate on those rivers is many, many  
4 miles from the railroad track so, no, I have not.

5 Q So no relevance to this case?

6 A No relevance to this case.

7 Q With respect to the time that you got hit by coal, sir,  
8 you said you could not sense or tell whether the materials  
9 was actually hitting the water, correct?

10 A That is correct.

11 Q And the distance between where you were standing, you  
12 estimated 15 to 20 feet and the train?

13 A Correct.

14 Q Did you take any opportunity to observe the water or the  
15 conditions once the train passed?

16 A I did not.

17 Q And the time that you were first hit, you didn't take any  
18 images of that, did you?

19 A No, I did not.

20 Q No photographs or video of any sort?

21 A No, I did not.

22 Q The material that you collected, you collected subsequent  
23 to that time, correct?

24 A I did collect it subsequent to the first incident.

25 Q So it wasn't the material that you say landed on your car.

1 That wasn't the material that you took home?

2 A It wasn't collected on the same day as that material. It  
3 looked to be the same material, but it wasn't collected at  
4 the same time that it hit me in the head.

5 Q That's what I wanted to confirm.

6 And with respect to the materials that you collected,  
7 it's your testimony you have not, to your recollection, have  
8 been sampled in any way to confirm what you thought they  
9 were?

10 A No, I did not. I -- I was never looking for any of this  
11 stuff. I've just come across the stuff in everyday life, so  
12 I was never in the mindset of looking for it or trying to  
13 have it analyzed or anything. So, to me, it looked like it  
14 was coming out of a coal car, it looked like coal, it seemed  
15 obvious it was coal.

16 Q I understand your testimony. But in terms of your  
17 supposition that it was a certain material, you didn't send  
18 that off to be sampled as part of this case or in any other  
19 way?

20 A Correct. I never had it scientifically analyzed.

21 Q And your own personal experience, again, no geology  
22 background, sir?

23 A I did take a geology class in college, and I've been an  
24 avid student of geology, but I don't have any formal degrees  
25 in geology.

1 Q Or training to recognize coal versus anything else?

2 A I certainly can recognize colonial basalt, which is the  
3 most prevalent rock form in the area where I live, and it  
4 forms a very distinctive crystal and structure. It looks  
5 very different from the coal debris that I found.

6 Q And you're an expert in that category?

7 A No, but I -- again, through my studies, I know what color  
8 the basalt looks like, and I know the crystal and structure  
9 of that rock. This did not appear to be basalt to me in any  
10 way.

11 Q You sound very certain about that. Would it surprise you  
12 to hear that of some of the samples that your colleagues and  
13 other members of the plaintiffs' organizations took, at least  
14 half of them came back not coal?

15 A That doesn't surprise me at all, because the material  
16 underneath the coal debris is the naturally occurring soils  
17 in that area, and some of that's probably going to get picked  
18 up, unless you go over it with tweezers and pick up the coal  
19 only. Of course, a lot of the material isn't going to be  
20 coal. It's all mixed in with the debris. That doesn't  
21 surprise me in the least.

22 Q So if a test came back that way, that would be consistent  
23 with your observations?

24 A Yes, uh-huh.

25 Q With respect to your observations of trains in general,

1     sir, you say you've lived in this area for many years?

2     A    Correct.

3     Q    And your house overlooks the trains coming past the area  
4     where you live, correct?

5     A    Correct.

6     Q    And you've previously testified, I believe, in a  
7     declaration you signed that when you're living in this area,  
8     you are biking or hiking or recreating virtually every day?

9     A    More or less, yes.

10    Q    So is it fair to say since 2008 you've had the opportunity  
11    to observe or see cars going by maybe thousands of times?

12           MR. SNYDER:  Objection, calls for speculation.

13           THE COURT:  Overruled.

14    A    It's certainly possible, yes.

15    Q    (By Mr. Wagner)  And of all those times, it's your  
16    testimony here today that it was those three times that you  
17    noticed a plume coming off a car or coal coming off a car  
18    only?

19    A    That's correct.  There would be no way to observe it from  
20    my home.  I'm much too far to be able to observe any of that.

21    Q    But you bike and hike and go along that road very  
22    frequently?

23    A    Very much so, yes.

24    Q    Let's talk about the plume that you saw while you were  
25    waiting at the stop sign on Exhibit 1261.3483 that's

1 currently on the screen.

2 At the time those trains went by, Mr. Ryan, you did not  
3 experience any debris coming down off of the trains on to the  
4 road, did you?

5 A I'm sorry. I don't understand the question. Could you  
6 repeat?

7 Q You talked about two instances where you observed plumes  
8 coming off of the rail cars, correct?

9 A Correct.

10 Q And you were approximately where the car is located in  
11 this photograph that's currently on the screen, right?

12 A Right.

13 Q You did not observe materials coming down off of the plume  
14 on to the road at that time, you just witnessed a plume?

15 A Correct.

16 Q And at that time you did not witness any material going  
17 into the water, either?

18 A That is correct.

19 MR. WAGNER: The court's indulgence.

20 Your Honor, I have nothing else.

21 THE COURT: All right. Any redirect?

22 REDIRECT EXAMINATION

23 BY MR. SNYDER:

24 Q Mr. Ryan, do you consider yourself tech savvy?

25 A You mean information technology?

1 Q Yeah.

2 A Not very much.

3 Q Do you carry a camera around with you often?

4 A My camera phone, but I don't use it very often. I don't  
5 use social media, any kind of Twitter, I don't really go on  
6 online forums much or anything. No.

7 THE COURT: That's good if you ever run for  
8 president.

9 THE WITNESS: Exactly. That's one of the reasons,  
10 Your Honor.

11 Q (By Mr. Snyder) These events that we're talking about --  
12 I just want to clarify -- do you have any reason to believe,  
13 sir, that the material you saw leaving the train did not get  
14 into the White Salmon River?

15 MR. WAGNER: Objection. Asked and answered.

16 THE COURT: Sustained.

17 THE WITNESS: Should I answer?

18 THE COURT: No, not unless you wanted to go to jail.

19 THE WITNESS: I won't answer, Your Honor.

20 Q (By Mr. Snyder) And finally, sir, you've been living in  
21 the Gorge for 25 years. So the coal material you've seen, is  
22 it like any other naturally occurring rocks in this area?

23 A Not that I have observed.

24 THE COURT: Anything further?

25 MR. WAGNER: Nothing further, Your Honor.

1 THE COURT: You may step down.

2 MR. WAGNER: Your Honor, with the court's indulgence,  
3 during the break, I was doing some prep, and I didn't have an  
4 opportunity to take a break. But while the next witness is  
5 called, may I excuse myself and come right back?

6 THE COURT: Sure.

7 MS. LOARIE: Plaintiffs call Michael Lang.

8 THE CLERK: Please come forward.

9 MICHAEL LANG, HAVING BEEN FIRST DULY SWORN,  
10 TESTIFIED AS FOLLOWS:

11 THE CLERK: Please state your full name for the  
12 record, spelling your last name.

13 THE WITNESS: Michael L. Lang, L-a-n-g.

14 DIRECT EXAMINATION

15 BY MS. LOARIE:

16 Q Thank you, Mr. Lang. Will you state your full name for  
17 the record, please?

18 THE COURT: He already did.

19 MS. LOARIE: Okay. Thank you.

20 Q (By Ms. Loarie) Where do you live, Mr. Lang?

21 A Portland, Oregon.

22 Q How long have you lived in Portland?

23 A Since 1986.

24 Q So about 30 years? That's correct?

25 A That is correct.

1 THE COURT: It is a nice town, if you like river  
2 towns.

3 THE WITNESS: It is.

4 Q (By Ms. Loarie) Where are you employed, Mr. Lang?

5 A Friends of the Columbia Gorge.

6 Q And since when have you worked for Friends?

7 A November of 1993.

8 Q What is the mission of Friends of the Columbia Gorge?

9 A To protect and enhance the scenic, natural, cultural and  
10 recreation resources of the Columbia River Gorge area, and to  
11 vigorously enforce laws that protect the Columbia River Gorge  
12 and those values.

13 Q When did you start working on Columbia Gorge protection?

14 A Originally, in 1986.

15 Q So about the time you moved to Portland?

16 A That's correct.

17 Q What work were you doing then?

18 A I worked for a national conservation organization called  
19 League of Conservation Voters.

20 Q Did you also work on Columbia Gorge protection there, as  
21 well?

22 A Yes. In fact, we supported and advocated for passage of  
23 the Columbia River Gorge National Scenic Area Bill when it  
24 was pending in Congress at that time.

25 Q Thank you.

1           And your testimony today is on behalf of Friends of the  
2 Columbia Gorge; is that correct?

3 A    That's correct.

4           MS. LOARIE: And I understand the court does not want  
5 to hear material on standing; is that correct?

6           THE COURT: The defendant has indicated they have no  
7 objection to standing, correct?

8           MR. SULLIVAN: That's correct, Your Honor.

9           MS. LOARIE: All right. So I will not waste the  
10 court's time and talk about those waterways, then.

11 Q    (By Ms. Loarie) Mr. Lang, have you ever seen coal in the  
12 Columbia River area?

13 A    Yes.

14 Q    And where have you seen coal on the Columbia River?

15 A    Along the Columbia River and near tributaries to the  
16 Columbia River, generally within the boundaries of the  
17 national scenic area on the Washington side of the Gorge.

18 Q    Can you give us a bit of a description about the area that  
19 the Columbia River Gorge protection area stands?

20 A    Sure. I'll start on the western end in Washington State.  
21 The boundary starts at Gibbons Creek and right on the  
22 boundary of the urban area of Washougal and also Steigerwald  
23 Lake National Wildlife Refuge National Wildlife Refuge, and  
24 it extends approximately 85 miles to the east to little --  
25 basically, Miller Island, right across from the mouth of the

1 Deschutes River, which is in Oregon.

2 Q Thank you. Can you be a little bit more specific about  
3 where you've seen coal on the Columbia River, since,  
4 obviously, this is a very large area?

5 A Yes. I'll start on the west side as well, too.  
6 Particularly, concentrations of coal around the Little White  
7 Salmon River, which is also called Drano Lake at the mouth  
8 into the Columbia. The White Salmon River, which lies just  
9 to the west of the town of Bingen and White Salmon, around  
10 the mouth where the railroad tracks are, and then also at  
11 what we've been referring to as Horsethief Lake State Park,  
12 but it is actually renamed now to Columbia Hills State Park.

13 Q Thank you. I want to talk about these a little bit in  
14 more detail.

15 MS. LOARIE: I'd like to mark for identification  
16 purposes Exhibit 1228. I'll turn to page 32.

17 Q (By Ms. Loarie) Do you recognize this map?

18 A Yes.

19 Q What does it depict?

20 A It depicts the mouth of the White Salmon River and the  
21 confluence with the Columbia River. It also depicts the  
22 Burlington Northern Santa Fe Railroad, the railroad bridge,  
23 and then what is called the Lewis and Clark Highway, more  
24 commonly referred to as State Route 14.

25 Q And have you seen coal in this area?

1 A Yes.

2 Q Can you use your finger on the screen to mark where you've  
3 seen coal?

4 A It marks on the screen?

5 Q It should, yes.

6 A Oh, nice.

7 (Witness complies.)

8 Q So can you describe for the court what this area that you  
9 just marked is? Is it a bridge? Is it a beach? Can you be  
10 more descriptive?

11 A Yes. It is the bridge over the White Salmon River. That  
12 would be the Burlington Northern Santa Fe Railroad bridge.  
13 And then I've circled the area around the railroad tracks,  
14 both on the north side of the tracks, between SR 14 and the  
15 tracks, and then also the area that would be on the south  
16 side of the tracks on the side of the Columbia River. So,  
17 yes.

18 Q Can you describe what you saw?

19 A Yes. You can see here and what I saw is what appears to  
20 be coal dispersed across the soil in various sizes, from  
21 granular-sized coal to bigger chunks, up to the size of a  
22 dime or even a quarter, that are dispersed across this little  
23 area of the landscape.

24 Q Why do you think it was coal?

25 A Well, for one, it doesn't match the natural soil that

1 occurs in the area in color or in size or in shape. It was  
2 black and had the appearance of coal.

3 Q Have you seen coal there more than once?

4 A Yes.

5 Q About how many times have you seen coal there?

6 A Well, every time I've been there. I estimate  
7 approximately ten or more times.

8 Q And you drew a picture on the map that we discussed  
9 earlier.

10 A Yes.

11 Q Can you describe where the water travels in that area?

12 A Sure. We'll start with the White Salmon River. It's  
13 flowing from the top of the screen towards the bottom of the  
14 screen, and that's more or less from the north to the south.  
15 And it flows into the Columbia River that is on the bottom of  
16 the screen. And then the Columbia River is flowing from  
17 right to left on the screen.

18 Q Does the -- I'm sorry. Continue.

19 A And the water flows -- you can see the bank right under  
20 the railroad bridge. There's riprap rocks underneath to  
21 support the bridge, and there's coal dispersed throughout  
22 there and then also along the tracks.

23 Q Does the water line ever fluctuate in that area?

24 A Oh, yes.

25 Q Can you describe where the water goes relative to the map?

1 Can you draw a line?

2 A How much the water fluctuates? It would be a rough  
3 estimate on this map.

4 THE COURT: Where you marked, would that be the high  
5 water mark?

6 THE WITNESS: More or less, but if I may. In 2010,  
7 the Condit Dam was removed up river several miles. So just  
8 so you know, this is a very dynamic area here. The sediment  
9 is relatively new. The bar on the southern part -- so it  
10 would be south of the railroad tracks -- is relatively new.  
11 And it was caused by sediment from above the dam being  
12 released once the dam was removed.

13 Q (By Ms. Loarie) Have you ever seen coal in the area where  
14 the high water mark is, if you will?

15 A Yes.

16 Q So you've seen coal within the area where the river  
17 travels on certain occasions?

18 MR. SULLIVAN: Objection; leading.

19 THE COURT: Overruled.

20 A Yes.

21 Q (By Ms. Loarie) Okay. Thank you. Let's go to another  
22 page in Exhibit 1228. This is another part of Exhibit 1228,  
23 and it is page 31 of that exhibit. Do you recognize this  
24 map?

25 A Yes.

1 Q And what does it depict?

2 A It depicts the Little White Salmon River flowing into what  
3 is referred to as Drano Lake, and it depicts the confluence  
4 of the Little White Salmon/Drano Lake with the Columbia River  
5 on the left side of the waterbody denoted as Drano Lake. It  
6 depicts the Burlington Northern Santa Fe Railroad line, the  
7 railroad bridge, SR 14 bridge, over the mouth of the Little  
8 White Salmon, and then its confluence with the Columbia  
9 River.

10 Q Have you ever seen coal in this area, Mr. Lang?

11 A Yes.

12 Q Can you describe what you've seen?

13 A Yes. Coal dispersed across the soil such that it was very  
14 noticeable, and at times it was more prevalent in the soil  
15 itself. So you'd be viewing something that looked more like  
16 a layer of coal than naturally occurring soil in the area.  
17 The coal was surrounding the area of the tracks and then also  
18 went down to the confluence of the Little White Salmon and  
19 the Columbia River down to the waterline.

20 Q Can you use your finger again to draw on the map where  
21 you've seen coal?

22 A Sure. I'm right-handed, so this is -- very right-handed.

23 Q I'm trying to see if we have a closer-up map of this,  
24 since that area is a little bit small on this one. But I  
25 believe you've described that you've seen coal on both sides

1 of that road; is that your testimony?

2 A Yes.

3 Q Okay. Can you describe again relative to that road where  
4 the railroad tracks are? Perhaps use your finger to draw on  
5 the map.

6 A To clarify that road, meaning SR 14?

7 Q That's helpful. We're just trying to make this --

8 A Right. So the railroad tracks are just south of SR 14.

9 Q Okay. So can you draw on the map where the railroad  
10 tracks follow, a straight line?

11 A (Witness complies.)

12 Is that enough?

13 Q Yes. Thank you. That's helpful.

14 Can you describe -- you've mentioned you've seen coal  
15 at this location. Can you be a little more descriptive about  
16 where?

17 A Yes. I've seen coal -- maybe if I mark it. And this is  
18 not exclusive, I don't think. It's just where I've seen it.  
19 From -- on the west side where I've just made a mark, over to  
20 the railroad bridge that I've now covered over, but just so  
21 we know that that denotes where the railroad bridge is. And  
22 I've seen it on both sides of the track and also extended  
23 down over the rock riprap, down to the water 's edge.

24 Q Thank you. We're going to turn to a different page that  
25 has a little bit closer up, page 38 of this same exhibit,

1 1228.

2 Do you recognize this area, as well?

3 A Yes.

4 Q Is this just a different shot of the same location?

5 A Yes.

6 Q Can you also draw on this map where the railroad bridge  
7 is?

8 A (Witness complies.)

9 Q And can you also draw where you've seen coal?

10 A (Witness complies.)

11 Q I believe you testified that you've seen coal right at the  
12 waterline and on the rocks; is that correct?

13 A Yes.

14 Q Does the water also kind of go in that area, as well?

15 MR. SULLIVAN: Objection, leading.

16 THE COURT: Sustained.

17 MS. LOARIE: I'll rephrase.

18 Q (By Ms. Loarie) You testified you've seen coal at the  
19 edge of the river; is that your testimony?

20 A Yes.

21 Q Do you know where the water line fluctuates in this area  
22 as well?

23 A Yes.

24 Q Can you draw that on the map?

25 A It would be difficult because of the scale of the map

1 compared to the fluctuation of the water.

2 Q Okay. But if the water levels change in that area, do  
3 they also extend to the area that you've seen coal?

4 A Oh, yes.

5 MR. SULLIVAN: Objection, leading.

6 THE COURT: He's already answered the question.

7 MS. LOARIE: Okay. Thank you, Your Honor. We'll  
8 move on.

9 Q (By Ms. Loarie) Have you also seen coal trains near the  
10 White Salmon River?

11 A Yes.

12 Q Do you recall when that was?

13 A So -- often. There are approximately three to four coal  
14 trains per day, to our knowledge. So frequently, even  
15 traveling up and down the Gorge, one would see a coal train  
16 passing through the Gorge, and often I've seen them in the  
17 area of the White Salmon River.

18 Q Thank you.

19 MS. LOARIE: I'd like to move Exhibit 1228 and the  
20 records pages into evidence.

21 MR. SULLIVAN: No objection.

22 MS. LOARIE: Thank you.

23 MR. SULLIVAN: Actually, I take that back, Your  
24 Honor. We object to the extent that counsel wants to move in  
25 the entire 72-page exhibit. We would not object to the pages

1 that were discussed.

2 MS. LOARIE: I'm only moving to the pages that were  
3 discussed. So I believe that was pages 30, 31, and 32 so  
4 far.

5 THE COURT: All right. It will admitted.

6 MS. LOARIE: Thank you.

7 (Exhibit 1228 admitted.)

8 Q (By Ms. Loarie) Let's move on.

9 You mentioned you had seen coal at other times in the  
10 Columbia River Gorge area; is that right?

11 A Yes.

12 Q You mentioned that Horsethief Lake is one of the areas?

13 A Yes.

14 Q I want to turn to pages 46 and 47 of Exhibit 1228. What  
15 does this map depict, Mr. Lang?

16 A This map depicts generally the area of the Columbia Hills  
17 State Park and Horsethief Lake on the upper-left area, the  
18 Burlington Northern Railroad tracks and causeway separating  
19 Horsethief Lake from the Columbia River on the lower  
20 right-hand portion of photo.

21 Q Let's go to page 47 of the same exhibit. Is this a  
22 picture of the same area, as well?

23 A Yes.

24 Q A different vantage point?

25 A Yes, different scale, uh-huh.

1 Q Is the boat launch in this picture?

2 A It is not.

3 Q Where would the boat launch be relative to this picture?

4 A It would be below the lower border of the photograph.

5 There is a road that's on the lower left-hand side of the  
6 photo, and that is the access road to the public boat launch.

7 So if you followed, more or less, that diagonal line down to  
8 where the Columbia River would be, that would be the area  
9 where the boat launch is, outside the frame of the picture.

10 Q I want to turn to Plaintiffs' Exhibit 1511 marked for  
11 identification purposes. Mr. Lang, what does this picture  
12 show you? Or I should say "map." What does the map show?

13 A It's Columbia Hills State Park, with Horsethief Lake and  
14 also the Columbia River.

15 Q Is the boat launch in this picture?

16 A Almost. In the very bottom part of the picture.

17 Q Can you put your finger on the screen to show me where the  
18 boat launch is?

19 A (Witness complies.)

20 Q Thank you.

21 Is this an accurate representation of the Horsethief  
22 Lake area?

23 A Yes.

24 Q Have you ever visited the Horsethief Lake/Columbia Hills  
25 State Park area that's shown there?

1 A Yes.

2 Q Have you ever seen what you believe to be coal there?

3 A Yes.

4 Q Where have you seen the coal?

5 A Do you want me to describe it or draw it on the map?

6 Q Describe it.

7 A Okay. A description would be around the area of the boat  
8 launch heading in an easterly or northeast direction. On the  
9 map there is an A and a B marked, so I have seen coal along  
10 the -- that's the railroad causeway along the tracks on what  
11 would be the south side of the tracks on the riprap and rocks  
12 leading down to the waterline of the Columbia River.

13 Q And now you can draw on the map where you've seen coal.

14 A (Witness complies.)

15 I missed the causeway a little bit and went out into  
16 the river. That's supposed to -- here. Let me do it better.

17 Q Thank you.

18 Can you also clarify on the map where the rail line  
19 runs in this area?

20 A Yes. The rail line runs right on the causeway that's more  
21 or less coterminous with the line that I just drew on the  
22 map.

23 Q So it's essentially the same places as you found coal?

24 A Yes.

25 Q Can you describe the substance a bit more, why you think

1 it was coal?

2 A Yes. For one, it stands out that it doesn't match any of  
3 the other soil types or rock that are in the area in  
4 appearance. And what I saw were from small grains up to  
5 larger chunks the size of a quarter. Some bigger than that,  
6 too, and dispersed in rocks, in crannies on the riprap and  
7 also in the soil in between it, it was completely black with  
8 coal rather than being soil or gravel at all. And it  
9 extended down to the waterline of the Columbia River on to  
10 rocks. Generally that's what I saw.

11 Q About how much coal did you see there?

12 A Well, it's, you know, I can't give a weight or volume but  
13 I can describe what it looked like. It's so thick that it  
14 covers the soil and all you see -- would see is black coal  
15 rather than what would be the natural soil and plants that  
16 would have been there.

17 Q How many times have you gone out to the boat launch area  
18 at Horsethief Lake?

19 A Many times. Oh, I would, you know, 15 or 20 times but in  
20 the last probably since 2012, 2013, oh, eight to ten times.

21 Q And of the times you've been out there have you seen coal  
22 each of those times?

23 A Yes.

24 Q Thank you.

25 I believe you already circled on the map the places

1 you've seen coal?

2 MS. LOARIE: I'd like to move into evidence  
3 Exhibit 1511 that we just discussed, and this page, I believe  
4 it's been marked as a deposition exhibit as well, 717.

5 MR. SULLIVAN: No objection to the map itself, Your  
6 Honor. The A and B, I'm not sure the distinction of those  
7 but I think it's hearsay.

8 THE COURT: Overruled. They'll be admitted.

9 (Exhibits 1511 and 717 admitted.)

10 MS. LOARIE: Thank you, Your Honor.

11 Q (By Ms. Loarie) I'd like to turn to what's been marked  
12 for identification as Plaintiffs' Exhibit 1485. I also have  
13 a housekeeping matter related to the other map exhibit on  
14 Exhibit 1228.

15 MS. LOARIE: I'd like to move into evidence pages 46  
16 and 47 of that exhibit as well.

17 MR. SULLIVAN: No objection.

18 THE COURT: Admitted.

19 (Exhibits 1228.46 and 1228.47 admitted.)

20 MS. LOARIE: Thank you. I'm also told I need to  
21 clarify that the pages I'm referencing for the exhibit. The  
22 last two exhibits were ECF pages as opposed to Bates numbers,  
23 as per agreement with defense counsel.

24 Q (By Ms. Loarie) Turning to page 4583, what's been marked  
25 Bates No. FOPG003583, Mr. Lang, do you recognize this

1 picture?

2 A Yes.

3 Q And what do you see?

4 A This is the area just to the east of the public access to  
5 the boat launch and the Columbia Hills State Park/Horsethief  
6 Lake. And what I see is an area with basalt rocks and then  
7 also coal interspersed among the rocks.

8 Q Did you take this picture?

9 A Yes.

10 Q Can you circle in this picture what you believe to be  
11 coal?

12 A (Witness complies.)

13 Q Do you recall when this picture was taken?

14 A I believe it was in 2013.

15 Q Thanks. I think the metadata will clarify the exact date.

16 A Yeah.

17 Q We'll get there soon.

18 So this is also the Horsethief Lake area, just to  
19 confirm?

20 A Yes.

21 Q About how far from the water were you here?

22 A I was approximately 12, 15 feet from the water.

23 Q Thank you. Let's turn to the next Bates number, 3584.

24 Do you recognize this picture as well?

25 A Yes.

1 Q Did you take this picture?

2 A Yes.

3 Q Did you take it at the same time you took the preceding  
4 picture?

5 A I believe, yes.

6 Q Okay. Thank you.

7 Do you see coal in this picture as well?

8 A Yes.

9 Q And where do you see coal? Can you circle it for me?

10 A Sure.

11 Q About how far from the river is this, Mr. Lang?

12 A This is very close to the river. It's probably within ten  
13 feet.

14 Q Okay. I believe in the last picture you described the  
15 rock as being a basalt rock. Is this the same type of rock  
16 you saw --

17 A Yes, I believe it is.

18 Q And you believe it to be coal on top of the basalt rock?

19 A Yes.

20 Q Let's turn to 3585.

21 THE COURT: Counsel, I need to break a little early.  
22 Let's start up at 1:15.

23 MS. LOARIE: Okay. Thank you, Your Honor.

24 (Court in recess.)

25 THE COURT: Okay.

1 Q (By Ms. Loarie) I believe we left off at Exhibit 1485 and  
2 FOCG 003585 is the Bates stamp of the picture.

3 Did you take this picture, Mr. Lang?

4 A Yes.

5 Q Where did you take it from?

6 A This was taken generally at Columbia Hills State Park east  
7 of the public boat launch near the Columbia River.

8 Q Do you recall when you took the picture?

9 A I believe this picture was taken in 2013.

10 Q Was it part of the same series we were discussing earlier?

11 A Yes.

12 Q Okay. Thanks.

13 Can you tell what in the picture looks like coal to  
14 you? Can you circle it for me?

15 A Yes.

16 Q Thank you.

17 Where is the water, or is there any water in this  
18 picture?

19 A Yes.

20 Q And where is that?

21 A It's in the upper right-hand corner of the photo.

22 Q Where you just marked the line?

23 A Yes.

24 Q Okay. So can you guesstimate -- estimate -- excuse me --  
25 how far from the water the coal is?

1 A Well, it's right next to the water.

2 Q Okay. Thank you. Can we go to 3586 in the series?

3 Do you recognize this picture?

4 A Yes.

5 Q Did you also take it?

6 A Yes.

7 Q When did you take it?

8 A 2013, around the same time.

9 Q Is this also the same location as the last picture?

10 A Yes.

11 Q So the Horsethief Lake area?

12 Is that your finger in the corner of the picture?

13 A Yes.

14 Q Okay. Can you tell me what's in this picture?

15 A Yes. It is a photo of the shoreline of the Columbia River  
16 with some of the rock ballast that's adjacent to the railroad  
17 tracks, and then there's coal covering the soil and  
18 interspersed within the rocks down to approximately the  
19 waterline.

20 Q Can you circle the coal in the picture?

21 A Yes.

22 Q And can you place a mark where the water begins in this  
23 picture?

24 A Yes.

25 And then it's behind the rocks here, so I'll just

1 generally make a dotted line.

2 Q Do you know if the water ever goes beyond that line that  
3 you just drew, Mr. Lang?

4 A Yes.

5 Q Yes, it goes higher?

6 A Yes.

7 Q Can you draw the place where the water extends to, if it  
8 extends within that picture?

9 A Yes. It would be an approximation.

10 MR. SULLIVAN: Objection; calls for speculation.

11 THE COURT: Overruled.

12 Go ahead.

13 A It may be higher in flood events. I haven't studied flood  
14 events in this section of the river.

15 Q (By Ms. Loarie) It looks like you just drew a line that  
16 extends into some of the area containing coal; is that right?

17 A Yes.

18 Q Go to Exhibit 3587, which is part of this series as well.

19 Did you take this picture, too?

20 A Yes.

21 Q Was it the same trip in 2013?

22 A Yes.

23 Q Where was this taken?

24 A At Columbia Hills State Park on the shoreline of the  
25 Columbia River.

1 Q So the Columbia River side of the state park?

2 A Yes.

3 Q Is there also water in this picture?

4 A Yes.

5 Q Can you draw a line where the water is?

6 A I missed a couple of rocks there, but you get the idea.

7 Q Okay. Is there also coal in this picture?

8 A Yes.

9 Q Can you circle it?

10 A (Witness complies.)

11 Q Do you know if the water in this photo ever extends beyond  
12 the line that you drew just a moment ago?

13 A Yes.

14 Q And do you know where that line would be? Where the water  
15 line extends to?

16 A From the picture, you can tell that it's generally like  
17 this.

18 Q And that area encapsulates what you just circled as coal;  
19 is that right?

20 MR. SULLIVAN: Objection, leading.

21 THE COURT: Sustained.

22 MS. LOARIE: I'll rephrase.

23 Q (By Ms. Loarie) The area that you just drew a line, does  
24 it extend into anything?

25 A The corner where the coal deposits are, yes.

1 Q You can't see it in the picture, but do you recall where  
2 in proximity to the rail line this photo was taken?

3 A Yes. It's -- so on the south side of the rail line  
4 between the rail line and the Columbia River, and here it  
5 would be approximately within 20 feet of the rail line.

6 Q Okay. Thank you. Let's move along to 3588, please. This  
7 is also part of the same exhibit. This next photo is labeled  
8 FOCG 003588.

9 What is this picture, Mr. Lang?

10 A Again, it's near the shoreline of the Columbia River and  
11 the Columbia Hills State Park adjacent to the BNSF railroad  
12 tracks.

13 Q You also took this photo on your trip in August 2013?

14 A Yes.

15 Q Is there coal in this picture as well?

16 A Yes.

17 Q Can you circle it?

18 A (Witness complies.)

19 Q Thank you. About how far from the water are you here?

20 A This is within ten feet of the waterline.

21 Q About how far from the rail track are you as well?

22 A It's approximately 20 feet, 15 to 20 feet.

23 Q Okay. Thank you.

24 Let's move along to the next picture, 3589. The next  
25 is FOCG 003589. Do you recognize this picture?

1 A Yes.

2 Q Did you also take it in August of 2013?

3 A Yes.

4 Q Where was this taken?

5 A Columbia Hills State Park.

6 Q More specifically?

7 A Adjacent to the Columbia River shoreline and near the BNSF  
8 railroad tracks.

9 Q About how far from the water are you here?

10 A This is within ten feet of the water.

11 Q I'm sorry. You said you were close to the railroad tracks  
12 as well. About how far?

13 A About 15 to 20 feet.

14 MS. LOARIE: Okay. Thank you.

15 Your Honor, I'd like to move to admit Exhibit 1485 into  
16 evidence with the starting Bates Nos. FOCG 3583 through 3589.

17 MR. SULLIVAN: No objection, Your Honor.

18 THE COURT: Admitted.

19 (Exhibits 1485 FOCG 3583 through 3589 admitted.)

20 MS. LOARIE: Thank you.

21 Q (By Ms. Loarie) Mr. Lang, have you ever seen coal in the  
22 water at Columbia Hills State Park Horsethief Lake area?

23 A Yes.

24 Q Where did you see that?

25 A In the Columbia River.

1 Q More specifically, was there anywhere close in the park  
2 that you were near?

3 A Yeah. Approximately one-quarter mile east-northeast from  
4 the public boat launch.

5 Q Exhibit 1511, page 1 has a map of the Horsethief Lake  
6 Columbia Hills area. Mr. Lang, can you put a circle on the  
7 map where you saw coal in the water?

8 A It was approximately where this "A" is.

9 Q How did you get in the water that day?

10 A Oh, by boat. And then I got out of the boat in my waders.

11 Q Were you with anyone else that day?

12 A Yes.

13 Q Who else were you with?

14 A Brett VandenHeuvel, another member of Sierra K staff, who  
15 I don't recall, and then also a reporter/photographer from  
16 *The Oregonian* newspaper.

17 Q Do you recall about when that happened?

18 A Yes. It was early 2013. In March, I believe, 2013.

19 Q About how far out in the water were you when you saw coal?

20 A Oh, I was standing on the shoreline in the water, and it  
21 was just right inside the waterline on a barely submerged  
22 rock.

23 Q How did you know it was the waterline?

24 A It was the line between where the liquid water was and the  
25 solid shoreline. I'm sorry. That's the best I can do.

1 Q I appreciate that. I'm sorry if that seemed like a  
2 simplistic question. Sorry. Excuse me.

3 How far from the rail tracks were you?

4 A Well, the rail tracks are very close to the shore -- or to  
5 the waterline there, so it is approximately ten feet. It's a  
6 very steep bank.

7 Q They're above you there?

8 A They're above, so I'm trying to think in linear distance  
9 rather than slope. So approximately ten feet of linear  
10 distance horizontal.

11 Q How much coal?

12 A How much?

13 Q Yeah.

14 A Well, there are large deposits of coal that cover what  
15 would be soil there and partially cover most of the rocks.

16 Q Did you pick anything up that day?

17 A I did not.

18 Q Okay. Did you take any pictures or anything like that?

19 A Yes.

20 Q Okay. Did those appear in an article?

21 A Not my photos. *The Oregonian* photographer's photos  
22 appeared in the article.

23 Q Okay. You mentioned you'd been out to the Horsethief  
24 Lake/Columbia Hills area numerous times; is that right?

25 A Yes.

1 Q Have you ever seen anyone trying to clean up coal there?

2 A Yes.

3 Q What have you seen?

4 A I've seen red and white trucks, vacuum trucks that have  
5 been working the tracks along Columbia Hills State Park in  
6 the vicinity of where the public boat launch is, and also an  
7 area approximately a half a mile to the northeast along the  
8 tracks and along the shoreline.

9 Q On Exhibit 1511, can you draw where you've seen vacuum  
10 trucks on this picture?

11 A Sure.

12 Q Have you seen vacuum trucks there more than once?

13 A Yes.

14 Q And when did you see them?

15 A Well, it was the same day as the Columbia River Gorge  
16 Commission meeting, and east of there, so I know that date.  
17 It was April 12th, 2016.

18 Q Were you driving at the time, or where were you?

19 A Yes.

20 Q Okay. So tell me more.

21 On April 12th you were driving. What road were you on?

22 A Approximately 9:30 in the morning, I was on Interstate 84  
23 heading eastbound, and the site is directly visible from  
24 Interstate 84 from across the river. And then returning from  
25 the meeting, I was traveling down State Route 14 and also saw

1     **them at that time.**

2     **Q    Is one of those the roads depicted in Exhibit 1511?**

3     **A    Yes.**

4     **Q    Can you draw a line where that road extends?**

5     **A    It is State Route 14.**

6     **Q    Okay.  Is Interstate 84, that you mentioned, in this**  
7     **picture?**

8     **A    No.**

9     **Q    Can you draw the general direction that that road is?**

10           **THE COURT:  It's on the other side of the river,**  
11     **counsel.**

12           **MS. LOARIE:  I wasn't sure if Your Honor was familiar**  
13     **with the area or not.  I'll move on.**

14     **Q    (By Ms. Loarie)  Going back to April 12th, you mentioned**  
15     **you saw them in the morning.  Did you see them again that**  
16     **day?**

17     **A    Yes.  In the afternoon.**

18     **Q    About what time, do you recall?**

19     **A    I recall it to be approximately 4:00 p.m.**

20     **Q    And were the trucks in the same location both times you**  
21     **saw them?**

22     **A    Generally in the same location; not in the same spot.**

23           **THE COURT:  Is the rail line on the other side, on**  
24     **the Oregon side, is that a Union Pacific line?**

25           **MR. SULLIVAN:  Yes, Your Honor.**

1 THE COURT: Do they have any coal trains there on the  
2 Union Pacific?

3 MR. SULLIVAN: I'm not a hundred percent sure of  
4 that, Your Honor.

5 THE COURT: It was the UP that had the problem with  
6 the oil car.

7 MR. SULLIVAN: That's correct. In Mosier. Yes.

8 Q (By Ms. Loarie) Did you take any pictures that day,  
9 Mr. Lang?

10 A No.

11 THE COURT: Why is there only one line from the BNSF  
12 along the river? Is it because of the physical restriction?

13 MR. SULLIVAN: That's my understanding. There are  
14 certain areas where there are sides for passage, but it's a  
15 pretty narrow strip for a lot of the way.

16 THE COURT: Okay.

17 Q (By Ms. Loarie) Did you do anything else after that with  
18 the information about seeing the vacuum trucks?

19 A I had spoke with our staff about it.

20 Q Did you ask them to go out and investigate?

21 A Yes, but -- we'll just leave it there, yes.

22 Q Anything else about -- I mean, is there anyone in  
23 particular that you asked to investigate?

24 A Yes. Prior to that, I had asked our staff to investigate  
25 and also after April 12th, too, and just to get an idea what

1 sort of work was being conducted there and take some pictures  
2 of it, too. It is an area of high interest.

3 Q Thank you. Are there any other times you've seen cleanup  
4 work happening in this area?

5 A Yes.

6 Q And when was that?

7 A I personally saw it on May 17th, 2016.

8 Q What happened that day?

9 A What happened that day is -- we actually had a new staff  
10 member who we wanted to take on a field trip. And we  
11 periodically do this with all of our staff. And one of our  
12 stops was Columbia Hills State Park because of a number of  
13 features of it. It's a beautiful state park, a beautiful  
14 place in the Gorge. Our land trust owns property adjacent to  
15 the park. There are cultural resources, including  
16 pictographs and petroglyphs that are in the area, some of  
17 them quite famous. And then also it's a well-known spot  
18 where there's visible coal dust that you can see from a  
19 public easement. So multiple reasons.

20 Q What did you see on that visit?

21 A Well, what we saw were vacuum trucks, red and white vacuum  
22 trucks. I believe the contractor's name is Hulcher. And  
23 they were working along the tracks with an armature out and a  
24 vacuum hose going down with contractors or workers that  
25 appeared to be vacuuming the area in the soil, too, and

1 vacuuming up material. At first, the truck was probably a  
2 half mile away northeast from the public boat launch, but it  
3 must have filled up -- for some reason, it came back to the  
4 boat launch area on the --

5 THE COURT: Was it on the rails?

6 THE WITNESS: It was up on the rails, yeah, yeah.  
7 And then they started unloading it.

8 Q (By Ms. Loarie) They started unloading what?

9 A The vacuum truck.

10 Q Okay. Was there anything else that happened that day?

11 A Yes, there was. In fact, I took photographs of the area,  
12 and also I attempted to speak to either a contractor or a  
13 BNSF employee -- I'm not sure which -- who was there in a  
14 truck, not in the vacuum truck. It was in another pickup  
15 truck. While I was taking photographs, he took pictures of  
16 me, so I thought as an icebreaker, I'd just try to chat with  
17 him a little bit.

18 Q And what did you say -- what transpired in that  
19 conversation?

20 A I asked him generally what they were doing, and he said,  
21 "A little cleanup."

22 MR. SULLIVAN: Objection, hearsay.

23 THE COURT: It's not being admitted for the truth of  
24 the contents. Actually, I'm going to sustain the objection.  
25 The last answer will be stricken.

1 Q (By Ms. Loarie) Can you tell me more about that  
2 conversation?

3 THE COURT: No. Move on.

4 MS. LOARIE: Okay.

5 Q (By Ms. Loarie) You mentioned you saw the trucks that  
6 day. Can you describe the trucks a little bit more in  
7 detail?

8 A Yes. They were red and white trucks that had an armature  
9 extending, I think, from the back of the truck and then a  
10 hose that -- a black hose that comes off of that. There is  
11 also a little area where it looks like an operator can  
12 operate the armature from the back of the truck. And then  
13 what we saw were contractors on the end of the hose, moving  
14 it over the land.

15 Q And you mentioned you took photos; is that right?

16 A Yes.

17 Q Okay. We'll get into those in a minute.

18 Did you tell anyone else about this incident?

19 A Yes.

20 Q And who was that?

21 A I told our staff -- so the people with me were our staff  
22 attorney, Steve McCoy, and our senior staff attorney, Nathan  
23 Baker. I also told other members of our staff, and I also  
24 informed counsel representing Friends in this matter.

25 Q Okay. Let's go to exhibit -- what's been marked for

1 identification as 1488. We'll start with FOCG 005261.

2 Do you remember this picture, Mr. Lang?

3 A Yes.

4 Q Did you take it?

5 A Yes.

6 Q And do you recall when you took it?

7 A On May 17, 2016.

8 Q And what does it depict?

9 A I'm standing on the public access to the boat launch. And  
10 what it's depicting is coal on the ground with some other  
11 rocks scattered around. And it's relatively adjacent to the  
12 railroad tracks, probably within 15 feet from the tracks.

13 Q Is that your shadow in the picture?

14 A Yes.

15 Q Thank you.

16 About how far from the water are you there?

17 A It's probably 20 feet from the water.

18 Q Okay. Go to the next slide, 5262. What is this picture,  
19 Mr. Lang?

20 A That's a picture of Columbia Hills State Park and the  
21 railroad tracks and an area that you can see that appears to  
22 be blackened, too.

23 Q Did you take this photo, as well?

24 A Yes.

25 Q And this was where exactly at Horsethief Lake?

1 A This is, again, facing east northeast from standing in the  
2 public access to the boat launch.

3 Q Was that picture also taken the same day as the preceding  
4 picture, in May of 2016?

5 A Yes.

6 Q Okay. Can you circle where you see coal on the ground or  
7 what you believe to be coal?

8 A (Witness complies.)

9 Q Okay. Thank you. Let's move along to 5263.

10 Moving on to the next slide that's labeled F0CG 005263.  
11 Do you recognize this picture?

12 A Yes.

13 Q What is it of?

14 A It's, again, of Columbia Hills State Park, the Columbia  
15 River and the BNSF tracks and a coal vacuum truck in the  
16 distance down the tracks. It's that white spot.

17 Q Can you circle that for us, please?

18 A (Witness complies.)

19 Q Did you also take this picture?

20 A Yes.

21 Q And was it the same day as the preceding picture, May  
22 2016?

23 A Yes.

24 Q Can you circle where the water is -- or the line where the  
25 water is demarcated in this picture?

1 A (Witness complies.)

2 Q So was the vacuum truck right up the waterline, or could  
3 you describe, I guess, where you see it?

4 A It's on the tracks, but the tracks are so close to the  
5 waterline. It's probably -- well, I'm not sure. I can't  
6 really tell from here, but it is close to the tracks.

