GasCo is a Fortune 500 company that wants to construct a liquefied natural gas (LNG) storage facility on a piece of land adjacent to the Ainyt River in the state of Franklin. The final design has not been fully completed, but it is expected to be similar to a prototypical LNG facility. This would consist of LNG storage tanks (imagine something that looks like a 200 foot tall thermos), a bulkhead for barges delivering the LNG and associated piping and gasification facilities. There is also a small operations building and an employee parking lot. GasCo has an option to purchase a 250 acre piece of undeveloped property adjacent to the river located in the City of Chatooga. The land is known in the community as Tippitan Point and has been used as an unofficial local park for dog walking, bird watching and other outdoor activities. The total expected cost to build the LNG Facility is $475,000,000.

The property is completely undeveloped, but 10 years earlier the Corps of Engineers (the “Corps”) issued a permit for the development of a bulk commodity terminal on the property. That project was abandoned and the permit has expired. No Environmental Impact Statement was prepared, but a great deal of historic resources information was developed that GasCo and the regulators have been able to review. This information includes past archaeological surveys (both terrestrial and aquatic) that discuss the presence of two distinct shell middens, which are located in two areas near the shoreline (known as Areas A and B). These shell middens were believed to be used by Native Americans during the Middle and the Late Woodland Period, respectively. There has also been an anecdotal report of the recovery of human remains that had eroded out of the shoreline by an amateur archaeologist.

The main channel of the river is dredged to a depth of 45 feet but to build its facility, GasCo will need to dredge a 25 foot deep, 1,000 yard-long channel to the main channel. This will generate 7,000,000 cubic yards of dredge material for disposal. The dredged material is a mixture of fine silts (40%) in the upper areas to be dredged and silty sandy clay (60%) in the deeper section of the proposed dredge area.
The parties in this round are:

**Representing GasCo**

Ken Jones  
Patricia Crotwell

**Representing the Corps of Engineers**

Peter Leonard  
Leslie Benitez

The Corps of Engineers and GasCo scheduled a pre-application meeting to give GasCo an opportunity to present its project proposals and receive any suggestions from the Corps as to what it expects to see in the permit application. Although the Corps’ permit writers have had conversations with GasCo's wetland consultants and with its engineers, this is the first time that GasCo's environmental counsel and the Corps’ general counsel will sit down to discuss the project. The issues on the agenda are satisfaction of National Environmental Policy Act (NEPA) requirements, avoidance and minimization of wetland impacts and the placement of dredged material.

GasCo prepared a wetlands delineation for the site and the findings have been confirmed by the Corps. There are a total of 75 acres of jurisdictional wetlands on the site, with the wetland acreage made up of 50 acres of non-tidal wetlands and 25 acres of tidal wetlands.
The Corps does not want to do an EIS because of the time and effort involved. The Corps thinks that the can be better served on other projects. The project is in a heavily industrialized area and, if proper mitigation is done, the Corps does not believe the actual impact to the environment will be significant. However, they know that this will be an unpopular decision in the community and may leave them open to a legal challenge.

In order to not require an EIS and be the safest from a legal challenge, the Corps would like to see the whole facility moved onto an offshore platform. This reduces the amount of dredging needed because the LNG vessels will not have to go far from the main shipping channel. It also reduces the impact to tidal and non-tidal wetlands because there are less onshore facilities needed to support the LNG tanks. They understand this is expensive, but they think it is the most defensible way to avoid having to go through the full blown EIS process. Alternatively, if GasCo can lower its impacts to 7.5 acres or less of tidal impacts and 15 acres or less of non-tidal wetland impacts, and if GasCo will place a restrictive covenant on the property prohibiting any further development of wetlands, then the Corps would agree that an EIS is not necessary and would settle for simply an EA (environmental assessment) to appease the public.

