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BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

In the matter of:) Project Number
) P-2726-012
MALAD HYDROELECTRIC PROJECT)
)
_____)

Fort Hall Indian Reservation
Tribal Business Center
Tribal Conference Room
Pocatello, Idaho
December 16, 2004, 3:00 p.m.

REPORTED BY:
AMY HORSLEY, C.S.R. No. 714, R.P.R.
Notary Public

1 PROCEEDINGS

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MR. WINCHELL: My name is Frank Winchell. I'm with the Federal Energy Regulatory Commission, and I'm with Lon Crow, who is our deputy director of the division of hydropower licensing. And we are here today to talk with the Shoshone-Bannock Tribes on the Malad Hydroelectric Relicensing Project.

To give you a little bit of a real brief background of where we're at with this particular project, we have pretty much gone through our NEPA analysis, where we have gone through the NEPA process, starting with reviewing the license application, when it was submitted back in July 2002, for adequacy, as well as additional information.

We had scoping meetings in May 2003, along with our submission of our draft environmental assessment. And then recently, we have issued our final environmental assessment in September. And we figured that -- we know that we're late in the process of getting back with the tribe in consultation, and we felt it would be appropriate to go ahead and have these

1 meetings today with both the Shoshone-Bannock
2 Tribe as well as the other tribe, the
3 Shoshone-Paiute Tribe, who has also been a
4 participating party to the relicensing process.

5 So again, we're here today to,
6 basically, listen to what the tribe would like
7 for us to hear about the relicensing. We feel --
8 and we'll get into this more in the discussion --
9 that there will be an opportunity for the tribe
10 to give us some additional input on things that,
11 perhaps, they think we could address. And I
12 would like to say that, of course, we are
13 Commission staff and that the final rendering of
14 the relicensing will be done with the four
15 commissioners, and they'll be doing it through a
16 license order.

17 And basically, we'd like to get
18 information before this point, but there's
19 always -- we can't say for sure, but there is a
20 mechanism where we probably could put in some
21 language of some sort, perhaps through the
22 license order, to accommodate anything that we
23 feel would be necessary to be put into the
24 license.

25 Are there any questions on this at this

1 point?

2 MR. BRONCHO: I just had one question
3 in regards to the Malad Hydroelectric Project.
4 Is this consultation process being initiated on
5 the new rules?

6 MR. WINCHELL: Yes.

7 MR. BRONCHO: To consult with Indian
8 tribes?

9 MR. WINCHELL: Right.

10 MR. BRONCHO: Because I know in the
11 Hells Canyon, we did that in midstream, and it
12 caused a lot of heartache to Idaho Power and
13 others on the Hells Canyon issue.

14 MR. WINCHELL: Right. And the same
15 with Malad. This is -- it's a work in progress
16 because we are trying to do as much as we can
17 with our new tribe -- or with the tribal
18 consultation policy with ongoing license
19 proceedings. And of course, we're getting
20 through the older license proceedings where we
21 can start fresh with the new ones.

22 And I'd like to point out that there
23 will be another license proceeding coming up in,
24 oh, about four years with Swan Falls. So that
25 will be another opportunity for us to go ahead

1 and have our consultation meeting with the
2 tribes.

3 MR. CROW: Yeah, I would just like to
4 say that the goal is to have it much earlier in
5 this process, as happened on Hells Canyon. And
6 it would happen either at the time of scoping or
7 advanced scoping. We're also, in terms of Swan
8 Falls, trying to engage the tribes in the
9 prefiling part of the process where applicants
10 are just now trying to put together their license
11 applications. The goal is, again, to get
12 involved and start communicating with the tribes
13 much earlier than what's happening in this
14 particular case.

15 So as Frank said, to the extent you
16 have any interests, Swan Falls is the next one
17 coming up. I believe there's a few that are new
18 projects that are proposed for this area. So you
19 may be seeing more of us in the future, earlier
20 in the process than what we have in this
21 particular case.

22 MR. COLTER: I would just like to
23 mention that this is -- the tribes are not
24 considering this formal consultation. This is
25 purely staff at this point.

1 MR. WINCHELL: I'd like to add, too,
2 since we are late in the process here with the
3 relicensing, it may be appropriate, though, at
4 this point, for staff to let us know, as much as
5 you would like for us to know, if there are
6 things that you would want us to consider either
7 being addressed in the postlicensing aspect of
8 the new license, if the Commission decides to
9 issue a new license for this project, or
10 something that, perhaps, we might be able to
11 consider as part of the license order.

12 So here today, we would like to have
13 some of these issues or any of the issues
14 discussed at this point, if that's appropriate.

15 MR. CROW: Yeah, let me just add to
16 that. I mean, Shoshone-Bannock has been pretty
17 active -- I'm sorry, Shoshone-Paiute have been
18 pretty active participants in this process. They
19 specifically asked for government-to-government
20 consultation, which we engaged in this morning.
21 And we felt it appropriate to also contact people
22 to provide you the same kind of opportunity.

23 I cannot guarantee that there will be
24 any additional opportunity, because we are so
25 late in this process, for subsequent exchanges

1 because right now, as Frank said, we're closed.
2 We've issued the final NEPA document.

3 What we discussed this morning with the
4 other tribe was concerns they had regarding the
5 final NEPA document, concerns they had regarding
6 the Commission's comments on -- well, the
7 Commission's responses to the comments they made
8 on the NEPA document, and other issues, such as
9 postlicense consultation that's going to happen
10 there.

11 As you may or may not -- I'm sure
12 you're aware that once the Commission issues a
13 license, that's really where things start to
14 happen. That's where the increased flows -- if
15 the Commission agrees with the staff's
16 recommendations, those will be initiated as well
17 as a plethora of other environmental protection
18 enhancement measures. For example, there is a
19 proposal to increase the flows, fish passage
20 proposal.

21 There are additional recreational
22 enhancements. The cultural resource aspects of
23 it are being handled through a programmatic
24 agreement, which would call, specifically, for
25 additional consultation with the tribes as they

1 develop this management plan, properties
2 management man. And that would be something
3 that's going to be happening -- if the Commission
4 decides to issue a license, and a license is
5 issued consistent with the staff's
6 recommendations, that would happen within a year
7 of license issuance.

8 So there is a postlicense forum that we
9 talked about this morning that will allow for the
10 implementation and fine tuning of law mitigating.

