

**In The Matter Of:
Confederated Tribes, et al.**

vs.

Yakima County, et al.

**Deposition of
John Fagan
September 28, 2017**



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I N D E X

CONFEDERATED TRIBES, et al. vs. YAKIMA COUNTY, et al.
NO. APL2017-00003
NO. APL2017-00004
September 28, 2017

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1 BE IT REMEMBERED that on Thursday,
2 September 28, 2017, at 12:57 p.m., at 917 Triple
3 Crown Way, Suite 200, Yakima, Washington, the
4 deposition of JOHN L. FAGAN was taken before
5 Phyllis Craver Lykken, Certified Court Reporter.
6 The following proceedings took place:

7
8 JOHN L. FAGAN, being first duly sworn to tell
9 the truth, the whole truth and
10 nothing but the truth,
11 testified as follows:

12
13 EXAMINATION

14 BY MR. SEXTON:

15 Q. Good afternoon, Dr. Fagan. My name is Joe
16 Sexton. Can you hear me okay?

17 A. Yes. Thank you.

18 Q. I represent the Confederated Tribes and Bands of
19 the Yakama Nation. During the course of this deposition
20 I'll be referring to them as the Yakama Nation.

21 Have you been deposed before, Doctor?

22 A. No.

23 Q. Okay. I'm going to go over a few of the ground
24 rules and make sure that they're okay and we're all on
25 the same page.



1 A. Okay. Sure.

2 Q. As you can tell, a record is being taken today
3 of everything that we say. For that reason it's
4 important that we not talk over each other. And I'm as
5 guilty of this as anybody else. But as you probably
6 know during the course of normal conversation with
7 someone a lot of times you can anticipate what they're
8 saying or a question they're going to ask and you'll
9 jump in. And it's not rude or anything, but it's just
10 the way we interact on a normal basis. For purposes of
11 the deposition to make sure our reporter can get a clear
12 record of everything that's said it's important that I
13 wait until you're done totally answering a question and
14 you wait until I'm finished asking my question before
15 responding. Is that okay?

16 A. Yes.

17 Q. Okay. In addition, whereas we can have a
18 meaningful conversation, you and me, with head nods or
19 head shakes or uh-huhs or nuh-uhs, again, because the
20 record is being taken, we need to verbalize all of our
21 answers with words, and so yes, no. And please avoid
22 head shakes or head nods, if you can. Is that okay?

23 A. Yes.

24 Q. Thank you. And sometimes I don't ask the best,
25 most concise questions as a lawyer, so if you don't



1 understand a question, rather than venturing a guess at
2 what I'm trying to get at, I would ask just let me know,
3 I don't understand what you're asking, can you please
4 rephrase that, and then I'll try to rephrase my
5 question. Is that good with you?

6 A. Yes. Okay.

7 Q. Okay. Finally, I don't anticipate the
8 deposition will run terribly long today, but if you need
9 a break for any reason, just let us know and we can go
10 off the record. The only thing I would ask is that if
11 there's a question pending that you would answer the
12 record before we go off and take a short break. Is that
13 okay?

14 A. Yes.

15 Q. Okay. Is there any reason today why you can't
16 give us your best testimony?

17 A. No.

18 Q. So can you please state your full name and
19 business address for the record.

20 A. Yes. John Lee Fagan. And my business is
21 Archeological Investigations Northwest at 1320 Northeast
22 122nd Avenue in Portland.

23 Q. Thank you. And for purposes of today's
24 deposition is it okay if I refer to Archeological
25 Investigations Northwest as AINW?



1 A. Yes.

2 Q. Okay. I'd like to ask you a few questions about
3 your background, Doctor. Where are you from originally?

4 A. Well, I grew up in central Oregon in a town
5 called Prineville.

6 Q. And did you grow up there your entire childhood?

7 A. Well, most of it, from about probably eight or
8 ten until I went to college.

9 Q. Where did you go to college?

10 A. At the University of Oregon, Eugene.

11 Q. And you graduated there, I take it, from the
12 University of Oregon?

13 A. Yes.

14 Q. Okay. What degree did you secure from them?

15 A. Well, I got my master's degree there and my
16 Ph.D.

17 Q. Okay. So you went undergraduate, master's, and
18 doctoral?

19 A. Right.

20 Q. What was your major for your undergraduate
21 degree?

22 A. It was anthropology with a focus on archeology.

23 Q. Okay. Same for your master's?

24 A. Yes.

25 Q. Your Ph.D., same thing?



1 A. Yes.

2 Q. Okay. After you graduated from the University
3 of Oregon, where did you work?

4 A. I worked for the Portland District Corps of
5 Engineers.

6 Q. How long did you work there?

7 A. Fifteen years.

8 Q. Okay. And then I'm sorry, what year did you
9 earn your Ph.D.?

10 A. 1973.

11 Q. Okay. So then from '73, 15 years forward you
12 worked for the Corps of Engineers; is that right?

13 A. Right.

14 Q. Then from there, where did you work?

15 A. Then I started AINW.

16 Q. Okay. And you've been with AINW ever since?

17 A. Yes.

18 Q. Have you worked exclusively for AINW since you
19 left the Corps' employment?

20 A. Pardon?

21 Q. I'm sorry. Have you worked exclusively for AINW
22 since you left the Corps' employment?

23 A. Yes.

24 Q. Okay. Aside from any conversations you may have
25 had with Mr. Quehrn, have you discussed this deposition



1 with anyone else before today?

2 A. No.

3 Q. Okay. Before your deposition earlier this
4 morning, us, as the attorneys, we discussed a
5 stipulation meant to ensure the confidential records
6 remain outside of the public record. So we have agreed
7 off the record that you would provide us with an index
8 of documents and records that you may have reviewed in
9 preparation for your testimony today that would allow us
10 off the record to determine, it's very likely that we
11 have access and we have those documents in hand, but if
12 we don't, that's part of the purpose of discovery, is
13 for us to learn what you're relying on for your
14 testimony. So we've agreed to do that rather than have
15 you identify those documents on the record in a
16 deposition transcript that will likely become a matter
17 of public record. Is that okay with you?