7 Q Thank you. Let's move along to 5264, please. What is  
8 this a picture of?

9 A Again, it is at Columbia Hills State Park, and it is a  
10 picture of coal interspersed within the rocks.

11 Q Was this taken on the same trip as the other pictures  
12 we've been discussing, on May of 2016?

13 A Yes.

14 Q Thank you.

15 Where is the water from this vantage point? How far  
16 are you from the water?

17 A Approximately 20 feet from the water. And I can draw the  
18 direction of the water here with an arrow.

19 Q Okay. Where is the rail line from there?

20 A In the opposite direction of the arrow I just drew.

21 Q Okay. Moving along to 5265. I'm sorry. That was 65.  
22 66.

23 Do you recognize this picture?

24 A Yes.

25 Q What is it?

1 A It's one of the vacuum trucks that is operating in this  
2 area, in Columbia Hills State Park.

3 Q Is this also what you saw in May of 2016, Mr. Lang?

4 A Yes.

5 Q Did you actually take this picture?

6 A This was taken by Steve McCoy. I was with him.

7 Q Okay. But it accurately depicts what you saw that day?

8 A Oh, yes.

9 Q Okay. Can you describe what you see happening in this  
10 picture?

11 A What I see happening is some operators, they're rolling  
12 out a hose that had been stored in this area. And having  
13 never seen this before, I believe what they were doing is  
14 getting ready to empty out "The Guzzler," which is the name  
15 of the truck.

16 MR. SULLIVAN: I'm going to object. It calls for  
17 speculation.

18 THE COURT: Sustaining the last portion of that  
19 question.

20 Q (By Ms. Loarie) Okay. Thank you. Let's move along to  
21 5267. That looks like the same picture.

22 Do you recognize this picture, Mr. Lang?

23 A Yes.

24 Q Same thing that you just saw in the preceding photo?

25 A Yes.

1 Q Okay. Thank you.

2 Was this also at Horsethief Lake?

3 A Yes.

4 Q Okay. Thank you.

5 Was there anything else about that day that was  
6 particularly memorable to you?

7 A Yes.

8 Q And what was that?

9 A The fact that there was coal dust in an area that had been  
10 previously treated twice before and had been treated in March  
11 of 2016, in April of 2016.

12 Q So you saw --

13 THE COURT: By "treated," do you mean vacuumed?

14 THE WITNESS: Yes.

15 Q (By Ms. Loarie) So you saw fresh coal dust that day?

16 A Yes.

17 Q In what area did you see fresh coal dust that day?

18 A In the area depicted in the previous photographs, and so  
19 it is directly east of the public access at the boat launch  
20 adjacent to the Columbia River and the Burlington Northern  
21 Sante Fe tracks.

22 Q Thank you.

23 MS. LOARIE: I just went through a number of  
24 different sub-exhibits to Exhibit 1488, and I would like to  
25 move to admit these into evidence, sub-exhibits 5261, 5262,

1 5263, 5264, 5265, 5266 and 5267.

2 MR. SULLIVAN: I'm going to object as to cumulative.  
3 I understand if the court is still happy to see more, but  
4 that's the objection.

5 THE COURT: I'm not happy to see more. I overruled  
6 an objection. I've seen enough pictures of alleged coal  
7 dust. I don't need to see any more.

8 MS. LOARIE: Thank you, Your Honor. I just wanted to  
9 get the vacuum trucks in during Mr. Lang's testimony. I  
10 appreciate that.

11 Q (By Ms. Loarie) Can we get a little bit into the contrast  
12 you mentioned? I want to quickly turn to Exhibit 1424 and  
13 3659 of that exhibit. This was previously admitted.

14 What do you see in this picture, Mr. Lang?

15 A It's Columbia Hills State Park, and it's near the public  
16 access to the boat launch, facing east northeast along the  
17 railroad tracks and the Columbia River.

18 Q How does this contrast to what you saw in May?

19 A There appears to be less coal on the ground.

20 Q So it looks like it was cleaned up?

21 MR. SULLIVAN: Objection.

22 THE COURT: Objection sustained.

23 MS. LOARIE: Okay.

24 Q (By Ms. Loarie) You've worked on the Columbia Gorge for  
25 many years, I believe you testified earlier?

1 A Yes.

2 Q How does seeing coal at Horsethief Lake and Columbia Hills  
3 State Park make you feel?

4 MR. SULLIVAN: Objection, relevance.

5 THE COURT: They've already stipulated to standard,  
6 counsel.

7 MS. LOARIE: Okay. Thank you. I have nothing  
8 further.

9 THE COURT: Cross?

10 CROSS-EXAMINATION

11 BY MR. SULLIVAN:

12 Q Good afternoon, Mr. Lang. I just have a few questions for  
13 you.

14 I believe your counsel just mentioned, you've been  
15 working as conservation director Friends of the Columbia  
16 Gorge for some time; isn't that correct?

17 A Yes.

18 Q And I believe that goes back to 1993; is that about right?

19 A Yes.

20 Q Okay. And you've been working on efforts to oppose coal  
21 transportation for the Gorge since about 2012; isn't that  
22 right?

23 A Yes.

24 Q And during that time, you've seen many BNSF trains carry  
25 coal; is that a fair characterization?

1 A Yes.

2 Q Would you say a hundred maybe, or more?

3 A I haven't counted them.

4 Q So do you think it's more than ten?

5 A Yes.

6 Q More than 50?

7 A Probably.

8 Q And of all the trains you've seen, you've never personally  
9 seen material you believe to be coal or petcoke come off of a  
10 train; isn't that right?

11 A Yes.

12 MR. SULLIVAN: That's all I have. Thank you, Your  
13 Honor.

14 THE COURT: Any redirect?

15 MS. LOARIE: Nothing further.

16 THE COURT: You may step down.

17 RICHARD MECSKO, JR., HAVING BEEN FIRST DULY  
18 SWORN, TESTIFIED AS FOLLOWS:

19 THE CLERK: State your full name, and spell your last  
20 name for the record.

21 THE WITNESS: My name is Richard Andrew Mecsko, Jr.  
22 The last name is spelled M-e-c-s-k-o.

23 DIRECT EXAMINATION

24 BY MR. TEBBUTT:

25 Q Good afternoon, Mr. Mecsko.

1 A Good afternoon.

2 Q I'm just going to ask you a few background questions, sir.

3 Where do you reside now?

4 A I live in Lyle, Washington, which is on the banks of the  
5 Columbia River.

6 Q And how long have you lived there?

7 A I've lived in Lyle for eight years.

8 Q And where did you live prior to that?

9 A I lived about 15 miles west, along the Columbia River in  
10 White Salmon, Washington.

11 Q Do you have a family, sir?

12 A I do. I am married, and I have a four-year-old daughter.

13 Q Did you bring your daughter to trial with you today?

14 A I did not.

15 Q But you brought her to Seattle, right?

16 A I brought her to Seattle, yeah.

17 THE COURT: Some things a child shouldn't see.

18 Q (By Mr. Tebbutt) Mr. Mecsko, I'm going to do my best to  
19 get you on and off so you can get home with your daughter by  
20 the end of today.

21 Can you describe for us your educational background,  
22 please?

23 A Yes. I started my college education in University of  
24 Cincinnati in Ohio, and then I transferred to Kent State  
25 University in Ohio. Between my junior and senior year,

1 studying to be an environmental scientist, I got offered a  
2 job out here in Washington State as a health biologist for a  
3 large beekeeping operation.

4 And so I moved out here intending just to stay for the  
5 summer. When the summer was over, they offered me a  
6 full-time position, which I accepted. That job led to a  
7 position working for the United States National Forest, which  
8 then led to a job working as a fisheries biologist,  
9 performing surgery on juvenile salmon, implementing radio  
10 tags to conduct a salmon passage study on the lower Columbia  
11 River -- I mean on the Snake River.

12 And then after a couple of years of working for USGS, I  
13 had the knowledge and experience available to start my career  
14 as an independent contractor, performing environmental  
15 science.

16 Q That's a long summer, sir.

17 So how long have you been an independent contractor?

18 A Thirteen years.

19 Q And so you've worked for USGS. That stands for "United  
20 States Geological Survey"?

21 A That's correct.

22 Q And have you done work for other federal or state  
23 agencies?

24 A Yes. I -- as an independent contractor, I've performed  
25 work -- environmental science work for the United States --

1 U.S. Army Corps of Engineers, for many public utility  
2 districts throughout the Columbia and Snake Basin. I've  
3 worked for other state agencies and many private entities, as  
4 well.

5 Q Have you done work for private corporations?

6 A Yes, I have conducted work for private corporations.

7 Q In the realm of environment cleanup?

8 A Yes. I am currently on a project in Kalama, Washington.  
9 We're mitigating chemical toxic spills at a chemical plant  
10 facility. Those historic chemical spills are working via  
11 groundwater towards the Columbia River, and we have a  
12 mitigation procedure in effect that collects those toxins.

13 Q Sir, when were you contacted to do some work related to  
14 this case?

15 A I was contacted in August of 2013.

16 Q And who contacted you?

17 A Columbia Riverkeepers, specifically Brett VandenHeuvel.

18 Q Do you know his title?

19 A I think he is president. I really don't know, to be  
20 honest.

21 Q Okay. And was there a protocol or a work plan that was  
22 developed through your work?

23 A Yes. There was a very introductory protocol that had been  
24 created.

25 Q And on the screen is Exhibit 1506. Is this the work plan

1 that you were given?

2 A Yes, that is correct.

3 Q And the work that you did, did you follow this plan to the  
4 black letter or did you vary from it at all?

5 A This particular scope of work was introductory. We worked  
6 together to evolve the scope of work after this current one  
7 was proposed.

8 Q And when you got out into the field, did you vary the work  
9 that was generally written on this work plan in order to fit  
10 field conditions?

11 A Yes, that is correct.

12 Q Okay. So let's go through that a little bit.

13 The first thing under "requested tasks," number one  
14 says "evaluate and refine a proposed design and protocol for  
15 a coal collection system." Did you design a coal collection  
16 system?

17 A Yes, I did.

18 Q What did you do to design that?

19 A I took the original design that was a prototype and I  
20 beefed it up to make it -- to make a float that would be  
21 accepted by the U.S. Coast Guard. I also made it have more  
22 flotation so that I was sure that it would stay afloat in the  
23 water throughout the study. I beefed up the anchoring system  
24 to make sure that it wouldn't lose its positioning in the  
25 river in high wind conditions.

1 Q Other than wind conditions, are there other environmental  
2 factors that you were concerned about that might affect a  
3 float?

4 A The combination in the Columbia Gorge, we have very high  
5 winds usually prevailing from the west and then we have the  
6 Columbia River has high velocity of waters that are moving  
7 towards the west. So the combination of that wind and moving  
8 water is something to really be concerned about if you are  
9 going to plan on anchoring anything in the Columbia River.

10 Q Are water level fluctuations also something of concern?

11 A That is correct. Because the Columbia is controlled by  
12 dams, it -- depending on the dam operation as well as yearly  
13 conditions, the water does fluctuate quite a bit on the  
14 shores of these rivers.

15 Q How much, in your experience, do the water levels  
16 fluctuate?

17 A There at Horsethief, it fluctuated approximately five  
18 feet, five to ten feet of -- of fluctuation on the shoreline.

19 Q So, again, so from the average it might fluctuate two to  
20 three feet up and two to three feet down?

21 A That's correct.

22 Q And that's true at Horsethief Lake. That's above what  
23 dam?

24 A That is above The Dalles Dam.

25 Q Okay. And have you done work in other sections of the

1 Columbia River?

2 A Yes. I conducted work, you know, at every hydro-powered  
3 dam on the Columbia River.

4 THE COURT: You know, at Biggs Crossing, if you're  
5 crossing from Washington into Oregon, off to the right there  
6 appear to be what looks like to be two barges that are  
7 permanently anchored there. Do you know what that's about?

8 THE WITNESS: I don't.

9 THE COURT: Okay.

10 MR. TEBBUTT: I always wondered that, too, Your  
11 Honor.

12 THE COURT: I think it is associated with the grain  
13 terminal over there. It's probably grain barges, but they  
14 never seem to move. They're always there.

15 THE WITNESS: Yeah, you're right. But I do not know  
16 what those are for.

17 THE COURT: All right. Go ahead.

18 Q (By Mr. Tebbutt) Okay. So I don't think the Columbia  
19 like you do, sir, but below The Dalles Dam there is another  
20 dam below that.

21 A Yes. Bonneville Dam.

22 Q So between those two, do you know what the water  
23 fluctuations are between those two?

24 A I don't know that offhand, the actual fluctuations between  
25 the dams. I don't know that.

1 Q Are they similar to the fluctuations above The Dalles Dam?

2 A Yes, they would be similar. There would be some  
3 differences based on the amount of water that is actually  
4 behind the dam, different projects.

5 Q And then below the Bonneville Dam are there any dams below  
6 that?

7 A No, there are not.

8 Q So is the river tidal to that point?

9 A Yes, it is.

10 Q So then the fluctuations are due to tide below the  
11 Bonneville Dam?

12 A Correct.

13 Q And above The Dalles Dam, there is another dam above that?

14 A Correct. John Day Dam.

15 Q Do you know what the fluctuations are in comparison to,  
16 say, the one above the one we were just talking about between  
17 The Dalles and John Day, above John Day, what are the  
18 fluctuations compared to that one?

19 A John Day is the second largest forebay of any of the dams.  
20 It's second to Grand Coulee. So because of the larger extent  
21 of that stretch of the reservoir, there is going to be a  
22 slightly higher amount of fluctuation in that reservoir.

23 Q Getting back to Exhibit 1506 --

24 MR. TEBBUTT: Your Honor, just for the record, I'd  
25 like to admit 1506.

1 MR. KLEIN: No objection.

2 THE COURT: It will be admitted.

3 (Exhibit 1506 admitted.)

4 Q (By Mr. Tebbutt) So we'll get to in a little bit some  
5 photographs of your design, but I just want to go through a  
6 little bit of this first.

7 So No. 2 was -- mentions your name. Your name is Elmo.  
8 Is that what you commonly go by?

9 A That is correct.

10 Q And you constructed the collection traps, correct?

11 A Yes.

12 Q And we'll describe those when we get to the photographs  
13 just because that will be a more useful time to do so.

14 A Okay.

15 Q Let's look at the design and frequency of coal collection  
16 in letter A on the first page.

17 You didn't write this, did you?

18 A No, I did not.

19 Q Okay. So Horsethief Lake was determined to be the area  
20 for the coal collection, correct?

21 A Yes.

22 Q Under A?

23 A Correct.

24 Q And B says "the sampling equipment will consist of two  
25 simple floating traps." Did you alter B of the design?

1 A Yes, I did.

2 Q And what did you end up doing out there?

3 A Letter B states that these traps that have already  
4 successfully been used to collect coal from the trains, I  
5 designed, as I mentioned earlier, based on the design that B  
6 refers to, I just beefed it up to allow it to handle the  
7 conditions of the Columbia.

8 Q Right.

9 A And as well, I made the removal procedure a lot more  
10 contained.

11 Q Right. We'll get to that in a minute.

12 A Okay.

13 Q But this says "two simple float traps were made."

14 Did you do more?

15 A That is correct. We added a third trap.

16 Q All right. And then letter C says that "the traps would  
17 be installed zero to three feet from the shoreline."

18 Did you alter that plan?

19 A Yes. We decided to make it five feet from the shoreline  
20 at low water.

21 Q Who is "we"?

22 A I believe I consulted with you on that as well as Brett  
23 VandenHeuvel.

24 Q Was that also a field decision that you made?

25 A Yes, yes.

1 Q Okay. And then the sampling frequency, D. Did you follow  
2 generally the sampling frequency plan?

3 A Yes.

4 Q Did you actually end up going out daily the first week?  
5 Under D, small A, you talked about high frequency. For the  
6 first week during proper weather, the trap would be checked  
7 daily. Did you go out daily the first week?

8 A I don't believe I went daily. I believe I went multiple  
9 times that first week but not every single day.

10 Q Did you keep records of when you went out and sampled?

11 A Yes.

12 Q So those records would accurately reflect how many times  
13 you went out and sampled?

14 A That is correct.

15 Q E of the protocol says to coordinate sampling with video  
16 evidence from motion-sensitive cameras. Did you do that?

17 A We attempted to do that but the cameras, after I mounted  
18 the cameras on the boxes, before I came back for my followup  
19 visit somebody had vandalized the floats and stolen the  
20 cameras.

21 Q So the cameras were gone and you weren't able to ever  
22 obtain any video or photo footage?

23 A That's correct. I never obtained any, nor did I view  
24 anything from those cameras.

25 Q Was the integrity of the tub still intact?

1 A Yes, it was.

2 Q And F says you would collect the samples and send them to  
3 a lab. Did you follow those protocols?

4 A Yes, I did.

5 Q Letter G is a picture of the design, at least is that the  
6 first design?

7 A That is correct. That is the design that was initially  
8 proposed.

9 Q Right. So what do you believe that to be a picture of the  
10 tub there?

11 A Can you ask the question again?

12 Q Yeah. Do you know what that's a picture of? Is that a  
13 picture you took?

14 A I did not take that picture.

15 Q This picture was provided to you as part of the study  
16 plan?

17 A Yes.

18 Q And again, these are pictures of what had been provided in  
19 the work plan to you?

20 A That is correct.

21 Q And a couple of pages down, this is Bates number 3262.  
22 The top picture again was a picture that was provided to you?

23 A Yes.

24 Q And the same with the picture in the bottom?

25 A Correct.

1 Q And the boat launch, is it located where it's indicated on  
2 that picture?

3 A That is accurate.

4 Q And the trap location, is that the approximate location of  
5 one of the floats that you installed?

6 A Yes. That would approximately be where float A was  
7 located.

8 Q And next page, 3263, is just a slightly different version,  
9 of the same thing, correct?

10 A Yes.

11 Q I'm going to show you, sir, Exhibit 1491. Is that a  
12 picture you took, sir?

13 A Yes, it is.

14 Q And is that a picture of the float that you made?

15 A Correct.

16 Q And which float is this?

17 A That is float A.

18 Q Okay. And describe for the court -- we were going to do  
19 that earlier but I wanted to wait until the picture was  
20 there. Describe for the court how you designed this float.

21 A Okay. I built it on three two and a half foot-long four  
22 by sixes standing from the high point to give it a little  
23 loft up over the water so that waves wouldn't enter the box.  
24 And then that frame of four-by-sixes was connected with an  
25 outer frame of two-by-fours . Underneath that framework I

1 had four crab buoy floats to give it the flotation it needed.

2 You can't see it in the photo but on the two by fours on  
3 the edge I had four eyebolts that my anchor lines were  
4 attached to to anchor to the bottom of the river.

5 If you look, you can see there is the box, it's a  
6 37-gallon Rubbermaid box, is sitting on top of a piece of  
7 plywood and I designed it so that piece of plywood had four  
8 nuts that I could unscrew. I would put a cap on the box,  
9 unscrew those nuts, pull the whole plywood platform with the  
10 box, bring that into the boat. And then I had a secondary  
11 piece of plywood with another box that I would then put back  
12 on to those bolts and screw on.

13 Q So the box was premounted on the plywood. You would  
14 change out the whole thing?

15 A That is correct.

16 MR. TEBBUTT: I'd like to introduce Exhibit 1491,  
17 Your Honor.

18 MR. KLEIN: No objection, Your Honor.

19 THE COURT: Admitted.

20 (Exhibit 1491 admitted.)

21 Q (By Mr. Tebbutt) 1493, is that a picture you took?

22 A Yes, it is.

23 Q And what does that show?

24 A That is showing Horsethief Lake looking south. You can  
25 see the train tracks on top of that causeway. Behind that

1 train track causeway is the actual Columbia River, and we're  
2 looking at the hills on the Oregon side of the river there.

3 Q Okay. And in the series 1493 is this another picture you  
4 took?

5 A Correct.

6 Q And again, where is that looking? What direction?

7 A I took that picture from approximately at the boat ramp  
8 where I would launch my boat. It's the Horsethief State Park  
9 boat ramp.

10 Q Looking in what direction?

11 A Looking east. Looking towards where I had my floats  
12 stationed.

13 Q Can you see one of your floats in that picture?

14 A Yes, you can.

15 Q Can you please circle it with your finger?

16 A With my finger?

17 Q Yes. Actually right on the screen. I forgot to tell you  
18 that.

19 A (Witness complies.)

20 Q So right in the middle of that little white spot just a  
21 few feet from the shore?

22 A That is correct.

23 Q And is that Float A or Float B?

24 A That appears to be Float B.

25 Q Is Float A visible in the picture?

1 A I think you might be able to see it in there, but I'm not  
2 sure.

3 Q Just with your finger approximate where Float A was  
4 located.

5 A (Witness complies.)

6 Q All right. And did the locations of Floats A and B stay  
7 the same throughout the study period?

8 A Yes, they did.

9 Q Did you ever have any problem with the anchoring?

10 A No, I did not.

11 Q Sir, the next picture in the series, this is Bates 265.  
12 What is that a picture of?

13 A That is a picture of my finger. I am right at the  
14 Horsethief State Park boat ramp where the train tracks cross  
15 the road there. That just a random spot I picked to display  
16 the fact that the coal is -- you're not -- it is not just a  
17 thin layer at the surface that if you dig down -- you know,  
18 you can keep finding coal as you move down, so I was just  
19 demonstrating with my finger.

20 Q And that's at the public boat ramp --

21 A Yes.

22 Q -- or near it?

23 A Yes.

24 Q And Picture 275, what is that a picture of?

25 A Once again, I'm standing there at the intersection of the

1 train tracks and the road down to the boat ramp. And now I'm  
2 looking west, and that is the edge of the train tracks, which  
3 is obvious, but all of this black that you can see is the  
4 coal that's deposited throughout the tracks. I mean, pretty  
5 much all the black stuff in here is the coal pollution that's  
6 been discharged there.

7 Q All right. And where in relation to that photo is the  
8 boat launch?

9 A If the picture went a little further, you'd see the actual  
10 boat ramp coming down right in here.

11 Q All right. Very good.

12 276, what is that a picture of?

13 A This, once again, is just a photo displaying the  
14 conditions of the environment there next to the train tracks  
15 at the boat ramp.

16 Q Is that near where you placed your floats?

17 A Yes. Actually, now that I look at it, this is near where  
18 I placed all my floats.

19 Q All right. And the same with 278?

20 A Correct.

21 Q 280, is that close to where the floats were, as well?

22 A Yes. I was on my boat taking a picture of the shoreline  
23 right by the floats there.

24 Q And 281, is that your hand in the picture?

25 A That's a friend of mine who helped me that day.

1 Q So you were with one other person that particular day?

2 A That is correct.

3 Q And what were you trying to do there?

4 A Here, we're demonstrating how far away the train tracks  
5 are from the edge of this causeway bank. And as I mentioned,  
6 our floats were at low water, five feet away from that  
7 shoreline. And this picture, the black tape is marking out  
8 five feet increments, so I wanted just to display that the  
9 train tracks are approximately 15 to 20 feet away from the  
10 edge of the Columbia River at that location.

11 Q Okay. And why did you use a pole?

12 A Well, for one thing, I did not want to trespass on their  
13 property. So I couldn't just go up there with a tape  
14 measure, so that was the solution I could think of to take  
15 the measurement without trespassing on any private land.

16 Q And is that the approximate location of one of the floats?

17 A Yes. The float is quite close to where we're at there.

18 Q And is that Float A or B?

19 A That would be Float A.

20 Q Is this before installation?

21 A No. This is when the study was happening.

22 Q All right. And what does Picture 284 show? Well,  
23 other --

24 MR. TEBBUTT: Sorry, Your Honor. We have a new  
25 witness, so I'm just trying to establish a little bit of

1 background. I know it is redundant for you.

2 Q (By Mr. Tebbutt) 284, what does that show, sir?

3 A 284 is another photo I took. This photo is below what  
4 scientists would call -- or fishermen -- the high river mark.  
5 And I wanted to display in this photo the way when the  
6 water -- and I would see this quite often out there. When  
7 the water would lap up onto the shores, it would pull the  
8 coal that was deposited in these rocks down into the river  
9 with it. And you can see it would create these little funnel  
10 shapes where the coal is falling between the cracks and the  
11 rocks as the water pulled it out into the river.

12 Q And how many times did you visit the Horsethief site  
13 during the time that you collected samples?

14 A Many. I don't know the exact number.

15 Q Dozens?

16 A Yes, dozens.

17 Q In your experience -- what was the -- using the Picture  
18 281, which is part of part of Exhibit 1493, how high have you  
19 seen waves wash up onto that area?

20 A Well, based on this picture, you can see the shadow of my  
21 fellow scientist there.

22 Q Yes.

23 A I guess I can write on this?

24 Q Yes, you can.

25 A So the water -- you know, the waves do get pretty large

1 out there on the Columbia when the wind is blowing. So, you  
2 know, there were times when the water was heading up into  
3 this region.

4 Q And what about water fluctuations? Where would you see  
5 some of the highest regular water levels without wave wash?

6 A I believe this picture was taken close to high level, but  
7 you can see a little bit of a line right in here. This looks  
8 like probably the high level mark right there.

9 Q The typical high water mark?

10 A Yes.

11 Q And 285 -- you also, by the way, sir, can clear the  
12 screen.

13 A Okay.

14 Q But I'll try to do it, too.

15 285, what does that show?

16 A So, once again, this is demonstrating the amount of coal  
17 that is just slowly falling down the rocks there at the  
18 causeway below the train tracks.

19 And if you look in this picture, you can actually see how  
20 the pellets of coal were constantly falling towards the  
21 river. So when the coal blew off the trains, the coal that  
22 lands on the shore there, a decent amount of it over time  
23 ends up in the river, and I witnessed that.

24 Q All right. Picture 288, which float is that, A or B?

25 A That is Float A.

1 Q And did you take that picture?

2 A Yes, I did.

3 Q The next picture, Bates No. 290, is that one of your  
4 floats?

5 A Yes, it is.

6 Q Is that A or B?

7 A That is Float B.

8 Q Okay. And what is different about this picture, about  
9 Float B?

10 A Float B is the float that we attempted to have those video  
11 cameras mounted to catch, you know, some video footage. Like  
12 I mentioned, they were stolen, you know, vandalized/stolen.  
13 You can still see the poles that I had the cameras mounted  
14 to.

15 Q You had two cameras mounted in that one?

16 A I did.

17 Q And where were the cameras pointed?

18 A One camera was pointed at the train to try to capture, you  
19 know, what I was experiencing, the coal coming out of the  
20 train cars. The other camera was pointed into the box to  
21 capture the coal entering the coal trap box.

22 Q When you say the coal that you were experiencing coming  
23 off the trains, had you experienced coal coming off the  
24 trains while you were out there?

25 A Yes.

1 Q And did you install the cameras after you had experienced  
2 this or before?

3 A I don't remember if the cameras were mounted before or  
4 after those incidents.

5 Q But the cameras are obviously gone in this photo, correct?

6 A Yes, correct.

7 MR. TEBBUTT: Your Honor, I'd like to move the  
8 admission of Exhibit 1493.

9 MR. KLEIN: No objection, Your Honor.

10 THE COURT: Admitted.

11 (Exhibit 1493 admitted.)

12 Q (By Mr. Tebbutt) Sir, showing you what's been labeled as  
13 Plaintiffs' Exhibit 1489, is that a document that you  
14 created?

15 A Yes, it is.

16 Q And was this the first invoice that you sent to my law  
17 offices for the work that you did in this case?

18 A That is correct.

19 Q And what does it describe?

20 A This describes the hours that I recorded on the -- on this  
21 contract, along with brief descriptions of what I  
22 accomplished during those hours. It also documents any  
23 supplies I had to purchase.

24 Q What is the hourly rate that you charge for your work,  
25 sir?

1 A For this job or generally?

2 Q For this job. Let's start with this job.

3 A This job, I charged \$30 an hour.

4 Q Is that less than your normal rate?

5 A Yes, that is less than my normal rate.

6 Q Why did you give a lower rate?

7 A I knew it was a small nonprofit. I normally contract for  
8 large entities, federal, you know, U.S. Army Corps of  
9 Engineers, which is the division of the Department of  
10 Defense. So I knew I was going to be working for one of my  
11 local nonprofits, so I reduced my rate just to -- just to  
12 make it feasible.

13 Q I'm sure they appreciate that.

14 And the second page of Exhibit 1489, does this start to  
15 list specific entries for dates that you did your work?

16 A That is correct.

17 Q So does this describe -- well, on 8/21, the first entry,  
18 8/21/13, this describes getting a number of things, the  
19 camera and gathering some of the equipment, correct?

20 A Yes.

21 Q And based on this document, when did you first install the  
22 first float?

23 A The first float, I believe, was -- yes, 8 /25 of 2013.

24 Q Okay. So the next page, page 3, says near the top that  
25 Float A was deployed on 8/25, correct?

1 A That's correct.

2 Q And then you built the second float?

3 A Yes.

4 Q And when was that installed?

5 A That was installed a few days later. I wanted to, you  
6 know, get one float out there to see how it handled the river  
7 conditions before I built the second float and deployed it.

8 Q Okay. And then you built and deployed. When did you  
9 deploy Float B?

10 A It was 8/27 of 2013.

11 Q Okay. And that's reflected in the entry for 8/27?

12 A Correct.

13 Q And did you get a sample from the first float on 8/27?

14 A I did, correct.

15 Q And how much material did you gather; do you know?

16 A Well, it says somewhere in there. I don't know if it is  
17 on this page.

18 Q Yeah. Is there another document that you created that has  
19 the weights of the samples that you collected?

20 A That is correct. And the fieldwork I'm in, any data that  
21 you collect might get written up in these written reports,  
22 but the data is stored and managed in Excel spreadsheet form.

23 Q Right. So describe for the court the process of how you  
24 collected a sample through the process of getting it ready to  
25 ship to the lab. And I may stop and ask you some questions

1 along the way.

2 A Sure.

3 Q But let's say starting the Float A on 8/27, that was the  
4 first sample that you collected?

5 A That is correct.

6 Q And what did you do to collect the sample of Float A?  
7 Describe that to Judge Coughenour, please.

8 A So I would maneuver my boat up to Float A, where I would  
9 then tie my boat to Float A onto one of the eyebolts off the  
10 side. And then, like I mentioned, I had four bolts, four  
11 nuts, that were holding that piece of plywood onto the  
12 platform.

13 The first thing I would do is put the Rubbermaid top on  
14 the box to ensure that the sample was not altered. Then I'd  
15 undo those four nuts, pull the platform off of the float, set  
16 it in the boat. I had a second box mounted to a piece of  
17 plywood there in the boat as well. I would take that, put it  
18 down on top of the bolts, reapply the nuts, and then remove  
19 the lid.

20 Q All right. And let me just stop you there. So the tub  
21 that you had for Float A that first time was in the boat, and  
22 the lid was on it?

23 A Correct.

24 Q Then let's just -- without complicating it, say -- okay,  
25 so Float A, then, at the end of the day you took back to the

1     **boat launch?**

2     A    Yes.  As soon as I would finish my work, I would return to  
3     the boat ramp.  The lid would stay on that 37-gallon bucket,  
4     or box.  And I would take the whole plywood lid with the box,  
5     put it from the boat into my truck, which has a canopy on it,  
6     so I was sure that nothing would happen to the boxes, that  
7     they were in safe transport.

8     Q    All right.  And each time you went to the floats, you had  
9     to -- the flood boat, you had to launch it each time.  You  
10    didn't keep the boat in the river somewhere?

11   A    That is correct, yes.

12   Q    And then --

13                 THE COURT:  Mr. Tebbutt, I feel like I'm watching  
14    corn grow.

15                 MR. TEBBUTT:  I hear you, Your Honor.

16                 THE COURT:  Let's pick it up.

17   Q    (By Mr. Tebbutt)  Sir, you then drove back to your place  
18    of business?

19   A    Yes, my office, correct.

20   Q    And that's attached to your house?

21   A    Yes, it is.

22   Q    And what would you do with the sample at that point?  How  
23    would you collect the sample to send to the lab?

24   A    I had a paper funnel that I would take the coal from the  
25    collection box, and then I would put it into a sterile

1 Nalgene 50 milliliter bottle that I would cap and label.

2 Q Okay. And so you labeled each bottle separately?

3 A Yes. Correct.

4 Q Did you have labels that you filled out and put on the  
5 bottle?

6 A No. I would Sharpie directly onto the bottle. That way,  
7 there was no confusion, you know, the wrong label went onto a  
8 bottle.

9 Q Okay. And then did you fill out chain-of-custody forms to  
10 go along with those?

11 MR. KLEIN: Objection, leading.

12 THE COURT: Overruled.

13 A Yes, I would fill out a chain of custody that was provided  
14 by ALS Lab.

15 Q (By Mr. Tebbutt) And ALS Lab is to whom you sent the  
16 samples?

17 A That's correct.

18 Q Okay. So you said you poured the material in the tub  
19 through a, like, paper funnel?

20 A That's correct.

21 Q Were there residuals in the tub that you tried to get into  
22 the bottles or not?

23 A No. It was -- I was pretty good at vibrating the  
24 container so that, you know, I would get -- you know, I'm  
25 sure there was some microscopic dust and some -- you know,

1 some real fine particles in the bottom. But because of that,  
2 I would wash each container out when I was done.

3 Q You didn't try to get the dust that had collected along  
4 the sides or the bottom into the sample?

5 A I tried to get, you know, as much as possible. The study  
6 didn't -- you know, what I was informed on the study was just  
7 to collect these samples. The lab had a minimum threshold, a  
8 minimum weight that they needed to perform their lab test on  
9 these samples.

10 Q Do you know what that minimum threshold is?

11 A That was five grams.

12 Q Okay. And when did you determine that for certain, those  
13 five grams?

14 A The lab let me know before I sent my first shipment in.

15 Q Okay. And have you confirmed that again subsequently with  
16 the lab?

17 A I did. I called the lab yesterday just to make sure my  
18 memory was correct on that.

19 Q Okay. So Float B was deployed on 8/27. When did you  
20 decide to put a third float in?

21 A We decided to add a third float at Little Spearfish Lake  
22 shortly after the study got started. I actually deployed  
23 that float on the 31st of September.

24 Q Okay. And Float C, how far down river from -- was it A or  
25 B, the further upriver one?

1 A B would be the furthest upriver float.

2 Q Okay. So how far downriver was C from A?

3 A A little less than three miles --

4 Q Okay.

5 A -- approximately.

6 Q And, again, the same general protocol, about five feet  
7 from the shoreline?

8 A Exact protocol, different spot.

9 Q Okay. And how close to the track was Float C?

10 A Float C was approximately the same distance from the track  
11 as A and B.

12 Q All right. Second invoice as part of Exhibit 1489 dated  
13 10/15/13, that describes what you've done between 8/31 and  
14 10/15, correct?

15 A That is correct.

16 MR. TEBBUTT: Your Honor, I'm going to spare going  
17 through this. You can read it as well as anybody.

18 THE COURT: Thank you.

19 Q (By Mr. Tebbutt) The third invoice dated December 6,  
20 2013; is that correct?

21 A That is correct.

22 MR. TEBBUTT: I might as well move this into evidence  
23 now, Your Honor, Exhibit 1489, if I haven't already.

24 MR. KLEIN: No objection, Your Honor.

25 THE COURT: Admitted.

1 (Exhibit 1489 admitted.)

2 Q (By Mr. Tebbutt) And the fourth invoice dated February  
3 20, 2014. That's yours as well, correct?

4 A That is correct.

5 Q And that includes tasks of removing the floats?

6 A Yes.

7 Q And that was done as indicated in the invoice sometime in  
8 February of 2014, correct?

9 A Correct.

10 Q All three floats were removed?

11 A Yes. Including all my anchoring supplies. Everything  
12 that I had floating was removed.

13 Q Sir, showing you Exhibit 1158, this is an Excel sheet.  
14 Does it have four different tabs?

15 A Yes, four worksheets.

16 Q Describe for the court what the first tab is that we see  
17 here before us?

18 A This is the actual graph of the wind data so the actual  
19 mile per hour of the winds experienced throughout the study  
20 at Horsethief Lake. I should correct it. This data came  
21 from The Dalles Dam, which is a couple of miles downstream  
22 from Horsethief Lake.

23 Q So the wind speeds on the right side of the graph are  
24 based on information from The Dalles, which is upriver,  
25 correct? Or downriver?

1 A Downriver.

2 Q Downriver. About how far?

3 A Less than five miles.

4 Q As we know, the winds do vary a little bit in there so you  
5 might not be exact, correct?

6 A Yeah.

7 Q But that was the closest station you could find?

8 A Exactly.

9 Q On the left side of the axis is the graph, the sample  
10 size?

11 A Correct.

12 Q So the sample size was in grams of what you collected?

13 A Yes.

14 Q On the very bottom is the date that the samples were  
15 collected; is that right?

16 A Yes. That is correct.

17 Q Okay. And then for each float there is a different color?

18 A That's correct.

19 Q So the sample data, the actual number of -- the actual  
20 amount of material that was collected -- and we haven't got  
21 to the weighing part yet, we'll get to that in just a  
22 minute -- but the results were depicted in this Excel  
23 spreadsheet?

24 A That's correct.

25 Q And is this the accurate Excel spreadsheet of the weight

1 of the samples?

2 A Yes, it is.

3 Q So the first sample, we looked before and on 8/27 it  
4 indicated that you took Float A away and collected a sample?

5 A I took a sample from Float A, yes.

6 Q Right. And was there sufficient amount of material in  
7 Float A on 8/27 to send it to the lab?

8 A No. 8/27 was under the minimum threshold that the lab  
9 required.

10 Q So are these accurate representations of the date the  
11 sample was taken?

12 A Yes, they are.

13 Q And describe for the court how you weighed the samples.

14 A I have a triple beam scale, which is a very accurate scale  
15 and I also had calibration weights. And so I would calibrate  
16 the scale to make sure it was reading accurately and then I  
17 would measure an empty 500-milliliter Nalgene bottle so I  
18 knew what to subtract from its over weight and then I would  
19 weigh my sample, subtract that empty container from the total  
20 weight and that would leave me with the weight of the sample  
21 itself.

22 Q Sir, did you also create a final report?

23 MR. TEBBUTT: I'd like to move into evidence 1158,  
24 Your Honor.

25 MR. KLEIN: Your Honor, to clarify for the court, are

1 all four tabs of this exhibit being moved into evidence?

2 MR. TEBBUTT: Yes.

3 MR. KLEIN: No objection.

4 THE COURT: It is admitted.

5 (Exhibit 1158 admitted.)

6 Q (By Mr. Tebbutt) The last tab, this has the recordings of  
7 both. Tab 4 has the wind speeds, the typical wind speeds of  
8 the day; is that right?

9 A Yes. That would be your average and then your high-gust  
10 speeds.

11 Q So if there are big gusts, these would be depicted as  
12 well?

13 A Yes, that's correct. And this data comes from  
14 northwestwind.net.

15 Q So there are examples of the gusts as well?

16 A Yes, correct. When it was provided by the website, I  
17 would include them.

18 Q That was a complete set of information you reviewed. You  
19 didn't delete anything from that?

20 A No. That is complete.

21 Q And, sir, Exhibit 1494, is this the final report that you  
22 did in this case?

23 A That is correct.

24 Q And you created this document yourself?

25 A I did.

1 Q Did you ever find any errors in this report?

2 A I did find some errors.

3 Q Okay.

4 MR. TEBBUTT: I'd like to move Exhibit 1494 into  
5 evidence.

6 MR. KLEIN: No objection.

7 THE COURT: It is admitted.

8 (Exhibit 1494 admitted.)

9 Q (By Mr. Tebbutt) And so going to the second page of  
10 Exhibit 1494, does this document indicate the weight of the  
11 samples that you collected?

12 A Yes, it does.

13 Q So when a sample is collected, you would later put the  
14 weight into these invoices?

15 A That's correct.

16 Q Or I take that back. These entries.

17 A Yes.

18 Q And these entries were also reflected in your invoices?

19 A Yes, they were.

20 Q So how -- what was the method for creating this report  
21 from the invoices?

22 A Well, to create the invoices I would, you know, when I  
23 would sit down to write the invoice, which was in a sense my  
24 ongoing report, I would go look at my samples, at the actual  
25 samples and record then the weight into those invoices of the

1 samples.

2 Q Okay. And did there come a point -- well, is everything  
3 in this report accurate?

4 A No, not in the final report. There was some transcribing  
5 errors, copy and paste errors.

6 Q Are those the only errors in this report that you believe?

7 A That I know of, yes.

8 Q Have you done an analysis of the errors that were made in  
9 the weight of the material that you collected?

10 A I did put together a small report that provides the  
11 corrections to the errors I made and a small evaluation of  
12 the differences between the errors and the accurate values.

13 Q And did you -- are you able to remember all the specific  
14 errors that were made or would it be helpful for you to  
15 review that piece of paper where the errors are corrected?

16 A It would definitely be helpful, considering there is a  
17 bunch of numbers. You know, it would be nice -- it would be  
18 hard for me to pull those numbers off of memory.

19 Q Do you have that piece of paper with you right now?

20 A I do not.

21 Q We have -- did you bring --

22 A Yes, I provided it.

23 Q Not on the stand?

24 A Not on the stand, no.

25 MR. TEBBUTT: Your Honor, may I have the witness.

1 THE COURT: Let's take a 15-minute recess.

2 (Court in recess.)

3 THE COURT: All right.

4 MR. TEBBUTT: Your Honor, forgive the slight delay,  
5 but I was just talking with counsel a little bit longer.

6 THE COURT: No problem.

7 Q (By Mr. Tebbutt) Mr. Mecsko --

8 MR. KLEIN: Your Honor, I've just been handed a  
9 document by Mr. Tebbutt that I believe he plans to now go  
10 through with Mr. Mecsko that is corrections to his report.  
11 And I haven't seen this document before 30 seconds ago. So  
12 I'm going to preemptively object to this being the basis of  
13 questioning for this witness. They were obligated to produce  
14 it earlier than now.

15 THE COURT: It can't be admitted into evidence, but  
16 it can be used to refresh the witness's recollection.

17 MR. TEBBUTT: Thank you, Your Honor. That was the  
18 intent.

19 Would Your Honor like to have a copy?

20 THE COURT: No.

21 MR. TEBBUTT: Okay.

22 Q (By Mr. Tebbutt) Mr. Mecsko, we were, before the break,  
23 just talking about your report and some errors in it.

24 What type of errors were they?

25 A They were copy and paste errors, transcribing errors.

1 Q Okay. And the first error -- and we're looking at --

2 THE COURT: Counsel, let me suggest this: I don't  
3 see the necessity to go through all these. Why don't we  
4 admit it for illustrative purposes only, and then it will be  
5 subject to your cross-examination if you want to cross on it,  
6 but I really don't need a lot of testimony about minor errors  
7 in this report. Okay?

8 MR. TEBBUTT: That's fine with me, Your Honor.

9 MR. KLEIN: And, Your Honor, I do plan to ask him  
10 questions about how the errors happened. So to the extent  
11 Mr. Tebbutt wants to ask those questions, I won't object.

12 THE COURT: That's fine.

13 MR. TEBBUTT: I'll make it quick, Your Honor.

14 THE COURT: So this is being admitted for  
15 illustrative purposes only.

16 MR. TEBBUTT: Understood. Do we need a number on it?

17 THE CLERK: It will be 1518.

18 MR. TEBBUTT: 1518 illustrative. Okay.

19 Q (By Mr. Tebbutt) Sir, you were starting to say the errors  
20 were cut-and-paste errors?

21 A That's correct.

22 Q And just describe, if you would, just a little bit how you  
23 believe the errors occurred.

24 A When I created the final report, the first couple of  
25 paragraphs were created for that final report, a summary of

1 what had happened. The rest of the report was just copy and  
2 pasted out of those invoices that we've been going through.  
3 I just thought it would be nice to just gather all the  
4 documents that I created into a final report.

5 Q Okay.

6 A And somehow -- you know how computers are. You think  
7 you're doing one thing, and then you find out later sometimes  
8 that what you copied was not what you intended to copy.

9 Q And so the illustrative -- the numbers in the illustrative  
10 Exhibit 1518, are they consistent with the numbers that we  
11 looked at in the prior exhibit, 14 -- in Exhibit 1158, the  
12 spreadsheet numbers?