The Corps would also like GasCo to do a benthic survey of the proposed dredge area to make certain that the river bottom and the macoinvertebrate life on the bottom is as degraded as conventional wisdom believes. They would like this done over the course of a year, with both a spring and fall sampling event. The Corps would prefer that this be done before the permit is issued, but will issue a permit if a survey is conducted. If this becomes a sticking point the Corps will take at the very minimum a 6 month survey but would we willing to issue the permit before this is completed.

Finally, the Corps does not want the dredged material to be disposed of overboard in an ocean disposal site. Some of the sediment may meet the Corps’ ocean disposal guidelines, but they still do not want it ocean dumped because of the public outcry that will occur. Instead, they want the material placed in the Corps owned and operated dredge material management facility. The Corps also wants to use the silty sandy portion of the dredged spoils as dike building material at the Corps’ disposal facility. The charge for using the Corps facility is $3 per cubic yard, but the Corps is willing to take it for less since it can reuse a portion for the dike building. In light of this, they would take a discounted price of up to 60% off the normal price per cubic yard if GasCo agrees to not seek permission to use ocean disposal for any portion of the dredged material.
Time is very important to GasCo. If they can secure permits quickly, then they feel they will be able to sign availability contracts with gas users while the gas market is still high. Additionally, GasCo needs to exercise its option within the next three months, or else the option price doubles to $100,000.00 per year and is nonrefundable. GasCo isn't in the land business and will not exercise the option without a commitment from the Corps that an EIS is unnecessary. GasCo wants the Corps to only require an environmental assessment (EA) because they are confident that it will lead to a finding of no significant impact. If a full blown EIS is required the project will take approximately 2 years longer to permit. GasCo understands that this decision is at the discretion of the Corps but GasCo’s attorneys have advised them that they have a good case that an EIS is not necessary, because of the nature of the surrounding area, the degradation of the river and the issuance of an earlier permit for similar impacts that did not require an EIS.

GasCo also wants to build the facility in the most efficient way possible for operational purposes. During its internal design meetings, GasCo’s engineers rejected the notion of building an offshore platform as economically unfeasible. This means building the wharf and LNG storage tank as close to the shoreline as possible. This makes unloading easier and has the added benefit of preserving portions of the back half of the property for development. In fact, GasCo wants to flip as much as the property as they don’t need as soon as possible because they don’t like to own surplus unimproved land.

GasCo has developed several different layouts for the facility. Its preferred plan involves impacting 13.6 acres of tidal wetlands and 19.23 acres of non-tidal wetlands. Another plan results in impacts to 9.7 acres of tidal wetlands and 16.4 acres of non-tidal wetlands. The last reasonably practical plan they have involves 5.23 acres of tidal wetlands and 10.2 acres of non-tidal wetlands. GasCo acknowledges the importance of wetlands and would agree to help preserve the unused portion of wetlands if the Corps will agree to issue the permit without an EIS.

GasCo wants to dispose of the material in the ocean. Most of it meets the ocean disposal guidelines and using ocean disposal is cheaper then using the Corps’ dredge disposal area and avoids any possible conflicts with other users of the Corps’ facility. However, they know that the Corps would like them to use the Corps’ dredge disposal area and they are willing to do so if they get a discount off the Corps’ standard disposal rate of $3.00 per cubic yard. GasCo would like to get a 50% discount.

GasCo’s consultants have advised them that the Corps is also likely to request a year-long benthic study to determine the health of the river’s aquatic life. GasCo will agree to do such a study, but wants it to be done after permit issuance because the study is really being done for information purposes rather than mitigation purposes. Alternatively, GasCo would agree to a six month study if it must be completed before the permit is issued.
The parties in this round are:

**Representing GasCo**

Ken Jones  
Patricia Crotwell

**Representing the City of Chatooga**

Ned Reynolds  
Natalie Voight

Chatooga has a population of approximately 125,000 people according to the 2000 census and this represents a 5% decline from the 1990 census. Jobs are scarce within the City and the residents are increasingly looking outside the City for work even though the City has a highly skilled and well educated work force. The mayor of Chatooga is very popular, but several of her strongest allies on City Council are not as popular. Recent public opinion polls have shown that residents' number one concern is jobs, their second concern is traffic and their third highest concern is protection of the environment.

