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NATURAL RESOURCES CONSERVATION BOARD

Application No. 1701

SPRINGBANK OFF-STREAM RESERVOIR PROJECT

P R O C E E D I N G S

Volume 11

April 7, 2021

(Via videoconferencing)

1 Natural Resources Conservation Board Proceedings taken
2 virtually in Calgary and Edmonton, Alberta.

3

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6

7

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Ifeoma Okoye Group

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3 Bob Williams For Calalta Amusements Ltd.
and Calalta Waterworks Ltd.

4

5 Scott Wagner For Scott Wagner

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8 Donna Gerbrandt, CSR(A)

9

10 (PROCEEDINGS COMMENCED AT 9:00 A.M.)

11 THE CHAIR: Good morning, everyone. Welcome

12

13 Day 11, I think it's Day 11, the final day of the

09:00

14

15 hearing and for Alberta Transportation's reply

16

17 argument.

18

19 Before we start, though, I would ask if there's

20

21 any preliminary matters anyone has to deal with this

22

23 morning?

24

25 I'm hearing none.

26

27 And I'll just maybe quickly check in.

28

29 Mr. Secord, are you online?

30

31 MR. SECORD: I am online, yes, sir.

32

33 THE CHAIR: Okay. And Ms. Loudon? Or

09:00

34

35 Mr. Rae?

36

37 MR. RAE: Yes, sir, it's Mr. Rae. We are

38

39 here this morning.

40

41 THE CHAIR: So I think it's -- checking in,

42

43 everybody's got -- their names are up for all the main

1 parties. So, Mr. Kruhlak, Mr. Fitch, Mr. Barbero, I'm
2 not sure if it's a tag-team approach this morning or
3 not, but whoever is leading off, the floor is yours.
4 Please proceed.

5 MR. KRUHLAK: Thank you, Mr. Chairman. It's
6 Ron Kruhlak, and I'll lead off with some brief comments
7 with respect to the submissions made by the
8 Stoney Nakoda Nations, and then my friend Mr. Fitch
9 will speak to the comments that were provided by the
10 SCLG.

09:01

11 I think our comments will be relatively brief,
12 Mr. Chairman, so... They're in respect to the final
13 argument, which was marked as Exhibit 413 yesterday.

14 And I guess as a general statement, similar to
15 the -- as made in our reply submissions, we obviously
16 have some fundamental disagreements with the
17 characterization of some of the facts and the law as
18 tendered by the Stoney Nakoda Nations in their final
19 argument.

20 I'll just refer to several specific references,
21 and noting in the initial paragraph, as we commented on
22 in our reply document, which is Exhibit 325 and
23 paragraph 223.

09:02

24 The Stoney Nakoda Nations make reference to their
25 ongoing claim for Aboriginal title and rights in the

1 Court of Queen's Bench. And, as we have previously
2 mentioned to the Board, we would respectfully suggest
3 that this process declined comment on matters that are
4 before the courts involved in that litigation.

5 In paragraph 12, the Stoney Nakoda Nations submit
6 that -- in the conclusion of their paragraph: (as read)
7 "Over the last two weeks, the Board has
8 heard evidence of Alberta's haphazard
9 consultation process with the
10 Stoney Nakoda amid the limitations
11 created by COVID-19 on the Stoney Nakoda
12 communities."

09:03

13 Mr. Chairman, obviously, we have to take exception to
14 that characterization that, in fact, what the Board did
15 hear in the last two weeks through the references to the
16 record of consultation was what we would characterize as
17 a complete and fulsome effort at consultation.

18 And I would indicate that that went on for a number
19 of years, some five years prior to even the commencement
20 of the COVID-19 situation which has impacted the
21 Stoney Nakoda Nations.

09:03

22 So we obviously have made references to the degree
23 of consultation and the quality of it, and continue to
24 be of a view that it was -- it was reasonable and, for
25 the Board's purposes, we would submit that it was -- it

1 was adequate.

2 In paragraph 14, the Stoney Nakoda Nations, of
3 their argument say: (as read)

4 "The consultation with Indigenous groups
5 generally is not consultation with the
6 Stoney Nakoda. Negotiations and
7 agreements with Tsuut'ina and other
8 distant First Nations bear no relevance
9 to the rights of the Stoney Nakoda. For
10 Alberta Transportation to imply that
11 consultation with unrelated Indigenous
12 groups constitutes consultation with the
13 Stoney Nakoda, is extremely
14 disrespectful."

09:04

15 Mr. Chairman, Alberta Transportation agrees that
16 consultation with other Indigenous groups is not
17 consultation with the Stoney Nakoda.

18 And, in fact, despite my searches through our
19 documents and submissions, and checking with our
20 consultation personnel, we cannot find any reference to
21 that argument being advanced by Alberta Transportation.

09:05

22 So, again, it's clearly our position that we agree
23 that that would not be a fair way to interpret
24 consultation, but that is not anything that Alberta
25 Transportation has advocated.

1 The Stoney Nakoda Nations' argument makes reference
2 in their paragraph 17 and 18, 20, with respect to their
3 assertion of Aboriginal and Treaty rights, and I think
4 those are -- have already been responded to adequately
5 in the reply -- Alberta Transportation's reply document,
6 Exhibit 325, and I can refer to paragraphs 226 and 227.

7 Similarly, I just want to briefly comment that the
8 characterization of the duty to consult, and the
9 explanation of it provided by the Stoney Nakoda in their
10 paragraph 15 of their argument, would not meet what
11 Alberta would describe as a fulsome discussion of the
12 duty to consult. We provided references in our
13 paragraph 246 of our reply, which is Exhibit 325, which
14 footnotes the government of Alberta's consultation
15 policy.

16 And for Board counsel, I'd simply refer also to a
17 leading case, which is *Behn v. Moulton Contracting Ltd.*
18 And Behn is B-E-H-N, and Moulton Contracting Ltd. of
19 2013, Supreme Court of Canada decision and those reports
20 at page 26, paragraph 27, 29.