13 A Yes.

14 Q Okay. And so there were some transpositional errors for  
15 Float A, correct?

16 A Correct.

17 Q And Float B?

18 A Correct.

19 Q And Float C?

20 A That's correct.

21 Q And what was your ultimate conclusion about those errors?

22 A The six errors that happened on Float A and B and the five  
23 errors on Float C, they were repeating values. So somehow  
24 when I copied the value on September 8th, that value kept  
25 repeating in the final report for -- instead of the actual

1 weight of the samples, there was a repeating value. For  
2 instance, Float A, 6.1 grams, was repeated six times instead  
3 of the actual values.

4 Q So let me stop you there. Float A and B values work  
5 together; is that correct? They were in the same  
6 cut-and-paste error?

7 A That's correct.

8 Q And then the Float C error was a separate cut-and-paste  
9 error?

10 A That's correct.

11 Q Okay. I'll move on.

12 THE WITNESS: Am I allowed to add something?

13 THE COURT: No.

14 MR. TEBBUTT: I don't think it's necessary at this  
15 point.

16 THE WITNESS: Okay.

17 Q (By Mr. Tebbutt) Okay. Again, there were some samples --  
18 there were times when you went out to the tubs and brought  
19 the tubs back, but there was an insufficient amount of  
20 material to send to the lab, correct?

21 A That's correct. It did not meet their minimum threshold  
22 of five grams.

23 Q Okay. And so at some point during the study period, did  
24 you make a field determination of whether there was  
25 sufficient material in the tub to collect?

1 A Yes, I did.

2 Q Once after a couple of weeks and you got familiar with the  
3 amounts?

4 A Yes. I learned what under five grams looked like, and so  
5 I knew when a float had collected enough that I could  
6 actually send a sample to the lab.

7 Q Okay. Was there ever a time that you went to any of the  
8 three tubs and found no coal in them?

9 A No. There was always some coal in the boxes.

10 Q Okay. But sometimes not enough to send to the lab,  
11 correct?

12 A That's correct. I should say on my repeat visits, there  
13 was always coal in those boxes. When I deployed them, as I  
14 mentioned, they were cleaned and emptied. But you are  
15 correct. Every time I went back, even if it wasn't a viable  
16 weight for the lab to accept, there was always coal in the  
17 boxes.

18 Q Right. And then the next time you'd come back, if there  
19 was a viable sample, you would take that and record that,  
20 correct?

21 A That is correct.

22 Q Okay. And that's what you sent to ALS Laboratories?

23 A Yes.

24 Q And the ALS Laboratory sheet, which is Plaintiffs' Exhibit  
25 1495, that has the results of the samples that you took,

1 correct?

2 A Yes.

3 MR. TEBBUTT: Okay. Your Honor, I move into evidence  
4 1495.

5 MR. KLEIN: No objection, Your Honor.

6 THE COURT: Admitted.

7 (Exhibit 1495 admitted.)

8 MR. TEBBUTT: And just so Your Honor knows, all of  
9 the samples that are depicted in 1495 have been stipulated by  
10 counsel as coal.

11 THE COURT: All right.

12 Q (By Mr. Tebbutt) Sir, while you were out collecting coal,  
13 how many times -- and, again, during the period of the study,  
14 late August 2013 till the last sample was collected,  
15 actually, in February of 2014, correct?

16 A Correct.

17 Q And that's not reflected in the spreadsheet in Exhibit  
18 1158, is it, a very last sample?

19 A That is correct. It is not.

20 Q Okay. Is that reflected in another document that you  
21 have? Is that in 1494?

22 A Which one was 1494? It would be in --

23 Q In the final report?

24 A I believe so.

25 Q Actually, it doesn't look like the last sample from 2014

1 is in there, does it?

2 A No. It would be in my final invoice.

3 Q Final invoice?

4 A Yeah.

5 Q While we're looking for that, how many times, while you  
6 were out picking up the tubs, did you see coal trains go by?

7 A I didn't keep a record. I'd say more -- approximately 50  
8 percent of the time.

9 Q Okay. About how many coal trains, would you say?

10 A More than I could, you know, keep a collection of in, you  
11 know, without actually documenting it.

12 Q Okay. And you didn't indicate in your field notes if a  
13 coal train went by when you were out in the field, correct?

14 A No, that was not part of the study.

15 Q Why not?

16 A It wasn't requested.

17 Q All right. Were there any times when you were out  
18 collecting the tubs that you saw coal coming off any of the  
19 trains?

20 A Yes.

21 Q How many times?

22 A Coal just coming off the trains?

23 Q Yes.

24 A During the study --

25 Q While you were out in the field at Horsethief Lake in the

1 boat?

2 A There were two times that I saw the coal for sure coming  
3 out of the coal trains, out of the train cars themselves and  
4 landing in the river as well as in my collection boxes.

5 Q Describe -- when was the first experience that you had  
6 like that?

7 A It was at the beginning of the study. I had all three  
8 floats out. It was in September, in early September.

9 Q Okay. And describe the experience.

10 A The Columbia Gorge, as I mentioned, is very windy. But  
11 when you live there, you learn that seldom does the wind blow  
12 consistently all day long. There are peaks and then even on  
13 some of the windiest days there will be times where the wind  
14 is just not blowing at all in particular area that might have  
15 been really window in an hour prior.

16 The days I was going to go check my floats I would  
17 normally look at the weather forecast, the wind forecast and  
18 try to get out there in the least windy time because trying  
19 to maneuver a boat and work on a float in very wavy  
20 conditions is a lot more difficult than when it's calm.

21 Q Let me stop you there for a minute.

22 Is it a fairly small boat, 15, 17 feet?

23 A Yeah, probably 17 feet.

24 Q So the first time you saw coal coming off the trains,  
25 where were you?

1 A I was finishing up at Float A.

2 Q Okay. And what happened?

3 A I was leaning over onto the float, and I had just been  
4 putting the nuts back on the replacement container platform  
5 and I started noticing I was being hit with decent-sized  
6 pellets. And it startled me at first and then I -- as I  
7 stood up, I noticed that it was not just hitting me, it was  
8 hitting the windshield of the boat, it was collecting in the  
9 boat. That's when I looked up and thought, oh, this is coal.

10 And from where I was at, I could see it coming directly  
11 out of the coal train cars just raining down on me. It was  
12 like, you know, a mid-summer rainstorm where it's just really  
13 large rain. Pellets coming down. As I looked at the river  
14 around me probably going a good ten, fifteen feet out into  
15 the river, it looked like a summer rainstorm. It looked like  
16 raindrops coming down on the water. I was watching it  
17 collect in the box, collecting in the folds of my float  
18 jacket, my survival jacket, you know, getting in my hair.

19 It was definitely a shocking moment for me, you know, even  
20 seeing all that coal everywhere, to actually experiencing it  
21 like blowing in your face and just seeing it, you know, being  
22 discharged into the river at that volume was very disturbing.

23 Q So the float was about five feet from the shore, correct?

24 A Correct.

25 Q And your boat was where in relation to Float A?

1 A I was tied to the float with the bottom of the boat facing  
2 into the wind, which is the west.

3 Q Were you offshore on the Columbia River side, the Oregon  
4 side, if you will, of Float A?

5 A Correct.

6 Q And the boat width is about five, six, seven feet?

7 A Probably about five feet.

8 Q And how far out beyond the boat could you see the coal  
9 hitting the water?

10 A At least ten feet.

11 Q Okay. Did you see any coal landing in the tub?

12 A I did. In Float A's tub. And as I mentioned, I was  
13 finishing up at Float A when this happened and out of my  
14 curiosity, I wanted to see if the same thing was happening at  
15 Float B --

16 Q Uh-huh --

17 A And so I boogied over there as fast as I could to get to  
18 Float B while that train -- that coal train was still  
19 passing. And I did arrive --

20 Q Let me stop you for just a second here.

21 Float B was, what, 50 to 100 yards upstream? Does that  
22 sound right? Or maybe a little more? You tell me.

23 A Yeah, a little more. I'd say 100 yards, approximately.

24 Q Okay. So did you get to Float B in time while the train  
25 was still coming by?

1 A I did, yes.

2 Q Okay. And about at what point in the train, you know, by  
3 thirds or quarters or so was -- how much was left of the  
4 train by the time you got to Float B?

5 A Probably less than a quarter of the train.

6 Q And what did you experience at Float B?

7 A I experienced the same thing. I didn't take the time to  
8 tie up to the float so I kind of just maneuvered the boat  
9 where I could sort of hang out right next to the float and I  
10 watched the same -- same experience. It was like a violent  
11 storm of coal. And once again I was able to see it coming  
12 directly out of the train cars, hitting me, the boat,  
13 entering the float box and once again discharging into the  
14 river at levels that even surprised me.

15 Q Okay. Let me go back to Float A for a second because I  
16 just want the court to understand what you did to finish up  
17 at Float A.

18 So you picked up, you were just finishing up, you said,  
19 at Float A?

20 A Correct.

21 Q So was Float A still -- was the box that you were going to  
22 pick up still deployed?

23 A No. I had already removed the box, and I had already  
24 positioned the replacement box on to the bolts. I just had  
25 to tighten up the nuts.

1 Q Okay. So the new box was in place at that point?

2 A Yes, correct.

3 Q Okay. And the float, did you put the lid on the float  
4 while that train was approaching? The float that you had  
5 removed?

6 A Yes. The lid to the float gets put on before I remove it.  
7 The lid on the box is in place before I remove that box  
8 from --

9 Q I see.

10 A -- the float.

11 Q So where did you put Float A with the lid on it?

12 A It was in the boat next to me.

13 Q And did you see anything hit that box while you were in  
14 the boat?

15 A Definitely. The lid to these boxes along the edge has a  
16 corrugated pattern and I do remember noticing the coal was  
17 hitting the box and sort of -- because of the slight angle on  
18 the box, it was collecting in that corrugated ring around  
19 the top of the box.

20 Q And that didn't become part of the sample that you weighed  
21 later, right?

22 A No, it did not.

23 Q Okay. And now I'm back to Float B. You testified that  
24 you saw coal getting into Float B as well?

25 A That is correct.

1 Q And so describe what you did or what you saw at that point  
2 in Float B?

3 A So as I was watching the coal coming out of the train  
4 cars, hitting me, the boat, you could hear the sound of the  
5 coal hitting the aluminum boat and the windshield, the glass  
6 windshield, I could hear it hitting the platform that I had  
7 on my float, hear it hitting the Rubbermaid as it entered the  
8 box. It was such an intense experience. I remember thinking  
9 to myself, I need to find a way to raise some money so I  
10 could get like the governor of Washington or the mayor of  
11 White Salmon. If I could get people of authority out here to  
12 witness, to actually be in the river while this coal is  
13 coming out of these train cars in this massive discharge and  
14 hitting you literally in the face, that would -- I mean, I  
15 don't think they would be quiet on the issue anymore if they  
16 actually could go out there in a boat and experience that. I  
17 remember thinking that.

18 Q Did you make notes in your field notes about that  
19 experience on that day?

20 A I did not.

21 Q Why not?

22 A As an environmental scientist, you know, that wasn't part  
23 of the protocol. That was just my personal observation so,  
24 no, it didn't go into my notes.

25 Q You said this happened a second time. You were out when a

1 train came by and you were hit by coal?

2 A That's correct.

3 Q When was the second time?

4 A The second time was probably about two weeks later.

5 Q And where were you when you first saw the train?

6 A That time I was strictly at Float B.

7 Q And describe the experience.

8 A A very similar experience. Quite similar, like -- like  
9 the way it looks when it's raining and you can just see the  
10 dimples on the water. I do remember one -- on that second  
11 time one piece catching in one of my folds of my sleeve of my  
12 jacket and being quite alarmed about how large the chunks of  
13 coal were.

14 Q Can you describe about how large they were?

15 A If you think of a thumbtack, the kind that have the little  
16 circle that you push your thumb on, they were that size and  
17 at times even larger than that.

18 Q And that day, how far out into the water could you see the  
19 coal hitting?

20 A The same. At least ten feet away from my boat, away from  
21 the float. So yeah, probably at least fifteen feet out into  
22 the river from the float.

23 Q I think you said that you saw coal coming from every car.  
24 You didn't look at every car in the train because were you  
25 looking at the floats, too?

1 A The second time I was stationed at Float B, so I did pay a  
2 lot more attention. I just stopped what I was doing and  
3 just -- I wasn't in as much shock and awe as I was the first  
4 time because, you know, it was happening again and so I did  
5 spend more time observing what happened the second time.

6 Q And can you -- were there any coal cars that you didn't  
7 see coal coming from that you observed?

8 A No. It was very uniform. The coal was coming off of the  
9 train cars in a uniform manner but there were -- I do  
10 remember there were some cars that really had a lot coming  
11 off, more so than the continual uniform onslaught. Every  
12 once in a while there would be a car would go by and it was  
13 just -- just outrageous. The volume would almost double.

14 Q Okay. Sir, have there been other times other than this  
15 study that you have experienced coal coming from trains?

16 A Yes.

17 Q When was the first time?

18 A The first time, it would have been 2008, I believe.

19 Q And where were you?

20 A I was conducting water quality work at John Day Dam.

21 Q Do you know what time of the year it was?

22 A It was, I believe, November.

23 Q Of 2008?

24 A Yes.

25 Q Okay. And where specifically along the river? You said

1 near John Day Dam. Was it above or below?

2 A It was below John Day Dam, approximately plus or minus --  
3 around ten miles below the project.

4 Q So below John Day Dam?

5 A That's correct.

6 Q And what would be the nearest city or marker?

7 A I was actually right across the river. I was on the  
8 Washington bank. Across the river on the Oregon side is a  
9 small town called Rufus.

10 Q Okay. And tell us your experience that day. What was  
11 your experience?

12 A That day I pulled up on to shore, I had a water quality  
13 instrument deployed from the bank of the river out into the  
14 river. I was collecting total dissolve gas and temperature,  
15 and I was on the return visit to collect that device so we  
16 could download the data. And as I pulled up to the shore,  
17 the train was passing and it was similar to the experience at  
18 Horsethief, not as intense. I think the train tracks might  
19 have been a little farther away from the river's edge at this  
20 particular location. But once again I was being pelted with  
21 coal, the boat was collecting coal.

22 Q You were in the boat?

23 A I was in the boat. I did get out of the boat to get on  
24 shore to get my equipment but then I actually jumped back in  
25 the boat because I was not going to get pelted, you know.

1 And it took me a second to realize like, oh, this is a  
2 product coming off of the train.

3 Q Did you observe the train, too?

4 A Yes, I did.

5 Q Did you observe the coal coming from the tops of the  
6 train?

7 A I did see it coming out of the tops of the train, yes.

8 Q And were there any cars in that train that you didn't see  
9 coal coming out of?

10 A No. Once it started, it continued until the train went by  
11 and as a matter of fact, after the train -- and this was the  
12 same for the instances at the Horsethief sampling sites --  
13 after the train went by it continued for at least, you know,  
14 probably around ten seconds.

15 Q Had there been other times and other places where you've  
16 experienced being hit by coal?

17 A Yes.

18 Q Where?

19 A I was one time recreating in my town of Lyle, Washington.  
20 We have the mouth -- the Klickitat River enters the Columbia  
21 River right on the western edge of the town of Lyle. There  
22 is a train bridge there and below that bridge to the west on  
23 the shores of the confluence of the Klickitat where the  
24 Klickitat meets the Columbia is a small band of rock that  
25 some of us rock climb at. And I was actually down there rock

1 climbing one afternoon when I experienced it.

2 Q So what were you doing under there?

3 A I was rock climbing, bouldering without ropes. I was just  
4 by myself just getting a little afternoon --

5 Q How close to the water was the place where you were  
6 bouldering?

7 A The wall extends probably about 150 feet. It starts at  
8 the water's edge and moves inland about 150 feet. At the  
9 time I was probably about 20 feet from the water's edge when  
10 I first started noticing it.

11 Q And how far from the tracks?

12 A Probably 20 feet vertically.

13 Q And describe the experience.

14 A I had just gotten done climbing and was standing there on  
15 the beach when I started noticing I was getting hit by  
16 something. And the particular area there where we're  
17 climbing is all white sand on the Klickitat bank there and so  
18 I was seeing it hit on the sand, bounce around around me, and  
19 because of my prior experience I had a pretty good idea what  
20 it was but I wanted to be sure so I looked up and I could see  
21 the clouds of -- I can't even say clouds.

22 A lot of people use the word "dust" but really it's a  
23 mixture of dust and particles and, like I said, some of them  
24 are even -- you could even consider pebbles. But I could see  
25 that coming down. And out of just natural instinct, I put my

1 gaze down across the bridge to see the train as it was coming  
2 at me, and when I looked up the tracks like that, I could  
3 actually see, as they were going across the bridge trestle,  
4 the coal coming out of the train cars and, once again,  
5 raining into the river.

6 Q You actually saw it hitting the water?

7 A In the Klickitat River, correct.

8 Q There really wasn't much of a choice for it to go; at  
9 least some in there, right?

10 MR. KLEIN: Objection.

11 THE COURT: Sustained.

12 Q (By Mr. Tebbutt) Had there been other times when you'd  
13 been hit by coal coming off the coal trains?

14 A That was the only times I'd been hit by coal.

15 Q Had you seen it come off the trains and go into water and  
16 other places?

17 A I have seen it coming off trains countless times, but  
18 seven to eight times I've been in the right location where  
19 I'm above the trains or just in the right vista where I could  
20 actually see the coal coming out of the train cars and  
21 entering a body of water.

22 Q And so you've seen this happen in multiple locations along  
23 through the Columbia River?

24 A That's correct.

25 Q When was the last time you saw a dusting train or, in your

1 words, a dusting particle, whatever, emission from the train?

2 A The last time I saw a train discharging coal would have  
3 been a few months ago, earlier in the year.

4 Q Where were you?

5 A I was driving on Highway 14. I was heading from my town  
6 of Lyle towards the town of Bingen.

7 Q What did you experience?

8 A At that particular moment, I was -- I was right around  
9 Exit 72, where you are above the train tracks, and the train  
10 is then maybe 20 feet from the river. And if you live in the  
11 Gorge, it's a real common thing to see this cloud of coal  
12 when the trains go by. The problem is being in the right  
13 place to see it actually -- specifically leaving the train  
14 cars and entering -- being discharged into the river.

15 So even though I do see the discharge coming around the  
16 coal trains and stuff, this time, in particular, was one of  
17 seven, eight times that I for sure saw it leaving the train  
18 cars because where I was on the Highway 14, I'm looking down  
19 on the train cars as they're passing, and I could see it  
20 coming out of the train cars and discharging into the river.

21 Q Any of those seven or eight times, were they -- were the  
22 coal trains adjacent to the water?

23 A Yes.

24 Q And were any of these seven or eight times when you could  
25 see a train going over a bridge, dusting?

1 A Some of them, yes, but at other timings, no. It was just  
2 driving along the shore.

3 MR. TEBBUTT: That's all I have, Your Honor.

4 THE COURT: All right. Cross?

5 MR. KLEIN: Thank you, Your Honor.

6 CROSS-EXAMINATION

7 BY MR. KLEIN:

8 Q Good afternoon, Mr. Mecsko.

9 A Good afternoon.

10 Q I'm Eric Klein, representing BNSF. I have a few questions  
11 for you. I'm hoping we can be done by the end of today's  
12 session. I'll do my best.

13 A Great.

14 Q Now, the 2013 coal discharge study that you performed for  
15 the plaintiffs, you were given a set of instructions on how  
16 to do that, right?

17 A I was given an idea of what they wanted to accomplish,  
18 with the -- with the leeway to, you know, change -- change  
19 the descriptions to conduct the best possible study.

20 Q This was not a study designed to figure out coal-loss  
21 rates in any kind of broad way, right?

22 A No.

23 Q It was not a study designed to be representative of  
24 coal-loss rates, right?

25 A Of the volume of the coal-loss rates? Is that what you're

1 saying?

2 Q Correct.

3 A Yes, that's correct.

4 Q It wasn't a study designed to measure coal-loss rates on a  
5 year-round basis, right?

6 A No.

7 Q And it was not a study designed to study coal-loss rates  
8 throughout the state of Washington, right?

9 A That's correct.

10 Q And, in fact, your clients instructed you to focus on the  
11 Columbia River at Horsethief Lake because that was a place  
12 where coal loss was known to happen, right?

13 A It was an area that was close to, you know, where I reside  
14 and -- yeah, it was one of the known areas that was in our  
15 neighborhood.

16 MR. KLEIN: Ms. Mendoza, can we see Exhibit 1506,  
17 please?

18 Q (By Mr. Klein) Do you see Exhibit 1506 on your screen,  
19 Mr. Mecsko?

20 A Yes, I do.

21 Q And do you see under the heading "Proposed Coal Collector  
22 Design and Frequency" a letter A, "Due to the large amount of  
23 coal discharges already identified at Horsethief Lake, coal  
24 collection will focus on this location"?

25 A Yes. Correct.

1 Q So that's why this location was chosen, because it was  
2 known to be a place where coal loss happened, right?

3 A That's correct.

4 Q And you were instructed to conduct your study during the  
5 high wind part of the year, weren't you?

6 A I was informed to start the study during the high wind  
7 time of the year.

8 Q And do you see at D on Exhibit 1506 that sampling  
9 frequency, the goal would be to conduct one month of sampling  
10 starting as soon as possible to take advantage of August and  
11 September winds?

12 A That is correct.

13 Q So they wanted you to do this during the windy part of the  
14 year, right?

15 A We wanted to represent all conditions.

16 Q During the windy part of the year is what this says,  
17 though, right?

18 A No. What that says is that we would like to start it to  
19 capture the high wind. If we would have started after that  
20 period, then we would have had to wait until the high winds  
21 started again because it is a seasonal event. So we wanted  
22 to conduct the study during the high-wind events as well as  
23 during non-high-wind events. So if we would have waited,  
24 then we would have had to prolong the study to go back into  
25 the time of the year when we reach our peakness.

1 Q Did you do this study at a time of year known to not be  
2 windy, in other words, to get a representative sample?

3 A Yes, we did.

4 Q And that's November?

5 A That would be like December, January.

6 Q This study wasn't conducted in December and January, was  
7 it?

8 A Yes, it was.

9 MR. KLEIN: Okay. Let's see Exhibit 1494, please,  
10 Ms. Mendoza.

11 A And I will add that you are correct. The high-wind season  
12 ends at the end of September. So you are correct to say  
13 November would be included in that low.

14 Q (By Mr. Klein) Let's figure this out first, though?

15 It looks to me -- and tell me if I'm wrong -- your last  
16 entry here is the end of November, right?

17 A What document are we looking at?

18 Q We're looking at your report in this case. It's  
19 Exhibit 1494.

20 A The final report?

21 Q Your final report.

22 A Yes. In this final report, that would be the last data.

23 Q And you did not report any data in December or January,  
24 did you?

25 A Not in this report, but in the invoice, the reports prior

1 to this, yes, we did.

2 Q Did your invoices go to any experts in this case, to your  
3 knowledge?

4 A Not that I know of.

5 Q Your report did, though, didn't it?

6 A I don't know who my report went to, to be honest.

7 Q You positioned your collectors intentionally downwind of  
8 the tracks under the prevailing winds at the time, right?

9 A That would be hard to answer. I mean, the wind blows in  
10 different directions, so....

11 Q You testified earlier that the prevailing wind at this  
12 location is westerly, correct?

13 A Depending on the time of year, yes.

14 Q And your floats were positioned downwind of the tracks  
15 under westerly winds, weren't they?

16 A Under westerly winds, yes.

17 Q You didn't choose those locations. The plaintiffs did,  
18 right?

19 A That is correct.

20 Q The point of this study here was to find and document coal  
21 losses in the place where you most expected it to happen,  
22 right?

23 A No.

24 Q Now, you didn't visit your floats every day, right?

25 A I did not, no.

1 Q And, in fact, you never visited your floats on consecutive  
2 days, did you?

3 A I might have.

4 Q You never collected coal in your report on any two  
5 consecutive days?

6 A No, I did not collect, that's correct.

7 Q And sometimes you would visit the floats and not see  
8 enough for a minimum sample, and on those days you would  
9 provide no sample?

10 A That's correct.

11 Q And on other days you see coal and measure it, and if it  
12 was less than five grams, you would write "nonviable sample,"  
13 right?

14 A That is correct, yes.

15 Q And sometimes you would see grain and other debris in your  
16 floats, right?

17 A Yes, that's correct.

18 Q And you never actually speciated these samples in any kind  
19 of microscopic way to actually separate dirt from coal,  
20 right?

21 A No.

22 THE COURT: "Speciated"?

23 MR. KLEIN: Speciated. I'm sorry if I'm using  
24 jargon, Your Honor. It's a technique for microscopically  
25 examining.

1 THE COURT: You're on the West Coast here. You need  
2 to --

3 (Laughter.)

4 MR. KLEIN: I am trying to keep that in mind.

5 Q (By Mr. Klein) You never microscopically examined field  
6 coal samples, right?

7 A I did not.

8 MR. KLEIN: I am crossing off parts of my outline.

9 Q (By Mr. Klein) Okay. You didn't routinely photograph  
10 your samples, did you, Mr. Mecsko?

11 A I did not.

12 Q Neither in the floats nor in the bottles, right?

13 A Not routinely, no.

14 Q And so there is no photographic evidence of your sampling  
15 study, is there?

16 A There is photographic evidence, yes.

17 Q You have a couple of pictures, right?

18 A Yes.

19 Q You have no routine or systematic photography evidence of  
20 sample study, do you?

21 A I guess it depends on what you mean by routine or  
22 systematic.

23 Q You did not regularly take pictures of your samples?

24 A Are you trying to say I didn't take it every day? I mean,  
25 I did do it on the systematic -- it was systematic, yes. I

1 would say yes.

2 Q Did you include photos of your samples in your report,  
3 more than one or two?

4 A Photos of?

5 Q Of buckets or of samples in plastic bottles.

6 A Yeah, they were the ones that have been submitted with the  
7 final report.

8 Q How many of those did you submit?

9 A I don't know. We'd have to pull it up and count them. I  
10 think it's -- I don't remember.

11 MR. KLEIN: Okay. Back to Exhibit 1494.

12 Ms. Mendoza, can we go to the last page?

13 Q (By Mr. Klein) This is your final report in this case,  
14 right?

15 A Yes.

16 Q And how many photographs were submitted with this report?

17 A Like I said, I don't remember.

18 Q Can you estimate for me? They haven't been produced to  
19 our party, so we'd like to know how many there were.

20 A Oh, gosh, I don't remember. Maybe it was ten. I'm  
21 guessing. I don't -- I don't remember how many photos were  
22 associated with it.

23 Q These were photos of your floats?

24 A They were photos of the floats, yes, and other photos, as  
25 well.

1 Q Were they photos of the interior of your floats with coal  
2 samples?

3 A There was at least one, yes.

4 Q Okay. Perhaps I haven't been clear.

5 You did not regularly take a camera and photograph the  
6 interior of your float before you would empty it, right?

7 A That would be correct, yes.

8 Q And you never photographed your Nalgene bottle that you  
9 would put your coal samples into before you would ship it to  
10 the lab, right?

11 A Yes. I never did photo my --

12 Q So we have seen photos of buckets in the water, but we  
13 don't have any regular photos of the actual samples you  
14 collected, do we?

15 A That's correct.

16 Q Okay. Now, you testified about water level fluctuation as  
17 it happens between the dams and the Columbia River.

18 A Uh-huh.

19 Q Do you know when or how often those waters fluctuate?

20 A It is -- you know, every day it's changed. When people's  
21 air conditioning units go on, there is more power being  
22 generated at the dam, so they start passing more water  
23 through the dam. So it really just depends on the human  
24 behavior, the behavior of the environment. If it rains,  
25 there's going to be more water. So there's many, many

1 variables.

2 Q And it happens because humans make the decision to let  
3 more or less water through the dams, right?

4 A That would be one variable, correct.

5 Q Does water go through the dams without someone's decision  
6 to let more water through?

7 A Well, water falls from the sky as rain.

8 Q Putting aside rain -- are you testifying that rain levels  
9 will materially alter the levels of the Columbia River  
10 between the dams?

11 A Yes.

12 Q By how much?

13 A I don't know. That's not my specialty.

14 Q You testified that it can go up and down, as much as two  
15 and a half feet up or two and a half feet down?

16 A That's correct.

17 Q So you don't know why, right? I mean, you can't just  
18 aggregate the variables that make that happen.

19 A I would say -- the more accurate way of saying that would  
20 be -- is, the reasons for it change all the time. You know,  
21 there's many variables that affect that, and they are  
22 changing day by day.

23 Q And how often is that kind of motion happening? Does the  
24 river rise and fall two and a half feet every day?

25 A Like I said, it changes every day, but, yeah, there is a

1 daily fluctuation.

2 Q But you don't know how much happens on a daily basis?

3 A No. You would have to conduct -- you would have to go to  
4 each dam and ask them for that data. It is available.

5 Q And it is not always two and a half feet up or two and a  
6 half feet down, right?

7 A No.

8 Q Variations can be much smaller than that, right?

9 A Sure.

10 Q Did you ever see water rise and pull coal down into the  
11 river?

12 A Yes.

13 Q How much did you see it rise?

14 A Quite a bit.

15 Q So while you were watching, the river would rise, what, a  
16 foot in front of your eyes?

17 A Yes, or more.

18 Q How long did that take?

19 A It would happen on a couple-second interval.

20 Q So you're talking about waves?

21 A Now I'm talking about waves.

22 Q Okay. You never saw the level of the river rise because  
23 of dam activity or rain so fast that you saw coal come into  
24 the water that way?

25 A I would -- I would witness that, yes.

1 Q How fast would that happen?

2 A That is a very slow rise. It's -- well, "slow" is not a  
3 very accurate word on -- it's a gradual rise, you know. And  
4 once again, that is going to be affected by different  
5 variables. Are they spilling through spillways? Are they  
6 strictly running water through the powerhouse? Are they  
7 operating both? You know, so there are variables that affect  
8 that.

9 Q My question is, have you ever just sat and watched the  
10 level of the river -- putting aside the wave action -- the  
11 level of river change gradually or slowly, as you said, but  
12 you watched it long enough that it rose up and grabbed some  
13 coal and pulled it down into the water?

14 A And you're saying not including the waves?

15 Q That's right.

16 A I would watch the river, you know, either increase or  
17 decrease. And, yes, when I would watch the river levels  
18 decrease, I would see some of the coal moving with that  
19 column of water down into the river.

20 Q And you've seen wind blow coal off the banks into the  
21 river, too, right? You've testified?

22 A Yes.

23 Q So the wind would just gust and coal would blow into the  
24 river around the bank?

25 A Yes.

1 Q And how many times have you seen that happen?

2 A Countless times. It's a mess out there. There's coal  
3 blowing all over the place.

4 Q Let's briefly discuss your report. Now, you understood  
5 when you were hired for this work, right, that the task you  
6 were given was to build evidence that BNSF trains were  
7 releasing coal into the river, right?

8 A No. Can you word that again?

9 Q Did you understand when you were hired here that your goal  
10 was to document coal release into the water?

11 A Yes.

12 Q And did you understand that it was possible that that  
13 could involve litigation down the road?

14 A I didn't really think about that at the time.

15 Q And you were hired by Mr. Tebbutt, right?

16 A Yes.

17 Q And did you know Mr. Tebbutt was an attorney?

18 A Yes.

19 Q And he never said to you anything about the reason for  
20 this?

21 A Not at the beginning, no. We never really talked about --

22 MR. TEBBUTT: Objection, Your Honor. Attorney  
23 work-product privilege.

24 THE COURT: Overruled.

25 Q (By Mr. Klein) At no point did he say to you that this

1 may involve a lawsuit against the rail company?

2 A You know, I really don't remember.

3 Q So he could have?

4 A He might have, yeah.

5 Q So you knew this was serious, the work you were doing  
6 collecting this coal?

7 A Yes. Right.

8 Q And you said -- you know that accurate reporting of your  
9 measurements is a foundational part of environmental science,  
10 right?

11 A That is correct. Yes.

12 Q So the errors that you described in your testimony, those  
13 were actually about half of the measurements that you  
14 reported in your final report, right?

15 A Less than half.

16 Q How much less than half?

17 A Like I said, it was six for Float A. And do you have a  
18 total number of samples?

19 Q Almost everything after October 18th was wrong; isn't that  
20 right?

21 A Yes.

22 Q And the study lasted only from the end of August through  
23 end of November, right?

24 A Correct.

25 Q So about six weeks on either side of October 18th, right?

1 A Yeah.

2 Q So about half was wrong, wasn't it?

3 A In -- you're saying in the final report?

4 Q Yes.

5 A Okay. You've got to specify, and that would help. Yes, I  
6 would say in the final report, in the final written report.  
7 In the final report, though, the data did appear in the Excel  
8 spreadsheet, which, as a scientist, that's where you put your  
9 data if you plan on referring to it or other scientists are  
10 going to refer to your data. They go to the Excel sheets.  
11 You know, you would go to your spreadsheet where the data is  
12 standing alone.

13 THE COURT: This will go a lot faster if you just  
14 answer the question.

15 THE WITNESS: Okay. Sure.

16 Q (By Mr. Klein) Do I take that to mean that accuracy of  
17 the actual reported results as a scientist isn't as  
18 important?

19 A In the written report, that would be correct, yes.

20 Q It's not important in your written report that you pass  
21 along to your client?

22 A It wouldn't be -- the data would be used most of the time  
23 out of the spreadsheet format.

24 Q And you're saying you're not aware that your final report  
25 was shared with other witnesses in this case?

1 A I'm sure it was, yeah.

2 Q And do you know whether your Excel document was shared  
3 with other witnesses?

4 A I assumed it was, yeah.

5 Q Now, you say this was a copy-and-pasting error, correct?

6 A That's correct, yes.

7 Q And the copy-and-pasting error involved just the data that  
8 was in the parentheses in your report, right?

9 A That's correct.

10 Q Not the whole entries for a certain date, but just the  
11 parentheses with the date and measurements?

12 A That's correct.

13 Q Why would you have been copying and pasting your data  
14 measurements?

15 A I don't know how the error happened.

16 Q You don't remember how it happened?

17 A I don't. I didn't even notice the error happened until  
18 you pointed it out in the deposition. So I can't answer that  
19 question.

20 Q But memory aside, why would you be copying and pasting  
21 just data? What reason would there be to do that?

22 A I don't know.

23 Q You didn't do any kind of proofing of your final report  
24 before you submitted it?

25 A I did do like a fast read through it.

1 Q But not enough to catch this?

2 A That's correct. Like I said, I scrutinized the data in  
3 the Excel spreadsheet as far as the values were concerned.

4 Q And is double-checking your scientific report something  
5 that you typically do when you report important data?

6 A Usually I would submit it to another scientist up here,  
7 who would then perform that for me.

8 Q Did you do that here?

9 A I submitted it to the -- you know, my team.

10 Q Your team, meaning Mr. Tebbutt?

11 A Yes.

12 Q No other scientists, though?

13 A No. Just to my -- to the client.

14 Q So, in other words, you didn't do any checking of this  
15 final report before you submitted it to your client in this  
16 case?

17 A Besides my, you know -- yeah, I did do a one read-through  
18 of it before I sent it off.

19 Q Other than the sheet that was passed out to me just  
20 shortly before we started this exam, did you fix this report  
21 after I brought this to your attention on July, I believe,  
22 12th?

23 A No.

24 Q So do you know whether your report was corrected to any of  
25 the other expert witnesses in this case who relied on it?

1 A I don't know.

2 Q Did you ask that it be done?

3 A No.

4 Q Let's talk about your observations of coal.

5 And when you were conducting your investigation in  
6 September of 2013, you said you twice saw coal blow out of  
7 coal trains and land in the Columbia River, right?

8 A That is correct.

9 Q And those occurred on two separate days?

10 A Yes.

11 Q You don't remember which days, though?

12 A No.

13 Q And you didn't count the cars in either instance, right?

14 A No.

15 Q Now, when you were doing your study you kept very detailed  
16 notes, didn't you?

17 A I guess it would depend on what you considered very  
18 detailed. They were adequate.

19 MR. KLEIN: Ms. Mendoza, can we see Exhibit 1494 on  
20 page 2, please?

21 Q (By Mr. Klein) I'll direct you to the entry on August  
22 25th. At noon, you noted that you drove to HTL, loaded  
23 cables, floats and tools into the boat, prepped the boat for  
24 launch, right?

25 A Correct.

1 Q And then at 5:15 you noted you went to Home Depot, right?

2 A That's correct.

3 Q And at 5:30 you noted that you unloaded supplies, right?

4 A That is correct.

5 Q And let's jump to page 5.

6 On September 29th, at the bottom here you noted that  
7 you spent eight hours looking at train traffic and taking  
8 notes, right?

9 A That's correct.

10 Q Back up for me one more page. Other direction, please.

11 Well, there's one on here where you note that you  
12 changed a flat tire, right?

13 A That's correct.

14 Q And yet you describe that what happened to you the first  
15 time you felt coal striking you in the Columbia River as  
16 shocking, a violent storm of coal, right?

17 A Correct.

18 Q It was levels that surprised you. It was an intense  
19 experience, right?

20 A Yes.

21 Q It made you want to raise money to get the mayor out  
22 there, right?

23 A I wanted to bring people who could have some type of say  
24 in what was happening. They had to see this for themselves,  
25 yeah.

1 Q And you knew you were conducting studies to document coal  
2 releases from trains to the river, right?

3 A Correct.

4 Q Yet this event was not something you felt worthy of even  
5 writing down?

6 A That's correct. Because of my collecting evidence, my  
7 perspective on it with my eyes was not a part of the study.  
8 The study was to collect evidence via these coal trains.

9 Q You're sharing your evidence and testimony now, aren't  
10 you?

11 A Yes.

12 Q You also testified about observing a discharge into the  
13 Columbia River on another occasion south of the John Day Dam?

14 A Correct.

15 Q And you're not sure what year that occurred?

16 A I believe it was 2008.

17 Q But you're not sure?

18 A I'm not sure, no.

19 Q And you were in a boat when that happened?

20 A Yes. Correct.

21 Q And the train had passed you by the time you started  
22 noticing the coal dust?

23 A The train -- yeah, the engine had gone past and then a  
24 couple of cars later I started experiencing it.

25 Q You didn't count the cars on that occasion?

1 A No, I did not.

2 Q And then on the Klickitat River, on another occasion you  
3 saw and experienced coal dusting, right?

4 A Yes.

5 Q And you don't know what date that was?

6 A No. It was in 2010.

7 Q Do you know what month it was?

8 A I think it was November.

9 Q And you were on a sand beach on the west side of the mouth  
10 of the Klickitat River?

11 A That's correct.

12 Q So you were across the Klickitat east of -- on the -- you  
13 were on the west side of the river and the east side of the  
14 river was the city of Lyle; is that right?

15 A Yes.

16 Q And the wind was blowing hard from the west to the east,  
17 right?

18 A Yeah, I believe so.

19 Q You testified so, right?

20 A Yes.

21 Q So it was blowing across the Klickitat River toward Lyle?

22 A It was blowing in a northwest direction.

23 Q It was blowing in the northwest -- it was from the  
24 northwest?

25 A Yes.

1 Q Okay. And you were south or north of the train?

2 A I was south of the train.

3 Q Okay. Was it from the west or the northwest?

4 A It was from the northwest.

5 Q And you're sure about that?

6 A Yes.

7 Q Did you count the cars in that event?

8 A No.

9 Q Okay.

10 You've lived in Lyle eight years?

11 A Correct.

12 Q And only a few hundred feet from the rail line, in fact?

13 A More than a few hundred feet.

14 Q Do you live between 2- and 400 feet from the rail line?

15 A Yeah, I would say more than that.

16 Q Have you testified in the past that you lived between two  
17 and four hundred feet from the rail line?

18 A In my deposition you asked me and I estimated how far it  
19 was. I've never actually gone out and measured as the crow  
20 flies.

21 Q Is it radically different than that?

22 A Yeah, I think it's probably a little bit more than that.

23 Q And you spend a lot of time on the Columbia River, right?

24 A That's correct.

25 Q Both coming in and out of your neighborhood, right, on

1 State Route 14?

2 A In proximity to the river, yes.

3 Q And you drive over bridges over the river frequently?

4 A Yes.

5 Q And you're on the river a lot through your work; aren't  
6 you?

7 A That's correct.

8 Q And in fact before you lived in Lyle, you lived in White  
9 Salmon near the Columbia River; right?

10 A That is correct.

11 Q How many days a week on average do you think you spend a  
12 substantial amount of time on the river?

13 A On the Columbia River? How many days in the average week?

14 Q Yeah.

15 A Actually on the river in a boat, you mean?

16 Q On or near where you can see it, within sight line of the  
17 train line.

18 A Well, from my house I can see the Columbia River so I'd  
19 say every day I can see the Columbia River.

20 Q So you've seen a lot of trains, I assume, right?

21 A I can't see the trains from my house but I see the river.

22 Q But you spend a lot of time on the river, right?

23 A When are you saying "on the river" or "in proximity to the  
24 river?"

25 Q I'll tell you right what I'm driving at. In 15 years

1 you've seen a lot of coal trains, haven't you?

2 A Yeah. It's not like -- when you live close to a train,  
3 like what's the line out of the --

4 THE COURT: It will go a lot faster if you just  
5 answer the question.

6 A Yeah, it's not like when trains go by I make a habit of  
7 looking to see what types of trains they are. So it's a hard  
8 question.

9 Q (By Mr. Klein) That's not what I'm asking. I'm just  
10 asking, you've probably seen more than a thousand trains in  
11 that time, haven't you?

12 A Oh, yeah.

13 Q Maybe two or three thousand?

14 A It would be hard for me to say. Like I said, I can't see  
15 them from my house so, you know, when I'm out driving around,  
16 I do see a lot of trains. Yes.

17 Q Of that more than a thousand trains you have seen coal  
18 dust that you think has fallen into the water seven or eight  
19 times, right?

20 A Seven or eight times is when I know for sure for a fact  
21 I've seen it coming out of the train cars and into the  
22 Columbia River or the Klickitat River.

23 MR. KLEIN: Thank you. That's all I have.

24 THE COURT: All right. Any redirect?

25 MR. TEBBUTT: Very briefly, Your Honor.

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25

REDIRECT EXAMINATION

BY MR. TEBBUTT:

Q Counsel just asked you how many trains you saw. He didn't specify coal trains, did he?

A No.

Q So the thousands of trains, those are regular trains. That was how you answered the question, correct?

A That's correct. Yes.

Q With respect to the counsel asking you questions about that final pick-up, that wasn't in your report but you testified that it was in your invoice?

A Yes.

Q Looking at the last page of your invoice -- looking at the last page of your invoice, which is Exhibit 1489, does this indicate the last date of your pick-up of both the last samples and the floats?

A That is correct.

Q And that's February 2014?

A Correct.

Q And the sample sizes that were picked up were in the range of two to three times what you had picked up for your largest sample on your interval pick-ups; is that right?

A That is correct.

Q And so there was about a six or maybe even ten-week period between the last sample in November and in February, right?

1 A Yes, correct.

2 Q And that's the wet time of year when it's less windy a lot  
3 of the time?

4 A Yes, correct.

5 Q Did you take a sample near the boat launch?

6 A Can you say that again?

7 Q Did you take a ground sample of material near the boat  
8 launch?

9 A Yes, I did.

10 Q Okay. That material, the ground sample is reflected on  
11 2345. Do you see that at the very bottom?

12 A Yes.

13 Q Okay. And the samples taken from the time period, Float  
14 A, B, C, are those the samples that you sent from that period  
15 for your last pick-up in February?

16 A What we're looking at now, no.

17 Q Float A, Float B, Float C, do you see those?

18 A Yes.

19 Q Okay. Let me go up one page. There we go.

20 A Okay.

21 Q Those are the samples for that period, right?

22 A Yes.

23 Q Okay. And the last little bit. I'm not sure if I did  
24 this on direct, so cut me off if I did, Your Honor.

25 THE COURT: I'd be happy to.

1 Q (By Mr. Tebbutt) The total values for Float A -- and you  
2 have the illustrative exhibit in front of you -- from the  
3 cut-and-paste errors amounted to what, adding those up? Just  
4 use the cut-and-paste errors.