11 MR. BRONCHO: So I imagine that the
12 Shoshone-Paiutes kind of, more or less, stressed
13 on the cultural portion?

14 MR. CROW: They expressed concerns
15 regarding the cultural aspects of it. Certainly,
16 the fishers aspects, also, they had concerns
17 about, and I think maybe, generally and
18 holistically, all the environmental resources
19 that were affected by the policy.

20 MR. BRONCHO: I just wanted to probably
21 clarify something, though, as you're dealing with
22 executive orders, statutes, and treaties, and if
23 they all have different rights in those areas.
24 As an example, we had the language in the Fort
25 Bridger Treaty that we can hunt and fish on any

1 unoccupied land within the United States. So
2 there are rights out there that are very
3 detrimental to us, from habitat to water quality,
4 to the resources out there for both the fish and
5 the wildlife.

6 And so those are the concerns we have,
7 similar to the Shoshone-Paiutes. And those are
8 areas that we consider very rich in culture, both
9 in spirituality, but also for the resources we
10 use from the fish, the residence fish, to the elk
11 and the deer that water in that myriad.

12 So there is a concern in that aspect,
13 just to let you know, that there are -- I don't
14 know if the Commission has looked into the
15 statutes and executive orders and treaties and
16 the rights that each individual tribe has as a
17 sovereign nation. You can't put every tribe into
18 one big category.

19 MR. CROW: No, I understand.

20 MR. BRONCHO: We're going to deal with
21 the Indians over here, since we consulted with
22 the Shoshone-Paiutes, we put all the -- you know,
23 they can't represent us over here.

24 MR. WINCHELL: Right, right.

25 MR. CROW: And I understand that.

1 There is a specific provision in staff
2 recommendations for all the tribes to be involved
3 in the cultural resource aspects of it for the
4 finalization of the management plan. That was
5 probably the major issue that they had discussed
6 this morning.

7 MR. WINCHELL: If I can clarify that,
8 as far as what we feel is to remedy some of the
9 additional aspects that the Shoshone-Paiutes
10 want, is that we've allowed -- at first, we're
11 going to have the programmatic agreement issue
12 the management plan at the time of the license
13 issuance, contingent upon the Commission's
14 decision. However, we did get rather extensive
15 comments from the Shoshone-Paiute Tribe on the
16 management plan.

17 And so what we did in that case was go
18 ahead and say, Well, all right, we'll issue our
19 standard programmatic agreement to go ahead and
20 have the final management plan be submitted to
21 the Commission within a year after license
22 issuance and then have some additional, closer,
23 consultation with Idaho Power to go ahead and put
24 in some provisions about consultation protocols,
25 additional information that would, perhaps, help

1 delineate some traditional cultural properties
2 that may be within the project areas there at
3 Malad, as well as to do some other fine
4 adjustings or adjustments to the management plan.

5 MR. BRONCHO: How our process -- what
6 we have been utilizing when we're working on
7 protocols for consultation is, like our Fish &
8 Wildlife director had mentioned, that we're
9 meeting on the technical level first. And
10 sometimes it's considered consultation, technical
11 consultation, but there's another level that goes
12 up to the formal consultation, government-to-
13 government consultation. That's to our elected
14 officials.

15 Different tribes have a different
16 consultation process, maybe with that authority
17 delegated to maybe some individual elected
18 officials, council members. But here, our formal
19 government-to-government consultation is with the
20 Fort Hall Business Council.

21 MR. WINCHELL: Well, if it would be
22 appropriate, we would say that if there are
23 specifics in the Shoshone-Bannock's consultation
24 protocol, that that could be integrated along
25 with the Shoshone-Paiute's consultation protocol

1 within the historic properties management plan
2 that will become finalized a year after license
3 issuance. And that would be a good point to go
4 ahead and get that put into the management plan
5 as well.

6 MR. COLTER: There are differences
7 between the two. For example, the
8 Shoshone-Paiutes have used -- and I don't know
9 what they use today as their consultation
10 protocol, their process, but typically they've
11 been using a "wings and roots" process.

12 MR. WINCHELL: Yeah, yeah.

13 MR. COLTER: Is that what they were
14 using today?

15 MR. WINCHELL: No, we didn't really get
16 into any fine details.

17 MR. COLTER: Was it facilitated?

18 MR. WINCHELL: No.

19 MR. COLTER: Because that is,
20 specifically, their process and not ours.

21 MR. WINCHELL: Right.

22 MR. COLTER: And that is a distinction
23 that our own business council has made, is that
24 it will be a separate process. It's not our
25 process. So ours, typically -- well, the Fort

1 Hall Business Council expects consultation to
2 occur on the reservation with the governing body.

3 And I know there's been instances with
4 Shoshone-Paiutes where they haven't necessarily
5 followed that kind of a strict government-to-
6 government consultation process. They've
7 actually done their government-to-government in
8 Boise. Or I don't know where you guys did it
9 today, but they haven't, from my experience, been
10 as strict with where it occurs.

11 So there is a difference there. And
12 that may be one that you might want to capture in
13 this agreement. We do have some examples of
14 consultation protocols that were developed and
15 have been approved by the business council, such
16 as an Environmental Protection Agency, EPA. We
17 do have a government-to-government accepted
18 understanding of how we're going to have
19 discussion, consultations.

20 And there's, basically, two levels:
21 The technical level and a policy level, where the
22 main purpose of it would be that the technical
23 folks, which is kind of what we're doing today,
24 will sit down and gather as much information to
25 present back to the business council in the form

1 of, we would make a recommendation to them, and
2 they would formally either request that formal
3 government-to-government occur, or they could,
4 upon their -- it's their discretion, simply
5 dictate their requirements or their needs or
6 whatever they may be thinking, you know, in a
7 letter. That's, basically, up to the business
8 council, though.

9 So what we're -- our purpose is to try
10 to gather information and try to make some
11 obvious, I guess, points that we see, as
12 technical folks, has been a standard for the
13 tribes. One of those standards has been natural
14 rivers. The tribes do have a Snake River policy
15 that pushes the tribal departments and the
16 tribes, in general, to a natural rivering
17 ecosystem. That's what the policy reads.