18 A. Yes.

19 Q. Okay. With your work for AINW, did you, I'm
20 just curious, did you work on the Kennewick Man issue?

21 A. Yes.

22 Q. I read part of your analysis, I think it was on
23 the projectile point for the Kennewick Man's pelvis.
24 Did you do anything else on the Kennewick Man?

25 A. No.



1 Q. I worked with the Yakama Nation recently in
2 their latest advocacy for getting what they call the
3 Ancient One, the Kennewick Man, repatriated and I worked
4 with Dr. Willerslev in particular. Are you familiar
5 with Dr. Willerslev's findings?

6 A. No.

7 Q. He's a DNA expert. That's something I find
8 fascinating, but I thought it was great that you had
9 worked on that.

10 I want to turn our attention now to this matter
11 and AINW's role in this dispute. And I guess have you
12 ever been contracted to work on -- let me rephrase that.
13 When did you start working for either Granite or any of
14 its predecessors with respect to the mine in Selah here?

15 A. So, that was 2000.

16 Q. And how was AINW specifically engaged at that
17 point?

18 A. We did an archeological survey for their
19 proposed expansion from their original work area.

20 Q. Okay. And who engaged you?

21 A. Oh. His name sort of slips my mind, but if it
22 comes to me, I'll mention it.

23 Q. Okay. Do you remember the name of the company
24 that engaged you?

25 A. Yes. It was Superior Asphalt and Concrete.



1 Q. Okay. And so you performed a survey at that
2 point in 2000; is that right?

3 A. Yes.

4 Q. Did you personally perform that survey?

5 A. No.

6 Q. Okay. Who did?

7 A. David Ellis was the supervising archeologist.

8 Q. Okay. Did you go to the site to supervise or
9 visit site at any point in 2000?

10 A. You know, I can't remember whether I did at that
11 particular time, so...

12 Q. Okay.

13 A. I can't remember that.

14 Q. That's fine. Seventeen years ago.

15 Have you ever been -- a little bit of an aside
16 here -- have you ever been contracted to work on behalf
17 of a federally recognized Indian tribe?

18 A. Could you repeat?

19 Q. Have you or AINW ever been contracted to work on
20 behalf of an Indian tribe?

21 A. Oh yes.

22 Q. Which tribe would that be?

23 A. Several. The Umatilla, the Grand Ronde, Cow
24 Creek, several tribes in California.

25 Q. Any tribes in Washington?



1 A. Let's see. I don't know that I've worked with
2 the Yakama, but I've actually had tribal members work
3 for me on projects.

4 Q. You've had Yakama tribal members work for you?

5 A. Yeah.

6 Q. Do you remember their names?

7 A. No, I don't.

8 Q. Okay. If you recall them, will you let me know?

9 A. Okay.

10 Q. Thank you. In the course of your work with
11 AINW, can you approximate how many surveys you've done
12 involving human remains, if you can?

13 A. No. I, I can't. But I don't think there is
14 very many.

15 Q. Okay.

16 A. Pretty rare.

17 Q. Would you be able to take an educated guess,
18 less than ten, more than 20?

19 A. No.

20 Q. Okay. Do you recall any of the specific
21 projects on which you had dealt with human remains
22 during your course work with AINW?

23 A. Yes.

24 Q. Which projects would those be?

25 A. One project was for a site in the Willamette



1 Valley.

2 Q. Do you remember what that project was?

3 A. It was called the Calapooia Midden.

4 Q. Do you remember approximately when that was?

5 A. It was in probably in the '80s.

6 Q. So we have the Calapooia Midden project maybe in
7 the '80s as one project you've dealt with human remains
8 on during your course, the course of your work with
9 AINW.

10 A. Uh-huh.

11 Q. Any other projects you specifically remember
12 working with human remains?

13 A. Not other than the Kennewick project.

14 Q. And that would be the Kennewick Man we were
15 discussing earlier?

16 A. Yes.

17 Q. And you did a report on the projectile point
18 that was found in his pelvis; is that right?

19 A. Yes.

20 Q. Did your work with the Kennewick Man involve
21 anything else beside that report that you did?

22 A. No.

23 Q. Okay. And aside from the Kennewick Man, and you
24 may have answered this question, so if you have, I
25 apologize, but aside from the Kennewick Man in the state



1 of Washington, do you recall any other projects you've
2 worked on involving human remains for AINW?

3 A. No.

4 Q. Okay. In any of your work with AINW, have you
5 ever recommended excavation of human remains in any of
6 these projects?

7 A. Let me -- could you rephrase that?

8 Q. Sure. In any projects during your work with
9 AINW in which you've worked with human remains, did you
10 recommend excavation of those human remains?

11 A. Yes.

12 Q. Do you remember which projects those were?

13 A. Yes. That was the Calapooia Midden.

14 Q. Can you describe that project for me, and the
15 human remains aspect of it?

16 A. Yes. It was a natural gas pipeline that was
17 going through a corridor that had been built probably in
18 the '50s, and it went right through the Calapooia Midden
19 site, which was a prehistoric pre-contact site that had
20 numerous burials in it, and the project actually
21 destroyed several burials, and my recommendation was for
22 them to stay within their existing corridor so they
23 don't expose any other remains or damage any more. And
24 I worked really closely with the Grand Ronde tribe on
25 that.



1 And what happened is one construction operator
2 got a few inches out of the corridor and exposed some
3 remains. And essentially the whole project had to stop
4 and the remains had to be protected. And so it was
5 pretty sad.

6 Q. Yeah. A similar question, but it's a little bit
7 different. In any case in which you've worked with
8 human remains on any archeological or cultural resources
9 project, have you ever found human remains visible in
10 the course of a pedestrian survey or lying on the
11 ground?