5 A That would be 36.6 grams.

6 Q And the actual values were what?

7 A 33.4 grams.

8 Q So a difference of 3.2?

9 A Yes.

10 Q Okay. And for Float B, I'll -- just speed this up, the  
11 number in the illustrative exhibit is 38.4 for the  
12 cut-and-paste error, correct?

13 A That's correct.

14 Q And the actual value is 38.6?

15 A That's correct.

16 Q And for Float C, the cut and pate error amounted to 26.5,  
17 correct?

18 A That's correct.

19 Q And the actual value was 5.4 grams higher at 31.9,  
20 correct?

21 A That's correct.

22 Q So if someone was relying on your data and if they were  
23 calculating loadings based on that, they would actually come  
24 up with a higher number overall if they used these numbers?

25 MR. KLEIN: Objection. Speculation.

1 THE COURT: Sustained.

2 MR. TEBBUTT: Fair enough. Thank you.

3 RECCROSS-EXAMINATION

4 BY MR. KLEIN:

5 Q On this question of when did your study end, you told us  
6 that your real true serious numbers were in your spreadsheet,  
7 right?

8 A For that period, yes.

9 Q The scientist's spreadsheet is the document that should  
10 control. That's what you testified earlier, right?

11 A Yes.

12 Q That spreadsheet doesn't include a value for February,  
13 right? The last one is at the end of November, right?

14 A Correct.

15 Q The study ended in November, right?

16 A The study where I was actually going on out on a regular  
17 interval did end in November.

18 MR. KLEIN: Thank you, sir.

19 THE COURT: All right. You may step down.

20 What time you want to get together tomorrow?

21 MR. WAGNER: Regular court time would be sufficient,  
22 Your Honor.

23 MR. TEBBUTT: I'm happy to do it earlier.

24 MR. WAGNER: After the election, the regular court  
25 time would be appreciated.

1

(Proceedings adjourned at 4:05 p.m.)

C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 8th day of November 2016.

/S/ Nancy L. Bauer

Nancy L. Bauer, CCR, RPR  
Official Court Reporter

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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SIERRA CLUB, a California	)	
nonprofit corporation;	)	
PUGET SOUNDKEEPER ALLIANCE, a	)	CASE NO. C13-00967JCC
Washington nonprofit corporation;	)	
RE SOURCES FOR SUSTAINABLE	)	SEATTLE, WASHINGTON
COMMUNITIES, a Washington	)	November 9, 2016
nonprofit corporation;	)	
COLUMBIA RIVERKEEPER, a	)	BENCH TRIAL, Vol. 3
Washington nonprofit corporation;	)	
FRIENDS OF THE COLUMBIA GORGE,	)	
INC., dba FRIENDS OF THE	)	
COLUMBIA GORGE, an Oregon	)	
nonprofit corporation;	)	
SPOKANE RIVERKEEPER; NATURAL	)	
RESOURCES DEFENSE COUNCIL, a	)	
New York nonprofit corporation,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
BNSF RAILWAY COMPANY,	)	
a Delaware corporation,	)	
	)	
Defendant.	)	
	)	

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VERBATIM REPORT OF PROCEEDINGS  
BEFORE THE HONORABLE JOHN C. COUGHENOUR  
UNITED STATES DISTRICT JUDGE

---

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1 November 9, 2016

9:22 a.m.

2 PROCEEDINGS

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3 THE COURT: Well, let me make some statements for the  
4 record regarding the protocol of what we're going to do this  
5 morning.

6 Yesterday I suggested to counsel that I would be willing  
7 to try to help you resolve this case by settlement, but  
8 given that, particularly given it is a nonjury trial, that I  
9 would do that only if the parties wanted me to do so, and  
10 also that if either of the parties had any reluctance  
11 regarding that, they should feel free to express that  
12 reluctance but in a way that I would not know which of the  
13 parties doesn't want to be involved in the settlement  
14 conference with me.

15 So I suggested that Mr. Wagner consult with opposing  
16 counsel and then tell my in-court deputy that the answer was  
17 either yes or no. If the answer was no, it meant that  
18 somebody didn't want to participate in the settlement  
19 conference, and I didn't want to know who that person was,  
20 and that Mr. Wagner would convey the yes or no to my in-court  
21 deputy.

22 After that, after the parties consulted with one another,  
23 the message that I was given by my in-court deputy was that  
24 the parties wanted to proceed with the settlement conference  
25 before me.

1           Before we do anything further, let me emphasize a couple  
2 of things about it. One is, as a former trial lawyer, I have  
3 no difficulty in my own mind separating the role of a  
4 facilitator in the resolution of this case in a nonbinding  
5 settlement conference with my role as a judge making the  
6 decision ultimately as to who should prevail in the trial and  
7 what the results should be.

8           On the other hand, I want to emphasize that if we go  
9 forward with a settlement conference, we will be discussing  
10 things that ordinarily I would not be party to or privy to,  
11 because we'll talk about what settlement offers have been  
12 exchanged and then the relative strengths and weaknesses in  
13 each side's case, in my own view, as to what the resolution  
14 would be. These are topics that would not be normally  
15 discussed with a judge in a nonjury context in particular.

16           If we go forward, I'll also engage in some shuttle  
17 diplomacy, if I can use that term, and I would have what  
18 would otherwise be ex parte communications with either side,  
19 talking about things that I think might facilitate the  
20 resolution of the case.

21           Now, having said those things, let's retire to my  
22 chambers.

23           And in the meantime, let me emphasize again that if  
24 anybody has any misgivings whatsoever about going forward  
25 with this, I have no problem with that at all, and we'll just

1 come back up and resume with the trial. But if we do go  
2 forward, I want it understood that both sides are in complete  
3 agreement that the fact that we have engaged in this process  
4 will not be considered an issue on appeal if this case goes  
5 to trial and is unable to be resolved.

6 Does anybody have any hesitation about that?

7 MR. WAGNER: Thank you, Your Honor.

8 No. Part of the agreement between the parties is that  
9 there was an understanding that if the parties went forward  
10 with this process and the trial did resume, that we had no  
11 hesitation to allow the matter to go forward for final  
12 decision.

13 I would raise one issue with you, however. The court's  
14 consideration in handling prior confidential settlement  
15 discussions between the parties does raise some concerns with  
16 us.

17 The framework that I had anticipated and proposed is that  
18 rather than framing the discussions such as the parties would  
19 say, "I propose a dollar" and they propose ten and so forth,  
20 that the discussions instead be framed however the parties  
21 wish to discuss it as things that are amenable for settlement  
22 for one side or the other.

23 It seems to me that in some way discussions of the facts  
24 and relative strengths and weaknesses goes to the heart of  
25 what any mediating judge must do. However, there is some

1 pause on my part in getting to the specifics of the  
2 back-and-forth and give-and-take of the settlement  
3 discussions themselves, not so much the particulars of what  
4 the parties may have discussed, that's fine, but I do urge  
5 some discretion in that regard rather than saying here is our  
6 letter of such-and-such date where we offered one dollar and  
7 here is the response. I think there is a subtle distinction  
8 there, Your Honor, and I urge the court to consider that.

9 THE COURT: Do you have any problem with that?

10 MR. TEBBUTT: Your Honor, in general, no.

11 What we have done for the court is extract from some of  
12 the prior 408 communications just the position that the  
13 plaintiffs believe is fair.

14 We did have that discussion with BNSF's counsel. We did  
15 not agree that that was necessarily the right way to go. But  
16 we are open to the court's instructions about how to  
17 structure -- how to move forward with the settlement.

18 But, in general, we have no problem with and we do  
19 stipulate to having you as the settlement judge for these  
20 purposes, and knowing that if it doesn't work, we go right  
21 back to the trial, and it is not an issue on appeal. No  
22 problem whatsoever.

23 THE COURT: All right. Is that understood?

24 MR. WAGNER: That is understood.

25 THE COURT: I have no problem with the limitations

1 that you're suggesting about any prior negotiations. I would  
2 like to kind of get a feel for where the parties were and  
3 where it broke down. But it is up to you to tell me what you  
4 want to tell me. I'm not going to force you to tell me  
5 anything you don't want to. Okay?

6 MR. WAGNER: Yes, Your Honor.

7 THE COURT: All right. Let's retire to my chambers  
8 without the court reporter.

9 We'll be in recess.

10 (Court in recess until 1:04 p.m.)

11 MR. WAGNER: Good morning, Your Honor. Thank you for  
12 your patience.

13 Just for an update: The parties have participated in  
14 discussions. I will need to step out for just a moment. I  
15 have an email communication from my client to be able to  
16 convey to plaintiffs' counsel.

17 THE COURT: Okay.

18 MR. WAGNER: But because it takes a little bit of  
19 time and we want to make sure it was written properly, I beg  
20 the court's indulgence to allow me to work with the client to  
21 get assent and finalized while the first witness of the  
22 afternoon is being heard.

23 THE COURT: That's fine.

24 MR. WAGNER: I think counsel has agreed that we  
25 should probably go through that witness and any another

1 witness through the break, and then we'll see what happens at  
2 that time. I intend to review the material at the break.

3 Is that sufficient?

4 THE COURT: Sure.

5 MR. WAGNER: Thank you, Your Honor.

6 MR. TEBBUTT: Your Honor, the plaintiffs call John  
7 Wood, please.

8 THE CLERK: Please come this way. Stand right there  
9 and raise your right hand.

10 JOHN WOOD, HAVING BEEN FIRST DULY SWORN,  
11 TESTIFIED AS FOLLOWS:

12 THE CLERK: Please be seated.

13 Please state your full name, and spell your last name for  
14 the record.

15 THE WITNESS: Do you want middle name?

16 THE COURT: Not necessary.

17 THE WITNESS: John Wood. And what was the second  
18 part?

19 THE COURT: Spell your last name.

20 THE WITNESS: W-o-o-d.

21 MR. TEBBUTT: Compound question, Mr. Wood.

22 Sorry. Inside lawyer joke.

23 DIRECT EXAMINATION

24 BY MR. TEBBUTT:

25 Q Good afternoon, Mr. Wood. Please tell us where you  
reside.

1 A I live in Hood River, Oregon.

2 Q And how long have you lived there?

3 A Since '97.

4 Q And are you a member of the Friends of the Columbia Gorge?

5 A Yes.

6 Q And have you undertaken any investigations of coal in  
7 waterways in the state of Washington?

8 A Yes.

9 Q And have you taken a series of photographs documenting the  
10 investigation that you've done?

11 A Yes.

12 Q Will you tell us the first -- or the date on which you did  
13 an investigation?

14 Strike that.

15 Did you take an investigation along the waterways that  
16 run north from the Columbia River to Seattle -- north of  
17 Seattle -- the north of Vancouver, going towards Seattle?

18 A Yes.

19 Q Yes?

20 Showing you what's marked as Plaintiffs' Exhibit  
21 1263 -- and that will come up on your screen here  
22 momentarily -- sir, is this a picture that you took?

23 A Yes.

24 Q And is that a picture of your hand?

25 A It is.

1 Q And do you know where that picture was taken, sir?

2 A I believe that's the Lewis River.

3 Q All right. And do you know the date that this picture was  
4 taken?

5 A I believe that's 2/12 of 2013.

6 Q Okay. And what, sir, is in your hand?

7 A That's coal.

8 Q And how do you know, or believe, at least, that that's  
9 coal?

10 A It's not a rock normally found there. It's under tracks  
11 crossed by coal trains, and it breaks apart very easily when  
12 you crush it, unlike the similar-looking basalt and other  
13 rocks that run along the river.

14 Q And the picture of the structure above you, what is that a  
15 picture of?

16 A That is a railroad trestle.

17 Q Okay. I'm going to try to go through these fairly quickly  
18 because the court has seen a lot of these through other  
19 witnesses, but let's see what we can do here.

20 So that's the first a picture in Exhibit 1263. Is this  
21 another picture of the Lewis River?

22 A I believe that is, yes.

23 Q And what is that a picture of, sir?

24 A That's looking down into water and identifying coal about,  
25 oh, within a foot or 18 inches from the surface of the water.

1 Q If you would with your finger, would you circle the  
2 coal -- what you believe to be coal?

3 A (Witness complies.)

4 There. Actually, it's hard to tell with the glare on  
5 this screen, but there might be others.

6 Q All right. And is this another picture taken at the Lewis  
7 River?

8 A Yes.

9 Q And does this picture depict coal, too?

10 A Yes.

11 Q And just circle a couple of examples of coal that you see.

12 A (Witness complies.) My finger is wide.

13 Q And is this another picture of the Lewis River?

14 A Uh-huh.

15 Q At the Lewis River?

16 THE COURT: You have to say "yes" or "no."

17 THE WITNESS: Okay.

18 Q (By Mr. Tebbutt) And is that more coal in the water at  
19 the same place?

20 A Well, I mean, you know, within arm's reach, yes.

21 Q Different picture of a different piece of coal?

22 A Uh-huh -- yes.

23 Q Yes?

24 And again, 3739, same area of Lewis River under the  
25 train trestle, a different picture of coal?

1 A Yes.

2 Q And is that in the water itself?

3 A That is on a block of basalt, which -- I can't remember  
4 whether that's actually holding the trestle or not. But I  
5 picked those out of the water and put them there for a photo.

6 Q Okay. Did you pick them out of the water right next to  
7 where the rock is?

8 A Yes, yes.

9 MR. TEBBUTT: Your Honor, move into evidence  
10 Plaintiffs' Exhibit 1263.

11 MS. MORGAN: Objection on relevance.

12 THE COURT: Overruled. It will be admitted.

13 (Exhibit 1263 admitted.)

14 Q (By Mr. Tebbutt) And, sir, the same day you visited other  
15 areas. You already testified to that. Is that true?

16 A Yes.

17 Q And Plaintiffs' Exhibit 1264, where was this picture  
18 taken?

19 A Well, it's either at the confluence of the Coweeman and  
20 the Cowlitz, which is kind of an estuary area, or the Kalama  
21 River. I -- I can't remember. To have --

22 MS. MORGAN: Your Honor, objection. The parties  
23 agreed to narrow the scope of this case by limiting the  
24 discovery to 50 waterbodies, and neither the Kalama or the  
25 Coweeman River is in the agreement.

1 MR. TEBBUTT: That was for standing purposes. We  
2 agreed -- we stipulated that we would not present of --  
3 specific evidence about discharge into certain waterways  
4 through witnesses that had been identified. That's true.  
5 I'll pass --

6 THE COURT: Sustained.

7 MR. TEBBUTT: We'll check on the Kalama and Coweeman,  
8 whether those are part of the stipulation and we'll get back  
9 to that if anything changes.

10 Thank you.

11 Q (By Mr. Tebbutt) Sir, did you take pictures -- besides  
12 the Kalama River, the Coweeman River, and the Lewis River,  
13 did you take pictures of coal at other rivers that same day?

14 A Yes. The Cowlitz and -- oh, man, I need my notes. I just  
15 can't recall without seeing them.

16 Q Do you have some notes that you gave me earlier today that  
17 would help refresh your recollection of exactly where  
18 pictures were taken?

19 A I have some notes and you have them, but I don't have the  
20 ones that I gave you. I gave you notes.

21 Q Would they help --

22 A Yes.

23 Q -- with the testimony today?

24 A Absolutely.

25 THE COURT: One at a time, please. You can't speak

1 over one another. She can't take that down.

2 THE WITNESS: Okay.

3 MR. TEBBUTT: Your Honor, may I approach?

4 Q (By Mr. Tebbutt) Sir, do you have those notes before you?

5 A Yes, I do.

6 Q Plaintiffs' Exhibit 1226, where were those pictures taken?

7 A Those were taken at the Toutle River.

8 MS. MORGAN: Objection, Your Honor. The Toutle is  
9 not included in the waterbodies.

10 THE COURT: Is that correct, counsel?

11 MR. TEBBUTT: Yes, Your Honor. My apologies.

12 THE COURT: Sustained.

13 Q (By Mr. Tebbutt) Sir, did you take some pictures along  
14 the Puget Sound?

15 A Yes.

16 Q Is that the same day that you took the pictures of the  
17 other places?

18 A Yes.

19 Q And Exhibit 1267, where were those pictures taken?

20 A These were at Solo Point. Its precise name I'm not sure  
21 of. But it's Solo Point Road, which ends in a little park  
22 along Puget Sound.

23 Q And you took these pictures?

24 A Yeah.

25 Q And what is depicted in 1267 F0CG 003769?

1 A That's coal and cement or some kind of a block that I put  
2 it on.

3 Q Was that coal there when you took the picture of it, or  
4 did you pick it up and put it there?

5 A No. I picked it up and put it there. And, actually, you  
6 can see the mark made by when I scraped it along the rock to  
7 break it up into pieces.

8 Q Where did you pick the coal up from?

9 A I picked it up it from -- well, it was wet, and that is a  
10 tidal area, and it was down -- not actually in the water at  
11 the time, but it was wet, in wet sand and surrounded by  
12 seaweed.

13 Q Where was the tide that day?

14 A The tide at the time was fairly low. I think it was  
15 incoming as well.

16 Q And is Picture 3770 a picture of the Solo Point Beach,  
17 where you picked up the coal?

18 A Yes. That is an establishing shot. If you were to turn a  
19 number of degrees to your right, that would have been where I  
20 picked it up.

21 Q And 3771, is that on the same beach, a close-up of  
22 something?

23 A Yes.

24 Q Can you circle for us -- is there coal in that picture?

25 A Yes.

1 Q Can you circle for us what you believe to be coal?

2 A (Witness complies.)

3 Q And, sir, moving to 3772, what do you believe that to be a  
4 picture of?

5 A That's my hand holding coal, found pretty much right where  
6 I picked it up. I don't think I moved my feet to take that  
7 picture.

8 Q And was that within the tidal zone?

9 A Oh, yeah, definitely. There were barnacles all over the  
10 rocks that were above it.

11 Q And 3773, again is that you there, sir?

12 A Yes.

13 Q And is that within the tidal zone?

14 A Uh-huh, yes.

15 Q And what do you have in your hand?

16 A Coal.

17 Q And 3774, what is that a picture of?

18 A That is coal I have not touched.

19 Q Okay. And was that within the tidal zone?

20 A Definitely.

21 Q And 3775, at the risk of another leading question, that is  
22 a train, isn't it?

23 A Well, among other things.

24 Q Yes?

25 A Yes.

1 Q That shows the proximity to the train to -- well, let me  
2 ask you: How close to the train tracks were you where you  
3 picked up the coal depicted in the photos in this series,  
4 Exhibit 1267?

5 A Can I draw on the screen?

6 Q You may.

7 A I picked up the coal that we've been seeing right around  
8 in this area here, which is within one car length -- one cole  
9 car length, or whatever those are. Those are some kind of  
10 hopper car. But anyway, within -- it's right there. It's  
11 probably two-thirds or so of the length of a car from the  
12 track, and so it's six or eight feet of vertical.

13 Q Okay. And did you pick up coal in any other places that  
14 are depicted in 3775 that day?

15 A I believe all of the coal I picked up was right around in  
16 that area. It was a windless area. My friend had locked her  
17 car keys in, so I wasn't wandering down the beach or  
18 anything.

19 Q All right. 3777, a picture, again, in the same area?

20 A Yes.

21 Q And was that within the tidal zone?

22 A Yes.

23 Q And please circle what you believe to be coal.

24 A (Witness complies.)

25 Q And 3778 is another picture you took?

1 A Yes.

2 Q And what is shown in that picture?

3 A A little crab.

4 MR. TEBBUTT: All right. Your Honor, I'd like to  
5 move into evidence Exhibit 1267.

6 MS. MORGAN: Objection, relevance.

7 THE COURT: Overruled. It will be admitted.

8 (Exhibit 1267 admitted.)

9 Q (By Mr. Tebbutt) And what's depicted in that picture?

10 A That's a baggie of coal that I picked up, and I put it in  
11 the bag and took a picture of it.

12 Q Okay. And where is this picture taken, sir?

13 A That's at the mouth at the White Salmon River on the  
14 sandbar in the Columbia Gorge -- Columbia River.

15 Q And do you know approximately when these pictures were  
16 taken?

17 A I believe that was 2012, but I think it was in the winter  
18 of 2012, but I'm not certain. Let me see if I can -- no,  
19 it's not on the notes. It is on the metric -- on the camera  
20 data.

21 Q Okay.

22 The third photo in the series, is that the same place  
23 but from a different angle?

24 A Yes, and the same coal. I was just trying to show where I  
25 was.

1 Q And what is the river in the background there?

2 A The Columbia River. And I think you can see a little bit  
3 of Mount Hood in the top left.

4 Q And where did you get the coal that you placed into the  
5 bag?

6 A I got that from the sandbar there.

7 Q And does the water ever, in your experience, come over the  
8 area where you picked up the coal?

9 A Well, yes.

10 Q Is it fairly regularly that the water would be up higher,  
11 or --

12 A Well, yeah. It has to do with the flows of the White  
13 Salmon River, which are now back to natural, but I think at  
14 that time it still had a dam on it, and also the level of the  
15 lake behind the Bonneville Dam on the Columbia. So it comes  
16 and goes, but it's not tidal.

17 Q All right. And Picture 3787 in the Exhibit 1268 series,  
18 is that taken in the same general location?

19 A Yes.

20 Q And what does Picture 3787 depict?

21 A That's a -- it looks like about a handful of scattered  
22 coal dust right by my toe there.

23 Q Will you circle that, please?

24 A (Witness complies.)

25 Q And, sir, where is Picture 3788 taken?

1 A That was also under the trestle of the White Salmon River  
2 mouth.

3 The road actually is kind more or less over the left  
4 shoulder of the person with the camera, which is me, and  
5 you're seeing the railroad trestle there.

6 Q All right. And the sandbar that you were on when you  
7 picked up coal, is that depicted in the picture?

8 A No.

9 Q Would that be on the other side of the bridge behind  
10 there?

11 A River right, yeah. As you float out -- the White Salmon  
12 Rivers flows that way, and around the corner there is another  
13 big sandbar, and that's where this was picked up.

14 Q Thank you.

15 Sir, can you see coal in the picture that is 3788?

16 A Not at this resolution. It's -- it breaks down into small  
17 pieces that are smaller, I think, than this camera and screen  
18 will allow me to detect it.

19 Q That day, do you remember whether or not you saw coal in  
20 this area?

21 A Oh, I definitely did. And I can tell you for sure that it  
22 was along on these rocks of riprap that are up here.

23 Q Okay.

24 A But I can't recall whether I saw any down where I was  
25 walking down below. I know I had collected it on the other

1 side around the corner.

2 Q All right. Thank you.

3 MR. TEBBUTT: Your Honor, I move into evidence  
4 Plaintiffs' Exhibit 1268.

5 MS. MORGAN: Objection, relevance.

6 THE COURT: Overruled. It will be admitted.

7 (Exhibit 1268 admitted.)

8 Q (By Mr. Tebbutt) And, sir, you have in front of you  
9 Plaintiffs' Exhibit 1269. It's another series of  
10 photographs. Do you know where those photographs were taken?

11 A Did you say when or where?

12 Q Where.

13 A Yeah. I can tell you that my notes say that they were in  
14 the lake out at Mosier's Incline. Upon looking at an atlas,  
15 it seems to be called Locke Lake. I've never heard anyone  
16 say that, so I can --

17 MS. MORGAN: Objection, Your Honor. Locke Lake is  
18 not in our agreement, stipulation.

19 MR. TEBBUTT: It's the Columbia River, Your Honor.

20 THE WITNESS: It is the Columbia River.

21 THE COURT: Overruled.

22 Go ahead.

23 Q (By Mr. Tebbutt) And Locke Lake was a manmade creation  
24 after the locks were put in?

25 A No. Actually, it's -- it's the water that is north of the

1 east-west rail line, which is on a -- what do they call it?

2 Q A causeway?

3 A A causeway. They put it on a causeway to straighten out  
4 the rail line and put it on a more stable footing than the  
5 rocky slopes of the riverbank, and that's what separated the  
6 water from the Columbia River. But it flowed --

7 Q Pardon me. I didn't mean to interrupt.

8 But your understanding is the trestle, essentially,  
9 created Locke Lake; is that right?

10 A Yes.

11 Q All right.

12 A If it's even a distinct waterbody, considering how loose  
13 and porous the rocks are.

14 Q All right. And what is depicted in the first picture in  
15 the series of Plaintiffs' Exhibit 1269?

16 A That is sand and little goose footprints on -- and coal.

17 Q And, again, just quickly circle the coal.

18 A (Witness complies.)

19 Q Thank you.

20 And is this a picture of the same area?

21 A That is exactly what I was trying to describe, yes.

22 Where I took these pictures is kind of over there.

23 And this is the railway causeway. And this lake here has no  
24 obvious culverts going out into the Columbia River, but  
25 that's where it gets its water, and its levels follow the

1 Columbia's levels, as you can see by the shoreline.

2 Q All right. Can you see a high water mark along the  
3 shoreline?

4 A Yes.

5 Q Can you draw with your finger where you see the high water  
6 mark along the shoreline?

7 A Well, to be specific, I can draw what appears to be a high  
8 water line, but with the dams going up and down, sometimes  
9 it's a quite a bit higher than that, but not often enough to  
10 have actually left a mark on the wall.

11 Q All right. And what do you see above that?

12 A That's Highway 14.

13 Q And is this another picture of coal in the same general  
14 location?

15 A Yes, same place. That's the coal with more geese -- goose  
16 footprints.

17 Q And the next picture, 3792, is that more coal in the same  
18 general area?

19 A Yes. Right here and here -- whoops. You have to move  
20 your finger to make it work.

21 Actually, this is a rock that I don't remember  
22 investigating, but if I were there I'd look at that one, too.

23 Q And the next picture in the series, 3793, was that taken  
24 also at Locke Lake?

25 A Yes.

1 Q And what is that a picture of?

2 A Coal in the water.

3 Q And give us the perspective on this picture.

4 A If you recall the one where it showed the trestle -- or  
5 not trestle. What do you call it? The causeway. I walked  
6 west down the beach, where I took that picture of the  
7 causeway, and then I turned to look north. That's what they  
8 call the Mosier's Incline, that cliff wall there. And then  
9 there's Highway 14 in the foreground, Locke Lake in the  
10 direct foreground, and if I looked down I'd probably be  
11 standing in pebbles or rocks at this point.

12 Q And that's paragraph 3794, for the record.

13 3795, was that taken out on the beach where you were  
14 walking?

15 A Yes. As you move west, it becomes more rocky until you  
16 can't walk anymore. And this is kind of in that transition  
17 zone. There's a lot of coal in the picture.

18 Q How far from the train tracks were you where you found  
19 this coal?

20 A This was not terribly far, because the -- I was walking  
21 along the southern border of lake, which, actually, more or  
22 less is the causeway. The causeway rises up behind -- you  
23 know, it rises up -- can you go back a couple of pictures?  
24 It's easier to just show you.

25 Q I'm going to just ask another question. Just listen to my

1 question.

2 The question is -- all right. This is a new question.

3 How far away -- the farthest point that day when you  
4 were investigating coal at Locke Lake, what was the farthest  
5 distance from the train track to where you saw coal?

6 A I would say those first two pictures on the sand, because  
7 those were more like -- I don't know, maybe between 30 and 50  
8 feet north, and I don't know what the vertical is, maybe 10  
9 or 12 feet from the tracks.

10 Q When you say "vertical," you mean from top, down?

11 A Just -- yeah. If you were to draw --

12 Q Elevation?

13 A Yeah, yeah.

14 Q Okay. And about 50 feet in horizontal --

15 A Within 30 to 50, in that range, yeah.

16 Q And 3796, is this a picture of more coal?

17 A Yes.

18 Q Please circle the areas where you see coal.

19 A (Witness complies.) This, too, I think.

20 Q All right. And, again, 3797, is that more coal?

21 A Yes.

22 Q And is that your hand?

23 A Yes.

24 MR. TEBBUTT: Your Honor, I move into evidence 1269.

25 MS. MORGAN: Objection, relevance.

1 THE COURT: Overruled. It will be admitted.

2 (Exhibit 1269 admitted.)

3 Q (By Mr. Tebbutt) Sir, you have in front of you  
4 Plaintiffs' Exhibit 1272. Where were those pictures taken?

5 A This is the western end -- no, sorry. It's the eastern  
6 end of the causeway of Drano Lake where -- so it is the  
7 western end of Tunnel No. 1, which is -- there is a series of  
8 five little tunnels through fingers of rock that the trains  
9 all go through. There's drilled-out tunnels, and I think  
10 there is five of them.

11 Q Okay. The next picture, is that taken in the same general  
12 area?

13 A Yes.

14 Q And the next picture, is that taken in the same general  
15 area?

16 A Yes.

17 Q And circle, if you would, where you see coal, if anywhere.

18 A (Witness complies.)

19 Q And, again, were these all taken, as you testified  
20 earlier, around December of 2012?

21 A This one was probably not because of the condition of the  
22 vegetation.

23 I've been out there a lot of times, and I don't remember  
24 looking at just a photograph, when it was taken. I do have  
25 all that metadata. It is in the witness room on a thumb

1 drive.

2 Q All right. Thank you.

3 And 3967, is that taken in the same general area?

4 A Yes.

5 Q And, again, circle if you will -- never mind.

6 A If it's got a plant on it, it's got coal under it.

7 Q All right.

8 And 3968, where was this taken?

9 A That's the -- yeah, same thing. Let's see.

10 Q What's the cement there in the picture?

11 A That -- oh. That's the causeway by Tunnel 1. It's the  
12 west end of the causeway by Tunnel 1.

13 Q Does the train go, basically, up on the track that's on  
14 top of that concrete?

15 A No. This is the roadway that you're seeing, and to the  
16 back -- if you can tell where the photographer is standing,  
17 behind me was where the train is, and that's the highway.

18 Q Okay. Let me show you another picture. Does that give  
19 you some more perspective on that?

20 A Yeah. That's the same place. I was standing probably  
21 over here looking at that, I think, in the previous photo.

22 Q Okay. And what is the name of the waterway you see  
23 between those two bridges?

24 A That's the exit of Drano Lake, which is, actually, fed in  
25 a combination of water coming in from the Columbia River and

1 also coming down from the Little White Salmon River. The  
2 fish hatchery is right up there.

3 Q And is this a picture in the same location, 3970?

4 A Yes.

5 Q Same with 3971?

6 A Uh-huh, yes.

7 MR. TEBBUTT: Your Honor, I move into evidence  
8 Plaintiffs' Exhibit 1272.

9 MS. MORGAN: Objection, relevance.

10 THE COURT: Admitted. Overruled.

11 (Exhibit 1272 admitted.)

12 Q (By Mr. Tebbutt) Sir, have you before you Plaintiffs'  
13 Exhibit 1273. Where were these pictures taken?

14 A That's the same place, the west end of the causeway, I  
15 believe. I'm not a hundred percent sure of that.

16 Q All right. Let me show you the next photograph. Maybe  
17 that will help you.

18 A Oh, yeah. We're back there now. Yeah.

19 Q Where is that?

20 A That is the same -- it's west end of the causeway. I had  
21 two series of those photographs, and my notes are a little  
22 spongy here.

23 Q All right.

24 Is this picture taken on Highway 14?

25 A Yes. It drains directly to the water below.

1 Q How do you know that?

2 A Because I kicked stuff down in it. You know, it's -- it's  
3 a -- well, I can't say I know it from an engineering  
4 standpoint. Let's put it that way.

5 But you have a roadway that collects water behind the  
6 jersey barrier that drains.

7 Q Have you ever gone under the bridge?

8 A Yeah. You can under and look for it, but I just don't  
9 recall if it actually lands directly in the water or on the  
10 riprap below it.

11 Q Okay. And, again, the wider-zoomed shot?

12 A Different angle, yeah, probably standing back a little  
13 ways, but you can see it right below the trains.

14 Q And were you alone that day?

15 A Well, it's hard to say on that day if I was alone. I  
16 think I might have been with Peter Cornelison. But I've been  
17 there a number of times, too, and so --

18 Q And had you taken photos there at times when you weren't  
19 with Mr. Cornelison?

20 A Yes. That's coal, too, by the way.

21 Q Have you taken pictures of coal on that same bridge when  
22 you weren't with Mr. Cornelison?

23 A Yes.

24 Q And same with 3977, same area?

25 A Yes. I think these are all more or less in a sequence.

1 Q All right. And 3978 is just the same thing, different  
2 angle?

3 A Uh-huh, yes. And, actually, if you wanted to know, that  
4 is Peter in the background. We did go that day together.

5 Q All right. Thank you.

6 3980, what is that a picture of, sir?

7 A That is a train going by when I was taking photographs,  
8 and it just kind of shows where the track is relative to the  
9 road.

10 Q So was this photograph taken near where those other  
11 photographs were taken?

12 A Yes. I think that's the same No. 57 mile marker that's in  
13 most of the photographs that I have there.

14 Q That one?

15 A Yeah, that one. Go to the next one. I don't know if the  
16 speed limit sign is there.

17 Q Okay.

18 A Yeah, that's it.

19 Q Can you see coal in this picture?

20 A Yeah. All the dust on the side of the road is kind of a  
21 combination of about two-thirds coal and one-third, you know,  
22 road sand or ballast stuff.

23 Q Can you circle for us, if you will, where you see coal in  
24 Photograph 3980?

25 A This whole area here. And then if you part the grass, you

1 can see it down anywhere you want there.

2 Q Is there a bird there in the picture amongst the coal?

3 A A bird? Yes.

4 Q Can you circle the bird, please?

5 A (Witness complies.)

6 MR. TEBBUTT: Your Honor, I move into evidence  
7 Plaintiffs' Exhibit 1273.

8 MS. MORGAN: Objection, relevance.

9 THE COURT: Overruled. It will be admitted.

10 (Exhibit 1273 admitted.)

11 Q (By Mr. Tebbutt) Sir, you have in front of you now  
12 Plaintiffs' Exhibit 1274, which is a series of photos. Did  
13 you take this picture?

14 A I believe I did.

15 Q And do you know about the time frame you took this  
16 picture, or is this something that the metadata would tell  
17 us?

18 A Yes. All of my metadata is available, and it was  
19 submitted in discovery. But now that we have exhibit  
20 numbers, I can't look it up.

21 Q Thank you.

22 What does photograph with Bates No. FOCG 004023 show,  
23 sir?

24 A That is kind of an establishing shot of the riprap at the  
25 east end of the White Salmon Bridge, at the mouth. The

1 trestle is the reflection in the water, and I believe that  
2 there is coal right here. And I think some of the next  
3 photos might show that more close up.

4 Q All right.

5 A Oh, and there's a little bit more.

6 Q That's okay.

7 4024, what does that picture depict?

8 A Coal in the water under the White Salmon trestle.

9 Q Can you please circle the coal, please?

10 A (Witness complies.)

11 Q Thank you.

12 And, again, is this more coal in your hand?

13 A Coal in the water at the White Salmon trestle.

14 Q And, again, same thing?

15 A Yeah. No, wait a second. That might not have been my  
16 hand. It looks like someone else's hand, because I don't  
17 have a yellow and gold ring.

18 Q All right. Did you take that picture?

19 A Yes.

20 Q And where are you now, sir, in 4027?

21 A This is the mouth of the White Salmon on the east bank.  
22 And this is that sandbar you were asking about before. So  
23 before, I was over here. Then when you go around the corner,  
24 that's that big sandbar we were discussing earlier.

25 Q Very good.

1 Different day than the pictures you took that other  
2 time?

3 A I'm sure, yes. Yeah.

4 Q And 4028, what does that depict, sir?

5 A Well, this is the water. This is the overhanging kind of  
6 riprap support structure that holds up the trestle, and every  
7 place that there is a little pocket, there is a little coal,  
8 as much as will fit in these pockets. And when you take it  
9 out, it fills up again.

10 MS. MORGAN: Objection, speculation.

11 THE COURT: Overruled.

12 MR. TEBBUTT: Your Honor, I move into evidence  
13 Plaintiffs' Exhibit 1274.

14 MS. MORGAN: Objection, relevance.

15 THE COURT: Overruled. It will be admitted.

16 (Exhibit 1274 admitted.)

17 Q (By Mr. Tebbutt) Sir, you have in front of you a series  
18 of photographs labeled Plaintiffs' Exhibit 1275. The first  
19 one, FOCG 004086. Where were these pictures taken?

20 A These are at the east end of Drano Lake, so this is closer  
21 to the actual Tunnel 1.

22 Q Okay. And were -- is that the same general area depicted  
23 in the photos we just looked at?

24 A No, that was the White Salmon River.

25 Q Okay.

1 A This is the Little --

2 Q Little White Salmon.

3 A Drano Lake's western boundary is the causeway where the  
4 drain is where you can see it falling and also the where the  
5 Little White Salmon River goes.

6 If you go down to the east end, which is upstream of the  
7 Columbia, you've got the tunnels, the beginning of the  
8 tunnels, and this one Tunnel 1 is the first of five.

9 Q Very good.

10 And what's depicted in that picture?

11 A That's a handful of coal I pulled out of that water below,  
12 and I sat on the rock to take a picture.

13 Q And that water you're referring to is the water of Drano  
14 Lake?

15 A This water here is found -- yes. It would have had been,  
16 because otherwise I would have been out in the river, which  
17 it would have been a bit of work to get to.

18 Q And the next picture, 4087?

19 A I believe those are the same rocks down here, with a  
20 better shot up.

21 Q Same thing, 4088, same area?

22 A Yes. And, actually, those are the same little bits of  
23 coal. All four of those shots show the same handful of coal.

24 Q All right.

25 MR. TEBBUTT: Your Honor, I move into evidence

1 Plaintiffs' Exhibit 1275.

2 MS. MORGAN: Objection; relevance and cumulative.

3 THE COURT: Overruled. It will be admitted.

4 (Exhibit 1275 admitted.)

5 THE WITNESS: Can I make another -- do you want  
6 another statement on that one?

7 THE COURT: No.

8 MR. TEBBUTT: No.

9 Q (By Mr. Tebbutt) Sir, did you take video as well at some  
10 time?

11 A Yes.

12 Q And is this -- we just talked about Milepost 57, which I  
13 think was near the Little White Salmon, correct?

14 A Yes.

15 Q I'm glad I got that right.

16 Did you take this video?

17 A Yes.

18 Q And what does the video show?

19 A Well, it's a coal train approaching from the east on a  
20 fairly calm day.

21 MR. TEBBUTT: I'll play it.

22 MS. MORGAN: Objection, Your Honor, to the sound.  
23 Hearsay.

24 THE COURT: Overruled.

25 (Video is played.)

1 Q (By Mr. Tebbutt) If something is of particular import to  
2 you in this video, just let me know. Just say stop, and  
3 we'll stop it and talk about it. Okay?

4 THE COURT: Don't speak unless you're asking a  
5 question.

6 MS. MORGAN: Your Honor, the speaking is in the  
7 video.

8 THE WITNESS: That's not me.

9 THE COURT: Oh, was it in the video?

10 THE WITNESS: Yes.

11 THE COURT: Okay. Go ahead.

12 MR. TEBBUTT: I'll go ahead and play.

13 MS. MORGAN: Objection to the sound of the witness  
14 testifying in the video.

15 THE COURT: The objection is overruled. It will be  
16 admitted.

17 Go ahead.

18 (Exhibit 1278 admitted.)

19 Q (By Mr. Tebbutt) Sir, you have your voice in the video;  
20 is that correct?

21 A Yes.

22 Q And you're describing what?

23 A Well, I was sitting in the car, waiting for a coal train,  
24 with my video, and then one came. And I realized I was  
25 hearing it hitting the car and thought I better get out and

1 see how much I felt and how much I could see, you know, from  
2 not being in the car.

3 Q And could you feel it?

4 A Yes.

5 Q And describe that experience.

6 A It was a bit like hail or bits -- particles hitting, you  
7 know, it was just like stuff hitting you.

8 MR. TEBBUTT: Thank you, sir. I have no further  
9 questions.

10 I'd like to move into evidence 1278, if I haven't already.

11 MS. MORGAN: Objection; hearsay to sound.

12 THE COURT: I've already ruled on that, counsel. It  
13 is admitted.

14 MR. TEBBUTT: Your Honor, at the risk of having your  
15 overruling just a presence-sense impression, I think it is  
16 above the hearsay --

17 THE COURT: It is not hearsay. The witness is on the  
18 stand and is subject to cross-examination.

19 MR. TEBBUTT: Thank you.

20 CROSS-EXAMINATION

21 BY MS. MORGAN:

22 Q Good afternoon, Mr. Wood.

23 A Good afternoon.

24 Q Mr. Wood, you testified regarding photos and video of  
25 material you believe to be coal, correct?

1 A Yes.

2 Q And on most of these occasions, the material that you  
3 believed to be coal in the photograph, you had gone out  
4 looking for it; is that right?

5 A Yes.

6 Q And, Mr. Wood, you have no specialized knowledge regarding  
7 the identification of coal; is that correct?

8 A I don't know what "specialized knowledge" is.

9 Q Have you ever studied geology?

10 A No.

11 Q And you've never analyzed the chemical components of coal,  
12 have you?

13 A I'm aware of the chemical components of coal.

14 Q But you've never analyzed them yourself?

15 A What is analyzed?

16 Q Have you conducted any studies on the analysis of coal?

17 A What is studies?

18 THE COURT: This is going to go a lot faster if you  
19 just answer the question.

20 A Well, nothing like going to school and being told that  
21 it's coal.

22 Q (By Ms. Morgan) And, Mr. Wood, you're not aware of any  
23 laboratory analysis of any of the material that you believe  
24 to be coal in these photographs; is that right?

25 A From these, I can -- that's correct, yes.

1 Q And you also testified about the high water line in some  
2 of the photographs; is that right?

3 A That's correct.

4 Q And you have no specialized expertise in delineation of a  
5 high water mark; is that right?

6 A From the standpoint of being told what the high water mark  
7 is in a school, no.

8 Q And you've never been trained by the Army Corps of  
9 Engineers in determining the ordinary high water mark?

10 A No.

11 Q In the photographs that you testified about today,  
12 Mr. Wood, you'd never seen that material in those photographs  
13 get to be to the location of where you found it; is that  
14 right?

15 A No, that's not true.

16 Q You testified about photographs in the White Salmon  
17 River --

18 A Correct.

19 Q -- is that correct?

20 And in those photographs, had you seen the material get  
21 to be to where it was at that time?

22 A Not in the White Salmon photos.

23 Q Thank you.

24 You also testified about an area of the Columbia River,  
25 I believe you called it Locke Lake, and you hadn't seen that

1 material get to be where it was in those photographs; is that  
2 right?

3 A I did not see the material arrive there, no.

4 Q And you also testified about photographs that you took at  
5 the Lewis River; is that right?

6 A Correct.

7 Q And if you didn't see the material in the photographs get  
8 to be to where it was in those photos; is that right?

9 A Correct.

10 Q And you testified about a point in Puget Sound, Solo  
11 Point; is that right?

12 A Yes.

13 Q And you didn't get to see that material get to where it  
14 was in those photographs?

15 A No.

16 THE COURT: Counsel, do you know where Solo Point is,  
17 because I don't?

18 MR. TEBBUTT: Yes, Your Honor.

19 THE COURT: Where is it?

20 MR. TEBBUTT: It is just a little northeast of  
21 Olympia, maybe 10 miles.

22 THE COURT: Okay. That's fine.

23 Q (By Ms. Morgan) And, Mr. Woods, you testified about  
24 photographs you had taken at Drano Lake?

25 A Correct.

1 Q And in those photographs that you took, you hadn't seen  
2 that material get to be where it was; is that right?

3 A Is that the video camera photo?

4 Q No. Let's start with the photos.

5 A Yeah, that's correct.

6 Q Now, in the video, Mr. Wood, could you see the material  
7 actually coming off of the train car?

8 A Yes.

9 Q Not when you were there that day, the --

10 A The material that was on the car was arriving during the  
11 video, and then being further moved by wind, and there was a  
12 white-painted surface.