18 It does realize also that we don't go
19 back to pretreaty times. It also provides for
20 those component resources that most resemble, or
21 most likely resemble, the natural resource. So
22 it does realize that there are -- we can't step
23 back to pre-1868, but it does push us to strive
24 to get natural rivers and to protect natural
25 rivers.

1 MR. CROW: I very much appreciate your
2 telling me that. Let me just say,
3 programmatically, you know, after the Commission
4 issues its policy statement, we've been trying as
5 best we can to accommodate and undertake
6 government-to-government consultation with as
7 many cases as we have.

8 Some cases, obviously, after the
9 issuance of each policy statement, were in the
10 latter stages of getting the record completed,
11 others at the earlier stages. And as I mentioned
12 earlier, our goal is to do it earlier to make it
13 efficient for all interests, for the tribal
14 members as well as ourselves.

15 In this particular case, we are -- as
16 you can imagine, we're in the final -- we've done
17 the final NEPA analysis, so we're in the latter
18 stages. We're close to bringing closure on the
19 record so that we could provide the Commission
20 an opportunity to take final action. That's what
21 we're doing today, and that's one reason we're
22 transcribing it, getting whatever information we
23 can from the tribes to indicate what their
24 concerns are with what has been proposed in
25 staff's documents and what additional measures

1 they feel may be necessary that have not been
2 addressed in those documents.

3 So that's our primary purpose today.
4 So to the extent that you have any additional
5 comments or you want to provide comments on
6 staff's recommendations, it would be most
7 appreciated.

8 MS. TUELL: Well, one of the first
9 things I see that there is no mention of the
10 government-to-government executive order. That
11 should be in one of the -- your laws and
12 regulations section. There also should be the
13 Fort Bridger Treaty. Those are our -- one of the
14 things that we look for, recognizing that you
15 have consulted with the Shoshone-Paiutes, and I
16 see that they have addressed and they have
17 responded, they were mainly, from what I can see,
18 looking at cultural resources.

19 We are very concerned about the treaty
20 resources that are protected under the treaty.
21 And that means the plants, the wildlife, the
22 fish, the water quality, all those aspects that
23 are important to us that was reserved to us.
24 That's what we're looking for. And there is no
25 mention of it in here at all, that I can see, in

1 quickly looking through.

2 MR. CROW: There are specific
3 provisions on the NEPA document that provide for
4 enhancement protection of those resources you
5 just mentioned.

6 MS. TUELL: But they're not identified
7 as such specific to the tribes.

8 MR. CROW: To the extent that the
9 tribes feel that the sources that are described
10 are not sufficiently explicit to address the
11 tribes' concerns, then feel free to, at this
12 point, you know, educate me.

13 MS. TUELL: I don't think so. For
14 example, on page 6, you talk about the no-action
15 alternative. You use your baseline as the
16 existing conditions now. That's a point that I
17 disagree with. I don't think that you should use
18 the existing conditions, and you should also look
19 at the cumulative actions or cumulative effects
20 and go to that and expand more than there.

21 I see you have also a section in here
22 discussing the area of potential effects and that
23 you should also have a discussion regarding
24 potential effects to treaty rights, whether
25 you're enhancing -- if you're enhancing, great;

1 state it. If you're not enhancing, if you're
2 adversely affecting, then state that as well.
3 That is appropriate under NEPA that you disclose
4 both effects.

5 MR. CROW: You've raised two issues.
6 One is the baseline issue. And the Commission
7 has a potential effect -- I disagree with that
8 policy, but it's a policy that has been
9 reinforced by more than one court decision.

10 MS. TUELL: However, you still are
11 affecting it.

12 MR. CROW: There are ongoing effects,
13 the resources, and there is a cumulative impact
14 resource made part of the NEPA document. And it
15 talks to examining the cumulative effects,
16 examines the ongoing environmental effects of the
17 action, and proposes specific measures to protect
18 and enhance, appropriately, those resources.
19 There are provisions to protect and enhance the
20 fisheries, wildlife, enhance recreational access
21 and, as we just discussed, cultural resources.

22 MS. TUELL: Well, I see on page --
23 proposed alternatives, Section C, you list out
24 all the specific resources. And I do not see any
25 mention of where you're addressing the tribal

1 concerns regarding treaty. You have the tribal
2 concerns all grouped into the cultural. And even
3 in there, you don't mention very much about the
4 Shoshone-Bannock Tribes.

5 MR. CROW: I think there is mention of
6 Shoshone-Bannock Tribes.

7 MS. TUELL: But there is no mention of
8 the treaty.

9 MR. CROW: To the extent that you have
10 resources that are encompassed by the treaty,
11 then it is our anticipation that the tribes will
12 justify those clearly to us what specific
13 resources they have that they think are part of
14 their treaty rights but have not been addressed.
15 And we'll certainly bring that to our attention.

16 MS. TUELL: Well, I wouldn't say the
17 tribes "think." It is a right that the tribes
18 have.

19 MR. CROW: Okay.

20 MS. TUELL: And maybe what would be
21 helpful is more education to the decision makers
22 as to whether or not they truly understand the
23 impact that their decision will have on the
24 tribes.

25 MR. CROW: They're impacted on the

1 resources that the tribes have interest in. Is
2 that an accurate statement?

3 MS. TUELL: Yes.

4 MR. CROW: Okay. Are there resources
5 that are not identified in this analysis that are
6 of concern to the tribes that haven't been
7 addressed?

8 MS. TUELL: Where is it that you
9 protected the treaty rights?

10 MR. CROW: The issue of treaty rights
11 is a legal determination, ultimately, that's up
12 to -- the Commission makes its decision on in its
13 final order. Where we are right now is that
14 we've done a bottom environmental assessment that
15 examines, hopefully comprehensibly, the ongoing
16 effects of the project on the plethora of
17 environmental resources. That's the record that
18 we have before us now.

19 MS. TUELL: So based on this, you're
20 going to give this to FERC, and they're going to
21 examine this and say, Based on the information
22 present in the EA, we'll make no effect to the
23 tribes' treaty rights?

24 MR. CROW: I don't -- you know, I can't
25 predict exactly what the --

1 MS. TUELL: Well, I mean, the process
2 is this: If you --

3 MR. CROW: -- board will say. What I
4 can tell you is, it's not just the environmental
5 assessment. They look at all the comments that
6 have been made a part of the record.