12 A. No.

13 Q. In the years since you've been engaged in your
14 work on this site, have you ever recommended that the
15 mining company secure a permit for DAHP for their work
16 within an archeological site?

17 A. You're talking about the Rowley Quarry?

18 Q. Yes.

19 A. Okay. No.

20 Q. Okay. And just to be clear, to your point, when
21 I say site, and I'm talking specifically in this
22 deposition, I'm generally referring to site 45YA109
23 unless I state otherwise; is that fair?

24 A. Yes.

25 Q. Okay. Do you agree that the entirety of the



1 site, site 45YA109, is protected by law?

2 A. Yes.

3 Q. Okay. Can you identify the law that protects
4 that site?

5 A. It would be the National Historic Preservation
6 Act.

7 Q. Any others?

8 A. Well, there are state laws, too.

9 Q. Okay. Do you know the state laws off the top of
10 your head?

11 A. Not off the top of my head, the RCWs.

12 Q. It would be in the RCWs?

13 A. Yeah.

14 Q. In general, can you describe for me how you
15 define an archeological site in general?

16 A. Yes. Yes. An archeological site is actually
17 the physical location of artifacts on the ground.

18 Q. And is that how you define archeological site?

19 A. Yes.

20 Q. Okay. And do you take that definition from any
21 authority beyond your professional position on it?

22 A. Yes. Pretty much Section 106 of the National
23 Historic Preservation Act and guidelines from state
24 historic preservation offices.

25 Q. So from the documents you submitted in this case



1 through Granite's attorneys, as I understand it, you've
2 indicated that you disagree with the current size of
3 site 45YA109; is that correct?

4 A. Yes.

5 Q. Can you explain why you disagree with that?

6 A. It goes back to the definition of an
7 archeological site being the location of artifacts and
8 evidence of human activity that produced those
9 artifacts. And I think that the expanded boundary for
10 site 109, I don't disagree that it's not a, could be a
11 traditional cultural property or certainly a work area,
12 a use area of tribal use, yeah.

13 Q. Okay. Despite your disagreement, though, you do
14 recognize that in its current form as far as Washington
15 law is concerned site 45YA109 is one single
16 archeological site; is that a fair statement?

17 A. Let me clarify that. Well, please restate that
18 because it's a little complicated.

19 Q. Sure. It was not entirely clear. So despite
20 your disagreement with the size of site 45YA109, you do
21 recognize that in its current form it is an
22 archeological site as far as the state of Washington is
23 concerned; is that fair?

24 A. Yes. I think that's a reasonable thing to say
25 because it's on their maps. And I disagree with their



1 mapping, but --

2 Q. Understood.

3 A. -- yes.

4 MR. SEXTON: I'm going to ask the court reporter
5 to mark this as Exhibit 1 and hand it to you, if she
6 would, please.

7 (APPELLANTS' EXHIBIT NO. 1 WAS
8 MARKED FOR IDENTIFICATION.)

9 Q. If you would take a moment to take a look at
10 this and let me know when you're ready to talk about it,
11 please.

12 A. (Witness reviewing document). Okay. Thanks.

13 Q. Thank you. For the record, this letter is dated
14 August 18, 2016, and it's from the Washington State
15 Department of Archeology and Historic Preservation. I
16 will call that agency DAHP for short, if that's okay
17 with you.

18 A. Yes.

19 Q. In this letter DAHP is writing Yakima County
20 Senior Project Planner and the subject reads
21 "Archaeology - MDNS Review Comments." James Essig for
22 Granite Construction was cc'd on this letter. Have you
23 seen this letter before, Dr. Fagan?

24 A. Yes.

25 Q. Did you rely on this letter in any way in



1 preparing your expert report submitted in this matter?

2 A. I reviewed this, yes.

3 Q. In the course of preparing your report for this
4 matter?

5 A. Yes.

6 Q. Can you read for me along the third sentence in
7 the first paragraph where DAHP notifies Yakima County
8 that "The project area is located within a large
9 significant archeological site 45YA109." Do you see
10 where it says that?

11 A. Pardon?

12 Q. Do you see where it says that?

13 A. The third sentence in the first paragraph?

14 Q. Yes.

15 A. Okay. Yes.

16 Q. So we've discussed already your disagreement
17 with the size of the site. Can you tell me whether you
18 disagree with DAHP's characterization of the site as not
19 only large, but also significant?

20 A. Yes. I disagree with the size of the site as an
21 archeological site. And significance would be something
22 that would, you know, need to be determined.

23 Q. At a later date?

24 A. Yes.

25 Q. And I'm glad you brought that up, because if you



1 could turn with me to the second page and I'll read from
2 the first paragraph on, first full paragraph, rather, on
3 that second page of this letter.

4 "We cannot concur with the MDNS for this project
5 as we believe it is not sufficient, has not fully
6 identified areas of cultural value and importance and
7 therefore does not contain mitigation measures for those
8 areas. In our opinion MDNS is not appropriate for this
9 project and we believe that a Determination of
10 Significance should be issued so that appropriate
11 studies and consultation can take place."

12 Do you see where it says that in the letter?

13 A. Yes.

14 Q. Do you agree in general with that statement?

15 MR. QUEHRN: I object. You're asking for a
16 legal opinion on SEPA.

17 Q. In your professional opinion as an archeologist
18 do you agree further studies are needed to determine the
19 significance of site 45YA109?

20 A. Are we talking about the existing boundary
21 that's expanded or the original boundary that was
22 recorded?

23 Q. When I, again, when I say site in general and
24 site 45YA109, I'm talking about that site as it's
25 presently recorded with the state of Washington today as



1 we sit here. Is that okay?