13 Q Now, in the video, could you see the actual material come  
14 off the top of the train car?

15 THE COURT: Counsel, I'm tempted to ask: Do you  
16 think it was sprinkled by the coal fairy?

17 Go ahead.

18 Q (By Ms. Morgan) Mr. Wood, in that video, was that your  
19 vehicle?

20 A Yes.

21 Q And when was the last time you had washed that vehicle  
22 before that day?

23 A Hmm, I'm not sure.

24 Q Mr. Wood, did you count the number of cars on the train as  
25 it went by?

1 A No.

2 Q In that video, it doesn't show material that you believe  
3 to be coal entering the waterway, does it?

4 A No, it doesn't.

5 Q Now, Mr. Wood, you said you lived in Hood River since  
6 around 1997; is that right?

7 A Yes.

8 Q So that's nearly 20 years?

9 A Uh-huh.

10 THE COURT: You have to say "yes."

11 THE WITNESS: Yes. Sorry. I missed that one.

12 Q (By Ms. Morgan) And in that time, you've seen typically  
13 about two BNSF coal trains a day go through the Gorge; is  
14 that right?

15 A Perhaps.

16 Q So is it fair to say you've seen thousands of coal trains  
17 in your time in Hood River?

18 A Well, I live across from the tracks, about two miles from  
19 them, and I can see trains moving along the Washington shore  
20 from Oregon frequently, and lots of them are coal trains.

21 Q And you testified that you go out trying to take video or  
22 photos of these trains; is that right?

23 A I have gone out, and you can see the dates on the  
24 metadata.

25 Q And, Mr. Wood, you'd like to see BNSF stop transported

1 coal in the state of Washington; is that right?

2 A I think I'd like to see them stop sprinkling it in the  
3 water and on the grass on the sides of the tracks.

4 Q And, Mr. Wood, during your -- you had a deposition taken  
5 earlier in this case; isn't that right?

6 A Yes, uh-huh.

7 Q And during that deposition, you were asked that same  
8 question; is that right?

9 A Uh-huh.

10 Q And at that time --

11 A Yes. Sorry.

12 Q And at that time, you had testified that you wished to see  
13 BNSF stop transporting coal through the state of Washington;  
14 is that right?

15 A Yes.

16 Q Now, Mr. Wood, this entire time that you've lived in the  
17 Gorge and attempted to take video and photos of trains,  
18 you've not taken any videos or photos that show material that  
19 you believe to be coal coming off a train and entering a  
20 waterbody; is that right?

21 A That's not entirely correct, because the video that I took  
22 of the coal coming off the train was -- the train is, what,  
23 100-something cars long? The train is moving past me. I'm  
24 within about three car lengths of the water to my back, so  
25 this train is going by me, it's hitting me with coal, it's

1 hitting my car with coal, and then right down- -- I hate to  
2 say "downstream," but it is downstream on the Columbia and  
3 also where the trains go, it goes over a trestle, which goes  
4 over a river, and then there's coal all down the slope and  
5 into the water.

6 So I'm taking a picture of coal coming off the train, it's  
7 hitting me, and then within a few train cars lengths, it goes  
8 over open water, and the idea that it couldn't also be going  
9 off there is -- is just ridiculous.

10 Q But, Mr. Wood, you already testified that in that video  
11 you took, you couldn't see the material you believed to be  
12 coal going into the waterway --

13 A I didn't have the presence of mind when I took the video  
14 to turn around and walk a little distance and look over into  
15 the water. But if I had, I'm sure it would have captured  
16 that. So I think it is fair to say that that video shows  
17 coal being deposited in a way that can reasonably assumed  
18 also into the water at the same time.

19 Q So it's accurate that you do not have a photo or a video  
20 of material you believe to be coal going into a waterway?

21 A Oh, that's accurate, yes.

22 MS. MORGAN: Thank you. No further questions.

23 THE COURT: All right. Any redirect?

24 MR. TEBBUTT: Nothing, Your Honor.

25 THE COURT: You may step down.

1 THE WITNESS: Sorry?

2 THE COURT: You may step down.

3 MILES JOHNSON, HAVING BEEN FIRST DULY SWORN,  
4 TESTIFIED AS FOLLOWS:

5 THE CLERK: Please state your full name, and spell  
6 your last name for the record.

7 THE WITNESS: Miles Johnson, J-o-h-n-s-o-n.

8 MS. MATSUMOTO: Your Honor, if I may, one  
9 housekeeping matter.

10 Mr. Johnson has bought a demonstrative exhibit with him  
11 today, and I wanted to provide opposing counsel the  
12 opportunity to see it before he begins testifying.

13 THE COURT: Sure. You can approach, if you wish.

14 MS. MATSUMOTO: Thank you.

15 DIRECT EXAMINATION

16 BY MS. MATSUMOTO:

17 Q Good afternoon, Mr. Johnson.

18 A Good afternoon.

19 Q Could you please tell the court where you live?

20 A I live at Hood River, Oregon.

21 Q And how long have you lived there, sir?

22 A Roughly four years.

23 Q Sir, what is your educational background?

24 A After high school, I went to Whitman College in Walla  
25 Walla, Washington. I got a bachelor of arts in biology and

1 environment studies. Then I went to Lewis and Clark Law  
2 School, and I got my J.D. in 2012.

3 THE COURT: Move closer to the microphone and keep  
4 your voice up.

5 Q (By Ms. Matsumoto) Sir, are you a member of the state bar  
6 of Oregon?

7 A Yes, I am.

8 Q And any other state bars?

9 A I'm a member of the Washington Bar as well.

10 Q And are you a member of any federal district court bar  
11 associations?

12 A Yes. I'm admitted to practice in the District of Oregon  
13 and the Eastern and Western Districts of Washington.

14 Q And are you employed at Hood River?

15 A Yes. I work for Columbia Riverkeeper.

16 Q And when did you begin working for Columbia Riverkeeper?

17 A In the fall of 2012.

18 Q What is your role with Columbia Riverkeeper?

19 A My job title is Clean Water Attorney. So I litigate Clean  
20 Water Act enforcement cases, and I also do legal and factual  
21 research. And some litigation work in support of  
22 Riverkeeper's other campaigns.

23 Q Are you counsel in this case, sir?

24 A No, I'm not.

25 Q Are you a member of any of the other plaintiff

1 organizations?

2 A No.

3 Q Sir, have you seen BNSF coal trains traveling through the  
4 Columbia River Gorge?

5 A Yes, I have.

6 Q Have you observed coal in the waterways in the Columbia  
7 River Gorge?

8 A Yes.

9 Q And where have you observed coal?

10 A I've observed coal at Horsethief Lake, at Spearfish Lake,  
11 on the beach just upstream from the mouth of Drano Lake, and  
12 on the beach at the mouth of Rock Creek near Stevenson,  
13 Washington.

14 Q And when you observed this material in the water, how did  
15 you know that it was coal?

16 A It was small to medium sized, sometimes even as big as  
17 your fist; chunks of jet black rock; lighter than the usual  
18 basalt that you see in the Columbia River Gorge, and when you  
19 pick it up, it just, you know, crumbles apart in your hand,  
20 and you can even run it together, and it just kind of  
21 disintegrates into a fine powder. So that, in conjunction to  
22 the proximity to the railroad where the coal trains are.

23 THE COURT: How big is Hood River?

24 THE WITNESS: I think it's about 7,000 people.

25 THE COURT: You'd think they're all here.

1 Q (By Ms. Matsumoto) Sir, I'm showing you what's been  
2 marked as Exhibit 1228, and this is page 23 of the ECF.

3 Do you recognize this image?

4 A Yes, I do.

5 Q And could you just describe what is depicted?

6 A Yeah. This is an aerial or satellite photograph of what  
7 we call the mouth of Rock Creek, where Rock Creek enters the  
8 Columbia.

9 Q And you earlier just testified this is one of the  
10 locations where you observed coal, correct?

11 A Correct.

12 Q Can you, using the stylus, draw on the screen there where  
13 it was that you observed coal?

14 A Sure. (Witness complies.)

15 Q And can you also circle where the rail bridge is?

16 A (Witness complies.)

17 Q And in the area you circled where you said you saw coal,  
18 how did you access that area?

19 A So there is this small public park right about here, or  
20 maybe farther upstream in the Columbia. In this picture the  
21 water level is much higher than -- or much more of the shore  
22 is covered than when we were there, so we went to that park  
23 and then walked kind of along the waterline down to Rock  
24 Creek.

25 Q And when you say "we," who is we? Were you accompanied by

1 anyone?

2 A Yes. I was accompanied by Brett VandenHeuvel, who is  
3 Riverkeeper's executive director and my boss; also John Wood  
4 and Dave LaLiberte.

5 Q Who is John Wood?

6 A John Wood is a Riverkeeper member and volunteer.

7 Q And who is Dave LaLiberte?

8 A His is a scientific consultant.

9 Q And, sir, do you remember the date that you and  
10 Mr. VandenHeuvel, Mr. Wood, and Mr. LaLiberte visited the  
11 area depicted in this map, the Rock Creek area?

12 A I'm fairly certain it was January of 2013. It was a -- it  
13 was certainly in the winter. It was a nasty, rainy day, but  
14 I couldn't tell you the exact day.

15 Q And you mentioned that the water that was shown here is  
16 different from what you experienced the day that you visited?

17 A Yeah. When we were there, the water level was much lower,  
18 and there were sandbars and kind of a sand spit at the mouth  
19 of the Rock Creek exposed that we were able to walk around  
20 on.

21 Q So were you able to walk on sandbars and surfaces that  
22 occasionally may be covered, as depicted in this map here?

23 A Yeah. Certainly the areas where we were are covered by  
24 water in this map.

25 Q Do you know how often the water fluctuates in the area of

1     **Rock Creek?**

2     **A    Not precisely, although I know that, through the operation**  
3     **of the dams, the water level in the Bonneville pool raises**  
4     **and lowers, you know, fairly regularly.**

5     **Q    On the day that you and you three companions visited the**  
6     **Rock Creek area, did you take any photographs or videos?**

7     **A    You know, I don't think I personally did, and that was**  
8     **mostly because it seemed like the other three people were**  
9     **taking a lot of videos and pictures.**

10    **Q    Have you seen any of the pictures or videos that those**  
11    **other three people took?**

12    **A    Yes.**

13            **MS. MATSUMOTO:  Your Honor, at this time I'd like to**  
14    **move to admit Exhibit 1228, just page 23 that's shown here.**

15            **MR. SULLIVAN:  No objection.**

16            **THE COURT:  Admitted.**

17                    **(Exhibit 1228.23 admitted.)**

18    **Q    (By Ms. Matsumoto)  Mr. Johnson, you said you had seen**  
19    **some other photographs and videos that your companions took**  
20    **on the day of your visit to Rock Creek.**

21            **MS. MATSUMOTO:  Your Honor, I'd like to play one of**  
22    **those in full right now.  It's under a minute.  And then I**  
23    **have a few questions for Mr. Johnson, if that's acceptable to**  
24    **the court.**

25            **THE COURT:  Go ahead.**

1 MR. SULLIVAN: I've viewed these, and if you play the  
2 sound, I'm going to object to hearsay. There is a voiceover  
3 by an individual not on the witness list.

4 THE COURT: You can't play the sound.

5 MS. MATSUMOTO: We will mute the video. Mr. Johnson  
6 is depicted in one of the videos, and we'll be able to  
7 discuss the contents.

8 THE COURT: Okay.

9 MS. MATSUMOTO: And just as a housekeeping matter,  
10 this is Plaintiffs' Exhibit 1363.

11 Q (By Ms. Matsumoto) Mr. Johnson, do you recognize what is  
12 depicted in this video?

13 A Yes, I do.

14 Q Can you describe, briefly, what was depicted?

15 A This is a video that was taken, I believe by Brett  
16 VandenHeuvel, of me standing and holding coal near the mouth  
17 of Rock Creek. You kind of get a couple of other shots of  
18 Rock Creek, and then at the end it pans over and you can see  
19 Dave LaLiberte and John Wood standing right next to --  
20 standing fairly close to where we were collecting coal.

21 Q And I'll just note for the record that at frame three  
22 seconds, there is an individual depicted. Is that you?

23 A Is that what's up on the --

24 Q Yes.

25 A Yes, that's me.

1 Q What is in your hand?

2 A It's a piece of coal.

3 Q How did you know it was a piece of coal?

4 A It is very black, kind of light in your hand, lighter than  
5 a piece of basalt would be, a piece of rock, and at the  
6 beginning there, you can see it kind of break apart as I  
7 break it. Yeah. And as you can see, we're also maybe 15  
8 yards from the railroad causeway there.

9 Q And how much coal did you observe during the time that the  
10 four of you were at Rock Creek?

11 A I don't -- I don't quite know how to answer that question,  
12 other than to kind of describe what we saw there, and that  
13 was, you know, just kind of pieces of that size, some as big  
14 as your fist and some smaller than that, kind of scattered  
15 over this -- the sandbar area there and in the shallow water  
16 surrounding the sandbar.

17 It wasn't like it was completely coating the ground, but  
18 you didn't have to walk around very far in any direction  
19 before you could just look down and see these chunks of coal.

20 Q I'm just forwarding through pages.

21 Mr. Johnson, it may be difficult, but could you just  
22 draw on the screen which waterways are depicted here?

23 A Sure. So basically out here is the Columbia River,  
24 looking downstream. And this -- this kind of waterway here,  
25 in general, is kind of the channel where Rock Creek comes out

1 under that railroad bridge and joins the Columbia River.

2 Q And when you were observing coal, did you observe it from  
3 locations that are visible in this frame?

4 A Yeah. I mean, there was coal kind of all over this  
5 sandbar area, both in the foreground and on the other side of  
6 the sandbar towards where Rock Creek was. Yeah, kind of all  
7 around over there.

8 Q So the sandbar was accessible the day that you visited,  
9 obviously, in this video.

10 Have you visited the Rock Creek area or seen the Rock  
11 Creek area when the sandbar is not visible?

12 A You know, I'm not sure I've specifically been there when  
13 it's not visible. It is very hard to see from where we were  
14 standing from the road, and I have not, you know, gone back  
15 to that specific spot.

16 You know, I will say that that area is probably frequently  
17 covered by water, like we saw in that picture.

18 Q Mr. Johnson, could you please circle the rail bridge in  
19 this frame?

20 A Yes.

21 Q And it looks like you are still depicted in the frame in  
22 the lower corner there.

23 Could you again remind us about how far from the bridge  
24 was from where you all were observing coal in Rock Creek?

25 A From where I am in that picture to the bridge, I guess I

1 would estimate that was oh, I don't know, 50 or 60 yards.

2 Q And from where you were standing, about how far were the  
3 railroad tracks?

4 A Oh, maybe, I don't know, 15 yards to the closest point.

5 Q And earlier, Mr. Johnson, you said you were in a group of  
6 four people the day that you visited Rock Creek.

7 Could you please identify the two individuals that are  
8 depicted in this frame?

9 A Yeah. On the left is Dave LaLiberte, and on the right is  
10 John Wood.

11 Q Could you please just draw a "D" under Mr. LaLiberte and a  
12 "J" under Mr. Wood?

13 A (Witness complies.)

14 Q Thank you.

15 THE COURT: What's happened with the frequency of  
16 coal trains as a result of the economic problems in the  
17 Wyoming coal fields?

18 MR. WAGNER: Your Honor, there has been a decline,  
19 most definitely. The average may have been, at the beginning  
20 of the statutory period, closer to the three or four per day  
21 that has been discussed. The average closer to where we are  
22 now, I can't give you the precise date of when that would be,  
23 would be much closer to two.

24 THE COURT: Okay.

25 Q (By Ms. Matsumoto) Mr. Johnson, what were Mr. Wood and

1 Mr. LaLiberte doing while you were at Rock Creek?

2 A They were both walking around in the same area where we  
3 were. I think both of them were looking for, finding, and  
4 photographing coal. My understanding is that Dave LaLiberte  
5 was also collecting samples of that coal to be analyzed.

6 Q Did you see Mr. LaLiberte collecting samples?

7 A Yes, I did.

8 Q Do you know about how many samples he collected at Rock  
9 Creek?

10 A I don't know that specifically.

11 MS. MATSUMOTO: Your Honor, at this time I'd like to  
12 move into evidence Plaintiffs' Exhibit 1363, although,  
13 understanding, without the sound.

14 MR. SULLIVAN: I think it is 1263. Is it? Okay. My  
15 apologies. No objections, as long as it doesn't have sound.

16 THE COURT: All right. It will be admitted without  
17 the sound.

18 MS. MATSUMOTO: Thank you, Your Honor.

19 (Exhibit 1363 admitted.)

20 Q (By Ms. Matsumoto) I'd like to show you what's been  
21 marked as 1364, and then I'll ask you questions about  
22 specific frames.

23 (Video is played.)

24 Q (By Ms. Matsumoto) Mr. Johnson, do you recognize the  
25 video we just saw?

1 A Yes, I do.

2 Q Did you take that video?

3 A No, I don't believe I did.

4 Q Do you know who did?

5 A I believe Brett VandenHeuvel did.

6 Q And, again, Brett VandenHeuvel is somebody you work with?

7 A Yes. He is the my boss. He is Riverkeeper's executive  
8 director.

9 Q So if you were to hear him speaking, you'd recognize his  
10 voice?

11 A Yes.

12 Q And could you describe the location that this video was  
13 captured?

14 A This is at the mouth of Rock Creek again.

15 Q Did you observe Mr. VandenHeuvel capturing this video?

16 A Yes, I did.

17 Q And was this on the same day as the video we just watched,  
18 Plaintiffs' Exhibit 1363?

19 A Yes, it was.

20 Q And does the video that we just saw accurately reflect  
21 what you observed that day?

22 A Yes, it does.

23 Q And on the screen there, there's a rail bridge, and,  
24 again, it's the same -- is it the same distance that you  
25 testified previously?

1 A Yes --

2 MR. SULLIVAN: Objection, leading.

3 THE COURT: Sustained.

4 Q (By Ms. Matsumoto) Mr. Johnson, how far were you from the  
5 rail bridge as depicted in this video?

6 A I would say roughly 50 yards.

7 Q And how far were you from the tracks, the nearest point of  
8 the tracks?

9 MR. SULLIVAN: I'm going to object because the video.  
10 The witness has testified he did not take the video, so we  
11 can't assume that he was standing in the spot where the video  
12 was taken.

13 THE COURT: Sustained.

14 Q (By Ms. Matsumoto) Mr. Johnson, were you in proximity to  
15 Mr. VandenHeuvel when he was taking this video?

16 A I believe I was standing more or less right next to him.

17 Q And you watched him film the video and undertake the  
18 activities that were portrayed?

19 A Yes.

20 Q And this is about 14 seconds in.

21 Mr. Johnson, could you describe what's depicted in this  
22 frame?

23 A Yeah. This is a shot of some shallow water, near the  
24 beach at Rock Creek, probably less than a foot deep.

25 Q And about how far is this area at Frame 14 from the

1 railroad tracks?

2 A Probably 20 yards.

3 Q Mr. Johnson, did you observe coal in the water when you  
4 were at Rock Creek?

5 A Yes, I did. There was coal on the beach, and there was a  
6 lot of shallow water around the sandbar, and there was coal  
7 both in the water and on the beach.

8 Q Did you pick up any of the coal?

9 A Yes, I did.

10 Q From the water?

11 A From the water, from the beach, yeah.

12 Q Mr. Johnson, in this frame, someone who has filmed the  
13 video is not in view, as you've testified, picked up an item  
14 out of the water.

15 Do you recognize that?

16 A Yes. That looks like a chunk of coal.

17 And as I recall when you played the video through the  
18 first time, you know, then the person whose hand that is, who  
19 is Brett VandenHeuvel, just kind of takes and crumbles that  
20 piece of coal in his hand, and that's pretty normal or  
21 characteristic of what happens when you pick up a chunk of  
22 coal like that.

23 Q And did try to break up the chunks when you were at Rock  
24 Creek?

25 A Yeah. And I think you see on that -- on the first video,

1 the one I'm in, kind of picking up a big chunk, and then it  
2 breaks into two or three pieces.

3 THE COURT: Is the coal from the Wyoming coal fields  
4 anthracite or bituminous?

5 MR. SULLIVAN: Primarily bituminous or  
6 sub-bituminous.

7 Q (By Ms. Matsumoto) Mr. Johnson, how large was the area of  
8 water at the sandbar the day that you were at Rock Creek?

9 A I guess I don't really know how to answer that well. I  
10 mean, the sandbar was surrounded by shallow water, and there  
11 were a couple of pools in and around the sandbar.

12 Q How much coal did you observe in the water at Rock Creek?

13 A I don't know how to get a total amount. But when you walk  
14 through the water, you couldn't go more than, you know, five  
15 or ten steps without looking down and seeing a chunk of coal  
16 like is kind of depicted here. And walking around, there was  
17 a lot of it around.

18 Q Do you recall how many times you picked up material out of  
19 the water that day?

20 A No, I don't. But, you know, we were at -- we stayed a  
21 better part of an hour, probably, at Rock Creek, walking  
22 around and picking up the coal, taking videos. Dave was  
23 taking samples, I remember, by the end. You know, I kind of  
24 got the feeling, like, you know, we've seen what's here. You  
25 know, there was -- yeah, it was just kind of everywhere you

1 looked.

2 Q And were you near Mr. LaLiberte when he was taking samples  
3 at Rock Creek?

4 A Yeah, generally in the same area.

5 MS. MATSUMOTO: Your Honor, I'd like to move into  
6 evidence Plaintiffs' 1364, again with the sound muted.

7 MR. SULLIVAN: No objection if the sound is muted.

8 THE COURT: It will be admitted without the sound.

9 (Exhibit 1364 admitted.)

10 Q (By Ms. Matsumoto) Mr. Johnson, showing you Plaintiffs'  
11 Exhibit 1259 at the specific page Columbia Riverkeeper  
12 0033391. Do you recognize this image?

13 A Yes, I do.

14 Q And is this a photograph that you took?

15 A I don't remember if it's one that I took, but I'm almost  
16 certain it was either me taking the photograph or someone  
17 taking a photograph from Riverkeeper's patrol boat while I  
18 was driving it.

19 Q And could you please describe what is depicted in this  
20 photograph?

21 A Yeah. So this is the railway causeway between Horsethief  
22 Lake and the Columbia River, as viewed from the Columbia  
23 River.

24 What you see here is at the -- kind of at the top is the  
25 rail itself, and then you see a ballast, and then the

1 causeway with these big basalt boulders on it, and  
2 interspersed between all those boulders are black patches,  
3 which are coal.

4 You can see down to the water line where there is some  
5 staining just above the water line that indicates the water  
6 may have been higher than in the recent past.

7 And then kind of in the very center, that white  
8 tub-looking thing is a coal sampler that I built and  
9 Riverkeeper put out to collect the coal.

10 Q Mr. Johnson, could you please circle, using the stylus, on  
11 the screen the areas that you said were the black patches of  
12 coal?

13 A Yeah.

14 MR. SULLIVAN: Your Honor, I'm going to object to the  
15 line of questioning about the coal and the slope at  
16 Horsethief Lake. I think we've now had about four witnesses  
17 describe this.

18 THE COURT: Yes, I think we've had enough.

19 MS. MATSUMOTO: Thank you, Your Honor.

20 Q (By Ms. Matsumoto) Mr. Johnson, I'm showing you another  
21 image that is Bates stamped Columbia Riverkeeper 0033388,  
22 also part of Plaintiffs' 1259.

23 Do you recognize what is depicted in this image?

24 A Yes.

25 Q And could you please describe it?

1 A This is the inside of one of those coal samplers that I  
2 built. I built two of these and put them out near Horsethief  
3 Lake.

4 Q How did you build the samplers?

5 A I basically built a square out of two-by-fours, which  
6 provided the frame and the flotation for the samplers. And  
7 then I attached, basically, a Rubbermaid tote to the  
8 two-by-fours with screws and anchors in the water and with  
9 line tied to shore.

10 Q How long were they out at the Horsethief Lake?

11 A Altogether, I think they were out there about a month.

12 Q Did you ever visit the floats?

13 A Yes. We deployed floats, and then came back on two  
14 occasions to see whether there was coal in the floats.

15 Q And was this photograph taken on one of those two  
16 occasions?

17 A Yes.

18 Q And what is it again in the middle of the photograph?

19 A There is a sample bottle that looks like it has coal in  
20 it. I'm not sure -- I think someone just put it there to  
21 make a nice photograph after probably collecting that coal  
22 either out of the sampler or from the shoreline.

23 MR. SULLIVAN: Objection, speculation.

24 THE COURT: Sustained.

25 Q (By Ms. Matsumoto) Do you know what happened with that

1 jar?

2 A Not specifically, but I think it is currently sitting on  
3 Mr. VandenHeuvel's desk.

4 Q Was it ever sent to a laboratory?

5 A No.

6 Q Are there other jars of samples that are at the Columbia  
7 Riverkeeper offices?

8 A There's that one, and then there is this one here sitting  
9 on the desk.

10 Q The one you brought with you?

11 A Yes.

12 Q And have any of those ever been sent to a laboratory for  
13 testing?

14 A No.

15 Q Could you quantify about how much coal was in the float  
16 the day this photo was taken?

17 MR. SULLIVAN: Objection, calls for speculation.

18 THE COURT: Overruled.

19 A I would say there was -- as I recall, when I got there,  
20 there was enough coal, basically, to cover the bottom of the  
21 float, you know, not to any significant depth, but, you know,  
22 maybe as much coal as is in this little Mason jar here.

23 Q (By Ms. Matsumoto) And how many times did you visit the  
24 floats?

25 A Twice.

1 MS. MATSUMOTO: Thank you, Your Honor. That's all I  
2 have.

3 THE COURT: Okay. Cross?

4 MS. MATSUMOTO: My apologies. Moving the last  
5 exhibit into admission, Plaintiffs' 1259, the two pages,  
6 Columbia Riverkeeper 33391, and the following page.

7 MR. SULLIVAN: No objection.

8 THE COURT: Admitted.

9 (Exhibit 1259 CR33391 and 1259 CR33392 admitted.)

10 MS. MATSUMOTO: Thank you.

11 CROSS-EXAMINATION

12 BY MR. SULLIVAN:

13 Q Good afternoon, Mr. Johnson. I just have a few questions  
14 for you.

15 Other than the material in the floats -- and I'll get  
16 to that in a moment -- of all the materials you've discussed  
17 today that you found in the environment that you believe to  
18 be coal, you don't know how those materials got there, do  
19 you?

20 A They blew or fell or bounced off the top of a coal train.

21 Q And you saw that happen?

22 A No.

23 Q So you don't have any personal knowledge as to how those  
24 materials got there, correct?

25 A I see the coal in the water and the trains going by and

1 the proximity between the two. But to answer your question  
2 directly, I've never seen coal go directly from the top of a  
3 train coal into the water.

4 THE COURT: Have you ever heard of the coal fairy?

5 MR. SULLIVAN: He's making a couple of experiences  
6 today.

7 THE COURT: Mr. Wagner is looking at me with a  
8 puzzled look. He wasn't here when I made fun earlier.

9 Q (By Mr. Sullivan) You're also not aware when those  
10 materials got to be located where they are; isn't that  
11 correct?

12 A That's correct.

13 Q Okay. And let's just talk about the floats for a moment  
14 that we just looked out, the ones were out at Horsethief --  
15 or in the Columbia River next to the causeway at Horsethief  
16 Lake.

17 How long were those buckets there?

18 A I believe they were there for about a month.

19 Q Okay. About a month.

20 And you checked them twice during that month; is that  
21 correct?

22 A That's my recollection, yeah.

23 Q And you never did actually quantify, measure, weigh how  
24 much you found -- whatever material it was you found in those  
25 floats; isn't that right?

1 A No, we did not.

2 Q You did not.

3 And you never produced any of your -- your organization  
4 never produced any of the materials you found in those floats  
5 to BNSF in discovery; isn't that right also?

6 A You know, that's my -- that's my recollection, although I  
7 will say that I was not involved, really, in production. But  
8 I don't think that the samples that were collected either  
9 time were -- were -- well -- were produced initially. I  
10 think we -- well, obviously it's here. You don't have it.

11 Q A little late.

12 MR. SULLIVAN: I have no further questions.

13 THE COURT: All right. Anything further?

14 MS. MATSUMOTO: Your Honor, I don't believe, with  
15 regard to Mr. Sullivan's last question, that was within the  
16 scope of the discovery request, to clarify.

17 THE COURT: That's not get into that.

18 MS. MATSUMOTO: Sure.

19 REDIRECT EXAMINATION

20 BY MS. MATSUMOTO.

21 Q Mr. Johnson, of the material that was in the float,  
22 Mr. Sullivan asked about the quantification, whether you were  
23 or were not able to quantify it.

24 Does what's in the demonstrative exhibit that you  
25 brought with you reflect at least some portion of what was in

1 the float?

2 A Yes, it was some portion of what was in the float the  
3 second time I went to check it. So, you know, I checked it  
4 once. We emptied the container and put it back out in the  
5 water. Probably a couple of weeks passed. I went out to  
6 check it again the final time, collected that coal from it.  
7 So this is -- and I don't recall if it is all, but it is  
8 certainly some portion of the coal that had accumulated in  
9 the float over that time.

10 MS. MATSUMOTO: Thank you.

11 THE COURT: Anything further?

12 MR. SULLIVAN: No, Your Honor.

13 THE COURT: All right. You may step down.

14 MR. TEBBUTT: Your Honor, may I see you in chambers  
15 to discuss the settlement progress?

16 THE COURT: Yes. Come this way.

17 (Court in recess.)

18 BART MIHAILOVICH, HAVING BEEN FIRST DULY SWORN,  
19 TESTIFIED AS FOLLOWS:

20 THE CLERK: Please state your full name, and spell  
21 your last name for the record.

22 THE WITNESS: Bart Mihailovich,  
23 M-i-h-a-i-l-o-v-i-c-h.

24 DIRECT EXAMINATION

25 BY MS. RODGERS:

1 Q Good afternoon, Mr. Mihailovich. Where do you live?

2 A Missoula, Montana.

3 Q And do you have a family?

4 A I do, a wife and an almost-two-year-old.

5 Q Where did you live before you moved to Montana?

6 A Spokane, Washington.

7 Q And what is your educational background?

8 A I've got a bachelor of arts in journalism from Eastern  
9 Washington University.

10 Q When did you graduate from Eastern Washington?

11 A 2006.

12 Q Where do you currently work?

13 A I work for Waterkeeper Alliance.

14 Q And how long have you been there?

15 A Since 2014.

16 Q And what do you do for the Alliance?

17 A I am our affiliate coordinator and our interim Gulf and  
18 South Atlantic regional coordinator.

19 Q Could you briefly describe what that is?

20 A So I work with our Waterkeepers in the Gulf and South  
21 Atlantic regions, specifically to offer them support and be a  
22 network for them for services that we can offer for them and  
23 tools that we can provide for them so we can help them do  
24 their jobs, and also work to recruit and bring on new  
25 waterkeepers to the Waterkeeper Alliance.

1 Q And what did you do before your current job at the  
2 Alliance.

3 A I was the Spokane Riverkeeper at the Center For Justice  
4 from 2010 to 2014.

5 Q And was Spokane Riverkeeper, was that your first job  
6 working to protect rivers?

7 A Yes, it was.

8 Q And why did you get into this line of work?

9 A I spent several years as an environmental journalist and I  
10 was interested the issues and there was an opportunity to  
11 actually do some work on environmental issues, and I jumped  
12 at that. But even before then, I was just interested in the  
13 environment and a healthy respect for the environment, and I  
14 wanted to get into that line of work.

15 THE COURT: Was the Center For Justice the  
16 organization that Breean Beggs was with?

17 THE WITNESS: Yes, Your Honor.

18 THE COURT: He's now on the Spokane City Council now,  
19 as I understand it.

20 THE WITNESS: That's correct.

21 Q (By Ms. Rodgers) And when did you start with Spokane  
22 Riverkeeper?

23 A It was in July 2010.

24 Q So you were there about four years?

25 A Yes.

1 Q And can you describe your job duties at Spokane  
2 Riverkeeper?

3 A Yes. I was, essentially, the director of a one-person  
4 operation. My -- you know, a lot of my job was to help with  
5 some fundraising, was to be the public face of this program,  
6 to be present in the community, whether it be at council  
7 meetings or talking to schools or being involved in any kind  
8 of permitting that was going on with the Spokane River  
9 issues. I did a lot of patrol work on the river. I was out  
10 there a lot, seeing what the issues were, and just generally  
11 raising awareness for the river and for the issues on the  
12 river and kind of advocating for those.

13 Q Uh-huh.

14 And you think -- the Spokane River, is that the only  
15 waterbody that you were concerned with with your job?

16 A No. We took a watershed approach. So the Spokane River  
17 and its tributaries. Chiefly, it would be Hangman Creek --  
18 Hangman Creek, yes.

19 Q Okay. Is that also known as Latah Creek?

20 A Correct, yes.

21 Q Okay. You mentioned that you get out in the field, out in  
22 the water quite a bit. About how frequently did you do that  
23 as Spokane Riverkeeper?

24 A It would -- you know, depending on the weather and the  
25 time of year, we'd try to be out on the river itself at least

1 twice a week; oftentimes in better months, every day if we  
2 could.

3 We did a lot of on-the-water education. We also did a lot  
4 of patrol work on the river as well.

5 Q Uh-huh. Can you describe to me what you mean by "patrol  
6 work on the river"?

7 A So we had a raft, a canoe, and a kayak that we would use  
8 on the river. And our patrols would be kind of visual  
9 patrols of the river, looking to see any potential pollution,  
10 looking to see if there were any developments happening along  
11 the river that may not have been permitted or, you know,  
12 looked funny in any other way. So that was a lot of the  
13 patrols we did.

14 And then we would just generally want to be out on the  
15 that stretch of the river as much as we could so we could  
16 photograph, videograph, get an idea of what was happening on  
17 the river.

18 Q And did you ever do any water quality sampling?

19 A Not much. If we found something that was really  
20 concerning that we wanted to have some more information on,  
21 we would. But, generally, I did not do much actual  
22 water-quality sampling in the river.

23 Q Now, did you do the patrols yourself, or were there others  
24 with you?

25 A I did a lot of the patrols by myself. However, we did

1 have several collaborations in the community with area  
2 community colleges or universities, where we would often  
3 partner up and have those folks join us on some patrols. And  
4 we also had interns and volunteers in our own office, in our  
5 organization, who also would join patrols with us.

6 Q Did you ever patrol the rivers for what you believed to be  
7 coal?

8 A Yes, I did.

9 Q And when did you start doing that?

10 A That began in really early 2013, probably the late winter  
11 months of 2013.

12 Q And where did you look for coal?

13 A I focused our efforts and our looking at three locations:  
14 Two on the actual mainstem of the Spokane River, and one on  
15 Hangman Creek. And I looked at specifically places where  
16 train tracks -- a bridge was crossing the river, or the  
17 creek, in Hangman instance.

18 Q Okay. I'd like to show you what's been marked as  
19 Exhibit 1322. Do you see that on your screen?

20 A Yes, I do.

21 Q And is this document familiar to you?

22 A Yes, it is.

23 Q And what is it?

24 A This is a computer screenshot of a Google map of Hangman  
25 Creek. It is a map that I then, from the screenshot, added

1 the red and yellow arrows. But this is of Hangman Creek,  
2 specifically where we were looking for coal in Hangman Creek.

3 Q So you created this map using Google Maps?

4 A I took a screenshot of a Google map, yes.

5 Q Okay. Can you take a look at the next one, please?

6 What is this document?

7 A I did the same thing on this. So a screenshot of a Google  
8 map view of the Spokane River, specifically, on the upper  
9 left there, a bridge that is crossing the Spokane River.

10 Q Okay. And can you take a look at the next one, please?

11 A Yeah.

12 Q And what is this map?

13 A This also is the Spokane River, a Google map screenshot,  
14 and specifically, again, focused on the bridge across the  
15 Spokane River. And, of course, the yellow arrow is, on all  
16 three maps, the parking locations for access.

17 Q When did you create these maps?

18 A I created these in early 2013.

19 Q And did you do that was part of your job duties as Spokane  
20 Riverkeeper?

21 A Yes, I did.

22 Q And were these maps kept in the ordinary course of your  
23 business?

24 A Yes. These were saved on my computer and kept at the  
25 Spokane Riverkeeper office.

1 MS. RODGERS: Okay. Can we move to the first one,  
2 please?

3 Q (By Ms. Rodgers) And you mentioned -- there's two arrows  
4 here. What does the red arrow on the first map show?

5 A So the red arrow is specifically the shoreline area  
6 underneath the bridge, the train track bridge. Here, I was  
7 pointing to where we would want to look for coal in Hangman  
8 Creek.

9 Q Okay. And what is the yellow arrow?

10 A The yellow area is a place to park for access to walk down  
11 there.

12 Q Now, can you describe -- the place that you see where the  
13 red arrow is pointing, can you describe what that looks like?

14 A Sure. That's right underneath the train tracks, right up  
15 against the bridge piling there on the banks of Hangman  
16 Creek.

17 It is a fairly brushy area right there, a lot of trees and  
18 shrubbery around Hangman Creek. But with the piling there,  
19 you know, we were able to walk down there and get right next  
20 to and, in some cases, into Hangman Creek.

21 Q And so where around there specifically? Can you draw a  
22 circle with your finger where you looked for coal?

23 A Sure.

24 Q Just on the screen.

25 A Okay. We looked here, and then, you know, we also crossed

1 and looked over here, too.

2 And both sides of the piling where there was access --  
3 some places were so overgrown with shrubbery that there was  
4 just simply no access -- but the places that we could find  
5 some rocks and debris and access to the creek is through  
6 there.

7 Q And you mentioned that you looked for coal in the water.  
8 About how far into the water did you go out from the  
9 shoreline?

10 A As far as we could wade with -- you know, safely.  
11 Actually, it's a fairly steep drop-off to the creek in these  
12 spots, so we didn't have boat access for these specific  
13 spots, so we were only in the water where we could wade -- or  
14 where I would wade. So I was looking just, you know, in the  
15 safe, wadable areas, and then along the actual shorelines  
16 itself.

17 Q And I hear you say "we." Who was with you?

18 A I did take someone -- a volunteer one time, who I was  
19 training to also do this, but especially the first time I  
20 went out.

21 Q And how many times did you go to this location to look for  
22 coal?

23 A Less than five, three-ish.

24 Q And did you find anything?

25 A I did one time, yes.

1 Q And what did you do with what you found?

2 A Well, we -- I would take what I found, put it into a  
3 baggie, mark the date, time, and location, and try to keep it  
4 uniform to, you know, location and number, and then took  
5 those baggies and kept them with me and brought them back to  
6 the office.

7 Q What led you to believe what you were collecting was coal?

8 A Well, I'd seen -- was looking specifically for what I  
9 thought to be coal, so I was looking for black rock in the  
10 river, in the creek itself, and on the shoreline.

11 And I'd done, you know, a fair amount of Internet research  
12 and talked to some other folks, and just tried to get a  
13 pretty good idea of what I was looking for. And if I saw  
14 something that was black and somewhat shiny and, you know,  
15 was suspect to me, I would then -- if I could get to it, I  
16 would grab it and get a feel for it and use my judgment from  
17 the research I had done of what I, Your Honor, thought to  
18 believe was to be coal, and then if I thought it was, I would  
19 then keep it and put it in a baggie.

20 Q Did what you believed to be coal, did it look different  
21 than the other river rock?

22 A Yeah. There is a fair amount of river pebbles in this  
23 area of the creek because of the flow oftentimes of this  
24 creek, and I was finding, you know, darker, you know, real  
25 black rock in some places and had a little, you know, a

1 little shine to it. If it was in the river, of course.  
2 Sometimes on the banks, it also seemed to be a little shiny,  
3 too.

4 Q And you testified that you put them in a baggie after you  
5 collected them; is that correct?

6 A Yes, I did.

7 Q And how long did you maintain the samples in the baggie?

8 A I would -- I brought them back to the office, and I  
9 believe it was roughly two months before I sent them in. I  
10 believe I had kept them in the office.

11 Q And where did you send them?

12 A I sent them to the Sierra Club.

13 MS. RODGERS: Could we go to the next map, please?

14 Q (By Ms. Rodgers) And I believe you testified this is the  
15 Spokane River, the mainstem of the Spokane, correct?

16 A Yes, it is.

17 Q And what is the red arrow depicting here?

18 A The red arrow points to the place underneath the bridge,  
19 the train track bridge on this specific side of the river  
20 where we wanted to look for coal.

21 Q Now, do coal trains pass over this railroad bridge?

22 A Yes, they I do.

23 Q Have you seen them go over this bridge before?

24 A Yes, I have.

25 Q And what is the yellow arrow on this map?

1 A The yellow arrow is the parking -- the public parking  
2 availability in that area where we could park and then walk  
3 downriver.

4 Q Okay. Could you circle on the screen where you looked for  
5 coal in this photograph?

6 A Sure. In this spot I only looked for coal right on this  
7 side of the river, right here.

8 Q And can you describe the area where you looked?

9 A Yes, I can.

10 This was done in late winter, early spring with some  
11 pretty significant water floats this time. And I looked  
12 right under the piling, I looked both in the river itself  
13 where I could do so safely and then up on the shoreline in  
14 the high water mark of the Spokane River.

15 Q And what did you find?

16 A I did find a little bit in this location, and I followed  
17 the same protocol as before with putting it in a baggie and  
18 marking it with the date, time, location, et cetera.

19 Q And were the materials that you collected here sent to the  
20 lab?

21 A Yes, they were.

22 Q Okay. If we could look at the next map, please.

23 And what is shown on this map?

24 A This is another location on the Spokane River. The yellow  
25 arrow, of course, again, is the parking location that we have

1 for this spot, and the red arrow points to another location  
2 where a bridge crosses the Spokane River, the train bridge  
3 specifically, and the location where we were looking for  
4 coal.

5 Q And have you ever seen coal trains pass over this bridge?

6 A Yes, I have.

7 Q And could you circle the area where you looked for coal on  
8 this map, please?

9 A Yes.

10 (Witness complies.)

11 Q And when did you look for coal here?

12 A This was the same time. This was the late winter, early  
13 spring time period, I believe, February, March-ish of 2013.

14 Q How many times did you visit this location?

15 A Just one time.

16 Q And what did you find?

17 A I did find coal in this location.

18 Q And could you describe the area where you looked here?

19 A Yeah. This area was a really steep location, very rocky;  
20 no growth specifically around the piling on either side of  
21 the train bridge, coming down on both sides there. It was  
22 very rocky, very steep. And, again, it was pretty  
23 significant water flows at this time, so the river itself was  
24 very deep in this place. So here we were looking -- I was  
25 looking in the ordinary high water mark and into the river as

1 safely as I could.

2 Q And what is the ordinary high water mark?

3 A When the river is flowing at its, you know, highest of  
4 flows or it is perceived as the normal high flow, that is the  
5 spot along the bank where the river -- where it would be.  
6 You'd be in the river if you were on that spot on the  
7 shoreline on the high water mark.

8 Q And given your job as Spokane Riverkeeper, do you think  
9 you would be able to tell what is and what is not the  
10 ordinary high water mark?