The newspapers have reported about the proposed project on the Tippitan Point property, but only in very general terms. The articles mainly discussed security, the zoning of the property and how the project would mean the loss of an unofficial park. The article also discussed the creation of 35 new high paying jobs and how the ready availability of natural gas could tempt other businesses to expand or relocate to the City.

The property is zoned M-2 Heavy Industrial/Waterborne Commerce, but an LNG facility would not be a permitted use under this zoning. Congress has recently passed a bill that expressly pre-empts local governments from regulating the situs of LNG facilities, except for non-discretionary ministerial-type approvals, such as building permits, site plan approval, erosion and sediment control type permits. This is important because Chatooga has an Aintry River Overlay Ordinance that prohibits development within 100 feet of the river's shoreline, except for activities deemed to be water dependent. Chatooga's zoning administrator recently issued a zoning interpretation to someone building a barge unloading facility that only the unloading facility was water dependent, and that other related uses, such as a cargo storage yard, would have to be built 100 feet away from the river shore.

GasCo has operated a fossil fuel power plant in Chatooga for many years and has always had a good relationship with the City and is a highly regarded corporate citizen in the City.

A Meeting has been scheduled between the City and GasCo to discuss the zoning and building of the LNG facility.
ROUND 2

CHATOOGA SECRET FACTS

The Mayor is actually very happy that her zoning power with respect to the site was preempted by Congress. For political reasons she does not want to have to actually approve or disapprove of the project. She just wants it to come and bring with it tax revenues, a host fee and new jobs. Next year is an election year and she is worried that this project could become a campaign issue if it does not go well. She is also worried about competition from other locations. Through her contacts in the state economic development office, she has heard that GasCo is looking closely at two other sites. She feels like she is walking a tightrope between leaving too much money on the table and driving such a hard bargain that she chases GasCo to a site in another jurisdiction.

At the top of her wish list is an annual host fee. She would like $1,000,000 per year fixed, regardless of the amount of activity at the project or the market price of natural gas. For her, the certainty of a guaranteed number that she can count on in her budget can outweighs any potential upside the City might get from a deal structured on volume or gas prices. Because of the current high gas prices, if necessary, she would accept a mixed package including a fixed fee of $200,000 and a volume percentage annually of 3%.

She would also like a promise to create the 35 jobs referenced in the newspaper and to give residents of Chatooga first preference for these jobs. Though it might hurt her public image, some jobs are better than none so a promise of 25 would be acceptable. Considering jobs are the number one priority with residents, the Mayor would accept 20 jobs, provided that they were all high paying jobs with Chatooga residents given first preference, but this is as low as she will go.

She doesn’t want to appear weak on the environment because of its importance to her constituents. Therefore, she wants to stand firm on the zoning director’s interpretation that the gasification facility, the tank itself and the operations building are not water dependent activities and must be located outside of the buffer zone, as required by the Aintry River Overlay District. However, she would lift the buffer limitation if she could secure a replacement piece of property that could be dedicated to the City and used as a park. There is a 60 acre piece of property (worth approximately $500,000) that is near the facility that she thinks would be perfect as a park. There also is an old landfill which could be purchased (approximately $300,000) and cleaned up (approximate clean up cost $100,000) to serve as a park. As a last resort, an old field on the other side of town could be bought and serve as a park for $350,000.
GasCo values its good relationship with the City of Chatooga, and it has an interest in keeping up its good relationship with the Mayor. Although the City’s zoning power with respect to the LNG facility is limited, the City still has jurisdiction over the GasCo power plant. As part of its long range plans, GasCo wants to add additional power generation capacity at this location and those plans will be subject to the City’s approval.