21 I want to briefly also comment on a reference which
22 is referred to in paragraph 18 of the Stoney Nakoda's
23 argument, and that is referring to Elder John Snow, Jr.
24 He spoke of the trauma he still feels as a result of the
25 flooding and desecration of Stoney Nakoda grave sites

09:06

09:06

1 resulting from the Bighorn Dam, and such a situation is
2 intolerable and must not be permitted to happen again.

3 It's Alberta Transportation's information that's
4 been provided in the record that no grave sites have
5 been located to date in the SR1 PDA.

6 And, in fact, the map tendered by the Stoney Nakoda
7 Nations in their evidence in Exhibit 288 essentially
8 showed that there's no anticipated burials within the
9 PDA based on the depiction they included within that
10 map.

09:08

11 I thought it may be helpful, Mr. Chairman, just to
12 provide the Board with some comments on the conditions
13 that the Stoney Nakoda Nations advanced.

14 So you have Alberta Transportation's response to
15 those proposals for the Board's consideration. And the
16 first set of proposed conditions was at paragraph 22,
17 which were under the preamble: (as read)

18 "In the event the Board approves the
19 project, the Stoney Nakoda submit that
20 the construction of SR1 not be permitted
21 to commence until and only if..."

09:08

22 And then the first item deals with seeking to be made a
23 party to the TransAlta and Province of Alberta Water
24 Agreement; and the second item deals with a full
25 assessment of all proposed flood and water control

1 structures on the Bow River upstream of Calgary.

2 Mr. Chairman, we submit that those issues involving
3 TransAlta and the province, or the Bow River and
4 potential future upstream control structures, were
5 canvassed through this hearing and I thought had been
6 concluded that they are not relevant to the issues
7 before this Board in reviewing the SR1 project.

8 Further, there's a reference to the indication that
9 Alberta must obtain the full and free and informed
10 consent of each of the Stoney Nakoda Nations. And 09:09
11 there's also reference in the following paragraph 23 to
12 UNDRIP and Alberta's commitment to it; and I would just
13 simply refer the Board back again to Alberta
14 Transportation response to UNDRIP, which was in
15 Undertaking Number 5.

16 There's also a lengthy set of conditions requested
17 under paragraph 24. The list includes some 16
18 conditions, which I'll just briefly speak to.

19 Condition 1: Completion of Stoney Nakoda
20 traditional land use assessment. Alberta Transportation 09:10
21 is in agreement with that, and, as it's tendered in its
22 opening statement, and through the course of further
23 submissions in our argument, it is looking forward to
24 receiving the final traditional land use assessment from
25 the Stoney Nakoda Nations.

1 Condition 2: Cultural awareness training. Alberta
2 Transportation submits that this has already been
3 proposed in the Indigenous participation plan. I think
4 I can refer to the Board, Exhibit 216, PDF 13, which is
5 a commitment to all First Nations, to which we welcome
6 the Stoney Nakoda Nations being involved with.

7 Condition Number 3: Information sharing agreement.
8 Alberta Transportation would be agreeable to developing
9 that agreement between itself and the Stoney Nakoda
10 Nations. It can't seek to compel Alberta Culture,
11 Multiculturalism, and Status of Women to such an
12 agreement through the course of this arrangement.

13 Condition Number 4 is in reference to an
14 independent Indigenous monitor. And, based on the
15 description of that condition, Alberta Transportation
16 finds it unclear and would welcome further discussion
17 with the Stoney Nakoda Nations with respect to that
18 issue.

19 Condition Number 5: Stoney Nakoda traditional
20 knowledge monitoring committee. Mr. Chairman, we'd
21 submit that Alberta Transportation has already advanced
22 extensive commitments to undertake a variety of forms of
23 monitoring with respect to the project, and we would
24 suggest that this also be an item deferred to further
25 construction after Stoney Nakoda Nations submit their

09:11

09:12

1 final traditional land use assessment.

2 Condition Number 6: Stoney Nakoda archeological
3 and heritage management plan. We can advise that
4 Alberta Transportation has already made a proposal,
5 which is made reference in its opening statement and
6 further documents, with respect to providing
7 Stoney Nakoda participation in the further archeological
8 work which is planned to take place at the PDA.

9 Condition Number 7: Previously recorded
10 archeological and historic sites. We can advise that
11 that has already been provided, to the extent it's
12 possible, under the restrictions that Alberta
13 Transportation finds itself under with respect to the
14 provisions of the *Historical Resources Act*.

15 Condition Number 8 is the Stoney Nakoda Nations
16 sacred ceremonial objects repatriation regulation. This
17 condition appears to be a request to fund what is
18 essentially a law reform initiative on behalf of the
19 Stoney Nakoda Nations, and Alberta Transportation would
20 not be in a position to undertake that funding.

21 Condition Number 9 is -- again made a reference to
22 the wildlife overpass, and Alberta Transportation has
23 provided its position on that earlier, and that has not
24 changed, that it is not based on the evidence that has
25 been reviewed and presented to this Board, finds that

09:13

09:13

1 that structure is necessary.

2 Condition Number 10: Crown land offsets measures
3 plan. Again, Mr. Chairman, this -- this request appears
4 to be more suitable to what might be a more typical
5 project involving Crown land and would not be viewed to
6 be necessary in the circumstances of this project and
7 the nature of it being on largely private land.

8 Condition Number 11: Water monitoring for
9 Woste Igic Nabi Ltd. lands. It's my understanding that
10 that site is currently outside of the planned monitoring
11 area having regard to its distance from the project
12 development area.

13 Condition Number 12: Seeking to be Chair of the
14 Indigenous advisory committee. Mr. Chairman, I think
15 Alberta Transportation believes that that would be a
16 matter that is best suited for discussion among all the
17 interested First Nations when that committee is
18 initially structured and set into operations.