11 A Yeah. I've spent a significant amount of time on the  
12 river, and not only from a visual standpoint of knowing the  
13 ordinary high water mark and the debris that you see washed  
14 up on the shore or discoloration of trees or tree stems, or  
15 even the bridge piling itself, I have a pretty good sense.  
16 But also I'm pretty aware of the ordinary high water mark  
17 from many of the advocacy or policy of the river. So I'm  
18 aware and very familiar with the ordinary high water mark.

19 Q Do you recall how many samples you collected at this  
20 location when you were there?

21 A I believe I just collected a few, one or two at this  
22 location.

23 Q And what did you do with the samples after you collected  
24 them?

25 A Again, marked them in the baggies and brought those back

1 to the office, and at that point filled out a  
2 chain-of-custody form at the office for all the corresponding  
3 samples that were collected.

4 Q And what did you do with the samples after you did that?

5 A I kept the samples until I had a critical mass of them  
6 or -- because I was doing some sampling work. And then a few  
7 weeks to a month after I did it, we had some volunteers in  
8 intern. So I waited until I had received enough to fill a  
9 box to send to the Sierra Club.

10 Q Now, the volunteers and the interns, did they also search  
11 for coal?

12 A Yes, they did.

13 Q And where did they search for coal?

14 A At these three locations.

15 Q And do you know, did they collect any samples?

16 A I know they collected samples. A majority of their  
17 samples were collected at the Hangman Creek location, but I  
18 do seem to recall some at, at least, Spokane River locations.

19 Q And what were the names of those volunteers?

20 A I don't recall last names, but Ben and John were two  
21 volunteers that worked as a pair, and Lupe May was another  
22 volunteer who worked with Marcos. Marcos Pichia was another  
23 volunteer. So the four of them worked as two separate teams.

24 Q And what was done with the coals that those volunteers  
25 sampled?

1 A They would return it to me, and I would then fill out the  
2 chain-of-custody form for them once they returned the coal  
3 and the baggies to me. We had our marking protocol down  
4 pretty well, so I could easily fill out that chain of  
5 custody.

6 MS. RODGERS: Okay. I'd like to move for admission  
7 of Exhibit 1322 into evidence, please.

8 MS. ASHBAUGH: No objection.

9 THE COURT: It will be admitted.

10 (Exhibit 1322 admitted.)

11 MS. RODGERS: And I have no further questions.

12 CROSS-EXAMINATION

13 BY MS. ASHBAUGH:

14 Q Good afternoon, Mr. Mihailovich.

15 A Good afternoon.

16 Q Good seeing you again.

17 A Likewise.

18 Q You testified about the material you believed to be coal,  
19 correct?

20 A Yes, ma'am.

21 Q On those occasions, you didn't see coal come off the rail  
22 and into where you found them, the material, did you?

23 A No, I didn't.

24 Q You also didn't say if you saw the material hit land first  
25 and then roll down to the location that you found it, either,

1 correct?

2 A No, I did not.

3 Q And you don't know when that material actually got to that  
4 location, do you?

5 A No.

6 Q You've testified a little bit on direct about the ordinary  
7 high water mark as well. Do you recall that?

8 A Yes, ma'am.

9 Q Have you ever undertaken any ordinary high water mark  
10 delineation that was approved by any regulatory entity?

11 A No.

12 Q Mr. Mihailovich, you've testified with regards to this  
13 Spokane Riverkeeper and when you did controls. You also used  
14 the -- sorry -- the Spokane River in engaging in a number of  
15 activities outside of your role as Spokane Riverkeeper,  
16 correct?

17 A Yes.

18 Q And those activities include boating and fishing and  
19 swimming and the like?

20 A Yes.

21 Q And as a result of those activities, you've been on or  
22 near the Spokane River hundreds of thousands of times between  
23 2011 and 2015, correct?

24 A Yes.

25 Q And you've seen coal trains pass over the Spokane River

1 during those occasions as well, correct?

2 A Yes.

3 Q Dozens and dozens of times?

4 A I'm not sure -- yeah, probably.

5 Q And outside of the occasions where you stated you've gone  
6 out to look for coal and collected, you've never personally  
7 seen material that you believe to be coal and/or petcoke  
8 leave a train and enter the water, have you?

9 A I haven't looked very close when I'm recreating no.

10 Q And you haven't actually seen material that you believe to  
11 be coal or petcoke outside of those times you've testified to  
12 on direct go -- land near the Spokane River, have you?

13 A I wasn't looking very closely, no.

14 Q Mr. Mihailovich, part of your personal goal for this case  
15 is to stop BNSF from transporting coal through the state of  
16 Washington; isn't that correct?

17 A Yes.

18 MS. ASHBAUGH: I have no further questions.

19 THE COURT: Okay. Redirect?

20 MS. RODGERS: Yes.

21 REDIRECT EXAMINATION

22 BY MS. RODGERS:

23 Q Are there any sources of coal or coal debris that you're  
24 aware of along the river?

25 A Outside of the trains?

1 Q Outside of the trains.

2 A No.

3 MS. RODGERS: Thank you. I have no further  
4 questions.

5 MS. ASHBAUGH: I have no further questions.

6 THE COURT: All right. You may step down.

7 CATHY SEABROOK, HAVING BEEN FIRST DULY SWORN,  
8 TESTIFIED AS FOLLOWS:

9 THE CLERK: State your full name, and spell your last  
10 name for the record.

11 THE WITNESS: Cathy Seabrook, S-e-a-b-r-o-o-k.

12 THE COURT: You may be seated.

13 DIRECT EXAMINATION

14 BY MS. LOARIE:

15 Q Good afternoon, Ms. Seabrook.

16 A Good afternoon.

17 Q Can I ask where you live?

18 A I live in Vancouver, Washington.

19 Q And how long have you lived in Vancouver?

20 A Since 1975.

21 Q Do you live near the railroad line?

22 A Yes, I do.

23 Q About how far?

24 A Just short of a mile from the tracks.

25 Q Thank you.

1                   Are you currently employed, Ms. Seabrook?

2    A    No.

3    Q    Have you worked previously?

4    A    Yes.

5    Q    And what have you done?

6    A    I've done a lot of teaching. I taught elementary school.  
7    I've taught windsurfing, snowboarding, aerobics, and swimming  
8    lessons.

9    Q    Thank you.

10                Are you a member of any nonprofits?

11   A    Yes.

12   Q    And which nonprofits are you a member of?

13   A    Currently I'm a member of the Sierra Club.

14   Q    And is your testimony on behalf of the Sierra Club today?

15   A    Yes.

16   Q    And are you also a current member of the Sierra Club?

17   A    Yes.

18   Q    Okay.

19                Ms. Seabrook, it sounds like you've spent a lot of  
20   time, since you live in Vancouver, probably near the Columbia  
21   River; is that a correct assumption?

22   A    Yes, as much as I can.

23   Q    Okay. Have you ever seen coal dust coming from the coal  
24   trains near the Columbia River Basin?

25   A    Yes.

1 Q And can you describe where you've seen coal trains with  
2 the dust in this area?

3 A I have seen trains all the way from the west end of the  
4 Gorge to as far out as Maryhill, and even further, all the  
5 way to Horsethief Lake.

6 Q Thank you.

7 That's a pretty big geographic area. Can you be more  
8 specific in where you might have seen coal trains --

9 A Specific places?

10 Yes. I've witnessed dust coming off of trains by  
11 Hamilton Mountain, by Drano Lake, which is over by  
12 Cook-Underwood, by Doug's Beach, and further east several  
13 places.

14 Q Okay. Let's talk about these in a little more detail --

15 A Sorry. I have a cold.

16 Q My apologies there.

17 You've previously testified the Drano Lake was one of  
18 the areas you've seen coal dust; is that right?

19 A Yes.

20 Q Okay. I'd like to use previously admitted Exhibit 1228 at  
21 page 31, I believe.

22 Ms. Seabrook, do you recognize this map?

23 A Yes.

24 Q And can you tell us what this picture is of?

25 A This is a picture of Drano Lake. It's running -- it's

1 right next to the Columbia River, and the train tracks are  
2 running right between Drano Lake and the body of water of the  
3 Columbia.

4 Q And you said you've seen coal trains emitting dust in this  
5 area; is that right?

6 A Yes.

7 Q Can you draw on the map with your finger -- it's a  
8 touchscreen, so it should draw a line for you -- where the  
9 tracks are on this map?

10 A Yes. Right through there area in here.

11 Q Okay. And can you tell me more? Have you seen coal dust  
12 emitted from trains more than once in this area?

13 A Yes.

14 Q About how many times would you guess?

15 A Five or six times.

16 Q Can you draw on this map where you've seen trains emitting  
17 dust? Draw a circle around it.

18 A Yeah. So where I've seen the trains, I've seen dust  
19 coming off the tops.

20 Q In that area?

21 A Yeah.

22 Q Okay. It sounds like you've seen it more than once. Can  
23 you recall, I guess, an incident, a time frame?

24 A This would be probably in the spring of 2012, the incident  
25 that I'm thinking of.

1 Q Okay. Can you tell us where in the spring of 2012?

2 A I was -- okay. So this is Washington here, and off the  
3 map, down further this way, is Oregon, and Highway 84 also  
4 runs parallel to the river, heading east-west.

5 I was heading east on Highway 84 and looking out over the  
6 water to observe the conditions for windsurfing, and I saw a  
7 train, and I noticed it was a coal train so I kept  
8 watching -- while watching the road, too -- and I saw coal  
9 dust coming off the top.

10 Q So you were situating -- I don't know how -- can you  
11 describe for the court how far away Highway 84,  
12 approximately, is from the track?

13 A So across the river, depending on where you are at any  
14 given -- approximately a half mile to a mile.

15 Q Okay. So you saw a train emitting dust from this  
16 distance. Was it fairly visible then?

17 A Yes.

18 Q Okay. Can you describe about how far up it went?

19 A Probably about 15, 20, 25 feet up off the tops of the  
20 cars.

21 Q Okay.

22 And did you see the dust go into the water, the  
23 Columbia River, during this time?

24 A No, I didn't see it go into the water. It was very small,  
25 fine particles. You could see it going into the air.

1 Q Is there anywhere else the dust could have gone?

2 MS. ASHBAUGH: Objection, calls for speculation.

3 THE COURT: Overruled.

4 MS. LOARIE: You can answer.

5 THE WITNESS: Okay. I'm sorry. The question was?

6 Q (By Ms. Loarie) Is there anywhere else it could have  
7 gone?

8 A No. I mean, there's water on both sides. It -- it would  
9 have gone in the water.

10 Q Okay. I believe you testified you've seen coal dust more  
11 than once here; is that right?

12 A Yes.

13 Q Are there any other times that stick out in your mind?

14 A For this particular location, no. I mean, it's is a  
15 common occurrence, so, I mean, once you -- I've seen it, I  
16 made note of it mentally, and I just, oh, there goes another  
17 train. It is part of the scenery now.

18 Q Okay. How about a time frame for this, if you recall?  
19 Over the last two years, three years, give us an estimate.

20 A Well, I started noticing them, it was either fall of 2011,  
21 definitely spring of 2012, and up till 2015 that I've seen  
22 them on a regular basis.

23 Q Okay. Thank you.

24 Let's move on to the other locations where you've seen  
25 dust along the Columbia River.

1                   Was another one of these areas the Rowland Lake/  
2 Catherine Creek area?

3 A    Yes.

4 Q    Okay. I'm going to marked for identification purposes  
5 Exhibit 1228 at page 37.

6 A    Okay.

7 Q    Do you recognize this map?

8 A    Yes.

9 Q    What does it depict?

10 A    This is showing the central eastern part of the Gorge  
11 here, Rowland Lake, and running right alongside Highway 14.  
12 It's just west of Lyle, Washington.

13 Q    Can you use your finger to mark on the screen where the  
14 railroad tracks are?

15 A    Excuse me. It's west, not east.

16                   Right in here. Those are the tracks.

17 Q    Okay. Can you draw a circle around where you've seen coal  
18 being discharged from a train?

19 A    I'm pretty sure it was right in here.

20 Q    Okay. And has this happened more than once in this  
21 location?

22 A    Yes.

23 Q    Okay. About how many times do you think it's happened?

24 A    Similar to the other. At least five times. I mean, it's  
25 probably more, but I can safely say five to ten times, in

1     **there.**

2     Q     Do you remember the most recent time you've seen it?

3     A     Yes. April of this last year.

4     Q     Okay. What brought you out to Rowland Lake?

5             THE COURT: You said "this last year." Do you mean  
6     **2015?**

7             THE WITNESS: Sorry. 2016, this current year.

8     **Sorry.**

9     Q     (By Ms. Loarie) And I asked what brought you to Rowland  
10    Lake in April of 2016.

11    A     Cabin fever. I took my son's girlfriend, and we went up  
12    for a hike up to the Catherine Creek hiking trail.

13    Q     Okay. And what did you see?

14    A     Well, we were hiking up the trail, and when we got to a  
15    certain spot, beginning of the year, we were out of shape, we  
16    had to take a break, and there is a beautiful vantage point  
17    where we could look out over the river. So we stopped and we  
18    were looking down, and she was doing something in her  
19    backpack, and I was, like, "Oh, look there, there's a coal  
20    train, come here." And she came over, and I was, like,  
21    "See?" And she goes, "Oh, wow, they really do have dust  
22    coming off the tops of the cars." And we watched it for a  
23    couple of minutes, and then it passed.

24    Q     Sounds like you were on a hike. Were you up a hill, or  
25    what was your vantage point?

1 A Yes. There's a -- it's a mountain, hill that goes right  
2 up there, yeah.

3 Q Okay. So --

4 A Just north of the spot.

5 Q Do you want to put a dot on the map to show us where you  
6 were --

7 A It was here somewhere.

8 Q Okay.

9 A Here in this area --

10 Q A little bit north, it looks like?

11 A Because there is lots of trails that crisscross all over  
12 in here --

13 THE COURT: Try to keep it one at a time so the  
14 reporter can get it.

15 THE WITNESS: Okay. Sorry.

16 MS. LOARIE: Sorry.

17 Q (By Ms. Loarie) And so you were able to look down on the  
18 tracks; is that right?

19 A Yes.

20 Q Okay.

21 Could you tell us a little bit more? You said you saw  
22 dust coming off the cars. Did you see how high in the air it  
23 was going or -- tell us a little bit more.

24 A So we were looking down on the trains from this point, and  
25 where we were -- where we were standing where we could look

1 down, there is like a little -- kind of a little outcroppings  
2 of rocks, and so you can only visualize maybe four cars at a  
3 time as the train is going by.

4 So what we could see just kind of looked like a haze kind  
5 of coming up off the cars and just kind of settling in the  
6 area right around there, right over the cars.

7 Q How long were you able to observe the train?

8 A Probably, like, two or three minutes. I think we caught  
9 the tail end of it, so we didn't see the whole train. We  
10 just saw the end of it going by.

11 Q And did every car have dust coming off of it?

12 A Every -- every coal car had dust coming off of it, yes.

13 Q Were there any other types of cars in that train?

14 A Not that I saw.

15 Q Did you see the coal enter the water there?

16 A No, but it went into the air, and there is water on both  
17 sides of the tracks, so --

18 Q Is there anywhere else the dust could have gone?

19 A Higher up in the air before it falls down.

20 Q Okay.

21 I believe you testified you've seen this happen more  
22 than once in this area; is that right?

23 A Yes.

24 Q Can you estimate the number of times?

25 A It's such a common occurrence that I couldn't tell you

1 exactly. It's been, I'll say, at least five, but probably  
2 much more than that, because I've been observing this from  
3 2012 till 2016.

4 Q So at least five times, your testimony is --

5 A At this particular area, yes, at least five times.

6 Q In the last how many years? Since 2012, you said?

7 A Yes, the last four years.

8 Q Okay. Thank you.

9 MS. LOARIE: I'd like to move, this is page 37 of  
10 Exhibit 1128 of ECF, into evidence.

11 THE COURT: I think it is already in, counsel.

12 MS. LOARIE: I don't think this particular page is  
13 in, Your Honor. The other pages are in, to my knowledge.

14 THE COURT: Any objection?

15 MS. ASHBAUGH: No objection.

16 THE COURT: It is admitted.

17 (Exhibit 1128.37 admitted.)

18 Q (By Ms. Loarie) Let's move on.

19 I believe you talked about the Hamilton Mountain area  
20 as being another area you had seen coal; is that right?

21 A Yes.

22 Q And had you also observed coal coming from a train more  
23 than once in this area?

24 A Yes.

25 Q Can you estimate the number of times that you've seen it?

1 A Probably about five times.

2 Q Okay.

3 Is there -- can you describe what you've seen in this  
4 area? Unfortunately, I don't think we have a map.

5 A Okay. So there is only one particular incident that I can  
6 remember, where I was really paying attention, and I think it  
7 was the first time that I noticed it, which is why it stands  
8 out in my mind.

9 So I was driving east on Highway 14 to go hiking up at  
10 Hamilton Mountain. And on the way there, the -- there's --  
11 okay. The trains run parallel right next to the cars -- or  
12 to the -- to the freeway. So I'm heading east, the train's  
13 heading west, and there was a little gust of wind, and I know  
14 that because my car kind of moved sideways. And as that  
15 happened, at the same time there was coal dust coming off a  
16 train that was passing by me, and it hit my windshield, and  
17 it was just kind of, whoa. That was a new -- a new thing for  
18 me. I'd never seen that before.

19 Q Do you recall approximately when that happened?

20 A That would have been the early spring of 2012, I believe.

21 Q Okay.

22 And you said -- you testified that coal chunks or dust  
23 actually hit your car. Can you describe -- was it dust, was  
24 it chunks?

25 A There was dust in very small chunks. I mean, it was --

1 they were big enough that you could see that there was this  
2 black stuff hitting the windshield.

3 Q Okay.

4 Since we don't have a map, can you describe for the  
5 court where the road is in proximity to the railroad there?

6 A The rail lines run parallel to Highway 14. So they're  
7 within, I don't know, 15 to 30 feet. It's really close.  
8 It's right -- right along the side.

9 Q And where is the river?

10 A The river is on the other side of the tracks.

11 Q And is that river the Columbia River?

12 A The Columbia River.

13 Q Okay.

14 And there are other tributaries in that area?

15 A Yes.

16 Q Okay.

17 Did you see the coal enter the water there at that  
18 time?

19 A No, I didn't see the coal enter the water.

20 Q Okay.

21 Had there been other occasions that you've seen trains  
22 dusting in that area as well?

23 A Yes.

24 Q Can you tell us how many more times?

25 A Probably about five times.

1 Q Okay.

2 Do you recall another incident that was particularly  
3 memorable to you?

4 A At that location? No.

5 Q Okay.

6 Do you recall the time frame that you've seen trains  
7 dusting in the Hamilton Mountain area?

8 A It -- it's -- again, it's a really common occurrence. So  
9 because I go into the Gorge so often -- spring, summer and  
10 fall -- almost every time that I go out there, I can recall  
11 seeing a coal train at some point. And if I'm paying  
12 attention and looking, I almost always see it dusting. Not  
13 every single time, but usually.

14 Q Okay.

15 I believe you testified previously that you've seen  
16 coal go into the Hamilton Creek area, but is it likely you  
17 were talking about the Columbia River instead?

18 MS. ASHBAUGH: Objection, leading.

19 THE COURT: Sustained.

20 Q (By Ms. Loarie) Can you clarify which waterbodies are  
21 closest to the areas where you've seen coal in that general  
22 vicinity?

23 A So Hamilton Creek -- I did not visualize coal dust going  
24 into Hamilton Creek. That would be almost impossible from  
25 where I was because you can't really see the creek enter into

1 the Columbia River, but I know that it's in that area. I  
2 know, because I hike up Hamilton Creek, and you can pass by  
3 the waterfalls that are a part of Hamilton Creek. And I was  
4 in that area, and the coal dust was coming off the train  
5 right before I got to the hiking spot, so I can assume it  
6 went into the water as well.

7 Q Okay.

8 A It definitely went into the Columbia.

9 Q Okay. Great.

10 Let's talk about -- you mentioned another place where  
11 you saw coal in the Columbia River area. At Doug's Beach, I  
12 think, was the location?

13 A Yes.

14 Q Can you describe to the court where Doug's Beach is  
15 located?

16 A Doug's Beach is just east of some tunnels that are just  
17 east of Lyle, Washington.

18 Q Okay.

19 MS. LOARIE: I'd like to marked for identification  
20 purposes Plaintiffs' Exhibit 15 and 16, and page 2 of this  
21 exhibit, please. I believe this was also previously Seabrook  
22 Deposition Exhibit 683 at page 2. I don't see a Bates stamp  
23 on this for reference purposes.

24 Q (By Ms. Loarie) Do you recognize this map, Ms. Seabrook?

25 A Yes.

1 Q And what does it depict?

2 A It depicts my home away from home, Doug's Beach.

3 Q Okay. Thank you.

4 Is this an accurate depiction of that location?

5 A Yes.

6 Q Have you ever seen coal dust coming from a train in this  
7 area?

8 A Yes.

9 Q Have you seen this happen more than once?

10 A Yes.

11 Q About how many times?

12 A Many, many times. I, on average, in the spring, summer  
13 and fall, would get out there twice a week, and virtually  
14 every single time that I've been there windsurfing I've seen  
15 a coal train.

16 Q Have you seen it dust more than five times, more than ten  
17 times? I mean, give us an estimate for what you've seen.

18 A When I was paying close attention, there is two particular  
19 incidents. And then after that, it was such a common  
20 occurrence that it was just all the time. It -- I don't  
21 know. So let me think.

22 On average, I go windsurfing maybe 40 times a year, and  
23 nine types out of ten it's at Doug's Beach, so 40 times,  
24 maybe, over the last four days.

25 Q Okay. Thank you. I don't want to talk about all of them.

1 I want to go home today.

2 Was there any time you saw coal come a train that was  
3 particularly memorable at Doug's Beach?

4 A Yes.

5 Q Can you tell us more about that time?

6 A This was early spring of 2012 -- excuse me, no -- early  
7 summer of 2012, and I was heading there to go windsurfing,  
8 and I pulled up into the parking spaces, which run just feet  
9 away from the railroad tracks and it's separated by about a  
10 six-foot chain link fence, and I parked there. And I got out  
11 of my car, and I'm getting ready to walk down to the river so  
12 I can look at the conditions and decide what gear to bring  
13 down and rig up and be social and talk with people.

14 And as I'm getting walking ready to walk over the tracks,  
15 a train was coming and the crossbars came down, the bell was  
16 ringing so you can't cross over, and there was a coal train  
17 going by, and it was particularly slow. At least it felt  
18 like it, because it was at least 10 minutes we had to wait  
19 till we could walk over the tracks to go down the hill to the  
20 water.

21 And when it was done and I'm walking down, I'm looking  
22 down to see -- to see if any dust comes off the trains, and,  
23 indeed, there was a lot of coal dust along the tracks, little  
24 small chunks and dust.

25 Q Okay.

1           Can you tell us more about what you saw as you were  
2 waiting at the railroad crossing?

3   A    Yes.  So while the train is going by, which, 100, 150  
4 cars, however many it is, takes 10 minutes or longer to go by  
5 if they're going slow, as they should.

6           And when I'm walking down, I'm looking down, and there is  
7 a lot of large, gray gravel rocks that line the -- my  
8 terminology is escaping me.  So the pieces of wood that run  
9 perpendicular to the -- the ties that run perpendicular to  
10 the rail lines, there is a lot of gravel underneath there.  
11 And in between the gray rock, crushed-rock gravel, there is a  
12 lot of black shiny dust in small chunks that look, to me,  
13 like coal dust.  That's the only thing that it could be.  
14 I've never seen it before, or never noticed it before.

15   Q    Okay.

16           Can you draw on this map with your finger where the  
17 rail lines run, for the court to see?

18   A    (Witness complies.)

19           Even though it's not perfectly straight.

20   Q    And it looks like there were Xs on there, perhaps from  
21 your deposition, does that represent something?

22   A    That would be the trail going down, going down to the  
23 water.

24   Q    Okay.

25   A    It's like a boat launch, but I don't think any boats go

1 down there, just windsurfers and kites.

2 Q Okay.

3 So you saw the coal on the tracks approximately where  
4 the trail crosses?

5 A Yes.

6 Q Okay.

7 About how much coal was on the track?

8 A Enough that if I bent down and just scooped up my hand, I  
9 could have filled my hand up easily.

10 Q How did you know it was coal?

11 A Because it doesn't look like any of the soil out there.  
12 I'm very familiar with the Gorge. It didn't look like  
13 anything I'd ever seen before or paid attention to it.

14 It was shiny. When I picked it up and touched it, it was  
15 kind of soft, almost a little slippery. And you could break  
16 the chunks apart easily with your fingers. You can't do that  
17 with just rocks.

18 Q Okay.

19 Do you recall when that happened, the time frame when  
20 you saw dust fly off the train at Doug's Beach?

21 A I'm sorry?

22 Q The time frame? Do you recall when --

23 A That would have been spring of 2012, that particular  
24 incident I'm thinking of.

25 Q Okay.

1           You'd mentioned there was --

2   A   Or summer. I'm sorry.

3   Q   Spring or summer of 2012?

4   A   Yeah, late spring or early summer, because it was crowded  
5   that day. There was a lot of people there.

6   Q   You mentioned there was another time that you'd also seen  
7   a coal train emit dust at Doug's Beach; is that right?

8   A   Yes.

9   Q   Okay. Can you tell us more about that?

10   A   There was a time that was soon -- and I say "soon," I  
11   don't remember the exact time frame -- a few weeks after that  
12   that I went out there camping for the weekend, but I was  
13   collecting coal dust, too. And on that particular incident,  
14   I saw coal dust coming off of a train, and I took samples.

15   Q   Okay.

16           Did you -- do you know if those samples got tested?

17   A   I don't believe they did.

18   Q   Do you know the results of those samples?

19   A   Not yet.

20   Q   Okay.

21           Is there another time that you've seen coal dust at  
22   Doug's Beach that was particularly memorable to you?

23   A   Aside from those two dates? No, not -- not a specific  
24   incident. Like I said, it is a very common occurrence, so it  
25   is just par for the course. It's going to be there. I mean,

1 almost every time I went windsurfing to Doug's Beach, I saw  
2 coal trains passing by.

3 And to see -- to see it coming -- sometimes you'd see it  
4 coming off the tops, but you could always see it come out  
5 from the bottoms of the cars, and it was along the tracks.

6 Q Did you have ever another time where there was dust on  
7 you, on your person, on your car, or something like that?

8 A Well, the first time that I -- the first incident I was  
9 talking about?

10 Q Whenever it happened.

11 A Yeah. That -- yes.

12 So I was done windsurfing, and when I went back to my  
13 car, I had a roof rack and a box that I put all my sails and  
14 masts and all my gear in. And I'm short. I have to climb up  
15 on top of my car to open the box, and when I did that, I  
16 noticed there was a thin film of coal dust on top of my car,  
17 because it was right there and I was getting it on my hands.  
18 And -- yeah.

19 Q How did you know it was coal dust?

20 A It looked like coal dust. It didn't look like the normal  
21 dust that you get -- when it's windy out in the Gorge, you  
22 almost always -- you're going to go back home with dust on  
23 your car. But it's usually kind of a brown color because  
24 that's what the soil looks like out there. This didn't look  
25 like soil. It was black, jet black.

1 Q Had you recently washed your car?

2 A Yeah, the day before.

3 Q Did you have to wash it again after that?

4 A Yes, I did. I went back and washed my car that night --  
5 or the next day.

6 Q So where in your car was the dust? Was it all over, just  
7 one part, or --

8 A It was all over the top and it was on my windshield. It  
9 was just covering the whole surface of my car.

10 Q About how thick was it?

11 A At least a millimeter thick. Maybe a little more. A  
12 couple millimeters.

13 Q Did you have to wipe it off to see?

14 A Yeah. So I always have towels with me for changing and  
15 for drying off after you get out of the water. And after I  
16 cleaned myself off and put my clothes on, I just wiped off my  
17 windshield and the tops of my car a little bit so that I  
18 could see to drive home.

19 Q Okay.

20 Did you ever see the dust go into the water at that  
21 location?

22 A I don't see it actually go into the water. The particles  
23 are very small, and you wouldn't be able to actually see it.

24 But you can see -- there is a hill that's a slope from the  
25 tracks going down to the water, and water levels raise and go

1 down, depending on what the dams are doing and depending on  
2 the time of year.

3 So I believe that the coal goes into the water. I don't  
4 see how it couldn't. I mean, gravity makes things go down.  
5 So coal is light, but not it's that light, and at some point  
6 it is going to go into the water.

7 Q Okay. Thank you.

8 You mentioned there were other times you experienced  
9 coal dust at Doug's Beach?

10 A Pretty much every time I've been there for windsurfing.

11 Q Anything else that was memorable to you?

12 A Not that I can think of, no.

13 Q Can you give us an approximate time frame that you've seen  
14 coal dust at Doug's Beach coming from coal trains?

15 A From 2012 to 2016.

16 MS. LOARIE: Okay. Thank you.

17 I have nothing further.

18 THE COURT: Cross?

19 MS. LOARIE: Excuse me. Another housekeeping matter.  
20 I'm not sure the last exhibit that I mentioned I asked to  
21 move into evidence.

22 Would Your Honor entertain admitting the last exhibit --  
23 I believe that was 1516, page 2 -- into evidence?

24 MS. ASHBAUGH: No objection.

25 THE COURT: It will be admitted.

1 (Exhibit 1516.2 admitted.)

2 CROSS-EXAMINATION

3 BY MS. ASHBAUGH:

4 Q Good afternoon, Ms. Seabrook.

5 A Good afternoon.

6 Q How long have you been windsurfing at Doug's Beach?

7 A I think mid to late '90s is when I first started  
8 windsurfing at Doug's Beach.

9 Q You've been windsurfing at Doug's Beach since mid to late  
10 '90s, and I believe you just testified that you've seen  
11 trains dusting there from 2012 till the present?

12 A Yeah.

13 Q So prior to that time you'd never seen any coal trains  
14 dusting at Doug's Beach?

15 A Prior to that time I wasn't paying attention, so if I did,  
16 I didn't notice it, no.

17 Q Ms. Seabrook, I think you testified that you live  
18 approximately a mile away from the railroad tracks?

19 A Correct.

20 Q And you've lived in that house for approximately 12 years?

21 A Since '99, so a long time. Sorry. My math is off today.

22 Q And I believe you mentioned in your deposition that you  
23 feel like you can feel the vibrations on the tracks all the  
24 way at your house, correct?

25 A Yes, before they started slowing the trains down. People

1 in my neighborhood and adjacent neighborhoods close to the  
2 tracks, I've talked to other people. They could feel it,  
3 too, yeah.

4 Q And you've testified that you took a few samples of some  
5 of the material that you found that you believe to be coal,  
6 correct?

7 A From where are you specifically talking about?

8 Q There was a couple of locations where you picked up some  
9 material that you believed to be coal, and that was sampled?

10 A Yes.

11 Q And it was tested?

12 A I believe so. I didn't test it.

13 Q And you're not aware of the results of those tests,  
14 correct?

15 A Not yet.

16 Q So you're not aware of whether or not you found material  
17 that was coal or something else, are you?

18 A I do not know the results of the test, no.

19 Q And you've testified a little bit on direct examination,  
20 Ms. Seabrook, that you've seen some coal trains dusting,  
21 right?

22 A Yes.

23 Q And oftentimes that -- when wind gusts occur, correct?

24 A Yes.

25 Q And you indicated that sometimes when you're driving on

1 Highway 14 and gusts of wind go by, you believe you've seen  
2 dust coming off of coal trains at that time, correct?

3 A Highway 14 and Highway 84, yes.

4 Q And how far away is Highway 84 from the trains?

5 A 84, depending on where you are on the river, I -- I don't  
6 know exactly, but it's approximately -- I know Hood River is  
7 approximately a mile across, is what I understand, and there  
8 is places where the river is narrower. So a half mile to a  
9 mile.

10 Q So you're seeing these coal trains from a half mile to a  
11 mile away?

12 A Yes.

13 Q And you've seen dust?

14 A Yes.

15 Q And I think you testified on direct that you haven't  
16 actually seen dust land in the water?

17 A I have not seen dust land in the water because the  
18 particles are so small that it would be pretty much  
19 impossible.

20 Q Right.

21 Do you know which way the wind was blowing at that  
22 time?

23 A Yes. It was blowing east.

24 Q And do you know --

25 A Excuse me -- yeah, from west to east.

1 Q And do you know the -- how do you know that?

2 A Because when I'm going windsurfing, I go on west winds,  
3 usually.

4 Q Okay.

5 And do you know how -- as you're driving and seeing  
6 these coal trains, do you know how strong of gusts of wind  
7 are coming by at that time?

8 A No, because I don't have a wind meter, but I can guess and  
9 give you an approximation.

10 Q Do you know how many cars actually went by when you saw  
11 this from approximately half mile to mile away of train cars?

12 A No, of any one in particular? No, I didn't count cars.  
13 But I know that they tend to be about a hundred cars long.  
14 Sometimes they're longer; sometimes they're shorter.

15 Q And was it possible that not every car on the train was  
16 emitting dust?

17 A Sorry. Can you say that again? Is it impossible?

18 Q Was it possible that every car on the train was not  
19 emitting dust?

20 A Is that possible?

21 Q Yes.

22 A It's possible.

23 Q Ms. Seabrook, you also testified, I believe, that one time  
24 you were hiking -- I want to make sure I got the area right.  
25 One time you were hiking near Rowland Lake; is that correct?

1 A Catherine Creek area, yes.

2 Q How far away were you when you saw coal train on that  
3 occasion?

4 MS. LOARIE: Objection, asked and answered.

5 THE COURT: Overruled.

6 MS. ASHBAUGH: Go ahead and answer.

7 THE WITNESS: Okay.

8 MS. ASHBAUGH: Sorry.

9 THE WITNESS: Sorry.

10 A So -- okay. So I was hiking -- this was last April -- I  
11 believe, you were referring to what I just testified about? -

12 Q (By Ms. Ashbaugh) Yes.

13 A Okay. So I'm not really good on judging exactly how many  
14 feet, but I think about a thousand feet high, but I'm not  
15 sure.

16 Q A thousand high --

17 A Five hundred to a thousand feet.

18 Q Okay.

19 You were about 500 to a thousand feet. How far in  
20 length were you?

21 A So --

22 THE COURT: Horizontal.

23 Q (By Ms. Ashbaugh) Not vertical.

24 A So -- so -- closer than it was in vertical.

25 Q And then you were -- for the time you were at Drano Lake,

1 you indicated that you were, again, about a half a mile to a  
2 mile away when you saw the trains?

3 A From Drano Lake, the time that I'm thinking of where I  
4 visualized coal train, I was driving east on Highway 84.

5 Q So that's --

6 A So a half mile to a mile across. I don't know, however  
7 far across the river is at that point.

8 Q Ms. Seabrook, you've also seen coal trains that haven't  
9 dusted, correct?

10 A I've seen trains where there is no visible dust coming off  
11 the tops of trains, yes.

12 Q And you've been near the Columbia River where it's near  
13 Underwood, correct?

14 A Yes.

15 Q And you've seen coal trains there as well?

16 A That's right near Drano Lake. I think that's what we're  
17 talking about, right?

18 Q Yes.

19 A Okay.

20 Q And you've seen trains where dust isn't coming off at that  
21 location, correct?

22 A I don't see dust coming off the tops of the trains every  
23 time I see a coal train, that is correct, yes.

24 Q And, Ms. Seabrook, you've also seen trains that do not  
25 dust near Vancouver, Washington, as well?

1 A I won't say that they don't dust. I will say that I don't  
2 visual -- I am not able to see dust coming off the tops of  
3 those every time.

4 Q And, in fact, that's because sometimes Vancouver doesn't  
5 get the same type of wind that further east may, correct?

6 MS. LOARIE: Objection, speculation.

7 THE COURT: Sustained.

8 THE WITNESS: Can I say something?

9 THE COURT: No.

10 MS. ASHBAUGH: You don't get...

11 THE WITNESS: All right.

12 Q (By Ms. Ashbaugh) And there are other locations that you  
13 have testified to with regards to near Hamilton Lake, Drano  
14 Lake, Rowland Lake. You've also seen trains where you  
15 visually have not seen trains dusting, correct?

16 A Yes.

17 MS. ASHBAUGH: I have no further questions.

18 THE COURT: Anything further?

19 MS. LOARIE: No, Your Honor.

20 THE COURT: All right. Why don't we stop for the  
21 day, and we'll start up tomorrow morning.

22 MR. TEBBUTT: Your Honor, before you leave, just one  
23 clarifying -- would you like -- if we get the documents we  
24 discussed earlier in chambers available, would you like an  
25 email to chambers?

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THE COURT: Yes, that would be fine.

MR. TEBBUTT: Okay.

THE COURT: Okay. We'll be in recess.

(Proceedings adjourned at 4:55 p.m.)

## C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 15th day of November 2016.

/S/ Nancy L. Bauer

Nancy L. Bauer, CCR, RPR  
Official Court Reporter

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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SIERRA CLUB, a California	)	
nonprofit corporation;	)	
PUGET SOUNDKEEPER ALLIANCE, a	)	CASE NO. C13-00967JCC
Washington nonprofit corporation;	)	
RE SOURCES FOR SUSTAINABLE	)	SEATTLE, WASHINGTON
COMMUNITIES, a Washington	)	November 10, 2016
nonprofit corporation;	)	
COLUMBIA RIVERKEEPER, a	)	BENCH TRIAL, Vol. 4
Washington nonprofit corporation;	)	
FRIENDS OF THE COLUMBIA GORGE,	)	
INC., dba FRIENDS OF THE	)	
COLUMBIA GORGE, an Oregon	)	
nonprofit corporation;	)	
SPOKANE RIVERKEEPER; NATURAL	)	
RESOURCES DEFENSE COUNCIL, a	)	
New York nonprofit corporation,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
BNSF RAILWAY COMPANY,	)	
a Delaware corporation,	)	
	)	
Defendant.	)	
	)	

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VERBATIM REPORT OF PROCEEDINGS  
BEFORE THE HONORABLE JOHN C. COUGHENOUR  
UNITED STATES DISTRICT JUDGE

---

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1 November 10, 2016

1:05 p.m.

2 PROCEEDINGS

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3 MR. SNYDER: Your Honor, plaintiffs call Scott  
4 MacDonald.

5 SCOTT MACDONALD, HAVING BEEN FIRST DULY SWORN,  
6 TESTIFIED AS FOLLOWS:

7 THE CLERK: Please state your first and last name,  
8 and spell your last name for the record.

9 THE WITNESS: Scott MacDonald, M-a-c-d-o-n-a-l-d

10 DIRECT EXAMINATION

11 BY MR. SNYDER:

12 Q Good afternoon, Mr. MacDonald.

13 A Good afternoon.

14 Q Sir, could you please tell the court where you work?

15 A I work for BNSF Railway.

16 Q What is your title at that organization?

17 A Assistant manager of environment remediation.

18 Q Could you briefly explain what it is you do for BNSF in  
19 that role?

20 A My primary job duty is to manage remediation sites.

21 Q How long have you been doing that for BNSF, sir?

22 A Just over three and a half years.

23 Q Those remediation sites, are they limited in scope to the  
24 Pacific Northwest?

25 A To Washington, Oregon, and Idaho.

1 Q Sir, I'm going to jump right into it and ask you, are you  
2 familiar with areas in Washington where BNSF is cleaning up  
3 coal?

4 A Not where we are currently cleaning up coal.

5 Q Could you please identify locations where BNSF has cleaned  
6 up coal, say, in the past five years in Washington?

7 A The ones that I know of would be Horsethief Lake, Connell,  
8 Washington, Tunnel No. 1 in Vancouver, and a small amount in  
9 Wishram.

10 THE COURT: What was the last?

11 THE WITNESS: Wishram.

12 Q (By Mr. Snyder) Sir, the Wishram spill that you  
13 mentioned, can you briefly describe what happened there?

14 A I don't know. I was contacted by the Load and Ride  
15 Solutions, asking about a disposal option.

16 Q Was that a spill that occurred at a BNSF yard?

17 A I believe so.

18 Q And the coal in Connell, could you please explain briefly  
19 what happened there?

20 THE COURT: It's pronounced "Ka-nell."

21 Q (By Mr. Snyder) Connell. Excuse me.

22 A The coal in Connell was -- as my understanding -- was a  
23 derailment. No. I'm sorry. Was not a derailment. It was  
24 a -- the doors opened at the bottom of the -- bottom of the  
25 hopper, loader.

1 Q Did those doors open while the hopper was in transit, sir?

2 A I do not know. I don't believe so.

3 Q I want to talk to you first, sir, about the Tunnel 1  
4 location near Vancouver.

5 Do you remember when you first received information  
6 about an issue with coal being in Tunnel 1?

7 A I do remember an email about that, yes.

8 Q Sir, I'm showing you what's been marked as Plaintiffs'  
9 Exhibit 1125. Scratch that.

10 Showing you what's been marked as Plaintiffs' Exhibit  
11 1126, sir. Earlier you mentioned an email. Is this the  
12 email that you were talking about?

13 A Yes.

14 Q Can you tell us who Monte Fus is here?

15 A He is one of the track foremen in the area.

16 Q And there are four pictures attached to this email, and  
17 I'm going to flip through them and show them to you. Five  
18 pictures.

19 What did you do, sir, to investigate the cause of the  
20 coal in this tunnel?

21 A Nothing.

22 Q Do you know if BNSF undertook any investigation into how  
23 the coal arrived in this tunnel?

24 A Not to my knowledge. I wasn't asked to.

25 MR. SNYDER: Your Honor, plaintiffs move into

1 evidence Plaintiffs' Exhibit 126.

2 MR. SULLIVAN: The text on here appears to be  
3 hearsay, so I'd object.

4 THE COURT: You're going to have to lay additional  
5 foundation.

6 MR. SNYDER: How about just the pictures, Your Honor?

7 MR. SULLIVAN: No objection.

8 THE COURT: The picture will be admitted but the text  
9 will not be considered part of the exhibit.

10 MR. SNYDER: Your Honor, I want to clarify for the  
11 record there are five pictures in this exhibit.

12 THE COURT: All right.

13 (Exhibit 126 admitted.)

14 Q (By Mr. Snyder) Sir, do you know if there was a  
15 derailment or other catastrophic release that could have  
16 caused the coal that's depicted in these photos to arrive in  
17 Tunnel 1?

18 A I do not.

19 Q Do you know if BNSF made a determination of that?

20 A I do not.

21 Q If there is in your experience some type of derailment or  
22 catastrophic release, does that create some type of alert or  
23 notification to the company?

24 A Yes.

25 Q And you're not aware of any alerts or notification as to

1 the coal that was in Tunnel 1?

2 A Correct.

3 Q Do you recall what you told Mr. Fus to do in response to  
4 these photos and the description of the coal that was here?

5 A He was -- I told him that we would be able to dispose of  
6 it at one of the approved landfills.

7 Q Do you know when that cleanup started?

8 A I really do not.

9 Q Do you know when that cleanup ended?

10 A I understand that it ended in August.

11 Q Has BNSF been back to investigate whether additional coal  
12 has been found at this location?

13 A I do not know.

14 Q And the material was brought to a landfill; is that right?

15 A My understanding is yes.

16 Q Do you recall ever telling Mr. Fus to handle the material  
17 in such a way that would prevent it from getting into a  
18 river?

19 A I did tell him to use our standard of practice for  
20 handling of any material.

21 Q Can you talk to us a little bit about what that means?

22 A I'm -- I'm trying to remember the exact words I used but I  
23 told him to use best-management practices to make sure that  
24 when they're transporting and cleaning up anything, that it  
25 doesn't enter any waterbodies because I didn't really know

1 where this was.