2 A. Yes.

3 Q. Okay. So in your professional opinion as an
4 archeologist, do you agree that further study is
5 necessary with respect to site 45YA109 --

6 A. Yes.

7 Q. -- to determine its significance?

8 A. Yes.

9 Q. You agree with that?

10 A. Yes.

11 MR. SEXTON: Okay. I'm going to ask the court
12 reporter if she would please mark Exhibit 2 to this
13 deposition and hand it to you and we'll have the same
14 drill. If you could take a moment to look at it and
15 then let me know when you're ready to discuss it,
16 please.

17 (APPELLANTS' EXHIBIT NO. 2 WAS
18 MARKED FOR IDENTIFICATION.)

19 A. (Witness reviewing document). Okay.

20 Q. Thank you. For the record, this letter is dated
21 February 15, 2017. That's again written by DAHP to the
22 Yakima County Senior Project Planner and the subject
23 line of this letter reads "Archeology - Request
24 Withdrawal of MDNS and Determination of Significance."
25 Once again, Mr. James Essig of Granite Construction



1 Company, among others, is cc'd on this letter.

2 Dr. Fagan, did you receive this letter?

3 A. Yes.

4 Q. Did he rely on this letter in any way in
5 preparing the report, your expert report that was
6 submitted in this case?

7 A. Yes.

8 Q. I'd like to draw your attention to the first
9 bullet point on page 2 of this letter, which I will
10 read.

11 "The project areas within the established
12 boundary of archeological site 45YA109, which contains
13 numerous precontact and historic-period archeological
14 objects and features. Additional archaeological
15 resources were identified during the most recent
16 archaeological survey but were evaluated for
17 significance individually and not as part of the larger
18 site. In DAHP's opinion it is not possible to evaluate
19 significance outside of the larger context of 45YA109,
20 which is not fully documented or understood at this
21 time. Archeological site 45YA106" -- and I believe that
22 is a typo and they meant to say 45YA109 -- "is likely a
23 Traditional Cultural Property as well as Cultural
24 Landscape and would be eligible for listing in the
25 National Register of Historic Places."



1 Am I safe to say you disagree with this
2 statement?

3 A. I can't say that I totally agree with the
4 interpretations and conclusions.

5 Q. Okay. Can you identify which interpretations
6 and conclusions you disagree with in this statement?

7 A. Well, for one thing, it's the boundary of the
8 site. And I don't disagree that it could be a
9 traditional cultural property and I think that would be
10 quite appropriate, but I don't see that it is a huge
11 archeological site. I think it has a lot of smaller
12 archeological sites within the traditional use area.

13 I agree that it could be part of a TCP. I'm not
14 sure about a cultural landscape. I don't have
15 familiarity with the guidance on landscapes.

16 And as far as the eligibility for listing in the
17 National Register of Historic Places, that's something
18 that would have to be pretty thoroughly documented to
19 get registered.

20 Q. Understood.

21 A. And it would have to be done to actually be
22 determined eligible.

23 Q. Thank you. And I believe you hit on most of the
24 points raised in that earlier paragraph that I read.
25 One sentence in particular, though, I would like to



1 revisit.

2 "Additional archeological resources were
3 identified during the most recent archeological survey
4 but were evaluated for significance individually and not
5 as part of the larger site." Do you agree with that
6 sentence --

7 A. No.

8 Q. -- factually?

9 A. Not totally, because I don't agree that the
10 items that were found were part of the larger site.
11 They were individual artifacts that were on the surface,
12 and under state law they aren't sites, they're isolated
13 artifacts.

14 Q. And I understand that's your professional
15 opinion.

16 A. Yes.

17 Q. But as a matter of fact presently, I think we've
18 discussed this already, the state recognizes site
19 45YA109 as a larger site with a certain polygon that I
20 understood you disagree with. Is that fair?

21 A. Yes.

22 Q. Okay. So the state says this is a large site
23 and you found artifacts within that site. Is that
24 factually inaccurate?

25 A. Not necessarily.



1 Q. So, yes, it is factually accurate to say you
2 found artifacts within the large site of 45YA109 which
3 you disagree with in terms of its current size. Is that
4 a fair statement?

5 A. I think it's a fair statement from the state's
6 point of view.

7 Q. Okay. And which agency within the state in
8 terms of a point of view are you referencing?

9 A. The DAHP.

10 Q. It's true that DAHP is responsible as far as
11 state law is concerned for regulating and governing
12 archeological matters under state law; is that fair?

13 A. Yes.

14 Q. Okay. Thank you. I'd like to turn a little bit
15 to more general questions regarding this site.

16 AINW conducted surveys in and around the project
17 area at issue here in 2000, 2008, and 2016; is that
18 correct?

19 A. Yes.

20 Q. And its true, then, the surveys, in all of those
21 surveys AINW discovered additional archeological or
22 cultural resources; is that fair?

23 A. Yes.

24 Q. During the return visits to this site, so I'm
25 talking about 2008, 2016, did AINW revisit any of the



1 newly discovered research sources from previous surveys?

2 A. Yes.

3 Q. Did you assess those sites in terms of them
4 being intact?

5 A. Pardon?

6 Q. That was a poorly phrased question. I
7 apologize.

8 When you returned in 2008, you revisited sites
9 that were discovered in AINW's survey in 2000; is that
10 right?

11 A. Yes.

12 Q. And did you determine in revisiting those sites
13 that they were intact?

14 A. I don't, don't recall that.

15 Q. Okay. Do you recall whether any of the sites
16 that were discovered in 2000 were later discovered to
17 have been damaged or destroyed in any way?

18 A. No.

19 Q. Okay. So as far as your memory is concerned as
20 you sit here today, all of the new sites that AINW
21 discovered in 2000 and 2008 remain intact today?

22 A. Well, there was one site, I don't recall the
23 actual numbering now, but it was a three-artifact site
24 that was within the approved quarry area, and it wasn't
25 there when we revisited the area.