19 Condition 13: Stoney Nakoda Nations communication
20 plan. Mr. Chairman, Alberta Transportation has already
21 committed to developing a communications plan that would
22 be in place prior to construction, and encourages the
23 Stoney Nakoda Nations and other Indigenous groups to be
24 participating in that plan. That plan was presented in
25 Exhibit 216, PDF 10 of 24.

09:14

09:15

1 Condition 14: Funding for participation and
2 conditions or programs, and my response will also deal
3 with the next condition, funding for consultation on
4 conditions.

5 I think you've heard, Mr. Chairman, that Alberta
6 Transportation has invited the Stoney Nakoda Nations,
7 where they see that they need assistance, to review
8 aspects of this project or to be involved. The practice
9 has been to make a request and provide a budget for the
10 expected resources required, and Alberta Transportation
11 would be pleased to consider that and get back to them,
12 as they have done in the past and as they have provided
13 funding in the past.

09:16

14 Condition 16: Mr. Chairman, our review of that
15 condition appears to be that it's more directed to the
16 NRCB than Alberta Transportation, so we would -- we
17 would defer comment on that.

18 Mr. Chairman, I just have some final comments with
19 respect to these type of requests, and that is if the
20 Board was to approve this project and is contemplating
21 crafting conditions, we would encourage the Board to
22 consider that Alberta Environment have the ability to
23 actually be the party to fulfill those conditions, as it
24 reminded me of perhaps some of the challenges that might
25 be raised where conditions are -- fulfillment might be

09:16

1 left to a third party, which would make it perhaps
2 difficult to ensure the condition could be achieved to
3 maintain schedules which the project would be hoping to
4 achieve.

5 Secondly, Mr. Chairman, the Board finds itself in a
6 situation with a federal review being undertaken and
7 that review process also generating conditions, and we
8 trust that the Board might consider that conditions may
9 require some coordination between the respective
10 agencies.

09:17

11 So, with that, Mr. Chairman, as I'll be passing the
12 mic over to my friend, Mr. Fitch. I echo his comments
13 of thanks yesterday, and I wish the Board well in its
14 deliberations.

15 THE CHAIR: Thank you, Mr. Kruhlak.

16 Mr. Fitch.

17 MR. FITCH: Yes. Good morning. I don't seem
18 to be...can you hear me, Mr. Chairman?

19 THE CHAIR: Yes, loud and clear.

20 MR. FITCH: Okay. Good. So I will be
21 providing reply argument on behalf of Alberta
22 Transportation primarily with respect to the argument
23 of the SCLG. I may have one or so comments in relation
24 to Calalta and Mr. Wagner.

09:18

25 So, Mr. Chair, to begin, there was a bit of debate

1 yesterday about the SCLG written -- the written version
2 of their submissions and the fact that, let's be
3 honest, they contain a lot of material that was
4 not -- that Mr. Secord was not able to orally deliver
5 within the allotted two and a half hours.

6 You know, I think our final position, having
7 thought about it a bit more, is that we do think it
8 pushed the boundary a little bit, but we
9 certainly -- we're not going to object. You know, it's
10 been marked as an exhibit, and that's fine.

09:19

11 The bigger issue, though, as we thought about it
12 last night, is one reason that the argument was,
13 frankly, too long for -- the written version of the
14 argument was too long for Mr. Secord to deliver orally
15 is that it seems quite clear that many paragraphs were
16 added literally in realtime yesterday morning
17 responding to Alberta Transportation's argument.

18 So, for example, you could look at paragraphs 346
19 to 360 of SCLG's written argument. These, it seems
20 quite apparent, were written by Dr. Zelt responding to
21 Alberta Transportation's final argument. And, you may
22 recall, Mr. Secord dealt with some of them where we
23 literally said in paragraph X Alberta Transportation
24 said this and in response here's my position. And I
25 think it's fair to say I think there were also

09:20

1 paragraphs like that added by Dr. Fennell and
2 potentially others.

3 The point of all this, Mr. Chair, is that the
4 applicant always gets the right of reply, and as we
5 lawyers know, the reason is that this, at the end of
6 the day, is our application, and, you know, therefore
7 we have the ultimate onus to persuade this Board that
8 approval of the project is in the public interest.

9 Interveners don't have the right of reply in
10 argument, and what's happened here is that by virtue of
11 the fact that this is a virtual hearing, the SCLG
12 essentially has provided reply argument in addition to
13 their written argument.

09:21

14 And, you know, we all know that the rules,
15 procedural rules, are quite flexible in administrative
16 hearings like this, but there have to be some rules.

17 I'm just going to finish on this by saying that we
18 think this was something new, I've certainly never seen
19 it, where an intervener provides extensive reply
20 argument in their argument, and we just ask the Board
21 to keep in mind whether or not that really is something
22 that's appropriate.

09:21

23 So the next thing I'm going to do, Mr. Chair, is
24 just offer a few, really, I guess, high-level comments
25 with respect to SCLG's written argument -- or, sorry,

1 oral argument and written argument, and those comments
2 are as follows.

3 Alberta Transportation understands that members of
4 the SCLG are opposed to this project, and we accept
5 that like happens with many, if not most, resource
6 projects, the impacts of the project are borne to a
7 greater extent by the people that live closest to it.
8 So, in this case, that would include members of the
9 SCLG. So we do understand all that. It's not like
10 we're deaf to all of this. We do understand it.

09:22

11 But, in our view, what we've seen here is this
12 opposition to the project that sort of manifested
13 itself through the SCLG has led to an intervention that
14 essentially saw the SCLG trying to find something,
15 anything, that they could latch onto to try to stop
16 this project.

17 And what that resulted in is an intervention
18 that -- whose hallmark, in my submission, was advocacy
19 and argument right from the very beginning. And,
20 again, we get it. We know that the SCLG doesn't want
21 this project to proceed; but we question, Alberta
22 Transportation questions, and we ask the Board to ask
23 itself what was the utility at the end of the day in
24 such an approach in assisting this Board in carrying
25 out its task of determining whether the project is in

09:23

1 the public interest. Because it really all kind of
2 comes down to this -- this almost existential question
3 of should it have been MC1 or some other project versus
4 SR1.