2 Q Is it standard for BNSF to implement best-management  
3 practices to prevent coal from being in waterways?

4 MR. SULLIVAN: Objection; calls for speculation.

5 THE COURT: Overruled.

6 A It's standard to, in any construction project, to abide by  
7 our best stormwater practices.

8 Q (By Mr. Snyder) And those best stormwater practices, do  
9 they specifically deal with coal or coal dust?

10 A They specifically deal with material generated while we  
11 are in the process of doing some kind of construction, which  
12 this was kind of in the construction-type problem.

13 Q Explain to me how this was a construction-type problem,  
14 please?

15 A Any ballast maintenance, any removal of material would  
16 fall under some kind of construction.

17 Q So was this a ballast maintenance cleanup; is that your  
18 understanding?

19 A I don't know.

20 Q You would agree that it was coal that was in Tunnel 1?

21 A I've never actually seen it, so I do not know if it was  
22 coal or not.

23 Q Do you recall what contractor BNSF hired to do this  
24 cleanup?

25 A That would be -- my understanding, it was Hulcher.

1 Q Did BNSF work with any other environmental cleanup groups  
2 as it pertains to tunnel concerns?

3 A Not that I know of. Hulcher did have a subcontractor.

4 Q Do you recall who the Hulcher subcontractor was?

5 A That would be Jammie's Environmental.

6 Q Do you recall receiving, sir, an EZ Profile waste  
7 description from somebody at Jammie's Environmental  
8 concerning the Tunnel 1 coal cleanup?

9 A Yes.

10 Q Mr. MacDonald, I'm showing you Plaintiffs' Exhibit 1380.  
11 Do you recognize this document, sir?

12 A Yes, I do.

13 Q Is this the original EZ Profile that you received from  
14 Jammie's Environmental?

15 A Yes.

16 Q Do you know, sir, if as part of the Tunnel 1 cleanup, BNSF  
17 obtained a Clean Water Act stormwater discharge permit for  
18 construction-related activity?

19 A I do not.

20 Q Did you review, sir, this Plaintiffs' Exhibit 1380 in  
21 connection with the Tunnel 1 cleanup?

22 A Yes, I did.

23 Q And, sir, do you see where it says under material  
24 information, "cleanup of bituminous coal from railroad tracks  
25 and surrounding areas from derailments and miscellaneous

1 spillage from railcars"?

2 A Yes.

3 Q Did you put that information on there?

4 A No, I did not.

5 Q Who did?

6 A That would be somebody with Jammie's Environmental.

7 Q Did Jammie's Environmental do an inspection of this  
8 location for identified information?

9 A I do not know.

10 Q Sir, looking at this document, do you have an idea of how  
11 much coal was cleaned out of Tunnel 1?

12 A No, I do not.

13 Q If you refer to Box F, it should be in the DOT  
14 information, do you see where it says "estimated quantity and  
15 unit of measure"?

16 MR. SULLIVAN: We'd object. This has been identified  
17 as a draft document and the witness is being ask to make --  
18 draw firm conclusions from this draft.

19 THE COURT: Overruled.

20 Q (By Mr. Snyder) Looking at that box, sir, does that help  
21 refresh your recollection about how much material was removed  
22 in Tunnel 1?

23 A How much material or how much coal?

24 Q Let's start with material.

25 A So material, when these are typically filled out we want

1 to make sure we don't go back to -- we don't want to have to  
2 fill out addendums to them, so they may have overinflated it.  
3 But when I received this, they were estimating that they  
4 would be pulling out a total of 200 tons of material.

5 Q Do you have any idea how much coal was going to be removed  
6 from this location?

7 A I do not know.

8 Q Do you have any reason to disbelieve that there was 200  
9 tons of material that had to be removed from Tunnel 1?

10 A No.

11 Q And, sir, as you heard Mr. Sullivan say earlier, this was  
12 not the final document, was it?

13 A Correct.

14 Q Tell me the process of how this document changed from this  
15 to the final.

16 A So I received this. I did call up Lisa Cothren, on line 3  
17 in the billing information, and asked her how they determined  
18 that it was coal.

19 MR. SNYDER: Your Honor, before I proceed I'd like to  
20 move into evidence Plaintiffs' Exhibit 1380.

21 MR. SULLIVAN: We'd object as it's hearsay. It's not  
22 created by the client or by the witness or from BNSF.

23 THE COURT: You have to lay additional foundation.

24 Q (By Mr. Snyder) Sir, BNSF uses these EZ Profiles to  
25 determine whether material can go to a waste management site,

1 do they not?

2 A These profiles are filled out by either us or by the  
3 consultants and then the landfill determines if the material  
4 is acceptable for disposal there.

5 Q Ultimately, sir, are you responsible for signing off on  
6 this document?

7 A Yes.

8 MR. SNYDER: Your Honor, plaintiffs move into  
9 evidence Exhibit 1380.

10 MR. SULLIVAN: Same objection. The witness hasn't  
11 signed off on the document before us.

12 MR. SNYDER: Your Honor, he testified he's reviewed  
13 this document as part of his job.

14 THE COURT: Is it maintained as part of the business  
15 records at BNSF?

16 THE WITNESS: It was in our email.

17 THE COURT: Is it maintained as part of the business  
18 records at BNSF?

19 THE WITNESS: No, not typically.

20 THE COURT: You don't keep it in your files?

21 THE WITNESS: We would not keep a draft document.

22 THE COURT: Where would this come from?

23 THE WITNESS: This came from email records.

24 THE COURT: It will be admitted.

25 (Exhibit 1380 admitted.)

1 Q (By Mr. Snyder) Mr. MacDonald, a moment ago you were  
2 talking about a conversation with Lisa -- was it Cothren?

3 A Cothren.

4 Q I'm going to show you an email, sir. This is Plaintiffs'  
5 Exhibit 1130, Mr. MacDonald. At the bottom there is an email  
6 from Ms. Cothren to someone named Jesse Baker.

7 Sir, do you know who Jesse Baker is?

8 A Jesse Baker was the Hulcher project manager for the  
9 cleanup.

10 Q Were you working with Mr. Baker on addressing the cleanup  
11 of Tunnel 1?

12 A Not directly.

13 Q Was there someone else at Hulcher you were working with  
14 directly?

15 A I was not working with anyone directly on the cleanup.  
16 The only thing I was doing was reviewing the initial profile.

17 Q And you signed off on that profile eventually?

18 A Eventually, I did sign off on the initial profile, yes.

19 Q This initial email at the bottom here dated June 30th,  
20 2016, was that the email that transmitted a document we just  
21 looked at, the EZ Profile that was unsigned?

22 A I believe so.

23 Q And then Mr. Baker forwarded that document on to you  
24 asking you to sign it, correct?

25 A Correct.

1 Q Tell me what happened next.

2 MR. SULLIVAN: I'm going to object to the extent that  
3 counsel is asking for the contents of the communication  
4 between Mr. MacDonald and the in-house counsel at BNSF, who  
5 are the recipients of the email at the top of the page.

6 MR. SNYDER: If I may?

7 THE COURT: Go ahead.

8 Q (By Mr. Snyder) Mr. MacDonald, at the top of this page,  
9 is this an email from you to the in-house counsel for BNSF?

10 A Yes.

11 Q Were you seeking legal advice when you wrote whatever is  
12 redacted here to those two?

13 A I was asking a legal question, yeah.

14 Q Okay. Tell me more, sir, about the conversation you had  
15 with Ms. Cothren we were talking about earlier.

16 A I asked her how she determined that the material was coal.

17 Q And what did she say, sir?

18 A That it looked like it.

19 Q And Monte Fus also said it looked like coal; is that  
20 right?

21 A Yes.

22 Q And was that sufficient for BNSF's purposes to identify  
23 that material as coal?

24 A I -- I had a follow-up question with Lisa, if she was a --  
25 if she was a geologist. She said no. And rather than just

1 sign something saying that this is coal without somebody who  
2 is more knowledgeable, we opted to have some analytical  
3 testing performed on it.

4 Q Did that conversation happen after you sent the email to  
5 the in-house counsel?

6 A It happened just before.

7 MR. SNYDER: Your Honor, plaintiffs move into  
8 evidence Exhibit 1130.

9 MR. SULLIVAN: I would object to the -- no objection.

10 THE COURT: It will be admitted.

11 (Exhibit 1130 admitted.)

12 Q (By Mr. Snyder) Mr. MacDonald, I'm showing you  
13 Plaintiffs' Exhibit 641.

14 Do you recognize this document, sir?

15 A Yes.

16 Q At the bottom is an email from Ms. Cothren to you and  
17 others. Would you agree?

18 A Yes.

19 Q And the date is July 7th?

20 A Yes.

21 Q Earlier you were discussing the conversation you had with  
22 Ms. Cothren. Is this the email reflecting that conversation  
23 and the revised profile that came about from it?

24 A Yes.

25 Q And, sir, now I'm showing you Plaintiffs' Exhibit 1381.

1 Do you recognize this document, sir?

2 A Yes, I do.

3 Q Was this the revised profile that you were talking about  
4 earlier?

5 A Yes.

6 Q Sir, does this document make any mention of coal being in  
7 Tunnel 1?

8 A No, it does not.

9 Q And you signed this document?

10 A Yes, I did.

11 Q Underneath the generating material, it says, "Railroad  
12 track cleaning activities."

13 Did you ask Ms. Cothren to change that from the  
14 previous document we looked at to say what it says now?

15 A I asked her to better define what -- what they were doing.

16 Q Did you ask her to take out any mention of coal from the  
17 document, sir?

18 A Not specifically.

19 Q But you asked her earlier, "How do you know it's coal?"

20 A Yes.

21 Q And as a result of that conversation, we have this profile  
22 that omits any mention of coal; is that right?

23 A Yes.

24 Q And just for clarification, the Tunnel 1 cleanup has since  
25 been complete?

1 A That is my understanding.

2 Q Sir, I'm going to ask you next some questions about  
3 Horsethief Lake.

4 Are you familiar with Horsethief Lake?

5 A Yes.

6 Q Are you familiar with the coal that has been accumulating  
7 at Horsethief Lake or was accumulated at Horsethief Lake?

8 A Yes.

9 Q When is the first time that you became aware of an issue  
10 of coal deposition at Horsethief Lake?

11 A I believe it was June of 2014.

12 MR. SNYDER: Your Honor, one housekeeping matter.

13 I'd like to move into evidence Plaintiffs' Exhibit 1381.

14 MR. SULLIVAN: No objection.

15 THE COURT: It's admitted.

16 (Exhibit 1381 admitted.)

17 Q (By Mr. Snyder) Sir, I want to show you this document one  
18 more time, and I want to ask you -- I believe you testified  
19 that 1381, the EZ Profile document, had more specificity than  
20 the previous document we were looking at, the initial EZ  
21 Profile; is that right?

22 A Correct. We had analytical that went with this.

23 Q What analytical went with this?

24 A They collected a couple of analytical samples for the --  
25 characterize it to see if it would meet the landfill profile

1 or not.

2 Q Was this the analytical report that you're speaking about,  
3 sir?

4 A I believe so.

5 Q I'll show you -- this is Plaintiffs' Exhibit 1382 for the  
6 record.

7 I'm going to ask, sir, do you know if this analytic  
8 report identifies the material as coal or not?

9 A It does not.

10 Q Did the document -- or did -- this analytic report, was it  
11 intended to identify the material as coal or not?

12 A No, it was not.

13 Q What was the intent?

14 A The intent was to determine if the material that was going  
15 to the landfill would fit in with their permit.

16 Q So was it a determination of whether the material was  
17 hazardous or not, hazardous waste?

18 A Not specifically, but that is one of the things that --  
19 that would be able to be determined through this.

20 Q So I believe you testified earlier, sir, that you had  
21 Ms. Cothren change the document to omit references to coal  
22 based on the analytical --

23 MR. SULLIVAN: Objection; mischaracterizes the prior  
24 testimony.

25 THE COURT: Sustained.

1 MR. SULLIVAN: Your Honor, I object on relevance  
2 grounds. Again, we're talking about material that was  
3 completely within a tunnel with no water nearby.

4 THE COURT: I'm kind of there, too, counsel.

5 MR. SNYDER: Moving on.

6 Q (By Mr. Snyder) Mr. MacDonnell, I'm showing you what's  
7 been identified as Plaintiffs' Exhibit 1125. Do you  
8 recognize this document, sir?

9 A Yes.

10 Q Is this an email that you were forwarded concerning the  
11 coal at Horsethief Lake that we were talking about a moment  
12 ago?

13 A Yes, it is.

14 Q So is it fair to say that approximately June of 2014 was  
15 when you first became of the issue?

16 A I believe Justin Piper forwarded me this on June 19th.

17 Q Have you had any conversations with anybody at the  
18 Department of Ecology about coal at Horsethief Lake?

19 A No.

20 Q Is this one of the photos you looked at, sir, when you  
21 determined whether there was coal at Horsethief Lake?

22 MR. SULLIVAN: Objection. I'm not sure that he was  
23 determining there was coal at Horsethief Lake.

24 THE COURT: Overruled.

25 A This is one of the photographs that was presented by

1 Ecology as being coal.

2 Q (By Mr. Snyder) Was this the other photograph, sir?

3 A Yes.

4 MR. SNYDER: Your Honor, plaintiffs move into  
5 evidence Exhibit 1125.

6 MR. SULLIVAN: No objection.

7 THE COURT: It's admitted.

8 (Exhibit 1125 admitted.)

9 Q (By Mr. Snyder) Sir, has BNSF determined how the coal  
10 depicted in the photos we just looked at arrived at its  
11 location?

12 MR. SULLIVAN: Objection. The witness is here in his  
13 personal capacity. I'm not sure that he's able to answer on  
14 behalf of BNSF.

15 THE COURT: Overruled.

16 A Not that I know of.

17 Q (By Mr. Snyder) Do you know, sir, whether there was any  
18 type of alert or notice about catastrophic release or  
19 derailment at Horsethief Lake that could have caused this  
20 coal to be placed there?

21 A Not to my knowledge.

22 Q Tell me what you did next after receiving this email from  
23 the Department of Ecology.

24 A I -- we went out to Horsethief Lake with the contractor to  
25 take a look at -- basically just kind of get a sense of the

1 situation.

2 Q Sir, I'm showing you what's been marked for identification  
3 as Plaintiffs' Exhibit 1117. This is an email from June  
4 23rd, 2014.

5 Was this email sent after you had a chance to go out  
6 and look at the site?

7 A I believe it was just before.

8 Q And at the top of the email, sir, you mentioned talking to  
9 Charlie on Friday. Do you know who Charlie is?

10 A Charlie McKinney with the Department of Ecology.

11 Q Do you recall what the contents of your conversation was  
12 with Mr. McKinney?

13 A Just that we were -- that I was going to be going down to  
14 take a look at it, and we'd fill in him later.

15 Q Did you make my representations to Mr. McKinney about how  
16 the coal arrived at its location?

17 A Not that I remember.

18 Q Do you recall making estimates around this time period of  
19 how much coal was at Horsethief Lake?

20 A Not until we were actually out at the site.

21 MR. SNYDER: Your Honor, plaintiffs move into  
22 evidence Exhibit 1117.

23 MR. SULLIVAN: No objection.

24 THE COURT: Admitted.

25 (Exhibit 1117 admitted.)

1 Q (By Mr. Snyder) Sir, this is Plaintiffs' Exhibit 1116.

2 Do you recognize this document, sir?

3 A Yes.

4 Q Is this an email you wrote?

5 A Yes.

6 Q Can you tell us who Violet Barnard is?

7 A At the time she was the environmental specialist for the  
8 Pacific Northwest region.

9 Q Did she come with you to inspect the site?

10 A No.

11 Q Was this email created after you attended the inspection  
12 you just talked about?

13 A It was written onsite, but we had not been able to walk  
14 the causeway yet.

15 Q And did you make an estimate, sir, of the spill volume in  
16 this email?

17 A Yes.

18 Q And what was the estimate?

19 A The estimate was 10 tons.

20 Q How did you make that estimate?

21 A Just kind of a placeholder.

22 Q Was it just based on what you could see from your spot at  
23 the location?

24 A Yes.

25 Q And when you were looking at the coal at the time, was

1 that near the boat launch at Horsethief Lake?

2 A The boat launch and the rock outcroppings that are over  
3 the top of the tracks.

4 MR. SNYDER: Your Honor, plaintiffs move into  
5 evidence Exhibit 1116.

6 MR. SULLIVAN: No objection.

7 THE COURT: Admitted.

8 (Exhibit 1116 admitted.)

9 Q (By Mr. Snyder) Sir, you made this estimate about the  
10 amount of coal being at the site on or about June 24th, 2014.

11 Do you know when cleanup began at Horsethief Lake?

12 A Cleanup began somewhere around late February of 2015.

13 Q Do you know why there was a delay of approximately eight  
14 months?

15 A Multiple reasons. One, train traffic. Working in this  
16 area in the summers is not overly beneficial due to  
17 environmental concerns for the workers. It gets really warm  
18 there on the causeway. The winds are not conducive. We'd  
19 had problems with snakes.

20 Q Rattlesnakes?

21 A Rattlesnakes, yes.

22 Q Is it common for there to be that much of a delay between  
23 identifying a spill and cleanup?

24 A That's highly dependent upon what the material is.

25 Q So is it because this material is coal, there was a delay

1 in cleanup in addition to the reasons you just said?

2 A Because the material was not really -- Ecology was not  
3 very concerned about it, and this was discussed with them for  
4 the time frame. We just -- it was something where,  
5 logistically speaking, it was difficult to get out there  
6 until train traffic slowed down.

7 Q Sir, who at the Washington Department of Ecology did you  
8 speak to and said they were not concerned about coal?

9 A I think that mischaracterized what I said.

10 Q Okay. Please clarify.

11 A They were not overly concerned as long as we were moving  
12 forward with the process.

13 Q And who did you talk to that said they weren't overly  
14 concerned?

15 A That would be Charlie McKinney or Jeff Lewis, one of the  
16 two.

17 Q Thank you, sir.

18 Do you recall who BNSF contracted with to clean up  
19 Horsethief Lake?

20 A We contacted Hulcher.

21 Q Showing you Exhibit 1119, do you recognize that document,  
22 sir?

23 A Yes.

24 Q And this is a three-page email between you and multiple  
25 individuals, right?

1 A Yes.

2 Q Mostly Hulcher employees?

3 A Yes.

4 Q Do you recall what instructions you gave to the Hulcher  
5 crew about cleaning up the material at Horsethief Lake?

6 A That we wanted to try and get the stuff -- the material  
7 that was more difficult to get to while we had the longer  
8 track windows, and we'd come back and get the easier stuff  
9 when the windows were shorter.

10 Q Did you tell people at Hulcher to clean up coal down to  
11 the water's edge?

12 A I did not tell them to clean up material at the water's  
13 edge. We didn't see any at the water's edge.

14 Q In the middle of the page here, sir, there is an email  
15 from you to Kevin Santillie. Do you remember who Kevin  
16 Santillie is? And please tell me if I'm mispronouncing his  
17 last name.

18 A That is the correct pronunciation.

19 Yes.

20 Q And did Kevin and Hulcher contact you?

21 A Yes.

22 Q Did you tell him to remove the material from at the  
23 ballast on the river side of the Horsethief Lake?

24 A Yes. That's where the material -- the majority of the  
25 material was.

1 Q The river side, sir, would be the Columbia River side?

2 A Correct.

3 Q Did you give any instructions about cleaning up the other  
4 side of the causeway on the Horsethief Lake side?

5 A No.

6 MR. SNYDER: Your Honor, plaintiffs move into  
7 evidence Exhibit 1119.

8 MR. SULLIVAN: Your Honor, BNSF has no objection as  
9 far as Mr. MacDonald's email, but there are a number from  
10 other individuals that I think would be hearsay.

11 THE COURT: Don't you think they are business  
12 records, counsel?

13 MR. SULLIVAN: That's fine.

14 THE COURT: They will be admitted.

15 (Exhibit 1119 admitted.)

16 Q (By Mr. Snyder) Do you recall exactly when cleanup began  
17 at Horsethief Lake, when Hulcher began physically removing  
18 the materials?

19 A I believe it was probably Monday or Tuesday following this  
20 Friday.

21 Q So very late February, perhaps --

22 A Yes.

23 Q -- early March?

24 A Very late February.

25 Q Sir, I'm now showing you Plaintiffs' Exhibit 1118. This

1 is another three-page email. I'm just going to flip through,  
2 starting from the bottom, going up.

3 I'm going to ask, do you recognize this email?

4 A Yes.

5 Q Were things on budget when Hulcher first started cleaning  
6 up at Horsethief Lake?

7 A I'm not sure I understand.

8 Q Let me ask you this: Did you have to seek approval for a  
9 different code for the cleanup at Horsethief Lake, a  
10 different code for budgetary reasons?

11 A Yes.

12 Q Can you tell us why?

13 A We typically use an MC code, a miscellaneous code, for  
14 projects under 50,000. If they go above that, we have to get  
15 special permissions.

16 Q Do you know who Rich McMahon is, sir?

17 A I've never met him. I've exchanged emails with him.

18 Q Is he a BNSF employee?

19 A Yes.

20 Q And were you conversing with him to obtain a different  
21 code for budgetary purposes?

22 A Via email, yes.

23 Q In the middle of this page, sir, this is the Friday, April  
24 24th, 2014, email at 9:54 a.m., you answered some of the  
25 questions posed by Mr. McMahon, did you not?

1 A Yes.

2 Q One of the things you say is that the estimate of the coal  
3 is 2,000 cubic yards.

4 I'm curious, sir, do you know why the estimate went  
5 from 10 tons that we talked about earlier to 2,000 cubic  
6 yards?

7 A The main reason is because we were looking at budgetary  
8 constraints, and it was just easier to overestimate than to  
9 underestimate.

10 Q So do you believe that the estimate of 2,000 cubic yards  
11 was an overestimate of the material deposited at Horsethief  
12 Lake?

13 A Yes.

14 Q And underneath -- or above that estimate I'm speaking  
15 about, it says, "Unknown which unit train this is from."

16 Do you know whether BNSF determined if a single unit  
17 train caused this coal to be accumulated at Horsethief Lake?

18 A No.

19 MR. SNYDER: Your Honor, plaintiffs move into  
20 evidence Exhibit 1118.

21 MR. SULLIVAN: No objection.

22 THE COURT: Admitted.

23 (Exhibit 1118 admitted.)

24 Q (By Mr. Snyder) Sir, I'm now showing you Exhibit 1122,  
25 another email. Do you recognize this email, sir?

1 A Yes.

2 Q Earlier I asked you about what the directions were that  
3 you gave the Hulcher crew about cleaning up material at  
4 Horsethief Lake. Do you remember that?

5 A Yes.

6 Q In this email, you're writing Todd Gose. Who is Mr. Gose?  
7 And again I hope I'm pronouncing his last name correctly.

8 A He was one of the foremen along that stretch of railway.

9 Q And you asked Mr. Gose who was the BNSF --

10 A Oh, I'm sorry. He was with Hulcher.

11 Q Thank you, sir.

12 And you asked Mr. Gose, "Who was the BNSF EIC that  
13 directed the crew to remove coal dust from the top of the  
14 bank rather than the direction I gave?"

15 What is "EIC"?

16 A Employee in charge.

17 Q And again I'm going to ask, what was the direction that  
18 you gave the Hulcher crew in terms of removing the coal dust?

19 A The direction was given for logistical reasons. We had  
20 longer track windows in the early spring, going -- going  
21 through, and it was to remove the material that was more  
22 difficult or the material on the slope, and then come back  
23 and get the stuff at the top.

24 Q So at the time you wrote this email, had Hulcher only been  
25 cleaning up coal dust from the top of the bank?

1 A Yes, his crew had been cleaning up material on top of the  
2 bank at this time.

3 Q And you asked him to try to get to the material that was,  
4 I believe you said, more difficult to reach?

5 A Yes.

6 Q Which would have been more far down the slope at  
7 Horsethief Lake?

8 A And it was -- the direction was given to Jesse Baker.

9 Q And, again, that material was the material was farther  
10 down the slope --

11 MR. SULLIVAN: Objection to "farther down." I don't  
12 think Mr. MacDonald testified to it would be farther down.

13 THE COURT: Overruled.

14 A The material that was on the slope.

15 Q (By Mr. Snyder) And, sir, was this just on the Columbia  
16 River side, or was it on the Horsethief Lake side?

17 A Just on the Columbia River side.

18 MR. SNYDER: Your Honor, plaintiffs move into  
19 evidence Exhibit 1122.

20 MR. SULLIVAN: No objection, Your Honor.

21 THE COURT: It is admitted.

22 (Exhibit 1122 admitted.)

23 Q (By Mr. Snyder) Another email, sir. This is Plaintiffs'  
24 Exhibit 1123. Please look this over and let me know if you  
25 recognize this document.

1 A Yes.

2 Q The last document we looked at was 2015, and this is a  
3 2016 document.

4 Sir, did cleanup at Horsethief Lake -- was it completed  
5 in different phases?

6 A It went through two different phases once we lost track  
7 windows.

8 Q Do you know what the time period of cleanup was in 2015,  
9 approximately?

10 A I think -- if I remember correctly, it probably ended  
11 about mid-April when it started warming up and track windows  
12 were becoming much less available.

13 Q So I think we said last -- late February and into early  
14 April?

15 A I believe so.

16 Q And the next cleanup crew came out starting in 2016; is  
17 that fair?

18 A Yes.

19 Q In this document, sir, in the middle of the page you write  
20 an email to Nicholas Dryer.

21 Do you remember who Mr. Dryer is?

22 A Yes, he is the roadmaster for that section.

23 Q And you asked him how close is Hulcher from being done out  
24 there. The short answer is we need to get as much of the  
25 coal cleaned up as possible.

1           Do you recall why you told Mr. Dryer that we need to  
2 get as much of the coal cleaned up as possible at this time?

3 A   Well, it gets really expensive having a crew out there  
4 that was working around short track windows.

5 Q   So is the only reason logistical, potentially?

6 A   Logistically, yes.

7 Q   It had nothing to do with the amount of coal that was at  
8 Horsethief Lake at this time?

9 A   It was purely logistical.

10 Q   Did you receive any instructions from BNSF, from your  
11 superiors at BNSF to get as much material cleaned up as  
12 possible at this time?

13 A   No.

14 Q   Sir, sitting here today, do you know if cleanup has been  
15 complete at Horsethief Lake?

16 A   Yes.

17 Q   Did it get complete this year?

18 A   It was completed this year, yes.

19 Q   What month?

20 A   I believe it was in August -- or late August, early  
21 September.

22 Q   Do you know why it took a longer period of time in 2016 to  
23 get the rest of the material cleaned up versus what we talked  
24 about in 2015?

25 A   Well, it was completion of the original work. It wasn't

1 anything new that we saw. The material that basically once  
2 the track -- once the track windows became shorter, it was  
3 just a decision that was made that we're going to continue  
4 out there. Even though we've got short track windows, we're  
5 going to try and see if we can expand on them. There was  
6 more capital gains, capital improvements going on in regular  
7 track maintenance that we could piggyback with.

8 Q So essentially you had more time on the track without  
9 trains coming through; is that fair?

10 A That was the thought that we had.

11 Q Do you know what type of equipment Hulcher used to clean  
12 up the material at Horsethief Lake?

13 A Vac trucks.

14 Q Did you ever witness that cleanup occur personally?

15 A Yes.

16 Q Can you describe for us how that process works?

17 A It's a large vacuum -- vacuum truck that basically sucks  
18 material in. And, you know, when I say "material," rock,  
19 sticks, coal, whatever happens to be there. And once the  
20 truck gets to a certain weight they have to go offload that  
21 material, which is about -- the nearest entrance point there  
22 is, I think, about two miles away.

23 Q At the Wishram yard?

24 A It's either at Wishram or at The Dalles or Dallesport.

25 Q The Hulcher crew, did they physically walk off the track

1 and down the causeway to clean up the material?

2 A Some of them would, yes.

3 Q Do you know if BNSF has done any other additional  
4 monitoring at the Horsethief Lake site since cleanup was  
5 complete?

6 A Not to my knowledge.

7 MR. SNYDER: Your Honor, Plaintiffs move into  
8 evidence 1123.

9 MR. SULLIVAN: No objection, Your Honor.

10 THE COURT: It will be admitted.

11 (Exhibit 1123 admitted.)

12 Q (By Mr. Snyder) Sir, I'm now showing you what's been  
13 previously admitted as Plaintiffs' Exhibit 95.

14 Do you know where the coal that was cleaned up at  
15 Horsethief Lake was disposed of?

16 A The coal at Horsethief Lake was disposed of at Republic  
17 landfill.

18 Q Is this the bill of lading for the disposal of material at  
19 that landfill?

20 A Yes.

21 Q How much material did BNSF contract for to dispose of at  
22 that landfill from Horsethief Lake?

23 A I don't remember.

24 Q Showing you on that same exhibit, sir, BNSF 192640 at the  
25 bottom. If you look at this document, does that help refresh

1 your recollection about how much material or how much coal  
2 BNSF was going to dispose from the Horsethief Lake site?

3 MR. SULLIVAN: Objection. You're asking coal or  
4 material?

5 Q (By Mr. Snyder) Coal, sir.

6 A So this was not specifically for -- if I'm reading it  
7 correctly -- specifically for the Horsethief Lake site. This  
8 was a generic profile that we had set up.

9 Q Sir, this is page 192638. The project at the top there,  
10 do you see where it says "BNSF coal spill Wishram?"

11 A Yes.

12 Q Looking at that identification, do you still believe this  
13 was a generic contract for spills in the area or was this  
14 specific to Horsethief Lake?

15 A So this was specific for Horsethief Lake. The previous  
16 one you were showing me was the profile.

17 Q And that would be the bill of lading?

18 A No. You have three documents there. This is the  
19 contract, you have the bill of lading and then the other  
20 one -- go down more.

21 Q Well, let's look at this one first, sir.

22 A Okay.

23 Q If you look at this page, the name of the waste there is  
24 bituminous coal and the volume is a thousand tons?

25 A Yes.

1 Q Annual volume.

2 So, sir, I'm going to ask again. Was a thousand tons  
3 the amount of material that BNSF had planned to remove from  
4 Horsethief Lake?

5 A No. You can also see the generated site address is  
6 "various" and cities, "various." This was part of a generic  
7 profile.

8 Q So this -- this page was not included in that page? These  
9 are separate documents?

10 A They are separate documents, yes.

11 Q What other spills in the area was BNSF cleaning up coal  
12 from?

13 A The canal.

14 Q At the time this document was executed, there was also  
15 cleanup occurring at Connell?

16 A So not when this one was generated. In February there was  
17 that -- I believe it was February of 2015 we also had the  
18 spill in Connell.

19 Q How much material spilled in Connell?

20 A My understanding was is it was one railcar.

21 Q And do you know how much coal is in one railcar?

22 A Approximately a hundred tons.

23 Q So if we took that hundred tons and put it aside, 900 tons  
24 from Horsethief Lake was the plan of material to be removed?

25 MR. SULLIVAN: Objection. That mischaracterizes

1 prior testimony.

2 THE COURT: Overruled.

3 A No. When we set up a generic profile, it takes into  
4 account that we are going to be -- that we can use that  
5 profile to transport material from -- if we have a spill  
6 somewhere for that.

7 Q (By Mr. Snyder) Okay. And just to clarify, though, the  
8 material that we're talking about is bituminous coal.

9 A If we are able to tell where it comes from. If it comes  
10 from a railcar that originated on the Powder River Basin,  
11 yes.

12 Q And this document in particular --

13 A Yes.

14 Q Has this contract been renewed?

15 A I'm not sure I understand. They're typically good for a  
16 year.

17 Q Let me ask you this: Has BNSF entered into another  
18 special waste service agreement for nonhazardous waste for  
19 this landfill for coal this year?

20 A This one was signed in 2016, so yes.

21 Q And is that going to continue into next year?

22 A Yes.

23 Q Sir, I'm now showing you Plaintiffs' Exhibit 1132.

24 Do you recognize this document, sir?

25 A Yes.

1 Q This is an email from Jesse Baker to you; is it not?

2 A Yes.

3 Q In June of 2016. Was that before or after the cleanup at  
4 Horsethief Lake was completed?

5 A It was during the completion.

6 Q And at that time, sir, how much material had been removed  
7 from Horsethief Lake?

8 A According to the email, 448.74 tons.

9 Q Sir, sitting here today, do you know the total amount of  
10 material that was removed for BNSF from Horsethief Lake?

11 A About 568 tons of total material.

12 Q Did BNSF make a determination of how much of that was  
13 coal?

14 A According to the generic profiles, they estimate -- the  
15 landfill typically estimates about ten percent.

16 Q The landfill made that estimate?

17 A The landfill, in conjunction with the -- it's kind of the  
18 standard cleanups that we've done.

19 THE COURT: Ten percent of the product is coal?

20 THE WITNESS: Yes.

21 Q (By Mr. Snyder) According to the landfill and BNSF?

22 A Yes.

23 Q And you said that was typical, I believe, for cleanups  
24 you've done. Is that typical for coal cleanups?

25 A Typical for that's what we saw out at Connell and that's

1 what we saw -- that's what my understanding is, what we saw  
2 in this when they were dumping the material. Sometimes you  
3 get more, sometimes you get less but it averages out to be  
4 about 10 percent.

5 Q Is it also true for the spill in Tunnel 1?

6 A I don't know. But the original email was between 1 and 15  
7 percent.

8 Q Of bituminous coal?

9 A Of bituminous coal is what they originally estimated.

10 Q Thank you, sir.

11 A It was in that range.

12 MR. SNYDER: Your Honor, plaintiffs move into  
13 evidence Exhibit 1132.

14 MR. SULLIVAN: No objection, Your Honor.

15 THE COURT: It is admitted.

16 (Exhibit 1132 admitted.)

17 Q (By Mr. Snyder) Sir, moving away from Horsethief Lake,  
18 I'm showing you Plaintiffs' Exhibit 1153. Take a look at  
19 this document, sir, and tell me if it is something you  
20 recognize.

21 A Yes.

22 Q Is this pertaining to a spill at one of the yards?

23 A This is actually having to do with the spill at Connell.

24 Q Do you know who Daryl Ness is, sir?

25 A Daryl Ness was the regional director at the time.

1 Q Do you know why Daryl Ness wrote to you saying, "This is  
2 very confidential so I don't want to pass this along"?

3 A I don't know. I'm assuming that it was the fact that we  
4 lost a load of something along the train tracks.

5 Q Was it important that that load was lost in the Columbia  
6 River Gorge particularly?

7 Mr. Sullivan: Objection. You're asking the witness  
8 about what Mr. Ness thought.

9 THE COURT: Overruled.

10 A This wasn't lost in the Columbia River Gorge.

11 Q (By Mr. Snyder) At the bottom of the page there, sir,  
12 there's an email from Will Cunningham. Do you see that?

13 A Yes.

14 Q And this document was forwarded to you?

15 A Yes.

16 Q At the bottom it says, "I assume the coal spill on the  
17 mainline had already been reported and plans are in place to  
18 clean up, considering the sensitivity of the Columbia River  
19 Gorge."

20 Do you see that?

21 A Yes.

22 Q Did you have any conversations with either Mr. Ness or  
23 Mr. Cunningham about the sensitivity to the Columbia River  
24 Gorge?

25 A I had talked with Mr. Ness about the possibility of

1 getting tractor time for the cleanup of Horsethief Lake when  
2 the -- and this is from the conversations I had with him  
3 regarding this email -- when they had the train show up at  
4 the TransAlta facility in Centralia with the -- with that one  
5 car being empty, they assumed that this was the material that  
6 was out at Horsethief Lake.

7 Q Okay. I see. And has any determination been made of  
8 whether that was correct or not?

9 A That was incorrect. This material was what was lost at  
10 Connell.

11 MR. SNYDER: Plaintiffs move into evidence  
12 Exhibit 1153.

13 MR. SULLIVAN: No objection.

14 THE COURT: Admitted.

15 (Exhibit 1153 admitted.)

16 MR. SNYDER: Thank you, Mr. MacDonald.

17 MR. SULLIVAN: I have no questions, Your Honor.

18 THE COURT: All right. You may step down.

19 THE CLERK: Please come this way to be sworn.

20 KATELYN KINN, HAVING BEEN FIRST DULY SWORN,  
21 TESTIFIED AS FOLLOWS:

22 THE CLERK: State your first name, and spell your  
23 last name for the record.

24 THE WITNESS: Katelyn Kinn, K-i-n-n.

25 DIRECT EXAMINATION

1 BY MS. RODGERS:

2 Q Good afternoon, Ms. Kinn. Where do you live?

3 A In Seattle.

4 Q How long have you lived in Seattle?

5 A Since 2010.

6 Q Are you from this area?

7 A No. I'm from northern Wisconsin.

8 Q And what is your educational background?

9 A I received a bachelor's degree in international relations  
10 from Boston University in 2006 and a juris doctorate from  
11 California Western School of Law in 2009.

12 Q And when did you graduate from law school?

13 A 2009.

14 Q Where do you work?

15 A At Soundkeeper.

16 Q How long have you worked at Soundkeeper?

17 A Since 2010.

18 Q What is your current job title?

19 A Staff attorney.

20 Q And what are your current job duties?

21 A I manage the litigation docket, I review cases, I'm  
22 co-counsel on cases, I conduct field investigations and  
23 patrol for pollution.

24 Q And have you held any other job titles at Soundkeeper?

25 A I actually started as an unpaid intern in the beach

1 cleanup program where I did -- my role was pollution  
2 prevention intern, and then I was hired onto the staff as  
3 pollution prevention coordinator. I then transitioned to  
4 legal affairs coordinator, was promoted to legal affairs  
5 manager, and then staff attorney.

6 Q And why did you get into this line of work?

7 A My father was a fisherman on the Great Lakes and built a  
8 fishing business. It was clear to me from a very young age  
9 that the quality of the water and the health of the fish was  
10 something my family depended on, so it's in my blood to  
11 protect the waterways. It's deeply important to me, and I'm  
12 very committed to it.

13 Q You mentioned as part of your job you do fieldwork, right?

14 A Yes.

15 Q And where do you generally do that?

16 A All over Puget Sound.

17 Q And how frequently are you out in the field and not in the  
18 office?

19 A A lot. It's impossible for me today to divide when I'm  
20 actually on a pollution patrol versus when I'm just out and  
21 about hiking or walking to and from the office or to  
22 meetings. Every time that I'm near a waterway, I'm looking  
23 for pollution.

24 Q Are you the only Soundkeeper employee who gets out on the  
25 water?

1 A No. Most of us do.

2 Q Who else?

3 A One is Paul Fredrickson. The executive director and  
4 Soundkeeper's name is Chris Wilke. We have an AmeriCorps  
5 serviceperson named Kerry McGowan who works with Kathryn  
6 Davis, our stewardship coordinator. We have a scientist,  
7 Connie Sullivan, and a boating programs coordinator, Andy  
8 Gregory. They're all out on the water a lot.

9 Q In addition to the fieldwork, are there other ways that  
10 you learn about pollution that's happening in Puget Sound?

11 A As a water keeper group, we operate a pollution hot line  
12 where we accept calls from member of the public and  
13 volunteers and supporters and we also have a forum on our  
14 website where anyone can submit a report of pollution.

15 Q I'd like to show you what's been marked as Exhibit 1437.

16 Is this document familiar to you?

17 A Yes.

18 Q And what is it?

19 A This is a -- a form, it's called an incident report form.  
20 It's where we enter data into a Microsoft Access database to  
21 log pollution reports.

22 Q Is this where you log reports that you get from members of  
23 the public?

24 A Yes, that's right.

25 Q Who created this particular form?

1 A This form was created by Margie Wallace.

2 Q What is the date on this form?

3 A August 29th, 2010.

4 Q Are forms like these created in the ordinary course of  
5 Soundkeeper business?

6 A Yes.

7 Q Do you keep them in a database or how are they maintained  
8 at Soundkeeper?

9 A We keep them in a database. It transitioned from  
10 Microsoft Access to Excel in 2015.

11 Q Reviewing parts of these forms, is that part of your job  
12 duties while at Soundkeeper?

13 A Yes, absolutely.

14 Q And did you review this particular form?

15 A Yes, I did.

16 MS. RODGERS: I'd like to move for admission into  
17 evidence this Exhibit Number 1437.

18 MS. ASHBAUGH: No objection.

19 THE COURT: Admitted.

20 (Exhibit 1437 admitted.)

21 Q (By Ms. Rodgers) Ms. Kinn, who is Teresa Bledsoe?

22 A She's a citizen who lives in Seattle. She's a Soundkeeper  
23 volunteer.

24 Q Could you describe the pollution incident that is  
25 described the form?

1 A Teresa called our office to report that she was on the  
2 beach at Carkeek Park and was finding large black rocks that  
3 she believed to be coal and petroleum coke on the beach.

4 Q And did you do any followup after you received this  
5 report?

6 A Yes. So Margie talked to Teresa and had Toby Wilkins pick  
7 up the sample and bring it into our office. I also made a  
8 phone call to the Department of Ecology to report what Teresa  
9 was finding.

10 Q Did you ever hear back from the Department of Ecology?

11 A Yes.

12 Q And what were their findings?

13 A They confirmed that it was coal.

14 Q Had you ever received any other reports of coal pollution  
15 in the Puget Sound area?

16 A Yes. In 2011, we received multiple reports from Sue  
17 Joerger finding coal in Seattle's Ballard neighborhood along  
18 the Burke-Gilman bike path.

19 Q I'd like to show you what's been marked as 1438.

20 Is this document familiar?

21 A Yes.

22 Q And what is this form?

23 A Another pollution report form. I entered this one into  
24 the database.

25 Q And is this one of the reports that Sue Joerger provided?

1 A Yes, on June 28th, 2011.

2 Q And what was the pollution that was reported and recorded  
3 in this form?

4 A Sue was biking along the bike path in Ballard, and she  
5 found black rocks believed to be coal or petroleum coke, and  
6 also some tar that may or may not have been the creosote  
7 dripping off the railroad ties under the bridge overpasses  
8 that go on the bike path.

9 Q And who is Sue Joerger?

10 A She was a Puget Soundkeeper employee about a decade now,  
11 and then there was a period of time where she was a  
12 volunteer, and she is now on the Soundkeeper staff again.

13 Q And did you do anything in response to this incident  
14 report?

15 A Yes. I spoke with Sue. She brought some samples into the  
16 office. I also joined her out in the field to look at what  
17 she was seeing.

18 Q Did you make any reports to other agencies?

19 A Yes. I reported this to the Department of Ecology as  
20 well.

21 MS. RODGERS: I'd like to move for the admission of  
22 Exhibit 1438.

23 MS. ASHBAUGH: No objection.

24 THE COURT: Admitted.

25 (Exhibit 1438 admitted.)

1 Q (By Ms. Rodgers) I'd like to show you what's been marked  
2 1478. What is that exhibit?

3 A This is a record created by Washington Department of  
4 Ecology staff when they receive a report on their  
5 environmental reporting tracking system.

6 Q And what is the date on this document?

7 A The date is June 28th, 2011.

8 Q And did you receive this document as part of your job as  
9 Soundkeeper?

10 A Yes.

11 Q And how did this come into your possession?

12 A I asked the Department of Ecology for a copy of it because  
13 it is a public record.

14 Q And who prepared this form?

15 A The form itself was prepared by Lynette Loyden. She's  
16 listed as the entry person on the bottom. But I know Celia  
17 Jackson at the Department of Ecology also had some data entry  
18 on this report.

19 Q And did you review this document as part of your normal  
20 job duties as Soundkeeper?

21 A Yes.

22 Q And are these documents like these kept in the ordinary  
23 course of business?

24 A Yes.

25 Q Does this document accurately reflect the pollution report

1 that you made on that day?

2 A Yes.

3 MS. RODGERS: I'd like to move for admission of  
4 Exhibit 1478 into evidence.

5 MS. ASHBAUGH: No objection.

6 THE COURT: Admitted.

7 (Exhibit 1478 admitted.)