7 MS. TUELL: Including these comments
8 today?

9 MR. CROW: Including these comments
10 today, that's correct.

11 MS. TUELL: So if there is nothing in
12 here regarding the treaty, then how can FERC make
13 that decision based on lack of information?

14 MR. WINCHELL: If I may, the
15 orientation with this document was to go ahead
16 and address the particular resource aspects that
17 the project may or has had an impact on. And
18 it's just the nature of dividing up the way that
19 the resources are addressed, is within this
20 breakdown within the environmental assessment.
21 And this is a standard breakdown for all our
22 management plans.

23 But of course, we divide it up by
24 aquatic resources, cultural resources, water
25 quality. We have not, at this point, focused

1 strictly on other legalistic aspects, such as
2 treaty rights.

3 Now, we do recognize that we do have
4 trust responsibilities to all the recognized
5 tribes. And we attempt to address that in our
6 NEPA document, as well as within the license
7 order. But it's just a difference in
8 organization that we've always divided up our
9 analysis based upon the particular resources that
10 have been identified within the project.

11 MR. COLTER: I think that's been what
12 the tribes struggle with, is how it is
13 compartmentalized and how treaty rights are not a
14 part of each compartment. They're, generally,
15 stuffed into a cultural resource section and
16 typically looked at as stone and bones, when the
17 cultural side is much broader than that, when it
18 comes from a tribal perspective. It includes the
19 fish; it includes the water; it includes the
20 wildlife, the plants; it includes the air; it
21 includes the rocks. It's so much broader than
22 just a simple snapshot of the resources.

23 And that's where tribes struggle with a
24 lot of NEPA documents that are all structured the
25 same way. And we've had some success with some

1 agencies in this whole idea of trying to view
2 tribal trust assets, cultural resources, treaty
3 rights throughout the documents.

4 MR. CROW: Then it would be a good time
5 to give an example. I mean, there was a project
6 in California, the tribes -- I can't remember the
7 name of the tribe now, but it had exquisitely
8 identified what their treaty interests were. And
9 it encompassed, just as you said, mostly the fish
10 aspects of it.

11 So it's not unusual for the treaties to
12 encompass more than stones and bones, but it's --
13 what we're attempting to do is identify just what
14 you did, all the resources that you feel are of
15 concern, that you have treaty rights that we need
16 to critically analyze in our NEPA documents.

17 So I guess, again, I have to ask to
18 what extent of -- what resource wasn't identified
19 in this particular proceeding?

20 MR. COLTER: Well, from what I've seen
21 in there, the whole ethnobotanical is a huge one
22 that's been missed in here.

23 MR. CROW: The ethnobotanical?

24 MR. WINCHELL: As far as the wildlife
25 habitat, I mean, I think they did identify plant

1 communities, you know, within -- I think there's
2 four plant communities. And there was, what, the
3 habitat enhancement program that they -- that
4 Idaho Power had offered to go ahead and get rid
5 of the evasive weeds and other deleterious plant
6 life that would affect these natural --

7 MR. COLTER: What it did identify in
8 there was that they were going to be using
9 rehabbing areas with native plants and other
10 desirable -- whose desires were they? That's, I
11 guess, part of my question, I guess. Are they
12 really looking at what the tribes have seen as
13 desirable?

14 Is there a sincere look to ensuring
15 that those plants that the tribes may deem as
16 necessary to have there, are there? Or is it
17 just purely a view of the dominant plant
18 community and just staying with -- looking at the
19 dominant plant community and staying with that
20 community? Or are they actually trying to
21 enhance the ethnobotanical plants, the culturally
22 satisfied?

23 MR. WINCHELL: That's something that I
24 think could be addressed in the management plan,
25 along with the identification of other

1 traditional cultural properties. And so I do
2 think that there is an avenue to address these
3 concerns. And I would say through the management
4 plan, if they're ethnobotanical, plant
5 communities would be part of a traditional
6 cultural property or a place where we'd have
7 cultural significance to a particular tribe.

8 So again, I do think that there is an
9 ability or an opportunity for the
10 Shoshone-Bannock Tribe to go ahead and
11 participate. Either you choose separately or
12 with the Shoshone-Paiutes to go ahead and further
13 identify these particular plant communities.

14 MR. COLTER: So I guess, I mean, the
15 purpose of today really isn't to change any of
16 this document here. I mean, this is basically
17 the final draft of this document. What we're
18 really trying to get at are specific things that
19 we may be able to put into the actual license?

20 MR. CROW: It's your forum to provide
21 additional opportunity to put into the record, is
22 what it is. So to the extent you want to use it
23 to make those kinds of recommendations, feel free
24 to do it. One of the things that the tribes this
25 morning had mentioned is that when they looked

1 through the recommendations, they noted, as staff
2 has presented it, that, for example, the fish
3 passage plan we developed in consultation with
4 the Department of Fish & Game, and the Fish &
5 Wildlife Service, and they had expressed an
6 interest to be also a party to that.

7 I can tell you that, historically, the
8 consultant entities are those with specific
9 expertise to provide comment on those kinds of
10 specialized resource enhancement measures. The
11 one thing that can be taken into consideration --
12 again, we're Commission staff -- is maybe
13 broadening that consultative role to include
14 tribal council.

15 Also, one thing they requested this
16 morning and that we can take back --

17 MR. COLTER: That was one of my
18 comments that I had, that we be included and have
19 an opportunity to comment and participate in that
20 process. I also had a question about the Fish &
21 Wildlife Service and their formal consultation
22 for, I believe it was, Bliss Rapids snails.

23 MR. CROW: Um-hmm.

24 MR. COLTER: Where has that gone to?

25 MR. CROW: Have they completed it yet?

1 My recollection is that it's not completed yet.
2 We haven't heard final response back from the
3 Fish & Wildlife Service.

4 MR. COLTER: As far as whether or not
5 it's going to be a concurrence or biological
6 opinion, or whether it is a biological opinion
7 with some jeopardy or nonjeopardy opinion?

8 MR. CROW: I don't -- my understanding
9 is they're preparing a biological opinion.
10 That's my understanding. I don't know. They
11 haven't posted this document, but that's one of
12 the things that hasn't been yet brought to
13 closure.

14 MR. WINCHELL: Yeah.

15 MR. COLTER: That would also be an area
16 where we would like to be able to provide some
17 comment or participation in, is that
18 government-to-government consultation.