GasCo knows that the Mayor will want a host fee. GasCo is prepared to offer a fee based upon the annual gas volume through put at the facility. Industry standard dictates 5.5% be paid as a host fee. This will be high during periods of high gas prices (expected revenues to the City would be approximately $2,000,000 per year under current gas prices) but would be less during times of lower gas prices (estimated revenues to the City would be $600,000). This will allow GasCo to match expenses at the facility with revenues generated, which is more favorable to it from an income tax perspective. GasCo would be willing to guarantee an annual minimum payment of $200,000 in fixed fees, but would lower the percentage to 3% annually.

GasCo is concerned because the newspaper accounts of the proposed project mention the creation of 35 jobs. There will be new jobs created, but only about 25 and of these, 5 must be filled by people who have very specific knowledge of how to operate an LNG facility. Therefore, GasCo only wants to agree to give a preference to workers from Chatooga for 15 jobs, although each would be considered a high paying job. If pushed, they would go as high as giving a preference to City residents for 20 of these high paying jobs, but would rather not go that high.

GasCo also wants the mayor to overturn the zoning administrator’s informal decision that only the bulkhead is a water dependent activity and that all other land disturbance must occur 100 feet away from the shoreline. If this decision were applied to the LNG facility it would cause an encroachment on the developable area at the back of the property that GasCo would like to sell. GasCo believes all of the facilities features (gas pipelines, storage tanks, gasification facilities) are integrally related to the marine unloading at the bulkhead and should be considered part of the water dependent activity. GasCo has calculated the present value of being forced to adhere to the buffer limitation as $400,000. Accordingly, GasCo has authorized their attorney’s to utilize up to $400,000 in discretionary funds to get the buffer limitation lifted. and would spend their way out of that requirement within that calculation.
The parties in this round are:

Representing GasCo
Ken Jones
Patricia Crotwell

Representing ARG
Robin Abbott
Ken Durst

The Aintry River is a working river that has supported industry and commerce for approximately 300 years. This has left portions of the river heavily contaminated and has caused a deterioration of its aquatic life, particularly its benthic community, which is an overall indicator of the environmental health of the river.

However, because these are legacy wastes with very few solvent responsible parties, cleanup of the river is not taking place. The Aintry River Group (ARG) is a non-profit environmental group whose sole purpose is to stop the degradation of the river and to work towards the improvement of the environmental health of the Aintry River. ARG generally has a market philosophy and believes that the best way to improve the river is to first prevent further degradation and to affirmatively clean up problem areas. It implements this philosophy by enlisting and encouraging business owners along the river to use best management practices in their operations and to seek donations and grants for specific remediation projects. Despite their cooperative philosophy, they are not afraid of a fight when they feel it is necessary and they have been involved in several lawsuits with both regulators and landowners over river issues.

In an effort to avoid future problems or potential litigation, GasCo and ARG have agreed to meet.
ARG staff is under a lot of pressure from some of its biggest donors, and therefore its Board of Directors, to significantly advance its clean-up activities. Some of these donors feel that ARG has been collecting money, but not spending it on the ARG mission. The area identified by ARG’s members, and confirmed by a study done of the river, that could be most effectively restored is known as Smackover Creek. It is located three miles upriver of GasCo’s proposed project. ARG has tiered estimates to do the restoration work. The smallest project, the removal of contaminated sediments, is anticipated to cost $700,000.00. The most ambitious project would involve contaminated sediment removal followed by seeding of clams or oysters, the planting of submerged aquatic vegetation and long-term annual monitoring of Smackover Creek. This project’s estimated cost is 3 million dollars. ARG thinks any amount over 1 million dollars will satisfy its Board and wishes to leave this meeting with a confirmed dollar figure in hand.

Because GasCo will has so much experience with marine contractors, ARG would also like GasCo to handle the administrative burden of receiving proposals and contracting for any river clean up work. For a higher commitment from GasCo than simply the smallest cleanup project, ARG would be willing to handle the administration.

ARG wants an environmental impact statement performed. Some of the information that is certain to be gathered if an EIS is done will be very useful to ARG as it has very little hard data on river conditions. ARG’s board has agreed to actively support the project if an EIS is prepared. They are not prepared, in this case, to sue to stop the project or aggressively pressure the Corps if only an Environment Assessment is done, as long as they think they will get satisfactory mitigation. However, ARG’s director is very hesitant to give up her right to sue because she believes it provides important leverage.