5 But the reality is, Mr. Chairman, that horse left
6 the barn a long time ago, and the real issue is whether
7 approval of this project is in the public interest
8 having regard to its social, environmental, and
9 economic effects. And it's unfortunate, I think, that
10 so much time and effort was focused in on this other
11 issue, which, frankly, just isn't part of the Board's
12 review. So those are just sort of our general
13 high-level comments.

09:24

14 I'm now going to address some specific submissions
15 that appear in the written version of the argument of
16 the SCLG, beginning with their submissions on the
17 public interest test.

18 At paragraph 3 the rhetorical question is asked:
19 "Is this just simply better than nothing? Is that the
20 public interest test?" And, Mr. Chair, Alberta
21 Transportation rejects that characterization. The
22 public interest benefits of SR1 have been fully
23 canvassed, we submit, in the evidence.

09:25

24 But to be clear, in our view, nothing is not
25 acceptable. And you heard, for example, from CRCAG

1 about that. The status quo, no flood mitigation on the
2 Elbow River, is not acceptable.

3 And further on in the submissions my friend
4 alluded to the evidence of, I think it was Marshall
5 Copithorne, to the effect that it's never too late to
6 reverse course.

7 We disagree. We think it is too late, and we
8 caution the Board about going down that road because no
9 one can say with any certainty how long it would
10 take -- if this project were not approved, how long it
11 would take for some other project to be fully
12 developed, applied for, and approved. And I think we
13 can all agree it would be years, and likely many years.
14 And, in our submission, that's simply not acceptable,
15 given the urgency of this project.

09:26

16 Next, Mr. Secord referred in his argument to the
17 Cougar Creek decision. And one of the reasons he
18 referred to it, there's a passage in there that the
19 Board has said that one of the factors it looks at when
20 considering public interest is does the project have
21 the support of the community, and Mr. Secord's argument
22 was, no, it does not.

09:27

23 And we submit, actually, there is a lot of support
24 for this project. Yes, again, we understand that
25 members of the SCLG and the most local of the

1 communities are not all in favour, and many are
2 strongly opposed. But in terms of the community, given
3 the purpose of this project, which is to protect
4 downstream communities, including the city of Calgary,
5 in our submission there actually is significant support
6 for this project: from The City itself, from CRCAG,
7 from Flood Free Calgary, from the Erlton Community
8 Association, and others. So, actually, Mr. Chair, we
9 say there is a lot of support for this project.

10 Next, my friend Mr. Secord refers, actually at
11 some length, in his argument to the Board's decision,
12 NR 2008-01, which is the revised Highwood Diversion
13 Plan. And a number of submissions are made about what
14 the Board said in that decision about the
15 considerations that apply when a water management
16 project is being -- is before the Board for
17 consideration.

18 And, in response, Alberta Transportation says the
19 following -- I mean, we don't need to tell this Board
20 what it decided in one of its own previous decisions,
21 but what we will simply point out for the record, and,
22 again, which I'm sure you know, Mr. Chair, is that the
23 Highwood Diversion project was not a flood control
24 project; it was a water management project. That's why
25 there are all those passages in that decision to what

09:28

09:28

1 the Board should consider when it is assessing a water
2 management project.

3 But, again, this is a flood control project, and,
4 again, we understand from the submissions of the SCLG
5 that they actually wish this was not just a flood
6 control project but, rather, also a water management
7 project. But, again, that goes to, we have to deal
8 with the project that's before us, and that's a flood
9 control project. So at the end of the day, we submit
10 that the -- our friend's references to the NRCB's 2008
11 decision in the Highwood Diversion are not of
12 assistance in this case.

13 There's also reference made to the original
14 Highwood/Little Bow decision from 1998, and that was in
15 the portion of my friend's argument relating to
16 alternatives.

17 And you might recall that there's a passage
18 highlighted that suggests that 12 different
19 alternatives were assessed in that case; but I'm sure
20 you noticed, Mr. Chair, that if you actually kept
21 reading the sentence that was highlighted, in fact,
22 what it says is that there were 12 projects that had
23 been reviewed by the Prairie Farm Rehabilitation
24 Administration in 1965, and that these 12 projects were
25 reduced to eight and then, ultimately, to four for

09:29

09:30

1 consideration for further review.

2 And, in our submission, that's actually not much
3 different from what's happened in this case, because,
4 you know, before the ultimate decision to select SR1
5 was made, there were three different projects that had
6 been advanced for some level of review; namely, MC1,
7 Calgary Tunnel, and SR1.

8 Just one comment about a passage in paragraph 13
9 of the written version of the argument. SCLG states
10 that Alberta Transportation, quote, "explicitly," end
11 quote, refuses to disclose material costs. I'm not
12 sure what was meant by the word "explicitly," but if
13 the implication is that Alberta Transportation is
14 intentionally refusing to disclose material costs, we
15 reject that assertion, Mr. Chairman.

09:31

16 There are several places in the argument of the
17 SCLG where they either explicitly or implicitly argue
18 that MC1 is superior because it could handle larger
19 floods, 1 in 500, 1 in 1,000, 1 in 2,000, or the
20 probable maximum flood. And, to be clear, Mr. Chair,
21 that is simply not correct.

09:31

22 And I would refer the Board, when it is
23 considering this issue, to Exhibit 101, which is the
24 OPUS design report for MC1. And if you have a look at
25 it, you will see that Table 6-1 on PDF page 46 shows

1 various -- the discharges from that -- from MC1 in the
2 various flood scenarios. And basically what it shows
3 is that, once MC1 gets to its design flood, it will
4 continue -- water will now pass, just as it will at SR1
5 and, indeed, just as it does at any dam.

6 And, in fact, what that table shows is that for a
7 probable maximum flood, or PMF, the peak outlet
8 discharge rate would be 1,000 cubic metres per second,
9 not the 212 that my friends keep referring to.