8 Q (By Ms. Rodgers) And could you just briefly describe what  
9 is the pollution that you reported that's recorded in this  
10 form?

11 A So when I joined Sue in the field, what I saw and what she  
12 had seen was black rocks on the bike path: Coal, coke, and  
13 also the streaks of creosote tar.

14 There were two locations in Ballard where the BNSF  
15 railroad tracks cross over the bike paths, so we visited both  
16 of those locations and found the same thing at both spots.

17 Q Now, could you describe those locations with a little more  
18 precision? Where are you speaking of?

19 A So in Seattle's Ballard neighborhood, between the Ballard  
20 Locks and Shilhole Marina along Seaview Avenue, right there  
21 on the northern shore of the Ship Canal and right alongside  
22 Shilhole Bay.

23 Q And is there a railroad bridge there?

24 A Yes.

25 Q And at these locations, about how far are they from the

1 water?

2 A The first one is within probably 50 feet of the water.  
3 The other is about a block away.

4 Q And how close are you to the railroad tracks at these  
5 locations?

6 A Directly under the railroad tracks.

7 Q Did you collect any samples when you were out in the  
8 field?

9 A Yes, I did.

10 Q And what did you do with the samples?

11 A I put them in plastic bags and kept them in my desk for a  
12 period of time. I later submitted them to a lab to be  
13 tested.

14 Q Okay. I'd like to show you what's been marked as  
15 Exhibit 1466.

16 Do you recognize this letter?

17 A Yes. I wrote this letter.

18 Q And what is this?

19 A It is a cover letter that I wrote to Deborah Grimm at  
20 Tulane University. With this letter I enclosed 12 samples of  
21 coal and a copy of the email with Jessica Yarnall Loarie, and  
22 also a catalog of the samples that are enclosed.

23 Q And what's the date on this letter?

24 A May 1st, 2012.

25 Q And did you send one of the samples that you collected

1 when you were out with Sue Joerger? Was this one of the 12  
2 samples?

3 A Yes.

4 Q And did you prepare this letter as part of your job duties  
5 at Soundkeeper?

6 A Yes.

7 Q And was it kept in the ordinary course of business?

8 A Yes.

9 Q You mentioned you sent 12 samples along with the letter --

10 A Yes.

11 Q -- correct?

12 A Yes.

13 Q And what samples of what?

14 A The first was the sample brought to us by Teresa Blodsoe  
15 collected from the beach at Carkeek Park, several samples  
16 that Sue Joerger brought to us from the Ballard location. I  
17 also went on to collect samples from the shoreline underneath  
18 the Ballard rail bridge, both on the north and south shores  
19 of the Ship Canal.

20 Q And can you take a look at the second page -- is it the  
21 first or the second page?

22 Is this document the sample catalog you mentioned in  
23 both the letter and in your testimony?

24 A Yes, I created this.

25 Q And did you collect all of these samples?

1 A No, I collected many of them. The first, from August 29th  
2 at Carkeek Park, was collected by Teresa Blodsoe.

3 Q And was that the sample that was referred to in the  
4 incident report?

5 A Yes, it was.

6 Q And what other samples did you collect? I'm sorry.

7 A Sue Joerger collected several of these samples. I also  
8 collected some of them, including most certainly some of the  
9 September and November samples.

10 Q And did you select these locations for sampling?

11 A Well, Teresa selected the Carkeek Park location  
12 inadvertently. She just happened to be recreating there.  
13 And Sue was just riding her bike when she the spots in  
14 Ballard.

15 The more that I investigated, I realized that I really  
16 wanted to be looking in the waterway directly under the  
17 bridge, so I found public access locations on the north and  
18 south sides of the rail bridge at the Ballard Locks.

19 Q Can you describe those locations a little bit more  
20 precisely?

21 A Sure.

22 So if you've been to the Ballard locks, you know that  
23 you can walk over and go view the salmon in the salmon  
24 ladder. If you take a right at the salmon ladder and walk  
25 west along the shoreline, there is a cement staircase that

1 brings you down actually into the canal. Kids use it for  
2 swimming. I used it to access the shoreline at low tide.

3 Even if you go down at low tide, there is 10, 12, 15 feet  
4 of, actually, the bed of the canal that you can walk along.  
5 And you can go all the way under the bridge and a little bit  
6 further. That's at the southern side.

7 Q And so the Magnolia side?

8 A That's right.

9 On the northern side, if you park in the parking lot  
10 for The Canal Restaurant and catering venue, you can just  
11 walk along the public bike path, and there is a pretty  
12 well-trodden trail that takes you down at low tide to the bed  
13 of the canal under the rail bridge.

14 Q And which of the samples were collected from those two  
15 locations?

16 A 10, 11, and 12, as well as 3, 4 -- oh, no, sorry. 3 was  
17 from the sidewalk. 4, 5, and 6 were also from the shoreline.

18 Q And were they collected from the beach, then, at low tide?

19 A Yes, that's right.

20 MS. RODGERS: I would like to move to admit  
21 Exhibit 1466 into evidence, please.

22 MS. ASHBAUGH: No objection.

23 THE COURT: Admitted.

24 (Exhibit 1466 admitted.)

25 Q (By Ms. Rodgers) Now, were the samples that are shown in

1 that exhibit, was that the only time that you collected coal  
2 on behalf of Puget Soundkeeper Alliance?

3 A No. That was just the beginning.

4 Q Where else did you collect coal samples?

5 A Many, many locations up and down Puget Sound, from the  
6 Samish Bay down to the Snohomish River Estuary in Everett,  
7 all the way down the coastline, Mukilteo, Picnic Point,  
8 Edmonds Marina Beach Park, Carkeek, Golden Gardens, through  
9 Seattle and down to the Green River in Kent, down to the  
10 Nisqually River.

11 I investigated a lot of sites. I didn't necessarily  
12 collect samples at all of them, depending on public access  
13 and whether I had my equipment with me.

14 Q I'd like to show you what has been marked as Exhibit 1439.  
15 Do you recognize this document?

16 A Yes, I created this.

17 Q And what is it?

18 A It's a list of some of the locations, but not all of them,  
19 where I visited to see if there was public access to collect  
20 coal from under the rail bridges.

21 Q And when did you create this rail document?

22 A I would have to look at the metadata to confirm, but I  
23 believe it was 2011.

24 Q And did you create this document as part of your job  
25 duties?

1 A Yes.

2 Q And was this record kept in the ordinary course of  
3 Soundkeeper business?

4 A Yes.

5 Q Now, are these the only places that you visited looking  
6 for coal?

7 A No, I went to more places.

8 Q But did you visit each of these places on this list?

9 A Yes, definitely.

10 MS. RODGERS: I'd like to move for admission of  
11 Exhibit 1439.

12 MS. ASHBAUGH: No objection.

13 THE COURT: Admitted.

14 (Exhibit 1439 admitted.)

15 Q (By Ms. Rodgers) What would you do when you would go to  
16 these places looking for coal?

17 A The first thing I would do is look at where the railroad  
18 tracks, railroad bridges especially, would cross over the  
19 waterway itself, and see if there was public access to the  
20 waterway and the shoreline below the ordinary high water mark  
21 at those spots.

22 If there was public access, I would see if it was safe for  
23 me to get to that spot, and with the footwear I happen to  
24 have one, depending on how wet it is, and I would get down  
25 there and look for coal. In some places it was easier to

1 find than others, and in some locations I collected samples  
2 of coal.

3 Q Were there other Soundkeeper employees or volunteers who  
4 engaged in this investigation with you?

5 A Sometimes Paul Fredrickson came with me; Sue Joerger, a  
6 volunteer, also came along; Chris Wilke came sometimes; and  
7 there were a couple of other volunteers and interns that  
8 came.

9 Q And were you responsible for providing them information in  
10 terms of what to do?

11 A Yes.

12 Q I'd like to show you what's been marked as Exhibit 1440.  
13 And what is this document?

14 A This is a list of rules that I provided to Soundkeeper  
15 staff and volunteers; that if they were interested in looking  
16 for and potentially collecting samplings of coal, this is how  
17 we wanted them to do it.

18 Q And so you created this document?

19 A Yes.

20 Q When did you create this, do you recall?

21 A Again, I'd have to check the metadata and the properties,  
22 but I would think it was late 2011.

23 Q And did you create this as part of your job duties at  
24 Soundkeeper?

25 A Yes.

1 Q Was this kept in the ordinary course of Soundkeeper  
2 business?

3 A Yes.

4 Q What did you do with this document?

5 A I circulated it to Soundkeeper staff people, especially  
6 those that were going to be out in the fields anyway, and  
7 then went out and discussed potential coal-collection  
8 activities with volunteers and would give it to them also.

9 MR. SNYDER: I'd like to move the admission of  
10 Exhibit 1440 into evidence.

11 MS. ASHBAUGH: No objection.

12 THE COURT: It's admitted.

13 (Exhibit 1440 admitted.)

14 Q (By Ms. Rodgers) Do you see the third bullet point there,  
15 Ms. Kinn, "Collect from below ordinary high water mark"?

16 A Yes.

17 Q What do you mean by that term?

18 A Well, it's a term that has both legal and ecological  
19 significance. As a Clean Water attorney, I'm very familiar  
20 with the definitions in the code and regulations and Revised  
21 Code of Washington, and also how the Army Corps of Engineers  
22 defines this.

23 But for me, with my work in the field, I mean, what the  
24 ordinary water mark really is the maximum rise of a waterway  
25 over land. And depending on the waterway, there are almost

1 always physical indicators that can show you where that is.  
2 There is the litter or debris patterns or lines, water, wet  
3 marks on the rocks. The different plant life, the matting of  
4 plants, the presence or absence of plants, as well as  
5 sediment shelving and indentations.

6 Q And many of the waters you work with are tidal, I would  
7 assume, correct?

8 A The easiest way to ensure you're below the ordinary high  
9 water mark is to go out at low tide and be within a few feet  
10 of where the mark actually is, is because it's a hundred  
11 percent certain that you're actually at the -- on the bed of  
12 the waterway at that point in time.

13 Q Now, how can you tell something is coal as opposed to just  
14 rocks -- other rocks on the beach?

15 A Well, it wasn't immediately apparent to me, but the more  
16 that I did it, I learned where it was because it is a lot  
17 darker-black than other rocks and materials. It's almost  
18 always cleaner because it's been there for less time than the  
19 other rocks. It's not covered in moss and barnacles. It is  
20 very, very light weight, so if you picked up a piece of coal  
21 in one hand and a rock in a another hand, you can also tell  
22 the difference. It breaks up in kind of a prismatic way,  
23 glistening and shinning in the inside.

24 Q Have you done anything to educate yourself about what coal  
25 looks like?

1 A The Internet. Actually, I learned a lot reading articles,  
2 looking at photos. I compared notes and pictures of what I  
3 was finding with other waterkeeper groups, and certainly the  
4 other groups that were working in Washington.

5 Q I'd like to show you what's has been marked as  
6 Exhibit 1450.

7 Ms. Kinn, is this photograph familiar?

8 A Yes. I took this.

9 Q And when did you take this photograph?

10 A I took this on or about June 24th, 2014.

11 Q And is this an accurate depiction of what you saw that  
12 day?

13 A Yes, it is. This was taken at the Ballard Locks location  
14 that I described earlier, on the northern shore.

15 Q And that's on the Magnolia side, correct?

16 A Yes.

17 Q And what do we see here?

18 A Well, clearly it's on the bed of the canal at a low tide  
19 because you see marine plant life. It's a type of sea life  
20 algae. It's matted down because it was previously floating  
21 in the water just a few hours earlier. Right in the middle  
22 there you see a piece of coal resting on top. The coal  
23 itself is dry. Everything else in the photo is muddy and  
24 matted down from the water.

25 So when I took this photo, it was really clear to me that

1 this coal had just fallen within the last few hours. In  
2 Puget Sound, we have two high and low tides every single day.  
3 This was taken during a morning low tide. So this area in  
4 where I took this photo where the coal is sitting was covered  
5 by feet of water just a couple of hours earlier, and it would  
6 be covered by feet of water again in a few hours after taking  
7 this photo.

8 Q And about how far from the railroad tracks is this -- was  
9 this photograph taken?

10 A Directly under the railroad tracks. One of the things I  
11 noticed when I was out in the field, especially at this  
12 location, is there was a higher concentration of coal in  
13 about a 10-foot band under the northbound side of the tracks.  
14 So that's usually where I looked for it most often.

15 Q And are you talking about the railroad bridge that's just  
16 down from the Ballard Locks, towards the Puget Sound?

17 A Yes, correct.

18 MS. RODGERS: I'd like to move for the admission of  
19 Exhibit 1450 into evidence, please.

20 MS. ASHBAUGH: No objection.

21 THE COURT: It's admitted.

22 (Exhibit 1450 admitted.)

23 Q (By Ms. Rodgers) I'd like to show you what has been  
24 marked as Exhibit 1447.

25 Is this photograph familiar to you?

1 A Yes. I took this.

2 Q And when did you take this photograph?

3 A It was on or about May 1st, 2014.

4 Q And where did you take this picture?

5 A At the Nisqually River.

6 So the Nisqually River emptied into the delta just  
7 north of Olympia, north of Lacey, south of Tacoma. And this  
8 is a public park. You can often find people fishing and  
9 swimming here. It's an easy, safe place to park your car and  
10 walk down to the river.

11 Q And can you describe what we see in is this picture?

12 A Here you can see the sand. You can see the edge of the  
13 water that's in the river. You can see that the plants in  
14 this area are dead. They're used to getting covered with  
15 water. So it was clear to me this was below the ordinary  
16 high water mark, based on the ecology.

17 And this is a large piece of coal that I saw resting on  
18 top of the sand, on top of the plants that were there, and I  
19 collected it.

20 Q How far from the railroad tracks are you in this  
21 photograph?

22 A Directly under. Other photos show it but you can actually  
23 see the shadow of the railroad right there.

24 Q About how far? Can you estimate a distance?

25 A It's directly under. This bridge is actually really high

1 up. I would say maybe 100, 120 feet up.

2 Q Is it higher than the bridge that's at the Ballard Locks?

3 A Yes.

4 Q Was this the only time that you collected a sample at the  
5 Nisqually River?

6 A No. I developed a habit or practice of every time I went  
7 to Olympia for a meeting to meet with agents and  
8 representatives or review public records for another case, I  
9 would stop at this location. So I was there pretty often.

10 MS. RODGERS: I'd like to move for admission of  
11 Exhibit 1447 into evidence.

12 MS. ASHBAUGH: No objection.

13 THE COURT: Admitted.

14 (Exhibit 1447 admitted.)

15 Q (By Ms. Rodgers) I'd like to show you what has been  
16 marked as Exhibit 1445. Are these photographs familiar? I  
17 believe there's a few in here. What is the first photograph  
18 that we see?

19 A Yes. So this is on the Green River, just south of  
20 Seattle, around Kent, sort of between Kent and Tukwila in  
21 King County and this is where the river crosses under or, I  
22 guess, the tracks cross over. You can see the stanchion and  
23 the railroad tracks.

24 Q And that's the bridge that you see directly above?

25 A Yes.

1 Q And when did you take these photographs?

2 A I would have to check the metadata, but I believe it was  
3 June 2013.

4 Q And do you have any reason to believe the metadata on your  
5 camera isn't reliable?

6 A No.

7 Q Could you tell us, there's a few pictures in this series,  
8 though I'll show you them one at a time, but if we could move  
9 to the next photo, please.

10 Is this another photograph that you took?

11 A Yeah. So this is directly under the bridge in the  
12 location shown in the first photo. This is below the  
13 ordinary high water mark. Again, you can tell by the  
14 matting-down of the sediment and the fact that the plants are  
15 dead. And this is a close-up photo that I took while I was  
16 standing in the water. It's just a few inches from the edge  
17 of the river itself and this is coal here.

18 Q And what did you do with that coal?

19 A I picked it up using rubber gloves, put it in a plastic  
20 zip-lock baggie and took it back to my office. I ultimately  
21 had it sent to a lab to be tested.

22 Q Can we see the next photograph? Is there a next one?  
23 What do we see here?

24 A This is my hand with a rubber glove on it. In my hand are  
25 a few of the pieces of coal that I just picked up and you can

1 see the shoreline, again, with some of the plant patterns.  
2 Here it's really obvious to me that it is below the ordinary  
3 water mark because you can see marine debris that's sort of  
4 beached on the shoreline showing that the water is a couple  
5 of feet higher.

6 Q Is this the only time you went to the Green River to  
7 collect coal?

8 A I believe this is the only time I collected a sample.  
9 There might have a couple of other times. A few times when I  
10 visited this location I didn't feel safe being there by  
11 myself so I made a mental note to return with company. But  
12 it was sort of off of my beaten path so I didn't go there as  
13 often as some of the other spots.

14 Q What do we see in this next photograph?

15 A So this is in the same location. You can see some of my  
16 boot prints. But this is a piece of coal. This is very  
17 obvious piece of coal that looks like it fell apart when it  
18 hit the ground. You can see the inside where it is  
19 glistening black. This is another piece of coal here.

20 Q And again, you collected these samples?

21 A That's right.

22 Q Okay. What do we see here?

23 A This is the bag of the sample that I collected on that  
24 day. My hand is holding the bag. You can see a tire beached  
25 behind it, and this is my boot in the water.

1 Q Not a koi?

2 A Not a koi.

3 MS. RODGERS: I'd like to move for admission of  
4 Exhibit 1435 into evidence.

5 MS. ASHBAUGH: No objection.

6 THE COURT: Admitted.

7 (Exhibit 1435 admitted.)

8 Q (By Ms. Rodgers) I'd like to show you what has been  
9 marked as Exhibit 1462. Is this photograph familiar to you?

10 A Yes, I took this.

11 Q And when did you take this photograph?

12 A This was on or about August 22nd, 2013.

13 Q And what do we see here?

14 A This is at the Ballard Locks location on the northern side  
15 so you see here the bottom -- the actual bed of the Shilshole  
16 Ship Canal. This area, the mud and the rocks that you can  
17 see at the bottom of the photo will be covered by water in a  
18 few hours, and it was covered by water just a few hours ago.  
19 This is at an extreme low tide. Obviously there's a plastic  
20 bag. It contains the coal that I just collected at that  
21 spot. It's being held by my hand with a rubber glove on it  
22 and here in the background is the railroad bridge.

23 Q And where did you find this coal in relationship to the  
24 railroad bridge?

25 A Directly under it. Where I took this photo, I'm standing

1 in that sort of ten-foot strip under the northbound side that  
2 I referenced earlier where I always see a higher  
3 concentration of coal.

4 Q And what did you do with this material in the baggie?

5 A I took it back to my office and ultimately sent it to a  
6 lab to be tested.

7 MR. SNYDER: I'd like to move to admit Exhibit 1462  
8 into evidence, please.

9 MS. ASHBAUGH: No objection.

10 THE COURT: Admitted.

11 (Exhibit 1462 admitted.)

12 Q (By Ms. Rodgers) I'd like to show you what's been marked  
13 as Exhibit 1457.

14 What do we see in this photograph?

15 A This is a picture that I took up in the Nisqually railroad  
16 bridge overpass site. Here it's a sunny day, so obviously  
17 you can see the bridge itself. You can also see the  
18 reflection in the water, it shows that I'm standing right  
19 underneath it. This is a rope swing that I often see kids  
20 swinging on in the river, swimming into the river. I'm  
21 holding a plastic bag of the coal that I just collected from  
22 the exact spot where I'm standing.

23 Q Did you collect it in the water or on the beach?

24 A Both.

25 Q The -- for the coal that you collected on the beach, about

1     **how far from the water was it?**

2     **A     Just a few inches.**

3     **Q     And do you believe that would be within the ordinary high**  
4     **water mark?**

5     **A     Absolutely.**

6     **Q     What did you do with this coal that you put into this**  
7     **baggie?**

8     **A     I brought it back to the office and ultimately sent it to**  
9     **a lab be tested.**

10           **MS. RODGERS: I'd like to move to admit Exhibit 1457**  
11     **into evidence.**

12           **Ms. Ashbaugh: No objection.**

13           **THE COURT: Admitted.**

14                   **(Exhibit 1457 admitted.)**

15     **Q     (By Ms. Rodgers) I'd like to show you what's been marked**  
16     **as Exhibit 1469.**

17           **Do you recognize this letter?**

18     **A     Yes. This is a letter that I wrote on December 17th,**  
19     **2013. It's a cover letter that I enclosed with a box of**  
20     **samples that I sent to the ALS lab.**

21     **Q     Were those samples that we just saw photographs of, were**  
22     **those some of the samples that you enclosed with this letter?**

23     **A     Yes.**

24     **Q     Who is Wendy Hyatt?**

25     **A     She is the supervisor at ALS lab. She is the contact that**

1 I wrote to when I sent samples in.

2 Q Was it your responsibility at Soundkeeper to write a  
3 letter like this?

4 A Yes.

5 Q And was this letter kept in the ordinary course of your  
6 business?

7 A Yes.

8 MS. RODGERS: I'd like to move the admitted  
9 Exhibit 1469 into evidence.

10 MS. ASHBAUGH: No objection.

11 THE COURT: Admitted.

12 (Exhibit 1469 admitted.)

13 Q (By Ms. Rodgers) You've testified that you sent samples  
14 of what you believe to be coal with the letter; is that  
15 correct?

16 A Yes.

17 Q And how long was it after you collected the samples that  
18 you sent them to the lab?

19 A Well, in the case of the samples that I collected earlier  
20 in the year, in the February to March time frame, it was, you  
21 know, nine or ten months later. But I also enclosed samples  
22 that I had just collected in the previous couple of weeks.

23 Q How did you maintain the samples that you collected?

24 A I brought them back to the office. In some cases I had to  
25 dry them out because they would have, you know, sand fleas or

1 other organic matter that I wanted to clear out before I  
2 sealed the bag. So I would do that on my desk, and then I  
3 would put it into a zip-lock bag and seal it with evidence  
4 tape, put my initials and the date on that tape, and then  
5 keep it in a file drawer within reach that no one else  
6 accessed.

7 Q I'd like to show you what has been marked as Exhibit 119.

8 Is this document familiar?

9 A Yes. This is the chain of custody for the samples that I  
10 sent to ALS lab in 2013.

11 Q And did you fill out this form? Is that your signature on  
12 the bottom there?

13 A Yes.

14 Q And was it part of your job duties at Soundkeeper to fill  
15 this form out?

16 A Yes.

17 Q And did you send this chain of custody form along with the  
18 samples? I believe you just said that.

19 A Yes, uh-huh.

20 Q And is this something that you would regularly do with the  
21 samples that you sent to the lab?

22 A Yes.

23 MS. RODGERS: And I believe Exhibit 119 is already  
24 admitted into evidence.

25 THE COURT: Yes.

1 Q (By Ms. Rodgers) Ms. Kinn, did you ever find out what the  
2 samples you collected were?

3 A Yes. The lab confirmed that they were coal.

4 Q I'd like to show you what has been marked as Exhibit 1445.  
5 I believe there's three photographs here.

6 Are these photographs familiar?

7 A Yes, I took these.

8 Q And when did you take these photographs?

9 A On or around November 5th, 2013.

10 Q And where did you take these photographs?

11 A Standing in the Samish River north of Ferndale and Bow,  
12 Washington, north of the Skagit River watershed just south of  
13 Bellingham.

14 Q What do we see in this photograph?

15 A A couple of us were doing pollution patrol on the Samish  
16 River, paddling two canoes down the river, and we passed  
17 under the railroad bridge. So we pulled to the side, and I  
18 stood in the water to see if there was coal at this location,  
19 and I found that this is the general location from where I  
20 collected a sample.

21 Q Is there anything notable in this photograph?

22 A You can see that it's below the ordinary high water mark.  
23 You can see the terrestrial plants up here, the matting of  
24 the mud here, you can see sort of a debris line with some of  
25 the trash here. So it's clear to me that most of what's in

1 this photo is below the ordinary high water mark, and there  
2 was an accumulation of coal in a line about here. From this  
3 photo you can see a few of the pieces there, there, and  
4 there.

5 Q Let's take a look at the next photograph, please. What do  
6 we see in this photograph?

7 A So the wet rocks at the location on the Samish River are  
8 directly under the BNSF railroad bridge that was just in the  
9 prior photo. Everything in this picture is a rock or a leaf  
10 except for this is my boot and this is the piece of -- the  
11 biggest piece of coal that I found on that date. It's, you  
12 know, just much darker black. As soon as I picked it up I  
13 knew it was much lighter weight. It broke up in my hands.

14 Q What do we see in this photograph?

15 A This is the location, this is the river, my paddling  
16 partner is still in the canoe. There's the bridge above,  
17 here is the bridge and the shadow of the bridge in the river.

18 Q So this is the railroad bridge?

19 A Yes.

20 Q Now, where associated with the bridge were those first two  
21 photographs where you pointed out the coal? Where was that  
22 in relationship to the bridge?

23 A Directly under. So from where I was standing when I took  
24 this photo, the coal was right at my feet.

25 Q And did you collect any samples that day?

1 A Yes.

2 Q And how did you collect the samples?

3 A Using a rubber glove, putting the sample in a plastic bag,  
4 bringing it back to the office, and sealing it with evidence  
5 tape.

6 Q And what did you do with it after that?

7 A Sent it to ALS lab to be tested.

8 Q Did you ever find out what the material was?

9 A Yes. The lab confirmed that it was coal.

10 MS. RODGERS: I'd like to move Exhibit 1445 into  
11 evidence, please.

12 MS. ASHBAUGH: No objection.

13 THE COURT: Admitted.

14 (Exhibit 1445 admitted.)

15 Q (By Ms. Rodgers) I'd like to show you what's been marked  
16 as Exhibit 1476. Is this document familiar?

17 A Yes. This is the chain of custody that I sent to ALS lab  
18 in 2014 with the batch of samples that I sent that year.

19 Q And is that your signature on the bottom?

20 A Yes.

21 Q And did you do this as part of your job duties at  
22 Soundkeeper?

23 A Yes.

24 Q Could we turn to the second page of this document. And is  
25 this the letter that you wrote?

1 A Yes.

2 Q And you did this letter as part of your job duties?

3 A That's right.

4 Q And how many samples did you send along with this letter?

5 A I'd have to look back at the chain of custody -- oh, yes,  
6 it does say there. Seven samples.

7 MS. RODGERS: I'd like to move for Exhibit 1476 into  
8 evidence, please.

9 MS. ASHBAUGH: No objection.

10 THE COURT: Admitted.

11 (Exhibit 1476 admitted.)

12 Q (By Ms. Rodgers) I'd like to show you what's been marked  
13 as Exhibit 1472. Is this photograph familiar?

14 A Yes, I took this.

15 Q And what do we see here?

16 A These are the samples that I sent to ALS lab. The ones  
17 that I referred to on that chain of custody, they are laid  
18 out with the cards that I used to mark the information about  
19 where the sample was collected and on what date, latitude,  
20 longitude, weather, who collected it. And in this photo  
21 they're laid out on our conference desk at our office.

22 Q And, again, more of the same thing.

23 A This is a close-up of the label that I used to label the  
24 samples.

25 Q Okay. Are the rest of the photographs just close-ups?

1 A Yes.

2 MS. RODGERS: I'd like to move for Exhibit 1472 into  
3 evidence, please.

4 MS. ASHBAUGH: No objection.

5 THE COURT: Admitted.

6 (Exhibit 1472 admitted.)

7 Q (By Ms. Rodgers) Are you still doing fieldwork looking  
8 for coal?

9 A Yes.

10 Q When was the last time you went out?

11 A October 26th, just two weeks ago.

12 Q And what did you find?

13 A I actually found more coal than I ever had at the location  
14 that I went to on the northern shore of the Ballard Locks in  
15 Seattle, in the same location where I'd looked in the past  
16 down below the ordinary high water mark on the bed of the  
17 canal.

18 Q Is that the only time you've gone out this year?

19 A I also went out in July of this year, July 12th, at that  
20 same exact location.

21 Q I'd like to show you what's been marked as Exhibit 1481.

22 Are these photographs familiar?

23 A Yes, I took these.

24 Q What do we see here?

25 A We see here the photographs from July 12th of this year.

1 This is the location on the north side of the Ballard Locks,  
2 the Shilshole Bay ship canal. You can see the cement  
3 stanchion or the pillar that holds the bridge into place. So  
4 on top of that cement piece is the BNSF rail bridge of this  
5 location. So I'm standing directly underneath it. You can  
6 see the water in the canal, even though the tide is very low  
7 on this day. Behind the water you can see the quay wall  
8 where the boats tie up temporarily before going through the  
9 locks. On the bed of the canal you can see the debris.  
10 There is actually always a lot of metal pieces at this  
11 location, rocks, some sea life, rock weed.

12 Q And the next photograph, please. What do we see here?

13 A So the person in this photo is Paul Fredrickson. He came  
14 with me on this day. That's my hand holding a piece of coal  
15 at the bottom of the photo.

16 Q And did you collect the coal from the location where  
17 you're standing?

18 A Yes.

19 Q What's the next photograph, please? What do we see here?

20 A So this is the ground where I was standing. This is the  
21 bed of the canal. It is -- in this case it is extremely  
22 clear to me that it is below the ordinary high water mark  
23 because these plants are called rockweed. They are a marine  
24 plant that only grows in water. So they are on land in  
25 between the low tides, but they require water to live. Here

1 down on the bottom are two pieces of coal that I collected.

2 Q Next photograph, please.

3 A So this is at the same location. Again, you can see the  
4 rockweed, the other rocks. This is my gloved hand pointing  
5 to a piece of coal here, and there is also coal here.

6 Q Is there another photograph?

7 A So this is a little further out, still below the ordinary  
8 high water mark, but you can see the edge of the shoreline  
9 here and some of the debris that accumulates when the tide  
10 goes up and down. There are several pieces of coal that I  
11 collected in this picture, and I'm pointing to one of them.

12 Q And in this photograph?

13 A Here I'm pointing to another piece of coal. What I was  
14 depicting in this photo that I often see at this location is  
15 that the coal so easily breaks apart. And the bridge is  
16 pretty high up, so you can see that the coal actually broke  
17 apart when it hit the ground. There's the one bigger piece,  
18 and then a bunch of smaller glistening black pieces.

19 Q And is that something you've seen before out on your coal  
20 patrols?

21 A Yes. It is very light weight. This is at low tide. The  
22 water was just covering this location by a few feet several  
23 hours before I took this photo, and the water will be coming  
24 in, again covering this exact location with water, a few feet  
25 of water, again in a few hours.

1 Q Is there another photo? Is that the same --

2 A That's the same thing a little closer up. You can really  
3 see the compensation of the coal and how shiny and black it  
4 is and how different it looks from the other rocks, but you  
5 can also see how it's broken apart.

6 Q Okay. And what do we see here?

7 A So I mentioned earlier that I have to sometimes dry out  
8 what I find to get the sand fleas off. This is what that  
9 looks like sitting on my desk on a piece of white paper.

10 MS. RODGERS: I'd like to move Exhibit 1481 into  
11 evidence, please.

12 MS. ASHBAUGH: No objection.

13 THE COURT: It's admitted.

14 (Exhibit 1481 admitted.)

15 Q (By Ms. Rodgers) And did you collect -- so I assume you  
16 collected samples on that day.

17 A Yes, I did.

18 MS. RODGERS: Your Honor, we have an exhibit that's  
19 up by the witness. We'd like to mark it as Exhibit 1519.

20 MS. ASHBAUGH: I have no objection to it being as a  
21 demonstrative exhibit.

22 THE COURT: It will be admitted for demonstrative  
23 purposes.

24 (Exhibit 1519 admitted.)

25 Q (By Ms. Rodgers) Ms. Kinn, what do we have in this?

1 A This is a clear plastic zip-lock bag, and it is a  
2 gallon-sized bag, but I rolled it down so that I could fasten  
3 it with the evidence tape that I initialed on the day. I  
4 sealed it. Inside you can actually see how this sample lines  
5 up with what's in the picture here, this one big piece and  
6 all of the smaller pieces that have broken up, and on it is  
7 the tag with the information of when and where I collected  
8 it.

9 Q And is that how you kept all of the samples that you  
10 collected?

11 A Yes.

12 Q Did you ever have that material tested?

13 A Not yet.

14 Q What do you believe that is?

15 A It's the same as everything else I had tested as coal.

16 MS. RODGERS: Thank you. I have nothing further  
17 questions.

18 THE COURT: All right. Let's take a 15-minute  
19 recess.

20 (Court in recess.)

21 CROSS-EXAMINATION

22 BY MS. ASHBAUGH:

23 Q Good afternoon, Ms. Kinn. Good to see you.

24 Before the break, you were talking on direct  
25 examination that you had created a list of instructions for

1 volunteers to follow when going out on patrols.

2 Do you recall that?

3 A Yes.

4 MS. ASHBAUGH: Ms. Mendoza, can you bring up 1440,  
5 please?

6 Q (By Ms. Ashbaugh) Do you see the fifth bullet point down  
7 on 1440?

8 A Yes.

9 Q And one of your instructions was to "collect only coal,  
10 dark black, light weight, breaks easily, and shimmers when  
11 broken."

12 Do you see that?

13 A Yes.

14 Q And I believe you testified right before the break the bag  
15 showed what you always find, which is just coal, correct?

16 A Yes.

17 Q You testified on direct examination about 12 samples that  
18 you had taken and you had sent off for sampling, correct?

19 A Of those 12, I don't believe I had taken every single one  
20 of them.

21 Q Right. But Exhibit 1466 was the letter that you were  
22 forwarding samples taken by Puget Soundkeepers, both you and  
23 others, correct?

24 A Yes.

25 Q And of those 12 samples, those two were tested, correct?

1 A Yes.

2 Q And of those 12 samples, none of them were coal; isn't  
3 that correct?

4 A My understanding is that they were coal.

5 Q And where did you get that understanding?

6 A Based on conversations and review of the results from the  
7 lab and my understanding of what the profiles and the numbers  
8 were matched up to be consistent with Powder River Basin  
9 coal.

10 Q And you're aware that Puget Soundkeepers and the other  
11 plaintiffs have hired an expert with regards to the  
12 identification of coal?

13 A At one point in time they did.

14 Q And that that expert has opined that none of those 12  
15 samples were, in fact, coal, correct?

16 A I'm not sure.

17 Q And you had also collected, Ms. Kinn, five other samples  
18 that had been sent off for testing, correct?

19 A Will you tell me which dates you're referring to, because  
20 there were several sets.

21 Q There was a set that was sent off on March 18th of 2013.

22 A Those were not samples that I collected. I sent in a  
23 batch to ALS lab in December of 2013 and also in December of  
24 2014. I know there was a Mr. Allen Wald at one point in  
25 time, who sent in some other samples, but I did not collect

1 those.

2 Q Okay.

3 MS. ASHBAUGH: If you could bring up Plaintiffs'  
4 Exhibit 1470.

5 Q (By Ms. Ashbaugh) Ms. Kinn, do you recognize this  
6 document?

7 A Yes.

8 Q And it is -- do you see below it says, "Project: Puget  
9 Soundkeepers Alliance"?

10 A Yes.

11 Q And this indicates on March 28, 2013.

12 Do you see that as well?

13 A Yes.

14 Q And there were samples taken at that time. Are these the  
15 samples you believe Mr. Allen Wald took?

16 A Yes. In the lower right-hand corner it says, "Report T,  
17 Sierra Club Wald." Mr. Wald took those samples.

18 Q And those were taken on behalf of Puget Soundkeepers as  
19 well?

20 A On our behalf.

21 Q And are you aware that those samples also were not coal?

22 A Generally.

23 Q So overall, Ms. Kinn, of all of the samples taken by Puget  
24 Soundkeepers Alliance that were sampled, tested, and the lab  
25 results produced, those proved to be about 50 percent coal,

1 correct?

2 MS. RODGERS: Objection. Evidence is not in the  
3 record, Your Honor.

4 THE COURT: Overruled.

5 A I think it would be well over 50 percent. The comment  
6 that I made was specific to the samples that I had collected.

7 Q (By Ms. Ashbaugh) And, Ms. Kinn, you testified during  
8 direct examination that your role at Puget Soundkeepers led  
9 you to some monitoring and surveying, correct?

10 A Yes.

11 Q And you patrol waterways for coal or petcoke, correct?

12 A Yes.

13 Q And you formerly did those patrols in 2011, 2012, 2013,  
14 2014?

15 A Yes.

16 Q And on average you did that about two times a month?

17 A That's right.

18 Q Sometimes more?

19 A Yes.

20 Q So you've done hundreds of patrols between 2011 and 2014,  
21 correct?

22 A I would say dozens.

23 Q Well, if you did two a month every month for four years,  
24 you're up to about 106?

25 A In 2011 and '12, though, I was still exploring locations,

1 so I wasn't collecting samples every time I went out.

2 Q And during that time that you did these patrols, Ms. Kinn,  
3 you have not, on one single occasion, seen material leave a  
4 railcar, have you?

5 A That's correct.

6 Q And never have you seen a material that you believe to be  
7 coal or petcoke even leave a rail line, have you?

8 A That's correct.

9 Q And you also testified on direct, Ms. Kinn, that you were  
10 the person that took in some reported concerns from the  
11 environment -- material found in the environment, correct?

12 A Yes.

13 Q And you discussed on direct a log or a database of the  
14 incidents or concerns of pollution problems, correct?

15 A Yes.

16 Q And Puget Soundkeepers Alliance produced the incident  
17 report forms which had referenced coal and/or BNSF in it,  
18 correct?

19 A Yes.

20 Q And Puget Soundkeepers produced two such forms, right?

21 A Yes.

22 MS. ASHBAUGH: Ms. Mendoza, can you please bring  
23 up -- sorry. Wait one second. Let me ask another question.

24 Q (By Ms. Ashbaugh) And one of those incident report forms  
25 that you testified to involved some material found by

1 Ms. Joerger, correct?

2 A Yes.

3 Q And that was on a bike trail, correct?

4 A Correct.

5 Q And I think you testified on direct examination that you  
6 had some communications with the Department of Ecology with  
7 regards to that?

8 A Yes.

9 MS. ASHBAUGH: And, Ms. Mendoza, can you please bring  
10 up Plaintiffs' Exhibit 122?

11 Q (By Ms. Ashbaugh) Ms. Kinn, do you recognize Exhibit --  
12 Plaintiffs' Exhibit 122?

13 A Yes. This is an email between myself and Celia Jackson at  
14 Ecology.

15 Q And if you turn to the second page, please, of Plaintiffs'  
16 Exhibit 122.

17 Ms. Kinn, at this time you were communicating with the  
18 Department of Ecology regarding whether the samples that you  
19 had given to them were coal and/or petcoke, correct?

20 A Yes.

21 Q And your understanding from this email communications --  
22 and if you look at the top portion of the second page of  
23 Plaintiffs' Exhibit 122, it talks about from the Department  
24 of Ecology, "I asked our water quality pros about the coal  
25 and coke and here is what our in-house expert has to say:

1 Jeanne Tran is our petroleum expert. She says that coal is  
2 95 to 99 percent" --

3 THE COURT: You misread that, counsel.

4 MS. ASHBAUGH: Sir?

5 THE COURT: I think you misread that.

6 Q (By Ms. Ashbaugh) "She says that coke is 95 to 99 percent  
7 carbon, so if it enters the water, it is fairly inert and  
8 will be mainly a turbidity or TSS violation at most,  
9 depending if it is dust or solid. Not a real environmental  
10 problem in solid form."

11 Do you see that?

12 A I see that.

13 Q And that was your understanding of what the Department of  
14 Ecology's expert has to say about this material, correct?

15 A What you read in this email is a common misconception  
16 about the environment harm associated with coal and coke, and  
17 I respectfully disagree with it. There was another email  
18 where she, in fact, confirmed that it was determined to be  
19 coal.

20 Q And that was at the top of that, correct?

21 A Right.

22 Q But, in fact, the Department of Ecology's own expert  
23 indicates to you in this email that she believes in its --  
24 coal and coke, in its solid form, is not a real environmental  
25 problem, correct?

1 MS. RODGERS: Objection, Your Honor.

2 THE COURT: You misread it, counsel.

3 MS. RODGERS: Sorry?

4 THE COURT: I said you misread it.

5 MS. ASHBAUGH: It begins --

6 MS. RODGERS: I'm objecting on the grounds that this  
7 is improper expert testimony. This is a petroleum expert  
8 whom none of us know in this case.

9 THE COURT: No. The objection is overruled.

10 Go ahead.

11 Q (By Ms. Ashbaugh) Ms. Kinn, again, this is the Department  
12 of Ecology's communication with you with regards to their own  
13 expert indicating that -- petroleum expert and it goes on to  
14 talk about coke is 95 to 99 percent carbon. And then it  
15 says, "It's not a real environmental problem in solid form,"  
16 correct?

17 A Ms. Jackson's comments here are specific to coke, not  
18 coal. She later went on to identify it as coal. What her  
19 opinion here about coke is, like I said, a common  
20 misperception as to what the harm is, but the material that  
21 she confirmed was coal.

22 Q At the very beginning of that email it says, "I asked our  
23 water quality pros about the coal and coke, and here is what  
24 our in-house expert has to say"?

25 A You're correct about that line, but we can all see the

1 second paragraph says coke is 95 to 99, and it goes on to her  
2 opinion.

3 MS. ASHBAUGH: I have no further questions, Your  
4 Honor.

5 THE COURT: All right. Any redirect?

6 REDIRECT EXAMINATION

7 BY MS. RODGERS:

8 Q With your work with Puget Soundkeepers Alliance, are you  
9 also concerned with turbidity and TSS violations in water?

10 MS. ASHBAUGH: Objection. This case is not about  
11 turbidity.

12 THE COURT: Overruled.

13 Go ahead.

14 A Absolutely that can degrade salmon habitat. It's just as  
15 much as pollutant as arsenic, lead, or mercury.

16 MS. RODGERS: Thank you. No further questions.

17 THE COURT: You may step down.

18 MR. WAGNER: Your Honor, if I may, there is one more  
19 witness that is on deck for calling this afternoon.

20 Mr. Carre, I believe, we'll be starting with as a fact  
21 witness. Mr. Carre will take a fair amount of time. It  
22 would certainly carry over into next week.

23 The guidance I seek is that I have an opportunity now to  
24 send some communication to the client regarding further  
25 settlement discussions. I don't know how quickly we could

1 hear back, but since tomorrow is an off day for the holiday  
2 and we are here, I'm trying if I can to get additional  
3 information to the plaintiffs today during the business day  
4 and then, perhaps, I can seek the court's guidance  
5 individually as one last round of individual discussions this  
6 afternoon.

7 In light of that and the progress that I believe has been  
8 made during the course of the day today, and the fact that  
9 this witness will carry on easily into next week, I'm  
10 wondering if this is --

11 THE COURT: You're preaching to the choir here. I  
12 was with you right up until the end. I have to go up to  
13 Whidbey Island tonight, and because it's a holiday weekend,  
14 the ferry line will be a nightmare, and I'd like to get away  
15 from here. I'm happy to recess now, let you guys work on it,  
16 and if you can't get there, we can talk about it again on  
17 Monday morning. Is that all right?

18 MR. TEBBUTT: Yes, Your Honor.

19 THE COURT: All right. We'll recess until Monday.

20 MR. TEBBUTT: Your Honor, you're hitting the highway  
21 now?

22 THE COURT: Yes.

23 MR. TEBBUTT: So we don't need his monitor?

24 MR. WAGNER: No.

25 THE COURT: Okay. Have a good weekend.

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**(Proceedings adjourned at 3:18 p.m.)**

## C E R T I F I C A T E

I, Nancy L. Bauer, CCR, RPR, Court Reporter for the United States District Court in the Western District of Washington at Seattle, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.

Dated this 15th day of November 2016.

/S/ Nancy L. Bauer

Nancy L. Bauer, CCR, RPR  
Official Court Reporter