19 MR. CROW: Yeah, you'd have to talk --
20 yeah, which is a good question. You'd have to
21 talk to the Fish & Wildlife Service. It's their
22 ultimate action.

23 MR. COLTER: Wouldn't they be
24 consulting with you folks?

25 MR. CROW: No. We consult with them;

1 they prepare a biological opinion; and that,
2 basically, remains to put the measures that they
3 set forth in the biological opinion in the
4 license.

5 MR. COLTER: So there's no
6 face-to-face, or it's just all a document-driven
7 process?

8 MR. WINCHELL: Basically, at this point
9 in time, yeah. Now, keep in mind, too, that
10 there is also going to be the Bliss snail -- part
11 of the proposed enhancement measures would be to
12 go ahead and have a Bliss snail management plan
13 to be part of the new license. So that is
14 another opportunity for the tribe to go ahead and
15 participate in that program as well.

16 MR. CROW: And all we can do is take
17 back that recommendation. It's up to the
18 Commission to make the ultimate decision. As I
19 mentioned, the historical practice has been to
20 focus the fine tunings of those measures with
21 those specific agencies. The only instances that
22 I can think of, off the top of my head, where the
23 consultative role would be much broader, is where
24 that's been -- and in those instances, virtually
25 every stakeholder is consulted in the

1 postlicensing arena. But that's the reason --

2 MR. BRONCHO: You were mentioning time
3 frame, that you're on a fast course. When are
4 those time frames, since we're at the final EIS?

5 MR. CROW: I don't think I said that
6 we're on a fast course. Some people may say that
7 several years is a slow course, frankly. But you
8 know, we have to bring a closure to the record,
9 which would be the comments you had today and the
10 ultimate biological opinion from Fish & Wildlife
11 Service. And at that point, we should -- the
12 Commission should be ready to take final action.
13 But as far as any dates are concerned, this has
14 been precluded from giving that a time frame --

15 MR. BRONCHO: So what you're saying
16 right now is the comments we're saying now will
17 be put into this right now?

18 MR. CROW: Because it's being
19 transcribed, it will be made part of the record.

20 MR. BRONCHO: Then what Chad had said,
21 this is not formal consultation. Then that is of
22 concern to us.

23 MR. CROW: I understand that entirely.
24 And I can't tell that there will be additional
25 opportunities afforded at this juncture.

1 MR. BRONCHO: There's no legal way of a
2 week to get you comments, three days, two days,
3 or anything?

4 MR. CROW: Comments on the --

5 MR. BRONCHO: On what we're talking
6 about today.

7 MR. CROW: If you have comments on --
8 well, of course, the final environmental
9 assessment went out -- what is it? -- in
10 September.

11 MR. WINCHELL: Yeah, September.

12 MR. CROW: There's no provisions to
13 provide comment, although people have provided
14 comments. Idaho Rivers United provided comments
15 post-issuance of the NEPA document. It has
16 happened. There's no special -- there's no
17 provision whereby there's a comment period due
18 for that.

19 MR. BRONCHO: Okay. So where will our
20 comments go?

21 MR. CROW: Your comments would be any
22 comments, written comments or additional, beyond
23 what's being transcribed, being made part of the
24 record. To the extent the Commission takes them
25 into consideration is up to the Commission.

1 MR. BRONCHO: Yeah, because we're not
2 no party or an interested person. We're a
3 government, a tribal government, you know. We
4 made the treaty with the federal government, and
5 those were the first contracts with America, you
6 know. And so it goes from 268 to prior to the
7 state of Idaho in 1890 becoming a statehood.

8 So those are things that Yvette had
9 mentioned. These are inherited rights we
10 inherited from our ancestors, not something given
11 to us by a state government or a federal
12 government. So those are the concerns we have to
13 these resources we utilize out there.

14 MR. CROW: I understand fully.

15 MR. BRONCHO: And with the question I
16 was asking is, since we're the technical staff,
17 we have to take it back to our elective
18 officials. And then that's why I was asking, is
19 there a two- or three-day process that we can get
20 something and get some type of consensus so that
21 we can put that into the record?

22 MR. CROW: I can tell you that it's not
23 something that's going to happen in two or three
24 days after this meeting. You know, Fish &
25 Wildlife Service, in issuing their final

1 decision, I don't know what their last
2 scheduled -- it may be part of the record. We
3 may have called them to get some details. But
4 that would be the terminal action that would be,
5 in theory, closing the record.

6 MR. BRONCHO: Okay.

7 MR. CROW: So there may be additional
8 time. I just can't say that it will be, you
9 know, another 30 days, another 60 days.

10 MR. BRONCHO: Well, we need to contact
11 U.S. Fish & Wildlife Service because they have
12 not come and consulted with us.

13 MR. CROW: That's interesting. Did
14 they, traditionally, on other agencies' federal
15 actions, consult with you on that?

16 MR. BRONCHO: Yes.

17 MR. COLTER: See, that's just it. The
18 treaty rights are such a big part of this neck of
19 the woods, so to speak. It is -- I mean, as the
20 treaty, as Claude described, it's unoccupied
21 lands of the United States. And whenever a land
22 management agency or a private industry or anyone
23 who is proposing an action that may potentially
24 adversely affect our treaty right, maybe through
25 it being an adverse effect on species, anything

1 from a snail to a resident fish or anadromous
2 fish or wildlife or plants, if it has an effect
3 on that particular species, it has an effect on
4 the treaty.

5 MR. CROW: I'm sorry, has the Fish &
6 Wildlife Service consulted with you on biological
7 opinions before?

8 MR. COLTER: On biological, yes.

9 MR. CROW: I'm sorry, on hydro, is the
10 question. The only time I knew that happened
11 was, there was a biological opinion issued up in
12 the northwest by --

13 MR. COLTER: We are a part of the ESA
14 consultation, and we have actually had assurances
15 from U.S. Fish & Wildlife Service on Idaho
16 Power's relicensing of Hells Canyon that we will
17 be a part of the government section, the
18 Section 7 government-to-government consultations.
19 And they assured us that we would be a part of
20 that.

21 MS. TUELL: I would like to say,
22 though, even though in the past they have not,
23 that doesn't necessarily mean that's the best
24 route to go. We would like to be consulted on
25 all actions that affect our treaty rights.

1 So in the past, we have not been. In
2 many actions, very major actions, we have not.
3 And so the tribes' interests have not been
4 adequately protected.