ARG also wants GasCo to agree to develop the site using low impact development techniques, such as the maximization of permeable land area, “dark sky” lighting to avoid light pollution, vegetated benches in the site’s storm water ponds to further reduce pollution, and, most importantly, they would like GasCo to install oil-water separators at the inlets to the stormwater ponds.
GasCo counsel’s marching orders for this meeting are fairly simple – don’t commit to anything unless it is absolutely necessary to avoid ARG coming out publicly and opposing the project or pressuring the Corps to require an EIS. GasCo does not need ARG to actively support their project (although that would be nice), but it is imperative that ARG not actively oppose it. GasCo also believes that if ARG pushes hard on the Corps of Engineers, the Corps is more likely to require an EIS, even if the Corps has given GasCo assurances to the contrary.

GasCo is willing to spend up to 3 million dollars on ARG projects (although it would rather keep its obligation below 1 million), be it river clean up or onsite activities, and GasCo does not care how the money is divided, i.e., it makes no difference to the Company whether they spend 2.5 million dollars for river clean up and $500,000.00 for onsite improvements or mitigation measures, but the counsel has been given two absolute limits: no administration of any clean up and no oil-water separators. If GasCo donates money for river clean up it does not want to have to do the contracting or any other administration of the project. GasCo’s stormwater system designers have stated that the project does not need oil-water separators because they think there are other means to catch storm water pollutants and the GasCo people believe it would be an operational nightmare to have to keep them cleaned.
The parties in this round are:

**Representing GasCo**

Ken Jones  
Patricia Crotwell

**Representing the Franklin Department of Historic Resources (FDHR)**

Jacob Nelson  
Elizabeth Burns

All of the historic reports prepared for the earlier project have now been reviewed. From these reports, the parties know that all of the property has at least been subject to a Phase I archaeological survey. These studies indicate the presence of the shell middens known as areas A & B which are believed to be evidence of a long-term seasonal encampment along the Aintry River. In addition, an underwater archaeological report was prepared that indicates the presence of 23 magnetic anomalies near the area of the proposed channel. Six of these are within the proposed dredge area and four are within 100 feet of the proposed dredge area. These are of potential interest to historians because the historic USS Jackson, one of the first ironclad warships, was reportedly scuttled in the vicinity of Tippitan Point. Further review of the past data also uncovered a report that confirmed what had long been rumored, that an amateur archaeologist walking along the shoreline had discovered human remains. The remains were protruding from a portion of the bank that had eroded during a storm. These remains were from the Middle Woodland period and have been sitting in a box in the basement of the FDHR for the past 30 years.

The Ouachitan Tribe is a non-federally recognized Indian tribe that considers Tippitan Point to be its ancestral lands. They have written to both GasCo and FDHR to let them know that they are interested in the treatment of the historic issues that could be related to their ancestors, particularly any issues involving funerary remains.

The FDHR has requested a meeting with GasCo to discuss GasCo’s historic resource obligations under Section 106 of the National Historic Preservation Act.
In preparation for the GasCo meeting, the counsel for the FDHR met with the FDHR director. The FDHR director wants his next job to be the Secretary of Natural Resources and the Environment for the State of Franklin and to help get the job he wants to be known as tough and someone who is always pulling for the state’s best interests. He had been briefed by his staff and gave very specific instructions to his attorneys that they were to get as much free historic research done as possible by GasCo with respect to excavations of areas A and B. He understands that in the past paving over an area has been treated as preservation, but he wants to change that interpretation and he wants both areas excavated and documented. He also wants every magnetic anomaly investigated by a marine archaeologist, whether the anomaly is within the proposed dredge channel or not. In practice, this means having a diver physically examine the area of each anomaly. If GasCo will agree to this, the FDHR will agree to only require GasCo to recover the USS Jackson (if it is found) if it lies within the proposed dredge path. If GasCo won’t examine all of the sites, then FDHR is going to take the position that it must test the six sites within the proposed dredge area and an additional four anomalies that are within 100 feet of the proposed dredge area. If the Jackson is found at any of those sites, then it must be completely recovered before dredging may begin.