1 Q. Were you able to ascertain why it wasn't there?

2 A. Because the area had been mined, scraped.

3 Q. Excavated?

4 A. Yeah.

5 Q. And do you remember what those three artifacts
6 were?

7 A. Yes, there was a biface fragment and two flakes.

8 Q. And what was the second one? I'm sorry.

9 A. There were two flakes in addition.

10 Q. Two flakes. Thank you.

11 Do you know whether AINW in general has any
12 experience with Granite or Mr. Rowley or Granite's
13 predecessor identifying any artifacts at this site?

14 A. Not to my recollection.

15 Q. Do you know whether Granite's employees have
16 undertaken any training in archeological or cultural
17 resources?

18 A. No, I don't know that.

19 Q. Okay. I'd like to talk a little bit about the
20 identified talus features at this site. When I use the
21 word talus pit, am I correct in saying this references
22 the fact that these features which are pits are
23 depressions in the earth? Is that a fair way to
24 characterize them?

25 A. Yes.



1 Q. Okay. Would you agree that when it comes to
2 talus burials or talus features used for other purposes,
3 such as for food storage, these features were generally
4 not depressions when they are intact?

5 MR. QUEHRN: Form of the question.

6 A. I don't understand that question.

7 Q. I guess I'm trying to better understand talus
8 features in pits and how they're distinguishable.

9 A. Uh-huh.

10 Q. So I guess could you describe for me what you
11 consider a talus pit to be?

12 A. Yes. That's a location where the loose talus
13 has been taken out of a particular area to expose an
14 area that may be several meters in diameter or just a
15 few feet in diameter that could be used for a lot of
16 different purposes.

17 Q. Can you identify those purposes?

18 A. As they have been identified by the Yakama
19 Nation members, they're oftentimes referred to as
20 refrigeration pits, storage pits for foods and other
21 materials, and as burials.

22 Q. Any other purposes that you can think of for
23 talus features?

24 A. No. I mean, there could be others, but I don't
25 know.



1 Q. So I guess what I was driving at in terms of the
2 word "pit," my understanding is that when the
3 individuals created or constructed these features for
4 whatever purpose, whether it was food storage or burial,
5 that they were not depressions, that they constructed
6 them and then covered them; is that fair to say?

7 A. No.

8 Q. Okay.

9 A. They actually pick the rocks out of the talus
10 and put them up on the side. So if you have seen
11 pictures in some of the reports, you have sort of a
12 cross-section of mounds on each side of this depression.

13 Q. Okay. So a depression could be an intact site?

14 A. Yes.

15 Q. Okay.

16 A. Yeah. Are there intact -- excuse me. I'll
17 rephrase.

18 Are there intact talus burials that you've seen
19 which are not pits or depressions?

20 A. Not to my knowledge.

21 Q. Okay. Have you looked at satellite imagery
22 regarding this site?

23 A. Again.

24 Q. Have you looked at satellite imagery regarding
25 this site, aerial photos?



1 A. Yes. Uh-huh.

2 Q. Can you identify what you used to look at that
3 imagery?

4 A. Eyes on a computer screen.

5 Q. Thank you.

6 A. And, you know, you can blow them up and go with
7 larger figures so you can get a better view. It depends
8 on the quality of the aerial photo.

9 Q. And thank you for pointing out that my question
10 was not phrased well. Did you use Google Earth as a
11 means of looking at satellite imagery?

12 A. Yes. Yes.

13 Q. Okay. Did you use any other software or --

14 A. No.

15 Q. Okay. Did you look at any historic aerial
16 photographs of the site?

17 A. Yes.

18 Q. Do you remember, can you identify any of those
19 photographs?

20 A. They would be the ones that are on the Google
21 search. You can see historic images.

22 Q. Okay. Are you aware that the Yakima Cultural
23 Resources Program has identified more than 50 talus
24 features on this site through the use of satellite
25 imagery and historic photographs?



1 A. A question about your term "site." Are we
2 talking about the big area?

3 Q. Yes.

4 A. Okay. I agree with that.

5 Q. Okay. So have you identified that amount of
6 talus features?

7 A. I've seen numerous talus features on almost
8 every slope that's in that big area.

9 Q. Would you say that the presence of these talus
10 features indicates evidence of potential burial sites at
11 this site?

12 A. Not necessarily. I think they're evidence of a
13 lot of activities that have to do with cultural issues.
14 There are several similar features, in fact I just drove
15 by some on my way out here up the Columbia River, and a
16 lot of them are, they're interpreted and probably from
17 tribal input to be, like, vision quest locations or
18 places where youth were sent to do activities to
19 essentially make mounds, pile rocks, and do things to
20 create or help get a vision for future guidance. So
21 that, that's, I think, a pretty common thing that
22 occurs. And it ends up looking like lines and furrows,
23 things that look like it took a lot of work to do. But
24 there is so many of them, it's pretty impressive.

25 Q. Okay.



1 A. But I don't think they're all burials. I think
2 there are probably are some burials, but...

3 Q. Within the site that we're talking about, site
4 45YA109 as it exists today?

5 A. Yes, there probably are.

6 Q. Okay. What is your experience working on
7 projects with talus slopes and talus features like the
8 ones we're talking about here?

9 A. So I have worked on surveys where we've found
10 talus features that are a lot of them were pits similar
11 to the ones that we have on the site, and others were
12 more concise hunting blind type things or even
13 structural features for houses.

14 Q. So I guess I'm trying to figure out how common
15 these features are in terms of your work as an
16 archeologist. So are there, I mean, is it usual, would
17 you say, to come across talus features in the Pacific
18 Northwest such as the ones we see out at 45YA109?

19 A. Yes. They're pretty common. And they're sort
20 of associated with the land forms and the geology and
21 the talus fields and usually associated with location of
22 villages and habitation areas.