5 MR. COLTER: We were never consulted
6 with when these dams were built, even the dam
7 we're talking about here today.

8 MR. CROW: Um-hmm.

9 MR. COLTER: We were never consulted
10 with these.

11 MR. CROW: That's before my time with
12 the Commission.

13 MR. COLTER: It's before my time, too,
14 but we're still living the legacy now. This is
15 the legacy of that.

16 MS. TUELL: We're not saying that, you
17 know, we want to continue that. We want to
18 change that. We want to have our rights
19 protected. And in order for that to happen, we
20 need to have more consultations with the agencies
21 that make those decisions.

22 MR. CROW: And clearly -- I don't want
23 to interrupt you. And clearly, the Commission's
24 issuance of policy, I mean, again, what we're
25 trying to do is do it as early as we can up front

1 in the process. I have a feeling that you'll be
2 seeing more of us on other cases earlier in the
3 process than we are here.

4 MS. TUELL: And that's good to hear. I
5 mean, we certainly would like to be in contact
6 and have more of these discussions way before
7 this, at this point.

8 I would like to say, too, that the
9 tribes are not, you know, a public environmental
10 group; we're not a county; we're not a
11 municipality. We are a tribe. And when we
12 signed the agreement with the United States,
13 nowhere in there did it say "with the exception
14 of NEPA deadlines."

15 So we -- just because you have a final
16 document, no decision has yet been made. So
17 therefore, there is appropriate time, I feel, to
18 make appropriate changes.

19 MR. CROW: What the Commission has done
20 as a matter of practice is that they will look at
21 the documents that are made part of the record,
22 even though they may be outside the comment
23 period. I can tell you that there may be a
24 change in that practice and policy. It may be
25 that they say, Well, we're going to stop doing

1 that because there is an interest among the
2 commissioners to make sure we get these projects
3 done far more quickly than they have been
4 historically.

5 So I can't tell you, you know -- or I
6 can't grant you the ability to provide additional
7 comments on the record. I'm just saying that
8 they have a practice, up until today, to look at
9 the comments that have come in on the record,
10 even though they may be outside the specified
11 comment period.

12 MR. BRONCHO: So again, the additional
13 comments that maybe the Fort Hall Business
14 Council might want to submit, along when the
15 technical staff starts meeting with them, will
16 that be put into the record? And will it even be
17 looked at, at the Commission level, or is it a
18 waste of our time?

19 MR. CROW: I would never say that.

20 MR. BRONCHO: Well, I hate to say it
21 that way.

22 MR. CROW: The fact that you just said
23 that makes it part of the record, that you
24 understand that there's going to be additional
25 consultation with your management of the tribe.

1 And that will be something they'll have to take
2 into consideration when they decide to take final
3 action.

4 MR. COLTER: It's more than just the
5 management of the tribe. It's the policy makers
6 of the tribe.

7 MR. CROW: I'm sorry.

8 MR. COLTER: That's who we have to deal
9 with. We're the management side.

10 MR. CROW: Now you've made it clear,
11 and it's now a part of the record.

12 MR. COLTER: I just want to make sure.
13 Well, I really see this as, I mean, our
14 opportunity here is to try to get a few things
15 that, I believe, the Shoshone-Paiutes have
16 already announced that they would like to see as
17 part of the license, the inclusion of the tribes
18 in those, as you were saying, after the license
19 is --

20 MR. WINCHELL: Participation.

21 MR. COLTER: The participation in those
22 processes that are going to occur after the
23 license is --

24 MR. WINCHELL: Yeah, um-hmm.

25 MR. COLTER: -- potentially given. We

1 want to have that same participation because
2 that's the way we're going to be able to ensure
3 that our treaty rights are going to be protected.

4 I also think that it's worth our while
5 and our time to have the Commission -- send the
6 Commission and have them see the tribes' policy,
7 the natural rivers policy. I believe that sets
8 up a lot of background on the tribes that may
9 give them a better perspective of the vastness of
10 our treaty right and what all it encompasses.

11 MR. CROW: Um-hmm. Is that a public
12 document? Is it readily available? You
13 mentioned --

14 MR. COLTER: It's been put into some
15 documents that were made public, but I believe
16 the tribes -- we put that into our comments to
17 the license on Hells Canyon. So they have seen
18 it in the Hells Canyon comments from the tribes.

19 MR. CROW: So it is part of that
20 proceeding?

21 MR. COLTER: But I think it would also
22 be worth it to put it out there again for this
23 one, but put it out there again for when Swan
24 Falls comes and every other dam that our -- that
25 impacts Shoshone-Bannock treaty rights. I don't

1 see the education ever stopping.

2 MR. WINCHELL: Right. Well, that's
3 what we were hearing today with Shoshone-Paiutes
4 in that what we felt was most appropriate would
5 be the postlicensing consultation and
6 participation with these various resource plans
7 that are going to be produced as part of the new
8 license. And I think that's where we think
9 that's probably the best avenue to go ahead and
10 try to get some of these issues remedied.

11 MR. COLTER: There's some things in
12 here that I don't necessarily agree with that are
13 mainly state-driven management issues, such as
14 the red band and the cove area, Cove Springs,
15 where, realistically they're just preserving a
16 zoo population, is how I see it. And I mean,
17 they may be a unique genetic lineage, but the
18 reality is, it's a zoo population nobody is going
19 to be able to touch or utilize. And therefore,
20 that impacts our treaty rights.

21 MR. WINCHELL: I guess, from my reading
22 of the fish -- the proposed fish passage plan
23 would be that, I guess, they would start with a
24 fish passage facility right there at the lower
25 dam, and then they would go ahead and monitor the

1 opening of the gene pool there with, I guess, the
2 red-band trout.

3 So it sounds like if things were not
4 adverse, that that probably would, ultimately,
5 open up the Malad drainage all the way up through
6 the upper bypass -- I mean, the upper facility
7 dam. So you would have a back and forth.

8 MR. COLTER: But not on the cove.

9 MR. WINCHELL: Not in the cove, that's
10 right.

11 MR. COLTER: Cove Springs. That's
12 stated in that -- actually, what that states is
13 the Idaho Fish & Game stated that they did not
14 want passage to the cove, and then it was stated
15 that -- it was described through a letter, or
16 through Harriet Hensley, was the attorney
17 general, in the attorney general's office, which
18 is not Idaho Fish & Game. They may be -- they're
19 all state, of course, but it's kind of stated
20 wrong in here that -- I mean, they're not Idaho
21 Fish & Game.