10 And, you know, on this issue, while MC1, because
11 it's an in-stream dam, we do know, the evidence was
12 clear, that it can continue to discharge at a constant
13 rate of 212 metres cubed per second up to the design
14 flood.

15 And, of course, SCLG says that that makes it
16 superior to SR1, but we remind the Board that this same
17 characteristic increases risk. It increases risk in
18 construction and in operation and in debris management
19 and in the event of emergencies.

20 So the benefit associated with the constant
21 discharge up to the design has to be weighed against
22 that increased risk. So it's not nearly as simple as
23 the SCLG would have you think.

24 Next, we were all struck in this room by the
25 analogy our friend Mr. Secord drew to vaccines which

09:32

09:33

1 was pursued in a number of places in their argument.
2 And let me suggest a different way of looking at that
3 analogy.

4 Currently in Canada, to deal with the COVID-19
5 pandemic, there are four vaccines approved for use, I
6 think we can all agree, and a lot of -- there's been a
7 lot of speculation, or it's been reported in the media,
8 that some people have been wondering, which one should
9 I take? Is one better than another? And I think we
10 can agree, Mr. Chair, that the answer that the public
11 health experts have given is, take the first one that
12 you can get, they're all effective, take the first one
13 that you can get.

09:34

14 So if we apply that to this case, the first
15 project that you can get to effectively deal with flood
16 mitigation on the Elbow River is the one that's before
17 us. And, again, if we don't take this one, we're
18 looking at the passage of many years before we're going
19 to get another.

20 Alberta Transportation also feels compelled to
21 observe that we saw in the argument of the SCLG, as
22 indeed we saw throughout the hearing, frequent and I
23 would say casual use of certain catch phrases like
24 "contaminated water" or "mud pit."

09:35

25 And, you know, we didn't, during our friend's

1 cross-examination, really object to all of these
2 characterizations, but I think Alberta Transportation
3 does want to say for the record that this idea of the
4 water being contaminated has no foundation in the
5 evidence. None. The water that enters the reservoir
6 is the same water that's in the river, and then it's
7 going to get released and go back into the river. So
8 this is just not correct, and it's a completely unfair
9 characterization.

10 At paragraph 89 of the written version of SCLG's
11 argument, there's what I would characterize as a reply
12 to our position on the Rocky View County land use bylaw
13 and Mr. Secord said there's no evidence in the record
14 about the bylaw.

15 And in response, I say, it doesn't matter because
16 it's a law. It's not evidence, it's a law, it's a
17 legal authority. So it doesn't have to be in evidence.

18 And Mr. Secord also suggested the fact that it's a
19 2020 bylaw that just came into effect in I think
20 January of 2021, is relevant and that it doesn't
21 retroactively apply. And, in our submission, that
22 entirely misses the point, which is that, in Rocky View
23 County, as indeed elsewhere throughout Alberta,
24 municipal districts either discourage or outright
25 prohibit development within the 1 to 100-year flood

09:36

09:36

1 hazard zone.

2 And the relevance of this, as we've already said,
3 is that by reducing flows from a design flood to the
4 equivalent of a 1 in 50-year flood, SR1 will protect
5 the vast majority of properties, not just downstream of
6 the reservoir but also upstream of Glenmore Reservoir.

7 With respect to costs, Mr. Chairman, the SCLG
8 argument dwelt at considerable length, I would submit,
9 on costs. And I think -- you know, our position on
10 costs I think is pretty clear, but what I wanted to say 09:37
11 just by way of -- I guess the final point we'd like to
12 make is that it's quite clear what's going on here,
13 which is all these questions about, well, what's the
14 cost of this and what's the cost of that, there's all
15 these unknown costs, these hidden costs, and all the
16 other costs that we know about have increased. It's
17 all ultimately in aid of the MC1 is better than SR1
18 argument, right? It's all about saying that one reason
19 SR1 was chosen was because it had a higher benefit cost
20 ratio than SR1 and now look, look at all these costs, 09:38
21 now it's different, and MC1 is better.

22 And at one point my friend referred to -- I think
23 it was in paragraph 127 of the written argument that:
24 (as read)

25 "MC1 is the project with the better

1 economics at this point."

2 Well, just think about that statement, Mr. Chair. MC1
3 is frozen in time. It was never more than a conceptual
4 project, and it's basically frozen in time as of 2017.
5 And to say -- and to embark on an exercise where you're
6 looking at how the costs of SR1 progress every month,
7 year, whatever, and then compare it to MC1 and say, aha,
8 MC1 is now better, that's just not valid.

9 Finally, just one comment on the section of SCLG's
10 argument on consultation. There's a suggestion that
11 Alberta Transportation pitted neighbour against
12 neighbour and that there was never any attempt made to
13 find a win-win solution.

09:39

14 Mr. Chair, again, I don't think Ms. Hunter or
15 anyone else at the SCLG would deny that the "win" for
16 them is that SR1 doesn't proceed and that something else
17 go ahead. And viewed in that context I ask, you know,
18 how do you arrive at a win-win solution when one party
19 just says this is the only win for us. So consultation
20 is always difficult in terms of satisfying everyone that
21 you carried out proper consultation.

09:40

22 But it is always the case, I would submit,
23 Mr. Chair, that there are some people that are not going
24 to ultimately be happy, who are going to consider that
25 they weren't properly consulted. But, again, it's hard

1 to consult when someone's position is so fixed and
2 inflexible.

3 With regard to design, safety, and risk, just a few
4 comments. We noted that our friends asked that
5 recommendations 1, 2, 15, and 17 from the Austin report
6 be imposed as conditions.

7 And, Mr. Chair, we've already dealt in our argument
8 with our position on all much the Austin
9 recommendations. I just simply reiterate here that it
10 is for the director of dam safety to review and decide
11 whether those recommendations should be implemented or
12 not, and so we don't think, therefore, it would be
13 appropriate for the Board to impose any conditions
14 related to the recommendations of Austin Engineering.