23 Q. So would you be able to ballpark a percentage in
24 terms of your archeological work?

25 A. No.



1 Q. No. Not even like greater than half of your
2 archeological work you've encountered talus pits in your
3 surveys?

4 A. No. No.

5 Q. Okay. Getting back to, and this is just a
6 general question, not with respect to the site
7 specifically, but in general in your work for AINW, I
8 understand that depending on the landscape and the
9 geology talus features are relatively common. Can you
10 give us an estimate for how often those talus features
11 are talus burials that you've encountered?

12 A. No, I can't.

13 Q. Okay. Did any of the previous projects you've
14 worked on, aside from the site currently at issue,
15 involve talus burials?

16 A. No.

17 Q. I know we discussed, I believe, one project that
18 was the Grand Ronde Calapooia Midden project, right, in
19 the '80s that involved your identifying of human remains
20 and recommendation for excavation of those remains. Did
21 you recommend a buffer be used in that case?

22 A. No. That was a real specific corridor that was
23 excavated and it was a matter of recovering the exposed
24 remains and turning them over to the tribes.

25 Q. Okay. And you were engaged by the Grand Ronde



1 Tribe in that case?

2 A. No. I was hired by the company that was doing
3 the construction and the Grand Ronde tribe assisted in
4 providing assistance on the recovery of the remains and
5 they reburied them.

6 Q. Okay. Have you in general, have you ever
7 recommended a buffer be used to protect known burial
8 grounds or historic cemeteries?

9 A. Well, in the current project, there is that 75-
10 foot buffer that has been recommended and used, and we
11 consistently have used that. I think it came originally
12 from the county in their requirements for the first
13 permit for the mining.

14 Q. All right. Aside from this project at issue
15 here, do you recall using a buffer or recommending a
16 buffer be used with respect to human burials in any
17 other projects you've worked on?

18 A. No.

19 Q. As I understand in your report, you have
20 recommended the use of trained dogs for the purposes of
21 potentially identifying human burials; is that right?

22 A. Yes. Yes.

23 Q. Can you tell me a little bit about these trained
24 dogs? I've never heard of --

25 A. Yes. In fact, the reason I did that research is



1 because of the comments from the tribe about the -- and
2 I have to say, I totally agree with this, that why dig
3 up a burial to determine that a burial is there. Why
4 not find some other way.

5 And so I did a little research and found that
6 there actually are other archaeologists, both in this
7 country and other countries, that actually have used
8 dogs that have been specifically trained to identify
9 human remains. And they have been successful in
10 recording and finding remains that have been deeply
11 buried, ones that were on, like, battlefields where they
12 were just covered with dirt and there is no physical
13 evidence of a burial.

14 And so that's something that I want to talk with
15 the tribe about and also the DAHP about if we, you know,
16 when we move forward to the permit process. I mean, I
17 would need their support to do that, and I don't think
18 DAHP will be very supportive, but I think if we combine
19 forces we might be able to prevail, and if we find
20 burials, then we protect them and not dig them up.

21 Q. Understood. That's one of the reasons I'm
22 asking to get a better. I've never heard of the use of
23 dogs and as a layperson; I guess I wouldn't expect to.
24 But even with the archaeologists I've discussed this
25 case with, they, this was new to them, too. Is it



1 something new in the field of archeology?

2 A. Apparently so. And I don't think it's been used
3 around this territory or this region.

4 Q. All right.

5 A. So I'm expecting it's going to be a pretty hard
6 sell.

7 Q. Is it, I mean --

8 A. Although, since it doesn't require any permits
9 to walk across the ground, we could do that. And if we
10 get signatures that say, yeah, there is remains here, I
11 would be happy with saying then let's consider this a
12 burial and not bother it.

13 Q. Sure. And I thought you referenced in your
14 report that these dogs have been used to detect very old
15 burials.

16 A. Yes.

17 Q. Do you remember where that was?

18 A. Croatia, I believe.

19 Q. Okay. Is this a method used more outside the
20 United States?

21 A. I don't know how to answer that. But I think
22 it's a pretty new method for anywhere.

23 Q. Do you know when it started, approximately?

24 A. No, I don't.

25 Q. Okay. Aside from the current project that we're



1 talking about here, have you worked on many projects
2 involving mining?

3 A. No.

4 Q. Have you worked on any projects aside from this
5 one involving mining?

6 A. I can't recall.

7 Q. Okay. In your experience, have you ever seen
8 that mining on a hillside can have an impact beyond the
9 immediate area being excavated to an archeological site?

10 A. Not in my experience.

11 Q. Okay. Are you aware of the mining methods used
12 at the site in this project?

13 A. Not particularly. Not specifically.

14 Q. Okay. Are you aware that mining activity at the
15 Rowley Mine involved an explosion that, according to the
16 USGS, caused a 2.1 magnitude earthquake on April 20,
17 2016?

18 A. I've heard that.

19 Q. Given this method of using explosive devices for
20 mining, does that affect your opinion in any way with
21 respect to protecting archeological resources at this
22 site?

23 A. I would say yes.

24 Q. Can you tell me how?

25 A. I've talked about this with Granite and I



1 expressed that and have been told that the mining, or
2 the blasting is real specific to specific areas of
3 bedrock and that that's done to loosen the bedrock so
4 they can mine it.

5 And so in my opinion, you know, blasting bedrock
6 is not going to really affect an archeological site
7 unless there is one -- well, I don't think there would
8 be one in bedrock, but essentially it would just loosen
9 the rock and then they would take it out. And the way
10 they describe it is that the impacts are just contained
11 in the bedrock and don't really affect the surrounding
12 area.

13 Q. Changing subjects a little bit here, can you
14 describe your knowledge of the Selah Valley and the
15 tribal inhabitants there pre-contact?

16 A. The what?

17 Q. The Selah Valley and the tribal inhabitants
18 there pre-contact.

19 A. Yes. So based on ethnographic information and
20 tribal information, there was a huge fishery in the
21 valley and lots of villages. And that's corroborated
22 with a lot of the archeology that's been done. And the
23 reports of the fishery, the Selah fishery, is pretty
24 well known. And before the dams went in and the river
25 was changed, apparently that was a very productive



1 fishing spot.