22 MR. CROW: Sometimes agencies will
23 designate a number of organizations to reflect
24 their interests. I don't know specifically about
25 Idaho, but that's --

1 MR. COLTER: Well, it's typical in
2 Idaho to have an attorney general's office
3 represent a Fish & Game issue.

4 MR. CROW: But you know, Frank had
5 mentioned a recommendation could be put before
6 the Commission that they would expand the typical
7 consulted entities in these articles. So that
8 may be a forum that the -- whether or not the
9 Commission will do that or not, you know, is up
10 to them. But obviously, the record here today
11 will be expressing your all's desire to do just
12 that, as I understand it.

13 MR. COLTER: Well, I think that's
14 something that we can express. We'd also really
15 like to express the whole concept of not closing
16 any doors here. Let's open some doors up and not
17 close them down. The Shoshone-Bannock Tribes
18 have bigger pictures in their mind than just this
19 subbasin. And this subbasin may someday hold
20 salmon again.

21 MS. TUELL: If I can make a comment,
22 the EA, going to the ethnographic cultural
23 resource, it is very historically driven. There
24 is very little mention of the current use, the
25 current -- how the tribes feel about this area

1 currently. It just mainly talks about historical
2 issues.

3 MR. WINCHELL: It's pretty brief, and
4 that is just part of the nature of condensing a
5 lot of that information. But of course, this is
6 where additional input through the management
7 plan, close consultation with Idaho Power -- and
8 that's the other thing that the Shoshone-Paiutes
9 expressed this morning, is that they truly want
10 to have a close relationship with the licensee.

11 And I think that's -- again, this is an
12 opportunity for the Shoshone-Bannock Tribe to go
13 ahead and do that in the same fashion. And that
14 kind of information would be worthwhile to go
15 ahead and put into the management plan, more of a
16 tribal perspective on the existing project area,
17 along with what cultural history.

18 MS. TUELL: Well, I see that you have a
19 lot of information from the Shoshone-Paiutes.
20 And that's great, but again, in the future, there
21 needs to be more efforts to address
22 Shoshone-Bannock tribal issues.

23 MR. CROW: And as I mentioned, I mean,
24 you'll see us more often on other cases earlier
25 in the process, so we can ensure that you're full

1 participants in the process and have an
2 opportunity to express the issues that you have.
3 But as we mentioned, this is a unique case in
4 that we are where we are here.

5 MR. WINCHELL: This is our final EA in
6 this process.

7 MR. BRONCHO: I think the other thing
8 that probably needs to be mentioned, which the
9 Fort Hall Business Council will probably ask the
10 staff here, is, are you the people -- you're
11 working for the FERC commission?

12 MR. CROW: The staff is charged with
13 creating this record.

14 MR. BRONCHO: Okay. So what I'm saying
15 is, maybe at one time the Fort Hall Business
16 Council will want to meet with the people that
17 can make the decision, which would be the
18 Commission. I don't know if that was mentioned
19 or not in the Hells Canyon issue in regards to
20 meeting with the FERC commission, because they're
21 the ones that make the final decision, unless
22 they delegate that authority to one of you.

23 MR. CROW: There are instances where we
24 do have delegated authority to act on licenses.
25 It's where there are no dimensions in opposition

1 to the particular case, or there's been possibly
2 resolution of any opposition. So there is
3 that -- that does, in fact, happen about 80
4 percent of the time. I think that's fair to say.

5 MR. BRONCHO: And so based on today's
6 meeting, when will these minutes be transcribed?
7 And when will we receive a copy of what was said,
8 both tribes addressed in the same area and the
9 State of Idaho and other interested parties?

10 MR. CROW: I think the goal is to get
11 the record within ten days.

12 MR. WINCHELL: Within a week or so. I
13 also -- it was going to be posted on our
14 eLibrary. I've got an instruction sheet I'll
15 pass out for folks to get a copy of it. It's
16 pretty easy just to get on the internet there at
17 the FERC home page, look up eLibray, and then
18 just download a copy. And I suspect that will be
19 in there within a week to two weeks, but I guess
20 we're on a ten-day --

21 MR. BRONCHO: Probably what we would
22 like to do is maybe have Chad and Yvette be the
23 contact persons, along with the chairperson.

24 MS. TUELL: And I would like to request
25 that a hard copy of the transcripts be sent. I

1 have tried to access the transcripts for Hells
2 Canyon, and it was huge, and it just overloaded
3 my computer.

4 MR. WINCHELL: Let me give you this
5 instruction -- but, yes, of course. You've got
6 my number, so if you want a hard copy, I would
7 probably be able to download a copy quickly.

8 MS. TUELL: Yeah, I have looked at this
9 eLibrary. And again, because of the size of the
10 document, it wouldn't -- I got, like, half of the
11 transcript.

12 MR. WINCHELL: Okay. Well, that's
13 fine. Just give me a ring, and I'll take care of
14 that. That's no problem. And also, I believe
15 that, yes, you can request in writing as well to
16 the Commission to provide you a full copy of the
17 transcript, but it probably would be a lot easier
18 just for me to give it to the tribe or whoever
19 wants a copy.

20 Is there anything else that you think
21 that's necessary or something that you'd like for
22 us to know now?

23 MR. COLTER: I don't have anything. I
24 mean, from the assessment, looking at the
25 assessment, a lot is covered, except for, I

1 believe, our viewpoint of treaty rights. And I
2 don't think there's anyone who can describe that
3 but us, and it's going to take a couple of pages
4 that we're going to have to rip out here and get
5 the council's blessing to send it off and see if
6 some of this can be put into the license, if
7 that's what the council agrees to. I think
8 that's probably where we're going to go right
9 now.

10 MR. BRONCHO: Right.

11 MR. WINCHELL: Okay.

12 MR. COLTER: Unless anybody else had
13 any other comments. I did have some questions.
14 When it talked about the fisheries, it just
15 talked, primarily, about fluvial populations, but
16 I didn't see any mention to adfluvial. Is
17 that -- the adfluvial populations, is that
18 suggesting that they don't occur in the Malad?