The Director was also very explicit about the publication of any findings of the historic resource. He would like a professionally prepared video made of the archaeological work that would be suitable for showing in classrooms. He expects all artifacts to be donated to the Ouachitan Tribe, but stored and curated by FDHR at the expense of GasCo. FDHR has employees to do this job, but he would rather have them working on other high profile historic resource cases. He would also like a traveling display case prepared with artifacts from the site that could be taken around to schools. The cost to produce such a video is estimated to be $35,000.00. The cost of the traveling exhibit is $5,000.00. It is expected to cost $50,000.00 if GasCo curates the artifacts for FDHR.

The Director has also been in touch with the Ouachitan chief, who is very concerned about the disposition of any newly found funerary remains and the existing ones held by FDHR. The chief has said that he does not expect any remains to be left in place and he does not object to them being reinterred as long as it is on an isolated portion of the Tippitan Point property and his tribe is granted access to the area. He thinks this area needs to be at least three acres. He will take less if the area is outside of any fencing that surrounds the facility so that the tribe members can visit the site without having to go through security. He trusts the FDHR to look after his Tribe’s interest and gave the FDHR authority to negotiate the size and location of a reinterrment area.
GasCo is nervous about doing too much archaeological work on the property, but they know some will have to be done on the areas previously identified as potentially historically significant. The chairman of GasCo hates archaeologists. He doesn’t understand why anyone would give a hoot about a pile of 400 year old oyster shells. It was a trash pile then and as far as he is concerned it is a trash pile now. The project manager knows this and knows that she will have to answer personally for every dollar she spends satisfying the FDHR. The storage tank is not going to be located directly on top of either Area A or B, but it is very close to Area B and because the lateral extent of Area B has not been completely confirmed, it is possible that construction of the container could impact historic resources located in Area B and GasCo realizes further work will be needed in this area.

GasCo wants to do no work on Area A because that area is being paved and there will be no grading or land disturbance of the native soils. Of the two areas, Area A has the most potential to be the location of Chief Tippitan’s summer camp and if that is discovered, the cost to properly excavate and curate it would be astronomical and it would drastically slow down the project. FDHR has historically allowed the paving of a site, if it is not going to be otherwise disturbed, to count as preservation because the area will remain in place for future study. The alternative is to avoid the area altogether or to excavate it and recover any artifacts.

GasCo will investigate the 6 anomalies located within the proposed dredge area, but thinks that having to do any more investigation then that is unnecessary (and overly expensive). They would agree to look at 2 additional sites that are within 50 feet of the proposed dredge channel.

Another major issue is the possibility of finding human remains. Because they know human remains were removed from the property 30 years earlier, there is a concern that more could be unearthed during construction or during further archaeological investigation of Areas A and B. If GasCo agrees to do further work in either A or B, they want assurances that any human remains can be relocated. GasCo is willing to provide up to 2 acres on its property for reburial and will allow the Ouachitan Tribe permanent access to this area for the reburial and for other ceremonial purposes. Its preferred area is on the interior of the property because of its desire to sell or develop the usable acreage on the edges of the property.

GasCo’s archaeologists have informed GasCo that part of its obligations under the Historic Resources Act include making the findings available to the public. GasCo is willing to allow FDHR to post its reports online and it will donate all of the artifacts to the Ouachitan Tribe as it will count as a tax deduction and will have economic value to them. It expects the Tribe or some other party to bear the cost of curating the remains, but it will contribute $5,000.00 to the effort. The only other thing GasCo is willing to do is to make a permanent display case with select artifacts that could be located at the
Ouachitan tribal headquarters building. In total, GasCo does not feel that it should spend more than $10,000.00 in meeting its publication requirements.