2 Q. Are you familiar with, I might butcher this
3 name, Wapaixie, does that strike a note for you?

4 A. What was the name?

5 Q. Wapaixie, W-A-P-I-X-I-E.

6 A. No, that doesn't sound familiar.

7 Q. I'm sorry. I misspelled that. W-A-P-A-I-X-I-E.

8 A. Is that the name for the village at the fishery?

9 Q. Yes.

10 A. Yes, I've seen that, but I don't know how to
11 pronounce it either.

12 Q. Okay. So you're familiar with that, the
13 village?

14 A. Yeah.

15 Q. Can you tell me what you know about that
16 village?

17 A. I just know about the references to it from a
18 couple of site forms. One site form that David Rice
19 prepared indicated that there were house pits and, and
20 burials at a location on the bank of the river. I don't
21 know, but I suspect it's probably been impacted or
22 moved, but, I mean, that's pretty much what I know about
23 it.

24 Q. Okay. And would it be important to you in your
25 professional opinion regarding this site to seek and



1 obtain tribal input regarding the cultural practices of
2 the people that lived at this village and elsewhere?

3 A. Yes.

4 Q. Did you review the Yakama Nation's site form on
5 this site submitted in late 2016?

6 A. Again, which site form?

7 Q. So my understanding is the Yakama Nation
8 submitted a site form in late 2016. Do you recall that?

9 A. You're talking about the one for 109?

10 Q. Yes. Sorry.

11 A. Yes. Yes, I did.

12 Q. You reviewed that?

13 A. Yes.

14 Q. Did you rely on that form in the AINW 2016
15 survey in any way?

16 A. I don't know how to answer rely on it.

17 Q. Did you use that report to inform the 2016 AINW
18 survey report?

19 A. Yes.

20 Q. Can you tell me how?

21 A. Essentially to see the descriptions of the use
22 area and the tribal information that was used to show
23 that the area had been used possibly for storing and
24 caching probably dried fish from the fishery.

25 MR. SEXTON: So we've been going about an hour.



1 Is it a good time for a short break? I may be done.

2 Actually, can we go off the record?

3 (A SHORT RECESS WAS HAD.)

4 Q. (By Mr. Sexton) Dr. Fagan, a couple more
5 questions and I think we can wrap up here pretty
6 quickly.

7 Have you, speaking of dogs, as we were talking
8 off the record, have you personally worked with these
9 dogs at all?

10 A. No, not at all.

11 Q. When I say "these dogs," I meant the dogs used
12 for determining the presence of human burials.

13 A. Yeah.

14 Q. You had mentioned in, I believe in 2000, I asked
15 you whether or not you personally walked and conducted
16 the survey yourself, and you had indicated that you had
17 someone else at AINW supervising that; is that right?

18 A. Yes.

19 Q. I didn't go through 2008 and 2016. Would the
20 answer to that question with respect to each of those
21 years be the same?

22 A. Yes. There was a supervising archaeologist that
23 was in charge of the 2016 survey.

24 Q. Okay. Did you do the physical survey work at
25 all yourself in either of those --



1 A. I did visit the site and looked at that one
2 feature that has the three talus, it has two pits and a
3 flat area.

4 Q. Which survey was that, do you remember?

5 A. That would be the -- well, that was actually
6 just a field meeting that we had before the survey was
7 done.

8 Q. And I believe I know which meeting you're
9 talking about. Was that the one where Ms. Lally and Mr.
10 Oliver were present?

11 A. No, it was the day before.

12 Q. Okay.

13 A. I was there for the day before they had their
14 field meeting but I had to leave, so I wasn't there.

15 Q. Okay. So that would have been recently, right,
16 the last couple of years?

17 A. Yeah, that was like the next day they did their
18 survey.

19 Q. But aside from that for the surveys that AINW
20 performed in 2008 and 2016 you didn't physically go and
21 conduct the survey work?

22 A. I didn't conduct the survey, but, you know, I
23 have a vague thought. I mean, I can't really say I was
24 specifically there, but I have seen so many photographs
25 and reviewed the reports and I sort of feel like I have



1 been there.

2 Q. Sure.

3 A. I know I was there once.

4 Q. Earlier in your testimony you indicated that
5 there was a three-artifact site that had been destroyed;
6 is that right?

7 A. Yes.

8 Q. Do you remember when that was?

9 A. That was during the 2000 survey.

10 Q. Okay. So that was Granite's predecessor?

11 A. Right.

12 Q. Did that company contact you regarding that
13 circumstance? I'll rephrase the question. Did that
14 company contact you regarding that site?

15 A. I'm not sure I understand the question or --

16 Q. Fair enough. You went and conduct the survey in
17 2000, as I understand from your testimony now you
18 discovered that a site with three artifacts had been
19 destroyed; is that right?

20 A. So in 2000 the survey was done, and then 2008
21 the area had been mined.

22 Q. Okay.

23 A. I think that's correct. I would have to go back
24 to the reports and try to figure out which, how that
25 sequence went.



1 Q. Okay. But as far as, as best as you can
2 remember today, then, just so I'm straight, AINW
3 discovered an archeological site containing three
4 artifacts in 2000, right?

5 A. Yes.

6 Q. And then in 2008, when AINW was conducting the
7 survey that year, the place where that site had been had
8 been mined; is that right?

9 A. Yes.

10 Q. What was done with those artifacts, do you know?

11 A. Those turned out that they had been collected
12 from the field during the original survey, and when I
13 heard that the site was gone, the lab director was going
14 through some records and said, Well, we have three
15 artifacts from that previous project. And so these were
16 the three artifacts that had been on the ground.

17 Q. So those three artifacts were collected in 2000?

18 A. 2000, yes.

19 Q. Okay. We talked a little bit about your work
20 with tribes, and I understand that your work in Oregon
21 at the Calapooia Midden site you were hired by the
22 company and you consulted with the Grand Ronde. Were
23 you ever hired and paid by Grand Ronde tribe to work for
24 them?