19 MR. WINCHELL: I'm going to be real
20 ignorant. What's adfluvial? I know what fluvial
21 is.

22 MR. COLTER: Adfluvial would be,
23 basically, fish coming out of the Snake and going
24 to the Malad.

25 MR. WINCHELL: Oh, yeah. Well, I

1 think, okay, the population that was -- they were
2 focusing on was, of course, the rainbow trout
3 species. And beyond that, it may be a nexus with
4 the project. In other words, the project only
5 went down to the Snake, and it didn't consider
6 other projects that could have an effect on
7 Malad, for example, you know, anadromous salmon
8 going up Malad.

9 But I suspect fish passage, certainly,
10 is going to be a part of the new license. And
11 they are going to install a ladder down there at
12 the lower dam and probably, at some point, in
13 about ten years, in the upper dam. So I would
14 suspect if you've got open passage, yeah, salmon
15 will want to come and eventually get up there.

16 MR. COLTER: That was my question. I
17 was just curious about, when they were looking at
18 the spawning populations, and it just talked
19 about the fluvial, those fish that basically
20 remain in the Malad River, if they were the only
21 ones viewed or if there was any other populations
22 that are larger -- from what I would perceive as
23 being a larger trout that lived in the main Snake
24 that migrated into the Malad to spawn.

25 MR. WINCHELL: They talk about

1 sturgeon, but I don't remember any discussion on
2 salmon.

3 MR. CROW: No, it was -- they did
4 sampling on the environment impact range, and
5 that's how they came up with the description of
6 the existing resources. Are there any species
7 that you think were not covered or identified?

8 MR. COLTER: That's what I'm saying, is
9 was that missing? I mean, that's typically what
10 occurs in most the systems that I've seen in this
11 area. There are adfluvial populations that go
12 along with a lot of these bigger systems and
13 smaller streams. Bull trout is another that
14 typically have populations.

15 MR. CROW: That is -- bull trout was
16 not identified as being in the project area here.
17 And my understanding is -- and neither Frank nor
18 I are the individual analysts on the particular
19 document, but my reading of it was that,
20 basically, they identified those species that
21 were inhabiting the breaches by doing spot
22 surveys.

23 And to my knowledge, there were none
24 that were exclusively used in the Malad breach
25 for a part of their life cycle when returned to

1 the Snake River. I don't know of any other
2 species that would do that. They did mention
3 sturgeon.

4 MR. WINCHELL: Yeah, yeah.

5 MR. COLTER: I didn't see mention of
6 bull trout, though. And that was --

7 MR. CROW: My recollection was that --
8 I don't think it's in the critical habitat area
9 either for bull trout, vaguely recollecting what
10 the critical habitat area looks like. It's not a
11 consulted -- it's not part of the consulting
12 process.

13 MS. TUELL: Well, understanding that we
14 are late in the NEPA process, not, you know,
15 considering the entire relicensing process within
16 this process, and you have mentioned that there
17 is a plan to be developed, please consider the
18 comments that we're making here to carry forward
19 for that.

20 MR. CROW: We certainly will.

21 MR. WINCHELL: Okay. Well, I think
22 that closes our meeting for today. We appreciate
23 you all listening to us or inviting us here
24 today. And attendees, thanks for attending the
25 meetings. We appreciate that, too.

1 MR. OSBORNE: Will we get a chance to
2 see, like, the operation maintenance plan and the
3 other plans that it says there will be
4 implemented?

5 MR. CROW: If the Commission would make
6 you a consulted entity, you would be consulted in
7 the development. If, for whatever reason, they
8 decide to, given their practice, then you can
9 always get it off of the internet when it is
10 filed. Everything has to be made part of the
11 record, and then there would be subsequent
12 filings.

13 So people have when they haven't been
14 specifically consulted, but they've gone ahead on
15 their own and made a requirement. And they've
16 seen it being filed with the filing comments. So
17 I guess my point is, if you're not a specific
18 entity, if that decision is made to break the
19 traditional practice and not include the tribes
20 as a consulted entity, then there is that
21 additional --

22 MS. TUELL: Well, we request to be.

23 MR. WINCHELL: We understand. We can
24 work into that.

25 MR. CROW: All I can do is make

1 predictions based on the Commission in the past.

2 MS. TUELL: Well, we make that request,
3 also to have those hard copies sent to us. It's
4 a lot easier to have the hard copies. Sometimes,
5 again, if it's a big document, and a lot of
6 these -- these are big documents, unless you
7 either send a CD or something.

8 MR. CROW: That might be a possibility.
9 I don't know. I can tell you -- and I'm probably
10 not the person to make comment on this, but there
11 is contractual agreement between us and the
12 stenographers. And there are some prohibitions
13 for distributing information, at least there was
14 at one time. I don't know if that's the case
15 here.

16 MS. TUELL: Well, I'm talking about the
17 plans as they're available on the internet.

18 MR. CROW: Oh, you mean after the
19 postlicensing plans?

20 MS. TUELL: All the stuff that you
21 have.

22 MR. CROW: To get a copy of that, you
23 can always request that Idaho Power Company
24 provide you a copy of it. But all the other
25 divisions that handle the postlicensing thing,

1 they'll look at, Okay, who was required to be
2 consulted, and do I have comments on the filing?

3 So the obligation would be on you to
4 kind of check and see, given the schedules, when
5 such a record would be filed with us.

6 MR. BRONCHO: We'll put it on our
7 trustees to get that for us.

8 MR. WINCHELL: Okay.

9 MR. BRONCHO: I just want to thank you
10 for coming down.

11 MR. CROW: We appreciate you having us.

12 (Proceedings concluded at 4:15 p.m.)

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REPORTER'S CERTIFICATE

I, AMY HORSLEY, CSR No. 714, Certified
Shorthand Reporter, certify;

That the foregoing proceedings were
taken before me at the time and place therein set
forth, at which time the witness was put under
oath by me;

That the testimony and all objections
made were recorded stenographically by me and
transcribed by me or under my direction;

That the foregoing is a true and
correct record of all testimony given, to the
best of my ability;

I further certify that I am not a
relative or employee of any attorney or party,
nor am I financially interested in the action.

IN WITNESS WHEREOF, I set my hand and
seal this ____ day of _____, 2005.

AMY HORSLEY, C.S.R., R.P.R.
Notary Public
Boise, Idaho 83706

My Commission expires January 18, 2008.