15 My friend briefly referred to, in paragraph 263, to
16 the fact that there was an error made by Mr. Wood in
17 that snowpack data, you may recall, from the -- I think
18 it was the Elbow summit station. And I just simply say
19 that while Mr. Wood acknowledged that he had made an
20 error, he also went on to say that it didn't change
21 anything. It did not affect the analysis that had been
22 carried out. It was something that actually arose at
23 the hearing. And it does not change Alberta
24 Transportation's climate change assessment results that
25 used IDF data and hydrological modelling for climate

09:41

09:41

1 change impacts. So, in our view, Mr. Chair, it's a
2 non-issue.

3 Just turning to water. I noticed Mr. Secord
4 mentioned that his client Mary Robinson is concerned
5 about the head pond backing up onto her property. And
6 in reply, Mr. Chair, this was addressed directly during
7 my redirect of the Topic 3 -- sorry, the Topic 4 -- no,
8 it was Topic 3 witness panel.

9 And you recall there was a map that we were all
10 looking at, Exhibit 131, PDF page 565. And what that
11 map shows, Mr. Chair, is that the head pond does not get
12 particularly close to Ms. Robinson's property. By that
13 I mean her -- what I would call her home quarter, the
14 southwest of 3. The head pond doesn't even impinge at
15 all on that property.

16 In paragraph 287 there is what I would characterize
17 as a bit of a throw-away comment about the "absurdity,"
18 that was the word that was used, of Alberta
19 Transportation's fish rescue plan.

20 And I would just simply say in reply that that
21 assertion is contrary to the evidence of the SCLG's own
22 expert, Mr. Locke, who clearly doesn't think it's
23 absurd, but rather explicitly said it was reasonable.

24 There was quite a bit of argument from SCLG with
25 respect to hydrogeology, just as there had been a lot of

09:42

09:43

1 cross-examination on the issue. And Alberta
2 Transportation does want to make a specific reply to
3 paragraph 290, that's 2-9-0, of the written version of
4 SCLG's argument because that's where they characterize
5 Mr. Yoshisaka as having been evasive. And Mr. Secord
6 referred to the fact that sometimes he had to ask
7 questions three different times.

8 Mr. Chair, Alberta Transportation submits that's a
9 completely unfair characterization. Mr. Yoshisaka was
10 not evasive, in our submission. Rather, the reason 09:44
11 Mr. Secord had to ask questions several times was
12 because he just wasn't getting the answers that he was
13 hoping he would get. And that happens all the time in
14 cross-examination, as I'm sure you know.

15 In our submission, Mr. Yoshisaka was entirely
16 credible. It was a long, tough cross-examination. He
17 was quiet, calm, patient, thoughtful, and we are very
18 comfortable leaving it to the Board to determine which
19 expert on hydrogeology the Board thinks is more
20 credible. In our submission, there's no doubt that 09:45
21 Mr. Yoshisaka was an entirely credible witness.

22 Still on hydrogeology, Mr. Chair, again, I think
23 there were a number of paragraphs in the written version
24 of the argument that were written in response to what
25 Alberta Transportation said in its argument -- and I

1 don't want to get into the details of which layer is
2 above which layer and what the conductivity of the water
3 is, et cetera.

4 But I do want to just, as an example, I guess, draw
5 to the Board's attention paragraph 295 of the SCLG's
6 argument, where a very basic assertion is made. The
7 K value for the top three layers is indicated as being
8 7.2 times 10 to the minus 8 metres per second.

9 Well, that's just not correct, Mr. Chair. The
10 K value in fact is 5.10 times 10 to the minus 6. This
11 is one of these points where Dr. Fennell had advanced
12 his position and it was actually shown on
13 cross-examination to be not correct, and yet here we see
14 it again showing up in final argument. So it doesn't
15 matter, you know, whether Dr. Fennell was right or
16 wrong, it's his position.

17 And so the submission I guess I want to make about
18 the portion of the SCLG's argument on hydrogeology is
19 that it's obviously based on the evidence of
20 Dr. Fennell.

21 And, frankly, in our submission, Dr. Fennell was
22 more an advocate than an independent expert. And you
23 can see that because in these paragraphs of the SCLG's
24 argument he continues to argue points that were
25 demonstrated on cross-examination not to be correct, and

09:46

09:47

1 yet it doesn't seem to have made any difference
2 whatsoever. And I'm just going to leave it at that.

3 So turning, then, to Topic Session 5. The
4 suggestion was made beginning at paragraph 325 of the
5 SCLG argument that there will be unsafe PM 2.5 levels at
6 area schools.

7 And, in fact, Mr. Chair, Alberta Transportation's
8 air modelling does not show any exceedance of PM 2.5 at
9 any of these schools. And this can be clearly seen at
10 Slides 13 or 14 of the PowerPoint presentation of
11 Mr. Person, which was part of the opening statement of
12 Alberta Transportation in Topic Session 5.

09:48

13 But, to be clear, you know, this suggestion that
14 the children at these schools are going to be exposed to
15 unsafe, unacceptable levels of fugitive dust emissions,
16 that's not at all, Mr. Chairman, what the evidence
17 shows.

18 I think the only other thing I want to say on air
19 is I've already drawn to your attention, Mr. Chair, that
20 beginning at paragraph 346 of the written version of
21 SCLG's argument, there's about 15 paragraphs where
22 Dr. Zelt, I think it's quite clear, responded to our
23 argument. And in those 15 paragraphs Dr. Zelt uses the
24 word "bias" seven times.

09:49

25 And, Mr. Chair, Alberta Transportation understands

1 that, you know, in a contested hearing emotions can run
2 high. Usually, though, that's something that happens
3 with, you know, the interveners themselves. They're
4 emotional because it affects them personally. It seems
5 to us fundamentally different when you're talking about
6 experts. Experts are supposed to be independent and
7 objective, and, of course, experts disagree. We
8 wouldn't have hearings if experts didn't disagree. If
9 they all agreed, there would be no hearings.