25 A. Yes.



1 Q. Okay. Do you remember the name of that project?

2 A. We did some surveys for them. I don't remember
3 the specific project.

4 Q. Okay. And then a similar question with respect
5 to Washington, I had asked you about your work with
6 tribes in Washington, you had mentioned that you worked
7 with some Yakama members.

8 A. Right.

9 Q. Have you ever been hired to work on behalf of a
10 tribe in Washington State?

11 A. I don't recall.

12 MR. SEXTON: Okay. Can we go off the record?

13 (AN OFF-THE-RECORD DISCUSSION WAS
14 HELD.)

15 MR. SEXTON: Back on the record.

16 Q. (By Mr. Sexton) Two more questions. I'm sorry.

17 A. Okay.

18 Q. One, on average, can you estimate how many
19 projects per year AINW does?

20 A. So we typically have about 60 projects going on
21 pretty much all the time.

22 Q. That includes present, 2017?

23 A. Yes.

24 Q. Historically, is that pretty steady for you?

25 A. Yes, it's been very, very steady.



1 Q. Okay. And on average, can you tell me how
2 many -- I'll rephrase the question. On average can you
3 tell me how long a project generally lasts?

4 A. No.

5 Q. All different?

6 A. Some are long, some are short, some may be multi
7 years, some may be multi days.

8 Q. Okay. One more question with respect to
9 buffers. Have you ever recommended a buffer in excess
10 of 75 feet in your work for AINW?

11 A. I wouldn't say I've recommended buffers, but
12 we've used buffers that were 30 meters in diameter,
13 especially in Oregon.

14 Q. Okay. And when would such a 30-meter buffer be
15 appropriate?

16 A. Well, in Oregon, it's what's in the guidelines
17 for the state, so it's pretty much any site.

18 Q. Is the 75-foot buffer here in Washington State,
19 is that pursuant to some guideline for this state?

20 A. Not that I know of.

21 Q. Okay. Can you tell me why you would prescribe
22 75 feet?

23 A. Well, that was what was prescribed by the county
24 during the first survey that we did.

25 Q. Have you ever used or recommended a buffer in



1 excess of 30 meters?

2 A. Not that I recall.

3 MR. SEXTON: Okay. I think that's all. Thank
4 you very much for your time, Doctor. I appreciate it.

5 THE WITNESS: Yeah. Appreciate the opportunity.
6 Thank you.

7 MR. DEMPSEY: Would you guys mind if I ask a
8 question or two? This will be really fast.

9

10 EXAMINATION

11 BY MR. DEMPSEY:

12 Q. Paul Dempsey on behalf of Selah Moxee Irrigation
13 District.

14 I just wanted to circle back on a couple items.
15 You mentioned, Doctor, I believe there was a question
16 and some testimony about an approximately 2.6 magnitude
17 earthquake that appeared, or that occurred at or near
18 the site. And I wanted to ask you, how did you come to
19 learn about that event?

20 A. That was mentioned in one of the letters that
21 was provided to the county.

22 Q. Did you, on the basis of that letter or any
23 followup research and review, have occasion to gather
24 any additional information about that earthquake or
25 potential impact to the site?



1 A. No, I didn't. No, I didn't really follow up on
2 that.

3 Q. Okay. Thank you. And there was also a
4 question, and I think you provided some testimony on a
5 question, your professional opinion as to potential
6 impacts or lack thereof of blasting in the basalt with
7 respect to burial grounds and archeological sites as
8 we've been discussing today; is that correct?

9 A. I was just expressing my, what I had heard from
10 the client.

11 Q. Okay.

12 A. Because I asked them how they did the blasting
13 and what did it do.

14 Q. Do you have any professional or educational
15 experience or expertise with respect to blasting and the
16 potential impacts of it on irrigation infrastructure,
17 for example?

18 A. No.

19 Q. I take it by your testimony you weren't
20 expressing or you don't have an opinion as to impacts of
21 blasting on irrigation infrastructure or manmade --
22 well, strike that -- on irrigation infrastructure?

23 A. No, I don't have any information about that.

24 MR. DEMPSEY: All right. Thank very much.
25 That's all I've got.



1 (DEPOSITION CONCLUDED AT 2:12 P.M.)
2 (SIGNATURE RESERVED.)
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1 CHANGES IN FORM AND SUBSTANCE REQUESTED BE MADE
2 IN THE FOREGOING ORAL EXAMINATION TRANSCRIPT:

3 (NOTE: If no changes desired, please sign and date
4 where indicated below.)

4	PAGE	LINE	CORRECTION AND REASON
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18 I, JOHN L. FAGAN, hereby declare under penalty of
19 perjury that I have read the foregoing deposition and
20 that the testimony contained therein is a true and
21 correct transcript of my testimony, noting the
22 corrections above.

21 JOHN L. FAGAN

22 Date

23 See: Wash. Reports 34A, Rule 30(e)
24 USCA 28, Rule 30(e)

25 PLEASE RETURN TO: Central Court Reporting, 1001
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STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

This is to certify that I, Phyllis Craver Lykken,
Certified Court Reporter in and for the State of
Washington, residing at Yakima, reported the within and
foregoing deposition; said deposition being taken before
me on the date herein set forth; that pursuant to RCW
5.28.010 the witness was first by me duly sworn; that
said examination was taken by me in shorthand and
thereafter under my supervision transcribed, and that
same is a full, true and correct record of the testimony
of said witness, including all questions, answers and
objections, if any, of counsel.

I further certify that I am not a relative or
employee or attorney or counsel of any of the parties,
nor am I financially interested in the outcome of the
cause.

IN WITNESS WHEREOF I have set my hand this 3rd
day of October, 2017.

PHYLLIS CRAVER LYKKEN, RPR,
CCR NO. 2423



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