10 But just because someone holds a different view,
11 some qualified expert holds a different view from you,
12 that does not make that person biased. Bias, Mr. Chair,
13 in our view, is a serious allegation. And with all due
14 respect to Dr. Zelt, I think -- I think this fairly
15 indiscriminate use of the word "bias" discredits him.
16 So that's all I'm going to say on that.

17 So you'll be very happy to hear, Mr. Chair, we're
18 basically at the end of our reply submissions. I just
19 want to conclude by picking up on a few things my friend
20 Mr. Kruhlak said, and that just relates to conditions.

21 Generally speaking, I guess I would say both the
22 Stoney Nakoda Nations and the SCLG, and also
23 Mr. Williams for Calalta and Mr. Wagner, have urged upon
24 the Board that you impose a fairly lengthy set of
25 conditions on an approval, if granted, for this project.

09:50

09:51

1 And Alberta Transportation just asks the Board to be
2 cautious in assessing these requests for conditions.

3 And, in our view, in assessing the appropriateness
4 of any given condition the Board should be asking itself
5 the same question, really, as it asks itself with
6 respect to the project generally, and that is, is this
7 condition really required to make approval of the
8 project in the public interest? In other words,
9 conditions should not be imposed unless they contribute
10 to making a project in the public interest.

09:52

11 So, for example, and this I think will be my only
12 reference to Calalta, one of their suggested conditions
13 is: (as read)

14 "We are asking Alberta Transportation to
15 recognize and compensate for the lands
16 that are sterilized for the life of this
17 agreement (that's the franchise
18 agreement) and our beneficial right
19 (that's again under the franchise
20 agreement). (And then) We're requesting
21 the Board to make this a condition of
22 approval."

09:52

23 Well, with respect, Mr. Chair, a condition that a
24 proponent compensate another party for alleged
25 sterilization of rights under an agreement is just

1 simply not an appropriate use of the condition power.
2 So I just -- I use that just as an example. I think
3 there are others.

4 But, again, we just simply say to the Board, look,
5 we do understand there will be conditions -- in the
6 event the project is approved, we understand and accept
7 that there will be conditions attached to any approval.
8 But we -- we -- we don't want to see conditions that
9 don't actually contribute to the public interest.
10 That's, I guess, the point I'd like to finish with.

09:53

11 So, Mr. Chair, I'm just going to ask, if I may,
12 quickly consult with Mr. Hebert, but I think Alberta
13 Transportation is done, but I just would like to check
14 if that's all right with you, sir.

15 THE CHAIR: Absolutely.

16 MR. FITCH: Thank you.

17 (DISCUSSION OFF THE RECORD)

18 MR. FITCH: Mr. Chairman, Board members, that
19 is, indeed, the end of the reply submissions of Alberta
20 Transportation.

09:54

21 Like my learned friend, Mr. Kruhlak, I want to
22 reiterate the thanks of Alberta Transportation for the
23 Board's patience during these last 11 days.

24 And we know the job you now have is challenging,
25 and we're happy to leave it in your capable hands and

1 we look forward to receiving a decision in due course.

2 THE CHAIR: Thank you, Mr. Fitch, and thank
3 you, Mr. Kruhlak.

4 I do have some closing remarks on behalf of the
5 Panel, and, really, a lot of it is our notes of
6 appreciation and I think they're warranted. I'll only
7 be about five, six minutes, but I think they're
8 warranted given the length of time and commitment that
9 all of the participants have shown through the last,
10 essentially, two weeks of hearing.

09:55

11 And I think Mr. Wiebe is going to throw up the
12 Panel members in these different speaker views and
13 gallery views. I think we've been somewhat
14 recognizable because of our backgrounds, but sometimes
15 it may be hard to find us, including our legal counsel
16 Ms. Vance and Mr. Kennedy.

17 And I'm also appreciative of the fact that we were
18 able to have a YouTube feed for the public, and I
19 certainly hope that, you know, that worked out well for
20 those that, of course, weren't able to join within sort
21 of the virtual hearing room that we had. I know that
22 their views, in terms of the virtual view that YouTube
23 can provide, is a little bit different, so it may have
24 been a bit more awkward for some YouTube viewers to
25 sort of kind of figure out the parties as we were

09:56

1 switching back and forth, but, hopefully, after at
2 least some time they got somewhat familiar with the
3 names and some of the faces and were able to piece that
4 together virtually.

5 And perhaps there's some, and perhaps many folks
6 that were able to participate via YouTube that may not
7 have been able to participate at all if we were in our
8 old school in-person hearing. And thanks for the
9 technology and MNP for having that -- or allowing that
10 to happen.

09:57

11 So we took a different approach for this hearing,
12 a new approach for the NRCB, and we instituted time
13 limits, as you know, for all participants. We asked
14 each of you how much time you required for direct
15 evidence, cross-examination, and final argument, and
16 the Board approved those requests, and it would only
17 work if you folks made it work. You needed to be
18 organized and have some buy-in by the applicant,
19 Alberta Transportation, but also by interveners, and we
20 did get that buy-in. And with only a few minor
21 exceptions, those time allotments were honoured. All
22 of you showed, in our view, tremendous respect for the
23 process and we really do appreciate that.

09:57

24 I would like to once again thank NRCB staff who
25 stepped up to manage documents online. I had the

1 document managers up on screen last week to thank them,
2 but I did want to, once again, acknowledge their hard
3 work over the course of the two-week hearing.

4 And a big thank you to Mr. Justin Wiebe with MNP
5 who Zoom hosted the entire hearing.

6 Mr. Wiebe, you flew solo the entire hearing and
7 did so remarkably well. You had participants up almost
8 instantaneously into speaker views. You arranged the
9 speaker views in order to make sense for those viewing,
10 and every day you started admitting participants pretty
11 early in the morning and we concluded fairly late in
12 the day, and you did that all on your own, and we
13 really do appreciate it. So on behalf of the NRCB and
14 all the hearing participants, I'd like to give you a
15 big thank you.

09:58

16 As many of you have mentioned in your closing
17 remarks, Ms. Friend has been an incredible resource and
18 help to you. On top of the work that she's done with
19 all of you, she also supports the Board and Board
20 staff.

09:59

21 Ms. Friend -- and Mr. Wiebe, you could perhaps
22 bring Ms. Friend up on the screen as well --
23 Ms. Friend, if you could have your video on, you've
24 been an amazing support to the entire hearing process,
25 and on behalf of the Panel and again all the

1 participants, a big thank you.

2 And, of course, for the Board, we have Ms. Vance
3 and Mr. Kennedy, our legal counsel. This is
4 Ms. Vance's first hearing with the NRCB and she
5 flattened a pretty steep learning curve because with
6 her sharp intellect and plain old hard work. Ms. Vance
7 is an extremely capable legal counsel and an extremely
8 hard worker.

9 Mr. Kennedy, you have been, and continue to be, a
10 huge asset to the Board and our stakeholders.

09:59

11 For those of you that don't know, Mr. Kennedy
12 joined the NRCB way back -- and, sorry, Mr. Kennedy,
13 this will perhaps age you a little bit -- but you
14 joined the Board upon its inception in 1991, some 30
15 years ago. Many of you have come across Mr. Kennedy in
16 the past hearings, with the NRCB perhaps, or in some of
17 Mr. Kennedy's work with the ERCB or the AUC, and you
18 know him to be calm under fire, well-reasoned, and an
19 even-handed approach to his counsel.

20 So, Mr. Kennedy, I would like to thank you for
21 your guidance and assistance that you provided this
22 Panel and to me personally as Chair.

10:00

23 And I know all of you have thanked the court
24 reporters, and what an incredibly difficult job they
25 have. We all rely upon those transcripts heavily, both

1 by the participants, the parties through the hearing
2 process as you prepare for each day; but also, of
3 course, for the Panel in our deliberations we rely
4 heavily on those transcripts.

5 A big thanks to Ms. DiPaolo, Ms. Gerbrandt. And
6 Ms. Vespa, who's with us again today, and I think you,
7 Ms. Vespa, have spent the most time during this hearing
8 process, and it's been delightful working with you.
9 Thank you very much.

10 And the Panel has benefited -- you don't see these 10:01
11 folks, you might see their names on the hearing panels,
12 but our environmental technical experts with the NRCB
13 have been a huge help to the Board in terms of
14 reviewing the EIA and assisting us with technical
15 questions and matters that we have: Mr. Mike
16 Iwanyshyn, Ms. Stephanie Fleck, Mr. Scott Cunningham
17 and Ms. Carina Weisbach have attended the entirety of
18 the hearing, and they all bring their unique expertise
19 to assist the Panel in the review of the EIA and also
20 the evidentiary portions that we receive throughout the 10:01
21 hearing. So a big thanks to our technical staff.

22 And, of course, the Panel would like to thank all
23 of you, all of the parties, for your participation in
24 this review process, including all the legal counsels
25 who have been excellent.

1 We would like to thank all the parties for the
2 enormous amount of work that you put in to preparing
3 for the hearing, and, indeed, the amount of energy many
4 of you put into advocating your positions on the
5 project since 2014. You did so professionally,
6 constructively, and respectfully, and we appreciate
7 that.

8 And I would like to thank, on behalf of all of us,
9 and send our appreciation to the Stoney Nakoda elders
10 that participated and shared their views in the
11 hearing, but also for their prayers. So thank you,
12 Elders Jackson Wesley, Elder Henry Holloway and
13 Elder John Snow.

10:02

14 And given that this is the last day of the
15 hearing, and with only Alberta Transportation's reply
16 on the agenda, it's clearly a short day and I expect
17 that there may be applicant and intervener experts and
18 impacted landowners that may or may not have been able
19 to join via YouTube today.

20 So I would ask that respective counsels pass along
21 the Panel's sincere gratitude for all the work they
22 have done for this process and the commitment to their
23 cause over the years.

10:03

24 The Panel is keenly aware that this decision
25 weighs heavily on landowners. Should the project be

1 approved, there is direct impacts to those landowners
2 who must give up land and, in some cases, heritage
3 ranches. If the project were to be denied, further
4 delay of flood mitigation would clearly weigh heavily
5 on many landowners and businesses impacted by the 2013
6 flood.

7 The entire Panel, all the parties, have our
8 heartfelt appreciation for the time, effort, and
9 emotional investment that all landowners have put into
10 this process.

10:04

11 So the Panel takes our responsibility seriously.
12 We understand that our decision to determine whether
13 this project is in the public interest will impact many
14 people for years to come.

15 The entirety of the record, including transcripts
16 and submissions to this hearing, will be considered in
17 reaching our decision.

18 And our long-standing performance target of the
19 Board is to release decisions under the *NRCB Act* within
20 80 working days of concluding the hearing. This is not
21 a statutory timeline, but it's a performance target
22 that we've always met, and I see absolutely no reason
23 why the Board will not live up to that, or perhaps even
24 beat this target for the SR1 decision.

10:04

25 So, in conclusion, it's been my privilege to serve

1 on this Board and to serve Alberta, alongside Panel
2 members Mr. Ceroici, Dr. Heaney, and Ms. Roberts for
3 the review of SR1.

4 I would like to thank everyone once again, and
5 with that this hearing is now closed.

6 (PROCEEDINGS ADJOURNED AT 10:05 A.M.)

7 _____

8 PROCEEDINGS CONCLUDED

9 _____

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1 Certificate of Transcript

2

3 We, the undersigned, hereby certify that the foregoing
4 pages 2812 to 2855 are a complete and accurate transcript
5 of the proceedings taken down by us in shorthand and
6 transcribed from our shorthand notes to the best of our
7 skill and ability.

8 Dated at the City of Calgary, Province of Alberta, on
9 April 7, 2021.

10

11

12

"Lorelee Vespa"

13

Lorelee Vespa, CSR(A) RPR CRR

14

Official Court Reporter

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16

"Donna Gerbrandt"

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Donna Gerbrandt, CSR(A)

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Official Court Reporter

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